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Within this line of reasoning and into this pattern of decisions the Court has placed the *Rochin* case. Although lacking the predictability which the minority would like to give to the law of search and seizure, the majority decision would seem to be preferred to one pin-pointed to a specific constitutional guaranty. Its flexibility leaves the way open for the advance of medical science in the field of more accurate crime detection. It appears that a more satisfactory result will be reached since each revolutionary detective device is likely to be tested constitutionally as it is used in securing evidence. Due process, as thus defined, sets an outside limit within which officers may work, but at the same time does not fetter them with power so closely defined as to make it incapable of beneficial use.

Contrary to the impression left by the press in reporting this decision, stomach pumping is not declared to be an unreasonable search and seizure in state courts, nor must such evidence illegally obtained be excluded from state trials. The decision holds only that on the combined facts of this case, viz., the illegal entry into the defendant's room, the assault and battery there, and the further assault, battery, and torture at the hospital, the accused had been denied due process of law as guaranteed by the Fourteenth Amendment. It is believed that out of this and future decisions in similar situations, each of which will be decided on its individual facts, will come a flexible and practicable body of law on the admission of evidence gathered by modern medical devices.

**JAMES D. BLOUNT, JR.**

### Contracts—Statute of Frauds—Recovery of Payments by Vendee

Contrary to most jurisdictions, the North Carolina Supreme Court has consistently carried out the original purpose of the statute of frauds relating to land by refusing to give effect to land contracts which are not in writing or which are not signed by the party charged therewith. This is clearly illustrated by the fact that it is one of only four courts in the United States which does not recognize the part performance exception.

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Frankfurter concurring). "We ultimately rely, not upon courts of law, but upon the convictions, the habits, and the actions of the community." Curtis, *Due, and Democratic, Process of Law*, 1944 Wisc. L. Rev. 39 at 52.

14 To base this decision on the Fifth Amendment would result in "an unequivocal, definite and workable rule of evidence for state and federal courts." People v. Rochin, 72 Sup. Ct. 205, 213 (1952).


See note 1 supra.

1 "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some person by him thereto lawfully authorized." N. C. Gen. Stat. §22-2 (1943).
to the statute. While specific performance is denied, recovery for benefits conferred pursuant to oral contracts failing to meet the statutory requirements is allowed in order to prevent unjust enrichment. The legislative intent favoring a strict application of the statute is illustrated by G. S. 22-2, which provides that contracts falling within the statute "shall be void," whereas the original English Statute of Frauds was merely to the effect that "no action shall be brought" on contracts falling within its purview.

A deviation from this strict attitude is found in the recent case of Rochlin v. West Construction Company, involving an oral contract under which defendant was to construct a house and convey the house and lot to plaintiff. Pursuant to the agreement the vendee paid $1000 in advance. Upon tender of the deed, a dispute arose as to the amount of the purchase price, and the transaction was never consummated. Vendee sought to recover the money paid and the vendor claimed the right to retain the $1000 as damages for failure of the vendee to perform. The trial court excluded all evidence of the contract, but the supreme court reversed, saying that the evidence should be admitted, and if the terms were as claimed by the vendee then the money was to be recovered, but if as alleged by the vendor then he should retain the $1000.

The decision is in accord with prior North Carolina cases and with the weight of authority in following the general rule that where a vendee has made payments under a contract which fails to meet the requirements of the statute of frauds, he may not recover them if the vendor is willing and able to perform the contract. Despite the statutory provision that a contract for the sale of land is void unless signed by the party to be charged, the North Carolina court has held such a contract in parol

3 Ballard v. Boyette, 177 N. C. 24, 86 S. E. 175 (1915); Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104 (1904); Barnes v. Teague, 54 N. C. 278 (1854); Glummer v. Adm' of Owens, 45 N. C. 254 (1852); Allen v. Chambers, 39 N. C. 125 (1845).
5 See note 1 supra.
6 Statute of Frauds, 29 Car. 11, c. 3. Practically all American statutes of frauds have followed this form, with only a few states providing that contracts failing to meet the statutory requirements are to be void. 49 AM. JUR. 872 (1943).
10 N. C. GEN. STAT. §22-2 (1943).
to be voidable only, and valid unless repudiated by the party to be charged. Following this construction, the repudiating party who avails himself of the statute is left in the position in which he finds himself at the time of repudiation and can recover no payments made pursuant to the contract. While there is a possible distinction between the case at hand and prior North Carolina cases in point, in that in those cases the terms of the contract were not in dispute, it is obvious that parol evidence of the contract and of benefits conferred because of it must be admitted, or the vendor could end the action on the pleadings by simply denying the contract or pleading a different one. In those jurisdictions which adhere to the minority view and allow a recovery of any benefits conferred upon the other party regardless of who repudiates the contract, the basis for the decisions has been: (1) That the contract is void and consequently neither party may retain benefits received because of it, or (2) that regardless of the wording of the statute, if there can be no specific performance decreed, a recovery may be had so as to place the parties in the status quo.

11 "The contracts entered into in compliance with this section are not void but voidable merely at the instance of the party to be charged. And when such party takes advantage of the provisions of the statute, he repudiates the contract in its entirety and cannot derive any benefit from it." Durham Consol. Land and Improvement Co. v. Guthrie, 116 N. C. 381, 384, 21 S. E. 952, 953 (1895). McCall v. Textile Industrial Institute, 189 N. C. 775, 128 S. E. 349 (1925).

12 But this does not prevent an action against the repudiator for benefits conferred upon him. In Durham Consol. Land and Improvement Co. v. Guthrie, 116 N. C. 381, 21 S. E. 952 (1895), the vendee took possession under a contract failing to meet the requirements of the statute of frauds, and cut timber upon the land. Vendee then refused to perform and abandoned the land. In a suit by the vendee to recover the deposit paid, the court allowed the vendor to retain the amount paid as well as recover damages by way of a counter-claim for the value of the timber cut. The court stated that the contract was admitted and that so long as it existed, plaintiff could not rely on the common counts. But cf. Davis v. Lovick, 226 N. C. 252, 37 S. E. 2d 680 (1946), where the owner sought ejectment against a tenant, who pleaded as a defense an oral lease contract to extend for the owner's life. The plaintiff admitted the contract in the reply, but pleaded the statute of frauds. The court held that the parol contract was not a necessary basis for the relief sought, and because it was invalid under the statute of frauds, plaintiff was entitled to the ejectment.

13 See note 8 supra.

14 The court has admitted parol evidence under similar circumstances. Perry v. Norton, 182 N. C. 585, 109 S. E. 644 (1921); Ford v. Stroud, 150 N. C. 362, 64 S. E. 1 (1909); Love v. Atkinson, 131 N. C. 544, 42 S. E. 966 (1902); Luton v. Badham, 127 N. C. 96, 37 S. E. 143 (1900). The parol evidence may not be introduced in order to establish the contract for the purpose of securing specific performance, but only for the purpose of determining whether the vendee is entitled to recover the amount he has paid under such agreement. Rochlin v. West Construction Co., 234 N. C. 443, 67 S. E. 2d 464 (1951).

15 Reedy v. Ebsen, 60 S. D. 1, 242 N. W. 592 (1932), where the court stated that all jurisdictions which follow the majority rule have a statute which does not expressly make, or has not been interpreted as making, contracts within its terms void, rather than voidable. Brandeis v. Neustadt, 13 Wis. 142 (1869), where the court says that the majority rule should prevail where the original English statute is in force, but where the statute declares such contracts void, the minority rule should apply. Merten v. Koester, 199 Wis. 79, 225 N. W. 750 (1929).

16 Nelson v. Shelby Mfg. & Improv. Co., 96 Ala. 515, 11 So. 695 (1892); Burks
In the *Rochlin* case the vendor has conferred no benefits upon the vendee, and in no event could he be made subject to a decree of specific performance. Were the house to increase in value, the vendor could return the deposit and sell to a higher bidder, and the vendee could neither enforce the contract specifically nor recover damages. To allow a retention of the deposit in this situation would, in effect, be awarding damages for breach of an agreement declared void by the statute, and would be treating the contract as if the statute read "no action shall be brought . . ." In view of the court's non-recognition of the part performance doctrine and the fact that the North Carolina statute of frauds provides that such a contract as that in the principal case is void, it would seem that application of the minority rule, to allow the vendee to recover the payment made without the necessity of proving the disputed terms of the contract, would better serve the purpose of the statute and would be more consistent with the effect of its prior application.

S. DEAN HAMRIC.

Criminal Law—Convicts—Commencement of Sentence*

In North Carolina, a prisoner sentenced to the state prison system does not begin to serve his sentence until he is actually received from the county jail. In a majority of the states where the issue has been decided in the absence of a controlling statute, a sentence is deemed to begin on the date when it is pronounced. When the defendant is not in custody


17 In Albea v. Griffin, 22 N. C. 9, 10 (1838), the court stated: "We admit this objection [the statute of frauds] to be well founded, and we hold as a consequence from it that the contract being void, not only its specific performance cannot be enforced, but that no action will lie in law or equity, for damages because of non-performance."

18 Of course, the vendor should be allowed to off-set any benefits he has conferred upon the vendee, such as reasonable rental value if vendee has been in possession of the property.

* This material was prepared during the summer of 1951 while the author was serving as a member of the staff of the Institute of Government. It is part of a forthcoming guidebook for prison officials to be published by the Institute.

2 This is not a statutory rule, nor are there any case decisions or rulings of the attorney-general to support it. According to the attorneys for the prison department, this has been the administrative policy since the state took over the county road camp system in 1933.