A TREATISE

ON THE CONSTRUCTION OF THE

STATUTE OF FRAUDS,

AS IN FORCE IN ENGLAND AND THE UNITED STATES.

By CAUSTEN BROWNE.

FIFTH EDITION.

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WITH THE COÖPERATION OF THE AUTHOR.

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PREFACE TO THIS EDITION.

In this edition, about nineteen hundred cases, decided since the publication of the last edition, have been added, and the whole text has been carefully revised. In order to make room for the new matter without materially increasing the size of the volume, the American statutes have been omitted from the appendix. It is believed that no serious inconvenience will result from this omission, as each practitioner may be supposed to have ready access to the statutes of his own State.

The author takes great pleasure in acknowledging his obligations to his co-editor for thorough research and intelligent criticism.

CAUSTEN BROWNE.

Boston, June, 1895.

PREFACE TO THE FOURTH EDITION.

In the preparation of the present edition, no pains have been spared which seemed to promise for the book a higher degree of accuracy or of usefulness to the profession. The text has throughout been carefully revised. Much of it has been entirely rewritten, in order to present certain topics with greater fulness or in new aspects, as seemed, by the course of recent judicial decisions, to be rendered desirable. Besides adding the cases reported since the third edition, all citations made in earlier editions have been carefully verified, and many other cases of that date added, with the result that the present edition contains in all more than a thousand cases not previously found in the book. Improvements have also been made in its index and table of cases. The author trusts and believes that the result of the careful and thorough work put into this edition will be to confirm the favorable judgment which the book has heretofore enjoyed at the hands of the profession.

And he takes peculiar pleasure in acknowledging his obligation to Alex. Porter Browne, Esq., of the Suffolk bar, for constant and very valuable aid in this revision; gladly conceding to him a least an equal share in whatever credit the work done may be held to deserve.

Boston, March, 1880.

PREFACE TO THE FIRST EDITION.

It can scarcely be necessary to offer any apology for the appearance of what professes to be a practical treatise upon the Statute of Frauds. Perhaps it is not too much to say that there is no subject, apparently so simple in its nature as the requirement of certain kinds of evidence in certain cases, more confused and complicated by the number, variety, and apparent if not actual contradiction of the decisions. Nor has there been for many years any work to which the practitioner could resort as a safe and ready guide to the rules and modifications of rules which these decisions have established. There are, it is true, numerous text-writers, of whose works we possess late editions, upon topics involving a more or less extended notice of the statute; but it is certainly no disparagement of their labors to say that they have been unable to give to it so full and thorough a treatment as its importance has come to demand; to do so was quite incompatible with the proper plans of their respective treatises. The work of Mr. Roberts, the only one in which this subject has been exclusively considered, ha always been held in high esteem for the breadth and judiciousness of its commentary, its critical analysis of cases, and its lucid and elegant style. Such has been the profusion of decisions since he wrote, however, that it cannot now supply the practical need of the profession.

That the present work is altogether such as to supply this need, the author is far from confident. The professional reader will be well able to appreciate the difficulties which have opposed themselves to the execution of such a task, arising not only from the confused state of the law itself but

from the diversity of the titles to be discussed. In regard to both these points, the method pursued in the examination of cases, and the selection and arrangement of the topics treated, a few words may be not inappropriately said in this place.

The multifarious provisions of the Statute of Frauds appear to group themselves in these several classes: 1. The creation and transfer of estates in land, both legal and equitable, such as at common law could be effected without deed; 2. Certain cases of contracts which at common law could be validly made by oral agreement; 3. Additional solemnities in cases of wills; 4. New liabilities imposed in respect of real estate held in trust; 5. The disposition of estates *pur autre vie;* 6. The entry and effect of judgments and executions. Of these, the last three classes have clearly no such mutual relation as would have made it profitable or practicable to consider them together even if there existed any need of a special treatise in regard to them. The other three classes have this common feature, that they all pertain, in one way or another, to the subject of written evidence, and thus are perhaps susceptible of being treated in succession without actual incongruity. But for two reasons it was deemed best to omit from this work the consideration of the provisions in regard to wills: first, because it did not seem to be really needed by the profession, the admirable treatise of Mr. Jarman, as lately edited in this country, presenting in complete and accessible shape all that it would have been appropriate to present here, and the author being unwilling to increase the size of the book without increasing its practical value; secondly, becau e those provisions stand entirely outside of what appears to be generally understood as the domain of the Statute of Frauds, whether in reference to the English law or that of the several States, namely, the requirement of writing in proof of transactions which were previously capable of valid proof by oral evidence, involving the recognition, so to speak, of writing as a *tertium quid* in

law, the establishment of a distinction between the two kinds of transactions, those effected by writing and those effected verbally, both of which the common law comprehended within the single term *parol*. The result has been, therefore, to confine the work to the first two of the general topics to which, as above analyzed, the statute relates; and of these, it has been found unavoidable to give decided prominence to the topic of *contracts*, as in itself possessing superior practical importance, and as being most perplexed by contradictory decisions.

As to the method pursued in the consideration of adjudged cases, it may be necessary to explain that while the text has been devoted, wherever the condition of the law allowed, to that concise and systematic statement of principles, with their modifications and exceptions, which is always most acceptable in a practical treatise, yet in many cases where, owing to the conflicting character of the decisions, this could not be done without leaving the topic confused, the author has thought best to avoid being superficial at the risk of being considered prolix, and has freely and closely examined the cases in detail. In so doing he has been occasionally obliged to state conclusions at variance with some which have appeared to rest upon high judicial authority, but always in a spirit of sincere deference, and solely with a view to afford some aid to the researches of the more accomplished reader. His examination of cases referred to has been personally and carefully made; and while he cannot doubt that the superior ability and learning of those who may examine his work may discover errors in his conclusions, he believes it will be found that the difficulties of the subject have been plainly stated and fairly met.

With all its imperfections, and doubtless it has many, it is now submitted to the profession for which the author has testified his respect by endeavoring to render it this service.

Boston, June, 1857.

INTRODUCTION.

THE title of the statute which forms the subject of this work states it to be "An Act for Prevention of Frauds and Perjuries." In the recital, however, its object is expressed somewhat differently, as the "prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury." The latter phraseology is clearly the more accurate; for the statute does not aim directly to suppress fraud and perjury by imposing any new punishment in cases where they are proved to have been committed, but makes provision for excluding in certain cases such modes of proof as experience had shown to be peculiarly liable to corruption. And again, it would be a narrow view of the statute, at least as interpreted at the present day, to limit its application to cases where there is in fact more or less danger of perjury or subornation of perjury. The purest character and the highest degree of credibility on the part of the witnesses by whom a transaction, for the proof of which this statute requires written evidence, is sought to be made out, or the most overwhelming preponderance in their number, are entirely unavailing to withdraw a case from its reach. Indeed the real object and scope of the statute would seem to extend far beyond all questions of the integrity of witnesses, and to comprehend the exclusion of merely oral testimony in certain classes of transactions, as at best of an uncertain and deceptive character. In estimating the value of this enactment, therefore, the important question is not whether the statute has in its practical working let in as much perjury as it has excluded.

for no strictness of legislation can bar out from a court of justice the man who deliberately purposes to commit perjury; but it is whether, in the average of large experience since the statute was enacted, the requisition of written testimony in certain cases has not materially served to secure the property of men against illegal and groundless claims. That it has done so will scarcely be disputed, and to the profound practical wisdom with which it was conceived to this end the most enlightened judges and jurists have at all times borne emphatic testimony.

Nevertheless it cannot be said to have been judically administered with a firm hand and in a consistent spirit. Within a few years after its enactment, and before the generation of its framers had passed away, we find the courts admitting exceptions and distinctions as to its application, and forcing upon it constructions tending to restrict its beneficial operation. In later days there has been evinced, on the whole, a disposition to return to a closer interpretation of its provisions; but even now there are doctrines, too firmly settled by precedent to be overthrown, which, from their very inconsistency with the spirit of the statute, lead continually to great embarrassment in its administration.

It must, however, be admitted that much of the difficulty which has been found to attend the exposition of the statute is due to the style in which it is framed. The professional reader who carefully examines it from beginning to end will find such obscurity of arrangement and such inexact and inconsistent phraseology, as to conclude that safe and rational rules for its construction can hardly be rested upon its literal expressions, but that it must be read, as far as may be, by the light of that broad and wise policy in which it was manifestly conceived. And this suggests a few words upon the authorship of the statute, with which these introductory observations may fitly close.

In a decision of the Court of Queen's Bench which has perhaps given rise to more discussion than any other which

has ever passed upon the statute, that of Wain *v.* Warlters, where it was determined that the written memorandum required by the fourth section must show the consideration of the agreement, Lord Ellenborough rested his judgment (in which his brother judges concurred) in great part upon the etymological force of the word "agreement;" remarking, in vindication of that rule of construction, that the statute was said to have been *drawn* by Lord Hale, "one of the greatest judges who ever sate in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law."[1] Lord Chief Baron Gilbert says that the statute was *prepared* by Lord Hale and Sir Lionel Jenkins.[2] But Lord Mansfield considered it scarcely probable that it was drawn by Lord Hale, as "it was not passed till after his death, and was brought in in the common way and not upon any reference to the judges."[3] This coincides with what is the most distinct evidence we seem to have upon the subject, the direct statement of Lord Nottingham, who says, "I have reason to know the meaning of this law, for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and civilians."[4] It would seem, therefore, that after its original proposition in Parliament by Lord Nottingham, Lord Hale and Sir Lionel Jenkins had it under consideration and revision, and that it was finally passed, as it was left by them, in an informal shape. Lord Hale was not then alive, and the statute itself affords strong internal evidence, as for instance in its want of compactness and in the use of different words in different places to express the same subject-matter, that it was never regularly engrossed with a view to its enactment.

[1] 5 East, 16. See this Treatise, § 392.
[2] Gilb. Eq. 171.
[3] 1 Burr. 418.
[4] 3 Swanst. 664.

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PART I.

THE CREATION AND TRANSFER OF ESTATES IN LAND.

STATUTE 29 Car. II. c. 3.

THE FIRST THREE SECTIONS; BEING SUCH AS AFFECT THE CREATION AND TRANSFER OF ESTATES IN LAND.

Section 1. All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

Section 2. Except nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term, shall amount to two-third parts at the least of the full improved value of the thing demised.

Section 3. And, moreover, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

TREATISE

ON THE

STATUTE OF FRAUDS.

CHAPTER I.

FORMALITIES FOR CONVEYING ESTATES IN LAND.

§ 1. The Statute of Frauds found the law of England in regard to the alienation of corporeal interests in land in a singularly unsettled condition. The ancient *investitura propria*, or actual delivery of the land by the donor to the vassal, which was practised in early feudal times, had been accompanied by such solemnities in the presence of chosen witnesses as gave the highest notoriety to the transaction and secured ample evidence of it. This was properly that livery of seisin which is mentioned in the first section of the Statute of Frauds, and it may be supposed that if it had been preserved in its original strictness and formality, the policy of the statute would not have demanded the substitution of any other ceremony. But the diffusion of landed property among the middle classes, and the extension of commercial intercourse between men, soon brought about infringement upon the ancient practice. The lord delegated the investiture of his tenant to the attorney or steward, and the attestation of common witnesses, instead of the *pares curiæ* of the particular manor, was received. Other relaxations of the ancient form followed, until there remained scarcely a vestige of the ori-

ginal ceremony. It had always been customary to make a brief written record of the investiture, and as the old formalities of the parol transfer fell into disuse, this record grew more elaborate, and finally came to be the sole resort for evidence of the transaction. Still, it was never indispensable, and down to the time when the Statute of Frauds was enacted, land could be transferred by parol with livery of seisin, loose and informal as that ceremony had then become, and consequently great danger was incurred of such transfers being attempted to be proved by false and fraudulent means. By this statute it was finally made essential to the conveyance of estates in land (with an exception to be hereafter noticed), that it should be by writing signed by the party or his agent; and all estates created "by livery of seisin only and by parol" were declared to possess no greater force or effect than estates at will. The statute made no provision, however, for the registration of the written conveyances, which omission doubtless left open a wide field for fraud, and was not cured in England till some years after, when recording acts were passed.

§ 2. It will be observed that the operation of the statute is confined to such interests in land as could formerly be conveyed by livery of seisin or by parol. Hence it is clear, and has always been held, that in regard to incorporeal estates no change has been introduced, but that they were left, as they stood at common law, transmissible only by deed or writing sealed.

§ 3. Again, if we consider the three first sections in connection with the fourth and sixth, the broad and comprehensive views of those who produced the Statute of Frauds will be still more clearly appreciated. The fourth section not only has the effect of preventing an action upon a verbal contract for the sale of any interest in land, but also cuts off those equitable claims to land which would arise upon such a contract made for a valuable consideration, and which might be enforced in equity so as ultimately to effect a trans-

fer of real estate without writing. And so with the sixth section, which prevents any trust in real estate from being manifested or proved without writing. By virtue of all those sections, if faithfully enforced by courts of equity as well as courts of law, it becomes impossible to transfer any interest in land, other than the very small class of estates saved by the second section, except by complying with those formalities which the statute has wisely required.

§ 4. There is, it is true, a difference of phraseology between the sections just referred to, and it may be confessed that this and similar irregularities in the language of the statute lead to confusion and embarrassment in treating of the general topics to which it relates. The sections which speak of conveyances specify in detail the various grades of property which may exist in real estate, whether "leases, estates, interests of freehold, or terms of years, or *any uncertain interest of, in, or out of*, any messuages, manors, lands, tenements, or hereditaments." The section which prohibits actions upon contracts for real estate goes, it might be thought, even farther; it says "lands, tenements, or hereditaments, or any interest in *or concerning* them." The section which prevents trusts in real estate from being verbally proved simply uses the words "lands, tenements, or hereditaments." We shall have occasion hereafter to refer to cases where judges have dwelt upon the expressions "uncertain interests," "concerning," etc., as embracing particular cases then before them; but no case appears to have been directly decided upon the ground of any of these differences of expression.

§ 5. Sir Edward Sugden explains very clearly the mutual relation of the several sections which refer to the creation of estates in land. He says that the former seem to embrace interests of every description, and that all estates actually created without the formalities required therein are avoided by their operation; while, if the same estates rest *in fieri*, the agreement to perfect and consummate them cannot be

enforced by reason of the latter section, relating to contracts.[1] But it is to be remembered that the sections which relate to contracts for, and trusts in land, take a wider range than those which relate to transfers of land. The operation of the statute in the latter case is confined to corporeal estates, or such as could previously have been created by "livery of seisin or parol," and does not extend to incorporeal estates, which lie in grant, and which, as well after the statute as before, could only be created by deed. But actions cannot be maintained on verbal contracts for, nor verbal proof admitted of trusts in, incorporeal any more than corporeal estates. On a comprehensive view of the statute as it regards the alienation of estates in land, therefore, we see that *all estates*, great and small, corporeal and incorporeal, are now provided for. Where an incorporeal estate is to be conveyed, the common law demands a deed for that purpose; and the Statute of Frauds leaves that requirement untouched. Where a corporeal estate is to be conveyed, the statute demands a writing. Where a contract is made for the conveyance of either a corporeal or incorporeal estate, the statute prevents that contract from being enforced unless it be in writing; and if a trust is alleged in either corporeal or incorporeal estates, the statute requires written evidence of that trust to be provided.

§ 6. The next question to be considered is, what changes the statute made in the formalities required for the transfer of estates in land; and, in answering it satisfactorily, we are met by no little difficulty in the exceedingly concise and somewhat obscure language of the first section. One construction, and perhaps the most obvious one, is derived from reading it *affirmatively*, that is, as if it enacted that all the interests and estates therein enumerated should thereafter be made or created by writing and signed by the parties, etc.; but as estates of freehold are embraced in the enumeration, this construction requires us to say that they too may be created

[1] 1 Vend. & P. 94, 95.

by writing merely without deed.[1] If, to avoid this difficulty, we say that a seal must be understood as required in addition to the writing, then it follows that terms for years which could originally be created without writing must now be not only in writing but also under seal. The important inquiry arises, therefore, whether the statute has in fact made it necessary that terms for years be created by deed. This inquiry was presented in the Supreme Court of New Jersey, in 1835, in the case of Mayberry *v.* Johnson, and answered in a masterly judgment of that court, pronounced by Chief Justice Hornblower. The ninth section of the New Jersey statute is copied almost literally from the first section of the English statute, and the case came before the court upon a verdict for the plaintiff, taken in an action of ejectment, subject to their opinion on two questions, of which the first was, "Whether a lease for more than three years, not under seal, is a good and valid lease within the Statute of Frauds." The argument for the plaintiff was the same suggested above, that if a lease could be without deed, so could a conveyance of freehold. The Chief Justice, after acknowledging the absence of any satisfactory judicial decision upon the question, proceeded to decide it upon the construction of the statute as ascertained by comparison with the common law. "At the common law, estates in fee, for life, or for years with remainder in fee, in tail or for life, might have been created by *deed and livery of seisin*, or by *livery of seisin* only; and leases or estates for years might have been made by *deed* or by *parol*, or by *parol* merely, without livery of seisin. It must also be remembered that, by the common law of England, *all* contracts were divided into *agreements* by *spe-*

[1] As lately as the year 1815, in Jackson *v.* Wood, 12 Johns. (N. Y.) 73, it was insisted that a writing not under seal was sufficient, under the Statute of Frauds, to pass a fee-simple. This position was not sustained by the court, but they admit that no direct decision appeared to have been made on the point. That a seal is necessary to pass a freehold estate, even as against the grantor, see Stewart *v.* Clark, 13 Met. (Mass.) 79.

cialty and *agreements* by *parol;* there was no such third class as agreements *in writing.* If they were *written* and not under seal, they were *parol* agreements. A lease for years written, but not sealed, was a *parol* lease, as well as a lease *unwritten and verbal* only. Thus stood the law of conveyancing and of contracts when the 29 Car. II., c. 3, was passed. The question then occurs, what change did the statute introduce in the mode of creating and transferring the different interests and estates of freehold, and less than freehold, mentioned in the statute. The answer is plain: it abolished the practice of creating estates in fee and all other estates of freehold, by *livery of seisin only;* and prohibited the making of leases for more than three years, by *parol* agreements, not put in writing. It did not prescribe the manner in which such estates should be created or transferred, but only declared that freehold estates, if made by *livery and seisin only*, and estates for years, if made by *parol,* and *not put in writing*, should operate as estates at will. In whatever way, therefore, such estates might have been created prior to the statute, other than by mere livery of seisin, or by parol, and not put in writing, they may still be created. Now it is manifest that before the Statute of Frauds, estates of freehold and of inheritance might have been created by *deed and livery of seisin*, and that leases might have been made by *writing simply*, or, to speak technically, by a *parol* agreement reduced to writing. It follows, therefore, that after the Statute of Frauds no estate of freehold could be created or conveyed but by *deed;* and that a lease for more than three years could only be made by indenture of lease, or by parol agreement 'in writing, signed by the parties.' Thus, by resorting to this distributive construction (a mode of construction not unusual, and often necessary to be adopted), the ninth section of the Statute of Frauds becomes plain and intelligible; and we are able to decide, without hesitation, that a lease for more than three years, *in writing*, though not under seal, is good and valid under that statute."[1]

[1] Mayberry *v.* Johnson, 3 Green (N. J.), 116.

§ 7. There are many cases to be found in the books, from which it appears that agreements in *writing* for leases, signed but not sealed, have been held to amount to leases, if *in præsenti*, and if it did not appear upon the whole instrument that the parties intended that it should not take effect until a more formal lease should be prepared and executed.[1] These agreements are not leases, in strict and legal language; they are more properly *parol demises* "put in writing and signed by the parties," etc., or written evidence of leases. A *lease*, when we mean thereby the instrument, is in legal language an indenture of lease, or a deed; but in common speech, where it is said a man has a lease for property, nothing more is meant than that he has a term or an estate for years in the premises, which may be by deed or by writing not under seal.[2] And it may be considered now as settled law both in England and this country, that the Statute of Frauds (except as it may have been modified by subsequent legislation) does not require a seal for the creation of an estate for years in land.[3]

§ 8. In the third section of the statute, relating to the assignment, grant, or surrender of an existing term or estate, the distinction is plainly marked between a *deed* and a note in writing; the use of either being permitted. Accordingly, it has generally been held in both countries that an assignment,

[1] Baxter *v.* Browne, 2 W. Bl. 973; Goodtitle *v.* Way, 1 T. R. 735; Morgan *v.* Bissell, 3 Taunt. 65; Poole *v.* Bentley, 12 East, 168.

[2] Mayberry *v.* Johnson, 3 Green (N. J.), 120, 121.

[3] 4 Greenl. Cru. Dig. 34; Roberts on Frauds, 249; Farmer *v.* Rogers, 2 Wils. 26. Maule, J., in Aveline *v.* Whisson, 4 Man. & G. 801. The enactment of 8 & 9 Vict. c. 106, § 3, providing that leases, etc., shall be by deed, is a circumstance strongly tending to show that previously a deed was not supposed to be necessary. So with Mass. Gen. Stat. c. 89, § 3. In Allen *v.* Jaquish, 21 Wend. 628, the Supreme Court of New York says: "There is no doubt that either a surrender *or a demise* may be effected by a simple writing not sealed." And see Hill *v.* Woodman, 14 Me. 38; Lake *v.* Campbell, 18 Ill. 106.

grant, or surrender of an existing term may be by writing unsealed.[1]

§ 9. On the other hand it has been doubted whether, since the statute, a lease is sufficiently executed by being sealed, though not signed. Sir William Blackstone says the statute "revives the Saxon custom, and expressly directs the signing in all grants of lands and many other species of deeds, in which, therefore, signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other."[2] Chief Justice Willes, in Ellis *v.* Smith, strongly disclaimed deciding to the contrary, and Blackstone's view appears to be favored by several recent cases in Massachusetts in which questions have been made as to the effect of a defective signature upon the validity of a deed.[3] But the opinion stated in the Commentaries is opposed by another eminent writer, who says it was conceived through not attending to the words of the statute.[4] The words in question, namely, "by livery of seisin only or by parol," defining those transfers which were thenceforth to be by writing *signed*, were examined in Cooch *v.* Goodman, in the Queen's Bench in 1842. It was not necessary in that case to decide the question we are now considering, but it is manifest that the remarks of Patteson, J., strongly support

[1] Beck *v.* Phillips, 5 Burr. 2827; Doe d. Courtail *v.* Thomas, 9 Barn. & C. 288; Holliday *v.* Marshall, 7 Johns. (N. Y.) 211; Allen *v.* Jaquish, 21 Wend. 628; Sanders *v.* Partridge, 108 Mass. 556. See § 42, *post.*

[2] 2 Bl. Com. 306.

[3] Ellis *v.* Smith, 1 Ves. Jr. 10; Wood *v.* Goodridge, 6 Cush. 117; Gardner *v.* Gardner, 5 Cush. 483. See also Hutchins *v.* Byrnes, 9 Gray, 369, *per* Bigelow, J. Soon after the act was passed, the question was raised in the Common Pleas upon another branch of the statute; three judges held the signature to be unnecessary to a will having a seal; the other doubted. Lemayne *v.* Stanley, 3 Lev. 1. That sealing a will is a signing of it was decided in Warneford *v.* Warneford, 2 Stra. 764. But see Smith *v.* Evans, 1 Wils. 313. This point is farther examined, *post*, § 355, under the head of the fourth section, relating to contracts, the language of which, as to the point in question, does not differ from that of the sections relating to conveyances.

[4] Mr. Preston, in 1 Shep. Touch. 56, n. 24.

the position that the statute did not mean to require a signature to a sealed conveyance of lands.[1] Again, in the more recent case of Aveline *v.* Whisson, where a declaration was in covenant upon an indenture of lease, a plea that the indenture was not *signed* by the plaintiff, nor by any agent authorized in writing, was held bad by the Court of Common Pleas; and Maule, J., said: "Can the other side contend that a deed requires a signature? This is not like a lease by parol."[2] And more recently still, in the Court of Exchequer, it has been stated to be settled that under the first section of the statute sealing alone is sufficient.[3] These latter decisions appear to leave no room for question upon the point as matter of authority, and the language used in the statute, upon close inspection and analysis, does not seem easily

[1] Cooch *v.* Goodman, 2 Q. B. 580. The following extract from the report is deemed justified by the doubt which has been entertained upon this important point. Counsel, speaking of the first section of the statute, says: —

"The section must be read as requiring every such lease to be in writing *and* signed, otherwise to have the effect only of a lease at will. Can any instance be found in which, since that statute, a lease under seal has been held valid without signature?"

[Patteson, J. "You read the statute so as to throw out the words 'or by parol.'"]

"Some words must be rejected. The meaning is that there shall be no leases by livery of seisin only, or by parol only; 'parol' may be construed as distinguished either from a deed or from a writing."

[Patteson, J. "'Livery and seisin only,' mean without deed; you give no sense whatever to the intermediate words."]

"The intention was that all demises should be evidenced by the signature of the party or his agent."

[Patteson, J. "The reference to the agent supports the agreement on the other side; had the intention been to include deeds, it would have required the agent to be authorized by deed, and not merely in writing."]

Lord Denman, C. J., in delivering the judgment of the court, says: "It is curious that the question should now for the first time have arisen in a court of law, and perhaps as curious that it is not now necessary to determine it."

[2] Aveline *v.* Whisson, 4 Man. & G. 801.

[3] Cherry *v.* Hemming, 4 Exch. 631.

reconcilable with any other interpretation.[1] In this country also, that interpretation has received the approbation of the Supreme Court of Indiana, and it is considered by a respected American writer, in a recent treatise, to be the better doctrine.[2]

§ 10. Assuming, however, that the statute does require a signature to a conveyance of an interest in land, the important question arises, what is to be deemed a signature under its provisions; whether it allows such a signature as would have been good at common law, as, for instance, by having the grantor's name affixed to the instrument in his presence and by his direction. This point has come before the Court of Appeals of South Carolina and received a very able discussion. The case was of a marriage settlement embracing real property, and one question was, whether the intended wife had validly executed the instrument, she not having signed it herself, but having requested a witness to sign her name for her, which was accordingly done in her presence. The court, which consisted of four chancellors, being equally divided on the question, it was not determined, and the decision passed upon another ground; but the opinion of Chancellor Johnston, in delivering judgment, presents very strongly the argument against the validity of such an execution. He said: "The statute requires the party to sign himself, or if he signs by an agent, the agent must be authorized in writing. When another person subscribes for him, that person is his agent, whether the act be done in his presence or out of it. The

[1] See the reasoning of Patteson, J., in Cooch *v.* Goodman, quoted *supra*. The English law is also stated to be in conformity with the position presented in the text, in Gresley, Eq. Evid. p. 121; and 1 Pres. Abs. Tit. 294.

[2] Parks *v.* Hazlerigg, 7 Blackf. (Ind.) 536; 1 Pars. Cont. 96, *note*, in which some valuable suggestions may be found as to the formalities required for conveyances by the statute. By the Revised Statutes of Indiana, 1843, p. 416, conveyances of lands or of any estate or interest therein are expressly required to be subscribed and sealed. See Appendix.

only difference between an agency exercised in the presence and one executed in the absence of the principal is in the evidence of the agent's authority. The presence and superintendence of the principal are proof of his assent; other proof may be necessary when he is absent. But in either case it is the principal who acts, and not the agent. If the agency be made out by proof of authority, then the law comes in and declares that the act done by him shall be attributed to and shall bind the principal. The common law, which admitted parol proof of authority, would no doubt have declared that an act done in the presence of the latter by his procurement was binding on him, and *in this sense* that it was his own act. But the statute in this section has emphatically declared that if an agent sign, his authority shall not be made out by parol, but must in all cases be proved by writing. The act, if otherwise evidenced, shall not be the act of the principal, nor bind him. This enactment, it is therefore contended, has materially altered the common law in this, that a subscription by agency, wherever executed, if the authority to make it depend upon parol, is not the subscription of the party, nor conclusive on him." The learned Chancellor supports this view by comparing the provisions of the statute in regard to the execution of conveyances with those in regard to the execution of wills; the latter expressly permitting the alternative of signature by the testator, *or* "by some other person in his presence and by his express direction;" and argues that the omission of this alternative in the former case shows the intention of the legislature that the alternative act should not, in cases of conveyances, be permitted. In cases of wills, the probable physical incapacity of the testator at the time affords a reason for allowing him to sign by the hand of another; and in maintaining that no exception can be engrafted upon the statute on consideration of expediency, where the statute itself is clear against such exception, the Chancellor seems to admit that, by his construction, all persons laboring under such physical incapacity to sign a conveyance or letter

of attorney to convey are disqualified from making a transfer of land.[1]

§ 11. In the case of Gardner *v.* Gardner, the Supreme Court of Massachusetts refused so to construe the statute. The grantor assented, by a nod, to her daughter's signing for her, whereupon the daughter signed thus: "Polly Gwinn by Mary G. Gardner," and the court held that it was not to be considered as an execution by an attorney, which would have required a power written and sealed, but as an execution by the grantor herself. Chief Justice Shaw, delivering the opinion of the court, said: "The name, being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. To hold otherwise would be to decide that a person having a full mind and clear capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing a letter of attorney under seal."[2] The report, however, does not show any physical inability on the part of the grantor to sign for herself, but a plain case of execution of a deed of land by the hand of another, similar to that which the court in South Carolina found itself unable to sustain. The reasoning in Gardner *v.* Gardner is certainly very satisfactory as to cases where there exists such physical inability; but the report shows no reasoning upon the question which appears to have been actually presented on the facts. None of the authorities quoted are decisions upon the statute. Ball *v.* Dunsterville[3] was upon a bill of sale, a part-

[1] Wallace *v.* McCollough, 1 Rich. Eq. 426; and see Rockford, &c., R. R. Co. *v.* Shunick, 65 Ill. 223.

[2] Gardner *v.* Gardner, 5 Cush. 483. See Bigler *v.* Baker, 58 N. W. Rep. (Neb.) 1026.

[3] Ball *v.* Dunsterville, 4 T. R. 313.

nership transaction, and one partner signed for both. The remark in Greenleaf on Evidence,[1] that "if the signature of an obligor be made by a stranger, in his presence, and at his request, it is a sufficient signing," is based upon the decision in Rex *v.* Longnor.[2] That was a case upon an indenture of apprenticeship, where the names of the apprentice and his father were signed by another person, in their presence, and at their request. The instrument was not read over to the father, but the court held, upon the authority of Thoroughgood's case,[3] that it was not for that reason invalid. The son subsequently had it read to him and approved it, and carried it to his master and entered as apprentice under it. It was decided that the instrument was validly executed by both, but the question whether the signature by the hand of a third person was sufficient was not raised. The decision went entirely upon Thoroughgood's case, in which the deed was actually sealed and delivered by the grantor, and which was before the Statute of Frauds was enacted.

§ 12. In Irvin *v.* Thompson, the Supreme Court of Kentucky adopted the same course of reasoning as that in Gardner *v.* Gardner. A letter authorizing the sale of lands was subscribed with the name of the party, by another person, at her request, and in her presence, and a *contract* for the sale of the land, made by the attorney under that letter, was now sought to be enforced. The court held that the power was sufficient though not actually signed by the principal, because, "to construe the statute to require an authority to make a contract for the sale of land to be in writing and signed by the party giving such authority, would in effect prevent any person who is unable to write from making a binding contract. Such an effect cannot be presumed to have been within the intent of the legislature to produce by the statute."[4] Upon

[1] Vol. II. § 295.
[2] Rex *v.* Longnor, 4 Barn. & Ad. 647.
[3] Thoroughgood's case, 2 Coke Rep. 5.
[4] Irvin *v.* Thompson, 4 Bibb, 295.

the point actually before the court in this case, however, no question could arise, as *contracts* for the sale of lands are provided for by the fourth section of the statute, which does not require that the authority to make them should be in writing. It seems, therefore, that there is no decision directly supporting Gardner *v.* Gardner, if the point there decided be that a deed of land is well signed if the signature of the grantor be affixed thereto by a third party, in his presence, and at his request, notwithstanding the Statute of Frauds. But as the Revised Statutes of Massachusetts [1] did not in terms require that the attorney for signing shall be appointed by writing, and as the common law does not require a written authority to make a transfer by parol (whether verbal or written), the decision in question may be supported under these limitations. In those States where the provision of the statute requiring the attorney to be appointed by writing is re-enacted, the question will undoubtedly present considerable difficulty. In Michigan it is held that an agreement for the sale of land signed by another with the name of the seller, in his presence, and at his request, is, in legal contemplation, signed by the seller himself.[2] It has also been decided repeatedly that after legal acknowledgment of the signature to a deed, as that of the grantor, he will not be heard to deny the fact of having signed it.[3]

§ 12 *a.* To the suggestion that a strict adherence to the statute will prevent a person laboring under physical incapacity from making a conveyance, it may be answered that a case can hardly be supposed where the party would not be able to make his mark, a mode of execution well known to be sufficient. That the opinion of Chancellor Kent, on the other hand, is opposed to any relaxation of the statute in this respect, may be inferred from his language in the case of Jackson *v.*

[1] Rev. Stats. c. 59, § 29.

[2] Eggleston *v.* Wagner, 46 Mich. 610. See Dickinson *v.* Wright, 56 Mich. 42.

[3] Kerr *v.* Russell, 69 Ill. 666; Tunison *v.* Chamberlin, 88 Ill. 378; Johnson *v.* Van Velsor, 43 Mich. 208.

Titus, where he says: "The affixing of the hand and seal to a piece of blank paper never can be considered an assignment by deed or note in writing, within the requisitions of the Statute of Frauds. And to allow the subsequent filling up of the deed *by a third person* to have relation back to the time of the sealing and delivery of the blank paper in consequence of some parol agreement of the parties, is to open a door to fraud and perjury, and to defeat the wise and salutary provisions of the statute."[1]

§ 12 *b*. Upon the whole, however, the drift of judicial opinion is so strong in the direction given to the law by Gardner *v.* Gardner, that it must now apparently be considered settled that a conveyance of an estate in land is well signed, as the conveyance of the principal under the statute, if the grantor's name be affixed by another *in the grantor's presence*, and by his oral direction, whether there be any physical incapacity on his part or not. The cases are to be supported, it seems, only on the ground that such an execution is to be regarded not at all as an execution by attorney (for which the statute in terms requires a written authority), but as an execution by the principal in a manner sufficient at common law and not controlled by the language of the statute.[2] Where the question arose of a deed which, when signed and sealed, contained only the printed form, and of which the blanks for the names of the parties, the description of the land, and a certain agreement of release, were afterwards inserted, in the *absence* of the grantor, by his agent previously orally authorized to do so, the Supreme Court of Massachusetts held the deed to be void.[3] The court say: "If such an act can be done under a parol agreement, in the

[1] Jackson *v.* Titus, 2 Johns. (N. Y.) 430.

[2] Frost *v.* Deering, 21 Me. 156; Mut. Benefit Ins. Co. *v.* Brown, 30 N. J. Eq. 193; Allen *v.* Withrow, 110 U. S. 119. See Jansen *v.* McCahill, 22 Cal. 563; Videau *v.* Griffin, 12 Cal. 389; Burns *v.* Lynde, 6 Allen (Mass.) 309; Pierce *v.* Hakes, 23 Pa. St. 242.

[3] Burns *v.* Lynde, 6 Allen, 305. See also Basford *v.* Pearson, 9 Allen, 387; Skinner *v.* Brigham, 126 Mass. 132, and Upton *v.* Archer, 41 Cal. 85.

absence of the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by deed." They refer to Gardner *v.* Gardner, and recognize it as correctly deciding "that a deed signed for the grantor in his presence and at his request is good without a power of attorney," and add that "it states accurately the distinction between acts done in the presence and by the direction of the principal, and acts done in his absence; the former are regarded as done by the principal himself, and the instrument need not purport to be executed by attorney, while the latter must be done under a power and must purport to be so done."

§ 13. When the deed is executed by an attorney for that purpose, he should sign the name of the grantor.[1] The best form of execution is writing the name of the principal, adding the words, "by his attorney," and then signing the name of the attorney. But an execution may be valid, though not in this form, provided it clearly shows the signing to be the act of the principal, done and executed in his name, by the attorney. Thus, where the attorney's name precedes that of the principal, the execution has been held sufficient.[2] The attorney may also execute by signing the name of his principal alone.[3] In Wilks *v.* Back,[4] it was said by Lawrence, J., that if an attorney should seal and deliver a deed in the name of the principal, that would be enough, without stating that he had so done; and it does not appear to have been ever decided that the signing of the grantor's name by the attorney, without adding words to show that it was done by

[1] Combes's Case, 9 Co. 75 *a*; Bac. Abr. Leases, I. § 10; 1 Pres. Abs. Tit. 293; Elwell *v.* Shaw, 16 Mass. 42. In Maine, it is sufficient if the deed be executed in the name of the agent for the principal. Compare Curtis *v.* Blair, 26 Miss. 309.

[2] Wilks *v.* Back, 2 East, 142, 145; Jones *v.* Carter, 4 Hen. & M. (Va.) 184; Mussey *v.* Scott, 7 Cush. (Mass.) 215. See Echols *v.* Cheney, 28 Cal. 157; Morrison *v.* Bowman, 29 Cal. 352; Bogart *v.* De Bussy, 6 Johns. (N. Y.) 94; Locke *v.* Alexander, 1 Hawks (N. C.) 412.

[3] Devinney *v.* Reynolds, 1 Watts & S. (Pa.) 332.

[4] Wilks *v.* Back, 2 East, 142, 145.

attorney, was not a sufficient signing. The question was presented in Massachusetts, where the conveyancer wrote at the bottom of the deed the words "Benjamin Goodridge, by his attorney," and the attorney, instead of writing his own name, wrote the name of the grantor, "Benjamin Goodridge." The court decided the case upon another ground, but in the opinion by Fletcher, J., it is said that they were inclined to think it was not a valid execution. It is strongly urged that it is nowhere stated or suggested in any work of authority that such a mode of execution is proper and legal, and the inconvenience of permitting it is forcibly explained. The doctrine of Lawrence, J., above quoted, is noticed, but not much regarded.[1] Where the attorney signs his own name only, the deed will not be sufficiently executed.[2] There is said to be an exception to this rule, however, in the case where the deed conveys land belonging to a town or state, which has authorized the attorney by vote or resolve.[3] Wherever a conveyance under seal is good without any signature, as has been shown to be the doctrine of the more recent English authorities, it would seem unreasonable to

[1] Wood *v.* Goodridge, 6 Cush. 117. The learned judge thus states the argument from inconvenience: "If the agent might execute instruments in this mode, the principal, if he found his name signed to an instrument, would have no means of knowing by whom it had been signed, or whether he was bound or not bound by such signature; and other persons might be greatly deceived and defrauded, by relying upon such signature as the personal act and signature of the principal, when the event might prove that it was put there by an agent, who had mistaken his authority, and consequently that the principal was not bound. When it should be discovered that the name of the principal was not written by him, as it purports to be, it might be wholly impossible to prove the execution by attorney, as there would be nothing on the note to indicate such an execution."

[2] Townsend *v.* Corning, 23 Wend. (N. Y.) 435; Martin *v.* Flowers, 8 Leigh (Va.), 158. *Contra*, Tenant *v.* Blacker, 27 Ga. 418 (statutory); Rogers *v.* Bracken, 15 Tex. 564. In Rogers *v.* Frost, 14 Tex. 267, such an execution was sustained in equity, as being a defective execution of a valid power.

[3] Ward *v.* Bartholomew, 6 Pick. (Mass.) 409; Cofran *v.* Cockran, 5 N. H. 458; Thompson *v.* Carr, 5 N. H. 510.

hold that a defective signature invalidates the deed, and that it does not, appears to be the opinion of an eminent English writer.[1] In the execution of a deed by a corporation, the affixing of the corporate seal is the essential thing, and the signature is of value only as evidence that the sealing is authorized.[2] Where therefore an instrument, necessarily under seal, is executed on behalf of a corporation, it will be bound thereby if the seal appears, or can be shown to be, the corporate seal, or to have been affixed as such.[3] But when a corporation executes an instrument which does not require a seal, the manner of its execution will be subject to the rules governing simple contracts; and this, though a seal should in fact be affixed.[4]

§ 14. As to the agent who may sign for the grantor under the three first sections, nothing is required by the statute except that he be "thereunto lawfully authorized in writing."[5] No personal qualifications therefore appear to be demanded for the agent other than those which are demanded at common law in other cases of agency. At common law it was not necessary to appoint, in writing, an attorney to make a transfer of an interest in land not under seal though in writing.[6] This difference results from the distinction, heretofore alluded to, between conveyances by parol and conveyances by deed. The common law put all parol trans-

[1] 4 Greenl. Cru. Dig. 48; Co. Litt. 48, c. 52 *b*. See Plummer *v.* Russell, 2 Bibb (Ky.) 174.

[2] Cooch *v.* Goodman, 2 Q. B. 580; Jackson *v.* Walsh, 3 Johns. (N. Y.) 226.

[3] Brinley *v.* Mann, 2 Cush. (Mass.) 337; Hutchins *v.* Byrnes, 9 Gray (Mass.) 367; Haven *v.* Adams, 4 Allen (Mass.) 80.

[4] Ang. & A. Corp. § 223; Sherman *v.* Fitch, 98 Mass. 59. Compare Abbey *v.* Chase, 6 Cush. (Mass.) 54; Fullam *v.* West Brookfield, 9 Allen (Mass.) 1.

[5] In Tennessee, the attorney need not be authorized in writing. Johnson *v.* Somers, 1 Humph. 268. Nor, it seems, in Massachusetts; see *ante*, § 12. Nor, *semble*, in New Jersey; Doughaday *v.* Crowell, 11 N. J. Eq. 201. See Lobdell *v.* Mason, 15 So. Rep. (Miss.) 44.

[6] 1 Story Ag. § 50.

fers of land, whether written or oral, upon the sam
not requiring any but a verbal authority to make t
was to this point that the clause we are now consider
directed. As the statute declared that such convey
should thenceforth be made in writing only, so it dec..ed
that, to make such writing, the attorney must thenceforth be authorized by writing.[1] Whether it is necessary that the authority be signed, if it be sealed, is a question quite identical with that which has been heretofore considered upon the subject of execution by the principal instead of an attorney. If, as was there suggested, it is a sufficient execution by the principal to seal the instrument without signing, it will of course be a sufficient execution of the authority to the agent. The general rule, however applicable to this subject, is clear, that, whatever be the act required to be done, the power to do it must be conferred by an instrument of as solemn a nature as the act to be performed.[2] If a deed is to be executed, the power to do it must be sealed; this is a principle of common law.

§ 14 *a.* And it has generally been held that if an agent, in the name of his principal, but without his authority, execute an instrument requiring a seal, the principal's subsequent ratification must be under seal.[3] In Massachusetts, however, there are some decisions indicating a relaxation of this rule of the common law. In the case of McIntyre *v.* Park,[4] the court says: "The defendant contends that a sealed instrument,

[1] In a case in North Carolina, Shamburger *v.* Kennedy, 1 Dev. 1, it was said that an authority by parol would not be sufficient, because titles to land must be *evidenced* by written conveyances. This is manifestly an incorrect view, for, under the fourth section of the statute, certain contracts are required to be *evidenced* by writing, but the agent to make them may be appointed verbally. The written letter of attorney, expressly required by the first section, appears to be a mark of that superior caution always exercised by legislatures in regard to whatever concerns the title to land.

[2] 1 Story Ag. § 50; 2 Kent Com. 614.

[3] Story Ag. 242.

[4] McIntyre *v.* Park, 11 Gray, 102.

executed without previous authority, can be ratified only by an instrument under seal. However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol. . . . The cases in which this doctrine has been adjudged were those in which one partner, without the previous authority of his copartners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases." This statement was not necessary to the decision of the case, the instrument in question (as appears from the report) being a contract for the sale of land, and therefore not necessarily under seal.[1] The statement is quoted and affirmed in a late case; but here again it was not necessary to the decision, the instrument being a lease for five years, which one of two partners had signed and sealed, but under which both had entered.[2]

§ 14 *b*. The decision in another case in Massachusetts would seem to involve a similar limitation of the general doctrine. The action was a writ of entry to recover land conveyed by the deed of the owner, a married woman. To this instrument she had affixed the signature of her husband in his absence, and without a sealed authority, or perhaps with no authority at all. The defendant denied the validity of this instrument, but the court held that a subsequent acknowledgment by the husband of the deed, bearing his signature so previously affixed by his wife in his absence, was a recognition and adoption of the signature as his own; and the conveyance was held valid. The decision was clearly put on the ground of subsequent ratification, but no notice seems to have been taken of the fact that this was by parol.[3]

[1] Swisshelm *v.* Swissvale Laundry Co., 95 Pa. St. 367.

[2] Holbrook *v.* Chamberlin, 116 Mass. 155. For other decisions in Massachusetts, bearing on this point, see Warring *v.* Williams, 8 Pick. 326; Cady *v.* Shepherd, 11 Pick. 400; Tapley *v.* Butterfield, 1 Met. 515; Swan *v.* Stedman, 4 Met. 548; Russell *v.* Annable, 109 Mass. 72.

[3] Bartlett *v.* Drake, 100 Mass. 174. Compare Burns *v.* Lynde, 6 Allen (Mass.) 305; Basford *v.* Pearson, 9 Allen (Mass.) 387.

§ 15. The rule requiring a written power to the attorney from whom a conveyance of an estate in land is to proceed is equally applicable, although the power is to be exercised through judicial forms. Thus it was held in Pennsylvania that a verbal submission to arbitrators of a question of partition did not give them authority to make that partition.[1]

§ 16. A doctrine recently applied in Massachusetts to cases of transfers of land within the Statute of Frauds, that if the grantor request another to affix his name to the deed, and it is so done in the grantor's presence, this is an original execution by the grantor, and not a verbal appointment of an attorney, has been heretofore considered under the question, what constitutes a valid execution by the principal.[2]

§ 17. A subsequent ratification in due form of an attorney's act always cures any defect in his original appointment; and for such purpose, in cases affected by this branch of the Statute of Frauds, the ratification must of course be by writing.[3] In South Carolina, where a sale and conveyance of land were made by a sheriff under a defective order of court for foreclosure of a mortgage, it was held that it operated as an assignment of the mortgagee's legal title, that the sheriff was the agent of the mortgagee, and that the answer of the mortgagee, admitting the facts, was a sufficient compliance with the Statute of Frauds.[4]

[1] Gratz *v.* Gratz, 4 Rawle, 411.

[2] Gardner *v.* Gardner, 5 Cush. 483, cited *ante*, § 11.

[3] McDowell *v.* Simpson, 3 Watts (Pa.) 129; Parrish *v.* Koons, 1 Pars. (Pa.) Eq. Cas. 79. But see Bartlett *v.* Drake, 100 Mass. 174. The doings of an agent whose appointment is not valid for want of writing cannot estop his principal unless actually adopted by him. Holland *v.* Hoyt, 14 Mich. 238; Judd *v.* Arnold, 31 Minn. 430; Henderson *v.* Beard, 51 Ark. 483; McClintock *v.* South Penn. Oil Co., 146 Pa. St. 144.

[4] Stoney *v.* Shultz, 1 Hill Eq. 499. See *post*, § 515.

CHAPTER II.

LEASES COVERED BY THE STATUTE.

§ 18. The first section of the English Statute of Frauds is sufficiently comprehensive in its language to embrace the creation of all possible estates in land, from the greatest to the least. But, as has been suggested heretofore, its object was not to dispense with, but to superadd, solemnities in their creation; and hence, as all freehold and all incorporeal estates were at common law required to be created by deed, and so were already provided for, the first section may be regarded as contemplating only those estates in land which might, up to the time of the statute, have been created verbally; namely, corporeal estates less than freehold, the creation of which is commonly said to be by lease. Whether it might not be necessary to restrict the application of the first section still farther, was a question in the case of Crosby *v.* Wadsworth, where a verbal agreement was made for the purchase of a standing crop of mowing grass, with liberty for an indefinite time to the purchaser to enter and take the grass. Lord Ellenborough said that, construing the first and second sections together, the former should be held to embrace only those leases which were for a longer term than three years, but still under a rent reserved upon the thing demised, and that the agreement in the case before him, not containing either of these features, was not vacated *as a lease.*[1] The decision was upon another ground, however, and it must be doubted whether the suggestion was well considered. Sir A. McDonald, C. B., only three years afterwards, seems to have enter-

[1] Crosby *v.* Wadsworth, 6 East, 610. See § 244, *post.*

tained no such view of the mutual relation of the first three sections; for, when it was argued that by the leases mentioned in the third section as to be *assigned* by writing only must be intended such leases as by the first and second sections could be created by writing only, namely, those conveying a larger interest than three years, he rejected that construction, and held that the lease in question, though created verbally, could be assigned only by writing.[1] Sir Edward Sugden shows very clearly that to confine the first section to leases upon a rent would lead to inadmissible conclusions;[2] and it may be added that if we take into consideration the whole language of the second section, as consistency requires that we should do, we must confine the statute to leases upon *such* a rent as is equal "to two-thirds of the full improved value of the thing demised;" a construction which would render the statute almost wholly inoperative, as it regards leases. In a subsequent part of this chapter[3] we shall have occasion to consider what practical effect this second section of the English statute, and kindred enactments in our own country, have had upon the law of leases.

§ 19. Confining ourselves, then, to the first section of the English statute, the first inquiry which presents itself is, — What is a lease of land within the meaning of its provisions? It is obvious that for the most part, and in the common cases of letting land, the inquiry is one upon which no great difficulty can arise. But the Statute of Frauds descends in this respect to very minute, and, so to speak, indistinct interests in lands; and in regard to these, questions of much nicety may occur.

§ 20. The relation of landlord and tenant must, of course, in all cases be distinctly found to exist, whether the interest acquired in the premises be great or small. Merely giving permission to a tenant, who has been duly notified to quit, to

[1] Botting *v.* Martin, 1 Camp. 317.
[2] Vend. & P. 95.
[3] §§ 21, *et seq.*

remain on the premises till they are sold, does not amount to a new lease to him, so as to entitle him to any term of notice afterwards.[1] Nor does an agreement to pay an increased rent, in consideration of repairs, amount to a lease, but it may be proved verbally.[2] Nor does an agreement, whereby the owner of land is to have the help of another in cultivating it, paying, in return, a share of the crop, constitute a lease. But if an agreement is made by the owner, whereby another is to possess the land, with the usual privileges of exclusive enjoyment, a tenancy in the land will be created, although the rent is to be paid out of the crop produced.[3] An agreement to provide board and lodging is not a lease and does not require a writing, even though the particular rooms to be occupied be designated.[4] An actual lease of certain rooms comes within the statute.[5] To make the transaction a lease, it is necessary that the party hiring should acquire thereby such privileges of exclusive enjoyment and control of the rooms as to amount to an interest in the realty; therefore the agreement ordinarily made with the keeper of a hotel or

[1] Whiteacre *v.* Symonds, 10 East, 13. See Hollis *v.* Pool, 3 Met. (Mass.) 350.

[2] Hoby *v.* Roebuck, 7 Taunt. 157; Donellan *v.* Read, 3 Barn. & Ad. 899. But see Crawford *v.* Wick, 18 Ohio St. 190.

[3] Creel *v.* Kirkham, 47 Ill. 344; Wilber *v.* Sisson, 53 Barb. (N. Y.) 258; Guest *v.* Opdyke, 31 N. J. L. 552. See Warner *v.* Abbey, 112 Mass. 355. In Pennsylvania, where the statute as it relates to contracts has not been adopted, verbal contracts for the sale of interests in land, appear to have been, in some measure, brought within the range of the first section, so as to forbid a decree for their specific execution, though actions for damages for the breach of them may be maintained; the decree in the former case having the effect to transfer land on verbal evidence of title, but the judgment in the latter case resting only in pecuniary damages. Treat *v.* Hiles, 68 Wisc. 344.

[4] Wright *v.* Stavert, 2 El. & E. 721; Wilson *v.* Martin, 1 Denio (N. Y.) 602; White *v.* Maynard, 111 Mass. 250. In Johnson *v.* Wilkinson, 139 Mass. 3, the same rule was applied to the hiring of a hall for dancing parties on certain days.

[5] Inman *v.* Stamp, 1 Stark. 12; Edge *v.* Strafford, 1 Cromp. & J. 391; Porter *v.* Merrill, 124 Mass. 534.

boarding-house does not fall within the statute; the proprietor, in those cases, retaining the general property, control, and care of the premises which the guest is to occupy.[1]

§ 21. By far the most important questions, however, as to the essential features of a lease, within the statute, have arisen upon transactions having the form of a mere verbal license; and it will be useful to give a somewhat extended examination to the cases involving them. We shall probably be able to deduce from the English decisions a tolerably consistent doctrine in regard to these questions; but in some of our own States it must be confessed there has been a freedom exercised in the construction of the statute on this point, which seems to have gone far to unsettle established principles of the common law itself, as well as to confound the interpretation and defeat the policy of the Statute of Frauds.

§ 22. It may not be superfluous to call to mind some of the leading characteristics of licenses properly so understood. A mere license, whether written or verbal, conveys no interest in the land. It simply confers an authority to do a certain act or series of acts upon the land of another, and so long as it remains unrevoked it is a justification for all acts done in pursuance of it, and for which the party committing them would otherwise be liable in trespass or case. Moreover, when the license is to enter and remove certain property from the land, the licensee acquires a good title to the property so removed while the license continues in force, and may, upon the ground of the license, defend an action of trover by the previous owner. Such licenses, however, are in their nature mere personal privileges, not assignable by the licensee, not inuring to his representatives, and not binding upon the assignees or heirs of the estate in respect of which they are granted. So long as they remain unexecuted, they are revo-

[1] The distinction is recognized and affirmed in Wells *v.* Kingston-upon-Hull, L. R. 10 C. P. 402, which was a case concerning a contract for the dockage of a vessel.

cable by the grantor; and they are *ipso facto* revoked upon the conveyance of his estate, and expire with the performance of the act or acts which they authorize to be done. These doctrines in regard to licenses as understood at common law, and in respect to which the Statute of Frauds has certainly made no change, are to be found in every text-book, and are so familiar and so firmly fixed that they have never in terms been questioned, even where their spirit has been most plainly invaded. But in the application of the rules that licenses, after execution, cannot be revoked, and that they justify acts done in pursuance of them, many practical difficulties have arisen. So long as the act or acts done are of a transitory nature, the rules may be applied without embarrassment, the very doing of the acts working a determination of the license. But if the act done be of a permanent nature, amounting to a continued occupation and enjoyment of another's land, we have at once to reconcile the principle that acts done in execution of a license are justified by it, and cannot be converted into wrongs by a revocation of the license afterwards, with the principle of common law that an easement of land or continuing privilege to make use of land in derogation of the proprietor's original rights, cannot be enjoyed without a grant by deed or a prescription which presumes a deed, and with the provision of the Statute of Frauds, that no estate or interest in land shall pass without writing.

§ 23. The confusion which has to a certain extent prevailed between licenses and leases appears to have had its origin in the case of Wood *v.* Lake, decided a few years after the Statute of Frauds was passed. A verbal license was given to stack coals on part of another's close for seven years, the licensee during that time to have the sole use of that part of the close. After the plaintiff had acted upon the license for three years, the defendant (his grantor) forbade him to stack any more coals there, and shut his gates. The court decided that the agreement amounted to a license only, and not to a

lease, and was good for seven years, and the plaintiff had judgment.[1] The only authority on which this decision pro-

[1] Wood *v.* Lake, Sayer, 3. The following report of this case, from the manuscript of Mr. Justice Burrough, is given in Wood *v.* Leadbitter, 13 Mees. & W. 838, and it seems well worth while to insert it here.

Case. "A parol agreement that the plaintiff should have liberty of laying and stacking of coals upon defendant's close, for seven years. Afterwards, defendant forbids plaintiff to lay any more coals there, and shuts up his gates. Defendant says, that plaintiff was but tenant at will. *Quære*, if this was an interest within the description of the Statute of Frauds.

Serjeant *Booth*. This is but a personal license or easement. 1 Roll. Abr. 859, p. 4; Roll. Rep. 143, 152; 1 Saund. 321. A contract for sale of timber growing upon the land has been determined to be out of the statute. 1 Ld. Raym. 182. *Vide* the difference of a license and a lease. 1 Lev. 194. This must be taken only as a license, for that the coal-loaders also are to have benefit as well as plaintiff.

Serjeant *Poole*, for defendant. Question is, if any interest in land passed by the agreement; for, if interest passed, it is within the statute, ergo void, being for longer term than three years. Bro. License, p. 19; Thome *v.* Seabright, Salk. 24; Webb *v.* Paternoster, Poph. 151. A license to enter upon and occupy land amounts to a lease. The plaintiff was not confined to a particular part of the close, and might have covered the whole if he pleased, on that account it is an uncertain interest. The distinction of license to plaintiff and his coal-loader is nothing; he could not stack the coal himself, and it is merely vague. Easement may be of more value than the inheritance; ex. gr. way-leave

Lee, C. J. If this be a lease, as it is argued, it is within the statute, and void for not being in writing. No answer as yet is given to the case in Popham, where the stacking of hay, which is similar, was determined to be a license. The word *uncertain*, in the statute, means uncertainty of duration, not of quantity. License was not revocable, and there is no case to show this to be considered as a lease.

Dennison, J. This seems not to be an interest, so called, in the language of the law; although easements, in general speaking, may be called interests. Had the plaintiff such an interest as to have maintained a *clausum fregit*? Certainly not. If a man licenses to enjoy lands for five years, there is a lease, because the whole interest passes, but this was only a license for a particular purpose.

Foster, J. These interests, grounded upon licenses, are valuable, and deserve the protection of the law, and therefore may, perhaps, have been within the intention of the words of the statute. Desired further time for consideration; stood over.

N. B. — Afterwards, upon motion for judgment the last day of

fesses to rest is Webb *v.* Paternoster, decided previously to the enactment of the statute.[1] This was a case of license to the plaintiff to keep his hay in a certain close until he could sell it; and it having been there two years, it was held that a reasonable time for selling it had elapsed. This seems to have been really the sum of the decision. Indeed, there are indications in the report that the license was, in point of fact, under seal, and therefore in conformity with the requirements both of the common law and of the statute, if it can be said to have any bearing whatever upon the latter.[2]

§ 23 *a.* Upon the authority of these two cases, that of Tayler *v.* Waters was decided in the Common Pleas, in the year 1815. That was an action against the doorkeeper of an opera house, for preventing the plaintiff from entering during a performance. The plaintiff had come into possession, by purchase, of a silver ticket entitling the holder to admission to the house for twenty-one years, and had been allowed by the proprietors, by virtue of the ticket, to attend the house for fourteen years. It was objected that the right claimed was an interest in land, and, being for more than three years, could not pass without a writing signed by the party or his agent authorized in writing, and that the person who, as agent of the proprietors, had originally granted the ticket in question to the first holder was not so authorized. It was further insisted that such an interest, being an easement, could only pass by deed. Chief Justice Gibbs referred to Wood *v.* Lake, and Webb *v.* Paternoster, as abundantly proving that a license to enjoy a beneficial privilege on land might be granted without deed, and, notwithstanding the Statute of Frauds, without writing, and held that what the

the term, and gave judgment for the plaintiff. *Foster* non-dissentiente."

The case will also be found reported in Palm. 71; Godb. 282; Poph. 151; Rol. 152; Noy, 98.

[1] Poph. 151.

[2] See this case commented on in Wood *v.* Leadbitter, 13 Mees. & W. 847, cited § 24.

plaintiff claimed was a license of this description and not an interest in land.[1] This decision was never followed in England, and has in effect been overruled by subsequent cases, some of which it may be well to notice briefly in this place.

§ 24. In Hewlins *v.* Shippam, the plaintiff, at considerable expense, made a drain over the defendant's land, by his verbal permission. The defendant afterwards stopped up the drain, and the plaintiff brought his action. Bayley, B., delivered the judgment of the court, holding that, although a parol license might be an excuse for a trespass till countermanded, a right and title to have passage for the water for a freehold interest required a deed to create it; and that, as there had been no deed in this case, the present action, which was founded upon a right and title, could not be supported.[2] Cocker *v.* Cowper was an entirely similar case, and therein it was said that Hewlins *v.* Shippam was conclusive to show that an easement to have water running upon another's land could not be conferred by parol.[3] In a later instance in the Court of Exchequer, where Webb *v.* Paternoster and Tayler *v.* Waters were cited to the point that there might be an irrevocable license to be exercised upon land, Parke, B., remarked: "It certainly strikes one as a strong proposition to say that such a license can be irrevocable, unless it amounts to an interest in land, which must therefore be conveyed by deed.[4] The latest and what must be regarded as the decisive case in England on this subject is Wood *v.* Leadbitter, in the Court of Exchequer, in 1845. The plaintiff had a ticket for which he paid a guinea, admitting him to the grand stand of the Doncaster races, and was in the enclosure upon the strength of his ticket, when the defendant, by order of the steward of the races, turned

[1] Tayler *v.* Waters, 7 Taunt. 374.

[2] Hewlins *v.* Shippam, 5 Barn. & C. 221.

[3] Cocker *v.* Cowper, 1 Cromp. M. & R. 418.

[4] Williams *v.* Morris. 8 Mess. & W. 488. See Dorris *v.* Sullivan, 90 Ala. 279.

him out, and without paying back the price of the ticket. It was held that a right to come and remain for a certain time on the land of another, as was the right claimed by the plaintiff, could be granted only by deed, and that a parol license to do so, though money were paid for it, was revocable at any time and without paying back the money.[1]

§ 25. Indeed, with the exception of Tayler *v.* Waters, the decision in Wood *v.* Lake, establishing a parol lease under the name of a license, does not appear to have ever been affirmed in England, and its principles have been repudiated in a long series of cases in addition to those just cited.[2]

§ 26. The distinction between such licenses to be exercised upon land as may be well granted by parol, and such as amount to leases and require a writing, is thus stated by Parker, C. J., delivering the judgment of the Supreme Court of Massachusetts, in the case of Cook *v.* Stearns, in 1814. "A license is technically an authority given to do some one act or series of acts on the land of another, without passing any estate in the land, such as a license to hunt in another's land, or to cut

[1] Wood *v.* Leadbitter, 13 Mees. & W. 838; affirmed in Ruffey *v.* Henderson, 21 L. J. (Q. B.) 49. And see McCrea *v.* Marsh, 12 Gray (Mass.) 211; Burton *v.* Scherpf, 1 Allen (Mass.) 133. Purcell *v.* Daly, 19 Abb. N. C. (N. Y.) 301. But see Drew *v.* Peer, 93 Pa. St. 234; McGowern *v.* Duff, 12 N. Y. 680.

[2] Rex *v.* Horndon-on-the-hill, 4 Maule & S. 565; Fentiman *v.* Smith, 4 East, 107; Bryan *v.* Whistler, 8 Barn. & C. 288; Wallis *v.* Harrison, 4 Mees. & W. 538; Rex *v.* Standon, 2 Maule & S. 461; Bird *v.* Higginson, 6 Ad. & E. 824; Ruffey *v.* Henderson, 21 L. J. (Q. B.) 49. Sir Edward Sugden, in a note to p. 96 of his Treatise on Vendors and Purchasers, cites Winter *v.* Brockwell, 8 East, 308, and Wood *v.* Manley, 11 Ad. & E. 34, as having followed Wood *v.* Lake. But, with great deference, this must be an oversight. The former case was a mere case of extinguishment of an easement by express permission of the party entitled to it, accompanied by corresponding acts on his part; such as is always admitted to be binding in view both of the common law and of the statute. Stevens *v.* Stevens, 11 Met. (Mass.) 251; Dyer *v.* Sanford, 9 Met. (Mass.) 395; Ang. Waterc. 351. The latter relates to an entirely different rule; namely, that a parol license, *coupled with an interest*, is irrevocable. See *post*, § 27 *a*.

down a certain number of trees. These are held to be revocable while executory, unless a definite term is fixed, but irrevocable when executed."[1] "Such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses which *in their nature amount to granting an estate for ever so short a time* are not good without deed, and are considered as leases, and must always be pleaded as such. The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest which ought not to pass without writing, and is the very object provided for by our statute."[2]

§ 27. Cases of licenses coupled with an interest in a chattel differ from mere licenses in that, whether executed or not, they are absolutely irrevocable. Such licenses are said to be

[1] For further illustrations see Davis *v.* Townsend, 10 Barb. (N. Y.) 333; People *v.* Goodwin, 5 N. Y. 568; Whitaker *v.* Cawthorne, 3 Dev. (N. C.) 389; Dillion *v.* Crook, 11 Bush (Ky.) 321; Pierpont *v.* Barnard, 6 N. Y. 279; Greeley *v.* Stilson, 27 Mich. 153; Marsh *v.* Bellew, 45 Wisc. 36; Sovereign *v.* Ortmann, 47 Mich. 181; Spalding *v.* Archibald, 52 Mich. 365; R. & D. R. R. *v.* D. & N. R. R., 104 N. C. 658. A license to hunt in another's land (referred to in Cook *v.* Stearns as passing no estate), coupled with the right to take away the game killed on any part of it, is however held to give an interest in land, and to require writing. Webber *v.* Lee, L. R. 9 Q. B. 315.

[2] Cook *v.* Stearns, 11 Mass. 533. The doctrine here laid down is manifestly opposed to the spirit of Wood *v.* Lake, but from the difference in phraseology between the Massachusetts and the English Statutes of Frauds, it was not necessary in terms to repudiate that decision. See Stevens *v.* Stevens, 11 Met. (Mass.) 251. It is proper to note also a little latitude of expression in Cook *v.* Stearns, namely, that "licenses which amount to granting an estate for ever so short a time are not good without *deed*." There are, of course, many estates which, so far as the Statute of Frauds is concerned, may be granted by simple writing without deed.

created when the owner of land sells chattels or other personal property situated upon the land; for the vendee thereby obtains an implied license to enter on the premises and take possession of and remove the property. "In such cases, the license is coupled with and supported by a valid interest or title in the property sold, and cannot be revoked. So, too, if the owner of chattels or other personal property, by virtue of a contract with, or the permission of, the owner of land, places his property on the land, the license to enter upon it for the purpose of taking and removing the property is irrevocable."[1] It may be doubted whether privileges of this sort depend upon the giving, either actually or by implication, of any license; they seem rather to be rights incident to the property in the chattel, which pass with the title as essential to the enjoyment of the thing bought, and not to depend upon any permission that may be given or withheld by the vendor. Furthermore, they are irrevocable, whether acted upon or not.

§ 27 *a*. There is another class of privileges, affecting real property, that may not be revoked, although granted by parol. When the owner of a dominant estate gives parol permission to the owner of the servient estate to do, upon his own land or that of a third person, acts of so decisive and conclusive a nature as to indicate and prove the intent of the licenser to abandon his easement, such parol permission cannot be revoked.[2] The rule in one of its bearings is well stated in the case of Curtis *v.* Noonan,[3] where the court

[1] Giles *v.* Simonds, 15 Gray (Mass.) 441; Poor *v.* Oakman, 104 Mass. 309; Wood *v.* Manley, 11 Ad. & E. 34; Whitmarsh *v.* Walker, 1 Met. (Mass.) 313; Erskine *v.* Plummer, 7 Greenl. (Me.) 457; Parsons *v.* Camp, 11 Conn. 525. The license must be given by one having authority to give it: Nelson *v.* Garey, 114 Mass. 418; and the entry under it must be peaceable: Churchill *v.* Hulbert, 110 Mass. 42. A license to one who has been tenant, to enter and remove a house or fixtures which it is agreed he shall have, is also good without writing. Dubois *v.* Kelley, 10 Barb (N. Y.) 496.

[2] Dyer *v.* Sanford, 9 Met. (Mass.) 402.

[3] Curtis *v.* Noonan, 10 Allen (Mass.) 406.

says: "An easement in real estate can be acquired only by deed, or by prescription which presupposes a deed; but it may be destroyed or extinguished, abandoned or renounced, in whole or in part, by a parol license granted by the owner of the dominant tenement, and executed upon the servient tenement." The same doctrine holds, however, whether the right abandoned be a natural right or an easement, and whether the license be executed upon the servient tenement, or, as was the case in Curtis *v.* Noonan, upon that of a third person.[1] Privileges of this sort differ from mere licenses in not being intended as justifications of acts done on the grantor's land. The granting of the permission is regarded by the law as showing an abandonment, either in whole or in part, of the only right which would otherwise be infringed. After such an abandonment, the licenser can no longer be injured by what has been done, and consequently can no longer object to its continuance. But the permission given may be such as, by its terms, to exclude any idea of abandoning or abridging the right. The case of Wood *v.* Edes, decided by the Supreme Court of Massachusetts, is an instance. It appeared that the permission there given amounted to a mere license during the grantor's pleasure, with sufficient notice that no other would be granted, and a bill to enjoin the revocation of the permission was dismissed, the court holding that if, under such circumstances, the grantees incurred expenses, the value of which to them would depend upon the continuance of the license, they acted at their own risk.[2]

§ 28. We have seen that licenses to do acts of a temporary or transient nature upon the grantor's land confer no interest in the land. But where the act licensed is of such a character that the licensee cannot perform it without actually

[1] Winter *v.* Brockwell, 8 East, 308; Liggins *v.* Inge, 7 Bing. 682; Davies *v.* Marshall, 10 C. B. N. S. 97; Stevens *v.* Stevens, 11 Met. (Mass.) 251; Morse *v.* Copeland, 2 Gray (Mass.) 302; Vechte *v.* Raritan Water Power Co., 21 N. J. Eq. 475.

[2] Wood *v.* Edes, 2 Allen (Mass.) 578.

holding and occupying the licenser's land for the purpose, the permission must be in writing, as the transaction is in effect a lease of the premises to that extent. Of this nature is a license to erect and maintain a dam by which water is flowed back upon the grantor's land, to dig and carry away ore, etc.[1] In some States, however, such licenses have been held to be good without a writing, and upon the ground that the permission was, after all, only to do a *series of acts* upon the grantor's land.[2] But it would seem that, under such an interpretation of a license, any lease whatever for any length of time might be verbally created by merely giving to it the form of a license.

§ 29. This violent interpretation of a license to do a particular act or series of acts on another's land has been in several cases carried so far as to hold that a parol permission to place permanent erections upon the land itself was valid and binding, and that the owner of the land could not after-

[1] Mumford *v.* Whitney, 15 Wend. (N. Y.) 380; Brown *v.* Woodworth, 5 Barb. (N. Y.) 550; Brown *v.* Galley, Hill & D. (N. Y.) 310; Moulton *v.* Faught, 41 Me. 298; Yeakle *v.* Jacob, 33 Pa. St. 376; Trammell *v.* Trammell, 11 Rich. (S. C.) 471; French *v.* Owen, 2 Wisc. 250; Carter *v.* Harlan, 6 Md. 20; Collins Co. *v.* Marcy, 25 Conn. 239; Riddle *v.* Brown, 20 Ala. 412; Pitman *v.* Poor, 38 Me. 237; Bridges *v.* Purcell, 1 Dev. & B. (N. C.) Law, 492; Woodward *v.* Seely, 11 Ill. 157; Hall *v.* Chaffee, 13 Vt. 150; Phillips *v.* Thompson, 1 Johns. (N. Y.) Ch. 131; Bennett *v.* Scutt, 18 Barb. (N. Y.) 347; M'Kellip *v.* M'Ilhenny, 4 Watts (Pa.) 317; Desloge *v.* Pearce, 38 Mo. 588; Duinneen *v.* Rich, 22 Wisc. 550; Cayuga Railway Co. *v.* Niles, 13 Hun (N. Y.) 170; Ganter *v.* Atkinson, 35 Wisc. 48. In a case in Michigan, where there had been exclusive possession of lands by flowage for several years, resting on a parol license at a regular rent reserved, those facts were held to be evidence to justify a jury in finding that the "license" was really a parol lease for an indefinite time, but good as a lease from year to year till terminated by notice. Morrill *v.* Mackman, 24 Mich. 279; Hamilton Co. *v.* Moore, 25 Fed. Rep. 4; Hammond *v.* Winchester, 82 Ala. 470; Meetze *v.* Railroad Co., 23 S. C. 2.

[2] Clement *v.* Durgin, 5 Greenl. (Me.) 9; Woodbury *v.* Parshley, 7 N. H. 237; Sampson *v.* Burnside, 13 N. H. 264. And see Sheffield *v.* Collier, 3 Kelly (Ga.) 82.

wards remove them without committing a trespass.[1] It is clear, however, that the weight of authority in both countries is against such a doctrine. As was said by Swift, J., in Benedict *v.* Benedict, where a man built a house on the land of another under a mere parol license: "If a parol license, even when carried into effect, will give the builder a right to continue the house so long as it shall last, and to maintain ejectment for it, then real estate may be transferred by parol; which is directly contrary to the statute."[2] And in a case in New York, the Supreme Court, speaking of Wood *v.* Lake, and of two cases in Maine, Ricker *v.* Kelley, and Clement *v.* Durgin, which are among those to which we have just referred, declared that they held doctrines in the teeth of the statute, and were excrescences upon the law.[3] The later decisions in Maine and New Hampshire have greatly shaken the authority of the cases thus criticised, and are in accordance with the law as generally laid down.[4]

§ 30. The ground upon which the cases holding these extreme doctrines have been placed is that, by the doing of the act in question, the license became executed and consequently irrevocable. It would be enough to say that the framers of the Statute of Frauds never could have contemplated so obvious and simple an evasion of its provisions as would follow from such an application of the rule in regard to licenses. But, in point of fact, the license being, as was before sug-

[1] Ricker *v.* Kelley, 1 Greenl. (Me.) 117; Ameriscoggin Bridge Co. *v.* Bragg, 11 N. H. 109; Wilson *v.* Chalfant, 15 Ohio, 248; Sullivant *v.* Comm'rs of Franklin Co., 3 Ohio, 89; Russell *v.* Hubbard, 59 Ill. 335; Lee *v.* McLeod, 12 Nevada, 280.

[2] Benedict *v.* Benedict, 5 Day (Conn.) 468.

[3] Houghtaling *v.* Houghtaling, 5 Barb. 383, per Pratt, P. J. See Cook *v.* Stearns, 11 Mass. 533; Stevens *v.* Stevens, 11 Met. (Mass.) 251; Miller *v.* Auburn and Syracuse R. R. Co., 6 Hill (N. Y.) 61; Hays *v.* Richardson, 1 Gill & J. (Md.) 366; Wright *v.* Freeman, 5 Harr. & J. (Md.) 467; Clute *v.* Carr, 20 Wisc. 531; Fryer *v.* Warne, 29 Wisc. 511.

[4] Moulton *v.* Faught, 41 Me. 298; Pitman *v.* Poor, 38 Me. 237; Houston *v.* Laffee, 46 N. H. 505; Dodge *v.* McClintock, 47 N. H. 383.

gested, continuous in its operation, cannot be said to be capable of execution by any one act. In some of the cases it seems to be admitted that it may be revoked after such inchoate execution, on paying or tendering to the licensee the expenses he has incurred therein.[1] The better doctrine, however, seems to be that, although there may be a sum due the licensee for expense or damage, payment or tender of the sum is not a condition precedent to a right to revoke.[2]

§ 31. In some of the earlier decisions, both English and American, the licensee was protected against revocation, on the ground that the licenser was estopped to revoke a license on the faith of which the licensee had incurred expense; but it is now well settled that the doctrine of estoppel does not apply, inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril. Courts of equity also have repeatedly declined to interfere on this ground.[3]

[1] Ameriscoggin Bridge Co. *v.* Bragg, 11 N. H. 109; Clement *v.* Durgin, 5 Greenl. (Me.) 9.

[2] Jamieson *v.* Millemann, 3 Duer (N. Y.) 255. And see Houston *v.* Laffee, 46 N. H. 505; Fryer *v.* Warne, 29 Wisc. 511. A licensee has a reasonable time after revocation to remove his property from the grantor's land. Cornish *v.* Stubbs, L. R. 5 C. P. 334; Mellor *v.* Watkins, L. R. 9 Q. B. 400.

[3] Babcock *v.* Utter, 1 Abb. (N. Y.) App. Dec. 60. See Hetfield *v.* Central R. R. Co., 29 N. J. L. 571; Owen *v.* Field, 12 Allen (Mass.) 457; Wingard *v.* Tift, 24 Ga. 179. In Pennsylvania, where the common-law courts have equity powers, a different rule seems to prevail; although, in a late case in that State, the court, while recognizing the obligations of previous decisions, says: "The courts of this State have gone beyond the rules of common law, and beyond the rulings of courts of equity elsewhere." Strong, J., in Huff *v.* McCauley, 53 Pa. St. 206. A similar statement is made in Jamieson *v.* Millemann, 3 Duer (N. Y.) 255. See the following Pennsylvania decisions: Rerick *v.* Kern, 14 Serg. & R. 267; M'Kellip *v.* M'Ilhenny, 4 Watts, 317; Swartz *v.* Swartz, 4 Pa. St. 353; Le Fevre *v.* Le Fevre, 4 Serg. & R. 241. See also Lane *v.* Miller, 27 Ind. 534; Cook *v.* Pridgen, 45 Ga. 331; Williamston & Tarboro R. R. Co. *v.* Battle, 66 N. C. 540; Cumberland Valley R. R. Co. *v.* McLanahan, 59 Pa. St. 23; National Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384. But see Tufts *v.* Copen, 37 W. Va. 623; Flickinger *v.* Shaw, 87 Cal. 126.

§ 31 *a*. Wherever a verbal agreement is made by which an interest in another's land is to be acquired, whether it be in form a license, or a contract for an interest in land, and upon the faith of that agreement the party taking it enters into possession, and makes improvements, or otherwise so changes his condition that equity will hold him entitled to a decree affirming his right, or enjoining his grantor's interference with it, such equity is a good defence at law to an action by the grantor, *e. g.* trespass, interfering with the grantee's possession and enjoyment, in those States where equity is administered by courts of law.[1]

[1] Petty *v.* Kennon, 49 Ga. 468; Russell *v.* Hubbard, 59 Ill. 335; Tanner *v.* Volentine, 75 Ill. 624; Dillion *v.* Crook, 11 Bush (Ky.) 321; Simons *v.* Morehouse, 88 Ind. 391; Robinson *v.* Thrailkill, 110 Ind. 117. See Flickinger *v.* Shaw, 87 Cal. 126.

CHAPTER III.

LEASES EXCEPTED FROM THE STATUTE.

§ 32. The second section of the statute, which saves certain descriptions of short leases from its operation, does not seem to have been precisely presented for consideration in any English case, though it would be too much to say, as has been said by high authority, that the English decisions have not alluded to it at all.[1] There are many instances in which the courts have paid attention to that clause of it which prescribes three years as the maximum duration of such leases; but, strange to say, they have to all appearance wholly disregarded the next and qualifying clause, which provides that those short leases only shall be excepted "whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised."[2] Indeed in one instance a verbal lease was upheld by Chief Justice Raymond solely (according to the report) on the ground that its duration was limited to three years, as prescribed by the second section, while there is nothing in the case to show that the rent reserved amounted to two thirds of the value of the demised premises.[3] That it

[1] 4 Kent, Com. 115.

[2] In Edge *v.* Strafford, 1 Cromp. & J. 391, the report states that in the trial at *nisi prius* the fact was found that the rent reserved amounted to two thirds of the annual value of the tenement. In a note to Coffin *v.* Lunt, 2 Pick. (Mass.) 70, a dissenting opinion of Mr. Justice Putnam is given, which is very instructive on the point stated in the text. For the other cases referred to in the text see the following sections, where the construction as to *duration* of leases is examined.

[3] Ryley *v.* Hicks, 1 Stra. 651.

was the intention of the parliament which enacted this section that the validity of verbal leases should depend entirely upon their limitation to three years from the making cannot, of course, be supposed; as they explicitly added another requisite. As is remarked by Sir Edward Sugden, the whole section seems to have been inserted under the impression that such a short lease, at nearly rack rent, would not be a sufficient temptation to induce men to commit perjury;[1] and, accordingly, we should not expect to see any such case brought before the courts, if the second section were construed according to its language and clear import. This section has been literally re-enacted in only a few States, and in consequence has not often been made the subject of judicial remark.[2] It was alluded to in a late case in Georgia, where the building of a house on a piece of land was the consideration of the lease, and the court said that though the improvement might very possibly be equal to two thirds of the improved value of the land, yet in the absence of proof of such value, the lease, not being in writing, would not be held

[1] Vend. & P. 93.

[2] See Appendix under the titles of the different States. The Revised Statutes of Massachusetts make no exception in favor of short leases, and it has been said that the English doctrine respecting tenancies from year to year, derived from parol leases, could only be sustained by the exception in the English statute; and that, *for that reason*, there could be no tenancy from year to year in Massachusetts, unless by a lease in writing: Ellis *v.* Paige, 1 Pick. 43. But the remark upon the effect of the second section does not seem to have been essential to the decision of the case, and the dissenting opinion of Mr. Justice Putnam, approved by Mr. Justice Jackson, contains a very full discussion of that point, and its reasoning is very satisfactory to show that no such effect has been given to the second section by the English courts. See note to Coffin *v.* Lunt, 2 Pick. 70. Again, in the case of Bolton *v.* Tomlin, 5 Ad. & E. 856, Lord Denman makes the remark that "leases not exceeding three years have always been considered as excepted by the *second* section from the operation of the fourth," so that special terms in a contract of tenancy might be proved by parol, though an action could not, perhaps, have been brought for refusal to perform the contract. See *post*, § 37 *a*. But the right to prove such special terms in a parol lease does not seem to be necessarily dependent upon the second section. See *post*, § 39.

good for the stipulated time. Even there, however, as the term of the lease exceeded three years, the court did not find it necessary to decide any question upon the second section; and the reference is, perhaps, only useful as showing that the courts of that State are ready to apply it to its full extent when a proper case arises.[1]

§ 32 *a*. In two cases in New Jersey, where the second section has in terms been re-enacted, the provision concerning rent reserved has been noticed, and its importance insisted upon. In the first of these, Birckhead *v.* Cummins, Beasley, C. J., notices the passage from Sugden, quoted in the preceding section, and says that the reservation of rent to the statutory amount was a circumstance that would modify essentially the legal character of the transaction. In Gano *v.* Vanderveer, decided very soon after, failure of proof that rent was so reserved prevented a recovery upon the lease.[2]

§ 33. But although there appears to have been no case in England where a verbal lease has been sustained, as coming within the whole language of the second section, yet, as has been said, there are many in which the courts have taken occasion to explain that part of it which limits the duration of a verbal lease to three years, and these cases will be instructive in getting at the construction of such limitations in our own statutes. In Rawlins *v.* Turner it was held by Lord Holt, in accordance with the plain words of the section, that the three years were to be computed from the time of making the agreement, and not from any subsequent day.[3] And although the lease is to commence and take effect at a future day, yet if, from the time of making the agreement until the lease expires, the interval be not more than three years, the

[1] Cody *v.* Quarterman, 12 Ga. 386. In Scotland, leases of land exceeding the term of a year, are not effectual unless in writing and followed by possession. 1 Bell's Com. 20.

[2] Birckhead *v.* Cummins, 33 N. J. L. 44; Gano *v.* Vanderveer, 34 N. J. L. 293. And see Union Banking Co. *v.* Gittings, 45 Md. 181.

[3] Rawlins *v.* Turner, 1 Ld. Raym. 736. See also Chapman *v.* Gray, 15 Mass. 439; Delano *v.* Montague, 4 Cush. (Mass.) 42.

statute does not apply to it.[1] These two rules in regard to verbal leases are very plainly settled.

§ 34. A question has arisen in New York, having a somewhat important relation to this subject. As the law of that State originally stood, the term for verbal leases was, as in England, "three years from the making." But the Revised Statutes[2] shortened the term to one year, and omitted the words "from the making thereof." This alteration was considered by the Supreme Court of that State in Croswell *v.* Crane, and it was held upon principle, as well as upon reference to the report of the revisors of the statutes, that a verbal lease for one year, to commence *in futuro*, was still invalid, notwithstanding the alteration in the laws.[3] But the same question, coming before the Court of Appeals in the following year, was decided otherwise, and Croswell *v.* Crane overruled. The court said that the legislature clearly intended to omit the requirement which existed previously, namely, that the lease must terminate within the prescribed time, reckoning from the making; and that their intention must be carried out, such omission not being contrary to the common law.[4] This decision and the legislation to which it refers seem to consider the policy of the statute as satisfied by prohibiting estates for a longer term than a fixed number of years from being created by word of mouth, thus regarding solely the important nature of land as requiring especial solemnities for its transfer; whereas the English statute and the decisions of the English courts clearly look also to the danger of admitting oral testimony of transactions long past, a danger which they seem to have kept constantly in mind in interpreting each of the provisions of the Statute of Frauds.

[1] Ryley *v.* Hicks, 1 Stra. 651.

[2] N. Y. Rev. Stat. Part II., c. vii., tit. 1, §§ 6, 8.

[3] Croswell *v.* Crane, 7 Barb. 191. See Sobey *v.* Brisbee, 20 Iowa, 105.

[4] Young *v.* Dake, 5 N. Y. 463. See also Taggard *v.* Roosevelt, 2 E. D. Smith, 100; Thomas *v.* Nelson, 69 N. Y. 118. In Allen *v.* Devlin, 6 Bosw. 1, the same doctrine is applied to a surrender. The case is affirmed, *nom.* Smith *v.* Devlin, 23 N. Y. 363.

§ 35. The operation of the statute as to the duration of verbal leases is prospective; it regards only the time which the lease has yet to run. Thus where a lease is to run from year to year, so long as both parties please, although, when five or six or more years are past, it may be said, regarding it retrospectively, to be a verbal lease for that number of years, yet the lease is good, as the statute only looks to verbal leases for a certain number of years to come.[1] This rule of course does not apply to leases from year to year, for and during a fixed period of time which exceeds the limit allowed to verbal leases;[2] though it would seem to hold good where it rests in covenant for the lessor to grant a fresh term at the end of the first, and so on.[3]

§ 36. In estimating the prescribed number of years, the day of the date will be included or excluded according to the nature of the instrument and the intention of the parties.[4] In Massachusetts and New Hampshire the rule is that if the lease is expressed to be from a day certain, that day is not counted; but if it is so expressed as by implication to run from the date of the making, the day is counted.[5]

§ 37. The case of Edge *v.* Strafford, in the Exchequer, 1831, brought up the interesting question whether a verbal lease good under the second section of the statute came within the fourth section in regard to contracts, so that neither party could bring action for not giving or taking possession under it;[6] and several of the text writers have regarded it as an

[1] Legg *v.* Strudwick, 2 Salk. 414; Birch *v.* Wright, 1 T. R. 378; Raynor *v.* Drew, 72 Cal. 307. See also Pugsley *v.* Aiken, 11 N. Y. 494; Fox *v.* Nathan, 32 Conn. 348.

[2] Plowd. 373; Bro. Tit. Leases, 49.

[3] Roberts on Frauds, 242, note (*d*).

[4] 4 Kent, Com. 95 note; Lysle *v.* Williams, 15 Serg. & R. (Pa.) 135; Donaldson *v.* Smith, 1 Ashm. (Pa.) 197; Wilcox *v.* Wood, 9 Wend. (N. Y.) 346.

[5] Atkins *v.* Sleeper, 7 Allen, 487; Perry *v.* Provident Insurance Co., 99 Mass. 162; Keyes *v.* Dearborn, 12 N. H. 52.

[6] Edge *v.* Strafford, 1 Cromp. & J. 391. And see Delano *v.* Montague, 4 Cush. (Mass.) 42.

authority that the two sections should be thus construed.[1] But in the light of later decisions both in England and this country, it may be doubted whether there is any such rule, or whether this case is any authority in support of it. The former question was thoroughly and ably discussed by Chief Justice Beasley, of the Supreme Court of New Jersey, in a case presenting a similar state of facts. After commenting upon the second section as being "adequate to its purpose and complete in itself," he proceeds to discuss the effect of the fourth section upon it. "It cannot be denied," he says, "that a lease is a contract concerning an interest in land; and therefore if the [fourth] section be applicable to this class of cases at all, such a contract cannot be enforced. The effect consequently would be that, by the exception in the former section, an interest is preserved, which is annulled by the incongruous operation of the latter. Nor can I perceive the propriety of the distinction that the latter section applies to the lease only in its condition as unexecuted by the entry of the lessee; because it is undeniable that after such entry it is as much a contract respecting an interest in lands as it was before the doing of such an act on the part of the tenant." The language of the second section is then noticed, "leases not exceeding the term of three years from the making thereof," as clearly contemplating the existence of present parol demises, giving a right of possession *in futuro;* for the duration of the estate is limited from the date of making the lease, and not from that of going into possession. Finally it is held that "by a just construction of the Statute of Frauds, a parol lease not exceeding three years from the making, and reserving a rent in the proportion designated, is good from its inception, and will support an action for the rent in arrear, without any entry having been made upon the premises by the lessee." In the case of Huffman *v.* Starks, also, the question of the effect of the fourth

[1] Chit. Cont. p. 287; Washb. Real Prop. Bk. I., c. xi., § 2, par. 31. See Larkin *v.* Avery, 23 Conn. 313.

section upon the second was discussed, and the Supreme Court of Indiana, by a majority, likewise held that the two were quite distinct, and were to be so regarded; and a conflicting decision of the same court was in substance overruled.[1] In the English case of Bolton *v.* Tomlin,[2] decided soon after Edge *v.* Strafford, Lord Denman expressly said that leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth. It may be added that if the provision of the fourth section in regard to interests in land is to apply to the leases excepted by the second section the provision of the fourth section in regard to agreements not to be performed within a year should also apply; and this would render the second section almost nugatory.[3]

§ 37 *a.* There remains to be discussed the question whether Edge *v.* Strafford is in conflict with the authorities just cited. This case, and that of Inman *v.* Stamp, which it follows and supports, were cited and discussed by the courts in the New Jersey and Indiana cases. In the former it was observed that the action in Edge *v.* Strafford was not upon any provision of the lease itself, but for damages for the breach of an alleged contemporaneous parol agreement that the lessee would take actual possession of the premises; and consequently that the ruling, which disallowed any action on such an agreement, even if correct, did not affect questions arising on the lease itself. In the Indiana case, the same distinction is noticed, but its soundness is much doubted. Lord Denman, in Bolton *v.* Tomlin, puts the cases of Edge *v.* Strafford, and Inman *v.* Stamp upon a different ground, assuming that they did not involve parol demises, but merely *agreements* to demise; and this view seems to be supported by the lan-

[1] Huffman *v.* Starks, 31 Ind. 474. See Young *v.* Dake, 5 N. Y. 463.

[2] Bolton *v.* Tomlin, 5 Ad. & E. 856. See Childers *v.* Talbott, 4 New Mexico, 168.

[3] Delano *v.* Montague, 4 Cush. (Mass.) 42. And see Bateman *v.* Maddox, 85 Tex. 546.

guage of some of the later cases.[1] Unless some distinction of this sort does exist in those cases, Lord Denman's decision seems to overrule them, and it may fairly be doubted, in view of the language used by Baron Bayley in Edge *v.* Strafford, whether he had any such distinction in his mind. Upon the whole, then, it would seem that these two cases should be regarded as of but little weight, so far as they favor that rule of interpretation of the statute, in support of which, as we have seen, they have been quoted; and in view of the authority against it, the existence of any such rule may well be doubted.[2]

§ 38. The English Statute of Frauds does not make verbal leases void, but allows them the effect of estates at will. Such a tenancy may be converted into a tenancy from year to year, by the entry of the lessor, and payment of rent,[3] provided nothing appears to show that the payment was *not* made or received *as rent*, and provided also that the payment be made with reference to a year, or some aliquot part of it. For where payment is not so made, the tenancy implied will

[1] Wright *v.* Stavert, 2 El. & E. 721; White *v.* Maynard, 111 Mass. 250. In Missouri, short leases are expressly excepted from that section corresponding to the fourth section of the English statute. Hoover *v.* Pacific Co., 41 Mo. App. 317.

[2] And see Coe *v.* Clay, 5 Bing. 440; followed in Jenks *v.* Edwards, 11 Exch. 775.

[3] Clayton *v.* Blakey, 8 T. R. 3. (Even since the statute 8 & 9 Vict. c. 106, § 3, requiring leases to be by deed, there seems no reason to doubt that this rule is the same. Chit. Cont. 287.) McDowell *v.* Simpson, 3 Watts (Pa.) 129; People *v.* Rickert, 8 Cow. (N. Y.) 226; Schuyler *v.* Leggett, 2 Cow. (N. Y.) 660. See also Duke *v.* Harper, 6 Yerg. (Tenn.) 280; Morehead *v.* Watkyns, 5 B. Mon. (Ky.) 228; Ridgely *v.* Stillwell, 28 Mo. 400; Drake *v.* Newton, 23 N. J. L. 111; Taggard *v.* Roosevelt, 2 E. D. Smith (N. Y.) 100; Reeder *v.* Sayre, 6 Hun (N. Y.) 562; affirmed, 70 N. Y. 180; Hoover *v.* Pacific Oil Co., 41 Mo. App. 317; Koplitz *v.* Gustavus, 48 Wisc. 48; Blumenthal *v.* Bloomingdale, 100 N. Y. 558; Coudert *v.* Cohn, 118 N. Y. 309; Rogers *v.* Wheaton, 88 Tenn. 665; Ohio and Miss. R. R. *v.* Trapp, 4 Ind. App. Ct. 69. See also Hammond *v.* Dean, 8 Baxter (Tenn.) 193; Chicago Attachment Co. *v.* Davis Machine Co., 142 Ill. 171.

not be one for a year, but for a quarter, month, or week, according to the intention of the parties, as inferred from the times of payment.[1] This is especially so in the interpretation of agreements for lodgings.[2] The mere entry of the lessee under the verbal lease will not be sufficient to convert it into an estate from year to year; there must also be payment or acknowledgment of rent.[3] It was said in the Supreme Court of Massachusetts that the doctrine as to tenancy from year to year seemed very clearly to depend upon

[1] Camden *v.* Batterbury, 5 C. B. N. S. 817; Braythwayte *v.* Hitchcock, 10 Mees. & W. 497; Anderson *v.* Prindle, 23 Wend. (N. Y.) 619; Barlow *v.* Wainwright, 22 Vt. 88; People *v.* Darling, 47 N. Y. 666; Creighton *v.* Sanders, 89 Ill. 543; Evans *v.* Winona Lumber Co., 30 Minn. 515; Johnson *v.* Albertson, 51 Minn. 333; Field *v.* Herrick, 14 Brad. (Ill. App.) 181; Steele *v.* Anheuser-Busch Brewing Ass., 58 N. W. Rep. (Minn.) 685.

[2] Wilson *v.* Abbott, 3 Barn. & C. 88.

[3] Doidge *v.* Bowers, 2 Mees. & W. 365; Cox *v.* Bent, 5 Bing. 185. In Pennsylvania, where there is no statute prohibiting actions upon executory contracts for land, and where there is an exception in the second section in favor of leases for not over three years, Chief Justice Tilghman expressed the opinion that, according to adjudged cases, a verbal lease for more than three years might be entirely taken out of the statute by delivery of possession, and that it certainly would, if attended by improvements by the lessee. No decision was required, however, or given upon the point. Jones *v.* Peterman, 3 Serg. & R. 543; Farley *v.* Stokes, 1 Sel. Eq Cas. 422, is to the same effect. But the case of Soles *v.* Hickman, 20 Pa. St. 180, decided in 1852, and which has been referred to above, seems to be irreconcilable with these decisions; for, there being no *written evidence* of the creation of the estate, the court would not decree a conveyance. The case does not show any part-performance, and the opinion does not indicate what would be the effect if there were any shown. In Mountain City Association *v.* Kearns, 103 Pa. St. 403, it was said that a lease of the character under discussion followed by possession and improvements created an estate at will. Such an estate, it has also been held, would be converted into a tenancy from year to year by the annual payment and acceptance of rent. Dumn *v.* Rothermel, 112 Pa. St. 272. In Kentucky (Morehead *v.* Watkyns, 5 B. Mon. 228), where the statute simply provides that no estate for a term of more than five years shall be conveyed without writing, etc., not specifying what effect parol leases for a less term shall have, it is held that a tenant under such a lease is bound to the duties of a tenant from year to year. See also in Indiana, the case of Nash *v.* Berkmeir, 83 Ind. 536.

the exception in the second section of the statute, and to be sustained only upon the ground of that exception.[1] This view receives some countenance from the language of Lord Kenyon in Clayton *v.* Blakey, where he says that what was considered at the time of the passage of the statute a tenancy at will "has since been very properly construed to inure as a tenancy from year to year."[2] Nevertheless, it is quite clear that this doctrine is much older than the Statute of Frauds, which, in giving to verbal leases of certain kinds the force of estates at will, left it to the common law to apply all the incidents of that estate, including its convertibility by entry and payment of rent into a tenancy from year to year.[3] The Supreme Court of Massachusetts determined, however, upon the strength of the absence from the law of that State of any exception as to short leases, that a verbal lease was to be treated strictly as a lease at will, and not as from year to year, and the same law prevails in Maine, where the statute in regard to leases resembles that of Massachusetts.[4] In Missouri, also, short leases are not excepted, but it has always been held there that these estates may be converted into tenancies for a term indicated by the times of payment of rent.[5]

§ 39. A long series of opinions has established, both in this country and in England, that where the statute simply declares a verbal lease to have the force of creating an estate at will, its policy is satisfied by preventing the creation by word only

Ellis *v.* Paige, 1 Pick. 43.

[2] Clayton *v.* Blakey, 8 T. R. 3.

[3] Such an estate at will, arising from a parol demise, and convertible into a tenancy from year to year, is assignable. Botting *v.* Martin, 1 Camp. 317. See Elliott *v.* Johnson, L. R. 2 Q. B. 120. Where such estates are not convertible, but remain estates at will purely, they come under the general rule and are not assignable. Cunningham *v.* Holton, 55 Me. 33; King *v.* Lawson, 98 Mass. 309. See Whittemore *v.* Gibbs, 24 N. H. 484; Austin *v.* Thompson, 45 N. H. 113.

[4] Davis *v.* Thompson, 13 Me. 209; Withers *v.* Larrabee, 48 Me. 570.

[5] Hammon *v.* Douglas, 50 Mo. 434.

of estates in land above a certain quality; and so long as parties do in fact proceed as landlord and tenant under such restrictions in point of time as the statute imposes, it allows full effect and obligation to the covenants and stipulations which they see fit to embrace in their agreement; so far as these are applicable to, or not inconsistent with, a tenancy for the time implied.[1] For instance, the covenant to repair contained in such a lease will be binding,[2] as also the stipulations as to the amount of rent and time of payment,[3] and as to the time when the tenant shall quit, whether it be at a time fixed, or upon a certain contingency.[4] The question whether covenants in an original lease apply to a tenancy from year to year, created after the term by parol, is for the jury.[5]

§ 40. It is obvious that where the statute in any particular State denies to the parol agreement of the parties even the efficacy of fixing the terms of the tenancy which may arise by their subsequent acts, and the time of determining it, still, if the lessee has actually used and occupied the land, he will be liable on his implied promise to pay for such use and occupation. And in such cases, recourse may be had to the original agreement as evidence of the value of such use and occupation.[6] But where defendant entered under a verbal agreement for an annual rent of four hundred dollars, payable quarterly, no time of terminating the tenancy being

[1] People *v.* Rickert, 8 Cow. (N. Y.) 226. See Hand *v.* Hall, 2 Ex. Div. 355. See Man *v.* Ray, 50 Ill. App. Ct. 415.

[2] Beale *v.* Saunders, 3 Bing. N. R. 850; Richardson *v.* Gifford, 1 Ad. & E. 52; Halbut *v.* Forrest City, 34 Ark. 246; Brockway *v.* Thomas, 36 Ark. 518.

[3] Barlow *v.* Wainwright, 22 Vt. 88; De Medina *v.* Polson, Holt, 49; Norris *v.* Morrill, 40 N. H. 395.

[4] Rigge *v.* Bell, 5 T. R. 471; Schuyler *v.* Leggett, 2 Cow. (N. Y.) 660; Hollis *v.* Pool, 3 Met. (Mass.) 350. See also Richardson *v.* Gifford, 1 Ad. & E. 52; Tress *v.* Savage, 4 El. & B. 36; Currier *v.* Barker, 2 Gray (Mass.) 226.

[5] Oakley *v.* Monk, 3 Hurlst. & C. 705.

[6] De Medina *v.* Polson, Holt, 47. See Morehead *v.* Watkyns, 5 B. Mon. (Ky.) 228.

fixed, and the lessor sold the premises between two quarter-days, it was held that no rent was due by the contract for occupation since the last quarter-day, because the tenancy was determined before the day of payment. Neither was there any implied promise, the tenancy being under an express agreement of the parties, to pay for use or occupation.[1]

[1] Fuller *v.* Swett, 6 Allen (Mass.) 219, n.; Robinson *v.* Deering, 56 Me. 357.

CHAPTER IV.

ASSIGNMENT AND SURRENDER.

§ 41. As the first section of the Statute of Frauds prescribes certain formalities in the creation of interests in land, the third section is directed to the assignment, grant, or surrender of those interests after their creation. The application of the statute to such transfers, with the formalities it requires, will be the subject of the present chapter.[1]

§ 42. The provision of the third section, with regard to the assignment, grant, or surrender of existing terms, is that, to be valid, it shall be either by deed or by note in writing. In view of this alternative provision, it has generally been held that, unless a seal is essential to the creation of the term, it need not appear upon the assignment, but that a note in writing is sufficient;[2] and this is also true, where the estate to be surrendered might have been created without deed, though in point of fact so created.[3]

[1] As was pointed out by the court, in a case in North Carolina, an assignment of a term requiring a writing to create it could not, in reason, be verbally made, even though the statute contained no provision with regard to the making of such assignment; for if, as is clear, the statute against parol leases applies to those which are carved out of a term, as well as out of the inheritance, it cannot be that a long termor can assign his whole interest verbally, when he could not underlet part of it without writing. Briles *v.* Pace, 13 Ired. Law, 279.

[2] Holliday *v.* Marshall, 7 Johns. (N. Y.) 211; Esty *v.* Baker, 48 Me. 495; Boyce *v.* Bakewell, 37 Mo. 492. See Dixon *v.* Buell, 21 Ill. 203. See also Sanders *v.* Partridge, 108 Mass. 556, in which the whole subject is fully considered, and which, as to the point in question, appears to be in conflict with the earlier cases of Wood *v.* Partridge, 11 Mass. 488; Brewer *v.* Dyer, 7 Cush. 337; Bridgham *v.* Tileston, 5 Allen, 371.

[3] Roberts on Frauds, 248, 249; Farmer *v.* Rogers, 2 Wils. 26; Gwyn *v.* Wellborn, 1 Dev. & B. (N. C.) Law, 313; Allen *v.* Jaquish, 21 Wend. (N. Y.) 628; Peters *v.* Barnes, 16 Ind. 219.

§ 43. The statute has prescribed no form of words for the surrender of an estate, but it may still be accomplished by any language fairly importing an intention to yield up the estate, provided it be put in writing signed by the party or his agent.[1] Nor is it necessary that there should be any formal redelivery or cancelling of the deed or other instrument which created the estate to be surrendered.[2] It has been contended that a recital in a second lease, that it was in consideration of the surrender of a prior one, was a sufficient note in writing of such surrender, to satisfy the requirements of the statute; but the judges of the Queen's Bench, when the question arose before them, were clearly of opinion that the fact of a previous surrender must be specifically found; which fact the recital by no means imported, for the recital would be sufficiently accurate if the surrender were merely by operation of law, arising from the reception of the second lease.[3] And in a decision of the Court of Exchequer to the same effect, Parke, B., remarked upon the custom, at the renewing of a lease, of reciting that it is in consideration of the surrender of the old one; from which, he said, it was clear that such a recital could not import certainly that the interest of a lessee in a prior lease had been in fact surrendered.[4]

[1] Weddall *v.* Capes, 1 Mees. & W. 50; Greider's Appeal, 5 Pa. St. 422; Strong *v.* Crosby, 21 Conn. 398; Gwyn *v.* Wellborn, 1 Dev. & B. (N. C.) Law, 313; Shepard *v.* Spaulding, 4 Met. (Mass.) 416; where the word "reconvey" was held a good word of surrender. After a written lease for ten years had been executed, it was verbally agreed between the parties, that if either became dissatisfied with the other before the ten years expired, the lease should be at an end. It was held that such an agreement, acted upon by one of the parties, though it might not technically amount to a surrender, was void, because the direct effect of it was to change a lease for years into a mere estate at will. Mayberry *v.* Johnson, 3 Green (N. J.) Law, 116; Brady *v.* Peiper, 1 Hilt. (N. Y.) 61.

[2] Greider's Appeal, 5 Pa. St. 422. See, in regard to the cancellation of instruments of conveyance, *post*, §§ 59, 60.

[3] Roe *v.* Abp. of York, 6 East, 86.

[4] Lyon *v.* Reed, 13 Mees. & W. 285. A recital in a second lease that it was granted "for the consideration of the present lease, and which is

§ 44. The cancellation or destruction of the indenture has no operation as a surrender of a lease of lands. Such was the opinion given extra-judicially by Lord Chief Baron Gilbert, in the case of Magennis *v.* MacCollogh; "because," he says, "the intent of the Statute of Frauds was to take away the manner they formerly had of transferring interests in lands, by signs, symbols, and words only, and, therefore, as a livery and seisin of a parol feoffment was a sign of passing the freehold, before the statute, so I take it that the cancellation of a lease was a sign of a surrender, before the statute, but is now taken away unless there be a writing under the hand of the party."[1] The same rule was afterwards affirmed by all the judges of the Common Pleas, and is now, as a general principle, adopted in England and the United States.[2] Where, however, a lessee voluntarily delivered up and destroyed his lease, and afterwards claimed under it, it was held in New York that he ought not to be allowed to avail himself of any obscurity or uncertainty in respect to its contents, but that every difficulty and presumption ought to be turned against him.[3] We shall have occasion, before passing from the subject of conveyances as affected by the statute, to consider rather more at large the effect of altering, destroying, or redelivering title-deeds, and until then reserve the examination of certain further modifications of the rule.[4]

hereby surrendered accordingly," was held to constitute a good surrender, by note in writing, in Doe *v.* Forwood, 3 Q. B. 627. But this case was explained in Doe *v.* Courtenay, 11 Q. B. 702, where the court, by Coleridge, J., said that when a surrender was expressed to be founded upon a new grant, the validity of the surrender would be conditional upon the validity of the new grant.

[1] Magennis *v.* MacCollogh, Gilb. Cas. 235.

[2] Bolton *v.* Bishop of Carlisle, 2 H. Bl. 259; Walker *v.* Richardson, 2 Mees. & W. 882; Roe *v.* Abp. of York, 6 East, 86; Doe *v.* Thomas, 9 Barn. & C. 288; Rowan *v.* Lytle, 11 Wend. (N. Y.) 616; Ward *v.* Lumley, 5 Hurlst. & N. 88, and note in American edition.

[3] Jackson *v.* Gardner, 8 Johns. (N. Y.) 394.

[4] See *post*, §§ 59, 60.

§ 45. It will be observed that the language of the third section of the statute, providing for the assignment and surrender of estates in land, is general, and contains no express reservation in favor of short leases. It declares that "*no leases*," etc., "shall be assigned or surrendered unless it be by deed or note in writing." Proceeding upon the ground of this generality of language, the English courts have uniformly held that even such short terms as could, by the statute or otherwise, be created verbally, could not be assigned or surrendered without writing. This doctrine appears to have been first held at *nisi prius* in 1818, in the case of Botting *v.* Martin.[1] It was argued that as a lease from year to year could be originally made without writing, there was no reason why it could not be assigned without writing, and that upon a comprehensive view of the three first sections of the statute it must be held that the requirements of the third section applied only to those estates which were covered by the first and second taken together. The decision of the court to the contrary is very briefly given, the report merely stating that, "Sir A. McDonald, C. B., held that the assignment was void for not being by deed or note in writing, and, therefore, nonsuited the plaintiff." In the following year, also at *nisi prius*, in Mollett *v.* Brayne, Lord Ellenborough ruled that a tenancy from year to year, created by parol, was not determined by a parol license from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting accordingly; thus affirming the rule laid down in Botting *v.* Martin, but without entering into the reasons to support it.[2] In Whitehead *v.* Clifford, a few years afterwards, in the Common Pleas, Gibbs, C. J., made the remark, that, "the clause of the Statute of Frauds which restricted estates created by parol to three years had nothing to do with that which required surrenders to be in writing;" but the case was determined

[1] Botting *v.* Martin, 1 Camp. 317. But see Poultney *v.* Holmes, 1 Stra. 405; commented upon in Barrett *v.* Rolph, 14 Mees. & W. 348.

[2] Mollett *v.* Brayne, 2 Camp. 103.

upon another point than the efficacy of the verbal surrender.[1] In the case of Doe *v.* Ridout, which was next decided in England, it was said that the lease "cannot be determined except by legal notice to quit, or legal surrender," and a parol surrender was clearly regarded as invalid.[2] Thomson *v.* Wilson followed, where it was determined by Lord Ellenborough, at *nisi prius*, that a verbal agreement to determine a tenancy (but whether it was a parol lease or not the case does not show) in the middle of a quarter was, as a parol surrender, not binding.[3] From a view of the foregoing cases there seems no room for doubt as to the prevailing doctrine in England on this question. At the same time, we must remark that they appear to have followed one another, upon mere authority, and that none of them, as reported, is put upon any other ground.[4]

§ 46. In the American courts the point has several times arisen, and different conclusions arrived at in different States. In Pennsylvania (where the three first sections of the statute are re-enacted, with the exception of the clause in regard to rent reserved in the second section), Gibson, C. J., in delivering the opinion of the Supreme Court, very ably argues against the English construction as follows: "Why the legislature should have purposely contravened a common-law maxim by requiring a matter to be dissolved by writing, which they allowed to be created by verbality, it is for them who insist upon the distinction to explain. An intent to establish it would have been a legislative absurdity which is not lightly to be imputed. What greater mischief there can be in a verbal surrender or transfer than there is in a verbal constitution of a lease has not been shown, and it is not to be

[1] Whitehead *v.* Clifford, 5 Taunt. 518.

[2] Doe *v.* Ridout, 5 Taunt. 519.

[3] Thomson *v.* Wilson, 2 Stark. 379. Lord Ellenborough said, in the course of his opinion, that he could not distinguish this case from Mollett *v.* Brayne, *supra.*

[4] In Barrett *v.* Rolph, 14 Mees. & W. 348, although the question was not directly passed upon, it was regarded by both the court and the counsel as entirely settled.

supposed that the legislature meant to establish a distinction without a reason for it. The apparent difference in the prescribed forms of constituting and surrendering arises from the generality of the words predicated by the latter, and ostensibly with leases written or unwritten, without discrimination. But that they were intended for the surrender or transfer of a lease in which writing was made a necessary ingredient, is evident from the fact that there is no purpose which requires writing in a surrender or transfer which does not equally require it in the act of constitution."[1] In Greider's Appeal, the same court, upon the strength of this language, declared the law to be settled for Pennsylvania, that an oral surrender of a term for less than three years was good;[2] but in neither of these cases was the point necessary to the decision. In the first, it was held that the facts showed a surrender by operation of law (which is expressly excepted by the statute), and in the second, the surrender was actually, as the opinion states, made in writing. In Connecticut, also, it seems to have been considered that a lease from year to year could be surrendered orally; but the report of the case in which this appears is somewhat obscure, and the decision is that there was no such surrender shown.[3] The States of New York and Delaware have both followed, without discussion, the English construction;[4] and, upon the whole, it must be admitted that the weight of authority is to the effect that, the statute itself being unqualified in this respect, no qualification is to be ingrafted upon it by construction or from the common law. The doctrine seems to stand upon the

[1] McKinney *v.* Reader, 7 Watts, 123.

[2] Greider's Appeal, 5 Pa. St. 422; Kiteser *v.* Miller, 25 Pa. St. 481. And see Tate *v.* Reynolds, 8 Watts & S. 91.

[3] Strong *v.* Crosby, 21 Conn. 398. So in Missouri. Koenig *v.* Miller Brewery Co., 38 Mo. App. 182.

[4] Rowan *v.* Lytle, 11 Wend. 616; Logan *v.* Barr, 4 Harr. 516. And see Lamar *v.* McNamee, 10 Gill & J. 116; Chicago Attachment Co. *v.* Davis Sewing Machine Co., 142 Ill. 171; Briles *v.* Pace, 13 Ired. Law, 279; Johnson *v.* Reading, 36 Mo. App. 306.

literal language of the third section, and to be, so far as reported cases show, without any distinct foundation in principle. In many of our States, where the law provides that leases must be surrendered by writing, the question has yet to be decided; for it is conceived that it is not necessarily connected with any statutory reservation of short leases, and that the English cases are not to be so limited; but that it may arise in regard to any lease which may be verbally created, whether at will, or from year to year, or for a term of years allowed by statute.[1]

§ 47. Upon the question whether a surrender must have an immediate operation, or may take effect *in futuro*, there is an apparent conflict in the English cases. It is true that the Court of Exchequer has once directly decided[2] that a surrender could not be made to take effect *in futuro*, but the grounds of that conclusion are not stated, and the authorities referred to hardly sustain it. One of them, a case decided two years before, also in the Exchequer, was upon a written surrender to take effect on a future day, and on condition of a certain sum of money being paid. It did not appear that the condition had been performed, and it was held that the surrender had not operated; but Baron Parke expressed his opinion that it should appear to be the intention of the parties that the term should immediately cease, in order to make a valid surrender.[3] Another case referred to in support of this doctrine is that of Johnstone *v.* Hudlestone, in the Queen's Bench, where an insufficient notice to quit was verbally given by the tenant and accepted by the landlord; and there, so far from deciding that there could be no surren-

[1] In New York, where the statute requires writing for the surrender of "any estate or interest in lands other than leases for a term not exceeding one year," it is held that if less than a year remain of a lease for more than a year, such unexpired term may be surrendered without writing. Smith *v.* Devlin, 23 N. Y. 364; on appeal from the Superior Court, *nom.* Allen *v.* Devlin, 6 Bosw. 1.

[2] Doe *v.* Milward, 3 Mees. & W. 328.

[3] Weddall *v.* Capes, 1 Mees. & W. 50.

der to operate *in futuro*, one of the judges declined to give an opinion upon the point, and the other expressed his opinion that, if the acceptance by the landlord had been in writing, it would have been a good surrender.[1] On the other hand, it was stated by the court, at *nisi prius*, in Aldenburgh *v.* Peaple, where a tenant from year to year gave an irregular notice to quit, that if the notice was in writing and signed by the tenant, the landlord might treat it as a surrender of the tenancy.[2] In the more recent cases of Williams *v.* Sawyer, in the Common Pleas,[3] Nickells *v.* Atherstone, in the Queen's Bench,[4] and Foquet *v.* Moor, in the Court of Exchequer,[5] the question seems to have been treated as unsettled. In the Supreme Court of New York the contrary doctrine to that of Doe *v.* Milward has been held, and supported by reasoning which appears satisfactory. An unsealed agreement was made by a lessee, to relinquish, upon failure to perform certain stipulations, a lease previously executed under seal, and it was decided that the agreement, though inoperative as a defeasance for want of a seal, was valid as a contingent surrender. Cowen, J., in delivering the judgment of the court, said that a surrender, when complete, "is, as it were, a re-demise. It may be made upon condition, that is, to become void upon condition; and, though no case goes so far as to say that a surrender may be made to become good upon condition precedent, yet there seems to be no objection to that in principle, if the interest surrendered be not a freehold. That cannot in general be granted to take effect *in futuro*, but a term for years can. The surrender of a term, to operate *in futuro*, is equally free of the objection. Contracts of parties, whether by deed or otherwise, should always

[1] Johnstone *v.* Hudlestone, 4 Barn. & C. 922.
[2] Aldenburgh *v.* Peaple, 6 Carr. & P. 212.
[3] Williams *v.* Sawyer, 3 Brod. & B. 70.
[4] Nickells *v.* Atherstone, 10 Q. B. 944.
[5] Foquet *v.* Moor, 7 Exch. 870.

take effect according to their real intent, if that be possible consistently with the rules of law." [1]

§ 48. It is necessary to a correct understanding of this branch of the statute, that we consider, as briefly as may be, what are those surrenders by act and operation of law, which are expressly excepted from it. In an important case in the Court of Exchequer, it was said that the term "surrender by act and operation of law" is properly applied to cases where the owner of a particular estate had been a party to some act, the validity of which he is by law afterwards estopped form disputing, and which would not be valid if his particular estate continued to exist.[2] The great majority of cases, however, appear to place such surrenders upon the broader, and on the whole more satisfactory ground of acts done or participated in by the lessee, from which is to be presumed a clear intention that his previous estate shall cease.[3] The most obvious instance under the first definition given above of these surrenders, and one which is said by Mr. Roberts to be the proper example of a surrender by act and operation of law, is where a lessee for life or years accepts from his landlord a new and valid lease of the same premises, to take effect during the time limited for the first tenancy. By accepting such a lease he admits the capacity of his landlord to make it, which capacity could not exist if the old tenancy were not first determined.[4]

§ 49. If the second lease is void, and the lessee takes nothing under it, a surrender of the first one will not result, whichever definition of surrenders by operation of law we

[1] Allen *v.* Jaquish, 21 Wend. 635. See Shep. Touch. 307; Woodf. Land. & T. 141; Coupland *v.* Maynard, 12 East, 134; Allen *v.* Devlin, 6 Bosw. (N. Y.) 1.

[2] Lyon *v.* Reed, 13 Mees. & W. 285.

[3] Davison *v.* Stanley, 4 Burr. 2210; Wilson *v.* Sewell, 4 Burr. 1975; Goodright *v.* Mark, 4 Maule & S. 30; Donellan *v.* Reed, 3 Barn. & Ad. 899; Roberts on Frauds, 259.

[4] Lyon *v.* Reed, 13 Mees. & W. 285; Van Rensselaer *v.* Penniman, 6 Wend. (N. Y.) 569.

adopt; for the lessee cannot be said to be estopped to dispute the validity of an act equally void whether his old term ceased or continued, nor can he be presumed to intend to surrender his previous tenancy and get nothing in return.[1] And it is still farther settled, that if the second lease be not good and sufficient to pass an interest according to the contract and intention of the parties, the acceptance of it is no implied surrender of the previous estate. Although it may be true that accepting a lease which is valid for some purposes and to some extent (as, for instance, a verbal lease for a term exceeding three years), admits the ability of the lessor to make it; yet the other, and, as has been suggested, safer theory of surrenders in law, will save the lessee from the loss of his old estate, when it is obvious upon the face of the transaction that the consideration and inducement for his surrendering it cannot be realized by him.[2] Whether a surrender by operation of law follows from accepting a lease which is only voidable and not void, seems uncertain. It has been stated in the Queen's Bench that it does; but later, in the same court, in a case where a bishop made a second lease in consideration of the actual surrender of a former one, and his successor avoided the second lease, the opinion appears to admit that if the surrender had not been an actual surrender in fact but by implication merely from the acceptance of the second lease, the avoiding the latter would have had the effect of reviving the former.[3] Probably a due regard to the certainty of land titles would lead us to abide by the older doctrine. But when the second lease is taken with a condition that it shall be void upon a certain contingency, which occurring, the term is lost, the first estate is clearly not revived, for the second lease, when accepted, was good, and extinguished the former once for all.[4]

[1] Roe *v.* Abp. of York, 6 East, 86; Doe *v.* Courtenay, 11 Q. B. 702.
[2] Wilson *v.* Sewell, 4 Burr. 1975; Davison *v.* Stanley, 4 Burr. 2210.
[3] Roe *v.* Abp. of York, 6 East, 86; Doe *v.* Bridges, 1 Barn. & Ad. 847.
[4] Fulmerston *v.* Steward, Plowd. 107 *b*; Doe *v.* Poole, 11 Q. B. 716.

§ 50. It is not essential that the second lease should be for a term equal to the unexpired term of the first, nor even that it should be of the same dignity with the first lease. An opinion has been expressed in England, that a tenancy at will would not be allowed to operate as a surrender of a written lease for years, because no such intention could be presumed in the lessee;[1] but it is inconsistent with several decisions in that country, and does not appear to have been adopted in this. Thus it is held that where a tenant has bargained for a new lease to himself and another jointly, and, pending the execution of the lease, they enter together and occupy the land, a tenancy either from year to year or at will, according to circumstances, is thereby created, which works a surrender of the original term.[2] If, indeed, the old tenant alone contract for a new lease, and, pending the execution of the lease, remain in possession, it may depend upon the intention of the parties, to be collected from the instrument, whether a mere tenancy at will is created and for what time; but if it is created, the old tenancy is thereby determined.[3] It is settled in New York, in harmony with this doctrine, that the acceptance of a verbal lease, if a valid one, is a surrender of a previous written lease, by act and operation of law.[4]

[1] Donellan *v.* Reed, 3 Barn. & Ad. 899.

[2] Hamerton *v.* Stead, 3 Barn. & C. 478; Mellows *v.* May, Cro. Eliz. 874. See the remarks of the court upon Donellan *v.* Reed, in Lyon *v.* Reed, 13 Mees. & W. 285; Doe *v.* Stanion, 1 Mees. & W. 701. In Foquet *v.* Moor, 7 Exch. 870, Pollock, C. B., says: "The argument . . . goes to this extent, that if there be a tenancy under a lease, and the parties make a verbal agreement for a sufficient consideration, that instead of the existing term, there shall be a tenancy from year to year, at a different rent, that would be a surrender of the lease by operation of law. I am of opinion that it would not. It would be most dangerous to allow a term created by an express demise to be thus got rid of by parol evidence."

[3] Doe *v.* Stanion, 1 Mees. & W. 695.

[4] Schieffelin *v.* Carpenter, 15 Wend. 400; Smith *v.* Niver, 2 Barb. 180. See also Dodd *v.* Acklom, 6 Mann. & G. 672. Of course the remarks in this section are confined to tenancies at will purposely created by the parties, and do not apply to such as may result, for instance, from

§ 51. The theory that such surrenders depend upon the presumed intention of the parties has been carried, perhaps, to an extreme in New York. It appeared that the lessee had a good title, by the first lease, to all that the second lease purported to convey, besides the personal covenant of the lessor for the payment of improvements; that the first lease was for three lives, and the second only for one of them; and that no surrender was *in fact* made of the first lease or of the bond accompanying it, but both were retained by the lessee; and, on these facts, the Supreme Court said that "every circumstance, except the fact of receiving the second lease, altogether rebutted the idea of an intention to surrender," and held that none had taken place.[1]

§ 52. Lastly, it is to be observed that the estate, whatever it is, the acceptance of which is to work a surrender of a previous tenancy, must take effect before the previous tenancy expires.[2] Where an agreement in writing was made between landlord and tenant, signed by the landlord, for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed, but blanks were left for the day of the commencement, and, the repairs being completed, the landlord tendered a lease to commence from that time, but the tenant insisted that the new lease was not to commence till the expiration of the old, the Master of the Rolls said he could not admit parol evidence to prove that the defendant was to surrender any part of his first lease, and ordered performance by accepting a lease to run from the expiration of the first one.[3]

§ 53. A surrender by act and operation of law will also

an unsuccessful attempt to create a term by parol for more than the statutory period. The lease which is to work the surrender must, as we have seen, be valid to pass the interest which it purports to convey. See also Switzer *v.* Gardner, 41 Mich. 164.

[1] Van Rensselaer *v.* Penniman, 6 Wend. 569. See Abell *v.* Williams, 3 Daly, 17; Flagg *v.* Dow, 99 Mass. 18.

[2] Roberts on Frauds, 260; Doe *v.* Walker, 5 Barn. & C. 111.

[3] Pym *v.* Blackburn, 3 Ves. Jr. 34; Sir Richard Pepper Arden, M. R.

follow from an actual change of tenancy. When the old tenant quits and a new tenant enters upon the premises, and is accepted as such by the landlord, the interest of the old tenant is fairly surrendered by act and operation of law.[1] These are acts so solemn that the parties are estopped to deny them, and they are sufficiently notorious to leave but small room for fraud or perjury in the testimony of witnesses to prove them. This doctrine, resting on a long series of decisions, was strongly condemned in the case of Lyon *v.* Reed, in the Court of Exchequer; but it was not found necessary to pass directly upon it, and the court simply refused to extend it to reversions or incorporeal hereditaments, which pass only by deed;[2] and whatever doubt their opinion may have cast upon its validity was removed by the later case of Nickells *v.* Atherstone, where the Court of Queen's Bench, while showing that Lyon *v.* Reed had not overruled the previous cases, reasserted the doctrine which they had established. The facts were that the landlord, by express permission of the tenant, let to another tenant and gave him possession, and afterwards brought an action for rent against the first tenant upon his original agreement. The court sustained the verdict below for defendant on the issue of surrender, and in delivering judgment Lord Denman, C. J., said, taking the definition of a surrender in law which was laid down in Lyon *v.* Reed: "If the expression 'surrender by operation of law' be properly 'applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued,' it appears to us to be properly applied

[1] Stone *v.* Whiting, 2 Stark. 235; Phipps *v.* Sculthorpe, 1 Barn. & Ald. 50; Thomas *v.* Cook, 2 Barn. & Ald. 119; Sparrow *v.* Hawkes, 2 Esp. 504; Randall *v.* Rich, 11 Mass. 494; Hesseltine *v.* Seavey, 16 Me. 212; Smith *v.* Niver, 2 Barb. (N. Y.) 180; Fobes *v.* Lewis, (N. Y.) Sup. Ct. 1876, 3 N. Y. Weekly Digest, 65; Koenig *v.* Miller Brewery Co., 38 Mo. App. 182.

[2] Lyon *v.* Reed, 13 Mees. & W. 285.

to the present. As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant, the owner of the particular estate in question, is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession and so enabling the new tenant to enter."[1]

§ 54. In like manner, a surrender by operation of law takes place where two tenants of different premises verbally agree to exchange, which agreement is assented to by the stewards of both landlords and executed by taking possession.[2] Where the new tenant was accepted for, and took possession of, only part of the premises previously leased, but advertised the whole to be let or sold, and had taken rent from the old tenant up to the middle of the quarter, it was held to be a surrender in law of the whole premises.[3] But where the lease under which the new tenant has entered and occupied turns out to be invalid, the mere entry and occupation will not have the effect to surrender the first tenancy, contrary to the intentions of all parties.[4]

§ 55. That there should be an actual change of possession is indispensable to such a surrender in law as we are now considering.[5] Thus, a verbal license to a tenant from year to year, for instance, to quit in the middle of a quarter, and

[1] Nickells *v.* Atherstone, 10 Q. B. 944.

[2] Bees *v.* Williams, 2 Cromp. M. & R. 581.

[3] Reeve *v.* Bird, 1 Cromp. M. & R. 31.

[4] Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400. Where the assignee of a term, under a verbal agreement to take the term and pay for certain repairs, enters, and occupies, it seems he may defend payment for the repairs, that remaining executory. Buttemere *v.* Hayes, 5 Mees. & W. 456.

[5] Taylor *v.* Chapman, Peake, Add. Cas. 19; Thomson *v.* Wilson, 2 Stark. 379; Lammott *v.* Gist, 2 Harr. & G. (Md.) 433.

the tenant quitting accordingly, was held to be insufficient in Mollett *v.* Brayne,[1] a case which has often been quoted against those which hold surrenders by operation of law to arise from a change of tenancy, but which is perfectly reconcilable with them, on the ground that in this case no possession was taken as in the other cases, and that therefore the surrender did rest entirely in agreement, and was against the spirit of the statute.[2] Where, however, the tenant assigns his term by writing, and the landlord assents, though verbally, no actual entry upon the land by the assignee appears to be necessary.[3] It is not, it seems, necessary that the possession should be taken by a new tenant; the resumption of it by the landlord himself is held to be sufficient.[4] And the Court of Common Pleas has held, that by the delivery back of the key by the tenant *animo sursum reddendi* and the acceptance of it by the landlord, there was such a change of possession as worked a surrender of the term.[5] In the case of Phené *v.* Popplewell, it was held by the same court to be a surrender, where the tenant went away, leaving the key at the landlord's counting-house, and the latter, though he at first refused to accept it, afterwards put up a notice that the premises were to let, used the key to show them to applicants, and painted out the tenant's name from the front of the building. Keating, J., in his opinion, says: "Any agreement between landlord and tenant which results in a change of the possession —

[1] Mollett *v.* Brayne, 2 Camp. 103.

[2] Stone *v.* Whiting, 2 Stark. 235; Johnstone *v.* Hudlestone, 4 Barn. & C. 922.

[3] Walker *v.* Richardson, 2 Mees. & W. 882. So in *Michigan:* Logan *v.* Anderson, 2 Doug. 101. But if there be a covenant by the lessee not to assign, a parol waiver by the lessor and lessee's assigning his term does not discharge him from the other covenants in the lease, but he is still liable for breach of them committed by the assignee. Jackson *v.* Brownson, 7 Johns. (N. Y.) 227.

[4] Grimman *v.* Legge, 8 Barn. & C. 324; Lamar *v.* McNamee, 10 Gill & J. (Md.) 116. But this is doubted in Morrison *v.* Chadwick, 7 C. B. 266.

[5] Dodd *v.* Acklom, 6 Mann. & G. 672. This case has since been discussed, but not overruled, in Furnivall *v.* Grove, 8 C. B. N. S. 496.

whether the former acts upon the agreement by reletting, or by taking possession himself, or by some unequivocal acts showing his assent thereto — will amount to a surrender by act and operation of law." [1] Though in all such cases the previous tenant is a necessary party to the surrender, yet it has been held in Pennsylvania, and, as it seems, very reasonably, that when a tenant abandons the premises and absconds, it amounts to a surrender as against him, though he in words deny that he has surrendered; and the landlord may enter.[2]

§ 56. It is not enough that there be an actual entry by the new tenant, but it must be with the landlord's assent and acceptance of him as his tenant. Thus, where a tenant sold out the remainder of his term to one who had agreed to purchase the reversion from the landlord, and the purchaser, without the landlord's assent, put in a new tenant who occupied two years, and afterwards the agreement for the purchase of the reversion was rescinded, it was held that the original tenant was liable to the original landlord for the whole rent from the time he quitted the premises to the end of the term, the landlord not having assented to the change of tenancy, and there having been no surrender in writing. The court said it did not appear that the second tenant was ever liable to the plaintiff for rent; and Parke, B., distinguished the case from Phipps *v.* Sculthorpe,[3] because there the landlord assented, though verbally, to hold the new comer as tenant.[4] Of course the original tenant, as well as his landlord, must be a consenting party to the substitution of the new tenant; and whether in either case the necessary assent has been given, is for the jury to determine upon all the circumstances of the case. Where a lessor, pending the

[1] Phené *v.* Popplewell, 12 C. B. N. S. 334. For facts that were held evidence of such a surrender, and therefore wrongfully kept from the jury, see Pratt *v.* Richards Jewelry Co., 69 Pa. St. 53; Auer *v.* Penn, 92 Pa. St. 444. And see Amory *v.* Kannoffsky, 117 Mass. 351.

[2] McKinney *v.* Reader, 7 Watts, 123.

[3] Phipps *v.* Sculthorpe, 1 Barn. & Ald. 50.

[4] Matthews *v.* Sawell, 8 Taunt. 270.

term, made another lease to a third party, and, it becoming a question whether the original lessee had so assented to the transaction as to determine his interest by operation of law, his lease was produced from the lessor's custody with the seals torn off, and it was proved to be the custom to send in old leases to the lessor's office before a renewal was made, it was held that there was evidence, particularly that of the custom, from which the jury might infer that the original lessee had assented to the making of the second lease, so that his tenancy had been regularly determined.[1] So, where the rent was regularly paid by a third person, who occupied for two years after the original tenant disappeared, the court refused to set aside a verdict finding that the landlord had accepted the former as his tenant.[2] Perhaps, however, the mere fact of receiving a payment of rent from a new occupant should not be held to discharge the original tenant;[3] but where rent is received from the new tenant as an original and not a sub-tenant, the landlord, it is held, is estopped to deny a legal surrender of the first lease.[4]

§ 57. The acts of landlord or tenant which will estop him to deny a surrender being, as we have seen, such acts as are plainly irreconcilable with an intention to continue the relation of landlord and tenant, it will be clear that a landlord may do such acts as are necessary and reasonable for the preservation of his property during the vacation of it by a tenant, without producing such a consequence. Thus advertising premises to let or sell, the tenant having quitted, does not estop the landlord to hold him for the rent until a new tenant be put in.[5] But, on the other hand, a mere protesta-

[1] Walker *v.* Richardson, 2 Mees. & W. 882.

[2] Woodcock *v.* Nuth, 8 Bing. 170.

[3] Copeland *v.* Watts, 1 Stark. 95.

[4] Smith *v.* Niver, 2 Barb. (N. Y.) 180; Bailey *v.* Delaplaine, 1 Sandf. (N. Y.) 5. See Wilson *v.* Lester, 64 Barb. (N. Y.) 431; Vandekar *v.* Reeves, 40 Hun (N. Y.) 430.

[5] Redpath *v.* Roberts, 3 Esp. 225. It will be observed that in Reeve *v.* Bird, 1 Cromp. M. & R. 31, there was an actual admission of a new tenant to part of the premises, besides the advertising to let or sell.

tion against a surrender will not prevail against such acts as must be held to work one, or the party not in fault be left helpless indefinitely; where a tenant quitted the premises and absconded with his family and effects, and upon the landlord resuming possession, the former tenant undertook to sustain an action against him from his retreat, it was held that he had surrendered his term by abandonment.[1]

[1] McKinney *v.* Reader, 7 Watts (Pa.) 123.

CHAPTER V.

CONVEYANCES BY OPERATION OF LAW, ETC.

§ 58. In the present chapter, which closes our consideration of the three first sections of the statute, it is proposed to inquire how far, if at all, an estate in land may be still created or transferred by manual or symbolical acts of the parties, without writing, and what are conveyances by act and operation of law; using the term conveyances in a somewhat restricted sense, not embracing the making, surrender, or assignment of leases, as that branch of conveyances has been already treated under the sections and clauses of the statute having particular reference to them.

§ 59. The general principle that cancelling, altering, or redelivering the title-deeds of corporeal interests in lands does not operate to revest the land in the grantor is too familiar to require the citation of authorities. Lord Chief Justice Eyre declared in the case of Bolton *v.* The Bishop of Carlisle,[1] that he would hold the law to be the same with respect to incorporeal hereditaments, which lie in grant and were conveyed without livery; but undoubtedly the weight of opinion is against this suggestion.[2] For things which are said to lie in grant are conveyed by means of the grant; the deed itself is the essential instrumentality of transfer; but in regard to corporeal estates, livery of seisin is that instrumentality, and the deed is only the written evidence of it. The principle, as above expressed, may be illustrated by the cases in which a deed of land is altered in some material respect by the

[1] Bolton *v.* Bp. of Carlisle, 2 H. Bl. 259.

[2] Gilbert Evid. 111, 112; Buller N. P. 267; Roberts on Frauds, 251.

grantee. In these, it is held, that as to him or those taking from him, with notice of the alteration, the deed is avoided, and neither he nor they can avail themselves of it in evidence, nor supply the want of it by parol testimony.[1] But, though such alteration be with a fraudulent intent, yet if there be a counterpart of the original deed in the hands of the grantor, the grantee may sustain himself upon it and use it to prove his title;[2] the alteration having no effect to devest the title,[3] but only to prevent the party making it, and those who claim under him with notice, from using it for the purposes of a deed, by proving property by it or obtaining redress upon its covenants.

§ 60. There is, however, a class of cases in which, while the general principle, as above stated, is carefully recognized, the courts in some of the States have allowed a certain effect to the cancellation of title-deeds or their redelivery to the grantor, which appears at first sight to be in contravention of the statute. Thus, where a deed has been given and not yet recorded, and the grantee, wishing to sell the estate, delivers up and cancels his deed, and the grantor executes a new deed to the purchaser, the title of the latter is good. Such, at least, is the doctrine held in most of the New England States, and in New Jersey and Alabama; though it seems not to be accepted in Connecticut, New York, or Kentucky.[4] In the first-named States, the general principle is laid down that the voluntary surrender or cancellation of an unrecorded deed, with intent to revest the estate in the grantor, operates as a

[1] Chesley *v.* Frost, 1 N. H. 145; Barrett *v.* Thorndike, 1 Greenl. (Me.) 73; Jackson *v.* Gould, 7 Wend. (N. Y.) 364.

[2] Lewis *v.* Payn, 8 Cowen (N. Y.) 71.

[3] Rifener *v.* Bowman, 53 Pa. St. 313.

[4] Holbrook *v.* Tirrell, 9 Pick. (Mass.) 105; Nason *v.* Grant, 21 Me. 160; Patterson *v.* Yeaton, 47 Me. 314; Mussey *v.* Holt, 24 N. H. 248; Farrar *v.* Farrar, 4 N. H. 191; Tomson *v.* Ward, 1 N. H. 9; Dodge *v.* Dodge, 33 N. H. 487; Faulks *v.* Burns, 1 Green (N. J.) Ch. 2 50; Mallory *v.* Stodder, 6 Ala. 801. See Cravener *v.* Bowser, 4 Pa St. 259; Gilbert *v.* Bulkley, 5 Conn. 262; Coe *v.* Turner, 5 Conn. 86; Holmes *v.* Trout, 7 Peters (U. S.) 171; Raynor *v.* Wilson, 6 Hill (N. Y.) 469; Parker *v.* Kane, 22 How. (U. S.) 1.

reconveyance to him;[1] but such a transaction is good only when fairly conducted, and when the rights of third parties have not intervened.[2] It has been held in Massachusetts that it was good under these conditions, though the first grantee had been in possession for thirteen years; but this was an early case and does not seem reconcilable with the great number of cases, some of which are Massachusetts cases, holding that when real estate has once vested by transmutation of possession it cannot be devested by cancelling or surrendering the deed.[3]

§ 61. The principle on which the doctrine of the cases referred to in the preceding section is supported, is explained, and shown to be not irreconcilable with the statute, by Chief Jutice Shaw, who said, in delivering the judgment of the Supreme Court of Massachusetts, "Such cancellation does not operate by way of transfer, nor, strictly speaking, by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence, by which alone the claim [of the first grantee] could be supported."[4] The same ground is taken, and perhaps more precisely stated, by the Supreme Court of New Hampshire: "The grantee having put it out of his power to produce the deed, the law will not allow him to introduce secondary evidence in violation of his undertaking, and to defeat the fair intention of the parties."[5] But in the same court, in a case where an unrecorded deed was delivered back, not with the

[1] Farrar *v.* Farrar, Tomson *v.* Ward, and Mallory *v.* Stodder, just cited. See also Trull *v.* Skinner, 17 Pick. (Mass.) 213; where cancelling a deed of defeasance by agreement was held to make the estate absolute in the mortgagee. Also Sherburne *v.* Fuller, 5 Mass 133.

[2] Trull *v.* Skinner, 17 Pick. (Mass.) 213; and Marshall *v.* Fisk, 6 Mass. 24; Hall *v.* McDuff, 24 Me. 311.

[3] Commonwealth *v.* Dudley, 10 Mass. 403. See a note to this case, in which the decision is criticised, and many authorities collected. See also Steel *v.* Steel, 4 Allen, 417; Lawrence *v.* Stratton, 6 Cush. 163; Howe *v.* Wilder, 11 Gray, 267.

[4] Trull *v.* Skinner, 17 Pick. 215.

[5] Mussey *v.* Holt, 24 N. H. 252. Also Farrar *v.* Farrar, 4 N. H. 191.

intent that the land should become the grantor's, but that another deed to a third party should be substituted, it was held that the grantee might prove contents of his deed, the transaction being in good faith, and the right of third parties not having intervened.[1] Again, the cancellation of a deed unrecorded and before possession taken, may be said to destroy the grantee's inchoate title leaving the grantor in possession of his former title;[2] or if it does not have that effect, it at least places it in the power of the grantor to sell or encumber the land, and a *bonâ fide* purchaser or encumbrancer without notice would have the paramount interest.[3] In any view, however, we may safely say that to allow validity to such transactions, according to the fair intentions of the parties, is not necessarily an infraction of the Statute of Frauds.

§ 62. There is one mode of conveying an interest in lands without writing, which is firmly established in the English law by a series of decisions beginning with Russel *v.* Russel,[4] in 1783, and that is by equitable mortgage arising on the deposit of title-deeds. The rule in such cases is stated to be, that when a debtor deposits his title-deeds with a creditor, as security for an antecedent debt or upon a fresh loan of money, it is a valid agreement for a mortgage between the parties, and is not within the operation of the Statute of Frauds.[5] The primary intention must be to execute an immediate pledge, and thereupon an engagement is implied to do whatever may be necessary to render the pledge available. Accordingly, a deposit of the title-deeds for the simple purpose of having a mortgage drawn, and in the absence of any indebtedness on the part of the depositor, would not raise an equitable mortgage; but if there were a debt then or previously incurred, the deposit would create an equitable mortgage,

[1] Bank *v.* Eastman, 44 N. H. 438.

[2] Tomson *v.* Ward, 1 N. H. 9.

[3] Mallory *v.* Stodder, 6 Ala. 801.

[4] Russel *v.* Russel, 1 Bro. Ch. 269. See cases referred to in other notes to this section.

[5] 2 Story Eq. Jur. § 1020.

though there should not be a word spoken between the parties at the time.[1] The lien thus created will be extended to cover future advances, if an intention to do so is made out by evidence;[2] and, though the deposit be made for a particular purpose, it seems that that purpose may be enlarged by subsequent agreement, without involving the necessity of actual redelivery.[3] Where, however, the parties accompany the deposit by a written memorandum to explain its purpose, parol evidence will not be admitted to show any other intention. Indeed, in the absence of any written memorandum, a mere deposit will never create an equitable mortgage as against strangers, except when it can be accounted for in no other way, or the holder is a stranger to the title and the lands;[4] and the delivery of such a memorandum to the creditor will not supply the place of the actual deposit of the title-deeds with him.[5] But when the party creating the charge has only a partial interest in the property charged, or for some other reason is not in a situation to deposit the deeds, a memorandum, showing an intention to create an equitable mortgage, may be sufficient.[6] The deposit of the deeds may be with some person on behalf of the creditor, and over whom the depositor has no control, provided the purpose of the deposit be proved; a deposit with the mortgagor's own wife has been held insufficient; but a deposit with his solicitor may be

[1] Norris *v.* Wilkinson, 12 Ves. 192; Keys *v.* Williams, 3 Young & C. 55; Hockley *v.* Bantock, 1 Russ. 141; Brizick *v.* Manners, 9 Mod. 284; Hooper, *ex parte*, 19 Ves. 177; Pain *v.* Smith, 2 Myl. & K. 417.

[2] Whitworth *v.* Gaugain, 3 Hare, 416; Langston, *ex parte*, 17 Ves. 228. But see Hooper, *ex parte*, 19 Ves. 477.

[3] Kensington, *ex parte*, 2 Ves. & B. 79; Nettleship, *ex parte*, 2 M. D. & De G. 124.

[4] Coote on Mortgages, 217; Bozon *v.* Williams, 3 Young & J. 150; Allen *v.* Knight, 5 Hare, 272; Hooper, *ex parte*, 19 Ves. 477.

[5] Coming, *ex parte*, 9 Ves. 115.

[6] Sheffield Union Co., *ex parte*, 13 L. T. N. S. 477; Smith, *ex parte*, 2 M. D. & De G. 587; Daw *v.* Terrell, 33 Beav. 218; Miller, Equitable Mortgages, 24.

good.[1] A mere verbal statement by the owner of the property to the alleged mortgagee, that he holds the deeds for the mortgagee, will not suffice to create an equitable mortgage.[2]

§ 62 *a.* It was for some time doubtful whether a deposit of part only of the title-deeds of an estate would be a sufficient deposit to create an equitable mortgage. In the case of Wetherell, *ex parte*, it was held that a deposit of part of the deeds, together with a written statement that the whole was deposited, was sufficient evidence to raise the presumption of an equitable mortgage.[3] In Pearse, *ex parte*, on the other hand, a part deposit alone was held insufficient.[4] The next case, Arkwright, *ex parte*, followed the doctrine of Wetherell, *ex parte*, although the only title-deed deposited was a paid-off mortgage.[5] In Chippendale, *ex parte*, there was a deposit of part of the deeds, but no writing; yet the court held that, in the absence of evidence to the contrary, this would make an equitable mortgage;[6] and it seems now well settled that an equitable mortgage may be created, though a part only of the title-deeds be deposited.[7] A somewhat similar question arises where it is intended to obtain advances upon several estates, but the deeds of a part only are deposited. Thus, in Jones *v.* Williams, deeds of some of the estates were deposited, and with them a statement that they were the deeds of all. It was held by Romilly, M. R., that, although the parties making the advances were deceived, and firmly believed that they had the deeds of all the estates, equitable mortgages were created only upon those the deeds of which were actually deposited. "To treat it as an actual charge on the property not included in any of the deeds,

[1] Coming, *ex parte*, 9 Ves. 115; Lloyd *v.* Attwood, 3 De G. & J. 614.

[2] *Ex parte* Broderick, 18 Q. B. D. 766.

[3] Wetherell, *ex parte*, 11 Ves. 401.

[4] Pearse, *ex parte*, Buck, 525.

[5] Arkwright, *ex parte*, 3 M. D. & De G. 129.

[6] Chippendale, *ex parte*, 1 Deac. 67.

[7] Lacon *v.* Allen, 3 Drew. 582. And see Roberts *v.* Croft, 2 De G. & J. 1. Dixon *v.* Mucklestone, L. R. 8 Ch. 155.

would be giving a greater extent than would be possible to the doctrine of equitable deposits."[1] So it has been held that an agreement to deposit a deed of title not now in existence does not make an equitable mortgage.[2]

§ 62 *b*. The case of Burton *v.* Gray[3] is an important one in connection with the subject of equitable mortgages. The plaintiff put certain title-deeds in the hands of his brother, to enable him to borrow money upon them from a friend. The brother, however, took the deeds to the defendant, a banker, and produced a letter, purporting to be a direction to the banker from the plaintiff, to advance to his brother £1,000 for a week, upon the security of the deeds. The defendant took the deeds, and lent the depositor money upon them at different times, but not as directed in the letter. The plaintiff's brother being afterwards convicted of forgery, and transported, the defendant threatened to foreclose his alleged equitable mortgage, to reimburse himself for the sums advanced. Plaintiff thereupon brought this bill that defendant might be decreed to give back the title-deeds, and the decree was granted. In the course of the hearing, it appeared that the letter of direction was probably a forgery, but the Master of the Rolls held that, whether it was so, or not, the decree must issue; deciding that, even if the letter were genuine, the defendants had not complied with the conditions it prescribed, and that if a forgery, the mere deposit of deeds, by one not authorized, could not, of itself, create an equitable mortgage on the property against the rights of the true owner. Sir John Romilly's decision was affirmed, on appeal, by Giffard, V. C. The case is valuable in showing the effect of the mere deposit of title-deeds, and of the conditions necessary to create the presumption of such an agreement that equity will enforce it as an equitable mortgage.

[1] Jones *v.* Williams, 24 Beav. 55.
[2] Parry, *ex parte*, 3 M. D. & De G. 252.
[3] Burton *v.* Gray, L. R. 8 Ch. 932.

§ 63. The whole doctrine of the creation, by the deposit of title-deeds, of an equitable lien which is preferred to a subsequent purchaser or mortgagee of the legal estate with notice, has been condemned by the most eminent English judges, and the disposition of the courts is to restrict rather than to enlarge its operation. It is not therefore ordinarily applied to enforce parol agreements to make a mortgage or to make a deposit of title-deeds for that purpose.[1]

§ 64. The doctrine of equitable mortgages arising upon the deposit of title-deeds does not prevail generally in this country. It is, however, accepted in New York,[2] in Rhode Island,[3] in Wisconsin,[4] apparently in South Carolina,[5] and perhaps in Maine.[6] In North Carolina,[7] in Pennsylvania,[8] in Tennessee,[9] in Ohio,[10] in Alabama,[11] and apparently in Kentucky,[12] it is rejected. In Vermont[13] it has been treated as an open question. In Mississippi[14] it appears that the deposit of title-deeds may effect an equitable mortgage for a term of time not longer than that for which, by the statute as there re-enacted, an estate in land may be created verbally.

§ 65. Upon the question whether a mortgage of land is a conveyance within the Statute of Frauds, so as to be not assignable without writing, very eminent authorities are

[1] 2 Story Eq. Jur. § 1020; 4 Kent Com. 151.

[2] Rockwell *v.* Hobby, 2 Sand. Ch. 9. See Jackson *v.* Parkhurst, 4 Wend. 376; Hammond *v.* Bush, 8 Abb. Pr. 166; Chase *v.* Peck, 21 N. Y. 584.

[3] Hackett *v.* Reynolds, 4 R. I. 512.

[4] Jarvis *v.* Dutcher, 16 Wisc. 307.

[5] Welsh *v.* Usher, 2 Hill Ch. 166.

[6] Hall *v.* McDuff, 24 Me. 311.

[7] Harper *v.* Spainhour, 64 N. C. 629.

[8] Bowers *v.* Oyster, 3 Penn. Rep. 239; Shitz *v.* Dieffenbach, 3 Pa. St. 233; Rickett *v.* Madeira, 1 Rawle, 325.

[9] Meador *v.* Meador, 3 Heiskell, 562.

[10] Probasco *v.* Johnson, 2 Disney, 96.

[11] Lehman *v.* Collins, 69 Ala. 127.

[12] Vanmeter *v.* McFaddin, 8 B. Mon. 435.

[13] Bicknell *v.* Bicknell, 31 Vt. 498.

[14] Gothard *v.* Flynn, 25 Miss. 58.

divided. In the case of Martin *v.* Mowlin, decided as early as 1760, the question before the court seems to have been, whether, under a general bequest of a testator's personal property, including his debts, his interest as mortgagee of land would pass. Lord Mansfield said: "A mortgage is a charge upon the land: and whatever would give the money will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence: nay, it would do it, though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the Statute of Frauds."[1] The view here taken by Lord Mansfield is adopted by Powell in the Treatise on Mortgages, but vigorously opposed by Mr. Roberts in his work upon the construction of the statute.[2] Considering a mortgage according to its strict legal effect, we should say with the latter author that "it should seem extraordinary indeed that, with respect to that part of the complex transaction called a mortgage, which consists in the conveyance of the land itself, the Statute of Frauds should be restrained from applying to it." The doctrine in Martin *v.* Mowlin, however, is that of courts of equity both in this country and in England, and the tendency of the courts of law has been constantly towards conformity with it.[3] In the different States of the Union, opposite views upon this question are strongly asserted, although upon the whole the preponderance of judicial opinion may be fairly said to be, that a mortgagee's interest will pass, at law as well as in equity, with the debt

[1] Martin *v.* Mowlin, 2 Burr. 978.

[2] Powell on Mortgages, 187; Roberts on Frauds, 272.

[3] Thornbrough *v.* Baker, Cas. in Ch. 283; Matthews *v.* Wallwyn, 4 Ves. 118; Richards *v.* Syms, Barn. Ch. 90, per Lord Hardwicke; Green *v.* Hart, 1 Johns. (N. Y.) 580; Aymar *v.* Bill, 5 Johns. (N. Y.) Ch 570; 2 Story Eq. Jur. §§ 1013–1018; 4 Kent Com. 160.

to which it is collateral, and consequently without the formalities imposed by the statute upon the alienation of lands.[1]

[1] 1 Powell on Mortgages, 187; Rex *v.* St Michael's, 2 Doug. 630; Eaton *v.* Jaques, 2 Doug. 455; Chimney *v.* Blackburne, 1 H. Bl. 117, note; Silvester *v.* Jarman, 10 Price, 78; 4 Kent Com. 160. The doctrine in Martin *v.* Mowlin has been affirmed in New York, both at law and in equity. Green *v.* Hart, 1 Johns. 580; Jackson *v.* Willard, 4 Johns. 41; Runyan *v.* Mersereau, 11 Johns. 534; Wilson *v.* Troup, 2 Cowen, 195; Johnson *v.* Hart, 3 Johns. Cas. 322; Aymar *v.* Bill, 5 Johns. Ch. 570; Jackson *v.* Bronson, 19 Johns. 325; Gillett *v.* Campbell, 1 Denio, 520. And in the New York Court of Appeals, Malins *v.* Brown, 4 N. Y. 403, it was said that, such being the law of that State, it was doubtful if a parol agreement to discharge the mortgage without payment of the debt would not be good. It is adopted also in *New Hampshire*, Southerin *v.* Mendum, 5 N. H. 420, 432; Rigney *v.* Lovejoy, 13 N. H. 247; Bell *v.* Morse, 6 N. H. 205; Ellison *v.* Daniels, 11 N. H. 274; Parish *v.* Gilmanton, 11 N. H. 298; Whittemore *v.* Gibbs, 24 N. H. 484; Page *v.* Pierce, 26 N. H. 317. In *Connecticut*, Crosby *v.* Brownson, 2 Day, 425; Dudley *v.* Cadwell, 19 Conn. 218; Clark *v.* Beach, 6 Conn. 159; Huntington *v.* Smith, 4 Conn. 235; Barkhamsted *v.* Farmington, 2 Conn. 600. In *Vermont*, Pratt *v.* Bank of Bennington, 10 Vt. 293; Keyes *v.* Wood, 21 Vt. 331; Belding *v.* Manley, 21 Vt. 550; Mussey *v.* Bates, 65 Vt. 449. In *Illinois*, McConnell *v.* Hodson, 2 Gilm. 640; Mapps *v.* Sharpe, 32 Ill. 13. In *Kentucky*, Burdett *v.* Clay, 8 B. Mon. 287; Waller *v.* Tate, 4 B. Mon. 529. In *Mississippi*, Dick *v.* Mawry, 9 Smedes & M. 448; Lewis *v.* Starke, 10 Smedes & M. 120; Henderson *v.* Herrod, 10 Smedes & M. 631. In *Tennessee*, Ewing *v.* Arthur, 1 Humph. 537. In *Alabama*, McVay *v.* Bloodgood, 9 Port. 547. In *California*, Bennett *v.* Solomon, 6 Cal. 134; Tapia *v.* Demartini, 77 Cal. 383. In *Iowa*, Bank of the State of Indiana *v.* Anderson, 14 Iowa, 544. In *Wisconsin*, Croft *v.* Bunster, 9 Wisc. 503. In *Louisiana*, Scott *v.* Turner, 15 La. Ann. 346. In *Michigan*, Martin *v.* McReynolds, 6 Mich. 70. In *Missouri*, Potter *v.* Stevens, 40 Mo. 229. In *North Carolina*, Hyman *v.* Devereux, 63 N. C. 624. In *Ohio*, Paine *v.* French, 4 Ohio, 318. In *Texas*, Perkins *v.* Sterne, 23 Tex. 561. In *Massachusetts*, it is held that, upon the transfer of the debt, the equitable title to the mortgage is in the transferee, but the legal title remains in the transferor, the parties holding to each other the relation of *cestui que trust* and trustee. Parsons *v.* Welles, 17 Mass. 419, 423; Crane *v.* March, 4 Pick. 131; Young *v.* Miller, 6 Gray, 152; Wolcott *v.* Winchester, 15 Gray, 464. See Morris *v.* Bacon, 123 Mass. 58. It is rejected in *Maine*, see Vose *v.* Handy, 2 Greenl. 322, per Mellen, C. J.; Smith *v.* Kelley, 27 Me. 237. And perhaps in *New Jersey*, McDermot *v.* Butler, 5 Halst. Law, 158; but see Sayre *v.* Fredericks, 16 N. J. Eq. 205; and in *Maryland*, Evans *v.* Merriken, 8 Gill & J. 39. In those States where paying the debt does not discharge the mortgage, of course a parol

This doctrine is not opposed by the circumstance that in many of the States provision is made for the discharge of mortgages, after payment, by the entry of satisfaction in the margin of the registry; for this may mean only to provide a remedy for damages sustained by the refusal of the mortgagee to put an acknowledgment of such payment on record.[1]

§ 66. It has been suggested that the equitable doctrine we have been considering might be better reconciled with the statute by regarding the mortgagee's interest as passing (upon the assignment of the debt) by way of a trust, which trust, as it arises by operation of law, would be saved from the section of the statute which is directed against verbal evidence of trusts in land. But besides the difficulty of bringing such a case fairly within the terms of that section, it seems unnecessary to go beyond the plain rule derived from the nature of the contract of mortgage as interpreted to be, on the one hand a conditional sale of the land, or on the other a mere security for the debt.[2] It appears, however, that a mortgage could never pass by mere parol gift, for want of the possibility of actual delivery of either the debt or the security.[3]

§ 67. The most common of those cases in which the verbal agreements of the parties, attended by certain acts *in pais*, are sometimes said to transfer the title to land, are verbal partitions and verbal exchanges, each followed by possession accordingly. Verbal licenses to be exercised upon land, which might, in one view, belong to this division of the subject, have already been discussed under the head of leases.

§ 68. At common law, partitions might be made between joint tenants by deed only, between tenants in common by

agreement to make no claim under a mortgage, though the debt remain, cannot be enforced. Parker *v.* Barker, 2 Met. (Mass.) 423; Hunt *v.* Maynard, 6 Pick. (Mass.) 489.

[1] Gray *v.* Jenks, 3 Mas. (C. C.) 520; 4 Kent Com. 193–196, 4th ed.

[2] 2 Greenl. Cruise, 91.

[3] Roberts on Frauds, 277.

livery only without deed, and between coparceners verbally without deed or livery. Since the Statute of Frauds, it is settled in England that tenants in common and coparceners can only make partition by writing, as provided in the statute; while the necessity for a deed between joint tenants remains as at common law.[1] In several of the United States, however, partitions between tenants in common, followed by occupation in severalty, have, for certain purposes, been held valid without writing, even at law. Thus in New York, in the case of Jackson *v.* Bradt, in 1804, tenants in common had made partition and had occupied in severalty for fifty years; but there was never any writing between them, except a covenant (though in the report it is designated as a *deed* of partition), made after the division, by which they agreed with each other, for themselves, their heirs and assigns, that the division so made and done should thenceforth and forever stand and remain. On the trial it was objected that this deed was a mere covenant, and did not contain the necessary granting words to sever the estate. Kent, J., said upon this part of the case: "The division *and the deed* between the proprietors by which they covenanted to abide by it, and the separate possessions taken in pursuance of that division, were sufficient to sever the tenancy in common, which consisted in nothing but a unity of possession." The deed being inoperative as such, it would seem to be the effect of this decision, that the division and the separate possession were sufficient to effect a valid partition for the purposes of the plaintiff, who sued in ejectment against a mere tenant at will.[2] In Jackson *v.* Harder it was held that a plaintiff, upon proof of parol partition and separate possession, could recover in an action of ejectment against a mere intruder.[3] In Jackson *v.*

[1] Roberts on Frauds, 285; 2 Bl. Com. 323; Allnatt on Partitions, 130; Johnson *v.* Wilson, Willes, 248; Ireland *v.* Rittle, 1 Atk. 541; Whaley *v.* Dawson, 2 Schoales & L. 367.

[2] Jackson *v.* Bradt, 2 Caines, 169.

[3] Jackson *v.* Harder, 4 Johns. 202.

Vosburgh, the defendant in ejectment gave evidence tending to show parol partition and occupation in accordance with it, but offered no proof of a tenancy in common among those whom he alleged to have made it. The plaintiff alleged that the title to the whole had vested in his grantor, as heir-at-law. The plaintiff had judgment, and the court, on appeal, affirmed it, holding that enough had not been proved by the defendant to devest the plaintiff of his title as claimed under the heir-at-law.[1] In Ryerss *v.* Wheeler, it was held, that ejectment could be maintained against a stranger, upon proof of partition, although it did not appear that all the tenants in common had acquiesced in it.[2] In Wood *v.* Fleet, said in the opinion of the Court of Appeals to be an action brought to "affect a division or partition of real estate," a parol partition had been made by two brothers, tenants in common, by which the referee found the property to have been fairly divided. One of them had made a quitclaim deed, and the possession had continued nearly twenty years. Under these circumstances the court declined to set the partition aside at the suit of the sister of the co-tenants, who before the partition had conveyed to them all her interest in the property previously held in common by the three.[3]

§ 69. In Mississippi, where a parol partition was sought to be sustained by a bill in equity for specific performance, it was held that such an agreement was "not within the letter or spirit of the Mississippi statute, which only affects contracts for the *sale* of lands."[4] The same decision was made in Texas, under a similar provision of the statute of that State,[5] also in Tennessee.[6] In North Carolina, in an action of trespass brought by one co-tenant against the other, the

[1] Jackson *v.* Vosburgh, 9 Johns. 270.

[2] Ryerss *v.* Wheeler, 25 Wend. 434.

[3] Wood *v.* Fleet, 36 N. Y. 499.

[4] Natchez *v.* Vandervelde, 31 Miss. 706.

[5] Stuart *v.* Baker, 17 Texas, 417; Aycock *v.* Kimbrough, 71 Texas, 330; Martin *v.* Harris, 26 S. W. Rep. (Tex.) 91.

[6] Meacham *v.* Meacham, 91 Tenn. 532.

plaintiff proved the co-tenancy and parol partition, and rested. Defendant then moved for a nonsuit, which was granted, and confirmed on appeal.[1] But in a similar action in Illinois, where the plaintiff offered evidence of a parol partition, and it was excluded, this ruling was held erroneous, on appeal.[2]

§ 70. An oral agreement for partition, followed by entry and occupation, which might be enforced in equity by a bill for specific performance of the express or implied agreement of either party to convey his interest in the portion assigned to the other, has been held a sufficient defence to an action of ejectment brought by one partitioner against the other's grantee, to recover an undivided half of the premises thus granted.[3]

§ 71. The decisions in other States seem to favor the English view of this question, and to be opposed to allowing a verbal partition to be effectual, even to sever the possessions of tenants in common.[4] In New Jersey, particularly, the sub-

[1] McPherson *v.* Seguine, 3 Dev. Law, 153, citing Anders *v.* Anders, 2 Dev. Law, 529; Medlin *v.* Steele, 75 N. C. 154.

[2] Grimes *v.* Butts, 65 Ill. 347.

[3] Buzzell *v.* Gallagher, 28 Wisc. 678. See Tomlin *v.* Hilyard, 43 Ill. 300. But where a creditor, having a judgment against one co-tenant, was about to enforce it upon the land held in common, the other co-tenant brought a bill in equity to stay execution upon a part of the land, which he alleged had been set aside to him by an oral partition, after which quit-claim deeds were made, but the deed to him was not recorded until after the judgment debt was incurred. The bill was dismissed on the ground of the complainant's laches in failing to record his deed. Manly *v.* Pettee, 38 Ill. 128; Tate *v.* Foshee, 117 Ind. 322; McKnight *v.* Bell, 135 Pa. St. 358; Wolf *v.* Wolf, 158 Pa. St. 621; Mellon *v.* Read, 114 Pa. St. 647.

[4] Porter *v.* Perkins, 5 Mass. 233; Porter *v.* Hill, 9 Mass. 34; Watson *v.* Kelly, 1 Harr. (N. J.) 517 ; Woodhull *v.* Longstreet, 3 Harr. (N. J.) 405; Richman *v.* Baldwin, 1 Zab. (N. J.) 395; Lloyd *v.* Conover, 1 Dutch. (N. J.) 47; Stuart *v.* Baker, 17 Texas 417; Goodhue *v.* Barnwell, Rice, (S. C.) Eq. 198; Chenery *v.* Dole, 39 Me. 162; Ballou *v.* Hale, 47 N. H. 347. See Hill *v.* Meyers, 43 Pa St. 395. Where each co-tenant had conveyed away a portion of the estate equal to the amount of his share, it was held in Eaton *v.* Tallmadge, 24 Wisc. 217, that the two conveyances amounted to a valid partition, but this was denied, and *semble* rightly, in Duncan *v.* Sylvester, 16 Me. 388; White *v.* O'Bannon, 86 Ky. 93.

ject has received a very full and able examination, and the reasoning of the court is in the highest degree satisfactory. Hornblower, C. J., in delivering the judgment of the Supreme Court of that State against the validity of such a partition, said: "If the partition . . . was valid in law, when did it become so? As soon as it was verbally agreed to, or not until they severally took possession? What, then, shall amount to such possession as to bind the parties? How long must it continue? If for any period less than twenty years, why not ten or five years, or one year or a month, or day? Again, suppose two out of three, or nine out of ten co-tenants enter upon their respective shares, take possession, and make improvements in pursuance of a parol partition; or suppose the lands are not of such a character as to be susceptible of an actual inclosure or occupation; what is to be done in such cases? . . . It is a mistake, in my opinion, to suppose that tenants in common have not such a community of estate as requires under the interest a deed or writing to put an end to. It is true they have only a privity of possession, but that privity gives each tenant in common a freehold in every part of the undivided tract, a right of possession in every square foot of it. Such a right is an interest in land that cannot be transferred, by the very terms of the statute, but by writing."[1]

§ 72. It is worthy of remark, that in all the English cases which have been referred to, the separate possession had existed for more than twenty years after the verbal partition had been made; nor does the question of the effect at law of such possession, continued for a less time, appear to have arisen. In the case of Woodhull *v.* Longstreet, just quoted, where it had been continued five or six years only, and it was decided that it had no effect to sever the possession, Hornblower, C. J., speaking of the leading New York case, Jackson *v.* Bradt, says: "If the court intended to say that

[1] Woodhull *v.* Longstreet, 3 Harr. 405.

a parol partition, followed by twenty years' possession in conformity with it, will be sufficient, I shall not differ with them." And there seems to be no reason why the presumption of a valid grant after the lapse of twenty years should not prevail in such cases, as in others of adverse possession for that length of time.[1] But it is held that where a parol partition has been made between tenants in common, and possession held in severalty according to it for a considerable period, though for less than twenty years, upon a suit in equity afterwards brought to compel a partition, the division thus made and acted on by the parties will be considered fair and equal.[2]

§ 73. It may be remarked, in regard to partitions between joint tenants, that as the reasoning adopted in cases of tenants in common, namely, that the only privity by which they are united is privity of possession, and that their several possessions may be well ascertained without writing, is inapplicable, the law remains the same as before the statute, and such a partition, to be valid, must be by deed.[3]

§ 74. In courts of equity, verbal partitions are often treated

[1] Marcy *v.* Marcy, 6 Met. (Mass.) 360; Dall *v.* Brown, 5 Cush. (Mass.) 289; Duncan *v.* Sylvester, 16 Me. 388; Townsend *v.* Downer, 32 Vt. 183.

[2] Pringle *v.* Sturgeon, Litt. (Ky.) Sel. Cas. 112; Polhemus *v.* Hodson, 19 N. J. Eq. 63; Moore *v.* Kerr, 46 Ind. 468; Hazen *v.* Barnett, 50 Mo. 506. Compare Wood *v.* Fleet, 36 N. Y. 499. Whatever latitude may be allowed in effecting a partition between tenants in common, a mere sale or contract of sale by one of them to the other of part or the whole of his property, must be in writing; for the Statute of Frauds applies to any contract for a transfer of an interest in land, between whatsoever descriptions of parties it is made. Galbreath *v.* Galbreath, 5 Watts (Pa.) 146.

[3] 4 Greenl. Cruise, 77; Roberts on Frauds, 283-285; Porter *v.* Hill, 9 Mass. 34. And see as to partition by tenants in mortgage, Perkins *v.* Pitts, 11 Mass. 125. In Haughabaugh *v.* Honald, 1 Tread. (S. C.) 90, it was said that a joint tenancy might be severed like a tenancy in common; but the case was decided upon other points. Where an estate is held by an equitable title, it is said that partition may be made by parol. Maul *v.* Rider, 51 Pa. St. 377; Dow *v.* Jewell, 18 N. H. 340. But compare § 229, *post.*

as contracts, which, when followed by possession, will be specifically enforced in like manner as other contracts for land, upon the equitable ground of part-performance. Such cases seem to belong entirely, therefore, to a subsequent part of this treatise, where the principles upon which courts of equity proceed in cases of part-performance of contracts affected by the Statute of Frauds are considered. It may be mentioned that this appears to be the proper view in which to regard the numerous Pennsylvania decisions on this subject; the custom of the law courts of that State being to administer equity through the forms of law.[1]

§ 74 *a*. The proprietors of common and undivided lands, in the New England States, holding their lands by a grant from the State, have been accustomed, it is said, from very early times, to make partition of their lands by vote, without deed, and these parol partitions have always been sustained by the courts, an exception to the strict rule of law being made in their favor, to avoid the mischief and public inconvenience which would result if the custom that had so long prevailed should be declared contrary to the law.[2] In the cases cited below, attempts have sometimes been made to find some other explanation, but the doctrine has generally been regarded as exceptional, and supported only on the grounds of custom and expediency.[3]

[1] McMahan *v.* McMahan, 13 Pa. St. 376; Ebert *v.* Wood, 1 Binn. 216; Galbreath *v.* Galbreath, 5 Watts, 146; Calhoun *v.* Hays, 8 Watts & S. 127; Rhodes *v.* Frick, 6 Watts, 315; Rhine *v.* Robinson, 27 Pa. St. 30. See also Weed *v.* Terry, 2 Doug. (Mich.) 344; Cummins *v.* Nutt, Wright (Ohio) 713; Goodhue *v.* Barnwell, Rice (S. C.) Eq. 198; Young *v.* Frost, 1 Md. 377; Sweeny *v.* Miller, 34 Me. 388; Buzzell *v.* Gallagher, 28 Wisc. 678; Bruce *v.* Osgood, 113 Ind. 360.

[2] Coburn *v.* Ellenwood, 4 N. H. 99.

[3] Codman *v.* Winslow, 10 Mass. 146; Coburn *v.* Ellenwood, 4 N. H. 99; Corbett *v.* Norcross, 35 N. H. 99; Thorndike *v.* Barrett, 3 Greenl. (Me.) 380; Cary *v.* Whitney, 48 Me. 526; Abbot *v.* Mills, 3 Vt. 521; Stiles *v.* Curtis, 4 Day (Conn.) 328. In Angell & Ames, Corporations, Chap. VI., these proprietorships are treated as *quasi* corporations, and receive a full and careful discussion.

§ 75. Where the proprietors of adjoining lands have agreed by parol upon a line for the settlement of a disputed boundary between their estates, and taken possession accordingly, such agreement and occupation is evidence that the line agreed upon is the true boundary,[1] and, in the absence of higher evidence of title, may be decisive.[2] Occupation in accordance with the agreement, if continued and acquiesced in by the parties during the length of time required to bar entry, will give an indefeasible title;[3] but occupying and improving the land up to the line will not, in the absence of actual fraud, bar an action by the other party to recover possession, brought before the statutory period has elapsed.[4] The oral agreement as to the boundary will be a license to either party to enter and occupy up to the line so fixed, and a justification of any trespass committed by so doing, until notice of revocation is given.[5] It seems to have been held in Tennessee, that if

[1] Whitney *v.* Holmes, 15 Mass. 152; Byam *v.* Robbins, 6 Allen (Mass.) 63; Prop'rs Liverpool Wharf *v.* Prescott, 4 Allen (Mass.) 22; Davis *v.* Townsend, 10 Barb. (N. Y.) 333; Raynor *v.* Timerson, 51 Barb. (N. Y.) 517; Meyers *v.* Johnson, 15 Ind. 261. See Carleton *v.* Redington, 21 N. H. 291; Evars *v.* Kamphaus, 59 Pa. St. 379.

[2] Vosburgh *v.* Teator, 32 N. Y. 561; Goodridge *v.* Dustin, 5 Met. (Mass.) 363; Dudley *v.* Elkins, 39 N. H. 78; Lindsay *v.* Springer, 4 Harr. (Del.) 547; Russell *v.* Maloney, 39 Vt. 583; Shelton *v.* Alcox, 11 Conn. 240. See Kincaid *v.* Dormey, 47 Mo. 337; Smith *v.* Hamilton, 20 Mich. 433; Ferguson *v.* Crick, 23 S. W. Rep. (Ky.) 668; Grigsby *v.* Combs, 21 S. W. Rep. (Ky.) 37.

[3] Boyd *v.* Graves, 4 Wheat. (U. S.) 513; Jones *v.* Smith, 64 N. Y. 180; Davis *v.* Judge, 46 Vt. 655. See § 269, *post;* John *v.* Sabattis, 69 Me. 473; White *v.* Spreckels, 75 Cal. 610.

[4] Prop'rs Liverpool Wharf *v.* Prescott, 4 Allen (Mass.) 22; Brewer *v.* Boston & Worcester R. R., 5 Met. (Mass.) 478; Tolman *v.* Sparhawk, 5 Met. (Mass.) 469; Raynor *v.* Timerson, 51 Barb. (N. Y.) 517; Warner *v.* Fountain, 28 Wisc. 405. See Story Eq. Jur. § 1543; Reed *v.* Farr, 35 N. Y. 113. *Contra*, Jones *v.* Pashby, 67 Mich. 459; Coleman *v.* Smith, 55 Texas 254; Cavanaugh *v.* Jackson, 91 Cal. 580; Turner *v.* Baker, 64 Mo. 218; Krider *v.* Milner, 99 Mo. 145; Jacobs *v.* Mosely, 91 Mo. 457; Bobo *v.* Richmond, 25 Ohio St. 115.

[5] Dewey *v.* Bordwell, 9 Wend. (N. Y.) 65; Sellick *v.* Addams, 15 Johns. (N. Y.) 197; Palmer *v.* Anderson, 63 N. C. 365. See Whitney *v.* Holmes, 15 Mass. 152; Davis *v.* Townsend, 10 Barb. (N. Y.) 333.

money be paid by either party upon the parol settlement of the boundary line, even where it had been previously in dispute, the settlement will be invalid.[1]

§ 76. By the common law a parol exchange of lands situate in the same county was good, provided each party went into possession of the lands acquired by such exchange. This was one of the ancient common-law methods of transferring real estate, adopted at a time when writing was practised or understood but by few individuals, and it is embraced in the general reform effected by the Statute of Frauds. It is undoubtedly the settled law of this country, as of England, that a conveyance of lands by verbal exchange or barter merely is invalid by reason of that statute.[2] But in regard to this method of transfer, as in regard to verbal partitions, it must be remembered that after the agreement of the parties is executed by possession and occupation accordingly, courts of equity will generally hold it binding upon conscientious grounds, and to prevent fraud.

§ 77. The force of the exception in the third section of the statute in favor of assignments and surrenders which result by operation of law, has been considered heretofore. A few matters belonging to the general head of transfers by operation of law remain to be examined before we close this chapter. In Simonds *v.* Catlin, Kent, J., said that the words, "act and operation of law," were strictly technical, and referred to certain definite estates, such as those by the curtesy and dower, or those created by remitter; and to these may be added, by way of illustration, transfers by bankruptcy

[1] Carroway *v.* Anderson, 1 Humph. 61.

[2] Roberts on Frauds, 285; Pembroke *v.* Thorpe, 3 Swanst. 441, *note;* Lindsley *v.* Coates, 1 Ohio, 243; Newell *v.* Newell, 13 Vt. 24; Clark *v.* Graham, 6 Wheat. (U. S.) 577; Lane *v.* Shackford, 5 N. H. 130; Maydwell *v.* Carroll, 3 Harr. & J. (Md.) 361. See, however, in Pennsylvania, Reynolds *v.* Hewett, 27 Pa. St. 176; Moss *v.* Culver, 64 Pa. St. 414; Brown *v.* Bailey, 159 Pa. St. 121; McLure *v.* Tennille, 89 Ala. 572; Savage *v.* Lee, 101 Ind. 514.

or succession.[1] Where a statute provided that the public might acquire an easement in land by the consent of the owner without writing, it was said by the Supreme Court of New York that this was a case of a transfer by act and operation of law.[2] But it would seem that it is more properly a legislative dispensation with the formalities by which the grantor's consent should be made evident. His consent, his individual act, still remains necessary, and is the operative means of making the transfer. The transfers which are excepted are those which take place by act and operation of law *merely*. Thus, an assignment of a widow's dower is good without deed or writing, for it is not a conveyance to the widow. She holds her estate by appointment of law, and only wants to have that part which she is to enjoy set out and distinguished from the rest, and this may be done by setting it out by metes and bounds, as well as by deed.[3]

§ 78. In the case of Boring *v.* Lemmon, the Maryland Court of Appeals decided that a deed from a sheriff to a vendee at a sale under a *fi. fa.* was not necessary to pass the legal estate, but that the land became vested in the vendee by operation of law.[4] This doctrine is opposed by the great weight of opinion in this country. Mr. Justice Kent, after referring to and criticising a remark of Lord Hardwicke, that a judicial sale of an estate took it entirely out of the statute, says, in the case of Simonds *v.* Catlin, "I cannot consider that observation in chancery as a sufficient authority to set

[1] Simonds *v.* Catlin, 2 Caines (N. Y.) 61; Briles *v.* Pace, 13 Ired. (N. C.) 279. See also Davis *v.* Tingle, 8 B. Mon. (Ky.) 539.

[2] Noyes *v.* Chapin, 6 Wend. 461.

[3] Conant *v.* Little, 1 Pick. (Mass.) 189; Jones *v.* Brewer, 1 Pick. (Mass.) 314; Baker *v.* Baker, 4 Greenl. (Me.) 67; Pinkham *v.* Gear, 3 N. H. 163; Shattuck *v.* Gragg, 23 Pick. (Mass.) 88; Johnson *v.* Neil, 4 Ala. 166; Shotwell *v.* Sedam, 3 Ohio, 5.

[4] Boring *v.* Lemmon, 5 Harr. & J. 223. See, in further explanation of the law of Maryland on this point, Barney *v.* Patterson, 6 Harr. & J. 182; Fenwick *v.* Floyd, 1 Harr. & G. 172; Remington *v.* Linthicum, 14 Pet. (U. S.) 84.

aside the plain letter of the statute. I apprehend the general practice has been different; and that upon sales under the direction of a master in chancery, as well as sales by sheriffs at law, the sale has uniformly been consummated by a conveyance."[1] But it is not clear that the Maryland doctrine has any countenance, even in Lord Hardwicke's remark. That was made in a suit for specific execution of a contract for sale, between the master in chancery and the defendants, and seems to have no bearing on the point that the final transfer of the estate may be without a regular conveyance. This distinction is recognized in North Carolina, where the opinion of Lord Hardwicke is followed, as far as regards executory contracts to sell land.[2] Upon what principles that opinion is to be sustained, as confined to the executory contract, will be seen hereafter; but beyond doubt, the prevailing, if not universal doctrine in this country is, that sales of land by sheriffs or other public officers are not to be considered as conveyances by act and operation of law, but require to be consummated regularly by deed.[3] It need hardly be said that the act of arbitrators in disposing of land under a submission by the parties, is not the act of the law, and that such act is void if the submission be not in writing.[4]

[1] Simonds *v.* Catlin, 2 Caines (N. Y.) 61; Attorney-General *v.* Day, 1 Ves. Sr. 218; Hughes *v.* Jones, 9 Mees. & W. 372.

[2] Tate *v.* Greenlee, 4 Dev. 149.

[3] Simonds *v.* Catlin, and Tate *v.* Greenlee, *supra;* Catlin *v.* Jackson, 8 Johns. (N. Y.) 520; Jackson *v.* Bull, 2 Caines (N. Y.) Cas. 301; Robinson *v.* Garth, 6 Ala. 204; Ennis *v.* Waller, 3 Black. (Ind.) 472; Evans *v.* Ashley, 8 Mo. 177; Alexander *v.* Merry, 9 Mo. 510. *Contra*, Watson *v.* Violett, 2 Duv. (Ky.) 332.

[4] Gratz *v.* Gratz, 4 Rawle (Pa.) 411; Stark *v.* Cannady, 3 Litt. (Ky.) 399.

PART II.

DECLARATIONS OF TRUSTS.

DECLARATIONS OF TRUSTS,

AS AFFECTED BY THE 7TH, 8TH, AND 9TH SECTIONS OF THE STATUTE OF FRAUDS.

SECTION 7. All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

SECTION 8. Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law; then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; any thing hereinbefore contained to the contrary notwithstanding.

SECTION 9. All grants or assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

CHAPTER VI.

TRUSTS IMPLIED BY LAW.

§ 79. It seems to be essential to our obtaining a clear understanding of the policy and spirit of this part of the Statute of Frauds, which concerns the proof of trusts in real estate, that we first of all compare it with other sections in which the subject of title in real estate is treated; namely, the fourth, which forbids an action upon any verbal contract for the sale of lands, and the first and third, which generally forbid the creation or transfer *in præsenti* of an estate in lands.

§ 80. The States of Kentucky, Virginia, North Carolina[1] and Texas,[2] while substantially re-enacting the fourth section, have altogether omitted the seventh from their legislation. In the first of these States, where an agreement was made between two parties, that one of them should make a purchase of land for the joint benefit of both, and one made the purchase, and it was then agreed that the other should advance half the money and be equally interested in the purchase, it was argued that, in order to carry the transaction into effect, it should be considered as a trust, and not as a contract for a sale of half the land, because, in the latter view, the fourth section would prevent any remedy upon it. The court said: "If the trust is considered as created by the agreement of the parties, if it does not come within the letter, that liberality of construction . . . which is alone calculated to prevent the mischiefs intended to be prevented by the statute emphatically requires it should be brought within the

[1] Pittman *v.* Pittman, 107 N. C. 159.
[2] Gardner *v.* Rundell, 70 Texas, 453.

influence of the statute." Then, after remarking that a trust arising by implication of law from existing facts and circumstances is always excepted from the operation of the statute, the court adds: "It is evident the trust in the present case, if it can be so denominated, is one created by contract, and is consequently within the statute."[1] The same court, upon another occasion, where land had been conveyed by one party to another in trust for the grantor, and upon an agreement that the grantee should reconvey to any one to whom the grantor might afterwards sell, treated the transaction as a *contract* for land, and, there being no written evidence of the arrangement, denied relief in equity on the ground of the statute.[2] Here was apparently a clear case of trust, to which the court applied the section which in terms extends to mere contracts for the purchase or sale of land. In Virginia, on the other hand, where the statute stands in the same way, the seventh section being omitted and the fourth retained, it has been said (in a case, however, where the point was not directly presented), that the latter would not apply to a trust created verbally, which would accordingly be good in that State; and the court based its opinion on the simple fact of the legislature's omission of the trust section and retention of the other, as conclusive of its design to allow a trust to be proved without writing; adverting also to the circumstance that in England it was thought necessary to enact the seventh section expressly providing for trusts, although the fourth section of the statute of Charles contained larger language than the corresponding section of the Virginia statute; namely, that the former included contracts for "any interest in or concerning land," words which were wanting in the latter.[3]

[1] Parker *v.* Bodley, 4 Bibb, 103.

[2] Chiles *v.* Woodson, 2 Bibb, 71.

[3] Bank of the United States *v.* Carrington, 7 Leigh, 566. See Gardner *v.* Rundell, 70 Texas, 453; Reed *v.* Howard, 71 Texas, 204.

§ 81. In Pennsylvania,[1] the three first sections of the English statute, with the omission from the second of the final clause relating to the reservation of rent in short leases, were re-enacted in 1772. In 1855, so much of the fourth section as concerns promises of executors, and promises to answer for the debt, etc., of another, was substantially adopted; and in the next year the seventh section was added. Until then, the courts of that State made a distinction between cases where the grantor at the time of the conveyance verbally declared the trust, and cases where the grantee declared it himself, paying the money which is the price of the land. In the former, it was held that a confidence arose which it would be unconscientious for the grantee to violate, and which would constitute that species of express parol trust which it was the object of the Pennsylvania statute to sustain. In the latter, it was held that the transaction amounted to a mere contract to make a conveyance hereafter, upon which contract, on account of the omission of the fourth section, the courts would allow a remedy in damages; while, on account of the retention of the first three sections, they would not generally decree a specific execution of it, as that would work indirectly a conveyance of land without writing. Or, briefly, it would seem the rule in that State was that if the purchaser of an estate verbally declared that he *held it* in trust, the statute as to conveyances applied; but if the grantor declared that he *conveyed it* in trust, the statute did not apply.[2] With this reservation as to what is to be considered a declaration of trust, the courts of Pennsylvania uniformly held, in conformity with those of Virginia, and in opposition to those of Kentucky, that, in the absence of any re-enactment of the seventh section of the statute of Charles, a verbal declaration of trust was valid and would be

[1] The same principle applies to Delaware, which was part of Pennsylvania. Hall *v.* Livingston, 3 Del. Ch. 348.

[2] A very full and clear discussion of the Pennsylvania cases on this subject will be found in Freeman *v.* Freeman, 2 Pars. Eq. Cas. 81.

enforced.[1] And, notwithstanding that the first section in their statute provides that no estate, etc., made or *created* without writing shall have any greater force either at law *or in equity* than an estate at will, it was held that its "obvious design . . . was, to prevent an equitable estate from being *transferred*, and the design of the seventh section was to prevent a trust estate from being *created* by parol."[2] Without assuming to harmonize these apparently discordant views of the mutual relation of the several portions of the statute in question, it may be remarked that it is difficult to understand the difference between creating an equitable estate by parol, and reserving by parol an equitable estate in land which is granted absolutely by deed; and that, consequently, the reservation of a trust for himself or for a third party by a grantor of land, at the time of the conveyance, should seem to be properly covered by any statute which contains (as does that of Pennsylvania) sections equivalent to the first of the statute of Charles; while, on the other hand, any trust declared by the grantee of land in favor of a third person, for value received or to be received from him, is hardly distinguishable from an agreement that the latter shall hold the equitable title in the land, and, as such, would naturally be embraced by the fourth section of the statute of Charles, without regard to any provision expressly covering trusts.[3] We pass, however, to the examination of the seventh section as it stands.

[1] German *v.* Gabbald, 3 Binn. 302; Wallace *v.* Duffield, 2 Serg. & R. 521; Peebles *v.* Reading, 8 Serg. & R. 484; Slaymaker *v.* St. John, 5 Watts, 27; Randall *v.* Silverthorn, 4 Pa. St. 173; and other cases referred to in the foregoing. See also Hall *v.* Livingston, 3 Del. Ch. 365; Fleming *v.* Donahoe, 5 Del. Ch. 255; Foy *v.* Foy, 2 Hayw. (N. C.) 296.

[2] Murphy *v.* Hubert, 7 Pa. St. 420, *per* Gibson, C. J. In California it is held that a parol declaration of trust in a mortgage of land is good, on the ground that by the law of that State a mortgage conveys no estate in the land.

[3] Troll *v.* Carter, 15 W. Va. 567. This case contains a valuable discussion of the question how far the function of the seventh section is not really performed by the fourth section.

§ 82. In regard to what kinds of trusts are embraced by the statute, there seems to have been little question made, the language of the sections relating to that subject being simple and comprehensive, and the word "trusts" having been long since determined to comprehend uses.[1] The section is, in terms, confined to trusts of real estate, and it has been repeatedly held that trusts of personalty are not affected by its operation.[2] The distinction is thus clearly illustrated by Sharswood, J.: "If a deed of land be made to A. and B. on a parol trust that they will hold for the benefit of grantor, or a third person, — which parol trust cannot be enforced against the land, . . . yet if they sell the land and convert it into money, a parol declaration made by them, subsequently to such sale and conversion, will be entirely effectual."[3] On the other hand it is equally clear that the statute embraces and applies to chattels real.[4] A trust in a *contract to convey land* may be proved by parol:[5] so also a trust in a mortgage.[6] And a written contract for the conveyance of land may be assigned by parol.[7] In New York, it was held in the Supreme Court, that an exception was to be admitted of uses or trusts in favor of religious societies. This may have been in con-

[1] Holt, 733; Roberts on Frauds, 94.

[2] Nab *v.* Nab, 10 Mod. 404; Kimball *v.* Morton, 1 Halst. (N. J.) Ch. 26; 2 Story Eq. Jur. § 912; Roberts on Frauds, 94; Williams *v.* Haskins Est., 29 Atl. Rep. (Vt.) 371.

[3] Maffitt *v.* Rynd, 69 Pa. St. 386; Hess' Appeal, 112 Pa. St. 168.

[4] Skett *v.* Whitmore, Freem. Ch. 280; Forster *v.* Hale, 5 Ves. 308; Riddle *v.* Emerson, 1 Vern. 108. And see Hutchins *v.* Lee, 1 Atk. 447; Bellasis *v.* Compton, 2 Vern. 294.

[5] Hazewell *v.* Coursen, 36 N. Y. Sup'r Ct. 459.

[6] Bucklin *v.* Bucklin, 1 Abb. (N. Y.) App. Dec. 242. In Dow *v.* Jewell, 21 N. H. 488, where there was a parol agreement that a party who had advanced part of the purchase-money for an estate should have the right for life of taking timber from the land, it was held that this privilege, while it might be secured by an express trust, could not be by one arising by implication of law. See Thacher *v.* Churchill, 118 Mass. 108; Japia *v.* Demartini, 77 Cal. 383.

[7] Currier *v.* Howard, 14 Gray (Mass.) 511. As to assignments of existing estates in land, see § 45, *ante*.

sequence of, and by inference from, the peculiar condition in which the statutory law of that State concerning the incorporation of religious societies has been left. Upon appeal, however, the ruling was reversed, the court holding that there was "no qualification or exception, express or implied, in favor of public trusts or charitable uses."[1] It has been decided in Massachusetts, that the statute does not apply to secret trusts and confidences for the purpose of delaying or defrauding creditors, but that they may always be proved by parol, and, when so proved, render wholly inoperative the formal transactions which may have been adopted for such purposes by the parties.[2] It could hardly be doubted that such cases must be excepted from the statute, even if it were required to treat them as exceptions; but though its language is general, applying to all cases where creations of trust estates are to be manifested or proved, it seems clearly the meaning of the statute that no such trust shall be *set up* by means of verbal proof, an object just the reverse of the verbal proof held to be admissible in the case referred to.

§ 83. The eighth section of the English Statute of Frauds, however, expressly enacts that the statute shall not apply to any cases of trusts arising by act or operation of law, upon any conveyance of any lands or tenements, and it may be convenient to examine what are the trusts here referred to, so as to arrive at a clear understanding of the subject-matter to which the statute applies, before proceeding to inquire what are the formalities which it requires to be observed.

§ 84. In Lloyd *v.* Spillet, Lord Hardwicke took occasion to classify these trusts by act or operation of law, or, as they are commonly called, *resulting* trusts, and he divided them into three classes: *first*, where an estate is purchased in the

[1] Voorhees *v.* Presbyterian Church of Amsterdam, 8 Barb. 135; reversed, 17 Barb. 103. See Adlington *v.* Cann, 3 Atk. 141; Muckleston *v.* Brown, 6 Ves. 52; Stickland *v.* Aldridge, 9 Ves. 516.

[2] Hills *v.* Eliot, 12 Mass. 26. See Baldwin *v.* Campfield, 4 Halst. (N. J.) Ch. 891.

name of one person, but the money or consideration is given by another, and a trust in the estate results to him who gave the money or consideration; *second*, where a trust is declared only as to part, and nothing said as to the rest, and what remains undisposed of results to the heir-at-law; and *third*, where transactions have been carried on *mala fide*. In the report of the same case in Barnardiston, the third class is stated to have been explained more clearly by his Lordship, as embracing cases "where there has been a plain and express fraud. Where there has been a fraud in gaining a conveyance from another, that may be a reason for making the grantee in that conveyance to be considered merely as a trustee."[1] These resulting trusts are not the creations of the statute, and in declaring them to be provable by parol it has only affirmed the common law. Thus in several of our own States whose Statutes of Frauds are silent upon the subject, resulting trusts have been sustained on common-law principles.[2] They do not depend upon any agreement between the parties, but are mere implications of law from the fact of the purchase with another's money, or the fact of the declaration of trust as to part of the estate only and silence as to the remainder, or the fact of fraud in procuring the legal title.[3] They arise upon actual conveyance of land, and

[1] Lloyd *v.* Spillet, 2 Atk; 148; Barnardiston Ch. 388. Mr. Roberts, in quoting this case, objects to the classification of Lord Hardwicke, which he says is confined to *two* kinds of resulting trusts. He appears to have overlooked the third class which is mentioned in the succeeding paragraph of his Lordship's opinion, and which seems to embrace in substance those cases which he enumerated as omitted in the classification. Roberts on Frauds, p. 97.

[2] Church *v.* Sterling, 16 Conn. 388; Brothers *v.* Porter, 6 B. Mon. (Ky.) 106; Murphy *v.* Hubert, 7 Pa. St. 420; Hoxie *v.* Carr, 1 Sumn. (C. C.) 173.

[3] Smith *v.* Burnham, 3 Summ. (C. C.) 435; Williams *v.* Brown, 14 Ill. 200; McElderry *v.* Shipley, 2 Md. 25; Jackman *v.* Ringland, 4 Watts & S. (Pa.) 149, and cases there cited; Foote *v.* Bryant, 47 N. Y. 544; Smith *v.* Smith, 85 Ill. 189; Reynolds *v.* Sumner, 126 Ill. 58; Gainus *v.* Cannon, 42 Ark. 503; McClure *v.* Doak, 6 Baxter (Tenn.) 364; Champlin

not upon an executory contract to hold land in trust.[1] Even where the contract to hold it in trust is the means of obtaining the legal title, a case which falls under the third class mentioned by Lord Hardwicke, the trust is not created by the contract, but results or is implied from the fraud; as will be made clear when we come to that class in its order.

§ 85. Resulting trusts of the first class, in which the purchase-money is paid by one and the deed taken in the name of another, may be *pro tanto*, or for a part of the estate proportionate to such part of the purchase-money as the *cestui que trust* may have advanced. The case of Crop *v.* Norton, in which Lord Hardwicke appears to have expressed the opinion that there could be no resulting trust unless the entire consideration proceeded from the *cestui que trust*, was afterwards disregarded by Sir Thomas Plumer, Vice Chancellor, in Wray *v.* Steele, where it was held that a joint advance by several upon a purchase in the name of one gave a resulting trust; and it seems to be not law in England, as it certainly is not in this country, if such was really the point decided by it.[2]

§ 86. But there is a farther rule upon this subject, to which it seems that Crop *v.* Norton may be referred; and that is, that though there may be a trust of a part only of the estate

v. Champlin, 136 Ill. 309; Knox *v.* McFarran, 4 Col. 586. In New York, Kentucky, Minnesota, Indiana, and Michigan, trusts resulting from purchase with another's money have been abolished by statute.

[1] Rogers *v.* Murray, 3 Paige (N. Y.) Ch. 390; Page *v.* Page, 8 N. H. 187; Jackson *v.* Morse, 16 Johns. (N. Y.) 197. See Green *v.* Drummond, 31 Md. 71.

[2] Crop *v.* Norton, 9 Mod. 233; 2 Atk. 74; Wray *v.* Steele, 2 Ves. & B. 388; Benbow *v.* Townsend, 1 Myl. & K. 506; Dale *v.* Hamilton, 5 Hare, 369; Ryall *v.* Ryall, 1 Atk. 59; Buck *v.* Swazey, 35 Me. 41; Livermore *v.* Aldrich, 5 Cush. (Mass.) 434; Powell *v.* Monson & Brimfield Manuf. Co., 3 Mason (C. C.) 362–364; Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 405; Stark *v.* Cannady, 3 Litt. (Ky.) 399; Brothers *v.* Porter, 6 B. Mon. (Ky.) 106; Ross *v.* Hegeman, 2 Edwards (N. Y.) Ch. 373; Larkins *v.* Rhodes, 5 Port. (Ala.) 195; Pumphry *v.* Brown, 5 W. Va. 107; Dudley *v.* Bachelder, 53 Me. 403; Reynolds *v.* Morris, 17 Ohio St. 510; Beadle *v.* Seat, 15 So. Rep. (Ala.) 243.

by implication of law, it must be of an aliquot part of the whole interest in the property. The whole consideration for the whole estate, or for the moiety or third or some other definite part of the whole, must be paid; the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it; and the reason of the distinction obviously is, that neither the entire interest in the whole estate nor in any given part of it could result from such a payment to the party who makes it, without injustice to the grantee by whom the residue of the consideration is contributed.[1] Upon the same view, it is held that if the proportion paid towards the consideration by the party claiming the benefit of the trust cannot be ascertained, whether because its valuation is from the nature of the payment uncertain, or because the sum paid is left uncertain upon the evidence, no trust results by operation of law.[2]

§ 87. It is not necessary that the person claiming the benefit of the purchase should make actual payment of the price in money. If it be upon his credit as by his giving his note for the price,[3] or by his being credited for the price by the vendor,[4] it is sufficient. So also if the compromise of a claim

[1] White *v.* Carpenter, 2 Paige (N. Y.) Ch. 217; Sayre *v.* Townsend, 15 Wend. (N. Y.) 647; Perry *v.* McHenry, 13 Ill. 227; McGowan *v.* McGowan, 14 Gray (Mass.) 119; Buck *v.* Warren, 14 Gray (Mass.) 122; Gee *v.* Gee, 2 Sneed (Tenn.) 395; Wheeler *v.* Kirtland, 23 N. J. Eq. 22; Firestone *v.* Firestone, 49 Ala. 128; Olcott *v.* Bynum, 17 Wall. (U. S.) 44; Perkins *v.* Cheairs, 2 Baxt. (Tenn.) 194; Bailey *v.* Hemenway, 147 Mass. 326. See Green *v.* Drummond, 31 Md. 71. Hall *v.* Young, 37 N. H. 134, and Fleming *v.* McHale, 47 Ill. 282, seem to be inconsistent with this doctrine.

[2] Sayre *v.* Townsend, 15 Wend. (N. Y.) 647; Baker *v.* Vining, 30 Me. 121; Cutler *v.* Tuttle, 19 N. J. Eq. 549; Olcott *v.* Bynum, 17 Wall. (U. S.) 44. See, however, Jenkins *v.* Eldredge, *post*, § 111, *note*. In so far as this case may be supposed to conflict with the rule stated in the text, it is doubted in McGowan *v.* McGowan, *supra*.

[3] Buck *v.* Pike, 11 Me. 9; Brothers *v.* Porter, 5 B. Mon. (Ky.) 106. See Seiler *v.* Mohn, 37 W. Va. 507.

[4] Buck *v.* Swazey, 35 Me. 41.

of his against the vendor be the consideration,[1] or the allowance to the vendor of an old debt.[2] Where it is his credit that is used in the transaction originally, it makes no difference that the money to meet the obligation is subsequently furnished him by another,[3] unless there was a previous agreement to that effect, in which latter case it is clear that the credit at risk was really that of the party who had engaged to furnish the money.[4]

§ 88. It is clear from several cases that, if part of the consideration of the purchase be the waiver by a third person of a claim or right of indefinite value, that circumstance prevents the party who pays all the money part of the consideration from claiming a resulting trust in the whole purchase;[5] hence it would seem reasonable that such a waiver, being in the nature of a contribution towards the purchase, should entitle the party making it to a resulting trust *pro tanto*, if its value can be ascertained, as well as an actual money contribution to the same amount; and such an opinion was expressed by Mr. Justice Story in the case of Jenkins *v.* Eldredge.[6]

§ 89. A resulting trust attaches only when the payment is made at the time of the purchase, and a subsequent advance will not have that effect,[7] even though it be made for one

[1] Sweet *v.* Jacocks, 6 Paige (N. Y.) Ch. 355.

[2] Dwinel *v.* Veazie, 36 Me. 509; Depeyster *v.* Gould, 2 Green (N. J.) Ch. 474; Taliaferro *v.* Taliaferro, 6 Ala. 404. In this and the next preceding class of cases, the fact of the appropriation of the debt or claim to the purchase is always provable by parol, and it would seem that as it must rest in the mere agreement of the parties to that effect, there is ample opportunity afforded for a fraudulent pretence by the *cestui que trust*. But the rule admitting such proof is clearly settled.

[3] Buck *v.* Swazey, 35 Me. 41.

[4] Forsyth *v.* Clark, 3 Wend. (N. Y.) 637.

[5] Crop *v.* Norton, 9 Mod. 233; Sayre *v.* Townsend, 15 Wend. (N. Y.) 647.

[6] Jenkins *v.* Eldredge, 3 Story (C. C.) 181, 286. See this case abstracted, *post*, § 111, *note*.

[7] Buck *v.* Swazey, 35 Me. 41; Hollida *v.* Shoop, 4 Md. 465; Alexander *v.* Tams, 13 Ill. 221; Conner *v.* Lewis, 16 Me. 268; Foster *v.* Trustees

who was surety for the original purchaser, and is finally compelled to pay.[1]

§ 90. It is obvious that the purchase-money must, at the time of payment, be the property of the party paying it and setting up the trust;[2] and the fact that the purchase was made with borrowed money will not establish a resulting trust in favor of the lender.[3] If, however, the party who takes the deed lend or advance the price to the party who claims the benefit of it, before or at the time of the purchase, so that the money or property paid actually belongs to the latter, a trust results.[4] But it is otherwise where the party taking the deed pays his own money for it, with an understanding or agreement that it may be afterwards repaid and the land redeemed by him who sets up the trust.[5] If a trustee or executor purchase estates with the trust money, and take a conveyance to himself without the trust appearing

of Athenæum, 3 Ala. 302; Jackson *v.* Moore, 6 Cowen (N. Y.) 706; Graves *v.* Dugan, 6 Dana (Ky.) 331; Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 405; Rogers *v.* Murray, 3 Paige (N. Y.) Ch. 390. But see Harder *v.* Harder, 2 Sandf. (N. Y.) Ch. 19; Wells *v.* Stratton, 1 Tenn. Ch. 328; Ducie *v.* Ford, 138 U. S. 587; Knox *v.* McFarran, 4 Col. 586; Williams *v.* County of San Saba, 59 Texas, 442.

[1] Buck *v.* Pike, 11 Me. 9; Pinnock *v.* Clough, 16 Vt. 500.

[2] Jackson *v.* Bateman, 2 Wend. (N. Y.) 570; Getman *v.* Getman, 1 Barb. (N. Y.) Ch. 499; Smith *v.* Burnham, 3 Sumn. (C. C.) 435; Hertle *v.* McDonald, 2 Md. Ch. 128; Gibson *v.* Foote, 40 Miss. 788; Walter *v.* Klock, 55 Ill. 362; Truski *v.* Streseveski, 60 Mich. 34; Fickett *v.* Durham, 109 Mass. 419.

[3] Smith *v.* Garth, 32 Ala. 368; Gibson *v.* Foote, 40 Miss. 788; Jackson *v.* Stevens, 108 Mass. 94; Harvey *v.* Pennypacker, 4 Del. Ch. 445.

[4] Reeve *v.* Strawn, 14 Ill. 94; Bartlett *v.* Pickersgill, 1 Eden, 515; 1 Cox, 15; 4 East, 577, *note;* Lathrop *v.* Hoyt, 7 Barb. (N. Y.) 59; McDonough *v.* O'Niel, 113 Mass. 92; Wallace *v.* Carpenter, 85 Ill. 590; Smith *v.* Smith, 85 Ill. 189; Keller *v.* Kunkel, 46 Md. 565; Walton *v.* Karnes, 67 Cal 255; Ward *v.* Matthews, 73 Cal. 13.

[5] Getman *v.* Getman, 1 Barb. (N. Y.) Ch. 499; Blodgett *v.* Hildreth, 103 Mass. 484; Fischli *v.* Dumaresly, 3 A. K. Marsh. (Ky.) 23; Jackman *v.* Ringland, 4 Watts & S. (Pa.) 149; Kellum *v.* Smith, 33 Pa. St. 161; Kendall *v.* Mann, 11 Allen (Mass.) 15; Morton *v.* Nelson, 145 Ill. 586; Parsons *v.* Phelan, 134 Mass. 109; Allen *v.* Richard, 83 Mo. 55.

on the deed, the estate will be liable to the trusts, if the application of the trust-money to the purchase be clearly proved.[1] And so if one partner make a purchase of land to himself, paying for it with the partnership funds, a trust results to his copartners,[2] though it is otherwise if the co-partnership be not at the time actually existing, but only resting in executory agreement.[3] Where land is bought with partnership funds, but the title is taken in the name of the partners as individuals, there is a resulting trust to the firm.[4]

§ 91. The fact of payment or of the ownership of the money may always be shown by parol evidence,[5] but such evidence must be clear and strong,[6] particularly after considerable lapse of time,[7] or when the trust is not claimed till after the death of the alleged trustee.[8] The testimony of the trustee is competent for this purpose;[9] but mere evi-

[1] Lane *v.* Dighton, Amb. 409; Ryall *v.* Ryall, 1 Atk. 59; Wilson *v.* Foreman, 2 Dickens, 593; Kisler *v.* Kisler, 2 Watts (Pa.) 323; Sugden, Vend. & P. 919, and cases cited.

[2] Phillips *v.* Crammond, 2 Wash. (C. C.) 441; Buck *v.* Swazey, 35 Me. 41. And see Fairchild *v.* Fairchild, 5 Hun. (N. Y.) 407, although resulting trusts are abolished by statute in that State.

[3] Dale *v.* Hamilton, 5 Hare, 369; Smith *v.* Burnham, 3 Sumn. (C. C.) 435.

[4] Paige *v.* Paige, 71 Iowa, 318.

[5] It is needless to cite the numerous cases to this effect. They are referred to in other parts of this section, and are collected at length in the American editor's note to Sugden on Vendors and Purchasers, 909.

[6] Sewell *v.* Baxter, 2 Md. Ch. 447; Baker *v.* Vining, 30 Me. 121; Hollida *v.* Shoop, 4 Md. 465; Malin *v.* Malin, 1 Wend. (N. Y.) 625; Kendall *v.* Mann, 11 Allen (Mass.) 15; Cutler *v.* Tuttle, 19 N. J. Eq. 549; Gascoigne *v.* Thwing, 1 Vern. 366; Finch *v.* Finch, 15 Ves. 43. Entries in books adduced to prove payment by a third person must be unequivocal to that effect. Dorsey *v.* Clarke, 4 Harr. & J. (Md.) 551. See Kennedy *v.* Kennedy, 57 Mo. 73; Whitsett *v.* Kershow, 4 Col. 419; Johnston *v.* Johnston, 138 Ill. 385.

[7] Carey *v.* Callan, 6 B. Mon. (Ky.) 44; Cutler *v.* Tuttle, 19 N. J. Eq. 549.

[8] Enos *v.* Hunter, 4 Gilm. (Ill.) 211; Midmer *v.* Midmer, 26 N. J. Eq. 299; Pillow *v.* Thomas, 1 Baxt. (Tenn.) 120.

[9] Ambrose *v.* Ambrose, 1 P. Wms. 321; Ryall *v.* Ryall, 1 Atk. 59; Malin *v.* Malin, 1 Wend. (N. Y.) 625. See Lord Gray's case, Freem. Ch. 6.

denee, given during his lifetime, of his declarations to that effect seems to be inadmissible, as not being the best existing evidence.[1] So if it appears upon the face of the conveyance, by recital or otherwise, that the purchase was made with the money of a third person, that is clearly sufficient to create a trust in his favor.[2] Evidence is also admissible of the mean circumstances of the pretended owner of the estate, tending to show it impossible that he should have been the purchaser,[3] although that fact alone would not probably be sufficient to establish the trust.[4]

§ 92. As parol evidence is admissible to show facts raising a presumption of a resulting trust, so it is also admissible to rebut that presumption;[5] and for that purpose, where the plaintiff set up a resulting trust, verbal evidence of his admissions that the whole land was the defendant's, and that he had nothing to do with it, has been held competent.[6] And so proof of an express trust, though by parol only, will cut off a resulting trust; the latter being left by the statute as at common law.[7] In like manner, a previous agreement that the nominal purchaser should also have the whole legal and equitable estate will, when proved, be an answer to the presumption of a resulting trust.[8] And this presumption may be overcome by others that arise from the natural relations, as

[1] Roberts on Frauds, 100.

[2] Kirk *v.* Webb, Prec. Ch. 84; Deg *v.* Deg, 2 P. Wms. 412; Young *v.* Peachy, 2 Atk. 254.

[3] Willis *v.* Willis, 2 Atk. 71; Ryall *v.* Ryall, 1 Atk. 59; Finch *v.* Finch, 15 Ves. 43; Strimpfler *v.* Roberts, 18 Pa. St. 283.

[4] Faringer *v.* Ramsay, 2 Md. 365.

[5] Lake *v.* Lake, Amb. 126; Baker *v.* Vining, 30 Me. 121; Foster *v.* Trustees of Athenæum, 3 Ala. 302; Welton *v.* Devine, 20 Barb. (N. Y.) 9; Livermore *v.* Aldrich, 5 Cush. (Mass.) 431; Baldwin *v.* Campfield, 4 Halst. (N. J.) Ch. 891; Wiser *v.* Allen, 92 Pa. St. 317.

[6] Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 405.

[7] Sugden, Vend. & P. 911.

[8] St. John *v.* Benedict, 6 Johns. (N. Y.) Ch. 111; Elliott *v.* Armstrong, 2 Blackf. (Ind.) 198; Henderson *v.* Hoke, 1 Dev. & B. (N. C.) Eq. 119.

e. g. presumption of advancement for a child, or provision for a wife.[1]

§ 93. It was formerly doubted whether parol evidence was admissible to show payment by a third person, in contradiction of the face of the deed expressing payment to have been by the nominal grantee,[2] but it is now clearly settled in the affirmative.[3] Indeed, as has been said by the Supreme Court of New Hampshire, such evidence does not go to contradict the statement in the deed that the grantee paid the money, but to show the farther fact that the money did not belong to him, but to the person claiming the trust.[4] Whether parol evidence to show the ownership of the purchase-money is admissible in opposition to the answer of the trustee denying the trust, is doubted by Sir Edward Sugden, upon the authority of certain early English cases;[5] but it is now settled, at least in this country, that it is admissible.[6] It has been maintained by eminent English writers that parol evidence, even of the confessions of the nominal purchaser, cannot be received to set up a resulting trust after his death;[7] but this position seems to be not now admitted in England, and in our courts may be fairly said not to prevail.[8]

[1] See Edgerly *v.* Edgerly, 112 Mass. 175.

[2] Kirk *v.* Webb, Prec. Ch. 84; Newton *v.* Preston, Prec. Ch. 103; Skett *v.* Whitmore, Freem. Ch. 280.

[3] Livermore *v.* Aldrich, 5 Cush. (Mass.) 435; Page *v.* Page, 8 N. H. 187; Scoby *v.* Blanchard, 4 N. H. 170; Powell *v.* Monson & Brimfield Manuf. Co., 3 Mason (C. C.) 347; Gardner Bank *v.* Wheaton, 8 Greenl. (Me.) 373; Pritchard *v.* Brown, 4 N. H. 397; Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 405; Boyd *v.* McLean, 1 Johns. (N. Y.) Ch. 582; Blodgett *v.* Hildreth, 103 Mass. 484.

[4] Pritchard *v.* Brown, 4 N. H. 397; Scoby *v.* Blanchard, 3 N. H. 170.

[5] Sugden, Vend. & P. 909, and cases there cited.

[6] Boyd *v.* McLean, 1 Johns. (N. Y.) Ch. 582; Dorsey *v.* Clarke, 4 Harr. & J. (Md.) 551; Faringer *v.* Ramsay, 2 Md. 365; Baker *v.* Vining, 30 Me. 121; Elliott *v.* Armstrong, 2 Blackf. (Ind.) 198; Jenison *v.* Graves, 2 Blackf. (Ind.) 440; Blair *v.* Bass, 4 Blackf. (Ind.) 539; Page *v.* Page, 8 N. H. 187; Larkins *v.* Rhodes, 5 Port. (Ala.) 195.

[7] 1 Sanders on Uses, 123; Roberts on Frauds, 99.

[8] Sugden, Vend. & P. 910, and cases there cited; Williams *v.* Hollingsworth, 1 Strobh. (S. C.) Eq. 103; Pinney *v.* Fellows, 15 Vt. 525;

§ 94. A few general observations should be made upon those implied trusts which arise in cases of fraud before proceeding to the subject of the manifestation or proof of express trusts required by the statute. The fraud which suffices to lay a foundation for such a trust is not simply that fraud which is involved in every deliberate breach of contract.[1] The true rule seems to be that there must have been an original misrepresentation by means of which the legal title was obtained; an original intention to circumvent, and get a better bargain, by the confidence reposed.[2] Thus, as

Bank of the United States *v.* Carrington, 7 Leigh (Va.) 566; Enos *v.* Hunter, 4 Gilm. (Ill.) 211. See Barnes *v.* Taylor, 27 N. J. Eq. 259.

[1] Robertson *v.* Robertson, 9 Watts (Pa.) 32; Jackman *v.* Ringland, 4 Watts & S. (Pa.) 149; Whetham *v.* Clyde, Pa. Leg. Gaz. 53; Harper *v.* Harper, 5 Bush (Ky.) 176; Walter *v.* Klock, 55 Ill. 362; Durant *v.* Davis, 10 Tenn. 522; Ryan *v.* Dox, 25 Barb. (N. Y.) 440. Upon appeal (*vide* same case, 34 N. Y. 307, reversing the former decision), the court seemed inclined to hold that the breach of the agreement was fraud, and although they did not so decide, the case is cited as an authority for that position, in Sandford *v.* Norris, 1 Tr. App. (N. Y.) 35; and see Soggins *v.* Heard, 31 Miss. 426. See also Wolford *v.* Herrington, 74 Pa. St. 311, where the distinction is pointed out between the breach of such an agreement, and that of an agreement between the parties to execute a writing, upon the faith of which promise reliance has been placed, so that a refusal to perform would be a fraud. But see Glass *v.* Hulbert, 102 Mass. 30; § 94 *a*, *post*. In Montacute *v.* Maxwell, 1 P. Wms. 620, Lord Chancellor Parker says: "In cases of fraud, equity should relieve, even against the words of the statute: . . . but where there is no fraud, only relying upon the honour, word, or promise of the defendant, the statute making those promises void, equity will not interfere." In Jenkins *v.* Eldredge, 3 Story, 292, *post*, § 111, *note*, Mr. Justice Story dissents from the doctrine, even as applied to contracts in consideration of marriage, and says: "I doubt the whole foundation of the doctrine, as not distinguishable from other cases which courts of equity are accustomed to extract from the grasp of the Statute of Frauds." But certainly it would seem that if there be not some distinction such as was suggested in Montacute *v.* Maxwell, there is an end of the Statute of Frauds so far as courts of equity are concerned. McClain *v.* McClain, 57 Iowa, 167; Scott *v.* Harris, 113 Ill. 447; Biggins *v.* Biggins, 133 Ill. 211; Randall *v.* Constans, 33 Minn. 329; Tatge *v.* Tatge, 34 Minn. 272; Von Trotha *v.* Bamberger, 15 Col. 1; Brock *v.* Brock, 90 Ala. 86.

[2] McCulloch *v.* Cowher, 5 Watts & S. (Pa.) 427; Church *v.* Ruland, 64

has been held in many cases, if a man procure a certain devise or conveyance to be made to himself, by representing to the testator or grantor that he will see it applied to the trust purposes contemplated by the latter, he will be held a trustee for those purposes.[1] In such cases, it seems to be requisite that there should appear to have been an agency, active or passive, on the part of the devisee or grantee in procuring the devise; it must appear that the testator or grantor was drawn in to make the devise or grant by the fraudulent representation or engagement of the devisee or grantee.[2] In all such cases of resulting trusts arising *ex maleficio*, equity, to use the forcible expression of Chief Justice Gibson, turns the fraudulent procurer of the legal title into a trustee, to get at him.[3]

§ 94 *a.* The breach of an agreement to make a written declaration of the proposed trust is not enough to create a trust *ex maleficio*,[4] although this, in connection with the

Pa. St. 432. But see Jenkins *v.* Eldredge, 3 Story (C. C.) 181; *post*, § 111, *note*.

[1] Harris *v.* Horwell, Gilb. Eq. 11; Chamberlaine *v.* Chamberlaine, Freem. Ch. 34; Devenish *v.* Baines, Prec. Ch. 3; Oldham *v.* Litchford, 2 Vern. 506; Thynn *v.* Thynn, 1 Vern. 296; Hoge *v.* Hoge, 1 Watts (Pa.) 163. But see Barrow *v.* Greenough, 3 Ves. Jr. 152; Hargrave *v.* King, 5 Ired. (N. C.) Eq. 430; Cloninger *v.* Summit, 2 Jones (N. C.) Eq. 513; Podmore *v.* Gunning, 7 Sim. 644; Henschel *v.* Mamero, 120 Ill. 620; Troll *v.* Carter, 15 W. Va. 567.

[2] Whitton *v.* Russell, 1 Atk. 448; Miller *v.* Pearce, 6 Watts & S. (Pa.) 97; Lantry *v.* Lantry, 51 Ill. 458; Haigh *v.* Kaye, L. R. 7 Ch. 469; Booth *v.* Turle, L. R. 16 Eq. 182; McClain *v.* McClain, 57 Iowa, 167; Fishbeck *v.* Gross, 112 Ill. 208.

[3] Hoge *v.* Hoge, 1 Watts (Pa.) 214. A *cestui que trust*, in such a case of trust, *ex maleficio*, defended successfully, upon this ground, an action of trespass brought by the trustee against him, in Carpenter *v.* Ottley, 2 Lans. (N. Y.) 451.

[4] Glass *v.* Hulbert, 102 Mass. 38, *per* Wells, J.; Marshman *v.* Conklin, 21 N. J. Eq. 546. Compare Hayes *v.* Burkam, 51 Ind. 130, on the subject of a promise to give a written guaranty. But see Wolford *v.* Herrington, 74 Pa. St. 311; qualified subsequently, 86 Pa. St. 39, on a new trial.

other circumstances in the case, may be sufficient to give equitable jurisdiction.[1]

§ 95. Upon similar principles, if one falsely represent himself to be purchasing for another, and by that means prevent competition in bidding, or otherwise get the land at a cheaper rate, he shall be held a trustee for him in whose behalf he pretended to act, or, at least, the purchase be set aside on account of the fraud.[2] But in no case will the grantee be deemed a trustee, if he used no fraud or deceit in getting his title, although he verbally promised to hold the land for another.[3] If, on the other hand, the grant was made on the faith of a promise, and induced thereby, the breach of the promise is fraud, and as such has been made ground of equitable relief,[4] and this doctrine has been extended to cover those cases where the promise which induced the conveyance was to convey to a third person, who has been held to be thereby enabled to compel a conveyance to himself from the grantee.[5]

§ 96. Finally, the principles above laid down apply in general to all conveyances to persons standing in fiduciary

[1] Glass *v.* Hulbert, 102 Mass. 38. See Jenkins *v.* Eldredge, 3 Story (C. C.) 181; Dean *v.* Dean, 6 Conn. 285; Bartlett *v.* Pickersgill, 1 Eden, 515; 1 Cox 15; 4 East, 577, *note;* Von Trotha *v.* Bamberger, 15 Col. 1.

[2] McCulloch *v.* Cowher, 5 Watts & S. (Pa.) 427; Kisler *v.* Kisler, 2 Watts (Pa.) 323; Schmidt *v.* Gatewood, 2 Rich. (S. C.) Eq. 162; Boynton *v.* Housler, 73 Pa. St. 453. *Contra*, Rogers *v.* Simmons, 55 Ill. 76.

[3] Leman *v.* Whitley, 4 Russ. 423; Whiting *v.* Gould, 2 Wisc. 552; Barnet *v.* Dougherty, 32 Pa. St. 371; Chambliss *v.* Smith, 30 Ala. 366; Campbell *v.* Campbell, 2 Jones (N. C.) Eq. 364; Pattison *v.* Horn, 1 Grant (Pa.) 301; Hogg *v.* Wilkins, 1 Grant (Pa.) 67; Walker *v.* Hill, 21 N. J. Ch. 191; Johns *v.* Norris, 22 N. J. Ch. 102; Loomis *v.* Loomis, 60 Barb. (N. Y.) 22; Kistler's Appeal, 73 Pa. St. 393; Payne *v.* Patterson, 77 Pa. St. 134; Kimball *v.* Smith, 117 Pa. St. 183; Salsbury *v.* Black, 119 Pa. St. 200.

[4] Haigh *v.* Kaye, L. R. 7 Ch. 469; Brison *v.* Brison, 75 Cal. 525. See *post*, §§ 439, *et seq.*

[5] Carr *v.* Carr, 52 N. Y. 251; Cipperley *v.* Cipperley, 4 Thomp. & C. (N. Y.) 342; Faust *v.* Haas, 73 Pa. St. 295; Boruff *v.* Hudson, 37 N. E. Rep. (Ind.) 786.

relations to others, and who avail themselves of their position to get the legal title to themselves. In all such cases, embracing those of agents, guardians, or others who are bound to act for the use of their principals or wards or other beneficiaries, the parties purchasing for their own use are made trustees for those in whose name they should have purchased.[1] It has been stated to be the law that, where one man employs another by parol as agent to buy an estate for him, and the latter buys it in his own name, with his own money, and denies the agency, the one who employed him cannot, by a suit in equity, compel a conveyance of the estate; for that, it is said, would be decidedly in the teeth of the Statute of Frauds.[2] The case put is not that of an agreement that one party shall take title in his own name, and pay his own money, and afterward convey to the other, for that is evidently a contract to transfer an interest in land which one of them is afterwards to obtain.[3] But the agreement between principal and agent is quite different. A man wishes to buy the land, and asks another to represent him at the sale. The

[1] Lees *v.* Nuttall, 1 Russ. & M. 53; Carter *v.* Palmer, 11 Bligh, N. R. 397; Dale *v.* Hamilton, 5 Hare, 369; Sweet *v.* Jacocks, 6 Paige (N. Y.) 355; Jenkins *v.* Eldredge, 3 Story, 181; Jackson *v.* Sternbergh, 1 Johns. (N. Y.) Cas. 153; Perry *v.* McHenry, 13 Ill. 227; Traphagen *v.* Burt, 67 N. Y. 30; Brannin *v.* Brannin, 18 N. J. Eq. 212. See Fischli *v.* Dumaresly, 3 A. K. Marsh. (Ky.) 23; Wright *v.* Gay, 101 Ill. 233; Reese *v.* Wallace, 113 Ill. 589; Vallette *v.* Tedens, 122 Ill. 607; Gurhn *v.* Richardson, 128 Ill. 178; Roby *v.* Colehour, 135 Ill. 300; Wood *v.* Rabe, 96 N. Y. 414; McMurry *v.* Mobley, 39 Ark. 309; Rose *v.* Hayden, 35 Kansas, 106; Larmon *v.* Knight, 140 Ill. 232. See Hamilton *v.* Buchanan, 112 N. C. 463. But see Bland *v.* Talley, 50 Ark. 71.

[2] Story Eq. Jur. § 1201 *a*. See Perry Trusts, § 135; Burden *v.* Sheridan, 36 Iowa, 125; Miazza *v.* Yerger, 53 Miss. 135; Nestal *v.* Schmid, 29 N. J. Eq. 458. See Watson *v.* Erb, 33 Ohio St. 35; Bauman *v.* Holzhausen, 26 Hun (N. Y.) 505; James *v.* Smith, L. R. 1 Ch. D. 1891, 384.

[3] See Pinnock *v.* Clough, 16 Vt. 501; Jackman *v.* Ringland, 4 Watts & S. (Pa.) 149; Taliaferro *v.* Taliaferro, 6 Ala. 406; Moore *v.* Green, 3 B. Mon. (Ky.) 407. Other cases of this nature are Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 405; Dorsey *v.* Clarke, 4 Harr. & J. (Md.) 551; Trapnall *v.* Brown, 19 Ark. 39; Kellum *v.* Smith, 33 Pa. St. 158; Levy *v.* Brush, 45 N. Y. 589; Spencer *v.* Lawton, 14 R. I. 494.

latter orally agrees to do this, and this agreement is not a contract to convey land, nor a declaration of trust. When the agent, thus appointed, takes a contract of sale or lease from the owner in his own name, two English cases have held that the principal could compel specific performance in his own favor.[1] In one of these cases, the agency was admitted by a demurrer; in the other, it was put in issue; but the decision in both cases was that the contract of the agent was the contract of the principal, and enforceable by him. And in the same way it would seem that a conveyance of the legal title to the agent in pursuance of the contract would be a conveyance of the equitable title to the principal, by a legal consequence which the agent cannot prevent or deny. It is true in a sense that the relation depends upon the oral agreement, but after the agreement is made and the relation of agent and principal established, a transfer to one is in equity a transfer to the other.[2]

§ 96 *a*. It has been held that a trust arises when the one who has got the land has been enabled to do it only by dint of his promise to convey it to another, upon the faith of which promise the latter has parted with some interest in the property in question. Thus, where a man who was in possession of land under contract for its purchase, was induced to abandon that interest, by an oral promise to buy and hold the land for him, the trust relation thus created was held a good defence to an action afterward brought by the party who

[1] Heard *v.* Pilley, L. R. 4 Ch. 548; Cave *v.* Mackenzie, 46 L. J. (Ch.) 564. And see DeMallagh *v.* DeMallagh, 77 Cal. 126.

[2] Pillsbury *v.* Pillsbury, 17 Me. 107; Sweet *v.* Jacocks, 6 Paige (N. Y.) 355; Firestone *v.* Firestone, 49 Ala. 128; Chastain *v.* Smith, 30 Ga. 96. See Follansbe *v.* Kilbreth, 17 Ill. 522; Jenkins *v.* Eldredge, 3 Story, 289; Dennis *v.* McCagg, 32 Ill. 429; Heacock *v.* Coatesworth, Clarke (N. Y.) Ch. 84; Taylor *v.* Salmon, 4 Myl. & C. 134; Rives *v.* Lawrence, 41 Ga. 283; Moore *v.* Pickett, 62 Ill. 158; Bosseau *v.* O'Brien, 4 Bissell (C. C.) 395; Johnson *v.* Brooks, 93 N. Y. 337; Caruthers *v.* Williams, 21 Fla. 485; Colt *v.* Clapp, 127 Mass. 476. But see Roughton *v.* Rawlings, 88 Ga. 819.

had made the promise, to deprive him of possession.[1] And where one party, by virtue of his previous relation to the property, has an equitable interest in it, as, for example, the mortgagor of an estate about to be sold under the mortgage, another who has promised to buy it in for the benefit of the party interested will be treated as a trustee and affected by the mortgagor's equity.[2]

[1] Dodge *v.* Wellman, 1 Abb. (N. Y.) App. Dec. 512. See Church *v.* Kidd, 3 Hun (N. Y.) 254; Boynton *v.* Housler, 73 Pa. St. 453; Payne *v.* Patterson, 77 Pa. St. 134; Wolford *v.* Herrington, 86 Pa. St. 39.

[2] Ryan *v.* Dox, 34 N. Y. 307. See Sandford *v.* Norris, 4 Abb. (N. Y.) App. Dec. 144; Judd *v.* Mosely, 30 Iowa, 423; Ragan *v.* Campbell, 2 Mackey (D. of C.) 28; Fishback *v.* Green, 87 Ky. 107; Cutler *v.* Babcock, 81 Wisc. 191.

CHAPTER VII.

EXPRESS TRUSTS.

§ 97. We come now to consider the formalities which are required by the Statute of Frauds in cases of express trusts of lands, tenements, or hereditaments. These are, that the declaration or creation of such trusts "shall be manifested or proved by some writing signed by the party who is by law entitled to declare such trusts, or by his last will in writing." It has been suggested that, by a comparison of the ninth section of the English statute with the seventh, just referred to, it appears to have been the intention of the legislature to require by the latter that the trust should actually be *created* by writing; but it is admitted that, whatever the intention may have been, it is clear, upon the language employed, that a trust in lands is only required to be *manifested or proved* by written evidence.[1] From this it results that the instrument in writing required by the statute may be in terms less formal than would be required for the creation of a trust, and that the making of it is to be regarded as an entirely independent transaction. It has been uniformly held, though perhaps not necessarily, on the ground of this peculiarity of phraseology,[2] that it may be executed subsequently to the creation of the trust,[3] or even, it is said, in anticipation of

[1] Lewin on Trusts, 30; Cook *v.* Barr, 44 N. Y. 156; Gordon *v.* McCulloh, 66 Md. 245.

[2] See *post*, § 104.

[3] Forster *v.* Hale, 5 Ves. 308; Barrell *v.* Joy, 16 Mass. 221; Wright *v.* Douglass, 7 N. Y. 564; Rutledge *v.* Smith, 1 McCord (S. C.) Ch. 119; Price *v.* Brown, 4 S. C. 144; Maccubbin *v.* Cromwell, 7 Gill & J. (Md.) 157; Newkirk *v.* Place, 47 N. J. Eq. 477.

it;[1] or it may be executed subsequently to the death of the grantor;[2] or the bankruptcy of the grantee.[3] The consequences are important; for if the trust had no effect previously to, or independently of, the written declaration, the trust property could not be disposed of by the *cestui que trust* in the meanwhile, and would be subject to the acts and encumbrances of the ostensible owner.[4]

§ 98. It has uniformly been held that letters under the hand of the trustee, distinctly referring to the trust, are sufficient as written manifestations or proofs to satisfy the statute;[5] and in Massachusetts a printed pamphlet, published and circulated by the trustee, has also been considered sufficient.[6] So with entries made by the trustee in his books, or any memorandum, however informal, under his hand, from which the fact of the trust and the nature of it can be ascertained.[7]

§ 99. In the case of Steere *v.* Steere,[8] Chancellor Kent had occasion to decide upon the effect of a series of letters from the alleged trustee, and among other grounds for his opinion that they did not furnish such proof of the trust as the law required, he remarks that some of them were not addressed

[1] Jackson *v.* Moore, 6 Cowen (N. Y.) 706.

[2] Ambrose *v.* Ambrose, 1 P. Wms. 321; Wilson *v.* Dent, 3 Sim. 385.

[3] Gardner *v.* Rowe, 2 Sim. & S. 346.

[4] Price *v.* Brown, 4 S. C. 144. See Smith *v.* Howell, 3 Stockt. (N. J.) Ch. 349.

[5] Forster *v.* Hale, 5 Ves. 308; O'Hara *v.* O'Neil, 7 Bro. P. C. 227; Crook *v.* Brooking, 2 Vern. 50; Morton *v.* Tewart, 2 Young & C. 67; Steere *v.* Steere, 5 Johns. (N. Y.) Ch. 1; Movan *v.* Hays, 1 Johns. (N. Y.) Ch. 339; Maccubbin *v.* Cromwell, 7 Gill & J. (Md.) 157; Wright *v.* Douglass, 7 N. Y. 564; Day *v.* Roth, 18 N. Y. 448; Newkirk *v.* Place, 47 N. J. Eq. 477; McCandless *v.* Warner, 26 W. Va. 754; Taft *v.* Dimond, 16 R. I. 584.

[6] Barrell *v.* Joy, 16 Mass. 221.

[7] Barrow *v.* Greenough, 3 Ves. Jr. 151; Lewin on Trusts, 30; Roberts on Frauds, 95; Smith *v.* Matthews, 3 De G. F. & J. 139. In Homer *v.* Homer, 107 Mass. 82, the entry in the book did not sufficiently declare the trust. And see Urann *v.* Coates, 109 Mass. 581; Ames *v.* Scudder, 83 Mo. 189.

[8] Steere *v.* Steere, 5 Johns. (N. Y.) Ch. 1.

to the *cestui que trust*, and were not intended for the purpose of manifesting or giving evidence of the trust; and in these respects, he says, they differed from letters which had been admitted in English cases.[1] The opinion of the learned Chancellor shows, however, abundant grounds upon which the letters before him should be held insufficient; for instance, as not containing the substance of the trust and as varying from the allegations in the bill. He does not therefore expressly decide upon the point suggested, and we may suppose that he would not have decided according to the intimation given in his opinion, if the case had depended upon it, and his attention had been particularly drawn in that direction. It may well be doubted whether in principle and reason it is necessary that the writing upon which a trustee is to be held to his conscientious duty should have been formally promulgated by him, and addressed to those interested, as evidence of his obligation; and the general spirit of the decisions upon this class of cases seems to be averse to such a doctrine. Thus a trust is often proved by the recital in a deed,[2] which, however solemn a mode of statement, is not addressed to the *cestui que trust*, though it may be made with the *intention* of manifesting the trust. In Barrell *v.* Joy,[3] in the Supreme Court of Massachusetts, the defendant had received from the plaintiff's father sundry conveyances of land, and, upon a suit brought after the father's death, the plaintiff alleged that the conveyances, though in terms absolute, were for the purpose of enabling the defendant to satisfy certain demands he had against the father, and that the remainder was to be held in trust for him, of which trust they claimed the benefit. There was a pamphlet in evidence published by the defendant, in which, in the opinion of the

[1] O'Hara *v.* O'Neil, 7 Bro. P. C. 227; Forster *v.* Hale, 3 Ves. Jr. 696.

[2] Deg *v.* Deg, 2 P. Wms. 412; Bellamy *v.* Burrow, Cas. Temp. Talb. 97; Kirk *v.* Webb, Prec. Ch. 84; Hutchinson *v.* Tindall, 2 Green (N. J.) Ch. 357; Wright *v.* Douglass, 7 N. Y. 564.

[3] Barrell *v.* Joy, 16 Mass. 221.

court, he admitted that he held the land in trust, as alleged by the complainants; but what they considered as even more satisfactory and convincing evidence was that the defendant, in an indenture between himself and certain third parties, covenanted with them to sell a portion of the lands he had received, and apply the proceeds to the payment of demands which they held against the plaintiff's father; from which it was evident that he considered himself as holding the land upon trust and not for his own use. Parker, C. J., delivering the opinion of the court, said: "This is a sufficient declaration in writing, for, although not made to Barrell (the *cestui que trust*), it is available to him or his representatives." It can hardly be said that this indenture was intended by the defendant as a manifestation of the trust on his part; and if his engagement to make that disposition of the land had been contained in a letter to, instead of an indenture executed with, third parties, the question would be quite identical with that before the Chancellor in Steere *v.* Steere; but it does not seem that the mere form of the manifestation should make any difference in principle. In a more recent case than either, Chancellor Vroom, of New Jersey, used the following language: "A declaration of trust requires no formality, so that it be in writing and have sufficient certainty to be ascertained and executed. It may be in a letter, or upon a memorandum, and it is not material whether the writing be made *as* evidence of the trust or not." [1] In Forster *v.* Hale, although the parol declarations of the party were adverse to the inference of a trust, and it was in evidence that he had refused to execute a declaration, yet, as the trust was clearly made out upon the face of a series of letters under his hand, he was charged accordingly.[2] In such a case, it is clear that the trustee must have been held upon his letters in spite of his intentions. On this point, therefore, it seems to be much

[1] Hutchinson *v.* Tindall, 2 Green (N. J.) Ch. 357. See Hutchins *v.* Van Vechten, 140 N. Y. 115.

[2] Forster *v.* Hale, 5 Ves. 308.

the better opinion that it is no objection to letters and other informal writings or memoranda of the trustee, introduced for the purpose of proving the trust, that they were drawn up for another purpose, and not addressed to, nor intended for the use of, the *cestui que trust.*[1]

§ 100. With more formal instruments of manifestation, there will generally be little difficulty It has before been observed, incidentally, that a recital in a deed was a good manifestation of a trust, and the same is true of a deposition of the trustee, signed and sworn to by him, and fully and clearly setting out the terms of the trust.[2] So of a recital in a bond.[3] So, also, the answer of the defendant in a suit to enforce the trust, admitting it as charged, is clearly a good manifestation within the statute;[4] or even an answer, made by the party to be charged in another suit, not *inter partes*, may bind him.[5]

§ 101. In Hampton *v.* Spencer, decided a few years after the Statute of Frauds was enacted, the plaintiff, in consideration of £80 paid by the defendant, conveyed a house and surrendered a copyhold estate to the defendant and his heirs; the bill was for a reconveyance on payment of the remainder due of the £80 and interest. The defendant, by answer, insisted that the conveyance was absolute to him and his heirs, without any promise, clause, or agreement that the

[1] Roberts on Frauds, 102. This view is confirmed by a comparison with those cases in which it has been held that a signature (under the fourth section) by a subscribing witness who knew the contents of the paper was a signature within the statute. See, in particular, Welford *v.* Beazely, 3 Atk. 503, where Lord Hardwicke said that "the word *party* in the statute is not to be construed party as to a deed, but *person* in general, or else what would become of those decrees where signing of letters, by which the party never intended to bind himself, has been held to be a signing within the statute." And see Urann *v.* Coates, 109 Mass. 581.

[2] *Ante*, § 99; Pinney *v.* Fellows, 15 Vt. 525.

[3] Gomez *v.* Tradesmen's Bank, 4 Sandf. (N. Y.) 102.

[4] Nab *v.* Nab, 10 Mod. 404; Ryall *v.* Ryall, 1 Atk. 59; Maccubbin *v.* Cromwell, 7 Gill & J. (Md.) 157; Jones *v.* Slubey, 5 Harr. & J. (Md.) 372; Patton *v.* Chamberlain, 44 Mich 5.

[5] Cook *v.* Barr, 44 N. Y. 156. See Haigh *v.* Kaye, L. R. 7 Ch. 469.

plaintiff might redeem; but he confessed that it was in trust that after the £80 with interest was paid, the defendant should stand seised for the benefit of the plaintiff's wife and children, although no such trust was declared by writing. The trust was not charged in the bill. For the plaintiff it was insisted that he having replied to the defendant's answer, who had not made any proof of such pretended trust, the defendant was bound by his confession that he was not to have the estate absolutely to himself, and no regard ought to be had to the matter set forth in avoidance of the plaintiff's demands, because the defendant had not proved it; yet the court decreed the trust for the benefit of the wife and children.[1]

§ 102. This case decides, it seems, that the answer of a defendant, setting up a trust in favor of third parties, will be sufficient evidence of it to defeat a complainant's equity, in a suit brought to recover or charge the land, and not alleging the trust. In this view it certainly conflicts with the principle that a defendant cannot by his answer discharge himself, but must establish his matter in avoidance by proof. It does not appear ever to have been followed in England nor in this country. In a case in Chancery in New Jersey, where a deed was made, absolute on its face and without any actual consideration paid, and on a bill to set it aside as obtained by fraud, the answer admitted that no part of the consideration was paid, but averred that the defendant held it in trust for the wife and children of the grantor (the plaintiff), and proffered willingness to execute a declaration of trust or secure the interest of the wife and children in any way the court should direct; it was held that such an answer, not being responsive to the bill, was not evidence of the trust. Chancellor Vroom said: "I am inclined to believe that if the present complainant had filed a bill claiming this deed to be a deed of trust, and praying that

[1] Hampton *v.* Spencer, 2 Vern. 288.

it might be so decreed, according to the original intention of the parties, the answer of the defendant, admitting the trust, would have been good evidence of it. It would have amounted to a sufficient declaration of the trust. But it would seem to be different where a complainant seeks, on the ground of fraud, to set aside a deed absolute on the face of it, and confessedly without any actual consideration paid; for . . . to suffer a defendant in such case to come in and avoid the claim by setting up a trust, would be to permit him to create a trust according to his own views, and thereby prevent the consequences of a fraud."[1] The position here taken seems to have been adopted also in the courts of Maryland.[2]

§ 103. Another class of cases in which the answer of a defendant in chancery is made to prove a trust, may, for the sake of completing our examination of this topic, be mentioned here. Where a bill is filed against an absolute devisee of an estate, alleging that it is held by him upon a trust not sufficiently declared under the statute, or illegal or fraudulent, there the defendant will be compelled in equity to disclose whether any such trust exists, although he plead the Statute of Frauds; and on his answering in the affirmative, his answer is evidence, not to set up the trust, but to defeat his apparent title, and to found a decree for a resulting trust to the heir.[3]

§ 104. Upon examination of the decisions which have been quoted to the admissibility of letters, recitals, answers, and memoranda in general made by the trustee, as manifestations of the trust, it will be seen that they have been commonly sustained upon the ground that the Statute of Frauds does not in its terms require that the trust shall be created or

[1] Hutchinson *v.* Tindall, 2 Green Ch. 363.

[2] Jones *v.* Slubey, 5 Harr. & J. 372; Maccubbin *v.* Cromwell, 7 Gill & J. 157.

[3] Adlington *v.* Cann, 3 Atk. 141; Stickland *v.* Aldridge, 9 Ves. 516; Muckleston *v.* Brown, 6 Ves. 52, and Bishop *v.* Talbot there cited. See Rutledge *v.* Smith, 1 McCord (S. C.) Ch. 119.

declared in writing, but only that such declaration or creation shall be manifested or proved by writing. The question how far such writings would be admissible (in view of their informality and in view of their not being contemporaneous with, or forming any part of, the original transaction by which the trust was created), under a different phraseology of the law may be very important. In Massachusetts and in New York, the statute has been altered: the former requiring that the trust shall be created or declared by writing, and the latter that it shall be created or declared by deed or conveyance in writing.[1] The subject was presented in the New York Court of Appeals in the case of Wright *v.* Douglass, where the question was upon the sufficiency of a recital in a deed as a manifestation of the trust. Ruggles, Ch. J., delivering the opinion of a majority of the court, said: "Under our former statute in relation to this subject, it was only necessary that the trust should be manifested in writing; and therefore letters from the trustee disclosing the trust were sufficient. . . . Our present statute requires that the trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust. But it need not be done in the form of a grant. A declaration of trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited, and if the trustee and *cestui que trust* are parties to the conveyance, the trust is as well and effectually declared in that form as in any other."[2] It would seem from this that if the New York statute as altered had not required that the trust should be declared or created by *deed or conveyance* in writing, any recital in a deed, whether the trustees and *cestui que trust* were parties or not, or any "solemn declaration of the existence of the facts," upon which a trust arises, would be sufficient. Striking out the words "deed or conveyance," the

[1] N. Y. Rev. Stat. 134; Mass. Pub. Stat. 1882, c. 141, § 1.

[2] Wright *v.* Douglass, 7 N. Y. 569.

statute is left substantially the same as the English.[1] We may conclude, therefore, that the phraseology of the English statute has not so extensive an effect as has been supposed. A recital of a trust is, by the very etymology of the word, *subsequent* to the creation of the trust; and a formal declaration of the facts upon which the trust arises also seems to presuppose an already existing trust obligation. In a case in South Carolina, the Court of Appeals take that view. The defendant there was a widow and executrix under a will by which her husband had devised the whole of his property to her, but upon an understanding that it should be disposed of according to a prior will in which certain provision had been made for his grandchildren. The defendant afterwards signed a writing by which she declared that there was due to her grandson (the plaintiff's intestate) a certain sum of money, on account of the legacies left him by his grandfather, and promised that the same with interest should be paid out of her estate. The court said that all *declarations* of trust must be in writing, though it was not necessary they should be *constituted* in writing; and that the instrument in question, though not in terms a declaration of trust, was a declaration of such facts as raised a trust, and was consequently sufficient.[2] And in Massachusetts, the court, in Homer *v.* Homer (cited *ante*, § 94), seems to have considered that the entry on the trustee's book would have been a good declaration of the trust, if it had been sufficiently full.[3] With such light upon

[1] By the statutes of 1860, the law in New York was again changed. See Cook *v.* Barr, 44 N. Y. 156.

[2] Rutledge *v.* Smith, 1 McCord Ch. 119.

[3] Homer *v.* Homer, 107 Mass. 86. In the case of Jenkins *v.* Eldredge, 3 Story, 294, decided after the revision of the statutes of Massachusetts, Mr. Justice Story said: "My opinion has proceeded upon the ground that there is no substantial difference between the Statute of Frauds of Massachusetts, either under the Act of 1783, c. 37, § 3, or the Revised Statutes of 1835, c. 59, § 30, and the statute of 29 Car. II. c. 3, on the subject of trusts; and such is the conclusion to which I have arrived, upon the examination of these statutes." (See Jenkins *v.* Eldredge, abstracted in the note to § 111, *post.*)

this question as is afforded by these decisions, it seems we must doubt whether, in those States where the law requires a trust to be created or declared by writing, it is not sufficient, as it is in England under the old statute, that that declaration be a clear statement of the facts upon which the trust arises, and whether it is material in what form or at what time it be made.

§ 105. The language of the statute in the seventh section is, "Some writing signed," etc., and it is decided that the writing is not required to be sealed.[1] In regard to the memorandum in these cases of trusts, like that required by the fourth section in cases of certain contracts, it is sufficient if, of several papers which together go to make up the required manifestation of the trust, one of them be signed, provided the others be so connected with it, in sense and meaning, as to render unnecessary a resort to parol evidence to show their relation to each other.[2]

§ 106. The requisition in the statute, that the writing shall be "signed by the party who is by law enabled to declare such trusts, or by his last will in writing," will be met by the signature of the grantor himself, if the declaration be previous to, or contemporaneous with, the act of disposition. Having once divested himself of all interest in property, by an absolute conveyance, it is no longer competent for him, either by parol or written declaration, to convert a party taking under such a conveyance into a trustee, except of course where the circumstances of the transaction were such as to raise a resulting or implied trust upon the conveyance, in which case the person entitled to such an interest would clearly have a right at any time to declare the trust.[3] But when a trustee holds an estate for another, on a trust either

[1] Adlington *v.* Cann, 3 Atk. 141; Boson *v.* Statham, 1 Eden, 508.

[2] Forster *v.* Hale, 3 Ves. Jr. 696. See this point examined under the head of the written memorandum required by the fourth section.

[3] Hill on Trustees, 62, and cases there cited. And see Sturtevant *v.* Sturtevant, 20 N. Y. 39; Phillips *v.* South Park Commissioners, 119 Ill. 626.

express or implied, although he succeeds to the grantor's legal title, a writing to declare a further trust of the estate so held is to be signed not only by the trustee, but by the beneficial owner.[1]

§ 107. Where there has been an absolute devise of lands, a mere declaration in writing by the devisor asserting a trust, not communicated to the devisee, and not executed and attested as required by the statute in cases of wills, will be insufficient to engraft a trust upon the will.[2] A paper testamentary in form, but inefficient as a will for want of regular execution and attestation as such, may, however, serve as a written manifestation of the trust, where it is not so controlled by an absolute devise. And in any case, even if the trust rest entirely in oral agreement between the devisor and devisee, the trust will be enforced notwithstanding the absolute devise, if it appear that the devise was made upon the faith of the devisee's agreement that the devise being made to him absolutely, he would carry out the trust.[3] But generally speaking, a parol declaration of trust in land is revocable at any time, and is revoked by a devise of the declarant to another person.[4]

§ 108. All that remains before concluding this chapter is to see what form of language will be sufficient to manifest a trust as required by the statute. It has been before remarked that the words used, though no formulary of expression be prescribed, must distinctly relate to the subject-matter, and must serve to show the court that there is a trust, and what that trust is. An illustration of this principle is presented in the case of Forster *v.* Hale, where it was attempted to establish a trust upon the expressions "our" and "your," contained in letters of the defendant to the alleged *cestui que*

[1] Tierney *v.* Wood, 19 Beav. 330; Kronheim *v.* Johnson, 7 Ch. Div. 60.

[2] Adlington *v.* Cann, 3 Atk. 141.

[3] Stickland *v.* Aldridge, 9 Ves. 516; Podmore *v.* Gunning, 7 Simons, 644; Tierney *v.* Wood, 19 Beav. 330; Barrell *v.* Hanrick, 42 Ala. 60; *post*, § 442; *ante*, § 94.

[4] Kelly *v.* Johnson, 34 Mo. 400.

trust, referring to the property in dispute. It was held that such terms did not necessarily imply that the parties to the correspondence were jointly interested in the estate alluded to; and the Master of the Rolls, Sir Richard Pepper Arden, said there was great danger in executing trusts proved only by letters loosely speaking of trusts which might or might not be actually and definitively settled between the parties, with such expressions as those above quoted, intimating only some intention of a trust; and that it should be clear from the declaration what the trust was.[1] So in the case of Steere *v.* Steere, before Chancellor Kent, two of the defendants, sons of Stephen Steere, under whose will the plaintiffs claimed, had purchased at judgment sale certain land belonging to their father, and it was alleged that they held it under a trust to reconvey to the testator on repayment of the purchase-money and expenses. The evidence relied upon consisted of a number of letters written by one or more of the defendants, in which frequent allusion was made to the estate, and to a promise by the defendants that the family should have a part of it, that it should be held for the family, with similar general expressions. The Chancellor was clear that such language did not tend to show the trust alleged, which was a trust in favor of the testator; but that even if a trust in favor of the family had been alleged, the suggestions and intimations were too loose to found a decree for specific execution.[2]

§ 109. Any instrument, however, which distinctly shows the trust relation existing between the parties will be sufficient to satisfy the statute, in whatever form it may be. Thus an acknowledgment in writing that he is indebted to another for a legacy under a will shows the defendant to be a trustee for the purpose of carrying out the will to that extent.[3] So

[1] Forster *v.* Hale, 3 Ves. Jr. 696; Burke *v.* Wilber, 42 Mich. 327. See Renz *v.* Stoll, 94 Mich. 377.

[2] Steere *v.* Steere, 5 Johns. (N. Y.) Ch. 1.

[3] Rutledge *v.* Smith, 1 McCord (S. C.) Ch. 119.

where the defendant, the owner of the legal title to an estate, had covenanted with third parties to sell part of it and apply the proceeds to the payment of certain demands which they held against the plaintiff's father, from whom the estate had been purchased, it was held to be a sufficient declaration of trust, as furnishing conclusive evidence that, notwithstanding the defendant held the legal title, there was a beneficial interest remaining in the plaintiff's father.[1] So where the holder of a note indorsed to him as security for a debt, having recovered judgment against the promisor and levied on the rents and profits of his land for a term of years, signed a writing not under seal, promising to pay to the plaintiff all the rents which he should receive after his debt should be paid, or to allow the plaintiff the use and improvement of the land after such payment, it was held that this was a sufficient declaration of trust.[2] And a mere private memorandum made by the defendant in his own handwriting, though not signed, setting forth that in a previous conversation with the plaintiff's testator, he had told him that certain persons (the plaintiffs) were to have certain legacies and annuities, has been held to be a sufficient declaration of the trust for those purposes.[3]

§ 110. A covenant to convey or hold lands, purchased or to be purchased, to certain uses, or a bond to convey lands, as the *cestui que trust* shall direct, is obviously equivalent to a declaration of trust.[4] So, also, where a Revolutionary soldier entitled to bounty land delivered to one Birch (from whom by mesne assignments it came to the appellants) his discharge from the army, indorsing upon it the following: "This is to certify that the bearer, John Birch, is entitled to

[1] Barrell *v.* Joy, 16 Mass. 221.

[2] Arms *v.* Ashley, 4 Pick. (Mass.) 71.

[3] Barrow *v.* Greenough, 3 Ves. Jr. 152. See Urann *v.* Coates, 109 Mass. 581.

[4] Earl of Plymouth *v.* Hickman, 2 Vern. 167; Blake *v.* Blake, 2 Bro. P. C. 241; Moorecroft *v.* Dowding, 2 P. Wms. 314.

all the lands that I, Benjamin Griffin, am entitled to, either from the State or Continent, for my services as a soldier, certified in my discharge," Kent, C. J., held that this certificate was an assignment of Griffin's equitable claim to the land, was sufficient for that purpose without any words of inheritance, and amounted to a declaration of trust.[1]

§ 111. Where there is any written evidence showing that the person apparently entitled is not really so, parol evidence may be admitted to show the trust under which he actually holds the estate. In the case of Cripps *v.* Jee, an estate being subject to certain encumbrances, the grantor mortgaged the equity of redemption, by deeds of lease and release, to two persons of the name of Rogers, as purchasers for a consideration stated in the deed, the real intention of the parties being that the Rogerses should be mere trustees for the grantor, and should proceed to sell the estate, and after paying the encumbrances should pay the surplus money to the grantor. In the books of account of one of the Rogerses, there appeared an entry in his handwriting of a year's interest paid to an encumbrancer on the estate, on account of the grantor, and other entries of the repayment of that interest to Rogers by the grantor, and there was also evidence of a note and bond given by the Rogerses to a creditor of the grantor, in which they stated themselves to be trustees of the estate of the grantor. Lord Kenyon held that this written evidence being inconsistent with the fact that the Rogerses were the actual purchasers of the equity of redemption, farther evidence by parol was admissible to prove the truth of the transaction.[2] Parol evidence has also been admitted by Chancellor

[1] Fisher *v.* Fields, 10 Johns. (N. Y.) 495.

[2] Cripps *v.* Jee, 4 Bro. Ch. 472; Lewin on Trusts. 62. The principle is somewhat illustrated in the following case, which, however, was decided long anterior to Cripps *v.* Jee, and apparently upon another ground. Bill filed to set aside an assignment of a leasehold estate, and all other the estate and effects of the plaintiff, upon a suggestion that the same was never intended as an absolute assignment for the benefit of the defendant, but made only to ease the plaintiff of the trouble and care of managing

Kent to repel the inference of a trust from certain letters and accounts, in a case where the writings were of a loose and ambiguous character, the principle being however carefully reserved, that if the written proof had been clear and positive, it could not have been rebutted by parol.[1] But in Leman *v.* Whitley, while the exception in favor of trusts partly proved in writing was recognized, the binding application of the Statute of Frauds to cases of mere parol trusts was firmly sustained. A son had conveyed an estate to his father, nominally as purchaser, for the consideration, expressed in the deed, of £400, but really as a trustee, in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the

his own concerns at that time (being then under great infirmities of body and mind), and subject to a trust for the benefit of the plaintiff, if he should afterwards be in a capacity of taking care of his own affairs. No trust of any kind appeared on the face of the assignment, but upon the whole circumstances of the case, (viz.), the annuity reserved to the plaintiff being by no means an equivalent to the estate so disposed of, the recital in the deed of assignment that the plaintiff was under a disability at that time, of taking care of his own affairs, all the effects in general being assigned, as well as the leasehold estate, and after a general covenant in the deed from the defendant to indemnify the plaintiff against any breach of covenant in the original lease, and a special reservation to the plaintiff of all the timber, etc., and he set out and allowed timber for the repair of the estate (a circumstance principally relied on by the *Lord Chancellor*, as not at all reconcilable with an absolute disposition of the whole interest to the defendant), and other circumstances raising a strong presumption of a trust intended. *Lord Chancellor* (Hardwicke) admitted parol evidence to explain this transaction, viz., declarations by the defendant, at the time the deed of assignment was executed, and afterwards amounting to an acknowledgment of such a trust as the plaintiff now insisted upon; and his Lordship said such evidence was consistent with the deed, as there was all the appearance of an intended trust upon the face of it; but, however, though there can be no parol declaration of a trust, since the stat. of 29 Car. II., yet this evidence is proper in avoidance of fraud, which was here intended to be put on the plaintiff, for the defendant's design was absolutely to deprive the plaintiff of all the benefit of his estate. Hutchins *v.* Lee, 1 Atk. 447. But see Dyer's Appeal, 107 Pa. St. 446.

[1] Steere *v.* Steere, 5 Johns. (N. Y.) Ch. 1.

son. The father died shortly afterwards, before any money was raised, having by his will made a general devise of all his real estate. Sir John Leach, in holding the case to be within the Statute of Frauds, and that parol evidence was inadmissible to prove the trust, said: "There is here no pretence of fraud, nor is there any misapprehension of the parties with respect to the effect of the instruments. It was intended that the father should by legal instruments appear to be the legal owner of the estate. There is here no trust arising or resulting by the implication or construction of law." He then adverts to Cripps *v.* Jee and to the written evidence in that case, upon the strength of which Lord Kenyon had admitted the auxiliary parol proof, and adds: "There is here no evidence in writing, which is inconsistent with the fact that the father was the actual purchaser of this estate; and it does appear to me, that to give effect to the trust here would be in truth to repeal the statute of frauds."[1] It would seem that the exception established in Cripps *v.* Jee, in favor of trusts partly manifested by writing, is difficult to reconcile with the plain language and policy of the statute requiring the trust (that is, the whole trust) to appear by written evidence; and that the determination in Leman *v.* Whitley, not to admit it unless clearly applicable, was wise and consistent.[2]

[1] Leman *v.* Whitley, 4 Russ. 426, 427. See Gallagher *v.* Mars, 50 Cal. 23.

[2] Cook *v.* Barr, 44 N. Y. 156. But see Kingsbury *v.* Burnside, 58 Ill. 336. In the case of Jenkins *v.* Eldredge (3 Story, 289), Leman *v.* Whitley was referred to and disapproved, as improperly excluding parol evidence in cases of trusts, and Mr. Justice Story says he "should have had great difficulty in following it, even if there were no authorities which seemed fairly to present grounds for doubt," which authorities are Lees *v.* Nuttall, 1 Russ. & M. 53; Carter *v.* Palmer, 11 Bligh, N. R. 397; and Morris *v.* Nixon, 1 How. (U. S.) 118. With the greatest submission, it must be said to be doubtful whether the principle laid down in Leman *v.* Whitley has been denied or questioned in either of the decisions quoted. And it is remarkable that any qualification of that principle should have been intended, no reference being made to Leman *v.* Whitley in either of

§ 112. When we come to that part of our subject which relates to contracts, it will be seen that one of the most im-

them. We should naturally desire to see those decisions placed upon some other ground, rather than conclude (as it seems we must) that they establish the absolute admissibility of parol evidence in cases of trusts. The two first-mentioned cases were mere cases of an agent abusing his agency to acquire the legal title contrary to the intention of his principal, such as have been before referred to, and are always excepted from the operation of the statute upon the ground of an implied trust, *ex maleficio*, in favor of the principal. The last is the common case of an absolute deed of land, proved by parol to have been actually made as security for a loan of money; such proof in that particular class of cases being allowed in the great majority of equity and even law courts of our country, and upon grounds quite unconnected with any construction of the Statute of Frauds. Mr. Justice Story, in his Equity Jurisprudence (§ 1199, note 2), refers to Leman *v.* Whitley as a case which stands upon the extreme boundary of the law as to the inadmissibility of parol evidence in cases of *resulting trusts*, and his condemnation of the case in his decision in Jenkins *v.* Eldredge is apparently pronounced under the same impression that it was a case of a resulting trust. But Sir John Leach expressly says in his opinion that it is not a case of a resulting trust, but of parol evidence offered to prove an express trust against the written documents in the case. From this and other remarks of Mr. Justice Story, it must be inferred that the intent of the decision in Leman *v.* Whitley was in some measure misapprehended by him. Jenkins *v.* Eldredge is a case itself which in all its bearings is highly interesting in relation to the whole subject of trusts as affected by the statute, and as it has been several times referred to in preceding pages, an abstract of its facts and the points decided is here presented. Jenkins purchased a piece of land of Deblois for $20,000, with a view to build on it for speculation. Being unable to comply with the conditions of sale, he agreed with Deblois that her warranty deed conveying the premises to him should, on the execution of the agreement and the payment of $1,000 to Deblois by Jenkins, be deposited with one Philips in escrow to be delivered to Jenkins if he should, before a certain day, pay Deblois $5,042.50, and execute a note to her for $15,127 payable in five years, and a mortgage of the premises to secure the payment of the note and taxes; otherwise the contract of sale to be null and void, and the $1,000 forfeited to Deblois. Jenkins paid the $1,000, and took possession of the land, and made excavations and commenced building upon it, expending, as his bill alleged, about $15,000. His means being exhausted, he was unable to pay the $5,000 on the day stipulated, and Deblois, pressing for payment, threatened to sell the premises at auction. Jenkins applied for and obtained an injunction, and a decree giving him about one year more in which to perform the contract, but he failed finally to do it, and his bill was dismissed. In the interven-

portant questions to be settled is, whether in the memorandum of the contract the consideration is required to be expressed.

ing year, Jenkins applied to Eldredge for assistance in raising money to complete his enterprise; and it was agreed between them that Eldredge should take a conveyance of the premises from Deblois, which was accordingly done after the dismissal of the bill, and Jenkins executed a release to Eldredge by which he admitted in terms that he had "no legal or equitable right in or to the same." From that time forward Eldredge continued to be ostensibly, and, so far as the second title was concerned, the sole and exclusive owner of the legal and equitable estate in the premises. Jenkins was subsequently employed superintending the erection of the building. The necessary moneys were advanced chiefly by Eldredge, but in part, as it appeared, by Jenkins himself. The original intention of the parties was shown by parol evidence to be, that the whole legal and equitable estate should be in Eldredge, to enable him to raise money on it to complete building and discharge the encumbrances. Eldredge admitted that he had promised to make a deed of trust and place it among his papers, to provide for the contingency of his death, but denied that he ever made such a deed, or that he ever intended to fetter his legal and equitable estate in the premises. There was parol evidence that it was part of the original bargain that this declaration of trust should be made and preserved by Eldredge. It was contended on the part of the plaintiff that the case was taken out of the statute: 1. Because it was a resulting trust. 2. Because it was a case of agency. 3. Because Eldredge had been guilty of fraud in his conduct and operations. 4. Because the plaintiff had done acts of part-performance, and could not now be reinstated in his former position without a decree for the specific execution of the trust. Judge Story's opinion was that the case was not to be considered as one standing purely or singly upon either of these grounds, but as embracing ingredients of all of them, and he examines the case in each view. Upon the first ground, namely, that Jenkins had a resulting trust in the estate, he says, p. 287, that "the plaintiff had expended a large sum of money on the premises; that Deblois never could have conveyed the same to Eldredge, without the plaintiff's express solicitation and consent; and that Eldredge was in no just sense a purchaser for his own sole account, giving a full value for the premises, but bought with a full knowledge of the enhanced value by the expenditures of the plaintiff, and for the purpose of giving the benefit of such expenditures as a resulting trust between the plaintiff and himself in the premises. In this respect, it approaches very nearly to the case of a joint purchase, where each purchaser is to have an interest in the purchase, in proportion to his advances. Now in such cases, parol evidence is clearly admissible to establish the trust, as well as to rebut, control, or vary it. It appears to me, that it may well be treated as a mixed case; *quoad* the plaintiff, as a resulting trust *pro tanto*, — and *quoad* Eldredge, as a trust *pro tanto* for his liabilities, expenditures, and

It may be sufficient to remark, in reference to the writing required by the seventh section in cases of trusts, that all the

compensation." He proceeds, p. 289: "In the next place, as to the agency. It appears to me, that here a confidential relation of principal and agent did exist; and that being once shown, it disables the party from insisting upon the objection, that the trust is void, as being by parol. The very confidential relation of principal and agent has been treated as, for this purpose, a case *sui generis*. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust, even when the agency itself may be, nay, must be proved only by parol. . . . In the next place, as to the asserted fraud. If, as the argument of the plaintiff supposes, Eldredge originally engaged in the undertaking with a meditated design to mislead the confidence of the plaintiff, and, by practising upon his credulity and want of caution, to get the title to the property into his own hands, and then to convert it into the means of oppressively using it for his own advantage and interest, I should have no doubt that the case would be out of the reach of the Statute of Frauds; for the rule in equity always has been, that the statute is not to be allowed as a protection of fraud, or as the means of seducing the unwary into false confidence, whereby their intentions are thwarted or their interests are betrayed." The learned judge here refers to Montacute *v.* Maxwell (1 P. Wms. 618-620), and to the opinion of Lord Chancellor Parker there expressed, that "in cases of fraud, equity should relieve, even against the words of the statute; . . . but where there is no fraud, only relying upon the honour, word, or promise of the defendant, the statute making those promises void, equity will not interfere." He dissents from that proposition, even as applied to cases of contracts in consideration of marriage, and then proceeds as follows: "I doubt the whole foundation of the doctrine, as not distinguishable from other cases which courts of equity are accustomed to extract from the grasp of the Statute of Frauds. It is not, however, necessary to consider, what should be the true rule in such a case; the present is not one of that nature, but stands upon very different grounds. I think, moreover, that there is one ingredient in the present case, which gives it a marked character, which is often relied on in cases of agreements on marriage, that Eldredge did agree to reduce the trust to writing, and to keep a private memorandum thereof in his own possession, as evidence, in case of his death or other accident. I do not accede to the statement, that this was a mere subsequent promise, long after the execution of the conveyances, as his answer imports; but it was a part of his original agreement, and upon the faith of which the arrangement was completed. He never did comply with that part of the agreement. He admits, that he never made any such memorandum. If he had made one, it might have swept away the whole of his present defence. I should not incline, however, to impute to Eldredge any such original premeditated

reasons in favor of requiring the express statement of the consideration under the fourth section seem to hold good in relation to the other. There are two cases found in which this question has been passed upon, and in which it was decided that the consideration need not be expressed. One of them,

intention of fraud as the argument of the plaintiff supposes, unless driven to it by the most cogent circumstances of necessity. And it does not seem to me necessary, in this case, to go to such a length. In my judgment, the result is the same, although the original design of Eldredge was perfectly fair and honorable, if he has since deviated from his duty, and attempted to absolve himself from the obligations of the trust, such as he knew the plaintiff believed it to be, and constantly acted upon; because, in point of law, it would be a breach of trust, involving a constructive fraud, such as a court of equity ought to relieve. . . . In the next place, as to the ground of a part-performance on the part of the plaintiff. From what has been already suggested, there seems to me strong ground to support this suggestion. The plaintiff did, at the time of the conveyance to Eldredge, surrender up his present rights, or just expectations, under the contract with Deblois; he suffered his equity to expire, and he agreed to give up to Eldredge all claims which he might have to the premises; and conseuted to a direct conveyance thereof to Eldredge. He did more; he surrendered up all remuneration for his past advances and services; and also all remuneration for his future services, except so far as ultimately, after satisfying all other claims, there might remain a surplus of value of the property to indemnify him. It has been suggested, that he had, at the time, no claim upon Deblois for those advances, or services, or improvement of the property. I doubt, if, in equity, that doctrine is maintainable, if the value in the hands of Deblois had been greatly enhanced thereby. But upon this, to which allusion has been before made, I do not dwell. But I do put it, that none of these acts would have been done; and, above all, the release to Eldredge by the plaintiff would never have been executed, but upon the faith that the trust was to exist for the plaintiff's benefit, and the release was a part execution of the agreement between him and Eldredge. And here I cannot but remark, that the very exception in the deed of Deblois to Eldredge (a most fit and proper exception, under the circumstances, and upon which the release was designed to operate) 'excepting any claim or demand made by, through, or on account of Joseph Jenkins, and also excepting any claim or demand arising out of any contract made by or with said Jenkins,' — shows clearly that all the parties understood that Jenkins then had or claimed some right or title in the premises, and that the extinguishment of it was essential to the security of purchasers. So that, upon the ground of part-performance, there is much in the case to take the case out of the reach of the statute."

however, was in Massachusetts, where it had been settled, for their own courts, that even the fourth section does not require the consideration to appear in the memorandum, and the other was upon an instrument under seal, a case excepted, even in England, from the application of the general rule.[1]

§ 113. It should also be observed, before passing from this branch of our subject, that the principles upon which courts of equity, under peculiar circumstances, decree the specific execution of verbal contracts, notwithstanding the Statute of Frauds, comprehend cases of trust resting in parol.[2] It is not, however, deemed worth while to anticipate here the discussion of any part of the important subject of the enforcement in equity of obligations affected by the statute, that being reserved for special examination hereafter.[3]

[1] Arms *v.* Ashley, 4 Pick. 71; Fisher *v.* Fields, 10 Johns. (N. Y.) 495.
[2] Jenkins *v.* Eldredge, *ante*, § 111 n.; Robson *v.* Harwell, 6 Ga. 589.
[3] *Post*, Chap. XIX.

PART III.

OF CONTRACTS.

OF CONTRACTS,

AS AFFECTED BY THE FOURTH AND SEVENTEENTH SECTIONS OF THE STATUTE OF FRAUDS.

SECTION 4. No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; 2, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; 3, or to charge any person upon any agreement made upon consideration of marriage; 4, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5, or upon any agreement that is not to be performed within the space of one year from the making thereof; 6, unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

SECTION 17. No contract for the sale of any goods, wares, and merchandises for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or *memorandum* in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

CHAPTER VIII.

VERBAL CONTRACTS, HOW FAR VALID.

§ 114. We come now to consider the Statute of Frauds in its application to contracts; a branch of the subject of superior importance, and upon which the decisions of the courts of both countries have been very numerous, presenting a great variety of questions of acknowledged difficulty. The method proposed for the discussion of it is that suggested by the very arrangement of the sections above quoted from the English statute, and it is to examine, *First*, How far the statute affects verbal contracts; *Secondly*, What are the contracts embraced by it; and, *Thirdly*, What are the formalities which it requires in the making of such contracts; or, more briefly, its *operation*, its *subject-matter*, and its *requirements*. The first of these divisions will form the subject of the present and the succeeding chapter.

§ 115. At the outset, we note the difference in phraseology between the fourth and seventeenth sections, in this, that the former says "no action shall be brought" upon the contract, and the latter says the contract shall not be "allowed to be good." There seems to be no reason to attribute to the latter phraseology any force, or to draw from it any inferences, different from those which attend the construction of the former. "Allowed to be good" appears to mean, considered good for the purposes of recovery upon it;[1] and the remaining portions of the two sections in question being very similar, and the policy of the two being very clearly the same, we should not be justified in laying much stress upon

[1] Townsend *v.* Hargraves, 118 Mass. 325, 334.

the change of phrase. The whole statute is undeniably put together most irregularly and loosely. Many of our States, in adopting the substance of it, have disregarded the difference alluded to, and put the sales of goods into the same section with other contracts, extending to them a common provision, that no action shall be brought, etc.

§ 115 *a*. The operation, then, which the statute has upon a contract covered by it, is that no enforcement of the contract can be had, while the requirements of the statute remain unsatisfied, if the party against whom enforcement is sought choose to insist upon this defence; the statute does not make the contract illegal; a contract which was legal and actionable before the statute is legal since and notwithstanding the statute, and is also actionable or enforceable if the making of the contract be followed by compliance with the requirements of the statute.[1] Compliance with the requirements of the statute does not constitute the contract; the statute presupposes an existing lawful contract, the enforcement of which is suspended till the statute is satisfied.

§ 116. Where the contract has been in fact completely executed on both sides, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute.[2] An apt illustration of this familiar doctrine is

[1] In previous editions of this treatise, the operation of the statute has been defined, as the mere prescription of *a rule of evidence*. It is still believed that this view is the true one, and that the cases which are inconsistent with it rest upon uncertain ground. But it is perhaps better to avoid, as far as may be, prejudging open questions in introductory definitions. The statement in the present text will be found to be as precise as the condition of the law will warrant. Since the foregoing was written, it has been confirmed by Lord Blackburn in an opinion delivered in Maddison *v.* Alderson, L. R. 8 H. L. C. 467.

[2] Stone *v.* Dennison, 13 Pick. (Mass.) 1; Mushat *v.* Brevard, 4 Dev. (N. C.) 73; Ryan *v.* Tomlison, 39 Cal. 639; Niland *v.* Murphy, 73 Wisc. 326; Haussman *v.* Burnham, 59 Conn. 117; Gordon *v.* Tweedy, 71 Ala. 202; Webster *v.* Le Compte, 74 Md. 249; Larsen *v.* Johnson, 78 Wisc. 300; Baldock *v.* Atwood, 21 Oregon 73; Bibb *v.* Allen, 149 U. S. 481;

afforded by the case of a verbal agreement for a lease not exceeding three years, followed by an actual verbal demise accordingly; here no action would lie upon the agreement while executory, but after it is executed by the creation of a tenancy such as the statute allows to be created without writing, both parties are bound by the terms of the tenancy, and neither party can avail himself of the fact that the agreement could not, in the first instance, have been enforced against him.[1] The same rule applies when goods are delivered and paid for, or a guarantor has paid, as he agreed to do, upon the default of the principal debtor; neither party can recover what money he has paid or what property he has delivered, though it may be that he could not have been compelled at law to pay or deliver; still less can the principal debtor for whom the guarantor has paid, or any third person for whom another has purchased goods, avoid the just claim of the guarantor or of the purchaser for reimbursement, on the ground that they could not have been compelled at law to make the payments which they now seek to have made up to them. So with all cases of contracts embraced by the statute.[2] When fully executed on both sides, the positions of the parties are fixed, subject, of course, to the power of a court of equity to afford relief in cases of fraud and mistake.

§ 117. When so much of a contract as would bring it within the Statute of Frauds has been executed, all the remaining stipulations become valid and enforceable, and the parties to the contract regain all the rights of action they would have had at common law. Thus when, in pursuance of a verbal

Grippen *v.* Benham, 5 Wash. 589. But see De Moss *v.* Robinson (Cooley, J., dissenting), 46 Mich. 62.

[1] Lord Bolton *v.* Tomlin, 5 Ad. & E. 856.

[2] Crane *v.* Gough, 4 Md. 316; Andrews *v.* Jones, 10 Ala. 400; Craig *v.* Vanpelt, 3 J. J. Marsh. (Ky.) 489; Watrous *v.* Chalker, 7 Conn. 224; Pawle *v.* Gunn, 4 Bing. N. C. 445; Shaw *v.* Woodcock, 7 Barn. & C. 73; s. c. 9 D. & R. 889; Price *v.* Leyburn, Gow, 109; McCue *v.* Smith, 9 Minn. 252; Beal *v.* Brown, 13 Allen (Mass.) 114.

contract, a conveyance or lease of land is executed, or goods are sold and delivered, an action may be maintained for the breach of the promise to pay the price, or of any of the other stipulations of the contract;[1] provided, of course, they are not such stipulations as the statute requires to be in writing.[2]

[1] Morgan *v.* Griffith, L. R. 6 Exch. 70; Angell *v.* Duke, L. R. 10 Q. B. 174; Green *v.* Saddington, 7 El. & B. 503; Lavery *v.* Turley, 6 Hurlst. & N. 239; Price *v.* Leyburn, Gow, 109; Souch *v.* Strawbridge, 2 C. B. 814, *per* Tindal, C. J.; Seago *v.* Deane, 4 Bing. 459; Wetherbee *v.* Potter, 99 Mass. 360; Preble *v.* Baldwin, 6 Cush. (Mass.) 549; Brackett *v.* Evans, 1 Cush. (Mass.) 79; Page *v.* Monks, 5 Gray (Mass.) 492; Eastham *v.* Anderson, 119 Mass. 526; Remington *v.* Palmer, 62 N. Y. 31; Worden *v.* Sharp, 56 Ill. 104; Allen *v.* Aguirre, 7 N. Y. 543; Jewell *v.* Ricker, 68 Me. 377. See Bonner *v.* Campbell, 48 Pa. St. 286; Tripp *v.* Bishop, 56 Pa. St. 424; Freed *v.* Richey, 115 Pa. St. 361; McCarthy *v.* Pope, 52 Cal. 561; Russell *v.* Berkstresser, 77 Mo. 417; Walsh *v.* Colclough, 6 U. S. Cir. Ct. App. 114, 56 Fed. Rep. 778. Hoyle *v.* Bush, 14 Mo. App. 408; Huston *v.* Stewart, 64 Ind. 388; Arnold *v.* Stephenson, 79 Ind. 126; Worley *v.* Sipe, 111 Ind. 238; Huff *v.* Hall, 56 Mich. 456; Toan *v.* Pline, 60 Mich. 385; Bork *v.* Martin, 132 N. Y. 280; Smart *v.* Smart, 24 Hun N. Y.) 127; McGinnis *v.* Cook, 57 Vt. 36; Kirk *v.* Williams, 24 Fed. Rep. 437; Walker *v.* Shackelford, 49 Ark. 503; Galley *v.* Galley, 14 Neb. 174; Watson *v.* Baker, 71 Texas 739; Lyman *v.* Lyman, 133 Mass. 414; Haviland *v.* Sammis, 62 Conn. 44; Showalter *v.* McDonnell, 83 Texas 158. A delivery of the deed to a third party in escrow is held not a delivery to the purchaser so as to hold him liable to action for the price, under the rule stated in the text, in Cagger *v.* Lansing, 43 N. Y. 550; but *contra*, in Negley *v.* Jeffers, 28 Ohio St. 90; Kelsey *v.* McDonald, 76 Mich. 188; Ducett *v.* Wolf, 81 Mich. 311; Waldron *v.* Laird, 65 Mich. 237. A *tender* of a deed of land under a verbal contract is not sufficient to support an action for the agreed price. Hodges *v.* Green, 28 Vt. 358. See Ballard *v.* Bond, 32 Vt. 355; King *v.* Smith, 33 Vt. 22. But see Walker *v.* Owen, 79 Mo. 563.

[2] Townsend *v.* Townsend, 6 Met. (Mass.) 319; Hibbard *v.* Whitney, 13 Vt. 21; Ballard *v.* Bond, 32 Vt. 355; Root *v.* Burt, 118 Mass. 521; Reyman *v.* Mosher, 71 Ind. 596; Nugent *v.* Teachout, 67 Mich. 571; Winters *v.* Cherry, 78 Mo. 344. In Michigan the decisions upon this point seem to be conflicting. Whipple *v.* Parkes, 29 Mich. 369; Liddle *v.* Needham, 39 Mich. 147; Waldron *v.* Laird, 65 Mich. 237; White *v.* Cleaver, 75 Mich. 17. Where an agreement by the vendee to give the vendor a pass-way over other land forms a part of the consideration for the sale and conveyance of land, and the vendee is placed in possession of the land sold and conveyed, and the grantor is placed in the use of

§ 117 *a*. This doctrine is commended by soundness in principle, and has in its favor the clear weight of authority; but there are cases really or apparently opposed to it, and a somewhat extended examination of these will be useful. The first was Cocking *v.* Ward,[1] decided in the Court of Common Pleas in 1845. The plaintiff occupied certain premises as tenant under a lease having several years to run, and the defendant agreed orally to pay him £100 if he would give up the rest of the term, and get the landlord to accept the defendant as tenant in his place. The plaintiff left the premises and the defendant entered, but afterwards refused to pay the £100, and for breach of his agreement to pay it the suit was brought. It was urged in argument in the plaintiff's behalf that, since the stipulation covered by the statute had been performed, the promise to pay was actionable. This was denied by Tindal, C. J., who delivered the opinion of the court; but recovery was allowed upon a subsequent oral admission by the defendant that he owed the money. Waiving the question whether the recovery was rightly so allowed,[2] it is to be observed that the stipulations covered by the statute had not been performed, as no valid assignment or surrender had been made, though this point was not noticed by the court. Kelly *v.* Webster,[3] seven years later in the same court, followed Cocking *v.* Ward, a brief opinion being delivered by Maule, J. In this case, also, the agreement, which was in part to assign a lease, was not

the pass-way, the former will not be allowed to prevent the latter from using the pass-way, upon the ground that the contract therefor was within the Statute of Frauds, and a court of equity will not allow the vendee to hold the land and at the same time refuse to pay for it. Champion *v.* Munday, 85 Ky. 31.

[1] Cocking *v.* Ward, 1 C. B. 858.

[2] See Pulbrook *v.* Lawes, 1 Q. B. D. 290; also Hooker *v.* Knab, 26 Wisc. 511, deciding that a duty arising from a promise covered by the statute cannot be enforced by virtue of a second promise also covered by the statute.

[3] Kelly *v.* Webster, 12 C. B. 283.

executed by any assignment in writing. Smart *v.* Harding,[1] in 1855, was decided in the same way; but there was in this case, also, an agreement to assign an interest, not sufficiently executed by a written assignment. In Hodgson *v.* Johnson,[2] in the Queen's Bench, it was again argued that the plaintiff could recover upon the executory part of the contract, all its stipulations which the statute covered having been executed. Substantially Lord Campbell admitted such to be the rule of law, saying, "Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then if that part of the contract has been executed, the fact of the whole contract not being in writing will not preclude an action on the other part founded on a promise to be performed after such execution." [3] But in this case, also, there had not in fact been an execution of all that part of the contract which fell under the statute. In Morgan *v.* Griffith,[4] in the Exchequer, a valid lease had been delivered and accepted pursuant to an oral contract, and the lessee was allowed to recover upon a stipulation of the lessor to keep down the rabbits on the demised property. Here the correct doctrine, as it is understood to be, was directly affirmed.[5] In Angell *v.* Duke,[6] in the Queen's Bench, where the declaration alleged a parol agreement for a lease to be given to the plaintiff, and for repairs to be made and more furniture put in by the defendant, and that the lease had been given, but the defendant did not put in the furniture, and the plaintiff sued for breach of this last stipulation, there was a demurrer, which admitted the giving of a valid lease; and the

[1] Smart *v.* Harding, 15 C. B. 652.

[2] Hodgson *v.* Johnson, El. B. & E. 685. See this case remarked upon as to another point, in Pulbrook *v.* Lawes, 1 Q. B. D. 284.

[3] Green *v.* Saddington, 7 E. & B. 503, cited as authority for the proposition quoted, was decided after Cocking *v.* Ward, and professed to be distinguished from it. Crompton, J., did not concur.

[4] Morgan *v.* Griffith, L. R. 6 Exch 70.

[5] See also Mann *v.* Nunn, 43 L. J. C. P. 241.

[6] Angell *v.* Duke, L. R. 10 Q. B. 174.

plaintiff recovered upon the parol agreements to repair the premises and to put in more furniture. The opinions go upon the ground (doubtful on the language of the declaration) that the contract was unilateral, the taking of the lease being optional with the defendant. Cocking *v.* Ward is remarked upon as a decision of little weight; and on the whole, Angell *v.* Duke may be regarded as affirming the correct doctrine.[1] But in a contemporaneous decision in the Exchequer,[2] although a valid lease was delivered, it was still held that this did not make enforceable an agreement to pay a *bonus*. The doctrine of Angell *v.* Duke cannot therefore be regarded as established in the English courts.

§ 117 *b*. And in this country, as well as in England, decisions opposed to it are to be found. In Baldwin *v.* Palmer,[3] in the Court of Appeals of New York, the defendant agreed to convey to the plaintiff certain premises free from all encumbrances, for a certain sum of money; the plaintiff paid his money and took his deed, but shortly afterwards discovered an unpaid assessment which he was obliged to pay himself, and brought this action to recover. His action was not sustained, the court holding that the conveyance of the land was not enough to take the rest of the contract out of the statute. And so in Dow *v.* Way,[4] where the defendant agreed to sell a house and lot to the plaintiff, and perform certain labor on it, for $1,500; and plaintiff paid the money and defendant conveyed the house, but afterwards failed to perform the labor as agreed; and the plaintiff brought his action for such breach; he was held not entitled to recover. On the other hand, in the case of Allen *v.* Aguirre,[5] in the New York

[1] In Mechelen *v.* Wallace, 7 Ad. & E. 49, the contract had never been *executed* by giving a lease, and therefore no recovery could be had on the other parts of the agreement. But see Steemod's Administrator *v.* Railroad Co., 27 W. Va.

[2] Sanderson *v.* Graves, L. R. 10 Exch. 234.

[3] Baldwin *v.* Palmer, 10 N. Y. 232. See Liddle *v.* Needham, 39 Mich. 147.

[4] Dow *v.* Way, 64 Barb. 255.

[5] Allen *v.* Aguirre, 7 N. Y. 543.

Court of Appeals, the plaintiff, who bought goods from the defendant and paid for them, with the understanding that if certain customs duties which the defendant had paid upon the goods should afterwards be remitted, the amount should be returned to the plaintiff, brought action on the contract for the amount which had been so remitted, and his action was allowed. And in the case of Remington *v.* Palmer,[1] in the same court, upon a state of facts not substantially distinguishable from those in Baldwin *v.* Palmer, that case, though not cited, was in effect overruled, and the correct doctrine was affirmed.

§ 117 *c.* A question similar to that of the right to recover on the verbal contract for breach of engagements not covered by the statute, when all that are covered by it have been performed, has sometimes arisen in cases involving the enforcement of contracts under which one party has performed, but the other is not, by the terms of his contract, required to perform till after the expiration of a year. It has been sometimes held that the party who has performed may sue at once upon the contract. But as the cases referred to turn upon the language of statutes of frauds relating to contracts not to be performed within a year from the making, a discussion of them will be reserved till that provision of the statute is considered.[2]

§ 118. Having considered the case of complete execution of the contract by both parties, and the case of complete execution by both parties of so much of the contract as is covered by the statute, we have now to consider the case of complete execution of so much of the contract as the statute does not cover, leaving the remainder executory. Under this head, the general rule is that such execution by one party does not entitle him to an action at law for damages for the non-performance by the other,[3] although in certain

[1] Remington *v.* Palmer, 62 N. Y. 31. See also Supervisors of Schenectady *v.* McQueen, 15 Hun 551.

[2] *Post*, §§ 289, *et seq.*

[3] But see Smock *v.* Smock, 37 Mo. App. 56.

cases a court of equity will decree specific execution of the agreement on such grounds.[1] A party, however, who has paid money in fulfilment of a verbal contract which the other refuses or becomes unable to carry out, may recover it in an action for money had and received; he may also recover property or its value, delivered in the same way, by any suitable proceeding;[2] and where a piece of property is delivered in payment, as being worth a certain sum, it is not in the power of the defendant, without the plaintiff's consent, to return the specific things received, but he must refund in the usual mode for money had or goods sold.[3] In like manner, one who has rendered services in execution of a verbal contract which, on account of the statute, cannot be enforced against the other party, can recover the

[1] See Chapter XIX.

[2] Basford *v.* Pearson, 9 Allen (Mass.) 387; Kidder *v.* Hunt, 1 Pick. (Mass.) 328; Seymour *v.* Bennet, 14 Mass. 266; Greer *v.* Greer, 18 Me. 16; Kneeland *v.* Fuller, 51 Me. 518; Lockwood *v.* Barnes, 3 Hill (N. Y.) 128; Keeler *v.* Tatnell, 23 N. J. L. 62; Rutan *v.* Hinchman, 30 N. J. L. 255; Gray *v.* Gray, 2 J. J. Marsh. (Ky.) 21; Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; Allen *v.* Booker, 2 Stew. (Ala.) 21; Luey *v.* Bundy, 9 N. H. 298; Keath *v.* Patton, 2 Stew. (Ala.) 38; Root *v.* Burt, 118 Mass. 521; Williams *v.* Bemis, 108 Mass. 91; White *v.* Wieland, 109 Mass. 291; Parker *v.* Tainter, 123 Mass. 185; Jellison *v.* Jordan, 69 Me. 373; Moody *v.* Smith, 70 N. Y. 598; Rosepaugh *v.* Vredenburgh, 16 Hun (N. Y.) 60. See Baker *v.* Scott, 2 Thomp. & C. (N. Y.) 606; Mannen *v.* Bradberry, 81 Ky. 153; Cade *v.* Davis, 96 N. C. 139; Bacon *v.* Parker, 137 Mass. 309; Whitaker *v.* Burrows, 71 Hun (N. Y.) 478; Bedell *v.* Tracy, 65 Vt. 494; Parker *v.* Niggeman, 6 Mo. App. 546; Jarboe *v.* Severin, 85 Ind. 496; Johnson *v.* Krassin, 25 Minn. 117; Pressnell *v.* Lundin, 44 Minn. 551; Day *v.* N. Y. Central R. R., 22 Hun (N. Y.) 416; Segars *v.* Segars, 71 Me. 530; Gifford *v.* Willard, 55 Vt. 36; Welch *v.* Darling, 59 Vt. 136; Adams *v.* Cooty, 60 Vt. 395; Nelson *v.* Shelby, Mfg. & Imp. Co., 96 Ala. 515; Worth *v.* Patton, 5 Ind App. Ct. 272. In Eaton *v.* Eaton, 35 N. J. L. 290, the rule was applied in a case of money paid in pursuance of a parol trust. See also Schroeder *v.* Loeber, 75 Md. 195. Davis *v.* Farr, 26 Vt. 592, appears to be opposed to the rule stated in the text.

[3] Hawley *v.* Moody, 24 Vt. 603. See Nugent *v.* Teachout, 67 Mich. 571.

value of the services upon a *quantum meruit*;[1] and this is true when, after part performance, the contract is broken by the plaintiff refusing to go on and complete the service; for if the defendant could compel him to do so, that would be to enforce the special contract.[2]

§ 118 *a.* The rule that where one person pays money or performs services for another upon a contract void under the Statute of Frauds, he may recover the money upon a count for money paid, or recover for the services upon a *quantum meruit*, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered; it does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant such as by the Statute of Frauds must be in writing. Such payment is not a payment to the defendant's use in the sense of the rule. It is a payment to

[1] Souch *v.* Strawbridge, 2 C. B. 808; King *v.* Brown, 2 Hill (N. Y.) 485; Burlingame *v.* Burlingame, 7 Cowen (N. Y.) 92; Shute *v.* Dorr, 5 Wend. (N. Y.) 204; Hambell *v.* Hamilton, 3 Dana (Ky.) 501; Davenport *v.* Gentry, 9 B. Mon. (Ky.) 427; Sims *v.* McEwen, 27 Ala. 184; King *v.* Welcome, 5 Gray (Mass.) 41; *In re* Kessler's Estate, 59 N. W. Rep. (Wisc.) 129; Wonsettler *v.* Lee, 40 Kansas 367; McCrowell *v.* Busson, 79 Va. 290; Baker Bros. *v.* Lanter, 68 Md. 64; Cohen *v.* Stein, 61 Wisc. 508; Ellis *v.* Cary, 74 Wisc. 176; Schoonover *v.* Vachon, 121 Ind. 3; Cadman *v.* Markle, 76 Mich. 448; Moore *v.* Horse Nail Co., 76 Mich. 606; Frazer *v.* Howe, 106 Ill. 563; McElroy *v.* Ludlum, 32 N. J. Eq. 828; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Lapham *v.* Osborne, 20 Nevada 168; Koch *v.* Williams, 82 Wisc. 186; Smith *v.* Lotton, 5 Ind. (App. Ct.) 177. See Knowlman *v.* Bluett, L. R. 9 Exch. 307; Kimmins *v.* Oldham, 27 W. Va. 258; Terrell *v.* Frazier, 79 Ind. 473. In Britain *v.* Rossiter, L. R. 11 Q. B D. 123, plaintiff appears to have sued for breach of a contract of employment, not for the value of his services; see Snelling *v.* Huntingfield, 1 C. M. R. 20, which Britain *v.* Rossiter apparently follows.

[2] Williams *v.* Bemis, 108 Mass. 91; King *v.* Welcome, 5 Gray (Mass.) 41. Upon a state of facts similar to that in this last case, a contrary decision was given in Mack *v.* Bragg, 30 Vt. 571; but the reasoning in King *v.* Welcome seems thoroughly convincing, and the doctrine expounded there to be the better one. See a further discussion of this, *post*, § 122 *a.* Salb *v.* Campbell, 65 Wisc. 405; Freeman *v.* Foss, 145 Mass. 361; Hartwell *v.* Young, 67 Hun (N. Y.) 472.

his use, only *if* he chooses to abide by the contract, and it is his right to refuse to do that. In a case in the Supreme Court of the United States,[1] where the verbal agreement relied upon in set-off by the defendant, was that the defendant should buy certain land from a third party and pay for it, and should then convey one-third of it to the plaintiff who should pay one-third of the purchase-money, and the defendant performed by buying the land and paying for it and tendering the plaintiff a deed of one-third of it, and, against the defence of the Statute of Frauds, contended that he was entitled to recover back the price of defendant's share as for money paid to the plaintiff's use, the defendant's claim in set-off was disallowed because of the Statute of Frauds. The Court say: "There is no implied contract on which the cross-action can rest, for the law implies a contract only to do that which the party is legally bound to perform. As the express contract set up by the defendant was void under the statute, the plaintiff was not bound in law to accept the deed tendered him by the defendant or pay the purchase-money. The defendant paid no money to or for the plaintiff. The money paid out by him was to enable him to perform his contract with the plaintiff. He paid it out for himself and for his own advantage. The plaintiff has received neither the money nor land from the defendant. Neither reason nor justice dictate that he should pay the defendant the price of the land, and therefore the law implies no provision to do so. The cross-action cannot, therefore, be sustained on any supposed implied promise of the plaintiff."

§ 119. Where one party has entered upon land under a verbal contract for the purchase of it, and has made improvements on the land which enhance its value, a court of equity will compel the other party, who has repudiated the contract or become unable to perform it, to remunerate the former for those improvements.[2] The right of recovery at law, on the

[1] Dunphy *v.* Ryan, 116 U. S. 491.

[2] Findley *v.* Wilson, 3 Litt. (Ky.) 390; Thompson *v.* Mason, 4 Bibb (Ky.) 195; Bellamy *v.* Ragsdale, 14 B. Mon. (Ky.) 364; Vaughan *v.*

other hand, for expenditures so made by the party entering, seems to exist only where the expenditures were made in pursuance of a stipulation in the contract;[1] if they were made without any express stipulation that they should be made, and only for the plaintiff's benefit and in reliance upon the defendant's performing his engagement to convey the estate, the plaintiff has no recovery at law.[2] In all cases where the plaintiff has been put in possession, whether of land or of any other property, the profits he has derived from the use and enjoyment of it in the mean time should be deducted from the sum he is to recover for his expenditures made on the faith of the contract.[3]

§ 120. It has been determined in Tennessee, that the advance of money upon a verbal contract for land creates no lien upon the land itself for the repayment of the sum

Cravens, 1 Head (Tenn.) 108. See Masson *v.* Swan, 6 Tenn. 450; Dowling *v.* McKenney, 124 Mass. 478. See also on this subject, Chap. XIX., *post.* But if a bill be filed for the specific execution of an agreement for the purchase of land, alleged to be evidenced by a written memorandum, and the allegation be not sustained by the proof, the plaintiff cannot under the prayer for general relief obtain compensation for improvements on the land. Smith *v.* Smith, 1 Ired. (N. C.) Eq. 83; Treece *v.* Treece, 5 B. J. Lea (Tenn.) 221; Powell *v.* Higley, 90 Ala. 103; Deisher *v.* Stein, 34 Kan. 39.

[1] Williams *v.* Bemis, 108 Mass. 91; White *v.* Wieland, 109 Mass. 291; Gray *v.* Hill, Ry. & M. 421, *per* Best, C. J.; Smith *v.* Smith, 4 Dutch. (N. J.) 208; Pulbrook *v.* Lawes, 1 Q. B. D. 284. See Rainer *v.* Huddleston, 4 Tenn. 223; Wade *v.* Newbern, 77 N. C. 460; Wainwright *v.* Talcott, 60 Conn. 43.

[2] Cook *v.* Doggett, 2 Allen (Mass.) 439; Gillet *v.* Maynard, 5 Johns. (N. Y.) 85; Shreve *v.* Grimes, 4 Litt. (Ky.) 220; Harden *v.* Hays, 9 Pa. St. 151; Miller *v.* Tobie, 41 N. H. 84; Welsh *v.* Welsh, 5 Ohio, 425; Farnam *v.* Davis, 32 N. H. 302; Cocheco Aqueduct Association *v.* B. & M. R. R., 59 N. H. 312. See Well *v.* Banister, 4 Mass. 514; Kemble *v.* Dresser, 1 Met. (Mass.) 271; Bacon *v.* Parker, 137 Mass. 309. But see Wiley *v.* Bradley, 60 Ind. 62.

[3] Richards *v.* Allen, 17 Me. 296; Lockwood *v.* Barnes, 3 Hill (N. Y.) 128; Rucker *v.* Abell, 8 B. Mon. (Ky.) 566; Shreve *v.* Grimes, 4 Litt. (Ky.) 220. See Dix *v.* Marcy, 116 Mass. 416; Watkins *v.* Rush, 2 Lans. (N. Y.) 234. And see McCafferty *v.* Griswold, 99 Pa. St. 270.

advanced, and that a court of chancery is not authorized to decree a sale of the land for that purpose.[1] But the general rule of law appears to be, that if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, he has a lien for it on the estate, although he may have taken a distinct security for the money advanced;[2] and it would seem that the rule should equally apply where the vendor, though able to make a title, refuses to do so. It has been, it is true, decided that, where a purchase cannot be enforced on account of its illegality by statute, there is no lien; for such a lien would, to that extent, be giving to the purchaser the benefit of the illegal contract.[3] But it may be replied that the contracts we are now considering are not made illegal by the Statute of Frauds, and it will be seen hereafter that the benefit of them is in a variety of ways given to the parties, notwithstanding the statute. The decision in Tennessee is opposed by the opinion of the courts in Kentucky, where in one case it is declared to be well-settled that the purchaser has a lien for his money advanced in payment for an estate which he cannot keep, as well as for his improvements made thereon while he supposed it to be his own.[4]

§ 121. Where the purchaser under a verbal contract for land has been put in possession, and has made payments on account of the price, it is plain that he cannot recover the money without surrendering or offering to surrender the possession;[5] nor can he resist a suit upon his promissory note for the price, upon the ground of a failure of consideration, since he has derived and continues to enjoy an essential benefit conferred by the contract, and since the plaintiff

[1] McNew *v.* Toby, 6 Humph. 27.

[2] Sugden, Vend. & P. 857; Turner *v.* Marriott, L. R. 3 Eq. 744.

[3] Ewing *v.* Osbaldiston, 2 Myl. & C. 53.

[4] McCampbell *v.* McCampbell, 5 Litt. 92; Rucker *v.* Abell, 8 B. Mon. 566.

[5] Abbott *v.* Draper, 4 Denio (N. Y.) 51; Cope *v.* Williams, 4 Ala. 362.

has placed himself in a condition which enables the defendant, upon payment of the purchase-money, to enforce a specific execution of the agreement in a court of equity.[1] Where the vendee has repudiated the contract, and holds possession of the land, not by force of the contract, but by permission of the vendor, there the latter cannot recover for any unpaid part of the purchase-money.[2]

§ 122. The right in the vendee of land by verbal contract, to recover what money or other consideration he has paid, is clearly confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part.[3] This rule is sometimes said to rest upon the ground

[1] Gillespie *v.* Battle, 15 Ala. 276; Curnutt *v.* Roberts, 11 B. Mon. (Ky.) 42; Ott *v.* Garland, 7 Mo. 28; McMurray's Appeal, 101 Pa. St. 421. But see Bates *v.* Terrell, 7 Ala. 129.

[2] Johnson *v.* Hanson, 6 Ala. 351.

[3] Hawley *v.* Moody, 24 Vt. 603; Shaw *v.* Shaw, 6 Vt. 69; Lockwood *v.* Barnes, 3 Hill (N. Y.) 128; Abbott *v.* Draper, 4 Denio (N. Y.) 51; Green *v.* Green, 9 Cowen (N. Y.) 45; Coughlin *v.* Knowles, 7 Met. (Mass.) 57; Dowdle *v.* Camp, 12 Johns. (N. Y.) 451; Lane *v.* Shackford, 5 N. H. 130; Richards *v.* Allen, 17 Me. 296; Collier *v.* Coate, 17 Barb. (N. Y.) 471; Bedinger *v.* Whitamore, 2 J. J. Marsh. (Ky.) 552; Barickman *v.* Kuykendall, 6 Black. (Ind.) 21; Sims *v.* Hutchins, 8 Sm. & M. (Miss.) 320; Donaldson *v.* Waters, 30 Ala. 175; Cobb *v.* Hall, 29 Vt. 510; Miller *v.* Tobie, 41 N. H. 84; Mitchell *v.* McNab, 1 Brad. (Ill.) 297; Galway *v.* Shields, 66 Mo. 313; Allis *v.* Read, 45 N. Y. 142; Galvin *v.* Prentice, 45 N. Y. 162; Van Valkenburgh *v.* Croffut, 15 Hun (N. Y.) 147; Green *v.* North Carolina R. R. Co., 77 N. C. 95; Adams *v.* Smilie, 50 Vt. 1; Plummer *v.* Breckman, 55 Me. 105; Wetherbee *v.* Potter, 99, Mass. 354; Cook *v.* Doggett, 2 Allen (Mass.) 439; Day *v.* Wilson, 83 Ind. 463; Sennett *v.* Shehan, 27 Minn. 328; Milligan *v.* Dick, 107 Pa. St. 259; Hill *v.* Grosser, 59 N. H. 513; Flinn *v.* Barber, 64 Ala. 193; Venable *v.* Brown, 31 Ark. 564; Syme *v.* Smith, 92 N. C. 338; McKinney *v.* Harvey, 38 Minn. 18. But see Hairston *v.* Jaudon, 42 Miss. 380; Collins *v.* Thayer, 74 Ill. 138; Scott *v.* Bush, 26 Mich. 418; Casson *v.* Roberts, 31 Beav. 613. The last-named case was practically overruled in Thomas *v.* Brown, 1 Q. B. D. 714. If the vendor meanwhile die, and administration is taken and the estate represented insolvent, so that the whole estate has to be reduced to cash, as of the day of the death, then the vendee may come in under the commission for his compensation. Sutton *v.* Sutton, 13 Vt. 71. Where a portion of the agreed price has been paid, it may be re-

that the vendor, when in such an action, merely *defends* upon the verbal contract, and that this is not prohibited by the statute.[1] As a general proposition, however, we shall hereafter see that a verbal contract within the statute cannot be enforced in any way, directly or indirectly, whether by action or in defence.[2] And it does not seem necessary to impeach that proposition, in order to sustain the rule in question. In such cases of suit by the vendee to recover the consideration paid, it has been suggested that the contract is substantially executed on the part of the vendor, he being able and willing to perform everything which in conscience he was bound to perform, and the vendee never having put him in default by a demand for title.[3] But another and better view, taken in a well-considered decision of the Supreme Court of New York, is that the right of the vendee in any case to recover what he has paid stands upon the ground that the vendor has received and holds it without consideration, so that a promise to repay it will be implied; but that if the vendor is able and willing to perform on his part, no such want or failure of consideration can be shown, and such promise is not implied.[4]

§ 122 *a*. Whether this rule is equally applicable to every case of a verbal contract within the Statute of Frauds, where the party who has refused to carry out the contract brings his action to recover for what he has done under it, is a question not free from difficulty. The Supreme Court of Con-

covered upon the vendor's refusal to convey, without proving a tender of the rest, an averment of readiness and willingness being sufficient. Tucker *v.* Grover, 60 Wisc. 233; Nims *v.* Sherman, 43 Mich. 45; Sutton *v.* Rowley, 44 Mich. 112; Weaver *v.* Aitcheson, 65 Mich. 285.

[1] Shaw *v.* Shaw, 6 Vt. 69; Philbrook *v.* Belknap, 6 Vt. 383.

[2] See *post*, §§ 131–136.

[3] Rhodes *v.* Storr, 7 Ala. 346; Meredith *v.* Naish, 3 Stew. (Ala.) 207.

[4] Abbott *v.* Draper, 4 Denio 51. See Collier *v.* Coates, 17 Barb. 471; Coughlin *v.* Knowles, 7 Met. (Mass.) 57; Browning *v.* Walbrun, 45 Mo. 477; Cameron *v.* Austin, 65 Wisc. 652; Sennett *v.* Shehan, 11 Rep. 401. Also, *ante*, § 120.

necticut, in a case where the plaintiff by oral agreement bound himself to serve the defendant for a term longer than one year, for a consideration to be paid at the end of that time, and, having repudiated the contract and quitted his employer at the end of six months, brought his action to recover the value of the services so rendered, held that he could recover, and that the defendant could not set up the existing verbal agreement to defeat his claim.[1] The court does not notice the established rule prohibiting the recovery of money paid for land where the vendor is willing to convey; and perhaps the cases may be thus distinguished. In the case of the suit to recover the purchase-money of the land, all that remains to be performed is required of the defendant, and he may waive the privilege, afforded by the statute, of refusing to convey. In the case of the suit to recover for partial services rendered, the defence is that the plaintiff is bound to perform additional services; but these services the plaintiff may refuse to perform, as his contract to that effect is within the statute and not binding without writing. In the former case, that which is within the statute is to be done by the defendant, and, if he is willing to do it, the plaintiff cannot force him to stand upon the statute. In

[1] Comes *v.* Lamson, 16 Conn. 246. See Clark *v.* Terry, 25 Conn. 395; King *v.* Welcome, 5 Gray (Mass.) 41. But see Abbott *v.* Inskip, 29 Ohio St. 59. In the case of Campbell *v.* Campbell, 65 Barb. (N. Y.) 639, the contract was that the plaintiff should serve the defendant till defendant died, in consideration of a conveyance of land, to be then made to the plaintiff; after serving some time, the plaintiff refused to serve further, and sued for the value of the past service; held, that the defendant being ready to perform on his part, the plaintiff could not prevail; and rightly, because this defence did not force upon the plaintiff the performance of a contract covered by the statute, for his contract was not such (see *post*, § 134): it was a case under the common rule that partial payment, in consideration of defendant's contract, cannot be recovered while the defendant is willing to perform and waive his statute defence (see § 122 *b*). But see Kriger *v.* Leppel, 42 Minn. 6. Where the failure to serve out the term was without fault of either party, it has been held that recovery at the contract rate might be had for the portion of the term served. La Du King Co. *v.* La Du, 36 Minn. 473.

the latter case, that which is within the statute is to be done in part by the plaintiff, and to force him to do it, by setting up the verbal contract as a bar to his recovery for the value of services rendered, would be to enforce the verbal contract by way of defence. This was put with great precision in an opinion of the Supreme Court of Massachusetts, delivered by Thomas, J., "In the case of the money paid upon a contract for the sale of land, the *action* fails because no failure is shown of the consideration from which the implied promise springs. In the case at bar, the *defence* fails because the contract upon which the defendant relies is not evidenced as the statute requires for its verification and enforcement."[1] The doctrine of the supreme court of Connecticut and that of Massachusetts, above referred to, that one who has partly performed a contract covering more than a year of time, may, repudiating the unexecuted part, have his action for the worth of what he has done, has also been recognized in New York, by the Court of Appeals. Land was conveyed in consideration of the grantee's undertaking to give to the grantor (a railroad company) all his freight business for a period longer than a year. After observing the contract for some time, the grantee repudiated it, and action was then brought by the grantor for the full value of the land. In defence to this, the grantee claimed his right to have the value of his observance of this contract for the time he had observed it deducted from the value of the land; and this claim, against the plaintiff's objection under the statute, was allowed.[2] When we compare the case of a plaintiff who has conveyed property under a verbal contract of sale, and that of a plaintiff who has rendered service, there is an apparent inconsistency in the application of the rule we are discussing. If the latter plaintiff can repudiate his contract to perform further services, and recover the proved value of

[1] King *v.* Welcome, 5 Gray 45.

[2] Day *v.* N. Y. C. & H. R. R. Co., 51 N. Y. 583. And see Turnow *v.* Hochstadter, 7 Hun 80.

what he has rendered, why may not the former plaintiff repudiate the contract to receive for the property he has conveyed a certain stipulated price, and recover its proved value? The answer appears to be that in the latter case the defendant may return the property, while in the former he cannot return the service, but only its money equivalent.

§ 122 *b*. Upon the same principle that the vendee cannot recover the purchase-money while the vendor is willing to convey, it is also held that the vendor of land can only enforce the vendee's note for the purchase-money against him, when he shows his own ability and willingness to perform.[1] Indeed, in such an action the defence must be, not upon the Statute of Frauds, but the want or failure of consideration; and this defence cannot be made out if the plaintiff shows his ability and willingness to convey according to the bargain.[2] But the admission of a vendor that he has no title may furnish a good ground for abandoning the possession and rescinding the contract, and, it would seem, a good ground for defending an action for the unpaid purchase-money, or for an action to recover that which has been paid.[3]

§ 123. Courts of equity, also, refuse to extend their aid to rescind a contract, merely because it is verbal, at the suit of one party, where the other party is not in default.[4] And a mere violation of the contract, in part, by a vendee who has taken possession of the land and made improvements thereon and paid part of the purchase-money, thus entitling himself

[1] Rhodes *v.* Storr, 7 Ala. 346; McGowan *v.* West, 7 Mo. 569.

[2] Edelin *v.* Clarkson, 3 B. Mon. (Ky.) 31, approved in Gillespie *v.* Battle, 15 Ala. 282. See also Rhodes *v.* Storr, 7 Ala. 346; and King *v.* Hanna, 9 B. Mon. (Ky.) 369; Crutchfield *v.* Donathon, 49 Tex. 691; Schierman *v.* Beckett, 88 Ind. 52.

[3] Gillespie *v.* Battle, 15 Ala. 276; Barnes *v.* Wise, 3 T. B. Mon. (Ky.) 167.

[4] Barnes *v.* Wise, 3 T. B. Mon. (Ky.) 167; Rowland *v.* Garman, 1 J. J. Marsh. (Ky.) 76; Nelson *v.* Forgey, 4 J. J. Marsh. (Ky.) 569; Manning *v.* Franklin, 81 Cal. 205.

to a decree in equity for a specific execution of the contract, will not justify the vendor, even at law, in treating the contract as void, so as to recover for the use and occupation of the land; in such a case his remedy sounds entirely in damages for the violation.[1]

§ 124. It has been already stated that where all engagements which the statute covers have been performed, an action lies upon the special contract for the enforcement of all remaining engagements, including the payment of the stipulated price for property conveyed or services rendered. On the other hand, where the engagements covered by the statute have not been all performed, and recovery is sought (under such conditions as justify it) of the value of property conveyed or services rendered in pursuance of the contract, such recovery must be upon the implied promise of the defendant to pay for such property or services, as held or enjoyed by him without consideration.[2] In such an action, however, evidence of the special contract may be received for purposes other than that of its direct enforcement.

§ 125. Thus, where there was a parol agreement to demise a house for five years, and leases to be executed, under which the party entered and subsequently refused to accept a lease, and the owner brought assumpsit for the use and occupation, and it was objected that the parol agreement was void by the Statute of Frauds, evidence of the agreement was held admissible for the purpose of showing that the defendant went into the occupation of the premises by the permission of the plaintiff, thus establishing the relation of landlord and tenant.[3]

[1] Smith *v.* Smith, 14 Vt. 440.

[2] Gray *v.* Hill, Ry. & M. 420; Marcy *v.* Marcy, 9 Allen (Mass.) 8; Thomas *v.* Dickinson, 14 Barb. (N. Y.) 90; Hollis *v.* Morris, 2 Harr. (Del.) 3; Hill *v.* Hooper, 1 Gray (Mass.) 131; Ives *v.* Gilbert, 1 Root (Conn.) 89; Shute *v.* Dorr, 5 Wend. (N. Y.) 204; Hambell *v.* Hamilton, 3 Dana (Ky.) 501; Ray *v.* Young, 13 Tex. 550; McDowell *v.* Oyer, 21 Pa. St. 417; Roberts *v.* Tunnell, 3 T. B. Mon. (Ky.) 247.

[3] Little *v.* Martin, 3 Wend. (N. Y.) 219; Whitney *v.* Cochran, 1 Scam. (Ill.) 209. See Arnold *v.* Garst, 16 R. I. 4.

Here the existence of the contract was proved as part of the *res gestæ*, to show in what character the defendant was in possession; not to hold him bound by the terms of the contract.

§ 126. Again, while the plaintiff in an action on the implied promise for the value of property conveyed or services rendered cannot insist upon the value stipulated in the verbal contract itself,[1] such stipulation may be evidence to be submitted to the jury,[2] and in the absence of other evidence may be decisive.[3] The ground upon which such evidence is received at all appears to be that it furnishes an admission by the party making such stipulation as to his contemporaneous judgment of the value of the subject in dispute; the question upon which it is admitted or excluded being, what was the actual value of the services rendered or the property transferred for which the plaintiff seeks compensation, at the time they were so rendered or transferred; not what was their value, even to him, at a different time when the defendant's obligation under the special contract matured; not what was their value at any time to the defendant as manifested by what he had agreed, in the special contract, to do or give for them; — and this, whether the value

[1] Earl of Falmouth *v.* Thomas, 1 Cromp. & M. 89; Ellet *v.* Paxson, 2 Watts & S. (Pa.) 418; Erben *v.* Lorillard, 19 N. Y. 299, explaining King *v.* Brown, 2 Hill (N. Y.) 485; Montague *v.* Garnett, 3 Bush (Ky.) 297; Sands *v.* Arthur, 84 Pa. St. 479. But see dictum of Chapman, J., in Basford *v.* Pearson, 9 Allen (Mass.) 392.

[2] Ham *v.* Goodrich, 37 N. H. 185; Emery *v.* Smith, 46 N. H. 151; Jennings *v.* McComb, 112 Pa. St. 518.

[3] Nones *v.* Homer, 2 Hilt. (N. Y.) 116. In McElroy *v.* Ludlum, 32 N. J. Eq. 828, the Court of Appeals of New Jersey have repudiated the whole doctrine; holding, in a case where, for services which had been rendered, the agreement was to pay a share of the profits to be earned by a business concern during a term outrunning one year, that even to receive evidence of the amount of such profits as bearing on the question of the *quantum meruit* for the services, was a violation of the policy of the Statute of Frauds, and rejecting such evidence accordingly. The opinion reviews the authorities upon the subject and discusses them fully and ably.

at the time the plaintiff rendered the services or transferred the property be greater or less than their value to him at the time when the defendant's special promise matured, or greater or less than their value to the defendant as manifested by what he had specially agreed to do or pay for them.[1]

§ 127. In the case of Kidder *v.* Hunt, in Massachusetts, a dictum in an earlier case in the same State[2] having been relied upon, to the effect that where an English court of equity would decree specific performance, the common-law courts which had no equity jurisdiction (as was then the case in Massachusetts) would give damages, it was overruled, and the court said: "There are no doubt cases proper for a court of chancery, such as those which relate to the execution of trusts, where the common law will give a remedy by an action for damages; and perhaps in the case of a parol contract respecting land, where the party has been put to expense as to his part of the contract, under circumstances which would amount to fraud by the other party, case might lie for damages for the fraud;" but the present action being brought upon the contract itself, it was considered that it would not lie.[3]

§ 128. Before passing from the consideration of the rights and liabilities of parties after execution in whole or in part, to which the previous sections of this chapter have been chiefly devoted, it should be observed that to plead or set up such execution is generally the privilege of the party from whom it has proceeded, and that it cannot in any way avail his adversary or any third party.[4]

[1] King *v.* Brown, 2 Hill (N. Y.) 485; Erben *v.* Lorillard, 19 N. Y. 299; Wm. Butcher Steel Works *v.* Atkinson, 68 Ill. 421; Galvin *v.* Prentice, 45 N. Y. 162; Williams *v.* Bemis, 108 Mass. 91; Whipple *v.* Parkes, 29 Mich. 369; Scotten *v.* Brown, 4 Harr. (Del.) 324; Hale *v.* Stuart, 76 Mo. 20. *Quære* as to Lisk *v.* Sherman, 25 Barb. 433, and Ham *v.* Goodrich, 37 N. H. 185.

[2] Boyd *v.* Stone, 11 Mass. 342.

[3] Kidder *v.* Hunt, 1 Pick. 328. See Dung *v.* Parker, 52 N. Y. 494; Heilman *v.* Weinman, 139 Pa. St. 143.

[4] Glenn *v.* Rogers, 3 Md. 312. But see Barton *v.* Smith, 66 Iowa 75 And see *post*, Chap. XX.

§ 129. The extent to which courts of equity recognize verbal contracts upon which actions at law are prohibited by the Statute of Frauds, is necessary to be here remarked. It is true that the statute is correctly held to be as binding in equity as at law, and such a contract cannot under ordinary circumstances, be specifically enforced, any more than the damages for a violation of it can be recovered by action. But, at the same time, equity pays great regard to the moral obligation growing out of it. We have already seen that a court of equity will not interfere to rescind such an agreement at the suit of one party, when the other is not in default. And while it is not accurate to say that the verbal agreement will be always admitted as a defence in those courts, since that would be to relieve them entirely from the binding power of the statute, it seems to be clear that they will not lend their aid to enforce and perfect a legal right which the plaintiff sets up, against his conscientious duty under a verbal contract interposed on the part of the defence.[1] Thus, where an execution creditor verbally agrees with his debtor, that he will buy in the premises at the sheriff's sale, and, on being repaid the amount of the execution, or on any other specified terms, will reconvey to the debtor, and afterwards, by representing those facts at the sale, is enabled to buy at a great sacrifice, a court of equity will refuse to ratify the sale at his instance.[2] And again, where two men agreed to purchase certain land jointly, and one of them took the deed in his own name, and the heirs of the other applied for an order for the conveyance of a moiety, and the defendant set up a verbal agreement between himself and the other party to pay a certain sum of money and convey to him a certain tract of land in satisfaction of his claim in the joint purchase, which agreement the defendant had in part performed, — it was

[1] Jarrett *v.* Johnson, 11 Grat. (Va.) 327; Story, Eq. Jur. § 1522. See Hughes *v.* Hatchett, 55 Ala. 539.

[2] Rose *v.* Bates, 12 Mo. 30. And see Moore *v.* Tisdale, 5 B. Mon. (Ky.) 352, and Letcher *v.* Cosby, 2 A. K. Marsh. (Ky.) 106.

admitted that the latter agreement, though it could not be sued upon at law, might be a legitimate defence to the claim which the plaintiff would otherwise have had to the relief of a court of equity; but in the present case, the terms of the agreement not being clearly shown, the defence was not allowed.[1]

§ 130. Upon similar grounds, and, it seems, at law as well as in equity, if a conveyance be made in pursuance of a verbal contract for the sale of land, it will be good against a party who claims under an intermediate written contract; in such a case, a court of equity will of course refuse the latter party a conveyance.[2] Some of the cases appear to say that the rule prevails only where the complainant took his written engagement with notice of the defendant's prior rights, but this can hardly be so, on principle. The true ground of the rule is well stated by the Supreme Court of Kentucky: "The vendor may avoid it [the verbal contract] by pleading or relying on the statute, yet he is left at liberty to waive his right to the defence and consummate the contract, and cannot be deprived of his election to do so by a stranger. Though a vendor is not *legally* bound to fulfil his

[1] Nichols *v.* Nichols, 1 A. K. Marsh. (Ky.) 166. Probably, in this case, the purchase-money for the land in question was all paid by the defendant himself, as otherwise the heirs could have obtained a conveyance to the extent of the share paid by their ancestor, on the ground of a resulting trust. The statute will not protect one who is equitably bound to convey land, although by a contract on which no action could be maintained against him by his vendee, in representing the title of the vendor to be good, and thereby inducing others to purchase from him. In such case, he will be compelled to convey to the second vendee, not by obligation of his contract with the first, but on account of the fraud practised on the second. Springle *v.* Morrison, 3 Litt. (Ky.) 52. See, upon this subject, Thompson *v.* Mason, 4 Bibb (Ky.) 195, where it is intimated, that it would make no difference as to the availability of a verbal contract to rebut a complainant's equity, though it might have been previously in suit in a court of equity, and refused to be enforced on the ground of the Statute of Frauds.

[2] Dawson *v.* Ellis, 1 Jac. & W. 524; Jackson *v.* Bull, 2 Caines (N. Y.) Cas. 301, *per* Kent, J.; Lucas *v.* Mitchell, 3 A. K. Marsh. (Ky.) 244.

contract by a conveyance, yet a *moral duty* rests upon him to convey, and a *moral right* in the vendee to ask a conveyance, and if the former choose to waive his *legal* right, in obedience to the dictates of his moral duty, by conveying or furnishing *written* evidence of his obligation to convey, a stranger to the contract has no right to complain, nor to preclude him from this discharge of his moral duty, in whole or in part, upon the terms of the original parol contract, or upon terms which he may choose to exact, and which the vendee or sub-purchaser may be willing to concede."[1]

§ 131. Although, as has now been shown, a verbal contract which is within the Statute of Frauds may for some purposes avail a defendant in equity, or in an action to recover a *quantum meruit* for property or labor received from the plaintiff in pursuance of it, still the clear rule of law is that such a contract cannot be made the ground of a defence, 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. Thus, if the plaintiff had a verbal contract with the defendant to serve him for three years, and should bring an action in the mean time for the value of the services he had actually rendered, the defendant could not protect himself by setting up the verbal contract as binding upon the plaintiff, though its terms and stipulations might be admissible to regulate the damages.[2]

[1] Clary *v.* Marshall, 5 B. Mon. 269. So if a principal purposes to sell land to a person, "provided his agent has not already disposed of it," if it turns out that the agent had previously disposed of the land by verbal contract, the principal is not bound to plead the statute, and thereby to vacate the contract made by his agent. Jacob *v.* Smith, 5 J. J. Marsh. 380. See also Mitchell *v.* King, 77 Ill. 462. Main *v.* Bosworth, 77 Wisc. 660; Pickerell *v.* Morss, 97 Ill. 220; Peck *v.* Williams, 113 Ind. 256. In California, where the code provides that the agreement shall be "invalid," it is held that oral agreements are enforceable where the defence of the statute is not taken. Nunez *v.* Morgan, 77 Cal. 427.

[2] Comes *v.* Lamson, 16 Conn. 246; Scotten *v.* Brown, 4 Harr. (Del.) 324; King *v.* Welcome, 5 Gray (Mass.) 41; Bernier *v.* Cabot Mfg. Co., 71 Me. 506. And see *ante*, §§ 122 *a*, 124.

Nor can a sum of money agreed to be paid in a contract affected by the statute, be set off in an action against the party entitled to it, on some independent cause.[1] So where a father in consideration of the marriage of his daughter verbally promised to pay his daughter and her husband a certain amount of money, and died intestate, and the daughter took out letters of administration, it was held that she could not retain the debt out of the assets.[2] And where there was an oral agreement by the husband in consideration of marriage, to transfer bonds to the wife when the marriage should take place, the husband's performance of the agreement after marriage was held to be voluntary and void as against creditors.[3]

§ 132. How far a subsequent verbal variation of a contract once put in writing agreeably to the requirement of the statute will be admissible, so that a party performing according to the terms of the contract as varied can defend upon the verbal variation, will be considered in another part of this work.[4] Such a case, manifestly, cannot be treated purely as a defence upon a verbal contract.

§ 133. It is well established that if an action, as for instance trespass, be brought against a defendant for certain acts which were done by him in pursuance of a verbal contract between himself and the plaintiff, the fact of the contract will in such case afford a perfect defence; or, more correctly speaking, the defendant may set up the license of the plaintiff to do those acts, being the substance of the right which the defendant has, such a license, though revocable at any time, being a justification for any act done under it of a temporary

[1] Payson *v.* West, Walker (Miss.) 515; Sennett *v.* Johnson, 9 Pa. St. 335; Lenheim *v.* Fay, 27 Mich. 70; Persifull *v.* Boreing, 22 S. W. Rep. (Ky.) 440; Dunphy *v.* Ryan, 116 U. S. 495; Ryan *v.* Dunphy, 4 Montana 342; Osborne *v.* Kimball, 41 Kan. 187.

[2] Field *v.* White, L. R. 29 Ch. D. 358.

[3] Deshon *v.* Wood, 148 Mass. 132.

[4] See *post*, §§ 409, *et seq.*

nature.[1] But it seems that the application of this rule must be carefully limited to cases where the contract is set up merely as a justification, as distinguished from cases where the result will be to establish the contract as binding, *for the purposes of a contract*, upon the parties. In the case of Carrington *v.* Roots, in the Court of Exchequer, a party had purchased, by a verbal contract, a growing crop of grass, with liberty to go on the close wherein it grew, for the purpose of cutting it and carrying it away; the seller seized and impounded the horse and cart which the purchaser had brought there for the purpose of carrying away the grass. In an action of trespass by the purchaser, the seller pleaded that he owned the close, and that the horse and cart were wrongfully encumbering it, and doing damage, wherefore he took and distrained the same, etc.; the plaintiff replied, setting forth the contract, and that he was there with his horse and cart for the purpose of carrying away the grass, according to the contract. It was admitted that, the contract being within the Statute of Frauds as for an interest in lands, an action to charge the defendant upon it could not be sustained, without evidence in writing; but it was argued that the plaintiff had a right to avail himself of it for any collateral purpose, as in this case to repel a trespass committed by the defendant. It was held that the action would not lie. Lord Abinger, C. B., states the distinction with great clearness; he says: "I think the contract cannot be available as a contract at all, unless an action can be brought upon it. What is done under the contract may admit of *apology* or *excuse*, *diverso intuitu*, if I may so speak; as where under a contract by parol, the party is put in possession, that possession may be set up as an excuse for a trespass alleged to have been committed by him. But whenever an action is brought on the assumption that the contract is good in law, that seems to me to be in effect an action on the contract. If the whole

[1] See *ante*, §§ 22, *et seq.* As applied in an action of trover, see Moore *v.* Aldrich, 25 Tex. Supp. 276.

transaction between the parties were set forth in the declaration, the contract would form part of it; and, in effect, the plaintiff now says that the defendant ought not to take his cart, because it was lawfully there under that contract. This is a collateral and incidental mode of enforcing the contract, though it is not directly sued upon." "It would be a different case if the plaintiff had been sued by the defendant in trespass; he might have pleaded a *license;* but though a license may be part of a contract, a contract is more than a license. The agreement might have been available in answer to a trespass, by setting up a license; not setting up the contract itself as a contract, but only showing matter of excuse for the trespass. That appears to me the whole extent to which the plaintiff could avail himself of the contract. I am therefore of opinion that the replication is not sustained, and that there ought to be a nonsuit." The other barons concurred.[1]

§ 134. This case affords a very clear exemplification of the general rule, which may be here reasserted, that no action can be brought to charge the defendant *in any way* upon his verbal agreement not put in writing according to the statute.[2] And it may be briefly illustrated farther. If land be sold at auction or otherwise, and no memorandum made, and the purchaser refuse to take it, no action will lie against him to recover the loss sustained upon a second sale to another party; this could be done, manifestly, only upon the ground that he was originally legally liable to take and pay for the land himself.[3] Nor will a discharge from performing a verbal

[1] Carrington *v.* Roots, 2 Mees. & W. 248. In this case, as remarked by Baron Parke, the plaintiff might have pleaded a license, but the defendant would have replied that it was countermanded, and the plaintiff could not have succeeded on that issue. See farther Buck *v.* Pickwell, 27 Vt. 157; Whitcher *v.* Morey, 39 Vt. 459; Taylor *v.* Wakefield, 6 El. & B. 765; Wheeler *v.* Frankenthal, 78 Ill. 124; McGinnis *v.* Fernandes, 126 Ill. 228.

[2] Finch *v.* Finch, 10 Ohio St. 501; Culligan *v.* Wingerter, 57 Mo. 241; Smith *v.* Tramel, 68 Iowa 488.

[3] Baker *v.* Jameson, 2 J. J. Marsh. (Ky.) 547; Carmack *v.* Masterson, 3 Stew. & P. (Ala.) 411. But, perhaps, if there were circumstances of

contract within the statute be a sufficient consideration to support another engagement. No action whatever could have been maintained against the defendant for any breach of that contract. A discharge from it, therefore, is of no use to him.[1] So, an engagement to forfeit a certain sum of money in case of failing to perform another engagement which, within the Statute of Frauds, could not itself be enforced, cannot be enforced by the party to whom it is made.[2] And where the only consideration of a promissory note was an agreement to sell shares of stock, the memorandum of which agreement was insufficient under the Statute of Frauds, it was held that action on the note could not be sustained.[3]

§ 135. As the Statute of Frauds affects only the remedy upon the contract, giving the party sought to be charged upon it a defence to an action for that purpose, if the requirements of the statute be not fulfilled, it is obvious that he may waive such protection;[4] or rather, that, except as he undertakes to avail himself of such protection, the contract is perfectly good against him. A third party cannot, in a case where his own obligations growing out of the existence of the contract in question are concerned, deny the obligation of the contract upon the party who was to be charged thereby, or take any benefit of the protection which such party could claim in an action brought upon it against himself.[5] Thus,

deceit in the case, the plaintiff might recover in an action on the case for the deceit. See Kidder *v.* Hunt, 1 Pick. (Mass.) 328.

[1] North *v.* Forest, 15 Conn. 400; Shuder *v.* Newby, 85 Tenn. 348. But see Stout *v.* Ennis, 28 Kansas 503.

[2] Goodrich *v.* Nickols, 2 Root (Conn.) 498; Rice *v.* Peet, 15 Johns. (N. Y.) 503. But see Couch *v.* Meeker, 2 Conn. 308.

[3] Cameron *v.* Tompkins, 72 Hun (N. Y.) 109.

[4] But after his death his executor or administrator may not waive it.

[5] See Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; Ames *v.* Jackson, 115 Mass. 508; Fowler *v.* Burget, 16 Ind. 341; Brown *v.* Rawlings, 72 Ind. 305; Morrison *v.* Collier, 79 Ind. 417; Dutch *v.* Boyd, 81 Ind. 146; Dixon *v.* Duke, 85 Ind. 434; Sedgwick *v.* Tucker, 90 Ind. 271; Royce *v.* Graham, 91 Ind. 420; Kelly *v.* Kendall, 118 Ill. 650; Gordon *v.* Tweedy, 71 Ala. 202; Cooper *v.* Hornsby, 71 Ala. 62; Welsh *v.* Coley, 82 Ala. 363; Mew-

where one summoned as trustee made answer that a debt was due from him to the defendant, but that he had verbally promised, and considered himself bound to pay a debt to a greater amount due from the defendant to a third person, it was held that he was not obliged to set up the Statute of Frauds and avoid this promise; and that if he chose to recognize it, he was not chargeable as trustee.[1] So, where, in an action by the plaintiffs for the non-fulfilment by the defendants of a contract to finish certain machinery within a reasonable time, it was averred as special damage that the plaintiffs had thereby been prevented from fulfilling a contract with third parties and had lost the profits thereon, it was held that such damages could be recovered, although the contract which would have produced the profits, could not have been enforced because not in compliance with the Statute of Frauds.[2] And it has been also held that the maker of a verbal guaranty may pay the amount and recover it from the original debtor; and may pay his memorandum check for the amount and recover it from the original debtor, although the latter, after its making, forbade its payment.[3] So where property is held by defendant subject to a verbal trust for a third party, the defendant's creditor cannot take the property discharged of

burn's Heirs *v.* Bass, 82 Ala. 622; Rickards *v.* Cunningham, 10 Neb. 417; Duckett *v.* Pool, 33 S. C. 238; Lee *v.* Stowe, 57 Texas 444; Old National Bank *v.* Findley, 131 Ind. 225; Singer *v.* Carpenter, 125 Ill. 117; Book *v.* Justice Mining Co., 58 Fed. Rep. 106; Bullion & Exchange Bank *v.* Otto, 59 Fed. Rep. 256; Savage *v.* Lee, 101 Ind. 514; Hughes *v.* Lumsden, 8 Brad. (Ill. App. Ct.) 185; Aultman *v.* Booth, 95 Mo. 383; Holden *v.* Starks, 159 Mass. 503; Jackson *v.* Stanfield, 37 N. E. Rep. (Ind.) 14.

[1] Cahill *v.* Bigelow, 18 Pick. (Mass.) 369; Hall *v.* Soule, 11 Mich. 494; Godden *v.* Pierson, 42 Ala. 370; Browning *v.* Parker, 17 R. I. 183. See also Bohannon *v.* Pace, 6 Dana (Ky.) 194; Garrett *v.* Garrett, 27 Ala. 687; Huffman *v.* Ackley, 34 Mo. 277; Houser *v.* Lamont, 55 Pa. St. 311; Cresswell *v.* McCaig, 11 Neb. 222.

[2] Waters *v.* Towers, 8 Exch. 401; Sneed *v.* Bradley, 4 Sneed (Tenn.) 301; Kratz *v.* Stocke, 42 Mo. 351.

[3] Beal *v.* Brown, 13 Allen (Mass.) 114. See Ames *v.* Jackson, 115 Mass. 508; Simpson *v.* Hall, 47 Conn. 417.

such trust, upon the ground that, as between the immediate parties to it, it could not be enforced.[1]

§ 135 *a*. Certain recent decisions in the State of New York, bearing upon the doctrine that a verbal contract within the Statute of Frauds is to be taken as binding except where the party contracting seeks the benefit of the statute, require careful examination. The first of these was the case of Dung *v.* Parker,[2] where one representing himself as agent for the letting of certain premises made an oral contract of lease to the plaintiff, who, on the faith of it, incurred considerable expense in fixtures for the premises in question; but upon finding out afterward that the other had no authority to let the premises, the plaintiff sued him for damages growing out of his false representation. The defendant relied upon the fact that his agreement for the lease was oral, and therefore that even had he been authorized to make it, the plaintiff could not have enforced it or recovered for its breach, and thus might in any event have lost the value of the fixtures; and this position was sustained by the Court of Appeals, which founded its decision upon the proposition that in no case would an agent, falsely representing his authority to make a contract on behalf of another, be liable either in contract or tort, unless the principal would have been bound by the contract made, had the agent such authority. The same doctrine was shortly afterward reiterated in the case of Baltzen *v.* Nicolay,[3] which presented substantially the same features as the former case, though the action here was brought against the agent, an auctioneer, for damages for breach of his contract. Three of the court dissented, but without delivering opinions. A case, however, decided in the Supreme Court about this time, though citing Dung *v.* Parker at some length, and not in terms criticising it, seems in substance opposed to the rule governing its decision. This

[1] Aicardi *v.* Craig, 42 Ala. 311; Crawford *v.* Woods, 6 Bush (Ky.) 200.
[2] Dung *v.* Parker, 52 N. Y. 494.
[3] Baltzen *v.* Nicolay, 53 N. Y. 467.

case is Rice *v.* Manley,[1] an action to recover damages from one who, by means of a feigned telegram to a person with whom the plaintiff had an oral contract for the purchase of some cheese, broke off the sale, and bought the cheese himself. The court held that the defendant was liable to pay the plaintiff for the loss of the bargain caused by the former's fraud, even though that bargain was within the Statute of Frauds; and they cited Benton *v.* Pratt,[2] as to the same effect, and being the doctrine of the highest court of the State. It will be observed that Rice *v.* Manley, in recognizing the oral contract as an existing relation, and giving the plaintiff damages for the fraudulent representation by which he was deprived of the benefit of it, is in opposition to the reasoning, if not to the decision, of Dung *v.* Parker; and another decision in the Court of Appeals later than any of the foregoing seems to tend in the same direction. This is the case of Mooney *v.* Elder,[3] where a broker, who was to receive a commission upon producing a customer ready and willing to buy a certain estate, made an oral contract with a third party for the sale of the premises, and sued for his commission. It was held that he could recover it, since it did not appear that payment was resisted on the ground that the purchaser had not made a written contract, nor that he would fail to carry out his oral undertaking.

§ 135 *b*. A witness may be convicted of perjury in falsely swearing to a contract within the statute. It was so held in a case in New York, where the defence to an action of slander for imputing perjury was, that the false swearing alleged was not perjury, the evidence being to set up a contract

[1] Rice *v.* Manley, 2 Hun 492.

[2] Benton *v.* Pratt, 2 Wend. 385.

[3] Mooney *v.* Elder, 56 N. Y. 238. And see Kelly *v.* Phelps, 57 Wisc. 425. *Aliter* where brokers' commissions are sued for and the purchaser does resist and set up the Statute of Frauds. Yeager *v.* Kelsey, 46 Minn. 402. Payment for advice and assistance in making a purchase of land may be enforced, although, for want of writing, the contract cannot be enforced. Wilson *v.* Morton, 85 Cal. 598.

affected by the statute, and therefore *immaterial.* But the court said it was not immaterial, for it proved the promise; though it was perhaps incompetent, if the objection had been in season.[1] So, also, a verbal contract for hiring for a year, to commence at a future day, will be sufficient for the purpose of acquiring a settlement.[2] And the implication that a tenant holding over holds on the terms of the old lease is destroyed by proof of a new contract of hiring, essentially different from the old and intended to displace it, although such new agreement be itself not actionable because not in writing.[3]

§ 135 *c.* The rule that third parties cannot set up the defence of the statute is of course inapplicable to parties in privity with the original promisor.[4]

§ 136. Upon the same principle, namely, that the Statute of Frauds presupposes an existing lawful contract, and affects only the remedy for its violation, it is held that where a contract within the statute is, by the laws of the country where it is made and to be executed, valid and enforceable, still no action can be maintained upon it in the courts of the country where the statute prevails, unless its requirements be satisfied.[5] Mr. Justice Story on several occasions expressed doubt as to this point, but on none of them was the question actually presented for decision;[6] and

[1] Howard *v.* Sexton, 4 N. Y. 157. And see Bartlett *v.* Pickersgill, 1 Eden 415.

[2] Bracegirdle *v.* Heald, 1 Barn. & Ald. 722.

[3] Singer Mfg. Co. *v.* Sayre, 75 Ala. 270.

[4] Best *v.* Davis, 44 Ill. App. 624.

[5] Leroux *v.* Brown, 12 C. B. 801; Downer *v.* Chesebrough, 36 Conn. 39; Kleeman *v.* Collins, 9 Bush (Ky.) 460; Turnow *v.* Hochstadter, 7 Hun (N. Y.) 80. See Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 18; Dacosta *v.* Davis, 23 N. J. L. 319; Hunt *v.* Jones, 12 R. I. 265; Wilson *v.* Miller, 42 Ill. App. Ct 332.

[6] Van Reimsdyk *v.* Kane, 1 Gall. 630; Smith *v.* Burnham, 3 Sumn. 435; Low *v.* Andrews, 1 Story 38. The learned judge may have had in his mind the opinion of Boullenois: "Ainsi deux particuliers contractent ensemble en présence de témoins, et sans écrit, dans un endroit où pareilles

in an opinion delivered by Chapman, C. J., for the Supreme Court of Massachusetts, the rule has been stated in opposition to that given above; but here, too, the question was not before the court.[1] A memorandum made subsequently to the breach of an oral contract enables the party aggrieved to maintain an action for damages.[2] And where, after an oral contract of sale had been made, so much of the statute as applied to it was repealed, the contract was declared to be afterward actionable.[3] And it was also held that a mortgage deed made by a bankrupt, eighteen days only before his petition, but in pursuance of an oral agreement made more than fifteen months before, took effect, by relation, as of the time when the agreement was made, and was not a fraudulent preference.[4]

conventions forment de véritables engagemens, et à raison de quoi la preuve par témoins est admise dans cet endroit pour quelque somme que ce soit même au dessus de 100 livres; ils plaident ensuite dans un lieu où cette preuve par témoins n'est pas admise; dans cette espèce, je ne trouve pas de difficulté à dire qu'il faudra admettre la preuve par témoins, parceque cette preuve appartient *ad vinculum obligationis et solemnitatem.*" Perhaps it may be said that in this passage the distinction is not entirely apprehended between the *making* of a valid contract, and the mode of *proving* it. The *vinculum et solemnitas* are certainly, properly speaking, elements of the *validity* of the contract. It appears to have been considered by the Chief Justice in Leroux *v.* Brown, that the conclusion would not be the same in a case under the 17th section relating to the sales of goods. But this was quite unnecessary to the question before the court, and the weight of their suggestion is counterbalanced by contrary suggestions in previous cases. See Carrington *v.* Roots, 2 Mees. & W. 248; Reade *v.* Lamb, 6 Exch. 130. The distinction does not appear to have ever been judicially upheld, and is certainly not supported by any considerations of difference in policy between the two sections. See 9 Am. Law Rev. 436, 444; and *ante*, § 115, and *note*.

[1] Denny *v.* Williams, 5 Allen 1. Miller *v.* Wilson, 146 Ill. 523, and Cochran *v.* Ward, 5 Ind. App. 89, hold, with Denny *v.* Williams, that the Statute of Frauds governing the contract is that of the State in which it is to be executed.

[2] Bird *v.* Munroe, 67 Me. 337.

[3] Work *v.* Cowhick, 81 Ill. 317, *per* Dickey, J.

[4] Burdick *v.* Jackson, 14 Hun (N. Y.) 488. And see Lloyd's Appeal, 82 Pa. St. 485; Gardner *v.* Rowe, 2 Sim. & S. 346.

§ 137. Where a contract has been, in obedience to the requirements of the Statute of Frauds, manifested so as to give a right of action for its violation, such right may be kept alive, for the purposes of the Statute of Limitations, by an oral renewal of it, *infra sex annos*, so far as the statute is concerned, and unless the particular Statute of Limitations in question requires such renewal to be in writing.[1] But it has been held that a statute requiring a writing for renewal of a promise barred by the United States Bankrupt Law applies to a suit instituted after the enactment of the law, but based on a verbal promise made before its enactment.[2]

§ 137 *a*. It seems that where the violation by the servant of a contract for service is made punishable under a criminal statute, such statute should be held not to apply, unless the contract was one which could be enforced by action between the parties consistently with the Statute of Frauds.[3]

§ 138. The summary jurisdiction of courts over their own officers may sometimes afford a remedy upon a verbal contract, where the Statute of Frauds would prohibit an action upon it. Thus, an attorney's undertaking to pay his client's debt and costs in an action has been enforced on motion in the court of which he is an attorney.[4]

§ 138 *a*. Where a memorandum of the contract is relied upon as satisfying the statute, although it must show all the material stipulations on both sides, it will be sufficient if it afford evidence of the *promise* to perform them by the defendant only; and thus a letter, distinctly stating the contract, although written to a third party, or although in terms repudiating the contract, may still serve as a memorandum

[1] Gibbons *v.* M'Casland, 1 Barn. & Ald. 690. Moreover, it would be sufficient in any case to declare upon the original promise. Leaper *v.* Tatton, 16 East 420; Upton *v.* Else, 12 Moore 303.

[2] Kingsley *v.* Cousins, 47 Me. 91.

[3] Banks *v.* Crossland, L. R. 10 Q. B. 97.

[4] Evans *v.* Duncan, 1 Tyrw. 283; Senior *v.* Butt, Hil. T. 1827, K. B., and Payne *v.* Johnson, there cited; Greave's case, 1 Cromp. & J. 374, *note* (*a*).

within the statute, because, as before stated, neither party can annul the contract, although neither could enforce it.[1]

§ 138 *b*. Where a verbal contract for the sale of a horse was made on Sunday, and no satisfaction of the statute was had until Monday, it seems to have been considered that the contract was to be taken as not made till the Monday, for the purposes of the law prohibiting business contracts on Sunday.[2] This opinion was not necessary to the decision of the case, and would seem to be untenable on principle. If the contract, for the purposes of the Sunday laws, be regarded as complete when it is verbally made (as it seems that it should be), it follows that the act of satisfying the Statute of Frauds is *not* the making nor the completing of the contract, and may therefore itself take place on Sunday, and have full effect.[3]

§ 138 *c*. The proposition that the Statute of Frauds presupposes an existing lawful contract which, except for the purpose of recovery for its violation, is binding upon the parties, finds a farther illustration in the decisions that a payment made without appropriation by the party making it may be appropriated by the party receiving it to a debt due from the former to him upon a contract not directly actionable for want of compliance with the Statute of Frauds.[4]

§ 138 *d*. In conclusion of this chapter, we will inquire into the effect of the making of the verbal contract, considered by itself, and considered as supplemented by satisfaction of the Statute of Frauds, as to the *title in goods sold*, both between the parties and those claiming under them, and as to third persons.

§ 138 *e*. The mere convention or agreement of the parties

[1] See *post*, Chap. XVIII.

[2] Bloxsome *v*. Williams, 3 Barn. & C. 232.

[3] The reader will find a full and careful discussion of these questions in the article of the American Law Review referred to *ante*, §§ 115 *a*, *note*.

[4] Haynes *v*. Nice, 100 Mass. 327; Murphy *v*. Webber, 61 Me. 478; Mueller *v*. Wiebracht, 47 Mo. 468. See Wart *v*. Mann, 124 Mass. 586.

to that effect is sufficient at common law to pass the title to goods sold, when the identical goods which are the subject of the sale are ascertained, and are capable of immediate delivery, and the price is fixed: neither payment of the price nor actual delivery of the goods being necessary to pass the title.[1] Is this true of a sale of goods for such price as to fall under the Statute of Frauds? If after such a verbal contract of sale, no satisfaction of the statute being ever had, the chattel perish, on whom does the loss fall? Or if the chattel be injured by the negligence or wilfulness of the seller in whose custody it remains, is he liable to the buyer for the injury? In such cases, it would seem, theoretically, that the title being in the buyer, the loss in the first case should be his, and that he should have, in the second case, his action for damages; and yet, practically, this would be to enforce against the buyer and the seller respectively the verbal contract of sale.[2] No case has been found reported which thus gives to one party as against the other the practical benefits of the passage of the title by their verbal contract, in cases where there is never any satisfaction of the Statute of Frauds.[3] But where there is a subsequent satisfaction of

[1] Clarke *v.* Spence, 4 Ad. & E. 448; Townsend *v.* Hargraves, 118 Mass. 332, and cases cited.

[2] See Carrington *v.* Roots, 2 Mees. & W. 248, discussed, § 133, *ante*.

[3] In Goddard *v.* Binney, 115 Mass. 450, there was a verbal contract for a buggy, and upon the ground of the work still to be done about it when the contract was made, the court held that it was not a contract for goods within the seventeenth section of the statute; but when the buggy was finished there took place between the parties what the court considered to amount to a delivery at common law, sufficient to pass the title; and this being so, and expressly declining to hold that there had been "acceptance and receipt" within the statute, they held that, after the buggy had been destroyed by fire on the seller's premises, the loss fell on the buyer, and that the seller could maintain an action against him for the contract price. The court treated the transaction throughout as one to which the statute did not apply. Yet the effect of the decision was to enforce payment of the contract price of a completed chattel of more than the statute price, when there was neither memorandum, nor earnest, nor acceptance and receipt. In this aspect the case appears to be anomalous.

the statute, so that the objection of enforcing the verbal contract against a party to it no longer exists, the title to the goods has been held to be in the buyer as of a date prior to the satisfaction of the statute, so as to make him, and not the seller, bear the damage sustained by the goods after the contract of sale and before the satisfaction of the statute.[1]

§ 138*f*. Cases where the rights or liabilities of third parties depend upon the question of title passing by the verbal contract without satisfaction of the statute present more difficulty. In Morgan *v.* Sykes,[2] the transaction was such as apparently to vest the title to the goods in the buyer at common law, before the loss of part of them by a carrier, who was sued in this action by the vendor to recover their value; and the vendor recovered, and judgment on the verdict was sustained. The residue of the goods was accepted and received by the buyer after the loss; but this fact was held immaterial. In Stockdale *v.* Dunlop[3] there was a dictum by Parke, B., to the effect that the complete oral contract of purchase, enough to give title at common law, did not, in the absence of compliance with the statute, give the buyer an insurable interest. And this dictum was referred to and approved by Willes, J. (though the question was not necessary to the decision), in Felthouse *v.* Bindley;[4] and there has been a decision to the same effect by a majority of the Court of Appeals of New York.[5] In O'Neil *v.* N. Y. C. & H. R. R. Co.,[6] where the goods after the oral sale were destroyed by fire in the hands of the carrier on the way to

[1] Bailey *v.* Sweeting, 9 C. B. N. S. 843; Wilkinson *v.* Evans, L. R. 1 C. P. 407; Townsend *v.* Hargraves, 118 Mass. 325; Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140; Phillips *v.* Ocmulgee Mills, 55 Ga. 633, Vincent *v.* Germond, 11 Johns. (N. Y.) 283.

[2] Morgan *v.* Sykes, 3 Q. B. 486, *note*.

[3] Stockdale *v.* Dunlop, 6 Mees. & W. 224.

[4] Felthouse *v.* Bindley, 11 C. B. N. S. 869.

[5] Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6.

[6] O'Neil *v.* N. Y. C. & H. R. R. Co., 60 N. Y. 138.

the purchaser, it was held by the Court of Appeals of New York, as in Morgan *v.* Sykes, that he could not recover. In Ely *v.* Ormbsy,[1] the Supreme Court of the same State held that the vendee, after oral purchase, could not maintain trespass against a sheriff for attaching the goods as the property of the seller. And in the Court of Appeals, again, it was held[2] that the seller's assignee in bankruptcy could maintain trover against a creditor of the buyer attaching the goods as his, after the oral purchase, there being (as in all the cases now under examination) no satisfaction of the statute. In the Supreme Court of Maine,[3] it has been held that a subsequent purchaser by a third party by bill of sale from the original seller of the same goods which he had already sold by oral bargain, could maintain replevin against the first purchaser undertaking to carry away the goods as his own. And in Florida,[4] it was held that the oral sale was insufficient to support an action by the purchaser of a slave against a third party detaining him.

§ 138 *g*. The Supreme Court of the United States has dealt with the question, in which of the parties was the title to cotton at the time of its capture, for the purposes of an Act of Congress allowing compensation to the loyal owners of property captured in war.[5] Certain bales of cotton were seized by military order during the war of the rebellion; the "Captured and Abandoned Property Act" allowed the owner, if loyal, to recover the value of the cotton from the United States; and the claimant (who was buyer under the contract of sale in question) brought suit accordingly in the Court of Claims, alleging herself to have been owner of the cotton at the time of capture. By the reporter's state-

[1] Ely *v.* Ormsby, 12 Barb. 570. And see Winner *v.* Williams, 62 Mich. 363.

[2] Hicks *v.* Cleveland, 48 N. Y. 84.

[3] Young *v.* Blaisdell, 60 Me. 272.

[4] Summerall *v.* Thoms, 3 Fla. 298.

[5] Mahan *v.* United States, 16 Wall. 143.

ment of the facts it appears that the seller agreed orally with the claimant that the claimant should have that particular lot of cotton in payment of a mortgage held by her from the seller; that the price of the cotton was fixed at so much per pound; but the cotton was not weighed, nor was payment indorsed on the mortgage, nor was there any actual or symbolic change of possession. There was, therefore, no satisfaction of the Statute of Frauds; but there was (it would seem) an ascertainment of the particular goods, a fixing of the price, and an agreement that the title should then pass to the claimant; being a state of facts upon which, as was argued on behalf of the claimant, title passed at common law. But the report made by the Court of Claims of the facts found by it, which report the Supreme Court refused to go behind, stated that there was "no ascertainment of the price" of the cotton. The Supreme Court affirmed the judgment of the Court of Claims that the claimant was not, upon the facts reported, owner of the cotton at the time of capture; proceeding apparently, not only upon the ground that upon the facts reported by the Court of Claims there was no change of title at common law, but also upon the ground that, if there had been such facts as to work change of title at common law, title was still not changed for want of satisfaction of the Statute of Frauds. Miller, J., who delivered the opinion, after quoting the Mississippi statute as it relates to sales of goods, viz., that the sale should not be "allowed to be good and valid," except, etc., says: "The finding of the Court of Claims negatives in the most express terms the existence in the agreement, by which the title of the cotton was supposed to be transferred, of each and every one of the acts or conditions, some one of which is by that statute made necessary to the validity of the contract. To hold that an agreement which that statute declares shall not be allowed to be good and valid was sufficient to transfer the title of the property to the claimant, would be to overrule the uniform construction of this or a similar clause in all statutes of frauds by all the

courts which have construed them." No authorities are cited in the opinion of the court; nor does it notice the distinction between "good and valid" for purposes of enforcement, and "good and valid" for the purpose of passing title between the parties.

§ 138 *h*. In opposition to the commanding current of authority above exhibited, as to the effect of the oral purchase to give title to the buyer, where the rights or liabilities of third parties are involved, there is an early case in Maine,[1] where it was said that the buyer by oral purchase could maintain an action against a sheriff attaching the goods as the property of the seller; and a case in the Supreme Court of Massachusetts,[2] where the plaintiff sued in replevin of goods on a title acquired from one whose title was by oral purchase, and it was held that he had such an interest in the goods that he could maintain the action. It was decided in another Massachusetts case that one who has orally contracted to buy a ship has an insurable interest in her.[3]

§ 138 *i*. It will be noticed that in all the cases there had been no satisfaction of the statute up to the time when the right or the liability of the third party accrued. In some of them there was such satisfaction afterwards; but none of the cases recognize it as having any retroactive effect upon the title given by the oral purchase as to the third party.[4]

§ 138 *j*. If the question whether an oral purchase of goods sufficient to vest title as between the buyer and seller is sufficient to do so as to third parties, can be regarded as open, there is much to be said against the doctrine that it is not;

[1] Cowan *v.* Adams, 1 Fairf. 374.

[2] Norton *v.* Simonds, 124 Mass. 19.

[3] Amsinck *v.* American Insurance Co., 129 Mass. 185.

[4] In an article in the American Law Review, Vol. IX. p. 434, containing a very intelligent discussion of this head of the statute, it is suggested that the subsequent satisfaction of the statute operates retroactively as between the parties by a fiction of law, and does not as to third parties, because no fiction of law affects third parties. See Messmore *v.* Cunningham, 78 Mich. 623.

strongly sustained by authority as we have seen that doctrine to be. It has been already shown in this chapter that the statute does not make the contract void, but only allows a defence to its enforcement, which defence is personal to the defendant and may be waived by him, and which no third party can assume that he will or would avail himself of, so as in effect to give the third party the privilege of the statute. Now the decisions under consideration seem to contravene this well-settled and salutary rule. In the case of the captured cotton the United States undertook to decide that the seller of the cotton would avail himself of his statutory right, and therefore held that the buyer had no title; and so in the cases holding that the buyer had no insurable interest. In the cases of attaching officers, it was their business to find out in whom was the title to the goods before they attached them; and there appears to be no reason why they should not be bound by the facts which make a common law title in the case of a chattel worth more than fifty dollars, as well as in the case of a chattel worth less. In the cases of suits against carriers, it has been supposed that to allow the question of title to be determined as at common law, and without regard to the fact that the statute had not been complied with, would work practical mischief by exposing the carrier to a double recovery. But suppose the buyer sue, and recover as for the loss of *his* goods, the seller cannot afterwards sue the carrier; for by claiming the goods as his own, the buyer has "accepted and received" them,[1] and the contract becomes valid to all intents and purposes. Or suppose the seller sue, can he recover against the carrier, and the carrier be afterwards subject to recovery by the buyer? It seems not. To the seller's action, the carrier may plead that the title is in the buyer; and this is not to enforce the contract against the seller contrary to the statute; the seller, having done his part by delivering the goods, has no privilege under the statute, but is bound unless the buyer should afterward refuse to accept

[1] See *post*, Chap. XV.

the goods; which right of refusal he alone can exercise or waive. Again, suppose the goods are damaged in the hands of the carrier, and afterwards the statute is satisfied so that the buyer becomes bound to pay the seller the contract price; if the seller can recover from the carrier for the damage (as the cases we are criticising hold), and afterward recover the full contract price from the buyer, he is paid twice for a part of the goods; and the buyer who has had to pay for the goods as perfect, can have no action against the carrier for the damage.[1]

[1] This question might well have arisen upon the facts in Bailey *v.* Sweeting, 9 C. B. N. S. 843. And see C. B. & Q. R. R. *v.* Boyd, 118 Ill. 73.

CHAPTER IX.

CONTRACTS IN PART WITHIN THE STATUTE.

§ 139. In the present chapter will be briefly considered, how far a promise embracing several executory stipulations is affected by the circumstance that one or more of those stipulations are not available to the promisee by reason of the Statute of Frauds; the remainder being, if they stood alone, good.

§ 140. It is clear that if the several stipulations are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole, or that a distinct engagement as to any one stipulation cannot be fairly and reasonably extracted from the transaction, no recovery can be had upon it, however clear of the Statute of Frauds it may be, or whatever be the form of action employed. The engagement in such case is said to be entire and indivisible.[1] A reference to some of the decisions on this point will illustrate the principle.

§ 141. In Cooke *v.* Tombs, the defendant, a ship-builder, verbally contracted to sell certain freehold premises and stock in trade, principally consisting of docks and timber for ship-building, and some houses. Upon a suit in equity for a decree of specific execution of the whole agreement, it was held that the agreement, being void as to the land, must be void also as to the personal property which was to be sold

[1] Rainbolt *v.* East, 56 Ind. 538; Becker *v.* Mason, 30 Kansas 697; Caylor *v.* Roe, 99 Ind. 1; Jackson *v.* Evans, 44 Mich. 510; Pond *v.* Sheean, 132 Ill. 312.

with it; McDonald, C. B., remarking that it never could be *the intention of the parties* that the stock should be sold apart from the premises, as most of it was of little comparative value separately, and, besides, that the agreement being for an entire sum the court could never sever it.[1] Similar to this was the case of Lea *v.* Barber, where the defendant made an oral agreement to take an assignment of leasehold premises, to wit, a brick-ground, at one hundred pounds, and to buy the stock, consisting chiefly of half-made bricks, at a valuation to be made by arbitrators. The arbitrators settled the price, but the defendant refused to complete the purchase. An action was brought upon the entire agreement, and the plaintiff, admitting that the contract as to the assignment was void by the Statute of Frauds, claimed that he could recover the valuation of the stock. But it was held by McDonald, C. B., on the authority of Cooke *v.* Tombs, that the agreement, being in its nature entire, could not be severed, and that, being void as to the land, it was void *in toto*.[2] So in Mechelen *v.* Wallace, where the declaration stated that the defendant wished the plaintiff to hire of her a house, and furniture for the same, at the rent, etc., and thereupon, in consideration that the plaintiff would take possession of the house partly furnished, and would, if the defendant sent into it complete furniture by a reasonable time, become tenant to the defendant of the house with all the furniture, at the aforesaid rent, and pay the same quarterly from a certain day, to wit, etc., the defendant promised the plaintiff to send into the said house, within a reasonable time after the plaintiff's taking possession, all the furniture necessary, etc.; it was held that the defendant's agreement to send in furniture

[1] Cooke *v.* Tombs, 2 Anst. 420. But see Stansell *v.* Leavitt, 51 Mich. 536.

[2] Lea *v.* Barber, 2 Anst. 425, *note*. See also Thayer *v.* Rock, 13 Wend. (N. Y.) 53, in which the contract was for the sale of one-sixth of a mill-site, with all the timber and irons belonging to the mill, and it was held to be entire. See Prante *v.* Schutte, 18 Brad. (Ill. App. Ct.) 62; Grant *v.* Grant, 63 Conn. 530; Stringfellow *v.* Ivie, 73 Ala. 209.

was an inseparable part of the contract of leasing, and that the action could not be sustained.[1]

§ 142. In Irvine *v.* Stone, the Supreme Court of Massachusetts held a contract for the purchase of coals at Philadelphia and to pay for the freight of the same to Boston, to be inseparable, so that no recovery for the freight could be had;[2] and this case is not unlike that of Biddell *v.* Leeder, where the Court of Queen's Bench held, upon a contract for the purchase of the plaintiff's share in a ship and to indemnify him for all liabilities on account of his share, that the latter engagement was inseparably connected with the former.[3] A contract to hire a shop at a certain rent, and to pay the landlord the amount expended in fitting it up, has also been decided, by the Supreme Court of Massachusetts, to be indivisible.[4]

§ 143. On the other hand, the cases where the different engagements of the party have been held such as to admit of being reasonably considered separately, or as independent contracts, are equally clear in their general spirit and principle. In Mayfield *v.* Wadsley, which was upon a contract for the sale of a growing crop of wheat, and also of certain dead stock upon a farm, it was remarked by Abbott, C. J., that the bargain in regard to the latter was made *after an interval of time* (though at the same interview and almost simultaneously with the former), and he seems to consider

[1] Mechelen *v.* Wallace, 7 Ad. & E. 49. See also the similar case of Vaughan *v.* Hancock, 3 C. B. 766. And compare § 117 *a*, *supra*, where Angell *v.* Duke, L. R. 10 Q. B. 174, is discussed.

[2] Irvine *v.* Stone, 6 Cush. 508. So with a contract to convey land and pay off the encumbrances upon it. Duncan *v.* Blair, 5 Denio (N. Y.) 196; Dock *v.* Hart, 7 Watts & S. (Pa.) 172. So with a verbal warranty of quality of goods sold under a verbal contract. Lamb *v.* Crafts, 12 Met. (Mass.) 353. And see Hanson *v.* Marsh, 40 Minn. 1.

[3] Biddell *v.* Leeder, 1 Barn. & C. 327.

[4] McMullen *v.* Riley, 6 Gray, 500. An agreement to convey land, coupled with a guaranty that a certain parcel of it should contain a certain number of acres, has been held indivisible. Dyer *v.* Graves, 37 Vt. 369.

that if that interval had not occurred, it would be necessary to hold the contract indivisible.[1] But the subsequent decision of the Court of Exchequer in Wood *v.* Benson clearly establishes a rule independent of any such distinction. There was a written guaranty, by which the defendant engaged to pay for all the gas which might be consumed at a certain theatre during the time it was occupied by a third party, and also to pay for all arrears which might be then due. It was held that the plaintiff could recover upon the former branch of the contract, on a count properly framed for the purpose.[2]

§ 144. Where an agreement is originally, and remains until the time of bringing suit, indivisible and executory as to its various stipulations, the disability of a plaintiff to recover upon any one of those stipulations manifestly results, not from the fact that the statute happens to apply to the remainder, but from the tenor of the agreement, by which it has been shown to be the intention of the parties that, if performed at all, it is to be performed as a whole.[3]

§ 145. Where, on the other hand, the stipulations of the defendant are not so connected that they cannot reasonably be performed separately and independently, the question arises whether the plaintiff can recover upon one or more to which the statute does not apply, notwithstanding there are others to which it does apply. And, in the first place, it is clear upon all the authorities that he cannot, if his action be brought upon the entire contract. On this point it is necessary that the principal cases be examined a little in detail, in order to show clearly the reason of the rule.

§ 146. In the case of Lord Lexington *v.* Clarke, the declaration set forth that the plaintiff had demised premises

[1] Mayfield *v.* Wadsley, 3 Barn. & C. 357.

[2] Wood *v.* Benson, 2 Cromp. & J. 94; Littlejohn, *ex parte*, 3 M. D. & De G. 182; Pierce *v.* Woodward, 6 Pick. (Mass.) 206; Mobile M. D. & M. Ins. Co. *v.* McMillan, 31 Ala. 711; Lowman *v.* Sheets, 124 Ind. 416.

[3] Dowling *v.* McKenney, 124 Mass. 478.

at will to the first husband of the defendant's wife, and that there was due from him £160 rent, and that the defendant's wife, in consideration of being allowed to hold possession till a certain time and to remove certain fixtures, promised to pay the £160 and £260 more; that she did hold possession and took the fixtures, but had not paid the money. A special verdict found that she had paid the former sum but not the latter. By the opinion of all the court, judgment was given for the defendant on the claim for the unpaid £260, for, they said, "the promise as to one part being void, it cannot stand good for the other, for it is an entire agreement, and the action is brought for both the sums, and indeed could not be otherwise without variance from the promise."[1] In Thomas *v.* Williams, the defendant verbally promised the plaintiff, who was about to distrain upon his tenant for rent, that if he would not distrain, he would pay him the rent which would be due at Michaelmas ensuing, including, of course, the arrears as well as what should accrue in the mean time. The plaintiff sued upon this promise, and his verdict was for a sum made up partly of rent due at the time of the promise and partly of what accrued afterwards. On argument upon a rule to set aside the verdict, it was held by the Court of Queen's Bench that the contract, being in part within the Statute of Frauds, was wholly void.[2] In both cases, it will be observed, the declaration was upon the entire special promise, and contained no general counts. Consequently the entire contract was to be proved as laid, and after the plaintiff had, by oral evidence, shown that part of it which was not within the Statute of Frauds, and upon which he wished to recover, there was a fatal variance between the contract he had counted upon and that which he had proved. In Chater *v.* Beckett, where the defendant engaged to pay the plaintiff the debt a third person owed him, and all the expenses he had incurred for the purpose of putting his debtor

[1] Lord Lexington *v.* Clarke, 2 Vent. 223.

[2] Thomas *v.* Williams, 10 Barn. & C. 664.

into bankruptcy, there was a special count setting forth the entire contract, and also general counts for money paid to defendant's use and money had and received. Neither of the latter counts was supported, however, for in paying his own expenses, the plaintiff had only paid his own debt; and so the case was correctly decided for the defendant, the authorities last quoted being precisely in point.[1]

§ 147. It is quite obvious that the cases which have just been quoted proceeded, in fact, upon the ground that by the form of the plaintiff's action he had precluded himself from proving even so much of the contract as was not affected by the Statute of Frauds, because to do so would have involved a variance from the declaration, which alleged the entire and therefore a different contract.[2] But they have been conceived to establish a principle that, if one stipulation in the engagement of a defendant was void by the statute, no recovery could be had upon the remainder. This opinion, which doubtless grew out of the generality of the language employed by judges in earlier cases, does not seem to have been distinctly affirmed and decided as law in any case but that of Loomis *v.* Newhall in Massachusetts. There the defendant had furnished supplies to the plaintiff's son, for which the son was liable, and the defendant at the request of the plaintiff continued to furnish supplies, the plaintiff saying, "for what you have done and for what you shall do for my son, I will see you paid." Besides the count on an account annexed, the declaration contained the common money counts. It was held upon the supposed authority of Chater *v.* Beckett and Lord Lexington *v.* Clarke, that the plaintiff could not recover for that part of the claim which arose after the

[1] Chater *v.* Beckett, 7 T. R. 201.

[2] The following American cases stand on the same ground: Noyes *v.* Humphreys, 11 Grat. (Va.) 636; Crawford *v.* Morrell, 8 Johns. (N. Y.) 253; Henderson *v.* Hudson, 1 Munf. (Va.) 510. And see Alexander *v.* Ghiselin, 5 Gill (Md.) 138; Duncan *v.* Blair, 5 Denio (N. Y.) 196; Flournoy *v.* Van Campen, 71 Cal. 14.

promise, inasmuch as his recovery on that part which arose previously was barred by the statute as a promise to pay the debt of his son.[1]

§ 148. But the true import of those and the other early English cases was defined in the case of Wood *v.* Benson, decided in the Court of Exchequer in 1831. That was assumpsit on the following guaranty signed by the defendant: "I, the undersigned, do hereby engage to pay the directors of the Manchester Gas Works, or their collector, for all the gas which may be consumed in the Minor Theatre and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. Neville; and I do also engage to pay for all arrears which may be now due." There was a count for gas sold and delivered. The general issue was pleaded, and it was objected that there was no consideration apparent on the face of the instrument for the promise to pay the arrears; and that the agreement, therefore,[2] being void as to part under the Statute of Frauds, was void as to the whole; and to this the cases of Lea *v.* Barber, Lexington *v.* Clarke, Chater *v.* Beckett, and Thomas *v.* Williams, were cited. The court admitted their authority, but explained that, as the actions were brought in each case upon the entire contract, the plaintiffs therein could not recover; and they decided that, in the case before them, the plaintiff could recover on the separate count for gas sold and delivered, which was applicable to the binding part of the contract.[3]

§ 149. The decision in Loomis *v.* Newhall is no longer law in Massachusetts. In the case of Irvine *v.* Stone, the Supreme Court of that State had occasion to examine into

[1] Loomis *v.* Newhall, 15 Pick. 159; overruled in Rand *v.* Mather, 11 Cush. 1. The case of Robson *v.* Harwell, 6 Ga. 589, while admitting Loomis *v.* Newhall as authority, decides that the principle there held does not extend to declarations of trusts.

[2] See *post*, §§ 386, *et seq.*

[3] Wood *v.* Benson, 2 Cromp. & J. 94.

the earlier English decisions upon the subject, and, while they did not find it necessary to overrule it, stated conclusions irreconcilable with it.[1] And later it was deliberately overruled by them, and the doctrine established in Wood *v.* Benson adopted. In the opinion of the court, delivered by Metcalf, J., the authorities are very carefully reviewed, and it is particularly noticed that in Loomis *v.* Newhall there were common counts upon which the plaintiff was entitled to recover; otherwise, it could have been supported upon the same ground as the early English cases.[2]

§ 150. We have thus seen that, on a count properly framed for the purpose, a plaintiff may recover upon such of the executory stipulations of the defendant's agreement as are not liable to any objection under the Statute of Frauds, provided they are, from the nature of the contract, capable of being considered separately from the remainder. But even where the various stipulations are so connected together that, so long as they all remained executory, no action could be maintained upon any one of them separately, yet if that part to which the statute would have applied has been executed, and thus in fact severed from the remainder, an action may be sustained upon the remaining executory part, and it is no objection to such action that the plaintiff may be obliged incidentally to prove the making and execution of the other part, inasmuch as he founds no claim upon it.[3]

§ 151. Where the plaintiff, from the nature of his case or of the relief which he requires, is obliged to set up the entire

[1] Irvine *v.* Stone, 6 Cush. 508.

[2] Rand *v.* Mather, 11 Cush. 1.

[3] See §§ 117, *et seq.*, *ante*. Also Dock *v.* Hart, 7 Watts & S. (Pa.) 172; Hess *v.* Fox, 10 Wend. (N. Y.) 436, distinguishing Van Allstine *v.* Wimple, 5 Cowen (N. Y.) 162; Page *v.* Monks, 5 Gray (Mass.) 492; Trowbridge *v.* Wetherbee, 11 Allen (Mass.) 361; Wetherbee *v.* Potter, 99 Mass. 354. And see Twidy *v.* Saunderson, 9 Ired. (N. C.) 5; Manning *v.* Jones, Busb. (N. C.) Law, 368; Dyer *v.* Graves, 37 Vt. 369; Tinkler *v.* Swaynie, 71 Ind. 562; Humphrey *v.* Fair, 79 Ind. 410; Stephenson *v.* Arnold, 89 Ind. 426.

contract, he will of course be debarred from recovering, if any executory part of the contract be within the statute and he has no written evidence of it. Thus, if a bill in equity is brought to enforce so much of the contract as is not affected by the statute, it would seem that the complainant must fail of his decree, the proceeding being founded wholly on the engagements specially made between the parties.[1] In Head *v.* Baldrey, decided some years after Wood *v.* Benson had defined the rule in such cases, the defendant had been owing the plaintiff a sum of money for goods previously sold, and he agreed, if the plaintiff would give him time upon that debt and would sell him certain other goods, he would pay for the whole by accepting a bill of a certain description. On his refusing to accept the bill, an action was brought in which, besides the special count upon the contract, there was a count for goods sold and delivered. The defendant pleaded the Statute of Frauds, because part of the consideration of his promise was the price of the wool, the sale of which was not binding under the statute. On demurrer to the plea, because the declaration showed a good consideration (namely, the debt for goods previously sold), it was held in the Queen's Bench that, part of the consideration failing by reason of the statute, the plea was good, and the defendant had judgment. Lord Denman, C. J., delivering the opinion of the court, said: "We apprehend that the defendant can only be made chargeable for a breach of the promise laid; and that promise is, not to pay for these or any other goods sold, but to fulfil a specific arrangement between the parties, that is, to pay by accepting a bill in respect of this liability, and a new one then in contemplation."[2]

§ 152. A class of contracts to which allusion has been heretofore made, namely, those in which a party promises to

[1] Alexander *v.* Ghiselin, 5 Gill (Md.) 138; Henderson *v.* Hudson, 1 Munf. (Va.) 510, *per* Tucker, J.; Robson *v.* Harwell, 6 Ga. 589, *per* Lumpkin, J.

[2] Head *v.* Baldrey, 6 Ad. & E. 468.

do one of two or more things, the statute applying to one of the alternative engagements, but not to the others, is sometimes referred to the head of contracts in part affected by the statute. It is needless to dwell upon the question whether they are properly so referred. It is manifest that of such alternative engagements no action will lie upon that one which, if it stood alone, could be enforced as being clear of the Statute of Frauds, because the effect would be to enforce the other; namely, by making the violation of it the ground of an action.[1]

[1] Van Allstine *v.* Wimple, 5 Cowen (N. Y.) 162; Patterson *v.* Cunningham, 12 Me. 506; Goodrich *v.* Nickols, 2 Root (Conn.) 498; Rice *v.* Peet, 15 Johns. (N. Y.) 503; Howard *v.* Brower, 37 Ohio St. 402. But see Couch *v.* Meeker, 2 Conn. 302.

CHAPTER X.

GUARANTIES.

§ 153. In the fourth section of the Statute of Frauds, special promises by executors or administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties. And there would be no distinction between them, but for the circumstance that the executor or administrator, being the legal representative of the party originally liable, is already, in that capacity, under a liability to pay to the extent of the property which comes to his hands. The statute, therefore, is confined to his special promise to pay out of his own estate. But as such special promise may be treated as collateral to the obligation of the estate which he represents, the distinction after all seems to be more technical than substantial. It will, accordingly, be proper to consider such promises in connection with guaranties, strictly so called, remarking, as we go on, those points in which the application of the statute to the former admits of separate notice. One observation in regard to them, however, it is important to make. As an *administrator* derives his office and interest from the appointment of the court, the statute affords him no protection against the enforcement of his verbal promise to answer damages out of his own estate, made after the death of the testator but before his own appointment. On the other hand, the office and interest of an *executor* being completely vested in him at the instant of the testator's death, the statute applies to any such promise made by him after that time.[1]

[1] Tomlinson *v.* Gill, Ambl. 330; Roberts on Frauds, 201. See *post*, § 186.

§ 154. In considering the general subject of guaranties as affected by the Statute of Frauds, it is proposed to inquire, *first*, what are debts, defaults, or miscarriages within the meaning of the statute; *secondly*, what is the nature of that special promise of the guarantor which is required to be in writing; and, *thirdly*, when do these liabilities so coexist or concur as to bring a case within the statute.

§ 155. The terms "debt, default, or miscarriage" seem to include every case in which one party can become liable to another in a civil action; although, in an early decision, it may be inferred to have been doubted whether they covered cases of tort.[1] That doubt, however, if it ever existed, was afterwards removed by the judgment of the Court of Queen's Bench, in the case of Kirkham *v.* Marter. The defendant had there engaged to pay the plaintiff the damage sustained by him from a third person's having, wrongfully and without his license, ridden his horse, and thereby caused its death. All the judges concurred that the liability was such as the statute would cover by force of the word "miscarriage;" Abbott, C. J., remarking that it had not the same meaning as "default or debt," and seemed to him "to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible." Holroyd, J., went somewhat farther, and considered that both "miscarriage" and "default" applied to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract.[2]

§ 156. Under whatever class it may fall, however, the liability of the party for whom a guarantor within the statute makes himself answerable must be a clear and ascertained

[1] Buckmyr *v.* Darnall, 2 Ld. Raym. 1085.

[2] Kirkham *v.* Marter, 2 Barn. & Ald. 613. It is stated, however, in a note by the reporters, that this case was furnished to them by a gentleman of the bar. The same point has been decided in Connecticut, and the statute held to be applicable to cases of tort, in Turner *v.* Hubbell, 2 Day, 457. See Combs *v.* Harshaw, 63 N. C. 198; Hayes *v.* Burkam, 51 Ind. 130; Baker *v.* Morris, 33 Kansas 580.

legal liability, capable of being enforced against the party himself.[1] Upon this principle it seems that an agreement to answer for the debt of a married woman is not within the Statute of Frauds; because at common law the contract of a married woman is absolutely void. Where she, or her separate estate, is by law made liable for her debts, the statute applies.[2] As to promises to answer for the debt of a minor, not incurred for necessaries, and therefore not enforceable against him upon his plea and proof of infancy, the weight of authority and of reason is in favor of holding that they are within the statute. While it is true that the minor cannot be compelled to pay the debt, if he choose to rely upon his defence of infancy, still the debt is only voidable at his instance, not void, and the defence of infancy is a personal one, of which, as between third parties (the party promising to answer for him, and the party to whom that promise is made), it cannot be assumed that the minor will avail himself; just as we have seen in a previous chapter,[3] that in a suit between third parties it cannot be assumed that the promisor under an oral contract covered by the Statute of Frauds would set up that defence in a suit against himself.[4]

1 Mease *v.* Wagner, 1 McCord (S. C.) 395; Prentice *v.* Wilkinson, 5 Abb. (N. Y.) Pr. N. S. 49; First National Bank *v.* Kinner, 1 Utah, 100; Hooker *v.* Russell, 67 Wisc. 257; Buchanan *v.* Moran, 62 Conn. 83. This rule seems to have been overlooked in Ruppe *v.* Peterson, 67 Mich. 437. In that case goods had been ordered by a man who died before they were delivered. His widow, carrying on his business, subsequently agreed to pay for the goods if they were delivered to her, and they were so delivered. Her promise was held collateral to the liability of the husband's estate: but *quære*, for the goods were never delivered to the husband's estate, and it was never liable for them.

2 Connerat *v.* Goldsmith, 6 Ga. 14. See, as to the general question of the application of the statute to promises to answer for the debt of a married woman, Kimball *v.* Newell, 7 Hill (N. Y.) 116; Maggs *v.* Ames, 1 Moore & P. 294; S. C. 4 Bing. 470; Miller *v.* Long, 45 Pa. St. 350.

3 §§ 135, *et seq.*

4 Dexter *v.* Blanchard, 11 Allen (Mass.) 365; Downey *v.* Hinchman, 25 Ind. 453; Clark *v.* Levi, 10 N. Y. Leg. Obs. 184; King *v.* Summit, 73 Ind. 312. The cases of Harris *v.* Huntbach, 1 Burr. 71, Roche *v.* Chaplin,

§ 157. Unless some liability or duty of a third person already exists, or is to be created, there cannot, of course, be an agreement to answer for the debt, default, or miscarriage of *another*. This was illustrated in the case of Read *v.* Nash, where one Tuack had brought an action of assault and battery against one Johnson. The cause being at issue, and the record entered and just coming on to be tried, the defendant Nash, who was then present in court, in conideration that Tuack would not proceed to trial but would withdraw his record, undertook and promised to pay him fifty pounds and costs. Tuack, relying upon this promise, did withdraw his record, and no farther proceeding was had in the cause. Tuack being dead, Read, his executor, brought the present action, and the question was whether Nash's promise was a promise to answer for the debt, default, or miscarriage of Johnson. It was unanimously held by the judges of the Queen's Bench that it was not; and Lee, C. J., delivering the opinion of the court, said: "Johnson was not a debtor; the cause was not tried; he did not appear to be guilty of any debt, default, or miscarriage; there might have been a verdict for him if the cause had been tried, for any thing we can tell; he never was liable to the particular debt, damages, or costs."[1] But where the defendant had verbally promised the

1 Bailey (S. C.) Law, 419, and Chapin *v.* Lapham, 20 Pick. (Mass.) 467, can be explained without opposition to the doctrine stated in the text, and are so explained in Mr. Throop's treatise on the Validity of Verbal Agreements, §§ 259-264.

[1] Read *v.* Nash, 1 Wils. 305. See Bray *v.* Freeman, 2 Moore, 114, where, however, the court seem to have applied Read *v.* Nash somewhat freely. See also Griffin *v.* Derby, 5 Greenl. (Me.) 476; Sampson *v.* Swift, 11 Vt. 315; Peck *v.* Thompson, 15 Vt. 637; Jepherson *v.* Hunt, 2 Allen (Mass.) 417; Merrill *v.* Englesby, 28 Vt. 150; Walker *v.* Norton, 29 Vt. 226; Douglass *v.* Jones, 3 E. D. Smith (N. Y.) 551; Johnson *v.* Noonan, 16 Wisc. 687; Thompson *v.* Blanchard, 3 N. Y. 335; Ingraham *v.* Strong, 41 Ill. App. Ct. 46; Johnson *v.* Hoover, 72 Ind. 395; Bellows *v.* Sowles, 57 Vt. 164; Crowder *v.* Keys, 91 Ga. 180; Davis *v.* Tift, 70 Ga. 52; Abbott *v.* Nash, 35 Minn. 451; Snell *v.* Rogers, 70 Hun (N. Y.) 462; Buchanan *v.* Moran, 62 Conn. 83.

plaintiff to pay the damages sustained by reason of a third person's having wrongfully and without the license of the plaintiff ridden his horse and thereby caused its death, in consideration that he would not bring an action against the third person; it was held by the Court of Queen's Bench, that the defendant's promise was within the statute, and that an action upon it could not be sustained. The court distinguished the case from Read *v.* Nash, because here it did appear as matter of fact that the third person had rendered himself liable.[1] The general principle is further illustrated by the cases where the plaintiff, on the defendant's verbal order, has rendered services or furnished goods to some third person designated by him. In such cases, where the plaintiff has dealt with the defendant alone, there is no duty or liability but that of the defendant, and his promise to pay for the work or the goods is manifestly original and valid.[2]

§ 157 *a.* It has been held by the Queen's Bench, that if at the time of the contract between the plaintiff and the defendant they supposed a third person to be liable to the plaintiff, although it should afterward turn out that he was not, the statute would apply to the defendant's promise. But this judgment was reversed in the Exchequer Chamber, and the reversal sustained in the House of Lords, where Lord Selborne says: "There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there

[1] Kirkham *v.* Marter, 2 Barn. & Ald. 613; Duffy *v.* Wunsch, 42 N. Y. 24[illegible]

[2] Buckmyr *v.* Darnell, 2 Ld. Raym. 1085; Sanborn *v.* Merrill, 41 Me. 467; Sutherland *v.* Carter, 52 Mich. 151; Peyson *v.* Conniff, 32 Neb. 269. See Walker *v.* Hill, 119 Mass. 249, *per* Gray, C. J.; Chicago & Wilmington Coal Co. *v.* Liddell, 69 Ill. 639. See *post*, § 197. In Walker *v.* Norton, 29 Vt. 226, the defendant's promise was to reimburse the plaintiff for expense to be incurred by him in hiring a band, in the event that a voluntary subscription to be made for that purpose should be insufficient, and it was held that the statute did not apply.

can be no suretyship. Nor can a man guarantee anybody else's debt, unless there is a debt of some other person to be guaranteed." In the Exchequer Chamber and the House of Lords, it was considered that the Queen's Bench had misapprehended the state of the evidence, and that it appeared, or at least the jury would be warranted in finding, that the plaintiff and defendant at the time of making their bargain knew that the third party, a certain local Board of Health, had not become liable; only it was known that it might thereafter become liable; but the plaintiff meanwhile went directly to work on the strength of the defendant's promise to "see him paid;" and these facts were held material, among others, to be put to the jury on the question, whether the plaintiff did not give credit solely to the defendant, although the words used naturally imported a collateral undertaking.[1]

§ 158. It is not necessary that the obligation for the performance of which the guaranty is given should be express; it is sufficient if it be implied by law. Such was the decision of Lord Ellenborough, in a case where the miscarriage provided against was the violation of the navigation laws;[2] and, indeed, it would seem to be impossible by any other rule ever to bring a case of tort within the statute, the obligation resting on the third person in such a case arising, of course, by implication. It has been said in the Supreme Court of Massachusetts that there might be instances in which a plaintiff who, for the benefit of a third person, had undertaken an onerous obligation at the defendant's verbal request, would have a remedy against him, notwithstanding that such third person was also liable incidentally, and upon a promise implied by law.[3] The remark was admitted to be not necessary to the decision, which went upon an entirely distinct ground,

[1] See *post*, § 197.

[2] Redhead *v.* Cator, 1 Stark. 12; Whitcomb *v.* Kephart, 59 Pa. St. 85.

[3] Chapin *v.* Lapham, 20 Pick. 467, *per* Shaw, C. J. But see the remarks of the same judge in Alger *v.* Scoville, 1 Gray 391.

namely, that the credit was given solely to the defendant; moreover, of the two cases referred to in support of it, one does not seem to justify it, and the other has been substantially overruled.[1] They belong, however, to a class of decisions important to be examined, as having been assumed to afford the foundation for a doctrine that a *promise to indemnify* is not within the statute.

§ 159. Where the promise is to indemnify against the consequences of such an act or engagement on the part of the promisee as involves no duty or liability on the part of any third person also to indemnify him, the statute manifestly does not apply; for there is no liability of a third party, either express or implied, to which the defendant's promise to indemnify can be collateral. Thus, where the indorser of a dishonored bill requested a subsequent indorsee to sue the acceptor, and the latter did so, it was held that he could recover upon the oral promise of the other to indemnify or reimburse him for the expenses of the suit.[2] So, where the plaintiff at the defendant's request has made a note to a third party, the promise of the defendant to save the maker from payment of the note is clearly original and not within the statute.[3] And so with a promise to indemnify the plaintiff against a suit to be brought for a trespsas committed by him at the promisor's instance, for the purpose of raising a question of title,[4] or against a suit of the same nature for resisting payment of tithes.[5]

§ 160. The only case found which stands opposed to the rule stated above is that of Winckworth *v.* Mills, decided at

[1] Harrison *v.* Sawtel, 10 Johns. (N. Y.) 242; Chapin *v.* Merrill, 4 Wend. (N. Y.) 657. See *post*, §§ 160, 161.

[2] Bullock *v.* Lloyd, 2 Car. & P. 119; and see Howes *v.* Martin, 1 Esp. 162.

[3] Hull *v.* Brown, 35 Wisc. 652; Green *v.* Brookins, 23 Mich. 48.

[4] Marcy *v.* Crawford, 16 Conn. 549; Allaire *v.* Ouland, 2 Johns. (N. Y.) Cas. 52. And see Weld *v.* Nichols, 17 Pick. (Mass.) 538.

[5] Adams *v.* Dansey, 6 Bing. 506. And see also Goodspeed *v.* Fuller, 46 Me. 141; Dorwin *v.* Smith, 35 Vt. 69; Evans *v.* Mason, 1 Lea (Tenn.) 26;

nisi prius, where one Taylor made a promissory note to the defendant, who indorsed it to another, who indorsed it to the plaintiff, and he, having lost the original note, applied to the makers, who made a difficulty about paying it, whereupon the defendants verbally promised to indemnify the plaintiff if he would endeavor to enforce payment from the maker. The action was in part to recover expenses incurred in such endeavor, and Lord Kenyon ruled that, as to that part which was based on the promise to indemnify, plaintiff could not recover, because it was a promise to answer for the debt and default of another.[1] This decision apparently cannot be sustained. The promise clearly was, not to answer to the promisee for the debt, default, or miscarriage of another, but to make up to him any loss he might sustain by his own act, in attempting to compel payment of the note by the maker.

§ 161. But there is a large class of cases, in which the defendant's promise is or may be expressed as a promise to the plaintiff to indemnify him against the consequences of some act or undertaking of his own, while at the same time there is an implied obligation on the part of some third person also to indemnify him; to which obligation the defendant's promise of indemnity is or may be collateral. It is from cases of this class that great confusion in the law has arisen, because apparently of the inconsiderate treatment of them by the courts as mere cases of contracts of indemnity, without sufficient regard to the fact of the coexistence of the implied obligation on the part of the third person. It is obvious that they must not be confounded with such cases as we have heretofore considered, where no such implied obligation

Peck *v.* Thompson, 15 Vt. 637; Flemm *v.* Whitmore, 23 Mo. 430; Stocking *v.* Sage, 1 Conn. 519; Stark *v.* Raney, 18 Cal. 622; Tarr *v.* Northey, 17 Me. 113; Chapman *v.* Ross, 12 Leigh (Va.) 565; Conkey *v.* Hopkins, 17 Johns. (N. Y.) 113; Farnum *v.* Chapman, 61 Vt. 395; Mays *v.* Joseph, 34 Ohio St. 22; Lerch *v.* Gallup, 67 Cal. 595.

[1] Winckworth *v.* Mills, 2 Esp. 484.

coexisted; and that they cannot be dismissed as not covered by the statute, simply because the defendant's promise is in form a promise to indemnify.[1] Whether or not in such cases the express promise of the defendant and the coexisting implied liability of the third party constitute a case of *collateral obligation* under the Statute of Frauds depends upon other considerations.

§ 161 *a*. As to the English cases, the first to be noticed is Thomas *v.* Cook, in the Queen's Bench, 1828, where the plaintiff, at the defendant's request and upon his special promise to indemnify him, joined the defendant as surety on a bond of a third party to secure his debt to a fourth. The case showed no obligation of the third party to the plaintiff, except that which would arise by implication of law upon the plaintiff's being actually damnified as his surety, and it was held that the statute did not apply to the defendant's special promise to indemnify the plaintiff.[2] In Green *v.* Creswell, in the Queen's Bench, 1839, the plaintiff at the defendant's request, and upon his special promise to indemnify him, became bail for a third party who was arrested for debt; the case, as before, showed no obligation of the third party to the plaintiff, except the implied obligation arising upon his being compelled to pay; but it was held that the defendant's special promise to indemnify him was within the statute, upon the ground (with another) that it was collateral to the third party's implied obligation to the like extent.[3] It is to be noticed that in Thomas *v.* Cook the plaintiff and defendant became co-sureties, while in Green *v.* Creswell the defendant was not himself on the bond; and this difference between the facts of the two cases has been supposed to distinguish them,[4]

[1] Cheesman *v.* Wiggins, 122 Ind. 352.

[2] Thomas *v.* Cook, 8 Barn. & C. 728.

[3] Green *v.* Creswell, 10 Ad. & E. 453.

[4] See Barry *v.* Ransom, 12 N. Y. 462; Apgar *v.* Hiler, 24 N. J. L. 812; Ferrell *v.* Maxwell, 28 Ohio St. 383. In the report of Green *v.* Creswell, in 4 Jurist, 169, the judges are stated to have themselves referred to the

upon the ground that where the defendant is co-surety he is, as such and without any special promise, liable already to contribute, and that his special promise to pay the whole may be regarded as but a matter of regulation of contribution between the two sureties. But to this there are two answers: first, that though called regulation of contribution, it is really a promise to pay what he was not otherwise liable to pay for a third party; and, secondly, that he was never liable to contribute at all except by force of the relation of co-suretyship into which he entered, and owed no antecedent debt or duty of his own. This distinction failing, the case of Green *v.* Creswell, so far as it asserted that the defendant's special promise was collateral to the third party's implied liability, and so within the statute, must be regarded as directly in conflict with Thomas *v.* Cook.

§ 161 *b.* As an authority for that doctrine, however, Green *v.* Creswell has been practically overruled by later English cases; and the English rule appears to be now settled in conformity with Thomas *v.* Cook. Cripps *v.* Hartnoll, in the Queen's Bench, 1862, was the case of a special promise by the defendant to indemnify the plaintiff for becoming surety on the bail-bond of a third party arrested on a criminal charge. It was held that the defendant's special promise was collateral to the third party's implied obligation to indemnify the plaintiff, the court placing their decision on the authority of Green *v.* Creswell as binding upon them, but at the same time doubting whether that case was rightly decided.[1] On appeal to the Exchequer Chamber, the judgment was reversed upon the distinction taken by the court to save the case from the authority of Green *v.* Creswell, that here the bail-bond was to answer a criminal charge, and that on such a bond there was no implied obligation of the prin-

difference of fact mentioned in the text, as distinguishing that case from Thomas *v.* Cook.

[1] Cripps *v.* Hartnoll, 2 Best & S. 697; on appeal, 4 Best & S. 414; 10 Jurist, N. S. 200; 11 Weekly Rep. 953.

cipal to indemnify his surety; but the judges very pointedly declined to be understood as acknowledging the decision in Green *v.* Creswell, where the bail-bond was in a civil case, to be right. The authority of Green *v.* Creswell was afterwards brought directly in issue in Wildes *v.* Dudlow,[1] 1874, before Vice-Chancellor Malins, where the question was whether an executor should be allowed to charge the estate upon the following case: his testator had requested him to make a note jointly with the testator's son-in-law, and for his accommodation, and promised the executor to indemnify him against loss by so doing; and the note having been made accordingly, the executor was compelled to pay. The Vice-Chancellor held that the testator's promise of indemnity was not within the statute, and that the executor could charge the estate; and remarked that the case of Green *v.* Creswell had been overruled, and the law as laid down in Thomas *v.* Cook restored. That the case to which he referred as overruling Green *v.* Creswell really did overrule it, is not true without qualification;[2] but the decision of the Vice-Chancellor is directly in conflict with it, and in view of this, and the repeated judicial criticisms to which it had been previously subjected, it may be considered that in England the case of Green *v.* Creswell is no longer of authority, and that, as first held in Thomas *v.* Cook, a defendant's special promise to indemnify a plaintiff against loss by becoming responsible for a third person's performance of his duty to a fourth is not brought within the statute by the coexistence of the im-

[1] Wildes *v.* Dudlow, L. R. 19 Eq. 198.

[2] It was the case of Reader *v.* Kingham, 13 C. B. N. S. 344, in which it was held that the third party's debt, which the defendant promised to answer for, must be (to come within the statute) a debt to the promisee, not a debt to a fourth party; a perfectly sound doctrine, supported by several other cases. *Post*, § 188. The court in Green *v.* Creswell certainly asserted the contrary, and perhaps put the decision quite as much upon that ground as upon the ground that the defendant's promise was collateral to the third party's implied obligation to the promisee, the plaintiff. But in so far as the case stood upon the latter ground, it had not been overruled up to the time of Wildes *v.* Dudlow.

plied liability of the third party to the plaintiff in such a case.

§ 161 *c.* In Massachusettts the same doctrine prevails,[1] and so in New York,[2] Maine,[3] New Hampshire,[4] New Jersey,[5] Georgia,[6] Kentucky,[7] Iowa,[8] Indiana,[9] Minnesota,[10] Wisconsin,[11] Nebraska,[12] and apparently in Vermont,[13] Connecticut,[14] and Michigan.[15] In Pennsylvania, North Carolina, and Illinois[16] the doctrine of Green *v.* Creswell is maintained, and the special promise to indemnify held to be within the statute, by reason of the coexisting implied obligation of the third party;[17] in South Carolina,[18] Tennessee,[19]

[1] Aldrich *v.* Ames, 9 Gray 76. And see Perley *v.* Spring, 12 Mass. 297; Chapin *v.* Lapham, 20 Pick. 467; Blake *v.* Cole, 22 Pick. 97.

[2] Sanders *v.* Gillespie, 59 N. Y. 250. Previous decisions in this State were conflicting. See Harrison *v.* Sawtel, 10 Johns. 242; Chapin *v.* Merrill, 4 Wend. 657; Carville *v.* Crane 5 Hill 484; Kingsley *v.* Balcome, 4 Barb. 131; Barry *v.* Ransom, 12 N. Y. 462; Mallory *v.* Gillett, 21 N. Y. 412; Baker *v.* Dillman, 12 Abb. Pr. 313. The question has been fully discussed, and the doctrine of Sanders *v.* Gillespie, following Thomas *v.* Cook, affirmed in Tighe *v.* Morrison, 116 N. Y. 263.

[3] Smith *v.* Sayward, 5 Greenl. 504.

[4] Holmes *v.* Knights, 10 N. H. 175; Cutter *v.* Emery, 37 N. H. 567; Demeritt *v.* Bickford, 58 N. H. 523.

[5] Apgar *v.* Hiler, 24 N. J. L. 812; Cortelyon *v.* Hoagland, 40 N. J. Eq. 1.

[6] Jones *v.* Shorter, 1 Kelly 294.

[7] Dunn *v.* West, 5 B. Mon. 376; Lucas *v.* Chamberlain, 8 B. Mon. 276; Jones *v.* Letcher, 13 B. Mon. 363.

[8] Mills *v.* Brown, 11 Iowa 314.

[9] Horn *v.* Bray, 51 Ind. 555; Anderson *v.* Spence, 72 Ind. 315, overruling Brush *v.* Carpenter, 6 Ind. 78; Keesling *v.* Frazier, 119 Ind. 185.

[10] Goetz *v.* Foos, 14 Minn. 265.

[11] Shook *v.* Vanmater, 22 Wisc. 532; Vogel *v.* Melms, 31 Wisc. 306.

[12] Minick *v.* Huff, 59 N. W. Rep. (Neb.) 795.

[13] Beaman *v.* Russell, 20 Vt. 205.

[14] Reed *v.* Holcomb, 31 Conn. 360; Smith *v.* Delaney, 64 Conn. 264.

[15] Potter *v.* Brown, 35 Mich. 274. See Comstock *v.* Morton, 36 Mich. 277.

[16] Brand *v.* Whelan, 18 Brad. (Ill. App. Ct.) 186.

[17] Nugent *v.* Wolfe, 111 Pa. St. 471, and cases cited; Draughan *v.* Bunting, 9 Ired. 10.

[18] Simpson *v.* Nance, 1 Speers 4.

[19] Macy *v.* Childress, 2 Tenn. Ch. 438.

Missouri,[1] Alabama,[2] and Ohio[3] the question seems to be unsettled.

§ 162. It would be unprofitable to trace the course of the American decisions here cited. It has manifestly resulted in the rejection, by the great preponderance of authority, of the doctrine of Green *v.* Creswell, and the acceptance of the doctrine of Thomas *v.* Cook, a result reached after much vacillation on the part of courts of the same State, and not, it must be confessed, by reference to any clear and satisfactory ground of principle. Indeed, most of the decisions which reject the doctrine of Green *v.* Creswell waive altogether the question of principle, and put it as a matter settled by authority that the "promise to indemnify" is not within the statute. In other cases it is put upon the ground that the plaintiff makes his engagement, relying upon the defendant's special promise, and not upon the third party's implied liability; that the former and not the latter is the foundation of the special contract; and that the decisive question is to whom credit was given by the plaintiff.[4] But as we shall have occasion to see hereafter, the application of the statute cannot safely be determined by the consideration that the plaintiff relied upon one obligation to himself rather than upon another; or even that he relied wholly upon the obligation of the defendant's special promise, giving "credit" solely to him, if still a third party was really liable to the plaintiff to the same extent. Ordinarily the rule, that if *credit* is given only to the defendant on his special promise the statute does not apply, is sound; for ordinarily the rule is applied to cases of property furnished or services rendered to the third party, and if no credit is given to him there is

[1] Garner *v.* Hudgins, 46 Mo. 399; Bissig *v.* Britton, 59 Mo. 204.

[2] Brown *v.* Adams, 1 Stew. 51; Godden *v.* Pierson, 42 Ala. 370.

[3] Easter *v.* White, 12 Ohio St. 219; Kelsey *v.* Hibbs, 13 Ohio St. 340; Ferrell *v.* Maxwell, 28 Ohio St. 383.

[4] Holmes *v.* Knights, 10 N. H. 175. And see a well-considered case in Wisconsin, Vogel *v.* Melms, 31 Wisc. 306, where this view is ably argued and the cases discussed.

no action against him, and the statute of course does not apply. But the troublesome element in the cases we are now considering is that by the hypothesis there are or are to be two different persons concurrently liable to the plaintiff to do the same duty. We must look further to find the reason why the statute does not apply in such a case. And perhaps it may be found in this, that the implied obligation of the third party exists only by force of and as incidental to the special contract between the plaintiff and the defendant. The defendant promises the plaintiff that, if he becomes liable upon the actual default of the third party, he, the defendant, will protect him; and upon the plaintiff's becoming surety accordingly, the third party, as a legal consequence thereof, becomes also bound to protect him. There was not, however, any independent obligation or debt or duty of the third party to the plaintiff, to which the defendant's promise came in aid. And it may well be said that the statute contemplates only obligations of the third party previously existing, or incurred contemporaneously with the defendant's special promise, or afterward, as the case may be, but always existing or to exist independently of any contract of guaranty between the plaintiff and defendant; an obligation which exists, or may exist, whether any contract be made between the plaintiff and defendant or not; not an obligation which comes into existence only as a legal incident of the contract which they have made. On this ground, it is believed, the doctrine that the statute does not apply to promises to indemnify may rest; at least none so satisfactory or so consistent with the spirit of the statute is suggested in any of the cases.[1]

§ 162 *a*. An analogous question arises when the title to

[1] In Wildes *v.* Dudlow, L. R. 19 Eq. 198, where the statute was held not to apply to a promise of indemnity, Malins, V. C., says that the promise "was not 'I engage with you to be answerable to you for the debt of Wildes' [the third party], *because Wildes did not owe Dudlow* [the promisee] *anything*." See also 3 Pars. Cont. (5th ed.) 22, *note*.

property is verbally warranted to a third person by some one not the owner, as an inducement to its purchase. It has been held,[1] that the warranty of title is in law an undertaking to be responsible for the fulfilment by the seller of his implied warranty of title arising from the sale, and is therefore within the statute. It may be doubted, however, whether the essence of the transaction is not a strict *warranty* that a certain condition of things now exists, namely, that the seller's title is good. If this is so, then clearly the matter of future default is not in the minds of the parties, and to treat the transaction as a collateral undertaking within the statute would seem to be giving to it an interpretation which it was not meant to have.

§ 163. It was once held that if a verbal guaranty was prospective, that is, to answer for a debt, default, or miscarriage not yet incurred or suffered, the statute did not apply; because, at the time the defendant's promise was made, there was no existing liability on the part of another person to which it could be collateral. Such was the decision of Lord Mansfield in Mowbray *v.* Cunningham, where the promise was to be responsible for goods to be thereafter supplied to a third person.[2] But in the following year, he appears to have distinctly abandoned that doctrine,[3] and it has certainly never prevailed since. Buller, J., in a subsequent case, said that the authorities against it were not to be shaken; at the same time stating that, if it were a new question, the bearing of his mind would be the other way, for that Lord Mansfield's reasoning in Mowbray *v.* Cunningham had struck him very forcibly.[4] There seems, however, to be

[1] *In re* Tozer's Estate, 46 Mich. 299.

[2] Mowbray (or Mawbray) *v.* Cunniugham, Hilary Term, 1773, cited in Jones *v.* Cooper, *infra*.

[3] Jones *v.* Cooper, 1 Cowp. 227. See Parsons *v.* Walter, cited in Peckham *v.* Faria, 3 Dougl. 14, *note;* Mallet *v.* Bateman, L. R. 1 C. P. 163; Mountstephen *v.* Lakeman, L. R. 7 Q. B. 196, 202, *per* Willes, J.

[4] Matson *v.* Wharam, 2 Term R. 80. The later doctrine prevails in the United States. Cahill *v.* Bigelow, 18 Pick. (Mass.) 369, which in this

but little difficulty in considering the guaranty, in such an instance, as suspended until the debt to which it is to apply shall be actually incurred; a view in which these cases may be entirely reconciled with Read *v.* Nash; for there, not only was there no debt or liability incurred by any third party at the time of the defendant's engagement, but none was ever to be incurred after that time to which the defendant's engagement could attach.

§ 164. It is obvious that, if the guarantor was already personally liable to pay the debt, his engagement to pay it if a third person does not cannot afford him protection on the ground of the Statute of Frauds. Although in form perhaps a guaranty, it is virtually an engagement to pay his own debt, and is binding without writing.[1] The same is true of those cases where the promise of the defendant is to pay

respect overrules Perley *v.* Spring, 12 Mass. 297; Matthews *v.* Milton, 4 Yerg. (Tenn.) 579; Cole *v.* Hutchinson, 34 Minn. 410; Mead *v.* Watson, 57 Vt. 426. But see Tighe *v.* Morrison, 116 N. Y. 263.

[1] Hoover *v.* Morris, 3 Ohio 76; Tarbell *v.* Stevens, 7 Iowa 163. In the case of Macrory *v.* Scott, 5 Exch. 907, a judgment by consent had been obtained by the plaintiff against the defendant on his agreement of suretyship for Scott Brothers, to secure the payment of money due from Scott Brothers to the plaintiff, and to be advanced by him to them. An arrangement was made between the plaintiff and defendant and Scott Brothers that they should be released from their liability for advances which had been already previously made, and that the plaintiff should make them further advances, for which the defendant agreed verbally that the judgment should stand as security. In an action on the judgment, after failure by Scott Brothers to repay these advances, it was contended by the defendant that his agreement to allow the judgment to stand as security therefor was within the Statute of Frauds. A majority of the court held that a certain writing made by the defendant was a sufficient memorandum of his agreement; but Parke, B., and Martin, B., took occasion to declare their opinion that the statute did not apply to the defendant's agreement. Parke, B., said that the case fell within the rule of Castling *v.* Aubert (*vide*, *post* §§ 202, 203). Martin, B., said: "It is not an undertaking to answer for the debt, default, or miscarriage of another, but an agreement that *a certain existing obligation shall continue.*" Note, however, that the obligation of defendant to pay the judgment as surety for the old advances fell when the third party's liability for their advances was released.

what he was previously liable, only jointly with others, to pay, as in the case of a verbal engagement by one partner to pay a debt owing by his firm; here the statute does not require the promise to be in writing.[1] And the same is true of the promise of one trustee to reimburse the *cestui* for the default of all;[2] also of the promise of one of the owners of a ship to material men to pay their claim for materials for which the ship was responsible, and which was already, therefore, the promisor's debt *sub modo*.[3] In the converse case of an individual debt owing by one partner, the verbal engagement of another partner to pay it would not be binding;[4] although a ratification by the firm of a debt contracted without authority by one of its members in the firm name (such ratification being sufficient to make the firm originally liable, as if the authority had existed from the beginning) may undoubtedly be made by the conduct of the firm, or otherwise, without writing.[5] Where a member of a corporate body assumes to pay its debts, his promise, if verbal, cannot be enforced, there being no pre-existing liability.[6] It has been held that where an indorser who has been dis-

[1] Stephens *v.* Squire, 5 Mod. 205; Howes *v.* Martin, 1 Esp. 162; Files *v.* McLeod, 14 Ala. 611; Aiken *v.* Duren, 2 Nott & McC. (S. C.) 370; Durham *v.* Manrow, 2 N. Y. 541, *per* Strong, J.; Rice *v.* Barry, 2 Cranch (C. C.) 447; Hopkins *v.* Carr, 31 Ind. 260. See Batson *v.* King, 4 Hurl. & N. 739; Bundy *v.* Bruce, 61 Vt. 619; Weatherly *v.* Hardman, 68 Ga. 592; Loring *v.* Dixon, 56 Texas 75.

[2] Orrell *v.* Coppock, 26 L. J. Ch. 269.

[3] Fish *v.* Thomas, 5 Gray (Mass.) 45. See Headrick *v.* Wiseheart, 57 Ind. 129.

[4] Taylor *v.* Hillyer, 3 Blackf. (Ind.) 433; Wagnon *v.* Clay, 1 A. K. Marsh. (Ky.) 257. In Georgia Co. *v.* Castleberry, 49 Ala. 104, the mere fact that a corporation was composed of the same persons as had formerly made up a partnership was held insufficient to make the corporation liable on the promise of its president to pay a debt of the firm.

[5] McGill *v.* Dowdle, 33 Ark. 311.

[6] Trustees of Free Schools *v.* Flint, 13 Met. (Mass.) 539; Rogers *v.* Waters, 2 Gill & J. (Md.) 64; Wyman *v.* Gray, 7 Harr. & J. (Md.) 409; Searight *v.* Payne, 2 Tenn. Ch. 175; Home National Bank *v.* Waterman, 134 Ill. 461.

charged, for instance, by the laches of the holder, renews his engagement verbally, this renewal is within the statute;[1] but the better doctrine seems to be that, inasmuch as the promise made by an ordinary indorser is an original and independent promise to pay the sum named in the instrument, upon the contingency that the maker or acceptor fails to perform his engagement, the indorser's subsequent promise is but a waiver of the technical bar attaching to his former original liability, and should be treated as original likewise, and not covered by the statute.[2]

§ 165. The general principle, prevailing in all the cases under this branch of the Statute of Frauds, is, that wherever the defendant's promise is in effect to pay his own debt to the plaintiff, though that of a third person may be incidentally discharged, the promise need not be in writing. To this principle is often referred the common class of cases where the holder of a bill or note transfers it to his creditor, in entire or partial satisfaction of his debt, with a verbal undertaking as to its value or collectibility. Upon this undertaking, the creditor, as is well settled, can maintain an action, if the note turn out to be worth less than the holder had thus virtually warranted it to be.[3] The decision of the

[1] Peabody *v.* Harvey, 4 Conn. 119; Huntington *v.* Harvey, 4 Conn. 124.

[2] Uhler *v.* Farmers' Nat. Bank, 64 Pa. St. 406. And see U. S. Bank *v.* Southard, 2 Harr. (N. J.) 473; Ashford *v.* Robinson, 8 Ired. (N. C.) Law, 114.

[3] Lossee *v.* Williams, 6 Lans. (N. Y.) 228; Johnson *v.* Gilbert, 4 Hill (N. Y.) 178; Malone *v.* Keener, 44 Pa. St. 107; Barker *v.* Scudder, 56 Mo. 272; Wyman *v.* Goodrich, 26 Wisc. 21; Cardell *v.* McNiel, 21 N. Y. 336; Westcott *v.* Keeler, 4 Bosw. (N. Y.) 564; Mobile & Girard R. R. *v.* Jones, 57 Ga. 198; Bruce *v.* Burr, 67 N. Y. 237; Allen *v.* Eighmie, 21 Hun (N. Y.) 559; Milk *v.* Rich, 15 Hun (N. Y.) 178; Moore *v.* Stovall, 2 B. J. Lea (Tenn.) 543; Spann *v.* Cochrano, 63 Texas 240; Morris *v.* Gaines, 82 Texas 255; Wilson *v.* Vass, 54 Mo. App. 221; Bates *v.* Sabin, 64 Vt. 511; Eagle Machine Co. *v.* Shattuck, 53 Wisc. 455; King *v.* Summit, 73 Ind. 312; Indiana Mfg. Co. *v.* Porter, 75 Ind. 428; Hassinger *v.* Newman, 83 Ind. 124; Darst *v.* Bates, 95 Ill. 493; Sheldon *v.* Butler, 24 Minn. 513; Milks *v.* Rich, 80 N. Y. 269; Clopper *v.* Poland,

Supreme Court of Massachusetts in Dows *v.* Swett,[1] however, seems to call for a somewhat more precise statement of the principle governing the class of cases mentioned, with which it may, at first sight, seem to be in conflict. In that case the defendant owed the plaintiffs $200 for goods sold, and had given them a due-bill for the amount. The defendant proposed to the plaintiffs that they should give him up the due-bill, upon his procuring one Robinson to make a promissory note in the plaintiff's favor, which note the defendant orally agreed that he would pay at maturity, if Robinson did not. The plaintiffs consented to the arrangement, and gave up the due-bill to the defendant, who handed them at the same time the note of Robinson, payable to their order. After Robinson's failure to pay the note at maturity, this suit was brought against the defendant upon his verbal promise. The judge in the Superior Court, who heard the case without a jury, had found for the plaintiff for the amount of the note with interest, "upon and by reason solely of the verbal promise," which promise "was not to be considered as collateral to the debt of another, but as creating an original obligation from the promisor, — a part of the mode and manner in which he was to pay his own debt." The judge refused to rule, at defendant's request, that the plaintiff could not recover, and exception taken to this refusal was sustained by the Supreme Court on the ground that, upon the facts shown, "the only direct liability was that of Robinson upon his note; and the oral promise of the defendant to pay

12 Neb. 69; Crane *v.* Wheeler, 48 Minn. 207. See Little *v.* Edwards, 69 Md. 499. In Taylor *v.* Soper, 53 Mich. 96, this rule was extended to cover the warranty by a third party of a note offered by its holder in payment of purchase money. See also Wilson *v.* Hentges, 29 Minn. 102, where the same principle was applied to the assignment by the owners of letters patent to the purchasers thereof of a contract of third parties to make the patented article for a certain price, with a verbal undertaking of the sellers to furnish the articles at that price, if the third party failed to do so.

[1] Dows *v.* Swett, 120 Mass. 322.

that note, if Robinson did not, was a collateral promise to pay Robinson's debt, and as such within the Statute of Frauds." [1]

§ 165 *a.* In this case, then, although the promise of the defendant was made in the course of a transaction entered into *for the purpose* of paying his own debt, it was held to be within the statute. But the distinguishing feature of the case is in the fact that the defendant was not the owner or holder of the note, and consequently there was no transfer by him to the plaintiffs of any property of his in satisfaction of his debt; whereas the class of decisions first spoken of stands upon the doctrine that when the *owner* of a promissory note prevails upon another to accept it in lieu of so much money, by what is virtually a warranty of the money value of the note so transferred, the transaction is like that of the transfer of any other property, with a promise that, if the transferee cannot get a certain sum for it, the other will make up the deficiency.

§ 166. Turning now to the language of the statute as to the nature of the promise to which it applies, we observe that the words are "any *special* promise." This term "special" seems to have no other effect than to show that express promises are referred to, and not promises implied by law. To the latter, whatever their nature, the statute does not apply.[2]

§ 166 *a.* Under this exception may be conveniently treated a class of cases of frequent occurrence, growing out of arrangements by which one man, usually in consideration of the transfer of property to him by another, undertakes to pay

[1] The decision was reaffirmed in Dows *v.* Swett, 134 Mass. 140. The count therein speaks of the note being transferred by the defendant to the plaintiff, but it is clear from the statement of the case that such was not the fact.

[2] *Per* Hosmer, C. J., in Sage *v.* Wilcox, 6 Conn. 81; Allen *v.* Pryor, 3 A. K. Marsh. (Ky.) 305; Pike *v.* Brown, 7 Cush. (Mass.) 133, *per* Shaw, C. J.; Goodnow *v.* Gilbert, 9 Mass. 510; Urquhart *v.* Brayton, 12 R. I. 169.

the latter's debts. Upon this state of things two questions arise: whether the arrangement gives to a person to whom such a debt is due the right to bring suit for it against the man with whom his debtor has made the arrangement in question; and whether, having such a right, he can maintain an action upon it in the absence of the proof required by the Statute of Frauds. The second question is thus dependent upon the first, and cannot arise if that be answered in the negative. In England it is definitely settled that the creditor has no right of action, upon the general principle that no one can sue upon a contract to which he is not a party, or, as is often said, to the consideration of which he is a stranger.[1] In Connecticut the right of the creditor to sue has been distinctly denied,[2] while in North Carolina and Tennessee the question seems an open one.[3] In Massachusetts the tendency of the later decisions is towards a return to the English rule, though the right of the creditor to sue had previously been declared to be well established in that State.[4] In the courts of the other States the creditor's right to sue is generally recognized.[5]

§ 166 *b*. It being permitted to the creditor to sue, is his right to recover controlled by the Statute of Frauds? The decided weight of authority is to the effect that it is not, but very different reasons for this conclusion have been given by different courts. A case which has been often cited is that of Barker *v.* Bucklin, in New York, where the facts were that the defendant's brother owed the plaintiff a sum of money,

[1] Jones *v.* Robinson, 1 Exch. 456, *per* Parke, B.; Tweddle *v.* Atkinson, 1 Best & S. 393.

[2] Clapp *v.* Lawton, 31 Conn. 95. See Packer *v.* Benton, 35 Conn. 343.

[3] See Rice *v.* Carter, 11 Ired. 298; Styron *v.* Bell, 8 Jones 222; Campbell *v.* Findley, 3 Humph. 330; Brice *v.* King, 1 Head 152.

[4] See Exchange Bank *v.* Rice, 107 Mass. 37; Carr *v.* Nat. Security Bank, 107 Mass. 45; Brewer *v.* Dyer, 7 Cush. 337.

[5] Wood *v.* Moriarty, 15 R. I. 518. See Sonstiley *v.* Keeley, 7 Fed. Rep. 447.

and, being pressed for payment, delivered to the defendant a pair of horses valued at a price somewhat less than the amount of the debt, and the defendant agreed to pay the amount of the price to the plaintiff, on account of his demand against his brother. As the declaration was upon a promise made to the plaintiff, while the only promise shown by the evidence was made to the brother, a nonsuit was entered on account of the variance. The remarks of the court, however, (Jewett, J., delivering the opinion,) are clear to the effect that, had the declaration been properly framed, the statute would not have been a bar to the action. They say: "It was not a promise to answer for the debt of another person but merely to pay the debt of the party making the promise to a particular person, designated by him to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no more within the Statute of Frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother, of whom he purchased them."[1] The theory here suggested, that the defendant's promise was to pay his own debt, has been adopted in analogous cases by the courts of New York and several other States, and the statute held not to apply.[2] In several cases where the promise to the debtor

[1] Barker *v.* Bucklin, 2 Denio 61.

[2] Seaman *v.* Hasbrouck, 35 Barb. 151; Dearborn *v.* Parks, 5 Greenl. (Me.) 81; Rowe *v.* Whittier, 21 Me. 545; Maxwell *v.* Haynes, 41 Me. 559; Brown *v.* Strait, 19 Ill. 88; Rabbermann *v.* Wiskamp, 54 Ill. 179; Berry *v.* Doremus, 30 N. J. L. 399; Taylor *v.* Preston, 79 Pa. St. 436; Johnson *v.* Knapp, 36 Iowa 616; Mason *v.* Hall, 30 Ala. 599; Mitchell *v.* Griffin, 58 Ind. 559; Tisdale *v.* Morgan, 7 Hun (N. Y.) 583; Williams *v.* Little, 35 Me. 323; Welch *v.* Kenney, 49 Cal. 49; Besshears *v.* Rowe, 46 Mo. 501; Casey *v.* Miller, 32 Pac. Rep. (Idaho) 195; Struble *v.* Hake, 14 Brad. (Ill. App. Ct.) 546; Mathers *v.* Carter, 7 Brad. (Ill. App. Ct.) 225; Edenfield *v.* Canady, 60 Ga. 456; Silsby *v.* Frost, 3 Wash. Terr. (N. S.) 388; Grant *v.* Pendery, 15 Kansas *236; Phelps *v.* Rowe, 75 Hun (N. Y.) 414; Keyes *v.* Allen & Maynard, 65 Vt. 667; Beardslee *v.* Morgner, 4 Mo. App. 139; Lee *v.* Porter, 18 Mo. App. 377; Dobyns *v.* Rice, 22 Mo.

was made a part of a contract of sale by him to the promisor, it has been held that the property thus transferred should be treated as a fund in the hands of the transferee, charged with the payment of the debts, and held in trust for the creditors.[1] In a case in Kentucky, the statute was said not to apply because the promise was made to the debtor.[2] In New Hampshire and Rhode Island it has been said that the assent of the creditor, before suit brought, to the arrangement between his former debtor and the defendant who has agreed to pay the debt, operates as a discharge of the original debtor, and thus, upon a principle hereinafter discussed,[3] takes the transaction out of the operation of the statute.[4] Again, it has been said that the defendant's promise is made to the debtor as agent of his creditor, the plaintiff, and thus in substance to the plaintiff himself, a view of the transaction which would bring it within the Statute of Frauds; but in the cases where this opinion was expressed the promise was in writing. The opinion of Robertson, C. J., in

App. 448; Bateman *v.* Butler, 124 Ind. 223; Mulcrone *v.* American Co., 55 Mich. 622; Estabrook *v.* Gebhart, 32 Ohio St. 415; Smart *v.* Smart, 97 N. Y. 559; Howell *v.* Field, 70 Ga. 592; Sapp *v.* Faircloth, 70 Ga. 690; Clay *v.* Tyson, 19 Neb. 530. See Sweatman *v.* Parker, 49 Miss. 19; Harris *v.* Young, 40 Ga. 65; Runde *v.* Runde, 58 Ill. 232; Meyer *v.* Hartmann, 72 Ill. 442; Crosby *v.* Jeroloman, 37 Ind. 264; Helms *v.* Kearns, 40 Ind. 124; Crim *v.* Fitch, 53 Ind. 214; Buchanan *v.* Padelford, 43 Vt. 64; Putney *v.* Farnham, 27 Wisc. 187; Balliet *v.* Scott, 32 Wisc. 174; Wynn *v.* Wood, 97 Pa. St. 216; Sweet *v.* Colleton, 96 Mich. 391.

[1] Townsend *v.* Long, 77 Pa. St. 143; Huber *v.* Ely, 45 Barb. (N. Y.) 169. See Fullam *v.* Adams, 37 Vt. 391; Urquhart *v.* Brayton, in the Supreme Court of Rhode Island, July, 1878, 6 Reporter 601, *per* Potter, J. See *post*, § 206. This seems to be the only ground upon which a recovery would be allowed in Massachusetts. See Exchange Bank *v.* Rice, 107 Mass. 37; Carr *v.* Nat. Security Bank, 107 Mass. 45.

[2] Spadone *v.* Reed, 7 Bush 455. This reasoning is adopted also by Mr. Throop, Val. Verb. Agr. § 391.

[3] *Post*, § 193.

[4] Warren *v.* Batchelder, 16 N. H. 580; Urquhart *v.* Brayton, 6 Reporter 601. See Lang *v.* Henry, 54 N. H. 57; Lindley *v* Simpson, 45 Ill. App. Ct. 648.

Connor *v.* Williams,[1] in the New York Superior Court, suggests what appears to be a satisfactory ground for holding that the statute does not apply to transactions of the class under consideration. The *promise* is made to the debtor, and the consideration for it moves wholly between him and his promisor. The only interest which the creditor has in the transaction between them arises by implication from the fact of his relation to the debtor; and it may well be said that the law imposes upon the promisor the duty of recognizing that interest, when he makes his bargain with the debtor. He is held by law to render himself liable to the creditor, and as that obligation arises only by implication, the statute does not apply.[2]

§ 167. The Supreme Court of New York appears to have at one time departed from the rule suggested by Barker *v.* Bucklin, or, at any rate, unsettled the reasoning on which it rests. One Rowley owed the plaintiff $87, and the defendant owed Rowley $150. On a settlement between Rowley and the defendant, the latter gave the former his note for all he owed him except $87, which he promised him verbally to pay to the plaintiff. He afterward refused to do so, and the plaintiff brought assumpsit upon the promise, as for his benefit. At the trial a motion for a nonsuit was denied, and the plaintiff had a verdict. On error, the court drew a distinction between the present case and Barker *v.* Bucklin, to which they were referred: in the latter, it was said, the defendant had in effect received money for the plaintiff's use, the debtor having sold property to the defendant on his agreeing to pay the price of it to the plaintiff; but here, it was added, "the defendant received nothing for the plain-

[1] Conner *v.* Williams, 2 Rob. 46.

[2] See *ante*, § 166. As to the promise or duty arising solely by implication, see Lawrence *v.* Fox, 20 N. Y. 268, *per* Gray, J.; Brewer *v.* Dyer, 7 Cush. (Mass.) 337, *per* Bigelow, C J.; Perry *v.* Swasey, 12 Cush. (Mass.) 36, *per* Shaw, C. J.; Urquhart *v.* Brayton, 6 Reporter 601, *per* Durfee, C. J.; Reynolds *v.* Lawton, 62 Hun (N. Y.) 596.

tiff's use. He had previously had the benefit of the labor of Rowley, for which he still owed him. Rowley gave the defendant no receipt, and no discharge from his indebtedness. He placed nothing in the hands of the defendant for the plaintiff. If he had received from the defendant all the money due to him, and then had paid back to the defendant $87 for the plaintiff, — the defendant agreeing to pay it to the plaintiff, — this action could have been maintained. And such payment would not have been a mere form. It would have changed the substantial rights of the parties to the contract. It would have discharged Rowley's claim against the defendant for the previous labor, which, as the business was in fact transacted, was left unpaid."[1] It is difficult to see the soundness of any such distinction. If the defendant had paid Rowley's debt to the plaintiff according to his agreement, it would have been a full defence to any subsequent action by Rowley for that amount, as due to him upon the old account. The sole difference between this case and Barker *v.* Bucklin seems to be, that there the debt was incurred contemporaneously with, while here it was incurred some time previously to, the making of the defendant's promise to pay the amount of it to the plaintiff. In both cases it was understood between the defendant and the third person that the former's debt was to be discharged by paying the amount to the latter's creditor. Later decisions in New York have rejected the distinction as to the time of incurring the debt which the defendant undertook to pay to the plaintiff, and have affirmed the law as held in Barker *v.* Bucklin.[2]

§ 168. The views expressed in Barker *v.* Bucklin afford an explanation of a series of decisions in New York, in which judges have very broadly applied the rule, repeatedly above referred to, that any new and distinct consideration passing between the creditor and the guarantor took the latter's

[1] Blunt *v.* Boyd, 3 Barb. 212.

[2] Barker *v.* Bradley, 42 N. Y 316; Meriden Britannia Co. *v.* Zingsen, 48 N. Y. 247; Cox *v.* Weller, 6 Thomp. & C. 309.

promise out of the statute, though the original debtor continued liable; a doctrine which, by its too free and unqualified assertion, has done much to darken and complicate the law upon this branch of the statute.[1] A brief review of those decisions, therefore, seems to be advisable.

§ 169. One of the most conspicuous among them is Farley *v.* Cleveland,[2] decided in the Supreme Court in 1825. There the defendant verbally promised to pay the plaintiff the debt which a third person owed him, in consideration of that person's delivering to the defendant a quantity of hay to the value of the debt. The court, in Barker *v.* Bucklin, refer to this case, and show clearly that the Statute of Frauds had no application to it, because, in point of fact, the defendant's engagement was only to pay to the plaintiff the money which he would have *otherwise been obliged to pay to his own immediate creditor* for the hay he received from him, and the only question was, whether the plaintiff, being a stranger to the consideration, could maintain a suit upon that engagement. Very similar is the case of Ellwood *v.* Monk,[3] in the same court in 1830, where the defendant, in consideration that Johannes Monk delivered to him certain valuable property, verbally promised to pay three notes of Johannes held by the plaintiff. The decision, to the effect that the statute did not apply, was put upon the ground of a new and distinct consideration passing between the parties to the guaranty, and Farley *v.* Cleveland was cited as authority to that point. But obviously it may be supported upon the ground that the defendant had purchased the property of Johannes in consideration of the amount of the latter's debt, and that he was only

[1] This doctrine will be found separately discussed hereafter, §§ 207, *et seq.*

[2] Farley *v.* Cleveland, 4 Cowen 432, afterwards affirmed by the Court for the Correction of Errors, but the report, 9 Cowen 639, does not state the grounds of the affirmance. See this case explained in Prime *v.* Koehler, New York Court of Appeals, 8 Reporter 244.

[3] Ellwood *v.* Monk, 5 Wend. 235. But see Furbish *v.* Goodnow, 98 Mass. 297, discussed *post*, § 214 *c*.

discharging his own obligation in paying the plaintiff. The earlier case of Skelton *v.* Brewster,[1] in which, in consideration of a third party's delivering to the defendant all his household goods, the latter promised to pay a debt for which the third party had been arrested on execution, is referable to the same principle; although, as the original debtor was by the agreement discharged, there would seem to be no reason for applying the statute at all. In a case where a first and second indorsee of a promissory note were informed by the maker, before it came due, that he would not be able to pay it at maturity, and all three agreed that the maker should assign his property to the indorsers, and that they should pay the note and look to the assignment for remuneration, which was accordingly done, it was decided that, on account of the new consideration thus moving to the indorsers, their engagement to pay the holder of the note was original and not collateral, and that consequently the statute did not apply. But there appears to be no difficulty in considering the transaction as a purchase of the property with an engagement to pay the price to the plaintiff, the creditor of the vendor, the purchasers taking the risk of realizing from the property a less amount than its estimated value.[2]

§ 170. Other decisions in New York, which at first sight appear to conflict with these views, are entirely reconcilable with them, when carefully applied. Thus, in Jackson *v.* Rayner,[3] the defendant told the plaintiff that he had taken an assignment of a third party's property and meant to pay his debts, and would pay the debt owing by him to the plaintiff. The defendant had not contracted a debt by becoming such assignee, the only promise shown being an express one to the plaintiff to pay the debt of a third person. And the court held it to be within the statute, the obligation of

[1] Skelton *v.* Brewster, 8 Johns. 376.

[2] Westfall *v.* Parsons, 16 Barb. 645.

[3] Jackson *v.* Rayner, 12 Johns. 291. See this case, *post*, § 187, *note*. See also Simpson *v.* Patten, 4 Johns. 422.

the third person not appearing to have been extinguished thereby.

§ 171. The doctrine stated in Barker *v.* Bucklin is directly sustained, and the proper application of the rule, saving from the statute those promises which are founded upon an independent consideration, may perhaps be also discovered in the earlier case of Gold *v.* Phillips, in the same State. There the defendants, in part consideration of the sale of a farm to them by one Wood, gave their bond binding themselves to pay certain debts and judgments against Wood, and also a debt due from Wood to the plaintiffs, and wrote to the plaintiffs that, by arrangement with Wood, they were to be accountable for the debt due to them. The court said, "The promise of the defendants was not within the Statute of Frauds. It had no immediate connection with the original contract, but was founded on a new and distinct consideration. The distinction noticed in Leonard *v.* Vredenburgh [1] applies to this case, and takes it out of the statute. The defendants made the promise in consideration of a sale of lands made to them by Aaron Wood; and they assumed to pay the debt of the plaintiffs, as being, by arrangement with Wood, part-payment of the purchase-money. Here was a valid assumption of the debt of Aaron Wood." [2] The decision was undoubtedly correct; though not simply because the defendant's promise was founded upon a new and distinct consideration. When the reception of the consideration from the third person is in such manner as to create an absolute debt to him from the defendant, the promise of the latter to pay the original debt to the same amount imposes upon him a new liability, but it

[1] Leonard *v.* Vredenburgh. 8 Johns. (N. Y.) 29. This appears to have been the first American case in which the doctrine was announced that a new consideration moving between the parties to the guaranty takes it out of the statute.

[2] Gold *v.* Phillips, 10 Johns. 414; affirmed in Mallory *v.* Gillett, 21 N. Y. 416. But see Furbish *v.* Goodnow, 98 Mass. 297, discussed *post*, § 214 *c*. See Winn *v.* Hillyer, 43 Mo. App. 139.

is not under a special promise, and there is no new liability entered into in the way of a mere guaranty.

§ 172. Under this same general head it would seem proper to place the numerous cases which hold that a verbal acceptance of, or a verbal promise to accept, a bill of exchange, is not within the statute, where the promisor holds funds of the drawer to meet it. Here no new obligation is imposed upon the promisor. He owes the drawer the amount of the funds in his hands, and by agreement with him, recognized by the payee, he pays the drawer by paying his creditor.[1]

§ 172 *a*. In the case of Townsley *v.* Sumrall,[2] the Supreme Court of the United States held that where the defendant, in consideration that the plaintiff would purchase a bill already drawn or to be thereafter drawn, and as an inducement to the purchase, verbally promised to accept the bill, and a bill was drawn and purchased upon the credit of such promise for a sufficient consideration, such verbal promise to accept was binding upon the defendant. The opinion says: "It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice as well as in law, it ought to bind him. It is of no consequence that the direct consideration moves to a third person, as in this case to the drawer of the bill; for it moves from the purchaser and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim

[1] Pillans *v.* Van Mierop, 3 Burr. 1663; Grant *v.* Shaw, 16 Mass. 341; Shields *v.* Middleton, 2 Cranch (C. C.) 205; Pike *v.* Irwin, 1 Sand. (N. Y.) 14; Strohecker *v.* Cohen, 1 Speers (S. C.) Law 349; Leonard *v.* Mason, 1 Wend. (N. Y.) 522; Raborg *v.* Peyton, 2 Wheat. (U. S.) 385; Townsley *v.* Sumrall, 2 Peters (U. S.) 170; Nelson *v.* First Nat Bank of Chicago, 48 Ill. 36; O'Donnell *v.* Smith, 2 E. D. Smith (N. Y.) 124; Spalding *v.* Andrews, 48 Pa. St. 411; Laflin & Rand Powder Co. *v.* Sinsheimer, 48 Md. 411; Walton *v.* Mandeville, 56 Iowa 597; Louisville R. R. *v.* Caldwell, 98 Ind. 245; Espalla *v.* Wilson, 86 Ala. 487; Neumann *v.* Shroeder, 71 Texas 81; Kohn *v.* First National Bank, 15 Kansas * 428; *In re* Goddard's Estate, 29 Atl. Rep. (Vt.) 634.

[2] 2 Peters, 170, 182.

the fulfilment of it. It is not a case falling within the objects or the mischiefs of the Statute of Frauds. If A. says to B., pay so much money to C. and I will repay it to you, it is an original independent promise; and if the money is paid upon the faith of it, it has been always deemed an obligatory contract even though it be by parol; because there is an original consideration moving between the immediate parties to the contract. Damage to the promisee constitutes as good a consideration as benefit to the promisor. In cases not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the Statute of Frauds so as to embrace original and distinct promises made by different persons at the same time upon the same general consideration. D'Wolf *v.* Rabaud, 1 Peters, 476."[1]

§ 173. Having now seen that the promise of a guarantor, within the Statute of Frauds, must be a special or express promise, raising a liability which did not exist already, and intended primarily to discharge that liability, our next inquiry is, what engagements, if not in form promises to pay another's obligation, are substantially so; for the statute being designed to repress fraud, cannot be evaded in its spirit by mere changes in the language of parties, or by the form under which they disguise their transactions.

§ 174. In the case of Carville *v.* Crane, in New York, the defendant promised, in consideration that the plaintiff at his request would sell and deliver a bill of goods to third parties, to *indorse their note* at six months, for the price. The case was in assumpsit upon this promise, and came before the Supreme Court on demurrer; and it was decided to be manifestly, in substance, an engagement to answer for the debt, and that, the promise not being in writing, the action could not be sustained. Cowen, J., delivering the opinion of the

[1] As to D'Wolf *v.* Rabaud, 1 Peters 476, see § 175 *a*. The case of Townsley *v.* Sumrall, 2 Peters 170, seems to be in conflict with the best recent authorities.

court, said: "It was a promise to become their [the third parties'] surety for the debt. . . . To say, then, that this is not in effect a promise to answer their debt, would be a sacrifice of a substance to sound. It would be devising a formulary by which, through the aid of a perjured witness, a creditor might get round and defraud the statute. He may say, 'You did not promise to answer the debt due to me from A.; but only to put yourself in such a position that I could compel you to pay it.' Pray, where is the difference except in words."[1] A verbal acceptance of, or a verbal promise to accept, a bill of exchange, where the acceptor has funds of the drawer in his hands, is, as we have seen, entirely without the operation of the statute, from the consideration that the drawee's engagement is in fact to pay his own debt to the drawer, the owner of the funds, and perhaps by virtue of another rule to be hereafter considered; namely, that the promise to pay another's debt, contemplated by the statute, is to pay it out of the promisor's own estate. But there seems to be no sound reason why a verbal acceptance or promise to accept for the mere accommodation of the drawer, and without value received, should not, upon the grounds stated in Carville *v.* Crane, be treated as within the statute. The acceptor or promisor certainly puts himself in such a position that the payee can compel him to pay the debt. Such is the opinion expressed in the same case, and it seems to be followed in a subsequent decision in the Superior Court in the same State, where, upon the defendant's offering to prove that he had no funds of the drawer in his hands at the time of making the promise to pay an order to be drawn upon him,

[1] Carville *v.* Crane, 5 Hill, 484. And see Gallager *v.* Brunel, 6 Cowen (N. Y.) 346; Mallet *v.* Bateman, L. R. 1 C. P. 163; Gallagher *v.* Nichols, 60 N. Y. 438; Manley *v.* Geagan, 105 Mass. 445. In Taylor *v.* Drake, 4 Strobh. (S. C.) Law, 431, it was held, as in Carville *v.* Crane, that a verbal promise to indorse was within the statute; and see Williams *v.* Caldwell, 4 S. C. 100; Wills *v.* Shinn, 42 N. J. Law, 138; Chapline *v.* Atkinson, 45 Ark. 67; Smith *v.* Easton, 54 Md. 138. And see Dee *v.* Downs, 57 Iowa 589.

and the rejection of such evidence at the trial, the judgment was reversed. The remarks of the court, it is true, indicate that, if the promise had been held good, it would have been upon the ground that the possession of funds of the drawer by the defendant was in the nature of a new consideration moving to him; but the result of the case certainly is that a verbal accommodation acceptance is not, as such, saved from the operation of the statute.[1] In Pillans *v.* Van Mierop, decided in the Queen's Bench in 1765, the same view is expressed by Lord Mansfield. The defendants, in the expectation of having funds of the payee in their hands, agreed with the plaintiffs to honor their draft, to be thereafter drawn, to reimburse them for money lent him; after the loan and before the draft was made, the proposed payee failed, and the defendants notified the plaintiffs that their draft would not be accepted, but the latter nevertheless drew, and their draft was dishonored. The agreement being by written correspondence, no question was made upon the Statute of Frauds, but the decision was simply that an acceptance of a draft to be drawn was good. Lord Mansfield, however, said he had no idea that "promises for the debt of another" were applicable to the present case; that this was a mercantile transaction; that the credit was given upon a supposition "that the person who is to draw upon the undertakers within a certain time has goods in his hands, or will have them. Here [the plaintiffs] trusted to this undertaking: and there is no fraud. Therefore it is quite upon another foundation than that of a naked promise from one to pay the debt of another."[2]

[1] Pike *v.* Irwin, 1 Sandf. 14. To the same effect are Quin *v.* Hanford, 1 Hill (N. Y.) 32; Morse *v.* Mass. Nat. Bank, 1 Holmes (C. C.) 209; Wakefield *v.* Greenhood, 29 Cal. 597. But see Jarvis *v.* Wilson, 8 Reporter 264.

[2] Pillans *v.* Van Mierop, 3 Burr. 1666. Upon a rehearing of the case at the next term, Lord Mansfield, p. 1672, used the following language: "The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having or being supposed to have effects

§ 175. The principle of Carville *v.* Crane seems to apply to a promise to execute a bail bond for the appearance of a debtor, in those cases where it is held that there exists a duty upon the part of the debtor to answer for his default to the promisee; inasmuch as the promise to execute the bail-bond would then bind the party making that promise to put himself in a position where he would be answerable for the default of the debtor in his duty of appearing.[1] In an early case in Connecticut, where the defendant, in consideration that an officer would release one whom he had arrested for debt on final process, promised to see the prisoner forthcoming in the morning, or pay the debt, it was decided on error to be within the statute, as a promise to answer for the debt or duty of another. But it may be doubted whether there was here any debt or duty of the third person to the defendant's promisee, and if not, the decision was not correct.[2]

§ 176. The case of D'Wolf *v.* Rabaud, decided by the

in hand; but for the convenience of trade and commerce. *Fides est servanda.* An acceptance for the honor of the drawer shall bind the acceptor: so shall a verbal acceptance." In the absence of all explanation of, or even allusion to, his language at the first hearing, it is not to be supposed that his Lordship considered himself as being really inconsistent. The remarks just quoted seem to be justly applicable only to ordinary business securities, and not to engagements for the mere accommodation of others, on consideration of personal kindness. The decision of the Supreme Court of the United States in Townsley *v.* Sumrall, 2 Peters 170, proceeds upon the assumption that a verbal accommodation acceptance is within the statute, but holds that it is taken out of the statute by the circumstance that the party to whom the promise was made paid money upon the strength of it (though not to the promisor). This is an extreme application of the modern doctrine that a new and original consideration moving between the parties to a guaranty (or, as in this case, moving only *from* one of them though not *to* the other) takes it out of the statute; and as, in all cases of the making of a guaranty, the party to whom it is given of course parts with *some* value thereupon, it must be said with the utmost deference that it is difficult to see what is left of the Statute of Frauds, as it regards this class of contracts, if the rule is to be so applied.

[1] This is discussed *supra*, §§ 159–162.

[2] Thomas *v.* Welles, 1 Root 57. Compare Reader *v.* Kingham, 13 C. B. N. S. 344; Gay *v.* State, 7 Kans. 216.

United States Supreme Court, was this. The defendant, James D'Wolf (plaintiff in error), in consideration that Rabaud & Co., the plaintiffs below, would authorize George D'Wolf to draw upon them for 100,000 francs, undertook and promised that he would ship, for the account of George D'Wolf, on board such vessel as he (George D'Wolf) should direct, 500 boxes of sugar consigned to the plaintiffs at Marseilles. The draft was made and honored, but the defendant failed to ship the sugar, and this action was brought to recover damages therefor. It was insisted for the defendant that the memorandum in writing signed by him did not show any consideration, but the court decided that it did; so it will be perceived that the determination whether the promise was within the statute as to answer for George D'Wolf's debt, was not indispensable to the case. The court, however, in their opinion, delivered by Mr. Justice Story, entertain that question, and conclude that the promise would have been binding without any written memorandum, putting the case thus: "If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time it is expressed upon the undertaking that C. will do some act for the security of A., and enter into an agreement with A. for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. The contract of B. to repay the money is not coincident with nor the same contract with C. to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other."[1] It appears a little doubtful from this language whether the promise of James D'Wolf to ship the sugars to Rabaud & Co. was or was not regarded by the court as, in its effect and substance, a promise to be answerable for their being reimbursed the money advanced to George D'Wolf; although, from the admission in the opinion that it was concurrent with George's liability, it is to be inferred that it

[1] D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 500.

was so regarded. And it would seem that such was clearly its character. It was a promise by the defendant to put into the hands of the plaintiffs a fund out of which the debt of George D'Wolf to them should be satisfied.[1] If the defendant had performed his promise, and George had afterwards failed to repay the money advanced, it would have been repaid out of that fund, as, so to speak, the representative of James's engagement.

§ 176 *a*. In this case, it is difficult to see why the promise to furnish sugar to the plaintiffs to pay the third party's debt with, in case of his default, is not as much a promise "to answer for" that debt as a promise to furnish money for the same purpose would have been. The distinction suggested by the court between the guarantor's contract to pay the third party's debt, and his contract to do "some *act* for the security" of the creditor in case the third party fails to pay, seems quite unsubstantial. If the act which the guarantor is to do upon the third party's default is an act intended and adapted to make the creditor whole for that default, whether it be to pay money, or to provide property from which it may be paid, or to render service of any kind equivalent in value, the promise to do such act is a promise "to answer for" that default, and must be proved by writing under the Statute of Frauds.[2]

§ 177. But it is not every promise, by the fulfilment of which a creditor is placed in a position to secure his debt, that is within the statute. When the promise is to indorse the note of the debtor, or accept his draft for his accommodation, the promisor engages to place himself in a position where *he* may be compelled to pay the debt; and where the promise is to furnish to the creditor a fund out of which the debt is to be secured, the fund is, according to the expression we have ventured to use, the representative of his own engagement to pay if the principal debtor does not. But the

[1] Thornton *v.* Williams, 71 Ala. 555.

[2] See Waterman *v.* Rossiter, 45 Ill. App. 155.

result of the decisions appears clearly to be, that, unless the promisor himself or his property is ultimately to be made liable in default of the principal debtor, the statute does not apply. For instance, an engagement by one who owes a party about to be sued by another, that he will not pay over without giving notice to the plaintiff, in order that the latter may attach the debt by the trustee process, is not within the statute,[1] nor a promise, by one who has receipted for attached property, that it shall be returned on demand;[2] for the whole effect of the promise in either case is to place at the plaintiff's disposal the debtor's own property and not that of the promisor. Again, where the defendant promised to procure some one else to sign a guaranty of the debt, the Court of Common Pleas held it not to be within the statute;[3] and although the decision was put upon another ground, the case appears to illustrate the principle under consideration; for the whole effect of the promise was that the creditor should have, not the promisor's, but a third party's obligation to rely upon as collateral to that of the original debtor. True, where in these several cases the promisor failed to keep his engagement, he was held to pay the damages sustained thereby, but not necessarily to the amount of the original debt; and if he had fulfilled his promise, he would not then have paid, or made himself liable to pay, the debt; which

[1] Towne *v.* Grover, 9 Pick. (Mass.) 306. And see Scott *v.* Thomas, 1 Scam. (Ill.) 58.

[2] Marion *v.* Faxon, 20 Conn. 486. A distinction has been intimated between promising that property levied upon and released to the debtor *should be returned*, and promising that the debtor *should return it*, but this seems to be a mere criticism upon words. Tindal *v.* Touchberry, 3 Strobh. (S. C.) Law, 177.

[3] Bushell *v.* Beavan, 1 Bing. N. R. 103. The ground taken by the court was that no one was bound collaterally with the defendant to procure the signature to the guaranty. This seems to be but a narrow view of the case, for if the effect of the defendant's promise was to engage that the original debt should be paid (which was the further and essential question), then it was collateral to the debtor's own liability. This case was commented upon unfavorably in Carville *v.* Crane, 5 Hill (N. Y.) 483.

latter appears to be a conclusive test as to whether his promise was within the statute.

§ 178. A mere engagement to let a party have goods by way of purchase, which goods are to be applied in payment of a debt of the purchaser, it can scarcely be necessary to say, is not affected by the Statute of Frauds.[1] But where, upon an account stated between two parties, it appeared that a large part of an amount which one acknowledged by letter to have received from the other was a sum due to the latter from a third party, which the former allowed to be transferred to the debit side of his account, it was held that he was not liable for that sum, the arrangement amounting to a promise without consideration to pay such third party's debt.[2] A conditional promise also, as, to pay a certain sum for a third person if so much should be found to be owing by him, is held to be within the statute.[3]

§ 179. It has been said that a promise to pay only a *portion* of the debt, in satisfaction of the whole, if the debtor failed to meet his obligation, was not within the statute, because it was not a promise to answer for the debt due.[4] The case in which the remark was made, however, was decided on wholly independent grounds, and this distinction (which is, if for no other reason, to be deprecated as founded merely upon the letter of the statute) appears to have been entirely disregarded in a late decision of the Lord Chancellor.[5]

§ 180. It hardly needs to be said that an administrator's verbal submission to arbitration of a claim against his intestate's estate will be binding upon him, notwithstanding the

[1] Price *v.* Combs, 7 Halst. (N. J.) 188. Mather *v.* Perry, 2 Denio (N. Y.) 162. See Moorehouse *v.* Crangle, 36 Ohio St. 130.

[2] French *v.* French, 2 Man. & G. 644.

[3] Barry *v.* Law, 1 Cranch (C. C.) 77.

[4] By Mansfield, C. J., in Anstey *v.* Marden, 1 Bos. & P. N. R. 124. See *post*, § 210, where that case is fully examined. A similar suggestion is made in Jolley *v.* Walker, 26 Ala. 690.

[5] Emmet *v.* Dewhurst, 3 McN. & G. 587.

Statute of Frauds, such a submission having no effect to hold him liable to pay the award out of his own estate.[1]

§ 181. Since the case of Pasley *v.* Freeman,[2] decided in the Queen's Bench in 1789, it has been considered, both in England and in this country, that the provisions of the statute in regard to verbal promises to answer for the debts, defaults, or miscarriages of others do not apply to false and deceitful *representations as to the credit or solvency* of third persons. The doctrine commends itself as a firm stand taken by the courts against actual frauds and cheats, but at the same time comes dangerously near to an invasion of the statute which was wisely designed to prevent them; and accordingly it has been strongly condemned by Lord Eldon.[3] Impelled

[1] Alling *v.* Munson, 2 Conn. 691; Holderbaugh *v.* Turpin, 75 Ind. 84. See the whole subject of submissions by administrators and executors well discussed in Williams on Executors, 1519–1522.

[2] Pasley *v.* Freeman, 3 T. R. 51, followed in England in Eyre *v.* Dunsford, 1 East 318; Haycraft *v.* Creasy, 2 East 92; Tapp *v.* Lee, 3 Bos. & P. 367; Foster *v.* Charles, 6 Bing. 396; and in this country in Wise *v.* Wilcox, 1 Day (Conn.) 22; Hart *v.* Tallmadge, 2 Day (Conn.) 381; Russell *v.* Clark, 7 Cranch (C. C.) 69; Patten *v.* Gurney, 17 Mass. 182; Benton *v.* Pratt, 2 Wend. (N. Y.) 385; Allen *v.* Addington, 7 Wend. (N. Y.) 9; Upton *v.* Vail, 6 Johns. (N. Y.) 181; Ewins *v.* Calhoun, 7 Vt. 79; Weeks *v.* Burton, 7 Vt 67; Warren *v.* Barker, 2 Duv. (Ky.) 155.

[3] In Evans *v.* Bicknell, 6 Ves. 186, the remarks of the learned judge are so judicious that it may be well to insert them. He says of Pasley *v.* Freeman: "The doctrine laid down in that case is in practice and experience most dangerous. I state that upon my own experience; and if the action is to be maintained in opposition to the positive denial of the defendant against the stout assertion of a single witness, where the least deviation in the account of the conversation varies the whole, it will become necessary, in order to protect men from the consequences, that the Statute of Frauds should be applied to that case. Suppose a man asked whether a third person may be trusted answers, 'You may trust him; and if he does not pay you, I will.' Upon that the plaintiff cannot recover; because it is a verbal undertaking for the debt of another. But if he does not undertake, but simply answers, 'You may trust him: he is a very honest man and worthy of trust,' etc., then an action will lie. Whether it is fit the law shonld remain with such distinctions, it is not for me to determine. Upon the case of Pasley *v.* Freeman, I have always said, when I was Chief Justice, that I so far doubted the principles of it

by that consideration, Parliament enacted what may be called a supplement to the Statute of Frauds, to the effect that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person,[1] to the intent or purpose that such other person may obtain credit, money, or goods upon [meaning 'money or goods upon credit'],[2] unless such representation or assurance be made in writing, signed by the party to be charged therewith."[3] The plain meaning of this statute seems to be that it requires writing to charge a defendant upon *any* representation made in regard to the credit, etc. of a third party, whether the representation was made in good faith, or was known to be false and was made in order to deceive and defraud the plaintiff;

as to make it not unfit to offer, as I always did, to the counsel, that a special verdict should be taken: but that offer was so uniformly rejected, that I suppose I was in some error on this subject. I could therefore only point out to the jury the danger of finding verdicts upon such principles; and I succeeded in impressing them with a sense of that danger so far, that the plaintiffs in such actions very seldom obtained verdicts. It appears to me a very extraordinary state of the law, that if the plaintiff in the case of Pasley *v.* Freeman had come into equity, insisting that the defendant should make good the consequence of his representation, and the defendant positively denied that he had made that representation, and only one witness was produced to prove it, the court of equity would give the defendant so much protection that they would refuse the relief; and yet upon the very same circumstances the law would enable the plaintiff to recover. Whether that is following equity, or not quite outstripping equity, is not a question for discussion now; but it leads to the absolute necessity of affording protection by a statute, requiring that these undertakings shall be in writing." This was done twenty-seven years after by Lord Tenterden's Act, referred to in the text. See also Carr, *ex parte*, 3 Ves. & B. 108.

[1] The word "person" was held to include a corporation in Bush *v.* Sprague, 51 Mich. 41.

[2] *Per* Gurney, B., in Lyde *v.* Barnard, Tyrw. & G. 250.

[3] 9 Geo. IV. cap. 14, § 6, commonly called Lord Tenterden's Act. In the following American States similar statutes have been enacted: Maine, Vermont, Massachusetts, Virginia, Alabama, Kentucky, Indiana, Missouri, Michigan, and Oregon.

because the presence of this element of intention to deceive and defraud was the very point on which Pasley *v.* Freeman held that Stat. 29 Car. II., did not apply; and the purpose of the Tenterden Act was to require writing in a case for which 29 Car. II. had failed to do so.[1] Nevertheless it has been held in several States that the Tenterden Act, as re-enacted there, did not require writing in cases of misrepresentation in regard to credit, etc., *if* fraudulently made.[2]

§ 182. Soon after the passage of this act, it was made a question, in the Court of Exchequer, whether the representations which were required to be in writing were such only as related to the third person's *general* pecuniary ability, standing, or condition, or whether the act embraced specific representations as to the state of a certain portion of his property. The plaintiff was about to lend money to T. on the purchase of an annuity, and it was intended to secure the loan by an assignment of his life interest in a particular trust fund. The trustee of the fund being applied to, to inform the plaintiff as to the existing state of T.'s life interest in it, and what encumbrances then affected it, replied verbally that, of six annuities which had been secured by T. on this fund, three had been paid off and discharged in the enrolment office, and that the other three still existed, but that, subject to the above, he, the trustee, had no notice of any other charge on it. At the time this representation was made, T.'s interest in the trust funds had been transferred to the party who had discharged three of the six annuities, subject to the payment of the other three. The plaintiff advanced the money to T., who did not repay it. An action having been brought against the trustee for false representation, the plaintiff was nonsuited, and the present question was upon setting aside the nonsuit. It was conceded that, if the

[1] Nevada Bank *v.* Portland National Bank, 59 Fed. Rep. 341.

[2] Warren *v.* Barker, 2 Duv. (Ky.) 156; Dent *v.* McGrath, 3 Bush (Ky.) 176; Clark *v.* Lumber Co., 86 Ala. 220.

defendant's representation was within the statute at all, it was as concerning the *ability* of the third person, and upon the meaning of that expression as there used the case is most elaborate and instructive. The court were, however, divided: Chief Baron Lord Abinger and Baron Gurney being of opinion that the representation, as one affecting the third person's ability to give the desired security, was covered by the statute, but Barons Alderson and Parke considering that the statute intended only a man's general pecuniary ability, or standing, or condition, and not, as they regarded this case, merely the state of a certain portion of his property. It was concluded that, although, on account of the equal division, the defendant was entitled to retain his nonsuit, yet the court would permit the rule to be made absolute, on payment of costs to the defendant, in order that the point might be raised upon the record, and carried to a court of error.[1]

§ 183. The application of the statute is to be strictly confined to representations in regard to a third party, and made for the purpose of obtaining credit for him.[2] It has been

[1] Lyde *v.* Barnard, Tyrw. & G. 250. Where the plaintiff was induced to lend money to a third party by the defendant's representation that *he* had in his possession the title deeds to an estate which he said such third party had lately bought, and nothing could be done without his (the defendant's) knowledge, *and that the plaintiff would be perfectly safe in making the desired loan;* it was held to amount to a representation that the third party's credit was good, and to be not binding without writing. Swann *v.* Phillips, 8 Ad. & E. 457. In Massachusetts, it has been held that false assertions fraudulently made by the defendant, as to the cost and other particulars in regard to an estate belonging to a third person, which the plaintiff was thereby induced to buy, were actionable in trespass on the case, without proving that they were made in writing. Medbury *v.* Watson, 6 Met. 246. See also French *v.* Fitch, 67 Mich. 492.

[2] First National Bank of Plattsburg *v.* Sowles, 46 Fed. Rep. 731; St. John *v.* Hendrickson, 81 Ind. 350. See Ball *v.* Farley, 81 Ala. 288; Medbury *v.* Watson, 6 Metc. (Mass.) 246; Kimball *v.* Comstock, 14 Gray (Mass.) 508; Norton *v.* Huxley, 13 Gray (Mass.) 285; Bush *v.* Sprague, 51 Mich. 41. It does not apply to representations made by the defendant in regard to his own credit, property, etc. French *v.* Fitch, 67 Mich. 492.

held, that it did not bar an action of tort upon oral representations falsely and fraudulently made by a defendant to the plaintiff, on his assuming the prosecution of a contract of work commenced for the defendant by another person (who had become unable to carry it on), that there would be no risk in his undertaking the work, and that defendant had sufficient funds in his hands due to the former contractor.[1] In a case in New York, the declaration, after setting forth a proposition for the sale of a quantity of cotton by the plaintiffs to certain third parties, and their inability to pay for it, and the plaintiff's unwillingness to sell upon their sole credit, stated that, to induce the plaintiffs to sell and deliver the cotton, the defendant falsely and deceitfully represented and held out to them that he, the defendant, was willing to indorse a proposed note of the third parties for the price of the cotton. That they did sell and deliver it in confidence of such false representation, when in truth the defendant was then not willing, and did not mean or intend, to indorse the note, or make himself responsible; nor did he then indorse, nor had he at any time since indorsed the note; and they alleged loss of the cotton and the price in consequence. The court held that the Statute of Frauds was a bar to the action, for that, if stripped of the general allegations of fraud and deceit, the case was nothing more than that the defendant encouraged the plaintiffs to sell to the third parties, and as surety promised to indorse their notes.[2] In a case in Maryland, the defendant carried a third person to the plaintiff, and passed him off as a particular friend of his, living near, whereby the plaintiff was induced to sell him slaves, which the third

[1] Norton *v.* Huxley, 13 Gray (Mass.) 285. And see Kimball *v.* Comstock, 14 Gray (Mass.) 508; Clark *v.* Dunham Lumber Co., 86 Ala. 220; Daniel *v.* Robinson, 66 Mich. 296.

[2] Gallager *v.* Brunel, 6 Cowen 346. And see Shaw *v.* Stine, 8 Bosw. (N. Y.) 157; Smith *v.* Harris, 2 Stark. 47. In Massachusetts it was held that the warranty of the genuineness of the signatures in a note, by the person offering it for discount at a bank, need not be in writing. Cabot Bank *v.* Morton, 4 Gray, 156.

party, who turned out to be a slave-dealer from South Carolina, afterward carried off to that State. It was objected that the representation or stipulation of the defendant was within the statute; but held to be clearly not so, but a palpable fraud and cheat, for which the plaintiff was entitled to damages.[1] Whether fraudulent verbal misrepresentations as to a third person's residence, or family connection, or other circumstance not embraced in the enumeration in the recent statutes, which are the inducements to giving credit to such third person, should give a cause of action in view of those statutes, the courts may hereafter have difficulty in determining.

§ 184. It does not save a case from the operation of this statute, that the procuring of credit, etc. for a third party was not the only, or the principal purpose with which the representation was made. For instance, a fraudulent representation by the defendant, that a third party was of good credit, although made for the purpose of enabling the third party to pay his debt to the defendant, has been held to be within the statute, and to require a writing; the plaintiff having been by such representation induced to sell such third party merchandise on credit.[2] And where an insurance agent made representations as to the credit of an insurance company, in which he thereby induced the plaintiff to effect an insurance, although it was alleged, and evidence offered to show, that the defendant's motive in making the representations was to secure his commissions as agent; yet as that profit would accrue only in consequence of the credit given to the company, the case was held to be within the statute.[3]

[1] Adams *v.* Anderson, 4 Harr. & J. 558. And see Hodgin *et al. v.* Bryant, 114 Ind. 401. See also Lahay *v.* City National Bank, 15 Col. 339.

[2] Kimball *v.* Comstock, 14 Gray (Mass.) 508. And see Mann *v.* Blanchard, 2 Allen (Mass.) 386; Cook *v.* Churchman, 104 Ind. 141; Hodgin *v.* Bryant, 114 Ind. 401; Bates *v.* Youngerman, 142 Mass. 120.

[3] Wells *v.* Prince, 15 Gray (Mass.) 562; McKinney *v.* Whiting, 8

§ 184 *a*. An action will lie for a false representation in writing as to the character and circumstances of a third person, whereby the plaintiff was induced to give him credit, although he might have been in part influenced by subsequent oral representations of the defendant; if the jury are satisfied that the plaintiff was substantially induced, by the written representation, to give the credit.[1]

§ 184 *b*. Although the action be not brought in terms upon the defendant's representation as to the third party's credit, etc., yet if proof of such representation be essential to the action, the statute applies.[2] A case in the Queen's Bench was assumpsit for money had and received; the plaintiff had been induced by the defendant's misrepresentations as to the credit of a third party to supply her with goods, from the sales of which she had paid a debt of her own to the defendant; and the plaintiff sought to recover under this form of action, the sums so received by the defendant. It was held that he could not recover. Lord Denman, C. J.: "The plaintiff says, the action is not upon the representation, but for money had and received; that the representation is a mere medium of proof, the case being that a fraud was committed, in the course of which this representation was made, and that the produce of the goods obtained by such fraud belongs to the plaintiff. But the only fact on which the case of fraud rested at the time of offering the evidence was, that the defendant had authorized H. to give Mrs. B. a fair character."[3]

Allen (Mass.) 207. But where an action is brought on account of a false representation as to the existence in fact of a corporation or copartnership, it has been held that the statute did not apply. Hess *v.* Culver, 77 Mich. 598; Clark *v.* Hurd, 79 Mich. 130.

[1] Tatton *v.* Wade, 18 C. B. 370; Weil *v.* Schwartz, 21 Mo. App. 372. See *post*, § 185.

[2] Hunter *v.* Randall, 62 Me. 425.

[3] Haslock *v.* Fergusson, 7 Ad. & E. 94. But recovery has been allowed where the plaintiff was induced to part with money by actual fraud of the defendant although the money was nominally paid to a third party, the defendant having in fact received it. Bush *v.* Sprague, 51 Mich. 41; Daniel *v.* Robinson, 66 Mich. 296.

§ 185. A question of much importance and nicety arises, in the absence of such a statute as that now under consideration, when a false and fraudulent representation as to the credit of a third person is coupled with a promise to answer for his paying the debt about to be incurred. Such was the case of Hamar *v.* Alexander, where the defendant represented to the plaintiff "that one C. L. was a good man, and might be trusted to any amount, and that he the said defendant durst be bound to pay for him, the said C. L." It was objected by the defendant that the action could not be maintained for the deceit, because the injury might have arisen not from the false representation, but from the violation of the promise to pay, which was not actionable on account of the Statute of Frauds. After a verdict for the plaintiff below, and upon motion in the Common Pleas to set it aside and enter a nonsuit upon that ground, the court took time to deliberate, and finally determined that the verdict should stand. Sir James Mansfield delivered the opinion, in which, after admitting the difficulty suggested for the defence, he says: "I am far from wishing to sustain an action simply upon misrepresentation, but there never was a time in the English law, when an action might not have been maintained against the defendant for this gross fraud. . . . There is no proof that the plaintiff ever considered the defendant as his debtor, or ever called upon him for the money, or relied upon his promise in the least degree. In the next place, we must suppose every man to know the law; and if the plaintiff was acquainted with the law he must have known that the defendant's promise was worth nothing, and could have given no credit to him upon it. He cannot have considered it in any other light than as a mode of expression, by which the defendant intended more strongly to express his opinion of L.'s circumstances." [1] It does not appear that any case directly involving the same point, namely, the combination of a deceit and a guaranty, has been since decided, though it

[1] Hamar *v.* Alexander, 2 Bos. & P. N. R. 244.

has been so alluded to as to indicate that it was settled and in conformity with the decision in Hamar *v.* Alexander.[1] It seems, then, that the question, in all such cases of deceit as to the third party's credit, accompanied by a promise to answer for him, is whether the party imposed upon by the false representation did or did not rely in addition upon the promise; for if not, but the sole credit was given to the third party by reason of the false representation as to his responsibility, then an action will lie for the deceit; and that this is a question of fact to be determined upon all the circumstances of the case.

§ 186. The special promise intended by the statute is, in the next place, such as raises an obligation to pay out of the promisor's own estate. That clause which relates to the engagements of executors and administrators to answer damages, or, in other words, to pay debts of the decedent, is *express* to the same effect; but for an obvious reason. Their

[1] Thompson *v.* Bond, 1 Camp. 4, by Lord Ellenborough. In a subsequent case, Smith *v.* Harris, 2 Stark. 48, Lord Ellenborough held the words, "that plaintiff might lend one H. £20 or £30, and that he would be perfectly safe, and that he (defendant) would see the plaintiff paid," to amount to nothing more than a guaranty within the Statute of Frauds. I do not understand his Lordship, as it seems Mr. Fell does (Law of Mercantile Guaranties, 235, *note*), to differ with the previous decisions upon this point, but that he considers the words used as having no meaning farther than a promise to answer for H. If the words used are put in the first person, thus: "You will be perfectly safe; I will see you paid," it is still more manifest that there is no distinct affirmation as to the fact of responsibility. The rule in Hamar *v.* Alexander is also incidentally stated (though that case is not referred to) in Gallager *v.* Brunel, 6 Cowen (N. Y.) 346, *per* Woodworth, J. And see also Haslock *v.* Fergusson, 7 Ad. & E. 86. Since the publication of the second edition of this work, it has been held that a verbal guaranty that certain notes sold by defendants to plaintiffs were good and collectible, and the makers responsible, — that the maker of a certain mortgage sold at the same time was responsible and able to pay, — that the land mortgaged was ample security and the title perfect and unencumbered, — was *valid without writing;* the statute in regard to parol representations of credit, etc., being confined to cases where the representations formed no part of a contract. Huntington *v.* Wellington, 12 Mich. 10.

promises to pay out of the decedent's estate, though *special*, it would clearly not be within the policy of the statute to require to be put in writing. We cannot, therefore, draw from that difference in the phraseology of the two clauses any argument against the rule as just stated, and as to be presently illustrated. Meanwhile it may be here remarked that whether a bare promise by an executor or administrator to pay a debt of his decedent will be regarded as a promise to answer from *his own* estate, or not, seems to depend upon his having or not having assets from the estate at the time of promising. If he have not assets, his promise must be fulfilled, if at all, out of his own estate, and the statute would require it to be in writing. If he have assets, he would have a right to charge them with the damages recovered against him upon such promise; and so, though the judgment might be against him personally, the damages would ultimately be answered out of the estate of the decedent, not out of his own, and the spirit of the statute would not require the promise to be in writing. Accordingly, it is held that an executor's or administrator's plea in bar to an action against him on such a promise should allege that he has no assets, as otherwise it does not appear that a memorandum in writing is necessary.[1] And in this view, it may be considered immaterial whether the promise be *in terms* to pay out of his

[1] Pratt *v.* Humphrey, 22 Conn. 317. The same view is contained in the case of Stebbins *v.* Smith, 4 Pick. (Mass.) 97, in which it is farther held that the executor's giving bond to the Judge of Probate is an admission of assets in his hands. The decision in Stebbins *v.* Smith seems to have been overlooked in the subsequent case of Silsbee *v.* Ingalls, 10 Pick. 526, where, however, the court did not find it necessary to hold the promise (notwithstanding the admission of assets) to be within the statute, for if it had not been, the plaintiff could have had no relief in equity, the statute not depriving him of his remedy at law. Again, Hay *v.* Green, 12 Cush. 282, without noticing Stebbins *v.* Smith, asserts broadly that an oral promise by an administrator to pay a distributive share in the estate to an assignee of the heir-at-law is not good. And Smith *v.* Carroll, 112 Pa. St. 390, to the same effect cites Hay *v.* Green, but not Stebbins *v.* Smith.

own estate, but that the true question is, whether by his promise he has assumed an obligation which is to be a charge upon his personal and private resources. For undoubtedly the statute, in this whole matter of collateral engagements, was designed to prevent the fraudulent assertion of claims against third parties who were, except for their alleged promises, not personally liable at all.

§ 187. It is obvious that an engagement in terms to apply the debtor's own funds, received or to be received by the defendant, to the payment of the demand against him, creates a duty as agent rather than as surety; the defendant's promise is not to pay the debt, but merely to deliver certain property to the nominee of the original debtor; and the right of action of such nominee against the defendant for a breach of his promise is not at all affected by the Statute of Frauds.[1] And though the form of the defendant's engagement be different, as for instance to pay if he should receive funds of the debtor to the amount of the debt, still it is clear the statute does not apply, as the debtor's own funds are in effect relied on for payment.[2] And, in general, where the defendant has

[1] Wyman *v.* Smith, 2 Sandf. (N. Y.) 331; Hitchcock *v.* Lukens, 8 Porter (Ala.) 333; Andrews *v.* Smith, Tyrw. & G. 173; Loomis *v.* Newhall, 15 Pick. (Mass.) 159; Todd *v.* Tobey, 29 Me. 219; Stephens *v.* Pell, 2 Cromp. & M. 710; Corbin *v.* McChesney, 26 Ill. 231; Lucas *v.* Payne, 7 Cal. 92; Nelson *v.* Hardy, 7 Ind. 364; Consociated Presbyterian Society of Green's Farms *v.* Staples, 23 Conn. 544; Stoudt *v.* Hine, 45 Pa. St. 30; Clymer *v.* De Young, 54 Pa. St. 118; McLaren *v.* Hutchinson, 22 Cal. 187; May *v.* Nat. Bank of Malone, 9 Hun (N. Y.) 108. Peck *v.* Goff, 25 Atl. Rep. (R. I.) 690; Smith *v.* Exchange Bank, 110 Pa. St. 508; Woodruff *v.* Scaife, 83 Ala. 152; Ledbetter *v.* McGhees, 84 Ga. 227; Mason *v.* Wilson, 84 N. C. 51; Milliken *v.* Warner, 62 Conn. 51; Tuttle *v.* Armstead, 53 Conn. 175. This principle seems to have been lost sight of in Willard *v.* Bosshard, 68 Wisc. 454. But see Clark *v.* Jones, 85 Ala. 127. See *post*, § 206.

[2] McKeenan *v.* Thissel, 33 Me. 368; Stilwell *v.* Otis, 2 Hilton (N. Y.) 148; Calkins *v.* Chandler, 36 Mich 320; Walden *v.* Karr, 88 Ill. 49; Wright *v.* State, 79 Ala. 262; Hughes *v.* Fisher, 10 Col. 383; Bice *v.* Marquette Building Co., 96 Mich. 21; American Lead Pencil Co. *v.* Wolfe, 30 Fla. 360.

in his hands money or property of the debtor, deposited with him for the purpose of paying the debt, he may be sued upon his special promise to pay it, without the production of evidence in writing.[1] It is, of course, necessary that such money or property should be within his control; he must be himself the bailee of it, and not the mere agent of others who are such bailees.[2] If he is to sell or otherwise convert such property with a view to payment, he is acting as the trustee of the debtor who placed it in his hands, and of those to whose benefit the proceeds are to be applied.[3] And it has even been decided that a promise thus to sell property and pay a creditor, coupled with a guaranty that it should sell for enough to pay him, was not such a promise to pay as was covered by the statute.[4] The mere possession of property or

[1] Hilton *v.* Dinsmore, 21 Me. 410; Cameron *v.* Clark, 11 Ala. 259; Laing *v.* Lee, Spencer (N. J.) 337; Goddard *v.* Mockbee, 5 Cranch (C. C.) 666; Stanley *v.* Hendricks, 13 Ired. (N. C.) 86; Lee *v.* Fontaine, 10 Ala. 755; McKenzie *v.* Jackson, 4 Ala. 230; Fullam *v.* Adams, 37 Vt. 391; Wright *v.* Smith, 81 Va. 777; Martin *v.* Davis, 80 Wisc. 371; Mitts *v.* McMorran, 64 Mich. 664; Cock *v.* Moore, 18 Hun (N. Y.) 31; Bailey *v.* Bailey, 56 Vt. 398; Barnett *v.* Pratt, 37 Neb. 349; Watkins *v.* Sands, 4 Brad. (Ill. App.) 207; Hamill *v.* Hall, 35 Pac. Rep. (Col.) 927; Locke *v.* Humphries, 60 Ala. 117. But see Jackson *v.* Rayner, 12 Johns. (N. Y.) 291; Belknap *v.* Bender, 75 N. Y. 446; Ackley *v.* Parmenter, 98 N. Y. 206. These cases establish, for the State of New York, an important limitation of the rule stated in the text. They hold (particularly the two last in which the subject is very fully considered) that where the defendant takes property of the third party for the purpose of paying his debt to the plaintiff from the proceeds, and at the same time verbally promises the plaintiff to pay it, the duty to pay does not arise until such proceeds have been realized, and that any action on the defendant's verbal promise before that time, is barred by the Statute of Frauds. In Belknap *v.* Bender the Court expressed *obiter* the further opinion that even after the conversion of the property, the defendant is bound to pay so far only as there may be proceeds applicable to that purpose. See Andern *v.* Ronney, 5 Espinasse, 254.

[2] Quin *v.* Hanford, 1 Hill (N. Y.) 82.

[3] Prather *v.* Vineyard, 4 Gilm. (Ill.) 40; Drakely *v.* Deforest, 3 Conn. 272.

[4] Lippincott *v.* Ashfield, 4 Sandf. (N. Y.) 611. But see Shaaber *v* Bushong, 105 Pa. St. 514.

funds belonging to the original debtor, not deposited with the defendant for the purpose of paying the debt, will not, however, withdraw his verbal promise to pay it from the operation of the Statute of Frauds.[1] It has been held in Pennsylvania that where the defendant represented that he had funds of the debtor, and promised to pay the debt from them, the promise was original, even if in fact he had no such funds.[2]

§ 188. The statute applies to promises to pay the debt of *another;* and this is construed by the courts of both countries to mean the debt of some person other than the immediate parties to the contract of guaranty and owed to one of those parties.[3] A verbal promise, therefore, to the debtor himself, to pay, or to furnish him the means of paying, his own debt, is binding notwithstanding the statute. It is substantially the same thing as promising to pay him a sum of money to the same amount.[4] Upon a familiar principle of law it has

[1] Dilts *v.* Parke, 1 South. (N. J.) 219; Simpson *v.* Nance, 1 Spears (S. C.) Law 4; State Bank at New Brunswick *v.* Mettler, 2 Bosw. (N. Y.) 392; Weyer *v.* Beach, 14 Hun (N. Y.) 231; Hughes *v.* Lawson, 31 Ark. 613.

[2] Dock *v.* Boyd, 93 Pa. St. 92.

[3] Eastwood *v.* Kenyon, 11 Ad. & E. 438. Mr. Smith, in his Lectures on the Law of Contracts, remarks that it is a singular thing that this question never should have received a judicial decision until so recent a case (1840). In point of fact it was determined by the Supreme Court of Massachusetts twenty years before. Colt *v.* Root, 17 Mass. 229. It is is now firmly settled by numerous cases. Hargreaves *v.* Parsons, 13 Mees. & W. 561; Reader *v.* Kinghan, 13 C. B. N. S. 344; Mersereau *v.* Lewis, 25 Wend. (N. Y.) 243; Weld *v.* Nichols, 17 Pick. (Mass.) 538; Barker *v.* Bucklin, 2 Denio (N. Y.) 45; Hardesty *v.* Jones, 10 Gill & J. (Md.) 404; Pratt *v.* Humphrey, 22 Conn. 317; Preble *v.* Baldwin, 6 Cush. (Mass.) 549; Pike *v.* Brown, 7 Cush. (Mass.) 133; Alger *v.* Scoville, 1 Gray (Mass.) 391; Flemm *v.* Whitmore, 23 Mo. 430; Fiske *v.* McGregory, 34 N. H. 414; Soule *v.* Albee, 31 Vt. 142; Aldrich *v.* Ames, 9 Gray (Mass.) 76; North *v.* Robinson, 1 Duvall (Ky.) 71; Howard *v.* Coshow, 33 Mo. 118; Morin *v.* Martz, 13 Minn. 191. See Patton *v.* Mills, 21 Kansas * 163; Teeters *v.* Lamborn, 43 Ohio St. 144; Resseter *v.* Waterman, 37 N. E. Rep. (Ill.) 875.

[4] Hardesty *v.* Jones, 10 Gill & J. (Md.) 404; Alger *v.* Scoville, 1 Gray (Mass.) 401; Hubon *v.* Park, 116 Mass. 541; Goetz *v.* Foos, 14 Minn.

also been held that such a promise may be sued upon by the creditor.[1] The rule, however, is to be understood with reference only to cases where the debtor is plaintiff. A promise to him that his debt to his creditor shall be paid, may, upon a familiar principle of law, be sued upon by the latter where proper privity on his part is shown, and in such case it must be proved by written evidence.[2]

§ 189. The promise which the statute contemplates, like any other promise which is to be binding in law, must be founded upon a sufficient consideration moving between the parties. The words of the statute are negative, that the defendant shall not be liable unless his promise is in writing; and the converse is not true, that when in writing he shall be liable. It is still to be tried and judged as all other agreements, merely in writing, are by the common law.[3] There is, of course, no necessity for discussing the sufficiency of different kinds of consideration to support such a promise, the rule of law that any benefit to the one party or any injury to the other will suffice, being in general terms entirely applicable. One species of consideration, however, occurs so frequently in such cases as to be worthy of particular notice; namely, the engagement of the creditor to forbear enforcing

265; Whitesell *v.* Heiney, 58 Ind. 108; Comstock *v.* Morton, 36 Mich. 277; Randall *v.* Kelsey, 46 Vt. 157; Pratt *v.* Bates, 40 Mich. 37; Oliphant *v.* Patterson, 56 Pa. St. 368; Pike *v.* Brown, 7 Cush. 136; Clapp *v.* Lawton, 31 Conn. 95; Bexar Building Assoc. *v.* Newman, 25 S. W. Rep. (Tex.) 461; Wood *v.* Moriarty, 15 R. I. 518; Poole *v.* Hintrager, 60 Iowa 180; Windell *v.* Hudson, 102 Ind. 521; Turpie *v.* Lowe, 114 Ind. 37; Leake *v.* Ball, 116 Ind. 214; Williams *v.* Rogers, 14 Bush (Ky.) 776; McGraw *v.* Franklin, 2 Wash. 17. See Hoile *v.* Bailey, 58 Wisc. 434; Clinton Bank *v.* Studemann, 74 Iowa 104. But see Fehlinger *v.* Wood, 134 Pa. St. 517.

[1] Center *v.* McQuesten, 18 Kansas 476.

[2] Brown *v.* Hazen, 11 Mich. 219.

[3] Lord Chief Baron Skynner in Rann *v.* Hughes, 7 T. R. 350, *note*, where the suggestions of Mr. Justice Wilmot in Pillans *v* Van Mierop, 3 Burr. 1663, are noticed and rejected. It is not necessary to cite from the multitude of subsequent cases to the same effect. They are alluded to in this and the following sections on the same topic.

his pre-existing demand, whereupon the defendant promises to pay it or see it paid.[1]

§ 190. The general rule that forbearance by the creditor is a sufficient consideration for a guaranty of the debt is abundantly settled,[2] and it clearly includes any kind of indulgence by which his remedy is postponed, as for instance the adjournment of the trial to a later day.[3] It appears also to be the better opinion that such postponement need not be for a specific length of time, but that an agreement to postpone indefinitely, with proof of actual forbearance for a reasonable term, will be sufficient.[4] A mere agreement not to push an execution, however, has been held to be no consideration in the nature of forbearance; the court apparently regarding the expression as too vague to impose any duty whatever on the creditor.[5] And, of course, where the creditor has not the legal right to sue at any time during which he promises to forbear suit, his promise is no consideration,[6] though it might be otherwise, and a written guaranty enforced, if the right of action should enure in the *interim* and the debtor should continue to avail himself of the original promise. In all cases there must be an *agreement* by the creditor to forbear; proof of his having done so in point of fact will not suffice.[7]

[1] A parol guaranty of the debt of another in consideration of forbearance is void under the statute. See Gump *v.* Halberstadt, 15 Oregon 356; Watson *v.* Randall, 20 Wendell (N. Y.) 201.

[2] See the cases cited below. And that it applies equally in cases of promises by executors and administrators. See Rann *v.* Hughes, 7 T. R. 350, *note;* Farish *v.* Wilson, Peake, 73; Forth *v.* Stanton, 1 Saund. 210; Barber *v.* Fox, 2 Saund. 136; Philpot *v.* Briant, 4 Bing. 717; Goring *v.* Goring, Yelv. 11. *note* 2 (Metcalfe's ed.); Pratt *v.* Humphrey, 22 Conn. 317; Harrington *v.* Rich, 6 Vt. 666; Taliaferro *v.* Robb, 2 Call (Va.) 258.

[3] Stewart *v.* McGuin, 1 Cowen (N. Y.) 99.

[4] The rule is so laid down by Lord Hobart in Mapes *v.* Stanley, Cro. Jac. 183. See also Elting *v.* Vanderlyn, 4 Johns. (N. Y.) 237; Thomas *v.* Croft, 2 Rich. (S. C.) Law 113. But see Sage *v* Wilcox, 6 Conn. 81.

[5] M'Kinney *v.* Quilter, 4 McCord (S. C.) 409.

[6] Martin *v.* Black, 20 Ala. 309.

[7] Mecorney *v.* Stanley, 8 Cush. (Mass.) 85; Walker *v.* Sherman, 11

§ 191. But although a written guaranty, like every other legal contract, requires a consideration for its support, it does not necessarily require a separate and special one, passing directly between the plaintiff and the defendant. Chancellor Kent (then Chief Justice) took occasion, in the case of Leonard *v.* Vredenburgh,[1] to divide considerations of guaranties into three classes; the first of which is where the defendant's promise, though collateral to the principal contract, is made at the same time with it, and becomes an essential ground of the credit given to the principal or direct debtor, and here, he says, the same consideration which supports the principal debtor's obligation, supports also that of his guarantor. And to this extent, he adds, he can understand the observation of Lord Eldon, that "the undertaking of one man for the debt of another does not require a consideration moving between them,"[2] meaning, no separate consideration. His second class is, where "the collateral undertaking is subsequent to the creation of the debt and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise." As to the first class, the rule, as stated, is undoubtedly correct.[3] As to the second, to appre-

Met. (Mass.) 170; Breed *v.* Hillhouse, 7 Conn. 523; Sage *v.* Wilcox, 6 Conn. 81; Crafts *v.* Beale, 11 C. B. 172; Manter *v.* Churchill, 127 Mass. 31.

[1] Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29.

[2] Minet, *ex parte*, 14 Ves. 190.

[3] Rabaud *v.* D'Wolf, 1 Paine (C. C.) 580; Larson *v.* Wyman, 14 Wend. (N. Y.) 246; Townsley *v.* Sumrall, 2 Pet. (U. S.) 170; Nelson *v.* Boynton, 3 Met. (Mass.) 396; Simons *v.* Steele, 36 N. H. 73; Moses *v.* Lawrence County Bank, 149 U. S. 298. Leonard *v.* Vredenburgh itself presented the same point, to which it is therefore an authority, and a most respectable one. The writer, however, cannot but remark, that if the Chief Justice had on that occasion refrained from passing any expression of opinion upon the other questions alluded to in the text, much

hend its full purport, we must notice also the third class mentioned by the Chancellor, namely, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties; in which case, he says, the promise is not within the statute at all. This last doctrine will be the subject of particular examination hereafter. But we remark here that, considering both together, the principle intended to be laid down clearly is, that the only consideration which will support a written guaranty of a pre-existing debt, without taking the guaranty out of the statute altogether (a case with which we have at present nothing to do), is such a one as has an immediate respect to that debt. This rule, thus narrowly stated, is certainly open to much doubt. If admitted, it would seem that forbearance on the part of the creditor to enforce his demand against the original debtor, which we have just seen is a sufficient consideration to support a written guaranty of it, must be the only such consideration. To have immediate respect to the original debt, the consideration passing from the creditor must apparently be, either that the debt is forborne for a time or that it is entirely released; in which latter case it is clear that the defendant's promise is not collateral to, but a substitute for, the original debtor's liability, and not within the statute at all. It is not, however, necessary in this place to say more than that some consideration, beyond that upon which the original credit was granted, must certainly appear in order to support the guaranty, though put in writing, if made subsequently to the creation of the original debt. To this extent there is entire uniformity in the decisions.[1] Of course, any consid-

of the existing perplexity on questions of guaranties within the statute might have been avoided. Highland *v.* Dresser, 35 Minn. 345.

[1] Fish *v.* Hutchinson, 2 Wils. 94; Chater *v.* Beckett, 7 T. R. 201; Wain *v.* Warlters, 5 East 10; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476; Sears *v.* Brink, 3 Johns. (N. Y.) 210; Gillighan *v.* Boardman, 29 Me. 79; Huntress *v.* Patten, 20 Me. 28; Ware *v.* Adams, 24 Me. 177; Elliott *v.*

eration which would suffice to take a guaranty of a pre-existing debt out of the statute, would suffice to support it if put in writing. And it is also held that where there is already a past debt, the giving of a new credit to the same party will be a good consideration to support a guaranty of both the new and the old debt.[1]

§ 192. Having now considered what is meant by the debt, default, or miscarriage of another, and what is meant by the special promise of the defendant, it remains to be ascertained when the two are so connected as to make a case within the statute; or, in other words, when the defendant's special promise is to *answer* for the third party's debt, default, or miscarriage. It has come to be customary to speak of such special promise as *collateral* to the obligation of the original debtor; and though the use of that term, as defining the nature of the promise which the statute means to embrace, has been sometimes criticised, it is believed to be, not only in the main but in strictness, correct. As will be explained hereafter, there are many cases where the obligation of the defendant is concurrent with that of the third party, and is discharged when that is discharged, and yet is not held to be affected by the statute; and for the sole reason, as our subsequent inspection of those cases will show, that it is not essentially an obligation of guaranty of, or in other words, not essentially collateral to, that of the third party. Understanding by a collateral obligation, one which is made for the purpose of securing the performance of another, and which exists only so long as that other exists, it may fairly be said that collateral promises are just what the statute intends shall be proved by writing. The question of phraseology is, however, of little consequence, except so far as it may be necessary to justify the occasional use of that term hereafter.

Giese, 7 Harr. & J. (Md.) 457; Crane *v.* Bulloch, R. M. Charl. (Ga.) 318; Rose *v.* O'Linn, 10 Neb. 364; Crooks *v.* Tully, 50 Cal. 254.

[1] Loomis *v.* Newhall, 15 Pick. (Mass.) 159; Hargroves *v.* Cooke, 15 Ga. 321.

§ 193. In the first place, the two obligations must *concur* or run together. Take the cases of special promises to answer for the payment of pre-existing debts of third persons. Here the statute does not apply if the liability of the original debtor is extinguished by the making and acceptance of the special promise. It has been argued that, as to such pre-existing liabilities, the language of the statute did not necessarily require that they should continue to exist concurrently with the defendant's promise, but that if one undertakes "to satisfy the debt of a person already indebted, in consideration of his instantaneous release, there seems to be no good reason for saying, that this is not a promise to answer for the debt of another within the reason and contemplation of the Act of Parliament."[1] On the other hand, it may be said that if such had been the intention of Parliament, the more apt language would have been that no action should be brought to charge a person upon any special promise to *pay* another's debt, or to *answer for* his default or miscarriage, and that by the exclusive use of the latter expression, which, as applied to executory liabilities of another, undoubtedly means a collateral or contingent engagement merely, it was intended to put all special promises upon that same footing. And such would appear to have been the general policy of the statute; for the danger of perjury was in the temptation to try to hold a third party, where the claim against him who had been originally liable had proved worthless. But, however all this may be, it is now clearly settled by authority in both countries, that if, by the arrangement between the parties, the original debtor is discharged, the defendant's promise is good without writing; it clearly raises, in such case, an original and absolute, and not a collateral and contingent, liability.[2] Upon this principle it has been held in England

[1] Roberts on Frauds, 225.

[2] Goodman *v.* Chase, 1 Barn. & Ald. 297; Bird *v.* Gammon, 3 Bing. N. C. 883; Butcher *v.* Steuart, 11 Mees. & W. 857; Gull *v.* Lindsay, 4 Exch. 45; Stone *v.* Symmes, 18 Pick. (Mass.) 467; Curtis *v.* Brown,

that an agreement to convert a separate into a joint debt is not within the statute; the effect being to create a new debt, in consideration of the former being extinguished.[1] And so a promise to pay the debt of another, in consideration that the plaintiff, who has taken him on a *ca. sa.*, will discharge him out of custody, is original and not within the statute; such discharge working an extinguishment of the debt.[2] Of course it must be a question to be determined upon all the

5 Cush. (Mass.) 492, *per* Shaw, C. J.; Anderson *v.* Davis, 9 Vt. 136; Watson *v.* Randall, 20 Wend. (N. Y.) 201; Allshouse *v.* Ramsay, 6 Whart. (Pa.) 331; Draughan *v.* Bunting, 9 Ired. (N. C.) 10; Click *v.* McAfee, 7 Port. (Ala.) 62; Armstrong *v.* Flora, 3 T. B. Mon. (Ky.) 43; Wood *v.* Corcoran, 1 Allen (Mass.) 405; Lord *v.* Davison, 3 Allen (Mass.) 131; Haggerty *v.* Johnson, 48 Ind. 41; Mead *v.* Keyes, 4 E. D. Smith (N. Y.) 510; Andre *v.* Bodman, 13 Md. 241; White *v.* Solomonsky, 30 Md. 585; Eddy *v.* Roberts, 17 Ill. 505; Gleason *v.* Briggs, 28 Vt. 135; Watson *v.* Jacobs, 29 Vt. 169; Quintard *v.* D'Wolf, 34 Barb. (N. Y.) 97; Booth *v.* Eighmie, 60 N. Y. 238; Griswold *v.* Griswold, 7 Lans. (N. Y.) 72; Yale *v.* Edgerton, 14 Minn. 194; Parker *v.* Heaton, 55 Ind. 1. Whittemore *v.* Wentworth, 76 Me. 20; Thornton *v.* Guice, 73 Ala. 321; Carlisle *v.* Campbell, 76 Ala. 247; Doss *v.* Peterson, 82 Ala. 253; Miller *v.* Lynch, 17 Oregon 61; Brant *v.* Johnson, 46 Kansas 389; Webster *v.* Le Compte, 74 Md. 249; Keadle *v.* Siddens, 5 Ind. App. Ct. 8; Eden *v.* Chaffee, 160 Mass. 225. So if the estate be discharged, the executor's promise to pay the debt is binding without writing. Harrington *v.* Rich, 6 Vt. 666; Robinson *v.* Lane, 14 Sm. & M. (Miss.) 161; Mosely *v.* Taylor, 4 Dana (Ky.) 542; Bott *v.* Barr, 95 Ind. 243. If the discharge be by protracted forbearance in pursuance of a general agreement to forbear for an indefinite time, *quære* if the statute applies. Templetons *v.* Bascom, 33 Vt. 132. See Brightman *v.* Hicks, 108 Mass. 246; Bunting *v.* Darbyshire, 75 Ill. 408. In Skelton *v.* Brewster, 8 Johns. (N. Y.) 376, and Cooper *v.* Chambers, 4 Dev. (N. C.) 261, the debtor was discharged, but the court took another and a less satisfactory ground for their decision. In Tompkins *v.* Smith, 3 Stew. & P. (Ala.) 54, the court "think there is no difference between a promise on consideration of giving day to the original debtor, and his discharge, — they both relate to his indebtedness." (!)

[1] *Ex parte* Lane, 1 De Gex 300. See Corbin *v.* McChesney, 26 Ill. 231.

[2] Lane *v.* Burghart, 1 Q. B. 933; Goodman *v.* Chase, 1 Barn. & Ald. 297. So where the consideration is only a promise to discharge; a mere executory agreement. Butcher *v.* Steuart, 11 Mees. & W. 857; Cooper *v.* Chambers, 4 Dev. (N. C.) 261.

circumstances of each case, whether the original debtor has been in fact discharged.[1]

§ 194. It must be observed here, that though there is no doubt that, when the original debtor has been discharged, the defendant's promise is good without writing, it is necessary to be careful in applying the converse of the rule; namely, that in order that the defendant's promise should be good without writing, the original debtor should be discharged. This is undoubtedly true in cases of mere guaranty, where the relation of the defendant to the plaintiff is principally and essentially that of surety for the debt owing to him, and nothing else. But there are many cases in which the plaintiff may not have discharged his original debtor, and may still have a double remedy, and yet the promise of the defendant be good without writing; its object and character being other than that of guaranteeing the debt, though the discharge of the debt may be incidental to the performance of that promise. These cases form a most important topic in the present chapter, and are hereafter separately discussed.[2]

[1] The entry of such discharge on the books of the plaintiff, and his debiting the new promisor with the amount, will be sufficient. Corbett *v.* Cochran, 3 Hill (S. C.) 41; Langdon *v.* Hughes, 107 Mass. 272. See Harris *v.* Young, 40 Ga. 65. But an agreement to submit a demand to arbitration is not such an extinguishment of it that a guaranty made in consideration of such an agreement shall be taken out of the statute. Harrington *v.* Rich, 6 Vt. 666. The case of Mallet *v.* Bateman, L. R. 1 C. P. 163 should, it would seem, have been decided for the plaintiff on the ground that by the agreement between the parties the plaintiff's claim against the third party was virtually extinguished. Holm *v.* Sandberg, 32 Minn. 427.

[2] See *post*, §§ 207 *et seq.* Mr. Chitty, after referring to some of these cases, remarks that they would probably be held otherwise now, *because* the original debtors therein were not discharged; but doubtless he had not had occasion to give them very close attention. The distinction is recognized in 1 Saund. 211 *b* (note to Forth *v.* Stanton). "The question whether each particular case comes within this clause of the statute or not, depends on the fact of the *original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.*"

§ 195. That the two liabilities must concur, when the promise of the defendant is to answer for the third person's discharge of his liability contemporaneously incurred (or for what may be technically called his default or miscarriage), is even more clearly true than in the case of a guaranty of an old debt.[1] If, for instance, goods are sold upon the sole credit and responsibility of the defendant, though delivered to a third person, there is no liability to which that of the defendant can be collateral, and consequently it does not require a memorandum in writing.[2] In such case, the common action of *indebitatus assumpsit* is the proper remedy against him, and a special count upon the promise is not necessary, as it would be if his undertaking were collateral. On the same principle, it has been held that when one advances money at the request of another (and on his promise to repay it) to pay the debt of a third party, as the payment creates no debt against such third party, not being made at all upon his credit, the liability of the party on whose request and promise it was made is original and not collateral, and not within the Statute of Frauds.[3]

§ 196. It was held in the Supreme Court of Vermont, that where the original debtor's liability is contingent, and, the contingency occurring, he is discharged, the defendant's guaranty made before it occurred was discharged with it. "The accessory obligation must necessarily fall with the principal obligation."[4] And, conversely, if the obligation, either on the part of the third party or on the part of the defendant, is simply contingent at the time of the contract,

[1] Roberts on Frauds, 216; Tileston *v.* Nettleton, 6 Pick. (Mass.) 509; Doyle *v.* White, 26 Me. 341; Arbuckle *v.* Hawks, 20 Vt. 538; Antonio *v.* Clissey, 3 Rich. (S. C.) Law 201; Brown *v.* Curtiss, 2 N. Y. 225; Booker *v.* Tally, 2 Humph. (Tenn.) 308; Rhodes *v.* Leeds, 3 Stew. & P. (Ala.) 212.

[2] McCaffil *v.* Radcliffe, 3 Rob. (N. Y.) 445; Brown *v.* Harrell, 40 Ark. 429.

[3] Pearce *v.* Blagrave, 3 Com. Law 338; Prop'rs of Upper Locks *v.* Abbott, 14 N. H. 157. See Mountstephen *v.* Lakeman, L. R. 7 Q. B. 196.

[4] Smith *v.* Hyde, 19 Vt. 4.

the happening of the contingency in the *interim* can have no effect to draw the case within the operation of the statute.[1] The case of Buckmyr *v.* Darnall[2] is strongly illustrative of this point. There the defendant, in consideration that the plaintiff at his request would hire a horse to one English to ride to another town, promised that English should return him again. At the first hearing of the case, a majority of the judges thought the defendant's promise was not within the statute, because English was not liable upon any contract; but that, if any action could be maintained against him, it must be for a *subsequent* wrong in detaining the horse or actually converting it to his own use. The last day of the term, the Chief Justice delivered the opinion of the court. He said the objection had been made by some of the judges that if English did not deliver the horse, he was not chargeable in an action on the promise, but in trover or detinue, which are founded upon the tort, and for matter subsequent to the agreement. But it was held by all that, as English might be charged in the bailment in detinue on the original delivery, and detinue was the adequate remedy, the promise of the defendant was collateral and within the reason and the very words of the statute. This case has been already referred to, as showing that the defendant's assumpsit may be collateral to a third person's liability in tort, but it determines also by implication, that that liability must begin to run with the defendant's assumpsit; for it was only upon the ground that detinue would lie, the root of which action was the original delivery, raising at the instant a contract for

[1] Harrington *v.* Rich, 6 Vt. 666 ; Elder *v.* Warfield, 7 Harr. & J. (Md.) 391, *per* Buchanan, C. J. *Ante*, § 164.

[2] Buckmyr *v.* Darnall, 2 Ld. Raym. 1085; 1 Salk. 27; 6 Mod. 248. Lord Hardwicke, in Tomlinson *v.* Gill, Ambler 330, commenting on this case, remarks that the distinction taken in it "is a very slight and cobweb distinction." It is not easy to see, however, how it related to the case before him. I do not understand his Lordship to condemn the doctrine in regard to the necessity of the liability of the third party existing at the time of the defendant's promise.

the redelivery, that the judges found themselves enabled to apply the statute.

§ 197. As to the liability of the person for whose benefit the promise is made, it was laid down by Mr. Justice Buller, in the case of Matson *v.* Wharam,[1] that if he be himself *liable at all* the promise of the defendant must be in writing. If this rule be understood as confined to cases where the third party and the defendant are liable in the same way, and to do the same thing, the one as principal and the other as surety, it may be accepted as the uniform doctrine of all the cases both in England and in our own country.[2] The defendant is said to *come in aid* to procure the credit to be given to the principal debtor.[3] The question therefore ultimately is, upon whose credit the goods were sold or the money advanced, or whatever other thing done which the defendant by his promise procured to be done. If any credit at all be given to the third party, the defendant's promise is required to be in writing as collateral.[4] And the rule applies equally, where there

[1] Matson *v.* Wharam, 2 T. R. 80.

[2] Barber *v.* Fox, 1 Stark. 270; Buckmyr *v.* Darnall, 1 Salk. 27; Tileston *v.* Nettleton, 6 Pick. (Mass.) 509; Peabody *v.* Harvey, 4 Conn. 119; Huntington *v.* Harvey, 4 Conn. 124; Newell *v.* Ingraham, 15 Vt. 422; Cutler *v.* Hinton, 6 Rand. (Va.) 509; Ware *v.* Stephenson, 10 Leigh (Va.) 155; Noyes *v.* Humphreys, 11 Grat. (Va.) 636; Leland *v.* Creyon, 1 McCord (S. C.) Law 100; Taylor *v.* Drake, 4 Strobh. (S. C.) Law 431; Puckett *v.* Bates, 4 Ala. 390; Caperton *v.* Gray, 4 Yerg. (Tenn.) 563; Hall *v.* Wood, 4 Chand. (Wisc.) 36; Price *v.* Chicago M. & S. P. R. R., 40 Mo. App. 189; Robertson *v.* Hunter, 29 S. C. 9; Ollever *v.* Duval, 32 S. C. 273; Simpson *v.* Harris, 21 Nev. 353; Dougerty *v.* Stone, 66 Hun (N. Y.) 498; Greene *v.* Latcham, 2 Col. Ct. of App. 416; McGaughey Bros. *v.* Latham, 63 Ga 67; Daniel *v.* Mercer, 63 Ga. 442; Reynolds *v.* Simpson, 74 Ga. 454.

[3] Aldrich *v.* Jewell, 12 Vt. 125.

[4] Anderson *v.* Hayman, 1 H. Black. 120; Cahill *v.* Bigelow, 18 Pick. (Mass.) 369; Chase *v.* Day, 17 Johns. (N. Y.) 114; Brady *v.* Sackrider, 1 Sandf. (N. Y.) 514; Elder *v.* Warfield, 7 Harr. & J. (Md.) 391; Conolly *v.* Kettlewell, 1 Gill (Md.) 260; Norris *v.* Graham, 33 Md. 56; Larson *v.* Wyman, 14 Wend. (N. Y.) 246; Darlington *v.* McCunn, 2 E. D Smith (N. Y.) 411; Hanford *v.* Higgins, 1 Bosw. (N. Y.) 441; Allen *v.* Scarff, 1 Hilton (N. Y.) 209; Bushee *v.* Allen, 31 Vt. 613; Walker *v.* Richards,

is already an existing liability of the principal, and the evidence shows that the plaintiff, by accepting the defendant as surety, does not release his claim upon the principal.[1] All the cases show that it does not matter upon which of the two parties the plaintiff principally depends for payment, so long as the third party is at all liable to him to do the same thing, which the defendant has engaged to do.[2] If, however, the credit is given to both jointly, as neither can be said to be surety for the other to the creditor, their engagement need not be in writing.[3]

§ 197 *a.* It has been suggested that the rule above stated

39 N. H. 259; Dixon *v.* Frazee, 1 E. D. Smith (N. Y.) 32; Steele *v.* Towne, 28 Vt. 771; Hill *v.* Raymond, 3 Allen (Mass.) 540; Swift *v.* Pierce, 13 Allen (Mass.) 136; Boykin *v.* Dohlonde, 1 Sel. Cas. Ala. 502; Bresler *v.* Pendell, 12 Mich. 224; Welch *v.* Marvin, 36 Mich. 59; Murphy *v.* Renkert, 12 Heisk. (Tenn.) 397; Whitman *v.* Bryant, 49 Vt. 512; Read *v.* Ladd. Edm. (N. Y.) Sel. Cas. 100; Rottman *v.* Fix, 25 Mo. App. 571; West *v.* O'Hara, 55 Wisc. 645; Weisel *v.* Spence, 59 Wisc. 301; Treat Lumber Co. *v.* Warner, 60 Wisc. 183; Langdon *v.* Richardson, 58 Iowa 610; Wills *v.* Ross, 77 Ind. 1; Hagadorn *v.* Lumber Co., 81 Mich. 56; Cole *v.* Hutchinson, 34 Minn. 410; Clark *v.* Jones, 87 Ala. 474; Radcliff *v.* Poundstone, 23 W. Va. 724; Bugbee *v.* Kendricken, 130 Mass. 437; Osborn *v.* Emery, 51 Mo. App. 408; Mackey *v.* Smith, 21 Oregon 598; Harris *v.* Frank, 81 Cal. 280; Gill *v.* Read, 55 Mo. App. 246; Kansas City Sewer Pipe Co. *v.* Smith, 36 Mo. App. 608; Bayles *v.* Wallace, 56 Hun (N. Y.) 428. *Ante*, § 157.

[1] Fish *v.* Hutchinson, 2 Wils. 94; Curtis *v.* Brown, 5 Cush. (Mass.) 488; Walker *v.* Hill, 119 Mass. 249; Minto *v.* McKnight, 28 Ill. App. Ct. 239; Home National Bank *v.* Waterman, 30 Ill. App. Ct. 535.

[2] See also Jack *v.* Morrison, 48 Pa. St. 113. The decision in Reed *v.* Holcomb, 31 Conn. 360, seems to be in conflict with this well settled principle, though it is disavowed by the opinion.

[3] Wainwright *v.* Straw, 15 Vt. 215; Eddy *v.* Davidson, 42 Vt. 56; Matthews *v.* Milton, 4 Yerg. (Tenn.) 579; Hetfield *v.* Dow, 27 N. J. L. 440; Gibbs *v.* Blanchard, 15 Mich. 292; Swift *v.* Pierce, 13 Allen (Mass.) 136. The decision in Schultz *v.* Noble, 77 Cal. 79, can be better sustained on this ground than on that adopted by the court, viz., that when a broker bought and carried stock for a customer at the request of the defendant and upon the strength of his promise to make good all losses, a settlement by endorsing the note of the broker, and then refusing to meet the endorsement at maturity, was a performance of the contract, which at law prevented the statute from applying. Boyce *v.* Murphy, 91 Ind. 1.

requiring the defendant's special promise to be in writing, whenever the third party is liable at all, should be modified by the limitation that such liability of the third party must be "made the foundation" of the contract between the plaintiff and the defendant.[1] This is one of those general expressions under which lurks great danger to the practical value of the Statute of Frauds. There are cases where the third party's liability is not the foundation of the contract between the plaintiff and the defendant, in the sense that the nature of the transaction between them is such as to throw upon the defendant an obligation to the plaintiff, independently of the fact that any third party is liable to him; and here it is true, as a matter of the legal character of the defendant's obligation, that it is not founded upon the third party's obligation; and to such cases the statute does not apply.[2] But if the phrase we are considering means (as it has been taken to mean)[3] that the third party's concurrent liability does not make the statute applicable if the plaintiff did not rely upon it, but relied only on the defendant's promise, such a modification of the rule cannot safely be admitted. How can it be ascertained whether or not the third party's liability was in this sense the foundation of the contract between the others? It would seem to be reducing the question of the application of the statute to the question of the state of mind of the parties, such as could never be put to a jury without substituting their judgment or conjecture for the sanction of the statute.[4]

§ 198. It is sometimes a matter of difficulty to determine to whom the credit has been actually given, whether to the defendant alone, in which case the debt is his own, and his promise is good without writing, or to the third party to any

[1] Willes, J., in Mountstephen *v.* Lakeman, L. R. 7 Q. B. 202.

[2] See *post*, § 212.

[3] Vogel *v.* Melms, 31 Wisc. 306.

[4] The remark quoted from Willes, J., was not necessary to the judgment in the case, which is stated and applied, *post*, § 198.

extent, in which case the defendant's promise, being only collateral to or in aid of the third party's liability, requires a writing to support it. In the absence of any other circumstance to show the understanding of the parties, the expressions used by the party promising are doubtless to be resorted to. It has been held by Holt, C. J., that a promise "to be the paymaster" of such a one as shall render services to a third party, is to be taken as an absolute engagement showing the promisor alone to be liable; but that if the words are "to see him paid," this is only a promise to pay if the third party does not, and is collateral and within the statute.[1] On the other hand, it seems to have been considered in subsequent English cases that the latter expression, uncontrolled by circumstances, would not necessarily import a collateral engagement.[2] But even a promise in terms "to pay" does not make the promisor absolutely liable, so as to dispense with a writing, if it appear in point of fact that the third party who received the benefit of the promise was liable with him.[3] It is material to know to whom the charge is made on the plaintiff's books. In Matson *v.* Wharam, and Anderson *v.* Hayman, before cited, the charge was made to the third party, and this circumstance controlled the absolute expressions used by the defendants; and their engagements were held collateral.[4] And in like manner the fact of the bill

[1] Watkins *v.* Perkins, 1 Ld. Raym. 224. And see Skinner *v.* Conant, 2 Vt. 453; and Bates *v.* Starr, 6 Ala. 697; Briggs *v.* Evans, 1 E. D. Smith (N. Y.) 192; Clement's Appeal, 52 Conn. 464; Wagner *v.* Hallack, 3 Col. 176. In Hartley *v.* Varner, 88 Ill. 561, the promise appears to have been clearly collateral, although held otherwise.

[2] Jones *v.* Cooper, 1 Cowp. 227; Matson *v.* Wharam, 2 T. R. 80. See also Thwaits *v.* Curl, 6 B. Mon. (Ky.) 472; Grant *v.* Wolf, 34 Minn. 32.

[3] Blake *v.* Parlin, 22 Me. 395; Moses *v.* Norton, 36 Me. 113, and the cases hereinafter cited on this subject. But see Russell *v.* Babcock, 14 Me. 138; Benbow *v.* Soothsmith, 76 Iowa 151.

[4] See also Leland *v.* Creyon, 1 McCord (S. C.) 100; Conolly *v.* Kettlewell, 1 Gill (Md.) 260; Dixon *v.* Frazee, 1 E. D. Smith (N. Y.) 32. But evidence that the charge was made to the defendant is not *conclusive* that credit was given to him. Swift *v.* Pierce, 13 Allen (Mass.) 136; Burk-

being presented to the original debtor in the first instance, if unqualified by other circumstances, proves the credit given to him, and that the defendant's promise is collateral only.[1] But it is material to remark that, though the debiting of the third party on the plaintiff's books or the presentation of the account to him is evidence *against* the plaintiff to show that he gave credit to the third party, so as to render a writing necessary to hold the defendant, his debiting of, or presenting the account to, the defendant is not necessarily evidence *for* him to show that he trusted the defendant only, while in fact the goods were delivered or the services rendered to the third party.[2] The delivery to the third party is not conclusive against the plaintiff, but evidence will be admitted to show that it was done by mistake.[3]

§ 199. But, after all, it is impossible to specify any one fact or set of facts, on which the question to whom the plaintiff gave credit is to be determined. In the language of Buchanan, C. J., in Elder *v.* Warfield,[4] "the extent of the undertaking, the expressions used, the situation of the parties, and all the circumstances of the case, should be taken into consideration." In Keate *v.* Temple,[5] in the Common

halter *v.* Farmer, 5 Kans. 477; Myer *v.* Grafflin, 31 Md. 350; Champion *v.* Doty, 31 Wisc. 190; Walker *v.* Hill, 119 Mass. 249; Ruggles *v.* Gatton, 50 Ill. 412; Maynard *v.* Ponder, 75 Ga. 664; Hake *v.* Solomon, 62 Mich. 377; Larson *v.* Jensen, 53 Mich. 427; Winslow *v.* Dakota Co., 32 Minn. 237; Maurin *v.* Fogelberg, 37 Minn. 23; Greene *v.* Burton, 59 Vt. 423. Nor when made to a third party, that credit was given to that party. Lance *v.* Pearce. 101 Ind. 595.

[1] Larson *v.* Wyman, 14 Wend. (N. Y.) 246; Pennell *v.* Pentz, 4 E. D. Smith (N. Y.) 639.

[2] Poultney *v.* Ross, 1 Dall. (Pa.) 238; Cutler *v.* Hinton, 6 Rand. (Va.) 509; Kinloch *v.* Brown, 1 Rich. (S. C.) Law 223; Noyes *v.* Humphreys, 11 Grat. (Va.) 636; Walker *v.* Richards, 41 N. H. 388. See Eshleman *v.* Harnish, 76 Pa. St. 97; Hardman *v* Bradley, 85 Ill. 162. In Scudder *v.* Wade, 1 South. (N. J.) 249, the jury found that in fact the whole credit was given to the defendant.

[3] Loomis *v.* Smith, 17 Conn. 115.

[4] Elder *v.* Warfield, 7 Harr. & J. (Md.) 397.

[5] Keate *v.* Temple, 1 Bos. & P. 158. See, further, on this subject, Simpson *v.* Penton, 2 Cromp. & M. 430; Payne *v.* Baldwin, 14 Barb.

Pleas, an instructive case on this subject, the defendant was a lieutenant in the navy, and said to a slop-seller, who was to supply the crew with clothes, that he would "see him paid at the pay-table," and afterwards, that he would "see him paid." Among other circumstances to show that the slop-seller actually relied upon the power of the defendant to stop the money out of the men's pay, and not upon his personal liability, the court laid great stress upon the fact that the sum claimed was very large, so much so that it seemed it never could have been contemplated to rely entirely for it upon the personal credit of a lieutenant in the navy, who could not be expected to be responsible for so large an amount. In another case the plaintiff, a builder, who had done some sewage work for a certain board of health, being asked by the board's surveyor to do further work of the same kind for them, said, "I have no objection to do the work if you or the local board will give the order," and the defendant said, "You go on and do the work and I will see you paid." The words used imported a collateral promise, a promise to pay *if* the board did not; but in view of all the circumstances of the case, including the fact that when the defendant made his promise and the plaintiff proceeded to act upon it, it was not known whether the third party, the board, would ever recognize the bargain and become itself liable, it was held by the Exchequer Chamber (reversing the Queen's Bench) and by the House of Lords sustaining the reversal, that there was evidence upon which the jury might find that the credit was given solely to the defendant, so as to make his promise original, and not collateral.[1] The question to whom the credit was given is

(N. Y.) 570; Chase *v.* Day, 17 Johns. (N. Y.) 114; Smith *v.* Hyde, 19 Vt. 54; Sinclair *v.* Richardson, 12 Vt. 33; Hetfield *v.* Dow, 27 N. J. L. 440; Hazen *v.* Bearden, 4 Sneed (Tenn.) 48; Turton *v.* Burke, 4 Wisc. 119; Prosser *v.* Allen, Gow 117; Billingsley *v.* Dempewolf, 11 Ind. 414; Blodgett *v.* Lowell, 33 Vt. 174; Mountstephen *v.* Lakeman, L. R. 7 Q. B. 196; Warnick *v.* Grosholz, 3 Grant (Pa.) 234: Rossmann *v.* Bock, 97 Mich. 431; Hazeltine *v.* Wilson, 55 N. J. Law 250.

[1] Mountstephen *v.* Lakeman, L. R. 5 Q. B 613; L. R. 7 Q. B. 196;

always for the jury to determine, upon all the circumstances of the case.[1]

§ 199 *a*. An application of this principle may be seen in the cases arising upon agreements made by the owners of buildings going up under contract, upon the faith of which subcontractors or others have continued to supply labor or materials after the principal contractor has become either actually or probably unable to pay. In these cases the question is the same, namely, whether the services for which the action is brought were performed solely upon the credit of the owner's promise.[2]

§ 200. Having now seen what kinds of obligations on the part of the original debtor and of the defendant or promisor, respectively, the statute is intended to affect, and also that these two obligations are to concur in order to bring a case within it, it remains to be considered, in the last place, in what cases the obligation of the latter is not within the statute, though it concur or co-exist with that of the original debtor. Upon this by far the most intricate division of this title, it is found to be impossible to lay down any one general

Lakeman *v.* Mountstephen, L. R. 7 H. L. 17. See Amort *v.* Christofferson, 59 N. W. Rep. (Minn.) 304.

[1] Dean *v.* Tallman, 105 Mass. 443; Glenn *v.* Lehnen, 54 Mo. 45; Cowdin *v.* Gottgetreu, 55 N. Y. 650; Lakeman *v.* Mountstephen, L. R. 7 H. L. 17; Bloom *v.* McGrath, 53 Miss. 249; Eshleman *v.* Harnish, 76 Pa. St. 97; Moshier *v.* Kitchell, 87 Ill. 18; Pettit *v.* Braden, 55 Ind. 201; West *v.* O'Hara, 55 Wisc. 645; Ingersoll *v.* Baker, 41 Mich. 48; Bonnie *v.* Denniston, 41 Mich. 292; Larson *v.* Jensen, 53 Mich. 427; Morris *v.* Osterhout, 55 Mich. 262; McTighe *v.* Herman, 42 Ark. 285; Flournoy *v.* Wooten, 71 Ga. 168; Reynolds *v.* Simpson, 74 Ga. 454; Heywood *v.* Stiles, 124 Mass. 275; Barrett *v.* McHugh, 128 Mass. 165; Boston *v.* Fan, 148 Pa. St. 220; Maddock *v.* Root, 72 Hun (N. Y.) 98.

[2] Gill *v.* Herrick, 111 Mass. 501; Walker *v.* Hill, 119 Mass. 249; Gifford *v.* Luhring, 69 Ill. 401; Rawson *v.* Springsteen, 2 Thomp. & C. (N. Y.) 416; Belknap *v.* Bender, 75 N. Y. 446; Jefferson County *v.* Slagle, 66 Pa. St. 202. See Eshleman *v.* Harnish, 76 Pa. St. 97; Haverly *v.* Mercur, 78 Pa. St. 257; Weyand *v.* Critchfield, 3 Grant (Pa.) 113; Lakeman *v.* Mountstephen, L. R. 7 H. L. 17; Bates *v.* Donnelly, 57 Mich. 521; Birchell *v.* Neaster, 36 Ohio St. 331; Crawford *v.* Edison, 45 Ohio St. 239; Merriman *v.* McManus, 102 Pa. St. 102.

rule which shall comprehend and reconcile all the decisions in our own courts and those of England, consistently with what is believed to be the intent and policy of the statute itself. The safest course to be pursued, and that which will probably lead in the end to the soundest conclusions upon the subject, will be to examine some of the leading English cases, ascertain upon what principles they were decided, and how far the existing body of decisions is reconcilable therewith.

§ 200 *a*. First, there is a class of cases in which the defendant or promisor has or is about to acquire an interest in property which has been or may be subjected to a lien to secure a debt owing by a third person. If the defendant promises to discharge the debt, thus freeing his own property or interest from the incumbrance, his promise is not affected by the fact that the third party was also liable for the same debt, but is regarded as original and independent, — a promise to pay his own debt.[1]

§ 201. Another class of cases holds that if the defendant (meaning the party who makes the promise to answer for the debt, default, or miscarriage of another) procures the surrender, or transfer to himself from the creditor, of a lien or security which the latter holds for the debt owing him, the defendant's promise, made in consideration of such surrender, or transfer, to be answerable for the debt, is not embraced by

[1] Burr *v.* Wilcox, 13 Allen (Mass.) 269; Fish *v.* Thomas, 5 Gray (Mass.) 45; Fitzgerald *v.* Dressler, 7 C. B. N. S. 374; Wills *v.* Brown, 118 Mass. 137; Young *v.* French, 35 Wisc. 111; Mitchell *v.* Griffin, 58 Ind. 559; Weisel *v.* Spence, 59 Wisc. 301; Kelley *v.* Schupp, 60 Wisc. 76; Hewett *v.* Currier, 63 Wisc. 386; Morrison *v.* Hogue, 49 Iowa 574; Helt *v.* Smith, 74 Iowa 667; Dunbar *v.* Smith, 66 Ala. 490; Westmoreland *v.* Porter, 75 Ala. 452; Fears *v.* Story, 131 Mass. 47; Joseph *v.* Smith, 57 N. W. Rep. (Neb.) 1012. It was held in Rees *v.* Jutte, 153 Pa. St. 56, that when the defendant's parol promise is to pay a debt of another composed of separate and independent accounts, some of which are liens on the defendant's property and some of which are not, it is valid and enforceable only as to the accounts which were liens when the promise was made.

the provisions of the Statute of Frauds. It is simply a purchase from the creditor of such lien or security for a price which is the amount of the original debt. The leading case to this effect is Castling *v.* Aubert, decided by the Court of Queen's Bench in 1802.

§ 202. The plaintiff as insurance broker had effected various policies of insurance for one Grayson, and was under accommodation acceptances for him, and had a lien on the policies to indemnify himself against the acceptances. A loss happened, and Grayson needing the policies to present in order to get the money, the plaintiff was applied to, to give them up for that purpose to the defendant, who was Grayson's agent at that time for the management of his insurance affairs. Some of the acceptances were outstanding, particularly one for £181 1*s.*, on which Grayson as drawer and the plaintiff as acceptor had been sued; and the defendant undertook verbally, in consideration of the policies being made over to him, to pay that particular acceptance and the costs, and to deposit money with a banker for the satisfaction of the others as they became due. The plaintiff delivered up the policies, but the defendant did not pay the acceptance or costs. Beside the special count upon the agreement, the declaration contained a count for money had and received, upon which, as Lord Ellenborough observed, the plaintiff was entitled to recover, as the defendant had received a much larger amount from the underwriters. But after recapitulating the facts, and without reference to the common count, his Lordship remarked that in entering into the agreement the defendant "had not the discharge of Grayson principally in his contemplation, but the discharge of himself. That was his moving consideration, though the discharge of Grayson would eventually follow. It is rather, therefore, *a purchase of the securities* which the plaintiff held in his hands. This is quite beside the mischief provided against by the statute; which was that persons should not by their own unvouched undertaking without writing charge themselves for the debt,

default, or miscarriage of another." And the plaintiff had judgment.[1]

§ 203. It is to be carefully noted that in this case the very lien or security which the creditor held was procured by the defendant for his own use, and it is thus that the transaction acquires the character attributed to it by the court of a sale by one party and a purchase by the other. The circumstance that the payment of the price by the latter is to take the form of discharging the debt of another person is treated by the court as merely incidental, and as not depriving the arrangement of its other and primary and essential character. The true meaning of this decision is well illustrated by reference to a late case in the Court of Exchequer, where it was attempted to be applied. The facts substantially were that the plaintiff had been employed, by a then part-owner of the ship "Mathesis," to procure a charter for the vessel under an agreement that, in consideration of his paying a certain sum due from the ship for repairs, he should have a lien upon

[1] Castling *v.* Aubert, 2 East 325. The case of Walker *v.* Taylor, decided by Chief Justice Tindal at *nisi prius* in 1834, presents a state of facts precisely analogous to those in the principal case, and upon that ground was rightly decided. 6 Car. & P. 752. And see Fitzgerald *v.* Dressler, 5 C. B. N. S. 885. The following are some of the American cases which seem to be in accordance with the principle of Castling *v.* Aubert. Allen *v.* Thompson, 10 N. H. 32. Here the plaintiff had obtained the account-book of his debtor as a pledge to secure the debt, and the defendant, in consideration that the plaintiff would deliver up the book to one B. to collect the demands, verbally promised the plaintiff to pay him the amount due from the debtor if B. should not collect enough for that purpose; the court holding that the delivery of the book to B. on the defendant's request was in effect the same as a delivery to the defendant himself. Also Gardiner *v.* Hopkins, 5 Wend. (N. Y.) 23; French *v.* Thompson, 6 Vt. 54; Olmstead *v.* Greenly, 18 Johns. (N. Y.) 12; Hindman *v.* Langford, 3 Strobh. (S. C.) Law 207; and Wolff *v.* Koppel, 5 Hill (N. Y.) 458, where the rule was applied (perhaps unnecessarily) to the case of a factor guaranteeing his sales under a *del credere* commission. A promise by the purchaser of personal property subject to mortgage to pay the mortgage note, the mortgagor continuing liable notwithstanding the promise, is within the statute, and must be in writing. Doolittle *v.* Naylor, 2 Bosw. (N. Y.) 206.

her certificate of register, and should collect and receive the freight. The "Mathesis" made her voyage and returned to England, and it turning out that there was difficulty in effecting a settlement between various parties having various interests in or claims upon the ship, they all, including the plaintiff, executed a writing by which, among other things, the defendants agreed to pay the plaintiff his commissions on the charter-party when ascertained, and all together agreed that no person signing the agreement should put or cause to be put any stop on the freight, and that, if such stop was put on, the defendants undertook to have the same removed. This was the writing produced in evidence, and in regard to which the defendants contended that it purported to be an agreement to answer for the debt, default, or miscarriage of another, within the Statute of Frauds, and did not disclose upon the face of it any consideration moving from the plaintiff, and was therefore *nudum pactum*. They contended also that there was a variance between it and the declaration, which set forth the plaintiff's lien, and that the defendants were the brokers for parties who during the voyage had become owners of the ship, and that it became desirable for them to obtain immediate possession of the ship, and they were therefore anxious that the plaintiff should abandon his right of receiving the freight, and that, in consideration of the premises, and that the plaintiff would relinquish his right to collect the freight, the defendants promised and agreed to pay him his commission; that the plaintiff did relinquish his right of collecting the freight, but that the defendants would not pay him his commission: allegations evidently framed to bring the case within the rule in Castling *v.* Aubert. The court, however, held there was a variance, and that the contract proved was within the Statute of Frauds; Pollock, C. B., saying: "It is not an agreement by the defendants to pay, in consideration of the plaintiff abandoning his rights, . . . but . . . in consideration of his not asserting any lien upon the freight, without regard to the

question whether he was or was not entitled to such lien."[1] In another and later case, where the discontinuance of a suit was the consideration of the defendant's promise, and it was contended that the statute did not apply, because a new consideration moved between the parties to the guaranty, the Court of Queen's Bench held otherwise, Patteson, J., remarking that the cases on that point had "been where something has been given up by the plaintiff and *acquired by the party making the promise;* as the security of goods for a debt."[2]

§ 204. The Supreme Court of Massachusetts has very clearly announced the same doctrine in these cases where the promise is made in consideration of the relinquishment of a lien. It says that it is not enough "that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage had not also directly enured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. . . . Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or

[1] Gull *v.* Lindsay, 4 Exch. 51. The same court, a year later, apply Castling *v.* Aubert to the case of a verbal agreement that a judgment previously obtained against the defendant as surety on certain old obligations of a third person should stand as collateral security for certain new obligations of that person. Macrory *v.* Scott, 5 Exch. 907. Parke, B., speaks of the judgment as a *fund* which is only to be appropriated in a different way, and considers that the case falls within the principle of the decision in Castling *v.* Aubert. It would seem, however, that if the judgment was already binding on the defendant, and the effect of his promise was only to apply the amount to a different account of the same party, it is better to let the case stand, on the ground that in reality no new obligation is imposed upon the defendant, than to strain unnecessarily so plain a decision as that referred to.

[2] Tomlinson *v.* Gell (not *Gill*), 6 Ad. & E. 571. See also Chater *v.* Beckett, 7 T. R. 201, where the plaintiff gave up a *ca. sa.;* but still the defendant's promise was held bad by the statute. Dillaby *v.* Wilcox, 60 Ct. 71; Warner *v.* Willoughby, 60 Ct. 468; Bray *v.* Parcher, 80 Wisc. 16. But see Muller *v.* Riviere, 59 Texas 640, where forbearance to enforce a lien on goods was the consideration for the promise of the defendant who manages the goods to pay the third person's debt.

recovering his debt, and where by means of such relinquishment the same interest or advantage *has enured to the benefit of the defendant*," there his promise is binding without writing. "In such cases, although the result is, that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase, by the defendant of the plaintiff, of the lien, right, or benefit in question." [1]

§ 205. The case of Houlditch *v.* Milne, decided by Lord

[1] *Per* Shaw, C. J., in Curtis *v.* Brown, 5 Cush. 491. And see Nelson *v.* Boynton, 3 Met. (Mass.) 396; Alger *v.* Scoville, 1 Gray (Mass.) 398; Fish *v.* Thomas, 5 Gray (Mass) 45; Dexter *v.* Blanchard, 11 Allen (Mass.) 365; Burr *v.* Wilcox, 13 Allen (Mass.) 269; Ames *v.* Foster, 106 Mass. 400; Brightman *v.* Hicks, 108 Mass. 246; Richardson *v.* Robbins, 124 Mass. 105; Smith *v.* Sayward, 5 Greenl. (Me.) 504; Boyce *v.* Owens, 2 McCord (S. C.) Law 208; Scott *v.* Thomas, 1 Scam. (Ill.) 58; Scott *v.* White, 71 Ill. 287; Stern *v.* Drinker, 2 E. D. Smith (N. Y.) 401; Van Slyck *v.* Pulver, Hill & D. (N. Y.) 47; Fay *v.* Bell, Hill & D. (N. Y.) 251; Mallory *v.* Gillett, 23 Barb. (N. Y.) 610; Spooner *v.* Drum, 7 Ind. 81; Luark *v.* Malone, 34 Ind. 444; Conradt *v.* Sullivan, 45 Ind. 180; Crawford *v.* King, 54 Ind. 6; Krutz *v.* Stewart, 54 Ind. 178; Lampson *v.* Hobart, 28 Vt. 697; Cross *v.* Richardson, 30 Vt. 641. See Stewart *v.* Campbell, 58 Me. 439; Hodgins *v.* Heaney, 15 Minn. 185; Young *v.* French, 35 Wisc. 111; Muller *v.* Riviere, 59 Texas 640; Waterman *v.* Rossiter, 45 Ill. App. 155. The case of King *v.* Despard, 5 Wend. (N. Y.) 277, the facts of which are very similar to those in Curtis *v.* Brown, is perhaps determinable upon the ground that the claim against the original debtor was actually abandoned. See also, in support of the text, Corkins *v.* Collins, 16 Mich. 478; Arnold *v.* Stedman, 45 Pa. St. 186; Clapp *v.* Webb, 52 Wisc. 638; Gray *v.* Herman, 75 Wisc. 453; Vaughn *v.* Smith, 65 Iowa 579; Fisher *v.* Wilmoth, 68 Ind. 449; Stewart *v.* Jerome, 71 Mich. 201; Borchsenius *v.* Canutson, 100 Ill. 82; Prime *v.* Koehler, 77 N. Y. 91; Prout *v.* Webb, 87 Ala. 593; Williamson *v.* Hill, 3 Mackey (D. of C.) 100; Rogers *v.* Empkie Hardware Co., 24 Neb. 653; French *v.* French, 84 Iowa 655; Parker *v.* Dillingham, 129 Ind. 542; Scudder *v.* Carter, 43 Ill. App. Ct. 252; Lyons *v.* Daugherty, 26 S. W. Rep. (Tex.) 146. *Contra*, Shook *v.* Vanmater, 22 Wisc. 532. Where a distinct consideration passes between the parties to a guaranty contract, it is without the statute. Graves *v.* Shulman, 59 Ala. 406. The necessity of the claim relinquished enuring to the benefit of the promisor seems to have been overlooked in Power *v.* Rankin, 114 Ill. 52; but the case was rightly decided, the promisor having funds of the debtor in his hands. See *supra*, § 187.

Eldon at *nisi prius* prior to Castling *v.* Aubert, seems to stand by itself in English law, so far as it holds that the mere relinquishment of a lien by the creditor, whether it enures to the defendant or not, is sufficient to take the promise of the latter, made in consideration of such relinquishment, out of the statute. In that case, certain carriages belonging to one Copey had been sent by the defendant to the plaintiffs to be repaired, and the defendant gave the orders concerning them. The bill was made out to Copey when the repairs were finished; but the order came from the defendant to pack them up and send them on board ship, and about the same time a verbal statement from him that he would pay for them. Upon the receipt of that engagement, the carriages were packed and shipped accordingly. It was in evidence also that afterwards, when the bill was presented to the defendant, he said he had the money to pay it, though he did not say whether it was his own or Copey's. Lord Eldon said, if a person had obtained possession of goods on which a landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary, and that such a case appeared to apply precisely to the one before him. The plaintiffs had to a certain extent a lien upon the carriages, which they parted with on the faith of the defendant's promise to pay, and it was held that for that reason the case was out of the statute.[1] From the circumstance that the goods in question passed into the hands of the defendant when the lien was relinquished, it might be inferred that it enured to his benefit.[2] But in several of the American

[1] Houlditch *v.* Milne, 3 Esp. 86. If, as is intimated in the report, the defendant in this case had money of the principal debtor in his hands to pay the debt with, there would be no difficulty in the decision. It would be a mere case of trust, and of course not within the statute. See *ante*, and compare Williams *v.* Leper, cited in the following section. In Bushell *v.* Beavan, 1 Bing. N. C. 103, there is an intimation of the court to a similar effect with Houlditch *v.* Milne, but it was unnecessary to the case, which was in point of fact determined on another ground.

[2] This was the case in Tindal *v.* Touchberry, 3 Strobh. (S. C.) Law

States, more particularly in South Carolina, it has been broadly decided that the mere relinquishment of the lien by the plaintiffs was sufficient to take the defendant's promise out of the statute.[1] In Tennessee the same doctrine has been urged, but the court declined to express an opinion, and determined the case upon another ground.[2]

§ 206. But it is obvious that Houlditch *v.* Milne was decided upon the supposed application of Williams *v.* Leper, a very conspicuous case upon this branch of the subject, and one which must now be examined, both as affording a test of the correctness of the first-mentioned decision, and as introducing us to another and most comprehensive class of cases. It will appear that the doctrine alluded to in the last section finds no support whatever in that case, when closely examined and rightly understood. The facts were that one Taylor, who was tenant to the plaintiff, being three-quarters of a year (or forty-five pounds) in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed Leper, the defendant, as a broker, to sell the effects, and he advertised a sale of them accordingly. On the morning advertised for the sale, Williams, the landlord, came to distrain the goods in the house. Leper, having notice of the landlord's intention to distrain them, promised to pay the arrear of rent if he would desist from distrain-

177. In 1 Wms. Saund. 211 *b*, a note to Forth *v.* Stanton, it is suggested that Houlditch *v.* Milne may be reconciled with the other cases, because it appears upon all the circumstances of the case that the sole credit was given to the defendant, and that the real owner of the carriages was not at all liable; on which ground the case would clearly be not within the statute.

[1] See Mercein *v.* Andrus, 10 Wend. (N. Y.) 461, which, however, was actually determined upon a different question unconnected with the statute. Also Slingerland *v.* Morse, 7 Johns. (N. Y.) 463; Stewart *v.* Hinkle, 1 Bond (C. C.) 506; and the following South Carolina cases: Adkinson *v.* Barfield, 1 McCord, Law 575; Siau *v.* Pigott, 1 Nott & McC. 124; Dunlap *v.* Thorne, 1 Rich. Law 213; Whitehurst *v.* Hyman, 90 N. C. 487.

[2] Randle *v.* Harris, 6 Yerg. 508.

ing; and he did thereupon desist. All the judges agreed that Leper's promise was not within the Statute of Frauds; and, although there are some differences in the language of their reported opinions, the ground of their decision appears to be sufficiently clear. The Chief Justice, Lord Mansfield, said: "The *res gesta* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge. He enters, to distrain: he has the pledge in his custody. The defendant agrees 'that the goods shall be sold, and the plaintiff paid in the first place.' *The goods are the fund:* the question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors; and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the Statute of Frauds. It is rather a fraud in the defendant to detain the £45 from the plaintiff, who had an original lien upon the goods." Mr. Justice Aston said he looked upon the goods as the debtor, as a *fund between both*, and he thought that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for £45. Mr. Justice Wilmot said, "Leper became the bailiff of the landlord: and when he had sold the goods the money was the landlord's (as far as £45) *in his own bailiff's hands.* Therefore an action would have lain against Leper for money had and received to the plaintiff's use." And in this view Mr. Justice Yates concurred.[1] Now the promise of Leper was in terms, it is true, to pay the debt in consideration of the surrender of the landlord's lien, and it was argued that he promised absolutely to pay it, and not to pay it out of the goods, or with any other restriction. But it is clear, in the first place, that it was not simply because the landlord surrendered his lien (which, being a

[1] Williams *v.* Leper, 3 Burr. 1886. In the report of the case in 2 Wilson 308, it is said that Taylor, the tenant, had made a bill of sale to Leper as trustee for the creditors. See Clark *v.* Hall, 6 Halst. (N. J.) 78; Alger *v.* Scoville, 1 Gray (Mass.) 391; Woodward *v.* Wilcox, 27 Ind. 207; Stoudt *v.* Hine, 45 Pa. St. 30. See *ante*, § 187.

damage to him, was a special consideration moving *from him* and supporting the defendant's promise) that such promise was held good; and hence Houlditch *v.* Milne, which depends upon this notion, cannot, to any such extent, be sustained. And in the second place, it is clear that the decision did not proceed upon the mere ground that Leper had acquired the lien which the landlord had lost, so as to make him personally a purchaser of that lien for a certain value, to wit, the amount of the debt he undertook to pay; for he was considered by all the judges as the mere trustee of the creditors whom he represented, and not as a purchaser of the lien for his own benefit; and hence the case is to be distinguished from that of Castling *v.* Aubert, which was merely and purely a sale of the security.[1] The judges really treat it, not as a promise to pay the debt in consideration of the forbearance to distrain (which is the manner in which it is presented upon the statement of facts), but as a transaction by which certain goods were intrusted out of the landlord's constructive possession and put in Leper's hands, for the purpose of his converting them into money wherewith to pay, among other debts, that due to the landlord. It was a mere case of agency or trust. The goods were the fund in regard to which it was to be exercised. As Mr. Justice Wilmot said, Leper became the bailiff of the landlord; and it is most worthy of notice that the court seem to agree that, if the goods had not sold for more than the landlord's debt, Leper would not have been liable beyond the proceeds of the sale. The result is that Leper's obligation hardly arose out of his special promise at all. The *res gesta* would have entitled the landlord to his action against him, as Lord Mansfield expressly says.[2]

[1] Both these points are well illustrated in the similar case of Edwards *v.* Kelly (see *post*, § 208), where the argument was that, *as* no consideration moved to the defendant, and *as* the defendant had no personal interest in the transaction, Williams *v.* Leper did not apply; but, notwithstanding those facts, the court held it did apply because of another and the true point in that case.

[2] This view of such transactions, where the property of the debtor is

§ 207. It is deemed well worth while to have analyzed this decision, because out of a misunderstanding of it has grown a doctrine, which seems to make a dead letter of the Statute of Frauds in many cases of promises to pay the pre-existing debt of another; namely, that any new consideration, distinct from the debt and moving between the parties to the guaranty, will take it out of the statute.

§ 208. In a case in the Queen's Bench, the facts were almost identical with those in Williams *v.* Leper, and the correct view of that decision well enforced and illustrated. A third party owed the plaintiff for rent, and the plaintiff distrained upon the premises, cattle, goods, and chattels, of greater amount than the rent in arrear, and the same were about to be sold to satisfy his claim; whereupon it was agreed between him and the defendants that he should deliver up the distress and permit the goods to be sold by one of them for the tenant, upon their joint undertaking to pay the plaintiff the rent due. That undertaking was held binding. Lord Ellenborough, C. J., said: "Perhaps this case might be distinguishable from that of Williams *v.* Leper, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them *in trust*, in effect, to raise by sale of the goods sufficient to satisfy the plaintiff's demand; the goods were put into their possession subject to this trust."[1] All the judges concurred in the opinion that Williams *v.* Leper was decisive of the case. Afterwards, that decision was recognized and applied in the Common Pleas. The defendant, an auctioneer, was employed by third parties to sell certain goods on the premises, and the plaintiff's agent applied to him for rent due to the plaintiff, say-

placed in the hands of the defendant, as his agent or trustee, is clearly set forth in Belknap *v.* Bender, 75 N. Y. 446; Ackley *v.* Parmenter, 98 N. Y. 425.

[1] Edwards *v.* Kelly, 6 Maule & S. 208. Note the suggestion of Bayley, J., in which Holroyd, J., concurred, that making the distress suspended the debt, and that consequently when the promise was made there was no debt to which it was collateral.

ing "it was much better so to apply than to put in a distress and stop the sale," when the defendant, after inquiring the amount, said, "Madam, you shall be paid; my clerk shall bring you the money." The court were all clearly of opinion that the case was not distinguishable from Williams *v.* Leper, and refused to set aside a verdict for the plaintiff.[1]

§ 209. It seems, therefore, that the English courts have clearly apprehended the force of Williams *v.* Leper as embracing mere cases of a trust assumed by the defendant in regard to property in the hands or under the control of the plaintiff, and in which the discharge of the third person's debt was merely incidental to the execution of that trust. It does not decide, any more than Castling *v.* Aubert decides, that the mere relinquishing by the plaintiff of his hold upon the property is, as being "a new consideration moving between the immediate parties to the guaranty," a circumstance sufficient to take the promise of the defendant out of the statute. In the case of Slingerland *v.* Morse, in New York, the declaration stated that the defendants, in consideration that the plaintiff had delivered *to them* certain articles, undertook and promised by their agreement in writing (which, however, as it did not express any consideration, was inefficient as a memorandum) to deliver the same articles to the plaintiff on demand or pay $450. The proof was that one Buys was duly authorized by the plaintiff to distrain for rent to that amount due to the latter from his tenant, and that the articles mentioned in the declaration were duly distrained, of which notice was given to the tenant, accompanied with an inventory of the articles distrained, but the goods were not removed; and that the defendants, at the request of the tenant, signed an agreement indorsed upon the inventory of the goods, as follows: "We do hereby promise to deliver to Peter Slingerland all the goods and chattels contained in the within inventory, in six days after demand, or pay the said Peter $450." Buys thereupon suspended the sale of the

[1] Bampton *v.* Paulin, 4 Bing. 264.

goods and left them in the house of the tenant. The court below considered this to be a mere collateral undertaking, but on motion for a new trial the Supreme Court held the case of Williams *v.* Leper to be in point, and granted the motion.[1] But it is obvious that the distinguishing feature of that case escaped the court; inasmuch as the proof before them did not show that the defendants were to do anything *with the goods* towards paying the debt; their agreement being, in substance, that the distress should be simply forborne for six days, at the end of which time the goods should be delivered up or the money paid. The doctrine in Williams *v.* Leper, however, may be rightly applied, as it has been in South Carolina, to cases where the plaintiff simply suspends an execution upon goods of the debtor, in consideration of the promise of the defendant to apply the *proceeds of the goods* to the satisfaction of the execution;[2] or where the defendant simply holds the goods from the original debtor for the purpose of paying the debt, and promises to pay it, if the creditor will postpone his attachment.[3] In such cases, the remark of Mr. Justice Bayley perfectly applies; the substance of the contract "is as if the defendants had proposed to the plaintiff in these words: You must convert the goods into money in order to satisfy yourself the arrears due, if you will allow us to do this we will pay you."[4]

§ 210. The next of the leading English cases to which it is deemed necessary to call particular attention, in connection with this branch of the subject, is one which establishes a principle entirely distinct from any of those which have been before examined, though it has been strangely confounded with them. The principle is, that where the transaction between the parties is in its nature *a purchase of the debt itself*, the defendant's promise to pay the whole or any part

[1] Slingerland *v.* Morse, 7 Johns. 463.
[2] Rogers *v.* Collier, 2 Bailey 581.
[3] McCray *v.* Madden, 1 McCord, Law 486.
[4] Edwards *v.* Kelly, 6 Maule & S. 209.

of the amount to the original creditor, as the consideration of the purchase, is not affected by the statute. The case referred to is that of Anstey *v.* Marden in the Common Pleas, where the facts were briefly as follows: The defendant being insolvent, it was verbally agreed between him and one Weston and the defendant's creditors (among whom was the plaintiff), that Weston should pay, and the creditors should accept, ten shillings in the pound upon Marden's debts, *in full discharge and satisfaction thereof*, and that the creditors should assign their claims to Weston. When it was afterwards proposed to reduce this agreement to writing, the plaintiff refused to sign, and brought this action against Marden for the full amount of his claim, objecting to the defence upon the agreement, and Weston's readiness and ability to perform it, that it was not enforceable against Weston for want of a memorandum in writing, and consequently his own engagement to accept ten shillings was *nudum pactum*. The defence was nevertheless held good. Chambre, J., said: "This was a contract to purchase the debts of the several creditors, instead of being a contract to pay or discharge the debts owing by Marden. It was of the substance of the agreement that these debts should remain in full force, to be assigned to Weston. When he had purchased them he did not mean to exact them rigorously, but the contract was a contract of purchase, and he had a right to make use of the names of the original creditors to recover the same to the full amount, if Marden had effects to satisfy the debts. *Instead of being a contract to discharge Marden from his debts, it was a contract to keep them on foot.*" [1] If the effect of the decision should be taken to be, that the mere discharge of the third person's liability to his original creditor, without discharging him altogether, is not what the statute contemplates, it might seem to be setting up a nice distinction. But its real force is conceived to be that the primary and

[1] Anstey *v.* Marden, 1 Bos. & P. N. R. 133. See Therasson *v.* McSpedon, 2 Hilton (N. Y.) 1; Humphreys *v.* St. Louis R. R., 37 Fed. Rep. 307.

essential character of the transaction was a purchase for value of certain choses in action, differing from any other purchase merely in the fact that incidentally the debt of a third party was satisfied.[1] And it is perhaps well to observe that this decision is not, as was intimated by one of the judges, in conflict with the previous case of Chater *v.* Beckett, nor with the still earlier case of Case *v.* Barber; for in both, while there was a strong resemblance in other respects to Anstey *v.* Marden, the circumstance of the assignment of the debt to the party making the promise was wanting, and the promise was rightly held to be within the statute.[2]

§ 211. Lastly, the case of Tomlinson *v.* Gill requires to be noticed, with a view to an accurate understanding of the question under discussion. The reporter's statement of facts is that "the defendant Gill promised, that if the widow of the intestate John Gill would permit him to be joined with her in the letters of administration of his assets, he would make good any deficiency of assets to discharge the intestate's debts;" and he adds that the case was on a "bill by creditors of the intestate against Gill, for a satisfaction of their debts, and performance of the promise." But apparently this is incorrectly stated, for the Chancellor, Lord Hardwicke, says: "The bill is founded on an argument [agreement], which is not unusual where there is a contest about obtaining administration. It is not uncommon, upon such occasions, for the simple contract creditors to agree, that administration shall be granted to a specialty creditor,

[1] It is necessary to remark, in regard to Mr. Roberts's account of this case (Roberts on Frauds, 226), that he omits in his statement of it the cardinal fact that the debts were *assigned* to Weston. This is what gives the transaction the distinctive character of a purchase. The same author classes this case with Castling *v.* Aubert, as being both cases of "considering the transaction in the light of a purchase." But it should be borne in mind that the former was a purchase of the debt, the latter of a security for the debt; the former completely extinguished the original creditor's claim upon the original debtor; the latter left that claim unimpaired.

[2] Chater *v.* Beckett, 7 T. R. 201; Case *v.* Barber, T. Raym. 450, decided four years only after the enactment of the statute.

upon terms of his agreeing to pay the debts equally and *pari passu*. Such agreements are seldom put in writing." Again, when speaking of the creditors' right to relief in equity, he says that they are entitled to it, "for the promise was for the benefit of the creditors, and the widow is a *trustee* for them. 2dly, the bill is brought for an account, and that draws to it relief, like the common case of a bill to be paid a debt out of assets."[1] This language is scarcely reconcilable with an absolute engagement to see the whole amount of the debts paid, but indicates rather a transaction in part like that in Castling *v.* Aubert, the control of the assets being the security acquired by the defendant, and in part like Williams *v.* Leper, the assets begin *a fund between both the defendant and his fellow-creditors*. The case was, however, decided before either of those mentioned. The Chancellor remarks that "the modern determinations have made a distinction between a promise to pay the original debt, and on the foot of the original contract, and where it is on a new consideration;" but his only reference is to Read *v.* Nash, which was decided a few years earlier than the case before the court, and which is declared to be strong to the purpose that here was a new, distinct consideration, such as would take the defendant's promise out of the statute.[2] It is difficult to see how Read *v.* Nash applied. There the defendant promised to pay a certain sum and costs, in consideration that the plaintiff would not proceed to trial, and would withdraw his record, in an action against a third person for assault; and the express ground for the decision was that the third party, the defendant in the action for the assault, was not a debtor, that he did not appear to have been guilty of any default or miscarriage, and that as the cause was not tried, and he might have succeeded, he never was liable to the particular debt, damages, or costs. Clearly, therefore, the case affords no support to the decision in Tomlinson *v.* Gill, where the debt was certainly actually

[1] Tomlinson *v.* Gill, 1 Ambler 330.
[2] Read *v.* Nash, 1 Wils. 305.

existing, if that decision be taken as broadly as the reporter's statement indicates.

§ 212. Having now examined these several cases at length, let us see if any one general and comprehensive rule can be stated as justified by them, and not violating the spirit and policy of the Statute of Frauds. It is said by Mr. Roberts, in his excellent treatise on the construction of the statute, and as the broad result of these cases, that if the consideration of the new promise "spring out of any new transaction or move to the party promising upon some fresh and substantive ground of a personal concern to himself, the Statute of Frauds does not attach."[1] If taken after a critical examination of the cases themselves, this rule can hardly be said to assert any error; but the generality of the expressions used is such that it is not surprising to find it since extended to cases which bear not the least resemblance to those on which the rule professes to be based.[2] Again, Chief Justice Kent, in the case of Leonard *v.* Vredenburgh, took occasion to classify all guaranties under the Statute of Frauds with refer-

[1] Roberts on Frauds, 232.

[2] Myers *v.* Morse, 15 Johns. (N. Y.) 425; Meech *v.* Smith, 7 Wend. (N. Y.) 315; King *v.* Despard, 5 Wend. (N. Y.) 277; Creel *v.* Bell, 2 J. J. Marsh. (Ky.) 309; Taylor *v.* Drake, 4 Strobh. (S. C.) Law 431; Cooper *v.* Chambers, 4 Dev. (N. C.) 261; Tompkins *v.* Smith, 3 Stew. & P. (Ala.) 54; Ragland *v.* Wynn, 1 Sel. Cas. (Ala.) 270; Tighe *v.* Morrison, 41 Hun (N. Y.) 1; Kansas City Sewer Pipe Co. *v.* Smith, 36 Mo. App. 608; Winn *v.* Hilyer, 43 Mo. App. 139. Dibble *v.* De Mattos, 8 Wash. 542; It is uniformly held, however, that forbearance by the creditor is not enough to take the defendant's promise out of the statute. Hilton *v.* Dinsmore, 21 Me. 410, overruling Russell *v.* Babcock, 14 Me. 138; Harrington *v.* Rich, 6 Vt. 666; Caston *v.* Moss, 1 Bailey (S. C.) Law 14; Musick *v.* Musick, 7 Mo. 495; King *v.* Wilson, 2 Stra. 873; Thomas *v.* Delphy, 33 Md. 373; Lang *v.* Henry, 54 N. H. 57. But see Chapline *v.* Atkinson, 45 Ark. 67; Killough *v.* Payne, 52 Ark. 174. Nor the creditor's merely stating and swearing to the account. Brown *v.* Barnes, 6 Ala. 694. *Quære*, if forbearance, protracted (without agreement to that effect) so long as to involve the loss of the claim against the original debtor, as by limitation, etc., will take the case out of the statute. Templetons *v.* Bascom, 33 Vt. 132. Compare Brightman *v.* Hicks, 108 Mass. 246.

ence to the consideration, and his third class consists of cases where, as he says, "the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." [1] In the rule, as thus stated, for which Mr. Roberts is (not quite correctly) cited as authority, we perceive scarcely any recognition of the distinctive features of the cases themselves from which the doctrine was first extracted. But acting upon this rule, and too often pressing it against the clear application of the statute, some of the American courts have held that, wherever there was a new consideration, distinct from that which supported the original debtor's liability, and moving between the parties to the guaranty, the defendant's promise was saved from the operation of the statute.[2] However respectable the countenance it has received, this doctrine, if unqualified, must be repudiated as not based upon authority, and as, to a great degree, nullifying the statute. And it may also be fairly said that the better opinion of courts and of commentators is now leaning against it.[3] It

[1] Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29.

[2] See the cases cited p. 272, n. 2. Several decisions, whose language affirms this doctrine, have, in previous pages of this chapter, been referred to other principles by which they were clearly determinable. In a case in Vermont, Templetons *v.* Bascom, 33 Vt. 132, defendant, being sole heir to, and coming into possession of an estate which was solvent, stated to the plaintiffs, who held a claim against the estate, that it was a just claim, that they might give themselves no trouble about it, and that he would pay it, etc. Held, that the Statute of Frauds did not require the defendant's promise to be in writing. The opinion of the court proceeds upon the ground that the promise was founded upon a new and distinct consideration, moving from the plaintiffs directly to the defendant; to wit, their "waiver" of their claim against the estate. By the statement of facts, it would appear that they lost their claim against the estate by their forbearance to present it. If the defendant's promise was taken in substitution for the liability of the estate, then the decision was correct upon other and obvious grounds. If it was not so substituted, but the claim against the estate was merely forborne for a time, then the decision is clearly not law.

[3] Kingsley *v.* Balcome, 4 Barb. (N. Y.) 131, *per* Sill, J.; Noyes *v.* Humphreys, 11 Grattan (Va.) 636; Floyd *v.* Harrison, 4 Bibb (Ky.) 76;

has been said that so long as the original debtor remains liable, so long as the plaintiff has a double remedy, one against him and the other against the defendant, the latter's promise is necessarily affected by the statute. But if this is so, Castling *v.* Aubert and Williams *v.* Leper are wrong, for in neither of them was the claim of the creditor against his original debtor discharged. And, indeed, if in any case such claim should be held so discharged, there could be no question under the statute; the defendant's promise then being, as we have heretofore seen, original, and not collateral. The words of the statute itself, in their simple meaning, seem to give us the true rule. It contemplates a promise *to answer* for another's debt; a promise *for that purpose;* a mere guaranty; and it never was meant that a man should set it up as a pretext to escape from the performance of a valid verbal obligation of his own, because, in performing it, the discharge of a third party's debt was incidentally involved.[1]

Barker *v.* Bucklin, 2 Denio (N. Y.) 45; Chitty on Contracts, 450; Lampson *v.* Hobart, 28 Vt. 697; Cross *v.* Richardson, 30 Vt. 641; Hassinger *v.* Newman, 83 Ind. 124; Birchell *v.* Neaster, 36 Ohio St. 331; White *v.* Rintoul, 108 N. Y. 222.

[1] Nelson *v.* Boynton, 3 Met. (Mass.) 396, *per* Shaw, C. J. In another later case, decided in the Supreme Court of Massachusetts, we find the true principle applied upon the following facts. The plaintiff being the owner of a major part of the stock in an incorporated company, and holding a note of the company for $3,350, and being also indorsee on their notes for about $4,000, agreed with the defendant to transfer to him the shares and the note of $3,350; in consideration of which the defendant conveyed to him a certain farm, and verbally undertook to save him harmless on his indorsements. The plaintiff, having afterwards taken up the indorsed notes, brought his action against the defendant on his promise to save him harmless. It was contended that the promise was void by the statute. The court considered that, as a promise made *to the debtor*, the statute could, for that reason, have no application to it (*ante*, § 188), but held that, if it should be construed as a promise, the effect of which, if performed, would amount to a guaranty that the company as promisors should pay the notes and thus save the plaintiff from his liability thereon as indorser, still this would not, under the circumstances of the case, be within the statute. Chief Justice Shaw, delivering judgment, says: "Was he [the defendant] to take the plaintiff's

§ 213. Upon the principle just stated, the Court of Exchequer have recently settled the question, whether the guaranty of a factor selling on a *del credere* commission was within the statute, as a promise to answer for those to whom his sales were made. Parke, B., delivered the opinion of the court to the effect that it was not. "Doubtless," he said, "if they [the factors defendant] had *for a percentage* guaranteed the debt owing, or performance of the contract by the vendee, being *totally unconnected with the sale*, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given

large interest in the stock and property of the Iron Company, constituting the natural fund out of which these indorsed notes were to be paid, without taking it subject to the incumbrances? Paying the debts of the company, after the defendant had become a shareholder of more than half, would in effect, and to the extent of his interest in those shares, enure to his own direct benefit. We are therefore of opinion, that this was a new and original contract between these parties, originating in a new consideration moving from the plaintiff to the defendant, *in effect placing the funds in the hands of the defendant*, out of which these notes, in due course of business, would be expected to be paid." Alger *v.* Scoville, 1 Gray 397. These cases are approved in Jepherson *v.* Hunt, 2 Allen (Mass.) 417. See also Fitzgerald *v.* Dressler, 7 C. B. N. S. 374. In Kingsley *v.* Balcome, 4 Barb. (N. Y.) 138, Sill, J., says: "The true rule is that the new 'original consideration' spoken of must be such as to shift the actual indebtedness to the new promisor. So that as between him and the original debtor he must be bound to pay the debt as his own, the latter standing to him in the relation of surety." The Supreme Court of Indiana say the new consideration must be "of such a character that it would support a promise to the plaintiff for the payment of the same sum of money, without reference to any debt from another." Chandler *v.* Davidson, 6 Blackf. 367. Emerson *v.* Slater, 22 Howard 28. As to this rule for determining whether the statute applies, see *post*, § 214. See also Lookout Mt. R. R. *v.* Houston, 85 Tenn. 224.

to them; and though it may terminate in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given; and the case resembles in this respect those of Williams *v.* Leper, and Castling *v.* Aubert."[1] And in Wolff *v.* Koppel, in the Supreme Court of New York, Cowen, J. (whose opinion Baron Parke speaks of as a very able one, and adopts as expressing his own views upon the subject), takes the same ground, remarking that the contract of the factor in such a case has "an immediate respect to his own duty or obligation. The debt of another comes incidentally as a measure of damages."[2] The observation of Parke, B., that if the defendants in the case before him had merely, and without being connected with the sale, guaranteed the debt owing or performance of the contract by the third party *for a percentage*, doubtless their engagement would have required a writing, is especially noteworthy; for such a case would present the naked point of a new and independent consideration moving from the creditor to the guarantor, and thus the rule which has been referred to, that such a consideration of itself takes a guaranty out of the statute, is shown to be distinctly denied by this most respectable English authority.[3]

§ 214. The difficulty which some of the cases decided since the earlier editions of this treatise have shown to exist in applying admitted rules, will justify a re-examination of

[1] Coutnrier *v.* Hastie, 8 Exch. 56. See this case commented upon by Wood, V. C., in Wickham *v.* Wickham, 2 Kay & J. 478; Sherwood *v.* Stone, 14 N. Y. 267. See Sutton *v.* Grey, L. R. 1 Q. B. D. 1894, 285.

[2] Wolff *v.* Koppel, 5 Hill 460. See also Swan *v.* Nesmith, 7 Pick. (Mass.) 220; Bradley *v.* Richardson, 23 Vt. 720; Suman *v.* Inman, 6 Mo. App. 384; Guggenheim *v.* Rosenfeld, 9 Baxter (Tenn.) 553. These cases of *del credere* factors' guaranties may be regarded as analogous to cases of sales by defendant to plaintiff of a third party's obligation to the defendant, accompanied by his guaranty that the obligation shall be worth to the plaintiff what it is accepted as worth (*ante*, § 165). The factor undertakes that his sales purporting to be worth a certain amount shall be worth that amount to his principal.

[3] Evans *v.* Duncan, 1 Tyrw. 283; on the authority of Senior *v.* Butt, Hil. T. 1827, in the King's Bench.

those rules as they regard cases in which the original debtor remains liable. It is frequently said that, where the *leading object* of the defendant in agreeing to pay or answer for the third party's debt is *to benefit himself*, the statute does not apply.[1] It is certainly true that in those cases where the

[1] It must be confessed that this view has been recognized by the Supreme Court of the United States. In Emerson *v.* Slater, 22 How. 28, the plaintiff had been employed by a railroad company to build certain bridges on their line, and the company failing to make its monthly payments as agreed, the plaintiff refused to go on. The defendant was a large stockholder in the road, and had leased to the company railroad iron to the value of sixty-eight thousand dollars, and, as a security for payment, held an assignment of the proceeds of the road to that amount, with interest, which was to be paid in monthly instalments of five thousand dollars. Unless the bridges were completed there could be no proceeds, and the company could not pay for the iron. The defendant orally promised to pay the plaintiff if he would go on and complete the bridges; and, to secure him from any loss on such engagement, he took from the company securities consisting of real estate and the company's bonds secured by the mortgage on the road, to an amount deemed by the company and himself sufficient to indemnify. The company itself was insolvent. The court held, that the defendant's promise was not within the statute. They say: "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 damage 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." And so again in Davis *v.* Patrick, 141 U. S. 479, where the facts were not materially different, it was held that the Statute of Frauds did not apply. The court cite and quote from Emerson *v.* Slater, and add, "There is a marked difference between a promise which, without any interest in the subject matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which though operating upon the debt of a third party, is *also and mainly for the benefit of the promisor*. The case before us is in the latter category." (See also Elkins *v.* Timlin, 151 Pa. St. 491, and cases cited; Walther *v.* Merrell, 6 Mo. App. 370.) Some expressions used by Chief Justice Shaw in the opinion on Nelson *v.* Boynton, 3 Met. (Mass.) 396, are frequently quoted in support of decisions holding the statute to be inapplicable where the defendant's "leading object" was to obtain an advantage to himself. (See among others Patton *v.* Mills, 21 Kansas 163; Kansas City Co. *v.* Smith, 36 Mo. App. 608.) But the contract before the court in Nelson *v.* Boynton was held to be within the statute; and rightly so, as the lien which the plaintiff relinquished did not enure to the defendant's benefit.

promise of guaranty, although the original debt continues, is unaffected by the statute, the leading object of the defendant in making that promise will appear to be to benefit himself. But when we put it conversely, and attempt to set up the object of the defendant as a test of the application of the statute, we find that it does not practically answer that purpose. For what is a *leading* object as distinguished from a secondary one, in any sense in which a court can define or a jury ascertain it? And how can the object of making a promise be made the test of its legal obligation? We must come after all to the question, what state of facts implies, in law, the existence of such an object or purpose. Again, it is frequently said that *considerations* of a certain sort moving between the original creditor and the new promisor make the case one to which the statute does not apply; and this is sometimes said by courts which do not profess to recognize the notion which once prevailed, that "any new and independent consideration of benefit or harm moving between the newly contracting parties" takes the case out of the statute. But the application of the statute does not depend upon the question from whom the consideration moves, nor upon the question what sort of consideration it is; for the contract of guaranty, like every other contract, requires to be supported by a valid consideration, and one valid consideration, as such, is as good as another. "The question, indeed, is, What is *the promise?* Not, what the consideration for that promise is; for it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless it be an extinguishment of the liability of the original party."[1] So in a case in Pennsylvania,[2] the Supreme Court say that it can make no difference that the new consideration moves from the promisee to the promisor, and the danger which the statute is intended to guard against exists, "no matter whence the consideration of the contract proceeded or to whom it

[1] Williams's Saunders, 232; Birchell *v.* Neaster, 36 Ohio St. 331.

[2] Maule *v.* Bucknell, 50 Pa. St. 39.

passed." To the same effect is a very able judgment of the Supreme Court of Vermont,[1] not to speak of many other well-considered cases decided earlier, and which are referred to in the text.

§ 214 *a*. It is not the motive of the promisor nor the nature of the consideration for his promise, but the substance of the transaction between him and the promisee, that must be regarded in determining whether the promise is within the statute. If the defendant come under an obligation to pay the amount of the debt, independently of any contract of guaranty, his promise to pay it, although expressed as a guaranty or an agreement to answer for the debt of another, is binding without writing.[2] The substance of the transaction

[1] Fullam *v.* Adams, 37 Vt. 391.

[2] Elson *v.* Spraker, 100 Ind. 374; Board of Commissioners *v.* Cincinnati Co., 128 Ind. 240; Emerson *v.* Slater, 22 How. (U. S.) 28; Preston *v.* Young, 46 Mich. 103; Davis *v.* Patrick, 141 U. S. 479.

To state it more exactly, if the *circumstances of the transaction*, which include the defendant's undertaking to pay the third party's debt, are such as to raise *an independent legal obligation* on the part of the defendant to pay that amount to the plaintiff, the fact of debt by the third party being material to the transaction only as ascertaining the amount to be so paid by the defendant, the statute does not apply. In a late case in the New York Court of Appeals (White *v.* Rentoul, 108 N. Y. 222) there is a valuable discussion of New York cases since Leonard *v.* Vredenburgh. Brown *v.* Webber, 38 N. Y. 187; Mallory *v.* Gillett, 21 N. Y. 412; Ackley *v.* Parmenter, 98 N. Y. 425. The opinion, which was unanimous, declares that the rule stated in Leonard *v.* Vredenburgh, that any new and original consideration moving between the parties to the contract of guaranty took it out of the statute, was "dangerously broad and capable of grave misapprehension;" that succeeding cases had imposed upon it the necessary limitations; and that the result had been the establishment of the rule (which the court adopts and applies to the case before them) that "when the primary debt subsists and was antecedently contracted, the promise to pay it is *original* when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby *comes under an independent duty of payment irrespective of the liability of the principal debtor*." This is sound doctrine, and its recognition by such high authority should tend strongly to settle the law. On the other hand, the decision of the Supreme Court of the United States in Davis *v.* Patrick, 141 U. S. 479,

is undertaking to pay his own debt in a particular way. But where the original party remains liable, and there is no liability on the part of the guarantor or his property except such as arises from his express promise, the statute applies.[1] It is not within the ability of the author to reconcile all the decisions under this most intricate head of the subject; but it is believed that the principle above stated (which is but repeated from the previous editions of this work) will, when carefully applied, be found upon the whole satisfactory.

§ 214 *b*. The simplest illustration of it is in that class of cases where the defendant owes a third party, and the third party owes the plaintiff, and by agreement between the three parties the defendant is to pay the amount of his debt directly to the plaintiff, although the third party remains liable to the plaintiff; the promise of the defendant, being really a promise

seems to be irreconcilable with this doctrine. The facts were these. Davis, being a large creditor of a silver mining company, and having given an order for silver which the company had been paid for by Davis, but had not delivered to him, the mine, by agreement between the company and Davis, was to be put under the management of Patrick by a power revocable by Davis only; in pursuance of this power, and upon the promise of Davis to pay him for doing so, Patrick mined and transported and delivered to Davis the silver which had been ordered by him from the company. Davis refused to pay, and set up the Statute of Frauds, stating that his promise to pay Patrick was collateral to the obligation of the mining company to pay him. The evidence tended strongly to show that Patrick gave credit solely to Davis: but still the company was not released from its obligation. The court held the defendant's agreement to be not within the statute, because "the promisor had a personal, immediate, and pecuniary interest in the transaction," and was therefore a party "to be benefited by the performance of the promise"; that "the promise, though operating upon the debt of the third party, was also and mainly for the benefit of the promisor." The transaction between Davis and Patrick seems to have been simply that Patrick agreed to do work for Davis, and Davis, in consideration of that work, agreed to pay him for it and also for past work, the company being also liable to the same extent. The court cites no cases in support of its decision except Emerson *v*. Slater, 22 How. 43, which has been already considered, *ante*, § 212, *note*, and § 214. Winn *v*. Hilyer, 43 Mo. App. 139, is similar to Davis *v*. Patrick, and decided in the same way.

[1] Williams's Saunders, 211, *note*.

to pay his own debt, is not required to be in writing.[1] And the cases show that the rule holds, whether the debt of the defendant to the third party was an old debt, or was incurred at the same time, and as part of the same transaction, with his agreement to pay to the plaintiff. The mere fact that the defendant has received property from the third party does not take his promise out of the statute; it must appear that he incurred a debt thereby; and not only so, but there must be an agreement that the amount of that debt shall be paid to the plaintiff; — a purchase or acquisition by defendants from plaintiff by reason of the promise of some property or benefit to themselves, such as would show the promise to be a new promise by defendants to pay a debt of their own fairly contracted in such purchase or acquisition.[2]

§ 214 *c*. The case of Furbish *v.* Goodnow, in Massachusetts, demands examination under this head. According to the report, one Redding was indebted to the plaintiff on a promissory note, and by agreement between the plaintiff and Redding and the defendants, Redding conveyed certain real estate to the defendant, and, as part of the consideration therefor, the defendant promised to pay the plaintiff the amount of the note. If the substance of the transaction was, as it appears to have been, that the defendant became indebted to Redding in the amount which Redding owed to the plaintiff, and, by agreement between the three, the defendant was to pay that amount directly to the plaintiff, the Statute of Frauds by an unbroken course of decisions (unless Curtis *v.* Brown [3] be an exception) fails to apply. It was held, however, that it did apply. There is no allusion in the opinion to the question whether the defendant's prom-

[1] *Ante*, §§ 165–172, and cases there cited. Also M'Laren *v.* Hutchinson, 22 Cal. 187; Conner *v.* Williams, 2 Rob. (N. Y.) 46; Clymer *v.* De Young, 54 Pa. St. 118; Ford *v.* Finney, 35 Ga. 258; Sanders *v.* Clason, 13 Minn. 379; Hoile *v.* Bailey, 58 Wisc. 434; Martin *v.* Davis, 80 Wisc. 379; Lowe *v.* Hamilton, 132 Ind. 406.

[2] *Ante*, §§ 166, 170, § 216, n. 1. Richardson *v.* Robbins, 129 Mass. 107.

[3] Curtis *v.* Brown, 5 Cushing, 488.

ise was not in effect to pay his own debt. The court say, in the first place, that "if the principal and immediate object of the transaction is to benefit the promisor, not to secure the debt of another person, the promise is considered not as collateral to the debt of another, but as creating an original debt from the promisor, which is not within the statute, although one effect of its payment may be to discharge the debt of another."[1] We have already (*ante*, § 214) remarked upon the inadequacy of this rule for determining whether the statute applies. But the court say farther: "When the original debtor remains liable, yet if the creditor, in consideration of the new promise, releases some interest or advantage relating to or affecting the original debt, and enuring to the benefit of the new promisor, his promise is considered as a promise to answer for his own debt, and the case is not within the statute. But if no [such] consideration moves from the creditor to the new promisor [the defendant], and the original debtor still remains liable for the debt, the fact that the promisee [the plaintiff] gives up something to that debtor, or that a transfer of property is made or other consideration moves from that debtor to the new promisor [the defendant] to induce the latter to make the new promise, does not make this promise the less a promise to answer for the debt of another; but, on the contrary, the fact that the only new consideration either enures to the benefit of that other person [the original debtor], or is paid by him to the new promisor [the defendant], shows that the object of the new promise is to answer for his debt." It is certainly true that if the creditor, in consideration of the new promise, release some interest or advantage relating to or affecting the original debt and enuring to the benefit of the new promisor, the statute does not apply; and that, notwithstanding such release, if it does not enure to his benefit the statute does apply. But why is this? It is because where the release enures to his benefit the substance of the transaction is a purchase by him of the interest

[1] Furbish *v.* Goodnow, 98 Mass. 297.

or advantage so released, at the price of the amount of the original debt; so that he becomes, as such purchaser, a debtor himself to the plaintiff to the same amount; and his promise in effect is to pay his own debt, although expressed as an agreement to pay that of the original debtor. On the other hand, where the interest or security released does not enure to the benefit of the new promisor, he incurs no debt. The release is a sufficient consideration for his promise to pay the debt of the original debtor, but that is not enough to prevent the application of the statute. Now, if this explanation of these cases is the right one, the next question is, Does the same rule apply to a defendant's promise to pay his own debt, whether it be to pay it to his own creditor or to the nominee of that creditor? In the cases of a release of an interest or security relating to the debt, which release enures to the benefit of the new promisor, it is his own creditor that he agrees to pay. In the case of Furbish *v.* Goodnow it was the nominee of his own creditor that the defendant agreed to pay. What is the difference? If there be none, it is difficult to see on what ground the decision in Furbish *v.* Goodnow can rest.[1]

§ 214 *d.* In the case of Curtis *v.* Brown,[2] one Coffin was under contract with the defendants to build for them certain houses, under which the work proceeded for about three months, when Coffin released the defendants from the contract, and assigned to them the materials on hand, in consideration of which the defendants agreed to pay all the bills for labor and materials then outstanding, and among them the bill for which the plaintiff sued. The court held that he could not recover, the promise of the defendants not being in writing; remarking, among other things, that "the plaintiff did not release Coffin, or relinquish any lien or benefit; and although there was *a good consideration in law* for the defend-

[1] Compare Urquhart *v.* Brayton, 6 Reporter 601; and see *ante*, §§ 166 *b*, 169, 171; Wright *v.* Smith, 81 Va. 777.

[2] Curtis *v.* Brown, 5 Cush. (Mass.) 488.

ant's promise, it was a consideration moving from Coffin, and not from the plaintiff." The question was not raised whether the transaction was such as to create against the defendants an independent obligation to pay Coffin money to the same amount as the debts which they undertook to pay; and it would seem from the report of the facts that it was not. The case was put upon the question of the nature of the consideration and the party from whom it moved. If it does necessarily depend upon that question, it cannot be denied that it supports the decision in Furbish *v.* Goodnow; and is subject also to the same difficulties.[1]

§ 214 *e.* We have spoken thus far of the first class of cases to which the rule stated in § 214 *a* applied; namely, where the defendant owes a third party and the third party owes the plaintiff, and, by agreement between the three parties, the defendant is to pay the amount of his debt directly to the plaintiff. The next class of cases to which the rule applies is where the defendant contracts a debt directly with the plaintiff, which he agrees to pay by paying a third party's debt to the plaintiff. In most cases under the statute, this debt arises from the plaintiff giving up directly or indirectly

[1] In the case of Pike *v.* Brown, 7 Cush. (Mass.) 136, the grantee in a deed of land which was subject to a mortgage verbally agreed to pay the interest on the mortgage debt as it became due. He failed to do so, and the grantor, having paid it himself, was held entitled to recover the amount from the grantee in assumpsit. The court said: "The substance of the contract with the plaintiff was on a consideration moving from him, to pay his debt, for his benefit, and to exonerate him, and was no less a direct promise to the plaintiff, because, in the performance of it, it would satisfy a debt due to another." See this case cited with approval in Clapp *v.* Lawton, 31 Conn. 95. But according to Furbish *v.* Goodnow, if the grantee's promise had been communicated to the mortgage creditor, and *he* had sued the grantee for the amount of the interest, he could not have recovered. Again it is settled in Massachusetts that a verbal promise to accept a bill of exchange is binding (Grant *v.* Shaw, 16 Mass. 341). But this is a promise to pay the debt of a third party to the drawer of the draft, and is only valid without writing because the defendant, being indebted to the third party, agrees to pay his own debt by paying that third party's debt to the plaintiff. See *ante*, § 172.

to the defendant some lien or security or other advantage for securing or recovering the debt owing to the plaintiff by the third party.[1] Those cases in which the giving up of such lien or security or advantage by the plaintiff, though not to the defendant directly or indirectly, has been held sufficient to take the defendant's promise out of the statute, are opposed to the clear current of later and better considered cases, and must be rejected as not law. Where the lien or security or other advantage is given up directly or indirectly to the defendant, it is really a purchase of it by him. But it is not true as a general proposition that every transfer of value from the plaintiff to the defendant prevents the statute from applying to the defendant's promise, in consideration of such transfer of value, to pay to the plaintiff the amount owing to him by a third party. The mere passing of a new and independent consideration between the plaintiff and the defendant does not take the case out of the operation of the statute; and so far as some of the decisions depend upon the contrary, they cannot be regarded as law.[2] Every contract of guaranty requires a consideration moving from the party to whom the guaranty is given; there can be no sensible distinction made between "new and independent" considerations and any other considerations; and the general proposition that "a new and independent consideration moving between the parties to the contract of guaranty" takes it out of the statute, simply nullifies the statute. The distinction is between a merely valid consideration for the defendant's promise of guaranty, and that transfer of *value* which creates an original obligation on the part of the defendant, the measure of which is, by the agreement of the parties, the defendant's payment of the third party's debt. To a third class belong the cases in which the property of the third

[1] *Ante*, §§ 200 *a*–205, and § 214 *c*; Small *v.* Schaefer, 24 Md. 143.

[2] *Ante*, § 212; Fullam *v.* Adams, 37 Vt. 391; Maule *v.* Bucknell, 50 Pa. St. 39; Kelsey *v.* Hibbs, 13 Ohio St. 340; Dillaby *v.* Wilcox, 60 Conn. 71; Warner *v.* Willoughby, 60 Conn. 468.

party is put into the hands of the defendant for the purpose of paying, out of the proceeds thereof, the third party's debt to the plaintiff. These are cases of obligation by the defendant as a trustee to make such payment, and it is that personal obligation which the plaintiff seeks to enforce, and his right of action is not affected by the statute.[1]

[1] *Ante*, § 206; Stoudt *v.* Hine, 45 Pa. St. 30; Woodward *v.* Wilcox, 27 Ind. 207. In one of the most intelligent and instructive opinions that have been delivered upon this subject of guaranties under the Statute of Frauds (Fullam *v.* Adams, 37 Vt. 397), Chief Justice Poland treats the cases of promises to pay the debt of another who still remains liable, as all reducible to the one principle that the promisor is liable because by the arrangement he becomes the holder of a fund or security which is appropriated to the payment of the debt, and clothed with a duty or trust in respect thereto which the law will enforce in favor of the party to whom the promise is made. He says, "It has been often decided, that where the purchaser of property promises to pay the price to a creditor of the vendor, such promise is binding, though not in writing, and the vendor still remains liable for the debt. . . . And where a debtor transfers funds or property to another for the purpose of paying his debt, and the person thus holding the debtor's funds or property promises the creditor to pay his debt, such promise is held good, though not in writing. . . . We apprehend the true principle why the promise to the creditor is valid without writing, is the same in both these classes of cases. In both, the party making the promise, *holds the funds of the debtor for the purpose of paying his debt*, and as between him and the debtor, it is his duty to pay the debt, so that when he promises the creditor to pay it, *in substance he promises to pay his own debt, and not that of another;* and though the debtor still remains liable for the debt, his real relation is rather that of a surety for the party whose duty it is, and who has promised to pay his debt, than of a principal for whom the other has become surety or guarantor. He holds a fund in trust, under a duty to pay it to the creditor, and he makes an express promise to perform it. . . . The cases which decide that where a creditor holds a security for his debt, and surrenders it to a third person, for his own benefit, upon his promise to be answerable for the debt, stand really upon the same substantial principle."

CHAPTER XI.

AGREEMENTS IN CONSIDERATION OF MARRIAGE.

§ 215. This section of the statute has been most frequently applied to what are commonly known as marriage settlements; and it is settled that any promise, made since the enactment of the statute, to give a portion to or settle property upon, either of the parties to an intended marriage, as an inducement to and consideration for entering into it, is incapable of supporting an action at law for damages for non-performance, or a suit in equity for specific execution, unless there be a memorandum thereof in writing signed by the party to be charged upon the promise.[1]

§ 215 *a*. It appears to have been once considered that the statute applied only to these cases of marriage settlements properly so called,[2] but it is now settled, at least by American authority, that it is not so limited, but extends to any agreement to undertake any duty or office in consideration of another's contracting a marriage, whether with the promisor or with a third person.[3] The sole exception found to this

[1] Harrison *v.* Cage, 1 Ld. Raym. 386; Salkeld 24; 5 Mod. 411; Cork *v.* Baker, Stra. 34; Clark *v.* Pendleton, 20 Conn. 495; Dunn *v.* Tharp, 4 Ired. (N. C.) Eq. 7; Wilbur *v.* Johnson, 58 Mo. 600. In South Carolina, where the English statute has been literally re-enacted, it has been said in chancery (Hatcher *v.* Robertson, 4 Strob. Eq. 179) that an antenuptial agreement founded on the consideration of marriage, though resting on parol merely, would be enforced, provided it was satisfactorily established by proof; but the case did not require the remark, and would seem to have been incorrectly reported.

[2] Harrison *v.* Cage, 1 Ld. Raym. 386.

[3] Brenner *v* Brenner, 48 Ind. 262; Henry *v.* Henry, 27 Ohio St. 121; *In re* Willoughby, 11 Paige (N. Y.) Ch. 257; Dygert *v.* Remerschnider, 32 N. Y. 629; Brown *v.* Conger, 8 Hun (N. Y.) 625; and see Jorden *v.*

general rule is that mutual promises to marry are not covered by the statute.[1]

§ 215 *b*. The distinction should be carefully noted between agreements in *consideration* of marriage, and agreements, which are merely in *expectation* or *contemplation* of marriage. In order that the contract shall be within the statute, marriage or the promise of marriage must have been its consideration or inducement. In a case where an intestate, about seven years before his marriage, borrowed money from the person who afterward became his wife, and in an interview with her shortly before their marriage, promised her that if she would not enforce payment of the notes, they should remain good and collectible against his estate, and she retained the notes during the coverture and after his death, it was held that, although the promise of the husband was made in contemplation of marriage, it was made in consideration of forbearance to collect the notes, and that after his death a claim for their amount by his wife was properly allowed against his estate, and that his agreement was not within the Statute of Frauds, and could be proved without writing.[2]

§ 216. The marriage is the consideration, a legal and suffi-

Money 5 H. L., C. 207, *per* Cranworth, L. C.; Adams *v.* Adams, 17 Oregon 247; Chase *v.* Fitz, 132 Mass. 359. In Mallory *v.* Mallory, 92 Ky. 316, an antenuptial contract stipulating that neither party should have any interest in the property of the other by reason of the marriage, was covered by the Statute of Frauds. The court say, "An antenuptial contract is one by which the parties agree to anticipate the general law controlling the marital relations, and make a law in that regard to suit themselves, the consideration of the contract being the agreement to marry each other." And see White *v.* Bigelow, 154 Mass. 593.

[1] It was held otherwise shortly after the enactment of the statute. Philpot *v.* Walcot, Skinner 24; Freeman 541; 3 Lev. 65. But the rule was reversed in the later English cases, cited in the note to the preceding section. See also Short *v.* Stotts, 58 Ind. 29; Ullman *v.* Meyer, 10 Fed. Rep. 241. That *all* promises in consideration of marriage are required to be in writing, if by their terms not to be performed within one year, see § 272, *post*.

[2] Riley *v.* Riley, 25 Conn. 154. And see Child *v.* Pearl, 43 Vt. 224; Rainbolt *v.* East, 56 Ind. 538.

cient consideration, for the defendant's promise, and one which, it is said, courts regard with especial favor, as of a most meritorious character.[1] In a case in Maryland, where it was held that an agreement made by a father with his daughter, in consideration of her marriage, by way of advancement, and as a marriage endowment, and followed by her marriage as then contemplated, could not be revoked by the father, Martin, J., delivering the judgment of the Court of Appeals, said that the daughter was regarded as a purchaser, as much so as if she had paid for the property an adequate pecuniary consideration, and that the consummation of the marriage was to be considered as the payment of the purchase-money.[2]

§ 216 *a*. The marriage is also an *acceptance* of the promise. In a case in the Irish Chancery, a promise was made to give a marriage portion to a young lady, and upon its being communicated by letter from the promisor's agent to the intended husband, he expressed his desire to have the promisor's bond to the same effect, but it was not given, and nothing further took place until the celebration of the marriage. It was urged that the promise had not been accepted, but Lord Chancellor Sugden said that "no acceptance could be more solemn than the fact of marrying the lady."[3] Where marriage follows upon the agreement, a distinct and positive dissent from the proposition of settlement would be required to be shown, in order to avert a decree of specific execution according to its terms.[4]

§ 217. The marriage must, however, have been celebrated upon the strength of the promise as any other consideration must be connected with the engagement it is to support. In

[1] See the remark of Lord Chancellor Sugden, in Greene *v.* Cramer, 2 Con. & L. 54; s. c. *nom* Saunders *v.* Cramer, 3 Dru & W. 87; also Dugan *v.* Gittings, 3 Gill (Md.) 138.

[2] Dugan *v.* Gittings, 3 Gill 138. But see Brown *v.* Conger, 8 Hun (N. Y.) 625.

[3] Greene *v.* Cramer, 2 Con. & L. 54.

[4] Luders *v.* Anstey, 4 Ves. 501.

Ayliffe *v.* Tracy, a father had written a letter to his daughter, agreeing to give her £3,000 portion, but this letter was not shown to the plaintiff, who became her husband, and afterwards brought his bill to have the promise enforced. Lord Chancellor Macclesfield dismissed the bill, remarking that there was here no ingredient of equity, and that the husband could not be supposed to have married in confidence of the letter.[1] In point of fact the letter, as another report of the same case[2] shows, referred to a previous verbal promise as having been made to the husband; so that it would seem the case did not necessarily present the point which was determined, and that the decree should rather have been the other way, the verbal promise to the husband being ratified and perfected by the subsequent written acknowledgment to the daughter. But there can hardly be a doubt of the accuracy of the principle indicated by his Lordship, as applied in a court of equity, and it is difficult to see why it should not equally prevail in an action at law.

§ 218. It is said by an eminent writer, that a promise by letter (or in writing generally) will be specifically enforced, although the person making it afterward dissent from the marriage and declare he will give the parties nothing.[3] Such a rule broadly stated, seems to be not altogether reasonable, there being nothing in the language of the statute, nor in the nature of such contracts themselves, to prevent them from being revocable at any time before they have been acted on. In the case cited by the writer in question, Wanchford *v.* Fotherley, the treaty for the settlement, upon the basis of a letter of the lady's father, depended long, and meanwhile the young couple married. The father, before they went to church, revoked his promise, and said he would give them nothing; but this the Lord Keeper Somers said he looked upon as nothing "after the young people's affections were

[1] Ayliffe *v.* Tracy, 2 P. Wms. 65.

[2] In 9 Mod. 3. See Atherley on Marriage Settlements, 82.

[3] Atherley, Marr. Sett. 84.

engaged;" regarding such a tardy revocation, apparently, in the light of a fraud upon those who, reposing upon the promise, had permitted their relations to each other to suffer an entire and irrevocable change.[1]

§ 219. It is hardly necessary, nor, if it were necessary, would it be altogether practicable, to show with much precision what will in point of substance be deemed to amount to contracts to bestow a portion in consideration of marriage; the ordinary rules of interpretation of contracts applying to them as to any others. The promise must of course be absolute in its terms, in order to be binding; even though it be reduced to writing. This is illustrated in the case of Randall *v.* Morgan, where the lady's father, in a letter to the intended husband, says: "The addition of £1,000 3 per cent stock is not sufficient to induce me to enter into a deed of settlement. Whether Mary [the daughter] remains single or marries, I shall allow her the interest of £2,000 at four per-cent; if the latter, *I may bind myself* to do it, and to pay the principal at her decease to her and her heirs." Sir William Grant, Master of the Rolls, said there were passages in the letter which, if they were detached from it, and could be considered by themselves, would amount to an agreement; but that there was no agreement whatever upon the whole letter taken together; that it was clear that the father meant to reserve it entirely in his own power to bind himself or not after the marriage had taken place, and that the expressions

[1] Wanchford *v.* Fotherley, Freem. Ch. 201. The Reporter adds in a note that this decree was affirmed on appeal in the House of Lords. In D'Aguilar *v.* Drinkwater, 2 Ves. & B. 234, the question was whether a marriage had taken place with consent of trustees. Sir William Grant's language illustrates the position of the court in the case just cited. He says that after a mutual attachment had been suffered to grow up under the sanction of the trustees, it would be somewhat late to state terms and conditions on which a marriage between the parties should take place, as they must either have done violence to their affections, or have submitted to any terms, however arbitrary and unreasonable, that the trustees might choose to dictate.

used showed clearly that he did not intend to bind himself *then.*[1]

§ 220. It seems to have been considered in an early case, that *satisfaction* with the proposed marriage on the part of the person promising to give the portion, was in some degree essential to such contracts. An uncle, by a letter to his niece, promised her £1,000 as a portion, but dissuaded her from the match; and, though he was afterwards present at the ceremony and gave her away, the court refused to decree the payment, but left the husband to his action at law.[2] The soundness of such a doctrine is doubted by Mr. Atherley,[3] and perhaps, as the report does not show the grounds of the decision, the case may be regarded as not determining it. Where the promise is made upon *condition* that the particular marriage in question should not take place, very clearly no relief either at law or in equity could be had upon it on consideration of the marriage. In Montgomery *v.* Reilly, finally decided in the House of Lords, there was a letter by the father, upon which the husband and wife relied, and in which he says, "I can never be reconciled to the marriage," etc.; then he proceeds to speak of the arrangement between himself and the family, stating what he intended to give to each of his children, and says: "This, I think, is an abstract of the agreement, and when put into the form of a deed, if assented to by them, I am ready to execute at any time," but adds, "I will not entangle myself with Mr. J. R." [the husband]. "If this match goes on, I will neither meddle nor make with [make nor meddle with] it or their settlements." Lord Eldon advised their Lordships that there would be a difficulty not easy to be overcome in enforcing the alleged settlement, if the question had to be determined alone upon the letter, considering what the law of the land required to

[1] Randall *v.* Morgan, 12 Ves. 67.

[2] Douglas *v.* Vincent, 2 Vern. 202. But compare Wanchford *v.* Fotherley, Freem. Ch. 201.

[3] Marr. Sett. 84.

give effect to a marriage agreement. But in view of the other circumstances in the case, he advised them that the agreement was one which in equity ought to be enforced.[1]

§ 221. In a case in Virginia, the question arose as to the *time* for performance of a contract for a marriage settlement, which was in that respect indefinite. The promise was, that if the plaintiff married the defendant's daughter, the defendant would endeavor to do her equal justice with the rest of his daughters, as fast as it was in his power with convenience; and it was held that he had not his lifetime to perform the promise in, but, in a reasonable time after the marriage (taking into consideration his property and other circumstances), was bound to make an advancement to the plaintiff and his wife equal to the largest made to any of his daughters.[2]

§ 222. In what form the written contract which shall satisfy the statute is to be, as, for instance, whether a letter or other informal writing is sufficient, and when such writing is to be deemed properly executed, as also the general rule as to what should be contained in the writing, and to what extent parol evidence may be admitted to explain or assist it, are matters which can probably be discussed to more advantage when we come to the consideration of the memorandum in writing which the fourth section of the statute requires to be produced in all cases of contracts falling within its provisions.[3] And in like manner, and for the sake of obtaining a more systematic view of the subject, it is proposed to defer to the same time all questions as to the effect which any acts of part-performance, or other equitable considerations, may have with courts of equity, in inducing them to direct specific execution of a verbal contract made upon consideration of marriage, notwithstanding the absence of the writing required by the statute.[4] There will remain, therefore, only the question

[1] Montgomery *v.* Reilly, 1 Bligh, 364.
[2] Chichester *v.* Vass, 1 Munf. 98.
[3] See *post*, Chapters XVII. and XVIII.
[4] See *post*, Chapter XIX.

how far a writing or settlement made after marriage, upon the basis of an antenuptial verbal promise, will be binding and valid; and the discussion of it will conclude this chapter.

§ 223. The case of Dundas *v.* Dutens is commonly cited as having determined that a postnuptial settlement, reciting the antenuptial verbal contract, was good against intervening creditors. Lord Thurlow there strongly expressed his opinion that it was, and dismissed the creditors' bill to set such a settlement aside. It also appears, however, that he regarded the suit as part of a combination between the husband, the creditors, and the solicitor, to defraud the children: a circumstance which certainly takes from the weight of the case as a decision upon the legal question of the validity of the settlement.[1] Lord Thurlow's opinion was referred to by Lord Ellenborough with apparent approbation, in the subsequent case of Shaw *v.* Jakeman,[2] but he did not find it necessary to apply it decisively. Afterwards in Randall *v.* Morgan, Sir William Grant, M. R., also referred to it, but as a *dictum* only, and said that he was not aware that the point had ever been decided; and at the same time he expressed a strong doubt whether a writing after marriage would set up an antenuptial verbal promise, even as between parties; but it was not necessary to decide, nor did he decide, either question.[3] Still later, in the case of Battersbee *v.* Farrington, Sir Thomas Plumer, M. R., remarked that it would be difficult to maintain that a recital in a settlement after marriage was evidence, as against creditors, of articles made before marriage. "Such a doctrine," he said, "would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties."[4] But even here the point was claims not directly raised, as there were in fact no intervening of creditors in the case, and no decision was made upon

[1] Dundas *v.* Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, Ch. 235.
[2] Shaw *v.* Jakeman, 4 East 201.
[3] Randall *v.* Morgan, 12 Ves. 67.
[4] Battersbee *v.* Farrington, 1 Swanst. 113.

it. The tendency, however, of the English Courts appears, from the course of these cases, to be against upholding the validity of a settlement after marriage, although it recite an antenuptial verbal agreement in consideration of marriage, when intermediate creditors are to be cut off by it.[1] In our own country there is less uncertainty upon the point. Chancellor Kent, in the case of Reade *v.* Livingston, reviews all the authorities which favor or appear to favor the validity of such a settlement, and doubts much whether it can be upheld by the mere force of a recital of the antenuptial verbal contract, and he inclines to think that the weight of authority, as well as the reason and policy of the case, is against it. This opinion has been much respected in our courts, and subsequent American decisions in various States have established the doctrine, that as against creditors, such a settlement has no force.[2]

§ 224. The principle upon which this doctrine is sustained

[1] The question may now be considered definitely settled by the case of Warden *v.* Jones, 2 De G. & J. 76 (affirming the decision of Sir John Romilly, M. R., reported in 23 Beavan 487), where Lord Cranworth said that the settlement in the case, even if it had contained a statement that it was made in pursuance of a previous parol antenuptial agreement, would be void against creditors. See also Spicer *v.* Spicer, 24 Beav. 367, and the early cases of Lavender *v.* Blakstone, 2 Lev. 147, and Sir Ralph Bovy's case, 1 Vent. 193. Both Mr. Atherley (Marr. Sett. 149) and Judge Story (Eq. Jur. § 374) express their assent to the doctrine that such a settlement is invalid.

[2] Reade *v.* Livingston, 3 Johns. (N. Y.) Ch. 481; Winn *v.* Albert, 2 Md. Ch. Dec. 169, affirmed on appeal, 5 Md. 66; Izard *v.* Izard, Bailey (S. C.) Eq. 228; Andrews *v.* Jones, 10 Ala. 400; Blow *v.* Maynard, and Lawrence *v.* Blow, 2 Leigh (Va.) 29; Smith *v.* Greer, 3 Humph. (Tenn.) 118; Wood *v.* Savage, 2 Doug. (Mich.) 316; Davidson *v.* Graves, Riley (S. C.) Eq. 219; Borst *v.* Corey, 16 Barb. (N. Y.) 136; Story Eq. Jur. ed. 1861, § 374. The Court of Chancery in New Jersey, however, have said that where an antenuptial settlement was fairly shown, they would be inclined to give validity to the settlement in pursuance of it, even against creditors; but they did not consider a recital in a postnuptial deed of settlement, nor declarations of a husband made during coverture and shortly before the conveyance by the wife and himself to his son, as satisfactory proof. Satterthwaite *v.* Emley, 3 Green, Ch. 489, *per* Haines, C.; Carter *v.* Worthington, 82 Ala. 334.

requires to be carefully noticed. In Randall *v.* Morgan, as has been seen, it was intimated that, even as between parties, a writing made subsequently to the marriage would be of no effect to set up an antenuptial verbal promise of a settlement; and the reason given is, that otherwise the construction of the fourth section of the statute would be just the same as the seventh, which requires only, in the case of a trust of lands, that it be manifested or proved by writing; that upon that clause, it is not necessary that a trust be constituted by writing, but that it is sufficient to show by written evidence the existence of the trust.[1] The weight of authority, however, seems decidedly to establish that a settlement or other writing made after marriage and recognizing an antenuptial verbal contract, is binding upon the parties.[2] Nor does it appear that any violence is thereby done to the spirit of the fourth section. The memorandum required by that section need not be contemporaneous with the making of the contract; it is only necessary that the evidence of the contract be put in that form, before any action can be maintained upon it.[3] Then, it becomes a binding agreement; and it seems to be no reason for holding otherwise in cases of marriage contracts, that the marriage has intervened; for that is, so to speak, but the payment of the consideration. No relief is sought or claim founded upon the contract, until after it is perfected by being put in writing. But when the rights of creditors accruing in the meantime are concerned, the case is different. The writing made after marriage, or the recital of the antenuptial contract in the postnuptial settlement, can have no relation back to the verbal contract so as to make it effective as of that date, if the rights of third parties have meantime intervened;[4] and consequently

[1] Randall *v.* Morgan, 12 Ves. 67.

[2] Montacute *v.* Maxwell, 1 P. Wms. 618; Stra. 236; Hammersly *v.* De Biel, 12 Clark & F. 45; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144.

[3] See *post*, § 348.

[4] See *supra*, § 233.

the settlement upon the basis of that verbal contract must be regarded as purely voluntary, and cannot affect pre-existing rights against the property conveyed.[1]

§ 224 *a*. In the case of Cooper *v.* Wormald, one S. C. by her father's will had a life estate in the real and personal estate left by her father, held by trustees, with a remainder to his son, the plaintiff. S. C., being about to marry the defendant, agreed by parol with him to transfer a certain sum, standing in her own name, in the bank, to the same trustees in trust for herself for life, and in default of appointment, for the defendant for life, with remainder to her children. The deed of trust was, by mistake, not executed till after the marriage, though the transfer of the property, which was in the shape of securities, was made before. The bill was brought, after S. C.'s death, against her husband to have him declared trustee of the property in favor of the plaintiff, executor of the father. It alleged that the money was part of the testator's estate, and subject to the trusts of the will. The defendant insisted that the settlement, being made in good faith and for value, should prevail, and this was the view taken by Romilly, M. R., who held that although the trustees might be guilty of and liable for a breach of trust, yet that in respect of the money itself, there were other persons who had become entitled for valuable consideration, and whose rights were not to be set aside.[2] He took pains, however, to point out that his decision was not at all intended to question the rule just stated and discussed.

[1] A very able discussion of this point will be found in the opinion of the Maryland Court of Appeals, in Albert *v.* Winn, 5 Md. 66.

[2] Cooper *v.* Wormald, 27 Beav. 266.

CHAPTER XII.

CONTRACTS FOR LAND.

§ 225. Of the various topics embraced by the provisions of the Statute of Frauds, nothing seems to have attracted such anxious attention on the part of its framers as the whole class of transactions affecting the title to real estate. The expanded phraseology of the fourth section in this respect, although it may not indeed appreciably enlarge the scope of the section, evinces this spirit very clearly; specifying, as it does, those lighter shades of interest which may be said merely to *concern* land. But this general drift and policy of the statute may be especially apprehended by comparing together the several provisions bearing on this kind of property. We have already had occasion to examine those sections in which the formality of a writing is exacted in all cases of the creation or transfer of a legal title to land, and written evidence of all declarations of trusts or confidences in land; and we now find the same watchful disposition guarding against the too ready alienation of this important species of property, by denying any remedy upon a mere oral contract for the sale of it, unless proved by a memorandum in writing signed by the party to be charged thereby. In view of the fact that, in the course of their independent legislation, some of the States have omitted one or more of these provisions while retaining others, it is well to observe how far those sections which concern the creation and transfer of interests in land may be made to supply the place of that which we have now to consider. We have already had occasion, in introducing the subject of trusts, to notice the

relation which the seventh section, covering trusts, bears to that which is now before us.

§ 226. In Pennsylvania, where the first three sections only of those of the English statute, which relate to the creation and transfer of interests in land, have been re-enacted, the courts have repeatedly had occasion to deal with verbal contracts for the purchase or sale of such interests. And although there have been, particularly in the more recent decisions, indications of a disposition to consider the English statute, including the fourth section, as having some force, by adoption into the common law of the State, to restrain the right of action upon such contracts, the law as it now stands clearly allows that right.[1] But it allows it for the mere and narrow

[1] Bell *v.* Andrews, 4 Dall. 152; Ewing *v.* Tees, 1 Binn. 450; McDowell *v.* Oyer, 21 Pa. St. 417; Kurtz *v.* Cummings, 24 Pa. St. 35; Malaun *v.* Ammon, 1 Grant 123. In Pugh *v.* Good, 3 Watts & S. 56, Gibson, C. J., said: "I would hold the particular clause in the fourth section of the British Statute of Frauds to have been extended here by adoption, had not this court, very inconsistently I think, held it otherwise in Bell *v.* Andrews [*supra*]. As it is, we must take that clause with its equitable exceptions to be part of our peculiar common law adopted in analogy to the British statute, as we take the doctrine of charitable uses to be adopted in analogy to the statute of that name; or, *if it must necessarily have a statute foundation*, we must forcibly engraft it on that clause of our Act which limits the effect of a parol conveyance to the creation of an estate at will, *though there be great difficulty in doing this.*" The case, however, presented fair ground for a decree of specific execution on account of part-performance, which was accordingly granted. In Ellet *v.* Paxson, 2 Watts & S. 418, it was said that on an action for refusal to fulfil a contract to purchase land the vendor was *at most* only entitled to recover his actual damage. In Whitehead *v.* Carr, 5 Watts 368, which was an action for damages for refusal to *convey* land according to a verbal contract, brought, as it appeared, for the purpose of obtaining an opinion of the court on the point whether such an action would lie, Huston, J., said: "If the question were new, and there were no decisions on the subject, and it were necessary to decide it in this case, it would deserve and obtain very serious consideration." These expressions show that an important question in that State is still regarded as not quite closed. It would be unprofitable, however, for us to pursue it here, as in the great body, if not all, of the other States the enactments referred to have been incorporated together in the local law.

purpose of recovering damages for the non-performance of the contract, and, under the liberal and salutary application of those sections which have been preserved in that State, the right is considerably affected in its extent. Thus, in an action by the vendor on such a contract, he is not allowed to recover the full amount of the purchase-money agreed to be paid; for this, it is said, would be in effect to compel the vendee to a specific execution of the contract, against the spirit of the other sections forbidding the establishment of a title to land without writing.[1] The vendee may recover the actual damage he has sustained by the refusal of the other to carry out the contract, and nothing more. And where the vendee sues for a breach by the vendor, it should seem plain that he is to recover only his actual damage, and not the value of the land, which he bargained for, but cannot acquire a title to on account of the first three sections of the statute.[2] But the learned judges of that State have uniformly refused to decree a specific execution of a verbal contract for the sale or purchase of land, unless there existed such circumstances as in England are held, in equity, sufficient to deprive the fourth section of its application, such as part-performance of the contract by one party on the faith of the other's engagement; or to eject the vendors by proceedings at law upon the proof of such oral contract; and their determinations have been placed upon the ground of the existence in their own law of the provisions against the *creation* of estates in land without writing.[3] It is thus appar-

[1] Wilson *v.* Clarke, 1 Watts & S. 554; McDowell *v.* Oyer, 21 Pa. St. 417; Moore *v.* Small, 19 Pa. St. 461; Ellet *v.* Paxson, 2 Watts & S. 418.

[2] Herzog *v.* Herzog, 34 Pa. St. 418, explaining Jack *v.* McKee, 9 Pa. St. 235; Bash *v.* Bash, 9 Pa. St. 360; Malaun *v.* Ammon, 1 Grant 123. And see McCafferty *v.* Griswold, 99 Pa. St. 270.

[3] See the various cases cited in this section, and, in addition, Soles *v.* Hickman, 20 Pa. St. 180; Kurtz *v.* Cummings, 24 Pa. St. 35; Malaun *v.* Ammon, 1 Grant 123; Pattison *v.* Horn, 1 Grant 301; Wible *v.* Wible, 1 Grant 406; Postlethwait *v.* Freaze, 31 Pa. St. 472; Washabaugh *v.* Entriken, 36 Pa. St. 513; McKowen *v.* McDonald, 43 Pa. St. 441.

ent that, so far as the office of the fourth section is to cut off such an equitable claim of title in land as arises in a contract for the purchase of it, that office is fulfilled by the other provisions referred to.

§ 227. With these preliminary observations, we pass to the examination of that clause of the fourth section which immediately forms the subject of the present chapter. Two questions present themselves under this clause which will be examined in order: *first*, as to what is embraced in the words "lands, tenements, or hereditaments, or any interest in or concerning them;" and, *secondly*, as to what is a "contract or [for] sale of" such lands, etc.; the one question relating to the *subject-matter*, and the other to the *nature* of the transaction.

§ 228. We have already had occasion to remark that the language which, in the first section, is used to describe the interest intended to be made grantable from that time by writing only, appears to be no more comprehensive than that here employed to describe the interest which it was intended should, from that time, be bargained for by writing only.[1] Such we saw was the opinion of a very eminent writer;[2] and a broad and rational view of the whole statute taken together, as it affects real property, leads to the conclusion that the Parliament which enacted these several sections, as well as that which concerns trusts, did not design to make any distinction between them in this respect. In the case of Wood *v.* Lake, so prominent in a former chapter on the subject of leases, it appears by one of the reports that Lee, C. J., took occasion to express an opinion upon the force of the term "any uncertain interest," etc., used in the first section, and considered that it meant uncertainty of duration, and not uncertainty of quantity, of interest.[3] And it seems to have

[1] *Ante*, §§ 4, 5.

[2] Sir Edward Sugden, in his Treatise on the Law of Vendors and Purchasers, p. 95.

[3] See the report of that case in note to § 23, *ante*.

been supposed in a Massachusetts case, that the decision in Wood *v.* Lake, to the effect that the privilege of stacking coal on another's land for seven years could be conferred without writing, might be supported on the particular words in question.[1] The repeated decisions in England since, however, overruling the principle of Wood *v.* Lake, show conclusively that, although the words still remain in the English statute, no such virtue can now be attributed to them. The words "lands, tenements, and hereditaments," which occur in every part of the statute where real estate is dealt with, certainly seem to embrace all that can be embraced by the other phrases occasionally used;[2] and we may perhaps find the latter to be important in the construction of the statute only in the way of an illustration of the extreme solicitude of its framers to guard property of this nature from the perils of oral testimony.[3]

[1] Stevens *v.* Stevens, 11 Met. 251.

[2] It seems that a contract for the transfer of a pre-emption right, although this is not any interest in the legal title, but merely a right of occupancy for the time being, with privilege of purchase, would be within the statute. Lester *v.* White, 44 Ill. 464. See also Miller *v.* Specht. 11 Pa. St. 449, where one having an oral contract for the transfer of a lease was said to have no interest attachable on execution. James *v.* Drake, 39 Tex. 143; Grumley *v.* Webb, 48 Mo. 562.

[3] Of the word *tenements*, which is the only word used in the Statute *de Donis* to express its subject-matter, Lord Coke says, that it "includes not only all corporate inheritances, which are or may be *holden*, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisible within, the same, though they lie not in tenure." It was suggested by Lord Littledale in Evans *v.* Roberts, 5 Barn & C. 829, that the words "lands, tenements, and hereditaments," in the fourth section, were used by the legislature to denote a fee-simple, and the words "any interest in or concerning them" were used to denote a chattel interest, or some interest less than a fee-simple. But it is settled that the seventh section, in regard to trusts, extends to trusts in chattels real, though the latter words are not used (*ante*, § 82). And, on an examination of the whole statute, it is impossible to conclude that the framers of it meant to affix to these words their technical sense. For instance, the fifth section provides that devises of *lands and tenements* shall be in writing, while the sixth provides that no written devise of *lands*, *tenements*, *or hereditaments* shall be revoked except in certain modes, but that all devises

§ 229. That the fourth section extends to and embraces equitable as well as legal interests in land is well settled. It has been held by Mr. Justice Story, that a verbal contract to buy a contract for lands, or, in other words, to buy another man's rights under an executory agreement for the sale of lands to him, was affected by the statute, because it was for the purchase of an equitable interest in real estate.[1] Nor can a mortgagor's equity of redemption in the mortgaged real estate be bought or sold without writing.[2] Nor, it would seem, can such equity be pledged without writing, though the contrary has been held in Kentucky;[3] the contract in such a case must eventually work a transfer of the equitable right

of *lands and tenements* shall continue in force till so revoked. Again, the seventh section provides that declarations of trusts in *lands, tenements, or hereditaments* shall be manifested by writing, while the eighth excepts resulting trusts in *lands or tenements*. Obviously it is unsafe, on a statute so loosely drawn, to determine anything on merely verbal differences.

[1] Smith *v.* Burnham, 3 Sumn. 435; Hughes *v.* Moore, 7 Cranch (U. S.) 176; Simms *v.* Killian, 12 Ired. (N. C.) 252; Toppin *v.* Lomas, 16 C. B. 145; Richards *v.* Richards, 9 Gray (Mass.) 313; Whiting *v.* Butler, 29 Mich. 122, where the interest of an execution purchaser was held within the statute. See Grover *v.* Buck, 34 Mich. 519; Daniels *v.* Bailey, 43 Wisc. 566; Anderson *v.* Powers, 59 Texas 213. But see Sprague *v.* Haines, 68 Texas 215; Chenoweth *v.* Lewis, 11 Rep. 380. It was said, however, in Hosford *v.* Carter, 10 Abb. (N. Y.) Pr. 452, that an agreement by one having the refusal of a piece of land to procure a purchaser for it need not be in writing. Dougherty *v.* Catlett, 129 Ill. 431; Darling *v.* Butler, 45 Fed. Rep. 332; Carr *v.* Williams, 17 Kansas 575; Telford *v.* Frost, 76 Wisc. 172; Rosenberger *v.* Jones, 116 Mo. 559.

[2] Scott *v.* McFarland, 13 Mass. 309; Marble *v.* Marble, 5 N. H. 374; Hughes *v.* Moore, 7 Cranch (U. S.) 176; Kelley *v.* Stanbery, 13 Ohio 408; Agate *v.* Gignoux, 1 Rob. (N. Y.) 278; Massey *v.* Johnson, 1 Exch. 255; Toppin *v.* Lomas, 16 C. B. 145; Williams *v.* Williams, 7 Reporter 656; Odell *v.* Montross, 68 N. Y. 499; Clark *v.* Condit, 18 N. J. Eq. 358; Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187. See *In re* Betts, 7 Reporter 522; Cowles *v.* Marble, 37 Mich. 158. But see Pomeroy *v.* Winship, 12 Mass. 513; Hogg *v.* Wilkins, 1 Grant (Pa.) 67; Shaw *v.* Walbridge, 33 Ohio St. 1; Rawdon *v.* Dodge, 40 Mich. 697; Wendover *v.* Baker, 25 S. W. Rep. (Mo.) 918.

[3] Griffin *v.* Coffey, 9 B. Mon. 452.

and title.[1] It has been held, however, that an equity of redemption may be *surrendered* without writing.[2]

§ 230. A widow's right of dower also is clearly an interest in land, which cannot be released, waived, or discharged without writing.[3] So also the right of the husband in his wife's land, under an anticipated marriage, cannot be surrendered by his oral ante-nuptial agreement.[4] Of course the statute extends to rents, commons, and all incorporeal hereditaments.[5] It also embraces agreements for the assignment of a lease,[6] and executory agreements for the creation of such leases as would be, after they were created, valid by reason of the exception contained in the second section of the statute.[7] An agreement for board and lodging, as not involv-

[1] See § 73, *supra*.

[2] Falis *v.* Conway Ins. Co., 7 Allen (Mass.) 46; Shaw *v.* Walbridge, 33 Ohio St. 1.

[3] Finney *v.* Finney, 1 Wils. 34; White *v.* White, 1 Harr. (N. J.) 202; Keeler *v.* Tatnell, 3 Zab. (N. J.) 62; Hall *v.* Hall, 2 McCord (S. C.) Ch. 269; Shotwell *v.* Sedam, 3 Ohio 5; Gordon *v.* Gordon, 56 N. H. 170. See Madigan *v.* Walsh, 22 Wisc. 501. An agreement by a widow, who was also administratrix, to release her dower if the price of the lands of her deceased husband, when sold, should reach a certain sum, is within statute. Wright *v.* De Groff, 14 Mich. 164. An agreement by the vendor of land to procure a relinquishment of his wife's right of dower, is within the statute. Martin *v.* Wharton, 38 Ala. 637. The mere assignment of dower, however, may be by parol, as the estate is conferred upon the widow by the act of the law. Lenfers *v.* Henke, 73 Ill. 405; Dunlap *v.* Thomas, 69 Iowa 358. *Ante*, § 77.

[4] De Bardelaben *v.* Stoudenmire, 82 Ala. 574.

[5] Roberts on Frauds, 127; Brown *v.* Brown, 33 N. J. Eq. 650; Barnes *v.* Boston & Maine R. R., 130 Mass. 388. It seems now to be settled in California that an interest in a mining claim is not an interest in land under the statute. See Copper Hill Mining Co. *v.* Spencer, 25 Cal. 18; Garthe *v.* Hart, 73 Cal. 541; Moritz *v.* Lavalle, 77 Cal. 10. But the contrary doctrine has been approved by the U. S. Supreme Court in Mining Co. *v.* Taylor, 100 U. S. 42. And it may be doubted if the California act of 1860, cited by the court in Garthe *v.* Hart, in reality affects the question. See opinion of Sawyer, J., in Goller *v.* Fett, 30 Cal. 482.

[6] Anonymous, 1 Vent. 361; Poultney *v.* Holmes, 1 Stra. 405; Potter *v.* Arnold, 15 R. I. 350; Nally *v.* Reading, 107 Mo. 350.

[7] Edge *v.* Strafford, 1 Cromp. & J. 391; s. c. 1 Tyrw. 93; Delano *v.*

ing an interest in land, is held not to require a written memorandum.[1]

§ 230 *a*. Where it was provided by will that the testator's lands should be converted into money and this money divided among the heirs, it was held that before such division one of the heirs might sell his interest to another without writing.[2]

§ 231. Mere *possession* of land seems to be properly regarded as such an interest in or concerning the land itself as cannot be contracted for, or disposed of, without writing. Mr. Baron Parke, it is true, in a case where the contract in question was really for an assignment of a lease, and, of course, not binding by parol, said that if it had been to relinquish the possession merely, it might not have amounted to a contract for an interest in land.[3] But upon such a casual suggestion as this, it would be unreasonable to base an exception which goes more to the letter than to the spirit of the statute. As was said in the Supreme Court of New York, "Possession is *prima facie* evidence of title, and no title is complete without it," and accordingly they held that it "must be considered an interest in land, within the meaning of the Statute of Frauds."[4] In Maine, where by statute a mort-

Montague, 4 Cush. (Mass.) 42; Stackberger *v.* Mostaller, 4 Ind. 461. But since the revision of the New York Statutes (2 R. S. 134, §§ 6, 8) see Young *v.* Dake, 5 N. Y. 463, and *ante*, § 34; Wallace *v.* Rappleye, 103 Ill. 229.

[1] Wright *v.* Stavert, 2 El. & E. 721; and *ante*, § 20. Where pews are treated as real estate, agreements for their transfer must, of course, be in writing. Vielie *v.* Osgood, 8 Barb. (N. Y.) 130. See Barnard *v.* Whipple, 29 Vt. 401.

[2] Mellon *v.* Read, 123 Pa. St. 1.

[3] Buttemere *v.* Hayes, 5 Mees. & W. 456. See Smith *v.* Tombs, 3 Jur. 72; Smart *v.* Harding, 15 C. B. 652.

[4] Howard *v.* Easton, 7 Johns. 205, which was afterwards quoted to the same point and affirmed in Lower *v.* Winters, 7 Cow. 263. Shortly after Howard *v.* Easton there was a case in New York where one man agreed to remove his fence so as to open a certain road to its original width, and in consideration thereof another agreed to pay him a sum of money; the court held that this was not an agreement concerning an interest in land, since no interest in land was to be conveyed. But it would seem that

gagee might recover possession before any breach of the condition, if there was no agreement to the contrary, it was held that such an agreement must be in writing as *affecting* the title to real estate by divesting the party of the right of possession.[1] And it was apparently on the same ground that it was held in Connecticut, that a verbal agreement, made at the delivery of a deed, that the grantee should not take possession nor record his deed until he should pay the first instalment of the purchase-money, was inoperative.[2]

§ 232. An easement in the land of another is, by common law, grantable only by deed, and of course no verbal agreement which amounts to conferring an easement or a right in the nature of one can be, as such, available to either of the parties to it. The law on this point is too well settled to require any detailed citation of authorities.[3] Many cases have arisen, however, in England and in this country, where such a verbal agreement, when it has been so far acted upon by one of the parties that it would be a fraud upon him to repudiate it, has been held binding against the other in a

here the former party gave up the *possession* of his land, if he did not give up the fee by dedication to the public, and that the fact that the latter party did not personally acquire it should make no difference. From the words *former width*, however, it may be gathered that the bargainor had without right enclosed part of the highway, in which case he evidently had nothing in the land in question to part with. The case is Storms *v.* Snyder, 10 Johns. 109. See also Onderdonk *v.* Lord, Hill & D. (N. Y.) 129; Rice *v.* Roberts, 24 Wisc. 461.

[1] Norton *v.* Webb, 35 Me. 218; Colman *v.* Packard, 16 Mass. 39.

[2] Gilbert *v.* Bulkley, 5 Conn. 262. In Kerr *v* Shaw, 13 Johns. (N.Y.) 236, it was held that a warranty for the quiet enjoyment of land was within the statute, and must express the consideration of it. As to the possession of land being an interest, etc., within the statute, see, further, Smart *v.* Harding, 15 C. B. 652; Whittemore *v.* Gibbs, 24 N. H. 484; Miranville *v.* Silverthorn, 1 Grant (Pa.) 410; Sutton *v.* Sears, 10 Ind. 223.

[3] See the decisions collected and reviewed in Gale and Whatley on Easements, cap. 3, § 1. Also in Angell on Watercourses, §§ 168 *et seq.* And see *ante*, §§ 21 *et seq.*, in relation to licenses to be exercised upon land. A contract to convey an existing easement is within the statute. Ferrell *v.* Ferrell, 1 Baxt. (Tenn.) 329.

court of equity; but for these cases reference must be had to a subsequent chapter, in which the whole subject of the peculiar equitable doctrine as to contracts within the Statute of Frauds is examined.[1]

§ 233. Although the improvements put upon land, such as buildings and other erections, tillage and labor generally, may be so incorporated with the land itself as to be inseparable therefrom in fact, yet it would seem that they ought to be so far separately regarded as to be capable of a distinct purchase and sale by verbal contract. In Falmouth *v.* Thomas, where the action was upon a verbal agreement by the lessee of a farm, "to take at a certain valuation growing crops thereon, and certain work, labor, and materials which the plaintiff had done and expended upon the land," Lord Lyndhurst said: "The defendant would not have the benefit of the work, labor, and materials, unless he has the land; and we are of opinion that the right to the crops, and the benefit of the work, labor, and materials, were both of them an interest in the land; but *if either of the two* were properly an interest in the land, this would form a sufficient objection to the special counts," etc. And again, of the latter part of the agreement, he says, "It was a contract for that which was, at the time of such contract, an interest in the land, and for that which never was, and never could be, separated from it."[2] It will be observed, however, that his Lordship himself admitted it to be unnecessary to the case to decide this point; and doubtless his attention was upon that account less strictly bestowed upon it. It is certainly settled in England that an agreement to pay an increased rent in consideration of repairs is not to be treated as a new lease, and this seems to cover the principle which has been stated.[3]

[1] See *post*, Chap. XIX.

[2] Earl of Falmouth *v.* Thomas, 1 Cromp. & M. 89. See Vaughan *v.* Hancock, 3 C. B. 766.

[3] Hoby *v.* Roebuck, 2 Marsh. 433; s. c. 7 Taunt. 157; Price *v.* Leyburn, Gow 109. In Angell *v.* Duke, L. R. 10 Q. B. 174, the agreement as to repairs and furniture was held not to be within the statute. So a

The American courts have taken the broader, and on the whole more reasonable view of the subject, and, however the law might now be held in England in a case directly presenting the question, it appears to be settled, so far as this country is concerned, that these improvements put upon land are not necessarily to be regarded as land, because incorporated with it. In New York, in a case where a verbal promise to pay the plaintiff (who had without any title entered and occupied and improved the defendant's land) for his tillage, and sundry buildings erected thereon, was held by the Supreme Court to be binding, Spencer, J., delivering the opinion of the court, thus clearly and rationally set forth the view on which the decision proceeded: "This was not a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, but related to the *labor* only which had been bestowed upon the land, under the denomination of improvements. Was it ever supposed that a parol contract to pay for work to be done on land, or for what had been done, was a void undertaking as under the statute? The contract in such case does not go *to take from the promisor* the land or any interest in or concerning it." [1]

promise to keep down rabbits upon leased land may be binding, though by parol. Morgan *v.* Griffith, L. R. 6 Ex. 70. See Beach *v.* Allen, 7 Hun (N. Y.) 441.

[1] Frear *v.* Hardenbergh, 5 Johns. 272, and the following cases: Benedict *v.* Beebe, 11 Johns. 145; Mitchell *v.* Bush, 7 Cow. 185; Lower *v.* Winters, 7 Cow. 263; Howard *v.* Easton, 7 Johns. 205. A subscription paper for the erection of a church edifice was held (apparently on the same principle) to be not a contract within the New York Statute of Frauds, in Barnes *v.* Perine, 15 Barb. 249. The doctrine expressed in Frear *v.* Hardenbergh has been also adopted in Alabama (Scoggin *v.* Slater, 22 Ala. 687; Cassell *v.* Collins, 23 Ala. 676); in Iowa (Zickafosse *v.* Hulick, 1 Morris 175); in Missouri (Clark *v.* Shultz, 4 Mo. 235), where it was commended on the further ground of the encouragement which it offered to settlers to occupy and improve uncultivated lands; perhaps, also, in Vermont (Forbes *v.* Hamilton, 2 Tyler 356); and it has been referred to by the Supreme Court of Indiana as settled (Green *v.* Vardiman, 2 Blackf. 324). See also South Baltimore Co. *v.* Muhlbach, 69 Md. 395.

§ 234. In the case of *fixtures*, which are in no sense incorporated with, but merely annexed to the freehold, the rule is well settled that the fourth section does not apply to render verbal contracts for the sale of them inoperative.[1] As has been very correctly observed, a transfer of fixtures simply seems to be nothing more than a transfer of the right which the vendor has to sever certain chattels attached to the soil, but not part of the freehold.[2]

§ 234 *a*. In a recent case in the Court of Appeals of New York, a barn, "a wooden structure worth less than $200, and resting upon four large stones at the corners and smaller stones at other places," stood upon a certain lot of land originally owned by the defendant, who subsequently sold a portion, including about two-thirds of the land under the barn, to the plaintiff by mesne conveyances. At the time of each conveyance a statement of the defendant's claim to the whole barn was made — and an oral reservation thereof — and the defendant occupied the barn continuously up to the sale to the plaintiff. After this, defendant removed so much of the barn as stood over plaintiff's land, and plaintiff sued for trespass. The case therefore presented distinctly the question of the validity of an oral reservation of a building removably located upon land at the time of sale. The plaintiff had judgment. The court say: "If at the time of the conveyance the barn had been personal property in the

[1] Hallen *v.* Runder, 1 Cromp. M. & R. 266; Horsfall *v.* Hey, 2 Exch. 778; Bostwick *v.* Leach, 3 Day (Conn.) 476. Where a house standing on the land of another has been sold and delivered to a third party, the seller may recover the price on the common count for goods sold and delivered. Keyson *v.* School District, 35 N. H. 477. And see Long *v.* White, 42 Ohio St. 59. But in Meyers *v.* Schemp, 67 Ill. 469, the Supreme Court held that a contract for the sale of bricks, etc., the remains of a house that had been burned, was for an interest in land, "because, *prima facie*, a building is *real estate*." And see Lavery *v.* Pursell, L. R. 39 Ch. D. 508; South Baltimore Co. *v.* Muhlbach, 69 Md. 395; Moody *v.* Aiken, 50 Texas 65; Michael *v.* Curtis, 60 Conn. 363.

[2] Chitty on Contracts, 320.

ownership of some other person, and the grantees had been notified of that fact, the title to it would not have passed by the successive conveyances. If this barn had been placed upon the lot by some third person with the consent of the owner, and with the understanding that such third person could at any time remove it, it would have remained personal property, and would not have passed to a purchaser under any form of conveyance, providing such purchaser had notice of the fact. But when the land and the buildings thereon belong to the same person, then the buildings are a part of the real estate and pass with it upon any conveyance thereof. In such a case, the grantor can retain title to the buildings only by some reservation in the deed, or by some agreement in writing which will answer the requirements of the Statute of Frauds." [1]

§ 234 *b*. Partition walls and fences are considered as real estate within the Statute of Frauds, on the ground that their use as such involves the right of occupation of the land to that extent.[2]

§ 235. Under the general head of contracts for the sale of what is annexed to or incorporated with land, the most difficult and embarrassing cases are those which deal with contracts for the sale of crops and other natural products growing upon land. Upon this subject the decisions of the English courts have been singularly vacillating and inconsistent, and many cases in which particular rules have been laid down for determining the question of the application of the statute have, on subsequent consideration, been in whole or in part overruled. It would therefore be presumptuous, and would only mislead the reader, to attempt to reconcile all the decisions; at the same time it is impossible to escape the duty of investigating them and comparing the principles upon which they have been respectively decided.

§ 236. There is, of course, nothing in the vegetable product

[1] Citing Noble *v.* Bosworth, 19 Pick. (Mass) 314.

[2] Rudisill *v.* Cross, 54 Ark. 519; Walker *v.* Shackelford, 49 Ark. 563.

itself which is an interest in or concerning land. When severed from the soil, whether trees, grass, and other spontaneous growth (*prima vestura*), or grain, vegetables, or any kind of crops properly so called (*fructus industriales*), the product of periodical planting and culture, they are alike mere chattels, the sale of which, when their value exceeds a certain sum, may be affected by another provision of the statute,[1] but is in no way affected by that which we are now considering. And this severance may be a severance in fact, as when they are actually cut and removed from the ground; or a severance in law, as when, while they are still growing, the owner in fee of the land, by a valid conveyance, sells them to another person;[2] or, where he sells the land, reserving them by express provision.[3] In certain cases, also, though they are actually growing in land, they may never have any character of realty themselves; as, for instance, if the title to them and the title to the land were originally and have remained distinct. A familiar case of this is found in nursery-trees; the nurseryman merely *using* the land for the purpose of nourishing his trees, the interest in the trees may be considered as separated from the realty, and they may well be denominated personal chattels, for the wrongful taking and conversion of which the owner may maintain an action *de bonis asportatis*.[4] Such cases of mere annexation to, without

[1] The seventeenth section. See *post*, Chap. XIV.

[2] Warren *v.* Leland, 2 Barb. (N. Y.) 613; Smith *v.* Bryan, 5 Md. 141. This appears to have been the case in Teal *v.* Auty, 2 Brod. & B. 99. See Richards *v.* Burroughs, 62 Mich. 117; Taylor *v.* Mueller, 30 Minn. 343.

[3] Bank of Lansingburgh *v.* Crary, 1 Barb. (N. Y.) 542. See Backenstoss *v.* Stahler, 33 Pa. St. 251; Harbold *v.* Kuster, 44 Pa. St. 392, where it was also said, *per* Paige, J., that a mortgage of growing trees or grass, given by the owner in fee of the land of which they are parcel, does not work a severance of them from the land until the mortgage becomes absolute by the non-performance of the condition.

[4] *Per* Dewey, J., delivering the opinion of the Supreme Court of Massachusetts in Miller *v.* Baker, 1 Met. 27; and see Penton *v.* Robart, 2 East 88; Wyndham *v.* Way, 4 Taunt. 316; Smith *v.* Price, 39 Ill. 28. In

incorporation with, the freehold, would seem to be properly regarded in the same light as cases of fixtures, which, as we have just seen, may be sold without writing.[1]

§ 237. Considering these vegetable products, however, as growing in the land, there is great conflict in the cases upon the question whether a contract for the sale of them shall be regarded as a contract for the sale of an interest in land. But upon a careful examination, the more approved and satisfactory rule seems to be that, if sold specifically, and to be by the terms of the contract delivered separately and as chattels, such a contract of sale is not affected by the fourth section of the statute, as amounting to a sale of any interest in the land; and that the rule is the same, when the transaction is of this kind, whether the product sold be trees, grass, and other spontaneous growth, or grain, vegetables, or other crops raised by periodical cultivation. This important principle requires to be fully developed and explained, and the authorities examined in detail and applied.

§ 238. In Emmerson *v.* Heelis in the Common Pleas, in 1809, the action was assumpsit for non-fulfilment of a verbal contract to remove certain *lots of turnips*, alleged to have been bought of the plaintiff by the defendant, and to bring back and lay on the ground a certain quantity of manure. The turnips were *growing* at the time, and were sold at auction by lots, each lot containing so many stitches or rows. The question directly before the court was upon the sufficiency of the auctioneer's memorandum of the purchase, and it was held to be sufficient. But Chief Justice Mansfield said, in

Lee *v.* Risdon, 7 Taunt. 191, Gibbs, C. J., discussing the more general question of fixtures, says that trees in a nursery-ground are a part of the freehold until severed; but this must mean as between the heir and the executor, or where the entire property in the land and the trees growing thereon are united in the same person. See Miller *v.* Baker, *supra*. It is apprehended, however, that if a nurseryman having trees lodged in the land should afterwards purchase the land, the trees would not thereby be made part of the realty.

[1] *Ante*, § 234.

passing: "Now as to this being an interest in land, we do not see how it can be distinguished from the case of hops;" [1] referring to Waddington *v.* Bristow, which was decided in the Common Pleas in 1801. Bearing in mind that this observation was gratuitous, there being a sufficient memorandum produced, and also that the circumstance that the turnips were sold as to be severed and removed from the land does not appear to have been noticed by the Chief Justice, let us refer to the case he alludes to as indistinguishable from that before him. In Waddington *v.* Bristow, the action was upon a verbal agreement for the purchase of all the growth of *hops* on a piece of land, at a certain rate per hundred-weight, to be in pockets, and to be delivered at a place named within a reasonable time after the hops were picked and dried. At the time of the contract, the hops, which were the subject of it, were not in existence, nothing but the root of the plant being in the ground. The question was whether it was a sale of *goods, wares, and merchandise*, so as to be exempted under an exception in the Stamp Act. All the judges, except Chambre, J., confined themselves to deciding that question in the negative; he, however, went further, and stated his opinion that the contract gave an interest to the vendee in the produce of the vendor's land; but neither he nor the others made any allusion to the Statute of Frauds.[2] The point before the court was determined without any reference to the statute, and unless the hops were necessarily an interest in land because they were not goods, wares, and merchandise, the case affords no authority for the decision in Emmerson *v.* Heelis.

§ 239. In Warwick *v.* Bruce, decided in the King's Bench in 1813, a similar question arose. The defendant verbally agreed to sell to the plaintiff all the potatoes then growing on three acres, at so much per acre, to be dug up and carried

[1] Emmerson *v.* Heelis, 2 Taunt. 38; doubted in Evans *v.* Roberts, 5 Barn. & C. 829. See *post*, § 240.

[2] Waddington *v.* Bristow, 2 Bos. & P. 452.

away by the plaintiff; the plaintiff paid £40 on the agreement, and dug up a part, and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the remainder. It was held, that he was entitled to recover for this breach, the oral agreement being not within the fourth section of the Statute of Frauds. Lord Ellenborough said: "Here is a contract for the sale of potatoes at so much per acre; the potatoes are the subject-matter of sale, and whether at the time of sale they were covered with earth *in the field, or in a box*, still it was a sale of a mere chattel."[1]

§ 240. Evans *v.* Roberts, decided in the King's Bench in 1826, was an action on the defendant's verbal agreement to purchase of the plaintiff a *cover of potatoes* then in the ground, to be turned up by the plaintiff, at the price of £5, of which the defendant paid one shilling earnest. A verdict had been directed below for the plaintiff, and a rule to set it aside was now discharged by the court. Mr. Justice Bayley said: "The effect of the contract was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete." He admitted that Emmerson *v.* Heelis was against him, but *rejected that decision* as not upon a point before the court, and as founded upon a misconception of Waddington *v.* Bristow. He then proceeds to say: "It has been insisted that the right to have the potatoes remain in the ground is an interest in the land; but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land." Holroyd, J., said: "*This is to be considered a contract for the sale of goods and chattels to be delivered at a future period.* Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think

[1] Warwick *v.* Bruce, 2 Maule & S. 208.

he had not an interest in the land within the meaning of the statute. He clearly had no interest so as to entitle him to the possession of the land for a period, however limited, *for he was not to raise the potatoes.* Besides, this is not a contract for the sale of the *produce of any specific part of the land*, but of the produce of a cover of land. The plaintiff did not acquire by the contract an interest in any specific portion of the land. The contract only binds the vendor to sell and deliver the potatoes at a future time, at the request of the buyer, and he was to take them away." And he concludes with the remark that the contract was "to render *what afterwards would become a chattel.*" Lord Littledale's remarks are too valuable to be omitted. "I am of opinion," says he, "that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the meaning of the fourth section of the Statute of Frauds. The words 'lands, tenements, and hereditaments' in that section appear to me to have been used by the legislature to denote a fee-simple, and the words 'any interest in or concerning them' were used to denote a chattel interest, or some interest less than the fee-simple. In the fifth section, . . . the words 'lands and tenements' are clearly used to denote a fee-simple and do not extend to leaseholds. The legislature contemplated an interest in land which might be made the subject of sale. I think, therefore, they must have contemplated the sale of *an interest which would entitle the vendee either to the reversion or to the present possession of the land.* Now this contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty."[1]

§ 241. In this case just quoted (the great importance of which seems to justify the extensive quotations which have

[1] Evans *v.* Roberts, 5 Barn. & C. 829.

been made from it) frequent allusion is made to two other cases. The first is Crosby *v.* Wadsworth, which it is deemed convenient to examine at a later page.[1] The second is Parker *v.* Staniland, which, for the reason that it makes one of the series of cases necessary to be studied together upon this subject, rather than because it gives any especial light upon the rule which was laid down at the outset,[2] should here be explained. It was upon a verbal contract for the sale of potatoes then in the ground, which the defendant was to get *himself and immediately.* The defendant had partially gathered them, when the residue were spoiled by the frost, and he refused to take or pay for them, and for the price of the remainder the action was brought. A rule to set aside a verdict for the plaintiff was discharged. Lord Ellenborough, C. J., said: "It does not follow that because the potatoes were not at the time of the contract *in the shape of personal chattels*, as not being severed from the land, so that larceny might be committed of them, therefore the contract for the purchase of them passed an interest in the land, within the fourth section of the Statute of Frauds. The contract here was confined to the sale of the potatoes, *and nothing else was in the contemplation of the parties.* It is probable that in the course of nature the vegetation was at an end; but *be that as it may*, they were to be taken by the defendant immediately, and it was quite accidental if they derived any farther advantage from being in the land. . . . The lessee *primæ vesturæ* may maintain trespass *qu. cl. fr.*, or ejectment for injuries to his possessory right: but this defendant could not have maintained either; for *he had no right to the possession of the close;* he had only an easement, a right to come upon the land, for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil." Grose and Le Blanc, JJ., concurred, and also Bayley, J., who observed that "here the land was considered as a mere

[1] *Post*, § 244.
[2] *Ante*, § 237.

warehouse for the potatoes till the defendant could remove them." [1]

§ 242. The next case, and one to which especial attention should be paid, for its bearing upon a particular branch of this question, is that of Smith *v.* Surman, decided in the King's Bench in 1829. The defendant verbally agreed to buy of the plaintiff a large quantity of *timber*, which, at the time, the plaintiff was *having cut down*, most of it being then actually standing; the price was valued per foot, and no time was fixed for payment, and the defendant was to take and carry it away. A rule to show cause against setting aside a verdict obtained below for the plaintiff was made absolute, on the ground that, as a sale of *goods, wares, and merchandise*, there was no memorandum, or acceptance and receipt, as required by the seventeenth section. The case, however, presented the question whether the contract was for an interest in lands, and the judges agreed that it was not. Bayley, J., said: "The contract was not for the growing trees, but for the timber at so much a foot; that is, the produce of the trees when they should be cut down and severed from the freehold." Littledale, J., said the fourth section related to contracts "which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land within the meaning of the statute. *The object* of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest *in the trees, when they become goods and chattels.* Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut, and ceased to be part of the freehold." [2]

[1] Parker *v.* Staniland, 11 East 362.

[2] Smith *v.* Surman, 9 Barn. & C. 561. See Hanson *v.* Roter, 64 Wisc. 622

§ 243. Next, we must briefly notice the case of Sainsbury *v.* Matthews, decided in the Court of Exchequer in 1838, the facts of which were that the defendant, in the month of June, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at two shillings *per sack*, the plaintiff to have them at digging time (October), and to find diggers. It was held that here was not a contract for an interest in land, within the meaning of the fourth section. It was argued by the defendant that the potatoes were not in such a shape at the time of the contract that they could be transferred as chattels; they were to be taken up by the vendee when ripe, and he must necessarily have the benefit of the land for the three intervening months. But the judges thought otherwise. Lord Abinger, C. B., said: "I think this was not a contract giving an interest in the land; it is only a contract to sell potatoes at so much a sack on a future day, to be taken up at the expense of the vendee. He must give notice to the defendant for that purpose, and *cannot come upon the land when he pleases.*" Parke, B., said: "This is a contract for the sale of *goods and chattels* at a future day, the produce of certain land, and to be taken away at a certain time. It gives no right to the land: *if a tempest had destroyed the crop in the mean time, and there had been none to deliver, the loss would clearly have fallen upon the defendant.*"[1]

§ 244. The American decisions, which, upon the whole, are quite harmonious with the general tendency of those we have been quoting, will be referred to hereafter.[2] Meanwhile, one more case, and that an early and most important one, requires to be examined. This is Crosby *v.* Wadsworth, decided in the King's Bench in 1805. The plaintiff verbally agreed to purchase from the defendant a *standing crop of mowing grass* then growing in the defendant's close, the plaintiff to mow the grass and make it into hay, but the time when the

[1] Sainsbury *v.* Matthews, 4 Mees. & W. 343.

[2] *Post*, §§ 255–257.

mowing was to begin was not fixed. Before the plaintiff had done any act under this agreement, the defendant notified him that he should not have the grass, and sold it to another man. Plaintiff afterwards made tender of the agreed price of the grass, which was refused. Defendant locked plaintiff out of the close, and the grass was finally cut and carried away by the second purchaser. The action was *trespass*, that the defendant, "with force and arms, broke and entered a certain close whereof the plaintiff was lawfully possessed, and trod down the plaintiff's grass and hay, and cut down the plaintiff's grass then growing in the close, and took and carried away," etc. Lord Ellenborough, C. J., said: "As the plaintiff appears to have been entitled (if entitled at all under the agreement stated) to the exclusive enjoyment of the crop growing on the land during the proper period of its full growth, and until it was cut and carried away, he might in respect of such exclusive right maintain trespass against any persons doing the acts complained of in violation thereof. . . . This brings us to the question, whether the plaintiff had under the agreement and circumstances stated *any legal title to this growing crop at the time* when the injury complained of was done; or whether his supposed title thereto was not wholly void, as being *created* by parol, under any and which of the provisions in the Statute of Frauds, or on any and what other account?" He then observes that the crop was not *goods, wares, and merchandise*, being an unsevered portion of the freehold, and also that for further reasons the contract did not amount to a lease.[1] He then proceeds to say, "I think the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least, an interest concerning lands." He adds, that although the statute, not making such a contract *void*,[2] but only prohibiting the bringing of an action for the

[1] See this case referred to as bearing on the construction of the statute as it regards leases, *ante*, § 18.

[2] *Ante*, Chap. VIII.

breach of it, would not bar a mere general action of trespass (such as the present) for injury to the plaintiff's possession, yet, being executory and not actionable, it might be discharged before anything was done under it which could amount to a part execution. "On this latter ground, therefore," he says, "namely, that this parol executory contract, supposing it to have been otherwise valid, was competently discharged by parol, we feel ourselves obliged to say that the plaintiff is not entitled to recover."[1] It is very material to note his remark upon the case of Poulter *v.* Killingbeck, decided in the Common Pleas in 1799. There the plaintiff had let to the defendant land, without rent, from which he was to take two successive crops, and to render to the plaintiff a moiety of the crops in lieu of rent; and afterwards the value of the crops was ascertained by appraisement, and action was brought in *indebitatus assumpsit* for moieties of crops sold, and for money had and received, to which it was objected that the contract was for an interest in land; but Buller, J., said: "This agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops."[2] Of this case Lord Ellenborough says (in the decision from which we have been quoting): "The contract, *if it had originally* concerned an interest in land, after the agreed substitution of pecuniary value for specific produce no longer did so; it was originally an agreement to render *what should have become a chattel*, that is, part of a severed crop in that shape, in lieu of rent, and by a subsequent agreement it was changed to money."

§ 245. Let us now attempt an analysis of the doctrines comprised in the cases we have examined. *First.* It is quite clear that the character of the contract for the growing produce of land is not to be determined by the mere circumstance that the purchaser is to have the liberty of entering upon the land to gather what he has purchased. In Crosby

[1] Crosby *v.* Wadsworth, 6 East 602.

[2] Poulter *v.* Killingbeck, 1 Bos. & P. 397.

v. Wadsworth,[1] the grass was to be mowed and made into hay by the purchaser; but that the reason why the contract there was held to convey an interest in land was not the right of entry given to the purchaser, is clear both on inspection of that case and from the fact that in Warwick *v.* Bruce[2] the same judge held a contract which embraced the same right to be binding without writing. The remarks of Holroyd, J., in Evans *v.* Roberts,[3] and of Littledale, J., in Smith *v.* Surman,[4] are decisive on this point; and in Parker *v.* Staniland, where the same feature existed, Lord Ellenborough expressly said that the defendant's "easement," or right to come upon the land for the purpose of carrying away the potatoes, gave him no interest in the land.[5] It is indeed a very familiar rule that the license given to a purchaser of a chattel to come on the land and remove it is not revocable by the vendor,[6] and it is to be regretted that the subject under consideration should ever have been complicated by any distinction on such a point. But the rule as stated requires to be carefully applied. It may be that the privilege of entry is, by the terms of the contract, to continue *so long* (as, for instance, during the pleasure of the buyer,[7] or even for a number of years[8]) as to ingraft upon a transaction which was nominally a purchase of a chattel the character of a lease of land. For certainly the privilege of *occupying* another's land is as much a lease when the occupancy is by leaving purchased articles upon it as when it is

[1] *Ante*, § 244.
[2] *Ante*, § 239.
[3] *Ante*, § 240.
[4] *Ante*, § 242.
[5] *Ante*, § 241. And see Smith *v.* Surman, *ante*, § 242; Jones *v.* Flint, 10 Ad. & E. 753; Nettleton *v.* Sikes, 8 Met. (Mass.) 34; Claflin *v.* Carpenter, 4 Met. (Mass.) 580; Whitmarsh *v.* Walker, 1 Met. (Mass.) 313; Miller *v.* Baker, 1 Met. (Mass.) 27; Kleeb *v.* Bard, 7 Wash. 41. But see Carney *v.* Mosher, 97 Mich. 554.
[6] Wood *v.* Manley, 11 Ad. & E. 34; Cool *v.* Peters Co., 87 Ind. 531.
[7] Erskine *v.* Plummer, 7 Greenl. (Me.) 447.
[8] Putney *v.* Day, 6 N. H. 430; Olmstead *v.* Niles, 7 N. H. 522; Buck *v.* Pickwell, 27 Vt. 157. But see Safford *v.* Annis, 7 Greenl. (Me.) 168; Byassee *v.* Reese, 4 Met. (Ky.) 372.

by depositing any other articles upon it.[1] Perhaps the only rule which can be safely stated on this point is, that the time allowed for the removal of the growing produce should be such as is reasonable *for the purpose* and under the circumstances in which the parties are placed, and not such as to tend to show, either by its length or its indefiniteness, that the parties really contemplated giving and acquiring an interest in land.

§ 246. *Secondly.* There is no materiality, as to whether the Statute of Frauds affects the contract or not, in the circumstance that the produce is fully grown or in process of growing at the time of making the contract. True, Lord Ellenborough made such a distinction in the case of Parker *v.* Staniland,[2] observing that there the potatoes were matured, whereas in Crosby *v.* Wadsworth the grass was in a growing state. But he abandoned it four years afterwards in Warwick *v.* Bruce,[3] where the sale was of a growing crop of potatoes, and was held good because the contract did not confer an exclusive right to the land for a time for the purpose of making a profit of the growing surface; and the cases of Evans *v.* Roberts,[4] and Sainsbury *v.* Matthews,[5] were both upon sales of immature crops, and in both the sales, though verbal, were held good.

§ 247. *Thirdly.* The mere circumstance that the produce purchased may, or probably or certainly will, derive nourishment from the soil between the time of making the contract and the time of delivering the produce, is not conclusive as to the application of the statute. In Warwick *v.* Bruce, where the potatoes were growing and no time was fixed for

[1] *Ante*, §§ 21 *et seq.*, in regard to licenses which amount to leases, Huff *v.* McCauley, 53 Pa. St. 206.

[2] *Ante*, § 241.

[3] *Ante*, § 239.

[4] *Ante*, § 240.

[5] *Ante*, § 243. And see Jones *v.* Flint, *post*, § 251; Bricker *v.* Hughes, 4 Ind. 146; Sherry *v.* Picken, 10 Ind. 375; Bull *v.* Griswold, 19 Ill. 631; Bryant *v.* Crosby, 40 Me. 9; Marshall *v.* Ferguson, 23 Cal. 65. But see Powell *v.* Rich, 41 Ill. 466.

their removal, Lord Ellenborough said, "that whether at the time of sale they were covered with earth *in the field, or in a box*, still it was a sale of a mere chattel."[1] So in Parker *v.* Staniland,[2] he said: "It is probable that in the course of nature the vegetation was at an end; but *be that as it may*, they [the potatoes] were to be taken by the defendant immediately, and it was quite accidental if they derived any farther advantage from being in the land;" and Bayley, J., remarked that the land was to be considered as *a mere warehouse* till the defendant could remove them. But is it necessary to the application of the rule that the produce bargained for be, by the terms of the contract, to be taken immediately? We should hesitate to assert a fresh distinction upon the ground of the casual use of that expression by Lord Ellenborough. The case in which it occurs was quoted by the judges in Evans *v.* Roberts,[3] with strong approbation, without any apparent apprehension of the materiality of the point to the decision, and they themselves decided the contract before them to be good, though the crop bargained for was to remain in the land until it was ripe. But, as is seen in the next section, the time of removal does become an important consideration when the parties intend to make a present sale of the crop, but stipulate that it shall remain on the land for a term of years, or during the pleasure of the purchaser.

§ 248. *Fourthly.* If the *benefit of the soil* is contracted for by the purchaser of the crop, if it be in the contemplation of parties that the purchaser shall *use the vendor's land*, in the interval between sale and delivery, for the purpose of raising the crop which, when matured, is to belong to the purchaser, then clearly the contract is for an interest in the land. It is distinguished by form only from a lease of the land for that purpose; for it can make no difference whether the cultivation is to be by the purchaser himself, or by his agent, the vendor.

[1] *Ante*, § 239.
[2] *Ante*, § 241.
[3] *Ante*, § 240. And in Jones *v.* Flint, *post*, § 251.

Lord Littledale's language in Evans *v.* Roberts [1] is marked to this effect: "The legislature contemplated an interest in land which might be made the subject of sale. I think, therefore, they must have contemplated the sale of an interest which would entitle the vendee either to the reversion or to the present possession of the land." And Holroyd, J., said the plaintiff "clearly had no interest so as to entitle him to the possession of the land for a period, however limited, *for he was not to raise the potatoes.*"

§ 249. The general rule, therefore, furnished us by the cases we have had under review would seem to be this: If by the intention of the parties the contract is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but if the contract is to confer upon the purchaser "an exclusive right *to the land* for a time *for the purpose* of making a profit of the growing surface," it is affected by the statute and must be in writing, although the purchaser's profit may be derived from the sale of the produce of the land as a mere chattel. Whether, in a given case, the parties do contemplate the use of land, or merely the sale of that which, when delivered, will be a mere chattel, ought not, it would seem, to present much difficulty. Notwithstanding the emphasis laid by Bayley, J., in Evans *v.* Roberts,[2] upon the fact that there the contract was not for the sale of the produce of *any specific part of the land*, it is very clear that, if it had been, the statute would not necessarily have applied. There are many, among the cases quoted, where, notwithstanding this fact, verbal contracts were held good. Nor would it seem, upon the authorities, that the mode of payment, whether in a gross sum for the entire yield, or at so much per cord, foot, bushel, acre, etc., determines the contract to be for a sale of an interest in the soil or of a chattel only. If by the contract the purchaser is to own the crop merely, as a chattel severed from the realty, it is good without writing; if he is to own

[1] *Ante*, § 240.

[2] *Ante*, § 240.

it while it is growing, and is to have the use of the land to grow it in, then a verbal contract to that effect is not good.

§ 250. But there is another doctrine upon this subject which has attracted much favor of late years, and that is that the application of the statute is to be determined by the character of the growing crop; verbal contracts for the *fructus industriales*, or growing grain, vegetables, etc., which are produced by periodical planting and culture, are at common law considered as emblements, go to the executor, and are leviable in execution, being good; and verbal contracts for the *prima vestura*, or growing trees, grass, fruit, etc., which at common law go to the heir, as of the realty, being not good. A brief review of the cases quoted in support of the rule here suggested seems indispensable to a full understanding of the question.

§ 251. In Evans *v.* Roberts,[1] both Bayley and Littledale, JJ., allude to this distinction; the former remarking that in Crosby *v.* Wadsworth the contract was for the "growing grass which is the natural and permanent produce of the land, renewed from time to time without cultivation;" but neither of them professed to find the distinction mentioned therein, and the case before them was, as we have seen, determined on other grounds. In Scorell *v.* Boxall, decided in the Exchequer in 1829, the action was *trespass* for cutting down and carrying away underwood, and the question presented was whether the plaintiff, who had verbally purchased the underwood then standing, to be cut by him, had *such a possession* as would enable him to maintain the action. Chief Baron Alexander said: "The action in this case proceeds upon the right of property in the plaintiff to the wood in question; and the contract by which that right is sought to be sustained, is a mere parol contract for the sale of *growing underwood, part of the freehold*, and in direct violation of the Statute of Frauds."[2] The decision seems to be entirely tenable with-

[1] *Ante*, § 240.

[2] Scorell *v.* Boxall, 1 Young & J. 398. See the remarks of Wilde, J., on this case, in Claflin *v.* Carpenter, 4 Met. (Mass.) 580.

out relying on any distinction between underwood and any other growth of the soil; for it was a case of an executory contract of sale, to be completed by the plaintiff's severing the underwood from the freehold, and until it was thus severed it remained the property of the owner of the soil. Moreover, this case was followed within two years by Smith *v.* Surman,[1] which held that the sale of standing trees, in prospect of severance and to be delivered after severance, was good without writing; and in that case the argument of the plaintiff took the same view of Scorell *v.* Boxall, and the court, not mentioning the case in terms, adopted the reasoning in the argument entirely. In Rodwell *v.* Phillips, a case in the Exchequer in 1842, the contract was for the sale of all the growing fruit and vegetables on a certain part of the vendor's close, for the price of £30, the vendee to enter and gather the crop when it was ripe; and the question was whether it was within the statute 55 Geo. III. c. 184, requiring a stamp upon an agreement for any interest in lands of the value of £20. It was held that it was. Lord Abinger, C. B., said: "The difference appears to be between annual productions, raised by the labor of man, and the annual productions of nature, not referable to the industry of man, except at the period when they were first planted;" and again: "Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied in execution under a writ of *fi. fa.* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir-at-law, but to some other person."[2]

[1] *Ante*, § 242.

[2] Rodwell *v.* Phillips, 9 Mees. & W. 503, 505. In making this decision, the court thus alluded to Smith *v.* Surman: "Undoubtedly there is a case in which it appears that a contract to sell timber growing was held not to convey any interest in the land, but that was where the parties contracted to sell the timber at *so much per foot*, and from the nature of that contract it must be taken to have been the same as if the parties had contracted for the sale of timber already felled." But a glance at the cases which have been examined in the text will show that no weight has been allowed in them to the circumstance that the produce was to be sold by the foot or bushel, or by the acre or row.

Here the action was assumpsit for not permitting the plaintiff to gather the crop. In Dunne *v.* Ferguson,[1] an Irish case, it was trover for a quantity of turnips which had been gathered and carried away by the defendant, he having previously, by a verbal bargain, sold the crop to the plaintiff; the same rule was followed, and the plaintiff was held entitled to recover.[1] Lastly, in Jones *v.* Flint, decided in 1839 in the Queen's Bench, which was an action of debt for the price stipulated to be paid for a crop of corn on the plaintiff's land and the profit of the stubble afterwards, some potatoes growing on the land, and *whatever lay grass was in the fields;* the defendant to harvest the corn and dig the potatoes; the plaintiff to pay the tithe; and when the crops, etc., were actually taken by the defendant, in conformity with this agreement; it was held that the Statute of Frauds did not apply to the contract. The opinion of the Chief Justice, Lord Denman, while it clearly illustrates and perfectly accords with the principles which we have had occasion to deduce from previous cases, adopts in terms the modern distinction founded upon the nature of the crop. He observes, first, that at the time of the contract the crops were *not ripe, though nearly so*, and that there was some dispute as to whether the sale was *by the acre* or not, and that nothing was expressly agreed on as to the possession of the land; again, that there were three things contracted for, — corn, potatoes, and the after-eatage of stubble and lay grass. "Of these," he says, "all but the lay grass are *fructus industriales:* as such, they are seizable by the sheriff under a *fieri facias*, and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as quite settled that the contract would have been held to be a contract merely for the sale of goods and chattels. And *although they had still to derive nutriment from the land*, yet a contract for the sale of them has been determined, from this their original character, not to be on that account a con-

[1] Dunne *v.* Ferguson, 1 Hayes 540.

tract for the sale of any interest in land." He then says: "We agree that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land. Tried by those tests, we think that, if the lay grass be excluded, the parties must be taken to have been dealing about goods and chattels. . . . It is very difficult to reconcile all the cases, and still more so all the *dicta*, on this subject from the case of Waddington *v.* Bristow to the present time; and we are, therefore, at liberty to abide by a general principle." And he adds, referring to Crosby *v.* Wadsworth, that if the present was a case in which the parties intended a sale and purchase of the grass to be mown or fed by the buyer, both on principle and authority the contract must be held within the statute. Then he examines the facts, and inasmuch as it was doubtful whether what could be called a crop of grass was in the ground, or in the contemplation of the parties at all, and the plaintiff was to pay the tithe and resume the right, after the harvesting, to turn his own cattle into the field, he says, "We think that, however expressed, the more reasonable construction of the contract is that the possession of the field still remained with the owner after harvesting, as before;" and adds, "Upon these grounds, not impeaching the principle of Crosby *v.* Wadsworth, but deciding on the additional facts in this case, we think this incident in the contract does not alter its nature; and the objection founded on the statute will not prevail."[1]

[1] Jones *v.* Flint, 10 Ad. & E. 753. In Teal *v.* Auty, 4 Moo 542, it was *said* that a contract for poles, made when they were growing, was a contract for an interest in land; but there the contract was executed, and the sale being made by one who had previously purchased them and thus severed them in law from the land, they could no longer be regarded in any view as making part of the realty. See Sugden on Vendors and Purchasers, 110, and *ante*, § 236, as to what works such a severance in law; and Yale *v.* Seeley, 15 Vt. 221. In Carrington *v.* Roots, 2 Mees. &

§ 252. It is not to be denied that there thus appears a very strong tendency to stand upon the distinction between the *prima vestura* and *fructus industriales*, as conclusive of these questions on sales of crops. Of the four cases which have been referred to under that head, however, Evans *v.* Roberts was decided on another ground; Rodwell *v.* Phillips was not upon the Statute of Frauds; and Jones *v.* Flint was, it appears, perfectly determinable without resorting to that distinction. With the greatest deference, it must be said that throughout these cases there appears to have been an entire misconception of the true doctrine of Crosby *v.* Wadsworth. That Lord Ellenborough did not intend in that case to say that *a sale* of growing trees, to be delivered separated from the soil, was void unless in writing, is manifest from the fact that, though he alluded afterwards to that decision several times, he never intimated that it rested upon the circumstance of the nature of the growth, but especially from the fact that an early decision of Chief Justice Treby, which was to the contrary, and upon which much stress was laid in the argument, was not alluded to in his decision.

§ 253. That case is thus given by Lord Raymond. "Treby, C. J., reported to the other justices that it was a question before him in a trial at *nisi prius* at Guildhall, whether the sale of timber growing upon the land ought to be in writing by the Statute of Frauds, or might be by parol. And he was of opinion, and gave the rule accordingly, that it might be by parol, *because it is but a bare chattel.* And to this opinion Powell, J., agreed." [1]

W. 248, which was on a verbal agreement for the sale of grass, at so much an acre, to be taken by the purchaser, the court held that if it was for goods, etc., it was void by the seventeenth section, and if it was for land it was void by the fourth; but no point was made as to the subject-matter being *prima vestura.*

[1] Reported anonymously in 1 Ld. Raym. 182. This case is pronounced by Mr. Baron Hullock in Scorell *v.* Boxall, 1 Young & J. 396, to amount to a mere *dictum.* It certainly has the appearance of an actual decision at *nisi prius*, but reported at second hand. It is quoted as an authority

§ 254. But it would seem that even those cases in which cultivated crops have been held capable of being sold without writing have proceeded upon grounds inconsistent with this modern doctrine. The judges have uniformly paid attention to the fact that these crops were to be, when the contract was consummated, separated from the ground and therefore mere chattels.[1] Again, it is well settled that, if those crops which are *fructus industriales* growing on land are purchased with the land and by one entire contract, they are considered as part of the land, and no recovery can be had upon a special valuation of the crops.[2]

§ 254 *a*. In the case of Marshall *v.* Green,[3] in the Common Pleas Division of the English High Court of Justice, in

by Mr. Justice Holroyd in Mayfield *v.* Wadsley, 3 Barn. & C. 357. Also by Mr. Roberts in his Treatise on the Statute of Frauds, who bases upon it the precise doctrine to which it is quoted in the text. Also by the Supreme Court of Massachusetts, in Claflin *v.* Carpenter, 4 Met. 580, where Mr. Justice Wilde speaks of it as the leading case on this point. To these add the high authority of Sir Edward Sugden, who approves it and says it ought not to have been lightly overruled. Law of Vendors and Purchasers, 110.

[1] See, in addition to the cases which have been examined in the text, that of Watts *v.* Friend, 10 Barn. & C. 446, where A. agreed to supply B. with a quantity of turnip-seed, and B. agreed to sell the crop of seed produced therefrom at one shilling per bushel, and Lord Tenterden held it was not a contract for an interest in land, for "the thing agreed to be delivered would, *at the time of delivery*, be a personal chattel."

[2] Earl of Falmouth *v.* Thomas, 1 Cromp. & M. 89. In Mayfield *v.* Wadsley, 3 Barn. & C. 365, Littledale, J., said: "If the giving up of the land was any part of the consideration for the defendant's agreeing to take the wheat which was then sown in the land, the wheat must be considered *as part of the land itself*. . . . Where the land is agreed to be sold, and the vendee takes from the vendor the growing crops, the latter are considered part of the land. . . . A parol agreement for the sale of crops may be good, also, between the outgoing and the incoming tenant; but then there would be no sale of any interest in the land, for that would come from the landlord." See further, on this subject, Mechelen *v.* Wallace, 7 Ad. & E. 49; Vaughan *v.* Hancock, 3 C. B. 766; Foquet *v* Moor, 7 Exch. 870; Thayer *v.* Rock, 13 Wend. (N. Y.) 53; Brantom *v.* Griffits, 1 C. P. D. 349.

[3] Marshall *v.* Green, 1 C. P. D. 35.

1875, the distinction between *fructus naturales* and *fructus industriales*, as a test of the application of the Statute of Frauds, has been substantially rejected, and the decision of Treby, C. J., approved and followed. The declaration contained three counts, for trespass by injury to the plaintiff's realty, for trover for carrying away cut trees, and for injury to the plaintiff's reversion. Amphlett, B., before whom the case was tried without a jury, found the following facts. The plaintiff was the owner in fee of a copyhold tenement upon which certain timber trees were growing. This tenement was leased, but the trees, by the custom of the manor, were reserved to the owner of the fee. He entered into negotiation with the defendant for the sale of certain of the trees, and there was finally "a parol sale of twenty-two of the trees, at the price of £26,"[1] with the understanding that they were to be taken away as soon as possible. After some of the trees had been cut down, the plaintiff attempted to set aside the sale, and forbade the defendant to proceed under it; but the latter entered, cut down the rest of the trees, and subsequently removed them. For this entry and removal the action was brought. It was assumed, both by the counsel in their argument and the court in their opinions, that the intention of the parties was that the title to the trees should pass presently, *i. e.*, at the time of the sale and before severance; and it will be seen, therefore, that one of the questions squarely presented for decision was, whether standing trees, clearly not *fructus industriales*, could be sold standing, as goods, wares, and merchandise. The court, in opinions delivered *seriatim*, held that they could be and were so sold in the present case; that the seventeenth section was complied with by acceptance and receipt of part of them. The plaintiff therefore, it was held, had no property in the trees, and could not recover, the defendant's entry to take his own property being justifiable.

§ 254 *b*. It remains to notice the effect of this decision

[1] *Per* Coleridge, J., at page 38 of the Law Report.

upon the questions previously discussed. It will be seen, first, that the judges have entirely disregarded any distinction founded upon the character or nature of the crop; or upon the *time* when the title passes, whether it is before or after the crop is severed from the soil. Those tests had, it is true, the sanction of previous decisions, but neither of them had proved satisfactory or been uniformly followed. The doctrine which laid down one rule for the sale of *fructus naturales*, and another for the sale of *fructus industriales*, is objectionable, because founded narrowly upon considerations of the ownership of the crop, not at all upon consideration of the conditions of the sale. The technical rules which govern the respective claims to the produce of land of its owner and its lessee are of necessity based upon grounds very different from those to be considered when the question is as to the nature of a certain transaction of sale, whether it be of lands or goods. Because as between lessor and lessee certain products of the land "went with it" by the technical rule of *emblements*, it does not follow by any necessary logical consequence that such products *are* land at all times and under all circumstances.

§ 254 *c*. The case is further noticeable, as deciding that the owner of the produce of land can, if he wishes, sell it as it stands, by an oral sale, as so much goods, wares, and merchandise. While it has always been admitted that no interest in land was conveyed where the parties intended that the title in the crop should not pass till it had been severed from the realty,[1] yet there seemed to be a difficulty in those cases where the crops were sold *standing*, and from the language of some of the decisions it might be inferred that parties cannot, under such circumstances, pass the title presently by a parol contract. But when the fact appears that the parties have dealt with the crops as so much produce, or goods now stored and ready for sale, it seems clear that the accidental

[1] Boyce *v.* Washburn, 4 Hun (N. Y.) 792; White *v.* Foster, 102 Mass. 375.

support given by the soil cannot of itself be an objection to the accomplishment of their sale in the ordinary manner of sales of goods. The court, therefore, found no difficulty in holding that the trees were sold as they stood, and as so much lumber. They gave effect to the intention of the parties as gathered from the facts of the case, which manifestly was to sell and buy goods, wares, and merchandise, and, finding the seventeenth section of the statute complied with, upheld and enforced the contract, and the transfer of title under it.

§ 255. In the case of Whitmarsh *v.* Walker, in Massachusetts, the defendant verbally agreed to sell to the plaintiff at a stipulated price two thousand mulberry trees then growing in the defendant's close. The plaintiff paid a small sum at the time, and was to pay the remainder on the delivery of the trees, which was to be on demand. The defendant refused to carry out the agreement, and it was insisted that it was not binding, being for the sale of an interest in land within the meaning of the statute. Wilde, J., delivering the opinion of the court, remarked, that the contract of sale was not to be considered as consummated at the time of the agreement; the delivery was to be at a future day, and the defendant was not bound to deliver unless the plaintiff was ready and willing to pay; that no property vested in the plaintiff by the agreement. He adds: "According to the true construction of the contract, as we understand it, the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be made by the plaintiff or by the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would without writing be valid notwithstanding the Statute of Frauds." In this case the contract was made enforceable by part payment of the price of the trees, and the plaintiff had damages for the defendant's refusal to deliver as he had

agreed.[1] In the next case, Claflin *v.* Carpenter, the opinion of Treby, C. J., that growing timber might be sold without writing, is cited as an authority and the leading one on this subject, and fully adopted, and the criticism of Hullock, B., upon it, in Scorell *v.* Boxall, distinctly disapproved. But while disregarding to this extent the technical nature of the crop as a part of the realty, the Massachusetts courts still hold that the oral contract, if it is intended to pass a present title to the standing crop, is *ex proprio vigore* for an interest in land,[2] thus differing in an important feature from Marshall *v.* Green. It is also held that before the severance the owner may revoke the license to enter and sever under the contract, and that the purchaser, having no title in what remains unsevered, will have no right to enter and sever it.[3] His only remedy will be for the breach of the contract, as in Whitmarsh *v.* Walker, *supra.*

§ 255 *a.* The doctrine of Marshall *v.* Green had been previously declared and acted upon in Maine,[4] Kentucky,[5] Maryland,[6] and perhaps Connecticut and Pennsylvania.[7]

§ 256. The rule based upon the nature of the crop sold, whether *fructus naturales* or *fructus industriales*, under which

[1] Whitmarsh *v.* Walker, 1 Met. 313.

[2] Claflin *v.* Carpenter, 4 Met. 580; Giles *v.* Simonds, 15 Gray 441. And see Knox *v.* Haralson, 2 Tenn. Ch. 232.

[3] Poor *v.* Oakman, 104 Mass. 309; Drake *v.* Wells, 11 Allen 141; Giles *v.* Simonds, 15 Gray 441.

[4] Cutler *v.* Pope, 13 Me. 377. See Safford *v.* Annis, 7 Greenl. 168; Erskine *v.* Plummer, 7 Greenl. 447.

[5] Cain *v.* McGuire, 13 B. Mon. 340; Byassee *v.* Reese, 4 Met. 372.

[6] Smith *v.* Bryan, 5 Md. 151, in which the Court of Appeals said: "The principle to be gathered from a majority of the cases seems to be this, that where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still, in the contemplation of the parties, evidently and substantially a sale of goods only."

[7] See Bostwick *v.* Leach, 3 Day 476; McClintock's Appeal, 71 Pa. St. 365. See also Heflin *v.* Bingham, 56 Ala. 566; Harris *v.* Powers, 57 Ala. 139; Kerr *v.* Hill, 27 W. Va. 605.

an oral sale of the latter is held sufficient, but of the former insufficient, to pass the title before severance, has been distinctly approved in New Hampshire,[1] New York,[2] New Jersey,[3] Indiana,[4] California,[5] Tennessee,[6] Missouri,[7] and Ohio.[8]

§ 257. The Supreme Court of Vermont asserted the earlier English doctrine, after much consideration, in the following case. The plaintiff had purchased by verbal contract, for a gross sum, all the timber standing on a particular part of the land of one Story, with liberty, for an indefinite time, to enter and take it off. The land passed from Story, through a long series of deeds, to the defendant, whose deed from his immediate grantor contained no reservation as to the trees in question. The defendant, more than twenty years after the contract of Story with the plaintiff, and after the plaintiff had cut and removed some of the trees, cut and removed the remainder, and for this the action was brought, *i. e.* "*trespass* for cutting down *growing trees of the plaintiff.*" It was held that it would not lie. Bennett, J., who delivered the opinion of the court, quotes the English cases setting up the distinction between the *prima vestura* and *fructus industriales* as decisive of the question whether the statute applies, and

[1] Howe *v.* Batchelder, 49 N. H. 204; Kingsley *v.* Holbrook, 45 N. H. 313; Putney *v.* Day, 6 N. H. 430.

[2] Green *v.* Armstrong, 1 Denio 550; Warren *v.* Leland, 2 Barb. 613. See Bank of Lansingburgh *v.* Crary, 1 Barb. 542. And the Court of Appeals of that State have gone so far as to hold that poles used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, to be replaced in the season of hop raising, were a part of the real estate. Bishop *v.* Bishop, 1 Kernan 123. And see Frank *v.* Harrington, 36 Barb. 415.

[3] Slocum *v.* Seymour, 36 N. J. L. 138. See Westbrook *v.* Eager, 1 Harr. 81; Thompson *v.* Tilton, 34 N. J. Eq. 306.

[4] Owens *v.* Lewis, 46 Ind. 488; Armstrong *v.* Lawson, 73 Ind. 498. And see Kluse *v.* Sparks, 36 N. E. Rep. (Ind.) 914.

[5] Vulicevich *v.* Skinner, 77 Cal. 239.

[6] Carson *v.* Browder, 2 B. J. Lea (Tenn.) 701. And see Powers *v.* Clarkson, 17 Kansas 218.

[7] Smock *v.* Smock, 37 Mo. App. 56.

[8] Hirth *v.* Graham, 50 Ohio St. 57.

assents to them. But he remarks, at the close of his judgment, that in Scorell *v.* Boxall (the authority principally relied on) "the action was substantially *based on title*, and the title wholly dependent on the verbal contract, which was inoperative *to convey a right.*"[1] The case before the court was undoubtedly decided correctly, the action being based on title, and the trespass being complained of as committed in respect of growing trees of the plaintiff. In a later case in that State the court, while recognizing the correctness of the decision last cited, say, "We are not supposed to give that opinion the force of authority beyond the very point of judgment," and at the same time express a decided disposition to sanction the broader rule, that either *fructus naturales* or *fructus industriales* could be sold in the ground as goods, wares, and merchandise, if such were the nature of the contract and the intention of the parties.[2]

§ 257 *a.* In most of those States which have extended the validity of the oral contract in passing the title before severance to sales of the annual produce of land, the question whether the oral contract would be in like manner valid in the case of natural growth has not been decided. In those States where it has been decided, the results are conflicting; the Supreme Court of New York, on the one hand, holding that the oral contract of sale in the case of natural growth is not effectual to pass the title before severance,[3] and the courts of Vermont and Pennsylvania, on the other hand, manifesting a disposition to treat such contracts as effectual for that purpose.[4] There is an evident uncertainty in the

[1] Buck *v.* Pickwell, 27 Vt. 157. See Daniels *v.* Bailey, 43 Wisc. 566; Lillie *v.* Dunbar, 62 Wisc. 198.

[2] Sterling *v.* Baldwin, 42 Vt. 306; and see Fitch *v.* Burk, 38 Vt. 687.

[3] Lawrence *v.* Smith, 27 How. Pr. 327; Wood *v.* Shultis, 4 Hun 309; and see Killmore *v.* Howlett, 48 N. Y. 569, *per* Gray, C. *Dicta* to the same effect in Slocum *v.* Seymour, 36 N. J. L. 138; Owens *v.* Lewis, 46 Ind. 488.

[4] See cases cited in note to § 257. Also McClintock's Appeal, 71 Pa. St. 365.

dealing of the courts with this subject, from which there appears to be no relief but by keeping steadily in view the question whether or not the contract of purchase involves, either by express stipulation or by fair implication from the circumstances, an agreement that the buyer shall have the right to occupy or enter upon the land during a definite or indefinite time after the bargain. Where such an agreement makes part of the transaction, it seems clear that an interest in land is contracted for and agreed to be given.[1] But where, as in Marshall *v.* Green,[2] there is no agreement that the goods shall remain on the vendor's land, the vendee's right to come in and take away what he has bought not depending upon any contract or agreement, but being a mere incident of his purchase arising by implication of law, and not subject to revocation by the owner of the land, the contract is for the sale, not of land, but of goods, and this independently of the nature of the growth sold.

§ 258. The impression appears to have prevailed at one time that shares in incorporated or joint-stock companies, whose profit, and the consequent value of the shares held by the several stockholders, were derived from the use and ownership of real property, were themselves to be deemed an interest in or concerning land, so as not to be capable of purchase and sale without a memorandum in writing, as required by the fourth section of the Statute of Frauds. The doctrine is stated with some confidence by Mr. Roberts, at least as applied to shares in canal navigations and all species of tolls.[3] And, in part upon his authority, it was determined in an early case in Connecticut that shares in a turnpike company which had power by its charter to make and maintain a road and collect a toll thereon were real estate, and were not subject to testamentary disposition by a testator not qualified to devise real estate, notwithstanding that their right of taking

[1] See Sterling *v.* Baldwin, 42 Vt. 306.

[2] Marshall *v.* Green, 1 C. P. D. 35, *per* Coleridge, J.

[3] Roberts on Frauds, 126.

toll was limited to the reimbursement of expenses and interest.[1] These opinions, however, are founded principally on the case of Townsend *v.* Ash,[2] where Lord Hardwicke held shares in the New River Corporation to be real estate; and that case has been since explained in the important decision of Bligh *v.* Brent, in the Court of Exchequer,[3] as proceeding on the ground that there the individual corporators owned the property, and the corporation only had the management of it. In a later case in the same court, Bligh *v.* Brent has been affirmed and the law finally settled on this point. The opinion of Martin, B., is very clear and satisfactory. After remarking that all the great railway companies, canal companies, and dock companies possessed land to a very great extent and value, and that land or real property was the main substratum of their joint-stock or partnership property, and their profits directly obtained from its use, he says: "The shareholder has only the right to receive the dividends payable on his share, that is, a right to his just proportion of the profits arising from the employment of the joint stock, consisting indeed partly of land; but *whilst he holds his share* he has no interest or separate right to the land, or any part of it. He is, indeed, interested in the employment of it; but he cannot proceed against it directly for anything which is due to him, or make any part of it his own for the purpose of satisfying any demand which he may have as shareholder. He is not in the situation of a mortgagee, who has a direct interest in the land; or of a joint tenant or tenant in common, who may make a part of it his own in severalty. Upon a dissolution or determination of the joint concern, he may possibly, though not very probably, become the owner of a part or share in the land; but if he does, it is not by virtue of any term in the partnership agreement [or act of incorpo-

[1] Wells *v.* Cowles, 2 Conn. 567.

[2] Townsend *v.* Ash, 3 Atk. 336; Drybutter *v.* Bartholomew, 2 P. Wms. 127.

[3] Bligh *v.* Brent, 2 Y. & C. 268.

ration], but upon a new transaction whereby the parties to the joint concern may, by virtue of a new contract, become separate owners of separate shares in the land belonging to it. Upon his death nothing descends to his heir; all goes to his personal representative, whether the land be held for years or in fee-simple, and his representative acquires no interest in the land different from what he himself had. . . . Land is merely a part of the joint-stock capital, and the real substantial interest of the shareholder and that which the share represents is the participation in, and right to participate in, the profits." [1] Upon this case and those which are referred to in the opinions of the judges, it must be considered as now settled that shares in companies owning land are not necessarily themselves interests in land, whether the companies be incorporated or joint-stock, or whether they be for mining, railway, canal, banking, or any other purpose.[2]

§ 259. Where land is owned by a partnership, each partner, of course, is entitled to his proper share in it. And here must be remarked an important exception (for so it seems we are forced to regard it) to the operation of the statute as it affects

[1] Watson *v.* Spratley, 10 Exch. 236.

[2] See Hilton *v.* Giraud, 1 De G. & Smale 183; Sparling *v.* Parker, 9 Beav. 450; Myers *v.* Perigal, 11 C. B. 90; Duncuft *v.* Albrecht, 12 Sim. 189; Bradley *v.* Holdsworth, 3 Mees. & W. 422; Humble *v.* Mitchell, 11 Ad. & E. 205; Curling *v.* Flight, 5 Hare 242; Vauxhall Bridge Co., *ex parte*, 1 Glyn & J. 101; Horne, *ex parte*, 7 Barn. & C. 632. For a recent analogous decision under the Statute of Mortmain, see Entwistle *v.* Davis, L. R. 4 Eq. 272; and see also Robinson *v.* Ainge, L. R. 4 C. P. 429. Many stock companies have been formed in England under statutes expressly providing that the stock "shall be personal estate, and shall not be of the nature of real estate." See Agnew, Statute of Frauds, pp. 147–151, where the English cases under these statutes are collected. See Johns *v.* Johns, 1 Ohio St. 350. It was early held in Massachusetts that the shares in a turnpike corporation were personal property simply. Tippets *v.* Walker, 4 Mass. 595. But *quære*, if the law in New York is not different from that stated in the text. Vaupell *v.* Woodward, 2 Sandf. Ch. 143. In England, the Court of Common Pleas have acted upon the authority of Watson *v.* Spratley, though declining to commit themselves to its correctness. Powell *v.* Jessopp, 18 C. B. 336.

interests in land. Where two men are found jointly occupying a piece of land, incurring equal expenditures upon it and enjoying equal profit from it, the relation which from such facts would be presumed to be existing between them is that of joint tenancy, and, as incident to that joint tenancy, upon the death of either the whole would go to the other by right of survivorship. And naturally we should say that any agreement by which the course of the estate in the event of the death would be altered, must be in writing as affecting the title to real estate. But when the parties are really partners, and the land has been brought into and actually held and used by the partnership for partnership purposes, the courts have dealt with it as partnership property, although the ownership has not been apparently in all the members of the firm, or, if in all, not apparently as partners, but under some other title. As Lord Chancellor Loughborough says in Forster *v.* Hale, a very valuable case on this point, "the partnership being established by evidence, upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership."[1] For it seems that the earlier authorities to the effect that real estate used for partnership purposes maintains its character of realty, and goes to the heirs

[1] Forster *v.* Hale, 5 Ves. 309. See also Jeffereys *v.* Small, 1 Vern. 217; Jackson *v.* Jackson, 5 Ves. 591; Elliott *v.* Brown, 3 Swanst. 489, *note;* Fereday *v.* Wightwick, 1 Russ. & M. 45; Essex *v.* Essex, 20 Beav. 442; Dyer *v.* Clark, 5 Met. (Mass.) 562; Burnside *v.* Merrick, 4 Met. (Mass.) 537; Howard *v.* Priest, 5 Met. (Mass.) 582; Fall River Whaling Co. *v.* Borden, 10 Cush. (Mass.) 458; Henderson *v.* Hudson, 1 Munf. (Va.) 510; Hanff *v.* Howard, 3 Jones (N. C.) Eq. 44; Fairchild *v.* Fairchild, 64 N. Y. 471; Boyers *v.* Elliott, 7 Humph. (Tenn.) 204; Wells *v.* Stratton, 1 Tenn. Ch. 328; Jones *v.* McMichael, 12 Rich. (S. C.) Law, 176; Allison *v.* Perry, 130 Ill. 9; Personette *v.* Pryme, 34 N. J. Eq. 26; Collins *v.* Decker, 70 Me. 23; McKinnon *v.* McKinnon, 56 Fed. Rep. 409. See Allison *v.* Perry, 28 Ill. App. Ct. 396. This subject is discussed in a valuable opinion of Lowell, J., *In re* Farmer, *Ex parte* Griffin, reported 10 Chicago Legal News 395. Cases apparently *contra* are Gray *v.* Palmer, 9 Cal. 616; Hale *v.* Henrie, 2 Watts (Penn.) 144.

of the partners respectively,[1] have been overruled, and that all property, whether real or personal, involved in a partnership concern, is now, upon the dissolution of the partnership distributable as personalty, and generally is to be, for ordinary purposes, regarded as stock in trade.[2]

§ 260. In Dale *v.* Hamilton, the question was presented in the English Chancery in a somewhat modified form. There the plaintiff, being a surveyor and land agent, alleged that he proposed to the defendant's testator an arrangement for the purpose of speculation, by which he and a third party were to furnish the capital for buying land, the plaintiff to lay out the lots and effect the sales, and each of the parties to be interested one-third in the profits and losses. It was admitted that lands were acquired under some such general arrangement, but denied that the plaintiff was, as alleged, a partner therein; and the farther question was made whether, if he was a partner in fact, verbal proof (or written proof imperfect in view of the Statute of Frauds) of the alleged partnership was sufficient to take the case out of the Statute of Frauds, in a case where, as here, the *entire subject* of the transaction was land, and the *partnership grew solely out of that subject*, and whether the cases in which that effect had been given to a partnership contract were not cases in which the dealing in land was only an *incident to the partnership business*. Vice-Chancellor Sir James Wigram delivered a very elaborate and careful opinion, in which, while admitting the general principle as to land acquired by an established partnership, he remarked that whether a simple case like that

[1] Thornton [Thompson] *v.* Dixon, 3 Bro. C. C. 199; Bell *v.* Phyn, 7 Ves. 453; Balmain *v.* Shore, 9 Ves. 500. But see Wilcox *v.* Wilcox, 13 Allen (Mass.) 252; Shearer *v.* Shearer, 98 Mass. 107.

[2] *Per* Lord Eldon, in Selkrig *v.* Davies, 2 Dow P. C. 230; Townsend *v.* Devaynes, cited in Montagu on Partnership, Vol. I., App. 97. See also Vol. I. p. 164 of that treatise, and Crawshay *v.* Maule, 1 Swanst. 495; also 3 Kent Com. § 37; Clagett *v.* Kilbourne, 1 Black (U. S.) 348. See also Marsh *v.* Davis, 33 Kansas 326; Richards *v.* Grinnell, 63 Iowa 44; Bates *v.* Babcock, 95 Cal. 479; Speyer *v.* Desjardins, 144 Ill. 641.

before him, divested of everything but an agreement for a partnership, could be brought within the scope of the cases, was a question of no inconsiderable difficulty. He also well stated the difficulty, in the way of principle, which must present itself against holding such an agreement efficacious to affect the rights of the parties to the land; for, says he, "if A. alleges that B. agreed to give him an interest in land, the statute applies; but if he adds that the land was to be improved and resold at their joint risk for profit and loss, then, according to the argument, the statute does not apply." Nevertheless, upon a nearer view of the cases,[1] he found himself unable to decide that the plaintiff was barred by the statute from recovering, if the agreement alleged was really made, and that fact he directed to be tried by a jury.[2]

§ 261. This doctrine prevails, however, as would seem from a well-considered case decided in the Supreme Court of Georgia, only as between the partners, or between them and third parties dealing with them in regard to the partnership land. Where a bill in equity alleged that of three persons who had formed a partnership for speculation in lands by purchases and resales, one (the defendant) agreed to sell to the plaintiff a third part of his interest in the lands held by the partnership, and in the proceeds from the sales, and in the speculations and profits, that court refused to decree a specific execution of the agreement, in the absence of a sufficient memorandum or equitable circumstances avoiding the effect of the statute. They say: "It is true that in a court

[1] Jeffereys *v.* Small, 1 Vern. 217; Jackson *v.* Jackson, 9 Ves. Jr. 591; Lake *v.* Craddock, 3 P. Wms. 158; Elliott *v.* Brown, 3 Swanst. 489, *note* (another report of which is alluded to by Lord Eldon in Jackson *v.* Jackson, *supra*); Forster *v.* Hale, 3 Ves. 696; s. c. 5 Ves. 309; Fereday *v.* Wightwick, 1 Russ. & M. 45.

[2] Dale *v.* Hamilton, 5 Hare 369. And see Smith *v.* Tarlton, 2 Barb. (N. Y.) Ch. 336; Fall River Whaling Co. *v.* Borden, 10 Cush. (Mass.) 458; Traphagen *v.* Burt, 67 N. Y. 30; Slevin *v.* Wallace, 64 Hun (N. Y.) 288; *contra*, Gray *v.* Palmer, 9 Cal. 616. The authority of Gray *v.* Palmer, 9 Cal. 616, has been denied in Coward *v.* Clanton, 79 Cal. 23. See *post*, § 262.

of equity real estate owned by a partnership may be treated as a part of the partnership funds, and, as a consequence, as personal estate. But this rule grows out of the peculiar nature of the partnership relation, and is adopted for the purpose of doing justice between partners, or between them and others having dealings with them, and for the purpose of properly adjusting the relations between them, or between them and others having dealings with, or relations to, the partnership. *It is not an arbitrary rule by which a court of equity transmutes real estate into personal property when it is once owned and possessed by a partnership*, and causes it to take that character outside of and independent of the exigencies of the partnership, and as to persons having no relations to that partnership."[1] They add, that here the purchase was "of an interest in the profits to be realized by the defendant from the sale of these lands by the partnership, and that he was not and could not have been a partner, or had any relation to the partnership himself." The defendant "was individually responsible to him, and not as one of the partnership. The complainant then was *a stranger to this firm*, and as to him these lands were, to all intents and purposes, real estate."

§ 261 *a*. The result of the cases we have been considering upon this subject of the effect of a parol partnership upon the title to lands acquired and used for partnership purposes is, that, the fact of partnership being proved, whether by articles or by parol, real estate acquired and used for the partnership purposes becomes, as between the partners, and for all purposes of adjustment of claims against the firm or its members, partnership assets; that in cases where the title to the land is in the partners as joint tenants the right of survivorship incident to that tenancy does not exist; and that where the title is in one, or some number less than the whole, of the partners, it is for the purposes above named devested, and becomes vested in all the partners by partnership title; and this whether the land was purchased with the money of the

[1] Black *v.* Black, 15 Ga. 449.

firm (creating a resulting trust to the firm) or with the money of the partner taking the title; and that it is not material whether the partnership was already established and engaged in its business when the land was acquired and brought into the stock, or whether it was established and the land acquired and put in contemporaneously, or whether the partnership was established for the purposes of some other trade or business,[1] or for the special purpose of dealing in and making profit out of the very land itself which is in question. The whole doctrine (unless it can stand as an application of the law of implied trusts to cases of land purchased and held by one partner in derogation of his fiduciary obligation to the other) must be regarded as a bald exception to the rule that no oral agreement can be made available directly or indirectly to effect or compel the transfer of any interest in land. It has been severely criticised, and strenuous efforts have been made to stop it half-way by limiting it to cases of a partnership already formed for and engaged in business, as distinguished from a partnership formed and the land acquired in pursuance of one and the same verbal agreement; or to cases of a partnership for general purposes to which the holding and use of the land was incidental, as distinguished from a partnership formed for the special purpose of dealing in the land. On principle, the doctrine of Forster *v.* Hale, that, on parol proof of a partnership existing and doing business, land used by the firm for the purposes of that business is assets of the firm, however the paper title may stand, seems to admit of no such limitations. And the cases which assert them do not deal at all, or do not appear to deal satisfactorily, with that question.

§ 261 *b*. In Caddick *v.* Skidmore (1857) before Lord Chancellor Cranworth, the defendant owned a colliery, and he

[1] In Clarke *v.* McAuliffe, 81 Wisc. 108, it was held that a parol agreement by a firm of lawyers to buy land on joint account with partnership funds, the title taken by one to be for the benefit of both, was within the Statute of Frauds, the land transaction being foreign to the partnership in the practice of law.

and the plaintiff made an oral agreement to become partners in the colliery for the purpose of demising it upon royalties which were to be divided between them; it was demised upon a royalty on account of which defendant made certain payments to the plaintiff, and afterwards the defendant sold the original term; and the bill prayed for an account and for payment of what was due to the plaintiff, apparently both back royalties and his share of the proceeds of sale. Both Forster *v.* Hale and Dale *v.* Hamilton were cited in the argument, but neither was noticed in the opinion of the Lord Chancellor. He dismissed the bill for want of a satisfactory memorandum in writing of the agreement, simply saying that "an agreement to the effect that plaintiff and defendant were to become partners in a colliery for the purpose of demising it upon royalties which were to be divided in some proportion between them" was in his opinion "an agreement not capable of being enforced, unless proved by such evidence as is required by the Statute of Frauds."[1] It is to be noticed that here the lease, which was the interest in lands in question, had been sold, and no relief was sought except a division of the profits; in this respect differing from Dale *v.* Hamilton, where the bill prayed for a sale of the lands on joint account and a distribution of the proceeds in conformity with the agreement, and an injunction to restrain the defendants from otherwise disposing of the land; and this would be a sufficient distinction, at least in this country, where it is settled that, a contract for the sale of lands on joint account having been executed as to the sale of the land, an action lies for distribution of the profits.[2]

§ 261 *c.* On the other hand, the more recent case of Essex

[1] Caddick *v.* Skidmore, 2 De Gex & J. 51.

[2] Trowbridge *v.* Wetherbee, 11 Allen (Mass.) 361; Morrill *v.* Colehour, 82 Ill. 618; Coleman *v.* Eyre, 45 N. Y. 38; Newell *v.* Cochran, 41 Minn. 374; Everhart's Appeal, 106 Pa. St. 349; Coward *v.* Clanton, 79 Cal. 23. In a recent case in New York, however, a distinction has been taken between land bought for speculation or trading and for investment. Slevin *v.* Wallace, 64 Hun (N. Y.) 288.

v. Essex, before Lord Chancellor Cranworth, where a parol agreement was held competent to extend the term of a written contract of partnership for dealing in land, and the rule of partnership distribution applied accordingly, may be considered as reaffirming the doctrine of Dale *v.* Hamilton, although that case was not referred to in the opinion.[1] In England, therefore, that doctrine can hardly be regarded as overthrown.[2]

§ 261 *d.* In this country the decisions are conflicting. The Supreme Court of Indiana[3] has directly followed Dale *v.* Hamilton, adopting in terms the opinion of the Court of Appeals of New York[4] to the same effect; that opinion, however, being unnecessary to the decision in the Court of Appeals, where the question was of the competency of parol evidence to prove the existence of the partnership relation between the several defendants for the purpose of charging all for the torts of some; the partnership being in fact for dealing in land, but no remedy being sought against the land or its proceeds. In Henderson *v.* Hudson in the Court of Appeals of Virginia,[5] sometimes referred to as opposed to the doctrine of Dale *v.* Hamilton, the agreement was that the plaintiff and defendant should join in the purchase of lands, and also that the defendant should after a certain time let the plaintiff have his share at a certain price; and it was held that the two stipulations were inseparable,[6] and that, inasmuch as the latter was clearly within the statute, no recov-

[1] Essex *v.* Essex, 20 Beav. 442.

[2] It is proper to add that the affirmance of Dale *v.* Hamilton by the Lord Chancellor on appeal (see 2 Phillips 266) was put upon a different ground from the rule to which it is cited in the text.

[3] Holmes *v.* McCray, 51 Ind. 358. See also Knott *v.* Knott, 6 Oregon 142; Bates *v.* Babcock, 95 Cal. 479. In Illinois the doctrine of Dale *v.* Hamilton seems to be questioned. Horne *v.* Ingraham, 125 Ill. 198.

[4] Chester *v.* Dickerson, 54 N. Y. 1. See also Gibbons *v.* Bell, 45 Tex. 417; King *v.* Barnes, 109 N. Y. 267; Kilbourn *v.* Olmstead, 5 Mackey (D. of C.) 304.

[5] Henderson *v.* Hudson, 1 Munf. 510.

[6] See Chap. IX., *ante*. Also Raub *v.* Smith, 61 Mich. 543.

ery could be had on the former. So far, therefore, as the case bears at all upon the question we are considering, it recognizes an agreement to buy lands on joint account as good by parol. The case of Walker *v.* Herring,[1] in the same State, does decide that a parol agreement to be jointly interested in a purchase of land is within the statute; the decision, however, being put expressly on the authority of Henderson *v.* Hudson, which is not an authority to that point.[2]

§ 261 *e.* The most prominent American case involving the question of a parol partnership for dealing in lands, as affecting the title to the land bought by one partner in pursuance of it, is Smith *v.* Burnham, decided by Mr. Justice Story several years before Dale *v.* Hamilton.[3] The plaintiff and defendant made an oral agreement to become copartners in the business of buying and selling land and lumber, upon a joint capital to be furnished by both, and the profits and losses to be equally shared between them. The bill alleged that land and lumber had been bought and held accordingly, the plaintiff advancing capital for the purpose, and called for an account and a decree of dissolution, and a conveyance to the plaintiff of his share of the land remaining unsold. Judge Story held that, inasmuch as the suit was for recognition and enforcement of a trust in land, arising upon the breach of the oral partnership agreement, it could not be maintained, and dismissed the bill.[4] This decision is manifestly opposed to Dale *v.* Hamilton and the cases which it represents. It should be noticed that in the copious citation of cases in the opinion, there is no reference to the case of

[1] Walker *v.* Herring, 21 Grat. 678.

[2] The subject of agreements to join in purchases of land is resumed, *post*, § 261 *g*. See also Raub *v.* Smith, 61 Mich. 543.

[3] Smith *v.* Burnham, 3 Sumn. 437.

[4] In Dale *v.* Hamilton the Vice-Chancellor was of opinion that the trust arising upon the refusal to perform the parol partnership agreement was a trust implied from the relation of copartnership, and hence exempt from the statute.

Lake *v.* Craddock,[1] which Sir Lancelot Shadwell cited in Dale *v.* Hamilton, and which fully supported his judgment.

§ 261 *f.* In conclusion of the review of the American cases, reference should be made to an able judgment of the Supreme Court of Wisconsin,[2] where the whole subject of the operation of a parol partnership relation upon the title to land bought in pursuance of it is fully discussed, and Smith *v.* Burnham followed, and a vigorous protest made against the doctrine of Forster *v.* Hale and the cases which it represents, the court evidently appreciating the difficulty of distinguishing the general rule of those cases from its particular application in Dale *v.* Hamilton.[3]

§ 261 *g.* There are frequent cases of parol agreements to join in the purchase of land, where the party excluded from the purchase seeks to enforce his right to a joint interest in it, or the party who has made the purchase alone seeks to compel the other to contribute to the payment of the price; and these cases, in this country, are held to be within the Statute of Frauds. It seems that such agreements must be regarded as *pro hac vice* agreements of copartnership in land; and the decisions in question must therefore be taken into consideration in ascertaining the preponderance of authority in this country on the question we have had under discussion.[4] Where the action is only for the agreed share of the

[1] Lake *v.* Craddock, 3 P. Wms. 158.

[2] Bird *v.* Morrison, 12 Wisc. 138. See also Clarke *v.* McAuliffe, 81 Wisc. 108.

[3] See opinion of Lowell, J., reported in 10 Chicago Legal News, 395, *in re* Farmer, *ex parte* Griffin, cited § 259, *supra*. And see Rowland *v.* Boozer, 10 Ala. 694; Case *v.* Seger, 4 Wash. 492.

[4] Linscott *v.* McIntire, 15 Me. 201; Hess *v.* Fox, 10 Wend. (N. Y.) 436; Gwaltney *v.* Wheeler, 26 Ind. 415; Bruce *v.* Hastings, 41 Vt. 380; Trowbridge *v.* Wetherbee, 11 Allen (Mass.) 361; Wetherbee *v.* Potter, 99 Mass. 354; Henderson *v.* Hudson, 1 Munf. (Va.) 510; Walker *v.* Herring, 21 Gratt. (Va.) 678; McCormick's Appeal, 57 Pa. St. 54; Dunphy *v.* Ryan, 116 U. S. 491; Young *v.* Wheeler, 34 Fed. Rep. 98; Slevin *v.* Wallace, 64 Hun (N. Y.) 288. And see Hirbour *v.* Reeding, 3 Montana 15.

profits of the sale of land, no agreement affecting the title to the land itself remaining executory, the statute (at least in this country) does not apply.[1]

§ 262. The mere parol agreement to form a partnership in land, apart from all question of asserting an interest in land, appears by the weight of authority to be valid and actionable.[2]

§ 263. Coming now to the second division of this general subject of contracts for interests in land (which has been already nearly anticipated), we are to inquire what is the nature of the transaction which the statute requires to be in writing. Contract *or* sale, the expression used in the clause under consideration, clearly means contracts *for* sale.[3] But it is not only contracts for the *sale* of land which are intended to be embraced; for all the cases show that a *purchase* of land is as much within the statute as a sale of it, the policy of the law being not only to protect owners of land from being deprived of it without written evidence, but also to prevent a purchase of land from being forced by perjury and fraud upon one who never contracted for it. An agreement to

[1] See the cases last cited, and *ante*, § 261 *b;* Howell *v.* Kelly, 149 Pa. St. 473. But see Raub *v.* Smith, 61 Mich. 543; Brosnan *v.* McKee, 63 Mich. 454.

[2] Chester *v.* Dickerson, 54 N. Y. 1; Traphagen *v.* Burt, 67 N. Y. 30; Gibbons *v.* Bell, 45 Tex. 417; Holmes *v.* McCray, 51 Ind. 358. See Bunnell *v.* Taintor, 4 Conn. 568; Murley *v.* Ennis, 2 Col. 300; Coffin *v.* McIntosh, 9 Utah 315; Fountain *v.* Menard, 53 Minn. 443; Speyer *v.* Desjardins, 144 Ill. 641; Richards *v.* Grinnell, 63 Iowa 44; Pennybacker *v.* Leary, 65 Iowa, 220; Newell *v.* Cochran, 41 Minn. 374; McElroy *v.* Swope, 47 Fed. Rep. 380; Flower *v.* Barnekoff, 20 Oregon 132; Bates *v.* Babcock, 95 Cal. 479. See Gorham *v.* Heiman, 90 Cal. 346. But where the partnership exists, and holds land, an agreement by one of the partners to retire and assign his share in the assets is within the statute. Gray *v.* Smith, L. R. 43 Ch. D. 208.

[3] In Boyd *v.* Stone, 11 Mass. 346, Parker, C. J., remarked upon the singular circumstance that this error of phraseology was adopted both in the Provincial Act of 1692, and the Statute of the Commonwealth, 1783. It is corrected in the Revised Statutes. But the same thing occurs in many of the American Statutes of Frauds.

devise an interest in land, though founded on a precedent valuable consideration, is also within this section of the statute;[1] and, as we shall see in the course of this chapter, the effect of the provision, as expounded and applied by the courts, is to render unavailing to the parties, as the ground of a claim, any contract, in whatever shape it may be put, by which either of them is to part with any interest in real estate.

§ 263 *a*. It would seem to be the more reasonable construction of the statute, as it regards contracts for land, that it embraces only contracts by which one of the parties parts with land to the other.[2] When, for instance, the defendant promises the plaintiff to buy land for himself, — the plaintiff, whatever his advantage from having the defendant make the purchase, acquiring no interest in land, — the contract does not appear to be within the policy of the statute.[3] But it has been held in the Common Pleas (Keating, J., doubting) that an agreement by the defendant to procure a third party to make a lease of real estate to the plaintiff was within the statute.[4] It is not clear from the report whether or not the purchase-money was to be advanced by the defendant. This may make a difference; for if it was, the defendant may be regarded as buying the lease himself, the deed to be made to his nominee, the plaintiff.[5] In cases of a promise to the

[1] Harder *v.* Harder, 2 Sandf. (N. Y.) Ch. 17; Mundorff *v.* Kilbourn, 4 Md. 459; Campbell *v.* Taul, 3 Yerg. (Tenn.) 548; Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 469; Johnson *v.* Hubbell, 2 Stock. (N. J.) Ch. 322; Gould *v.* Mansfield, 103 Mass. 408; *In re* Kessler's Estate, 59 N. W. Rep. (Wisc.) 129; Manning *v.* Pippen, 86 Ala. 357; Wellington *v.* Apthorp, 145 Mass. 69; Manning *v.* Pippen, 95 Ala. 537; Hale *v.* Hale, 19 S. E. Rep. (Va.) 739. See Crutcher *v.* Muir, 90 Ky. 142.

[2] Murley *v.* Ennis, 2 Col. 300.

[3] Little *v.* McCarter, 89 N. C. 233.

[4] Horsey *v.* Graham, L. R. 5 C. P. 9; Bannon *v.* Bean, 9 Iowa, 395.

[5] In Mather *v.* Scoles, 35 Ind. 2, the defendant's promise was to procure "at his own cost" the conveyance from the third party to the plaintiff of land worth a certain amount, or to pay the plaintiff enough to enable him to procure the conveyance directly to himself; he did neither, and the plaintiff sued for breach of the agreement; and it was held that the statute applied.

plaintiff by the defendant to buy land for himself from a third party, if the third party be the nominee of the plaintiff,[1] or a relative for whom he wishes to provide,[2] the indirect interest of the plaintiff in the purchase itself may draw the contract under the operation of the statute.

§ 264. It was formerly supposed that *auction sales* of land were not embraced by the statute, but it is now clearly settled otherwise. Sir William Grant says: "From the public nature of a sale by auction, it does not follow that what passes there must be matter of certainty; so far from it that I never saw more contradictory swearing than in those cases where attempts were made to introduce evidence of what was said or done during the course of the sale."[3] As to sheriff's sales on execution, and sales by town officers, or trustees or administrators, there are differences of opinion and decision, turning upon the fact of their being regarded, or not, as *quasi* judicial sales. When so regarded, they are held not to be affected by the statute, but if otherwise, no exception is made in their favor.[4]

§ 265. The distinction in favor of what are called judicial sales appears to have been first made by Lord Hardwicke in the case of the Attorney-General *v.* Day. There, the Master in Chancery having reported a scheme for carrying out a verbal contract of which specific execution had been ordered,

[1] Chiles *v.* Woodson, 2 Bibb (Ky.) 72. And see Allen *v.* Richard, 83 Mo. 55.

[2] Campbell *v.* Taul, 3 Yerg. (Tenn.) 548; Lamar *v.* Wright, 31 S. C. 60.

[3] Blagden *v.* Bradbear, 12 Ves. 466. The rule is too familiar to require the citation of authorities. They will be found collected in Chitty on Contracts, 271.

[4] See Tate *v.* Greenlee, 4 Dev. (N. C.) 149; Ingram *v.* Dowdle, 8 Ired. (N. C.) 455; Emley *v.* Drumm, 36 Pa. St. 123; Ruckle *v.* Barbour, 48 Ind. 274; Warfield *v.* Dorsey, 39 Md. 299; Brent *v.* Green, 6 Leigh (Va.) 16; Wolfe *v.* Sharp, 10 Rich. (S. C.) Law, 60; King *v.* Gunnison, 4 Pa. St. 171; Carroll *v.* Powell, 48 Ala 298; Jones *v.* Kokomo Association, 77 Ind. 340; Joslin *v.* Ervien, 50 N. J. Law 39; White *v.* Farley, 81 Ala. 563.

and his report having been allowed, his Lordship said he did not doubt the propriety of carrying into execution against the representative a purchase by a bidder before the Master, though the purchaser had subscribed no agreement; that it was a judicial sale of the estate, which took it entirely out of the statute.[1] This remark has been strongly criticised by Judge Kent, but apparently without necessity. He had occasion in the case before him only to hold that a sale by a sheriff required to be consummated by deed, and that his seizure of land under a *fi. fa.* and return on the execution did not suffice to devest the debtor's estate in it.[2] This is true also of a judicial sale, which should be followed up by a deed from the Master, or other officer of the court. The decision of Lord Hardwicke was simply that, after confirmation of the report, the parties were bound to carry out the sale, notwithstanding no memorandum of it had previously been made in writing. The grounds of this rule are well stated by Story, J., in the case of Smith *v.* Arnold. "In sales directed by the Court of Chancery, the whole business is transacted by a public officer under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the court, and, if any mistake has occurred, may have it corrected. He, therefore, becomes a party in interest; and may represent and defend his own interests; and if he acquiesces in the report, he is deemed to adopt it, and is bound by a decree of the court confirming the sale. He may be compelled by process of the court to comply with the terms of the contract. So that the whole

[1] Attorney-General *v.* Day, 1 Ves. Sen. 218. See also Blagden *v.* Bradbear, 12 Ves. 466; Smith *v.* Arnold, 5 Mas. (C. C.) 474; Boykin *v.* Smith, 3 Munf. (Va.) 102; Trice *v.* Pratt, 1 Dev. & B. (N. C.) Eq. 626; Jenkins *v.* Hogg, 2 Treadw. (S. C.) 821; Hudson *v.* Coble, 97 N. C. 260.

[2] Simonds *v.* Catlin, 2 Caines (N. Y.) 61. *Ante*, § 28.

proceedings from the beginning to the end are under the guidance and direction of the court; and the case does not fall within the mischiefs supposed by the Statute of Frauds." [1] Sales by sheriffs on execution are not, as we have seen, to be regarded as judicial sales,[2] nor sales by town officers, nor by trustees, nor by administrators. The remarks of Judge Story in the case from which we have just quoted, and where the point decided was that an administrator's sale of land was not saved from the statute as a judicial sale, are entirely applicable to all these varieties. "In the case of an administrator, the authority to sell is indeed granted by a court of law. But the court, when it has once authorized the administrator to sell, is *functus officio*. The proceedings of the administrator never come before the court for examination or confirmation. They are mere matters *in pais*, over which the court has no control. The administrator is merely accountable to the Court of Probate for the proceeds acquired by the sale, in the same manner as for any other assets. But whether he has acted regularly or irregularly in the sale is not matter into which there is any inquiry by the court granting the license, or by the Court of Probate having jurisdiction over the administration of the estate. So that the present case is not a judicial sale in any just sense, but it is the execution of a ministerial authority. The sale is not the act of the court but of the administrator." [3]

§ 266. An agreement by which a party shall ultimately be bound to sell or purchase land is, of course, as much within the statute as if he bound himself immediately to do so.[4] A verbal engagement, therefore, to execute a written agreement

[1] Smith *v.* Arnold, 5 Mas. (C. C.) 420. See also Hutton *v.* Williams, 35 Ala. 503; Fulton *v.* Moore, 25 Pa. St. 468; Halleck *v.* Guy, 9 Cal. 181; Armstrong *v.* Vroman, 11 Minn. 220; Watson *v.* Violett, 2 Duvall (Ky.) 332; Andrews *v.* O'Mahoney, 112 N. Y. 567.

[2] *Ante*, § 264. Also see Brent *v.* Green, 6 Leigh (Va.) 16.

[3] Smith *v.* Arnold, 5 Mas. (C. C.); Wolfe *v.* Sharp, 10 Rich. (S. C.) Law, 60; King *v.* Gunnison, 4 Pa. St. 171.

[4] Rucker *v.* Steelman, 73 Ind. 396.

to convey land is invalid,[1] or to make a will of lands.[2] And so where it was attempted to prove that a deceased owner of land had *said*, during his lifetime, that he had sold it to the plaintiff and that the proceeds belonged to him, the evidence was rejected, because it worked the same result as oral proof of an executory contract to sell the land.[3]

§ 267. The statute extends to any agreement by which rights already acquired in real estate under a deed or other sufficient writing are enlarged or qualified.[4] Not only is an agreement to execute a mortgage invalid without writing,[5] but also an agreement to make a defeasance to an absolute conveyance,[6] or to convert a written mortgage into a conditional sale,[7] or to foreclose a mortgage, even when the agreement is made by solicitors in anticipation of a decree of court to the same effect.[8] It would seem to be very clear that a defunct mortgage cannot be revived by a parol agreement;[9] and it has been decided that a defunct written agreement for the sale of land could not.[10] Nor can a written executory contract for the sale of land be rescinded by parol.[11]

[1] Ledford *v.* Ferrell, 12 Ired. (N. C.) 285; Trammell *v.* Trammell, 11 Rich. (S. C.) Law, 471; Yates *v.* Martin, 1 Chand. (Wisc.) 118; Lawrence *v.* Chase, 54 Me. 196; Sands *v.* Thompson, 43 Ind. 18. So with the sale of a bond entitling the holder to the benefit of a mortgage of land. Toppin *v.* Lomas, 16 C. B. 145; Curtis *v.* Abbe, 39 Mich. 441; Brackett *v.* Brewer, 71 Me. 478.

[2] Gould *v.* Mansfield, 103 Mass. 408; Roehl *v.* Haumesser, 114 Ind. 311; Chase *v.* Fitz, 132 Mass. 359; Wellington *v.* Apthorp, 145 Mass. 73.

[3] White *v.* Coombs, 27 Md. 489.

[4] Irwin *v.* Hubbard, 49 Ind. 350; and see McEwan *v.* Ortman, 34 Mich. 325. And see Sullivan *v.* Dunham, 42 Mich. 518.

[5] Clabaugh *v.* Byerly, 7 Gill (Md.) 354. And see Stringfellow *v.* Ivie, 73 Ala. 215; Patton *v.* Beecher, 62 Ala. 579.

[6] Boyd *v.* Stone, 11 Mass. 342.

[7] Woods *v.* Wallace, 22 Pa. St. 171.

[8] Cox *v.* Peele, 2 Bro. C. C. 334.

[9] A different doctrine, however, might be inferred from the New York cases of Truscott *v.* King, 6 N. Y. 147, and Mead *v.* York, 6 N. Y. 449.

[10] Davis *v.* Parish, Litt. (Ky.) Sel. Cas. 153.

[11] Catlett *v.* Dougherty, 21 Ill. App. 116.

An arrangement to extend the effect of a mortgage so as to cover other and farther liabilities is not good without writing.[1] But a verbal extension of the time for redeeming mortgaged land is, it seems, to be regarded as conferring no interest in the land.[2] Whether a mortgage can be verbally released or discharged, seems to depend upon the question (on which, as we have seen, there is great contrariety of opinion in the courts of different States) whether it is to be regarded strictly as a conveyance of the land or as a mere incident to the debt.[3]

§ 268. An agreement to establish the title to land in any party is, of course, equivalent to an agreement to sell him the land; and it has accordingly been held that an engagement to break down a certain alleged title under which a third party claimed adversely, or in any way to perfect the title in the promisee, is within the statute.[4] Also, as appears to have been the opinion of the Supreme Court of Massachusetts, a verbal agreement to release a covenant of warranty would be invalid.[5] On the other hand, a mere verbal guar-

[1] Williams *v.* Hill, 19 How. (U. S.) 246; Stoddard *v.* Hart, 23 N. Y. 556; Curle *v.* Eddy, 24 Mo. 117. Nor is an agreement to substitute certain other land for that which is described in a mortgage. Castro *v.* Illies, 13 Tex. 229.

[2] Hamilton *v.* Terry, 11 C. B. 954; Griffin *v.* Coffey, 9 B. Mon. (Ky.) 452; Butt *v.* Butt, 91 Ind. 305; Scheffermeyer *v.* Schaper, 97 Ind. 70; McMakin *v.* Schenck, 98 Ind. 264; Vliet *v.* Young, 34 N. J. Eq. 15; Hicks *v.* Aylsworth, 13 R. I. 562. See Martin *v.* Martin, 16 B. Mon. (Ky.) 8; Moorman *v.* Wood, 117 Ind. 144; McNeil *v.* Gates, 41 Ark. 264; Worden *v.* Crist, 106 Ill. 326. In Littell *v.* Jones, 56 Ark. 139, it was held that where the time to redeem had expired an oral contract by the purchaser at the execution sale to relinquish his claim to the land is within the statute.

[3] Hunt *v.* Maynard, 6 Pick. (Mass.) 489; Parker *v.* Barker, 2 Met. (Mass.) 423; Malins *v.* Brown, 4 N. Y. 403; Phillips *v.* Leavitt, 54 Me. 405; Leavitt *v.* Pratt, 53 Me. 147; *ante*, § 65. As to a parol waiver of a devise of land, see Doe *v.* Smyth, 6 Barn. & C. 112. As to a parol discharge of a contract for land, see *post*, §§ 429 *et seq.*

[4] Duvall *v.* Peach, 1 Gill (Md.) 172; Bryan *v.* Jamison, 7 Mo. 106. See Bishop *v.* Little, 5 Greenl. (Me.) 362.

[5] Bliss *v.* Thompson, 4 Mass. 488. And it seems to have been consid-

anty of title, or quantity, of course, gives merely a remedy in damages, and does not go to pass any interest in the land between the parties, nor does the statute affect an agreement to pay the expense of investigating the title to land in case it prove unsatisfactory.[1] It is obvious that these are rather contracts concerning, than contracts for the sale of an interest concerning, land.[2] Still less can the statute be considered applicable to mere agreements to pay or account for the proceeds of sales of land, or to pay an agent's commission for services in buying or selling land.[3]

§ 269. It is undoubtedly the meaning of this branch of the statute that only those agreements which bind the parties to a change in some respect in the *title* to the land are required to be in writing. Thus, as we had occasion to see in a former part of this book under the head of conveyances, a verbal agreement for the settlement of an uncertain boundary

ered by the Supreme Court of New York doubtful whether an agreement to pay off incumbrances was not also within the statute. Duncan *v.* Blair, 5 Denio, 196.

[1] Jeakes *v.* White, 6 Exch. 873; Huntington *v.* Wellington, 12 Mich. 10; Lamm *v.* Port Deposit Association, 49 Md. 233. So a parol guaranty by a seller that the tract sold contained a certain number of acres is not within the statute. Schriver *v.* Eckemode, 94 Pa. St. 456. A parol stipulation by a building contractor that no material men's liens should be filed held good in McElroy *v.* Bradden, 152 Pa. St. 81.

[2] See also Doggatt *v.* Patterson, 18 Texas 158; Evans *v.* Hardeman, 15 Texas 480; Natchez *v.* Vandervelde, 31 Miss. 706; Miller *v.* Roberts, 18 Texas 16.

[3] Graves *v.* Graves, 45 N. H. 323; Ford *v.* Finney, 35 Ga. 258; Gwaltney *v.* Wheeler, 26 Ind. 415; Jones National Bank *v.* Price, 37 Neb. 291; Miller *v.* Kendig, 55 Iowa 174; Carr *v.* Leavitt, 54 Mich. 540; Monroe *v.* Snow, 131 Ill. 126; Snyder *v.* Wolford, 33 Minn. 175; Benjamin *v.* Zell, 100 Pa. St. 33; Mahagan *v.* Mead, 63 N. H. 130; Green *v.* Randal, 51 Vt. 67; Sayre *v.* Wilson, 86 Ala. 151; Von Trotha *v.* Bamberger, 15 Col. 1; Michael *v.* Foil, 100 N. C. 178; Sprague *v.* Bond, 108 N. C. 382; Strong *v.* Kamm, 13 Oregon 172; Gorham *v.* Herman, 90 Ala. 346; Watters *v.* McGuigan, 72 Wisc. 155; Byers *v.* Locke, 93 Cal. 493. See Patterson *v.* Hawley, 33 Neb. 440. A verbal contract to pay a commission to an agent for his services in buying or selling land is valid. Waterman Exchange *v.* Stephens, 71 Mich. 104; unless the commission is to be paid in land. McDonald *v.* Maltz, 78 Mich. 685.

is binding between the parties, as no title of either is affected thereby; neither could be said to own the disputed tract, as neither had any evidence whatever of title in it.[1] And the same is true of an agreement which merely restricts the purchaser of land as to the manner in which or the purposes for which he shall use the land, while at the same time his title to it is not impaired, as, for instance, stipulations that he shall not carry on a certain trade or use certain buildings upon the premises, or the like.[2] Nor is there any reason why the statute should be held to cover mere arrangements as to the payment of taxes.[3]

§ 269 *a*. Parol reservations, by which it is attempted to except from the operation of a deed some interest in the realty conveyed by it, are inoperative by the Statute of Frauds.[4]

§ 270. Where a deed has been actually executed or a title to the land in any way passed, agreements between the parties as to pecuniary liabilities growing out of the transaction, but not going to take any interest in land from the grantee, are not affected by the statute.[5] Thus an agreement releas-

[1] *Ante*, § 75. See also Lindsay *v.* Jaffray, 55 Texas 626.

[2] Bostwick *v.* Leach, 3 Day (Conn.) 476; Leinau *v.* Smart, 11 Humph. (Tenn.) 308; Fleming *v.* Ramsey, 46 Pa. St. 252. But an agreement to open a street adjacent to the promisor's land has been held to be within the statute. Richter *v.* Irwin, 28 Ind. 26. So an agreement not to build within three feet of the street. Wolfe *v.* Frost, 4 Sandf. (N. Y.) Ch. 72; and see Rice *v.* Roberts, 24 Wisc. 461; Hall *v.* Solomon, 61 Conn. 476. An agreement for the use of a dry dock, held not an agreement for an interest in land in Wells *v.* Mayor, L. R. 10 C. P. 402.

[3] Preble *v.* Baldwin, 6 Cush. (Mass.) 549; Brackett *v.* Evans, 1 Cush. (Mass.) 79. See McCormick *v.* Cheevers, 124 Mass. 262. A verbal substitution of appraisers of the value of land for those originally appointed by writing, is not a contract for any interest in the land. Stark *v.* Wilson, 3 Bibb (Ky.) 476.

[4] Leonard *v.* Clough, 133 N. Y. 292; Armstrong *v.* Lawson, 73 Indiana 498; Kerr *v.* Hill, 27 W. Va. 576. Growing crops may be so reserved Thompson *v.* Tilton, 34 N. J. Eq. 306. See *ante*, § 256.

[5] McCabe *v.* Fitzpatrick, 2 Leg. Gaz. 138; McOuat *v.* Cathcart, 84 Ind. 567; Turpie *v.* Lowe, 114 Ind. 37.

ing damages for the taking of land for public uses,[1] or for the use of it by statutory privilege, as in certain cases of flowage, is binding without writing,[2] and so, manifestly, is any special agreement to pay the price of land previously conveyed.[3]

§ 271. A contract for the sale or purchase of land is within the statute, though no price be paid in money. A verbal agreement for an exchange of lands, we have seen in a former chapter, was not binding;[4] and the same is undoubtedly true when the price of the proposed conveyance is to consist of labor or services of any kind, or, generally, of whatever the law would regard as a good consideration.[5]

[1] Embury *v.* Conner, 3 N. Y. 511; Fuller *v.* Plymouth Commissioners, 15 Pick. (Mass.) 81.

[2] Fitch *v.* Seymour, 9 Met. (Mass.) 462; Smith *v.* Goulding, 6 Cush. (Mass.) 154; Clement *v.* Durgin, 5 Greenl. (Me.) 14. But when the statute authorizing the taking of the land contemplates *a contract* with the owner, this contract must be in writing. Phillips *v.* Thompson, 1 Johns. (N. Y.) Ch. 131.

[3] *Quære*, if an agreement to discount for so much as a piece of land granted shall fall short of the amount named in the deed is affected by the statute. It has been determined both ways in early Connecticut cases. Mott *v.* Hurd, 1 Root, 73; Bradley *v.* Blodget, Kirby, 22. The former of these cases, however, was referred to as law by the Supreme Court of Indiana in Green *v.* Vardiman, 2 Blackf. 324. See also Dyer *v.* Graves, 37 Vt. 369; and Metcalf *v.* Putnam, 9 Allen (Mass.) 100. An agreement to pay an increased price for land if coal were found in it, has been held void by the statute in Virginia. Heth *v.* Wooldridge, 6 Rand. 605. See also Garret *v.* Malone, 8 Rich. (S C.) Law, 335; Howe *v.* O'Mally, 1 Murph. (N. C.) 287; Fraser *v.* Child, 4 E. D. Smith (N. Y.) 153; Sherrill *v* Hagan, 92 N. C. 345.

[4] *Ante*, § 76; Purcell *v.* Miner, 4 Wall. (U. S.) 513.

[5] Burlingame *v.* Burlingame. 7 Cowen (N. Y.) 92; Jack *v.* McKee, 9 Pa. St. 235; Helm *v.* Logan. 4 Bibb (Ky.) 78; Baxter *v.* Kitch, 37 Ind. 554; Dowling *v.* McKenney, 124 Mass. 478; Slocum *v.* Wooley, 43 N. J. Eq. 451. See *post*, § 293.

CHAPTER XIII.

AGREEMENTS NOT TO BE PERFORMED IN A YEAR.

§ 272. In that clause of the Statute of Frauds which we have now to consider, we perceive still another restriction placed upon the formation of binding contracts by mere verbal understanding. We have seen that all verbal promises to answer for the debt, default, or miscarriage of another, all agreements made upon consideration of marriage, and all contracts for an interest in real estate, must be reduced to writing, in order that any action may be supported upon them or advantage taken of them; and we shall hereafter see that the same is true of certain bargains for goods, wares, and merchandise. All these provisions relate to the *subject-matter* of the contract. But that which is at present before us relates to the *period of the performance* of the contract. It manifestly includes them all to a certain extent; that is, a contract which any one of them would render invalid on account of the subject-matter, may be, so to speak, doubly invalid if it is not to be performed within a year.[1]

[1] It is so, for instance, with a contract in consideration of marriage. Paris *v.* Strong, 51 Ind. 339. Or mutual promises to marry. Ullman *v.* Meyer, 10 Fed. Rep. 241; Derby *v.* Phelps, 2 N. H. 515; Lawrence *v.* Cooke, 56 Me. 193; Nichols *v.* Weaver, 7 Kans 373. But see Brick *v.* Gannar, 36 Hun (N. Y.) 52. Or with executory contracts for such short leases as would be valid *in esse*. See Delano *v.* Montague, 4 Cush. (Mass.) 42; Roberts *v.* Tunnell, 3 T. B Mon. (Ky.) 247; Wilson *v.* Martin, 1 Denio (N. Y.) 602; Comstock *v.* Ward, 22 Ill. 248; Atwood *v.* Norton, 31 Ga. 507; Strehl *v.* D'Evers, 66 Ill. 77; Beiler *v.* Devoll, 40 Mo. App. 251; Wolf *v.* Dozer, 22 Kansas,* 436; Jellett *v.* Rhode. 43 Minn. 166; Brown *v.* Kayser, 60 Wisc. 1. But as to the law in New York since the last revision of the statutes, see Young *v.* Dake, 5 N. Y.

§ 273. Postponing the questions, what is the performance of such an agreement, and what the meaning of the limitation as to time, we are first to ascertain the force of the words "*to be* performed." And on these words much reasoning has been expended. The result seems to be that 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 that 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.[1]

§ 274. Suppose that the parties make *no stipulation as to time;* but the performance of the agreement depends either expressly or by reasonable implication upon the happening of a certain contingency which may occur within the year. In such case it is settled upon authority and reasonable in principle that the statute shall not apply. The agreement *may be* performed entirely within the year, consistently with the understanding and the rights of the parties. There are many cases which illustrate this rule, and which may be conveniently divided into classes, for the purpose of showing more clearly the extent of the rule.

463, overruling Croswell *v.* Crane, 7 Barb. 191; also Taggard *v.* Roosevelt, 2 E. D. Smith (N. Y.) 100. See also Sobey *v.* Brisbee, 20 Iowa 105; Jones *v.* Marcy, 49 Iowa 188; Fall *v.* Hazelrigg, 45 Ind. 576. But see Wolke *v.* Fleming, 103 Ind. 105; Worley *v.* Sipe, 111 Ind. 238. See also Baynes *v.* Chastain, 68 Ind. 376; Cole *v.* Wright, 70 Ind. 179; Whiting *v.* Ohlert, 52 Mich. 462; Sears *v.* Smith, 3 Col. 287. But see Stern *v.* Nysonger, 69 Iowa 512 The statement in Taggard *v.* Roosevelt, *supra*, that the section in the New York Statute of Frauds applies only to contracts for goods, etc., and not to those for an interest in land, is not supported by other New York cases. See Cayuga R. R. Co. *v.* Niles, 13 Hun (N. Y.) 170. *Quære* if an agreement to make a lease within one year is within the year clause of the statute, whatever be the length of the term. Becar *v.* Flues, 64 N. Y. 518.

[1] *Post*, § 279.

§ 275. Cases where the thing promised is in terms to be done when a certain event occurs which may occur within a year; as, for instance, to pay money on the day of the promisor's marriage,[1] to leave it by will (the promise, of course, taking effect in the event of the promisor's death),[2] or that his executor shall pay it;[3] to pay on the death of a third party[4] upon the termination of a suit;[5] to pay when a sum of money is received by the promisor from a third person, which payment may be made within the year;[6] to marry at the end of a voyage, which voyage may be accomplished within the year;[7] to marry upon restoration to health;[8] to save a party harmless from signing an obligation, which obligation may be forfeited within the year,— are not within the statute.[9] Under this head come contracts of insurance, where the promise to pay is conditioned upon the happening of the contingency within the term of the policy.[10]

§ 276. Cases where the promise is to continue to do something until an implied contingency occur, as, for instance, to pay during the promisee's life;[11] to pay during the life of

[1] Peter *v.* Compton, Skin. 353.

[2] Fenton *v.* Emblers, 3 Burr. 1278; Ridley *v.* Ridley, 34 Beav. 478; Izard *v.* Middleton, 1 Des. (S. C.) Ch. 116; Bell *v.* Hewitt, 24 Ind. 280; Jilson *v.* Gilbert, 26 Wisc. 637; Wellington *v.* Apthorp, 145 Mass. 69. The case of Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 469, so far as it must be taken to assert the contrary, is clearly opposed to prevailing authority.

[3] Wells *v.* Horton, 4 Bing. 40.

[4] Thompson *v.* Gordon, 3 Strobh. (S. C.) Law, 196; King *v.* Hanna, 9 B. Mon. (Ky.) 369; Frost *v.* Tarr, 53 Ind. 390; Riddle *v.* Backus, 38 Iowa, 81; Sword *v.* Keith, 31 Mich. 247.

[5] Derrick *v.* Brown, 66 Ala. 112; Heflin *v.* Milton, 69 Ala. 354.

[6] Artcher *v.* Zeh, 5 Hill (N. Y.) 200.

[7] Clark *v.* Pendleton, 20 Conn. 495. See *post*, § 280.

[8] McConahey *v.* Griffey, 82 Iowa 564.

[9] Blake *v.* Cole, 22 Pick. (Mass.) 97.

[10] Walker *v.* Metropolitan Ins. Co., 56 Me. 371; Wiebeler *v.* Milwaukee Ins. Co., 30 Minn. 464.

[11] Hutchinson *v.* Hutchinson, 46 Me. 154; Atchison, T. & S. F. R. R. *v.* English, 38 Kans. 110. In Berry *v.* Doremus, 30 N. J. L. 399, this rule seems to have been overlooked. See Tolley *v.* Greene, 2 Sandf.

another;[1] to work for another during his life;[2] to board the promisee during his life;[3] to educate a child;[4] to support a child;[5] to pay during coverture,[6] — are not within the statute, because the contracting parties contemplate that the one whose life is involved may die within the year. And so, of course, whatever else be the contingency, provided it may happen within the year.[7]

§ 276 *a*. Agreements to continue to do something for an indefinite period, which may be terminated at any time by either party;[8] or which may be terminated by such a change

(N. Y.) Ch. 91, where the Assistant Vice-Chancellor intimates a distinction on this point between a contingency consisting in the happening of an event which neither party nor both together can hasten or retard, and the happening of an event which rests upon human effort and volition, inclining to the opinion that in the former case the statute applies. But the distinction, as the cases show, is entirely without foundation in authority, and the same judge, in his *dictum* in Rhodes *v.* Rhodes, 3 Sandf. Ch. 285, seems to have disregarded it. See it criticised in Blanchard *v.* Weeks, 34 Vt. 589.

[1] Gilbert *v.* Sykes, 16 East 150; Burney *v.* Ball, 24 Ga. 505; Wiggins *v.* Keizer, 6 Ind. 252.

[2] Updike *v.* Ten Broeck, 32 N. J. L. 105, 116; Kent *v.* Kent, 62 N. Y. 560, affirming the doctrine of Dresser *v.* Dresser, 35 Barb. 573, reversed on other grounds by the Court of Appeals. Pennsylvania Co. *v.* Dolan, 6 Ind. App. Ct. 109.

[3] Howard *v.* Burgen, 4 Dana (Ky.) 137. And see Alderman *v.* Chester, 34 Ga. 152; Bull *v.* McCrea, 8 B. Mon. (Ky.) 422; Heath *v.* Heath, 31 Wisc. 223; Harper *v.* Harper, 57 Ind. 347; Murphy *v.* O'Sullivan, 18 Ir. Jur. 111; Carr *v.* McCarthy, 70 Mich. 258.

[4] Ellicott *v.* Turner, 4 Md. 476. In Wilhelm *v.* Hardman, 13 Md. 140, which followed the authority of the preceding case, the circumstances would seem to show a period of time fixed by the parties, which should have brought the case within the statute. See Abbott *v.* Inskip, 29 Ohio St. 59.

[5] Stowers *v.* Hollis, 83 Ky. 544.

[6] Houghton *v.* Houghton, 14 Ind. 505.

[7] White *v.* Hanchett, 21 Wisc. 415; Blake *v.* Voight, 134 N. Y. 69; Railroad Co. *v.* Staub, 7 B. J. Lea (Tenn.) 397; Smith *v.* Conlin, 19 Hun (N. Y.) 234; Sweet *v.* Desha Lumber Co., 56 Ark. 629. *Quære* if the application of this rule was not strained in Railway Co. *v.* Whitley, 54 Ark. 199.

[8] Esty *v.* Aldrich, 46 N. H. 127; Sherman *v.* Champlain Trans. Co., 31 Vt. 162; Baptist Ch. *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305; Knowl-

in the circumstances of the parties as will make it unreasonable or unnecessary that they should be farther bound, the contingency of such change of circumstances being implied in the nature of the contract, — are not within the statute. The latter point may be illustrated by a case in New York, where the defence to an action for injury to the plaintiff's cattle by running over them with railway cars, was that the plaintiff had verbally agreed to build and maintain a fence along the railroad opposite his land, whence his cattle escaped on to the track at the time of the injury. This agreement was held not to require a writing under the Statute of Frauds; but upon doubtful ground. It would have been properly so held upon the ground that the duration of the plaintiff's promise to maintain the fence was obviously limited (though no words said to that effect) by the duration of the circumstances of the parties which led to the making of it. If the road should cease to be used by the promisee or its assigns for railway purposes, it is unreasonable to suppose that the fence was still to be maintained, the reason for maintaining it no longer existing; and this might well happen within the space of a year, consistently with the understanding and rights of the parties.[1]

man *v.* Bluett, L. R. 9 Exch. 1, 307; Greene *v.* Harris, 9 R. I. 401; Blakeney *v.* Goode, 30 Ohio St. 350; Prout *v.* Webb, 87 Ala. 593; Walker *v.* Railroad Co., 26 S. C. 80.

[1] Talmadge *v.* Rensselaer & Saratoga R. R. Co., 13 Barb. (N. Y.) 493. The court took the ground, as sufficient for the decision of the case, that as the contract was, by present payment of the consideration, executed completely on one side, the statute did not apply. (Upon this point see *post*, § 286.) It seems that the case can hardly be sustained except upon the ground stated in the text. In Pitkin *v.* Long Island R. R. Co., 2 Barb. Ch. 221, is was held that a mere executory agreement between complainant and defendant that the latter should establish a turn-out track near his land, and stop there, as a permanent arrangement, was void. But here the contract went to create a negative easement in the property of the railroad company, a right which could not pass by parol, and so the case is explained in Talmadge *v.* Rensselaer & Saratoga R. R. Co., *supra*. It must be said that the cases of Osborne *v.* Kimball, 41 Kans. 187 and Baynes *v.* Chastain, 68 Ind. 376 (cases of mutual contracts to maintain prices seem to be against the view taken in the text.

§ 276 *b*. But in a case where a railway company verbally agreed to lay a switch for the use of a saw-mill owner, and to maintain the same as long as he should need it, and it was made to appear as matter of fact that it was expected and understood between the parties that he would need it for many years, the United States Circuit Court of Appeals for the Fifth Circuit held that the Statute of Frauds barred action by the mill-owner against the railway company for breach of the agreement. The court say, "We think it appears affirmatively that the agreement was not to be performed within the space of one year, and that it was void." [1]

§ 277. Agreements to refrain altogether from certain acts are also held not to be within the statute; such as an agreement not thereafter to engage in the staging or livery business in a certain town; [2] an agreement not thereafter to practise medicine in a certain town; [3] an agreement not thereafter to sell or aid in selling musical instruments except to certain parties. [4] In all such cases the agreement, from its nature, will be performed when the party dies, and this contingency, though not named by the parties, must be in their contemplation as one which *may* happen within the year. [5]

[1] Warner *v.* Texas & Pacific R. R. Co., 4 U. S. Cir. Ct. App. 673; 54 Fed. Rep. 922. See also Fallon *v.* Chronicle Publishing Co., 1 McArthur 485.

[2] Lyon *v.* King, 11 Metc. (Mass.) 411. Observe the distinction between this, and cases like King *v.* Welcome, 5 Gray (Mass.) 41, where the time is fixed by the parties. See §§ 281, 282, *post.*

[3] Blanding *v.* Sargent, 33 N. H. 239; Blanchard *v.* Weeks, 34 Vt. 589; Welz *v.* Rhodius, 87 Ind. 1.

[4] Hill *v.* Jamieson, 16 Ind. 125. See also Richardson *v.* Pierce, 7 R. I. 330; Worthy *v.* Jones, 11 Gray (Mass.) 168.

[5] The case of Davey *v.* Shannon, decided in the Exchequer Division in 1879 (4 Exch. Div. 81), is against the rule stated in the text. As treated in argument, and by the court, the agreement in question was that the defendant should not thereafter practise a certain trade in a certain neighborhood. "*Primâ facie*," said the court, Hawkins, J., "it was not to be performed within a year." And starting with this assumption, he applied to the case the acknowledged rule that a contract which by its terms is not to be performed within a year, is not the less within the statute, because it is made *defeasible* by a contingency, *e. g.*, the party's

§ 278. Although a period of more than a year be expressly *allowed* for the performance of the agreement, yet if the agreement may be substantially and reasonably *performed*, according to the fair understanding and intention of the parties, within a year, the statute will not apply.[1]

§ 278 *a*. An agreement, in general terms, to do a particular act, no time being specified, and the act being such as may be performed by the party promising, under the contract, within a year, is also saved from the operation of the statute, on the principles before stated.[2]

death, which may occur within that period; and gave judgment for the defendant. The proposition that an agreement to be performed so long as the promisor lives is *primâ facie* not to be performed within a year, can hardly stand. None of the cases which are cited in support of this judgment presented such a question; but they all turned upon other considerations which form the subject of discussion in different parts of this chapter. The statement of claim alleged that, "In or about 1866, the defendant entered into the employment of the plaintiff as a foreman tailor for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment, he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter, within five miles of Devonport. The defendant, on the expiration of the said period of three years, continued in the employment of the plaintiff on the like terms, except as to the period of employment, until the end of October, 1877." The true view of the defendant's agreement would seem to be, that he was to refrain from taking employment with others for at least three years. If this view were taken, the decision would be right. Since the foregoing was written the authority of Davey *v.* Shannon has been repudiated by the Court of Appeal in McGregor *v.* McGregor, in L. R. 21 Q. B. D. 424. *Post*, § 282 *b*.

[1] Walker *v.* Johnson, 96 U. S. 424; Southwell *v.* Beezley, 5 Oreg. 143; Hodges *v.* Richmond Manuf. Co., 9 R. I. 482; Paris *v.* Strong, 51 Ind. 339; Plimpton *v.* Curtiss, 15 Wend. (N Y.) 336; Kent *v.* Kent, 18 Pick. (Mass.) 569; Artcher *v.* Zeh, 5 Hill (N. Y.) 200; Lapham *v.* Whipple, 8 Metc. (Mass.) 59; Linscott *v.* McIntire, 15 Me. 201; Smith *v.* Westall, 1 Ld. Raym. 316; Saunders *v.* Kastenbine, 6 B. Mon. (Ky.) 17; Jones *v.* Pouch, 41 Ohio St. 146; Bartlett *v.* Mystic River Corporation, 151 Mass. 433; Sarles *v.* Sharlow, 5 Dak. 100.

[2] McPherson *v.* Cox, 96 U. S. 404; Adams *v.* Adams, 26 Ala. 272; Soggins *v.* Heard, 31 Miss. 426; Suggett *v.* Cason, 26 Mo. 221; Rogers *v.* Brightman, 10 Wisc. 55; Marley *v.* Noblett, 42 Ind. 85; Van Woert *v.* Albany & Susquehanna R. R. Co., 67 N. Y. 538; Hedges *v.* Strong, 3 Oreg. 18; Blair Town Lot Co. *v.* Walker, 39 Iowa 406; Blackburn *v.*

§ 279. It is very clear that it is immaterial, upon the question of the application of the statute to a contract, that it has or has not been performed within the year.[1] Otherwise the obligations of parties might be avoided by any accident which postponed their complete execution beyond the statutory period, though made in good faith with the expectation and intention that they should be executed within it. And still farther, the cases show that where the happening of a contingency may work a satisfaction or execution of the promise, the mere circumstance that it was not likely to occur within the year will not bring the case within the statute. It would certainly add much embarrassment to the duties of courts in construing the statute if they should be obliged to entertain questions of probabilities and degrees of probability in such cases. So long as there is nothing in the agreement itself to show that the parties contemplated, and contracted with reference to its happening after the expiration of the year, it is reasonable to suppose that either party was to have the benefit of the uncertainty as the fact might result.[2] And, to advance still another step, it can make no difference at what time the contingency was expected to occur;[3] understanding by expectation, the judgment either

Mann, 85 Ill. 222; Duff *v.* Snider, 54 Miss. 245; Thomas *v.* Hammond, 47 Tex. 42. So it was held that an agreement to labor for a year was not within the statute; for the plaintiff might tender his services immediately. Russell *v.* Slade, 12 Conn. 455; and see Tatterson *v.* Suffolk Manuf. Co., 106 Mass. 56; Dougherty *v.* Rosenberg, 62 Cal. 32; Lorimer *v.* Kelley, 10 Kans. 228; Osment *v.* McElrath, 68 Cal. 466; Raynor *v.* Drew, 72 Cal. 307; Niagara Ins. Co. *v.* Greene, 77 Ind. 590; Sines *v.* Superintendents of Poor, 58 Mich. 503; Gonzales *v.* Chartier, 63 Texas 36; Roberts *v.* Summit Park Co., 72 Hun (N. Y.) 458.

[1] Where a contract as originally made is to be performed within a year, a subsequent oral extension for a period less than a year is binding. Donovan *v.* Richmond, 61 Mich. 467.

[2] Upon these two points it is unnecessary to collate cases. They will be found stated in almost any one of those cited. *Ante*, §§ 275–277.

[3] Roberts *v.* Rockbottom Co., 7 Met. (Mass.) 46; Lockwood *v.* Barnes, 3 Hill (N. Y.) 128; Clark *v.* Pendleton, 20 Conn. 495; Randall *v.* Turner, 17 Ohio St. 262. The suggestion of a different doctrine by

party may have formed upon the probabilities of the case, and always supposing that such expectation has not so entered into their bargain that the disappointment of it would prevent the bargain from being considered executed and performed so as to be binding upon them. The statute, *finding* them 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.[1]

§ 280. There is a decision of the Supreme Court of New York, however, which it would seem cannot be supported, unless a distinction be adopted as to the *nature* of the contingency. The parties there orally agreed that one of them should have a colt at a price to be paid on delivery, the colt to be got by his stallion out of the other's mare, and the latter to keep the mare in his possession, and to keep the colt until the ordinary weaning time, or until it was four or six months old; and the court considered that, as the *common* period of gestation, eleven months, and the *common* period of weaning, four to six months, would carry the performance of the contract to the fifteenth or seventeenth month from the time of making it, the statute applied.[2] But in this case,

Redfield, J., in Hinckley *v.* Southgate, 11 Vt. 428, seems to stand quite unsupported. See, however, the dissenting opinion of Morgan, J., in Dresser *v.* Dresser, 35 Barb. (N. Y.) 584.

[1] Walker *v.* Johnson, 96 U. S. 424; Lawrence *v.* Cooke, 56 Me. 187; Sutphen *v.* Sutphen, 30 Kansas 510; Hinkle *v.* Fisher, 104 Ind. 84; Durham *v.* Hiatt, 127 Ind. 514; Warren Chemical Co. *v.* Holbrook, 118 N. Y. 586; Duffy *v.* Patten, 74 Me. 396; Sterling Organ Co. *v.* House, 25 W. Va. 64; Schultz *v.* Tatum, 35 Mo. App. 136; Barton *v.* Gray, 57 Mich 622; Farwell *v.* Tillson, 76 Me. 227; Kiene *v.* Shaeffing, 33 Neb 21; Powder River Live Stock Co. *v.* Lamb, 38 Neb. 339.

[2] Lockwood *v.* Barnes, 3 Hill (N. Y.) 128; Groves *v.* Cook, 88 Ind. 169.

gestation *might* be completed and the young weaned within the year, notwithstanding the ordinary course of nature would require some months longer. Or suppose the case of a contract to erect a certain building, which, in the ordinary course of business, could not be erected under two years, or to do something on the completion of a voyage which would ordinarily occupy two years;[1] extraordinary exertion in the former case or extraordinary weather in the latter, *might* bring about within the space of a year the event upon which the obligation was to take effect. It would seem to be pushing the rule, that *possibility* of performance within the year makes the contract good, to an extreme which sacrifices the spirit of the statute to its letter, to hold that in such cases as these it does not apply. Perhaps it is proper to limit that rule so far as to say that, though the period of the execution of the contract *may* arrive within a year from the making, yet if that cannot possibly occur in the *natural course of*

[1] In Clark *v.* Pendleton, 20 Conn. 495, the declaration alleged that the defendant being about to embark on a whaling voyage, and to be absent from the United States for about the term of eighteen months as was then expected, in consideration that the plaintiff had at his request promised to marry him when thereto requested after his return from said voyage, he, etc., undertook, etc., to marry her, etc., alleging defendant's return after about twenty months' absence, request to marry the plaintiff, and refusal to do so. The Supreme Court held that the defendant's promise was not within the statute. They say: "It is not alleged in any form that it was made with reference to, or that its performance was to depend on, the determination of a voyage which would necessarily occupy that time. It is only alleged that it was expected by the parties that the defendant would be absent for the period of eighteen months. But this expectation, which was only an opinion or belief of the parties, and the mental result of their private thoughts, constituted no part of the agreement itself; nor was it connected with it, so as to explain or give a construction to it, although it naturally would, and probably did, form one of the motives which induced them to make the agreement. . . . It is unnecessary for us to determine what would be the effect of proof that the event upon which the performance of a verbal contract depended, could not by possibility take place within a year from the making thereof, when it did not appear from the contract itself that it was not to be performed within that time, because there was no claim in the present case which raised that point." See *post*, §§ 283, 284.

events, the parties cannot be supposed to have intended to abide thereby, and the statute applies.[1]

§ 281. 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. *Physical possibility* is not what is meant when it is said that if the verbal contract may be performed within a year it is binding. Or, to speak exactly, it is not enough that the thing stipulated may be accomplished in a less time; but such an accomplishment must be an execution of the contract according to the understanding of the parties.[2]

§ 281 *a*. Such was the principle of Boydell *v.* Drummond, decided in the Queen's Bench, in 1809. The Boydells had proposed to publish by subscription a series of large prints illustrative of scenes from Shakespeare. There were to be eighteen numbers of the work, each number to contain four prints, and the price to be three guineas the number. The defendant became a subscriber. A prospectus issued by the Boydells, with reference to which the parties appeared to have contracted, set forth that "one number at least should be published annually, and the proprietors were confident they should be enabled to produce two numbers within the course of every year." The defendant having received two numbers and having refused to take any more, this action was brought against him to recover the price of the remain-

[1] Gault *v.* Brown, 48 N. H. 183, is a case on the border line. The contract was for the sale of all the cord-wood on a certain lot, to be delivered, as far as possible, that winter, and the rest the next. It was held not within the statute, upon the ground that there might *possibly* be full performance within the year; but the terms in which the parties put their agreement seem to show that *they* did not contemplate any such possibility, but, on the contrary, believed that in the natural course of events a part of the performance would necessarily be deferred to the second year. And see Sutcliffe *v.* Atlantic Mills, 13 R. I. 480.

[2] Farwell *v.* Tillson, 76 Me. 227.

ing numbers, the Boydells having duly laid them aside for him as they came out. The judges were unanimous in holding that the statute applied to the defendant's engagement. Lord Ellenborough said: "The whole scope of the undertaking shows that it was not to be performed within a year, and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year."[1] Grose, J., said that, considering the nature of the work and of the prospectus, it was "impossible to say that the parties *contemplated* that the work was to be performed within a year." And by the word *contemplated*, it is evident from the whole case that he meant *understood as matter of contract.* The Supreme Court of Maine, in a case where the contract was to clear eleven acres of land in three years from date, one acre to be seeded down the present spring, one acre the next spring, and one acre the spring following, the compensation to be all the proceeds of the land for these years, except the two acres first seeded down, also held upon a similar view that the statute applied. They say: "It is urged that the defendant *might* have cleared up the land and seeded it down in one year, and thereby performed his contract. . . . We are not to inquire what, by possibility, the defendant might have done by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do, and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the case is clearly with the defendant."[2]

[1] Boydell *v.* Drummond, 11 East 155. See *ante*, §§ 279, 280.

[2] Herrin *v.* Butters, 20 Me. 122; Saunders *v.* Kastenbine, 6 B. Mon. (Ky.) 17; Peters *v.* Westborough, 19 Pick. (Mass.) 364; Linscott *v.* McIntire, 15 Me. 201; Hinckley *v.* Southgate, 11 Vt. 428; Sines *v.* Superintendents of Poor, 58 Mich. 503; Fallon *v.* Chronicle Publishing Co., 1 McArthur (D. of C.) 485; Kellogg *v.* Clark, 23 Hun (N. Y.) 393. See

§ 282. We have thus far noticed a variety of cases, in which the contract contained no express provision that the thing to be done should be done for more than one year or after the expiration of one year. We now come to the cases of agreements which are in terms to do a thing during or after a definite period of time, more than one year from the making of the agreement. To such cases the statute generally applies; and this may be so, notwithstanding that the agreement may consistently with its terms cease to be operative in one year or less.[1] Thus, a contract of hiring for more than a year is within the statute, although it be stipulated that either party may withdraw from the contract before the expiration of a year.[2] And a contract for the use of a patented cut-off on a certain steamboat for a definite number of years is within the statute, although the parties may recognize the possibility of the destruction of the vessel during that time.[3] In such cases as those just cited, it cannot be

Somerby *v.* Buntin, 118 Mass. 279. See also Eley *v.* Positive Life Assurance Co., 1 Ex. Div. 20, where an agreement to act as solicitor of the company was held to be within the statute, the fair inference from the circumstances being that the parties contemplated that the performance of the contract should occupy more than a year. But the judges in their opinions made use of expressions which certainly seem to be at variance with the doctrines which before had been generally accepted; for they say that inasmuch as the employment of the plaintiff might continue during his life, therefore the statute would apply. And this view, which did not, it is to be noticed, receive the sanction of the Court of Appeal (*vide* 1 Exch. Div. 88), was followed by the decision in Davey *v.* Shannon, which is criticised, *supra*, § 277, *note*. What contract was made is, if controverted, a question for the jury. Tatterson *v.* Suffolk Manuf. Co., 106 Mass. 56.

[1] Observe the difference between this rule, and that stated in § 278, where the agreement *allowed* a certain time, more than a year, for the doing of the thing promised, but did not *require* that its doing should continue through that time.

[2] Dobson *v.* Collis, 1 Hurlst. & N. 81; Meyer *v.* Roberts, 46 Ark. 80. But see Smith *v.* Conlin, 19 Hun (N. Y.) 234.

[3] Packet Co. *v.* Sickels, 5 Wall. (U. S.) 580; and see Birch *v.* Liverpool, 9 Barn. & C. 392; Acraman, *ex parte*, 7 L. T. N. S. 84; Van Schoyck *v.* Backus, 9 Hun (N. Y.) 68; Deaton *v.* Tennessee Coal and Railroad Co., 12 Heisk. (Tenn.) 650; Green *v.* Pennsylvania Steel Co., 75 Md 109.

said that the agreement would be fully performed when one party withdrew from the contract of hiring, or when the vessel was lost or destroyed; we should rather say, that in such event, the performance of the agreement according to its terms would be frustrated or become impossible.

§ 282 *a*. Where the agreement is in terms to do a thing during or after the space of one year, and is personal in its nature, not binding the promisor's representatives, shall his death, necessarily terminating all enjoyment of the contract on either side, and being a contingency which the parties of course contemplated, be regarded as working a performance of his agreement, or as frustrating and rendering impossible his performance of it? Is such a contract, subject to such a contingency, within or without the Statute of Frauds? If it could be regarded as an open question, it might present much difficulty. On the one hand, it may be argued that it cannot matter for how long a time the promise was expressed to run, if all obligation cease when the promisor dies; that as to all the time after his death, the promise is a promise only in name; that it is in substance a promise to do a thing for a term of years, if the promisor live, or in other words, to do it for his life, not to exceed that term of years. But the result of this argument is to force upon the Statute of Frauds an absolute limitation to contracts which do not descend and bind the representative; a limitation which seems to be neither commended by considerations of the policy of the statute, nor justified by any judicial recognition. The question, however, can hardly be regarded as an open one. There are numerous cases in which agreements to do a thing during or after a definite term of time longer than one year from the making, have been held to be covered by the statute, notwithstanding that the death of the promisor, the agreement being of a personal nature, would render further performance impossible;[1] or where the impossibility of carry-

[1] Shute *v.* Dorr, 5 Wend. (N. Y.) 204; Roberts *v.* Tucker, 3 Exch. 632; Shumate *v.* Farlow, 125 Ind. 359. See Wahl *v.* Barnum, 116 N. Y. 87.

ing on performance of the contract to the full end of the stipulated time arises upon the death of another than the promisor.[1]

§ 282 *b*. A distinction has been made where the agreement is to refrain from doing a thing for a definite term longer than one year. In the case of Doyle *v.* Dixon, in Massachusetts,[2] the action was upon an oral agreement that the defendant would not engage in a certain trade at a certain place for the term of five years, and the agreement was held not to be within the statute, because it was fully performed if the promisor performed it as long as he lived; the court distinguishing between an agreement to do a thing and an agreement not to do a thing, for a certain definite time, more than a year. On the other hand, the courts of Ohio and Missouri, disregarding this distinction, have held contracts not to engage in a particular business for a period longer than a year, to be within the Statute of Frauds.[3] The question is not without difficulty, but upon the whole, the weight of reasoning would seem to be opposed to the judgment of the Supreme Court of Massachusetts. They treat the agreement as not differing substantially from an agreement that the party should never in future engage in a certain business, saying, "whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for

[1] Hill *v.* Hooper, 1 Gray (Mass.) 131. The case of Peters *v.* Westborough, 19 Pick. (Mass.) 364, so far as it is *contra*, appears to be not law. In Farrington *v.* Donohoe, Irish Rep. 1 C. L. 679, the agreement was to support a child "until she was able to support herself," and was held to be within the statute, because it "contemplated an event not to be *performed* within a year, though, of course, the agreement would have been *determined* by the collateral event — the death of the child — which might have happened within the year." And see Murphy *v.* O'Sullivan, 18 Irish Jurist, 111; Goodrich *v.* Johnson, 66 Ind. 259. But see Wooldridge *v.* Stern, 42 Fed. Rep. 311.

[2] Doyle *v.* Dixon, 97 Mass. 208. See also Perkins *v.* Clay, 54 N. H. 518.

[3] Gottschalk *v.* Witter, 25 Ohio St. 76; Self *v.* Cordell, 45 Mo. 345; and see Davey *v.* Shannon, 4 Exch. Div. 81.

a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life." This seems to go the length of saying, in substance, that if the agreement does not bind the representatives, the death of the promisor completes his performance of his agreement, whatever the length of time contemplated and expressly stipulated by the parties for its performance; and this, as has been shown, is doubtful upon consideration of the policy of the statute, and opposed to the current of authority. The cases of an agreement to keep out of a certain business for a definite term of years, and an agreement to keep out of it altogether, are not obviously the same in substance and effect, for the purposes of the Statute of Frauds. The agreement to keep out of the business altogether necessarily implies that the promisor's undertaking is completely performed if he fulfils it until his death; nothing more can be within the contemplation of the parties; that, neither more nor less, is exactly what they stipulate for.[1] But if the agreement be to keep out of the business for a definite term of years, it is certain upon the face of it that the parties contemplated that the promisor would live for that term of years, and that the conditions of their bargain in other respects were regulated in that view. The fact of his death occurring within the first year will render the contract as to the remainder of the term useless to the other party, and will render its further performance by the promisor impossible; but, as we have seen, an agreement within the statute is not under such circumstances held to be performed.[2] The distinction between an agreement to do a thing and an agreement not to do a thing, for a definite term of years, would seem to be, barely stated, quite unsubstantial. In each case the promisor undertakes that during the stipulated term of years he will submit to and observe a certain

[1] See §§ 277, 277 *a*, *supra*.

[2] *Supra*, §§ 279, 280; and see Davey *v.* Shannon, 4 Exch. Div. 85.

obligation, which the agreement imposes upon him; and in each case, and in the same way in each case, his death only makes the performance of that obligation for the residue of the stipulated time impossible.

§ 283. In cases where no question of the death of the promisor or some other party, or the perishing of the subject-matter of the contract is involved, and the only question is whether, by the true construction of the language used by the parties, a greater term than one year is required for the due and perfect performance of the agreement, little or no difficulty will be found. An agreement, for instance, made in January of one year to pay a sum of money in March of the next year, is not capable of execution within the first year. A tender before the March specified would not be good; the promisee would not be bound to accept payment any sooner.[1] So an agreement made by one who sold a patent-right, that he would refund the price paid if the purchaser did not in three years realize the amount of the profits, is manifestly within the statute. The promisee might have realized the amount in less than a year, whereby the promisor would have been discharged from his liability, but his promise would not take effect, and he be liable to an action for the non-performance, until the expiration of the three years.[2] So with a contract to deliver a crop of hemp raised the present year, and that of two succeeding years.[3] So with a mortgagee's promise, at the time of entering to foreclose, that if he shall sell the place he will pay the mortgagor all he receives beyond the mortgage debt; as he cannot sell in

[1] Lower *v.* Winters, 7 Cowen (N. Y.) 263; and see Cowles *v.* Warner, 22 Minn. 449.

[2] Lapham *v.* Whipple, 8 Met. (Mass.) 59. See also Curtis *v.* Sage, 35 Ill. 22. But if the agreement be to pay over money as soon as received, and it is not due for two years, but may be received in less than one, the statute applies. Curtis *v.* Sage, *supra*.

[3] Holloway *v.* Hampton, 4 B. Mon. (Ky.) 415. See also Tuttle *v.* Swett, 31 Me. 555; Lawrence *v.* Woods, 4 Bosw. (N. Y.) 354; Bartlett *v.* Wheeler, 44 Barb. (N. Y.) 162.

less than three years the statute applies.[1] An agreement for the payment of money by instalments at less than a year each, the entire payment to occupy more than a year, is within the statute.[2] An agreement to pay a certain sum of money per annum is manifestly within the statute;[3] but if the payments are to be in instalments at less than a year, and no term be fixed for the completion of the payments, the statute does not apply.[4]

§ 284. It need hardly be remarked that an oral agreement to put in writing a contract which will require more than a year to perform, is within the statute, and no action will lie for its non-performance.[5]

§ 285. The next question is, What is that *performance* within the space of a year from the making, the possibility of which removes a contract from the reach of this provision of the statute. One thing is well settled and admitted in all cases; that the contract must be capable of entire and complete execution within the year. It is not enough that it may be commenced, or ever so *nearly* completed in that space of time.[6] In certain kinds of contracts, however, as where a series of things is to be done, occupying in the whole more than a year, but each item, as it is performed, drawing with it a separate liability therefor, the statute does not prevent an action upon such items as are performed within the year,

[1] Frary *v.* Sterling, 99 Mass. 461.

[2] Hill *v.* Hooper, 1 Gray (Mass.) 131. See also Tiernan *v.* Granger, 65 Ill. 351, and *post*, § 285.

[3] Giraud *v.* Richmond, 2 C. B. 835; Drummond *v.* Burrell, 13 Wend. (N. Y.) 307; Parks *v.* Francis, 50 Vt. 626.

[4] Moore *v.* Fox, 10 Johns. (N. Y.) 244, referred to and explained in Drummond *v.* Burrell, *supra*. See Knowlman *v.* Bluett, *supra*, § 276 *a*, and *post*, § 285, as to cases in which some items of an agreement are to be performed within a year, and are separable from the rest. See also Sprague *v.* Foster, 48 Ill. App. 140.

[5] Amburger *v.* Marvin, 4 E. D. Smith (N. Y.) 393; and see § 177, *supra*.

[6] Groves *v.* Cook, 88 Ind. 169. But see Brown *v.* Throop, 59 Conn. 596.

to recover the stipulated *pro rata* compensation. Thus it was held by the Court of Common Pleas, that upon a contract for twenty-four numbers of a periodical work, to be delivered monthly at a guinea a number, the plaintiff might sue for the numbers actually delivered, although the contract was not reduced to writing. And they distinguished this case (as one of a *divisible* contract) from Boydell *v.* Drummond, on the ground that there the defendant had paid for all the numbers he had actually received, and the action was upon that part which remained executory.[1] But, as may be inferred from the reasoning of the judges in the latter case, it is not true that because certain items of a divisible contract may be performed within the year, an action may be sustained for a breach of those items, thus severing what the contract made continuous.[2]

§ 286. A rule has been announced within a few years, in England, which requires very careful examination; namely, that if all that is to be performed on one side is to be performed within a year from the making of the contract, the statute does not apply to it, and an action will lie for the non-performance of the other stipulations. The first intimation of this doctrine is found in Boydell *v.* Drummond, where the counsel for the plaintiff insisted that by accepting the earlier numbers of the Shakespeare the defendant had taken the case out of the Statute of Frauds by part execution, and compared it to selling and delivering goods, on thirteen months' credit, without writing, in which case, if no evidence could be given of the terms of payment, as part of the contract, the vendor would not be bound by the stipulated price, and the jury could only give a verdict for the value of the goods; but Lord Ellenborough said that there the delivery of the goods would be a complete execution on one

[1] Mavor *v.* Pyne, 3 Bing. 285. See *ante*, § 282, in regard to cases where a sum of money is agreed to be paid in less than semi-annual instalments. And see Winters *v.* Cherry, 78 Mo. 344.

[2] Boydell *v.* Drummond, 11 East 142; Holloway *v.* Hampton, 4 B. Mon. (Ky.) 415.

part within the year, and the question of consideration only would be reserved for the future. Nothing is given in the report to explain any further his Lordship's remarks.[1] And afterwards, in Bracegirdle *v.* Heald, which was a case of a contract for a year's service to commence at a future day, and therefore clearly within the statute, Mr. Justice Abbott took occasion to remark that when all that was to be done on one side was to be done within the year, as in the case of goods to be delivered in six months and paid for in eighteen months, the contract would not be within the statute.[2]

§ 287. The doctrine, however, was not directly decided until the case of Donellan *v.* Read, in the Queen's Bench, in 1832. There a landlord, who had demised premises for a term of years at £50 a year, agreed with his tenant to lay out £50 in making certain improvements upon them, the tenant agreeing to pay an increased rent of £5 a year during the remainder of the term (fifteen years). It was held that the landlord having done the work, he might recover arrears of the £5 a year against the tenant, though the agreement had not been signed by either party. Littledale, J. (delivering judgment for the court), said: "As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part."[3]

[1] Boydell *v.* Drummond, 11 East 142.

[2] Bracegirdle *v.* Heald, 1 Barn. & Ald. 727.

[3] Donellan *v.* Read, 3 Barn. & Ald. 899. With regard to Mr. Justice Littledale's hypothetical case, it is important to observe that the agreement there may or may not be one to be performed within the year. If the parties contract, one to deliver the goods now, and the other to pay

§ 288. In Souch *v.* Strawbridge, a few years later, where an action was brought for board, lodging, etc., supplied by the plaintiff to a child at the request of the defendant, Tindal, C. J., remarked that the action was brought for an executed consideration, and the Statute of Frauds did not apply; that it meant only that no action should be brought to recover damages in respect to the non-performance of the contracts referred to; but, assuming that to be otherwise, held that this contract was saved from the statute by the fact that the plaintiff was by its terms to keep the child only so long as he thought proper, and it might, therefore, be executed within the year. The other judges concurred upon the second point, but Coltman, J., said that if it had been necessary to decide the case upon the first, he should have wished to consider it because he felt some difficulty in saying that the plaintiff might rely on an executed consideration, when he was obliged to resort to the executory contract to make out his case.[1] So far it would seem that the doctrine in Donellan *v.* Read was not considered as settled in England. In a later case upon this subject, however, Cherry *v.* Heming, in the Court of Exchequer, 1849, that decision was distinctly approved by Baron Parke and Baron Alderson. But there the point decided was that the statute did not apply to a deed sealed.[2]

§ 289. It is much to be regretted that the English courts have not had occasion to review this doctrine, and definitely decide upon it. For it does not appear, unless Sweet *v.* Lee[3]

for them more than a year hence, the fact that the buyer will have the full benefit of the goods is immaterial, since it was intended by the contract that he should. If on the other hand the money is presently due, and the seller then sees fit to promise not to sue within a year, it is this new contract that is within the statute, the old one remaining good, though the remedy be suspended by the seller's own act.

[1] Souch *v.* Strawbridge, 2 C. B. 808.

[2] Cherry *v.* Heming, 4 Exch. 631. The doctrine of Donellan *v.* Read was alluded to with approval in Smith *v.* Neale, since decided in the Common Pleas. 2 C. B. N. S. 67.

[3] Sweet *v.* Lee, 3 Man. & G. 452.

is to be taken as a direct judgment against it, that in any one instance it has been necessarily involved. Even in Doncllan *v.* Read the plaintiff was entitled to recover upon his count for money paid to the defendant's use, without resorting to the special agreement.[1] In our own courts there appears to be a disposition to follow that case. It has been followed in Rhode Island.[2] In Maine, the doctrine laid down by it has been distinctly and strongly affirmed, but unnecessarily, the plaintiff in the case before the court (as is stated in the opinion) being entitled to recover on the common counts.[3] In Massachusetts, it was on one occasion apparently admitted to be law, but no judgment was passed or required to be passed upon it; and it has recently been distinctly rejected.[4] In New Hampshire, the decisions are conflicting.[5] The Southern and Western courts have generally approved it;[6] but it has been criticised in Mississippi[7]

[1] See Knowlman *v.* Bluett, L. R. 9 Ex. 307, on appeal.

[2] Durfee *v.* O'Brien, 16 R. I. 213.

[3] Holbrook *v.* Armstrong, 10 Me. 31.

[4] Cabot *v.* Haskins, 3 Pick. 83. In Marcy *v.* Marcy, 9 Allen 8, the English doctrine is criticised with great ability, and its defects exhibited. See also Frary *v.* Sterling, 99 Mass. 461.

[5] See the doctrine approved in Blanding *v.* Sargent, 33 N. H. 239; Perkins *v.* Clay, 54 N. H. 518; disapproved in Emery *v.* Smith, 46 N. H. 151. citing earlier decisions with approval. See Cocheco Aqueduct Association *v.* B. & M. R. R., 59 N. H. 312.

[6] Ellicott *v.* Turner, 4 Md. 476; Hardesty *v.* Jones, 10 Gill & J. (Md.) 404; Johnson *v.* Watson, 1 Ga. 348; Rake *v.* Pope, 7 Ala. 161; Bates *v.* Moore, 2 Bailey (S. C.) 614; Gully *v.* Grubbs, 1 J. J. Marsh. (Ky.) 387; Holloway *v.* Hampton, 4 B. Mon. (Ky.) 415; Blanton *v.* Knox, 3 Mo. 241; Suggett *v.* Cason, 26 Mo. 221; Self *v.* Cordell, 45 Mo. 345; McClellan *v.* Sanford, 26 Wisc. 595; Miller *v.* Roberts, 18 Tex. 16; Zabel *v.* Schroeder, 35 Tex. 308; Compton *v.* Martin, 5 Rich. (S. C.) Law, 14; Haugh *v.* Blythe, 20 Ind. 24; Curtis *v.* Sage, 35 Ill. 22; Atchison, T. & S. F. R. R. *v.* English, 38 Kansas 110; Washburn *v.* Dosch, 68 Wisc. 436; Smalley *v.* Greene, 52 Iowa 241; Piper *v.* Fosher, 121 Ind. 407; Dant *v.* Head, 90 Ky. 255; Smock *v.* Smock, 37 Mo. App. 56. In Berry *v.* Doremus, 30 N. J. L. 399, the doctrine is approved, although, as it would seem, unnecessarily, in view of the application to the case of the rule noticed, § 276, *supra*. In Montague *v.* Garnett, 3 Bush (Ky.) 297, the recovery is said to be not on the contract, but the implied promise.

[7] Duff *v.* Snider, 54 Miss. 245.

and Ohio.[1] In New York, on the other hand, the Supreme Court have expressed very strong dissatisfaction with it, and with great force of reasoning.[2]

[1] Reinheimer *v.* Carter, 31 Ohio St. 579.

[2] Broadwell *v.* Getman, 2 Denio 87, the criticism upon which in Talmadge *v.* Rensselaer & Saratoga R. R. Co., 13 Barb. 493, seems to be quite unnecessary, the latter case being rightly decided upon another point. (*Ante*, § 278.) See also Bartlett *v.* Wheeler, 44 Barb. 162; Dodge *v.* Crandall, 30 N. Y. 294; Weir *v.* Hill, 2 Lans. 282.

The Supreme Court of Vermont, in a case decided in 1855, but not published till after the first edition of this treatise was in print, have come to a conclusion directly opposite to the views expressed in Donellan *v.* Read, and upon precisely the grounds upon which Donellan *v.* Read is criticised in the text. The respectability of the tribunal, and the marked ability of the opinion of the court, delivered by Chief Justice Redfield, justify, upon a point so important, the transcription here of the entire opinion, in which the facts sufficiently appear, and which was as follows : —

"This is an action of assumpsit upon a promise to pay the plaintiff the money paid out, and interest, if he would subscribe for fifty shares in the stock of the Vermont Central Railroad Company, and pay the amount of them, as the assessments fell due, which was within one year, if, after one year, the plaintiff should elect not to keep them, but to transfer them to the defendant. And if the plaintiff did then elect to keep them, and they were above par, he was to pay the defendant half the advance. It is claimed, on the part of the defendant, that this is a contract within the Statute of Frauds, as not to be performed within the year from its date, and not being in writing.

"And it is replied to this, that, as it was to be performed, upon one side, within the year, that takes it out of the operation of this portion of the statute, and the case of Donellan *v.* Read, 3 Barn. & Ad. 889, 23 Eng. C. L. R. 215, is relied upon. There can be no doubt such a doctrine is declared in this case; but it is severely questioned by Smith, in his Leading Cases, 1 vol. p. 145, *et seq.;* and in the American note it is said, that it has been generally held, in this country, 'that it [the statute] applies in all cases where the obligation or duty sought to be enforced, could not have been fulfilled within the year, and that an oral promise for the payment of money, or the performance of any other act, at a greater distance of time than one year, is consequently invalid, whether made upon an executed or executory consideration,' citing Cabot *v.* Haskins, 3 Pick. 83; Lockwood *v.* Barnes, 3 Hill 128; Boardwell *v.* Getman, 2 Denio 87.

"And the chief difference between the case of Donellan *v.* Read and the other cases is, that in the former case it is laid down that if one party is to perform and does perform all of his part of the contract, that takes the case out of the statute; and in the American cases cited, and in one

§ 290. It may well be doubted, indeed, whether this doctrine would ever have been accepted in England, if the ques-

late English case, Souch *v.* Strawbridge, 2 C. B. 808, by Tindal, C. J., it is said that to entitle the party to recover on his part-performance within the year, when the other party was not bound to perform within the year, it must appear that the performance, on the part of the plaintiff, was accepted on the other side, or that it went to the benefit of the other side. And just here it seems to us comes the proper distinction.

"If the contract has been performed on one side, in such a manner that the performance goes to the benefit of the other party, whether this was done within the year or not, it undoubtedly lays the foundation of a recovery against the party benefited by such performance. But when the contract, on the part of this party, was not to be performed within one year from the time it was made, the recovery is not upon the contract, but upon the *quantum meruit*, or *valebat*, or upon money counts. It is a recovery back of the consideration of a contract upon which no action will lie, and which has been repudiated by the other party.

"And in the present case, if the plaintiff could be treated as the mere agent of the defendant, in making this subscription and payment of money and the stock as being the defendant's stock, standing in the name of the plaintiff, there would certainly be no difficulty in the plaintiff recovering the money and interest. And this is the view taken of the plaintiff's case by the learned counsel on his behalf, and it is the only ground upon which it seems to us the action can be maintained, consistently with a fair and reasonable construction of the statute. For the statute is explicit, that no action shall be maintained upon any agreement not to be performed within the year. It is that portion of the agreement, or the contract sued upon, which comes within the statute, by not being to be performed within the year, and not that portion of the agreement which constitutes the consideration of the promise sued upon. It will make no difference in regard to recovering the price of the consideration, whether it is paid down, or paid within the year, or after the expiration of the year; or whether it is agreed to be paid at one time or another. If it has been paid, so as to go for the benefit of the other party, at any time, and he does not perform the contract on his part, a recovery may be had, but not upon the special contract, if not to be performed in the year, but for the consideration paid or performed by the plaintiff, and which came to the use of the defendants; and this recovery may be had upon the common counts, ordinarily, it is presumed. See note to 3 Pick. 95, by Judge Perkins, citing Lane *v.* Shackford, 5 N. H. 133; 1 Fairfield 31, and 1 Pick. 328; 3 Wen. 219, and other cases.

"But to say that this takes the whole agreement out of the operation of the statute, is virtually disregarding both its terms and all the beneficial objects of its adoption. It is the contract sued upon, which, by its

tion had not uniformly arisen on cases where the stipulation sought to be enforced related solely to the payment of the

being of the older date than one year, exposes to the evils of fraud and perjury. And these evils are none the less because the consideration has been performed within the year. The consideration may be a peppercorn or a thousand dollars; it may be money, labor, goods, or a counter-promise, and it may be executed or executory, and the danger of fraud or perjury is not materially increased or diminished. The danger of fraud and perjury is chiefly connected with the proof of that portion of the contract sued, and if that is not to be performed within the year, in our judgment, no action can be sustained upon the contract or agreement, consistently with a fair interpretation of the statute; and this, we think, is the only consistent result of the decided cases upon this point.

"The case of Donellan *v.* Read was where improvements upon premises in the occupancy of a tenant, had been made at his request, upon a contract to pay an increased rent during the remainder of his term, which was more than one year. He enjoyed the benefit and use of the improvements, and declined to pay for them. The court held the contract not within the statute. This was immaterial to the recovery. The defendant had received the benefit of the improvements, and had agreed to pay £5 for the use annually. This contract was not binding, or could not be sued specially, but a recovery could be had for the use, and that is all this case decides; the declaration containing the count for use and occupation, and the money counts. It is like the case of a contract to demise premises for five years, without writing. No action can be maintained upon the contract. But if the defendant occupy the premises, a recovery may be had for the use and occupation, and the agreed rent may be adopted, as the probable value of use. So the argument of Littledale, J., in this case, which seems to have been regarded by him as quite conclusive, is nothing more than saying, if one party, after having received goods or money on a contract within the Statute of Frauds, repudiates the contract, he must answer for the money or goods. It is said this case has been reaffirmed in a late case in the Exchequer, Cheney [Cherry] *v.* Heming, 4 Exch. 631. But as it does not go further than Donellan *v.* Read, it requires no further answer; it is, indeed, far more questionable than Donellan *v.* Read. And Holbrook *v.* Armstrong, 1 Fairfield 31, which is sometimes referred to upon this point, as confirming the case of Donellan *v.* Read, is only a recovery for money or goods which came to the defendant's use.

"We must then fall back upon the ground quoted from Mr. Wallace's note, and the cases referred to, that no recovery can be had if the *contract sued upon* was not in writing and not to be performed within one year. And no recovery can be had upon the consideration unless it has come to the defendant's use.

"To apply this to the present case, no question is made that the de-

money consideration. In such cases it is a mere point of form in bringing the action, the plaintiff's right to recover

fendant's portion of the contract was not to be performed within the year, inasmuch as one full year was to expire before the plaintiff made his election whether to transfer the stock to the defendant or not, and this was to determine the defendant's obligation. If the plaintiff elected to keep it, he could, and the profits, for that term, were to be divided. If he elected to transfer, the defendant was to pay him the money he had paid out, and interest, and the profits to be divided between them, the defendant to pay half the advance in price; so that clearly the defendant could not know what was the nature of his obligation till after the year had expired. This is the plaintiff's own version of the facts. The witness, Warner, finally said he thought the defendant guaranteed the stock to be good at the end of the year, or that he would then take it and pay the cost and interest, and half the advance in price, if any. But all the testimony gives one full year before the defendant's obligation attached; of course it could not be performed within the year.

"Upon the point whether the payment of the money came to the defendant's use, so that it may be recovered back, it seems very clear to us that it did not. The plaintiff himself says that he had an election to keep the stock himself, at the end of the year. The stock was not then to become the defendant's till the end of the year, and there is no pretence it ever did become his, so as to vest any title or use in him, unless a proxy may be so regarded, and we think this is no use for which any recovery can be had.

"In looking in the cases, the leading case of Peter *v.* Compton is a full authority to show that it makes no difference as to the binding force of a contract, not to be performed within the year, that is performed within the year upon one side. In that case the consideration was paid down. And this case is not questioned, except that incidentally it is said to be limited by Donellan *v.* Read. But Tindal, C. J., puts this upon the true ground, in Souch *v.* Strawbridge, 2 C. B. 808, that there may always be a recovery when there has been full performance on one side, accepted. or which comes to the use of the other. But in the present case nothing came to the defendant's use. So, too, in Broadwell *v.* Getman, 2 Denio 87, Beardsley, J., fully maintains the ground that if the portion of the contract *sued* was not to have been performed within the year, no action can be maintained upon the contract, and that to hold the contrary is virtually to disregard the statute. The same is expressly decided in Lapham *v.* Whipple, 8 Metcalf 59. Wilde, J., says: 'To support the action, the plaintiff must prove the contract, and the object of this part of the statute was to prevent the proof of verbal agreements, when, from the lapse of time, the witness might not recollect the precise terms of the agreement.' And in Lockwood *v.* Barnes, 3 Hill 131, it is said, and has been so held by this court, that a recovery may always be had for per-

on the *indebitatus assumpsit* (which count is uniformly found to have been inserted in the declaration) being clear.[1] It never has been held in England that an agreement to do some act after the expiration of a year, in consideration of a payment of money made presently, was binding without writing. And the decision in Peter *v.* Compton, that an agreement, for one guinea paid down, to pay so many on the day of the defendant's marriage, requires a writing, is manifestly to the contrary.[2] But it is also shown by that case, and is settled law, that a promise to pay money, as much as a promise to do any other act after the expiration of a year, is within the statute.[3] And no substantial reason appears why the mere circumstance that the counter stipulation in such a case is fixed to be performed within the year, should hinder the statute from applying. Again, it is not now doubted that a mere partial execution of a contract that is required by the statute to be in writing, will have no effect at law to take it out of the statute, though it is often made the basis

formance, or a part-performance, on one side, of a contract, within this or any other section of the Statute of Frauds, if repudiated by the other party, and this part-performance came to the use of the other party. But the payment or performance of the consideration of an agreement or contract within any section of the Statute of Frauds, never takes it out of the statute; if it were so, no contract upon an executed consideration would ever come within the statute. But in all cases of contracts within the statute, where the promisee has done something towards the performance of the contract on his part, and the other party declines to perform on his part, a recovery of what is thus done may always be had, and this is all that the performance of such contract on one side will avail at law, and this only when such performance on one side enures to the benefit of the other side.

"Judgment reversed and case remanded." Pierce *v.* Paine's Estate, 28 Vt. 34. See also the remarks of the court upon Donellan *v.* Read, in Wilson *v.* Ray, 13 Ind. 1. For another valuable opinion on this point, see Marcy *v.* Marcy, 9 Allen (Mass.) 8.

[1] Bartlett *v.* Wheeler, 44 Barb. (N. Y.) 162; Emery *v.* Smith, 46 N. H. 151.

[2] Peter *v.* Compton. Skin. 353.

[3] Cabot *v.* Haskins, 3 Pick. (Mass.) 83, *per* Parker, C. J.; and see cases referred to in §§ 275, 276, *supra*.

in equity of special relief on the ground of virtual fraud in the party repudiating the partially executed contract.[1] And it is difficult to see why an entire execution by one party of his part of the agreement shall be sufficient to do what is not done by his execution of however large a proportion of that part. Moreover, it is proper to observe, that if the English cases which hold that the memorandum of the agreement must show the consideration, because the word agreement embraces the stipulations of both sides, are right, those English cases can hardly be right which hold that the same word, in the clause just preceding, may embrace only the stipulations of one side.[2]

§ 290 *a*. But suppose that what the *defendant* verbally agreed to do, was to be done within the year; and that what the *plaintiff*, in consideration thereof, verbally agreed to do, was to be done after the expiration of the year; can the plaintiff maintain his action for damages for the breach of the defendant's agreement, notwithstanding the statute? It has been decided by the Supreme Court of Vermont that he could; assuming the contract to be such that the defendant's breach put an end to it altogether. The case was that the defendant agreed to furnish to the plaintiff a cow at a certain time within a month, and allow him the use of the cow for a year from that time; in consideration whereof the plaintiff agreed, at the end of the year, to buy the cow or pay for the past use of her. The defendant failed to furnish the cow, and the plaintiff sued for damages, and the judgment in his favor was affirmed. The court said: "The plaintiff had done that by way of adequate consideration which, independently of the statute, would have rendered the undertaking of the defendant valid and enforceable against him. Only that which was undertaken by the defendant was to be done within a year. That undertaking is here sued upon. His

[1] *Post*, Chapter XIX.; and see Turnow *v.* Hochstadter, 7 Hun (N. Y.) 80.

[2] *Post*, §§ 386, *et seq.*

breach of it at once perfected his liability, and the plaintiff's right of action. Looking to the reason of the law, under the statute, this case stands for the same consideration as any case in which the cause of action should arise from the breach of an agreement that had no relation to the Statute of Frauds. Upon the occurring of such breach, the right of action would be perfected; but the party would be at liberty to delay bringing his suit to the last hour allowed by the Statute of Limitation without affecting the right to maintain the action. The purpose of the Statute of Frauds is to provide for a class of cases in which there cannot be an actionable breach within the specified time. That class embraces only agreements that are not to be performed within a year. Such agreements as may be wholly broken within the year, and thereby give a cause of action for such complete breach, do not fall within either the letter or the reason of the statute. The present case shows the matter in a strong light. The failure of the defendant to furnish the cow or the money, as he agreed to do, made an end of the whole arrangement, and left nothing further, either in act or time, to be done by either party toward the performance of the agreements on either side. The plaintiff thereupon ceased to have anything thereafter to do as matter of obligation to the defendant. The defendant had nothing to do but to pay the damage caused by his breach of agreement, and that breach constituted a perfected cause and right of action in the plaintiff. This being so, the reason of the law under the statute no more had application and force than it would have had if the time for the performance of the agreement on both sides had been limited to a period short of a year from the making thereof, and the defendant had committed the same breach that he did in this case. It is proper further to remark that in all the cases where the agreement has been held to be within the statute, the action was for the breach of that side of the contract that was not to be performed within the year." [1]

[1] Sheehy *v.* Adarene, 41 Vt. 541.

§ 291. It need only be added to what has been said upon this clause of the statute, that if the time from the *making* of the agreement to the end of its performance exceeds a year never so little, the statute applies; for, in the language of Lord Ellenborough, "if we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop, for in point of reason an excess of twenty years will equally not be within the act." [1] And a promise by defendant to work a year for the plaintiff beginning "as soon as he could" has been held to be within the statute.[2]

§ 291 *a*. It should be noticed that in some cases the agreement is such that it is *performed* as soon as made, although the rights growing out of it may continue indefinitely. Thus an agreement that the plaintiff should be taken into partner-

[1] Bracegirdle *v.* Heald, 1 Barn. & Ald. 726. And see Nones *v.* Homer, 2 Hilton (N. Y.) 116; Kelly *v.* Terrell, 26 Ga. 551; Snelling *v.* Huntingfield, 1 Cromp. M. & R. 20; Shipley *v.* Patton, 21 Ind. 169; Kleeman *v.* Collins, 9 Bush (Ky.) 460; Hearne *v.* Chadbourne, 65 Me. 302; Sharp *v.* Rhiel, 55 Mo. 97; Briar *v.* Robertson, 19 Mo. App. 66; Cole *v.* Singerly, 60 Md. 348; Sutcliffe *v.* Atlantic Mills, 13 R. I. 480; Britain *v.* Rossiter, L. R. 11 Q. B. D. 123. The case of Cawthorne *v.* Cordrey, 13 C. B. N. S. 406, is not at variance with this doctrine, although the head-note is ambiguous and might mislead. See the opening of the argument of counsel supporting the rule, and remarks of Eyre, C. J. But see Dickson *v.* Frisbee, 52 Ala. 165.

[2] Sutcliffe *v.* Atlantic Mills, 13 R. I. 480. See also Ward *v.* Matthews, 73 Cal. 13, where the plaintiff sued for the possession of land of which he held the legal title, but the defendant (in possession) claimed that it was held in trust for him under a verbal agreement to take and hold it as security only for his repayment of plaintiff's advance of part of the purchase-money; the repayment was to be at a time originally fixed within a year from the time of the verbal agreement, but (before the year expired) extended for six months; but before the year expired, the plaintiff took the deed to himself and repudiated his verbal agreement with the defendant; it was held that after such repudiation, "time was no longer of the essence of the contract," an order refusing to enter judgment for the plaintiff was affirmed; the court holding the defendant entitled to the land on repayment to the plaintiff of his advance in accordance with the verbal agreement between them.

ship with the defendant, was held to have been performed when the plaintiff was admitted, although the partnership business was the prosecution of a building contract extending over more than a year. Such an agreement is manifestly not within the statute.[1]

§ 291 *b*. A distinction which has been made[2] between agreements that the promisor will himself do something requiring more than a year, and agreements that some third party shall do it, holding the statute to be inapplicable to the latter, seems to be unsubstantial.

[1] M'Kay *v.* Rutherford, 13 Jur. 21; and see Hoare *v.* Hindley, 49 Cal. 274. But see Johnson *v.* Reading, 36 Mo. App. 306. Parol extensions of less than one year each, of a contract agreed to be performed within a year, are not required to be in writing. Donovan *v.* Richmond, 61 Mich. 467; Ward *v.* Matthews, 73 Cal. 13. It would seem that an agreement made before the issue of letters patent to work the same jointly and be jointly interested in the proceeds might be better sustained upon this ground than upon the ground that the contract might be entirely performed within a year. See Fraser *v.* Gates, 118 Ill. 99. Ordinarily the expected and contemplated term of such a contract would be for the whole life of the letters patent.

[2] Blanton *v.* Knox, 3 Mo. 342.

CHAPTER XIV.

SALES OF GOODS, ETC.

§ 292. THE form of the seventeenth section itself suggests a method which will probably be found convenient for its consideration; and that is, to examine in the first place the question, what is a contract such as is contemplated by it; and in the second place the question, what evidence of such a contract it requires. The latter topic, however, embraces not only the acceptance and receipt of part of the goods sold and the payment of earnest, formalities which are peculiar to this section, but also the making of a written memorandum of the bargain, a formality which applies also to the fourth section and the various classes of contracts enumerated therein. It seems best, therefore, to consider in this chapter only those matters which strictly concern contracts for the sale of goods, wares, and merchandise, and to postpone the subject of the written memorandum to the succeeding chapter, where it can be discussed singly and separately, and in relation to the general topic of contracts as affected by the statute.

§ 293. Upon the first of the proposed divisions of the present subject, our attention is attracted at the outset to the inquiry, what transactions are to be regarded as *contracts for the sale* of goods, etc. As to the character of the parties the statute makes no distinction, and the established doctrines of the courts present none. Nor, as it seems, will the contract be any less within the statute, because something other than money is to be given in return for the goods; contracts of barter being regarded, so far as the Statute of Frauds is con-

cerned, as contracts of sale.[1] It was at one time doubted whether the policy of the statute extended to sales at public auction,[1] but it is now settled beyond dispute that it does, and that sheriffs' sales in execution are also included by its provisions.[2] Another distinction, which has been supposed to be established by some of the earlier cases, was that the statute did not embrace executory contracts for the sale of goods, etc., but only those which contemplated an immediate execution.[3] But this was manifestly against the intent and spirit of the statute, and has, of late years, been entirely rejected,[4] and those cases upon which it was imagined that it rested have been shown to relate to a distinct point, of great importance, which we shall presently have occasion to examine.[5] Nor is it necessary that the contract should be particularly formal or explicit, so that there appear to be a bargain made; a common *order*, given to the seller for the article required, is clearly equivalent to a contract for the purchase.[6] A stipulation that the subject of the sale may be returned in a certain event, is not to be regarded as a contract for resale, so as to be affected by the statute. Thus in a case where the plaintiff sold a mare to the defendant for £20, with the understanding that if she should prove to be in foal he might have her back again on paying £12, and the mare was delivered to the defendant, and afterwards, when she proved

[1] See Dowling *v.* McKenney, 124 Mass. 478; Rutan *v.* Hinchman, 30 N. J. L. 255; Kuhns *v.* Gates, 92 Ind. 66. See § 76, *supra*.

[1] Simon *v.* Metivier, 1 W. Bl. 599; Hinde *v.* Whitehouse, 7 East 558.

[2] Sugden, Vend. & P. ch. v. § 6; 2 Kent, Comm. 540; Chitty on Contracts, 272; and cases cited by those authors

[3] Rondeau *v.* Wyatt, 2 H. Bl. 63; s. c. 3 Bro. Ch. 154; Alexander *v.* Comber, 1 H. Bl. 20; Towers *v.* Osborne, 1 Stra. 506; Clayton *v.* Andrews, 4 Burr. 2101.

[4] Cooper *v.* Elston, 7 T. R. 14; Acker *v.* Campbell, 23 Wend. (N. Y.) 372; Bennett *v.* Hull, 10 Johns. (N. Y.) 364; Ide *v.* Stanton, 15 Vt. 690; Carman *v.* Smick, 3 Green (N. J.) Law 252; Newman *v.* Morris, 4 Harr. & McH. (Md.) 421; and see Appendix, Lord Tenterden's Act, 9 Geo. IV. c. 14, § 7.

[5] See *post*, §§ 299–309.

[6] Allen *v.* Bennet, 3 Taunt. 169.

to be in foal, the plaintiff tendered the £12, but the defendant refused to return her, and set up the Statute of Frauds as a bar to any recovery on the agreement to return her, the Court of Queen's Bench held that it did not apply, considering that this stipulation was not an independent contract of sale, but was part of the original contract, which was a qualified one, and which had been taken out of the statute by the delivery of the mare.[1]

§ 293 *a*. But it may be necessary to distinguish between such a case as this, where the stipulation to return is annexed to the original sale by way of condition, and the case of a stipulation to resell at a future time for the same or a different price, although made contemporaneously with the original sale. It must depend, it seems, upon whether the latter is a complete transaction of itself, and, in some degree, upon the language used by the parties. Where a partner upon the formation of a partnership sold and delivered a quantity of goods to the firm, soon after which the partnership was dissolved, and it was agreed that his claim for the goods should be cancelled by his taking them back, but there was no written memorandum on the subject and no act of acceptance; upon a bill in equity brought by the partner who had sold the goods, alleging the sale and dissolution, and praying for a decree that the other partners should pay their share of the price of the goods, it was held that the arrangement by which the goods were to be taken back was not to be considered as properly a resale of them, or as an independent transaction, but as a mutual rescission of the original contract of sale, and therefore the transaction was valid without a written memorandum or act of acceptance, especially against the petitioner, who had alleged the dissolution, which

[1] Williams *v.* Burgess, 10 Ad. & E. 499. The case was likened by Littledale, J., to a delivery *on trial:* but it must be observed that the stipulation was to return, not to receive back, and was made in favor of the vendor, not of the vendee. See Fay *v.* Wheeler, 44 Vt. 292; Wooster *v.* Sage, 6 Hun (N. Y.) 285, 67 N. Y. 67; Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Johnson *v.* Trask, 116 N. Y. 136.

was not in writing, and of which the agreement for the taking back the goods was part.[1]

§ 293 *b*. An agreement to deliver goods, wares, or merchandise to the amount of, and in payment of, a pre-existing debt, has been held in Alabama[2] to be, and in New York[3] not to be, within the statute as a bargain for the sale of the goods, etc. The latter decision appears to be the more reasonable. There is no reason why the language of the seventeenth section should be strained beyond its expressed limitation to such transactions as come under the common designation of sales of goods.

§ 294. Whether a mortgage of goods, wares, and merchandise is within the scope of the Statute of Frauds is, apparently, to be considered a doubtful question. The Supreme Court of Maine have expressed themselves not satisfied that the statute was to be so construed. They say that the statute "manifestly contemplates an absolute sale, where the vendor is to receive payment and the vendee the goods purchased. But the mortgagee is not intended or expected to pay anything. His lien is created to secure what he is to receive. Nor is he to take possession, unless his security requires it. That is retained by the mortgagor; and herein a mortgage differs from a pledge. As this is a contract, then, in which neither payment nor delivery is expected, we are not prepared to say that it comes within the statute."[4] It is mani-

[1] Dickinson *v.* Dickinson, 29 Conn. 600; Wulschner *v.* Ward, 115 Ind. 219. See Boardman *v.* Cutter, 128 Mass. 388.

[2] Sawyer *v.* Ware, 36 Ala. 675.

[3] Woodford *v.* Patterson, 32 Barb. 630.

[4] Gleason *v.* Drew, 9 Greenl. 79. Where A took from B a chattel mortgage, which was not recorded, and B sold the mortgaged property to C and took his note for the price, and C and A then agreed orally that, if A would take up C's note and return it to him, C would deliver the property to A, and A took up the note and tendered it to C, who refused to deliver the property; it was held, on a suit by A against C for the value of the property, that the agreement between A and C was not a contract of sale, but an agreement by C to waive his claim and allow A's mortgage to take effect; and was not within the Statute of Frauds.

fest, however, that the mortgagee *has* paid something before, or contemporaneously with, the execution of the mortgage; and it is a familiar principle of law that the mortgagee of personal property *may*, and as a general rule *ought to*, take possession. Such a mortgage is simply a conditional or defeasible sale; and where the opinion above quoted speaks of an absolute sale as what the statute manifestly contemplates, we should say it must intend an actual sale, as distinguished perhaps from a merely nominal one; for that a defeasible sale is within the Statute of Frauds can hardly be doubted on principle, and is, by implication, decided in the English case last referred to. But the court (in Maine did not, it will be observed, find it necessary to place their judgment upon the ground we have been considering.

§ 294 *a*. An agreement between two parties to be partners in a sale of goods has been held to be not within the statute.[1] But otherwise where the contract is in substance for the purchase of all the goods by one, and a subsequent sale by him of part of them to the other.[2]

§ 294 *b*. An agreement between two creditors claiming the same property under rival executions, that the property should be sold under one execution and the proceeds divided equally, is not to be regarded as a sale by either to the other, but simply as a compromise of conflicting money claims.[3]

§ 295. In the next place, we have to inquire what is the proper scope of the words "goods, wares, and merchandise,"

Clark *v*. Duffey, 24 Ind. 271; and see Phelps *v*. Hendrick, 105 Mass. 106. An agreement to mortgage personal property was held not within the statute in Alexander *v*. Ghiselin, 5 Gill (Md.) 180.

[1] Buckner *v*. Ries, 34 Mo. 357; Colt *v*. Clapp, 127 Mass. 476; Bullard *v*. Smith, 139 Mass. 497. See Coleman *v*. Eyre, 45 N. Y. 38. As to an agreement to be a partner in the real estate business, see § 262, *ante*.

[2] Brown *v*. Slauson, 23 Wisc. 244.

[3] Mygatt *v*. Tarbell, 78 Wisc. 351. And see Goldbeck *v*. Kensington Nat. Bk., 147 Pa. St. 267.

as used in the seventeenth section to denote the subject-matter of the contracts embraced by it. On this point there has been considerable diversity of opinion in the courts, arising, it would seem, from their having adopted, on the one hand, that interpretation which is founded upon the abstract legal signification of the words, and, on the other, that which limits this signification by a reference to the other clauses of the section.

§ 296. The most difficult class of cases under this head has grown out of contracts for the sale of shares or stocks, notes, checks, bonds, and generally evidences of value as distinguished from palpable personal property having an intrinsic value. In the early case of Pickering *v.* Appleby, the question was submitted, as appears by Comyns's report, to all the judges of England, whether a contract for the purchase of shares in the stock of a copper company was affected by the seventeenth section of the statute, and they were divided in opinion.[1] Subsequently Lord Chancellor King, in Colt *v.* Nettervill, upon the ground of that division, declined to take the responsibility of deciding the point.[2] But some years later, and notwithstanding the intervention of several cases in which a disposition was shown to hold otherwise,[3] it was directly determined in England, and so far as that country is concerned must be taken to be settled, that the statute is not applicable to such contracts. Such was the decision of Sir Lancelot Shadwell in Duncuft *v.* Albrecht, and of Lord Denman in Humble *v.* Mitchell, cases which have been fully acquiesced in by the English courts.[4] Both

[1] Pickering *v.* Appleby, 1 Comyns 354.

[2] Colt *v.* Nettervill, 2 P. Wms. 304.

[3] Mussell *v.* Cooke, Finch, Prec. Ch. 533; Crull *v.* Dodson, Sel. Cas. Ch. 41.

[4] Duncuft *v.* Albrecht, 12 Sim. 189; Humble *v.* Mitchell, 11 Ad. & E. 205; Heseltine *v.* Siggers, 1 Exch. 856; Tempest *v.* Kilner, 3 C. B. 249; Bowlby *v.* Bell, 3 C. B. 284; Bradley *v.* Holdsworth, 3 Mees. & W. 422; Watson *v.* Spratley, 10 Exch. 222. See Pawle *v.* Gunn, 4 Bing. N. R. 445.

of these decisions proceeded upon the ground that shares were mere choses in action, and were not in their nature capable of that delivery and acceptance by the respective parties to the contract which the statute provides as one method of making it binding.

§ 296 *a*. The Supreme Court of Massachusetts have taken a different view of the question. In Tisdale *v.* Harris, they decided that shares in a manufacturing corporation were to be deemed included by the words "goods, wares, and merchandise." The opinion of the court, delivered by Shaw, C. J., places the decision on two grounds; first, that by correct legal definition "goods" and "merchandise" were both sufficiently comprehensive to include shares, and, secondly, that the policy of the statute required that they should be included. Upon the latter point he says: "There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them." He does not consider the circumstance that shares cannot be actually accepted and received as at all conclusive of the question, and says that this seems to be rather a narrow and forced construction of the statute. "The provision is general, that no contract for the sale of goods, etc., shall be allowed to be good. The exception is, when part are delivered, but, if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature, it cannot

apply."[1] In the doctrine of this case the Supreme Court of Connecticut have fully concurred.[2]

§ 297. It has been since still further extended in Massachusetts in the case of Baldwin *v.* Williams, where it was held that a contract for the sale of *promissory notes* was within the seventeenth section. Wilde, J., who delivered judgment, said it was certainly within the mischief thereby intended to be prevented, and that the words "goods" and "merchandise," both of them of large signification, were sufficiently comprehensive to include promissory notes; applying the definition *merx est quicquid vendi potest.*[3]

[1] Tisdale *v.* Harris, 20 Pick. 13. See Eastern R. R. Co. *v.* Benedict, 10 Gray 212; Boardman *v.* Cutter, 128 Mass. 388; Meehan *v.* Sharp, 151 Mass. 564.

[2] North *v.* Forest, 15 Conn. 400; Reed *v.* Copeland, 50 Conn. 472; See also Fay *v.* Wheeler, 44 Vt. 292. An early case in Maryland, also, Colvin *v.* Williams, 3 Harr. & J. 38, seems to be to the same effect. But in the case of Webb *v.* Baltimore & E. S. R. R., 77 Md. 92, the court decide that a contract of subscription to stock is not within the statute, and pronounce Colvin *v.* Williams at best only a dictum to the contrary. See also Bullock *v.* Falmouth Co., 85 Ky. 184, and §§ 297, 298, *post;* Hinchman *v.* Lincoln, 124 U. S. 38.

[3] Baldwin *v.* Williams, 3 Met. (Mass.) 365. The learned judge refers, in support of this judgment, to two prior decisions of the same court, Mills *v.* Gore, 20 Pick. 28, and Clapp *v.* Shephard, 23 Pick. 228, to the effect that a bill in equity might be maintained to compel the redelivery of a deed and note of hand on the provision in the Massachusetts Revised Statutes (c. 81, § 8), giving the court jurisdiction in all suits to compel the redelivery of any goods or chattels whatsoever taken and detained from the owner thereof and secreted or withheld so that the same cannot be replevied. But it is the deed and note, the papers on which they are written, that the words *goods* and *chattels* are held to embrace; not the right, interest, or obligation represented by those papers, as in the case of Baldwin *v.* Williams. There is a decision of the U. S. Circuit Court, Riggs *v.* Magruder, reported in 2 Cranch 143, to the effect that a contract for the notes of a private bank was within the seventeenth section; but the bench was not full at the time, and the grounds of the decision are not furnished. A contract for the sale of gold, *i. e.* coin, was held within the statute in Peabody *v.* Speyers, 56 N. Y. 230. And a contract for the sale of a bond and mortgage was held to be a contract for the sale of goods, wares, or merchandise under the Statute of Frauds in Greenwood *v.* Law, 55 N. J. Law 168.

§ 297 *a*. In a later case in Massachusetts, however, a disposition seems to be manifested against further extending the doctrine. The court there held that a contract for the sale of an interest in an invention, before letters patent obtained, was not a contract for the sale of goods, wares, or merchandise; and they also express the opinion that to apply the seventeenth section to a patent right, granted by the government, "would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough." [1]

§ 298. And it seems impossible to regard Judge Wilde's interpretation as entirely free from doubt and difficulty, whether the meaning of the words used in the statute be taken abstractly or in connection with the context. That *merx est quicquid vendi potest* is not to be taken strictly as the definition of this word, as used in the statute, seems to be very clear; for if it is, certainly *goods* and *wares*, if not lands also, must be embraced by it. Moreover, it appears by the reports of those cases in which first the collected judges of England, and afterward Lord Chancellor King, failed to determine the application of the statute to sales of shares, that in both the same definition was urged by counsel. And in regard to *goods*, also, it seems dangerous to found a construction of the statute on a mere verbal definition. As was said in one of the superior courts of Georgia, where it was held that treasury checks on the Bank of the United States were not covered by the seventeenth section, "In the civil law it is a term that embraces all things over which a man may exercise private dominion, divided into goods movable and immovable. This cannot be the sense attached to the word in the statute, for other sections of it treat of immovables, this alone of movables. Nor can it be designed to include every class of movables, for wares and merchandise are expressly mentioned, which latter embrace

[1] Somerby *v.* Buntin, 118 Mass. 285. See Boardman *v.* Cutter, 128 Mass. 388.

everything usually rendered in commerce." And it is added that it is "a fair construction of the statute to limit the meaning of the word *goods* to such personal property, other than wares and merchandise, as are usually transferred by sale and delivery."[1] This view, which, as we have seen, nearly corresponds to that taken by the English courts, appears to be reasonable. Indeed, upon that taken by the earlier cases above cited of the Supreme Court of Massachusetts, the words used in the statute appear to be made coextensive with personal property.[2] As to the principle that the goods, wares, and merchandise intended by the statute must be such as are capable of acceptance and receipt by the purchaser, it is true that there are many cases[3] in which sales of articles not in existence at the time of the bargain have been held to be within the statute; but there the articles *contracted for* were essentially capable of acceptance and receipt, and were to be, in time, bodily accepted and received according to the contract. Nevertheless, the difficulty presents itself that shares or stocks, and even (though that would be far more doubtful) promissory notes, bonds, etc., may become in the course of commercial development so much the subject of ordinary traffic, that the construction of the statute must be expanded so as to make it reach them, as being one kind of merchandise.[4] And so with that rapidly enlarging class

[1] Beers *v.* Crowell, Dudley 29. But see Walker *v.* Supple, 54 Ga. 178.

[2] In Florida, the expression used to describe the subject-matter of the seventeenth section is "personal property," which has, of course, been held to include shares. See Southern Life Ins. Co. *v.* Cole, 4 Flor. 359. In New York, choses in action are expressly specified as requiring a writing for their sale, and the following cases may be referred to as illustrative of that enactment. Allen *v.* Aguirre, 7 N. Y. 543; People *v.* Beebe, 1 Barb. 379; Thompson *v.* Alger, 12 Met. (Mass.) 428, which arose on the New York statute; Armstrong *v.* Cushney, 43 Barb. 340; Tomlinson *v.* Miller, 7 Abb. Pr. N. S. 364; Doty *v.* Smith, 62 Hun (N. Y.) 598. And see Bank *v.* German American Ins. Co., 72 Wisc. 535.

[3] See *post*, §§ 299–309.

[4] Gadsden *v.* Lance, McMull. (S. C.) Eq. 87. Since the publication of the first edition of this treatise, it has been decided in Maine that sales of promissory notes were within the statute, and in New Hamp-

of transactions, the purchase and sale of patent rights; the *business*, as it has now become, of many individuals and even partnerships in this country. But in a case in the Court of Exchequer it has been lately held that the purchase of a right to use a patented furnace, which was already erected by the purchaser, was not within the seventeenth section;[1] and although upon the principles of the earlier Massachusetts cases we have quoted, patent rights would seem to be included in the words of the statute as there interpreted, yet, as we have seen, in a later case, the court, manifesting a disposition to restrict the application of the statute, were of opinion that patent rights were not goods, wares, and merchandise.[2] In New York the contrary view has been expressed as to an invention complete but unpatented.[3]

§ 299. Several questions which might require attention in this place, such as those arising on contracts for the sale of fixtures and growing crops, particularly the latter, have been anticipated in the course of our consideration of the fourth section as it regards interests in land. But a most important one remains to be examined, and that is how far, if at all, the *condition* of the goods, wares, and merchandise, at the

shire and Indiana that they were not. The Supreme Court of Alabama seem to hold the former opinion. Gooch *v.* Holmes, 41 Me. 523; Whittemore *v.* Gibbs, 24 N. H. 484; Vawter *v.* Griffin, 40 Ind. 593; Hudson *v.* Weir, 29 Ala. 294. A book account was held to be within the seventeenth section in Walker *v.* Supple, 54 Ga. 178; shares in an ice company, in Pray *v.* Mitchell, 60 Me. 430; land scrip, in Smith *v.* Bouck, 33 Wisc. 19, and see Fine *v.* Hornsby, 2 Mo. App. 61; May *v.* Thomson, L. R. 20 Ch. D. 705. It has been held in Wisconsin that a contract for the publication of an advertisement in a newspaper was a contract for the sale of goods, chattels, or things in action within the meaning of the Statute of Frauds of that State. Goodland *v.* Le Clair, 78 Wisc. 176. In New Jersey a bond and mortgage have been held to be goods, wares, and merchandise within the statute. Greenwood *v.* Law, 26 Atl. Rep. (N. J.)134.

[1] Chanter *v.* Dickinson, 5 Man. & G. 253.

[2] Somerby *v.* Buntin, 118 Mass. 279. See Gould *v.* Banks, 8 Wend. (N. Y.) 562; Dalzell *v.* Dueber Mfg. Co., 149 U. S. 320; Burr *v.* De la Vergne, 102 N. Y. 415; Blakeney *v.* Goode, 30 Ohio St. 350.

[3] Jones *v.* Reynolds, 120 N. Y. 213.

time of making the bargain, is to be regarded in determining whether the statute will apply to it.

§ 300. In Clayton *v.* Andrews, a case early decided in the Queen's Bench, the defendant agreed verbally to deliver to the plaintiff a quantity of wheat at a future day, for a certain price, of which, however, no part was paid by way of earnest, nor was there any portion of the wheat accepted and received by the plaintiff at the time, nor was any memorandum of the bargain made in writing; but the wheat was *unthreshed*, and of course *unfit for delivery*, when the bargain was concluded. Lord Mansfield and the other judges held, upon the supposed authority of a previous case,[1] that the statute did not apply, for the reason that the wheat was not to be delivered immediately.[2] This doctrine, of the necessity of the parties' contemplating an immediate execution of the bargain in order to bring it within the prohibitions of the seventeenth section, has long since been abandoned; but the case itself has often been quoted as an authority for the position that, where work and labor are required to be performed upon the article sold, in order to put it in condition to be delivered, the statute does not apply to the contract of sale. This, however, as will amply appear by the cases to which reference will be presently made, is not a tenable doctrine.

§ 301. In Towers *v.* Osborne, upon which the decision in Clayton *v.* Andrews was based, the defendant *bespoke* a chariot (to use the language of the report), and after it was made refused to take it. In an action for the value of the chariot, it was held that the statute did not apply; and here also the decision was put upon the ground that the statute only related to contracts for the sale of goods to be delivered immediately. It was not till long after these two cases that this opinion was directly condemned; and it is a singular fact that they have been made the foundation of a distinction, as to the application of the statute, not alluded to in them,

[1] Towers *v.* Osborne, 1 Stra. 506.

[2] Clayton *v.* Andrews, 4 Burr. 2101.

but which is one of the most important on this branch of our subject; namely, the distinction which regards the condition of the article at the time of the bargain. It will be perceived that Towers *v.* Osborne differs from Clayton *v.* Andrews in this particular, that whereas in the latter the wheat only required the operation of threshing to be performed to prepare it for delivery, in the former the chariot contracted for did not exist at all. And the courts have shown a disposition, while doubting the authority of Clayton *v.* Andrews, to place the authority of the other case upon the simple ground of that difference. Thus, in Groves *v.* Buck, Lord Ellenborough held that the statute did not apply to a contract for the purchase of a quantity of oak pins, which were not then made, but were to be cut out of slabs and delivered to the buyer; for, he said, the subject-matter of the contract did not exist *in rerum natura;* it was incapable of delivery and part acceptance; and when that was the case, the contract had been considered as not within the statute.[1]

§ 302. In the New York cases, this distinction between contracts for an article to be entirely manufactured and an article already existing but to be fitted for delivery by the application of work and labor, the latter being within the statute and the former not, appears to be adopted as decisive in questions of this class.[2] But, as a fixed criterion, it is liable to some practical objections. For it may often be a

[1] Groves *v.* Buck, 3 Maule & S. 178.

[2] Downs *v.* Ross, 23 Wend. 270; Sewall *v.* Fitch, 8 Cow. 215; Crookshank *v.* Burrell, 18 Johns. 58; Robertson *v.* Vaughan, 5 Sandf. 1; Bronson *v.* Wiman, 10 Barb. 406; Donovan *v.* Willson, 26 Barb. 138; Bennett *v* Hull, 10 Johns. 364; Parsons *v.* Loucks, 48 N. Y. 17, Gray, C., *diss.;* Deal *v.* Maxwell, 51 N. Y. 652; Bates *v.* Coster, 1 Hun 400. See also Rentch *v.* Long, 27 Md. 188; Pawelski *v.* Hargreaves, 47 N. J. Law 334. The delivery to be made of goods purchased has never been considered as work and labor done upon them. Waterman *v.* Meigs, 4 Cush. (Mass.) 497; Jackson *v.* Covert, 5 Wend. (N. Y.) 139; Downs *v.* Ross, 23 Wend. (N. Y.) 270; Houghtaling *v.* Ball, 19 Mo. 84; Ellison *v.* Brigham, 38 Vt. 64; Warren Chemical Co. *v.* Holbrook, 118 N. Y. 586; Bagley *v.* Walker, 27 Atl. Rep. (Md.) 1033.

matter of great nicety whether the labor to be applied to the article really amounts to *constructing* it or only to preparing it; as, for instance, where articles are kept on hand by manufacturers, in parts or pieces ready to be put together.[1] And it is difficult, also, to see the reason for the distinction; for in either case the article is incapable at the time of being delivered *according to the contract;* it is as much so when incomplete as when not existing.

§ 303. The great body of authority, both English and American, has of late proceeded upon principles entirely independent of this distinction. In a case occurring only a year after Groves *v.* Buck, where the contract was to sell and deliver oil not yet expressed from seed in the vendor's possession, it was held by the Common Pleas to be within the exception of the stamp act exempting from duty contracts relating to goods, wares, and merchandise; and Gibbs, C. J., thus illustrates the fallacy of the distinction referred to: "A baker agrees to produce me a loaf to-morrow; he has not the bread, but he has the flour and is to make it into bread and deliver it. How often does a butcher contract to deliver meat when he has not the meat, and the beast is not yet killed. It is out of all common sense to say this is not a contract for goods, wares, and merchandises."[2] Again, in the case of Watts *v.* Friend, the Court of Queen's Bench held that the seventeenth section of the statute applied to a contract to sell a crop of turnip-seed not yet planted. Lord Tenterden, C. J., said that according to good common sense this must be considered as substantially a contract for goods and chattels, for the thing agreed to be delivered would, at the time of the delivery, be a personal chattel.[3] And to the

[1] See the case of Mixer *v.* Howarth, 21 Pick. (Mass.) 205, where nothing was done but putting on to the carriage contracted for a certain lining selected by the buyer. See Bates *v.* Coster, 1 Hun (N. Y.) 400, criticising Mead *v.* Case, 33 Barb. (N. Y.) 202.

[2] Wilks *v.* Atkinson, 6 Taunt. 12.

[3] Watts *v.* Friend, 10 Barn. & C. 446. See Bowman *v.* Conn, 8 Ind. 58; Pitkin *v.* Noyes, 48 N. H. 294.

same effect, it will be remembered, is the case of Smith *v.* Surman, which, like that last quoted, was examined in another chapter in connection with the subject of contracts for land.[1] These authorities, with many others to be presently referred to, conclusively show that, so far as the English courts are concerned, the mere circumstance that the article is not existing at the time of the bargain will not prevent the application of the statute.[2]

§ 304. There is, however, a distinction taken in many decisions between the purchase of articles such as the vendor regularly manufactures from time to time and has for sale in the ordinary course of his business, and those which he manufactures to order, though from materials in his possession. Thus, in Garbutt *v.* Watson, where the plaintiffs, who were millers, verbally agreed with the defendant, who was a corn merchant, for the sale of one hundred sacks of flour to be got ready to ship in three weeks, the Court of Queen's Bench refused to set aside a nonsuit obtained below, holding that the bargain was within the statute; and when the decision in Towers *v.* Osborne was urged, Abbott, C. J., said that in that case "the chariot which was ordered to be made would never, but for that order, have had any existence. But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as a part of their general stock. The distinction is indeed somewhat nice, but the case of Towers *v.* Osborne is an extreme case, and ought not to be carried farther."[3]

§ 305. In Massachusetts a similar view has repeatedly been

[1] Smith *v.* Surman, 9 Barn. & C. 561. See also Northern *v.* State, 1 Ind. 112; Ellison *v.* Brigham, 38 Vt. 64; Hanson *v.* Roter, 64 Wisc. 622.

[2] The same is true, as appears by several of the cases cited, where the articles contracted for are not at the time in possession of the vendor, but are expected to be received by him in season. See Bronson *v.* Wiman, 10 Barb. (N. Y.) 406; Seymour *v.* Davis, 2 Sandf. (N. Y.) 239; Ide *v.* Stanton, 15 Vt. 685.

[3] Garbutt *v.* Watson, 5 Barn. & Ald. 613.

expressed. In Mixer *v.* Howarth, the facts were that the defendant went to the plaintiff's shop, where the plaintiff had the unfinished body of a carriage, and gave directions to him to finish the carriage, putting in a certain lining which the defendant selected. The carriage was to be finished in about a fortnight. The Supreme Court held that it was essentially an agreement on the plaintiff's part to build a carriage and on the defendant's part to take it when finished and pay for it at the agreed or a reasonable rate, but that it was not a contract of sale within the meaning of the Statute of Frauds. Chief Justice Shaw, who delivered the opinion of the court, proceeds to say: "Where the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time as where it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement."[1] So in Lamb *v.* Crafts, a later case in the same court, where a person whose business was that of collecting rough tallow and preparing it for market, made an oral agreement with another to *furnish him* at a certain time and place with a certain quantity of prepared tallow, it was held to be a contract for the sale of the tallow and within the Statute of Frauds. And the same eminent judge (Chief Justice Shaw) said: "The distinction, we believe, is now well understood. Where a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise, when the article is made pursuant

[1] Mixer *v.* Howarth, 21 Pick. 207.

to the agreement."[1] So in Goddard *v.* Binney, in the same court, the defendant gave the plaintiff, a carriage-builder, a verbal order for a buggy to be painted and lined in a certain way, furnished with a seat of a certain material, and marked with the defendant's initials; so far as the report shows, no other directions were given, and the buggy was to be in all other respects such as the plaintiff was in the habit of making; the contract was held to be not within the Statute of Frauds.[2]

§ 306. This distinction has not been recognized in the courts of New York, which have preferred to abide by the rule asserted in the earlier English cases, but, as we have seen, more lately repudiated; namely, that if the goods, etc., do not at the time of making the bargain exist *in solido*, the statute cannot apply. Thus, in Sewall *v.* Fitch, the plaintiffs by their agent contracted with the defendants for a quantity of nails. The defendants' clerk (with whom the bargain was made) told him the quantity was not then on hand, but that they could be soon made, or "knocked off," and be obtained from the manufactory at Norwich at the opening of the navigation. The Supreme Court (per Savage, C. J.) said: "The contract in this case was for the delivery of nails thereafter to be manufactured. It was, *therefore*, a contract for work and labor and materials found, and so out of the statute."[3] Subsequently, in a case where the facts were very similar, except that the agreement proved was in terms to *make and*

[1] Lamb *v.* Crafts, 12 Met. 356; and see Atwater *v.* Hough, 29 Conn. 508; O'Neil *v.* New York Mining Co., 3 Nev. 141; Edwards *v.* Grand Trunk Railway, 54 Me. 105; Finney *v.* Apgar, 31 N. J. L. 266. In Clark *v.* Nichols, 107 Mass. 547, a contract for the delivery of a certain number of feet of plank, to be sawed of various dimensions under the purchaser's directions, was held within the statute. Central Co. *v.* Moore, 75 Wisc. 170; Orman *v.* Hager, 3 New Mex. 331; Pratt *v.* Miller, 109 Mo. 79; Flynn *v.* Dougherty, 91 Cal. 669; Fox *v.* Utter, 6 Wash. 299; Mighell *v.* Dougherty, 86 Iowa 480.

[2] Goddard *v.* Binney, 115 Mass. 450. See Meincke *v.* Falk, 55 Wisc. 427.

[3] Sewall *v.* Fitch, 8 Cow. 219.

deliver the articles, the same court decided that the statute did not apply, proceeding, however, simply on the authority of Sewall *v.* Fitch, and very forcibly condemning the doctrine on which that case rested.[1]

§ 307. But, reverting to the distinction between the cases where the articles to be sold are to be made up in the ordinary course of the vendor's business, and those where they are to be made pursuant to the purchaser's special order, we may on further examination discover a broader rule, and one more manifestly derived from the terms of the statute itself, on which the cases advancing that distinction may be naturally and firmly supported. In Gardner *v.* Joy, in the Supreme Court of Massachusetts, the plaintiff asked the defendant his price for candles; the defendant named it; the plaintiff said he would take a hundred boxes, and the defendant said the candles were not manufactured, but he would *manufacture and deliver* them in the course of the summer. Shaw, C. J., said the contract was "essentially a contract of *sale.* The inquiry was for the price of candles; the quantity, price, and terms of sale were fixed, and the mode in which they should be put up. The only reference to the fact that they were not then made and ready for delivery was in regard to the time at which they would be ready for delivery; and the fact that they were to be manufactured was stated as an indication of the time of delivery, which was otherwise left uncertain."[2] Here, although the agreement was in terms, as in Robertson *v.* Vaughan, to *manufacture and deliver* the articles, yet the statute was held to apply; because, upon all the circumstances of the bargain, it was clearly *no part of it* that the

[1] Robertson *v.* Vaughan, 5 Sand. 1. In a late case in New York, where it was held that the statute applied to a contract for cider to be obtained by the seller from farmers and refined before delivery, the decision in Garbutt *v.* Watson was cited as law. Seymour *v.* Davis, 2 Sand. 239. But see Bronson *v.* Wiman, 10 Barb. 406. See also Smith *v.* New York Central R. R., 4 Keyes 180; Parsons *v.* Loucks, 48 N. Y. 17; Killmore *v.* Howlett, 48 N. Y. 569.

[2] Gardner *v.* Joy, 9 Met. 179.

vendor should manufacture them.[1] On the other hand, there are repeated New England cases where a contract expressly to *manufacture* articles out of materials to be found by the manufacturer has been held not affected by the statute.[2]

§ 308. It would seem then to be broadly true that, if the contract is essentially a contract for the article, manufactured or to be manufactured, the statute applies to it; but if it is for the manufacture, for the work, labor, and skill to be bestowed in producing the article, the statute does not apply. The former is within the terms of the seventeenth section; the latter is not. Where the article contracted for is not such as the vendor has for sale in the ordinary course of his business, in other words, not with him an ordinary article of traffic, that fact will go to show that, in contracting with him for the production of it, the purchaser *contemplates* getting by his bargain the work, labor, and skill of the other.[3] A circumstance from which the intention of the parties that the purchaser should get by the bargain the work, labor, and skill of the seller may conclusively appear, will be that the article, when complete, is to be of a peculiar kind, suitable only to peculiar uses, or perhaps only to those of the purchaser himself. This point is dwelt upon with much force in an opinion of the Superior Court of Georgia, delivered by Nisbet, J., where he refers to Towers *v.* Osborne, and considers it as belonging to a class of cases where articles are "to be made by the work and labor, and with the material, of the vendor, and which, when made, may reasonably be presumed to be unsuited to the general market, such as contracts for the

[1] See also Eichelberger *v.* M'Cauley, 5 Harr. & J. (Md.) 213.

[2] Spencer *v.* Cone, 1 Met. (Mass.) 283, affirming Mixer *v.* Howarth, 21 Pick. 205; Mattison *v.* Wescott, 13 Vt. 258; Allen *v.* Jarvis, 20 Conn. 38.

[3] In Cummings *v.* Dennett, 26 Me. 401, Whitman, C. J., said: "It is very clear that, if application is made to a mechanic or manufacturer [though] for articles in his line of business, and he undertakes to prepare and furnish them in a given time, such a contract, though not in writing, is not affected by the statute."

manufacture of goods suited alone to a particular market, or for the painting of one's own portrait." Of which contracts he says: "The work and labor and material constitute the prime consideration. They are for work and labor, and are, by authority and upon principle, without the influence of the statute. *Ex æquo et bono*, a man who agrees to bestow his labor in the manufacture of goods for a price, and which price he must lose unless the goods are received by him who ordered them, ought to be paid, and a statute which would protect the purchaser from liability in such a case would be alike impolitic and unjust." Of the case before them, which was an action on a contract for a crop of cotton, to be delivered as soon as it could be gathered and prepared for market, the court say: "The manufacturer does not necessarily lose the price of his labor. If the purchaser does not take the goods, others will. The work and labor bestowed are in the line of his business, and his work and labor would have been bestowed in the production of such goods had the contract not been made. The goods and their price are the considerations of the contract, and not the work and labor and their price."[1] And so the Supreme Court of Maine have held that a contract by which the defendants bound themselves to furnish as soon as possible a quantity of malleable hoe-shanks, according to patterns left with them, and to furnish a larger amount if required at a diminished price, was to be considered as a contract for the manufacture and delivery and not for the mere sale of the articles, and so not within the statute. The opinion of the court contains the following important suggestion as to the distinction between the two kinds of contracts: "The person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party, combined with the materials, for which he contracted and to which

[1] Cason *v.* Cheely, 6 Ga. 554, approving Bird *v.* Muhlinbrink, 1 Rich. (S. C.) Law 199. See also Buxton *v.* Bedall, 3 East, 303.

he is entitled."[1] A decision of the Court of Exchequer, also, is instructive upon this point. An author, by verbal agreement, employed a printer to print a certain work, and placed the manuscript in his hands for that purpose. The printer having completed the work (with the exception of the dedication, which, discovering it to be libellous, he refused to print) brought his action for what he had done, in the form of *work, labor, and materials supplied.* A verdict was obtained for the plaintiff, and in support of a rule to set it aside and enter a nonsuit, the Statute of Frauds was relied upon, the book being above the value of ten pounds. It was held that the form of the action was correct, and that the statute did not apply. Lord Chief Baron Pollock remarked that the true rule was, to consider whether the essence of the contract consisted in the work and labor, or in the materials that were to be supplied; and his impression was, that in cases of works of art, which were applications of labor of the highest description, the material was of no sort of importance as compared with the labor.[2]

§ 308 *a.* Perhaps it might not be always correct to say that when the purchaser could refuse the goods as not being of the vendor's manufacture, then the statute would not apply; but the cases which have been referred to seem, upon the whole, to establish that the true question is, whether the essential consideration of the purchase is the work and labor of the seller to be applied upon his materials, or the product itself as an article of trade; and that in determining this question the peculiarity of the article ordered, and the seller's not

[1] Hight *v.* Ripley, 19 Me. 139; Mead *v.* Case, 33 Barb. (N. Y.) 202; Parker *v.* Schenck, 28 Barb. (N. Y.) 38; Abbott *v.* Gilchrist, 38 Me. 260; Winship *v.* Buzzard, 9 Rich. (S. C.) Law 103; Higgins *v.* Murray, 4 Hun (N. Y.) 565; Flynn *v.* Dougherty, 91 Cal. 669.

[2] Clay *v.* Yates, 1 Hurl. & N. 73. The mere fact that the particular article contracted for is to be adapted, in the manufacture, to the personal use of the purchaser, as in the case of custom-made clothing, etc., does not, it seems, prevent the statute from applying. Lee *v.* Griffin, 1 Best & S. 272; *per* Lord Abinger, in Scott *v.* Eastern Counties Railway Co., 12 Mees. & W. 33; Rasch *v.* Bissell, 52 Mich. 455.

commonly dealing in such articles, are material and may be conclusive circumstances. In other words, while a contract for the *sale* of an article (in whatever state it is at the time) is within the seventeenth section, a contract for the *manufacture and delivery* of an article is not; either expression, however, as used by the parties, being liable to such an interpretation as the circumstances of the transaction show to be that intended by them.

§ 309. The statute 9 Geo. IV. c. 14, 7, commonly called Lord Tenterden's Act, provides that the seventeenth section of the statute of Charles "shall extend to all contracts for the sale of goods of the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." This statute, following as it did closely upon the decision of Garbutt *v.* Watson, in 1822, seems to be no more than declaratory of the prevailing opinion in England as to what was the construction of the seventeenth section of the Statute of Frauds, touching the classes of cases which it enumerated. In the case just referred to, of the suit by a printer for work, labor, and materials found in printing a book, Lord Chief Baron Pollock expressed his opinion that Lord Tenterden's Act applied only when the bargain was for goods afterward to be made, and not for goods for which the material was found.

§ 309 *a*. An important English case, involving the question of construction we have been considering under the seventeenth section, is Lee *v.* Griffin, in the Queen's Bench, in 1861.[1] This was an action by a dentist to recover £21 for two sets of teeth, ordered by a deceased person, whose executor was the defendant. The main question in the case was whether or not a contract to make a set of artificial teeth was

[1] Lee *v.* Griffin, 1 Best & S. 272.

a contract for the sale of goods, wares, and merchandise, and all the judges agreed that it was. The rule upon which they based their decision was stated somewhat differently by the judges; Crompton and Hill, JJ., saying that, wherever a contract is for a chattel to be made and delivered, it is a sale of goods, and not a contract for work and labor. Blackburn, J., said: "If the contract be such that, when carried out, it will result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." The same learned judge, at the close of his opinion, said: "I do not think that the test to apply to these cases is, whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would in my opinion, nevertheless, be a contract for the sale of a chattel." [1] This case goes manifestly to an extreme. The declaration of Blackburn, J., that a contract for the execution of a work of art by a sculptor would, in his opinion, be a contract for the sale of a chattel, is no stronger than the actual decision of the court, that the contract before it was for a sale of a chattel. All the cases under this head of the statute have been cases of contracts which, when carried out, resulted in the sale of a chattel. The very question has always been whether, notwithstanding that fact, the particular contract should be regarded as for (not the resulting chattel, but) the labor, or the technical or artistic skill, of which the purchaser was to receive the benefit. The case of Lee *v.* Griffin, therefore, seems to reject rather than to illus-

[1] The rule laid down in this case has been approved by Mr. Benjamin, Law of Sales, 84; Burrell *v.* Highleyman, 33 Mo. App. 183; Pike Electric Co. *v.* Richardson Drug Co., 42 Mo. App. 272. See Fairbanks *v.* Richardson Drug Co , 42 Mo. App. 262.

trate this difficult distinction, which a long course of authority has introduced into the law of the construction of the statute.

§ 310. Before passing from this subject, we must remark the distinction between a contract to *sell* and deliver and a contract to *procure* and deliver goods, wares, or merchandise. In the case of Cobbold *v.* Caston, the master of a vessel agreed to carry the plaintiff's corn from one port to another, and then proceed to a third and fetch a cargo of coals, which he would bring back and deliver to the plaintiff at the first port, at a certain price per chaldron. The Court of Common Pleas held that this was not a contract for the sale of the coals within the meaning of the seventeenth section of the statute, but simply a contract to procure and deliver them; in illustration of which distinction Gifford, C. J., remarked that, if no coals could be found at the port specified, it was clear that the plaintiff could not have maintained an action against the defendant for goods bargained and sold, or for a breach of the contract in not delivering them; that the contract was founded on the purchase of coals by the defendant at a certain port, but there was none whatever that he would sell them to the plaintiff.[1]

§ 311. The last point to be considered, in determining whether a contract for the sale of goods, wares, or merchandise falls within the provision of the seventeenth section of the statute, is the *price*. The statute declares that such contracts must be proved by writing, when the subject-matter of them is of the price of ten pounds sterling and upwards; and this limitation as to the amount has been generally adopted in the United States. Of course the price is not to be presumed to reach this sum; it has been decided in New York, and is according to manifest reason, that the defendant who

[1] Cobbold *v.* Caston, 8 Moore, 460. And see Bird *v.* Muhlinbrink, 1 Rich. (S. C.) Law 199; Abbott *v.* Gilchrist, 38 Me. 260; Crockett *v.* Scribner, 64 Me. 447; Atwater *v.* Hough, 29 Conn. 508; Russell *v.* Wisconsin R. R. Co., 39 Minn. 145; Frank *v.* Murphy, 7 Montana 4. As to land, see §§ 263, 283 *a*, *ante*.

seeks the protection of the statute must affirmatively show that it does reach it.[1] But it does not prevent the application of the statute, that the price of the goods has been enhanced by the vendor's being bound to deliver them, there being no separate charge for their delivery.[2] In cases where, at the time of making the bargain, it is uncertain what the amount of the price to be paid will be, there seems to arise some embarrassment. In Watts *v.* Friend (which has been already examined under another head), the defendant agreed to supply the plaintiff with a quantity of turnip-seed, and the plaintiff agreed to sow it on his own land, and sell the crop of seed produced therefrom to the defendant at £1 1*s.* the Winchester bushel. The seed so produced at the price agreed upon exceeded in value the sum of £10; and it was held by the Court of Queen's Bench (though without any particular attention being paid to the point of uncertainty of value) that the contract for the sale of the seed was covered by the seventeenth section.[3]

§ 312. From this decision it appears that, whereas that clause of the fourth section which prohibits bringing an action upon any verbal agreement not to be performed within the space of a year from the making does not apply if the agreement *may* by possibility be so performed, the seventeenth section must be differently construed. and will cover a contract for articles for which a sum exceeding the statutory limit becomes payable eventually, though it *might* have fallen within that limit consistently with the terms of the contract. On the other hand, in the case of Cox *v.* Bailey, where the defence to an action upon an undertaking of indemnity was that the amount of the indemnity might, and in fact did, exceed twenty pounds, and that the undertaking was therefore affected by a certain statute requiring an agreement

[1] Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58.

[2] Astey *v.* Emery, 4 Maule & S. 262.

[3] Watts *v.* Friend, 10 Barn. & C. 446. See Bowman *v.* Conn, 8 Ind. 58; Brown *v.* Sanborn, 21 Minn. 402; Carpenter *v.* Galloway, 73 Ind. 418.

stamp where the matter of the agreement was of the value of twenty pounds or upwards, the Court of Exchequer held that statute not to apply, because the matter of the agreement *might* be of no value at all.[1] In the former case, it is true that the turnip-seed would surely be of some value; but this seems to be a mere distinction without a difference. Looking at the policy of the statute in this particular, which is to remove the strong temptation to perjury in the proof of commercial transactions of a certain magnitude, we should incline to follow the authority of Watts *v.* Friend; for if a bargain may, by the understanding of the parties, attain that magnitude, it seems but reasonable that they should defer to the provisions of the law and put their bargain in writing.

§ 313. Next, as to the meaning of the word *price*. Ordinarily it means a consideration stipulated by one party to be paid to the other; and the question arises whether the statute shall apply in any case where no price is expressly agreed upon. In Hoadley *v.* McLaine the defendant gave the plaintiff an order for a landaulet to be built for him, and signed a memorandum to that effect, but without fixing any price. Evidence being introduced of what it was fairly worth, the Court of Common Pleas held the defendant bound to pay that sum, though it exceeded ten pounds, there being nothing to the contrary in the memorandum. The case involved to a certain extent the consideration of Lord Tenterden's Act before referred to, and Chief Justice Tindal remarked upon the substitution in that act of the word *value* for the word *price* (which latter is used in the statute of Charles), as showing its framer's extreme accuracy of mind, and that, *by force of that substitution*, where the parties had omitted to fix a price, it was open to a jury to ascertain the value in dispute.[2] From this it must be inferred that the learned judge was of opinion that the seventeenth section of the statute of Charles

[1] Cox *v.* Bailey, 6 Mann. & G. 193.

[2] Hoadley *v.* M'Laine, 10 Bing. 482; and see Harman *v.* Reeve, 18 C. B. 587.

would not apply where the parties had not fixed a price. In the case before him, however, it was only necessary to decide, as he did, that the memorandum was sufficient, though silent as to price, the jury being of course called upon to determine the value of the article which the memorandum had first shown the defendant to be bound to pay for. And there is certainly room for much hesitation in accepting, without an express judgment upon the point, the intimation of the court as to the narrow meaning of the word *price* in the seventeenth section. Apart from the manifest policy of the statute, which, as we have before remarked, is to prevent the fraudulent assertion of commercial bargains of a certain magnitude, it is no straining of words to say that, where parties make no stipulation as to the amount to be paid for goods, wares, or merchandise bought and sold, and thus agree tacitly upon the *quantum valet*, they do contract for a *fair price*, which is capable of being ascertained by proof, and thus their bargain is brought within the reach of the statute, where that price is shown to exceed the amount therein fixed.

§ 314. When a purchaser buys a number of articles at one transaction, and the aggregate price exceeds the statutory limit, the seventeenth section will be held to apply to the bargain. The mere fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference so long as the different purchases are so connected in time or place, or in the conduct of the parties, that the whole may be fairly considered one entire transaction.[1]

[1] Baldey *v* Parker, 2 Barn. & C. 37. See the authorities cited to the corresponding point under the head of *acceptance and receipt*. *Post*, Chap. XV § 335; also Gilman *v*. Hill, 36 N. H. 311; Jenness *v*. Wendell, 51 N. H. 63; Allard *v*. Greasert, 61 N. Y. 1. But see Roots *v*. Dormer, 4 Barn. & Ad. 77.

CHAPTER XV.

ACCEPTANCE AND RECEIPT.

§ 315. It has been repeatedly observed that the primary intention of the framers of the seventeenth section of the statute was, that contracts for the sale of goods, wares, and merchandise should be put in writing, although other modes of establishing the contract are allowed by it.[1] And this view is confirmed by the fact that the other section relating to contracts — the fourth section — provides only for the memorandum in writing, allowing no equivalent. And while, as if in deference to the exigencies of trade, incessant and sudden as they must be, the legislature saw fit, in the seventeenth section, so far to modify the stricter rule, it is quite clear that they intended thereby no departure from the spirit of the statute; but that the alternative evidence was meant to be of such a nature as to constitute, of itself, and in the absence of writing, a sufficient safeguard against perjury, by requiring proof of such conduct on the part of either party as involved an open and public recognition of a contract of sale.

§ 316. This recognition of the contract, as the statute provides, is to be shown by proof of the conduct of the parties with regard to the goods which are the alleged subject of sale, or by proof of payment of a part of the price. In the present chapter we have to deal only with the former provision, *i. e.*, that no contract shall be allowed to be good "except the buyer shall accept a part of the goods so sold,[2] and actually

[1] *Per* Denman, C. J., in Bushel *v.* Wheeler, 15 Q. B. 442, *in notis*. *Per* Bayley, J., in Smith *v.* Surman, 9 Barn. & C. 569.

[2] See Davis *v.* Eastman, 1 Allen (Mass.) 422.

receive the same." This provision, it will be seen, names only the buyer, and the same is true of that concerning payment; yet it has never been questioned that the provisions of the statute apply, whether the buyer or the seller be the party to be charged, and the courts have almost uniformly regarded the provision which in terms concerns the *receipt* by the buyer, as covering, by implication, the complementary and contemporary act of *delivery* by the seller.

§ 316 *a.* Before proceeding further, it is essential to notice the distinct nature of the acceptance and the receipt for which the statute provides. It is very clearly stated by an eminent writer on this subject. Speaking of the part of the seventeenth section now under discussion, he says: "If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with unless the two things concur; the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both.[1] And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt."[2] This view of the statute was at the time (1845), as the writer says, somewhat "in the absence of authority;" but the more recent and weighty decisions, both in England and in this country, have clearly recognized it.[3] In the earlier cases, the terms "acceptance,"

[1] In the case of Goddard *v* Binney, 115 Mass. 450, the Supreme Court of Massachusetts held that enough had been done to vest the general ownership of the goods in the buyer, and to cast upon him the risk of loss by fire while the goods remained in the seller's possession, and to support an action by the seller against the buyer for the contract price, although the circumstances of the case might not show "delivery and acceptance within the Statute of Frauds."

[2] Blackburn on Sales, 22, 23.

[3] Hunt *v.* Hecht, 8 Exch. 814; Cusack *v.* Robinson, 1 Best & S. 299; Knight *v.* Mann, 118 Mass. 143; Hewes *v.* Jordan, 39 Md. 472; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 18; Heermance *v.* Taylor, 14 Hun (N. Y.) 149. See Benjamin on Sales, Ch. IV. § 1; Langdell, Select Cases on Sales, 1021; Simpson *v.* Krumdick, 28 Minn. 352; Billin *v.* Henkel, 9 Col. 394; Powder River Live Stock Co. *v.* Lamb, 38 Neb. 339.

"receipt," and "delivery" were often used as if synonymous and interchangeable; and this makes it necessary, at the present day, to notice carefully the exact sense in which they are used in those cases, when they may be cited as authority upon questions concerning "acceptance" or "receipt," as those terms are applied with greater strictness in the more modern decisions.[1]

§ 316 *b*. To constitute *acceptance*, there must be such conduct of the buyer in respect to the goods as affords evidence that he has identified and recognized them as the goods which were to be his by virtue of the alleged contract. The burden of showing this will obviously fall upon the buyer or the seller, accordingly as the one or the other of them is defendant in the action,[2] but the fact itself is the same in either case, and it is also a question of what the buyer only has done.[3] Again, it is a fact that ordinarily can be proved by oral evidence only; evidence of what the buyer has done or said, or refrained from doing or saying. But it will readily be seen that, by imposing upon the party suing on the contract the necessity of proving not only that the contract was made, but that it was also ratified by the other party by conduct such as has been above described, the framers of the Statute of Frauds placed a substantial obstacle in the way of the false swearing which it was their object to prevent.

[1] The term "delivery," which does not occur in the statute at all, has been often loosely used to denote acceptance or receipt alone, or a mixture of the two. See, for illustration of this, Searle *v.* Keeves, 2 Esp. 598, *per* Eyre, C. J.; Norman *v.* Phillips, 14 Mees. & W. 277, *per* Alderson, B. In Tempest *v.* Fitzgerald, 3 Barn. & Ald. 680, Holroyd, J., in his opinion, speaks constantly of "acceptance," although in reality deciding, and intending to decide, a question of "receipt" involving the custody or possession of the chattel, and the existence of the seller's lien; and see Wright *v.* Percival, 8 L. J. Q. B. (N. S.) 258; Terney *v.* Doten, 70 Cal. 399. That no acceptance, as distinguished from delivery, is required under a statute of frauds which specifies delivery only, see Bullock *v.* Tschergi, 13 Fed. Rep. 345.

[2] Remick *v.* Sandford, 120 Mass. 309, 316.

[3] See Knight *v.* Mann, 118 Mass. 143.

§ 316 *c.* The definition above given of acceptance points to a connection existing between it and the passage of the title to the goods, which, as will be hereafter seen, finds its counterpart in a similar connection between the receipt and the right of possession.[1] Thus it is now pretty well settled that when, at the time of making the sale, the thing sold is definite and specific, and nothing remains to be done in the way of preparation, or selection from a mass, the same evidence that would prove the making of the sale whereby the title would pass will ordinarily be sufficient to show an acceptance by the buyer such as would satisfy the statute. But if, at the time, the thing to be sold and bought is not defined, or is yet to be completed, or to be selected from a larger lot, or to be compared with a sample shown, there is as yet no acceptance, nor will there be till the selection or the comparison has been made and consented to by the buyer.[2] This was clearly brought out in the opinion of the Court of Queen's Bench, delivered by Blackburn, J., A.D. 1861, in the case of Cusack *v.* Robinson. In that case, the defendant called at the plaintiff's warehouse, and examined a certain lot of butter, and later in the day made a verbal agreement to purchase it at a specified price, and left orders to have it delivered at a designated place. The butter was accordingly delivered as directed, but the defendant declined to keep it, or to pay for it. There was a verdict for plaintiff, with leave to defendant to move for a nonsuit, if the full court should be of opinion that the facts failed to show an acceptance and receipt. Leave was refused. In the argument of counsel for defendant the case of Nicholson *v.* Bower was cited, but the court distinguished it on the ground that the contract there was not originally a sale of specific wheat, and that the vendees had never agreed to take the particular bushels of wheat which they had received; in other words,

[1] See Townsend *v.* Hargraves, 118 Mass. 325, 333.

[2] See Brewster *v.* Taylor, 63 N. Y. 587; Fitzsimmons *v.* Woodruff, 1 Thomp. & C. (N. Y.) 3.

that, the goods not being specified at the time of the contract, the buyer had not had even the opportunity of accepting the goods, that is, of acknowledging them as the goods to be his under the contract; whereas, in the case before the court, the goods being a specific lot, it was clear that the acceptance was complete when the bargain was made.[1] From this it follows, generally, that in the case of goods not specified at the time of the contract, although they be subsequently selected and even delivered to the buyer, this is not of itself evidence of an acceptance; indeed, as is often the case, they may have been delivered to the buyer for the very purpose of enabling him to say whether he will accept them or not.[2]

§ 316 *d*. A further illustration of this general doctrine is to be found in cases like that of Maberley *v*. Sheppard,[3] which arose upon a contract for the manufacture and sale of a wagon. The defendant, who had ordered the wagon, had procured a third person to put upon it the iron work and a tilt, while it was still in the plaintiff's yard unfinished. The Court of Common Pleas held, in view of the fact that this wagon was unfinished when the acts relied on as constituting acceptance were done, that they were not evidence of acceptance within the statute; admitting, however, that if, after the wagon was completed and ready for delivery, the defendant had sent a workman of his own to perform additional work upon it, such conduct, as being an admission of ownership, might have amounted to an acceptance.[4] Again, in the case of Hunt *v*. Hecht,[5] where defendant agreed to buy a certain quantity of bones of particular kinds, to be picked out from a larger heap, put up in bags furnished by the buyer, and then sent to a designated warehouse, all of which was

[1] Cusack *v*. Robinson, 1 Best & S. 299; and see Cross *v*. O'Donnell, 44 N. Y. 661.

[2] See Knight *v*. Mann, 118 Mass. 143; Stone *v*. Browning, 68 N. Y. 598; Simpson *v*. Krumdick, 28 Minn. 352.

[3] Maberley *v*. Sheppard, 10 Bing. 99.

[4] See Brewster *v*. Taylor, 63 N. Y. 587.

[5] Hunt *v*. Hecht, 8 Exch. 814.

done; but when the defendant came to inspect the bones, he found they were not what he had ordered, and so declined to keep them; the court held that the evidence showed receipt, but not acceptance, and the grounds for the decision are thus put by Alderson, B.: "If a person agrees to buy a quantity of goods to be taken from the bulk, he does not purchase the particular part bargained for until it is separated from the rest; and he cannot be said to accept that which he knows nothing of, otherwise it would make him the acceptor of whatever the vendor chooses to send him; whereas he has a right to see whether, in his judgment, the goods sent correspond with the order. The statute requires an acceptance and actual receipt of the goods; here there has been a delivery, but no acceptance." [1]

§ 316 *e*. That there has been no acceptance may also appear when it is proved that the purchaser, after receipt of the goods, refuses to examine them. In Nicholson *v.* Bower,[2] the buyer of certain goods by sample, being bankrupt at the time of their delivery, declined to compare them with the sample, as he did not desire, in the condition of his affairs, to insist upon the contract, but wished to repudiate it.[3]

§ 316 *f*. After the buyer has come into possession of the goods, his acceptance of them may be found from the fact of his subsequently so dealing with them as to involve an admission that they are the goods bought by him. Upon this point the leading case is Morton *v.* Tibbett,[4] which may be said to have decided that when the purchaser of goods takes upon himself to exercise a dominion over them, and deals with

[1] See also Gorham *v.* Fisher, 30 Vt. 428; Atherton *v.* Newhall, 123 Mass. 141; Knight *v.* Mann, 118 Mass. 143; Fitzsimmons *v.* Woodruff, 1 Thomp. & C. (N. Y.) 3.

[2] Nicholson *v.* Bower, 1 El. & E. 172.

[3] And see Remick *v.* Sandford, 120 Mass. 309; Stone *v.* Browning, 68 N. Y. 598; Bacon *v.* Eccles, 43 Wisc. 227.

[4] Morton *v.* Tibbett, 15 Q. B. 428. See commentary upon it of Alderson, B., in Hunt *v.* Hecht, 8 Exch. 814. See also Meyer *v.* Thompson, 19 Oregon 194.

them in a manner inconsistent with the right of property or the title being in the vendors, that is evidence to justify the jury in finding that the vendee has accepted the goods. The same rule was applied in the case of Currie *v.* Anderson, the court being of opinion that inasmuch as the buyer had designated as the place of delivery a particular ship, and, after the goods were delivered there, had also given directions to have the bill of lading made out in a particular manner, there was ample evidence that he had dealt with the goods as owner, and consequently had accepted them.[1]

§ 316 *g*. Again, after the buyer has come into the possession of the goods, his acceptance of them may be inferred from his continued and unexplained retention of them, though no affirmative act of acceptance or identification appear. Thus, in Coleman *v.* Gibson, the contract was for the purchase of five distiller's vats, to be made for the buyer. Four of the vats had been made and delivered, the deliveries being a few days apart, when the buyer went to the maker and refused to keep the vats already made, on the ground that they were worthless, or to take the one which was to be made, and the fifth vat accordingly was not delivered. Lord Tenterden, who decided the case, held that it was a question for the jury whether the defendant had within a reasonable time signified to the plaintiff his objection to the goods, as not satisfying the contract; and that if he had not done so, he should be taken to have accepted them.[2] The same principle was applied in the case of Bushel *v.* Wheeler, where the goods were delivered at the place designated by the buyer, who afterward for five months failed to inform the seller whether or not they corresponded to the order; and this was held evidence to go to the jury on the question of accept-

[1] Currie *v.* Anderson, 2 El. & E. 592; and see Castle *v.* Sworder, 6 Hurlst. & N. 828, on appeal, opinion of Crompton, J.; also Page *v.* Morgan, L. R. 15 Q. B. D. 228.

[2] Coleman *v.* Gibson, 1 Moo. & R. 168. See Lauer *v.* Richmond Institution, 8 Utah 305; Small *v.* Stevens, 65 N. H. 209.

ance.[1] In Norman *v.* Phillips, in the Exchequer, the following year, where, under nearly similar circumstances, a month had elapsed before the buyer notified the seller, the judge below had directed a verdict for the plaintiff, and the full bench made a rule absolute for a nonsuit; it was admitted that there was some evidence of acceptance that should have gone to the jury, but as, in the opinion of the court, it was not enough by itself to warrant a finding of an acceptance, a new trial was not ordered.[2]

§ 316 *h.* In this last case the doctrine of a constructive acceptance by the buyer's inaction after taking the goods into his possession received but a grudging assent; yet the doctrine, it seems, ought to stand as law. The law may well say that the buyer, by his silence for an unreasonable time, must be taken to have said to the seller, "I accept the goods;" and that this shall not be allowed to be controverted by the buyer afterward. But inasmuch as the question in all such cases turns upon the inference to be drawn from the facts, it is clear that the facts which tend to negative the inference should be regarded, as well as those which may support it. In the case of Curtis *v.* Pugh the buyer had ordered three casks of "Cox's Best Glue," and when the casks arrived he took out the contents and stored them in bags, for the purpose, as he alleged, of examination; and not finding them to correspond with the order, he repacked them, and sent them back to the seller, who declined to receive them. It appeared that a sufficiently thorough examination might have been made without entirely unpacking the glue, and also that repacking would, to some extent, injure it. The judge at *nisi prius* had ruled, that if the defendant had done any act altering the condition of the goods, that would prove an acceptance; but the verdict for the plaintiff was set aside, the court being of the opinion that what was done was not inconsistent

[1] Bushel *v.* Wheeler, 15 Q. B. 442, *note;* and see Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 18.

[2] Norman *v.* Phillips, 14 Mees. & W. 277.

with an examination merely for the purpose of ascertaining whether or not the goods answered the orders.[1] The same doctrine was applied in the case of Parker *v.* Wallis, where the buyer of certain turnip-seed had taken it out of the sacks and spread it out thin. It was held that, under all the circumstances, the jury would be justified in finding that the handling had not been done as an act of ownership.[2]

§ 316 *i.* The same principles apply to those cases where the acts relied on to show acceptance are the dealings of the buyer with the bill of lading, or other *indicium* of right to possession. The mere fact that such a document was sent by the buyer and received by the seller manifestly affords no ground for inferring an acceptance by the latter of the goods to which it refers.[3]

§ 317. But in addition to the *acceptance*, the buyer must have *received*, and consequently the seller *delivered*, the goods sold, or a part of them. This again is a question of fact, and in deciding it, the conduct of the seller as well as the buyer must, it is obvious, be considered. Thus it is a well-known rule, and one established by a series of most respectable decisions, that, so long as the seller has not so acted toward the goods as to divest himself of his lien upon them for the price, there has been no *receipt* under the statute. Under this rule, it will be seen, the conduct of the seller is the chief thing to be considered.[4] And as the idea of a lien of the vendor presupposes the passage of the title out of him, — for a man cannot be said to have a lien on his own goods, — it will be seen that, while in the case of acceptance we regard the *title*, so, in the case of receipt, we must regard the *possession*, and notice in whom, either actually or constructively,

[1] Curtis *v.* Pugh, 10 Q. B. 11.

[2] Parker *v.* Wallis, 5 El. & B. 21. And see Remick *v.* Sandford, 120 Mass. 309.

[3] See Quintard *v.* Bacon, 99 Mass. 185; Farina *v.* Home, 16 Mees. & W. 119.

[4] See Mechanics & Traders' Bk. *v.* Farmers & Mechanics' Nat. Bk., 60 N. Y. 40.

it is.[1] And it is generally true that, to constitute the receipt required by the statute, there must be shown a transfer of the possession of the goods by and from the seller to the buyer, either actually by manual delivery, symbolically by some substituted delivery, or constructively by a change in the nature of the seller's subsequent holding.

§ 317 *a*. Where, by the terms of the contract, the sale is to be for cash, or any other condition precedent to the buyer's acquiring title in the goods be imposed, or the goods be, at the time of the alleged receipt, not fitted for delivery according to the contract, or anything remain to be done by the seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer. There must be first a delivery by the seller, with intent to give possession of the goods to the buyer.[2] If, however, the buyer has taken possession, and merely remains under an engagement restricting his use or disposition of the goods until payment of the price, that restriction will not, it seems, be deemed inconsistent with his having received them so as to conclude the contract. In a case in the Queen's Bench, the buyer of some wool had it removed to a warehouse belonging to a third party, but where he was in the habit of collecting his various purchases of wools and having them packed, and there he had the wool in question weighed and packed in his own sheetings, but by the course of dealing he was not to remove it till the price was paid; it was held that there was a sufficient receipt. After remarking that everything was complete but the payment of the price, Lord Denman, C. J., who delivered the opinion of the court, says: "We think that, upon this evidence, the place to which the wools were removed must be considered as the *defendant's* warehouse, and that he was in actual possession of it there as soon as it was weighed and packed; that it was thenceforward at his risk, and if burnt must have been paid for by him. Consist-

[1] Rodgers *v.* Jones, 129 Mass. 420.
[2] Hinchman *v.* Lincoln, 124 U. S. 38.

ently with this, however, the plaintiff had, not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment." [1] In a later case, where the defendant had bargained for a carriage from the plaintiff, and after leaving it for a few days in the plaintiff's shop took it out for a drive, paying for the horse and man, it was held by the Court of Exchequer that there was a receipt of the carriage, and Maule, J., remarked that, "assuming that the man who drove it was the plaintiff's servant, and had directions from the plaintiff to bring back the carriage, still that which passed clearly amounted to an acceptance [receipt] *subject to a contract* on the defendant's part to send the carriage back to the plaintiff and repledge it for the price." [2] Mere retention of possession by the vendor after the property of the goods has passed, and for the purpose of performing some duty in regard to them as the agent of the purchaser and owner, of course does not invalidate the bargain of the parties.[3]

§ 318. The actual receipt of the goods does not necessarily involve manual taking possession of them by the buyer. In many cases this would be impracticable, and no other receipt is required than such as is consistent with the nature, locality, and condition of the goods; though this be merely symbolical, the statute will be satisfied when the case admits of none other. It is, therefore, a general rule in regard to the actual receipt of inaccessible, or ponderous, or bulky articles, that it may be accomplished by the performance of any act which shows that the seller has parted with the right to control the

[1] Dodsley *v.* Varley, 12 Ad. & E. 634.
[2] Beaumont *v.* Brengeri, 5 C. B. 308.
[3] Boynton *v.* Veazie, 24 Me. 286.

property, and that the purchaser has acquired that right. Thus goods lodged in a warehouse may be transferred symbolically by the delivery of the key.[1]

§ 318 *a*. There remains to be considered the third form of delivery and receipt, often spoken of as "constructive," where, without actual transfer of the goods or their symbol, the conduct of the parties is such as to be inconsistent with any other supposition than that there has been a change in the nature of the holding; that the seller, or his bailee, now holds as the bailee of the buyer, or that the buyer himself, who formerly had goods of the seller in his own possession as bailee, is now permitted by the latter to deal with them as owner. Whether such a change has taken place is a question for the jury on the evidence.

§ 318 *b*. Where the seller's goods remain in his possession after the sale, the change in the nature of his holding is often to be inferred from his subsequent conduct toward them, as showing that, though still in his hands, they are no longer under his own control, but that he holds as the bailee or agent of the buyer, and subject to his order. Upon this point the case of Elmore *v.* Stone is instructive, as being a decision which, though somewhat criticised as to the application of the rule to its particular facts, has been abundantly affirmed by subsequent decisions as recognizing the true rule. It was an action to recover the price of two horses alleged to have been sold to the defendant, who, as it appeared in evidence, after concluding the bargain verbally, sent word that "the horses were his, but that, as he had neither servant nor stable, the plaintiff must keep them at livery for him." Accordingly the plaintiff removed the horses from his sale-stable to another, where, it was testified, they thereafter stood at livery. Upon this evidence, the jury found that there had been constructively a receipt of the horses, and Lord Mansfield supported the verdict, on the ground that there was evi-

[1] Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335; Chappel *v.* Marvin, 2 Aik. (Vt.) 79.

dence that the seller had consented to keep, and had kept, the horses in the character of a livery-stable keeper; and that, if the jury believed the evidence, they were justified in finding a change in the posesssion, and consequently a constructive receipt.[1]

§ 319. The same doctrine applies where the property is not in the manual possession either of the seller or his bailee, but is upon the premises of some third person, though subject to the control of the seller. Here again the evidence may afford sufficient ground for a finding that the possession and control have been transferred constructively, if not actually, to the buyer.[2] In the case of Shindler *v.* Houston, in the Supreme Court of New York, the proof showed a sale by the plaintiff to the defendant of a quantity of lumber, which was piled apart from other lumber on a dock, and had been previously measured and inspected, and was in the view of the parties at the time of the bargain. The defendant offered a certain price per foot, which the plaintiff accepted, saying, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill of the lumber and take it to the

[1] Elmore *v.* Stone, 1 Taunt. 457. See Marsh *v.* Rouse, 44 N. Y. 643; Castle *v.* Sworder, 6 Hurlst. & N. 828; Cusack *v.* Robinson, 1 Best & S. 299; Marvin *v.* Wallis, 6 El. & B. 726; Beaumont *v.* Brengeri, 5 C. B. 301; Chaplin *v.* Rogers, 1 East, 192; Green *v.* Merriam, 28 Vt. 801; Safford *v.* McDonough, 120 Mass. 290; Knight *v.* Mann, 118 Mass. 143; Brown *v.* Hall, 5 Lans. (N. Y.) 177; Janvrin *v.* Maxwell, 23 Wisc. 51. But see Phillips *v.* Hunnewell, 4 Greenl. (Me.) 376. As has been noted above, § 317 *a*, the circumstance that the sale was for cash, and that consequently the vendor had the right to withhold delivery till the price was paid, is to be borne in mind, in considering the inference to be drawn by the jury from his conduct with regard to the goods; the inference of a delivery, of course, excluding his lien. See Tempest *v.* Fitzgerald, 3 Barn. & Ald. 680; Carter *v.* Toussaint, 5 Barn. & Ald. 855; Clark *v.* Labreche, 63 N. H. 397; Shepherd *v.* Pressey, 32 N. H. 49; Reinhart *v.* Gregg, 8 Wash. 191; Spear *v.* Bach, 82 Wisc. 192.

[2] Calkins *v.* Lockwood, 17 Conn. 174; Boynton *v.* Veazie, 24 Me. 286; Leonard *v.* Davis, 1 Black (U. S.) 476. See Jewett *v.* Warren, 12 Mass. 300; Tansley *v.* Turner, 2 Bing. N. R. 151; Cooper *v.* Bill, 3 Hurlst. & C. 722; Smith *v.* Fisher, 59 Vt. 53.

defendant's agent, who would pay the amount. This was soon after done, but payment was refused. In the Supreme Court it was held that the case had been properly submitted to the jury on their verdict on the question of acceptance and receipt. Jewett, J., pronounced judgment, saying that "delivery in a sale may be either *real*, by putting the thing sold into the possession or under the power of the purchaser, or it may be *symbolical* [or constructive], when the thing does not admit of actual delivery; and such delivery is sufficient, and equivalent in its legal effects to actual delivery. It must be such as the nature of the case admits."[1] The Court of Appeals reversed this decision,[2] not objecting to the principle, but to its application, and basing its opinion upon the important feature in the case that what was relied upon as evidence of acceptance and receipt was in reality the acts and declarations of the parties during and as a part of the negotiation, not such subsequent acts and declarations as would constitute the open recognition and admission of an existing contract, as the law requires.

§ 319 *a*. When the goods at the time of sale are in the hands of a bailee who holds them for the seller, it has generally been held essential to the proof of a constructive delivery to and receipt by the buyer, to show not only a giving up of his control by the seller, but a communication of this to the bailee, and his assent to it and attornment to the buyer; the change in the nature of the holding being thus clearly established. This is well illustrated by the case of Bentall *v.* Burn, decided in the King's Bench in 1824. It appeared that the plaintiff had sold the defendant a hogshead of wine,

[1] Shindler *v.* Houston, 1 Denio 52. See Hallenbeck *v.* Cochran, 20 Hun (N. Y.) 416.

[2] 1 Comst. 261. The *dicta* in the opinions, seeming to attribute some superior weight or competence upon the question of acceptance and receipt to proof of what the parties *did*, as distinguished from what they *said*, are neither in accordance with authority, nor, it seems, with a sound view of the object and nature of the statutory provision. The subject is discussed in § 320, *post*. See Smith *v.* Evans, 36 S. C. 69.

which, at the time of the sale, was lying in the London Docks warehouse, and gave him a delivery order for it upon the warehouseman. This, it was held, did not amount to receipt of the goods by the buyer, until the order had been presented, and the dock company had, by accepting it, assented to hold as agents of the vendee.[1] In Simmonds *v.* Humble, the same rule was applied, though in that case the bailee of the goods was also the factor of the seller, and in that capacity made the sale himself to the buyer. In the words of Byles, J., "Here was a verbal contract made by the bailee of the hops. The moment that contract was complete, the bailee became the bailee of the buyers. No objection, therefore, could be taken to the want of a sufficient receipt."[2]

§ 319 *b*. The evidence may also show a constructive delivery to, and receipt by, the buyer of goods, which were already in his hands at the time of making the contract. This rule was applied in a case of some delicacy in the Queen's Bench, where the goods in question, then belonging to the plaintiff, were already in the hands of the defendant, as agent for their sale. The defendant told the plaintiff that he would take them himself at a price then named, and afterward sold them to a third party, and in a written account-current delivered to the plaintiff debited himself with the price of the goods as sold. This was held proper evidence to go to

[1] Bentall *v.* Burn, 3 Barn. & C. 423.

[2] Simmonds *v.* Humble, 13 C. B. N. S. 262. See also Farina *v.* Home, 16 Mees. & W. 119; Godts *v.* Rose, 17 C. B. 229; Boardman *v.* Spooner, 13 Allen (Mass.) 353; Cushing *v.* Breed, 14 Allen (Mass.) 376; Townsend *v.* Hargraves, 118 Mass. 325; Zachrisson *v.* Pope, 3 Bosw. (N. Y.) 171; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335; Franklin *v.* Long, 7 Gill & J. (Md.) 407; Williams *v.* Evans, 39 Mo. 201; Bass *v.* Walsh, 39 Mo. 192; Hankins *v.* Baker, 46 N. Y. 666; Somers *v.* McLaughlin, 57 Wisc. 358. The subject of the delivery of warehouse receipts, etc., is discussed at length in Burton *v.* Curyea, 40 Ill. 320. See also Bassett *v.* Camp, 54 Vt. 232; Hinchman *v.* Lincoln, 124 U. S. 38.

the jury, and to warrant their finding a constructive delivery and receipt by the buyer.[1]

§ 320. Coming now to the question of the general character of evidence necessary to establish acceptance and receipt, it is important to notice at the outset the view, sometimes advanced, that "mere words" cannot of themselves furnish sufficient evidence of either acceptance or receipt. This statement has been especially made in opinions of the courts of New York, although the decisions of that State show that it has not yet become recognized or adopted as the law. In a case previously noted,[2] the decision turned upon the fact that, in the opinion of the Court of Appeals, the language used by the parties in making their contract had been allowed to go to the jury as evidence of a delivery and receipt of the goods in recognition and fulfilment of it. But from the language of Wright, J., in the case, it will be seen that he is of the further opinion that even the declarations of the parties, subsequently made, are not evidence of receipt. He says: "Far as the doctrine of constructive delivery has been sometimes carried, I have been unable to find any case that comes up to dispensing with all acts of parties, and rests wholly upon the memory of witnesses as to the precise form of words to show a delivery and receipt of the goods." This statement asserts a difference between the testimony of witnesses as to what the parties *did* and what they *said*, for the purpose of proving the acceptance and receipt, and to give full credence to the former while rejecting the latter. But is it true that, either as matter of authority or upon principle, any such difference does or should exist? Under the provisions of the statute, the contract may be fully proved and enforced, and the "prevention of frauds and perjuries" be sufficiently accomplished, though not a line of writing be pro-

[1] Edan *v.* Dudfield, 1 Q. B. 302. See Lillywhite *v.* Devereux, 15 Mees. & W. 285; Snider *v.* Thrall, 56 Wisc. 674; Dorsey *v.* Pike, 50 Hun (N. Y.) 534.

[2] Shindler *v.* Houston, 1 N. Y. 268; *ante*, § 319.

duced or sworn to. Every term and condition of the contract, to quote Justice White, frequently "rests wholly upon the memory of witnesses as to the precise form of words" used. There are the questions of fact for the jury, — "What was the contract?" "Did the buyer accept or identify and recognize the goods as those to be his under it?" and, lastly, "Did the seller part with, and the buyer receive, possession and control of them?" It will be seen that, while these facts must be proved, nothing is said as to the method of proving them; that is left to be governed by the rules of evidence which concern the proof of all facts in courts of law. In short, that part of the seventeenth section which mentions acceptance and receipt relates to the proof of facts additional to the making of the bargain, not to new ways of proving them.[1]

§ 321. The facts of acceptance and receipt being questions for the jury,[2] circumstances of the slightest probative force may properly be submitted to them for that purpose. But it

[1] An examination of the cases will show that evidence has uniformly been received, even in New York, of the *conduct* of the parties, *i. e.*, what they did and said, without in any way discriminating between acts of doing, and acts of saying. See Stanton *v.* Small, 3 Sandf. (N. Y.) 230; Calkins *v.* Lockwood, 17 Conn. 174; Wylie *v.* Kelly, 41 Barb. (N. Y.) 594; Green *v.* Merriam, 28 Vt. 801; Gray *v.* Payne, 16 Barb. (N. Y.) 277; Bass *v.* Walsh, 39 Mo. 192; Garfield *v.* Paris, 96 U. S. 557; Cusack *v.* Robinson, 1 Best & S. 299; Tomkinson *v.* Staight, 17 C. B. 245; Marvin *v.* Wallis, 6 El. & B. 726. In Walker *v.* Nussey, 16 Mees. & W. 302, it was held that an oral agreement to set off from the contract price of the goods the amount of a debt already owing by the seller to the buyer, being proved as part of the original bargain for the goods, would not be available as part payment, under the statute; it being inferable from the opinions that, if such oral agreement had been independent of the bargain for the goods, it would have been competent evidence of payment. See this case commented upon in Benjamin on Sales, 145; Schmidt *v.* Thomas, 75 Wisc. 529; Dehority *v.* Paxson, 97 Ind. 253.

[2] Chaplin *v.* Rogers, 1 East 192; Blenkinsop *v.* Clayton, 7 Taunt. 597; Hunt *v.* Hecht, 8 Exch. 814; Edan *v.* Dudfield, 1 Q. B. 302; Lillywhite *v.* Devereux, 15 Mees. & W. 285; Houghtaling *v.* Ball, 19 Mo. 84; Williams *v.* Evans, 39 Mo. 201; Wylie *v.* Kelly, 41 Barb. (N. Y.) 594; Garfield *v.* Paris, 96 U. S. 557; Hinchman *v.* Lincoln, 124 U. S. 38.

is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance and an actual receipt; and this includes cases where, though the court might admit there was a *scintilla* of evidence tending to show the acceptance and receipt, they would still feel bound to set aside a verdict in which they were found upon that evidence.[1]

§ 321 *a*. Where the thing contracted to be sold is defined, specified, and ascertained at the time of the purchase, proof of the fact that the buyer then agreed to buy that particular thing, and consequently thereby finally recognized and identified it as the particular thing he was to get, will, in general, be a sufficient proof of an *acceptance* by him. This was clearly brought out in the case of Cusack *v.* Robinson, by Justice Blackburn, who said: "There was also sufficient evidence that the defendant had, at Liverpool, selected these specific 156 firkins of butter, as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. This was certainly evidence of an acceptance." [2]

§ 321 *b*. The application of this principle to the many reported cases of the sale of a specific thing, *e. g.*, a horse, a jewel, or a piano, would seem to make the proof of the fact that the party agreed distinctly for its purchase sufficient to warrant the jury in finding an acceptance, which, coupled

[1] Norman *v.* Phillips, 14 Mees. & W. 277; Bushel *v.* Wheeler, 15 Q. B. 442, *note;* Stone *v.* Browning, 68 N. Y. 598. In Denny *v.* Williams, 5 Allen (Mass.) 1, the passage in the text is affirmed, with the qualification that, "if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions." *Per* Chapman, J. Hinchman *v.* Lincoln, 124 U. S. 38.

[2] Cusack *v.* Robinson, 1 Best & S. 308; see also Bog Lead Mining Co. *v.* Montague, 10 C. B. N. S. 489, *per* Willes, J., citing Cusack *v.* Robinson with approval.

with their finding a receipt also, upon sufficient evidence, would sufficiently attest the contract and enable the plaintiff to proceed with his action upon it. And a close examination of the language of the opinions will, it is believed, show that the attention of the court in each of these cases was particularly devoted to the evidence of the subsequent conduct of the parties toward the chattel, as bearing upon and establishing an inference of *delivery* and *receipt*.[1]

§ 321 *c*. It is, however, highly important to bear in mind that the principle noted above applies only where the contract of sale concerns goods which the buyer, by his bargain, agrees to take as they are, and does not contain any provision giving him the right of subsequent examination of the goods, to ascertain what they are, and whether they are what he agrees to take. In this latter case, it is evident that the identification and recognition, which facts constitute the acceptance, must, by the very terms of the contract, take place subsequently to the time of its making.[2]

§ 321 *d*. As has been suggested in a previous section, the conduct of the parties with regard to the goods furnishes the source from which the jury are to ascertain whether there has been an acceptance and an actual receipt of the goods or a portion of them. With regard to the acceptance, the conduct of the buyer is most important, as the acceptance is a thing in which he takes by far the greater, and usually the sole part. When goods have been sent to him to be examined and approved, the conduct of the seller is generally material, on the question of acceptance, only as it appears to be conduct which precludes acceptance by the buyer, — is

[1] See particularly Tempest *v*. Fitzgerald, 3 Barn. & Ald. 680, *per* Holroyd, J. In Saunders *v*. Topp, 4 Exch. 390, the question was left undecided, there being evidence of an acceptance subsequent to the time of the sale.

[2] Compare Hewes *v*. Jordan, 39 Md. 472, which seems to be thus distinguished from Cusack *v*. Robinson, § 321 *a*, *supra*; Beaumont *v*. Brengeri, 5 C. B. 301; Maberley *v*. Sheppard, 10 Bing. 99; Smith *v*. Fisher, 59 Vt. 53.

incompatible with such acceptance. Where, for instance, acceptance of goods sold by sample was sought to be shown from the fact of the goods not having been returned by the buyer immediately after delivery, evidence that, while they remained, the *seller* had notified the holder, a railway company, to hold the goods thereafter for him, was said to be material upon the question of any subsequent acceptance.[1]

§ 321 *e*. The conduct of the buyer showing an acceptance consists in his so dealing with the goods as to warrant the inference that he has admitted and recognized them, or such part of them as he has dealt with, to be his goods under the contract. And this inference, it is held, may be drawn as well from his silence and failure to act, as from what he does and says.[2]

§ 322. Upon the question of receipt, the seller being the party chiefly to be prejudiced, because of the loss of his lien incident to his parting with the control of the goods, it is his conduct that is of primary importance, and the conduct of the buyer with regard to the goods is material, chiefly because of the inference arising from the seller's acquiescence in it. In Chaplin *v.* Rogers, after a verbal sale had been made of a stack of hay, the resale of a part of it by the vendee to a third person was held evidence of a delivery, because, as said Lord Kenyon, C. J., "here the defendant dealt with this commodity afterwards as if it were in his actual possession, for he sold part of it to another person."[3] But it is manifest that the sale to another person was evidence of a delivery of the hay to the vendee of the first contract only so far as, under the circumstances, it afforded evidence that the vendor in that contract had consented to and acquiesced in such dealings as would tend to show the giving up of his lien.

§ 323. And so, in Tempest *v.* Fitzgerald,[4] where the buyer

[1] Smith *v.* Hudson, 6 Best & S. 431; and see Taylor *v.* Wakefield, 6 El. & B. 765.

[2] Rasch *v.* Bissell, 52 Mich. 455. See *ante*, §§ 316 *g*–316 *i*.

[3] Chaplin *v.* Rogers, 1 East 195.

[4] Tempest *v.* Fitzgerald, 3 Barn. & Ald. 380.

of a horse ordered him to be taken out of the stable, and he and his servant rode him, and his servant cleaned him, and he gave directions for his treatment, and in Holmes *v.* Hoskins,[1] where the horse, though remaining in the seller's field, was fed on the buyer's hay, the inference of receipt arising from these acts indicative of ownership was held to be controlled by the fact that, in each case, the terms of the sale were cash, and, as the seller could not have intended to part with his property until he was paid, the buyer could not receive it, within the meaning of the statute, so as to conclude the bargain.[2]

§ 324. In Elmore *v.* Stone, the constructive delivery and consequent receipt was shown by the conduct of the seller in consenting to keep, and keeping, the horses, after the sale, at livery; that is, as the bailee of the buyer.[3] And in Howe *v.* Palmer, where the defendant orally purchased of the plaintiff a quantity of tares by sample, and left them on the plaintiff's premises, saying that he had no immediate use for them, and requested that they might remain there till he wanted to sow them, which was agreed to; and afterwards the tares were measured out by the agent of the plaintiff and set apart in his granary, and ordered to be delivered to the defendant when he called, and the defendant afterwards refused to take them, for which the action was brought; this evidence was held ample to prove a delivery, but the plaintiff was nonsuited because he could not show that the defendant had ever accepted the tares thus set apart for him as satisfying the contract.[4]

§ 325. The circumstance of marking the goods with the name of the buyer is sometimes treated as if it could concern

[1] Holmes *v.* Hoskins, 9 Exch. 753.

[2] See also Carter *v.* Toussaint, 5 Barn. & Ald. 855; Safford *v.* McDonough, 120 Mass. 290; Washington Ice Co. *v.* Webster, 62 Me. 341; Jerney *v.* Doten, 70 Cal. 399.

[3] Elmore *v.* Stone, 1 Taunt. 457.

[4] Howe *v.* Palmer, 3 Barn. & Ald. 321. See Beaumont *v.* Brengeri, 5 C. B. 301, and Castle *v.* Sworder, 6 Hurlst. & N. 828.

only their acceptance; again, as if it had to do only with their receipt. But from all the cases it seems clear that marking the goods is not a peculiar transaction for which any special rule has been, or should be, laid down; but that, like any other act done to them, the marking may be evidence for the jury of the buyer's identification and acknowledgment of the goods he is to receive, or of the seller's devesting himself of his lien, by consenting to hold as bailee. And sometimes, indeed, both buyer and seller may be affected by the marking; for it may show both the identification by the former, and the abandonment of his lien by the latter.[1]

§ 326. It is, of course, always to be noticed that the effect of the acts relied on to show an acceptance or an actual receipt may be much qualified by the circumstances under which they were done. Thus it has been held that the taking out of a sample, or the opening and spreading out of the goods delivered, even though they be so injured thereby as to diminish their value, may not conclude the buyer.[2] Nor will a delivery, or a taking possession of the goods, not in pursuance of the intention or with the consent of the seller, vest their possession or control in the buyer, or be evidence of a receipt.[3] This is well illustrated by the case of Taylor *v.*

[1] Thus, in the cases of Proctor *v.* Jones, 2 Carr. & P. 532, and Rappleye *v.* Adee, 65 Barb. (N. Y.) 589, it was evidence of acceptance; in Anderson *v.* Scott, 1 Camp. 235, *note*, Bill *v.* Bament, 9 Mees. & W. 36, Byassee *v.* Reese, 4 Met. (Ky.) 372, and Dyer *v.* Libby, 61 Me. 45, of receipt (and see Walden *v.* Murdock, 23 Cal. 540); and in Hodgson *v.* Le Bret, 1 Camp. 233, Baldey *v.* Parker, 2 Barn. & C. 37, and Kealy *v.* Tenant, 13 Ir. C. L. 394, of both.

[2] Gorman *v.* Boddy, 2 Carr. & K. 145; Kent *v.* Huskinson, 3 Bos. & P. 233; Baylis *v.* Lundy, 4 L. T. N. S. 176; Curtis *v.* Pugh, 10 Q. B. 111; Elliott *v.* Thomas, 3 Mees. & W. 170; Carver *v.* Lane, 4 E. D. Smith (N. Y.) 168. See Bacon *v.* Eccles, 42 Wisc. 227.

[3] Godts *v.* Rose, 17 C. B. 229; Phillips *v.* Bistolli, 2 Barn. & C. 511; Baker *v.* Cuyler, 12 Barb. (N. Y.) 667; Leven *v.* Smith, 1 Denio (N. Y.) 571; Mechanics & Traders' Bk. *v.* Farmers & Mechanics' Nat Bk., 60 N. Y. 40. See Davis *v.* Eastman, 1 Allen (Mass.) 422. It might however be evidence of an acceptance; see Tempest *v.* Fitzgerald, 3 Barn. & Ald. 680, *per* Abbott, C. J.

Wakefield, where a landlord had agreed orally with his tenant to sell him, at the expiration of his term, certain goods then in his possession. At the end of the tenancy, the tenant tendered the price, but the landlord refused to take it, and the tenant subsequently brought action against him for the conversion of the goods. In support of it, he endeavored to rely upon his having had the goods in his possession as evidence of a receipt by him; but, as the court in their opinions pointed out, until payment or tender, the tenant had no right to hold as buyer; and the subsequent refusal of the landlord to give him such a right evidently negatived any inference of delivery under the contract of sale.[1]

§ 326 *a.* It was said by Heath, J., in Kent *v.* Huskinson,[2] that the acceptance by the buyer must be "such as completely affirms the contract." It is obvious, however, that the mere act of accepting goods, though it may give an indication more or less sure of the quantity and quality bargained for, gives none whatever as to the price and time, or other conditions of payment, and the same remark applies with nearly the same force to the giving of earnest to bind the bargain. So far, then, as these alternative methods of fixing the liabilities of the parties go to prove the contract, they fall far short of the written memorandum, which, as we shall see hereafter, is required to afford evidence in itself of the terms agreed upon. The statute requires that when an oral contract of sale is sought to be enforced at law, and the statute is relied upon as a bar to its enforcement, this bar may be removed by the production of certain evidence in writing, or by oral proof of part-payment, or by satisfying the jury that the conduct of the parties to the contract has been such as to show that the relation of buyer and seller has been recognized and acted upon by them. This may be done by proof of the two things, acceptance and receipt of the goods,

[1] Taylor *v.* Wakefield, 6 El. & B. 765, especially the opinion of Crompton, J.

[2] Kent *v.* Huskinson, 3 Bos. & P. 233.

or a part of them; that the buyer has openly recognized and identified the goods as his by purchase, and that the seller has put them into his custody or control as their owner. The sufficiency of this requirement as a guard against fraud and perjury is manifest; for it will be observed that *facts* must be proved, sufficient to support the reasonable inference that the acceptance and the receipt have taken place; and, as is seen in many of the cases, these facts will often be so definite and so public in their nature, that an attempt to prove them by false swearing would be readily defeated. When, therefore, these additional matters of acceptance and receipt have been made to appear to the satisfaction of the jury, the contract, though it rest entirely upon parol proof, is completely available, like any other contract, between the parties. The application of this principle is seen in a case before the Court of Common Pleas, where the plaintiff delivered to the defendant a piano at the price of £15, and it was accepted and received by him. In an action for the price, it was proved that, when the piano was delivered, the plaintiff asked ready money for it, but the defendant said he was entitled to keep it as security for the payment of certain bills, and refused to deliver it up again to the plaintiff. Parol evidence was heard at the trial as to what the agreement really was, and, the jury having found for the plaintiff, the defendant on leave moved to set it aside and enter a nonsuit. In support of the motion it was contended that by acceptance of the goods "so sold" the statute meant acceptance of them as sold under the contract alleged, and that it must be such an acceptance as is equivalent to a memorandum in writing, and shows all the terms of the contract, and that parol evidence should not have been admitted to explain the acceptance of the piano. The court discharged the rule on grounds which appear in the following extracts from the opinions of the judges. Jervis, C. J.: "My mind has wavered considerably during the discussion of this case. At one time I was inclined to think that there had been no acceptance under the

statute; but, after looking into the matter, I now think that there was, and that the rule ought, therefore, to be discharged. In order to satisfy the statute, on a sale of goods for £10 or more, there must be either a writing, or a part-payment, or a delivery and acceptance of the goods 'so sold.' I think those words mean an acceptance of goods sold at a price of £10 or more. In this case there is no doubt that there was a delivery of that which the plaintiffs say was sold for more than £10; and there is no doubt there was an acceptance, as the defendant says that he accepted on certain terms. It is just as if the defendant had said he accepted on six months' credit. The terms of the contract as to the time when the money is to be paid would then be the question in dispute, there being no doubt about the acceptance. The jury has found the acceptance, and the terms set up by the plaintiffs. This case really does not differ from the ordinary case where a man says to another, 'I have sold you goods for present payment,' and the other answers, 'You sold them on a month's credit, and you have brought your action too soon.' The fact that there is no case to be found in the books to support the defendant's view affords a strong argument to show that it is not in accordance with the meaning of the statute. I think, in this case, the defendant is precluded by the finding of the jury, and that, therefore, the rule ought to be discharged." Williams, J.: "I think there is no doubt there was a delivery and acceptance under the Statute of Frauds. No doubt the acceptance was accompanied by a denial by the defendant of one of the terms necessary to support this action, and for some time I felt great difficulty in saying that any proof could be offered, in lieu of writing, which amounted, instead of a corroboration of the contract, to a denial of it. But, upon the whole, I am of opinion that nothing was intended in the statute, except that the defendant should have accepted in the quality of vendee. The legislature has thought that where there is a fact so consistent with the alleged contract of sale as acceptance, it would be quite safe

to dispense with the necessity of a writing. The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee. Here the relation of vendor and vendee was established, and that was sufficient to satisfy the statute." Crowder, J.: "I think there was an acceptance within the Statute of Frauds. The jury having found the acceptance, there is no doubt there was a delivery and acceptance, and that enables the plaintiff to lay before the jury evidence of the terms of the contract. It seems to me, that all that was necessary under the statute was that there should have been a contract of sale, and that, under that contract, the vendee should have accepted; it being a question for the jury on the parol evidence what were the precise nature and terms of the contract." [1]

§ 327. The acceptance and receipt which the statute requires may be inferred from the conduct of the agent of the buyer or seller, acting under proper authority, as well as from that of the principals themselves.[2] One of the parties, it is held, cannot be the agent of the other;[3] but this seems a somewhat arbitrary rule, and, as a matter of principle, there seems

[1] Tomkinson *v.* Staight, 25 L. J. C. P. 85. See Danforth *v.* Walker, 40 Vt. 257.

[2] Snow *v.* Warner, 10 Met. (Mass.) 132; Outwater *v.* Dodge, 6 Wend (N. Y.) 397; Howe *v.* Palmer, 3 Barn. & Ald. 321; Astey *v.* Emery, 4 Maule & S. 262. See Barkley *v.* Rensselaer & Saratoga R. R. Co., 71 N. Y. 205; Rogers *v.* Gould, 6 Hun (N. Y.) 229; Field *v.* Runk, 22 N. J. L. 525; and *post*, § 336; Alexander *v.* Oneida County, 76 Wisc. 56; Vanderbilt *v.* Central R. R., 43 N. J. Eq. 669. Where a Michigan man died after purchasing goods in New York by sample, and before their arrival at his store in Michigan, it was held that acceptance and receipt of the goods by his administrator were unauthorized, and the seller was allowed to recover the goods by replevin. Smith *v.* Brennan, 62 Mich. 349.

[3] See Clark *v.* Tucker, 2 Sand. (N. Y.) 157; Caulkins *v.* Hellman, 14 Hun (N. Y.) 330. As to whether the agent of the seller may be the agent of the buyer for this purpose, *quære*. Howe *v.* Palmer, 3 Barn. & Ald. 321, remarks of Holroyd, J.

to be no reason why, upon sufficient proof of the agency, it should not be allowed the same effect as any other.

§ 327 *a.* The extent of the authority of the agent to bind his principal is a matter on which the courts have of late inclined to exercise some care; as is shown particularly by the course of decisions in cases where the goods in question have been delivered to, and received by, a carrier for transportation to the buyer. In an early case at *nisi prius*, where a hogshead of gin, purchased verbally by the defendant from the plaintiff, was shipped to him by a certain vessel, and it appeared that, in the course of dealing between the parties, it had been *customary* for the plaintiffs to ship similar goods to the defendant by the same vessel, and the defendant had always received them, it was held that under those circumstances the defendant must be considered as having constituted the master of the vessel his agent to accept and receive the goods.[1] And in another instance it appears to have been held by the Court of Queen's Bench that the same effect of concluding the contract followed from the goods being delivered to a carrier *designated* by the buyer for that purpose.[2] So far as these early cases touch the question of *receipt* by a carrier, they are not inconsistent with the current of authority. Inasmuch as a delivery by the seller of the goods sold to a carrier who is not his own agent will divest him of his lien, the possession must be in the buyer. So far, then, as the question of receipt goes, the rule is, that if by the agreement the seller is to deliver the goods to a carrier or other person, who subsequently is to transport them for the buyer, this delivery amounts to an actual receipt by the buyer. It is quite as if the seller had contracted to deliver the goods on board a certain ship, or at some freight or transportation depot; the master of the ship or the agent of the railroad or steamer receives them, it is true, but the essence of the delivery lies in the fact that the seller has delivered the

[1] Hart *v.* Sattley, 3 Camp. 528.

[2] Dawes *v.* Peck, 8 T. R. 330. See Spencer *v.* Hale, 30 Vt. 314.

goods at the place designated, rather than to some person in charge, who may well be wholly unknown to buyer and seller alike. And in this point of view, the question of the authority of such a person is evidently of slight importance, as compared with the fact that a delivery has been made as the contract provided.[1] Where, however, by his contract, the seller is to forward the goods to a certain place, and employs a carrier for this purpose; or where, even though the buyer pays the expenses of and performs the transportation, yet the seller preserves his possession, as by making out the bill of lading to himself or his own agent; or where the goods are sent by the carrier, to be paid for on delivery; these circumstances show that the delivery to the carrier did not devest the seller of his lien, and consequently did not establish a receipt under the statute.

§ 327 *b*. But as to the doctrine that the carrier, when he has received the goods, must also be taken to have accepted them under authority from the buyer, and thereby to have established the contract, this is no longer law.[2] And that it should not be, seems clear. So far as the receipt goes, the buyer cannot well complain, for he has himself instructed the seller how to make the delivery and transfer the possession. But in the absence of proof that the buyer has actually vested in the carrier the authority (which under ordinary circumstances he certainly would not have) to acknowledge that goods delivered under the contract are in conformity with its terms, no inference of such authority in the carrier can arise from the mere fact that the goods have been delivered to him.[3]

[1] Allard *v.* Greasert, 61 N. Y. 1; and see Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 18.

[2] Hart *v.* Bush, El. B. & E. 494, *per* Lord Campbell, C. J.; Rindskopf *v.* De Ruyter, 39 Mich. 1.

[3] Nicholson *v.* Bower, 1 El. & E. 172; Bushel *v.* Wheeler, 15 Q. B. 442, *note*, *per* Coleridge, J.; Smith *v.* Hudson, 6 Best & S. 431, *per* Blackburn, J.; Johnson *v.* Cuttle, 105 Mass. 447; Atherton *v.* Newhall, 123 Mass. 141. See Quintard *v.* Bacon, 99 Mass. 185; Keiwert *v.* Meyer, 62 Ind. 587; Hausman *v.* Nye, 62 Ind. 485; Taylor *v.* Mueller, 30 Minn.

§ 328. Several of the cases which establish this principle have also contained the statement that there can be no acceptance to satisfy the statute so long as the buyer is afterward to be at liberty to return any of the goods as objectionable under the contract in quantity or quality. As thus stated, this rule for determining the question of acceptance has been very forcibly attacked in a judgment of the Queen's Bench, delivered by Chief Justice Lord Campbell. The defendant purchased a quantity of wheat of the plaintiff, by sample, and directed that the bulk should be delivered on the next morning to a carrier named by himself, who was to convey it from the place where it then was to a market town; and he took away the sample with him. On the following morning the bulk was delivered to the carrier, and the defendant *resold it* at the market town that day by the same sample. The carrier conveyed the wheat by order of the defendant, *who had never seen it*, to the sub-vendee, who rejected it as not corresponding with the sample; and the defendant, on notice of this, repudiated his contract with the plaintiff on the same ground. The plaintiff having obtained a verdict below, a rule to set it aside and enter a nonsuit on the ground that there had been no acceptance and receipt of the wheat by the defendant, was now discharged. Lord Campbell said: "Judges as well as counsel have supposed that, to dispense with a written memorandum of the bargain, there must first have been a receipt of the goods by the buyer, and after that an actual acceptance of the same. Hence, perhaps, has arisen the notion that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor." He then recites the language of the seven-

343; Simmons Co. *v.* Mullen, 33 Minn. 195; Fontaine *v.* Bush, 40 Minn. 141; Smith *v.* Brennan, 62 Mich. 349; Hudson Furniture Co. *v.* Freed Furniture Co., 36 Pac. Rep. (Utah) 132. But see Liggett *v.* Collier, 56 N. W. Rep. (Iowa) 417.

teenth section, and proceeds to say: "It is remarkable that, notwithstanding the importance of having a written memorandum of the bargain, the legislature appears to have been willing that this might be dispensed with where by mutual consent there has been part-performance. Hence the payment of any sum in earnest, to bind the bargain or in part-payment, is sufficient. . . . The same effect is given to the corresponding act by the vendor, of delivering part of the goods sold to the buyer, if the buyer shall accept such part and actually receive the same. As part-payment, however minute the sum may be, is sufficient, so part-delivery, however minute the portion may be, is sufficient. This shows conclusively that the condition imposed was not the complete fulfilment of the contract to the satisfaction of the buyer. In truth, the effect of fulfilling the condition is merely to waive written evidence of the contract, and to allow the contract to be established by parol as before the Statute of Frauds was passed. The question may then arise whether it has been performed either on the one side or the other. The acceptance is to be something which is *to precede, or, at any rate, to be contemporaneous with* the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined. As the act of Parliament expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer to object, at all events, to the quantity and quality of the residue, and, even where there is a sale by sample, that the residue offered does not correspond with the sample. We are, therefore, of opinion that, whether or not a delivery of the goods sold to a carrier or any agent of the buyer is sufficient, still there may be an acceptance and receipt within the meaning of the act, without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which

affords conclusive evidence of the contract having been fulfilled." After an elaborate review of the cases upon which the doctrine he contended against rested, he remarks that in the case before him the buyer specially sent his carrier to receive the wheat; "after the delivery of the wheat to his agent, and when it was no longer in the possession of the vendor, instead of rejecting it, as in the other cases, he exercised an act of ownership over it by reselling it at a profit, and altering its destination by sending it to another wharf, there to be delivered to his vendee. The wheat was then constructively in his own possession; and could such a resale and order take place without his having accepted the commodity? Does it lie in his mouth to say that he has not accepted that which he has resold and sent on to be delivered to another? At any rate, is not this evidence from which such an acceptance and receipt may be inferred by the jury?" [1]

§ 328 *a*. The rule laid down in Morton *v.* Tibbett, that the act of acceptance and receipt which is to bind the bargain need not be such as to bar the buyer's right to reject the goods afterwards as not being such in quantity or quality as the bargain called for, has been asserted and applied since in the Court of Appeal in the cases of Kibble *v.* Gough,[2] and Page *v.* Morgan.[3] In Kibble *v.* Gough, the defendant agreed to buy of the plaintiff a quantity of barley (an undressed sample being exhibited at the time) at a named price per quarter, on condition that it should be well dressed. The plaintiff sent in an instalment of the barley, which was received by the defendant's foreman, who examined it and returned a receipt with the words "not equal to sample." The defendant himself examined the barley next morning, and wrote to the plaintiff refusing the barley as being not well dressed. The plaintiff having obtained a verdict for the

[1] Morton *v.* Tibbett, 15 Q. B. 428.
[2] 38 Law Times, N. S. 204.
[3] L. R. 15, Q. B. D. 228.

whole price, and a rule for a new trial on the ground of erroneous direction to the jury that there was evidence on which they might find acceptance and receipt to bind the bargain having been refused, that judgment was affirmed by the Court of Appeal; holding that the examination of the barley to see whether it was well dressed was an act recognizing the contract to take it if it was well dressed. In Page *v.* Morgan there was a sale of wheat by sample, and the purchaser having received a number of sacks of wheat delivered under the contract into his premises, opened the sacks and examined their contents to see if they were equal to sample, and immediately after so doing gave notice to the seller that he refused the wheat as not being equal to sample. Here also it was held (affirming the refusal of a rule for new trial) that there was evidence for the jury of acceptance and receipt to bind the bargain; the act of examination to see if the goods were according to sample being evidence of acceptance and receipt of the goods as delivered under a contract of purchase and sale.

§ 329. It will be observed that the court do not decide in Morton *v.* Tibbett that the receipt of the goods by a carrier appointed by the buyer is an acceptance and receipt by the buyer himself so as to make the purchase binding on him, and that it is not must now be considered settled both by the cases which preceded and by those which have followed the case now under consideration.[1] Lord Campbell simply says that there may be acceptance and receipt of the goods sufficient to satisfy the Statute of Frauds, without the buyer's having precluded himself from "contending that they do not correspond with the contract." The case before him comprised an act on the part of the buyer emphatically and unequivocally asserting his ownership of the wheat, namely, his reselling it at a profit: and the sum of the decision appears to be, that such an act deprives the buyer of that *locus penitentiæ* which would otherwise be allowed him between the delivery to the carrier

[1] See § 327 *b*, *supra*.

and inspection by himself; in the same way as we have before seen that, conversely, acts strongly indicative of receipt will be deprived of their effect if it appear that the seller has not intended to part with his lien upon the goods. The correctness of the decision, therefore, was acknowledged in the subsequent case of Hunt *v.* Hecht, where the Court of Exchequer, nevertheless, expressed their doubt of much that fell from Lord Campbell, and reasserted the rule, as correctly drawn from the previous authorities.[1]

§ 330. The observations of that eminent judge are, however, full of consequence, and demand of us a careful inquiry into the meaning of the rule that the buyer will not be held to have accepted and received goods until he has exercised, or has had an opportunity to exercise, his option to return them. And it seems that the cases commented upon by Lord Campbell do not go so far as to hold — what it would be most difficult, in the face of his reasoning, to hold — that the acceptance by the purchaser must be that final acceptance, which, following upon the receipt and inspection of the goods, "precludes the buyer from contending that they do not correspond with the contract." It is true that the buyer has at common law the privilege, which the Statute of Frauds has not taken away from him, of sending back the goods and resisting suit for the price, if they do not turn out to be what they were represented; and that he retains this privilege even though he has signed a written memorandum of the bargain, and of course as much so if he has done the alternative, accepted and received the goods; consequently, if it is *this* privilege, the continuance of which the cases in question assert to be incompatible with an acceptance and receipt within the statute, they clearly cannot be law. But in those cases, it is to be observed, the articles were bought by sample, or merely *ordered* by the buyer, and he had no opportunity of

[1] Hunt *v.* Hecht, 8 Exch. 814. See Coombs *v.* Bristol & Exeter Railway Co., 3 Hurlst. & N. 510; Simpson *v.* Krumdick, 28 Minn. 352; Roman *v.* Bressler, 32 Neb. 240.

seeing what he had purchased. And the rule which, when the cases are examined by the light of the facts involved, they really lay down, appears to be simply the very reasonable rule, that, where the goods are not specified or ascertained at the time of making the sale, the buyer cannot be said to have accepted them until they have been specified or ascertained, and he has seen them, and has had an opportunity of judging whether they are the goods he purchased.[1] Even this privilege he may waive,[2] as in the case before Lord Campbell, by a resale of them, or any other act distinctly and unequivocally asserting ownership, himself taking the risk of an error in the quantity or quality; but in the absence of such act concluding him, he seems clearly to retain it. Indeed, it is hard to see how he can accept and receive what he has never seen.[3] The distinction suggested is between accepting and receiving the goods as those which he purchased, and accepting them as satisfactory so as to preclude subsequent objection on the ground of concealed defects; and it seems to be well illustrated in the late case, already referred to, of Hunt *v.* Hecht, in the Court of Exchequer.

§ 331. In that case, one of the defendants, who were partners, called upon the plaintiff, a bone merchant, for the purpose of buying bones. He there saw a heap containing a quantity of the kind he desired to buy, but intermixed with others which were unfit for manufacturing purposes. He ultimately agreed with the plaintiff to buy the heap if the objectionable bones were taken out. It was arranged between the parties that the plaintiff should deliver the bones at a certain quay in sacks marked in a particular way, and the defendants then sent to the wharfingers an order to receive the bones and ship them by a certain lighter, the order containing a memorandum that the wharf charges were to be

[1] Remick *v.* Sandford, 120 Mass. 309; Stone *v.* Browning, 51 N. Y. 211.

[2] Mason *v.* Whitbeck Co., 35 Wisc. 164.

[3] See *post*, § 336.

paid by them, the defendants. The bags, marked as requested, were received by the wharfingers on the day named, but the defendants did not hear of their being sent until the following day, when the invoice was received. They then examined the bones, and wrote to the plaintiff complaining of their quality and declining to accept them. The jury found that the plaintiff had sent the bones of the description agreed upon; but the judge (Martin, B.) ruled at the trial that there was no acceptance within the seventeenth section, and nonsuited the plaintiff. A rule having been obtained to set aside the nonsuit, and enter a verdict for the plaintiff, the court on hearing discharged the rule. Pollock, C. B., said: "I am of opinion on the facts that the nonsuit was right. The goods were received by the person appointed by the defendants, but they were not at any time accepted. The defendants never saw them when they were in a state to be accepted, because they had not been separated. A man does not accept flour by looking at the wheat that is to be ground." And Martin, B., said: "The contract was for such bones in the heap as were ordinarily merchantable, and they were only bound to accept such merchantable bones. Directions were no doubt given to the wharfinger to receive the bones, and in one sense they were received, but this was not an acceptance within the statute. There is no acceptance unless the purchaser has exercised his option, or has done something that has deprived him of his option."[1]

§ 332. As was before remarked, however, there may be an act done by the buyer, pending this option, so decisive of an intention to be bound by the contract, as to debar him from the exercise of the option and to control the inference of non-acceptance arising from his not having exercised it; as, for instance, reselling the goods for his own profit. The execution of a written memorandum in the *interim* would also

[1] Hunt *v.* Hecht, 22 L. J. Exch. 293. See also what was said by Bolland, B., in Jordan *v.* Norton, 4 Mees. & W. 155; also Gorham *v.* Fisher, 30 Vt. 428; Taylor *v.* Mueller, 30 Minn. 343.

certainly be such an act. On this ground, it was said by Coleridge, J., in Bushel *v.* Wheeler, that it was not a fair test that the buyer could not be held to have accepted the goods so long as the seller's right to stop them *in transitu* remained.[1]

§ 333. But the *locus penitentiæ* of the buyer remains only until he has exercised his option, *or done something to deprive himself of it.* He may deprive himself of it, not only by an unequivocal and conclusive course of conduct affirming the contract, but also by an unreasonable detention of the goods after they have come under his control; what amounts to such a detention being, in each case, and in view of all the circumstances, a question for the jury.[2] Such appears to be the clear effect of the modern decisions, though the rule is applied with much caution. In Bushel *v.* Wheeler, to which frequent reference has been made, the buyer designated the vessel for the carriage of the goods, which on their arrival were placed in a warehouse belonging to the owner of the vessel, and the buyer saw them there, and said to the warehouseman that he should not take them, but did not communicate this refusal to the seller till the end of *five months.* The court held that the learned judge who tried the case had done wrong in instructing the jury that there had been no acceptance, and should have left that question to them upon the facts in the case.[3] In Norman *v.* Phillips, the goods were sent by a particular road to a particular station, as had been the course of dealing between the parties, and, on being informed by the railway clerk of their arrival, the buyer

[1] Bushel *v.* Wheeler, 15 Q. B. 442, *note.* See Borrowscale *v.* Bosworth, 99 Mass. 378.

[2] Coleman *v.* Gibson, 1 Moo. & R. 168; Percival *v.* Blake, 2 Carr. & P. 514; Curtis *v.* Pugh, 10 Q. B. 111; Bushel *v.* Wheeler, 15 Q. B. 442, *note;* Meredith *v.* Meigh, 2 El. & B. 364; Cunliffe *v.* Harrison, 6 Exch. 903; Baylies *v.* Lundy, 4 L. T. N. S. 176; Cusack *v.* Robinson, 1 Best & S. 299; Castle *v.* Sworder, 6 Hurlst. & N. 828; Borrowscale *v.* Bosworth, 99 Mass. 378; Spencer *v.* Hale, 30 Vt. 314. See, however, Nicholle *v.* Plume, 1 Carr. & P. 272.

[3] Bushel *v.* Wheeler, 15 Q. B. 442, *note.*

stated to *him* that he would not take them; but *six weeks* elapsed before he communicated this refusal to the seller. The Court of Exchequer held that, after the decision in Bushel *v.* Wheeler, it was impossible to say that there was not a *scintilla* of evidence of acceptance to go to the jury, but that there was not enough to sustain the verdict for the plaintiff below, which they accordingly set aside.[1] Whether the pertinency of such detention to the question of acceptance arises from the buyer's being, so to speak, estopped by it, or from its going to show that the carrier was really intended by the buyer to be his agent for accepting and receiving the goods, is a matter upon which the decisions are not clear. Lord Campbell, in Meredith *v.* Meigh, seems to put it on the latter ground.[2]

§ 334. The statute requires proof of acceptance and actual receipt of a *part* only of the goods, and whether it be a small part or a large part is immaterial.[3] It may be satisfied by the delivery and acceptance of a sample; provided that such sample is, by the terms and conditions of the sale, to be treated as forming a part of the goods, which has been sold and delivered and accepted; as, for instance, when the amount of the sample would be allowed for in ascertaining the total of the amount delivered.[4] But where from the circumstances of the bargain it appears that the taking of samples was a mere act of examination, and that what was so taken was not taken as a symbolical acceptance and receipt of any part of the goods bargained for, it would not satisfy the statute.[5]

[1] Norman *v.* Phillips, 14 Mees & W. 277.

[2] Meredith *v.* Meigh, 2 El. & B. 364.

[3] Garfield *v.* Paris, 96 U. S. 557; Gilbert *v.* Lichtenberg, 98 Mich. 417.

[4] Talver *v.* West, Holt, 178; Hinde *v.* Whitehouse, 7 East, 558; Klinitz *v.* Surry, 5 Esp. 267; Gardner *v.* Grout, 2 C. B. N. S. 340. And see Smith *v.* Milliken, 7 Lans. (N. Y.) 336; Brock *v.* Knower, 37 Hun (N. Y.) 609.

[5] Carver *v.* Lane, 4 E. D. Sm. (N. Y.) 168; Galvin *v.* MacKenzie, 21 Oregon 184.

§ 334 *a*. And since the language of the statute refers to the acceptance and receipt of a part of the goods "so sold," it is essential that the proof should show acceptance and receipt such as afford evidence of recognition by the parties of the contract sued upon, and of acts done under and in pursuance of *that* contract. Thus in a case in Massachusetts, the defendant made a contract on a Saturday for so much leather, out of a lot of about eight hundred sides, as was "light weight" leather. After he had left, the plaintiff, the seller, picked out the "light weight" leather, rolled it up and set it aside, and a part, six rolls out of forty-four, was that afternoon taken by an expressman to the town where the buyer lived. The same night the rest of the leather was burned up. On the Monday following, the buyer came to the seller's store, produced the bill for the whole lot, and requested the seller's book-keeper to take off from it so much as had not been delivered, which was done. The price of the amount delivered was subsequently tendered and refused. In an action brought for the whole price, the seller was allowed to recover only for the part delivered, and it was further held that "the acceptance by the buyer on Monday of the part brought by the expressman, was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with an intention to perform the whole contract and to assert the buyer's ownership under it, but on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received." [1]

§ 334 *b*. In a case where the sale of goods together with other matters, such as the performance of services, constitute one indivisible contract, it will not be sufficient that the services have been performed, and the benefit of them accepted and received.[2]

[1] Atherton *v.* Newhall, 123 Mass. 141. See Davis *v.* Eastman, 1 Allen (Mass.) 422; Hausman *v.* Nye, 62 Ind. 485.

[2] Harman *v.* Reeve, 18 C. B. 587.

§ 335. In considering the question, when the price of the goods sold is to be held to amount to the sum fixed by the statute, we saw that the prices of a number of articles, each less than that sum, but in the aggregate exceeding it, were to be taken together, so as to bring the contract within the statute, if the purchases were all made at the same time, or so connected as to show the transaction to be one and the same. And in like manner, the acceptance and receipt of one, or part of one, of such parcels in a combined purchase is sufficient to perfect the contract as to the whole. It may often be a matter of some difficulty to determine whether the transaction was one and the same. In the common case of a number of articles purchased at private sale, of a shopman for instance, at the same time though at separate prices, it is clear that the aggregate is generally to be taken as the purchase.[1] As to the aggregate of various purchases made by a party in the course of an auction, there is a difference of opinion. The English cases hold that the purchases so made are to be regarded as separate and distinct;[2] in this country, however, the same rule is applied as in the case of purchases at a store, even though the auction sale continue more than one day.[3] The same rule (regarding the purchases in the aggregate) was also applied by an English court, in a case where the parties had met by appointment for the purchase of timber, and had proceeded together to several places some miles apart, making bargains for timber at each place at

[1] Baldey *v.* Parker, 2 Barn. & C. 37; Elliott *v.* Thomas, 3 Mees. & W. 170 (in which Hodgson *v.* Le Bret, 1 Camp. 233, so far as it is opposed to the rule stated in the text, was declared to be no binding authority); Scott *v.* Eastern Counties Railway Co., 12 Mees. & W. 33; Allard *v.* Greasert, 61 N. Y. 1; *ante*, § 314. And see Hart *v.* Mills, 15 Mees. & W. 85; Champion *v.* Short, 1 Camp. 53; Bailey *v.* Sweeting, 9 C. B. N. S. 843; Garfield *v.* Paris, 96 U. S. 557.

[2] Emmerson *v.* Heelis, 2 Taunt. 38. See *per* Le Blanc, J., in Rugg *v.* Minett, 11 East 218; Franklyn *v.* Lamond, 4 C. B. 637.

[3] Mills *v.* Hunt, 17 Wend. (N. Y.) 333, affirmed on error, 20 Wend. 431; Jenness *v.* Wendell, 51 N. H. 63. See Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377; Tompkins *v.* Haas, 2 Pa. St. 74.

separate prices, but all on the same day.[1] In many cases presenting this general question, there will be found some evidence, such as the fact of a memorandum or bill of the whole made out and presented, and assented to by the buyer tending to show that the parties regarded the transaction as one and entire. Perhaps as safe a general test as any will be to see whether either party can be made to take or part with any less than the whole lot. Where the defendant gave the plaintiff's travelling agent a positive order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price, which the agent said was too low, but agreed to write to his principals, and that if the defendant did not hear from them in one or two days he might consider that his offer was accepted, and the principals never wrote to the defendant, but sent all the goods; it was held by the Court of Queen's Bench that this was not a joint order for them all, so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, and render the defendant liable for refusing to accept the latter.[2]

§ 336. The Court of Exchequer have determined an interesting point, and one not unlikely to be of frequent recurrence, touching the combined effect of the Statute of Charles and of Lord Tenterden's Act, so called (which it will be remembered concerns contracts for unmanufactured or unfinished goods), as regards this matter of accepting one of a lot of articles. The defendants ordered of the plaintiffs certain lamps, some of which were ready made, and one was to be made to order; the former were afterwards delivered and paid for, and the question was whether the defendants were thereby bound for the whole. Lord Abinger, C. B., said that the "two statutes must be construed as incorporated together, and then it is plain that where an order for goods made and for others to be made forms one entire contract, acceptance of the former goods will take the case out of the statutes as

[1] Bigg *v.* Whisking, 14 C. B. 195.
[2] Price *v.* Lea, 1 Barn. & C. 156.

regards the other also;" and Alderson, B., said: "The articles bargained to be made are treated for this purpose as goods actually made, although they are not in existence at the time of the agreement."[1] Bearing in mind that the statute requires an acceptance and receipt of a part only of the goods sold, the decision is evidently correct; and in this point of view, it seems to throw some further light upon the question discussed in a former section, as to the extent to which acceptance sufficient to satisfy the statute precludes the subsequent refusal to accept, and the return of any part of the goods as not answering the demands of the contract. In the case under discussion all of the lamps were delivered and paid for shortly after the contract was made, except one lamp of peculiar form, which at the time of the delivery of the rest was not in existence, and which was not in fact completed till two years afterward. The decision was that, by an acceptance and receipt of a part, the contract as a whole was freed from the application of the statute. It was not decided, nor could it well be maintained, that the buyer had, at any time before the triangular lamp was made and shown to him, ever done anything whatever to preclude him from examining that lamp when finished, and rejecting it if it was not what it was promised to be. Thus it is seen that while the acceptance of goods may preclude the subsequent rejection of those same goods, it does not relate to or concern the other goods which have not been examined, although they are to be made and delivered under the same contract.[2] In connection with this point of the acceptance of one of a number of articles not all ready for delivery, it may be proper

[1] Scott *v.* Eastern Counties Railway Co., 12 Mees. & W. 33; Van Woert *v.* Albany & Susquehanna R. R. Co., 67 N. Y. 538; Kaufman *v.* Farley Mfg. Co., 78 Iowa 679.

[2] Some cases which may create embarrassment may be here referred to; *e. g.* Rugg *v.* Minett, 11 East 210; Rohde *v.* Thwaites, 6 Barn. & C. 388; Logan *v.* Le Mesurier, 6 Moo. P. C. 116. The two former, however, were determined before the passage of Lord Tenterden's Act; and the latter was determined, the report seems to show, upon the old French law prevailing in Lower Canada.

to refer to the case of goods owned by two or more persons in severalty; it has been held that if all the owners together make sale of the goods, a delivery and acceptance of part of one parcel is sufficient as to the whole.[1] And acceptance and receipt by one of several joint purchasers will, it is said, bind the bargain against all.[2]

§ 337. We next come to the question, *when* the acceptance and receipt may take place; and this, it seems, may be contemporaneous with or at any time subsequent to the making of the verbal agreement.[3] The grounds upon which this rule rests are presented with such clearness in an opinion of the Supreme Court of Massachusetts, delivered by Bigelow, J., as to justify an extended quotation. "There is nothing in the statute, which fixes or limits the time within which a purchaser is to accept and receive part of the goods sold, or give something in earnest to bind the bargain, or in part-payment. It would fully satisfy its terms if the delivery or part-payment were made in pursuance of a contract previously entered into. . . . The great purpose of the enactments, commonly known as the Statute of Frauds, is to guard against the commission of perjury in the proof of certain contracts. This is effected by providing that mere parol proof of such contracts shall be insufficient to establish them in a court of justice. In regard to contracts for sales of goods, one mode of proof which the statute adopts to secure this object is the delivery of part of the goods sold. But this provision does not effectually prevent the commission of perjury; it only renders it less probable, by rendering proof in support of the contract more difficult. So in regard to other

[1] Field *v.* Runk, 22 N. J. L. 525.

[2] Smith *v.* Milliken, 7 Lans. (N. Y.) 336. See Wilkinson's Administrator *v.* Wilkinson, 61 Vt. 409.

[3] Walker *v.* Nussey, 16 Mees. & W. 302; Field *v.* Runk, 22 N. J. L. 525; McKnight *v.* Dunlop, 5 N. Y. 537; Davis *v.* Moore, 13 Me. 424; Sprague *v.* Blake, 20 Wend. (N. Y.) 61; Buckingham *v.* Osborne, 44 Conn. 133. See Whitwell *v.* Wyer, 11 Mass. 6; Damon *v.* Osborne, 1 Pick. (Mass.) 476; Dehority *v.* Paxson, 97 Ind. 253; Ortloff *v.* Klitzke, 43 Minn. 154; Coffin *v.* Bradbury, 35 Pac. Rep. (Idaho) 715.

provisions of the same statute; perjury is not entirely prevented by them; the handwriting of the party to be charged, or the agency of the person acting in his behalf, may still be proved by the testimony of witnesses who swear falsely. Absolute prevention of perjury is not possible. In carrying this great purpose of the statute into practical operation, it can add no security against the danger of perjury, that the act, proof of which is necessary to render a contract operative, is not contemporaneous with the verbal agreement. A memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth. So proof of the delivery of goods, in pursuance of an agreement for their sale previously made, will be as efficacious to secure parties against false swearing, as if the delivery had accompanied the verbal contract. It is the fact of delivery under and in pursuance of an agreement of sale, not the time when the delivery is made, that the statute renders essential to the proof of a valid contract. It is to be borne in mind that, in all cases where there is no memorandum or note in writing of the bargain, the verbal agreement of the parties must be proved. The statute does not prohibit verbal contracts. On the contrary, it presupposes that the terms of the contract rest in parol proof, and only requires, in addition to the proof of such verbal agreement, evidence of a delivery or part-payment under it. It does not therefore change the nature of the evidence to be offered in support of the contract. It merely renders it necessary for the party claiming under it to show an additional fact in order to make it 'good and valid.' . . . In all cases like the present, a single inquiry operates as a test by which to ascertain whether a contract is binding upon the parties under the Statute of Frauds. It is whether the delivery and acceptance, whenever they took place, were in pursuance of a previous agreement. If the verbal contract is proved, and a delivery in

pursuance of it is shown, the requisites of the statute are fulfilled."[1]

§ 338. The acceptance and the receipt may take place at different times, and either may precede or follow the other. In the case of a sale of specific ascertained chattels, the acceptance is generally shown at the time when the sale is made, while the delivery and receipt is often at some subsequent time. On the other hand, in the case of goods not ascertained at the time of sale, but subsequently selected or finished by the seller and forwarded to the buyer, the latter's acceptance is usually made after the goods are thus delivered to and received by him.[2] It was suggested by Chief Justice Tindal on one occasion, that acceptance and receipt after action brought might be sufficient.[3] He had no occasion to decide the point, however, and it is quite clear by the authorities, upon an analogous question in regard to the written memorandum,[4] as well as upon the language of the section, that such an acceptance and receipt would not answer. Should the plaintiff sue upon a contract within the statute, and the defendant choose to avail himself of that defence, this would obviously bar the plaintiff's right of action, and subsequent acceptance and receipt would not be material.

§ 339. It is a very material question, *what is the date of the contract*, when a verbal agreement is thus made perfect by a subsequent acceptance and receipt; the date of the acceptance and receipt, or that of the original agreement, both of which go to compose the complete and binding contract? On the one hand, we may say, the terms of the contract are in the first instance agreed upon, and would be binding but for

[1] Marsh *v.* Hyde, 3 Gray 331. See Townsend *v.* Hargraves, 118 Mass. 336; also Sale *v.* Darragh, 2 Hilton (N. Y.) 184; Chapin *v.* Potter, 1 Hilton (N. Y.) 366. But that the acceptance and receipt should be before action brought, see the next section.

[2] Garfield *v.* Paris, 96 U. S. 557; Cusack *v.* Robinson, 1 Best & S. 299; Jamison *v.* Simon, 68 Cal. 17.

[3] Fricker *v.* Thomlinson, 1 Man. & G. 772.

[4] *Post*, § 352 *a*.

a difficulty which the subsequent acceptance removes, and thus establishes the contract *ab initio;* on the other hand, we may say, the acceptance is all that gives the parties any rights, and it does so by drawing to itself the original agreement, which then, and of that date, becomes binding in law. Suppose a damage occur to the goods in the meanwhile, shall the purchaser pay the full value? It will be seen that this question is one of a class, the treatment of which involves a full discussion of the effect of the Statute of Frauds upon the nature and validity of the oral contract, for which the reader is referred to a previous chapter.[1]

§ 340. It is hardly necessary to remark, in conclusion of this part of our subject, that an acceptance or receipt once intelligently made cannot be afterward revoked, and its effect avoided.[2]

[1] Chapter VIII., §§ 138 *d*–138 *j*.

[2] Jackson *v.* Watts, 1 McCord (S. C.) Law 288. See Buckingham *v.* Osborne, 44 Conn. 133.

CHAPTER XVI.

EARNEST AND PART-PAYMENT.

§ 341. BESIDES the acceptance and receipt of part of the goods sold, the statute provides that the giving of something in *earnest* or in *part-payment* of the price shall also have the effect of perfecting the contract and making it binding upon the parties. The giving of earnest, for the purpose of binding a bargain, was recognized at common law, and the statute simply permits it as still valid for that purpose, though the bargain be by word of mouth.[1] As at common law, however, so under the statute, its only effect is to make the bargain obligatory and to give the buyer a right to demand the goods on payment of the price.[2] It seems to be agreed that the earnest must be money or money's worth, — in other words, something of *value*, though the amount be immaterial.[3] And it must be actually paid; merely giving it and then taking it back again, or "crossing the hand" with it will not suffice.[4]

§ 342. What shall amount to part-payment of the price seems to be a question not altogether free from difficulty. In a case of much authority in New York, the defendant owed a sum of money to a third party, who owed the plaintiff a larger sum upon a promissory note, and all three agreed that the defendant should pay to the plaintiff directly the amount which he owed to the third party, and that the plaintiff

[1] See Glanvil, Chapter xiv., an interesting reference to show how closely the seventeenth section of the statute pursues the rules of the common law.

[2] Langfort *v.* Tiler, 1 Salk. 113; 2 Bl. Com. 447; 2 Kent, Com. 389.

[3] Artcher *v.* Zeh, 5 Hill (N. Y.) 200; Kuhns *v.* Gates, 92 Ind. 66; Weir *v.* Hudnut, 115 Ind. 525.

[4] Blenkinsop *v.* Clayton, 7 Taunt. 597. And see Hudnut *v.* Weir, 100 Ind. 501.

should credit the amount on the third party's note held by him; the agreement was entirely oral, and the Statute of Frauds of New York, extending to the sale of choses in action as well as goods, was relied upon in defence to the plaintiff's claim. On error, it was contended that here was something equivalent to part-payment of the money, because the terms of the agreement were such as to extinguish, *pro tanto*, the debt due from the third party to the defendant; in other words, that the transfer was accepted as a payment, and *per se* worked a satisfaction. But the court held that, even if there had appeared to be an express agreement between the third party and the defendant that the latter would absolutely credit the amount on the former's note (whereas it was not clear but that it was conditional on his finally recovering the whole amount from the plaintiff), still it was not sufficient to take the contract out of the statute, because no indorsement or receipt was ever actually made. Cowen, J., speaking for the court, said the object of the statute "was to have something pass between the parties besides mere words; some symbol like earnest money. Here everything lies in parol." [1]

§ 342 *a*. The principle of this decision, that the mere agreement to pay or credit a sum of money without actual payment or crediting is not sufficient to satisfy the Statute of Frauds, has been affirmed in New York, and seems to be entirely conformed to the spirit and policy of the statute.[2]

[1] Artcher *v.* Zeh, 5 Hill (N. Y.) 205; Brabin *v.* Hyde, 32 N. Y. 519. That the note of a third person given as payment will take a bargain for goods out of the statute is clear. See Combs *v.* Bateman, 10 Barb. (N. Y.) 573. Also the check of the purchaser. Hunter *v.* Wetsell, 84 N. Y. 549; Hunter *v.* Wetsell, 17 Hun (N. Y.) 133. *Quære*, how it may be in Massachusetts as to the purchaser's own note, which is there regarded as payment if given with that intention. In Sharp *v.* Carroll, 66 Wisc. 62, it was held that the actual surrender of a note of the vendor by the vendee, as part of the purchase money for goods bought, was part payment to satisfy the statute of frauds. See also Krohn *v.* Brantz, 68 Ind. 277.

[2] Ely *v.* Ormsby, 12 Barb. 570; Brand *v.* Brand, 49 Barb. 346; Brabin *v.* Hyde, 32 N. Y. 519; Teed *v.* Teed, 44 Barb. 96; Walrath *v.* Richie, 5

In a case which came before the Court of Exchequer, the plaintiff, then owing the defendant four pounds and odd, sold him a lot of leather, the price of which exceeded ten pounds, and agreed that the defendant might deduct or set off from the payment to be made for the leather the amount already owing to him by the plaintiff. The defendant returned the leather as inferior to the sample, and demanded the money previously due him, on which the plaintiff brought his action for the agreed price of the leather, less the old debt, insisting that the agreement as to the allowance of the old debt, on the price of the leather, was a part-payment of such price and took the bargain out of the statute. All the Barons agreed that it could not be so regarded, because such agreement was part of the bargain for the leather; such bargain being to buy the leather at a certain price, less the old debt; and so denied the motion for a new trial. But it was said that if the defendant had agreed to extinguish the old debt, and receive the plaintiff's goods *pro tanto* instead of it, the law might have been satisfied without the ceremony of paying to the defendant and repaying it by him.[1] The decision, however, went upon the ground, clearly presented by the case, that the agreement was that the defendant, *when* he paid for the goods, and *if* he paid, might deduct the old debt; thus evidently leaving that deduction contingent, somewhat as in the New York case above quoted. So far as the suggestions of the Barons on the other point are concerned, they seem to involve a little difficulty. Doubtless, if the parties to the suit had been changed, the defendant suing the plaintiff for the four pounds and odd, the latter could have

Lans. 362. See Mattice *v.* Allen, 3 Abb. App. Dec. 248; Gilman *v.* Hill, 36 N. H. 311; Gaddis *v.* Leeson, 55 Ill. 83; Matthiessen & Weichers Refining Co. *v.* McMahon, 38 N. J. L. 536. The question is one of fact, viz., whether there was any actual transfer of money or money's worth from the buyer to the seller, made in pursuance of the agreement. See Dow *v.* Worthen, 37 Vt. 108; Cotterill *v.* Stevens, 10 Wisc. 422; Organ *v.* Stewart, 60 N. Y. 413; Walrath *v.* Ingles, 64 Barb. (N. Y.) 265.

[1] Walker *v.* Nussey, 16 Mees. & W. 302.

defended on showing that he had paid the debt in leather; but suppose the bargain of the leather had been wholly fixed by the parties, and afterwards they had agreed that the old debt might be waived or released by way of part-payment; would that have been sufficient, without any receipt or other act showing the release?

§ 342 *b*. The mere *tender* of earnest will not be sufficient; it must be taken by the seller as well. And so it was held that, where the buyer had sent by mail to the seller a sum of money to bind the bargain, the latter was at liberty, upon receipt of the money, to keep it as earnest, and thereby make a binding contract, or to return it to the sender and refuse to carry out his parol agreement.[1] Nor will a deposit with a third person, who is to hand it to either of the parties, if the other neglect or refuse to fulfil his part of the bargain, be a sufficient giving of earnest.[2]

§ 343. We have seen that the acceptance and receipt of part of the goods may be subsequent to the making of the oral bargain, but that they should be before action brought. The same cases and the same reasoning seem to apply so clearly to a part-payment also, that it is not considered necessary to refer to them here.[3]

[1] Edgerton *v.* Hodge, 41 Vt. 676.

[2] Howe *v.* Hayward, 108 Mass. 54; Noakes *v.* Morey, 30 Ind. 103.

[3] *Ante*, §§ 337, 338. And see Thompson *v.* Alger, 12 Met. (Mass.) 428. The language of the New York statute is "unless the buyer shall, *at the time*, pay some part of the purchase money" This provision was regarded as satisfied in Bissell *v.* Balcom, 39 N. Y. 275, by payment made a day or two after the day of the agreement. And in Hunter *v.* Wetsell, 4 N. Y. 549, by a check delivered and received as payment "at the time," such check being good when drawn and afterwards paid on presentation. But from the language of later decisions, it would seem that, where payment is relied upon to take the case out of the statute, the contract must be substantially repeated and made anew by the parties when the payment is made. See Webster *v.* Zielly, 52 Barb. (N. Y.) 482; Hunter *v.* Wetsell, 57 N. Y. 375; Hunter *v.* Wetsell, 17 Hun (N. Y.) 133. See also Bates *v.* Chesebro, 32 Wisc. 594; same case, on new trial, 36 Wisc. 636; Paine *v.* Fulton, 34 Wisc. 83; Jackson *v.* Tupper, 101 N. Y. 515; Hallenbeck *v.* Cochran, 20 Hun (N. Y.) 416.

CHAPTER XVII.

THE FORM, ETC., OF THE MEMORANDUM.

§ 344. In considering the subject of writings and written evidence satisfying the statute, it is important to notice carefully the language of the statute in regard to them. The first section provides that the *creation* of "leases, estates, interests of freehold, or terms of years," must be by an instrument in writing; and the third section contains a similar provision as to the *transfer* of such interests after they have been created. The fourth section, concerning the *agreement to create or transfer* such interests, declares that such agreements, among others, shall not be enforceable unless they have been reduced to writing, or (if this has not been done), unless some note or memorandum in writing of them is produced, authenticated by the signature of the party to be charged upon the agreement. The seventeenth section, regarding contracts for the sale of goods, contains a similar provision as to the note or memorandum. The language of these two last sections clearly indicates a difference between a contract in writing, and a note or memorandum in writing of an oral contract; but this difference, though manifest, and often judicially recognized by authority,[1] has not always

[1] *Per* Erle, J., in Parton *v.* Crofts, 33 L. J. C. P. 189; Barkworth *v.* Young, 4 Drew. 1; Hoar, J., in Lerned *v.* Wannemacher, 9 Allen (Mass.) 412; Ide *v.* Stanton, 15 Vt. 685; Batturs *v.* Sellers, 5 Harr. & J. (Md.) 117; Lanz *v.* McLaughlin, 14 Minn 72; Thayer *v.* Luce, 22 Ohio St 62; Benziger *v.* Miller, 50 Ala. 206; Mizell *v.* Burnett, 4 Jones (N. C.) Law 249; Old Colony R. R. Co. *v.* Evans, 6 Gray (Mass.) 25; Kibby *v.* Chitwood, 4 T. B. Mon. (Ky.) 91; Williams *v.* Bacon, 2 Gray (Mass.) 387; Hart *v.* Carroll, 85 Pa. St. 508; Jones *v.* Victoria Graving Dock Co., 2

been allowed its due weight. First, it is important to bear in mind that an oral contract for the sale of lands or goods was valid before the passage of the Statute of Frauds; next, that the statute does not make the contract void, in the sense that an illegal contract is void, but simply makes it unenforceable; and lastly, that that bar is removed by the production of a writing containing the terms of the oral contract and authenticated by the signature of the party to be charged.

§ 344 *a*. It must be remembered, too, that the statute concerns oral contracts only; written contracts, of whatever nature, are untouched by its provisions. The rules governing their interpretation and effect are of course unaffected by the fact that, if the contract had not been in writing, the Statute of Frauds would or might have affected it. Being a written contract, it is specially excepted by the statute itself from its operation. As was said of the Statute of Frauds by Lord Redesdale, "it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind." [1] But the memorandum or note of such an unwritten agreement, which, under the statute, gives it validity, is governed by rules in many respects peculiar. In discussing these, it is believed expedient to examine, first, those pertaining to the external features of the memorandum, or of what it must consist; and secondly, its internal features, or what it must contain.

§ 345. The fourth section of the statute provides that no action shall be brought upon any of the classes of contracts

Q. B. Div. 314; Drury *v.* Young, 58 Md. 546; Johnson *v.* Trinity Church Society, 11 Allen (Mass.) 123. The court in McAnnulty *v.* McAnnulty, 120 Ill. 126, appears to have overlooked or disregarded the distinction between the contract and the memorandum, for they say "the statute requires the contract itself to be in writing," and hold that a sufficient memorandum in writing made after marriage of a verbal ante-nuptial contract will not support an action for its enforcement. But see Lasher *v.* Gardner, 124 Ill. 441, which holds that "the statute does not require that the contract itself should be reduced to writing."

[1] Clinan *v.* Cooke, 1 Sch. & L. 39.

there enumerated, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized." And the provision in regard to the memorandum under the seventeenth section, relating to the sales of goods, is substantially the same, except in the use of the plural, "parties to be charged." The present chapter concerns the different kinds of writings which may be *memoranda*, the incorporation of other writings by reference, the signature, and the authority to affix it; all coming under the general head of the form of the memorandum.

§ 345 *a*. The note or memorandum of the oral contract which the statute requires is some writing, authenticated by the signature of the party to be charged upon the contract, or of his agent, and containing, either in terms or by incorporation of other writing referred to in it, a statement of the terms of the contract and the parties to it. The writing, it has been decided, need not state that the contract has been made, or afford any evidence of that fact. An offer or proposal, signed by the party making it, and communicated to the other party, is held a sufficient memorandum to support an action against the party making it for breach of the contract afterward made by the oral acceptance of the offer; the fact of such acceptance being provable by oral evidence.[1]

[1] Reuss *v.* Picksley, L. R. 1 Ex. 342; Stewart *v.* Eddowes, L. R. 9 C. P. 311; Sanborn *v.* Flagler, 9 Allen (Mass.) 474; Himrod Furnace Co. *v.* Cleveland & Mahoning R. R. Co., 22 Ohio St. 451; Argus Co. *v.* Mayor, etc. of Albany, 55 N. Y. 495; Griffin *v* Rembert, 2 S. C. 410. See Bird *v.* Blosse, 2 Ventris, 361; Brettel *v* Williams, 4 Exch. 623; Waul *v.* Kirkman, 27 Miss. 823; Lanz *v.* McLaughlin, 14 Minn. 72; Lowber *v.* Connit, 36 Wisc. 176; Thayer *v.* Luce, 22 Ohio St. 62; Justice *v.* Lang, 42 N. Y. 493; Western Union Tel. Co. *v.* Chicago & Paducah R. R. Co., 86 Ill. 246; Kessler *v.* Smith, 42 Minn. 494; Raubitschek *v.* Blank, 80 N. Y. 478; Norton *v.* American Ring Co., 1 Fed. Rep. 684; Lee *v.* Cheney, 85 Tenn. 707; Gradle *v.* Warner, 140 Ill. 123; Doherty *v.* Hill, 142 Mass. 465. Where a written offer, expressly limited as open until a certain time, was not accepted until after that time, the limit having been meanwhile verbally extended, *semble* that the original offer in writ-

§ 345 *b*. Apart from authority, and upon principle merely, it may well be questioned whether an offer in writing made before the contract can be evidence of the contract afterward made, if the idea of admission is to enter.[1]

§ 346. The writing may be sufficient, however informal. A letter,[2] a receipt for money,[3] a bill of parcels,[4] or a stated account, in which the vendor of land charges himself with the price,[5] or the return of a sheriff upon an execution,[6] or a vote of a corporation entered on their records, signed by their clerk,[7] or a city ordinance appropriating land and acted upon by defendant,[8] may be a sufficient memorandum.

§ 346 *a*. It would seem that, in the case of the loss or non-production of the writing relied upon as a memorandum, its contents may, like those of any other writing, be sufficiently proved by secondary evidence, but upon this the decisions are conflicting.[9]

ing would not be a good memorandum of the subsequent oral agreement. See Atlee *v.* Bartholomew, 69 Wisc. 43. In Banks *v.* Harris Mfg. Co., 20 Fed. Rep. 667, the written offer was not accepted, but was declined by the defendant. See Neville *v.* State, 73 Texas 629; Hastings *v.* Weber, 142 Mass. 232. But see Cloud *v.* Greasley, 125 Ill. 313.

[1] Wardell *v.* Williams, 62 Mich. 50.

[2] Troy Fertilizer Co. *v.* Logan, 96 Ala. 619.

[3] Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; Ellis *v.* Deadman, 4 Bibb (Ky.) 466; Evans *v.* Prothero, 1 De G., M. & G. 572; Williams *v.* Morris, 95 U. S. 444.

[4] Batturs *v.* Sellers, 5 Harr. & J. (Md.) 117; Saunderson *v.* Jackson, 2 Bos. & P. 238; Hawkins *v.* Chace, 19 Pick. (Mass.) 502.

[5] Barry *v.* Coombe, 1 Pet. (U. S.) 640; Bourland *v.* County of Peoria, 16 Ill. 538.

[6] Hanson *v.* Barnes, 3 Gill & J. (Md.) 359; Fenwick *v.* Floyd, 1 Harr. & G. (Md.) 172; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182; Elfe *v.* Gadsden, 2 Rich. (S. C.) Law 373; Nichol *v.* Ridley, 5 Yerg. (Tenn.) 63; Stearns *v.* Edson, 63 Vt 259.

[7] Tufts *v.* Plymouth Gold Mining Co., 14 Allen (Mass.) 407; Johnson *v.* Trinity Ch. Soc., 11 Allen (Mass.) 123; Chase *v.* City of Lowell, 7 Gray (Mass.) 33; Rhoades *v.* Castner, 12 Allen (Mass.) 130; Grimes *v.* Hamilton County, 37 Iowa 290; Argus Co. *v.* Albany, 55 N. Y. 495. See Caldwell *v.* School City of Huntington, 132 Ind. 92; Marden *v.* Champlin, 17 R. I. 423.

[8] District of Columbia *v.* Johnson, 1 McKay 51.

[9] See Davis *v.* Robertson, 1 Mill (S. C.) 71; Jelks *v.* Barrett, 52 Miss.

§ 346 *b*. It is often the case that the terms of the contract are not all contained in any one paper. The question then arises, under what circumstances two or more papers can be offered in evidence as together constituting the memorandum, one only or all being signed, as the case may be. With regard to the first case, the rule is that the letter or other paper that is signed is to be regarded as incorporating and reciting any other writing referred to in it. It follows, then, that in the case of any signed paper, those writings referred to in it may be read,[2] provided they were in existence at the time when the paper referring to them was signed.[1] It seems also that one signature may apply not only to the paper on which it is written, but also to another which at the time of signing was attached to it in such a way as to indi-

315; Pitts *v.* Beckett, 13 Mees. & W. 743; Washburn *v.* Fletcher, 42 Wisc. 152; Elwell *v.* Walker, 52 Iowa 256; Roehl *v.* Haumesser, 114 Ind. 311; MaGee *v.* Blankenship, 95 N. C. 563; White *v.* Bigelow, 154 Mass. 593.

[1] Jackson *v.* Lowe, 1 Bing. 9; Dobell *v.* Hutchinson, 3 Ad. & E. 371; Laythoarp *v.* Bryant, 2 Bing. N. R. 735; Scarlett *v.* Stein, 40 Md. 512; Tawney *v.* Crowther, 3 Bro. C. C. 318; De Beil *v.* Thompson, 3 Beav. 469; Coles *v.* Trecothick, 9 Ves. 234. See Peirce *v.* Corf, L. R. 9 Q B. 210; Washington Ice Co. *v.* Webster, 62 Me. 341; Mayer *v.* Adrian, 77 N. C. 83; Williams *v.* Morris, 95 U. S. 444; Williams *v.* Jordan, 6 Ch. Div. 517; Buxton *v.* Rust, L. R. 7 Exch. 279; Rishton *v.* Whatmore, 8 Ch. Div. 467; Hickey *v.* Dole, 29 Atl. Rep. (N. H.) 792; Wilson *v.* Lewiston Mill Co., 74 Hun (N. Y.) 612; Rafferty *v.* Lougee, 63 N. H. 54; Wylson *v.* Dunn, L. R. 34 Ch. D. 569; Cave *v.* Hastings, L. R. 7 Q B. D. 125; Oliver *v.* Alabama Gold Life Insurance Co., 82 Ala. 417; St. Louis R. R Co. *v.* Beidler, 45 Ark. 17; Christenson *v.* Wooley, 41 Mo. App. 53; Williams *v.* Robinson, 73 Me. 186. See Coombs *v.* Wilkes, L. R. 3 Ch. D. 1891, 77.

[2] Wood *v.* Midgeley, 5 De G., M. & G. 41. Compare Ridgway *v.* Wharton, 6 H. L. C. 238. But see Briggs *v.* Munchon, 56 Mo. 467. See also Freeland *v.* Ritz, 154 Mass. 257, holding on the authority of Brown *v.* Bellows, 4 Pick. 179, that it is no objection to a written contract that some of its terms are to be fixed by something to be done in the future if that something is done before action brought, and that, if it is in writing, the provisions of the Statute of Frauds are complied with," and distinguishing Wood *v.* Midgeley. See § 373, *post*, Camp *v.* Moreman, 84 Ky. 635.

cate that the whole was intended to be recognized by the signer as one paper.[1]

§ 347. Although one writing refer specifically to another, the terms of the intended contract may still be left in doubt, and the requirement of the statute be unsatisfied, for want of certainty in the writing referred to. Thus, in the case of Brodie *v.* St. Paul, which was a suit in equity to enforce an agreement to execute a lease, the parties had signed an agreement referring to another paper as containing the terms and conditions; but this paper contained other terms and conditions besides those which were to be embraced in the proposed lease, the latter embracing only such among them as the defendant had on the previous occasion read to the plaintiff. The court rejected parol testimony to show what passages had been so read, as manifestly against the Statute of Frauds.[2]

§ 348. Where there is more than one signed paper, so many of them as of themselves show their relation to the contract sued upon may be taken together to make the memorandum.[3] But if such relation does not appear from the writings themselves, it cannot be established by extrinsic evidence.[4] Boydell *v.* Drummond is a conspicuous case,

Tallman *v.* Franklin, 14 N. Y. 584. See Wilkinson *v.* Evans, L. R. 1 C. P. 407; Ridgway *v.* Ingram, 50 Ind. 145; Commins *v.* Scott, L. R. 20 Eq. 11; Kronheim *v.* Johnson, 7 Ch. Div. 60; Wilstach *v.* Heyd, 122 Ind. 574; Gordon *v.* Collett, 102 N. C. 532.

[2] Brodie *v.* St. Paul, 1 Ves. Jr. 326. See Clinan *v.* Cooke, 1 Sch. & L. 22.

[3] Wilkinson *v.* Evans, L. R. 1 C. P. 407; Lerned *v.* Wannemacher, 9 Allen (Mass.) 412; Allen *v.* Bennet, 3 Taunt. 169; Ide *v.* Stanton, 15 Vt. 685; Thayer *v.* Luce, 22 Ohio St. 62; Peabody *v.* Speyers, 56 N. Y. 230; Work *v.* Cowhick, 81 Ill. 317; Beckwith *v.* Talbot, 95 U. S. 289; Buxton *v.* Rust, L. R. 7 Exch. 279; Everman *v.* Herndon, 11 So. Rep. (Miss.) 652; Wills *v.* Ross, 77 Ind. 1; Peck *v.* Vandemark, 99 N. Y. 29; Bayne *v.* Wiggins, 139 U. S. 210; Shardlow *v.* Cotterell, L. R. 20 Ch. D. 90; Studds *v.* Watson, L. R. 28 Ch. D. 305; Beckwith *v.* Talbot, 2 Col. 639; Otis *v.* Payne, 86 Tenn. 663; Barker *v.* Smith, 92 Mich. 336; Mann *v.* Higgins, 83 Cal. 66; Elbert *v.* Los Angeles Gas Co., 97 Cal. 244.

[4] Jacob *v.* Kirk, 2 Moo. & R. 221; Hinde *v.* Whitehouse, 7 East 558; Morton *v.* Dean, 13 Met. (Mass.) 385; Freeport *v.* Bartol, 3 Greenl. (Me.)

bearing upon this general rule.[1] The Messrs. Boydell, being about to publish an illustrated Shakespeare, prepared two prospectuses containing the terms, etc., on which the numbers were to be furnished; and had them, and also a book entitled simply "Shakespeare subscribers, their signatures" (but not referred to in the prospectuses, nor referring to them), lying about the shop. The defendant put his name down in the book among the subscribers; but it was held in the Court of Queen's Bench that he was not liable on his subscription, there being no such connection between the prospectuses and the book, on their face, as to enable the court to consider them together as constituting one complete memorandum. There was also in the case a letter from the defendant, in reply to one from the plaintiff, calling upon him to take and pay for his numbers, wherein he said that he ceased taking the numbers of the Boydell Shakespeare many years before, in consequence of *the engagement* not being fulfilled on the part of the proprietors, etc.; but, notwithstanding it was urged by the counsel that no other engagement between the parties was shown to have existed beyond what was contained in the prospectus, the court held the letter insufficient; Lord Ellenborough remarking that the engagement could not be shown to be that of the particular prospec-

340; O'Donnell *v.* Leeman, 43 Me. 158; Wiley *v.* Robert, 27 Mo. 388; Boardman *v.* Spooner, 13 Allen (Mass.) 353; Clark *v.* Chamberlin, 112 Mass. 19; Johnson *v.* Buck, 35 N. J. L. 338; Johnson *v.* Kellogg, 7 Tenn. 262; Ridgway *v.* Ingram, 50 Ind. 145; Schafer *v* Farmers & Mechanics' Bank, 59 Pa. St 144; Stocker *v.* Partridge, 2 Rob (N. Y.) 193; Tice *v.* Freeman, 30 Minn. 389; Mellon *v.* Davison, 123 Pa St. 298; Nibert *v.* Baghurst, 47 N. J. Eq 201; Wilson *v.* Miller, 42 Ill. App. Ct. 332; Hale *v.* Hale, 19 S. E. Rep. (Va.) 739; North *v.* Mendel, 73 Ga 404; North Staffordshire R. R. *v.* Peck, 1 E. B. & E. 100; Fowler Elevator Co. *v.* Cottrell, 38 Neb. 512. Recent English cases show a relaxation of this rule. See Long *v.* Millar, L. R. 4 C. P. D. 450; Cave *v.* Hastings, 7 Q. B. D. 125; Oliver *v.* Hunting, L. R. 44 Ch. D. 205. The last named case discusses the subject very thoroughly, and holds the rule to be that parol evidence may always be received to show the circumstances under which the papers were written, in order to ascertain what they refer to.

[1] Boydell *v.* Drummond, 11 East 142.

tus without parol evidence, which the statute would exclude; but if there had been a plain *reference to the particular prospectus*, that might have helped the plaintiff.

§ 349. The question what amounts to a sufficient reference of the different papers to one another, on their face, to make them one memorandum, has been judicially considered to some extent. Thus, in Allen *v.* Bennet, the defendant having, by his agent, made and signed a memorandum for the sale to the plaintiff of "8 cwt. of fine shag tobacco," and of a quantity of rice and other tobacco, and it being objected, in an action for non-delivery, that the plaintiff's name did not appear in the writing, a letter was produced, written by the defendant to his agent, mentioning the sale, and naming the plaintiff as the person who had bought. It was held that, under all the circumstances, this letter was so connected with the first memorandum that it might be read therewith to show the name of the buyer.[1] Again, in the case of Johnson *v.* Dodgson, in the Court of Exchequer, the memorandum of a bargain for the sale of hops, *written by the defendant*, and signed by the plaintiff's agent, was as follows: "Sold John Dodgson [the defendant] 27 pockets Playsted, 1836, Sussex, at 103*s*. The bulk to answer the sample. 4 pockets Selme, Beckley's, at 95*s*.," etc. This was held by the court a sufficient signature by the defendant.[2] The defendant, on the same day, wrote to the plaintiffs requesting them to deliver "the 27 pockets Playsted, and the 4 pockets Selme, 1836, Sussex," to a third party. It was insisted that the defendant's letter and the previous memorandum should not be read together; that parol evidence must be introduced to show that there was only one such contract, *i. e.*, for hops of a certain description. To that Lord Abinger said: "The statute does not absolutely exclude parol evidence; it only

[1] Allen *v.* Bennet, 3 Taunt. 173; Louisville Co. *v.* Lorick, 29 S. C. 533; Kennedy *v.* Gramling, 33 S. C. 367. And see Long *v.* Millar, L. R. 4 C. P. D. 450.

[2] See *post*, § 357.

requires that there shall be a note of the contract in writing, in order to exclude fraud or mistake as to its terms." It was not found necessary in the decision to pass upon this point, as the writing previously made was held sufficient of itself; but the opinion of the majority of the court appears to have been that, had it been necessary to rely upon them both, the letter and the previous writing were so connected as to form one memorandum to satisfy the statute. Lord Abinger, in delivering judgment, after remarking that the case was clear on other grounds, said: "If it rested upon the question as to the recognition of the contract by the letter, there might have been some doubt; although, even upon that, I should have thought the reference to the only contract proved in the case sufficient." Bolland, B., expressed his inclination to hold the same; but Parke, B., said that, if the question had turned upon that point, he should have had very considerable doubt whether the letter referred sufficiently to the contract; remarking that it referred to the subject-matter, but not to the specific contract.[1] The same learned judge, a few years afterward, in a case at *nisi prius*, declined to connect two writings, on the ground that "the whole mischief intended to be guarded against by the statute would be incurred, if verbal evidence were admitted to show that the documents must necessarily be presumed to refer to each other."[2]

§ 350. In a case in the Supreme Court of the United States,[3] where the memorandum of a bargain for the sale of goods was ambiguous in some of its terms, the majority of the court, while deciding that the memorandum was sufficient of itself, expressed the opinion that, for the purpose of

[1] Johnson *v.* Dodgson, 2 Mees. & W. 653. It was said in the argument of this case, upon the authority of Kennett *v.* Milbank, 1 Moo. & S. 102, that a letter from a debtor must refer specifically to the debt in question, to take it out of the Statute of Limitations; but Parke, B., remarked that that was questionable, and cited Lechmere *v.* Fletcher, 1 Cromp. & M. 623.

[2] Jacob *v.* Kirk, 2 Moo. & R. 224; but see Buxton *v.* Rust, L. R. 7 Exch. 279, and cases cited under § 348.

[3] Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446.

explaining ambiguities in the memorandum, resort could be had to a bill of parcels made by the plaintiff subsequently to the memorandum and containing no reference to it; the bill of parcels being treated (apparently) as one of the contemporaneous facts in the light of which the paper which really constituted the memorandum should be read. Thus limited, the case may not be exposed to the criticisms since made upon it in the same court.[1]

§ 351. In cases of sales by auction, the entry of the purchaser's name with the price, etc., in the sales-book of the auctioneer, completes the memorandum;[2] provided that the book be so headed and otherwise arranged that the entry shall be intelligible and show what the transaction is.[3] So with the note-book of a broker, so far as his entries therein are to be resorted to for proof of any bargain and sale effected by him in that capacity. But it has been much disputed whether the broker's entry in his book is the memorandum intended by the statute, or the bought and sold notes which he hands to his respective parties. It is clearly settled that the bought and sold notes together constitute a binding memorandum, though the broker make no entry in his book.[4] But for this purpose the rule is that they must agree in their

[1] See Grafton *v.* Cummings, 99 U. S. 100. But see Doherty *v.* Hill 144 Mass. 468. That a printed advertisement of the sale, previously published, may be considered in aid of the auctioneer's memorandum for identifying land sold, see McBrayer *v.* Cohen, 92 Ky. 479.

[2] See the cases cited in note to § 369, *post.*

[3] Gill *v.* Bicknell, 2 Cush. (Mass.) 355; Rishton *v.* Whatmore, 8 Ch. Div. 467. First Baptist Church of Ithaca *v.* Bigelow, 16 Wend. (N. Y.) 28. The Revised Statutes of New York and the statutes of some other States have expressly provided what shall be the nature of the book in which an auctioneer's entry, to be binding, must be made. See Appendix.

[4] Hawes *v.* Forster, 1 Moo. & R. 368; Rucker *v.* Cammeyer, 1 Esp. 105; Hicks *v.* Hankin, 4 Esp. 114; Chapman *v.* Partridge, 5 Esp. 256; Dickerson *v.* Lilwal, 1 Stark. 128; Soames *v.* Spencer, 1 Dowl. & R. 32; Short *v.* Spackman, 2 Barn. & Ad. 962; Grant *v.* Fletcher, 5 Barn. & C. 436; Goom *v.* Aflalo, 6 Barn. & C. 117; Trueman *v.* Loder, 11 Ad. & E. 589; Sievewright *v.* Archibald, 17 Q. B. 103; Bibb *v.* Allen, 149 U. S. 481.

terms.[1] If either the bought or the sold note alone be produced, the other will be presumed to correspond with it, in the absence of evidence to the contrary.[2] When they do not agree, or when they both state a contract different from that entered in the book, the question is presented, which is the memorandum; and on this point there is unquestionable conflict in the decisions. It has been decided, however, by a majority of the judges of the Queen's Bench that, if the bought and sold notes differ, reference may be had to the book entry, as being really the memorandum, of which the notes were merely meant as copies.[3] Which of the two, the notes or the book entry, shall govern when the notes state a different contract from the book entry, is the more direct and essential question, and it seems to be still undecided; though Erle, J., in the case in the Queen's Bench, intimates that, in the absence of any commercial usage to rely exclusively on the notes, the parties, by accepting and acquiescing in them, might be taken to have ratified the bargain therein expressed, and so adopted it instead of the original entry. Of course, if there are no bought and sold notes, or none which agree together, and no book entry, the contract cannot, so far as it depends upon written evidence, be enforced;[4]

[1] Cumming *v.* Roebuck, Holt, N. P. 172; Thornton *v.* Kempster, 5 Taunt. 786; Gregson *v.* Ruck, 4 Q. B. 737; Grant *v.* Fletcher, 5 Barn. & C. 436; Sievewright *v.* Archibald, 17 Q. B. 103; Peltier *v.* Collins, 3 Wend. (N. Y.) 459; Davis *v.* Shields, 26 Wend. (N. Y.) 341; Suydam *v.* Clark, 2 Sand. (N. Y.) 133.

[2] Hawes *v.* Forster, 1 Moo. & R. 368; Parton *v.* Crofts, 16 C. B. N. S. 11.

[3] Sievewright *v.* Archibald, 17 Q. B. 103. And see Hawes *v.* Forster, 1 Moo. & R. 368; Hinde *v.* Whitehouse, 7 East 558; Pitts *v.* Beckett, 13 Mees. & W. 743; Heyman *v.* Neale, 2 Camp. 337; Thornton *v.* Meux, Moo. & M. 43; Thornton *v.* Charles, 9 Mees. & W. 802; Townend *v.* Drakeford, 1 Car. & Kir. 20; Toomer *v.* Dawson, Cheves (S. C.) 68. Where the bought and sold notes constitute the memorandum relied on, it must be so averred in the declaration. Rayner *v.* Linthorne, Ryan & M. 325.

[4] Grant *v.* Fletcher, 5 Barn. & C. 436; Sievewright *v.* Archibald, 17 Q. B. 103. And see Newbery *v.* Wall, 84 N. Y. 576. A broker's entry in his own book, without any bought and sold notes, was held sufficient in Coddington *v.* Goddard, 16 Gray (Mass.) 436.

unless, indeed, as has been suggested, the defendant, by recognizing one of the notes as containing correctly the terms of the bargain, may be considered to have accepted and ratified it.[1]

§ 351 *a*. It may be doubted whether the courts, so far as can be gathered from the decisions referred to in the preceding section, have not failed to discriminate in all cases between a written contract and an oral contract evidenced by writing. It seems clear that the requirement of the statute may be fully met either by a bought note alone or a sold note alone, not because of the peculiar commercial character of the paper in either case, but because, like any other memorandum, it is an accurate statement in writing signed by the party to be charged. Thus, in a recent case in Missouri,[2] where the seller of goods sold by parol was sued for non-delivery, a sold note alone was held a sufficient memorandum, on the ground that it correctly evidenced the terms of the contract, and was signed by the defendant's duly authorized sub-agent. In that case no bought note was produced or referred to, and it would seem generally that even if no bought note had been made, or that, if one had been made, it differed from the sold note in not stating the contract correctly, the latter would still be a sufficient memorandum to charge the seller.

§ 352. It is immaterial whether the memorandum be written in ink or pencil, or otherwise;[3] or it may not be written at all, but printed or stamped.[4]

[1] Erle, J., in Sievewright *v.* Archibald, 17 Q. B. 103. In this case, the judges, being divided, delivered opinions *seriatim*, and the whole subject of broker's notes and entries will be found there discussed at length, and the authorities carefully examined. A careful and valuable discussion of the subject will also be found in Langdell, Select Cases on Sales, 1035

[2] Greeley-Burnham Co. *v.* Capen, 23 Mo. App. 301.

[3] Geary *v.* Physic, 5 Barn. & C. 234; Merritt *v.* Clason, 12 Johns. (N. Y.) 102; Clason *v.* Bailey, 14 Johns. (N. Y.) 484.

[4] Saunderson *v.* Jackson, 2 Bos. & P. 238; Schneider *v.* Norris, 2 Maule & S. 286. In Pitts *v.* Beckett, 13 Mees. & W. 743, a machine copy of a

§ 352 *a*. As to the time when the memorandum must be executed, it is settled that it may be at any time subsequent to the formation of the contract by the parties,[1] and before action brought.[2] It has been sometimes doubted whether it might not be after action brought, upon the ground that the statute only meant to secure written *evidence* of the contract.[3] But there appears to have been no direct decision to that effect, and the weight of opinion as well as of reason is against it.[4]

writing was offered as a memorandum. The court did not have occasion to pass upon the instrument, but Baron Parke said that he was strongly of opinion that it would do as a memorandum. See also Vielie *v.* Osgood, 8 Barb. (N. Y.) 130; McDowel *v.* Chambers, 1 Strobh. (S. C.) Eq. 347; Draper *v.* Pattina, 2 Speers (S. C.) 292. As to signature by printing, see *post*, § 356. And by telegraph, Hazard *v.* Day, 14 Allen (Mass.) 487; Palmer *v.* Marquette & Pacific Rolling Mill Co., 32 Mich. 274; Godwin *v.* Francis, L. R. 5 C. P. 295; Little *v.* Dougherty, 11 Col. 103; Breckenridge *v.* Crocker, 78 Cal. 529.

[1] Munday *v.* Asprey, L. R. 13 Ch. D. 855.

[2] See *ante*, § 346, and cases there cited, where letters of the defendant recognizing the contract were held sufficient to charge him. Also Williams *v.* Bacon, 2 Gray (Mass.) 387; Sievewright *v.* Archibald, 17 Q. B. 107, 114. The time of making the memorandum may be shown by extrinsic evidence, even in contradiction of the date upon the memorandum itself. Hewes *v.* Taylor, 70 Pa. St. 387; Heideman *v.* Wolfstein, 12 Mo. App. 366. It was held in McAnnulty *v.* McAnnulty, 120 Ill. 126, that a memorandum made after marriage of an oral ante-nuptial agreement would not be sufficient, — but *quære*. See § 344, *note* 1, *supra*.

[3] Fricker *v.* Thomlinson, 1 Man. & G. 772; Thornton *v.* Kempster, 5 Taunt. 786; Gibson *v.* Holland, L. R. 1 C. P. 1, opinion of Willes, J. And see Nelson *v.* Dubois, 13 Johns. (N. Y.) 175; Hudson *v.* King, 2 Tenn. 560.

[4] Bill *v.* Bament, 9 Mees. & W. 36. Erle, J., in Sievewright *v.* Archibald, 17 Q. B. 103. See Bailey *v.* Sweeting, 9 C. B. N. S. 843. See *ante*. § 338. In Rose *v.* Cunynghame, 11 Ves. 550, before Lord Eldon, where it was necessary for the plaintiff to show a binding contract for the purchase of land existing prior to the execution of a will by the purchaser, so that (the contract being regarded in equity as executed) the will would pass that land, it was argued, that a letter, written prior to the execution of the will, might be read in connection with a deed made subsequently to its execution, so as to constitute a sufficient memorandum of the purchase. It does not appear that Lord Eldon noticed the point, but he decided against the sufficiency of the writings relied upon, on other grounds. Lucas *v.* Dixon, L. R. 22 Q. B. D. 357.

§ 353. In the case of auctioneers, the general rule just stated seems not to apply. In Buckmaster *v.* Harrop, Lord Chancellor Erskine decided (the point being directly presented on the facts) that an auctioneer's entry, to be valid as a memorandum, must be made contemporaneously with the sale;[1] and the language of many of the cases, apparently uncontradicted, is that the name of the purchaser must be written down by him *immediately* after the announcement of the bid and the fall of his hammer; by which we should understand, before proceeding to put up another article. Mr. Justice Story, referring to this rule as to auctioneers, puts it on the ground that men are not to be "ensnared by contracts subsequently reduced to writing by their agents."[2] His remark is casually made, however, and the rule itself is referred to by him in illustration merely of an entirely different question under the statute. If we except this remark, there appears to be no support for the position that a memorandum made by an agent (other than an auctioneer) acting for the party to be charged, must be contemporaneous with, or immediately follow, the transaction, any more than if made by the party himself.[3] No such exception appears to have been suggested by those judges who have had occasion to lay down the general rule, that the memorandum may be made at any time before action brought; and we do sometimes find that rule laid down with more or less distinct inclusion of the case of signature by an agent, though, as was before remarked, without its being made a point in the decision.[4] Again, the exception seems to be irreconcilable

[1] Buckmaster *v.* Harrop, 13 Ves. 456. And see Mews *v.* Carr, 1 Hurlst. & N. 484.

Smith *v.* Arnold, 5 Mason, 414.

[3] In Price *v.* Durin, 56 Barb. (N. Y.) 647, an auctioneer's sale-book in which the purchaser's name was entered when the lot was knocked down to him, and which was signed by the auctioneer's clerk at the close of each day's sales, was held a sufficient memorandum, although the New York statute requires the memorandum to be made "at the time" of the sale. See Jones *v.* Kokomo Association, 77 Ind. 340.

[4] See, in particular, Sievewright *v.* Archibald, 17 Q. B. 103, *per* Erle

with what we have seen to be settled, namely, that a broker's bought and sold notes, though there be no previous book entry made by him, constitute a binding memorandum; for such notes imply a legal contract antecedently made and concluded.[1] And if the exception should be admitted in cases of agency generally, it would leave open the question, what lapse of time would deprive the agent's signature of its efficacy; a question which, there being no natural criterion, as in the case of the auctioneer's entry, could not fail to present much difficulty. It is at all times in the power of the principal to revoke the agent's authority to sign, before he has executed the signature;[2] and, on the whole, we may be well justified in hesitating to accept a casual remark, even of such an eminent jurist, as a convincing statement of the law on this point.

§ 353 *a*. The cases since Buckmaster *v.* Harrop, however, appear to rest on the distinction between the auctioneer's agency for the seller and his agency for the buyer. The former they seem to concede (against the decision of that case) may continue so as to authorize the auctioneer to sign the memorandum at some time after the sale; but the latter, held, it is must be exercised at the time of the sale.[3]

§ 354. We shall presently see that whether a memorandum is or is not signed, within the meaning of the statute, depends upon the intention of the party in affixing his name.[4] But the rule in regard to the intention of the party does not seem to be so narrowly applied in determining whether a paper sufficiently executed for the purposes of a memoran-

and Patteson, JJ.; Williams *v.* Bacon, 2 Gray (Mass.) 387. In Barclay *v.* Bates, 2 Mo. App. 139, it was held that the sheriff's memorandum need not be made contemporaneously with the sale by him, and need not be signed by the identical deputy who made the sale. And see Elston *v.* Castor, 101 Ind. 426.

[1] Farmer *v.* Robinson, in note to Heyman *v.* Neale, 2 Camp. 337.

[2] See Gwathney *v.* Cason, 74 N. C. 5.

[3] Mews *v.* Carr, 1 Hurlst. & N. 484; Gill *v.* Bicknell, 2 Cush. (Mass.) 355; Horton *v.* McCarty, 53 Me. 394.

[4] See Doe *v.* Pedgriph, 4 Car. & P. 312.

dum shall bind the party as such. Where a paper is drawn up and signed for the mere purpose of having an agreement prepared, as, for instance, an inventory of articles, or a list of heads to be embraced therein, it is of course not to be itself taken as the agreement,[1] but it may be available as a memorandum.[2] Even when a paper is drawn up as the final obligation, if it be retained by the party signing it, and never in any way delivered as his agreement, it cannot be made use of, even as a memorandum.[3] And generally it is held that where the writing is a private one, or kept by the maker in his own possession, it cannot be treated as a memorandum or admission of the agreement;[4] but an instrument so drawn as to recognize the obligation, though not for that special purpose, will, if it be delivered to the other party and accepted by him, suffice for a memorandum under the statute.[5]

§ 354 *a*. The Statute of Frauds was not intended to apply to written contracts, but to the enforcement of oral ones,

[1] Cooke *v.* Tombs, 2 Anst. 420; Pipkin *v.* James, 1 Humph. (Tenn.) 325. And see Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Thynne *v.* Glengall, 2 H. L. C. 131; Mountacue *v.* Maxwell, Stra. 236; Rose *v.* Cunynghame, 11 Ves. 550 ; Glengal *v.* Barnard, 1 Keen 769.

[2] Sugden, Vend. & P. 115.

[3] Johnson *v.* Dodgson, 2 Mees. & W. 653, remark of Parke, B.; Grant *v.* Levan, 4 Pa. St. 393 ; Johnson *v.* Brook, 31 Miss. 17 ; Sanborn *v.* Sanborn, 7 Gray (Mass.) 142 ; Comer *v.* Baldwin, 16 Minn. 172 ; Steel *v.* Fife, 48 Iowa 99; Brown *v.* Brown, 33 N. J. Eq. 650 ; Swain *v.* Burnette, 89 Cal. 564. But see Bowles *v.* Woodson, 6 Grat. (Va.) 78; Jenkins *v* Harrison, 66 Ala. 345; Johnston *v.* Jones, 85 Ala. 286; Parker *v.* Parker, 1 Gray (Mass.) 409; Wier *v.* Batdorf, 24 Neb. 83.

[4] Remington *v.* Linthicum, 14 Pet. (U. S.) 84; Hart *v.* Carroll, 85 Pa. St. 508. See Peirce *v.* Corf, L. R. 9 Q. B. 210; Ruckle *v.* Barbour, 48 Ind. 274. But see Drury *v.* Young, 58 Md. 546; Logsdon *v.* Newton, 54 Iowa 448; Sullivan *v.* O'Neal, 66 Texas 433 See Chesebrough *v.* Pingree, 72 Mich. 438.

[5] Ellis *v.* Deadman, 4 Bibb (Ky.) 466 ; Smith *v.* Arnold, 5 Mas. (C. C.) 414; Shippey *v.* Derrison, 5 Esp. 190; Evans *v.* Prothero, 1 De G., M. & G. 572; Howe *v.* Dewing, 2 Gray (Mass.) 476; Durrell *v.* Evans, 1 Hurlst. & C. 174; Thayer *v.* Luce, 22 Ohio St. 62. And see Dobell *v.* Hutchinson, 3 Ad. & E. 355; Sugden, Vend. & P. 114; Alford *v.* Wilson, 26 S. W. Rep. (Ky.) 539.

when properly evidenced, as by the admission in a writing of the party to be charged. It has therefore always been held that letters addressed to a third party, stating and affirming a contract, may be used against the writer, as a memorandum of it.[1] And for the same reason, an oral contract may be taken out of the statute by letters which admit the making of the contract by the writer, but in terms repudiate his liability.[2] An instrument intended to operate as of a higher nature, but insufficient for that purpose, as, for instance, a deed of land which is defective in not having an *habendum*, or a bond to convey land, signed after the obligatory part instead of at the foot, may be available as a simple memorandum.[3] An answer filed in a prior suit setting up an oral contract and not pleading the statute has been held a sufficient memorandum for the enforcement of the contract in a subsequent proceeding.[4]

§ 354 *b*. The question how far the contents of a deed of land, executed by a vendor but delivered in escrow only, may be resorted to in aid of a previous insufficient memorandum of

[1] Moore *v.* Hart, 1 Vern. 110; Ayliffe *v.* Tracy, 2 P. Wms. 65; Owen *v.* Thomas, 3 Myl. & K. 353; Gibson *v.* Holland, L. R. 1 C. P. 1; Fugate *v.* Hansford, 3 Litt. (Ky.) 262; Moss *v.* Atkinson, 44 Cal. 3; Spangler *v.* Danforth, 65 Ill. 152; Kleeman *v.* Collins, 9 Bush (Ky.) 460; Moore *v.* Mountcastle, 61 Mo. 424; Mizell *v.* Burnett, 4 Jones (N. C.) Law 249; Wood *v.* Davis, 82 Ill. 311. And see Cox *v.* Cox, Peck (Tenn.) 443; Kuhn *v.* Brown, 1 Hun (N. Y.) 244. A suggestion is apparently made to the contrary, though not acted upon, in Buck *v.* Pickwell, 27 Vt. 167; Clark *v.* Tucker, 2 Sand. (N. Y.) 157; Kinloch *v.* Savage, Speers (S. C.) Eq. 464; Wright *v.* Cobb, 5 Sneed (Tenn.) 143; Lee *v.* Cheney, 85 Tenn. 707; Cunningham *v.* Williams, 43 Mo. App. 629; First Nat. Bank of Plattsburg *v.* Sowles, 46 Fed. Rep. 731.

[2] Bailey *v.* Sweeting, 9 C. B. N. S. 843; Wilkinson *v.* Evans, L. R. 1 C. P. 407; Heideman *v.* Wolfstein, 12 Mo. App. 366. See Westmoreland *v.* Carson, 76 Texas 619.

[3] Reeves *v.* Pye, 1 Cranch (C. C.) 219; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144; Henry *v.* Root, 33 N. Y. 526; Henderson *v.* Beard, 51 Ark. 483; Cannon *v.* Handley, 72 Cal. 133; Popp *v.* Swanke, 68 Wisc. 364; Ryan *v.* United States, 136 U. S. 68. But see Luzader *v.* Richmond, 128 Ind. 344; Freeland *v.* Charnley, 80 Ind. 132.

[4] Jones *v.* Lloyd, 117 Ill. 597.

the contract, or to serve as a memorandum of a parol contract, has been much considered. It has been held that, if a person who has made a parol agreement to sell land, sign an instrument in the form of a conveyance of such land to the vendee, and deliver it in escrow, if such instrument contain the terms of the parol agreement, including the consideration, it is a sufficient compliance with the Statute of Frauds.[1] But this is opposed to the decided weight of authority.[2] With more show of reason it has been held that, considering the imperfect memorandum and the deed delivered in escrow as parts of the same transaction, the contents of the deed might be resorted to in order to help out the insufficient description in the memorandum.[3] But to this it is replied, with great force, that the escrow is not an operative instrument at all or for any purpose, for want of delivery, and therefore cannot form any element of a binding contract.[4]

§ 355. Whatever be the form of the memorandum, the statute requires that it be *signed*. Though it should be all written out with the party's own hand, there must still be a signature.[5] But if the names of the principals appear in such

[1] Cagger *v.* Lansing, 57 Barb. (N. Y.) 421; and see Campbell *v.* Thomas, 42 Wisc. 437. See also 3 Washburn on Real Property, 303.

[2] Parker *v.* Parker, 1 Gray (Mass.) 489; Overman *v.* Kerr, 17 Iowa 485; Freeland *v.* Charnley, 80 Ind. 132; Cannon *v.* Cannon, 26 N. J. Eq. 316; Johnston *v.* Jones, 85 Ala. 286. Cagger *v.* Lansing was reversed in 43 N. Y. 550. The statement in Washburn was pronounced in Freeland *v.* Charnley to be "radically wrong." In the opinion in that case the report of Campbell *v.* Thomas is critically examined, and it is shown that its effect is to leave the question open.

[3] Kopp *v.* Reiter, 146 Ill. 447; Jenkins *v.* Harrison, 66 Ala. 345; Work *v.* Cowhick, 81 Ill. 317; Wood *v.* Davis, 82 Ill. 311; Swain *v.* Burnette, 89 Cal. 564; Johnston *v.* Jones, 85 Ala. 286.

[4] Freeland *v.* Charnley, 80 Ind. 132. And see Doherty *v.* Hill, 144 Mass. 465.

[5] Bawdes *v.* Amhurst, Finch, Prec. in Ch. 402; Hawkins *v.* Holmes, 1 P. Wms. 770, and Ithel *v.* Potter, there cited; Selby *v.* Selby, 3 Meriv. 2; Hubert *v.* Moreau, 12 Moo. 216; Hubert *v.* Turner, 4 Scott, N. R. 486; Bailey *v.* Ogden, 3 Johns. (N. Y.) 399; Anderson *v.* Harrold, 10 Ohio 399; Barry *v.* Law, 1 Cranch (C. C.) 77; Wade *v.* City of Newbern, 77 N. C. 460; Rafferty *v.* Lougee, 63 N. H. 54; Andrews *v.* Babcock, 63 Conn. 109.

way as to amount to signature,[1] it is not necessary that the signature, or even the name, of *the agent* through whom the business is transacted should appear in the writing; at least this is so in cases of contracts made through brokers and auctioneers who are deemed to be the agents of both parties, and by virtue of their employment stand in such a relation to their principals that they can sign the names of the parties to a contract of sale effected through their agency.[2] Sealing does not appear ever to have been considered necessary under the fourth section.[3] Whether the language of the statute requiring the memorandum to be signed, will be satisfied by a seal without any writing, has never been decided. In the somewhat analogous case of the signature to a will, required by the statute, the question must be considered still open. It was said by a majority of the judges in the case of Lemayne *v.* Stanley, decided within four years after the enactment of the Statute of Frauds, that a party's sealing his will was a sufficient signature, for that "*signum* is no more than a mark, and sealing is a sufficient mark that this is his will."[4] Next, it is reported by Strange that Chief Justice Raymond, on an issue directed out of Chancery, ruled that sealing a will was a signing within the Statute of Frauds and Perjuries.[5] And still later, in the report of Atkyns, it is said of Lord Hardwicke that "sealing without signing, in presence of the witness, he seemed to think, would have been sufficient to make it a good will, but said it was a point proper to be determined at law."[6] A few years afterward the Exchequer barons condemned the opinion of the judges in Lemayne *v.*

[1] See §§ 357, 358, *post*.

[2] Coddington *v.* Goddard, 16 Gray (Mass.) 444.

[3] Wheeler *v.* Newton, Prec. in Ch. 16; s. c., more fully reported in 2 Eq. Cas. Ab. 44, c. 5; Worrall *v.* Munn, 5 N. Y. 229; Farris *v.* Martin, 10 Humph. (Tenn.) 495.

[4] Lemayne *v.* Stanley, 3 Lev. 1.

[5] Warneford *v.* Warneford, Stra. 764.

[6] Gryle *v.* Gryle, 2 Atk. 177. But see Grayson *v.* Atkinson, 2 Ves. Sr 454.

Stanley, considering it a strange doctrine, for that, "if it was so, it would be very easy for one person to forge any man's will by only forging the name of any two obscure persons dead, for he would have no occasion to forge the testator's hand;" and they said that "if the same thing should come in question again, they should not hold that sealing a will only, was a sufficient signing within the statute."[1] More lately, Lord Eldon, in the case of Wright *v.* Wakeford, alluding to the old doctrine that sealing was sufficient where the statute prescribed signing, declared that the contrary had been held for a long time, adding that "so far is sealing from being equivalent to signing, that it is determined, that sealing is not necessary."[2]

§ 355 *a*. A signature consisting of the *mark* of the party only would, it seems, be sufficient,[3] and a signature by initials has been held so.[4]

§ 356. A printed signature will also answer the requirements of the statute, if there be sufficient evidence of its adoption as such by the party to be charged. Thus where a trader who is in the habit of delivering printed bills of parcels to which his name is prefixed, delivers one containing the necessary particulars of the contract, it is sufficient.[5]

[1] Smith *v.* Evans, 1 Wils. 313.

[2] Wright *v.* Wakeford, 17 Ves. 459. With submission, however, it may be said to be quite obvious that although sealing may not be precisely equivalent to, it may be something higher and more solemn than, mere signature; so that the inference that it was insufficient would not follow from its being unnecessary. See also Morison *v.* Turnour, 18 Ves. 175. His Lordship refers to no cases in support of his remark.

[3] Selby *v.* Selby, 3 Meriv. 2; Schneider *v.* Norris, 2 Maule & S. 286, *per* Lord Ellenborough. See Hubert *v.* Moreau, 2 Car. & P. 528. And see the following cases holding the execution of a will by mark to be good: Wilson *v.* Beddard, 12 Sim. 28; Taylor *v.* Dening, 3 Nev. & P. 228; Jackson *v.* Van Dusen, 5 Johns. (N. Y.) 144; *In re* Field, 3 Curt. (Eccl.) 752.

[4] See § 362, *post*.

[5] Saunderson *v.* Jackson, 3 Esp. 180; Schneider *v.* Norris, 2 Maule & S. 286. And see Commonwealth *v.* Ray, 3 Gray (Mass.) 447; Lerned *v.* Wannemacher, 9 Allen (Mass.) 417.

In a case where the defendant's name as vendor was printed at the head of a bill of parcels, and the plaintiff's name as vendee was written in below in the defendant's handwriting, Lord Ellenborough held that the defendant had thus affirmed the printed name as his own; but remarked that if the case had rested merely on the printed name, unrecognized by, and not brought home to, the party, as being printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not have been trenching upon the statute to have admitted it.[1] There would seem to be no doubt that a man's stamping or impressing his name himself on the memorandum is a good signature.[2]

§ 357. In regard to the place of the signature, there is no restriction. It may be at the top, or in the body, of the memorandum as well as at the foot. It was held in a very early case that an instrument in a testator's handwriting, commencing "I, A. B., do make," etc., was sufficiently signed as a will;[3] and the same rule has been applied in many cases of memoranda of agreement commencing in the same way, or in the third person, as "Mr. A. B. proposes," etc.[4] But the name, beside being in his handwriting, must

[1] Schneider *v.* Norris, 2 Maule & S. 286; Drury *v.* Young, 58 Md. 546. Since the Revised Statutes of New York, requiring the memorandum to be "subscribed," it is held in that State that an actual manual subscription in writing is necessary, and that a printed signature is not sufficient. Vielie *v.* Osgood, 8 Barb. 130; Davis *v.* Shields, 26 Wend. 351.

[2] Pitts *v.* Beckett, 13 Mees. & W. 743. *Quære*, if this, done at the bottom of the instrument, would not satisfy the New York statute cited in the last note.

[3] Lemayne *v.* Stanley, 3 Lev. 1.

[4] Knight *v.* Crockford, 1 Esp. 188; Ogilvie *v.* Foljambe, 3 Meriv. 53; Morison *v.* Turnour, 18 Ves. 175; Propert *v.* Parker, 1 Russ. & M. 625; Western *v.* Russell, 3 Ves & B. 187; Penniman *v.* Hartshorn, 13 Mass. 87; Hawkins *v.* Chace, 19 Pick. (Mass.) 502; Yerby *v.* Grigsby, 9 Leigh (Va.) 387; Bleakley *v.* Smith, 11 Sim. 150; Holmes *v.* Mackrell, 3 C. B. N. S. 789. The New York Court of Appeals have decided (reversing the judgment of the Supreme Court), that since their Revised Statutes requiring the memorandum to be *subscribed*, the signature must be at the

always be inserted in such a manner as to authenticate the instrument as the act of the party executing it, or, in other words, to show the intention of the party to admit his liability upon the contract.[1] The mere insertion of his name in the body of an instrument, where it is applicable to a particular purpose, will not constitute a signature within the meaning of the statute.[2] And although it be so inserted as to control and direct the entire instrument, still the better opinion seems to be that its insertion must also be intended as a final signature, and that if it appear that the instrument was to be further executed, it will not be taken to have already been sufficiently signed. Such was the decision of the High Court of Delegates in a case of a will where both real and personal property were disposed of, and the testatrix signed and sealed it, a clause of attestation in the common form being subjoined, but no subscription of witnesses; and the will was found, at her death, wrapped in an envelope on which was written, "I sealed and signed my will to have it ready to be witnessed the first opportunity I could get proper persons for it;" it was held not well signed so as to pass even the personal property.[3] The same view has been taken by high authority in several cases arising upon the fourth section.[4] It was criticised by Lord Eldon, it is true,

foot. James *v.* Patten, 6 N. Y. 9; Traylor *v.* Cabanne, 8 Mo. App. 131; Coon *v.* Rigden, 4 Col. 275; Tingley *v.* Bellingham Bay Boon Co., 5 Wash. 644.

[1] See cases cited in last note; also Kronheim *v.* Johnson, 7 Ch. Div. 60. The Supreme Court of Maryland has repudiated this doctrine. Higdon *v.* Thomas, 1 Harr. & G. 139. The question is for the jury. Johnson *v.* Dodgson, 2 Mees. & W. 653.

[2] Stokes *v.* Moore, 1 Cox 219; Hubert *v.* Turner, 4 Scott N. R. 486, Cabot *v.* Haskins, 3 Pick. (Mass.) 95. But see Higdon *v.* Thomas, 1 Harr. & G. (Md.) 139; Coe *v.* Tough, 116 N. Y. 273.

[3] Walker *v.* Walker, 1 Meriv. 503.

[4] Hubert *v.* Turner, 4 Scott N. R. 486; Hawkins *v.* Chace, 19 Pick. (Mass.) 502; Barry *v.* Coombe, 1 Pet. (U. S.) 640. And see Parker *v.* Smith, 1 Coll. Ch. 608; McConnell *v.* Brillhart, 17 Ill. 354; Wise *v.* Ray, 3 Iowa 430; McMillen *v.* Terrell, 23 Ind. 163. Also, the valuable remarks of Mr. Fell, Merc. Guar. Appendix, No. V.

in Saunderson *v.* Jackson, where he said that if a man make a memorandum commencing, "I, A. B.," etc., it is held sufficient, though it is manifest he intends a further signature.[1] But it may be questioned whether this broad observation is justified by the authorities. Where instruments commencing in the first person have been taken to be well signed, without subsequent subscription, they generally appear to have been so attested, or accompanied by acts of the party so clearly showing that he regarded the instrument as complete, as to repel the presumption of an intention to make a further execution;[2] in cases of instruments commencing in the third person, as, "Mr. A. B. agrees," etc., such a presumption does not arise. Actual delivery of a memorandum of the former class as the agreement of the party, and perhaps the *res gestæ*, the circumstances attending the writing of it, would be taken into consideration to determine whether it was signed within the intent and meaning of the law.[3]

§ 358. In an early case in Massachusetts,[4] the memorandum was as follows: "*Hartshorn & Arnold, of Providence*, Dec. 13, 1813. I sold to the above gentlemen 39 bales upland cotton at 40 cents, — 60 days for approved security.

[1] Saunderson *v.* Jackson, 2 Bos. & P. 238.

[2] See the remark of L. C. B. Skinner, in Stokes *v.* Moore, 1 Cox 219. In Knight *v.* Crockford, 1 Esp. 188, the defendant drew up a paper in the first person, and the plaintiff, after approving of its terms, required the following to be added: "That the parties bound themselves to its performance under a penalty of £100;" and the defendant added it with his own hand, and it was signed by the plaintiff and attested by a witness; and the defendant, though he did not sign it, allowed the plaintiff to take it away; it was decided that the memorandum was binding upon the plaintiff. The decision seems to be amply justified upon the ground that the defendant, by his written addition to the instrument, recognized it as perfectly executed by him beforehand.

[3] Hawkins *v.* Chace, 19 Pick. (Mass.) 502; Evans *v.* Ashley, 8 Mo. 177. With further reference to the question of place of signature, see Sanborn *v.* Sanborn, 7 Gray (Mass.) 142; Schneider *v.* Norris, 2 Maule & S. 286; Johnson *v.* Dodgson, 2 Mees. & W. 653; Durrell *v.* Evans, 1 Hurlst. & C. 174.

[4] Penniman *v.* Hartshorn, 13 Mass. 87.

Silas Penniman. *Bill to be made out in the names of Hartshorn & Arnold, Warden & Billings, and Andrew Taylor.*" The words in italics were written by the defendant Hartshorn, the residue by the plaintiff; and it appeared (parol evidence being admitted for that purpose) that the plaintiff read the memorandum to Hartshorn. It was objected that it was not properly signed, the names of the defendants being above, and not below, the body of the paper. This objection the court overruled; but there was another point, not taken at the argument or noticed in the decision, which seems worthy of consideration. The paper was *actually* signed by Penniman, the plaintiff, and, from its whole structure, seems to have been intended for his signature; and this feature, on the principle stated in the preceding section, should ordinarily have deprived of its efficacy as a signature the insertion of the defendant's name above.[1] According to this case, therefore, it seems that the same paper, though adapted to the signature of one party only, may be signed by both; the one subscribing, and the other inserting his name elsewhere in the instrument, by way of recognition of the contract.[2] The words which follow the signature of Penniman are, in the present instance, particularly to be noticed, as conveying such recognition quite unequivocally.

§ 359. But it has been decided that a signature *as witness* may bind as principal the party signing; and this, certainly, is not easy to reconcile with the rule that a signature, to be valid, must be so placed as to authenticate the instrument as the act of such party. The doctrine has been strongly condemned by Lord Denman, C. J.,[3] but still appears to be tenable under such limitations as are presented in the instances where it was actually applied. It was first held

[1] Evans *v.* Ashley, 8 Mo. 177.

[2] See Bluck *v.* Gompertz, 7 Exch. 862; Knight *v.* Crockford, 1 Esp. 188; Johnson *v.* Dodgson, 2 Mees. & W. 653; Evans *v.* Hoare, L. R. 1 Q. B. D. 1892, 593.

[3] Gosbell *v.* Archer, 2 Ad. & E. 508. See Noakes *v.* Morey, 30 Ind. 103.

in Welford *v.* Bezely, where the defendant verbally promised to give the plaintiff £1,000 as a marriage portion, and, articles being drawn up to that effect and read over to her, she put her name to them in the place for the witness's signature; Sir Thomas Sewell, M. R., held it sufficiently signed by her as principal.[1] And afterward, in Coles *v.* Trecothick, an auctioneer who had authority to sell certain lots of land at private sale, told the owner that he had two confidential clerks through whom he transacted great part of his business, and who, in his absence, would enter into contracts, and the owner assented, and afterward the auctioneer contracted for the sale of one of the lots, and after he had left town, one of the clerks signed the memorandum thus: "Witness Evan Phillips for Mr. Smith, Agent for the Seller." Lord Eldon held the signature sufficient to bind the owner, and laid down the rule, that "where a party, or principal, or person to be bound, signs as, what he cannot be, witness, he cannot be understood to sign otherwise than as principal."[2] He adds that the signature of an agent, not a contracting party, as a witness, would not be sufficient, and this qualification appears to apply to the case before Lord Denman, where the signature (in the witness's place) was by one who was proved *aliunde* to be the clerk of the auctioneer, the principal, but did not on the face of the instrument appear to be or to represent the contracting party; whereas in Coles *v.* Trecothick that fact did appear.

§ 360. Notwithstanding the doctrine that the signature must be such as to authenticate the instrument, it has been held, in an early case in Massachusetts, that a signature in blank will suffice to bind the party to a guaranty afterward inserted over it by his agent, whose express authority to do so may be proved by parol.[3] The decision is briefly reported,

[1] Welford *v.* Bezely, 1 Wils. 118.

[2] Coles *v.* Trecothick, 9 Ves. 234. See Hill *v.* Johnston, 3 Ired. (N. C.) Eq. 432.

[3] Ulen *v.* Kittredge, 7 Mass. 233. See also Underwood *v.* Hossack, 38 Ill. 208; Blacknall *v.* Parish, 6 Jones (N. C.) Eq. 70. From the man-

and stands directly opposed to that of the Supreme Court of New Hampshire a few years later, where the reasons against the admission of such an exception are very forcibly stated. It is there urged that such a signature cannot be said to authenticate, or bind the party signing to an admission of what is afterward inserted; and the court say: "There is a material distinction between authorizing an agent to sign a contract already written, or make and sign an agreement, and authorizing an agent to reduce to writing a contract already made. Where an agent has been authorized to sign a contract reduced to writing, as soon as his authority and signature are proved, the writing becomes evidence of the terms of the contract. The authority of signature may be proved by parole. . . . So where an agent has been authorized to make a contract, and has reduced it to writing and signed it, when his authority and signature are proved, the writing itself becomes evidence of the contract, and although the principal may deny the authority and signature of the agent, he would not be permitted to introduce evidence to show that the contract made by the agent was different from the written contract. In both these cases the signature of the agent is an admission that the contents of the writing are true, and it is this circumstance that makes the writing evidence. But where an agent has been authorized to write over the signature of the principal a contract already made, it is not enough to prove the signature of the principal, and the authority of the agent to write a contract over it; this does not make the writing evidence of the contract, unless the contract is to be presumed to be anything the agent pleased to write. It would still be necessary to show that the agent had pursued his authority, and this could be done only by showing what the contract was, and comparing it with the writing." [1]

ner in which Ulen *v.* Kittredge was afterwards referred to in Packard *v.* Richardson, 17 Mass. 122, the court do not seem altogether to approve it.

[1] Hodgkins *v.* Bond, 1 N. H. 287. See also Jackson *v.* Titus, 2 Johns. (N. Y.) 430; *ante*, § 12; Wood *v.* Midgley, 5 De G., M. & G. 41; Ayres *v.* Probasco, 14 Kansas * 175.

§ 361. It is very reasonable, however, and has lately been decided in the Court of Exchequer, that words afterward introduced into a paper signed by a party, or any alteration in it, may be considered as authenticated by a signature already on the paper, if it be clear that they were meant to be so authenticated, and that the act of signing after the introduction of the words is not absolutely necessary. Indeed, the case where this was held (the circumstances of which were somewhat singular) went still further, and held the previous signature to authenticate the subsequent alteration, though the latter was made by the plaintiff himself, and not by the party signing. The declaration stated, that one O'Connell agreed with the plaintiff to buy certain wines, part for £200, and part for £150, and the defendant undertook to procure two bills, one for each of those sums, to be accepted by O'Connell on their being drawn by the plaintiff, and delivered to the defendant, and to see them paid at maturity. The breach alleged was that he did not see them paid. The evidence showed that the defendant's engagement, which was in writing, was that upon the plaintiff's handing him two drafts on O'Connell for £200 and £146 respectively, he would get them accepted by the defendant and see them paid. It also appeared that afterward, the true price of the second lot turning out to be £150 instead of £146, the bills were drawn for the correct amounts, and the defendant got them accepted and gave them to the plaintiff, and then wrote across the face of his guaranty the following in his own hand: "I have received *the* two drafts (one being for £150 instead of £146, there being an error in the invoice of £4), both accepted by Mr. O'Connell;" and the plaintiff signed this memorandum, but the defendant did not. It was held that the defendant's undertaking was rightly described as an undertaking to see the two bills of £200 and £150 respectively paid by O'Connell, and that the original signature covered and authenticated the subsequent correction, as to the amount of the smaller bill, within the Statute

of Frauds, although it was in form signed, not by the defendant, but by the plaintiff. The view taken by the Barons, who confessed some difficulty in coming to their conclusion, is very clearly stated by Mr. Baron Platt. He says: "Suppose that, after this instrument was signed, the defendant, with his own hand, had altered the £146 into £150; there could be no doubt that there would have been a sufficient contract within the statute, without re-signing the agreement. Then the effect of this memorandum, as it seems to me, is just the same as if the defendant had written upon the face of it, that 'a bill for £150 has been drawn instead of one for £146, there being an error as to the amount of the invoice price;' and then for the plaintiff to have written underneath, 'I have received the two above-mentioned bills.' That being in the handwriting of the defendant, on the face of the original agreement, seems to me to justify us in holding that the transaction operates as a signature within the Statute of Frauds." [1]

§ 362. A further question, not without difficulty, on this point of signature is, whether the *name* of the party must be actually signed to the instrument. In Selby *v.* Selby, Sir William Grant, M. R., held that a letter from a mother to her son, beginning with, "My dear Robert," and concluding with, "Your affectionate Mother," was not signed, so as to constitute a binding agreement on the part of the mother, within the intent of the Statute of Frauds. He said: "It is not enough that the party may be identified. He is required to sign; there may be in the instrument a very sufficient description to answer the purpose of identification, without a signing, that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name." [2] With submission to so high a judicial authority, it may be asked, whether such a conclusion as was borne by the letter before

[1] Bluck *v.* Gompertz, 7 Exch. 869, *note.*
[2] Selby *v.* Selby, 3 Meriv. 2.

him was not manifestly intended by the writer to be equivalent to the actual signature of her name; especially as the letter was sent to its address as a completed communication. In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence, which is admitted to apply to them, the signature is to be held valid.[1] There certainly seems to be some difficulty in distinguishing the cases.

§ 363. It has been often attempted to carry the point that where a memorandum is inserted by the plaintiff or his agent in the defendant's book, and at his request, the latter should be taken to have signed it; but the courts appear to have uniformly rejected such notion, and with manifest reason.[2] It is enough that there is evidence that the party sought to be charged upon the contract regarded it as concluded by him; the statute specifies actual signature as the proper proof of that fact.

§ 364. As regards more especially the manner of signing by an agent, it seems now well settled that the instrument, in order to bind the principal, need not be executed in his name, or as his act; but that it is sufficient if it appear that the party signing acts as agent in so doing, and with intent to bind the third party as his principal.[3]

§ 365. The requisition of the statute in the fourth section is that the memorandum be signed *by the party to be charged.* And it is now uniformly held that, under this clause, the

[1] Phillimore *v.* Barry, 1 Camp. 513; Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446; Barry *v.* Coombe, 1 Pet. (U. S.) 640; Sanborn *v.* Flagler, 9 Allen (Mass.) 474. See, however, Sweet *v.* Lee, 3 Man. & G. 452; Hubert *v.* Moreau, 2 Car. & P. 528.

[2] Champion *v.* Plummer, 5 Esp. 240; Graham *v.* Musson, 5 Bing. N. R. 603; Graham *v.* Fretwell, 3 Man. & G. 368; Barry *v.* Law, 1 Cranch (C. C.) 77; Newby *v.* Rogers, 40 Ind. 9; Groover *v.* Warfield, 50 Ga. 644.

[3] Kenworthy *v.* Schofield, 2 Barn. & C. 945; Wilson *v.* Hart, 7 Taunt. 295; Kelner *v.* Baxter, L. R. 2 C. P. 174; Dykers *v.* Townsend, 24 N. Y. 57; Williams *v.* Bacon, 2 Gray (Mass.) 387, *per* Merrick, J.; Sanborn *v.* Flagler, 9 Allen (Mass.) 474, *per* Hoar, J. But see Squier *v.* Norris, 1 Lans. (N. Y.) 282; Wheeler *v.* Walden, 17 Neb. 122.

signature of the defendant alone, or the party who is to be charged upon the agreement, is sufficient, although, as we shall see hereafter, it is necessary, in another view, that the plaintiff, or party who seeks to charge the defendant, be designated in the memorandum.[1] In the seventeenth section, relating to sales of goods, etc., the word *parties*, in the plural, is used, and this distinction was once urged in an early case in the Common Pleas,[2] but the court declined to take it;[3] and indeed, as we have remarked once or twice

[1] Laythoarp *v.* Bryant, 2 Bing. N. R. 735; Huddleston *v.* Briscoe, 11 Ves. 583; Hatton *v.* Gray, 2 Ch. Cas. 164; Seton *v.* Slade, 7 Ves. 265; Fowle *v.* Freeman, 9 Ves. 351; Schneider *v.* Norris, 2 Maule & S. 286; Allen *v.* Bennet, 3 Taunt. 169; Martin *v.* Mitchell, 2 Jac. & W. 426; Clason *v.* Bailey, 14 Johns. (N. Y.) 484; M'Crea *v.* Purmort, 16 Wend. (N. Y.) 460; Justice *v.* Lang, 42 N. Y. 493; Gage *v.* Jaqueth, 1 Lans. (N. Y.) 207; Penniman *v.* Hartshorn, 13 Mass. 87; Old Colony R. R. Co. *v.* Evans, 6 Gray (Mass.) 25; Shirley *v.* Shirley, 7 Blackf. (Ind.) 452; Barstow *v.* Gray, 3 Greenl. (Me.) 409; Douglass *v.* Spears, 2 Nott & M. (S. C.) 207; Marqueze *v.* Caldwell, 48 Miss. 23; Newby *v.* Rogers, 40 Ind. 9; Morin *v.* Martz, 13 Minn. 191; Reuss *v.* Picksley, L. R. 1 Ex. 342; Moore *v.* Powell, 25 S. W. Rep. (Tex.) 472; Slater *v.* Smith, 117 Mass. 95; Hodges *v.* Kowing, 58 Conn. 12; Oliver *v.* Alabama Gold Life Ins. Co., 82 Ala. 417; Moses *v.* McClain, 82 Ala. 370; Smith *v.* Jones, 66 Ga. 338; Love *v.* Welch, 97 N. C. 200; Putnam *v.* Dungan, 89 Cal. 231; Guthrie *v.* Anderson, 47 Kansas 383; Guthrie *v.* Anderson, 49 Kansas 416; Easton *v.* Montgomery, 90 Cal. 307; Gardels *v.* Kloke, 36 Neb. 493. See Winn *v.* Henry, 84 Ky. 48. But see Marcus *v.* Barnard, 4 Rob (N.Y.) 219. It has been held in Tennessee, that the memorandum of contract for the sale of an interest in land must be signed, in all cases, by the vendor. Frazer *v.* Ford, 2 Head 464. In Michigan a different rule prevails. Wilkinson *v.* Heavenrich, 58 Mich. 574.

[2] Allen *v.* Bennet, 3 Taunt. 169, *per* Shepherd, Serjt., *arguendo*. In Wisconsin the statute requires this. See Docter *v.* Hellberg, 65 Wisc. 415.

[3] See Stapp *v.* Lill, 1 Camp. 242. In New York, the Revised Statutes (see Appendix) provide that in contracts for the sale of land the vendor shall always sign. Coles *v.* Bowne, 10 Paige 526; McWhorter *v.* McMahan, 10 Paige 386; Champlain *v.* Parish, 11 Paige 405; National Fire Ins. Co. *v.* Loomis, 11 Paige 431; Worrall *v.* Munn, 5 N. Y. 229. It has been suggested that, possibly, the legislature of that State, by simply providing that the vendor shall sign, and being silent as to the purchaser, have left the law in such position that the latter may be bound by an agreement which he has not, though the former has, signed. Miller *v.* Pelletier, 4 Edw. Ch. 102.

before, it would be manifestly unsafe, even if it were possible with consistency, to base broad rules of interpretation upon mere literal variations in the language of different parts of an enactment so unsystematically put together as the Statute of Frauds and Perjuries. That the singular and plural of the word in question were intended to be taken in the same way seems, moreover, quite plain from the addition of the same words, "to be charged," after each; those words being, in the seventeenth section, merely redundant, if both parties must sign.

§ 366. It has been seriously doubted by a very eminent judge, whether an agreement, of which the memorandum was signed by one party only, should be enforced against the other in a court of equity; upon the ground that, if so, it would follow that the court would decree a specific performance when the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance.[1] Notwithstanding this doubt, however, the rule is firmly settled that in equity for obtaining a specific execution, as well as at law for recovering damages, the signature of the party who makes the engagement is all that the statute requires; and this is put upon the ground, in addition to the unqualified language of the statute itself, that the plaintiff by his act of filing the bill has made the remedy mutual.[2] But a more satisfactory

[1] Lawrenson *v.* Butler, 1 Schoales & L. 13, *per* Lord Redesdale. And see Armiger *v.* Clarke, Bunbury 111; Troughton *v.* Troughton, 1 Ves. Sr. 86; Parkhurst *v.* Van Cortlandt, 1 Johns. (N. Y.) Ch. 273; Benedict *v.* Lynch, 1 Johns. (N. Y.) Ch. 370.

[2] Hatton *v.* Gray, 2 Ch. Cas. 164; Coleman *v.* Upcot, 5 Vin. Ab. 528, pl. 17; Flight *v.* Bolland, 4 Russ. 298; Seton *v.* Slade, and Hunter *v.* Seton, 7 Ves. 265; Child *v.* Comber, 3 Swanst. 423, *note;* Bowen *v.* Morris, 2 Taunt. 374; Lord Ormond *v.* Anderson, 2 Ball & B. 363; Martin *v.* Mitchell, 2 Jac. & W. 413; Palmer *v.* Scott, 1 Russ. & M. 391; Sugden, Vend. & P. 112, 113; Ballard *v.* Walker, 3 Johns. (N. Y.) Cas. 60; Shirley *v.* Shirley, 7 Blackf. (Ind.) 452; Roget *v.* Merritt, 2 Caines (N. Y.) 117; Parrish *v.* Koons, 1 Pars. (Pa.) Eq. 79; Lowry

ground is that suggested by Story, viz.: "The agreement, although originally by parol, is now in part evidenced by writing under the signature of the party, which is a complete compliance with the terms of the statute."[1] In other words, written contracts not being within the purview of the statute, the question is as to the enforcement of an *oral* agreement, evidenced in writing. There are several New York cases in which it is treated as an open question, whether a memorandum signed by one party and delivered to and accepted by the other, as the statement of the agreement between them, might not be binding upon the latter.[2] In none of them, however, is it found necessary to pass upon it, nor is the reasoning given upon which the proposed rule would be sustained. With all due respect, we may be allowed to doubt whether, if applied, it would not be a dangerous relaxation of the provision of the law in this particular.

§ 367. The statute does not require the party's own signature to the memorandum, but allows it to be signed by "some other person thereunto by him lawfully authorized." It is held that a member of a corporation is a competent agent under this clause to sign for the corporation,[3] or a partner for his firm;[4] and, generally, little difficutly can arise as to who is qualified to act as such agent, the statute having imposed no disabilities in that respect beyond those existing at common law. One rule, however, has been settled, both under the fourth and seventeenth sections, that neither party can be the other's agent to bind him by signing the memo-

v. Mehaffy, 10 Watts (Pa.) 387; Clason *v.* Bailey, 14 Johns. (N. Y.) 484; Ives *v.* Hazard, 4 R. I. 14; Sams *v.* Fripp, 10 Rich. (S. C.) Eq. 447; Old Colony R. R. Co. *v.* Evans, 6 Gray (Mass.) 25; Mastin *v.* Grimes, 88 Mo. 478.

[1] Story Eq. Jur. § 755.

[2] Roget *v.* Merritt, 2 Caines 117; Gale *v.* Nixon, 6 Cow. 445; Reynolds *v.* Dunkirk & State Line R. R. Co., 17 Barb. 613. See Smith *v.* Theobald, 86 Ky. 141.

[3] Stoddert *v.* Vestry of Port Tobacco Parish, 2 Gill & J. (Md.) 227.

[4] Kyle *v.* Roberts, 6 Leigh (Va.) 495; Sanborn *v.* Flagler, 9 Allen (Mass.) 474.

randum.[1] And it makes no difference that the pretended agent has not himself any beneficial interest in the contract, but stands in a fiduciary relation to third persons, so long as he is, in a legal point of view, the real party to, and the proper one to sue upon, the contract.[2]

§ 368. One of the cases in which the rule that neither of the parties to the contract could be agent to sign for the other was applied, was Farebrother *v.* Simmons, decided in the Queen's Bench. There the action was on a memorandum made by an auctioneer, and was brought in the auctioneer's own name, and it was held that his entry was not evidence to take the case out of the statute.[3] In a later case, Bird *v.* Boulter, in the same court, the facts proved respecting the proceedings at the auction sale were somewhat peculiar. The auctioneer (who was the plaintiff, as in Farebrother *v.* Simmons) received the bids of the buyers, and repeated them aloud, and when the hammer fell, one Pitt, who attended for the purpose, called out the name of the purchaser, and, if the party assented, made an entry accordingly in the sale-book. In the case on trial, the auctioneer having named the defendant as purchaser of a lot of wheat which was knocked down to him, Pitt said to him, "Mr. Boulter, it is your wheat;" the defendant nodded, and Pitt made the entry in his sight, he being then within the distance of three yards. After verdict obtained for the plaintiff, it was urged upon a motion for nonsuit, that signature by the auctioneer's clerk was the same as signature by the auctioneer, and the rule insisted

[1] Wright *v.* Dannah, 2 Camp. 203; Farebrother *v.* Simmons, 5 Barn. & Ald. 333; Rayner *v.* Linthorne, 2 Car. & P. 124; Bailey *v* Ogden, 3 Johns. (N. Y.) 399 ; Boardman *v.* Spooner, 13 Allen (Mass.) 353; Sharman *v.* Brandt, L. R. 6 Q. B. 720; Adams *v.* Scales, 1 Baxt. (Tenn.) 337. See Murphy *v.* Boese, L. R. 10 Exch. 126. But see Snyder *v.* Wolford, 33 Minn. 175.

[2] Buckmaster *v.* Harrop, 13 Ves. 456; Smith *v.* Arnold, 5 Mason 414; Bent *v.* Cobb, 9 Gray (Mass.) 397.

[3] Farebrother *v.* Simmons, 5 Barn. & Ald. 333; Robinson *v.* Garth, 6 Ala. 204. But see Ennis *v.* Waller, 3 Blackf. (Ind.) 472; Johnson *v.* Buck, 35 N. J. L. 338.

upon that one of the contracting parties could not be agent for the other, and Farebrother *v.* Simmons cited, but the verdict was sustained.[1] The several judges, in their opinions, while fully admitting the authority of that case, strongly dwelt upon a distinction to the effect that, under the peculiar circumstances of the case before them, Pitt was not merely the auctioneer's clerk, but his agent for taking down the names and also the agent of the purchasers, whom they constituted such for the same purpose by acquiescing in his proceedings. But some of the judges placed their decision upon the further ground that the party who signed the memorandum was not the plaintiff *of record*. And this seems to distinguish the case satisfactorily from Farebrother *v.* Simmons, while it suggests an important consideration in connection with the rule laid down in that case. For though the entries at an auction sale should be really made by the mere clerk of the auctioneer, still, in this view, the auctioneer could read it in evidence upon an action brought by himself. If the auctioneer were in any just sense a party in *interest*, or a party *to the contract*, it would be hard to admit the signature of his clerk as competent evidence, his own not being so. But there is a clear difference between the invalidity of a memorandum as signed by one who had no power to sign it, and its inadmissibility in evidence as signed by a party to the record. The latter objection is of a technical character, not affecting the writing, but only the remedy upon it. Where that is escaped by the form of the memorandum, there seems no good reason why the party entitled to sue upon it should not recover. The Court of Appeals of Virginia have fully upheld this distinction, in a case where they allowed an action by a sheriff upon a memorandum signed by his deputy.[2]

[1] Bird *v.* Boulter, 4 Barn. & Ad. 443. And see Murphy *v.* Boese, L. R. 10 Exch. 126.

[2] Brent *v.* Green, 6 Leigh 16, overruling Carrington *v.* Anderson, 5 Munf. 32. The doctrine stated in the text is also supported by the recent case of Bent *v.* Cobb, 9 Gray (Mass.) 397. That was an action of

§ 369. The same person may act as agent for both parties. This is shown by the familiar cases of entries by brokers and auctioneers, in addition to which others will be referred to presently. In regard to brokers, we have already had occasion to see that they bind both the buyer and the seller, between whom they complete a bargain, by their bought and sold notes or by their written book entry.[1] And in England

contract by guardians on a sale by auction of land of their ward, pursuant to a license of the judge of probate. One of the plaintiffs was auctioneer at the sale, and made a memorandum thereof in writing and signed it with his own name, as "guardian and auctioneer;" but the defendants refused to accept a deed or pay the price. It was held that the memorandum was insufficient, as being not signed by the defendant or by "any person by him thereunto lawfully authorized." Bigelow, J., delivering the opinion of the court, says: "The chief reason in support of the rule, that an auctioneer, acting solely as such, may be the agent of both parties to bind them by his memorandum, is that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails when he is the party to the contract and the party in interest also. The purpose of the statute was, that a contract should not be binding unless it was in writing and signed by the party himself to be charged thereby, or by some third person in his behalf, not a party to the contract, who might impartially note its contents. Nor can it make any difference, as to the power of the vendor to make a memorandum binding on the vendee, that the sale is made by the former in a representative or fiduciary character, as an executor, administrator, guardian, or trustee. He is still the party to the contract, the price is to be paid to him, he is to deal with the purchase-money; his interest and bias would naturally be in favor of those whom he represented, and, what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to those of the vendee. He would stand in a relation which would necessarily disqualify him from acting as agent of both parties. We do not mean to say that a contract would not be binding, made by an auctioneer, where, from the form in which it was written, an action might be brought to enforce the contract in his name. In such case, if he was only the nominal party to the contract and the record, not being himself the vendor, and having no interest in the sale except as auctioneer, his memorandum might be sufficient to bind both parties to the contract. But we confine our opinion to the case at bar, where the auctioneer was the vendor and a party having an interest, greater or less, in the contract, as well as a party to it in terms." See also Sanborn *v.* Chamberlin, 101 Mass. 409.

[1] *Ante*, § 351.

where the broker is a known legal public officer, governed by statute, and cannot act as principal without subjecting himself to a penalty, those who deal with him are bound to find out who his principals are; whereas, in this country, he must be known by the party dealing with him to be a broker, and acting in that capacity and not as principal, or his memorandum will not bind such party to the bargain with his employer.[1] As to auctioneers, though the rule was once denied, and its expediency has not always been admitted, it is fully settled by authority that where at public sale, either of real estate or of goods and chattels, the auctioneer knocks down the property to the highest bidder, he becomes his agent, as he was previously that of the seller, and acts as such in entering the buyer's name as buyer in his sales-book, or upon his catalogue.[2] The rule applies equally to public officers not professedly auctioneers, but selling property at public auction: such as sheriffs and their deputies,[3] administrators,[4] commissioners acting under order of

[1] Shaw *v.* Finney, 13 Met. (Mass.) 453. See Davis *v.* Shields, 26 Wend. (N. Y.) 341.

[2] Simon *v.* Motivos *or* Metivier, 1 W. Bl. 599; 3 Burr. 1921; Hinde *v.* Whitehouse, 7 East 558; Coles *v.* Trecothick, 9 Ves. 234; Buckmaster *v.* Harrop, 7 Ves. 341; Blagden *v.* Bradbear, 12 Ves. 466; Stansfield *v.* Johnson, 1 Esp. 101; Walker *v.* Constable, 1 Bos. & P. 306; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kenworthy *v.* Schofield, 2 Barn. & C. 945; Morton *v.* Dean, 13 Met. (Mass.) 385; Gill *v.* Bicknell, 2 Cush. (Mass.) 355; M'Comb *v.* Wright, 4 Johns. (N. Y.) Ch. 659; Cleaves *v.* Foss, 4 Greenl. (Me.) 1; Inhabitants of Alna *v.* Plummer, 4 Greenl. (Me.) 258; Singstack *v.* Harding, 4 Harr. & J. (Md.) 186; Smith *v.* Jones, 7 Leigh (Va.) 165; Adams *v.* M'Millan, 7 Port. (Ala.) 73; Gill *v.* Hewett, 7 Bush (Ky.) 10; Gordon *v.* Sims, 2 McCord (S. C.) Ch. 164; Endicott *v.* Penny, 14 Smedes & M. (Miss.) 144; Anderson *v.* Chick, Bail. (S. C.) Eq. 118; Parton *v.* Crofts, 16 C. B. N. S. 11; Jackens *v.* Nicolson, 70 Ga. 198; Ansley *v.* Green, 82 Ga. 181; Springer *v.* Kleinsorge, 83 Mo. 152.

[3] Christie *v.* Simpson, 1 Rich. (S. C.) Law, 407; Endicott *v.* Penny, 14 Smedes & M. (Miss.) 144; Robinson *v.* Garth, 6 Ala. 204; Ennis *v.* Waller, 3 Blackf. (Ind.) 472; Brent *v.* Green, 6 Leigh (Va.) 16; Carrington *v.* Anderson, 5 Munf. (Va.) 32; Jones *v.* Kolsomo Association, 77 Ind. 340; White *v.* Farley, 81 Ala. 563.

[4] Smith *v.* Arnold, 5 Mas. (C. C.) 414.

court, land commissioners,[2] etc. It seems, however, that the powers of an auctioneer, in this particular, are confined to such persons as act, either professionally or by authority, in that capacity; and do not extend to a mere private agent of the vendor, assuming to sell property at auction.[3] Nor is a commission merchant regarded as either auctioneer or broker, so as to enable him to bind the buyer of goods by his memorandum.[4] In regard to the clerk of an auctioneer, writing down the name of the buyer under his principal's direction, there has been much conflict of opinion; but the preponderance of the later authorities is in favor of regarding him in such cases as clothed with the same powers as his master, the auctioneer.[5] It has been decided that the rule did not cover the clerk of a broker,[6] but even this seems now to be open to question.[7] It may be doubted whether there is any sound analogy between auctioneers' and brokers' clerks, in this particular. In the case of the former, the authority to

[1] Jenkins *v.* Hogg, 2 Tread. (S. C.) 821; Gordon *v.* Sims, 2 McCord, (S. C.) Ch. 151; Hutton *v.* Williams, 35 Ala. 503.

[2] Hart *v.* Woods, 7 Blackf. (Ind) 568. The clerk, entering a release of record in open court, by verbal direction, is considered the agent of both parties for so doing. Boykin *v.* Smith, 3 Munf. (Va.) 102; Huston *v.* Cincinnati & Zanesville R. R. Co., 21 Ohio St. 235.

[3] Walker *v.* Herring, 21 Grat. (Va.) 678; Anderson *v.* Chick, Bail. (S. C.) Eq. 118; Adams *v.* Scales, 1 Baxt (Tenn.) 337.

[4] Sewall *v.* Fitch, 8 Cow. (N. Y.) 215; Batturs *v.* Sellers, 5 Harr. & J. (Md.) 117.

[5] Coles *v.* Trecothick, 9 Ves. 234; Gosbell *v.* Archer, 2 Ad. & E. 500; Bird *v.* Boulter, 4 Barn. & Ad. 443; Henderson *v.* Barnewall, 1 Young & J. 387; Gill *v.* Bicknell, 2 Cush. (Mass.) 355; Smith *v.* Jones, 7 Leigh (Va.) 165; First Baptist Church of Ithaca *v.* Bigelow, 16 Wend. (N. Y.) 28; Frost *v.* Hill, 3 Wend. (N. Y.) 386; Doty *v.* Wilder, 15 Ill. 407; Inhabitants of Alna *v.* Plummer, 4 Greenl. (Me.) 258; Adams *v.* M'Millan, 7 Port. (Ala.) 73; Brent *v.* Green, 6 Leigh (Va.) 16; Hart *v.* Woods, 7 Blackf. (Ind.) 568. *Contra*, Meadows *v.* Meadows, 3 McCord (S. C.) Law, 458; Entz *v.* Mills, 1 McMull. (S. C.) Law, 453; Christie *v.* Simpson, 1 Rich. (S. C.) Law 407. But see Peirce *v.* Corf, L. R. 9 Q. B. 210; Springer *v* Kleinsorge, 83 Mo. 152.

[6] Henderson *v.* Barnewall, 1 Young & J. 387; Johnson *v.* Mulry, 4 Rob. (N. Y.) 401. And see Boardman *v.* Spooner, 13 Allen (Mass.) 353.

[7] Townend *v.* Drakeford, 1 Carr. & K. 20.

sign for the buyer is, by his bidding and allowing the property to be knocked down, openly given to the auctioneer, who on his part merely uses the hand of his clerk immediately and under his own eye and direction, to insert the name in the sales-book or catalogue. In the case of the latter, there seems to be a plain delegation of authority by the broker, such as the law does not allow in cases of agencies of that description.[1]

§ 370. The agent must be "thereunto lawfully authorized." It has been held that one who was acting at the time as legal attorney for the party in whose behalf he signed the memorandum, did not necessarily have power so to sign, by virtue of that relation.[2] At the same time, the court by their emphatic reference to the words "*thereunto* lawfully authorized," might seem to imply that the agency for the purpose of signing an agreement under the statute, must in all cases be specifically given; but, in the absence of any decision to that effect, we may well doubt whether a general agency sufficiently comprehensive in its terms would not be sufficient; though, of course, even an actual signature by the agent in such a case might be controlled by circumstances showing that it was not intended by the principals that it should bind them; as in Hubert *v.* Turner,[3] where the instrument was signed by an agent whose general authority embraced his so doing, but the signature was followed by the words, "as witness our hands," on which the court held the defendants intended themselves to sign, and that they were not bound. Of course, the power must embrace the act of signature; if it extend only to settling the terms of the contract,[4] or tak-

[1] Story on Agency, §§ 13, 109; Blore *v.* Sutton, 3 Meriv. 237.

[2] Bushell *v.* Beavan, 1 Bing. N. R. 103.

[3] Hubert *v.* Turner, 4 Scott N. R. 486; and see Smith *v.* Webster, 3 Ch. Div. 49.

[4] Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60; Rice *v.* Rawlings, Meigs (Tenn.) 496; Edwards *v.* Johnson, 3 Houst. (Del.) 435; Taylor *v.* Merrill, 55 Ill. 52; Rutenberg *v.* Main, 47 Cal. 213.

ing notes, or writing out the agreement,[1] or doing anything else merely preliminary to the signature, it is insufficient.

§ 370 *a*. The agent for signing may, in all the cases enumerated in the fourth section, be appointed without writing,[2] unless, of course, the memorandum to be signed is to be sealed also, in which case the power must be conferred by an instrument of equal dignity.[3] The authority in cases of

[1] Earl of Glengal *v.* Barnard, 1 Keen 769. See also Dixon *v.* Broomfield, 2 Chitty 205.

[2] Coles *v.* Trecothick, 9 Ves. 250; Mortlock *v.* Buller, 10 Ves. 292; Clinan *v.* Cooke, 1 Schoales & L. 22; Graham *v.* Musson, 5 Bing. N. R. 603; Rucker *v.* Cammeyer, 1 Esp. 105; Wright *v.* Dannah, 2 Camp. 203; Greene *v.* Cramer, 2 Con. & L. 54; Inhabitants of Alna *v.* Plummer, 4 Greenl. (Me.) 258; McWhorter *v.* McMahan, 10 Paige (N. Y.) 386; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107; Worrall *v.* Munn, 5 N. Y. 229; Hawkins *v.* Chace, 19 Pick. (Mass.) 502; Ulen *v.* Kittredge, 7 Mass. 232; Yerby *v.* Grigsby, 9 Leigh (Va.) 387; Johnson *v.* McGruder, 15 Mo. 365; Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436; Coleman *v.* Bailey, 4 Bibb (Ky.) 297; Curtis *v.* Blair, 4 Cush. (Miss.) 309; Johnson *v.* Dodge, 17 Ill. 433; Roehl *v.* Haumesser, 114 Ind. 311; Neaves *v.* Mining Co, 90 N.C. 412; Campbell *v.* Fetterman's Heirs, 20 W. Va. 398; Hargrove *v.* Adcock, 111 N. C. 166. But see Caperton *v.* Gray, 4 Yerg. (Tenn.) 563. Mr. Fell (Merc. Guar. Appendix No. VI.) argues very forcibly against the propriety of this rule, but admits it to be settled. Of course this rule does not hold where a particular Statute of Frauds specifies that the appointment shall be in writing. See Linn *v.* McLean, 85 Ala. 250; Hall *v.* Wallace, 88 Cal. 434; Edwards *v.* Tyler, 141 Ill. 454; Albertson *v.* Ashton, 102 Ill. 50; Chappell *v.* McKnight, 108 Ill. 570, in which case a ratification must also be in writing in the absence of some element of equitable estoppel. Kozel *v.* Dearlove, 144 Ill. 23; Hawkins *v.* McGroarty, 110 Mo. 546; Salfield *v.* Sutter County Co., 94 Cal. 546. But such a statute does not affect the right of a real estate agent, who has no written authority to sell a parcel of land, to recover a commission. Gerhart *v.* Peck, 42 Mo. App. 644.

[3] Blood *v.* Hardy, 15 Maine (3 Shep.) 61; *ante*, § 14. In a late case of appeal from the Exchequer, the plaintiff, a hop-grower, having sent samples of hops for sale to N., his factor, with instructions as to price, the defendants, who were hop-merchants, called at N.'s office to see the samples, but could not agree as to price. Subsequently, on the same day, the defendants met the plaintiff, and, after a conversation about the hops, they went with him to N.'s office, and there in N.'s presence, made the plaintiff an offer for the hops, which, in the presence and hearing of the defendants, the plaintiff asked N. whether he should accept, and was

contracts, however, may be given subsequently to the signature, by parol ratification of it.[1]

§ 370 *b*. One, who as agent has made an oral contract may not, after his agency has terminated, bind his former principal by reducing the contract or a memorandum of it to writing.[2]

§ 370 *c*. In many of the American States the Statute of Frauds does not in terms provide that the memorandum may be signed by *the agent* of the party to be charged. The language of the *Tenterden Act* is that there shall be writing "signed by the party to be charged," and it is said that, because of that explicit provision, the writing under the Tenterden Act cannot be signed by the agent of the party to be charged.[3] By the same reasoning, the memorandum of agreement under 29 Car. II. cannot be signed by the agent unless that statute as re-enacted expressly so provides. The question does not appear to have been raised in any of the American States where that statute as re-enacted fails to provide explicitly for signature by agent.

advised by him so to do. Thereupon N. wrote out in his book a sale-note in duplicate, each part of which was dated "19th October." At the request of the defendants, the date in each part was, with the plaintiff's consent, altered by N. to the "20th October," in order to give defendant a longer time for payment, and then one part so altered was torn from the book by N. and handed to defendants, who took it away and kept it. In an action by plaintiffs against defendants for not accepting the hops, it was held, reversing the decision of the Court of Exchequer (4 L. T. N.S. 255). that there was evidence for the jury of the intention of the parties that N. should be their agent for the purpose of making a written record of a contract binding upon both of them. Durrell *v.* Evans, 1 Hurlst. & C. 174. But see Murphy *v.* Boese, L. R. 10 Exch. 126.

[1] Maclean *v.* Dunn, 4 Bing. 722; Gosbell *v.* Archer, 2 Ad. & E. 500; Sugden, Vend. & P. 134; Holland *v.* Hoyt, 14 Mich. 238 : Hankins *v.* Baker, 46 N. Y. 666; Fitzmaurice *v.* Bayley, 6 El. & B. 868; Heffron *v.* Armsby, 61 Mich. 505; Swisshelm *v.* Swissvale Laundry Co., 95 Pa. St. 367; Tynan *v.* Dulling, 25 S. W. Rep. (Tex.) 465.

[2] Elliot *v.* Barrett, 144 Mass. 256.

[3] Nevada Bank *v.* Portland National Bank, 59 Fed. Rep. 342; citing Hyde *v.* Johnson, 3 Scott 289; Clark *v.* Alexander, 8 Scott N. R. 147; Williams *v.* Mason, 28 Law T. (N. S.) 232.

CHAPTER XVIII.

THE CONTENTS OF THE MEMORANDUM.

§ 371. HAVING in the last chapter inquired of what the memorandum required by the statute may or must consist, we come now to the question, *what the memorandum must contain.* Upon this the general rule is that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.[1] It is proposed in the present chapter to consider in detail the several matters which it has been determined the writing must contain; observing, as we proceed, the degree of certainty or fulness required in their statement, and the extent to which parol evidence is admitted to aid in the interpretation of the memorandum; and also to inquire how far the statute allows effect to oral agreements of parties made subsequently to the execution of a memorandum, for the purpose of modifying or discharging the contract.

§ 371 *a.* In the first place, assuming that there is a completed oral contract, the note or memorandum must contain the terms of the contract as completed.[2] If it tend to falsify

[1] 2 Kent, Com. 511; Abeel *v.* Radcliff, 13 Johns. (N. Y.) 297, and compare Holms *v.* Johnston, 12 Heisk. (Tenn.) 155. The ordinary incidents only of an agreement, as, for instance, the usual covenants and other ingredients of a complete transfer in the case of a sale of land, will be supplied by the court. Barry *v.* Coombe, 1 Pet. (U. S.) 640; Symes *v.* Hutley, 2 L. T. N. S. 509; Scarritt *v.* St. John's M. E. Church, 7 Mo. App. 174; Sheley *v.* Whitman, 67 Mich. 397; Messmore *v.* Cunningham, 78 Mich. 623; Frazer *v.* Howe, 106 Ill. 563.

[2] Whaley *v.* Bagnel, 1 Bro. P. C. 345; Gaunt *v.* Hill, 1 Stark. 10; Stratford *v.* Bosworth, 2 Ves. & B. 341; Roberts *v.* Tucker, 3 Exch. 632;

the contract sued upon, as by showing conditions and stipulations that have not been made to appear,[1] or if, referring to the contract, it annex conditions to it or otherwise make variations in it,[2] it has no effect as a memorandum of the contract alleged. In short, where the plaintiff proposes to rely upon a written admission of the contract, with the defendant's signature, he must produce such a writing as will tend to prove and not disprove the existence of the contract alleged,[3] as a concluded agreement between the parties.

§ 372. It is necessary that the memorandum should show who are the parties to the contract by some reference sufficient to identify them. Upon this point the leading case is Champion *v.* Plummer, decided in the Exchequer Chamber in 1805, where the memorandum was duly signed by the vendor, defendant, but the name of the purchaser nowhere appeared. The plaintiff being nonsuited below, a rule was obtained to set the nonsuit aside and for a new trial. Sir James Mansfield, C. J., said: "How can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person, as well as to the plaintiff. There cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser

Barry *v.* Coombe, 1 Pet. (U. S.) 640; Ballingall *v.* Bradley, 16 Ill. 373; Hazard *v.* Day, 14 Allen (Mass.) 487; Oakman *v.* Rogers, 120 Mass. 214; Winn *v.* Bull, 7 Ch. Div. 29; Rossiter *v.* Miller, L. R. 3 H. L. 1124.

[1] Cooper *v.* Smith, 15 East 103; Richards *v.* Porter, 6 Barn. & C. 437. See Archer *v.* Baynes, 5 Exch. 625; Elliot *v.* Barrett, 144 Mass. 256.

[2] Smith *v.* Surman, 9 Barn. & C. 561; Nesham *v.* Selby, L. R. 7 Ch. App. 406; Williams *v.* Bacon, 2 Gray (Mass.) 387; Jenness *v.* Mt. Hope Iron Co., 53 Me. 20; Hastings *v.* Webber, 142 Mass. 232.

[3] See Bailey *v.* Sweeting, 30 L. J. C. P. 152, *per* Erle, C. J.; Rossiter *v.* Miller, 5 Ch. Div. 648; McLean *v.* Nicoll, 7 Jur. N. S. 999, *per* Martin, B.; Williams *v.* Morris, 95 U. S. 444; Munday *v.* Asprey, L. R. 13 Ch. D. 855; Williams *v.* Smith, 37 N. E. Rep. (Mass.) 455; Coe *v.* Tough, 116 N. Y. 273; Hussey *v.* Horne-Payne, 4 App. Cas. 311. This principle seems not to have been observed in Linsley *v.* Tibbals, 40 Conn. 522.

as well as the seller, in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain." And, the rest of the court concurring, the rule was discharged.[1] On the same principle, it is held that a memorandum of guaranty is not sufficient unless the party whose debt is to be answered for is disclosed therein.[2]

§ 373. This principle has been uniformly assented to by the courts both of England and this country.[3] As to the identification, it is sufficient if, upon the memorandum, in addition to its having the signature of the party to be charged, it appear with reasonable certainty who the other party to the contract is.[4] Thus, a letter addressed by the defendant to, or received by him from, the plaintiff, and sufficiently connected with the other writings relied upon as constituting the memorandum, may be evidence to show the

[1] Champion *v.* Plummer, 1 Bos. & P. N. R. 252. See McElroy *v.* Seery, 61 Md. 389; Brown *v.* Whipple, 58 N. H. 229; Coombs *v.* Wilkes, L. R. 3 Ch. D. 1891, 77; Lincoln *v.* Erie Preserving Co., 132 Mass. 129.

[2] Williams *v.* Lake, 2 El. & E. 349.

[3] Jacob *v.* Kirk, 2 Moo. & R. 221; Wheeler *v.* Collier, Moo. & M. 123; Allen *v.* Bennet, 3 Taunt. 169; Waterman *v.* Meigs, 4 Cush. (Mass.) 497; Nichols *v.* Johnson, 10 Conn. 192; Sherburne *v.* Shaw, 1 N. H. 157; Webster *v.* Ela, 5 N. H. 540; Farwell *v.* Lowther, 18 Ill. 252; Sheid *v.* Stamps, 2 Sneed (Tenn.) 172. A promise in writing, signed, to pay one unnamed who shall furnish goods to the writer, or to a third person, will become a binding contract with any one, whosoever he may be, who shall accept the promise *in writing* and furnish the goods. Williams *v.* Byrnes, 8 L. T. N. S. 69. And see Griffin *v.* Rembert, 2 S. C. 410; Mentz *v.* Newwitter, 122 N. Y. 491; O'Sullivan *v.* Overton, 56 Conn. 102.

[4] Grafton v. Cummings, 99 U. S. 100; Thornton *v.* Kelly, 11 R. I. 498; Gowen *v.* Klous, 101 Mass. 449. See Jones *v.* Dow, 142 Mass. 130. Upon this point there has been some variance in later English decisions, as to what is sufficient certainty of designation. See Sale *v.* Lambert, L. R. 18 Eq. 1; Potter *v.* Duffield, L. R. 18 Eq. 4; Commins *v.* Scott, L. R. 20 Eq. 11; Beer *v.* London & Paris Hotel Co., L. R. 20 Eq. 412; Rossiter *v.* Miller, 5 Ch. D. 648, on appeal L. R. 3 H. L. 1124; Catling *v.* King, 5 Ch. D. 660; Thomas *v.* Brown, 1 Q. B. Div. 714; Jarrett *v.* Hunter, L. R. 34 Ch. D. 182; McGovern *v.* Hern, 153 Mass. 308; Lewis *v.* Wood, 153 Mass. 321; Lash *v.* Parlin, 78 Mo. 39.

plaintiff to be a party to the contract.[1] And the fact that the person to whom such a letter was addressed was the agent of the plaintiff, and received it in that character, may be proved by parol evidence, to show the plaintiff to be the real promisee.[2] Where the particulars of an auction sale, upon which the memorandum charging the purchaser was indorsed, stated that the sale was "by order of Mr. W. Laythoarp, the proprietor," this was held a sufficient indication of the plaintiff.[3] And in a case where an order for goods was written and signed by the seller's agent in a book belonging to the buyer, Mansfield, C. J., said, if it were "a regular order-book, and supposing that the person to whom it belonged, the place in which it was kept, and the purpose for which it was employed were consonant, it would be no great stretch to say, this was a ground for inferring that these entries were made by the authority of the owner of the book, for the purpose of evidencing the sale;" but there was other evidence in the case that the plaintiff was the buyer.[4]

[1] Jacob *v.* Kirk, 2 Moo. & R. 221; Allen *v.* Bennet, 3 Taunt. 169; Williams *v.* Jordan, 6 Ch. Div. 517. And see *ante*, § 347.

[2] Bateman *v.* Phillips, 15 East 272. And see Williams *v.* Bacon, 2 Gray (Mass.) 387; Thayer *v.* Luce, 22 Ohio St. 62; Walsh *v.* Barton, 24 Ohio St. 28; Beer *v.* London & Paris Hotel Co., L. R. 20 Eq. 412. But where a letter of credit was addressed by mistake to John and Joseph, and delivered to John and Jeremiah, it was held that John and Jeremiah could not sustain an action upon it for goods furnished by them to the bearer on the strength of it; for there was no ambiguity, patent or latent, in the case, nor any fraud upon the plaintiffs, nor (as they had observed the misdirection and taken the risk of its materiality) any mistake on their part. Grant *v.* Naylor, 4 Cranch (U. S.) 224; Huntington *v.* Knox, 7 Cush. 371; Briggs *v.* Partridge, 64 N. Y. 357; Neaves *v.* Mining Co., 90 N. C. 412; Higgins *v.* Senior, 8 M. & W. 834; Mantz *v.* McGuire, 52 Mo. App. 136; Kelley *v.* Thuey, 102 Mo. 529. But see Clampet *v.* Bells, 39 Minn. 272; Jarrett *v.* Hunter, L. R. 34 Ch. D. 182.

[3] Laythoarp *v.* Bryant, 2 Bing. N. R. 735.

[4] Allen *v.* Bennet, 3 Taunt. 169. Where the names of the plaintiffs (vendors) appeared upon the titlepage of their order-book in which the defendant's order was written, and signed by him, it was held sufficient in Sarl *v.* Bourdillon, 1 C. B. N. S. 188. See also Newell *v.* Radford, L. R. 3 C. P. 52; Harvey *v.* Stevens, 43 Vt. 653.

§ 374. It has been said that the mere appearance of the plaintiff's name in the memorandum is not sufficient, if it does not appear as that of the promisee, or party to whom the defendant is bound, and that such character cannot be affixed by parol evidence to an otherwise ambiguous insertion of the name.[1] This point, among others, was expressly held by Mr. Justice Kent, in an action on the following memorandum: "J. Ogden & Co. Bailey & Bogart. Brown, 12½; White, 16¼, 60 and 90 days. Debenture part pay;" one of his objections to its sufficiency being that no person could ascertain from it which of the parties was buyer and which was seller.[2]

§ 375. A decision of much consideration by the Supreme Court of the United States, however, seems to stand opposed to this rule.[3] The memorandum there relied upon was as follows: "Sept. 19, W. W. Goddard, 12 mos. 300 bales. S. F. drills, 7¼. 100 cases blue do., 8¾. Credit to commence," etc., and signed "R. M. M.; W. W. G." The former initials appeared by parol evidence to be those of the agent of the plaintiff. In the opinion delivered on behalf of the majority of the court, in favor of the sufficiency of the memorandum, no attention appears to be paid to the uncertainty upon the face of the writing as to who was buyer and who was seller in the transaction; a point which Mr. Justice Curtis, in his dissenting opinion, urges with great force of reasoning and a full citation of the authorities.

§ 375 *a*. In an English case,[4] the names of both parties appeared in the memorandum, but it did not show which was buyer and which was seller. The full court sustained the

[1] Champion *v.* Plummer, 1 Bos. & P. N. R. 252; Sherburne *v.* Shaw, 1 N. H. 157; Nichols *v.* Johnson, 10 Conn. 192; Osborn *v.* Phelps, 19 Conn. 63.

[2] Bailey *v.* Ogden, 3 Johns. (N. Y.) 399. See also Vandenbergh *v.* Spooner, L. R. 1 Exch. 316; Breckinridge *v.* Crocker, 78 Cal. 529.

[3] Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446. See Grafton *v.* Cummings, 99 U. S. 100; Wills *v.* Ross, 77 Ind. 1.

[4] Newell *v.* Radford, L. R. 3 C. P. 52.

admission of parol evidence to show the occupation of each party, in aid of the interpretation of the memorandum in this respect. In the case from the Supreme Court of the United States cited in the preceding section, evidence was admitted, of the fact that a bill of parcels detailing the purchases was made out and sent to the purchaser, and accepted as such by him, and this was allowed on the ground that it would throw light on the ambiguities of the memorandum.[1] From these cases, it seems that the later authorities allow the introduction of parol evidence in this case, as in others, to apply the writing relied on, as one made with reference to and in recognition of the contract sued on.[2]

§ 376. The memorandum must also contain the express stipulations of the contract. Thus, it must contain the *price* agreed to be paid for property sold where the contract contained a stipulation as to price,[3] and when the memorandum

[1] *Ante*, § 350.

[2] Harvey *v.* Stevens, 43 Vt. 653; Mann *v.* Higgins, 83 Cal. 66; Breckinridge *v.* Crocker, 78 Cal. 529. But see Grafton *v.* Cummings, 99 U. S. 100; Lee *v.* Hills, 66 Ind. 474; Clampet *v.* Bells, 39 Minn. 272.

[3] Blagden *v.* Bradbear, 12 Ves. 466; Clerk *v.* Wright, 1 Atk. 12; Bromley *v.* Jefferies, 2 Vern. 415; Elmore *v.* Kingscote, 5 Barn. & C. 583; Ide *v.* Stanton, 15 Vt. 685; Norris *v.* Blair, 39 Ind. 90; McElroy *v.* Buck, 35 Mich. 434; Williams *v.* Morris, 95 U. S. 444; Smith *v.* Arnold, 5 Mas. (C. C.) 414; Buck *v.* Pickwell, 27 Vt. 157; Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21; M'Farson's Appeal, 11 Pa. St. 503; Soles *v.* Hickman, 20 Pa. St. 180; Kay *v.* Curd, 6 B. Mon. (Ky.) 100; Parker *v.* Bodley, 4 Bibb (Ky.) 102; Ellis *v.* Deadman, 4 Bibb. (Ky.) 466; Kinloch *v.* Savage, Speers (S. C.) Eq. 470; Goodman *v.* Griffiths, 1 Hurlst. & N. 574; Powell *v.* Lovegrove, 8 De G., M. & G. 357; Wright *v.* Cobb, 5 Sneed (Tenn.) 143; Farwell *v.* Lowther, 18 Ill. 252; Sheid *v.* Stamps, 2 Sneed (Tenn.) 172; Ives *v.* Hazard, 4 R. I. 14; Webster *v.* Brown, 67 Mich. 328; Hanson *v.* Marsh, 40 Minn. 1; Phillips *v.* Adams, 70 Ala. 373; Grace *v.* Denison, 114 Mass. 16. The records of a corporation, showing the plaintiff's appointment as their engineer, to serve a year from a future day, have been held sufficient for the plaintiff's recovery of the compensation agreed, although the record did not show that compensation. Chase *v.* City of Lowell, 7 Gray (Mass.) 33. In Carroll *v.* Powell, 48 Ala. 298, it was held that the memorandum of a sale of land at public auction must state whether the sale was for cash or on credit; but see Lewis *v.* Wells, 50 Ala. 198.

states one price, no recovery can be had if it be shown that the parties had really agreed for another; for the true contract is, as to one of its essential elements, left unsupported, the memorandum being shown to be not an accurate statement of the contract which the parties made.[1]

§ 377. If no price is named by the parties, the memorandum may be silent in that respect. If the property was sold for what it was reasonably worth, that fact need not be stated in the memorandum. In Acebal *v.* Levy, in the Court of Common Pleas, Tindal, C. J., in the course of the opinion which he delivered for the court, expressed a doubt whether this would be so in the case of *executory* contracts of sale, *i. e.*, contracts of sale and delivery where the property is still in the possession and control of the vendor.[2] But in Hoadly *v.* McLaine, a few months later in the same court, the very question was presented, and Chief Justice Tindal concurred in the decision that even in the case of an executory contract, where no price was named in the contract, none need be named in the memorandum.[3]

§ 378. It is obvious that the statute will be satisfied by a statement as to what the parties stipulated was the price to be paid, although they mentioned no specific sum; as, for instance, if the agreement is to pay a price to be settled by arbitration,[4] or to pay the same for which the property had been previously purchased.[5] It has been held that an order

[1] Kennedy *v.* Gramling, 33 S. C. 367.

[2] Acebal *v.* Levy, 10 Bing. 376.

[3] Hoadly *v.* M'Laine, 10 Bing. 482, cited as law by Wilde, C. J., in Valpy *v.* Gibson, 4 C. B. 837. In Johnson *v.* Ronald, 4 Munf. (Va.) 77, the rule as to price seems to have been overlooked, for the court admitted evidence that a certain price had been agreed upon, and then received as sufficient a memorandum that was silent on the subject. The rule that the memorandum must state the price as one of the essential terms of a contract of sale seems to be not recognized in Missouri. Ellis *v.* Bray, 79 Mo. 227, and cases cited. So in North Carolina, see Thornburg *v.* Masten, 88 N. C. 293.

[4] Cooth *v.* Jackson, 6 Ves. 12; Brown *v.* Bellows, 4 Pick. (Mass.) 178; Norton *v.* Gale, 95 Ill. 533.

[5] Atwood *v.* Cobb, 16 Pick. (Mass.) 227.

for goods "on moderate terms" sufficiently expressed the amount to be paid;[1] that being the stipulation made by the parties.

§ 379. Where the memorandum itself states that the price has been paid or received, the amount need not be set forth; as in such case the price is not a part of the contract to be performed.[2]

§ 380. For further illustration of the rule that the memorandum must sufficiently state the price agreed, attention may be directed to a class of cases where evidence was admitted of trade usages or customs, to show that abbreviated and apparently ambiguous statements of price had a recognized meaning in the trade, and were consequently a sufficient statement of the price agreed to be paid. Thus, where a sold-note purported to be of "18 pockets of hops at 100*s.*," parol evidence was admitted to show that the 100*s.* was understood in the trade to mean the price per cwt.[3] And so with the various ambiguities of this nature presenting themselves in brief notes of mercantile contracts, which are generally composed, to use the language of a learned judge, in "a sort of mercantile short-hand, made up of few and short expressions."[4]

§ 381. The rule that the memorandum of a contract of sale must exhibit the price agreed to be paid, is not quite coextensive with the proposition which we shall presently have to examine, that every memorandum under the fourth section must exhibit the consideration on which the engagement of the party to be charged is founded. In Egerton *v.*

[1] Ashcroft *v.* Morrin, 4 Man. & G. 450. But see Ashcroft *v.* Butterworth, 136 Mass. 511.

[2] Fugate *v.* Hansford, 3 Litt. (Ky.) 262; Holman *v.* Bank of Norfolk, 12 Ala. 369.

[3] Spicer *v.* Cooper, 1 Q. B. 424. See Salmon Falls Mfg. Co. *v.* Goddard, 14 How (U. S.) 446; Heideman *v.* Wolfstein, 12 Mo. App. 366.

[4] Parke, B., in Marshall *v.* Lynn, 6 Mees. & W. 118. But see North *v.* Mendel, 73 Ga. 400; Mohr *v.* Dillon, 80 Ga. 572; Wilson *v.* Coleman, 81 Ga. 297; Ansley *v.* Green, 82 Ga. 181.

Mathews, the memorandum sued upon was of a contract for the purchase of a quantity of cotton, and expressed that the defendants agreed to give the plaintiff "19*d.* per lb. for 30 bales of Smyrna cotton," etc.; and the objection was taken on behalf of the defendants, that no consideration for their promise appeared in the memorandum. At the trial the plaintiff was nonsuited; but, on a motion for setting aside the nonsuit, the attention of the judges was called to the difference of phraseology between the fourth and seventeenth sections, the one using the word "bargain," and the other the word "agreement," and it would appear that their decision granting the motion was in some measure based upon that difference; taking the view that the force of the former word did not, like that of the latter, require the statement of the consideration.[1] Subsequently, in the case of Saunders *v.* Wakefield, where the action was on a written guaranty, and the question was whether it was sufficient without having the consideration apparent on its face, all the judges concurred that it was not; but Mr. Justice Bayley, in illustration of his position, went on to make this remark: "I find, too, that the word 'agreement' in this clause is coupled with 'contracts of marriage and for the sale of land;' now, in those cases, it is clear that the consideration must be stated. For it would be a very insufficient agreement to say, 'I agree to sell A. B. my lands,' without specifying the terms or the price."[2]

§ 381 *a.* The statement of the price in the memorandum of a contract of sale is not always to be regarded in the same light as the statement of the consideration of the contract. When an action is brought upon a contract within the statute, the memorandum must contain some designation of the parties contracting and the terms of the contract; which last, in the case of a contract of sale, would include the price, if any had been stipulated. It need not contain or state any

[1] Egerton *v.* Mathews, 6 East, 307.

[2] Saunders *v.* Wakefield, 4 Barn. & Ald. 601.

promise to perform or allegation of performance, although such promise or performance constitutes the only consideration for the engagement upon which the defendant is sought to be charged. In Egerton *v.* Mathews, for example, it did not appear in the memorandum, whether or not the plaintiffs ever had delivered, or agreed to deliver, any cotton, yet delivery, or a promise to deliver, was evidently the only consideration for the defendant's promise to pay. The decision of Egerton *v.* Mathews was certainly correct, because all the terms of the bargain were there presented in the writing; not because the word "bargain" imports a consideration any less than the word "agreement." On the other hand, as Mr. Justice Bayley says, "it would be a very insufficient agreement to say 'I agree to sell A. B. my lands,' without specifying the terms or the price," because the price, which is an element of the sale, is not stated; and not because a memorandum of an agreement to do a thing must necessarily show the motive or inducement for making it.

§ 381 *b*. The question whether the statement of *price* may be omitted from a memorandum of sale of land, under the rule (in those States where it is the rule) that the *consideration* of a contract within the Statute of Frauds need not be expressed, has been recently considered by the Supreme Court of Massachusetts.[1] The action was by the purchaser and upon a memorandum which failed to state clearly the amount of the price he was to pay. The decision, by a majority of the court, was that the purchaser could recover. In terms, it turned upon the construction of a section of the Massachusetts Statute of Frauds, explicitly enacting that the consideration of the contract need not be expressed in the memorandum.[2] This section, it was agreed, was inserted in the Massachusetts statute for the purpose of adopting and confirming the judgment of the court in Packard *v.*

[1] Hayes *v.* Jackson, 159 Mass. 451.

[2] Mass. Public Statutes, chap. 78, sec. 2; re enacting Mass. Rev. Stat., chap. 74, sec. 2.

Richardson,[1] declining to follow Wain *v.* Warlters. But it was inserted after an enumeration of contracts covered by the Statute of Frauds, expressly including contracts for the sale of land, and was in terms that "the consideration of *any such* promise, contract, or agreement, need not be set forth or expressed in the writing," etc.

The majority opinion said, "the language of the section is general, and should be read as no doubt it was meant." The minority insisted that it should be construed so as to give effect to the intention of the revisers of the statutes, which was to adopt and confirm the judgment in Packard *v.* Richardson, declining to follow Wain *v.* Warlters; and that as those were cases of guaranties, unilateral contracts, the section should not be made to apply to other than unilateral contracts. Their opinion, by Field, C. J., says: "When the whole contract or promise of the defendant is to do a certain thing, and this is an absolute promise, resting upon a consideration which has been executed, there is some reason in saying that the memorandum signed by the defendant need not contain the consideration or inducement of the contract or promise. But in a contract executory on both sides, where the promises are mutual, and each is the consideration of the other, the promises are conditional, and one party agrees to perform his part of the contract only on condition that the other will perform his part, and it cannot be known what the promise of the one is without knowing the express or implied promise of the other. . . . If a mere acknowledgment in writing by the vendor that he has agreed to convey specific land to the vendee, on terms which are not expressed, is sufficient to satisfy the Statute of Frauds, then it is open to the vendee to prove by oral testimony the price to be paid, and all the other terms of the contract to be performed by him, and the statute will no longer prevent frauds and perjuries. . . . The decision of the court seems to me in great part to nullify the statute." There is no answer to this

[1] 17 Mass. 122.

reasoning, in the absence of the special provision that the consideration need not be expressed in the case of *any* of the contracts named, including contracts for land. And the dissenting opinion recites numerous cases where, notwithstanding the presence of such a special provision, it has been held that all the material terms and conditions of a sale of land must appear in the memorandum.

§ 382. In cases of sales, *credit* stipulated is an essential term of the contract, and must appear in the memorandum. Such appears to be the established rule in actions at law,[1] though it seems it is not so strictly applied in suits in equity for a specific execution of the contract. Where an advertisement of land for sale at auction stated that it was to be on a credit, and the auctioneer's entry at the time of sale made no allusion to the credit, and the proprietor, at the expiration of the time alleged by the defendant as having been really allowed, brought a bill to compel a specific execution of the purchase, the Court of Appeals of Virginia made a decree accordingly. Brockenborough, J., remarked that the defendant, by the memorandum of sale, had bound himself to pay in cash; and although that memorandum did not state the truth as to the time of payment, yet the bill did, and the defendant could not object; but that if the plaintiff had claimed specific execution at cash, the defendant might have resisted on the ground of the credit really agreed to be given.[2] In the absence of any evidence that credit was to be allowed, the memorandum may be silent in that respect, and a sale for cash will be presumed.[3] And it seems to be in no case material that it should appear

[1] Morton *v.* Dean, 13 Met. (Mass.) 385; Davis *v.* Shields, 26 Wend. (N. Y.) 341; M'Farson's Appeal, 11 Pa. St. 503; Soles *v.* Hickman, 20 Pa. St. 180; Buck *v.* Pickwell, 27 Vt. 157; Ellis *v.* Deadman, 4 Bibb (Ky.) 466; Parker *v.* Bodley, 4 Bibb (Ky.) 102; Elfe *v.* Gadsden, 2 Rich (S. C.) Law 37; Wright *v.* Weeks, 3 Bosw. (N. Y.) 372.

[2] Smith *v.* Jones, 7 Leigh 165.

[3] Valpy *v.* Gibson, 4 C. B. 837; Fessenden *v.* Mussey, 11 Cush. (Mass.) 127.

in the writing whether the payment on time is to be with interest.[1]

§ 383. In a case in the Supreme Court of the United States, already repeatedly referred to in this chapter, the memorandum was: "Credit to commence when ship sails, not after Dec. 1st," and the court held the time of credit to be sufficiently expressed, although there was no evidence what ship was referred to.[2] See the dissenting opinion of Mr. Justice Curtis, in which he exhibits very clearly the difficulties attending this and other points in the decision of the majority of the court.

§ 384. The memorandum need not stipulate any time or place for the delivery of goods sold, or for the performance of any other contract, in the absence of such stipulation in the contract.[3] But where time is stipulated, then it is in the nature of a condition, which goes to the essence of the contract and must appear in the memorandum.[4] And so with a warranty of quality in case of a sale of goods,[5] provided, it would seem, that the warranty is a condition of the contract of sale, and not an independent agreement.[6] The general rule is that the memorandum must contain all the material terms of the contract.[7]

[1] Atwood *v.* Cobb, 16 Pick. (Mass.) 227; Neufville *v.* Stuart, 1 Hill (S. C.) Eq. 159.

[2] Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446.

[3] Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446; Kriete *v.* Myer, 61 Md. 558.

[4] Davis *v.* Shields, 26 Wend. (N. Y.) 341. On error, reversing the decision of the Supreme Court, 24 Wend. 322. See also First Baptist Church of Ithaca *v.* Bigelow, 16 Wend. 28; Gault *v.* Stormont, 51 Mich. 636; Smith *v.* Shell, 82 Mo. 215; Newburger *v.* Adams, 92 Ky. 26.

[5] Peltier *v.* Collins, 3 Wend. (N. Y.) 459; Smith *v.* Dallas, 35 Ind. 255; Newbery *v.* Wall, 65 N. Y. 484.

[6] Langdell, Select Cases on Sales, 1033. Compare the agreement in Sarl *v.* Bourdillon, 26 L. J. C. P. 80, as to the mode of payment, which, according to Jervis, C. J., "was not intended to be a part of the contract."

[7] M'Lean *v.* Nicoll, 7 Jur. N. S. 999; Boardman *v.* Spooner, 13 Allen, 353; Gardner *v.* Hazelton, 121 Mass. 494; Gwathney *v.* Cason, 74 N. C.

§ 385. It must, of course, appear from the memorandum, what is the subject-matter of the defendant's engagement. Property which is purported to be bargained for, must be so described that it may be identified;[1] and in the case of an

5; Linn Boyd Co. *v.* Terrell, 13 Bush (Ky.) 463; Bacon *v.* Eccles, 43 Wisc. 227; Williams *v.* Morris, 95 U. S. 444; Jervis *v.* Berridge, L. R. 8 Ch. App. 351; May *v.* Ward, 134 Mass. 127; Eckman *v.* Brash, 20 Fla. 763; Davis *v.* Pollock, 36 S. C. 544; Reid *v.* Kenworthy, 25 Kansas * 701; Fry *v.* Platt, 32 Kansas 62; Dickson *v.* Lambert, 98 Ind. 487; Shipman *v.* Campbell, 79 Mich. 82; George *v.* Conhaim, 38 Minn. 338; Drake *v.* Seaman, 97 N. Y. 230; Webster *v.* Clark, 60 N. H. 36; Eppich *v.* Clifford, 6 Col. 493; Mims *v.* Chandler, 21 S. C. 480; Ringer *v.* Holtzclaw, 112 Mo. 519; Bauman *v.* Marristee Co., 94 Mich. 363; Lester *v.* Heidt, 86 Ga. 226; Rineer *v.* Collins, 156 Pa. St. 343; Nelson *v.* Shelby Mfg. & Imp. Co., 96 Ala. 515. Whether, as was held in Cherry *v.* Long, Phil. (N. C.) Law 466, an auctioneer's memorandum which omits the terms of sale, can be helped by the advertisement, without producing it, but taking it for granted that it "contained the terms of sale, as is usual in such cases," *quære*. See Riley *v.* Farnsworth, 116 Mass. 223.

[1] Clinan *v.* Cooke, 1 Schoales & L. 22; Lindsay *v.* Lynch, 2 Schoales & L. 1; Harnett *v.* Yeilding, 2 Schoales & L. 549 (in regard to the case of Allan *v.* Bower, 3 Bro. C. C. 149, see the remarks of Lord Redesdale, in Clinan *v.* Cooke, *supra*); Barry *v.* Coombe, 1 Pet. (U. S.) 640; Church of the Advent *v.* Farrow, 7 Rich. (S. C.) Eq. 378; Carmack *v.* Masterson, 3 Stew. & P. (Ala.) 411; Pipkin *v.* James, 1 Humph. (Tenn.) 325; Kay *v.* Curd, 6 B. Mon. (Ky.) 100; Baldwin *v.* Kerlin, 46 Ind. 426; Scanlan *v.* Geddes, 112 Mass. 15; Meadows *v.* Meadows, 3 McCord (S. C.) Law 458; Ferguson *v.* Staver, 33 Pa. St. 411; Ives *v.* Armstrong, 5 R. I. 567; Force *v.* Dutcher, 18 N. J. Eq. 401; Montacute *v.* Maxwell, 1 P. Wms. 618; Fisher *v.* Kuhn, 54 Miss. 480; White *v.* Motley, 4 Baxt. (Tenn.) 544; Williams *v.* Morris, 95 U. S. 444; Ryan *v.* Davis, 5 Montana 505; Fortescue *v.* Crawford, 105 N. C. 29; Humbert *v.* Brisbane, 25 S. C. 506; Sherer *v.* Trowbridge, 135 Mass. 500; Voorheis *v.* Eiting, 22 S. W. Rep. (Ky.) 80; Lowe *v.* Harris, 17 S. E. Rep. (N. C.) 539; Andrew *v.* Babcock, 26 Atl. Rep. (Conn.) 715; Fox *v.* Courtney, 111 Mo. 147; Weil *v.* Willard, 55 Mo. App. 376; Crockett *v.* Green, 3 Del. Ch. 466; Tewksbury *v.* Howard, 37 N. E. Rep. (Ind.) 355; Watt *v.* Wisconsin Co., 63 Iowa, 730; Slater *v.* Smith, 117 Mass. 96; Scarritt *v.* St. Johns M. E. Church, 7 Mo. App. 174; Schroeder *v.* Taaffe, 11 Mo. App. 267; Whaley *v.* Hinchman, 22 Mo. App. 483; Pulse *v.* Miller, 81 Ind. 190; Beekman *v.* Fletcher, 48 Mich. 555; Tice *v.* Freeman, 30 Minn. 389; Pierson *v.* Ballard, 32 Minn. 263; Quinn *v.* Champagne, 38 Minn. 322; Mellon *v.* Davison, 123 Pa. St. 298; Patrick *v.* Sears, 19 Fla. 856; Winn *v.* Henry, 84 Ky. 48.

agreement for a lease, the term for which the lease is to be given must appear in the writing, and cannot be supplied by parol evidence.[1] But the subject-matter may in any case be identified by reference to an external standard, and need not be in terms explained.[2] Thus to describe it as the vendor's right in a particular estate,[3] or as the property which the vendor had at a previous time purchased from another party,[4] is sufficient. And 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 such third person to the plaintiff, without further description.[5] Where the memorandum described the land as the estate owned by the seller on a certain street, and it appeared that he owned two estates on that street, to either of which the description might apply, the memorandum was held insufficient.[6]

[1] Clinan *v.* Cooke, 1 Schoales & L. 22; Abeel *v.* Radcliff, 13 Johns. (N. Y.) 297; Hodges *v.* Howard, 5 R. I. 149; Fitzmaurice *v.* Bayley, 9 H. L. C. 79; Hurley *v.* Brown, 98 Mass. 545; Parker *v.* Tainter, 123 Mass. 185; Riley *v.* Williams, 123 Mass. 506; Clarke *v.* Fuller, 16 C. B. N. S. 24; Farwell *v.* Mather, 10 Allen (Mass.) 322; Marshall *v.* Berridge L. R. 19 Ch. D. 233.

[2] Springer *v.* Kleinsorge, 83 Mo. 152. See § 346 b., *ante*.

[3] Nichols *v.* Johnson, 10 Conn. 192; Phillips *v.* Hooker, Phil. (N. C.) Eq. 193; Lente *v.* Clarke, 22 Fla. 515; Mfg. Co. *v.* Hendricks, 106 N. C. 485. See MacLin *v.* Haywood, 90 Tenn. 195; Ballon *v.* Sherwood, 32 Neb. 666.

[4] Atwood *v.* Cobb, 16 Pick. (Mass.) 227. And see Tallman *v.* Franklin, 14 N. Y. 584; Simmons *v.* Spruill, 3 Jones (N. C.) Eq. 9; Hurley *v.* Brown, 98 Mass. 545; Whelan *v.* Sullivan, 102 Mass. 204; Grace *v.* Denison. 114 Mass. 16; Mead *v.* Parker, 115 Mass. 413; Horsey *v.* Graham, L. R. 5 C. P. 9; Owen *v.* Thomas, 3 Mylne & K. 353; Baumann *v.* James, L. R. 3 Ch. App. 508; McMurray *v.* Spicer, L. R. 5 Eq. 527. But see Holmes *v.* Evans, 48 Miss. 247; Johnson *v.* Kellogg, 7 Heisk. (Tenn.) 262; White *v.* Core, 20 W. Va. 272; Springer *v.* Kleinsorge, 83 Mo. 152; Henderson *v.* Perkins, 21 S. W. Rep. (Ky.) 1035. See Parks *v.* People's Bank, 31 Mo. App. 12. And see Phillips *v.* Swank, 120 Pa St. 76; Shardlow *v.* Cotterell, L. R. 20 Ch. D. 90. But see Nippolt *v.* Kammon. 39 Minn. 372; Horton *v.* Wollner, 71 Ala. 452.

[5] Bateman *v.* Phillips, 15 East 272. See also Sale *v.* Darragh, 2 Hilton (N. Y.) 184; Hall *v.* Soule, 11 Mich. 494.

[6] Doherty *v.* Hill, 144 Mass. 465.

§ 386. But the question which is by far the most difficult presented in the present branch of our subject, and which has perhaps more engaged the attention of courts, and provoked a more marked conflict of judicial opinion than any other arising upon any part of the Statute of Frauds, is, whether the note or memorandum in writing must show *the consideration* upon which the defendant's promise is founded.

§ 387. This question first arose in the case of Wain *v.* Warlters, decided in the Queen's Bench in 1804. The declaration alleged in substance that the plaintiffs, being the indorsees and holders of a bill of exchange for £56, drawn upon and accepted by one Hall, which was then due and unpaid, and being about to sue the drawee and acceptor thereon, the defendant, upon a certain day, in consideration of the premises and that the plaintiffs would forbear to proceed with their suit, undertook and promised to pay the plaintiffs, by half-past four o'clock on that day, £56 and the expenses which had been incurred by them on said bill. At the trial before Lord Ellenborough, the plaintiffs produced in evidence a writing, signed by the defendant, in these words: "Messrs. Wain & Co., I will engage to pay you by ½ past 4 this day fifty-six pounds and expenses on bill that amount on Hall. (Signed) Jno. Warlters, and dated, No. 2, Cornhill, April 30th, 1803." The defendant having objected that, although his promise was in writing, the consideration of it was not in writing, and that the Statute of Frauds required both to appear in the memorandum, Lord Ellenborough nonsuited the plaintiffs; a rule *nisi* was obtained for setting this nonsuit aside and for a new trial. Upon argument, all the judges concurred in discharging the rule. Lord Ellenborough first referred with approbation to the remark of Comyns, L. C. B., that "an agreement is *aggregatio mentium*, viz., where two or more minds are united in a thing done or to be done; a mutual assent to do a thing; and it ought to be so certain and complete that each party

may have an action upon it;"[1] and then proceeded to say: "The question is, whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect; the more so when it is considered by whom that statute is said to have been drawn, by Lord Hale, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special *promise;* but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause, but still in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce

[1] Com. Dig. tit. Agreement, A. 1.

the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain. . . . The word *agreement* is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word *agreement* in the statute, which appears to be most apt and proper to express that which the policy of the law seems to require, and finding no case in which the proper meaning of it has been relaxed, the best construction which we can make of the clause is to give its proper and legal meaning to every word of it." Grose, J.: "What is required to be in writing . . . is the *agreement* (not the promise, as mentioned in the first part of the clause), or some *note or memorandum of the agreement.* Now the *agreement* is that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing.* If it were only necessary to show what *one* of them was to do, it would be sufficient to state the *promise* made by the defendant who was to be charged upon it. But if we were to adopt this construction it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent. For without the parol evidence the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the *agreement,* by which must be understood

the *whole agreement* should be in writing." Lawrence, J.: "From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration I agree with my Lord and my Brothers upon their construction of it. If the question had arisen merely upon the first part of the clause, I conceive that it would only have been necessary that the *promise* should have been stated in writing; but it goes on to direct that no person shall be charged on such *promise*, unless the *agreement*, or some *note or memorandum thereof*, that is, *of the agreement*, be in writing; which shows that the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing." Le Blanc, J.: "If there be a distinction between *agreement* and *promise*, I think that we must take it that *agreement* includes *the consideration* for the promise as well as *the promise* itself: and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, 'unless *the promise* or *agreement* upon which the action is brought, or some note or memorandum thereof, shall be in writing.' But not having so done, I think we must adhere to the strict interpretation of the word *agreement*, which means the *consideration* for which as well as the *promise* by which the party binds himself." [1]

§ 388. Within a few years after the determination of this case, it was several times disapproved by Lord Eldon, par-

[1] Wain *v.* Warlters, 5 East 10.

ticularly in Gardom, *ex parte*, where he said that until it was decided, he "had always taken the law to be clear that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear upon the face of the writing."[1] But it was never overruled, and afterward, the same point being directly presented to the judges of the Queen's Bench, it was unanimously affirmed.[2] From that time the doctrine of Wain *v.* Warlters appears to have been accepted as, beyond question, the English law upon this point.[3]

§ 389. The case of Egerton *v.* Mathews, decided in the year following Wain *v.* Warlters, and by the same bench, requires especial notice; because upon it much of the opposition in this country to the doctrine of Wain *v.* Warlters is found to rest. The facts in that case have been recited on a previous page,[4] where we saw that it arose upon a bargain for the purchase of goods under the seventeenth section; and that the memorandum produced described the goods purchased and stated the price to be paid. An objection on the ground of Wain *v.* Warlters was made to the court and over-

[1] Gardom, *ex parte*, 15 Ves. 288; Minet, *ex parte*, 14 Ves. 190. See also Boehm *v.* Campbell, 8 Taunt. 679.

[2] Saunders *v.* Wakefield, 4 Barn. & Ald. 595.

[3] Lyon *v.* Lamb, in the Exchequer of Pleas, 1807, reported in Fell on Merc. Guar. Appendix, No. III.; Jenkins *v.* Reynolds, 3 Brod. & B. 14; Morley *v.* Boothby, 3 Bing. 107; Hawes *v.* Armstrong, 1 Bing. N. R. 767; Cole *v.* Dyer, 1 Cromp. & J. 461; James *v.* Williams, 5 Barn. & Ad. 1109; Clancy *v.* Piggott, 2 Ad. & E. 473; Raikes *v.* Todd, 8 Ad. & E. 846; Sweet *v.* Lee, 3 Man. & G. 452; Bainbridge *v.* Wade, 16 Q. B. 89. By 19 & 20 Vict. c. 97, the Mercantile Law Amendment Act, it is provided that "No special promise . . . to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, *by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.*"

[4] *Ante*, § 381.

ruled; the judges recognizing that case, but discriminating between the requisitions of the fourth section and those of the seventeenth, in respect to the statement of the consideration. Lord Ellenborough observed that the words of the statute were satisfied, if there was some note or memorandum of the bargain signed by the parties to be charged by such contract; and that this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it was all that the statute required. Mr. Justice Lawrence said: "The case of Wain *v.* Warlters proceeded on this, that in order to charge one man with the debt of another, the *agreement* must be in writing; which word *agreement* we considered as properly including the *consideration* moving to, as well as the *promise* by, the party to be so charged; and that the statute meant to require that the whole agreement, including both should be in writing."[1] But, notwithstanding these remarks, it is obvious that the case did not turn upon the absence of the word "agreement," from the seventeenth section. In point of fact, the consideration for the defendant's engagement to pay, namely, the delivery to be made to him of certain goods, did appear upon the face of the memorandum;[2] although the plaintiff had not himself signed the memorandum so as to be bound. The case does not stand at all opposed to Wain *v.* Warlters, the doctrine of which cannot indeed come in question under those clauses of the statute which relate to contracts of bargain and sale, where, of course, the memorandum must always show the price stipulated, as necessary to an understanding of the obligation of the party to be charged, whether the buyer or seller,[3] and, by showing the price stipulated, shows by fair implication the agreement of the other party to buy or sell

[1] Egerton *v.* Mathews, 6 East 308.

[2] Jenkins *v.* Reynolds, 3 Brod. & B. 14, *per* Park, J.

[3] *Ante*, §§ 376 *et seq.*

at that price, which agreement is the consideration of that of the defendant in the case supposed.

§ 390. In this country, such has been the contrariety of opinion upon the doctrine of Wain *v.* Warlters, that it would scarcely serve any useful purpose to attempt to weigh the cases with a view to ascertain which way the balance of judicial opinion may incline. In each of the States the point has been presented, and in each has been decided as seemed to its courts wisest in point of policy, or most commended by authority. By statute in several States the consideration must be expressed in writing.[1]

§ 391. Of those States where the word "agreement" is retained in the clause requiring the memorandum, the doctrine of Wain *v.* Warlters is repudiated in Maine,[2] Vermont,[3] Connecticut,[4] Massachusetts,[5] North Carolina,[6] Ohio,[7] and Missouri.[8] But it has received the sanction of the courts in New Hampshire,[9] New York,[10] New Jersey,[11] Delaware,[12]

[1] Eppich *v.* Clifford, 6 Col. 493.

[2] Levy *v.* Merrill, 4 Greenl. 180; Gillighan *v.* Boardman, 29 Me. 79; Williams *v.* Robinson, 73 Me. 186.

[3] Smith *v* Ide, 3 Vt. 290; Patchin *v.* Swift, 21 Vt. 292.

[4] Sage *v.* Wilcox, 6 Conn. 81.

[5] Packard *v.* Richardson, 17 Mass. 121. The Revised Statutes of Massachusetts have since expressly provided that the consideration need not appear in the memorandum. See Appendix.

[6] Miller *v.* Irvine, 1 Dev. & B. Law 103; Ashford *v.* Robinson, 8 Ired. Law 114.

[7] Reed *v.* Evans, 17 Ohio, 128.

[8] Bean *v.* Valle, 2 Mo. 126; Halsa *v.* Halsa, 8 Mo. 303.

[9] Neelson *v.* Sanborne, 2 N. H. 413; Underwood *v.* Campbell, 14 N. H. 393. Underwood *v.* Campbell was doubted in Britton *v.* Angier, 48 N. H. 420, and overruled in Goodnow *v.* Bond, 59 N. H. 150.

[10] Sears *v.* Brink, 3 Johns 210; Kerr *v.* Shaw, 13 Johns. 236. But see Leonard *v.* Vredenburgh, 8 Johns. 29. The Revised Statutes of New York afterward expressly enacted that the consideration must appear. See Appendix. Sackett *v.* Palmer, 25 Barb. 179; Castle *v.* Beardsley, 10 Hun (N. Y.) 343.

[11] Buckley *v.* Beardslee, 2 South. 570; Laing *v.* Lee, Spencer, 337.

[12] Weldin *v.* Porter, 4 Houst. 236.

Maryland,[1] South Carolina,[2] Georgia,[3] Indiana,[4] Illinois,[5] Michigan,[6] Wisconsin,[7] and Minnesota.[8] In the statutes of some other States the word "agreement" does not so occur, but the word "promise" is coupled with it in the clause in question; and the courts of those States have generally dispensed with the statement of the consideration, on the ground of that difference.[9]

§ 392. It is important to observe that the American decisions which stand opposed to Wain *v.* Warlters have almost exclusively considered that case as depending upon the force attributed by the judges to the word "agreement," and the case of Egerton *v.* Mathews as depending entirely upon the distinction suggested between that word and "bargain." If there had been no other ground upon which those cases could

[1] Sloan *v.* Wilson, 4 Harr. & J. 322; Elliott *v.* Giese, 7 Harr. & J. 457; Wyman *v.* Gray, 7 Harr. & J. 409; Edelen *v.* Gough, 5 Gill, 103; Hutton *v.* Padgett, 26 Md. 228; Deutsch *v.* Bond, 46 Md. 479. But see Brooks *v.* Dent, 1 Md. Ch. Dec. 523; Ordeman *v.* Lawson, 49 Md. 135.

[2] Stephens *v.* Winn, 2 Nott & McC. Law 372, *note a;* though it was afterward treated as an open question in Lecat *v.* Tavel, 3 McCord Law, 158.

[3] Henderson *v.* Johnson, 6 Ga. 390; Hargroves *v.* Cooke, 15 Ga. 321.

[4] Gregory *v.* Logan, 7 Blackf. 112. This was before the present Revised Statutes, which provide that the consideration may be proved by parol. See Appendix.

[5] Patmor *v.* Haggard, 78 Ill. 607. But since regulated by legislative enactment. See Appendix.

[6] Jones *v.* Palmer, 1 Doug. 379.

[7] Reynolds *v.* Carpenter, 3 Chandl. 31; Taylor *v.* Pratt, 3 Wisc. 674; Parry *v.* Spikes, 49 Wisc. 384.

[8] Nichols *v.* Allen, 23 Minn. 542.

[9] Thus, in *Virginia*, Violett *v.* Patton, 5 Cranch (U. S.) 142; *Mississippi*, Wren *v.* Pearce, 4 Smedes & M. 91; *Tennessee*, Taylor *v.* Ross, 3 Yerg. 330; Campbell *v.* Findley, 3 Humph. 330; Gilman *v.* Kibler, 5 Humph. 19; *Alabama*, Thompson *v.* Hall, 16 Ala. 204; Rigby *v.* Norwood, 34 Ala. 129. But see Foster *v.* Napier, 74 Ala. 393; *Kentucky*, Ratliff *v.* Trout, 6 J. J. Marsh. 605; *Florida*, Dorman *v.* Bigelow, 1 Fla. 281; *California*, Baker *v.* Cornwall, 4 Cal. 15; Evoy *v.* Tewksbury, 5 Cal. 285; Ellison *v.* Jackson Water Co., 12 Cal. 542. In *Louisiana*, the civil law prevails, and by that law no consideration is necessary to be stated or proved. Ringgold *v.* Newkirk, 3 Pike (Ark.) 97. See *post*, § 393, as to the materiality of such change in the phraseology.

be sustained, and no other argument for the necessity of having the consideration stated in the memorandum, it may be doubted whether, even in England, the doctrine in question would have survived and been finally established as law. The definition of "agreement," as adopted by Lord Ellenborough from Comyns, is itself open to some question;[1] but if it were correct, the question remains, whether that word, so introduced into the statute, is to be taken in its strict legal sense. His Lordship determines this in the affirmative, upon the ground of the well-known sagacity and precision of Lord Hale, whom he asserts to have been the author of the Statute of Frauds. But apart from the historical doubts which exist upon this point,[2] we find it difficult to maintain such an interpretation, when we come to compare the several clauses of the fourth section with each other and with the seventeenth.

§ 393. It is suggested by the judges in Wain *v.* Warlters, that the fourth section discriminates between the "promise" and the "agreement;" the former being that upon which the defendant is to be charged, but the latter being that of which the memorandum is required. On looking at the last clause of the section, however, we find that the party signing the "agreement" is spoken of as "charged" thereupon. Moreover, the section begins with saying that "no action shall be brought, whereby to charge, etc., upon any special promise," etc., and in the last clause provides that "the agreement upon which such action is brought," etc., shall be in writing. The proper method of interpreting the word "agreement" in this section, if it must be conceded to have been used at all distinctively, seems to be that suggested by Chief Justice Abbott, who said it should be read as a word of reference, as if all the precedent words were incorporated in it, and then

[1] See Mr. Fell's Treatise on Mercantile Guaranties, Appendix, No. IV., where this definition is examined with much research and critical skill.

[2] *Vide* Introduction to this Treatise.

the section would stand thus: "Unless the agreement, special promise, contract, or sale, upon which such action is brought, shall be in writing," etc.[1] But again, in the seventeenth section, which we may certainly compare with the fourth, as *in pari materiâ*, to ascertain the force intended to be given to such words as they have in common, the word "bargain" appears to be used in the same sense as "contract," thus: "No contract for the sale of goods, etc., shall be allowed to be good, unless some note or memorandum of the *said* bargain," etc. Upon the whole, therefore, it is not easy to see that these several terms are employed in any such discriminating manner as can itself afford a precise, consistent, and satisfactory rule of construction.[2]

§ 394. But it is conceived that the doctrine of Wain *v.* Warlters is to be supported upon other and more substantial grounds. The case of Saunders *v.* Wakefield, which followed after those cases in which Lord Eldon had expressed his dissatisfaction with Wain *v.* Warlters, reasserted the rule that the memorandum must show the consideration; and this, as is most important to observe, upon principle and reason, and with little more than a passing allusion to the leading case. The words of Mr. Justice Holroyd present with most admirable clearness and force what is conceived to be the true reason of the rule. He says: "The general object of the statute was, to take away the temptation to commit fraud by perjury in important matters, by making it requisite in such cases for the parties to commit the circumstances to writing. The particular object of the fourth clause was, to prevent any action being brought in certain cases, unless there was a memorandum in writing. The object of both was, that the ground and foundation of the action should be in writing, and should not depend on parol testimony.

[1] Saunders *v.* Wakefield, 4 Barn. & Ald. 595.

[2] In Thompson *v.* Blanchard, 3 N. Y. 335, it was held that an *undertaking* required by statute to be entered into by sureties, in order to give a right of appeal, is valid if it contain the necessary stipulations, although it does not express a consideration, and is not under seal.

Unless, therefore, what is sufficient to maintain the action be in writing, no action can be supported." And upon the case before him, which was assumpsit on a promise to see a third party's bill of exchange paid, he says: "In the present case, that which is reduced into writing is merely an engagement to pay the bill. Now, unless there be a consideration for that, no action lies upon such a promise. If a consideration is to be introduced, it may be either past or future, and must be proved by parol evidence. If that were allowed, all the danger which the Statute of Frauds was intended to prevent, would be again introduced." [1]

§ 395. It was said by Chief Justice Best, that if the clause in the statute had not expressed (as he thought it did) that the whole agreement should be in writing, the law of evidence would have rendered it necessary, by declaring that nothing could be added by parol testimony to the terms expressed in writing; and that, if he had never heard of Wain *v.* Warlters, he should have held that a consideration must appear upon the face of the written instrument.[2] But even if this were not so,[3] and if by the rules of common law parol evidence were admissible to show the consideration upon which a promise was founded, it does not seem to follow that it would be sufficient to supply so important a term of the undertaking, where the writing required by the statute is wholly silent in this particular.

§ 396. It is further urged against the rule in Wain *v.* Warlters, that the statute requires only "some note or memorandum." But this argument seems to overlook the fact that these words are put in apposition with "agreement," and that that clearly cannot be held to be a memorandum of an agreement, which entirely fails to note or commemorate so essential and important a feature of it as the consideration upon which it is entered into, and without which, even

[1] Saunders *v.* Wakefield, 4 Barn. & Ald. 595.

[2] Morley *v.* Boothby, 3 Bing. 112.

[3] See Sage *v.* Wilcox, 6 Conn. 81, and Miller *v.* Irvine, 1 Dev. & B. (N. C.) Law 103.

if it were made, it would be quite without validity or value. To use the words of Mr. Justice Richardson, "They who framed the clause were aware that it would be dangerous to leave the word 'agreement' unaccompanied, because that might have occasioned difficulty through excess of strictness; they therefore allowed a memorandum of the agreement to be made, which, though it should not state the whole agreement in detail, should sufficiently disclose the substantial cause of action." [1]

§ 397. Nor does there appear to be, as has been suggested by Mr. Roberts,[2] any conflict between the rule that the memorandum must show the consideration of the engagement of the party who signs, and the rule that only the party to be charged need sign. The memorandum is required to be signed by the party to be charged, because it is thereby made a statement or admission of all the terms of a contract made by him, which statement is put in writing and to which he gives his assent by signing his name.

§ 398. If the broad and wise policy of the statute be kept in view, namely, to prevent the false and fraudulent assertion against men of engagements which they never made, it is at least to be lamented that so many courts, illustrious for learning, have felt bound to hold that the character of the consideration, whether executed or executory, legal or illegal, on which the availability or the very existence of an agreement depends, should be left to the frail security of oral testimony.

§ 399. But in those courts where the doctrine of Wain *v.* Warlters has been received as law, it is not held necessary that the consideration should be formally and precisely expressed in the memorandum. The rule is sometimes stated to be, that it is sufficient if it appear by "necessary implication" from the terms of the writing.[3] Even this,

[1] Jenkins *v.* Reynolds, 3 Brod. & B. 24.

[2] Roberts on Frauds, 117 *note*.

[3] Raikes *v.* Todd, 8 Ad. & E. 846. And see Powers *v.* Fowler, 4 El. & B. 511, and the language of the Mercantile Law Amendment Act, for which see Appendix.

however, broadly applied, would tend to give an impression of greater strictness than the courts have shown on this subject. As was remarked by Jervis, C. J., in a case in the Common Pleas, necessary implication does not mean "by compulsion, but so as a person's common sense would lead him to understand."[1] The proper criterion in this difficult class of cases appears to have been very clearly and judiciously stated by Chief Justice Tindal. "It would undoubtedly be sufficient in any case," he says, "if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute: but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise."[2] To an exact appreciation of this rule a reference to some of the decisions is, however, indispensable.

§ 400. A memorandum in these words: "I guarantee the payment of any goods which J. S. delivers to J. N." was held by the Court of Queen's Bench, only four years after the decision of Wain *v.* Warlters, and in affirmance of the ruling of Lord Ellenborough (by whom, it will be remembered, that case was originally determined at *nisi prius*), to import upon its face a sufficient consideration, namely, the stipulated delivery of the goods.[3] For, as we have had occasion to see,[4] where a guaranty is made contemporaneously with, and in

[1] Caballero *v.* Slater, 23 L. J. C. P. 68.

[2] Hawes *v.* Armstrong, 1 Bing. N. R. 761.

[3] Stadt *v.* Lill, 9 East 348; s. c. at *nisi prius*, *nom.* Stapp *v.* Lill, 1 Camp. 242; Church *v.* Brown, 21 N. Y. 315; Benedict *v.* Sherill, Hill & D. (N. Y.) 219; Williams *v.* Ketchum, 19 Wisc. 231; Young *v.* Brown, 53 Wisc. 333; City Bank *v.* Phelps, 86 N. Y. 484.

[4] *Ante*, § 191.

order to procure, the giving of credit to the principal debtor, the consideration of the latter's engagement enures to, and sustains, that of the guarantor also. But if the words used are such that the court cannot by any effort of construction pronounce that they import either a debt already incurred or a credit to be thereafter allowed, the memorandum must be held insufficient, if no other means of arriving at the consideration be afforded by it.[1] Again, the following memorandum: "I, the undersigned, do hereby agree to bind myself to be security to you for Mr. J. C., late in the employ of Mr. P., for whatever (while in your employ) you may entrust him with, to the amount of £50, in case of default to make the same good," signed by the defendant, was held sufficient. It was argued that the only consideration must be that the plaintiff was bound to take J. C. into his service; whereas by the agreement he might or might not be bound to do so or he might have already done so; consequently, there being no mutuality, the contract was not binding. But Chief Justice Tindal said: "I think you lay down your rule too largely. The written agreement must show the consideration, but it need not show 'mutuality.' If you can by reasonable construction collect from it the consideration, it is enough. In this case, it rather appears from the words of the contract, mentioning C. as lately in the employment of another master, that he was not at the time of its date taken into the plaintiff's service. If so, it is clear that the plaintiff's doing so was the consideration of the defendant's promise; and if by fair construction we can, as it were, spell out from the contract that it was so, it is enough."[2] So where the guaranty was in these terms: "I do hereby agree to become surety for R. G., now your traveller, in the sum of £500, for all money he may receive on your account," it was held sufficient to sustain a declaration averring the con-

[1] Price *v.* Richardson, 15 Mees. & W. 539.

[2] Newbery *v.* Armstrong, Moo. & M. 389. See also Kennaway *v.* Treleavan, 5 Mees. & W. 498; Weldin *v.* Porter, 4 Houst. (Del.) 236.

sideration to be that the plaintiff would keep and continue the traveller in his service.[1]

§ 401. But a memorandum, "I hereby agree to remain with Mrs. Lees, . . . for two years from the date hereof, for the purpose of learning the business of a dressmaker," was held not binding, because it did not show that the plaintiff was bound on her part to teach the defendant that business.[2] And so where one contracted in writing to work for the plaintiff, in his trade, and for no other person, during twelve months, and so on from twelve months to twelve months, until the employer should give notice of quitting; the writing was held insufficient. In the latter case, it was urged that an agreement on the master's part to pay might be inferred as the consideration; but Lord Denman, C. J., said: "I do not see how we can infer that as a consideration for his confining himself to the one employer, because any person with whom he worked would be obliged to pay him."[3]

§ 402. Again, where a memorandum states the delivery of securities for the payment of money to the plaintiff by a third person, and at the same time contains an engagement to see them paid at maturity, it is held that a consideration for the engagement sufficiently appears, namely, the plaintiff's extending credit to a third person by accepting such securities.[4]

§ 403. A rule of construction, however, well established in the general law of evidence, but of comparatively recent application, it would seem, to questions of this nature, is often called to the aid of a memorandum of guaranty, where the terms used are ambiguous and may refer either to a pre-existing liability of a third party to the creditor, or to one which is allowed to be incurred contemporaneously with and in confidence of the defendant's undertaking. This is the

[1] Ryde *v.* Curtis, 8 Dowl. & R. 62.
[2] Lees *v.* Whitcomb, 5 Bing. 34.
[3] Sykes *v.* Dixon, 9 Ad. & E. 697.
[4] Morris *v.* Stacey, Holt 153: Pace *v.* Marsh, 1 Bing. 216.

admission of parol evidence to show the circumstances of the parties at the time of contracting, in order to understand correctly the language they employ. Under this rule a memorandum of guaranty addressed to the plaintiffs, in the words, "In consideration of your being in advance to the third party," was sustained by parol evidence, showing that at the time of executing it no advance had been made.[1] And in a case, so to speak, the converse of this, where the words were, "I hereby guarantee B.'s account with A.," etc.; it appearing that there was a pre-existing account to which the words could apply, it was held that the guaranty could not be sustained.[2] The Supreme Court of New York, upon the authority of this latter case, have held a guaranty employing the same expression to be good, on its being proved by parol that there was an account between the plaintiff and the third party not existing when the guaranty was given, but contracted afterward; admitting at the same time, that if the words "your account" had necessarily implied a precedent account, the letter containing them would have been insufficient as not showing an available consideration.[3] In a case in the Exchequer, the language of the memorandum was, "In consideration of your having released the above-named defendant from custody I hereby engage, within one month from this date, to pay you," etc. It appeared that the release was in fact given after the memorandum was made and accepted. The court held that the engagement might be construed to be, as it really was, prospective on the release, and that it might be read thus: "I hereby engage, etc., within one month, in consideration of your having then released," etc.[4] So also in the same court, where the words were, "In consideration of your having advanced," etc., and it was

[1] Haigh *v.* Brooks, 10 Ad. & E. 309.

[2] Allnutt *v.* Ashenden, 5 Man. & G. 392.

[3] Walrath *v.* Thompson, 4 Hill 200. But see Weed *v.* Clark, 4 Sand 31.

[4] Butcher *v.* Steuart, 11 Mees. & W. 857.

proved that the advance was made after the memorandum.[1] And so in the House of Lords, in a case where the action had been brought upon a memorandum containing this expression: "Entertaining the highest opinion of Mr. P. C.'s integrity, . . . we, therefore, hold ourselves responsible to you in the sum of £500 sterling, for his discharging faithfully and honestly any duty assigned to, or trust reposed in him," the memorandum was held sufficient; Lord Tenterden advising the Lords, "It appears that at the time when this letter was written, C. had no situation or employment under the defendants in error. The House, therefore, has a right to understand the letter as though it expressed a promise to be responsible for C. if the defendants in error would employ him."[2] Under a statute of frauds which required the consideration of a contract to answer for the debt of another to be expressed in writing, a guaranty by a third person of a negotiable promissory note need not express any consideration if written upon the note before it is delivered, and first takes effect as a contract; but must, if written afterwards.[3]

§ 404. We have seen in a previous chapter that a creditor's forbearance to sue his debtor is an adequate consideration, moving from the creditor, to support a guaranty by a third party that the debt shall be paid at a subsequent day. The memorandum of guaranty of such a debt, therefore, will be sufficient for the purposes of the rule we are now examining, if it afford a reasonable inference that the inducement of the guaranty was the creditor's giving time to the debtor.[4] It is quite plain that his forbearance is not necessarily inferred

[1] Goldshede *v.* Swan, 1 Exch. 154.

[2] Lysaght *v.* Walker, 5 Bligh, N. S. 27. See further, in illustration of the same rule, Thornton *v.* Jenyns, 1 Man. & G. 166; Steele *v.* Hoe, 14 Q. B. 431; Edwards *v.* Jevons, 8 C. B. 436; Bainbridge *v.* Wade, 16 Q. B. 89; Shortrede *v.* Cheek, 1 Ad. & E. 57; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476.

[3] Moses *v.* Lawrence County Bank, 149 U. S. 298.

[4] Powers *v.* Fowler, 4 El. & B. 511; Emmott *v.* Kearns, 5 Bing. N. R. 559; Patchin *v.* Swift, 21 Vt. 292.

to be the consideration of a guaranty, because the memorandum refers to the debt as already due.[1] And although, as has been already remarked, a memorandum stating the delivery therewith to a creditor of securities for the payment of money by a third party, and engaging to see them paid at maturity, may be supported upon the inference that the consideration of such engagement was the plaintiff's giving the third person credit until their maturity; yet it is held that such a memorandum cannot be construed to import the forbearance of the creditor, for the period which the securities have to run, to enforce an old debt; and a demurrer to a declaration setting out the memorandum, and alleging forbearance as the consideration, will be sustained.[2]

§ 405. As a general rule, however, in all cases where the language of the memorandum shows with reasonable clearness that the defendant's promise is designed to procure something to be done, forborne, or permitted by the party to whom it is made, either to or for the promisor or a third party, such act, forbearance, or permission, so stipulated for by the defendant, is taken to be the inducement to his promise; and the suggestion of it in his memorandum, preventing him from asserting that his promise is without consideration, suffices to make the memorandum binding upon the plaintiff.[3] Where a guaranty refers partly to a credit

[1] Wain *v.* Warlters, 5 East 10; Clancy *v.* Piggott, 2 Ad. & E. 473; Cole *v.* Dyer, 1 Cromp. & J. 461; James *v.* Williams, 5 Barn. & Ad. 1109; Smith *v.* Ives, 15 Wend. (N. Y.) 182. But see Neelson *v.* Sanborne, 2 N. H. 413.

[2] Hawes *v.* Armstrong, Bing. N. R. 761, which in this respect seems inconsistent with Boehm *v.* Campbell, 8 Taunt. 679.

[3] The rule is derived from the various cases previously cited and explained in reference to this subject; to which may be added, for further illustration, the following: Benson *v.* Hippius, 4 Bing. 455; Redhead *v.* Cator, 1 Stark. 14; Coe *v.* Duffield, 7 Moore 252; Peate *v.* Dicken, 1 Cromp. M. & R. 422; Colbourn *v.* Dawson, 10 C. B. 765; Rogers *v.* Kneeland, 10 Wend. (N. Y.) 252; Marquand *v.* Hipper, 12 Wend. (N. Y.) 520; Waterbury *v.* Graham, 4 Sand. (N. Y.) 215. The Revised Statutes of New York (see Appendix) provided that the consideration shall be *expressed* in the memorandum. Upon the force of this word much has

previously given, and partly to a credit to be thereupon given, to the third party, the latter of course will be sufficient to uphold the memorandum.[1]

§ 406. But it is not always necessary that the defendant's memorandum should in itself contain any words from which the inducement to his promise can be inferred. If, for instance, he makes himself a party to a written agreement between two others, and in that agreement it is stipulated that he is to be answerable for the performance on the part of one of them, this close connection between his guaranty and the agreement will show that the consideration of the guaranty was the making of the agreement.[2] Again, if at the time of making the principal agreement, and as part of one entire transaction between those concerned, the guaranty be indorsed, or otherwise written upon it, or, being on a separate paper, refer to it,[3] the consideration of the guaranty

been said in the courts of that State, but upon the whole it seems to involve no important modification of the principle stated in the text. See the cases, Packer *v.* Willson, 15 Wend. 343; Smith *v.* Ives, 15 Wend. 182; Bennett *v.* Pratt, 4 Denio, 275; Staats *v.* Howlett, 4 Denio 559; Douglass *v.* Howland, 24 Wend. 35; Union Bank of Louisiana *v.* Coster, 1 Sand. 563; Gates *v.* McKee, 13 N. Y. 232; Barney *v.* Forbes, 118 N. Y. 580; O'Bannon *v.* Chumasero, 3 Montana 419; Kenney *v.* Hews, 26 Neb. 213.

[1] White *v.* Woodward, 5 C. B. 810; Wood *v.* Benson, 2 Cromp. & J. 94; Russell *v.* Moseley, 3 Brod. & B. 211; Gates *v.* McKee, 13 N. Y. 232. Also Raikes *v.* Todd, 8 Ad. & E. 846, which is explained in Caballero *v.* Slater, 14 C. B. 300.

[2] Caballero *v.* Slater, 14 C. B. 300.

[3] Stead *v.* Liddard, 1 Bing. 196; Coldham *v.* Showler, 3 C. B. 312; Adams *v.* Bean, 12 Mass. 136; Bailey *v.* Freeman, 11 Johns. (N. Y.) 221; Douglass *v.* Howland, 24 Wend. (N. Y.) 35; Lecat *v.* Tavel, 3 McCord (S. C.) Law 158; Dorman *v.* Bigelow, 1 Fla. 281; Simons *v.* Steele, 36 N. H. 73. See, however, Draper *v.* Snow, 20 N. Y. 331; Otis *v.* Haseltine, 27 Cal. 80. But an indorsement, etc., *subsequently* to the making and delivery of the principal obligation is not sufficient, without itself showing the consideration. Hall *v.* Farmer, 2 N. Y. 553, affirming on error the judgment of the Supreme Court, in 5 Denio 484; Brewster *v.* Silence, 8 N. Y. 207, affirming the judgment of the Supreme Court, in 11 Barb. 144; Rigby *v.* Norwood, 34 Ala. 129; Gould *v.* Moring, 28 Barb. (N. Y.) 444; Wood *v.* Wheelock, 25 Barb. (N. Y.) 625. Or even *at the*

will in like manner be held to appear, namely, the plaintiff's becoming a party to the principal agreement; and the fact that the two instruments were so connected in time, and that their delivery formed one entire transaction, may be proved by parol evidence.

§ 407. Such was the decision of the Supreme Court of New York, pronounced by Chief Justice Kent, in the case of Leonard *v.* Vredenburgh. There the defendant wrote and signed, at the foot of a promissory note, purporting to be for value received, the words, "I guaranty the above." The facts were that the maker of the note had applied to the plaintiff for certain goods upon credit, but the plaintiff had refused to furnish them to him without security, whereupon the note was made, with the defendant's guaranty appended, the whole delivered to the plaintiff, and the goods furnished as desired. At the trial, the plaintiff offered parol testimony to show this connection between the making of the note and the giving of the guaranty; but the Chief Justice himself rejected it, as an attempt to prove the consideration of the guaranty by parol. On subsequent argument before the full court, he united with them in a different conclusion, and the opinion then delivered by him is one of important bearing upon this branch of our investigation. He remarks that, admitting the origin of the contract to be such as the plaintiff offered to show, there was no necessity for, nor was there in fact, any consideration passing directly between him and the defendant, and of course none was to be proved; that it was one original and entire transaction, and the sale and delivery of the goods supported the promise of the defend-

same time, if the principal obligation is made in payment of a pre-existing debt. Hall *v.* Farmer, *supra*. The cases of Lequeer *v.* Prosser, 1 Hill (N. Y.) 256; and Manrow *v.* Durham, 3 Hill (N. Y.) 584, seem to have been overruled by the two just cited. Moog *v.* Strang, 69 Ala. 98. It is held in New Jersey (Frech *v.* Yawger, 47 N. J. Law 157) that an indorsement of a note after maturity is good, notwithstanding that the consideration does not appear otherwise than from the fact of the indorsement.

ant as well as that of the purchaser; and he adds: "The writing imported, upon the face of it, one original and entire transaction; for a *guaranty* of a contract implies, *ex vi termini*, that it was a concurrent act, and part of the original agreement. . . . Upon the whole, we think that the plaintiff was entitled to recover, upon production and proof of the writing. But if there was any doubt upon the face of the paper, whether the promise of J. [the purchaser] and that of the defendant were or were not concurrent and one and the same communication, the parol proof was admissible to show that fact." [1]

§ 408. It will be observed that such a case as the above differs from those in which a guaranty is on its face expressed to be for the security of credit which is to be allowed to the third party, in this, that it merely refers to another writing from which that credit appears; the parol evidence being admitted for the purpose of establishing, between the two, that unity of time and transaction which would be manifest if they were both comprised in one instrument. And such seems to be the light in which the distinguished judge whose words we have been quoting regarded it. But in another part of that opinion he remarks upon the case before him, that the purchaser's note "given for value received, and, of course, importing a consideration on its face, was all the consideration requisite to be shown. The paper disclosed that the defendant guarantied this debt of J. [the purchaser]; and if it was all one transaction, the value received was evi-

[1] Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 40; Union Bank of Louisiana *v.* Coster, 3 N. Y. 203; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476. The first of these cases is sometimes said to have decided that the rule in Wain *v.* Warlters *did not apply* to guaranties made contemporaneously with, and for the purpose of, procuring the credit to be given to the third party. See Smith *v.* Ide, 3 Vt. 290; Lecat *v.* Tavel, 3 McCord (S. C.) Law 158. But this appears to be a misapprehension of that case, which really decided, not that the memorandum of such guaranties need not show any consideration, but that it need not show a separate one from that which supported the third party's obligation. The decision has lately been disapproved, but it would seem unnecessarily, in the N. Y. Court of Appeals. Brewster *v.* Silence, 8 N. Y. 207.

dence of a consideration embracing both the promises." Are we then to conclude that the principal agreement, with which a memorandum of guaranty is thus shown to have been connected as one transaction, must itself express on its face, or necessarily import, a consideration? The whole tenor of the opinion seems to show that the case was not determined upon that reasoning, and we may therefore be pardoned for suggesting a doubt in regard to it. If it were enough that the principal agreement expressed or imported a consideration, it would seem to follow that a guaranty written upon it at a subsequent date would be supported by such consideration; but this is clearly not so.[1] It must be written contemporaneously with it and as part of the same transaction. But if so written, is it not enough, although the principal agreement do not itself express or import a consideration? Suppose the case of an engagement from A. to B., which would be good by parol, but is in fact reduced to writing, and contains no statement or implication of the consideration upon which it is founded beyond the fact that a credit has been given to A. by B.; and upon this engagement, at the same time, and as part of the same transaction, C. writes a guaranty that it shall be performed; it is submitted that C. is liable, his memorandum showing the consideration of his guaranty, namely, B.'s acceptance of A.'s engagement. That engagement is binding upon A., though the consideration be not stated or necessarily implied in the writing, but proved by parol; and consequently the acceptance of it by B. is a valid inducement to support C.'s guaranty that it shall be performed.[2]

§ 408 *a*. A memorandum expressed to be for "value received," is held to state the consideration sufficiently for the purposes of the statute.[3]

[1] *Ante*, §§ 191, 400.

[2] The view which is here attempted to be controverted seems to be that entertained, however, by an American author of much consideration. See Parsons on Contracts, vol. ii. p. 297.

[3] Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; Day *v.* Elmore, 4 Wisc.

§ 409. Where a contract, within the Statute of Frauds, has been put in writing, it is of course governed by the rule excluding oral evidence of what passed by way of agreement or proposition before or at the time of making the contract in writing, between the parties to it; a rule which prevails as well in equity, wherever such evidence is offered to sustain the plaintiff's suit, as in actions at law.[1] On the other hand, it is competent to show by oral evidence the circumstances under which the written agreement was made, so far as they may tend to aid the construction or application of its contents. Again, it is a familiar principle of equity, when the court is called upon to decree the specific execution of a written agreement, that the defendant may by parol evidence prove that by fraud, mistake, or surprise, the writing fails to show the real agreement entered into by the parties. And the Statute of Frauds does not interdict such evidence in such cases. To use the language of Lord Redesdale, before quoted, "The statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. . . . It does not say, that a written agreement shall bind, but that an unwritten agreement shall not bind." [2]

§ 409 *a*. There is, however, a further rule, prevailing at common law, in regard to which it is a matter of some difficulty to ascertain how far, if at all, it applies to contracts required to be in writing by the provisions of the statute. This rule is that a contract reduced to writing may, by oral agreement of the parties subsequently made, and before any breach has occurred, be varied in one or more of its terms or be wholly waived or discharged; the contract, when so varied, subsisting partly in writing and

190; Miller *v.* Cook, 23 N. Y. 495; Emerson *v.* Aultman, 69 Md. 125; Osborne *v.* Baker, 34 Minn. 307.

[1] See Snelling *v.* Thomas, L. R. 17 Eq. 303; Garbanati *v.* Fassbinder, 15 Col. 535.

[2] Clinan *v.* Cooke, 1 Schoales & L. 39; Glass *v.* Hulbert, 102 Mass. 24, 35.

partly in parol, and as such remaining obligatory upon the parties.[1]

§ 410. We have already seen that if the "bargain" or "agreement" has not been put in writing, the memorandum must show the terms as stipulated by the parties at the time of making the contract. The question now is, how far the parties may, by a subsequent oral agreement, waive, add to, or vary the terms contained in the written contract, or the memorandum.

§ 411. It seems to be well established that where a contract, affected by the statute, has been put in writing, and the plaintiff, in a case of subsequent oral variation of some of the terms of the written agreement, declares upon the writing as qualified by the oral variation, he cannot prevail. The decision in Cuff *v.* Penn, one of the earliest and most important cases of this class, was in fact to the contrary;[2] but from the report the point does not seem to have been distinctly in the mind of the court, the whole stress of the opinion bearing upon another position; and later English and American authorities have conclusively settled the rule as above laid down.[3]

[1] Goss *v.* Lord Nugent, 5 Barn. & Ad. 58; 1 Greenl. Ev. § 34; 1 Phillips Ev. (Cowen & Hill's ed.) 563, *note*, 987.

[2] Cuff *v.* Penn, 1 Maule & S. 21. In the judgment of the Supreme Court of Massachusetts in Stearns *v.* Hall, 9 Cush. 31, this case appears to be misapprehended in this respect. It is there spoken of as having been an action upon the original written contract. But, in fact, the declaration in Cuff *v.* Penn contained three counts, the first upon that contract, and the second and third on *the contract as afterward varied by parol;* and it was on these latter counts that the plaintiff's verdict was rendered and sustained.

[3] See the cases referred to hereafter, § 414. The Supreme Court of Massachusetts fully admit the truth of this proposition in Cummings *v.* Arnold, 3 Met. 486. See further, Jordan *v.* Sawkins, 1 Ves. Jr. 402; Parteriche *v.* Powlet, 2 Atk. 383; Blood *v.* Goodrich, 9 Wend. (N. Y.) 68; Rogers *v.* Atkinson, 1 Kelly (Ga.) 12; Bryan *v.* Hunt, 4 Sneed (Tenn.) 543; Dana *v.* Hancock, 30 Vt. 616; Whittier *v.* Dana, 10 Allen (Mass.) 326; Noble *v.* Ward, L. R. 1 Exch. 117; Carpenter *v.* Galloway, 73 Ind. 418; Heisley *v.* Swanstrom, 40 Minn. 196; Hill *v.* Blake, 97 N. Y.

§ 412. But, this rule being admitted as correct, there remain two questions of some interest and importance which it suggests. *First.* In what cases, if any, can it be said that notwithstanding a subsequent oral variation of the agreement in some respect, the original contract substantially remains? *Secondly.* How far may such variation be made available to the parties, otherwise than by a direct proceeding to enforce the contract as varied?

§ 413. In the case of Cuff *v.* Penn, before referred to, where the parties to a written agreement for the sale of goods, specifying the times at which they were to be delivered, subsequently made a verbal change postponing such delivery, it was remarked by Lord Ellenborough that "the contract remained," notwithstanding the verbal stipulation for a "substituted performance." The distinction here suggested between the contract itself, as being alone that which the statute requires to be proved by writing, and the performance of it, as being something distinct therefrom and to which the statute has no application, has occasioned, by a somewhat undiscriminating application of it, much of the embarrassment attending this subject. For certain purposes, as will be seen hereafter, the distinction clearly exists and must be applied; but not in any such way as to impair the integrity of the rule heretofore stated; and such is the clear result of the later authorities, both English and American.

§ 414. In the case of Goss *v.* Lord Nugent, there was a

216; Randolph *v.* Frick, 50 Mo. App. 275; Rucker *v.* Harrington, 52 Mo. App. 481; Burns *v.* Fidelity Real Estate Co., 52 Minn. 31. In Low *v.* Treadwell, 12 Me. 441, and Grafton Bank *v.* Woodward, 5 N. H. 99, Mr. Chitty is cited as saying in his Law of Contracts, that "a subsequent parol agreement not contradicting the terms of the original contract, but merely in continuance thereof, and in dispensation of the performance of its terms as in prolongation of the time of execution, is good, even in the case of a contract reduced to writing, under the Statute of Frauds." In neither of those cases, however, was it found necessary to apply this doctrine judicially, the contracts in question not being within the statute; and it does not seem to have been reasserted in the later editions of that esteemed author. See 9th Amer. from 5th Lond. ed.

written agreement by which the defendant was to purchase certain lots of land, and the plaintiff bound himself to make a good title to them all. Subsequently he was, by verbal arrangement with the defendant, released from this obligation as to one of the lots, and the defendant took possession of the whole. Upon the plaintiff's suing him for the unpaid balance of the purchase-money of the whole, however, and declaring upon the agreement as so altered, he objected that the agreement, in order to charge him upon it, must be wholly in writing; and the court sustained the objection, and set aside the verdict which the plaintiff had obtained below.[1] So in Harvey *v.* Grabham, where the subject-matter of the oral variation was merely the method of valuation of certain straw, etc., which was, by written agreement for the sale of land, reserved to the vendor.[2] So in Stead *v.* Dawber, a decision of the Queen's Bench, where the oral variation was, as in Cuff *v.* Penn, simply in the time of delivery of a cargo contracted for by the plaintiff.[3] And so in Marshall *v.* Lynn, a decision of the Court of Exchequer, upon similar facts.[4]

§ 415. The ground upon which the cases just cited were all decided is this: that the plaintiff sued upon a contract which the Statute of Frauds required to be in writing, but which in fact was partly in writing and partly in parol; and that although originally put in writing, and varied only as to the manner of performance, still the suit could not be said to be upon the original written contract, but upon a new contract made out by incorporating therewith certain oral stipulations.[5]

[1] Goss *v.* Lord Nugent, 5 Barn. & Ad. 58.

[2] Harvey *v.* Grabham, 5 Ad. & E. 61.

[3] Stead *v.* Dawber, 10 Ad. & E. 57. But where the first contract is valid, and the second, or modifying one is within the statute, the first can still be enforced. See Noble *v.* Ward, L. R. 1 Exch. 117; L. R. 2 Exch. 135; Sanderson *v.* Graves, L. R. 10 Exch. 234.

[4] Marshall *v.* Lynn, 6 Mees. & W. 109.

[5] See Barton *v.* Gray, 57 Mich. 622.

§ 416. It clearly appears from these cases, and indeed it could hardly be questioned, that the rule must apply equally to all contracts embraced by the provisions of the statute, whether bargains for goods, under the seventeenth section, or any of the various agreements enumerated in the fourth.

§ 417. They show also that no exception can be founded upon the question whether the particular in respect of which the oral variation is made, is itself a *material* particular of the contract. In the case of Stead *v.* Dawber, it is true, where the value of an article contracted for had risen in the interval between the time fixed by the writing for delivery and the time to which it was afterward verbally posptoned, the court lay some stress upon that fact as showing the time of delivery to have been essential to the bargain.[1] But this distinction finds no countenance in any other of the cases referred to, whether prior or subsequent to itself. Thus in Goss *v.* Lord Nugent, the Chief Justice Lord Denman said, alluding to the suggestion that the waiver of title as to one of the number of lots was only an abandonment of a collateral point, "We think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only." And while insisting that the title to a piece of land was by no means a non-essential of a contract for its purchase, he distinctly says that the opinion of the court is not formed upon that view, but "upon the general effect and meaning of the Statute of Frauds, and that the contract now brought forward by the plaintiff is not wholly a contract in writing."[2]

§ 418. Again, in Marshall *v.* Lynn, where the oral variation was in respect of the time fixed for the delivery of a cargo, and it was contended by counsel that this time appeared to be a material part of the contract, and the court, on the broad ground heretofore stated, denied the plaintiff's

[1] Stead *v.* Dawber, 10 Ad. & E. 57.

[2] Goss *v.* Lord Nugent, 5 Barn. & Ad. 67.

claim to recover, Mr. Baron Parke took occasion to say that it seemed to him "to be unnecessary to inquire what are the *essential* parts of the contract and what not, and that *every* part of the contract, in regard to which the parties are stipulating, must be taken to be material;" and he alludes to the suggestion made in Stead *v.* Dawber, with the remark that it might be considered as laying down too limited a rule. In the course of the argument he had already said, "No doubt every particular of the contract need not be mentioned; but if mentioned it must be observed."[1]

§ 419. Again, in the case of Harvey *v.* Grabham, the oral variation was in respect of a particular which was in the first instance not required to be in writing, namely, the valuation back to one party of certain straw, etc., lying upon land which he had contracted to lease to the other; but this particular had been, in fact, put in writing as part of one entire transaction with the contract to lease the land. Even there, the court held that on a declaration upon the stipulation for payment for the straw, etc., as making part of the entire contract, including the engagement to lease the land, the plaintiff could not enforce the orally substituted valuation. If he could, says Lord Denman, speaking for the court, "it would follow that, should the present plaintiff hereafter refuse to execute the lease, the present defendants, in suing for such refusal, would be obliged to state the altered agreement as the consideration, and aver a readiness to perform it, and would have to prove their case partly by writing and partly by oral evidence; the very predicament which the Statute of Frauds was intended to prevent."[2]

§ 420. And in illustration of this case and others which discard the distinction as to the oral variation being in respect of a particular which is material or immaterial to the contract, or within or without the Statute of Frauds, it may not be without profit to recur to a principle which has

[1] Marshall *v.* Lynn, 6 Mees. & W. 116, 117.
[2] Harvey *v.* Grabham, 5 Ad. & E. 74.

been discussed in a previous chapter. We there saw that where a defendant verbally agrees to do two or more things, one of which is without and the others within the Statute of Frauds, the plaintiff cannot recover upon the former engagement, if his declaration be framed upon the whole, as it must be where the several engagements are in their nature interdependent, and have not been in fact severed by the anterior execution of so much as would have been affected by the statute.[1] By applying this principle to the cases in question, it is perhaps more clearly seen why an oral variation of a written agreement within the Statute of Frauds, though made in respect of a particular which might, if standing alone, be good by parol, cannot be available, so long as the whole contract, embracing that which is required to be in writing as well as that which is not, remains executory.

§ 421. If, however, the case should arise of an action to recover upon that part only which had been so varied by parol, the other part having been severed therefrom by being performed (as if, in Harvey *v.* Grabham, the lease had been executed, and the plaintiff had sued only for the valuation of the straw, etc., according to the substituted oral agreement), it is held, by analogy with the principle just referred to, that the action may be sustained. For when the part in respect of which the oral variation is made, has ceased to be a part of a contract required by the statute to be in writing, the statute loses its hold upon the case, and the rule of common law intervenes, allowing a contract reduced to writing to be afterward varied by parol.[2]

§ 422. The general rule which has thus far occupied our attention, finds perhaps its most appropriate illustration in a suit in equity for the purpose of enforcing a written contract with a subsequent oral variation ingrafted upon it. Such a case has arisen in England, and Lord Chancellor Truro held the rule to be entirely applicable, in the absence

[1] *Ante*, Chapter IX.

[2] Negley *v.* Jeffers, 28 Ohio. St. 90.

of any suggestion of fraud; and he referred also to the several cases we have reviewed, as clearly establishing it at law, and stated the case of Cuff *v.* Penn to have been overruled.[1]

§ 423. But the further question remains, in what manner may such an oral variation be made available to the parties, otherwise than by a direct proceeding to enforce the contract as varied? To this the correct answer seems to be that performance, according to the orally substituted terms, is available to either party in like manner as would have been performance, according to the original contract. This is manifestly not to enforce an oral agreement within the Statute of Frauds, even by way of defence; the oral stipulation is relied upon simply by way of accord and satisfaction; it is relied upon for the purpose of proving performance alone, which is thus, so to speak, dissociated from the contract itself. And in this sense and for this purpose, there is no difficulty in accepting the distinction asserted between the contract, which is within the purview of the statute, and the performance, which is not.

§ 424. Thus, where the plaintiff has brought his action upon the original contract (as he must do), alleging non-performance by the defendant, the latter may answer that he has performed according to an oral agreement for a substituted performance, or, being ready to do so, was prevented by the fault of the plaintiff himself.[2] It is not competent to him to set up the oral agreement in bar of the plaintiff's claim, not alleging his own performance or readiness to perform.

§ 425. Again, the action having been brought upon the original contract, if the defendant set up that the plaintiff did not himself perform according to its terms, the plaintiff may reply that he was ready to do so, but that it was dis-

[1] Emmet *v.* Dewhurst, 3 McN. & G. 587.

[2] Cummings *v.* Arnold, 3 Met. (Mass.) 486; Neil *v.* Cheves, 1 Bail. (S. C.) Law, 537; Lerned *v.* Wannemacher, 9 Allen (Mass.) 412; Whittier *v.* Dana, 10 Allen (Mass.) 326.

pensed with by the defendant assenting to a substituted performance; and his proof of such assent is not considered a variance from his declaration.[1]

§ 426. The question of the extent of the validity of these oral stipulations subsequently made, has been discussed at length in the Court of Common Pleas in the case of Hickman *v.* Haynes, the previous decisions commented upon, and the general principle reaffirmed "that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds." In the case before the court, the plaintiff, to accommodate the defendants, had postponed the delivery of certain goods which he had agreed to sell. The defendants, having refused to accept them even after the postponement, sought to rely upon the fact of the oral extension as having invalidated the contract. The court held, however, that although the plaintiff assented to the defendant's request not to make the delivery at the contract time, he must be taken to have been ready to deliver then, and that the defendants were estopped from averring the contrary.[2]

§ 426 *a*. This case was followed the next year by the case of Plevins *v.* Downing. In that case the plaintiff, whose original contract bound him to deliver the goods in July, sought to recover for the refusal of the defendant to receive them in the following October. The plaintiff had failed in his July delivery, and relied upon a verbal request by the defendant made in October, to deliver. With regard to this, the court, while approving Hickman *v.* Haynes, pointed out the distinction between that case and the one before them,

[1] Stearns *v.* Hall, 9 Cush. (Mass.) 31; Swain *v.* Seamens, 9 Wall. (U. S.) 254; Leather Cloth Co. *v.* Heironimus, L. R. 10 Q. B. 140; Long *v.* Hartwell, 34 N. J. L. 116.

[2] Hickman *v.* Haynes, L. R. 10 C. P. 598, 605. The plaintiff was also allowed to recover damages assessed according to the market price at the later or postponed date. See Ogle *v.* Lord Vane, L. R. 3 Q. B. 272; Smith *v.* Loomis, 74 Me. 503.

and they held that the plaintiff, being unable to show readiness and willingness to deliver in July, and being "logically driven to rely upon the subsequent request of the defendant, either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept," could not recover.[1]

§ 427. There remains to be discussed under this head only one case, Stowell *v.* Robinson, decided in the Common Pleas in 1836. The plaintiff declared upon a written agreement by which the defendant engaged to assign to him a lease, possession to be given by a certain day, and that he had good right to assign; breach, that he had not such right, and could not perform his engagement; and a count was added for money had and received to recover back £50 which the plaintiff had advanced as deposit, on the ground that the defendant had not completed the conveyance and given possession on the day agreed. The defendant pleaded that he had good right to assign; that neither he nor the plaintiff was ready on the day named for delivering possession; that it was orally agreed to postpone it a reasonable time if the defendant would make out title meanwhile; that he did so make out title, but the plaintiff then refused to perform. A verdict having been obtained for the defendant, the court said they would not disturb it upon the special count, as it was not considered sufficiently proved; but in view of the count for the deposit they set the verdict aside, the defendant not having assigned on the day originally agreed. Chief Justice Tindal, who delivered judgment, said that the question was whether the day for the completion of the purchase of an interest in land, inserted in a written contract, could be varied by a parol agreement, and another day substituted *so as to bind the parties;* and that the court were of opinion it could not. And, although admitting that upon the case shown, neither party was ready on the day first agreed, he says that to allow the oral variation would be "virtually and

[1] Plevins *v.* Downing, 1 C. P. D. 220.

substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing, and signed by the parties, and partly not in writing but by parol only, and amounts to a contravention of the Statute of Frauds."[1]

§ 428. From the report of this case, it nowhere appears that the distinction between relying upon the oral variation "so as to bind the parties," and relying upon readiness to perform according to its tenor as a defence in the nature of accord and satisfaction, was brought to the notice of the court; nor is there, in the decision itself, any allusion to the English cases antecedent to Cuff *v.* Penn, where this distinction appears to be recognized. It is to be remarked, also, that in neither Stead *v.* Dawber nor Marshall *v.* Lynn, both decided subsequently to Stowell *v.* Robinson, and both asserting the rule that an action could not be maintained upon an agreement, embraced by the Statute of Frauds, partly in writing and partly resting in parol, do the judges quote that case as an authority.[2] These circumstances may incline us to doubt whether it can be so regarded. The Supreme Court of Massachusetts, in their careful and discriminating judgment in Cummings *v.* Arnold, say: "It appears to us, that the case of Stowell *v.* Robinson was decided on a mistaken construction and application of the Statute of Frauds; and that the distinction between the contract of sale, which is required to be in writing, and its subsequent performance, as to which the statute is silent, was overlooked, or not sufficiently considered by the court; otherwise, the decision perhaps might have been different."[3]

§ 429. The only question that remains is, how far parol evidence is admissible to prove the waiver or discharge of a

[1] Stowell *v.* Robinson, 3 Bing. N. R. 937.

[2] In Horne *v.* Wingfield, 3 Scott N. R. 340, Mr. Justice Coltman refers to it as seeming to oppose an obstacle to a parol waiver of a promise to deliver an abstract of title, — a case which, it is said, might be raised by an amendment of that actually before the court.

[3] Cummings *v.* Arnold, 3 Met. 494.

contract once put in writing in obedience to the requirements of the Statute of Frauds.

§ 430. Mr. Chancellor Kent remarks, that in certain cases, and on certain terms, an agreement in writing concerning lands (and the reason of the remark, doubtless, applies to all other classes of contracts within the statute) may be discharged by parol; but that the evidence in such cases is good only as a defence to a bill for specific performance, and is totally inadmissible, at law or in equity, as a ground to compel a performance *in specie*.[1] Passing by, for the present, the question whether such parol evidence may be introduced *in equity only*, in defence it may be remarked that the precise meaning of the learned Chancellor seems to be that it is inadmissible, either in equity to compel a performance *in specie*, or at law to support a claim for damages. And such seems to be clearly the correct opinion. Lord Hardwicke has observed that an agreement to waive a purchase contract was as much an agreement concerning lands as the original contract.[2] We have seen that a contract by one who holds an agreement for the sale of lands to him, to dispose of his rights to a third party, is to be treated as itself a contract for the sale of an interest in land;[3] and it is substantially the same thing if he release that right to him who executed the agreement to sell, or, in other words, waive and discharge the agreement by parol.

§ 431. The question how far the parol waiver in such cases may be set up presents more difficulty, and may be considered in two views, as it may arise in equity or in law.

§ 432. In Gorman *v.* Salisbury, an early case before Lord Keeper North, where a bill was brought for a specific execution of a written contract, it was held that a parol discharge was binding, and the bill was dismissed.[4] Afterwards, when

[1] Stevens *v.* Cooper, 1 Johns. (N. Y.) Ch. 425.

[2] 2 Eq. Cas. Abr. 33; Bell *v.* Howard, 9 Mod. 302. See Arrington *v.* Porter, 47 Ala. 714.

[3] *Ante*, § 229.

[4] Gorman *v.* Salisbury, 1 Vern. 240.

this case was cited upon a similar one before Lord Hardwicke, he declared that he would not say that a contract in writing could not be waived by parol, yet he should expect in such a case very clear proof, and, the defendant before him not furnishing such proof, the plaintiff had a decree.[1] In another case he said it was certain that an interest in land could not be parted with or waived by naked parol without writing; yet articles might by parol be so far waived that if the party came into equity for a specific execution, such parol waiver would rebut the equity which the party before had, and prevent the court from executing them specifically.[2]

§ 433. And this opinion, that a parol discharge of a written contract within the Statute of Frauds is available in equity to repel a claim upon that contract, to which the mind of Lord Hardwicke came so reluctantly, is since firmly established by many authorities.[3] But it has been laid down by Lord Lyndhurst that, although such waiver is unquestionably admissible according to the rule stated, it must be in effect a total dissolution of the contract, such as would place the parties in their original situation.[4]

§ 434. The question of the admissibility of such a parol waiver as a defence to an action at law was raised, and, it would seem, for the first time, in the case of Goss *v.* Lord Nugent, in the Queen's Bench, where the court remarked that the statute did not say that all contracts concerning the sale of lands should be in writing, but only that no action should be brought unless they were in writing; and that as there was no clause in the act which required the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands might still

[1] Buckhouse *v.* Crosby, 2 Eq. Cas. Abr. 32, Pl. 44.

[2] Bell *v.* Howard, 9 Mod. 302.

[3] Sugden, Vend. & P. 173; Roberts on Frauds, 89; Phelps *v.* Seely, 22 Grat. (Va.) 573; Marsh *v.* Bellew, 45 Wisc. 36; Jones *v.* Booth, 38 Ohio St. 405; Miller *v.* Pierce, 104 N. C. 389.

[4] Robinson *v.* Page, 3 Russ. 119.

be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering in an action on the contract which was in writing.[1]

§ 435. As thus stated, the admission of the parol waiver is apparently put upon the ground that it is only used for defence. But in an earlier part of this work, it was shown that to defend upon a verbal contract within the Statute of Frauds was as much in opposition to its spirit as to prosecute a claim upon it.[2] This reason is forcibly urged by Sir Edward Sugden against admitting parol evidence of waiver in such cases. And he gives it as his opinion, upon a review of the cases,[3] that "perhaps the better opinion is that it is inadmissible at law."[4] On the other hand, Mr. Phillips says that it seems to be generally understood that such parol evidence is admissible;[5] and Mr. Greenleaf considers that there is little doubt of its admissibility.[6]

§ 436. It must be observed that those writers who stand opposed to Sir Edward Sugden upon this question, rest their opinions chiefly upon the somewhat unsatisfactory language used by the court in Goss *v.* Lord Nugent. If they are to be sustained, it would seem that it must rather be upon the ground, upon which a parol waiver even of an instrument under seal has been admitted in evidence, that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.[7]

[1] Goss *v.* Lord Nugent, 5 Barn. & Ad. 67.

[2] *Ante*, §§ 131 *et seq.*

[3] Sugden, Vend. & P. 171, 172.

[4] Sugden, Vend. & P. 173, 174. See also Noble *v.* Ward, L. R. 1 Exch. 117. Affirmed in the Exchequer Chamber, L. R. 2 Exch. 135.

[5] 2 Phillips 363 (Cowen & Hill's ed. 1849).

[6] 1 Greenl. Ev. § 302. See also Phil. & Am. Ev. 776; Lawrence *v.* Dole, 11 Vt. 549; Raffensberger *v.* Cullison, 28 Pa. St. 426; Boyce *v.* McCullough, 3 Watts & S. (Penn.) 429; Morse *v.* Copeland, 2 Gray (Mass.) 302.

[7] Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528. See Canal Co. *v.* Ray, 101 U. S. 522. In Cummings *v.* Arnold, 3 Met. 494, the Supreme Court of Massachusetts assert, and apparently upon the view suggested in the text, that to an action upon a written contract within the Statute of Frauds a plea that it had been totally dissolved before breach, by an oral agreement, would be a good and sufficient bar.

CHAPTER XIX.

VERBAL CONTRACTS ENFORCED IN EQUITY.

§ 437. We now come to consider the doctrines which courts of equity maintain and apply in cases where verbal contracts, such as the Statute of Frauds has required to be put in writing, come before them. These courts, as has been many times affirmed by the wisest and most learned of their judges, are as much bound by the express provisions of the statute as courts of law. They cannot in general specifically enforce contracts embraced by them, any more than courts of law can give damages for their non-performance. But they have always been clothed with the salutary power of preventing fraud, or affording positive relief against its consequences; and this power they have not hesitated to exercise by compelling the specific execution of a verbal contract to which the provisions of the Statute of Frauds apply, *where the refusal to execute it would amount to practising a fraud.* In so doing they disclaim the power of ingrafting exceptions upon the statute, but proceed upon the ground that to prevent fraud is their supreme duty as courts of equity and conscience.

§ 438. It is, indeed, often said that as the statute itself was intended for the suppression of frauds, it is but subserving more effectually the ends of its enactment for courts of equity to interpose, and prevent it from being made, by the liberty which it affords a party of protecting himself under its cover, the very engine and instrument of fraud. To this view it might be replied, however, that the fraud which the statute was intended to suppress consists in the assertion of a contract which was never made, whereas the fraud against

which courts of equity, in the cases we have to consider, afford relief, consists in the repudiation of a contract which has been made, and upon which an innocent party has actually proceeded to do that for which the jurisdiction of the law courts affords him no just recompense. Again, it seems to be no less than a contradiction in terms to say that the object of a statute is promoted by rejecting its authority. The correct view appears to be that equity will at all times lend its aid to defeat a fraud, *notwithstanding* the Statute of Frauds; and upon this simple ground it is believed that the many decisions in equity which it is now our duty to examine will be found substantially to rest.

§ 439. The fraud against which equity will relieve, notwithstanding the statute, is not the mere moral wrong of repudiating a contract actually entered into, which, by reason of the statute, a party is not bound to perform for want of its being in writing.[1] This was early laid down by Lord Macclesfield, Chancellor, in a case arising upon a promise of a defendant, about to marry, that his wife should enjoy all her own estate, to her separate use after the marriage, which promise, as one made "upon consideration of marriage," could not regularly be enforced. His Lordship declared that "in cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere." [2]

[1] See § 94, *ante*.

[2] Montacute *v.* Maxwell, 1 P. Wms. 620; s. c. 1 Stra. 236, *nom.* Mountacue *v.* Maxwell; s. c. 1 Eq. Cas. Abr. 19, *nom.* Maxwell *v.* Montacute; s. c. Finch. Prec. Ch. 526, *nom.* Maxwell *v.* Mountacute, Schmidt *v.* Gatewood, 2 Rich. (S. C.) Eq. 162; Kinard *v.* Hiers, 3 Rich. (S. C.) Eq. 423; Whitridge *v.* Parkhurst, 20 Md. 62; McClain *v.* McClain, 57 Iowa, 167; Caylor *v* Roe, 99 Ind. 1; Jackson *v.* Myers, 120

§ 440. This distinction commends itself at once as one which must be regarded, or courts of equity be deemed not at all bound by the Statute of Frauds. Mr. Justice Story has, indeed, dissented from it in the following strong language: "I doubt the whole foundation of the doctrine, as not distinguishable from other cases, which courts of equity are accustomed to extract from the grasp of the Statute of Frauds."[1] This doubt does not appear to have been asserted in his Commentaries, and, as he says himself, it was unnecessary to act upon it in the case before him; and, although there are in some late cases[2] expressions from which the question seems to be considered in some degree an open one, at least where the contract is one of marriage settlement, no decision has ever passed in opposition to the ancient doctrine.

§ 441. A simple illustration of the rule that when the Statute of Frauds has been used as a cover to a fraud, equity will relieve against the fraud, notwithstanding its provisions, is found in a case reported by Viner, and stated by him to have occurred in Lord Nottingham's time, and to have been the first instance in which any equitable exception to the statute appears. There was a verbal agreement for an absolute conveyance of land, and for a defeasance to be executed by the grantee; but he, having obtained the conveyance, refused to execute the defeasance and relied upon the statute; but his plea was overruled, and he was compelled to execute according to his agreement.[3] Here the attempted

Ind. 504; Dunphy *v.* Ryan, 116 U. S. 491; Patton *v.* Beecher, 62 Ala. 579; Crabill *v.* Marsh, 38 Ohio St. 331.

[1] In Jenkins *v.* Eldredge, 6 Story, 292, quoted *ante*, § 112, *note*.

[2] In De Biel *v.* Thompson, 3 Beav. 469, Lord Langdale, M. R., passed it by as a question which it was *unnecessary to decide*; and in Surcome *v.* Pinniger, 3 De G., M. & G. 571, Lord Justice Knight Bruce said that it was *probably true* that marriage only would not suffice

[3] 5 Vin. Ab. 523. And see Sir George Maxwell's case, cited in Whitbread *v.* Brockhurst, 1 Bro. C. C. 409; Crocker *v.* Higgins, 7 Conn. 342; Teague *v.* Fowler, 56 Ind. 569; Langford *v.* Freeman, 60 Ind. 46. So in Walker *v.* Walker, 2 Atk. 99, where Lord Hardwicke says: "Suppose a

fraud consisted not merely in refusing to do what he agreed, but in deceiving the plaintiff out of his property. And the case is analogous to that put by Lord Macclesfield, as falling within the rule, where one agreement in writing is proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former.

§ 441 *a*. This doctrine, that courts of equity have power to declare a deed, absolute on its face, to be a mortgage, upon parol proof that the conveyance was in reality only a security for the payment of a debt of the grantor to the grantee, has been discussed by the Supreme Court of Massachusetts, with especial reference to the application of the Statute of Frauds. The case was that of Campbell *v.* Dearborn,[1] and presented the following state of facts. The plaintiff had a written contract from one Tirrill for the conveyance of a lot of land to himself upon payment of a certain sum, in pursuance of which Tirrill executed the conveyance to the plaintiff, who paid the purchase price with money lent him by the defendant, and about the same time executed to the defendant an absolute deed of the property. The bill alleged that this conveyance to the defendant was understood and intended by the parties to it to be only a security for the money advanced to the plaintiff to enable him to carry out his purchase from Tirrill, and prayed that the plaintiff might be allowed to redeem by payment of the amount lent him by the defendant, and the latter be decreed thereupon to convey the premises back to the plaintiff. The answer denied that any loan was ever made, and relied upon the Statute of Frauds as an answer to any of the alleged oral agreements,

person who advances money should, after he has executed [received] the absolute conveyance, refuse to execute the defeasance, will not this court relieve against such fraud ?" See also Arnold *v.* Cord, 16 Ind. 177 ; McBurney *v.* Wellman, 42 Barb. (N. Y.) 390, affirmed *sub nomine* Dodge *v.* Wellman, 43 How. Pr. 427; Leahey *v.* Leahey, 11 Mo. App. 413; Chambers *v.* Butcher, 82 Ind. 508 ; Union Insurance Co. *v.* White, 106 Ill. 67; Armes *v.* Bigelow, 3 McArthur (D. of C.) 442. See also § 95 *ante*.

[1] Campbell *v.* Dearborn, 109 Mass. 130.

understandings, or promises stated in the bill. The case was reported to the full court, it being found as a fact that the plaintiff believed, with reason, that the money had been advanced as a loan and that the defendant would, on repayment of it, reconvey the property. The opinion of the court, by Wells, J., after pointing out that the plaintiff was precluded by his deed, and its recitals and covenants, from setting up any trusts by implication against its express terms,[1] and also that the case was not one showing any breach of an agreement to execute a written defeasance, but was "a transaction between borrower and lender, and not a real purchase," proceeds to discuss the question, can equity relieve in such a case? It says that the parol evidence is admissible, "not to vary, add to, or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings, by restricting their operation, or defeating them altogether." The evidence is admissible to show that the transaction was not in reality a sale, but a pledge; and when this fact is clearly established,[2] the deed, which no longer truly represents the nature of the transaction, will be construed as constituting a mortgage, or defeasible conveyance. This doctrine, say the court, "may be adopted without violation of the Statute of Frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt." This case, which is here noticed at length on account of its careful and thorough statement and dicussion of the question involved,

[1] Blodgett *v.* Hildreth, 103 Mass. 484; Miller *v.* Blackburn, 14 Ind. 62; Moore *v.* Moore, 38 N. H. 382; Collins *v.* Tillou, 26 Conn. 368; Sturtevant *v.* Sturtevant, 20 N. Y. 39. See Haigh *v.* Kaye, L. R. 7 Ch. App. 469, however, in limitation of this doctrine.

[2] Lance's Appeal, 112 Pa. St. 456.

is entirely in accordance with the current of judicial opinion on the point.[1]

§ 441 *b*. It is to be noticed that the rule, as laid down in Campbell *v.* Dearborn, does not allow the *enforcement* of an oral agreement,[2] but merely allows it to be proved when, taken as a fact, and in connection with the other circumstances of the case, it affords sufficient ground for a court of equity to reform the instrument, by construing it according to what has been proved to be the true character of the transaction, viz., a security for the payment of a debt. If this does not appear, and the oral agreement relied upon is within the Statute of Frauds, a court of equity is as powerless as a court of law to disregard the statute, if relied upon by a defendant who is not by his conduct equitably estopped to insist upon it.[3]

§ 441 *c*. In the case of Glass *v.* Hulbert,[4] also in the Supreme Court of Massachusetts, the plaintiff sought, by bill in equity, to have the defendant decreed, *inter alia*, to convey to him certain land which he alleged was included in the oral contract of sale, or represented by the defendant to be

[1] See Pond *v.* Eddy, 113 Mass. 149; McDonough *v.* Squire, 111 Mass. 217; Sweetzer's Appeal, 71 Pa. St. 264; Danzeisen's Appeal, 73 Pa. St. 65; Klein *v.* McNamara, 54 Miss. 90; Odell *v.* Montross, 68 N. Y. 499; Jones *v.* Guaranty Co., 101 U. S. 622. The rule cannot be extended to allow parol proof of an oral agreement, made *after* an absolute conveyance, to turn it into a mortgage. This is obviously in derogation of the Statute of Frauds. Richardson *v.* Johnsen, 41 Wisc. 100; Armor *v.* Spalding, 14 Col. 302; Booth *v.* Hoskins, 75 Cal. 271; Landers *v.* Beck, 92 Ind. 49; Alford *v.* Wilson, 26 S. W. Rep. (Ky.) 539; Bender *v.* Zimmerman, 26 S. W. Rep. (Mo.) 973. Nor will it apply where the rights of third parties have intervened. Pancake *v.* Cauffman, 114 Pa. St. 113.

[2] Compare Pierce *v.* Colcord, 113 Mass. 372; Glass *v.* Hulbert, 102 Mass. 35.

[3] See Taylor *v.* Sayles, 57 N. H. 465; Howland *v.* Blake, 97 U. S. 624.

[4] Glass *v.* Hulbert, 102 Mass. 29; compare Beardsley *v.* Duntley, 69 N. Y. 577; Hitchins *v.* Pettingill, 58 N. H. 386; Macomber *v.* Peckham, 16 R. I. 485; Noel's Ex'r *v.* Gill, 84 Ky. 241. See further consideration of Glass *v.* Hulbert, *post*, § 444 *a*.

so included, but omitted from the deed; and to have the deed reformed so as to include the land in question. "Such a reformation," says Wells, J., in delivering the opinion of the court dismissing the bill, "not only requires a description of the subject-matter of the sale, different from the express terms of the oral contract, but would enlarge the effect and operation of the deed, as a conveyance. It involves the transfer of the legal title to land not covered by the deed already given. It requires a new deed to be executed and delivered by the defendant to the plaintiff. Whether that deed shall embrace the entire subject of the alleged contract of purchase, with a corrected description to make it conform to facts and abuttals as they were represented to be, or merely convey the seventeen acres omitted from the deed already given, the order for its execution will enforce the specific performance of a contract for the sale of lands, for which there exists no memorandum, note, or other evidence in writing signed by the party to be charged therewith. As to the seventeen acres in dispute, the obligation to convey them rests solely in the oral contract. The defendant denies any contract which includes them. The plaintiff seeks to establish such a contract by parol evidence, and enforce it." The opinion then proceeds to enumerate and discuss those circumstances which, when proved, operate as an equitable estoppel upon the defendant and prevent him from relying upon the statute when called upon to perform according to his agreement. This will be taken up later[1] in the discussion of the foundation upon which such jurisdiction in courts of equity rests.

§ 441 *d*. Does the power of a court of equity to correct a deed so as to make it conform to the actual contract between the parties, extend to verbal contracts included within the Statute of Frauds? According to Glass *v*. Hulbert, it does not. In that case, the court say: "When the proposed reformation of an instrument involves the specific enforcement of

[1] *Post*, §§ 448 *et seq*.

an oral agreement within the Statute of Frauds; or when the term sought to be added would so modify the instrument as to make it operate to convey an instrument or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed; the Statute of Frauds is a sufficient answer to such a proceeding; unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defence. The fact that the omission or defect in the writing, by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. There must concur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it, as if it were executed, with the knowledge and acquiescence of the other party either express or implied, for which he would be left without redress if the agreement were to be defeated." These views are enforced in an opinion of extraordinary ability and learning; but they have not commanded the assent of the courts. The preponderance of authority remains on the side of maintaining the jurisdiction to reform contracts or conveyances in cases of mistake or fraud proved by oral testimony only, nowithstanding the Statute of Frauds.[1]

§ 442. In an earlier chapter, where the subject of trusts arising by implication of law was considered, we saw that in cases where an executor or devisee prevented a testator from making express provision for a third party, by assurances that his intentions should be carried out, equity would enforce such promise against them, as a trust in favor of a third party, arising out of the fraud so practised.[2] The same

[1] A very full correction of the authorities is to be found in the opinion of Sage, J., in McDonald *v.* Youngblutter, 46 Fed. Rep. 836. And see *post*, 444 *a*, and cases cited; also Murray *v.* Parker, 19 Beavan 308.

[2] *Ante*, § 94. Compare Thomson *v.* White, 1 Dall. (Pa.) 424.

doctrine seems to apply in cases of contracts made directly between the parties. Where one who had agreed to give the plaintiff a lease of certain lands, upon which, in consequence of the agreement, the plaintiff had entered and made valuable improvements, was desirous and anxious, when near his death, to fulfil his promise, but was prevented by the fraudulent contrivance of his relatives from seeing the plaintiff for that purpose, and died without executing the lease, the relatives who succeeded to the estate were afterward compelled in equity to execute it themselves.[1]

§ 443. Thus, in Cookes *v.* Mascall, a marriage was about to be celebrated between the plaintiff and the defendant's daughter, and the solicitor on behalf of the plaintiff was in the course of preparing articles of settlement; and in the meanwhile a disagreement arose as to the articles, but the plaintiff was still allowed to come to the defendant's house, and afterward married his daughter, the defendant being privy to it, helping to set them forward in the morning, and entertaining them, and seeming well pleased with the marriage upon their return to his house at night; he was decreed to execute the agreement according to what had been drawn up by the solicitor, though it had not received his signature.[2] This case has been considered hard to be reconciled with another decided by the same judges at the same term, where an uncle, by letter, promised his niece a certain portion, but in the same letter dissuaded her from marrying the plaintiff; and they refused to decree the execution, but left the plaintiff to his action at law.[3] But there seems to be no suggestion, in the latter case, of fraud or artifice on the part of the

[1] Lester *v.* Foxcroft, Colles, P. C. 108; cited 2 Vern. 456; Gilb. 4, 11; Prec. Ch. 519, 526; Story, Eq. Jur. § 768. See also Chamberlaine *v.* Chamberlaine, Freem. Ch. 34; Chamberlain *v.* Agar, 2 Ves. & B. 259; Mestaer *v.* Gillespie, 11 Ves. 621; Stickland *v.* Aldridge, 9 Ves. 516; Dixon *v.* Olmius, 1 Cox, 414; Reech *v.* Kennegal, 1 Ves. Sr. 123; Sellack *v.* Harris, 5 Vin. Ab. 521.

[2] Cookes *v.* Mascall, 2 Vern. 200. And see Bawdes *v.* Amhurst, Finch, Prec. Ch. 402.

[3] Douglas *v.* Vincent, 2 Vern. 202.

uncle; whereas in Cookes *v.* Mascall the presence of such fraud and artifice was manifestly the ground upon which the court proceeded.

§ 444. Again, in Montacute *v.* Maxwell, as appears from one of the reports of that case,[1] the defendant, having given instructions to have a marriage settlement drawn, privately revoked those instructions, and persuaded the plaintiff to marry him; and he was decreed to execute the settlement, the Lord Chancellor, as stated in still another report of the case,[2] asserting the rule to be, that if the parties rely wholly upon the parol agreement, neither party can compel the other to the specific performance, for the Statute of Frauds is directly in their way; but that if there is any agreement for reducing the same to writing, and that is prevented by the fraud and practice of the other party, the court would in such case give relief; as where instructions are given and preparations made for the drawing of a marriage settlement, and before the completion thereof the woman is drawn in, by the assurances and promises of the man to perform it, to marry without a settlement.

§ 444 *a*. In Glass *v.* Hulbert, the Supreme Court of Massachusetts, by Wells, J., said that it makes no difference whether the want of a writing was accidental or intentional, and that so long as the effect of the fraud or mistake extends no further than to prevent the execution, or withhold from the other party written evidence of the agreement, it does not furnish ground for the court to disregard the statute, and enter into the investigation of the oral agreement for the purpose of enforcing it.[3] In this particular the decision has

[1] 1 Eq. Cas. Abr. 19. In the report in 1 P. Wms. 620, the Lord Chancellor is represented as saying that the instructions to the counsel to prepare the writing were immaterial, since the party might still refuse to sign after the writing was prepared. And see Glass *v.* Hulbert, 102 Mass. 30, 38; Equitable Gas Light Co. *v.* Baltimore Coal Tar & Mfg. Co., 63 Md. 285.

[2] Finch, Prec. Ch. 528.

[3] Glass *v.* Hulbert, 102 Mass. 30.

been criticised and perhaps with justice. The facts in that case were that the defendant, in the negotiations for the sale of the property, represented to the plaintiff that the boundary line of an adjoining estate ran to a certain indicated point, and if it did, a deed describing the land sold as bounded by that line would include the seventeen acres which the bill sought to have the deed aforesaid to include. As matter of fact the boundary line in question did not extend to the point indicated, and accordingly the deed, which described the land sold as bounded by that line (and it was agreed that the deed should be so drawn), failed to cover the seventeen acres. The question is whether the defendant's misrepresentation of fact, which induced the plaintiff to take the deed drawn in those terms, was not to be regarded as a fraud against which equity would relieve by decreeing a conveyance of the seventeen acres? On closely similar facts the Court of Appeals of New York has so held, expressly refusing to follow Glass *v.* Hulbert. The opinion says: "A party unfamiliar with the precise boundaries of a farm of land might not discover the omission of an inconsiderable portion of the same from a mere inspection of the papers. More especially might this be the case where such party had reason to believe that it was intended to include such portion in the conveyance. There is certainly strong ground for claiming that the plaintiff was deceived in regard to the description of the premises by the statements of the defendant." [1]

§ 445. Where the defendant, on a treaty of marriage with his daughter, signed a writing comprising the terms of the agreement, and afterward, designing to elude the force thereof and get loose from his agreement, ordered his daughter to put on a good humor and get the plaintiff to deliver up the writing and then to marry him, which was accordingly

[1] Beardsley *v.* Duntley, 69 N. Y. 580. See also Hitchins *v.* Pettingill, 58 N. Y. 386; McDonald *v.* Youngblutter, 46 Fed. Rep. 836; Johnson *v.* Johnson, 8 Baxter (Tenn.) 261; Morrison *v.* Collier, 79 Indiana, 417.

done, the Master of the Rolls decreed the execution of the agreement.[1]

§ 445 *a*. And it appears to be a general rule that where the verbal promise of the defendant to make a certain disposition of lands was the means of his obtaining to himself the legal title to lands, so that in fact he practises a deception upon his grantor, by so obtaining the lands and then holding and dealing with them as his own, a court of equity will compel him to perform his verbal engagement.[2] This principle is recognized in the cases which hold that a conveyance of land absolute on its face may be shown by parol testimony to have been intended at the time as a mortgage.[3] But where there is no deception practised in obtaining the title, but a mere verbal promise to make a certain disposition of land already acquired, the promisor will not be held as a trustee.[4]

§ 445 *b*. To this doctrine of equity, that a title obtained by a defendant by means of the verbal contract cannot be retained by him on the ground of the Statute of Frauds, may be referred the rule that where the title is obtained by one

[1] Mallet *v.* Halfpenny, 1 Eq. Cas. Abr. 20; s. c. 2 Vern. 373, *nom.* Halfpenny *v.* Ballet. This case is related very graphically by Lord Chancellor Cowper, in Bawdes *v.* Amhurst, Finch. Prec. Ch. 404. He says he well remembered that this case was heard before the Master of the Rolls, and the plaintiff had a decree on the ground of the fraud, and "Halfpenny walked backwards and forwards in the court, and bid the Master of the Rolls observe the statute, which he humorously said, 'I do, I do.'"

[2] Jones *v.* M'Dougal, 32 Miss. 179; Cousins *v.* Wall, 3 Jones (N. C.) Eq. 43; Fraser *v.* Child, 4 E. D. Smith (N. Y.) 153; Cameron *v.* Ward, 8 Ga. 245; Arnold *v.* Cord, 16 Ind. 177; Martin *v.* Martin, 16 B. Mon. (Ky.) 8; Hodges *v.* Howard, 5 R. I. 149; *ante*, §§ 94 *et seq.*, and § 129; Hunt *v.* Roberts, 40 Me. 187; Nelson *v.* Worrall, 20 Ia. 469; Hidden *v.* Jordan, 21 Cal. 92; Coyle *v.* Davis, 20 Wis. 564; Servis *v.* Nelson, 14 N. J. Eq. 94; Catalani *v.* Catalani, 124 Ind. 54; Bohm *v.* Bohm, 9 Col. 100; Equitable Co. *v.* Baltimore Co., 63 Md. 285.

[3] Babcock *v.* Wyman, 19 How. (U. S.) 289, and cases there cited; Jones *v.* Jones, 1 Head (Tenn.) 105. *Ante*, §§ 441 *a*, *et seq.*

[4] *Ante*, §§ 94 *et seq.*

who holds a fiduciary relation to the plaintiff, he must surrender it to the plaintiff on the ground of that fiduciary relation, although he is, in doing so, peforming an oral contract to that effect.[1]

§ 446. Lord Keeper North, in a case arising a few years after the enactment of the statute, and where it was pleaded and the plea allowed, is reported to have been of opinion that if a plaintiff laid in his bill that it was part of the agreement that the agreement should be put in writing, it would alter the case and possibly require an answer.[2] And he appears to have actually decided to that effect in the case of Leak *v.* Morrice, occurring shortly afterward at the same term.[3] But Lord Thurlow, when the first of these cases was quoted before him, remarked that it was never decided, and added: "I take that to be a single case and to have been overruled. If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, I agree to it;[4] otherwise, I take Lord North's doctrine . . . to be a single decision, and contradicted, though not expressly, yet by the current of opinions."[5] In speaking of it as a single decision, his Lordship would seem to have overlooked the case of Leak *v.* Morrice; but however the question might stand upon a view of the early authorities, the doctrine referred to has clearly not been recognized in those of later years. Indeed, as is remarked by an acute writer on

[1] Wakeman *v.* Dodd, 12 N. J. Eq. 567.

[2] Hollis *v.* Whiteing, 1 Vern. 151.

[3] Leak *v.* Morrice, 2 Cas. Ch. 135.

[4] Equitable Co. *v.* Baltimore Co., 63 Md. 285.

[5] Whitchurch *v.* Bevis, 2 Bro. C. C. 565. See Wood *v.* Midgley, 5 De G., M. & G. 41. His Lordship at the same time says that the Earl of Aylesford's case (2 Stra. 783) is directly contrary; but, on reference to that decision, it is not clear that the point was involved in it. The report simply says: "There was a *parol* agreement for a lease of twenty-one years, upon which the lessee entered, and enjoyed for six years, and then the Earl brought a bill against him to oblige him to execute a counterpart for the residue of the term. The lessee pleaded the Statute of Frauds and Perjuries, which in argument was overruled, the agreement being in part carried into execution."

equity pleading, "If an allegation, that it was part of the agreement that the contract should be put in writing, could prevent a plea of the statute, the effect in practice would be, that the statute never could be pleaded, at least without a particular denial of such allegation, rendering the plea anomalous." [1]

§ 447. The next class of cases in which equity intervenes to enforce a verbal contract, notwithstanding the Statute of Frauds, consists of those where one party has done certain acts in part execution, or upon the faith of the contract, with the knowledge and consent of the other.[2] And although, for the sake of convenience, it is here treated as a distinct subdivision of the general topic of equitable doctrines in regard to the statute, it may be most useful to ascertain in what respect the principles upon which it stands differ from those of the cases we have already been considering.

§ 448. It is obvious that the *mere* circumstance that a verbal agreement has been in part performed, can afford no reason, such as to control the action of any court, whether of law or equity, for holding the parties bound to perform what remains executory. The doctrine of equity in such cases is, that where an agreement has been so far executed by one party, with the tacit encouragement of the other, and relying upon his fulfilment of it, that for the latter to repudiate it and shelter himself under the provisions of the statute, would amount to a fraud upon the former, that fraud will be defeated by compelling him to carry out the agreement.[3]

[1] Beames, Elements of Pleas in Equity, 181. See also Box *v.* Stanford, 13 Smedes & M. (Miss.) 93; Wilson *v.* Ray, 13 Ind. 1; Glass *v.* Hulbert, 102 Mass. 30, 39.

[2] Whether the plaintiff can ever rely on acts of part performance done by the defendant, *quære*. See §§ 453, 471, *post.*

[3] Seagood *v.* Meale, Prec. Ch. 560; Savage *v.* Foster, 9 Mod. 35; Morphett *v.* Jones, 1 Swanst. 172; Clinan *v.* Cooke, 1 Schoales & L. 22; Gunter *v.* Halsey, 2 Ambler, 586; Allen's Estate, 1 Watts & S. (Pa.) 383; Greenlee *v.* Greenlee, 22 Pa. St. 225; Moore *v.* Small, 19 Pa. St. 461; Church of the Advent *v.* Farrow, 7 Rich. (S. C.) Eq. 378; Sites *v.* Kellar,

§ 448 *a*. "The fraud," says Judge Wells in Glass *v.* Hulbert, "most commonly treated as taking an agreement out of the Statute of Frauds, is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the Statute of Frauds." [1]

§ 448 *b*. The cases which have already been considered present the feature of an actual fraud, an artifice, a trick, which, being alleged and proved, was relieved against by the court of equity without any reference to the statute. The fraud in cases of part-performance is no less fraud because

6 Ohio, 207; Anthony *v.* Leftwich, 3 Rand. (Va.) 255; Hamilton *v.* Jones, 3 Gill & J. (Md.) 127; Meach *v.* Stone, 1 D. Chip. (Vt.) 182; Underhill *v* Williams, 7 Blackf. (Ind.) 125; Eyre *v.* Eyre, 4 Green (N. J.) 102; Caton *v.* Caton, L. R. 1 Ch. App. 137; Ford *v.* Finney, 35 Ga. 258; Feusier *v.* Sneath, 3 Nev. 120; Townsend *v.* Hawkins, 45 Mo. 286; Wheeler *v.* Reynolds, 66 N. Y. 227; Hart *v.* Carroll, 85 Pa. St. 508; Williams *v.* Morris, 96 U. S. 444; Thompson *v.* Simpson, 128 N. Y. 270; Wendell *v.* Stone, 39 Hun (N. Y.) 382; Union Pacific R. R. *v.* McAlpine, 129 U. S. 305; Fallon *v.* Chronicle Publishing Co., 1 McArthur (D. of C.) 485; Turner *v.* Johnson, 95 Mo. 431. The equitable doctrine of part-performance as a ground for enforcing a verbal contract, notwithstanding the Statute of Frauds, has been repudiated in some few of the States. Ellis *v.* Ellis, 1 Dev. (N. C.) Eq. 341; Dunn *v.* Moore, 3 Ired. Eq. (N. C.) 364; Allen *v.* Chambers, 4 Ired. (N. C.) Eq. 125; Albea *v.* Griffin, 2 Dev. & B. (N. C.) Eq. 9; Beaman *v.* Buck, 9 Smedes & M. (Miss.) 207; Box *v.* Stanford, 13 Smedes & M. (Miss.) 93; Ridley *v.* McNairy, 2 Humph. (Tenn.) 174; Patton *v.* M'Clure, Mar. & Y. (Tenn.) 333. So in Massachusetts; see Jacobs *v.* Peterborough and Shirley R. R. Co., 8 Cush. 223, and cases there cited.

[1] Glass *v.* Hulbert, 102 Mass. 35. See Brown *v.* Hoag, 35 Minn. 373.

not asserted to have been, and not, in fact, premeditated at the inception of the transaction. Hence those courts of equity whose established powers extend to all cases of fraud of whatever description are able to enforce the contract, and do so upon the ground of the fraud, and upon none other. But where, as in some of the American States, the power of courts of equity to enforce contracts in cases of fraud is specifically given them by statute, it is an important inquiry whether they can decree execution where the fraud is constructive only, arising upon the circumstances of part-performance.

§ 449. By the Revised Statutes of Maine, power is given to the Supreme Judicial Court of that State to compel specific performance of contracts in writing made after a certain date therein mentioned, in all cases of "fraud, trust, accident, and mistake;" [1] enactments which have received the construction of that court in the following case: The defendants verbally agreed to sell the plaintiffs a lot of land at a certain price, relying upon which agreement the plaintiffs built a house upon the land and afterward tendered the price and requested a conveyance, which was refused, whereupon a bill was filed praying that the defendant might be compelled to perform his agreement, or pay the value of the house, and that he be restrained from obstructing the plaintiffs in their occupation of it, and from bringing suits against them on account of it. In the opinion of the court it is said, that if it was intrusted with a general jurisdiction in equity, there might be no difficulty in decreeing a specific execution of the agreement on the ground of part-peformance; but that its jurisdiction was limited in such cases. It is then remarked, that it had been decided that the original statute law of the State did not authorize the court to compel a specific performance of a contract in writing, and the opinion proceeeds to say: "By the Revised Statutes such

[1] Rev. Stat. Cap. 96, § 10. And in the Revised Statutes of 1871, Cap. 77, § 5.

power is given, but it is limited to contracts in writing, made since February 10, 1818. It is contended, however, by the counsel for the plaintiffs, that a specific performance of a verbal contract may be decreed by virtue of the statute giving jurisdiction in all cases of fraud. If the court were to decree the specific performance . . . on the ground, that after part-performance, it was a fraud upon one party for the other to refuse to execute a conveyance, the effect would be to assume, under that clause of the statute, the very jurisdiction intentionally denied under another and more appropriate clause. During the revision of the statutes the law relating to the specific performance of contracts not in writing, after they had been partially executed, was doubtless noticed and considered; and it appears to have been the intention not to authorize under any circumstances a decree for the specific performance of a contract not made in writing. It is also contended, that the defendant should in equity be enjoined from claiming and asserting a title to the lot, after having been instrumental in causing the plaintiffs to expend their money in building upon it under the promise of a title. It is true, that one, who hears another bargain with a third person for an estate, and sees such third person pay for it, or expend money upon it, without making known his own title, will not be permitted in equity to disturb him in the enjoyment of the estate, because by so doing he knowingly abets or aids the seller to deceive and injure him. The essential ingredient which destroys his own title is the knowledge, that the purchaser is deceived with respect to the title, and that he must suffer by it, and the neglect, when he has an opportunity to do so, to undeceive him and save him from injury. But this rule cannot be applied to cases of contract, where all the parties to the contract fully understand the true state of the title, and one of them seeks relief from another. The plaintiffs in this case were not ignorant, that the title to the lot was in the defendant, and that they must rely upon his verbal contract to obtain a title to it.

If the defendant, after having authorized the plaintiff to place the building upon his land, had by any act converted it to his own use, their proper remedy to recover the value of it would have been an action of trover, and not a suit in equity. It is not therefore necessary to consider, whether the testimony presented would have entitled them to maintain such an action. It is not perceived, that under this process the court has any power to relieve the plaintiffs from the inconvenience or loss which they may sustain by having inconsideratcly placed too great confidence in the verbal promise of the defendant." The bill was dismissed without costs.[1]

§ 450. In Massachusetts, also, the equity powers of the Supreme Court were formerly specifically defined, the Revised Statutes giving it power to enforce contracts in writing,[2] and an act passed in 1855 giving it "jurisdiction in equity in all cases of fraud."[3] The latter statute does not appear to have received a judicial construction in reference to cases of part-performance.[4] By the General Statutes[5] full equity jurisdiction is given to the Supreme Court, and this provision manifestly covers the specific execution of verbal agreements within the Statute of Frauds.[6]

[1] Inhabitants of Wilton *v.* Harwood, 23 Me. 133; Patterson *v.* Yeaton, 47 Me. 308. See Pulsifer *v.* Waterman, 73 Me. 233.

[2] Mass. Rev. Stat. Cap. 74, § 8.

[3] Stat. 1855, Cap. 194, § 1.

[4] In the case of Sanborn *v.* Sanborn, the point was raised and discussed, but as the suit was commenced before the passage of the statute of 1855, the court gave no opinion upon it, being clear that they had no jurisdiction of the suit, it being for specific execution of a verbal contract, though acts of part-performance were alleged. The bill was dismissed without prejudice to the complainants' right to file a new bill framed upon the hypothesis that the statute of 1855 would give the court jurisdiction as of the fraud arising upon the alleged part-performance. Sanborn *v.* Sanborn, 7 Gray, 142. No report of the subsequent trial and decision has been found.

[5] Mass. Gen. Stat. ch. 113, § 2.

[6] Glass *v.* Hulbert, 102 Mass. 33; Whelan *v.* Sullivan, 102 Mass. 204. It has been decided in Massachusetts, that a clause of the Revised Stat-

§ 451. It is settled by a long series of authorities, that a part execution of a verbal contract within the Statute of Frauds has no effect *at law* to take the case out of its provisions;[1] but this of course does not apply in those jurisdictions where law and equity powers are merged in the courts, sitting nominally as courts of law. Mr. Justice Buller did on one occasion lay it down, that as there could be but one construction of the statute, and that construction should hold equally in courts of law and equity, the equitable rules in regard to part-performance should apply in law.[2] Lord Redesdale says, however, that he remembers, when Mr. Justice Buller was pressed with the consequences of that opinion, in the case of a demurrer to evidence, he was obliged to abandon the position; and he adds that "the ground on which a court of equity goes, in cases of part-

utes giving the court jurisdiction of all suits concerning *waste*, etc., extended only to cases of technical waste, and not to cases of mere trespass where there is no priority of title, in which courts of equity having full powers had sometimes granted injunctions to stay irreparable damage to the inheritance. Attaquin *v.* Fish, 5 Met. 140. In 1874 full equity jurisdiction was conferred upon the courts of Maine.

[1] O'Herlihy *v.* Hedges, 1 Schoales & L. 123; Kelly *v.* Webster, 12 C. B. 283; Lane *v.* Shackford, 5 N. H. 130; Inhabitants of Freeport *v.* Bartol, 3 Greenl. (Me.) 340; Patterson *v.* Cunningham, 12 Me. 506; Norton *v.* Preston, 15 Me. 14; Newell *v.* Newell, 13 Vt. 24; Thompson *v.* Gould, 20 Pick. (Mass.) 134; Kidder *v.* Hunt, 1 Pick. (Mass.) 328; Adams *v.* Townsend, 1 Met. (Mass.) 483; Eaton *v.* Whitaker, 18 Conn. 222; Thomas *v.* Dickinson, 14 Barb. (N. Y.) 90; Abbott *v.* Draper, 4 Denio (N. Y.) 51; Jackson *v.* Pierce, 2 Johns. (N. Y.) 221; Seymour *v.* Davis, 2 Sand. (N. Y.) 239; Walter *v.* Walter, 1 Whart. (Pa.) 292; Henderson *v.* Hays, 2 Watts (Pa.) 148; Sailors *v.* Gambril, Smith (Ind.) 82; Johnson *v.* Hanson, 6 Ala. 351; Allen *v.* Booker, 2 Stew. (Ala.) 21; Meredith *v.* Naish, 4 Stew. & P. (Ala.) 59; Payson *v.* West, Walker (Miss.) 515; Davis *v.* Moore, 9 Rich. (S. C.) Law, 215; Wentworth *v.* Buhler, 3 E. D. Smith (N. Y.) 305; Pike *v.* Morey, 32 Vt. 37; Bontwell *v.* O'Keefe, 32 Barb. (N. Y.) 434; Downey *v.* Hotchkiss, 2 Day (Conn.) 225; Hunt *v.* Coe, 15 Iowa, 197; Creighton *v.* Sanders, 89 Ill. 543; Dougherty *v.* Catlett, 129 Ill. 431; Henry *v.* Wells, 48 Ark. 485. See Green *v.* Jones, 76 Me. 563.

[2] Brodie *v.* St. Paul, 1 Ves. Jr. 326.

performance, is that sort of fraud which is cognizable in equity only." [1]

§ 452. The right of a party who has done acts in part execution of a verbal contract, to call upon a court of equity to enforce it against the other, is subject to the same general restrictions as that of any other plaintiff in equity. He must of course show that he is himself ready to perform the contract on his part. It must also appear that his position is such that an action at law for damages will not afford him adequate relief.[2] And, as will be hereafter discussed more at length, he must furnish clear and full proof of the contract, so that it may be enforced finally, and with due regard to the rights of all parties concerned.[3]

§ 453. Again, the acts of part-performance relied upon by the plaintiff must be acts done by himself. This appears to have been first declared in the case of Buckmaster *v.* Harrop, where the Master of the Rolls, Sir William Grant, said that acts done by the defendant, where there was no prejudice to the plaintiff, amounted only to proof of the existence of an agreement, but that the objection upon the statute, that the agreement was not in writing, remained; adding, that the court did not profess to execute a verbal agreement merely because it was satisfactorily proved.[4] In support of this proposition, he cited the case of Whaley *v.* Bagnel, in the House

[1] O'Herlihy *v.* Hedges, 1 Schoales & L. 130. In Humphreys *v.* Green, L. R. 10 Q. B. D. 148, it was fully discussed by the judges of the Queen's Bench Division on appeal, whether damages might not be recovered for breach of a contract to devise land in a suit at law based upon alleged part-performance by the party suing.

[2] Frame *v.* Dawson, 14 Ves. 386; Pembroke *v.* Thorpe, cited 3 Swanst. 441, *note;* Eckert *v.* Eckert, 3 Penna. Rep. 332; Parkhurst *v.* Van Cortlandt, 1 Johns. (N. Y.) Ch. 273; Townsend *v.* Sharp, 2 Overt. (Tenn.) 192; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Wright *v.* Pucket, 22 Grat. (Va.) 370; Williams *v.* Morris, 95 U. S. 444; Sheldon *v.* Preva, 57 Vt. 263.

[3] *Post*, §§ 493 *et seq.*

[4] Buckmaster *v.* Harrop, 7 Ves. 341. See Glass *v.* Hulbert, 102 Mass. 30.

of Lords, which, however, does not appear to have involved an adjudication upon it.[1] But it cannot require many authorities for its support, being founded in manifest reason and justice. If the defendant chooses to waive the benefit of his own acts of part-performance, which would entitle him to allege a fraud on the part of the plaintiff, it cannot be that the plaintiff may force him to rely upon them, thus, in effect, himself setting up his own fraud.[2] The decision in Buckmaster *v.* Harrop has indeed been attacked in Pennsylvania, but entirely without necessity; the court having to determine simply in that case, whether *delivery* of possession of land could be asserted by the vendor plaintiff as an act of part-performance done by himself; apparently losing sight of the distinction, which is more particularly noted hereafter,[3] between his so asserting it, and his asserting the purchaser's *taking* possession, — an act which, by the rule in Buckmaster *v.* Harrop, could only be relied on by the purchaser, or those claiming under him.[4] With the exception of this case, there appears to be no dissent from that rule, on the part of any judicial or other authority.[5]

§ 454. Another general rule in regard to the acts relied upon is, that they must appear to have been done *in pursuance* of the contract alleged. To use the language of Lord Hardwicke, "it must be such an act done, as appears to the court would not have been done, unless on account of the agreement;"[6] or, as it is expressed by Sir William Grant,

[1] Whaley *v.* Bagnel, 1 Bro. P. C. 345.

[2] Rathbun *v.* Rathbun, 6 Barb. (N. Y.) 98; Barnes *v.* Boston & Maine R. R. 130 Mass. 388. But see Bard *v.* Elston, 31 Kansas 274.

[3] *Post*, §§ 468 *et seq.*

[4] Pugh *v.* Good, 3 Watts & S. (Pa.) 56. See Brown *v.* Hoag, 35 Minn. 373.

[5] See Sugden, Vend. & P. 169. Roberts on Frauds, 139; Cameron *v.* Austin, 65 Wisc. 652. In Caton *v.* Caton, L. R. 1 Ch. App. 148, Cranworth, L. C., says: "I presume it will not be argued that any consequence can be attached to acts of part-performance by *the party sought to be charged.*"

[6] Lacon *v.* Mertins, 3 Atk. 4.

it must be "an act unequivocally referring to, and resulting from, the agreement."[1] This rule is laid down in many cases, and will be found fully illustrated hereafter, when we come to consider in detail the different classes of acts which are commonly relied upon as part-performance.

§ 455. It has been sometimes said that the acts of part-performance, in order to avail a plaintiff seeking relief by specific execution, must be such as unequivocally *prove* the contract alleged. And, upon this view, it has been remarked by Mr. Roberts, that the entire doctrine of enforcing a contract in equity on the ground of part-performance proceeds in a circulating course of reasoning; that it *assumes* the existence of the contract, inasmuch as the acts must have been done with a direct view to perform a particular agreement, and that thus the acts relied on prove and are proved from the agreement at the same time; and he adds that "to call anything a part-performance before the existence of the thing whereof it is said to be the part-performance is established, is an anticipation of proof by assumption, and gets rid of the statute by jumping over it; for the statute requires proof, and prescribes the medium of proof."[2] So far as this view

[1] Frame *v.* Dawson, 14 Ves. 386. See upon this rule the following cases: Buckmaster *v.* Harrop, 7 Ves. 341; Lindsay *v.* Lynch, 2 Schoales & L. 1; O'Reilly *v.* Thompson, 2 Cox, 271; Parker *v.* Smith, 1 Coll. Ch. 624; Morphett *v.* Jones, 1 Swanst. 172; Brennan *v.* Bolton, 2 Dru. & War. 349; Cooth *v.* Jackson, 6 Ves. 12; Rathbun *v.* Rathbun, 6 Barb. (N. Y.) 98; North *v.* Forest, 15 Conn. 400; Osborn *v.* Phelps, 19 Conn. 74; Moore *v.* Small, 19 Pa. St. 461; Eckert *v.* Eckert, 3 Penna. Rep. 332; Frye *v.* Shepler, 7 Pa. St. 91; Moale *v.* Buchanan, 11 Gill & J. (Md.) 314; Hamilton *v.* Jones, 3 Gill & J. (Md.) 127; Shepherd *v.* Shepherd, 1 Md. Ch. Dec. 244; Owings *v.* Baldwin, 8 Gill (Md.) 337; Shepherd *v.* Bevin, 9 Gill (Md.) 32; Hall *v.* Hall, 2 McCord (S. C.) Ch. 269; Rawlins *v.* Shropshire, 45 Ga. 182; Townsend *v.* Sharp, 2 Over. (Tenn.) 192; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Cole *v.* Potts, 10 N. J. Eq. 67; Jervis *v.* Smith, Hoff. (N. J.) Ch. 470; Cutsinger *v.* Ballard, 115 Ind. 93; Ducie *v.* Ford, 8 Montana, 233; Sullivan *v.* Ross Estate, 98 Mich. 570; Koch *v.* National Building Association, 137 Ill. 497; Shahan *v.* Swan, 48 Ohio St. 25; Wallace *v.* Rappleye, 103 Ill. 229.

[2] Roberts on Frauds, 135.

tends only to prove general unsoundness in the equitable doctrine of part-performance, it would be of little practical importance to discuss it, now that the doctrine is so firmly rooted in the jurisprudence of both England and our own country. But it seems to confound two branches of that doctrine which are, and it is most material should be, kept entirely distinct; namely, the use of parol evidence to prove the terms of the contract, and the use of parol evidence to prove part-performance. The latter evidence is that which, in such cases, is required to be first introduced. It is manifest that the two classes of evidence cannot be required for proving precisely the same thing. If the acts of part-performance prove the whole contract, there is no occasion for any parol evidence of its terms, and no difficulty whatever arises under the Statute of Frauds. It is true, the acts relied on must ultimately appear to have been done in pursuance of the contract sought to be enforced, or the whole equity of the plaintiff fails. But they are not put in evidence to prove what that contract is, that being the office of the parol evidence to which the proof of them opens the door. They are put in evidence, in the first instance, to show that the parties have entered into *some contract*, and they must be such as clearly to show that fact. Vice-Chancellor Sir James Wigram says: "It is, in general, of the essence of such an act that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. A common example of this is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that *some contract* has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part-performance. But an act which, though in truth done in pur-

suance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part-performance taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money, alleged to be purchase-money. The *fraud*, in a moral point of view, may be as great in the one case as in the other; but in the latter cases the court does not in general give relief."[1]

§ 455 *a*. The question of the principle upon which courts of equity proceed in enforcing oral contracts covered by the Statute of Frauds, which have been acted upon by the party seeking relief, has received very thorough consideration in Maddison *v.* Alderson, before the House of Lords.[2] The case was that an intestate induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by the verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate; and it was held that there was no contract, and that even if there had been, and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its nature referable to any contract, and was not such a part-performance as to take the case out of the operation of the Statute of Frauds, and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.[3] The Lord Chancellor (Selborne) said: "In a suit founded on part-performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injus-

[1] Dale *v.* Hamilton, 5 Hare, 381. And see Forster *v.* Hale, 3 Ves. Jr. 696. Also § 463 notes, *post*.

[2] Maddison *v.* Alderson, 8 App. Cas. 476.

[3] See sec. 463, note 2.

tice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the

rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement." The case is an instructive one, and Lord Selborne's opinion contains a careful review of the authorities.

§ 456. These remarks, though they may somewhat anticipate the discussion, which it has been thought best to defer to a later page, of what acts are or are not deemed sufficient as part-performance, are valuable at this point, as embodying, in singularly clear and forcible phrase, the correct rule as to the extent to which acts of part-performance may be said themselves to afford, or to be required to afford, proof of the contract alleged. There are indeed some cases [1] in which it is broadly laid down that they must themselves furnish unequivocal evidence of the contract alleged, but this leaves the whole doctrine exposed to the criticism of Mr. Roberts, by confounding the offices and degrees of the two classes of parol evidence; the first, to prove some contract existing; the second, to prove the terms of that contract; the first, to sustain the allegation of fraud so as to let in the second; the second, to satisfy the court of all the terms of that contract which it is called upon to enforce. And these cases, to this extent, are opposed to the clear preponderance of judicial opinion.[2] They would seem to have proceeded upon an imperfect apprehension of the force of Sir William Grant's language that the acts of part-performance must "unequivocally refer to *the* agreement;" which means that they must appear to have been done in pursuance of it, but

[1] Phillips *v.* Thompson, 1 Johns. (N. Y.) Ch. 131; Beard *v.* Linthicum, 1 Md. Ch. Dec. 345; Grant *v.* Craigmiles, 1 Bibb (Ky.) 203; Chesapeake & Ohio Canal Co. *v.* Young, 3 Md. 480; Goodhue *v.* Barnwell Rice (S. C.) Eq. 198; Sitton *v.* Shipp, 65 Mo. 297.

[2] Allan *v.* Bower, 3 Bro. C. C. 149; Morphett *v.* Jones, 1 Swanst. 172; Frame *v.* Dawson, 14 Ves. 386; Sutherland *v.* Briggs, 1 Hare, 26; Savage *v.* Carroll, 1 Ball & B. 265; Toole *v.* Medlicott, 1 Ball & B. 393; Church *v.* Sterling, 16 Conn. 388; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Parkhurst *v.* Van Cortland, 14 Johns. (N. Y.) 15; Jones *v.* Peterman, 3 Serg. & R. (Pa.) 543; Grant *v.* Grant, 63 Conn. 530; Andrews *v.* Babcock, Ibid. 109, 122.

not that they must themselves, and without any suppletory evidence, prove the terms of it.

§ 457. It is also sometimes further said that the acts of part-performance relied upon by the plaintiff must have been done in *execution* of the contract, or, as Mr. Roberts expresses it, "must appear to be done with a direct view to perform the agreement, and tend inceptively towards its accomplishment."[1] Acts of part-performance do, *ex vi termini*, it would seem, come under this description. Still, it is often the case that acts are done by the plaintiff, and acquiesced in by the defendant, which cannot be said to be done in execution of the contract, because the contract does not stipulate that they should be done, yet which are such that if the defendant acquiesced in their being done, it would prevent him from afterward relying upon the statute, — acts, for instance, so connected with the performance of the contract that from the nature of the case the defendant should understand they were done in reliance upon his agreement. An illustration of this is found in the rule that the expenditure by the plaintiff of money in improvements upon the land may entitle him to specific performance, although this formed no part of what he was to do under the terms of the contract. On the other hand, however, it is obvious that the acts done must obviously be related to and connected with the contract and the defendant's performance of it. If any act, however disconnected with the agreement, which a plaintiff might proceed to do upon the faith of the agreement, were to be regarded as a reason for the interposition of equity, because prejudicial to him, known to the defendant, and incapable of adequate compensation in damages, the inconvenience would be serious and manifest.[2]

[1] Roberts on Frauds, 140. See Gunter *v.* Halsey, 2 Ambl. 586; Buckmaster *v.* Harrop, 7 Ves. 341.

[2] See Parker *v.* Heaton, 55 Ind. 1; Williams *v.* Morris, 96 U. S. 444; Lydick *v.* Holland, 83 Mo. 783. In Whitchurch *v.* Bevis, 2 Bro. C. C. 559. the bill stated, among other circumstances which were relied upon to meet the defence of the statute, that "the plaintiff had, with the privity

§ 457 *a.* It is important here, as well as throughout the discussion of the question of equity jurisdiction over the enforcement of oral contracts in which the defence of the Statute of Frauds may be relied upon, to bear in mind the nature and foundation of that jurisdiction. It is to be remembered that the term "part-performance" falls short of describing the whole doctrine and theory of courts of equity in this matter.[1] The principle is well stated in a case frequently referred to in this chapter.[2] After pointing out the general head of equity jurisdiction, viz., fraud, the Supreme Court of Massachusetts, by Wells, J., says: "The fraud most commonly treated, as taking an agreement out of the Statute of Frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon

and consent of the defendant, entered into articles with a third person (Webb) to grant him a lease of the premises for seven years, as soon as he should be in possession of the lease from the defendant." The questions presented and decided in the case related only to the pleadings, but, in the course of the hearing, in reply to a suggestion by the counsel for the plaintiff that the sufficiency of the part-performance alleged could not be argued till the hearing on the merits, the Lord Chancellor, Thurlow, said: "Supposing you have laid a sufficient part-performance in your bill, I cannot conceive the plea would have held. . . . But the great point is, whether you can plead the Statute of Frauds, without supporting the plea by an answer, averring that there was no parol agreement. I put out of the case all the facts, charged in the bill as a part-performance, considering them as weak and trivial, and by no means amounting to a part-performance." It will be noticed that the last remark was *obiter*, and the language of Lord Thurlow does not warrant the inference that he intended thereby to make any statement concerning the general doctrines of part-performance, but simply to show that, in the case before him, enough was not alleged to give a court of equity the power to enforce performance of the contract.

[1] As was well said by the court in Meach *v.* Perry, 1 D. Chip (Vt.) 191, "The question never ought to have been, Is it a case of part-performance? But, does the part-performance, with the attending circumstances, make a case of fraud, against which a court of equity can relieve?" See Brown *v.* Hoag, 35 Minn. 373.

[2] Glass *v.* Hulbert, 102 Mass. 34, 35.

the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the Statute of Frauds."[1] Bearing in mind, as was said in another part of the same opinion, "the purport and force of the statute, which reaches no farther than to deny the right of action to enforce such agreements," we see here a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitations of its exercise. A plaintiff, seeking specific performance of an oral agreement affected by the statute, must be able to show clearly not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur "an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defence." After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.

§ 458. The change of situation necessary to create the

[1] See similar statements of the doctrine in Swain *v.* Seamens, 9 Wall. (U. S.) 254; Neale *v.* Neales, 9 Wall. (U. S.) 1; Tate *v.* Jones, 16 Fla. 216; Ungley *v.* Ungley, 4 Ch. Div. 73. And on the general ground of a person being estopped by his conduct to rely upon this defence, see Vicksburg & Meridian R. R. Co. *v.* Ragsdale, 54 Miss. 200; Hayes *v.* Livingston, 34 Mich. 384; Gheen *v.* Osborne, 11 Heisk. (Tenn.) 61; Brown *v.* Hoag, 35 Minn. 373; O'Fallon *v.* Clopton, 89 Mo. 284.

equitable estoppel must have been made in reliance upon and in pursuance of the contract, although it is not confined to the doing of what the contract stipulates, *i. e.*, part-performance, strictly so called.[1] As that phrase, however, is commonly used as a short and convenient statement of the general ground of specific performance, it will be used in the present discussion, except as to those cases where the equitable circumstances were not acts which the contract stipulated should be done, and were consequently not part-performance, or indeed performance at all.

§ 458 *a.* At the outset it should be observed that the application of the rules as to equitable enforcement must to a considerable extent be governed by the circumstances of each case. As has been well said in a recent case in Minnesota, "the courts have never assumed or attempted to lay down any general rule as to what would or would not constitute part-performance, but have rather contented themselves with applying this principle to the facts of each case, by which, under a gradual process of inclusion and exclusion, it has been determined that certain states of facts will operate as an equitable estoppel, and that certain others will not."

§ 459. It would certainly seem that where a party, to whom a marriage portion has been promised, actually enters into the marriage upon the faith of the promise, this is such a change of condition on the faith of the agreement as answers all the requirements of courts in decreeing specific performance. But it appears to be firmly settled that the mere marriage will not be sufficient.[2] This, as Judge Story

[1] See Swain *v.* Seamens, 9 Wall. (U. S.) 254; Neale *v.* Neales, 9 Wall. (U. S.) 1; Brown *v.* Hoag, 35 Minn. 373. But see Wallace *v.* Rappleye, 103 Ill. 229.

[2] Montacute *v.* Maxwell 1 P. Wms. 618; Taylor *v.* Beech, 1 Ves. Sr. 297; Dundas *v.* Dutens, 1 Ves. Jr. 196; s. c. 2 Cox, 235; Redding *v.* Wilkes, 3 Bro. C. C. 400; Story, Eq Jur. § 768: Finch *v.* Finch, 10 Ohio St. 501; Caton *v.* Caton, L. R. 1 Ch. App. 137; Peek *v.* Peek, 77 Cal. 106; Richardson *v.* Richardson, 148 Ill. 563; Richardson *v.* Richardson, 45 Ill. App. Ct. 362.

says, is at variance with the rules governing other cases of contract, and is to be treated as a peculiar case standing on its own grounds;[1] and Vice Chancellor Malins has expressed his regret that such an exception was ever made.[2] The argument in favor of it has been that "marriage is necessary to bring the case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity,"[3] and that "such agreements are always performed before they become the subject of judicial consideration, and so no case would ever be within the statute," if marriage were held to be part-performance. But is this so? Suppose a woman agrees to marry a man, on the faith of his promise to settle her property to the use of her own family; both sides of the contract executory; and the woman marries him; it is hard to see why the principle of part-performance as a doctrine of equity should not cover the case. In a case in the House of Lords,[4] where the old rule that marriage was not part-performance was in terms (though unnecessarily) reasserted, Lord Cottenham used language very forcible showing the equitable ground for the contrary opinion. He said: "The principle of equity is this: if a party holds out inducements to another, clearly and deliberately, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal."

§ 459 *a*. Where, however, there is not only a marriage but any further act done, in reliance upon the promise sued upon, there a claim to specific execution may be sustained.[5] Thus, in a case before the Lords Justices, it was held that

[1] Eq. Jur. § 768.

[2] Ungley *v.* Ungley, 4 Ch. Div. 73. See also remarks of same Judge in Coles *v.* Pilkington, L. R. 19 Eq. 174.

[3] Caton *v.* Caton, *supra*.

[4] Hammersly *v.* De Biel, 12 Cl. & Fin. 45.

[5] Taylor *v.* Beech, 1 Ves. Sr. 297; Ungley *v.* Ungley, 4 Ch. Div. 73.

the son-in-law having, after the marriage and with the knowledge of the father-in-law and without objection by him, entered upon and used and improved premises which it was verbally proved the latter had said he intended to give to him and his wife, a case of part-performance was made out, and the petition of the administrator of the father-in-law, for payment over to him of the purchase-money upon a sale of the premises by the son-in-law to a third party, was dismissed.[1] So, also, where an intended husband, whose wife was to receive upon her marriage a large settlement, engaged by the same agreement to settle a certain jointure upon her, which he did before the marriage took place, both Lord Cottenham and afterward Lord Campbell and Lord Chancellor Lyndhurst strongly inclined to hold it a sufficient part-performance, though the marriage which had ensued was of itself not sufficient. Upon this point, however, no decision was passed, the case being determined upon a distinct ground.[2]

§ 460. It is settled that acts which are merely preparatory or ancillary to the agreement alleged are not to be considered as part-performance. Of this nature are the following: delivering abstracts and giving directions for the preparation of conveyances, or even the solicitor's taking notes and preparing the instrument, going to view the estate, fixing upon appraisers to value stock, or making valuations, measuring the land, executing and registering conveyances not accepted by the purchaser, etc.[3] It is obvious that such acts as these,

[1] Surcome *v.* Pinniger, 3 De G., M. & G. 571; explaining Lassence *v.* Tierney, 1 McN. & G. 551.

[2] Hammersly *v.* Baron De Biel, 12 Clark & F. 61, where Lord Cottenham's opinion, on appeal from the Rolls, is reported; s. c. at the Rolls, *nom.* De Biel *v.* Thomson, 3 Beav. 469. See also Caton *v.* Caton, L. R. 1 Ch. App. 137.

[3] Earl of Glengal *v.* Barnard, 1 Keen, 769; Cooth *v.* Jackson, 6 Ves. 12; Clerk *v.* Wright, 1 Atk. 12; Pembroke *v.* Thorpe, cited in 3 Swanst. 437; Thynne *v.* Earl of Glengal, 2 H. L. C. 131, 158; Gratz *v.* Gratz, 4 Rawle (Pa.) 411; Hawkins *v.* Holmes, 1 P. Wms. 770; Montacute *v.* Maxwell, 1 P. Wms. 618; Popham *v.* Eyre, Lofft, 786; Whitchurch *v.*

though tending to show a treaty in progress between the parties, do not prove any agreement executed between them, do not show the parties in a position different from that which they would be in, according to their legal rights, if there were no contract made. And so, also, where the defendant agreed to convey land to the plaintiff, on the latter's procuring a release from a stranger, which he did procure accordingly and paid a large consideration for it, it was held to be an act merely preparatory to the agreement and no part-performance.[1] But where the landlord of a coal set, having four tenants, partners, holding under a lease of which there were several years to run, entered into an agreement with the four lessees that two of them should retire from the copartnership, so that the benefit of the lease and the business of the colliery should remain to the other two, and that on this being done he would grant a new lease at a reduced rent, and in accordance with this agreement the firm dissolved, and the two retiring partners released their interest therein, it was considered by Sir Knight Bruce, Vice Chancellor, impossible to treat these acts otherwise than as acts of part-performance, taking the case out of the statute; and he distinguished the case from that last quoted, because there the release procured was not between the parties to the contract which was sought to be enforced, and the procuring of it was to be antecedent to, and formed no part of, the execution of the contract.[2]

§ 460 *a*. As the remainder of the discussion of the doctrine of part-performance will be concerned exclusively with cases of contracts for land, this may be a convenient place to consider the question, on which the authorities are con-

Bevis, 2 Bro. C. C. 559; Redding *v.* Wilkes, 3 Bro. C. C. 400; Givens *v.* Calder, 2 Desaus. (S. C.) Ch. 171; Reeves *v.* Pye, 1 Cranch (C. C.) 219; Colgrove *v.* Solomon, 34 Mich. 494. Compare Whaley *v.* Bagnel, 1 Bro. P. C. 345.

[1] O'Reilly *v.* Thompson, 2 Cox, 271; Lydick *v.* Holland, 83 Mo. 703 *Post*, § 463.

[2] Parker *v.* Smith, 1 Coll. Ch. 608.

flicting, whether that doctrine really has any proper application to any contracts other than contracts for land. It is manifest that these are not the only contracts included within the provisions of the Statute of Frauds which in their nature admit of part-performance. There may be part-performance of an agreement not to be performed within a year, or of an agreement in consideration of marriage. While the marriage alone, as we have already seen,[1] is not regarded as an act of part-performance which entitles the party marrying to a decree in equity for specific execution; other acts done upon the faith of the marriage contract have been held in England to be acts of part-performance entitling the party doing them to such a decree;[2] but in view of more recent cases, it must be taken now as settled in England that the doctrine of part-performance has no application except to contracts for land.[3] In a suit in equity to compel account of the profits of a concern, a certain share of which profits to be earned in a term outrunning one year was the verbally agreed consideration for services which had been rendered by the plaintiff, the Supreme Court of New Jersey refused even to receive evidence of the profits to ascertain the value of the services, and refused also to recognize the rendering of the services as an act of part-performance, saying that the doctrine of part-performance "applies only to contracts relating to lands" and does not extend to contracts relating to other matters.[4] As a matter of principle, having regard to the substance of that doctrine, which is that when one party has so changed his situation as to the subject-matter of the agreement on the faith of the agreement, that the refusal of

[1] *Ante*, § 459.

[2] Hammersly *v.* De Biel, 12 Clark & Finnelly, 45; Surcome *v.* Pinniger, 3 De G., M & G. 571.

[3] Britain *v.* Rossiter, 11 Q. B. Div. 123; Maddison *v.* Alderson, 8 App. Cas. 474.

[4] McElroy *v.* Ludlum, 32 N. J. Eq. 828. See also Wheeler *v.* Frankenthal, 76 Ill. 124; Osborn *v.* Kimball, 41 Kansas, 187; Equitable Co *v* Baltimore Co., 63 Md. 285.

the other party to carry it out would inflict upon him an unjust and unconscientious injury and loss, equity will not permit the Statute of Frauds to be set up in aid of the refusal, there seems to be no reason for limiting the operation of the doctrine to any particular class of contracts included within the statute.

§ 461. It was originally held that payment of the whole or of a considerable part of the purchase-money, upon a verbal contract for real estate, was such a part-performance as entitled the party making it to a decree for the specific execution of the contract, while, at the same time, payment of a small part was not held sufficient.[1] The entire unsoundness of such a discrimination as to the amount paid is now, however, generally conceded. The objections to it are stated, with his usual force and clearness, by Sir Edward Sugden, thus: "To say that a *considerable* share of the purchase-money must be given, is rather to raise a question than to establish a rule. What is a considerable share, and what is a trifling sum? Is it to be judged of upon a mere statement of the sum paid, without reference to the amount of the purchase-money? If so, what is the sum that must be given to call for the interference of the court? What is the limit of the amount at which it ceases to be trifling, and begins to be substantial? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid?"[2] And now, by an unbroken current of authorities, running through many years, it is settled too firmly for question, that payment, even to the whole amount of the purchase-money, is not to be deemed such part-per-

[1] Lacon *v.* Mertins, 3 Atk. 1; Skett *v.* Whitmore, Freem. Ch. 280; Owen *v.* Davies, 1 Ves. Sr. 82; Hales *v.* Van Berchem, 2 Vern. 617; Main *v.* Melbourn, 4 Ves. 720, and Dickenson *v.* Adams, there cited. See also Jones *v.* Peterman, 3 Serg. & R. (Pa.) 543; Hardesty *v.* Jones, 10 Gill & J. (Md.) 404; Frieze *v.* Glenn, 2 Md. Ch. Dec. 361; Rawlins *v.* Shropshire, 45 Ga. 182; Castleman *v.* Sherry, 42 Tex. 59.

[2] Treatise on Vendors and Purchasers, 168. And see 1 Burton, Cas. & Opin. 136. Story Eq. Jur. § 760.

formance as to justify a court of equity in enforcing the contract.[1]

§ 462. Nevertheless, it is important to notice with some particularity the grounds on which these authorities rest. One reason which is assigned, and that which was said by Lord Redesdale to be the great reason, why payment is not to be deemed part-performance, is that the framers of the statute having expressly provided that payment in whole or in part shall be sufficient to exempt from its operation a contract for the sale of goods, wares, or merchandise, they must be presumed to have intended that it should not be sufficient in cases of contracts for lands, no such provision in favor of the latter occurring in the statute.[2] And upon this view, among others, the Court of Appeals of Delaware have decreed execution of a verbal contract for land, where part of the purchase-money has been paid; the Statute of Frauds in that State, as it then stood, not presenting any such difference between the two sections.[3] But it may be remarked that by the seventeenth section of the English statute, part-payment is made a substitute for the written memorandum; whereas courts of equity, as we have before noticed, never regard acts of part-performance in that light, but as demanding from them the application of certain rules which are of paramount force in their jurisdiction, and which override the statute altogether.

[1] Temple *v.* Johnson, 71 Ill. 13; Glass *v.* Hulbert, 102 Mass. 28; Wood *v.* Jones, 35 Tex. 64. But otherwise in *Iowa* by its statute. Stern *v.* Nysonger, 69 Iowa, 512. Carlisle *v.* Brennan, 67 Ind. 12; Green *v.* Groves, 109 Ind. 519; Townsend *v.* Fenton, 30 Minn. 528; Webster *v.* Blodgett, 59 N. H. 120; Price *v.* Price, 17 Fla. 605; Neal *v.* Gregory, 19 Fla. 356; Humbert *v.* Brisbane, 25 S. C. 506; Ward *v.* Stuart, 62 Texas, 333; Guthrie *v.* Anderson, 47 Kansas, 383; Maxfield *v.* West, 6 Utah, 327; Boulder Valley Co. *v.* Farnham, 12 Mont. 1; Crabill *v.* Marsh, 38 Ohio St. 331; Townsend *v.* Vandenwerker, 20 D. of C. 197; Miller *v.* Lorentz, 19 S. E. Rep. (W. Va.) 391.

[2] Clinan *v.* Cooke, 1 Schoales & L. 22; Lord Pengall *v.* Ross, 2 Eq. Cas. Abr. 46; Lane *v.* Schackford, 5 N. H. 130; Baker *v.* Wiswell, 17 Neb. 52.

[3] Townsend *v.* Houston, 1 Harr. 532; Houston *v.* Townsend, 1 Del. Ch. 416.

§ 463. Another view is, that payment is not part-performance, because nothing is to be so regarded which does not put the party performing it in such a position that a fraud will be allowed to be practised upon him if the contract is not enforced. And this is the view which is now generally adopted, and to which Mr. Justice Story gives his approbation.[1] The money, it is said, may be recovered back by action, and the parties restored to their original position. If, from the nature of the payment, or the peculiar circumstances of the case, this cannot be done, this rule would seem to fail with the reason of it. Thus an agreement by one, who was himself helpless from disease, to convey a piece of land to another, in consideration of being provided for and taken care of during his lifetime, has been enforced, in New York, against the heirs-at-law of the former; the court remarking that the rule applied to a money consideration only, and that where, as here, the services were of such a peculiar character that it was impossible to estimate their value to the recipient by any pecuniary standard, and where it was evident that they were not intended to be so measured, it was out of the power of any court, after the performance of the services, to restore the complainant to the situation in which he was before the contract was made, or to compensate him in damages.[2] And so, also, where the complainant has not paid his money, but has involved himself in

[1] Story, Eq. Jur. § 761.

[2] Rhodes *v.* Rhodes, 3 Sandf. (N. Y.) Ch. 279. See Watson *v.* Mahan, 20 Ind. 223; Davison *v.* Davison, 13 N. J. Eq. 246; Gupton *v.* Gupton, 47 Mo. 37; Webster *v.* Gray, 37 Mich. 37; Franklin *v.* Tuckerman, 68 Iowa, 572; Crabill *v.* Marsh, 38 Ohio St. 331; Howard *v.* Brower, 37 Ohio St. 402; Phlugar *v.* Pulz, 43 N. J. Eq. 440. But see Suman *v.* Springate, 67 Ind. 115; Wallace *v.* Long, 105 Ind. 522; Austin *v.* Davis, 128 Ind. 472; Hershman *v.* Pascal, 4 Ind. App. Ct. 330. A similar point was raised in argument by Sir Samuel Romilly, as early as the case of Buckmaster *v.* Harrop, 13 Ves. 456. The payment there, however, was of the auction *duty*, and Lord Chancellor Erskine, admitting that the duty could not be recovered back, held that the payment was not to be taken as an act of part-performance, because it was required to be made, whether there was any effectual contract or not.

transactions including the contract in question, and upon the strength of it, from which he cannot retire without a damage, which would not be compensated by mere repayment, the highest court in the same State has decreed the contract to be specifically executed.[1]

[1] Malins *v.* Brown, 4 N. Y. 403; German *v.* Machin, 6 Paige Ch. 288. See also Dugan *v.* Gittings, 3 Gill (Md.) 138; Gosden *v.* Tucker, 6 Munf. (Va.) 1; Johnson *v.* Hubbell, 2 Stock. (N. J.) 332. *Ante*, § 460. The rule stated in the text is supported by the following cases also: Phlugar *v.* Pulz, 43 N. J. Eq. 440; Warren *v.* Warren, 105 Ill. 568; Kenyon *v.* Youlan, 53 Hun (N. Y.) 592; Matthews *v.* Matthews, 62 Hun (N. Y.) 110; Van Dyre, 3 Stock. (N. J.) 370; Sharkey *v.* McDermott, 91 Mo. 647; Fuchs *v.* Fuchs, 48 Mo. App. 18; Ruggles *v.* Emery, 14 Sup. Ct. Rep. 1083; Ford *v.* Steele, 31 Neb. 521. But in the recent case of Wallace *v.* Long, 105 Ind. 522 the Supreme Court of Indiana have decided to the contrary. The facts were that a childless husband and wife, in consideration that a young girl should live with them until the death of either of them and of the survivor, in all respects as their child, rendering them such service as she could, verbally promised to give her by will at their death the whole estate, which included land and more than fifty dollars' worth of personalty; it was held that the Statute of Frauds applied, and that the verbal promise, notwithstanding performance by the girl, could not be enforced. See also Maddison *v.* Alderson, 8 App. Cas. 467, disapproving Loffus *v.* Maw, 3 Giff. 592; Nelson *v.* Masterton, 2 Griffith (Ind.) 524; Grant *v.* Grant, 63 Conn. 530 and cases cited; Baldwin *v.* Squier, 31 Kansas, 283. The case of Brown *v.* Sutton, 129 U. S. 238, is peculiar. In that case the facts were that in consideration of the plaintiff's living with the defendant and his wife and taking care of them until their death, the defendant agreed to buy land and build a house on it larger than was necessary for the three, and made larger for the purpose of enabling the plaintiff to keep boarders therein; and the land was bought and the house built accordingly, and the plaintiff put into possession. The Court said: "There can be little doubt that the delivery of possession to the Suttons, and the construction of this house under their direction and control, is a sufficient part-performance to take the case out of the Statute of Frauds;" and the decree accordingly was affirmed. No cases are cited. In the case of Mauck *v* Melton, 64 Indiana, 414, where the verbal promise was to convey or devise lands to promisee, in consideration of promisee's boarding and caring for him during his life, and the promisee was put in possession, and also made valuable improvements upon the property, the case was, with more reason, it would seem, held to be taken out of the statute by the promisee's acts in part-performance of the contract. The difficulty with the decision in Brown *v.* Sutton is that the possession was no more by one

§ 464. In such cases as these, it will be observed, the contract is originally so made that the payment provided for

party than the other, as they all occupied together. (See *post*, sections 474, 476.) In the case of Barbour *v.* Barbour, 49 N. J. Eq. 429, a husband, against whom his wife had filed a petition for divorce on the ground of adultery, asking for alimony and counsel fees, entered into an agreement with his wife by which he promised that if she would dismiss her suit and return to him and live with him as his wife, he would execute and deliver to her a deed for the house and lot in and upon which they had been living, and she accepted his offer, dismissed her suit, and returned to her home in good faith. He was required to specifically perform. In Murphy *v.* Whitney, 69 Hun (N. Y.) 573, there was an agreement between parties owning an estate, that it should be held in common for the joint use of all, as from time to time they might be living, and that on the decease of any of them, his or her interest was to vest in the survivors, until the title was concentrated in the last survivor, on whose death it should pass to the plaintiff. This agreement was respected by the brothers and sisters, who by deeds and wills conveyed and devised their interests to each other, until all had died but one sister. She, being old and feeble, was induced by the other defendants to convey the property to them without consideration. *Held*, that she could not be compelled to convey or devise to the plaintiff the undivided share of the estate owned by her as a tenant in common with her brothers and sisters; but that as to the remainder, as to which the agreement had been executed by the other tenants in common by conveying and delivering their shares to her, she would not be permitted to repudiate the agreement under which she had taken title, as such repudiation would be a fraud upon all her deceased brothers and sisters; and that on her death, such shares should go to the plaintiff; and there was a decree establishing the trust and setting aside the conveyance to the other defendants. (Affirmed in Murphy *v.* Whitney, 140 N. Y. 541.) Compare with this Graves *v.* Goldthwait, 153 Mass. 268, where, on a bill in equity for specific performance, it appeared that the plaintiff and her six sisters, including the defendant, all of whom were tenants in common of several parcels of land, made an oral agreement, by which the plaintiff was to pay to each a fixed sum, and they were to convey to her their right and title in and to one parcel, on which the plaintiff resided; and after three of them had conveyed to her their respective interests, and each had received the sum agreed, she offered the same amount to the defendant, requesting a release, which was refused; that thereafter, and before the bill was brought, the other two released their rights to her, in accordance with the agreement; and that the defendant offered, for the protection of the plaintiff's title, to surrender any claim she might have to avoid the conveyances made to her by the other sisters of their respective fractions of the parcel in question, and to recognize their validity. *Held*, that any injury that might

cannot be satisfactorily returned; and so it is, in effect, a fraud in the defendant to repudiate the contract. The case seems to be different where, a mere money consideration having been originally provided for, the defendant has become bankrupt or otherwise unable to return it. Here there is no such fraud in the transaction on his part as would justify equitable interference.[1]

§ 465. Although payment alone is not sufficient, yet it may serve to corroborate other acts which are generally regarded as amounting to part-performance, so as to afford ground for a decree of specific execution. Where, for instance, it is accompanied by a purchaser's entering into possession of land in pursuance of a verbal contract for the purchase of it, a case for specific performance is commonly considered to be shown.[2] And this leads us to some impor-

result to the plaintiff by a failure of the defendant to carry out her agreement was insufficient to take the contract out of the Statute of Frauds; and that the bill must be dismissed.

[1] On this point compare § 760 and § 761 of Story, Eq. Jur. See Townsend *v.* Fenton, 32 Minn. 482.

[2] See, in addition to those cited hereafter under the head of taking or giving possession, the following cases: Wilkinson *v.* Scott, 17 Mass. 249; Sutton *v.* Sutton, 13 Vt. 71; Davis *v.* Townsend, 10 Barb. (N. Y.) 333; Gilday *v.* Watson, 2 Serg. & R. (Pa.) 407; Greenwalt *v.* Horner, 6 Serg. & R. (Pa.) 71; Billington *v.* Welsh, 5 Binn. (Pa.) 129; Dugan *v.* Gittings, 3 Gill (Md.) 138; Drury *v.* Conner, 6 Harr. & J. (Md.) 288; Moale *v.* Buchanan, 11 Gill & J. (Md.) 314; Woods *v.* Farmare, 10 Watts (Pa.) 195; Follmer *v.* Dale, 9 Pa. St. 83; Tibbs *v.* Barker, 1 Blackf. (Ind.) 58; Williams *v.* Pope, Wright (Ohio) 406; Kelley *v.* Stanbery, 13 Ohio, 408; Shirley *v.* Spencer, 4 Gilm. (Ill.) 583; Thornton *v.* Vaughan, 2 Scam. (Ill.) 218; Hawkins *v.* King, 2 A. K. Marsh. (Ky.) 548; Brewer *v.* Brewer, 19 Ala. 481; Wible *v.* Wible, 1 Grant (Pa.) 406; Jones *v.* Pease, 21 Wisc. 644; Fitzsimmons *v.* Allen, 39 Ill. 440; Holmes *v.* Caden, 57 Vt. 111; Hunt *v.* Hayt, 10 Col. 278; Holmden *v.* Janes, 42 Kansas 758; Bechtel *v.* Cone, 52 Md. 698; McWhinne *v.* Martin, 77 Wisc. 182; McDowell *v.* Lucas, 97 Ill. 489; McNamara *v.* Garrity, 106 Ill. 384; Whitsitt *v.* Trustees Presbyterian Church, 110 Ill. 125; Smith *v.* Yocum, 110 Ill. 142; Gorham *v.* Dodge, 122 Ill. 528; Nibert *v.* Baghurst, 47 N. J. Eq. 201; Price *v.* Bell, 91 Ala. 180; Spies *v.* Price, 91 Ala. 166; Gould *v.* Elgin City Banking Co., 136 Ill. 60; Hall *v.* Peoria & Eastern R. R., 143 Ill. 163; Manning *v.* Pippen, 95 Ala. 537; Watts *v.* Witt, 39 S. C. 356.

tant considerations upon the taking or delivering of possession as an element of such a case.

§ 466. It has been said that nothing was to be considered part-performance of a contract for land, which did not include a change of possession in the land;[1] but this would seem to be a merely arbitrary proposition, for there may be, obviously, many acts done by the vendor or purchaser under such a contract, which would, from their irrevocable character, and from the situation in which they would leave the party performing, demand the specific enforcement of the contract.[2]

§ 467. It is, however, well settled, that possession alone, without payment or other acts of ownership, is sufficient part-performance of a verbal contract for land to sustain a decree for its specific execution.[3] Such is declared to be the

[1] M'Kee *v.* Phillips, 9 Watts (Pa.) 85; M'Farland *v.* Hall, 3 Watts (Pa.) 37; Peifer *v.* Landis, 1 Watts (Pa.) 392; Ackerman *v.* Fisher, 57 Pa. St. 457; Wallace *v.* Long, 105 Ind. 522; Bowers *v.* Bowers, 95 Pa. St. 477.

[2] Hollis *v.* Edwards (and Deane *v.* Izard), 1 Vern. 159; Mundy *v.* Jolliffe, 5 Mylne & C. 167; Slingerland *v.* Slingerland, 39 Minn. 197; Gulley *v.* Macy, 84 N. C. 434. *Ante*, § 463.

[3] 1 Powel on Contracts, 299; Newland on Contracts, 181; Sugden, Vend. & P. 105; 1 Fonbl. 175; 1 Madd. Ch. 303; Roberts on Frauds, 147; 4 Kent Com. 451; Story, Eq. Jur. § 761; Butcher *v.* Stapely, 1 Vern. 363; Seagood *v.* Meale, Finch. Prec. Ch. 560; Lacon *v.* Mertins, 3 Atk. 1; Boardman *v.* Mostyn, 6 Ves. 467; Coles *v.* Pilkington, L. R. 19 Eq. 174; Ungley *v.* Ungley, 4 Ch. Div. 73; Hunt *v.* Wimbledon Local Board, 4 C. P. Div. 48; Maddison *v.* Alderson, L. R. 8 H. L. C. 467; *per* Blackburn, J. at 489; Rapley *v.* Klugh, 18 S. E. Rep. (S. C.) 680; Eaton *v.* Whitaker, 18 Conn. 222; Harris *v.* Crenshaw, 3 Rand. (Va.) 14; Murray *v.* Jayne, 8 Barb. (N. Y.) 612; Anderson *v.* Simpson, 21 Iowa, 399; Arrington *v.* Porter, 47 Ala. 714; Pindall *v.* Trevor, 30 Ark. 249; Wells *v.* Stratton, 1 Tenn. Ch. 328. *Ante*, §§ 74, 76. *Quære* as to this, however, in *Maryland*. Shepherd *v.* Shepherd, 1 Md. Ch. Dec. 244; Owings *v.* Baldwin, 8 Gill, 337; Morris *v.* Harris, 9 Gill, 19. And *Massachusetts:* Glass *v.* Hulbert, 102 Mass. 32. And *Illinois:* Cloud *v.* Greasley, 125 Ill. 313; Ferbrache *v.* Ferbrache, 110 Ill. 210. See Reynolds *v.* Johnston, 13 Tex. 214; Danforth *v.* Laney, 28 Ala. 274; Carroll *v.* Powell, 48 Ala. 298; Pindall *v.* Trevor, 30 Ark. 249; Catlett *v.* Bacon, 33 Miss. 269. See Eshleman *v.* Henrietta Vineyard Co., 36 Pac. Rep. (Cal.) 775; Eberly *v.* Lehman, 100 Pa. St. 542; Wiggin *v.* Wiggin, 58 N. H. 235; Southmayd *v.* Southmayd, 4 Montana, 100; Hanlon *v.* Wilson,

law also in Pennsylvania, and equally so in that State, notwithstanding the absence from its legislation of the fourth section of the statute of Charles at the time of such decisions.[1] In the case of a parol *gift* of land, however, something more seems to be required than the mere taking possession; as, for instance, the expenditure of money upon the estate, or the rendering of service by the donee, upon the faith of the gift.[2]

§ 468. The subject of possession under a verbal contract for land is to be regarded from two points of view: the one where the purchaser relies upon it as *taken* by him, and the other where the vendor relies upon it as *delivered* by him, in pursuance of the contract.[3]

§ 469. Where the purchaser goes into possession, and rests upon that act his claim for the specific execution of the contract, one reason assigned for allowing that claim is, that if

10 Neb. 138; Wallace *v.* Scoggins, 17 Oregon, 476; Rosenberger *v.* Jones, 118 Mo. 559; Puterbaugh *v.* Puterbaugh, 131 Ind. 288; Burns *v.* Daggett, 141 Mass. 368.

[1] Pugh *v.* Good, 3 Watts & S. 56, a decision of great fulness and learning; see, however, Moore *v.* Small, 19 Pa. St. 461; McKowen *v.* McDonald. 43 Pa. St. 441. See also Ebert *v.* Wood, 1 Binn. 216; Bassler *v.* Niesly, 2 Serg. & R. 352; Jones *v.* Peterman, 3 Serg. & R. 543; Miller *v.* Hower, 2 Rawle, 53; Stewart *v.* Stewart, 3 Watts, 253; Rhodes *v.* Frick, 6 Watts, 315; Johnston *v.* Johnston, 6 Watts, 370; Woods *v.* Farmare, 10 Watts, 195; Reed *v.* Reed, 12 Pa. St. 117. The rule in Pennsylvania has been changed from that stated in the text, but it is not clear what the present rule is in that State. See Anderson *v.* Brinser, 129 Pa. St. 376; Simmons' Estate, 140 Pa. St. 567.

[2] Stewart *v.* Stewart, 3 Watts (Pa.) 253. And see Young *v.* Glendenning, 6 Watts (Pa.) 509; Syler *v.* Eckhart, 1 Binn. (Pa) 378; Bright *v.* Bright, 41 Ill. 97; Guynn *v.* McCauley, 32 Ark. 97; Shellhammer *v.* Ashbaugh, 83 Pa. St. 24; Sower *v.* Weaver, 84 Pa. St. 262; Ballard *v.* Ward, 89 Pa. St. 358; Poorman *v.* Kilgore, 26 Pa. St. 365; Harris *v.* Richey, 56 Pa. St. 395; Anson *v.* Townsend, 73 Cal. 415; Neukirk *v.* Marshall, 35 Kansas, 77; Ballard *v.* Ward, 89 Pa. St. 358; Brown *v.* Sutton, 129 U. S. 238; Story *v.* Black, 5 Montana, 26; Dickerson *v.* Colgrave, 100 U. S. 583; Galbraith *v.* Galbraith, 5 Kans. 241.

[3] Tender of a deed is not sufficient delivery to be a ground for a decree for specific performance. Graham *v.* Theis, 47 Ga. 479; Sands *v.* Thompson, 43 Ind. 18.

there be no agreement valid in law or in equity, he is made a trespasser and is liable as a trespasser; a position which would amount to a fraud practised upon him by the vendor.[1] "Now," says Mr. Justice Story, "for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admissible for such a purpose, there seems to be no reason why it should not be admissible throughout."[2]

§ 470. If the rule in question were not so firmly established, it might be a most pertinent inquiry, whether it necessarily follows that a fraud is practised upon the purchaser unless the verbal agreement be valid in law or in equity, and whether it is a sound reason for holding it valid for all purposes, that evidence of it is admissible to repel the vendor's claim in trespass. To apply the forcible reasoning of one of our judges, "Seeing the English act . . . gave to the party put into possession under the parol contract for the purchase of the land in fee, an implied, at least, if not an express estate at will, which was sufficient to prevent his being made a trespasser until the vendor entered upon him and gave him notice to quit, it is difficult to imagine why it should have been deemed necessary to carry the contract into complete execution in order to protect the vendee from being punished as a trespasser for having entered and occupied the land before he had notice to quit."[3] The Supreme Court of Massachusetts also has strongly intimated that specific performance will not be decreed in that court, unless some stronger equity than that arising from possession merely can be shown.[4]

[1] Lockey *v.* Lockey, Finch, Prec. Ch. 518; Clinan *v.* Cooke, 1 Schoales & L. 22; Lord Pengall *v.* Ross, 2 Eq. Cas. Abr. 46; Underhill *v.* Williams, 7 Blackf. (Ind.) 125; Smith *v.* Smith, 1 Rich. (S. C.) Eq. 130; Story, Eq. Jur. § 761; Ham *v.* Goodrich, 33 N. H. 32; Coney *v.* Timmons, 16 S. C. 378.

[2] Story, Eq. Jur. § 761.

[3] Kennedy, J., in Allen's Estate, 1 Watts & S. (Pa.) 387.

[4] Glass *v.* Hulbert, 102 Mass. 32.

§ 471. From the fact that the purchaser, when he has taken possession of the land, may on that ground enforce the contract of sale against the vendor, it seems to follow, upon equitable principles, that the vendor should have a right to enforce it when he has *delivered* possession. At any rate (and the cases are not explicit as to the reason upon which the doctrine depends), it is held that he may enforce upon that ground, as an act done by himself in part-performance of the contract,[1] although this doctrine seems to be open to just the same objections as those above noted with regard to possession delivered.

§ 472. In all cases in which possession, either as delivered by the vendor, or as assumed by the purchaser, is relied upon, it must appear to be a notorious and exclusive possession of the land claimed, and to have been delivered or assumed in pursuance of the contract alleged, and so retained or continued. These several elements of a possession which satisfies the rules of equity in such cases will be briefly considered in detail.

§ 473. First, it must be *notorious*. To allow a mere technical possession, not open to the observation of the neighborhood, and capable of being proved only by select and confidential witnesses, to be sufficient for obtaining a decree to enforce the contract, would manifestly afford an oppor-

[1] Earl of Aylesford's case, 2 Stra. 783; Pyke *v.* Williams, 2 Vern. 455; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Pugh *v.* Good, 3 Watts & S. (Pa.) 56; Reed *v.* Reed, 12 Pa. St. 117; Moore *v.* Small, 19 Pa. St. 461; White *v.* Crew, 16 Ga. 416; Nau *v.* Jackman, 58 Iowa, 359; Andrews *v.* Babcock, 63 Conn. 109; Andrew *v.* Babcock, 26 Atl. Rep. (Conn.) 715; Cameron *v.* Austin, 65 Wisc. 657. And see Usher *v.* Flood, 83 Ky. 552; Dean *v.* Cassiday, 88 Ky. 572. But see Reynolds *v.* Reynolds, 45 Mo. App. 622; Greenlees *v.* Roche, 48 Kans. 503. In Barton *v.* Smith, 66 Iowa, 75, where the plaintiff sued to recover real estate, the defendant in possession produced a written contract of sale to himself. The plaintiff was then allowed to prove that the defendant had verbally cancelled his contract of purchase, and had thereafter held as tenant and paid rent. On this ground, it is held that under verbal contracts for the exchange of lands, possession of one party may be evidenced by the giving up of possession by the other. Savage *v.* Lee, 101 Ind. 514.

tunity for and an encouragement to dishonest testimony. Thus, where the vendor, having at the time a tenant in possession, makes a verbal sale of the premises, it has been held that, the tenant remaining in possession, and merely attorning to the purchaser, there was no such open and notorious change of possession as would justify a court of equity in enforcing a contract; and that, at any rate, the attornment must be formal, public, and explicit.[1]

§ 474. Secondly, it must be *exclusive.* Where the purchaser moves in upon the premises and remains there in company with the previous occupant, not as the ostensible and exclusive proprietor,[2] or where the metes and bounds of the land alleged to be purchased are not fixed and recognized, and the purchaser occupies it in common with adjacent land of his own,[3] it has been held that possession, as an act of part-performance, was not sufficiently made out.

§ 475. Thirdly, it must be a possession *of the tract claimed.* This has never been questioned, and it is obvious that it is necessarily implied in the principles upon which the cases holding possession in any case sufficient have proceeded. Whether the *whole* of the estate bargained for must be occupied, in order to make a case of possession within the meaning of the rule, is a question requiring some remark.[4] Where several lots of land were sold by distinct agreements,

[1] Brawdy *v.* Brawdy, 7 Pa. St. 157. And see Johnston *v.* Glancy, 4 Blackf. (Ind.) 94; Moore *v.* Small, 19 Pa. St. 461; Haslet *v.* Haslet, 6 Watts (Pa.) 464; Frye *v.* Shepler, 7 Pa. St. 91; Charpiot *v.* Sigerson, 25 Mo. 63.

[2] Frye *v.* Shepler, 7 Pa. St. 91; Wooldridge *v.* Hancock, 70 Texas, 18; Peek *v.* Peek, 77 Cal. 106. And see Miller *v.* Zufall, 113 Pa. St. 317; Trammell *v.* Craddock, 93 Ala. 450; Miller *v.* Lorentz, 19 S. E. Rep. (W. Va.) 391. But see Brown *v.* Sutton, 129 U. S. 238. The possession of one cutting timber under an oral agreement has been held not exclusive. Sheldon *v.* Preva, 57 Vt. 263.

[3] Haslet *v.* Haslet, 6 Watts (Pa) 464. See also Moore *v.* Small, 19 Pa. St. 461; Davis *v.* Moore, 9 Rich. (S. C.) Law, 215; Zimmerman *v.* Wengert, 31 Pa. St. 401.

[4] See Glass *v.* Hulbert, 102 Mass. 28; Beardsley *v.* Duntley, 69 N. Y. 577; Small *v.* Northern Pacific R. R., 20 Fed. Rep. 753.

Sir William Grant held, at the Rolls, that part-performance by taking possession of one of such lots could have no efficacy to relieve against the operation of the statute, as to any but that particular lot.[1] He leaves to be inferred, apparently, that where several of the parcels are sold together, at one transaction, and for a gross price, it would be otherwise. And so it has been held in New York, in a case before the Vice Chancellor.[2] But the Supreme Court of Pennsylvania appear to have determined just the reverse, and to have even considered the fact that the contract for the several parcels was an entire contract, and a gross price to be paid for the whole, a conclusive circumstance against the sufficiency of taking or delivering possession of one parcel only. In the vigorous opinion of Mr. Justice Kennedy, speaking for the court, the whole doctrine of enforcing verbal contracts for land on the ground of possession merely, is ably criticised, and it is declared that the court know of no case where the point referred to was otherwise determined.[3] Possibly the aversion of that learned bench, there expressed, to the established doctrine in regard to possession as amounting to part-performance, inclined it to a more strict and narrow application of that doctrine than other courts would be disposed to adopt. Possession of a tract of land must generally be, from the nature of the case, a possession of part only as representing the whole. So long, therefore, as the contract under which possession is claimed to have been taken or delivered is an entire contract, though the land consists of several parcels, it would seem more reasonable to hold that possession of one of such parcels was equivalent to posses-

[1] Buckmaster *v.* Harrop, 7 Ves. 341.

[2] Smith *v.* Underdunck, 1 Sand. Ch. 579. So in Wisconsin, Jones *v.* Pease, 21 Wisc. 644. And see Bigelow *v.* Armes, 108 U. S. 10; Union Pacific R. R. *v.* McAlpine, 129 U. S. 305; Blalock *v.* Waggoner, 82 Ga. 122.

[3] Allen's Estate, 1 Watts & S. 383. See also McClure *v.* McClure, 1 Pa. St. 374; Pugh *v.* Good, 3 Watts & S. 56; Myers *v.* Crosswell, 45 Ohio St. 543.

sion of the whole. This view is illustrated and confirmed by what we have heretofore seen to be the settled rule in cases of sales of goods consisting of several parcels; namely, that an acceptance and receipt of one, or a part of one of such parcels, was sufficient to withdraw the whole contract from the operation of the seventeenth section.[1]

§ 476. Fourthly, the possession must appear to have been delivered or assumed *in pursuance of the contract alleged.*[2] Thus, it is abundantly settled, that if one who is already in possession of land as tenant, verbally contract with the owner for a new term, his merely continuing in possession after the making of the alleged contract is not an act of *taking* possession within the meaning of the rule, so as to justify a decree for a lease according to the contract.[3]

§ 477. The same reasoning applies, of course, where the contract set up is the sale of the estate to the defendant by the owner of the fee. And, in like manner, where the tenant's old term has expired and he holds over, such holding will not be decreed an act of part-performance of an alleged contract for the purchase of the estate, but is more

[1] *Ante*, § 334.

[2] Neal *v.* Neal, 69 Ind. 419; Judy *v.* Gilbert, 77 Ind. 96.

[3] Seagood *v.* Meale, Finch, Prec Ch 560; Morphett *v.* Jones, 1 Swanst. 172; Wills *v.* Stradling, 3 Ves. Jr. 378; Gregory *v.* Mighell, 18 Ves. 328; Savage *v.* Carroll, 1 Ball and B. 265, 548; Kine *v.* Balfe, 2 Ball & B. 343; Christy *v.* Barnhart, 14 Pa. St. 260; Aitkin *v.* Young, 12 Pa. St. 15; Greenlee *v.* Greenlee, 22 Pa. St. 225; Johnston *v.* Glancy, 4 Blackf. (Ind.) 94; Wilde *v.* Fox, 1 Rand. (Va.) 165; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Cole *v.* Potts, 10 N. J. Eq. 67; Rosenthal *v.* Freeburger, 26 Md. 75; Billingslea *v.* Ward, 33 Md. 48; Mahana *v.* Blunt, 20 Iowa, 142; Anderson *v.* Simpson, 21 Iowa, 399; Wilmer *v.* Farris, 40 Iowa, 309; Carrolls *v.* Cox, 15 Iowa, 455. See Hooper, *ex parte*, 19 Ves. 477, *per* Lord Eldon; Truman *v.* Truman, 79 Iowa, 506; Green *v.* Groves, 109 Ind. 519; Padfield *v.* Padfield, 92 Ill. 198; Pickerell *v.* Morss, 97 Ill. 220; Clark *v.* Clark, 122 Ill. 388; Ducie *v.* Ford, 138 U. S. 587; Haines *v.* McGlove, 44 Ark. 79; Von Trotha *v.* Bamberger, 15 Col. 1; Boozer *v.* Teague, 27 S. C. 348; Charles *v.* Byrd, 29 S. C. 544; Nibert *v.* Baghurst, 47 N. J. Eq. 201; Foster *v.* Maginnis, 89 Cal. 264; Barnes *v.* Boston & Maine R. R., 130 Mass. 388; Andrews *v.* Babcock, 63 Conn. 109. But see Barton *v.* Smith, 66 Iowa, 75.

naturally referable to his landlord's permission to continue in possession upon the terms of the old holding.[1]

§ 478. Some disposition seems to exist, both in courts[2] and text-writers,[3] to treat the continuing in possession, and the taking of it, as standing upon the same footing, and therefore entitled to the same weight, in the view of a court of equity. However unsatisfactory the rule may be that allows proof of possession merely to justify a decree for specific performance, there is this to be said in its favor, that the *taking* of possession is an overt and public act of the plaintiff, capable of proof or disproof by other testimony than his word alone, whereas, in the case of continuing in possession, there is no new act, nor can any change of position be shown save by the word of the party seeking to enforce an alleged oral agreement. And beside the fact that of itself it affords no corroboration of the parol testimony upon which its proof solely depends, it is difficult to see how a mere change in the character of a possession already taken can in any case be followed by consequences so serious as to be ground for equitable interference. The important prerequisite to the exercise of that power is that the plaintiff should show such acts and conduct on his part, as of them-

[1] Jones *v.* Peterman, 3 Serg. & R. (Pa.) 543, *per* Tilghman, C. J., Sugden, Vend. & P. 141; Danforth *v.* Laney, 28 Ala. 274; Recknagle *v.* Schmaltz, 72 Iowa, 63; Railsback *v.* Walks, 81 Ind. 409; Felton *v.* Smith, 84 Ind. 485; Messmore *v.* Cunningham, 78 Mich. 623; Koch *v.* National Building Association, 137 Ill. 497; Bigler *v.* Baker, 58 N. W. Rep. (Neb.) 1026.

[2] In Pearson *v.* East, 36 Ind. 27, the court was equally divided upon the question of the effect of continuing in possession merely. In Morrill *v.* Cooper, 65 Barb. (N. Y.) 512, continuing in possession, with payment in full, was held sufficient to bar the defence of the statute. Upon full consideration a contrary decision was reached in Emmel *v.* Hayes, 102 Mo. 186, overruling Simmons *v.* Headlee, 94 Mo. 482. But see Peckham *v.* Balch, 49 Mich. 179.

[3] In [§ 763, *a*] of Story's Eq. Jur., the editor says: "We see no reason why the *continuance* of possession under a contract may not be regarded as much part-performance as the taking possession under the contract."

selves are confirmatory both of his having made the contract and furthermore of his having acted upon the faith of it after it was made. But the continued holding is naturally and properly referable to the old tenancy, and does not at all necessarily suggest any new agreement between the parties.

§ 479. The payment of an additional rent is in itself an equivocal circumstance, where a claim is set up of a positive agreement for a new lease, inasmuch as it may be attributed to a mere holding from year to year, after the expiration of the old lease, or there may be other inducements to its payment. But where the bill to enforce such an agreement alleged that the landlord had accepted the additional rent upon the foot of the agreement, Lord Loughborough would not allow a plea of the statute, but required the landlord to answer to the allegation.[1]

§ 480. Where the tenant, continuing in possession, makes improvements upon the premises, this fact is of weight to show a change in the holding.[2] But they must, of course, be of such a marked and important character as to be not naturally reconcilable with the continuance of the old relation. In a case where the improvements which were made and the alleged expenditure by the tenant were no more than what would take place in the ordinary course of husband y, Lord Chancellor Sugden said that it would be against all authority to say that such acts amounted to part-peformance.[3]

§ 481. Where the party alleging the contract, however, was previously a stranger to the estate, the question, *quo animo* the possession was taken, is generally answered, with-

[1] Wills *v.* Stradling, 3 Ves. Jr. 378; Wilde *v.* Fox, 1 Rand. (Va) 165; Williams *v.* Landman, 8 Watts & S. (Pa.) 55; Spear *v.* Orendorf, 26 Md. 37; Spalding *v.* Conzelman, 30 Mo. 177; Nunn *v.* Fabian, L. R. 1 Ch. App. 35; Lincoln *v.* Wright, 4 De G. & J. 16.

[2] Savage *v.* Carroll, 1 Ball & B. 265; Sutherland *v.* Briggs, 1 Hare, 26; Dowell *v.* Dew, 1 Younge & C. C. C. 345; Hibbert *v.* Aylott, 52 Texas, 530; Edwards *v.* Fry, 9 Kans. 285.

[3] Brennan *v.* Bolton, 2 Dru. & W. 349. And see Frame *v.* Dawson, 14 Ves. 386; Padfield *v.* Padfield, 92 Ill. 198.

out further proof, by the mere fact of his being in possession with the knowledge of the owner of the fee, and without objection by him; a natural presumption arising from this fact, that some contract has been entered into between the parties. This presumption, however, it is said, does not arise where a son enters upon land previously owned by his father, even though he make valuable improvements thereon; such a transaction generally resulting from the confidence which exists between father and son, that the father will provide for the son in his will, which is perfectly consistent with the father's salutary retention of the title to the land.[1]

§ 482. From the very terms of the rule that the possession must be taken or delivered in pursuance of the contract, it seems to follow that it must be subsequent to it *in time.* And it was so held in Pennsylvania, in a case where the plaintiff had taken possession, and made improvements upon the land in anticipation of the contract.[2] Where a tenant under an unexpired lease for a year made an oral agreement for a term of years to begin at the end of his yearly holding, it was held that valuable improvements made after the agreement but before the new term began would justify a decree for specific performance.[3]

§ 483. In all cases the entry of the purchaser must be *with the knowledge of the vendor.* Otherwise he cannot be said to enter under the contract at all, but is a mere trespasser, and can derive no benefit from his trespass, for the purpose of obtaining a specific execution of any contract he may have for the purchase of the land; nor, on the other hand, can the vendor be charged with fraud in respect of a transaction to which he was not privy and consenting.[4] To use the expres-

[1] Eckert *v.* Eckert, 3 Penna. Rep. 332. See also Haines *v.* Haines, 6 Md. 435; Johns *v.* Johns, 67 Ind. 440.

[2] Eckert *v.* Eckert, 3 Penna. Rep. 332. See also Inman *v.* Stamp, 1 Stark. 12; Reynolds *v.* Hewett, 27 Pa. St. 176; Myers *v.* Byerly, 45 Pa. St. 368; Knoll *v.* Harvey, 19 Wisc. 99. See however, Pain *v.* Coombs, 1 De G. & J. 46, *per* L. J. Knight Bruce.

[3] Morrison *v.* Herrick, 130 Ill. 631.

[4] Cole *v.* White, cited in 1 Bro. C. C. 409; Gregory *v.* Mighell, 18 Ves.

sive phrase of Mr. Justice Grier, "a scrambling and litigious possession" will not suffice to make a case for relief in equity.[1] At the same time, it would seem that where possession has been long continued under the eye of the vendor, he would be held estopped to deny that the entry was without his consent.[2] Permitting the party to occupy the property for a few months, however, where it was of trifling value as to profits, and no improvements put upon it in the meantime, has been considered insufficient for this purpose.[3]

§ 484. But it does not follow that because an entry against the will, and without the knowledge of the vendor, is not to be taken as an act of part-performance, therefore no entry is to be so taken which is not by the terms of the contract stipulated to be allowed. If it is in pursuance, that is, on the faith of the contract, and with the permission of the vendor, that is sufficient.[4]

§ 485. Lastly, the possession relied upon must not only be taken under the contract, but so *retained*. Where a purchaser takes possession under the contract, and afterward attorns to the vendor as landlord, it has been held that he yields his equity, and his possession is referable to his new agreement.[5]

328; Goucher *v.* Martin, 9 Watts (Pa.) 106; Gratz *v.* Gratz, 4 Rawle, (Pa.) 411; Sage *v.* M'Guire, 4 Watts & S. (Pa.) 228; Johnston *v.* Glancy, 4 Blackf. (Ind.) 94; Thomson *v.* Scott, 1 McCord (S. C.) Ch. 32; Givens *v.* Calder, 2 Desaus. (S. C.) Ch. 171; Ash *v.* Daggy, 6 Ind. 259; Jervis *v.* Smith, Hoff. (N. Y.) Ch. 470; Carrolls *v.* Cox, 15 Iowa, 455; Evans *v.* Lee, 12 Nevada, 393; Ryan *v.* Wilson, 56 Texas, 36; Kaufman *v.* Cook, 114 Ill. 11. Possession taken and improvements made after the death of the alleged vendor do not make a case of part-performance as against his estate. Rochester *v.* Yesler, 6 Wash. (Nev.) 116.

[1] Purcell *v.* Miner, 4 Wall. (U. S.) 513.

[2] Thomson *v.* Scott, 1 McCord (S. C.) Ch. 32; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 645.

[3] Jervis *v.* Smith, Hoff. (N. Y.) Ch. 470.

[4] Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 645; Smith *v.* Underdunk, 1 Sand. (N. Y.) Ch. 579. And see Gregory *v.* Mighell, 18 Ves. 328; Chambliss *v.* Smith, 30 Ala. 366.

[5] Rankin *v.* Simpson, 19 Pa. St 471; Dougan *v.* Blocher, 24 Pa. St. 28. See Chambliss *v.* Smith, 30 Ala. 366; Johnson *v.* Reading, 36 Mo. App. 306; Drum *v.* Stevens, 94 Ind. 181.

§ 486. It may conveniently be observed at this point, that the efficacy of possession taken as part-performance cannot rest on the mere ground of its being an act of ownership. If the purchaser under a parol contract omit to take possession, such acts as having the land assessed in his own name and paying taxes upon it,[1] or even cutting timber upon it, or making other transitory use of it (and this latter, too, in a case of uncultivated timber land, such as is not ordinarily taken possession of in any other way),[2] have been held insufficient, though clearly acts of ownership.

§ 487. It is always regarded as strongly confirmatory of the right of a plaintiff seeking the specific execution of a verbal contract for an estate in land, that he has proceeded, upon the faith of the contract, and with the knowledge of the vendor, to expend money in improving the land for which he has paid and of which he has taken possession.[3] In cases

[1] Christy *v.* Barnhart, 14 Pa. St. 260, explaining Lee *v.* Lee, 9 Pa. St. 169.

[2] Gangwer *v.* Fry, 17 Pa. St. 491. But see Borrett *v.* Gomeserra, Bunb. 94; Hunt *v* Lipp, 30 Neb. 469.

[3] Savage *v.* Foster, 9 Mod. 35; Wetmore *v.* White, 2 Caines (N. Y.) Cas. 87; Adams *v.* Rockwell, 16 Wend. (N. Y.) 285; Cummins *v.* Nutt, Wright (Ohio) 713; Casler *v.* Thompson, 3 Green (N. J.) Ch. 59; Cummings *v.* Gill, 6 Ala. 562; Floyd *v.* Buckland, Freem. Ch. 268; 2 Eq. Cas. Abr. 44; Harrison *v.* Harrison, 1 Md. Ch. Dec. 331; Harder *v.* Harder, 2 Sand. (N. Y.) Ch. 17; Moreland *v.* Lemasters, 4 Blackf. (Ind.) 383; Martin *v.* McCord, 5 Watts (Pa.) 492; Parkhurst *v.* Van Cortland, 14 Johns. (N. Y.) 15; Ridley *v.* McNairy, 2 Humph. (Tenn.) 174; Rowton *v.* Rowton, 1 Hen. & M. (Va.) 92; Surcome *v.* Pinniger, 3 De G., M. & G. 571; Syler *v.* Eckhart, 1 Binn. (Pa.) 378; Milliken *v.* Dravo, 67 Pa. St. 230; Shepherd *v.* Bevin, 9 Gill (Md.) 32; Byrd *v.* Odem, 9 Ala. 755; Brock *v.* Cook, 3 Port. (Ala.) 464; Toole *v* Medlicott, 1 Ball & B. 393; Underhill *v.* Williams, 7 Blackf. (Ind.) 125; Wilton *v.* Harwood, 23 Me. 131; Wilkinson *v.* Wilkinson, 1 Desaus. (S. C.) Ch. 201; Newton *v.* Swazey, 8 N. H. 9; Blakeney *v.* Ferguson, 8 Ark. 272; Conway *v.* Sherron, 2 Cranch (C. C.) 80; Farley *v.* Stokes, 1 Sel. Eq. Cas. (Pa.) 422; Miller *v.* Tobie, 41 N. H. 84; School Dist. No. 3 *v.* Macloon, 4 Wisc. 79; Morin *v.* Martz, 13 Minn. 191; Hoffman *v.* Fett, 39 Cal. 109; Pfiffner *v.* Stillwater & St. Paul R. R. Co., 23 Minn. 343; Seaman *v.* Ascherman, 51 Wisc. 678; Morrison *v.* Herrick, 130 Ill. 631; Pledger *v.* Garrison, 42 Ark. 246; Meetze *v.* Railroad Co, 23 S. C. 2; Ponce *v.* McWhorter, 50 Texas, 562;

of purchasers who were, before and at the time of the contract, tenants of the same land, as we have just seen, it is often conclusive of the nature and *animus* of their continued possession; thus serving to explain and define one act of part-performance, by means of a superadded and corroboratory act. The propriety of admitting this expenditure of money in improvements as a reason for enforcing the contract, is much more clear upon the equitable view of preventing fraud, than is that of admitting the taking or delivery of possession. For in many cases such improvements are carried to that point that they are quite incapable of being compensated in damages. And even where this is not so, it is a plain fraud for a vendor who has encouraged a purchaser to make them, to compel him to dispose of them afterward, and lose the expected fruit of enterprise and industry, thus directly making a profit out of the deception which he has himself practised.[1]

§ 487 *a*. In a case where the plaintiff entered and improved under a contract of sale with the tenant for life, it was held that the former could not enforce the specific performance of the agreement against the remainder-man, it not being shown that the expenditure had been made with his knowledge and consent.[2]

§ 488. The improvements relied upon must be of a kind permanently beneficial to the estate, and involving a sacrifice to the purchaser who made them.[3] Thus, the cutting of

Moulton *v.* Harris, 94 Cal. 420; Johnson *v.* Hurley, 115 Mo. 513; Hays *v.* Kansas City R. R., 108 Mo. 554; Wall *v.* M., St. P. & S. S. M. R. R., 86 Wisc. 48; Lloyd *v.* Hollenback, 98 Mich. 203; Young *v.* Overbaugh, 76 Hun (N. Y.) 151; Mudgett *v.* Clay, 5 Wash. 103; Young *v.* Young, 45 N. J. Eq. 27; Bard *v.* Ellston, 31 Kans 274.

[1] Whether the making of improvements not amounting to occupation of the land will suffice, see Ackerman *v.* Fisher, 57 Pa. St. 457.

[2] Blore *v.* Sutton, 3 Mer. 237. See Shannon *v.* Bradstreet, 1 Schoales & L. 72; Morgan *v.* Milman, 3 De G., M. & G. 24.

[3] Hollis *v.* Edwards, 1 Vern. 159; Deane *v.* Izard, 1 Vern. 159; Hamilton *v.* Jones, 3 Gill & J. (Md.) 127; Davenport *v.* Mason, 15 Mass. 85; Wolfe *v.* Frost, 4 Sandf. (N. Y.) Ch. 72; Wack *v.* Sorber, 2 Whart. (Pa.) 387.

a ditch through an adjoining estate, in order to supply the plaintiff's mill with water, though attended with expense to himself, has no effect to induce a decree for the specific execution of a verbal agreement by the owner of the adjoining estate to sell the ditch to the plaintiff; it is not beneficial to that estate, but the reverse.[1] Again, as the same case illustrates, the improvements must be on the faith of the contract, and, of course, are not available to set up a *subsequent* contract.[2]

§ 489. But although the improvements are required to be beneficial to the estate, a court of equity will not inquire whether the expenditures have been judiciously or injudiciously made; for, apart from the many embarrassments which would attend the determination of such a question, it would be plainly inequitable to allow the vendor in such a case to defend upon the ground of the innocent indiscretion of the purchaser. To use the language of Lord Thurlow, "whether the money has been well or ill laid out is indifferent; the fraud is the same."[3]

§ 490. It must appear, however, that the loss of his improvements would be a sacrifice to the purchaser. If therefore he has gained more by the possession and use of the land, than he has lost by his improvements,[4] or if he has been in fact fully compensated for the improvements,[5] they will not be available to him as a ground for specific execution. On the other hand, the vendor will never be allowed to profit by the expenditures into which he has deceived the purchaser; therefore when the court finds itself compelled, for want of sufficient acts of part-performance being shown,

[1] Hamilton *v.* Jones, 3 Gill & J. (Md.) 127.

[2] Byrne *v.* Romaine, 2 Edw. (N. Y.) Ch. 445; Farley *v.* Stokes, 1 Sel. Eq. Cas. (Pa.) 422; Wood *v.* Thornly, 58 Ill. 464; Sands *v.* Thompson, 43 Ind. 18; Abbott *v.* Baldwin, 61 N. H. 583.

[3] Whitbread *v.* Brockhurst, 1 Bro. C. C. 417.

[4] Wack *v.* Sorber, 2 Whart. (Pa.) 387.

[5] Eckert *v.* Eckert, 3 Penna. Rep. 332; Ash *v.* Daggy, 6 Ind. 259; Pond *v.* Sheean, 132 Ill. 312.

or from failure in the proof of the terms of the contract, to refuse to enforce it, they will decree compensation to be made by the vendor to the purchaser for the fair value of the improvements.[1]

§ 491. From the language of some of the cases, it seems to be considered that the making of improvements cannot be relied on as an act of part-performance, unless it was stipulated in the agreement itself that they should be so made; and it is said by Mr. Roberts to be hardly reconcilable with the rule to call it an act of part-performance, unless this is the case, because of the rule that such an act must be done with a view to perform the agreement.[2] But this arises from a too narrow view of the nature of the equity jurisdiction, as based solely on acts done in *performance* of the contract, as distinguished from those done in *reliance* upon it.[3]

§ 491 *a*. A principle analogous to that upon which taking possession of and making improvements upon the land claimed, protect the claimant from the operation of the Statute of Frauds in courts of equity, is applied to gifts of lands, upon the faith of which such possession has been taken and such improvements made, although there is in such cases no *contract* enforceable even at common law, the gift, if strictly

[1] Lord Pengall *v.* Ross, 2 Eq. Cas. Abr. 46; Parkhurst *v.* Van Cortlandt, 1 Johns. (N. Y.) Ch. 273; Wack *v.* Sorber, 2 Whart. (Pa.) 387; Harden *v.* Hays, 9 Pa. St. 151; Heft *v.* McGill, 3 Pa. St. 256; Dunn *v.* Moore, 3 Ired. (N. C.) Eq. 364; Goodwin *v.* Lyon, 4 Port. (Ala.) 297. In Anthony *v.* Leftwich, 3 Rand. (Va.) 255, the rule of compensation in such cases is instructively discussed. In North Carolina, where the doctrine of part-performance does not obtain, he is allowed in a court of equity on account for his improvements. Albea *v.* Griffin, 2 Dev. & B. Eq. 9; Baker *v.* Carson, 1 Dev. & B. Eq. 381; Pitt *v.* Moore, 99 N. C. 85. Where the plaintiff, being behindhand in his payments, was warned by the defendant not to put on improvements, except at his own risk, he was not allowed to recover for improvements afterwards made. Rainer *v.* Huddleston, 4 Heisk. (Tenn.) 223.

[2] Roberts on Frauds, 135.

[3] See Ingles *v.* Patterson, 36 Wisc. 373; Neale *v.* Neales, 9 Wall. (U. S.) 1; Swain *v.* Seamens, 9 Wall. (U. S.) 254; *ante*, § 457.

such, being without a consideration sufficient to support an action for breach of the promise to give.[1]

§ 492. It should be remarked, in conclusion of this topic, that the decided inclination of the courts appears to be against extending, beyond those limits to which it has been carried by clear authority, the doctrine of enforcing oral contracts in equity upon the ground of part-performance. As Lord Redesdale remarks, the "statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred; agreements would, from the necessity of the case, have been reduced to writing: whereas it is manifest that the decisions on the subject have opened a new door to fraud, and that under pretence of part execution, if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. And I remember, it was mentioned in one case, in argument, as a common expression at the bar, that it had become a practice '*to improve gentlemen out of their estates.*' It is, therefore, absolutely necessary for courts of equity to make a stand, and not carry the decisions further."[2]

[1] McLain *v.* School Directors of White Township, 51 Pa. St. 196; Freeman *v.* Freeman, 43 N. Y. 34; Murphy *v.* Stell, 43 Tex. 123; Neale *v.* Neales, 9 Wall. (U. S.) 1; *ante*, § 467; Mauck *v.* Melton, 64 Ind. 414; Allison *v.* Burns, 107 Pa. St. 50; Ogsbury *v.* Ogsbury, 115 N. Y. 290; Stratton *v.* Stratton, 58 N. H. 473; White *v.* Ingram, 110 Mo. 474; Dougherty *v.* Hartel, 91 Mo. 161; Young *v.* Young, 45 N. J. Eq. 27; Smith *v.* Smith, 125 N. Y. 224; West *v.* Bundy, 78 Mo. 407; Anderson *v.* Shockley, 82 Mo. 250.

[2] Lindsay *v.* Lynch, 2 Schoales & L. 5. See also Harnett *v.* Yeilding, 2 Schoales & L. 549; Forster *v.* Hale, 3 Ves. Jr. 696, *per* Lord Alvanley; O'Reilly *v.* Thompson, 2 Cox, 271; Parkhurst *v.* Van Cortlandt, 1 Johns.

§ 492 *a*. It has been held[1] that possession taken and improvements made under a verbal contract for land constitute an equitable title which may be enforced, not only between the parties, but against a third party taking a deed of the land with knowledge of such possession and improvements. This seems to be a dangerous extension of the doctrine of part-performance.

§ 493. In all cases where the plaintiff seeks relief upon the ground of his having in part performed the agreement, it is incumbent upon him not only to show his acts of part-performance, but also to prove to the satisfaction of the court the terms of the agreement, before they will undertake to enforce it.[2]

§ 494. As to the degree of proof which will suffice in such cases, it is obviously quite impossible to lay down any gen-

(N. Y.) Ch. 273; Phillips *v.* Thompson, 1 Johns. (N. Y.) Ch. 131; Eyre *v.* Eyre, 19 N. J. Eq. 102.

[1] C. B. & Q. R. R. Co. *v.* Boyd, 118 Ill. 73.

[2] Pilling *v.* Armitage, 12 Ves. 78; Parkhurst *v.* Van Cortlandt, 1 Johns. (N. Y.) Ch. 273; s. c. *nom.* Parkhurst *v.* Van Cortland, 14 Johns. 15; Phillips *v.* Thompson, 1 Johns. (N. Y.) Ch. 131; Sage *v.* M'Guire, 4 Watts & S. (Pa.) 228; Frye *v.* Shepler, 7 Pa. St. 91; Greenlee *v.* Greenlee, 22 Pa. St. 225; Rankin *v.* Simpson, 19 Pa. St. 471; Moore *v.* Small, 19 Pa. St. 461; Burns *v.* Sutherland, 7 Pa. St. 103; Hugus *v.* Walker, 12 Pa. St. 173; Charnley *v.* Hansbury, 16 Pa. St. 16; Shepherd *v.* Bevin, 9 Gill (Md.) 32; Owings *v.* Baldwin, 1 Md. Ch. Dec. 120; Shepherd *v.* Shepherd, 1 Md. Ch. Dec. 244; Beard *v.* Linthicum, 1 Md. Ch. Dec. 345; Chesapeake & Ohio Canal Co. *v.* Young, 3 Md. 480; Wingate *v.* Dail, 2 Harr. & J. (Md.) 76; Rowton *v.* Rowton, 1 Hen. & M. (Va.) 92; Thomson *v.* Scott, 1 McCord (S. C.) Ch. 32; Church of the Advent *v.* Farrow, 7 Rich. (S. C.) Eq. 378; Goodwin *v.* Lyon, 4 Port. (Ala.) 297; Kay *v.* Curd, 6 B. Mon. (Ky.) 100; Newnan *v.* Carroll, 3 Yerg. (Tenn.) 18; Shirley *v.* Spencer, 4 Gilm. (Ill.) 583; Eyre *v.* Eyre, 19 N. J. Eq. 102; Petrick *v.* Ashcroft, 19 N. J. Eq. 339; Force *v.* Dutcher, 18 N. J. Eq. 401; Purcell *v.* Miner, 4 Wall. (U. S.) 513; Williams *v.* Williams, 7 Reporter, 656; Hart *v.* Carroll, 85 Pa. St. 508; Wright *v.* Pucket, 22 Grat. (Va.) 370; Williams *v.* Morris, 95 U. S. 444; Nay *v.* Mograin, 24 Kansas * 75; Cutsinger *v.* Ballard, 115 Ind. 93; Lords Appeal, 105 Pa. St. 451; Wagonblast *v.* Whitney, 12 Oregon, 83; Vose *v.* Strong, 144 Ill. 108; Alba *v.* Strong, 94 Ala. 163; Vose *v.* Strong, 45 Ill. App. Ct. 98.

eral rules. But it may be remarked that mere contrariety in the proofs adduced will not prevent the courts from decreeing the execution of the agreement; their principle is, to collect from the proofs, if they can, what the terms of the agreement really are.[1]

§ 495. In some of the earlier cases, this principle was applied with extreme liberality. In an anonymous case reported by Viner, where a man entered and built upon certain land upon the faith of the defendant's having told him that his word was as good as his bond, and promised him a lease when he received his own from the landlord, but the terms of the lease to be given were not proved, it appears that Lord Chancellor Jeffries decreed a lease to the plaintiff, notwithstanding the uncertainty in the terms; for he considered that it was in the plaintiff's election, for what time he would hold the land, and he elected to hold during the defendant's term at the old rent.[2] The proceeding of the court in this case appears to have been, as Judge Story remarks, to frame "a contract for the parties, *ex æquo et bono*, where it found none."[3]

§ 496. Again, it would seem to have been formerly an approved rule, where there was no proof, or insufficient proof, of the contract before the court, to send the case to a Master to ascertain what the terms of the contract were. Lord Eldon mentions a case as having occurred before Lord Thurlow, where "possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow thought proper to send it to the Master, upon the ground of the possession

[1] Mundy *v.* Jolliffe, 5 Myl. & C. 177; Boardman *v.* Mostyn, 6 Ves. 467; Burns *v.* Sutherland, 7 Pa. St. 103; Rhodes *v.* Rhodes, 3 Sandf. (N. Y.) Ch. 279. In Pennsylvania it is held that a stricter rule of proof should be applied in cases of agreements between members of the same family. See Ackerman *v.* Fisher, 57 Pa. St. 457; Edwards *v.* Morgan, 100 Pa. St. 330.

[2] 5 Vin. Abr. 523, pl. 40.

[3] Story, Eq. Jur. § 764.

being delivered, to inquire what the agreement was. The difficulty there was in ascertaining that. The Master decided as well as he could, and then the case came on before Lord Rosslyn,[1] upon farther directions; who certainly seemed to think Lord Thurlow had gone a great way; and either drove them to a compromise, or refused to go on with the decree upon the principle on which it was made."[2] Lord Thurlow, nevertheless, adhered to the same course in the subsequent case of Allan *v.* Bower, where it appeared that there was an oral agreement by the defendant's testator to give the plaintiff a lease of certain premises. His Lordship directed the Master, who had refused to admit parol evidence, to ascertain and report what the promise was, at what time it was made, and what interest the tenant was to acquire under it in the premises; upon which order evidence was received, proving that the tenant was to hold during his life, and a lease was decreed to be executed accordingly.[3] And so Lord Redesdale, in a case where a written agreement for a lease was held imperfect, as not showing the term for which it was to be granted, said that if there had been evidence of part-performance he must have directed a further inquiry, the bill not suggesting any specific term of lease, and the pleadings and evidence being both silent on that point.[4]

§ 497. Lord Eldon's remarks, just quoted, show a strong bias on his part against the freedom exercised in the cases referred to, in obtaining proof of the terms of the contract. And subsequent decisions show that the same view is gaining ground with the courts. Lord Chancellor Manners has very clearly indicated what may be considered at this day the prevailing doctrine. "Where there is contradictory evidence in a case that raises a doubt in the mind of the court, that is to say, where the case is fully proved by the party on

[1] Lord Loughborough, afterward created Earl of Rosslyn.

[2] *Per* Lord Eldon, in Boardman *v.* Mostyn, 6 Ves. 479.

[3] Allan *v.* Bower, 3 Bro. C. C. 149.

[4] Clinan *v.* Cooke, 1 Schoales & L. 22; Weaver *v.* Shipley, 127 Ind. 526.

whom the *onus* of proof lay; but that proof shaken, or rendered doubtful, by the evidence on the other side; there the court will direct a reference or an issue to ascertain the fact; but where there is no evidence whatever, would it not be introducing all the mischiefs intended to be guarded against by the rules of the court, in not allowing evidence to be gone into after publication, and holding out an opportunity to a party to supply the defect by fabricated evidence, if I were to direct such an inquiry? I therefore do not think myself at liberty, from the evidence in this case, to direct the reference or issue desired."[1]

§ 498. The third and last of those classes of cases in which courts of equity enforce verbal agreements, notwithstanding the Statute of Frauds, is where the agreement, fully set forth in the bill, is confessed by the answer.[2] The reason upon which this rule is generally said to rest is, that the statute is only intended to prevent fraud and perjury, the danger of which is wholly removed by the defendant's admission. But, as we shall hereafter see, it is settled that the defendant,

[1] Savage *v.* Carroll, 1 Ball & B. 283. See also Boardman *v.* Mostyn, 6 Ves 467; Reynolds *v.* Waring, Younge, 346; Story, Eq. Jur. § 764; Sugden, Vend. & P. 150; Wallace *v.* Brown, 10 N. J. Eq. 308.

[2] Attorney-General *v.* Day, 1 Ves. Sr. 218; Croyston *v.* Banes, 1 Eq. Cas. Abr. 19; s. c. Finch, Prec. Ch. 208; Symondson *v.* Tweed, Finch, Prec. Ch. 374; Lacon *v.* Mertins, 3 Atk. 1; Cottington *v.* Fletcher, 2 Atk. 155; Gunter *v.* Halsey, 2 Amb. 586; Child *v.* Godolphin, 1 Dick. 39; Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Spurrier *v.* Fitzgerald, 6 Ves. 555; Cooth *v.* Jackson, 6 Ves. 12; Attorney-General *v.* Sitwell, 1 Younge & C. (Exch.) 583; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144; Hollingshead *v.* McKenzie, 8 Ga. 457; Ellis *v.* Ellis, 1 Dev. (N. C.) Eq. 341; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529; Dyer *v.* Martin, 4 Scam. (Ill.) 146; Woods *v.* Dille, 11 Ohio, 455; McGowen *v.* West, 7 Mo. 569; Artz *v.* Grove, 21 Md. 456; Burt *v.* Wilson, 28 Cal. 632. In Pennsylvania, it has been held, on the strength of the principle of this rule, that a mortgagee could not, in an action at law, avail himself of the Statute of Frauds to resist the enforcement of a prior trust agreement concerning the land, which was acknowledged by the owner of the reversion. Houser *v.* Lamont, 55 Pa. St. 311; Bennett *v.* Tiernay, 78 Ky. 580; Connor *v.* Hingtgen, 19 Neb. 472; Brakefield *v.* Anderson, 87 Tenn. 206.

notwithstanding such admission, may insist upon the statute, and thus defeat any recovery upon the agreement, — a rule with which the reason just alluded to does not seem to be altogether consistent. For if the removing of all danger of perjury, by having the defendant admit the agreement, does in fact take the case out of the intent of the statute, his subsequent reliance upon the statute of course cannot avail him. And it may have been with this view that Lord Bathurst held that, though admitted by the defendant, a verbal agreement within the statute could not be enforced, and that to do so would be to repeal the statute.[1] The same difficulty opposes itself to what Mr. Justice Story has suggested as another reason which might perhaps be adduced in support of the general rule we are considering; namely, that after admission by the defendant, the agreement, though originally by parol, was now in part evidenced by writing under the signature of the party, which was a complete compliance with the terms of the statute.[2] In a late case in Maryland, it was urged that an answer filed by a defendant, admitting an agreement, and not setting up the statute, could be read against his creditors afterward coming in to resist the decree for specific execution, as itself a memorandum; but the Chancellor held that it could not, and strongly dissented from Judge Story's suggestion above referred to.[3] Upon the whole, the soundest reason which can be assigned for this rule, impregnably settled as it is by authority, seems to be that the defendant, having admitted the agreement charged, if he does not insist upon the statute, is taken to renounce the benefit of it; the maxim, *quisque renuntiare potest juri pro se introducto*, being applicable to such a case.[4]

[1] Popham *v.* Eyre, Lofft, 786.

[2] Story, Eq. Jur. § 755.

[3] Winn *v.* Albert, 2 Md. Ch. Dec. 169. Affirmed on appeal, *nom.* Albert *v.* Winn, 5 Md. 66.

[4] Newland on Contracts, c. 10, p. 201; 1 Fonbl. Eq. Bk. 1, c. 3, § 8, *note d*; Rondeau *v.* Wyatt, 2 H. Bl. 63; Spurrier *v.* Fitzgerald, 6 Ves 548; Adams *v.* Patrick, 30 Vt. 516.

§ 499. Where the defendant, having appeared to the suit, makes default in filing his answer, and the bill is taken *pro confesso*, it should seem, and has been held in New Hampshire, that it amounted to an admission of the contract charged, so as to entitle the plaintiff to a decree.[1] Where the defendant has once admitted the contract as charged, he cannot afterward, when the plaintiff has amended his bill in a matter not going to the substance of the contract, retract his admission.[2] And the same rule seems to hold, where the plaintiff afterward comes in for a decree, upon a bill amended by permission so as to cover an agreement which the defendant in his answer had confessed.[3] And if the defendant, after having admitted the agreement, should die before a decree, upon a bill of revivor against the heir, a specific performance by him would be decreed; for the principle goes throughout, and binds the representative as well as the ancestor.[4]

§ 500. An important question, having a near relation to the point we are now considering, has received the attention of Mr. Baron Alderson, namely, whether a court of equity, upon a bill filed for that purpose, will first reform a written agreement for real estate, so as to embrace or exclude certain property, and then enforce it as reformed, the mistake being admitted by the answer. In the case before him, the answer did not admit the mistake, and the learned Baron thought it clear that he could not decree a performance, after reforming the agreement by parol evidence admitted for that purpose. But upon the hypothesis of the answer's admitting the mistake, he says: "The case might have fallen within the principle of those cases at law where there is a declaration on an agreement not [?] within the statute, and no issue taken upon the agreement by the plea; because in such a

[1] Newton *v.* Swazey, 8 N. H. 9. See James *v.* Rice, Kay, Ch. 231; Esmay *v.* Groton, 18 Ill. 483; Angel *v.* Simpson, 85 Ala. 53.

[2] Spurrier *v.* Fitzgerald, 6 Ves. 548.

[3] Patterson *v.* Ware, 10 Ala. 444.

[4] Attorney-General *v.* Day, 1 Ves. Sr. 218; Lacon *v.* Mertins, 3 Atk. 1.

case it would seem as if, the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider whether, according to the *dicta* of many venerable judges, I should not have been authorized to reform an executory agreement for the conveyance of an estate, when it was admitted to have been the intention of both parties that a portion of the estate was not to pass."[1]

§ 501. The general rule is undoubtedly clear, that in order to entitle the plaintiff to the benefit of the agreement admitted by the answer, it must appear to be, in all its essential terms, the same with that charged in the bill;[2] although an immaterial variation would not be regarded, and although, in certain cases, a plaintiff may be allowed to amend his bill after answer, in order to avail himself of the agreement admitted by it, or at least, may have his bill dismissed, without prejudice to his filing a new bill adapted to such admitted agreement.[3] And it has been held by Sir William Grant, at the Rolls, that the rule denying to the plaintiff a decree for the execution of a different sort of agreement, an agreement of a different import or tendency from that laid, was not infringed by allowing the plaintiff, who alleged a written agreement, the benefit of the defendant's admission that such an agreement was made, though by parol; remarking that the difference between a written and a parol agreement consisted in the mode in which they were evidenced, an objection which did not at all depend on the Statute of

[1] Attorney-General *v.* Sitwell, 1 Younge & C. 583. That a Court of Equity may reform a deed of land, and compel the conveyance of the land agreed upon, though only by parol, see Johnson *v.* Johnson, 8 Baxter (Tenn.) 261.

[2] Legal *v.* Miller, 2 Ves. Sr. 299; Legh *v.* Haverfield, 5 Ves. 452; Willis *v.* Evans, 2 Ball & B. 225; Lindsay *v.* Lynch, 2 Schoales & L. 1; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638.

[3] Lindsay *v.* Lynch, 2 Schoales & L. 1; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Willis *v.* Evans, 2 Ball & B. 225; Deniston *v.* Little, 2 Schoales & L. 11, *note;* Pleasonton *v.* Raughley, 3 Del. Ch. 124.

Frauds.[1] It may be a question whether proof of acts of part-performance in the case makes it an exception to the general rule above referred to. In Mortimer *v.* Orchard, where the bill stated a certain agreement, the complainant's witness proved a different one, and the two defendants by their answer set up an agreement which differed from both, Lord Loughborough thought the bill should in strictness be dismissed, but, as there had been a part execution *of some agreement* between the parties, and there were two defendants who proved the agreement set up by their answer, he decreed a specific performance of the agreement confessed by the answers, and required the plaintiff to pay the costs.[2] His Lordship, it would seem, did not come to that conclusion altogether without difficulty, and the doctrine of the case appears to conflict with the established rule in regard to part-performance, that it must appear to be in pursuance of *the* contract upon which relief is to be granted.

§ 502. The authority of this case would seem to be somewhat shaken by the decision of Lord Redesdale, in Lindsay *v.* Lynch.[3] There, the plaintiff, having been previously in possession of certain premises, alleged a parol agreement by the lessor to give him a further lease for three lives. The lessor defendant, by his answer admitted an agreement to give him a further lease for one life, whereupon the plaintiff amended his bill, claiming still the lease for three lives, but praying, in the alternative, that if that was not decreed, he might have the lease for one life. The plaintiff showed payment of rent after the agreement made, as an act of part-performance. Lord Redesdale said, that if there had been acts of considerable expenditure, he could *do no more* than was done in the case before Lord Loughborough, just referred to. He then observed that as the payment of rent was an act which might be in part execution of a lease for one life, as

[1] Spurrier *v.* Fitzgerald, 6 Ves. 548.
[2] Mortimer *v.* Orchard, 2 Ves. Jr. 243.
[3] Lindsay *v.* Lynch, 2 Schoales & L. 1.

well as of a lease for three, there was no ground for admitting parol evidence of the latter, the agreement charged in the bill; and he refused, in view of the course the plaintiff had taken in pleading, to allow him to amend so as to obtain a decree for a lease for one life, but dismissed the bill without prejudice to his filing a new one for that purpose. Although Lord Loughborough's decision is not in terms questioned by Lord Redesdale, yet he seems to speak of it with some uncertainty as to its correctness; and it will be observed that the payment of rent was admitted here to be an act in part execution *of some agreement*, as in the case before Lord Loughborough.

CHAPTER XX.

PLEADING.

§ 503. We have now to examine, in conclusion of this treatise, certain points of pleading which have presented themselves, some of them involving no little difficulty, in cases decided upon the Statute of Frauds. And in so doing, it will be convenient to inquire, *first*, how the declaration or bill should be framed, and, *secondly*, when and how the defence upon the statute may be taken.

§ 504. We have seen that in cases where the plaintiff is allowed to recover for money paid, services rendered, etc., in pursuance of a verbal contract, upon which, as being within the statute, he cannot maintain an action directly for damages, he must claim upon the implied obligation of the defendant to give compensation for what he has received.[1] On the other hand, where he brings an action upon the contract of which a memorandum in writing has been duly executed, his count must of course be special, relying upon the contract itself.[2]

§ 505. It is now well settled in this country, that in a suit at law or in equity upon a contract affected by the statute, the declaration or bill will be sufficient if it allege a contract generally, without stating whether it is in writing or not. In a case in Massachusetts, the declaration, after setting forth that one F. owed the plaintiff the sum of sixteen dollars

[1] *Ante*, § 124.

[2] Babcock *v.* Bryant, 12 Pick. (Mass.) 133; Quin *v.* Hanford, 1 Hill (N. Y.) 82; Beers *v.* Culver, 1 Hill (N. Y.) 589; Elder *v.* Warfield, 7 Harr. & J. (Md.) 391; Wagnon *v.* Clay, 1 A. K. Marsh. (Ky.) 257; Louisville Prize Mining Co. *v.* Scudder, 3 Col. 152.

for labor and services performed by him for F., and that he was about to sue F. therefor, alleged "that the defendant, in consideration that the plaintiff would forbear to sue the said F., *promised and agreed* to pay the same to the plaintiff, and the plaintiff did forbear to sue the said F., and the defendant owes him the said sum." To this declaration the defendant demurred, assigning for cause "that the defendant's promise was void, as within the Statute of Frauds, it being to answer for the debt or default of another, and no agreement in writing or memorandum thereof was ever made or signed by the defendant, nor is any copy of any agreement set out by the plaintiff in his declaration." The lower court overruled the demurrer, and on appeal their judgment was sustained by the full bench. Metcalf, J., delivering the opinion of the court, said: "As this demurrer contains a traverse or denial of facts, it is wrong in form. But we do not overrule it for that reason. We treat it, as the counsel for the defendant treated it, namely, as a demurrer because the declaration, though it sets forth an agreement which is within the Statute of Frauds, does not allege that the agreement was in writing. This, however, is not a legal cause for demurrer. The Statute of Frauds has not altered the rules of pleading, in law or equity. A declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner, since the statute, as it might have been before. The writing is matter of proof, and not of allegation." [1]

[1] Price *v.* Weaver, 13 Gray 273; and see Kibby *v.* Chitwood, 4 T. B. Mon. (Ky.) 91; Dayton *v.* Williams, 2 Doug. (Mich.) 31; Richards *v.* Richards, 9 Gray (Mass.) 313; Sanborn *v.* Chamberlin, 101 Mass. 409; Mullaly *v.* Holden, 123 Mass. 583; Carroway *v.* Anderson, 1 Humph. (Tenn.) 61; Elting *v.* Vanderlyn, 4 Johns. (N. Y.) 237; Piercy *v.* Adams, 22 Ga. 109; Walker *v.* Richards, 39 N. H. 259; Perrine *v.* Leachman, 10 Ala. 140; Brown *v.* Barnes, 6 Ala. 694; Miller *v.* Drake, 1 Caines (N. Y.) 45; Elliott *v.* Jenness, 111 Mass. 29; Cross *v.* Evarts, 28 Tex. 523; Walsh *v.* Kattenburgh, 8 Minn. 127; Cranston *v.* Smith, 6 R. I. 231; Burkham *v.* Mastin, 54 Ala. 122; Ecker *v.* Bohn, 45 Md. 278. *Contra*, by Indiana statute, Langford *v.* Freeman, 60 Ind. 46; Krohn *v.* Bautz, 68

§ 505 *a.* In England, however, the doctrine was not definitely settled until the promulgation, in 1875, of the Rules and Orders concerning Pleading and Practice under the "Supreme Court of Judicature Act."[1] In Whitchurch *v.* Bevis, in 1789, Lord Thurlow said, speaking of the case of Child *v.* Godolphin, before Lord Macclesfield:[2] "If the bill had stated the agreement generally, a demurrer might have been allowed, but where the agreement is stated to be in writing, the plea must be supported by the answer."[3] In Spurrier *v.* Fitzgerald, the Master of the Rolls, Sir William Grant, after citing this passage, says: "That shows that, if the plaintiff alleges a written agreement, the defendant will be reduced to the necessity of pleading."[4] In the case of

Ind. 277; and see Babcock *v.* Meek, 45 Iowa 137; Harris Photo. Co. *v.* Fisher, 81 Mich. 136; Benton *v.* Schulte, 31 Minn. 312; Dexter *v.* Ohlander, 89 Ala. 262; Lehow *v.* Simonton, 3 Col. 346; Tucker *v.* Edwards, 7 Col. 209; Groce *v.* Jenkins, 28 S. C. 172; Horn *v.* Shamblin, 57 Texas 243; Broder *v.* Conklin, 77 Cal. 330; McCann *v.* Pennie, 100 Cal. 547; Manter *v.* Churchill, 127 Mass. 31; Vassault *v.* Edwards, 43 Cal. 458; Mallory *v.* Mallory, 92 Ky. 316; Smith *v.* Theobald, 86 Ky. 141.

[1] 36 & 37 Vict. cap. 66; amended 37 & 38 Vict. cap. 83; and 38 & 39 Vict. cap. 77, under which last the first schedule prescribes certain rules of court. Order xix., p. 23, of these rules prescribes that after November 1, 1875, a "bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise." In Catling *v.* King, 5 Ch. Div. 660, in 1876, the judges of the Chancery Appeals Court intimated that, under this rule, the defence of the statute could not be raised by demurrer, and in Towle *v.* Topham, 37 L. T. N. S. 309, Jessel, M. R., said, "The first objection is that the contract did not contain all that was necessary; and that by the Statute of Frauds such a contract cannot be enforced. To that the answer is that if the Statute of Frauds is relied on it must be pleaded. That was decided by the Court of Appeals (of which I was a member) in Catling *v.* King." See this same rule xix. noticed *post*, § 511, *note*. In Daniell's Chancery Practice, 5th London ed. 1871, p. 306, it is stated that "in a bill for specific performance of an agreement relating to land, it is, however, necessary to allege that the agreement is in writing, otherwise the bill will be demurrable."

[2] Child *v.* Godolphin, 1 Dick. 39.

[3] Whitchurch *v.* Bevis, 2 Bro. C. C. 566.

[4] Spurrier *v.* Fitzgerald, 6 Ves. 555.

Barkworth *v.* Young, in 1856, Vice Chancellor Kindersley, after citing the foregoing cases, said: "A verbal agreement is still an agreement; you cannot, from a mere allegation of an agreement, infer or presume that it was in writing; and as the fact that it was in writing is neither expressly alleged in the bill, nor necessarily to be inferred or presumed from what the bill does allege, the mere allegation of an agreement amounts to nothing more than the allegation of a verbal agreement, and then the defence may be made by demurrer. I think this view is strongly supported." In the case before him, however, as the bill set out in addition a sufficient memorandum of the agreement, which was one in consideration of marriage, he overruled the demurrer.[1] Thus it appears that in England the general tendency of judicial opinion has been against the sufficiency of a bill in equity, unless it alleged that the agreement was in writing. At law, on the other hand, the rule in England has been (as both in equity and at law in this country), that it is sufficient since the statute, as it was before, to allege an agreement generally, which throws it on the defendant to allege that it is not in writing.[2]

§ 506. A distinction has been taken, in regard to the obligation to allege a writing, between the cases where the contract is declared on by the plaintiff and where it is pleaded by the defendant. In the Queen's Bench, four years after the enactment of the Statute of Frauds, where a contract of guaranty was set up in defence, and the plea did not allege it to be in writing, and the plaintiff demurred, the demurrer was allowed, on two grounds, one of which was that "though

[1] Barkworth *v.* Young, 26 L. J. N. S. Ch. 156. And see Jerdein *v.* Bright, 2 Johns. & H. 325.

[2] Spurrier *v.* Fitzgerald, 6 Ves. 555, *per* Grant, M. R.; Roberts on Frauds, 202; Buller, N. P. 279; Williams *v.* Leper, 3 Burr. 1890; Forth *v.* Stanton, 1 Wms. Saund. 226, *note;* Duppa *v.* Mayo, 1 Wms. Saund. 380, *note;* Birch *v.* Bellamy, 12 Mod. 540; Rann *v.* Hughes, 7 T. R. 350, *note;* Clarke *v.* Callow, 46 L. J. Q. B. Div. 53, *per* Mellish, L. J.; Young *v.* Austen, L. R. 4 C. P. 553.

upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court, that an action will lie upon it, for he shall not take away the plaintiff's present action and not give him another upon the agreement pleaded."[1] It will be observed, however, that the plea being held bad also upon another ground, the case is not decisive of the point above quoted. And it seems the rule does not apply where the plea is of *title*, in the party pleading and as against the other party claiming adversely, in property for the sale of which the statute makes a writing necessary. Thus, where the plaintiff in replevin for growing corn pleaded a *fi. fa.* under which the sheriff seized the corn and sold it to the plaintiff, who thus became possessed of the same, and the defendant contended that the plea was bad as not alleging that the sale was in writing, it is reported that the courts were against him on that point, and observed that assignments of terms of years were commonly pleaded without a statement of any writing.[2]

§ 507. Where a plaintiff in equity seeks the specific performance of an oral agreement, having no writing, but relying upon the peculiar power of a court of equity, he should specially allege all the equitable circumstances existing in his case, such as part-performance and the like, upon which he intends to rely to avoid the bar of the statute and give the court of equity its jurisdiction.[3] According to the system of equity pleading which once prevailed, it would have been sufficient for the plaintiff to allege the agreement, and then, if the defendant pleaded the statute, he might specially reply the equitable circumstances to meet that plea. Now

[1] Case *v.* Barber, T. Raym. 451. See Villers *v.* Handley, 2 Wils. 49; Young *v.* Austen, L. R. 4 C. P. 553, 558.

[2] Peacock *v.* Purvis, 2 Brod. & B. 362.

[3] Small *v.* Owings, 1 Md. Ch. Dec. 363; Meach *v.* Stone, 1 D. Chip. (Vt.) 182; Underhill *v.* Allen, 18 Ark. 466; Hart *v.* McClellan, 41 Ala. 251.

that special replications in equity are practically abolished, and amendments to the bill after plea or answer have taken their place, the method above suggested appears to be uniformly pursued, though necessitating an informality in the plea.[1] It does not appear to have been ever decided that acts done in part-performance of the agreement must be expressly alleged to have been so done; but such is the common and probably safer course.[2] The question of the sufficiency of what is alleged to warrant a decree for specific performance will be raised by a demurrer to the bill.[3]

§ 507 *a*. With regard to the proper manner of setting out a trust, the enforcement of which is sought, it is unnecessary to aver that the trust was manifested or proved in writing.[4]

§ 508. Next, with regard to the necessity and the manner of taking advantage in pleading of the defence given by the statute. As to the first, there seems to be an important difference between cases of trust and cases of contract. In the former, the statute provides that, unless evidenced as it requires, the trust "shall be utterly void and of none effect." From this it follows, that although the defence of the statute be not taken, a court will still be unable to give effect to the trust in the absence of the evidence required. With regard to contracts, however, the statute being regarded as not affecting their validity, it is held that unless the privilege of requiring the statutory evidence given by it to the party resisting the enforcement of the contract is sufficiently

[1] See *post*, § 516. *Quære*, whether, since the form of pleading has become well settled in these cases, an amendment would be allowed to the bill, after plea or answer setting up the statute, for the introducing of equitable circumstances.

[2] Meach *v.* Stone, 1 D. Chip. (Vt.) 182.

[3] Wood *v.* Midgley, 5 De G., M. & G. 41; Barkworth *v.* Young, 4 Drew. 1; Howard *v.* Okeover, 3 Swanst. 421; Field *v.* Hutchinson, 1 Beav. 599; Redding *v.* Wilkes, 3 Bro. C. C. 400. See Van Dyne *v.* Vreeland, 11 N. J. Eq. 370.

[4] Davies *v.* Otty, 33 Beav. 540; Whiting *v.* Gould, 2 Wisc. 552; Peralta *v.* Castro, 6 Cal. 354. See Walker *v.* Locke, 5 Cush. (Mass.) 90.

claimed by him in some proper pleading, the court will proceed with the contract under common-law rules.[1] To this rule, however, an exception must be made where the plaintiff sues on the common counts, and therefore does not disclose the foundation of his case until he puts in his evidence. Under these circumstances, the defendant will be allowed to insist upon this statutory privilege, although his pleading has not in terms done so.[2]

§ 509. The defence of the Statute of Frauds may be set up by plea or answer; or, where the structure of the plaintiff's

[1] Middleton *v.* Brewer, Peake 15; Petrick *v.* Ashcroft, 20 N. J. Eq. 198; Vaupell *v.* Woodward, 2 Sandf. (N. Y.) Ch. 143; Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436; Adams *v.* Patrick, 30 Vt. 516; Huffman *v.* Ackley, 34 Mo. 277; Trayer *v.* Reeder, 45 Iowa, 272; Montgomery *v.* Edwards, 46 Vt. 151; Newton *v.* Swazey, 8 N. H. 9; Lingan *v.* Henderson, 1 Bland (Md.) Ch. 236; Harrison *v.* Harrison, 1 Md. Ch. Dec. 331; Burke *v.* Haley, 2 Gilm. (Ill.) 614; Guynn *v.* McCauley, 32 Ark. 97; Thornton *v.* Vaughan, 2 Scam. (Ill.) 218; Lawrence *v.* Chase, 54 Me. 196; Rigby *v.* Norwood, 34 Ala. 129; Lear *v.* Chouteau, 23 Ill. 39; Boston *v.* Nichols, 47 Ill. 353; Milledgeville Laundry Co. *v.* Gobert, 89 Ga. 473; Iverson *v.* Cirkel, 57 N. W. Rep. (Minn.) 800; Hamill *v.* Hall, 35 Pac. Rep. (Col.) 927; Feeney *v.* Howard, 79 Cal. 525; Lauer *v.* Richmond Institution, 8 Utah 305; Kraft *v.* Greathouse, 1 Idaho 254; Browning *v.* Berry, 107 N. C. 231; League *v.* Davis, 53 Texas 9; Fleming *v.* Holt, 12 W. Va. 143; Penninger *v.* Reilley, 44 Mo. App. 255; Hackworth *v.* Zeitinger, 48 Mo. App. 32; Loughran *v.* Giles, 110 N. C. 423; Harner *v.* Sidway, 124 N. Y. 538; Hobart *v.* Murray, 54 Mo. App. 249; Neagle *v.* Kelly, 146 Ill. 460; Crane *v.* Powell, 139 N. Y. 379; Hunt *v.* Johnson *et al.*, 96 Ala. 130; Benjamin *v.* Mattler *et al.*, 3 Col. Ct. of App. 227; Donaldson *v.* Newman, 9 Mo. App. 235; Scharff *v.* Klein, 29 Mo. App. 549; McClure *v.* Otrich, 118 Ill. 320; Porter *v.* Wormser, 94 N. Y. 431; Wells *v.* Monihan, 129 N. Y. 161; Reed *v.* McConnell, 62 Hun (N. Y.) 153; Douglass *v.* Snow, 77 Me. 91; Howe *v.* Chesley, 56 Vt. 727; Battell *v.* Matot, 58 Vt. 271; Scofield *v.* Stoddard, 58 Vt. 290; Ritch *v.* Thornton, 65 Ala. 309; Clark *v.* Taylor, 68 Ala. 453; Bailey *v.* Irwin, 72 Ala. 505. But it is held otherwise in North Carolina. Morrison *v.* Baker, 81 N. C. 76; Holler *v.* Richards, 102 N. C. 545; Browning *v.* Berry, 107 N. C. 231. And see Suman *v.* Springate, 67 Ind. 115; Gordon *v.* Reynolds, 114 Ill. 118.

[2] Hunter *v.* Randall, 62 Me. 423; Boston Duck Co. *v.* Dewey, 6 Gray (Mass.) 446; Durant *v.* Rogers, 71 Ill. 121. See Alger *v.* Johnson, 4 Hun (N. Y.) 412; Harris *v.* Frank, 81 Cal. 280; Lynch *v.* Scroth, 50 Ill. App. Ct. 608.

allegations admits of it, by demurrer. The appropriateness of demurrer has been already indicated in previous sections, where the proper mode of averring the agreement in suit was considered. It may now be regarded as settled in this country, both at law and in equity, that a demurrer is regular where the bill or declaration alleges a contract within the Statute of Frauds, and alleges it to be oral.[1]

§ 510. Much of the confusion among the earlier authorities upon this matter of allowing the defence of the statute to be taken by demurrer, would seem to have grown out of the doctrine, which at one time received some countenance, that if the defendant admitted the fact of the agreement as charged (which is the effect of a demurrer to the bill or declaration), the agreement must be enforced, notwithstanding the statute was insisted upon in bar of the relief. This doctrine no longer prevails; the defendant's reliance upon the statute, as is now well settled, depriving the plaintiff of the benefit of the admission.[2] The question has also been further complicated by the failure of courts to distinguish between cases for the enforcement of contracts on common-law grounds, and those in which the interference of equity

[1] Randall *v.* Howard, 2 Black (U. S.) 585; Lawrence *v.* Chase, 54 Me. 196. And see Richards *v.* Richards, 9 Gray (Mass.) 313; Sanborn *v.* Chamberlin, 101 Mass. 417; Thomas *v.* Hammond, 47 Tex. 42. Were the question to be considered as an open one, *quære* whether, at common law, and upon a strict application of the principle that the statute has made no alteration in the rules of pleading, a declaration may not be good which alleges, according to the fact, that the contract was oral, saying nothing as to whether or not it was followed by any of those authentications of the oral contract for which the statute provides. See Kibby *v.* Chitwood, 4 T. B. Mon. (Ky.) 91; Price *v.* Weaver, 13 Gray (Mass.) 272; Bolling *v.* Munchus, 65 Ala. 558; Phillips *v.* Adams, 70 Ala. 373; Manning *v.* Pippen, 86 Ala. 357; Ducie *v.* Ford, 8 Montana, 233; Campbell *v.* Brown, 129 Mass. 23; Cloud *v.* Greasley, 125 Ill. 313; White *v.* Levy, 93 Ala. 484; Barr *v.* O'Donnell, 76 Cal. 469; Roth *v.* Goerger, 118 Mo. 556; Burden *v.* Knight, 82 Iowa 584; Speyer *v.* Desjardins, 144 Ill. 641; Clanton *v.* Scruggs, 95 Ala. 279; Piedmont Land & Imp. Co. *v.* Piedmont F. & M. Co., 96 Ala. 389; Howard *v.* Brower, 37 Ohio St. 402; Beadle *v.* Seat, 15 So. Rep. (Ala.) 243.

[2] § 515, *post*.

is sought upon the equitable ground of fraud. In this latter case, as has already been pointed out, the very ground of the suit is afforded by the power of a court of equity to decline to apply the provisions of the statute upon proof of certain equitable circumstances. A demurrer to such a bill evidently raises the question of the sufficiency of the case shown, the application and force of the statute being practically recognized by the very nature of the relief sought.[1]

§ 510 *a.* Where the bill alleges only an oral agreement, and the answer denies it, it has been held that this excludes oral proof of the agreement in issue.[2]

§ 511. In the next place, a defendant may insist upon the benefit of the statute by plea of the general issue, or in equity by answer simply, denying the fact of the agreement which the plaintiff charges to have been made. This puts the plaintiff to proof of the agreement at the trial or hearing, and he then must produce a writing.[3] Where, however, the

[1] See § 507, *supra.*

[2] Mahana *v.* Blunt, 20 Iowa 142; Askew *v.* Poyas, 2 Desaus. (S. C.) Ch. 145; Allen *v.* Chambers, 4 Ired. (N. C.) Eq. 125; Dunn *v.* Moore, 3 Ired. (N. C.) Eq. 364.

[3] Buttemere *v.* Hayes, 5 Mees. & W. 456; Johnson *v.* Dodgson, 2 Mees. & W. 653; Elliott *v.* Thomas, 3 Mees. & W. 170; Eastwood *v.* Kenyon, 11 Ad. & E. 438; Leaf *v.* Tuton, 10 Mees. & W. 393; Reade *v.* Lamb, 6 Exch. 130; and in equity, Skinner *v.* McDouall, 2 De G. & S. 265; Clifford *v.* Turrell, 1 Younge & C. 138; Cozine *v.* Graham, 2 Paige (N. Y.) 181; Ontario Bank *v.* Root, 3 Paige (N. Y.) 478; Small *v.* Owings, 1 Md. Ch. Dec. 363; Chicago & Wilmington Coal Co. *v.* Liddell, 69 Ill. 639; Wynn *v.* Garland, 19 Ark. 23; Trapnall *v.* Brown, 19 Ark. 39; Myers *v.* Morse, 15 Johns. (N. Y.) 425; Givens *v.* Calder, 2 Desaus. (S. C.) Ch. 171; Kay *v.* Curd, 6 B. Mon. (Ky.) 100: Fowler *v.* Lewis, 3 A. K. Marsh. (Ky.) 443. But see Maggs *v.* Ames, 4 Bing. 470; Barnett *v.* Glossop, 1 Bing. N. R. 633. The new rules of pleading under the Supreme Court of Judicature Act, make it necessary to plead the statute specially. See Rule XIX. par. 23, sched. 1, of the amended Act. And see Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447, and Mass. Gen. St. c. 129, § 20; May *v.* Sloan, 101 U. S. 231; Dunphy *v.* Ryan, 116 U. S. 491; Allen *v.* Richard, 83 Mo. 55; Wiswell *v.* Tefft, 5 Kans. 156; Tatge *v.* Tatge, 34 Minn. 272; Busick *v.* Van Ness, 44 N. J. Eq. 82; May *v.* Sloan, 101 U. S. 231; Bernhardt *v.* Walls, 29 Mo. App. 206; Feeney *v.* Howard, 79 Cal. 525 But see Smith *v* Pritchett, 98 Ala. 649; Citty *v.* Southern Queen Mfg. Co., 24 S. W. Rep. (Tenn.) 121.

bill, in addition to the allegation in general terms that the agreement was made, alleges such acts done in part execution of it, or such other equitable circumstances, as would justify the court in enforcing it, the defendant cannot by this method avail himself of his defence upon the statute, but must directly traverse the allegation of equitable circumstances, at the same time that he pleads, or by answer insists upon, the statute as preventing the plaintiff's recovery on the mere verbal agreement.[1] And this brings us to the most important class of cases upon the subject of the present chapter.

§ 512. A defendant may, by special plea or by answer, expressly interpose the statute in bar of the plaintiff's claim. Under this head, several questions arise: *first*, when the statute may be specially pleaded or insisted upon; *secondly*, the proper form of the plea or answer in order to present the defence upon the statute; *thirdly*, the extent of the defence thus presented.

§ 513. We have already seen that it is open to the defendant to demur where the plaintiff expressly states that the agreement rests in parol. Where he does not by his allegations disclose whether it is in writing or not, the defendant may deny that it is in writing and insist upon the statute by his plea or answer.

§ 514. And in equity, although, as the general averment of an agreement in the bill may be understood to mean an agreement in writing, the plea of the statute has rather the appearance of an answer, it has always been allowed in that form. But if the bill states an agreement in writing and seeks nothing but an execution of that agreement, a plea that there is no agreement in writing has been considered improper, being no more than so much of an answer.[2]

§ 515. It was formerly held that if the defendant, by his

[1] *Post*, § 518.

[2] *Per* Lord Eldon, in Morison *v.* Turnour, 18 Ves. 175. And see Story, Eq. Pl. § 762, *note*.

answer in chancery, admitted the fact of the agreement, he could not avail himself of the benefit of the statute. Lord Macclesfield so decided,[1] and Lord Hardwicke, if he did not actually determine the point,[2] clearly appears to have been of the same opinion.[3] But by the unbroken course of more modern decisions, it is now settled that although the defendant admit the agreement, it cannot be enforced without the production of a written memorandum, if he insist upon the bar of the statute.[4] As was said by Sir William Grant, "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."[5] The American courts have also fully accepted this doctrine.[6] It is hardly necessary to say that the defendant

[1] Child *v.* Godolphin, 1 Dick. 39; s. c. cited 2 Bro. C. C. 566; Child *v.* Comber, 3 Swanst. 423, *note*.

[2] Cottington *v.* Fletcher, 2 Atk. 155. It is to this case that Lord Loughborough seems to refer when he says (Moore *v.* Edwards, 4 Ves. 24): "There is a case in Atkyns that misleads people; where Lord Hardwicke is stated to have overruled the defence upon the statute merely on the ground that the agreement was admitted. I had occasion to look into that; and it is completely a misstatement. It appears by Lord Hardwicke's own notes that it was upon the agreement having been in fact executed that he determined that case."

[3] See his *dictum* in Lacon *v.* Mertins, 3 Atk. 3.

[4] Walters *v.* Morgan, 2 Cox 369; Whitbread *v.* Brockhurst, 1 Bro. C. C. 416; Whitchurch *v.* Bevis, 2 Bro. C. C. 559, and Eyre *v.* Ivison, and Stewart *v.* Careless, there cited; Rondeau *v.* Wyatt, 2 H. Bl. 63; Moore *v.* Edwards, 4 Ves. 23; Cooth *v.* Jackson, 6 Ves. 37; Rowe *v.* Teed, 15 Ves. 375; Blagden *v.* Bradbear, 12 Ves. 466; Kine *v.* Balfe, 2 Ball & B. 343; Luckett *v.* Williamson, 37 Mo. 388; Burt *v.* Wilson, 28 Cal. 632; Taylor *v.* Allen, 40 Minn. 433. But see Auter *v.* Miller, 18 Iowa, 405; Dewey *v.* Life, 60 Iowa 361; Creigh's Administrator *v.* Boggs, 19 W. Va. 240.

[5] Blagden *v.* Bradbear, 12 Ves. 471.

[6] Thompson *v.* Tod, Pet. (C. C.) 380; Stearns *v.* Hubbard, 8 Greenl. (Me.) 320; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144; Winn *v.* Albert, 2 Md. Ch. Dec. 169; s. c. *nom.* Albert *v.* Winn, 5 Md. 66; Hollingshead *v.* McKenzie, 8 Ga. 457; Barnes *v.* Teague, 1 Jones (N. C.) Eq. 277; Thompson *v.* Jamesson, 1 Cranch (C. C.) 295.

is not debarred from thus insisting upon the statute, by the bill's alleging that the agreement has been in part performed; for the part-performance can have no other effect than to let in the plaintiff to prove the contract *aliunde* where it is not confessed.[1]

§ 516. According to a case before Lord Thurlow, it would seem to have been considered by him that where a bill in equity charges acts of part-performance or other equitable circumstances to avoid the bar of the statute, it is impossible for the defendant to plead the statute in bar; for in that case the plea averring, first, that there was no contract in writing, and secondly, that there had been no acts done in part-performance, was overruled as double.[2] The bill, in fact, seems to have asserted two grounds of relief, a written agreement and acts done in part-performance, thus making a double case, both branches of which the defendant sought to meet in his plea. It is remarked, however, by an eminent writer, that it may be questionable whether, at this advanced era of equity pleading, such an objection should be suffered to prevail, as this mode of pleading, though undoubtedly loose and improper, technically speaking, had been, for a period long preceding, acknowledged and tolerated.[3]

§ 516 *a*. Whether the rule that a defendant may insist upon the statute, though admitting the agreement charged,

[1] Thompson *v*. Tod, Pet. (C. C.) 380.

[2] Whitbread *v*. Brockhurst, 1 Bro. (C. C.) 404.

[3] Beames's Elements of Pleas in Equity, 174. Such also would seem to be the inclination of Lord Redesdale's mind, from a comparison of the several passages of his work on Pleading (Mitf. Pl. 240, 243, 266, 267), bearing upon this question. In his second edition he states the settled rule to be that "if any matter is charged in the bill, which may avoid the bar created by the statute, that matter must be denied by way of averment in the plea, and must be denied particularly and precisely by way of answer to support the plea." (pp. 212–214.) In his last edition, he states this as what *had been* the rule, deferring, apparently with some reluctance, to Lord Thurlow's decision in Whitbread *v*. Brockhurst. See *ante*, § 507, as to this difficulty in regard to the manner of pleading having grown out of the disuse of special replications.

applies equally in cases of *trusts*, is a question which has been agitated to some extent, and is of manifest importance. Lord Redesdale speaks of it as a question "upon which it may be very difficult to make a satisfactory distinction."[1] The admission of the trust by the defendant's answer is susceptible, it is said, of being considered as a declaration of trust in writing.[2] But at the same time it is admitted that, to the same extent, an admission of an agreement must, upon the same principle, be considered as a memorandum of the agreement, and that it is difficult to see why the defendant should not be allowed to insist upon the statute, notwithstanding such admission, in one case as well as in the other.[3] Indeed, it may well be said, that whether the admission in either case is or is not properly to be taken as a manifestation of the trust or a memorandum of the agreement, within the meaning of the statute, must depend upon the question whether the defendant is allowed nevertheless to insist upon the statute. If he is, it can hardly be that his admission amounts to the required manifestation or memorandum, seeing that it is in his power to nullify the whole effect of it in the same pleading.[4]

§ 517. We have seen, at an earlier page, that a man might be convicted of perjury for falsely swearing to a contract within the Statute of Frauds, on the ground that the testimony was not immaterial when in fact it proved the promise; though it might have been incompetent, if objected to in season.[5] It has been held, however, by Chief Justice Abbott, at *nisi prius*, that where, in an answer in chancery to a bill filed against the defendant for a specific performance of an agreement relating to the purchase of land, the defendants denied having entered into any such agreement, and relied

[1] Mitf. Eq. Pl. 268. See Rigby *v.* Norwood, 34 Ala. 129.
[2] Mitf. Eq. Pl. 268. Also Story Eq. Pl. § 766.
[3] Mitf. Eq. Pl. 268; Story Eq. Pl. § 766.
[4] *Ante*, § 498.
[5] *Ante*, § 135 *b*.

upon the Statute of Frauds, they were not guilty of perjury upon its being proved that they had entered into such an agreement verbally. The Chief Justice said: "The statute, for the wisest reasons, declares that agreements of this description shall not be enforced unless they are reduced into writing. These defendants, therefore, having insisted upon the statute in their answer, the question is whether, under such circumstances, the denial of an agreement which by the statute is not binding upon the parties is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to, and said to be false, should be material and relevant to the matter in issue, the matter here sworn to is in my judgment immaterial and irrelevant, and the defendant must be acquitted." [1] In this case, it will be observed, the testimony given by the defendants did not prove the contract, all parol proof of it having been barred by their reliance upon the statute; whereas in the case before referred to, that bar not having been interposed, the testimony was competent and material, and did prove the contract. Lord Mansfield relates a case, which he speaks of as remarkable, where the defendant bought an estate for the plaintiff; there was no writing, nor was any part of the money paid by the plaintiff; the defendant articled in his own name and refused to convey, and by his answer denied any trust; parol evidence was rejected, and the bill was dismissed; the defendant was afterward indicted for perjury, tried, and convicted upon evidence of the plaintiff confirmed by circumstances and the defendant's declarations; the plaintiff then petitioned for a supplemental bill in the nature of a bill of review, stating this conviction, but the bill was dismissed because the conviction was not evidence.[2] It would appear from his Lordship's account of the case, that the Statute of Frauds was insisted upon by the defendant, as

[1] Rex *v.* Dunston, Ry. & M. 112.

[2] Bartlett *v.* Pickersgill, Trin. T. 32 & 33 Geo. II., cited in Abrahams *v.* Bunn, 4 Burr. 2255, and 4 East 577, *in notis*.

upon no other ground could parol evidence of the contract have been rejected. If so, it conflicts with the decision of Chief Justice Abbott, and is overruled by it so far as the propriety of the conviction for perjury is concerned; but it seems that it may stand upon the general rule that when the defendant does not choose to admit the agreement and thereby waive the benefit of the statute, the truth of his denial cannot be inquired into by means of parol evidence.

§ 518. The next question is upon the form or ingredients of a proper plea or answer insisting upon the statute.[1] In equity, the defendant's plea of the statute must contain negative averments to the effect that there was no writing executed as required by the statute.[2] And when the bill charges any such equitable circumstances as might avoid the bar of the statute, they must be traversed generally by way of averment in the plea, and particularly and precisely by way of answer to support the plea.[3] So also, where the bill, though not stating any such equitable circumstances, alleges the agreement to have been in writing, and charges facts in evidence thereof, negative averments must be put in by the

[1] For form of plea of the statute to bill for specific performance of a parol agreement, accompanied by an answer to the matters stated in the bill tending to show part-performance, see Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Van Heythusen's Eq. Draft. 107. For form of answer insisting on the same benefit of the statute as if it had been pleaded, see Curtis, Eq. Prec. 197, 198.

[2] Mitf. Eq. Pl. 265; Welf. Eq. Pl. 326; Stewart *v.* Careless, cited in Whitchurch *v.* Bevis, 2 Bro. C. C. 565; Moore *v.* Edwards, 4 Ves. 23; Bowers *v.* Cator, 4 Ves. 91; Evans *v.* Harris, 2 Ves. & B. 361; Mussell *v.* Cooke, Finch, Prec. Ch. 533; Bean *v.* Valle, 2 Mo. 126; Dinkel *v.* Gundelfinger, 35 Mo. 172.

[3] Taylor *v.* Beech, 1 Ves. Sr. 297; Bowers *v.* Cator, 4 Ves. 91; Rowe *v* Teed, 15 Ves. 378; Evans *v.* Harris, 2 Ves. & B. 361; Cooth *v.* Jackson, 6 Ves. 12; Hall *v.* Hall, 1 Gill (Md.) 383; Cozine *v.* Graham, 2 Paige (N. Y.) Ch. 177; Champlin *v.* Parish, 11 Paige (N. Y.) Ch. 405; Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638; Thompson *v.* Tod, Pet. (C. C.) 380; Chambers *v.* Massey, 7 Ired. (N. C.) Eq. 286; Meach *v.* Stone, 1 D. Chip. (Vt.) 182; Miller *v.* Cotten, 5 Ga. 341; Tarleton *v.* Vietes, 1 Gilm. (Ill.) 470. But see *ante*, § 516.

defendant against these allegations.[1] At law, the earlier cases leave it doubtful whether the correct practice was to couple the plea of the statute with a denial that the contract sued upon was reduced to writing according to its requirements. In Lilley *v.* Hewitt, decided in the Exchequer in 1822, the action was upon a guaranty, and the plea averring that there was no agreement or note or memorandum stating the consideration, in writing signed by the defendant, was held bad on special demurrer. Mr. Baron Wood, with whom the rest of the court seem to have concurred, said the plea appeared to him to be altogether new, that he had never before met with, nor did he ever hear of, such pleas as a bar to an action of that nature, and he condemned them in the strongest language, as leading to great prolixity and confusion in pleading.[2] But in Maggs *v.* Ames, a few years later, the Court of Common Pleas held a similar plea to be good; without any allusion made to Lilley *v.* Hewitt by the court or in argument.[3] Again, Lord Tenterden, in the House of Lords, where a similar plea was presented, said he inclined to think it bad; but he did not find it necessary to pass upon the point.[4] In 1833 the New Rules were passed, by which, among other things, it is ordered that the general issue shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged is implied by law.[5] It was soon settled that under the general issue, as thus restricted, the defence of want of written memorandum might still be taken,[6] and thereby the case of Maggs *v.* Ames is

[1] Evans *v.* Harris, 2 Ves. & B. 361. And see Jones *v.* Davis, 16 Ves. 262.

[2] Lilley *v.* Hewitt, 11 Price 494.

[3] Maggs *v.* Ames, 4 Bing. 470. The form there sustained is inserted by Mr. Chitty in his volume of precedents, 2 Chit. Pl. 909.

[4] Lysaght *v.* Walker, 5 Bligh N. S. 1.

[5] Hil. T. 4 Will. IV.

[6] Johnson *v.* Dodgson, 2 Mees. & W. 653; Buttemere *v.* Hayes, 5 Mees. & W. 456; Eastwood *v.* Kenyon, 11 Ad. & E. 438.

considered to be overruled. Later cases established that a plea that the alleged agreement was not reduced to writing, etc., is bad on demurrer, as amounting to an argumentative denial of the contract or of the facts from which it is implied by law, within the New Rules.[1]

§ 519. The language of the plea or answer in setting up the statute must be clear and explicit to that end. Where a defendant by his answer formally alleged that no formal note of the agreement charged was made, and denied that any binding agreement ever existed, but did not expressly claim the benefit of the Statute of Frauds, he was held to be not entitled to the benefit of it at the hearing.[2] So with an allegation in the answer, "that the contract is void in law and that the defendant is not bound to perform the same."[3] And where the answer to a bill for the specific performance of a contract for the sale of land set up that the writing produced was signed by the defendant for another purpose and not to acknowledge the agreement, and concluded with submitting to the court whether it was "an agreement, such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed," etc., the Supreme Court of the United States doubted whether it was a sufficient setting up of the statute, though they did not find it necessary to determine the point.[4]

§ 520. Next, as to the extent of the protection afforded the defendant by his plea or answer setting up the statute. This presents the inquiry, whether he is thereby protected

[1] Leaf *v.* Tuton, 10 Mees. & W. 393; Reade *v.* Lamb, 6 Exch. 130. But see § 511 *supra*, showing a still more recent change in the Rules.

[2] Skinner *v.* McDouall, 2 De. G & S. 265; Rigby *v.* Norwood, 34 Ala. 129.

[3] Vaupell *v.* Woodward, 2 Sandf. (N. Y.) Ch. 143. See also Rhodes *v.* Rhodes, 3 Sandf. (N. Y.) Ch. 279.

[4] Barry *v.* Coombe, 1 Pet. 649. See further on this subject, Small *v.* Owings, 1 Md. Ch. Dec. 363; Harrison *v.* Harrison, 1 Md. Ch. Dec. 331; Edelin *v.* Clarkson, 3 B. Mon. (Ky.) 31; Allen *v.* Chambers, 4 Ired. (N. C.) Eq. 125; Baker *v.* Hollobaugh, 15 Ark. 322; Schoonmaker *v.* Plummer, 139 Ill. 612.

from discovery as to the fact of the making of the agreement; and it is a question the most difficult in itself, and the most embarrassed by conflicting decisions and *dicta*, of any which have thus far arisen upon the subject of pleading under the Statute of Frauds.

§ 521. The doctrine that the defendant cannot plead the statute in bar of the discovery, is principally founded upon the rule of equity, that every defendant is bound to confess or deny all facts which, if confessed, would give the plaintiff a claim or title to the relief prayed, and that, as equity would decree a parol agreement if confessed, the defendant must confess or deny it. "But in applying this rule," says an eminent writer, with a force and discrimination displayed by none other upon this vexed question, "it is previously material to ascertain, whether the Statute of Frauds has not in such a case relieved the defendant from this general obligation. The prevention of frauds and perjuries is the declared object of the statute; and the decreeing of a parol agreement, when confessed by the defendant, and the statute not insisted on, is evidently consistent with such object; *nam quisque renuntiare potest juri pro se introducto.* But if the defendant be bound to confess or deny the parol agreement, his answer must be either liable to contradiction, or not liable to contradiction. If the defendant's answer be liable to contradiction by evidence *aliunde*, the evil arising from contradictory evidence, which the statute proposed to guard against, would necessarily result. If the defendant's answer be not liable to contradiction by evidence *aliunde*, the rule would furnish a temptation to perjury, by giving the defendant a certain interest in denying the agreement; since, if he confessed it, he would be bound to perform it. If the defendant be bound to confess or deny the parol agreement insisted on by the plaintiff, one of the above consequences must necessarily ensue; which of the two is likely to prove the most mischievous, were, perhaps, difficult to decide; for though the perjury, which might take place if

contradictory evidence were allowed, is an evil of considerable size, yet the defendant being liable to be contradicted, might operate as a check on his falsely denying that which was truly alleged."[1]

§ 522. And so Lord Thurlow, upon one of several occasions on which a case presenting this question was argued before him, remarked that the court had laid down two exceptions, by which, if they were to be sustained, it amounted to the same thing as if the statute had made the exception of the two cases, that is, where the agreement is confessed by the answer, or where there is a part-performance; that in the latter case the defendant must answer to the agreement as well as to the part-performance; that as to the former, it was a clear exception from the statute, that the danger of fraud and perjury was avoided, where the defendant admitted the agreement; that if the party might or might not take advantage of the statute by insisting or not insisting upon it, there was no foundation for the exception, but, if the exception was founded, it made it like any other equitable case. "But," he asks, "what will become of the statute? The bill will not be sustained, unless the defendant confesses the agreement by his answer; you shall not prove it *aliunde*."[2] Nevertheless, he comes to the conclusion that even if the bill stated only the agreement, without alleging part-performance, a pure plea of the statute would not suffice, but the defendant must answer to the agreement.

§ 523. Again, it is obvious, upon a careful examination of the cases, that the doctrine that the defendant could not plead the statute in bar of the discovery as to the fact of the agreement, is closely connected with the doctrine, which, as we have seen, is no longer maintained, that upon a confes-

[1] Fonbl. Eq. Bk. I. Ch. III. § 8, *note d*.

[2] Whitchurch *v.* Bevis, 2 Bro. C. C. 567. Such *seems* to be the conclusion of his Lordship, and is the only one which makes the report of the case (which is quite defective and confused) consistent with itself. See Mr. Belt's note to page 567 of the report.

sion of the agreement by answer the court will enforce it, although the defendant insist upon the benefit of the statute. Thus, Lord Thurlow says, in the case just referred to: "When a court of equity said, that, if a parol agreement came out, there should be a specific performance, they said it was matter of honesty to carry it into execution. If I say that, upon a parol agreement appearing it shall be performed, I must say, I shall compel the discovery whether there was a parol agreement or not," for, as he adds in another place, "the discovery is only an incident to the natural justice of performing the unwritten agreement." [1] And so Lord Macclesfield said in an early case: "The defendant ought by answer to deny the agreement; for if she confessed the agreement, the court would decree a performance notwithstanding the statute, for that such confession would not be looked upon as perjury, or intended to be prevented by the statute." [2] It is thus apparent that the doctrine of not allowing the statute to be pleaded in bar of the discovery, has been, by the course of later and sounder decisions, deprived of its chief foundation in principle; if, indeed, it has not become entirely nugatory.

§ 524. Before examining the cases bearing upon this question, however, one more quotation may be pardoned, in order that the objections in reason to compelling a discovery may be fully illustrated. In a case in the highest court of judicature in Virginia, Mr. Justice Tucker says: "I am, therefore, of opinion, that, with respect to all promises, agreements, and contracts within the purview of the statute, if not reduced to writing, and signed pursuant to the statute, and if nothing be done in performance of them, whereby the actual state of the parties, or one of them, is *materially* affected; they ought to be considered as *imperfect* and *incomplete*, so as to be incapable of supporting a suit, either at law, or in equity; consequently, that wherever a defendant

[1] Whitchurch *v.* Bevis, 2 Bro. C. C. 560.

[2] Child *v.* Godolphin, 1 Dick. 42.

to a bill for the specific performance of a parol agreement, pleads and relies upon the benefit of the statute, he is not compellable to answer as to the agreement, and *confess* or *deny* it, but may protect himself from such answer by his plea; and where offered and insisted on, it ought to be allowed: for, by compelling a defendant to answer after he has claimed the protection of the statute by his plea, the inducement to perjury, which it is the object of the statute to prevent, will be increased in tenfold proportion."[1]

§ 525. The first case in which this question appears to have been raised was that of Child *v.* Godolphin, decided by Lord Macclesfield, in 1723, where it was held that the defendant ought by answer to deny the agreement, and a plea of the statute, not denying the parol agreement, was ordered to stand for an answer.[2]

§ 526. In Cottington *v.* Fletcher, 1740, the same question arose upon a trust, upon which the plaintiff alleged that the defendant had taken a certain advowson, and the defendant pleaded the Statute of Frauds in bar of the discovery, but by his answer admitted that the advowson was assigned to him for the purposes charged by the bill. Lord Hardwicke said that undoubtedly, if the plea stood by itself it might have been a sufficient plea; but as coupled with an answer admitting the facts, it was overruled.[3]

§ 527. Again, in Taylor *v.* Beech, 1749, a case of agreement for securing a wife's independent property at her marriage, the defendant denied having entered into any written agreement, and pleaded the statute in bar of any discovery as to the parol agreement. Lord Hardwicke overruled the plea because of the equitable circumstances alleged, although, as he said, "the Statute of Frauds was a protection

[1] Argenbright *v.* Campbell, 3 Hen. & M. 161.

[2] Child *v.* Godolphin, 1 Dick. 39. But see the case of Hollis *v.* Whiteing, 1 Vern. 151, where Lord Keeper North said, as early as 1682, that if a plaintiff laid in his bill that it was part of the agreement that it should be put in writing, it would *possibly require an answer*.

[3] Cottington *v.* Fletcher, 2 Atk. 155.

against the defendant's making a discovery of a parol agreement, and might be pleaded as well to the discovery as relief." [1]

§ 528. The same question was argued very fully before the House of Lords, in the case of Whaley *v.* Bagnel, in 1765. The plaintiff's bill was for a specific execution of an oral agreement for the sale of land, and the defendant pleaded the Statute of Frauds in bar both of the discovery and relief. The plea having been allowed by the Lord Chancellor of Ireland, an appeal was taken to the House of Lords, and was there dismissed.[2]

§ 529. The case of Whitchurch *v.* Bevis, before Lord Thurlow, was first heard in 1786, and, after several rehearings and full arguments, was finally determined three years later. The bill was for a specific performance of an agreement to sell a house for an annuity, and stated certain facts in the way of part-performance, the agreement not having been reduced to writing; the defendant pleaded the Statute of Frauds, both as to the discovery and relief, but did not aver in his plea that there was no parol agreement. Lord Thurlow, after the first hearing upon the plea, ordered the cause to stand over that it might be argued upon the form of the plea itself, remarking that if the rule was right that, upon an agreement appearing by the answer, though not in writing, it should be enforced, notwithstanding the defendant insisted upon the statute, he saw no reason why there should not be a discovery, for the discovery was only an incident to the natural justice of performing the unwritten agreement. At a subsequent hearing, his Lordship overruled the plea, and ordered it to stand for an answer, with liberty to except and to reserve the benefit of the plea to the hearing. After stating the view upon which he proceeded, and

[1] Taylor *v.* Beech, 1 Ves. Sr. 297.

[2] Whaley *v.* Bagnel, 1 Bro. P. C. 345. The report furnishes no opinions in the case, only a brief note of judgment at the end of the arguments.

which has already been referred to,[1] he says, "I am aware, that except the case determined by Lord Macclesfield,[2] there is no other; the opinion I give is, that if nothing had been stated in the bill but a parol agreement, if the defendant pleads, he must support his plea by an answer, denying the parol agreement, the only effect of the statute being that it shall not be proved *aliunde*. If he answers and says there was no parol agreement, I think that no evidence that can be given will sustain the suit. If this doctrine be not maintainable, the judgment I am giving is wrong."[3] Finally, in delivering judgment upon the whole case, he asserts the same view; but, an answer having been filed, in which the agreement charged was confessed, the plea of the statute as to the relief was allowed.

§ 530. A few years later, in the case of Moore *v.* Edwards, Lord Loughborough seems to have taken the rule as settled, according to the view expressed by Lord Thurlow. Upon a bill for specific performance of a verbal agreement to make a lease, the defendant pleaded the statute and made answer, denying that the acts alleged were done in part-performance, as was charged in the bill. Lord Loughborough held the answer to be argumentative, and ordered the plea to stand for answer with liberty to except, benefit to be saved at the hearing; and on the defendant's moving that the words, "with liberty to except," be struck out, or the following added, "except as to such part of the said plea which insists upon the Statute of Frauds and Perjuries in bar to the discovery of the agreement therein mentioned," his Lordship said the order was right, and added, "saving the benefit of the plea to the hearing gives you a right to insist upon the Statute of Frauds as a defence to the suit; but it does not exempt you from the discovery."[4]

[1] *Ante*, § 522.

[2] Child *v.* Godolphin, 1 Dick. 39. His Lordship's attention does not seem to have been called to the various *dicta* before referred to in the text.

[3] Whitchurch *v.* Bevis, 2 Bro. C. C. 567.

[4] Moore *v.* Edwards, 4 Ves. 23.

§ 531. But in the latest English case bearing upon this question Lord Eldon puts the case of a defendant answering as to the acts of part-performance, when alleged, and insisting that he was not bound to answer whether there was a parol agreement or not, as raising a difficulty which he had never been able to get over; and this certainly goes to show that he did not regard it as settled that the statute could not be pleaded in bar of discovery.[1]

§ 532. Upon the whole, it would seem to be by no means clear but that the present English doctrine, whatever earlier decisions may go to establish, is against allowing the bar to the discovery. Lord Redesdale comes to the conclusion, in the last edition of his treatise on Equity Pleadings, that "it may now be doubtful whether a plea of the statute ought in any case (except perhaps the case of a trust),[2] to extend to any discovery sought by the bill."[3] Other text-writers, however, appear to entertain a contrary opinion.[4]

§ 533. In our own country, the weight of judicial authority may be said to be in favor of allowing the bar to the discovery, the courts both of Vermont[5] and Virginia[6] having adopted that position as agreeable to the soundest principles and the most approved precedents. It must be observed, however, that the learned Chancellor of New York does not appear to coincide in this view, when he lays it down that if the bill states an agreement generally, which will be presumed a legal contract until the contrary appears, the defendant "must either plead the fact that it was not in writing, or insist upon that defence in his answer."[7]

§ 534. The same reasoning upon which it is maintained that a defendant may insist upon the statute in bar of the

[1] Rowe *v.* Teed, 15 Ves. 372.
[2] *Post*, § 534.
[3] Mitf. Pl. (6th Am. from 5th Eng. Ed.) 312.
[4] Cooper, Eq. Pl. 256; Story, Eq. Pl. § 763.
[5] Meach *v.* Stone, 1 D. Chip. 182.
[6] Argenbright *v.* Campbell, 3 Hen. & M. 144.
[7] Cozine *v.* Graham, 2 Paige, 182.

discovery as to the fact of the agreement, seems to apply where the bill seeks to enforce a trust resting in parol. If he may, as we have seen it is the better opinion that he may, insist upon the statute in bar of the execution of the trust, it is nugatory to force him to discover as to its existence. There appears to be no case in which the question has been distinctly under consideration. The cases where a discovery has been required as to trusts alleged to be imperfectly declared, or illegal or fraudulent, are not applicable; as there the answer is made evidence not to set up the trust, but to defeat the defendant's apparent title, and to found a decree for a resulting trust to the heir.[1]

§ 535. As to the burden of proof, the plaintiff having alleged a certain contract, and the defendant having answered that the alleged contract was not actionable unless in writing, and was not in writing, the burden is on the plaintiff to prove the writing without which his action cannot be maintained,[2] unless the contract was made in another State, in which case it is said that the law presumes that it was made in conformity with the law of that State, and casts upon the party maintaining the contrary the burden of proving it.[3] As to the general presumption, when nothing more appears than the existence of the contract, that it was a contract in writing, the case of Stout *v.* Ennis is instructive.[4]

[1] *Ante*, § 103.

[2] Jonas *v.* Field, 83 Ala. 447; Lowe *v.* Hamilton, 132 Ind. 406; Jones *v.* Hagler, 95 Ala. 529.

[3] Miller *v.* Wilson, 146 Ill. 523.

[4] Stout *v.* Ennis, 28 Kans. 706.

APPENDIX.

STATUTE 29 CAR. II. CAP. 3.

An Act for prevention of Frauds and Perjuryes.

For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury Bee it enacted by the King's most excellent Majestie by and with the advice and consent of the Lords Spirituall and Temporall and the Commons in this present Parlyament assembled and by the authoritie of the same That from and after the fower and twentyeth day of June which shall be in the yeare of our Lord one thousand six hundred seaventy and seaven All Leases Estates Interests of Freehold or Termes of yeares or any uncertaine Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments made or ereated by Livery and Seisin onely or by Parole and not putt in Writeing and signed by the parties soe makeing or creating the same or their Agents thereunto lawfully authorized by Writeing, shall have the force and effect of Leases or Estates at Will onely and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect, Any consideration for makeing any such Parole Leases or Estates or any former Law or usage to the contrary notwithstanding.

II. Exeept neverthelesse all Leases not exceeding the terme of three yeares from the makeing thereof whereupon the Rent reserved to the Landlord dureing such terme shall amount unto two third parts at the least of the full improved value of the thing demised.

III. And moreover That noe Leases Estates or Interests either of Freehold or Terms of yeares or any uncertaine Interest not being Copyhold or Customary Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments shall at any

time after the said fower and twentyeth day of June be assigned granted or surrendered unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or surrendring the same or their Agents thereunto lawfully authorized by writeing or by act and operation of Law.

IV. And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June noe Action shall be brought whereby to charge any Executor or Administrator upon any speciall promise to answere damages out of his owne Estate [2] or whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person [3] or to charge any person upon any agreement made upon consideration of Marriage [4] or upon any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them [5] or upon any Agreement that is not to be performed within the space of one yeare from the makeing thereof [6] unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.

VII. And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June Declarations or Creations of Trusts or Confidences of any Lands Tenements or Hereditaments shall be manifested and proved by some Writeing signed by the partie who is by Law enabled to declare such Trust or by his last Will in Writeing or else they shall be utterly void and of none effect.

VIII. Provided alwayes That where any Conveyance shall bee made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law or bee transferred or extinguished by an act or operation of Law then and in every such Case such Trust or Confidence shall be of the like force and effect as the same would have beene if this Statute had not beene made. Anything hereinbefore contained to the contrary notwithstanding.

IX. And bee it further enacted That all Grants and Assignments of any Trust or Confidence shall likewise bee in Writeing signed by the party granting or assigning the same [or [1]] by such last Will or Devise or else shall likewise be utterly void and of none effect.

[1] Interlined on the Roll.

XVII. And bee it further enacted by the authority aforesaid That from and after the said fower and twentyeth day of June noe Contract for the Sale of any Goods Wares or Merchandises for the priee of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give something in earnest to bind the bargaine or in part of payment, or that some Note or Memorandum in writeing of the said Bargaine be made and signed by the partyes to be charged by such Contract or their Agents thereunto lawfully authorized.

STATUTE 9 GEO. IV. CAP. 14.[1]

An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements [*9th May*, 1828].

V. And be it further enacted, That no Action shall be maintained whereby to charge any Person upon any Promise made after full Age to pay any Debt contracted during Infancy, or upon any Ratification after full Age of any Promise or Simple Contract made during Infancy, unless such Promise or Ratification shall be made by some Writing signed by the Party to be charged therewith.[2]

VI. And be it further enacted, That no Action shall be brought whereby to charge any Person upon or by reason of any Representation or Assurance made or given concerning or relating to the Character, Conduct, Credit, Ability, Trade, or Dealings of any other person, to the Intent or Purpose that such other Person may obtain Credit, Money, or Goods upon,[3] unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith.[4]

VII. 'And Whereas by an Act passed in *England* in the Twenty-ninth Year of the Reign of King *Charles* the Second, intituled

[1] Commonly called Lord Tenderten's Act. See ante, in the text, § 181.

[2] As to the memorandum required by this section, see Harris *v.* Wall. 1 Exch. 122; Hunt *v.* Massey, 5 Barn. & Adol. 902; Hartley *v.* Wharton, 11 Adol. & Ell. 934; Hyde *v.* Johnson, 2 Bing. N. R. 776.

[3] Sic. See ante, in the text, § 181.

[4] See Swann *v.* Phillips, 8 Adol. & Ell. 457; Turnley *v.* Macgregor, 6 Man. & G. 46; Devaux *v.* Steinkeller, 6 Bing. N. R. 84; Hasock *v.* Fergusson, 7 Adol. & Ell 86.

An Act for the Prevention of Frauds and Perjuries, it is, among other Things, enacted that from and after the Twenty-fourth Day of *June*, One thousand six hundred and seventy-seven, no Contract for the Sale of any Goods, Wares, and Merchandizes, for the Price of Ten Pounds Sterling or upwards, shall be allowed to be good except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in part of Payment, or that some Note or Memorandum in Writing of the said Bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized: And 'whereas a similar Enactment is contained in an Act passed in *Ireland* in the Seventh Year of the Reign of King *William* the Third: And Whereas it has been held, that the said recited Enactments do not extend to certain Executory Contracts for the Sale of Goods, which nevertheless are within the Mischief thereby intended to be remedied; and it is expedient to extend the said Enactments to such Executory Contracts;' Be it enacted, That the said Enactments shall extend to all Contracts for the Sale of Goods of the Value of Ten Pounds Sterling and upwards, notwithstanding the Goods may be intended to be delivered at some future Time, or may not at the Time of such Contract be actually made, procured, or provided, or fit or ready for Delivery, or some Act may be requisite for the making or completing thereof, or rendering the same fit for Delivery.

X. And be it further enacted, that this Act shall commence and take effect on the First Day of *January* one thousand eight hundred and twenty-nine.

MERCANTILE LAW AMENDMENT ACT, 19 & 20 Vict. Cap. 97.

An Act to amend the Laws of England *and Ireland affecting Trade and Commerce* [29*th July*, 1856].

III. No special Promise to be made by any Person after the passing of this Act to answer for the Debt, Default, or Miscarriage of another Person, being in Writing, and signed by the Party to be charged therewith or some other Person by him thereunto lawfully authorized, shall be deemed invalid to support an Action, Suit, or other Proceeding to charge the Person by whom such

Promise shall have been made, by reason only that the Consideration for such Promise does not appear in Writing, or by necessary Inference from a written document.

SUPREME COURT OF JUDICATURE ACT AMENDMENT, 1873.

38 & 39 *Vict. Ch.* 77, *Order XIX.*

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

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