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Theodore S. Fins

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NEED FOR UNIFORMITY IN STATUTE OF FRAUDS AND SUGGESTED REMEDY: RECOUPMENT IN REALTY TRANSACTIONS

This article deals with the recently changed case law in Wisconsin regarding the retention of earnest money (or downpayments) in realty binder contracts^{1a} between vendors and vendees which are "void" for

^{1a} Such contracts are commonly designated "escrow agreements." *Spedding, Executor of Will of McCarthy v. Patrick*, 35 Northampton Co. 220, 226 (Pa. C.P., 1961). The term "escrow" originates from the law French word *escroue* which means writing or scroll. *BOWMAN, REAL ESTATE LAW IN CALIFORNIA* 368, §1 (1958). *But see: Angelcyk v. Angelcyk*, 367 Pa. 381, 384, 80 A. 2d 753 (1951) wherein the court states at n. 1: ". . . [T]he term escrow is derived from the French word meaning *bond* or *written obligation* and is so always used in English . . ." [Emphasis supplied] citing *Stonewall v. McGown*, 231 S.W. 850, 851 (Tex. Civ. App. 1921) as authority.

In 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 307 (1 ed. 1771), the author describes the conditions and mode of operation under which an escrow may take effect: "A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a deed, but as an escrow; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes." (Emphasis supplies).

To the same general effect are: 19 AM. JUR., *Escrow* pp. 418-20, 437-38, 445-46, §§1-3, 20, 25 (1939); 30 C.J.S. *Escrows* pp. 1191-1200, 1206, 1216, §§1-5, 9, 13 (1942); 1 BOUVIER, LAW DICTIONARY 1072-74 (3 ed. Rawle rev. unabr. 1914); 1A CORBIN, CONTRACTS 417, §249 (1963); JAMES, OPTION CONTRACTS 78 §208 (1916) and especially n. 4 therein; 2 THOMAS, LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 276-77, n. (L), §36(a) (1827); SHEPPARD, THE TOUCHSTONE OF COMMON ASSURANCES 57-59 (1 ed., 1651); 1 WILLISTON, CONTRACTS 782, §212 (3 ed. 1957).

Cf., generally: 1 COKE, COMMENTARY UPON LITTLETON ch. 5, §36a (First American ed., 1853); 4 KENT, COMMENTARIES ON AMERICAN LAW 546, §454(2) (14 ed. 1896) *Exodus* 22:26; *Ezekiel* 18:7, 16 (King James). Although, the latter citation uses the term "pledge," it really means an "escrow."

For the leading Wisconsin case following this definition of an escrow, see generally: *Thomas v. Sowards*, 25 Wis. 631 (1870). The following cases are *in accord*: *Gulf Petroleum, S.A. v. Collazo*, 316 F. 2d 257, 261 (1st Cir. (1963)); *British-American Oil Producing Co. v. Baltimore Trust Co. et. al.*, 105 F. 2d 291, 292 (4th Cir. 1939) *affirming* *Baltimore Trust Co. v. Inter-ocean Oil Co.*, 26 F. Supp. 817, 820 (D. Md. 1939); *Hewitt Inv. Co. v. Minnesota & Oregon Land & Timber Co. et. al.*, 211 Fed. 1021 (9th Cir. 1914) (memorandum decision) *affirming* *Minnesota & Oregon Land & T. Co. v. Hewitt Investment Co.*, 201 Fed. 752, 759 (D. Ore. 1913); *Young v. Bishop*, 88 Ariz. 140, 146, 353 P. 2d 1017 (1960); *Masters v. Clark*, 89 Ark. 191, 193, 116 S.W. 186 (1909); *Raymond v. Smith*, 5 Conn. (15 Day) 555, 559 (1825); *Love v. Brown Dev. Co.*, 100 Fla. pt 2, 1373 at 1378-79, 131 So. 144 (1930); *Fulton Land Co. v. Armor Insulating Co.*, 192 Ga. 526, 527, 15 S.E. 2d 848 (1941); *Moslander v. Beldon*, 88 Ind. App. 411, 415, 164 N.E. 277 (1928); *Johnson v. Wallden*, 342 Ill. 201, 206, 173 N.E. 790 (1930); *Rinehart v. Rinehart*, 14 Ill. App. 2d 116, 123, 143 N.E. 2d 398 (1957); *Merchants Nat. Bank of Aurora v. Frazier*, 329 Ill. App. 191, 199, 67 N.E. 2d 611 (1946); *Hirschberg v. Russell*, 317 Ill. App. 329, 333, 45 N.E. 2d 886 (1943); *Millett v. Parker*, 59 Ky. (2 Met.) 608, 613 (1859); *Wampler v. Wampler*, 239 La. 315, 322-23, 118 So. 2d 423 (1960); *Eddy et. al. v. Pinder*, 131 Me. 139, 141, 159 Atl. 727 (1932); *Jackson v. Sheldon*, 22 Me. (9 Shep.) 569, 573-74 (1843); *Meade v. Robinson*, 234 Mich. 322, 327, 208 N.W. 41 (1926); *Van Valkenburg v. Allen*, 111 Minn. 333, 335, 126 N.W. 1092, 137 Am. St. Rep. 561 (1910); *Nash v. Normandy State Bank*, 201 S.W. 2d 299, 301 (Mo. 1947); *Pike v. Friska*, 165 Neb. 104, 119, 84 N.W. 2d 311 (1957); *Killeen v. Doran*, 118 Neb. 750, 754, 226 N.W. 435 (1929); *Dooley v. Kushin*, 105 N.J.L. 595, 598-99, 146 Atl. 208 (1929); *State Bank v. Evans*, 15 N.J.L.

failure to comply with the Statute of Frauds. Remedies are suggested to both immediate and future problems both in Wisconsin and in other states.

Prior to 1953, the law of Wisconsin was that if a vendor was ready, willing and able to perform on a void contract for the sale of realty, his readiness would not bar *total* recovery of the vendee's downpayment if the vendee refused to consummate the sale.^{1b}

In 1953, in *Schwartz v. Syver*² the Supreme Court of Wisconsin stated by way of *dictum* that such readiness and ability to perform by the vendor constituted a *total* bar to vendee's recovery of his earnest money; that is, the vendor could retain this money, irrespective of the doctrine of unjust enrichment.

However, in 1963, in *Steusser v. Ebel*,³ this area of controversy was intensified when the Supreme Court of Wisconsin held the *dictum* of the *Schwartz*⁴ case no longer applicable. The Court held that while the vendee was entitled to "recovery" of his earnest money, the vendor also was entitled to his "expenses incurred in reliance upon the void

(3 J. S. Green) 155, 158-59, 28 Am. Dec. 400 (1835); Silberstein v. Murdock, 216 App. Div. 665, 670-71, 215 N.Y.S. 657 (1926); Squire v. Branciforti, 131 Ohio St. 344, 353, 2 N.E. 2d 878 (1936); McGriff v. McGriff, 48 Ohio L. Abs. 218, 219 (headnote 3) (memorandum decision), 74 N.E. 2d 619 (Ohio App. 1947); Eason v. Walter, 118 Okla. 37, 39-40, 246 Pac. 865 (1926); Murphey v. Greybill, 34 Pa. Super. 339, 353 (1907); Umani v. Reber, 9 Ches. Co. Rep. 158, 160 (Pa. C.P. 1959) quoting from RESTATEMENT (SECOND) AGENCY §14D, Comment (a) (1858); Campbell v. Barker, 272 S.W. 2d 750, 753 (Tex. Civ. App. 1954); Rhodes v. Walton, 163 Va. 360, 371-72, 175 S.E. 865, 176 S.E. 472 (L. Epes, J. dissenting opinion in latter unofficial reporter); Lechner v. Halling, 35 Wash. 2d 903, 912-13, 216 P. 2d 179 (1950); Bronx Inv. Co. v. National Bank of Commerce, 47 Wash. 566, 569, 92 Pac. 380 (1907).

Cf. State v. Hurley, 66 Nev. 350, 356, 210 P. 2d 922 (1949) wherein it was held that while the term "escrow" has been thought of as a type of land conveyancing instrument, ". . . it is now commonly applied to the deposit of any written instrument and to the deposit of money."

See also: Anon., *Modern Uses of An Escrow*, 14 THE MILWAUKEE BAR ASSOCIATION GAVEL 12 (No. 3, 1953). The legal periodical literature on the subject of "escrows" is too numerous to mention. A scrutiny of the complete sets of the Index to Legal Periodicals (Jones ed.), Index to Legal Periodical Literature (Chipman ed.), and Index to Legal Periodicals (A.A.L.L. ed.) reveals that there are 25 major articles, 21 student notes, 1 editorial, and 10 articles in journals of the British Commonwealth.

^{1b} In *Arjay Investment v. Kohlmetz*, 9 Wis. 2d 535, 538, 101 N.W. 2d 700 (1960), Justice Hallows said: "Money paid under an oral contract void because of the statute of frauds may be recovered on the theory that it was paid without consideration because the law implied a promise of repayment when no rule of public policy or good morals has been violated." See also: Merten v. Koester, 199 Wis. 79, 225 N.W. 750 (1929); Durkin v. Machesky, 177 Wis. 592, 188 N.W. 77 (1922); Harney v. Burhans, 91 Wis. 348, 64 N.W. 1031 (1895); in which interest was allowed on the earnest money in addition to the principal sum; Thomas v. Sowards, 25 Wis. 631 (1870); Brandeis v. Neustadt, 13 Wis. 142 (1860); Smith v. Finch, 8 Wis. 245 (1860); Blanchard v. McDougal, 6 Wis. 167 (1858). Cf. *Schwartz v. Syver*, 264 Wis. 526, 59 N.W. 2d 489 (1953). See also: MELLINKOFF, *THE LANGUAGE OF THE LAW* 43, §30 (1963) for a historical discussion of the term "ready, willing and able."

² *Schwartz v. Syver*, 264 Wis. 526, 59 N.W. 2d 489 (1953) citing 55 AM. JUR., *Vendor and Purchaser* 927, §535 (1946).

³ 19 Wis. 2d 591, 120 N.W. 2d 679 (1963) noted in 1964 WIS. L. REV. 167.

⁴ *Supra*, note 2.

contract." These expenses could be deducted from the vendee's earnest money which the vendor was holding unjustly.⁵ The basis of this holding was that "the vendee is somewhat at fault for repudiating the contract. . . ."⁶

The Court said that the *Schwartz* case had been decided upon a body of a case from states with Statute of Frauds which make the contracts merely "unenforceable."⁷

⁵ *Steusser v. Ebel*, 19 Wis. 2d 591, 598, 120 N.W. 2d 679 (1963).

⁶ Note, 1964 Wis. L. Rev. 167, 170.

⁷ This type statute is known as the English Statute of Frauds. For an interesting history of this type statute and the Statute of Frauds in general, see 2 CORBIN, CONTRACTS 2-14, §275 (1950). In 49 AM. JUR., *Statute of Frauds* 870, §564 (1943), footnote 4, a compilation of cases construing cases not complying with the statute of frauds requirements may be found.

As to what are "void," "voidable," and "unenforceable" contracts, see I CORBIN, CONTRACTS 12-18, §6-8 (1950).

The "unenforceable" or "no action shall be brought" statutes are (listed in alphabetical order by state with historical commentary when necessary):

ALASKA: ALASKA STAT. §09.25.010(b) (1962); ARIZONA: ARIZ. REV. STAT. ANN. §44-101 (1956), generally, but with regard to land specifically, it is an "invalid" type statute with an "unenforceable" interpretation, see: *infra*, footnote 12; ARKANSAS: ARK. STAT. ANN. §38-101 (1962 reprinted ed.); CONNECTICUT: CONN. GEN. STAT. REV. §52-550 (1958); DELAWARE: DEL. CODE ANN. tit. 6, §2714 (1953); DISTRICT OF COLUMBIA: D.C. CODE ANN. §12-302 (1961); FLORIDA: FLA. STAT. ANN. §725.01 (1944); HAWAII: HAWAII REV. LAWS §190 - 1D (1955); ILLINOIS: ILL. REV. STAT. ch. 59, §2 (1962); INDIANA: IND. ANN. STAT. §33-101(4) (1949); KANSAS: KAN. GEN. STAT. ANN. §33-106 (1949); KENTUCKY: KY. REV. STAT. §371.010(6) (1962). In addition to the usual requisite provisions, this section provides further: "The consideration need not be expressed in the writing, but it may be proved when necessary or disproved by parol or other evidence."

MAINE: ME. REV. STAT. ANN. ch. 119, §1(4). In addition to the usual requisite provisions, this section provides further: ". . . [C]onsideration need not be expressed therein." See: *Haskell v. Tuksbury*, 92 Me. 551, 43 Atl. 500 (1899); *Williams v. Robinson*, 73 Me. 186 (1882); *Levy v. Merrill*, 4 Me. 180 (1826).

MARYLAND: MD. ANN. CODE art. 36, §35 (1957). The Maryland Statute of Frauds has a most interesting history. It was incorporated by adoption into this jurisdiction's constitution as part of the existing English common law. The MARYLAND CONST. of 1867 in article 5 provides (as amended): "That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.

The historical concepts behind this statute's adoption and development have been furthered by case law. See: *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459 (1900); *Webb v. Baltimore & Eastern Shore R. Co.*, 77 Md. 92, 26 Atl. 113 (1893); *Sentman v. Gamble*, 69 Md. 293, 13 Atl. 58 (1888); *Rentch v. Long*, 27 Md. 188 (1867); *Colvin v. Williams*, 3 H. & J. 38 (Md. 1810); *Newman v. Morris*, 4 H. & McH. 421 (Md. 1799).

Further references to this fact are found in: 49 AM. JUR., *Statute of Frauds* 364-65, §2 (1943); and a general history concerning the adoption of

certain British statutes directly into American state law is found in: *Annottation*, 22 L.R.A. 508 (1894).

In addition to the usual requisite provisions, this statute provides further: ". . . It shall not be necessary to show that the consideration for such a promise is in writing."

MASSACHUSETTS: MASS. GEN. LAWS ANN. ch. 259, §1(4) (1956). In addition to this statute, MASS. GEN. LAWS ANN. ch. 259, §2 (1956) provides: "The consideration of such promise, contract or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence."

This section has been interpreted in: *United States v. Farrington*, 172 F. Supp. 797 (D. Mass. 1959); *Fichera v. City of Lawrence*, 312 Mass. 287, 44 N.E. 2d 779 (1942); *Packard v. Richardson*, 17 Tyng 122 (Mass. 1821).

MISSISSIPPI: MISS. CODE ANN. §264(c) (1957); **MISSOURI:** MO. ANN. STAT. §432.010 (1952); **NEW HAMPSHIRE:** N.H. REV. STAT. ANN. §506: 1 (1955). This last state has specifically held, in contrast to certain others, that a memorandum must express consideration. See: *Phelps v. Stillings*, 60 N.H. 505 (1891); *Underwood v. Campbell*, 14 N.H. 393 (1843). **NEW JERSEY:** N.J. REV. STAT. §25:1-5(d) (1940).

NEW MEXICO: N.M. STAT. ANN. §21-3-3 (1953). As such, this jurisdiction has no Statute of Frauds. The present New Mexico statute was created by virtue of "An Act To Provide Where Civil Actions May Be Brought." See: N.M. TERR. LAWS 1875-76, Ch. 2, §2, p. 23, 22nd Sess. January 7, 1876. This statute provides: "In all the courts in this state the common law as recognized in the United States of America, shall be the rule and practice of decision."

The state courts held this statute meant that the English Statute of Frauds, 29 Car. II, ch. 3 (1676) was the recognized common law and incorporated it by reference into New Mexico's law.

For an interesting case law history development, demonstrating the "unenforceable" interpretation, see: *Maljamar Oil & Gas Corp. v. Malco Refineries*, 155 F. 2d 673 (10th Cir. 1946) which does not involve a realty transaction; *Kennedy v. Justus*, 64 N.M. 131, 325 P. 2d 716 (1958); 181 Ades v. Supreme Lodge Order of Ahepa, 51 N.M. 164, 181 P. 2d 161 (1947); *McNeill v. Kass*, 31 N.M. 110, 241 P. 2d 1026 (1925); *Browning v. Browning*, 3 N.M. 371, 9 P. 677 (1886). See also: 3 WILLISTON, CONTRACTS 697, §526, footnote 1 (1960). Compare with: *Coseboom v. Marshall's Trust*, 64 N.M. 170, 326 P. 2d 368 (1958).

OHIO: OHIO REV. CODE ANN. §1335.05 (Page 1962).

PENNSYLVANIA: PA. STAT. tit. 33 §1 (1949). The latter is one of the original colonial statutes. It dates to March 21, 1772. Upon reading it, one can immediately see that its structure and certain of its terminology is much removed from our modern day.

RHODE ISLAND: R.I. GEN. LAWS ANN. §9-1-4(1) (1957). An interesting history of this jurisdiction's statute is given in: *Taft v. Dimond*, 16 R.I. 584, 18 Atl. 183 (1889).

SOUTH CAROLINA: S.C. CODE ANN. §11-104(4) (1962).

SOUTH DAKOTA: S.D. CODE §10.0605(3) (1939). Prior to this statute, an "invalid" type statute was in force in this jurisdiction: S.D. CODE §856 (1919). Although using the term "invalid" within the statute, contracts not complying with it were deemed "void" *ab initio*. See: *Reedy v. Ebsen*, 60 S.D. 1, 256 N.W. 372 (1932); *Adron v. Evans*, 52 S.D. 292, 217 N.W. 397 (1927); *Schomiger v. Logan*, 43 S.D. 228, 178 N.W. 929 (1921); *Hulsether v. Peters*, 40 S.D. 423, 167 N.W. 497 (1918); *Schumway v. Kitzman*, 28 S.D. 577, 134 N.W. 325 (1912); *Jones v. Pettigrew*, 25 S.D. 432, 127 N.W. 538 (1910); *Dobbs v. Atlas Elevator Co.*, 25 S.D. 177, 126 N.W. 250 (1910).

Furthermore, a search of Shephard's Citations has not revealed any cases subsequent to *Reedy v. Ebsen*, *supra*, the leading case in this jurisdiction interpreting the statute of frauds as meaning non-complying contracts to be "void," in which this case has been cited on that proposition specifically.

TENNESSEE: TENN. CODE ANN. §23-201(4) (1955); **TEXAS:** TEX. REV. CIV. STAT. art. 3995, §4 (1945); **VERMONT:** VT. STAT. ANN. tit. 12, §181(5) (1959); **VIRGINIA:** VA. CODE ANN. §11-2(6) (1964); **WEST VIRGINIA:** W.VA. CODE ANN. §3523 (1961). An interesting history of the West Virginia Statute is provided in: *Ross v. Midelburg*, 129 W.Va. 851, 42 S.E. 2d 185 (1947).

Wisconsin,⁸ and other states have a Statute of Frauds requiring that contracts which fail to comply with statute are entirely "void" *ab initio*.⁹

⁸ WIS. STAT. §240.08 (1963) provides: "Contract for lease or sale in writing: Every contract for the leasing for a longer period than one year or the sale of any lands or any interest in lands shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made or by his lawfully authorized agent."

⁹ As to the effect of the word "void" generally, see: 3 WILLISTON, CONTRACTS, 755, §531 (1960).

This type of statute is known as the American Statute of Frauds. An interesting historical development of this "void" type statute in New York and its transition from the English type statute is given in 300 West End Ave. Corp. v. Warner, 250 N.Y. 221, 165 N.E. 271 (1929).

Although New York does not have a "void" type statute the courts have interpreted it to give it the same effect as an "unenforceable" type statute. "The New York rule is less favorable to the defaulting vendee. In effect, the rule gives the vendee a choice either to perform the contract or lose his down payments. By imposing this choice the court exerts pressure upon the vendee to perform the contract, even though the statute makes the contract void. This interpretation, in effect, does not allow the vendee to escape performance without penalty of losing his down payments, should he invoke the technicalities of the statute of frauds. Therefore, the New York result encourages more reflective negotiations and stable relationships between the vendor and vendee." Note: 1964 Wis. L. Rev. 167, 170. There are a number of New York cases bearing out this interpretation: Gallo v. Brengard Const. Co., 1 App. Div. 2d 840, 148 N.Y.S. 2d 782 (1956); Schutzbank v. Schaeffer, 194 N.Y.S. 458 (1922); Rouse v. Halper, 97 Misc. 494 (1917); Graham v. Healy, 154 App. Div. 76, 138 N.Y.S. 611 (1912).

Approving this New York interpretation and the "unenforceable" type statute generally while remaining highly critical of the importance and effect placed upon the word "void" and particularly in the state of Wisconsin is: Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L. Q. 355, pp. 358-60 (1952). "The law of the United States ought in all jurisdictions be what it was believed to have been in the seventeenth and eighteenth centuries. Effect should be given to the defendant's admission of the making of an oral contract. The statute should not be recognized as a defense except where the defendant can and does deny the contracting." *Id.* at 381.

Another noted law writer approves the retention of down-payments where the vendee defaults. In 2 CORBIN, CONTRACTS 39, §284 (1950), the author states: "The party to be charged has a legal power of validation. This power he gets from the oral agreement. Unless he uses it (or, in some cases, until certain acts of past performance by the other party), the most important remedies for the direct enforcement of the contract are not available against him. That is all that is here meant by 'void' or 'invalid.' Such legal operations as the oral contract already has, he has no powers to avoid. The contract is not 'voidable' by him; but it might properly be described as validated by him."

As to the general meaning of the word "void" in Wisconsin and its general history in this state, see: *Supra*, footnote 1; Page, *The Effect of Failure to Comply with the Wisconsin Statute of Frauds*, 1928 WIS. L. REV. 323.

The "shall be void" statutes are (listed in alphabetical order by state with historical commentary when necessary):

ALABAMA: ALA. CODE tit. 20, §3(5) (1958); COLORADO: COLO. REV. STAT. ANN. §59-1-8 (1954).

MICHIGAN: MICH. STAT. ANN. §26.908 (1953). This statute is, in form, an historical combination between the English Statute of Frauds, 29 Chas. II, c. 3 (1676) and the Elizabethan statute preventing conveyances to fraud creditors, 13 Eliz., c. 5 (1571) and 29 Eliz., c. 5 (1587), which statutes were repealed by the Law of Property Act, 1925 (15 Geo. 5, c. 20). In form, it reads closely to WIS. STAT. §240.08 (1963) with the exception of its extensive proviso which states: ". . . *Provided*, That whenever any lands or interest in lands shall be sold at public auction and the auctioneer or clerk of the auction at the time of the sale enters in a sale book or memorandum specifying the description and price of the land sold and the name of the purchaser, such memorandum together with the auction bills, catalog or written or

In addition, other groups of states hold contracts not complying with their statute are: "not binding,"¹⁰ "invalid,"¹¹ "invalid and unenforceable,"¹² "invalid and void,"¹³ "void but to be interpreted as unenforceable,"¹⁴ "contract to be used for evidentiary purposes only,"¹⁵ evidentiary and void,¹⁶ and "evidentiary and unenforceable."¹⁷

printed notice of sale containing the name of the person on whose account the sale is made and the terms of sale, shall be deemed a memorandum of the contract of sale within the meaning of this section."

MINNESOTA: MINN. STAT. §513.05 (1947); NEBRASKA: NEB. REV. STAT. §36-103 (1960); NEVADA: NEV. REV. STAT. §111.210 (1957); OREGON: ORE. REV. STAT. §41.580(5) (1963); UTAH: UTAH CODE ANN. §25-5-3 (1953); VIRGIN ISLANDS: VIR. IS. CODE ANN. tit. 28, §244 (1962); WASHINGTON: WASH. REV. CODE ANN. §19.36.010(5) (1961); WISCONSIN: WIS. STAT. §240.08 (1963); WYOMING: WYO. STAT. ANN. §16-1(5) (1957).

¹⁰ The "not binding" statute is in GEORGIA: GA. CODE ANN. [20-401(4) (1958),

¹¹ The "invalid" statute interpreting non-complying contracts as strictly invalid is in IDAHO: IDA. CODE ANN. §9-505(5) (1948).

¹² The "invalid and unenforceable" type statutes are: ARIZONA: ARIZ. REV. STAT. §44-101(6) (1956). CALIFORNIA: CAL. CIV. CODE §1624(4) (1954). In 22 CAL. CIV. CODE (West 1955) appears this editorial comment: "Section 1624 of the Civil Code and section 1973 of The Code of Civil Procedure contain identical provisions, except that section 1973, in the introductory paragraph, contains the additional provision that 'Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents.'

"Generally, both sections have been cited by the courts in construing and applying the Statute of Frauds, but in a substantial number of cases the courts have cited only one or the other."

CANAL ZONE: C. Z. CODE tit. 4, §1146(4) (1963). This statute is based on the California Civil Statute, §1624, *supra*. Except for the second sentence in the introduction concerning evidence, they are identical. Title 4 of the CANAL ZONE CODE, §3257 (1963) is for all practical purposes identical to §1973 of the California Civil Statute, *supra*. See also: C. Z. CODE tit. 4, §3255 (1963) based on: CALIF. CIV. PROC. CODE, §1971 (1954) and C. Z. CODE tit. 4, §3256 based on: CALIF. CIV. PROC. CODE §1972 (1954).

MONTANA: MONT. REV. CODE ANN. §13-606(4) (1963); OKLAHOMA: OKLA. STAT. ANN. tit. 15, §136(5) (1937).

¹³ The "invalid and void" type statute is: NORTH DAKOTA: N. D. CENT. CODE §9-06-04(4) (1959). It is interesting to note that this statute was copied from §1624 of the California statutes, *supra*, footnote 12. Nevertheless, the results among the two states in interpreting the same statute are opposite.

¹⁴ The "void but to be interpreted as unenforceable" statutes are: NEW YORK: N. Y. GEN. OBLIGATIONS LAW §5-703(2) (1964). See also: *Supra*, footnote 9; Annotation, 169 A.L.R. 188 (1947) and 49 AM. JUR., Statute of Frauds, §564 (1946) which all show New York among the "unenforceable" type jurisdictions due to its interpretation of its "void" type statute.

NORTH CAROLINA: N. C. GEN. STAT. §22-2 (1953). This particular statute has several interesting features.

It is interesting to note this is the only statute of frauds which makes any specific references to mineral deposits on mining activities. The statute in full provides: "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands for three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other by him thereto lawfully authorized." (Emphasis supplied).

Further mention should be made that this is one of the only statutes which provides for a written lease in which the period involved is three years rather than one year as in most other statutes.

While the statute specifically mentions the term "shall be void," North

Carolina is the only state which historically traces its "void" statutes back to the English Statute of Frauds, 29 Car. II, ch. 3, §§1, 2, 3 (1676) as its source. Thus, the interpretation given to "void" in this state is, in reality, "unenforceable," and quite similar to the method in which New York operates under its statute. *Supra*, same footnote.

In *Herring v. Merchandise, Inc.* 249 N.C. 221, 106 S.E. 2d 197 (1958), a case involving a realty transaction, the Supreme Court of North Carolina said at 224-25: "The English statute of frauds, 29 Car. 2, declares void parol assignments or surrenders of leases, but the English statute was not adopted by us as a part of our common law. *Foy v. Foy*, 3. N.C. 131.

"Our statute, G.S. 22-2, adopted in 1819, declares void when not in writing all leases and contracts for leasing lands for a period exceeding three years. It makes no declaration with respect to the assignment or surrender of leases when an unexpired term exceeds three years. Does the statute apply to parol contracts to surrender such leasehold estates and if so, may the statute be avoided by estoppel or a consummated surrender? The statute has not been given a literal or narrow construction. Our decisions have consistently given that interpretation which would accomplish the purpose declared in the English statute. Even though the statute declares leases and conveyances void, that word has been regularly interpreted to mean voidable. *Walker v. Walker*, 231 N.C. 54, 55 S.E. 2d 801; *Real Estate Co. v. Fowler*, 191 N.C. 616, 132 S.E. 575; *Herndon v. R.R.*, 161 N.C. 650, 77 S.E. 683; *Wilkie v. Womble*, 90 N.C. 254. A party who claims protection from the statute must take affirmative action. He cannot avail himself of its provisions by demurrer. *Weant v. McCannless*, 235 N.C. 384, 70 S.E. 2d 196.

"The statute acts to prevent enforcement of executory contracts, not contracts which have been consummated. *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785; *Herndon v. R.R.*, *supra*; *Hall v. Fisher*, 126 N.C. 205; *Choat v. Wright*, 13 N.C. 289."

Supplementing this statute is N.C. GEN. STAT. §47-18 (1953) which provides that in order for a written surrender or assignment of a lease, contract to convey, or conveyance, to be effective, under the Statute of Frauds herein, this statute making no reference to the Statute of Frauds, the instrument must be recorded in the county of the *situs* of the realty. It is the intent of this statute to protect the grantee, lessee, or vendee against creditors or subsequent purchasers. Should recodation not take place, the instrument concerning the realty "shall [not] be valid to pass any property."

In essence, this statute is the same as Wis. STAT. §235.49 (1963) except that North Carolina also protects subsequent creditors as well as purchasers. Thus, this state has, in effect, a "race" type recording act. This operates in such a manner to make the purchaser who races to the recorder's office and records first, the legal title holder.

¹⁵ The state in which the statute is "used for evidentiary purposes only" is: IOWA: IOWA CODE §622.32(3) (1950). This statute provides: "Except when otherwise specifically provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or his authorized agent: * * * 3. Those for the creation or transfer of any interests in lands, except leases for a term not exceeding one year."

Thus, this statute is a procedural statute applied solely to the type of evidence to be presented; and goes to the burden of proof the plaintiff must sustain to show a contract does exist. It does render contracts void, invalid, or unenforceable in and of itself as a statute *per se*.

¹⁶ The state in which the statute is "evidentiary" but interprets non complying contracts as "void" is: LOUISIANA: LA. CIV. CODE ANN., art. 2275 (West 195x).

Louisiana has no statute of frauds as such. These statutes relate only to testimonial proof by the contracting parties involved as to the burden to be placed upon them as well as the admissibility of parol evidence with special regard to written or oral agreements.

Art. 2275 relating to "Verbal sale of immovables" provides: "Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confessed it when interrogated on oath, provided actual delivery has been made of the immovable property thus sold."

As to what constitutes a sufficient writing to pass the requirements of this statute, see: Note, 21 TUL. L. REV. 706 (1947) as well as the Note, 23 LA.

L. Rev. 561 (1963) discussing problems of descriptions of land in Louisiana realty contracts. Additional material relating to the effect to be given to the verbal transfer of realty in Louisiana is found in: Note, 21 TUL. L. REV. 286 (1946).

In addition to oath swearing by the parties to a verbal realty contract, the statute requires possession of the realty by the vendee in order for it to be effective. See: *Carona v. McCallum*, 146 So. 2d 697 (La. App. 1962); *Perry v. Perry*, 122 So. 2d 829 (La. App. 1960).

In addition, Art. 2275 has built into it a further legal and moral obligation upon the contracting parties. They must confess to the existence of a contract "when interrogated on oath" and "actual delivery" must be made of "the immovable property thus sold." Failure to tell the truth concerning the contract when under oath will subject these parties to prosecution, generally, under the statute relating to perjury and false-swearing. See: LA. REV. STAT. ANN. §§14:123; 14:125; 14:126 (West 195x).

For further information concerning the history and operational effect of this statute, see: *infra*, footnote 67.

Art. 2276 relating to "parol evidence relative to written instruments" provides: "Neither shall parol evidence be admitted against or beyond what is contained in the sets, nor on what may have been said before, or at the time of making them, or since."

The historical development and general commentary upon this statute is found in: 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, Pt. 1, 645-48, Nos. 1135-40 (11th ed. trans., 1939).

Art. 2278 relating to cases where parol evidence is not admissible provides: "... Parol evidence shall not be received: * * * 2. To prove any acknowledgment or promise of a party deceased to pay any debt or liability, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed."

This section has been included within this footnote only insofar as it concerns the phrase "of a party deceased." A testator could, by will, leave a parcel of realty to pay an existing debt or liability. Thus, this statute does have a limited bearing upon transfers of title to land.

To avoid confusion, the term "prescription" refers to a statute of limitations or time "prescribed" for a cause of action. See: Comment, 14 TUL. L. REV. 430 (1940) and Note, 19 TUL. L. REV. 151 (1944).

Art. 2462 relating to "specific performance and promises to sell" provides: "A promise to sell, where there exists a reciprocal consent of both parties as to the thing, the price and terms, and which if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same. One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise cannot be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party."

For a good general commentary on this statute, see: 2 PLANIOL, *op cit.*, 788-94, Nos. 1398-1410, *supra*, this footnote.

Art. 2480 relating to "Retention of possession by seller, presumption of simulation" provides: "In all cases where the thing sold remains in the possession of the seller because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the realty of the sale."

In *Heintzen v. Binninger*, 79 Cal. 5, 21 Pac. 377 (1889), a case involving usufructuary rights, the Supreme Court of California defining that term said at 6: "A usufructuary right is the right of using and enjoying the profits of a thing belonging to another, without impairing the substance." See also: 1 BALLANTINE, LAW DICTIONARY 1323 (2 ed., 1948) wherein the following commentary is made upon this term: "This amounts to nothing more than the right to use the property of another."

In regard as to what constitutes unlawful simulation, see: *Chesebrough Mfg. Co. v. Old Gold Chemical Co.*, 70 F. 2d 383 (6th Cir. 1934) in which the United States Court of Appeals for the 6th Circuit said at 384: "If the general impression which it makes when seen alone is such as is likely to

lead the ordinary purchaser to believe it to be the original article, there is an unlawful simulation. *McLean v. Fleming*, 96 U.S. 245, 255, 24 L. Ed. 828; *Paris Medicine Co. v. W. H. Hill Co.*, 102 F. 148, 150 (C.C.A. 6). See also: Rives, *Historical Review of the Doctrine of Simulation in the Civil Law*, 10 *TUL. L. REV.* 188 (1936) considered one of the best articles on the subject of simulation in the French Civil Law; and *Jones v. Detrich*, 186 So. 881 (La. App. 1939) citing *Brown's Adm'r. v. Brown*, 30 La. Ann. 966 (1870). These cases held there is no simulation when an actual consideration has been paid. Cf. *Strongin v. International Acceptance Bank*, 70 F. 2d 248 (2d Cir. 1934).

Art. 2479 relating to "Immovables, method of making delivery" provides: "The law considers the tradition or delivery of immovables, as always accompanying the public act, which transfers the property. Every obstacle which seller afterwards interposes to prevent the taking of corporal possession by the buyer, is considered as a trespass."

An interesting commentary concerning what constitutes a proper delivery of immovables is found in: 2 *PLANIOL, op. cit.*, 815-16, Nos. 1449-50 inc., *supra*.

Art. 2440 concerning the methods of making a sale of immovables provides: "All sales of immovable property shall be made by authentic act or under private signature.

"Except as provided in article 2275, every verbal sale of immovables shall be null, as well as for third persons as for the contracting parties themselves and the testimonial proof of it shall not be admitted."

In 2 *PLANIOL, op. cit.*, 773, No. 1355, *supra*, the following commentary is made concerning this statute: ". . . [T]he sale can be made 'by authentic act or under private signature.' Instead of 'made' we should say 'established,' for this writing is not necessary for the validity of the contract; it serves only to prove it."

Art. 2234 relating to a definition of the term "authentic act" provides: "The authentic act, as relates to contracts, is that which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, aged at least fourteen years, or three witnesses if a party be blind. If a party does not know how to sign, the notary must cause him to affix his mark to the instrument.

"All proces verbal of sales of succession property, signed by the sheriff or other person making the same, by the purchaser and two witnesses, are authentic acts."

For additional information concerning this statute, see the commentaries in: 2 *PLANIOL, op. cit.*, 53-4, Nos. 80-83, *supra*.

Art. 2236 relating to an "Authentic act as full proof of agreement" provides: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery."

Art. 2238 relating to the "Effect of written provisions as between parties" provides: "An act, whether authentic or under private signature, is proof between the parties, even of what is there expressed only in enunciative terms, provided the enunciation have a direct reference to the disposition. "Enunciations foreign to the disposition, can serve only as a commencement of proof."

The terms "act," "disposition," "enunciation" are terms unique only to the French Civil Law and are not found in the statutes of other jurisdictions pertaining to contracts. The "act" is the act of contracting an article of a written contract. The "disposition" of the contract is its essential terms and the subject matter of the document or the object of the entire act. It is the reason the writing is being made.

Conversely, the "enunciations" are those parts of the writing which are only incidental . . . but not strictly vital . . . to it or the transaction. The enunciations "are only accidentally included. These are the prior facts or acts, which are referred to incidentally: these could be omitted or abbreviated without the writing losing any of its utility. These matters foreign to the object of the act are called 'simple enunciations'. . ." 2 *PLANIOL, op. cit.*, 58-9, No. 94, *supra*. See also: *id.*, No. 95.

Art. 2242 relating to "Acknowledged private acts" provides: "An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act."

In 8 *LA. CIV. CODE ANN.* 398-99 (West 195x) the following elucidating

editorial commentaries appear with regard to this statute: "R.S. 13:3719 . . . provides that acts under private signature acknowledged before diplomatic and consular officials or the United States or a commissioner for the state of Louisiana shall be accepted as prima facie valid.

"R.S. 35:452, 35:453 . . . provides that 'any commissioner for the state of Louisiana, for anyone of the states or territories of the United States' has full notarial powers and his acts have the effects of notarial acts."

* * *

"R.S. 35:512 . . . states that form of acknowledgement by a married woman is the same as for a femme sole.

"R.S. 35:513 . . . recognizes as valid those acknowledgments taken in other states or territories before such officers as are there authorized 'to take the proof and acknowledgment of deeds'."

"R.S. 35:555 . . . provides that duly certified acknowledgments and oaths before a commissioner, ambassador, etc. are equivalent to authentic acts."

Art. 2439 relating the definition of a sale provides: "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. "Three circumstances concur to the perfection of the contract, to wit: The thing sold, the price, and the consent."

A good general discussion of contracts affecting immovable property and a history of the law and practices involved is found in: Sarpy, *Form in Louisiana Contracts Involving Rights in Property*, 14 TUL. L. REV. 16, 23 (1939).

See also: William v. Bowie Lumber Co., 214 La. 750, 38 So. 2d 729 (1949); and compare with result in: Blevins v. Manufacturers Record Publishing Co., 235 La. 708, 105 So. 2d 392 (1958).

¹⁷ The jurisdiction in which the statute is "evidentiary" in nature but interprets non-complying contracts as "unenforceable" is *PUERTO RICO*: P. R. LAWS ANN. tit. 31, §3453 (1955).

This statute is based on Spanish Civil law. In many ways it operates similar to the Louisiana statutes, *supra*, footnote 16.

P. R. LAWS ANN. tit. 31, §3741 (1955) relating to "Contract of purchase and sale defined" provides: "By a contract or purchase and sale one of the contracting parties binds himself to deliver a specified thing and the other to pay a certain price therefor in money or in something representing the same."

P. R. LAWS ANN. tit. 31, §3371 (1955) provides: "A contract exists from the moment one or more persons consent to bind themselves, with regard to another or others, to give something or to render some service."

P. R. LAWS ANN. tit. 31, §3746 (1955) provides: "The sale shall be perfected between vendor and vendee and shall be binding on both of them, if they have agreed upon the thing which is the object of the contract and upon the price, even when neither has been delivered."

It is to be noted that all persons are qualified to execute contracts involving property, P. R. LAWS ANN. tit. 31, §3771 (1955), except that married persons cannot sell property to their spouses unless the property has been judicially separated from one of the marriage partners, P. R. LAWS ANN. tit. 31, §3772 (1955), in accordance with P. R. LAWS ANN. tit. 31, §3712 (1955).

In addition, these persons and their agents, are forbidden to purchase certain property at public auction or judicial sale as provided for in P. R. LAWS ANN. tit. 31, §3773 (1955):

- (1) Guardians may not purchase property of their wards.
- (2) General agents may not purchase property over which they have powers of sale or administration.
- (3) Executors may not purchase property of estates or trusts they administer.
- (4) Public officials may not purchase property of the state or municipalities or public buildings or works, over which they have administrative powers. This sub-section also applies to judges and experts, who are connected, in any manner, with the sale.
- (5) Judges, public prosecutors, clerks of courts, attorneys and all related judicial officials and peace officers may not purchase any property or rights therein in which they are involved in the litigation thereto.

This subsection specifically excepts "the cases in which hereditary actions among co-heirs are involved, or assignments in payment of debts, or security for the goods they may possess."

Indeed, it has been recognized that:

This right of recovery may depend, however, on whether the statute in a given jurisdiction which does measure up to its requirements renders it merely unenforceable or illegal and void.¹⁸

Thus, the problems posed by the *Steusser* case are:

(1) Has the Wisconsin Supreme Court in reality introduced the doctrine of equitable recoupment (as contrasted to legal set-off) under the guise of "recovery" of earnest money; and, if so, for what items is the vendor entitled to retain all or part of the earnest money?

(2) What are the ethical considerations behind a policy which allows recoupments to the vendor so as, at least in some instances, to make it foolhardy for the vendee not to consummate the sale?

(3) What is the policy of other jurisdictions with regard to the various types of Statutes of Fraud so far as concerns recoupment by the vendor when the vendee demands his money back? Will a state with a "void" type Statute, such as Wisconsin, more readily apply the recoupment doctrine than the theory of total recovery by the vendee affirmed just a few years ago in *Arjay Investment Co. v. Kohlmetz*?¹⁹

(4) Is there a need for the elimination of the various types of Statutes of Fraud and the creation of a nation-wide uniform statute with regard to realty transactions?

P. R. LAWS ANN. tit. 31, §3451 (1955) provides: "Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist."

P. R. LAWS ANN. tit. 31, §3271 (1955) provides: "Public instruments are those authenticated by a notary or competent public official, with the formalities required."

P. R. LAWS ANN. tit. 31, §3272 (1955) provides: "Instruments in which a notary public takes part shall be governed by the notarial Law."

P. R. LAWS ANN. tit. 31, §3453 (1955) relating to contracts which must appear as a public instrument and must be in writing provides: "The following must appear in a public instrument: 1. Acts and contracts the object of which is the creation, conveyance, modification or extinction of rights on real property."

P. R. LAWS ANN. tit. 4 §1001 (1957) provides that *only* notaries may certify contracts. However, P. R. LAWS ANN. tit. 4, §1020 (1957) provides that in the following instances a public instrument "shall be null and void:"

(1) Contracts in which the authorizing notary has actively intervened or have a clause running his favor. (2) Contracts in which the witnesses thereto are servants, clerks or relatives of the notary or the contracting parties' relatives. (3) Contracts in which the proper marks, seals or signatures of the parties, witnesses or notary do not appear.

Further, "[p]ublic instruments in which the notary fails to certify as to his knowledge of the parties, or to supply this deficiency with witnesses of identification, shall be voidable [Emphasis supplied], unless through a public deed or notarial instrument the same notary who authorized the defective deed attests to his knowledge of said parties at the time of executing same."

In addition, failure to pay the proper amount of notarial fees will result in "immediate cancellation" of the contract. Cf. generally these statutes with those of Louisiana. *Supra*, footnote 16.

¹⁸ Annotation, 169 A.L.R. 187-88 (1947). See also, generally, on the entire subject of various types of statutes of fraud: Comment, *Statute of Frauds: Evaluation of Underlying Theories*, 14 CORNELL L. Q. 102 (1928).

¹⁹ 9 Wis. 2d 535, 101 N.W. 2d 700 (1960).

(5) What solutions are available to avoid situations presented in the cases of *Steusser*, *Schwartz*, and *Arjay Investment*?

I. IS THIS RECOVERY OR RECOUPMENT?

Research has revealed only one Wisconsin case dealing with recoupment. Although it does not deal with the doctrine in depth, the court does recognize the difference existing between "recoupment," "counterclaim," and "set-off."²⁰

'Recoupment is the act of rebating or recouping a part of a claim upon which one is sued by means of a legal or equitable right resulting from a counterclaim arising out of the same transaction,' 57 C.J. *Setoff and Recoupment*, §1. It differs from a set-off in that 'A setoff is a counter demand which a defendant holds against a plaintiff arising out of a transaction extrinsic cause of action.' Id §2. Setoff is of statutory origin and depends for application generally upon statutory provisions. Id §3 of ff.²¹

Recoupment is a term derived from the French word *recouper*: "to cut again" or "to cut back."²² It is an idea which has a similar parallel in civil law wherein the defendant could show his claim against a plaintiff, providing it was incidental to or arose out of plaintiff's cause of action.²³

Recoupment was a defense recognized at common law²⁴ and crept from the courts of chancery into the practice of law to prevent circuitous actions.²⁵ It presented to the courts an equitable reason why amounts payable to or demanded by plaintiff should be reduced in defendant's favor.²⁶

Although recoupment implies that the plaintiff has a cause of action, it asserts that the defendant has a counter cause of action therein which can be pleaded as a counterclaim for damages or expenses incurred upon reliance to the plaintiff's contractual promises.²⁷ Recoupment is

²⁰ *Peterson v. Feyereisen*, 203 Wis. 294, 298, 234 N.W. 496, 73 A.L.R. 571 (1931).

²¹ *Howard Johnson, Inc. of Florida v. Tucker*, 157 F. 2d 959, 961 (5th Cir. 1946). This case involved the rights of a sublease—an interest in land—in a bankrupt's estate. See also: 3 STORY, EQUITY JURISPRUDENCE, ch. 41, 468 *et. seq.* (14 ed. 1918), and particularly §1878 therein; WATERMAN, SET-OFF, RECOUPMENT AND COUNTERCLAIM, ch. 10, 476 *et. seq.* (2 ed. 1872), and particularly §§568-589 therein. However, there the author discusses only the problems of actual deceit and misrepresentations. He does not discuss the problem of non-compliance with the statute of frauds. 55 AM. JUR., *Vendor and Purchaser* 915, §521, footnote 8 (1946) citing *Refeld v. Woodfolk*, 63 U.S. (2d How.) 318 (1859); 80 C.J.S., *Setoff and Counterclaim* 5, §2 (1953).

²² *Peuser v. Marsh*, 167 App. Div. 604, 153, N.Y.S. 381 (1915); *Davenport v. Hubbard*, 46 Vt. 200 (1873); *The Wellesville v. Geisse*, 3 Ohio St. 333 (1854). Cf. MELLINKOFF, *op. cit.*, 244-45, §105 for an interesting history of the term "setoff."

²³ *McKnight v. Devlin*, 52 N.Y. 399 (1873).

²⁴ *Fricke v. Fuetterer Battery & Supply Co.*, 220 Mo. App. 623, 288 S.W. 1000 (1922).

²⁵ *Williams v. Neely*, 134 Fed. 1, 4 (8th Cir. 1904). This is today, still one of the leading cases on the characteristics of recoupment.

²⁶ *Warner v. Sullivan*, 249 Mich. 469, 471, 229 N.W. 484 (1930).

²⁷ *Marianna Lime Prod. Co. v. McKay*, 109 Fla. 275, 281, 147 So. 264 (1933).

not strictly limited to actions based on contract, but may also be had on actions arising out of tort.²⁸

The fundamental philosophy of all setoffs and recoupments is that they are offered in opposition by the defendant to some money demand asserted by the plaintiff.²⁹ Recoupment by way of defense is the right to cut down the original demand of the plaintiff because that party has violated a duty imposed by law upon him in performance of terms of some contract or transaction upon which plaintiff's cause of action is based.³⁰ The use of recoupment in a defense can be applied to many types of causes of action and has been so done.³¹ Such a defense is not barred by the statute of limitations as long as the main action itself is brought within the time allowed by law.³²

This development shows that it may be safely assumed that the Wisconsin Supreme Court has in the *Steusser* decision³³ actually adopted the doctrine of Equitable Recoupment. As to what claims may be laid by "way of defense" in order to result in a recoupment to the vendor, it is necessary to look behind the actual written opinion. The appellate brief prepared on behalf of the vendor reveals that he sought recoupment of the following items³⁴ in various amounts: Rent,³⁵ use of truck,

For a general discussion of permitting recovery based on a reliance interest of contracts within the Statute of Frauds, see: Fuller & Perdue, *The Reliance Interest In Contract Damages*, 46 YALE L. J. 373, 386 *et. seq.* (1937), while an excellent discussion of restitutionary allowances and processes in connection with the statute may be found in: Jeanblanc, *Restitution Under The Statute of Frauds: What Constitutes a Legal Benefit*, 26 IND. L. J. 1 (1950); Corbin, *The Right of a Defaulting Vendee To The Restitution of Installments Paid*, 40 YALE L. J. 1013 (1931).

²⁸ Mack v. Hugger Bros. Construction Co., 153 Tenn. 260, 283 S.W. 448, 46 A.L.R. 389 (1926). This case involves a tort claim arising out of a master-servant relationship. See also: Annotation, 47 A.L.R. 1095 (1926) concerning actions for tortious assault and battery; Annotations, 6 A.L.R. 388, 393 (1920) concerning civil liability growing out of mutual combat.

²⁹ Mills Novelty Co. v. Trauseau, 196 Atl. 187 (Del. Sup. 1937).

³⁰ Baylor v. Bartolussi, 194 A. 2d 653, 656 (D.C. App. 1963).

³¹ Annotation, 12 A.L.R. 2d 816 (1950) (taxes) supplementing 130 A.L.R. 838, 845 (1940); Annotation, 140 A.L.R. 816 (1942) (common carriers bills of lading); Annotation, 116 A.L.R. 1228, 1237 (1938) (lessee's remedy for breach of lease) supplementing 28 A.L.R. 1448, 1484 (1924); Annotation, 109 A.L.R. 1354, 1362 (1937) (governmental collection of taxes); Annotation, 106 A.L.R. 1241 (1936) (damages against the United States or a sovereign state); Annotation, 85 A.L.R. 644, 655 (1933) (wrongful seizure of real property); Annotation, 51 A.L.R. 1213 (1927) (damages for delay in completing public improvements); Annotation, 46 A.L.R. 393, 400 (1927) (faulty workmanship by contractors). This is by far one of the best collections on the subject of types of claims subject to recoupment. Annotation, 43 A.L.R. 648 (1926) (automobile warranty) supplementing 34 A.L.R. 535 (1925).

³² U.S. on the use of Grenville Equipment Co. v. U.S. Casualty Co., 218 F. Supp. 653, 656, 657 (D.Del. 1963); Peterson v. Feyereisen, *supra*, footnote 20; Annotation, 1 A.L.R. 2d 630, 660 *et seq.* (1948); Annotation, 73 A.L.R. 574, 580 (1931); Annotation, 16 A.L.R. 326, 338 (1922). Cf., collaterally related: Pennsylvania R.R. Co. v. Miller, 124 F. 2d 160 (1941); Annotation, 79 A.L.R. 2d 1309 (1961).

³³ 19 Wis. 2d 591, 120 N.W. 2d 679 (1963).

³⁴ Brief and Appendix for Appellant, p. 10, *Steusser v. Ebel*, *supra*, footnote 33. For an additional, more definitive breakdown see: *Id.*, p. 5.

³⁵ Cf. Boone v. Coe, 153 Ky. 233, 154 S.W. 900 (1913).

labor, electrician, miscellaneous help, legal expenses, redecorating, debris removal, electric bill, heater, loss of gross business sales assuming 1/3 to be profit.³⁶ The Wisconsin Supreme Court allowed him these items for a total of \$1000.00.³⁷ The earnest money down-payment was \$3000.00.³⁸ This is 1/5 of the total \$15,000 price.³⁹ Thus, the defendant vendor was allowed to recoup 33 1/3% of the down-payment or 6 2/3% of the total sales price. These liquidated damages were in the form of "expenses incurred in reliance"⁴⁰ on the contract "for the sale of any lands or any interest in lands."⁴¹

II. WHAT ARE THE ETHICAL FACTORS INVOLVED?

It is very doubtful whether the vendor may recover in recoupment an amount in excess of the vendee's money down-payment.⁴² However, a small minority does so hold.⁴³ Wisconsin Supreme Court would probably not follow this small minority of "excessive allowance."

The overriding ethical considerations on the vendor and the vendee must be discussed. It is the duty of the vendee to fulfill his contracts. He should not be allowed to find escape hatches by virtue of the fact that technical formalities of the Statutes of Fraud were not meticulously followed.⁴⁴ A vendee and a vendor should at all times act in good faith to bring about the consummation of their agreements. In the *Steusser* case, for example, the act of non-compliance was that the writing failed to give an adequate description.⁴⁵ Nevertheless, it is evident that the vendee wanted to break the binder agreement and then sought legal counsel to help him do so.⁴⁶

³⁶ Vendor also prayed for loss of bargain and sale to the land but this the Court held "is of no importance under the void contract." *Steusser v. Ebel*, 19 Wis. 2d 591, 598, 120 N.W. 2d 679 (1963).

³⁷ *Id.* In all probability, if the vendee would seek interest on the residue, if any, it would have to be paid. *Harney v. Burhans*, 91 Wis. 348, 64 N.W. 1031 (1895). But vendor would have right to deduct for realty brokerage fees. *Infra*, footnote 57.

³⁸ Brief and Appendix for Appellants, p. 9, *id.*

³⁹ *Id.*, p. 1.

⁴⁰ *Steusser v. Ebel*, 19 Wis. 2d 591, 598, 120 N.W. 2d 679 (1963).

⁴¹ Wis. STAT. §240.08 (1963).

⁴² *McHardy v. Wadsworth*, 8 Mich. 349 (1860); *Kingman v. Draper*, 14 Ill. App. 577 (1884); *Ruby v. Baker*, 106 Kan. 855, 190 Pac. 6 (1920).

⁴³ *E.g.*, *Stanley v. Clark*, 159 F. Supp. 65, 66 (D.N.H. 1957); *Weaver v. Robertson*, 134 Ga. 137, 67 S.E. 662 (1910).

⁴⁴ *Kenner v. Edwards Realty & Finance Co.*, 204 Wis. 575, 586, 236 N.W. 597 (1931).

In *Marshall Realty Co. v. Zerman*, 296 S.W. 1057 (Mo. App. 1927), the Missouri Court of Appeals said at 1061: "The statute which was enacted to prevent fraud, is never allowed to operate as an aid or shield to the perpetration of a fraud."

In *Stewart v. Wyrick*, 228 N.C. 429, 432, 45 S.E. 2d 764 (1947) Chief Judge Stacey speaking for the Supreme Court of North Carolina said: "The mainspring of the statute of frauds is to prevent frauds, not to promote them." See also: *Stevens, Ethics and The Statute of Frauds*, 37 CORNELL L. Q. 355 (1952).

⁴⁵ Annotation, 23 A.L.R. 2d 6 (1952) discusses the statute of frauds and the necessary and proper description of lands; 2 CORBIN, CONTRACTS 718, §505 (1950).

⁴⁶ It is interesting to note that within the principal case herein both parties hired

Likewise, it is the duty of courts to help the consummation of contracts and not aid in breaking them.

The possibility exists that vendor's plea in recoupment, by way of defense, may amount to nearly the entire amount or more than the entire amount of the earnest money down-payment. Thus, the vendor could attempt to make it economically imprudent for the vendee not to consummate the transaction and force him to deal. This would be tantamount to economic coercion.

Considering economic duress, the Appellate Court of Illinois has said:

Duress can be physical, economic or psychological—in legal parlance we read psychological 'moral.' Moral duress consists of imposition, oppression, undue influence or the taking of undue advantage of the business or financial stress or weakness of another.⁴⁷

It must be kept in mind that in the *Steusser* case, the vendor was ready, willing, and able to perform. It was the vendee who did not wish to do the same. Thus, the vendee could not charge "economic duress" against the vendor. Even though the binder contract did not comply with the Statute of Frauds, the vendee had a choice to affirm it. As long as this choice is present, coercion is not.⁴⁸

the same attorney to prepare the contract. Thus, not only did the attorney create a contract which failed to comply with the statutory requirement; but, he found himself in the odd position in representing one of the parties in attempting to get out of the agreement obligations. This presents an interesting problem under the conflict of interests rule. Canon 6, CANON OF ETHICS OF THE AMERICAN BAR ASSOCIATION; *Steusser v. Ebel*, 19 Wis. 2d 591, 593, 120 N.W. 2d 679 (1963).

⁴⁷ *Pittman v. Lageschulte*, 45 Ill. App. 2d 218-19, 195 N.E. 2d 394 (1963).

⁴⁸ In *Joyce v. Year Investments, Inc.* 45 Ill. App. 2d 310, 196 N.E. 2d 24 (1963), a case involving a sale of realty, the Illinois Appellate Court said at 314: "[T]he real and ultimate fact to be determined in every case is whether or not the party really had a choice—whether he had freedom of exercising his will." 5 Williston, Contracts, (Rev. Ed., 1937) §1603. The legal conception of economic or compulsory duress is in forcing a person to act against his own will. It does not exist when the person upon whom it has been so charged had an option or choice as to whether he will do the thing or perform the act said to have been done under duress."

In *J. F. Egan, Inc. v. City of New York*, 18 App. Div. 2d 357, 239 N.Y.S. 2d 420, 424 (1963), the New York Supreme Court said: "[T]aking advantage of a distressed financial condition is not, in itself, duress (Restatement, Contracts, §493)."

In *Grad v. Roberts*, 35 Misc. 2d 811, 231 N.Y.S. 2d 516, 518 (1962), a case wherein defendant creditor of a corporation that had negotiated a transfer and sale of realty insisted on payment for his services prior to his turning over a general release and his stock in the corporation to plaintiff, even though it would have prevented plaintiff from making a contemplated profit until he did pay, the New York Supreme Court held: "*Driving a hard bargain is not sufficient to cause duress.*" (Emphasis supplied)

Compare these statements with: *Mendelson v. Blatz Brewing Co.*, 9 Wis. 2d 487, 101 N.W. 2d 805 (1960) in which the Wisconsin Supreme Court discussing contracts procured by economic coercion said at 494: "Wisconsin is one of the jurisdictions which has adopted the modern view which hold contracts and transfers may be voided when procured by business or economic compulsion, as well as by physical coercion. *Minneapolis, St. P. & S.S. R. Co. v. Railroad Comm.* (1924), 183 Wis. 47, 197 N.W. 352. See also Anno. 79 A.L.R. 655, 658."

III. HOW HAVE OTHER STATES DECIDED THIS PROBLEM?

There are only a few cases in the United States similar to *Steusser*. Notice should be taken that neither the Court in its opinion, nor appellant's counsel in his brief in the *Steusser* case cited any authority for the proposition advocated therein.⁴⁹

However, the Wisconsin Supreme Court implies that it is following precedent.⁵⁰ Appellant's counsel seemed to advocate that *Schwartz v. Syver*⁵¹ held that it was up to the vendee to carry the burden of proof and show that the vendor would be unjustly enriched if permitted to retain such down-payment. Respondent-vendee claimed that he had met the burden of proof by showing that the down-payment earnest money exceeded the damages sustained by the vendor. Respondent claimed he was entitled to the residue after the vendor is allowed his recoupment. The Court, by implication, appears to agree.

*Massaro v. Bashara*⁵² is a case involving the sale of real estate. There, the Ohio Court of Appeals held that a vendor's plea in recoupment, by way of defense (under the Ohio counterclaim statute generally, even though recoupment not specifically provided for) would be valid, under the doctrine of unjust enrichment, against a vendee for "such damages as he may have sustained incident to the transaction. . . ."⁵³ This, when the vendee seeks to recover earnest money paid to the vendor, and proof of the agreement to purchase is barred by the Statute of Frauds. The Statute of Frauds involved was of the "unenforceable" type⁵⁴ and the damages were allowed to be proven by "oral

⁴⁹ See: *Steusser v. Ebel*, 19 Wis. 2d 593, 598, 120 N.W. 2d 679 (1963); Brief and Appendix for Appellant, p. 10 wherein counsel for appellant assumes this proposition as one of his Conclusions.

⁵⁰ 19 Wis. 2d 593, 597, 120 N.W. 2d 679 (1963); Brief, p. 9.

⁵¹ 264 Wis. 526, 59 N.W. 2d 489 (1952).

⁵² 91 Ohio App. 475, 108 N.E. 2d 850 (1952).

⁵³ *Id.*, Court Syllabus note 2.

⁵⁴ Decisions of the following states with a "no action shall be brought" statute have interpreted non-complying contracts as having the effect of being "unenforceable" (listed in alphabetical order by state with textual comparisons when necessary: This serves as a general annotation to footnote 7, *supra*):

ALASKA: Research has not revealed any cases on the subject.

ARKANSAS: *E.g.*, *Lee Wilson & Co. v. Springfield*, 230 Ark. 257, 321 S.W. 2d 775 (1959).

CONNECTICUT: *E.g.*, *In re Fisk's Appeal*, 81 Conn. 433, 71 Atl. 559 (1908).

DELAWARE: Research has not revealed any cases on the subject.

DISTRICT OF COLUMBIA: *E.g.*, *Greenfield v. Murray, Executor*, 117 A. 2d 227 (D.C. Muni. App. 1955).

FLORIDA: *E.g.*, *Mayer v. First Nat. Co. of Sarasota*, 99 Fla. 173, 125 So. 909 (1930); *Swisher v. Conrad*, 76 Fla. 644, 80 So. 564 (1919).

HAWAII: *E.g.*, *Opunui v. Kauhi*, 8 Hawaii 648 (1882).

ILLINOIS: *E.g.*, *Nelson Development Co. v. Ohio Oil Co.*, 45 F. Supp. 933 (E.D. Ill. 1942); *Kohlbrecher v. Guetterman*, 329 Ill. 246, 160 N.E. 142 (1928); *Sander v. Schwab*, 315 Ill. 623, 146 N.E. 509 (1925); *Stein v. McKinney*, 313 Ill. 84, 144 N.E. 795 (1924); *Weber v. Adler*, 311 Ill. 547, 143 N.E. 95 (1924); *Ewell v. Hicks*, 238 Ill. 170, 87 N.E. 316 (1909); *Kopp v. Reiter*, 146 Ill. 437, 34 N.E. 942 (1893); *Farwell v. Lowther*, 18 Ill. 252 (1857); *McConnell v. Brillhart*, 17 Ill. 354 (1856).

INDIANA: *E.g.*, *Schierman v. Beckett*, 88 Ind. 52 (1882); *Day v. Wilson*,

83 Ind. 463 (1882); *Mather v. Scoles*, 35 Ind. (1870); *Gerda, Admr. v. Hall*, 129 Ind. App. 643, 154 N.E. 2d 527 (1959); *Hurd v. Ball*, 128 Ind. App. 278, 143 N.E. 2d 458 (1957); *Gates v. Petri*, 127 Ind. App. 670, 143 N.E. 2d 293 (1957).

KANSAS: *E.g.*, *Zeligson v. Hartman-Blair, Inc.*, 126 F. 2d 595 (10th Cir. 1942); *Murray v. Brown*, 177 Kan. 139, 276 P. 2d 344 (1954); *Reiffel v. Deiter*, 159 Kan. 628, 157 P. 2d 831 (1945); *Nelson v. Street*, 148 Kan. 587, 83 P. 2d 793 (1938); *Jay v. Ellis*, 135 Kan. 272, 10 P. 2d 840 (1932); *Quinton v. Kendall*, 122 Kan. 814, 253 Pac. 600 (1927); *Lane v. Ozias*, 114 Kan. 46, 217 Pac. 331 (1923); *Rice v. Randolph*, 111 Kan. 73, 206 Pac. 314 (1922); *Vaught v. Pettyjohn & Co.*, 104 Kan. 174, 178 Pac. 623 (1919); *In re Engelbrecht*, 103 Kan. 21, 172 Pac. 715 (1918); *Bannister v. Fallis*, 85 Kan. 320, 116 Pac. 822 (1911); *Hampe v. Sage*, 82 Kan. 728, 109 Pac. 406 (1910); *Mertz v. Hubbard*, 75 Kan. 1 88 Pac. 529 (1907).

Contrast with: *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565 (1884); *Carr v. Williams*, 17 Kan. 575 (1887) holding a non-complying contract to be "void" rather than "unenforceable." Later overruled by *Ely v. Jones*, 101 Kan. 572, 168 Pac. 1102 (1917).

KENTUCKY: *E.g.*, *May v. Mohn*, 282 S.W. 2d 144 (Ky. 1955); *Rhorer v. Rhorer's Exct'r.*, 272 S.W. 2d 801 (Ky. 1954); *Bitzer v. Mooock's Exct'r. & Trustee's*, 271 S.W. 2d 877 (Ky. 1954); *Triplett v. Knight*, 309 Ky. 349, 217 S.W. 2d 802 (1949); *Chatham's Exct's. v. Parr*, 308 Ky. 175, 214 S.W. 2d 91 (1948); *Head v. Exct'r. of Schwartz*, 304 Ky. 798, 202 S.W. 2d 623 (1947); *Watkins v. Wells*, 303 Ky. 728, 198 S.W. 2d 662 (1947); *Deaton v. Bowling*, 302 Ky. 829, 196 S.W. 2d 603 (1946); *Carpenter v. Carpenter*, 200 Ky. 738, 187 S.W. 2d 282 (1945); *Wilson v. Adath Israel Charit. & Educ. Assn's. Agent*, 262 Ky. 55, 89 S.W. 2d 318 (1935); *Maloney v. Maloney*, 258 Ky. 657, 80 S.W. 2d 611 (1935); *Gibson v. Crawford*, 247 Ky. 228, 56 S.W. 2d 985 (1932); *Nugent v. Humpich*, 231 Ky. 122, 21 S.W. 2d 153 (1929); *Jennett v. Sherrill and Wife*, 205 Ky. 307, 265 S.W. 781 (1924); *Nisbet v. Dozier*, 204 Ky. 204, 263 S.W. 736 (1942); *Cracraft v. McDaniel*, 196 Ky. 128, 244 S.W. 300 (1922); *Duteil v. Mullens*, 192 Ky. 616, 234 S.W. 192 (1921); *Fields v. Hoskins*, 182 Ky. 446, 206 S.W. 763 (1918); *Belleu v. Gregory*, 174 Ky. 418, 192 S.W. 492 (1917); *McMee v. Henry*, 163 Ky. 729, 174 S.W. 746 (1915); *McConathy v. Lanham*, 116 Ky. 735, 76 S.W. 535 (1903); *Begley v. Treadway*, 29 K.L.R. 493, 93 S.W. 1045 (1906); *Hurley v. Woodsides*, 21 K.L.R. 1073, 54 S.W. 8 (1899); *Barnes v. Beverly*, 17 K.L.R. 586, 32 S.W. 174 (1895). Cf. the unusual situation in *Wigginton v. Leach's Adm'x.*, 285 Ky. 787, 149 S.W. 2d 531 (1941) in which a contract involving dower rights was interpreted as "void."

MAINE: *E.g.*, *Barrett v. Greenhall*, 139 Me. 75, 27 A. 2d 599 (1942); *Smith v. Farrington*, 139 Me. 241, 20 A. 2d 163 (1942); *Brown v. True*, 123 Me. 288, 122 Atl. 850 (1923); *Fletcher v. Lake*, 121 Me. 474, 118 Atl. 321 (1922); *Jellison v. Jordan*, 68 Me. 373 (1878); *Lawrence v. Chase*, 54 Me. 196 (1886); *Fisher v. Shaw*, 42 Me. 32 (1856); *Patterson v. Cunningham*, 12 Me. 506 (1835).

Contrast with these cases in which a verbal contract for the sale of land is held as being "void": *Segars v. Segars*, 71 Me. 530, 534 (1880); *Plummer v. Bucknam*, 55 Me. 105, 106 (1866); *Leavitt v. Pratt*, 53 Me. 147 (1865); *Greer v. Greer*, 18 Me. 16, 18 (1840); *Bishop v. Little*, 5 Me. 362, 366-67 (1828); Cf. *Blake v. Parlin*, 22 Me. 395, 397 (1843) which speaks of a contract as "void under the statute of frauds," but really means "unenforceable" and so holds.

MARYLAND: *E.g.*, *Hearn v. Ruark*, 148 Md. 354, 129 Atl. 366 (1925); *Morgart v. Smouse*, 103 Md. 463, 63 Atl. 1070 (1906); *Hamilton v. Thurston*, 93 Md. 213, 48 Atl. 709 (1901); *Nagengast v. Alz*, 93 Md. 522, 49 Atl. 333 (1901); *Equitable Gas Light Co. of Baltimore City v. Baltimore Coal Tar & Manufacturing Co.*, 63 Md. 285 (1884); *Polk v. Reynolds*, 31 Md. 106 (1869); *Duval v. Peach*, 1 Gill (Md.) 172 (1843); Cf. the following cases holding Maryland's Statute of Frauds affects only the remedy and not the validity of a contract: *Baldwin, et. v. Grymer*, 232 Md. 470, 194 A. 2d 285 (1963); *Forsyth v. Brillhart*, 216 Md. 437, 140 A. 2d 904 (1958); *Grael v. Rohe*, 185 Md. 121, 43 A. 2d 201 (1945).

MASSACHUSETTS: *E.g.*, *Duff v. United States Trust Co.*, 327 Mass. 17, 97 N.E. 2d 189 (1951); *Frost v. Kendall*, 320 Mass. 623, 70 N.E. 521 (1947); *Michelson v. Sherman*, 310 Mass. 774, 39 N.E. 2d 633 (1942); *Lewis*

v. Chapin, 263 Mass. 168, 160 N.E. 786 (1928); Slotnick v. Smith, 252 Mass. 303, 147 N.E. 737 (1925); Estabrook v. Wilcox, 226 Mass. 156, 115 N.E. 233 (1917); Ribock v. Canner, 218 Mass. 5, 105 N.E. 462 (1914); Barker v. Thayer, 217 Mass. 13, 104 N.E. 572 (1914); Miller v. Burt, 196 Mass. 395, 82 N.E. 39 (1907); Carleton v. Floyd, etc., Co., 192 Mass. 204, 78 N.E. 126 (1906); Mathews v. Carlton, 189 Mass. 285, 75 N.E. 637 (1905); Boyd v. Greene, 162 Mass. 566, 39 N.E. 277 (1895); May v. Ward, 134 Mass. 127 (1883); Gould v. Mansfield, 103 Mass. 408 (1869); Dexter v. Blanchard, 93 Mass. (11 Allen) 365 (1865); McMullin v. Riley, 72 Mass. (6 Grey) 500 (1856); Curtis v. Brown, 59 Mass. (5 Cush.) 488 (1850); Coughlin v. Knowles, 48 Mass. (7 Met.) 57 (1843); Nelson v. Boynton, 44 Mass. (3 Met.) 396 (1841); Tileson v. Nettelton, 23 Mass. (6 Pick.) 509 (1828); Boyd v. Stone, 11 Mass. (11 Tyng) 342 (1814). Cf. Parker v. Barker, 43 Mass. (2 Met.) 423, 431 (1841) which speaks of a contract as being "inoperative and void."

MISSISSIPPI: E.g., Collins' Estate v. Dunn, 233 Miss. 636, 103 So. 2d 425 (1958); Leavenworth v. Lloyd, 229 Miss. 880, 92 So. 2d 224 (1957); Poole v. John-Manville Products Corp., 210 Miss. 528, 49 S. 2d 891 (1951); Vandalingham v. Jenkins, 207 Miss. 882, 43 So. 2d 578 (1949); Hardy v. Candelain, 204 Miss. 328, 37 So. 2d 360 (1948); Wells v. Brooks, 199 Miss. 327, 24 So. 2d 533 (1946); Lewis v. Williams, 186 Miss. 701, 191 So. 479 (1939); Palmer v. Spencer, 161 Miss. 561, 137 So. 491 (1931); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931); Harvey v. Daniels, 133 Miss. 40, 96 So. 746 (1923).

MISSOURI: E.g., Lusco v. Tavitan, 296 S.W. 2d 14 (Mo. 1956); Yacobian v. J. D. Carson Co., 205 S.W. 2d 921 (Mo. 1947); Huttig v. Brennan, 328 Mo. 471, 41 S.W. 2d 1054 (1931); St. Louis, K. & N.W. Ry. Co. v. Clark, 121 Mo. 169, 25 S.W. 192 (1894); Allen v. Richard, 83 Mo. 55 (1884); Coleman v. Fletcher, 238 Mo. App. 813, 188 S.W. 2d 959 (1945); Feldman v. Levinson, 93 S.W. 2d 31 (Mo. App. 1936); Shupe v. A. J. King Realty Co., 29 S.W. 2d 230 (Mo. App. 1930); Jose v. Aufderheide, 222 Mo. App. 524, 293 470 (1926); Nat. Surety Co. v. Equitable Surety Co., 242 S.W. 109 (Mo. App. 1922); Heath v. Beck, 231 S.W. 657 (Mo. App. 1921); Cash v. Wysocki, 229 S.W. 428 (Mo. App. 1921); Longacre v. Longacre, 132 Mo. App. 192, 111 S.W. 855 (1908); Shannon v. Mastin, 108 S.W. 1116 (Mo. App. 1908); Shelton & Sires v. Thompson, Bennett Co., 96 Mo. App. 327, 70 S.W. 256 (1902); Schlauger v. Smith, 27 Mo. App. 516 (1887). Cf. Campbell v. Sheraton Corp. of America, 363 Mo. 688, 253 S.W. 2d 106 (1952) holding the statute of frauds to be a rule of evidence affecting the remedy; and Major v. St. Louis Union Trust Co., 64 S.W. 2d 296 (Mo. App. 1933) stating the "Statute of frauds . . . does not render a contract void, but goes merely to the remedy, and as such is a rule of evidence."

NEW HAMPSHIRE: E.g., Clark v. Lovelace, 102 N.H. 97, 15 A. 2d 224 (1959); Knox v. Allard, 90 N.H. 57, 4 A. 2d 352 (1939); Boyle v. Dudley, 87 N.H. 282, 179 Atl. 349 (1935); Southern v. Kittredge, 85 N.H. 307, 158 Atl. 132 (1932); Chellis v. Grimes, 72 N.H. 337, 56 Atl. 742 (1903); Smith v. Phillips, 69 N.H. 470, 43 Atl. 183 (1898); Webster v. Blodgett, 59 N.H. 120 (1879); Brown v. Whipple, 58 N.H. 229 (1887); Ballow v. Hale, 47 N.H. 347 (1867); Ham v. Goodrich, 37 N.H. 185 (1858); Crawford v. Parsons, 18 N.H. 293 (1846).

NEW JERSEY: E.g., Borough of Lodi v. Fravi Realty Co., 4 N.J. 28, 71 A. 2d 333 (1950); Birch v. Baker, 79 N.J.L. 9, 74 Atl. 151 (1909); Grabow v. Gelber, 138 N.J.Eq. 586, 49 A. 2d 431 (1946); Habelman v. Cavallo, 102 N.J.Eq. 243, 140 Atl. 432 (1927); Tannsey v. Suckoneck, 98 N.J.Eq. 669, 130 Atl. 528 (1925); Schwartz v. Hoerster, 93 N.J.Eq. 100, 114 Atl. 785 (1921); Welsh v. Bayard, 21 N.J. Eq. 186 (1870); Kufta v. Hughson, 46 N.J. Super. 222, 134 A. 2d 643 (1957); Johnson v. Wehrle, 9 N.J. Misc. 939 (1931). Cf. Brehan v. O'Donnell, 36 N.J.L. 257, 258 (1873) which speaks of a non-complying contract as "void" but appears to mean unenforceable by plaintiff. *Per Contra:* Smith v. Smith's Admr's., 28 N.J.L. 208 (1860) holding a contract "void."

OHIO: E.g., Hamilton Foundry & M. Co. v. International M. & F. Wkrs. Union, 193 F. 2d 209 (6th Cir. 1951), not involving realty, however a good interpretation of the statute; Watson v. Erb, 33 Ohio St. 35 (1877); Shillito Co. v. Bassler, 38 Ohio App. 569, 176 N.E. 461 (1930); Cohen v. P. J. Spitz,

31 Ohio App. 63, 166 N.E. 382 (1928); *Maro v. Borak*, 18 Ohio OP. 2d 322 (1959).

PENNSYLVANIA: *E.g.*, *Polka v. May*, 383 Pa. 80, 118 A. 2d 154 (1956); *Arndt v. Matz*, 365 Pa. 41, 73 A. 2d 392 (1950); *Simon v. Beck*, 300 Pa. 344, 150 Atl. 640 (1930); *Wilson v. Pennsy. Coal Co.*, 269 Pa. 127, 112 Atl. 135 (1920); *Fidelity T. & T. Co. of Pittsburgh v. West Side Belt R.R. Co.*, 230 Pa. 160, 79 Atl. 235 (1911); *Jacoby v. Pipher*, 92 Pa. Super. 324, (1928); *Smith v. Smith*, 27 Pa. Super. 227 (1921); *Bilak v. Bilak*, 44 Berks Co. 91 (1952); *Albright v. Leer*, 3 Cumberland Co. 93 (1951); *S. B. Lawrence & Co. v. Conestoga Nat. Bank of Lancaster*, 48 Lanc. Rev. 587 (1943).

RHODE ISLAND: *E.g.*, *Supra*, footnote 7, § on this jurisdiction; *Oakland Cemetery Co. v. Smith*, 54 R.I. 136, 170 Atl. 492 (1934); *Ray v. Card*, 21 R.I. 362, 43 Atl. 846 (1899); *Potter v. Arnold*, 15 R.I. 350, 5 Atl. 379 (1886).

SOUTH CAROLINA: *E.g.*, *Walker v. Preacher*, 185 S.C. 462, 194 S.E. 868 (1937); *White v. McKnight*, 146 S.C. 59, 143 S.E. 552 (1926); *Jackson v. Frier*, 118 S.C. 449, 110 S.E. 676 (1921); *Coleman v. Curtis*, 36 S.C. 607, 15 S.E. 709 (1892); *Davis v. Pollock*, 36 S.C. 544 (1892); *Lamar v. Wright*, 31 S.C. 60, 9 S.E. 736 (1888); *Shuford v. Shingler*, 30 S.C. 612, 8 S.E. 799 (1888); *Charles v. Byrd*, 29 S.C. 544, 8 S.E. 1 (1888); *Hunter v. Mills*, 29 S.C. 72, 6 S.E. 907 (1887); *Boozer v. Teague*, 27 S.C. 348, 3 S.E. 551 (1886); *Nesbitt v. Cavender*, 27 S.C. 1, 2 S.E. 702 (1886); *Mims v. Chandler*, 21 S.C. 480 (1884); *Wetmore v. Rhett*, 46 S.C.L. (12 Rich.) 565 (1860); *Jones v. McMichael*, 46 S.C.L. (12 Rich.) 176 (1859); *Trammell v. Trammell*, 45 S.C.L. (11 Rich.) 471 (1858); *Davis v. Moore*, 43 S.C.L. (9 Rich.) 215 (1856); *Hyde v. Cooper*, 34 S.C. Eq. (13 Rich.) 250 (1867); *Lee v. Lee*, 32 S.C. Eq. (11 Rich.) 574 (1858); *Church of Advent v. Farrow*, 28 S.C. Eq. (7 Rich.) 378 (1855); *Johnson v. LaMotte*, 27 S.C. Eq. (6 Rich.) 347 (1854); *Cox v. Cox*, 26 S.C. Eq. (5 Rich.) 365 (1853); *Pog v. Sandifer*, 26 S.C. Eq. (5 Rich.) 170 (1852); *Schmidt v. Gatewood*, 19 S.C. Eq. (2 Rich.) 162 (1846); *Smith v. Smith*, 18 S.C. Eq. (1 Rich.) 130 (1845); *Howell v. Howell*, 5 S.C. Eq. (Harp.) 156 (1824); *Givens v. Calder*, 2 S.C. Eq. (2 Desaus.) 170 (1803).

SOUTH DAKOTA: *E.g.*, *Supra*, footnote 7, § on this jurisdiction. Research has not revealed any cases interpreting the unenforceable statute in terms of its word meanings.

TENNESSEE: *E.g.*, *Stallings v. Jones*, 193 Tenn. 200, 245 S.W. 2d 199 (1951). *Cherokee Foundries, Inc. v. Imperial Assurance Co.*, 188 Tenn. 349, 219 S.W. 2d 203 (1949); *Harris v. Morgan*, 157 Tenn. 140, 7 S.W. 2d 53 (1928); *Baily v. Henry*, 125 Tenn. (17 Cates) 390, 143 S.W. 1124 (1911); *Goodloe v. Goodloe*, 116 Tenn. (8 Cates) 252, 92 S.W. 767 (1905); *Dunlap v. Gibbs*, 12 Tenn. (4 Yerg.) 94 (1883); *Newman v. Carroll*, 11 Tenn. (3 Yerg.) 18 (1832).

TEXAS: *E.g.*, *Robertson v. Melton*, 131 Tex. 325, 115 S.W. 2d 624 (1938); *Leverett v. Leverett*, 59 S.W. 2d 252 (Tex. 1933); *Landis v. Fuqua, Inc.*, 159 S.W. 2d 228 (Tex. Civ. App. 1942); *Anderson v. Gipson*, 144 S.W. 2d 948 (Tex. Civ. App. 1940); *Watkins v. Arnold*, 60 S.W. 2d 476 (Tex. Civ. App.); *Bates v. Dunn*, 293 S.W. 231 (Tex. Civ. App. 1927); *Mattherson v. Fluhman*, 41 S.W. 2d 204 (Tex. Comm. App. 1931).

VERMONT: *E.g.*, *Taplin v. Hinckley Fibre Co.*, 97 Vt. 184, 122 Atl. 426 (1923), commenting on the statute of frauds as an evidentiary rule; *Bedell v. Tracy*, 65 Vt. 494, 26 Atl. 1031 (1892); *Welch v. Darling*, 59 Vt. 136, 7 Atl. 547 (1886); *Montgomery v. Edwards*, 46 Vt. 151 (1873).

VIRGINIA: *E.g.*, *Dupuy v. Delaware Ins. Co.*, 63 Fed. 680 (C.C.W.D. Va. 1894); *Clay v. Clay*, 196 Va. 997, 86 S.E. 2d 812 (1955); *Ricks v. Sumler*, 179 Va. 571, 19 S.E. 2d 889 (1942); *Lloyd v. Smith*, 150 Va. 132, 142 S.E. 363 (1928); *Hurley v. Hurley*, 110 Va. 31, 65 S.E. 472 (1909); *Hoover v. Baugh*, 108 Va. 695, 62 S.E. 968 (1908); *Walker v. Tyler*, 94 Va. 532, 27 S.E. 434 (1897); *Brown v. Pollard*, 89 Va. 696, 17 S.E. 6 (1893); *Dunsmore v. Lyle*, 87 Va. 391, 12 S.E. 610 (1891); *Perry & Wife v. Ruby*, 81 Va. 317 (1886); *Blow v. Maynard*, 29 Va. (2 Leigh) 29 (1830); *Exct'r. of Heth v. Exct'r. of Wooldridge*, 27 Va. (6 Rand.) 605 (1828).

WEST VIRGINIA: *E.g.*, *Ballengue v. Whitlock*, 138 W. Va. 58, 74 S.E. 2d 780 (1953); *Cain v. Keeley*, 129 W. Va. 642, 41 S.E. 2d 185 (1946); *Gibson v. Stalnaker*, 87 W. Va. 710, 106 S.E. 243 (1921); *Kennedy v. Burns*, 84 W. Va. 701, 101 S.E. 156 (1919); *Capehart v. Hale*, 6 W. Va. 547 (1873).

testimony."⁵⁵ Thus, the *Massaro* case is authority that such a recoupment plea by vendor is proper.

In *Loring v. Peacock*,⁵⁶ a case involving the sale of realty questioning the description given in the contract (a situation similar to that in *Steusser*), the Texas Court of Civil Appeals held that where the contract for the sale of realty stipulated that if the vendee should fail to consummate the binder contract for any reason, except title defects, the vendee was not entitled to recover from the vendor his down-payment earnest money because the contract was "void" under the Statute of Frauds. The court also held that the vendor had the right to retain cash deposits and liquidated damages for breach of the contract by the vendee and to pay the commission of his realty broker therefrom.⁵⁷ The Statute of Frauds involved herein was of the "unenforceable" type. However, the Texas court spoke of this type of statute as having the effect of making a non-complying realty contract "void."⁵⁸

⁵⁵ 91 Ohio App. 475, 108 N.E. 2d 850 (1951), Court Syllabus note 2.

⁵⁶ 236 S.W. 2d 876 (Tex. Civ. App. 1951).

⁵⁷ Not to be overlooked with regard to realty broker's commissions are: *Wauwatosa Realty Co. v. Paar*, 274 Wis. 7, 79 N.W. 2d 125 (1956) in which the Wisconsin Supreme Court held that where a contract complied with the statute of frauds' requirements and the vendor is ready and willing to perform, but the vendee procured by broker is not, the agent is still entitled to be paid his commission; and *Geis v. McKenna*, 10 Wis. 2d 16, 102 N.W. 2d 101 (1959) which held that vendees under a contract not complying with the statute of frauds cannot recover the agent's commission deducted by him from the proceeds of the sale with the vendee's consent at the time of settling their accounts.

⁵⁸ 236 S.W. 2d 876 (Tex. Civ. App. 1953).

Decisions of the following states with a "void" type statute have interpreted non-complying contracts as having the effect of being "void but unenforceable" (listed in alphabetical order by state with textual comparisons when necessary; this serves as a general annotation to footnote 14, *supra*):

NEW YORK: *E.g.*, *Supra*, footnote 9; *Burns v. McCormack*, 233 N.Y. 230, 135 N.E. 273 (1922) *reversing* 194 App. Div., 979, 185 N.Y.S. 920 (1920); *Dung v. Parker*, 52 N.Y. 494 (1873); *Reynolds v. Dunkirk & State Line R.R. Co.*, 17 Barb. 613 (N.Y. 1854); *Arnold v. Conklin*, 145 N.Y.S. 2d 689 (1955); *Nathan v. Spector*, 281 App. Div. 451, 120 N.Y.S. 2d 358 (1953); *Meyer v. Le Mieux*, 110 N.Y.S. 2d 689 (1952); *Rork v. Orcutt*, 53 N.Y.S. 2d 354 (1945); *George v. Dobson*, 261 App. Div. 447, 25 N.Y.S. 2d 817 (1941) *affirmed* 287 N.Y. 675, 39 N.Y.S. 2d 237 (1940); *Rowland v. Fleitman*, 24 N.Y.S. 2d 251 (1940); *Hoffman v. R. H. Merwin Co.*, 23 N.Y.S. 2d 26 (1940); *Sinclair v. Purdy*, 213 App. Div. 439, 210 N.Y.S. 208 (1925); *Condon v. Mission of Immaculate Virgin*, 87 App. Div. 165, 84 N.Y.S. 49 (1903); *Braun v. Ochs*, 77 App. Div. 20, 79 N.Y.S. 100 (1902); *Di Gregorio v. Micosia*, 3 Misc. 2d 24, 150 N.Y.S. 2d 754 (1956); *McQuade v. Maidman*, 207 Misc. 364, 137 N.Y.S. 2d 910 (1955); *Hinman v. Hinman*, 146 Misc. 786, 263 N.Y.S. 800 (1933). Cf. *Oneida Park, Inc. v. First Nat. Credit Corp.* 36 Misc. 2d 1085, 234 N.Y.S. 2d 168 (1962) discusses an oral contract as being "invalid" and cited local authorities to this effect. See, generally: *Knecht v. American Flag & Accessories Co.*, 237 N.Y.S. 2d 626 (1963), syllabus note 1; *Broady v. Rhodes*, 214 N.Y.S. (2) 10 (1961) *affirmed* 15 App. Div. 561, 222 N.Y.S. 2d 1022 (1961).

NORTH CAROLINA: *E.g.*, *Gales v. Smith*, 249 N.C. 263, 106 S.E. 2d 164 (1958); *Herring v. Merchandise, Inc.*, 249 N.C. 221, 106 S.E. 2d 197 (1958); *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. 2d 524 (1957); *Clapp v. Clapp*, 241 N.C. 281, 85 S.E. 2d 153 (1954); *Jamerson v. Logan*, 228 N.C. 540, 46 S.E. 2d 561 (1948); *Barbee v. Lamb*, 225 N.C. 211, 34 S.E. 2d 65 (1945); *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E. 2d 477 (1945); *Neal v.*

In *Lewis v. Peterson*,⁵⁹ a case involving the sale of realty, where the memorandum did not comply with the Statute of Frauds and the transaction was not consummated, the Montana Supreme Court held that the vendee was entitled to recover his earnest money down-payment less the commissions which the vendor was required to pay his agent in connection with the transaction. The Statute of Frauds involved herein was of the "invalid" type. Montana is one of the several states which interprets this type of statute as having the effect of making realty contracts "unenforceable."⁶⁰

Thorough research has not revealed any additional reported cases in point. As to what the future decisions will hold in states which interpret contracts not complying with their respective Statutes of Fraud as being "void,"⁶¹ "not binding,"⁶² "strictly invalid,"⁶³ "invalid and

Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E. 2d 206 (1944); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E. 2d 446 (1943); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Maurey v. Norwell, 179 N.C. 628, 103 S.E. 372 (1920); Alexander v. Morris, 145 N.C. 22, 58 S.E. 600 (1907); Improvement Co. v. Guthrie, 116 N.C. 381, 21 S.E. 952 (1895); Holmes v. Holmes, 86 N.C. 205 (1882). See also: Note, 31 N. C. L. REV. 498 (1953); Note, 30 N. C. L. REV. 292 (1952).

⁵⁹ 127 Mont. 474, 267 P. 2d 127 (1954).

⁶⁰ Decisions of the following states with an "invalid" type statute have interpreted non-complying contracts as having the effect of being "unenforceable" (listed in alphabetical order by state with textual comparisons when necessary; this serves as a general annotation to footnote 12, *supra*):

ARIZONA: *E.g.*, Brought, et al. v. Howard, et al., 30 Ariz. 522, 249 Pac. 76, 48 A.L.R. 1347 (1926).

CALIFORNIA: *E.g.*, Toobert v. Woods, 174 F. 2d 861 (9th Cir. 1949); Tabata v. Murrane, 24 Cal. 2d 221, 148 P. 2d 605 (1944); Long v. Rumsey, 12 Cal. 2d 334, 84 P. 2d 146 (1938); Zimmerman v. Bank of America N.T. & S.A., 191 Cal. App. 2d 55, 12 Cal. Rep. 319 (1961). Cf. Offeman v. Robertson-Cole Studios, Inc., 80 Cal. App. 1, 251 Pac. 830 (1926), which held an oral contract was neither "unenforceable" nor "void." *Contra*: Feeney v. Howard, 79 Cal. 525, 536, 21 Pac. 984 (1889) which holds a parol contract "void."

CANAL ZONE: *E.g.*, Research has not revealed any cases interpreting the "invalid" type statute in terms of its word meanings.

MONTANA: *E.g.*, Mahoney v. Lester, 118 Mont. 551, 168 Pac. 339 (1946); Eccles v. Kendrick, 80 Mont. 120, 259 Pac. 609 (1927); Perkins v. Allnut, 47 Mont. 13, 130 Pac. 1 (1912), Landt v. Schneider, 31 Mont. 15, 77 Pac. 307 (1904). Cf. Ryan v. Dunphy, 4 Mont. 342, 354, 1 Pac. 710 (1882) which holds a contract as "void" by the statute of frauds, but seems to mean unenforceable.

OKLAHOMA: *E.g.*, Garrett v. Gerard, 156 F. 2d 227 (10th Cir. 1946); Foster v. Barton, 365 P. 2d 714 (Okla. 1961); Merchants' Southwest T. & S. Co. v. Hartford Accident & Indem. Co., 146 Okl. 241, 292 Pac. 60 (1930); Hyde v. City of Altus, 92 Okla. 170, 218 Pac. 1081 (1923); Farmers State Bank v. Cox, 41 Okla. 672, 139 Pac. 953 (1914); Fox v. Eastern, 10 Okla. 527, 62 Pac. 283 (1900). Cf. Oklahoma Farm Mortgage Co. v. Cesar, 178 Okla. 451, 62 P. 2d 1269 (1936).

⁶¹ Decisions of the following states with a "void" type statute have interpreted non-complying contracts as having the effect of being "void" *ab initio* (listed in alphabetical order by state with textual comparisons when necessary; this serves as an annotation to footnote 9, *supra*.)

ALABAMA: *E.g.*, Spruiell v. Stanford, 258 Ala. 212, 61 So. 2d 758 (1952).

COLORADO: *E.g.*, Horton v. Stegmyer, 175 F. 756 (8th Cir. 1910); Thomas Realty Co. v. Guthrie, 71 Colo. 98, 204 Pac. 330 (1922).

MICHIGAN: *E.g.*, Begg v. Bowerman, 366 Mich. 346, 115 N.W. 2d 63 (1962); Fields v. Korn, 366 Mich. 108, 113 N.W. 2d 860 (1962); Brooks v.

Gillow, 352 Mich. 189, 89 N.W. 2d 457 (1958); Needham v. Huraud, 328 Mich. 483, 44 N.W. 2d 17 (1950); McCrea v. Jerkatis, 320 Mich. 309, 31 N.W. 2d 63 (1948); Daugherty v. Poppen, 316 Mich. 430, 25 N.W. 2d 580 (1947); Morten v. Zevalkink, 304 Mich. 572, 8 N.W. 2d 642 (1943); Rehn v. Booth, 299, Mich. 311, 300 N.W. 100 (1941); Fix v. Aimot, 251 Mich. 124, 231 N.W. 114 (1930); Bame v. Bame, 250 Mich. 515, 231 N.W. 60 (1930); Windiate v. Leland, 246 Mich. 659, 225 N.W. 620 (1929); Forler v. Williams, 242 Mich. 639, 219 N.W. 641 (1928); Jenkins v. Jenkins' Estate, 241 Mich. 39, 216 N.W. 384 (1927); Payne v. Jones, 230 Mich. 257, 202 N.W. 935 (1925); Klasky v. Burkheiser, 225 Mich. 121, 195 N.W. 695 (1923); Gannon v. Stansfield, 216 Mich. 440, 185 N.W. 705 (1921); Steinhoff v. Bullock, 214 Mich. 473, 183 N.W. 31 (1921); Cooper v. Pierson, 212 Mich. 657, 180 N.W. 351 (1920); Droppers v. Marshall, 206 Mich. 560, 173 N.W. 356 (1919); Clark v. Holman, 204 Mich. 62, 170 N.W. 23 (1918); White v. McKenzie, 193 Mich. 189, 159 N.W. 367 (1916); Rosenbaum v. Tyszka, 192 Mich. 457, 158 N.W. 848 (1916); Nichols v. Burcham, 177 Mich. 601, 143 N.W. 647 (1913); Hilberg v. Greer, 172 Mich. 505, 138 N.W. 201 (1912); Mitchell v. Bilderback, 159 Mich. 483, 124 N.W. 557 (1910); Taglor v. R. D. Scott & Co., 149 Mich. 525, 113 N.W. 32 (1907); Nester v. Sullivan, 147 Mich. 493, 111 N.W. 85 (1907); Bewick v. Hanika, 142 Mich. 206, 106 N.W. 63 (1905); Wisconsin & M. Ry. Co. v. McKenna, 139 Mich. 43, 102 N.W. 281 (1905); Bartlett v. Bartlett, 103 Mich. 293, 61 N.W. 500 (1894); Collar v. Collar, 86 Mich. 507, 49 N.W. 551 (1891); Ducett v. Wolf, 81 Mich. 311, 45 N.W. 829 (1890); Kelsey v. McDonald, 76 Mich. 188, 43 N.W. 1103 (1888); Muffat v. Gott, 74 Mich. 672, 42 N.W. 149 (1889); Webster v. Brown, 67 Mich. 328, 34 N.W. 676 (1887); Brosman v. McKee, 63 Mich. 454, 30 N.W. 107 (1886); Wardell v. Williams, 62 Mich. 50, 28 N.W. 796 (1886); Kelly v. Kelly, 54 Mich. 30, 19 N.W. 580 (1884); Gault v. Stormont, 51 Mich. 636, 17 N.W. 214 (1883); Peckham v. Balch, 49 Mich. 179, 13 N.W. 506 (1882); De Moss v. Robinson, 46 Mich. 62, 8 N.W. 712 (1881); Jackson v. Evans, 44 Mich. 510, 7 N.W. 79 (1880); Sutton v. Rowley, 44 Mich. 112, 6 N.W. 216 (1880); Ayres v. Callup, 44 Mich. 13, 5 N.W. 1072 (1880); Nims v. Sherman, 43 Mich. 45, 4 N.W. 434 (1880); Maynard v. Brown, 41 Mich. 298, 2 N.W. 30 (1879); Rawdon v. Dodge, 40 Mich. 697 (1879); Curtis v. Abbe, 39 Mich. 441, (1878); Liddle v. Needham, 39 Mich. 147 (1878); Ochsenehl v. Jeffers, 32 Mich. 482 (1875); Scott v. Bush, 29 Mich. 523 (1874); Scott v. Bush, 26 Mich. 418 (1873); Cook v. Bell, 18 Mich. 387 (1869); Hogsett v. Ellis, 17 Mich. 351 (1868); Wright v. DeGross, 14 Mich. 164 (1866); Dwight v. Cutler, 3 Mich. 566 (1855).

MINNESOTA: *E.g.*, Hanson v. Fergus Falls Nat. B. & T. Co., 242 Minn. 498, 65 N.W. 2d 857, 49 A.L.R. 2d 1379 (1954); Goette v. Howe, 232 Minn. 168, 44 N.W. 2d 734 (1950); Phelan v. Carey, 222 Minn. 1, 23 N.W. 2d 10 (1946); Alamo Realty Co. v. Mutual Trust Life Ins. Co., 202 Minn. 457, 278 N.W. 902 (1938); Bey v. Keeping, 192 Minn. 283, 256 N.W. 140 (1934); Pierce v. Hanson, 147 Minn. 219, 179 N.W. 893 (1920); Betcher v. Rinehart, 106 Minn. 380, 118 N.W. 1026 (1908); Todd v. Bettinger, 98 Minn. 170, 107 N.W. 1049 (1906); Newlin v. Hoyt, 91 Minn. 409, 98 N.W. 323 (1904); Cram v. Thompson, 87 Minn. 172, 91 N.W. 483 (1902); Pierce v. Clarke, 71 Minn. 114, 73 N.W. 522 (1902); Fargeson v. Duluth Imp. Co., 56 Minn. 222, 57 N.W. 480 (1894); Brockway v. Frost, 40 Minn. 155, 41 N.W. 548 (1889); Lanz v. Laughlin, 14 Minn. 72, 14 Gil. 55 (1869); Bennett v. Phelps, 12 Minn. 326, 12 Gil. 216 (1867); Sharpe v. Rogers, 10 Minn. 207, 10 Gil. 168 (1865); Wentworth v. Wentworth, 2 Minn. 257, 2 Gil. 238 (1858). *Cf.* Hatlestad v. Mutual Trust Life Ins. Co., 197 Minn. 640, 641, 268 N.W. 665 (1936) discussing a non-complying contract as "unenforceable if not void;" Biddle v. Whitmore, 134 Minn. 68, 69, 158 N.W. 808 (1916) discussing a leasing contract as "within the statute of frauds and unenforceable;" Hanson v. Marion, 128 Minn. 468, 471, 151 N.W. 195 (1915) discussing a non-complying contract as "unenforceable;" Power v. Immigration Land Co., 93 Minn. 247, 249, 101 N.W. 161 (1904) discussing a non-complying contract as being "invalid," as well as "void and unenforceable."

NEBRASKA: *E.g.*, Winkelmann v. Luebbe, 151 Neb. 543, 38 N.W. 2d 334 (1949); Anderson v. Anderson, 150 Neb. 879, 36 N.W. 2d 287 (1949) *citing* with approval, *Herbstreith v. Walls*, 147 Neb. 805, 25 N.W. 2d 409 (1946); and *Norton v. Brink*, 75 Neb. 566, 106 N.W. 668 (1906); *Shelby v. Platte Valley Public Power & Irr. Dist.*, 134 Neb. 354, 278 N.W. 568 (1938); *Penn Mutual Life Ins. Co. v. Kimble*, 132 Neb. 408, 272 N.W. 231

void,"⁶⁴ strictly "for evidentiary purposes only,"⁶⁵ "evidentiary but unenforceable,"⁶⁶ and "evidentiary but void,"⁶⁷ time alone will tell. How-

(1937); *Shafe v. Wilsonville Elevator Co.*, 121 Neb. 280, 237 N.W. 155 (1931); *Wehnes v. Marsh*, 103 Neb. 120, 170 N.W. 606 (1919); *Elder v. Webler*, 3 Neb. Unof. 534, 92 N.W. 126 (1902); *Bloomfield State Bank v. Miller*, 55 Neb. 243, 75 N.W. 569 (1898); *Kelley v. Palmer*, 42 Neb. 423, 60 N.W. 924 (1894); *Folsom v. McCague*, 29 Neb. 124, 45 N.W. 269 (1890); *Kittle v. St. John*, 7 Neb. 73 (1878). Cf. *Taylor v. Clark*, 143 Neb. 563, 570 (1943) holding a contract "void and unenforceable;" *Cameron v. Nelson*, 57 Neb. 381, 383, 77 N.W. 771 (1899) discussing a non-complying contract as one that "could not be enforced" but seems to mean "void." *Contra*: In *Brodie v. Robertson*, 113 Neb. 408, 203 N.W. 590 (1925), the Supreme Court of Nebraska held at 412: "Oral contracts are not void but voidable at the option of either party." This case was approved in *Corcoran v. Leen's, Inc.*, 126 Neb. 149, 156, 252 N.W. 819 (1939) citing *Creswell v. McCraig*, 11 Neb. 222, 9 N.W. 52 (1881) being approved in *First National Bank v. Blair St. Bank*, 80 Neb. 400, 114 N.W. 409 (1907). See also: *Happ v. Ducey*, 110 Neb. 429, 193 N.W. 918 (1923); *Gruessel v. Payne*, 107 Neb. 84, 185 N.W. 336 (1921); *Richards v. Cunningham*, 10 Neb. 417, 6 N.W. 475 (1880). To the same effect: *Hackbarth v. Hackbarth*, 146 Neb. 919, 22 N.W. 2d 184 (1946).

NEVADA: Research has not revealed any cases interpreting the void statute in terms of its word meanings.

OREGON: *E.g.*, *Webster v. Harris*, 189 Ore. 671, 22 P. 2d 644 (1950) a case not involving realty; *Hertel v. Woodard*, 183 Ore. 99, 191 P. 2d 400 (1948). Cf. *Zeuske v. Zeuske*, 55 Ore. 65, 105 Pac. 249 (1909), a case involving a realty contract "unenforceable" under the statute of frauds at law. The Supreme Court of Oregon held this contract could be of no avail to the vendee until its validity was established by a suit in equity. *Contra*: *Barton v. Simmons*, 129 Ore. 457, 278 Pac. 83 (1929) which holds "void" as used in this jurisdiction's statute means voidable and thus "unenforceable."

UTAH: *E.g.*, *Campbell v. Nelson*, 102 Utah 78, 125 P. 2d 413 (1942); *Utah Optical Co. v. Keith*, 18 Utah 464, 56 Pac. 155 (1899).

VIRGIN ISLANDS: *E.g.*, *Roebuck v. Hendricks*, 255 F. 2d 211 (3rd Cir. 1958), 3 V.I. 680 (1958).

WASHINGTON: *E.g.*, *Ennis v. Ring*, 49 Wash. 2d 284, 300 P. 2d 773 (1956); *American, Inc. v. Bishop*, 29 Wash. 2d 95, 185 P. 2d 722 (1947); *Realty Mart Corp. v. Standing*, 165 Wash. 21, 4 P. 2d 1101 (1931); *McInnis v. Watson*, 116 Wash. 680, 200 Pac. 578 (1921); *Mead v. White*, 53 Wash. 638, 102 Pac. 753 (1909).

WISCONSIN: *E.g.*, *Springer v. Chafee*, 5 Wis. 2d 472, 90 N.W. 2d 397 (1958); *Hutson v. Field*, 6 Wis. 407, 1 Vil. & Bry. 401 (1856); *Supra*, footnote 1.

WYOMING: *E.g.*, *Montana & Wyoming Oil Co. v. Gibson*, 19 Wyo. 1, 113 Pac. 784 (1910). Cf. *Vogel v. Shaw*, 42 Wyo. 333, 294 Pac. 687 (1930).

⁶² There is only one state in the nation having a "not binding" type statute . . . Georgia. *Supra*, footnote 10.

GEORGIA: *E.g.*, *Griffin v. Driver*, 203 Ga. 481, 46 S.E. 2d 913 (1948); *Griffin v. Driver*, 202 Ga. 111, 42 S.E. 2d 368 (1947). Cf. *Fraser v. Jarrett*, 153 Ga. 441, 112 S.E. 487 (1922) in which the Supreme Court of Georgia interpreted the statutory effect to make non-complying contracts, generally "unenforceable." The Court said at 448: "Under our statute of frauds a contract for the purchase of lands need only be signed by the party against whom the contract is sought to be enforced."

⁶³ There is only one state in the nation having a "strictly invalid" type statute . . . Idaho. *Supra*, footnote 11.

IDAHO: *E.g.*, *Bennett v. Richards*, 80 Ida. 140, 326 P. 2d 986 (1958); *Kerr v. Finch*, 25 Ida. 32, 135 Pac. 1165 (1913).

⁶⁴ There is only one state in the nation having an "invalid" type statute which interprets non-complying contracts as "void" . . . North Dakota. *Supra*, footnote 13.

NORTH DAKOTA: *E.g.*, *Severson v. Fleck*, 148 F. Supp. 760 (D.N.D. 1957); *Heinzeroth v. Bentz*, 116 N.W. 2d 611 (N.D. 1962); *Syrup v. Pitcher*, 73 N.W. 2d 140 (N.D. 1955); *Petroleum Exchange, Inc. v. Poynter*, 64 N.W. 2d 718 (N.D. 1954); *Brey v. Tvedt*, 72 N.D. 192, 21 N.W. 2d 49 (1945); *Baird v. Elliot*, 63 N.D. 738, 249 N.W. 894, 91 A.L.R. 274 (1933); *A. M.*

ever, in the few instances discussed above, no matter which type of Statute of Frauds was involved, the result with regard to recoupment was identical.⁶⁸ The vendor's right to rely on a plea of recoupment, by way of defense, was upheld.⁶⁹

Wilson Co. v. Knowles, 52 N.D. 886, 204 N.W. 663 (1925); Fried v. Lonski, 48 N.D. 1023, 188 N.W. 582 (1922); Bangs, Berry & Carson v. Nichols, 47 N.D. 123, 181 N.W. 87 (1920); Weber v. Bader, 42 N.D. 142, 172 N.W. 72 (1919).

⁶⁵ There is only one state in the nation having a "strictly evidentiary" type statute of frauds . . . Iowa. *Supra*, footnote 15.

IOWA: E.g., McMinimee v. McMinimee, 238 Iowa 1286, 30 N.W. 2d 106 (1947); Reuber v. Negles, 147 Iowa 734, 126 N.W. 966 (1910); Berryhill v. Jones, 35 Iowa 335 (1872). Cf. Grauel v. Rohe, Md. 121, 43 A. 2d 201 (1945); and *supra*, footnote 54, § on Maryland. See also: 3 WILLISTON, *CONTRACTS* 709, §527 (3rd ed., 1960); Hudson, *Contracts in Iowa Revisited—Statute of Frauds*, 6 DRAKE L. REV. 63 (1957).

⁶⁶ There is only one jurisdiction in the nation having an "evidentiary" type statute which interprets non-complying contracts as "unenforceable" . . . Commonwealth of Puerto Rico. *Supra*, footnote 17.

PUERTO RICO: E.g., Commonwealth v. Baldrich, 79 P.R.R. 680 (1956) holding that the fact a five year lease with renewal option clause was not in writing does not mean that the contract is not binding upon the parties; nor does it mean that it is non-existent. *Freyre v. Blasini*, 68 P.R.R. 198 (1948) holding parol evidence is admissible where the parties to the contract are the persons concerned. Cf. the following cases interpreting the statute of frauds but not involving realty sales or interests: *De La Torre v. Bengoecha*, 84 F. 2d 894 (1st Cir. 1936) *affirming* 47 P.R.R. 710 (1934); *De La Torre v. Bengoecha*, 48 P.R.R. 358 (1935); *Rio v. Vazquez*, 17 P.R.R. 644 (1911); *Abella v. Antunano*, 14 P.R.R. 485 (1908).

⁶⁷ There is only one state in the nation having an "evidentiary" type statute which interprets non-complying contracts as "void" . . . Louisiana. *Supra*, footnote 16.

LOUISIANA: E.g., Id., Michel v. Dolliole, 1 La. Ann. 459 (1846); *Bartlett v. His Creditors*, 12 Rob. (La.) 474 (1846); *Smesler v. Williams*, 4 Rob. (La.) 152 (1843); *Davis' Heirs v. Prevost's Heirs*, 7 La. 274 (1834); *Nichols v. Roland*, 11 Mart. O.S. (La.) 190 (1822); *Grafton v. Fletcher*, 3 Mart. O.S. (La.) 486 (1814); *Raper's Heirs v. Yocum*, 3 Mart. O.S. (La.) 424 (1814); *Watkins v. McDonough*, 2 Mart. O.S. (La.) 154 (1812). *In accord*, generally: *McKenna v. Wallis*, 200 F. Supp. 468 (E.D.La. 1962) holding an oral agreement as to immovable is not effective upon the parties under local law. See also: *Louisiana St. Board of Educ. v. Lindsay*, 227 La. 553, 79 So. 2d 879 (1955); *Oeschner v. Keller*, 134 La. 1098, 64 So. 921 (1914); *Gelpi v. Buceola*, 153 So. 2d 486 (La. App. 1963); *Halsmith v. Castry*, 17 La. Ann. 140 (1865) holding realty sales or binder contracts to be enforceable must be in writing; and, parol evidence cannot be received to prove its existence. Cf. the following cases holding the specific details of a contract cannot be varied or altered by parol testimony: *Johnson v. Graham*, 40 So. 2d 500 (La. App. 1949); *Federal Sign System v. Amavet*, 7 La. App. 680 (1927); *Harvey v. Mouncon*, 3 La. App. 231 (1925); *Comment*, 3 LA. L. REV. 427 (1941); *Note*, 25 LA. L. REV. 277 (1964).

The Louisiana Civil Code, although basically French oriented, has been greatly influenced by Spanish Civil Law. Especially is this true with regard to the sale of immovables as well as the admissibility of parol evidence in order to establish realty sales and binder contracts. Compare the French Law rules, discussed above, with the Spanish Civil Law rules which provide that a parol sale of immovables is valid and parol evidence pertaining to it is admissible. See: *Devall v. Chopin*, 15 La. O.S. 566 (La., 360) (1840); *Strawbridge v. Warfield*, 4 La. O.S. 20 (La. 397) (1832). *Ducrest's Heirs v. Bijeau's Estate*, 8 Mart. N.S. (La.) 192 (1829); *Conzales v. Sanchez*, 4 Mart. N.S. (La.) 456 (1823).

⁶⁸ "This difference in wording undoubtedly has had some effect on decisions as to the legal operation of oral contracts; but it is believed that this dif-

IV. IS A UNIFORM STATUTE NEEDED?

Professor Corbin states that the various wordings in the Statutes of Fraud "undoubtedly has some effect on decisions," but he does not believe it to be of importance.⁷⁰ It has been shown, at least with regard to recoupments,⁷¹ that this is correct. Thus, it is difficult to assert whether the problem presented by different statutes would be alleviated by a uniform type of statute. Perhaps it would be desirable, as it would give courts in the various jurisdictions a fresh chance to interpret the same words and, it may be hoped, to reach similar results in the contractual relationship of vendor and vendee.

The Wisconsin based (land investment company) vendee purchasing land in Montana would be operating under a different statute rendering an opposite effect, and the California based (land investment company) vendee purchasing land in North Dakota under a mutually identical statute, would find each state rendering an opposite result on a non-complying contract.⁷² Corbin's "some effect, although not great,"⁷³ could actually come to be of substantial effect depending upon the number of increased land purchases crossing state lines in a rapidly paced world.

Yet, in the broad perspective, it is difficult to foresee a vendee going into a realty arrangement—out of his local area—without the aid of legal counsel familiar with the laws of the new area. Greater is the difficulty to envision a vendee who would enter a bargain with the intent of trying to disaffirm it before it was even agreed.

If a uniform statute were to be drafted, perhaps the term "ineffectual"⁷⁴ would be a good substitute for: "void," "not binding," "in-

ference is much less than has been supposed." 2 CORBIN, CONTRACTS, 37-8, §284 (1950).

Of course, note must be made that in each of the instances presented, no matter which statute was in effect, the interpretation given to the non-complying contract was "Unenforceable."

⁶⁹ Cf. 5 CORBIN, CONTRACTS 207, §1035 (1951) for a discussion of the related topic of recovery of expenditures in reliance on the contract but *not* in part performance of it.

⁷⁰ *Supra*, note 68.

⁷¹ *Idem*, par. 2; Compare the identical results in: *Loring v. Peacock*, 236 S.W. 2d 876 (Tex. Civ. App. 1951) involving an "unenforceable" statute *with* *Lewis v. Peterson*, 127 Mont. 474, 267 P. 2d 127 (1953) involving an "invalid-unenforceable" statute; and *Massara v. Basharo*, 91 Ohio App. 475, 108 N.E. 2d 850 (1951) involving an "unenforceable" statute *with* *Steusser v. Ebel*, 19 Wis. 2d 591, 120 N.W. 2d 679 (1963) involving a "Void" type statute.

⁷² *Supra*, note 13.

⁷³ *Supra*, note 68.

⁷⁴ The term "ineffectual" is not entirely novel in this area.

In *Brockway v. Frost*, 40 Minn. 155, 156, 41 N.W. 411 (1889), a case involving an agreement to convey land which did not comply with the Statute of Frauds, the Supreme Court of Minnesota held the contract to be "ineffectual."

In *Newlin v. Hoyt*, 91 Minn. 409, 98 N.W. 323 (1904), the same court, *supra*, said in Syllabus note 2: "An acceptance of the property and contract by an agent who had no written authority so to act was *ineffectual*." (Emphasis supplied)

valid," "invalid and void," "invalid and unenforceable," "for evidentiary purposes only," "for evidentiary purposes but unenforceable," "for evidentiary purposes but void," "unenforceable," "void but unenforceable," and the other local interpretations of these phrases which aid in forming a crazy-quilt pattern of results and applications with regard to realty contracts and transactions.

It can be safely said, however, that with regard to the limited number of cases involving recoupments, in this area, a uniformity of consequence has been effected.⁷⁵ Thus, the hope of Professor Page expressed many years ago has been answered in some small way.

Whether or not uniformity of legislation can be secured throughout the United States, it would seem that, in each state, *the same consequences should follow* a failure to comply with the requirement of the statute, whatever the type of contract.⁷⁶

While it is possible to speak of philosophic and philologic niceties and incongruities in regard to the Statute of Frauds, perhaps the best solution to the entire situation is to try to seek a uniformity of consequence. This the Wisconsin Supreme Court has done in *Steusser v. Ebel*⁷⁷ through its application of the concept of burden of proof devolved upon vendees as expounded in *Schwartz v. Syver*.⁷⁸

V. WHAT ARE THE SOLUTIONS?

Can a situation such as was involved in the *Steusser* case and its subsequent costly litigation be avoided? One solution may be to have both parties agree to place the earnest money down-payment in escrow with the abstract or title insurance company involved in the transaction. The escrow agreement, separate from the binder contract, could provide that in the event either party does not perform his part of the binder contract or if the binder contract was not valid for failure to comply with the Statute of Frauds, the money placed in escrow would be forfeited⁷⁹ or used to cover the vendor's "expenses incurred in reliance,"⁸⁰

In *Polk v. Reynolds*, 31 Md. 106, 112, (1869) a contract for an interest in land which did not comply with the Statute of Frauds was found to be "ineffectual."

In *Penn Mutual Life Ins. Co. v. Kimble*, 132 Neb. 415, 272 N.W. 220 (1937), the Supreme Court of Nebraska said at 414: "In the case of *Herring v. Whitford*, 117 Neb. 725, 232 N.W. 581, an oral agreement to give a mortgage was held to be *ineffective* . . ." (Emphasis supplied). Cf. Conn. Gen. Stat. Ann. §47-19: "No lease . . . exceeding one year . . . shall be *effectual* . . . unless it is in writing. . . ." (Emphasis supplied)

Note should be taken that Maryland and Connecticut have "unenforceable" type statutes while Nebraska and Minnesota have "void" type statutes. Yet, there appears to be a close agreement between the two differing groups as to the use of the term "ineffectual."

⁷⁵ *Supra*, note 71.

⁷⁶ Emphasis supplied. Page, *The Effect of the Failure To Comply With The Wisconsin Statute of Frauds*, 1928 WIS. L. REV. 323, 348.

⁷⁷ 19 Wis. 2d 591, 120 N.W. 2d 679 (1963).

⁷⁸ 264 Wis. 526, 59 N.W. 2d 489 (1953).

⁷⁹ *Infra*, note 82. Research has not revealed many other situations where this was done in the binder contract. However, in land installment contracts, this

whichever it may be.⁸¹ This is exactly what was done in *Loring v. Peacock*,⁸² discussed previously, but in a somewhat modified form. In that case, the parties wrote such a provision into the binder agreement. The only problem with this situation is that if the binder agreement would be "unenforceable" as Texas⁸³ or "void" as Wisconsin⁸⁴ interpret their Statutes of Fraud, then the provision would have fallen along with the entire agreement in the event of its statutory non-compliance.

A mutually binding obligation and economic pressure could be placed in the escrow agreement to make certain that the vendor would think twice before failing to perform on the binder contract. The vendor could be required to post a fidelity bond by a reputable private surety guaranteeing performance.⁸⁵ In the alternative, the vendor could give to the escrowee, either by another separate instrument or by incorporation into the original escrow agreement, a conditional mortgage on the realty subject to its extinguishment at the time of performance. The abstract or title company would accept this inchoate mortgagor's conditional lien in consideration for posting its own surety performance bond in behalf of the vendor but payable to the vendee.⁸⁶ Such a lien would be within the scope of the Statute of Frauds concerning conveyances⁸⁷ and it would be agreed not to be recorded by the conditional mortgagee (escrow-abstract title company) until the time of default. In this way the vendor would be faced with the possible maturing of a

is done quite frequently. For related readings, see: Corbin, *The Right of a Defaulting Vendee To Restitution of Instalments Paid*, 40 YALE L. J. 1013, 1028 et. seq. (1931); Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 (1960); Kratovil, *Forfeitures of Installment Contracts in Illinois*, 53 ILL. L. J. 188 (1964); Stone, *Relief From Forfeitures of Installment Land Contracts*, 46 CHI. B. REC. 40 (1964); Comment, 29 MO. L. REV. 222 (1964); 3 WILLISTON, CONTRACTS 2224, §791 (rev. ed., 1936); 55 AM. JUR., *Vendor and Purchaser* 919, §525 (1946); Annotation, 31 A.L.R. (2) 1953. Cf. Annotation, 51 A.L.R. 1213 (1927) presenting an interesting discussion concerning the measure of damages or amount of recoupment for delays in completing a structure when a provision for liquidated damages is absent.

⁸⁰ *Steusser v. Ebel*, 19 Wis. 2d 591, 598, 120 N.W. 2d 679 (1963). Cf. *Supra*, footnote 69; and, Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 373, 386 et seq. (1937).

⁸¹ If this practice were used, many binder contracts could be passed on, as to their validity, by the legal department of the title insurance companies prior to writing the escrow agreement. The defects within them could be cured and the contracts made to comply with the statute of frauds. Thus, it is in this manner that many lawsuits could be avoided.

⁸² 236 S.W. 2d 876 (Tex. Civ. App. 1951).

⁸³ TAX. REV. CIV. STAT. art. 3995 (1963).

⁸⁴ WIS. STAT. §240.08 (1963).

⁸⁵ Although this suggestion sounds good at first glance, the high cost of such bonds must be borne in mind. Furthermore, in the event of loss, the surety will seek reimbursement in a separate suit of contribution against the vendor.

⁸⁶ This, on the basic assumption, it is financially large enough to afford to do so.

⁸⁷ WIS. STAT. §240.06 (1963): "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner related thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing."

secured lien on his property should he default on his binder agreement with the vendee.

In the event that a default took place on the escrow agreement by either or both of the parties, in order to avoid further litigation costs and confusion as to which of the parties involved was in default first, and as to who is the true title holder of the realty, a provision could be inserted in the separate escrow agreement to submit the entire case and set of agreements to an arbitration hearing in conformity with the various decisions and statutes pertinent to the subject.⁸⁸

Thus, through the application of the above suggestions and their inherent built-in economic sanctions and operational devices, it can readily be expected: (1) that more realty binder agreements will be consummated; (2) that the cost of future litigation to the parties involved, or the threat thereto, will be greatly diminished; and (3) the load of cases in our courts involving this type of situation will be diminished. This should result in enabling the judiciary to shift its energies to other areas.

VI. CONCLUSIONS.

The following conclusions can be given to the problems posed:

- (1) A. The Wisconsin Supreme Court has, through *Steusser v. Ebel*⁸⁹ introduced the doctrine of recoupment rather than "recovery."
 - B. The items which a vendor may claim as liquidated damages or recoupment are those which are "expenses incurred upon reliance" of the contract and within the scope of immediacy of the transaction.
- (2) A. Use of economic coercion by the vendor against the vendee is not a factor involved; nor can it be relied upon by the vendee so long as the choice to affirm or disaffirm exists.
 - B. It is the intended purpose of the Statute of Frauds not

⁸⁸ WIS. STAT. Ch. 298 (1963). The doctrine of *res adjudicata* is applicable to a final award made by arbitrators. *Denhart v. Waukesha Brewing Co.*, 21 Wis. 2d 583, 124 N.W. 2d 664 (1963). Every contract containing an arbitration agreement clause which does not clearly negate the application of Ch. 298 automatically incorporates the provisions of that statute. Ch. 298 is intended to make all arbitration agreements, subject to Wisconsin law, specifically enforceable. *City of Madison v. Frank Lloyd Wright Foundation, Inc.*, 20 Wis. 2d 361, 122 N.W. 2d 409 (1963). Although the Supreme Court, on review, may not agree with the decision, it will not overturn that decision since the parties involved contracted for a settlement of grievances by arbitration; and, that is what they received. *Denhart v. Waukesha Brewing Co.*, 17 Wis. 2d 44, 115 N.W. 2d 490 (1961). See also: *Grayson-Robinson Stories v. Iris Construction Co.*, 8 N.Y. 2d 133, 168 N.E. 2d 377 (1960) noted in 3 WM. & MARY L. REV. 203 (1961) which allowed specific performance, in equity, of an arbitration award under an express voluntary arbitration clause in the original contract.

⁸⁹ 19 Wis. 2d 591, 120 N.W. 2d 679 (1963).

to create frauds, but to prevent them and aid in the consummation of contracts.

- (3) A. The policy of other jurisdictions with regard to application of the doctrine of recoupment in realty binder contract cases is the same in Wisconsin.
- B. Whether a state has an "invalid," "void," "unenforceable," or "evidentiary," etc. type of Statute of Frauds seems to make little difference in results in cases involving realty binder contracts and recoupments.
- (4) A. While a Uniform Statute of Frauds Act substituting the term "ineffectual" for all the other words and phrases now used would be helpful, such a proposed statute would not be necessary, if the same consequences would follow in given similar factual situations.
- B. There is a need for the reviewing courts to be more precise in their opinions in employment of the terms: "void," "voidable," "unenforceable," "of no effect," "invalid," "not binding," "ineffective," and the numerous other combinations of these terms. With greater care as to word choice in describing the operative effect of a non-complying contract, *intra* state variations can be solved.⁹⁰ The same is true of certain interstate differences. More precise word choice in opinion writing will dispel much of the interpretive confusion. Thus, a certain amount of regularity, and perhaps uniformity, is inherent in such a proposal.
- (5) A. The situation posed by *Steusser v. Ebel* and the many cases factually similar⁹¹ could be substantially lessened if the parties involved would put to better use the specially proposed private corporate escrow agreement discussed heretofore.
- B. Such agreement, with its inherent economic sanctions and operational devices, would place upon the defaulting vendee partial or full loss of the earnest money down-payment. In the event the escrowee takes a conditional mortgage on the realty, the defaulting vendor is faced with the loss of clear title ownership to it and the consequences of this situation. He could also be

⁹⁰ Compare the *intra*-jurisdictional inconsistencies shown among the cases interpreting the various statutes. *Supra*, notes 54, 58, 60-67 inc., *passim*. Cf. Mellinkoff, *op. cit.*, 351, pp. 352, 358, 360, §123 for an interesting history and discussion of the terms: "force and effect," "in effect," "null and void," "void," "void and of non-effect," "void contract," and "void, not voidable."

⁹¹ *Supra*, note 1.

faced with a money damages suit for contribution by a private surety.

- C. Through the implementation of the proposed special escrow agreement, a less costly, more rapid method of settling disputes could be employed in the form of contractual arbitration.

The study of recoupments by a vendor for expenses incurred in reliance upon or within the scope of immediacy of a realty binder contract transaction, when such contract does not comply with the Statute of Frauds, is an examination of one leaf in an ever-growing garden of legal knowledge.

THEODORE S. FINS