DEPARTMENT OF PROPERTY.

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CONNOR ET AL. *v.* BALL ET AL., APPELLANTS.[1] SUPREME COURT OF PENNSYLVANIA.

Adverse Possession. Vendor and Vendee. Title.

An owner of a lot conveyed it to another person by deed with covenant of general warranty. At the date of the conveyance a portion of the lot was enclosed by a fence, with other land of the vendor. The vendee entered into possession of the remaining part of the lot, but never had possession of the enclosed part. *Held*, that the vendor could not acquire title to the enclosed part by adverse possession.

MITCHELL, J., dissented.

ADVERSE POSSESSION BETWEEN VENDOR AND VENDEE.

The line of authorities in Pennsylvania lead to the support of the doctrine as laid down in this case, but the question of adverse possession, especially in cases arising between vendor and vendee, drifts almost imperceptibly into a question of evidence, and, as to Pennsylvania cases, will have to be taken as an instance of the variance of a settled principle of law by the evidence. In Olwine *v.* Holman, 23 Pa. St., 279, the rule was laid down as follows: When a vendor sells a piece of land enclosed with his other land, and the piece sold continues afterwards to be enclosed and used and occupied by the vendor as before, such occupancy will be deemed to be in subservience to the right of the vendee and not adverse thereto. A vendor, after conveyance and before delivery of possession, is to be regarded as a trustee for the vendee, so far as regards the possession, just as he was a trustee of the title before conveyance. If he wishes to change the character of the possession he must manifest his intention by some act of hostility to the title of his vendee, plainly indicating to the latter the intention to deny his right and to hold adversely to it: Buckholder *v.* Sigler, 7 W. & S., 154. PAXSON, C. J., said in Ingles *v.* Ingles, 150 Pa. St., 397: This well-established rule applies with special force between a father and his son. In such instances it is not unusual for the vendee to leave the vendor in possession for an indefinite period or for life. Such transactions are

[1] Reported in 152 Pa. St., 444.

often arrangements to suit the family convenience. The possession of the vendor is the possession of the vendee, and until some unequivocal act is done by the vendor, the knowledge of which is brought home to the vendee, tending to show that the former holds adversely, no question of the Statute of Limitations can arise.

After a sale of land by articles of agreement and payment of the purchase money, the vendee died and his wife and children left the land; the vendor placed a tenant on it and the possession continued in him and those claiming under him twenty-one years. *Held*, that it was erroneous to charge the jury that the putting on the tenant was not an ouster, unless they believed that the vendor intended to commit an ouster: Pipher *v.* Lodge, 16 S. & R., 214; Watson *v.* Gregg, 10 Watts, 289.

In 1801 the City of New York sold to W. lot No. 194 of its "common lands," so-called, the deed describing it as then being in the possession of W. In 1804 the city leased lot No. 193, adjoining lot 194 on the south. There was then a wall line clearly marking W.'s possession on the south. The tenants of the city occupied lot 193 from the time of said leasing continuously up to 1852, having possession and cultivating up to said line, W. and his successors in interest occupying north of the line. The city also paid assessments up to said line. Upon the city maps said line was recognized as the boundary between the lots. From 1852 up to 1866 the lands south of said line remained vacant. In the year last mentioned they were sold by the city to defendant, K. In an action of ejectment brought to recover a parcel of land lying south of said line, it was held that if the same was covered by the description in the deed to W., the city re-acquired title by adverse possession. That its possession could not be presumed to have been in subordination to W.'s title, and that the title so acquired was not lost by the failure to occupy after 1852: Sherman *v.* Kane, 86 N. Y., 57.

The non-claim by a grantee of an interest in land for a period of thirty-four years after acquiring title is, in an action against the heir of the grantor, no bar to a recovery; nor does the exclusive possession of the land by the grantor and his heirs for that length of time afford *per se* the presumption of a re-conveyance or surrender of the interest conveyed, as long as the nature of the possession is consistent with the rights of the grantee: Butler *v.* Phelps, 17 Wendell, 642; Creekmur *v.* Creekmur, 75 Virginia, 430; Burhans *v.* Van Zandt, 7 Bar., 91; Jackson *v.* Brink, 5 Conn., 83; Millard *v.* McMullin, 46 N. Y., 345; Cramer *v.* Benton, 4 Lans., 291; Chalfin *v.* Malone, 9 B. Mon. (Ky.), 596.

In Burhans *v.* Van Zandt, 7 Barb., 91, the Court said: "By the execution and delivery of a deed of land the entire legal interest in the premises becomes vested in the grantee, and if the grantor continues in possession afterwards, his possession is not that of owner, but of a tenant of the grantee. He will be regarded as holding the premises in subserviency to his grantee, and nothing short of an explicit disclaimer of such relation, and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the

grantee. But from the time the grantor explicitly disclaims holding under the grantee, and openly asserts his title to the premises in hostility to the title claimed under his own previous deed his possession becomes adverse, even though he knew his title to be bad, and from that moment the Statute of Limitations will begin to run."

A person may reacquire title to property that he has once parted with by the same process through which he might originally have acquired it, and if the plaintiff conveyed the premises in question by deed to the defendant, and for twenty years thereafterwards held open notorious exclusive adverse possession of them, he reacquired title to them as effectually as though she had reconveyed them to him: Traip *v.* Traip, 57 Maine, 268.

One who has conveyed land may disseize his grantee, and will in such case by twenty years' adverse possession bar the entry of his grantee and his heirs: Tilton *v.* Emery, 17 N. H., 536.

The general rule is that possession of land is notice to a purchaser of the possessor's title. But this rule does not apply to a vendor remaining in possession so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed; so far as the purchaser is concerned the vendor's deed is conclusive on that subject: Van Keuren *v.* Central R. R., 47 N. J. L., 165.

Where in ejectment it appears that a division fence was by mistake built and maintained for more than ten years over the line on plaintiff's land, and that defendant and his grantors claimed to own the land to the fence, and had actual possession thereof during such period with the knowledge and acquiescence of plaintiff, such possession was adverse, though the acquiescence of plaintiff was because he supposed the fence was on the true line: Ramsey *v.* Ogden, 31 Pac. Rep., 778; Crary *v.* Goodman, 22 N. Y., 175.

If a party occupies land up to a certain fence because he believes it to be the line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting. The intent to claim does not exist, and the claim which is set up is upon the condition that the fence is upon the line: Brown *v.* Cockerell, 33 Ala., 45.

When a person who has conveyed property by a warranty deed subsequently acquires an interest in the same property by a tax title, and conveys his subsequently acquired title in a portion of the property to third parties who reside thereon for more than ten years, their title cannot be attacked: Reilly *v.* Blaser, 28 N. W. Rep. (Mich.), 151.

The grantor who conveys by a quit-claim deed may remain in possession of the property conveyed, and assert and maintain an adverse possession for the term of five years, and thus acquire a title as against the grantee by the Statute of Limitations: Dorland *v.* Majilton, 47 Cal., 455.

A defendant in execution who remains upon land after it is sold under execution, does not occupy the attitude of tenant or quasi-tenant of the purchaser. There is no estoppel upon the defendant which precludes him from converting the

amicable possession into one that is adverse and hostile. The law does not merely, from the fact that he continues in possession, raise the presumption that the possession is adverse, but devolves upon him the burden of evincing, if he relies upon it, that such has been its true nature and character: Chalfin *v.* Malone, 9 B. Mon. (Ken.), 496.

An adverse and exclusive possession of land for a period of twenty years is a good bar to a writ of entry to recover the same, although the demandant's title may have been derived through mesne conveyances from the tenant, nor is the tenant estopped by his covenants of warranty in the deed to his original grantee from setting up a subsequent title acquired by disseisin: Stearns *v.* Hendersass, 9 Cush. (Mass.), 497.

In Brinkman *v.* Jones, 44 Wis., 498, the Court said: "There would seem to be no good reason why the possession of a grantor may not be hostile to his deed, provided it be such as to give his grantee notice that he claims in hostility to his grant; nor why such hostile possession may not ripen into an adverse and perfect title and bar the grantee from recovering the possession under the Statute of Limitations. We are, however, of the opinion that when the possession has been for a long period, the presumption of a claim of right hostile to the title granted does arise in every case where such possession is inconsistent with the rights of the grantee, and that in such case account of jury might find the possession adverse from the nature of the possession without proof of an express declaration on the part of the occupant that he claimed to hold in hostility to his grant.

"We believe it to be more in harmony with the settled rules applicable to cases of adverse possession to hold, that whether he holds in subserviency to the grant or in hostility thereto depends upon the nature of the possession, and is generally a question of fact and not of law, and that the length of the possession is a circumstance to be considered in determining the nature of the possession."

It is undoubtedly true that one who enters into the possession of land in subordination to the title of the real owner is estopped from denying that title while he holds actually or presumptively under it. But a trustee may disavow and disclaim his trust, the tenant the title of his landlord after the expiration of his lease, the vendee the title of his vendor after breach of his contract, and the tenant in common the title of his co-tenant, and drive the respective owners and claimants to their action within the period of the Statute of Limitations.

A tenant of land under an agreement to purchase which contemplates a continuing right of possession while the contract is being performed, and an absolute right of possession by virtue of its performance may on performance deny the title of the vendor, and thereafter his possession will be adverse: Catlin *v.* Decker, 38 Conn., 262.

If one buys land with borrowed money, taking the title in the name of the lender, and goes into possession under an agreement with the lender that the title is to be conveyed to him whenever he repays the loan, his possession will not become adverse as against the lender until he has made an open

and explicit disavowal of the lender's title and assertion of title in himself, and such disavowal and assertion have been brought home to the lender: Estes *v.* Long, 71 Mo., 605.

The mere continued possession of the vendor of lands is not adverse to his vendee: Ingles *v.* Ingles, 150 Pa., 397; Olwine *v.* Holman, 23 Pa. St., 279; Ronan *v.* Meyer, 84 Ind., 391; Record *v.* Ketcham, 76 Ind., 482; R. R. Co. *v.* Oyler, 82 Ind., 394; Jackson *v.* Benton, 1 Wendell, 341; Doe *v.* Butler, 3 Wendell, 149; Higginson *v.* Mein, 4 Cranch, 414; Bresler *v.* Pitt, 58 Mich., 347; Beach *v.* Catlin, 4 Day (Conn.), 284.

JOSEPH T. TAYLOR.

NELSON *v.* SHELBY MANUFACTURING AND IMPROVEMENT COMPANY.[1] SUPREME COURT OF ALABAMA.

Memorandum—Sale of Real Estate—Statute of Frauds.

The plaintiff, Nelson, sued in assumpsit to recover money paid as part payment for the purchase of certain lots sold to him by the defendant. Upon selection of each lot by plaintiff, he was given a memorandum as follows: "Sold to Frank Nelson, Jr., 1 lot, 1, R. 70, block 63, 10.00, for the Shelby Manufacturing and Improvement Co. By J. Schwed."

Upon presentation of this memorandum to the treasurer, and a one-third cash payment, a written instrument as follows was delivered to the purchaser: "No. 277. Shelby Manufacturing and Improvement Co., Shelby, Ala., April 3, 1890. Received of Frank Nelson, Jr., $233.33, being one-third cash payment on lot No. 1, of block No. 63. Bond for title to said lot will be delivered on execution of notes for balance of purchase money, and return of this receipt properly endorsed. T. H. Hopkins." *Held*, that the memorandum subscribed by the vendor to execute bond for title was void under the Statute of Frauds, and that a failure to perform it by the vendor gave the plaintiff no cause of action against him.

MEMORANDA FOR THE SALE OF REAL ESTATE UNDER THE STATUTE OF FRAUDS.

The Statute of Frauds, under the Alabama code, § 1732, provides that every contract for the sale of lands, saving leases for one year, shall be void, unless payment is made and the purchaser put into possession, or unless a memorandum of the sale, expressing the consideration, is in writing, subscribed by the party to be charged or his duly authorized agent. In the opinion rendered in the above case, Justice COLEMAN said: "We may concede the memorandum to be complete in all respects, except as to the terms of the payment. It says one-third cash, and 'notes to be executed for the balance.'

[1] 11 So. Rep., 695. Decided November 2, 1892.

Whether these notes are to bear interest, and, if so, the rate of interest, or to be payable in two or ten years, or whether there were to be two or a half a dozen notes is not stated. To permit parol evidence to be introduced to supply the omission would break down the safe-guards intended to be secured by the statute in all contracts for the sale of land."

In its adoption by the various States, the English statute has been somewhat altered and abridged. In Pennsylvania, for example, the first three sections were adopted in 1772; but the fourth section, requiring a note or memorandum of "any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them," has never been adopted by that State as to contracts for the sale of lands: Malana *v.* Ammon, 1 Barr, 139. The courts of Pennsylvania, however, hold that no contract for the sale of land will be specifically enforced in default of a sufficient memorandum of the sale, and they refuse in such cases to allow the price of the land agreed to be conveyed to be taken as the measure of damages for a breach of the agreement: Wible *v.* Wible, 1 Grant, 406; Sales *v.* Heckman, 20 Pa. St., 180; Everhart's App., 106 Pa. St., 349; Bowers *v.* Bowers, 95 Pa. St., 471. It should be borne in mind that the statute does not require the contract of sale to be in writing, but only a note or memorandum thereof. The two should not be confused. Where a memorandum is necessary, the agreement itself is not written, but oral. The suit is not founded upon the writing; it is based upon the oral contract, and all that the statute is intended to secure is some adequate writen evidence of the contract, such evidence being preferable to an oral description drawn from an uncertain or biased recollection.

General Requisites.—A sufficient memorandum made and signed by the party to be charged, binds him, although not delivered, if made with the intent that it should constitute a memorandum of the contract of the sale. In Johnson *v.* Dodgson, 2 M. & W., 653, counsel asked whether a memorandum entered by defendant in his own book, that plaintiffs had sold to him would be sufficient. Baron PARKE'S answer was: "If he meant it to be a memorandum of the contract between the parties, it would; not so if he meant it to be a mere memorandum to be kept by himself for himself." See, also, on this point, Kuhn *v.* Brown, 1 Hun. (N. Y.), 244; Drury *v.* Young, 58 Md., 546; Bowles *v.* Woodson, 6 Gratt. (Va.), 78; Remington *v.* Lithicum, 14 Pet. (U. S.), 84; Boyd, etc., *v.* Terrill, 13 Bush. (Ky.), 463.

The memorandum must contain, either expressly or by necessary inference, every material part of the agreement; and must show, not a treaty pending, but a contract concluded. It should express the consideration, the terms, the parties, the property, and be signed by the party to be charged, or his agent. Unless the contract be actually concluded and certain in all its parts, equity will not interfere to grant specific performance: Jenkins *v.* Harrison, 66 Ala., 345; Phillips *v.* Adams, 70 Ala., 376; Carter *v.* Shorter, 57 Ala., 253; Fry, Spec. Perf., §§ 164, 203; McKibbin *v.* Brown, 14 N. J. Eq., 13. The writing, to meet the requirements of the statute, need not give all the details, but it must express

he substance of the contract with easonable certainty, either by its wn terms or by reference to some ther agreement or writing from which it can be ascertained with ike reasonable certainty. Atwood *v.* Cobb, 16 Pick., 227; Ives *v.* Hazard, 4 R. I., 29; Meadows *v.* Meadows, 3 McCord, 458; Seymour *v.* Belding, 83 Ill., 222; Weaver *v.* Fries, 85 id., 356; Frazer *v.* Howe, 106 Ill., 563. In Miller *v.* Wilson, 31 N. E. Rep., 423 (Ill. Sup. Ct., 1892), in an action for the price of and, the written evidence consisted of a letter by defendant to plaintiff, dated October 24, 1887, saying: "Should I take a notion to buy the lot adjoining the three I bought, what would be your lowest price for it? I feel that I paid a pretty good price for the three lots; 120 x 140 is a small farm for $1000." Also a note signed by defendant, saying: "Not having received funds, I forfeit the above $100, and relinquish all claim to the above lots," which note was attached to the following receipt, signed by plaintiff: "Received of (defendant) $100 in cash, in consideration of which, and the further payment of $900, to be paid on or before the 21st day of January, 1888, I agree to convey to him by warranty deed lots 5, 6 and 7 of block 1, in M. M. Miller's addition to Clay Center, Kansas." It was held that such writings were insufficient to constitute a note or memorandum in writing, signed by the defendant, of a contract to purchase land, as required by Rev. Stat, 1891, c. 59, § 2. The Court, per SCHOLFIELD, J., said: "The contention is that the note of October 24, 1887, is a sufficient memorandum of the contract. But that does not state the terms of any contract. It is true that it acknowledges a previous purchase of lots, but not when or on what terms. It promises to pay nothing, but, on the contrary, speaks of the lots as 'paid for,' and it acknowledges no existing indebtedness." And parol evidence was held inadmissible to prove what, under the issue, could only be proved by a writing.

In Littell *v.* Jones, 19 S. W. Rep, 497 (Ark. Sup. Ct., 1892), a memorandum reciting the receipt by L. from R. of money on account of the amount due on a certain judgment, and reciting that it was received in and upon an agreement of compromise, whereby R had agreed to pay off the judgment, was held not a sufficient writing to satisfy the Statute of Frauds as to the sale of land, and show an agreement by L. to relinquish his claim to lands bought at execution sale on the judgment, time to redeem from which had expired. The Court said: "We do not consider the receipt a sufficient writing to answer the requirement of the statute. It not only does not disclose the terms of the contract relied upon, but of itself, and without the aid of oral proof, it furnishes no intimation of the the essential provisions of the agreement."

That the memorandum must show an agreement concluded is illustrated in the case of Williston *v.* Lawson, 19 Canada Sup. Ct., 673. Defendant signed a paper agreeing to sell certain lands to plaintiff for $42,500, and plaintiff signed a paper agreeing to purchase the same. The papers were substantially the same, except that the one signed by plaintiff stated that he was to purchase "subject to the encumbrance thereon," and each paper recited at the end, "Terms and deeds to be arranged by the 1st of

May next." On the day the papers were signed defendant, on request of plaintiff's solicitor, added to the paper signed by him the following: "Terms $500 cash this day, $500 on delivery of the deed of the Parker property, $800 with interest every three months until the $6500 are paid, when the deed of the entire property will be executed." The property mentioned in the papers, with other property of defendant, was mortgaged for $36,000. Plaintiff paid the two sums of $500, and demanded a deed of the Parker property, which being refused, he sued to compel defendant to perform the contract. It was held that there was no completed agreement in writing to satisfy the Statute of Frauds.

A memorandum of a sale of land at auction is sufficient, which contains the names of the vendor and purchaser, the terms of the sale, the amount bid and paid, and a description of the land sufficient to enable the purchaser, from surrounding facts and circumstances, to identify and locate it. The insertion by the auctioneer, at the time of the sale, and in the presence of the defendant, of the latter's name in the memorandum of sale as the purchaser is a sufficient execution of the contract to bind him as the party to be charged thereby: Springer *v.* Kleinsorge, 83 Mo., 152.

When, at an auction sale under a deed of trust, the trustee acts as his own auctioneer, he cannot bind the purchaser by a memorandum of the sale made by himself, so as to hold him liable within the meaning of the statute. Although acting as auctioneer, he is a party to the sale, with natural interest and bias adverse to the purchaser; and the circumstance that he has no beneficial interest in the subject-matter of the sale settles nothing as to his bias: Tull *v.* David, 45 Mo., 444. A written advertisement or notice of a trustee's sale, signed by the trustee, is not a sufficient memorandum within the statute: White *v.* Watkins, 23 Mo., 423.

Time of Making the Memorandum.—It seems to be the settled rule that the memorandum may be made at any time subsequent to the formation of the contract, and before action brought, except in sales by auctioneers: Bird *v.* Monroe, 66 Mo., 347; Bill *v.* Bament, 9 M. & W., 36; Williams *v.* Bacon, 2 Gray (Mass.), 387; Hewes *v.* Taylor, 70 Pa. St., 387. It would seem rational to hold that it (the memorandum) may be made even after suit is brought, so long as the trial has not been had. But there appears to have been no direct decision to that effect, and the weight of opinion is against it: Browne on St. of Frauds, § 352, p. 435. See Rose *v.* Cunynghame, 11 Ves., 550.

With respect to sales made by auctioneers the decisions hold that an auctioneer's entry, to be valid as a memorandum, must be made contemporaneously with the sale: Buckmaster *v.* Harrop, 13 Ves., per Lord Chancellor ERSKINE.

There are decisions which hold that the memorandum will answer if made on the day of the sale, shortly after it: Barclay *v.* Bates, 2 Mo. App., 139. The language of many of the cases, apparently uncontradicted, is, that the name of the purchaser must be written down by the auctioneer immediately after the announcement of the bid and the fall of the hammer: Browne on the Stat. of Frauds, § 353, p. 436. The cases appear to draw distinc-

tion between the auctioneer's agency for the seller, and his agency for the buyer. In the former the auctioneer is permitted to sign the memorandum some time after the sale, but in the latter he must do this contemporaneously with the sale: Gill *v.* Bicknell, 2 Cush (Mass.), 355; Mews *v.* Carr, Hurl. & N., 484; Horton *v.* McCarty, 53 Mo., 394.

Form.—The form of the memorandum is not material. It may consist of letters, telegrams or accounts. If the terms of the contract may be gathered from it the statute is satisfied, whatever form it may assume: Heidman *v.* Wolfstein, 12 Mo. App., 266; Moore *v.* Mountcastle, 61 Mo., 424; Thayer *v.* Luce, 22 Ohio St., 62; Whaley *v.* Hinchman, 22 Mo. App., 483; Pierce *v.* Corf, L. R., 9 Q. B., 210; Hinde *v.* Whitehouse, 7 East, 558. The agreement is sufficient if it appear from different memoranda; it need not all be contained in one writing. A memorandum of a sale of real estate, which consists of two papers, must contain such a reference from one to the other as will serve to connect the two, and such as will conduct the searcher from one to the other with reasonable certainty. Per THOMPSON, J., in Boeckeler *v.* McGowan, 12 Mo. App., 507; Schroeder *v.* Taaffe, 11 Mo., 267; Wiley *v.* Roberts, 27 Mo., 388; Briggs *v.* Munchon, 56 Mo., 467; Christensen *v.* Wooley, 41 Mo. App., 53.

A valid contract for the sale of land may be embraced wholly in letters written concerning such land; and it is not absolutely essential that the letters should be addressed by one of the contracting parties to the other: Hollis *v.* Burgess (Kan.), 15 Pac. Rep., 536. Letters from a vendor to his agent may constitute a sufficient note or memorandum of an agreement to convey land, if, from such letters, the terms and proposal of sale, the description of the property, and the affirmance of a sale made by the agent can be gathered: Lee *v.* Cherry (Tenn.), 4 S. W. Rep., 835.

A writing, purporting to be a contract for the sale of land, which does not specify the purchase price, nor the terms of payment, is insufficient, and is not aided by a subsequent letter of the party sought to be charged, instructing his agent how to fill out the contract, if one should be executed: Webster *v.* Brown (Mich.), 34 N. W. Rep., 676.

Signature of Party to be Charged.—The memorandum must be signed by the party to be charged. The statute is not strictly construed in this respect, and anything done indicating a clear intention to sign is usually held sufficient. The signature may be printed or stamped; it may be by mark or by initials, or may even be a fictitious name. It cannot, however, consist of a mere designation of the writer. In Selby *v.* Selby, 3 Meriv., 2, the words, "Your dear mother," were held insufficient to constitute a signature: Tagiasco *v.* Molinau, 9 La. (O. S.), 512; Hubert *v.* Moreau, 12 Moore (C. P.), 216; Brown *v.* Butchers' Bank, 6 Hill, 443; Palmer *v.* Stephens, 1 Denio, 478; Sanborn *v.* Flagler, 6 Allen, 474; Angur *v.* Couture, 68 Me., 427.

In the case of a memorandum made by telegraph, the sender's signature to the blanks filled out by him is sufficient: Godwin *v.* Francis, L. R. C. P., 295; Little *v.* Dougherly (Col.), 17 Pac. Rep., 292. If the memorandum is to be

signed only, a signature in any part will answer; but if it is to be subscribed, it must appear at the bottom of the memorandum: Brayley *v.* Kelley, 25 Minn., 160; Brown on Stat. of Frauds, § 356; Merritt *v.* Clason, 12 Johns., 102; Draper *v.* Platina, 2 Speers, 292; Clason *v.* Bartley, 14 Johns., 484; Tiedeman on Sales, § 77.

If it sufficiently appears that the signature was intended to govern the whole agreement, it is immaterial in what part of the memorandum it appears; but if it be not intended to govern the whole agreement, its position may make a difference. In Caton *v.* Caton, L. R., 2, H. L., 127, Lord WESTBURY said: "If a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute and to give authenticity to the whole of the memorandum." See, also, Fry, Spec. Perf., § 503–506; Stokes *v.* Moore, 1 Cox, 219; Hawkins *v.* Holmes, 1 P. Wms., 770; Drury *v.* Young, 58 Md., 547; Penniman *v.* Hartshorne, 13 Mass., 87; Sayres *v.* Patterson, 2 W. N. C., 334.

In Guthrie *v.* Anderson, 47 Kan., 383 (1891), the owner of land signed a written memorandum for the sale thereof, executed in the handwriting of the prospective purchaser. The purchaser's name appeared in the body of the memorandum, but it was not signed at the end, either by himself or by his agent. The purchaser gave his check for the cash payment, signed by himself and containing the following memorandum: "Nick Anderson and wife, lot 8, bk. 39, to W. W. Guthrie." It was held not a sufficient memorandum. The Court said: "The party charged in the action is the one who must have signed. If the Andersons desired that Mr. Guthrie should be charged by the writing or memorandum, they should have required him or his agent to have signed the same. The Andersons, who signed the writing, are bound thereby, and could not set up the statute in bar. Mr. Guthrie is not bound, because neither he nor his agent signed, and, therefore, he can plead the statute."

Vendor.—In a recent English case, Coombs *v.* Wilkes, 3 Ch., 77 (1891), the defendant signed a document dated October 7, whereby he agreed to purchase a freehold farm for $650, and stated that he had paid a certain sum by way of deposit to "Messrs. R., as agents for the vendor." The document continued: "I hereby agree to pay in the usual way for the tenant right (the landlord to be considered as an outgoing tenant according to the usual custom of the country)." The vendor's name (Coombs) was not mentioned in the document, and he did not sign it, but it was signed by a clerk of Messrs. R. In a subsequent letter to the vendor's solicitor the defendant asked that the balance of the purchase money might be allowed to remain on mortgage, and concluded: "Let me know by return of post, and then Mr. Coombs could sign off the deeds. . . . I should like a copy of our agreement." The sole question was whether, within the Statute of Frauds, the vendor was sufficiently identified. It was held that the term "landlord" was not a sufficient description of the vendor in the document of October 7, that

such document was not a sufficient agreement within the Statute of frauds, and that the subsequent letter did not so clearly refer to the previous document and show the name of the vendor as to cure the defect in the document. In the Massachusetts cases of McGovern *v.* Hern, 26 N. E. Rep., 861 (1891), and Lewis *v.* Wood, 26 N. E. Rep., 862 (1891), it was held that memoranda for the sale of land which omitted to name or describe in the one case the sellers and in the other the purchaser, were insufficient to satisfy the statute. See also Mentz *v.* Newwitter, 122 N. Y., 421; O'Sullivan *v.* Overton (Conn.), 14 At. Rep., 300; Quinn *v.* Champagne (Minn.), 37 N. W. Rep., 451.

Description of the Property.— The general rule given by BROWNE on the Statute of Frauds (§ 371) is that the writing required by the statute "must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." And again, in § 385: "It must, of course, appear from the memorandum what is the subject matter of defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." See, also, Fry, Spec. Perf., § 325.

While this certainty is required, the identification may sufficiently appear by reference. The writing must be a guide to find the land, must contain sufficient particulars to point out and distinguish the tract from any other. A proposition in writing, accepted by the other party, to sell "all that piece of property known as the Union Hotel property," has been held not a sufficient description of the property to take the case out of the Statute of Frauds, it being uncertain what property was comprehended in the words "Union Hotel property" without resorting to parol evidence: King *v.* Wood, 7 Mo., 390. So, a memorandum which describes the land sold as a "lot of 18th St., 60 x 180 ft., about 300 ft. S. of Herbert St.," is not sufficient: Schroeder *v.* Taaffe, 11 Mo. App., 267. In Brockway *v.* Frostm, 40 Minn., 155 (1889), it was held that an agreement for the conveyance of a designated number of acres "in" a specified larger tract of land, the subject not being otherwise designated, was ineffectual for uncertainty. A written memorandum of a contract for the sale of land is insufficient as containing no description of the land, when the only description is contained in a letter to the alleged vendor, which referred to it as "your land;" and such description cannot be supplied by parol evidence of what land was referred to: Taylor *v.* Allen, 40 Minn., 433; Breckinridge *v.* Crocker, 78 Cal., 529; Leute *v.* Clarke, 22 Fla., 515; Francis *v.* Barry, 69 Mich., 311; Sherwood *v.* Walker, 66 Mich., 568; and Machine Co., *v.* Smith, 16 Oreg., 381.

In Mellon *v.* Davidson, 123 Pa. St., 298 (1889), a receipt signed by defendant showed the payment of a sum of money on account of the price of "a lot of ground fronting about 190 feet on the P. R. R., in the 21st Ward, P." *Held*, that it did not sufficiently identify the land to comply with the Statute of Frauds, and was inadmissible in an action for specific performance, though accompanied by two pencil draughts of land in the vicinity,

which did not appear on their faces to be connected with the receipt, and were not attached thereto, and supplemented with parol evidence that the land mentioned was the same sued for, and that defendant owned no other in said ward.

In Fox *et al. v.* Courtney, 20 S. W. Rep., 20 (Mo. Sup. Ct., 1892), a petition claimed damages for alleged breach of contract in failing to purchase "thirty-three feet of ground on the east side of Grand Avenue, in Kansas City, Mo.," under a contract to purchase "ground lying between Missouri Avenue and Sixth Street on the east side of Grand Avenue." The petition was held demurrable for want of a sufficient description of the land to satisfy the statute. The Court said: "We do not think, reading the contract and petition together, that any land was sufficiently described to satisfy the statute." In McBrayer *v.* Cohen, 18 S. W. Rep., 123 (Ky. Sup. Ct., 1892), an auctioneer at public auction, immediately after selling land to defendant, signed the following: "365 acres, at $20 per acre, Capt. McBrayer. I certify that the above is correct. Oct. 10, 1888. T. D. English." This was held a sufficient memorandum in writing to support a suit against defendant. Upon the argument that the suit was not enforceable because the land was not sufficiently described, the Court said: "There can be no doubt of the identity of the land having been rendered certain by reference to the printed advertisement of the sale previously made, which may be considered in connection with and in aid of the auctioneer's memorandum in identifying the land sold."

The Consideration.—The rule that the memorandum must contain the consideration was laid down in the case of Wain *v.* Warlters, 5 East, 10, which went upon the ground that the statute required a note of the "agreement," and that the consideration was an essential element of the agreement. This case has since been maintained and followed as law in a long series of English cases. In this country the State courts differ as to the necessity for the presence of this element in the memorandum of sale. In Nibert *v.* Baghurst, 47 N. J. Eq., 201 (1890), it was held that a receipt for $25, "to account for in the purchase of the meadow lot," was not a sufficient memorandum. GREEN, V. C., said: "Since the revision of 1874 it is not necessary that the consideration of a contract coming within the statute should be set out in the memorandum (Revision, p. 446, § 9), and the cases which held that to be a requisite have to that extent become inapplicable; but it is necessary that the other parts of the agreement should appear.

In Carroll *v.* Powell, 48 Ala., 298, the memorandum, after describing the land, stated as follows: "Bought by A. Carroll at $400." The Court, per PECK, C. J., said: "It (the memorandum) does not state the terms of the sale, whether for cash or no credit. It is, however, insisted that as it is not stated whether the sale was for cash or on credit, the law presumes it was for cash. Admit this to be true in ordinary sales, it does not, in cases like the present, answer the requirements of the statute. The statute requires the terms of the sale to be stated as a part of the memorandum."

In Shively *et al v.* Black, 45 Pa.,