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Chapter 119.

Statute of Frauds. Bulk Sales Act. Conditional Sales. Assignment of Wages. Contracts for Sale of Real Estate.

Statute of Frauds.

Editor's note.—It is felt that many of the principles set forth in the annotations to particular sections of the statute of frauds would be applicable to other sections of the statute. It is therefore suggested that all of the annotations for §§ 1-5 be examined in their entirety.

Sec. 1. Cases in which promise must be in writing; consideration need not be expressed therein. — No action shall be maintained in any of the following cases:

I. To charge an executor or administrator upon any special promise to answer damages out of his own estate;

II. To charge any person upon any special promise to answer for the debt, default or misdoings of another;

III. To charge any person upon an agreement made in consideration of marriage;

IV. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;

V. Upon any agreement that is not to be performed within 1 year from the making thereof;

VI. Upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, or assignment or insolvent laws of this state;

VII. Upon any agreement to give, bequeath or devise by will to another, any property, real, personal or mixed; (1947, c. 185)

VIII. Upon any agreement to refrain from carrying on or engaging in any trade, business, occupation or profession for any term of years or within any defined territory or both; provided that the provisions of this subsection shall not apply to any such agreement made prior to August 13, 1947; (1947, c. 185)

unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise. (R. S. c. 106, § 1. 1947, c. 185. 1949, c. 349, § 131.)

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See c. 185, § 4, re statute of frauds in uniform sales act.

I. GENERAL CONSIDERATION.

Statute does not invalidate oral contract.—Our statute does not pretend to invalidate the original oral contract but only prevents maintenance of an action upon it unless it is in writing or unless there is some memorandum or note thereof in writing. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

And such contract is sufficient consideration for note given.—A verbal agreement, not enforceable under the statute of frauds, is avoidable only, and is a sufficient consideration for a note given by reason of the agreement, providing the payee of the note is ready and willing to be bound by the agreement. Fletcher v. Lake, 121 Me. 474, 118 A. 321.

Part of severable contract may stand although other part violates statute.—If the several stipulations are not so interdependent but that a distinct engagement as to any one stipulation may be fairly and reasonably extracted from the whole, then there may be a recovery in such distinct engagement, whenever it is clear of the statute of frauds, though the other stipulations are in violation of the statute. Brown v. True, 123 Me. 288, 122 A. 850.

But if the contract is entire and part is within the statute of frauds, it is unenforceable as a whole, and no action can be maintained to enforce the part which would not have been affected by the statute if it had been separate and distinct from the other part. Brown v. True, 123 Me. 288, 122 A. 850.

Defendant must take advantage of statute by proper plea.—If the defendant would take advantage of the statute of frauds in an action to recover damages for the breach of an oral agreement within its provisions, he must do so by some proper plea. The proper plea is sometimes a demurrer, sometimes the general issue, and sometimes a special plea in bar. Which is the proper one to use can always be determined by a simple inspection of the plaintiff's declaration. If the declaration sets out a parol promise, a demurrer is the proper plea. If the declaration sets out a written promise, the general issue, "never promised in manner and form," etc., is the proper plea. If the declaration avers a promise merely, without stating whether it is or is not in writing, then a special plea in bar, denying that it is in writing, is the proper plea. Lawrence v. Chase, 54 Me. 196.

But failure to object to evidence proving oral contract is not a waiver.—In this state the proper method of insisting upon the statute of frauds as a ground of defense is to plead it specially, and, when this has been done, a failure to object to certain evidence tending to show an oral contract, that is to say, to certain evidence which does not prove the issue, is not a waiver of the issue itself; especially when the whole course of the trial shows that, in point of fact, the precise issue of the pleadings was the one to which the controversy before the jury related and upon which the rulings of the court were given. Farwell v. Tillson, 76 Me. 227.

And it is immaterial what admissions are made by a defendant insisting upon the benefit of the statute; for he throws it upon the plaintiff to show a complete written agreement, and it can no more be thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement. Farwell v. Tillson, 76 Me. 227.

Thus, although the defendant admits the agreement, it cannot be enforced without the production of a written memorandum, if he insists upon the bar of the statute. Farwell v. Tillson, 76 Me. 227.

Statute not applicable to executed contract.—Although it is true that an oral executory contract which fails to comply with the requirements of the statute of frauds is unenforcible, it is equally true that when the contract has been fully executed it cannot be abrogated for that reason. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

And equity may enforce partially performed contract.—While it is true that equity will under some circumstances grant relief to one who has fully or partially performed a contract which is unenforcible because it does not comply with the requirements of the statute of frauds, it does so only upon certain well recognized and established equitable principles. Relief because of the partial or full performance of the contract is usually granted in equity on the ground that the party who has so performed has been induced by the other party to irretrievably change his position and that to refuse relief according to the terms of the contract would otherwise amount to a fraud upon his rights. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873. See this note, analysis line IV, E.

But performance must be by person seeking to enforce contract.—Part performance to operate as a bar to the application of the statute of frauds must be part performance on the part of one seeking to charge the other party under the contract, not part performance on the part of the one whom it is sought to charge. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

Memorandum must show material conditions of contract.—The memorandum must show within itself or by reference to some other paper all the material conditions of the contract. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

Contain whole agreement.—The instrument signed, or others to which it refers and which are thereby made a part of it, should contain the whole agreement; at least so far as it is intended to affect the party to be charged. Freeport v. Bartol, 3 Me. 340.

And must be complete in itself as to parties and terms.—A memorandum sufficient to satisfy the requirement of the statute of frauds must be complete in itself as to the parties charged with liability thereunder and the essential terms of the contract. The memorandum cannot rest partly in writing and partly in parol; that is to say, a deficiency in the memorandum cannot be supplied by parol evidence. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

The memorandum must establish the contract plainly in all its terms or it will not be sufficient; and it can receive no aid from parol evidence. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

In order to constitute a sufficient memorandum, the subject matter must be so certainly described that no oral testimony is needed to supply any necessary terms or conditions. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249.

But subject matter may be identified by reference.—The subject matter of the contract may in any case be identified by reference to an external standard, and need not be in terms explained. Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

And parol evidence of such does not destroy sufficiency of memorandum.—Parol evidence identifying the subject matter of the contract does not destroy the sufficiency of the memorandum, but when the subject matter is thus ascertained, the memorandum may be construed to apply to it. Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

But parol evidence cannot connect different writings.—Parol evidence can only bring together the different writings. It cannot connect them. They must show their connection by their own contents. The connection must be apparent from a comparison of the writings themselves. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249.

Contract need not recite consideration.—The statute of frauds, even before the amendment expressly declaring it unnecessary, never required the consideration to be recited in the note or memorandum signed by the party to be charged. Williams v. Robinson, 73 Me. 186; Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

And it may be proved by parol.—The statute does not require that the consideration be expressed in the writing but expressly provides that it "may be proved otherwise." The consideration may be proved by parol. Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

Contract by agent need not disclose principal.—The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing,

and if the party is an agent, it is not necessary that the name of the principal shall be disclosed in the writing. Indeed, if a contract, within the provisions of the statute, be made by an agent, whether the agency be disclosed or not, the principal may sue or be sued as in other cases. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249; Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

And agency may be proved by parol.—It is competent to prove by parol that a party named in a writing relied upon to satisfy the requirements of the statute acted as agent of another, and the principal has the same rights and is under the same liabilities as though he had acted in his own proper person. Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

The memorandum must name or describe two contracting parties, but if one of the parties named is merely an agent, the undisclosed principal may be shown by parol. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249.

Which evidence does not contradict the written contract.—It is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement is or is not required to be in writing by the statute of frauds. This evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it, it purports to bind, but shows that it also binds another by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249.

The memorandum or note does not constitute a new contract; it simply makes enforceable the original contract, although oral. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

But is evidence of contract.—The note or memorandum is not the contract, but is evidence of it. The language of this section implies that an oral contract may be made first, and a memorandum of it given afterwards. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

The purpose of the note or memorandum is to express the terms of the original trade and is evidence by which that trade can be proved. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

Which must be in existence at time action brought.—It is necessary only that the written evidence of the contract necessary to satisfy the statute of frauds must be in existence at the time the action is brought. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

Signing may be done any time before action brought.—As a general rule, it is not necessary that the signing should be at the moment of making the contract, when the parties are acting for themselves. It may be done at any time before the action is brought. And there is no reason why the same rule should not apply where the signing is by an agent fully authorized to act at the time of signing. Horton v. McCarty, 53 Me. 394.

Contract within statute is no ground of defense.—An oral contract within the statute of frauds cannot be made the ground of a defense, any more than of a demand; the obligation of the plaintiff to perform it is no more available to the defendant in the former case, than the obligation of the defendant to perform it would be to the plaintiff in the latter case. Bernier v. Cabot Mfg. Co., 71 Me. 506.

Money paid under contract may be recovered.—An action for money had and received lies to recover money paid by a party to an agreement invalid by the statute of frauds, which the other party refuses to perform. Jellison v. Jordan, 68 Me. 373.

Applied in Wade v. Curtis, 96 Me. 309, 52 A. 762.

II. PROMISE TO ANSWER FOR DEBT, ETC., OF ANOTHER.

A. In General.

A promise to pay the debt of another by future labor is within the statute and must be in writing. Strickland v. Hamlin, 87 Me. 81, 32 A. 732.

Usual rules of construction and evidence applicable to contracts of guaranty.—Contracts of guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default or miscarriage of another to be in writing subscribed by the party to be charged thereby, and no parol evidence will be allowed as a substitute for these requirements of the statute. But, in other respects, the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts. Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

Writing sufficient if names of parties and

amount of debt made certain.—If the agreement was in writing, and the names of the parties, debtor and creditors, and the amount of the debt are made certain, either in the writing itself or in the writ to which reference is made by the writing, this is sufficient, and the statute of frauds is satisfied. Savage v. Robinson, 93 Me. 262, 44 A. 926.

And debt described as then owing or to become owing is sufficient.—It is very common to identify the debt of a third person, for which the defendant has made himself responsible, as the debt then owing, or to become owing, by said third person to the plaintiff, without further description, and this is sufficient. Haskell v. Tukesbury, 92 Me. 551, 43 A. 500.

Consideration need not appear in memorandum.—The statute of frauds does not require that the consideration for the collateral undertaking should appear in the note or memorandum signed by the party to be charged. Levy v. Merrill, 4 Me. 180. See this note, analysis line I.

Payments made by promisor may be applied to oldest item. — When a defendant is exonerated by the statute of frauds from liability upon his oral promise to pay for certain goods furnished by the plaintiff to a third person before a certain date and liable for those furnished afterwards, payments made by him on the orders of such third person, drawn, payable upon the account generally, without reference to the question of liability, may be applied by the creditor to the oldest item. Murphy v. Webber, 61 Me. 478.

Subsection II applied in Bishop v. Little, 5 Me. 362; Smith v. Sayward, 5 Me. 504; Rowe v. Whittier, 21 Me. 545; Danforth v. Pratt, 42 Me. 50; Richardson v. Williams, 49 Me. 558; Rollins v. Crocker, 62 Me. 244; Berry v. Pullen, 69 Me. 101; Baker v. Fuller, 69 Me. 152; Stevens v. Mayberry, 82 Me. 65, 19 A. 92.

Subsection II stated in Congregation Beth Abraham v. People's Savings Bank, 120 Me. 178, 113 A. 53.

B. Original and Collateral Promises.

1. In General.

Subsection II applies only to collateral promises. Ferren v. S. D. Warren Co., 124 Me. 32, 125 A. 392.

And original promise is not within statute.—The general rule is well recognized that it is a collateral and not an original promise that is within the statute. Fairbanks v. Barker, 115 Me. 11, 97 A. 3.

A promise which is an original and not a collateral undertaking is not within subsection II. Goodspeed v. Fuller, 46 Me. 141.

The test in all cases under the statute is, whether the party promising is an original debtor or not. Moses v. Norton, 36 Me. 113.

No precise form or words are necessary to show an original promise, or conclusive as to the intention of the parties. Fairbanks v. Barker, 115 Me. 11, 97 A. 3.

Test is whether credit given to person receiving goods. — The test to decide whether the one promising is an original debtor or a guarantor is whether the credit was given to the person receiving the goods. Doyle v. White, 26 Me. 341; Fairbanks v. Barker, 115 Me. 11, 97 A. 3; Hines & Smith Co. v. Green, 121 Me. 478, 118 A. 296.

An individual may originally undertake to pay for services which are to be rendered or for goods which are to be delivered to another—the question in such cases is on whose credit the services are rendered or the goods delivered—and the promise need not be in writing. Whittemore v. Wentworth, 76 Me. 20.

And promise is original if credit given solely to promisor. — The obligation is original if the promise is made at the time or before the debt is created and the credit is given solely to the promisor, but it is collateral if the promise is merely superadded to the promise of another to pay the debt, he remaining primarily liable. Fairbanks v. Barker, 115 Me. 11, 97 A. 3; Hines & Smith Co. v. Greene, 121 Me. 478, 118 A. 296; Drummond v. Pillsbury, 130 Me. 406, 156 A. 806.

Whether the engagement was original or collateral must be determined by the contract itself; although if doubt remains, the particular words which import the promise may be interpreted in the light of attending facts, the nature of the contract, the acts to be done, the time, place and manner of performance, the situation and relations of the parties, and sometimes even by the aid of the subsequent conduct of the parties showing a practical construction put upon doubtful terms by themselves. Hines & Smith Co. v. Greene, 121 Me. 478, 118 A. 296.

And, in ascertaining to whom credit was extended, the intention of the parties must govern. This intention should be ascertained from the words used in making the promise, the situation of the parties, and all the circumstances surrounding the transaction. The real character of the promise does not depend altogether on the form of expression, but largely on the sit-

uation of the parties; and the question is, always, what the parties mutually understood by the language; whether they understood it to be a collateral or a direct promise. Hines & Smith Co. v. Greene, 121 Me. 478, 118 A. 296.

Question determined by jury. — As a general rule, the question as to whether the promise is original or collateral is one of fact for the jury to determine. Fairbanks v. Barker, 115 Me. 11, 97 A. 3.

Where intention of parties is doubtful. —Where the language used, together with the surrounding facts and circumstances, makes it doubtful whether the parties intended, by the promise, to create an original or a collateral obligation, then the intention should be determined by the jury, under proper instructions by the court. Hines & Smith Co. v. Greene, 121 Me. 478, 118 A. 296.

But court should decide question if there is no conflict. — When there is no substantial conflict in the evidence as to the precise terms of the alleged promise, then the court should decide, as a matter of law, the meaning of the words used which are alleged to constitute the promise, and to decide, as a matter of law, whether the alleged promise is original or collateral. Hines & Smith Co. v. Greene, 121 Me. 478, 118 A. 296.

Manner in which account charged is not conclusive as to intention. — While the manner in which the account has been charged by the creditor in his books of account is very strong evidence, and entitled to great weight in arriving at the intention of the parties to a promise, yet the fact that the account is charged to the debtor is generally held not to be conclusive evidence that credit was extended to the debtor, and the reason for so making the charge is open to explanation. Hines & Smith Co. v. Greene, 121 Me. 478, 118 A. 296.

2. Promises within the Statute.

Promise is within statute if goods sold on credit of third person.—An oral promise to pay for goods furnished at the promisor's request to a third person is not valid if the transaction is wholly or partly upon the credit of the third person so as to create a debt against him to which the oral promise is merely collateral. If any credit whatever is given to the third person, so that he is in any degree liable, the oral promise is not valid. Hines & Smith Co. v. Greene, 121 Me. 478, 118 A. 296.

And if debt remains against original debtor. — While the debt remains a subsisting demand against the original debtor, the promise of a third person is collateral, and must be in writing. Stewart v. Campbell, 58 Me. 439.

When the person, in whose behalf the promise is made, is not discharged, but the person promising agrees to see the debt paid, so that the promise has a double remedy, the promise is collateral, and must be in writing. Stewart v. Campbell, 58 Me. 439.

The general rule is that as long as the debt of the person, for whom the promise is made, remains, the promise is collateral. Stewart v. Campbell, 58 Me. 439.

Even though consideration moves from original debtor to new promisor.—An oral promise to pay the debt of another is within the statute of frauds, if the original promisor remains liable, and no consideration moves from the creditor to the new promisor, although there is a valuable consideration moving from the original debtor to the new promisor. Stewart v. Campbell, 58 Me. 439.

A promise to pay, in consideration of forbearance to sue, is within the statute. When there is a verbal promise to pay the amount of the debt of another, in consideration that the creditor will forbear to sue for a limited time, the forbearance is a new consideration upon which the promise is founded. But such cases are held to be within the statute. Stewart v. Campbell, 58 Me. 439.

As is promise to delay collection of execution. — In Russell v. Babcock, 14 Me. 138, it was held that an agreement to delay the collection of an execution was a sufficient promise by a third person to pay the same, and that such promise need not be in writing. But this decision would repeal the statute, and it has since been overruled. Referring to this decision, it was said in Hilton v. Dinsmor, 21 Me. 410, that "if this was in reality the ground of the decision in that case, and the abstract of the reporter is to that effect, we are constrained to say it is unsupported by the authorities." To the same effect was the case of Doyle v. White, 26 Me. 341. Stewart v. Campbell, 58 Me. 439.

And promise to accept order from debtor in favor of creditor. — A parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there had been no privity, is within the statute of frauds as a promise to pay the debt of another. Stewart v. Campbell, 58 Me. 439.

And promise to pay rent for tenant. — A promise to pay the accruing rent of a tenant is nothing more than a promise to

pay money that would become due from a third person, and is within the words of the statute, and the mischief intended to be remedied thereby. Moses v. Norton, 36 Me. 113.

Where an agreement to pay rent is but collateral to a prior promise of another to pay the same rent, such agreement is unenforceable unless it be in writing. Blake v. Parlin, 22 Me. 395.

3. Promises Not within the Statute.

Promise based on new and original consideration not within statute. — If the promise as alleged and proved is one based upon a new and original consideration beneficial to the promisors, it is not within the statute of frauds, although the promise is to pay the debt of another. Maine Candy & Products Co. v. Turgeon, 124 Me. 411, 130 A. 242.

A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well be to pay another's debt as to do any other act. This promise may be absolute or conditional; to pay money or perform labor; and having a valuable consideration of its own to rest upon, it is a new, original and independent undertaking, and may be enforced. Coffin v. Bradbury, 89 Me. 476, 36 A. 988.

Cases in which the promise to pay the debt of another arises from some new and original consideration of benefit or harm, moving between the newly contracting parties, are not within the statute of frauds. Dearborn v. Parks, 5 Me. 81; Griffin v. Derby, 5 Me. 476; Maxwell v. Haynes, 41 Me. 559.

When a promise to pay the debt of another is founded on a new consideration beneficial to him who makes the promise, such a promise is not within the statute of frauds. Stewart v. Campbell, 58 Me. 439.

If the promisor receives a valuable consideration for the purpose from either party, distinct from and independent of that of the original debt, and, thereupon, promises payment, it is an original undertaking, and need not necessarily be evidenced by a writing. Hilton v. Dinsmore, 21 Me. 410.

Where the promise is founded upon some new consideration, sufficient in law to support it, and is not merely for the debt of another, although, in effect, the undertaking be to answer for another person, it is considered as an original promise, and not within the statute. Dearborn v. Parks, 5 Me. 81.

Nor is one induced by benefit to promisor.—When a benefit, legal or pecuniary, to the promisor is the inducement for a promise of indemnity, such promise is not within the statute of frauds as being a special promise to answer for the debt or default of another, but is an original promise binding upon the promisor. Colbath v. Everett B. Clark Seed Co., 112 Me. 277, 91 A. 1007.

If the promise springs out of any new transaction, or moves to the party promising upon some fresh substantive ground of a personal concern to himself, the statute of frauds does not attach. In other words the promise to be binding and not within the statute, must spring out of some new transaction, or out of some fresh substantive ground of personal concern to himself. Dolye v. White, 26 Me. 341.

Although its performance may extinguish liability of another. — Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damages to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. Colbath v. Everett B. Clark Seed Co., 112 Me. 277, 91 A. 1007.

If, when the promisor pays, he pays his own debt, that it operates also to discharge the debt of another, does not change the original character of his own engagement. Brown v. Attwood, 7 Me. 356.

Where one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise, this is not such an undertaking to pay the debt of another as is within the statute of frauds, and, therefore, it is not necessary that it should be in writing. Dearborn v. Parks, 5 Me. 81.

The statute of frauds does not apply to a case of novation, where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor. The new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation. Hamlin v. Drummond, 91 Me. 175, 39 A. 551.

Assumption of mortgage by purchaser of realty not within statute. — Where the purchaser of real estate agrees to assume an existing mortgage on the property, he becomes liable to the holder of the mortgage for the entire mortgage debt. It is

part of the purchase money, and the promise to pay it is a promise to pay his own debt and not the debt of another within the statute of frauds. Flint v. Winter Harbor Land Co., 89 Me. 420, 36 A. 634.

Nor is case where debtor delivers money to third person to pay debt. — Where a debtor delivers current funds to a third party to enable him to pay the creditor the debt, and such third party, in consideration thereof, promises to pay the debt, he is liable in a proper action directly to the creditor, if he afterward upon demand refuses to pay. The statute of frauds requiring a promise to pay the debt of another to be in writing does not apply to such a case. By taking the debtor's money he makes the debt his own. Watson v. Perrigo, 87 Me. 202, 32 A. 876.

Nor where purchaser agrees to pay debts of seller. — When one person sells property to another, and the purchaser agrees to pay certain bills of the vendor to third persons, as part of the consideration, and afterwards promises such third persons to pay the same, he makes himself thereby liable, and his promise is not within the statute of frauds. Perkins v. Hitchcock, 49 Me. 468.

III. AGREEMENTS MADE IN CONSIDERATION OF MARRIAGE.

Agreement in consideration of marriage must be in writing. — A contract made in consideration of marriage is required, as a condition to enforcibility by action, to be in writing and signed by the party to be charged therewith in accord with subsection III. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

And marriage alone does not remove bar to enforcibility of oral promise.—Marriage alone pursuant to an oral contract in consideration thereof is sufficient either at law or in equity to remove the bar to the enforcement of such contract which is imposed by subsection III. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

For it is not a part performance upon which equitable relief can be based.—In the case of a verbal contract made in consideration of marriage, the marriage alone, even though it is an irretrievable change of position, is not a part performance upon which equitable relief can be based. This rule which is firmly established, is based upon the express language of the statute. The marriage adds nothing to the very circumstance described by the statutory provision which makes the writing essential. Unlike the other paragraphs of this section, in paragraph III it is the consideration of the contract which brings it within the statute, not the nature of the promise made. To say that in the case of an oral contract made in consideration of marriage the bar of the statute is removed, even in equity, by the marriage itself would destroy the statute and make it meaningless. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

Oral agreement in consideration of promise to become engaged is invalid.—An oral agreement to pay money in consideration of a promise of marriage is invalid and such an agreement in consideration of a promise to become engaged to marry is also invalid. Guild v. Eastern Trust & Banking Co., 122 Me. 514, 121 A. 13.

But a promise to marry is not within the statute of frauds. It is not promises of marriage but promises "made in consideration of marriage" that must be in writing. The statute concerns itself not with the subject of the promise, but with the consideration for it. Guild v. Eastern Trust & Banking Co., 122 Me. 514, 121 A. 13.

And need not be in writing.—A promise to marry is not a contract or agreement made in consideration of marriage within the meaning of the statute of frauds and hence it is not necessary that the contract should be in writing. Guild v. Eastern Trust & Banking Co., 122 Me. 514, 121 A. 13.

Mutual promises of marriage do not have to be in writing in order to be binding. Guild v. Eastern Trust & Banking Co., 122 Me. 514, 121 A. 13.

The statute reaches not mutual promises to marry, but only promises for other things made in consideration of marriage. Guild v. Eastern Trust & Banking Co., 122 Me. 514, 121 A. 13.

Thus written promise in consideration of oral marriage promise is valid. — An oral money promise in consideration of a marriage promise is invalid. But a written money promise, like a check, made in consideration of an oral marriage promise is a perfectly good and enforceable contract. Guild v. Eastern Trust & Banking Co., 122 Me. 514, 121 A. 13.

Antenuptial contract reduced to writing after marriage is valid.—It is generally held that a verbal antenuptial contract may be reduced to writing or be evidenced by a written memorandum after the marriage so as to render it, when properly signed, valid and enforceable as between the parties and persons claiming under them. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

Subsection III applied in Roderick v.

Paine, 121 Me. 420, 117 A. 575; Guild v. Eastern Trust & Banking Co., 125 Me. 292, 133 A. 164.

IV. CONTRACTS RELATING TO LAND.

A. In General.

Subsection IV extends generally to all leases, estates and interests. Pitman v. Poor, 38 Me. 237. See this note, analysis line IV, C, re applicability of statute to particular contracts.

And contract in relation to real estate must be in writing.—A contract in relation to real estate, to be binding at law, must be in writing, signed by the party to be charged, or some other person thereunto by him lawfully authorized. Blood v. Hardy, 15 Me 61.

But authority of one to sign for another need not be in writing.—A contract in relation to real estate, to be binding at law, must be in writing, and signed by the party to be charged, or by some other person by him thereunto lawfully authorized. But where the writing is not under seal, it is not necessary that the authority of one to sign for another should be in writing. Blood v. Hardy, 15 Me 61.

A parol grant of real estate is ineffectual to change the ownership of the property. Nevells v. Carter, 122 Me. 81, 119 A. 62.

And an action at law cannot be sustained on a parol contract for the sale of real estate. Green v. Jones, 76 Me. 563.

Even though contract partially performed.—An agreement for the conveyance of land, not reduced to writing, although performed in part by each party, cannot be enforced by an action at law for the recovery of damages. Norton v. Preston, 15 Me. 14.

But statute furnishes no defense if contract fully executed.—When a contract for the sale of land, which when made was within the statute of frauds and might have been avoided thereby, has been fully executed, and nothing remains but to pay over the money received, the statute furnishes no defense. Linscott v. McIntire, 15 Me. 201.

Subsection IV applied in Ricker v. Kelly, 1 Me. 117; Smith v. Sayward, 5 Me. 504; Greer v. Greer, 18 Me. 16; Wheeler v. Cowan, 25 Me. 283; Fisher v. Shaw, 42 Me. 32; Lawrence v. Chase, 54 Me. 196; Rand v. Webber, 64 Me. 191; Collins v. Decker, 70 Me. 23; Segars v. Segars, 71 Me. 530.

B. Sufficiency of Writing.

All essential elements and terms of contract should be in writing.—To comply with the statute both in letter and in spirit, it is necessary that all essential elements and terms of the contract be made to appear in writing signed by the party to be charged therewith or by some person thereunto lawfully authorized, in order that no part of the agreement needs to be proved by parol evidence. Among such essential terms the amount of the purchase price is to be included where the contract contains a stipulation as to price. Thurlow v. Perry, 107 Me. 127, 77 A. 641.

To satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, (if any) without any aid from parol testimony. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249.

And memorandum merely admitting previous verbal agreement is not sufficient.—A letter which is sufficiently definite in its designation of the property which is the subject of the contract, and which contains a clear statement of an intention to purchase in accordance with the terms which had been previously agreed upon, but which fails to set out these terms and omits any reference to the purchase price is not a sufficient memorandum under this section. It amounts to nothing more than an admission that a verbal agreement previously made for the purchase of the property existed. Thurlow v. Perry, 107 Me. 127, 77 A. 641.

Date of lease and time it has to run must be stated in contract for purchase of assignment of lease.—Where the contract is one for the purchase of an assignment of a written lease, the date of the lease and the remaining time it has to run are obviously essential items in the description of the interest created by it. Without those being fixed, the whole interest under the lease is indeterminate. They are essential elements of the contract, and must be completely stated in the memorandum. The want of such cannot be supplied by parol. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249.

Transmission of signed deed to attorney is not sufficient memorandum. — The signing of a deed by the grantor and its being sent by him to his attorney, do not constitute a sufficient memorandum in writing to take the contract out of the statute of frauds, if it was still an unexecuted deed because undelivered and still in the pos-

session and under the control of the grantor. Morrow v. Moore, 98 Me. 373, 57 A. 81.

Parol evidence not admissible to prove connection between separate papers. — Where an agreement concerning the sale of real estate is contained on two separate papers, neither of which contains in itself any reference to the other, parol evidence is inadmissible to prove their connection. Freeport v. Bartol, 3 Me. 340. See this note, analysis line I.

Memorandum sufficient to satisfy statute.—See Nugent v. Smith, 85 Me. 433, 27 A. 342.

C. Applicability of Statute to Particular Contracts.

1. In General.

Contract to execute deed must be in writing.—A party who contracts to execute a deed is bound to prepare and deliver it only when such contract is in writing as required by the statute of frauds. Brackett v. Brewer, 71 Me. 478.

As must agreement to make good title. —A vendor's oral agreement to remove existing incumbrances is generally good, but a general agreement to make a good title, if the deed delivered does not have that effect, is within the statute. Ladd v. Holman, 109 Me. 46, 82 A. 437.

Where one, upon giving a deed of release and quitclaim, stipulated by parol that "if the deed did not pass and secure the land to the grantee, he would make it good," this was taken as a promise to convey a legal and perfect title to the land, and therefore as void, by the statute of frauds. See Bishop v. Little, 5 Me. 362.

To make repairs.—Where premises are leased by the month, the rent paid, and premises occupied, and the landlord agrees as part of the contract to make repairs, such agreement is within the statute of frauds. O'Leary v. Delaney, 63 Me. 584.

To give bond for a deed. — An agreement to give a bond for a deed must be in writing. It concerns an interest in real estate. Brown v. True, 123 Me. 288, 122 A. 850.

And to repay money received in payment of oral contract for sale of land.— Oral promises to repay money received in partial payment of an oral contract for the sale of land, or to share the profits of a sale of such land, are unenforceable when the statute of frauds is pleaded in defense. Barrett v. Greenall, 139 Me. 75, 27 A. (2d) 599.

And a promise in the alternative, to pay money or convey land, does not exempt it from the operation of the statute. Patterson v. Cunningham, 12 Me. 506.

A grantor can only assign his reserved interest in land by writing, according to the express provisions of the statute of frauds. Moulton v. Faught, 41 Me. 298.

A parol partition of lands between cotenants is invalid by reason of the statute of frauds. John v. Sabattis, 69 Me. 473.

And an assignee of a lease of real estate must be in writing. Brown v. True, 123 Me. 288, 122 A. 850.

The assignment of a lease is a contract concerning an interest in lands within the meaning of subsection IV. Inderlied v. Campbell, 119 Me. 303, 111 A. 333.

As must contract for purchase of assignment.—A contract for the purchase of an assignment of a written lease is for "an interest in or concerning" land, and hence is within the statute of frauds. Kingsley v. Siebrecht, 92 Me. 23, 42 A. 249.

And surrender of lease.—Since the statute of frauds there is no doubt that a surrender of a lease can be legally proved only by deed or note in writing, or by act and operation of law. Hesseltine v. Seavey, 16 Me. 212.

And account cannot be proved by oral testimony.—A contract between two principals to obtain and assign a lease is within the statute of frauds and cannot be proved by oral testimony. Inderlied v. Campbell, 119 Me. 303, 111 A. 333.

But assignee's promise to pay rent need not be in writing. — Where a lease has been assigned by the lessee, an oral promise by the assignee to pay the rent to the lessor does not involve the question of title or interest in real estate and is not within the statute of frauds. Knight v. Blumenburg, 111 Me. 190, 88 A. 474. But see Blake v. Parlin, 22 Me. 395, wherein it was held that a special verbal agreement to pay rent is not enforceable.

Right to erect dam cannot pass by parol. The right to erect and maintain a dam on the land of another, must be regarded as such an interest in real estate as cannot pass by parol. Moulton v. Faught, 41 Me. 298.

A parol license that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir of water for the use of his mill, will confer no right upon the plaintiff to maintain such dam after it is built, or control the water raised by means of it. Pitman v. Poor, 38 Me. 237.

Statute applicable to agreement to form partnership for purchase and sale of land.

—A parol agreement to become partners in the business of purchasing and selling lands and lumber is a parol contract respecting an interest in lands within the meaning of the statute. Farnham v. Clements, 51 Me. 426.

But contract of agency need not be in writing. — A contract which is one of simple agency by which one party agrees to obtain a lease or purchase real estate for another and in the principal's name need not be in writing. Inderlied v. Campbell, 119 Me. 303, 111 A. 333. But see Farnham v. Clements, 51 Me. 426, wherein it is said that, if a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds.

Contract for sale of timber not within statute.—Parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee are construed as not intended by the parties to convey any interest in land, and, therefore, not within the statute of frauds. Banton v. Shorey, 77 Me. 48.

Nor is sale of grass already grown.—Grass already grown and in a condition to be cut might be sold by parol, and there is no objection to such sale arising from the statute of frauds. Cutler v. Pope, 13 Me. 377.

2. Agreements Concerning Mortgages.

Agreement giving or discharging mortgage is within statute.—A mortgage of real estate in this state is in form a warranty deed with a condition subsequent specifying the means and manner of defeasance. Legal title passes at once to the mortgagee upon delivery. It follows that an oral agreement concerning the giving or discharging of a mortgage comes within subsection IV. Brown v. True, 123 Me. 288, 122 A. 850.

An unexecuted verbal agreement made by a mortgagee to discharge a mortgage by a release is void by the statute of frauds. Phillips v. Leavitt, 54 Me. 405.

And mortgagee's interest does not pass by parol assignment.—The interest of the mortgagee of land is held to be within the statute of frauds, and does not pass by delivery of the mortgage nor by parol assignment. Leavitt v. Pratt, 53 Me. 147.

Or oral promise to relinquish his claim.—An oral promise, on sufficient consideration, made by a mortgagee to relinquish his claim to the land mortgaged, is void by the statute of frauds. Leavitt v. Pratt, 53 Me. 147.

Contract divesting mortgagee of right of possession must be in writing.—A contract by which a mortgagee divests himself of the right of possession operates upon an interest in real estate and must be evidenced by writing. Norton v. Webb, 35 Me. 218.

As must contract to extend equity of redemption.—A verbal contract to extend the equity of redemption of a mortgage of real estate, entered into by the mortgagee with one who at the time has no legal or equitable interest in that equity of redemption, is within the statute of frauds, and not enforceable unless in writing and supported by a valuable consideration. Dow v. Bradley, 110 Me. 249, 85 A. 896.

But such contract verbally made may be binding if acted upon by parties.—An agreement beween mortgagee and mortgagor, or those holding their respective interests, to extend the time of redemption, although not in writing, nor supported by any other consideration than the promise of the redemptioner, when such an agreement has been acted upon so far that the parties cannot be placed in statu quo, is not within the statute of frauds, and is binding upon the parties. Dow v. Bradley, 110 Me. 249, 95 A. 896.

3. Sales at Auction.

Sales at auction of real estate are within the statute of frauds. Horton v. McCarty, 53 Me. 394.

But a memorandum signed by an auctioneer at time of sale is sufficient to take the case out of the statute. Horton v. McCarty, 53 Me. 394.

And auctioneer or his clerk can sign for both purchaser and seller.—In sales of real estate at auction, the auctioneer is the agent of both parties; and his putting down the name of the purchaser, with the price and conditions of sale, is a sufficient signing within the statute of frauds. And if the memorandum was made by the clerk of the auction in the presence of the auctioneer and of the purchaser and with the full knowledge of the latter, it falls clearly within the same principles. Alna v. Plummer, 4 Me. 258.

In a sale of real estate at auction, the auctioneer is to be regarded as the agent of the purchaser, and as such competent to charge him by his signature. Cleaves v. Foss, 4 Me. 1.

A sale of real estate at auction, where the name of the bidder is entered by the auctioneer, or by his clerk, under his direction, on the spot, and such entry is so

connected with the subject and terms of the sale as to make part of the memorandum, is a contract in writing, so as to take the case out of the statute of frauds. Horton v. McCarty, 53 Me. 394.

But memorandum must be made and signed at time of sale.—To bind the purchaser, a memorandum, containing all of the essential terms of the contract, must be made and signed by the auctioneer at the time of the sale and before the termination of the proceedings. Horton v. McCarty, 53 Me. 394.

The auctioneer is primarily and actively the special agent of the party selling. His feelings, his sympathies and his interest all unite to make him anxious to sell at the highest possible price, and to hold the bidder to the performance of the contract. In case of any dispute or difference, he would, although an honest man, naturally incline to the side of his employer, against a person with whom he has no other relation than that of a bidder for the property which he, as agent for the owner, has offered at public sale. The law, therefore, when it allows him to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied to the usual cases of agency, and requires that the single act for which, almost from necessity, he is authorized to perform for the buyer, shall be done at the time of sale, and before the termination of the proceedings. This is a reasonable and necessary limitation of this special agency. Horton v. McCarty, 53 Me. 394.

And signature of auctioneer after sale does not bind purchaser.—Although the auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature, yet the moment the sale is over the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only, and the signature of the seller or his agent cannot bind the buyer. Horton v. McCarty, 53 Me. 394.

Memorandum in auctioneer's book is sufficient if it gives essential terms of contract.—The memorandum, which the auctioneer shows in his book of sales of real estate at auction, is sufficient, if seasonably made, to charge the defendant, if it contains a description of the premises, the time and place of sale, the name of the seller, the terms, and the name of the defendant as purchaser, and is signed by the auctioneer. Horton v. McCarty, 53 Me. 394.

Without recourse to parol testimony.—The paper or book signed must contain the essential terms of the contract, with such a degree of certainty that it may be understood, without recourse to parol testimony. Horton v. McCarty, 53 Me. 394.

But subsequent entry made without memorandum and in absence of purchaser is not sufficient.—It is not sufficient for the auctioneer to enter, in the absence of the purchaser, the sale on his book at his office upon his return from the place of sale, he having no sufficient memorandum of the sale, made at the time, from which to make the entry. Horton v. McCarty, 53 Me. 394.

Nor is mere writing of price and name of purchaser.—The mere writing of the price and the name of the purchaser of real estate sold at auction, by the auctioneer, upon a slip of paper not connected with any other papers, is not a sufficient signing within the statute of frauds. Horton v. McCarty, 53 Me. 394.

The writing of a name and a sum on a slip of paper, which contains no reference to the sale and its terms, or to the description of the property, is not sufficient. Horton v. McCarty, 53 Me. 394.

D. Rights and Liabilities of Parties upon Disaffirmance.

Vendor not entitled to recover for use and occupation until contract disaffirmed.—The parties to the oral contract of purchase may, if they choose to do so, carry out such contract, and until it is disaffirmed by one or the other the relation between them is that of vendor and vendee and not that of landlord and tenant. Since this is true, the vendor is, therefore, not entitled to recover for use and occupation until disaffirmance. Weeks v. Standish Hardware & Garage Co., 145 Me. 307, 75 A. (2d) 444.

But purchaser liable for use and occupation from time vendor disaffirms.—In the absence of special circumstances, the purchaser in possession under a contract for the purchase of land, which contract is unenforcible because it does not comply with the requirements of the statute of frauds, is not liable for the use and occupation of the premises. However, if the vendor disaffirms the contract, from that time on, if the vendee continues to occupy, the law will imply an obligation to pay for the subsequent use and occupation. Weeks v. Standish Hardware & Garage Co., 145 Me. 307, 75 A. (2d) 444.

And such liability is ab initio if purchaser himself disaffirms.—Upon disaffirmance of the oral contract, the relationship of vendor and vendee is terminated and the law implies an obligation to pay for use and occupation. The extent of the

obligation depends upon which party disaffirms. If the vendee disaffirms, the law implies an obligation to pay for use and occupation ab initio, whereas if the vendor disaffirms, the implied obligation is to pay only for use and occupation subsequent to the disaffirmance. Weeks v. Standish Hardware & Garage Co., 145 Me. 307, 75 A. (2d) 444.

Purchaser may recover purchase price when vendor interposes statute.—One who has paid a part of the agreed purchase price of land in reliance on an oral contract for the purchase thereof may recover such payment, if not himself in fault, when the seller interposes the statute of frauds as a bar to the enforcement of such contract. Barrett v. Greenall, 139 Me. 75, 27 A. (2d) 599.

As law implies promise to return what vendor has received.—If a vendor, having received payment of or on the purchase price from his vendee under a legal but unenforcible contract, disaffirms the contract, the law will imply a promise on his part to return what he has received from the vendee. This rule rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act. Weeks v. Standish Hardware & Garage Co., 145 Me. 307, 75 A. (2d) 444.

And such amount can be set off against liability for use and occupation.—As between the original parties, the amount paid by the vendee can by proper procedure be offset against a liability to pay for use and occupation after disaffirmance. Weeks v. Standish Hardware & Garage Co., 145 Me. 307, 75 A. (2d) 444.

Possession by purchaser no bar to his right to recover.—A contract for the conveyance of real estate not in writing is void by the statute of frauds. When a party to such contract has complied with its conditions and made all the payments required by its terms, he is entitled to recover back such payments in case the other party refuses to perform on his part. Nor will it defeat his right of recovery that he is in possession of the premises agreed to be conveyed. Jellison v. Jordan, 68 Me. 373.

And he need not make tender before seeking recovery. — When the intended seller of land under an oral contract has made performance on his part impossible by divesting himself of title to the property, or when he has made statements to the intended purchaser which justify the belief that he has done so, such purchaser is not required to make a tender before seeking recovery of money paid in reliance on such contract. Barrett v. Greenall, 139 Me. 75, 27 A. (2d) 599.

Purchaser may recover value of land conveyed as payment in kind.—The rule of law is well established that an intended purchaser of land, under an oral contract which is unenforceable because of the statute of frauds, who has paid a part of the purchase price, when the statute is interposed by the other party as a defense and that party has breached the contract and made performance on his part impossible, by divesting himself of title to the property which was the subject matter of the trade, may recover that portion of the purchase price which he has paid in reliance on the contract, and under this rule such a party, when his payment on account has been made in kind by the conveyance of other land, has been held entitled to recover the value of the land so conveyed. Barrett v. Greenall, 139 Me. 75, 27 A. (2d) 599.

Purchaser cannot recover if vendor ready, willing and able to perform.—The party advancing money under a verbal contract for the sale of land cannot recover it back so long as the other contracting party is able and willing to perform on his part. To this extent, it is well settled that an oral contract for the purchase of lands, or an interest in lands, will be upheld. Gammon v. Butler, 48 Me. 344; Fletcher v. Lake, 121 Me. 474, 118 A. 321.

If a parol contract is made, and fulfilled on the part of the purchaser, and the seller is ready and willing to perform his agreement, no action can be maintained to recover back payments. But, if the seller refuses to perform the contract, the other party not being in fault can recover the payments he has made. Plummer v. Bucknam, 55 Me. 105.

For he cannot invoke statute of frauds in such case.—As between the parties to a parol contract for the sale of land, the vendee cannot invoke the statute of frauds when the vendor is ready and willing to perform the contract and seeks to enforce the note of the vendee given in payment therefor. Fletcher v. Lake, 121 Me. 474, 118 A. 321.

E. Part Performance.

1. In General.

Statute does not preclude action when there are equities resulting from res gestae. —When the statute says no action is to be brought to charge any person upon a contract concerning land unless it is in writing, it has in view the single case in which he is charged upon the contract only

and not that in which there are equities resulting from res gestae subsequent to and arising out of the contract. McGuire v. Murray, 107 Me. 108, 77 A. 692.

And part performance of oral contract may authorize equity to decree specific performance.—A part performance by the purchaser of an oral contract for the sale and purchase of land may take the contract out of the operation of the statute of frauds, and authorize a court of general equity powers, in the exercise of a sound discretion, to decree specific performance of the contract on the part of the vendor. Pulsifer v. Waterman, 73 Me. 233.

If such performance is such as would result in fraud if vendor not compelled to perform.—A parol agreement for the conveyance of land may be enforced in equity in behalf of a vendee whose partial performance has been such that fraud would result to him unless the vendor is compelled to perform on his part. Bigelow v. Bigelow, 93 Me. 439, 45 A. 513; McGuire v. Murray, 107 Me. 108, 77 A. 692.

And statute furnishes no defense to vendor in such case.—A respondent cannot avail himself of the statute of frauds, on demurrer, when a bill in equity is brought to enforce specific performance of an oral contract, although the bill admits the contract to be by parol, if such bill, in addition to the contract, alleges matter avoiding the bar created by the statute, such as part performance. Green v. Jones, 76 Me. 563.

Where there has been part performance, the refusal to complete it is the nature of fraud, and the defendant is estopped to set up the statute of frauds in defense. Green v. Jones, 76 Me. 563.

The ground of the remedy is equitable estoppel based on an equitable fraud. After having induced or knowingly permitted another to perform in part an agreement on the faith of its full performance by both parties and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void. In other words, the statute of frauds having been acted for the purpose of preventing frauds should not be used fraudulently. McGuire v. Murray, 107 Me. 108, 77 A. 692.

The ground upon which the courts of equity consider part performance of a contract relating to lands as creating an equity to have the agreement specifically executed, is that it would be a fraud upon the party if the transaction were not completed. Green v. Jones, 76 Me. 563.

The statute of frauds, having been enacted for the purpose of preventing frauds, should not be used to aid in the accomplishment of a fraud. Hence, it has long been settled law that if one induces or knowingly permits another to perform in part an oral contract for the sale of land, on the faith of its full performance by both parties, and it clearly appears that such acts of part performance were done in pursuance of the contract, that damages recoverable in law would not adequately compensate the plaintiff, and that fraud and injustice would result to him if the agreement is held void, then on the principle of equitable estoppel, a court of equity is authorized to compel specific performance by the other party in contradiction to the positive terms of the statute of frauds. Bennett v. Dyer, 89 Me. 17, 35 A. 1004.

And the doctrine of part performance is confined to courts of equity. Patterson v. Cunningham, 12 Me. 506.

The principle of part performance is applicable to courts of equity only. Freeport v. Bartol, 3 Me. 340.

Doctrine applicable to parol gift.—Equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. And this is particularly true where the donor stipulates that the expenditure shall be made and by doing this makes it the consideration or condition of the gift. Bigelow v. Bigelow, 93 Me. 439, 45 A. 513.

2. Sufficiency of Acts of Performance.

Acts of part performance must be such as will take case out of statute.—A court of equity will not lend its aid in the enforcement of oral contracts, unless there shall have been such acts of part performance by the party seeking relief, as will be considered sufficient in equity to take the case out of the operation of the statute, and authorize a court of general equity powers, in the exercise of a sound discretion, to decree specific performance. Green v. Jones, 76 Me. 563.

And such as will result in fraud if contract held inoperative.—The court is never authorized to nullify the imperative provisions of the statute and decree specific performance of an oral contract for the sale of land, unless sufficient part performance is made out to show that fraud and injustice would result if the contract should be held inoperative. The doctrine is based on the principle of equitable estoppel, and it must appear that one of the parties has been induced or allowed to change his position on the faith of the contract to such an extent and in such a manner that all

legal remedies would be inadequate to compensate him for the damages sustained, and nothing but specific performance would restore him to his original position. And the evidence must be full, definite and conclusive. Bennett v. Dyer, 89 Me. 17, 35 A. 1004.

And must be done in pursuance to contract relied on.—When the existence of an oral agreement for the sale of land has been clearly proven to the satisfaction of the court, and acts of part performance are relied upon to defeat the operation of the statute of frauds, it must appear in the first place that such acts of performance had unequivocal reference to the agreement and were done in pursuance and execution of it. Bennett v. Dyer, 89 Me. 17, 35 A. 1004.

It must clearly appear that the acts relied upon as part performance were done with a view to the performance of the contract. And slight and temporary erections for the tenant's own convenience give no equity. Bigelow v. Bigelow, 93 Me. 439, 45 A. 513.

And none other.—The act of part performance must be of the identical contract set up and alleged. It is not enough that the act of part performance is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill or answer. Bennett v. Dyer, 89 Me. 17, 35 A. 1004.

Possession together with payment is sufficient part performance; and this act is greatly strengthened where improvements have been made, serving to explain and define one act of part performance to which it is itself a superadded and contributory act. Green v. Jones, 76 Me. 563.

A parol gift of land, accompanied by possession by the donee, will be enforced in equity, when the donee has been induced by the promise of the gift to make valuable improvements to the land of a permanent nature and to such an extent as to render a revocation of the gift unjust, inequitable and a fraud upon the donee. Bigelow v. Bigelow, 93 Me. 439, 45 A. 513.

Where the purchaser pays the whole or a part of the purchase money, and enters into possession of the premises, or does acts relying upon the agreement, that places him in such a position that the refusal by the seller to execute the contract on his part will operate to his prejudice and injury, beyond the payment of the money, so that the repayment of the money, or the recovery of it, will not be an adequate remedy, then such acts will take the case out of the statute, and warrant a court of equity in decreeing a specific performance of the contract. Green v. Jones, 76 Me. 563.

Admission into possession, having unequivocal reference to the contract, has always been considered an act of part performance. Green v. Jones, 76 Me. 563.

Possession of land taken by the vendee and continued from the time of the contract to the time of bringing the bill, such possession being in pursuance of the contract, is an act of part performance, taking the case out of the operation of the statute of frauds. Green v. Jones, 76 Me. 563.

But mere payment of the consideration alone will not take it out of the statute. Green v. Jones, 76 Me. 563.

Nor will removal of small amount of fence.—A tenant's removal of sixty rods of fencing at the expense of $25 was held not such a substantial improvement as would avoid the effect of the statute of frauds on an oral option allegedly given to the tenant to purchase a farm worth $21,000, in Murphy v. Federal Land Bank of Springfield, 136 Me. 381, 11 A. (2d) 349.

3. Pleading and Practice.

Bill must set out alleged agreement.—A bill for the specific performance of an oral agreement for the conveyance of real estate necessarily presupposes an agreement, and the bill must, as in all cases of this description, set out what that agreement was. Green v. Jones, 76 Me. 563.

And oral contract must be established by clear and satisfactory evidence.—The party making the attempt to take the case out of the statute of frauds must establish the existence of the oral contract by clear and satisfactory evidence. The proof must show the terms of the contract clearly, definitely and conclusively, leaving no jus deliberandi or locus penitentiæ. To be enforceable the agreement must be concluded, unambiguous, and proved to the satisfaction of the court. Bennett v. Dyer, 89 Me. 17, 35 A. 1004.

And proof of part performance must be clear and convincing.—The proof of part performance, in order to take the contract out of the operation of the statute of frauds, must be clear and convincing. Goodwin v. Smith, 89 Me. 506, 36 A. 997; Stewart v. Gilbert, 115 Me. 262, 98 A. 752.

Equity will not interfere when purchaser guilty of laches.—In cases where the contract is not fully executed on the part of the complainant seeking for a decree of specific performance, even where time is not of the essence of the contract, courts of equity will not interfere where there has been long delay and laches on the part

of the party seeking specific performance. Green v. Jones, 76 Me. 563.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN YEAR.

Statute applies to any agreement which does not admit of performance within a year.—Subsection V includes any agreement which, by a reasonable construction of its terms, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention within that period. Farwell v. Tillson, 76 Me. 227.

And contingency must render such performance possible.—To defeat the application of the statute of frauds, the contingency must be one which renders performance of the contract possible within the year; otherwise, the words of the statute apply. Farwell v. Tillson, 76 Me. 227.

And unless an oral agreement can be completely performed within a year, no action can be maintained on it. Farwell v. Tillson, 76 Me. 227.

General rules of construction apply in determining when contract to be performed.—There is no reason why any other than the general rules of construction should apply in determining when a contract is to be performed, with reference to the applicability of the statute of frauds. Farwell v. Tillson, 76 Me. 227.

And court must look to both undertaking and consideration.—The court must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other, and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Herrin v. Butters, 20 Me. 119.

It must appear affirmatively that the contract cannot be performed within a year, or the statute of frauds does not apply. Farwell v. Tillson, 76 Me. 227.

It must have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. Herrin v. Butters, 20 Me. 119.

To bring a case within subsection V, it must appear that the contract was not to have been performed within a year. Duffy v. Patten, 74 Me. 396.

The statute, finding the parties perfectly free to make a certain contract without a writing, provides, simply, that if that contract does, by its terms expressed, or from the situation of the parties reasonably implied, require more than a year for its performance they must put it in writing. In other words, it must affirmatively appear from the contract itself, and all the circumstances that enter into the interpretation of it, that it cannot in law be performed within the space of a year from the making. Farwell v. Tillson, 76 Me. 227; White v. Fitts, 102 Me. 240, 66 A. 533.

Effect is to be given to the oral contract, if proved, unless upon the whole case it appears, affirmatively, that more than the year is required for its performance. Farwell v. Tillson, 76 Me. 227.

But such need not be expressly agreed to by the parties.—The old idea that it must be expressly and specifically agreed that the contract is not to be performed within the year is so far modified as to include cases where such appears to have been the understanding of the parties. Hearne v. Chadbourne, 65 Me. 302; Farwell v. Tillson, 76 Me. 227.

Contracts terminable upon contingencies which may occur within a year are not within the provisions of subsection V. The manifest intent in such cases is that the contract shall terminate upon the happening of the contingency whether that event occurs sooner or later. Longcope v. Lucerne-In-Maine Community Ass'n, 127 Me. 282, 143 A. 64.

And the subsection does not apply to contracts which simply may not be performed within the year, even if they probably will not or are not expected to be so performed, but only to those which are not to be performed within that time. Farwell v. Tillson, 76 Me. 227.

Or which are merely not expected to be performed within a year.—The statute does not mean to include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed, within the space of a year from the making; but it means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making. White v. Fitts, 102 Me. 240, 66 A. 533.

Promise which may be performed within year is not within statute.—If the thing promised may be performed within the year, the contract is not within the provision of the statute in relation to time of performance. Linscott v. McIntire, 15 Me. 201. See Walker v. Metropolitan Ins. Co., 56 Me. 371.

Unless parties intended performance to take longer.—Contracts wherein the manifest intent and purpose of the parties, affirmatively proved, is that more than one year shall be taken for their performance, are within the provisions of subsection V. Longcope v. Lucerne-In-Maine Community Ass'n, 127 Me. 282, 143 A. 64.

If the promise might have been performed within a year, and it does not appear that the parties understood that it was not to be performed within that time, the promise need not be in writing. Lawrence v. Cooke, 56 Me. 187.

In which case statute applies despite possibility of performance within year. — Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year, will not prevent the statute from applying. Such an accomplishment must be an execution of the contract according to the understanding of the parties. Farwell v. Tillson, 76 Me. 227; White v. Fitts, 102 Me. 240, 66 A. 533; Longcope v. Lucerne-In-Maine Community Ass'n, 127 Me. 282, 143 A. 64.

Some authorities hold that mere possibility of literal performance within a year removes the bar of the statute. Such is not the law in this jurisdiction. The intent of the parties that the contract is not to be performed within a year whether such intent is expressed in words or otherwise plainly manifested is controlling. Longcope v. Lucerne-In-Maine Community Ass'n, 127 Me. 282, 143 A. 64.

If it is within the range of possibility that the contract may be completed within one year, still it will not be taken out of the operation of the statute of frauds unless such a performance of it within a year was in accordance with the understanding and intentions of the parties. White v. Fitts, 102 Me. 240, 66 A. 533.

And despite actual part of performance within such time.—This enactment applies to all contracts, the complete performance whereof is of necessity to extend beyond the space of a year; the rule being, that where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a longer period than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void, if it appears to have been the understanding of the parties at the time, that it was not to be completed within a year, although it might be, and was, in fact, in part performed within that period. White v. Fitts, 102 Me. 240, 66 A. 533.

Delivery of goods held to remove case from statute.—A contract is not within the statute of frauds, though not in writing, and in part not to be performed within a year, if there is a part execution of the contract within the year, by a delivery of the goods, though the price is stipulated to be paid at a period beyond a year. Holbrook v. Armstrong, 10 Me. 31.

If the death of a party within the year would merely prevent full performance of the agreement, it is within the statute. Bernier v. Cabot Mfg. Co., 71 Me. 506; Farwell v. Tillson, 76 Me. 227.

The death of a party within the year will not take the contract out of the operation of the statute of frauds, if, in such an event, the contract will not have been fully performed. White v. Fitts, 102 Me. 240, 66 A. 533.

If the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. Bernier v. Cabot Mfg. Co., 71 Me. 506; Farwell v. Tillson, 76 Me. 227.

But if death will leave the agreement completely performed and its purpose fully carried out, it is not. Bernier v. Cabot Mfg. Co., 71 Me. 506; Farwell v. Tillson, 76 Me. 227.

Thus, a parol contract to support one during life is not within the statute, Thurston v. Nutter, 125 Me. 411, 134 A. 506, for the person may die within the year. Hutchinson v. Hutchinson, 46 Me. 154.

Employment contract for specified period longer than year is within statute.— Contracts of employment for a specified period of more than a year or for the performance of undertakings which necessarily require more than that time are obviously within the statute. Longscope v. Lucerne-In-Maine Community Ass'n, 127 Me. 282, 143 A. 64. See Bernier v. Cabot Mfg. Co., 71 Me. 506.

An entire contract for three years' service cannot be performed in a year and, if it was not in writing, the case is within the statute of frauds. Tuttle v. Swett, 31 Me. 555.

And if period not specified intent of parties governs.—An oral contract for the

performance of work or labor which does not specify the time within which such contract is to be performed must be interpreted in the light of its subject matter and the circumstances surrounding it, and if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, such contract falls within the statute of frauds. White v. Fitts, 102 Me. 240, 66 A. 533.

When upon the reasonable construction of the terms of an oral contract for the performance of work or labor which does not state the time within which such contract is to be performed, it appears to have been understood by the parties thereto that the contract was not to be performed within the year, such contract comes within the statute of frauds. White v. Fitts, 102 Me. 240, 66 A. 533.

Subsection V applied in Wheeler v. Cowan, 15 Me. 283.

Subsection V cited in Greenlaw v. Aroostook County Patrons Mut. Fire Ins. Co., 117 Me. 514, 105 A. 116.

VI. CONTRACTS TO PAY DEBT AFTER DISCHARGE IN BANKRUPTCY, ETC.

Subsection VI relates to remedy and not validity of contract.—Subsection VI does not, in terms, declare the contract void, nor does it affect, in any way, the original debt or judgment. It simply gives a rule of evidence as to the proof of a new promise to revive the old debt; or, in other words, declares that the law will furnish no remedy to enforce such a promise, unless it is in writing. The law has relation to the remedy, and not to the validity of the contract. Kingley v. Cousins, 47 Me. 91.

And is constitutional.—The provision of subsection VI relates not to the validity of the contract, but to the remedy for a breach of it, and is constitutional. Stetson v. Parks, 133 Me. 463, 180 A. 366.

Statute applicable to promise during pendency of proceedings to waive expected discharge.—Subsection VI is not restricted to revival, by a promise made after bankruptcy discharge, of a debt thereby barred, but is comprehensive also of a promise made during the pendency of proceedings, to waive the expected discharge. Stetson v. Parks, 133 Me. 463, 180 A. 366.

The new promise, whether made after the discharge, or between the adjudication and the discharge, is within the statute of frauds. Stetson v. Parks, 133 Me. 463, 180 A. 366; Stetson v. Parks, 134 Me. 495, 182 A. 664.

Payment of part of debt is not written promise to pay balance. — Within the meaning of subsection VI, the payment of a part of a debt is not a written promise to pay the balance. It might be regarded as some evidence of a promise to pay the debt, but the element of certainty, as required to be shown by written evidence, is utterly wanting. Ames v. Storer, 80 Me. 243, 14 A. 67.

Statute not applicable to suits commenced prior to its enactment.—In the case of Spooner v. Russell, 30 Me. 454, it was decided that the provision of subsection VI was prospective only as to suits, and that it did not apply to suits which had been commenced prior to its passage. This was reaffirmed in Otis v. Gazlin, 31 Me. 567. Kingley v. Cousins, 47 Me. 91.

But it is applicable to suits based on promise made prior to its enactment.—Subsection VI reaches those cases on suits which are instituted after the passage of the law, based upon a verbal promise made before its passage. Kingley v. Cousins, 47 Me. 91. See note to Me. Const., Art. 1, § 11.

History of subsection VI.—See Stetson v. Parks, 133 Me. 463, 180 A. 366.

VII. AGREEMENTS TO GIVE, BEQUEATH OR DEVISE BY WILL.

Contract must be in writing.—A contract to give, bequeath and devise property to another is required, as a condition precedent to its enforcibility by action; to be in writing; or evidenced by some note or memorandum thereof in writing, and signed by the party to be charged therewith. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

And mere execution of a will is not full performance on the part of the promisor in contract to make a will. A will is ambulatory in its nature and may be revoked at any time prior to death. Full performance of the contract on the part of the promisor requires not only the making of the will but also that the will be allowed to remain in force until his death. Whether this condition is the subject of an express promise contained in the oral contract or is implied from the oral promise to make a will in favor of the promisee is immaterial and can make no difference in the result. Busque v. Marcou, 147 Me. 289, 86 A. (2d) 873.

Subsection VII cited in Lutick v. Sileika, 137 Me. 30, 14 A. (2d) 706.

Sec. 2. No action on contract of minor, unless ratified in writing. —No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of 21 years, except for necessaries or real estate of which he has received the title and retains the benefit. (R. S. c. 106, § 2.)

I. General Consideration.
II. Duty of Minor to Restore Property Received.
III. Ratification.
IV. Contracts for Necessaries or Real Estate.

I. GENERAL CONSIDERATION.

Section intended as protection to minors.—The common-law doctrine relating to the liability of minors upon their contracts was designed for their protection, and it is clear that this section was intended as an additional protection. Hilton v. Shepherd, 92 Me. 160, 42 A. 387.

From the earliest times in legal history it has been the policy of the law to protect the infant. The legislatures of today universally recognize by statutes that minors must be saved from unscrupulous persons, who might take advantage of inexperience and immaturity. At common law, and by our statute, the infant is not authorized to bind himself or his property except for necessaries, and except for real estate under certain circumstances. Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

And person dealing with minor does so at his own peril.—The disabilities of the minor are really privileges which the law gives him, and which he may exercise for his own benefit. The object is to secure him in his youthful years from injuring himself by his own improvident acts. Any person dealing with one who has not reached his majority, must do so at his peril. Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

And a false statement on the minor's part as to his age is held not to create an estoppel. Whitman v. Allen, 123 Me. 1, 121 A. 160; Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290.

Section limited to actions against minor.—By the express language of this section as it formerly read, the necessity of written ratification was limited to actions against persons on contracts made by them while minors. It was not at all applicable to actions brought by them to recover back the consideration paid. And, when the section was condensed and placed in the Revised Statutes in its present form, there was no intention to change its meaning. A change in phraseology merely in the revision of a statute is not deemed to be a change in the meaning. Hilton v. Shepherd, 92 Me. 160, 42 A. 387.

And is not applicable to action by him to recover consideration paid.—This section applies only in suits brought against a minor, where he is acting on the defensive. It has no application where one acts on the offensive and seeks to recover the consideration paid by him on a contract made during minority. Whitman v. Allen, 123 Me. 1, 121 A. 160.

In case the minor wishes to repudiate the contract and recover back the consideration, it cannot be said that he is not barred from recovering back the consideration, simply because he has not ratified the contract in writing. Hilton v. Shepherd, 92 Me. 160, 42 A. 387.

Applied in Bird v. Swain, 79 Me. 529, 11 A. 421; Neal v. Berry, 86 Me. 193, 29 A. 987.

II. DUTY OF MINOR TO RESTORE PROPERTY RECEIVED.

Section does not require minor to return consideration.—The prohibition of this section is absolute. The section does not impose any conditions to be complied with before the minor can have the shelter of the statute. It does not require him, before or afterward, to return the consideration as a condition. Lamkin & Foster v. LeDoux, 101 Me. 581, 64 A. 1048.

But he must return or account for property received remaining in his possession. —If any part of the property received remains in the infant's possession or under his control, he must return it or account for it as a condition precedent to his recovery of the amount paid on account of its purchase. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

Upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control. Whitman v. Allen, 123 Me. 1, 121 A. 160.

If an infant, when he seeks to avoid a sale of property by himself, has in his possession the specific property which came to him under the contract, or any part of it, he must return it or account for it as a prerequisite to the recovery of the amount

paid by him. Whitman v. Allen, 123 Me. 1, 121 A. 160.

Or exchanged therefor.—The doctrine of restoration is extended so that it may include not only the specific property received by the minor but in case the minor has exchanged that original property for other property the latter may take the place of the original and come under the same obligation. Whitman v. Allen, 123 Me. 1, 121 A. 160. See Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

The infant is compelled to account for benefits actually received and still possessed, and it can make no difference in what form they may happen to exist. The minor is not harmed by the extended rule any more than by the accepted rule. In fact it is the generally accepted rule a little more widely applied. All the rights to which the minor is entitled are fully protected and at the same time justice is done to the other contracting party. Whitman v. Allen, 123 Me. 1, 121 A. 160.

However he is not liable to restore property consumed or destroyed.—If the infant had received property during infancy and had spent, consumed or destroyed it, to require him to restore it or the value of it, upon avoiding the contract, would be to deprive him of the very protection which it is the policy of the law to afford him. Whitman v. Allen, 123 Me. 1, 121 A. 160.

If a minor receives property during his infancy under a voidable contract, and spends, consumes or destroys it, he may recover back the money he has paid under the contract, though he is unable to place the other party in statu quo. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

Nor is he liable for value of depreciation.—To require the minor to restore the value of depreciation as a prerequisite to his disaffirmance of the contract and recovery of his payments would be to deprive him of the protection which it is the policy of the law to afford him, and would violate the rule adopted in this state that a minor is not obliged to place the other party in statu quo. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

And this value cannot be recovered by recoupment.—Neither the value of depreciation nor the value of beneficial use can be recovered from the minor by way of recoupment in an action by the minor to recover the purchase price. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

Burden on minor to show reason for failure to restore.—The burden of proof rests on the plaintiff infant, if he would excuse or explain his failure to restore, to show the reason for such failure, when he sues to recover property disposed of during minority under a contract never affirmed. Whitman v. Allen, 123 Me. 1, 121 A. 160.

The infant plaintiff seeking to disaffirm a contract made by him must restore the specific benefits received by him or their substitutes or equivalents if still in his possession or control. If he does not restore, it is his duty to explain the reason therefor. In the absence of such explanatory evidence he must be charged with the value of what he received or of its substitute, that is, the value still in his possession in another form. Whitman v. Allen, 123 Me. 1, 121 A. 160.

III. RATIFICATION.

Contracts may be ratified on coming of age.—The contracts of an infant may be revived and ratified by him on arriving at age upon the same principles and for the same reason and by the same means as a debt barred by the statute of limitations. Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290.

But section requires deliberate written ratification.—A deliberate written ratification or a promise as to the whole debt is necessary under this section. Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

This section requires the ratification, if one is claimed, to be in writing. Whitman v. Allen, 123 Me. 1, 121 A. 160.

By the terms of this section, ratification of a promise made by a minor, upon his reaching majority, must be in writing. Reed Bros v. Giberson, 143 Me. 4, 54 A. (2d) 535.

And oral and uncertain proof of ratification is not sufficient.—If the other party to the contract seeks to enforce it against the minor, such an action cannot be maintained on oral and uncertain proof of ratification, but only on proof of his deliberate written ratification. Hilton v. Shepherd, 92 Me. 160, 42 A. 387.

Nor can ratification be shown by conduct after coming of age.—Even at common law, a minor's contract was not enforceable unless ratified by him after coming of age. Our statute goes further and makes such contract unenforceable by action unless it is ratified in writing by the maker after coming of age. The defendant's conduct after coming of age may have shown a sufficient ratification at com-

mon law, but if there was no ratification in writing, the statute bars the action. Lamkin & Foster v. LeDoux, 101 Me. 581, 64 A. 1048; Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

Ratification is question of intention.—Ratification of a voidable promise is a recognition of it and an election not to avoid it but to be bound by it. Ratification always resolves itself into a question of intention. Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290; Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

And must be more than recognition that debt exists.—The ratification required by this section must be something more than a recognition of the existence of the debt and the amount due thereon. It must be a deliberate written ratification. Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290; Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

The fact that a minor, after coming of age, joined in a mortgage of realty held jointly with another and that in the mortgage it was stated, as is usual, that the land was subject to mortgages held by other parties is not such a ratification by the minor of a promissory note held by the prior mortgagees as this section demands. It may have recognized the existence of a claim or debt, but it did not ratify. Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

And the ratification must be voluntary and not obtained by circumvention. Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290.

A ratification under this section should be voluntary, not obtained by circumvention, nor under ignorance of the fact that he was entitled to claim the privilege. Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

Thus, signed transcript of testimony in bankruptcy proceedings is not ratification of debts disclosed.—A transcript of testimony given by the defendant before a referee in bankruptcy, his signature being subscribed at some date after the hearing and under the necessity of complying with the rules of the bankruptcy court, at most, must be construed only as an admission of the existence of the debt, which does not meet the statutory requirements as to ratification. To hold that the statements of a person under such circumstances afterwards reduced to writing, and signed not voluntarily but of necessity, can be seized upon by his creditors as written ratification of his contracts made in infancy, is to destroy the shield of protection with which the law surrounds the contracts of minors. Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290.

Nor is inclusion of plaintiff's name in list of creditors filed.—The inclusion of the plaintiff's name in the list of creditors filed by the defendant in bankruptcy proceedings does not constitute a written ratification of the defendant's original promise to pay. Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290.

IV. CONTRACTS FOR NECESSARIES OR REAL ESTATE.

Minor cannot disaffirm contract for necessaries.—A minor is bound by and cannot disaffirm his contract for necessaries such as food, clothing, lodging, medical attendance, and instruction suitable and requisite for the proper training and development of his mind. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

What constitute "necessaries."—Coke's statement as to what are the necessaries, for which the minor is fully responsible, has been recognized for generations as the rule: "Necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise his good teaching, or instruction, whereby he may profit himself afterwards." Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

They do not include articles purchased for business purposes.—While the term "necessaries," as used in this section, is not confined merely to such things as are required for bare subsistence, and is held to include those things useful, suitable and necessary for the minor's support, use and comfort, it is limited in its inclusion to articles of personal use necessary for the support of the body and improvement of the mind of the infant, and is not extended to articles purchased for business purposes, even though the minor earns his living by the use of them, and has no other means of support. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

The law does not contemplate that a minor shall become the proprietor of a business which involves the making of a variety of contracts. Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 A. 725.

Deed may be avoided by minor at majority.—Under this section one exception is for "real estate of which he has received the title and retains the benefit." In this, the law recognizes what may be beneficial to the minor, and a deed received by the minor or a deed given by

the minor may be avoided by the minor at majority as against the other party. Reed Bros. v. Giberson, 143 Me. 4, 54 A. (2d) 535.

Sec. 3. Representation of another's credit.—No action shall be maintained to charge any person by reason of any representation or assurance, concerning the character, conduct, credit, ability, trade or dealings of another, unless made in writing and signed by the party to be charged thereby or by some person by him legally authorized. (R. S. c. 106, § 3.)

The design of this section was to withhold legal protection from all who are so heedless or inconsiderate as to rely upon verbal statements or representations. Hearn v. Waterhouse, 39 Me. 96.

Plaintiff need not declare on representation.—The language of this section is that "no" action shall be maintained "by reason of" any representation. It does not require that the plaintiff must, in terms, declare upon the representation. Hunter v. Randall, 62 Me. 423.

And section applies if proof of representation is essential to the action.—The true test whether the cause of action, in whatever form alleged, comes within this section is whether the action can be sustained without proof of the representation. If such proof is essential to the action, the section applies. Hunter v. Randall, 62 Me. 423.

And even though promisor benefited from transaction.— It is immaterial that the promisor may have had some design of obtaining an advantage to himself in consequence of the transaction, or that such a thing resulted from the transaction, provided the primary object of the representations was to induce the procurement of a credit to the third party and the loans were obtained thereby. In such case the protection extended by the statute is absolute and complete. Hunter v. Randall, 62 Me. 423; Brown v. Kimball, 84 Me. 280, 24 A. 847.

But representation must have been for purpose of obtaining credit for another.— This section of the statute of frauds applies to cases where the representations are made for the purpose of obtaining a credit for the person in relation to whom the words are spoken. Brown v. Kimball, 84 Me. 280, 24 A. 847.

This section was intended to bar only actions for verbal representations, made with the intent that the person concerning whom they are made may obtain credit, money or goods thereupon. Hunter v. Randall, 62 Me. 423.

Sec. 4. Acceptance of bill, draft or written order, also waiver of demand and notice.—No person shall be charged as acceptor of a bill of exchange, draft or written order, unless his acceptance is in writing, signed by him or his lawful agent; and no waiver of demand and notice by an indorser of a promissory note or bill of exchange is valid unless it is in writing and signed in like manner. (R. S. c. 106, § 4.)

Oral acceptance of written order not binding.—Where an examination of the evidence discloses nothing which can give the defendant's promise to pay the plaintiff any other character or effect than an oral acceptance of a written order, by the express enactment of the legislature, the defendant cannot thus be made legally chargeable as an acceptor. Hall v. Flanders, 83 Me. 242, 22 A. 158.

And retention of order does not constitute drawee acceptor.— No person shall be charged as an acceptor of a bill of exchange, draft or written order, unless his acceptance is in writing signed by him or his agent; nor is a drawee made liable as an acceptor by retaining an order in his possession. Hall v. Flanders, 83 Me. 242, 22 A. 158.

But this rule applicable only to suit against defendant as acceptor.— If the suit is not against the defendant as acceptor of the order, the rule in relation to what is necessary in order to charge one as an acceptor of a draft, or written order, as stated in Hall v. Flanders, 83 Me. 242, 22 A. 158, does not apply. Jenness v. Wharff, 87 Me. 307, 32 A. 908.

Indorser's waiver of demand and notice must be in writing.—Waiver of demand and notice by the indorser of a foreign bill of exchange is invalid under this section, unless in writing and signed by him or his agent. First Nat. Bank of Skowhegan v. Maxfield, 83 Me. 576, 22 A. 479.

But he may be held to have adopted waiver of prior indorser.—Where the first indorser of a piece of negotiable paper, instead of restricting his written waiver of demand and notice to himself, uses language which may fairly be understood to apply to all the successive parties, those

who merely append their naked signatures beneath his must be held to adopt the written waiver and be bound by it. Parshley v. Heath, 69 Me. 90.

If the indorser desired to make his contract differ from that which a natural construction of the words preceding his signature would import, it would be easy for him to exclude himself from their operation by placing before his own signature the words "requiring demand and notice," or something equivalent. If he neglects this, the fair presumption is that he intends to adopt the language of the previous signer and make the same contract. Parshley v. Heath, 69 Me. 90.

Or to have waived provisions of section. —The provision of this section that the waiver of demand and notice by an indorser of a promissory note to be valid must be in writing may be waived by the indorser under such facts and circumstances as will estop him from denying that the note was not duly protested for nonpayment. Hallowell Nat. Bank v. Marston, 85 Me. 488, 27 A. 529.

Applied in Plummer v. Lyman, 49 Me. 229; Peabody v. Lewiston, 83 Me. 286, 22 A. 171.

Cited in Holmes v. Hilliard, 130 Me. 392, 156 A. 692.

Sec. 5. Certain contracts for sale of goods. — No contract for the sale of goods, wares or merchandise, for $30 or more made prior to July 6th, 1923, shall be valid, unless the purchaser has accepted and has received part of the goods, or has given something in earnest to bind the bargain or in part payment thereof, or some note or memorandum thereof was made and signed by the party to be charged thereby or by his agent. (R. S. c. 106, § 5.)

Cross reference.—See c. 185, § 4, re provisions regulating enforceability of contracts to sell or sales of goods or choses in action made after July 6, 1923.

Editor's Note. — Since the applicability of this section is limited to contracts made prior to July 6, 1923, it is felt that, so far as this section is concerned, the cases arising under it would be of little practical value. Consequently, the cases concerning this section are simply cited below. However, those cases which involve provisions of this section which are substantially similar to those of c. 185, § 4, which governs contracts made after July 6, 1923, will be found in the note to that section.

Barstow v. Gray, 3 Me. 409; Cleaves v. Foss, 4 Me. 1; Gleason v. Drew, 9 Me. 79; Cowan v. Adams, 10 Me. 374; Bucknam v. Nash, 12 Me. 474; Davis v. Moore, 13 Me. 424; Hight v. Ripley, 19 Me. 137; Cummings v. Dennett, 26 Me. 397; Abbott v. Gilchrist, 38 Me. 260; Maxwell v. Brown, 39 Me. 98; Fickett v. Swift, 41 Me. 65; Gooch v. Holmes, 41 Me. 523; Goddard v. Demerritt, 48 Me. 211; Edwards v. Grand Trunk Ry., 48 Me. 379; Jenness v. Mount Hope Iron Co., 53 Me. 20; Bush v. Holmes, 53 Me. 417; Atwood v. Lucas, 53 Me. 508; Edwards v. Grand Trunk Ry., 54 Me. 105; Chase v. Willard, 57 Me. 157; Young v. Blaisdell, 60 Me. 272; Pray v. Mitchell, 60 Me. 430; Dyer v. Libby, 61 Me. 45; Washington Ice Co. v. Webster, 62 Me. 341; Crockett v. Scribner, 64 Me. 447; Bird v. Munroe, 66 Me. 337; Williams v. Robinson, 73 Me. 186; Duffy v. Patten, 74 Me. 396; Weeks v. Crie, 94 Me. 458, 48 A. 107; Edwards v. Brown, 98 Me. 165, 56 A. 654; Weymouth v. Goodwin, 105 Me. 510, 75 A. 61; Ford v. Howgate, 106 Me. 517, 76 A. 939; Beedy v. Brayman Wooden Ware Co., 108 Me. 200, 79 A. 721; Silver v. Moore, 109 Me. 505, 84 A. 1072; Delaval Separator Co. v. Jones, 117 Me. 95, 102 A. 968; L. J. Upton & Co. v. Colbath, 122 Me. 188, 119 A. 384; E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 A. 609; Knobel & Bloom v. Cortell-Markson Co., 122 Me. 511, 120 A. 721; Dean v. W. S. Given Co., 123 Me. 90, 121 A. 644; Tewksbury v. Noyes, 138 Me. 127, 23 A. (2d) 204.

Bulk Sales Act.

Sec. 6. Sales in bulk of stocks of merchandise; inventory; written list of creditors; amount of indebtedness; notice to creditors. — The sale in bulk of any part of the whole or a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the seller and purchaser, at least 5 days before the sale, make a full, detailed inventory, showing the quantity, and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale;

and unless the purchaser preserve such inventory for inspection by the creditors or any of them for 30 days after the completion of the sale; and unless the purchaser demand and receive from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser, at least 5 days before taking possession of such merchandise or paying therefor, notify personally or by registered mail every creditor whose name and address is stated in said list, of the proposed sale and of the price, terms and conditions thereof. Provided, however, that the preceding provisions of this section shall not apply if the purchaser, before any such sale of merchandise, shall demand and receive from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each, and certified by the seller under oath to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness, and the seller, prior to such sale, shall deliver to the purchaser a certificate signed and sworn to by the seller that he has in good faith given notice of the proposed sale to all of the creditors whose names are stated in such verified list, and shall also deliver to the purchaser a written waiver of the provisions of this section signed by a majority in number of such creditors, and by creditors holding a majority of the total indebtedness shown by such list. (R. S. c. 106, § 6.)

Cross reference.—See note to c. 114, § 63, re trustee process is proper remedy for recovery of goods sold in violation of Bulk Sales Act.

Purpose of section.—The purpose of the legislature in enacting this section was to provide creditors protection against a class of sales which is frequently fraudulent and which leave creditors with no means of collecting that which they ought to receive. McGray v. Woodbury, 110 Me. 163, 85 A. 491.

Section does not interfere with transaction of ordinary business.—This section deals only with sales in bulk of a part or the whole of a stock of merchandise, which are not made in the ordinary course of trade, and in the regular and usual prosecution of the sellers' business. It does not interfere with the transaction of ordinary business, but relates to unusual and extraordinary transfers. In substance it declares that a sale of this kind shall not be made without first giving creditors an opportunity to collect their debts so far as the property to be sold might enable them to collect, or subsequently make satisfactory provision for the payment of these debts. McGray v. Woodbury, 110 Me. 163, 85 A. 491.

Nor does it require of the vendor anything that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and receive payment for himself. But, under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opporunity to consider what ought to be done with it. McGray v. Woodbury, 110 Me. 163, 85 A. 491.

And the section is not unconstitutional as depriving persons of their rights, privileges and liberty to control their property. McGray v. Woodbury, 110 Me. 163, 85 A. 491.

The violation of this section of itself constitutes constructive fraud and renders the sale void. Conquest v. Atkins, 123 Me. 327, 122 A. 858.

And no evidence of intentional fraud need appear, for a sale in violation of this section is made void as to creditors. Philoon v. Babbitt, 119 Me. 172, 109 A. 817.

A vendee, having failed to comply with the law, must be held to disburse the purchase price at his peril, if a creditor is omitted from the list furnished him, but not in accordance with the statute. Such omitted creditor is entitled at least to his pro rata share of the value of the goods sold if his delay in presenting his claim is due to no fault of his. The vendee who has proceeded to pay the other creditors in good faith may in a proceeding in equity or on trustee process still be subrogated to their pro rata claims against the goods, or their value in case of resale, and they are not sufficient to pay all claims in full. Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 308.

Vendee subrogated to rights of creditors.—The vendee in a sale in violation of this section who, in good faith, pays all of the creditors their respective pro rata shares

of the value of the goods, is entitled to be subrogated to the rights of such creditors therein and is liable only to unpaid creditors to the amount of their pro rata claims. Lee Tire & Rubber Co. v. Snow Hudson Co., 130 Me. 475, 157 A. 710.

The doctrine of subrogation is a creature of equity and is administered so as to secure real and essential justice without regard to form, which it ignores, looking only to the substance. The equitable principle underlying its application to conveyances in violation of the Bulk Sales Act is that, if the value of a stock in trade so conveyed is in fact and in good faith distributed among the vendor's creditors, it is not real and essential justice that the creditors so paid should reap the entire benefits of the transaction and the purchaser bear the whole loss. It is equity that the purchaser should be substituted for the creditors to the extent, at least, of their pro rata claims against the stock. Lee Tire & Rubber Co. v. Snow Hudson Co., 130 Me. 475, 157 A. 710.

Trustee in bankruptcy may maintain suit to set aside sale in violation of section. —A trustee in bankruptcy occupies a dual position. He represents the debtor and he also represents creditors. In this latter capacity he may maintain suits to set aside fraudulent conveyances or transfers constructively fraudulent because in violation of the Bulk Sales Act. Conquest v. Goldman, 121 Me. 335, 117 A. 236.

Applied in Conquest v. Goldman, 122 Me. 555, 119 A. 528.

Cited in Maine Candy & Products Co. v. Turgeon, 124 Me. 411, 130 A. 242.

Sec. 7. Sales in bulk of stocks of merchandise, payment of taxes. —Prior to the sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of his business, the seller shall pay to the city or town in which such personal property is assessed the full amount of all unpaid tax due thereon. If the sale is made after the assessment date but prior to the date of the commitment of the tax by the assessors to the collector, the seller shall pay an amount based upon the valuation established by the assessors for the current year and computed on the tax rate of the previous year. If the seller does not pay the amount of the tax due under the provisions hereof, the sale shall be void as against the city or town or its collector and the purchaser shall be liable for the payment of the amount of the tax as established herein. (1949, c. 221, § 1.)

Sec. 8. Corporations, associations, copartnerships and individuals included.—Sellers and purchasers under the preceding sections shall include corporations, associations, copartnerships and individuals, but the provisions of section 6 shall not apply to sales by executors, administrators, receivers, assignees under voluntary assignments for the benefit of creditors, trustees in bankruptcy, or by any public officer under judicial process or to mortgages made in good faith for the purpose of security only, but nothing contained herein shall in any way relieve any of the aforementioned from payment of the tax as set forth in section 7. (R. S. c. 106, § 7. 1949, c. 221, § 2.)

Conditional Sales.

Sec. 9. Agreement that goods sold and delivered to remain the property of seller; record; husband bound only if he signs.—No agreement, that personal property bargained and delivered to another shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby; and when so made and signed, whether said agreement is, or is called a note, lease, conditional sale, purchase on installments or by any other name, and in whatever form it may be, it shall not be valid except as between the original parties thereto, unless it or a memorandum thereof is recorded in the office of the clerk of the city, town or plantation organized for any purpose, in which the purchaser resides at the time of the purchase; but if any of the purchasers are not residents of the state or reside in an unorganized place in the state, then in the registry of deeds in the county where the seller

resides at the time of the sale. The fee for recording the same shall be the same as that for recording mortgages of personal property. All such property, whether said agreements are recorded or not, shall be subject to redemption and to trustee process as provided in section 50 of chapter 114, but the title may be foreclosed in the same manner as is provided for mortgages of personal property.

A statement signed by the party to be bound, describing the parties and the personal property bargained and delivered and stating the date of the sale, the amount remaining unpaid, the terms of payment and that it is a memorandum of an agreement that personal property bargained and delivered to another shall remain the property of the seller until paid for, shall constitute a memorandum within the meaning of this section. The recording of such a memorandum shall make effective all the terms of the agreement as effectively as if said agreement had been recorded in full.

Such agreement or memorandum as provided in the preceding paragraphs shall be binding upon a husband only when signed by him. Any person who permits a wife to sign her husband's name to any such agreement or memorandum without his written authority to do so, when such person is acting as the other party thereto or as his agent, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 11 months, or by both such fine and imprisonment. (R. S. c. 106, § 8. 1951, c. 349. 1953, c. 159.)

I. General Consideration.
II. The Writing.
III. Recordation.
IV. Rights of the Parties.

Cross References.

See c. 46, § 101, re non-applicability of § 9 to contract for conditional sale of railroad equipment; c. 107, § 4, sub-§ 1, re equity power; c. 178, §§ 4, 5, re mortgages of personal property.

I. GENERAL CONSIDERATION.

Conditional sale distinguished from chattel mortgage. — Whatever the language of the decision of our court, holding that a sale, manifested by what is usually termed a Holmes note, is in the nature of a personal mortgage, the conclusion is nevertheless inevitable that in the whole course of our law upon this question is found a fundamental distinction which differentiates a mortgage, as security, from the Holmes note, as security. The mortgage conveys title to the vendee which may be defeated by payment by the vendor; the Holmes note retains title in the vendor which may be defeated by payment by the vendee. Delaval Separator Co. v. Jones, 117 Me. 95, 102 A. 968.

A mortgage is a sale to the extent of carrying title, not an agreement to sell. A mortgage conveys title to the vendee which may be defeated by payment by the vendor. A conditional sales agreement retains title in the vendor which may be defeated by payment by the vendee. Beal v. Universal C. I. T. Credit Corp., 146 Me. 437, 82 A. (2d) 412.

This section applies to agreements when made by a corporation as purchaser, as well as when made by any other person. Emerson Co. v. Proctor, 97 Me. 360, 54 A. 849.

But it does not affect contracts executed prior to its enactment. Boscho, Inc. v. Knowles, 147 Me. 8, 83 A. (2d) 122.

Nor can it, by well-settled principles, affect contracts made in other states, the validity, force and effect of such depending upon the laws of the place where made. Drew v. Smith, 59 Me. 393; Boscho, Inc. v. Knowles, 147 Me. 8, 83 A. (2d) 122.

Although property is moved to Maine.— This section does not apply to a conditional sale contract between a Massachusetts seller and a Maine buyer, made in Massachusetts where the property was then situated and delivered to the buyer, when it was contemplated the property would be removed to and used in Maine. The fact that the property was brought to Maine, as it was contemplated by the parties, does not bring the contract within the statute. Boscho, Inc. v. Knowles, 147 Me. 8, 83 A. (2d) 122.

And where the property is not "bargained," or agreed to be sold, this section does not apply. Thomas v. Parsons, 87 Me. 203, 32 A. 876.

A contract which contains no element of bargain or sale is not within this sec-

tion. Richardson Mfg. Co. v. Brooks, 95 Me. 146, 49 A. 672.

This section requiring a record of written agreements that declare the title to property bargained and delivered to the bargainee shall remain in the bargainor until payment, does not apply to agreements in which the right to purchase is not given. Thomas v. Parsons, 87 Me. 203, 32 A. 876.

For such a transaction is not a conditional sale.— If, in a transaction title was not in the seller and the property in question was not bargained and delivered by the seller to the buyer, the transaction was not a conditional sale. Mac Motor Sales v. Pate, 148 Me. 72, 90 A. (2d) 460.

A conditional sales agreement within the terms of this section is a transaction whereby personal property is bargained and delivered to another with an agreement that the same shall remain the property of the seller until paid for. In other words, the property is bargained and delivered and title is to vest in the purchaser or vendee only upon the performance of a condition precedent. Mac Motor Sales v. Pate, 148 Me. 72, 90 A. (2d) 460.

Thus, section does not apply to assignee under assignment for benefit of creditors. —The assignee, under a common-law assignment for the benefit of creditors, of "the property of, or belonging to" his assignor is not within the purview of this section, requiring the written instrument of a conditional sale to be recorded in the town in which the purchaser resides. He occupies no better position than his assignor did. Rowell v. Lewis, 95 Me. 83, 49 A. 423.

Nor to permit to cut and haul logs.— A written permit to cut and haul logs and lumber is not an agreement for the bargain and delivery of personal property and is not within the meaning of this section. Webber v. Granville Chase Co., 117 Me. 150, 103 A. 13.

Transaction held not bargain and delivery within meaning of section. — See Crosby v. Redman, 70 Me. 56.

History of section. — See Webber v. Granville Chase Co., 117 Me. 150, 103 A. 13; Boscho, Inc. v. Knowles, 147 Me. 8, 83 A. (2d) 122.

Former provision of section.—For cases under this section when applied only to an agreement "for which a note is given," see Boynton v. Libby, 62 Me. 253; Morris v. Lynde, 73 Me. 88; Nichols v. Ruggles, 76 Me. 25; Cunningham v. Trevitt, 82 Me. 145, 19 A. 110; Hill v. Nutter, 82 Me. 199, 19 A. 170; Holt v. Knowlton, 86 Me. 456, 29 A. 1113; Sawyer v. Long, 86 Me. 541, 30 A. 111; Hopkins v. Maxwell, 91 Me. 247, 39 A. 573.

Applied in Campbell v. Atherton, 92 Me. 66, 42 A. 232; Pendleton v. Poland, 111 Me. 563, 90 A. 426.

Stated in Shaw v. Wilshire, 65 Me. 485.

Cited in Monaghan v. Longfellow, 82 Me. 419, 19 A. 857; Cadwallader v. Clifton R. Shaw, Inc., 127 Me. 172, 142 A. 580.

II. THE WRITING.

Conditional sale not effected unless section complied with. — The provisions of this section as to the form and execution of a conditional sales agreement are imperative. If unmet, no conditional sale is effected. Gould v. Huff, 130 Me. 226, 154 A. 574.

And burden is on party relying on sale to establish such compliance.— The burden of establishing that a conditional sales agreement encumbers or controls the title of the property involved rests upon the party relying on it, and nothing less than full compliance with all statutory requirements will satisfy that burden. Tardiff v. M-A-C Plan of NE, 144 Me. 208, 67 A. (2d) 337.

Agreement must be in writing and signed by party to be bound.—A conditional sales agreement, to have validity as between the original parties, must be in writing and signed by the person to be bound thereby. Gould v. Huff, 130 Me. 226, 154 A. 574.

If the imperative provisions of this section that the agreement be in writing and signed by the party to be bound are not met, no conditional sale is effected. Pinkham v. Commercial Acceptance Corp., 128 Me. 139, 145 A. 900.

Which requirement changes the common law.—The common-law rule has been changed by this section which requires that all agreements that personal property bargained and delivered to another shall remain the property of the seller until paid for be in writing and signed by the person to be bound thereby. Mac Motor Sales v. Pate, 148 Me. 72, 90 A. (2d) 460.

Sufficiency of description in agreement determined as in case of chattel mortgage. —The same rule of description which applies to a chattel mortgage determines the sufficiency of the description in a conditional sales agreement. Gould v. Huff, 130 Me. 226, 154 A. 574. See c. 178, § 1, and note.

And it is sufficient if it will enable third persons to identify property.—A conditional sales agreement is sufficiently defi-

nite and, when recorded, is constructive notice to third persons, if its description is such as will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property. Gould v. Huff, 130 Me. 226, 154 A. 574.

Third person with actual knowledge cannot complain of insufficient description. —A third person who has actual knowledge of the existence of a conditional sales agreement and of the property affected thereby cannot avail himself of any lack of sufficiency of description as could one to whom constructive notice alone was attributable. Persons with actual knowledge of the property covered by the agreement stand in no better position than the vendor in respect to their right to object to an insufficient description. Gould v. Huff, 130 Me. 226, 154 A. 574.

Actual knowledge is question of fact.—Actual knowledge, which will cure insufficiency of description in a conditional sales agreement is a question of fact for the jury. It bears directly upon a vital issue between the parties. It is not a preliminary question upon which the admissibility of the instrument itself depends. The proper procedure in such a case is to admit both the instrument and facts bearing on the defendant's knowledge, leaving the question of the sufficiency of the proof for the jury under proper instructions. Gould v. Huff, 130 Me. 226, 154 A. 574.

III. RECORDATION.

Sale not valid as to third persons unless properly recorded.—This section provides that no conditional sale shall be valid except as to the original parties thereto unless properly recorded. The record is necessary to establish its validity. The section is for the benefit and protection of all persons who have any interest in examining the record title to property of which they may thereafter become owner, either in whole or in part, absolutely or otherwise. Motor Finance Co. v. Noyes, 139 Me. 159, 28 A. (2d) 235.

A conditional sale is not valid, except between the original parties, without record. Ivers & Pond Piano Co. v. Allen, 101 Me. 218, 63 A. 735.

As to third persons, a conditional sales agreement is a nullity unless duly recorded. Gould v. Huff, 130 Me. 226, 154 A. 574.

A conditional sale to be valid between other than the original parties thereto must be recorded in accordance with the provisions of this section. Mac Motor Sales v. Pate, 148 Me. 72, 90 A. (2d) 460.

A conditional sales agreement which is not recorded as required by this section is of no avail against third parties. Muskin v. Lazarovitch, 106 Me. 353, 76 A. 702.

Thus, an unrecorded conditional sales contract is not valid against an attaching creditor. Maine Acceptance Corp. v. Sheehan, 129 Me. 485, 149 A. 833.

And nothing less that full compliance with recording requirements is sufficient. —Nothing less than full compliance with the statutory requirements as to the recording of a conditional sales contract can make it effective against a purchaser for value. Tardiff v. M-A-C Plan of NE, 144 Me. 208, 67 A. (2d) 337.

The burden of proving which is on the plaintiff.—The burden of establishing a compliance with the requirement of this section as to recording is on the plaintiff. Blaisdell Automobile Co. v. Nelson, 130 Me. 167, 154 A. 184.

Instrument recorded must be signed by party to be bound.—The recording of an unsigned copy of a conditional sale agreement is not a recording of the agreement within the meaning of this section. The action of a recording officer in copying an unsigned agreement on the record is a nullity. Tardiff v. M-A-C Plan of NE, 144 Me. 208, 67 A. (2d) 337.

And defect not cured by fact that duplicate of such instrument has been signed. —Under this section, the instrument to be recorded must be signed by the person to be bound. The lack of a signature is as outstanding a defect as the omission of any one formality could be. That a duplicate of the unsigned instrument presented for record has been signed by the person to be bound cannot cure the defect. Tardiff v. M-A-C Plan of NE, 144 Me. 208, 67 A. (2d) 337.

Agreement must be recorded in town where purchaser resides.—A conditional sale agreement is not binding on third parties, unless it was recorded in the office of the town clerk in the place where the purchaser resides. Blaisdell Automobile Co. v. Nelson, 130 Me. 167, 154 A. 184.

And this applies to corporations.—The legislature when it used the word "resides" did not intend to change the existing law in regard to recording, but did intend that the term should embrace corporations which have an established place of business in this state as well as those persons who, more strictly speaking, reside here. Emerson Co. v. Proctor, 97 Me. 360, 54 A. 849.

Which "reside" where they have established place of business.—A corporation within the meaning of this section "re-

sides" in that town in which it has its established place of business. Emerson Co. v. Proctor, 97 Me. 360, 54 A. 849.

Recording not necessary as between original parties.—In a suit between the original parties to the contract, it is immaterial whether it was recorded or not. Arthur E. Guth Piano Co. v. Adams, 114 Me. 390, 96 A. 722.

Until payment, the seller's title is good as against the buyer, without record in the town clerk's office, and after such record, it is good as against subsequent purchasers or mortgagees. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A. 567.

This section is interpreted as meaning that an unrecorded conditional sales contract is not valid against the lawful claims of third persons. As between the original parties it must be definite, in writing, and signed by the person to be bound thereby. As to third persons it must be recorded. It follows that if a sales agreement is good between the parties, and no other person has a valid claim, such as a true owner, an attaching creditor, a mortgagee holding valid legal mortgage, a trustee in bankruptcy, and the like, it is good against everyone. Beal v. Universal C. I. T. Credit Corp., 146 Me. 437, 82 A. (2d) 412.

Common law does not require recording.—At common law, the conditional sale would have been valid against all persons. It is this section, and not the common law, which denies validity, except as between the original parties, unless the agreement is recorded. Boscho, Inc. v. Knowles, 147 Me. 8, 83 A. (2d) 122.

And unless this section applies mistake in recording is immaterial.—Unless this section was applicable to a conditional sales contract, a mistake in recording could not have affected the seller's rights under the contract. Boscho, Inc. v. Knowles, 147 Me. 8, 83 A. (2d) 122.

History of recording requirements.—See Tardiff v. M-A-C Plan of NE, 144 Me. 208, 67 A. (2d) 337.

Former provisions as to recording.—For a case under this section when it provided that the note be recorded in order to be effectual against third parties, "if the agreement is made in a note for more than thirty dollars," see Field v. Gellerson, 80 Me. 270, 14 A. 70.

For a case under this section when it made no provision for the recording of a memorandum of the conditional sales agreement, see Mac Motor Sales v. Pate, 148 Me. 72, 90 A. (2d) 460.

IV. RIGHTS OF THE PARTIES.

Vendee has right of redemption.—By this section, under a contract of conditional sale, the conditional vendee has a right of redemption as in the case of chattel mortgages. As to redemption, it is considered as a mortgage. Franklin Motor Car Co. v. Hamilton, 113 Me. 63, 92 A. 1001. See Harvey v. Anacone, 134 Me. 245, 184 A. 889; Mac Motor Sales v. Pate, 148 Me. 72, 90 A. (2d) 460.

And, by this section, the conditional sale vendor is given the right to foreclose. Harvey v. Anacone, 134 Me. 245, 184 A. 889.

Vendor's right is that of mortgagee.—By this section the vendee has the right of redemption after condition broken which right continues until the vendor forecloses the right in the manner provided for foreclosing chattel mortgages. Practically, therefore, the right of the vendor is that, and only that, of a mortgagee of personal property under a chattel mortgage given as security for a debt. He can attempt the collection of his debt by suit and also by enforcing his mortgage security concurrently, or successively. Westinghouse Elec. & Mfg. Co. v. Auburn & Turner R. R., 106 Me. 349, 76 A. 897.

In both a conditional sale and chattel mortgage, the legal title is held only as security, subject to redemption, and the conditional sale vendor's right is practically the same as that of the chattel mortgagee. Harvey v. Anacone, 134 Me. 245, 184 A. 889.

And he retains practically only a lien.—Under this section, the vendor retains, not the entire title, but practically only a lien on the property as security for the promise of the vendee to pay the agreed price. Westinghouse Elec. & Mfg. Co. v. Auburn & Turner R. R., 106 Me. 349, 76 A. 897.

But transfer of property without his consent is conversion for which he can maintain action without demand.—Though having some of the incidents of a chattel mortgage, a conditional sale is different from a mortgage. The vendee is not the owner of the property. Until the payment of the price, title remains in the vendor; and a transfer of possession by the vendee to an intended purchaser without consent of the vendor is a conversion by both the vendee and by such purchaser. No demand is necessary by the vendor to permit him to maintain an action for such conversion. Blaisdell Automobile Co. v. Nelson, 130 Me. 167, 154 A. 184.

Vendee cannot maintain trover without tender of indebtedness.—A conditional sale

vendee, without tender of his overdue indebtedness, and without demand, cannot maintain trover against his vendor, who, having lawfully repossessed the property after default, has without foreclosure sold it to a third party. Harvey v. Anacone, 134 Me. 245, 184 A. 889.

Assignment of Wages.

Sec. 10. Assignment of wages, not valid unless recorded. — No assignment of wages is valid against any other person than the parties thereto unless such assignment is recorded by the clerk in the town where the assignor is employed while earning such wages; provided that if said assignor is employed in an unorganized place while earning such wages, said assignment to be valid against any other person than the parties thereto shall be recorded in the office of the register of deeds for the registry district in which said unincorporated place is located. No such assignment of wages shall be valid against the employer unless he has actual notice thereof. (R. S. c. 106, § 9.)

Cross reference.—See c. 59, § 221, re assignments of wages to secure loans.

Purpose of section.—To prevent the mischief of double assignments, and the uncertainty of assignments, this section was passed, requiring them to be in writing and recorded. Wright v. Smith, 74 Me. 495; Whitcomb v. Waterville, 99 Me. 75, 58 A. 68; Holt v. American Woolen Co., 129 Me. 108, 150 A. 382.

This section does not apply to wages which have been wholly earned when the assignment is made. Wright v. Smith, 74 Me. 495.

Nor to future "earnings" as distinguished from "wages."—The distinction between wages and the earnings under a contract is apparent. An assignment of the future earnings under a contract, need not be recorded. Augur v. Couture, 68 Me. 427.

Under this section, at law, as between assignees, the first assignment recorded will prevail. Holt v. American Woolen Co., 129 Me. 108, 150 A. 382.

This section provides that no assignment of wages shall be valid against any other person than the parties thereto unless properly recorded. The record is absolutely essential to the validity of an assignment of wages involving the rights of a third party, and the prior assignment will prevail. Whitcomb v. Waterville, 99 Me. 75, 58 A. 68, wherein it was held that, when two assignments of wages are made by the same person running to two different persons, each dated the same day, against the same employer, covering the same period of time, embracing the same services and recorded in the same town and at the same hour and minute, the employer is not liable to an action thereon.

And in equity, qui prior est tempore, potior est jure applies unless a superior equity in the assignment of later record may require a variance in the rule. Holt v. American Woolen Co., 129 Me. 108, 150 A. 382.

Former provisions of section.—For cases under a former provision of this section requiring the assignment to be recorded in the town or plantation in which the assignor was commorant while earning them, see Wade v. Bessey, 76 Me. 413; Pullen v. Monk, 82 Me. 412, 19 A. 909; Gilman v. Inman, 85 Me. 105, 26 A. 1049; Woods v. Ronco, 85 Me. 124, 26 A. 1056.

Under this section as it formerly read, it was held that it did not apply to an assignor earning wages in an unorganized township. Peaks v. Smith, 104 Me. 315, 71 A. 884.

Applied in Stinson v. Caswell, 71 Me. 510; Peabody v. Lewiston, 83 Me. 286, 22 A. 171; Harlow v. Bangor, 96 Me. 294, 52 A. 638.

Cited in Edwards v. Peterson, 80 Me. 367, 14 A. 936.

Public Accounts.

Sec. 11. Accounts and claims against state and municipalities verified.—A person, presenting an account or claim against any town, village, corporation, city, county or the state for services rendered, articles furnished or expenses incurred, shall cause said account or claim to be verified by oath, if required by any person whose duty it is to audit the same; and if said claimant refuses so to verify, his claim shall be rejected. (R. S. c. 106, § 10.)

Sec. 12. Expense accounts of county officers. — Every county officer

whenever required by law to render a bill of expenses shall itemize the same and make oath, before presenting it for auditing or payment, that it includes only actual cash outlay while in the performance of his official duties. (R. S. c. 106, § 11. 1945, c. 10.)

Contracts for Sale of Real Estate.

Sec. 13. Contracts for sale of real estate, when to terminate.—All contracts entered into for the sale or transfer of real estate and all contracts whereby a person, company or corporation becomes an agent for the sale or transfer of real estate shall become void in 1 year from the date such contract is entered into unless the time for the termination thereof is definitely stated. (R. S. c. 106, § 12.)

Section enacted for protection of owner.—The intent of the legislature in passing this section was undoubtedly to give protection to owners of real estate against the contracts that it was the practice of brokers to obtain from the owners of real estate, many of which contracts were entered into by the owners without realizing that the language used was such that the broker's interest was more fully protected than the owner's, and that the courts had construed them as continuing contracts unless the time they were to terminate was inserted therein, and that if, after many years, the owner sold the property the brokers, by the terms of the contracts, were entitled to a commission. It was to protect the owners that this section was enacted, compelling brokers to write their contracts for a fixed time, that the owner might know the time within which the broker must sell the property to be entitled to a commission, and if the time was not set forth by the contract, then one year should be the life of the contract. Odlin v. McAllaster, 112 Me. 89, 90 A. 1086.

The purpose of this section has been said to be the protection of owners against continuing contracts. Sawyer v. Federal Land Bank of Springfield, 135 Me. 137, 190 A. 731.

This section was passed to give protection to the owners of property against agreements which might continue indefinitely without the owners of the property suspecting because of the lapse of time that they might be still in force. Goodwin v. Luck, 135 Me. 228, 194 A. 305.

And the section is inclusive of contracts both written and oral. Sawyer v. Federal Land Bank of Springfield, 135 Me. 137, 190 A. 731.

Contract between broker and administrator must be performed in year.—A contract between a broker and administrator for sale of real estate by the broker without specifying any time therefor must be performed within a year. Jones v. Silsby, 143 Me. 275, 61 A. (2d) 117.

The contracts enumerated in this section are void, not voidable, in one year unless the time for the termination thereof is definitely stated. Odlin v. McAllaster, 112 Me. 89, 90 A. 1086.

The intent of the legislature is plain that at the end of one year such contracts as are within its scope are not merely voidable, but are void, unless the time for termination is definitely stated. Goodwin v. Luck, 135 Me. 228, 194 A. 305.

And owner's knowledge of such is immaterial.—The fact that the owner did not know that the contract was void at the expiration of one year from its date is immaterial. The law declares the contract void at the expiration of one year from its date; being void the parties are at liberty to enter into a new contract embracing the same subject matter, but neither party has the right to insist upon a further performance of the void contract, unless by the acts or conduct of the parties they are estopped to question the validity of the contract. Odlin v. McAllaster, 112 Me. 89, 90 A. 1086.

But if the original dealing was definite in respect to termination, it is not afterward made void by this section. Hoskins v. Wolverton, 123 Me. 33, 121 A. 170.

Provision that contract to be in force until expiration of 60 days' written notice does not fix time for termination.—A provision that "this contract and agency shall continue and be in full force until the expiration of sixty days' written notice given to said Agent by said Principal of his intention to revoke the same," does not fix a definite time for the termination of the contract, within the meaning of this section. It indicates rather an attempt to avoid the consequences of the section. Such would certainly be the case if the language had stated merely that the contract should remain in force until written notice should be given by the principal to the agent of its termination; and such result is in nowise changed because it is provided that it shall terminate sixty days

after such notice. Goodwin v. Luck, 135 Me. 228, 194 A. 305.

Cited in Mansfield v. Goodhue, 142 Me. 380, 53 A. (2d) 264.

Sec. 14. Specific performance of a contract to convey real estate after death of contractor.—If a person, who has contracted in writing to convey real estate, dies before making the conveyance, the other party may have a bill in equity in the supreme judicial court or in the superior court to enforce specific performance thereof against his heirs, devisees, executors or administrators, if commenced within 3 years from the grant of administration or from the time when he is entitled to such conveyance, but not exceeding 4 years after the grant of administration, provided that written notice of the existence of the contract is given to the executor or administrator within 1 year after the grant of administration. (R. S. c. 106, § 13.)

Section applies only when owner contracts to convey his own land.—This section relates to cases where the owner of land contracts to convey on certain terms and conditions land of his own, not when he holds property in trust. This provision was not intended to diminish or to destroy the rights of the cestui que trust. The object was to enforce the performance of a contract within a limited time after the grant of administration. Frost v. Frost, 63 Me. 399.

Applied in Hubbard v. Johnson, 77 Me. 139.

Cited in May v. Boyd, 97 Me. 398, 54 A. 938.

Sec. 15. Decree; effect.—If it appears that the plaintiff is entitled to a conveyance, the court may authorize and require the executor or administrator to convey the estate as the deceased ought to have done; and if any of the heirs or devisees are in the state and competent to act, the court may direct them, instead of the executor or administrator, to convey the estate or join with either in such conveyance; which conveyance shall pass the estate as fully as if made by the contractor. (R. S. c. 106, § 14.)

Sec. 16. Enforcement of decree.—If the defendant neglects or refuses to convey according to the decree, the court may render judgment for the plaintiff for possession of the land, to hold according to the terms of the intended conveyance, and may issue a writ of seizin as in a real action, under which the plaintiff, having obtained possession, shall hold the premises as effectually as if conveyed in pursuance of the decree; or the court may enforce its decree by any other process according to chancery proceedings. (R. S. c. 106, § 15.)

Sec. 17. Provision, in case of death of obligee, before conveyance.—If the person entitled to such conveyance dies before bringing his suit, or before the conveyance is completed or such seizin and possession are obtained, his heir, devisee or other person entitled to the estate under him may bring and prosecute such suit, and shall be entitled to the conveyance or seizin and possession in like manner as the obligee. (R. S. c. 106, § 16.)

Sec. 18. Administrator may petition for authority to make conveyance. — If the party to whom any such conveyance was to be made or those claiming under him do not commence a suit as before provided, and the heirs of the deceased party are under age or otherwise incompetent to convey the lands contracted for, the executor or administrator of the deceased may file a bill in equity in the supreme judicial court or in the superior court, setting forth the contract and circumstances of the case; whereupon the court by its decree may authorize such executor or administrator to convey the estate as the deceased should have done; and such conveyance shall be deemed a performance of the contract on the part of the deceased so as to entitle his heirs, executors or administrators to demand a performance thereof on the part of the other party. (R. S. c. 106, § 17.)

See c. 89, § 226, re recording officer not to draft any instrument which he is by law required to record.