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# Acceptance and Receipt: An Anomaly in the Statute of Frauds

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## ACCEPTANCE AND RECEIPT: AN ANOMALY IN THE STATUTE OF FRAUDS

The enactment of the English Statute of Frauds<sup>1</sup> in 1677 has been attributed to the ineffectual trial procedure of that period.<sup>2</sup> Both the practice of awarding new trials and the development of the rules of evidence were in a formative stage.<sup>3</sup> At that time juries could reject the evidence heard and reach a verdict on their own privately secured information,<sup>4</sup> and the parties to the action, who were not familiar with the facts, could not testify.<sup>5</sup> Fraud and perjury were to be prevented primarily by removing from juries any determination of liability in certain cases unless the statutory formalities were met.<sup>6</sup> Furthermore, the turbulent times following the Civil War, the Commonwealth, and the Restoration probably encouraged claims without any foundation.<sup>7</sup>

The present day statutes of frauds which relate to the sale of goods are derived from Section seventeen of the English Statute of Frauds. In England Section seventeen was replaced by Section four of the English Sale of Goods Act of 1893.<sup>8</sup> In the United States substantially the same language was incorporated in state legislation<sup>9</sup> patterned after the Uniform Sales Act.<sup>10</sup>

### SATISFACTION OF THE STATUTE BY ACCEPTANCE AND RECEIPT

Section four of the Uniform Sales Act provides, among other things, that an oral "contract to sell or a sale of any goods . . . shall not be enforceable by action unless the buyer shall accept part of the

1. An Act for Prevention of Frauds and Perjuries, 29 Car. II, c. 3 (1677).

2. Thayer, Preliminary Treatise on Evidence at the Common Law 180 (1898).

3. *Ibid.*

4. *Id.* at 429-430. But see Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L. Q. Rev. 174 (1947).

5. This disqualification of parties to the action was not removed until 1843. Ireton, *Should We Abolish the Statute of Frauds?*, 72 U. S. L. Rev. 195, 197 n. 8 (1938).

6. See Thayer, *op. cit. supra* note 2, at 409-410. The fact that the Statute was not directed primarily, if at all, at judges, may explain the equitable doctrine of part performance of contracts pertaining to land. See Costigan, *Has There Been Judicial Legislation in the Interpretation and Application of the "Upon Consideration of Marriage" and Other Contract Clauses of the Statute of Frauds?*, 14 Ill. L. Rev. 1, 6-12 (1919).

7. See Wright, Book Review, 55 L. Q. Rev. 189, 204 (1939). But see Rabel, *supra* note 4.

8. Ireton, *supra* note 5.

9. *E.g.*, Minn. Stat. § 512.04 (1949). The amount fixed for the value of the goods varies. A contract for the sale of goods of any value is within the Statute in Florida and Iowa. Fla. Stat. § 725.02 (1951); Iowa Code Ann. § 554.4 (1950). But only contracts of \$2,500 or more are within the Statute in Ohio. Ohio Code Ann. § 8384 (1948). Minnesota sets the value at \$50 or more. Minn. Stat. § 512.04 (1949).

10. 1 U. L. A. Uniform Sales Act § 4 (1950).

goods . . . so contracted to be sold or sold, and actually receive the same. . . ." Acceptance and receipt are separate requirements,<sup>11</sup> and acceptance may precede, accompany, or follow receipt of the goods.<sup>12</sup> Under English law acceptance occurs "when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale."<sup>13</sup> The Uniform Sales Act provides that acceptance occurs when the buyer assents to become owner of the goods.<sup>14</sup> This difference in definition is especially significant in its application to cases involving nonconforming goods. A buyer's assertion that the bulk of the goods does not conform to the sample previously obtained is sufficient acceptance to satisfy the English provision although it may not bind the purchaser to pay for the goods.<sup>15</sup> But under American law rejection of nonconforming goods is not sufficient to satisfy the Statute.<sup>16</sup> When the buyer exercises that degree of control evidenced by a resale, an offer to resell, or a mortgage of the goods, the conclusion unless otherwise explained is that he assented to become owner.<sup>17</sup> An agent may accept for the buyer,<sup>18</sup> but supposedly the seller cannot act as the buyer's agent for this purpose.<sup>19</sup>

Nevertheless, if goods remain in the seller's possession there may be acceptance and receipt by the buyer if the seller ceases to hold as owner and agrees to hold as bailee with the buyer's consent.<sup>20</sup> Conversely, where goods are already in the hands of the

11. See *Castle v. Swift & Co.*, 132 Md. 631, 635, 104 Atl. 187, 189 (1918); see 2 Corbin, *Contracts* § 482 (1950); see Willis, *The Statute of Frauds—A Legal Anachronism*, 3 Ind. L. J. 528 (1928). The presence of acceptance and receipt is determined independently of when title passes. See *Tonkelson v. Malis*, 119 Misc. 717, 720, 197 N. Y. Supp. 309, 312 (Sup. Ct. 1922); *Mellen Produce Co. v. Fink*, 225 Wis. 90, 98, 273 N. W. 538, 542 (1937).

12. See 2 Corbin, *Contracts* § 482 (1950).

13. *Sale of Goods Act of 1893*, 56 & 57 Vict., c. 71 § 4(3).

14. 1 U. L. A. *Uniform Sales Act* § 4(3) (1950).

15. *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97; see Weir, *The Sale of Goods Act—Acceptance*, 5 Alberta L. Q. 26 (1942).

16. *E.g.*, *Kemensky v. Chapin*, 193 Mass. 500, 79 N. E. 781 (1907); *Remick v. Sanford*, 120 Mass. 309 (1876); *Hewett Grain & Provision Co. v. Spear*, 222 Mich. 608, 193 N. W. 291 (1923); *Taylor v. Mueller*, 30 Minn. 343, 15 N. W. 413 (1883); *Stone v. Browning*, 51 N. Y. 211 (1872); *Cleveland Worsted Mills Co. v. Brownstone & Co.*, 190 N. Y. Supp. 601 (Sup. Ct. 1921); *Davison Coal Co. v. Empire Brick & Supply Co.*, 168 N. Y. Supp. 534 (Sup. Ct. 1918).

17. See 1 Williston, *Sales* § 77 (rev. ed. 1948).

18. See 2 Corbin, *Contracts* § 485 (1950).

19. *Shepherd v. Pressey*, 32 N. H. 49 (1855); see 2 Corbin, *Contracts* § 485 (1950); *Vold*, *The Application of the Statute of Frauds Under the Uniform Sales Act*, 15 Minn. L. Rev. 391, 415 (1931).

20. *Means v. Williamson*, 37 Me. 556 (1854); *Bissell v. Balcom*, 39 N. Y. 275 (1868); *Green v. Merriam*, 28 Vt. 801 (1856); *Janvrin v. Maxwell*, 23 Wis. 51 (1868). *Contra*: *Easley v. Stewart*, 131 Miss. 756, 95 So. 525 (1923).

buyer as bailee, acceptance and receipt occur when the buyer holds as owner.<sup>21</sup> Some courts require that such changes in relationship must be proved not by mere words but by some objective act inconsistent with the previous position.<sup>22</sup>

Receipt is the buyer's act of acquiring possession of the goods<sup>23</sup> with the seller's consent.<sup>24</sup> Where goods are difficult to move because of their bulk, receipt may occur by constructive delivery.<sup>25</sup> Where goods are in the possession of a third party such a warehouseman, the buyer receives the goods when the warehouseman assents to hold the goods as bailee for the buyer.<sup>26</sup> Receipt may also occur by delivery to a third party transferee designated by the buyer<sup>27</sup> or to an agent of the buyer such as a carrier.<sup>28</sup> The exist-

21. *Wilson v. Hotchkiss*, 171 Cal. 617, 154 Pac. 1 (1915); *Harlan v. Carney*, 219 Mich. 539, 189 N. W. 27 (1922); *Kenesaw Mill & Elevator Co. v. Aufdenkamp*, 106 Neb. 246, 183 N. W. 294 (1921); *James Mack Co. v. Bear River Milling Co.*, 63 Utah 565, 227 Pac. 1033 (1924); *Sneider v. Thrall*, 56 Wis. 674, 14 N. W. 814 (1883); *Morton v. Kohler & Chase*, 70 Cal. App. 458, 233 Pac. 415 (1st Dist. 1925); *accord*, *Wilde v. Zimmerman*, 46 Wyo. 530, 30 P. 2d 148 (1934); *see* *Deitrick v. Sinnott*, 189 Iowa 1002, 1004, 179 N. W. 424, 426 (1920).

22. *Gardet v. Belknap & White*, 1 Cal. 399 (1851) (seller in possession); *Charlotte H. & N. Ry. v. Burwell*, 56 Fla. 217, 48 So. 213 (1908) (buyer in possession); *Walker & Rogers v. Malsby Co.*, 134 Ga. 399, 67 S. E. 1039 (1910) (seller in possession); *Deitrick v. Sinnott*, 189 Iowa 1002, 179 N. W. 424 (1920) (buyer's agent in possession); *Kirby v. Johnson*, 22 Mo. 354 (1856) (seller in possession); *Hill v. Dodge*, 80 N. H. 381, 117 Atl. 728 (1922) (seller in possession); *Maher v. Randolph*, 275 N. Y. 80, 9 N. E. 2d 786 (1937) (buyer in possession), 22 Minn. L. Rev. 118; *Shindler v. Houston*, 1 N. Y. 261 (1848) (seller in possession); *see* *Silkman Lumber Co. v. Hunholz*, 132 Wis. 610, 612-613, 112 N. W. 1081, 1082 (1907). Critics of the rule argue that when the buyer is already in possession of the goods, mere words should be enough. *Wilson v. Hotchkiss*, 171 Cal. 617, 154 Pac. 1 (1915); *see* 1 Williston, Sales § 87 (rev. ed. 1948). But *see* 22 Minn. L. Rev. 118 (1937); 12 St. John's L. Rev. 347 (1938).

Some courts use the test of whether the seller has surrendered his lien to ascertain whether receipt has occurred. *See Hinchman v. Lincoln*, 124 U. S. 38 (1888) (alternative holding); *Northwestern Consol. Milling Co. v. Rosenberg*, 287 Fed. 785 (3d Cir. 1923); *Clark & Co. v. Scribner Co.*, 122 Me. 418, 120 Atl. 609 (1923); *Hill v. Dodge*, 80 N. H. 381, 117 Atl. 728 (1922) (alternative holding); *Green v. Merriam*, 28 Vt. 801 (1856); *Wood*, Statute of Frauds § 335 (1884).

23. *Willis*, *supra* note 11, at 529.

24. *Young v. Ingalsbe*, 208 N. Y. 503, 102 N. E. 590 (1913).

25. *E.g.*, *King & Clopton v. Jarman*, 35 Ark. 190 (1879); *Atwell v. Miller*, 6 Md. 10 (1854); *cf.* *Boynton v. Veazie*, 24 Me. 286 (1844); *See Hanson v. Knutson Hardware Co.*, 182 Wis. 459, 196 N. W. 831 (1924); 1 Williston, Sales § 92 (rev. ed. 1948).

26. *E.g.*, *Flanigan v. Waterman*, 117 Misc. 617, 191 N. Y. Supp. 646 (Sup. Ct. 1922); *see* *Townsend v. Hargraves*, 118 Mass. 325, 332 (1875); *see* 2 Corbin, Contracts § 491 (1950).

27. *See Houghton & Cutton Co. v. Journal Engraving Co.*, 241 Mass. 541, 135 N. E. 688 (1922); *Mosher v. Sanford-Evans Co.*, 68 Mont. 64, 216 Pac. 811 (1923); *cf.* *Munroe v. Mundy & Scott*, 164 Iowa 707, 146 N. W. 819 (1914).

28. *Waite v. McKelvy*, 71 Minn. 167, 73 N. W. 727 (1898) (by implication); *Gaffers-Hinman Coal Co. v. Wessel*, 132 Misc. 907, 230 N. Y.

ence of acceptance and receipt is usually a question for the trier of fact unless the facts are not in dispute.<sup>29</sup>

### *Part Performance*

The effect of acceptance and receipt of part of the goods is to make the oral contract enforceable as to those undelivered.<sup>30</sup> But the part performance must be pursuant to the alleged transaction.<sup>31</sup> Thus, if a sample is part of the bulk of the goods, acceptance and receipt of the sample validates the entire contract.<sup>32</sup> But if the accepted sample is merely a specimen of what is offered for sale or a device to facilitate sales and thus not pursuant to the transaction, the oral contract is unenforceable as to the undelivered goods.<sup>33</sup>

A similar problem occurs when the claim is made that acceptance and receipt of part of the goods is only fulfillment of one of several contracts.<sup>34</sup> For example, where there has been acceptance and receipt of one carload of goods but refusal of a second, if the contract is found to be for two carloads, acceptance and receipt of any part thereof applies to the entire contract;<sup>35</sup> but if the entire trans-

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Supp. 561 (Sup. Ct. 1928) ; see *Fontaine v. Bush*, 40 Minn. 141, 143, 41 N. W. 465, 466 (1889) ; *Walker Bros. & Co. v. Daggett*, 115 Miss. 657, 662, 76 So. 569 (1917) ; see 2 Corbin, *Contracts* § 490 (1950).

29. See, e.g., *Hinchman v. Lincoln*, 124 U. S. 38, 48 (1887) ; *Taylor v. Mueller*, 30 Minn. 343, 348, 15 N. W. 413, 415 (1883).

30. 1 U. L. A. *Uniform Sales Act* § 4(1) (1950). In some states it is held, however, that oral contracts not to be performed within a year cannot be made enforceable by acceptance and receipt of part of the goods. E.g., *David Taylor Co. v. Fansteel Products Co.*, 234 App. Div. 548, 255 N. Y. Supp. 270 (1st Dep't 1932), *aff'd*, 261 N. Y. 514, 185 N. E. 718 (1933), 17 Minn. L. Rev. 107 (1932) ; see *Simpson-Fell Oil Co. v. Pierce Petroleum Corp.*, 32 F. 2d 576, 581 (8th Cir. 1929). Satisfaction of one section of the Statute might well fulfill the purpose of the Statute and should therefore render the contract enforceable. See 17 Minn. L. Rev. 107 (1932) ; 10 N. Y. U. L. Q. Rev. 85 (1932).

31. E.g., see *Howland v. Iron Fireman Mfg. Co.*, 188 Ore. 230, 282, 213 P. 2d 177, 199 (1949).

32. *Cotton States Hosiery Mills v. Buchwald*, 194 N. Y. Supp. 145 (Sup. Ct. 1922) ; *Brock v. Knower*, 37 Hun 609 (N.Y. Sup. Ct. 1885) ; cf. *Garfield v. Paris*, 96 U. S. 557 (1877) (acceptance and receipt of copyright labels validated oral contract to sell liquor) ; see *Wood*, *Statute of Frauds* § 309 (1884).

33. *Richardson v. Smith*, 101 Md. 15, 60 Atl. 612 (1905) ; *Buchanan v. Remington Rand, Inc.*, 130 N. J. L. 10, 30 A. 2d 832 (Sup. Ct. 1943) (advertising cut of typewriters not part of goods sold) ; *Carter, Macy & Co. v. Matthews*, 220 App. Div. 679, 222 N. Y. Supp. 472 (1st Dep't 1927), *aff'd*, 247 N. Y. 532, 161 N. E. 171 (1928).

34. This problem arises in determining whether a sale of goods with an agreement to repurchase is one or two contracts. See, e.g., *Gainsburg v. Bachrack*, 241 App. Div. 28, 270 N. Y. Supp. 727 (1st Dep't), *aff'd*, 266 N. Y. 468, 195 N. E. 158 (1934). Other courts avoid such problems by holding the oral promise to repurchase to be a contract of indemnity, which is not within the Statute. E.g., *Lingelbach v. Luckenbach*, 168 Wis. 481, 170 N. W. 711 (1919).

35. E.g., *Hess v. Dicks*, 181 Iowa 342, 164 N. W. 639 (1917) ; *Farmers*

action is composed of separate contracts, then acceptance and receipt of any one part will not apply to another.<sup>36</sup>

If the oral agreement is repudiated, there is disagreement whether acceptance and receipt of part of the goods are pursuant to the repudiated oral contract or a new contract. When a seller expressly repudiates the remainder of a bargain when delivering part of the goods, it has been held that acceptance and receipt of the part delivered do not satisfy the Statute as to the repudiated contract.<sup>37</sup> But if a buyer accepts and receives part of the goods subsequent to his unequivocal disavowal of the oral agreement, the contract is still enforceable in its entirety.<sup>38</sup>

#### EVIDENTIARY VALUE OF ACCEPTANCE AND RECEIPT

Legal formalities serve two purposes. They evidence the existence and tenor of a contract in case of controversy and prevent the making of an inconsiderate contract.<sup>39</sup> The Statute of Frauds was enacted primarily in furtherance of the first purpose.<sup>40</sup> The requirement that certain contracts must be in writing to be enforceable provides an evidentiary safeguard because it provides evidence not only of the existence but also the terms of a transaction. But acceptance and receipt of part or all of the goods merely show the existence of some transaction<sup>41</sup> and *may* indicate its object and general

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Union Co-op. Elevator Federation v. Carter, 152 Neb. 266, 40 N. W. 2d 870 (1950) (alternative holding); Adams v. King, 68 Okla. 190, 170 Pac. 912, 173 Pac. 206 (1918) (alternative holding); Newman v. Multnomah Fuel Co., 93 Ore. 247, 183 Pac. 1 (1919).

36. *E.g.*, M. Samuel & Sons, Inc. v. Cutler, 185 N. Y. Supp. 368 (Sup. Ct. 1920); *cf.* Scott v. Troop Water Heater Co., 345 Pa. 368, 28 A. 2d 922 (1942); *see* Bundy v. Voelker, 145 Minn. 19, 21, 175 N. W. 1000, 1001 (1920).

37. Zachos v. Kay, 78 N. Y. S. 2d 836 (N.Y. City Ct. 1948).

38. John Thallon & Co. v. Edsil Trading Corp., 302 N. Y. 390, 98 N. E. 2d 572 (1951), 36 Minn. L. Rev. 293 (1952). *But see* Adams v. King, 68 Okla. 190, 192, 170 Pac. 912, 914, 173 Pac. 206 (1918); Gorden v. Witty, 198 App. Div. 333, 336, 190 N. Y. Supp. 381, 382 (1st Dep't 1921). Some cases in which acceptance and receipt of part of the goods have not made the entire contract enforceable are based on the theory that a new and different contract was made after repudiation. *See, e.g.*, Brister & Koester Lumber Corp. v. American Lumber Corp., 356 Pa. 33, 50 A. 2d 672 (1947) (seller formally cancelled parol contract after buyer repudiated); Golden Eagle Milling Co. v. Old Homestead Bakery, 59 Cal. App. 541, 211 Pac. 56 (1st Dist. 1922) (buyer accepted only after seller made reduction in price); *cf.* Atherton v. Newhall, 123 Mass. 141 (1877) (after acceptance of part, buyer notified seller that he would be responsible only for part received). Similarly, where the buyer conditionally accepts, there may be a new contract. *See* Davison Coal Co. v. Empire Brick & Supply Co., 168 N. Y. Supp. 534, 535 (Sup. Ct. 1918); *see* 2 Corbin, Contracts § 484 (1950).

39. *See* 2 Austin, Jurisprudence 907 (5th ed. 1911).

40. *See* Fuller, Basic Contract Law 943 (1947).

41. *See id.* at 957; Llewellyn, Cases and Materials on the Law of Sales 917 (1930); Vold, *supra* note 19, at 406. Some authors and courts have made

nature.<sup>42</sup> Once the transaction's existence has been so established, it may be shown by parol evidence that its terms constitute an otherwise valid contract.<sup>43</sup> Thus, acceptance and receipt are not an effective alternative to a writing.

If the fear of allowing juries to determine liability without a writing led to the enactment of the Statute, the doctrine of acceptance and receipt is an anomaly since the determination of the occurrence of acceptance or receipt is often a fact question for the jury.<sup>44</sup> On the one hand, the jury is said not to be competent to handle parol evidence to ascertain the terms of a contract in the first instance; but on the other hand it is competent to handle similar evidence to ascertain the occurrence of acceptance and receipt—which determine existence of an enforceable contract. Furthermore, when acceptance and receipt are proved, parol evidence may then establish the terms of the contract<sup>45</sup> and again the jury determines liability from oral evidence. Some courts have long recognized this anomaly,<sup>46</sup> and as early as 1855 it had been suggested in England that acceptance and receipt should be abolished as an alternative for the requirement of a writing because it creates uncertainty and encourages perjury in proving the terms of the contract.<sup>47</sup> It has been said, however, that the Statute of Frauds as a whole is presently beneficial because it prevents misunderstanding, as well as dishonesty, which may arise without a writing.<sup>48</sup> Although this contention may have some merit,<sup>49</sup> it is not really applicable to acceptance and receipt because no writing is necessary to show the terms of a contract if acceptance and receipt can be proved, and in effect

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the questionable assumption that acceptance and receipt of part of the goods ipso facto establish the relationship of vendor and vendee, see, *e.g.*, *Hinchman v. Lincoln*, 124 U. S. 38, 55 (1888); *Browne*, Statute of Frauds 439 (5th ed. 1895), but they are also consistent with a bailment, consignment for resale, or gift.

42. Fuller, *Basic Contract Law* 957 (1947).

43. See *Browne*, *op. cit. supra* note 41, at 459.

44. See note 29 *supra*.

45. See note 43 *supra*.

46. See, *e.g.*, *Davis v. Moore*, 13 Me. 424, 427 (1936): acceptance and receipt ". . . may leave a purchaser, who buys and receives a single article, liable to be charged as the purchaser of more, if the vendor can bring perjured witnesses to say that it was delivered as part of the greater number purchased."

47. Second Report to Parl. of Commissioners on Mercantile Laws 120 (1855).

48. See, *e.g.*, *Hill v. Dodge*, 80 N. H. 381, 117 Atl. 728 (1922). The court also stated that to hold that the Statute is avoided by a verbal waiver of acceptance and receipt of part of the goods would be to circumvent its purpose. *Id.* at 383, 117 Atl. at 729. It is questionable whether there is any more danger admitting parol evidence as to waiver than there is in admitting parol evidence to prove acceptance and receipt or the terms of the transaction.

49. See *Llewellyn*, *op. cit. supra* note 41, at 916.

this argument attacks the validity of this exception to the Statute.

The validity of the acceptance and receipt doctrine is certainly not strengthened by the American rule regarding rejection of non-conforming goods.<sup>50</sup> Cases have arisen in which the defendant has resisted a contract suit by pleading defective goods and the Statute of Frauds.<sup>51</sup> Even though proof of the soundness of the goods is established, defendant may escape liability on the ground that there was no acceptance and receipt to satisfy the Statute, since when he rejected the goods—by a mere oral assertion—he thought they were defective.<sup>52</sup> It is not surprising that the Statute has been condemned as an aid to dishonesty,<sup>53</sup> for it would be no great hardship or injustice for the buyer to defend on the merits when a seller tenders nonconforming goods.

Nor is that the sole situation where recourse to the Statute is mainly to avoid the substantive controversy rather than prevent fraud or perjury. When there has been partial performance and the issue is risk of loss as to the amount undelivered,<sup>54</sup> or when acceptance has been induced by mistake as to some material fact<sup>55</sup> or by false representations,<sup>56</sup> the buyer should be required to defend on the merits, not the Statute, for any acceptance of goods under these circumstances should sufficiently protect him from being held to a fictitious transaction.<sup>57</sup> For the same reason, in cases involving samples,<sup>58</sup> where the real issue is whether the transaction as to the remainder of the goods has advanced beyond the stage of preliminary negotiations,<sup>59</sup> there is no merit in disguising it with terminology of acceptance and receipt.<sup>60</sup> The fallibility of the court

50. See note 16 *supra* and text thereto.

51. See, *e.g.*, *Cleveland Worsted Mills Co. v. Brownstone & Co.*, 190 N. Y. Supp. 601 (Sup. Ct. 1921).

52. *Ibid*; see *Kemensky v. Chapin*, 193 Mass. 500, 506, 79 N. E. 781, 783 (1907) (buyer's rejection may be arbitrary). For a more desirable solution under English law, see note 15 *supra*.

53. See note 69 *infra*.

54. See *Atherton v. Newhall*, 123 Mass. 141 (1877); *Townsend v. Hargraves*, 118 Mass. 325 (1875); *cf. Dean v. Given Co.*, 123 Me. 90, 121 Atl. 644 (1923).

55. See, *e.g.*, *Rodgers v. Phillips*, 40 N. Y. 519 (1869) (bill of lading accepted after barge containing goods had sunk).

56. See, *e.g.*, *Barrett Mfg. Co. v. D'Ambrosio*, 90 Conn. 192, 96 Atl. 930 (1916).

57. See 2 *Corbin, Contracts* § 484 (1950); 1 *Williston, Sales* § 83 (rev. ed. 1948).

58. See notes 32 and 33 *supra* and text thereto.

59. See, *e.g.*, *Scott v. Troop Water Heater Co.*, 345 Pa. 368, 28 A. 2d 922 (1942).

60. The court's concern in the *Scott* case, *supra* note 59, is more in accord with the second purpose for legal formalities—preventing inconsiderate contracts. For a discussion of the prophylactic regulation of contracts see *Llewellyn, What Price Contract?—An Essay in Perspective*, 40 *Yale L. J.* 704, 746-748 (1931).

or jury in reaching the correct result from the same parol evidence is not dependent on the terminology used to define the issue. But the proof introduced at the trial is more likely to lead to a just decision if the real issue is litigated rather than the technical formalities.

In those cases involving the question of whether there are one or two contracts, a buyer can escape liability with impunity even though he admits the oral contract. The primary purpose of the Statute—to protect parties from being held to contracts not actually made—is thereby perverted. For example, in *Bundy v. Voelker*,<sup>61</sup> although the existence of an oral agreement as to a third carload was recognized in the order for a new trial,<sup>62</sup> admitted by defendant's answer in the second trial,<sup>63</sup> and there assumed in the court's charge to the jury,<sup>64</sup> the case was litigated on the issue of enforceability by acceptance and receipt of part of the goods.

#### THE MODERN ROLE OF THE STATUTE OF FRAUDS

The motives for originally enacting the Statute no longer exist.<sup>65</sup> In reaching their verdicts, juries are limited to the evidence submitted in court, parties to the action may testify, the new trial has become available, and the rules of evidence have been developed to protect the parties to the suit; and one critic of the Statute has found little evidence of perjury being a widespread practice.<sup>66</sup>

It must be conceded, however, that the Statute has thwarted

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61. 145 Minn. 19, 175 N. W. 1000 (1920).

62. *Ibid.*

63. Transcript of Record, p. 6, *Bundy v. Meyer*, 148 Minn. 252, 181 N. W. 345 (1921): ". . . said co-partners informed plaintiff that they would take and receive more cabbages from him upon the same terms and conditions as they had purchased said two carloads of cabbages. That at the time said co-partners paid plaintiff for said two carloads of cabbages and at the time they informed him that they would receive more cabbages from him, they had no knowledge or information of the fact that plaintiff had placed and concealed therein immature, small, leafy and unmarketable cabbages and would not have accepted the same or paid therefor had they had knowledge thereof."

64. Transcript of Record, pp. 200, 201, *Bundy v. Meyer*, 148 Minn. 252, 181 N. W. 345 (1921). The jury was charged that if they found that the contract between the plaintiff and defendant was for three carloads and pursuant to that contract the defendant accepted two carloads of cabbages, then he would be bound to receive and pay for the third car received. But if he purchased only two carloads and that agreement had been completed in full, and if he then entered into another contract for a third car which he refused to accept, he would not be liable because it was within the Statute of Frauds.

65. See Ireton, *supra* note 5, at 196-197, Willis, *supra* note 11, at 431; Rep. English Law Revision Committee, *The Statute of Frauds and the Doctrine of Consideration*, 15 Can. B. Rev. 585, 589 (1937).

66. See Willis, *supra* note 11, at 539. Although his observation may be disputed, the concern today is not in being able to detect the perjurer but whether there are any effective sanctions for perjury. See McClintock, *What Happens to Perjurers*, 24 Minn. L. Rev. 727 (1940).

the assertion of purely fictitious transactions.<sup>67</sup> This salutary effect as to actual cases of fraud has been gained at the expense of providing a technicality to avoid honest transactions.<sup>68</sup> Thus, the Statute has often been attacked as an aid to the unscrupulous.<sup>69</sup> The English Commissioners on Mercantile Laws of 1855<sup>70</sup> and the English Law Revision Committee of 1937<sup>71</sup> recommended the repeal of the Section pertaining to the sale of goods because they felt that the Statute promoted, rather than restrained, dishonesty. Nor have the civil law countries felt the need for the statute of frauds.<sup>72</sup>

The assumption that the Statute has increased the use of writings in the sales of goods has been questioned on the premise that the law has little power to control conduct in this area.<sup>73</sup> Common sense or custom regulates the mass of human transactions,<sup>74</sup> and though it would be nice in theory to reduce every contract to writing, a large amount of business is nevertheless carried on orally.<sup>75</sup> Although there has been an increase in the use of written records,<sup>76</sup> it may be attributed in part to the growing size of business and the

67. See 2 Corbin, *Contracts* § 275 at 13 (1950).

68. *Ibid.* Of course, social and business pressures will always deter somewhat the avoidance of honest transactions.

69. See, e.g., Burdick, *A Statute Promoting Fraud*, 16 Col. L. Rev. 273 (1916); Stephen and Pollock, *Section Seventeen of the Statute of Frauds*, 1 L. Q. Rev. 1, 3-4 (1885); Willis, *supra* note 11, at 432. But see Llewellyn, *op. cit. supra* note 41, at 916-918; Lilienthal, *Judicial Repeal of the Statute of Frauds*, 9 Harv. L. Rev. 455 (1896).

70. Second Report to Parl. of Commissioners on Mercantile Laws (1855).

71. Their sixth interim report is reprinted as, *The Statute of Frauds and the Doctrine of Consideration*, 15 Can. B. Rev. 585 (1937).

72. See Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. of Chi. L. Rev. 427, 433 (1950). The draft of an International Sales Act had no provisions comparable to the Statute of Frauds. See Rabel, *A Draft of An International Law of Sales*, 5 U. of Chi. L. Rev. 543, 558-559 (1938). Neither do Kansas, Louisiana, New Mexico, North Carolina, Texas, Virginia, and West Virginia have any corresponding statutory provision. 1 Williston, *Sales* § 51 (rev. ed. 1948).

73. See Stephen and Pollock, *supra* note 69, at 6.

74. See Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 Yale L. J. 821, 829 (1950); Stephen and Pollock, *supra* note 69, at 6.

75. See Corbin, *supra* note 74, at 829; Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L. Q. Rev. 174, 187 (1947); Wright, Book Review, 55 L. Q. Rev. 189, 204 (1939); Comment, 13 Cornell L. Q. 303, 306 (1928); 61 Yale L. J. 585 n. 2 (1952). In 1855, the Manchester and Dublin Chambers of Commerce reported that the great majority of mercantile contracts were oral. See Second Report to Parl. of Commissioners on Mercantile Laws 6 (1855).

Professor Llewellyn recognizes that much business will always be done orally but supports the Statute because it encourages written contracts—and writings are subject to less misunderstanding. Llewellyn, *op. cit. supra* note 41, at 916-917.

76. Thus, it is argued that the Statute should be retained since it is in accord with commercial practice apart from the Statute. See Llewellyn, *supra* note 60, at 747.

consequent need for office memoranda; and standardized forms have been adopted by industries chiefly to expedite negotiations.<sup>77</sup> But acceptance and receipt as an alternative to a writing have very little to do with regulating transactions in advance of litigation.<sup>78</sup>

As has been discussed, acceptance and receipt can provide little protection against fraud and perjury because parol evidence is admissible to prove the terms of the contract and to prove acceptance and receipt in the first instance. The dissatisfaction concerning the present law of acceptance and receipt is illustrated by the solution proposed in the Uniform Commercial Code, which would limit rather than enlarge the effect of acceptance and receipt under the present legislation. An oral contract for the sale of goods would be enforceable only to the extent of the goods already accepted and received, and the price would be apportioned to such goods.<sup>79</sup> If there could be no fair apportionment, the remedy would apparently be quasi contractual.<sup>80</sup> But in those cases involving defective goods, mistake, or misrepresentation, the defendant would no longer be able to avoid liability as to the goods delivered by asserting the Statute as a defense.

This proposed Code would also provide that a contract otherwise valid but within the Statute is enforceable "if the party against whom enforcement is sought admits in his pleading or otherwise in court that a contract for sale was made."<sup>81</sup> Thus, one could no longer escape liability by asserting that the oral agreement was a separate transaction from the one under which part of the goods were accepted and received.

This Code substantially adopts the provisions of the Statute of Frauds by requiring some writing to validate a contract of sale.<sup>82</sup> But the Code's requirement of a writing would be more uncompromising, in some respects, than that of the present Statute because the effect of the exception—acceptance and receipt—would be to make the contract enforceable only as to the goods actually de-

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77. See 3 Corbin, Contracts § 548 (1950). The adoption of standard forms arose because the seller and the buyer sent out conflicting sales and purchase forms; and the transactions, although in writing, were a source of much litigation. See Fuller, Basic Contract Law 178-180 (1947).

78. See Llewellyn, *op. cit. supra* note 41, at 917. Corbin argues that such an easy method of satisfying the Statute strongly suggests that the Statute is not needed. See Corbin, *supra* note 74, at 831 n. 7.

79. UCC § 2-201(3)(c) and comment 2 (Official Draft 1952); see 2 Corbin, Contracts § 482 (1950); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 Harv. L. Rev. 561, 575 (1950).

80. See 2 Corbin, Contracts § 482 (1950); Williston, *supra* note 79, at 575-576.

81. UCC § 2-201(3)(b) and comment 7 (Official Draft 1952).

82. UCC § 2-201(1) (Official Draft 1952).

livered.<sup>83</sup> A seller would have no opportunity to enforce an oral contract as to the undelivered goods unless the buyer admitted in court or in his pleading that a contract had been made.<sup>84</sup> The buyer would probably not make this mistake since the Code immunizes him from liability for goods undelivered, without proving that the goods already delivered were not part of the bulk or were pursuant to a separate contract or one replacing the repudiated oral agreement. In abrogating the present effect of acceptance and receipt, the Code would make the Statute, on its face, more consistent internally. But Corbin attacks the solution by pointing out that the terms of the oral contract will nevertheless have to be proved in order to justly apportion the price of the goods accepted and received;<sup>85</sup> and if the terms of the contract are proved to justly apportion the price, there is little reason for not enforcing the entire contract.<sup>86</sup>

Thus, it is evident that the Code has retreated to a position of defending an obsolescent formalism which represents the times in which trial procedure was in its infancy, condons breach of honest contract, and is disregarded commercially unless in accord with common sense reasons for having a writing. If the Code is adopted, as is presently sought,<sup>87</sup> this statutory provision requiring a writing should be deleted in favor of a practice of determining liability in a sales transaction by testing the quality of the evidence whatever form it takes.

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83. See note 79 *supra*.

84. See note 81 *supra*.

85. See note 79 *supra*.

86. See Corbin, *supra* note 74, at 831 n. 7.

87. Pennsylvania has already enacted the Code into law. 21 U. S. L. Week 2500 (April 14, 1953).