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THE STATUTE OF FRAUDS AFFECTING SALES OF GOODS

LLOYD J. PLANERT*

HISTORICALLY, the Wisconsin Statute of frauds affecting sales of goods is derived from the English statute enacted in 1677. The English legislation was incorporated into our statutory law in 1849 and has since remained there without substantial change or amendment. The purpose of the Wisconsin statute is the same as that of the English statute, namely to prevent fraud by avoiding the enforcement of baseless sales through perjured oral testimony, the means provided by the statute being a requirement of written or otherwise adequate evidence of the transaction.

The Wisconsin statute provides that no contract to sell or sale of any goods or choses in action of the value of fifty dollars or upwards shall be enforceable by action unless 1) a contract to sell or sale valid at common law is shown, and 2) the statute of frauds is satisfied in one of three specified ways. These three alternate methods of complying with the statute are as follows: 1) the buyer must “accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same”; or 2) the buyer must “give something in earnest to bind the contract, or in part payment”; or 3) there must be some “note or memorandum in writing of the contract or sale . . . signed by the party to be charged or his agent in that behalf.” Until the making of a contract to sell or sale and a compliance with one of the three specified means of satisfying the statute has been proved, no recovery can be had on the alleged contract; the defendant can withdraw without liability. This is a firmly established rule and cannot be derogated or abrogated by any custom or conduct of the parties in prior transactions.

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1 Korrer v. Madden, 152 Wis. 646, 140 N.W. 325 (1913); 29 Car. II c. 3.
2 Korrer v. Madden, 152 Wis. 646, 140 N.W. 375 (1913).
6 Wis. Stat. (1941) § 121.04(1).
7 Idem.
8 Idem.
9 Supra, note 5.
While the statute seems clear enough, yet its application to many and different transactions has naturally given rise to varying questions and divergent views of solution. A consideration of some of these questions and the interpretation which the Wisconsin Supreme Court and the courts of other jurisdictions have placed upon the statute, is the purpose of this paper.

A question that arises at the outset in a cause involving the statute of frauds, is one of pleading, namely, whether the statute must be pleaded as an affirmative defense or may be relied on under a denial of the contract of sale. The authorities are thoroughly divided on this question, some declaring that advantage may be taken of the statute under a simple denial of the contract, while others following the English rule, require it to be affirmatively pleaded. The Rules of Civil Procedure for the District Courts of the United States, likewise require the Statute of Frauds to be set up as an affirmative defense. Since under the wording used in the statute "shall not be enforceable by action" a transaction is not entirely void without a writing but merely unenforceable it would seem that the authorities requiring the statute to be affirmatively pleaded present the sounder view. While Wisconsin in Flatley Brothers v. Beauregard, seems to have aligned itself with the states holding that the statute need not be affirmatively pleaded, it should be noted that this decision is expressly based on a second version of the statute of frauds found in the Wisconsin Statutes at the time of that decision in 1927, namely Section 241.03 which provided that any contract in violation of the statute of frauds shall be "void." Section 241.03 was repealed in 1931 so that when the question again comes up for determination, Wisconsin probably will align itself with the states and the Federal Rules which require the statute to be affirmatively pleaded.

14 Rule 8 (e).
16 192 Wis. 174, 212 N.W. 22.
17 1931 c. 470. s. 8.
As to the subject-matter within the statute, an examination of its provisions discloses that it includes two types of contracts, namely, a "contract to sell" and a "sale"; it also reveals that the statute is applicable to two definite classes of subject matter, namely, "goods" and "chooses in action." The statute therefore can apply to four different situations, namely, to a contract to sell goods, to a sale of goods, to a contract to sell a chose in action and to a sale of a chose in action. The significance of each of these four key concepts will next be considered.

The connotation that is to be given to a "contract to sell" and a "sale" as used in the Uniform Sales Act offers no difficulty inasmuch as both terms are defined expressly in the Act. The distinction between the two terms is a fundamental one. In the case of a "contract to sell," the seller merely agrees to transfer the property in the goods to the buyer; the actual transfer takes place at some future time. In the case of a "sale," the seller actually transfers the property in the goods to the buyer as of the time of the sale.

These absolute terms, namely, "contract to sell" and "sale," are qualified by the succeeding words "of any goods or choses in action." The first of these two words, namely "goods," as construed by the Wisconsin Supreme Court include any personal property in existence at the time of the making of the contract, and also personal property not ready for delivery or even existent at the time of the making of the contract provided that it need not be made especially for the buyer.

That "goods" means "personal property" is apparent from the following expression of the Wisconsin Supreme Court: "The alleged contract in question was one for the sale of personal property and so comes within the statute of frauds. . . ." Particular illustrations are the holdings of the Supreme Court of Wisconsin that the following subjects of contracts to sell or sales are "goods" within the statute of frauds: wheat, land scrip, trees, logs, potatoes and the sale of one-fourth of an interest in a boat. The latter decision indicates that

18 Wis. Stat. (1941) § 121.04.
19 Idem.
20 Wis. Stat. (1941) § 121.01. "Contracts to sell and sales.
(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.
(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."
21 Wis. Stat. (1941) § 121.04(1).
22 Idem. § 121.04(1) (2); Meinicke v. Falk, 55 Wis. 427, 13 N.W. 545 (1882).
23 Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920).
24 Hooker v. Knab, 26 Wis. 511 (1870); Nichols v. Mitchell, 30 Wis. 329 (1872).
25 Smith v. Bouck, 33 Wis. 19 (1873).
26 Hawkinson v. Harmon, 69 Wis. 551, 35 N.W. 28 (1887).
27 Hansen v. Roter, 64 Wis. 622, 25 N.W. 530 (1885).
29 Brown v. Slauson, 23 Wis. 244.
Wisconsin regards even the sale of an interest in a chattel as personal property and thus "goods" within the statute of frauds. Whether or not corporate stock is "goods" within the statute of frauds has been an issue of considerable controversy in some jurisdictions, but the matter is definitely settled in Wisconsin, corporate stock being without question included in the term "goods."39 "There may be some doubt arising from the decisions elsewhere" says the Circuit Court of Appeals of the Seventh Circuit "as to whether 'corporate stock' is 'goods' as used in the Statute of Frauds, but for Wisconsin the question is settled by decision..."31

The statute of frauds32 itself is authority for the statement that "goods" includes personal property even though not ready for delivery or in existence at the time of the making of the contract. It is to be noted, however, that not all cases in which personal property is involved are held to be within the statute of frauds. The statute expressly excludes from its scope contracts to sell and sales of goods that are "to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business. ..."33 This provision marks the distinction between contracts for manufacture and sale which are by this provision excluded from the operation of the statute of frauds, and contracts of sale only where there is nothing for the seller to do but to tender the property, which are within the statute. Although this enactment would seem to present no special difficulty, yet a full appreciation of its import especially in view of some broad language in the cases34 requires a consideration, not only of the determinative Wisconsin decisions, but also an examination of the history of this "exclusion" clause.35 Due to border line cases between contracts for manufacture and sale which are not within the statute and contracts of sale only which are within the statute, there was much conflict of authority in various jurisdictions as to the rule by which to determine whether a contract was within one class or the other, this conflict resulting in the development of three specific rules—the English Rule,35a the New York Rule,35b and the Massachusetts

30 Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920); Backus v. Taplin, 81 Fed. (2d) 444 (C.C.A. 7th, 1936).
31 Backus, ibid.
32 Wis. Stat. (1941) § 121.04.
33 Ibid. § 121.04(2).
34 Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904); Boyington v. Sweeney, 77 Wis. 55, 45 N.W. 938 (1890); Wiger v. Carr, 131 Wis. 584, 111 N.W. 657 (1907).
35 Wis. Stat. (1941) § 121.04(2).
Rule.\textsuperscript{35c} Under the English Rule if the contract is intended to result in the transfer of a chattel in which the vendee had no previous property, then, although work and labor are to be done on such chattel before delivery, the contract is within the statute of frauds.\textsuperscript{35d} The New York Rule states that an agreement for the sale of any commodity not in existence in solido at the time, but which the seller is to manufacture or put in condition to be delivered is not a contract of sale within the statute of frauds,\textsuperscript{35e} but, if at the time of the agreement the commodity sold substantially exists in its ultimate form,\textsuperscript{35f} or is to be procured in substantially its ultimate form from others,\textsuperscript{35g} then, even though acts remain to be done in finishing it, the agreement is a contract of sale within the statute of frauds. The Massachusetts Rule, is as follows: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. . . ."\textsuperscript{38} The difference between the three rules is well stated in an Oregon case\textsuperscript{37} as follows: "By the Massachusetts rule, the test is not the existence or non-existence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for trade, or as the result of a special order and for special purposes. If the former, it is regarded as a contract of sale, and within the statute; if the latter, it is held to be essentially a contract for labor and material, and, therefore, not within the statute. . . ."\textsuperscript{38}

Under the English Rule, Missouri has held contracts to make a coat and vest of peculiar design and pattern,\textsuperscript{39} and to make a number of special drawings\textsuperscript{40} to be contracts for the sale of goods and within the statute of frauds. Such contracts would be held to be contracts for skill and labor and, therefore, not within the scope of the statute of frauds under the Massachusetts Rule.

\textsuperscript{35c} Goddard v. Binney, 115 Mass. 450 (1874).
\textsuperscript{35d} Supra, note 29.
\textsuperscript{35f} Alfred Shrimpton & Sons v. Dworsky, 21 N.Y.S. 461, 2 Misc. 123 (1892).
\textsuperscript{35g} Seymour v. Davis, 4 N.Y. Super 239.
\textsuperscript{36} Supra, note 31.
\textsuperscript{38} Idem.
\textsuperscript{39} Schmidt v. Rozier, 121 Mo. A. 306, 98 S.W. 791 (1906).
\textsuperscript{40} Lesan Advertiz. Co. v. Castleman, 165 Mo. A. 575, 148 S.W. 433 (1912).
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The Massachusetts Rule, being a part of the Uniform Sales Act, is the most generally accepted American doctrine. It has been adopted by thirty-three of the forty-eight states, namely, Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming; Alaska, the District of Columbia, and Hawaii have also accepted the Act. In the Meinicke case, the Wisconsin Supreme Court referring to the Massachusetts Rule lays down the conforming interpretative Wisconsin "exclusion" rule as follows: "We are inclined to think that the rule announced by Chief Justice Shaw ... and followed in Goddard v. Bin-

41 Wis. Stat. (1941) § 121.04(2).
42 Supra, note 37.
44 Idem.
45 Idem.; Cape County Milling Co. v. Morris, 137 Ark. 430, 208 S.W. 792 (1919); Moore v. Camden Marble Works, 80 Ark. 274, 96 S.W. 1063 (1906).
46 Supra, note 43.
48 Supra, note 43.
49 Supra, note 43. 
50 Supra, note 43.
51 Supra, note 43.
52 Supra, note 43.
53 Supra, note 43.
54 Supra, note 43; Crockett v. Scribner, 64 Me. 447 (1875).
55 Supra, note 43.
56 Supra, note 43.
58 Supra, note 43.
59 Supra, note 43.
60 Supra, note 43; O'Neil v. N. Y. Mining Co., 3 Nev. 141. 
61 Supra, note 43.
62 Supra, note 43.
63 Supra, note 43.
64 Supra, note 43.
65 Supra, note 43.
66 Supra, note 43; Courtney v. Bridal Veil Box Factory, 55 Ore. 210, 105 Pac. 896 (1909).
67 Supra, note 43.
68 Supra, note 43.
69 Supra, note 43.
70 Supra, note 43.
71 Supra, note 43.
72 Supra, note 43; McDonald v. Webster, 71 Vt. 392, 45 Atl. 895; Scales v. Wiley, 68 Vt. 39, 33 Atl. 771 (1895).
73 Supra, note 43.
74 Supra, note 43; Meinicke v. Falk, 55 Wis. 427, 13 N.W. 545 (1882).
75 Supra, note 43.
76 Supra, note 43.
77 Supra, note 43.
78 Supra, note 43.
79 Meinicke v. Falk, 55 Wis. 427, 13 N.W. 545 (1882).
ney, . . . is entitled to our confidence and respect. We, therefore, hold that, while an executory contract for the sale of an article for the price of $50 or more may be within the statute, notwithstanding such article does not at the time exist in solido, yet where such contract is to furnish materials and manufacture the article according to specifications furnished or a model selected, and when without the special contract the thing would never have been manufactured in the particular manner, shape, or condition it was, then the contract is essentially for skill, labor, or workmanship, and is not within the statute.80 The legal basis upon which the Massachusetts Rule is founded is stated as follows by the Wisconsin Court: Contracts for the purchase of goods that are to be manufactured especially for the buyer and that are not suitable for sale on the general market are not within the statute of frauds because such contracts imply "that the application of such labor and capital in the execution of the agreement is to be accepted as the work of the manufacture processes, contingent upon the thing, when produced, corresponding to that ordered. The result is that, as soon as the process of manufacture commences the contract is no longer wholly executory. When the article contracted for is ready for delivery and the situation is such that it might then form the subject of a sale within the meaning of the statute, the real contract has been substantially performed upon one side. To allow the statute of frauds to then interfere with the final consummation of the agreement would be a use thereof to perpetrate fraud instead of to prevent fraud."81

Wisconsin, under the Massachusetts Rule, has held the following contracts to be contracts, not for the sale of goods, but for skill and labor, and, therefore, not within the statute of frauds: a contract for a specially-built carriage,82 a contract for the publication of an advertisement in a newspaper,83 a contract for iron-work to be manufactured according to a particular design,84 a contract for specially-made matting,85 and a contract for the purchase of certain lithographs and engravings to be made according to a specific design.86

However, one Wisconsin case,87 as a result of its general language, causes a quaere to arise as to whether the Wisconsin "exclusion" clause88 should really be limited to goods that are to be manufactured especially for the buyer or whether this enactment should also embody

80 Idem.
81 Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904).
82 Supra, note 79.
83 Goodland v. LeClair, 78 Wis. 176, 47 N.W. 268 (1890).
85 Supra, note 81.
86 Central Lithographing & Engraving Co. v. Moore, 75 Wis. 170, 43 N.W. 1124 (1882).
87 Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904).
88 Wis. Stat. (1941) § 121.04(2).
contracts for the sale of any goods that must be manufactured in the future. In the case in question, namely, the Gross case, the court uses the following language: "That statute (statute of frauds) relates only to the executory sales of property; not to contracts for the manufacture and sale of property. Meinicke v. Falk, 55 Wis. 427..." Accepting this general statement as it stands, it would seem that the Wisconsin "exclusion" clause is meant to include all contracts wherein the goods must be manufactured in the future regardless of whether these goods are to be manufactured especially or in the ordinary course of the seller's business. However, in view of the fact that the court cites the Meinicke case as authority for its general statement, and in view of the fact that the case concerns specially made matting, it is apparent that the court referred only to goods that were to be manufactured especially for the buyer and which would not be suitable for sale in the ordinary course of the seller's business. That such is the rule is thoroughly established by the words of the statute itself and the Hansen case. In that case the court held that a contract for the sale and delivery of logs was a contract for the sale of goods within the statute of frauds even though it was necessary for the vendor to cut, transport and deliver the logs to a certain place. The court spoke as follows: "The logs were an ordinary article of traffic, like lumber, or other merchandise, and stand upon the same ground. It could not with propriety be said that the contract was for special skill and labor...." If any other construction were allowed to be given to the opening words of the court in the Gross case, Wisconsin would not be following the Massachusetts Rule at all, but rather would be applying the New York Rule, namely, the non-existence of the article at the time of the contract. General language is found in other Wisconsin cases also, but, in all of these cases the Meinicke case is cited as authority for these general statements. Thus, it is apparent that the court is really referring only to goods which are manufactured by the vendor especially for the vendee and which are not saleable on the general market and that Wisconsin accepts the Massachusetts Rule.

Besides those contracts which are declared not to be within the statute of frauds because they fall under the express "exclusion" provision of the statute, there is still another type of contract which is

89 Supra, note 87.
90 55 Wis. 427, 13 N.W. 545 (1882).
91 Supra, note 88.
92 Hansen v. Roter, 64 Wis. 622, 25 N.W. 530 (1885).
93 Idem.
94 Supra, note 87.
95 Boyington v. Sweeney, 77 Wis. 55, 45 N.W. 938 (1890); Wiger v. Carr, 131 Wis. 584 (1907).
96 Supra, note 90.
97 Wis. Stat. (1941) § 121.04(2).
declared not to be within the statute although personal property is involved, namely, those contracts in which the personal property is but incidental to common services\(^98\) or employment\(^99\) or a compromise agreement.\(^{100}\) In the Agnew case\(^{101}\) the Wisconsin Supreme Court held that a promise to fill lots with dirt was a contract for services and not a sale of property and, therefore, not within the statute of frauds even though the transfer of title to the dirt was involved. The Wisconsin court in a later case\(^{102}\) held that a contract authorizing another to act as agent and purchase property from a third person was not within the statute of frauds. In arriving at its decision the court reasoned as follows: "The distinction involved in the employment of one as an agent to obtain for the principal something which he has not is in close analogy to that in an employment to manufacture for another that which at the time of contracting has no existence." In the Mygatt case\(^{103}\) the court held that an agreement between two execution creditors, each of whom claimed priority, to allow the property of the debtor to be sold under one execution and to divide the proceeds equally is not a sale at all but a compromise of the conflicting claims of the parties in respect to their priority of levy, and, therefore, not within the statute of frauds. Another Wisconsin case\(^{104}\) presented the question Whether an oral contract between two vendees to jointly purchase a stock of merchandise and sell part of the goods and then divide the proceeds and the balance of the goods between themselves was a contract within the statute of frauds. The court held that the contract was not within the statute of frauds because "the parties do not stand in the relation of seller and buyer. They agree to buy jointly and to divide what they buy." In other words, there is no contract to sell or sale at all; it is merely a contract to divide the interests growing out of a joint purchase.

The second class of subject-matter to which the statute of frauds is applicable, is "chooses in action." By "chooses in action" is meant any "rights to personal things of which the owner has not the possession but merely a right of action for their possession."\(^{105}\) The Alexander case\(^{106}\) involving an order drawn upon the county treasurer is a good example of a sale of a chose in action. The only reason that "chooses in action" are expressly designated in the present Wisconsin statute of frauds is

\(^{99}\) Wiger v. Carr, 131 Wis. 584, 111 N.W. 647 (1907).
\(^{100}\) Mygatt v. Tarbell, 78 Wis. 351, 47 N.W. 618 (1890).
\(^{101}\) Supra, note 98.
\(^{102}\) Supra, note 99.
\(^{103}\) Supra, note 100.
\(^{104}\) Stack v. Roth Bros. Co., 162 Wis. 281, 156 N.W. 148 (1916).
\(^{106}\) Alexander v. Oneida County, 76 Wis. 56, 45 N.W. 21 (1890).
to avoid any mistaken conception that choses in action are not to be included within its scope.

The next key word of the statute,\textsuperscript{107} namely, "of the value of fifty dollars or upwards," further limits the scope of the statute of frauds, restricting its scope to contracts to sell or sale of goods or choses in action of the value of fifty dollars or more.\textsuperscript{108} However, regardless of whether the vendee is purchasing a full or partial interest in the property, the contract is within the statute if the value of interest purchased is fifty dollars or over.\textsuperscript{109} The value limit of the Wisconsin statute is taken from the original English statute of frauds fixing the limit at £10, which roughly translated corresponds to $50. It has been suggested, that constantly rising price levels during the last two centuries have gradually made the statute applicable to smaller and smaller sales and that the limit should be raised. The Uniform Sales Act, as recommended by the Commissioners on Uniform State Laws, fixes the limit at $500 and this amount is fixed in most of the jurisdictions which have adopted the act. However, the Wisconsin Legislature, notwithstanding the recommendation, has seen fit to retain the original limit.

Having considered what contracts are within the statute of frauds, we next inquire what must be done in order to comply with the statute if the contract in question is governed by it. Although the statute\textsuperscript{110}, itself states the three alternate modes of compliance, yet a consideration of the decisions is necessary in order to properly interpret these statutory requirements.

The first of the three alternate methods of satisfying the statute of frauds is expressed as follows in the Wisconsin statute: "the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same."\textsuperscript{111} While the statute specifies acceptance and receipt as necessary requirements to satisfy the statute, yet the words of the statute "actually receive the same" necessarily include delivery of the goods on the part of the seller.\textsuperscript{112} There could be no actual receipt on the part of the buyer unless the vendor delivered the goods. Therefore to constitute a valid sale by a compliance with the first method, there must be 1) delivery of the goods; 2) receipt of the good; and 3) acceptance of the goods.\textsuperscript{113}

\textsuperscript{107} Wis. STAT. (1941) § 121.04(1).
\textsuperscript{108} Weston v. Dahl, 162 Wis. 32, 155 N.W. 949 (1916).
\textsuperscript{109} Gerndt v. Conradt, 117 Wis. 15, 93 N.W. 804 (1903).
\textsuperscript{110} \textit{Supra}, note 107.
\textsuperscript{111} \textit{Supra}, note 107.
\textsuperscript{112} Friedman v. Plous, 158 Wis. 435, 149 N.W. 218 (1914); Mellen Produce Co. v. Fink, 225 Wis. 90, 273 N.W. 538 (1937).
\textsuperscript{113} \textit{Supra}, note 112; Hansen v. Roter, 64 Wis. 622, 25 N.W. 530 (1885); Bacon v. Eccles, 43 Wis. 227 (1877); Pike v. Vaughn, 34 Wis. 499; Smith v. Bouck, 33 Wis. 19 (1873).
Considering the term "delivery," the decisions show that it must be such a transfer of possession as the property is susceptible of; mere words are not sufficient to constitute delivery. A constructive or symbolic delivery may satisfy the necessary transfer of possession to constitute delivery in the case of articles incapable of actual manual delivery. However, in such case the thing done to effect the transfer and delivery must be such as to put the goods as fully in the actual physical control of the buyer as of any other person. The Mahoney case illustrates this rule. In that case an oral contract was made for the sale of the stock of a certain company but no stock had as yet been printed or issued. However, after the making of the contract, the seller (owner of all the stock) ceased to act as secretary, treasurer and general manager, and he transferred his checking right to the buyer; he took no further part at all in the management of the corporation. The buyer took over the company, appointed his own manager, and drew checks upon the company's funds in the bank. The issue in the case was whether there was a sufficient delivery to satisfy the statute of frauds. The court spoke as follows: "In view of the nature of the subject matter sold it is difficult to see what more could have been done to perform the contract. The certificates of stock were not printed so could not be delivered. . . . The nature of the subject matter of the sale in this case did not permit of a manual delivery, but delivery so far as possible was made by plaintiff stepping out and the defendants stepping in. This constituted delivery and acceptance." However, actual manual delivery of the goods is necessary in those cases where such delivery is possible. Moreover, delivery of the goods is not sufficient in itself to take the contract out of the statute of frauds; the delivery must be under and pursuant to the contract. However, it is not necessary that all of the goods be delivered in order to constitute a sufficient delivery; a delivery of a portion of the goods will suffice. As to the time at which delivery must be made, proper delivery can be made either when the agreement is made or afterwards. In certain circumstances no semblance of an actual physical transfer of the goods is necessary in order to constitute delivery although actual physical

114 Supra, note 112; Roberts, Johnson & Rand v. Machowski, 171 Wis. 420, 177 N.W. 509 (1920).
115 Supra, note 112.
116 Mellen Produce Co. v. Pink, 225 Wis. 90, 273 N.W. 538 (1937).
117 Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920).
118 Idem.
119 Supra, note 116.
120 Libman v. Fox-Pioneer Scrap Iron Co., 175 Wis. 485, 185 N.W. 551 (1921).
122 Amson v. Dreher, 35 Wis. 615.
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transfer is possible. For example, where a person sells his property to his bailee;\textsuperscript{123} where the vendee constitutes the vendor his bailee of the goods and the vendor thereafter holds these goods as bailee;\textsuperscript{124} where the vendor writes a notation to the effect that he holds the goods as bailee for the vendee and vendee accepts this instrument;\textsuperscript{125} where the vendee of all the merchandise in a store places a sale sign across the front of the building, takes the key and assumes control of the store;\textsuperscript{126} where the original vendee resells the property to the original vendor before any delivery is made under the original sale.\textsuperscript{127} In the \textit{Snider} case\textsuperscript{128} the Wisconsin court said that "a person can sell his property to his bailee and make a good delivery thereof without actually taking the property into his own possession and then returning it to the possession of the vendee." The court reasoned as follows: "The law is founded in reason and common sense, and requires the performance of no such useless acts to make a sale valid."\textsuperscript{129} In the \textit{Janvrin} case\textsuperscript{130} the court stated that "parties contract without writing for the sale of goods exceeding fifty dollars in value. There is no payment and no delivery. The contract is void by statute. But the vendor says to the vendee, 'I deliver the goods'; and the latter replies, 'I accept them, and desire you to store them for me as my bailee,' and the contract is good! . . . If such a delivery and acceptance are actually made, it satisfies the letter of the statute." The Wisconsin court, in a later case,\textsuperscript{131} spoke as follows: "It would seem that the giving of a written receipt for the goods by Limits (seller), acknowledging that he held the goods subject to the order of the company, and the acceptance of such receipt by the company, was a sufficient delivery and acceptance of them by the company to take the case out of the statute." In an even more recent case\textsuperscript{132} the court held that: "His (buyer's) sign spread across the front of the building was a public declaration that a delivery sufficient to effect a sale had been made. His taking and retaining possession of the key to the premises in which the goods were found, the assuming control thereover, the subsequent sales by the clerk, all furnish ample support for the conclusion . . . that there had been a delivery and acceptance." On the question of retained possession by a repurchasing vendor and delivery, the Wisconsin court set down the rule that the retained possessions was equivalent to delivery; "no further delivery

123 Snider v. Thrall, 56 Wis. 674, 14 N.W. 814 (1883).
124 Janvrin v. Maxwell, 23 Wis. 51, 82 N.W. 298 (1888).
125 Norwegian Plow Co. v. Hauthorn, 71 Wis. 529, 37 N.W. 825 (1888).
127 Couillard v. Johnson, 24 Wis. 533 (1869).
128 Supra, note 123.
129 Supra, note 123.
130 Supra, note 124.
131 Supra, note 125.
132 Supra, note 126.
was practicable or necessary in order to take the transaction out of the statute."\textsuperscript{133}

The Wisconsin cases are very much in accord on the question of delivery with the exception of the \textit{Silkman} case\textsuperscript{134} The \textit{Silkman} case is out of line with the tenor of a number of Wisconsin cases, but it is especially at variance with the \textit{Snider} case.\textsuperscript{135} The court in the \textit{Silkman} case says, that "the fact that the goods are already in the A's (buyer's) possession under a prior understanding does not amount to a delivery or acceptance. There must be some affirmative act of his to take the case out of the statute."\textsuperscript{136} A redelivery by the vendee to the vendor and another delivery by the vendor to the vendee under the circumstances disclosed in the \textit{Silkman} case would seem to be just such "useless acts" as the \textit{Snider} case\textsuperscript{137} declared to be unnecessary.

The next two requirements under the first method of complying with the statute of frauds, namely, acceptance and receipt, can best be considered together. The meaning of "acceptance" is stated in the statute itself as follows: "There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specified goods."\textsuperscript{138} The Wisconsin case of \textit{Friedman} v. \textit{Plous}\textsuperscript{139} points out the difference between acceptance and receipt and a later Wisconsin case\textsuperscript{140} further defines receipt: "The statute seems to separate acceptance from receipt and provide that the former requirement may be satisfied by words or conduct, while the latter presupposes a delivery by the seller and requires some intentional act of receipt on the part of the purchaser. . . . Mere words are not sufficient to establish . . . receipt."\textsuperscript{141} "Obviously there can be no actual receipt on the part of the purchaser in the absence of some affirmative action on his part. Actual receipt cannot result from passive or negative conduct."\textsuperscript{142} However, a physical delivery is not always necessary to constitute receipt. If the nature of the subject matter of the sale is not such as is capable of manual receipt, any constructive or symbolic receipt is sufficient to transfer possession and constitute a valid receipt.\textsuperscript{143} "There may be a transfer of possessions although the property remains with the seller. . . . But in such case title and possession must be in the unre-

\begin{footnotes}
\item[133] Supra, note 127.
\item[135] Snider v. Thrall, 56 Wis. 56, 14 N.W. 814 (1883).
\item[136] Supra, note 134.
\item[137] Supra, note 135.
\item[138] Wis. Stat. (1941) § 121.04(3).
\item[139] Friedman v. Plous, 158 Wis. 435 (1914).
\item[140] Roberts, Johnson & Rand v. Machowski, 171 Wis. 420, 177 N.W. 509 (1920).
\item[141] Supra, note 139.
\item[142] Supra, note 140.
\item[143] Mellen Produce Co. v. Fink, 225 Wis. 90, 273 N.W. 538 (1937).
\end{footnotes}
stricted control of the buyer, so as not to permit or recall or recis-

4 As to the time at which acceptance and receipt can be made, it is evident from the statute (121.04) and the cases\textsuperscript{145} that acceptance can be made either before or after the contract, and that receipt can be made either at the time of the making or after the making of the contract. The \textit{Mellen Produce Co.} case\textsuperscript{148} states that "to enable acceptance and receipt of part of the goods to vitalize the oral contract, it is not necessary that they occur at the time the contract was made." The \textit{Amson} case\textsuperscript{147} is to the same effect. Moreover, the fact that the vendee has previously canceled the oral contract will not prevent the operation of the acceptance and receipt theory if the vendee subsequently receives and accepts the goods and gives the vendor no notification of rejection within a reasonable time.\textsuperscript{148} However, where an owner makes an oral contract of sale with one party and later makes a written contract of sale with a bona fide third party, any subsequent delivery, acceptance and receipt under the oral contract of sale after the execution of the written contract is of no effect and does not take the prior oral contract of sale out of the statute of frauds.\textsuperscript{149}

In many cases one of the two requirements is present but the other is missing, and, as a result,\textsuperscript{150} the contract fails. For example, in an Illinois case the vendee received shares of stock manually but gave no expression by word or conduct of his assent to become the owner of the stock. The court held that that was a receipt but no acceptance. In the \textit{Mellen Produce Co.} case,\textsuperscript{151} the vendee inspected the lumber in the vendor's yard and said it was satisfactory, but he left the lumber in the vendor's yard and did no affirmative act in regard to it. The court held that there was an acceptance but no receipt. However, the court did point out that if the vendee had left some one in charge of the lumber for him and thus obtained unrestricted control of title and possession, there would have been a valid receipt even though the lumber remained upon the vendor's land. A New York court\textsuperscript{152} held that despite the fact that the vendee signed a receipt for the delivery of needle-books as "in good order" and said "It is all right," and even though the needle-books were left on the sidewalk in front of the

\textsuperscript{145} \textit{Amson v. Dreher}, 35 Wis. 615; \textit{Mahoney v. Kennedy}, 172 Wis. 568, 179 N.W. 754 (1920).
\textsuperscript{146} \textit{Supra}, note 143.
\textsuperscript{147} \textit{Amson, Supra}, note 145.
\textsuperscript{148} James Talcott, Inc. v. Cohen, 226 Wis. 418, 275 N.W. 906 (1938).
\textsuperscript{151} \textit{Mellen Produce Co. v. Fink}, 225 Wis. 90, 273 N.W. 538 (1937).
\textsuperscript{152} Alfred Shrimpton & Sons v. Dworsky, 21 N.Y.S. 461 (1892).
buyer's place of business, nevertheless, there was no receipt within the meaning of the statute of frauds. In the Spear case the vendor, in pursuance of an oral contract, delivered stock to the vendee, but the vendee, not having the purchase price with him, handed the stock back to the vendor and told him to send the stock to a certain bank with a draft drawn upon the vendee for the price. The court, in deciding that there was no receipt and acceptance, held that the vendee merely agreed to buy the stock and to accept and pay for it afterwards at the bank. In the Roberts, Johnson, and Rand case the vendee left a shipment of defective shoes at a railroad depot for two and one-half months and gave the vendor no notification of rejection. The court held that there was neither an acceptance nor a receipt. In this regard, the point is often made that delivery by the vendor to the railroad and receipt by the railroad constitutes a delivery, acceptance and receipt by the vendee. However, the decisions show that delivery to a carrier for conveyance to the vendee is prima facie an actual receipt by the vendee, a carrier being the vendee's agent to receive the goods but that the carrier is not the vendee's agent to accept the goods. In the Weinrich case the New York court specifically states as follows: "Assuming that the delivery to the carrier was equivalent to an actual receipt by the buyer, there has been no acceptance of the goods . . . " However, inasmuch as acceptance and receipt need not be contemporaneous, and, since delivery to the carrier constitutes delivery to and receipt by the vendee, it would seem that if the vendee accepted the goods by word or conduct before delivery to the carrier, then, upon delivery to the carrier, the statute would be fulfilled.

The question is often raised whether a manual receipt of goods by the vendee is not always 'de facto' such conduct as to constitute an "acceptance." This quaere is answered in the Bacon case as follows: "We think the question must be answered in the negative. To hold otherwise would be to hold that the words "accept" and "receive," as used in the statute, are synonymous. . . . When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing. Indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not." In order that a receipt may constitute an acceptance "there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the

153 Spear v. Bach, 82 Wis. 192, 52 N.W. 97 (1892).
154 171 Wis. 420, 177 N.W. 509 (1920).
156 Hancock, Supra, note 155.
157 Bacon v. Eccles, 43 Wis. 227 (1877).
part of the vendor, and an ultimate acceptance and receiving of the
property by the vendee, so significant that he shall have precluded him-
self from taking any exception to the quantum or quality of the goods
sold. However, if the vendor delivers goods to the vendee in pur-
suance of an oral contract and if the vendee receives these goods with
intent to accept them in case they should agree with the sample, and if
they do actually agree with the sample, this is a complete "acceptance"
even though the vendee subsequently refuses to accept the goods.
The intention of the vendee to accept if the goods agree with the
sample, concurring with the fact that they did so agree, is held to
constitute a complete acceptance.

"Part perforpiance" is often spoken of as a method of satisfying
the statute of frauds. However, this term designates no separate
manner of complying with the statute but is rather a form of compact
terminology for expressing the idea that a delivery, acceptance and
receipt have taken place.

Whether or not oral "repurchase agreements," that is, promises to
repurchase the property from the vendee at the option of the vendee,
are rendered unenforceable by the statute of frauds depends wholly
upon who makes the "repurchase" promise. If the vendor owner him-
self makes the "repurchase" promise as a condition of the sale, the
"repurchase" agreement is valid because "the whole constitutes but an
entire original contract that is sufficiently performed to take it out of
the statute of frauds"; the agreement of the vendee to purchase and
the agreement of the vendor owner to repurchase are parts of an origi-
nal and entire contract constituting a conditional sale, and the delivery
of the property and the payment of the purchase price satisfies the
statute of frauds. Part performance is the ultimate basis for holding
such an agreement valid. If the vendor is selling goods as agent of
another, and, as part of the contract of sale enters into an individual
agreement to repurchase the goods, this "repurchase agreement" is
valid because "the contract between the agent and buyer is in the
nature of a contract of indemnity, which is neither a contract for the
sale of goods, ware, and merchandise, nor a contract to answer for
the debt default or miscarriage of another hence not within the statute

158 Idem.
159 Idem; Smith v. Stoller, 26 Wis. 671 (1870).
160 Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920); Cotterill v. Stevens,
10 Wis. 422 (1860); Hankwitz v. Barrett, 143 Wis. 639, 128 N.W. 430 (1910);
Hoberg v. McNeveins, 169 Wis. 485, 173 N.W. 221; Gano v. Chi. & N. W.
Ry. Co., 66 Wis. 1, 27 N.W. 628 (1886).
161 Idem.
162 Korrer v. Madden, 152 Wis. 646, 140 N.W. 325 (1913); Hankwitz v. Barrett,
143 Wis. 639, 128 N.W. 430 (1910).
163 Vohland v. Gelhaar, 136 Wis. 75, 116 N.W. 869 (1908); Hassey v. A. C.
of frauds." The "repurchase agreement" is an original undertaking made upon a valuable consideration and to subserve the business or pecuniary purposes of the vendor agent. The question of the enforceability of this type of "repurchase agreement" was merely raised by the Wisconsin Supreme Court in the Korrer case, but was expressly answered by the court in the cases of Lingelbach and Hull. If the "repurchase promise" is made by a third person, this agreement is unenforceable under the statute of frauds even though made at the time of the sale and even though it is an "inducing cause thereof because it is a separate, distinct and independent agreement from the contract between the parties to the sale consummated.

The second method of complying with the statute of frauds is stated in the statute as follows: "give something in earnest to bind the contract, or in part payment." Although the statute contains a disjunctive, yet in effect and to all intent and purposes it offers but one manner of compliance—namely, the giving of any personal property, money or otherwise, as a part of the purchase price. This construction is placed upon the statute because the two key words of the disjunctive are practically synonymous. "Today," said a New York court, "the giving of earnest and part payment are practically synonymous. Some overt act is what the framers wanted in addition to words of mouth. The statute places no limitation on the manner in which payment shall be made. . . . The payment may be in the form of any personal property. 'The statute requires that he should pay some part of the purchase money. No doubt it must be taken, in its spirit, to mean anything or part of anything given, by way of consideration, which is money or money's worth. But the object was to have something pass between the parties besides mere words; some symbol like earnest money'. " Whatever may have been the meaning of the word 'earnest' its statutory meaning is part payment. . . . 'Earnest' seems understood to be a part of the price'. However, part payment can be made in many different ways other than by the manual transfer of money or personal property. For example, a promise to pay the seller's creditor, accepted by the latter, who thereupon discharges the seller, is

164 Lingelbach v. Luckenbach, 168 Wis. 481, 170 N.W. 711 (1919).
165 Hull v. Brown, 35 Wis. 652; Cooper v. Huerth, 156 Wis. 346, 146 N.W. 485.
166 Supra, note 162.
167 Supra, note 164.
168 Supra, note 165.
169 Korrer v. Madden, 152 Wis. 646, 140 N.W. 325 (1913); Becher v. Kreul, 173 Wis. 273 (1921); Felton v. Cherkasky, 234 Wis. 223, 290 N.W. 591 (1940).
170 Wis. STAT. (1941) § 121.04(1).
172 Idem; Weidner v. Hyland, 216 Wis. 12, 255 N.W. 134 (1934).
173 Idem.
a part payment within the statute;\textsuperscript{175} the fact that the buyer gives credit to the seller on the debt he owes the buyer is "as much a payment for them (the goods purchased) as though the money had been paid over for them."\textsuperscript{176} The actual surrender of the seller's promissory note by the buyer, as part of the purchase money for goods purchased, is also such a part payment as will take the sale out of the statute of frauds.\textsuperscript{177} Nevertheless, in order to constitute part payment, the payment must run primarily from the vendee to the vendor.\textsuperscript{178} For example, neither the payment of a commission by a vendor to a broker for selling property, nor the transfer of the property by the vendor to the purchaser constitutes the giving of "something in earnest to bind the contract, or in part payment."\textsuperscript{179} The quaere concerning whether the giving of a check is payment within the statute of frauds is answered, as follows by the Missouri court: "Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense the holder of the check becomes the agent of the drawer to collect the money on it; and if it is dishonored there is no accord and satisfaction of the debt."\textsuperscript{180}

As to the time within which the payment of some portion of the purchase price must be made in order to comply with the statute, all of the Wisconsin decisions\textsuperscript{181} hold that such "payment . . . must be made at the time the contract was entered into, and a subsequent payment does not meet the requirements of the statute," except "where there is a distinct, intelligent reference by both parties, where the payment is made, to the previous void contract, and a declared intent to make the agreement valid and binding according to the tenor of the previous negotiation; there the sale may be deemed made in fact at that time, and the requirements of the statute are fully satisfied."\textsuperscript{182}

However, in view of the fact that all of these decisions are based upon the previous version of the statute of frauds which expressly stated

\begin{itemize}
  \item Cotterill v. Stevens, 10 Wis. 423 (1860).
  \item\textsuperscript{175} Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N.W. 825 (1888).
  \item\textsuperscript{176} Sharp v. Carroll, 66 Wis. 62, 27 N.W. 832 (1886).
  \item\textsuperscript{177} Schwanke v. Dhein, 215 Wis. 61, 254 N.W. 346 (1934).
  \item\textsuperscript{178} Bates v. Cheesbro, 32 Wis. 594 (1873); Kerhof v. Atlas Paper Co., 68 Wis. 674, 32 N.W. 766 (1887); Alexander v. Oneida County, 76 Wis. 56, 45 N.W. 21 (1890); Crosby Hrdw. Co. v. Trester, 90 Wis. 412 (1895).
  \item\textsuperscript{179} Idem.
  \item\textsuperscript{180} Supra, note 174.
  \item\textsuperscript{181} Bates, Supra, note 181.
  \item\textsuperscript{182} Supra, note 174.
\end{itemize}
that the part payment must be made “at the time” of the making of the contract, and also declared that unless the statute was complied with the contract would be “void,” these cases are not determinative in construing the present statute. New York, however, has had occasion to decide upon this very point under the present statute, and, in so deciding, spoke as follows: “The Legislature has enacted the Uniform Sales of Goods Act as the law of this state. . . . It will be noted that the requirement for part payment to be made at the time is omitted, thus changing the law of this state. . . . In my opinion, it is now the law of this state that neither acceptance, receipt nor part payment need be contemporaneous with the making of the contract, but may occur at any time thereafter, if under the contract and prior to its revocation.” In another case involving the identical issue, the New York court stated that “the amendment of the statute of frauds has eliminated the requirement that the part payment must be made ‘at the time’ of making the contract.” In view of these decisions construing the Uniform Sales Act, it can be said with reasonable certainty that in Wisconsin, as in New York, neither delivery, acceptance, receipt nor part payment need be contemporaneous with the making of the oral contract if made under the contract and prior to its revocation.

The third and most common method of satisfying the statute of frauds is expressed as follows in the statute: “unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.” In considering this manner of complying with the statute, it is to be noted that this clause refers not to a written contract but to a written note or memorandum of the existing oral contract. The interpretation to be placed on the two key words “note or memorandum” is stated by the Wisconsin Supreme Court as follows: “It is not necessary in order to take the contract of sale out of the statute of frauds that there be a formal written contract, nor is it necessary that the written memorandum be complete in one writing. . . . It is well established that a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to the subject matter of the contract and so connected with each other that they may be fairly said to constitute one paper relating to the contract, though only one of the papers may be signed by the party to be charged. . . . However, it must appear from the several writings, without resorting

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183 Supra, note 181.
186 Wis. Stat. (1941) § 121.04(1).
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8 to parol evidence, what the contract is."

Letters, receipts, order blanks, statements of account, notes, checks, deeds, wills, pleadings, advertisements, records of municipal affairs, telegrams and memorandum books have all been held to be notes or memorandums within the meaning of the statute. As to the actual contents of the note or memorandum, it must state 1) the parties, and their respective identities; 2) the consideration or price, if the price has not been paid; if the price has been paid, it need not be specifically stated; 3) the subject matter of the contract; and 4) the signature of the person to be charged. In regard to the description of the subject matter of the goods, Wisconsin holds that the memorandum of a sales contract need not describe the goods so minutely and exactly as to exclude the possibility that other goods than those intended will fall within the words of the writing; no more is required than that there be reasonable certainty. As to the time when the note or memorandum must be made, the cases hold that they may be made at any time before the action is brought. Further, it is not necessary that they be made with the intent of making a note or memorandum.

Concerning the issue of whether or not the note or memorandum must be delivered in order to satisfy the statute, Williston, citing Wisconsin authority, says as follows: "Since the memorandum need not itself be a contract and intent to make it is not requisite, it should follow,


189 Wis. Club v. John, 202 Wis. 476, 233 N.W. 79.

190 Pearlberg v. Levishon, 112 Misc. 95, 182 N.Y.S. 615 (1920).


194 Campbell v. Thomas, 42 Wis. 437 (1877).


199 Tarbell Co. v. Grimes, 84 N.H. 219, 14 Atl. 73 (1930); St. Edwards Co. v. Shawano Milk Products Co., 211 Wis. 378, 247 N.W. 465 (1933).

200 Weiner v. Whipple, 53 Wis. 298, 10 N.W. 433.

201 Des Brisay v. Foss, 264 Mass. 102, 162 N.E. 4 (1928); Frank v. Ettringham, 65 Miss. 281, 3 So. 655 (1888).


204 Wis. Stat. (1941) § 121.04 (1).


207 Idem.

208 Campbell v. Thomas, 42 Wis. 437 (1877).
especially in view of the fact that neither the original statute, nor its successors, mentions delivery, that a writing retained wholly within the control of the party to be charged, but which complies with the other requirements of the statute, should be a sufficient memorandum."²⁰⁹

Any writing by hand, or printed, or typewritten is sufficient to satisfy the qualifying term "in writing."²¹⁰

As to the nature of the signature required by the statute, any signature in the form of writing, stamping, printing or typewriting is sufficient to meet the calls of the statute if made with the intention of authentically and finally adopting it as one's own.²¹¹ It is to be noted also that, in view of the fact that the note or memorandum is not a contract, it is not compulsory that both parties to the contract sign; it is necessary only that one party sign, namely, the party to be charged or his agent.²¹² Moreover, "for the purpose of satisfying the provisions of a statute requiring a note or memorandum to be signed by the party to be charged or by his agent, a memorandum signed by a properly authorized agent with or without indication of the existence or identity of the principal is sufficient to charge the principal."²¹³ On the question of whether or not the agent must be authorized in writing it is held in the Kreutzer case²¹⁴ that in the absence of statutory requirement, an agent need not be authorized in writing to sign a note or memorandum of a contract for a sale.

Having considered what contracts are within the scope of the statute of frauds and the three alternate methods of satisfying the statute the question arises as to who can raise the statute of frauds as a defense. This is answered in Wisconsin by two cases—the Draper case²¹⁵ and the Gehl case.²¹⁶ From a reading of these cases it is evident that the defense of the invalidity of a contract of sale under the statute of frauds is a personal defense and is not available to strangers to the contract. Like usury, infancy, and various other defenses, it can only be relied upon by parties of privies.²¹⁷ Consequently, where a vendor, by written contract, sells hay to vendee A and

²⁰⁹ II Williston, Contracts, No. 579A, p. 1666.
²¹¹ Idem; 54 Wis. 214, 11 N.W. 534; 56 Wis. 292, 14 N.W. 465; 104 Wis. 614, 80 N.W. 530; Lee v. Vaughn Seed Store, 101 Ark. 68, 141 S.W. 496 (1911).
²¹⁴ Kreutzer v. Lynch, 122 Wis. 474, 100 N.W. 887 (1904).
²¹⁵ Draper v. Wilson, 143 Wis. 510, 128 N.W. 66.
²¹⁷ Supra, note 215.
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later sells the same hay to vendee B by an oral contract, vendee A cannot raise the statute of frauds in regard to the oral contract between the vendor and vendee B.\footnote{Supra, note 215.} Vendee A is a stranger to the oral contract. But, where the vendor makes an oral contract of sale to vendee C first and then sells the same property to vendee D by a written contract, vendee D can raise the statute of frauds as to the prior oral contract\footnote{Supra, note 216.} because by making this subsequent written contract of sale the vendor "de facto" repudiated the previous oral contract. The vendor, upon making this subsequent written contract, said, in effect, to vendee C, "Our contract is unenforceable because not in writing and I am repudiating it. Therefore, vendee D is not raising the statute of frauds to question the validity of an oral contract to which he is a stranger; he is merely availing himself of the fact that the vendor used the statute of frauds to repudiate a prior oral contract of sale which he, the vendor himself, had made with vendee C in regard to the same property which he later sold to vendee D by a written contract.

Concerning the question of oral modification of a contract within the statute of frauds, the authorities are in accord that no oral modification of the essential terms of a contract required to be in writing is permitted.\footnote{Gutknecht v. C. A. Lawton Co., 231 Wis. 413, 285 N.W. 411 (1939); Hansen v. Gunderson, 95 Wis. 613, 70 N.W. 827 (1897); Saveland v. Western Wis. Ry. Co., 118 Wis. 267, 95 N.W. 130 (1903); Schaas v. Wolf, 173 Wis. 351, 181 N.W. 214 (1921); Gether v. R. Connor Co., 196 Wis. 25, 219 N.W. 373 (1928).} However, no case holds that a collateral agreement referred to in a contract required to be in writing must be regarded as an essential element of such contract, or that it is within the statute.\footnote{Gutknecht, Supra, note 220.} Consequently, a collateral agreement as to wages can be orally modified though contained in a written contract of sale which, under the statute of frauds, is required to be in writing.\footnote{Gutknecht, Supra, note 220.} However, there is one basis upon which an oral modification of the essential terms of a written contract within the statute of frauds is permitted, namely, upon the doctrine of estoppel.\footnote{Gutknecht, Supra, note 220.} One party to a contract cannot invoke the statute of frauds to close the door to a trap in which the other party may be caught by reason of having relied upon an oral agreement made between the parties.\footnote{Hirsch Rolling Mill Co. v. Milw. & Fox River Valley, 165 Wis. 220, 161 N.W. 741 (1917).} For example, where the parties to a written contract within the statute of frauds make an oral agreement extending the time for delivery, and the seller relies upon the oral agreement and would have made delivery within the time specified

\footnote{Idem.}
in the written contract if he had not relied on this oral agreement, the buyer is estopped from asserting that this oral modification of the written contract was invalid under the statute of frauds.225

Whether or not the statute of frauds is a just and equitable law has often been questioned. It has been asserted that the statute has outlived its usefulness and is out of place amid the changed legal and commercial conditions of today.226 This viewpoint has its foundation in the fact that some of the original reasons for requiring the writing, such as the interest disqualification of the party to a lawsuit have now disappeared and that it appears to furnish opportunity for a fraudulent defendant to avoid an honest bargain on the mere technical defense of the statute. However the Wisconsin Supreme Court has taken a favorable attitude toward the statute, the court expressing itself in Korrer v. Madden227 as follows: “The statute of frauds sometimes works hardships, but it is the law as written by our lawmaking power, and it is the duty of the courts to enforce it in all cases which come fairly within its scope. Our statute is substantially taken from Statute 29, Cor. II, which has stood the test of over two centuries of time and change. The English statute was incorporated in our statute law in 1849 and has since remained there without substantial change or amendment. This is pretty substantial evidence that the good which it has accomplished far outweighs any wrong that has resulted from its operation.”228

225 Idem.
227 152 Wis. 646, 140 N.W. 325 (1913).
228 Idem.