

performance. The trial court sustained a motion for judgment on the pleadings in favour of the plaintiff. On appeal, the Supreme Court reversed the holding of the trial court, and in so doing, said:—

“The second question, whether the verbal contract modifying the original written contract was within the Statute of Frauds, is of more difficulty. In this state a contract employing an agent to sell or purchase real estate for a commission must be in writing in order to be valid. Rem. & Bal. Code, sec. 5289. And this court has held that a contract modifying or abrogating a prior written contract required by statute to be in writing must itself be in writing to be obligatory: *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225. And we have held also that an oral contract for the payment of a commission for selling or purchasing real estate, although fully performed, is not enforceable: *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473. These principles are relied on to support the judgment of the trial court; but it seems to us they do not meet the question presented. While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate it, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract, required by the statute to be in writing, can be successfully pleaded as a defence to an action on the original contract. To hold otherwise is to make the Statute of Frauds an instrument of fraud; for it would be a fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation. It is for this reason that equity allows a performance or a substantial part performance of a contract, invalid because not in writing, modifying or abrogating a valid contract to be pleaded as a defence to an action on the valid contract. To do otherwise would be to allow one of the parties to have the benefit of both