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STUDIES IN THE LAW OF THE STATUTE OF FRAUDS.

(Continued from p. 602.)

III. *Indemnities for becoming guarantor or bailman.*

In regard to this troublesome question it may be said first that an agreement to save one harmless for entering into an ordinary guaranty is, as a rule, within the Statute of Frauds. If A. says to B., become surety for C. to D., here if D. recovers from B. the first person who ought to reimburse and from whom if he assents to B.'s becoming surety, the ultimate exoneration should come is C., so that A.'s promise is to pay B. if C. does not, and is therefore within the statute. See the opinion of Lord DENMAN in *Green v. Cresswell*, 10 A. & E. 453. *Chapin v. Merrill*, 4 Wend. 657, which held a contrary doctrine, has been overruled in *Baker v. Dillman*, 12 Abb. Prac. 316. In *Lucas v. Chamberlain*, 8 B. Mon. 276, although the unqualified language of the opinion of the court would perhaps endorse *Chapin v. Merrill*, the facts of the case support the decision on another ground. C., the person answered for, was really a mere instrument of the promisee's, so that the promissor guaranteed the promisee's own debt, thus coming substantially within the line of decision headed by *Thomas v. Cook*, 8 B. & C. 728, and *Eastwood v. Kenyon*, 11 A. & E. 438, to the effect that a promise made to a debtor to answer for a debt for which he himself is liable is not within the Statute of Frauds. In a dictum in *Mallory v. Gillett*, 21 N. Y. 412, an indemnity for an ordinary guaranty is classed among those without the statute. *Perley v. Spring*, 12 Mass. 297 (partially overruled in *Cahill v. Bigelow*, 18 Pick. 371), has language to the same effect as

Chapin v. Merrill, but in fact the promissor was put in funds out of which to answer his indemnity, which of itself (*vide supra* 598-9) would take the case out of the statute. This was a case too of civil bail, as to which something will be said hereafter.

Besides *Baker v. Dillman* we have cases as follows denying the ruling of *Chapin v. Merrill*: *Brown v. Adams*, 1 Stew. 51; *Staats v. Howlett*, 4 Denio 559; *Kingsley v. Balcome*, 4 Barb. 131; *Drangham v. Bunting*, 9 Ired. 10; *Easter v. White*, 12 Ohio 219. The authorities usually cited to support the principle of *Chapin v. Merrill* will be found to resolve themselves into cases where the party promising to indemnify was either co-principal with the person whose debt the plaintiff guaranteed, as in *Batson v. King*, 4 Hurlst. & N. 176; or was substantially himself the principal, as in *Doane v. Newman*, 10 Mo. 69; *Lucas v. Chamberlain*, 8 B. Mon. 276, *Garnier v. Hudgins*, 46 Mo. 399 (a case rather resembling *Batson v. King*); *Reynolds v. Doyle*, 1 M. & G. 753, and *Smith v. Sayward*, 5 Greenl. 504; or was already surety for the principal and procured the promisee to become his co-surety, as in *Jones v. Letcher*, 13 B. Mon. 364; *Barry v. Ransom*, 12 N. Y. 462; *Jones v. Shorter*, 1 Kelly (Geo.) 294; *Thomas v. Cook*, 8 B. & C. 728; *Harrison v. Sawtel*, 10 Johns. 242 (it is stated that the promissor in this case was already liable for the third party as to whom the promisee became guarantor, but it does not appear how); *Blake v. Cole*, 22 Pick. 97 (A. sued B. his co-surety for contribution; B. set up a parol indemnity; the Statute of Frauds held not to apply), and *Taylor v. Savage*, 12 Mass. 102; or where, as in *Peck v. Thompson*, 15 Vt. 637, A., who had paid B. with an order on C., which C. honored on the stipulation that B. should hold himself accountable for repayment, says to B. endure a suit from C., and if it is found that C. owed you nothing on my order (having owed me nothing), that the payment was a voluntary one of his own money and you are obliged to refund the amount, I will not consider that order as a payment of my debt to you, but will pay you afresh and compensate you for the costs and expenses of the suit; or where, as in *Tarr v. Northey*, 17 Me. 113, A., who was not the execution-creditor, told B. the sheriff, to levy on certain property and promised to indemnify him; cases where the promise was not to answer for the debt, default, &c., of a third person, but for that of the promisee himself. In *Peck v. Thompson* the promisee should

have paid C. without a suit; in *Tarr v. Northey* if he should levy on the wrong property, he would have been guilty of a default. *Adams v. Dansy*, 6 Bingh. 506 (19 E. C. L. 149), is a case similar to these two last. *Peck v. Thompson* may also be considered as a case of conditional payment; A. who owes B. pays him by a debt which C. owes him, A., and promises if C. does not pay, he, A., will; a contract clearly without the statute. Or lastly, the cases will be found to be where the promisee's liability is substituted for the promisor's, as in *Hassinger v. Solmes*, 5 S. & R. 9. A. says to B., take my place as surety for C. to D. and I will save you harmless. In *Beaman v. Russell*, 20 Vt. 205, A. promised to indemnify B. for becoming one of the makers of a promissory note. The court held that as it did not appear that any one but A. was liable to reimburse B., the contract was not collateral. In *Chapin v. Lapham*, 20 Pick. 467, A. promised to indemnify B. for becoming surety for C. C. was a minor in whom there was no liability, the engagement therefore was not collateral.

The present state of the English law as to the application of the Statute of Frauds to indemnities for becoming bail, is thus given by Mr. Leake in his work on Contracts, p. 129: "An indemnity given to a person for becoming bail for the appearance of another on a criminal charge is not within the statute, because there is no debt or duty owing from the person bailed to the person who becomes bail. (*Cripps v. Hartnoll*, 2 B. & S. 697; 4 Id. 414; 31 L. J. Q. B. 150; 32 Id. 381): But an indemnity given to a surety in a bail-bond in a civil action was held to constitute a promise within the statute to answer for the default of the principal debtor; which decision it seems is to be supported, if at all, on the ground that in civil proceedings there is a legal duty in the person bailed towards his bail to keep him harmless by surrendering or paying the debt (*Green v. Cresswell*, 10 A. & E. 453; and see *Cripps v. Hartnoll*, *supra*; *Reader v. Kingham*, 13 C. B. N. S. 344, 355; 32 L. J. C. P. 108, 110)." *Reader v. Kingham*, as given by Mr. Leake, is as follows: "The plaintiff, the bailiff of a county court, having arrested a person for the non-payment of a judgment-debt, released him upon the promise of the defendant to pay the plaintiff the amount on a certain day or surrender the debtor; it was held that the promise was not within the statute because the debt answered for was not owing to the promisee." *Aldrich v. Ames*,

9 Gray 76, a promise to indemnify one for becoming bail held not to be within the statute; the case seems to have been rested on the principle of *Thomas v. Cooke*, and *Eastwood v. Kenyon*, *supra* 721. The bail seems to have been in a civil action. *Holmes v. Knight*, 10 N. H. 175 supports *Reader v. Kingham*; contra *Kingsley v. Balcolme*, 4 Barb. 131.

IV. *Whether an agreement which can be performed on one side within a year but not on the other, is within that section of the statute which provides that "No action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof."*

Mr. Leake, in his work on Contracts, p. 136-7, says: "The statute includes only those contracts which cannot be performed within a year on either side, contracts which may be performed within the year on one side, though they cannot be performed within the year on the other side, are not within the statute; thus a contract for the sale of goods to be delivered in six months, and to be paid for in eighteen months, would not be within the statute (per ABBOTT, J., *Bracegirdle v. Heald*, 1 B. & Ald. 722, 727; per PARKE, J., *Donellan v. Read*, 3 B. & Ad. 899, 903). A contract for the sale and assignment of a patent, to be paid for by payments at periods extending beyond a year, is not within the statute, because it is capable of being performed by the seller within the year: *Cheny v. Heming*, 4 Ex. 631; *Smith v. Neale*, 2 C. B. N. S. 67; 26 L. J. C. P. 143. So a contract between a landlord and tenant for the landlord to lay out 50*l.* in improvement of the premises, no time being given for so doing, and the tenant to pay 5*l.* a year increased rent during the remainder of the term, was held not within the statute: *Donellan v. Read*, 3 B. & Ad. 899; and see *Hoby v. Roebuck*, 7 Taunt. 157." See the American cases of *Gee v. Hicks*, Rich. Eq. 5; *Johnson v. Watson*, 1 Geo. 348; *Talmadge v. R. R.*, 13 Barb. 493; *Holbrook v. Armstrong*, 10 Me. (1 Fairf.) 31; *Rake v. Pope*, 7 Ala. 161; *Bates v. Moore*, 2 Bailey 614; *Houghton v. Houghton*, 14 Ind. 505. Where one party has it in his power to perform his part of a contract and to exact compensation from the other within a year the Statute of Frauds does not apply, though the performance of the contract might not happen till after a year: *Plimpton v. Curtis*, 15 Wend. 336. The doctrine of *Donellan v. Read* has been vigorously com-

batted in some of the United States, and not without a show of reason when the literal wording of the statute is considered. See Browne on Stat. of Fr., § 286 *et seq.*, for a clear treatment of this point. In *Sheehy v. Adarene*, 8 Am. Law Reg. N. S. 326, per BARRETT, J. (with a note by Judge REDFIELD), the syllabus is as follows: "Where a verbal contract is to be performed within a year by one party but not by the other, the question whether the Statute of Frauds applies or not depends on whether the suit is brought against the party who was to have performed his part within the year. If it is so brought the statute would not apply, but if brought against the party whose agreement was not to be performed within the year then the statute would be a defence." This apparently unequal rule is not, it is believed, supported by any other American authority, and though a number, as we shall see, are in harmony with it so far as it denies *Donellan v. Read*, none involve a doctrine which so seriously infringes the ordinary principle of mutuality of remedy. In *Pierce v. Paine*, 28 Vt. 34, REDFIELD, C. J., says "that if the work done by A., whose performance is to be *infra annum*, is accepted by B., whose performance is to be *extra annum*, the rule should be, not as laid down in *Souch v. Strawbridge*, 2 C. B. 808, viz.: that the contract is taken out of the statute, but that an action for recovery of his damages should lie by A." It is submitted, however, that if the doctrine of *Donellan v. Read* be denied, then it would follow that such an action for damages should be allowed each party, but that neither should be held to an exact performance of the contract. See *Emery v. Smith*, 46 N. H. 151, to the same effect as *Pierce v. Paine*, with an elaborate discussion of the cases. A promise to pay in three years for lands presently conveyed, held to be within the Statute of Frauds: *Marcy v. Marcy*, 9 Allen 8, denying the English rule and claiming the law of Vermont and New York to be the other way. In *Broadwell v. Getman*, 2 Denio 87, BEARDSLEY, J., laid down the rule afterwards developed in *Sheehy v. Adarene*. He said that a *quantum meruit* lay but not a recovery on the contract. The actual contract was, it would seem, incapable on both sides of performance within a year, or rather it appears to have been the intention of the parties that nothing should be done within that time. As to *Broadwell v. Getman*, see *Wilson v. Ray*, 13 Ind. 1. *Pitkin v. Long Island R. R.*, 2 Barb. Ch. 221, and *Quackenbush v. Ehle*, 5 Barb. N. Y. 469, ap-

parently involve the doctrine of *Broadwell v. Getman*. A. hired certain negroes to B., to be delivered at once and to be paid for twenty months from date; in an action for the price, the Statute of Frauds held to be a good defence: *Davenport v. Gentry*, 9 B. Mon. 427. *Tuttle v. Swett*, 31 Me. 555, is not an authority against *Donellan v. Read*, the contract in question could not be performed on either side, *infra annum*. A person received a conveyance of land, in consideration of which he promised to pay off an incumbrance thereon, maturing *extra annum*. Held, that as the contract was completely executed on one side by the delivery of the deed and nothing remained but the payment of the money, the Statute of Frauds did not apply: *Curtis v. Sage*, 35 Ill. 37, distinguishing *Archer v. Zeh*, 5 Hill 200, and sustaining *Donellan v. Read*, the cases cited against the latter being considered. A vendor's lien for purchase-money to be paid more than a year from the date of conveyance, held not to be affected by the Stat. of Frauds, one side of the contract being *infra annum*: *Haugh v. Blythe*, 20 Ind. 24. See to the same general effect *Compton v. Martin*, 5 Rich. (So. Car.) 14, and *Miller v. Roberts*, 18 Tex. 19.

V. *As to what contracts on the one hand are for the sale of any goods, wares, and merchandise, for the price of," &c., and within the statute; as to what contracts on the other are for work and labor and without the statute.*

A passage from Leake may perhaps be the best opening for this discussion also. "Contracts for work and labor, says Mr. Leake (Elements of the Law of Contracts, p. 138-9), "though expended in making goods for the employer are not contracts for the sale of goods within the statute. Thus a contract with a person to make an article with the materials of the employer is a contract for work and labor and not within the statute: (per BAYLEY, J., *Atkinson v. Bell*, 8 B. & C. 277, 283). A contract with a person to work up his own materials in making an article and to deliver it, may be a contract for work and labor, and the materials incident to the employment or a contract for the sale of goods according to the circumstances: (*Atkinson v. Bell*, and see *Lee v. Griffin*, 1 B. & S. 272; 30 L. J. Q. B. 252). Thus a contract with an attorney to prepare a deed: see per ERLE, J., *Grafton v. Armitage*, 2 C. B. 336, and per BLACKBURN, J., *Lee v. Griffin*), a contract for contriving a machine for a certain purpose (*Grafton v. Armitage*), a con

tract with a printer to print a book (*Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237), are contracts for work, labor and materials, and not for the sale of goods and not within the statute. A contract for the manufacture of a machine (*Atkinson v. Bell*, and *Grafton v. Armitage*), a contract with a tailor or shoemaker for the making of articles of their trade (per COLTMAN, J., *Grafton v. Armitage*), a contract with a miller for a quantity of flour which he had to grind (*Garbutt v. Watson*, 5 B. & Ald. 613, and see *Wilks v. Atkinson*, 6 Taunt. 11; *Rondeau v. Wyatt*, 2 H. Bl. 63, 67), a contract to makè a set of artificial teeth to fit the mouth of the purchaser (*Lee v. Griffin*), a contract with an artist for work of art (*Lee v. Griffin*, but see per POLLOCK, C. B., *Clay v. Yates*, 1 H. & N. 73, 78; 25 L. J. Ex. 237, 239), are not contracts for work and labor, but for the sale of goods when completed. A contract for the sale of goods at a certain price, including the carriage and delivery of them at a certain place, is within the statute (*Astey v. Emery*, 4 M. & S. 262). Where a carrier was employed by a purchaser of goods to buy them for him and to carry and deliver them, the contract was held not to be within the statute (*Cobbold v. Caston*, 1 Bing. 399)."

"Lord Tenterden's Act, 4 Geo. IV., c. 14 s. 7, after reciting this section (17th section of the Statute of Frauds relating to contracts for the sale of goods) of the statute, and that it had been held that it did not extend to certain executory contracts for the sale of goods which were nevertheless within the mischief thereby intended to be remedied, and that it was expedient to extend it to such executory contracts, enacted that the said enactment shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured or provided or fit or ready for delivery or some act may be requisite for the making or completing thereof or rendering the same fit for delivery." (Leake, p. 137.) "As to contracts of this kind before Lord Tenterden's Act, see *Towers v. Osborne*, 1 Str. 506; *Mucklow v. Mangles*, 1 Taunt. 318; *Buxton v. Bedol*, 3 East 303, seeming to hold them not within the statute; and *Cooper v. Elston*, 7 T. R. 14; *Wilks v. Atkinson*, 6 Taunt. 11; *Garbutt v. Watson*, 5 B. & Ald. 613; *Smith v. Surman*, 9 B. & C. 561, holding the contrary." (Leake p. 137, n. f.)

This act has been considered in Wisconsin and Georgia, as declaratory of the previous law: *Hordell v. McClure*, 1 Chand. (Wis.) 271; *Cason v. Cheely*, 6 Geo. 554. In New York the expediency of having such a statute was strongly urged in *Robertson v. Vaughn*, 5 Sandf. 1; reluctantly following *Sewall v. Fitch*, as to which *vide infra* 733. As to how far *Towers v. Osborne, &c.*, and how far *Cooper v. Elston, &c.*, are law in this country, *vide infra*.

The American authorities on the vexed question which is now before us may be said to be contained in the following summary. "If the contract be substantially for the goods, it is within the statute whether they are then manufactured or not, but it is otherwise if the labor and skill of the seller is stipulated for and makes part of the contract": *Pitkin v. Noyes*, 48 N. H. 294, in which will be found an extended review of the cases. The following contracts have been held to be within the Statute of Frauds: A contract for the delivery of a quantity of planks for ship-building at a future time, and at a specified price. (There is no evidence that there was any work to be done upon the timber): *Waterman v. Meigs*, 4 Cush. 499. A contract to cut growing timber and deliver it; *Edwards v. R. R.*, 54 Me. 105, citing *Garbutt v. Watson*, and *Waterman v. Meigs*. A contract for the sale and delivery of a quantity of wood then in standing trees: *Smith v. R. R.*, 4 Keyes 180. A contract to sell certain articles—so many boxes at so much per pound, to be manufactured by the vendor: *Gardner v. Joy*, 8 Metc. 179, distinguishing *Spencer v. Cone*, and *Mixer v. Howarth*, as to which *vide infra* 732. A contract for boards at so much per foot board measure, to be sawed from logs at the plaintiff's expense but under the defendant's direction: *Gorham v. Fisher*, 30 Vt. 428. A contract for a certain number of spokes to be made and delivered: *Prescott v. Locke*, 51 N. H. 94. A contract to cut down certain trees, cut them enough to make them transportable, and deliver them at the defendant's mill, to be paid for at so much per cord: the work and labor to be bestowed having no effect to change the character of the goods delivered, but being only enough to fit them for transportation, it was said that they must be considered as substantially unaltered when delivered: *Ellison v. Brigham*, 38 Vt. 66, relying on *Smith v. Surman*, 9 B. & C 561, and denying *Clayton v. Andrews*, as being founded on the doctrine since overthrown, to the effect that executory contracts are without the statute: see the arguments of counsel in *Ellison v.*

Brigham, for a full collection of authorities. A contract to deliver certain sewing-machines not then finished to the plaintiff, the machines to be completed by a third person who worked for the defendant, the contract between the two latter being that the defendant was to provide a shop and its fittings, and the third person was to make the machines to be paid for at so much each: *Atwater v. Hough*, 29 Conn. 508. A contract on the plaintiff's part to procure cider from the farmers, refine it, and deliver it to the defendant: *Seymour v. Davis*, 2 Sandf. 239 (relying on *Downs v. Ross*, (*vide infra*), and *Garbutt v. Watson*). A contract for the manufacture of a cotton-gin made under a general order: *Winship v. Buzzard*, 9 Rich. 105. A contract for so many bushels of wheat, the actual wheat being at the time of the contract made still unthrashed: *Hordell v. McClure*, 1 Chand. 271. A contract for the sale of wool-pelts, to be taken off during a certain season: *Gilman v. Hill*, 36 N. H. 311. A contract to deliver a certain number of barrels of flour, to be ground out of wheat which has been bargained for by the promissor but not yet received: *Bronson v. Wiman*, 10 Barb. 406. (In *Ide v. Stanton*, 15 Vt. 689, *Garbutt v. Watson* was referred to, but the contract in question, which was for the sale of wool, some of which the party had and the rest of which he expected to procure, was, without relying on that authority, clearly within the Statute of Frauds.) A contract for the sale and delivery of cotton growing: *Cason v. Cheely*, 6 Geo. 554, approving *Bird v. Muhlinbrin*, (*infra* 731), *Garbutt v. Watson*, and *Watts v. Friend*, 10 B. & C. 440, and saying that a contract for goods, not yet *in esse* but easily procurable, and if rejected by the party, for whom they were made or procured, readily saleable, should be within the statute. A contract to clean some thrashed wheat, and to thrash other wheat still in straw, and to deliver a certain number of bushels; *Downs v. Ross*, 23 Wend. 270, per BRONSON, J., (NELSON, J., concurring, and COWEN, J., dissenting), Judge BRONSON, after saying how much it had cost to explain the Statute of Frauds (a million or so of pounds sterling), went on to remark that it never would be explained "so long as it is held that a promise by a seller to thrash his grain or to blow the chaff out of a bin of wheat before sending it to market, changes a contract of sale into an agreement for work and labor." He further remarked, citing *Astey v. Emery*, 4 M. & S. 262, that the fact that goods are to be delivered at another place than that where they are at the time of the contract,

so as to enhance the price which the party setting up the statute is to receive, will not help the other party. All the cases cited, said the learned judge, holding contracts of this kind to be without the statute are those where something *not yet in existence*, is to be manufactured by the vendor (mentioning among the rest *Mixer v. Howarth*, *vide infra* 732).

In *Jackson v. Covert*, 5 Wend. 136, following *Bennett v. Hull*, 10 Johns. 364 (holding a contract to deliver 100 barrels of apples to be within the statute: whether the apples were *in esse* or not at the time of the contract made does not appear), and distinguishing *Crookshank v. Burrell* (*vide infra* 749), and *Sewall v. Fitch* (*vide infra* 733), a contract for the future delivery of wheat upon which no labor was to be bestowed, was held to be within the Statute of Frauds. But see *Webster v. Kelly*, *infra* 733, and *Eichelberger v. McCauley*, *infra* 734.. A contract to sell and deliver at a fixed price per quantity, all the broom-corn on a certain tract of land, was held to be within the Statute of Frauds in *Bowman v. Conn*, 8 Ind. 58, relying on *Watts v. Friend*, 10 B. & C. 446, and distinguishing the case of work to be done upon a future crop from the skill bestowed upon the manufacture of a wagon for example. A contract by a tallow-chandler to furnish one with refined tallow, held to be within the Statute of Frauds in *Lamb v. Crafts*, 12 Metc. 356, SHAW, C. J., saying that "when a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise where the article is made pursuant to the agreement." In *Hight v. Ripley*, 19 Me. 149, the difference between a contract for sale and one for labor said to consist in this, that "the person *ordering* the article *to be made* is under no obligation to receive as good or even a better one of the like kind purchased from another for him. It is the peculiar skill and labor of the other party combined with the materials for which he (the purchaser) contracted, and to which he is entitled." Hence, a contract to make hoes according to a pattern left by the purchaser, was held not to be within the statute. A contract for an article not *in esse* and to be made according to order by the party not in the line of his general business, was held in *Finney v. Apgar*, 2 Vroom 226, to be for work and materials and without the statute. So a contract by a mechanic to furnish materials and do carpenter work, &c.,

according to a specific plan for buildings to be erected upon the land of the other party: *Courtright v. Stewart*, 19 Barb. 455; considering the early cases and following *Garbutt v. Watson*; said Judge HARRIS, who delivered the opinion of the court: "In *Mixer v. Howarth* (*vide infra* 732), SHAW, C. J., said: 'When the contract is a contract of sale, either of articles then existing or of articles which the vendor has usually for sale in the course of his business, the statute applies to the contract as well when it is to be executed at a future time as when it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common it may be called a purchase and sale of the article to be completed in future; it is not a sale until an actual or constructive delivery and acceptance.' A still more accurate criterion," adds HARRIS, J., "is to inquire whether the work and labor required in order to prepare the subject-matter of the contract, for delivery is to be done for the vendor himself or for the vendee. In the former case the contract is really a contract of sale, while on the latter it is a contract of hiring," and goes on to say that tried by this test *Sewell v. Fitch* (*infra* 733) is questionable. In *Bird v. Muhlinbrink*, 1 Rich. 202, the learned judge who delivered the opinion of the court, thought that the contract should only be taken out of the Statute of Frauds when labor is primarily contemplated, done for the purchaser so as to make this the essential part of the contract, as a picture for example, directed to be painted which no one else perhaps would buy: *Sewall v. Fitch* (*vide infra* 733), thought to go too far. In an action for *making* certain surgical instruments, evidence that the parts of the instruments were procured, each finished, and that the defendants' labor was merely putting them together, was held to be no variance: held also, that the contract was not within the Statute of Frauds: *Allen v. Jarvis*, 20 Conn. 38, considering *Atkinson v. Bell*. So a contract to make bricks for B. and to deliver them at a certain price, B. to select the spot and the clay for the manufacture, the statute was held not to apply: *O'Neil v. The Mining Co.*, 9 Nev. 141. See *Parker v. Schenck*, 28 Barb. 38, for an example of a contract, held to be without the statute as being for work done under a special order. In *Mead v. Case*, 33 Barb. 202, a contract that a monument, the pieces of which were standing in the plaintiff's

yard, should by him be polished, put together and lettered, was held to be not within the statute, SMITH, J., dissenting: *Sewall v. Fitch*, (*vide infra* 733), and *Crookshank v. Burrell* (*vide infra* 733), relied on. JOHNSON, J., in delivering the opinion of the court, said, that in the case in question the work of finishing the monument involved additional skill different from that which had been bestowed on preparing the parts and of a higher character. The case of *Mixer v. Howarth*, 21 Pick. 207, which may be considered the leading one in this country, and which, Chief Justice SHAW, who gave the opinion of the court, always defended in his later and more precise rulings, is not altogether satisfactory on its own facts. The contract declared on was to make for and deliver to the defendant a particular carriage. The evidence was that the defendant chose out this one from a number standing in the plaintiff's shop, and indicated a certain stuff with which he wished it lined, a lining being all that was necessary to complete it, while the plaintiff on his part agreed so to line the carriage and to deliver it to the defendant. The contract was in the course of the plaintiff's ordinary business, and except the lining was merely for the purchase of a chattel. The lining was chosen by the defendant, it is true, but was not as far as we can see to be put in after any special fashion. A carriage with that lining might not have been saleable to any other person than the defendant, but such a possibility seems a slight foundation for the theory of a contract for work and labor.

Spencer v. Cone, 12 Metc. 283, follows *Mixer v. Howarth*, but how far the contract in question was or was not within the scope of the party's ordinary business does not appear. A contract to obtain the material for and to prepare certain houses known as the "Fitzgerald patent portable houses," of certain specified dimensions and to be delivered at a specified time and for a specified price, held not to be within the Statute of Frauds, inasmuch as the sale of the material was so blended with an agreement for work, labor and materials as to take the whole agreement out of the statute: *Phipps v. McFarlan*, 3 Minn. 100, distinguishing *Downs v. Ross*, *ante* 729, and saying that Judge HARRIS'S test given in *Courtright v. Stewart* was of no great practical value, and that Judge LITLEDALE'S remark in *Thompson v. Maccaroni*, 9 B. & C. 561, to the following effect, viz., "it appears to me to be sufficient if at the time of completion of the contract the subject-matter

be goods, wares and merchandise," was contrary to American law. In *Matthison v. Westcott*, 13 Vt. 261, a contract to procure the materials and make two gravestones, was held not to be within the Statute of Frauds. Whether making gravestones was the party's ordinary business, and whether they were or not to be made under a special order, does not appear: the two overruled cases of *Andrews v. Clayton*, 4 Burr. 2101, and *Towers v. Osborne*, 1 Str. 506, were relied on.

The New York decisions upon the question before us are almost consistently opposed to the great weight of authority, and have not been considered as satisfactory even by the New York courts themselves.

In *Crookshank v. Burrell*, 18 Johns. 58, a contract to make and deliver the wood-work of a wagon was held not to be within the Statute of Frauds. It does not appear, however, but that the contract was under a general order and in the line of the person's ordinary business. *Sewall v. Fitch*, 8 Cow. 215 (reluctantly followed in *Robertson v. Vaughan*, 5 Sandf. 1), is the most conspicuous authority on this point in New York, and though, as we have seen, much disapproved of, has until recently been considered settled law. It decided that a contract for nails to be manufactured apparently under a general order of the plaintiff's, and in the ordinary business of the defendant, was not within the Statute of Frauds. A contract to make a certain number of barrels of beer was held in *Donovan v. Wilson*, 26 Barb. 138, following *Sewall v. Fitch*, not to be within the statute. A contract for the manufacture of ten tons of paper by the plaintiff in the usual course of his business, to be of the kind and quality as other paper previously ordered by the defendant, and to be delivered at a place designated, was held not to be within the Statute of Frauds: *Parsons v. Lower*, 4 Roberts. (N. Y.) 216, distinguishing *Downs v. Ross* and *Seymour v. Davis*, following *Sewall v. Fitch* and *Crookshank v. Burrell*, and admitting that *Gardner v. Joy* and *Lamb v. Crafts* (Mass. cases) favored a different view. In *Webster v. Kelly*, 52 Barb. 482, a contract to purchase and deliver at a future time hop-roots at so much per bushel, was held not to be within the Statute of Frauds. A contract to deliver to the defendant malt, which is to be manufactured by the plaintiff and to be paid for per quantity on delivery, was held not to be within the Statute of Frauds: *Ferren v. O'Hara*, 62 Barb. 527. *Hight v. Ripley*, 19 Me. 149, was ap-

proved by MULLIN, J., who delivered the opinion of the court, but he felt constrained by the previous decisions in New York. *Donovan v. Wilson*, 26 Barb. 138, was said to be decisive of the case, and the general principle was laid down that work bestowed upon the subject of the contract so as to put it into the condition contemplated by the contract, takes the case out of the Statute of Frauds. The reader is here reminded that there are two New York cases, *Downs v. Ross*, 23 Wend. 270, and *Seymour v. Davis*, 2 Sandf. 239, which are in accord with the general course of decision outside of that state.

In *Passaic Man. Co. v. Hoffman*, 11 Am. Law Reg. N. S. 105, however, C. J. DALY makes an elaborate and able review of the cases and treats *Downs v. Ross* and *Sewall v. Fitch*, as substantially overruled by *Smith v. R. R. Co.*, 4 Keyes 199.

Besides the abnormal authorities we have just been considering, we have in Maryland *Eichelberger v. McCauley*, 5 Har. & J. 213, holding a contract to thrash and deliver wheat not to be within the Statute of Frauds, on the ground that work was necessary to the delivery of the wheat, and *Rentch v. Long*, 28 Md. 188, to the same effect. In *Gadsden v. Lance*, 1 McMull. Eq. (South Car.) 90, it was said "that when the goods contracted for exist *in solido* and are capable of delivery at the time, it (the contract) "is within the statute, but where they are to be made or something is to be done to put them in a condition to be delivered according to the terms of the contract, is not within the statute." In *Cummings v. Dennett*, 26 Me. 401, Judge WHITMAN said: "It is very clear that if application is made to a mechanic or manufacturer for articles in his line of business, and he undertakes to prepare and finish them in a given time, such a contract, though not in writing, is not affected by the statute: *Mixer v. Howarth* and *Spencer v. Cone* relied on, the learned judge evidently taking the same view of the former case as the writer has done above.

A comparison of the American with the English rulings on the question which we have just been considering, will show on the part of the latter a stricter adherence to the statute. Whether the principles laid down by Judge SHAW and Judge BRONSON are not more practical and sound, is a point which the reader must settle for himself.

HENRY REED.