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STATUTE OF FRAUDS UNDER SALES ACT

THE APPLICATION OF THE STATUTE OF FRAUDS UNDER THE UNIFORM SALES ACT

By L. Vold*

Sec. 1. Special Formalities Unnecessary

A contract to sell or a sale of goods may be made, in the absence of special statutory requirements, by mere informal agreement. No special form is necessary. The deal may be oral. It may be in writing. It may be manifested by conduct of the parties. It may appear in any combination of these forms which the parties may see fit to employ. Aside from the statute of frauds, the only importance of a writing in this connection is to furnish more satisfactory evidence of the terms of the bargain than oral testimony based on memory could afford. Special formalities for certain types of sales may for particular reasons be imposed by statute, but for sales of goods in the ordinary course in current commercial dealings between buyers and sellers no special statutory requirements as to form have been imposed beyond what is included in the statute of frauds.

Sec. 2. The Statute of Frauds Affecting Sales of Goods

The type of legislation bearing the name of the statute of frauds requires that certain transactions, to be enforceable, must be evidenced by a writing. Historically this legislation is derived

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1Uniform Sales Act, Sec. 3.
4Auburn Shale Brick Co. v. Cowan Bldg Co., (1915) 125 Md. 221, 93 Atl. 443 (bricks); Klinge v. Farris, (1929) 128 Or. 142, 273 Pac. 954 (foxes).
5For instance, in Fiedler v. Bigelow, (1926) 25 Oh. App. 456, 159 N. E. 131, is presented the question of the application of a statute requiring a certain type of bill of sale on the transfer of an automobile.
from the English Statute of Frauds, enacted in the year 1677. This statute covered many types of transactions and provided for different formalities among them. The seventeenth section of this statute applied to sales of goods. It provided in substance that if the transaction exceeded ten pounds in value, it should be unenforceable unless the buyer accepted and actually received a portion of the goods, or made part payment, or unless a memorandum in writing of the bargain was made and signed by the party to be charged or his agent thereunto lawfully authorized. In somewhat varying form, the statute of frauds has been enacted in the various states of the United States. Some version of the seventeenth section, applicable to the sale of goods, is in force in all but a few of our states at the present time. The substance of the seventeenth section of the original statute of frauds, is now found in sec. 4 of the Uniform Sales Act. As business processes and business habits change in adaptation to changing times and conditions, novel problems regarding its application are constantly arising.

Sec. 3. Conflicting Considerations Regarding Its Usefulness

Many conflicting interpretations of the statute and divergent viewpoints as to the reasons behind the statute have been set forth in the multitude of resulting decisions on its application, and in the professional literature of the subject in the course of its long judicial history. It may be readily admitted that the original statute of frauds at the time of its enactment in the year 1677, was a piece of wise social engineering to avoid the enforcement of feigned bargains proved through fraudulent perjured oral testimony. For instance, at that time witnesses with an interest in the litigation were disqualified from testifying. Where a defendant who himself had personal knowledge was thus practically helpless

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6 For a convenient historical account of the statute of frauds, see 6 Holdsworth, History of English Law, 379-397.
7 The exact wording is conveniently accessible in quotation in 1 Williston, Sales, 2nd ed., sec. 51.
8 1 Williston, Sales, 2nd ed., sec. 51 lists the following states as having no statutory provision corresponding to sec. 17 of the original Statute of Frauds: Alabama, Delaware, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Texas, Virginia and West Virginia. From this list Kentucky must now be omitted, however, as it has now adopted the Uniform Sales Act.
9 Some of these are discussed briefly in 6 Holdsworth, History of English Law, 387-397.
to disprove perjured testimony against him, requiring a writing signed by the party to be charged as a guaranty of genuineness of the claim asserted against him seems but the protection properly due to otherwise helpless innocent defendants.\textsuperscript{10} Today, with the interest disqualification of witnesses removed, the need originally served by the statute in this regard has disappeared. The spectacle now repeatedly observed in legitimate cases, of an apparently fraudulent defendant sliding out of a genuine bargain on the merely technical defense of the lack of the statutory writing has led to much questioning as to whether the statute of frauds now serves a useful purpose.\textsuperscript{11} Divergent viewpoints as to the wisdom of the statute under present conditions undoubtedly accounts for some of the conflicting borderline decisions as to its present applications.\textsuperscript{12} It must not be overlooked, however, that while some of the original reasons for enacting the statute of frauds have disappeared, other reasons for continuing it in force have been becoming apparent. The statute serves a useful purpose in so far as it contributes to the business habit of requiring a writing. The lay tradition, often encountered, that a writing signed by the party must be had to make a contract binding probably is to a certain extent derived from the statute of frauds.\textsuperscript{13} Not only is a writing useful to prevent fraud by deliberate overreaching regarding the terms of the bargain, but the presence of a writing prevents to a large extent otherwise possible innocent misunderstanding of what actually were the terms of the bargain. It also pre-

\textsuperscript{10}Holdsworth, History of English Law, 388-390.

\textsuperscript{11}Holdsworth, History of English Law, 396; Stephen and Pollock, Section Seventeen of the Statute of Frauds, (1885) 1 L. Quart. Rev. 1; Burdick, A Statute for Promoting Fraud, (1916) 16 Col. L. Rev. 273; Willis, The Statute of Frauds—A Legal Anachronism, (1928) 3 Ind. L. J. 427 and 528.

\textsuperscript{12}See, for instance, the favorable attitude toward the statute, taken in Upton Mill, etc., Co. v. Baldwin Flour Mills, (1920) 147 Minn. 205, 179 N. W. 904 (flour) and Dolan Mercantile Co. v. Marcus, (1923) 276 Pa. St. 404, 120 Atl. 396 (sugar), as contrasted with the critical attitude toward the statute shown in Chas. R. Ablett Co. v. Sencer, (1927) 130 Misc. Rep. 416, 224 N. Y. S. 251 (electric bulbs).

Such is the background, too, for the ever recurring assertion that the statute of frauds was enacted to prevent fraud, not to aid it, and should receive a reasonable construction directed to that end. For a recent case invoking that viewpoint as a guide in the particular problem see Mead v. Leo Sheep Co., (1925) 32 Wyo. 313, 232 Pac. 511.

On the other hand, it was held in Steiner v. Am. Alcohol Co., (1918) 181 App. Div. 309, 168 N. Y. S. 739 that one party's fraudulent prevention of the giving of the memorandum did not dispense with its necessity under the statute, as the statute would be nullified by holding it inapplicable where the memorandum was withheld through fraud.

\textsuperscript{13}Llewellyn, Cases and Materials on Sales 917.
serves the exact wording of the terms, rather than leaving them to the recollection of their general purport preserved in the elusive and treacherous memory of interested parties.¹⁴ With present day long time contracts, often negotiated for large amounts in dealings at the last moment closed in a telephone conversation or in an order given orally to a traveling salesman, it is highly important to have the written "confirmation" in due course at the outset to ascertain that the parties have correctly understood each other, instead of finding out about the difficulty, if any, only after the lapse of weeks or months after all commitments have been made. In this viewpoint, the cases that justify the statute are not primarily the litigated cases themselves, where it often looks as if a tricky defendant slides out of an honest bargain on the mere technicality of the lack of the statutory writing. The cases that justify the statute are rather the thousands of uncontested current transactions where misunderstanding and controversy are avoided by the presence of a writing which the statute at least indirectly aided to procure.¹⁵ While reasons of this sort are not frequently

¹⁴Llewellyn, Cases and Materials on Sales 916. See also Mayer v. Hirsch, (1918) 212 Ill. App. 441, 444.

¹⁵The fact foundation assumed by this reasoning that the statute has increased the use of written memoranda, is sharply questioned in Stephen and Pollock, Section Seventeen of the Statute of Frauds, (1885) 1 L. Quart. Rev. 6-7, as follows: "... the power of law to control conduct is small, and is constantly exaggerated ... Custom, and what is called common sense, regulate the great mass of human transactions. ... If you require people to take precautions which they feel to be practically unnecessary ... they will prefer the risk of the penalties of neglect to the nuisance of taking the precaution. ... To buy and sell is the daily and hourly business of a large part of the population; and it is perfectly certain that they will make their contracts in the manner which they find convenient, and not in the manner which lawyers prescribe for them. ... immense numbers of the class of contracts to which that enactment applies are made with no reference at all to its provisions."

The opposing viewpoint, sustaining the usefulness of the statute under present conditions, is persuasively phrased in Llewellyn, Cases and Materials on Sales 916-17, as follows: "Along these lines, then, it may be argued that transactions—and especially transactions looking to the future—would do well to be in writing, and that a rule which presses in that direction presses well. That a good part of the lay feeling in many quarters that a deal is no deal until it is signed up, is healthy; some of it must be traceable indirectly to the statute. That the statute's influence in keeping untold numbers of disputes from arising, by getting what might otherwise be oral deals onto paper, is worth its cost in pinching some unfortunates from time to time. And, the argument would proceed, the costs are constantly decreasing. They decrease with spreading literacy. They decrease as particular trades which have to deal quickly become organized and learn how to meet the statute with a few pencil scratches—the stockbroker's exchange of "bought and sold notes." They decrease especially as busi-
discussed at length in the decided cases, their actual presence in this field largely explains the readiness with which the business world seems to assume that on the whole the statute of frauds as applied to sales of goods is doing more good than harm, and in consequence does not press for its repeal despite the pungent criticisms occasionally in recent times directed against it. Reasons such as these, moreover, may properly claim the attention of courts when novel doubtful borderline questions of application of the statute are presented for solution; cases where a literal construction may destroy while a more liberal construction may save the particular transaction involved.

Sec. 4. Effect of Non-Compliance

The broadest general question on the application of the statute of frauds, the question of what is the effect of non-compliance with the statute, is under the improved wording used in the Uniform Sales Act answered without much difficulty. Under the wording used in the Uniform Sales Act, "shall not be enforceable by action," it is readily seen that the transaction is not entirely void without a writing, but is merely unenforceable. This was the position taken, too, by the large weight of authority under

ness units grow, and written records become necessary for the control by executives of what subordinates have done, so that internal as well as external pressure moves toward the written memorandum. To this is added the impetus of the standardized contract, conveniently possible only by way of printed forms. The national market, with its inter-city deals by mail, is added. And finally, answering from a business man's point of view the same needs that the statute answers, comes the almost universal practice of "confirming" by letter the telephone or face to face conversation—for purposes of record, for purposes of comparison, for purposes of authentication. Indeed, this practice of confirmation alone almost might be enough to justify the statute in ninety per cent of the field of its operation; it shows that the statute is in basic accord with practice apart from the statute. If the confirmations do not check, the statute may bar an action; but the parties know within a day or two how matters stand; which is a vastly different thing from uncovering a dispute three months later, with all commitments made."

16See the critical references cited in note 11 above.

the divergent wordings found in the earlier versions of the statute of frauds, though there was much conflict of opinion.\textsuperscript{18} Accordingly, it is now readily seen that a memorandum made subsequently to the transaction and acknowledging its terms makes the transaction enforceable.\textsuperscript{19} The contract is enforceable against a defendant who has signed the memorandum, though not enforceable against the other party who has not signed.\textsuperscript{20} The defense of lack of compliance with the statute can ordinarily not be set up by third persons not parties to the contract.\textsuperscript{21} It is commonly held, though there are also contrary decisions, that the defense of the statute of frauds must be affirmatively pleaded, and cannot be taken advantage of under a general denial.\textsuperscript{22} It is often said, again, though on this point there is great diversity of opinion, that the statute of frauds affects the remedy only, rather than the

\textsuperscript{18}See 1 Williston, Sales, 2nd ed., sec. 71a and 72a for a compilation of authorities.


The position stated in the text is not always carried out consistently. Thus in Kent-Costikyan Trading Co. v. Am. Ry. Express Co., (1925) 124 Misc. Rep. 510, 208 N. Y. S. 445 it was stated by way of dictum that a carrier of goods, sued by the buyer for damage to goods in transit, could set up against the buyer the defense that the title had not passed under the statute of frauds. That position seems indefensible.


right under the contract, and is to be dealt with as procedural matter, governed by the law of the forum, rather than as a substantive matter governed by the law of the place of making of the contract.\textsuperscript{23} The fact that a party has on previous occasions performed oral contracts which were unenforceable does not, however, preclude his setting up the statute of frauds as a defense under a subsequent contract.\textsuperscript{24} It is usually held, too, that modifications of contracts to which the statute is applicable, to be enforceable, must themselves comply with the statute.\textsuperscript{25} Parol rescis-

\textsuperscript{23}Straesser-Arnold Co. v. Franklin Sugar Refining Co., (C.C.A. 7th Cir. 1925) 8 F. (2d) 601 (sugar); Franklin Sugar Refining Co. v. Lipowicz, (1927) 220 App. Div. 160, 221 N. Y. S. 11 (sugar). It has been held in Pennsylvania, however, that the statute of frauds embodied in the Uniform Sales Act affects the right under the contract rather than the remedy only. See the Pennsylvania cases in note 22 above. In Manufacturer's Light & Heat Co. v. Lamp, (1921) 269 Pa. St. 517, 520, 112 Atl. 679, 681, Sadler, J. said: "Statutes such as the one with which we are dealing, do not provide mere rules of evidence but are limitations upon the judicial authority to afford remedies." Accordingly, it has been held to follow that the law of the place of making of the oral contract recognizing no right, an oral Pennsylvania contract obnoxious to the statute there was unenforceable everywhere, even though the law of the forum did not require a writing. See Franklin Sugar Refining Co. v. Martin-Nelly Grocery Co., (1923) 94 W. Va. 504, 119 S. E. 473 (sugar); Franklin Sugar Refining Co. v. Holstein Harvey's Sons, Inc., (D.C. Del. 1921) 275 Fed. 622 (sugar); Franklin Sugar Refining Co. v. William D. Mullen Co., (D.C. Del. 1925) 7 F. (2nd) 470 (sugar). The matter is too complicated to be here analysed on its merits. For such analytical discussion see I Williston, Sales, 2nd ed., sec. 126, and Goodrich, Conflict of Laws 173-177; McClintock, Distinguishing Substance and Procedure in the Conflict of Laws, (1930) 78 U. of Pa. L. Rev. 933.


\textsuperscript{25}Stead v. Dawber, (1839) 10 Adol. & E. 57 (bones); Morris v. Barton, (1918) A. C. 1; Warren v. A. B. Mayer Mfg. Co., (1901) 161 Mo. 112, 61 S. W. 644 (iron); Maddaloni Olive Oil Co. v. Aquino, (1920) 191 App. Div. 51, 180 N. Y. S. 724 (wine); W. J. Crouch Co. v. Farrell, (App. Div. 1920) 184 N. Y. S. 564. Loose expressions the other way are at times met with, attempting to draw a questionable distinction between a new contract and mere modification affecting the performance of an existing contract. See, for instance, Brouis v. Grafton Light & Power Co., (App. Div. 1916) 156 N. Y. S. 1106 (trucks). The leading case for this view is Cummings v. Arnold, (1842) 3 Metc. (Mass.) 486. Criticising this distinction, see the concurring opinion of Cardozo, J. in Imperator Realty Co. v. Tull, (1920) 228 N. Y. 447, 127 N. E. 263. See also 1 Williston, Sales, 2nd ed., secs. 120-122 incl. In Producer's Coke Co. v. Hoover, (1920) 268 Pa. St. 104, 110 Atl. 733 a written contract to sell coke was subsequently modified by a parol, and deliveries and payments under the contract as thus modified were made. It was held that the contract as modified was enforceable not because of any writing but because there had been acceptance and receipt, and payment. In Van Inderstine Co. v. Barnet Leather Co. Inc., (1926) 242 N. Y. 425, 132 N. E. 250, 46 A. L. R. 858 it was held that a subsequent oral agreement with reference
sions of the contract are operative, however, where such cases do not involve any enforcement but merely the abandonment of the bargain. It has also been held that where a party for his own benefit secures a parol modification of the conditions upon which his promise is to mature, he is precluded from insisting on the original written conditions if the other party materially changes his position in reliance on the parol modification. This is but an application of the broad general rule that he who prevents the happening of a condition is not permitted to take advantage of the failure of condition which he himself brought about.

Sec. 5. Subject Matter Within the Statute

The application of the statute of frauds to the multitudinous and varying facts involved in practical business transactions has very naturally led to some sharply contested distinctions in borderline cases where it becomes arguable whether the situation involved is within the statute.

a. Borderline Between Land and Goods.—Borderline questions as between land and goods under the older statute of frauds legislation frequently had to be determined, and many of them are now relatively well settled although novel applications may still give rise to controversy. Thus it is commonly held that contracts to sell standing timber or buildings, being contracts affecting part of the realty, must comply with that part of the statute of frauds applying to contracts for transfers of an interest in land.

to the time for delivery while not superseding the written contract which specified only when deliveries should begin, was evidential as practical construction by the parties as to what was a reasonable time for performance within the terms of the contract.

27Maddaloni Olive Oil Co. v. Aquino, (1920) 191 App. Div. 51, 180 N. Y. S. 724. See for collected earlier authorities of general application, 1 Williston, Sales, 2nd ed., sec. 119. In Noble v. Ward, (1867) L. R. 2 Exch. 135 it was held that a parol unenforceable modification of an existing written contract did not operate as a rescission of the written contract, the parties not having intended a rescission of the original contract, except on condition that the substituted modification be operative according to their intentions. The modification failing, for lack of a writing, the obligation under the original contract was therefore held to remain.


On the other hand, contracts contemplating the immediate severance of such materials from the realty, and their sale and removal as chattels, are held to fall within the section of the statute of frauds applicable to the sale of goods. On a somewhat similar basis, too, contracts for ordinary industrial growing crops, ice, or natural gas are commonly classified as falling within the section applicable to the sale of goods. Even after this general rule for dealing with the borderline cases between realty and personality has been established, close questions of construction of the agreement as affecting its classification one way or the other may frequently arise as variant and novel fact situations are encountered in the development and expansion of the practical business affairs out of which the contracts arise.

b. Borderline Between Goods and Work and Labor.—The borderline cases between contracts for the sale of goods and contracts for work and labor gave rise under the earlier statute of frauds legislation to several conflicting rules, prevalent in different jurisdictions, as to the application of the statute of frauds thereto. Thus the English rule was finally established in Lee v. Griffin, a case involving a contract for the manufacture of a set of false teeth to the defendant's order. This case held that if the contract is intended to result in transferring a chattel for a price it is a contract for the sale of a chattel, notwithstanding that the chattel is not in existence at the time of the contract, and is to be the product of the labor and materials of the seller. This rule has had some following in this country. The New York

30 Robbins v. Farwell, (1899) 193 Pa. St. 37, 44 Atl. 260 (trees); Marshall v. Green, (1875) L. R. 1 C. P. Div. 35 (trees); Wetkopsky v. New Haven Gas Light Co., (1914) 88 Conn. 1, 90 Atl. 30 (building). There was much American authority contra, with respect to standing timber, before the adoption of the Uniform Sales Act. One of the leading cases illustrating that position is Hirth v. Graham, (1893) 50 Oh. St. 57, 33 N. E. 90, 19 L. R. A. 721. The authorities on the point are compiled in 1 Williston, Sales, 2nd ed., sec. 62.

31 Stern v. Crawford, (1919) 133 Md. 579, 105 Atl. 780 (wheat); Wenger v. Grummel, (1920) 136 Md. 80, 110 Atl. 206 (tomatoes); Evans v. Roberts, (1826) 5 Barn. & C. 829 (potatoes); Sainsbury v. Matthews, (1838) 4 M. & W. 343 (potatoes).


34 Vulicevich v. Skinner, (1888) 77 Cal. 239, 19 Pac. 424 (growing peaches, though produced on permanent trees, dealt with on the analogy of crops); Whitmarsh v. Walker, (1840) 1 Metc. (Mass.) 313 (nursery trees dealt with on the analogy of crops).

35 (1861) 1 Best & Smith 272.
rule, in the formulation of which the cases of Parsons v. Loucks, and Cooke v. Millard are leading cases, holds that an agreement to sell a commodity not in existence but which the seller is to manufacture and put in condition to be delivered is not a contract to sell but is to be dealt with as a contract for work and labor, and that where the chattel is in existence the contract is to be deemed a contract to sell even though the article may have been ordered from a seller who is to do some work upon it to adapt it to the requirements of the purchaser. The so-called New York rule had a considerable following in this country before the Uniform Sales Act, a following which is now being reduced by progressive adoption of the Uniform Sales Act in more and more jurisdictions. The Massachusetts rule, formulated in the leading cases of Mixer v. Howarth and Goddard v. Binney, is the rule now adopted in sec. 4 (2) of the Uniform Sales Act, which seemed to represent the weight of American authority before the statute. The draftsman of the Uniform Sales Act has explained that although the English rule is more exact from a scientific standpoint, as a practical rule, it seems to have no advantage over the Massachusetts rule. Under the Uniform Sales Act, accordingly, not only are the contracts within the statute where the goods are to be specially manufactured by a third person for the seller and when manufactured sold by the seller to the buyer, but the contracts are also within the statute where the goods are to be manufactured by the seller especially for the buyer unless the goods are not suitable for sale to others in the ordinary course of the seller's business. Naturally, in the application of this

36(1871) 48 N. Y. 17 (paper to be manufactured).
37(1875) 65 N. Y. 352, 22 Am. Rep. 619 (existing lumber to be dressed for the purchaser).
38The authorities are gathered in 1 Williston, Sales, 2nd ed., sec. 55.
39(1839) 21 Pick. (Mass.) 205 (contract to make and sell a buggy).
40(1874) 115 Mass. 450 (contract to make and sell a buggy).
41 Authorities are set out in 1 Williston, Sales, 2nd ed., sec. 55.
421 Williston, Sales, 2nd ed., sec. 55a.
44Uniform Sales Act, sec. 4 (2); Goldowitz v. Henry Kupfer & Co., (1913) 80 Misc. Rep. 487, 141 N. Y. S. 531; Pearlberg v. Levisohn, (1920) 112 Misc. Rep. 95, 182 N. Y. S. 615 (clothing to be manufactured); Berman Stores Co. v. Hirsch, (1925) 241 N. Y. 209, 148 N. E. 212 (clothing to be manufactured). Where the contract with the buyer provides merely that the goods are to be supplied by the seller, leaving the seller free to buy them elsewhere if convenient, instead of himself manufacturing them to fill the buyer's order, the statute of course applies, the special exception mentioned in the last part of sec. 4 (2) not touching
section of the Uniform Sales Act to current transactions, the suitability of the goods for sale to others in the ordinary course of the seller's business has at times been carefully examined as a fact question for help in the solution of which some subsidiary rules are sometimes suggested.

**c. Borderline Between Goods and Choses in Action.**—Borderline questions as between goods and choses in action under the original statute of frauds legislation gave rise to great conflict of authority. The English cases generally held that choses in action were outside the range of the statute, not being goods, wares,


Roth Shoe Co. v. Zager, (1923) 195 Iowa 1238, 193 N. W. 540 (shoes made to defendant's special order, of odd sizes and widths and stamped with defendant's name, within the exception); Adams v. Cohen, (1922) 242 Mass. 17, 136 N. E. 183 (whether shoes manufactured according to a special order were suitable for sale in the general market held a question of fact for the jury); Brooks v. Stone, (1826) 256 Mass. 16 152 N. E. 59 (carpets specially cut and sewed to fit the floor dimensions of defendant's office within the exception); M. K. Smith Corp. v. Ellis, (1926) 257 Mass. 269, 153 N. E. 548 (cider tank built according to defendant's special order within the exception); Ericsson Mfg. Co. v. Caille Bros. Co., (1917) 195 Mich. 545, 162 N. W. 81 (ignition magnetos specially made for defendant's use with his type of motor within the exception).


and merchandise. American cases, noting that the need of a writing in cases of transfers of choses in action may be as great as in cases of sales of goods, often applied the statute to cases involving what is called specialty choses in action, such as share certificates of corporate stock, bonds, mortgages, and negotiable paper. Such instances afforded a technical reason at least for applying the statute, involving as they did not only a transfer of an intangible chose in action but also a transfer of the tangible paper, itself a chattel, in which the chose in action was embodied. In some states the statutory wording was broad enough expressly to cover choses in action. In the Uniform Sales Act, the wording of the statute in this respect was so broadly drawn as expressly to include broadly not only chattels but also choses in action generally. The borderline questions in this respect are therefore removed under the Uniform Sales Act, since its application broadly to transfers of choses in action in general no longer makes it necessary to invoke the technical inquiry of finding a chattel element involved in specialty choses in action.


48 The authorities are gathered in 1 Williston, Sales, 2nd ed., sec. 67.


50 "... any goods or choses in action ..." Uniform Sales Act, sec. 4 (1).

51 With the large expansion of corporate dealings in recent times, sales transactions involving corporate stock have frequently been held to fall within the statute of frauds provision of the Uniform Sales Act where share certificates were involved. De Nunzio v. De Nunzio, (1916) 90 Conn. 342, 97 Atl. 323; Armstrong v. Orlé, (1915) 220 Mass. 112, 107 N. E. 392; Wood v. Fairbanks, (1923) 244 Mass. 10, 137 N. E. 924; Melników v. Winter, (1929) 105 N. J. L. 278, 145 Atl. 318; Kellner v. Kreul, (1921) 173 Wis. 273, 181 N. W. 211; Pierce v. Rothwell, (1928) 38 Wyo. 267, 267 Pac. 86. Under the Uniform Sales Act, however, the statute is equally applicable to cases where no certificates had been issued but the deal was for a transfer of the shareholders' interest. Illinois-Indiana Fair Ass'n v. Phillips, (1927) 328 Ill. 368, 159 N. E. 815 (oral agreement to buy certain shares that had been subscribed for, but for which certificates had not yet been issued); Davis v. Arnold, (1929) 267 Mass. 103, 165 N. E. 885 (oral contract to buy from plaintiff an allotment of shares expected to be issued to him); Bohrer v. Auslander, (1929) 133 Misc. Rep. 597, 233 N. Y. S. 182 (fractional interest in shares); Mahoney v. Kennedy, (1920) 172 Wis. 568, 179 N. W. 754 (share certificates still unissued at the time the transfer was made). For certain possible questions regarding the constitutionality of this section of the Uniform Sales Act, which the present text does not attempt to discuss, see Guppy v. Moltrup,
d. Miscellaneous Novel Borderline Applications.—The changing detail of current business transactions as new commercial devices are introduced every now and then raises some variant or novel aspects of the application of the statute of frauds. Thus among the grist of relatively recent cases, arising under the Uniform Sales Act, it has been held that the statute of frauds provision applied to a contract to sell foreign money as a commodity.\(^2\)

The statute has been held not to apply, however, to “an agreement for a transfer of foreign credit by cable,” the facts being understood by the court, in the light of the banking and commercial usage presented, not to involve a sale of an existing credit, an existing chose in action, but to involve a contract to create in favor of the party a credit abroad at a future time.\(^3\) So, while the statute is applicable to contracts to transfer existing shares of corporate stock,\(^4\) existing choses in action, it has been held not applicable to original subscriptions for corporate stock whereby such choses in action are in the first instance created when the original subscriber becomes a member of the corporation.\(^5\) Similarly, the statute is not applicable to a contract to pay for corporate stock if the proper construction of its terms shows that it is not a contract for the purchase of such stock but is a contract to indemnify the other party against loss.\(^6\) While the provision of the statute of frauds applicable to goods does not apply to a contract for services,\(^7\) yet it is applicable to a contract to sell goods though


\(^3\)Equitable Trust Co. v. Keene (1922) 232 N. Y. 290, 133 N. E. 894. In the lower court, where the facts had been interpreted as amounting to a contract to transfer existing credits, the statute was held applicable. See Equitable Trust Co. of N. Y. v. Keene, (1921) 195 App. Div. 384, 186 N. Y. S. 468. The reversal in the higher court was therefore primarily on the facts. For a study of cable or wireless transfers of credit, in general, see Fraenkel, Some Aspects of the Law Relating to Foreign Exchange, (1920) 20 Col. L. Rev. 832.

\(^4\)See footnote 51 above.

\(^5\)Mills v. Friedman, (1920) 111 Misc. Rep. 253, 181 N. Y. S. 285; Shadbolt & Boyd Iron Co. v. Long, (1920) 172 Wis. 591, 179 N. W. 785. The same result was reached under the earlier versions of the statute of frauds before the Uniform Sales Act. See authorities compiled in 1 Willis-ton, Sales, 2nd ed., sec. 67, at note 89.

\(^6\)Wood v. Fairbanks, (1923) 244 Mass. 10, 137 N. E. 924; Linglebach v. Luckenback, (1919) 168 Wis. 481, 170 N. W. 711, 4 A. L. R. 380; Pierce v. Rothwell, (1928) 38 Wyo. 267, 267 Pac. 86. On this point see also a good discussion in Kunzmann v. Pettey, (1923) 74 Colo. 342, 221 Pac. 888 (not under the Uniform Sales Act).

\(^7\)Brown v. Frederick J. Quimby Co., (1910) 204 Mass. 206, 90 N. E. 586.
the price was to be paid in services. The statute has been held to have no application to a contract to transfer a patent, or a right to take out a patent. It has been held not to apply to a contract to form a partnership or to engage in a joint venture, the parties to the agreement not standing in such cases in the relation of buyers and sellers. For the same reason it does not apply to the agency of a broker for a customer in purchase of corporate stock. It has been held to have no application to the case where a seller sues the buyer on a check given in part payment, the consideration for the check not failing so long as the seller is ready and willing to go through with the oral bargain. Auction sales are held to be within the statute of frauds provision so long as not expressly excluded therefrom, although the Uniform Sales Act deals specifically in another section with other aspects of auction sales. The statute of frauds provision has been held applicable to contracts with an individual defendant to sell goods to a corporation to be formed, the price to be paid by the defendant. With further development of new features in current business devices additional novel questions regarding the application of the statute of frauds are likely to be raised. In the solution of such novel questions, the attitude to be taken toward the policy of the statute is likely to be the principal factor, determining as it does whether the statute is to be given an extensive or a restricted application.

59 Dalzell v. Dueber Watch Case Mfg. Co., (1893) 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; Obear-Nester Glass Co. v. Lex & Shaw, (C.C.A. 8th Cir. 1926) 11 F. (2nd) 240. The reason may be briefly stated in that a patent right is neither a tangible chattel nor a chose in action against anyone but is rather an exclusive privilege for the interference with which the law affords a remedy. There is also some authority contra. Thus in Jones v. Reynolds, (1890) 120 N. Y. 213, 24 N. E. 279 the sale of an unpatented invention was held to be within the statute of frauds.
65 Some specific illustrations on how the court's attitude toward the policy of the statute affects its application to the individual controversy are referred to in footnote 12 above.
Sec. 6. The Value Limit—$500.00 or Upward

The original fixed value limit to which the statute of frauds was applicable, ten pounds or over, copied in many states as $50.00, has with repeatedly rising price levels during the last two hundred and fifty years been making the statute progressively applicable to smaller and smaller transactions. In recent times, a fifty dollar deal has often been regarded as so small relatively that with respect to it the application of the statute of frauds was a mere nuisance readily susceptible of occasioning more fraud than it avoided. In the Uniform Sales Act, in recognition of this difficulty, the limit is fixed at $500.00 or over. This more nearly corresponds to the original value involved in the ten pound limit set two hundred and fifty years ago, and thus confines the application of the statute of frauds, to transactions of substantial size where the occasion is more likely to call for deliberation and a written record of the transaction and where the effects of misunderstanding for lack of a writing are likely to be more serious.66

Through the conservativeness and inertia of legislatures in particular states, however, the original $50.00 limit has in several instances been retained or some other limit substituted instead of the $500.00 limit found in the draft Uniform Sales Act as recommended by the Commissioners on Uniform State Laws.67

Under the older statute of frauds legislation it became well established that the mere fact that several articles are bought at a separate price agreed on for each does not necessarily prove that several contracts existed. If on all the facts appearing it is apparent that the parties intended the whole series of items to constitute one trade, the sum total of all the items is the amount of the contract with reference to which the application of the statute is to be judged.68 This general position, too, seems not to have

66 Williston, Sales, 2nd ed., sec. 70.
67 According to the latest information available here (1930) the limit fixed in each of the jurisdictions which have adopted the Uniform Sales Act is as follows: Alaska, $500; Arizona, $500; Connecticut, $100; Hawaii, $100; Idaho, $500; Illinois, $500; Indiana, $500; Iowa, no limit specified; Kentucky, $500; Maine, $500; Maryland, $50; Massachusetts, $500; Michigan, $100; Minnesota, $50; Nebraska, $500; Nevada, $500; New Hampshire, $500; New Jersey, $500; New York, $50; North Dakota, $500; Ohio, $2,500; Oregon, "exceeding" $50; Pennsylvania, $500; Rhode Island, $500; South Dakota, $500; Tennessee, $500; Utah, $500; Vermont, $50; Washington, "exceeding" $50; Wisconsin, $50; Wyoming, $50. The new limit set in the Uniform Sales Act, where enacted, obviously repeals the preexisting limit under the statute theretofore in force. Eigen v. Rosolin, (1914) 85 N. J. L. 515, 89 Atl. 923.
been seriously questioned in the application of the statute of frauds provision of the Uniform Sales Act.\(^6\)

Sec. 7. **Satisfaction of the Statute by Acceptance and Actual Receipt**

The first way mentioned for satisfying the statute is satisfaction by acceptance and receipt. Where the transaction has been so far performed by the parties that the buyer has accepted and actually received a portion of the goods involved, there is little danger of such barefaced fraud as is found in the assertion of a purely perjured and fictitious transaction. There is equally little danger of misunderstanding and mistake as to the existence of a deal. Such partial performance by the parties is indicative that there was some deal, though it does not indicate what were its terms. Such partial performance therefore is not as effective protection against possible imposition as is a signed memorandum showing the terms. On the other hand, the danger of injustice to the plaintiff if the deal is upset for lack of a writing is much greater, while the danger of injustice to the defendant from being held to an oral bargain is much less than in the cases where there has been no such part performance.\(^7\) In apparent recognition of this practical problem, accordingly, the original statute of frauds itself provided that it might be satisfied as to transactions involving sales of goods not only by the making of a written memorandum signed by the party to be charged but also by the buyer's accepting and actually receiving a part of the goods involved. This provision, with a clarifying clause as to its application, is continued in the Uniform Sales Act.\(^8\)

Controversy over the application of this portion of the statute to the practical details in the handling of business affairs has covered a wide range as the actual practices in vogue have developed and gradually changed in the two centuries and a half that have intervened since the original statute was enacted. Many of the lessons from this long course of application are summarized in the leading treatises on the law of sales that have been prepared for the use of the legal profession during the past generation or

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\(^6\)The annotations to the Uniform Sales Act, published currently by Edward Thompson Co. to date (1930) show no cases having this point as the principal or conspicuous matter in controversy.

\(^7\)The substance of these underlying considerations is most persuasively indicated in Llewellyn, Cases and Materials on Sales 917-18.

\(^8\)Uniform Sales Act, sec. 4, subdivisions (1) and (3).
two. No attempt is made in this text to repeat them at length. As business practices have been changing, however, there has been a gradual shift of emphasis as to the points of application to the facts over which there now occur active and sharp differences of opinion. Enough of such litigated points of application have already accumulated under the Uniform Sales Act to make a survey of this material itself, with occasional reference to older leading cases, a fairly representative as well as up to date presentation of the general problems at present involved.

The simplest cases directly recognize that the statute is satisfied and the oral transaction thereby rendered enforceable when it is shown as a fact that the buyer accepted and actually received the goods or a portion thereof. Occasional cases have directly emphasized that neither acceptance alone nor receipt alone are enough, but that it requires the concurrence of both to satisfy the statute under this provision of its language. It is necessary, moreover, that the buyer accept and receive under the contract sought to be enforced. Acceptance and receipt of goods under one contract does not render enforceable another contract, if oral, between the same parties. Whether a particular set of facts pre-

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72 Reference may be made to Benjamin, Sales, 7th ed., (Bennetts) secs. 138-188 inclusive; Mechem, Sales, secs. 353-403 inclusive; 1 Williston, Sales 2nd ed., secs. 73-96 inclusive.


75 Hearn v. Ruark, (1925) 148 Md. 354, 129 Atl. 366 (tomatoes); S. L. Munson Co. v. De Vries, (1922) 220 Mich. 53, 189 N. W. 859 (clothing);
sents a case of several contracts or of one contract with several items may become a very close question. Whether the goods were accepted and received under one contract or another when there are several contracts between the same parties may readily present a contested question of fact for the jury. On this basis, the acceptance and receipt of a sample of goods is insufficient to render an oral contract enforceable unless the sample were accepted and received as a part of the bulk to be supplied under the contract. Similarly, the acceptance and receipt of goods under an oral modification of a written contract renders the oral modification enforceable. Acceptance and receipt of one installment under an oral installment contract renders the entire contract enforceable even though the contract be properly classified as a divisible contract. If the oral contract to sell includes a promise


76 A convenient illustration is at hand in the facts of Schwarzenbach v. Schwartz, (App. Div. 1922) 193 N. Y. S. 573, a case in which there were two items on orders given, apparently at the same time, with the buyer accepting performance under one and rejecting it as to the other. The court held they were separate contracts.


78 Carter, Macy & Co., Inc. v. Matthews, (1927) 220 App. Div. 679, 222 N. Y. S. 472 (tea); Gold v. Cross, (1914) 146 N. Y. S. 164 (cloth);

79 Braverman v. Naimark, (App. Div. 1922) 194 N. Y. S. 855; Miller Bros. Hat Co. v. A. D. Smith Sons Co., (1924) 237 N. Y. 570, 143 N. E. 747 (hats). The last mentioned case emphasizes the point that on disputed acts it is a jury question whether the sample was received independently or was received under the contract as part of the bulk contracted for.


81 Jessup & Moore Paper Co. v. Bryant Paper Co., (1925) 283 Pa. St. 434, 129 Atl. 559 (bleached soda pulp). Dictum in Jessup & Moore Paper Co. v. Bryant Paper Co., (1925) 283 Pa. St. 434, 129 Atl. 559 (bleached soda pulp). The explanation is briefly suggested as applied to the converse case in 1 Williston, Sales, 2nd ed., sec. 72b in the following language: "As a divisible contract is not several contracts but a single agreement, neither party can be
by the seller later to repurchase the identical property at the buyer's option, the buyer's acceptance and receipt in the original sale makes the seller's promise to repurchase enforceable.\(^8\) Acceptance and receipt may be as effectively made by a nominee or agent\(^8\) as by the buyer personally, provided he has authority to act for the buyer in this regard.\(^8\) Acceptance and receipt need not be contemporaneous with the bargain whose oral terms they render enforceable.\(^8\) A few additional general applications are given in the footnote.\(^8\)

required to perform part unless the whole is enforceable. Therefore, so long as there has been no payment of the price or acceptance and actual receipt of any part of the goods, any oral contract of which a sale or a contract to sell forms part is unenforceable.\(^8\)

\(^{83}\)Armstrong v. Oriar, (1915) 220 Mass. 112, 107 N. E. 392 (corp. stock); Grotto v. Rachman, (1926) 114 Neb. 284, 207 N. W. 204 (corp. stock); Melniker v. Winter, (1929) 105 N. J. L. 278, 145 Atl. 318 (corp. stock); Pierce v. Rothwell, (1928) 38 Wyo. 267, 267 Pac. 86 (corp. stock). One of the leading authorities on the point, decided before the Uniform Sales Act was adopted, is Johnston v. Trask, (1889) 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630 (bonds). See also, to the same effect, Williams v. Burgess, (1839) 10 Ad. & El. 499, (mare). Whether the policy of the statute permits the application of the same doctrine to a contract which is not to repurchase the identical articles sold but to purchase other goods from the buyer at his option at some later time is sometimes sharply disputed. Thus in the case of De Waal v. Jamison, (1917) 176 App. Div. 756, 163 N. Y. S. 1045 the majority opinion declines to extend the doctrine of acceptance and receipt under the statute so far while the dissent emphatically asserts the propriety of such application. Unless some limit can be put to the application of the position asserted by the dissent it is hard to see, if this dissent should prevail, how there is much left of the statutory protection against the dangers at which the statute was aimed, whether viewed from the angle of deliberate fraud and perjury or from the angle of misunderstanding and mistake with respect to contracts for the sale of property. A later oral contract to repurchase goods previously sold and delivered, not being part of the original contract partly executed, of course is not enforceable under the statute of frauds. Brewster Lumber Co. v. General Builders Supply Co., (1924) 228 Mich. 559, 200 N. W. 283 (lath).

\(^{84}\)Houghton & Dutton Co. v. Journal Engraving Co., (1922) 241 Mass. 541, 135 N. E. 688 (acceptance and receipt by a third party subpurchaser to whom the buyer directed the seller to deliver); Taylor v. Harrington, (1922) 243 Mass. 210, 137 N. E. 350 (building materials delivered by seller directly to a third party at buyer's direction); New London Ship & Engine Co. v. Simpson, (1925) 254 Mass. 76, 149 N. E. 670 (materials for repair of a vessel delivered at the vessel by the seller at the buyer's direction); Sneider v. Big Horn Milling Co., (1921) 28 Wyo. 40, 200 Pac. 1011 (one partner accepting and receiving on behalf of the partnership).

\(^{85}\)Friedman v. Pious, (1914) 158 Wis. 435, 149 N. W. 218 (alleged agent having no authority in instant case).


\(^{87}\)Acceptance and receipt of the proceeds of a chose in action renders
a. What Constitutes Acceptance.—The natural meaning of the term "accept" as used in the statute is readily understood to be an assent on the part of the buyer to take the indicated goods as owner. Where the goods bargained for are specific goods, such assent, constituting acceptance of the goods, is found in the fact of the oral agreement itself at the time the bargain was made. If the bargain was not one for specific goods but for the supply of goods of a certain kind, such assent to take certain specific goods in performance of the contract must appear by subsequent words or conduct of the buyer. The most frequent controversies over such subsequent assent occur with regard to conduct. Thus it became settled at a relatively early date in statute of frauds litigation that a resale of the goods by the buyer was so unequivocal an act of ownership that his assent to become owner of the goods was thereby fully manifested. Milder instances of alleged acts


88Blackburn, Sales 16; 1 Williston, Sales, 2nd ed., sec. 75. This position is now specifically embodied in the language of the Uniform Sales Act, sec. 4 (3).


90Chaplin v. Rogers, (1801) 1 East. 192 (hay); Morton v. Tibbett, (1850) 15 Q. B. 428 (wheat). The same problem recurs nowadays and is answered in the same way. See Hanson v. Knutson Hardware Co., (1924) 182 Wis. 459, 196 N. W. 831 (stock of merchandise in store, buyer taking control of the store and selling to the public from the stock as in ordinary course of business). In the recent case of Black Beauty Coal Co. v. Cohen, (1929) 269 Mass. 98, 165 N. E. 878 it is held that even an offer to resell by the buyer is evidential, though not conclusive, of acceptance.
of ownership still give rise to similar questions over their sufficiency to show the buyer's assent to become the owner of those specific goods. Thus, using a portion of raw material in the manufacture of finished product has been held sufficient.\textsuperscript{91} Taking possession of the goods and removing them to another place has been held enough.\textsuperscript{92} Taking control and management of the corporate assets has been held evidential of assent to become the owner of corporate stock.\textsuperscript{93} Mere retention of possession of the goods after delivery for an unreasonable time without objection or protest is usually held to be evidential\textsuperscript{94} though not conclusive,\textsuperscript{95} of such assent to become the owner of the goods. The buyer's acts of seasonable inspection, followed by prompt rejection, however, do not manifest any assent to become the owner of the goods and hence, under the language adopted in the Uniform Sales Act, do not constitute acceptance.\textsuperscript{96} On the particular point of the effect of inspection the modern English rule is different, the English Sale of Goods Act having codified some decisions under the ear-

Since the buyer's only commercial motive for accepting often is to enable himself to resell it would seem very clear, however, that a mere offer to resell, if merely a feeler as to the possibilities of resale, can readily be consistent with no acceptance and be in that respect roughly comparable to inspection to determine whether the buyer cares to accept.

\textsuperscript{91} Isaacson v. J. L. Blum Co., (App. Div. 1919) 178 N. Y. S. 333 (merchandise part of which was made into hats).

\textsuperscript{92} Hance v. Frame, (1926) 141 Wash. 50, 250 Pac. 456 (wood).

\textsuperscript{93} Davis Laundry & Cleaning Co. v. Whitmore, (1915) 92 Oh. St. 44, 110 N. E. 518.

\textsuperscript{94} Leibman v. Beck, (App. Div. 1920) 179 N. Y. S. 472 (small package kept five days before opening, and retained nine more days thereafter before making objection); Backman v. Mendelson, (1922) 120 Misc. Rep. 52, 197 N. Y. S. 672; Strachman v. Levy, (1924) 124 Misc. Rep. 160, 207 N. Y. S. 185 (cloth); Fredonia Seed Co. v. Nathan & Bro., (1924) 83 Pa. Super. Ct. 374 (seeds kept in possession of buyer for a long time); Klein-Messner Co. Inc. v. Fair Waist & Dress Co., (1926); 217 App. Div. 647, 216 N. Y. S. 174 (goods warehoused for buyer who kept the warehouse receipt over a year without doing anything about it). It may be stated, generally, that a dealing with the goods such as to constitute an acceptance, may take place as effectively with an order bill of lading, which represents the goods, as with the goods themselves. Currie v. Anderson, (1860) 2 El. & El. 592. There seems to have been little, if any, serious controversy over this point in recent years.

\textsuperscript{95} Karwacki v. Holtsberg, (1923) 144 Md. 98, 124 Atl. 410 (goods found on examination not to be in conformity with sample, buyer setting them aside as unsatisfactory but not notifying seller for three weeks).

lier statute which defined acceptance as meaning any act by the
buyer in relation to the goods which recognizes a pre-existing
contract. The buyer's mere giving of orders for goods to be
filled, not in itself manifesting assent to become the owner of any
specific chattel, is not in itself conduct constituting acceptance.

So, the mere acceptance and receipt by the buyer of some circu-
lar plans and directions for the use of goods bargained for, not
being a part of the goods under the contract, does not show the
necessary assent to constitute acceptance. It was formerly held
in New York, going beyond the words of the earlier statute, that
the policy of the statute required that satisfaction of the statute in
the absence of a memorandum must be shown by some unequivo-
cal act and could not be founded on mere words alone. The
language of the Uniform Sales Act, section 4 (3) is clear, how-
ever, to the effect that acceptance may be shown either by words
or conduct. Earlier New York precedents to the contrary are

97 Kibble v. Gough, (1878) 38 L. T. R. 204 (barley); Page v. Morgan,
(1885) 15 Q. B. D. 228 (wheat); Taylor v. Smith, [1893] 2 Q. B. 65
(spruce deals). The language of the English Sale of Goods Act, sec. 4
(3), is as follows: "There is an acceptance of goods within the meaning
of this section when the buyer does any act in relation to the goods which
recognizes a preexisting contract of sale whether there be an acceptance
in performance of the contract or not." It may be observed that this
development under the English statute, which has not been followed in
the Uniform Sales Act, constitutes a relaxation from the previous policy
of the Statute of Frauds in favor of more liberally sustaining the enforce-
ability of oral transactions. It limits further than before the application
of the statute for the buyer's protection, by enlarging the range for holding
the statute satisfied.

Cir. 1925) 7 F. (2d) 441 (coal); Kline v. Minnesota Cent. Creameries,
(1923) 156 Minn. 6, 193 N. W. 958 (coal).


100 The leading case was Shindler v. Houston, (1848) 1 N. Y. 261, 49
Am. Dec. 316 (lumber). The reason given, that mere words are liable to
be misunderstood and misconstrued, and dwell only in the imperfect
memory of witnesses, obviously suggests a legislative question of policy
as to what the limits of the statute ought to be, rather than an inter-
pretation of the language of the statute as drawn by the legislature, which
in its ordinary meaning might on the proper combination of facts be
satisfied by words alone. The matter neatly illustrates the difficulty of
gaining unanimous agreement as to just how far it is wise to extend the
protection of the statute and just where the limits should be even after
it is granted that there should be a statute of frauds of some sort, with
some limits somewhere.

101 "There is an acceptance of goods within the meaning of this sec-
tion when the buyer, either before or after delivery of the goods, expresses
by words or conduct his assent to becoming the owner of those specific
goods." Uniform Sales Act, sec. 4 (3). In De Nunzio v. De Nunzio,
(1916) 90 Conn. 342, 97 Atl. 323 the court followed earlier precedents
holding that acceptance could not be manifested by mere words alone,
therefore no longer applicable in jurisdictions which have adopted the Uniform Sales Act. The New York courts, too, have recognized that since the enactment of the Uniform Sales Act in that state their earlier precedents to the contrary on the point of acceptance do not apply.\textsuperscript{102}

A conditional acceptance is not operative as an acceptance to satisfy the statute of frauds if the facts on which it was expressly conditioned do not happen, the assent to become owner being limited by its own express terms.\textsuperscript{103} Whether this rule is equally applicable to cases where there is an acceptance induced by a mistaken belief as to an essential fact is more doubtful. There have been several decisions in which such cases have been dealt with as analogous to conditional acceptances, the condition of the existence of the supposed facts being implied.\textsuperscript{104} Against this view is the weighty authority of Professor Williston, the master specialist in the subjects of contracts and sales, the draftsman of the Uniform Sales Act, who argues that if the requirements of the statute have actually been satisfied, the motive which induced the buyer to satisfy them should not be held to condition such acceptance but should be held to be immaterial,\textsuperscript{105} a position for which it is counsel apparently not having pressed on the court's attention the applicable language of the Uniform Sales Act which is directly contrary.

\textsuperscript{102}Carroll v. Schmolock, (App. Div. 1917) 164 N. Y. S. 415 (discussing in detail the change wrought by the Uniform Sales Act in the earlier New York rule); Flanigan v. Waterman, (1922) 117 Misc. Rep. 617, 191 N. Y. S. 646 (potatoes—acceptance shown by buyer's acknowledgment to bailee, and to outside third parties, that he had bought the goods); Gaffers-Hinman Coal Co. v. Wessel, (1928) 132 Misc. Rep. 907, 230 N. Y. S. 561 (coke—acceptance shown by a phone conversation while goods in transit). In Gold v. Cross, (City Court N.Y. 1914) 146 N. Y. S. 164 through obvious error the court followed the earlier local precedents on the point, inadvertently overlooking the Uniform Sales Act, which apparently had not been called to the court's attention by counsel in charge of the case.

\textsuperscript{103}A. Sidney Davison Coal Co. v. Empire Brick & Supply Co., (App. Div. 1918) 168 N. Y. S. 534 (coal dust—acceptance of alleged inferior quality goods expressly conditioned on a large deduction in price).

\textsuperscript{104}Ft. Dearborn Coal Co. v. Borderland Coal Sales Co., (C.C.A. 6th Cir. 1923) 7 F. (2d) 441 (coal—acceptance, known to be on assumption of a certain nonexistent quality in the goods held inoperative); Barrett Mfg. Co. v. Ambrosio, (1916) 90 Conn. 192, 96 Atl. 930 (coal tar—buyer's acceptance of the goods induced by mistake caused by seller's false representation). A similar position had been taken under the earlier form of the statute. In Rodgers v. Phillips, (1869) 40 N. Y. 519, the buyer who had accepted a bill of lading for coal shipped aboard a certain vessel and had applied for insurance on the cargo was held not bound by the acceptance, it appearing that at the time of such acceptance the cargo had already been destroyed by the sinking of the vessel.

\textsuperscript{105}Williston, Sales, 2nd ed., sec. 83.
also possible to adduce supporting authority.\textsuperscript{106} Paraphrased in different language, this position would decline to limit the operative effect of acts satisfying the statute by imposing thereon implied conditions to cover cases of mistake. In perspective, the difference between these two opposing viewpoints respecting the imposition of implied conditions is a fresh illustration of divergent attitudes respecting the policy of the statute, the one leading to a broad application of the statute, the other restricting more narrowly the application of the statute to save the enforceability of the particular transaction.

The acceptance relied upon to satisfy the statute of frauds must have been by the buyer himself or by someone having authority to act for the buyer in that respect. Such authority may be proved as in any other application of the law of agency. It seems now well settled that a carrier's mere authority to transport on the buyer's behalf does not as such include an authority to assent on behalf of the buyer that the buyer shall become the owner of the goods.\textsuperscript{107} A little more obscure is the question of whether the seller himself has capacity to act as the buyer's agent for the purpose of accepting the goods. There is no question, apart from the statute of frauds, that the seller may act for the buyer in making an appropriation of the goods passing the prop-

\textsuperscript{106}Townsend v. Hargreaves, (1874) 118 Mass. 325 (receipt of a part of wool sold held to enable seller to enforce the contract for the price of the whole though the rest may have been destroyed by fire before receipt of a part); Vincent v. Germond, (1814) 11 Johns. (N.Y.) 283 (receipt of part of cattle held to render contract enforceable for entire purchase price though some had died in the interval. In this case, however, the buyer knew all the facts at the time he took possession). In Leather Cloth Co. v. Heironomous (1875) 10 Q. B. 140 a letter written after loss of goods to which it related was held a sufficient memorandum. Here, however, the buyer had knowledge of all the facts at the time the letter was written. Supporting this viewpoint is also the closely analogous position that if the memorandum satisfies the statute, the intention with which it was made is immaterial. See below, footnote 155, and accompanying text.

\textsuperscript{107}The reason is aptly stated in 1 Williston, Sales, 2nd ed., sec. 89, as follows: "The agency of the carrier is to receive and carry goods, not to decide whether they conform to the contract or offer." Among recent cases sustaining this position are the following: Speeding v. Griggs, Fuller & Co., (1917) 196 Mich. 571, 162 N. W. 956 (apples); Southern Pines Sales Corp. v. Braddock Lumber Co., (1923) 81 Pa. Super. Ct. 309 (lumber); Dolan Mercantile Co. v. Marcus, 1923) 276 Pa. St. 404, 120 Atl. 396 (sugar); Burlington Grocery Co. v. McGreggs, (1923) 97 Vt. 63, 122 Atl. 479 (apples). Though there were occasional older cases the other way, such as Strong, Whiting & Co. v. Dodds, (1875) 47 Vt. 348, the strong trend of the older authorities was to the same effect. See Atherton v. Newhall, (1877) 123 Mass. 141, 25 Am. Rep. 47 (leather), and Rodgers v. Phillips, (1869) 40 N. Y. 519 (coal).
History to him in performance of a previous contract, the seller's act of appropriation to him having been by the buyer authorized in advance. The rule is usually stated, however, that the seller cannot act as the buyer's agent for the purpose of acceptance under the statute of frauds. The reason, briefly stated, is that if the seller were recognized as having capacity to accept on behalf of the buyer, as well as having capacity to receive on behalf of the buyer, the buyer's statutory protection against feigned claims could in every case be overcome by the mere verbal assertion of the seller himself, thereby rendering the statute substantially nugatory. Accordingly, the seller's mere act of appropriation of the goods to the buyer, even though in conformity with the buyer's previous order, does not satisfy the statute of frauds with respect to acceptance by the buyer.

108 This matter is properly dealt with at length in connection with sec. 19 of the Uniform Sales Act.

109 Williston, Sales, 2nd ed., sec. 81. The cases noted in note 107 above, holding that the seller's delivery of goods to the carrier is not enough necessarily involve this position, as the seller's delivery of goods to the carrier can readily be sufficient as an act of appropriation. The cases cited in note 96 above also bear out this position, since, were the seller's mere appropriation sufficient, no question of the buyer's manifesting assent by the fact of inspection would be material. In Wilson v. Lewiston Mill Co., (1896) 150 N. Y. 314, 44 N. E. 959 the same reasoning is employed in deciding that the seller cannot act as the buyer's agent for making the memorandum of a contract within the statute of frauds. That is a rule of long standing. See Wright v. Dannah, (1809) 2 Camp. 203. There is some confusion on the point in the cases, however, where no intermediate carrier is involved. Thus, it was correctly held in Peck v. Abbott & Fernald Co., (1916) 223 Mass. 423, 111 N. E. 890 that the seller's setting aside of oats for the buyer in accordance with a previous oral contract, but after the buyer's repudiation, was insufficient as acceptance by the buyer within the statute of frauds. In Castle v. Swift, (1918) 132 Md. 631, 104 Atl. 187, however, it was held that the seller's setting aside of eggs for the buyer in accordance with a previous oral contract (denied by the buyer) was enough to constitute acceptance on behalf of the buyer. The court in reaching this position quoted indiscriminately both sec. 48 and sec. 4 of the Uniform Sales Act, inadvertently overlooking the difference between acceptance sufficient for a common law appropriation of the property to the buyer, dealt with in sec. 48, and acceptance sufficient to satisfy the Statute of Frauds, dealt with in sec. 4. The difference between these two is sharply emphasized in Clegg v. Clegg v. Lees, (1924) 32 Pa. Super. Ct. 584 (yarn). In Goodwin v. Mariners Savings Bank, (1923) 99 Conn. 169, 121 Atl. 172 it was held that the buyer of corporate stock under an oral contract could be the seller's agent for accepting in purchasing in the open market and then receiving on his account as buyer a portion of the stock, thereby satisfying the statute as to both acceptance and receipt. While this is distinguishable from Castle v. Swift, (1918) 132 Md. 631, 104 Atl. 187 where the seller was held the buyer's agent for the purpose of acceptance, yet it seems equally at variance with the policy of the statute. Under this application it would seem that the statute affords no protection to alleged sellers, buyers being in position by words alone in every case.
b. What Constitutes Actual Receipt.—Actual receipt by the buyer means acquisition of possession by the buyer with the seller's assent. The borderline questions on its applications are very largely problems on what constitutes possession. The applications have been very numerous but only those that have been litigated under the Uniform Sales Act will be here particularly discussed.

Actual receipt by the buyer in its simplest form occurs when the seller hands over the article to the buyer who takes control. Such cases constantly occur in commercial dealings, especially at retail, but their incidents in this respect are too well understood to lead to litigated controversy. It may happen, however, that the goods are at the time of the transaction in the hands of a third party holding for the seller, such as a warehouseman or other bailee. In that case no physical handing over is required. All that is necessary for the buyer to receive the goods is for the bailee to attorn to the buyer, recognizing him as the party for whom the goods are held. After such attornment by the bailee to the buyer, the bailee's possession, which previously inured to the seller and assured his control over the goods now equally inures to the buyer and assures his control over the goods. The buyer may then be roughly described as being in possession through his bailee. From early times, for the convenience of business, and consistent with the policy of the statute, such attornment by the bailee to the buyer has been regarded as sufficient actual receipt to satisfy the statute of frauds,\textsuperscript{110} a position which is reaffirmed by the cases that have arisen under the Uniform Sales Act.\textsuperscript{111} Where the buyer is already himself in possession as bailee before the oral sale transaction is had, as for instance where a grain elevator man holds grain in storage which he later buys from the depositors who placed it in storage, a similar result is reached. The buyer being already in physical possession of the goods, no handing over to him is practically desirable or possible, but by the agreement of


purchase there is a change in the character of his possession in
that previously he held as bailee for the depositor but after the
agreement he holds possession not as bailee but in his own right as
owner of the goods. 112 Similarly, where the goods are at the
time of the deal in the seller's possession, the parties may because
of their bulk and weight or for other reasons find it convenient
not to make at the moment a physical change of possession. In
that case they might satisfy the statute as to actual receipt by ar-
ranging that the seller is to hold possession of the goods for the
buyer, constituting thus the seller the buyer's bailee. 113 The phys-
ical possession of the goods is not changed, but there is a change
in the character of the possession in that previously the seller held
in his own right as owner, but after the deal he holds as bailee

112 Edan v. Dudfield, (1841) 1 Q. B. 302; Wilson v. Hotchkiss, (1915)
171 Cal. 617, 154 Pac. 1, L. R. A. 1916F 389 (corporate stock previously
pledged to the buyer); Kienesaw Mill & Elevator Co. v. Aufdenkamp,
(1921) 106 Neb. 246, 183 N. W. 294 (wheat already in storage in buyer's
elevator); Snider v. Thrall, (1883) 56 Wis. 675, 14 N. W. 814 (building
structure already in buyer's possession). The same rule is applied in the
cases under the Uniform Sales Act. See Harlan v. Carney, (1922) 219
Mich. 539, 189 N. W. 27 (oil already stored in buyer's storehouse); James
Mack Co., v. Bear River Milling Co., (1924) 63 Utah 565, 227 Pac. 1033,
36 A. L. R. 643 (wheat already stored in buyer's elevator. In some cases
on the point it is insisted that after the oral agreement of purchase the
buyer must somehow manifest the change in the character of the possession.
Dietrick v. Sinnott, (1920) 189 1a. 1002, 179 N. W. 424 (cattle at the
time in hands of buyer's bailee). In the last cited case the discussion in the
opinion, with the authorities there relied upon, readily demonstrates
that the special New York rule is in substance relied on as dictating this
requirement. This requirement is not warranted by the words of the
statute, however, as said by Professor Williston (1 Williston, Sales, 2nd ed.,
sec. 90), and is either not mentioned or is repudiated in the cases first above
cited. In James Mack Co. v. Bear River Milling Co., (1924) 63 Utah 56
227 Pac. 1033, 36 A. L. R. 643, the court points out that even conceding
such requirement, it is satisfied in the case before it.

113 Urbansky v. Kutinsky, (1912) 86 Conn. 22, 84 Atl. 317 (tobacco
left to remain on seller's premises temporarily); Castle v. Swift, (1918)
132 Ind. 631, 104 Atl. 187 (eggs to be kept for buyer in seller's cooler);
Stem v. Crawford, (1919) 133 Md. 579, 105 Atl. 780 (wheat to be kept for
buyer temporarily on grower's premises (dictum). In 1 Williston, Sales,
2nd ed., sec. 91 this position is criticised as opening wide the door to the
perpetration of frauds. While sustaining the view taken by the authorities
as to goods in the buyer's possession already, and as to goods in the hands of
a third party bailee, Professor Williston distinguishes the case where the
goods are left in the seller's possession. The American Law Institute Re-
statement of Contracts for which Professor Williston is the reporter, in
tentative draft, no. 4, sec. 201 (Feb. 20, 1928), adopts the position that
the seller cannot be the agent of the buyer either to accept or to
receive under this provision of the statute. As explained in the Re-
statement's accompanying commentaries, this position is regarded by the
draftsmen as practically desirable. The authorities principally
relied on to support this view apparently are the cases embodying the
New York rule.
for the buyer. In order to establish that the seller is holding as bailee for the buyer and is not holding possession in his own right it is necessary to show that he has waived his seller's lien.\textsuperscript{114}

It will be observed that in all three types of cases just mentioned the actual receipt takes place through an agreement relating to the character of the possession, and does not involve any physical act whatever outside of the making of the agreement itself. It has often been asserted that such holdings go beyond the policy of the statute in that they permit the fact of actual receipt to rest in words alone.\textsuperscript{116} On that ground a special rule was formulated at an early date in New York that there could be no actual receipt sufficient to satisfy the statute short of some unequivocal act beyond the mere words of the agreement.\textsuperscript{116} The words of the statute, however, furnish no direct support for such criticism of the general rule, leaving untouched, as they do, the definition of "actual receipt." The New York rule has also itself been criticised on the merits. The statute of frauds does not attempt to do away with parol evidence altogether, nor to prevent the decision's turning sometimes on parol evidence, and ought not unnecessarily to be so construed as to penalize the parties for adopting the only natural and practically feasible mode of delivery.\textsuperscript{117} On the particular point, however, there being no verbal change involved from the previous statutory language when the Uniform Sales Act was adopted in New York the New York courts have shown a tendency to follow their former precedents as authority under the Uniform Sales Act.\textsuperscript{118}


\textsuperscript{117}The leading case is Shindler v. Houston, (1848) 1 N. Y. 261, 49 Am. Dec. 316. The seller owned a pile of lumber which was lying apart from other lumber on a dock where it had been unloaded from a canal boat. The seller met the buyer at the place where the lumber lay and the parties struck an oral bargain for the lumber. The New York court held the bargain unenforceable, there having been no act manifesting acceptance and receipt. Said the court, (Wright, J.) "When the memorandum is dispensed with, the statute is not satisfied with anything but unequivocal acts of the parties; not mere words that are liable to be misunderstood and misconstrued, and dwell only in the imperfect memory of witnesses."

\textsuperscript{118}Such was the forecast by Professor Bogert, at the time the statute was enacted in New York. Bogert, Sale of Goods in New York
Actual receipt may be found on receipt by a third party properly authorized by the buyer to receive on his behalf. Thus delivery to a third party who has been designated by the buyer to receive as his bailee constitutes actual receipt sufficient to satisfy the statute.\textsuperscript{119} It is properly said, following this analysis, that delivery of the goods to a common carrier to be transported to the buyer in accordance with a previous arrangement is sufficient, the carrier having authority to receive on behalf of the buyer though it has no corresponding authority to accept.\textsuperscript{120} This does not apply, however, if the seller ships the goods to his own order,

\textsuperscript{26} It was so held in Broom v. Joselson, (1924) 211 App. Div. 157, 206 N. Y. S. 841 after deliberate discussion of the question merely as a matter of authority. No attempt was made to discuss its merits. In De Nunzio v. De Nunzio, (1916) 90 Conn. 342, 97 Atl. 323 while unnecessary to the decision, the court also repeated some of the old phrases borrowed from the special New York rule.


\textsuperscript{120} Tonkelson v. Malis, (1922) 119 Misc. Rep. 717, 197 N. Y. S. 309 (leather); Gaffers-Hinman Coal Co. v. Wessel, (1928) 132 Misc. Rep. 907, 230 N. Y. S. 561 (cement sacks). There is also on the point some contrary authority, going on the basis that the carrier has no authority to receive on behalf of the buyer within the meaning of the statute of frauds, though why the carrier should not have such authority, admitted in the case of other bailees, is not clear. Chicago Metal Refining Co. v. Jerome Trading Co., (1920) 218 Ill. App. 333 (cement sacks); Roberts, Johnson & Rand v. Mackowski, (1920) 171 Wis. 420, 177 N. W. 509 (shoes). In Dolan Mercantile Co. v. Marcus, (1923) 276 Pa. St. 404, 120 Atl. 396 it was asserted that delivery of goods to a carrier, consigned to the buyer was insufficient as actual receipt by the buyer, the reason being stated that the carrier could not be regarded as holding absolutely for the buyer so long as the seller's right of stoppage in transit in the event of the buyer's insolvency remained. The soundness of this position is open to great question. Tending to show its unsoundness as an original question is the following quotation, applied by its author to the question of the seller's lien: "The fact that at the expiration of the period of credit the lien will revive if the price has not been paid seems not to preclude actual receipt if the agency of the seller for that purpose is once admitted to be possible. In the meantime the right of the buyer to demand the goods has been absolute, and actual receipt, for however short a period, is enough." I Williston, Sales, 2nd ed., Sec. 91, but cf. Sec. 89. It may be remarked that such holdings as that in Dolan Mercantile Co. v. Marcus, (1923) 276 Pa. St. 404, 120 Atl. 396 manifest so far as they go a tendency to apply the statute broadly, and to narrow the exceptions of satisfaction of the statute which save the enforceability of the particular transaction in question. In Ft. Dearborn Coal Co. v. Borderland Coal Sales Co., (C.C.A. 6th Cir. 1925) 7 F. (2nd) 441 delivery of coal to the carrier, consigned to a third party with whom the seller had had no dealings but to whom the buyer expected to resell if the quality was satisfactory, was held not to constitute actual receipt within the statute of frauds.
or if he ships them C. O. D., thereby effectively preserving his seller's lien. A recent case has pressed this limitation so far as to assert that in no case where the seller's right of stoppage in transitu on the buyer's supervening insolvency is not negatived can the carrier as such be regarded as having authority to receive on behalf of the buyer.

Receipt by the buyer of an order bill of lading or other negotiable document of title to the goods satisfies the requirements of actual receipt within the meaning of the statute of frauds. The bailee of the goods in such cases has by the issue of the documents in that form as it were attorned in advance to the holder of the documents whoever he may be. Other symbolic receipt, while less familiar, may also be found sufficient. The typical case of the receipt of a key to the room or building where the goods are stored readily illustrates the point. Other instances of varying detail may arise to which the same general analysis is applicable, that it shows the withdrawal by the 'seller of such actual control as practically exists and its assumption by the buyer.

121 Josephson v. Weintraub, (1915) 78 Pa. Super. Ct. 14 (goods consigned to seller at buyer's destination). Cases where the shipment is under a bill of lading to the seller's order are equally clear that the buyer acquires thereby no control over possession, though the point apparently has not been raised on the question of the statute of frauds.

122 The present writer has not noticed any case where such shipment was even claimed to have constituted actual receipt by the buyer.

123 Dolan Mercantile Co. v. Marcus, (1923) 276 Pa. St. 404, 120 Atl. 396. As to the correctness of this position, see comment on this case in note 120 above.

124 In 1 Williston, Sales, 2nd ed., Sec. 93, this position is asserted confidently as a matter of principle and the available fragmentary authorities for it cited. No case raising the question seems to have arisen under the Uniform Sales Act. In the American Law Institute's Restatement of Contracts, tentative draft no. 4 (Feb. 20, 1928), Sec. 200 this position is squarely adopted.


126 In Walden v. Murdock, (1863) 23 Cal. 540, 83 Am. Dec. 135 cattle roaming the range were collected and branded with purchaser's brand, and again released to roam the range. This was held to satisfy the statutory requirements of a continuous change of possession, necessary to validate the sale as against the seller's creditors. Negative illustrations are equally significant. See W. F. Hall Printing Co. v. Wells W. & F. Co. & Cromwell Jones, (1926) 241 Ill. App. 146 (delivery of an invoice which was not a document of title insufficient); Dodd v. Stewart, (1923) 276 Pa. St. 225, 120 Atl. 121 (buyer's merely securing some plans for installing new engines in a boat held no receipt of the boat by the buyer).
Receipt requires more than a mere giving or taking of possession. The change of possession must have been with the assent of parties. Thus it has been consistently held that a mere forcible seizure of the goods by the buyer is not sufficient to satisfy the statute of frauds. Similarly, an attempted delivery by the seller which the buyer refuses to accept does not constitute receipt, even though the goods may be left in a position where they are under the buyer's control.

**SEC. 8. SATISFACTION OF THE STATUTE BY EARNEST OR PART PAYMENT**

The second way of satisfying the statute, according to its provisions, is satisfaction by the giving of earnest or part payment. Where the facts showing payment, or part payment, are clear it is readily found that the statute has been satisfied. Since the statute requires payment, however, a mere tender which is refused is not sufficient. Where there have been several transactions between the parties it may become a closely contested question of fact for the jury to which contract an admitted payment was applicable. Under the Uniform Sales Act, the part payment need not be made at the same time that the contract is made. The payment is sufficient whether made in money, in goods, or in services.

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130 Edgerton v. Hodge, (1869) 41 Vt. 676 (cheese).
131 Truesdell v. Michigan R. Co., (1923) 225 Mich. 374, 196 N. W. 334 (railroad ties); Pucci v. Krauter, (App. Div. 1919) 173 N. Y. S. 405 (oil). In King v. Farmers Grain Co., (1922) 194 Ia. 979, 188 N. W. 720 the court on appeal reversed the case after a jury finding on the point. There was a vigorous dissent which appeals to the present writer as being unquestionably correct on the facts as reported.
132 Earlier local statutes sometimes varied on this point. Where the Uniform Sales Act has been adopted any varying earlier rule on this point has been changed. Meyers v. Kaufman, (1920) 110 Misc. Rep. 321, 180 N. Y. S. 403; Gordon v. Witty, (1921) 198 App. Div. 333, 190 N. Y. S. 381.
133 King v. Farmers Grain Co., (1922) 194 Iowa 979, 188 N. W.
The distinction formerly observed between giving something in earnest and making part payment seems no longer to have any practical importance, present day commercial practice generally looking to part payment and considering any transfer by the buyer to the seller on account of the bargain as part payment. The placing of forfeit money with a third party to be forfeited on the buyer's failure to perform, not being part payment, accordingly does not satisfy the statute. Recent cases have also held that the buyer's furnishing the seller with a gratuity as an inducement to encourage him to make the deal does not satisfy the statute where it is not given and received as part payment under the contract. Similarly, work done by the buyer to put himself in position to be able to carry out the contract is not work done for the seller under the contract and is therefore insufficient to satisfy the statute as to part payment. Cases of this sort obviously can present extremely close questions of fact as to whether what is done by the buyer was done for the seller under the contract, and thereby constitutes part payment, or was done by the buyer on his own account. The bearing of the given facts on the


134 Shadbolt & Boyd Iron Co. v. Long, (1920) 172 Wisc. 591, 179 N. W. 785 (payment in property on account of subscription for corporate stock). The Uniform Sales Act, Sec. 9 (2) expressly provides that the price may be made payable in any personal property.


136 Williston, Sales, 2nd ed., Sec. 97. In Nelson v. Landesman, (1922) 118 Misc. Rep. 832, 193 N. Y. S. 574 the seller orally sold a store business with a stock of merchandise at the price of $14,000.00, the seller receiving from the buyer at the time a "deposit" of $500.00. The buyer later sought to avoid the contract, contending that the money had not been paid on account of the price but was merely a deposit to insure good faith. The court treated it as part payment.

137 Howe v. Hayward, (1871) 108 Mass. 54; Jennings & Silvey v. Dunham, (1895) 60 Mo. App. 635.

138 Wenger v. Grummel, (1920) 136 Md. 80, 110 Atl. 206 (tomato seeds or plants furnished to seller of tomato crop by contract buyer as an accommodation).

139 Manufacturers' Light & Heat Co. v. Lamp, (1921) 269 Pa. St. 517, 112 Atl. 679 (buyer of gas expending labor and materials in installation of pipe line to reach the region of the producing wells).

140 In Hudnut v. Weir, (1884) 100 Ind. 501 the case as first pleaded showed an oral contract to sell five thousand bushels of corn at fifty cents per bushel, the buyer to furnish sacks in which seller was to make delivery. The sacks were furnished, but the buyer later refused delivery and when sued set up the statute of frauds. The court on demurrer held there had been no part payment by the buyer to the
The giving of the buyer's note or check for the price of the goods has traditionally been held not sufficient to satisfy the statute as to payment, such being regarded as conditional payment only, unless shown to have been given and accepted in absolute agreement by the furnishing of the sacks. The plaintiff thereafter so amended his pleading as to allege that a part of the price bargained for was that the buyer should furnish sacks. On demurrer admitting the facts as pleaded the court (1888) 115 Ind. 525, 18 N. E. 24 held the facts as pleaded and admitted by the demurrer showed a good cause of action, there having been part payment. In the opinion, however, the court suggests that "It is, perhaps, difficult to conceive how the averment can be established by evidence, but with that question we are not now concerned, for it is admitted to be true."

The point is well shown in contrasting the prevailing and the dissenting opinions in DeWaal v. Jamison, (1917) 176 App. Div. 756, 163 N. Y. S. 1045. In that case plaintiff and defendant were both engaged in the sugar trade in New York City. Plaintiff made an oral deal with defendant whereby plaintiff was to supply to defendant on Aug. 3rd 10,000 bags of sugar at the market rate that day, and that defendant should sell to plaintiff at any time within ten days an equal amount of sugar at the same price. Plaintiff supplied the sugar and defendant paid for it. When plaintiff later demanded sugar as agreed defendant refused, and when sued set up the statute of frauds. The majority of the court sustained the defense, treating the transaction as involving two contracts, performance of one not being part payment under the other. The dissenting opinion treated the case as presenting but one contract with separate clauses for successive performances. Said the dissenting judge (Dowling, J. at p. 1049), "The plaintiff also showed that the transaction in question was not unique or extraordinary in the sugar business, but one having a definite trade existence, and known as 'switching' whereby a party having sugar ready for delivery is willing to exchange it for sugar to arrive later: the party with whom he contracts having immediate use for the sugar, and he himself desiring to use the same amount later. By this practice those who need the goods at once are able to get them at a fixed price, mutually agreeable, without going into the market, and the return of a similar amount of the goods at the same price is insured." See, however, for some broader considerations of policy tending to support the majority, the observations on this case in note 83 above.

141 Illinois-Indiana Fair Ass'n v. Phillips, (1927) 328 Ill. 368, 159 N. E. 815 (note dishonored at maturity); Hessburg v. Welsh (App. Div. 1914) 147 N. Y. S. 44 (buyer stopping payment on check before it was cashed); Gay v. Sundquist, (1919) 42 S. D. 327, 175 N. W. 190 (seller destroying buyer's check without cashing it, on repenting of the oral bargain). In Michelin Tire Co. v. Williams, (1928) 125 Or. 689, 268 Pac. 56 the buyer's delivery to the seller of a third party's guaranty of payment was held not to render the oral contract enforceable, delivery of a promise to pay as distinguished from a present discharge of existing obligation being said not to constitute part payment. Other authorities to the same effect are cited in 1 Williston, Sales 2nd ed., Sec. 98.
In recent times, however, the accuracy as well as the expediency of this technical interpretation of the term "payment" in connection with the application of the statute has been sharply questioned. Certainly a check or note, whether taken in conditional or in absolute payment, furnishes objective external evidence that there was a transaction thereby meeting the mischief at which these sections of the statute was aimed. The minute inquiry as to whether it was a conditional or an absolute payment, an inquiry in most instances arising only as an afterthought and not at the time present to the conscious contemplation of the parties, is an obscure technical inquiry whose determining factors must all rest in mere words. It hardly seems wise as an original question to fix upon that point of demarcation in drawing up a rule to prevent the perpetration of fraud, and there is no evidence that any such distinction was intended by the words of the statute. Accordingly, some of the late cases have argued that the term "payment" as used by the statute must be understood in its loose popular sense, in which case payment by note or check manifestly is sufficient. More technical in its analysis but reaching the same result in sustaining the sufficiency of such payment is the position adopted on the point in the American Law Institute Restatement on Contracts. It is there asserted in substance that a present payment results on the giving of a note or check, in that the original claim is suspended in the interval, the negotiable promise or order being taken in its stead, that pay-

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ment being subject, however, to the condition subsequent that the note or check must not be dishonored on due presentation. Where the buyer does not give his own check or note for the price but transfers to the seller, who accepts it in payment and not merely as collateral, the negotiable note of a third party, it seems clear that the statute has been satisfied. The parties have agreed to it as payment in fact, and there is also present the external objective evidence of the transfer of the negotiable paper. The same position is also taken where the buyer in payment of the goods makes an assignment to the seller of a parol chose in action which he holds against a third party, unless in the jurisdiction the special New York rule is followed which requires that satisfaction of the statute, apart from a memorandum, must be by some unequivocal act and cannot take place by mere words alone.

Where the buyer does not give in payment for the goods his claim against a third party, but orally gives the seller a discharge of a claim owing to the buyer from the seller himself, there is great difficulty in accurately applying the law with respect to part payment under the statute of frauds. All the authorities seem to agree that if the facts are that the transaction did not amount to a present discharge of the debt but was rather merely a promise later to discharge it on receiving delivery of the goods there has been no payment as yet and the statute is not satisfied. If the transaction, properly interpreted, amounted to a present discharge of the seller's debt to the buyer, as the price of the goods bargained for, some authorities applying the statute literally hold that the statute is satisfied, there being in fact payment and the statute making no exception as to its form. The majority of

148Combs v. Bateman, (1850) 10 Barb. (N.Y.) 573 (dictum); 1 Mechem, Sales, sec. 414.

149American Law Institute Restatement of Contracts (tentative draft no. 4, Feb. 20, 1928) sec. 202, illustration (b). There seem to be few if any cases where the particular point has been directly adjudicated. In Cotterill v. Stevens, (1860) 10 Wis. 366 a novation arranged by the buyer's assuming the seller's debt to a third party, the third party assenting, was held to constitute payment within the meaning of the statute of frauds.

150The leading case is Walker v. Nussey, (1847) 16 M. & W. 302. A recent case in which the facts were thus interpreted is Brewster Loud Lumber Co. v. General Builder's Supply Co., (1924) 228 Mich. 559, 200 N. W. 283 where an oral bargain that the seller in a former deal should take back certain lath and cancel the debt due by the buyer for it was held not enforceable.

151There is a dictum to this effect in Walker v. Nussey, (1847)
reported cases, however, following on the point substantially the New York rule, have asserted either by decision or dictum that even though a present discharge of the seller's antecedent debt to the buyer were intended, such discharge must be evidenced by some receipt, memorandum, or book entry, and cannot for satisfying the statute of frauds be rested wholly in mere words.¹⁵²

SEC. 9. SATISFACTION OF THE STATUTE BY WRITTEN MEMORANDUM

The third way in which the statute of frauds may be satisfied with respect to transactions involving goods, according to its own provisions, is by "some note or memorandum in writing of the contract or sale...signed by the party to be charged or his agent in that behalf."¹⁵³ This is the most familiar requirement found in the statute. It is this requirement that applies in by far the largest group of cases, the cases where there has been no partial performance either by acceptance and receipt or by part payment. Innumerable controversies over the application of this requirement have occupied the attention of courts in years past. Changes continue to be made from time to time in the manner of doing business, in the attempt to adjust business practices to the varied needs and opportunities occasioned by changing times and conditions. These changes in business practices in turn frequently give rise to novel questions with regard to the application of the statute of frauds. Accordingly, in the current litigation on the topic, while old established points may at times recur, there is much relatively new material growing out of recently developed business practices not directly touched in the older cases. In the present discussion, while reference is made to leading cases, particular attention is given to the current litigation over the application of the provisions of the statute of frauds as formulated in the Uniform Sales Act.

¹⁶ M. & W. 302. For recent cases supporting this position, see Obear-Nester Glass Co. v. Lax & Shaw, (C.C.A. 8th Cir. 1926) 11 F. (2d) 240; Wheeler v. Barnes, (1923) 100 Conn. 57, 122 Atl. 917; Selznick v. Holmes Pittsburgh Automobile Co., (1922) 275 Pa. St. 1, 118 Atl. 553 (buyer of an automobile at the time in possession of a third party garageman for repairs taking it in discharge of a debt due him from the seller).

¹⁵² Scott v. Mundy, (1922) 193 Iowa 1360, 188 N. W. 972, 23 A. L. R. 460 (citing most of the available authorities); Milos v. Covacevich, (1901) 40 Or. 239, 66 Pac. 914.

¹⁵³ Uniform Sales Act, sec. 4 (1).
It is elementary under the wording of the statute adopted in the Uniform Sales Act that the memorandum need not be given at the time of the transaction. A memorandum given at a later time is sufficient.\(^1\)\(^{154}\) Neither is it necessary that the memorandum be given with the intention of furnishing the writing required to make the agreement enforceable. So long as the memorandum which is made satisfies the requirements set out in the statute it is immaterial with what intention it was made.\(^1\)\(^{155}\)

a. Form of the Memorandum—Incorporation by Reference—Denials.—No particular form of memorandum is required under the statute. A formal written contract may serve as a memorandum,\(^1\)\(^{156}\) but an informal memorandum showing the terms of an oral contract, if properly signed by the party to be charged, is equally effective to make the contract enforceable.\(^1\)\(^{157}\) The memorandum may thus be found in the form of invoices,\(^1\)\(^{158}\) order blanks,\(^1\)\(^{159}\) letters,\(^1\)\(^{160}\) telegrams,\(^1\)\(^{161}\) or in whatever other particular form it happens to suit the convenience of parties to express the terms in signed writings.\(^1\)\(^{162}\)

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\(^{155}\) Baster v. Lustberg, (1923) 205 App. Div. 673, 200 N. Y. S. 125 (cotton cloth). The cases holding that a written offer, signed by the offeror defendant is a sufficient memorandum on oral proof of its acceptance by plaintiff bear out the same position. See authorities in note 180 below.

\(^{156}\) Williston, Sales, 2nd ed., sec. 101.


\(^{158}\) W. F. Hall Printing Co. v. Wells W. & F. Co. & Cromwell Jones, (1926) 241 Ill. App. 146 (holding the invoice insufficient in the instance, however, for lack of setting out the parties and terms).


\(^{162}\) In Drury v. Young, (1882) 58 Md. 546, 42 Am. Rep. 343 a
The memorandum may consist of several writings only the last of which is signed so long as their connection with each other to show the entire contract appears. This connection may appear by direct physical attachment of the papers, by direct words of reference in the signed paper incorporating therein the unsigned paper, or by such internal evidence from the contents of the papers as to lead to the necessary inference that they are connected as component parts of one written memorandum of the transaction signed by the party to be charged.

Parol evidence memorandum made by defendant's clerk and filed in his safe, never delivered to plaintiff, was held sufficient. In Gravenhorst v. Turner, (1926) 215 App. Div. 617, 213 N. Y. S. 468 a signed entry in a broker's book was held sufficient. In M. Lowenstein & Sons Inc. v. Noon Bag Co., (1924) 111 Or. 421, 226 Pac. 222 the entry in the broker's book was held insufficient only for lack of the signature. In 1 Wiliston, Sales, 2nd ed., sec. 101, is compiled a large array of common law authorities in detail holding good as a memorandum a great variety of papers and documents.

162 Tallman v. Franklin, (1856) 14 N. Y. 584 (a land deal papers pinned together); Jones Brothers v. Joyner, (1900) 82 L. T. R. 768 (order for hops, signed by buyer in seller's order book, seller's name not appearing on the signed sheet but appearing on the cover of the book).


165 Straesser-Arnold Co. v. Franklin Sugar Refining Co., (C.C.A. 7th Cir. 1925) 8 F. (2d) 601 (sugar); Howell v. Witman-Schwartz Corporation, (C.C.A. 3rd Cir. 1925) 7 F. (2d) 513 (sugar order given orally to broker who filled it out in writing and sent it to seller, recognized in buyer's letters asking cancellation on "this car of sugar" and directing that no shipments be made till further advised); Lerned v. Wannemacher, (1864) 9 Allen (Mass.) 412 (coal); Kline v. Minnesota Cent. Creameries, (1923) 156 Minn. 6, 193 N. W. 958 (series of letters and telegrams containing a common identifying number of the car of coal shipped); Atlas Shoe Co. v. Lewis, (1922) 202 App. Div. 244, 195 N. Y. S. 618 (buyer's letter, identifying salesman's order by the contents); Tilton & Keeler v. Bachrach, (1923) 121 Misc. Rep. 708, 202 N. Y. S. 506, (buyer's letter referring to contents of seller's confirmation of order held sufficient though misstating the date for delivery); Fredonia Seed Co. v. Nathan & Bro., (1924) 83 Pa. Super. Ct. 374 (several sheets constituting one order, consecutively numbered, and correctly totalled at the end, though without individual page totals
is said not to be admissible to supply the terms of reference between several papers, where there is nothing else to connect them, but parol evidence may be admissible with respect to circumstances of delivery and in explanation of terms in the writings which, when their application is thus explained, are seen to constitute words of reference. The same may now be said for terms which when thus explained furnish internal evidence in the writings themselves that they are connected with each other, although it is very difficult in this matter to lay down any exact rule as to how definite such internal evidence must be.

carried over from page to page); Mead v. Leo Sheep Co., (1925) 32 Wyo. 313, 232 Pac. 511 (exchange of several signed letters, their connection shown by coincidences as to names, dates, references to subject matter, and period of time of the contract).


Delaware Mills v. Carpenter Bros., (1922) 200 App. Div. 324, 193 N. Y. S. 201, affirmed in (1923) 235 N. Y. 537, 139 N. E. 725 (stock feed). In Elmore v. Busseno, (1916) 175 App. Div. 233, 161 N. Y. S. 533 it was held that defendant's letter referring in general terms to "a future order standing with you" could not be applied as a reference to a confirmation of the oral order which plaintiff had prepared but which it did not appear had been sent to the defendant or received by him.


In Davis v. Arnold, (1929) 267 Mass. 103, 165 N. E. 885 a stock broker's statement of account, showing the amount due, which included the price of stock sold, was held a sufficient reference when signed by buyer as being a correct statement of amount.

"We exclude the writing that refers us to spoken words of promise. We admit the one that bids us ascertain a place or a relation by comparison of the description with some 'manifest, external, and continuing fact' . . . . The statute must not be pressed to the
Letters purporting to cancel an oral contract, if stating its terms either directly or through incorporation of other writings containing the terms, themselves supply the necessary written memorandum to make the contract enforceable. The same is true of letters in terms repudiating the obligation of the contract, if the existence of the contract is recognized therein. Correspondence denying the existence of the contract claimed, however, furnishes no written and signed admission of its existence and therefore is usually held not to be sufficient to satisfy the statute. A milder case of the same sort is found in mutual extreme of a literal and rigid logic. Some compromise is inevitable, if words are to fulfill their function as symbols of things and of ideas. How many identifying tokens we are to exact, the reason and common sense of the situation must tell us. 'What, then, is a sufficient description in writing? No one can say beforehand... You cannot have a description in writing that will shut out all controversy, even with the help of a map... The memorandum exacted by the statute does not have to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion.' Cardozo, J. in Marks v. Cowdin, (1919) 226 N. Y. 138, 144, 145, 123 N. E. 139, 141.

177Straesser-Arnold Co. v. Franklin Sugar Refining Co., (C.C 7th Cir. 1925) 8 F. (2d) 601 (sugar); Mayer v. Hirsch, (1918) 212 Ill. App. 441; Kahn v. Carl Schoen Silk Corporation, (1925) 147 Md. 516, 128 Atl. 359, 44 A. L. R. 285 (silk dress goods); Spiegel v. Lowenstein, (1914) 162 App. Div. 443, 147 N. Y. S. 655 (cancelling letter and telegram, acknowledging existence of the contract, followed later by letter referring to its terms but denying its existence for lack of agent's authority); Willis v. Imperial Underwear Co. (App. Div. 1916) 159 N. Y. S. 729; Wiarda v. Independent Chemical Co., (App. Div. 1916) 162 N. Y. S. 158; Atlas Shoe Co. v. Lewis, (1922) 202 App. Div. 244, 195 N. Y. S. 618 (cancellation because of delay by carrier in making delivery). In Schwarzenbach v. Schwartz, (App. Div. 1922) 193 N. Y. S. 573 the buyer gave an oral order for goods. The seller sent a written confirmation which he asked the buyer to sign. The buyer returned the written confirmation unsigned and requested cancellation as he found he could not use the goods. The court held no sufficient memorandum was made out, the buyer having given no written and signed recognition of the seller's written confirmation. If the request for cancellation be construed as applying to the oral order the case can be supported as consistent with the other authorities on the point. If it be regarded as applying to the seller's written confirmation it is hard to see how there can be said not to be recognition of it.


179Ebling Brewing Co. v. Cereal Products Co., (C.C.A. 2nd Cir. 1925) 6 F. (2d) 994 (malt); Ft. Dearborn Coal Co. v. Borderland Coal Sales Co., (C.C.A. 6th Cir. 1925) 7 F. (2d) 441 (coal); Schmoll Fils & Co. v. Wheeler, (1922) 242 Mass. 464, 136 N. E. 164 (dictum); Franklin Sugar Refining Co. v. John, (1924) 279 Pa. St. 104, 123 Atl. 685 (sugar). In Upton Mill, etc., Co. v. Baldwin Flour Mills, (1920) 147 Minn. 205, 179 N. W. 904 the purported seller in his letter, re-
correspondence which does not agree as to the terms of the contract claimed, each party setting out different terms. In such cases any words of reference to the other's letters, etc., obviously indicate no admission that the terms there set out are recognized as correct. Where the available memoranda are conflicting it is a question of fact which, if any, accurately states the oral contract which was entered into by the parties.

b. Contents of Memorandum.—To satisfy the statute of frauds, the memorandum must contain the essential terms of the contract or sale. Where the memoranda in the form of letters, etc., merely show that preliminary negotiation by the parties did not result in a completed agreement, it is very clear that the statute of frauds is not satisfied for the very good reason that no contract or sale is shown. The memorandum must conform to the contract actually made, or it is not a memorandum of the

ferring to buyer's memorandum of terms, denied his agent's authority to enter into such contract and refused to confirm. The court held there was no sufficient memorandum signed by the party and admitting the contract. This case may be compared with the case of Spiegel v. Lowenstein, (1914) 162 App. Div. 443, 147 N. Y. S. 655 where the seller first sent telegram and letter cancelling the contract, entered into by his agent over the telephone because he found himself unable to supply the goods, but not stating the terms, followed later by a letter referring to the terms, and to the earlier correspondence and now denying the existence of a contract on the asserted ground that his agent had no authority to make it. The court held the memorandum sufficient.


contract which the parties made. Instances are frequent where the signed writing at hand is held insufficient as a memorandum for lack of definiteness where it is apparent therefrom that the parties had some sort of deal but its terms are not set out nor adequate reference made to other papers where they are set out.

On the other hand, it is usually held that if the memorandum sets out adequately the terms of the defendant's promise or transfer and is signed by him it is sufficient although the consideration for such promise or transfer, if already executed, is not set out.


179 In Hanson v. Marsh, (1888) 40 Minn. 1, 40 N. W. 841 a memorandum not reciting the price which the plaintiff was to pay was held insufficient, the payment agreed upon not being actually made but remaining unperformed. In Fredenburg v. Horn, (1923) 108 Or. 672, 218 Pac. 939, 30 A. L. R. 1153 a memorandum was held sufficient where the writing evidenced the transfer of cattle, the fact being orally proved that the transfer was in payment of services already rendered to the transferee. There is some conflict on the point. The authorities are compiled in 1 Williston, Sales, 2nd ed., sec. 102 a. The matter is discussed elaborately on its merits in 1 Williston, Sales, 2nd ed. sec. 102b, from which is here quoted the following: "Even the word 'promise' certainly includes in its meaning not simply a statement of the performance which the promisor was to render, but of the conditions on which he was to render such performance. . . . It is therefore fair to construe a provision that a promise shall not be enforceable without a written memorandum as requiring the memorandum to contain a statement of all conditions, implied as well as express, qualifying the promise. The result of such a rule will be that generally executory performance due from the plaintiff as well as that due from the defendant must be stated in the memorandum: not as consideration, however, but as condition. . . . Not only is executed consideration no part of a 'promise' but it seems that such consideration is not part of a 'contract'
If the memorandum sets out adequately the terms to which the defendant binds himself by the contract it is said to be immaterial that the memorandum itself does not set out the acceptance by the other party by which the transaction became a binding contract. Accordingly the memorandum may consist of a signed writing setting out the terms of the defendant's offer which was orally accepted by the plaintiff. The written offer, unaccepted, however, is insufficient, not in that case evidencing the terms of a contract. Where the written offer is made by the plaintiff, however, an oral acceptance by the defendant does not render it enforceable against him, for lack of being signed by the party to be charged.

The memorandum is insufficient if it does not show who are the parties. It is also frequently held that though the memorandum or 'agreement.' . . . The executory performance which will be due from each party must be stated in the memorandum, . . . so much of the bargain as has been fully executed need not be stated. This result is supported by the weight of authority in the United States. . . . It seems, too, that this result is practically the most desirable,'
The application of these rules, however, is greatly qualified by the position that if parol evidence of the circumstances and trade usages under which the contract was entered into makes clear the meaning of its terms the memorandum is sufficient. Thus where both parties sign a memorandum reciting the sale of a specific house, evidence of who was the owner of the house readily renders clear which party is seller and which is buyer. This position has been applied, too, where the deal was not one for specific goods. Thus evidence that one party was a flour broker and that the other was a baker has been held persuasive to indicate which party was seller and which was buyer under a written memorandum reciting an executory contract for the sale of flour. This analogy was probably carried beyond what the authorities relied on would justify in a recent case wherein a written memorandum signed by both parties recited a contract to sell furs. The court on appeal held the memorandum sufficient, though it did not recite who was seller and who was buyer, and though both were fur dealers occupying adjacent premises, the external circumstances thus shedding no light on the question of which party was buyer and which was seller.

It is necessary, similarly, that the price term in the bargain to which the defendant binds himself be indicated in the memorandum. Numerous cases have held that the memorandum must definitely indicate the price term upon which the parties agreed.

appears in the memorandum in the form of a fictitious name adopted for the occasion, however, it may be shown by parol, as in other cases of names the application of which is not clear, to whom the name that is used refers. Bibb v. Allen, (1893) 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819 (cotton).


Here, too, however, evidence of trade usage with reference to which the bargain was made may render clear the meaning of the terms used in the memorandum, although it would not be apparent to persons who are without familiarity with such trade usages. There are somewhat similar decisions with reference to the necessity of reciting in the memorandum what the parties agreed upon regarding requirements of delivery, and regarding the property involved in the deal, and regarding other essential terms of the bargain. Here, too, cases are not lacking where


Franklin Sugar Refining Co. v. Wm. D. Mullen Co., (C.C. 3rd Cir. 1926) 12 F. (2) 885 (sugar). The sufficiency of a price notation of "basis 22 50," as explained by usages in the sugar trade invoking an existing standard trade differential for determining the exact price on various grades and packages of sugar has been upheld, after much controversy, in the following cases: Am. Sugar Refining Co. v. Colvin Atwell Co., (D.C. Pa. 1923) 286 Fed. 685; Franklin Sugar Refining Co. v. Egerton, (C.C.A. 4th Cir. 1923) 288 Fed. 698; Howell v. Witman-Schwartz Corporation, (C.C.A. 3rd Cir. 1925) 7 F. (2d) 513; Milliken-Tomlinson Co. v. Am. Sugar Refining Co., (C.C.A. 1st Cir. 1925) 9 F. (2d) 809; Franklin Sugar Refining Co. v. Lipowicz, (1927) 220 App. Dy. 160, 221 N. Y. S. 11; Franklin Sugar Refining Co. v. John, (1924) 279 Pa. St. 104, 123 Atl. 685. There is language intimating the contrary in Franklin Sugar Refining Co. v. Howell, (1922) 274 Pa. St. 190, 118 Atl. 109, and in Howell v. Elk Hill Butter Co., (D.C. Pa. 1923) 294 Fed. 539. These cases have, however, been distinguished in some of the later cases just cited above on the ground that in these cases there was no sufficient allegation and proof of the trade meaning relied on.


it is held that the terms of the memorandum, though at first sight unintelligible on such points, may be held sufficient if so explained by parol evidence of the circumstances and business usages with reference to which the terms were used as to render their meaning clear. A trade custom to waive the requirements of the statute

112 Atl. 679 (memorandum insufficient for failing to include time during which contract for supply of gas from well was to run). The quotation given at note 170 above is also applicable to the discussion at this point. 193 Howell v. Witman-Schwartz Corporation, (C.C.A. 3rd Cir. 1925) 7 F. (2d) 513 (brief notations in memorandum, explainable by usages in the sugar trade); Strasser-Arnold Co. v. Franklin Sugar Refining Co., (C.C.A. 7th Cir. 1925) 8 F. (2d) 601 (technical trade terms used in memorandum explainable by usages in sugar trade); Franklin Sugar Refining Co. v. Wm. D. Mullen Co., (C.C.A. 3rd Cir. 1926) 12 F. (2d) 885 (memorandum in the form of a few notations, not self-explanatory, but rendered clear in light of usages in the sugar trade); Bartlett-Heard Land & Cattle Co. v. Harris, (1925) 28 Ariz. 497, 238 Pac. 327 (“the heifers you inspected” held sufficient description though parol testimony necessary to attach the identifying marks to the proper goods); Brewer v. Horst & Lachmun Co., (1900) 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240 (numerical figure used in telegram to describe property purchased explainable); Falletti v. Carrano, (1918) 92 Conn. 636, 103 Atl. 753 (flour) (“to be taken from car” explainable); New England Dressed Meat & Wool Co. v. Standard Worsted Co., (1896) 165 Mass. 328, 43 N. E. 112 (wool); Maurin v. Lyon, (1897) 60 Minn. 257, 72 N. W. 72 (brief notations in memorandum explainable by usages in the grain trade); Spiegel v. Lowenstein, (1914) 162 App. Div. 443, 147 N. Y. S. 655 (“usual terms and conditions” may be explained by parol); Eising v. American Alcohol Co., (App. Div. 1918) 168 N. Y. S. 682 (loose use of terms not fatal where meaning clear when interpreted in light of business usage); Stausebach v. Andubon Paper Stock Co., (1919) 108 Misc. Rep. 548, 177 N. Y. S. 893 (ambiguous language in memorandum explained through practical construction by conduct of the parties); Le Roy Silk Mills Inc. v. Majestic Shirt Co. Inc., (1924) 209 App. Div. 399, 204 N. Y. S. 528 (trade meaning of “piece” in yardage); Samuel Strauss & Co. v. Katz, (1924) 210 App. Div. 405, 206 N. Y. S. 246 (trade meaning of “piece,” in yardage to show quantity); Northeastern Paper Co. v. Concord Paper Co., (1925) 214 App. Div. 537, 212 N. Y. S. 318 (“all . . . in the warehouse” held sufficient description); Miles v. Vermont Fruit Co., (1924) 98 Vt. 1, 124 Atl. 559 (technical terms explainable—also silence on point of shipment not fatal, in light of established practice on the point between parties); Washington Dehydrated Food Co. v. Triton Co., (1929) 151 Wash. 613, 276 Pac. 562 (parol evidence held admissible to explain the trade meaning and identify the application of terms expressed in the writing); Hoberg v. McNevin, (1919) 169 Wis. 486, 173 N. W. 221 (surrounding facts making clear the terms as to quantity of shares of stock contracted for). For a case contrasting with the cases just mentioned, and applying the rule that the terms of the memorandum could not be added to or changed by parol testimony, see C. Noel Legh & Co. v. Stitzinger & Co., (D.C. Pa. 1922) 281 Fed. 1015. The difference between that and explaining the trade meaning of terms by parol testimony can of course become a very close question of degree.
is, however, inoperative to change the law laid down by the statute.\(^{194}\)

c. Signature to the Memorandum.—As the statute requires the memorandum to be signed by the party to be charged, an unsigned memorandum is insufficient to satisfy the statute\(^{195}\) even though made out by the defendant who is sought to be charged in the action.\(^{196}\) Signature by the party to be charged in the action is enough even though the memorandum is not signed by the other party.\(^{197}\) Under the language of the Uniform Sales Act, differing from some of the earlier local versions of the statute, it is enough if the memorandum is signed by the party, even though it is not subscribed at the end.\(^{198}\) The position of the signature on the paper is unimportant,\(^{199}\) as is also the form in which it appears,\(^{200}\) so long as the signature that is used was placed on the paper with the intention of authenticating the instrument.\(^{201}\) This rule is carried to such lengths that printed names already on the paper even though in the form of letter heads or firm names printed at the top of order blanks are held to be sufficient if shown to have been adopted for the occasion as the authenticating signature.\(^{202}\) If such adoption for the occasion of already printed

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\(^{194}\)Webster v. Condon (1924) 248 Mass. 269, 142 N. E. 777 (oats).


designations does not appear, however, the memorandum will be held insufficient for lack of signature by the party to be charged.208

The signature to the memorandum binding the party to be charged may be affixed by the party himself or by a properly authorized agent acting in his behalf.204 The authorization does not need to be in writing and often appears merely by parol.205 As a general rule, an agent's authority to make the contract or sale on behalf of the principal includes the incidental authority to sign a memorandum on his behalf to make it legally enforceable.206 Thus, the signature by the agent who acts for the seller is sufficient to bind the seller, though the seller does not personally sign.207 Similarly, the signature by the agent of the buyer is suffi-


208Lee v. Vaughan's Seed Store, (1911) 101 Ark. 68, 141 S. W. 496, 37 L. R. A. (N.S.) 352. In Upton Mill, etc., Co. v. Baldwin Flour Mills, (1920) 147 Minn. 205, 179 N. W. 904 defendant corporation's printed order form, with corporate name printed in signature form accompanied by word and blank line "by . . . ," placed on corporate desk for authentication after being filled in by a clerk was held not a signed memorandum in absence of the officer's authenticating signature. In Mesibov, Glnert & Levy v. Cohen Brothers Mfg. Co., (1927) 245 N. Y. 305, 157 N. E. 148 defendant seller's name was printed across the top of the order blank signed by the buyer, but there was also a form clause providing for acceptance, followed by a dotted line for the seller's signature. This signature was never added. In Joseph Galin Co. v. Newhouse, (1920) 110 Misc. Rep. 680, 180 N. Y. S. 812 the printed name of defendant's predecessor in business, appearing on old order blank forms in temporary use by defendant pending arrival of new stationery properly printed was held not to have been adopted as a signature.


207Falletti v. Carrano, (1918) 92 Conn. 636, 103 Atl. 753 (flour); Jacobson v. Perman, (1921) 238 Mass. 445, 131 N. E. 174 (cloth); Evans, Coleman & Evans v. Pistorino, (1923) 245 Mass. 94, 139 N. E. 848 (salmon).

cient to bind him without his personal signature. Apparent authority is as effective in this respect as express authority. The signature in the name of the agent himself is sufficient to bind the principal where the principal is undisclosed, and the same has been held also in the case of a disclosed principal where the signature in that form is authorized as the name under which the principal's business is done for the occasion.

It is well settled that one party to the transaction has not capacity to act as agent for the other in signing the memorandum. A third person may, however, with the knowledge and authorization of both parties act for both in signing the memorandum. This position is frequently illustrated in cases of auctioneers or their clerks while the auction is in progress, and in cases of brokers in the commercial centers who negotiate contracts or sales of merchandise between buyers and sellers with whom they are in touch, but who are not directly in touch with each other. Whether in any individual case the intermediate third

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213 Wright v. Dannah, (1809) 2 Camp. 203 (clover seed); Farebrother v. Simmons, (1822) 5 B. & Ald. 333 (turnips); Johnson & Miller v. Buck, (1872) 35 N. J. L. 338, 10 Am. Rep. 243; Levitt v. Shinnan, (App. Div. 1912) 137 N. Y. S. 904; Lezinsky Co. v. Hoffman, (1920) 111 Misc. Rep. 415, 181 N. Y. S. 732. "The theory is that it would defeat the whole purpose of the statute if the other party, who could not under the statute directly establish the contract by oral testimony may do so indirectly by establishing by such testimony that he was made the agent of the other to sign the note or memorandum." Mechem, Agency, 2nd ed., sec. 180.


215 Prairie State Grain & Elevator Co. v. Wrede, (1920) 217 Ill. App. 407 (corn); Green & Bennett v. McCormack, (1929) 83 N. H.
person had authority to act as agent for both parties is a question of fact which goes to the jury if the evidence on the matter is conflicting.\textsuperscript{215}

SEC. 10. THE DECISIVE BEARING OF LEGAL PERSPECTIVE

The foregoing account of detail regarding the application of the statute of frauds to current controversies under the Uniform Sales Act readily illustrates how minute and technical often are the distinctions that have been taken in the application of the statute to close borderline cases. It also indicates how the reasoning employed in drawing such distinctions often is literal and sometimes becomes rather artificial and arbitrary. In such matters it is easy in the mass of detail to lose sight of the perspective which guides the choice of alternatives and in the long run largely determines the course of development as novel borderline applications are brought out with changing business conditions. The juristically interested observer of legal phenomena can readily notice, however, that in the relatively novel borderline cases which arise with changing business devices and business habits the essentially determining factor in the instance often appears to be the underlying attitude taken by the court with regard to what it considers to be the policy of the statute. If that underlying attitude is favorable to the understood or assumed policy of the statute, the construction given in the instance may readily bring the case within the


statute and render the transaction unenforceable. If that under-
lying attitude is unfavorable to the understood or assumed policy
of the statute it may as readily give occasion for rigidly limiting
the application of the statute, thus saving the enforceability of the
particular transaction, either by bringing the case within the excep-
tions to the statute or by so interpreting the given facts as to find
that the statute has been satisfied. It therefore seems highly im-
portant, for intelligent advice or argument with respect to unsettled
novel borderline cases as they arise, not only to be familiar with
the labored specific detail of past applications of the statute, but
also to appreciate vividly the broader and deeper questions involved
with regard to the policy of the statute. To that end, therefore,
renewed careful attention must from time to time be given to
such fundamental questions as what that policy actually is and
whether the application of that policy to the novel situation in the
instant case is likely as a precedent to hinder or to promote the
general welfare. Adequate dealing with such questions, needless
to emphasize, requires both alert recognition and painstaking evalu-
at of conflicting interests.216

216See footnotes 9-16 above, with accompanying text.