to the contract, without committing a breach of contract, at least not from the viewpoint of a court of equity. Schwartz v. Schwartz, 273 W 404, 78 NW (2d) 912.

A joint will which expressly or impliedly does not take effect until the death of the survivor is invalid, but in the absence of this factor, a joint will may be regarded as the will of each cotestator and probated twice, once at the death of each, whether the property bequeathed be owned severally or jointly by the testators, and especially does the rule hold true where the testators are husband and wife. Estate of Cordes, 1 W (2d) 1, 82 NW (2d) 920.

238.19 does not apply where there is a separate contract involved. It applies if the only evidence of the contract were the wills themselves and they fail to expressly reveal their contractual nature. Pederson v. First Nat. Bank, 31 W (2d) 648, 143 NW (2d) 425.

A will which is jointly executed may furnish in itself prima facie proof that it was executed pursuant to a contract between the testators, notwithstanding it does not expressly purport to have been made pursuant to contract, does not contain the words "contract" or "agreement," or include an express promise that the survivor will carry out the dispositions contained in the will. Estate of Hoeppner, 32 W (2d) 339, 145 NW (2d) 754.

Joint and mutual wills. Glinski, 24 MLR 42.

Joint and mutual wills. Dall, 38 MLR 30, 239.

Wills made pursuant to contract. 50 MLR 549.

238.20 History: R. S. 1849 c. 66 s. 38, 39; R. S. 1858 c. 97 s. 38, 39; R. S. 1878 s. 2296; Stats. 1898 s. 2296; 1903 c. 76 s. 1; Supl. 1906 s. 2296; 1925 c. 4; Stats. 1925 s. 238.20; 1949 c. 303; 1969 c. 339.

Although a will is not recorded, a purchaser from an heir having notice of such will is bound thereby. Prickett v. Muck, 74 W 199, 42 NW 256.

238.21 History: 1969 c. 82; 1969 c. 392 s. 66; Stats. 1969 s. 238.21.

CHAPTER 240.

Fraudulent Conveyances and Contracts Relating to Real Estate.

240.01 History: R. S. 1849 c. 75 s. 1; R. S. 1858 c. 106 s. 1; R. S. 1878 s. 2297; Stats. 1898 s. 2297; 1925 c. 4; Stats. 1925 s. 240.01.

A complaint which seeks to set aside a deed under sec. 2297, Stats. 1898, must either allege directly that such deed was made with a particular intent to defraud specified in the statute, or must allege facts from which such intent must be inferred. McDonald v. Sullivan, 135 W 361, 116 NW 10.

240.02 History: R. S. 1849 c. 75 s. 2; R. S. 1858 c. 106 s. 2; R. S. 1878 s. 2298; Stats. 1898 s. 2298; 1925 c. 4; Stats. 1925 s. 240.02.

240.03 History: R. S. 1849 c. 75 s. 3; R. S. 1858 c. 106 s. 3; R. S. 1878 s. 2299; Stats. 1898 s. 2299; 1925 c. 4; Stats. 1925 s. 240.03.

240.04 History: R. S. 1849 c. 75 s. 4; R. S. 1858 c. 106 s. 4; R. S. 1878 s. 2300; Stats. 1898 s. 2300; 1925 c. 4; Stats. 1925 s. 240.04.

240.05 History: R. S. 1849 c. 75 s. 5; R. S. 1858 c. 106 s. 5; R. S. 1878 s. 2301; Stats. 1898 s. 2301; 1925 c. 4; Stats. 1925 s. 240.05.

240.06 History: R. S. 1839 p. 162 s. 6; R. S. 1849 c. 75 s. 6; R. S. 1858 c. 106 s. 6; R. S. 1878 s. 2302; Stats. 1898 s. 2302; 1925 c. 4; Stats. 1925 s. 240.06; 1969 c. 285.

Editor's Note: This section is repealed, effective July 1, 1971, by ch. 285, Laws 1969. See the editor's note printed ahead of ch. 700 for information as to the provisions in the new property law which replace it.

1. Transactions covered.
2. Estate or interest in lands.
3. Operation of law, or acts of parties.
4. Deed or conveyance in writing.

1. Transactions Covered.

A contract of license to search for ore or to open and work a quarry is not within the statute. Gillett v. Treganza, 6 W 343.

An agreement for a deed and a lease of an easement in discharge of a mortgage is within the statute. Starin v. Newcomb, 13 W 519.

The sale of crops with the right to harvest them is not an interest in land. Westcott v. Delano, 20 W 514.

A right of way, either a freehold or for a fixed term, is an interest in land and cannot be created by parol. But an oral agreement for a right to draw logs across land for a term less than a year is a license revocable at will. Duinneen v. Rich, 22 W 550.

An executory agreement to release an equitable interest in land, not being in writing, is void under the statute. Gough v. Dorsey, 27 W 119.

An agreement to drain mines is not within the statute. Townsend v. Peasley, 35 W 383.

A license does not create an interest in land. Lockhart v. Geir, 54 W 133, 11 NW 245.

An agreement that A shall procure a conveyance to B from a third person, that B shall pay for the land, and that they shall work a quarry thereon and share the profits, is not within sec. 2302, R. S. 1878, as being for an interest in lands and is not within sec. 2307, R. S. 1878, as being by its terms not to be performed within a year. Treat v. Hiles, 68 W 344, 32 NW 517.

An oral agreement by which the plaintiff and another were to look up and locate lands and defendant was to enter and pay for them and take title to himself, and afterwards to sell and dispose of them for the benefit of all and pay the plaintiff one-fourth of the proceeds, is not void as creating an estate or interest in lands, the proceeds being referred to merely as a measure of the compensation to be paid plaintiff for his services. Watters v. McGuigan, 72 W 155, 39 NW 382.

If a parol agreement to convey is fully performed it is enforceable. Larsen v. Johnson, 78 W 300, 47 NW 615.

A parol agreement by S to pay A one-half the cost of a party wall on the line between their lots is not within the statute if S uses

the wall after A has erected it and receives the full benefit thereof. Pireaux v. Simon, 79 W 392, 48 NW 674.

An oral agreement to purchase standing timber, while void under the statute of frauds, is effective as a parol license, and title to timber cut in reliance on the license prior to its revocation vests in the purchaser. Bruley v. Garrin, 105 W 625, 81 NW 1038.

A mortgage on land may be effectually released by parol and without actual delivery of the instrument if the oral release is so acted upon and carried into execution as to create equities demanding protection on the principle of estoppel. In re Bank of West Superior, 109 W 672, 85 NW 501.

Equity will protect and enforce a parol gift of land, if accompanied by possession and if the donee, induced by the promise to give it, has made valuable improvements upon the property. Rodman v. Rodman, 112 W 378, 88 NW 218.

A parol lease for a year, to commence in the future, is valid. Baumgarten v. Cohen, 141 W 315, 124 NW 288.

The interest which is acquired by part payment and taking possession of land is a right to a conveyance on the payment of the balance. Wilcox v. Scallon, 144 W 74, 127 NW 1007.

An oral agreement to conduct partnership dealings in lands is void. Where such an agreement was executed as to everything relating to the interest in the land so that it was only necessary to determine the amount due each partner, it is enforceable. Huntington v. Burdeau, 149 W 263, 135 NW 845. See also: Richtman v. Watson, 150 W 385, 136 NW 797; and Steuerwald v. Richter, 158 W 597, 149 NW 692.

An oral leasing is void as to its continuance unless it affirmatively appears that it was for a term not exceeding one year. If the term is to continue until the premises are sold it is void. An entry followed by the payment of rent under an oral lease creates a tenancy for such a term, not exceeding one year, as the payment contemplates. Sutherland v. Drolet, 154 W 619, 143 NW 663.

An oral agreement to devise realty in consideration of services and disbursements is void. Nelson v. Christensen, 169 W 373, 172 NW 741.

The vendor under an executory land contract, at a time when the vendee, his nephew, made a partial payment, stated that he had paid enough on the home, directed the nephew to indorse "Paid in full" on the check, and said if they were not so busy they would go to a lawyer to have the papers drawn. The county court should have granted the petition of the vendee and directed the executor of the vendor to execute a conveyance of the lands, the transaction not involving the gift of an interest in lands but the forgiveness of a debt. Estate of Dohm, 188 W 626, 206 NW 877.

Where tenants at will told the owner of a farm that they were leaving the farm after sustaining uninsured loss from a fire, but remained and made valuable improvements on the owner's agreement that they should receive the farm, continued possession was referable solely to the oral contract, and was sufficient as part performance to make compliance with the statute unnecessary. Estate of Cullen, 224 W 463, 272 NW 363.

An unwritten 3-year lease of land is invalid. Part performance does not make such lease fully enforceable. A tenant farmer's recovery for services rendered would have to be on quantum meruit and would be limited to services rendered to the date when the relationship of the parties was terminated, less offsets, if any. Kirkpatrick v. Jackson, 256 W 208, 40 NW (2d) 372.

Where A, a party to a bilateral written agreement required by the statute to be in writing, has knowledge that after A had signed the agreement B, the other party to the agreement, had made material changes therein before B also signed it, and with such full knowledge A thereafter accepted any benefits from B as performance under the altered agreement, A is thereby estopped from raising the defense of the statute so as to claim that such alterations invalidated the agreement. Pick Foundry, Inc. v. General Door Mfg. Co. 262 W 311, 55 NW (2d) 407.

2. Estate or Interest in Lands.

A license to flow lands is an interest therein, and cannot be created without writing, although an oral license to flow is a defense to an action for such flowing. French v. Owens, 2 W 250.

Easements are interests in land covered by the statute. Duinneen v. Rich, 22 W 550.

An oral agreement between lot owners that one shall not build a wall flush with the street creates an easement and is within the statute. Rice v. Roberts, 24 W 461.

The interest of the holder of school land and tax certificates is an interest in land. Eaton v. Manitowoc County, 44 W 489.

A parol contract giving the right to take water from a ditch for a period exceeding one year is void. Case v. Hoffman, 84 W 438, 54 NW 793.

The fact that a person is so circumstanced as regards realty as to dispossess the owner thereof adversely does not, until the expiration of the statutory period of limitation, vest any estate in the lands within the meaning of sec. 2302, Stats. 1898, and substitution of another in his place is not the transfer of any such estate. Illinois Steel Co. v. Budzisz, 106 W 499, 82 NW 534.

There can be no express warranty of the title to standing timber by parol, the same being real estate. Van Doren v. Fenton, 125 W 147, 103 NW 228.

No damages can be recovered for a breach of a part of a contract when the whole is void. Schultz v. Kosbab, 125 W 157, 103 NW 237.

An agreement that a person should advance the necessary money to buy property at a foreclosure sale, take the title in his own name, and transfer it to the other party to the agreement, upon the latter's reimbursing him for the advance, which agreement was carried out to the extent of acquiring the property at such sale and making such advances, was within the statute. Kaufer v. Stumpf, 129 W 476, 109 NW 561.

A leasehold interest in lands for an unexpired term, not exceeding one year, may be

surrendered by parol. Garrick T. Co. v. Gimbel Brothers, 158 W 649, 149 NW 385.

An agreement between real estate agents to share between them the commissions arising from an exchange of properties and the sale of that taken by one of the parties to the exchange does not create any estate, or interest, or trust, or power in, over, or concerning lands, nor is it a contract for the sale of any land or interest in land. Such an agreement is not invalidated by an oral contract by one of the parties to the exchange to convey the land he obtained to parties designated by the real estate agents. Etscheid v. Tiefenthaler, 172 W 273, 177 NW 887.

An oral agreement for the leasing of a farm for 5 years is invalid. But a tenant who entered under such an agreement and held more than a year became a tenant from year to year. Hauser v. Fetzer, 183 W 25, 197 NW 170.

Plaintiff, having an unrecorded written contract for the purchase from X of 120 acres of land, orally arranged with defendant and X that X should convey 40 acres thereof to plaintiff and 80 acres to defendant, but defendant secured a conveyance of both tracts to himself. Notwithstanding sec. 2302 and sec. 2077, 231.07, declaring that no trust results where the conveyance is to one other than the person paying the consideration, a trust resulted under sec. 2079 and defendant was properly required to convey to plaintiff the 40 acres. Awe v. Domer, 183 W 268, 197 NW 718.

An interest in a mortgage is an interest in personalty. Estate of Hart, 187 W 629, 205 NW 386.

Where a wife, joint optionee with her husband under an option contract for the purchase of real estate, did not authorize material alterations by the husband and the optionor, and did not ratify the act of the husband by any writing or by any conduct which might work an estoppel against her, and never did anything inconsistent with her asserted claim under the original option, she did not surrender her interest. To constitute a surrender of an interest, the act must be inconsistent with the continuance of the former estate or interest, and must be actually accepted and acted on by the other party. Formality of writing is necessary to ratify an agent's act. Wyman v. Utech, 256 W 234, 40 NW (2d) 378.

3. Operation of Law, or Acts of Parties.

The actual surrender of possession of leased premises by the lessee and the taking of exclusive possession of them by the lessor is an effectual surrender of the lease. Kneeland v. Schmidt, 78 W 345, 47 NW 438.

A surrender is the effectual yielding up of an estate or interest to one having the immediate reversion or remainder wherein such particular estate or interest may merge, and may be by such act or acts as are inconsistent with the continuance of such former estate or interest, and must be accepted and acted upon by the other, or by both parties. O'Donnell v. Brand, 85 W 97, 55 NW 154.

A written lease cannot be canceled by a parol agreement alone, but an executed agreement to surrender will effect such cancellation. Goldsmith v. Darling, 92 W 363, 66 NW 397; Lovejoy v. McCarty, 94 W 341, 68 NW 1003.

Parol surrender by acts must be inconsistent with the continuance of the contract, and be acted on by all concerned. Maxon v. Gates, 112 W 196, 88 NW 54.

Where vendee surrenders to vendor a land contract and the same is accepted with the intention of extinguishing the vendee's interest, it was sufficient to satisfy the statute. Hogue v. Farmers' Mut. Fire Ins. Co. 116 W 656, 93 NW 849.

Sec. 2302 did not authorize an inference that a written lease was still in effect because the lessee remained in possession of the premises without a written surrender thereof, where the lease had been surrendered by act or operation of law. Truesdale v. Straight, 183 W 638, 198 NW 620.

Resulting trusts and constructive trusts are within the exception of trusts created by "operation of law." Schofield v. Rideout, 233 W 550, 290 NW 155.

Where a mortgagee did not materially change his position, because of an oral agreement whereby the mortgagor was to convey the mortgaged farm to the mortgagee in consideration of a satisfaction of the mortgage, but merely took possession of the farm and leased it to a tenant, and continued to hold the mortgage and appeared to have an adequate remedy by foreclosing the same, there was not a sufficient part performance of the oral contract to overcome the defense of the statute of frauds against the enforcement thereof. Beranek v. Gohr, 260 W 282, 50 NW (2d) 459.

A surrender of a land contract may be effected by acts of the parties or by operation of law. Ordinarily surrender of possession by the vendee and its acceptance by the vendor works a surrender of the land contract "by operation of law," absolving each of the parties from all rights and interests therein and liabilities arising therefrom. In re Erickson, 106 F (2d) 937.

4. Deed or Conveyance in Writing.

On alienation by deed and proof and recording of instruments see notes to various sections of ch. 235.

Payment of a portion of purchase money, unaccompanied by any other act, will not take the case out of the statute. Brandeis v. Neustadtl, 13 W 142.

Parol proof is admissible to show that a deed absolute on its face is in fact only a mortgage. Wilcox v. Bates, 26 W 465.

Where land was conveyed by an absolute deed but without consideration, and the grantee mortgaged it for his own benefit and then reconveyed to the original owner, pursuant to a parol agreement, a judgment rendered against the grantee intermediate the mortgage and the reconveyance did not attach to the land and an execution sale did not transfer the title to it to the judgment creditor who purchased at such sale. The execution of the trust was provable by parol. Main v. Bosworth, 77 W 660, 46 NW 1043.

A nuncupative will cannot pass any title to real estate or to the income thereof accruing subsequent to the death of the testator. In re Davis's Will, 103 W 455, 79 NW 761.

A paper signed by both parties showing consideration with sufficient description, price and agreement, is valid. It is not necessary that it should contain apt and definite words expressing the agreement to convey, if such intent can be gathered from the instrument Van Doren v. Roepke, 107 W 535, 83 NW 754.

If any of the papers evidencing the creation of a mortgage satisfies the essentials of this statute, other essentials may be shown by parol. Jordan v. Estate of Warner, 107 W 539, 83 NW 946.

It is not necessary that the statute of frauds be pleaded. Langley v. Sanborn, 135 W 178, 114 NW 787.

An agreement to convey land and to fill the same is not void where the conveyance of the land was later reduced to writing. Agnew v. Baldwin, 136 W 263, 116 NW 641.

A deed of land, absolute in form, to which is annexed a void parol trust is not absolutely void if the trustee performs or if he executes a declaration of trust. The verified answer of the grantee under an absolute deed setting out a trust agreement and offering to execute the trust was binding on him. Schumacher v. Draeger, 137 W 618, 119 NW 305.

A deed valid on its face conveying absolute title to the grantee named therein cannot be shown by oral evidence to be in trust. Illinois S. Co. v. Kunkel, 146 W 556, 131 NW 842.

A land contract in writing is valid which does not specifically describe the land to be conveyed if it refers to it in such terms that the court can determine with reasonable certainty the land intended. Wisconsin C. R. Co. v. Schug, 155 W 563, 145 NW 177.

The signature of the person making the sale satisfies the statute; it is not necessary that it be the signature of the party to be charged. An agent without written authority may bind his principal by a contract of sale. Heins v. Thompson & Flieth L. Co. 165 W 563, 571, 163 NW 173.

Where a deed from husband to wife is absolute in form, an oral condition that she convey to a third person is void and parol evidence is not admissible to show that a trust was created. Felz v. Estate of Felz, 170 W 550, 174 NW 908.

A deed cannot be reformed to include an oral restriction on the use of the land conveyed which was not to be inserted in the deed; but courts of equity will, under some circumstances, imply and recognize restrictive equitable easements not recognized by courts of law. Florsheim v. Reinberger, 173 W 150, 179 NW 793.

A contract in writing selling standing timber provided that the timber should be removed within a specified time. An oral modification of the time of removal was void. Schaap v. Wolf, 173 W 351, 181 NW 214.

A receipt for money paid on a contract for the purchase of land, which is not itself a contract, is open to explanation by parol evidence; but where the description was "Southwest corner 28th and Meinecke," with nothing to show whether one lot or more was intended, the description was too vague to satisfy the statute of frauds. Money so paid may be recovered if no rule of public policy or good morals has been violated. Durkin v. Machesky, 177 W 595, 188 NW 97.

A finding based on sufficient evidence cannot be disturbed. Donahue v. Keaveny, 181 W 468, 195 NW 387.

A condition expressed in writing that lands deeded to a lumber company would be reconveyed to the grantor for a stated sum of money after the timber has been cut off cannot be modified by a subsequent oral agreement, based on a consideration, that the grantor would accept sum stated and surrender his right to a reconveyance. Gether v. R. Connor Co. 196 W 25, 219 NW 373.

A written contract for sale of realty was valid as against purchasers' objection of insufficiency of description, where the purchasers took possession and accepted an abstract. Pierson v. Dorff, 198 W 43, 223 NW 579.

A land contract signed by the president, but not by the secretary, of the vendor corporation is good as between the vendor and purchaser, where the president was authorized to act for the corporation in such matter, since 235.19 (2), providing that a conveyance of land by a corporation shall be signed by the president and secretary thereof, only affects the recordability of the contract and the rights of subsequent purchasers who purchase from the vendor in ignorance of the existence of the contract. Jefferson Gardens, Inc. v. Terzan, 216 W 230, 257 NW 154.

An oral contract of joint adventure was made between O. and associates to buy and sell a leasehold, title to which was conveyed to O. who alone contracted to purchase it, and who then conveyed to a corporation for a consideration which was divided among the adventurers. Such completion of the venture did not make conveyance in writing unnecessary so as to entitle the seller's assignee to recover against an associate of O. for breach of contract obligations entered into by O. in purchasing the leasehold. At such prior time, the contract of adventure being then wholly void because of the statute, O. had no authority in law as agent to bind his associates, and the subsequent execution of such contract did not operate retroactively to create an agency and a liability as of a prior date. Goodsit v. Richter, 216 W 351, 257 NW 23.

In an action to recover an amount owing on an original loan secured by a mortgage, and an amount owing on an additional loan, and to foreclose the mortgage as security for both loans, the plaintiffs were not entitled to foreclosure of the mortgage as security for the additional loan, where the parties had merely orally agreed that the mortgage securing the original loan should be extended to cover the subsequent loan, although no rights of third persons had intervened, since, in view of 240.06, no rights in and to real property can be granted by parol, and consequently no additional mortgage lien or incumbrance on real property can be created by parol agreement to secure other indebtedness than that which was intended to be secured when the mortgage was executed. Healy v. Fidelity Savings Bank, 238 W 12, 298 NW 170.

Extrinsic evidence in relation to description. 13 MLR 254.

Authorization of agents to deal with real

estate as affected by the statute of frauds. Zievers, 38 MLR 203.

The effect of failure to comply with the Wisconsin statute of frauds. Page, 4 WLR 323.

240.07 History: R. S. 1849 c. 75 s. 7; R. S. 1858 c. 106 s. 7; R. S. 1878 s. 2303; Stats. 1898 s. 2303; 1925 c. 4; Stats. 1925 s. 240.07; 1969 c. 285.

Editor's Note: This section is repealed, effective July 1, 1971, by ch. 285, Laws 1969. See the editor's note printed ahead of ch. 700 for information as to the provision in the new property law which replaces it.

On uses and trusts see notes to various sections of ch. 231, including 231.06 to 231.09.

The trusts arising from "operation of law" are "resulting trusts," which are implied from the supposed intention of the parties and the nature of the transaction, and "constructive trusts" which are raised, independently of any such intention and enforced on the conscience of the trustee by equitable construction and operation of law. When an agent with his own money fraudulently purchases property which he is orally employed to purchase for his principal, a constructive trust is created, and the agent is estopped by his fraudulent conduct from setting up the statute of frauds. Inability under 240.10 of a real estate agent to collect a commission because the agreement with his principal was not in writing does not prevent his liability to the principal under a constructive trust, since compensation is not essential to agency. Krzysko v. Gaudynski, 207 W 608, 242 NW 186.

The evidence warranted findings, as against a contention that only a loan was involved, that the defendant at his own suggestion was intrusted with certain sums of money by the plaintiffs as their respective portions of the purchase price of real estate in which they and the defendant individually were to have interests in proportion to their respective investments, and that there existed a fiduciary relationship on the part of the defendant to the plaintiffs and they reposed confidence in him because of a close family relationship and friendship and a prior attorney-client relationship, and that the defendant, using the money and acquiring title to the property in his own name but wrongfully refusing to convey to the plaintiffs, held their proportionate interests as trustee of a constructive trust, so that their oral claim was not barred by the statute of frauds. Stein v. Soref, 255 W 42, 38 NW (2d) 3.

If an agent fraudulently purchases with his own money property which he is employed under an agreement to purchase for his principal, a constructive trust is created by operation of law which need not be in writing. Shevel v. Warter, 256 W 503, 41 NW (2d) 603.

The underlying principle of a constructive trust is the equitable prevention of unjust enrichment which arises from fraud or the abuse of a confidential relationship; and 240.06 does not prevent a trust from arising by implication or operation of law, especially in view of 240.07. Masino v. Sechrest, 268 W 101, 66 NW (2d) 740.

Where a deed is given for the purpose of effecting a family settlement, the close relationship of the parties, the giving of the deed, and the purpose are sufficient to support a finding that a confidential relationship exists. The party asking to establish a constructive trust has the burden of proving oral arrangements by clear and convincing testimony. Nehls v. Meyer, 7 W (2d) 37, 95 NW (2d) 780.

The statute of frauds will prevent enforcement of an oral express trust relating to land, but in a proper case a constructive trust will be employed to accomplish justice. A constructive trust, based on unjust enrichment, is construed from circumstances surrounding the transaction, independently of intent of parties, and parol evidence is admissible, not to enforce the agreement, but to prove that the grantee has been unjustly enriched by repudiation of the agreement, the proving of the contract being incidental. Nehls v. Meyer, 7 W (2d) 37, 95 NW (2d) 780.

See note to 238.02, citing Estate of Russell, 10 W (2d) 346, 102 NW (2d) 768.

Trusts implied by law. Fox, 7 MLR 50.

240.08 History: R. S. 1849 c. 75 s. 8, 9; R. S. 1858 c. 106 s. 8, 9; R. S. 1878 s. 2304; Stats. 1898 s. 2304; 1925 c. 4; Stats. 1925 s. 240.08; 1969 c. 285.

Editor's Note: This section is repealed, effective July 1, 1971, by ch. 285, Laws 1969. See the editor's note printed ahead of ch. 700 for information as to the provision in the new property law which replaces it.

1. Interests covered.
2. Written memorandum.
3. Consideration expressed; terms definite.
4. Subscribed by vendor; lessor; agent.
5. Part performance; rebut gratuity.
6. Terms or modifications by parol.

1. Interests Covered.

An oral agreement whereby a boy agrees to work in a family enterprise in consideration that real property be left to him is indivisible and is void. Martin v. Martin's Estate, 103 W 284, 84 NW 439.

An agreement by which a homesteader agrees to relinquish his entry and possession to another so that the latter may acquire title in the regular and lawful way is not contrary to public policy, is not a contract to sell real estate and is not within the statute of frauds. Dohr v. Wolfgany, 151 W 95, 138 NW 75.

An oral agreement between a son and his father and mother that they might occupy during their lifetime a house belonging to the son was void, in the absence of any conditions warranting specific performance. Ludwig v. Ludwig, 170 W 41, 172 NW 726.

An oral lease for one year with the privilege of 3 years was valid for one year but void for the time in excess of one year; and possession taken by the lessee and acquiesced in by the lessor was referable to the valid and not to the void part of the lease. An oral agreement to execute a writing validating the void part of the oral lease was void. Falk v. Devendorf, 172 W 10, 177 NW 894.

See note to 240.06 (estate or interest in lands), citing Etscheid v. Tiefenthaler, 172 W 273, 177 NW 887.

An agreement whereby the plaintiff was to loan the company money, and, if it became necessary for the plaintiff to take over property of the company to protect the loan, defendants, who were stockholders of the company, were to contribute their pro rata share of the amount loaned, was not an agreement to purchase an interest in the property described. Ernest v. Schmidt, 199 W 440, 227 NW 26.

To be valid, an agreement by a prospective husband to execute a will leaving almost his entire estate to his prospective wife would have to comply with the statute of frauds, since it would pass an interest in land and was an agreement in consideration of marriage. Will of Paulson, 252 W 161, 31 NW (2d) 182.

2. Written Memorandum.

A verbal offer to sell land to a village and a resolution of the board, duly recorded, accepting such offer, are not sufficient. A written acceptance of a verbal offer is not sufficient. Gummer v. Trustees of Omro, 45 W 384.

An oral agreement to convey land in payment for services is not validated by a written offer, made after the services have been rendered to convey it in payment therefor, such offer not being accepted. Koch v. Williams, 82 W 186, 52 NW 257.

It is not necessary that the memorandum should be formal or in one writing. A letter to a vendor from his agent transmitting an offer for land and his reply to the agent accepting such offer are sufficient. Singleton v. Hill, 91 W 51, 64 NW 588.

It is not necessary that the memorandum should contain apt and definite words expressing the agreement to convey. Van Doren v. Roepke, 107 W 535, 83 NW 754.

An oral agreement to purchase a farm and certain hay cut thereon, whereby the purchaser was to care for the hay, is void. Schultz v. Kosbab, 125 W 157, 103 NW 237.

A contract for the sale of land made by letters which do not specify the state where the land is situated, or whether the township was north or south or the range east or west is definite where the letter of acceptance referred to the county in which the land was located. Curtis L. & L. Co. v. Interior L. Co. 137 W 341, 118 NW 853.

Under the facts stated, a contract for the sale of land is valid. Chudnow v. Ketter, 161 W 432, 154 NW 699.

Where a combined receipt for a down payment made by the plaintiffs to a real estate agent authorized to sell the defendants' property, and agreement for sale, signed by the defendants, referred only to "the purchasers" and did not contain their names, but an option to purchase, signed by the agent and delivered to the plaintiffs, did contain their names, and the evidence warranted a finding that it was understood and agreed by all parties that "the purchasers" referred to in the agreement for sale were the plaintiffs, there was a contract satisfying the statute of frauds, so as to be specifically enforceable. A contract for the sale of lands which clearly appears from several writings considered together satisfies the statute of frauds and may be specifically enforced. Padol v. Switalski, 248 W 183, 21 NW (2d) 375.

To satisfy the statute of frauds, a contract for the sale of land need not consist of one writing alone, but may be made up of several; and it is not necessary that all the writings constituting the memorandum be signed, but it is enough if one is signed and the others are physically annexed to it, are expressly referred to, or show on their face that they refer to the same transaction. Merely keeping several documents in the same file for the sake of convenience is not the physical attachment which alone would justify considering the documents together as a memorandum satisfying the statute of frauds. Kelly v. Sullivan, 252 W 52, 30 NW (2d) 209.

Where the owner stopped the auction sale and discharged the auctioneer, thereby revoking the auctioneer's authority to give any memorandum, and the owner left the scene of the auction, the owner cannot complain that no memorandum of sale sufficient under the statute of frauds was given to the plaintiff, who was the high bidder when the sale was stopped. Zuhak v. Rose, 264 W 286, 58 NW (2d) 693.

Receipts for monthly payments of money, signed by the owners of the property in question, but which did not mention a material part of the consideration for the alleged agreement to sell, were insufficient to constitute a written memorandum satisfying 240.08. Springer v. Chafee, 5 W (2d) 472, 93 NW (2d) 451.

An oral contract for the sale of real estate is void unless there is a sufficient memorandum to satisfy 240.08, and such memorandum must contain all the essential terms of the contract, including the identity or description of the parties and their relation, who the seller is and who the buyer is. The memorandum need not be a single document, but may be several documents if they are internally connected by appropriate references. Correspondence, in which neither the name of the prospective purchaser nor the purchase price appeared, did not constitute a memorandum satisfying the statute, and oral proof could not be used to supply this defect in the memorandum. Handlos v. Missman, 7 W (2d) 660, 97 NW (2d) 419.

Land contract—new Wisconsin form No. 36. Kalupa, Steinhaus and Tolzmann, 1958 WLR 260.

3. Consideration Expressed; Terms Definite.

The words "for value received" are sufficient to express the consideration. Cheney v. Cook, 7 W 413.

The writing need not in terms express the consideration; a reference to some extrinsic fact or instrument, as to a debt or note between the parties, is sufficient. Washburn v. Fletcher, 42 W 152.

A written lease of a room in a building in process of erection for the term of 5 years from the completion of the building is valid, the element of uncertainty in the commencement of the term being removed by the completion of the building and the occupancy of

the room. Hammond v. Barton, 93 W 183, 67 NW 412.

A contract for the conveyance of land which stipulates that the owner will convey to each of 2 other parties one of 2 specified 40 acre tracts of land without specifying which 40 shall be conveyed to either individual is indefinite and invalid. Hannon v. Scanlon, 158 W 357, 148 NW 1082.

A contract for the sale of land providing that a mortgage to be given back to the vendor to secure purchase money should be released as to certain parcels thereof "upon payment to me of such a sum as may be hereafter agreed upon by us as being equitable," was invalid. Carlock v. Johnson, 165 W 49, 160 NW 1053.

A written memorandum acknowledging receipt from C. V. of $15, "as part payment of $2,400, when warranty deed and abstract is given to" the real property described, and signed by the owner's authorized agent, is a sufficient contract for the sale of land, under sec. 2304, Stats. 1915. The time of payment is to be when the deed and abstract are delivered and a reasonable time for examining them has elapsed. Douglas v. Vorphal, 167 W 244, 166 NW 833.

The writing required by sec. 2304, Stats. 1921, must be definite as to intent of parties, their identity, their relations to each other, the property, the price and the terms of payment. Wirthwein v. Dailey, 182 W 200, 296 NW 221.

A memorandum on the purchaser's check for part of the price was an insufficient memorandum of a contract for the exchange of property. Merten v. Koester, 199 W 79, 225 NW 750.

This statute was not intended to give one person a technical escape from a fair and definite agreement with another. By the terms of a written land contract, the vendor agreed to place a mortgage for a definite sum upon the land and to convey the land subject to such mortgage. The fact that the rate of interest and time of payment of the mortgage was not mentioned in the land contract did not render the land contract invalid. Kenner v. Edwards R. & F. Co. 204 W 575, 236 NW 597.

A will made pursuant to an oral agreement to convey lands, to constitute a valid memorandum of the agreement, must show the consideration. Kessler v. Olen, 228 W 662, 281 NW 691.

See note to 241.02, on expressing the consideration, citing Estate of Burmania, 253 W 470, 34 NW (2d) 850.

The question whether consideration was expressed in a contract for sale of land was considered in Taylor v. Bricker, 262 W 377, 55 NW (2d) 404.

A letter from the owner of certain land to a prospective purchaser, which contained an offer to sell but contained no expression of consideration, was not a valid contract for the sale of land or an interest therein, and hence did not create an enforceable agreement. Siler v. Read Inv. Co. 273 W 255, 77 NW (2d) 504.

An offer to purchase, which, in addition to the legal description, stated "about 3½ acres" and gave the dimensions of 100 feet by 1,276 feet, which amounted to somewhat over 3 acres, was not inadequate or ambiguous as to description. George v. Oswald, 273 W 380, 78 NW (2d) 763.

A written offer to purchase land, providing for an earnest-money payment, a further payment "on day of closing of sale," and payment of the balance on the day of closing of the sale of the buyers' home "which should take place in about 90 days," and further providing that the instant transaction was "to be closed . . . on or before April 6," was not void as not complying with the statute of frauds. George v. Oswald, 273 W 380, 78 NW (2d) 763.

Where a contract for the purchase and sale of land did not set forth the terms of a $7,000 purchase-money mortgage which the buyers were to obtain from a named loan association but the buyer's subsequent loan application to such association specified the terms, such application constitutes part of the memorandum of sale. Kovarik v. Vesely, 3 W (2d) 573, 89 NW (2d) 279.

A description "the real estate owned by the sellers and located in the town of Oak Grove, now known as the 'Dobie Inn' and used in the business of the sellers" is insufficient since the sellers owned other property in the town. Stuesser v. Ebel, 19 W (2d) 591, 120 NW (2d) 679.

In order to satisfy the statute of frauds with respect to a contract for the lease or sale of land, the memorandum or contract must describe with reasonable certainty the property to which it relates. For a description to be adequate to satisfy the statute, the memorandum must describe the land that accompanies the buildings to be conveyed. Wiegand v. Gissal, 28 W (2d) 488, 137 NW (2d) 412, 138 NW (2d) 740.

An option extension must comply with 240.08 by expressing any new consideration for it, but if it does not the seller may be estopped to assert the defense if the buyer was induced to rely on it to his detriment. Bratt v. Peterson, 31 W (2d) 447, 143 NW (2d) 538.

Pitfalls in the standard offer to purchase form. Mayew, 46 MLR 499.

4. Subscribed by Vendor; Lessor; Agent.

In sales at auction it seems that the auctioneer is the agent of both parties to bind them by a "note or memorandum," but that it must be made at the time of the sale. Bamber v. Savage, 52 W 110, 8 NW 609.

A contract may be enforced against the vendor though it is signed by him alone. Wall v. Minneapolis, St. P. & S. S. M. R. Co. 86 W 48, 56 NW 367.

A contract for the sale of land may be signed by an agent; the conveyance only need be executed by the vendor or his agent authorized in writing. Heins v. Thompson & Flieth L. Co. 165 W 563, 163 NW 173.

An offer in writing to sell real estate, with the signature of the owner affixed thereto by her husband, is valid if the husband was authorized to sign her name; but if not so authorized, the offer is invalid as to her but binding upon the husband. Such an offer may be accepted orally. If the written offer states that abstracts will be furnished, a merchantable title must be tendered before the purchase money can be demanded. The purchase money need not be tendered after the vendor repudi-

ates the contract. Russell v. Ives, 172 W 123, 178 NW 300.

Signing an acceptance of a written offer to buy land without bringing it to the attention of the vendor does not create a contract within sec. 2304, Stats. 1917. An offer to purchase a farm for a specified consideration is not finally accepted if the vendor's acceptance requires the vendee to satisfy the tenant on the place. Such offer could be withdrawn any time before such acceptance. Helmholz v. Greene, 173 W 306, 181 NW 221.

It is the duty of the special deputy savings and loan commissioner to accept offers and consummate sales of the property only after approval by the commission and the circuit court has been given; and the special deputy's submission for such approval of an offer to purchase real estate, signed by the offeror and containing a blank space for the special deputy's signature of acceptance, does not constitute an "acceptance" by the special deputy. In re Wisconsin S. L. & B. Asso. 241 W 1, 4 NW (2d) 127.

Estates and interests in lands cannot be created by an agent unless he is authorized in writing, but an agent may bind his principal by a contract for the sale of land satisfying the statute of frauds, although his own authority as agent may have been by parol. Zuhak v. Rose, 264 W 286, 58 NW (2d) 693.

Where defendant landowners had signed the acceptance of plaintiffs' offer to purchase after insertion therein of an easement provision, it was immaterial, to constitute compliance with 240.08, Stats. 1957, that plaintiff purchasers had not signed the contract after the making of such insertion if they actually accepted it in some other manner. Schwartz v. Handorf, 7 W (2d) 228, 96 NW (2d) 366.

Authorization of agent to deal with real estate as affected by the statute of frauds. Zievers, 38 MLR 203.

The effect of failure to comply with the Wisconsin statute of frauds. Page, 4 WLR 323.

5. Part Perfomance; Rebut Gratuity.

Upon an oral agreement to purchase a farm it was agreed that if the purchaser failed to get title he was to be paid certain sums for his work. He did not acquire title. The contract was void because oral; but the purchaser might recover quantum meruit. Clark v. Davidson, 53 W 317, 10 NW 384.

An oral agreement to exchange certain land for lumber, followed by the delivery of a deed of the land in escrow, the execution of a written instrument reciting the sale of the land and certain personal property, but not containing the terms of the contract, is void. Popp v. Swanke, 68 W 364, 31 NW 916.

When a conveyance has been executed and accepted in pursuance of an oral contract for the sale of land an action may be maintained for the contract price. Niland v. Murphy, 73 W 326, 41 NW 335.

The relinquishment of rights under an option, after an oral contract of sale has been made, is not such a part performance of the contract as to take it out of sec. 2304, Stats. 1898. J.L. Gates Land Co. v. Ostrander, 124 W 287, 102 NW 558.

An agreement void under sec. 2304, Stats. 1898, may be received to rebut the presumption of gratuity and allow a recovery upon implied contract. Taylor v. Thieman, 132 W 38, 111 NW 229.

Payment of the purchase price will not take an agreement contract out of the statute. The vendee may sue on a quantum meruit. Ellis v. Cary, 74 W 176, 42 NW 252; Seifert v. Mueller, 156 W 629, 146 NW 787.

An oral agreement to devise lands in payment of services to be thereafter rendered was void; but it may be proved to show that the services were not gratuitous. Estate of Brill, 183 W 282, 197 NW 802.

The performance that supports oral agreements void under the statute of frauds is performance by the party seeking to enforce the contract, not performance by the other party. Kessler v. Olen, 228 W 662, 280 NW 352.

An oral promise or agreement to compensate for services by a devise of real estate in whole or in part is void, and can be resorted to for no purpose except to rebut the presumption that the services were gratuitously rendered. Estate of Rosenthal, 247 W 555, 20 NW (2d) 643.

If a plaintiff buyer, acting under an oral agreement and with the assent of the seller, either makes valuable improvements on the land or takes possession of the land, he is entitled to specific performance of the agreement. Kelly v. Sullivan, 252 W 52, 30 NW (2d) 209.

The vendees, suing to recover a down payment made by them under a void agreement for the conveyance of real estate, were entitled to recover so much thereof as they could show amounted to unjust enrichment of the vendors, and the vendors' retention of the down payment in excess of their expenses incurred in reliance on the void agreement would be unjust. Stuesser v. Ebel, 19 W (2d) 591, 120 NW (2d) 679.

Where 2 tenants in common with undivided interests in real property orally agreed to execute reciprocal wills, whereby each would devise to the other his or her interests in the property, conditioned upon the devisee's survival—execution by plaintiff of her will alone (without mentioning therein the underlying agreement) was not sufficient to constitute part performance so as to remove the bar of the statute of frauds. Estate of Rogers, 30 W (2d) 284, 140 NW (2d) 273.

In order to make the doctrine of part performance applicable so as to take the case out of the statute of frauds, the acts must be those which the oral agreement requires and must be for the purpose of carrying out such agreement, and the performance relied upon to make the statute inoperative must be exclusively referable to the contract. Bunbury v. Krauss, 41 W (2d) 522, 164 NW (2d) 473.

Quantum meruit recovery on unenforceable contracts. Schabaz, 11 MLR 235.

Recoupment in realty transactions based on a void contract. Fins, 49 MLR 419.

Right of a defaulting vendee to recover down payment under a void contract for the sale of land. 1964 WLR 167.

6. Terms or Modifications by Parol.

An oral agreement to pay a consideration in

addition to that expressed in a deed is valid. Kickland v. Menasha W. W. Co. 68 W 34, 31 NW 471.

The time of performance of an agreement for the sale of lands cannot be extended by parol. Such extension makes a new agreement void unless in writing. Atlee v. Bartholomew, 69 W 43, 33 NW 110.

A contract for the sale of land and personal property complied with the statutes of frauds except that the time of payment and the rate of interest on deferred payments were omitted. A subsequent oral agreement supplied these omissions without contradicting the writing in any way, the writing indicating on its face that it did not contain the whole agreement, and validated the contract. Hopfensperger v. Bruehl, 174 W 426, 183 NW 171.

Parol evidence may be received to identify the land to be conveyed, where there is some language in the writing to which parol evidence can be linked and the property identified with reasonable certainty. Spence v. Frantz, 195 W 69, 217 NW 700.

Where a contract providing for improvement, exploitation, and sale of lots had been fully performed in accordance with subsequent oral modifications relating to sale as a joint adventure, the oral consent was binding on the owner, and rights and duties of the parties were subject to obligations enforceable by virtue thereof. Belt Line R. Co. v. Dick, 201 W 159, 229 NW 639.

The application of the contract provision that the trade price included all personal property and crops on the farm, except one hog and from 12 to 18 hens, and the identification of the subject-matter thereof, could be shown by parol evidence as to the surrounding circumstances and situation of the parties at the time the contract was made. Haumersen v. Sladky, 220 W 91, 264 NW 653.

A land contract, although required to be in writing, may be modified orally as respects extending the time of payment, unless such oral modification violates 241.02 requiring agreements not to be performed within one year to be in writing. Vaudreuil Lumber Co. v. Culbert, 220 W 267, 263 NW 637.

A land contract which does not specifically describe the land to be conveyed, but refers to it in such terms that by the aid of the facts and circumstances surrounding the parties at the time the court can with reasonable certainty determine the land which is to be conveyed, satisfes the statute of frauds in this regard and may be enforced. Kuester v. Rowlands, 250 W 277, 26 NW (2d) 639.

In determining the sufficiency of a memorandum relating to the sale of real estate to satisfy the statute of frauds, parol evidence may be used in a proper case to identify the property referred to in the memorandum, but the description in the memorandum must be sufficient so that the function of parol evidence is limited to identification to a reasonable certainty, and parol evidence may not be used to supply a portion of the description or establish what property was intended to be sold. Thiel v. Jahns, 252 W 27, 30 NW (2d) 189.

The statute is satisfied in respect to description if from the description given in the contract or memorandum, supplemented by other evidence, the property sold can be definitely ascertained. Parol evidence which explains the terms used in the contract, without altering them, is admissible for such supplementary purpose. Schwartz v. Syver, 264 W 526, 59 NW (2d) 489.

240.09 History: R. S. 1849 c. 75 s. 10; R. S. 1858 c. 106 s. 10; R. S. 1878 s. 2305; Stats. 1898 s. 2305; 1925 c. 4; Stats. 1925 s. 240.09; 1969 c. 285.

Editor's Note: This section is repealed, effective July 1, 1971, by ch. 285, Laws 1969. See the editor's note printed ahead of ch. 700 for information as to the provision in the new property law which replaces it.

To take a parol agreement out of the statute on the ground of part performance the acts relied on must refer to and result from the agreement and be such as would not have been performed but for it. Bowen v. Warner, 1 Pin. 600.

Where the number of acres is guaranteed and there is a shortage the vendee may have specific performance and an abatement of the price in the proportion which the value of the deficiency bears to the whole value, deducting improvements. Docter v. Hellberg, 65 W 415, 27 NW 176.

Where time is not of the essence of the contract, and the thing to be done by one party can as well be done at a later as at an earlier day, delay will not defeat his right to specific performance. Maltby v. Austin, 65 W 527, 27 NW 162.

An oral agreement to sell lands is void and part performance will not justify a decree of specific performance unless otherwise the defendant would be enabled thereby to practice a fraud. Popp v. Swanke, 68 W 364, 31 NW 916.

The plaintiff must show by clear and satisfactory evidence both the terms of the contract and the authority of the agent or a ratification by the principal. Hadfield v. Skelton, 69 W 460, 34 NW 397.

Equity will not specifically enforce a contract by the common council of a city to erect a city hall on a lot conveyed to the city by the plaintiff although he sold the lot for less than its actual value, relying on such contract. Kendall v. Frey, 74 W 26, 42 NW 466.

If possession of land is taken after the purchaser has declared his option to purchase it under a written contract, which contract has been modified by parol, and valuable improvements have been made on it in reliance on the contract, specific performance may be decreed. Wall v. Minneapolis, St. P. & S. S. M. R. Co. 86 W 48, 56 NW 187.

Specific performance will not be decreed where there is uncertainty as to the price which was to be paid for the land. Eckel v. Bostwick, 88 W 493, 60 NW 784.

Specific performance will not be decreed though the purchase price has been paid unless the vendee has taken possession or sustained an injury for which damages will not give a complete remedy. Harney v. Burhans, 91 W 348, 64 NW 1031.

After part performance of an agreement to lease premises specific performance may be

compelled. Hammond v. Barton, 93 W 183, 67 NW 412.

In the following cases specific performance of oral agreements was denied. Dewey v. Spring Valley L. Co. 98 W 83, 73 NW 565; Sipes v. Decker, 102 W 588, 78 NW 769; Mulligan v. Albertz, 103 W 140, 78 NW 1093; Dickey v. Pugh, 110 W 400, 85 NW 963; Bardon v. Hartley, 112 W 74, 87 NW 809; Hawkes v. Slight, 110 W 125, 85 NW 721; Rodman v. Rodman, 112 W 378, 88 NW 218; Park v. Minneapolis, St. P. & S. S. M. R. Co. 114 W 347, 89 NW 532; Engberry v. Rosseau, 117 W 52, 93 NW 824.

In the following cases specific performance of verbal contracts was decreed. Hege v. Thorsgaard, 98 W 11, 73 NW 567; Valley I. W. M. Co. v. Goodrick, 103 W 436, 78 NW 1096 (contract for patent right); Brown v. Griswold, 109 W 275, 85 NW 363; Peterson v. Chase, 115 W 239, 91 NW 687; McDougal v. New Richmond R. M. Co. 125 W 121, 103 NW 244.

Under a parol agreement for a partnership the fact that one party made repairs and received a share of the rent is not such part performance as to take the case out of the statute. Scheuer v. Cochem, 126 W 209, 105 NW 573.

A written agreement for sale of land which provides for a partial payment at a certain time but contains no stipulations as to the terms of the further payment is insufficient to uphold a decree of specific performance. Buck v. Pond, 126 W 382, 105 NW 909.

A contract which is fatally indefinite as to its subject matter cannot be specifically enforced, as when the description of the lands was wholly uncertain. Auer v. Mathews, 129 W 143, 108 NW 45.

There is such a part performance of a verbal contract as will take it out of the statute and justify a decree of specific performance when there has been a payment of part of the purchase money, and an entry into possession of the purchased property. Booher v. Slathar, 167 W 196, 167 NW 261.

See note to section 240.08, on interests covered, citing Ludwig v. Ludwig, 170 W 41, 172 NW 726.

A contract void at law may be specifically enforced in equity to prevent fraud where there has been a partial performance. Doyle v. Fischer, 183 W 599, 198 NW 763.

Where an oral contract to convey a house which included an agreement for a reconveyance was wholly performed by the grantor, the transaction was removed from the statute of frauds and a subsequent execution by the grantee, who had purchased the house for a homestead, of the promised contract for a reconveyance, but without obtaining the signature of his wife, was valid and binding on the wife. Papenthien v. Coerper, 184 W 156, 198 NW 391.

Where an oral agreement is relied on, all of the essential terms must be proved by clear, satisfactory and convincing evidence. Mere preponderance will not suffice. Fontaine v. Riley, 189 W 226, 207 NW 256.

One agreeing to convey land to another on fixed terms may be required to perform even though no written memorandum in compliance with the statute of frauds was made, if there has been a part performance and fraud would result from not enforcing the oral agreement. Karrels v. Karrels, 234 W 44, 290 NW 624.

An oral agreement by the lessees to pay all utility bills for the entire building was not incorporated in the lease and option to purchase. This failure did not prevent specific performance of the option to purchase on the ground that the entire agreement between the parties must be in writing to be enforceable, where the plaintiffs at all times during their occupation as lessees performed the oral agreement to pay the utility bills and, by 240.09, such performance took that part of the agreement out of the statute of frauds. Petre v. Slowinski, 251 W 478, 29 NW (2d) 505.

The doctrine of part performance can be invoked only where fraud would result from not enforcing the oral agreement. Under some circumstances the party pleading the statute of frauds is estopped to assert it as a defense, as where he has induced the other party to change his position, because of the oral agreement, to such an extent that he has no adequate remedy at law and could not be restored to the situation in which he was when the agreement was made. Beranek v. Gohr, 260 W 282, 50 NW (2d) 459.

Expenditures of approximately $16,000, almost the equivalent of 2 years' rent, made by a lessee in moving its machinery and stock to the leased premises and installing the same therein in reliance on the provisions of a 3-year written lease, would be sufficient to invoke the doctrine of part performance and bar the lessors from raising the question of violation of the statute of frauds and claiming that the lessee was in possession under a mere month-to-month tenancy so as to be subject to ejectment on one month's notice. It is not essential that the acts relied on as constituting part performance be rendered pursuant to the terms of the parol agreement in order to be effective to deprive the opposite party of the benefit of the statute of frauds, the doctrine of part performance applying with equal force to acts done on the faith of the parol agreement and to those in the performance of its terms and conditions. Pick Foundry, Inc. v. General Door Mfg. Co. 262 W 311, 55 NW (2d) 407.

In an action by intended purchasers for the specific performance of an alleged oral agreement for the purchase of a residence property which they occupied, the trial court's finding that the plaintiffs had failed to establish an oral agreement was not against the great weight and clear preponderance of the evidence and must therefore be affirmed; hence, there being no oral agreement in view of such finding, there was no right to specific performance on the theory of part performance of an oral agreement. Springer v. Chafee, 5 W (2d) 472, 93 NW (2d) 451.

240.10 History: 1917 c. 221; Stats. 1917 s. 2305m; 1921 c. 388; 1925 c. 4; Stats. 1925 s. 240.10; 1965 c. 383; 1967 c. 26.

1. Transactions covered; exceptions.
2. Items required in contract.
3. Contract in writing; subscribed.
4. Performance; authority of agent.

1. Transactions Covered; Exceptions.

Sec. 2305m, Stats. 1917, does not apply to a real estate brokerage contract made in Illinois and relating to lands in that state. Dean v. Wendeberg, 175 W 513, 185 NW 514.

The right of a broker to recover compensation for the sale of property made after his listing agreement had expired rests on implied contract, and it must appear that the broker was performing services on behalf of the owner and with his consent, otherwise he is a mere volunteer. Hug v. Theilacker, 192 W 330, 212 NW 671.

It is the duty of the court to give effect to the legislative intent expressed in 240.10, that there shall be no recovery of commissions in the absence of a written contract or a memorandum thereof. (Seifert v. Dirk, 175 W 220, 184 NW 698, overruled.) Hale v. Kreisel, 194 W 271, 215 NW 227.

An agreement between real estate brokers to pool commissions realized from a sale of property is not contrary to public policy; and such agreement is not within the prohibition of 240.10, Stats. 1923. Connerton v. Andrews, 195 W 433, 218 NW 817.

Expenses incurred by a real estate broker in procuring abstracts for the benefit of the owner of property are not within the terms of 240.10, Stats. 1923. The performance of the services and the foregoing of the right of the broker to collect therefor constituted good consideration for a note given pursuant to a parol agreement under the circumstances then existing. Harris v. Petersen, 196 W 310, 220 NW 174.

A principal is liable on a promissory note voluntarily given a licensed real estate broker for services rendered pursuant to an oral agreement within the statute, notwithstanding the broker could not have maintained an action on the original contract to recover the value of the brokerage services, there being a sufficient moral consideration for the note. Elbinger v. Capitol & Teutonia Co. 208 W 163, 242 NW 568.

A verbal agreement to pay a commission for selling real estate is void, and no recovery can be had by a salesman under such agreement on the ground that he was the "procuring cause" of the sale. No recovery can be had on quantum meruit. Otto v. Black Eagle Oil Co. 266 W 215, 63 NW (2d) 47.

A real estate broker, performing services under a contract which was void and unenforceable for not being in writing, was not entitled to recover compensation under a mere verbal promise and written acknowledgment of obligation to pay subsequently made. (Elbinger v. Capitol & Teutonia Co. 208 W 163, distinguished.) Garvey v. Wenzel, 272 W 606, 76 NW (2d) 291.

Where various writings, separately or together, do not comply with the statutory requirements, payments made on the alleged contract in the past are not a substitute for the required written contract as to future claims. Karl M. Elbinger Co. v. George J. Meyer Mfg. Co. 3 W (2d) 202, 87 NW (2d) 807.

In an action for violation of a real estate listing contract it is not necessary to allege facts to establish that the contract complies with the statute. Purtell v. Tehan, 29 W (2d) 631, 139 NW (2d) 655.

Where an Illinois broker not licensed in Wisconsin sued a Wisconsin resident for a commission for sale of defendant's Wisconsin property, the suit could not be entertained. Reed v. Kelly, 177 F (2d) 473.

An oral agreement, made in Illinois, to pay a broker licensed in Illinois but not in Wisconsin, a commission for selling Wisconsin real estate was unenforcible here. Reed v. Kelly, 81 F Supp. 755.

2. Items Required in Contract.

The description of the premises to be sold as "my farm" was sufficient in a contract with a real estate agent, where there was no demurrer to the complaint and the evidence showed that defendant owned no land except the farm on which he lived and that this was the only land shown to the proposed purchaser. The commission is sufficiently stated if the contract provides that the agent shall have all he can get above a specified sum. The agent performs his contract if he finds a purchaser within the specified time. Gifford v. Straub, 172 W 396, 179 NW 600.

A brokerage contract containing a house number at the beginning and on the back thereof, authorizing the broker to sell the buildings "on this lot" is a sufficient description when accompanied by parol evidence that the words "this lot" referred to the address at the beginning. Extrinsic evidence is admissible to identify land to be sold under a brokerage contract. A brokerage "contract to remain in force until the thirty-first day of December, 1919, and thereafter until terminated by a 30 days' notice in writing" is not void for indefiniteness of duration. Graham v. Lamp, 174 W 373, 183 NW 150.

A contract providing a commission for the sale of real estate is not invalid because the rate of compensation agreed upon is not expressly stated, if it provides for the payment of the rate adopted by a city real estate association, such rate being provable by parol evidence. Graham v. Guetzkow, 177 W 259, 187 NW 982.

The commission of a real estate broker is not based on the amount of his services, but on the result of the services. Estate of Kayser, 190 W 189, 208 NW 895.

A provision in a real estate broker's listing agreement for a sale of property at a definite price, or at any other price which the principal might authorize, sets forth a sufficient basis on which a commission might be definitely computed. Mikkelson v. Faber, 195 W 64, 217 NW 702.

Authorization of a broker to sell real estate at a named net price to the owner, is tantamount to an agreement to pay as commissions all sums which the buyer is able and willing to pay in excess of such price. Werner v. Leser, 195 W 99, 217 NW 650.

A contract authorizing the sale of real estate by an agent provided a minimum 4-month period, with right to terminate it by 30 days' notice. Greene v. Donner, 198 W 122, 223 NW 427.

A commission contract of a real estate agent reserving to the owner the right to withdraw

the property 90 days from its date on giving written notice, "providing no negotiations are pending at the time," did not make the term of the agency uncertain nor make the contract invalid. Pallange v. Mueller, 206 W 100, 238 NW 815.

The contract of a real estate agent, made before a pending deal was closed, is construed as not being a contract to pay for services already rendered, and being void because it did not express the price for which the premises might be sold, nor the time for procuring a buyer, although referring to a land contract not then in existence, no action can be maintained thereon. Prinz v. Aussem, 207 W 603, 242 NW 183.

The statute is not satisfied unless the contract contains all the essential terms, either by its own terms or by reference to other writings. A contract to pay a commission to a real estate agent for procuring a lessee of a theater, in the event a satisfactory deal should be consummated, was void because it did not state the terms of rental or the period within which the tenant should be procured. A second writing, executed at the same time as the writing relating to a commission, but relating only to leasing the theater, and neither expressly made a part of nor expressly referred to in the writing relating to a commission, could not be considered as a part of the contract to pay a commission so as to result in a valid contract complying with 240.10. Brest v. Maenet Realty Co. 245 W 631, 15 NW (2d) 798.

A written listing agreement, whereby a real estate broker was to be paid a commission for negotiating a lease of theater properties, was void for failure to comply with 240.10 in that it did not specify the period of time the lease was to run. Kaufman v. La Crosse Theaters Co. 248 W 43, 20 NW (2d) 562.

The description in written contracts was sufficient. Kruger v. Wesner, 274 W 40, 74 NW (2d) 354.

A contract under which services were to be rendered by a broker in obtaining a suitable tenant for a building to be erected at a specified location, but which contained no other statement of the terms of rental acceptable to the owner of the real estate, was void for failure to express the terms of rental. Wozny v. Basack, 21 W (2d) 86, 123 NW (2d) 513.

Compensation is not essential to agency; hence inability of a real estate broker under 240.10 to collect a commission because the agreement with his principal was not in writing would not render the agreement void nor prevent him as agent from subjecting himself to the fiduciary duties arising therefrom. Hilboldt v. Wisconsin R. E. Brokers' Board, 28 W (2d) 474, 137 NW (2d) 482.

3. Contract in Writing; Subscribed.

A writing subscribed and delivered by one joint owner of property to a real estate agency acknowledging the receipt of earnest money on the sale of the property therein described, and stating the commission to be paid, is a note or memorandum fully complying with the requirements of the statute. Genske v. Leutner, 191 W 125, 210 NW 369.

A written agreement between a property owner and real estate brokers, using the word "option" because it gave the brokers the right to sell "or purchase" certain described real estate, and providing for the payment of a specified commission to the sellers, created an agency to sell which was in compliance with 240.10, Stats. 1943. Paul v. Markle, 250 W 81, 26 NW (2d) 276.

Under 240.10, Stats. 1945, there can be no implied contract to pay a commission. Leuch v. Campbell, 250 W 272, 26 NW (2d) 538.

Letters written to a broker after a written contract had expired did not extend the contract where they did not refer to the original contract and where the terms of sale were substantially different. Gilbert v. Ludtke, 1 W (2d) 228, 83 NW (2d) 669.

The contract or memorandum may consist of separate writings, if such separate writings, when construed together, contain all the elements specified by the statute; furthermore, the fact that the plaintiff broker was not a party to the contract of sale, one of the writings relied on, is immaterial, because it was subscribed by the defendant vendor, the person who is claimed to have agreed thereby to pay the commission. Mitler v. Associated Contractors, 4 W (2d) 568, 91 NW (2d) 367.

4. Performance; Authority of Agent.

The words "to sell" and "to sell or find a buyer" in a real estate brokerage contract are identical in meaning. Such a broker performs his contract and is entitled to his agreed compensation when he produces a person ready, able and willing to buy upon the terms specified by the contract. But authority "to sell" does not empower a broker to execute a conveyance or even to enter into an agreement to convey. Grinde v. Chipman, 175 W 376, 185 NW 288.

Ordinarily an agent to sell land is not entitled to a commission unless he sells, and if no sale is effected the time, labor and other expenditures are his loss; but the slightest effort resulting in a sale earns his commission. But when his contract is exclusive he can recover in case of an independent sale by the owner only upon a showing of a bona fide effort to sell. Such bona fide effort must have been substantially commensurate with the time and terms of the agency. Huchting v. Rahn, 179 W 50, 190 NW 847.

A written agreement giving a broker the exclusive right to sell lots in a subdivision was a mere listing contract, under which the agent had no authority to enter into a written contract which would bind his principal. Laughlin v. Goff, 193 W 554, 215 NW 592.

Services of a real estate broker are fully performed when a purchaser is procured who is ready, able and willing to purchase at the price agreed upon. A broker should not be denied recovery of a commission merely because he relied on a false representation of the owner's agent as to depth of a lot. Levine v. Mueller, 201 W 633, 231 NW 182.

A broker employed to carry out an exchange of lands does not earn his commission where he brings to his employer a person who

assumes to contract as owner, though in fact he is not, which fact the broker knows, and within the time allowed for performance proves unable to perform the contract. Goldman v. Schmidt, 209 W 71, 244 NW 586.

Where an agent is employed to procure a purchaser at a specified price, but one is procured who is not willing to pay the price named, the owner may sell to the purchaser produced at a lower figure, without rendering himself liable for a commission, provided there is no fraud or bad faith on his part and the agent is unable to induce his client to pay the price demanded. Smith v. Koch, 247 W 551, 20 NW (2d) 566.

Under a listing contract providing that the owners of the listed real estate would pay a commission to the broker if the property was sold during the life of the contract, or if it was sold within 6 months after the termination thereof to anyone with whom the broker had negotiated during the life of the contract, "and whose name you have filed with me in writing" prior to the termination of the contract, the act of the broker in supplying the owners with a written offer to purchase, bearing the name of the offeror, and leaving it with the owners overnight, sufficiently complied with the requirement of the listing contract as to "filing" so as to render the owners liable to the broker where the owners, after refusing the first offer, sold the property through another to the same offeror within 6 months after the termination of the listing contract. L. W. Smith & Co. v. Romadka, 261 W 374, 52 NW (2d) 797.

As to the meaning of "negotiated" in a contract, see Munson v. Furrer, 261 W 634, 53 NW (2d)697.

A real estate broker's listing contract on a printed form supplied by himself must be most strongly construed against the broker in case of any ambiguity or doubt. Under a listing contract providing that a commission is due on a sale by the owners within 6 months after termination to anyone with whom the broker negotiated, and whose name the broker has filed with the owners in writing prior to termination, both of such conditions must concur in order for a commission to be due on any sale made during the 6-month period. Actual notice by the owners of negotiations had between the broker and the subsequent purchaser is not a substitute for nor compliance with the filing requirement. Dunn & Stringer Inv. Co. v. Krauss, 264 W 615, 60 NW (2d) 346.

The evidence suggested the conclusion that the plaintiff-broker had furnished a buyer within the provisions of a listing contract. Wauwatosa Realty Co. v. Bishop, 6 W (2d) 230, 94 NW (2d) 562.

Where an oral contract for the payment of a commission on the sale of real estate was void but the broker, in settling with the sellers, withheld and deducted a commission from the proceeds of the sale with the full knowledge, consent, and approval of the sellers, it amounted to a voluntary payment which could not subsequently be recovered by the sellers. Geis v. McKenna, 10 W (2d) 16, 102 NW (2d) 101.

CHAPTER 241.

Fraudulent Contracts.

241.01 History: R. S. 1849 c. 76 s. 1; R. S. 1858 c. 107 s. 1; R. S. 1878 s. 2306; Stats. 1898 s. 2306; 1925 c. 4; Stats. 1925 s. 241.01; 1969 c. 283.

Editor's Note: This section is repealed, effective July 1, 1971, by ch. 283, Laws 1969. See the editor's note printed ahead of ch. 700 for information as to the provision in the new property law which replaces it.

The sale of goods to a creditor with an arrangement that the vendor should have the privilege of reclaiming them would create a trust for the benefit of the vendor and render the sale void as to creditors if the value of the goods exceeded the amount of the vendee's claim. Grant v. Lewis, 14 W 487.

The conveyance of land by an insolvent debtor as a gift, in trust for his own benefit, is void as against creditors whether or not the grantee has knowledge. Manseau v. Mueller, 45 W 430.

A conveyance of realty and personalty by a father to his son upon condition that the latter give his parents one-half the buildings, one-half of all crops raised during their lives and one-third of the avails of the land to the one surviving, that he pay specified sums to his sister and brother after the parents' death, and that he pay a mortgage upon the realty creates a trust, and is void as against the father's creditors, notwithstanding the son had previously made advances to the father. Severin v. Rueckerick, 62 W 1, 21 NW 789.

A voluntary conveyance made by a judgment debtor to a third person of substantially all his nonexempt property, upon a trust and benefit reserved to himself, is fraudulent as a matter of law. Faber v. Matz, 86 W 370, 57 NW 39.

Where a debtor made a voluntary conveyance to his wife of his real estate, charging the same with his support during his life time, and also conveyed all his personal property without consideration, the transfers were fraudulent against creditors. Stapleton v. Brannan, 102 W 26, 78 NW 181.

A fraudulent conveyance is made void, not merely voidable by sec. 2306, Stats. 1921. Goetz v. Newell, 183 W 559, 198 NW 368.

An assignment of a right of action to secure a promissory note did not create a trust for the benefit of the assignor which was void as against creditors, since it did not inure to the benefit of the assignor. Jones v. Krueger, 1 W (2d) 27, 82 NW (2d) 910.

156.125, relating to burial agreements, is an exception to the prohibition in 241.01. Grant County Service Bureau v. Treweek, 19 W (2d) 548, 120 NW (2d) 634.

Where a contract was made for the purchase of a season's output of lumber and advances on such contract were to be made, a provision giving the vendors "the privilege of retaining any stock included in this contract provided no advances have been made on the same" does not make it a conveyance in trust for the use of the person making the same under sec. 2306, R. S. 1878. Stelling v. Jones L. Co. 116 F 261.