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THE STATUTE OF FRAUDS—A LEGAL ANACHRONISM.¹

HUGH EVANDER WILLIS*

If a case has not, by judicial hocus pokus, been taken out of the Statute of Frauds, how can the Statute be satisfied?

In the case of the contracts named in section four there is only one way to satisfy the Statute, and that is by putting the "agreement," or some memorandum or note thereof—in writing—signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized"; but in the case of contracts for the sale of goods there are two additional ways of satisfying the statute; (1) "The buyer shall accept part of the goods so sold and actually received the same, (2) or give something in earnest to bind the bargain, or in part payment."

Acceptance and receipt and part payment seem to be ways of satisfying the Statute only in cases of actual sales of goods. But they have been allowed to satisfy the statute also in cases of contracts to sell goods.⁹⁴ Receipt and acceptance by the buyer are sufficient to take out of the Statute a contract of the seller to repurchase if it is a part of the original contract;⁹⁵ and acceptance and receipt of a part of the goods no matter how small a part are sufficient.⁹⁶ The early English cases used the word "delivery" interchangeably with acceptance and receipt,⁹⁷ but this was clearly wrong. Acceptance and receipt are a double requirement and each differs from delivery. Blackburn is entitled to the credit for pointing out this distinction.⁹⁸ Consequently either

¹ Continued from the March issue, 3 *Ind. Law Jour.*, 427.

*See biographical note, p. 544.

⁹⁴ *Pinkham v. Mattox*, (1873) 53 N. H. 600.

⁹⁵ Williston on Contracts, Sec. 540 n. 6.

⁹⁶ *Hinde v. Whitehouse*, (1806) 7 East 558; *Scott v. T. W. Stevenson Co.*, (1915) 130 Minn. 151. Do receipt and acceptance of a part of the goods by the buyer satisfy the Statute so that the buyer may sue the seller? Apparently, yes. *Swigart v. McGee*, (1858) 19 Ark. 473; *Goodwin v. Cadwallader*, (1901) 158 Ind. 202; See also note 95.

⁹⁷ *Chaplin v. Rogers*, (1800) 1 East 192.

⁹⁸ Blackburn on Sales (1st ed.) 22. The Indiana Statute of Frauds names receipt but not acceptance. It is not clear whether or not our courts now require both. *Dehority v. Paxson*, (1884) 97 Ind. 253; *Goodwin v. Cadwallader*, (1901) 158 Ind. 202; *Sprankle v. Truelove*, (1899) 22 Ind. App. 577; *Porter v. Patterson*, (1908) 42 Ind. App. 404. At first they seemed to tie up to the notion of delivery as the early English cases did. *Barkalow v. Pfeiffer*, (1871) 38 Ind. 214; *Hausman v. Nye*, (1878) 62 Ind. 485.

party may refuse to go on with the contract, though one thing has occurred, if the other has not.⁹⁹ Acceptance is a mental act and receipt a physical act on the part of the buyer.¹⁰⁰ The buyer may accept so far as concerns the Statute of Frauds though the title has not passed.¹⁰¹ Acceptance may precede or follow receipt and both may be subsequent to the bargain.¹⁰² Acceptance may be manifested by an act which assumes ownership without any expression of satisfaction,¹⁰³ but it does not prevent the buyer from objecting that there has been a breach of warranty.¹⁰⁴ Actual receipt means the acquisition of possession. The seller cannot force this possession on the buyer,¹⁰⁵ nor can the buyer forcibly take it from the seller unless the seller chooses to treat it as receipt.¹⁰⁶ But goods may be received while still in the hands of a bailee by an attornment by the bailee to the buyer;¹⁰⁷ or, where goods are ordered from a distance, by delivery to a carrier;¹⁰⁸ or, where the goods are already in the possession of the buyer, by continued possession by the buyer;¹⁰⁹ or where the seller agrees to become bailee for the buyer;¹¹⁰ or by a symbolical delivery by means of delivery of a document of title,¹¹¹ or even a key to a room,¹¹² or the evidence of a chose in action.¹¹³ Earnest (not a part of the price) has become of little importance.¹¹⁴ Part payment may be of any amount, no matter how

⁹⁹ *Hatch v. Gluck*, (1905) 93 N. Y. S. 508; *Smith v. Hudson*, (1865) 6 B. & S. 431.

¹⁰⁰ *Cusack v. Robinson*, (1861) 1 B. & S. 299.

¹⁰¹ Williston on Contracts, Sec. 542.

¹⁰² *Cusack v. Robinson*, supra.

¹⁰³ *Morton v. Tibbett*, (1850) 15 Q. B. 428.

¹⁰⁴ In England by a strange substitution of the word "reject" for "object" it is held that rejection is an acceptance, so that there acceptance means acceptance of the contract instead of acceptance of the goods. *Kibble v. Gough*, 38 L. T. Rep. (N. S.) 204; *Page v. Morgan*, (1885) 15 Q. B. D. 228.

¹⁰⁵ *Dierson v. Petersmeyer*, (1899) 109 Ia. 233.

¹⁰⁶ *Somers v. McLaughlin*, (1883) 57 Wis. 358.

¹⁰⁷ *Daniel v. Hannah*, (1898) 106 Ga. 91. New York cases and cases following New York, contra. *Dehority v. Pawson*, supra.

¹⁰⁸ *Keiwert v. Meyer*, (1878) 62 Ind. 587.

¹⁰⁹ *Edan v. Dudfield*, (1841) 1 Q. B. 302. New York cases are contra, *Young v. Ingalsbe*, (1903) 208 N. Y. 503.

¹¹⁰ *Tempest v. Fitzgerald*, (1820) 3 B. & Ald. 680. New York contra.

¹¹¹ *Mueller v. Guys*, (1882) 12 Mo. App. 588.

¹¹² *Atwell v. Miller*, (1854) 6 Md. 10.

¹¹³ *Jones v. Reynolds*, (1890) 120 N. Y. 213.

¹¹⁴ But see *Hudnut v. Weir*, (1884) 100 Ind. 501, and *Weir v. Hudnut*, (1888) 115 Ind. 525.

insignificant, and it may be in property,¹¹⁵ or service,¹¹⁶ and it may be made at any time¹¹⁷ (unless a statute inserts the words "at the time"); but a tender,¹¹⁸ or the buyer's note,¹¹⁹ or check,¹²⁰ or detriment incurred by the buyer¹²¹ will not amount to part payment, unless the check or note is taken in extinguishment of the debt.¹²²

Perhaps this kind of receipt and acceptance and part payment will protect promisors from fraud, but it seems to the writer that the interminable amount of litigation which has been required to determine or change the meaning of these terms has cost litigants more than they would ever have had to pay on promises they had never made, if there had been no Statute of Frauds; and that, when the courts hold that a seller may receive the goods for the buyer and that the buyer's own note, or check, may be taken in part payment, they admit that these two requirements of the Statute of Frauds are a mere form and technicality and only to be followed in letter, because it is impossible for them utterly to dispense with them.

The memorandum required, if the Statute of Frauds is to be satisfied by a memorandum, may be in any form—a formal contract, letters, advertisements, undelivered deeds and wills, book entries, telegrams; it may be found in separate documents if they are physically attached, or incorporated by reference, or even when there is no reference if, after put together, they show that they relate to the same transaction; but it must contain, not merely the promise of the party to be charged signed by him, but all the essentials of a contract, and this in spite of the fact that section four uses the words "promise" and "agreement" and not the word "contract." This means that the memorandum must state the names of both parties and, if it is a sale, which is buyer and which is seller, the consideration for the promise (according to many authorities), the price if not already paid, and all the other terms and conditions of the contract together

¹¹⁵ *Weir v. Hudnut*, *supra*.

¹¹⁶ *Driggs v. Bush*, (1908) 152 Mich. 53. This Michigan court held that the buyers baling of hay orally bought was part payment. Indiana has held that delivery or bags for wheat bought is part payment. *Weir v. Hudnut*, (1888) 115 Ind. 525; but see *Hudnut v. Weir*, (1884) 100 Ind. 501.

¹¹⁷ *Davis v. Moore*, (1836) 13 Me. 424.

¹¹⁸ *Hershey Lbr. Co. v. St. Paul Sash, etc. Co.*, (1896) 66 Minn. 449.

¹¹⁹ *Krohn v. Bantz*, (1879) 68 Ind. 277.

¹²⁰ *Bates v. Dwinell*, (1917) 101 Neb. 712.

¹²¹ *Hewson v. Peterman Co.*, (1913) 76 Wash. 600.

¹²² *Parker v. Crisp*, (1919) 1 K. B. 481.

with the signature of the party or parties to be charged or their agent. In other words the courts have theoretically required the same particularity in the memorandum that they have required in pleading.¹²³

Yet oral evidence is admissible to show a trade usage which will show which party is buyer and which seller,¹²⁴ to explain the meaning of abbreviations or a private code used,¹²⁵ to show that a person named as a party was an agent,¹²⁶ or misnamed,¹²⁷ and to show the terms of employment when the memorandum says it continues in force a position then held.¹²⁸ It is also held, in jurisdictions where the consideration must be stated, that the nature of the consideration may be left to inference.¹²⁹ The intent to make a memorandum is not necessary. Hence a sufficient memorandum may be found in a letter repudiating a contract,¹³⁰ or refusing to enter into a contract,¹³¹ or written to a third person,¹³² or even retained in the promisor's own possession.¹³³ If a memorandum has been lost its contents may be proved orally.¹³⁴ The signature may be put at any place in the writing¹³⁵ unless, as sometimes occurs, the Statute requires subscription, and it may be by initials,¹³⁶ or first name,¹³⁷ or mark,¹³⁸ or code sign,¹³⁹ or by adoption of a printed name already on the papers,¹⁴⁰ since oral evidence is admissible to explain all of these things. The party to be charged, generally, is held to mean, not the promisor in a unilateral contract and both

¹²³ Williston on Contracts, Sec. 568-600.

¹²⁴ *Salmon Falls Mfg. Co. v. Goddard*, (1852) 14 How. 446.

¹²⁵ *Salmon Falls Mfg. Co. v. Goddard*, *supra*.

¹²⁶ *Filby v. Hounsell*, (1896) 2 Ch. 737, 740.

¹²⁷ *Allen v. Barnett*, (1912) 92 S. C. 95. Yet it has been held that in the case of property a description "Estate on Congress Street owned by Sarah A. Hill" is not sufficient. *Doherty v. Hill*, (1877) 144 Mass. 465.

¹²⁸ *Marks v. Cowdin*, (1919) 226 N. Y. 138.

¹²⁹ *Bowers v. Ocean, etc., Corp.*, (1906) 97 N. Y. S. 485. Affd. (1907) 187 N. Y. 561.

¹³⁰ *Welford v. Beazely*, (1747) 3 Atk. 503; *Bailey v. Sweeting*, (1861) 9 C. B. (N. S.) 843.

¹³¹ *Grant v. New D. M. Co.*, (1912) 185 Conn. 421.

¹³² *Moore v. Hart*, (1681) 1 Vern 110.

¹³³ *Ames v. Ames*, (1910) 46 Ind. App. 597.

¹³⁴ *Woodruff, etc., Co. v. Portsmouth, etc., Co.*, (1917) 246 Fed. 375.

¹³⁵ *Griffiths, etc. Co. v. Humber*, (1899) 2 Q. B. 414.

¹³⁶ *Salmon Falls Mfg. Co. v. Goddard*, *supra*.

¹³⁷ *Zann v. Haller*, (1880) 71 Ind. 136.

¹³⁸ *Foye v. Patch*, (1881) 132 Mass. 105.

¹³⁹ *Brown v. Butchers, etc. Bank*, (1844) 6 Hill 443.

¹⁴⁰ *Grieb v. Cole*, (1886) 60 Mich. 397.

parties in bilateral contracts, nor the vendor in contracts for the sale of land, but whoever is sued as a defendant.¹⁴¹ Consequently, if one party has signed a memorandum but the other has not, he may be held liable although he cannot hold the other party liable.

It is difficult to see how a Statute of Frauds which perpetrates this sort of a memorandum upon the public can be said to be a means for the prevention of fraud. In the first place, it is held that the Statute of Frauds does not apply to contracts under seal¹⁴² and therefore a promise under seal is good, if delivered, though it does not state the consideration, the price, or the other terms and conditions of an agreement. It would seem that the courts should have held that the Statute of Frauds requires no more for informal contracts. What is good enough in case of the seal, ought to be good enough in case of the Statute. In not doing so they simply have laid a trap for an innocent person ignorant of the technicalities of the law, thereby created, and have permitted a way of escape for the unscrupulous from promises they actually have made. In the second place to permit oral evidence to show the contents of a lost memorandum, to explain initials and other marks used for signatures, to show that a party named was misnamed, to permit a memorandum never delivered to anyone to be used, and to hold one party liable when the other cannot be held liable, are just as bad as to permit the entire contract to be proven by oral evidence.

What is the effect of failure to comply with the Statute of Frauds in cases which come within it?

Section four says in that case "No action shall be brought" and section seventeen says that no contract then "shall be allowed to be good."

What do these words mean? In England it has been held that the language in both sections means the same thing and both the English Sale of Goods Act and the American Uniform Sales Act have changed the language of section seventeen to make it read like that of section four. Most of the states in the United States have language equivalent to that of the original statute, but a few of the states have substituted the word "void" or "invalid" (generally in the case of contracts for the sale of goods).¹⁴³ Yet

¹⁴¹ *Burke v. Mead*, (1902) 159 Ind. 252; *Knapp v. Beach*, (1913) 52 Ind. App. 573. Contra, *Scott v. Glenn*, (1893) 98 Cal. 168; *Lusky v. Keiser*, (1914) 128 Tenn. 705. (Party to be charged is vendor of realty.)

¹⁴² Tiffany on Real Property, Sec. 457.

¹⁴³ Williston on Contracts, Secs. 525, 526.

even then there is a tendency to make the word "void" read as though it were voidable.¹⁴⁴

With the possible exception of some states where the word void is used, we then should have a uniform holding as to the effect of failure to comply with the Statute, but unfortunately this is not the fact.

The English courts have taken the view that the Statute of Frauds only touches the subject of evidence; that there is a good contract and a good remedy thereon, but it is unenforcible.¹⁴⁵ This view has also been championed by Browne in his work on the Statute of Frauds, and has been adopted by the State of Iowa.¹⁴⁶

Professor Williston champions the view that the Statute of Frauds affects not only evidence but also the remedy, but that it does not affect the antecedent contract. He takes this view, because a memorandum made after the beginning of the action does not satisfy the statute as it should if it only affected evidence,¹⁴⁷ because oral evidence of a lost memorandum is sufficient¹⁴⁸ and because the statute must be affirmatively pleaded.¹⁴⁹

The writer does not agree with either of these positions. On the one hand he is of the opinion, taken by most jurisdictions where the Statute reads "No action shall be brought" and by some whose Statute reads "void" that the effect of the Statute is not to make the oral agreement either illegal or a nullity. This is proven by the fact that after performance, or part performance, by one party the remedy of specific performance is available for him in the case of an oral agreement to sell land,¹⁵⁰ that the law will create a quasi contract for one who has conferred benefits in reliance upon an oral agreement within the Statute,¹⁵¹ that the oral agreement is admissible in evidence on the issue of the measure of damages,¹⁵² that a party in default according to the better view cannot sue in equity or in quasi contract,¹⁵³ that

¹⁴⁴ *Doney v. Laughlin*, (1911) 50 Ind. App. 38, 42, 46, 47.

¹⁴⁵ *Maddison v. Alderson*, (1883) 8 App. Cas. 467.

¹⁴⁶ *Reuber v. Negles*, (1910) 147 Ia. 374.

¹⁴⁷ *Lucas v. Dixon*, (1889) 22 Q. B. D. 357.

¹⁴⁸ *Woodruff, etc. Co. v. Portsmouth etc. Co.*, *supra*.

¹⁴⁹ Williston on Contracts, Sec. 527.

¹⁵⁰ *Birch v. Baker*, (1914) 85 N. J. L. 660.

¹⁵¹ *McDonald v. Crosby*, (1901) 192 Ill. 283; *Wallace v. Long*, (1886) 105 Ind. 522; *Welsh v. Welsh*, (1832) 5 Oh. 425; Woodward on Quasi Contracts, p. 166.

¹⁵² *Bird v. Monroe*, (1877) 66 Me. 337; *MaGee v. Blankinship*, (1886) 95 N. C. 563.

¹⁵³ *Abbott v. Inskip*, (1875) 29 Oh. St. 59, 61; *Day v. Wilson*, (1882) 83 Md. 463.

the discharge of the oral agreement is sufficient consideration for another promise,¹⁵⁴ that the statute of limitation, does not begin to run at once,¹⁵⁵ that the oral agreement has sufficient vitality to be proof against (or immune from) attack by third parties,¹⁵⁶ that if the oral agreement has been executed it will not be disturbed,¹⁵⁷ and that each party has the power to impose a contractual obligation upon himself by signing the required memorandum¹⁵⁸ (and the buyer in the case of goods by making the required part payment¹⁵⁹ or receipt and acceptance).¹⁶⁰

On the other hand do the above facts prove that the oral agreement within the Statute is a contract and that the Statute of Frauds affects only either evidence or the remedy? Of course the writer agrees with Professor Williston that the Statute affects more than evidence. The reasons given by Professor Williston are enough to prove this. In addition there is the fact that according to the majority view in conflict of laws the law of the place of the making of the oral agreement and not the law of the forum governs.¹⁶¹ But is the effect of the Statute limited to the remedy? The writer is of the opinion that the Statute prevents the making of a contract, because a contract is an antecedent right in personam, and neither party to an agreement can be said to have such a right when the other has the privilege not to perform it. The oral agreement (something like an offer) gives a party the power to create a contract by supplying missing evidence. It is admissible in evidence on the issue of the measure of damages, not on the theory that it is a contract, but as an admission of value by the defendant. It is the basis for equitable or quasi contractual relief, not because a contract, but because it removes the objection of officiousness, or lays the foundation for fraud. In other cases it has the effect, not of creating rights but of creating privileges, powers, or immunities. But

¹⁵⁴ Where states hold the oral agreement to be void of course such discharge is not sufficient consideration. *Kaufer v. Stumpf*, (1906) 129 Wis. 476.

¹⁵⁵ *Estate of Kessler*, (1894) 87 Wis. 660.

¹⁵⁶ *Ex parte Banks*, (1913) 185 Ala. 275; *Jackson v. Stanfield*, (1893) 137 Ind. 592.

¹⁵⁷ *Day v. Wilson*, (1882) 83 Ind. 463. The cases are in conflict as to whether the *lex fori* or the *lex loci contractus* should apply to Statute of Frauds questions. Williston on Contracts, Sec. 600.

¹⁵⁸ *Davis v. Moore*, (1836) 13 Me. 424.

¹⁵⁹ *Cusack v. Robinson*, *supra*.

¹⁶⁰ *Larson v. Johnson*, (1890) 78 Wis. 300.

¹⁶¹ Williston on Contracts, Sec. 600.

this is far from proving that the oral agreement is a contract. Only by showing that the oral agreement creates an antecedent right or rights in personam (with correlative obligations) can it be shown that it is a contract. This cannot be done. The reason why the Statute of Frauds affects the remedy is because a remedy is a remedial right given for violation of an antecedent right. If there is no antecedent right there can be no violation or breach of it, and, of course, if there is no breach there is no remedy.

The decisions heretofore referred to support the position which has been taken. Other decisions may be referred to. For example it has been held that after two oral agreements to sell the same real estate to different vendees if the vendor executes a conveyance to the second vendee, the latter, though he has notice of the prior oral agreement, can retain his title, because the vendor had the privilege not to perform his oral agreement and this he has transferred to the second vendee, and this is true though the vendor should later execute a conveyance to the first vendee; but if the first oral agreement is validated by a memorandum prior to a conveyance to the second vendee the first vendee will be protected against a second vendee with notice because the vendor has exercised his power and given the vendee a right.¹⁶² It is true an English case has said that in an oral agreement to sell specified goods the title passes at once though the statute is not satisfied and that if the buyer refuses to pay for them that the seller may treat the contract as rescinded and the title revested in him.¹⁶³ But this position must be wrong. Suppose the goods meanwhile have been lost or destroyed by the act of some third person. Can the seller recover from the buyer? It would be intolerable. To permit this would completely nullify the effect of the Statute. This shows that satisfaction of the Statute must be held a condition precedent to the passing of title. Can the buyer recover from such third person? The weight of authority is to the effect that the buyer cannot recover.¹⁶⁴ This also shows that title has not passed. However, it is held that the buyer has an insurable interest in such case so that he can recover against an insurance company, though the Statute has not been satisfied, but

¹⁶² *Van Cloostere v. Logan*, (1894) 149 Ill. 588; *Pickerell v. Morss*, (1880) 97 Ill. 220; *Peck v. Williams*, (1887) 113 Ind. 256.

¹⁶³ *Taylor v. Gr. East. Ry. Co.*, (1901) 1 K. B. 774, 779.

¹⁶⁴ *Morgan v. Sykes* referred to in 3 Q. B. 486; *O'Neill v. New York etc. Co.*, (1875) 60 N. Y. 138; *Summerall v. Thoms*, (1850) 3 Fla. 298; *Mahan v. United States*, (1872) 16 Wall 143; *Cf. Briggs v. United States*, (1891) 143 U. S. 346.

this may be explained on the theory that the insurance company is a third person who cannot set up the Statute.¹⁶⁵

If the purpose of the Statute of Frauds was to protect people from being held on promises they had never made, it would seem that the view that the Statute simply affects evidence, and that it would make no difference when the evidence became available—even after the institution of action—ought to prevail. Since the Statute has been held to require more than this, is it to that extent doing harm or good? Has the litigation over the effect of the Statute of Frauds been of any advantage to litigants or society? Has it prevented fraud to hold that the Statute of Frauds requires the memorandum to be signed before action is begun? Are not the suits in equity and quasi contracts judicial pronouncements that the effect of the Statute of Frauds is bad?

The draftsmanship of the Statute is bungling and awkward. The words "promise," "agreement," "contract" and "bargain" are used under such circumstances as to leave a doubt as to whether or not they were used with identical or with different meanings. The courts have generally tended to treat all these words as requiring about the same things.¹⁶⁶ Yet a promise is only half an agreement, an agreement is only one essential of an informal contract, and bargain is a word of indefinite meaning. Do the words "debt," "default," or "miscarriage," evidently chosen with great care, connote distinct and separate ideas or a repetition of the same idea? The courts have evidently thought best not to draw fine cut distinctions between them.¹⁶⁷ Why then, should they all be used? The words "goods," "wares" and "merchandise" clearly are synonymous. Here is an illustration of tautology. "Goods" includes all that would be included by all three words. Yet "goods" clearly does not include choses in action, and the draftsmen could not have meant to exclude these. What did the draftsmen mean by "agreement made upon consideration of marriage?" Evidently nobody as yet knows. "Contract *or* sale" is patently a typographical error. With the error corrected do the words "contract for sale" mean the same thing in section four and section seventeen? Apparently not. Nearly every word in the statute has had to be defined and courts have differed in their definitions. The draftsmanship of the Statute alone is enough to condemn it. The explanation undoubtedly is that at the time of the enactment of the Statute of Frauds in the

¹⁶⁵ *Amsinek v. Am. Ins. Co.*, (1880) 129 Mass. 185.

¹⁶⁶ Williston on Contracts, Sec. 571.

¹⁶⁷ *Ibid.*, Sec. 453.

seventeenth century the modern informal contract was in the making. At that time there had not as yet been formulated the principles of agreement, consideration, conditions and illegality. Consequently the draftsmen did not know what terms to employ and they did the best they could at that time. Since then all the law of contracts outside the Statute of Frauds has had great development, both in content and terminology, but the language of the Statute of Frauds has remained unchanged, a legal anachronism in this modern world. It would seem that the Statute should be brought abreast of the times or forgotten. An explanation is not a justification.

Enough has been said to show that, even admitting that some Statute of Frauds is needed, the Statute of Frauds of Anglo-American legal history is not a fit instrument for the prevention of fraud. If modern law is going to demand any Statute of Frauds, it should be one redrafted, so as to correct its phraseology; one whose content has been entirely worked over in the interest of scientific classification; and one whose means of satisfaction has been entirely revamped for the sake of common sense and justice. But the writer can see no need for any Statute of Frauds.

Under the heading of the Statute of Frauds the century digest has digested approximately 6,300 cases; the first decennial approximately 2,200 cases; and the second decennial approximately 2,300 cases. Of these it is estimated that less than one-third were held to be within the Statute.

Among the cases held to come within the provisions of the Statute, the following are typical illustrations (one for each clause). In *Hayes v. Burkam*,¹⁶⁸ A made a loan of certain bonds to B, in consideration of C's promise to sign a certain bond as surety that B would return the bonds at a given time, but C later refused to do as he had promised (though he admitted the promise) and when sued was held not liable, on the theory that his promise was within the Statute, because a promise to answer for the debt of another. Yet A relied upon C's promise to put his promise in writing, would not have delivered the bonds to B except for C's promise and was injured thereby. Was there any good reason why C should not have been held liable? To hold him liable would not hold him liable on a promise he had never made, for it is admitted that the promise was made. If there is any good reason why C should not be liable, it is public policy, and the way to protect that social interest is by making the agree-

¹⁶⁸ (1875) 51 Ind. 130.

ment illegal. In *Dienst v. Dienst*,¹⁶⁹ D promised to execute a will leaving all his property to E in case he survived her if E would marry her, which involved his giving up his residence in another state and moving to the state of her residence. E married D, but could not enforce D's promise because it was within the Statute of Frauds. Was this a just result? If so, it clearly was not because E was being held on a promise she never made, for she admittedly made the promise, but because of some reason of public policy. The way to accomplish such a result, if desired, is by making the promise illegal not by requiring writing. E could not possibly, by perjury, practice a fraud on D. In *Houston v. Farley*,¹⁷⁰ F orally agreed with G to attend a sale and buy certain land if he could at a certain price and to execute a bond to make good title to the property to G, for G's promise to pay therefor in installments. F bought the land, took title in his own name and G tendered performance in accordance with his promise, but F refused to perform, and was held not bound to do so, because the agreement was one for the sale of land within the Statute. Yet there was no possibility of G's practicing fraud on F. F, if anyone, was practicing fraud on G. In *Caldwell v. School City of Huntington*,¹⁷¹ the H school board on May 24 by resolution employed I as superintendent of the public schools of H from August 1st to July 31st, and I accepted the employment, but the secretary of the board failed to make any record thereof. A new board repudiated the contract and employed another man for superintendent, and when I offered to perform he was not permitted to do so. I was not allowed to recover against H, because his promise was within the Statute, since it could not be performed within one year from the making thereof. Again there was no chance of fraud on H, but H was permitted to practice fraud on I. In *Young v. Ingalsbe*,¹⁷² J and K were the joint owners of a law library. J owed K a larger sum of money (\$800.00) but this was barred by the statute of limitations unless K was entitled to apply \$77.00 on the indebtedness. J had offered to sell his interest in their law library to K for \$77.00 to be applied on his indebtedness and K had agreed to this, had continued in possession of the library and had pasted labels with his name on the books, and given J credit for \$77.00. The real value of J's interest in the books was \$40.50 but K allowed him

¹⁶⁹ (1913) 175 Mich. 724.

¹⁷⁰ (1917) 146 Ga. 822.

¹⁷¹ (1892) 132 Ind. 92.

¹⁷² (1913) 208 N. Y. 503.

\$77.00. It was held by a New York court that this was a sale within the Statute of Frauds, and there was no receipt and acceptance or part payment to satisfy the Statute, and therefore no application of \$77.00 on the indebtedness. Yet, if K as agent for the partnership had only applied \$40.50, the application would have been good and the statute of limitations avoided. The Statute of Frauds in this case prevented no fraud on J, but it promoted a fraud on K.

The great question in all these cases and other cases within the Statute is not, will some one be held liable on a promise he has never made; but the great question is will some one, because of the Statute, be able to escape liability on a promise he has made but which he has not put in writing, or (if a contract for the sale of goods) pursuant to which he has not accepted and received a part of the goods, or on which he has not made a part payment. In most cases the defendant admits the oral promise and in others the evidence shows he made it. Of course there is a possibility that, if there was no Statute of Frauds, people might try, as they do not now, to hold others on oral promises which they had never made. Only a guess can be made as to what would happen in this respect, if the Statute was abolished, but the writer's guess is that it would make no difference in human behavior. There are so many opportunities now to try to hold people on oral promises which they never made, if plaintiffs wished to commit perjury; and, outside of guaranty cases (where the protection of the Statute has been almost entirely whittled away), there is so little evidence of the practice, that the writer is of the opinion that a repeal of the Statute would not effect the situation.

From the above facts and figures what conclusions can be drawn? First, it appears that the flood of cases under the Statute of Frauds continues unabated, with the consequent expense to clients and society. Second, it appears that in an overwhelming majority of the cases the courts think that the Statute is accomplishing no good purpose, for they try to and succeed in nullifying its operation by getting the cases outside its scope. Either the Statute is wrong or the courts are wrong, but we must accept the doctrine of the courts. Third, the Statute is not accomplishing good in the few cases which the courts have not withdrawn from its operation, but rather the results in this class of cases so shock the sense of decency and justice that they should turn anyone against the Statute. A Statute which in practice either causes nothing but litigation, or forces the courts to find

ways to avoid its operation, or causes injustice when its operation cannot be avoided, has no modern reasons for its existence, and demonstrates that the modern world needs no Statute of Frauds.

By way of summary, we have found: first, the original reasons for the enactment of the Statute of Frauds no longer exist because of the competency of parties to testify, the control exercised by the courts over the jury and changes in the law of distribution and in the law of contracts, so that the Statute of Frauds should go with the reasons which brought it into existence, unless some new reasons for it have arisen; second, that so far as the contract clauses of the Statute are concerned no new reasons have been suggested and there is no complaint by defendants that they are being sued on promises they never made; and third, that even if there were some new reasons the present Statute of Frauds would not fulfill any useful purpose because (1) it is unjust, in that it cheats litigants of their just rights, and, outside of guaranty cases, never has any operation except to enable a person to escape from discussing the question of whether he is guilty of a legal wrong in breaking his word; (2) it is uncertain, in that it is so obscure in language and indefinite in meaning that it often is unintelligible and affords no sure guide for conduct; (3) it is expensive, in that it breeds litigation ("Every line has cost a subsidy"); (4) it is obsolete, in that contract law has outgrown it; (5) there is no more reason for its application to the cases within the statute than to other cases outside of it; (6) it is contrary to business practice; (7) the lawyers—especially chancery judges and common law judges, like Holt and Mansfield, who have been permeated with the spirit of equity—have practically repealed many of its provisions; (8) the fact that there is no complaint of perjury in cases outside of the Statute where there is as much danger as in cases within shows that there is no need of writing to prevent perjury; (9) the original Statute was bad enough but it has (when allowed to stand) been made doubly worse by judicial interpretation, which has filled our reports with a great mass of conflicting and irreconcilable decisions both between different jurisdictions and within the same jurisdiction; and (10) if there is any danger of fraud and perjury in contract cases today the Statute of Frauds affords no sane or adequate protection against it.

These conclusions are supported not only by the arguments

given above but by the authority of some of our most eminent law writers and jurists.

Professor Holdsworth gives as his opinion:¹⁷³

"The prevailing feeling both in the legal¹⁷⁴ and the commercial world¹⁷⁵ is, and has for a long time been, that these clauses have outlived their usefulness, and are quite out of place amid the changed legal and commercial conditions of today."

Mr. Justice Stephen, after he had collaborated with Sir Frederick Pollock in redrafting the seventeenth section of the Statute of Frauds, wrote:¹⁷⁶

"And now, having cooked my dish with all possible care, I can only recommend that it should be thrown out of the window—that the seventeenth section should be repealed, and the cases upon it consigned to oblivion."

Justice Campbell said:¹⁷⁷

"I shall rejoice when section 17 is gone. In my opinion, it does more harm than good. It promotes fraud rather than prevents it, and introduces distinctions which I must confess, are not productive of justice.¹⁷⁸

The Statute of Frauds, so far as its contract clauses are concerned, has outlived its usefulness. These sections of the Statute of Frauds are no longer preventing fraud, if they ever did, but rather are a cause of fraud. They should be abolished. They should not be re-stated. The legal profession can no longer afford to stultify itself, either by enforcing their grotesque and unethical provisions, or by finding ways of escape from their unjust operation. Lord Nottingham congratulated himself upon his work in the enactment of the Statute. Any one who will now undo the work of Lord Nottingham will have more reason to congratulate himself.

It is a good thing to have parties put their contracts in writing; contracts under seal have to be in writing; but it is not a good thing to make writing an absolute requirement for any contract (other perhaps than those named in the first three sections of the Statute). It would be going too far to require all

¹⁷³ History of English Law, Vol. VI, 396.

¹⁷⁴ Leake, Papers of the Juridical Society I, 271.

¹⁷⁵ Second Report of the Mercantile Law Commissioners, 6.

¹⁷⁶ 1 Law Quar. Rev. 5.

¹⁷⁷ *Marvin v. Wallis*, (1856) 6 E. & B. 736.

¹⁷⁸ See also 16 Col. L. Rev. 273; 100 Cent. L. J. 171; 43 Law Quar. Rev. 1.

contracts to be in writing. That was the defect of the contract under seal, and the origin of the modern informal contract. Some contracts must be oral. Today it is difficult to find any reason for requiring certain contracts (other than those excepted above) to be in writing, and others not to be in writing. Informal contracts require an expression of assent by means of offer and acceptance and consideration. These requirements have now developed until they answer every purpose of the law in protecting people against liability on promises they never have made. If writing is to be required at all today, it probably should be as an alternative requirement. That is, where a promise is in writing, neither agreement nor consideration should be required but only delivery in addition to the writing. Then the contract in writing would be enforced for the same reason that the contract under seal is, except for the seal, which is now a mere form and technicality, and might well be dispensed with so far as concerns ordinary natural persons.

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