

contracts when in equity and good conscience he should have the benefit of but one. The case of *Keith v. Smith, supra*, is not contrary to these principles. To allow one entering into an oral contract to sell or purchase real estate on commission to recover his commission merely because he had performed the contract would render nugatory the statute requiring such contracts to be in writing. As was said in the case cited, a claim for commission from its very nature cannot be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself."

Certain parts of the two last excerpts from opinions have been italicised to shew that under the holdings of the Washington court a contract, void under the law because not in writing, if partially performed, may be successfully pleaded in defence to an action on the valid contract sought to be abrogated or discharged by the invalid oral contract, although it be substituting for the valid contract one that the plaintiff could not enforce should he seek to make it the basis of an action. In this respect these holdings differ essentially from those quoted earlier in this article. It is also to be noted that in the *Thill* case the court says that the payment of a consideration for the making of the new oral contract would not take it out of the Statute of Frauds sufficiently to permit it to be interposed as a successful defence, while in the *Gerard Fillia Co.* case it expressly says that it would be inequitable to permit the plaintiff to maintain his action on the original written contract "when he has accepted the consideration for its modification or abrogation."

If the holding of the Washington court is a proper modification of the general rule on this subject, though we have been unable to find any cases in other jurisdictions to the same effect, the law would seem to be that in cases where the parties have sought to modify or abrogate a written contract within the Statute of Frauds while still executory by a subsequent oral contract invalid because not in writing, such oral contract may not be pleaded in defence unless the party seeking to enforce the original written contract has received some substantial benefit under the modified oral contract. It is to be noted, however, that the modification