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The Statute of Frauds—a Legal Anachronism

Hugh Evander Willis*

There has been a difference of opinion among law writers as to the date and authorship of the Statute of Frauds; but it now seems to be settled that the correct date for this celebrated Statute is April 16, 1677, and that Lord Nottingham and Lord North (Lord Keeper Guilford) must be given equal credit for its authorship, since they were responsible each for different sections of the original draft of the Statute, although much credit must also be given to Sir Mathew Hale—a great common law judge—and to Sir Leoline Jenkens—a great civilian—for many suggestions and changes. This Statute of Frauds without substantial alteration either has been reenacted or has been adopted as a part of the common law by every state in the Union.

The original purpose for the enactment of the statute of Frauds was to prevent fraud caused by perjury; or in other words, to make it sure that legal effect should not be given to transactions never entered into, and that parties should not be held on promises never made. The Statute undertook to accomplish this purpose by the requirement either of written or other adequate evidence of such promises in certain cases where

* See biographical note, p. 461.
1 29 Charles II c. 3.
3 Holdsworth, History of English Law, p. 380-2; 26 Harv. L. Rev. 334-346.
at that time, because of perjury, it was thought that there was danger that people might be held on promises which they had never made. These cases may be classified as conveyances, trusts, wills, and six classes of contracts. The Statute also introduced some other changes into the law of land, procedure, and succession to chattels, but they were outside the main purpose of the Statute. All of the clauses of the Statute of Frauds,

5 29 Charles II c. 3 (Preamble).
6 The following summary of the original Statute of Frauds by Professor Holdsworth in general gives the contents thereof: (i) "Leases, estates, and interests in freehold, or terms of years, or any uncertain interests in land (other than leases not exceeding three years at a rent of two-thirds the full value) must be in writing, signed by the parties. If they are not, they will have the force only of estates at will. Assignments and surrenders of such interests must also be in writing. (Sections 1-3) (ii) Wills of real estate must be in writing signed by the testator, or by some other person in his presence and by his direction, and attested in his presence by three or four credible witnesses; and such wills were only to be revocable, either by another will or codicil executed in like manner; or by a writing signed by the testator in the presence of three or four witnesses declaring the will revoked; or by the destruction or obliteration of the document by the testator, or by some one else in his presence and by his direction and consent. (Sections 5, 6.) The statute did not apply to the execution of wills of personal property if the estate was of the value of 30 pounds or less (Section 19), or if it was a will of a soldier on actual military service or of a mariner or seaman at sea (Section 23). But, in other cases, a nuncupative will of personal property was not to be valid unless (a) it was proved by the oath of three witnesses who were present at its making, and were requested by the testator to bear witness to it; and (b) it was made during the last sickness of the deceased, and in the house in which he had been resident ten days before its making. (Section 19.) Further, after a period of six months from the making of a nuncupative will, no testimony was to be received to prove it, unless such testimony had been committed to writing within six days of its making. (Section 20.) No written will of personal estate was to be revoked or altered by words, or by a nuncupative will, unless the words were, in the lifetime of the testator, committed to writing, and proved by three witnesses to have been read to and allowed by the testator. (Section 22.) (iii) Declarations or creations of trusts of lands or tenements must be 'manifested and proved' by a writing signed by the party creating the trust, or by his will in writing. (Section 7.) The same form was required for the grant or assignment of any trust (Section 9); but the statute was not to apply to trusts which arose or were transferred or extinguished by operation of law. (Section 8.) (iv) Five classes of contracts, (1) a special promise by an executor or administrator to answer damages out of his own estate; (2) a promise to answer for the debt, default, or miscarriage of another person; (3) an agreement made in consideration of marriage; (4) contracts or sales of any lands, tenements, or hereditaments or any interest in or concerning them; and (5) an agreement which is not to be performed within a year from the making thereof, were declared to be unenforceable
except sections four and seventeen, relate either to the above named useful but minor changes in the law; or to the require-
ment of writing in the cases of conveyances, the creation or assignment of trusts in land and for wills,—cases where ad-
mittedly it was not only expedient then, but it would be expedi-
ent today to require writing. Hence the only clauses of the Statute of Frauds which we desire to discuss are the contract clauses of sections four and seventeen.

Have the contract clauses of the Statute of Frauds outlived their usefulness, and should they now be abolished rather than re-stated? In the opinion of the writer these questions should be answered in the affirmative.

First, the original reasons for the Statute of Frauds no longer exist, and, second, no new reasons have arisen for a Statute of Frauds in the case of contracts.

The original reasons for a Statute of Frauds—to prevent men from being held by means of perjury on promises they had never made—were first the uncontrolled discretion of the jury, second, the rule as to the competency of witnesses, and, third, the immaturity of contract law in the seventeenth century.7

While the process of the evolution of the jury, from a tribunal where the jurors were witnesses and decided the facts in cases on their own knowledge, to a tribunal where the jurors were judges of the facts and decided cases on evidence given in open court, was just about completed,8 the modern control of the court over the jury, in the matter of the limits and elements of injury, the rules by which compensation for pecuniary injuries shall be ascertained, and in cases of passion and prejudice,9 was only just beginning.10 It was therefore a wise precaution at this time to require certain kinds of evidence as proof of certain contracts in order to place a limitation upon the uncontrolled power of the

by action unless evidenced by a note or memorandum in writing signed by the party to be charged therewith (Section 4); and contracts for the sale of goods for the price of 10 pounds or upwards were not to be 'allowed to be good' unless evidenced by either acceptance and actual receipt, or by a gift of something as earnest, or by part payment, or by a note or memoran-
dum in writing signed by the parties to be charged." (Section 17.) Besides these clauses, the statute made some amendments in the land law (Sections 10, 11, 12), the law of procedure (Sections 14, 15, 16, 18) and in the law of succession to chattels (Section 25). Holdsworth, History of English Law, 384-6.

8 Willis, Introduction to Anglo-American Laws, 85, 104, 114.
9 Willis on Damages, 67-71.
10 Willis, Introduction to Anglo-American Law, 114-123.
jury, which could be exercised only in this way; but with the control exercised by the courts over juries in modern times the danger that juries will hold people liable on promises they never made is better protected by such court control than by a Statute of Frauds, and no Statute of Frauds is needed so far as concerns this reason.

At the time of the enactment of the original Statute of Frauds neither the parties to the action, nor their husbands or wives, nor any person who had any interest in the result of the litigation, were competent witnesses. For example, if A drove his horse (not his automobile) onto B and seriously injured B neither A nor B, perhaps the only people who knew anything about the trespass, were competent to testify. In the same way a man sued for goods which he claimed he had never bought, or on a promise which he claimed he had never made, was incompetent to testify in his own behalf. Such a state of the law of evidence was a temptation to plaintiffs to procure perjured testimony, and exposed defendants to outrageous liabilities; and it probably was in this state of the law a wise precaution to require for such liability, either writing or other adequate evidence, at least where it was feasible to do so as in the case of contracts. This defect in the law of evidence has now been reformed, as a result of the work of Bentham, who took the position that the rules of evidence should be for the purpose of discovering the truth instead of hiding it, and therefore it is no longer any reason for a Statute of Frauds.

Of course the Statute of Frauds did not prevent forgery and perjury, yet, as Holdsworth says, it probably did go some way to meet the evil consequences of the defective condition at this time both of the system of trial by jury and of the law of evidence.

Yet, if the incompetency of parties to testify and the uncontrolled power of the jury were the two main reasons for the Statute of Frauds, why was the Statute limited to the few cases covered by it rather than extended to all cases of legal liability? On this point, too, the explanation, if any, is found in the state of English Law in the seventeenth century. There was a reason for the requirement of writing to hold an executor on his promise to answer damages out of his own estate because these promises were common, due to the fact that at this time he took

11 Holdsworth, History of English Law, 388; Willis, Introduction to Anglo-American Law, 110.
12 Willis, Introduction to Anglo-American Law, 122.
13 History of English Law, 390.
beneficially if there was no residuary gift and to the fact that the estate of the deceased was not liable for wrongful acts, and the idea that part of the estate should be spent in making restitution helped to exert moral pressure on the executor. There was a reason for the requirement of writing in the case of contracts of guaranty and contracts not to be performed within one year because in the then state of the law of evidence—because these were continuing contracts—it might be very difficult to find any evidence at the time they came to be enforced. There was less reason for agreements in consideration of marriage, for the sale of interests in land, and for sales of goods; but the reason for the inclusion of these contracts was probably their relation to transfers of property covered by other clauses of the Statute.\textsuperscript{14} These explanations do not satisfactorily explain the omission of other contracts and other cases of liability, and even so far as they offer an explanation for the inclusion of the special contracts named they no longer explain because the situations which called for their inclusion no longer generally exist. So that, even if the Statute of Frauds tended to prevent fraud and perjury in the cases of the contracts to which it was made to apply in the seventeenth century, it would not do so today and there is no reason for limiting it to those cases if it is to be retained.

Probably the true explanation for the requirements of the Statute of Frauds in contracts is that at the time of the enactment thereof the modern informal contract law was in the making. The law of agreement, consideration, conditions, illegality, etc., had not been fully worked out. The Statute of Frauds was an attempt to cover a field now perhaps adequately covered by other topics. If our modern contract law had existed in the seventeenth century, there probably would have been no fourth and seventeenth sections of the Statute of Frauds at least.

Since the uncontrolled power of the jury and the incompetency of parties to testify and the inadequacy of contract and property law no longer are reasons for a Statute of Frauds, either in the few cases singled out in the seventeenth century for a Statute of Frauds or in the cases not singled out, there would seem to be no reason at all for a Statute of Frauds today unless some new reasons have arisen. In the cases of conveyances, trusts and wills the recording acts and the need for keeping titles clear, as well as the fact that the old rule as to incompetency still generally obtains in the case of suits against decedents' es-

\textsuperscript{14} Ibid., 390-2.
tates,\textsuperscript{15} are sufficient reasons for continuing the requirement of writing. But in the case of contracts no new reasons have arisen.

But, third, if there was any reason in modern times for a requirement of a Statute of Frauds for any kind of contracts the present Statute of Frauds—and that is the only one we can discuss—would not fulfill that purpose for the present Statute of Frauds, both because of its draftsmanship and because of the judicial interpretations which it has accumulated and which are a part of it is, if it has not always been, better calculated to cause fraud than to prevent it. Hence, even if it should be admitted that there should be made some further requirement for oral contracts than agreement, consideration, competent parties and legality of object, that requirement should not be the Statute of Frauds. In fact it is extremely doubtful if the Statute of Frauds would not do more harm than good in contract cases and should be abolished, even if the old rules in regard to the power of the jury, and to competency of witnesses and external conditions precedent for a contract still obtained. With those rules changed there is no question that the Statute of Frauds has outlived its usefulness in this field and should be abolished.

This can be clearly and abundantly shown not only by taking up the different clauses of sections four and seventeen and studying their meaning and operation, clause by clause, but also by the testimony of experts who have watched these clauses in operation.

The first clause of section four of the Statute of Frauds applies to an action “to charge any executor or administrator, upon any special promise to answer damages out of his own estate.” This has been interpreted by the courts to mean, as to executors and administrators, about what the second clause has been interpreted to mean as to others. Hence if the executor or administrator does not promise to answer out of his own estate some claim against the estate of another, for which he is responsible only as a representative of the decedent, but makes an original promise to discharge a debt of the testator, or to subserve some interest of his own, or on behalf of such estate, or a promise to pay from the assets of the estate,—in all such cases his promise is not within the statute and is good though oral.\textsuperscript{16} Therefore for purposes of criticism clause one may be considered

\textsuperscript{15} Burns' Anno. Ind. Stat. (1926) Secs. 551-554; H. W. Taft Law Reform, 78-9; see also 22 Ill. L. Rev. 545 (competency of witnesses in federal courts).

\textsuperscript{16} Bott v. Barr, (1883) 95 Ind. 243.
along with clause two. However, if there ever was a reason for a separate clause for the protection of executors and administrators, it no longer exists, because of the changes in the common law of beneficial inheritance by an executor and of liability of estates of decedents. If our present law upon these subjects had obtained at the time of the original enactment of the Statute of Frauds there is no likelihood that any reference would have been made to executors and administrators.

The second clause of the fourth section of the Statute of Frauds applies to an action "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person." What does this mean? Anyone not a common law lawyer might be forgiven for thinking that, aside from any special meaning to be given "debt," "default" and "miscarriage," it means what it apparently says, a promise to answer for the legal liabilities of another either to that person or to anyone else; but a common law lawyer knows that, though no special meaning has been given "debt," "default" and "miscarriage," it means a promise by one person to answer for the legal liabilities of a second person to a third person. In other words, it covers only technical guaranties and not so-called indemnities. One not a common law lawyer, accepting this construction as sound for some good reason not apparent, might now hastily conclude that he knew the meaning of this clause of the Statute. But a common law lawyer knows better. Suppose that one serves his own interest at the time he makes his promise? His promise is not a promise to answer for the debt of another but his own debt. Suppose the creditor, with common law wisdom, makes the charge against the promisor alone, and not against the one who gets the benefit? Again the promisor is promising to answer for his own debt and not that of another. Suppose that a person promises to answer for an obligation of

17 Holderbaugh v. Turpin, (1881) 75 Ind. 84; Bott v. Barr, (1883) 95 Ind. 243; Williston on Contracts, Sec. 451.
18 Bourkmire v. Darnell, (1703) 3 Salk. 15; Thomas v. Wells, (1773) 1 Root (Conn.) 57; Walther v. Merrell, (1878) 6 Mo. App. 370; Ribbock v. Conner, (1914) 218 Mass. 5.
20 Bailey v. Marshall, (1896) 174 Pa. 602; Meyer v. Hartman, (1874) 72 Ill. 442; Cases like Lowe v. Turpie, (1897) 147 Ind. 652, 685, which hold that the benefit to the promisor must move from the creditor and not the debtor are contra. Williston on Contracts, Sec. 476-8.
another when the assumed obligation is void, as in the case of a married woman at common law? He is not promising to answer for the obligation of another because there is no obligation of another and his promise does not have to be in writing.\textsuperscript{22} Suppose that the consideration for the promisor's promise is the discharge of the original debtor? Again, in common law nicety, he is not promising to answer for the debt of another, because that debt has been extinguished.\textsuperscript{23} There was a debt of another at the time of his promise, but after he made his promise there was none. Therefore by legal magic he is not answering for the debt of another. Or suppose he promises to answer for the debt of another out of funds of another? Here he is not making a promise for himself but for the other, apparently, so that he is not answering for the debt of another.\textsuperscript{24} Or suppose his promise is not identical in scope with the promise of the primary debtor? His promise is not within the Statute.\textsuperscript{25} Thus by legal legerdemain persons are permitted, on one technicality or another, to be held liable on oral promises they have or have not made; but, unless guarantors have been so careless as to put their promises in writing, they are not held liable, and the Statute enacted for the purpose of preventing fraud on guarantors is used to allow guarantors to perpetrate frauds on creditors. Perhaps this is right. But if so, why deny the privilege of fraud to the creditor? It would seem that the danger of perjury can not be confined to the narrow territory in which the common law lawyer has attempted to corral it; and, if written evidence should be required for guaranties, it should be required for indemnities, and, if it should be required where the original debt is not extinguished or the principal debtor also charged, it should be required where the original debt is extinguished, or the principal debtor is not charged. Admitting that the receipt of benefits may be sufficient protection against perjury there is no receipt of benefits in the above cases, and nothing else to distinguish them from guaranties so far as concerns the prevention of fraud by perjury. Either promisees in other cases than guaranties or promisors in guaran-

\textsuperscript{22} King v. Summett, (1881) 73 Ind. 312, 315. But the best view is that the guaranty of an infant's obligation is within the Statute. Dexter v. Blanchard, (1865) 11 Allen (Mass.) 365; Scott v. Bryan, (1875) 73 N. C. 582; King v. Summett, supra, contra.

\textsuperscript{23} Griffin v. Cunningham, (1903) 183 Mass. 505; Hopkins v. Carr, (1869) 31 Ind. 260; Hyatt v. Bonham, (1897) 19 Ind. App. 256; Williston on Contracts, Sec. 477.

\textsuperscript{24} Dock v. Boyd, (1880) 93 Pa. 92.

\textsuperscript{25} Williston on Contracts, Sec. 455.
ties are unduly protected. If one class of promisors should be held on their oral promises the other class of promisors should be. There is no more danger of perjury in one case than the other. There is, in truth, little danger of perjury in either case today, and, if it is desired to prevent fraud, guarantors should be held liable on their oral promises when they otherwise conform to the law of contracts. Today guarantors are not often in danger of being held on promises they have never made, but probably are using the Statute to escape liability on promises they have actually made. If there is a public policy against holding guarantors liable (especially with the advent of the corporate surety), it should be put on some better basis than the Statute of Frauds.

The third clause of section four of the Statute of Frauds applies to an action "to charge any person upon any agreement made upon consideration of marriage." Does this clause include both unilateral and bilateral agreements? The words "consideration of marriage" would seem to imply a unilateral agreement, but such a construction would clearly do violence to the intent of the legislature and the courts have held that both kinds of agreements are included within the provision. Yet, after having done so, they, on the one hand, give no effect to part performance in the case of unilateral agreements, but, on the other hand, arbitrarily exempt from the operation of the Statute mutual promises, or engagements, to marry and antenuptial contracts in contemplation of marriage, as distinguished from consideration of marriage. It is probably fortunate that the courts have read into the Statute the exception in favor of mutual promises

25a 3 Ind. Law Jour. 105, 196.
26 Mallory's Adm'r. v. Mallory's Adm'r., (1891) 92 Ky. 316; Chase v. Fitz, (1882) 132 Mass. 359. Yet it is generally held that after a bilateral agreement to marry, actual marriage will be both consideration for another unilateral agreement (instead of performance of the prior bilateral) and such consideration as will support a conveyance by an insolvent debtor. Professor Williston is clearly right when he says that both positions are indefensible. Williston on Contracts, Sec. 486. See Miles v. Monroe, (1910) 96 Ark. 531.
28 Caylor v. Roe, (1884) 99 Ind. 1, 5; Short v. Stotts, (1877) 58 Ind. 29; Coggins v. Cannon, (1919) 112 S. C. 225; Blackburn v. Mann, (1877) 85 Ill. 222.
29 Rainbolt v. East, (1877) 56 Ind. 538; Riley v. Riley, (1856) 25 Conn. 154; Larsen v. Johnson, (1890) 78 Wis. 300; Peter v. Compton, (K. B. 1694) Skin. 353.
to marry, but it is hard to find legal justification for it in anything but the result. The Statute would be unworkable if applied to mutual promises to marry! Yet there is probably no case where, if ever, there is greater danger of perjury. It is even more difficult to see why there should be less danger of perjury in contracts in contemplation of marriage than in contracts in consideration of marriage. In other cases under this clause of the Statute persons are protected by the Statute against liability on promises they have never made, but they are also protected against liability on promises they have made. As a result of judicial legislation on this clause of the Statute there is very little left of it, and what little is left is accomplishing little good. The cases taken out of the Statute are cases where promisors need protection as much as in the cases within and the cases within are cases where the promisees at least today need protection as much as the promisors. Here also the Statute of Frauds is not preventing fraud, and if any law upon this subject is desired it would seem that it better be found in legality than in the Statute of Frauds.

The fourth clause of the fourth section of the Statute of Frauds applies to an action "upon any contract or [for the] sale of land, tenements or hereditaments, or any interest in or concerning them."

This clause refers only to executory contracts. At common law corporeal hereditaments could be conveyed only by livery of seisin, if one was in possession, or by deed, if one was out of possession, and incorporeal hereditaments could be conveyed only by deed. The first, second and third sections of the Statute of Frauds practically abolish conveyance by livery of seisin and require a deed or note in writing in all cases of conveyances or leases, except leases not exceeding three years. In England it is held that the Statute of Frauds does not apply to any contracts under seal including conveyances, while in the United States it is frequently held that the Statute of Frauds applies to conveyances but to no other contracts under seal.30 In England it is held that surrenders must be in writing, though of terms which can be created orally, but there is conflict on this point in the United States.31 In this article we are not discussing the first three sections of the Statute, but what is essential for an executory contract to convey, so that we will not discuss further whether the English or United States position as to conveyances is right.

30 Tiffany on Real Property, Sec. 457.
31 Schnebly, Operative Facts in Surrenders, 22 Ill. L. Rev. 29.
The first thing to be noted in connection with the clause now under consideration is that it contains a patent typographical error. The first "or" should read "for." Otherwise this clause would cover the same ground as, and would be in conflict with, the first three sections to which reference has just been made.

The courts with fair unanimity, have held that an "interest in land" includes profits, easements, rents, mortgages, leases, equitable interests, growing trees and fixtures. Yet the courts are in conflict as to whether an oral rescission is valid, although an equitable interest is thereby conveyed; and the courts hold that mortgage debts, licenses, agreements for the construction of buildings and the planting of trees on land are not interests in land. However, if the building is to be erected on a boundary line separating the estates of the contracting parties, or if the contract is to pay the price of land actually conveyed, or if the license is coupled with an interest, or if the growing trees or fixtures are to be first severed, the courts are in dispute as to whether or not there is an interest in land.

The courts generally agree that any contract the purpose of which is to have one party transfer an interest in land (whatever that may be), for a price paid or to be paid by the other, is a "contract for sale," and that an agreement to exchange and a promise to procure a conveyance where such party is to pay for whatever price is necessary and to receive from the other party pay, not for services but for the land, are all within the principle; but that contracts of agen-

32 Williston on Contracts, Sec. 487.
33 Ibid., Sec. 491.
34 Ibid., Sec. 515-520.
35 Ibid., Sec. 491. The better view undoubtedly is that the oral rescission is invalid.
36 Ibid., Sec. 493.
37 Ibid., Sec. 493.
38 Ibid., Sec. 493.
39 Tiffany on Real Property, Sec. 349.
40 The better view is that if the severance is to be by the seller there is no contract for the sale of an interest in land, but if the severance is to be by the buyer there is. Lavery v. Purcell, (1888) 39 Oh. Div. 508; Long v. White, (1884) 42 Ch. St. 59; Witkowsky v. New Haven Gas L. Co., (1914) 38 Conn. 1, contra.
42 Wallace v. Long, (1885) 106 Ind. 522.
partnership, partition, boundary, exceptions and contracts to pay for land already conveyed are not, even though agencies and partnerships may relate to buying and selling land and partition and boundary agreements may transfer title to land. But some courts, and those representing the better view, hold that such partition and boundary agreements, as well as reservations (as distinguished from exceptions) unless the thing reserved is really a chattel, are contracts for sale.

This clause of the Statute, originally obscure and ambiguous, has been made doubly obscure and ambiguous by judicial interpretation. In many instances, even now, until after litigation, no one knows when there is a contract for the sale of an interest in land and when there is not. If this part of the Statute ever tended to prevent fraud it certainly, with the changes in the law of evidence, does so no longer; but it is often a shield for fraud, especially where one takes title in his own name when he has promised orally to take title in the name of another, and in cases where innocent parties have incurred losses upon the oral promises of others. The situations created by the Statute of Frauds became so bad, in fact, that courts of equity interfered to prevent fraud in cases of part performance, not on the theory that the Statute did not apply to equitable actions, nor on the theory that partial performance created a new duty of restitution, but on the theory that it was a substitute for the evidence required by the Statute, because equity's power to grant relief against fraud is not limited by the Statute of Frauds. There is no common doctrine as to what will constitute part performance. A few states wholly repudiate the doctrine, and some deny, while others permit, recovery in quasi contract; a few hold that payment by the vendee or conveyance by the vendor is sufficient part

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45 Lewis v. Harrison, (1881) 81 Ind. 278, 286; Maquire v. Kiesel, (1913) 86 Conn. 453.
46 Foltz v. Wert, (1885) 103 Ind. 404.
47 Tate v. Foshee, (1888) 117 Ind. 322; Leconte v. Toudouze, (1891) 82 Tex. 208.
48 For cases pro and con see Tiffany on Real Property, Sec. 259.
50 Williston on Contracts, Sec. 490.
51 Fuelling v. Fuesse, (1908) 43 Ind. App. 441.
STATUTE OF FRAUDS

performance; England and many states hold that taking possession is sufficient part performance; and other states hold that for part performance such as to take a case out of the Statute of Frauds there must be possession plus either a payment of a part or all of the purchase price or improvements made on the property in question. But the doctrine of part performance cannot be confined to cases where possession has been taken. Many other acts [quere, marriage] not compensable in damages have been and must be held sufficient part performance to satisfy the Statute.\(^5\)

Equity thus has patched up the law so that the effects of this clause of the Statute of Frauds are not so bad as they otherwise would be, but the fact that equity had to do this shows how bad this part of the Statute really was and is.

The fifth clause of the fourth section of the Statute of Frauds applies to an action “upon any agreement that is not to be performed within the space of one year from the making thereof.” As interpreted by the courts this means any agreement that by its express terms cannot possibly be performed, either by one or by both parties, within one year from the making thereof;\(^5\) but even thus interpreted different courts cannot agree upon the application of their principle to the same or to similar facts. Thus, most courts would hold that a promise to support another for life\(^5\) would not be within the statute as the life might end within a year, although in fact it should last forty years, but that a promise to employ that same person for thirteen months\(^5\) would be, because it could not possibly by its terms be performed within a year, although death would excuse further performance. Can anyone tell why there is danger of fraud unless the latter promise is in writing but that there is no danger of fraud though the former promise is oral? But the same courts have held that a promise to support a minor (say then 12 years old) until he is eighteen years old\(^5\) and a promise not to compete in business


\(^5\) *Harper v. Harper*, (1877) 57 Ind. 547.


\(^5\) *Peters v. Westborough*, (1837) 19 Pick 364; *Wiggins v. Keizer*, (1855) 6 Ind. 252; *Williston on Contracts*, Sec. 496 n. 53; but see contra, *Goodrich v. Johnson*, (1879) 66 Ind. 258; *Lowman v. Sheets*, (1890) 124 Ind. 416.
again for say five years\textsuperscript{58} are not within the statute. How such contracts by their terms can be performed within one year it is hard to see. They may by death be discharged, but it looks as though they could not be performed within one year. They should be compared not only with employment cases, but with cases where the courts have held that a contract to deliver 90,000 logs at the rate of 200 logs a day\textsuperscript{69} and a contract for two years with a power of termination after six months\textsuperscript{60} are within the statute, though they are liable to be discharged within a year. It is difficult to believe that the latter cases can be reconciled with the former. A promise to serve two years if the promisor lives so long\textsuperscript{61} would generally be held not to be within the statute; while a promise to serve two years, but if the promisor should die the contract to be terminated,\textsuperscript{62} would generally be held to be within. Some courts hold that a contract for a year to begin on the day following its making is not within the Statute,\textsuperscript{63} and other courts hold that it is.\textsuperscript{64} The early English and more than half the United States cases\textsuperscript{55} hold that, if an agreement can be performed by either party within a year, it is not within the statute; while the later English and nearly half the United States cases\textsuperscript{60} hold that, unless it can be performed by both parties within a year, it is within the statute. Some cases\textsuperscript{67} have held that a promise to marry at a time more than a year from the making of the agreement is not within the statute but the better cases\textsuperscript{68} hold the opposite. The fact that promises come or do not come within one clause of the Statute of Frauds does not prove that they may not come within other clauses. The application of each of the clauses must be considered as a separate matter.\textsuperscript{69}

Such a Statute of Frauds may breed litigation and cause fraud

\textsuperscript{58} Doyle v. Dixon, (1867) 97 Mass. 208; Welz v. Rhodius, (1882) 87 Ind. 1.

\textsuperscript{59} Edwards v. Farve, (1916) 110 Miss. 864.

\textsuperscript{60} Hanan v. Ehrlich, (1911) 2 Q. B. 1056.

\textsuperscript{61} Williston on Contracts, Sec. 499.

\textsuperscript{62} Ibid., Sec. 499.

\textsuperscript{63} Prokop v. Bedford, etc. Co., (1919) 173 N. Y. S. 792.

\textsuperscript{64} Raymond v. Phipps, (1913) 215 Mass. 559; Shipley v. Patton's Adm'rs., (1863) 21 Ind. 169.

\textsuperscript{65} Donallan v. Read, (1832) 3 B & Adol. 899; Piper v. Fosher, (1889) 121 Ind. 407; Williston on Contracts, Sec. 504 n. 8.


\textsuperscript{67} Blackburn v. Mann, (1877) 85 Ill. 222.

\textsuperscript{68} Paris v. Strong, (1875) 51 Ind. 339.

\textsuperscript{69} But see Fall v. Hazelrigg, (1874) 45 Ind. 576.
but it cannot be said to prevent fraud. This evidently has been the view of the courts, for, by holding that agreements which can possibly be performed within one year from the making thereof and that support and competition agreements in spite thereof are not within the Statute, they have done everything they could to set aside this clause of the Statute. Endless litigation over the question of when cases come and do not come within the Statute is itself a fraud. Why people who make oral promises which by their terms cannot possibly be performed within one year from the making should be protected against danger of perjury and given an opportunity to commit fraud, while those whose oral promises can possibly be performed within one year from the making thereof and those who have made promises to support or not to compete are not protected and given equal opportunity is not explicable. This clause of the Statute has by the courts, not only been given a narrow meaning and then misapplied, it has been made to mean practically nothing, but it is used for fraudulent purposes. Its abolition today would tend to prevent fraud.

The seventeenth section of the Statute of Frauds applies to any “contract for the sale of any goods, wares and merchandise for the price of ten pounds sterling ($50.00) or upwards.”

This section perhaps better than any other shows how the Statute of Frauds may fail to accomplish the purpose for which it was enacted, but may cause many other ills not thought of.

At first there was doubt as to whether or not a “contract for sale” included an executory contract to sell, or only actual sales, but it is now settled in both England and the United States that contracts to sell are included. Yet, perhaps due to the fact that the courts did not at first apply the Statute to executory contracts, the courts are in hopeless conflict as to when there is a contract to sell (within the Statute) and when there is only what is called a contract for work, labor and materials (not within the Statute). According to the modern English rule, there is a contract to sell if the contract when ultimately carried out will result in the sale of a chattel. This is undoubtedly the correct rule; but it is followed in the United States only by the State of Missouri. A rule, which has been widely followed in

70 The American Uniform Sales Act sets the limit at five hundred dollars. Ohio has raised the limit to two thousand five hundred dollars.
71 Towers v. Osborne, (1722) 1 Strange 506.
72 Williston on Contracts, Sec. 507.
73 Lee v. Griffin, (1861) 1 Best & Smith 272.
the United States, is that which was followed in New York prior to the adoption of the Sales Act. According to this rule there is a contract to sell if the chattels are in existence (in solido) at the time of the contract.\textsuperscript{75} The rule most widely adopted in the United States, and incorporated in the Sales Act, is the one called the Massachusetts rule. According to this rule a contract is a contract to sell if, when ultimately carried out, it will result in the sale of a chattel, except where the goods are manufactured especially for the buyer and on his special order and neither intended nor adapted for the general market.\textsuperscript{76} A contract for sale includes conditional sales and contracts to sell on condition,\textsuperscript{77} a contract to bequeath,\textsuperscript{78} exchanges;\textsuperscript{79} but not mortgages (apparently not even where the mortgage is held to transfer title),\textsuperscript{80} nor joint ventures and partnerships,\textsuperscript{81} nor agencies,\textsuperscript{82} nor compromises.\textsuperscript{83}

The phrase "goods, wares and merchandise" is synonymous with "goods." Does the term "goods" include choses in action? In England it is settled that it does not.\textsuperscript{84} In some of the states of the United States it is held that it does.\textsuperscript{85} And most United States cases hold that the word "goods" includes intangibles as well as tangibles where they have a visible form.\textsuperscript{86} Where is the line drawn between goods and land (contracts for the sale of which are always within the statute)? This is a most troublesome question. It would seem that, so long as crops are growing or standing affixed to the land, they should be regarded as land, and they will pass under a deed to the land, but by an arbitrary rule fructus industriales are classed as goods,\textsuperscript{87} and fructus naturales as land;\textsuperscript{88} and by an equally arbitrary rule nursery

\textsuperscript{75} Parsons v. Loucks, (1871) 48 N. Y. 17.
\textsuperscript{77} Russell v. Betts, (1913) 107 Ark. 629.
\textsuperscript{78} Wallace v. Long, (1885) 105 Ind. 522.
\textsuperscript{79} Kuhns v. Gates, (1883) 92 Ind. 66.
\textsuperscript{80} Bogigian v. Hassonoff, (1904) 186 Mass. 380, 382.
\textsuperscript{81} Hunt v. Elliott, (1881) 80 Ind. 245.
\textsuperscript{82} Arkansas Lbr. Co. v. Benson, (1909) 92 Ark. 392.
\textsuperscript{83} Clark v. Duffey, (1865) 24 Ind. 271.
\textsuperscript{84} Colonial Bank v. Whitney, (1885) 30 Ch. Div. 261, 283. An early Indiana case is in accord, Vawter v. Griffin, (1872) 40 Ind. 593.
\textsuperscript{85} Walker v. Supple, (1875) 54 Ga. 178.
\textsuperscript{86} Spencer v. McGuffin, (1911) 190 Ind. 308; Greenwood v. Law, (1892) 55 N. J. L. 168.
\textsuperscript{87} Sherry v. Picken, (1858) 10 Ind. 375; Kluse v. Sparks, (1894) 10 Ind. App. 444.
\textsuperscript{88} Kirkeby v. Erickson, (1903) 90 Minn. 299.
trees, hops and orchard fruit are classed as fructus industriales, though without logical justification. But standing trees, water, ice, minerals and buildings though land, may be sold as chattels by contracting to sell them after severance.

The limit of the Statute runs all the way from thirty dollars to twenty-five hundred dollars. With such variations it cannot make much difference where the limit is set. Whether a limit is set because of the belief that people are more liable to lie about large transactions, or because the people who deal in large transactions are more liable to be liars, is also probably not of much importance. A difficult question as to whether a contract is within the Statute is liable to arise where several articles for a separate price have been bought separately, but the ingenuity of a court anxious to save a person from or to hold him to liability is generally equal to the occasion.

It may afford an interesting intellectual exercise to determine what is a contract to sell and what is a contract for work, labor and materials, and to draw fine spun distinctions between what are goods and what is land and what is a chose in action, and to play with the money limits of the Statute, but it is hard to see the relation between such intellectual exercise and the prevention of fraud. When the reason for the Statute of Frauds is considered, there certainly is no good reason for holding that an oral promise to sell a debt is good, but that an oral promise to sell a cow (a debt raiser) is bad; or for holding that an oral promise to sell a horse for one dollar under the price limit is good, but that an oral promise to sell it for one dollar over is bad; or for holding that an oral sale of growing corn is good, but that an oral sale of growing grass is bad; or for holding that an oral sale of goods manufactured on the buyer's special order is good, but that an oral sale of goods adapted for the general market is bad. A man is no more liable in the one case than in the other to be held on a promise he never made.

(To be continued)

89 Miller v. Baker, (1840) 1 Met. 27 (Mass.).
91 Purner v. Piercey, (1874) 40 Md. 212.
92 Williston on Contracts, Secs. 515, 516, 517, 518, 520.
93 Baldey v. Parker, (1823) 2 B & C 37.