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The English statute of frauds[1] has been in effect for almost four centuries. The requirement of a writing, which that statute brought to a position of prominence in Anglo-American law, remains as a pitfall for the unwary. The courts have applied the statute of frauds rather harshly in some cases and rather liberally in others, resulting in a considerable lack of uniformity. As is the situation in many of the other jurisdictions in this country, the cases in Washington are confused and almost impossible to reconcile. This is particularly unfortunate due to the drastic effects the statute of frauds can have when it is deemed applicable.

The English statute of frauds is the law in Washington[2] "so far as it is not inconsistent with the Constitution and laws . . . of the state of Washington nor incompatible with the institutions and condition of society in this state, . . ."[3] This Comment is concerned with the problem of whether the Washington statutes have entirely displaced the English statute in regard to the requirement of a writing and with some of the problems presented by the application of the statutes of frauds in Washington.[4]

WILLS

Sections 5 and 6 and 19 through 23 of the English statute of frauds were concerned with the formalities of execution and revocation of wills and with the requirements of nuncupative wills. These provisions have been preserved in the Washington statutes, in modified form,[5] in RCW 11.12.020 and RCW 11.12.040. These Washington statutes appear to have superseded the comparable sections of the English statute completely.

SALE OF GOODS

Section 17 of the English statue, which relates to the sale of goods, was copied into section 4 of the English Sale of Goods Act of 1893, with

[1] An Act for Prevention of Frauds and Perjuries, 29 Car. 2, c. 3 (1677).

[2] Wagner v. Law, 3 Wash. 500, 28 Pac. 1109 (1892); Richards v. Redelsheimer, 36 Wash. 325, 78 Pac. 934 (1904).

[3] RCW 4.04.010; WASH. CONST. art. XXVII, § 2.

[4] The sufficiency of a writing to satisfy the statute of frauds is beyond the scope of this Comment, as is the effect of full or part performance of a contract.

[5] The principal differences are that the English statute required "three or four witnesses," while the Washington statute requires only two; and the English version was limited to devises of land and tenements, which is not the case in Washington.

minor changes. The Sale of Goods Act, in turn, served as the foundation for the Uniform Sales Act,[6] and this provision is presently found in the Washington statutes in RCW 63.04.050.[7]

CONTRACTS

Sections 1 through 4 and 7 through 9 require more detailed treatment.[8] Section 4, which perhaps is the most widely known section of the English statute of frauds, was incorporated into the Washington statutes in RCW 19.36.010,[9] the Washington contract statute of frauds, with two important variations. Part 4 of that section, which provides that no action shall be brought "upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," unless in writing, was omitted from RCW 19.36.010. Also, the provision that "no action shall be brought" upon unwritten contracts was discarded in favor of a statement that such contracts "shall be void." The latter variation was made the basis of the holding in *Hendry v. Bird.*[10] That case held that contracts within the terms of RCW 19.36.010 are void and that this raises the question of whether a cause of action is stated. If none is stated, then Rule on Appeal 43 will permit an objection for the first time on appeal. Under this interpretation the statute bars the right, and not just the remedy. This result is contrary to that reached under section 4 of the English statute, which has been held to be procedural only,[11] and which must be pleaded to be given effect.

[6] The statute of frauds section of the Uniform Sales Act applies to sales of choses in action as well as to sales of goods, which is an addition to the coverage of the English statutes. Both the Sale of Goods Act and the Uniform Sales Act use the phrase "shall not be enforceable by action," in contrast with "no contract... shall be allowed to be good, except..." in the English statute of frauds.

[7] The Uniform Sales Act, which was enacted in Washington in 1925, displaced a prior sales statute of frauds which used the terminology "shall be void." See Ayer, *The Uniform Sales Act in the State of Washington,* 2 WASH. L. REV. 65, 145, 225 at 69 (1927).

[8] The remaining sections of the English statute of frauds, 10 through 16 and 24 and 25, do not involve the requirement of a writing and are not relevant to the subject of this Comment.

[9] RCW 19.36.010. "In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) Every special promise to answer for the debt, default, or misdoings of another person; (3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) Every special promise made by an executor or administrator to answer damages out of his own estate; (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The last part, part 5, was not in the English statute, but was added to RCW 19.36.010 by amendment in 1905. Part 4 also appears in RCW 11.48.040.

[10] 135 Wash. 174, 237 Pac. 317 (1925).

[11] Leroux v. Brown, 12 C.B. 801, 138 E.R. 1119 (1852).

INTERESTS IN LAND

The greatest departure from the English statute of frauds in Washington is found in the area of real property transactions. For this reason, that area demands the most attention in this Comment. The provisions of the English statute which relate to real property transactions, other than section 4(4) which was noted above, are substantially as follows:

> Section 1. Leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in or out of any lands, tenements or hereditaments, created by parol, and not put into writing and signed by the parties creating the same, shall have the force and effect of leases or estates at will only.
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> Section 2. Leases not exceeding a term of three years are excepted when the rent reserved for the term amounts to two-thirds of the value of the thing demised.
>
> Section 3. No leases, estates, or interests, either of freehold or terms of years, or any uncertain interest in, to or out of any lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same.
>
> Section 7. All declarations or creations of trusts of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect.
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> Section 8. Trusts created by operation of law are excepted.
>
> Section 9. All grants and assignments of any trust shall likewise be in writing, signed by the party granting or assigning the same.

The principal[12] Washington statutes which have replaced these sections are RCW 59.04.010,[13] which provides, in part, that "Leases may be in writing or print, or partly in writing and partly in print, and shall be valid for a term not exceeding one year, without acknowledgment, witnesses, or seals"; and the two following statutes:

> RCW 64.04.010. Every conveyance of real estate or any interest therein, and every contract creating or evidencing an encumbrance upon real estate, shall be by deed . . .[14]

[12] It should be noted that RCW 26.16.040, which requires a wife to join her husband in conveying or encumbering community real property, has not been treated as a statute of frauds. Ratification is a defense, which is not true under the statute of frauds. See Spreitzer v. Miller, 98 Wash. 601, 168 Pac. 179 (1917). It is not clear whether part performance will defeat this statute. However, the court has indicated that sufficient part performance, under the appropriate circumstances, might support a plea of estoppel. Kaufman v. Perkins, 114 Wash. 40, 194 Pac. 802 (1921).

[13] This statute has remained unchanged since it was first enacted in 1881.

[14] The proviso which excepts certificates evidencing an interest in a trust of record is omitted. It was added by amendment in 1929. From 1915 to 1929, this provision was

RCW 64.04.020. Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized to take acknowledgments of deeds.[15]

The pattern of statutes in Washington was fairly well developed before statehood. As a result of this, little evidence remains, except the statutes themselves, to serve as the basis for a determination of legislative intent. However, on its face it appears that RCW 64.04.010 was intended to cover all types of real property transactions except leases for terms not exceeding one year, which are covered by RCW 59.04.010. This would explain the abandonment of the English practice of enumerating specific types of transactions. This would also indicate that the legislature intended to provide for every type of transaction mentioned in the English statute of frauds. As will be seen later in this discussion, the present state of the case law in Washington indicates that there is serious question whether this result was accomplished.

Perhaps a more important problem is raised by the acknowledgment requirement. Why do the statutes require an acknowledgment as well as the writing required by the English statute? Should it have some substantive effect, or is it simply intended to be a formality? These questions are difficult to answer, and the statutes provide little aid. The only statute which gives any clear indication of the purpose of the requirement is RCW 64.08.050, which requires that the certificate of the acknowledging officer recite "in substance that the person, known to him as the person whose name is signed to the instrument as executing it, acknowledged before him that he executed it freely and voluntarily, on the date stated in the certificate, which certificate shall be *prima facie* evidence of the facts therein recited." However, this statute follows RCW 64.08.040, which sets forth the requirements of valid acknowledgment outside of the state. It is at least arguable that it has relevance only in that situation.[16] If it is proper to read RCW 64.08.050 in conjunction with RCW 64.04.020, it seem that acknowledgment of deeds within the state should have some substantive effects as well as procedural or evidential effects. A statement that the instrument was executed freely and voluntarily, made before an acknowledging officer,

contained in what is now RCW 64.04.020. Other than this one addition, RCW 64.04.010 has continued substantially in its present form since the Code of 1854.

[15] The requirements of a writing and an acknowledgment have been in this section of the statutes since 1854. In addition to these requirements, from 1854 to 1888 two witnesses were required for the execution of a deed.

[16] These two statutes were added to the deed section of the code together in 1879 and are found in the same order in the Code of 1881 in sections 2320 and 2321. The present form of these statutes, which was established in 1929, varies somewhat from the original form.

should have the effect of being a deterent to coercion and fraud in the execution of deeds. The contention that acknowledgment should be substantive is supported by the fact that the requirements of a writing and an acknowledgment are contained in the same sentence in RCW 64.04.020, and are preceded there by the mandatory word "shall."

Acknowledgment of deeds is required by statute in many jurisdictions. Generally, the type of statute controls the purpose and effect of the acknowledgment. Most jurisdictions require acknowledgment either as a prerequisite of recording or as a means of admitting the instrument into evidence without further proof of execution. Under these types of statutes the instrument is valid between the parties, their heirs, and assigns without acknowledgment. A few jurisdictions have statutes which make acknowledgment essential to the validity of the instrument, which is not enforceable without it, even between the parties.[17]

In Washington acknowledgment of deeds is made a prerequisite of recording by RCW 65.08.060 and RCW 65.08.070, although this was not expressly so provided before these statutes were enacted in 1927.[18] Since this is true, what purpose does the requirement of acknowledgment in the deed statute, RCW 64.04.020, serve now? Is it intended to have only an evidential effect, if it even has that, or is it intended to be a substantive requirement for validity? Unfortunately, the Washington court has seldom considered the purpose of the requirement, and the Washington cases shed little light on the subject.

Any theories that might be evolved regarding the requirements or applicability of the Washington statutes must inevitably consider the interpretation that these statutes have received in the Washington cases. However, different types of transactions must be treated separately here because of the wide disparity in treatment that they have received by the court.

Leases. The first three sections of the English statute of frauds apply to leases. Whether these sections were entirely displaced by RCW 64.04.010, and RCW 59.04.010, is perhaps still open to question. One of the few cases that have mentioned the problem is the early case of *Richards v. Redelsheimer*.[19] In that case the court decided that a lease

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[17] See 7 THOMPSON, REAL PROPERTY § § 3991-3993 (perm. ed. 1940); 4 TIFFANY, REAL PROPERTY § 1027 (3d ed. 1939).

[18] In the Code of 1854 acknowledgment was not mentioned in conjunction with recording, although it was provided for in the predecessor of RCW 64.04.020. The requirement of acknoledgment for recording did not appear in the statutes until 1927.

[19] 36 Wash. 325, 78 Pac. 934 (1904).

is an encumbrance within the meaning of RCW 64.04.010,[20] and therefore must be created by deed. The court could well have found that a leasehold was an interest in real estate; however, it chose to rely upon an earlier case construing the community property statutes.[21] The court then found that RCW 59.04.010 excepted leases for terms not exceeding one year from the deed statutes. After finding that an oral lease for over one year cannot be sustained as a tenancy at will under section 1 of the English statute, since "that statute is superseded by [RCW 64.04.010]," the court held that the only way such a lease could be sustained was as a periodic tenancy under RCW 59.04.020. The court also went on to find that RCW 19.36.010 is not applicable to leases.

Up to this point in the decision, the court had made it fairly clear that it felt that the first two sections of the English statute have no further applicability in Washington.[22] However, the court went even further, and said that the English statute of frauds relating to real property had been entirely superseded by the Washington statutes. This statement was perhaps too broad, and was certainly not necessary to the decision.

When the court reached the principal issue of the case, whether a contract to execute a lease must be in writing, it held that contracts to execute leases come within the statute of frauds the same as leases, since otherwise an oral lease could be construed to be a contract to execute a lease, and thus the statute of frauds would be avoided. The reasoning which would permit a lease to be construed to be a contract for a lease was not explained by the court. However, the holding of the *Redelsheimer* case, that contracts to execute leases must be by deed, in writing and acknowledged, was followed in *Omak Realty Investment Co. v. Dewey*.[23]

The rule that leases for over one year must be acknowledged to be enforceable between the parties has been uniformly followed.[24] This

[20] From 1888 to 1929 this statute provided "that all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance upon real estate shall be by deed." The published report of the Redelsheimer case, which was decided in 1904, misquoted the statute, omitting the words "creating or."

[21] This holding was based upon the decision of Hoover v. Chambers, 3 Wash. Terr. 26, 13 Pac. 547 (1887), which held that a lease was an encumbrance within the meaning of the community property statutes. The Hoover case, in turn, relied upon a number of decisions in other jurisdictions in which the issue was marketable title.

[22] It is still possible to argue that the application of section 1 to freehold interests was not precluded by this case.

[23] 129 Wash. 385, 225 Pac. 236 (1924).

[24] *E.g.*, Garbick v. Franz, 13 Wn.2d 427, 125 P.2d 295 (1942); Central Building Co. v. Keystone Shares Corp., 185 Wash. 645, 56 P.2d 697 (1936); Jamison v. Reilly, 92 Wash. 538, 159 Pac. 699 (1916); National Laundry Co. v. Mayer, 79 Wash. 212, 140 Pac. 393 (1914).

indicates that the purpose of the acknowledgment requirement is not merely evidentiary but is substantive as well. RCW 59.04.010 lends some support to this view, by negative implication, by saying that leases "shall be valid for a term not exceeding one year, without acknowledgment. . . ." However, this statute alone hardly supports the rule that leases for over one year must be acknowledged in order to be valid. The *Redelsheimer* case indicates that the court was relying upon RCW 64.04.020 when it reached that result.

In *American Savings Bank v. Mafridge,*[25] the court held that Washington does not have a statute which requires a written assignment of a leasehold interest to be acknowledged. This would seem to strengthen the proposition that leases come under the terms of RCW 64.04.010 as encumbrances, and not as interests in real estate. Clearly, if leaseholds were *interests* in real estate they would have to be conveyed by deed. However, RCW 64.04.010 does not appear to require that the transfer of an *encumbrance* must be by deed. The next problem is, if they are only encumbrances, what statute, if any, requires that the assignment of leases be in writing? This question was presented to the court in *Mobley v. Harkins,*[26] and it was left undecided. It appears that RCW 64.04.010 is not applicable unless such an assignment creates or evidences an encumbrance upon real estate. Since the encumbrance, the lease, is already in existence at the time of an assignment, it can hardly be created again. It seems almost as unlikely that such an assignment evidences an encumbrance. On the other hand, section 3 of the English statute of frauds clearly requires that assignments of leases be in writing. Perhaps the court was premature in dismissing the English statute so summarily in the *Redelsheimer* case.

Conveyances. Conveyances of real property are clearly included within the coverage of RCW 64.04.010. It would be difficult even to raise an argument that the English statute of frauds still has any applicability to this type of transaction in Washington. The requirement of a writing has never been seriously contested. The problem which has been frequently litigated here is whether an acknowledgment is required. The first reported case that faced this problem was *Mann v. Young.*[27] There the court held that in equity an unacknowledged deed was valid as against the grantor and all persons claiming under him with notice. Twenty years later in *Edson v. Knox,*[28] the court held that an

[25] 60 Wash. 180, 110 Pac. 1015 (1910).
[26] 14 Wn.2d 276, 128 P.2d 289 (1942).
[27] 1 Wash. Terr. 454 (1874).
[28] 8 Wash. 642, 36 Pac. 698 (1894).

unacknowledged deed could be maintained as a contract for a deed,[29] that the contract conveyed full equitable title to the grantee, and that the grantor and those holding under him were estopped in equity to assert legal title. *Carson v. Thompson*,[30] decided the same year as the *Edson* case, likewise said that as between the parties an unacknowledged deed passes equitable title.

These cases involve the same type of avoidance of the statutory requirements that led the court in the *Redelsheimer* case, *supra*, to apply the same rules to contracts to execute leases that it did to leases themselves. There the court reasoned that a lease could be construed to be a contract to execute a lease, and that therefore a contract to execute a lease must satisfy the lease requirements or the statutory requirements for leases would be avoided. In the deed cases the reasoning is reversed. The court has assumed that a contract to convey does not require acknowledgment and then has construed an unacknowledged deed to be a contract to convey.

It should be noted that the doctrine of equitable conversion, which supported the result in the *Edson* case, has been somewhat weakened in Washington by the case of *Ashford v. Reese*.[31] However, notwithstanding the *Ashford* case, the rule of the *Edson* case is now so well entrenched that no reason is deemed necessary for enforcing an unacknowledged instrument[32] against a grantor, his heirs, or those claiming under him with notice.[33]

The court adds nothing by saying that an unacknowledged deed is not valid against a purchaser for value without notice. The recording statutes already compel this result, and the deed statutes contribute nothing. The rule the court has followed regarding the acknowledgment of conveyances reduces the requirement of acknowledgment in the deed statutes to one possible effect only, that of making the certificate "*prima facie* evidence of the facts therein recited." This should be contrasted with the substantive effect given the requirement in the lease cases.

Mortgages. At the time the English statute of frauds was enacted there was no good reason for making a special provision for mortgages.

[29] Chamberlain v. Abrams, 36 Wash. 587, 79 Pac. 204 (1905), did not follow this rule in the case of a quitclaim deed, when the grantor had no title at the time of execution.

[30] 10 Wash. 295, 38 Pac. 1116 (1894).

[31] 132 Wash. 649, 233 Pac. 29 (1925).

[32] Although the court has said that the deed is enforceable, so far the court has only enforced the conveyance. No attempt has been made yet to enforce other personal obligations set forth in the instrument.

[33] *E.g.*, Ockfen v. Ockfen, 35 Wn.2d 439, 213 P.2d 614 (1950); *In re* Deaver's Estate, 151 Wash. 454, 276 Pac. 296 (1929).

At that time a mortgage was a conveyance with a defeasance clause. This is no longer the case. A mortgage in Washington gives the mortgagee only a lien and not the full legal title.[34] However, the Washington court has continued to treat mortgages of real property much the same as conveyances insofar as the statute of frauds is concerned. Apparently the court has assumed that real estate mortgages are covered by RCW 64.04.010 without explaining how. The apparent statutory requirement of an acknowledgment is disposed of by the court in the same manner that it is disposed of in the conveyance cases.[35] If RCW 64.04.010 applies, how does it apply? The only *interest* that a mortgage conveys is a lienor's interest. Is this adequate to support the application of the statute or is the court relying upon the *encumbrance* clause? The latter possibility appears to be the most likely. This conclusion seems to be supported by RCW 61.12.010, which is found in the real estate mortgage section of the Code. It provides that "encumbrances shall be by deed," but it does not define a mortgage as an encumbrance. However, its position in the statutes arguably supports the conclusion that a mortgage is an encumbrance within the meaning of the deed statutes.

If a mortgage is an encumbrance under RCW 64.04.010, the reasoning of the *Redelsheimer* case, *supra,* would seem to require that a contract to execute a mortgage must satisfy the deed statutes. The case of a completely executory contract to execute a mortgage appears never to have been presented to the Washington court. However, in *Fleishbein v. Thorne*[36] the court considered the enforceability of an oral contract to execute a mortgage when the intended mortgagee had already fully performed. The court decided that, since the intended mortgagee had fully performed, the contract was to be treated as an equitable mortgage, and was not within the operation of the statute of frauds.[37] Of more interest here is the fact that the court indicated that a writing would normally be required. In the recent case of *Thompson v. Hunstad*[38] the court was again presented with an oral contract to execute

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[34] *E.g.,* Bloomer v. Southwest Washington Production Credit Ass'n, 36 Wn.2d 752, 220 P.2d 324 (1950); State *ex rel.* Gwinn, Inc. v. Superior Court, 170 Wash. 463, 16 P.2d 831 (1932); Spokane Sav. & Loan Soc'y v. Park Vista Improvement Co., 160 Wash. 12, 294 Pac. 1028 (1930).

[35] *E.g.,* Bremner v. Shafer, 181 Wash. 376, 43 P.2d 27 (1935); Fidelity & Casualty Co. v. Nichols, 124 Wash. 403, 214 Pac. 820 (1923); Lynch v. Cade, 41 Wash. 216, 83 Pac. 118 (1905).

[36] 193 Wash. 65, 74 P.2d 880 (1937).

[37] A contract fully executed on one side is sometimes treated as being outside of the reach of the statute of frauds. Gerard-Fillio Co. v. McNair, 68 Wash. 321, 123 Pac. 462(1912); Clements v. Cook, 112 Wash. 217, 191 Pac. 874 (1920).

[38] 153 Wash. Dec. 73, 330 P.2d 1007 (1958).

a mortgage, fully performed by the intended mortgagee. The court said that "the plaintiff concedes that the statute of frauds (RCW 64.04.010) applies to the alleged agreement, since it pertains to an interest in land." This decision did not mention the *Fleishbein* case. Even though the two cases are irreconcilable, they both indicate that a fully executory contract to execute a mortgage must be in writing. Why? The court has not given an answer. Perhaps when presented with another case on the point the theory which the court evolves will also impose the requirement of an acknowledgment.

Contracts to Convey.[39] Under the English statute of frauds, contracts to convey were covered by section 4(4), which, as was noted above, was deleted by the territorial legislature when it adopted RCW 19.36.010. The problem here is where such contracts fit into the Washington statutes, if they fit in at all. If not, is section 4(4) of the English statute still in effect in Washington?

A good case can be made for the proposition that a contract to convey should come within the terms of RCW 64.04.010, either as a conveyance of an "interest" in real estate, or as a "contract creating or evidencing an encumbrance upon real estate," or both. Before *Ashford v. Reese*[40] was decided, it seemed fairly clear that Washington followed the orthodox rule of equitable conversion.[41] This rule, which provides that the vendee in an executory contract for the sale of land has full equitable title, has been followed almost universally, both in England and in the United States. Even though the *Ashford* case cast some doubt upon the applicability of this doctrine to forfeitable contracts,[42] it still quite clearly applies to non-forfeitable contracts.[43] Under equitable conversion, the court could have found that a contract to convey conveys an "interest" in real estate, even though it is only an equitable interest. This position would have had the added effect of placing subsequent transfers of the vendee's interest in the contract within the terms of RCW 64.04.010. This result would appear to be impossible without

[39] This category includes contracts to convey by will.
[40] 132 Wash. 649, 233 Pac. 29 (1925).
[41] Taylor v. Interstate Inv. Co., 75 Wash. 490, 135 Pac. 240 (1913).
[42] See Comment, *The Vendor-Purchaser Relationship in Washington*, 22 WASH. L. REV. 110 (1947); Schweppe, *The New Forfeiture Clause Test in Executory Contracts for the Sale of Real Estate*, 3 WASH. L. REV. 80 (1928); Schweppe, *Rights of a Vendee Under an Executory Forfeitable Contract for the Purchase of Real Estate: A Further Word on the Washington Law*, 2 WASH. L. REV. 1 (1926).
[43] Dean v. Woodruff, 200 Wash. 166, 93 P.2d 357 (1939); First Nat'l Bank v. Mapson, 181 Wash. 196, 42 P.2d 782 (1935); Aylward v. Lally, 147 Wash. 29, 264 Pac. 983 (1928).

first finding that the contract transferred an interest in real estate to the vendee.[44]

The second alternative for the court would have been to find that such contracts created or evidenced an encumbrance upon real estate. The general rule in the marketable title cases is that an outstanding contract to convey is an encumbrance.[45] Although "encumbrance" does not necessarily have the same meaning in all situations, title cases were relied upon in the *Redelsheimer* case to support a finding that a lease is an encumbrance within the meaning of RCW 64.04.010.[46] The analogy should be as valid in the contract area as it is in the lease area. Unfortunately for the clarity of the law, the court has failed to discuss either of the foregoing possibilities.

When presented with the problem of whether an oral contract to convey is enforceable, the Washington court quite commonly has said that RCW 64.04.010 requires such contracts to be in writing,[47] when it refers to a specific statute at all.[48] However, one early case, *Anderson v. Wallace Lumber and Mfg. Co.*,[49] concluded that RCW 64.04.010 was not applicable to contracts to convey. This case appears to have little validity as authority now in view of the later cases on this point. It is quite clear that a written contract to convey is enforceable in Washington without an acknowledgment.[50] One case that deviated from this rule and required an acknowledgment was *Sherlock v. Van Asselt*.[51] Later, in *Fallers v. Pring*,[52] the *Sherlock* holding was dismissed as an "improvident statement, not necessary to the decision of the case. . . ."

The present rule of the cases is that a contract to convey must be in writing, but does not have to be acknowledged.[53] The reasoning behind

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[44] Even the English statute gives little help here unless the vendee acquires some interest in real property.

[45] See 2 Patton, TITLES § 598 (2d ed. 1957).

[46] See discussion, note 21, *supra*.

[47] *E.g.*, State *ex rel.* Wirt v. Superior Court, 10 Wn.2d 362, 116 P.2d 752 (1941); Peterson v. Nichols, 110 Wash. 288, 188 Pac. 498 (1920); Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162 (1893).

[48] In Blakely v. Sumner, 62 Wash. 206, 113 Pac. 257 (1911), the court said that the "universal ruling of all courts" requires contracts to convey to be in writing. No statute was cited.

[49] 30 Wash. 147, 70 Pac. 247 (1902).

[50] *E.g.*, Phillip v. Curtis, 35 Wn.2d 844, 215 P.2d 431 (1950); First Nat'l Bank v. Conway, 87 Wash. 506, 151 Pac. 1129 (1915); Anderson v. Wallace Lumber and Mfg. Co., 30 Wash. 147, 70 Pac. 247 (1902); National Bank v. Hughson, 5 Wash. 100, 31 Pac. 423 (1892).

[51] 34 Wash. 141, 75 Pac. 639 (1904).

[52] 144 Wash. 224, 257 Pac. 627 (1927).

[53] For a case where the court enforced an agreement to convey contained in an unacknowledged lease, see Phillip v. Curtis, 35 Wn.2d 844, 215 P.2d 431 (1950). Although the lease was void under the normal ruling of the court, the option to purchase contained in the lease was enforced.

this rule is obscure. A typical explanation was given in *First Nat'l Bank v. Conway.*[54] The court said, "In this state executory contracts for the conveyance of real property, while required to be in writing, are not specialties, but are simple contracts, valid when signed by the parties to be charged, whether or not they are executed with the formalities required for the execution of deeds."[55] It is possible that the court has found that RCW 64.04.010 does not apply to such transactions and is applying section 4(4) of the English statute instead.[56] This proposition is weakened by the fact that the court has said that RCW 64.04.010 requires such contracts to be in writing. Also, the English statute of frauds has not been clearly recognized as being applicable. Another possibility is that the court is applying RCW 64.04.010 and is treating the acknowledgment requirement here the same as it did in the conveyance cases. However, there the court relied upon equitable conversion and estoppel. In those cases it was necessary for the court to assume that a contract to convey is valid without acknowledgment, because equitable conversion could not operate on a void contract. In the contract to convey cases it seems there is nothing upon which equitable conversion could operate if the contract is not valid. Estoppel might explain the result, but the court has made no attempt to explain it on that basis. It appears to be impossible to determine exactly what the court is doing in this type of case.

Express Trusts in Real Property.[57] Sections 7 and 9 of the English statute of frauds required that express trusts in real property be manifested and proved by a writing and that an assignment of such trusts be in writing. As was mentioned before, these provisions were omitted from the Washington statutes. The same problem is presented here that was presented in the discussion of contracts to convey: What Washington statute, if any, applies to such transactions. As is the case where oral contracts to convey are involved, when the court is asked to enforce an oral express trust it is willing to say that RCW 64.04.010 requires such trusts to be in writing.[58] Just how that statute applies is

[54] 87 Wash. 506, 151 Pac. 1129 (1915).

[55] *Id.* at 515, 151 Pac. at 1132.

[56] This conclusion was reached, based upon the cases available in 1903, in McAvoy, Statue of Frauds in Relation to Land Contracts in the State of Washington, 1903 (unpublished thesis in the University of Washington Law School Library).

[57] This category is properly limited to the creation of the equitable interest in the beneficiary. The fact that a conveyance of the legal title to a third party, the trustee, may be involved also is not pertinent here. The conveyance is controlled by the same rules that control other conveyances.

[58] *E.g., In re* Swartwood & Welsher Estates, 198 Wash. 557, 89 P.2d 203 (1939); Pacheco v. Mello, 139 Wash. 566, 247 Pac. 927 (1926); Nichols v. Capen, 79 Wash. 120, 139 Pac. 868 (1914).

not clear. It does not seem that an express truts conveys an "interest" in real estate any more than does a contract to convey.[59] In both situations only an equitable interest is transferred. However, this was the line of reasoning used in *Eggert v. Ford*[60] in order to find that an express trust is a "conveyance" within the meaning of the recording statutes,[61] thus requiring an acknowledgment before a trust in writing can be recorded.

The other possibility under RCW 64.04.010, that an express trust is an "encumbrance" within the meaning of the statute, has been stated with approval in at least one case involving an oral express trust.[62] If a trust is an encumbrance, why is a contract to convey not an encumbrance? Both leave the legal title unaffected.

Apparently the only case which has raised the issue of whether an acknowledgment is necessary for express trusts in writing is the *Eggert* case. However, all that case decided was that an express trust in land must be acknowledged before it can be recorded. This does not answer the question of whether such a trust must be acknowledged before it can be enforced, since unrecorded instruments are still enforceable between the parties.[63] Executory contracts to convey must also be acknowledged before they can be recorded;[64] yet they are clearly enforceable without acknowledgment.

Although the case law is not fully enough developed to indicate whether acknowledgment is a requisite of enforceability, there appears to be good reason for applying the same rules to express trusts in land that are applied to contracts to convey.

SUMMARY

Although the rules are fairly clear regarding when the requirement of a writing will be imposed, and when acknowledgment is required, there is no consistent pattern to be found in all of the cases. The major difficulty is that the court has failed to state any theory regarding what the statutes are intended to accomplish. Too often the court has relied

[59] It might be argued that, by amending RCW 64.04.010 to exclude certain transfers of a beneficiary's interest, the legislature recognized that a beneficiary has an interest within the meaning of that statute. If this is true, the trust transferred an interest when created. A necessary result of this line of reasoning is that RCW 64.04.010 applies to equitable "interests" as well as to legal "interests." This would carry over into the area of contracts to convey. See note 14, *supra.*

[60] 21 Wn.2d 152, 150 P.2d 719 (1944).

[61] RCW 65.08.060 and RCW 65.08.070.

[62] Spaulding v. Collins, 51 Wash. 488, 99 Pac. 306 1909).

[63] J. W. Fales Co. v. O. H. Seiple Co., 171 Wash. 630, 19 P.2d 118 (1933).

[64] RCW 65.08.080.

upon the text treatment of the statutes in other jurisdictions rather than making an attempt to construe the Washington statutes. At this point of deveolpment, an attempt to apply a consistent approach to all types of transactions could cause some individual hardship, due to the retroactive effect of court decisions. However, the present state of the law leaves many questions unanswered. For instance, why should acknowledgment be given substantive effect in the lease area when it has no such effect elsewhere? The statutes do not justify the result. Why should a contract to execute a lease be treated differently than a contract to execute a conveyance? Does the English statute of frauds have any efficacy in Washington today? If not, does RCW 64.04.010 apply to all real property transactions except leases for terms less than one year? If this is the case, why is the acknowledgment requirement excused in some instances? Does RCW 64.04.010 apply to equitable interests in real property?

A possible rule to follow would be to hold that RCW 64.04.010 applies to all real property transactions and to require acknowledgment as a substantive requirement in all instances. The effect of this rule would not be as drastic as it first appears, since most types of instruments are already acknowledged for purposes of recording. The court would still have the doctrine of part performance to apply to achieve a desirable result when necessary. However, this would require that a considerable number of cases be overruled.

Perhaps a better rule would be to hold that acknowledgment never has substantive effect, even in the lease cases. Since this is a more lenient approach, very little hardship would be created. Also, this would tend to make it irrelevant whether the court is relying upon 64.04.010 or the English statute of frauds. A third approach would be to find that there are some transactions which were omitted from the Washington statutes. It would then be necessary to look to the English statute of frauds as well as to the Washington statutes.

Before leaving this discussion, it might be well to note the possible effect of RCW 19.36.010(1), the "one-year" section, if the court should begin relying upon the English statute of frauds. Although the *Redelsheimer* case, *supra,* appears to preclude the applicability of this section to leases, it has been applied to both contracts to convey[65] and express trusts.[66] If the only statute of frauds applicable in these areas otherwise is the English statute, it seems it should be displaced by the express

[65] Foelkner v. Perkins, 197 Wash. 462, 85 P.2d 1095 1938).
[66] Moe v. Brumfield, 27 Wn.2d 714, 179 P.2d 968 (1947).

Washington statutory provision, when applicable. This would raise the question of whether the doctrine of part performance could be applied in order to avoid the effect of the statute. In two cases[67] the court held that this doctrine is not applicable to RCW 19.36.010(1). However, in two later cases[68] the court ignored its earlier holdings and applied the doctrine to cases under this statute. What the court would do with the problem now is not clear. Another consideration is the possible effect of the court's ruling that contracts violating the provisions of RCW 19.36.010 are void, and not merely voidable. As was noted before, this is directly contrary to the result reached under section 4 of the English statute of frauds.

[67] Hendry v. Bird, 135 Wash. 174, 237 Pac. 317 (1925); Union Sav. & Trust Co. v. Krumm, 88 Wash. 20, 152 Pac. 681 (1915).

[68] Sunset Oil Co. v. Vertner, 34 Wn.2d 268, 208 P.2d 906 (1949); Foelkner v. Perkins, 197 Wash. 462, 85 P.2d 1095 (1938).