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Warren L. Shattuck
University of Washington School of Law

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CONTRACTS IN WASHINGTON, 1937-1957: PART III

WARREN L. SHATTUCK*

CONDITIONS; AND BREACH OF PROMISE AS AN EXCUSE FOR FAILURE TO PERFORM A RETURN PROMISE

Express Conditions. Express conditions continue to be the draftman's principle reliance, in his endeavor to delineate precisely the scope of the obligation undertaken by a promisor. The later cases contain many interesting illustrations of this drafting technic, but are otherwise notable only for the continued absence of a sound approach to the classification of conditions as precedent or subsequent.

A good statement of fundamentals appeared in *Partlow v. Matthews*:⁴⁶⁵

A condition precedent is such as must happen or be performed before a right can accrue to enforce an obligation dependent upon the happening or performance thereof against another in favor of one claiming such right. . . . Conditions precedent to a recovery under a contract are usually created by such phrases as 'on condition' or 'provided that', or 'so that', and the like. But such expressions are not necessary if the contract is of such a nature as to show that the parties intended to provide for a condition precedent. . . . Whether the doing of an act is a condition precedent depends, not on any hard and fast rule, but on the intention of the parties as deduced from the whole instrument.

It will be observed that an express condition is a contract term qualifying a promise. It is a term because the offeror stated the condition (either as a limitation on his own promise or on one he requested the offeree to make) and the offeree acquiesced when he accepted. The offer and acceptance phase of many a transaction is obscured in the execution of a formal document, but this does not vary the analysis. Nor is it material whether the contract is bilateral or unilateral.

The qualification created by a condition most often consists of a restriction (other than the passage of time) on the expressed purpose of a promisor to do what he promised. As an integral part of his undertaking he has said that he will perform only if an indicated event occurs or does not occur before, or an indicated state of affairs exists or does not exist when, the time for performance arrives. He may adopt

* Professor of Law, University of Washington.

⁴⁶⁵ 43 Wn.2d 398, 261 P.2d 394 (1953). See also *In re Lewis' Estate*, 2 Wn.2d 458, 98 P.2d 654 (1940) (provision in a note, for extinguishment of liability on the payee's death, analyzed as a condition and part of the contract).

the negative phrasing, saying he will not perform if a stated event occurs or does not occur. He may even say the contract "shall be void" or "terminated" if a stated event occurs or does not occur. These variant ways of expressing a qualification all fit within the formula stated in the *Partlow* case; the condition regulates performance of a contract duty and is precedent.⁴⁶⁶ Confusion was however evidenced in other opinions which seem to indicate that negative or "null and void" phrasing of the condition makes it subsequent.⁴⁶⁷ The term "condition subsequent" is by the better usage reserved for a qualification which takes quite a different direction, operating on the enforceability of a cause of action produced by a breach rather than on the existence of a duty to perform.⁴⁶⁸ The only common instances are found in clauses which set a period within which suit for a breach must be brought. Since some important procedural propositions are governed by the distinction between a condition precedent and a condition subsequent,⁴⁶⁹ proper analysis and classification of a particular contract provision can be more than a terminological problem. This is a detail which badly needs clarification by the court.

As was inferred in the *Partlow* case, disputes about the existence or

⁴⁶⁶ This is the classification endorsed by RESTATEMENT, CONTRACTS §§ 250(a), 259 (1932); 3 WILLISTON, CONTRACTS §§ 666-667A (rev. ed. 1936); 3 CORBIN, CONTRACTS §§ 628, 739 *et seq.* (1950).

⁴⁶⁷ See, e.g., *Fleming v. August*, 48 Wn.2d 131, 291 P.2d 369 (1955), and *Ravenholt v. Hallowell*, 48 Wn.2d 136, 291 P.2d 653 (1955). These cases involved a parol evidence rule issue, and are discussed in Note, 31 WASH. L. REV. 105 (1956). Concerning the parol evidence rule problem, see the discussion at note 443 *et seq.*, above. See also *In re Lewis' Estate*, cited in note 465 above; of the condition there in issue the court said that the payee's death "marked the termination of the obligation under the contract." Actually, was not the payee's survival a condition precedent to the maker's duty to pay?

⁴⁶⁸ See RESTATEMENT, CONTRACTS § 250(b) (1932) and the text material cited in note 466 above.

⁴⁶⁹ The burden of proving satisfaction or excuse of a condition precedent is usually said to rest on the promisee; the burden is on the promisor if the condition is subsequent. See 3 CORBIN, CONTRACTS § 741 (1950). Although there is no logical basis on which negative or "null and void" phrasing of the condition can be made to govern the burden of proof, there are cases which make the phrasing govern. See *Port Blakely Mill Co. v. Hartford Fire Ins. Co.*, 50 Wash. 657, 97 Pac. 781 (1908); 3 WILLISTON, CONTRACTS § 674 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 259 comment *b* (1932). The reason is often obscure; one reason may be erroneous analysis of the condition as subsequent. The Washington situation was further complicated by *Towey v. New York Life Ins. Co.*, 27 Wn.2d 829, 180 P.2d 815 (1947), in which the burden of allegation and proof was put on the promisor because the policy did not recite that "no suit or action on the policy could be maintained until after full compliance by the insured with all of the requirements of the policy." The condition in question was proof of loss (clearly a condition precedent) and the decision seems unsupportable on any theory. On the other hand the promisor is obliged to identify in his answer the specific condition he contends was not met, the promisee remaining under the burden of persuasion but able to frame a good complaint by alleging generally that he has met all conditions precedent. See 3 CORBIN, CONTRACTS § 749 (1950); RCW 4.36.080; WASH. RULES, PLEADING, PRACTICE, PROCEDURE 9(c), 153 Wash. Dec. v (1958).

scope of an express condition will be resolved by the familiar interpretation⁴⁷⁰ and implication⁴⁷¹ principles. The canon under which ambiguity is resolved against the person who used the unclear language is often controlling and will usually operate against the promisor.⁴⁷²

Since an express condition is a contract term and part of the bargain, literal operation of the condition is normally to be anticipated.⁴⁷³ The promisee bought a qualified right. He can expect excuse of the condition and relief from his bargain only if the promisor wrongfully interferes with satisfaction of the condition,⁴⁷⁴ or waives it,⁴⁷⁵ or if the condition is not of material importance to the promisor and denial of relief for the promisee would occasion him a serious forfeiture.⁴⁷⁶

Constructive Conditions. The basic constructive condition prin-

⁴⁷⁰ See RESTATEMENT, CONTRACTS §§ 253, 258 (1932); 3 CORBIN, CONTRACTS § 639 (1950); 3 WILLISTON, CONTRACTS §§ 672, 673 (rev. ed. 1936); Gregory v. Morrow, 4 Wn.2d 144, 102 P.2d 699 (1940); Georgian House of Interiors, Inc. v. Glens Falls Ins. Co., 21 Wn.2d 470, 151 P.2d 598 (1944); Garrett v. Nespelem Consol. Mines, Inc., 23 Wn.2d 824, 162 P.2d 591 (1945); Superior Portland Cement, Inc. v. Pacific Coast Cement Co., 33 Wn.2d 169, 205 P.2d 597 (1949); Michigan Chem. Corp. v. Frady, 47 Wn.2d 677, 289 P.2d 363 (1955).

⁴⁷¹ Gregory v. Morrow, 4 Wn.2d 144, 102 P.2d 699 (1940), citing RESTATEMENT, CONTRACTS § 262 (1932). See also 3 CORBIN, CONTRACTS §§ 631, 640 (1950); 3 WILLISTON, CONTRACTS § 887A *et seq.* (rev. ed. 1936). The key argument for implication of a condition is inability of the promisor to perform unless the condition-event occurs. Tube-Art Display, Inc. v. Berg, 37 Wn.2d 1, 221 P.2d 510 (1950), is instructive in its holding against the promisor; although the defense was primarily impossibility, the court's discussion is also applicable to an implied-condition issue.

⁴⁷² See Dowell, Inc. v. United Pac. Cas. Ins. Co., 191 Wash. 666, 72 P.2d 296 (1937); McKillips v. Railway Mail Ass'n, 10 Wn.2d 122, 116 P.2d 330 (1941); State Bank of Wilbur v. Phillips, 11 Wn.2d 483, 119 P.2d 664 (1941). See also the discussion at note 401 above.

⁴⁷³ Richardson v. Superior Fire Ins. Co., 192 Wash. 553, 74 P.2d 192 (1937); Hilliard v. United Pac. Cas. Ins. Co., 195 Wash. 478, 81 P.2d 513 (1938); Draper v. Aetna Life Ins. Co., 1 Wn.2d 17, 95 P.2d 28 (1939); Post v. Maryland Cas. Co., 2 Wn.2d 21, 97 P.2d 173 (1939); Trinity Universal Ins. Co. v. Willrich, 13 Wn.2d 263, 124 P.2d 950 (1942); Department of Labor & Indus. v. Northwestern Mut. Fire Ass'n, 13 Wn.2d 288, 124 P.2d 944 (1942); Jones v. Allen, 14 Wn.2d 111, 127 P.2d 265 (1942); Rushlight & Co. v. Johnson, 18 Wn.2d 383, 139 P.2d 280 (1943); Georgian House of Interiors, Inc. v. Glens Falls Ins. Co., 21 Wn.2d 470, 151 P.2d 598 (1944); Garrett v. Nespelem Consol. Mines, Inc., 23 Wn.2d 824, 162 P.2d 591 (1945); Kraft v. Spencer Tucker Sales, Inc., 39 Wn.2d 943, 239 P.2d 563 (1952); Partlow v. Mathews, 43 Wn.2d 398, 261 P.2d 394 (1953); Winslow v. Mell, 48 Wn.2d 581, 295 P.2d 319 (1956). See also 3 WILLISTON, CONTRACTS § 675 (rev. ed. 1936).

⁴⁷⁴ See the discussion below at note 496.

⁴⁷⁵ See the discussion below at note 502.

⁴⁷⁶ Hegeberg v. New England Fish Co., 7 Wn.2d 509, 110 P.2d 182 (1941), citing RESTATEMENT, CONTRACTS § 302 (1932). Said the court: "This court has not hesitated to grant relief from express conditions in contracts, where great injustice and undue hardship would result from strict enforcement . . ." citing earlier Washington cases. See also WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 302 (1935); 3 CORBIN, CONTRACTS § 748 (1950); 3 WILLISTON, CONTRACTS §§ 769 *et seq.*, 805 (rev. ed. 1936). "Forfeiture" is often alleged by a plaintiff who has performed his side of the bargain, wholly or substantially, but has not satisfied an express condition qualifying the defendant's duty. If for such a plaintiff there is available a remedy in quasi-contract, it may be doubted that there exists any forfeiture risk of the kind which justifies a court in ignoring a condition.

ciples were well established in early Washington cases⁴⁷⁷ and relatively few disputes about the existence of such conditions or about their operation have reached the court since 1937. The later cases disclose no departures from the propositions previously adopted.

Constructive conditions implement a simple and obvious analysis of a non-aleatory bilateral contract. Back of the exchange of promises which creates the legal relation of contract are some expectations about the promised performances which constitute the real exchange or bargain. The parties could (but rarely do) protect those expectations by express conditions. Courts have accordingly felt obliged to create substantive law principles which provide the needed protection.

The development has followed two main themes. One is concerned with the credit risks taken or not taken by the parties, as indicated by the agreed timing of their performances. The other is concerned with the parties' exchange-purpose where the contract calls for multiple performances on one or both sides.

If the contract requires X to deliver goods on February 1 and Y to pay on March 1, the rendition or tender of his performance by X is a condition to any duty in Y to perform immediately. So also if X and Y are both to perform on March 1. In the latter instance a like burden rests on Y.⁴⁷⁸ Several of the later Washington cases are illustrative; some were concerned with the particular problem raised by an installment payment real estate contract where the final installment falls due while earlier installments are unpaid, and reached the usual result holding payment and conveyance to be concurrent conditions.⁴⁷⁹ Cor-

⁴⁷⁷ See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 266 *et seq.* (1935).

⁴⁷⁸ See RESTATEMENT, CONTRACTS §§ 267, 272, 273 (1932); 3 WILLISTON, CONTRACTS § 829 (rev. ed. 1936); 3 CORBIN, CONTRACTS §§ 656, 657 (1950).

⁴⁷⁹ *Mayflower Realty Co. v. Security Sav. & Loan Soc'y*, 192 Wash. 129, 72 P.2d 1038, 75 P.2d 579 (1937) (tender by vendee matured a cause of action against the vendor); *Parchen v. Rowley*, 196 Wash. 340, 82 P.2d 857 (1938); *Lasher v. Wheeler*, 198 Wash. 205, 87 P.2d 982 (1939); *Rushlight & Co. v. Johnson*, 18 Wn.2d 383, 139 P.2d 280 (1943); *Foster v. Montgomery Ward & Co.*, 24 Wn.2d 248, 163 P.2d 838 (1945); *Kolossoff v. Turri*, 27 Wn.2d 81, 176 P.2d 439 (1947); *Cascade Timber Co. v. Northern Pac. Ry.*, 28 Wn.2d 684, 184 P.2d 90 (1947); *Gillmore v. Green*, 39 Wn.2d 431, 235 P.2d 998 (1951); *Kirby v. Woolbert*, 48 Wn.2d 141, 291 P.2d 666 (1955) (citing several prior cases and holding, "after the final payment is due upon a time contract for the sale of land, neither party can put the other in default without a tender of performance"). Although conditions usually operate defensively, a promisor being insulated from successful suit if the condition is not met, they have on occasion important side effects. Thus in the Kirby case, *supra*, a contract purchaser who failed to pay when the contract required was not "in default" after the final payment matured, because the seller did not tender conveyance; therefore the seller could not exact a bonus for conveying. (That a bonus was exacted is surmised; she received an overpayment and in this suit by the purchaser was required to return it.) In *Crim v. Watson*, 196 Wash. 99, 82 P.2d 172 (1938), (cited in the Kirby opinion) the court held a declaration of forfeiture not preceded by a tender of conveyance, after the final installment fell due and was not paid, to be legally ineffective as a forfeiture. It was

relatively, where X is to perform first, his duty is not conditioned on a proffer of payment. The court so held in other of the later cases.⁴⁸⁰

If X undertakes to deliver a horse and a cow on March 1, for which Y is to pay then (or on a later day), is Y's duty of immediate performance conditioned on delivery or tender of both animals? The answer must be found in interpretation. If for one of X's performances the contract allocates a counter-performance by Y, the reciprocal part-performances are an exchange and constructive conditions can operate accordingly.⁴⁸¹ A significant interrelation between X's two performances, the utility of one being materially diminished if the other is not rendered, is strong evidence against such segmentation of the exchange. So is lump-sum pricing. Separate pricing is evidence the other way.⁴⁸² Several of the later Washington cases illustrate the operation of these ideas.⁴⁸³

also held to be neither a repudiation nor an offer mutually to rescind; the purchaser in this action to recover the payments he had made was unsuccessful, he not having tendered the contract balance. *In re Berry's Estate*, 196 Wash. 252, 82 P.2d 549 (1938) followed the *Crim* case. In the *Foster* case, *supra*, failure of a buyer to give promised shipping instructions excused delivery or tender by the seller, as a constructive condition to the buyer's duty to pay. In the *Rushlight* case, *supra*, failure of a contractor to meet a constructive condition to the subcontractor's duty to provide a bond meant that the subcontractor was not in default and an attempted cancellation of the contract by the contractor was not legally justified. See also cases cited in note 488 below. *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 215 P.2d 425 (1950) is also of interest. It involved an unusual application of the concurrent constructive condition principle to an installment real estate contract forfeited for default, the court's decree being conditioned on the vendee's failure to pay the remaining part of the contract price within a stated time; this part of the price was by the terms of the contract unaccrued. The court held that the vendee had not lost the redemption interest afforded him by the decree, although he neither paid nor tendered payment, because the vendor had not tendered a deed and conveyance and payment were now concurrent conditions. The decision must be questioned; the vendee was already in total default and the conditional decree merely gave him an opportunity to preserve his interest by producing the money.

⁴⁸⁰ *Klein v. Zeeve*, 199 Wash. 644, 92 P.2d 877 (1939) (suit for interim installments under a real estate contract; failure of the plaintiff to tender his performance was held to be no defense; *RESTATEMENT, CONTRACTS* § 269 (1932) was cited; see §§ 270, 271 also); *Foster v. Montgomery Ward & Co.*, 24 Wn.2d 248, 163 P.2d 838 (1945) (defendant undertook to buy and to give shipping instructions; upon failure to give the instructions it became liable; no tender of the goods by plaintiff was needed); *Kolosoff v. Turri*, 27 Wn.2d 81, 176 P.2d 439 (1947) (seller who undertook to furnish title insurance, the date for his performance preceding the date set for the buyer's next performance, was in default upon failure to perform; the buyer in this action recovered his down payment). See also 3 *WILLISTON, CONTRACTS* § 829 (rev. ed. 1936); 3 *CORBIN, CONTRACTS* § 657 (1950).

⁴⁸¹ Even here, if the transaction is of the installment variety which requires reciprocal performances at successive intervals, an earlier performance on one side will be a condition both to the performance which is the immediate exchange for it and to a subsequent performance on the other. *E.g.*, where X is to deliver a horse and a cow on March 1 for payment then, and another horse and cow on April 1 for payment then. X's March 1 performances will be conditions to Y's April 1 duty, as well as his March 1 duty. This will be so without regard to the "divisibility" of X's March 1 performance.

⁴⁸² *RESTATEMENT, CONTRACTS* §§ 266(3), 268 (1932); 3 *CORBIN, CONTRACTS* § 687 *et seq.*; 3 *WILLISTON, CONTRACTS* § 860A *et seq.* (rev. ed. 1936).

⁴⁸³ *Darst v. Meduna*, 15 Wn.2d 293, 130 P.2d 361 (1942) (gross pricing); *Rush-*

Determining the existence of a constructive condition is a relatively easy operation. Determining how one works in a given transaction can be extremely difficult, made so by the principles summed up in the phrase "substantial performance." A promisor may receive⁴⁸⁴ or be tendered a performance which nearly enough approaches perfection to persuade a court that justice requires him to render his own performance and find his relief for the defects⁴⁸⁵ in a cross-claim for damages.⁴⁸⁶ A performance which has this effect, although defective in terms of quantity, quality or time, is said to be "substantial performance" and to satisfy the constructive condition. The key to the analysis and argument of issues about substantial performance is in

light & Co. v. Johnson, 18 Wn.2d 383, 139 P.2d 280 (1943) (promise of subcontractor to furnish a bond and promise of contractor to pay half the premium were held to be "mutual and dependent covenants"); Cascade Timber Co. v. Northern Pac. Ry., 28 Wn.2d 684, 184 P.2d 90 (1947) (gross pricing, in effect); Kraft v. Spencer Tucker Sales, Inc., 39 Wn.2d 943, 239 P.2d 563 (1952) (contract for the sale of a car and certain accessories; the dealer was able to deliver the accessories only); Mell v. Winslow, 49 Wn.2d 738, 306 P.2d 751 (1957) (gross pricing); see also Reid Co. v. M-B Contracting Co., 46 Wn.2d 784, 285 P.2d 121 (1955) (gross pricing formula stated; the issue was the scope of a rescission agreement which in language referred only to part of the gross performance); Bariel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954) (two contracts found; the court discussed Darst v. Meduna, *supra*, and the effect of separate pricing, which was unnecessary and confusing; the issue was rescission for fraud); Anstine v. McWilliams, 24 Wn.2d 230, 163 P.2d 816 (1945) (plaintiff bought a used car, promising to pay a sum which included a "time price differential" and giving a mortgage to secure the debt; the mortgagee converted the property; in this conversion action the court in applying the damages rule which requires deduction of the debt from the market value of the property excluded the "time price differential" in computing the debt balance, saying consideration for it failed when the conversion occurred; this analysis evidently means that performance of the mortgagee's promise to receive payment in installments was a condition to the mortgagor's promise to pay the part of the price which was allocated to "time.") Concerning the meaning of the term "failure of consideration" see the discussion at note 492 below. Cf. Marshall v. Campbell, 19 Wn.2d 497, 143 P.2d 449 (1943) (real estate contract required the vendee to make certain installment payments and to buy gasoline from the vendor; upon default by the vendee on his promise to buy gasoline the vendor sought to forfeit the contract; he was unsuccessful because in the court's view this promise was "independent" and breach of it would not relieve the vendor from his duty to convey; the court's analysis and terminology cannot be supported; the issue was the materiality of the vendee's breach and the result could be justified only by a finding it was immaterial; the vendee's duty was "independent," being performable at least in part before the date for conveyance; the court used the term here in a most confusing way to mean that the vendee's performance was not a constructive condition to the vendor's duty).

⁴⁸⁴ See RESTATEMENT, CONTRACTS §§ 275, 276 (1932); 3 WILLISTON, CONTRACTS § 841 *et seq.* (rev. ed. 1936); 3 CORBIN, CONTRACTS § 700 *et seq.* (1950).

⁴⁸⁵ If a defective performance is received with knowledge of the defects and under circumstances such as would have made its refusal practicable, or retained after knowledge of its defects, where return is practicable, the recipient loses the protection of the constructive condition without regard to substantial performance. The theory is waiver. See RESTATEMENT, CONTRACTS § 298 (1932). He no doubt has a cause of action for the defects, in the usual transaction. See 3 WILLISTON, CONTRACTS §§ 699 *et seq.* (rev. ed. 1936).

⁴⁸⁶ It will be recalled that any deviation from full and precise performance by a contract promisor whose duty of immediate performance has matured is a breach by him. The substantial performance doctrine is strictly limited to satisfaction-of-condition issues.

the standards courts use in their effort to strike a fair balance between the conflicting interests of the parties. Yet these standards are uncommonly hard to synthesize from the opinions, which tend to be more diffuse than otherwise in discussing the factors which impressed the court.⁴⁸⁷ Some of the later Washington cases are illustrative.⁴⁸⁸ Notable

⁴⁸⁷ The most helpful summary of the standards courts use in resolving substantial performance (and material breach) controversies is contained in the RESTATEMENT, CONTRACTS §§ 275, 276 (1932).

⁴⁸⁸ *Marrazzo v. Orino*, 194 Wash. 364, 78 P.2d 181 (1938); *Barfknecht v. Shepard S. S. Co.*, 1 Wn.2d 643, 99 P.2d 387 (1939) (employment contract; employee in total default); *Hegeberg v. New England Fish Co.*, 7 Wn.2d 509, 110 P.2d 182 (1941) (although the issue was the effect of delay in meeting what the court evidently regarded as an express condition, the opinion contains a discussion of delay which also has meaning in a constructive condition context); *Beaulaurier v. Washington State Hop Producers, Inc.*, 8 Wn.2d 79, 111 P.2d 559 (1941) (court indicated that the release of some co-op members from their marketing contracts might be such a breach by the co-op of its contracts with other members as to discharge the latter; there was however no discharge here because the releases were consented to or ratified by the other members); *Patrick v. Bonthius*, 13 Wn.2d 210, 124 P.2d 550 (1942) (building contract; substantial performance by the builder found); *Central Life Assur. Soc'y v. Impelmans*, 13 Wn.2d 632, 126 P.2d 757 (1942) (failure of seller of land to own a small part of it held not such prospective failure of consideration as would justify rescission by the buyer); *Sherman v. Western Constr. Co.*, 14 Wn.2d 252, 127 P.2d 673 (1942); *Vance v. Ingram*, 16 Wn.2d 399, 133 P.2d 938 (1943) (building contract; substantial performance found); *Marshall v. Campbell*, 19 Wn.2d 497, 143 P.2d 449 (1943) (the issue was materiality of breach rather than substantial performance; the opinion is nevertheless of interest here; see the discussion of the case in note 483 above); *Hesselgrave v. Mott*, 23 Wn.2d 270, 160 P.2d 521 (1945) (material breach of a life-support contract was in issue and not found); *In re Donaldson's Estate*, 26 Wn.2d 72, 173 P.2d 159 (1946) (life-support contract; substantial performance found); *Kolosoff v. Turri*, 27 Wn.2d 81, 176 P.2d 439 (1947) (failure of vendor to furnish title insurance on time held to be a material breach); *Hopper v. Williams*, 27 Wn.2d 579, 179 P.2d 283 (1947) (material breach found); *Knatvold v. Rydman*, 28 Wn.2d 178, 182 P.2d 9 (1947) (material breach found); *Crook v. Tudor*, 28 Wn.2d 289, 182 P.2d 740 (1947) (material breach found); *Bryant v. Stablein*, 28 Wn.2d 739, 184 P.2d 45 (1947) (real estate contract; vendee's delay in performance found not fatal); *Haag v. Revell*, 28 Wn.2d 883, 184 P.2d 442 (1947) (employment contract; employee's misconduct found to have justified his discharge); *Bruckart v. Cook*, 30 Wn.2d 4, 190 P.2d 725 (1948) (material breach found); *State ex rel. Piper v. Pratt*, 31 Wn.2d 725, 198 P.2d 814 (1948) (architect who submitted plans for a building which would cost in excess of the authorized cost held unable to recover); *Hebb v. Severson*, 32 Wn.2d 159, 201 P.2d 156 (1948) (real estate contract; tender of warranty deed conveying an insurable title held insufficient, the vendor's duty being to convey a marketable title); *Carey v. Powell*, 32 Wn.2d 761, 204 P.2d 193 (1949) (life-support contract; sufficient performance found); *Litel v. Marsh*, 33 Wn.2d 441, 206 P.2d 300 (1949) (real estate contract; vendee found to be in total default); *Peplinski v. Campbell*, 37 Wn.2d 857, 226 P.2d 211 (1951) (real estate contract; vendor's delay in clearing defects in his title held to have been excessive); *Gillmore v. Green*, 39 Wn.2d 431, 235 P.2d 998 (1951) (an unusually interesting example of the "who is in material default" problem often encountered when both parties default; a vendor defaulted by failure to deliver a title report but the materiality of the default was waived by the vendee, who continued to make payments for a time and then quit); *Yeager v. International Bhd. of Teamsters*, 39 Wn.2d 807, 239 P.2d 318 (1951) (union's failure to follow the prescribed procedure in passing on an application for membership held to be an immaterial breach); *Kraft v. Spencer Tucker Sales, Inc.*, 39 Wn.2d 943, 239 P.2d 563 (1952) (buyer who contracted for a car and certain accessories was not in default upon refusing to take the accessories where the seller could not deliver the car); *Bean v. Hallett*, 40 Wn.2d 70, 240 P.2d 931 (1952) (wrongful repossession by a conditional sale vendor of land held a total breach); *Lacey Plywood Co. v. Wienker*, 42 Wn.2d 719, 258 P.2d 477 (1953) (defects in machine which was the subject matter of the

exceptions are *Jacks v. Blazer*,⁴⁸⁹ in which a delay problem was resolved by reference to a proposition set out in the *Restatement of Contracts*, section 276,⁴⁹⁰ and *Bayley v. Lewis*,⁴⁹¹ in which the controlling fact was the rendition of a performance which though not complete gave the recipients "the major portion of the benefits they bargained for under the contract."

Prospective Failure of Consideration. "Failure of consideration" is a confusing term. Once a bilateral contract is formed by an exchange of promises, consideration exists in fact and cannot very well "fail." The term is used to describe a failure to render or to tender substantial performance in a situation where such performance is a constructive condition. One result of such a failure is discharge of the conditioned duty,⁴⁹² a matter which will be discussed later. Of immediate concern however is "prospective failure of consideration," i.e., the existence of a state of affairs, before the time for satisfying a constructive condition has arrived, which indicates that it will not be satisfied when the time does arrive. The basic exchange-of-performances analysis of a bilateral contract not only justifies the creation of constructive conditions, but also justifies protecting a promisor who encounters an unanticipated, unassumed, and abnormal risk of not receiving the counter-performance. The appropriate protection varies with the circumstances and ranges from discharge of the promisor on a change of position by him, to a legal excuse for refusal of his performance, though due first in

contract held to constitute material breach); *Angeles Gravel & Supply Co. v. Clallam County Hospital Dist. No. 2*, 42 Wn.2d 827, 259 P.2d 366 (1953) (seller recovered despite alleged shortages in quantity of concrete delivered; waiver, or estoppel to assert the shortage, was the stated ground for the decision); *Ferris v. Blumhardt*, 48 Wn.2d 395, 293 P.2d 935 (1956) (life support contract; total breach); *Radach v. Prior*, 48 Wn.2d 901, 297 P.2d 605 (1956) (time can be made of the essence as to a defaulted installment under a real estate contract, by notice to the vendee demanding payment within a stated reasonable period); *Mell v. Winslow*, 49 Wn.2d 738, 306 P.2d 751 (1957) (total failure of promisee to perform held "failure of consideration"). It will be observed that some of the cases cited above put in issue the materiality of a defaulting party's breach rather than satisfaction of a constructive condition. These were included because the same tests are used by courts in resolving both types of issue.

⁴⁸⁹ 39 Wn.2d 277, 235 P.2d 187 (1951).

⁴⁹⁰ I.e., "In mercantile contracts performance at the time agreed upon is important, and if the delay of one party is considerable having reference to the nature of the transaction and the seriousness of the consequences, and is not justified by the conduct of the other party, the duty of the latter is discharged." The issue was discharge, not satisfaction of the condition. See note 486 above. The same criteria determine "materiality" and "substantiality."

⁴⁹¹ 39 Wn.2d 464, 236 P.2d 350 (1951). *Central Life Assur. Soc'y v. Impelmans*, 13 Wn.2d 632, 126 P.2d 757 (1942), is also of more than average interest; inability of a seller to convey a marketable title to all of the property was said not to be prospective failure of consideration, because the part as to which his title was defective was small and for it damages were an adequate substitute.

⁴⁹² *RESTATEMENT, CONTRACTS* § 274 (1932); 3 *CORBIN, CONTRACTS* § 658 (1950); 6 *CORBIN, op. cit.* § 1252 *et seq.* See the discussion at notes 670-676.

time, save on contemporaneous rendition of the exchange performance.⁴⁹³ Apparently but one of the later Washington cases involved the assertion of prospective failure of consideration as a defense.⁴⁹⁴ Other cases in which a contract vendee sought to rescind and recover his payments, because of defects in the vendor's title, are of interest insofar as they shed light on the court's thinking about the evidence requisite to establish prospective failure of consideration.⁴⁹⁵

When Conditions Precedent are Excused—Prevention. A condition, whether express or constructive, ceases to be operative if the promisor whose duty it qualifies wrongfully interferes with its satisfaction.⁴⁹⁶ Several of the later cases required routine applications of this principle.⁴⁹⁷ In *Kingston v. Anderson*⁴⁹⁸ the court encountered an

⁴⁹³ RESTATEMENT, CONTRACTS §§ 280 *et seq.* (1932); 3 WILLISTON, CONTRACTS § 875 *et seq.* (rev. ed. 1936); 6 CORBIN, CONTRACTS § 1255 *et seq.* (1950). For the earlier cases see WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 280 *et seq.* Conditional sales contracts for land or a chattel typically contain a risk of loss clause under which the vendee assumes the risk as to events which might otherwise be prospective failure of consideration. *Teply v. Sumerlin*, 46 Wn.2d 504, 282 P.2d 827 (1955), is an example.

⁴⁹⁴ *Erckenbrack v. Jenkins*, 33 Wn.2d 126, 204 P.2d 831 (1949) (vendee who failed to pay was in default and his interest subject to forfeiture even though the vendor's title was defective, as the defects were curable before time for conveyance; earlier cases were cited and followed).

⁴⁹⁵ *Parchen v. Rowley*, 196 Wash. 340, 82 P.2d 857 (1938) (vendee can rescind a real estate contract upon the vendor's contracting to sell the property to another); *Hebb v. Severson*, 32 Wn.2d 159, 201 P.2d 156 (1948) (vendee's claim of rescission was legally justified by vendor's lack of marketable title; the defect was evidently one which the vendor could not cure in time to render his performance). Cf. *Gillmore v. Green*, 39 Wn.2d 431, 436, 437, 235 P.2d 998, 1001, 1002 (1951) (vendee sought without success to rescind a real estate contract because the vendor did not have title; the court said: "The fact that the vendor . . . is not the owner of it at the time of making the contract, is not ground for rescission of the contract in the absence of a representation by the vendor, at the outset, as an inducement, that he, in fact, had such title," and "the burden is upon plaintiff . . . to allege and prove that the vendor cannot perform when the time for performance arrives. This, plaintiff has not done.") See also *Erckenbrack v. Jenkins*, 33 Wn.2d 126, 137, 204 P.2d 831, 836 (1949) ("We have repeatedly held that the fact that a vendor in a contract for the sale of land is not the owner thereof at the time of making the contract is not of itself ground for rescission on the part of the purchaser, but it must appear that the vendor cannot or will not perfect a title thereto. It is a question of conveying the title, or having it conveyed, to a purchaser when the time of performance comes.")

⁴⁹⁶ RESTATEMENT, CONTRACTS § 295 (1932); 3 WILLISTON, CONTRACTS § 677 (rev. ed. 1936); 3 CORBIN, CONTRACTS § 767 (1950).

⁴⁹⁷ *Vance v. Mutual Gold Corp.*, 6 Wn.2d 466, 108 P.2d 799 (1940) (payee of notes payable from production proceeds sought recovery, arguing that sale of its mine was prevention by the maker; the court found no prevention, the sale having been made for stock in a company which undertook operation of the mine); *Wolk v. Bonthius*, 13 Wn.2d 217, 124 P.2d 553 (1942) (owner who wrongfully ordered contractor off the site cannot assert the contractor's failure to perform as a defense); *Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines, Inc.*, 13 Wn.2d 370, 125 P.2d 668 (1942); *Foster v. Montgomery Ward & Co.*, 24 Wn.2d 248, 163 P.2d 838 (1945) (buyer who was to designate a place for delivery, and did not, cannot assert the seller's failure to tender the goods as a defense); *Haugen v. Raupach*, 43 Wn.2d 147, 260 P.2d 340 (1953) (owner who wrongfully induced architect to refuse his certificate cannot assert against the contractor a contract provision making such a certificate a condition; RESTATEMENT, CONTRACTS § 303(b) (1932) was cited); *Aircraft Radio Indus., Inc. v.*

unusual prevention problem and disposed of it in a highly unsatisfactory way. A condition the subject matter of which is an act (such as payment or delivery of a deed or a chattel) is satisfied by a tender of the act.⁴⁹⁹ If the promisor prevents a tender by evasive tactics the condition is excused.⁵⁰⁰ Since evasion consists of absence from the place where the tender is to occur, no progress can be made toward solution of the problem until that place is determined. The *Kingston* case probably raised this prevention issue. The case certainly demonstrates the inevitable consequences of insufficient attention to the question, where was the contract to be performed.⁵⁰¹

M. V. Palmer, Inc., 45 Wn.2d 737, 277 P.2d 737 (1954) (buyer whose duty to pay is conditional on suitability of the goods for his purposes excuses the condition by unreasonable delay in determining their suitability). See also *Dygert v. Hansen*, 31 Wn.2d 858, 199 P.2d 596 (1948) (fishermen who were to fish on shares had a cause of action when the vessel put out without them; although the court did not mention prevention, it is evident that doing the work was a constructive condition, excused by prevention). A case hard to classify and which may belong here, or may be more allied to the waiver or estoppel cases discussed at note 508 below, is *Stewart v. Moss*, 30 Wn.2d 535, 192 P.2d 362 (1948) (buyer who paid part of the price and who neither paid nor tendered the balance was permitted to recover the amount he had paid; the seller had conveyed to another without having tendered the property to the buyer, and the case might have been grounded on this circumstance; see the discussion at note 479 above; the court however chose to take a quite different approach, finding its reason in the seller's failure to cooperate with a buyer who it knew could not raise the final payment save on security of the property and could not provide security both because he had no title and because the property was already encumbered; this cooperation, either by offering to convey subject to its own mortgage, or by escrowing the transaction, the court evidently deemed to have been the reasonable and honest course although not required by the contract). It should be noted that an obligee who asserts excuse of condition by prevention must be prepared to show that he could and would have met the condition, save where the prevention induced the inability. The *Foster* case, *supra*, is illustrative.

⁴⁹⁸ 3 Wn.2d 21, 99 P.2d 630 (1940), noted in 16 WASH. L. REV. 49 (1941).

⁴⁹⁹ 3 WILLISTON, CONTRACTS §§ 832, 833 (1950); 3 CORBIN, CONTRACTS § 663 (1950); 6 CORBIN, CONTRACTS § 1258 (1950).

⁵⁰⁰ 3 WILLISTON, CONTRACTS § 836 (rev. ed. 1936).

⁵⁰¹ It is impossible to determine from the opinion either what the precise issue was or what the court thought it was. The court said: "The rule in the United States is that, when a contract is made in one state for the payment of money and no place of payment is designated, the debtor is not bound to go to another state to tender the money to the creditor." The rule as stated is sound in instances of money debts. 6 WILLISTON, CONTRACTS § 1812, note 6 (rev. ed. 1936). See also 5 CORBIN, CONTRACTS §§ 1234, 1235 (1950). The *Kingston* case did not involve a money debt; it involved either acceptance of an offer or the operation of constructive conditions in a bilateral contract. In neither situation is the rule as stated properly applicable. Upon examining the briefs as well as the opinion, it appears that a California resident handed to a British Columbia resident in Seattle a writing which recited an offer to sell stock in a Washington corporation. This writing the court refers to as an "option" although the opinion says nothing about any payment for the offer. The offeree sent a telegram from British Columbia to the offeror at his California address, advising him that the option would be exercised. The offeree never tendered payment; this action was to recover damages for the seller's failure to deliver the stock. If the offer required payment as part of the acceptance, the existence of any contract was in issue. If the offer was not an option, absence of the offeror from the place where payment was to be made was not wrongful, being but a type of revocation. If the offer was an option, evasion of offeror by offeree would be wrongful and his absence from the indicated place for acceptance would give the offeree additional time within which to accept or might even give him a cause of action without any tender. Annot., *When*

Waiver. A contract obligor whose undertaking is qualified by an express condition the subject matter of which is not a material part of the contemplated exchange will "waive the condition" if he expresses a purpose to perform even though the condition is not satisfied.⁵⁰² The effect of the waiver is simply to make the duty in question unconditional. Washington cases so holding were numerous before 1937.⁵⁰³

optionee's delay in exercising option excused, 157 A.L.R. 1311, 1318 (1945); 2 CORBIN, *op. cit. supra*, § 275, n. 41; 1 WILLISTON, *op. cit. supra*, § 61, n. 4. This principle cannot be applied without first determining where the payment was to be made. The parties said nothing about this detail. Should it be found, either by interpretation or as a matter of law, to be the place, where the option was created? This seems unreasonable where both parties resided elsewhere. The money-debt cases which support the proposition quoted above are grounded on the idea that the parties expect the debtor to pay in the state in which the debtor resided when the debt was incurred. This reasoning is not appropriate where, as in the Kingston case, both of the parties live in another place. It is probably unsound even where an option is given in the state of the optionee's residence. Here the bilateral contract cases (discussed below) are more analogous than the debt cases. It may be doubted that the parties expect payment at any place other than the optionor's residence or place of business. There seems to have been no valid reason in the Kingston case to find Washington to be the place for payment. It is doubtful that British Columbia would be either. If acceptance was the problem, the case is unsupportable. If the offer permitted acceptance by a promise to buy and pay, the offeree's telegram could be interpreted as an acceptance. If it was, a bilateral contract resulted, made, probably, in British Columbia (see the discussion at note 90 above). Under it, payment and delivery of the stock were concurrent constructive conditions. It is not possible to proceed further without knowing where the contract was to be performed. If at the buyer's residence, he may have made an effective tender by being there with the money. If at the seller's residence (or place of business), the buyer has no cause of action. If in Washington, failure of the seller to designate a place would be a type of prevention and payment as a condition to the seller's duty to perform immediately was excused (assuming the buyer could show ability and willingness to pay had the place been designated). Where as here the parties did not expressly fix the place for performance, the answer probably lies in interpretation, including custom. Typically, the seller's residence or place of business is found to be the place for performance. WILLISTON, *op. cit.* §§ 836, 1812. In chattel sale-contracts the same answer is dictated by the UNIFORM SALES ACT, RCW 63.04.440 (1); 2 WILLISTON, SALES §§ 449, 450 (rev. ed. 1948). If the Kingston case involved a contract to buy and sell, a holding that the seller's residence was the place for performance would have been expectable. Certainly the opinion discloses no evidence suggesting that the parties intended to perform in Washington. The offer did not say anything about this detail. The acceptance did suggest Spokane as the place for closing but the court found this passage to be no part of the acceptance; indeed, had it been, there would have been no acceptance. If a seller moves to another state after a sale-contract is made, it can be argued that the place for performance remains in the state where the seller resided when the contract was made; this was not however the Kingston case. When the Kingston contract was made the buyer resided in British Columbia and the seller in California, and the seller remained in California. If excuse of a constructive condition by prevention was the issue, the Kingston case is in result supportable only if Washington was the place for performance and the principle the court stated, as quoted above, is not supportable at all. The case will be a threat to accurate analysis of sales contracts made in Washington between non-residents or between a Washington resident and a non-resident, until such time as the court re-examines the proposition stated in the Kingston opinion. It should also be noted that the case raises some disturbing questions about the way in which the seller must proceed if he is to acquire a cause of action against the buyer. Must he tender to the buyer in the state where the contract was made, and if so, where in that state?

⁵⁰² RESTATEMENT, CONTRACTS § 297 (1932); 3 WILLISTON, CONTRACTS §§ 678 *et seq.* (rev. ed. 1936); 3 CORBIN, CONTRACTS §§ 752 *et seq.* (1950).

⁵⁰³ WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 297.

The critical issues in the subsequent cases were factual: Was sufficient evidence offered in support of the alleged waiver?⁵⁰⁴

Application of the waiver doctrine to bilateral contracts and constructive conditions requires careful analysis. A performance, being the subject of a duty in one party and a right in the other, cannot by the better view be "waived." The right is a type of property interest; for its surrender to the obligor the technics appropriate to discharge or assignment must be employed.⁵⁰⁵ These in turn reflect basic concepts about sales and gifts. It is equally clear that an obligor can render a constructive condition inoperative and come under a duty of immediate performance even though the counter-performance, the subject of the constructive condition, was so defective as not to meet the demands of the substantial performance doctrine. He will not be discharged and will be obliged to find his relief for the defects in a cross-claim for damages. There is demonstrated in the opinions more than a little confusion about the theory on which these principles rest and about the proper terminology by which to describe the obligor's conduct.⁵⁰⁶ The extent to which reliance (on an expression of purpose to treat as immaterial a certain deviation from the promised counter-performance) is important, is not clear. Nor is it clear whether the obligor's conduct should be characterized as producing waiver, estoppel or election. Certainly, few would quarrel with the results generally reached by courts.

That these principles appertain in Washington was made clear by the pre-1937 cases, which also illustrate some of the significant types

⁵⁰⁴ *Dowell, Inc. v. United Pac. Cas. Ins. Co.*, 191 Wash. 666, 72 P.2d 296 (1937) (insurer who received a verbal accident report held "estopped" to assert a policy term requiring written notice); *Draper v. Aetna Life Ins. Co.*, 1 Wn.2d 17, 95 P.2d 28 (1939) (proof of loss; waiver not found); *Morango v. Phillips*, 33 Wn.2d 351, 205 P.2d 892 (1949) (construction contract; clause making a written request a condition to the builder's right to pay for extras; condition held waived). See also *Lidral Constr. Co. v. Parker*, 9 Wn.2d 128, 113 P.2d 1022 (1941) (the pleading burden resting on a contract obligee, to allege satisfaction or excuse of conditions, was found to have been met by allegations sufficient, in the court's view, to indicate waiver).

⁵⁰⁵ RESTATEMENT, CONTRACTS § 297 comments *b* and *c* (1932); 3 WILLISTON, CONTRACTS §§ 678, 700 *et seq.* (rev. ed. 1936); 3 CORBIN, CONTRACTS §§ 752, 766 (1950). Cases like *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948) and *Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954), insofar as they suggest that a property right can be extinguished by "waiver," are not supportable. A by-product of the analytic confusion evident in these cases is doubt about the meaning of the word "waiver." See 3 WILLISTON, *op. cit. supra* § 679. It should also be noticed that promissory estoppel may operate to preclude damages for failure to perform which was consented to by the obligee. See 3 WILLISTON, *op. cit. supra* § 690. *Cf.*, 3 WILLISTON, *op. cit. supra* § 724. See also the discussion at note 694 below.

⁵⁰⁶ 3 WILLISTON, CONTRACTS §§ 683 *et seq.*, 699 *et seq.* (rev. ed. 1936); 3 CORBIN, CONTRACTS §§ 754 *et seq.* (1950). See also RESTATEMENT, CONTRACTS §§ 298, 299, 300, 304, 305, 309 (1932); *Cf.* § 297 and § 311.

of evidence.⁵⁰⁷ The later cases are only cumulative authority, both for the basic rule, and for the very important collateral principle which enables an obligor who has "waived" the importance of deviations from the other party's promised performance to revive their importance by seasonable notice.⁵⁰⁸

Repudiation. If an obligor has indicated without legal justification that he will not or cannot perform there is no reason for requiring the obligee to go through the useless motion of satisfying express or constructive conditions which would otherwise qualify the obligor's duty. Conditions are "excused," (*i.e.*, rendered inoperative) by such a repudiation.⁵⁰⁹ In *Parchen v. Rowley*⁵¹⁰ both parties relied on this propo-

⁵⁰⁷ WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 297, 298, 299, 300, 304, 309, 311.

⁵⁰⁸ *Dopps v. Alderman*, 12 Wn.2d 268, 121 P.2d 388 (1942) (vendee cannot rescind a real estate contract and vendor can specifically enforce it, where the vendor's delay in clearing his title was consented-to by the vendee); *Bulmon v. Bailey*, 22 Wn.2d 372, 156 P.2d 231 (1945) (after indulging the vendee in delays in payments, the vendor cannot summarily forfeit the contract for subsequent delays); *Knoblauch v. Sanstrom*, 37 Wn.2d 266, 223 P.2d 462 (1950) (similar to the *Bulmon* case); *Gillmore v. Green*, 39 Wn.2d 431, 235 P.2d 998 (1951) (vendee who continues to make his payments cannot rescind for failure of the vendor to furnish a title report at the time set in the contract; the court followed *Central Life Assur. Soc'y v. Impelmans*, 13 Wn.2d 632, 126 P.2d 757 (1942), quoting from the earlier opinion a text passage reading in part: "Any act on the part of the purchaser treating the contract as in force, when done voluntarily and with a knowledge of facts creating a right to rescind, amounts to a waiver of the right to rescind. . ."). Some of these cases indicate by dicta that prompt performance might, for the future, be required by appropriate notification and a reasonable opportunity to comply; this proposition was held to have been met in *Radach v. Prior*, 48 Wn.2d 901, 297 P.2d 605 (1956) (notice of forfeiture was effective where made contingent on payment of delinquent installments within thirty days, a period deemed sufficient); *Hall v. Nordgren*, 196 Wash. 68, 81 P.2d 857 (1938) (a similar holding); *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 215 P.2d 425 (1950) (also a similar holding). See in this connection 3 CORBIN, CONTRACTS § 764 (1950). An employer may by permitting an employee to continue in the employ "waive" defective performance. In *Haag v. Revell* 28 Wn.2d 883, 184 P.2d 442 (1947) the court declined to find that the evidence supported application of this principle. The court also held that repudiation of the contract by the employer was justified where the employee was in fact in total default even though the employer gave some other reason for discharging the employee. See also *Hansen v. Columbia Breweries, Inc.*, 12 Wn.2d 554, 122 P.2d 489 (1942); *Knatvold v. Rydman*, 28 Wn.2d 178, 182 P.2d 9 (1947). In *Angeles Gravel & Supply Co. v. Clallam County Hosp. Dist. No. 2*, 42 Wn.2d 827, 259 P.2d 366 (1953) a buyer who sought to defend an action for a balance due on a contract for the sale of cement, by showing that various deliveries were short in quantity, was held barred from the defense by his failure timely to ascertain and specify in his protests about shortages the amounts thereof. It will be observed that two different but interrelated themes run through these cases. One is an obligor's purpose to continue the transaction, manifested in language, in continuation of his own performance, or in demands for performance by the other party. The second is a kind of deception plus reliance, as where defective performance is received or retained.

⁵⁰⁹ RESTATEMENT, CONTRACTS § 306 (1932); 3 WILLISTON, CONTRACTS § 698A (rev. ed. 1936); 4 CORBIN, CONTRACTS § 977 (1950). It will be observed that the same consequences may attend an expression by the obligor of doubt about his intentions concerning performance. See also WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 306, and the cases cited in note 530 *et seq.* below. Here as in instances of prevention an obligee claiming excuse of a condition must be prepared to show that he could and

sition. The contract was for the sale of real property, with the price payable in installments and conveyance due on full payment. When the time came at which the vendee should have been paid out he was far behind and said he could not pay the balance due, whereupon the vendor, without first tendering conveyance, contracted to sell the property to another. Subsequently, the vendee proposed to pay up and demand conveyance but did not actually tender the contract balance. The vendor then brought this action to quiet her title and the vendee cross-complained for rescission and restitution. The vendee prevailed. The vendor was held to have repudiated, rather than the vendee. Judge Steinert, in dissenting, characterized the decision as "illogical, inequitable, and wrong." His appraisal seems to be a fair one.⁵¹¹ The vendee received a remedy to which he was entitled only if the vendor was in total default. The vendor was not in default; she was totally discharged, both because she had materially changed her position after the vendee expressed inability to pay,⁵¹² and also because the vendee was himself in total default.⁵¹³

would have satisfied it had the conduct which produced the excuse not occurred. RESTATEMENT, CONTRACTS § 295 (1932); 3 WILLISTON, *op cit. supra*, § 677 n.7; 4 CORBIN, CONTRACTS, *op. cit. supra* § 978.

⁵¹⁰ 196 Wash. 340, 82 P.2d 857 (1938), discussed in Comment, *Does the Law require a useless act? Parchen v. Rowley*, 15 WASH. L. REV. 107 (1940). The Parchen case was apparently approved in *In re Horse Heaven Irrigation Dist.*, 19 Wn.2d 89, 141 P.2d 400 (1943), which, insofar as it denied all legal effect to a vendee's statement that he could not pay, is subject to the criticism below accorded the Parchen case.

⁵¹¹ Of the vendee's statement that he could not pay, the court said: "He never repudiated the contract or refused to carry it out. . . . Appellant cannot be deprived of his legal rights under the contract by a casual remark of that sort." This reasoning is contrary to that followed in *Hunter v. Radford*, 111 Wash. 668, 191 Pac. 794 (1920) and by other courts. 3 WILLISTON, CONTRACTS § 698A, n. 8 (rev. ed. 1936); 4 CORBIN, CONTRACTS § 974, n.93, § 977, nn. 2, 3 (1950). A flat statement by a vendee, that he cannot pay, is hardly a "casual remark." Of course, the statement must be both actually and reasonably relied upon by the vendor to have legal effects. The main objection to the Parchen case is that the court will never get to these details, if it is unwilling to concede that "I cannot" is a type of repudiation statement. It should be noticed too that "I cannot," to justify discharge of the vendor on his change of position, must mean "I cannot during the period of time within which my tender of performance would be substantial performance." The reliance element in the principle under discussion differentiates it from the proposition invoked in anticipatory breach cases, which often purport to require a more positive statement of unwillingness or inability to perform than would be appropriate where prospective failure of consideration is in issue. See RESTATEMENT, CONTRACTS § 318 (1932); 4 CORBIN, *op cit. supra*, § 973; 5 WILLISTON, *op cit supra* § 1324. Apart from what the vendee said, if he was in fact unable to perform, this fact plus the vendor's justified change of position should both discharge the vendor and put the vendee in default at performance time, tender by the vendor as a condition being excused. RESTATEMENT, CONTRACTS § 323 (1932); 6 CORBIN, *op cit. supra* §§ 1259, 1260; 3 WILLISTON, *op cit. supra*, § 877.

⁵¹² RESTATEMENT, CONTRACTS § 280 (1932); 6 CORBIN, CONTRACTS §§ 1265, 1270 (1950). See also *McCormick v. Tappendorf*, 51 Wash. 312, 99 Pac. 2 (1909) and WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 280.

⁵¹³ The vendee was in total default, either because his statement of inability was an anticipatory breach, if positive enough (RESTATEMENT, CONTRACTS § 318 (1932)), or because the time for his performance had arrived and there was no condition to his

Expert's Certificate. A builder's right to payment is often expressly conditioned on his obtaining an architect's certificate. Just what circumstances will operate to excuse the condition is a recurrent problem. It is also one on which the cases are considerably confused.⁵¹⁴ If the certificate be denied because of collusion between owner and architect, or improper persuasion by the owner, there is prevention within the principle discussed above under that subheading. The difficult issues grow out of other evidence. *Haugen v. Raupach*⁵¹⁵ clarified the Washington rule to a degree by adopting as an alternative ground for the decision a proposition apparently based on *Restatement of Contracts*, section 303(c): "If the architect is satisfied that there has been a substantial performance of the contract, it then becomes his duty to issue the certificate of completion, and if he does not do so, his conduct is regarded as arbitrary and capricious."⁵¹⁶ The condition was held to be excused. The court did not mention, and may have inferentially disapproved, an earlier case⁵¹⁷ which ought to be overruled. That case can be read as adopting a minority doctrine under which the condition is excused if the builder substantially performs the work.⁵¹⁸ It is a bad doctrine because it substitutes the determination of judge or jury about conformity of the work to the contract, for the determination of the expert. The owner is thus deprived of a protection for which he bargained. The formula stated in the *Haugen* case is an improvement. It at least makes the expert the arbiter of "substantial performance." Whether the owner is sufficiently protected by this formula, and, indeed, whether the formula is workable at all, will depend on the content

duty to perform immediately. Conveyance as a constructive condition was excused by the vendee's expression of inability. *RESTATEMENT, CONTRACTS* § 323 (1932). The court's holding that the vendor repudiated when she disabled herself from performing would have been sound had its conclusion about the vendee's conduct been sound. *RESTATEMENT, CONTRACTS* § 318 (1932).

⁵¹⁴ 3 WILLISTON, *CONTRACTS* § 794 (rev. ed. 1936); 3 CORBIN, *CONTRACTS* §§ 650 *et seq.* (1950). See also WASHINGTON ANNOTATIONS, *RESTATEMENT, CONTRACTS* § 303. A major source of difficulty is the use in opinions of vague terms like "fraud" or "arbitrary" or "unreasonable" in discussing the architect's conduct and in explaining why the owner should or should not pay even though no certificate was forthcoming. See, for example, the summary of prior cases in the dissenting opinion, *Schuehle v. Seattle*, 199 Wash. 675, 92 P.2d 1109 (1939).

⁵¹⁵ 43 Wn.2d 147, 260 P.2d 340 (1953).

⁵¹⁶ The court cited this *Restatement* subsection; it proposes excuse of the condition if the architect "refuses to give a certificate after making examination of the work and finding it adequate." Just what the word "adequate" was intended to mean in this context is obscure. It seems not to mean "perfect." That it was intended to mean "substantial performance" is unlikely.

⁵¹⁷ *Washington Bridge Co. v. Land & Improvement Co.*, 12 Wash. 272, 40 Pac. 982 (1895).

⁵¹⁸ 3 WILLISTON, *CONTRACTS* § 797, n. 2 (rev. ed. 1936); 3 CORBIN, *CONTRACTS* § 651 n. 23 (1950).

given it by future decisions. Its application presents obvious difficulties. What the phrase "substantial performance" means in this context is unclear. It may be doubted that architects now make a practice of finding "substantial performance" however defined; they refuse certificates because the builder has in their judgment departed from the plans and specifications. The court is apparently trying to find a balance point, to protect the builder against an overly captious architect, and to retain for the owner in fair measure the assurance which is afforded by an expert's certificate. The endeavor is a laudable one. It can hardly be regarded as finished.⁵¹⁹

BREACH OF CONTRACT

Nature of Breach. A contract obligor who fails to do what he promised commits a legal wrong if the time for his performance has arrived and if all the express and constructive conditions which qualify his undertaking have been satisfied or excused. In other words, a cause of action for breach of contract exists only if a duty to perform immediately is not fulfilled.⁵²⁰ Moreover, the obligor's duty must encompass the particular conduct or inaction of which the obligee is complaining. A good many disputes about breach are simply disputes about what was promised, and must be resolved by the application of interpretation and implication principles already discussed. These basic propositions supplied the solution in a number of the later Washington cases.⁵²¹

⁵¹⁹ The real problem is whether the owner should have to pay if the expert has examined the work and has in the exercise of his honest judgment, without interference from the owner, concluded that the plans and specifications have not been met. The quarrel is typically about the technical accuracy of the expert's decision. The condition is an express one and a term of the contract, relief from which can be justified only by resort to the court's power to excuse a condition where its application would result in extreme forfeiture. See the discussion at note 476 above; *RESTATEMENT, CONTRACTS* § 303 comment *a* (1932). Caution rather than liberality in excusing the condition would appear to be in order.

⁵²⁰ *RESTATEMENT, CONTRACTS* §§ 312, 314 (1932); 4 *CORBIN, CONTRACTS* § 943 (1950); 5 *WILLISTON, CONTRACTS* § 1288 (rev. ed. 1936). Notice too the discussion in the Discharge section below.

⁵²¹ Breach was a factor in many of the cases already referred to, although the contested issue was contract formation, interpretation, or the operation of conditions. The following decisions are cited here, because the existence of a breach was disputed and the opinions contain discussion more or less relevant to the issue: *Mayflower Realty Co. v. Security Sav. & Loan Soc'y*, 192 Wash. 129, 72 P.2d 1038 (1937); *Bullock v. Parsons*, 193 Wash. 79, 74 P.2d 892 (1937); *Parchen v. Rowley*, 196 Wash. 340, 82 P.2d 857 (1938); *Kenney v. Abraham*, 199 Wash. 167, 90 P.2d 713 (1939); *Merager v. Turnbull*, 2 Wn.2d 711, 99 P.2d 434 (1940); *Vance v. Mutual Gold Corp.*, 6 Wn.2d 466, 108 P.2d 799 (1940); *Walker v. Herke*, 20 Wn.2d 239, 147 P.2d 255 (1944); *Hesselgrave v. Mott*, 23 Wn.2d 270, 160 P.2d 521 (1945); *Lyle v. Haskins*, 24 Wn.2d 883, 168 P.2d 797 (1946); *White v. Mullen*, 25 Wn.2d 239, 170 P.2d 322 (1946); *Norm Advertising, Inc. v. Monroe Street Lumber Co.*, 25 Wn.2d 391, 171 P.2d 177 (1946); *Kolosoff v. Turri*, 27 Wn.2d 81, 176 P.2d 439 (1947); *Palmer Supply Co. v. Time Oil*

Prevention and Repudiation. The implication technic has further been used to solve two problems which do not obviously lend themselves to the method. Unjustified prevention by one party of the other's performance or satisfaction of a condition is a breach because courts will imply a promise not to interfere in this way with the normal development of the transaction.⁵²² An obligor's unjustified anticipatory repudiation of his duty under a bilateral contract is breach because a promise not to repudiate will be implied.⁵²³ Since these implied promises are unconditional and are performable immediately upon formation of the contract, they create duties which can be breached before the time has arrived for rendition by the wrongdoer of his main performance. For such a breach the injured party has at once a cause of action. If he delays his suit, however, resort to this theory will become unnecessary. The accepted analysis of his situation, after the time has come for rendition of the wrongdoer's main promise (to pay or build or whatnot) gives him a cause of action for non-performance of it. The injured party is excused by the prevention or repudiation from

Co., 27 Wn.2d 468, 178 P.2d 737 (1947); Hopper v. Williams, 27 Wn.2d 579, 179 P.2d 283 (1947); Knatvold v. Rydman, 28 Wn.2d 178, 182 P.2d 9 (1947); Rathke v. Roberts, 33 Wn. 2d 858, 207 P.2d 716 (1949); Bean v. Hallett, 40 Wn.2d 70, 240 P.2d 931 (1952); Bernbaum v. Hodges, 43 Wn.2d 503, 261 P.2d 968 (1953); McFerran v. Heroux, 44 Wn.2d 631, 269 P.2d 815 (1954); Walsh Services v. Feek, 45 Wn.2d 289, 274 P.2d 117 (1954); Lyle v. Heidner & Co., 45 Wn.2d 806, 278 P.2d 650 (1954); Hansen v. Walker, 46 Wn.2d 499, 282 P.2d 829 (1955); Arnesen v. Rowe, 46 Wn.2d 718, 284 P.2d 329 (1955); *In re Black*, 47 Wn.2d 42, 287 P.2d 96 (1955); *In re Kennewick School Dist.*, 47 Wn.2d 56, 287 P.2d 105 (1955); Carstens Packing Co. v. Cox, 47 Wn.2d 346, 287 P.2d 486 (1955); Gertz v. American Discount Corp., 47 Wn.2d 694, 289 P.2d 369 (1955); Lidral v. Sixth & Battery Corp., 47 Wn.2d 831, 290 P.2d 459 (1955); Ferris v. Blumhardt, 48 Wn.2d 395, 293 P.2d 935 (1956); Morse v. McGrady, 49 Wn.2d 505, 304 P.2d 691 (1956). Several of these cases dealt with facts of more than ordinary interest. Merager v. Turnbull and Lyle v. Haskins involved a covenant not to compete, made by the seller of a business, and breach by the financing of a business ostensibly operated by another person. Lyle v. Heidner & Co. was concerned with the degree of care and skill required of a builder who takes a cost-plus contract. In the Arnesen case, negligence in the repair of a marine engine was found to be a breach by the repairman. In Morse v. McGrady, a builder, sued for alleged breach in that his work was not properly done, was permitted to introduce, under his general denial and in rebuttal, a certificate executed by the owner to the mortgagee stating the work was accomplished satisfactorily. For the earlier cases see WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 312 *et seq.*

⁵²² RESTATEMENT, CONTRACTS § 315 (1932); 4 CORBIN, CONTRACTS § 944 (1950); 5 WILLISTON, CONTRACTS §§ 1293, 1293A, 1318 (rev. ed. 1936). Interference is justified only if the contract, fairly interpreted, places the risk of it on the other party.

⁵²³ 4 CORBIN, CONTRACTS §§ 959, 961, 971 (1950); 5 CORBIN, *op. cit. supra*, § 1053; 5 WILLISTON, CONTRACTS §§ 1296, 1318 (rev. ed. 1936). There is some support for the idea that anticipatory repudiation is a wrong, not because of an implied promise not to repudiate but because nonrepudiation is a duty which exists as a matter of law. RESTATEMENT, CONTRACTS § 318 comment a (1932); 4 CORBIN, *op. cit. supra*, § 971; 5 WILLISTON, *op. cit. supra*, § 1318. Whether repudiation of a unilateral contract should have the same effect is much mooted. See 2 CORBIN, *op. cit. supra*, §§ 962 *et seq.*; 5 WILLISTON, *op. cit. supra* §§ 1328 *et seq.*; Note, 33 WASH. L. REV. 135 (1957). The only justification for repudiation is the existence of a legal excuse for not performing the repudiated promise. See note 540 below.

meeting the conditions which qualify that promise.⁵²⁴ *Wolk v. Bonthius*⁵²⁵ was such a case.

*Mayflower Realty Co. v. Security Sav. & Loan Co.*⁵²⁶ appears to be the only 1937-1957 Washington case concerned with prevention as a breach. A corporation sold land on an installment payment contract under which the vendee had the option of paying in cash or by surrender at its par value of stock in the vendor; the corporation thereafter voluntarily dissolved. The court recognized the dissolution to be prevention, and specifically enforced the contract in an action brought by the vendee several years before the contract-date on which conveyance was due.⁵²⁷ The remedy granted is of major interest as there is no reason to expect any different approach in the far more numerous instances of breach by repudiation. Concerning the propriety of ordering premature performance of the promise to convey the court said only: "Appellants cannot be heard to complain of the acceleration of the payments on the principal since this must inevitably inure to their advantage. . . ." This sketchy disposition of a very difficult problem makes the decision of doubtful authority on the remedy issue. Although it is generally recognized that upon an anticipatory breach a decree

⁵²⁴ See notes 496 *et seq.*, and 509 *et seq.*, above.

⁵²⁵ 13 Wn.2d 217, 124 P.2d 553 (1942). Noncompletion of the work was held to be no defense to a builder's action to recover for work done where the owner without justification ordered the builder off the premises. See also *Norm Advertising Inc. v. Monroe Street Lumber Co.*, 25 Wn.2d 391, 171 P.2d 177 (1946). There is one situation in which it is difficult to determine whether the injured party's theory should be present breach or anticipatory breach. What of a repudiation after the date set in the contract, for the repudiator's performance, unjustified because he was not yet discharged by delay in satisfying a condition to his duty to perform immediately? The repudiation is "anticipatory" and presumably a breach. The repudiation also excuses the condition to the main promise, which is then immediately performable. Nonperformance is a present breach. *Parchen v. Rowley*, discussed at note 530 below is an illustrative case.

⁵²⁶ 192 Wash. 129, 72 P.2d 1038, 75 P.2d 579 (1937). For earlier cases see WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 315.

⁵²⁷ The trial court ordered conveyance by the vendor's successor on payment in cash of the entire contract balance plus interest on deferred installments. (See the respondent's brief.) The supreme court affirmed, and evidently regarded the prevention as unjustified and a present breach. There was also repudiation by the vendor but no particular point was made of it. In form the action as brought was simply to enjoin a threatened breach, a remedy which may be had without showing a breach has already occurred, 6 CORBIN, CONTRACTS § 1411 (1950), but the relief given went well beyond the injunction prayed for. The vendee's action was precipitated by a notice of forfeiture for failure to pay the current installment in cash, served by the vendor's successor after refusal to accept the vendee's tender of stock certificates issued by the vendor. The decree, in permitting payment in cash, seems sound; there is technically no such thing as "stock" in a defunct corporation and the vendee could not deliver "stock" even though he still held certificates. Interest was properly required, as the contract had no pre-payment option. The cash amount to be paid was computed as the difference between the par value of the stock and its cash value when the dispute arose. Since the vendee presumably had and retained a claim on the dissolved corporation's assets, which was determinative of the "cash value" of what had been "stock," this too seems a sound solution.

can be entered which orders performance at the future date set in the contract, it may be doubted if most courts would order performance ahead of such date.⁵²⁸ The Washington court's solution may nevertheless be preferable where the vendee is willing to prepay.

Several of the later repudiation cases merely reiterated propositions previously established.⁵²⁹ In *Parchen v. Rowley*⁵³⁰ a vendor under a real estate contract was held to have breached it when he subsequently contracted to sell the property to another person. In other cases the court declined to find a vendor to be in default just because his title was not marketable when he entered into the contract.⁵³¹ *McFerran v. Heroux*,⁵³² however, raised an unusual problem. An optionee sued a repudiating optionor,⁵³³ for damages, before the time at which the contemplated sale-contract would have been performable, and without accepting. He prevailed. The holding seems to be a sensible one, although under the more common analysis of option contracts an expression of purpose by an optionor not to perform would be only a legally ineffective attempt to revoke.⁵³⁴

⁵²⁸ RESTATEMENT, CONTRACTS §§ 358, 360, illustration 4 (1932); 6 CORBIN, CONTRACTS § 1411 (1950); 5 WILLISTON, CONTRACTS § 1432 (rev. ed. 1936).

⁵²⁹ See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 318, for the earlier cases.

⁵³⁰ 196 Wash. 340, 82 P.2d 857 (1938). The repudiation occurred after the date for performance of the vendor's promise to convey, and before the vendor was under a duty of immediate performance. See the discussion at note 525 above. Selling or contracting to sell to another the specific subject matter of the contract is generally regarded as evidencing repudiation. RESTATEMENT, CONTRACTS § 318(b) (1932); 5 WILLISTON, CONTRACTS § 1325 (rev. ed. 1936).

⁵³¹ *Central Life Assur. Soc'y v. Impelmans*, 13 Wn.2d 632, 126 P.2d 757 (1942); *Erckenbrack v. Jenkins*, 33 Wn.2d 126, 204 P.2d 831 (1949); *Gillmore v. Green*, 39 Wn.2d 431, 235 P.2d 998 (1951). Even though the vendor is not in default by reason of such a defect, if it is one which cannot be removed in time for the vendor to perform there is prospective inability; the vendee on a change of position is discharged and able to recover the payments he has made. See the discussion at note 492 *et seq.*, above.

⁵³² 44 Wn.2d 631, 269 P.2d 815 (1954), noted as to other issues in the case, 30 WASH. L. REV. 147, 175 (1955).

⁵³³ The court so characterized the optionor, but in another passage suggested that he was in actual breach by non-performance. Repudiation appears the correct analysis. The optionor was a lessee who owned the building on leased land and had a right to remove it. The lease gave the lessor an option to buy the building. The building burned and a lease covenant obligating the lessee to rebuild became operative. He refused to rebuild. This was a breach of the covenant but not of the option, which only obligated him not to revoke his offer to sell. The refusal to build was also an expression of intent not to sell what the offer called for and so was a repudiation of his offer-promise. In a non-option offer transaction this would be a revocation. Whether in an option it should be only an abortive attempt to revoke, or a repudiation permitting the optionee to sue at once may be debatable. See the following note. On no reasoning can it be a breach of the option by non-performance.

⁵³⁴ See the citations and discussion at note 71 above; RESTATEMENT, CONTRACTS § 47 (1932); 1 WILLISTON, CONTRACTS § 61 (rev. ed. 1936); *Kotcher v. Edelblute*, 250 N.Y. 178, 164 N.E. 897 (1928). Cf. 4 CORBIN, CONTRACTS § 977 n. 7 (1950), citing with apparent approval a case permitting specific enforcement by the optionee, without the formality of an acceptance. The filing of the complaint, if timely, might be deemed a sufficient substitute for an acceptance which requires only notice, and perhaps for one

*Crim v. Watson*⁵³⁵ and *In re Berry's Estate*⁵³⁶ also merit special mention. Each involved a wrongful notice of forfeiture, given by the vendor under a real estate contract. Of this conduct the court said:⁵³⁷ "Such a declaration cannot be construed as a repudiation of the contract by the vendor. For, of necessity, it is but an ineffectual attempt on his part to *enforce* the terms of the contract" [italics by the court].⁵³⁸ Granted that an expression of purpose not to perform should be a breach only if unequivocal,⁵³⁹ what stronger statement of such a purpose can be found than a notice informing the vendee his interest is forthwith terminated? These cases appear overly generous to the vendor. A repudiation is not devoid of legal effect just because the repudiator thinks he is legally justified in his course.⁵⁴⁰

In *Walker v. Herke*,⁵⁴¹ apparently the first Washington case on the point, a repudiator who retracted before the other party changed his position was held to have nullified the effect of the repudiation. This is the usual view.⁵⁴²

requiring payment if the proceeding is in equity and the optionee has of necessity indicated his willingness to pay. The obvious support for the McFerran case result is the uselessness of accepting. It must, however, be recognized that under this approach a vital part of the optionee's case is proof he would have accepted within the time-life of the offer had there been no repudiation. On this detail the court might be hard to persuade if suit is brought after the time for acceptance has run out, particularly where changes in market values suggest that the optionee's testimony about his purpose is unreliable. Despite the McFerran holding, the wiser course for an optionee may well be to ignore a repudiation and accept.

⁵³⁵ 196 Wash. 99, 82 P.2d 172 (1938).

⁵³⁶ 196 Wash. 252, 82 P.2d 549 (1938).

⁵³⁷ The quoted passage appears in the opinion in *Crim v. Watson*, note 535 above. *In re Berry's Estate* reached the same result, holding no repudiation occurred.

⁵³⁸ The court also stressed the fact that when payment and conveyance are due, a tender is necessary if either party is to put the other in default. This is an accurate statement of the operation of constructive conditions but totally irrelevant to the issue. A contract obligor can repudiate and in so doing breach, even though he would not be in default by non-performance save upon a tender by the other party. This was recognized in the dissenting opinion in *Davis v. C. E. Downie Inv. Co.*, 179 Wash. 470, 38 P.2d 215 (1934). It is to be regretted that the analysis of the dissenting judges did not prevail, in the *Davis* case and thereafter.

⁵³⁹ RESTATEMENT, CONTRACTS § 318(a) (1932); 4 CORBIN, CONTRACTS § 973 (1950); 5 WILLISTON, CONTRACTS § 1324 (rev. ed. 1936). See also *McGillivray v. Nielson*, 30 Wn.2d 589, 192 P.2d 369 (1948), noted, 24 WASH. L. REV. 68 (1949).

⁵⁴⁰ 4 CORBIN, CONTRACTS § 973 (1950); Note 33 WASH. L. REV. 135 (1957). *Palmer Supply Co. v. Time Oil Co.*, 27 Wn.2d 468, 178 P.2d 737 (1947) is a good example. One who had contracted to buy chattels "cancelled its order" when it thought the seller was excessively late with delivery; the court disagreed with the buyer on the critical detail, finding the seller was not too late. The cancellation operated as a repudiation (although the court did not so denominate it). Another good example is *McFerran v. Heroux*, discussed at notes 532 and 533 above. There the repudiator was not saved by his having asserted, as his reason for refusing performance, that he was not legally obliged to perform. See also *Norm Advertising, Inc. v. Monroe Street Lumber Co.*, 25 Wn.2d 391, 171 P.2d 177 (1946).

⁵⁴¹ 20 Wn.2d 239, 147 P.2d 255 (1944). The RESTATEMENT, CONTRACTS §§ 318, 319 were cited.

⁵⁴² 4 CORBIN, CONTRACTS § 980 (1950); 5 WILLISTON, CONTRACTS § 1335 (rev. ed. 1936).

Total and Partial Breach Distinguished. A breach has varying effects on the legal relations between wrongdoer and injured obligee, depending on the circumstances. In instances of bilateral contracts, a breach may or may not be so serious in relation to the whole of the defaulter's obligation as at once to mature for the injured party a cause of action in which damages for future as well as past-due performances of the defaulter can be recovered, or give him the remedy of restitution. A breach which does not have these consequences is usually characterized as "partial." A breach which does have them is called "total." Although the Washington court has not always used these terms, it seems clear enough that the distinctions they represent will be recognized.⁵⁴³ Non-performance by one party to a bilateral contract may also discharge the other, but this result is better explained in terms of constructive conditions than in terms of "total breach."

JUDICIAL REMEDIES FOR BREACH OF CONTRACT

Damages—fundamentals. Where the failure of a contract obligor to perform is a legal wrong, the injured obligee's basic remedy is a money judgment. "Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented by the defendant's breach, in excess of savings made possible . . ."⁵⁴⁴ Although a commonly stated objective of courts is an award so measured as to put the obligee in the economic position he would have occupied had the contract been performed,⁵⁴⁵ this is an imperfectly achieved ideal. Damages will not include the expenses incurred in obtaining the judgment, save where the contract obligates the defaulting promisor to reimburse the injured party for these losses.⁵⁴⁶ Nor can recovery be had for the time expended by the obligee in consulting counsel, appearing as a witness and the like. The restrictive propositions discussed below under the subheadings "Foreseeability" and "Certainty" can operate to exclude gains or losses which are fairly within a chain of causation originating with the

⁵⁴³ See for example *Marshall v. Campbell*, 19 Wn.2d 497, 143 P.2d 449 (1943); *Hesselgrave v. Mott*, 23 Wn.2d 270, 160 P.2d 521 (1945); *Kolosoff v. Turri*, 27 Wn.2d 81, 176 P.2d 439 (1947); *Jacks v. Blazer*, 39 Wn. 2d 277, 235 P.2d 187 (1951); *Kelly v. Valley Constr. Co.*, 43 Wn.2d 679, 262 P.2d 970 (1953). See also the discussion above at notes 486, 488, and *RESTATEMENT, CONTRACTS* §§ 275, 276, 317 (1932).

⁵⁴⁴ *RESTATEMENT, CONTRACTS* § 329 (1932). See also §§ 335, 346.

⁵⁴⁵ *Rathke v. Roberts*, 33 Wn.2d 858, 207 P.2d 716 (1949); *Donald W. Lyle, Inc. v. Heidner & Co.*, 45 Wn.2d 806, 278 P.2d 650 (1954); *RESTATEMENT, CONTRACTS* § 329(a) (1932); 5 *CORBIN, CONTRACTS* § 1002 (1950); 5 *WILLISTON, CONTRACTS* § 1338 (rev. ed. 1936).

⁵⁴⁶ *McCORMICK, DAMAGES* § 61 (1935); *Sharpe Sign Co. v. Parrish*, 33 Wn.2d 883, 207 P.2d 758 (1949) (illustrates the operation of an "attorney fee clause").

breach. In addition to these legal difficulties the injured obligee (and the defaulter too) faces the risks of malfunctioning which are inherent in the processes by which a trier of fact places money values on services or things.

The most common injury suffered by an obligee is the net difference between the market value of the performance he was to receive and the cost to him of rendering his own performance⁵⁴⁷ (or such of it as has not already been rendered). Some of the later Washington cases illustrate the recoverability of damages measured by this difference.⁵⁴⁸ There are, however, transactions for which this would be an obviously unfair and inadequate measure. For some types of performance "market value" is an unrealistic standard. The defaulted performance may be worth more to the obligee than its market value. Out-of-pocket losses may be sustained, other than expenditures by the obligee in partly performing his own undertaking. Damages will include gains prevented or losses sustained in transactions of these types, if the

⁵⁴⁷ Concerning the difficulties encountered in determining the correct measure of recovery for breach of a bilateral contract by a party whose performance was to be rendered first, see RCW 63.04.640(2); 5 WILLISTON, CONTRACTS § 1351 (rev. ed. 1936).

⁵⁴⁸ *Kingston v. Anderson*, 3 Wn.2d 21, 99 P.2d 630 (1940) (for seller's breach of contract to sell stock, damages measured by difference between market value and contract price); *Foster v. Montgomery Ward & Co.*, 24 Wn.2d 248, 163 P.2d 838 (1945) (for buyer's breach of contract to buy apples, damages measured by full contract price as the apples were worthless to the seller); *Holton v. Hart Mill Co.*, 24 Wn.2d 493, 166 P.2d 186 (1946) (for employer's breach of employment contract, damages measured by full agreed wage as there was no showing the employee could have obtained like employment in the locality); *Rathke v. Roberts*, 33 Wn.2d 858, 207 P.2d 716 (1949) (for breach by the owner of a contract for the installation of a refrigeration system, damages measured by the difference between the contract price and the amount it would have cost the contractor to perform); *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408 (1953) (for breach of a contract to convey orchard land in its then condition, damages measured by the difference between market value with and without the orchard, which was substantially destroyed by cold before conveyance and after the contract was made); *Mathews v. Heiser*, 42 Wn.2d 326, 255 P.2d 366 (1953) (for breach of a contract to convey land, no damages can be awarded where the market value of the land was not established); *Frazier v. Bowmar*, 42 Wn.2d 383, 255 P.2d 906 (1953) (for breach of employment contract which provided for compensation on a commission basis, damages measured by the commissions which would have been earned, less the expenses the employee would have incurred in earning them); *West v. Jarvi*, 44 Wn.2d 241, 266 P.2d 1040 (1954) (for breach by the owner after partial completion by a builder, the latter can recover the contract price less the amount the builder would have expended in completing the job); *Donald W. Lyle, Inc. v. Heidner & Co.*, 45 Wn. 2d 806, 278 P.2d 650 (1954) (for breach of a contract to sell lumber, damages measured by the difference between the price paid by the buyer to obtain lumber from other mills, and the contract price); *Pettaway v. Commercial Automotive Serv., Inc.*, 49 Wn.2d 650, 306 P.2d 219 (1957) (for breach of a contract to sell a car, the proper measure is the market value less any unpaid part of the price). See also *Truck-Trailer Equip. Co. v. S. Birch & Sons Constr. Co.*, 38 Wn.2d 583, 231 P.2d 304 (1951) (for breach of contract promise to pay for the renovation of trucks, damages were apparently measured by the contract price less the cost of doing the work). It will be noted that the "market value" of a money payment is simply the amount of the promised payment. See too the cases cited in note 586 below; notice that *prima facie* the damages for an employer's breach are the agreed wage, the off-setting value of the employee's time being handled as a mitigation problem.

obligee successfully hurdles the obstacles raised by the foreseeability and certainty rules. Several of the later Washington cases are illustrative.⁵⁴⁹

Two of the 1937-1957 cases are of particular interest. In *Kenney v. Abraham*⁵⁵⁰ and *Bernbaum v. Hodges*,⁵⁵¹ earlier authority was followed, under which the measure of damages for breach by a builder will vary with the circumstances. If the work was substantially done, the owner recovers the cost of completion. If it was not substantially done, he recovers the difference between the market value of the property as it would have been had the builder performed and its value in its actual

⁵⁴⁹ *Merager v. Turnbull*, 2 Wn.2d 711, 99 P.2d 434 (1940) (for breach of a non-competition covenant, damages measured by the profits lost by the obligee as a result); *Quist v. Zerr*, 12 Wn.2d 21, 120 P.2d 539 (1941) (for breach of a contract to buy petroleum products, damages measured by the seller's "commission," it being a distributor, without deduction for expenses, because the seller could have handled the buyer's account without additional overhead); *Hole v. Unity Petroleum Corp.*, 15 Wn.2d 416, 131 P.2d 150 (1942) (for breach of refinery's contract to sell gasoline to a wholesaler, damages measured by the profits the buyer would have realized on resale); *Holden v. Schafer Bros. Lumber & Shingle Co.*, 23 Wn.2d 202, 160 P.2d 537 (1945) (for breach of a contract to sell lumber, buyer recovered the profits he would have made from the operation of his door-making business; buyer was unable to obtain lumber elsewhere); *Sharpe Sign Co. v. Parrish*, 33 Wn.2d 883, 207 P.2d 758 (1949) (for breach by the owner of a contract to pay for the erection of a sign, damages can be measured by the reasonable worth of the work done before the owner repudiated; if the transaction is viewed as a construction contract the holding conflicts with *Davis v. Thurston County*, 119 Wash. 414, 205 Pac. 840 (1922), which held the proper measure to be a proportionate part of the contract price; the *Davis* case represents what is apparently a minority view; see RESTATEMENT, CONTRACTS §§ 333, 346(2) (1932); McCORMICK, DAMAGES § 164 (1935); 5 CORBIN, CONTRACTS § 1094 (1950); *Dally v. Isaacson*, 40 Wn.2d 574, 245 P.2d 200 (1952) (for breach by the manufacturer, of a contract to furnish mill-work to a contractor, the latter recovered his expenses in remedying defects in mill-work delivered, and for extra labor costs incurred as a result of delay in delivery); *Hill's, Inc. v. William B. Kessler, Inc.*, 41 Wn.2d 42, 246 P.2d 1099 (1952) (for breach by the manufacturer, of a contract to sell suits to a retailer, the latter recovered the profits it would have made on resale); *Kelly v. Valley Constr. Co.*, 43 Wn.2d 679, 262 P.2d 970 (1953) (subcontractor recovered his "profits," on breach by the contractor); *Mall Tool Co. v. Far West Equipment Co.*, 45 Wn.2d 158, 273 P.2d 652 (1954) (for breach by the manufacturer of an exclusive distributorship contract by wrongfully permitting sales by others, the distributor recovered the gross commissions it would have earned on such sales; no deduction for expenses was made, because the contract impliedly obligated the manufacturer to pay the full commission); *Lidral v. Sixth & Battery Corp.*, 47 Wn.2d 831, 290 P.2d 459 (1955) (for a builder's delay in completing construction, the owner can recover lost rentals); *Carstens Packing Co. v. Cox*, 47 Wn.2d 346, 287 P.2d 486 (1955) (a contract between a packer and a cattle feeder obligated the packer to pay at a stated rate per pound for the weight added to the animals while in the feeder's care, and to remove the animals when they would grade out "choice"; the packer breached both duties; the feeder recovered at the contract rate for the added weight, and the reasonable worth of all its services rendered after the date on which the animals should have been taken by the packer); *Sears, Roebuck & Co. v. Grant*, 49 Wn.2d 123, 298 P.2d 497 (1956) (for breach by the seller of a contract to deliver sprinkler-system pipe, the buyer recovered the value of the crop he would have raised had he been able to provide the necessary water). See also the discussion of profits as damages, in *Donald W. Lyle, Inc. v. Heidner & Co.*, 45 Wn.2d 806, 278 P.2d 650 (1954), and the damages section of the UNIFORM SALES ACT, RCW 63.04.680.

⁵⁵⁰ 199 Wash. 167, 90 P.2d 713 (1929); followed in *Hansen v. Walker*, 46 Wn.2d 499, 282 P.2d 829 (1955); difference in market values was the measure used.

⁵⁵¹ 43 Wn.2d 503, 261 P.2d 968 (1953); cost of completion was the measure used.

condition.⁵⁵² Just what determines whether a performance is "substantial" in this situation is obscure. The apparent stress on the quantum of performance may be misleading. In other jurisdictions the difference in market values is usually said to govern damages only where the work done is defective, and reconstruction would be economically wasteful.⁵⁵³ There is reason to believe that the results reached by the Washington court may not differ materially from those reached by courts which state their rule in terms of "economic waste."⁵⁵⁴

Nominal damages. The traditional view deems a token award of a nominal sum to be a proper vindication of the obligee's right. As explained by Professor Williston, "an unexcused failure to perform a contract is a legal wrong. Action will lie for the breach although it causes no injury. Nominal damages are then awarded."⁵⁵⁵ The Washington court long ago took a different position, holding that proof of breach without proof of some injury will not sustain a judgment for the obligee, even for nominal damages.⁵⁵⁶ Such an award is appropriate only where there is injury and failure to prove compensatory damages. This proposition was inferentially reaffirmed in *Gilmartin v. Stevens Inv. Co.*⁵⁵⁷ It will be observed that the rule as stated dictates whether the obligee's cause shall be dismissed, or a judgment for nominal damages entered. The issue in the *Gilmartin* case was an unusual and difficult one. What constitutes the failure of proof which will justify an award of nominal rather than compensatory damages? The obligee presented evidence which if credible would support a judgment for a substantial sum. The trial court concluded injury was established but disbelieved the testimony which would establish the amount of damages. The trial court awarded nominal damages and was reversed in a five-four decision. The majority said:

⁵⁵² From the owner's recovery under either formula the unpaid contract balance must of course be deducted.

⁵⁵³ RESTATEMENT, CONTRACTS § 546 (1) (1932); 5 CORBIN, CONTRACTS §§ 1089, 1090 (1950); 5 WILLISTON, CONTRACTS § 1363 (rev. ed. 1936).

⁵⁵⁴ See the discussion in *Mahan v. Springer*, 155 Wash. 98, 283 Pac. 667 (1930) and in the *Bernbaum* case, cited note 551 above.

⁵⁵⁵ 5 WILLISTON, CONTRACTS § 1339A (1950) (rev. ed. 1936). See also RESTATEMENT, CONTRACTS § 328 (1932); 5 CORBIN, CONTRACTS § 1001 (1950).

⁵⁵⁶ See *Ketchum v. Albertson Bulb Gardens, Inc.*, 142 Wash. 134, 252 Pac. 523 (1927) and the decisions cited therein. For a discussion approving the Washington rule see MCCORMICK, DAMAGES § 524 n.56 (1935).

⁵⁵⁷ 43 Wn.2d 289, 261 P.2d 73 (1953). The court quoted from an earlier opinion: "Nominal damages never purport to be real damages. They are awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show." (Emphasis added.)

[S]ince competent and undisputed opinion evidence was submitted as to the values comprising the agreed measure of damages, and the court did find that substantial damage had been sustained, the court had the duty either to make an award of substantial damages or to give appellants an opportunity to submit additional proof as to damages. Had the latter course been followed, the court was entitled, but not required, to appoint an appraiser or other expert to present additional testimony as to value.

The two dissenting opinions are perhaps more persuasive. The *Gilmartin* decision may not represent the final word on this problem.

Foreseeability.

In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.⁵⁵⁸

The Washington court has long adhered to this formula.⁵⁵⁹ It was invoked in three 1937-1957 cases. *Lewis v. Jensen*⁵⁶⁰ illustrates a loss found to be a normal result of the breach. *Dally v. Isaacson*⁵⁶¹ illustrates the effect of an obligor's knowledge of the special circumstances which produced the disputed loss. In *Pettaway v. Commercial Automotive Serv., Inc.*,⁵⁶² the foreseeability rule was used to bar damages for mental anguish, a technic which must be questioned. For the highly complex problem raised by a claim for mental or physical suffering caused by a breach of contract a more definitive and particularized principle is needed.⁵⁶³

⁵⁵⁸ RESTATEMENT, CONTRACTS § 330 (1932). See also 5 CORBIN, CONTRACTS §§ 1006 *et seq.* (1950); 5 WILLISTON, CONTRACTS §§ 1356, 1357 (rev. ed 1936).

⁵⁵⁹ See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 330.

⁵⁶⁰ 39 Wn.2d 301, 235 P.2d 312 (1951) (bailee of an airplane, under a contract to service it, held liable for its value; the bailee failed to adequately safeguard the plane, which was stolen and wrecked by the thief).

⁵⁶¹ 40 Wn.2d 575, 245 P.2d 200 (1952) (manufacturer who delivered defective millwork late was held for the buyer's expenses in correcting the defects and for extra labor costs incurred because of the delay). Followed in *Lidral v. Sixth & Battery Corp.*, 47 Wn.2d 831, 290 P.2d 459 (1955) (for delay by a builder in completing the structure, lost rentals can be recovered where the builder knew this loss would follow his breach).

⁵⁶² 49 Wn.2d 650, 306 P.2d 219 (1957). The Pettaway case involved breach by the seller, of a contract for a car, and a claim for mental anguish suffered by the buyer on being deprived of an article desired for "conspicuous consumption."

⁵⁶³ The foreseeability rule must of course be met. But there are also serious questions of basic policy, which are obscured and distorted if the emphasis is put on foreseeability, the presence or absence of which is, in final analysis, very much in the "eye of the beholder." It would be perfectly sensible for a court to hold that worry or rage and physical manifestations of these emotional disturbances are such normal

Certainty. The most confusing of the damages principles with which a contract obligee must contend is the "rule of certainty." Just what is it that he must establish with certainty—the fact of his injury, the monetary evaluation of his injury, or both? Does the rule apply only to "special" or "consequential" damages, or to general damages too? How much proof does the rule demand? Is the degree of certainty demanded in his proof of damages affected by the degree of persuasiveness in his evidence of foreseeability? Although seemingly contradictory answers to these questions can be found, the variant language of judges and text writers is probably a reflection of flexibility in the rule rather than of doctrinal differences.

It is believed that the following statement is a fair summary of the results expectable in American courts: An obligee may fail in his endeavor to obtain compensatory damages, either because he does not establish with "certainty" the injury for which he seeks compensation, or because he does not establish with "certainty" the data by which a monetary award can be determined.⁵⁶⁴ Courts tend to stress the fact of injury, or the evaluation of it, depending on the problem before them. These differences in emphasis can be misleading if the over-all pattern is not kept in mind.⁵⁶⁵ Several of the later Washington cases are illustrative. In *Dunseath v. Hallauer*⁵⁶⁶ the court said: "The uncertainty here is not as to the fact of damage, which would be fatal to a recovery by a plaintiff, but as to the amount of the total damage that occurred after January 15th." In *Gaasland Co. v. Hyak Lumber &*

results of a breach of contract as to be always foreseeable. The certainty requirement is not an insuperable barrier, as there are exceptions to it which are flexible enough to encompass damages for mental or physical suffering. The real problem is a fundamental one—should a non-monetary damage element be permitted where the wrong is in an essentially commercial relationship? In a number of American jurisdictions the answer to this question is "maybe," rather than "no," although there are others in which the prime concern seems to be the classification of the cause of action as tort or contract. As is to be expected, the break-through is coming in cases involving "wanton" breach of contracts in which the personal element predominates. See the discussion in the dissent, *Carpenter v. Moore*, 51 Wn.2d 795, 322 P.2d 125 (1958). The *Carpenter* case is discussed in Note, 34 WASH. L. REV. 186 (1959). See also Note, 5 WASH. L. REV. 36 (1930); RESTATEMENT, CONTRACTS § 341 (1932); (and the WASHINGTON ANNOTATIONS to that section); 5 CORBIN, CONTRACTS § 1076 (1950); 5 WILLISTON, CONTRACTS § 1340A (rev. ed. 1936).

⁵⁶⁴ 5 CORBIN, CONTRACTS §§ 1020, 1021, 1022 (1950); MCCORMICK, DAMAGES §§ 26, 27 (1935); 5 WILLISTON, CONTRACTS §§ 1345, 1346 (rev. ed. 1936).

⁵⁶⁵ These differences in emphasis are carried into some text statements. See 15 AM. JUR. CONTRACTS § 23 at 414 (1938): "It is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount . . ." (the remainder of the section indicates however that this statement was not intended to be taken literally and out of context); RESTATEMENT, CONTRACTS § 331 (1932) (which stresses evaluation; notice however comment a, which indicates that the required certainty as to the amount will vary with the positiveness with which the fact of injury is established).

⁵⁶⁶ 41 Wn.2d 895, 902, 253 P.2d 408 (1953).

Millwork, Inc.,⁵⁶⁷ it was said: "Furthermore, the doctrine respecting the matter of certainty, properly applied, is concerned more with the fact of damage than with the extent or amount of damage." These statements suggest that the fact of injury is the sole or governing element. Yet in *National School Studios v. Superior School Photo Serv., Inc.*,⁵⁶⁸ the obligee lost, even though the fact of injury was manifest, because its proof did not provide a satisfactory basis for evaluating its loss. The fact of injury and the amount are evidently both important.⁵⁶⁹

Despite opinions suggesting that the rule of certainty applies only where operating profits from a commercial enterprise are sought to be recovered,⁵⁷⁰ there is no serious doubt but what all manner of contract damages are affected.⁵⁷¹

Concerning the kind and amount of proof needed to satisfy the rule, the typical judicial statement calls for "reasonable" certainty. Few guides can be derived from decisions discussing the application of so flexible a standard. It does appear that of an obligee whose evidence of injury is strong, less will be demanded as to evaluation.⁵⁷² Pre-

⁵⁶⁷ 42 Wn.2d 705, 712, 257 P.2d 784 (1953). A similar statement appeared in *Gilmartin v. Stevens Inv. Co.*, cited note 570 below.

⁵⁶⁸ 40 Wn.2d 263, 242 P.2d 756 (1952). See also *Pettaway v. Commercial Automotive Serv., Inc.*, 49 Wn.2d 650, 654, 306 P.2d 219, (1957) (as to damages for deprivation of the Chrysler).

⁵⁶⁹ *Quist v. Zerr*, 12 Wn.2d 21, 120 P.2d 539 (1941) is a good example. So is the court's handling of the renewal option and fuel oil aspects in *Hole v. Unity Petroleum Corp.*, 15 Wn.2d 416, 131 P.2d 150 (1942).

⁵⁷⁰ *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, cited note 567 above ("In the main, the doctrine usually applies to bar recovery for loss of profits in a business which has not been established"); *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 261 P.2d 73 (1953) (involved breach of a contract to furnish water for domestic use, and a successful effort to get damages measured by the diminished market value of the land; to the argument that the obligee's evidence failed to meet the certainty rule, the court replied: "But there is also a serious question as to whether the standard of reasonable certainty has any application to a case of this kind. This standard is usually applied only in cases where the measure of damages is the amount of profits or losses.") The term "profits" is a treacherous one, being variously used by courts and writers to mean net profits of a commercial enterprise, and the gain of which any obligee has been deprived. It is used in the RESTATEMENT, CONTRACTS § 331 (1932), in the latter sense; comment *a* and the illustrations so indicate. It is quite true that the certainty rule most often strikes at commercial operating profits, but this is because such profits are typically speculative and vulnerable to the rule.

⁵⁷¹ See, e.g., *H. W. Whitaker v. G. B. & S. Mill, Inc.*, 21 Wn.2d 625, 152 P.2d 719 (1944); *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408 (1953); *Pettaway v. Commercial Automotive Serv., Inc.*, 49 Wn.2d 650, 306 P.2d 219 (1957) (as to damages for deprivation of use of the Chrysler); 5 CORBIN, CONTRACTS § 1022 (1952); 5 WILLISTON, CONTRACTS § 1346A at n. 2 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 331(1) (1932).

⁵⁷² *Franklin v. Northern Life Ins. Co.*, 4 Wn.2d 541, 104 P.2d 310 (1940). See also *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 257 P.2d 784 (1953); RESTATEMENT, CONTRACTS § 331, comment *a* (1932); 5 CORBIN, CONTRACTS § 1020 (1950).

sumably the converse is also true, if only because persuasive evidence on evaluation tends to establish the fact of injury. Operating profits of a new business enterprise will be difficult indeed to prove with certainty, although it would seem incorrect to say flatly that the burden can never be met.⁵⁷³ The obligee would be well advised to muster the best proof available to him; failure to do so may induce an adverse holding on the certainty issue.⁵⁷⁴ Correlatively, an obligee who has done the best he can in light of difficulties created by the nature of the transaction and the fact of breach, may prevail on evidence a good deal less concrete than would be required in other circumstances.⁵⁷⁵

One of the more mysterious aspects of the certainty rule is its interrelation with foreseeability. Logically, the latter concept is exhausted with the technical principle discussed in the preceding subsection and many opinions concerned with certainty contain no comment on foreseeability. There occasionally appears, however, a passage which suggests that less certainty will be required where the obligor willfully defaulted knowing what injury would result, or knew his breach would cause a loss difficult to evaluate.⁵⁷⁶

⁵⁷³ The Washington court has said many times: "[L]oss of prospective profits of an established business may be recovered if they can be ascertained with reasonable certainty. . . ." *Hole v. Unity Petroleum Corp.*, 15 Wn.2d 416, 131 P.2d 150 (1942); *Holden v. Schaefer Bros. Lumber & Shingle Co.*, 23 Wn.2d 202, 160 P.2d 537 (1945), and the older cases therein cited. The obvious inference is that for a new venture such damages cannot be had. A by-product of this notion is observable in the *Hole* and *Holden* cases; the main contest seems to have been over the question: Did the obligee have an "established business?" The inference is unsound. Duration of the enterprise is hardly controlling. The earnings experience of an established business may make the requisite proof of profits impossible; a new enterprise may under exceptional circumstances provide proof enough. 5 CORBIN, CONTRACTS § 1023 (1950); MCCORMICK, DAMAGES § 29 (1935). If the business has enjoyed a period of profitable operation, the problems are much less acute; past sales and operating results may well meet the certainty rule. *Quist v. Zerr*, 12 Wn.2d 21, 120 P.2d 539 (1941). See also the *Hole* and *Holden* cases, *supra*, and *Randall v. Tradewell Stores, Inc.*, 21 Wn.2d 742, 153 P.2d 286 (1944). These cases and those cited below in note 574 demonstrate that the books of account and not opinion testimony provide the best evidence. A salesman whose compensation is on a commission basis faces similar problems. His past sales and earnings may enable him to meet the certainty requirement. *Frazier v. Bowman*, 42 Wn.2d 383, 255 P.2d 906 (1953); 5 CORBIN, CONTRACTS § 1025 (1950).

⁵⁷⁴ *California E. Airways, Inc., v. Alaska Airlines*, 38 Wn.2d 378, 229 P.2d 540 (1951); *National School Studios v. Superior School Photo Serv., Inc.*, 40 Wn.2d 263, 242 P.2d 756 (1952). See MCCORMICK, DAMAGES § 29 (1935). Cf., *McFerran v. Heroux*, cited note 579 below and discussed in note 581 (depreciation of a building was a critical part of the plaintiff's damages evidence; the court took judicial notice of a depreciation table and indicated that it had previous cases taken such notice of standard mortality tables).

⁵⁷⁵ *Ball v. Stokely Food, Inc.*, 37 Wn.2d 79, 211 P.2d 832 (1950); *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408 (1953); *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 261 P.2d 73 (1953); *Sears, Roebuck & Co. v. Grant*, 49 Wn.2d 123, 298 P.2d 497 (1956). See also MCCORMICK, DAMAGES, § 27 (1935).

⁵⁷⁶ *Holden v. Schaefer Bros. Lumber & Shingle Co.*, 23 Wn.2d 202, 160 P.2d 537 (1945) ("Appellant's officers and agents knew the facts when the contract was made and then deliberately, with an evident intent to enrich appellant corporation at the

Repudiation of life insurance policy. *Franklin v. Northern Life Ins. Co.*⁵⁷⁷ brought to the court, apparently for the first time, the question of damages for repudiation of a life insurance contract. The policyholder had become uninsurable. Said the court:

The just and logical rule governing the measure of damages recoverable . . . is the present value of his insurance policy, as of the date of death, less the estimated cost of carrying the insurance from the date of cancellation at appellant's then age. His life expectancy from the time of the breach of the contract of insurance is a question of fact to be determined from competent life expectancy tables and from his physical condition at the time the contract was breached. In the determination of this question, there must be taken into consideration his bodily affliction, which may prove fatal or shorten his life expectancy.

Three judges dissented, arguing that the insured's physical condition made any estimate of his life expectancy speculative, and proposing return of the premiums paid plus interest.⁵⁷⁸

Repudiation of option contract. *McFerran v. Heroux*,⁵⁷⁹ also a

expense of respondent, refused to comply with the terms of the agreement. Respondent, under the circumstances, was entitled to recover prospective profits." Respondent's evidence was probably adequate, without regard to the conduct of appellant referred to in the quoted passage; that conduct would evidently have had weight, were the respondent's evidence doubtful); *Dally v. Isaacson*, 40 Wn.2d 574, 579, 245 P.2d 200 (1952) (in discussing consequential damages resulting from delay in performance, the court said: "Damage to Dally from a tardy delivery schedule of defective material was not a mere possibility. It was a certainty. This foreseeable damage was not speculative or remote." The passage suggests that foreseeability will counter, to a degree, the element of speculativeness at which the certainty rule is directed.) Notice too Professor Corbin's comment: "There are many cases in which, by reason of the ordinary experience and belief of mankind, the trial court is convinced that substantial pecuniary harm has been inflicted, even though its amount in dollars is incapable of proof. If the defendant had reason to foresee this kind of harm and the difficulty of proving its amount, the injured party will not be denied a remedy in damages because of the lack of certainty. It seems probable also that a lesser degree of certainty will be required as against one whose breach is described as 'wilful' or is motivated by malice or avarice than against one whose breach was due to misfortune and whose efforts to perform were honest and in good faith. In such cases the trial court and jury have a greater degree of discretion and doubts will more readily be resolved against the party committing the breach." 5 CORBIN, CONTRACTS § 1020 at 110, 111 (1950).

⁵⁷⁷ 4 Wn.2d 541, 104 P.2d 310 (1940). The court did not discuss the fact that the plaintiff's wife was the named policy-beneficiary. As to this *cf.*, RESTATEMENT, CONTRACTS § 345 (1932); 5 CORBIN, CONTRACTS § 1088 (1950).

⁵⁷⁸ There is authority for the measure suggested by the dissent, although the propriety of an award which makes no allowances for the protection afforded by the policy prior to its breach has been questioned. See 5 CORBIN, CONTRACTS § 968, (1950); 6 CORBIN, *op cit. supra*, § 1088; 5 WILLISTON, CONTRACTS § 1330 (rev. ed. 1936). The majority appears clearly right, in its refusal to deny the damages sought because of uncertainty in the proof of the insured's life expectancy. The many personal injury cases in which the probable duration of a person's life is left for the jury to decide on the basis of his physical condition, with or without the aid of a mortality table, indicate that the uncertainty is not excessive. See MCCORMICK, DAMAGES § 86 (1935).

⁵⁷⁹ 44 Wn.2d 631, 269 P.2d 815 (1954).

case of first impression, was concerned with an unusually interesting damage issue. A lease gave the lessor an option to buy improvements at the end of the lease term. It also obligated the lessee to rebuild if improvements were destroyed,⁵⁸⁰ and this obligation he repudiated after a destructive fire. The lessor recovered the cost of rebuilding less the depreciation⁵⁸¹ which would have accrued and less the option price. The resulting figure was also reduced by discounting it at 6 per cent to the end of the term. The court stated the measure of damages to be the worth of the option, and went on to say:

In the case of options to purchase land, the surest measure of this value may be, as stated by James, "the excess of the market value of the land over the option price." In the instant case, however, such a measure would be wholly inadequate. . . . [the] market value of the grandstand would be substantially less than its worth to the plaintiff, as owner of the land. . . .

This well-reasoned decision should help materially in resolving damages problems created by an optionor's repudiation.⁵⁸²

Mitigation. "Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."⁵⁸³ This seemingly simple proposition, accepted generally by the Washington⁵⁸⁴ and other American courts,⁵⁸⁵ produces some knotty problems. The difficulties are however primarily factual, produced by the indefiniteness of the term "reasonable" and by the necessity for establishing a causal relation between a questioned injury or valuation, and whatever it was the

⁵⁸⁰ The lessee had an election, to rebuild or terminate the lease; when the improvements were destroyed by fire he elected to rebuild.

⁵⁸¹ The plaintiff's evidence on depreciation might have been subject to question under the certainty rule; the court was however willing to take judicial notice of a treasury department (Bureau of Internal Revenue) bulletin dealing with depreciation, and to apply to the tables therein contained the reasoning on which mortality tables are relevant evidence even though the case involves a specific person.

⁵⁸² Although the court characterized the breach as a present one, since the lease obligated the lessee to rebuild, it must be recognized that the breach was anticipatory so far as the option contract was concerned. The recovery approved was appropriate to an anticipatory breach action. "The rules for determining the damages recoverable for an anticipatory breach are the same as in the case of a breach at the time fixed for performance." *RESTATEMENT, CONTRACTS* § 338 (1932); 5 *CORBIN, CONTRACTS* § 1053 (1950); 5 *WILLISTON, CONTRACTS* § 1397 (rev. ed. 1936). Cf., *Cron & Dehn v. Chelan Packing Co.*, 158 Wash. 167, 290 Pac. 999 (1930) (for anticipatory breach of a contract to sell dehydrated apple rings, the buyer recovered the difference between the contract price and the price at which a forward contract could have been made at the time of the repudiation; this view, for which there is some case support, is critically discussed in 5 *WILLISTON, CONTRACTS* § 1397 p. 3902 (rev. ed. 1936)).

⁵⁸³ *RESTATEMENT, CONTRACTS* § 336(1) (1932).

⁵⁸⁴ *WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS* § 336.

⁵⁸⁵ 5 *CORBIN, CONTRACTS* § 1039 (1950); 5 *WILLISTON, CONTRACTS* § 1353 (rev. ed. 1936).

obligee failed to do. The 1937-1957 Washington cases dealing with mitigation are illustrative.⁵⁸⁶

Interest. "In cases where it is promised, interest is an agreed compensation for consideration received; and it is payable because it is promised and not as reparation for a previous breach of duty."⁵⁸⁷ The promise may call for interest from the date of the promise or only from the date on which the principal amount falls due. In either situation promised interest is not usually considered "damages." The promised

⁵⁸⁶ *Hansen v. Columbia Breweries, Inc.*, 12 Wn.2d 554, 122 P.2d 489 (1942) (employer breached an employment contract; the court found sufficient evidence to indicate the employee had tried without success to obtain other employment); *Hole v. Unity Petroleum Corp.*, 15 Wn.2d 416, 131 P.2d 150 (1942) (buyer recovered prospective re-sale profits; although like goods were procurable elsewhere, the contract called for credit and the seller failed to show that the buyer could have made the purchases which would have reduced his loss); *Randall v. Tradewell Stores, Inc.*, 21 Wn.2d 742, 153 P.2d 286 (1944) (reasonableness of what the obligee did, and did not do, was for the jury); *O'Brien v. Puget Sound Plywood, Inc.*, 23 Wn.2d 917, 165 P.2d 86 (1945) (employee sued for breach of employment contract; his pay during the unperformed contract period would have been \$7,856.17; he earned during that period \$533.57; the jury returned a verdict for \$1,800; the award was sustained, because there was evidence on which the jury could have found that the plaintiff failed to mitigate his damage; moreover, the court held that the plaintiff undertook the burden of proof as to mitigation, a burden ordinarily on the defendant, because he "tried his case on the theory that the burden on the issue was upon him"; four judges dissented, apparently deeming the burden of proof to be on the employer, and not sustained); *Rathke v. Roberts*, 33 Wn.2d 858, 207 P.2d 716 (1949) (contractor who undertook to install a refrigeration system in a warehouse is entitled to his profit, contract price less cost of performance, on breach by the owner; the owner sought to invoke the mitigation rule, because the contractor had the machinery which he would have installed but for the breach; this issue the court disposed of by demonstrating that the evidence did not show he could not have made a similar installation contract with another person; the court failed to see that such evidence would not have come within the mitigation rule; the contractor's profit, had he found another buyer, would not have been a gain properly deductible from his recovery against this defendant); *Hill's, Inc. v. William B. Kessler, Inc.*, 41 Wn.2d 42, 246 P.2d 1099 (1952) (failure of a buyer to procure goods elsewhere does not diminish his recovery of profits under a contract to buy goods for resale, it appearing that the added cost of doing so would have exceeded his profits); *Lidral v. Sixth & Battery Corp.*, 47 Wn.2d 831, 290 P.2d 459 (1955) (on finding that the owner mitigated his damages, when the contractor breached, by moving into the uncompleted building, the court sustained recovery for the costs of completing the work at overtime pay rates, as the work had to be done during off hours); *Sears, Roebuck & Co. v. Grant*, 49 Wn.2d 123, 298 P.2d 497 (1956) (failure of a buyer to procure pipe elsewhere, on the seller's breach of a contract to sell pipe for irrigation purposes, was held not to invoke the mitigation rule, where the seller repeatedly assured him that the pipe was on the way). See also *Norm Advertising, Inc. v. Monroe St. Lumber Co.*, 25 Wn.2d 391, 171 P.2d 177 (1946), in which the court applied to a contract to buy advertising materials the principle which appertains in employment contracts, holding the contract price to be *prima facie* the measure of recovery; the burden of showing that the seller could have reduced his loss was placed on the buyer.

⁵⁸⁷ RESTATEMENT, CONTRACTS § 337, comment *a* (1932). See also 4 CORBIN, CONTRACTS § 1045 (1950); *Mayflower Realty Co. v. Security Sav. & Loan Soc'y*, 192 Wash. 129, 72 P.2d 1038, 75 P.2d 579 (1937) (on the seller's anticipatory breach of an installment payment real estate contract, the buyer was permitted to maintain a specific performance action but was required to pay all of the interest which would have accrued, as the contract contained no pre-payment clause).

rate, if lawful, governs the amount.⁵⁸⁸ Correlatively, an agreement that interest shall not be paid will be effective.⁵⁸⁹

A statutory duty to pay interest seems also to be outside a proper definition of "damages." RCW 19.52.010,⁵⁹⁰ which should arguably provide the answer for many interest problems, has been more ignored than cited, probably because it is so ambiguous. Interest issues which might have been analyzed as requiring only construction of the statute have been and no doubt will continue to be resolved by the application of common law principles.⁵⁹¹

The 1937-1957 period produced in *Mall Tool Co. v. Far West Equip. Co.*⁵⁹² a case of particular significance. The reasons for its importance lie in the court's earlier decisions. In some it was indicated with reasonable precision that interest is recoverable as damages where the defaulted promise was to pay money for work or goods received, in an amount fixed by or readily computable from data contained in the agreement, even though a dispute exists about the liability of the promisor to pay such amount.⁵⁹³ In others the court took a liberal position, approving interest on damages measured by lost profits under a buy-sell contract where the market value of the defaulted performances was readily established,⁵⁹⁴ and on damages for breach of war-

⁵⁸⁸ The usury statute, discussed later in the section on illegality, appears to have produced the only 1937-1957 appellate cases on promised interest.

⁵⁸⁹ *Tingstad v. National Bank of Commerce*, 36 Wn.2d 1, 216 P.2d 236 (1950).

⁵⁹⁰ This statute reads in part: "Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per cent per annum where no different rate is agreed to in writing between the parties."

⁵⁹¹ *E.g.*, *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn.2d 158, 273 P.2d 652 (1952). *Cf.*, *Gheen v. Construction Equip. Co.*, 49 Wn.2d 140, 298 P.2d 852 (1956), in which the court cited both the statute and the Mall case. The statute was also cited in *Herman v. Golden Arrow Dairy, Inc.*, 191 Wash. 582, 71 P.2d 581 (1937); the case involved an agreement extending the maturity of an existing money obligation; interest was allowed during the extension period. The statute was not cited in *State ex rel. Pac. Bridge Co. v. Washington Toll Bridge Auth.*, 8 Wn.2d 337, 112 P.2d 135 (1941) (contractor recovered interest from the date on which the final payment under a construction contract was due), nor in a number of earlier cases involving analogous facts. See the cases cited, WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 337.

⁵⁹² 45 Wn.2d 158, 273 P.2d 652 (1954); *Noted*, 30 WASH. L. REV. 128 (1955). Professor Corbin was moved to write of this decision: "The court's discussion of interest is unusually good and such as is seldom found in the reports." 5 CORBIN, CONTRACTS § 1051 (1950, Supp. 1959).

⁵⁹³ *Arnott v. City of Spokane*, 6 Wash. 442, 33 Pac. 1063 (1893); *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381 (1910); *Empire State Sur. Co. v. Moran Bros. Co.*, 71 Wash. 171, 127 Pac. 1104 (1912); *McHugh v. City of Tacoma*, 76 Wash. 127, 135 Pac. 1011 (1913); *Modern Irr. & Land Co. v. Neely*, 81 Wash. 38, 142 Pac. 458 (1914); *Dornberg v. Black Carbon Coal Co.*, 93 Wash. 682, 161 Pac. 845 (1916); *Dixon & Oliver v. Parker, Moran & Parker*, 102 Wash. 101, 172 Pac. 856 (1918); *A. W. Hartman Shoe Co. v. Hanson*, 135 Wash. 512, 238 Pac. 17 (1925); *Hudnall v. Pennington & Co.*, 136 Wash. 155, 239 Pac. 2 (1925); *Svarz v. Dunlap*, 168 Wash. 74, 10 P.2d 975 (1932); *Woodbridge v. Johnson*, 187 Wash. 191, 59 P.2d 1135 (1936).

⁵⁹⁴ *National Steel Car Corp. v. Schwager & Nettleton, Inc.*, 124 Wash. 557, 214 Pac. 1049 (1923).

ranty.⁵⁹⁵ Incompatible with these holdings, and disturbing, was a passage in *Wright v. City of Tacoma*⁵⁹⁶ purporting to deny interest where "the demand is for something which requires evidence to establish the quantity or amount of the thing furnished, or the value of the services rendered. . . ." The broad implications of this language indicate an unusual and restrictive formula. A test of the court's actual adherence to it was inevitable, and came in the *Mall Tool Co.* case. Of the quoted passage from the *Wright* case the court said: "This language, taken out of context, is too broad if applied to quantity or amount where there has been a sale at a fixed price per unit." Although this is a carefully limited disapproval of the earlier decision, it seems unlikely that the court will in any situation disapprove interest as damages merely because the plaintiff was obliged to establish his loss by evidence going beyond the contract language. It is on the other hand clear enough that interest is not always recoverable. Just where the dividing line falls is still not certain, but from the court's discussion in the *Mall Tool Co.* case⁵⁹⁷ and from *Hopkins v. Ulvestad*⁵⁹⁸ it would appear that the critical point is passed when computation of the amount of the loss becomes excessively imprecise.⁵⁹⁹

The *Mall Tool Co.* case also much clarified the effect on interest as damages, of a counterclaim which is sustained and which will not itself carry interest. Counterclaims based on defects in the performance for which the plaintiff seeks recovery were distinguished from those based on other defaults. The latter were held not to diminish interest damages. As to the former, earlier cases permitting interest only on the net balance were favorably discussed.⁶⁰⁰

⁵⁹⁵ *Dickinson Fire & Pressed Brick Co. v. F. T. Crowe & Co.*, 63 Wash. 550, 115 Pac. 1087 (1911).

⁵⁹⁶ 87 Wash. 334, 151 Pac. 837 (1915) (extras under a building contract; interest denied); followed in *Lloyd v. American Can Co.*, 128 Wash. 298, 222 Pac. 876 (1924); see also *Woodbridge v. Johnson*, 187 Wash. 191, 59 P.2d 1135 (1936), in which the quoted passage from the *Wright* case was repeated.

⁵⁹⁷ See particularly the court's discussion of *Meyer v. Strom*, 37 Wn.2d 818, 226 P.2d 218 (1951) and of *Lloyd v. American Can Co.*, cited above at note 596. See also *Gheen v. Construction Equip. Co.*, 49 Wn.2d 140, 298 P.2d 852 (1956), in which the *Mall Tool Company* case was followed.

⁵⁹⁸ 46 Wn.2d 514, 282 P.2d 806 (1955) (interest is not recoverable where the plaintiff's loss is measured by the reasonable worth of his performance). There is some contrary authority in other states. 5 CORBIN, CONTRACTS § 1048 (1950).

⁵⁹⁹ This is apparently the position to which a number of other courts have come. See 5 CORBIN, CONTRACTS §§ 1048, 1050 (1950); 5 WILLISTON, CONTRACTS § 1413 (rev. ed. 1936). For the purposes of the stated formula, imprecision may be the product of conflicting evidence about the extent of the plaintiff's performance or about values. The formula cannot work with the certainty of an algebraic equation. It does however establish a theoretic base from which counsel and court can work.

⁶⁰⁰ This is a view for which there is considerable authority in other states. See 5 CORBIN, CONTRACTS § 1051 (1950).

Limitation of Liability. A contract term restricting an obligor's liability for breach, to a type of injury, or type of remedy, or an amount of loss less than would otherwise be recoverable, has been generally and in Washington sustained.⁶⁰¹ This proposition was reaffirmed in *Ketel v. Hovick*.⁶⁰² The court went on however to distinguish a clause disclaiming liability for "any loss or damage resulting from the use, or loss of use, of any machine . . .," which was enforced, from a clause limiting the seller's liability for breach of warranty to replacement of the machine or (at his option) refund of the purchase price. The latter clause was not enforced, (*i.e.*, damages were held to be recoverable) because the dealer refused to furnish a new machine or make the refund,⁶⁰³ and his doing so was found to be a condition to the limitation of liability.⁶⁰⁴ This is a decision which may occasion further controversy. The buyer received more than he bargained for, a result not readily justified. Serious problems will be raised by an obligor who disputes the fact of his default. Must he surrender his contest, on pain of invalidating the limitation provision? The holding seems inconsistent with the liquidated damages cases, in which failure of the defaulter to pay the sum specified in the contract to be paid as liquidated damages does not make him liable for the injured party's actual and greater loss.⁶⁰⁵

A contract provision which prescribes a course of conduct to be followed by a defaulting party but does not expressly limit his liability can produce a difficult interpretation issue. That it is apt to be resolved against the obligor is demonstrated by *Byrne v. Bellingham Consol.*

⁶⁰¹ 5 CORBIN, CONTRACTS § 1068 (1950); 3 WILLISTON, CONTRACTS § 781A (rev. ed. 1936). *Crandall Engr. Co. v. Winslow Marine Ry. & Shipbuilding Co.*, 188 Wash. 1, 61 P.2d 136 (1936).

⁶⁰² 47 Wn.2d 368, 287 P.2d 739 (1955). Although this case and the *Crandall* case (cited in the previous note) involved chattel sales and relied on § 71 of the Uniform Sales Act (RCW 63.04.720), there is no reason to expect a different result in other types of transaction. See also *McDonald Credit Serv. v. Church*, 49 Wn.2d 400, 301 P.2d 1082 (1956) and the decisions therein cited, which sustain the validity of clauses disclaiming all warranty liability. An analogous result can be achieved in a real property transaction by use of a "special warranty" of title. See *Central Life Assur. Soc'y v. Impelmans*, 13 Wn.2d 632, 126 P.2d 757 (1942).

⁶⁰³ Return of the machine by the purchaser was a condition to the dealer's undertaking to replace or refund; the purchaser offered to return the machine and the dealer refused to receive it. This conduct, the court quite properly held, excused the condition.

⁶⁰⁴ The condition was purportedly found by construction; the contract document contained (so far as the opinion indicates) no language supporting such an interpretation.

⁶⁰⁵ Insofar as the seller promised to replace the property, a type of relief not otherwise available to the buyer was created. Such a provision goes well beyond the simple limitation of liability clause; the analogy to liquidated damages seems to be a close one.

*School Dist.*⁶⁰⁶ The court will probably not find a limitation of liability to have been agreed on save where the parties' purpose in that particular is clearly stated.

Liquidated damages. Contract provisions purporting to fix the amount of damages recoverable upon breach were frequently litigated in Washington prior to 1937. The appellate decisions accorded generally with the results reached by other courts⁶⁰⁷ and with the *Restatement of Contracts*, section 339.⁶⁰⁸ If the liquidated amount is a bona fide and reasonable pre-estimate of the expectable loss which breach will cause, and the transaction is of a type which makes proof of damages difficult, such a clause will be sustained. The later cases illustrate the application of this formula but add nothing of substantive significance.⁶⁰⁹

In *Russell v. Stephens*⁶¹⁰ the court recognized that an action for damages presupposes the existence of a contract which has been breached, and went on to say: "The vendor in a contract of sale and purchase may, upon default in payment by the vendee, declare the contract forfeited and, if the contract so provides, retain all sums paid thereon, as liquidated damages, or he may elect to sue either for

⁶⁰⁶ 7 Wn.2d 20, 108 P.2d 791 (1941). A building contract provided for an extension of time to the builder should he be delayed "by any act or neglect of the Owner or the Architect . . ." It did not say that such an extension was the limit of the owner's liability. The interpretation issue was resolved by resort to routine principles (against the owner because he prepared the document; all provisions must if possible be harmonized and given force), and by this statement: "Another reason for resolving the ambiguity, if any, in appellant's [builder's] favor is that, while contracting parties may provide for a limitation on the right to recover damages, the harshness of that result, in an instance such as this, calls for strict construction of the language relied upon to bar recovery." The builder, although he had received the extension, recovered damages for delay caused by the owner. *Cf.*, *Erickson v. Edmonds School Dist.*, discussed in note 812 below.

⁶⁰⁷ See CORBIN, *CONTRACTS* §§ 1054 *et seq.* (1950) ; 3 WILLISTON, *CONTRACTS* §§ 783 *et seq.* (rev. ed. 1936).

⁶⁰⁸ See WASHINGTON ANNOTATIONS, *RESTATEMENT, CONTRACTS* § 339.

⁶⁰⁹ *Foster v. Montgomery Ward & Co.*, 24 Wn.2d 248, 163 P.2d 838 (1945) (buyer under contract for the sale of apples promised to pay an indicated sum for each box not taken; sustained) ; *Mead v. Anton*, 33 Wn.2d 741, 207 P.2d 227 (1949) (seller of restaurant covenanted not to compete with the buyer and to pay \$500 for each month of breach; sustained) ; *Management, Inc. v. Schassberger*, 39 Wn.2d 321, 235 P.2d 293 (1951) (seller of a laundry and dry-cleaning business covenanted not to compete, as "an owner or part-owner" and to pay \$10,000 in the event of breach; held a penalty and unenforceable; the decision demonstrates that lump-sum liquidated damages provisions must be used with great caution) ; *Wai v. Parks*, 43 Wn.2d 562, 262 P.2d 196 (1953) (lease provided for lessee's payment of part of the cost of erecting improvements, and that "all moneys paid by Lessees to Lessors shall be forfeited as liquidated damages to Lessors" in the event of breach; the lessee made the promised capital payment and paid rent for several years, then defaulted; the quoted clause was sustained as a liquidated damages provision and the lessor was unable to recover defaulted rent payments).

⁶¹⁰ 191 Wash. 314, 71 P.2d 30 (1937). In addition to the cases cited by the court, see *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023 (1912).

specific performance or for the damages actually suffered." The liquidated damages clause here referred to is evidently a limited and special variety, having no effect on an action by vendor who has not "forfeited" (*i.e.*, repossessed the property). Despite the contrary implications of the court's statement, it must be doubted whether this type of liquidated damages provision can have any real effect even if the vendor does choose to forfeit, since he must elect between this course and damages.⁶¹¹ The clause seems actually aimed at the vendee and some claim by him to return of his payments. Its usefulness in that connection is unclear.⁶¹² Apparently the same result will follow in the absence of such a clause,⁶¹³ and properly so. A vendee in total default can neither resist repossession of the property,⁶¹⁴ nor recover in contract for payments made by him before his default.⁶¹⁵ The *Russell* case involved a land transaction; like problems arise under chattel conditional sale contracts and with like results, save that specific enforcement is not often an alternative remedy.

Penalty or alternative performance. It is often difficult to determine whether a particular contract clause gives a party a choice between rendering one or another of indicated performances, or obligates him to one and specifies another as a remedy for its default. The former arrangement is not a limitation of liability agreement nor need it conform to the criteria by which liquidated damages agreements are tested.⁶¹⁶ *Chandler v. Doran Co.*⁶¹⁷ indicates that the problem is to be solved by interpretation of the contract.⁶¹⁸

⁶¹¹ See *Washington Co-op Chick Ass'n v. Jacobs*, discussed at note 628 below. Notice that the vendor's choice between "contract" and "no contract," discussed in this case, is not easily reconciled with the court's evident assumption, in the *Russell* case, that damages, specific enforcement, and forfeiture plus retention of payments are all remedial techniques which assume the existence of the contract.

⁶¹² See the discussion in note 676 below.

⁶¹³ See *Liliopoulos v. Ayerst*, 125 Wash. 134, 215 Pac. 339 (1923); *Peterson v. Chess*, 92 Wash. 682, 159 Pac. 894 (1916) (over-ruled on another point in *Helf v. Hansen & Keller Truck Co.*, 167 Wash. 206, 9 P.2d 110 (1932)).

⁶¹⁴ This was clearly stated in *Rider v. Cottle*, 32 Wn.2d 538, 202 P.2d 741 (1949).

⁶¹⁵ Such recourse as he may have is quasi-contractual or equitable. See *RESTATEMENT, CONTRACTS* § 357 (1932); 5 *WILLISTON, CONTRACTS* § 1454 (rev. ed. 1936).

⁶¹⁶ See 5 *CORBIN, CONTRACTS* §§ 1070, 1079, 1081, 1082 (1950); 3 *WILLISTON, CONTRACTS* § 781 (rev. ed. 1936); *RESTATEMENT, CONTRACTS* § 339 comment on subsection (1), *f* (1932).

⁶¹⁷ 44 Wn.2d 396, 267 P.2d 907 (1954). The decision is apparently one of first impression in Washington. An employer hired a plant manager, gave him an option on the plant, promised to pay him \$600 per month "base salary," and promised to pay him \$900 more per month if the employer decided not to convey the optioned property. The agreement was oral and the main problem was the operation of the Statute of Frauds. In the process of determining that the statute did not bar recovery for the additional pay, the court found the contract was an alternative one. The case will also be significant, where an obligor is resisting recovery on the argument that the promise to pay the additional sum is a penalty rather than liquidated damages.

⁶¹⁸ The key inquiry is indicated in a passage quoted by the court from 5 *CORBIN*,

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A party who has himself wholly or partly performed will on occasion prefer to recover his performance or its worth, upon the other's total breach. This he may be able to do. The remedy by which his objective is achieved is restitution, an alternative to damages. There are many 1937-1957 Washington cases in this important area. They will be discussed by Donald P. Lehne in a Comment scheduled for publication in the Summer, 1960, issue of the *Washington Law Review*.

Specific performance. Thanks to some thirty cases⁶¹⁹ concerned with promises to execute a will, the 1937-1957 period produced an impressive amount of specific performance litigation. For the most

CONTRACTS § 1079 (1950), defining an alternative contract as "one in which a party promises to render some one of two or more alternative performances either one of which is mutually agreed upon as the bargained-for equivalent given in exchange for the return performance by the other party." Correlatively, if the parties intend but one of the performances to be the exchange, the other being compensation for failure to render the exchange-performance, the transaction is not an alternative contract; if the ostensible "alternative" performance is the payment of money the parties have attempted to provide for liquidated damages, and the provision will be valid only if it meets the test discussed in the preceding subsection.

⁶¹⁹ Most of the cases concerned with an agreement to make a will were resolved on mutual assent or Statute of Frauds issues. Their principal significance is in the court's increasing concern with assurance in the proof of the agreement. Specific performance was decreed in: *Resor v. Schaefer*, 193 Wash. 91, 74 P.2d 917 (1937); *In re Fischer's Estate*, 196 Wash. 41, 81 P.2d 836 (1938); *Luther v. National Bank of Commerce*, 2 Wn.2d 470, 98 P.2d 667 (1940); *In re Hilbert's Estate*, 14 Wn.2d 475, 128 P.2d 647 (1942); *Cummings v. Sherman*, 16 Wn.2d 88, 132 P.2d 998 (1943); *Auger v. Shideler*, 23 Wn.2d 505, 161 P.2d 200 (1945) (appears to be a specific enforcement action, although not so denominated); *Ellis v. Wadleigh*, 27 Wn.2d 941, 182 P.2d 49 (1947) (this, and the *Luther* case, *supra*, indicate that "reasonable" certainty as to the terms of the promised performance is sufficient); *Forsberg v. Everett Trust & Sav. Bank*, 31 Wn.2d 932, 200 P.2d 499 (1948); *Southwick v. Southwick*, 34 Wn.2d 464, 208 P.2d 1187 (1949); *Jansen v. Campbell*, 37 Wn.2d 879, 227 P.2d 175 (1951); *Raab v. Wallerich*, 46 Wn.2d 375, 282 P.2d 271 (1955). See also *In re Young's Estate*, 40 Wn.2d 582, 244 P.2d 1165 (1952) (complaint held sufficient to set out a cause of action for specific performance); *Dahlgren v. Blomeen*, 49 Wn.2d 47, 298 P.2d 479 (1956) (contract held established; relief given was imposition of a trust on the property). Relief was denied in *Wayman v. Miller*, 195 Wash. 457, 81 P.2d 501 (1938); *Osterhout v. Peterson*, 198 Wash. 166, 87 P.2d 987 (1939); *Thompson v. Weimer*, 1 Wn.2d 145, 95 P.2d 772 (1939); *Aho v. Ahola*, 4 Wn.2d 598, 104 P.2d 487 (1940); *Allen v. Dillard*, 15 Wn.2d 35, 129 P.2d 813 (1942); *Dau v. Pence*, 16 Wn.2d 368, 133 P.2d 523 (1943); *Widman v. Maurer*, 19 Wn.2d 28, 141 P.2d 135 (1943); *Payn v. Hoge*, 21 Wn.2d 32, 149 P.2d 939 (1944); *Whiting v. Armstrong*, 23 Wn.2d 290, 160 P.2d 1014 (1945); *Blodgett v. Lowe*, 24 Wn.2d 931, 167 P.2d 997 (1946); *McGregor v. McGregor*, 25 Wn.2d 511, 171 P.2d 694 (1946); *Jennings v. D'Hooghe*, 25 Wn.2d 702, 172 P.2d 189 (1946); *Thomas v. Hensel*, 38 Wn.2d 457, 230 P.2d 290 (1951); *In re Hickman's Estate*, 41 Wn.2d 519, 250 P.2d 524 (1952); *Boettcher v. Busse*, 45 Wn.2d 579, 277 P.2d 368 (1954); *Ferris v. Blumhardt*, 48 Wn.2d 395, 293 P.2d 935 (1956) (plaintiffs succeeded in establishing the contract but lost because they were themselves in default of it; the court repeated the passage in *Bayley v. Lewis* which is discussed in note 620 below, saying "one in default cannot enforce specific performance of a contract"); *Estes v. Estes*, 48 Wn.2d 729, 296 P.2d 705 (1956) (in form the action was for a declaratory judgment; the court's discussion is relevant here).

The operation of the Statute of Frauds on promises to convey land, and the part performance doctrine, were discussed at note 347 *et seq.*, above.

part, however, the decisions⁶²⁰ added nothing to the body of doctrine

⁶²⁰ An equitable mortgage was decreed in *Fleishbein v. Thorne*, 193 Wash. 65, 74 P.2d 880 (1937). Equitable security was found to have existed, insulating subsequent transfers by the debtor from attack as preferences, in *Whiting v. Rubenstein*, 7 Wn.2d 204, 109 P.2d 312 (1941). The operation of the Statute of Frauds on verbal promises to create security was discussed at note 356 *et seq.*, above.

Negative covenants, *i.e.*, not to compete, were enforced by injunction, in *Merager v. Turnbull*, 2 Wn.2d 711, 99 P.2d 434 (1940), and *Lyle v. Haskins*, 24 Wn.2d 883, 168 P.2d 797 (1946). These cases involved unusually interesting problems of proof; the competition was affected indirectly. In the *Merager* case, damages were also awarded for the period during which the defendant wrongfully competed.

Injunctive relief was granted in aid of other types of obligation, in *Mayflower Realty Co. v. Security Sav. & Loan Soc'y*, 192 Wash. 129, 72 P.2d 1038, 75 P.2d 579 (1937) (vendor was enjoined from wrongfully forfeiting a real estate contract) and *United States Fid. & Guar. Co. v. Barrow*, 3 Wn.2d 89, 99 P.2d 949 (1940) (at the instance of a surety on a construction bond, the builder's administratrix was enjoined from collecting payments accrued under a defaulted building contract).

Contracts for the transfer of an interest in land were specifically enforced in *Dopps v. Alderman*, 12 Wn.2d 268, 121 P.2d 388 (1942); *Mobley v. Harkins*, 14 Wn.2d 276, 128 P.2d 289 (1942); *Campbell v. Webber*, 29 Wn.2d 516, 188 P.2d 130 (1947); *Stephens v. Nelson*, 37 Wn.2d 28, 221 P.2d 520 (1950); *Griffin v. Hart*, 26 Wn.2d 304, 173 P.2d 780 (1946); *Blume v. Bohanna*, 38 Wn.2d 199, 228 P.2d 146 (1951); *Adams Marine Serv. v. Fishel*, 42 Wn.2d 555, 257 P.2d 203 (1953); *Nielsen v. Northern Equity Corp.*, 47 Wn.2d 171, 286 P.2d 1031 (1955); *Baird v. Knutzen*, 49 Wn.2d 308, 301 P.2d 375 (1956). The inadequacy of damages and the availability of specific performance in transactions of this type are beyond question. The *Baird* case also indicates that the relief can extend to a promisor's successor, who took title with notice (here constructive) of the prior contract. This conforms to the usual analysis. 5 WILLISTON, CONTRACTS § 1453 (rev. ed. 1936).

Specific enforcement was on occasion denied. Some proponents of the relief failed to establish a contract; as in *KVI, Inc. v. Doernbecher*, 24 Wn.2d 943, 167 P.2d 1002 (1946); *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 171 P.2d 703 (1946); *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wn.2d 109, 173 P.2d 194 (1946); *Golden v. Mount*, 32 Wn.2d 653, 203 P.2d 667 (1949). In *Herb v. Severson*, 32 Wn.2d 159, 201 P.2d 156 (1948), the plaintiff, seller under a real estate contract, lost because he could not convey a marketable title. In *Cascade Timber Co. v. North. Pac. Ry.*, 28 Wn.2d 684, 184 P.2d 90 (1947) the plaintiff, buyer under a real estate contract, lost because it refused to accept a deed in conformity with the contract. In *McLean v. Archer*, 32 Wn.2d 234, 201 P.2d 184 (1948), the action was dismissed for failure to join a necessary party plaintiff.

The effect on recovery, of a breach by the party seeking specific enforcement, was to a degree confused by *Bayley v. Lewis*, 39 Wn.2d 464, 236 P.2d 350 (1951). Relief was decreed despite a partial breach, a result in conformity with the usual view. See RESTATEMENT, CONTRACTS § 375 (2) (1932). The court also said: "A party cannot enforce specific performance of a contract while in default on its terms." The word "default" as used here must mean "material breach". RESTATEMENT, CONTRACTS § 375(1) (1932). See also *Ferris v. Blumhardt*, cited in the preceding note.

The certainty element was discussed in several decisions. Uncertainty was held to preclude relief, in *Keys v. Klitten*, 21 Wn.2d 504, 151 P.2d 989 (1944); *KVI, Inc. v. Doernbecher*, *supra*; *St. Paul & Tacoma Lumber Co. v. Fox*, *supra*; *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952). See also *Ellis v. Wadleigh*, note 619. In *Adams Marine Serv., Inc. v. Fishel*, *supra*, sufficient certainty was found to support relief. It is not always clear, in these decisions, whether the court is considering certainty as a contract formation requirement (see the discussion above at note 46 *et seq.*) or as a separate specific performance factor. See RESTATEMENT, CONTRACTS § 370 (1932). In *Blume v. Bohanna*, *supra*, a certainty issue was resolved by interpretation, *i.e.*, finding the agreement, which in terms called for a rental to be agreed-on, meant a "reasonable" rental.

The power of the court to decree whatever relief is appropriate under the pleadings and evidence was demonstrated in *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 171 P.2d 703 (1946) (*dictum*; plaintiff sued on an oral real estate contract and lost on the Statute of Frauds issue; the court said that the trial court could have decreed restitution for benefits conferred on the defendant, but that it was not error to remit the plaintiff to a separate restitution action); *Hubbell v. Ward*, *supra*

earlier developed.⁶²¹

An exception is *State ex rel. Schoblom v. Anacortes Veneer, Inc.*,⁶²² apparently a case of first impression. The court followed *Restatement of Contracts*, section 377 in denying specific enforcement of a contract under which the defendant's termination powers were such as to vitiate any decree.⁶²³ As an additional ground, the court denied relief because the contract was for employment.⁶²⁴

Election of remedies. *McKown v. Davis*⁶²⁵ appears to be the only 1937-1957 case squarely raising an election of contract remedies issue.⁶²⁶ The court held that an action by a land buyer to rescind for fraud, lost because he failed to prove the fraud, did not bar his later specific performance suit.⁶²⁷

*Washington Co-op Chick Ass'n v. Jacobs*⁶²⁸ is also of interest at this point. In an excellent opinion written by Judge Olson, the court considerably clarified the theoretic basis for the election which a conditional sales vendor must make when the vendee defaults. The vendor

(plaintiff tried without success to get specific enforcement of an earnest money agreement calling for the execution of a real estate contract; the trial court did however decree specific performance conditioned on full payment by the plaintiff; this was approved on appeal); *McKown v. Davis*, 47 Wn.2d 10, 285 P.2d 1048 (1955) (buyer under a real estate contract sued after the seller had conveyed the property to another person; the trial court decreed specific performance, with an alternative proviso requiring payment of a sum measured by plaintiff's restitution interest, if the defendant failed to convey within ninety days; this was approved on appeal).

⁶²¹ See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 358 *et seq.*

⁶²² 42 Wn.2d 338, 255 P.2d 379 (1953).

⁶²³ This is the usual result. 5 WILLISTON, CONTRACTS § 1442 (rev. ed. 1936).

⁶²⁴ The employee sued; the court said: "It is impossible for a court to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves rendering personal services. To attempt to do so would be futile. Equity will not decree an act which will not serve a useful purpose." This is the usual result. RESTATEMENT, CONTRACTS § 379 (1932); 5 WILLISTON, CONTRACTS § 1423A (rev. ed. 1936).

⁶²⁵ 47 Wn.2d 10, 285 P.2d 1048 (1955).

⁶²⁶ See also: *Willis T. Batcheller, Inc. v. Welden Constr. Co.*, 9 Wn.2d 392, 115 P.2d 696 (1941) (election of remedies discussed; the issue was whether filing a claim for a payment due, in obligor's receivership, barred subsequent forfeiture for default on that payment); *Labor Hall Ass'n, Inc. v. Danielson*, 24 Wn.2d 75, 163 P.2d 167 (1945) (the court's discussion of election is of interest here, although the transaction involved a lease); *Bayley v. Lewis*, 39 Wn.2d 464, 236 P.2d 350 (1951) (right of injured party to rescind for total breach was acknowledged by the court, but found to have been lost through delay and assertion of the contract as a defense in subsequent litigation).

⁶²⁷ This is in accord with the usual view. See RESTATEMENT, CONTRACTS § 383 (1932); 5 WILLISTON, CONTRACTS § 1528 (rev. ed. 1936). See also *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 116 P.2d 315 (1941). The court expressed doubt "that, under our liberal practice, the filing of a complaint stating one theory of a controversy, in the absence of any element of estoppel, constitutes such an election as to prevent a later filing of an amended complaint on another theory." The court went on to hold that an attempt to assert a remedy not available is not an election. *Willis T. Batcheller, Inc. v. Welden Constr. Co.*, 9 Wn.2d 392, 115 P.2d 696 (1941) is a similar holding.

⁶²⁸ 42 Wn.2d 460, 256 P.2d 294 (1953).

sued for the price and thereafter dismissed his action without prejudice. He subsequently brought this conversion action and sought to escape the election effect of his earlier conduct by resort to the proposition set forth in *Restatement of Contracts*, section 381, under which an election becomes final only when the other party has materially changed his position. In denying this analysis, the court said:

The election in question is not a choice between inconsistent remedies of a procedural nature, to which plaintiff's theory might apply. It is a choice between inconsistent substantive rights which plaintiff had as a conditional sale vendor, and over which its vendee had no control. It is an election between inconsistent substantive legal relations, that is, between a contract and no contract. Plaintiff chose the former. This it could do, and create the chosen relation with its vendee, by merely making its desire to do so manifest.⁶²⁹

DISCHARGE OF CONTRACTS

Basic principles. It will be recalled that contract duties are of two varieties, the basic duty which is created by contract formation, and the duty to perform immediately which exists when the time has arrived for performance and all conditions have been met or excused. If the latter duty is not at once performed it becomes a duty to make compensation or otherwise answer for breach and the obligee has at once a cause of action. At either stage of the transaction the duty then extant can be extinguished. The term "discharge" is variously used, to indicate a process by which a duty is extinguished, and to indicate the end result of its extinguishment.

There are two quite different types of discharge. One is the product of the obligee's intent. The common instances are release, rescission, accord and satisfaction, novation and account stated. The other is the product of legal principles which operate without regard to the obligee's purpose. Typical are the propositions which regulate the operation of express or constructive conditions, the statute of limitations, alteration, merger, *res judicata*, impossibility, fraud, duress and mistake.

The most obvious of discharge methods is of course performance. It is so pervasive a factor that no attempt has been made to isolate the

⁶²⁹ The court went on to hold that commencement of the earlier action indicated the vendor's intent and established the election, without regard to any reliance by the vendee. See also *Geranios v. Annex Investments*, 45 Wn.2d 233, 273 P.2d 793 (1954), in which the court said: "When a vendor has given a purchaser under an executory real-estate contract notice of forfeiture and the entire purchase price is not due, the purchaser has a right to acquiesce therein and treat the notice as a waiver of the vendor's right to hold the purchaser for the unpaid balance of the contract."

later cases in which performance was a defense,⁶³⁰ save for the application-of-payment cases.

Application of payments. If an obligor owes multiple money obligations and neglects to specify the one to which a particular payment shall appertain, litigation over application of the payment will be resolved by resort to legal principles. These give effect to the creditor's application if seasonably made, and require application by the court in all other situations. The court will usually direct application to the obligation which was the longest past due when the payment was made.⁶³¹ Adherence to these propositions was reaffirmed in *Whiting v. Rubenstein*⁶³² and *Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines*.⁶³³

Release. A release is a writing expressing an obligee's purpose to discharge the obligor at once or on a condition stated, executed by the obligee and backed by value.⁶³⁴ There appears to be no significant 1937-1957 Washington release case.⁶³⁵

Rescission. A new bilateral contract by which the parties surrender their rights under an existing bilateral contract still wholly or partially executory on both sides is a mutual rescission. The old duties are immediately discharged.⁶³⁶ *Letres v. Washington Co-op Chick Ass'n*⁶³⁷

⁶³⁰ The issues are typically factual, e.g., what did the obligor do? *Morse v. McGrady*, 49 Wn.2d 505, 304 P.2d 691 (1956) is an example. The obligor was held to have "the right under their general denial to produce evidence showing that the work was done in a satisfactory manner." In other instances conformity of what was done, to the demands of the contract, is disputed; the answer lies in interpretation of the contract.

⁶³¹ RESTATEMENT, CONTRACTS §§ 387 *et seq.* (1932); 5 CORBIN, CONTRACTS § 1231 (1950); 6 WILLISTON, CONTRACTS §§ 1795 *et seq.* (rev. ed. 1936).

⁶³² 10 Wn.2d 5, 116 P.2d 305 (1941).

⁶³³ 13 Wn.2d 370, 125 P.2d 668 (1942). For the earlier cases see WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 387, 394.

⁶³⁴ RESTATEMENT, CONTRACTS §§ 402 *et seq.* (1932); 4 CORBIN, CONTRACTS § 1238 (1950); 6 WILLISTON, CONTRACTS § 1820 (rev. ed. 1936). Where the seal continues to have its common law force, a release will be operative if sealed. The "value" requirement is often said to be regulated by consideration principles, including the antecedent-duty rule. See the discussion at note 135 above.

⁶³⁵ *Morse v. McGrady*, 49 Wn.2d 505, 304 P.2d 691 (1956) held, without discussion, that an FHA Title 1 Completion Certificate, executed by the owner to his bank, was not a release of any duty of the builder to the owner. *Bakamus v. Albert*, 1 Wn.2d 241, 95 P.2d 767 (1939) held a release to be protected by the parol evidence rule and to encompass all demands which fell within its language. (The case did not involve a release of contract duties.)

⁶³⁶ RESTATEMENT, CONTRACTS §§ 406 *et seq.* (1932); 4 CORBIN, CONTRACTS § 1236 (1950); 6 WILLISTON, CONTRACTS §§ 1828 *et seq.* (rev. ed. 1936). Some confusion in terminology will be observed; the stated definition appears to conform to the better usage of "rescission" as a discharge technique for contract obligations. Great care must be exercised in differentiating between this type of agreement, and the unilateral "rescission" which is a remedy for total breach of contract, for breach of warranty in a sale, or for fraud. See the discussion, notes 639, 640 below.

⁶³⁷ 8 Wn.2d 64, 111 P.2d 594 (1941).

is of interest, both for a good statement of the mutual assent requirements for the formation of the new contract,⁶³⁸ and for the court's failure to recognize that a new agreement by which the parties undo a fully-performed contract is not mutual rescission.⁶³⁹ The crucial issue in other cases was interpretation of words or conduct which might or might not express an offer to rescind and acceptance of it.⁶⁴⁰ Consideration presents no serious problem, being sufficiently established in the reciprocal surrender of old rights.⁶⁴¹ The rescinding contract can be oral save where a statute of frauds requires a writing.⁶⁴²

⁶³⁸ The court recognized that a rescission agreement can be express or implied and requires offer and acceptance. This proposition was repeated in *Morango v. Phillips*, 33 Wn.2d 351, 205 P.2d 892 (1949). The court also said: "Silence, when an offer of rescission is made, does not, as a general rule, operate as an acceptance, unless the attendant circumstances are such as require the one to whom the offer is made to speak. An agreement inferred from silence rests upon the principle of estoppel."

⁶³⁹ Chicks were sold, delivered, and paid for; the parties knew that the chicks might be infected and the seller promised to be responsible for all losses. The chicks did come down with bronchitis and at the buyer's request the seller took back such as still survived. The issue was whether the seller was liable for the buyer's other losses, in addition to refund of the price paid. Insofar as a sales was involved, the new transaction was simply a re-sale, not a rescission. Whether return of the chicks had any legal effect on the seller's promise to make good all losses presented an interpretation question. Cf., *Dahl v. Stromberg*, 31 Wn.2d 884, 200 P.2d 495 (1948), where the court referred to a transaction by which the parties rescinded a conditional sale contract as an "abandonment." The term "abandonment" recurs in Washington decisions; just what the court means by it is not always clear. See *Jacks v. Blazer*, 39 Wn.2d 277, 235 P.2d 187 (1951); *Ferris v. Blumhardt*, 48 Wn.2d 395, 293 P.2d 935 (1956).

⁶⁴⁰ *Wiegardt v. Becken*, 21 Wn.2d 59, 149 P.2d 929 (1944); *Holton v. Hart Mill Co.*, 24 Wn.2d 493, 166 P.2d 186 (1946); *Rider v. Cottle*, 32 Wn.2d 538, 202 P.2d 741 (1949); *Morango v. Phillips*, 33 Wn.2d 351, 205 P.2d 892 (1949); *Litel v. Marsh*, 33 Wn.2d 441, 206 P.2d 300 (1949); *Bayley v. Lewis*, 39 Wn.2d 464, 236 P.2d 350 (1951). One type of conduct which can evidence an agreement to rescind the original contract wholly or in part is the formation of a new one which is inconsistent with it, or with part of it. *Ethredge v. Diamond Drill Contracting Co.*, 196 Wash. 483, 83 P.2d 364 (1938); *Haley v. Brady*, 17 Wn.2d 775, 137 P.2d 505 (1943); *Reid Co. v. M-B Contracting Co.*, 46 Wn.2d 784, 285 P.2d 121 (1955). Particularly treacherous is a wrongful repudiation by one party apparently acquiesced in by the other; mutual rescission is not ordinarily a sound interpretation of such evidence. See 4 CORBIN, CONTRACTS § 1236, at 961 (1950). Here, as in other instances of total breach by one party, a declared purpose by the injured party to "rescind" is but a declaration by him of his purpose about his remedy. This was recognized in the *Holton* and *Rider* cases, *supra*. It is, however, a distinction which the court has not always observed. Cf., *Jones v. Grove*, 76 Wash. 19, 135 Pac. 488 (1913). The asserted rescission agreement should also fail for lack of consideration. See the following note.

⁶⁴¹ This was recognized and stated in *Exeter Co. v. Martin, Ltd.*, 5 Wn.2d 244, 105 P.2d 83 (1940), a case involving surrender of a lease. See also the discussion at notes 146, 162 above. Notice that a purported "mutual rescission" of a unilateral contract or of a bilateral contract performed on one side must fail for lack of consideration; only one party has a right to surrender. If the other provides consideration in some new promise or performance, discharge may result; it is however properly classified as accord rather than "mutual rescission." See 6 WILLISTON, CONTRACTS § 1828 (rev. ed. 1936). Cf., 5 CORBIN, CONTRACTS § 1236 at 959, 960 (1950). Where one party has committed a total breach, the other is discharged thereby and the defaulter cannot provide consideration for a mutual rescission. This the court has on occasion failed to recognize. *Jones v. Grove*, 76 Wash. 19, 135 Pac. 488 (1913) is an example. With the *Jones* case, compare *Harris v. Morgensen*, 31 Wn.2d 228, 196 P.2d 317 (1948).

⁶⁴² RESTATEMENT, CONTRACTS § 407 (1932); 5 CORBIN, CONTRACTS § 1236, n. 58 (1950);

On occasion, mutual rescission occurs after one party has partly performed. The new agreement may or may not wipe out his right to be paid for what he did, or create a right to return of his performance. The answer is usually said to turn on interpretation of the new contract.⁶⁴³ The older Washington cases were not harmonious in their disposition of the problem; in several the court apparently required restoration of the *status quo ante*, (where the rescission agreement was silent on the point) as a matter of law.⁶⁴⁴ This approach was again taken in *Morango v. Phillips*;⁶⁴⁵ it may be the product of failure to observe the difference between rescission as a remedy and rescission by mutual agreement.⁶⁴⁶ In any event this is a detail which will require clarification in future decisions.

Accord and satisfaction. Accord and satisfaction is a routine method for the discharge of unilateral contracts, bilateral contracts fully performed on one side, and claims for breaches of contract. Traditionally, the accord is bilateral in form, the obligor undertaking to render an indicated performance and the obligee undertaking to receive it in satisfaction of his right or claim.⁶⁴⁷ The discharge occurs when the new performance is rendered.⁶⁴⁸ There is however much modern use

6 WILLISTON, CONTRACTS § 1828 (rev. ed. 1936), *Haley v. Brady*, 17 Wn.2d 775, 137 P.2d 505 (1943) supports the rule, although the case involved a modification which probably came after a breach by one party so that the new agreement was an accord; a change in part of an executory contract of necessity rescinds the affected part of the old one. *Kelly Springfield Tire Co. v. Faulkner*, 191 Wash. 549, 71 P.2d 382 (1937) was cited; there the court said: "Although the guaranty provided . . . that it could not be modified or abrogated except in writing . . . it is well settled that such a contract may be modified or abrogated by the parties thereto in any manner they choose . . ." The issue, however, was discharge of a unilateral contract by accord and satisfaction.⁶⁴³ RESTATEMENT, CONTRACTS § 409 (1932); 5 CORBIN, CONTRACTS § 1236 n. 53 (1950); 6 WILLISTON, CONTRACTS § 1827 (rev. ed. 1936).

⁶⁴⁴ See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 409, and *McMillen v. Bancroft*, 162 Wash. 175, 298 Pac. 460 (1931).

⁶⁴⁵ 33 Wn.2d 351, 205 P.2d 892 (1949).

⁶⁴⁶ Indeed, it is difficult to read otherwise the following passage in the *Morango v. Phillips* opinion: "We have decided many times that, before a party to a contract is entitled to a rescission, he must be willing to do equity and restore that which he has received from the other party; and, if a rescission is had, either as the result of a decree of court or by mutual agreement, each party to the contract must place the other in *status quo* in so far as it is practicable or possible so to do." The court cited for this statement one mutual rescission case (*McMillen v. Bancroft*, cited note 644 above) and two cases concerned with rescission as a remedy.

⁶⁴⁷ RESTATEMENT, CONTRACTS § 417 (1932); 6 CORBIN, CONTRACTS §§ 1268, 1276 (1950); 6 WILLISTON, CONTRACTS § 1838 (rev. ed. 1936). An agreement for a substitute performance is a rescission where it replaces reciprocal rights and duties under an executory bilateral contract; see the preceding subsection. The parties to an accord may agree (but seldom do) that the original claim is at once discharged. See RESTATEMENT, CONTRACTS, § 418 (1932); 6 WILLISTON, CONTRACTS § 1847 (rev. ed. 1936). This principle was apparently applied in *Kandoll v. Penttila*, 18 Wn.2d 434, 139 P.2d 616 (1943); the affected obligation was a judgment.

⁶⁴⁸ *Kelly Springfield Tire Co. v. Faulkner*, 191 Wash. 549, 71 P.2d 382 (1937) is illustrative.

of the term "accord and satisfaction" in discussions of unilateral discharge contracts, *i.e.*, transactions in which the obligor proffers a performance as an offer for a discharge, or the obligee proffers a discharge as an offer for a performance. In these transactions there is no intermediate executory contract stage, as the discharge occurs simultaneously with formation of the contract. This usage appertains in Washington.

The accord, whether bilateral or unilateral, must satisfy the mutual assent and consideration requirements for contract formation. Several of the 1937-1957 accord cases were concerned with the application of offer and acceptance principles.⁶⁴⁹ Their main interest is in emphasis of an obvious point—an obligee who would have his remittance operate as an accord must accompany the check or other payment with language indicating that he is making an offer for a total discharge.⁶⁵⁰

Accords also produced a number of consideration problems. In disposing of them the court further complicated an already confused area. In *Watkins v. Seattle*⁶⁵¹ and *Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines*⁶⁵² payment of less than the sum due was held not to be a consideration for discharge of a liquidated obligation, without discussion of earlier contrary cases. The latter were, in turn,

⁶⁴⁹ *Berliner v. Greenberg*, 37 Wn.2d 308, 223 P.2d 598 (1950) (the parties' discharge transaction was found not to have progressed beyond the preliminary negotiation stage); *Sprague Ave. Inv. Co. v. Pacific Fin. Corp.*, 5 Wn.2d 301, 105 P.2d 28 (1940) (from an earlier case the court quoted: "The general rule is that, where a debtor sends to his creditor a check for the amount he is willing to pay, and at that time informs the creditor that he intends the check to be considered as full payment, then, by the acceptance and cashing of the check, the creditor agrees to the settlement and cannot thereafter seek additional compensation."); *Gould v. Witter*, 10 Wn.2d 553, 117 P.2d 210 (1941) (found, on the facts that there was no accord for lack of mutual assent); *Bellingham Sec. Syndicate v. Bellingham Coal Mines, Inc.*, 13 Wn.2d 370, 125 P.2d 668 (1942) (found, on the facts, that there was no accord for lack of mutual assent); *Meyer v. Strom*, 37 Wn.2d 818, 226 P.2d 218 (1951) (stressed the absence of any indication by the creditor, when he remitted, of a condition that the payment be accepted in discharge of a larger amount; there was no mutual assent); *Boyd-Conlee Co. v. Gillingham*, 44 Wn.2d 152, 266 P.2d 339 (1954) ("The mere receipt by respondent of an amount less than is claimed, with the knowledge that appellants admit an indebtedness only to the extent of the payment made, does not of itself establish an accord and satisfaction. When a remittance is made, which is less than the amount in dispute, it must be made plain to the creditor that the remittance is tendered as full payment of the disputed amount"; the alleged accord failed for lack of mutual assent).

The earlier cases were discussed in *Shepherd and Shattuck, Accord and Satisfaction in Washington*, 8 WASH. L. REV. 112, 165 (1934).

⁶⁵⁰ If the creditor receives the payment, cashes the check or (probably) if he retains the check for an undue time, he will be deemed to have accepted the offer, quite without regard to his actual purpose in that particular. *RESTATEMENT, CONTRACTS* § 420 (1932); 6 *WILLISTON, CONTRACTS* § 1856 (rev. ed. 1936).

⁶⁵¹ 2 Wn.2d 695, 99 P.2d 427 (1940).

⁶⁵² 13 Wn.2d 370, 125 P.2d 668 (1942).

followed in *Douglas County Memorial Hosp. Ass'n v. Newby*,⁶⁵³ with equal inattention to opposed decisions. In *Meyer v. Strom*⁶⁵⁴ it was held that payment "of an amount admitted to be due can furnish no consideration for an accord and satisfaction of the entire claim." This is a minority view,⁶⁵⁵ adhered to in some of the pre-1937 cases.⁶⁵⁶ In *Sprague Ave. Inv. Co. v. Pacific Fin. Corp.*,⁶⁵⁷ on the other hand, an obligor's remittance of the sum he contended was due was held without discussion to be consideration. *Tonseth v. Serwold*⁶⁵⁸ followed a 1935 decision,⁶⁵⁹ in holding to be liquidated, and hence within the antecedent-duty rule, an obligation the amount of which was certain but the existence of which was disputed. This is an analysis difficult to understand. It is generally conceded in other jurisdictions that the antecedent-duty rule does not apply where either the existence of an obligation or its extent is disputed.⁶⁶⁰

Welsh v. Loomis,⁶⁶¹ is also of interest, for its recognition that a payment in any amount by a person who does not owe the obligation can support discharge of a liquidated obligation.⁶⁶²

In 1937 the court had occasion, apparently for the first time, to

⁶⁵³ 45 Wn.2d 784, 278 P.2d 330 (1954). See Shepherd and Shattuck, *Accord and Satisfaction in Washington*, 8 WASH. L. REV. 112, 165 at 119 (1934), and the discussion at note 135 above.

⁶⁵⁴ 37 Wn.2d 818, 226 P.2d 218 (1951).

⁶⁵⁵ 5 CORBIN, CONTRACTS § 1289 (1950); 1 WILLISTON, CONTRACTS § 129 (rev. ed. 1936).

⁶⁵⁶ Shepherd and Shattuck, *Accord and Satisfaction in Washington*, 8 WASH. L. REV. 112, 165 at 120 *et seq.* (1934). Paulsen Estate v. Naches-Selah Irrigation Dist., 190 Wash. 205, 67 P.2d 856 (1937) reached a contrary result.

⁶⁵⁷ 5 Wn.2d 301, 105 P.2d 28 (1940). The court said: "Where a dispute arises over the construction of the terms of a contract by which liability is to be measured, that in itself renders the amount owing unliquidated."

⁶⁵⁸ 22 Wn.2d 629, 157 P.2d 333 (1945).

⁶⁵⁹ *Graham v. New York Life Ins. Co.*, 182 Wash. 612, 47 P.2d 1029. (The action involved a life insurance policy with a double indemnity clause from which suicide was excluded. The insured died, whether from suicide or otherwise being disputed. Payment of the regular death benefit was held not to be consideration, both because it was payment of a sum the obligor did not dispute (as to which see notes 175, 178 above) and because the controversy concerned the cause of death, the amount of the obligation being otherwise undisputed. The fallacy in this reasoning seems obvious. The "amount" is certainly disputed if an alleged obligor denies all liability. Moreover, for purposes of the consideration rule which defeats a discharge based on part performance of a duty, the parties should be free to compromise the fact of liability as well as the scope of it. *James v. Riverside Lumber Co.*, 121 Wash. 130, 208 Pac. 260 (1922), seems inconsistent with the *Graham* case.

⁶⁶⁰ RESTATEMENT, CONTRACTS §§ 76, 417 (1932); 6 CORBIN, CONTRACTS §§ 1288, 1290 (1950); 1 WILLISTON, CONTRACTS § 128 (rev. ed. 1936). Whether the dispute must be bona fide or reasonable or both was discussed above, under the subheading "Compromise."

⁶⁶¹ 5 Wn.2d 377, 105 P.2d 500 (1940). The case is apparently one of first impression in Washington.

⁶⁶² This is the usual view. RESTATEMENT, CONTRACTS §§ 76, 421 (1932); 4 CORBIN, CONTRACTS § 1285 (1950); 1 WILLISTON, CONTRACTS § 125 (rev. ed. 1936).

consider the legal situation after breach of an accord by the obligor. Recovery on the original claim was permitted.⁶⁶³

Novation. The essence of novation is substitution. A third person can be substituted for the original obligor, or for the original obligee. In either event the original duty is discharged.⁶⁶⁴ In *MacPherson v. Franco*⁶⁶⁵ and *Hines v. Chesire*⁶⁶⁶ the existence of a novation was denied because the proof failed to establish an agreement to which obligor, obligee and third person were parties.⁶⁶⁷

Account stated.

Matured debts are discharged by a manifestation of assent in good faith by debtor and creditor to a stated sum as an accurate computation of the amount of the matured debt or debts due the creditor, or if there are cross demands as the amount of the difference between the total indebtedness due one party and the total indebtedness due the other party. A new duty arises to pay a sum so fixed.⁶⁶⁸

In *Goodwin v. Northwestern Mut. Life Ins. Co.*⁶⁶⁹ the court without discussion held that an insurer's periodic statements to the insured concerning a policy loan and indicating compound interest did not ground an account stated.

⁶⁶³ *Buob v. Feenaughty Mach. Co.*, 191 Wash. 477, 71 P.2d 559 (1937). RESTATEMENT, CONTRACTS § 417 (1932) was cited with approval; under its system the obligee has a choice of remedies, i.e., suit on the original claim or suit on the accord. Most modern courts would probably concur. 4 CORBIN, CONTRACTS § 1275 (1950); 6 WILLISTON, CONTRACTS § 1848 (rev. ed. 1936). The Washington court quoted from comment a, and subsection d. The latter covers breach by the obligee and would seem not to be in point in the Buob case. The reference does however suggest that the court would be favorably inclined to the provisions of subsection d in an appropriate case. This subsection provides not only for damages, but also for specific enforcement, which would enable the debtor for all practical purposes to use the accord defensively. This use of the accord would be a departure from some of the early Washington decisions. See Shepherd and Shattuck, *Accord and Satisfaction in Washington*, 8 WASH. L. REV. 112, 165 at 169 *et seq.* (1934).

⁶⁶⁴ RESTATEMENT, CONTRACTS §§ 424 *et seq.* (1932); 6 CORBIN, CONTRACTS § 1297 (1950); 6 WILLISTON, CONTRACTS § 1865 (rev. ed. 1936). That the novation is a recognized discharge method in Washington was indicated in the earlier cases. See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS, to the cited sections.

⁶⁶⁵ 34 Wn.2d 179, 208 P.2d 641 (1949).

⁶⁶⁶ 36 Wn.2d 467, 219 P.2d 100 (1950).

⁶⁶⁷ Two-party discharge transactions of the substituted-party variety can of course be effective, as where the obligor and obligee agree that the obligor will perform only to a third person, or a third person and the obligee agree that the third person will perform in lieu of the obligor. Whether the term "novation" should encompass agreements like these is debatable. For a discussion favoring the affirmative view, see 6 CORBIN, CONTRACTS § 1299 (1950).

⁶⁶⁸ RESTATEMENT, CONTRACTS § 422(1) (1932). See also 6 CORBIN, CONTRACTS §§ 1303 *et seq.* (1950); 6 WILLISTON, CONTRACTS § 1862 (rev. ed. 1936). It seems clear from the earlier cases that the account stated as defined in the Restatement operates in Washington. See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS, to the cited section. See also National Ass'n of Creditors v. Ultican, 190 Wash. 109, 66 P.2d 824 (1937).

⁶⁶⁹ 196 Wash. 391, 83 P.2d 231 (1938).

Conditions, express and constructive. "A contractual duty is discharged by the unexcused failure of a condition to occur within the time necessary to create a right to the immediate performance of the duty."⁶⁷⁰ Since the discharge takes place when the time has passed within which the condition can be satisfied, determining whether such time has passed is often the key step. In instances of express conditions the answer lies in interpretation to ascertain the time fixed by the contract. The obligee has no leeway, as express conditions operate literally and time is always of the essence.⁶⁷¹ Constructive conditions are made much more difficult by the concept of "substantial performance," under which an obligee can on occasion satisfy the condition by a tender made after the date set by the contract for his performance.⁶⁷² The same criteria are significant where an obligee's attempt to meet a condition is timely but deviates in terms of quantity or quality; he has no leeway where the condition is express; he may have some, where the condition is constructive. Discussions of constructive conditions are complicated by shifts in terminology; failure to satisfy such a condition always entails failure to render a promised performance, and the injured party's discharge is often said to be the product of "material" or "total" breach by the defaulter,⁶⁷³ or of "failure of consideration."⁶⁷⁴

The operation of these propositions was illustrated in many of the 1937-1957 cases. This period also produced several cases⁶⁷⁵ demonstrating that a conditional sale contract whether for land or a chattel, is governed by special rules.⁶⁷⁶

⁶⁷⁰ RESTATEMENT, CONTRACTS § 395 (1932). See also 6 CORBIN, CONTRACTS §§ 1252 *et seq.* (1950). The range of constructive conditions which fall within this principle is very broad. Included will be conditions grounded on an obligee's duty not to interfere with the obligor's performance, and on an obligor's duty not to repudiate. See RESTATEMENT, CONTRACTS §§ 295, 317, 318 (1932), and the discussion at note 522 *et seq.*, above, under the subheading Prevention and Repudiation.

⁶⁷¹ See the discussion above at note 473 *et seq.* Notice that an express condition can be excused, and that one basis for excuse is extreme hardship and forfeiture.

⁶⁷² See the discussion at note 484 *et seq.* above.

⁶⁷³ See RESTATEMENT, CONTRACTS § 397 (1932).

⁶⁷⁴ See RESTATEMENT, CONTRACTS § 274 (1932). An illustrative case is *Mell v. Winslow*, 49 Wn.2d 738, 306 P.2d 751 (1957). Prospective failure of consideration was discussed above under that subheading, at note 492 *et seq.*

⁶⁷⁵ The discharge is not often directly in issue. The contested question is typically the existence of the condition or whether it was satisfied or excused. A holding for the promisor is however indicative of his discharge. See, as to express conditions, *In re Lewis' Estate*, 2 Wn.2d 458, 98 P.2d 654 (1940) and the cases cited in note 473 above. As to constructive conditions, see notes 488-491 above. Prevention and repudiation were discussed at notes 522 *et seq.* above.

⁶⁷⁶ The vendee who defaults will subject himself to repossession and forfeiture; no contract clause so stating is necessary to the result. *Rider v. Cottle*, 32 Wn.2d 538, 202 P.2d 741 (1949). That "default" will encompass any breach was indicated in earlier cases. *Liliopoulos v. Ayerest*, 125 Wash. 134, 215 Pac. 339 (1923) (failure to pay one installment); *Gaffney v. O'Leary*, 155 Wash. 171, 283 Pac. 1091 (1929) (refusal to sign a written contract). No inclination to apply the usual total-breach

Statute of Limitations. "Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued . . ."⁶⁷⁷ Once the limitation period has run, the duty of a contract obligor is discharged. The discharge is in a sense contingent, because of the tolling principle.⁶⁷⁸ The statute operates on a cause of action, which in a contract situation exists only when a duty of immediate performance has been defaulted. Interpretation of the contract to determine when the obligor was to perform or whether his undertaking was conditional, and the operation of express or constructive conditions, are accordingly common issues in statute of limitations litigation. Several of the later cases are illustrative.⁶⁷⁹ The statute also

criteria is evidenced in these cases. The vendor must however elect between repossession and forfeiture, or recovery of the price. His choice of the first course discharges the vendee's duty to pay. *Standard Finance Co. v. Townsend*, 1 Wn.2d 274, 95 P.2d 786 (1939); *Washington Co-op. Chick Ass'n v. Jacobs*, 42 Wn.2d 460, 256 P.2d 294 (1953). (These cases state the rule; the effect on title, of election to recover the price, was the point in issue). It is evident that the vendor is ordinarily discharged of all duties by his election of either course; if however he elects forfeiture and sues in replevin, a conditional decree may be entered, under which the vendee can defeat the action by payment of the entire contract balance within a time set by the court. *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835 (1908); *Standard Furniture Co. House v. Burrows*, 59 Wash. 455, 110 Pac. 13 (1910); *Kohler & Chase v. Turner*, 84 Wash. 192, 146 Pac. 393 (1915). A similar technique has been followed in real estate contract cases. *Crook v. Tudor*, 28 Wn.2d 289, 182 P.2d 740 (1947); *Bruckart v. Cook*, 30 Wn.2d 4, 190 P.2d 725 (1948). In the *Crook* case the sum to be paid, set by the trial court, covered only defaulted installments and the vendor's costs; this detail was not however in issue on the appeal. On the other hand it may be doubted that default by the vendee, however gross, serves to extinguish his interest until the vendor makes his selection. This idea was expressed in *In re Horse Heaven Irrigation Dist.*, 19 Wn.2d 89, 141 P.2d 400 (1943), a land contract case. *Cf.*, *Harris v. Morgensen*, 31 Wn.2d 228, 196 P.2d 317 (1948) (vendee in default does not provide consideration for a promise by the vendor to refund part of the price paid, by surrendering the property). That the election does not necessarily involve a notice of forfeiture, where this is the vendor's choice, was indicated in *Crook v. Tudor*, *supra*, (vendee abandoned the property). *Geranios v. Annex Investments*, 45 Wn.2d 233, 273 P.2d 793 (1954), also a land contract case, indicates that forfeiture will discharge not only accrued installments but unaccrued ones as well. Forfeiture will discharge a down-payment note found by the court to represent a part of the vendee's executory promise to pay. *Jones-Short Motor Co. v. Bolin*, 153 Wash. 198, 279 Pac. 395 (1929), noted 30 YALE L. J. 124 (1920). A note found to be "payment" of the down-payment will not be discharged. *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78 (1916). The vendee's discharge has been held not to encompass his undertaking, in the contract, to pay an attorney fee, or insurance premiums. *Motor Contract Co. v. Van Der Volgen*, 162 Wash. 449, 298 Pac. 705 (1931); *Union Mach. & Supply Co. v. McCush*, 104 Wash. 62, 175 Pac. 559 (1918).

⁶⁷⁷ RCW 4.16.010. The prescribed period is six years, for "an action upon a contract in writing, or liability express or implied arising out of a written agreement." RCW 4.16.040 (2). The period is three years, on "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." RCW 4.16.080(3). Statutes regulating administrative procedures may affect contract obligees; see for example RCW 28.88.010, *et seq.*, which create a system of appeals in the public school system; the statute was applied in *Blunt v. School Dist. No. 35*, 12 Wn.2d 336, 121 P.2d 367 (1942) to bar an action by a discharged school teacher.

⁶⁷⁸ The tolling cases were discussed at p. 65 *et seq.* above.

⁶⁷⁹ *Gensman v. West Coast Power Co.*, 3 Wn.2d 404, 101 P.2d 316 (1940), noted 15 WASH. L. REV. 267 (1940) (the action was to recover over-time pay; the court

generates a continuing grist of construction problems. In *Campbell Co. v. Holsum Baking Co.*⁶⁸⁰ the court declined to treat as defensive and unaffected by the limitations statute a cross claim based on an alleged over-payment of plaintiff by defendant. In *DeBritz v. Sylvia*⁶⁸¹ an optionee who accepted a written option offer, by words and conduct only, was held to the six-year statute; the action was found to arise "out of a written agreement."⁶⁸² In *Rushlight v. McLain*⁶⁸³ the statute was held not to run during the obligor's absence from the state, even though the obligor was an employee of the obligee.⁶⁸⁴

Merger and Res judicata. An adjudication, in litigation between an actual or alleged obligor and obligee concerning either the existence or scope of a contract duty, precludes a second action. A holding for the obligee merges the obligor's duty in the judgment.⁶⁸⁵ A holding for the obligor brings the doctrine of res judicata into operation.⁶⁸⁶ These principles were significant in several of the later cases.⁶⁸⁷

found that payment was due monthly and held that the statute started to run as each monthly payment was defaulted; earlier cases holding that the statute does not begin to run on wage claims for services rendered under a continuous and indeterminate employment, until the employment ends, were distinguished; presumably a finding that wage payments were due periodically is fatal to the continuous-employment rule); *Keyes v. Tacoma*, 12 Wn.2d 54, 120 P.2d 533 (1941) (holder of local improvement district bonds occupied as to the city and funds held by it for the payment of bonds the position of trust beneficiary; recovery was permitted long after the limitations period had run on the bonds; the cut-off point was held to be the date on which the bondholder learned that the city had repudiated its trust); *Bellingham Sec. Syndicate v. Bellingham Coal Mines*, 13 Wn.2d 370, 125 P.2d 668 (1942) (obligor's duty was subject to an express condition; obligor was held to have the burden of proof because the statute creates an affirmative defense; obligor failed to sustain the burden of showing that the condition was met more than six years before the action was commenced); *Chatos v. Levas*, 14 Wn.2d 317, 128 P.2d 284 (1942) (in the absence of credible evidence concerning the due date of a note, the court "must hold that there was no date of payment mentioned in the note and that it, therefore, became a note payable on demand."); *Trethewey v. Green River Gorge, Inc.*, 17 Wn.2d 697, 136 P.2d 999 (1934) (where salary under an employment for an indeterminate term was to be paid only if sufficient funds were available and unpaid amounts were to be carried as a running account, the statute was held to begin to run when the employment was terminated); *Rushlight v. McLain*, 28 Wn.2d 189, 182 P.2d 62 (1947) (demand note is due when issued and statute starts to run then). In connection with running accounts, see RCW 4.16.150.

⁶⁸⁰ 15 Wn.2d 239, 130 P.2d 333 (1942).

⁶⁸¹ 21 Wn.2d 317, 150 P.2d 978 (1944), noted, 20 WASH. L. REV. 69 (1945).

⁶⁸² The earlier cases dealing with the very troublesome problem, when does a cause "arise" from a writing, were discussed by the court; the statutory language is so vague as to insure continuing necessity for its construction.

⁶⁸³ 28 Wn.2d 189, 182 P.2d 62 (1947).

⁶⁸⁴ The statute directly in issue was RCW 4.16.180.

⁶⁸⁵ RESTATEMENT, CONTRACTS § 444 (1932); 6 CORBIN, CONTRACTS § 1318 (1950); 6 WILLISTON, CONTRACTS § 1875A (rev. ed. 1936).

⁶⁸⁶ RESTATEMENT, CONTRACTS § 449 (1932); 6 CORBIN, CONTRACTS § 1318 (1950); 6 WILLISTON, CONTRACTS § 1875E (rev. ed. 1936).

⁶⁸⁷ *Woodruff v. Coate*, 195 Wash. 201 80 P.2d 555 (1938) (husband and wife, owners of all of the stock in a corporation, held bound by the judgment in a prior action to which the corporation was a party and in which relief on an alleged contract executed by the husband was denied; the husband managed the corporation's case);

Impossibility and frustration. An obligor whose performance requires the existence of a specific person or thing and who has not assumed the risk of non-existence will be discharged by death or incapacity of the person or unavailability of the thing.⁶⁸⁸ Within limits as yet imperfectly indicated by the cases, other events which destroy its purpose may discharge a contract.⁶⁸⁹ In *Bryne v. Bellingham Consol. School Dist.*,⁶⁹⁰ the court held that weather and labor difficulties did not excuse an owner's failure to "keep the construction work in a sufficient state of progress to allow timely completion of the electrical work." In *Tube-Art Display, Inc. v. Berg*,⁶⁹¹ destruction of the building on which an electric sign was displayed was held not to discharge the owner's duty to pay rent on the sign.

Estoppel, waiver, renunciation. Save where the renunciation section of the Uniform Negotiable Instruments Law governs,⁶⁹² it is difficult to determine the legal effect of an obligee's gratuitous expression of a purpose not to require a performance to which he has a right, or not to require compensation for a prior breach. Although value or consideration is often said to be needed for a consensual discharge, gift and reliance principles have on occasion been drawn on to sustain a gratuitous discharge.⁶⁹³ The later Washington cases demon-

Clubb v. Sentinel Life Ins. Co., 197 Wash. 308, 85 P.2d 258 (1938) (prior adjudication of the amount due under an accident insurance contract); *Dolby v. Fisher*, 1 Wn.2d 181, 95 P.2d 369 (1939) (a prior action is not adjudication of an issue raised by a cross-complaint and reply, where no evidence on it was submitted by either party and the judgment ignored it); *Golden v. McGill*, 3 Wn.2d 708, 102 P.2d (1940) (a decree of distribution, entered after hearing and service, was held to bar this later action by one of the parties for specific enforcement of an alleged contract which the will breached; the issue now sought to be litigated could have been raised in the earlier proceeding); *Gable v. Allen*, 25 Wn.2d 186, 169 P.2d 699 (1946) (in a prior action for breach of an alleged contract to marry, the defendant both denied the contract and alleged an unsatisfied condition to his promise, i.e., the settling of his former's wife's estate; judgment went for the plaintiff in superior court; the supreme court reversed; its judgment was held to bar the present action seeking recovery on the same contract upon an allegation that the condition had now been met; to the plaintiff's argument that the prior judgment must be limited to the condition issue, under which the earlier action would only be dismissed as premature, the court's answer was that its prior decision was on alternative grounds—no contract, and non-satisfaction of a condition; the prior judgment was accordingly res judicata on both issues).

⁶⁸⁸ RESTATEMENT, CONTRACTS §§ 454 *et seq.* (1932); 6 CORBIN, CONTRACTS §§1320 *et seq.* (1950); 6 WILLISTON, CONTRACTS §§ 1931 *et seq.* (rev. ed. 1936). For the earlier cases see WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS, to the cited Restatement sections.

⁶⁸⁹ RESTATEMENT, CONTRACTS § 288 (1932); 6 CORBIN, CONTRACTS §§ 1353 *et seq.* (1950); 6 WILLISTON, CONTRACTS §§ 1951, 1954 *et seq.* (rev. ed. 1936). For the earlier cases see WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS, to the cited Restatement sections.

⁶⁹⁰ 7 Wn.2d 20, 108 P.2d 791 (1941).

⁶⁹¹ 37 Wn.2d 1, 221 P.2d 510 (1950).

⁶⁹² RCW 62.01.122.

⁶⁹³ See RESTATEMENT, CONTRACTS §§ 410, 411 (1932); 5 CORBIN, CONTRACTS §§ 1240 *et seq.* (1950); 6 WILLISTON, CONTRACTS § 1829 (rev. ed. 1936).

strate the impossibility of arriving at any firm conclusions about this area.⁶⁹⁴ The most which can safely be said is that an obligee can in Washington so conduct himself as to lose his right, without receiving any compensation for it. Just what conduct will have this effect cannot be specified.

FRAUD AND MISREPRESENTATION

Terminology and basic principles. A promisor may be induced to make his promise, by a misstatement of the promisee about some aspect of the transaction, or by a misimpression which the promisee could have dispelled. Whether such conduct or inaction by a promisee is legally wrongful is a question which can be answered only after the application of a complicated set of interlocking principles. Those which concern relief of a promisor from his undertaking are discussed in the following subsections.

Development of a terminology appropriate to the substantive refinements has been slow. Prior to 1958 the word "fraud" was used without discrimination in Washington tort and disaffirmance cases. It appeared where the misstatement was knowingly false and where the misstatement was made without awareness of its falsity. A definition of it in which both scienter and materiality were stressed was

⁶⁹⁴ *Herman v. Golden Arrow Dairy, Inc.*, 191 Wash. 582, 71 P.2d 581 (1937) (employee who for a long period received without objection pay which to his knowledge did not include compensation for overtime, was held estopped to later claim overtime pay); *Byrne v. Bellingham Consol. School Dist.*, 7 Wn.2d 20, 108 P.2d 791 (1941) (subcontractor who went ahead with the job after delays caused by the owner was held not to have waived his right to damages for the delays); *Bellingham Sec. Syndicate v. Bellingham Coal Mines*, 13 Wn.2d 370, 125 P.2d 668 (1942) (lessor who for a long time received royalty payments without objection and without knowledge that the payments should be larger was held not estopped to recover the balance due it; said the court: "Estoppel by silence does not arise without full knowledge of the facts, and a duty to speak on the part of the person against whom it is claimed."); *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948) (buyer of land who paid the price, received a warranty deed, and remained silent while the escrow holder disbursed to the seller, all with knowledge that there existed an encumbrance on the property which violated the covenants of the deed and the seller's contract obligation, was held to be precluded from recovering damages for the breach; the court discussed both "waiver" and "estoppel"); *Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954) (vendee who paid and received a deed, knowing that it did not cover all of the area encompassed by the seller's original representation concerning the boundaries, was held to have "waived" any right he might have to a conveyance of the additional land); *Douglas County Memorial Hosp. Ass'n v. Newby*, 45 Wn.2d 784, 278 P.2d 330 (1954) (obligee who gave an extension of time based on part payment of a liquidated obligation was held "estopped" to deny consideration for the extension; reliance by the obligor in paying what he did was stressed). The use of the term "waiver" in this context is difficult to understand; conditions can be waived, but to hold that property rights can be lost by a mere expression of purpose does manifest violence to basic transfer concepts. "Estoppel" is no less difficult to work into the facts of these cases; the reliance is typically but the doing of something the obligor was legally bound to do. Reconsideration of the entire problem would seem to be in order.

often repeated, despite abundant evidence that a promisor does not have to show scienter in order to disaffirm.

In *Brown v. Underwriters at Lloyd's*,⁶⁹⁵ a 1958 case which was not concerned with disaffirmance, the court recognized that "fraud" is a word which should be used only to designate a misstatement accompanied by scienter.⁶⁹⁶ Whether the word as so defined has any proper place in disaffirmance litigation is discussed below, in the subsection entitled "Materiality."

A wrongful misstatement by the promisee may lead the promisor to promise, believing he is doing something else or that he is making a different kind of promise. This variety of mistake is fatal to mutual assent. There is no contract.⁶⁹⁷ No 1937-1957 Washington case involving this kind of mistake was found.

More commonly, a wrongful misstatement affects the promisor's decision to make a promise which he knows full well he is making. His mistake does not defeat mutual assent and there is a contract if the usual contract-formation criteria are met. The promisor is protected by an election which is a significant addition to the discharge methods discussed in the preceding section. He may elect to disaffirm (a word with which "avoid" and "rescind" seem to be interchangeable) and if he does he is discharged. If he fails to disaffirm he remains bound. If he has already performed, he can by disaffirmance mature a right to the return of his performance. This he can also do where the transaction was a sale. It is often impossible to determine from an opinion whether a property transfer was made in performance of a contract, and no attempt has been made to segregate sale and contract cases for the purposes of this section.

Proof. A misstatement may be asserted by a promisor as a defense, or as an integral part of an action to recover a performance he has rendered. In either situation he carries the burden of persuasion. The Washington court has said many times that "fraud" must be shown by "clear and convincing evidence,"⁶⁹⁸ but it is not possible to ascertain

⁶⁹⁵ 153 Wash. Dec. 126, 332 P.2d 228 (1958).

⁶⁹⁶ Although the case did not involve rescission the court's analysis and terminology should carry over into rescission cases.

⁶⁹⁷ RESTATEMENT, CONTRACTS § 475 (1932); 5 WILLISTON, CONTRACTS § 1488 (rev. ed. 1936).

⁶⁹⁸ *Russell v. Stephens*, 191 Wash. 314, 71 P.2d 30 (1937); *Hopper v. Williams*, 27 Wn.2d 579, 179 P.2d 283 (1947); *Paulson v. Cuddy*, 31 Wn.2d 924, 199 P.2d 920 (1948); *Ramsey v. Mading*, 36 Wn.2d 303, 217 P.2d 1041 (1950); *Elliott v. Fischer*, 36 Wn.2d 774, 220 P.2d 338 (1950); *Graff v. Geisel*, 39 Wn.2d 131, 234 P.2d 884 (1951); *Jenness v. Moses Lake Dev. Co.*, 39 Wn.2d 151, 234 P.2d 865 (1951); *Dragos v. Plese*, 39 Wn.2d 521, 236 P.2d 1037 (1951); *Shay v. Archambo*, 40 Wn.2d 277,

from the opinions just what the promisor must show in addition to the usual preponderance. There are a few decisions in which no reference is made to a special burden of proof;⁶⁹⁹ the omission is probably not meaningful. In *Westerbeck v. Cannon*⁷⁰⁰ the rule requiring clear and convincing proof was said not to apply because the misstatement was by a person occupying a fiduciary relationship to the promisor. The significance and scope of the stated exception is obscure.

In *Gronlund v. Andersson*⁷⁰¹ and *Nyquist v. Foster*⁷⁰² the court reaffirmed its refusal to enforce a contract-document clause disclaiming all representations not stated in the document. This type of clause will not bar proof of misstatements, nor will it bar disaffirmance.

That conduct can express a misstatement was recognized in *Westerbeck v. Cannon*⁷⁰³ and in *Downing v. State*.⁷⁰⁴

The *Downing* case is of interest for another reason. The plaintiff had received for property a sum less than its fair value and the legal significance of this fact was one of the issues. The court said that although inadequacy of price will not alone support rescission⁷⁰⁵ (unless so gross as to "shock the conscience of an equity court"), relief can be had if there is in addition an inequitable incident such as "fraud." The court went on: "Even though no directly false statements are made, if there appears to be a studied effort to produce a false impression upon the mind of the party from whom land is being purchased, this, together with inadequacy of price, will be sufficient to authorize relief." The utility of this approach is not readily seen. If "fraud" is proved,

242 P.2d 511 (1952); *Nyquist v. Foster*, 44 Wn.2d 465, 268 P.2d 442 (1954); *Simms v. Erwin*, 46 Wn.2d 417, 282 P.2d 291 (1955). In result, these cases go both ways. See also *Schulz v. Spokane United Rys.*, 16 Wn.2d 43, 132 P.2d 366 (1942), in which an attempt to upset a release on the ground of fraud was unsuccessful.

⁶⁹⁹ *Gose v. Harris*, 196 Wash. 167, 82 P.2d 160 (1938) (but compare the dissent); *Downing v. State*, 9 Wn.2d 685, 115 P.2d 972 (1941); *Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 120 P.2d 527 (1942); *Weaver v. Blochberger*, 31 Wn.2d 877, 199 P.2d 589 (1948); *Gronlund v. Andersson*, 38 Wn.2d 60, 227 P.2d 741 (1951).

⁷⁰⁰ 5 Wn.2d 106, 104 P.2d 918 (1940).

⁷⁰¹ 38 Wn.2d 60, 227 P.2d 741 (1951).

⁷⁰² 44 Wn.2d 465, 268 P.2d 442 (1954).

⁷⁰³ 5 Wn.2d 106, 104 P.2d 918 (1940). The court said: "Appellant contends that the record does not show a single false statement made to respondents.... However that may be, we think actions may speak louder than words, and we are clearly of the opinion that the acts of appellant indicate a course of conduct, carried out with the intent of deceiving respondents, which was just as reprehensible as though appellant had verbally made misrepresentations, and we are also satisfied that appellant cannot escape liability for the wrong caused such acts, and that such acts constitute fraud in law." See also 5 WILLISTON, CONTRACTS § 1497 at 4181 n.4 (rev. ed. 1936).

⁷⁰⁴ 9 Wn.2d 685, 115 P.2d 972 (1941).

⁷⁰⁵ In *Meyer v. Eschbach*, 192 Wash. 310, 73 P.2d 803 (1937) earlier cases were discussed, and followed which hold that inadequacy of price is not alone a basis for relief.

inadequacy of price is certainly not a necessary additional requirement for disaffirmance.

Even more confusing is a passage in *Hood v. Cline*,⁷⁰⁸ quoted from an earlier case: "Mere inadequacy of consideration will not afford cause for rescission of a contract on the ground of fraud, where the parties have dealt at arm's length . . ." The inference in this passage, that inadequacy of price can *per se* be "fraud" under some circumstances, seems obviously unsupportable. On the other hand, evidence indicating a considerable discrepancy between price and value can hardly be dismissed as irrelevant. It can properly be weighed with conflicting testimony about the making of false statements, since gross discrepancy is abnormal and logically supports other evidence of wrongdoing by the person who got the long end of the bargain. The Washington court has gone even further in this direction. An earlier case,⁷⁰⁷ cited with approval in *Ramsey v. Mading*,⁷⁰⁸ suggests that inadequacy of price may be so gross as to create a presumption of "fraud". How the presumption will work if the promisor has no credible evidence of misstatements cannot be determined.

Concealment. In general, a promisee's non-disclosure of the true facts is not legally wrongful even though he knows the promisor is laboring under a misapprehension.⁷⁰⁹ A quite different problem is present if the parties are in a relationship which makes this kind of advantage-taking improper. Both the basic rule and some of the exceptions were discussed in *Hood v. Cline*.⁷¹⁰ Disclosure was said to be required by an agent-principal or an attorney-client relationship. This is the usual view.⁷¹¹

What is a "fact." A promisee's misstatement of his opinion about some aspect of the transaction is not ordinarily regarded as "fraud";

⁷⁰⁸ 35 Wn.2d 192, 212 P.2d 110 (1949).

⁷⁰⁷ *Tausick v. Tausick*, 52 Wash. 301, 100 Pac. 757 (1909). The stated rule was not however applied, as the evidence of inadequacy was unsatisfactory.

⁷⁰⁸ 36 Wn.2d 303, 217 P.2d 1041 (1950). The rule was not applied because the court did not regard the consideration as "so far out of line as to be unconscionable." See also *Soya v. First Nat'l Bank*, 18 Wn.2d 88, 138 P.2d 181 (1943); *Vossen v. Wilson*, 39 Wn. 2d. 906, 239 P.2d 558 (1952).

⁷⁰⁹ 5 WILLISTON, CONTRACTS § 1497 (rev. ed. 1936).

⁷¹⁰ 35 Wn.2d 192, 212 P.2d 110 (1949).

⁷¹¹ RESTATEMENT, CONTRACTS § 472 (1932); 5 WILLISTON, CONTRACTS § 1499 (rev. ed. 1936). The court went on to find that neither of these relationships existed, and to hold that "confidence alone is not enough to establish a fiduciary relationship. . . ." See also *Westerbeck v. Cannon*, 5 Wn.2d 106, 104 P.2d 918 (1940) (which appears to involve agency), and the dissent in *Kalkwarf v. Geschke*, 194 Wash. 135, 77 P.2d 612 (1938).

neither is non-performance of a promise made by him.⁷¹² The insistence by courts on proof of a misstatement of "fact" has led to contests over the classification of a promisee's remarks as "fact," "opinion," or "promise," and to opinions drawing distinctions which approach the esoteric. The later Washington cases dealing with these matters are not entirely harmonious.

In *Algee v. Hillman Inv. Co.*⁷¹³ and *Darnell v. Noel*⁷¹⁴ the court followed earlier cases in holding statements about the boundaries of land to be statements of fact. This proposition has apparently, in the court's estimation, become a "rule." Statements about the value of property have not received consistent treatment. In *Hood v. Cline*⁷¹⁵ such a statement was held to be of opinion. *Cunningham v. Studio Theatre*,⁷¹⁶ on the other hand, suggests that the court will examine the circumstances in each transaction and will be inclined to view value-representations as statements of fact.⁷¹⁷

The most complex "promise" vs. "fact" controversies have revolved around a promisee's statement about future events. At first encounter such a statement seems clearly not one of fact.⁷¹⁸ Moreover, in many transactions the context readily supports classification of the statement as a warranty, a type of undertaking affected by the parol evidence rule and by a warranty-disclaimer clause. Despite these difficulties a promisor has in some instances been able to establish his case.

In *Holland Furnace Co. v. Korth*⁷¹⁹ and in *Nyquist v. Foster*⁷²⁰ a

⁷¹² Opinions: RESTATEMENT, CONTRACTS § 474 (1932) (a false statement of opinion is misrepresentation or fraud, if made by one who is or purports to be an expert, or if it is intentional and "varies so far from the truth that no reasonable man in his position could have such an opinion"); 5 WILLISTON, CONTRACTS §§ 1491 *et seq.* (rev. ed. 1936).

Promises: RESTATEMENT, CONTRACTS § 473 (1932) (promise made with intent not to perform can be fraud); 5 WILLISTON, *op. cit. supra* § 1496. See note 723 below.

⁷¹³ 12 Wn.2d 672, 123 P.2d 332 (1942).

⁷¹⁴ 34 Wn.2d 428, 208 P.2d 1194 (1949).

⁷¹⁵ 35 Wn.2d 192, 212 P.2d 110 (1949).

⁷¹⁶ 38 Wn.2d 417, 229 P.2d 890 (1951).

⁷¹⁷ The court said: "Appellants rely upon what they call the general rule that an expression of value is but opinion.... However, this rule is not absolute, and it is not the law that an expression of value is always an opinion and never a material fact.... Indeed, the so-called general rule has been whittled down until it can be said that it 'applies only where the parties stand on an equal footing....' " The court went on to indicate that in its view many value-statement cases in which fraud was denied actually turned on the absence of reliance, and that it was not necessary in the immediate case to decide whether the questioned statement was fact or opinion.

⁷¹⁸ This proposition was stated in *Graff v. Geisel*, 39 Wn.2d 131, 234 P.2d 884 (1951), in a quotation from an earlier case: "The representation must relate to an existing fact." The court held a statement by a seller, that he intended to move to another city, was not material because it failed to meet the stated test.

⁷¹⁹ 43 Wn.2d 618, 262 P.2d 772 (1953). The seller of a furnace said it was adequate

buyer succeeded in rescinding although the seller's remarks concerned the future performance of what he was selling. In the former case the court said:

Where it is not shown that the buyer relied upon the salesman's asserted special and peculiar knowledge of the article or of the conditions under which it was to be used, a statement that such article will satisfactorily meet the buyer's requirements will be regarded as an expression of opinion about something to take place in the future . . . But where the salesman does assert such special and peculiar knowledge, and the buyer relies thereon, a statement that the article is appropriate for, and will satisfactorily meet, the buyer's requirements will be regarded as a representation of fact.

A rather different approach was taken in the *Nyquist* case. The seller said the walls of a house-trailer would not warp. This was held to be a statement of fact because it concerned existing qualities in the trailer walls.⁷²¹ But, said the court, "where the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon particular future use, or future requirements of the representee, then the representation is not of an existing fact." Although the court did not in *Nyquist v. Foster* purport to over-rule *Holland Furnace Co. v. Korth*, the tests stated in the two cases are evidently inconsistent. That the earlier case will be followed seems doubtful, if only because the approach taken in it is hard to justify. How can reliance on the seller as an expert change what is otherwise a prediction about the future into a statement about the present?

In *Murdoch v. Leonard*⁷²² "fraud" was found in the making of a promise "with no intent, at the time it was made, to abide by it."⁷²³

in design to heat the entire house comfortably in the coldest weather. Fraud was found.

⁷²⁰ 44 Wn.2d 465, 268 P.2d 442 (1954); See also *Gronlund v. Andersson*, 38 Wn.2d 60, 227 P.2d 741 (1951), in which no issue was made of the point here under discussion although the wrongful language as alleged in the complaint related to the future performance of a well; it would appear desirable to proceed with caution when framing pleadings in this marginal area; the *Nyquist* case provides a guide—the proper cast of the allegation in the *Gronlund* case would be the existing capacity and past performance of the well, not what it would do in the future.

⁷²¹ The court said: "On the other hand, a statement is one of existing fact, if a quality is asserted which inheres in the article so that, at the time the representation is made, the quality may be said to exist independently of future acts or performance of the one making the representation, independently of other particular occurrences in the future, and independently of particular future uses or future requirements of the buyer." (Emphasis by the court.)

⁷²² 1 Wn.2d 37, 95 P.2d 37 (1939).

⁷²³ This is the usual result. See note 712 above. An attempt to establish fraud in this way failed in *Investment & Securities Co. v. Adams*, 192 Wash. 41, 72 P.2d 288 (1937), because the crucial element, intent when the promise was made, not to perform, was not proved.

Scienter.

It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient, for though the representation may have been made innocently, it would be unjust to allow one who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations.⁷²⁴

American courts have in general come to this view.⁷²⁵ Although the Washington court has too,⁷²⁶ it continues to publish opinions in which "fraud" is identified with scienter. Illustrative are *Haugen v. Neiswonger*,⁷²⁷ *Gronlund v. Andersson*,⁷²⁸ and *Graff v. Geisel*,⁷²⁹ from which a definition of "fraud" which requires an "intentional" misstatement can be derived. Also dangerous are *Dragos v. Plese*,⁷³⁰ *Nyquist v. Foster*,⁷³¹ and *Peterson v. Boyd*,⁷³² which refer to deceit cases containing a similar definition. Of course an intentional misstatement can support disaffirmance, but care in explaining the result is needed if an appearance of conflict between cases involving intentional misstatements and cases involving innocent ones is to be avoided.

⁷²⁴ 5 WILLISTON, CONTRACTS § 1500 (rev. ed. 1936). See also RESTATEMENT, CONTRACTS, §§ 470, 476 (1932).

⁷²⁵ See Judge Foster's discussion in *Brown v. Underwriters at Lloyd's*, 153 Wash. Dec. 126, 332 P.2d 228 (1958).

⁷²⁶ *Algee v. Hillman Inv. Co.*, 12 Wn.2d 672, 123 P.2d 332 (1942) ("This court has many times held that one who indicates to a purchaser that the land sold has a certain area when, as a matter of fact, the deed or contract of purchase contained a less amount, is responsible to the purchaser even though he acted under an honest mistake without any intent to deceive."); *Thompson v. Huston*, 17 Wn.2d 457, 135 P.2d 834 (1943) ("Untrue statements amount to constructive fraud, even though made in entire good faith."); *Anthony v. Warren*, 28 Wn.2d 773, 184 P.2d 105 (1947) (from an earlier case a passage was quoted, indicating that the court has aligned itself in rescission cases with the courts which deem intent not to be a controlling factor and which permit rescission "notwithstanding the misrepresentations were not fraudulently made..."); *Hunt v. Marsh*, 40 Wn.2d 531, 244 P.2d 869 (1952) ("Marsh may not have had actual knowledge that the triangle was not a part of the motel property, but when she chose to represent to respondent by words and the exhibition of a map that such was the fact, she became bound thereby."); *Holland Furn. Co. v. Korth*, 43 Wn.2d 618, 262 P.2d 772 (1953) ("[I]f a person represents as true material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know his representations were false, or that he believed them to be true.")

⁷²⁷ 34 Wn.2d 422, 209 P.2d 267 (1949). Rescission was denied, for lack of justified reliance.

⁷²⁸ 38 Wn.2d 60, 227 P.2d 741 (1951). An intentional misrepresentation was found and rescission was granted.

⁷²⁹ 39 Wn.2d 131, 234 P.2d 884 (1951). Rescission was denied for lack of justified reliance.

⁷³⁰ 39 Wn.2d 521, 236 P.2d 1037 (1951) (deceit case cited which did not spell out the criteria for fraud but cited earlier deceit cases which did).

⁷³¹ 44 Wn.2d 465, 268 P.2d 442 (1954).

⁷³² 46 Wn.2d 97, 278 P.2d 400 (1955).

Materiality. The traditional definition of "fraud" excludes an immaterial misstatement, *i.e.*, one which would not "be likely to affect the conduct of a reasonable man with reference to a transaction with another person . . ."⁷³³ Professor Williston took issue with this limitation:

It is laid down in the cases that a misrepresentation must be material in order that the law may take notice of it as a fraud. If, however, a party to a bargain has made misrepresentations for the purpose of inducing action by the other, and the other party has acted, relying upon the misrepresentations, it seems that the former should not be allowed to deny that misrepresentations which have effectively served a fraudulent purpose were material. This in effect is saying that any misrepresentations which were intended to bring about a particular result and which do bring about that result are sufficiently material.⁷³⁴

The *Restatement of Contracts* conforms to this analysis, providing for rescission both where a material fact is innocently misrepresented and where a misstatement is intentionally made.⁷³⁵ Nothing was observed in the later Washington opinions, however, which suggests any inclination by the court to dispense with materiality where the misstatement was made with knowledge of its falsity. There is, on the contrary, considerable evidence the other way.⁷³⁶ Whether *Brown v. Underwriters at Lloyd's*⁷³⁷ portends not only a tightening of the terminology in the fraud area, but also a willingness to review substantive elements such as materiality, is entirely conjectural.

It will be observed that the terminology problem mentioned at the beginning of this section is inter-related with scienter and with materiality. Under the Williston and *Restatement* system there are two combinations of evidence on which a promisor can disaffirm. One, denominated "material misrepresentation," stresses materiality and the other, denominated "fraud," stresses scienter.⁷³⁸ A misstatement, and

⁷³³ RESTATEMENT, CONTRACTS § 470(2) (1932).

⁷³⁴ 5 WILLISTON, CONTRACTS § 1490 (rev. ed. 1936).

⁷³⁵ RESTATEMENT, CONTRACTS §§ 470, 471, 476 (1932).

⁷³⁶ In *Dragos v. Plese*, 39 Wn.2d 521, 236 P.2d 1037 (1951); *Nyquist v. Foster*, 44 Wn.2d 465, 268 P.2d 442 (1954); and *Petersen v. Boyd*, 46 Wn.2d 97, 278 P.2d 400 (1955), the court cited deceit cases, which routinely state materiality to be a requisite for "fraud." In *Ramsey v. Mading*, 36 Wn.2d 303, 217 P.2d 1041 (1950); *Holland Furnace Co. v. Korth*, 43 Wn.2d 618, 262 P.2d 772 (1953) and *Peterson v. Boyd*, *supra*, materiality of the misstated fact was said to be a requisite for rescission. In *Cunningham v. Studio Theatre*, 38 Wn.2d 417, 229 P.2d 890 (1951); *Hunt v. Marsh*, 40 Wn.2d 531, 244 P.2d 869 (1952); and *Holland Furnace Co. v. Korth*, *supra*, materiality was found and rescission granted, but without any helpful discussion. See also *Hood v. Cline*, 35 Wn.2d 192, 212 P.2d 110 (1949) (rescission denied, apparently because the fact concealed was not material).

⁷³⁷ See the discussion at note 695 above.

⁷³⁸ See the discussion at note 724 *et seq.* above.

reliance, are requisites to both. Scierter remains an important concept because it determines the necessity for a showing of materiality. In the final analysis, the Washington cases stress "material misrepresentation." Scierter certainly does the promisor's cause no harm, but the cases cited at note 726 demonstrate the court's willingness to permit disaffirmance even though the misstatement was made without knowledge of its falsity. If scierter is not a requisite, opinions inferring the contrary are none the less misleading and confusing because the statement in issue was made with knowledge of its falsity.⁷³⁹ The term "fraud" as defined in the *Brown* case, discussed at note 695, does not accurately delineate the minimum evidence on which a promisor can disaffirm. It would accordingly seem that the use of this term in rescission litigation is undesirable. The term is useful only if scierter plays a significant part in determining whether a promisor can disaffirm. Scierter does not now play such a part. It will if the court adheres to the position proposed by Professor Williston and discussed above.

Reliance. Reliance by the promisor is a vital element of "fraud";⁷⁴⁰ a misstatement which does not mislead will not give a promisor cause for disaffirmance. In several of the later Washington cases reliance was in issue and was handled like any contested fact.⁷⁴¹

Whether a promisor should in addition be required to establish justification for his reliance is a question not easily answered. Ought he be held to a standard of care in protecting himself, even though this operates to insulate a defrauder from any penalty for the wrongdoing? The cases in other American jurisdictions are far from harmonious in their disposition of this problem.⁷⁴² Nor can the 1937-1957 Washington cases on the point be reconciled. The court has stated

⁷³⁹ As in the cases cited at notes 727-732 above.

⁷⁴⁰ 5 WILLISTON, CONTRACTS § 1515 (rev. ed. 1936). The Restatement of Contracts uses the term "induced" rather than the term "reliance," and states a presumption of inducement where the misstated fact is material. See §§ 476, 479. There is no indication in the later Washington cases of adherence to such a presumption.

⁷⁴¹ *Sutton v. Peterson*, 193 Wash. 175, 74 P.2d 884 (1938) (reliance not found); *Buckley v. Hatupin*, 198 Wash. 543, 89 P.2d 212 (1939) (reliance not found); 31 Wn.2d 877, 199 P.2d 589 (1948) (reliance evidently found); *Ramsey v. Mading*, 36 Wn.2d 303, 217 P.2d 1041 (1950) (reliance not found); *Michaelson v. Hopkins*, 38 Wn.2d 256, 228 P.2d 759 (1951) (reliance not found); *Dragos v. Plese*, 39 Wn.2d 521, 236 P.2d 1037 (1951) (reliance not found); *Shay v. Archambo*, 40 Wn.2d 277, 242 P.2d 511 (1952) (reliance not found); *Nyquist v. Foster*, 44 Wn.2d 465, 268 P.2d 442 (1954) (reliance found).

⁷⁴² 5 WILLISTON, CONTRACTS § 1516 (rev. ed. 1936). Professor Williston appears to question the propriety of a justification requirement, and says: "The modern tendency is certainly toward the doctrine that negligence in trusting in a misrepresentation will not excuse positive wilful fraud or deprive the defrauded person of his remedy."

broadly a requirement that the promisor demonstrate his "right to rely" and has in some cases denied relief because justification for reliance was lacking.⁷⁴³ Other decisions go very far in expressions of impatience with a promisee's argument that investigation by the promisor would have disclosed the true facts, and with the idea that a promisor should be held to his bargain because he was gullible in relying.⁷⁴⁴ The latter group of cases appear to better forecast the future course of the court than does the group in which relief was denied. Justification has offensively cynical overtones, when projected against findings for the promisor on all the other elements of his case. On the other hand, close materiality issues may properly go against a promisor who neglects an obvious and easily pursued verification precaution, and in comparable situations reliance as a fact need not be decided for the promisor even though he testified that he did rely. The court has ample control over the outcome, without resort to a justification requirement.

Disaffirmance. A promisor who can meet the substantive demands previously discussed has a power the exercise of which (variously labelled "disaffirmance," "avoidance," or "rescission") gives him a defense should he be sued for failure to perform,⁷⁴⁵ and a right to the return of any performance he has rendered.⁷⁴⁶ It is a limited power, regulated by the propositions considered in this subsection.

⁷⁴³ *Weir v. School Dist. No. 201*, 200 Wash. 172, 93 P.2d 308 (1939) (school directors were held not justified in relying on the statement, by an applicant for a position as principal, that the district's budget would cover the salary proposed for him; the court's discussion is very good); *Haugen v. Neiswonger*, 34 Wn.2d 422, 209 P.2d 267 (1949) (buyer of a half-interest in a saw-mill held not justified in relying on the seller's concealment of a chattel mortgage on the property; the mortgage was a matter of public record; the court stressed the buyer's experience in the saw-mill business and his failure to examine the books of the business or the public records, or investigate the seller's financial standing); *Graff v. Geisel*, 39 Wn.2d 131, 234 P.2d 884 (1951) (justification not found; with a little investigation the buyer could have protected himself).

⁷⁴⁴ *Cunningham v. Studio Theatre*, 38 Wn.2d 417, 229 P.2d 890 (1951); *Rummer v. Throop*, 38 Wn.2d 624, 231 P.2d 313 (1951); *Jenness v. Moses Lake Dev. Co.*, 39 Wn.2d 151, 234 P.2d 865 (1951); *Hunt v. Marsh*, 40 Wn.2d 531, 244 P.2d 869 (1952); *Bariel v. Tuinstra*, 45 Wn.2d 513, 276 P.2d 569 (1954). In these cases rescission was granted. See also the *Weir* case, cited in the preceding note.

⁷⁴⁵ *RESTATEMENT, CONTRACTS* §§ 476, 490 (1932). In *Brown v. VanTuyt*, 40 Wn.2d 364, 242 P.2d 1021 (1952), fraud was attempted to be used defensively; the defense failed on the merits. The defendant also sought recovery of his performance, relief he would have obtained had he succeeded in establishing fraud. *Thompson v. Huston*, 17 Wn.2d 457, 135 P.2d 834 (1943) illustrates another common procedural combination; the vendor under a real estate contract sued for possession alleging total breach; the vendee successfully countered with fraud. Where forfeiture rather than damages is sought by the vendor, the defrauded vendee of course does not defeat repossession; he does obtain restitution. In the *Thompson* case the court recognized that the rule which bars restitution for a vendee himself in total default does not apply where the vendee was defrauded and has disaffirmed.

⁷⁴⁶ *RESTATEMENT, CONTRACTS* §§ 488, 489 (1932); 5 *WILLISTON, CONTRACTS* § 1525

The promisor can of course elect to affirm the transaction. If he does he cannot thereafter disaffirm.⁷⁴⁷ Several of the later Washington cases demonstrate that his purpose in this particular can be evidenced by conduct, such as rendering his own performance or using things received from the wrongdoer.⁷⁴⁸

Excessive delay in making the election is fatal to the power to disaffirm. Time starts to run when knowledge of the promisee's wrongdoing is acquired. The permissible delay varies with the circumstances.⁷⁴⁹ The later Washington cases concerned with these details are illustrative.⁷⁵⁰

(rev. ed. 1936). *Thompson v. Huston*, cited in the preceding note, is illustrative. So are a number of the cases cited in the following notes.

⁷⁴⁷ RESTATEMENT, CONTRACTS § 484 (1932); 5 WILLISTON, CONTRACTS § 1527 (rev. ed. 1936).

⁷⁴⁸ *Weir v. School Dist. No. 201*, 200 Wash. 172, 93 P.2d 308 (1939) (although delay in disaffirming was the stated reason for refusing rescission, there was evidence also of affirmance); *Beaulaurier v. Washington State Hop Producers*, 8 Wn.2d 79, 111 P.2d 559 (1941); *Hood v. Cline*, 35 Wn.2d 192, 212 P.2d 110 (1949); *Power v. Esarey*, 37 Wn.2d 407, 224 P.2d 323 (1950); *Graff v. Geisel*, 39 Wn.2d 131, 234 P.2d 884 (1951); *Brown v. VanTuyt*, 40 Wn.2d 365, 242 P.2d 1021 (1952). Cf., *Algee v. Hillman Inv. Co.*, 12 Wn.2d 672, 123 P.2d 332 (1942), in which a vendee succeeded in persuading the court that the payments he made after knowledge of the fraud were "not made... with any idea of retaining the property..." Cf., also *Bariel v. Tuinstra*, 45 Wn.2d 513, 276 P.2d 569 (1954) (the defrauded buyer of a dairy herd did not affirm, by retaining the cows and making payments; he attempted to disaffirm but the seller refused to take back the cows, whereupon the buyer "became an involuntary bailee of the milk cows and had no alternative but to continue operating the dairy farm and selling the milk"; the buyer had given the seller an assignment of his milk checks and the creamery insisted on honoring the assignment after the attempted disaffirmance; the "payments" to the seller were accordingly involuntary). If the buyer's use of the property, after his notice of disaffirmance, had been as "owner," he would have been held to the contract; see RESTATEMENT, CONTRACTS § 482 (1932). It will be observed that in the cited cases the court employed a curiously diverse terminology, talking variously of the promisor's conduct in terms of "intent," "waiver," "estoppel," or "ratification." It would appear that the real factor is "intent," as was recognized in the *Algee* case.

⁷⁴⁹ RESTATEMENT, CONTRACTS §§ 480, 483 (1932); 5 WILLISTON, CONTRACTS § 1526 (rev. ed. 1936). The traditional theory is laches, although delay also tends in many transactions to express affirmance and it is often difficult to tell just what theory the court is pursuing. See the cases cited in the following note. The Restatement requires "prompt" return of property received from the defrauder, and notice of disaffirmance within a "reasonable time" in other situations. This is a refinement not clearly evidenced in the 1937-1957 Washington decisions.

⁷⁵⁰ *Weir v. School Dist. No. 201*, 200 Wash. 172, 93 P.2d 308 (1939) ("One who seeks to avoid a contract, which he has been induced to enter into by fraudulent representations... must act with reasonable promptness on discovering the fraud, or the right to rescission will be waived."); *Algee v. Hillman Inv. Co.*, 12 Wn.2d 672, 123 P.2d 332 (1942) (extended delay in discovering the fraud is not relevant); *Thompson v. Huston*, 17 Wn.2d 457, 135 P.2d 834 (1943) (where notice of disaffirmance was promptly given, retention of the property up to the date of trial was not a bar to relief); *Darnell v. Noel*, 34 Wn.2d 428, 208 P.2d 1194 (1949) (delay during the time the seller, having been advised of his misrepresentation concerning land boundaries, endeavored to perfect the buyer's title, is not relevant; the court in stating the delay principle said: "It is a well-settled rule that actions for rescission must be promptly commenced"; that any such "rule" actually exists must be questioned; if notice of disaffirmance is seasonably given, surely the action need not be started at once; the word "promptly" must also be compared with the phrase "reasonable promptness,"

Return of any performance received from the wrongdoer is an integral part of disaffirmance, but this is a requirement of some flexibility. Where rescission by action is sought, the requisite proffer can be made in the pleadings. If return is physically impossible (e.g., user of property) the relative equities of the parties can be worked out by the court in money terms.⁷⁵¹ These too are details on which the 1937-1957 cases are only illustrative.⁷⁵²

used in the Weir case, *supra*); Graff v. Geisel, 39 Wn.2d 131, 234 P.2d 884 (1951) (the passage from the Weir case, set out above, was quoted; the promisor continued to perform after learning of the fraud; affirmance would appear the real reason for the refusal of relief); Brown v. VanTuyt, 40 Wn.2d 364, 242 P.2d 1021 (1952) (court quoted a text statement: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it"; whether the phrase "at once" is to be taken literally must be questioned; it was certainly not necessary to the decision; the proponent of fraud received as buyer a boat, and never did proffer it back to the seller); Baniel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954) (several weeks delay was held not to bar disaffirmance; the defrauder was not prejudiced by the delay).

⁷⁵¹ RESTATEMENT, CONTRACTS §§ 480, 481 (1932); 5 WILLISTON, CONTRACTS §§ 1529, 1530 (rev. ed. 1936).

⁷⁵² Thompson v. Huston, 17 Wn.2d 457, 135 P.2d 834 (1943) (a rescinding buyer is entitled to a judgment for payments made plus interest on them, less a sum measured by the reasonable rental value of the property for the period of occupancy); Hopper v. Williams, 27 Wn.2d 579, 179 P.2d 283 (1947) ("This court has laid down a rule which we now are satisfied to follow, namely, that restoration or tender of restoration of property is not a condition precedent to the commencement or maintenance of an action for the rescission of a contract for the purchase of land, but that it is sufficient to show a willingness to do equity"; the court went on to indicate the theory of an action to rescind to be the existence of a right to this relief, not that rescission has already occurred; the buyer lost because he never, in his pleadings or otherwise, made any proffer of restoration); Weaver v. Blochberger, 31 Wn.2d 877, 199 P.2d 589 (1948) (upon rescission, a buyer who gave the seller's broker a negotiable note as part of the down-payment is entitled to a judgment for the amount of the note, there being no proof by the seller that the note is not binding on the buyer; having refused a proffer of the property, whereupon the buyer vacated the property, the seller is not entitled to rental value even though he did not then re-enter); Darnell v. Noel, 34 Wn.2d 428, 208 P.2d 1194 (1949) (upon rescission by a buyer, the seller is entitled to rents received by the buyer from the property less operating expenses including a charge for remodeling part of the building, and less an additional amount for reasons not specified in the opinion; the buyer tore down several small buildings; for them the seller received nothing, on a finding they did not add to the value of the property); Rummer v. Throop, 38 Wn.2d 624, 231 P.2d 313 (1951) (upon rescission by a buyer, the seller is entitled to reasonable rental value as an offset against the purchase price); Brown v. VanTuyt, 40 Wn.2d 364, 242 P.2d 1021 (1952) (buyer who neither returned the property nor offered to return it cannot have rescission); Baniel v. Tuinstra, 45 Wn.2d 513, 276 P.2d 569 (1954) (a buyer who initiates a rescission action within a reasonable time, in his complaint lists the property, and prays both for restoration of the parties to their condition prior to the sale and for general equitable relief, has sufficiently met the restoration burden; from an earlier case the court quoted: "In order to rescind a contract for fraud, the party defrauded must as a general rule restore, or offer to restore, the consideration which he has received under the contract. The trend of the later cases seems to be toward a *reasonable and equitable application of the rule*, and to hold that it requires a plaintiff to do merely what equitably he ought to do." (Emphasis by the court)). Thompson v. Huston, *supra*, is also of interest in that the trial court made its judgment for the buyer's purchase money a lien on the property. This the appellate court held was wrong, saying: "We find no legal basis for the portion of the decree above quoted. The property in question had not been attached . . . nor did they ever acquire any right which would authorize the granting to them of the specific lien provided for in the judgment."

Duress and undue influence. A promisor may be induced to promise by fear of action the promisee has threatened to take should the promise not be made. If the threatened action is wrongful, the threats are wrongful and are duress; the promisor can disaffirm as in the case of fraud.⁷⁵³

No 1937-1957 Washington case was found involving the traditional duress pattern, *i.e.*, a threat of physical injury to the promisor, a member of his family or his property. Business compulsion, a more recently developed type of duress grounded on threatened indirect injury to a property interest,⁷⁵⁴ was unsuccessfully asserted in two cases.⁷⁵⁵ Also unsuccessful were attempts to establish duress in threats to pursue civil remedies.⁷⁵⁶ Such threats can be wrongful and duress; the test is *bona fides*, that is, a belief by the promisee that he had a cause of action.⁷⁵⁷

Although persuasion by a promisee is not usually a legal wrong and is certainly not duress, the relations between promisor and promisee can be such as to set a limit past which persuasion creates in the promisor a power to disaffirm.⁷⁵⁸ In *Kalkwarf v. Geschke*⁷⁵⁹ the court recognized both the parent-child and principal-agent relationships as coming within the limiting principle, but found no improper persuasion.

Mistake. "In the Restatement of this Subject, mistake means a state of mind that is not in accord with the facts."⁷⁶⁰ The extent to which

⁷⁵³ RESTATEMENT, CONTRACTS §§ 492(2), 493, 495, 499 (1932); 5 WILLISTON, CONTRACTS §§ 1603, 1627B (rev. ed. 1936).

⁷⁵⁴ 5 WILLISTON, CONTRACTS § 1618 (rev. ed. 1936); *Ferguson v. Associated Oil Co.*, 173 Wash. 672, 24 P.2d 82 (1933), noted, 8 WASH. L. REV. 140 (1934); *McDonald v. Pend Oreille Mines & Metal Co.*, 189 Wash. 389, 65 P.2d 1250 (1937).

⁷⁵⁵ *Starks v. Field*, 198 Wash. 593, 89 P.2d 513 (1939); *Marrazzo v. Orino*, 194 Wash. 364, 78 P.2d 181 (1938).

⁷⁵⁶ *Investment & Securities Co. v. Adams*, 192 Wash. 41, 72 P.2d 288 (1937) (threat to file a petition for involuntary bankruptcy); *Doernbecher v. Mutual Life Ins. Co.*, 16 Wn.2d 64, 132 P.2d 751 (1943) (threat to bring an action for cancellation of insurance policies).

⁷⁵⁷ 5 WILLISTON, CONTRACTS § 1606 (rev. ed. 1936), a passage from which was quoted in the *Doernbecher* case, cited in the preceding note.

⁷⁵⁸ RESTATEMENT, CONTRACTS §§ 497, 498, 499 (1932); 5 WILLISTON, CONTRACTS §§ 1608, 1625, 1625A (rev. ed. 1936); *Vossen v. Wilson*, 39 Wn.2d 906, 239 P.2d 558 (1952) ("We have said that persuasion and solicitation do not constitute undue influence." The court went on to quote from an earlier case a definition of undue influence which requires a showing that the promisor's will was overcome by the persuasion.)

⁷⁵⁹ 194 Wash. 135, 77 P.2d 612 (1938). Domination of the promisor and undue influence can of course exist without any formal relationship such as agency or intra-family relations. The discussion in *Tecklenburg v. Washington Gas & Elec. Co.*, 40 Wn.2d 141, 241 P.2d 1172 (1952) is indicative, although undue influence was not found. This case, *Parris v. Benedict*, 28 Wn.2d 817, 184 P.2d 63 (1947), and *Thilman v. Thilman*, 30 Wn.2d 743, 193 P.2d 674 (1948) also demonstrate that the mental strength or weakness of the obligor is an important factor in determining whether the persuasion was improper. In *Sova v. First Nat'l Bank*, 18 Wn.2d 88, 138 P.2d 181 (1952), a fraudulent conspiracy case, the same point was stressed.

⁷⁶⁰ RESTATEMENT, CONTRACTS § 500 (1932).

mistake by a person who makes what is otherwise an offer or an acceptance can effect mutual assent and the formation of a contract was discussed at page 46 above. At this point the concern is with equitable relief from a contract through rescission and with reformation, a remedy by which a contract document is amended to conform to the parties' purpose.

If both parties are under a mistake concerning a material fact relating to the transaction, rescission will probably be decreed at the suit of either party.⁷⁶¹ No 1937-1957 Washington case clearly raising this problem was found.

If but one party labored under a mistake, rescission has in other jurisdictions been as often refused as granted.⁷⁶² The Washington court in earlier cases aligned itself with the courts in which relief can be had;⁷⁶³ its position was reaffirmed in *Puget Sound Painters Inc. v. State*,⁷⁶⁴ with a full statement of the requirements which the promisor must meet in order to obtain relief.⁷⁶⁵

Reformation to correct a scrivener's failure to carry into his drafting the purpose of the parties is a routine remedy. In the usual case the issues are factual and revolve around the court's insistence on ample proof of the mistake.⁷⁶⁶ The later Washington cases are typical.⁷⁶⁷

⁷⁶¹ RESTATEMENT, CONTRACTS § 502 (1932); 3 CORBIN, CONTRACTS § 608 (1950); 5 WILLISTON, CONTRACTS §§ 1542, 1544 (rev. ed. 1936).

⁷⁶² 3 CORBIN, CONTRACTS §§ 608, 609 (1950); 5 WILLISTON, CONTRACTS §§ 1578, 1579 (rev. ed. 1936). It will be observed that there is a considerable divergence between the views of Professors Corbin and Williston as to what the law should be on this point. RESTATEMENT, CONTRACTS § 503 (1932), adheres to Williston's preference for refusal of relief where the mistake is unilateral.

⁷⁶³ *Donaldson v. Abraham*, 68 Wash. 208, 122 Pac. 1003 (1912). See also WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS § 503; the earlier cases were not entirely harmonious in their disposition of unilateral mistake issues.

⁷⁶⁴ 45 Wn.2d 819, 278 P.2d 302 (1954). The action was to restrain forfeiture of a bid bond. Although the court's discussion is carefully limited to the exact problem before it, the principle stated should apply broadly to rescission actions in which the promisor meets the indicated standards. See the following note.

⁷⁶⁵ "We are convinced that the opinion in the *Donaldson* case establishes the principle or policy in this jurisdiction: that equity will relieve against forfeiture of a bid bond, (a) if the bidder acted in good faith, and (b) without gross negligence, (c) if he was reasonably prompt in giving notice of the error in the bid to the other party, (d) if the bidder will suffer substantial detriment by forfeiture, and (e) if the other party's status has not greatly changed, and relief from forfeiture will work no substantial hardship on him." 45 Wn.2d 819, 823, 278 P.2d 302, 304 (1954). Whether "negligence," gross or otherwise, should play any part in the solution of this problem is arguable. See 3 CORBIN, CONTRACTS § 609 at 438 (1950); 5 WILLISTON, CONTRACTS § 1596 (rev. ed. 1936). The key elements would appear to be a showing of substantial injury to the promisor if relief is denied, and a showing of notification to the promisee, of the mistake, before he has substantially changed his position in reliance on the contract.

⁷⁶⁶ RESTATEMENT, CONTRACTS §§ 504, 511 (1932); 3 CORBIN, CONTRACTS § 614 (1950); 5 WILLISTON, CONTRACTS § 1547 (rev. ed. 1936). There were many Washington cases before 1937. See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 504, 511.

⁷⁶⁷ RESTATEMENT, CONTRACTS §§ 504, 511 (1932); 3 CORBIN, CONTRACTS § 614 (1950); 5 WILLISTON, CONTRACTS § 1547 (rev. ed. 1936). There were many Washington cases before 1937. See WASHINGTON ANNOTATIONS, RESTATEMENT, CONTRACTS §§ 504, 511.

The special problem raised by an attempt to reform a memorandum so it will satisfy the Statute of Frauds was discussed above at page 360.

"There is no portion of the law of mistake more troublesome than that relating to mistake of law, by which is meant either ignorance of a rule or principle of law or an erroneous conclusion as to the operation of the law upon a known set of facts."⁷⁰⁸ The confused state of the cases generally on the matter of equitable relief for mistakes of law has occasioned some difficulty where a scrivener uses the words the parties expect (or supplies words to which they do not object) but fails to accomplish the legal relation they expect, other words being requisite to that end. The better view permits reformation for such a mistake.⁷⁰⁹ To this view the Washington court adhered in *Chebalgoity v. Branum*.⁷¹⁰

Reformation can also be had to correct a mistake not truly "mutual," as where one party knows the document does not express the agreed terms and the other does not.⁷¹¹ This proposition was followed in *Meyer v. Young*,⁷¹² but with an unfortunate emphasis on "fraud." The

⁷⁰⁷ *Shaw v. Briggie*, 193 Wash. 595, 76 P.2d 1011 (1938) (relief granted); *John Hancock Mut. Life Ins. Co. v. Agenew*, 1 Wn.2d 165, 95 P.2d 386 (1939) (relief denied; the court indicated that the burden of proof will not be met where there is a direct conflict in the testimony of the parties concerning the existence of the alleged mistake; see however the explanation of this statement, in the *Akers* case, *infra*); *Marks v. Scaler's Inc.*, 2 Wn.2d 277, 97 P.2d 1084 (1940) (relief granted; the burden on the proponent of reformation was said to be "clear, cogent, and convincing evidence of mutual mistake in the drafting of the instrument, and of what was the true agreement and intention of the makers"); *Moeller v. Schultz*, 11 Wn.2d 416, 119 P.2d 660 (1941) (relief granted); *Keesling v. Pehling*, 35 Wn.2d 624, 214 P.2d 506 (1950) (relief denied; the action was to reform an option contract which stated a price above the Civil Production Administration ceiling price; plaintiff's argument that the parties' intended a lawful agreement hence must be taken to have intended the lower price, was rejected by the court; the sum stated in the option was the one agreed on, not a sum appearing there by mistake); *Nadreau v. Meyerotto*, 35 Wn.2d 740, 215 P.2d 681 (1950) (relief granted); *Akers v. Sinclair*, 37 Wn.2d 693, 226 P.2d 225 (1950) (after discussing its earlier and not-always consistent statements concerning the burden of proof, the court reaffirmed "the long-established rule in this state that clear, cogent and convincing evidence is necessary to sustain an action for reformation on the ground of mutual mistake." The court went on to cite the *John Hancock Mut. Life Ins. Co. case, supra* and others, and to say, "we have sometimes said that where any doubt exists as to the intent of the parties, reformation will not be granted. . . . However, the mere denial that a mistake was made will not defeat an action for reformation. . . . In determining this question, the courts will look into the surrounding circumstances, and will take into consideration all facts which throw light upon the intention of the parties"); *Bergstrom v. Olson*, 39 Wn.2d 536, 236 P.2d 1052 (1951) (relief granted); *Mulhausen v. Nalley's, Inc.*, 42 Wn.2d 701, 258 P.2d 459 (1953) (relief denied); *Corbett v. Ticktin*, 43 Wn.2d 248, 260 P.2d 895 (1953) (relief granted).

⁷⁰⁸ 5 WILLISTON, CONTRACTS § 1581 (rev. ed. 1936).

⁷⁰⁹ 3 CORBIN, CONTRACTS §§ 616 *et seq.*, particularly § 619 (1950); 5 WILLISTON, CONTRACTS §§ 1581 *et seq.*, particularly § 1585 (rev. ed. 1936).

⁷¹⁰ 16 Wn.2d 251, 133 P.2d 288 (1943). Earlier Washington authority was followed. See also *Schwieger v. Robbins & Co.*, 48 Wn.2d 22, 290 P.2d 984 (1955) (discussing unilateral mistake of law).

⁷¹¹ RESTATEMENT, CONTRACTS § 505 (1932); 3 CORBIN, CONTRACTS § 614 (1950); 5 WILLISTON, CONTRACTS §§ 1523, 1525 (rev. ed. 1936).

⁷¹² 23 Wn.2d 109, 159 P.2d 908 (1945).

vital element is knowledge of the mistake. A direct misrepresentation that the document accurately embodies their agreement is not significantly more reprehensible than is failure to reveal a known divergence between document and agreement.⁷⁷³

The defendant in the *Meyer* case sought to defeat reformation by pointing to the plaintiff's negligence in not discovering the mistake. The court was not impressed and its opinion indicates that a good deal more than failure to carefully scrutinize the document and related papers before signing must be shown before this type of defense can succeed. A similar position was taken by the court in *Moeller v. Schultz*,⁷⁷⁴ where the mistake was mutual.⁷⁷⁵

If reformation will adversely affect a successor in interest of a party to the contract, who acquired his interest for value and without knowledge of the mistake, the remedy will be refused.⁷⁷⁶ General creditors of a party were accorded the same protection in *Malott v. General Mach. Co.*⁷⁷⁷ The holding seems extreme.⁷⁷⁸ *Peterson v. Paulson*⁷⁷⁹ involved the difficult problem posed by a successor who bought from a party on an installment payment contract. Reformation was decreed. The court stated a formula which requires a contract purchaser to "have paid the purchase price and have acquired the legal title without notice of such prior equity," before he is entitled to protection.⁷⁸⁰

⁷⁷³ See also *Kaufman v. Woodard*, 24 Wn.2d 264, 163 P.2d 606 (1945), in which the court said that reformation can be had for "a mistake on the part of one party and fraud or inequitable conduct on the part of the other party." What the term "inequitable conduct" means in this context is obscure. The court so characterized the defendants' failure to reveal their failure to include certain property in a document they prepared, but there was no showing that the agreement actually encompassed such property. The critical issue would seem to have been a contract formation issue, to which insufficient attention was given.

⁷⁷⁴ 11 Wn.2d 416, 119 P.2d 660 (1941).

⁷⁷⁵ RESTATEMENT, CONTRACTS § 508 (1932); and 5 WILLISTON, CONTRACTS § 1596 (rev. ed. 1936) were cited. See also 3 CORBIN, CONTRACTS § 614 at 469 (1950), and *Geoghegan v. Dever*, 30 Wn.2d 877, 194 P.2d 397 (1948); "The fact that, due to the neglect of either or both of the parties to verify the description, a mistake was made, or the fact that appellant wrote the erroneous description, would not, in our opinion, affect the mutuality of the mistake."

⁷⁷⁶ RESTATEMENT, CONTRACTS § 504 (1932); 3 CORBIN, CONTRACTS § 614 (1950). In *Shaw v. Briggie*, 193 Wash. 595, 76 P.2d 1011 (1938), reformation was decreed against a successor who acquired his interest with knowledge of the mistake. See also the court's discussion in the *Malott* case, cited in the following note.

⁷⁷⁷ 19 Wn.2d 62, 141 P.2d 146 (1943).

⁷⁷⁸ The action was to reform a conditional sale contract to correct the delivery dates specified in the contract document; were the relief granted the instrument was timely filed; in its original form, the filing was late. Relief was denied. There was no showing that any creditor relied on the document in its original form.

⁷⁷⁹ 24 Wn.2d 166, 163 P.2d 830 (1945).

⁷⁸⁰ The case was a difficult one and few are apt to quarrel with the outcome, which in effect sustained a buyer's right to reformation as against a successor from the seller, who bought on real estate contract and learned of the mistake before he paid

ILLEGALITY

The contract formation process is regulated not only by the mutual assent and consideration propositions already discussed, but also by standards created by legislatures and courts for the protection of the public interest. An agreement which does not conform to these standards is "illegal." Whether an agreement which would be a contract but for the illegality creates any legal relations between the parties depends on factors which are considered in the final subsection below.

A great variety of standards have been stated.⁷⁸¹ The 1937-1957 Washington cases were concerned with only a few of them.

Bargains in restraint of trade. It has long been settled that the buyer of a business can exact of the seller a covenant not to start or enter a competing business, provided the covenant does not encompass too much territory or too long a period.⁷⁸² No issue about the legality of the covenant was raised in the later cases concerned with transactions of this type.⁷⁸³

A seller of land can lawfully take from the buyer a covenant not to use the property in competition with the seller, provided the restraint is "reasonable."⁷⁸⁴ In *Messett v. Cowell*,⁷⁸⁵ the court sustained a covenant not to use any of the lime rock on the demised property for the purpose of making or burning lime.

In *Marvel Baking Co. v. Teamster's Union*⁷⁸⁶ the legality of a union-employer agreement requiring the employer to sell only to persons in

out and received his deed. Nevertheless, ramifications of the stated principle, particularly its applicability to recording system controversies, are so serious as to suggest that the point may not be settled by the Peterson case. An innocent buyer on contract, who has paid part of the price, would appear to merit a more sympathetic reception than was accorded Mr. Peterson in this case.

⁷⁸¹ See RESTATEMENT, CONTRACTS, heading to Chap. 18, § 512 (1932); 6 CORBIN, CONTRACTS §§ 1373 *et seq.* (1950); 5 WILLISTON, CONTRACTS §§ 1628 *et seq.* (rev. ed. 1936).

⁷⁸² RESTATEMENT, CONTRACTS §§ 513-516 (1932); 6 CORBIN, CONTRACTS §§ 1385-1387 (1950); 5 WILLISTON, CONTRACTS § 1641 (rev. ed. 1936). A number of the earlier cases involved legality problems. See WASHINGTON ANNOTATIONS to the cited RESTATEMENT sections.

⁷⁸³ *Merager v. Turnbull*, 2 Wn.2d 711, 99 P.2d 434 (1940) (sale of undertaking business; covenant not to compete in Spokane, no time limit); *Lyle v. Haskins*, 24 Wn.2d 883, 168 P.2d 797 (1946) (sale of sawmill; covenant not to compete in Lewis County for ten years); *Mead v. Anton*, 33 Wn.2d 741, 207 P.2d 227 (1949) (sale of restaurant; covenant not to compete within a radius of five hundred yards, for ten years); *Management, Inc. v. Schassberger*, 39 Wn.2d 321, 235 P.2d 293 (1951) (sale of dry cleaning and laundry business; covenant not to compete in Yakima for five years). The controversies in these cases were about the fact of competition and about remedies.

⁷⁸⁴ 6 CORBIN, CONTRACTS § 1389 (1950); 5 WILLISTON, CONTRACTS § 1642 (rev. ed. 1936).

⁷⁸⁵ 194 Wash. 646, 79 P.2d 337 (1938).

⁷⁸⁶ 5 Wn.2d 346, 105 P.2d 46 (1940).

good standing with the union was apparently assumed by the court.⁷⁸⁷

An agreement between prospective bidders at a public sale, whereby one for a consideration provided by the other undertakes not to bid against him, is illegal.⁷⁸⁸ This proposition was reaffirmed in *Conran v. White & Bollard, Inc.*⁷⁸⁹

Wagers. "While it is true that wagering contracts are unenforceable, yet the first requisite of a wagering contract is that it must be so considered by both parties in such transactions as are here involved. Where the intention of gambling is limited to one party, it is not a wagering contract." With this passage the court in *Ferris & Hardgrove v. Buff*,⁷⁹⁰ met the defendant's argument that his margin transactions on the wheat exchange were illegal because he "never intended actually to buy or sell but only to gamble . . ."⁷⁹¹ The decision appears to be the only one of the later cases which is concerned with this type of illegality.

Usury. The basic Washington usury statute is RCW 19.52.020. Three of the later cases were concerned with its operation. In *Tacoma Hotel, Inc. v. Morrison & Co., Inc.*⁷⁹² a lender who had loaned \$10,000 succeeded in persuading the court that the agreement was for repayment of \$10,000 plus seven per cent interest, although the borrower's note was for an amount which violated the statute and the lender's first complaint sought recovery of such amount. In *Auve v. Fagnant*,⁷⁹³ the court refused to give effect to an agreement whereby the parties purportedly compromised the usury issue; the transaction was usurious at the outset and was held to remain usurious despite the

⁷⁸⁷ The union called its members out on strike, and picketed the employer's plant. This action was to restrain the picketing. The court denied the injunction, finding a labor dispute existed and that there was no secondary boycott; the court evidently assumed the legality of the restraint. See also *Edwards v. Teamsters Local Union No. 313*, note 814 below.

⁷⁸⁸ RESTATEMENT, CONTRACTS § 517 (1932); 5 WILLISTON, CONTRACTS § 1663 (rev. ed. 1936).

⁷⁸⁹ 24 Wn.2d 619, 167 P.2d 133 (1946). See also *Wilder v. Nolte*, 195 Wash. 1, 79 P.2d 682 (1938).

⁷⁹⁰ 20 Wn.2d 161, 163, 146 P.2d 331, 332 (1944).

⁷⁹¹ The stated test is the usual one. See RESTATEMENT, CONTRACTS §§ 520, 522, 523 (1932); 6 CORBIN, CONTRACTS §§ 1484, 1485 (1950); 6 CORBIN, CONTRACTS § 1468 (1950); 6 WILLISTON, CONTRACTS §§ 1668, 1669, 1670 (rev. ed. 1936).

⁷⁹² 193 Wash. 134, 74 P.2d 1003 (1938). The court recognized that the true transaction must be ascertained by determining the intent of the parties. The evidence of a usurious bargain, provided by the note and the first complaint, was sufficiently rebutted by evidence of mistakes in the preparation of those instruments. Courts will be equally astute in getting at the realities of the transaction where a lender attempts to disguise usury. 6 CORBIN, CONTRACTS § 1501 (1950); 6 WILLISTON, CONTRACTS § 1687 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 529 (1932).

⁷⁹³ 16 Wn.2d 669, 134 P.2d 454 (1943).

"compromise." With *Hafer v. Spaeth*⁷⁹⁴ Washington joined the many jurisdictions in which a conditional sale transaction will not be usurious;⁷⁹⁵ the transaction is a sale and the financing charge is a part of the price. The opinion contains an unusually full and helpful discussion of the basic usury elements.

Bargains tending to obstruct the administration of justice. *Yount v. Zarbell*⁷⁹⁶ involved an agreement by which a person not a lawyer employed a lawyer. The agreement was held to be illegal. The employer was in the collection and discount business. He prepared pleadings and related papers which the lawyer signed. The lawyer then conducted the litigation. In one instance a judgment was taken with knowledge that the defendant had partly paid the obligation sued on.

*In re Arbitration Puget Sound Bridge Co. v. Lake Washington Shipyards*⁷⁹⁷ followed earlier cases in holding that arbitration is in Washington solely a statutory proceeding. The court also construed the statute as conferring on the parties "an absolute right to be heard and to present their evidence, after reasonable notice of the time and place of the hearing." An earlier case⁷⁹⁸ was disapproved insofar as it conflicts with this construction. The court went on, however, to find that the right to a hearing can be waived.

Bargains in violation of public or fiduciary duty. An agreement which contemplates persuasion of a public official to a course of action desired by one of the parties creates obvious hazards to the public interest. In their endeavor to protect that interest without stultifying legitimate activity, courts have stressed the method of persuasion contemplated or used. If the method is corrupt the agreement is illegal. A provision for payment only if the persuasion is successful is not proof enough that corrupt methods are contemplated.⁷⁹⁹ In *Hall v. Anderson*⁸⁰⁰ the court adhered to these principles. *York v. Gaasland Co.*⁸⁰¹ went against the legality of a contingent fee agreement, but only because an executive order hostile to such agreements was found to

⁷⁹⁴ 22 Wn.2d 378, 156 P.2d 408 (1945).

⁷⁹⁵ 6 CORBIN, CONTRACTS § 1500 (1950); 6 WILLISTON, CONTRACTS § 1685 (rev. ed. 1936).

⁷⁹⁶ 17 Wn.2d 278, 135 P.2d 309 (1943).

⁷⁹⁷ 1 Wn.2d 401, 96 P.2d 257 (1939).

⁷⁹⁸ *Hatch v. Cole*, 128 Wash. 107, 222 Pac. 463 (1924).

⁷⁹⁹ RESTATEMENT, CONTRACTS §§ 559, 563 (1932); 6 CORBIN, CONTRACTS § 1450 (1950); 6 WILLISTON, CONTRACTS § 1729 (rev. ed. 1936). The cited texts indicate some contrary authority on contingent fee agreements.

⁸⁰⁰ 18 Wn.2d 625, 140 P.2d 266 (1943).

⁸⁰¹ 41 Wn.2d 540, 250 P.2d 967 (1952).

declare a federal public policy which state courts should respect. The opinion in the *York* case also pointed out a conflict between the *Hall* case, *supra*, and *Goodier v. Hamilton*,⁸⁰² an earlier case:

In determining whether or not a contract is inherently corrupt, however, we seem to have applied a less stringent test in the *Hall* case than in the earlier *Goodier* case. In the *Hall* case, we stated that a contract is not inherently corrupt if it "could conceivably have been lawfully performed," while in the *Goodier* case we held that a contract should be condemned if it "contains the germ of possible corruption."

It was not thought necessary in the *York* case to resolve the conflict. *Sinnar v. LeRoy*⁸⁰³ gave the court another opportunity to clarify its position. The opportunity was not taken.⁸⁰⁴

Bargains tending to defraud or injure third persons.⁸⁰⁵ "A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm, is legal except in the cases stated in sec. 575."⁸⁰⁶ The exceptions provided in section 575 cover willful breach of duty, and negligence in employer-employee and public service relationships. Both the basic rule and the exceptions represent views which most American courts would accept,⁸⁰⁷ and which the Washington court approved in a 1936 case.⁸⁰⁸ Operators of parking lots have in several outside cases been held to come within the "public service" exception.⁸⁰⁹ *Ramsden v. Grimshaw*⁸¹⁰ involved the familiar parking lot claim check disclaiming all liability for theft or injury to the vehicle; in holding the disclaimer to be ineffective the court stated a principle broader than was necessary for the result, and

⁸⁰² 172 Wash. 60, 19 P.2d 392 (1933).

⁸⁰³ 44 Wn.2d 728, 270 P.2d 800 (1954) (contingent-fee agreement for procuring a beer license was held illegal; the *Hall* case was purportedly distinguished; the court said after referring to the *Goodier* case, "the record not only discloses that this transaction 'contains the germ of possible corruption,' but the evidence and all inferences which may be drawn lead us to conclude that the parties contemplated the use of means other than legal to accomplish the end desired."

⁸⁰⁴ The *Hall*, *York*, *Goodier* and *Sinnar* cases are discussed in Note, 30 WASH. L. REV. 97 (1955).

⁸⁰⁵ This subheading is taken from the RESTATEMENT, CONTRACTS; it is concededly inapt as to a bargain for exemption from liability, which is the subject matter of Restatement sections 574 and 575 and the problem raised in some of the Washington cases discussed in this subsection.

⁸⁰⁶ RESTATEMENT, CONTRACTS § 574 (1932).

⁸⁰⁷ 6 CORBIN, CONTRACTS § 1472 (1950); 6 WILLISTON, CONTRACTS § 1751C (rev. ed. 1936).

⁸⁰⁸ *Broderson v. Rainier Nat'l Park Co.*, 187 Wash. 399, 60 P.2d 234 (the exemption covered operation of the toboggan slide at Longmire Springs, and was sustained).

⁸⁰⁹ 4 WILLISTON, CONTRACTS § 1065A (rev. ed. 1936).

⁸¹⁰ 23 Wn.2d 864, 162 P.2d 901 (1945).

probably broader than was intended: "[T]he rule is that one cannot contract away responsibility for one's own negligence or fraud." The earlier case was not discussed or cited.⁸¹¹ It seems unlikely that the court will hold disclaimers of liability for simple negligence in non-public-service relationships to be illegal.

Disclaimers of liability for breach of contract have come to litigation in a limitation-of-liability context and have been sustained in Washington and elsewhere.⁸¹² The fate of an outright disclaimer of all liability for any and all breaches remains obscure.

If the making or performance of an agreement entails tortious injury to a third person or the breach of a contract to which he is a party, the agreement is illegal.⁸¹³ This proposition was invoked in several of the later Washington cases.⁸¹⁴

⁸¹¹ In the Brodersen case, cited note 808 above, the court discussed the public service exception and found the defendant did not come within it. The opinion in the Ramsden case contains no helpful discussion.

⁸¹² See the subsection entitled "Limitation of liability," n. 601 *et seq.* above. Erickson v. Edmonds School Dist., 13 Wn.2d 398, 125 P.2d 275 (1942) is of particular interest in this connection, because the court addressed itself directly to the validity of a building-contract clause disclaiming liability for any delay. The clause was sustained, with citation of earlier Washington cases and of many cases from other jurisdictions: "Where, however, the contract expressly precludes the recovery of damages by the contractor for delay caused by the default of the owner, that provision will be given full effect." Whether the court might take a different position if the breach is "willful" cannot be determined. The disclaimer at issue in the Erickson case was of course partial, excluding damages for just one kind of breach; it was also accompanied by a provision for an extension of the builder's time for performance if delay was caused by the owner's fault.

⁸¹³ RESTATEMENT, CONTRACTS §§ 571, 576, 577 (1932); 6 CORBIN, CONTRACTS § 1470 (1950); 6 WILLISTON, CONTRACTS § 1738 (rev. ed. 1936).

⁸¹⁴ Findley v. Findley, 193 Wash. 41, 74 P.2d 490 (1937) (An agreement between three of four heirs to divide all of a decedent's estate among themselves was held to be illegal); Wilder v. Nolte, 195 Wash. 1, 79 P.2d 682 (1938). The case involved an agreement between contractors. One, who shortly thereafter submitted a bid on a public road job, undertook to employ the other as superintendent, on a basis which gave the "employee" the profits on the job in excess of five per cent and obligated him to stand the losses. The court found no harm to the state in this arrangement. The construction contract contained a non-assignment clause. Maryland Cas. Co. v. Tacoma, 199 Wash. 72, 90 P.2d 226 (1939). A partnership obtained a construction subcontract; one partner had charge of the work and secretly agreed with a person to whom he sublet part of the work to share the profits and losses on that part; the agreement was sustained; the court said: "We believe, however, that it is also the rule that there is nothing which is inherently fraudulent or against public policy in one member of a firm engaging in enterprises in his own behalf, provided he acts in good faith towards his partner . . ." Edwards v. Teamsters Local Union No. 313, 8 Wn.2d 492, 113 P.2d 28 (1941). The agreement required Edwards to discontinue a mode of operation then covered by contracts with third persons and was sustained because those contracts contained termination clauses. McVicar v. Peters, 12 Wn.2d 92, 120 P.2d 485 (1945). A side-deal by which a purchaser who was being refinanced by the Home Owners' Loan Corporation promised to pay the vendor \$325 was sustained because known to the Corporation; cases from other states, holding side-arrangements illegal as a fraud on the Corporation, were discussed and distinguished. Jones v. Curtiss, 20 Wn.2d 470, 147 P.2d 912 (1944) reached the opposite result, because the Corporation was not shown to have been aware of the side-deal. Four judges dissented, finding insufficient proof of the public policy which was assumed in

Bargains prohibited by statute. An agreement prohibited by legislation is of course illegal. Legislative purpose is expressed with varying degrees of clarity and it is often hard to determine whether a particular statute is prohibitory or only regulatory.⁸¹⁵ Both the basic principle and the difficulties in applying it were demonstrated in the later cases.⁸¹⁶

the cases which invalidated secret deals collateral to HOLC refinancing. In *Washington State Hop Producers v. Riel*, 20 Wn.2d 624, 148 P.2d 847 (1944), a contract for the sale of land by a father to his daughter was sustained, although the effect of it was to relieve the father of an exclusive marketing agreement with the Hop Producers; the court recognized that the transaction would be illegal unless shown to have been undertaken in good faith, and found both an adequate price and good faith to have been shown.

⁸¹⁵ RESTATEMENT, CONTRACTS § 580 (1932); 6 CORBIN, CONTRACTS § 1374 (1950); 6 WILLISTON, CONTRACTS §§ 1763 *et seq.* (rev. ed. 1936). Usury, which was discussed above, is a statutory wrong. Bargains in restraint of trade, also discussed above, may come within the operation of a statute.

⁸¹⁶ *Smith v. Seattle*, 192 Wash. 64, 72 P.2d 588 (1937) (a city's request for bids on electric light globes may specify "Mazda lamps only"; a request so phrased does not violate a city charter requirement of competitive bidding); *Fisher v. Thumler*, 194 Wash. 70, 76 P.2d 1018 (1938) (credit sale of apples to an unlicensed commission merchant is not void; the buyer acquired title and his later mortgage created a valid lien; in a dictum the court said that a contract made by an unlicensed commission merchant to buy goods would not be enforced); *Ogilvy v. Peck*, 200 Wash. 122, 93 P.2d 289 (1939) (a licensed plumber can recover for work done despite his failure to procure a building permit for the work); *Callahan v. Jones*, 200 Wash. 241, 93 P.2d 326 (1939) (prosecuting attorney's agreement with a person who had lodged a criminal complaint concerning a theft, for representation of the complainant in civil proceedings for recovery of the stolen property, was held to violate REM. REV. STAT. § 4138 and to be illegal); *Washington Fruit & Produce Co. v. Yakima*, 3 Wn.2d 152, 100 P.2d 8, 103 P.2d 1106 (1940) (agreement for the furnishing of power, made between a city and a power company, was held not to violate an ordinance requiring franchises for the use of city streets to be submitted to the voters, and not to violate an ordinance requiring contracts to be let on an advertisement for bids); *Whittaker v. Weller*, 8 Wn.2d 18, 111 P.2d 218 (1941) (transaction by which corporation issued its stock, receiving the stockholder's note in payment, with the understanding that on a stated contingency the stock would be cancelled and the note returned to the maker thereof, was held to conflict with REM. REV. STAT. § 3823 and to be illegal); *Smaby v. Shrauger*, 9 Wn.2d 691, 115 P.2d 967 (1941) (an agreement between stockholders of a corporation and its employees, whereby the corporation was released and the stockholders promised to pay accrued wages, was held not to violate REM. REV. STAT. § 7594; four judges dissented); *Pillatos v. Hyde*, 11 Wn.2d 403, 119 P.2d 323 (1941) (an agreement between a corporation and its employee whereby the latter was to receive part of his pay in stock of the corporation was held to violate REM. REV. STAT. § 7594 and to be illegal; four judges dissented) (the statute with which the Smaby and Pillatos cases were concerned is now RCW 49.48.010; it forbids the issuance by an employer of orders for wages, payable in other than money); *Oregon-W. Ry. & Nav. Co. v. C. M. Kopp Co.*, 12 Wn.2d 146, 120 P.2d 845 (1942) (an agreement by which a rail carrier undertakes to transport, and render a service not covered by its rate schedule, violates 24 STAT. 380 (1887); 63 STAT. 486 (1949); 49 U.S.C. § 6 (1952), and is illegal); *Dalton v. Clarke*, 18 Wn.2d 322, 139 P.2d 291 (1943) (agreement between the Seattle transportation commission and a contractor, negotiated and not let on a public call for bids, was held not to violate the applicable statutory regulations for such transactions); *Shorewood, Inc. v. Standing*, 19 Wn.2d 627, 144 P.2d 243 (1943) (unlicensed real estate broker cannot enforce a commission agreement); *Malcolm v. Yakima County Consol. School Dist. No. 90*, 23 Wn.2d 80, 159 P.2d 394 (1945) (agreement between teacher and school district, by which the teacher leased living quarters from the district, was held to violate REM. REV. STAT. (Supp.) § 4852-1, setting a minimum pay for teachers); *Rathke v. Yakima Valley Grape Growers Ass'n*, 30 Wn.2d, 486, 192 P.2d 349 (1948) (agreement was held to violate the Robinson-Patman Act, 38 STAT. 730 (1914); 49 STAT. 1526 (1936); 15 U.S.C. § 13 (1958), and to be illegal); *State ex rel. Piper v. Pratt*, 31 Wn.2d 725, 198 P.2d 814 (1948) (agree-

Bargains concerning domestic relations. An agreement to marry after one party (or both) is freed from an existing marriage by divorce or death of the present spouse is illegal.⁸¹⁷ This proposition was applied in several of the later cases.⁸¹⁸

An agreement for illicit sex relations is illegal.⁸¹⁹ This principle was invoked by the defendant in *Anderson v. Pettridge*,⁸²⁰ without success. The action was on an employment contract, which the court found was not made in contemplation of the illegal relationship which subsequently developed.

Effect of illegality. Generally speaking, there is no remedy for either party to an illegal agreement. Damages or specific enforcement cannot be had. Neither can restitution for a performance rendered.⁸²¹

ment between a county and an architect whereby the latter prepared plans for a court house, was held unenforceable because the building project exceeded the county's statutory debt limit and because the commissioners had no authority to engage an architect save in conjunction with a building project); *Johnson v. Rutherford*, 32 Wn.2d 194, 200 P.2d 977 (1948) (agreement for sale of a leasehold on commission does not violate the statute requiring a real estate broker to be licensed); *Meyer v. Simpson*, 34 Wn.2d 486, 209 P.2d 294 (1949) (an unlicensed architect cannot enforce a promise to pay for his services); *Sunset Oil Co. v. Vertner*, 34 Wn.2d 269, 203 P.2d 906 (1949) (agreement between an oil company and a distributor, requiring the latter to deal only in the oil company's products and to maintain indicated prices, was held to violate no federal or state statute); *Wachob v. Griner*, 35 Wn.2d 309, 212 P.2d 781 (1949) (agreement for sale of a leasehold on commission does not violate the statute requiring a real estate broker to be licensed); *Hederman v. George*, 35 Wn.2d 357, 212 P.2d 841 (1949) (option agreement covering mining stock was held to violate REM. REV. STAT. § 5853-37 and to be illegal); *Prichard v. Conway*, 39 Wn.2d 117, 234 P.2d 872 (1951) (an agreement by which the widow of a deceased dentist undertook to sell the decedent's dental practice for a price which included a percentage of the profits, and which authorized her to supervise the business operation but not the professional operation of the practice, was held not to violate REM. REV. STAT. (Supp.) § 10031-6); *Yaeger v. International Bhd. of Teamsters, Local 313*, 39 Wn.2d 807, 239 P.2d 318 (1951) (a closed-shop agreement between an employer and a union, voluntarily entered into by the employer and extorting no compulsion on the then employees of the employer, does not violate REM. REV. STAT. (Supp.) § 7612-2 and is lawful); *Isthmian S.S. Co. v. National Marine Eng'rs Beneficial Ass'n*, 41 Wn.2d 106, 247 P.2d 549 (1952) (followed the Yeager case, *supra*); *York v. Gaasland Co.*, 41 Wn.2d 540, 250 P.2d 967 (1952) (discussed at note 801 above); *McDonald v. Wockner*, 44 Wn.2d 261, 267 P.2d 97 (1954) (agreements held to violate the policy declared by the Anti-Kickback Statute, RCW 49.52.050 and 49.52.070, and to be illegal); *Anderson v. Petridge*, 45 Wn.2d 299, 274 P.2d 352 (1954) (agreement found not to violate 23 STAT. 332; 8 U.S.C. § 141, and to be lawful); *Robertson v. Club Ephrata*, 48 Wn.2d 285, 293 P.2d 752 (1956) (agreement found not to violate regulation 18 of the Washington State Liquor Control Board, and to be lawful).

⁸¹⁷ RESTATEMENT, CONTRACTS § 588 (1932); 6 CORBIN, CONTRACTS § 1475 (1950); 6 WILLISTON, CONTRACTS § 1743 (rev. ed. 1936).

⁸¹⁸ *Davis v. Davis*, 3 Wn.2d 448, 101 P.2d 313 (1940); *Jones v. Allen*, 14 Wn.2d 111, 127 P.2d 265 (1942); *Armitage v. Hogan*, 25 Wn.2d 672, 171 P.2d 830 (1946). See also *Chiles v. Kail*, 34 Wn.2d 600, 208 P.2d 1198 (1949), a deceit action which failed because the defendant's promise to marry plaintiff, although made without intent to perform and hence fraudulent, was made while defendant was still married to another; plaintiff knew of the existing marriage.

⁸¹⁹ RESTATEMENT, CONTRACTS § 589 (1932); 6 CORBIN, CONTRACTS § 1476 (1950); 6 WILLISTON, CONTRACTS § 1745 (rev. ed. 1936).

⁸²⁰ 45 Wn.2d 299, 274 P.2d 352 (1954).

⁸²¹ RESTATEMENT, CONTRACTS § 598 (1932).

No attempt will be made to segregate and cite again the illustrative cases already cited in this section.

There are exceptions to the basic proposition. In other words, there are illegal agreements which courts will enforce, wholly or in part, or upon which a remedy in restitution may be grounded. The factors which support the exceptions are clear enough, although their operation produces some difficult problems.⁸²² The public interest is injured with varying degrees of seriousness by different types of illegality. Some types of agreement are illegal only because it is in the public interest to protect a particular class of persons. The parties may not be equally culpable in making an illegal agreement. The illegality may be the product of a statute which specifies a remedy for one party. Some of these factors were significant in the later Washington cases.⁸²³

CONCLUSION

This is not an article which permits of a conventional concluding summary. The problems which have been considered are much too heterogeneous. It does seem appropriate to mention some by-products of the case reading, analysis and comparison reflected in the discussion above. One is increased appreciation of just what "*stare decisis*" means. Another is increased awareness of the effort required for the preparation of a court's opinion. Still another is a firm conviction that the work-load of the court is appallingly heavy. These three are inter-

⁸²² RESTATEMENT, CONTRACTS §§ 599 *et seq.* (1932); 6 CORBIN, CONTRACTS §§ 1518 *et seq.* (1950); 6 WILLISTON, CONTRACTS §§ 1630 *et seq.* (rev. ed. 1936).

⁸²³ Ryan v. KVI, Inc., 198 Wash. 459, 88 P.2d 836 (1939) (restitution was permitted where the deviation from the legality-standard was minor; RESTATEMENT, CONTRACTS § 600 (1932) was cited); Goodwin Co. v. National Discount Corp., 5 Wn.2d 521, 105 P.2d 805 (1940) (usury was found; the penalty provisions of REM. REV. STAT. § 7304 were invoked by the debtor but their application was refused because the action was for an accounting and hence equitable; "we have held that the person seeking equitable relief must offer to return what he actually received under the contract, along with lawful interest thereon."); Pillatos v. Hyde, 11 Wn.2d 403, 119 P.2d 323 (1941) (where an employment contract is illegal because in violation of REM. REV. STAT. § 7594, the employee can recover the cash value of unpaid wages); Auve v. Fagnant, 16 Wn.2d 669, 134 P.2d 454 (1943) (a debtor who has paid usury can recover the interest paid in excess of twelve per cent); O'Neil v. Crampton, 18 Wn.2d 579, 140 P.2d 308 (1943) REM. REV. STAT. § 2304, permitting the recovery of money lost at gambling, was applied); Malcolm v. Yakima County Consol. School Dist. No. 90, 23 Wn.2d 80, 159 P.2d 394 (1945) (school teacher whose employment agreement violated REM. REV. STAT. (Supp.) § 4852-1, the minimum pay statute, was permitted to recover the pay-deficiency); Melton v. United Retail Merchants, 24 Wn.2d 145, 163 P.2d 619 (1945) (the court recognized that "a plaintiff may recover a sum of money from a defendant who has acknowledged that it belongs to plaintiff even if that sum be plaintiff's share of the profits of some illegal business or transaction in which both were engaged and equally culpable. This is so because the plaintiff, in such a situation, need prove nothing illegal, but has only to prove that the defendant has acknowledged the sum sued for to belong to him. . .").

related. They have meaning for anyone pondering the probable future development of contract law in Washington.

The reason given in an opinion for the result reached by the court is especially important in an area where planning and drafting are dominant factors. Naturally enough, judicial opinions are not uniform in clarity either of writing or of reasoning. Yet every new contract case, whatever the quality of the opinion, becomes a part of the mass of precedent with which judges, as well as lawyers and law teachers, must struggle in their endeavor to ascertain the legal principles which govern the creation, operation and extinguishment of this legal relation.

The accumulated total of Washington cases on contracts is now very large. As the number of the decided cases goes up, it becomes more and more difficult to undertake the kind of research needed for a thorough understanding of them. Without such an understanding, differences in the language and emphasis of opinions can crystallize in succeeding cases into applications or statements of principle which are seemingly if not actually divergent. Several instances in which this seems already to have occurred were observed in the case discussion above. Where it occurs, consistency in results and in the stated reasons for them becomes ever harder to achieve. Appeals are encouraged by the existence of precedents apparently favorable to both sides. Good briefing becomes more difficult. The court must decide an increasing number of cases by resort to an increasingly amorphous body of basic doctrine. The practitioner is harassed in his drafting and advisory functions, where he must be guided by his best judgment concerning the court's position should the transaction come to litigation. On matters about which the court has already spoken, his judgment must of necessity be predicated on the existing cases. If they are inconclusive (as to which both the language of opinions and the results reached are important), the percentage of uncertainty in his advice and drafting may rise above the level which is tolerable in commercial transactions.

The 1937-1957 contract opinions are a major research and writing accomplishment, particularly notable when the peculiarities of records and the deficiencies in briefs are considered, yet they comprise but a fraction of the court's total output. It is difficult indeed to see how the time needed for the thorough investigation of earlier cases and the preparation of lucid opinions can be found by the court if the volume of appellate litigation continues to increase.