Contracts in Washington, 1937-1957 (Part I)

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CONTRACTS IN WASHINGTON, 1937-1957

WARREN L. SHATTUCK*

Reliable information about trends, developments, and possible aberrations in an area as extensive as contracts is difficult to achieve by reading advance sheets as they appear. The preparation of this article has been in part motivated by a desire to acquire such information, related to the Washington decisions of the twenty years just past.¹ Another motivation has been reluctance to let die of inattention a project initiated in 1935 with the publication of the Washington Annotations to the Restatement of the Law of Contracts.² Such annotations make the Restatement more useful, and provide ready access to the Washington cases for the practitioner familiar with the Restatement's organization. This discussion has therefore been arranged in terms of the Restatement's major topic headings.

MEANING OF TERMS

Implied Contracts. "Implied contract" and "contract implied in fact" are terms in general use both in Washington and elsewhere. It has long been clear that they are used to indicate a contract established by a particular type of proof, rather than a legal relation differing in any way from "contract" or "express contract." The Washington court provided a good basic explanation in 1931: "It matters not whether the claimed agreement be considered as an express or an implied contract. The result will be the same. An implied contract differs not from an express contract except in the mode of proof."³ Later opinions contain some helpful amplification. "A true implied contract, or contract implied in fact, is an agreement which depends for its existence on some act or conduct of the party sought to be charged, and arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention on the part of the parties to contract with each other."⁴ Before a court can find the existence of an implied contract in fact, there

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¹ More precisely, the discussion encompasses contracts decisions reported in 191 Washington Reports through 49 Washington Reports 2nd Series.
² A supplemental annotation was published in 13 Wash. L. Rev. 20; it continued the coverage to include decisions reported in 176 Washington Reports through 190 Washington Reports.
³ Troyer v. Fox, 162 Wash. 537 at 554, 298 P. 733, 77 A.L.R. 1132.
⁴ Ross v. Raymer, 32 Wn.2d 128 at 137, 201 P.2d 129 (1948).
must be an offer; there must be an acceptance; the acceptance must be in the terms of the offer; it must be communicated to the offeror; there must be a mutual intention to contract.\textsuperscript{15}

Whether there is a sufficiently certain line of demarkation between the proof requisite to an "express contract" and the proof contemplated by "implied contract" to justify continued use of the latter term, may well be questioned.

It is apparent that what is "implied" in a transaction characterized as "implied contract" is a promise or a set of them. The existence of a promise is typically the critical issue in litigation which produces opinions containing the term. Passages such as that quoted above at note 4, in their stress of "act or conduct," seem to supply both a test for determining whether an implied promise exists and a justification for distinguishing transactions grounded on express promises. The inference is that words fall into one category, yielding express promises by interpretation, while conduct falls into another, yielding implied promises by implication. If the inference is unsound, continued use of the term "implied contract" serves no useful purpose. It is suggested that the inference is unsound.

In practice, implication and interpretation tend to coalesce. The apparent cleavage between words and conduct disappears and so does assurance about the ability of a court to determine precisely the boundaries of the implication process. A promise can of course be expressed by conduct. "Promise," as a term, merely describes an undertaking, to quote the Restatement of Contracts,\textsuperscript{6} "either that something shall happen, or that something shall not happen, in the future." Purpose can be expressed either by non-verbal action or by non-action. It can also be expressed by inept words, words not manifestly promissory. Evidence both of conduct and of inept words is often before the court in the same case. Conduct may be equivocal, and disputes about the meaning of conduct do not differ materially from disputes about the meaning of words. Segregation of "implication," in the sense of inferences about purpose, and "interpretation," in the sense of ascribing meaning to an expression of purpose, can be extremely difficult or impossible.\textsuperscript{7} A clearer recognition that the promise essential to the legal relation known as contract can be proved by any relevant evidence, and that a promise proved in one way works just like one proved by some


\textsuperscript{6} § 2(1). As to promises and implication see RESTATEMENT, CONTRACTS § 5 (1932); 1 WILLISTON, CONTRACTS, § 3 (REV. ED. 1936); 1 CORBIN, CONTRACTS §§ 17, 18 (1950).

\textsuperscript{7} See 3 CORBIN, CONTRACTS §§ 561 et seq. (1950).
other type of evidence (excepting the possible application of a Statute of Frauds) might facilitate the solution and rationalization of controverses of the types now said to involve "implied contracts."

**Quasi-Contracts.** To describe the type of legal liability fastened on the recipient of benefits, quite without regard to any expression by him of a purpose to pay, the Washington court seems to prefer the term "quasi-contract." The distinction between "contract" and "quasi-contract" has been so clearly stated by the court as to leave no room for reasonable dispute about these terms.

**Bilateral and unilateral.** These are contract terms often employed and usually deemed free from multiple-meaning hazards. In *Cook v. Johnson* the court adopted the commonly stated definitions of them.

**MANIFESTATION OF ASSENT**

**Mutual assent.** In this society the responsibility for selecting those types of promise which shall be enforced by group compulsion of one sort or another has been for the most part entrusted to courts. From the extant opinions it can be quickly determined that something variously described as "mutual assent," "mutual intention," or "a meeting of the minds" is a criterion in the selection process. A proposition so

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8 Chandler v. Wash. Toll Bridge Authority, 17 Wn.2d 591 at 600, 137 P.2d 97 (1943): "Quasi-contracts arise from an implied legal duty or obligation, and are not based on a contract between the parties, or any consent or agreement." See also Bill v. Gattavara, 34 Wn.2d 645 at 650, 209 P.2d 457 (1951); Mill & Logging Supply Co. v. West Tidewater Lumber Co., 44 Wn.2d 102 at 113, 265 P.2d 807 (1954).

9 37 Wn.2d 19, 221 P.2d 525 (1950), noted 26 WASH. L. REv. 227.

10 "The law recognizes, as a matter of classification, two kinds of contracts—bilateral and unilateral. A bilateral contract is one in which there are reciprocal promises. The promise by one party is consideration for the promise by the other. Each party is bound by his promise to the other. A unilateral contract is a promise by one party—an offer by him to do a certain thing in the event the other party performs a certain act. The performance of the other party constitutes an acceptance of the offer and the contract then becomes executed. Until acceptance by performance, the offer may be revoked.... An example of this class of contract is the offer of a reward." Some of the court's language, e.g. "A unilateral contract is a promise... an offer," and "performance... constitutes an acceptance... and the contract then becomes executed," must be questioned. The central ideas, that a bilateral contract results from an exchange of promises and that a unilateral contract results from an offer requesting an act or forbearance plus accomplishment thereof, conforms to the normal patterns. See RESTATEMENT, CONTRACTS § 12 (1932); 1 WILLISTON, CONTRACTS § 13 (rev. ed. 1936); 1 CORBIN, CONTRACTS § 21 (1950). These definitions were approved in Millett v. Sampson, 41 Wn.2d 442, 249 P.2d 773 (1952). Much the same language had earlier been used in Higgins v. Egbert, 28 Wn.2d 313, 182 P.2d 58 (1947). The conclusions reached in Cook v. Johnson upon applying the law to the facts requires further comment. It is discussed in the next section.

11 Our court seems to like "meeting of the minds"; the phrase appears in many of its opinions. For example; Ross v. Raymer, 32 Wn.2d 128 at 138, 201 P.2d 129 (1948); Newsome v. Miller, 42 Wn.2d 727 at 732, 258 P.2d 812 (1953); Richards v. Kuppinger, 46 Wn.2d 62 at 69, 278 P.2d 395 (1955); Hedges v. Hurd, 47 Wn.2d 683 at 690, 289 P.2d 706 (1955) (dissent); Milone and Tucci, Inc. v. Bona Fide Builders, Inc., 49 Wn.2d 363 at 368, 301 P.2d 759 (1956).
generally phrased is little better than an aphorism, of no real help in solving contract-formation problems. What must be known is the behavior patterns which do or do not meet the criterion. A start in this direction is afforded by the opinions summarized in the Restatement of Contracts: "The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties." The working rules are evidently going to be rules about offer and acceptance. Before examining them in detail, however, it is desirable to take another look at implied contracts and at contracts embodied in documents.

Implication. The Washington court has a distressing tendency to resolve controversies about implied promises without discussing offer and acceptance. Opinions so written inform one that mutual assent can be established by implication but shed no light whatever on the meaning of "offer" or "acceptance."

Much implied-promise litigation grows out of services rendered without the formality of a contemporaneous or precedent express promise to pay. Controversies of this type are difficult to discuss, save on the
offer and acceptance level, and the court's opinions reflect that fact. Is one who requests services, or who receives unrequested services, legally obligated to pay? There is ample precedent in other states for a simple and direct approach in terms of mutual assent. A request for services is an offer if the circumstances would indicate to the other party as a reasonable man an undertaking to pay for them. A proffer of services is an offer if the circumstances would indicate to the other party as a reasonable man an expectation of payment. Acceptance is evidenced by rendition of the requested services in the one situation and by receipt of the proffered services in the other. The critical issues are invariably factual. The stress must be on the inferences about purpose, reasonably derivable from the setting in which the transaction occurred, rather than on actual purpose. Inferred purpose must often be pieced together from evidence which recreates the context of request or proffer. This evidence supplies the controlling elements, which are, to borrow Judge Steinert's felicitous phrasing, "the ordinary course of dealing and the common understanding of men."

Two services cases of unusual interest reached the court during the period under review. They put in issue the existence of a promise by a general contractor to pay for the service he receives when a subcontractor gives him a bid. This problem and a companion one, whether a subcontractor must stand by his bid after the general contractor has used his bid figures, have long troubled the construction industry and its counsel.

The opinions in these cases leave unanswered the key question, whether the context in which a request for or proffer of a subcontractor's bid is usually made, will move the court to find a promise by the general contractor to pay.

*Western Asphalt Co. v. Valle* was an action by a subcontractor to recover the reasonable worth of its services in supplying the defendant general contractor with subcontract bid figures. Plaintiff's theory was that a contract implied in fact existed, and its officers testified that compensation was expected for their service, either by being awarded the subcontract or otherwise. Defendant requested the bid figures, used first time after the recipient of services has died, proof of more than ordinary persuasiveness. Just what this really means in the way of added burden on the proponent of such an implied promise is quite undeterminable.

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them in part, received the main contract, and awarded the subcontract to another. For defendant, testimony went in to the effect that it never expected or intended to pay plaintiff, that it was not customary to pay for such service, and that defendant never had paid for such service. The appeal required the court to determine whether plaintiff's evidence was sufficient as a matter of law to warrant submission of the cause to the jury. The court held it was, saying: "The evidence presented a case that should be determined by the trier of the facts—in this instance the jury." No attempt was made in the opinion to indicate which evidence was deemed to be significant nor why it was significant. The circumstances under which defendant requested plaintiff's figures were enough outside the normal pattern of dealing to make it desirable to know what elements in the evidence the court regarded as important.

In Milone and Tucci, Inc. v. Bona Fide Builders, Inc., a subcontractor asserted a duty in the defendant, a general contractor, to award it the subcontract, defendant having used plaintiff's bid figures and having been awarded the general contract. Whether defendant requested plaintiff to bid is not clear from the opinion. Plaintiff prevailed below. The trial court's decision was based in part on the Western Asphalt Co. case, which was taken to mean that use of a subcontractor's bid gives rise to an implied contract, and in part on industry custom. The evidence of custom which was before the court is not set out. In reversing, the supreme court denied the applicability of the earlier decision, saying "the quotation of the subcontractor was secured by the prime contractor under circumstances materially different." Specifications of the reasons why the differences were material would have been helpful. The court also said: "Careful reading of the opinion does not disclose that this court held that the use of a bid—gives rise to an implied contract." Here again an explanation which would have been useful was not given; the court did not discuss the part which use of a bid can play in transactions of this type. There is even an unfortunate inference that use of a bid is without legal significance. The court then discussed plaintiff's bid as an offer to do the work and found no acceptance of it by defendant's use of the bid. The reason for this discussion is difficult to understand. Plaintiff's theory was not that its offer to do the work was accepted, but was, as the court stated it, that defendant "was obligated to award the subcontract to respondent [plaintiff] at its

20 Defendant's request for plaintiff's figures was made shortly before expiry of the time within which defendant's bid could be submitted, and was couched in somewhat urgent terms.

21 49 Wn.2d 363, 301 P.2d 759 (1956), noted 32 WASH. L. REV. 76.
The court made no reference to the key passage in the *Western Asphalt Company* opinion: “The fact that respondent hoped to obtain a subcontract from the general contractor—and that with this idea in mind, respondent made available to appellant its figures—is not necessarily inconsistent with its expectation that it would be entitled to receive reasonable compensation for the service rendered if appellant was awarded the construction contract and did not award respondent the subcontract . . . .” This passage seems clearly to recognize the possible dual nature of a subcontractor’s bid-offer to do the work, and service to the prime contractor. As in other instances of services, a request for, or proffer of a bid may or may not be an offer. The attendant circumstances must govern and must determine whether the prime contractor’s undertaking (where one is found) is to award the subcontract to the bidder or is to compensate him in some other way.22 It would appear that the court in the *Milone and Tucci* case never addressed itself to the precise implied contract issue tendered by the plaintiff.

The court went on to say:

Usage and custom are admissible to explain the terms of an express or implied contract once the contract is established. The fallacy of the trial court’s second theory is that an implied contract cannot arise from proof of usage and custom. The effect of custom or usage upon contractual obligations is dependent upon the existence of an actual contract between the parties. Where there is no contract, proof of usage and custom will not make one.

Whether evidence of usage and custom is properly restricted to contract-interpretation issues will be discussed more fully at a later point.23 The impact of the court’s language on implied-contract litigation is the sole concern here. This passage seems to mean, “we will consider evidence of customs when interpreting a contract which has been otherwise established, but will not consider it where the issue is the existence of a contract.” It is very much to be hoped that the court did not actually intend to embrace so narrow a position and that this portion of the opinion will be clarified in future opinions.24 There is an obvious incongruity in determining the purpose expressed by either conduct or words, without regard for the context in which the conduct occurred or the words were spoken. Trade usage is certainly a vital part of the

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22 Use of the bid and an award of the main contract to the general contractor could be conditions implied in fact to the general contractor’s duty to perform, if on the request for or proffer of a bid these qualifications are properly inferable.

23 See the discussion below, under the topic heading “Usage.”

24 See 1 CORBIN, CONTRACTS § 23, and 3 CORBIN, CONTRACTS § 534 (1950).
context. If there exists in the building industry a common understanding about payment (or non-payment) for a subcontractor's bid, refusal to examine a request for, or proffer of, a bid in the light of that understanding can hardly lead to a just result.

Goods may be requested or proffered in transactions which create implied-promise difficulties analogous to those encountered in services transactions. Whether an implied promise to pay accompanied the request, and whether the proffer was an offer contemplating payment, are commonly the issues. One who receives goods under circumstances which would to a reasonable man indicate that payment is expected will be deemed to have impliedly promised to pay. A similar problem reached the court in Bakke v. Columbia Valley Lumber Co., Inc. An offeree was held to have accepted an offer reading “you can continue to use this road for a payment for the use thereof at the rate of twenty-five cents per thousand for all logs transported . . .” The acceptance (and the offeree’s promise to pay) was proved only by showing that the offeree continued to use the road. The offeree argued that it did not intend to pay and had demonstrated its lack of purpose to pay by not paying. The argument was entirely unsuccessful. The better evidence was deemed to have been provided by the offeree's use of the road. In its refusal to attribute a wrongful intent to conduct of this type, the opinion is typical. The Bakke case, in its lack of concern about communication of the promise the offeree was held to have made, illustrates another characteristic of decisions in which a promise to pay is found in receipt of goods or services.

The implication process is by no means restricted to controversies about services or goods. A promise to share losses has been implied where a partnership relationship was disputed. A debtor who requested an extension of time was held to have impliedly promised to pay interest during the extension period. Implication seems to have been the basis for a holding that continuance of the services, after the period stipulated in an employment contract has expired, raises a “presumption” that the employee is “serving under a new contract having.

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25 See Restatement, Contracts §§ 21, 72 (1932); 1 Williston, Contracts § 91 (rev. ed. 1936); Ross v. Raymer, 32 Wn.2d 128 at 138, 201 P.2d (1938) (where the court talked of "services rendered or material furnished").


A service station lessee, who undertook to pay a gallonage rental, was held to have impliedly promised to operate a service station on the demised land. In *Losli v. Foster* the court characterized as "implied contract" the relations between owner and contractor, whose conversations about their transaction were most inconclusive, the court being persuaded that the contractor was to build for a reasonable compensation. In *Tonseth v. Serwold* it was recognized that a labor agreement entered into by an association of boat owners and a fisherman's union might by implication become a part of employment contracts made by an individual boat owner and his men. In *Hedges v. Hurd* Judge Hill, in a concurring opinion, was prepared to resolve the problem created by an earnest-money agreement calling for the execution of a real estate contract (terms not specified) by implying an agreement to negotiate in good faith the terms of the contemplated real estate contract.

These decisions and the services cases discussed above provide ample, and discouraging, laboratory material for anyone inclined to the view that implication and interpretation are separable judicial technics.

**Contract documents.** Counsel who prepare contract documents probably give little thought to mutual assent, assuming that whatever demands it involves will be met when the document is signed. The assumption seems to be a valid one. It does not, however, necessarily follow that mutual assent fails where the parties do not sign. Implication may supply the missing element. In several instances where the seller signed a real estate contract document and the buyer did not, evidence showing that the buyer regarded the contract as extant has led the court to conclude that the contract came into existence. The opinions refer to the buyer's conduct as proving he "ratified" or "adopted" the contract document. These are not familiar methods by which promises are made. Implication would appear to be a better explanation.

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21 Reeker v. Remour, 40 Wn.2d 519, 244 P.2d 270 (1952).
22 37 Wn.2d 220, 222 P.2d 824 (1950). *Cf.* Pape v. Armstrong, 47 Wn.2d 480, 287 P.2d 1018, where the court without discussion simply said: ". . . [W]e cannot find any evidence from which we could reasonably infer a mutual assent of the parties thereto."
23 22 Wn.2d 629, 157 P.2d 333 (1945).
25 See 1 WILLISTON, CONTRACTS § 23 (rev. ed. 1936); 1 CORBIN, CONTRACTS § 31 (1950); presumably the person who signs first makes the offer, which is accepted by the other party as he signs.
Offer. Since the legal relation known as “contract” is ordinarily the product of “offer” and “acceptance,” clear definitions of these terms are certainly useful in analysis and argument of the confused indicia of purpose which clients so often bring to lawyers. For “offer” the Restatement of Contracts provides: “An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance.” So formal a definition is not to be found in Washington decisions. Neither do the decisions give any reason to doubt the acceptability of this definition to the court.

Proof of promise and condition, by implication, has already been discussed. An interesting contrast is provided by Jones v. Allen. There the court faced an exchange of promises to marry and evidence which elicited this remark about plaintiff’s reaction to defendant’s promise: “[W]e are convinced that she did not believe that any such promise would be performed, for she had said that she would not believe appellant [defendant] under oath.” By way of conclusion the court said: “If she attached no credit to his promise, then she cannot predicate any action upon it, for a promise, to be binding, must be accepted as well as given.” Although the thought behind the court’s word “accepted” can only be surmised, it seemingly contemplates an expectation that performance will be forthcoming. Whether the court meant to restrict the definition of “promise” by excluding expressions which do not induce such an expectation, as suggested by Professor Corbin, or to restrict the definition of “offer” by excluding a promise which does not, cannot be determined. Nor is the distinction of practical significance; no offer exists if there be no promise. Words which state as clearly as can be, both a purpose to do something and a request

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56 § 24.
57 Cases in which a promise coupled to a request for a counter-promise or an act, is flatly called an offer, are indicative. For example: Bakke v. Columbia Valley Lumber Company, Inc., 49 Wn.2d 165, 298 P.2d 849 (1956). See also Milone and Tucci, Inc. v. Bona Fide Builders, Inc., 49 Wn.2d 363, 301 P.2d 759 (1956); McGregor v. Inter-Ocean Ins. Co., 48 Wn.2d 268, 292 P.2d 1054 (1956); Hill’s Inc. v. William B. Kessler, Inc., 41 Wn.2d 42, 246 P.2d 1099 (1952). In Cook v. Johnson, 37 Wn.2d 19, 221 P.2d 525 (1950), noted 26 WASH. L. REV. 227 (1951), a unilateral contract was said to be a “promise by one party ... and offer by him to do a certain thing in the event the other party performs a certain act.” p. 23. On the other hand, there are opinions in which the court tells us only that the evidence sufficiently or prima facie established mutual assent. Western Asphalt Co. v. Valle, 25 Wn.2d 428, 171 P.2d 159 (1946); Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 257 P.2d 784 (1953). Any attempt to identify the evidence which proved the offer is sheer guesswork.
58 14 Wn.2d 111, 127 P.2d 265 (1942).
59 He proposes this definition: “A promise is an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promisee that he may justly expect performance and may reasonably rely thereon.” 1 CORBIN, CONTRACTS § 13 at p. 25 (1950).
for a counter-performance may in their context fail to state an offer.\footnote{The result reached in Jones v. Allen is that generally expectable. 1 CORBIN, CONTRACTS § 15 (1950); 1 WILLISTON, CONTRACTS § 21 (rev. ed. 1936). Representative are the “joke contract” cases. Some of these, however, involve a joke marriage and a refusal to dissolve it for reasons which have no bearing on mutual assent. Also typical is the casebook favorite, Higgins v. Lessig, 49 Ill. App. 459 (1893), where the key words were: “I will give $100 to any man who will find out who the thief is . . . ,” and the context persuaded the court that the words “should be regarded rather as the extravagant exclamation of an excited man than as manifesting an intention to contract.”}

It will on occasion be difficult to determine whether a communication is really an offer, or whether it is a preliminary move in negotiations which may or may not culminate in an offer.\footnote{See 1 WILLISTON, CONTRACTS § 27 (rev. ed. (1936); 1 CORBIN, CONTRACTS §§ 22, 23 (1950); Federal Land Bank of Spokane v. Egan, 195 Wash. 330, 80 P.2d 813 (1938).} An attempt to put this problem in issue was made in Bakke v. Columbia Valley Lumber Co., Inc.\footnote{49 Wn.2d 165, 298 P.2d 849 (1956).} In summarily disposing of it, the court provided a test of general import: “[W]hether a writing will constitute a definite offer which the other party may turn into an obligation by acceptance, depends upon the intent and purpose of the writer.” In applying this test, it may be doubted that the court will permit the writer’s subjective intention to govern. The words “intent” and “purpose” probably refer to intention objectively manifested.\footnote{49 Wn.2d 165, 298 P.2d 849 (1956).}

A variation of the preliminary-negotiation problem is encountered where an alleged offer contemplates incorporation of the proposed agreement into a formal contract document. A reference to such a document is often ambiguous. It may indicate a purpose to defer legal relations until the document is signed, or a purpose to create a more formal record of the transaction, should a contract be concluded by the parties’ correspondence, informal memoranda or conversations. Since there is usually no direct evidence of the parties’ actual purpose, the argument and disposition of this interpretation issue will necessarily be very difficult. In deciding the several cases of this type which have reached it during the past twenty years, the court has given much weight to he completeness or incompleteness of the agreement at the stage to which the parties did carry it.\footnote{44 BUILDING SERVICE UNION v. SEATTLE HOSPITAL COUNCIL, 18 Wn.2d 186, 138 P.2d 891 (1943); KVL INC. v. DRAIBacher, 24 Wn.2d 943, 167 P.2d 1002 (1946). If no such details remain for settlement, a finding of intent to make of the document merely a memorial is to be anticipated. Moxee Co. v. Hughes, Inc., 24 Wn.2d 224, 163 P.2d 603; Fuller v. Ostruske, 48 Wn.2d 802, 296 P.2d 996 (1956); Pettaway v. COMMERCIAL AUTOMOTIVE SERVICE, Inc., 49 Wn.2d 650, 306 P.2d 219 (1957); McKennon v. Anderson, 49 Wn.2d 55, 298 P.2d 492 (1956). From the Moxee Company opinion another idea can be obtained. It appeared that the contemplated document was expected to serve a}
left to be later determined and included in the formal document, a
finding of intent to have no contract until that document is executed
should be anticipated.45

An expression of purpose, ostensibly promissory in nature but so
vaguely phrased as to create real doubt about what the "promisor" was
to do, will not be an offer.46 It probably is not even a promise. If the
questioned language appears in a contract document, courts tend to
discuss the problem in terms of "uncertain agreement" rather than in
terms of offer.

One source of litigation about certainty is an undertaking to render
a performance, the exact nature of which is to be later determined by
the application of an indicated standard. Only if the standard so
operates that the promised performance can be ascertained with assur-
ance when performance time arrives, will the certainty requirement be
satisfied. If the standard by which the performance is governed is a
subsequent agreement by the parties, the promise is uncertain. As
stated by Professor Williston: "Since either party by the very terms
of the promise may refuse to agree to anything to which the other party
will agree, it is impossible for the law to affix any obligation to such a
promise."47 It must not, however, be too quickly assumed that language
which is ostensibly only an agreement to agree will receive a literal
interpretation.

In Hubbell v. Ward48 the questioned promise was contained in an
earnest-money agreement which specified the total price, the parties,
and the land. The buyer undertook to "pay Nine Thousand ($9,000) Dollars down and sign a contract for the balance, payable at $200.00 or more per month, including interest at the rate of 5% on deferred balances." Since none of the subsidiary details of the proposed real estate contract were stipulated, these were evidently to be later agreed on by the parties. The buyer's promise was to do something, the exact nature of which awaited the later agreement. The court held that the buyer could not specifically enforce an agreement to agree on and execute a real estate contract document, but went on to hold that he could have a decree directing the seller to convey, provided the full price was paid in cash within thirty days. The reasoning behind what may at first encounter seem to be a remarkable tour de force is not clearly discernible. The result would be understandable had the buyer promised in the alternative to pay cash or to sign a contract. The court may have achieved this interpretation, although the earnest-money agreement does not readily yield such a meaning. The pre-payment option was to be contained in the real estate contract, which never came into existence.

*Hedges v. Hurd* involved similar facts and an action by the purchaser for damages. Before the action was brought, the seller offered to convey the property on prompt payment in full, a proposal which the buyer rejected. In holding for the plaintiff, the court stressed the need for simplicity in earnest-money agreements, and the presence in this agreement of the usual closing details. Neither point is very persuasive. If an earnest-money agreement calls for closing by execution of a purchase contract, there is no good reason why a copy of the proposed contract document cannot be attached. In no other way can disputes about purchase-contract details be obviated. The agreement was not

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49 The court's explanation was this: "The agreement contains within itself the essential elements of a binding contract . . . Respondents (buyers) were given an option to pay the entire consideration at any time. The subject matter of the agreement, the consideration and terms of payment are all set forth, and it is evident from a consideration of all the terms of the agreement that it was not intended merely as a preliminary negotiation." The first sentence squarely conflicts with the court's previous conclusion that the promise to execute a purchase contract was "not sufficiently definite and certain" to permit of specific enforcement. The phrase "the consideration and terms of payment are all set forth" must mean the price was settled. The technical consideration provided by the buyer, in the earnest money agreement, was in his promise; if that fails for uncertainty there is no consideration. Indeed, a promise to agree creates an illusory promise issue and can be disposed of on that ground as readily as on the mutual assent ground.

50 A somewhat similar decision is Morris v. Ballard, 16 F.2d 175 (1926), noted 36 YALE L. J. 707 (1927), in which the buyer's promise was to pay $18,000.00 "on terms to be agreed on," and the court read into his promise the alternative of paying in full at once.

complete. The critical closing details, what was to be in the purchase contract in the way of insurance, forfeiture, maintenance, risk of loss, and like provisions, were not stated. The decision is not supported by the *Hubbell* case. There a contract was found, but it must have been a contract to buy and sell for cash. If such a contract was made by Hedges and Hurd, Hurd was not in default on it.⁵² Hedges must have recovered on a contract to execute a purchase contract. On indistinguishable facts, the court said in *Hubbell v. Ward*: "We conclude that the agreement here, in so far as it looks to the preparation and execution of a future real-estate purchase contract upon which the minds of the parties have not met, is not sufficiently definite and certain and cannot be specifically enforced." These cases appear to be in conflict.⁵³

As will be seen shortly, a not dissimilar problem has been solved by reading into an otherwise uncertain promise a standard which cures the defect; e.g., interpretation of a promise to pay a rental to be agreed on as meaning a promise to pay a reasonable rental. Despite evidence in the opinions in both the *Hubbell* and *Hedges* cases of a contrary assumption by the court, the contents of real estate contract documents, particularly those covering residential property, may have acquired enough uniformity in a given community to justify resort to the same technic. If a seller and buyer have undertaken to close their earnest-money agreement by executing a purchase contract, do they not mean a "reasonable" contract? There should be no greater difficulty in determining what contract details are reasonable and appropriate in light of local usage than there is in determining what sum is a reasonable rental or a reasonable price. The amount of the down payment and the amounts of the periodic payments are the only details for which the technic seems inappropriate. It can of course be argued that a promise to sign a contract document with details to be thereafter agreed on

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⁵² Two judges dissented in Hedges v. Hurd. Two others concurred, emphasizing the seller's refusal to negotiate with the buyer about the purchase contract details, and saying: "[T]here is an implied agreement . . . that they will negotiate in good faith the terms of the executory real-estate contract contemplated by the agreement. The terms of such executory contracts are now so generally standardized that bona fide disagreement on the terms not covered by the earnest-money receipt and agreement is quite unlikely." For refusal to negotiate, damages measured as they would be for breach by the seller of a contract to sell and convey were evidently deemed to be appropriate. Whether a promise to "negotiate in good faith" is any less uncertain than a promise to agree may well be arguable.

⁵³ That damages were sought in the Hedges case provides no valid basis for harmonizing the two decisions. Where the issue is contract formation, no different tests for certainty are properly employed in law and in equity. Granted that a contract exists, specific enforcement may be refused because it lacks the degree of certainty required for the framing of the decree. See *Restatement, Contracts* § 370 (1932); 5 *Williston, Contracts* § 1424 (rev. ed. 1958); 5 *Cobb, Contracts* § 1174 (1950).
actually reserves to the promisor with unambiguous precision the privilege of insisting on unreasonable details, precluding any interpretation which would fasten on him a "reasonable" form.

It will be observed that a promise to execute a purchase contract, where parties, property, price, down payment, and monthly payments are specified, is perfectly definite. An exchange of such promises by seller and buyer leaves no legal demand unmet.\(^4\) Clauses about insurance and the dozen and one other miscellany typically found in these documents are not necessary to contract formation. There was an uncertainty problem in the *Hubbell* and *Hedges* transactions only because the court implied an intent by the parties to have these miscellaneous clause. A possible solution to the certainty problem might be found in refusal to make this implication. If the court feels obliged to read into the bare word "contract," which the parties used, an intent to have clauses about insurance and so forth, it would be sound also to imply an intent to have clauses "such as are reasonable in light of local usage."

Parties, property, term, and rental are the only requisites for a lease. An agreement to execute a lease, which specifies these, can nevertheless fail for uncertainty because additional details are contemplated and left for future negotiation. For example, where the parties undertook to execute a "proper lease," the court found the word "proper" to mean "terms going beyond the legal minimum" and refused specific enforcement.\(^5\) Where the agreement was to execute a lease "on terms to be agreed upon," a like result was reached.\(^6\) If the parties simply agreed to execute a "lease" (property, term, rental, and parties being specified) the question of implying intent to have additional details would arise, as in the real estate contract cases. Leases are probably less standardized than are real estate contracts and hence less easily salvaged by resort to the "reasonable" standard. The court has demonstrated no inclination to use that standard where miscellaneous lease terms are the source of the uncertainty.

A promise to pay rent in an amount to be later agreed on has been

\(^4\) It is assumed that absence of specification of the form of the deed is not a serious defect. This is certainly a detail which can readily be supplied by reference to usage-evidence. Whether the grantee can from that evidence establish a right to anything more than a quit claim deed is another matter.

\(^5\) Keys v. Klitten, 21 Wn.2d 504, 151 P.2d 989 (1944). The court apparently found no contract existed, rather than that a contract existed which was not specifically enforceable; the trial court's dismissal of plaintiff's action with prejudice was approved. Judge Simpson dissented, arguing that the word "proper" did not require the interpretation given it by the majority, and should instead be taken to mean "a lease prepared in conformity to the agreement."

\(^6\) Finch v. King Solomon Lodge No. 60, 40 Wn.2d 440, 243 P.2d 645 (1952).
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differently treated. Here "agreed on" has been interpreted to mean "reasonable rent"; the uncertainty thus vanishes and there is a contract capable of specific enforcement. Presumably, purchase-sale agreements leaving the price for later determination would receive the same treatment.

A quite different type of problem results from an agreement to buy and sell at a price to be later fixed by the seller. Although it is more commonly and easily analyzed as an illusory promise-consideration problem, an occasional decision goes into the uncertainty aspect. So approached, the solution may be far from obvious. The seller's undertaking is to sell and deliver; it appears to be certain. The buyer is to pay a sum the amount of which is unknown when he promises but which will be certain enough when performance time arrives; the seller will by then have set the price. Although this is a standard as sure in operation as are many which courts deem to be adequate, the Washington court and others have refused to enforce such agreements. Non-enforcement may well be justified. The seller's control is excessive; he can, by manipulating his price, make it impossible for the buyer to buy. One who has so high a degree of control over his undertaking really has not promised anything. Absence of a promise by the seller, and hence no offer (or no acceptance), would be a rationale preferable to uncertainty.

Where the seller's control is less sweeping, the agreement may be enforced. In Guyen v. Time Oil Co., the court refused to invalidate for uncertainty a service station lease calling for the sale and purchase of gasoline at the lessor's posted tank wagon price. There was no more certainty here than there is where the seller is to fix the price for an

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57 Blume v. Bohanna, 38 Wn.2d 199, 228 P.2d 146 (1951). A good many courts have refused to invoke the "reasonable" standard in this type of case. See 1 WILLISTON, CONTRACTS § 45 at p. 132 (rev. ed. 1936); 5 CORBIN, CONTRACTS § 1174 at p. 761 (1950). Of the approach taken by our court, Corbin says: "... [T]he later cases now generally hold that specific enforcement will be granted at a rental to be determined by the court as the reasonable one."

58 As to this and variations, see 1 WILLISTON, CONTRACTS § 41 (rev. ed. 1936); 1 CORBIN, CONTRACTS § 97 (1950). Bishop v. Williams, 32 Wn.2d 50, 200 P.2d 497 (1949) may be a contrary holding. To defendant's statement "I will buy his shares," plaintiff replied, "I will accept that offer." In this action for specific enforcement, relief was refused. The opinion is unintelligible; it might be read as inferentially declining to supply the missing price by implication of "reasonable price."


60 See 1 CORBIN, CONTRACTS § 98 at p. 311 (1950).

61 46 Wn.2d 457, 282 P.2d 287 (1955). The Washington Chocolate Company case was distinguished on the ground that there the seller could fix the price without regard to the prices it was charging its other customers. Although the court does not make the point, an oil company which tried to manipulate its prices to all of its customers would quickly be out of business.
individual buyer, but there is a good deal less risk of improper use of the power to fix the price where the resulting figure appertains to all of the seller's customers.

Several other cases putting certainty in issue were decided; none merits particular discussion. Attention must however be called to Westland Construction Co., Inc. v. Berg, Inc., in which apparent uncertainty in a written offer was resolved by parol evidence, and to two cases in which undertakings uncertain when expressed were held to have been made certain by subsequent expressions of purpose. These

62 Foelkner v. Perkins, 197 Wash. 462, 85 P.2d 1095 (1938) ("reasonable time" implied); Bloom v. Christensen, 18 Wn.2d 137, 138 P.2d 655 (1943) (earnest money agreement to be closed in part by signing a purchase contract; in an action by the broker for his commission the court characterized the earnest money agreement as "a valid contract enforceable by a suit for specific performance."); In Hubbell v. Ward, 40 Wn.2d 779, 246 P.2d 468 (1952) this case was distinguished as involving a different issue and the phrase "enforceable by a suit for specific performance" was said to have been unnecessarily used in the earlier opinion); Washington Machinery & Supply Company v. Zucker, 19 Wn.2d 377, 143 P.2d 294 (1943) (the problem and its solution appear in this quotation: "A contract of guaranty is not uncertain in amount merely because it was not known at the time it was made what the ultimate liability would be... When the guaranty under consideration was made, it was with reference to an obligation the amount of which was to be determined when an oven was manufactured and the necessary equipment for it was assembled."); St. Paul & Tacoma Lumber Company v. Fox, 26 Wn.2d 109, 173 P.2d 194 (1946) (A proposal to sell for a figure stated, "adjusted more or less as follows," the adjustments to be regulated by several details requiring further agreement by the parties, was held to be no offer); Schuehle v. Schuehle, 21 Wn.2d 609, 152 P.2d 608 (1944) (a proposal which was in its context ambiguous and possibly the product of mistake was held to be no offer for lack of certainty; the rationale seems inappropriate); Pettaway v. Commercial Automotive Service, Inc., 49 Wn.2d 650, 306 P.2d 219 (1957) (the essential elements in a contract to buy and sell a car were stated by the court and the trial court's instruction on the certainty with which these must be identified was approved). See also Winslow v. Mell, 48 Wn.2d 581, 295 P.2d 319 (1956) and Spooner v. Reserve Life Ins. Co., 47 Wn.2d 454, 287 P.2d 735 (1955), noted 31 WASH. L. REV. 107 (1956).

63 35 Wn.2d 824, 215 P.2d 683 (1950) (on the basis of plans which he had examined, a plasterer made a bid to a general contractor, worded: "Our bid for lathing and plastering the main floor of your plan No. 68 our bid is $575.00." Dispute developed about the scope of the work; in this litigation the bidder asserted his bid was too uncertain to be an offer; the plans were not detailed in the particulars which caused the dispute; the court accepted as a curative and without discussion, testimony by the general contractor that he had verbally spelled out these details in the negotiations which preceded the bid. The decision probably illustrates a useful technique; apparent uncertainty may vanish upon interpretation of the critical language. It might also be seen as illustrating a closely related technique; an offer may by implication draw in details specified in prior negotiations. Whether the parol evidence rule might affect a contest of this type is an inquiry into which the court did not go.)

64 Christofersen v. Radovich, 23 Wn.2d 846, 162 P.2d 830 (1945) (a contractor who built is entitled to his pay even though his promise to build was uncertain for lack of specifications); Platts v. Arney, 46 Wn.2d 122, 278 P.2d 657 (1955) (an agreement to exchange property and calling in part for the execution of future contracts, terms not specified, became certain enough for enforcement when the contemplated contract documents were thereafter prepared and executed. Said the court: "The defense of uncertainty in the terms of a contract is not applicable in an action upon the contract when performance has made it certain in every respect in which it might have been regarded as uncertain.") Although the theory on which evidence created after the legally ineffective initial agreement serves to make that agreement a contract is
not only suggest methods by which counsel can on occasion persuade the court that what appears to be uncertain is really certain but also emphasize the relationship between interpretation and uncertainty. Any discussion of certainty is premature, pending completion of the interpretation process. Ambiguity, the product of an expression of purpose which conveys multiple and conflicting meanings, can easily be confused with uncertainty. The latter, as a legal term, is properly restricted to expressions of purpose which, upon interpretation (that is, after any ambiguity present has been resolved), fail to identify the proposed performance with the degree of precision demanded by courts.

Termination of offers. The court has had little occasion of late to consider the methods by which offers come to an end; its few decisions on termination conform to the familiar pattern. An offer can state its duration and expires when that time runs out; an offer which does not state its duration ends when a reasonable time has elapsed; an offer is ended by rejection; a purpose to reject is evidenced when an offeree makes a counter-proposal; an offer unsupported by considera-
tender full performance. (but not after); whereas an option is a contract and irrevocable during its term.\textsuperscript{71}

Acceptance. The principle which demands of an offeree precise and literal compliance with the requirements of the offer is generally\textsuperscript{72} and in Washington\textsuperscript{73} thought to be both fundamental and inflexible. Nothing else or less can be an acceptance; the power created by an offer is a strictly limited one, to be exercised only within the confines of the offeror's request. If the offeror asked for a promise, he is entitled to exactly that promise in unequivocal language (or to reasonable rendi-

\textsuperscript{71} Hill v. Corbett, 33 Wn.2d 219, 204 P.2d 845 (1949) (in which the offeree tried without success to persuade the court that the offer, unsupported by consideration, was an option by reason of promissory estoppel); Gray v. Lipscomb, 48 Wn.2d 624, 296 P.2d 308 (1956) (in which an optionee tried without success to persuade the court that the time-life of the offer should be extended because of an alleged estoppel). Cook v. Johnson, 37 Wn.2d 19, 221 P.2d 525 (1950), noted 26 Wash. L. Rev. 227 (1951), is notable for some unusually confused language, e.g.: "In a unilateral contract, the offer may be revoked by the offeror before acceptance. . . . But such an offer may not be revoked by either party to a bilateral contract." No variety of contract can be "revoked." Defendant, who had made an offer calling with reasonable clearness for the offeror to clean the ditches on the offeror's farm, an act, received by way of response a promise by the offeror to do the work. Thereafter the offeror sold the farm; this was known to the offeree before he commenced work. Defendant tried to invoke a variation of the proposition set out in Restatement, Contracts § 42, implied revocation by conduct inconsistent with continued existence of the offer and known to the offeree. (That this Restatement section, in restricting its coverage to sale of or contracting to sell specific property previously offered, too narrowly states the principle involved, is suggested in 1 Corbin, Contracts § 40.) The endeavor was thwarted by the court's conclusion that the offeree's promise produced a bilateral contract. Apart from the violence thus done to acceptance principles, the court's failure to discuss the novel and unsettled implied revocation point raised by defendant is much to be regretted. Hopkins v. Barlin, 31 Wn.2d 260, 196 P.2d 347 (1948) contains an excellent discussion of options. So does Whitworth v. Entai Lumber Co., 36 Wn.2d 767, 220 P.2d 328 (1950). The specialized option variety known as a "first refusal" was discussed in Time Oil Company v. Palmer, 28 Wn.2d 272, 182 P.2d 695 (1947) and Superior Portland Cement, Inc. v. Pacific Coast Cement Company, 33 Wn.2d 169, 205 P.2d 597 (1949). McFerran v. Heroux, 44 Wn.2d 631, 269 P.2d 815 (1954) merits special reference. Defendant gave plaintiff an option to purchase a grandstand and obligated himself to rebuild it in the event of fire during the option term. A fire did occur, the grandstand was destroyed, and the structure which defendant erected to replace it was not in the court's view what the covenant to rebuild required. This action was brought, four and one-half years prior to expiry of the option term, and without any attempt to accept the offer to sell. Defendant was found to have breached the option contract. Substantial damages were awarded plaintiff. The decision achieved an eminently sound analysis of the legal relations between optioner and optionee. Its implications for the more common situation, in which an optioner disables himself or less can be an acceptance; the power created by an offer is a strictly limited one, to be exercised only within the confines of the offeror's request. If the offeror asked for a promise, he is entitled to exactly that promise in unequivocal language (or to reasonable rendi-

\textsuperscript{72} Restatement, Contracts §§ 52, 58, 59, 60, 61 (1932); 1 Williston, Contracts §§ 72, 73 (rev. ed. 1936); 1 Corbin, Contracts §§ 82 et seq. (1950).

\textsuperscript{73} The rule has been several times reiterated in the later cases: St. Paul & Tacoma Lumber Co. v. Fox, 26 Wn.2d 109, 173 P.2d 194 (1946); McGregor v. Inter-Ocean Insurance Company, 48 Wn.2d 268, 292 P.2d 1054 (1956); Ferris v. Blumhardt, 48 Wn.2d 395, 293 P.2d 935 (1956); Blue Mountain Construction Company v. Grant County School District No. 150-204, 49 Wn.2d 685, 306 P.2d 209 (1957). A limited variation of the principle may occur where revocation of an offer for a unilateral contract is attempted after the offeree has partially performed. See Restatement, Contracts § 45 (1932). This proposition was mentioned in Ferris v. Blumhardt, 48 Wn.2d 395, 293 P.2d 935 (1956), but was not applied because the offeree failed to render or tender full performance.
tion or tender of the offeree's performance);" if he asked for an act, he is entitled to exactly that act. An offeree who chooses to respond in some other way may in doing so make a counter-offer; he does not accept. Negotiations, however protracted, come to nothing if the parties cling to positions which never coincide.75

Cook v. Johnson76 does not conform to the rule as stated and must be regarded as anomalous. To an offer requesting an act, the offeree replied by promising. Of this the court said: "He could have accepted the offer by performance. But he went further than that and promised to do the work. The promises of the two men thereby became reciprocal and binding . . . ." The decision is an unfortunate invitation to litigation by other offerees who see in such an offer an election to respond as they please. It should be overruled.

The opinion in Simms v. Ervin77 also contains some disturbing language. An offeree who was requested to promise to sell and deliver a car and who promptly delivered it was said by the court to have "waived the condition of written acceptance when he delivered the Buick to the purchaser on February 18th."78 It would be difficult to hit on a concept more foreign to the basic acceptance principle than "waiver" by the offeree. Taken literally, the court has said that an offeree can waive the promise or act requested by the offer, substitute an act or promise he likes better, and thereby accept. Although no such literal reading is likely to be given the opinion by either court or bar, some other and less hazardous explanation for what is surely a sound result is to be preferred.79

Application of any rule about acceptance is impossible until implication and interpretation have delineated the offeror's proposed performance and the response he requested. Some options are singularly trouble-

74 Restatement, Contracts § 63 (1932); 1 Williston, Contracts § 78A (rev. ed. 1936).
78 The court went on to say, "... and such delivery was as unequivocal an acceptance of the order as a written confirmation." It will be noted that if the order contained a statement of express warranties to be made by the seller, this is accurate only if the court is willing to imply those warranties from the seller's act of delivering. It may be doubted that delivery, as an act, is ever entirely unequivocal.
79 Delivery could be performance and hence within the exception indicated at n. 74 above, if the offer requested only a promise to sell and deliver. It would also be possible to regard the seller's proffer of delivery as a counter-offer, accepted when the buyer received the car.
some in their failure to specify whether the offeree is to pay or promise to pay. Offerees’ responses likewise often require interpretation and exploration of the implication possibilities before further progress can be made. Indeed, an offeree who does not respond at all may in unusual situations find his non-action interpreted as an acceptance.

Much controversy over acceptances has resulted from sheer garrulity. Many an offeree who intends (apparently) to accept an offer for a bilateral contract, feels moved to paraphrase, discuss, add to, clarify, or otherwise embellish the proposal, either as to what the offeror is to do or as to what the offeree is to do, or both. Far better would be the restrained reply, “I accept.” Interpretation may show there are in

80 An offer ambiguous in that it does not clearly indicate whether a promise or an act is requested is usually interpreted as requesting a promise. Restatement, Contracts § 31 (1932); 1 Corbin, Contracts §§ 62, 70 (1950); Jacoby v. Davis, 1 Cal.2d 370, 34 P.2d 1026 (1934), noted 23 Calif. L. Rev. 213 (1935). Ambiguous options are similarly handled; a notice from the optionee that he exercises the option is acceptance enough, amply expressing his promise to buy and pay. 1 Corbin, Contracts § 264 (1950). Whitworth v. Enita, 36 Wn.2d 767, 220 P.2d 328 (1950), which might well have raised the problem, went against the optionee on a different basis. In Kingston v. Anderson, 3 Wn.2d 21, 99 P.2d 630 (1940) the court disposed of an argument that the optionee had not tendered the price before expiry of the option, by applying the debt-tender rule, saying “... no one is required to go beyond the boundaries of the realm in order to make a tender.” The offeror lived in California; if payment was a part of the required acceptance the court’s reasoning cannot be approved; the option did not state whether payment or promise was required.

81 Examples are Inland Navigation Co. v. McGrady, 43 Wn.2d 209, 260 P.2d 893 (1953), noted 29 Wash. L. Rev. 99 (1954) and Hill’s Inc. v. William B. Kessler, Inc., 41 Wn.2d 42, P.2d 1099 (1952). These cases, in their diverse results, suggest that the outcome of litigation on interpretation issues is beyond the realm of safe prediction.

82 An acceptance promise by the offeree will on occasion be implied from his conduct, although the offer did not request or authorize this mode of expression. Examples are: Jackson v. Gardner, 197 Wash. 276, 84 P.2d 992; Wenatchee Production Credit Association v. Pacific Fruit & Produce Company, 199 Wash. 651, 92 P.2d 883; De Britz v. Sylvia, 21 Wn.2d 317, 150 P.2d 978 (1944); Leroux v. Knoll, 28 Wn.2d 964, 184 P.2d 564 (1947); Jones v. Brisbin, 41 Wn.2d 167, 24 P.2d 891 (1952); Fuller v. Ostrowske, 48 Wn.2d 802, 296 P.2d 996 (1956); Bakke v. Columbia Valley Lumber Company, Inc., 49 Wn.2d 165, 298 P.2d 849 (1956). See also Restatement, Contracts § 72 (1) (a) (1932) and the cases cited in the previous discussion of implied promises, n. 15 et. seq.

83 Bond v. Wiegardt, 40 Wn.2d 196 (1950) (offeree, an attorney, proposed a non-contingent fee; the client made a counter-proposal for a contingent fee; the attorney without replying to the counter-proposal undertook the representation; in doing so he accepted). Said the court: “If the modification was not satisfactory to him ... he should have replied to the letter. His not doing so led the Wiegardts to suppose that he was agreeable to carrying out the contract according to their specifications. ... It is clear they relied on Mr. Bond’s silence to their detriment, and the trial court was correct in holding him estopped to deny his acceptance of the contract as modified.” See Restatement, Contracts § 72 (1) (c) (1932); 1 Corbin, Contracts § 75 (1950); 1 Williston, Contracts § 91 (rev. ed. 1936). These indicate that past dealings or other circumstances may place an offeree under a burden to reply to the offer, on pain of being held to have accepted. In Kalez v. Miller, 20 Wn.2d 362, 147 P.2d 506 (1944) the court reached a contrary result, saying without discussion: “We ... do not find that this case falls under any of the very restricted situations in which silence constitutes an acceptance of a contract.” Letres v. Washington Co-op Chick Association, 8 Wn.2d 64, 111 P.2d 894 (1941) is a similar holding.
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reality no deviations between offer and acceptance; or that an apparent deviation was merely "requested" by the offeree and so not fatal to the acceptance; or that deviation is a "condition" exacted by the offeree, whose reply is accordingly no acceptance.

Disputes over accomplishment of the act requested by an offer for a unilateral contract seem to be uncommon, save in connection with real estate brokers. To aid in determining their rights, the recent opinions have repeated a formula earlier stated: "A broker is entitled to his commission when he produces a purchaser who is ready, able and willing to purchase upon the terms required." The critical issue is typically a factual one.

An old principle infrequently encountered in modern appellate decisions restricts the power of acceptance to the offeree designated in the offer. The court found occasion to invoke this proposition in Dorsey v. Strand, the main problem being identification (in a very complicated situation) of the offeree.

In Norm Advertising, Inc. v. Monroe Street Lumber Co., the court recognized again a well-established proposition—the place of contracting is the place at which the acceptance became legally operative. In applying the rule, the court assumed without discussion the applicability of an equally well-established proposition, which makes an acceptance—


86 Bloom v. Christensen, 18 Wn.2d 137, 138 P.2d 655 (1943); Best v. Kelley, 22 Wn.2d 257, 155 P.2d 794 (1945) (stressing the requirement that the broker produce a buyer willing to buy on the terms of the listing); Burt v. Heikkala, 44 Wn.2d 52, 265 P.2d 280 (1954), noted 30 Wash. L. Rev. 103 (1955). See also Largent v. Ritchey, 38 Wn.2d 856, 233 P.2d 1019 (1951) (involving a promise to pay a commission, appended to an earnest money agreement); Haynes v. John Davis & Co., 22 Wn.2d 474, 156 P.2d 659 (1945) (involving the broker’s interest under a forfeiture-of-down-payment clause in an earnest money agreement); Guenther v. Equitable Life Assur. Society, 23 Wn.2d 65, 159 P.2d 389 (1945) (involving a loan broker). Real estate brokerage problems are discussed in 1 Corbin, Contracts § 50 (1950).

87 See Restatement, Contracts § 54 (1932); 1 Williston, Contracts § 80 (rev. ed. 1936); 1 Corbin, Contracts § 56 (1950).

88 25 Wn.2d 391, 171 P.2d 177 (1946). See also Restatement, Contracts § 74 (1932); 1 Williston, Contracts § 97 (rev. ed. 1936). The transaction involved was of a familiar type—an order was solicited in Washington by a salesman for an out-of-state seller; the order form signed by the buyer recited: "This agreement is subject to the acceptance of Norm Advertising, Inc. at New York." The presence of this clause makes certain that the order is an offer rather than an acceptance; if the acceptance occurred in New York; the law of that place regulates issues of contract formation and interpretation. This the court acknowledged. It then went on to apply Washington law because the law of New York was not pleaded or proved.
promise legally operative when put in the course of transmission by an authorized or customary mode of communication.\textsuperscript{90}

\textbf{Mistake.} The concern here is with those errors in understanding which arguably defeat mutual assent, rather than with mistake as a basis for rescinding a contract the existence of which is not disputed. In opinions the two problems are not always neatly labelled and pigeonholed, nor are the function of interpretation and the requirement of certainty always carefully differentiated.\textsuperscript{91} Analysis and argument, and decision too, of the conflicts which result from misunderstanding are extraordinarily difficult. In recent years the court has had several encounters with this prickly area.

In \textit{Schuehle v. Schuehle},\textsuperscript{92} the court handled as a certainty problem a failure of the parties to achieve concensus, they having attached differing meanings to a proposal which was patently ambiguous when read against their precedent complex negotiations. The offeror may have been negligent in phrasing his offer; the offeree was equally at fault in failing to clarify the situation before purporting to accept. There was no reason for preferring the meaning of either party, and the court properly found no contract. Mistake, rather than uncertainty, would seem the better explanation.\textsuperscript{93}

If \(X\) writes \(Y\): “I will sell you my red cow for $250.00,” really meaning to offer his black cow, he has offered to sell the red cow. \(Y\)’s reliance outweighs \(X\)’s hardship. Only if \(Y\) knew or should have known of the mistake will his acceptance fail to produce a contract for sale of the red cow.\textsuperscript{94} This old classroom hypothetical came to life in \textit{Carroll Construction Co. v. Smith},\textsuperscript{95} with the accent on \(Y\)’s knowledge of the mistake. A subcontractor submitted, and the general contractor accepted, a bid reading: “Plumbing and heating will be done according to specifications for the sum of $1419.31.” The specifications referred to encompassed both labor and materials in the heating installation. The offeror, sued for not completing the work, testified that he was requested to and intended to bid on just the labor part of the heating plant. The trial court believed him and found “no meeting of the minds or contract either oral or in writing . . . in regard to the heating job . . . .” The

\textsuperscript{90} See \textit{Restatement, Contracts} §§ 64 et seq. (1932); 1 \textit{Williston, Contracts} §§ 81 et seq. (rev. ed. 1936); 1 \textit{Corbin, Contracts} § 78 (1950).

\textsuperscript{91} See 1 \textit{Corbin, Contracts} §§ 103 et seq. (1950); 2 \textit{Corbin} 597 et seq.; 1 \textit{Williston, Contracts} § 94 et seq. (rev. ed. 1936).

\textsuperscript{92} 21 Wn.2d 609, 152 P.2d 608 (1944).

\textsuperscript{93} See \textit{Restatement, Contracts} § 71 (b) (1932).

\textsuperscript{94} \textit{Restatement, Contracts} § 71 (1932); 1 \textit{Williston, Contracts} § 94 (rev. ed. 1936); 1 \textit{Corbin, Contracts} § 104 (1950).

\textsuperscript{95} 37 Wn.2d 322, 223 P.2d 606 (1950).
mistake principle supports both the admission of this testimony and the conclusion.\textsuperscript{90} In affirming, the appellate court did not discuss mistake; it cited only precedents concerned with interpretation, and its opinion is accordingly most confusing. The bid as made was not ambiguous.\textsuperscript{97}

There is little prospect of success for the offeror or offeree who tries to escape liability by showing he did not, before signing it, carefully read a document which imperfectly expressed his intent.\textsuperscript{93} Lake Air, Inc. v. Duffy\textsuperscript{90} is illustrative. The asserted defense failed. 'The parties dealt face to face and the promisor was, as the court put it, "obviously in a hurry to take off."' Could the promisee's knowledge of the haste or inattention with which the document was executed be shaped into an argument for charging him with awareness of the deviation between the promisor's purpose and the document? The inquiry is particularly intriguing if the document is a form prepared by the promisee and states in small print a variety of undertakings by the signer.

Two release cases must be mentioned here\textsuperscript{100} as possibly indicative of the court's reaction to a promisor who accurately expressed a purpose he was induced to formulate by his own unilateral misinterpretation of the underlying data. These cases suggest that such a promisor cannot successfully attack his promise as offer or acceptance and that he must seek relief in equity; to prevail he must establish one or another of the bases upon which the equitable remedy of rescission or cancellation will be granted.\textsuperscript{101}

\textsuperscript{90} Denial that the bid was an offer to accomplish even the labor part of the heating installation was sound. The offeror did not in his bid make any such offer. His bid covered labor and materials; that indivisible proposal had no legal efficacy. The trial court evidently found there was no evidence other than the bid from which an offer to supply the labor could be found.

\textsuperscript{97} On this basis one judge dissented. In a later case the court said flatly: "We have often said the courts will not interpret the meaning of unambiguous contracts." Schwieger v. Robbins & Co., 48 Wn.2d 22, 290 P.2d 984 (1955). See also n. 100 below.

\textsuperscript{93} Restatement, Contracts § 70; 1 Williston, Contracts § 35 (rev. ed. 1936); 3 Corbin, Contracts § 607 (1950).

\textsuperscript{90} 42 Wn.2d 478, 256 P.2d 301 (1953).

\textsuperscript{90} Bakamus v. Albert, 1 Wn.2d 241, 95 P.2d 767 (1939); Schwieger v. Robbins & Co., 48 Wn.2d 22, 290 P.2d 984 (1955). In both cases the person who executed the release evidently tried to persuade the court that it was not intended to cover the cause of action asserted in the present litigation. The evidence on which proof of intent was sought to be made is not set out in the opinions and it is impossible to determine the exact issue. From the opinions it appears that the court found the releases to be unambiguous and invulnerable to interpretation. That either plaintiff had evidence showing the release did not express his purpose and that the defendant knew it did not, seems unlikely. The decisions are probably not authority against a plaintiff who has such evidence. See the discussion at n. 96, 97 above.

\textsuperscript{101} Some courts have found no mutual assent, where a contractor made a bid, the amount of which he achieved by faulty computation, and notified the offeree of the error after acceptance and prior to any real change of position by the offeree. These decisions conflict with the basic idea that an offeree may take an unambiguous offer at face value if he has no reason to know it does not express the offeror's purpose. Hardship on the
CONSIDERATION AND ITS SUFFICIENCY

The basic principle. "Consideration" is a term singularly difficult to define. Used initially only to mean "sufficient reason for enforcing a promise," it has acquired a technical content, the precise scope of which is debatable. Courts, more concerned with reaching just results than with theoretic symmetry, have not coherently enunciated any "basic principle." They seem rather to have produced a complex of principle in which several themes are interwoven.\(^{102}\)

The promisee's detrimental reliance on a promise has been a reason for enforcement since the early assumpsit actions, as has also the fact of a debt antecedent to a promise to pay it.

With the development of mutual assent came an essentially commercial concept of contract; a transaction rooted in offer and acceptance must be an exchange. This has much influenced the subsequent thinking of courts about consideration. It has fostered the idea that the essence of consideration is bargain and the allied ideas that consideration must be contemporaneous or future, need not be adequate, is not concerned with motive, and cannot be made out by proof of mere states of affairs, such as love and affection.

It could be argued with some plausibility that mutual assent and its attendant "bargain" or "exchange" has made any concomitant requirement such as consideration unnecessary. Nothing in the decisions suggests that the argument might be persuasive. Courts not only continue to write opinions disposing of contract formation controversies on a consideration basis where mutual assent would provide a more simple and obvious solution; they also continue to police exchange transactions, refusing enforcement of some types of bargain despite proof of mutual assent.

All of these developments are arguably indicative of the burden laid on the proponent of contract formation, by the substantive requirement known as "consideration." An all-encompassing formula, if possible of accurate statement, would certainly be clumsy and complicated. The draftsmen of the Restatement chose instead to separate, and designate as enforceable without consideration or mutual assent, promises followed by detrimental reliance or preceded by a debt.\(^{103}\) Promises of other types were deemed obligatory only if supported by a "sufficient

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\(^{102}\) See 1 Williston, Contracts §§ 99 et seq. (rev. ed. 1936); 1 Corbin, Contracts §§ 109 et seq. (1950).

\(^{103}\) Restatement, Contracts §§ 85-90 (1932).
"Consideration" was so defined as to exclude anything not bargained for. Any act, forbearance, or promise bargained for was declared to be a "sufficient consideration," save for a limited number of stated exceptions.

There is much to be said for the Restatement's organization. Most promises are now made in an offer and acceptance context, and most so made will be enforced. Stress may properly be laid on the universality with which promisors who receive what they bargained for come under a legal duty, and the exceptional nature of the situations in which they do not. Clear thinking about the problems posed by promisees who provide no exchange but can show reliance or a past debt is fostered by disassociating those problems, in both an analytical and a terminological sense, from the problems which arise out of purported exchanges.

The Washington court does not differentiate between "consideration" and "sufficient consideration." In other particulars its position appears to coincide generally with that of the Restatement. Most significant is its restriction of "consideration" to "something bargained for." In *Universal C.I.T. Corp. v. DeLisle* the court said: "Yet, beyond the bare fact of a benefit or detriment, or, more specifically the extension of further credit, it is fundamental that such must arise out of an agreement between the parties. There must be a meeting of the minds." In this passage there is also a reasonably clear statement of the proof by which conformity to the "bargained-for" requirement shall be established. The critical evidence will be evidence of offer and acceptance. There is, indeed, no other basis on which the inquiry can be conducted. Under this approach, a promisee's post-promise and unrequested act or forbearance cannot be consideration. A promisee who can muster only this kind of proof would be well advised if he shifted his theory to promissory estoppel.

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104 *Id.* § 19.
105 *Id.* § 75(1).
106 *Id.* §§ 76 et seq.
107 See the discussion at *n.* 112 et seq.
108 47 Wn.2d 318, 287 P.2d 302 (1955). See also Snyder v. Roberts, 45 Wn.2d 865 at p. 869, 278 P.2d 348 (1955) (which cites the Restatement and adopts the "bargained-for" language of § 75); Jenkins v. Jenkins University, 17 Wash. 160, 49 P. 247 (1897). The separate treatment accorded promises supported by reliance or a prior debt is apparent in the section which follows, entitled "Informal Contracts Without Assent or Consideration." The University C.I.T. Corporation case is discussed in Comment, *Consideration in Suretyship Contracts in Washington*, 31 WASH. L. REV. 76 at 86 (1956), it being there suggested that application of the court's formula to the facts before it would seem to demand a contrary holding on the bargained-for requirement.

109 A good example of an unsuccessful attempt to make the shift is *Hill v. Corbett*, 33 Wn.2d 219, 204 P.2d 845 (1949), lost for failure to meet all of the requirements for promissory estoppel. See also *n.* 119 below. It must be recognized that a promisee
The later Washington decisions demonstrate that consideration may be found in a bargained-for act, forbearance, change in legal relations, or promise. They also demonstrate that consideration need not move to the promisor and provide no reason for thinking that consideration cannot move from a third person. They further demonstrate a truly astonishing diversity in word-usage, "valid consideration," "sufficient consideration," "adequate consideration," "valuable consideration," and "mutuality of obligation" having been used at one time or another in addition to or in lieu of, and apparently interchangeably with, "consideration." The latter has in turn been used where "value" would perhaps have more precisely expressed the court's purpose. The word "consideration" has continued to appear in opinions discussing the enforceability of oral suretyship promises and the main-purpose Statute of Frauds exception, augmenting the confusion in that already badly confused area. Bare promises have continued to elicit "no con-
sideration" explanations for non-enforcement. In Cowles Publishing Co. v. McMann, the court treated as "bare" a promise which might better have been differently regarded. There was in issue a specialized

the promise; hence it is unenforcible." p. 630. See also Fairview Lumber Co. v. Makos, 44 Wn.2d 131, 265 P.2d 837 (1954). The promisee of an oral promise to answer for another's debt has a double burden, proof of consideration and of conformity to the peculiar Statute of Frauds proposition known generally as "the main purpose exception." Nothing but obfuscation can come from use of the word "consideration" in attempts to explain or apply the Statute of Frauds exception. The performance of the promise will have run to the principal at the surety's request and will have provided consideration; the oral or written nature of the surety's promise can never be relevant to the consideration issue. Whether the surety should be held on his oral promise despite the Statute is an inquiry presupposing that the surety is otherwise contractually obligated. It is an inquiry difficult enough to handle, without talking as though it turns on the presence of some special variety of consideration. Justification for excluding the surety from whatever protection the Statute is intended to afford must be found in the motive which induced him to bargain for a performance moving to the principal.

See 2 CORBIN, CONTRACTS §§ 366 et seq. (1950).

110 Hill v. Corbett, 33 Wn.2d 219, 204 P.2d 845 (1949); Castle & Co. v. Public Service Underwriters, 198 Wash. 576, 89 P.2d 506 (1939) (where a creditor's promise to extend time was held to be gratuitous. Since the extension was requested, in effect, by the debtor, it is difficult to see why a promise by the debtor to pay interest during the extension period was not implied; cf. Strong v. Sunset Copper Co., 9 Wn.2d 214, 114 P.2d 526 (1941); had it been implied, the debtor's request would have been part of an offer and the creditor's response would have created a bilateral contract); Universal C.I.T. Credit Corp. v. DeLisle, 47 Wn.2d 318, 287 P.2d 302 (1955) (discussed above at n. 108 and below at n. 120); Cowles Publishing Co. v. McMann, 25 Wn.2d 736, 172 P.2d 235 (1946) (discussed below at n. 120); Hopkins v. Barlin, 31 Wn.2d 260, 196 P.2d 347 (1948).

120 25 Wn.2d 736, 172 P.2d 235, 167 A.L.R. 1164 (1946), noted 4 Wash. & Lee L. Rev. 221 (1947); 22 Wash. L. Rev. 142 (1947). See also 6 WILLISTON, CONTRACTS § 1874 (rev. ed. 1936); Comment, Consideration in Suretyship Contracts in Washington, 31 Wash. L. Rev. 76 (1956); Annot., Consideration for assumption of obligation as guarantor, surety, indorser or indemnitor, after execution and delivery of principal contract, as predicable upon an antecedent promise to assume or furnish such obligation, 167 A.L.R. 1174. Four judges dissented; their opinion appears the better reasoned. The majority displayed no real awareness of the many decisions (some from Washington) holding the surety on similar facts, nor of the reasoning on which those decisions rest. Dittmar v. Frye, 200 Wash. 451 at 460, 93 P.2d 709 (1939) the court seemed prepared to acknowledge a special rule for this type of problem, saying: "If at the time the loan was made it was the understanding...that the additional signature of appellant would be obtained, and it was placed on the note February 11, 1931, by appellant pursuant to the original agreement, that signing related back to the inception of the original contract...and no new consideration was necessary." Relation back is as good a ratio as any, if a special consideration principle is to be framed. The force of the Cowles Publishing Company case may have been diminished by Universal C.I.T. Credit Corp. v. DeLisle, 47 Wn.2d 318, 287 P.2d 302 (1955), in which the court said at p. 320: "However, a guaranty contract executed after the creation of the principal obligation is supported by a consideration if it is predicated upon an antecedent promise with
consideration problem encountered in suretyship. Where the principal receives the credit he desires, and at the time promises to procure a surety, is the surety's later promise supported by consideration? The court held "no." The opinion is not persuasive.

The words "benefit" and "detriment" have continued to recur in Washington decisions, as in the passage quoted above at note 108 from the Universal C.I.T. Corp. opinion. Proper evaluation of their function is not easy. They have survived from an earlier era in which the principles now comprising "consideration" were emerging. That they have utility today may be questioned. Any apparent connotation that consideration always exists where there is "benefit" or "detriment" is obviously false. The Universal C.I.T. Corp. case and its emphasis of the bargained-for requirement is demonstrative. Does "bargained-for benefit or detriment" provide a sound test? It may be sound; it is certainly useless. No problems can be solved with such a test; for problem-solving, the conduct which courts will recognize as "benefit" or "detriment" must be known. Courts will not accept proof of conduct conforming to the dictionary meanings of "benefit" or "detriment" as conclusive proof of consideration. These words are used in a technical and special sense. They indicate something bargained for which satisfies such substantive law requirements for consideration as appertain in the jurisdiction. "Benefit" really means nothing more nor less than "consideration"; likewise of "detriment." The important tools for lawyers and judges are the substantive law requirements; i.e., the propositions discussed in the subsections which follow. Precision in analysis and exposition might well be fostered by letting "benefit" and "detriment" go into retirement. They are not used in the Restatement of Contracts.¹²¹

Acts. Acts are a routine source of consideration. The noted Washington cases are illustrative.¹²²

respect thereto, made as an inducement to the principal obligation, either directly by the undertaker or by the principal obligor in such a way as to bind him in a legal duty to the obligee." (Italics added). There is no indication here that the principal must have identified the surety. This passage is dictum; no promise by the principal to provide a surety was in evidence. Moreover, the court went on to cite and quote from the Cowles Publishing Company opinion, with no indication of disapproval. The latter, insofar as it reads, "... or the debtor gives the creditor an assurance that, if he later deems the debt insecure, he might look to a certain person, then named by the debtor..." conflicts with the proposition stated in the later case.¹²³

¹²¹ Moreover, § 81 reads: "Except as this rule is qualified by §§ 76, 78-80, gain or advantage of the promisor or loss or disadvantage to the promisee, or the relative values of a promise and the consideration for it, do not affect the sufficiency of consideration."

¹²² Fleischbein v. Thorne, 193 Wash. 65, 74 P.2d 880 (1937) (release of a mortgage held consideration although the statute of limitations had run on obligation secured);
Forbearances. An unfortunate conflict has developed in the Washington cases concerned with forbearance as consideration. Despite the existence of several prior decisions sustaining the sufficiency of bargained-for forbearance, and without mentioning those decisions, the court in Cowles Publishing Co. v. McMann held that "mere forbearance, without an agreement to forbear, is not sufficient." Following this somewhat casual embracing of a minority doctrine, the reason for which is obscure and the soundness of which is more than doubtful, Snyder v. Roberts was decided. There, after summarizing the several lines of authority which have developed in the United States around forbearance as consideration, the court said of the view which finds consideration in requested forbearance, "We find no Washington cases in [this] category." Since earlier decisions were not discussed nor expressly overruled, and the merits of the conflicting principles were not exam-
ined, it seems safe to conclude that the Washington position on the sufficiency of forbearance as consideration is presently unpredictable.

Promises. The basic proposition that a promise can be consideration has been reiterated in several recent opinions. The word "mutuality" has been scrutinized and rightly analyzed. It is only a confusing synonym for "consideration," which in the formation of a bilateral contract demands an exchange of promises, both of which satisfy the criteria by which the sufficiency of a promise as consideration is determined. Several decisions dealing with various phases of the illusory promise problem were decided. They evidence no inclination to depart from the generally accepted rule, under which a promise by which

127 Strong v. Sunset Copper Co., 9 Wn.2d 214, 114 P.2d 526 (1941); Sargent v. Drew-English, Inc., 12 Wn.2d 320, 121 P.2d 373 (1942); Auger v. Shideler, 23 Wn.2d 505, 161 P.2d 200 (1945); Levas v. Dewey, 33 Wn.2d 232, 213 P.2d 933 (1949); In re Young's Estate, 40 Wn.2d 582, 244 P.2d 1165 (1952) (here the court quoted from the opinion in Auger v. Shideler, cited above, the curious statement: "The mutual promises would constitute the consideration for the agreement, and the making of each will would be the consideration for the making of the other." Just what this means is not at all clear.) Raab v. Wallerich, 46 Wn.2d 375, 282 P.2d 271 (1955). See also Howell v. Benton, 40 Wn.2d 871, 246 P.2d 823 (1952).

128 Sargent v. Drew-English, 12 Wn.2d 320, 121 P.2d 373 (1942). See also 1 CORBIN, CONTRACTS § 152 (1950). Despite the demonstration in the Sargent case that the word serves no useful purpose, "mutuality" continues to appear in opinions; the citations appear in n. 116 above. An illustration of the confusion the term can cause is the statement in Foelkner v. Perkins, 197 Wash. 462 at 466, 85 P.2d 1095 (1938): "It is necessary to determine, however, if the oral modification is void because . . . of lack of consideration and mutuality of obligation, . . . ." Passages like this, in which the court talks as though mutuality were an independent requirement for bilateral contracts, may tempt counsel to read into "mutuality" ideas about equivalency of performances. The Sargent case, cited supra, is possibly an example. Thus a side-wise approach to the restrictions rejected in cases directly concerned with adequacy (see the discussion below in the subsection entitled "Adequacy") is encouraged.

Although neither case involved a consideration issue, Winslow v. Mell, 48 Wn.2d 581, 295 P.2d 33 (1956) and Spooner v. Reserve Life Ins. Co., 47 Wn.2d 454, 287 P.2d 735 (1955), noted 31 WASH. L. REV. 107 (1956) contain good definitions of "illusory promise." In both instances the defendant had made a promise on a condition within his control; the condition had not been satisfied and liability was denied. In the Winslow opinion the court said: "One who promises to do a thing only if it pleases him to do it is not bound to perform it at all, as his promise is illusory." (citing 1 CORBIN, CONTRACTS §§ 145, 147). In the Spooner opinion it was said: "A supposed promise may be illusory because it is so indefinite that it cannot be enforced . . . or by reason of provisions contained in the promise which in effect make its performance optional or entirely discretionary on the part of the promisor." (citing 1 WILLISTON, CONTRACTS § 33). In Washington Chocolate Co. v. Canterbury Candy Makers, Inc., 18 Wn.2d 79, 138 P.2d 195 (1943), a seller's promise to sell at a price to be fixed by him was held not to be consideration. The vice in such a promise lies in the promisor's power to raise the price to a point at which the buyer cannot buy, thus relieving the seller of any burden of selling. In Larkins v. St. Paul & Tacoma Lumber Co., 35 Wn.2d 711, 214 P.2d 700 (1950), the stated basis for denying contract formation was lack of consideration. Since the defendant was found not to have made the promise sued on, that might well have been made the rationale. In Reeker v. Remour, 40 Wn.2d 519, 244 P.2d 270 (1952), a service station lessee's promise to pay as rent one cent per gallon of gasoline sold was attacked as consideration; a promise like this is illusory if there be no promise to sell gasoline; a promise to sell was found by implication.
the promisor reserves to himself complete control over whether he shall perform is not consideration.130

Antecedent duty. In the view of most American courts, consideration for a promise is not to be found in the promisee's doing or promising to do something which he was already under a legal duty to the promisor to do.131 The operation of this principle in transactions whereby the promisor was to pay more for a performance to which he was already entitled, is illustrated in several of the later Washington decisions.132 A few decisions which involved indistinguishable facts were given an unfortunate variation in result or rationale by virtue of the peculiar modification principle discussed in the following subsection.133 Another type of attack on the antecedent-duty principle was extensively discussed in Snyder v. Roberts,134 and denominated "merger." The scope and theory of the attack is well enough stated by the court in this passage: "The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed."

Even less consistency is found in the Washington cases which deal with the discharge of prior obligations. Discharge transactions of the substituted-performance type, usually called "accords" where the original obligation was the product of a unilateral contract or of a bilateral contract fully performed on one side, are generally required to rest on something more than part performance of the duty already owed.135 There is some contrary authority and some adherence to the idea that a debtor who has actually paid the lesser amount is discharged, although an agreement to pay and to receive the lesser amount would be unenforceable.136 Washington is in the odd position of having case support

130 See Restatement, Contracts § 79 (1932); 1 Williston, Contracts §§ 104 et seq. (rev. ed. 1936); 1 Corbin, Contracts §§ 145 et seq. (1950).

131 See Restatement, Contracts §§ 76(a), 78 (1932); 1 Williston, Contracts §§ 120 et seq. (rev. ed. 1936); 1 Corbin, Contracts §§ 171 et seq. (1950); Comment Note, Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 A.L.R.2d 78.


133 See particularly n. 152 below.

134 45 Wn.2d 865, 278 P.2d 348 (1955).

135 1 Williston, Contracts § 120 (rev. ed. 1936); 1 Corbin, Contracts §§ 174 et seq. (1950).

136 1 Williston, Contracts § 120 (rev. ed. 1936); 1 Corbin, Contracts §§ 175, 184 (1950).
for all three of these propositions: that the promise to discharge is inoperative, that it is operative, and that it is operative if the debtor has paid the part. The cases have been well discussed in preceding issues of this *Review*. Attention is particularly directed to *Bellingham Securities Syndicate, Inc. v. Bellingham Coal Mines* in which the court said flatly: "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 creditor . . . can not operate as an accord and satisfaction of the entire indebtedness, as there is an absence of consideration therefor." *Meyer v. Strom* contains similar language. A contrary result was reached in the *Douglas County Memorial Hospital Ass'n* case. There the creditor was held "estopped" to deny consideration, and the court discussed favorably some earlier cases in which a creditor who had received a reduced payment was refused recovery of the difference between the original obligation and the sum paid.

It is not surprising that antecedent-duty controversies have produced so much confusion. There are cogent arguments both for and against an undeviating adherance to the view which denies that consideration can be provided in a performance already owed. If an obligor can, in a legally effective maneuver, exact more pay for the rendition of his performance, or buy a discharge by paying part of what he owes, the whole economic structure is arguably weakened. That structure rests very much on the notion that contract obligations should be performed and will be legally enforced. The availability of legal machinery making such conduct profitable would encourage gouging and defaults for the purpose of forcing settlements. On the other hand, many a creditor on occasion faces salvage operations made necessary by the financial difficulties of an honest debtor. The creditor is the best judge of how such an operation should be conducted. There should be no legal impediment to the implementation of the arrangements he voluntarily makes with his debtor. Even in instances of a promise to pay more for the same performance, there is sometimes something to be said for the obligor who exacted the extra pay. He may, by reason of unforeseen and uncontrollable difficulties, be able to ask for additional compensa-

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138 13 Wn.2d 370 at 386, 123 P.2d 668 (1942).
139 37 Wn.2d 818, 226 P.2d 218 (1951).
tion without impinging on any but the most sensitive of ethical standards. Between him and the callous blackmailer of a necessitous obligee there is a considerable difference.

Even in one state the litigation can illustrate a wide range of ethical overtones. The *Douglas County Memorial Hospital* case involved a settlement proposed by the hospital, which was informed concerning the debtor's financial condition and knew he was not able to pay its bill in full and in cash. *Inman v. Roche Fruit Co.* involved a promise by a buyer to pay the same price for a lesser performance; the rearrangement was apparently solicited by the buyer for reasons deemed advantageous to it. The transaction litigated in *Portion Pack, Inc. v. Bond* was an outright gouge as the court saw it; that litigated in *Snyder v. Roberts* was about as bad. That litigated in *Goodwin v. Northwestern Mut. Life Ins. Co.* seems more probably the product of a mistake by the insurance company concerning its legal position.

Can and should courts police bargains like these on a case-to-case basis? It would certainly be difficult to frame an antecedent-duty doctrine flexible enough to encompass all of the possible ethical nuances. The court can move either way in future litigation, simply because it has announced contradictory propositions and can ground a decision either way on Washington precedent. This fact must considerably complicate the work of counsel in advising clients and in briefing. It defeats the commentator, who finds in this area more than normal difficulty in arriving at any solid basis for predicting the future course of the court.

**Modification agreements.** The subject matter of this subsection merits separate treatment only because Washington has a group of cases involving transactions characterized by the court as "modifications." These cases are a tangle of diverse language and results. The origins of the trouble lie in early decisions, reference to which is accordingly necessary.

Preliminarily, some discussion of the ways in which a contract can be changed seems necessary. It is believed that most American courts would accept the following analysis:

If the parties to a bilateral contract still wholly or partly executory on both sides agree to terminate their remaining duties, the new tran-
sation is a contract and is usually called “mutual rescission.” Consideration is provided in the surrender by each party of his rights under the original contract. Rescission can be partial, affecting one pair of several reciprocal rights.\textsuperscript{146}

If the parties to a bilateral contract still executory on both sides agree that one party shall perform in a different way, consideration for the new agreement is provided in his promise to render the different performance and in surrender by the other party of his right to receive the original performance. If the new agreement contemplates a performance by each differing from that originally undertaken, consideration is provided in the new promises. But if one party undertakes to do less than he originally promised, or to do more than he originally promised, while the other is to perform according to the original contract, there is an antecedent-duty problem, and the new agreement will fail for lack of consideration.\textsuperscript{146a}

If the parties to a unilateral contract or a bilateral contract fully performed on one side agree that the obligor shall perform in a different way, there is no consideration impediment to enforcement of the new promise; the new transaction will usually be termed an “accord.”\textsuperscript{147} The antecedent-duty rule, however, again comes into operation if the new agreement contemplates discharge of the obligor upon his accomplishing only a part of his original obligation.\textsuperscript{148} A promise by the obligor to do more than he was obligated to do would also be a “bare” promise and unenforceable.

The new transaction must stand on its own feet. For any new promise there must be consideration, bargained-for and hence contemporaneous or future, and satisfying such other requirements as the jurisdiction exacts. There is no way in which the existence of the original contract can furnish consideration for the change and no way in which the original consideration can carry over and support the subsequent promise. No sensible attack can be made on the consideration issues presented by a new agreement purporting to change a prior contract without first determining what rights and duties, created by the prior contract, were extant when the new agreement was undertaken, nor without determining the ways in which those rights and duties were to be affected by the new agreement.

\textsuperscript{146} 6 \textsc{Williston, Contracts} § 1826 (rev. ed. 1936); 5 \textsc{Corbin, Contracts} § 1236 (1950).
\textsuperscript{146a}\textsuperscript{a} 6 \textsc{Williston, Contracts} § 1826 (rev. ed. 1936); \textsc{Restatement, Contracts} § 84c (1932).
\textsuperscript{147} 6 \textsc{Corbin, Contracts} § 1268 (1950); \textsc{Restatement, Contracts} § 84c (1932).
\textsuperscript{148} 6 \textsc{Williston, Contracts} § 1851 (rev. ed. 1936).
Prior to 1937 the court, in disposing of various cases involving transactions of the types discussed above, said that no new consideration was necessary for the new agreement. In several instances, starting with *Tingley v. Fairhaven Land Co.*, there was consideration in fact, and the result reached was sound.¹⁴⁰ In *Stofferan v. Depew*,¹⁵⁰ however, the court's erroneous formula led to an unsupportable result; the obligor under a unilateral contract was held liable on a substituted contract broadening his obligation with no new consideration. Only a little less objectionable was the result reached in *Inman v. Roche Fruit Co.*,¹⁵¹ where the defendant was held on its subsequent promise to pay the same price for a lesser performance by the plaintiff.¹⁵²

Meanwhile there was developing a parallel line of authority which

¹⁴⁰ Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098 (1894) (contract to sell logs; later agreement to change the delivery point and reduce the price. The new agreement was held effective and treated as "abrogating" the original contract; the court also said the change could be effected "without the actual payment of any consideration." This erroneous statement was totally unnecessary; it seems to have been the cause of the present confusion, having been repeated without critical examination or any apparent awareness that there was consideration in the Tingley transaction); Long v. Pierce County, 22 Wash. 330, 61 Pac. 142 (1900) (involved waiver of a construction contract clause making written notice of extras a requisite to recovery for them; in sustaining the waiver the court said in answer to the owner's objection that it received no consideration for the waiver, "no independent consideration was necessary" for a modification agreement. The analysis underlying this language is patently faulty; moreover, for waiver of an express condition no new contract is needed); Dyer v. Middle Kittitas Irr. Dist., 25 Wash. 80, 64 Pac. 1009 (1901) (mutual rescission of a bilateral contract still partly executory on both sides; the new agreement was sustained. By way of explanation the court said: "... [I]t is sufficient to say the agreement required no new or independent consideration," and cited the Tingley and Long cases, with several cases from elsewhere. Here again there was routine consideration in the reciprocal surrender of rights under the original contract; it is assumed the owner was not already in material default on the original contract); Sunset Copper Co. v. Black, 115 Wash. 132, 196 Pac. 640 (1921) (formula used, unnecessarily); LaPlante v. Hubbard, 125 Wash. 621, 217 Pac. 20 (1923) (agreement to "cancel" the executory part of a bilateral contract still partly executory on both sides; the court said: "The second agreement was a new contract, taking the place of the first, which had not been executed by either of the parties, and the first was a sufficient consideration for the second." The Tingley, Dyer and Long cases were cited. That there was consideration in the reciprocal surrender of rights under the original contract seems clear; that the original could supply consideration for the second contract seems obviously impossible; that the new contract discharged rather than replaced the old one seems evident); Winn v. Stanton, 146 Wash. 328, 262 Pac. 645 (1928) (formula used, although consideration existed).

¹⁵¹ 162 Wash. 235, 298 Pac. 342 (1931).

¹⁵² After distinguishing Wright v. Tacoma (see n. 153 below), the court placed its reliance in Long v. Pierce County (see n. 149 above), which was cited for the proposition that "the contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract." The court has here confused two problems. Taken at face value, the promise of Roche Fruit Co. to pay the same price and also pack and clean the fruit was a bare promise supported by nothing. The most the sellers can argue by way of consideration was a new promise by them to deliver the fruit. This fails as consideration because the sellers were already obligated to deliver the fruit.
accords with the thinking of other courts. In *Wright v. Tacoma*\textsuperscript{153} the court said: “There is no doubt of the rule that a subsequent agreement, which does not form any part of the original contract, is of no force or validity unless supported by a new consideration.” In *Tacoma & Eastern Lumber Co. v. Field & Co.*,\textsuperscript{154} a bilateral contract to sell lumber and to provide an inspection certificate was performed by the seller; his later promise to procure another inspection was held to be unenforceable. The court said:

The rule is that, while a contract remains executory on both sides, an agreement to annul on one side is a consideration for the agreement to annul on the other; but that, if the contract has been executed on one side, an agreement without a new consideration that it shall not be binding is without consideration and void.\textsuperscript{155}

In *Hunters Cattle Co. v. Carstens Packing Co.*,\textsuperscript{156} a contract to feed cattle by feeding cut hay in feed boxes for a price stated, still partly unperformed on both sides, was held to have been successfully modified by a new agreement calling for a different mode of feeding and payment

\textsuperscript{153}87 Wash. 334, 151 Pac. 837 (1915). The words “does not form any part of the original contract” are not clear; the court sustained a new agreement by which a contractor surrendered his right to claim an extra for work done under a construction contract and the owner undertook to pay for certain other work; the quoted language was part of a discussion of consideration, which the owner said was necessary and lacking, and which the court conceded was necessary but found to exist. In the Inman case, n. 151 and 152 above, the court said in countering the Wright case, cited by counsel, “there is no question but that the subsequent agreement forms part of the original contract in writing.” There is no discernible rational basis on which to determine what the court meant by “part of the original contract.” Why a promise to pay more for the same fruit is such a part, while a promise to forego a right to extras or pay for additional work is not, is quite undeterminable. Since the consideration supporting the original transaction cannot on any logical basis support the subsequent agreement, the attempt to distinguish between what is a “part” and what is not a “part” seems a particularly unfortunate waste of energy.

\textsuperscript{154}100 Wash. 79, 170 Pac. 360 (1918).

\textsuperscript{155}The Long case, discussed at n. 149 above, was distinguished as involving a new agreement made while the original contract remained executory on both sides. See also n. 169 below.

\textsuperscript{156}129 Wash. 377, 225 Pac. 68 (1924).
of the same price.\textsuperscript{157} In \textit{Stauffer v. Northwestern Mut. Life Ins. Co.},\textsuperscript{158} a promise to pay compound interest on a policy loan was held unenforceable because the policy provided for simple interest. The court said: "The rule is well settled in this state that, if a contract has been executed by one of the parties thereto, it cannot be modified except by an agreement supported by new consideration."\textsuperscript{159}

On recapitulation of the pre-1937 situation, it is found that the \textit{Stoferan} case cannot be reconciled in either approach or result with the \textit{Tacoma & Eastern Lumber Co.} and \textit{Stauffer} cases. The recognition in the \textit{Tacoma & Eastern Lumber Co.} and \textit{Hunters Cattle Co.} cases (and possibly in \textit{Wright v. Tacoma}) of consideration in the surrender of rights under the prior contract is incompatible with the notion expressed in the \textit{Tingley} case and its successors, that the mere existence of the prior contract, or the original consideration, supports the new agreement. The court had said new consideration \textit{was} necessary for an agreement changing a prior contract and had said new consideration \textit{was not} necessary. "Modification" was used without discrimination in discussing agreements for the change or discharge of a prior contract.

The later cases have done nothing to clarify the situation. In \textit{Foelsner v. Perkins}\textsuperscript{160} the court sustained an agreement by which the vendor under a prior real estate contract was permitted to collect rents on part of the property in return for his undertaking (apparently) not to require the installment payments stipulated in the original contract. The result is sound; each party made a new promise, and neither promise was infected with any antecedent duty limitations. In explaining its conclusion, the court both recognized this consideration and repeated the \textit{Wright} case formula.

In \textit{Queen City Construction Co. v. Seattle},\textsuperscript{161} a promise to pay more for the same work was correctly analyzed, and enforcement was refused, although the contract was partly executory on both sides when the new promise was made.

In \textit{Exeter v. Martin, Ltd.}\textsuperscript{162} the court sustained mutual rescission of a lease still partly executory, saying: "The relinquishment . . . of their

\textsuperscript{157} The court did however cite the \textit{La Plante} case, discussed in n. 149 above, saying that it "and others therein cited, plainly indicate that this court has consistently held to this view of the law." Since the feeder undertook to render a different performance, the \textit{La Plante} case was not in point.

\textsuperscript{158} 184 Wash. 431, 51 P.2d 390 (1935).

\textsuperscript{159} Citing the \textit{Tacoma & Eastern Lumber Co.}, and \textit{Hunters Cattle Co.} cases. See notes 154, 156 above.

\textsuperscript{160} 197 Wash. 462, 85 P.2d 1095 (1938).

\textsuperscript{161} 3 Wn.2d 6, 99 P.2d 407 (1940).

\textsuperscript{162} 5 Wn.2d 244, 105 P.2d 83 (1940). For this sound result the court cited the \textit{La Plante} case (n. 149 above) and the \textit{Hunters Cattle Company} case (n. 156 above).
mutual rights under the lease is sufficient consideration to support the agreement of surrender.”

In *Hopkins v. Barlin* an optionee tried to recover the sum he had paid for the option, alleging a promise by the optioner to return it to him. In denying recovery the court stressed the absence of any consideration for the alleged promise and repeated the *Tacoma & Eastern Lumber Co.* case formula.

In these cases the court reached sound results on sound statements of normal consideration principles. But in *Meyer v. Strom*, in sustaining a lessor’s promise to reduce the rental stipulated in a lease, the court reverted to its earlier erroneous doctrine, saying “the original consideration was sufficient to support the subsequent modification.” Neither the result nor the reasoning can be reconciled with the *Queen City Construction Co.* case.

*Snyder v. Roberts* involved a vendor who had been fully paid pursuant to a real estate contract and had inserted in his deed a covenant obligating the vendee-grantee to a new undertaking. Enforcement of the new undertaking, as a modification, was refused by the court. This was sound. But in disposing of the vendor’s argument for adherence to the language of the *La Plante* case, one of those following the *Tingley* case, the court distinguished the earlier decision on its facts and thus indirectly approved its faulty analysis and language.

In *Nielsen v. Northern Equity Corp.*, the court sustained an agreement reducing the price stipulated in a prior contract, saying: “Since the earnest-money agreement was executory on both sides, no new or additional consideration was necessary to make the modification agree-

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164 37 Wn.2d 818, 226 P.2d 218 (1951).
165 Citing the Hunters Cattle Co. and Inman cases.
166 The court also relied on the fact the reduced rental had been paid. For this there is some support. See 1 *WILLISTON, CONTRACTS* § 130 p. 450 (rev. ed. 1936); Vigeliu v. Vigeliu, 169 Wash. 190, 13 P.2d 425 (1932) (cited in the Meyer opinion); Fuller v. Deacon, 172 Wash. 489, 20 P.2d 843 (1933); Conlon v. Spokane Hardware Co., 117 Wash. 378, 201 Pac. 26 (1921); Johnson v. Peterson, 43 Wn.2d 816, 264 P.2d 237 (1953).
167 45 Wn.2d 865, 278 P.2d 348 (1955).
168 Discussed in n. 149 above.
169 The court cited the Tacoma & Eastern Lumber Co., Stauffer and Hopkins cases. In its apparent approval of the erroneous proposition stated in the *La Plante* case as to contracts still executory, the court encouraged future resort to that unfortunate proposition. Moreover, the court perpetuated the misleading phrasing used in the *La Plante* case: “As is made clear therein, the rule of that case is applicable only to the modification of executory contracts.” The court must have meant “bilateral contracts not fully performed on both sides” in its phrase “executory contract.” The transaction before it was executory until the deed was issued; a unilateral contract, e.g., a promissory note, is an executory contract until it is paid.
170 47 Wn.2d 171, 286 P.2d 1031 (1955).
ment enforcible." Here again the court reached back into the *Tingley* case line of precedents for its authority, ignoring entirely the contrary decisions.\(^1\)

The post-1937 cases have merely extended the conflicting lines of authority previously developed.

Since the existing confusion in this area is a compound of several elements, clarification will come only if several corrective measures are taken. There are conflicting statements of principle, that an agreement purporting to change a prior contract requires new consideration, that it does not, and that it does not if the prior contract is "executory." This conflict can be obviated only by repudiating the first, or the second and third of these propositions. It is certainly to be hoped that the court will adopt the view which requires the new agreement to meet the usual consideration requirements. There are cases conflicting in result, a situation which can be remedied only by overruling one or the other. The *Stofferan* case\(^7\) is a likely prospect for overruling. The *Inman*\(^173\) and *Nielsen*\(^174\) cases merit re-examination; they may or may not withstand critical scrutiny. Viewed as violations of the antecedent duty rule, they should fall. If, in the making of the subsequent agreement, evidence enough of intent to rescind the original contract can be found, the antecedent duty difficulty will be cured. Whether such intent should ever be inferred in this context is a collateral problem which justifies careful review. Part of the confusion in analysis is the product of failure to differentiate between the various types of change-transactions. Consistent recognition of the diverse consideration problems presented by mutual rescissions, accords, agreements requiring one party to do more for the same pay, or to perform as originally undertaken, for less pay, and agreements requiring both parties to perform differently, will be necessary if consistent results are to be achieved in future litigation.

**Compromise.** The type of discharge agreement called a "compromise" raises some consideration problems which are the concern here. What the obligor did or promised pursuant to the compromise may be attacked as consideration for the promised discharge by invoking the

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\(^1\) See n. 149 above. The *La Plante*, *Hunters Cattle Co.* and *Meyer* cases were cited. The fallacious notion that for the modification of a contract no new consideration is needed, "as the original consideration attached to and supported" it, was also given a further lease on life in *Conran v. White & Bollard, Inc.*, 24 Wn.2d 619, 167 P.2d 133 (1946), in which the doctrine was approved although application of it was refused on the particular facts before the court. Concerning implied rescission, which might support the result of the *Nielsen* case, see n. 152 above.

\(^7\) See n. 150 above.

\(^173\) See n. 151 above.

\(^174\) See n. 170 above.
antecedent-duty rule; the attack will fail if the existence or extent of the alleged prior duty was disputed. The critical detail is the test which courts will apply in determining whether it was "disputed." The obligee's promise to discharge the obligor may be attacked as consideration for the promised payment by asserting that the obligee really had no claim. Here the critical detail is the test which courts will apply in determining whether the surrender of an asserted claim is consideration.

There are questions common to both inquiries. Will the bald assertion by an obligor that he owes nothing or has a defense or counterclaim create a "dispute"? Will the bald assertion by the claimant that he has a claim be enough to give him something he can sell? Should the court inquire into the facts and, if so, how far? Is there protection enough against fabricated defenses and fabricated claims in a standard requiring only good faith? Would a standard requiring reasonableness be preferable? How can good faith be determined without considering reasonableness? How can either good faith or reasonableness be determined without some attention to the facts on which the claim or defense was grounded? As to these matters there is much confusion in the language of the opinions of other courts and little information as to how the differing language really works in application. The later Washington cases are also not definitive. It is reasonably clear that most courts, including Washington's, will not require a showing that the defense or claim actually existed in law and fact; so rigorous a standard would discourage compromises.

Concerning the discharge of an obligation disputed in part, a clear-cut split of American authority has developed where the obligor paid only the sum he admitted owing. The court in Bellingham Securities

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176 Restatement, Contracts §§ 76 (a), 78 (1932); 1 Williston, Contracts § 128 (rev. ed. 1936); 1 Corbin, Contracts §§ 187, 188 (1950).
176 Restatement, Contracts §§ 76 (b), 78 (1932); 1 Williston, Contracts § 135 (rev. ed. 1936); 1 Corbin, Contracts §§ 140, 141 (1950).
178 1 Williston, Contracts § 129 (rev. ed. 1936); 1 Corbin, Contracts § 187 (1950).
Syndicate, Inc. v. Bellingham Coal Mines continued its adherence to the view which refuses to find consideration in such a payment.

Adequacy. In Rogich v. Dressel the court reaffirmed its reluctance to engraft onto consideration a requirement that exchanges be of equal values.

Partial insufficiency. Luther v. National Bank of Commerce brought to the court an unusually interesting example of consideration sufficient in part and insufficient in part. The contract was sustained.

INFORMAL CONTRACTS WITHOUT ASSENT OR CONSIDERATION

Tolling the statute of limitations. In the Washington cases decided before 1937, there were inconsistencies in the court's pronouncements about the theory on which tolling rests and conflicting expressions about the evidence requisite to establish tolling. It was not possible to determine whether a new promise to pay (or a part payment or an acknowledgement) created a new contract or merely prevented assertion of the statute as a defense to an action on the old obligation. The cases since 1937 have not clarified the theory; the court has continued to state several incompatible theories: that a new promise or acknowledgement made before that statute has run "vitalizes" the old debt; that a payment made after the statute has run "revives" the debt; that


\[170\] 45 Wn.2d 829, 278 P.2d 367 (1954). See also Foelkner v. Perkins, 197 Wash. 462 at 467, 85 P.2d 1035; Restatement, Contracts § 81 (1932); 1 WILLISTON, CONTRACTS § 115 (rev. ed. 1936); 1 CORBIN, CONTRACTS § 127 (1950). Heideman v. Tall's Travel Shops, Inc., 192 Wash. 513, 73 P.2d 1323 (1937) may appear to be in conflict. In deciding for the promisor in an action involving a promise to employ for life the court said the promisee provided no consideration save his services. If services cannot be consideration for promises to pay the going wage and to employ for life, a standard resembling adequacy is exacted. It is doubtful that the court meant to create a special consideration principle for life employment transactions. There has developed elsewhere a curious inclination to turn issues of interpretation or definiteness, presented by alleged promises to employ for life, on the presence or absence of a separate consideration. See Annot. Validity and duration of contract purporting to be for permanent employment, 35 A.L.R. 1432, supp. 135 A.L.R. 646. The primacy of the interpretation issue in these cases is more apparent in Gensman v. West Coast Power Co., 3 Wn.2d 404, 101 P.2d 316 (1940). See also I WILLISTON op. cit. § 39; 1 CORBIN op. cit. § 96.

\[180\] 182 2 Wn.2d 470, 98 P.2d 667 (1940), noted 16 WASH. L. REV. 49 (1941).

\[180\] Plaintiff promised two performances; both were rendered; one was successfully attacked, under the antecedent duty rule; the other was held sufficient to support the contract. This result seems to be the expectable one. Restatement, Contracts § 84(b) (1932); 1 WILLISTON, CONTRACTS § 134 (rev. ed. 1936); 1 CORBIN, CONTRACTS § 126 (1950).

\[180\] The cases are discussed in Palmer, Moral obligation as consideration for a promise in Washington, 10 WASE. L. REV. 181 at 187 et seq. (1935).

\[180\] Cannavina v. Poston, 13 Wn.2d 182, 124 P.2d 787 (1942) (quoting from Wood on Limitations).

a part payment is an acknowledgement from which arises a new implied promise "supported by the original consideration."\textsuperscript{186} and that "moral obligations arising from, or connected with, what was once a legal liability which has since become suspended or barred by the operation of a positive rule of law will furnish a consideration for a subsequent executory promise."\textsuperscript{187} The court's failure to steer a straight course through this area is astonishing, in the light of Washington's statutory coverage of tolling and the availability of a reasonably consistent common-law background against which to construe the statutes.\textsuperscript{188}

Common-law precedents adequately support the key propositions: that a prior debt is reason enough to enforce a subsequent promise to pay it; that a debt survives despite the operation of a limitations statute, which only affects the remedy; and that a part payment or an acknowledgment of a debt evidences a promise to pay it.\textsuperscript{189}

Having no firm base in theory, the court has been unable to achieve consistency in resolving the tolling controversies which have reached it. There developed, before 1937, conflicting lines of authority about acknowledgments. One group of cases adhered to the majority view, under which an acknowledgment that debt exists tolls the statute.\textsuperscript{190} The other group seemingly rejected this method of tolling, the court having said: "[A] mere acknowledgment of a debt, or the expression of an intention to pay, is not sufficient to revive the debt."\textsuperscript{191} The court may have meant in this passage only to express a conclusion about the sufficiency of the creditor's evidence of the acknowledgment. Its language rejected the acknowledgment as a source of tolling. The later cases have not resolved the conflict.\textsuperscript{192}

\textsuperscript{187} Opitz v. Hayden, 17 Wn.2d 347, 135 P.2d 819 (1943).
\textsuperscript{188} RCW 4.16.270 says flatly that upon a part payment the limitations period begins to run anew; RCW 4.16.280 is in form a statute of frauds, requiring written evidence of a promise to pay or acknowledgement of a prior debt; the legislature evidently contemplated enforcement of a promise or acknowledgement which satisfies the statute.
\textsuperscript{189} 1 WILLISTON, CONTRACTS §§ 143, 160 et seq. (rev. ed. 1936); 1 CORBIN, CONTRACTS §§ 211, 214 et seq. (1950). Although many courts continue to say the original obligation is consideration for the new promise, the RESTATEMENT, CONTRACTS § 86 (1932) attempted to avoid complications in defining "consideration" by stating the new promise to be enforceable without consideration.
\textsuperscript{190} E.g. Griffin v. Lear, 123 Wash. 191, 212 Pac. 271 (1923). See Comment, The written acknowledgement: its effect on the operation of the Statute of Limitations, 15 WASH. L. REV. 112 (1940); RESTATEMENT, CONTRACTS § 86(2) (a) (1932); 1 WILLISTON, CONTRACTS §§ 162, 163 (rev. ed. 1936); 1 CORBIN, CONTRACTS § 216 (1950).
\textsuperscript{191} E.g. Tucker v. Guerrier, 170 Wash. 165, 15 P.2d 936 (1932).
\textsuperscript{192} In Dolby v. Fisher, 1 Wn.2d 181, 95 P.2d 369 (1939) the Tucker case, n. 191 above, was followed. The court approved an instruction by the trial court, worded: "In order to remove the bar of the statute of limitations, a new promise must be clear, distinct, unequivocal, certain and unambiguous. A mere acknowledgement of a debt or
In several of the older cases, the court purported to require "clear and unequivocal" proof that the obligor intended to "keep alive the debt." Two later opinions have repeated this language with approval. Taken literally, this would require the creditor to prove both the promise or part payment or acknowledgment and intent by the debtor to be bound despite the defense afforded him by the limitations statute. Whether literal application of this formula is likely cannot be determined; these cases have at least confused the situation. The approach of courts generally and of Washington's in other cases, an expression of an intention to pay is insufficient to revive the debt." Faced with such an instruction, a jury would seem unable to find tolling save where promissory words were used by the debtor. Moreover, the cumulative effect of "clear, distinct, unequivocal, certain and unambiguous" must have had some impact on the jury's deliberations; why this baggage should be added to the word "promise" is most obscure. There is language in the Dolby opinion suggesting that the court felt the letter in question to be no acknowledgment. Even so, the instruction should have been disapproved. In Cannavina v. Poston, 13 Wn.2d 182, 124 P.2d 787 (1942) the court followed the Lear case, n. 190 above, and demonstrated no awareness of the conflict between it and cases such as Tucker v. Gnerrier, n. 191 above. Cannavina v. Poston would appear to represent the view most likely to prevail when the court in some future litigation sets about straightening out the muddle. Under that view the fact issue—what words are an acknowledgment, will continue to plague the practitioner. There is language in Griffin v. Lear, n. 190 above, indicating that statements made after the statute has run will be less liberally interpreted than will statements made before the statute has run. It is hard to see any logic in this approach. The obligor's words will either fairly mean "I recognize this obligation exists," or they will not; the time at which the words were spoken is not relevant to the determination of their meaning.


195 The cases, cited n. 193 and 194 above, involved credits on the obligation not made on account of direct payments by the obligor (Arthur & Company v. Burke, proceeds of property the court regarded as collateral; Berteloot v. Remillard, transfer in trust for the benefit of creditors, income distributed by the trustees to creditors; Abrahamson v. Payse, small amount of goods sold on credit by the obligor to the obligee, who credited the sales price on the obligor's old debt; Stockdale v. Horlacher, payments made by one co-debtor, credited to both; Walker v. Sieg, supplies delivered to the obligee by the obligor, under circumstances suggesting they were gifts; Easton v. Bigley, proceeds of pledged collateral). It would appear that in each case the only issue was one of fact—did the obligor make a payment? In each a complete answer could have been stated in a finding that he did not. The court's language purports to state a rule of law—nothing short of "clear and unequivocal" proof of "intent to revive the debt" will suffice to toll the statute.

105 1 WILLISTON, CONTRACTS §§ 174 et seq. (rev. ed. 1936); 1 CORBIN, CONTRACTS § 217 (1950).

196 E.g. Cannavina v. Poston, 13 Wn.2d 182, 124 P.2d 787 (1942); Wickwire v. Reard, 37 Wn.2d 748, 226 P.2d 192 (1951). See also Hein v. Forney, 164 Wash. 309, 2 P.2d 741 (1931) and the court's statement: "... [I]n the case of part payment, the recognition and intent to revive is an inference the law raises from the part payment." Cf. Keen v. O'Rourke, 48 Wn.2d 1, 290 P.2d 976 (1955) and the trial court's instruction, to which the obligor did not except and which accordingly was not in issue on the appeal: "... [Y]ou must find that it (the part payment) was made under such circumstances as to show an intentional acknowledgement by the debtor of his liability for the whole debt as of the date of payment." Just what the word "intentional" is expected to mean in the context is most obscure. The coupling of "acknowledgment" and "liability" seems improper; it is acknowledgement of the obligation's existence rather than of
has been to regard a new promise, whether express or inferred from a part payment or acknowledgment, as proof enough.

An apparent conflict in early cases concerning the admissibility and probative value of endorsements or book credits, made by the obligee and ostensibly reflecting payments made by the obligor, was examined and much clarified in Wickwire v. Reard. The court adopted the view under which the evidence is admissible and sufficient to make out a prima facie case on the fact of payment if there is collateral proof showing the endorsement or credit was made before the limitations period ran out. Presumably the evidence would be inadmissible if the endorsement or credit was made after the limitations period ran out.

Several other post-1937 cases are significant. In Cannavina v. Poston the debtor argued that his alleged acknowledgment should not toll the statute because it was really a proposal to compromise the creditor's claim. The court conceded the soundness of the argument but found it irrelevant, there having been no dispute between the parties when the acknowledgment was made.

RCW 4.16.280, which demands a writing signed by the debtor in proof of a promise or acknowledgment, was construed in two cases. Strong v. Sunset Copper Co. held it inapplicable to a contract, made before the limitations period ran out, to extend the maturity date of the obligation. Campbell Co. v. Holsum Baking Co. held it inapplicable to a contract whereby the obligee promised not to plead the statute of limitations if suit was subsequently brought. Since a new promise to pay, resting on contemporaneous consideration, is not an instance of tolling, these decisions seem entirely sound. Less obviously right was the application in Kandoll v. Penttila of the same reasoning to an extension contract, the subject matter of which was a judgment. After the enactment in 1929 of the legislation now known as RCW 4.56.210,

"liability" which is usually deemed requisite. "Liability," with its overtones of legal duty, goes far beyond the inferred promise to pay, from which the acknowledgment properly derives its tolling effect.

A proposal to compromise a disputed claim should fail as an acknowledgment both because it is in fact an offer, a conditional undertaking, and the condition has not been met, and also because it has no probative value when offered to prove that existence of the obligation was acknowledged. See 1 CORBIN, CONTRACTS § 216 p. 717 n. 55 (1950).

See 1 CORBIN, CONTRACTS § 218 (1950).

One judge dissented, saying in part: "Obviously, if the contract is given force, the judgment and claim or demand upon which it is based is extended for a total period of twelve years."
forbidding any "suit, action or other proceeding" by which the duration of a judgment shall be extended beyond six years from the date of its entry, it seemed quite possible that the court would analyze this type of transaction as an attempt to accomplish a violation of the statute by indirection.

It has been generally assumed that the duty of a tort-feasor to compensate his victim could not be tolled, save where the tort could be waived and assumpsit maintained.\(^{205}\) In two pre-1937 cases the Washington court indicated its adherence to this limitation.\(^{206}\) *Opitz v. Hayden\(^{207}\)* reached a contrary result, enforcing a promise to pay for a tortious injury, despite prior expiration of the time within which an action could have been brought. The earlier decisions were not mentioned, and the opinion does not contain the extended discussion expectable in a holding which departs from a long-settled principle. Evaluation of the case and of its meaning for the future is accordingly difficult.\(^{208}\) It does not appear to have been cited in any other opinion. Maybe the existence of this decision will encourage a thorough reexamination of tolling in relation to this type of obligation. Upon such a reexamination, the traditional exclusion of tort obligations from the tolling process may be found to have been more fortuitous than logical.

**Moral consideration.** The court has gone further than most in enforcing promises supported by antecedent benefits which, when conferred, created no legal duty in the recipient.\(^{209}\) There has been, however, no significant development in this area since 1937.\(^{210}\)


\(^{206}\) Richey v. Bolton, 18 Wn.2d 522, 140 P.2d 253 (1943) (followed an earlier case in holding that prior services in finding a buyer for land, under an oral and hence unenforceable arrangement, supported a later promise to pay a commission); Opitz v. Hayden, 17 Wn.2d 347, 135 P.2d 819 (1943) (which involved a tort obligation and a
Promissory estoppel. By 1937, the Washington cases in which a promise was sought to be enforced because of an unbargained-for and detrimental change of position by the promisee in reliance on receiving the promised performance, were in a state of confusion.211 This was no local phenomenon. Although the promisee's reliance was long ago deemed by English judges to be a sufficient reason for enforcing a promise, the cross-currents set in motion by the development of consideration and its connotations of exchange and bargain inhibited orderly development in the reliance area.212

In the analysis and decision of the later cases, section 90 of the Contracts Restatement has been an increasingly helpful factor. It provides a formula by which reliance problems can be handled with some assurance, however divergent the attendant facts may be.213 That the formula is in general acceptable to the Washington court now seems fairly evident.214 Section 90 will probably provide the arguments and ratio decidendi in future Washington litigation concerned with promissory estoppel. Some clues to the operation of the propositions which make up section 90 are present in the decisions of the past twenty years.

promise to pay made after the statute of limitations had run; the opinion contains a good summary of the facts which will create a "moral obligation.") See also Annotation, Moral Obligation as consideration for executory promise, 17 A.L.R. 1299, supp. 79 A.L.R. 1346; Moral Obligation as consideration for contract—modern trend, 8 A.L.R. 2d 787.

211 Reliance was said to be a sufficient reason for enforcement, in Hidden v. German Sav. and Loan Soc., 48 Wash. 384, 93 Pac. 668 (1908) ; Coleman v. Larson, 49 Wash. 321, 95 Pac. 262 (1908) ; Young Men's Christian Ass'n v. Olds Co., 84 Wash. 630, 147 Pac. 406 (1915) ; DePauw University v. Ankeny, 97 Wash. 451, 166 Pac. 1148 (1917) ; Raymond v. Hattrick, 104 Wash. 619, 177 Pac. 640 (1919) ; Ellison v. Keith, 117 Wash. 648, 202 Pac. 241 (1921). Contrary results were reached in Mitchell v. Pirlie, 38 Wash. 691, 80 Pac. 774 (1905) and Hudson v. Ellsworth, 56 Wash. 243, 105 Pac. 463 (1909); see also Jenkins v. Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785 (1897).


213 This section reads: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." It will be noted that in its several elements—reasonable anticipation by the promisor, a substantial change of position actually induced, and the avoidance of injustice—the court is provided with a high degree of control and flexibility in reaching its decision. The greatest contribution of the section is its provision of a reasonable and sensible approach to reliance litigation, disassociated from the pigeon-holing of problems in terms of promises to give land, promises to act as bailee and agent, and so forth, which had theretofore characterized the cases. See 1 Corbin, Contracts § 200 (1950).

Spooner v. Reserve Life Ins. Co.\textsuperscript{215} put in issue an undertaking by an employer to pay a bonus, with a reservation of the power to withhold, decrease, or discontinue the bonus. The court said of promissory estoppel: "But before this rule can be applied, there must be a real promise to be enforced. Action in reliance upon a supposed promise creates no obligation on an individual or corporation whose only promise is wholly illusory."\textsuperscript{226} Enforcement of the alleged promise to pay a bonus was accordingly refused.

In Hill v. Corbett\textsuperscript{217} enforcement of a gratuitous option was refused, the court saying of the promisee's conduct in reliance that he had not proved the promisor should reasonably have expected such conduct.

Forbearance as a manifestation of reliance was in issue in Hazlett v. First Federal Sav. & Loan Ass'n.\textsuperscript{218} The defendant's promise was to procure insurance; the plaintiff's reliance was in not obtaining insurance himself. Of section 90 and the passage: "A promise which the promisor should reasonably expect to induce action or forbearance . . . ," the court said: "Surely, forbearance was not intended to include the mere passive failure of the promisee to procure elsewhere, or by other means, the service or the thing promised." That the draftsmen of section 90 had any such distinction in mind seems most unlikely. The creation of categories of non-action, only some of which are sufficient reliance, is a process hard indeed to justify on any logical basis. This is a holding which may be vulnerable to attack in future litigation.\textsuperscript{219}

Whether reliance as a reason for enforcement should be limited to gratuitous promises, those in which the promisor expected no exchange, is a troublesome and unsettled detail. If any promise can be sustained by reliance, bargaining transactions which are not contracts because

\textsuperscript{215} 47 Wn.2d 454, 287 P.2d 735 (1955) noted 31 WASH. L. REV. 109 (1956). In support of the court's result, is 1 CORBIN, CONTRACTS § 201 (1950).

\textsuperscript{216} See also Gray v. Lipscomb, 48 Wn.2d 624, 296 P.2d 308 (1956).

\textsuperscript{217} 33 Wn.2d 219, 204 P.2d 845 (1949) (a lessee, anticipating expiry of his lease, bought other property; then, having acquired a gratuitous option to buy the leased property, he leased his own property for a term extending past the terminal date of the lease under which he was a tenant).

\textsuperscript{218} 14 Wn.2d 124, 127 P.2d 273 (1942).

\textsuperscript{219} Promises to procure insurance differ from most gratuitous undertakings, in that the promisee's loss on non-performance (assuming the property is destroyed) greatly exceeds the worth of the promised performance, viewed as a service. Whether this fact should be stressed rather than the promisee's loss through reliance is arguable. See 1 CORBIN, CONTRACTS § 208 (1950). If it is stressed, the consequence might better be adjustment of the amount of damages instead of denial of any cause of action. Our court was evidently influenced by Hudson v. Ellsworth, n. 211 above, which also involved a gratuitous promise to take out insurance, not enforced. No progress can be made if all the earlier cases are followed, without review of the circumstances which put those cases in opposition to each other. Hudson v. Ellsworth was not, when decided, easily reconciled with the Hidden and Larson cases (n. 211 above) which preceded it.
a consideration principle was not satisfied may nevertheless result in legal obligation. To the extent that they do, the consideration principle has ceased to accomplish whatever objective courts sought in creating it. Two later cases illustrate the problem. Luther v. National Bank of Commerce was involved a promise to devise and bequeath property to the promisee, made as an offer requesting the offeree to sell her hospital and care for the promisor during his lifetime. The hospital was sold, promisor and promisee were married, and the requested care rendered. The services rendered after marriage offended the antecedent-duty rule, being the subject of a wife's legal duty to her husband. As an alternative ground for enforcement of the promise, the court said:

We think that another rule applicable to the facts of this case is that found in Restatement of the Law of Contracts, 110, Sec. 90 . . . . It seems to us that it would be a gross injustice to deny respondent the benefit of her bargain, which she performed to the letter, merely because by operation of law the services which she rendered subsequent to marriage are held to be without consideration.

Douglas County Memorial Hospital Ass'n v. Newby involved a debtor's promise to pay a hospital bill at the rate of twenty dollars per month (apparently without interest) and the creditor's promise (assumed by all concerned to exist) to forbear collection of the gross account. The creditor sued, in violation of its promise, and lost. Said the court: "We hold that respondent, under the facts in this case, is estopped to deny that there was a valid consideration for the written contract. By that contract, appellants were induced to voluntarily pay to the hospital a substantial portion of a 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.

Just what is left of the principle which disables an obligor from providing consideration for a promise by his obligee, in the doing or promising of something he was already under a legal duty to do? Will re-

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220 2 Wn.2d 470, 98 P.2d 667 (1940), noted 16 Wash. L. Rev. 49 (1941).
221 The court no doubt meant to say, in the phrase "without consideration," "incapable of being consideration."
223 The court did not mention § 90 of the Contracts Restatement. It cited several earlier cases holding that a creditor who had actually received a part payment and promised to accept it as payment in full could not collect the difference (which are certainly not in point), and Vigelius v. Vigelius, 169 Wash. 190, 13 P.2d 425 (1932), which does support the holding. See also Hidden v. German Sav. and Loan Soc'y, 48 Wash. 384, 93 Pac. 668 (1908). Cf. Corbin, Contracts § 200 p. 658 (1950).
liance salvage exchange transactions which run afoul of other consideration principles? In finding a sufficient reliance in acts which were insufficient consideration, the Luther and Douglas County Memorial Hospital Ass'n cases suggest answers to these questions which should distress anyone who feels that the consideration principles represent desirable ethical controls over the creation of contract obligations.

At another point the boundary between bargain and reliance is demonstrably tenuous. The thing done by a promisee in reliance on the promise is often a thing which would have been consideration had the promisor requested it. Implying the request or assuming it to have been made are judicial technics by which a gift promise becomes a bargain and the promisor is held without mention of promissory estoppel. Franklin v. Fischer would appear to be an illustration. Greater familiarity with the potential in reliance as a ground for enforcing promises should reduce the incidence of such decisions.

FORMATION OF FORMAL CONTRACTS—CONTRACTS UNDER SEAL

The period under review produced but one decision pertinent to this section. Its import is indicated in the following passage from the opinion:

We think the instrument here in issue is not a sealed instrument. The signatures of the parties were not accompanied by a scroll, seal, the printed or written word "SEAL" or "L.S." or any other symbol which manifested an intention to make the instrument a specialty.... As to the recital "signed and sealed" in the certificate of acknowledgment, if the instrument had borne a seal it may be conceded that such a recital would have been corroborative, but the recital standing alone would not change an unsealed instrument into a sealed one.

CONTRACTUAL RIGHTS OF PERSONS NOT PARTIES TO THE CONTRACT

Where a performance promised by a contracting party runs to a third person, not to the promisee, can the third-person-beneficiary sue the promisor on his default? Such a suit is arguably by a stranger to the contract and conceptually impossible. Although it has troubled some

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224 34 Wn.2d 342, 208 P.2d 902 (1949).
226 In some transactions and in some opinions it is not clear whether the third person is a promisee or is only to receive performance; it is quite possible for A to make a promise to C at the request of and for a consideration provided by B. See for an example of an opinion difficult to analyze, Richey v. Bolton, 18 Wn.2d 522, 140 P.2d 253 (1943). Recovery by a third person who would have been benefited by performance of a promise which by its terms called for performance to the promisee only seems unlikely. Loan agreements under which the borrower is to receive a loan to finance construction create no enforceable rights in the borrower's workmen or suppliers. Lloyd Co. v. Wyman, 16 Wn.2d 621, 134 P.2d 459 (1943) (principle recognized
courts, the argument is unsound. It assumes a negative answer to the real issue, "can a contract create a right-duty relationship between beneficiary and promisor"? In determining this issue, courts either create a new principle by which the beneficiary becomes a party to the contract, or refuse to; there is nothing more fundamental to which resort can be had for an answer. Washington has chosen to create the new principle, as have most American courts. There is no theoretic barrier to recovery by a beneficiary in Washington; the only problem is to ascertain what standards the third person must meet in order to recover.

Washington cases involving promises to pay the promisee's debt to a third person were numerous in the period before 1937. They appear to require of the beneficiary proof only of the debt and of the contract-promise to pay it, and have been followed in the more recent decisions. Cases of the past twenty years have for the most part concerned third persons who would have received a performance under the contract as a gratuity, and provide some information about the criteria such per-

although not in issue); 4 CORBIN, CONTRACTS § 779D (1932); see also Priestly v. Peterson, 19 Wn.2d 820, 145 P.2d 253 (1944). The contractor's bond cases are also informative; interpretation of the surety's promise, to determine whether it undertook to pay only the owner, or to pay laborers and materialmen, is a common technique. CORBIN op. cit. § 800, RESTATEMENT, CONTRACTS § 133 comment d provides: "A contract for the benefit of a third person usually provides that performance shall be rendered directly to the beneficiary, but this is not necessarily the case. A promise to discharge an indebtedness of one whom the contract is made to benefit, will provide for payment to the creditor of the beneficiary, not to the beneficiary himself who owes the money." Transactions of this type must be uncommon.

228 See the cases cited, Washington Annotations to the Restatement of Contracts p. 64 et seq.
229 "The pressing necessity of the situation and the inherent reasonableness of this solution (relief for the beneficiary) has led the great majority of the American courts frankly to recognize, as does the Restatement of Contracts, that through this travails the common law has given birth to a distinct, new principle of law which takes its own place in the family of legal principles, and gives not only to a donee beneficiary, but also to a creditor beneficiary, the right to enforce directly the promise from which he derives his interest." 2 WILLISTON, CONTRACTS § 357 at p. 1049 (rev. ed. 1936).
230 The early cases are cited in Washington Annotations to the Restatement of Contracts p. 64 et seq. See also the discussion in Priestly v. Peterson, 19 Wn.2d 820, 145 P.2d 25 (1944) ; Cascade Timber Co. v. Northern Pacific R. Co., 28 Wn.2d 684, 184 P.2d 90 (1947). See also McCarty v. King County Med. etc. Corp., 26 Wn.2d 660, 175 P.2d 653 (1946) which may involve a creditor-beneficiary transaction. Union contracts with employers occupy an anomalous middle position; if the union owes its members a duty to procure promises from employers about pay rates and working conditions an argument of sorts for creditor-beneficiary classification of employees can be made. In Huston v. Washington Wood & Coal Co., 4 Wn.2d 449, 103 P.2d 1095 (1940) the court apparently accepted the employee's contention that he was a contract beneficiary but failed to disclose the details of its reasoning. Cases elsewhere are divided in their analyses, many finding the union contract to be operative as a part of each individual hiring arrangement. See 2 WILLISTON, CONTRACTS § 379A (rev. ed. 1936). The opinion in Clark v. Claremont Apt. Hotels Co., 19 Wn.2d 115, 141 P.2d 403 (1943) contains some language suggesting adherence by the court to this view of the union contract.
sons must satisfy. "Intent" seems to be the touchstone; whose intent and intent about what are the vital details.\textsuperscript{231} The court has not been willing to regard as conclusive proof of the requisite intent the fact that the promisee bargained for and received a promise, the performance of which was to go to another. Whether this fact is even prima facie proof is not clearly determinable from the opinions. Arguably it should be. Here, as in interpretation controversies, evidence of the context in which the contract was made is admissible as an aid to ascertaining intent.\textsuperscript{232}

Whose intent should control? Since the promisee bought the promise and specified performance to the third person, it is his purpose which must govern. The latest Washington cases accord with this analysis,\textsuperscript{233} as does also the Restatement of Contracts.\textsuperscript{234}

What intent by the promisee must be proved? This is the point of greatest difficulty, made so by its inherent complexity and by the divergent language the court has used in discussing it. Two quite different types of transaction are encountered. There are on the one hand transactions in which the promisee's purpose to make a gift to the beneficiary is demonstrable, as in non-business life insurance contracts. For them, proof of the gift purpose will no doubt suffice.\textsuperscript{235} Mustereng the proof is not apt to be difficult. Where the beneficiary is the natural object of the promisee's bounty and the promisee has, as to the performance in question, no apparent objective save benefit to the beneficiary, the inference of gift purpose is probably strong enough to establish the beneficiary's cause of action. There are on the other

\textsuperscript{231} This is true also in American jurisdictions generally. See 2 Williston, Contracts §§ 356A, 357 (rev. ed. 1936); 4 Corbin, Contracts §§ 776, 777 (1950).

\textsuperscript{232} Ridder v. Blethen, 24 Wn.2d 552, 166 P.2d 834 (1946). The promisee was also permitted to testify directly about his purpose and a good deal of evidence bearing directly on the promisor's purpose (he having died prior to the action) was also admitted. It is not clear from the opinion whether evidence of this type was deemed proper because of waiver or whether it would be deemed proper without regard to any waiver.

\textsuperscript{233} Cascade Timber Co. v. Northern Pac. R. Co. 28 Wn.2d 684, 184 P.2d 90 (1947); Vikingstad v. Baggott, 46 Wn.2d 494, 282 P.2d 824 (1955). See also Jeffery v. Hanson, 39 Wn.2d 855, 239 P.2d 346 (1952) (which appears to involve a donee transaction although the case refers to creditor beneficiary precedents). In some other opinions the court referred to "intent of the parties"; Grand Lodge etc. v. United States F. & G. Co., 2 Wn.2d, 561, 98 P.2d 971 (1940); Ridder v. Blethen, 24 Wn.2d 552, 166 P.2d 834 (1946). Despite this language it seems clear enough that the court considered only the promisee's purpose in the Grand Lodge case. In the Ridder case, however, the court did examine the purpose of both parties and placed more emphasis on the promisor's than on the promisee's. Doing so may have been justified because of the unusual circumstances of the transaction. In the usual transaction, exploration of the intent of both promisor and promisee is unnecessary and confusing. It is to be hoped that in future opinions the phrase "intent of the parties" will not reappear.

\textsuperscript{234} § 133(1) (a).

hand transactions in which the promisee's motivation is economic benefit for himself. The existence of this motive, plus the absence of a relationship between them which makes natural a gift from promisee to beneficiary, can easily lead to a faultily conclusion about the promisee's intent. A good illustration of the problem is found in *Cascade Timber Co. v. Northern Pac. Ry.*, which involved a real estate contract with a provision obligating the buyer to offer all timber cut from the property to Northwest Door Company. The buyer's argument against beneficiary status for the door company was absence of intent by the seller, the railroad, to make a gift and a purpose by it to gain as much freight revenue as possible; the railroad would carry whatever logs the door company acquired. There is a serious flaw in such an argument. Accomplishment of the promisee's objective would be advanced if the beneficiary acquired a right against the promisor. This fact is the really important element. From it, intent by the promisee to create the requisite right in the beneficiary is the only proper inference. This the court recognized in the *Cascade Timber Co.* decision. *Vikingstad v. Baggot* is a similar holding. It approved and followed the *Restatement of Contracts* in acknowledging the effectiveness of intent by the promisee either to make a gift to the beneficiary or to create a right in the beneficiary.

In the *Cascade Timber Co.* and *Vikingstad* cases, the court has developed a formula which should help materially in the analysis and decision of future donee beneficiary controversies. There are in some other cases less concrete expressions by the court about intent; these may well be found not to merit repetition in future opinions.

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237 46 Wn.2d 494, 282 P.2d 824 (1955) See also Jeffery v. Hanson, 39 Wn.2d 855, 239 P.2d 346 (1952), (which appears to involve a donee transaction).
238 Section 133 (1) (a).
239 For example, the statement, "To constitute one a donee beneficiary, it must appear that the contract was designed for his benefit, or that it was the intent and purpose of the parties to bestow a benefit or gift upon him," which appears in Ridder v. Blethen, 24 Wn.2d 552, 166 P.2d 834 (1946); or that which appears in Grand Lodge etc. v. United States F. & G. Co., 2 Wn.2d 561, 98 P.2d 971 (1940): "Ordinarily it is sufficient if the contract was evidently made for the benefit of the third person. Where the contract between the first part yand the second party was entered into for the benefit of others, and where it appears that such benefit must be the direct result of performance and so within the contemplation of the parties, the third persons may enforce the contract. ..." The variant language the court has used certainly confuses the problem. If the "intent to confer a right" test stated in the *Vikingstad* case, n. 237 above, is adhered to and other phrasings such as used in the Ridder and Grand Lodge cases are abandoned, there is hope that in time a body of precedent will build up from which some assurance about the outcome of future litigation can be derived. It will be noted that debt assumption transactions, analyzed in terms of the promisee's purpose, closely resemble these donee beneficiary cases. The *Cascade Timber Company* and *Vikingstad* decisions create doubt about the durability of the court's early private-work construction bond holdings. These stressed the desire of the owner to protect himself,
It can be said with some assurance that a donee beneficiary is not obliged to prove delivery of something to him, either as an element of his proof of the promisee's intent or as an independent requirement.\footnote{Formation of a contract between promisor and promisee and the existence of whatever "intent" the court demands suffice to create in the beneficiary a legal right to receive the promisor's performance and a correlative legal duty in the promisor. This is so even though the promisee's death is an express condition to the promisor's duty to perform and the demands of the statute of wills have not been met.\footnote{On the other hand, the beneficiary is not obliged to accept the new legal relationship; if he disclaims it, it will no longer exist.\footnote{Any beneficiary's right is of course limited by the terms of the contract and by any express or constructive conditions qualifying the promisor's duty.\footnote{The interest of a donee beneficiary is not, however, vulnerable to a subsequent unconsented-to rescission or modification by promisor and promisee.\footnote{(This article will be continued in subsequent issues.)}}}}

to the point of denying beneficiary status to the contractor's workmen and suppliers. See \textit{e.g.} Rust \textit{v.} United F. \& G. Co., 87 Wash. 93, 151 Pac. 248 (1915); other bond cases are cited in Washington Annotations to the Restatement of Contracts p. 67, 68. Application of the reasoning of the Vikingstad case to a construction bond would make it difficult to reach the result of the Rust case. In other states the decisions on such bonds are divided in result; there are many in which workmen and suppliers have rights against the surety, either as donees or as a special variety of creditor beneficiary. 4 Corbin, \textit{Contracts} § 759 (1950). That specific identification of the beneficiary when the contract was made is not a requisite seems clear enough. Chandler \textit{v.} Washington Toll Bridge Authority, 17 Wn.2d 591, 137 P.2d 97 (1943) is illustrative although the point was not put in issue. See \textit{Restatement, Contract} § 139 (1932); 2 Williston, \textit{Contracts} § 378 (rev. ed. 1936).

\textit{Decker v. Fowler}, 199 Wash. 549, 92 P.2d 254 (1939) noted 14 Wash. L. Rev. 312 (1939) threatened to introduce into donee beneficiary transactions the delivery concept which appertains to chattel-gifts. The case involved a government bond naming a third person as the recipient of the proceeds on the promisee's death. The court regarded the bond proceeds as tangible property and as the subject matter of the gift which failed for lack of delivery. This analysis seems obviously faulty. The effect of the case on government bonds was destroyed by legislation; RCW 11.04.240; see also RCW 11.04.230. Extension of the Decker case reasoning to a life insurance transaction was refused in Toulouse \textit{v.} New York Life Ins. Co. 40 Wn.2d 538, 245 P.2d 205 (1952), in language which makes its application in any other situation also unlikely.


\textit{Restatement, Contracts} § 137 (1932); \textit{Huston v. Washington Wood \& Coal Co.}, 4 Wn.2d 449, 103 P.2d 1095 (1940).


\textit{Grand Lodge v. United States F. \& G. Co.}, 2 Wn.2d 561, 98 P.2d 971 (1940). \textit{Cf. Huston v. Washington Wood \& Coal Co.}, 4 Wn.2d 449, 103 P.2d 1095 (1940) (union contract; dictum worded "After a contract for the benefit of a third person has been accepted or acted on by such third person beneficiary, the contract cannot be rescinded by the parties without his consent"; "accepted or acted on" is not usually appended in modern cases as a qualification of a donee's interest, although it does have considerable currency in creditor beneficiary cases; see \textit{Restatement, Contracts} §§ 142, 143 (1932); 2 Williston, \textit{Contracts} §§ 390 et seq. (rev. ed. 1936); 4 Corbin, \textit{Contracts} §§ 813 et seq. (1950).