Contracts in Washington, 1937-1957: Part II

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ASSIGNMENT OF RIGHTS AND DELEGATION OF DUTIES OR CONDITIONS

Assignments. That a contract obligee can "assign," i.e., invest another with his right, substitute a third person for himself so that the obligor's duty to perform will run to such person, seems never to have been seriously questioned by the Washington court. This is not surprising. The basic legal principle which permits assignment (save where the contract forbids or the right is "personal") is a part of our common-law heritage. We also inherited an unusually complicated body of evolutionary English and American case law, produced by the initial struggle over the basic principle of assignability and then by the efforts of courts to create a conveyancing system appropriate to the peculiar characteristics of the intangible contract right. Some confusion was inevitable as different courts encountered controversies between obligor and obligee, or one of them and the assignee, or the assignee and creditors of or other successors of the obligee, in the diverse settings of sale, security, gift, and assignment for collection.

Less understandable is the appearance in modern opinions of archaic ideas or language derived from opinions written during the formative period of assignments.

Our court continues to use the term "equitable assignment." This term became the accepted description for a voluntary assignment by a private person, during the period when an assignment was apt to be valueless unless the chancellor would protect it. A Washington assignee

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245 The right of an assignee for collection to sue, and in his own name, was confirmed by Wash. Sess. Laws, 1854, p. 131, § 3, now (as amended) RCW 4.08.080, as construed in Pioneer Mining & Ditch Co. v. Davidson, 111 Wash. 262, 190 Pac. 242 (1920). This case also acknowledges the common-law right of other types of assignee to recover, and the inapplicability of the statute to them. Presumably the occasion for RCW 4.08.080 was the main-party-in-interest statute, now RCW 4.08.010, and the possibility of controversy over its application to assignments for collection, under which the beneficial ownership will be in the assignor. An assignment for security also results in divided interests; RCW 4.08.080 is broad enough in language to cover such an assignment, although there is no demonstration in the decisions that security assignees have needed to invoke the statute. RCW 4.08.080 covers only rights for "the payment of money" and arguably will not apply to an assignment of a claim for unliquidated damages resulting from breach of a contract promise to render services or transfer property. The statutory coverage is further limited, to assignments in writing. Whether an assignee for collection would be denied recovery for failure to satisfy these restrictions cannot be determined with assurance; the statute might be construed as not mandatory.

247 CoRiEN, Contracts § 856 (1950); 2 WILLISTON, Contracts § 404 (rev. ed. 1936).

no longer needs or can get any special equitable relief and use of the term now seems obviously anachronistic. Moreover, the term suggests a dichotomy, "legal assignment" and "equitable assignment," which does not in fact exist.

The later Washington cases have been concerned, as were the earlier ones, with the requisites for and operation of an assignment. Under neither heading has there been any notable departure from the patterns previously established. It is still not possible to determine precisely what must be done in order to effect an assignment. In *Crutcher v. Scott Publishing Co.*, "intent to transfer" was said to be the requirement. In *Arcweld Mfg. Co. v. Burney* and *Mercantile Ins. Co. v. Jackson*, "intent to transfer" and "appropriation" were said to be necessary. In *Amende v. Morton* "intent to transfer" and intent to "deprive the assignor of control" were stressed. In *Sundstrom v. Sundstrom* the court said: "an equitable assignment must be supported by a valuable consideration." In several opinions a writing evidencing the assignment was held to be unnecessary.

It might be inferred from the opinion in *Mercantile Ins. Co. v. Jackson* that intent by the assignee to receive the assignment is an additional requirement. The court's failure to mention such a requirement in other opinions, and the evident absence of any reason why the assignee's intent should be a factor, suggest that the inference is an unsound one in the ordinary assignment situation.

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248 In *Barto v. Seattle & Int'l Ry.*, 28 Wash. 179, 68 Pac. 442 (1902), the court carefully analyzed the right of an assignee against the obligor and clearly stated his interest to be a legal one; the terminological implications of the opinion seem to have been overlooked by later judges.

249 *Corbin, Contracts §§ 858, 889 (1950); Cf. 2 *WillsToN, Contracts §§ 446A, 447* (rev. ed. 1936).

250 For a discussion of the earlier cases, see *Washington Annotations, Restatement, Contracts § 148 et seq.*

251 42 Wn.2d 89, 253 P.2d 925 (1953).

252 12 Wn.2d 212, 121 P.2d 359 (1942).


255 15 Wn.2d 103, 129 P.2d 783 (1942).

256 *Sundstrom v. Sundstrom*, 15 Wn.2d 103, 129 P.2d 783 (1942) (it was also held that a contract provision requiring a written assignment was for the obligor's benefit only and could not be put in issue by another); *Crutcher v. Scott Publishing Co.*, 42 Wn.2d 89, 253 P.2d 925 (1953). There are similar earlier decisions. See *Washington Annotations, Restatement, Contracts § 157.* See also n. 269 below.

257 40 Wn.2d 233, 242 P.2d 503 (1952). The court said: "No particular form is necessary to constitute an equitable assignment.—Any words or transactions indicating an intent, on the one side, to assign, and an intent, on the other, to receive, are sufficient, assuming there is a valuable consideration." The court went on to find an assignment, although the opinion contains no further discussion demonstrating proof of the assignee's intent to receive the assignment.

“Appropriation” and “intent to deprive the assignor of control” are probably only variant expressions of the same idea. That either of them actually requires evidence which goes beyond proof of intent to transfer seems unlikely.299

“Valuable consideration” as used in Sundstrom v. Sundstrom no doubt means “value.”220 If value is a requirement for assignment, no gift assignment can be made. Assignment to secure a pre-existing debt might not be possible. This would indeed be retrogression. During an earlier era it may have been accurate to prescribe value as a requisite for assignment; the chancellor was not inclined to aid volunteers and his protection was often needed by assignees. It is not accurate now.281 American courts have in general come to recognize that contract rights are property to which the fundamental tangible personality conveyancing principle is applicable in sale and security transactions. Intent to transfer is now the only proper requirement.222 Although gratuitous assignments have proved to be more troublesome, it is believed that most modern courts would accept the solutions proposed by the Restatement of Contracts. In its analysis, value is not a requirement for the accomplishment of an assignment. Intent to transfer suffices. A gratuitous assignee can collect from and discharge the obligee. But, until he has collected, or obtained a judgment against or novation from the obligor, his interest may be revoked by the

299 Little light on the meaning of “appropriation” can be had from the opinions. In Mercantile Ins. Co. v. Jackson, 40 Wn.2d 233, 242 P.2d 503 (1952) the court said: “In order to accomplish an effective equitable assignment, an assignor must have intended to transfer a present interest in the debt or fund and, pursuant to such intention, must have made an absolute appropriation of the thing assigned, relinquishing all control or power of revocation over it to the use of the assignee.” In Sundstrom v. Sundstrom, 15 Wn.2d 103, 129 P.2d 783 (1942) the court added: “What amounts to a present appropriation constituting an equitable assignment is thus a question of intention to be gathered from a consideration of the language used, in the light of all the attendant facts and circumstances.” “Appropriation” seems at most to contemplate circumstances the absence of which the court deems incompatible with “intent to presently transfer.” Nevertheless, so long as the court continues to state “appropriation” to be a requirement for assignment the existing uncertainty will continue. Whether the relinquishment of all power to revoke should be a demand is discussed below at note 275.

220 Consideration, a contract-formation requisite, cannot very well be a requirement for assignment, which is a type of conveyance. In the Sundstrom case, cited above at note 255, the court found its demand for a “valuable consideration” to have been met, in the assignee’s having previously permitted the use of community earnings in discharge of the assignor’s separate debt. The opinion does not facilitate the determination of just what value the assignee must prove. Also unhelpful are flat statements such as appear in McDaniel v. Pressler, 3 Wash. 636, 29 Pac. 209 (1892), and Washington State Bar Ass’n v. Merchants Rating & Adj. Co., 183 Wash. 611, 49 P.2d 26 (1935), “an assignment for collection is regarded as an assignment for a valuable consideration.” If value is a requisite, it is a fact each assignee must prove.

281 4 CORBIN, CONTRACTS § 909 (1950).

222 2 WILLISTON, CONTRACTS § 424 (rev. ed. 1936); 4 CORBIN, CONTRACTS § 879 (1950).
assignor and is terminated by the assignor’s death, save where the assignment satisfies criteria drawn from the law of chattel gifts.\textsuperscript{283} Under the Restatement system an irrevocable gratuitous assignment is accomplished by delivery of a deed of gift\textsuperscript{284} or of a writing embodying the contract right,\textsuperscript{286} with intent to transfer. It is to be hoped that our court will repudiate Sundstrom v. Sundstrom\textsuperscript{286} and align itself with those jurisdictions which recognize the limited significance of value in present-day assignment transactions.

The Sundstrom case is particularly vulnerable insofar as it denies (inferentially) the possibility of effecting gift assignments; it is in conflict with other Washington decisions\textsuperscript{287} which were not discussed.

The court’s refusal to require written evidence of assignment accords with the conclusions reached in other jurisdictions where statutes do not otherwise dictate.\textsuperscript{288} The Uniform Sales Act statute of frauds section covering “a contract to sell or a sale” of “chooses in action exceeding the value of fifty dollars” does not preclude an oral assignment.\textsuperscript{289} Filing under the Washington accounts receivable statute\textsuperscript{284}Where seals no longer have their common law force the accomplishment of a deed of gift is possible only if the court will work out a new principle. Many have, finding an effective gift assignment in delivery, with donative purpose, of an unsealed signed writing reciting the donor’s transfer purpose. 2 WILLISTON, CONTRACTS § 438B (rev. ed. 1936). Our court might also. See the discussion in Tucker v. Brown, 199 Wash. 320, 92 P.2d 221 (1939).

\textsuperscript{285} The cases are far from harmonious in their disposition of issues involving the sufficiency of the relationship between right and document. 2 WILLISTON, CONTRACTS §§ 439, 440 (rev. ed. 1936); 4 CORBIN, CONTRACTS § 915 (1950). A life insurance policy would generally be recognized as embodying the insured’s right. The Sundstrom case, cited above at note 255, in which our court announced the necessity for “consideration,” was concerned with what appears to have been a gift assignment and delivery of a life insurance policy. In other jurisdictions the assignment would have been sustained without question or difficulty, on proof of the delivery and intent to transfer. See also n. 267 below.

\textsuperscript{286}Bleitz v. Bryant Lumber Co., 113 Wash. 455, 194 Pac. 550 (1920), which also held valuable consideration to be a requirement for assignment, was cited in the Sundstrom opinion, and should also be overruled.

\textsuperscript{287} The Old Nat’l Bank & Union Trust Co. v. Kendall, 14 Wn.2d 19, 126 P.2d 603 (1942) (gift of savings account sustained on proof of delivery of the passbook with donative purpose; the court did not refer to the transaction as assignment; the donor’s interest was a contract right and what she accomplished was a gift assignment of that right); In re Slocum’s Estate, 83 Wash. 158, 145 Pac. 204 (1915) (a bond and several notes were involved; assignment and delivery were said to be the requisites for a gift of them). See also Tucker v. Brown, 199 Wash. 320, 92 P.2d 221 (1939).

\textsuperscript{288}2 WILLISTON, CONTRACTS §§ 424, 430 (rev. ed. 1936); 4 CORBIN, CONTRACTS §§ 879 (1950); RESTATEMENT, CONTRACTS § 157 (1932).

\textsuperscript{289} RCW 63.04.050(1). In view of this section the court’s broad statement in Crutcher v. Scott Publishing Co., 42 Wn.2d 89, 253 P.2d 923 (1953), approving an oral sale assignment, requires careful analysis. The Statute of Frauds may have been satisfied through payment by the assignee. Of more moment is the obligor’s inability to defeat an oral assignment by resort to the statute; the assignor alone can attack an assignment which fails to satisfy the Statute of Frauds. 2 WILLISTON, CONTRACTS § 430 (rev. ed. 1936); 4 CORBIN, CONTRACTS § 879 (1950).
will protect only a written assignment, but the statute in no sense makes a writing legally necessary for the accomplishment of assignment.

Concerning the proof needed to establish an assignor's intent to transfer, several of the court's later opinions are instructive. In Smith v. Rowe it was held that a plaintiff whose sole evidence was the execution of a writing otherwise in typical assignment form but not naming the assignee, and his possession of the writing, was held unable to recover. In Arcweld Mfg. Co. v. Burney, an instrument in form a power of attorney to collect was held to have created agency rather than assignment; garnishment of the obligor by a creditor of the principal was sustained. In Olsen v. National Grocery Co. an assignor who had assigned for security was permitted to recover damages for wrongful garnishment of the obligor; the court did not question the validity of such an assignment, and recognized the multiple property interests present in a security transaction. In Mercantile Ins. Co. v. Jackson assignment of his interest in a draft, by one payee to his co-payee, was found in endorsement and delivery to a third person to hold for the assignee; the court in stating the requirements for assignment said that the assignor must relinquish "all... power of revocation." The wisdom of this demand must be questioned. Retention by an assignor of a power to revoke is not incompatible with intent to assign. It is difficult to see how the usual assignment for collection can be sustained or the gift assignment principles advocated above at note 267 can be developed if revocability is fatal to assignment.

270 RCW 63.16.020. It will be noticed that the statute covers both sale and pledge assignments.
271 12 Wn.2d 320, 100 P.2d 401 (1940).
272 15 Wn.2d 164, 130 P.2d 78 (1942).
275 RESTATEMENT, CONTRACTS § 150(2) (1932) provides that an assignment is not ineffective because revocable. The obligor is adequately protected, being discharged on performance to an assignee whose assignment is revocable, unless he knows the assignment has been revoked. RESTATEMENT, CONTRACTS § 170(2) (b) (1932). See also 2 WILLISTON, CONTRACTS § 438A (rev. ed. 1936).
277 In Amende v. Morton, 40 Wn.2d 104, 241 P.2d 445 (1952) the court said of an assignee for collection that he must have "some title, legal or equitable." The court repeated its previous pronouncements about the need for intent to assign, surrender of control, and absence of a right of revocation in the original owner of the claim, and concluded the plaintiff could not maintain the action as an assignee. Part of his difficulty was a provision in the alleged assignment-document authorizing the owner of the claim to terminate the arrangement "at any time after one year from the date hereof by ninety days written notice." This was clearly enough a reserved right of revocation and fatal under the court's formula. The court appears however to have
In Hartmeier v. Eiseman the court followed its earlier decisions on checks, saying: "The ordinary bank check is not, in either law or equity, an assignment of the funds upon which it is drawn, but is merely an order for the payment of money. . . ." In Philip v. Seattle a promise to assign was held not to create an assignment.

Several problems about the operation of assignments reached our court during the period under review. In School Dist. Number 15 v. Peoples Nat'l Bank the court reaffirmed its earlier view that "money due or to become due upon a contract... is assignable" and sustained against a subsequent federal tax lien a security assignment which in part covered progress payments and retainage thereafter to be earned by the assignor. In Burleson v. Blankenship the court refused to find that assignment of his interest by one of the partner-obligees to his copartner violated a contract term prohibiting assignment. In overlooked the fact that the parties here merely expressed what in many other assignment-for-collection transactions will be necessarily implied, i.e., a right to revoke. If the assignee for collection fails to proceed with diligence the assignor can no doubt terminate the assignment by notices to assignee and obligor. Brockhausen v. Toklas, 64 Wash. 150, 116 Pac. 668 (1911). He may be able to revoke the assignment even though in so doing he breaches a contract with the assignee. Underlying the assignment for collection there will be an attorney-client or agency relation. Can the assignee resist revocation of the assignment if this basic relationship is terminated by the assignor, withal wrongfully? Concerning other aspects of assignments for collection, see 4 Corbin, Contracts § 882 (1950).

Our court's position is that which American courts in general have reached. A secured creditor released his security and in lieu of it received a promise by the debtor to assign a claim against Seattle, whether under a contract then extant or one expected to be made not being determinable from the opinion; the promised assignment was later made, within four months of the assignor's bankruptcy; it was held in this action that the promise to assign was not an assignment, and that the assignment later made was preferential. On the first point this is the usual result. Restatement, Contracts § 166 (1932); 4 Corbin, Contracts § 877 (1950); 2 Williston, Contracts § 428 (rev. ed. 1936). On the second point the opinion is confused in analysis and appears to conflict with the principle which appertains in Washington and elsewhere under which a promise to create a pledge gives the promisee, if he has parted with his credit, the position of an equitable pledgee when the promisor acquires the subject matter. Whiting v. Rubenstein, 7 Wn.2d 204, 109 P.2d 312 (1941); Williston op. cit. § 429. Cf. the 1938 and 1950 amendments to § 60, Federal Bankruptcy Act, 11 U.S.C. § 96.

It is generally recognized that rights under an existing contract can be assigned, although the obligor's performance is to be rendered at a later date and is conditioned on performance by the assignor. Restatement, Contracts § 154 (1932); 2 Williston, Contracts § 413 (rev. ed. 1936). Care must be exercised in distinguishing a presently extant contract right and the "fund" or "money" which will be the obligor's performance and which will be forthcoming in the future. Failure to do so may lead to the erroneous conclusion that the "fund" was the subject matter of the purported assignment, which must then fail because the fund was non-existent when its transfer was attempted.

The court said: "In determining whether these transactions violate the stipulation against assignment, we must look to the covenant itself, bearing in mind that covenants of such character are to be strictly— even literally—constructed."
Sundstrom v. Sundstrom\textsuperscript{283} and Erckenbrack v. Jenkins\textsuperscript{284} it was held that a contract provision regulating assignments was for the benefit of the obligor alone. In Association Collectors, Inc. v. Hardman,\textsuperscript{285} recovery by an assignee for collection was refused, the assignor being an unlicensed foreign corporation doing business here.\textsuperscript{286} The inability of an assignor to assign a greater interest than he has was again affirmed in Stansbery v. Medo-Land Dairy, Inc.\textsuperscript{287} The assignee was held to have taken subject to modifications of the basic transaction between assignor and obligor, effected prior to notice to the obligor of the assignment.\textsuperscript{288} The assignee tried without success to invoke an estoppel against the obligor, for its failure to disclose the modifications known to it when the assignment was made.\textsuperscript{289} In re Dickson's Estate\textsuperscript{290} held that the federal government's statutory priority in an insolvent's estate attached to a claim acquired by assignment. Hall v. Mathewson,\textsuperscript{291} although involving a judgment, merits mention. An assignment document phrased "I do hereby ... assign ... all of my right, title and interest" was found to be but a quit claim by the assignor, without

\textsuperscript{283} 15 Wn.2d 103, 129 P.2d 783 (1942) (life insurance policy; clause requiring assignment to be in writing).

\textsuperscript{284} 33 Wn.2d 126, 204 P.2d 831 (1949) (real estate contract; clause forbidding assignment by the vendee save "in writing attached hereto and approved by the seller").

\textsuperscript{285} 2 Wn.2d 414, 98 P.2d 318 (1940).

\textsuperscript{286} 5 Wn.2d 328, 105 P.2d 86 (1940).

\textsuperscript{287} The obligor was also permitted to deduct from his payment to the assignee sums disbursed by him after notice of the assignment, which were in the court's view reasonably and necessarily expended to enable the assignor to render his performance to the obligor. The basic contract was one for the sale of milk and the assignment was in form a transfer of the assignor's right to payment. Although the court's result would appear to be amply supported by interpretation of the assignment as covering only net proceeds of the dairy operation, the court went on to approve the proposition that the obligor can do what is reasonably necessary to enable the assignor to render his performance to the obligor. This is an idea of dubious propriety. See 4 CORBIN, CONTRACTS § 890 (1950); 2 WILLISTON, CONTRACTS § 433, note 6 (rev. ed. 1936).

\textsuperscript{288} Cf. National Bank of Tacoma v. Puget Sound Lumber Co., 104 Wash. 363, 176 Pac. 553 (1918); Doub v. Rawson, 142 Wash. 190, 232 Pac. 920 (1927). A representation made to a prospective assignee by the obligor, that he has no defense or cross-claim, may estop him from later asserting to the contrary. Butters v. Oles, 124 Wash. 380, 214 Pac. 629 (1923).

\textsuperscript{289} 197 Wash. 145, 84 P.2d 661 (1938).

\textsuperscript{290} 192 Wash. 651, 74 P.2d 209 (1937).
warranty either that the judgment existed or that it could be collected.\footnote{292}

The legal relations between an assignee and a creditor of the assignor reached the court in two cases of unusual interest. Both cases came out of the same transaction. After notice of assignment, the obligor was garnisheed by a creditor of the assignor. He answered, setting out the assignment, and paid the money into court. A judgment was subsequently entered awarding the fund to the garnisheeing creditor and purporting to discharge the obligor both as to the assignor and the assignee. The assignee was not interpleaded or served and did not intervene; in fact it did not know of the garnishment proceeding until after the judgment was entered. The assignee thereafter sued the obligor. Its right to do so was affirmed in Portland Ass'n of Credit Men, Inc. v. Earley.\footnote{293} The obligor then successfully sued both the garnisheeing creditor and her attorney, who had received as his fee a part of the garnishment proceeds.\footnote{294} The court in these decisions recognized the priority of an assignment as against a subsequent garnishment or attachment\footnote{295} and spelled out the procedure to be

\footnote{292} In the usual sale-assignment transaction the assignor impliedly warrants the existence of the contract right but not its collectibility. Restatement, Contracts § 175 (1932); 4 Corbin, Contracts § 904 (1950); 2 Williston, Contracts § 445 (rev. ed. 1936).

\footnote{293} 42 Wn.2d 273, 254 P.2d 758 (1953). The court said in Earley v. Rooney, note 294 below, that the assignee could have recovered from either obligor or garnisheeing creditor. The obligor has no defense because the judgment was entered without the court having obtained jurisdiction over the assignee or his interest. The creditor has received a fund which is rightfully property of the assignee.

\footnote{294} Earley v. Rooney, 49 Wn.2d 222, 299 P.2d 209 (1956). The recovery was in quasi-contract.

\footnote{295} This is the usual holding, where the obligor was informed of the assignment in time to enable him to defeat the garnishment. During what stage of the proceeding the garnishment can be defeated by allegation and proof of an assignment varies in different states, the more common view being that the cut-off point is the entry of judgment. 4 Corbin, Contracts § 903 (1950); 2 Williston, Contracts § 434 (rev. ed. 1936). The Restatement, Contracts § 172 (1932) adopts a more plausible solution, according the superior right to the assignee without regard to notification of the obligor, who in turn is discharged as to the assignee if he is not notified in time to enable him to defeat the garnishment. Presumably, where this occurs, the assignee can recover from the garnisheeing creditor. This analysis would probably prevail in Washington. Although in both the Portland Ass'n and Earley cases the fact that both obligor and creditor were aware of the assignment was stressed, the court cited with apparent approval Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238 (1896), in which the court said: "[A]n assignment of a chose in action in good faith and for value... is complete and effectual as against third persons, upon its execution and delivery to the assignee, and does not acquire any additional force or validity by notice to the debtor." The priority of the assignee and his right to recover from the garnisheeing creditor without regard to notice to the obligor, seems to be assured by the accounts receivable filing statute, RCW 63.16.010 et seq., where the assignee filed. On the other hand, an assignee whose assignment is within the operation of this statute and who does not file is subordinate to the assignor's creditors even though he does notify the obligor.
followed by an obligor subjected to garnishment.\textsuperscript{298}

Delegation. In \textit{Hesselgrave v. Mott}\textsuperscript{297} the court stated both the basic principle which bars delegation of a contract duty where the obligor’s performance is of a “personal” character, and the inapplicability of this principle where the obligee consents to the delegation. Presumably the court would sustain delegation if the duty affected is not personal.\textsuperscript{298}

\textbf{THE STATUTE OF FRAUDS}

Suretyship. RCW 19.36.010 reads in part: “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: ... (2) Every special promise to answer for the debt, default, or misdoings of another person.” This statute generated a limited amount of appellate litigation during the 1937-1957 period.

The inapplicability of the statute to a promise made to a debtor, to pay his debt, was reaffirmed by the court in \textit{Miller v. O’Brien}.\textsuperscript{299} \textit{Lloyd Co. v. Wyman}\textsuperscript{300} and \textit{Stowell Lumber Corp. v. Wyman}\textsuperscript{301} in-

\textsuperscript{298} The court pointed out that payment into court is not a part of the garnishment procedure, that the assignee must be a party if the judgment is to adjudicate his interest, and that interpleader is the usual procedure by a debtor who faces conflicting claims.

\textsuperscript{297} 23 Wn.2d 270, 160 P.2d 521 (1945).

\textsuperscript{298} The duty in question was to provide care and maintenance of an elderly man. The court said: “It is unquestionably true that the obligation arising out of a contract in which one party agrees to support another is personal to the obligor and cannot be avoided or assigned by him to a third party without the consent of the beneficiary of the obligation.” “Assignment,” which is a term describing a type of conveyance, seems obviously inappropriate in this context. A contract obligor cannot convey his duty; he can authorize another to perform for him, and can in addition procure the third person’s promise to perform for him. These are processes best described by the term “delegation.” The obligee becomes involved only when the delegatee proffers performance, or the obligor accompanies the delegation with a statement that he will not perform. Whether a proffer of performance by the delegatee has the same legal effect as would a proffer by the obligor depends on the principle stated in the Hesselgrave case. Whether a statement by the obligor that he personally will not perform is a wrongful repudiation turns on the same principle. Of course, if the obligor denies all liability (i.e. even if the delegatee should fail to perform) he repudiates without regard to the delegability of the duty. See \textit{Restatement, Contracts} §§ 160, 165 (1932); 4 \textit{Corbin, Contracts} § 865 \textit{et seq.} (1950); 2 \textit{Williston, Contracts} §§ 411, 411A (rev. ed. 1936).

\textsuperscript{299} 17 Wn.2d 753, 137 P.2d 525 (1943). This is the usual holding. \textit{Restatement, Contracts} § 191 (1932); 2 \textit{Corbin, Contracts} § 357 (1950); 2 \textit{Williston, Contracts} § 460 (rev. ed. 1936). For the earlier Washington decisions see \textit{Washington Annotations, Restatement, Contracts} § 191.

\textsuperscript{300} 16 Wn.2d 621, 134 P.2d 459 (1943) (defendant’s promise “collateral”; statute applied).

\textsuperscript{301} 19 Wn.2d 487, 143 P.2d 457 (1943) (defendant’s promise “direct”; statute did not apply).
volved the perplexing "direct promise or collateral promise" problem, and added little to the earlier and generally unsatisfactory cases. The "main-purpose exception" came to issue in four cases, one of which should, if carefully followed, aid materially in avoiding perpetuation of the dialectic confusion created by prior decisions.

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302 Where S requests C to deliver goods or render services to P and promises C to pay, does the statute apply? As our court has phrased the controlling proposition, a "direct" promise is outside the statute, while a "collateral" promise is within it. The difficulty is in determining what facts will move the court to classify a promise one way or the other. The question is, in the court's view as indicated in the Stowell Lumber Corp. case, note 301 above, "primarily one of fact, to be determined by a consideration of the evidence, with the view of ascertaining the person to whom it was agreed the credit should be extended. In determining that question, regard must be had to the situation of the respective parties, the words used by them, their understanding of the words used, and all the circumstances connected with the particular transaction." In its preoccupation with intent and the words used by the parties, the court has paid insufficient attention to a detail which would appear to be the key to correct analysis, i.e., did P undertake to pay C? Even if S's promise was to pay "if P does not" (which is typical guaranty language) the statute cannot apply if P never undertook to pay C; if on the other hand P did so undertake, the statute should apply without regard to the phrasing of S's promise, save where P and S became joint debtors or were really both principals. See 2 CORBIN, CONTRACTS §§ 349, 352, 356, 361 (1950); 2 WILLISTON, CONTRACTS §§ 454, 462-464 (rev. ed. 1936).


304 Collins v. Nelson, 193 Wash. 334, 75 P.2d 570 (1938); Andrews v. Standard Lumber Co., 2 Wn.2d 294, 57 P.2d 1062 (1940); Lloyd Co. v. Wyman, 16 Wn.2d 621, 134 P.2d 459 (1943) (each of which appears to approve the unfortunate idea that an oral promise to pay another's debt must be supported by a peculiar and unusual variety of consideration; see discussion, n. 118 above); Fairview Lumber Co. v. Makos, 44 Wn.2d 131, 265 P.2d 837 (1954).

305 In the Fairview Lumber Company case, cited in the preceding note, the court quoted the RESTATEMENT, CONTRACTS § 184 (1932), which stresses the desire of the promisor to obtain the promisee's performance to the principal "mainly for his own pecuniary or business advantage", and went on to say: "This court has consistently followed the principle of Burns v. Bradford-Kennedy Lumber Co., 61 Wash. 276, 280, 112 Pac. 359 (1910), . . . that where the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."

306 Characteristic of the earlier decisions is Washington Printing Co. v. Osner, 99 Wash. 537, 169 Pac. 988 (1918), from which the following criteria for the main-purpose exception can be isolated: proof that the promisor promised to pay the debt as his own, proof that he promised to further his own financial interests, proof that he promised for a consideration "redounding to his financial benefit," and proof that his leading object was to "subserve some interest or purpose of his own." These may be four ways of expressing the same requirement; so long as the court repeats them separately it will be impossible to determine precisely what is the standard. In the Lloyd Company case, cited in n. 304 above, the "special consideration" demand was stated, as it had been in McKenzie v. Puget Sound Nat'l Bank, 9 Wash. 442, 37 Pac. 668 (1894). In the Burns case, (see n. 305 above), the "leading object" criterion was stressed; so also of Seiffert Co. v. Wright, 108 Wash. 616, 185 Pac. 577 (1919). In Dybdahl v. Continental Lumber Co., 133 Wash. 276, 233 Pac. 10 (1925) the court examined both the "special consideration" and "leading object" tests, and concluded that the real test is proof of a "personal benefit moving to the promisor . . . of such a personal, direct and substantial character as to fairly justify and naturally lead the promisor to make the debt his own . . ." See also Guth v. First Nat'l Bank, 137 Wash. 280, 242 Pac. 42 (1926); Jannsen v. Curtis, 182 Wash. 499, 47 P.2d 662 (1935). It is apparent that the court is in search of a relationship between the surety and the creditor-principal transaction such as will justify holding the surety on his oral
In Smaby v. Shrauger\textsuperscript{307} the court refused to apply the statute to a novation.\textsuperscript{308}

Broker's Contracts. RCW 19.36.010 brings within the Statute of Frauds "An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission." No diminution in the volume of appellate litigation engendered by this provision can be observed in the period under review.

An earlier decision holding a lessee's interest to be personalty, and hence not within this section, was followed in Johnson v. Rutherford.\textsuperscript{309} Pavey v. Collins\textsuperscript{310} involved a broker who received a listing which satisfied the statute, and who subsequently received a letter which he argued extended the listing, it having by its terms expired. He did not prevail.\textsuperscript{311} In Leo v. Casselman\textsuperscript{312} and Geohegan v. Dever,\textsuperscript{313} the court followed earlier decisions requiring that a written listing agreement contain "a description of the land sufficiently definite to locate it without recourse to oral testimony."\textsuperscript{3214} In the latter case, however, the court decreed reformation of the listing document to make the land description accurate, thus curing the Statute of Frauds defect.\textsuperscript{315}
In two cases the court reaffirmed its previous ruling that failure to satisfy the statute does not preclude recovery on a promise to pay, made after the broker’s services were rendered.\(^{316}\)

*American, Inc. v. Bishop*\(^{317}\) and *Gertz v. Shaeffer*\(^{318}\) brought to the court deceit actions, the gravamen of each being an oral promise to pay a commission if the broker procured a buyer, the promise being made without intent to perform it. In each case a judgment below dismissing the action was affirmed. In the *Gertz* case the broker was equally unsuccessful in his attempt to state, as a second cause of action, a tortious conspiracy between the seller and buyer to deprive him of his commission.

Is an orally-authorized broker an agent and as such subject to the responsibilities of the principal-agent relationship? Agency is a status, for the creation of which a contract is not necessary. This Statute of Frauds section is relevant, where the issue is the existence of agency, only if the statute requires written evidence of the authorization. In *Pedersen v. Jones*\(^{319}\) and *Mele v. Cerenzie*,\(^{320}\) the court followed earlier cases in concluding: “The agreement which the statute declares void unless in writing is one for the payment of a commission to the agent, but it does not say that the actual authority to sell or purchase must be in writing.” This construction seems obviously correct. The statute is aimed at brokers and fabricated proof of a promise to pay a commission, and purports only to invalid the oral “agreement.” The contrary construction would provide brokers with a shield behind which they could violate their trust with impunity. Some doubt about the

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\(^{316}\) Richey v. Bolton, 18 Wn.2d 522, 140 P.2d 253 (1943); Johnston v. Smith, 43 Wn.2d 603, 262 P.2d 530 (1953). The technical basis stated for this result is the language of the statute, which is worded “an agreement authorizing or employing.” The consideration problem posed by a promise to pay for services previously rendered under an agreement declared by the statute to be “void” was discussed above at nn. 209, 210. Persons unfamiliar with the many curious consequences of the Statute of Frauds may feel the differentiation between an oral promise to pay made before the broker renders his services and one made afterward to be strangely technical. A variation of the later-promise-to-pay reached the court in *Haynes v. John Davis & Co.*, 22 Wn.2d 474, 156 P.2d 659 (1945); the earnest money agreement which seller and buyer signed provided that if the buyer defaulted the broker could retain enough from the down-payment to cover its “regular commission;” the court enforced this clause according to its terms, refusing to find in it any violation of the statute.

\(^{317}\) 35 Wn.2d 180, 211 P.2d 705 (1949) (an orally-employed broker was held liable to his principal for a profit made by the broker through concealment of his interest in the property purchased by the principal).

\(^{318}\) 38 Wn.2d 639, 231 P.2d 273 (1951).

\(^{319}\) 29 Wn.2d 95, 185 P.2d 722 (1947).

\(^{320}\) 40 Wn.2d 123, 241 P.2d 669 (1952); noted 27 Wash.L.Rev. 230 (1952) (principal recovered from an orally-employed broker who in negotiating a sale falsely represented to the principal that the sale could be closed only by procuring a loan for the purchaser, which would entail payment by the principal of a bonus to the lender; no loan was procured; the broker pocketed the bonus).
court's position was, however, created by Carkonen v. Alberts, which preceded the Pedersen and Mele cases and was neither over-ruled nor clarified by them. The Carkonen case involved a broker orally employed to negotiate for the purchase of land by the principal. The broker bought for himself, using his own money. He subsequently sold the property at a profit. In an action by the principal to impose a constructive trust on the profit, the principal lost. The court's rationale can only be surmised, as the opinion is virtually unintelligible. It seems to deny the existence of any agency. Until the scope and effect of the Carkonen decision is explained by the court it will not be possible to determine with certainty the impact of the statute on controversies between broker and principal, which put agency in issue.

Land Contracts. Just what Statute of Frauds appertains to Washington land transactions is not determinable. The confusion, well developed by 1937, was not diminished by the 1937-1957 cases.

Various questions concerning the memorandum required to satisfy the statute have reached the court. Particularly troublesome were controversies over property descriptions. In Martin v. Seigel a formula was stated which should make the disposition of future litigation about platted property reasonably certain; the memorandum

\[321\] 196 Wash. 575, 83 P.2d 899 (1938); for a critical discussion of the decision see Comment, Real Estate Brokers' Contracts Within the Statute of Frauds, 14 WASH. L. REV. 210 (1939).

\[322\] The original English statute (see 2 WILLISTON, CONTRACTS § 449 (rev. ed. 1936)) covered a "contract or sale of lands, tenements or hereditaments, or any interest in or concerning them." There is abundant evidence that agreements for the conveyance of an interest in land are in this state subject to a Statute of Frauds; whether we have acquired the English statute as a part of our common law, or have a comparable requirement under strained constructions of the statutes relating to leases (RCW 59.04.010) and deeds (RCW 64.04.010 and 64.04.020) is not determinable. In support of the latter analysis are State ex rel. Wirt v. Superior Court, 10 Wn.2d 362, 116 P.2d 752 (1941) and Dowgiella v. Knevage, 48 Wn.2d 326, 294 P.2d 393 (1956), and the earlier case, Richards v. Redelsheimer, 36 Wash. 325, 78 Pac. 934 (1904). Opposed, and suggesting the applicability only of the English statute, are cases which sustain an unacknowledged real estate contract; see e.g., Phillip v. Curtis, 35 Wn.2d 844, 215 P.2d 311 (1950) and the earlier cases therein cited. In Davis v. Alexander, 25 Wn.2d 458, 171 P.2d 167 (1946) an oral partnership to deal in land was sustained (a result conforming to prior Washington authority and to the usual holding elsewhere; see 2 COBB, CONTRACTS § 411 (1950); the court referred to REM. REV. STAT. § 5825 (now RCW 19.36.010)) as though it were in issue. No provision of that statute save the one-year section can by any stretching be made to cover land contracts. Unhelpful on this problem are the many cases in which the court talked about a statute of frauds affecting agreements concerning land, without identifying the details or the source. See, for a good discussion of the whole problem, Comment, The English Statute of Frauds in Washington, 34 WASH. L. REV. 124 (1959). The boundary dispute cases, which seem to be pretty much sui generis, are discussed in Comment, Boundary Disputes in Washington, 23 WASH. L. REV. 125 (1948).

\[323\] 35 Wn.2d 223, 212 P.2d 107 (1949) (description: 309 E. Mercer, ... City of Seattle, County of King; held insufficient.) The case is noted 27 WASH. L. REV. 166 (1952). See also n. 330 below.
must contain "the description of such property by the correct lot number(s), block number, addition, city, county, and state." Whether so rigorous a test can be justified is another matter. A statute of frauds can easily be made to foster a good deal more fraud than it prevents. In the view of Professor Corbin, "it is going far beyond the express provision of the statute to require a memorandum containing an exact and complete description or containing a description that needs no supplementary oral testimony to identify the property." The extreme favoritism shown the statute in the Martin case contrasts strangely with the court's handling of suretyship problems of oral land contracts where the buyer has partly performed.

The Martin case demand for specification of the county and state was considerably ameliorated by Lojberg v. Viles, in which the court indicated that as to Washington land it would take judicial notice of the county and state, where the city was named.

For unplatted property the governing formula appears to be one several times repeated by the court, a "contract for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else must contain a reference to another instrument which does include a sufficient description."
Although the operation of this formula is not entirely clear, it is difficult to see how any description short of the legal description can satisfy the formula. Such a standard is certain and easy to apply; it also goes well past what is needed to protect against fabricated proof of promises to convey.\(^{385}\)

In *Geyen v. Time Oil Co.*,\(^{382}\) the memorandum-signature requirement of the statute was put in issue. The court was apparently willing to regard proof that the parties "accepted and acted upon" the written agreement, unsigned by one party, as a substitute for the missing signature. This is not the usual approach; the case badly needs clarification.\(^{383}\)

A description which included the county, state and "Tax No. 3, in Section Thirty-one, in Township Twelve, North, of Range Forty-two, as at present designated on the tax rolls in the office of the County Assessor," was sustained in *Bingham v. Sherfey*.\(^{384}\) The reference to the assessor's records was accepted, this being unplatted land. Judicial notice was taken of the public-land survey system, supplying the "east" needed to complete the range designation. In *Platts v. Arney*\(^{385}\) involve platted property and which purport to demand only the requirement stated in the Bingham case, are no longer authoritative as to platted property; see *e.g.*, Bonded Adjustment Co. v. Edmunds, 28 Wn.2d 110, 182 P.2d 17 (1947) (involving a lease), noted 24 Wash. L. Rev. 69 (1949).

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381 See Casenote, *Statute of Frauds—Requisites and Sufficiency of a Written Description of Land by Street and Number*, 24 Wash. L. Rev. 69 (1949); see also n. 325 above.


383 The opinion is a most unsatisfactory one. The transaction in question was a lease assignment, signed by the lessee-assignor and by Ruby Geyen for herself and her husband as assignees. The lessor attacked the validity of the assignment, because the husband did not sign personally. That Ruby Geyen was authorized by her husband to sign for him seems evident; if the case involved a Statute of Frauds memorandum problem it could have been (but was not) decided on this fact, since the statute requires only signature "by the party to be charged therewith, or by some person thereunto by him lawfully authorized" (leaving aside the possible argument that the agent's authority must be evidenced by a writing; in the view of courts generally the argument is unsound; see 2 Corbin, *Contracts* § 526 (1950)). The court referred to both the lease and the assignment as "contracts" and cited RCW 19.31.010 as though it applied. That code section (save as it might pick up an assignee's promise, not performable within a year) contains nothing bearing on a lease or a lease assignment. Neither RCW 59.04.010 nor 64.04.010 were mentioned. Having thus arrived at an issue which did not actually exist, i.e., that there was an agreement, to which RCW 19.36.010 applied, the court said: "The written assignment, which was accepted and acted upon by all parties, fully meets the statutory requirement," citing Van Geest v. Willard, 27 Wn.2d 753, 180 P.2d 78 (1947). The Van Geest case did not involve the Statute of Frauds and held only that a party thereto can become bound by a written contract although he does not sign it, his assent being expressed in his conduct. See the discussion at n. 35 above. The Geyen case appears to hold that conduct by a non-signing party can be a substitute for a signature required by the Statute of Frauds, and can be supported only if the husband adopted his name (apparently written in the assignment) as his signature. It will be observed that the court did not discuss or cite decisions holding a signature to exist by reason of adoption. See 2 Corbin, *Contracts* §§ 521, 522 (1950).

384 38 Wn.2d 886, 234 P.2d 489 (1951).

several signed writings were considered and a sufficient memorandum found, it appearing from the instruments themselves that they were part of the same transaction. In Martinson v. Cruikshank an attempt to supplement an inadequate written option by documents not therein referred to failed for the stated reason, "it would require parol evidence to establish their connection with the option agreement." The court was also invited, without success, to estop the defendant from asserting the statute, because the plaintiff, relying "upon the good faith and integrity of the defendant and his ability and willingness to perform," had expended time and money in cruising the timber on the land and in obtaining rights of way to it.

Two actions to reform written agreements containing property descriptions inadequate to satisfy the statute were unsuccessful, the court saying: "Where a contract is void under the statute of frauds, it is not subject to reformation, since the right to reformation presupposes a valid contract." This proposition is squarely opposed to a 1925 decision, which was not mentioned. In 1951 the 1925 case was followed, and the intervening cases were not mentioned.

As of the present writing, the 1951 decision appears to state the court's position on the point. It is to be hoped that the court will adhere to this position. Until the memorandum document is made to say what the parties intended it to say, invocation of the Statute of

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337 Concerning reference problems, see 2 Corbin, Contracts § 512 et seq. (1950), particularly § 515; 2 Williston, Contracts § 580 et seq. (rev. ed. 1936); Restatement, Contracts § 208 (1932); the discussion at n. 380 below.
338 Martinson v. Cruikshank, 3 Wn.2d 565, 101 P.2d 604 (1940); Fosburgh v. Sando, 24 Wn.2d 586, 166 P.2d 850 (1946). The cases elsewhere are divided. 3 Corbin, Contracts § 335 (1950); 5 Williston, Contracts § 1535 (rev. ed. 1936). The Restatement, Contracts § 509 (1932) provides for reformation only where a deed has issued or there has been partial performance.
341 Further support for the reformation remedy is to be found in Geohagan v. Dever, 30 Wn.2d 877, 194 P.2d 397 (1948), a real estate broker case. There the court did distinguish the Martinson and Fosburgh cases (cited n. 338 above), but in a way which is not illuminating. Of them the court said: "In neither of the cases . . . was it alleged that the error in description was caused by a mutual mistake . . ." Since in each of those cases the complaint sought reformation, as to which mutual mistake or fraud is an essential element, this passage is confusing. Moreover, if in those cases there was in fact no allegation of mutual mistake the complaints should have been dismissed for failure to meet the criteria for the remedy sought, and the stated basis for decisions adverse to the plaintiffs, e.g., the unavailability of reformation to correct a mistaken description, was totally unnecessary. See also the following note.
342 Lofberg v. Viles (cited at n. 340 above) was followed in Platts v Arney, 46 W.2d 122, 278 P.2d 657 (1955), which is also interesting in that the action was for damages. The court apparently deemed the pleadings amended to conform to the proof, and the instrument reformed, saying "It is apparent from the instrument itself that the mistake is one of the scrivener . . ."
Frauds is premature. The high degree of proof required of one who seeks the remedy of reformation is protection enough against the hazards of the oral evidence offered in support of the remedy.\footnote{Refusal to reform a contract is manifestly inconsistent with the cases in which deeds have been reformed.\footnote{In Edwards v. Meader a memorandum was held to be sufficient, although the property description was inserted by an agent after the memorandum was signed.}}

In Edwards v. Meader\footnote{In Edwards v. Meader a memorandum was held to be sufficient, although the property description was inserted by an agent after the memorandum was signed.} a memorandum was held to be sufficient, although the property description was inserted by an agent after the memorandum was signed.

That an agreement for the purchase and sale of an interest in land can be specifically enforced despite noncompliance with the Statute of Frauds seems never to have been questioned by our court. By 1937 the criteria which the court would exact were reasonably clear—possession and improvements or payment, consented-to substantial improvements, rendition of the promised services (where the agreement called for support of the promisor as the price for the promised conveyance.)\footnote{In specifically enforcing an oral promise to devise land our court went very far, and opened a veritable Pandora’s box, judging from the high incidence of such cases during the 1937-1957 period. In these, as in most of the part performance appellate litigation.}
tion during this period, the issues were factual. Few of the cases justify discussion here.

Resor v. Schaefer and Richardson v. Taylor Land & Livestock Co. are notable, because the opinions in these cases contain full and helpful discussions of basic problems. In the Resor case Judge Steinert pinpointed a crucial detail—the existence of the alleged agreement must be established by proof of more than ordinary persuasiveness. sold a business at the promisor's request in order to be free to serve. Forsberg v. Everett Trust & Savings Bank, 31 Wn.2d 932, 200 P.2d 499 (1948), noted 24 Wash. L. Rev. 167 (1949), involved an agreement between plaintiff and the decedent, whereby each was to pay half of the cost of acquiring and furnishing the property, after which they would share its occupancy and running expenses, and each would devise her interest to the other; plaintiff fully performed; this the court held to be "sufficient to take the case out of the statute of frauds." Contracts to make mutual wills were specifically enforced in Cummings v. Sherman, 16 Wn.2d 88, 132 P.2d 998 (1943) and In re Fischer's Estate, 196 Wash. 41, 81 P.2d 836 (1938); enforcement was denied in Allen v. Dillard, 15 Wn.2d 35, 129 P.2d 813 (1942), because the agreement was not proved. Although the court said in the Fischer case: "to escape the nullifying effect of the statute a sufficient part performance or full performance of the contract must be shown," the term "full performance" probably cannot be taken literally. In the Allen case the court said, as dictum: "the making of mutual wills is not sufficient part performance to take the agreement without the statute of frauds, in the absence of any other consideration," 15 Wn.2d 35, 50, 129 P.2d 813 (1942). Since each of the promises is to make the will, in a sense the making of a will by one party is full performance. Similarly, if for the oral promise to make a will the consideration is a cash payment which is made, specific enforcement is unlikely. In both the Fischer and Cummings cases the promisee of the promise sought to be enforced had made the will he had promised, had died, and the promisor had taken under his will. Success for the plaintiff who cannot make a similar showing is certainly speculative. If both parties have performed, the defect in their agreement seldom comes to litigation. An exception is Exeter Co. v. Martin, Ltd., 5 Wn.2d 244, 105 P.2d 83 (1940) (oral agreement for surrender of lease; held executed when the lessee relinquished and the lessor resumed possession.)

The case involved a promise to devise land; of actions to enforce such promises the court said: "'[A]lleged oral contracts to devise property have become so frequent in recent years as to occasion alarm and cause courts to become very conservative and even strict, with reference to the nature of evidence required to establish [them]." An oral promise to sell land presents a like problem; an equally high standard of proof should be and probably will be exacted by the court. See McLean v. Archer and Golden v. Mount, n. 349 above. See also 2 CORBIN, CONTRACTS § 442 (1950).
In the Richardson case Judge Steinert discussed the additional proof (i.e. "part performance") requisite for specific enforcement of an agreement the court is satisfied was actually made, and stated the theoretic base on which rests the whole idea of part performance as a counter to the Statute of Frauds: "it would be a fraud upon the purchaser if the vendor were allowed to escape performance of his contract after the purchaser, relying upon the agreement, has done acts which have so altered the relations of the parties as to prevent their restoration to their former position." In Granquist v. McKean the court purportedly added another basic requirement, saying: "the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other relationship, such as that of landlord and tenant, or may be accounted for on some other hypothesis, they are not sufficient." That this passage actually states a part performance element must be questioned. Few indeed of the Washington plaintiffs who have succeeded in obtaining specific enforcement of an oral promise to transfer an interest in land proffered proof of acts unexplainable on any hypothesis save the existence of such a promise.

Two equitable mortgage cases merit attention. One of the traditional subjects of equity jurisdiction is a contract promise to give a mortgage. Such a promise will be specifically enforced or an equitable mortgage decreed to exist, at the instance of a promisee who has himself performed. A promise to execute a mortgage on land is of course within the court stated as the principal elements entry of the promisee into possession, payment and the making of improvements, said payment alone had been held to be insufficient (as to which compare the services cases discussed at n. 347 et seq. above), and of improvements said: "It is a settled proposition that not all improvements or repairs, of however little value, will entitle a vendee to specific performance . . . the improvements must be permanent, substantial, and valuable." These last three adjectives may be more flexible than appears at first encounter; cf. Stephens v. Nelson and Mobley v. Harkins, discussed in n. 349 above.

355 The court stated as the principal elements entry of the promisee into possession, payment and the making of improvements, said payment alone had been held to be insufficient (as to which compare the services cases discussed at n. 347 et seq. above), and of improvements said: "It is a settled proposition that not all improvements or repairs, of however little value, will entitle a vendee to specific performance . . . the improvements must be permanent, substantial, and valuable." These last three adjectives may be more flexible than appears at first encounter; cf. Stephens v. Nelson and Mobley v. Harkins, discussed in n. 349 above.

356 Cited n. 354 above. Professor Corbin suggests that judicial statements about the need for acts of part performance which point to the alleged promise are really another aspect of courts' insistence on clear proof of the promise. 2 CORBIN, CONTRACTS § 430 (1950).

354 In Granquist v. McKean, 29 Wn.2d 440, 457, 187 P.2d 623 (1947), the word "fraud," used in the Richardson case, was amplified to "gross fraud." Just what the court meant to accomplish by adding the word "gross" is undeterminable.

355 Cited n. 354 above. Professor Corbin suggests that judicial statements about the need for acts of part performance which point to the alleged promise are really another aspect of courts' insistence on clear proof of the promise. 2 CORBIN, CONTRACTS § 430 (1950).

356 5 CORBIN, CONTRACTS § 1153 (1950); 5 WILLISTON, CONTRACTS § 1421, p. 3969 (rev. ed. 1936); OSBORNE, MORTGAGES § 25; Klettgen v. Stewart, 125 Wash. 186, 215 Pac. 513 (1923) (from the opinion it might be inferred that insolvency of the promisor is a necessary fact; this interpretation was assumed in Stewart v. Bounds, 167 Wash. 554, 9 P.2d 1112 (1932); the point was not actually in issue in the Klettgen case; insolvency of the promisor is not generally deemed necessary to the relief); Terhune v. Weise, 132 Wash. 208, 216, 231 Pac. 954 (1925), "Since the parties intended to make specific security for the advances, even though the assignment or the transfer of the security was not made at the actual moment the money was lent to the company, yet
the Statute of Frauds,\textsuperscript{357} since a mortgage is a conveyance of an interest in land even though but a lien is transferred.\textsuperscript{358} The statute does not, however, in the view of most American courts, preclude the usual relief for the promisee. The cases are not harmonious in their disposition of the statute, some deeming it met by part performance, others denying the applicability of the statute where the promisee has fully performed. The latter appears to be the preferred analysis.\textsuperscript{359} It was adopted by our court in \textit{Fleishbein v. Thorne};\textsuperscript{360} the court said: "A parol agreement which has been fully performed . . . creates an equitable mortgage. . . . [T]he contract has the effect of an equitable mortgage and is not within the operation of the statute of frauds." \textit{Thompson v. Hunstad}\textsuperscript{361} must be noted here because it is in flat opposition to \textit{Fleishbein v. Thorne}, although decided in 1958 and so outside the twenty year span encompassed by this article. The court held the statute to be applicable despite full performance by the promisee and found full performance by the promisee to be insufficient part performance to meet the statute. The \textit{Fleishbein} case was not cited to, nor by, the court. The opinion contains no discussion of equitable mortgage principles or authorities. In its result the \textit{Thompson} case is not supportable.\textsuperscript{362}
Also of interest is Goodwin v. Gillingham,368 in which the court was obliged to restate another basic proposition; part performance as a counter to the Statute of Frauds is an equitable concept, applicable only where equitable relief is sought.

Agreements not to be performed within a year. RCW 19.36.010 (1) extends the Statute of Frauds coverage to "every agreement that by its terms is not to be performed in one year from the making thereof." Several of the 1937-1957 cases involving this subsection required only routine construction of the statute.369 Gronvold v. Whaley365 is, however, worthy of mention; the court after full dis-operates only on conveyances and contracts which create an interest in land; it can be made to cover a promise to convey only by the construction discussed at n. 322 above. (It should be noted that even where a mortgage document fails to meet the demands of a statute of deeds, the document sufficiently establishes an equitable mortgage where the mortgagor has extended his credit; see Osborne, Mortgages § 32.) When the court came to discuss part performance it cited only Grandquist v. McKean (cited at n. 354 above), for the proposition that the advance of funds was not part performance because it did not point to the alleged agreement, and Richardson v. Taylor Land & Livestock Co. (cited at n. 351 above), for the proposition that courts of equity will ignore the Statute of Frauds only to prevent gross fraud. Neither of these nebulous generalizations gets to the real problem. There is much direct authority on promises to execute a mortgage. The preferred analysis of such promises stresses the promisor's fraud and the insufficiency of legal remedies; a money judgment for restitution is not a fair substitute for the promised security. There are cases in other jurisdictions holding that an equitable mortgage will not be decreed where the promise was verbal and the promisee was to and did loan money for purposes other than acquisition of or improvement of the property; those cases do not represent the prevailing or the better view. Where as in the Thompson case the money was loaned to enable the borrower to acquire the property the generally expectable result is relief for the promisee in the form of an equitable mortgage. See the Annotation cited above, and Annot., Statute of Frauds: Doctrine of part performance as applied to advance of money on oral agreement for mortgage on real estate, 30 A.L.R. 1403 (1924); see also the texts cited above at n. 359.

368 10 Wn.2d 656, 117 P.2d 959 (1941). Cf. the discussion, nn. 367-374 below.
369 Cone v. Ariss, 13 Wn.2d 650, 126 P.2d 591 (1942) (oral conditional sale contract, vendee to pay $657 in $25 monthly installments; statute held applicable; this is the expectable result; see 2 CoRrn, Contracts § 444, p. 539, n. 9 (1950); 2 WILLs-TO, Contracts § 510 (rev. ed. 1936)); Building Union v. Seattle Hosp. Council, 18 Wn.2d 186, 138 P.2d 891 (1943) (oral five year closed-shop union-employer agreement held within the statute even though the parties had also agreed to execute a written contract document; on the ineffectiveness of an agreement to execute a writing, to remove the transaction from the statute, this is the usual holding; see 2 WILLs-TO, Contracts § 495, p. 1448, n. 13 (rev. ed. 1936)). Hansen v. Columbia Breweries, Inc., 12 Wn.2d 554, 122 P.2d 489 (1942) (oral agreement made on July 12, 1940 to work for a year, commencing July 1, 1940, is not within the statute); Dowgialla v. Knevage, 48 Wn.2d 326, 294 P.2d 393 (1956) (where the agreement does not specify when performance is to be rendered the date for performance will be determined by ascertaining the intent of the parties, on examination of their objective and the surrounding circumstances).
365 39 Wn.2d 710, 237 P.2d 1026 (1951). See also von Herberg v. von Herberg, 6 Wn.2d 100, 106 P.2d 737 (1940) (promise to pay in two years or upon the sale of indicated property is outside the statute); Sargent v. Drew-English, Inc., 12 Wn.2d 320, 121 P.2d 373 (1942) (agreement for an indefinite term, terminable at will, is performable within a year); Davis v. Alexander, 25 Wn.2d 458, 171 P.2d 167 (1946) (followed the Drew case on a similar problem); Gasch v. Compton, 36 Wn.2d 782, 220 P.2d 331 (1950) (agreement for life support is performable within a year). The von Herberg, Drew, Davis and Gasch cases conform to the usual construction of the statute; see 2 CoRrn, Contracts § 446 (1950).
discussion reaffirmed its refusal to apply the statute where the agreement could have been performed within a year, however unlikely it was, when the agreement was made, that performance would occur within a year.\textsuperscript{366} Also notable are Foelkner v. Perkins\textsuperscript{367} and Sunset Oil Co. v. Vernter,\textsuperscript{368} which indicate that an agreement not to be performed within a year is removed from the statute by part performance. This is a position at variance both with prior Washington decisions\textsuperscript{369} in which agreements calling for the transfer of an interest in land were not in issue, and with the majority view in other American jurisdictions.\textsuperscript{370} Neither opinion discusses the contrary cases or otherwise demonstrates awareness by the court that it was upsetting a proposition generally deemed settled. Until further light on the problem is provided by the court, it would not be wise to assume that the Foelkner and Sunset Oil Co. cases will be followed. On the other hand, there is much merit in Professor Corbin's argument that the one-year section should yield to part performance where equitable relief is sought and criteria comparable to those developed in the land contract cases are satisfied.\textsuperscript{371} Tested by the standard he proposes, the Foelkner case (but not Sunset Oil Co. v. Vertner, supra) was rightly decided\textsuperscript{372} and

\textsuperscript{366} This is the usual construction. See Restatement, Contracts § 198, comment b (1932); 2 Corbin, Contracts § 444 (1950); 2 Williston, Contracts § 495 (rev. ed. 1936).

\textsuperscript{367} 197 Wash. 462, 85 P.2d 1095 (1938).

\textsuperscript{368} 34 Wn.2d 268, 208 P.2d 906 (1949).

\textsuperscript{369} Union Savings & Trust Co. v. Krumm, 88 Wash. 20, 152 Pac. 681 (1915); Hendry v. Bird, 135 Wash. 174, 237 Pac. 317, 240 Pac. 565 (1925). See also Hamilton v. Atlas Freight, Inc., 184 Wash. 199, 50 P.2d 522 (1935); Cone v. Ariss, 13 Wn.2d 650, 126 P.2d 591 (1942); Dowgialla v. Knevage, 48 Wn.2d 326, 294 P.2d 393 (1956). The Dowgialla case involved a plaintiff who had performed; this fact was not discussed. The Cone case involved a plaintiff who had partly performed; although the part-performance doctrine was not discussed by the court, the Hendry case was cited as factually similar and controlling; the Foelkner case (n. 367 above) was not cited. The cases before 1934 are discussed in Comment, Statute of Frauds—Contracts Not to Be Performed Within a Year, 9 Wash. L. Rev. 105 (1934).

\textsuperscript{370} See 2 Corbin, Contracts § 459 (1950).

\textsuperscript{371} 2 Corbin, Contracts § 459 (1950), particularly p. 583.

\textsuperscript{372} In Foelkner v. Perkins (n. 367 above), the seller under a land-purchase contract sought to cancel the contract for alleged defaults and the buyer successfully resisted the action by establishing part performance of an oral extension agreement; the defense was in essence specific enforcement of the oral agreement. Although the point was not stressed by the court, it is of some interest that Oregon & Washington Ry. v. Elliott Bay Mill & Lumber Co., 70 Wash. 148, 126 Pac. 406 (1912), the case principally relied on, was one involving the land-contract Statute of Frauds. The court has not demonstrated, in specifically enforcing an oral promise to transfer an interest in land, any reluctance to grant the relief because the promise was not performable within a year; see e.g., Garbrick v. Franz, n. 349 above. The Sunset Oil Company case involved a contract to buy and sell oil, assignment of his interest by the seller, default by the buyer, and suit by the assignee. The buyer defended on the ground, among others, that there was no mutuality because the assignee had not assumed the obligations of the seller, his assumption promise being oral and not enforceable by the buyer. This defense the court met by pointing to performance by the assignee to the buyer, after the assignment and until default by the buyer; Foelkner v. Perkins and
Hendry v. Bird, our leading contrary decision, cannot be sustained.

Sales. RCW 63.04.050(1) reads:

A contract to sell or a sale of goods or choses in action exceeding the value of fifty dollars shall not be enforceable unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale is signed by the party to be charged or his agent in that behalf.

Of the several cases in which the court had occasion to consider

Rowland v. Cook, 179 Wash. 624, 38 P.2d 224 (1934) (involving a lease) were cited. Equitable relief was not involved and for that reason the part-performance doctrine was not properly applicable. Whether a promise to assume and pay the promisee’s obligation to another person is void under the one-year section has in the few cases which have considered the question been answered in the negative; Osborne, Mortgages § 235. Since the contract is between promisor and promisee and the latter has in the usual case fully performed, this seems to be the right answer. See the discussion, n. 374 below. On this basis, the court in the Sunset Oil Company case reached a sound result, withal on an unsatisfactory rationale. The result is certainly supported by cases like Frazey v. Casey, 96 Wash. 422, 165 Pac. 104 (1917), in which the court enforced an oral assumption promise.

This part of the Uniform Sales Act is followed by subsections (2) (excluding contracts for the manufacture of goods especially for the buyer) and (3) (“There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods”). As to some cases, another statute is also important. The assignment of accounts receivable filing statute, RCW 63.16.010 et seq., restricts to a written assignment signed by the assignor the protection accorded by the filing of a statutory notice.

Bay Construction, Inc. v. Olsen, 23 Wn.2d 307, 161 P.2d 177 (1945) (oral agreement by which plaintiff was to fill and rough-grade part of a construction site; defendant’s Statute of Frauds defense was rejected, on finding that the plaintiff had delivered several loads of dirt to the site before defendant directed him to cease performance); Gronvold v. Whaley, 39 Wn.2d 710, 237 P.2d 1026 (1951) (joint venture agreement under which plaintiff was to receive a 25 per cent interest to be represented by stock to be held by defendant until his cash investment was recouped from earnings; held, not a contract of sale); Pettaway v. Commercial Automotive Serv., Inc., 49 Wn.2d 650, 306 P.2d 219 (1957) (part payment by buyer, of agreement for the purchase of a new car, found in buyer’s delivery of his used car to the seller); Roberts v. Williams, 6 Wn.2d 509, 108 P.2d 334 (1940) (buyer made an offer, accompanied by her check for part of the price; this offer was refused but the check was not returned; buyer then made a second offer, which was accepted; the check was held to be part payment, on a finding that the parties so intended; no particular attention was given to the fact a check rather than cash was involved, a point which was at issue in a later Washington case discussed at nn. 377, 379 below).
this statute, only Maryatt v. Hubbard\(^{377}\) and Grant v. Auvil\(^{378}\) require mention. The Maryatt case put in issue, for the first time in Washington, the sufficiency of a check as "part payment." After acknowledging that a check can be payment for the purposes of the statute, the court stated the governing criteria to be intent by the buyer to pay and intent by the seller to receive and accept the check as payment.\(^{379}\)

The key issue under this formula is a fact one; payment was found, in the Maryatt case. Grant v. Auvil involved a written but unsigned order for goods, followed by a signed message reading in part "[W]ill you please cancel my order?" The court discussed the requirements for a "memorandum in writing"\(^{380}\) and concluded that the statute was not satisfied because the signed message did not sufficiently identify the unsigned writing. The court went on, however, to say: "If the signed memorandum makes no reference to the unsigned memorandum, they may not be read together. Parol evidence is inadmissible to connect them." This passage appears to demand an express reference in the signed writing, to the unsigned writing, a view which may be over-technical\(^{381}\) and which is in conflict with the position taken in an earlier Washington case.\(^{382}\)

\(^{377}\) 33 Wn.2d 325, 205 P.2d 623 (1949).
\(^{378}\) 39 Wn.2d 722, 238 P.2d 393 (1951), noted 27 Wash. L. Rev. 231 (1952).
\(^{379}\) This is the position generally taken by other courts. 2 Corbin, Contracts § 495, p. 668, note 46 (1950). The contrary result has been reached where the check was given and received as conditional payment only; Professor Corbin suggests that the distinction between payment and conditional payment is not a valid one. 2 Corbin op. cit. § 495, p. 669. A few courts have purported to require proof of an express agreement to receive the check as payment. Annot., Check as payment within contemplation of Statute of Frauds, 8 A.L.R. 2d 251 (1949). The Restatement, Contracts § 205 (1932) appears to make delivery and receipt of a check proof enough of "payment," leaving no open issue about the parties' intent.

The court recognized that a signed writing purporting to deny or cancel the earlier transaction can be a memorandum (the usual result; 2 Corbin, Contracts § 511 (1950)) and that signed and unsigned writings can be considered together where the internal reference is adequate; identification of the transaction in the signed writing is not enough; what must be identified is the other writing.

\(^{380}\) This is the position generally taken by other courts. 2 Corbin, Contracts § 582 (rev. ed. 1936); 2 Corbin, Contracts § 512 (1950). See also Restatement, Contracts § 208(b) (iii) (1932).

\(^{381}\) Jones-Scott Co. v. Ellensburg Milling Co., 108 Wash. 73, 183 Pac. 113 (1919). The action was by seller against buyer. The unsigned writing was a letter from the seller to the buyer; the signed writing was the buyer's reply, reading: "If you will give me time I will take the wheat bought from you in August." The court said: "We think there can be no doubt that this letter refers to the contract mentioned by the [seller's letter]." The case seems to fall within the group of which Professor Corbin said, with approval, "The necessity of any internal reference at all, much more the necessity of a completely identifying internal reference, is dependent on the surrounding facts. If in the light of this accompanying evidence, the court is convinced that no fraud is being perpetrated and that the several writings, taken together, evidence with reasonable certitude the terms of the contract, internal references can be dispensed with." 2 Corbin, Contracts § 512, p. 746, 747 (1950). In Grant v. Auvil, the Jones-Scott Company case was distinguished, the court saying of it, that the signed writing "contained an internal identifying reference." . . . The differentiation is not persuasive. Where in the buyer's letter is there an "identifying reference?" The Jones-Scott
Parol Discharge Agreement. An oral accord followed by satisfaction, in *Kelly Springfield Tire Co. v. Faulkner*, was held to discharge a written guaranty contract.

The Scope and Meaning of Contracts. The number of 1937-1957 cases cited or discussed in this section is proof enough of the frequency with which interpretation and parol evidence rule controversies occur. It is proof too that precise exposition is not easy in the English language and that the parol evidence rule is not one of the clearer doctrines. Carelessness, preconceptions, or thinking so fuzzy that no clear purpose is ever really achieved much less expressed can compound the risk of ultimate disagreement. After reading a few hundred of these cases a prospective draftsman, no matter how experienced, would probably approach his job with increased humility and caution.

Interpretation. The later cases demonstrate no marked departures from the patterns previously set. They do emphasize a cleavage concerning the interpretation of a contract evidenced by a writing, which will be discussed at some length below.

Interpretation controversies may involve a single word, or words in combination, or conduct. Our concern here is with words, and with conduct insofar as it may affect the meaning of words.

Interpretation is the process by which the meaning of an expression of purpose is determined. If the parties, when they made their case appears to be irreconcilable with the quoted passage from the Grant case, requiring an internal reference. It will be observed that the result of the Grant case did not require resort to a requirement of internal reference. Whether the word "order" sufficiently identified the unsigned writing was a question of fact. When it is resolved against identification, there is no memorandum.

191 Wash. 549, 71 P.2d 382 (1937). The result seems obviously sound although the court's explanation leaves something to be desired. The court quoted from an earlier Washington decision in which the fact that the discharge transaction was "executed" was stressed. The problem is more complicated. An accord is not within any statute of frauds unless it involves a performance such as transfer of an interest in land or a chattel, which the statute covers. The mere fact the duty sought to be discharged was created by a written contract within the statute does not extend the statute to the accord. (Cf. *Restatement, Contracts* § 522 (1932), discussing rescission agreements). The typical accord, under which the obligor's performance is payment, within a year, is not within the statute. The Kelly Springfield Tire Company case did involve a performance (transfer of tires) which was within the statute. The tires were at once delivered however and the statute was accordingly satisfied.

Conduct as a basis for implication was discussed above, under the subheadings "Implied Contracts" and "Implication," at n. 3 et seq., and n. 15 et seq.

Restatement, Contracts § 226 (1932); 3 Williston, Contracts §§ 601, 602 (rev. ed. 1936). In a contract transaction the expression of purpose will normally relate to what a promisor will do and under what circumstances; disputes about meaning will accordingly be disputes about the scope of a promised performance. Where the issue is contract formation, e.g., whether a particular communication is an offer, the inquiry often ranges into other aspects. See the discussion above under the subheading "Offer," at n. 36 et seq. See also n. 389 below.
agreement, expressed no purpose with regard to the details now in dispute, the court will not under guise of interpretation supply those details.\[^{386}\] Schoenwald v. Diamond K Packing Co.\[^{887}\] is illustrative.\[^{388}\]

Obviously critical are the legal principles by which the court will be guided in resolving disputes about meaning. Several of these principles can be ascertained and restated with reasonable assurance. The goal of interpretation is to find the meaning objectively expressed in language or conduct (not what went on in the mind of the speaker, writer or actor).\[^{389}\] It is not the court’s function to construct or re-

\[^{386}\] 3 CORBIN, CONTRACTS § 534 (1950).
\[^{387}\] 192 Wash. 409, 73 P.2d 748 (1937). A contract document covering a joint venture in the operation of fish traps specified in detail the duties of the defendant as operator of the traps and provided for operation by the plaintiff on a contingency (which occurred), saying of his operation only that he “shall have the right to make arrangements for the construction and maintenance of this trap for the benefit of both parties . . . .” The trial court in a declaratory judgment action entered a decree requiring the plaintiff to do a number of the things which the defendant undertook to do while it operated the traps. This, the supreme court held, was error because the parties expressed no purpose about the details of plaintiff’s operation and interpretation must end when the meaning of the quoted passage is ascertained. This passage expresses only a purpose to have a joint venture with equal sharing of the burden or benefits. The trial court’s additions amount to making a new contract. The court’s analysis and solution seem to be eminently sound.

\[^{388}\] See also Chaffee v. Chaffee, 19 Wn.2d 607, 145 P.2d 244 (1944); Merlin v. Rodine, 32 Wn.2d 237, 203 P.2d 683 (1949); Tube-Art Display, Inc. v. Berg, 37 Wn.2d 1, 221 P.2d 510 (1956); Silen v. Silen, 44 Wn.2d 884, 271 P.2d 674 (1954); Cf. the discussion below at nn. 416 and 427; if the parties agree on additional terms but fail to state them in the written agreement, the parol evidence rule (or its exceptions) governs proof of them.

\[^{389}\] Vance v. Ingram, 16 Wn.2d 399, 133 P.2d 938 (1943) (the opinion also suggests that if the writing is ambiguous, “the actual unexpressed intentions of the parties may be considered; similarly in Downie v. Coolidge, 48 Wn.2d 485, 294 P.2d 926 (1956) evidence offered to show the ‘intent of the parties in executing’ the document was rejected for the stated reason, ‘the agreement was not ambiguous on its face’; the propriety of inquiry into unexpressed purpose, even to resolve ambiguity, (is) doubtful); Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 349, 147 P.2d 310 (1944) (“It is the duty of the court to declare the meaning of what is written, and not what was intended to be written”); Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 257 P.2d 784 (1953); Balcke v. Columbia Valley Lumber Co., 49 Wn.2d 165, 298 P.2d 849 (1956). An exception, important but of very limited application, must be made where mistake is in issue. See Vance v. Ingram, supra, and the discussion above under the subheading “Mistake,” at n. 91 et seq.; see also RESTATEMENT, CONTRACTS §§ 71, 230 comment a, 233 comment b (1932); 3 CORBIN, CONTRACTS § 538 (1950); Reid Co. v. M-B Contracting Co., 46 Wn.2d 784, 285 P.2d 121 (1955). There may be still another exception. The unexpressed purpose (i.e., not to accept) of an offer and a unilateral contract, who does the requested act, may be relevant. See RESTATEMENT, CONTRACTS § 55 (1932); 1 WILLOSTON, CONTRACTS §§ 66, 67 (rev. ed. 1936). “Intent of the parties,” a phrase which recurs in the opinions, has subjective-purpose connotations which do not actually appertain outside the mistake area. It is evident too that the phrase “the parties” has troublesome connotations if taken literally. If both parties have adopted the questioned language, as will be the case where they adopt a writing as expressing their purpose, the phrase is not confusing. If the questioned language is that of one party, not adopted by the other, as may be the case when a letter offer is accepted, the phrase is misleading. For the latter situation the RESTATEMENT proposes, as the basic interpretation technic, giving the expression of purpose the meaning which the one who used it should reasonably have expected the other to give it. RESTATEMENT, CONTRACTS § 233 (1932). For the integration, i.e., language adopted by both parties, the RESTATEMENT proposes a different technic; the language will be given
construct a contract, withal the court might accomplish a considerably better contract than did the parties.\textsuperscript{890}

Where the dispute is about the meaning of a word, the "ordinary meaning" will govern unless there is a sufficient reason for taking some other meaning.\textsuperscript{891} The ordinary meaning is often found by consulting the meaning which a "reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean" would give it. Restatement, Contracts § 230 (1932). See also 3 CORBIN, CONTRACTS §§ 537, 538 (1950). The language of the Washington opinions does not appear to differentiate in this way between integrated and nonintegrated agreements.\textsuperscript{892}

\textsuperscript{890}See for examples the cases cited in nn. 387 and 388 above; Clements v. Olsen, 46 Wn.2d 445, 282 P.2d 266 (1955); and Peters v. Watson Co., 40 Wn.2d 121, 241 P.2d 441 (1952). Just how far this proposition extends is not clear; it has let-the-chips-fall-where-they-may implications which are offset by other ideas, implicit in some of the specific canons of interpretation indicated below; for example, the preference of the court for a reasonable and effective result.

\textsuperscript{891}Handley v. Oakley, 10 Wn.2d 396, 116 P.2d 833 (1941); Seattle v. Northern Pac. Ry., 12 Wn.2d 247, 121 P.2d 392 (1942); Bellingham Sec. Syndicate v. Bellingham Coal Miners, Inc., 13 Wn.2d 370, 125 P.2d 668 (1942); Cleveland v. Sun Life Assurance Co., 13 Wn.2d 318, 125 P.2d 251 (1942) (rule apparently following Gray v. Tarbox, 14 Wn.2d 236, 127 P.2d 415 (1942); Omicron v. Hansen, 16 Wn.2d 362, 133 P.2d 505 (1943) (rule apparently followed); Vernon v. Equitable Life Assur. Soc'y, 15 Wn.2d 94, 129 P.2d 801 (1942) (rule apparently followed); Viking Sprinkler Co. v. Pacific Indus. Co., 19 Wn.2d 294, 142 P.2d 394 (1943) (in re Garrity's Estate, 22 Wn.2d 391, 156 P.2d 217 (1945); Evans v. Metropolitan Life Ins. Co., 26 Wn.2d 594, 174 P.2d 961 (1946) (the opinion contains an unusually good statement of the basic principle); Jack v. Standard Marine Ins. Co., 33 Wn.2d 265, 205 P.2d 351 (1949) (indicating that the ordinary meaning will not govern where the over-all purpose of the contract dictates otherwise); Mead v. Anton, 33 Wn.2d 741, 207 P.2d 227 (1949); Minder v. Bowley, 15 Wn.2d 92, 211 P.2d 170 (1949); Finch v. King Solomon Lodge No. 60, 40 Wn.2d 440, 243 P.2d 645 (1952); Rew v. Beneficial Standard Life Ins. Co., 41 Wn.2d 577, 250 P.2d 956 (1952); Boeing Airplane Co. v. Firemen's Fund Indem. Co., 44 Wn.2d 498, 268 P.2d 654 (1954) (rule stated but not applied; the controversy concerned the meaning of an insurance policy word, "possession"; this the court said was ambiguous, a conclusion apparently reached upon examining "possession" as a legal concept rather than examining a standard dictionary. In effect, the court recognized that a word may be used by the parties in other than its ordinary usage); this idea also appeared in Christensen v. Sterling Ins. Co., 46 Wn.2d 713, 284 P.2d 287 (1955) (the word "war" was found to have been used in a non-technical way and to be operative as intended by the parties). On the other hand, the word "radius" was in LeMaine v. Seals, 47 Wn.2d 259, 287 P.2d 305 (1955), given a literal meaning because a prior case (Mead v. Anton, supra) had so held; the rationale is unsupportable. The meaning of no word is fixed by its interpretation in one decision, or in many; each decision represents but a finding as to the intent of the parties. There are instances in which the law fixes the meaning of a word. See Restatement, Contracts § 234 (1932); this is not such an instance. Pierce County v. King, 47 Wn.2d 328, 287 P.2d 316 (1955) is also of interest at this point. The word "sale," used in a real estate contract clause dealing with alienation by the vendee, was found not to encompass condemnation. A prior case reaching a contrary interpretation of a lease provision was urged on the court, without success. Although the court referred to "the rule" announced in the prior case (certainly an erroneous evaluation of the effect of interpretation), it was held inapplicable. The reason apparently appears in the passage, "It may be useful for some purposes to regard a condemnation as a forced sale, but the two types of transactions certainly are not identical in all respects ...", Just where "ordinary meaning" ends and ambiguity begins can be difficult to determine; in Selective Logging Co. v. General Cas. Co., 49 Wn.2d 347, 301 P.2d 535 (1956) the court was obliged to determine what "handling" meant; the word appeared in the exclusion clause of a liability policy; it was found on examining WORDS AND PHRASES to have various "ordinary" meanings and hence to be in a sense ambiguous; yet the
a standard unabridged dictionary, sometimes by finding what meaning other courts have given the word, and sometimes by methods the court does not disclose. If a word has several "ordinary" meanings, the combination of which the word is a part will usually indicate the right choice. If it does not, there is ambiguity which will be resolved by resort to the techniques used when a combination of words is ambiguous.  

Several "sufficient reasons for taking some other meaning" are illustrated in the cases; these probably do not exhaust the possibilities, although the limits of the idea remain obscure. One important reason is the necessity for making the word jibe with the rest of the combination of which it is a part.  

The over-all meaning must control. Multiple documents will accordingly be interpreted together if they comprise one transaction.  

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[Footnotes]

1. In Truck Ins. Exch. v. Rohde, 49 Wn.2d 465, 303 P.2d 659 (1956), the word "accident" was interpreted; the court started with the "ordinary," i.e., the dictionary meaning.

2. Selective Logging Co. v. General Cas. Co., 49 Wn.2d 347, 301 P.2d 535 (1956), seems to be an example; the multiple meanings were ascertained by consulting Words and Phrases; the court concluded that none of the possible meanings of the key word was broad enough to encompass plaintiff's claim. As to the techniques by which ambiguity will be resolved, see the discussion at n. 397 et seq. below.

3. Simons v. Stokely Foods, Inc., 35 Wn.2d 920, 216 P.2d 215 (1950) (usage; see the discussion below under that section heading); Jack v. Standard Marine Ins. Co., 33 Wn.2d 265, 205 P.2d 351 (1949) (over-all purpose dictated a non-ordinary meaning); Boeing Airplane Co. v. Fireman's Fund Indem. Co., 44 Wn.2d 456, 285 P.2d 654 (1954) (the "broadest" meaning was given to the word "possession" after examining the "surrounding circumstances"); Christensen v. Sterling Ins. Co., 46 Wn.2d 713, 284 P.2d 287 (1955) (the word "war" was found to have been used in a non-technical way; over-all purpose was probably the controlling idea). Several of these cases are discussed in n. 391 above. See also Restatement, Contracts § 227 (1932), which indicates some of the possible standards which the parties themselves may contemplate when they use a word. In connection with terms of art in a trade or profession see Restatement, Contracts § 235(b) (1932) and the Washington Annotations to that subsection.

4. Ethredge v. Diamond Drill Contracting Co., 196 Wash. 483, 83 P.2d 364 (1938) (original contract document and a subsequently executed writing evidencing a modification agreement); Vance v. Ingram, 16 Wn.2d 399, 133 P.2d 938 (1943); Brun v. Northern Life Ins. Co., 16 Wn.2d 564, 134 P.2d 84 (1943) (application and life insurance policy); Moore v. Gillingham, 22 Wn.2d 655, 157 P.2d 598 (1945) (sale contract and deed); Largent v. Ritcher, 38 Wn.2d 856, 233 P.2d 1019 (1951) (commission agreement read with earnest money agreement); Paine-Gallucci, Inc. v. Anderson, 41 Wn.2d 46, 246 P.2d 1095 (1952) (bid, building contract and specifications interpreted together as parts of the same transaction; the analysis seems faulty; the bid was not a part of the contract and was merged into the contract document; examination of the bid was justifiable but on another ground; the bid was part of the "surrounding circumstances." See the discussion below at n. 403 et seq.); Brown v. Poston, 44
If the court deems the over-all meaning to be unclear, whether because a key word has multiple meanings or otherwise, there are at hand several ways to resolve the conflict. The conduct of the parties, i.e., “practical construction,” may provide an answer.\textsuperscript{296} Specific provisions control general ones.\textsuperscript{297} A recital can be considered.\textsuperscript{298} A type-written clause will prevail over an inconsistent printed one.\textsuperscript{299} An interpretation which gives a reasonable and effective operation to all of the language is to be preferred.\textsuperscript{300} Ambiguity will be resolved against the person who used the unclear language.\textsuperscript{301} Ambiguity will

\textsuperscript{296} Wn.2d 717, 269 P.2d 967 (1954) (building contract read with the plans and specifications). See also RESTATEMENT, CONTRACTS §§ 230, 235(d) (1932).


\textsuperscript{298} Local 104, Int'l Bhd. of Boilermakers v. International Bhd. of Boilermakers, 28 Wn.2d 536, 183 P.2d 504 (1947).


\textsuperscript{300} Franklin v. Northern Life Ins. Co., 4 Wn.2d 541, 104 P.2d 310 (1940) (the court also said that the insuring clause of a group life policy would control if in conflict with subsequent clauses); Brun v. Northern Life Ins. Co., 16 Wn.2d 564, 134 P.2d 84 (1943) ; Preugschat v. Hedges, 41 Wn.2d 660, 251 P.2d 166 (1952) (lease; rule stated but not applied because the two provisions were reconcilable).


also justify the admission of evidence about the circumstances under which the agreement was reached;\textsuperscript{402} (whether this evidence should come in even where the writing is not ambiguous is discussed in the following paragraphs). One of these propositions may conflict with another; which the court will use in a given situation will be difficult to predict. No sequence or hierarchy of importance has been stated.

There remains to be discussed the interpretation issue which presents the greatest difficulty. If the disputed language is written, will the proponent of one meaning be permitted to aid his cause by verbal testimony? If so, what is the permissible range such testimony can take? On these important details the Washington cases are in confusion.

There are cases in which the court examined the circumstances surrounding the execution of a writing as an aid to its interpretation and sustained the admissibility of the pertinent evidence even though the writing might on its face be unambiguous.\textsuperscript{403} The position taken

\textsuperscript{402}For case citations see n. 404 below.

\textsuperscript{403}For case citations see n. 404 below.
in these cases is the one endorsed by Professors Corbin and Williston and by the Restatement of Contracts.\textsuperscript{404} It is the only approach which can consistently yield interpretations likely to coincide with the meanings the parties contemplated.\textsuperscript{405}

There are other cases in which the court indicated that it will not look beyond the four corners of a contract writing unless what appears within those four corners is ambiguous.\textsuperscript{406} The reason is variously

\textsuperscript{404}Ethridge v. Diamond Drill Contracting Co., 196 Wash. 483, 83 P.2d 364 (1938) (evidence admitted because of ambiguity); Stipich v. Marovich, 13 Wn.2d 155, 124 P.2d 215 (1942) (evidence admitted because of ambiguity); Bellingham Sec. Syndicate v. Bellingham Coal Mines, Inc., 13 Wn.2d 370, 125 P.2d 668 (1942) (“It is only in those cases where the writing fails to provide the answer to a question of meaning that the courts may look elsewhere for aid in construction. Where the terms are plain and unambiguous, the meaning of the contract is to be deduced from its language.”); Hansen v. Lindell, 14 Wn.2d 643, 129 P.2d 234 (1942) (evidence admitted because of ambiguity); Hoover v. Sandifur, 25 Wn.2d 791, 171 P.2d 1069 (1946) (evidence admitted because of ambiguity); Goerg v. Elliott, 27 Wn.2d 600, 179 P.2d 320 (1947) (evidence admitted because of ambiguity); Macri v. Bergevin, 30 Wn.2d 654, 193 P.2d 360 (1948) (evidence refused; “In a case where, after all the rules of construction of a contract have been used, there is still a clear ambiguity, parol evidence is admissible, not to vary or to modify the written instrument, but to explain it.”); Reinemann v. Anderson, 34 Wn.2d 809, 210 P.2d 304 (1949) (evidence admitted because of ambiguity); Minder v. Rowley, 35 Wn.2d 92, 211 P.2d 170 (1949) (evidence of “circumstances existing at or about the time of the execution of the agreement” was refused, although offered to explain the writing); Jackson v. Domschot, 40 Wn.2d 30, 239 P.2d 1058 (1952) (“the language of the real-estate contract
stated as an interpretation principle, or as an application of the parol evidence rule. Neither reason is persuasive. If there is to be an interpretation rule restricting the inquiry to the writing, it must rest on an assumption about the clarity of written language which experience shows to be ill-founded. Adoption of the language by both parties adds nothing to its reliability; if the language has been integrated in a writing the agreement is entitled to the protection of the parol evidence rule, but what is to be protected cannot be known until the writing has been interpreted. The cart is very much in front of the horse if the parol evidence rule is employed to exclude evidence proffered in aid of interpretation. The argument that evidence offered for this purpose should be rejected because it may "vary" or "contradict" the "plain meaning" of the writing is without substance; interpretation may have precisely those effects, and properly so. A writing, read in light of the circumstances under which it was executed, may well prove to have a meaning it would not have if read in a vacuum. This does not mean the surrounding circumstances will usually or even often require a non-literal interpretation of the writing; they may in fact bolster such an interpretation. It does mean that as a matter of technic, the door should not be closed on the occasional litigant as to whom those circumstances point to a non-literal meaning.

These two groups of cases appear to be irreconcilable. The schism developed before 1937 and the fact of its existence has been ignored in the later cases. That it is not known to the court seems unlikely. The cases are too numerous. Conflicting decisions are often close in question is clear and not susceptible of interpretation."; Keeter v. John Griffith, Inc., 40 Wn.2d 128, 241 P.2d 213 (1952) (evidence admitted because of ambiguity); Preugschat v. Hedges, 41 Wn.2d 660, 251 P.2d 165 (1952) (court approved trial court's refusal to consider "the negotiations and background leading up to the execution of this lease," there being no ambiguity); Boeing Airplane Co. v. Firemen's Fund Indem. Co., 44 Wn.2d 488, 268 P.2d 654 (1952); Washington Fish & Oyster Co. v. G. P. Halferty & Co., 44 Wn.2d 646, 269 P.2d 806 (1954); Silen v. Silen, 44 Wn.2d 884, 271 P.2d 674 (1954); Schwieger v. Robbins & Co., 48 Wn.2d 22, 250 P.2d 984 (1955) ("Neither will the courts permit oral testimony to establish or create an ambiguity in a written contract."); Henry v. Morrow, 49 Wn.2d 270, 300 P.2d 574 (1956) (evidence admitted because of ambiguity).

No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined what the writing means. The 'parol evidence rule' is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation." 3 CORBIN, CONTRACTS § 579 (1950). "All courts agree that the written memorandum must be interpreted according to legal rules, and that, when so interpreted meanings may sometimes be given to it which would not have been apparent without parol evidence." 3 WILLISTON, CONTRACTS § 632 (rev. ed. 1936). See also RESTATEMENT, CONTRACTS §§ 238(a), 242 (1932).

See the cases cited, WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 230, 238(a) (1932).
together in time. For example, compare *Clements v. Olsen*\(^{409}\) and the passage reading:

> In ascertaining the intention of the parties to a written instrument, the courts must look to the wording of the instrument itself as made by the parties, view it as a whole, and consider all of the circumstances surrounding the transaction, together with the interpretation of the instrument by the parties themselves as indicated by their subsequent acts,

with *Boeing Airplane Co. v. Firemen's Fund Indemnity Co.*\(^{410}\) and the passage reading:

> Where the terms of a contract taken as a whole are plain and unambiguous, the meaning of the contract is to be deduced from its language alone, and it is unnecessary for a court to resort to any aids to construction. . . . But where the language of a contract is ambiguous . . . it is the duty of the court to search out the intent of the parties by viewing the contract as a whole and considering all of the circumstances surrounding the transaction, including the subject-matter and the subsequent acts of the parties.

It would be useful to know why the court permits this conflict to continue. Examination of the later opinions has suggested no worthwhile clue. It would be useful to know under what circumstances counsel may expect the court to take one approach or the other. No reliable basis for prediction has been found. In some of the "four-corners" cases, the excluded evidence may have gone beyond the fair limits of "surrounding circumstances," or had little probative value.\(^{411}\) Both points are most illusive. One may suspect that ambiguity is sometimes found, where reasonable men might differ about its existence.\(^{412}\) This too is an illusive point.

*The parol evidence rule.* For the most part, the later parol evidence

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\(^{409}\) 46 Wn.2d 445, 282 P.2d 266 (1955) (although the issue was interpretation of a deed, the disputed deed clause evidenced part of a life support agreement; for the quoted language a contract case was cited).

\(^{410}\) 44 Wn.2d 488, 269 P.2d 654 (1954) (ambiguity was found and evidence of the surrounding circumstances was admitted).

\(^{411}\) There must be some limits to "surrounding circumstances" but where the dividing line falls is unclear. See the discussion at n. 389 above. Although the detail is not one about which assurance can be reached, it seems that the proponent of proof of surrounding circumstances is on occasion trying to make from them a good deal more that he could reasonably expect a court to swallow. The unpersuasiveness of the proffered proof is not however a valid reason for excluding it.

\(^{412}\) Cascade Timber Co. v. Northern Pac. Ry., 28 Wn.2d 684, 184 P.2d 90 (1947) may be an example.
rule cases reiterated long established basic propositions.\footnote{For the earlier cases, see Washington Annotations, Restatement, Contracts § 236 et seq. The operation of the rule as a reason for refusing to consider parol proof is illustrated by the following 1937-1957 cases: Asher Bros. Gen. Illuminating Co. v. General Illuminating Co., 193 Wash. 105, 74 P.2d 495 (1937); Sears, Roebuck & Co. v. Nicholas, 24 Wn.2d 128, 97 P.2d 633 (1940); Doppe v. Alderman, 12 Wn.2d 268, 121 P.2d 388 (1942); Schnitzer v. Panhandle Lumber Co., 14 Wn.2d 434, 128 P.2d 501 (1942) (bill of sale excepted a particular engine; buyer not permitted to show a prior agreement for inclusion of the engine if the seller did not dispose of it to another person); Vance v. Ingram, 16 Wn.2d 399, 133 P.2d 938 (1943) (writings evidenced a partnership agreement; parol evidence offered to prove an agreement for a different relationship held to be barred by the rule); Mapes v. Santa Cruz Fruit Packing Corp., 26 Wn.2d 145, 173 P.2d 182 (1946); Macri v. Bergevin, 30 Wn.2d 654, 193 P.2d 360 (1948); Hopkins v. Barlin, 31 Wn.2d 260, 196 P.2d 347 (1948); Merlin v. Rodine, 32 Wn.2d 757, 203 P.2d 683 (1949); Truck-Trailer Equip. Co. v. S. Birch & Sons Constr. Co., 38 Wn.2d 583, 231 P.2d 304 (1951) ("rule applies to documentary, as well as oral, evidence"); Reeder v. Western Gas & Power Co., 42 Wn.2d 542, 256 P.2d 806 (1954); Washington Fish & Oyster Co. v. G. P. Halferty & Co., 44 Wn.2d 646, 269 P.2d 806 (1954); Simms v. Ervin, 46 Wn.2d 417, 282 P.2d 291 (1955) (purchase order superseded by a conditional sale contract; rule applied although not mentioned; the application seems erroneous; see n. 447 below); Cf. Wittenberg v. Sylvia, 35 Wn.2d 626, 214 P.2d 690 (1950) (rule held inapplicable in a contest between a party to the writing and one who was neither party nor successor to a party; for a criticism of this proposition see 3 Corbin, Contracts § 596 (1950)); Cf. also St. Paul & Tacoma Lumber Co. v. Fox, 26 Wn.2d 109, 173 P.2d 194 (1946), which seems clearly wrong in applying the rule; the critical issue was interpretation of a letter-offer, which was certainly no integration.} The rule is a rule of substantive law and "failure to object to oral testimony inconsistent with the written agreement does not constitute a waiver of the right to have inconsistent parol excluded."\footnote{Rule cases reiterated long established basic propositions.} Adoption of a writing or writings as the final expression of the parties' agreement is the test by which the transactions to which the rule applies will be isolated.\footnote{If part of an agreement is covered by such a writing, there is a partial integration.} The rule does not preclude proof of a "collateral agreement,"\footnote{The rule does not preclude proof of a "collateral agreement," or of an agreement which modifies or dis-}
challenges an integrated agreement, or of fraud, failure of consideration, mistake or illegality. There is an important inter

relation between the rule and interpretation, which was discussed in the preceding section.

A receipt is not a contract and not an integration. Recitals in such a document are not protected by the parol evidence rule. Neither are recitals of fact in an integration. Although the court has talked as though a like liberality extends to any proof aimed to establish the true consideration for an agreement, such statements are not to be taken literally. Where a bilateral agreement states a promise, it cannot be shown that the promise was not in fact made. Nor can an additional promise be fastened on the promisor by parol, where the instru

one written and one oral; proof of the oral contract was held to be unaffected by the parol evidence rule.

420 Goerig v. Elliott, 27 Wn.2d 600, 179 P.2d 320 (1947); Gronlund v. Anderson, 38 Wn.2d 60, 227 P.2d 741 (1951) (dictum, recital in the document, “that there have been no representations, or that all oral representations shall be inoperative,” would not bar proof of fraud); Mele v. Cerenzie, 40 Wn.2d 123, 241 P.2d 669 (1952); Nyquist v. Foster, 44 Wn.2d 465, 268 P.2d 442 (1954).
421 Eder v. Nelson, 41 Wn.2d 58, 247 P.2d 230 (1952) (“Absence or failure of consideration, in an action between the original parties to a negotiable instrument, may be shown by parol evidence”); Cf. Ryan v. Ryan, 48 Wn.2d 593, 295 P.2d 1111 (1956) (document recited: “That Joseph H. Ryan shall receive as his share Seventy Thousand ($70,000.00) Dollars in cash upon the execution of this Agreement . . .” Held, the parol evidence rule did not bar proof that he had already received $20,000 of the $70,000). See also nn. 425, 426 and 427 below.
423 Auve v. Fagnant, 16 Wn.2d 669, 134 P.2d 454 (1943) (usury).
424 Johnson v. Peterson, 43 Wn.2d 820, 264 P.2d 237 (1953); see also Hopkins v. Barlin, 31 Wn.2d 260, 196 P.2d 347 (1948) (rule stated but not applied; the document was found to be an “agreement”).
425 Cowles Publishing Co. v. McMann, 25 Wn.2d 736, 172 P.2d 235 (1946) (“Parol evidence is admissible to contradict the date of a written instrument”); Zackovich v. Jasmont, 32 Wn.2d 73, 200 P.2d 742 (1948) (agreement acknowledged receipt of a cash payment; evidence admitted to show the payment was really made by the execution of notes); Schrock v. Gillingham, 36 Wn.2d 419, 219 P.2d 92 (1950) (a recital of payment received can be contradicted by parol); Cook v. Vennigerholz, 44 Wn.2d 612, 269 P.2d 824 (1954) (recital of partnership ownership of certain property does not preclude proof that one partner had a lien on the property). See also Harris v. Morgensen, 31 Wn.2d 228, 196 P.2d 317 (1948) (receipt rule applied to writing which read “Bal. due . . . $500”).
426 Zackovich v. Jasmont, 32 Wn.2d 73, 200 P.2d 742 (1948) (“It has become an established principle in this state, as elsewhere generally, that parol evidence is admissible to show the true consideration of a written agreement”). See also von Herring v. von Herberg, 6 Wn.2d 100, 106 P.2d 737 (1940).
ment is complete on its face. On the other hand, if a purchase agreement does not state the price, the agreed price can be proven.

Three integration cases of special interest were decided. Bond v. Wiegardt involved a contract document which was signed by the defendant and returned to the plaintiff with a letter insisting on a pay basis different from the one stated in the document. In an excellent opinion the court approved admission of the letter, because integration is an issue which must be resolved before the applicability of the parol evidence rule can be determined. On this issue the parties' purpose controls, and hence the letter was relevant evidence of their purpose. The court went on to find the integration to consist of the document plus the letter.

Washington Fish & Oyster Co. v. G. P. Halferty & Co., involved a memorandum confirming a verbal sales agreement, and demonstrates that neither formality nor execution by both parties are requisites for an integration.

One of the more difficult integration problems reached the court in Randall v. Tradewell Stores, Inc. Where a contract document does not specify the duration of the transaction, can a contemporaneous verbal agreement fixing the duration be proved? The court sitting en banc held "yes." Three judges dissented. Two judges concurred in the result because they deemed the questioned evidence properly to have been considered in determining what period would be a "reason-

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428 Sears, Roebuck & Co. v. Nichols, 2 Wn.2d 128, 97 P.2d 633 (1939) (buyer in purchase agreement promised to assume certain specified debts of the seller; parol proof of a promise to assume another debt held inadmissible); von Herberg v. von Herberg, 6 Wn.2d 100, 106 P.2d 737 (1940) (document incomplete; additional promise can be shown); cf. Vikingstad v. Baggott, 46 Wn.2d 494, 282 P.2d 824 (1955), in which the evidence was admitted as proof of a "collateral" agreement; cf. also Randall v. Tradewell Stores, Inc., 21 Wn.2d 742, 153 P.2d 286 (1944), noted 20 WASH. L. REV. 171 (1945) (agreement silent on the duration of one party's performance; parol evidence of the agreed duration admitted; the case is also discussed at n. 432 below).

429 Keeter v. John Griffith, Inc., 40 Wn.2d 128, 241 P.2d 213 (1952); see also RESTATEMENT, CONTRACTS § 240(2) (1932) and the discussion at nn. 432-434 below. The Keeter case apparently turned an analysis of the omitted price terms as a "collateral agreement." See 3 CORBIN, CONTRACTS § 586 (1950). Informality can reach a point beyond which a holding that a document is an integration becomes increasingly unlikely. See 3 CORBIN, CONTRACTS § 588 (1950). Incompleteness or the contrary is also cogent evidence. Logsdon v. Trunk, 37 Wn.2d 175, 222 P.2d 851 (1950) (obvious incompleteness strongly suggests a document is not an integration); 3 WILLISTON, CONTRACTS § 633 (rev. ed. 1950) (document apparently complete will ordinarily be deemed an integration). Notice also 3 CORBIN, CONTRACTS §§ 582, 583 (1950) and the suggestion that greater liberality in exploring the intent to integrate would be desirable.

430 36 Wn.2d 41, 216 P.2d 196 (1950).

431 The contract document was not returned to the plaintiff as a contract and the letter would come in under another parol evidence rule principle (which the court also stated, 36 Wn.2d 41, 48, 216 P.2d 196 (1950)) permitting attack on the existence of a contract ostensibly set forth in the document. See 3 CORBIN, CONTRACTS § 577 (1950).

432 44 Wn.2d 646, 269 P.2d 806 (1954). Informality can reach a point beyond which a holding that a document is an integration becomes increasingly unlikely. See 3 CORBIN, CONTRACTS § 586 (1950). Incompleteness or the contrary is also cogent evidence. Logsdon v. Trunk, 37 Wn.2d 175, 222 P.2d 851 (1950) (obvious incompleteness strongly suggests a document is not an integration); 3 WILLISTON, CONTRACTS § 633 (rev. ed. 1950) (document apparently complete will ordinarily be deemed an integration). Notice also 3 CORBIN, CONTRACTS §§ 582, 583 (1950) and the suggestion that greater liberality in exploring the intent to integrate would be desirable.

433 21 Wn.2d 742, 153 P.2d 286 (1944), noted 20 WASH. L. REV. 171 (1945).
able time.” Whether an integration encompasses terms the court would supply by implication, such as “reasonable time,” is a question other courts have answered variously. 434 Professor Corbin has approved the decisions which reach the result achieved in the Randall case, arguing that an integration is partial only, if it omits an agreed-on duration term. 435

An analogous problem exists where one of two persons who signed a contract document ostensibly as buyers or borrowers seeks to show by parol that he really participated in the transaction as surety for the other. Since suretyship is a legal relation between a principal and a surety and the writing does not purport to integrate any agreement inter sese the “buyers” or “borrowers” the parol evidence rule is arguably inapplicable despite the inference of a co-obligor relationship derivable from the writing. The Washington court has admitted the proof, where the issue arose between the principal and the surety. 436 Presumably the same ruling is expectable in an action by the surety against the obligor for subrogation. 437 But if the surety attempts to establish suretyship as a basis for cutting down his obligation to the obligee, the problem becomes much less easy to resolve. The integration supports a negative inference, i.e., absence of suretyship. The presence of this relationship (if proved) brings into play collateral legal principles which diminish the obligation apparently evidenced by the writing, e.g., the community property principle restricting a husband’s power to create community suretyship contracts and the

434 3 Corbin, Contracts § 593 (1950); 3 Williston, Contracts § 640 (rev. ed. 1936).
435 3 Corbin, Contracts § 593, p. 336 (1950). A similar problem exists where the writing omits an agreed-on price term, if the court would supply “reasonable price” by implication. Proof of the agreed-on term has been approved by the court (see n. 428 above) but without discussion of the complications introduced by the implication possibility.
436 Eder v. Nelson, 41 Wn.2d 58, 247 P.2d 230 (1952), 43 Wn.2d 536, 262 P.2d 180 (1953), and the cases therein cited. This is the usual result. 3 Corbin, Contracts § 593, p. 341 (1950).
437 Subrogation cannot be had until the creditor’s claim against the principal is fully satisfied; the creditor cannot be harmed by the proof; the principal is indirectly the real contestant, as the objective of subrogation is to acquire the creditor’s right for use against the principal. There is no more reason for excluding oral proof of suretyship, in this situation, than there is where the surety sues the principal for reimbursement. There are a few Washington cases involving comparable problems, in which the evidence was admitted, apparently without question. Pease v. Syler, 78 Wash. 2d 24, 501 P.2d 310 (1972) (surety paid creditor on a note and received an assignment of the note; he was permitted to sue the principal on the note; unless subrogation was a remedy available to the surety his payment would have discharged the note) ; Northern Bank & Trust Co. v. Slater, Watt and Co., 123 Wash. 528, 212 Pac. 1063 (1923) (which has some discussion relevant to subrogation, although the issue was discharge of the surety).
principles which create suretyship defenses.\(^{438}\) On this phase of the matter the earlier Washington cases left the position of the court uncertain.\(^{439}\) The issue came to the court again in *Zarbell v. Mantas*.\(^{440}\) The uncertainty continues. The court apparently approved admission of the evidence if the surety is prepared to show that the obligor knew of the suretyship relation when the contract was made,\(^{441}\) but went on to find ambiguity in the contract document as to status of the signers and to state this too as a basis for proof of suretyship. The opinion also acknowledges the possibility that the parol evidence rule might apply if the integration includes language which evidence of suretyship would directly contradict.\(^{442}\)

Another aspect of the parol evidence rule as to which the Washington cases are not entirely harmonious is the application of the rule to proof of a verbal condition.

Preliminarily it should be recalled that there are different types of condition. There are external conditions precedent, which must be met before the legal relations known as contract exist.\(^{443}\) There are

\(^{438}\) E.g., extension of time, release of collateral or modification of the principal-creditor contract.

\(^{439}\) Karatofski v. Hampton, 135 Wash. 139, 237 Pac. 17 (1925) (proof of suretyship proffered by the Hamptons was excluded because the document recited that the "parties of the second part," who were by the terms of the document buyers of timber, were "Orting Lumber Company . . . and S. Wade Hampton and Hildegard Hampton, his wife"); the court said the proof would directly contradict the quoted language and hence fell within the parol evidence rule; the decision is disturbing, since any real difference between the facts of the case and a transaction in which principal and surety promise "to buy" or "to pay" is very hard to see; moreover, recitals of fact are not ordinarily protected by the parol evidence rule); Bradley Eng'r & Mfg. Co. v. Heyburn, 57 Wash. 629, 106 Pac. 170 (1910) (maker of negotiable note held unable to prove that he signed for accommodation; the court found its reason in construction of *The Negotiable Instruments Law*; earlier cases were discussed in the opinion).

\(^{440}\) In other cases proof of accommodation status was admitted without question. Northern Bank and Trust Co. v. Slater, Watt and Co., cited in n. 436 above, is an example.

\(^{441}\) Knowledge of the suretyship relation has no discernible technical effect on the parol evidence rule problem but it certainly gives the obligee's attempt to defeat the proof a different ethical complexion. Of course, if the alleged surety is embarked on a course of fraud he can fabricate proof of the obligee's knowledge as readily as any other. Where a suretyship defense is asserted, it can be argued that the requirement of knowledge when the contract was made is an unnecessary and undesirable limitation because the defense will not in any instance be available to a surety unless the obligee knows of his status when the conduct creating the defense occurs. Perhaps the real reason for permitting proof of suretyship is simply the public interest in preserving the community property or suretyship-defense proposition which underlies the dispute; this interest may well over-ride the interest represented by the parol evidence rule.

\(^{442}\) The court said: "Nevertheless, particularly in view of our own case of Karatofski v. Hampton, . . . we are not prepared to state that there could not be a contract so explicit in its definition of the character of the parties signing it that parol evidence would be inadmissible to qualify it." Zarbell v. Mantas, 32 Wn.2d 920, 923, 204 P.2d 203 (1949). The Karatofski case was cited in n. 436 above.

\(^{443}\) For example, if X signs as maker and hands to the payee what is otherwise a negotiable note for $1,000 and says: "This note shall have legal effect only if W buys and pays for my house."
internal conditions precedent, which must be satisfied or excused before a contract duty is immediately performable. There are conditions subsequent, which operate to extinguish a contract duty which has matured and been defaulted. Verbal proof of any type of condition necessarily varies an unconditional written promise. The different kinds of condition simply vary the operation of the promise in different ways.

Whether a condition precedent is external or internal can be a close fact question, the answer to which must be found in interpretation. The analytic key to this issue is clear enough. If contract relations were intended to be postponed until the condition event occurred, the condition is external; otherwise it is internal. The words used in stating the condition are only evidentiary and must be examined in their context. The event which is the subject matter of the condition will often be of concern to but one party; this circumstance is not relevant, even where the agreement is bilateral, in determining whether the condition is external or internal.

The parol evidence rule is generally held to be applicable to proof of an internal condition precedent or a condition subsequent, but inapplicable to proof of an external condition because the rule protects only a writing which evidences a contract. There is no contract until all external conditions are satisfied.

A number of Washington cases reach these results. In some of them an internal condition (as de-
fined above) was called a condition subsequent, but this has of course no effect on application of the parol evidence rule as the rule applies to both types of condition. A good deal more disturbing is language in a few cases which apparently repudiates the traditional external v. internal condition test. These cases appear to adopt a test under which proof of an oral condition is admitted if it does not contradict or vary the writing, and rejected if it does. They seem wrong in principle. Certainly they have introduced an unfortunate complication which can be resolved only by future litigation.
Usage. There is an obvious inter-relation between interpretation and the parol evidence rule, and trade usage. An operative usage is part of the context in which an agreement is made and hence should always be demonstrable as an aid to interpretation. If from usage an additional term can be derived, it should be provable and made a part of the agreement as would a “collateral agreement,” provided the agreement does not contain terms directly inconsistent with the addition.

The later cases suggest that these propositions are acceptable to the Washington court. In Lyle v. Heidner & Co., evidence of usage in the lumber business was admitted as an aid to interpretation of the phrase “late November/early December,” used by the parties to designate delivery time. Said the court:

In various phases of commercial, business and professional activities, certain terms are used which have meanings peculiar to the persons engaged in that particular type of enterprise. Here, the evidence was admitted, not for the purpose of varying the terms of a written instrument, but to explain its meaning as understood by those engaged in the trade in which the term was used; for without such explanation, the term is indefinite and ambiguous.

A critical detail is whether the court meant to restrict its statement of the principle to instances of ambiguity. The Restatement of Contracts, section 246, and Williston on Contracts, section 650 (revised edition), were cited; both indicate that ambiguity is not a requisite for the admission of such proof. Intent by the court to adopt the restricted
proposition seems unlikely (although similar statements appear in other cases).\textsuperscript{455} Usage typically indicates meanings which depart from ordinary meanings, the latter being clear enough if alone examined; limitation to the resolution of ambiguity would in large measure devitalize the trade usage principle.\textsuperscript{456}

In Simons v. Stokely Foods, Inc.,\textsuperscript{457} the seller under a contract for the sale of peas was permitted to show by parol a usage which obligated the buyer to furnish harvesting machinery. The document contained no such provision, and required the seller to “plant, cultivate, harvest and deliver” the peas. The court, after thorough discussion of the problem, approved admission of the evidence even though it added a promise to the buyer’s undertaking as expressed in the document.

The phrase, “when there is no contract, proof of usage will not make one,” appeared in two of the later opinions. In Pearce v. Dulien Steel Prods., Inc.,\textsuperscript{458} the issue was interpretation of an offer; in Milone & Tucci, Inc., v. Bona Fide Builders,\textsuperscript{459} it was the existence of an offer. In both cases, evidence of trade usage was rejected. The wisdom of rejecting it must be questioned.\textsuperscript{460} Perhaps usage should not make a

\textsuperscript{455} See the cases cited in Washington Annotations, Restatement, Contracts § 246, and Freugshat v. Hedges, 41 Wn.2d 660, 251 P.2d 166 (1952).

\textsuperscript{456} Additional support for the suggested interpretation of the Lyle case is provided by the court’s discussion in Simons v. Stokely Foods, Inc. (cited in the following note); see also Willett v. Davis, 30 Wn.2d 622, 193 P.2d 321 (1948) (union rules considered in interpreting the phrase “cost of labor” in a cost-plus construction contract).

\textsuperscript{457} 35 Wn.2d 920, 216 P.2d 215 (1950).

\textsuperscript{458} 14 Wn.2d 132, 127 P.2d 271 (1942) (offeree received an offer silent about inspection; in replying he added to what was otherwise an acceptance, “Hunt will inspect this rail . . .” The court found variance between offer and reply, and hence no acceptance; evidence of a trade usage giving a buyer of steel “the right to inspect or designate an inspector . . .” was held inadmissible).

\textsuperscript{459} 49 Wn.2d 363, 301 P.2d 759 (1956) (Here a subcontractor submitted a bid which the main contractor used in computing his own bid, erroneously thinking it was the lowest subcontractor bid; the main contractor received the job and awarded the subcontract to another bidder. The trial court found a trade usage to exist on the basis of which it held there “was created . . . an implied contract to enter into a subcontract with such bidder . . .” The supreme court reversed, using the quoted phrase. The real problem was interpretation of the subcontractor’s conduct in submitting a bid. His conduct could be both an offer to do the work and the proffer of a service. Had he said in so many words, “I proffer you my bid, prepared at considerable expense to me and a service to you as without it and like bids you would have to compute these costs yourself; you may use it only if you award me the subcontract provided you are awarded the main contract,” there is little doubt but what use of the bid would be acceptance of an offer if the stated condition be met (see the discussion above beginning at n. 15). If usage attributes this meaning to the subcontractor’s conduct it is just as much in existence as though explicitly stated. Maybe the plaintiff’s position was adversely affected by the fact he was not the lowest bidder. It may be doubted that the usage found by the trial court actually exists.

\textsuperscript{460} See the discussion above at nn. 22, 24, 80, 81 and 82; Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510, 516, 218 Pac. 232 (1923); and 3 Corbin, Contracts § 555, p. 127 (1950); “Not infrequently cases are found in which rules are laid down, as if well established, that evidence of usage . . . is not admissible . . . to make a contract
promise enforceable where there is not conformity to the usual mutual assent, consideration, Statute of Frauds, capacity and legality requirements. But, is there any more reason for excluding proof of usage offered to establish the meaning of an expression of purpose which is or may be an offer than there is for excluding it when the meaning of a contract document is in issue? Usage so employed does not "make" a contract; it merely delineates the expression of purpose to which the contract-formation principles will be applied.

The court also had occasion to consider the proof requisite to establish an operative usage. In *Simons v. Stokely Foods, Inc.*, the court rightly rejected the argument that usage must be "unvarying and universal." Local usage, established by the defendant's trade practices over a period of several years, was held to be operative where the plaintiff knew of and (apparently) relied on it. As Professor Williston has explained, "The real question where usage is concerned is whether the parties contracted with reference thereto . . . the generality of habit or usage is important only with reference to the inference properly to be drawn of the parties' knowledge or ignorance of its existence." *Seattle Flower & Bulb Co. v. Burgan* conformed to this analysis; evidence of his own trade practices, offered by a seller, was rejected because there was "no showing that this custom was so universally observed that (the buyer) should be presumed to have it in mind and consequently to have contracted in reference to it."

(This article will be continued in subsequent issues.)

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where the parties have made none. Such statements are very misleading in form and are very likely to lead to unjust decisions.” See also 3 *WILLISTON, CONTRACTS* § 651, p. 1880 (rev. ed. 1936) : “Indeed, the very existence or non-existence of a contract may depend upon usage.”

461 *RESTATEMENT, CONTRACTS* § 249 (1932); 3 *WILLISTON, CONTRACTS* § 651, p. 1880 (rev. ed. 1936).


463 The idea asserted by the defendant in the Simons case may have been derived from *Washington Brick, Lime & Sewer Pipe Co. v. Anderson*, 176 Wash. 416, 29 P.2d 690 (1934) (buyer of brick alleged a trade usage under which a manufacturer-seller supplies a plan for its installation; he was not successful; the court said: "[T]o establish a usage . . . it must be shown to be uniformly prevalent and universally observed, so that it may be said that the contracting parties either had such custom in mind or else must be presumed to have had it in mind, and consequently to have contracted with reference to it." It seems obvious that the phrase "universally observed" cannot be disassociated from the rest of the sentence).

464 3 *WILLISTON, CONTRACTS* § 660 (rev. ed. 1936). In the same section it was said: "A habit of business confined to the two parties to a contract may by implication be adopted as an unexpressed part of it. The habit, indeed, of one party, known and apparently acquiesced in by the other, may prove the adoption of an implied term of the contract between them.” See also *RESTATEMENT, CONTRACTS* §§ 247, 248 (1932).