of the provisions of this statute; but will necessarily restrict us to a brief notice of the rules of evidence which it has introduced.

§ 263. By this statute, the necessity of some writing is universally required, upon all *conveyances of lands, or interest in lands*, for more than three years; all interests, whether of freehold or less than freehold, certain or uncertain, created by parol without writing, being allowed only the force and effect of estates at will; except leases, not exceeding the term of three years from the making thereof, whereon the rent reserved shall amount to two thirds of the improved value. The term of three years for which a parol lease may be good, must be only three years from the making of it; but, if it is

country might be exchanged, without judicial appraisement, (per tabulas manu signoque permutantis affixas,) by deed, under the hand and seal of the party. (Ib. p. 261, n. 4.) The Roman Law required written evidence in a great variety of cases, embracing, among many others, all those mentioned in the Statute of Frauds; which are enumerated by N. De Lascut, De Exam. Testium, Cap. 26. (Ferinac. Oper. Tom. 2, App. p. 243.) See also Brederodii Repertorium Juris, col. 984, *verb.* Scriptura. Similar provisions, extending in some cases even to the proof of payment of debts, were enacted in the statutes of Bologna, (A. D. 1454,) Milan, (1498,) and Naples, which are prefixed to Danty's Traité de la Preuve par Temoins. By a Perpetual Edict in the Archduchy of Flanders, (A. D. 1611,) all sales, testaments, and contracts whatever, above the value of three hundred livres Artois, were required to be in writing. And in France, by the Ordonnance de Moulins (A. D. 1566,) confirmed by that of 1667, parol or verbal evidence was excluded in all cases, where the subject-matter exceeded the value of one hundred livres. See Danty, de la Preuve, &c. *passim;* 7 Poth. Œuvres, &c., 4to. p. 56, Traité de la Procéd. Civ. ch. 3, art. 4, Regle 3me.; 1 Poth. on Obl. Part 4, ch. 2, art. 1, 2, 3, 5; Commercial Code of France, Art. 109. The dates of these regulations, and of the Statute of Frauds, and the countries in which they were adopted, are strikingly indicative of the revival and progress of commerce. Among the Jews, lands were conveyed by deed only, from a very early period, as is evident from the transaction mentioned in Jer. xxxii. 10, 11, 12; where the principal document was "sealed according to the law and custom," in the presence of witnesses; and another writing, or "open evidence," was also taken, probably, as Sir John Chardin thought, for common use, as is the manner in the East at this day.

to commence *in futuro*, yet if the term is not for more than three years it will be good. And if a parol lease is made to hold from year to year, during the pleasure of the parties, this is adjudged to be a lease only for one year certain, and that every year after it is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception in the statute; though as to the time past it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.[1] But though a parol lease for a longer period than the statute permits is void for the excess, and may have only the effect of a lease for a year, yet it may still have an operation, so far as its terms apply to a tenancy for a year. If, therefore, there be a parol lease for seven years for a specified rent, and to commence and end on certain days expressly named; though this is void as to the duration of the lease, yet it must regulate all the other terms of the tenancy.[2]

§ 264. By the same statute, no *leases*, estates, or interests, either of freehold or terms of years, or an uncertain interest, other than copyhold or customary interest in lands, tenements, or hereditaments, can be *assigned, granted, or surrendered*, unless by deed or writing, signed by the party, or his agent authorized by writing,[3] or by operation of law. At Common Law, surrenders of estates for life or years in things corporeal were good, if made by parol; but things incorporeal, lying in grant, could neither be created nor surrendered but by deed.[4] The effect of this statute is not to dispense with any

[1] Roberts on Frauds, p. 241 – 244.

[2] Doe *v.* Bell, 5 T. R. 471.

[3] In the statutes of some of the United States, the words "authorized by writing" are omitted; in which case it is sufficient that the agent be authorized by parol, in order to make a binding *contract* of sale, provided the contract itself be made in writing; but his authority to *convey* must be by deed. Story on Agency, § 50; Alna *v.* Plummer, 4 Greenl. 258.

[4] Co. Lit. 337, b. 338, a; 2 Shep. Touchst. (by Preston) p. 300.

evidence required by the Common Law, but to add to its provisions somewhat of security, by requiring a new and more permanent species of testimony. Wherever, therefore, at Common Law a deed was necessary, the same solemnity is still requisite; but with respect to lands and tenements in possession, which before the statute might have been surrendered by parol, that is, by words only, some note in writing is now made essential to a valid surrender.[1]

§ 265. As to the *effect of the cancellation* of a deed to devest the estate, operating in the nature of a surrender, a distinction is taken between things lying in livery, and those which lie only in grant. In the latter case, the subject being incorporeal, and owing its very existence to the deed, it appears that at Common Law the destruction of the deed by the party, with intent to defeat the interest taken under it, will have that effect. Without such intent, it will be merely a case of casual spoliation. But where the thing lies in livery and manual occupation, the deed being at Common Law only the authentication of the transfer, and not the operative act of conveying the property, the cancellation of the instrument will not involve the destruction of the interest conveyed.[2] It has been thought, that, since writing is now by the statute made essential to certain leases of hereditaments lying in livery, the destruction of the lease would necessarily draw after it the loss of the interest itself.[3] But the better opinion seems to be, that it will not; because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words alone, as formerly used, and therefore a surrender by cancellation, which is but a sign, is also taken away at law; though a symbolical surrender may still be

1 Roberts on Frauds, p. 248.

2 Roberts on Frauds, p. 248, 249; Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263, 264; Doe *v.* Bingham, 4 B. & A. 672; Holbrook *v.* Tirrell, 9 Pick. 105; Botsford *v.* Morehouse, 4 Conn. 550; Gilbert *v.* Bulkley, 5 Conn. 262; Jackson *v.* Chase, 2 Johns. 86.

3 4 Bac. Abr. 218, tit. Leases and Terms for years, T.

recognised in Chancery as the basis of relief.[1] The surrender in law, mentioned in the statute, is where a tenant accepts from his lessor a new interest, inconsistent with that which he previously had; in which case a surrender of his former interest is presumed.[2]

§ 266. This statute further requires that the declaration or creation of *trusts* of lands shall be manifested and proved only by some writing, signed by the party creating the trust; and all grants and assignments of any such trust or confidence, are also to be in writing, and signed in the same manner. It is to be observed, that the statute does not require that the trust itself be created by writing; but only that it be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving that there was a trust, and what the trust was. A letter acknowledging the trust, and, *à fortiori*, an admission, in an answer in Chancery, has therefore been deemed sufficient to satisfy the statute.[3]

1 Roberts on Frauds, p. 251, 252; Magennis *v.* Mac Cullogh, Gilb. Eq. R. 235; Natchbolt *v.* Porter, 2 Vern. 112, 4 Kent, Comm. 104; 4 Cruise's Dig. p. 85, (White's ed.) Tit. 32, ch. 7, § 5, 6, 7; Roe *v.* Abp of York, 6 East, 86. In several of the United States, where the owner of lands, which he holds by an unregistered deed, is about to sell his estate to a stranger, it is not unusual for him to surrender his deed to his grantor, to be cancelled, the original grantor thereupon making a new deed to the new purchaser. This redelivery is allowed to have the practical effect of a surrender, or reconveyance of the estate, the first grantee and those claiming under him not being permitted to give parol evidence of the contents of the deeds, thus surrendered and destroyed with his consent, with a view of passing a legal title to his own alienee. Farrar *v.* Farrar, 4 N. Hamp. 191; Commonweath *v.* Dudley, 10 Mass. 403; Holbrook *v.* Tirrell, 9 Pick. 105; Barrett *v.* Thorndike, 1 Greenl. 78.

2 Roberts on Frauds, p. 259, 260.

3 Forster *v.* Hale, 3 Ves. 696, 707, per Ld. Alvanley; 4 Kent, Comm. 305; Roberts on Frauds, p. 95; 1 Cruise, Dig (by White,) Tit. 12, ch. 1, § 36, 37, p. 390; Lewin on Trusts, p. 30. Courts of Equity will receive parol evidence, not only to explain an imperfect declaration of a testator's intentions of trust, but even to add conditions of trust to what appears a simple devise or bequest. But it must either be fairly presumable, that the testator would have made the requisite declaration, but for the undertaking of the

Resulting trusts, or those which arise by implication of law, are specially excepted from the operation of this statute. Trusts of this sort are said by Lord Hardwicke to arise in three cases; first, where the estate is purchased in the name of one person, but the money paid for it is the property of another; secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and thirdly, in certain cases of fraud.[1] Other divisions have been suggested;[2] but they all seem to be reducible to these three heads. In all these cases, it seems now to be generally conceded that parol evidence, though received with great caution, is admissible to establish the collateral facts, (not contradictory to the deed, unless in the case of fraud,) from which a trust may legally result; and that it makes no difference as to its admissibility whether the supposed purchaser be living or dead.[3]

§ 267. Written evidence, signed by the party to be charged therewith, or by his agent, is by the same statute required in every case of contract by an executor or administrator, to

person whom he trusted, or else it must be shown to be an attempt to create an illegal trust. Gresley on Evid. in Equity, p. 208; Strode *v.* Winchester, 1 Dick. 397. See also the cases cited in Cowen & Hill's note 1003, to 1 Phil. Evid. p. 578.

[1] Lloyd *v.* Spillet, 2 Atk. 148, 150.

[2] 1 Lomax's Digest, p. 200.

[3] 3 Sugden on Vendors, 256 – 260, (10th edit.); 2 Story, Eq. Jurisp. § 1201, note; Lench *v.* Lench, 10 Ves. 517; Boyd *v.* McLean, 1 Johns. Ch. R. 582; 4 Kent, Comm. 305; Pritchard *v.* Brown, 4 N. Hamp. 397. See also an article in 3 Law Mag. p. 131, where the English cases on this subject are reviewed. The American decisions are collected in Cowen & Hill's note 1003, to 1 Phil. Evid. 578, and in Mr. Rand's note to the case of Goodwin *v.* Hubbard, 15 Mass. 218. In Massachusetts, there are *dicta* apparently to the effect, that parol evidence is not admissible in these cases; but the point does not seem to have been directly in judgment, unless it is involved in the decision in Bullard *v.* Brigs, 7 Pick. 533, where parol evidence was admitted. See Storer *v.* Batson, 8 Mass. 431, 442; Northampton Bank *v.* Whiting, 12 Mass. 104, 109; Goodwin *v.* Hubbard, 15 Mass. 210, 217.

answer damages out of his own estate; every promise of one person to answer for the debt, default, or miscarriage of another; every agreement made in consideration of marriage; or which is not to be performed within a year from the time of making it; and every contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them. The like evidence is also required in every case of contract for the sale of goods, for the price of £10 sterling or upwards,[1] unless the buyer shall receive part of the goods at the time of sale, or give something in earnest, to bind the bargain, or in part payment.[2]

§ 268. It is not necessary that the written evidence, required by the statute of frauds, should be comprised in a single document, nor that it should be drawn up in any particular form. It is sufficient, if the contract can be *plainly made out, in all its terms, from any writings* of the party, or even from his *correspondence.* But it must *all* be collected from the *writings;* verbal testimony not being admissible to supply any defects or omissions in the written evidence.[3] For the policy

[1] The sum here required is different in the several States of the Union, varying from thirty to fifty dollars; but the rule is every where the same. By the statute of 9 Geo. 4, c. 14, this provision of the statute of frauds is extended to contracts executory, for goods to be manufactured at a future day, or otherwise not in a state fit for delivery at the time of making the contract. Shares in a joint-stock-company, or a projected railway, are held not to be goods or chattels, within the meaning of the statute. Humble *v.* Mitchell, 11 Ad. & El. 205; Tempest *v.* Kilner, 3 M. G. & S. 251; Bowlby *v.* Bell, Ibid. 284.

[2] 2 Kent, Comm. 493, 494, 495.

[3] Boydell *v.* Drummond, 11 East, 142; Chitty on Contracts, p 314 – 316, 4th Am. Edit.; 2 Kent, Comm. 511; Roberts on Frauds, p. 121; Tawney *v.* Crowther, 3 Bro. Ch. Rep. 161, 318; 4 Cruise's Dig. (by White) p. 35, 36, 37, tit. 32, ch. 3, § 16 – 26; Cooper *v.* Smith, 15 East, 103; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. R. 280, 281, 282; Abeel *v.* Radcliff, 13 Johns. 297. Whether the Statute of Frauds, in requiring that in certain cases the "agreement" be proved by writing, requires that the "consideration" should be expressed in the writing, as part of the agreement, is a point which has been much discussed, and upon which the English and some American cases

of the law is to prevent fraud and perjury, by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever. Nor is the *place of signature* material. It is sufficient, if the vendor's name be printed, in a bill of parcels, if the vendee's name and the rest of the bill are written by the vendor.[1] Even his signature as a witness to a deed, which contained a recital of the agreement, has been held sufficient, if it appears that in fact he knew of the recital.[2] Neither is it necessary that the agreement or memorandum be *signed by both parties*, or that both be legally bound to the performance; for the statute only requires that it be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded.[3]

§ 269. Where the act is *done by procuration*, it is not

are in direct opposition. The English Courts hold the affirmative. See Wain *v.* Warlters, 5 East, 10; reviewed and confirmed in Saunders *v.* Wakefield, 4 B. & Ald. 595; and their construction has been followed in New York; Sears *v.* Brink, 3 Johns. 210; Leonard *v.* Vredenburg, 8 Johns. 29. In New Hampshire, in Neelson *v.* Sanborne, 2 N. Hamp. 414, the same construction seems to be recognised and approved. But in Massachusetts it was rejected by the whole Court, upon great consideration, in Packard *v.* Richardson, 17 Mass. 122. So, in Maine; Levy *v.* Merrill, 4 Greenl. 180; in Connecticut; Sage *v.* Wilcox, 6 Conn. 81; in New Jersey; Buckley *v.* Beardsley, 2 South. 570; and in North Carolina; Miller *v.* Irvine, 1 Dev. & Batt. 103; and *now* in South Carolina; Fyler *v.* Givens, Riley's Law Cas. p. 56, 62, overruling Stephens *v.* Winn, 2 N. & McC. 372, n.; Woodward *v.* Picket, Dudley's So. Car. Rep. p. 30. See also Violet *v.* Patton, 5 Cranch, 142; Taylor *v.* Ross, 3 Yerg. 330; 3 Kent, Comm. 122; 2 Stark. Evid. 350, 6th Am. Edit.

[1] Saunderson *v.* Jackson, 2 B. & P. 238, as explained in Champion *v.* Plummer, 1 New Rep. 254; Roberts on Frauds, p. 124, 125.

[2] Welford *v.* Beezely, 1 Ves. sen. 6; 1 Wils. 118, S. C. The same rule, with its qualification, is recognised in the Roman Law, as applicable to all subscribing witnesses, except those whose official duty obliges them to subscribe, such as notaries, &c. Menochius, De Præsump. Lib. 3; Præsump. 66, per tot.

[3] Allen *v.* Bennett, 3 Taunt. 169; 2 Kent, Comm. 510, and cases there cited.

necessary that the agent's authority should be in writing; except in those cases where, as in the first section of the statute of 29 Car. 2, c. 3, it is so expressly required. These excepted cases are understood to be those of an actual conveyance, not of a contract to convey; and it is accordingly held, that though the agent *to make a deed* must be authorized by deed, yet the agent to enter into an *agreement to convey* is sufficiently authorized by parol only.[1] An *auctioneer* is regarded as the agent of both parties, whether the subject of the sale be lands or goods; and if the whole contract can be made out from the memorandums and entries signed by him, it is sufficient to bind them both.[2]

§ 270. The word *lands*, in this statute, has been expounded to include every claim of a permanent right to hold the lands of another, for a particular purpose, and to enter upon them at all times, without his consent. It has accordingly been held, that a right to enter upon the lands of another, for the purpose of erecting and keeping in repair a mill-dam, embankment, and canal, to raise water for working a mill, is an interest in land, and cannot pass but by deed or writing.[3] But where the interest is vested in a corporation, and not in the individual corporators, the shares of the latter, in the stock of the corporation, are deemed personal estate.[4]

§ 271. The main difficulties under this head have arisen in the application of the principle to cases, where the subject of the contract is trees, growing crops, or other *things annexed*

[1] Story on Agency, § 50; Coles *v.* Trecothick, 9 Ves. 250; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Roberts on Frauds, p. 113, n. (54.)

[2] Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Procter, 4 Taunt. 209; Long on Sales, p. 38, (Rand's ed.); Story on Agency, § 27, and cases there cited; Cleaves *v.* Foss, 4 Greenl. 1; Roberts on Frauds, p. 113, 114, note (56); 2 Stark. Ev. 352, (6th Am. Ed.)

[3] Cook *v.* Stearns, 11 Mass. 533.

[4] Bligh *v.* Brent, 2 Y. & Col. 268, 295, 296; Bradley *v.* Holdsworth, 3 M. & W. 422.

to the freehold. It is well settled, that a contract for the sale of *fruits of the earth, ripe*, but not yet gathered, is not a contract for any interest in lands, and so not within the statute of frauds, though the vendee is to enter and gather them.[1] And subsequently it has been held, that a contract for the sale of a *crop of potatoes*, was essentially the same, whether they were covered with earth in a field, or were stored in a box; in either case the subject-matter of the sale, namely, potatoes, being but a personal chattel, and so not within the statute of frauds.[2] The later cases confirm the doctrine involved in this decision, namely, that the transaction takes its character of realty or personalty, from the principal subject-matter of the contract, and the intent of the parties; and that therefore a sale of any growing produce of the earth, reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land.[3] In regard to things produced annually, by the labor of man, the question is sometimes solved by reference to the law of emblements; on the ground, that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.[4] But the case seems also to be covered by a broader principle of distinction, namely, between contracts, conferring an exclusive right to the land for a time, for the

[1] Parker *v.* Staniland, 11 East, 362; Cutler *v.* Pope, 1 Shepl. 337.

[2] Warwick *v.* Bruce, 2 M. & S. 205. This contract was made on the 12th of October, when the crop was at its maturity; and it would seem that the potatoes were to be forthwith dug and removed.

[3] Evans *v.* Roberts, 5 B. & C. 829; Jones *v.* Flint, 10 Ad. & El. 753.

[4] See observations of the learned Judges, in Evans *v.* Roberts, 5 B. & C. 829. See also Rodwell *v.* Phillips, 9 M. & W. 501, where it was held, that an agreement for the sale of growing *pears* was an agreement for the sale of an interest in land, on the principle, that the fruit would not pass to the executor, but would descend to the heir. The learned Chief Baron distinguished this case from Smith *v.* Surman, 9 B. & C. 561, the latter being the case of a sale of growing timber by the foot, and so *treated by the parties*, as if it had been actually felled; — a distinction which confirms the view subsequently taken in the text.

purpose of *making a profit of the growing surface*, and contracts for things annexed to the freehold, *in prospect of their immediate separation;* from which it seems to result, that where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still, in the contemplation of the parties, evidently and substantially a sale of goods only, and so is not within the statute.[1]

[1] Roberts on Frauds, p. 126; 4 Kent, Comm 450, 451; Long on Sales, (by Rand,) p. 76–81, and cases there cited; Chitty on Contracts, p. 241, (2d edit.) On this subject neither the English nor the American decisions are quite uniform; but the weight of authority is believed to be as stated in the text, though it is true of the former, as Ld. Abinger remarked, in Rodwell *v.* Phillips, 9 M. & W. 505, that "no general rule is laid down in any one of them, that is not contradicted by some others." See also Poulter *v.* Killinbeck, 1 B. & P. 398; Parker *v.* Staniland, 11 East, 362, distinguishing and qualifying Crosby *v.* Wadsworth, 6 East, 611; Smith *v.* Surman, 9 B. & C. 561; Watts *v.* Friend, 10 B. & C. 446. The distinction taken in Bostwick *v* Leach, 3 Day, 476, 484, is this, that when there is a sale of property, which would pass by a deed of land, as such, without any other description, if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the statute. See, accordingly, Whipple *v.* Foot, 2 Johns. 418, 422; Frear *v.* Hardenburg, 5 Johns. 276; Stewart *v.* Doughty, 9 Johns. 108, 112; Austin *v.* Sawyer, 9 Cowen, 39; Erskine *v.* Plummer, 7 Greenl. 447; Bishop *v.* Doty, 1 Vermont R. 38; Miller *v.* Baker, 1 Metc. 27; Whitmarsh *v.* Walker, Ib. 313; Claflin *v.* Carpenter, 4 Metc. 580. Mr. Rand, who has treated this subject, as well as all others on which he has written, with great learning and acumen, would reconcile the English authorities by distinguishing between those cases, in in which the subject of the contract, being part of the inheritance, is to be severed and delivered by the vendor, as a chattel, and those in which a right of entry by the vendee to cut and take it is bargained for. "The authorities," says he, "all agree in this, that a bargain for trees, grass, crops, or any such like thing, when severed from the soil, which are growing at the time of the contract upon the soil, but to be severed and delivered by the vendor, as chattels, separate from any interest in the soil, is a contract for the sale of goods, wares, or merchandise, within the meaning of the seventeenth section of the statute of frauds. (Smith *v.* Surman, 9 B. & C. 561; Evans *v.* Roberts, 5 B. & C. 836; Watts *v.* Friend, 10 B. & C. 446; Parker *v.*

§ 272. *Devises of lands and tenements* are also required to be in writing, signed by the testator, and attested by credible, that is, by competent witnesses. By the statutes, 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5, devises were merely required to be in writing. The statute of frauds, 29 Car. II. c. 3, required the attestation of "three or four credible witnesses;" but the statute, 1 Vict. c. 26, has reduced the number of witnesses to two. The provisions of the statute of frauds on this subjeet have been adopted in most of the United States.[1] It requires that the witnesses should attest

Staniland, 11 East, 362; Warwick *v.* Bruce, 2 M. & S. 205.) So, where the subject-matter of the bargain is *fructus industriales*, such as corn, garden-roots, and such like things, which are emblements, and which have already grown to maturity, and are to be taken immediately, and no right of entry forms absolutely part of the contract, but a mere license is given to the vendee to enter and take them, it will fall within the operation of the same ssction of the statute. (Warwick *v.* Bruce, 2 M. & S. 205; Parker *v.* Staniland, 11 East, 362; Park, B., Carrington *v.* Roots, 2 M. & W. 256; Bayley, B., Shelton *v.* Livius, 2 Tyrw. 427, 429; Bayley, J., Evans *v.* Roberts, 5 B. & Cr. 831; Scorell *v.* Boxall, 1 Y. & J. 398; Mayfield *v.* Wadsley, 3 B. & Cr. 357.) But, where the subject-matter of the contract constitutes a part of the inheritance, and is not to be severed and delivered by the vendor as a chattel, but a right of entry to cut and take it is bargained for, or where it is emblements growing, and a right in the soil to grow and bring them to maturity, and to enter and take them, makes part of the bargain, the case will fall within the fourth section of the statute of frauds. (Carrington *v.* Roots, 2 M. & W. 257; Shelton *v.* Livius, 2 Tyrw. 429; Scorell *v.* Boxall, 1 Y. & J. 398; Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89; Teal *v.* Auty, 2 B. & Bing. 99; Emmerson *v.* Heelis, 2 Taunt. 38; Waddington *v.* Bristow, 2 B. & P. 452; Crosby *v.* Wadsworth, 6 East, 602.)" See Long on Sales, (by Rand,) p. 80, 81. But the later English and the American authorities do not seem to recognise such distinction.

[1] In Vermont alone the will is required to be sealed. Three witnesses are necessary to a valid will, in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are requisite, in New York, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, and Kentucky. In some of the States, the provision as to attestation is more special. In Pennsylvania, a devise is good, if properly signed, though it is not subscribed by any attesting witness, provided it can be proved by two or more competent witnesses; and if it be attested

and subscribe the will in the testator's presence. The attestation of marksmen is sufficient; and if they are dead, the attestation may be proved by evidence, that they lived near the testator, that no others of the same name resided in the neighborhood, and that they were illiterate persons.[1] One object of this provision is, to prevent the substitution of another instrument for the genuine will. It is therefore held, that, to be present, within the meaning of the statute, though the testator need not be in the same room, yet he must be near enough to see and identify the instrument, if he is so disposed, though in truth he does not attempt to do so; and that he must have mental knowledge and consciousness of the fact.[2] If he be in a state of insensibility at the moment of attestation, it is void.[3] Being in the same room is held *primâ facie* evidence of an attestation in his presence; as an attestation, not made in the same room, is *primâ facie* not an attestation in his presence.[4] It is not necessary, under the statute of frauds, that the witnesses should attest in the presence of each other, nor that they should all attest at the same time;[5] nor is it requisite that they should actually have

by witnesses, it may still be proved by others. 4 Kent, Comm. 514; 6 Cruise's Dig. 44, 46, 47, notes, (3d Am. edit.) See Post, Vol. 2, tit. WILLS.

[1] Doe *v.* Caperton, 9 C. & P. 112; Jackson *v.* Van Dusen, 5 Johns. 144; Doe *v.* Davis, 11 Jur. 182.

[2] Shires *v.* Glascock, 2 Salk. 688, (by Evans,) and cases cited in notis; 4 Kent, Comm. 515, 516; Casson *v.* Dade, 1 Bro. Ch. 99; Doe *v.* Manifold, 1 M. & S. 294; Todd *v.* E. of Winchelsea, 1 M. & M. 12.

[3] Right *v.* Price, Doug. 241.

[4] Neil *v.* Neil, 1 Leigh, R. 6, 10–21, where the cases on this subject are ably reviewed by Carr, J. If the two rooms have a communication by folding doors, it is still to be ascertained whether, in fact, the testator could have seen the witnesses in the act of attestation. In the goods of Colman, 3 Curt. 118.

[5] Cook *v.* Parsons, Prec. in Chan. 184; Jones *v.* Lake, 2 Atk. 177, in note; Grayson *v.* Atkin, 2 Ves. sen. 455; Dewey *v.* Dewey, 1 Metc. 349; 1 Williams on Executors, (by Troubat,) p. 46, note (2). The statute of 1 Vict. c. 26, § 9, has altered the law in this respect, by enacting, that no will shall be valid, unless it be in writing, signed by the testator in the presence of two witnesses at one time. See Moore *v.* King, 3 Curt. 243; In the goods of Simmonds, Ib. 79.

seen the testator sign, or known what the paper was, provided they subscribed the instrument in his presence, and at his request.[1] Neither has it been considered necessary, under this statute, that the testator should *subscribe* the instrument; it being deemed sufficient, that it be *signed* by him in any part with his own name, or mark, provided it appear to have been done *animo perficiendi*, and to have been regarded by him as completely executed. Thus, where the will was signed in the margin only; or where, being written by the testator himself, his name was written only in the beginning of the will, I, A. B. &c., this was held a sufficient signing.[2] But where it appeared that the testator intended to sign each several sheet of the will, but signed only two of them, being unable, from extreme weakness, to sign the others, it was held incomplete.[3]

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[1] White *v.* Trustees of the British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457; Dewey *v.* Dewey, 1 Metc. 349; Johnson *v.* Johnson, 1 C. & M. 140. See further, as to proof by subscribing witnesses, Post, § 572.

[2] Lemaine *v.* Stanley, 3 Lev. 1; Morrison *v.* Turnour, 18 Ves. 183. But this also is now changed by the statute, 1 Vict. c. 26, § 9, by which no will is valid, unless it be signed at the foot or end thereof, by the testator, or by some other person in his presence, and by his direction; as well as attested by two witnesses, subscribing their names in his presence. See, In the goods of Carver, 3 Curt. 29.

[3] Right *v.* Price, Doug. 241. The statute of frauds, which has been generally followed in the United States, admitted exceptions in favor of nuncupative or verbal wills, made under certain circumstances therein mentioned, as well as in favor of parol testamentary dispositions of personalty, by soldiers in actual service, and by mariners at sea; any farther notice of which would be foreign from the plan of this treatise. The latter exceptions still exist in England; but nuncupative wills seem to be abolished there, by the general terms of the statute of 1 Vict. c. 26, § 9, before cited. The Common Law, which allows a bequest of personal estate by parol, without writing, has been altered by statute in most, if not all of the United States; the course of legislation having tended strongly to the abolition of all distinctions between the requisites for the testamentary disposition of real and of personal property. See 4 Kent, Comm. 516–520; Lovelass on Wills, p. 315–319; 1 Williams on Executors (by Troubat,) p. 46–48, notes.

§ 273. By the statute of frauds, the *revocation of a will*, by the direct act of the testator, must be proved by some subsequent will or codicil, inconsistent with the former; or by some other writing, declaring the same, and signed in the presence of three witnesses; or by burning, tearing, cancelling, or obliterating the same, by the testator, or in his presence and by his direction and consent.[1] It is observable, that this part of the statute only requires that the instrument of revocation, if not a will or codicil, be signed by the testator in presence of the witnesses, but it does not, as in the execution of a will, require that the witnesses should sign in his presence. In regard to the other acts of revocation here mentioned, they operate by one common principle, namely, the intent of the testator. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation;[2] and the words of the statute are satisfied by any act of spoliation, reprobation, or destruction, deliberately done upon the instrument, *animo revocandi*.[3] The declarations of the testator, accompanying the act, are of course admissible in evidence as explanatory of his intention.[4] Accordingly, where the testator rumpled up his will, and threw it into the fire, with intent to destroy it, though it was saved entire without his knowledge, this was held to be a revocation.[5] So, where he tore off a superfluous seal.[6] But where, being angry with the devisee, he began to tear his will, but being afterwards pacified, he fitted the pieces carefully together,

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[1] Stat. 29 Car. II. c. 3, § 6. The statute of 1 Vict. c. 26, § 20, mentions "burning, tearing, or otherwise destroying the same," &c.

[2] Bibb *v.* Thomas, 2 W. Bl. 1043.

[3] Burtenshaw *v.* Gilbert, Cowp. 49, 52; Burns *v.* Burns, 4 S. & R. 567; 6 Cruise's Dig. (by White,) Tit. 38, ch. 6, § 54; Johnson *v.* Brailsford, 2 Nott & McC. 272; Winsor *v.* Pratt, 2 B. & B. 650; Lovelass on Wills, p. 346–350; Card *v.* Grinman, 5 Conn. 168; 4 Kent, Comm. 531, 532.

[4] Dan *v.* Brown, 4 Cowen, 490.

[5] Bibb *v.* Thomas, 2 W. Bl. 1043.

[6] Avery *v.* Pixley, 4 Mass. 462.