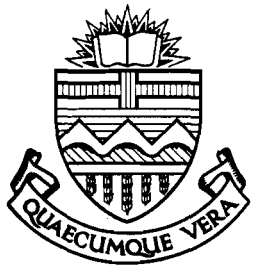

INSTITUTE OF LAW RESEARCH AND REFORM
THE UNIVERSITY OF ALBERTA
EDMONTON, ALBERTA

Background Paper No. 12

STATUTE OF FRAUDS

March 1979

INSTITUTE OF LAW RESEARCH AND REFORM

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PREFACE

The Statute of Frauds is a 300-year-old enactment requiring that a number of kinds of transactions be in writing or be evidenced by writing. The Institute of Law Research and Reform has undertaken a study of the law in connection with the Statute of Frauds and other related legislation, including the Guarantees Acknowledgment Act, section 7 of the Sale of Goods Act and section 22 of the Real Estate Agents' Licensing Act.

In the course of the Statute of Frauds project, the Institute asked Professor Robert Nozick of the Faculty of Law at the University of Alberta to prepare a draft of a Working Paper, using the information contained in two research papers written in 1974-75 by Douglas R. Stollery, then a student on the Institute's staff. The Institute had then intended that the draft Working Paper should become the vehicle for consultation with the public and also serve as the basis for discussion of the subject by the Institute's Board of Directors. Later, however, the Board came to the conclusion that an abbreviated and simplified discussion of the issues would more likely be read by the public than a thorough and comprehensive discussion such as that contained in the draft Working Paper, and accordingly the Board has decided that the consultative document should be a memorandum for discussion rather than a Working Paper. So that the valuable research and analysis contained in the draft Working Paper will be available to those who want to go more deeply into the subject, we are issuing the draft as a Background Paper. We would also refer interested persons to Mr. Stollery's article, "Statute of Frauds", which appears in Volume 14 of the Alberta Law Review, 1976 at page 222.

Readers are advised that other demands on the Institute's time have precluded efforts to update this Background Paper or alter its format for publication. It should also be noted that since Professor Nozick was in part trying to anticipate the policy positions of the Institute's Board of Directors, and in view of the history set forth above, the opinions expressed in this Background Paper are not necessarily the views of either Professor Nozick or the Institute.

The Institute would be interested in receiving comments and opinions about reform or repeal of the writing requirements set out in the Statute of Frauds and related Acts, and would ask that submissions be sent to:

The Institute of Law Research and Reform,
402 Law Centre,
The University of Alberta,
Edmonton, Alberta T6G 2H5.

In due course the Institute proposes to issue a Report on the Statute of Frauds.

CHAPTER I

INTRODUCTION

The Statute of Frauds was enacted in 1677. As the name implies, the reason for its enactment was to prevent fraud and perjury. Indeed the opening words of the Statute are, "For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury..." The Statute seeks to prevent fraud, perjury and subornation of perjury by requiring transactions enumerated in the Statute either to be evidenced in writing or, in some cases, actually to be in writing.

June 24, 1977 marked the tercentenary of the Statute of Frauds. It is still in force in Alberta as part of the law of England received into Alberta. Conditions have, of course, changed considerably over the past 300 years and a review of the provisions contained within the Statute is desirable.

It is the purpose of this Working Paper to explore whether the individual provisions of the Statute of Frauds and related Acts should be retained, and, if so, whether they should be retained in their present form.

The following categories or transactions or undertakings will be discussed individually in this Working Paper.

1. Contracts for the Sale of an Interest in Land. (Ch. IV of this Working Paper).

2. Creations and Transfers of Interests in Land. (Ch. V of this Working Paper).

3. Contracts for the Sale of Goods. (Ch. VI of this Working Paper).

4. Creations and Declarations of Trusts of Land. (Ch. VII of this Working Paper).

5. Grants and Assignments of Interests under a Trust. (Ch. VIII of this Working Paper).

6. Guarantees. (Ch. IX of this Working Paper).

7. Contracts Not to Be Performed Within a Year. (Ch. X of this Working Paper).

8. Contracts to Charge an Executor or Administrator. (Ch. XI of this Working Paper).

9. Contracts Made Upon Consideration of Marriage. (Ch. XII of this Working Paper).

10. Misrepresentations as to Creditworthiness. (Ch. XIII of this Working Paper).

11. Ratification of Infants' Contracts. (Ch. XIV of this Working Paper).

In respect of each of these categories, after a brief analysis of the present state of the law, the following questions will be considered:

1. OUGHT THERE TO BE ANY WRITING REQUIREMENT FOR THIS CATEGORY?

2. IF A WRITING REQUIREMENT IS TO BE RETAINED WHAT SHOULD THAT REQUIREMENT ENTAIL?

This question raises such issues as whether the undertaking ought to <u>be</u> in writing in order to be <u>valid</u> or if it

ought merely to be evidenced in writing in order to be enforceable; what should constitute a sufficient writing or memorandum (i.e. ought the writing to evidence only that there is a contract or ought it to prove all the material terms of that contract?); and what types of terms ought to be considered material.

3. IF THERE IS NON-COMPLIANCE WITH THE WRITING REQUIREMENT OUGHT THERE TO BE ANY OTHER RELIEF AVAILABLE?

This question raises for consideration the application of the doctrine of part performance and whether the scope of this doctrine should be broadened. It also involves a consideration of the nature of relief available on the grounds of unjust enrichment, quasi-contract, etc.

Before analyzing each of the categories we shall consider in Chapter II the historical background of the Statute of Frauds and in Chapter III the functions which a writing requirement can serve, as well as the disadvantages and criticisms normally associated with a writing requirement. An initial reading of Chapters II and III should enable the reader to consider in a better perspective the rather diverse categories discussed in following chapters.

The Institute welcomes comments addressed to it in writing at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Comments should refer by number to any relevant questions in this Working Paper.

CHAPTER II

HISTORICAL BACKGROUND OF STATUTE OF FRAUDS

It has been said that, "First and foremost, it is urged that the Act is a product of conditions which have long passed away . . . [T]he provisions of Section 4 are an anachronism. A condition of things which was advanced in relation to 1677 is backward in relation to 1937."--Law Revision Committee [of Great Britain], Sixth Interim Report, Cmd. 5449, 1937, at 6, 7.

There were at least four "factors" which existed in 1677 which no longer exist today.

First, parties to an action, their husbands or wives, and persons with an interest in the result of the action were not competent to testify. As Simpson (A.W.B. Simpson, A History of the Common Law of Contract, at 605) has noted the common law did not ". . . adopt the canonical rule requiring a minimum of two witnesses for proof of a fact; a single witness or in theory no witness at all would suffice, the plaintiff's declaration providing him with his sole opportunity to set out a set of averments which were not, of course, testable by cross examination or inquisition by the court." Given this state of affairs an evidentiary requirement of a writing or memorandum signed by the defendant was valuable and may indeed have initially prevented many frauds.

Second, trial by jury was in a state of transition. It was still possible at the time of the enactment of the Statute of Frauds for jurors to decide cases on the basis of their own personal knowledge. Simpson (Simpson, 604) notes that there was ". . . a general dissatisfaction with the operation of jury trials . . ." and that ". . . it was this dissatisfaction which gave rise to the desire to reform the law."

A third factor is that conditions in England were unsettled at the time of the enactment of the Statute. There had been a long period of political turmoil. "No legislation had been enacted affecting ordinary litigation. The ordinary law courts had been functioning under great difficulties. Subornation and perjury evidently were rife."--[Drachsler, "The British Statute of Frauds--British Reform and American Experience," (1958-1960), A.B.A. Section of International and Cooperative Law Bulletin 3-4, 24].

Finally, it should be noted that ". . . contemporaries were, by modern standards, extremely litigious, so that opportunities to bring groundless suits were likely to be taken . . . . Litigation indeed came close to a form of sanctioned aggression, and it was an aggressive age."--[Simpson, 599].

The above conditions explain the motivation for, and perhaps justify, the enactment of the Statute of Frauds in 1677. None of these conditions exists in Alberta today. There may however be other compelling reasons which justify a requirement of evidence in writing for at least some of the categories of transactions presently falling within the Statute of Frauds.

CHAPTER III

ADVANTAGES AND DISADVANTAGES OF STATUTE OF FRAUDS

In deciding whether the requirement of writing for any particular category of transactions presently falling within the Statute of Frauds ought to be retained, the advantages of retaining that category must be weighed against the potential harm or injustice likely to result from retention. Since we are of the opinion that the Statute of Frauds should not be totally repealed it will be necessary through the course of this Working Paper to weigh or "balance" the advantages and disadvantages associated with retention, for each category separately. It is nevertheless useful to analyse at this time the general functions which the Statute of Frauds can serve together with the disadvantages and criticisms of the Statute. Accordingly we set them forth here.

A. Advantages of the Statute of Frauds

1. Evidentiary Function

The main function which the Statute of Frauds served at the time of its enactment was that of requiring particularly cogent evidence, signed documents or memoranda, as a condition precedent to enforceability of what were considered at that time particularly significant transactions. As we noted in Chapter II the conditions which justified this stringent evidentiary requirement (the prevalence of perjury, jurors deciding cases on the basis of personal knowledge, the incapacity of parties to an action to testify, and the aggressiveness of litigation) no longer exist. Nevertheless, it is at least arguable that even today certain important transactions should be required to be evidenced in writing in order to be enforceable. It may very well be that, in so far as certain types of

transactions are concerned, more injustice will occur as a result of allowing contracts or transactions which never actually existed to be fraudulently proved by parol evidence than will occur as a result of not enforcing otherwise perfectly valid agreements. In other words, if it is thought that the frauds which may occur as a consequence of allowing proof by parol evidence more than outweigh the injustice which will occur as a result of not enforcing legitimate bargains then the evidentiary function of the Statute of Frauds may still be a justification for its retention.

However, if the evidentiary function of the Statute of Frauds is to be viewed as the sole or major reason for retention of a writing requirement in respect of a particular category we must further ask how that particular category differs from each significant transaction not falling within the Statute. Characteristics which might be considered in a determination of whether a particular category merits a special evidentiary requirement include the pecuniary importance of that category (many financially significant transactions such as sales of shares are not within the ambit of the Statute of Frauds), the intrinsic importance of that category (e.g. contracts for the purchase or sale of a house are often the most important contracts into which many persons will enter in the course of their lives) and the type of individual who will be "protected" by the evidentiary requirement (i.e. is the potential defendant usually going to be a business entity with ready access to legal advice or will he often be a non-business entity?).

2. The Cautionary Function

The cautionary function which a legal formality can perform has been described by Fuller, "Consideration and Form" (41 Col. L.R. 799, 800):

> A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer--symbol in the popular mind of legalism and weightiness--was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

This cautionary function was emphasized in Working Paper No. 20 of the B.C. Law Reform Commission, pp. 148-150, in support of the proposal of that body that guarantees and indemnities should not be enforceable unless they are set out in writing (as opposed to being merely evidenced in writing). It is also the underlying purpose of the Guarantees Acknowledgment Act, R.S.A. 1970, c. 163. The Institute of Law Research and Reform in its Report on the Guarantees Acknowledgment Act, at p. 2 commented that the purpose of the Act is,

> . . . the prevention of fraudulent practices. More particularly, the Guarantees Acknowledgment Act is designed to protect the ordinary individual who, through lack of experience or understanding, might otherwise find himself subject to onerous liabilities at law, the nature and extent of which he did not properly appreciate when he entered into the undertaking in question. The statute seeks to provide this protection by requiring that the person giving the guarantee must appear before a notary public and that the latter must satisfy himself by examination that the guarantor is aware of the contents of the guarantee and understands it.

3. The Channelling Function

The channelling function of a formality is that of denoting in and of itself that an undertaking is enforceable, that negotiations have ended, and that contractual intention is conclusively presumed. Fuller, (41 Col. L.R. 799, 801) has described the channelling function of the seal:

> The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability.

It should be noted that most of the writing requirements in the Statute of Frauds are not good examples of formalities serving a channelling function. For example, satisfying the writing requirement of s. 4 of the Statute does not provide ". . . a simple and external test of enforceability . . ." of that undertaking or promise. All the other essential elements of a simple contract must still be proved, i.e. consideration, certainty, and intention to create legal relations. As Fuller goes on to say (at p. 802):

> The Statute of Frauds, for example, has only a negative canalization effect in the sense that it indicates a way by which one may be sure of not being bound. On the positive side, the outlines of the channel are blurred because too many factors, including consideration, remain unassimilated into the form.

B. Disadvantages and Criticisms of the Statute of Frauds

1. The Act Causes Injustice

Probably the most serious criticism of the Statute of Frauds is that it has caused more injustice than it has prevented. An example of such injustice is demonstrated by the effect of an admission of the existence of the contract by the party to be charged when there has not been compliance with the Statute. Even if a defendant admits making the contract, the Statute provides a defence. This leads to results such as those expressed by Lord Campbell in Sievewright v. Archibald (1871), 17 Q.B. 103, 119:

> I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; although, believing that he had broken his contract, he could only have defended the action in the hope of mitigating the damages; and although he was not aware of the objection on which he now relies, till a few days before the trial.

While the Statute of Frauds has caused injustice in individual cases by providing a technical defence to the defendant who entered into an oral contract with the full intention of being bound by it and who subsequently decided to renege on his contractual obligations, the Statute has also had the function of preventing individuals from being bound by alleged contracts into which they never entered, or into which they entered without sufficient deliberation. It is as against these evidentiary and cautionary functions that the injustice caused by the Statute must be weighed.

2. <u>The Statute Causes Unnecessary Litigation</u>

The English Law Revision Committee has commented (English Law Revision Committee Report, 8):

> Apart from its policy the Statute is in point of language obscure and ill-drafted. 'It is universally admitted,' observed the original editor of Smith's Leading Cases, 'that no Enactment of the Legislature has become the subject of so much litigation.' This could hardly have been so if its terms had been reasonably lucid.

The Statute of Frauds has resulted in a mass of litigation as to whether particular cases are within or without the Statute. For example, the Century Digest, the First Dicennial and the Second Dicennial list 10,800 cases on the Statute. This obviously entails a considerable public as well as private cost.

This particular criticism must however be placed in its proper perspective. First, a great many of these cases may have been litigated even had there been no Statute of Frauds, particularly since most of these cases must by definition have involved oral agreements or insufficient memoranda in which the defendant was disputing either the very existence of an agreement, or else the terms as alleged by the plaintiff.

Second, there is no way of estimating how many disputes were not litigated, simply because the Statute of Frauds provided a complete defence.

Finally, it may be possible to reduce litigation by making the application of the Statute clearer. This latter reform would not entail repeal.

3. The Statute is a Product of Conditions Which No Longer Exist

As discussed in Chapter II the original conditions which led to the enactment no longer exist. While the changes in conditions do not render the evidentiary function of the Statute as compelling a reason for retaining the Statute, this particular function is still of some use. Also, the cautionary and channelling functions of the Statute, which were not at all the reasons for its enactment may justify the retention of at least some of its provisions.

4. The Statute is not in Conformity with Actual Practice

It can be argued that the Statute should be repealed since it prescribes a method of contracting which is not in conformity with the way business or transactions of that sort are normally carried. If there is a divergence between actual practice and the legal requirement of writing set forth in the Statute, then

this in itself would be justification enough for repeal. However, this criticism is likely more warranted in respect of some provisions of the Statute than of others. For example, while we have no empirical data to prove this it would seem likely that the vast majority of conveyances of land, contracts for the sale of land, guarantees, and express creations of trusts are in fact in writing. On the other hand it would seem that many contracts not to be performed within a year, often being contracts of service, are not in writing.

5. The Statute Renders Contracts Unenforceable But Does Not Affect Their Validity

The English Law Revision Committee in its criticism of the Statute argued (E.L.R.C., Report, at 7):

> The section does not reduce contracts which do not comply with it to mere nullities, but merely makes them unenforceable by action. For other purposes they preserve their efficacy.

The British Columbia Law Reform Commission points out (B.C.L.R.C. Working Paper, 89:

> The statute engenders situations in which oral agreements are unenforceable, ostensibly because of the dangers of fraud and perjury, and yet in which, notwithstanding the same danger of fraud and perjury, they may be used as defences in actions to recover deposits paid under alleged agreements, to explain acts of past performance in order to enforce agreements, or even (in the eighteenth century) to serve as the justification for imprisoning defendants for perjury when they denied agreements.

While the fact that contracts within the Statute are merely unenforceable and not void may seem to lead to rather anomalous results, it should be pointed out that it also provides for a certain degree of flexibility. For example it is difficult to see how the doctrine of part performance could

ever have arisen if failure to satisfy the Statute rendered the contract void. Because the Statute merely rendered the contract unenforceable until certain evidentiary requirements were met it is not too difficult to understand how Courts of Equity would eventually recognize an alternate form of evidence, acts of part performance, as being equally probative. Likewise the fact that an unenforceable contract can be raised by way of defence leads to the perfectly sensible result that an agreement executed by both parties cannot be undone. If the contract were void, the parties could presumably demand back any consideration transferred as being conveyed or paid under a void contract. The ability to raise an unenforceable contract as a defence to an action for recovery of a deposit paid under an enforceable contract does not really create an injustice if only because the deposit can be retained only if that party is willing to perform.

CHAPTER IV

CONTRACTS FOR THE SALE OF, OR ANY INTEREST IN OR CONCERNING, LAND

Section 4 of the Statute of Frauds reads:

> . . . no action shall be brought whereby to charge any Executor or Administrator upon any special promise to answer damages out of his own Estate or whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriages of another person or to charge any person upon any agreement made upon consideration of Marriage or upon any Contract or Sale of Lands, Tenements or Hereditaments or any Interest in or concerning them or upon any Agreement that is not to be performed within the space of one year from the making thereof unless the Agreement upon which such action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

Section 4, which we refer to as the "Contracts section," has been the most litigated of all the sections in the Statute of Frauds. It refers to five categories of contracts:

1) Contracts to Charge Executors or Administrators.

2) Contracts to Answer for the Debt, Default, or Miscarriage of Another (Guarantees)

3) Contracts made upon consideration of marriage.

4) Contracts or sale of lands . . . or any Interest in or concerning them.

5) Contracts not to be performed within one year.

Of these five categories the most litigated and the most controversial in terms of potential law reform is contracts relating to land. Accordingly, in this chapter we shall discuss and evaluate the present state of the law of this particular category of contracts. In Chapter V we discuss the related (though different) categories of Creations and Conveyances of Interests in Land (sections 1 and 3 of the Statute). A consideration of the other 4 contract categories is deferred until Chapters IX, X, XI, and XII.

We shall begin our consideration of contracts concerning an interest in land by analyzing the category under the following headings:

A) Interpretation of the phrase ". . . no action shall be brought . . ." (legal implications of unenforceability).

B) Requirements for a Sufficient Writing or Note or Memorandum.

C) Judicial interpretation of "Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them."

D) Other relief in the event of non-compliance with the Statute (this includes a discussion of the doctrine of part performance).

E) Evaluation of the Law and Proposals for Reform.

Headings A and B are relevant as well to the other four categories of contracts mentioned in the section. Headings C and D and E are of course relevant only to this particular category.

A. "No Action shall be Brought"

While at one time in the long history of the Statute of Frauds the phrase ". . . no action shall be brought. . . ." was interpreted as rendering the contract void.--Carrington v. Roots (1837), 2 M & W 249 (Exch.)--it is now well settled that the effect of non-compliance with the Statute is to render the contract unenforceable--Leroux v. Brown (1852), 12 C.B. 801 (Common Pleas); Maddison v. Alderson (1883), 8 App. Cas. 467.

There are several implications arising from the fact that a contract may be merely unenforceable and not void. First, the contract may be used as a defence in an action--Miles v. New Zealand Alford Estate (1886), 32 Ch. D. 266. Thus, if pursuant to an oral contract A allows B to enter upon his land and dig for gravel, B, should he be sued in trespass, can raise the oral agreement by way of defence. On the other hand if A were to turn B and his machinery off the land B could not sue A in trespass, since this would amount to enforcement of the contract, albeit indirectly--Treitel, The Law of Contract, 3rd ed. 144, 145. Likewise an attempt by a purchaser, who is in default under an oral agreement, to recover his deposit can be met by the successful defence that the monies are held pursuant to a valid agreement--Thomas v. Brown (1876), 1 Q.B.D. 714; Switzer's Investments Ltd. v. Burn (1964), 49 W.W.R. 627; Monnickendam v. Leanse (1923), 39 T.L.R. 445. However, if the vendor repudiates the money is recoverable on the ground of total failure of consideration--Treitel, 145.

A second implication is that the agreement, while unenforceable, is sufficient consideration to support a negotiable instrument. Thus, in an action on a cheque given as a deposit on oral agreement, the defence of no consideration (which is normally available as between immediate parties to a negotiable instrument) will be of no avail to the purchaser for the simple

reason that the agreement, though unenforceable, is still valid and thus constitutes consideration--Jones v. Jones (1840), 6 M. & W. 84 (Exch.); Low v. Fry (1935) 152 L.T.R. 585.

Finally the fact that the agreement is valid but unenforceable means that evidence sufficient for a court of common law or equity may arise at a point in time after the formation of the contract, such that the agreement then becomes enforceable. At common law the evidence would have to be a sufficient note or memorandum (discussed infra); at equity this evidence would have to meet the requirements of the doctrine of part performance. While the contract might become enforceable only at the later date, the existence of the contract dates back to the time of its actual formation. Had failure to satisfy the requirements of the Statute of Frauds been judicially treated as rendering the contract void, a later note or memorandum or acts of part performance would be significant only to the extent that they constituted the formation of a new contract in compliance with the Statute or the equitable doctrine of part performance. This might be the case some of the time but there are clearly many memoranda which would not in themselves constitute formation of a new contract, e.g., a note referring to the prior agreement but repudiating it. Likewise it would be difficult to prove from most acts of part performance a "new" offer and acceptance.

As we noted earlier in our discussion of the disadvantages of the Statute (supra Ch. III), the apparently anomalous consequences of mere unenforceability has been a major criticism of the Statute. We have also commented that at the same time it permits a certain degree of flexibility in the operation of the Statute, particularly by allowing in later evidence of the valid, but initially unenforceable contract.

B. The Requirement of a Sufficient Note or Memorandum

The issue of whether a given note or memorandum has satisfied the evidentiary requirements of section 4 of the Statute has been the source of a flood of litigation. We discuss later in this chapter some possible approaches to law reform in this area. At this time, we set out, without comment, the present state of the law.

1. Time by Which the Note or Memorandum Must be in Existence

The phrase ". . . no action shall be brought. . . ." has been held to mean that the writing must be in existence prior to the commencement of the action--Lucas v. Dixon (1889), 22 Q.B.D. 357 (C.A.). On the same principle the pleadings of a defendant will be insufficient--Jackson v. Oglander (1865), 2 H. & M. 465 (V. Ch.). It is however sufficient if the note or memorandum is in existence at the time when the party relying on it is joined to the action--Farr, Smith & Co. v. Messers Ltd., [1928] 1 K.B. 397.

2. Form of Note or Memorandum Required

As early as 1683 it was decided that a writing need not be in any particular form to satisfy the Statute--Moore v. Hart 1 Vern. III 201 (Ch.). Thus writings in letters [see for example Thirkell v. Cambi, [1919] 2 K.B. 590; Maybury v. O'Brien (1911), 25 O.L.R. 229, reversed on the facts, 26 O.L.R. 628 (C.A.)] and in wills [see Re Hoyle, [1893] 1 Ch. 84] have been held to be capable of constituting sufficient notes or memoranda. The note or memorandum need not have been written with the intention of satisfying the Statute. As long as it sufficiently evidences the existence of a contract, the note or memorandum will suffice, even if it amounts to a repudiation of the

contract; Thirkell v. Cambi. However, a letter showing a dispute between the parties as to the terms [Archer v. Baynes (1850), 5 Exch. 1625] or denying the very existence of the contract will not be sufficient.

Thus in Tiverton Estates Ltd. v. Wearwell Ltd., [1975] Ch. 146, the English Court of Appeal held that a "subject to contract" document, even if it could be said to evidence all the material terms of an alleged contract, was insufficient on the ground that it did not also evidence the fact that there was a finally concluded agreement [see also Tweddell v. Henderson, [1975] 2 All E.R. 1096 (Ch.)].

3. Contents of the Note or Memorandum

Williams, in his book The State of Frauds Section IV, states, at 55: ". . . to satisfy the Statute the memorandum must set forth all of the contract, and as a contract exists only in its various terms, the memorandum must therefore disclose all the terms of the contract."

The more prevalent view, however, is that the memorandum need only disclose all the material terms. This less strict standard is stated in Cheshire and Fifoot, Law of Contract, 8th ed., 1972, at 185; Anson, Law of Contract, 23rd ed., 1969, at 75; Treitel, The Law of Contract, 3rd ed., 1970, at 140; Halsbury's Laws of England, vol. 8 (3rd ed., 1954) at 100; and C.E.D. (Western), Vol. 5 (2nd ed. 1958) at 103, 104. In McKenzie v. Walsh (1921), 61 S.C.R. 312, Sir Louis Davies C.J.C. stated at 313:

> I have reached the conclusion that the memorandum or receipt is sufficient. That it must contain all the essential terms of the contract and must show that the parties have agreed to those terms is conceded by both sides. That it does so, I conclude. The essential terms are the parties, the property and the price.

Besides the parties, property and the price, it is clear that, depending on the circumstances of a case, other terms can be material--Chapman v. Kopitoski, [1972] 6 W.W.R. 525. Thus in Tweddle v. Henderson the payment of the purchase price in stages was considered material and in Huttges v. Verner (1975), 10 N.B.R. 533 (S.C.Q.B.D.) the reservation of a life interest by the defendant seller in a contract of sale was held to be material.

The issue of whether a given material term is in fact included in the memorandum is complicated by the principle that it is sufficient if the term is disclosed by reasonable inference--Caddick v. Skidmore (1857), 2 DeG. & J. 52 (Ch.)--and that parol evidence is admissible for the purposes of explanation, though not of adding or varying terms--Williams, 59. Precisely what constitutes reasonable inference and the point at which explanation ceases and additions or variations begin are points of great difficulty. A number of cases illustrate these distinctions. In Carr v. Lynch, [1900] 1 Ch. 613 a memorandum of a lease stating "in consideration of you having this day paid me the sum of 50£" was held to be sufficient identification of the lessee, when he proved that he had paid the 50£ on that day. In Rossiter v. Miller (1878), 3 App. Cas. 1124 parol evidence was admissible to identify "proprietor." However in Potter v. Duffield (1874), L.R. 18 Eq. 4 parol evidence was inadmissible to identify "vendor." In Plant v. Bourne, [1897] 2 Ch. 281 parol evidence was admissible to identify "twenty-four acres of land . . . at Totomslow . . . ."; but in Caddick v. Skidmore a receipt for money paid to a party "on account of his share in the Tividale mine" could not be explained by parol evidence.

Even if a material term is omitted there is authority for the proposition that if that term is for the sole benefit of the plaintiff (i.e., not for the joint benefit of plaintiff

and defendant) the omission will not preclude the plaintiff from enforcing the contract as long as he waives that term--North v. Loomes, [1919] 1 Ch. 378.

4. The Requisite Signature

Signature, in the normal use of the word, implies that a party has written his own name at the end of a document as a means of authenticating it. However, in the case of the Statute of Frauds, the word has been given a more liberal interpretation. First, initials will be sufficient--Chichester v. Cobb (1866), 14 L.T. 433. Second, the signature may be in any part of the document, not necessarily at the bottom--Durrell v. Evans (1862), 1 H. & C. 174; Evans v. Hoare, [1892] 1 Q.B. 593. Third, the signature may be printed--Schneider v. Norris (1814), 2 M. & S. 286. However, it is necessary that the "signature" authenticate the whole document. As Treitel points out (Treitel), 3rd ed., 141):

> These rules are lax, but a document is not signed by a party merely because his name occurs somewhere within it: the signature must authenticate the whole document. Thus if a memorandum is headed 'Articles of Agreement between A and B' and concluded 'as witness our hands . . . .' the parties must actually subscribe: the mention of their names at the beginning is clearly not intended as a signature.

It is sufficient if the note or memorandum is signed by the agent of the party to be charged, "lawfully authorized." Unlike certain other sections of the Statute, section 4 does not require the agent to be authorized in writing--Coles v. Trecothick (1804), 9 Ves. Jun. 234 (Ch.). Whether or not an agent is lawfully authorized is a question of fact in each case; however, it is not necessary that the agent be authorized for the express purpose of satisfying the Statute--Daniels v. Trefusus, [1914] 1 Ch. 788. He may sign his own name or that

of his principal--Graham v. Mosson (1839), 5 Bing. (N.C.) 603--and he may be agent for both parties--Sievewright v. Archibald (1851), 17 Q.B. 103. However the plaintiff cannot be the agent for the defendant--Sharman v. Brandt (1871), L.R. 6 Q.B. 720. Finally, the same principles as to "authentication" of signatures applies to agents as well as to principals--Wallace v. Roe, [1903] 1 I.R. 32.

Finally it should be emphasized that the signatures of both parties are not required. It is only the "party to be charged," i.e., the defendant, that must sign. Thus it is possible for a plaintiff, who has not signed, to enforce a contract against a defendant who has.

5. Joinder of Documents

In circumstances where a single document does not disclose all the material terms it may be possible to join together two or more documents in order to produce a sufficient memorandum. A distinction should be made between the joining of documents, both of which are signed, and the joining of signed and unsigned documents.

In the joining of signed and unsigned documents the two must be connected in some way and the authenticating influence of the signature must extend to the unsigned document. It has been held that the signed document must come into existence in point of time after the unsigned document--Turney v. Hartley (1848), 3 New Pract. Cas. 96--but it is now sufficient if the documents come into being more or less contemporaneously, regardless of order--Timmins v. Moreland Street Property Co., [1957] 3 All E.R. 265.

There is some dispute about what sort of connection between the two documents must be established, and about the

admissibility of parol evidence to establish their connection. There are apparently two tests. The stricter test was set out by Baggallay L.J. in Long v. Millar (1879), 4 C.P.D. 450, 454:

> The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence."

This was expanded by Russell J. in Stokes v. Whichar, [1920] 1 Ch. 411:

> . . . if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the Statute by reading the two together.

This strict test, then, requires that there be some reference in the signed document to the unsigned document.

The more liberal test, sometimes referred to as the "side by side" test was set forth by Brammell J. in Long v. Millar at 454:

> . . . it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the documents are placed side by side. The agreement referred to may be identified by parol evidence.

This was extended in Olver v. Hunting (1890), 44 Ch. D. 205 where Kekewich J. stated: "Whenever parol evidence is required to connect two written documents together then that parol evidence is admissible."

It should be noted that both the strict and liberal tests require some connection to be shown by other than parol evidence.

In the latter test the connection must be obvious from placing the two documents side by side. In the former test there must be a reference, express or implied, in the signed document. If the connection can only be drawn by parol evidence then that will be insufficient (see Treitel, 143).

If a plaintiff attempts to join two signed documents it is not necessary that the signature on one document authenticates the other. According to Williams, Statute of Frauds Section IV, 142:

> Where two signed documents refer to the same subject matter, they may be connected together to form a writing under the Statute, parol evidence being admissible to identify the subject of reference.

He relies upon Allen v. Bennet (1810), 3 Taunt. 169; Verlander v. Codd (1823), Turn. & R. 352; Studds v. Watson (1884), 28 Ch. D. 305; but admits that Potter v. Peters (1895), 64 L.J. Ch. 357 is to the contrary.

C. Meaning of "Contract or Sale of Lands, Tenements or Hereditaments or any Interest in or concerning them."

We consider in this section the scope of application of section 4 insofar as it relates to contracts concerning land. The wording in the Statute refers to: ". . . any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them." The applicable English provision, found in s. 40(1) of the Law of Property Act, 1925, 15 Geo. 5, c. 20, refers to: ". . . any contract for the sale or other disposition of land, or any interest in land." The applicable provision in British Columbia found in s. 2(1) of the B.C. Statute of Frauds refers to: ". . . agreement concerning an interest in land."

In certain instances the scope of application of the Statute is obvious, in other instances the application is less obvious. As the B.C. Law Reform Commission points out in its Working Paper, at p. 4:

> Over three hundred years of judicial interpretation have left us with an imprecise notion, to say the least, of what agreements will be construed as concerning an interest in land. To be sure, a disposition of the fee simple, an agreement to convey an equity of redemption, and an agreement to grant a lease, come within the judicial definition of interests in land. The same may be said of agreements creating easements and 'profits à prendre' in land. On the other hand, mere licenses have been enforced on the basis of parol agreements since a license, not being an interest in land, falls outside the Statute of Frauds.
>
> Difficulties have arisen, however, when the courts have been asked to consider agreements which, in the nature of things, are more ambiguous. For example, because an agreement must, in the words of the English Law of Property Act, be 'for the sale or other disposition of an interest in land', agreements for other purposes, notwithstanding a peripheral involvement of an interest in land, have been held to fall outside the statute. Thus contracts to form a partnership, or to receive shares in a company, each of which involved land, have been excluded.

We now review specific problem areas which have received judicial consideration.

1. Produce of the Soil

A major problem area is whether a sale of products of the soil is a sale of goods or a sale of an interest in land. Such products may be divided into two classes, fructus industriales and fructus naturales.

> Fructus industriales have been defined as 'corn and other growths of the earth produced not spontaneously, but by labour and industry'; fructus naturales as the

> spontaneous product of the soil, such as grass and even planted trees, where 'the labour employed in their planting bears so small a proportion to their natural growth.'
>
> [Cheshire & Fifoot, Law of Contract, 183 (8th ed., 1972), relying on Marshall v. Green (1875), 1 C.P.D. 35 per Lord Coleridge C.J.]

Fructus industriales have always been regarded as goods while, at common law, the status of fructus naturales depended upon the time for severance. If they were to remain attached to the soil for some time so that the buyer would benefit from the continued attachment, they were considered to be land--Cheshire and Fifoot, Law of Contract, 183.

The situation has been complicated by the fact that s. 2(1)(h)(ii) of the Sale of Goods Act defines "goods" as including:

> emblements, industrial growing crops and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale.

In Cheshire & Fifoot, Law of Contract, 184 (8th Ed. 1972), the effect of this provision is discussed and it is pointed out that in most cases the purchaser buys the produce of the soil intending at some time to effect its severance so that the severance will take place under the contract of sale. As a result, fructus naturales should be considered in most cases as goods. However in Saunders v. Pilcher, [1949] 2 All E.R. 1097, Singleton L.J. stated that the definition of "goods" in the Sale of Goods Act applied only to that Act. Thus fructus naturales may well be considered goods for the purposes of the Sale of Goods Act and land for the purpose of s. 4 of the Statute of Frauds.

This conclusion could lead to anomalous results. Section 7 of the Sale of Goods Act (discussed in more detail in Ch. VI, infra) contains an evidentiary provision requiring either a signed note or memorandum, acceptance and receipt of the goods, or "something given in earnest to bind the contract or in part payment. . . ." in order to render the contract enforceable. Because of the latter two means of complying with s. 7 of the Sale of Goods Act, it is possible for there to exist a situation in which the evidentiary provisions of the Sale of Goods Act have been satisfied, and in which there is non-compliance with s. 4 of the Statute of Frauds. However, since an agreement coming within both statutes must comply with both--DiCastri, Canadian Law of Vendor and Purchaser 24, 25 (1st ed., 1968)--the agreement would still be unenforceable.

To complicate matters even further there are cases in which the court has not looked to the physical nature of what was being bought but has focused its attention on the "substance of the agreement." As the B.C. Law Reform Commission points out in its Working Paper, at pp. 11, 12:

> . . . there are cases in which the court considers the agreement as a whole, and in so doing may construe it as creating merely a license or permit allowing A to go onto B's land and take timber away. Since a license is not generally considered to be an interest in land, A could enforce the agreement notwithstanding its parol nature. Conversely, however, there are cases which hold such agreements to be analogous to profits a prendre, or leases, both of which are interests in land. Similar arguments have been raised successfully with regard to dispositions of minerals and growing crops.
>
> The result in any specific case appears to rest on such factors as the length of time before the objects are to be severed from the land, the extent of exclusive possession granted under the agreement, and the relevant provisions of any statute at issue.

2. Fixtures

The general rule is that fixtures are interests in land, passing with the land when it is transferred. Agreements to sever fixtures have thus been held to be contracts concerning an interest in land--Lee v. Risdon (1816), 7 Taunt. 188. An exception to this rule apparently arises in the case of an agreement to dispose of a tenant's fixtures. In Lee v. Gaskell (1876), 1 Q.B.C. 700 it was held that a sale of a tenant's fixtures was neither a sale of goods (while still attached to the land) nor was it a sale of an interest in land since the tenant had the right to sever them during the tenancy.

3. Sales of Minerals and Oils

Whether contracts concerning minerals, oils, natural gas and the like fall within s. 4 of the Statute is an issue which cannot be decided definitively. As the B.C. Law Reform Commission points out in its Working Paper, at pp. 9-10:

> Agreements concerned with things which are not merely interests in land, but "the land itself" can be construed as contracts for the sale of goods. In Benjamin's Sale of Goods it is argued that the sale of minerals that have been extracted from the land, or an agreement to sell minerals which the land owner is to mine are, both at common law and under the Sale of Goods Act, contracts for the sale of goods.
>
> Other cases, however, suggest that such agreements come within the Statute of Frauds, either as contracts in respect of an interest in land, or as contracts in respect of the land itself. . . .
>
> The reasons underlying the inconsistencies evident in this area are obscure. It may be, where agreements were construed as concerning interests in land, that the court was in fact concentrating not on the physical nature of the oil, minerals, or gas referred to in the contract, but on the 'package of rights' transferred thereunder.

Finally, it should be noted that in Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd. (1969), 3 D.L.R. (3d) 630 (Alta. S.C., A.D.), affirmed (1971), 15 D.L.R. (3d) 256 (S.C.C.) it was held that a royalty agreement on oil from land fell outside the Statute of Frauds.

4. Agreements About Proceeds From Sales of Land

Agreements for the division of proceeds from the sale of land have been considered in Canada as not falling with s. 4 of the Statute--Harris v. Lindeborg, [1931] S.C.R. 235; Stuart v. Mott, (1893) 23 S.C.R. 153. In England the position might be different. In an obiter dictum Jenkins L.J. in Cooper v. Critchley, [1955] 1 All E.R. 520, 524, stated:

> . . . there is, to my mind, little doubt that before the Law of Property Act, 1925, an interest in the proceeds to arise from a sale of land would notwithstanding the equitable doctrine of conversion have ranked as an interest in land for the purposes of s. 4 of the Act of 1677.

5. Collateral Agreements

Sometimes an agreement in issue is considered collateral to and independent of an agreement relating to land, and hence not within the Statute. An example of an application of this principle can be found in Canadian General Securites Co. v. George (1918), 43 D.L.R. 20 (Ont. S.C.)., reversed on other grounds, (1919), 59 S.C.R. 641. In that case there was an agreement for the sale of land from the plaintiffs to the defendants with an undertaking by the plaintiffs to resell for the defendants. The latter undertaking was considered as collateral to the contract of sale, and since it was an agreement to sell, as opposed to an agreement for sale, did not fall within the Statute.

6. Agreements to Sell or Purchase Land

Agreements under which a party agrees to buy or sell land from or to a third party have generally been treated as contracts for services, thus not falling within s. 4 of the Statute of Frauds--Archibald v. Goldstein (1884), 1 Man. L.R. 45; Horsey v. Graham (1869), L.R. 5 C.P. 9; Ross v. Scott (1875), 22 Gr. 29.

However s. 22 of the Real Estates Agents' Licensing Act, R.S.A. 1970, c. 311, provides:

> No action shall be brought to charge a person by commission or otherwise for services rendered in connection with the sale of land, tenements or hereditaments, or an interest therein, unless
>
> (a) the contract upon which recovery is sought in the action or some note or memorandum thereof is in writing signed by the party to be charged or by his agent lawfully authorized in writing, or
>
> (b) the person sought to be charged
>
> (1) has as a result of the services of an agent employed by him for the purpose effected a sale or lease of lands, tenements and hereditaments or any interest therein, and
>
> (2) has either executed a transfer or lease signed by all necessary parties and delivered it to the purchaser, or has executed an agreement of sale of lands, tenements and hereditaments or an interest therein, signed by all necessary parties, entitling the purchaser to possession of the lands, tenements and hereditaments or any interest therein, as specified in the agreement, and has delivered the agreement to the purchaser.

The effect of this section is similar to that of s. 4 of the Statute of Frauds insofar as it merely renders contracts not

complying with it unenforceable. The memorandum requirement is, however, slightly more stringent in that a signature by the agent of the party to be charged will not suffice unless that agent was "lawfully authorized in writing." The section also provides an alternate method of compliance in subsection (b).

D. Relief Available Where There Has Been Non-Compliance

1. Doctrine of Part Performance

It was not long after the enactment of the Statute of Frauds that courts of equity when faced with the obvious injustice arising in at least some cases as a result of adhering to the rigid requirements of the statute, would enforce the contract notwithstanding non-compliance with the statute. This intervention by the courts of equity and the "circumstances" which must be proved to allow equity to dispense with the requirement of writing has become known as the doctrine of part performance. The earliest reported case was Butcher v. Stapely (1686), 1 Vern 363. In its modern sense the doctrine was established in the nineteenth century case of Maddison v. Alderson (1883), 8 App. Cas. 467.

It is important to review, at least briefly the theoretical foundations of the doctrine. As the B.C. Law Reform Commission has noted in its Working Paper at p. 17,

> The basis for the intervention . . . is essential to an appreciation of its function, and an assessment of its adequacy in preventing abuses of the Statute.

There are two theoretical bases of the doctrine. The more orthodox approach to the doctrine and the one that has received judicial acceptance in Canada is that of regarding

it as a theory of what we call "alternate evidence." In this sense acts of part performance are viewed as being evidence sufficiently cogent to allow a court of equity to enforce the contract even though it could not be enforced at common law because of non-compliance with the Statute. Precisely what acts, and what circumstances must be proved will be discussed infra. We note here, however, that even regarding acts of part performance as being merely an alternate type of evidence, there has been dispute as to what are sufficient acts of part performance such as to allow in parol evidence. That is, must the acts prove the precise terms of the alleged contract, or only that there is a contract?

The second theoretical basis of the doctrine emphasizes the acts of part performance not so much for their evidentiary value, but as raising equities in the plaintiff which render it unjust not to enforce the contract. This approach to the doctrine recently has received judicial approval in England. In Steadman v. Steadman, [1974] 3 W.L.R. 56 (H.L.), Lord Simon stated, at p. 80:

> If the plaintiff has so performed his obligations under the contract that it would be unconscionable for the defendant to plead the statute, it is immaterial whether or not the plaintiff's acts prove the contract. . . ."

In general terms, the acts of part performance must have been done by the party asserting the contract, with the knowledge or acquiescence of the other party in pursuance of the terms of the contract. However, the nature of the acts required has changed considerably, at least in England, since the nineteenth century. The classic quotation is that of Lord Selbourne L.C. in Maddison v. Alderson (1883), 8 App. Cas. 467, 479:

> All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.

As interpreted for about 80 years by the courts in England the doctrine was applied very narrowly. Not only did the acts have to refer to the land in question, but as was stated by Fry L.J. in Fry on Specific Performance 276, 277 (6th ed.) 1921:

> . . . the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title.

The strictness of the test is illustrated by the facts of Maddison v. Alderson. In that case a housekeeper who had served her employer for many years without wages alleged an oral promise to leave her the farm. It was held that her continuing service was not a sufficient act of part performance since it was not unequivocally referable to some such contract as that alleged. As Lord Selbourne L.C. stated at p. 481 in referring to the continued service, "It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease." Initially then, the acts of part performance served a clear evidentiary function.

By 1962 this rather stringent test had become somewhat liberalized. In Kingswood Estate Co. Ltd. v. Anderson [1962] 3 All E.R. 593, Upjohn L.J. stated, at p. 604:

> The true rule is, in my view, stated in Fry on Specific Performance: "The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one:

> that they prove the existence of some contract, and are consistent with the contract alleged.

This test was adopted in Wakeham v. Mackenzie, [1968] 1 W.L.R. 1175, 1181. It is useful to contrast this case with Maddison v. Alderson. In Wakeham v. Mackenzie the defendant had promised the plaintiff his house if she would move in and take care of him. She did so, and applying the liberal test, the court found sufficient acts of part performance. While the case can be distinguished from Maddison v. Alderson on the facts (in the latter case there was a mere continuation of service, whereas in Wakeham she moved into the house in reliance on the promise) Treitel in Treitel, The Law of Contract 3rd ed., 147 regards Wakeham v. Mackenzie as representing a ". . . a more lax approach to the doctrine of part performance . . . the courts have become bolder in the application of the doctrine. . . ." Even this liberal test is consistent with the notion of the doctrine being basically evidentiary in nature; the acts under the liberal test, however, need not "unequivocally refer" to the contract in question, but must prove some contract and be consistent with the one alleged.

Steadman v. Steadman, [1974] 3 W.L.R. 56 (H.L.) marks a radical departure from even the liberal test set forth in Wakeham v. Mackenzie. In that case, the parties, who were husband and wife, entered into a contract whereby the husband would pay 100£ in respect of arrears of maintenance and a sum of 1,500£ in consideration of the wife conveying her interest in the house. The wife agreed to a discharge of the maintenance order. The husband paid the £100 and the husband's solicitors sent the transfer deeds to the wife, who refused to complete. The husband later sought to set up the agreement for sale in defence to the wife's application in the county court. The court found sufficient acts of part performance.

The effect of this decision was commented on in a critical note by H.W.R. Wade in 90 L.Q.R. 433, 436:

> Now that the textbooks must be rewritten, what are they to say? It seems that part performance is to be based merely upon equities resulting from res gestae subsequent to and arising out of the contract.... Lord Reid said that "the rule must be that you take the whole circumstances, leaving aside the evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not." There seems to be no need for these circumstances to point to any contract about land, still less about any particular land: for the payment of £100 of arrears of maintenance under an obligation already existing independently of any land, can clearly have no such character. Oral statements made to the court in matrimonial proceedings were apparently regarded as part of the res gestae. But of all these novelties the most surprising must be the opinion of a bare majority (not including Lord Salmon) that the mere sending by the plaintiff of a deed of transfer for the signature by the defendant might be part performance. If a party to an unenforceable contract can make it enforceable by his own unilateral act, without any assent by the defendant, the statute is indeed judicially repealed.

While the English courts have been giving an increasingly liberal interpretation to the doctrine of part performance, Canadian courts have adhered to the stricter test. In Deglman v. Guaranty Trust Co. of Canada & Constantineau, [1954] 3 D.L.R. 785 (S.C.C.) Cartwright J. stated, at 793:

> . . . it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts. It is for this reason that a payment of purchase money alone can never be a sufficient act of performance within the rule.

This same strict test was applied in Thompson v. Guaranty Trust Co. of Canada (1974), 39 D.L.R. (3d) 408 (S.C.C.). In the recent Alberta case of Toombs v. Mueller (1974), 47 D.L.R. (3d) 709 (S.C.T.D.), McDonald J., after reviewing the law, assumed, without deciding, that the narrower interpretation of the doctrine of part performance, applied in Alberta. He relied in part upon the cases of Erb v. Wilson (1969), 69 W.W.R. 126 (Sask. Q.B.); McGillivray v. Shaw (1963), 39 D.L.R. (2d) 660 (Alta. S.C., A.D.); and Brownscombe v. Public Trustee of Alberta, [1969] S.C.R. 658. Applying the narrow test, McDonald J. found the acts done by the plaintiff to be sufficient to constitute part performance, but specific performance was refused on the ground that the plaintiff had not shown he was willing and able to carry out his obligations. On appeal, the decision was reversed without reasons [1975] 3 W.W.R. 96 (A.D.)--see editor's note, [1975] 5 W.W.R. 520.

In short the law in Canada appears to be that:

(a) the acts of part performance must relate to the land in question,

(b) such acts must be unequivocally referable to a contract in relation to the lands,

(c) part payment or even full payment will not of itself be a sufficient act of part performance,

(d) the defendant must have acquiesced in or had knowledge of the acts of part performance,

(e) acts done by the defendant will not suffice as acts of part performance--see Robertson V. Colwell (1932), 5 M.P.R. 451, 459.

There is some question as to what types of contracts the doctrine of part performance applies. In Britain v. Rossiter (1879), 11 Q.B.D. 123 it was held that it only applied to sales of interests in land. The more commonly accepted position, however, is that established in McManus v. Cooke (1887), 35 Ch. D. 681, 697 that the doctrine "applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing." According to Halsbury's [36 Halsbury's Laws of England 267-271 (3rd ed., 1961)] this would exclude, inter alia, contracts requiring the continued supervision of the courts, contracts for personal work or service and contracts lacking mutuality.

One final area of controversy involves the question of whether the doctrine of part performance applies to support an action for damages when specific performance is not available. This question arises because prior to 1858 the Court of Chancery could not award damages in substitution of, or in addition to, specific performance. By the Chancery Amendment Act (Lord Cairns' Act) (1858) 21-22 Vict., c. 27, s. 2, it was provided that:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

The equivalent provision in Alberta is contained in s. 34(11) of the Judicature Act, R.S.A. 1970, c. 193, which reads:

> In all cases in which the Court has jurisdiction to entertain an application
>
> (a) for an injunction against
>
> (i) a breach of covenant, contract or agreement, or
>
> (ii) the commission or continuance of a wrongful act, or
>
> (b) for the specific performance of a covenant, contract or agreement,
>
> the court if it thinks fit may award damages to the injured party either in addition to or in substitution for the injunction or specific performance, and the damages may be ascertained in such matter as the Court may direct, or the Court may grant such other relief as it deems just.

The more traditional interpretation of Lord Cairns' Act is that it does not simply give a court of equity the same jurisdiction to award damages as existed in a court of common law. In Lavery v. Purcell (1888), 39 Ch. D. 508, 519 it was held per Chitty J. that a court of equity could not award damages in a case where it could not award specific performance.

There are three situations which must be considered:

(a) where specific performance could not have been awarded because it was not the type of contract which a court of equity would specifically enforce, e.g., contracts requiring continuing supervision.

(b) where specific performance would have been refused on a discretionary ground, e.g., delay.

(c) where specific performance could not have been granted because it was impossible given the facts of that case, e.g., land sold to a third party.

It would seem that if Lavery v. Purcell has any application in Canada it would apply to situation (a). Yet in Dobson v. Winton & Robbins Ltd. (1960), 20 D.L.R. (2d) 164 the Supreme Court of Canada apparently undermined the basic holding in Lavery v. Purcell. While the case did not directly deal with part performance it did involve an interpretation of Lord Cairns' Act (which was retained in the Ontario Judicature Act). The case involved an enforceable contract for the sale of land in which specific performance was impossible (as a result of a sale to a third party). Lord Cairns' Act was raised by way of defence to the action for damages. The court stated, at 166:

> The prerequisite in the Court of Chancery to the exercise of jurisdiction under this legislation in contract cases was the right to relief by way of specific performance. If, for any reason, a litigant was before the court without any such right to relief, damages could not be awarded and the plaintiff was still left to hear the remedy, if any, in a court of law.
>
> This jurisdictional difficulty disappeared with the Judicature Act. . . . The problem now is not one of jurisdiction or substantive law, but the narrow one of pleading. . . .

Other Canadian cases in which damages have been awarded despite the unavailability of specific performance are McIntyre v. Stockdale (1913), 27 O.L.R. 461 (H.C.); Pfiefer v. Pfiefer, [1950] 2 W.W.R. 1227; and Brownscombe v. Public Trustee of Alberta, [1969] S.C.R. 658.

On the other hand there is a sufficient number of cases which follow Lavery v. Purcell so that the law is still uncertain. See for example, Hipgrave v. Case (1885), 28 Ch. D. 356; Pearson v. Skinner School Buslines (St. Thomas) Ltd., [1968] 2 O.R. 329 (H.C.); Carter v. Irving Oil Co. Ltd., [1952 4 D.L.R. 128 (N.S.S.C.); Robinson v. MacAdam, [1948] 2 W.W.R. 425.

A further anomaly arising from Lord Cairns' Act is the possibility that the measure of damages may, in the discretion of the court, be different than would be the case at common law. Thus in Wroth v. Tyler, [1973] 2 W.L.R. 405, Megarry J. seizing upon the wording in the Act that damages may be granted "in substitution for" specific performance or an injunction, calculated damages as of date of judgment instead of the date for performance of the agreement, the latter being the common law criterion for measuring damages.

2. The Statute of Frauds Cannot Be Used as an Instrument of Fraud

It is long settled that the Statute of Frauds cannot be used as an instrument of fraud--Halfpenny v. Ballet (1699), 2 Vern. 373. However, the interpretation given to this maxim has severely restricted its application. The most important restriction is that the mere refusal to sign a memorandum is not fraud--Maxwell v. Mountacute (1719), Prec. Ch. 526; Wood v. Midgley (1854), 5 De G.M. & G. 41. Even if the defendant admits the contract and then seeks to raise the statute in defence, this will not be considered fraud--Rondeau v. Wyatt (1792), 2H. Blk 63; Moore v. Edwards (1798), (1798), 4 Ves. 23; Cooth v. Jackson (1801), 6 Ves. 12; Plagden v. Bradbear (1806), 12 Ves. 466; Rowe v. Teed (1808), 15 Ves. 372 (see Stevens, "Ethics and the Statute of Frauds," (1952) 37 Cornell L.Q. 355.)

Apparently what is required to bring the maxim into operation is something more active, e.g., fraudulently preventing the written evidence of an agreement from coming into existence --Maxwell v. Mountacute.

In Wakeham v. MacKenzie, [1968] 2 All E.R. 783 (Ch. D.) Stamp J. in an obiter dictum at p. 788, suggested that the repudiation of a contract could be fraud, but did not decide the issue since it had not been pleaded. This suggestion would obviously be a radical departure from the traditional position.

We agree with the B.C. Law Reform Commission (Working Paper, p. 40) that ". . . the restricted application of this doctrine even in England, and its conspicuous absence in Canadian jurisprudence suggests that little weight ought to be given to it as a device which significantly reduces the hardship of the statute."

3. Quasi-Contract

While a plaintiff may be unable to enforce a contract falling within the statute, he may be able to recover money on the basis of quasi-contract. This right arises by operation of law and not ex contractu.

(a) Money had and received

Some heads of recovery under the action for money had and received are stated in Goff & Jones, The Law of Restitution (1966), 1st ed., p. 3:

> The action for money had and received lay to recover money which the plaintiff had paid to the defendant, on the ground that it had been paid

> under a mistake or compulsion, or for a consideration which had wholly failed. By this action the plaintiff could also recover money which the defendant had received from a third party, as when he was accountable or had attorned to the plaintiff in respect of the money. . . .

The most common occurrence in which a plaintiff will be able to recover money under this head is when a deposit has been paid under an unenforceable contract and the defendant refuses to perform. Here the plaintiff can recover on the basis of total failure of consideration. However, he cannot sue to recover the money if the defendant is willing and able to perform since there is then no failure of consideration [see Goff & Jones, 283; Meek v. Gass (1877), 2 R. & C. 243 (N.S.S.C.)].

(b) Account stated

To succeed under this head of quasi-contract the plaintiff must be able to show that he has fully executed his part of the contract and that the defendant has admitted that he owes the plaintiff money on the contract. This is illustrated by the case of Cocking v. Ward (1845), 1 C.B. 858 in which the plaintiff, a tenant on a farm, had surrendered possession to the lessor and had secured from the lessor the acceptance of the defendant as tenant. The plaintiff having fully performed his part of the contract, the defendant refused to pay the plaintiff the agreed upon sum of £100. It was held that the defendant having acknowledged his liability, the plaintiff was entitled to recover the £100 upon an account stated.

(c) Quantum meruit

Quantum meruit claims lie to recover reasonable remuneration for services rendered. The leading Canadian case is Deglman v. Guaranty Trust Co. of Canada & Constantineau, [1954]

3 D.L.R. 785 (S.C.C.). In that case there was an alleged contract under which the plaintiff was to perform certain services and the defendant to devise certain lands. The services were rendered but the land was not devised. Since there was no written note or memorandum and the plaintiff could not establish sufficient acts of part performance the contract was not to be enforced. Nevertheless damages were awarded on a quantum meruit basis. The judgment is clearly not based on contract but upon principles of unjust enrichment and restitution. As Cartwright J. stated, at 795:

> . . . when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable but the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of services rendered to her.

While these heads of quasi-contract provide some relief to a party in the case of an unenforceable contract, they must be kept in perspective.

First, neither a claim for money had and received nor a claim for quantum meruit has the effect of enforcing the contract. In the case of recovery of money paid the effect is to place the plaintiff in the same position as if there were no contract. He will not be compensated for loss of bargain. A recovery on a quantum meruit basis only compensates the plaintiff to the extent of reasonable payment for services rendered, regardless of the fact that the contract itself provided for more valuable compensation. This is illustrated by the Deglman case in which the award of $3,000 as quantum meruit was far less than the value of the property the plaintiff would have received had the contract been enforceable.

Second, neither head of recovery will compensate for efforts expended or expenditures made in reliance on the

contract. A claim for money had and received requires that monies be paid to the defendant. Yet it is possible for the plaintiff to incur expenses, in reliance on the contract, by paying money to third parties. Likewise, quantum meruit will be available only when the defendant has received the benefit of those services.

E. Evaluation of the Law and Proposals for Reform

In this section we consider under a number of different headings possible avenues of law reform in respect of contracts concerning land. We have attempted to balance the advantages of a particular reform against the disadvantages, and where appropriate we have stated our conclusions.

1. Contracts for the Sale of Land; the Question of Repeal

In Chaper 3 we noted the functions which a requirement of writing can serve: evidentiary, cautionary, and channelling. We also took note of the traditional criticisms which have been levied against the Statute.

In our view the strongest argument in favour of total repeal of this particular category is the fact that at least in some cases individuals have suffered hardship as a result of being precluded from enforcing contracts which were clearly intended to be legally binding.

While the Statute may have led to hardship or injustice in individual cases, we also noted that the Statute has also prevented injustice by providing a complete defence in situations where a plaintiff would otherwise have perjured himself in attempting to enforce a non-existent contract. This, of course, is the evidentiary function which the Statute serves and was the major motivation for its original enactment.

If this were the only function of the Statute repeal would probably be justified. While there is no way of empirically proving this, we suspect that there have been more instances of valid contracts which have been rendered unenforceable by the Statute than of potential frauds prevented. As well, the courts seem quite capable of discerning perjured testimony and of deciding disputed factual matters upon other than documentary evidence. (Indeed in criminal cases, where the consequences are more significant than the enforcement of a contract, the courts every day decide cases upon parol and circumstantial evidence.) Also, the conditions in existence in 1677, i.e., prevalence of perjury, inability of parties to testify, etc., no longer provide the same compelling need for documentary evidence.

However, two other functions of the Statute augment the position in favour of retention. It serves a valuable cautionary function by warning individuals that before a bargain is to be effective certain formal steps must be taken. It thus has the effect of inducing more thoughtful consideration and prevents individuals from being bound in circumstances where perhaps unconsidered, rash decisions have been made. We also noted in Chapter III the more limited channelling effect which is caused by a writing requirement.

It is thus not merely as against frauds prevented that the hardship caused by retention must be balanced, but also against rash, unconsidered bargains which are prevented from becoming effective.

We are of the opinion that most contracts entered into with an intention to be bound ought to be enforceable regardless of the rashness with which one of the parties may have acted. This is the general rule in the law of contracts, the reason for it being the protection of the expectation and reliance interests of the other party. The question that must

be asked is whether, given combined evidentiary and cautionary objectives, there should be a deviation from the general rule in the case of contracts concerning land. We have come to the conclusion that contracts concerning land have characteristics which, when looked at together, justify a requirement of writing:

1. They are normally of significant pecuniary value. This, by itself, is not a justification for retention since there are other financially significant transactions not required to be evidenced in writing.

2. Such transactions are entered into by large numbers of lay persons, not just business entities. This particular characteristic is significant because it renders all the more significant the cautionary objectives. A type of transaction which is primarily entered into by business entities probably does not require formalities for the purposes of inducing due and thoughtful consideration, whereas in the instance of financially significant transactions which are entered into by large numbers of lay people, a much stronger case can be made for a cautionary formality.

3. Apart from any pecuniary significance, contracts concerning land often have an <u>intrinsic</u> importance for large numbers of people. The buying or selling of a home, for many individuals, may be the most important contract into which they will enter in the course of their lives. Such contracts may involve emotional and sentimental considerations which, apart from the money involved, justify the need for a cautionary formality.

4. The requirement is probably in accord with actual practice. Most such contracts are probably evidenced in writing in any event and are probably believed by most people to be required to be so. This has the effect of minimizing the hardships normally associated with this Statute.

In short, it is the combination of the above characteristics that makes retention desirable: the fact that the contract is significant, both financially and otherwise, to large numbers of lay people. It is our opinion that the combined cautionary and evidentiary effects of retention outweigh the injustice and hardship caused to individual plaintiffs. This hardship could be further lessened by changes in the law falling short of total repeal. (We consider such possible changes later in this section.) We also note that this particular formality has not been repealed in any Canadian province, nor in England, and that all law reform bodies which have considered the matter, have recommended its retention, though sometimes with alterations (see Appendix 1).

Question 1

Would you advocate a writing requirement for some or all contracts relating to the sale of land? If so, for which contracts? Why?

2. Whether Contracts for the Sale of Land Should be Required to be in Writing

Section 4 of the Statute of Frauds can be satisified at present either if the agreement is in writing or if there is

a note or memorandum of the agreement signed by the party to be charged. We have already noted that one of the implications of this is that it is possible for the Statute to be satisfied by a note or memorandum which comes into existence after the initial formation of the contract. Further, as long as such note or memorandum was signed by the defendant and contains all the material terms it is not necessary that the memorandum have been signed with the intention of satisfying the Statute or of validating or affirming the contract. In fact, the memorandum could be a repudiation of the contract, although it cannot deny its existence. The fact that a note or memorandum subsequent to the formation of the contract can satisfy the Statute definitely provides more flexibility than would be the case if the requirement was that of the contract being in writing. Obviously there would be more cases of contracts rendered unenforceable if such contracts had to <u>be</u> in writing. Since the note or memorandum must indicate the existence of a contract as well as its material terms, the note or memorandum requirement is also consistent with the evidentiary functions of the Statute.

On the other hand, the possibility of satisfying the Statute by a subsequent, perhaps inadvertent memorandum, does not fulfil the cautionary objectives as well as would a requirement that the contract be in writing. If a party rashly enters into an oral contract it is difficult to see how a subsequent letter either repudiating the agreement or perhaps attempting to gain concessions, makes the initial decision any less rash. If the requirement were one of the agreement being in writing, the only way for the Statute to be satisfied after an ineffective oral agreement would be for the parties to put the actual agreement to writing. Such a step would obviously enhance the chances of thoughtful consideration being given to the agreement.

A decision whether to change the present law to require the agreement to be in writing entails a weighing of the better fulfillment of cautionary objectives against the further inflexibility which is necessarily incidental to such a change. We invite comment on this question.

QUESTION 2

> Should Section 4 as it relates to contracts for the sale of land be changed to require the agreement to be in writing?

3. The Requirement of a Sufficient Note or Memorandum

The present state of Canadian law is that for a note or memorandum to be sufficient it must contain all the material terms. This rather stringent requirement has been the source of much criticism. As the B.C. Law Reform Commission points out in its Working Paper at p. 128:

> What often results is a defendant escaping liability under a written agreement which he has signed, by proving that, in fact, he and the plaintiff had agreed to an additional term. Because the term is not embodied in the written document, the Statute of Frauds is not complied with and the agreement is unenforceable. . . .
>
> The present law in Canada as to the effect of omitted terms is clearly unsatisfactory. If a term is deemed "essential" to the agreement at issue, its absence, regardless of a determination as to the existence of an agreement evidenced by the signed writing, will render the whole agreement unenforceable.

The present law could be liberalized by requiring that the writing need only evidence the existence of a contract, allowing in parol evidence to prove the precise terms. A

somewhat less radical departure from existing law would be to require the writing to evidence or indicate a contract of the general nature of the type alleged. Any change along these lines would obviously lessen both the evidentiary and cautionary effects of the writing requirement, the first test more so than the second.

An example of a change of the latter type is found in the Contracts Enforcement Act proposed by the B.C. Law Reform Commission in its Working Paper, at p. 143, which reads in part:

> 10. No contract concerning an interest in land should be enforceable unless;
>
> (a) there is some evidence in writing which indicates that a contract has been made between the parties, reasonably identifies the subject-matter of the contract, and is signed by the party to be charged or by his agent; or
>
> (b) & (c) (Not relevant to present discussion.)
>
> 11. A writing required by the Statute should not be insufficient merely because it omits or incorrectly states a term agreed upon.

An example of a similar proposal can be found in the American Uniform Land Transactions Act, section 2-201, which reads in part:

> a) Notwithstanding agreement to the contrary and except as provided in subsection (b), a contract to convey real estate is not enforceable by judicial proceeding unless there is a writing signed by or on behalf of the party against whom enforcement is sought which describes the real estate and is sufficient to indicate that a contract to convey has been made by the parties.

The explanatory comments on this section indicate that besides rejecting the "material terms" requirement, the intent is:

> . . . not that the contract or memorandum of the contract be in writing, nor that the writing be sufficient to itself establish that a contract has been made. It need merely be sufficient to afford a basis for believing that the offered oral evidence that a contract was in fact made rests on a real transaction. For example, a written offer with a sufficient description, properly signed, would be a sufficient memorandum against the signer even though there is no writing indicating that the offer was in fact accepted.

Obviously the effect which any change in the law would have in this area depends to a large degree on the precise wording used in any legislation. At the present time we are not prepared to propose any specific pieces of draft legislation. We do however point out that any liberalization of the law would be a step away from achieving evidentiary and cautionary objectives and toward enforcing contractual bargains and more flexibility. Given these inconsistent objectives, we invite comment on whether there should be <u>any</u> change in the law.

<u>QUESTION 3</u>

> Should a sufficient note or memorandum be required to contain all the material terms of the agreement?

4. <u>Contracts Executed by Both Parties</u>

In most cases of contracts fully performed by both parties the issue of enforceability will not arise. Any attempt by one party to undo the contract (recover property conveyed or money paid) can be met by the successful <u>defence</u>-that such property was conveyed or money paid under a valid contract. One circumstance in which the issue of enforceability will arise in contracts executed by both parties is when a party seeks damages for breach of warranty. We invite comment on the following question.

QUESTION 4

Should contracts completely executed by both parties be enforceable, notwithstanding the absence of a note or memorandum?

5. Doctrine of Part Performance

We have examined in some depth the present state of the law relating to part performance. To briefly recapitulate the Canadian position, the acts of part performance must relate to the land in question, must be unequivocally referable to a contract such as that alleged, and must have been acquiesced in by the defendant. In contrast to the Canadian position is the increasingly liberal interpretation given to the doctrine of part performance by the English courts, culminating in the decision in Steadman v. Steadman, under which the acts need not relate specifically to the land and need only prove on a balance of probabilities the existence of an agreement.

A good case can be made that the doctrine of part performance should be liberalized. Since, for the doctrine to have any application in the first place, the defendant must have consented or acquiesced in the acts of the plaintiff (the acquiescence of the defendant being the substitute for his signature), it seems reasonable to assume that the defendant has decided to affirm the oral agreement, however rash or ill-considered his original decision may have been. Thus, the objective of protecting parties from rash decisions would seem to be of less importance in this context. The acquiesence of the defendant also provides sufficient evidence of his intention to be contractually bound.

A second aspect of the doctrine of part performance is that in many cases the plaintiff will have relied on the con-

tract to his detriment, sometimes in circumstances under which he could receive no compensation under a head of quasi-contract. This to would seem to weigh the scales in favour of enforcing clearly intended contractual bargains.

Given these factors it is arguable that the doctrine of part performance ought to encompass any act, including deposits, acquiesced in by the defendant, and not just acts relating to land. Indeed s. 7 of the Sale of Goods Act, R.S.A. 1970, c. 327 recognizes this principle:

> 7.(1) A contract for the sale of any goods of the value of fifty dollars or upwards is not enforceable by action
>
> a) unless the buyer accepts part of the goods so sold and actually receives the same, or gives something in earnest to bind the contract or in part payment, or
>
> b) unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf,
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer does any act, in relation to the goods, the recognizes a pre-existing contract of sale whether there is an acceptance in performance of the contract or contract.

The B.C. Law Reform Commission has proposed in its Working Paper a radical change in the doctrine of part performance. Sections 10 and 12 of its proposed Contracts Enforcement Act read in part:

> 10. No contract concerning an interest in land should be enforceable unless;
>
> (b) the party to be charged acquiesces in acts of the party alleging the contract, which indicate that a contract, not inconsistent with that alleged, has been made between the parties;

12. Without limiting the generality of the meaning of "acts of the party alleging the contract" in Proposal 10(b), that term should include the situation where the party alleging the contract has made a deposit, or part payment of the purchase price.

Besides including any acts of the plaintiff within the ambit of the doctrine, the B.C. Law Reform Commission proposal would markedly change the standard of proof from "unequivocal referability" to that of merely indicating a contract, "not inconsistent with that alleged."

A somewhat less radical change in the standard of proof could be one in which the acts must at least indicate a contract of the type alleged.

A possible compromise between the British Columbia Law Reform Commission proposal and the present Canadian law is found in section 2-201 of the Uniform Land Transactions Act which reads in part:

> (b) A contract not evidenced by a writing satisfying the requirements of subsection (a) but which is valid in other respects, is enforceable if:
>
> (2) The buyer has taken possession of the real estate and has paid all or a part of the price;
>
> (4) either party, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to the extent that an unreasonable result can be avoided only by enforcing the contract;

The only real argument in favour of retention of the present Canadian law is that the present doctrine at least requires acts which evidence a contract in relation to the

land in question, whereas both the Uniform Land Transaction Act and the British Columbia Law Reform Commission proposal envisage acts which might indicate a contract, but not necessarily one of the land in question, nor indeed of any land. For example, a deposit retained by the defendant, might be sufficient evidence of a contract, but certainly not one relating to a particular piece of land. Thus the present position in Canada better serves an evidentiary function. Balanced against this, are three factors, which strongly favour a less stringent standard:

1. The cautionary impact of the writing requirement is of less importance where there has been acquiescence to acts of part performance.

2. In many cases of part performance the plaintiff will have relied on the contract to an extent that injustice can be avoided only by enforcing the contract.

3. In any event the acts of part performance would not of themselves be the final proof of the contract alleged. The elements of a valid contract including finality of agreement and certainty, as well as the terms would still have to be proved by parol evidence.

We invite comment on the following questions.

Question 5

Should the doctrine of part performance be expanded to include acts, which evidence a contract, done by the Plaintiff and acquiesced

in by the Defendant, other than acts relating to the land in question?

Question 6

Should the doctrine of part performance specifically include the giving of a deposit or part payment?

Question 7

Should the present standard of "unequivocal referability" be lowered?

6. Acts Done by the Defendant

Under existing law acts of part performance must be those of the plaintiff which have been acquiesced in by the defendant. The acquiescence of the defendant to these acts provides the necessary alternate evidence in substitution of the signature. Yet, positive acts done by the defendant cannot, under present law, be acts of part performance. This aspect of the law has been criticized as being illogical:

> There is, however, no doubt that the crucial element of the doctrine of part performance is, under the present law, the acquiescence of the defendant in acts of the plaintiff. We fail to see why positive acts of a defendant which establish that he bound himself should not be of equal value.
>
> -B.C. Law Reform Commission Working Paper, p. 142

Such criticism seems justified. Positive acts do seem to be even better evidence than mere acquiescence.

QUESTION 8

Should the doctrine of part performance include acts of the defendant?

7. Damages

The right of a plaintiff to receive damages in circumstances where specific performance could not or would not be awarded, even though sufficient acts of part performance have been proved, is, at best, uncertain. There are three situations in which acts of part performance might be proved and in which specific performance might not be awarded:

1) Where the contract is not the type of contract for which a court of equity could award specific performance. (This has no relevance in the present context since contracts concerning land are clearly the type of contract over which a court of equity had jurisdiction.)

2) Where specific performance is not available on discretionary grounds such as undue delay, inequitable conduct of the plaintiff, etc.

3) Where specific performance is impossible on the facts, e.g., the land has been sold to a third party.

The policy considerations relating to whether damages should be available differ for categories 2 and 3. In the case of category 3 it is difficult to see why a plaintiff should not be able to recover damages, merely because the defendant has done some act, such as sale to a third party, which renders specific performance physically impossible.

Where, however, specific performance would not have been awarded on discretionary grounds (category 2), such as delay or inequitable conduct, it is arguable that the conduct which has barred specific performance should also be a bar to a damages award.

QUESTION 9

> Where there are sufficient acts of part performance should damages be available where specific performance would be barred on discretionary grounds?

QUESTION 10

> Where there are sufficient acts of part performance, should damages be available where specific performance would not be possible on the facts?

8. Quasi-Contractual Remedies

In our discussion of quasicontractual relief, we noted that where a contract is unenforceable, a party can nonetheless recover monies paid or be compensated for services rendered which have unjustly enriched the other party. However no such recovery is available where the expenditure of money or effort in reliance on the contract does not constitute a benefit conferred on the other party.

It is arguable that as a compromise measure there should be compensation in such situations. It is not an indirect way of enforcing the contract; only compensation for loss of bargain would accomplish that. At the same time compensating a party for expenditures made in reliance on the contract does mitigate some of the hardship created by the Statute. The

B.C. Law Reform Commission in its Working Paper proposed, at pp. 145, 146, that a court should at least have the discretion to award compensation for expenditures made which do not constitute a benefit for the defendant. Section 13 of its proposed Contracts Enforcement Act reads:

> Where a contract is unenforceable pursuant to our proposals, a court should be able to grant to the plaintiff such relief,
>
> (a) by way of restitution of any benefit received by the party to be charged, and
>
> (b) by way of compensation of moneys expended in reliance on the contract,
>
> as is just.

We invite comment on the following question.

QUESTION 11

> Where a contract is unenforceable should there be compensation as of right for expenditures made in reliance on the contract, and which do not confer a benefit on the party to be charged, and if not, should such compensation be available in the discretion of the court?

9. Real Estate Agency Contracts

We have seen that section 4 of the Statute of Frauds does not cover contracts between a real estate agent and vendor. This is because these have been treated not as contracts for the sale of an interest in land but as contracts of service. However, section 22 of the Real Estate Agents Licensing Act, R.S.A. 1970, c. 311 does impose a requirement of writing for such contracts. The section provides:

> No action shall be brought to charge a person by commission or otherwise for services rendered in connection with the sale of land, tenement or hereditaments, or an interest therein, unless
>
> (a) the contract upon which recovery is sought in the action or some note or memorandum thereof is in writing signed by the party to be charged or by his agent lawfully authorized in writing, or
>
> (b) the person sought to be charged
>
> (i) has as a result of the services of an agent employed by him for the purpose effected a sale or lease of lands, tenements and hereditaments or any interest therein, and
>
> (ii) has either executed a transfer or lease signed by all other necessary parties and delivered it to the purchaser, or has executed an agreement of sale of lands, tenements and hereditaments or an interest therein, signed by all necessary parties, entitling the purchaser to possession of lands, tenements and hereditaments or any interest therein, as specified in the agreement, and has delivered the agreement to the purchaser.

Section 22(a) was enacted in the first sitting of the first legislature of the newly created province of Alberta--S.A. 1906, c. 27, s. 1. S. 22(b) was added in the Statute Law Amendment Act, S.A. 1920 c. 4, s. 38(1). These two statutes were joined to form the Real Estates Commission Act, R.S.A. 1922, c. 139. The section was finally incorporated into the present Real Estates Agent Act by S.A. 1947, c. 15. Legislation to similar effect has been enacted in Saskatchewan (Real Estate Brokers Act S.S. 1968, c. 58, s. 41); Manitoba (Real Estate Brokers Act R.S.M. 1970, c. R-20); New Brunswick (Statute of Frauds R.S.N.B. 1973, c. S-14, s. 6); and Ontario (Real Estate and Business Brokers Act R.S.O. 1970, c. 401, s. 34).

Under subsection (b) if a sale has been effected and, either a document of conveyance or an agreement for sale has been executed and delivered to the purchaser, then the contract of agency is enforceable even if not evidenced in writing. The criterion of enforceability under this subsection thus seems to be the ability of the purchaser to enforce a contract of sale. In effect, this subsection limits, for all practical purposes, the requirement of writing to two types of agency contracts:

1. Those where the agent has effected a contract of sale, but where neither a document of conveyance nor an agreement of sale, entitling the purchaser to possession, has been both executed by the vendor and delivered to the purchaser. One can query whether the usual interim agreement is one "entitling the purchaser to possession". If so, most oral agency contracts through which a contract of sale is eventually made by way of a written interim agreement will be enforceable. However, if the vendor does not have title or if a necessary dower act consent cannot be procured, then the interim agreement would not be one "entitling the purchaser to possession" and the oral agency contract would be unenforceable.

2. Those which provide for payment to the agent even where a contract of sale is not ultimately consummated, e.g. on the introduction of a prospective purchaser, or the making of an offer which is not accepted.

The substantive law on this point is set out in
1. Halsbury's Laws of England (3rd ed. 1952), 199:

> If the agent desires to bind the principal to pay commission, not only on sales but on the introduction of a person who makes an offer to purchase as contrasted with one who actually buys, he must use clear and unequivocal language to that effect.

Section 22 of the Real Estate Agents Licensing Act expands the common law requirement of clear and unambiguous language to that of requiring such clarity in writing.

We recognize that there is some inconsistency in requiring writing for this particular kind of service contract and not for others. However, the impact of the section is such that it applies in limited circumstances. This type of service contract, while not uncommon, does impose an unusual liability upon the principal. We also note that because real estate agency contracts are frequently entered into by lay people without the benefit of legal advice the writing requirement serves an important cautionary function.

An argument can be made, therefore, that before an employer should be liable upon, say, the mere introduction of a prospective purchaser, or upon the making of an offer which is not accepted, there should be written evidence of such a contractual term. Because of the nature of the liability, special cautionary protection is perhaps desirable. Also, the requirement of writing will serve a useful evidentiary function in what would otherwise be an area prone to litigation--see e.g. Luxor v. Cooper, [1941] A.C. 108. We invite comment on the following question:

QUESTION 11A:

> Should there be a requirement of writing for contracts between vendors of land and real estate agents?

CHAPTER V

CONVEYANCES OF INTERESTS IN LAND

A. Sections 1 and 3 of the Statute of Frauds

In Chapter 4 we considered the formalities under the Statute of Frauds necessary to render a contract to convey enforceable. In addition to the section 4 formalities, Sections 1 and 3 also impose formalities in the case of the actual conveyances themselves.

Section 1 relates to the creation of an estate or interest in land de novo, whereas Section 3 relates to the transfer of an already existing estate, whether such transfer be by way of assignment, common grant, or surrender. Section 4, of course, deals with contracts to convey or create an interest, as opposed to the conveyance itself. - see Leith & Smith, Blackstone's Commentaries on the Laws of England Applicable to Real Property 327 (2nd ed., 1880). Falling within Section 1 are the creation of leasehold estates (as opposed to the assignment or surrender of presently existing leasehold estates) and life estates. Most other conveyances fall within Section 3. Under Section 1 the interest conveyed must be put in writing and signed by the party creating the interest or by his agent lawfully authorized in writing; the effect of a conveyance not complying with Section 1 is to render the interest or estate created an "estate at will". In the case of Section 3 the conveyance must be by "deed or note in writing" signed by the party conveying or by his agent lawfully authorized in writing; no mention is made of the effect of failure to comply.

In addition to Sections 1 and 3 of the Statute of Frauds Section 56 of the Land Titles Act, R.S.A. 1970, c. 198 provides:

> After a certificate of title has been granted for any land, no instrument is effectual to pass any estate or interest in that land (except a leasehold interest for three years or for a less period) or to render that land liable as security for the payment of money, unless the instrument is executed in accordance with the provisions of this Act and is duly registered thereunder, but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein passes or, as the case may be, the land becomes liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature.

Section 56 has been interpreted as requiring registration in order to protect third parties. However as between a transferor and transferee, an interest in land can pass even prior to registration of an instrument of conveyance. In Re Church, [1923] 3 W.W.R. 405, 409 (S.C.C.) Idlington, J. considered the effect of Section 41, a predecessor section to Section 56:

> It is suggested that this recognition of an equitable interest belonging to the purchaser under a sale agreement cannot be relied on where there prevails a land titles system such as that in force in Alberta. And the respondent cites Section 41 of The Land Titles Act, Alberta, 1906, ch. 24, under which, after a certificate of title has been granted for any land, "no instrument until registered under this Act shall be effectual to pass any estate or interest in any land."
>
> It would probably be sufficient to say that Section 41 is mainly intended for the protection of third parties who have obtained registration and that the respondent claiming under her father's will is not in a better position than the latter would have been to contend that an equitable interest did not pass to Lockerbie under the sale agreement. By giving to Section 41 and similar provisions full effect for the protection of third parties who have complied

> with the Act, it does not appear possible, and certainly not inter partes, to exclude from The Land Titles Act equitable interests in property resulting from sale agreements.

While Idlington J. was referring to the equitable interest created by a contract of sale, it is also true that a conveyance which complies with the Statute of Frauds (i.e., indicates an intention to vest immediately title in the transferee and which accurately describes the property) but which does not comply with The Land Titles Act (either because of non-registration or because the instrument is not in statutory form) also transfers an interest in land as between the immediate parties to the transaction: Jellett v. Wilkie (1896) 26 S.C.R. 282.

The legal effectiveness of a conveyance will be at issue in two different contexts: a) where a conveyance has been alleged pursuant to a contract to convey, and, b) where a conveyance has been alleged by way of a gift.

If a conveyance has been alleged pursuant to a contract which is enforceable (either because there is a sufficient memorandum or because there are sufficient acts of part performance) the issue of an alleged conveyance complying with Sections 1 and 3 will not normally arise, since an order for specific performance could be obtained under the contract. If a conveyance has been alleged pursuant to a valid but unenforceable contract, the issue of compliance with Sections 1 and 3 of the Statute, and possibly with Section 56 of The Land Titles Act, will arise. This is so, because if there has been an effective conveyance under an unenforceable contract an attempt to get the land reconveyed can be met by the defence that the land was conveyed pursuant to a valid conveyance. In order for this defence to prevail there must, of course, be an effective conveyance. An effective conveyance for this purpose would be one complying with the Statute

of Frauds and, possibly, with the formalities prescribed in The Land Titles Act.

In the case of a conveyance made by way of gift, compliance with the requisite formalities would seem to be necessary for the perfection of the gift. Thus an oral conveyance with a taking of possession by the donee is insufficient.

There is however, one exception to the rule that there cannot be an oral conveyance. If a donee who has taken possession of land in reliance on an alleged gift to him, has expended money, such as in construction of a building, equity would recognize the title of the donee. This doctrine, while analogous to part performance, is in fact based upon estoppel. - see Dillwyn v. Llewelyn (1862), 4 De. G.F. & J. 517; Campbell v. Campbell, [1932] 3 D.L.R. 501 (N.S.S.C.); Brogden v. Brogden (1920), 53 D.L.R. 362 (Alta. A.D.).

Given our recommendation that there should be formalities in respect of contracts concerning land we can see no reason for permitting oral conveyances in performance of contracts. If the contract is enforceable equity will enforce the contract in any event. If the contract is not enforceable permitting oral conveyances could result in a situation where a party could successfully claim title to land not on the basis of contract but on the basis of a successful oral conveyance. We think that such a claim should be based upon proof of the contract either by virtue of a writing or acts of part performance. Consistency thus demands that in the case of conveyances pursuant to a contract to convey there should be a requirement of writing.

In the case of oral conveyances allegedly made by way of gift there are different policy considerations. The real issue here is what formalities, if any, should be necessary to

perfect a gift of land, or of an interest in land. One point of view, expressed by the British Columbia Law Reform Commission, at page 117 of its Working Paper, is that there should be no statutory formalities in respect of gifts of land. The Commission argued that such gifts are often made in circumstances where formalities are not observed, e.g. between family members and that the common law requirements of a gift, i.e. clear evidence of the donor's intention and actual or constructive delivery, clearly satisfy any evidentiary objectives.

There are however, strong arguments to be made in favor of formalities in the case of gifts of land. First, the requirement of actual or constructive delivery is a somewhat elusive evidentiary protection when the parties may at the time of the alleged delivery already be living together on the same piece of land. In such cases allegations of constructive delivery are easily made and difficult to disprove. Second, it is arguable that the cautionary purpose of a formality is even more important in the case of a gratuitous disposition than in the case of a contract. In the case of a gift the donor has more to lose. We invite comment on the following questions:

QUESTION 12

Should a conveyance pursuant to a contract to convey be required to be in writing?

QUESTION 13

Should a conveyance by way of gift be required to be in writing?

B. Section 2 of the Statute of Frauds

Section 2 of the Statute of Frauds provides an exception to the requirement of writing:

> Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

Our discussion of this Section breaks down into two segments, an analysis of the law as we presently believe it to be, and an evaluation of the law.

1. Analysis of the Law

The words "three years from the making thereof" have been interpreted as meaning that a particular case will be within the exception unless it must of necessity last for more than three years. - Re Knight, Ex Parte Voisey (1882), 21 Ch. D. 422. It would seem to follow that a lease for less than three years with an option to renew would fit within the exception, and it was so held in Le Corporation Episcopale De St. Albert v. Sheppard & Co. (1913), 3 W.W.R. 814 (Alta. S.C.), relying on the English Court of Appeal decision in Hand v. Hall (1877), 2 Ex. D. 355. However, it was decided to the contrary in the more recent case of Pain v. Dixon, [1923], 3 D.L.R. 1167 (Ont. S.C.), relying on the Exchequer Division decision in Hand v. Hall (1877), 2 Ex. D. 318. The former position is probably correct.

We note that Section 97 of The Land Titles Act provides an exception to registration for a lease "for a term of more than three years" whereas Section 2 of the Statute of Frauds provides an exception for "all leases not exceeding the term

of three years from the making thereof." Hence, for the purpose of the Statute of Frauds, it is not the length of the lease which is relevant, but rather the length of time between the making of the contract and the termination of the lease. A lease to last for three years and to begin at a date subsequent to the formation of the contract is therefore required to be in writing - Forster v. Reeves, [1892] 2 Q.B. 255 (C.A.) - but rather anomalously would be exempt from registration under The Land Titles Act.

In addition to being not more than three years, it is necessary that the rent be "two-third parts at the least of the full improved value of the thing demised" to avoid the requirement of writing. There are three possible interpretations on this clause.

Under the first interpretation the clause is taken in its literal sense, so that the rent must be equal to two-thirds of the fair market value of the land. Support for this interpretation can be found in Cody v. Quarterman (1853), 12 GA. 386, 399. This interpretation is however, a bit unreasonable. To fit within the exception, the rent must be at least two-thirds of the value of the land and this would mean that virtually no lease would meet the requirements. Even if this clause were read as meaning that a rent of two-thirds of the value of the land must be paid in total over a three-year period, this would not make sense from a commercial point of view.

The second interpretation is that the rent must equal at least two-thirds of the annual value of the land. Several authorities refer to Section 2 as requiring a lease of not more than three years at greater than two-thirds of "rack rent". - see Chitty on Contracts 84 (16th ed., 1912); 18 Halsbury's Laws of England 384 (1st ed., 1911); Sugden on Vendors and Purchasers 175 (14th ed., 1873). "Rack rent" is

defined in Elphinstone, Rules for the Interpretation of Deeds 618 as "rent of or approaching to the full annual value of the property out of which it issues." The Nova Scotia Statute of Frauds, R.S.N.S. 1967 c. 290 s. 2 also provides an exception to the requirement of writing when the time of the lease does not exceed three years "whereupon the rent reserved amounts to two-thirds at the least of the annual value of the land demised."

The third interpretation is that accepted most frequently by the American authorities: The proviso that the rent reserved in such leases must amount to 'two-thirds at the least of the thing demised' refers to two-thirds of the rental value and not of the fee - Page on the Law of Contracts 2187 (2nd ed., 1920). According to Black's Law Dictionary 1461 (4th ed., 1968) at p. 1461, "rental value" is

> the value of land for use for purposes for which it is adapted in the hands of a prudent occupant ...fair rental value of land, but not the conjectural or probable profits there of...

It is impossible to say which of these three interpretations properly expresses the law in Alberta.

A further problem exists in determining to which sections the provisions of Section 2 provide an exception. Read literally, the words "except nevertheless" following immediately after Section 1 would seem to indicate that it applies only to the provisions of Section 1. This is the view taken by Leith and Smith, Blackstone's Commentaries Adapted to the Present State of the Law in Ontario, 2nd Edn., 1880, page 357:

> It will be observed, this exception to the operation of Section 1 does not apply to Section 4; so that there is this singularity; that a lease not exceeding three years at such a rent, if actually made, is good by parol, whilst a parol agreement for such a lease is

> void as against the party making it. This is the reverse of the policy of the legislature, which was to place the actual creation of an interest on a higher footing than an agreement for its creation; thus, in the latter case, it will be seen they required only verbal authority to the agent, but in the former a written one.

However, a contrary position was taken in the case of Lord Bolton v. Tomlin (1836) 5 Ad. & E. 856, 111 E.R. 1391. The case concerned a parol lease for a term of less than three years. In addition to the lease, the parties also agreed to certain conditions which were not to be performed within one year from the making thereof (Section 4 Statute of Frauds). The lease was enforceable since it was obviously excepted from the Statute by Section 2, but the issue arose as to whether Section 2 also excepted the contractual covenants. Lord Denman, C.J. held, at page 1394, that it would be foolish to enforce the lease and not enforce the covenants;

> ...leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth; and it seems absurd to say that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements...

Whether Section 2 is also an exception to section 3 (which requires assignments or surrenders of leases to be in writing) is also uncertain. Taken in a literal sense, there is no reason why Section 2 should be an exception to Section 3. Section 2 only refers to "all leases"; it makes no mention of transfers or surrenders of leases. However, in 18 Halsbury's Laws of England 546 (1st Ed., 1911) it is implied that Section 2 is an exception to Section 3 by the statement that the surrender of a lease not exceeding three years at a rent greater than two-thirds rack rent need not be evidenced by deed. (See the discussion of the Real Property Amendment Act, (1845) 8 & 9 Vict. c. 106 in the section immediately following.)

2. Evaluation of the Law and Proposals for Reform

The main rationale for excepting leases under three years from the requirement of writing (and from registration under The Land Titles Act) is that because of their relatively short duration they are less significant, and because many such leases would probably not comply with the required formalities (thus causing an unacceptable amount of hardship). We can see no justification for repealing this exception.

The requirement that in order to fall within the exception the lease must be performed within three years from the making thereof is archaic and not in conformity with The Land Titles Act exception (which is based on the term of the lease). We invite comment on the following question.

QUESTION 14

> Should there be an exception for leases under 3 years? and if so, should such exception be for leases of a term of three years or less, regardless of the time differential between the making of the lease and its completion?

We have stated that the better view of the law is that options to renew are not considered in determining the definitional question of whether a particular lease is under three years. Certainly, from a commercial point of view, short term leases with options to renew are more significant than those without such options, and thus perhaps warrant more cautionary and evidentiary protection. However, if such options to renew are widespread the inclusion of the option period in the calculation of time would seriously detract from the efficacy of the exception. We invite comments on the following question.

QUESTION 15

> Should the time period for determining whether a lease is excepted include possible further terms which may arise by reason of the exercising of an option to renew?

The present requirement that only leases of a certain value, whichever interpretation of "two-thirds of full improved value" is accepted, is archaic, not in conformity with The Land Titles Act, and impossible to determine in advance. We see no reason for retaining this criterion.

QUESTION 16

> Should there be a criterion for excepting short term leases based on property or rental value?

We have noted the present uncertainty in the law about whether agreements to lease and contractual covenants are also excepted by Section 2. It does seem anomalous that a parol lease may be enforceable yet covenants in that lease may not be. We invite comment on the following question.

QUESTION 17

> Should agreements to lease and contractual covenants in a lease be excepted from the requirement of writing where such leases would be excepted?

There is also uncertainty about whether assignments or surrenders of leases are excepted at present. We can see no material conceptual distinction between a creation of a lease of less than three years and an assignment or surrender of such a lease. Both involve the transfer of a short term

leasehold estate; it is only the legal mechanism by which such an estate is transferred that is different.

If there is to be an exception for transfers or surrenders of leases the proper criterion is probably the unexpired portion of the lease which is being transferred or surrendered and not the initial term of the lease. If the proper criterion of significance is the term of years being transferred then an assignment of a lease initially made for five years, with two years to run at the time of assignment, should be just as meritorious of exception as an initial creation of a lease for two years. We invite comment on the following question.

QUESTION 18

> Should the exception for leases apply to assignments and surrenders of leases and to agreements to assign and surrender leases, and if so, should the proper criterion in terms of time be the unexpired portion of the lease so assigned or surrendered?

C. Section 3 of the Real Property Amendment Act

Section 3 of the Real Property Amendment Act (1845) 8 & 9 Vict. c. 106 reads:

> Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows; (that is to say,)
>
> III. That a Feoffment, made after the said First Day of October, One thousand eight hundred and forty five, other than a Feoffment made under a Custom by an Infant, shall be void at Law, unless evidenced by Deed; and

> that a Partition, and an Exchange, of any Tenements or Hereditaments, not being Copyhold, and a Lease, required by Law to be in Writing, of any Tenements or Hereditaments, and an Assignment of a Chattel Interest, not being Copyhold, in any Tenements or Hereditaments, and a Surrender in Writing of an Interest in any Tenements or Hereditaments, not being a Copyhold Interest, and not being an Interest which might by Law have been created without Writing, made after the said First Day of October One thousand eight hundred and forty-five, shall also be void at Law, unless made by Deed: Provided always, that the said Enactment so far as the same relates to a Release or a Surrender shall not extend to Ireland.

The effect of this Section with regard to the Statute of Frauds is to require a deed for leases required by law to be in writing, for assignments of leases, whether or not the lease is required by law to be in writing, and for surrenders of interests, freehold or leasehold, required by law to be in writing.

Although a lease exceeding three years or at a rent of less than two-thirds of the full and proved value of the land which is not made by deed is void, it will be construed as an agreement for a lease. - Bond v. Rosling (1861), 1 B. & S. 371. See also Rogers v. National Drug & Chemical Co. (1911), 24 O.L.R. 486 (Ont. C.A.) and Gebler v. Palmason [1930], 1 D.L.R. 475 (Man. C.A.).

The difference between a lease and an agreement for a lease is set out in 18 Halsbury's Laws of England 366 (1st Ed., 1911):

> An instrument by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee--either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently--is a lease; it is said to operate by way of actual demise, and

> when the lessee has entered under it the relation of landlord and tenant is fully created. An instrument which only binds the parties, the one to create and the other to accept a lease hereafter, is an agreement for a lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created unless he also pays rent, in which case he becomes tenant from year to year, upon the terms of the agreement so far as applicable to a yearly tenancy. If, however, a question of the legal rights and liabilities of the parties arises in a court which has jurisdiction to order specific performance of the agreement, and if the agreement is one of which specific performance will be ordered, then the parties are treated as having the same rights and as being subject to the same liabilities as if the lease had been granted; consequently the lessor is entitled to distrain, and the lessee, on the other hand, is entitled to hold for the agreed term.

By thus treating leases which do not comply with the above section as agreements for a lease equity can enforce such "agreements". As a result the effect of Section 3 of the Real Property Amendment Act has been largely nullified.

By Section 97 of The Land Titles Act leases for a term of more than three years must be executed in a prescribed form. The prescribed form, FORM 16, is not that of a deed. Thus it is possible to comply with The Land Titles Act and not the Real Property Amendment Act. We can see no useful purpose in the requirement of Section 3 of the Real Property Amendment Act that assignments of leases and leases which are required to be in writing must be by way of deed.

QUESTION 19

> Should assignments of leases and leases which are required to be in writing also be required to be in the form of a deed?

CHAPTER VI

CONTRACTS FOR THE SALE OF GOODS

Section 7 of the Sale of Goods Act, R.S.A. 1970, c. 327 provides:

> (1) A contract for the sale of any goods of the value of fifty dollars or upwards is not enforceable by action
>
> (a) unless the buyer accepts part of the goods so sold and actually receives the same, or gives something in earnest to bind the contract or in part payment, or
>
> (b) unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
>
> (2) The provisions of this section apply to every such contract notwithstanding that the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, procured or provided or fit or ready for delivery or that some act may be requisite for the making or completing thereof or rendering the same fit for delivery.
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer does any act, in relation to the goods, that recognizes a pre-existing contract of sale whether there is an acceptance in performance of the contract or not.

This is a revised version of Section 16 of the Statute of Frauds as amended by Section 7 of Lord Tenterden's Act (1828) 9 Geo. 4, c. 14.

As is the case with Section 4 of the Statute of Frauds non-compliance with Section 7 of the Sale of Goods Act will result in a contract being merely unenforceable and not void.

We refer the reader to our discussion in chapter IV of the legal implications of "mere" unenforceability.

Unlike Section 4 of the Statute of Frauds Section 7 of the Sale of Goods Act stipulates three alternate means of compliance:

1) A note or memorandum of the contract signed by the party to be charged:

2) receipt and acceptance of the goods by the buyer;

3) the giving by the buyer of "something in earnest" or in part payment.

The "note or memorandum" requirement is precisely the same as that for contracts in relation to land. Thus we will not repeat our analysis of that requirement here.

Our review of this section shall consist first, of an analysis of the two other methods of compliance. Then we shall consider what types of contracts fall within the meaning of the words, "contract for the sale of any goods of the value of fifty dollars or upwards." Finally, we shall examine whether this section should be repealed and some measures of law reform falling short of repeal.

A. Receipt and Acceptance of the Goods

Section 7(3) defines acceptance:

> There is an acceptance of goods within the meaning of this section when the buyer does any act, in relation to the goods, that recognizes a pre-existing contract of sale whether there is an acceptance in performance of the contract or not.

This sub-section is basically a codification of the requirement of acceptance developed by judicial interpretation of Section 7 of Lord Tenterden's Act--see Morton v. Tibbet (1850) 15 Q.B. 428, Kibble v. Gough (1878), 38 L.T. 204 (C.A.).

As Section 7(3) implies, acceptance under Section 7 is different from and less than "acceptance in performance." Acceptance in performance relates only to the buyer's right to reject the goods for breach of condition. (Under Section 14(4) of the Sale of Goods Act if there has been acceptance in performance, then, unless there is a term in the contract to the contrary, the buyer is precluded from rejecting the goods, i.e. rescinding the contract, and is thus relegated to a remedy in damages.) Sections 35 and 36 of the Sale of Goods Act relate to acceptance in performance. Under Section 35 a buyer shall not be deemed to have accepted the goods until he has had a reasonable opportunity to examine them. Since this section relates only to acceptance in performance, it is possible for there to be acceptance within the special meaning of that word set forth in Section 7(3), even where a buyer shall not be deemed to have accepted in performance. Section 36 sets forth three sets of circumstances in which a buyer shall be deemed to have accepted in performance. Briefly, those three sets of circumstances are express intimation, acts inconsistent with the seller's ownership, and lapse of time. It is clear that where a buyer is deemed to have accepted in performance under Section 36 there will also be acceptance under Section 7--Re A Debtor, [1938] 4 All E.R. 308. In short, while the absence of acceptance in performance does not preclude a finding of acceptance under Section 7, a finding of acceptance in performance necessarily implies acceptance under Section 7.

Section 7(3) states that the act of the buyer need only recognize a pre-existing contract and not the pre-existing

contract. Hence, there may be a rejection of the goods, but an act so as to recognize the existence of a contract and to constitute acceptance.--Abbott v. Wolsey, [1895] 2 Q.B. 97.

Six points with regard to the requirement of acceptance within Section 7(3) are set out in Benjamin on Sale, (8th ed., 1950) 199:

1. It adopts the distinction, drawn in Morton v. Tibbett, between a provisional and a final acceptance;

2. There must be an act;

3. The act may be done, not only to, but merely in relation to, the goods;

4. The acceptance is not an acceptance of the goods, but only a recognition of a contract;

5. The contract must be pre-existing;

6. Acceptance is a different thing from actual receipt.

To satisfy the Sale of Goods Act there must be receipt and acceptance. Whereas acceptance refers to acts done in relation to the goods, receipt refers to a change in possession, i.e. delivery--Blackburn on Sale (3rd ed., 1910) 38. In most cases, whether there has been delivery will be relatively easy to determine. There are however, some fact situations which raise special problems.

The first is where prior to the contract of sale the goods are already in the buyer's possession as bailee for the seller. The test for receipt in such case is set out in Lillywhite v. Devereaux (1846), 15 M. & W. 285, as summarized in Benjamin on Sale, 208:

> . . . if it appears that the conduct of a defendant in dealing with the goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract. . .

A second situation occurs when the goods are in the possession of a third party as bailee for the seller. This is governed by Section 30(5) of the Sale of Goods Act:

> (5) Where the goods at the time of the sale are in possession of a third person there is no delivery by the seller to the buyer until the third person acknowledges to the buyer than he holds the goods on his behalf.

A third problem area is the question of whether there can be receipt or delivery if the seller has become bailee of the goods for the buyer, albeit there has been no physical change in possession. Presumably if the seller has possession of the goods in a capacity as bailee for the buyer and not in his capacity as seller, then this should amount to a constructive change in possession, i.e. delivery to the buyer. According to Blackburn on Sale, 41:

> . . . in many of the cases [relating to this third problem area] the test for determining whether there has been actual receipt by the purchaser, has been to enquire whether the seller has lost his lien.

However, by Section 41(2) of the Sale of Goods Act:

> The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Hence, it would seem that this is not a particularly suitable test.

The final problem area involves delivery of the goods to a carrier. By Section 33(1) of the Sale of Goods Act:

> Where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, delivery of the goods to the carrier, whether named by the buyer or not, for the purpose of transmission to the buyer shall prima facie be deemed to be a delivery of the goods to the buyer.

However, delivery to a carrier will only amount to receipt if the goods are in accordance with the contract--Gorman v. Boddy (1845), 2 Car. & K. 145--and if the seller does not retain a right of disposal--Benjamin on Sale, 216.

B. The Giving of Something in Earnest to Bind the Contract or in Part Payment

In addition to a signed note or memorandum and receipt and acceptance there will also be compliance with Section 7 if something has been given in earnest to bind the contract or in part payment. According to Blackburn on Sale, 41:

> "Earnest" is some tangible token or gift, which need not be money, given or actually transferred by the buyer to the seller to mark the conclusion of the bargain.

Earnest is not given as part of the price and is an outright gift to the seller. Both earnest and part payment must be independent of the contract; they cannot be in pursuance of the terms of the contract in order to meet the statutory requirements. Thus in Walker v. Nussey (1847), 16 M. & W. 302 there was a term in the contract of sale that the seller should deduct from the price the amount of a debt which he owed the buyer. Because this set-off was part of the actual process of contracting and thus not independent of the

contract, it did not constitute part payment within the meaning of that term in Section 7.

It should be noted that parol evidence is necessary to prove acceptance and receipt, earnest and part payment.

C. Meaning of Contract for the Sale of Goods

One problem area is the definition of "goods." Section 2 (1)(h) of the Sale of Goods Act states:

> (h) "goods" includes
>
> (i) all chattels personal other than things in action or money, and
>
> (ii) emblements, industrial growing crops and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale;

Section 2(1)(h)(i) is fairly clear; "goods" includes chattels personal but not choses in action such as money, shares, insurance or debts. Section 2(1)(h)ii) has already been discussed in Chapter IV and replaces the common law distinction between fructus naturales and fructus industriales. (For a more detailed discussion of the definition of "goods" see Benjamin on Sale, 171-189).

Another problem presented by Section 7 arises as a result of the legal distinction between a contract for the sale of goods and a contract for the supply of skill and labour, the latter type of contract not having to comply with the formalities of the Sale of Goods Act. Precisely what attributes distinguish a contract for the sale of goods from one for the supply of skill and labour is, in reality, a metaphysical question. This is illustrated by three cases.

In Clay v. Yates (1850), 1 H. & N. 73 (Exch.) the plaintiff printer entered into a contract with the defendant to print a book. Referring to the distinction between contracts for the sale of goods and those for the supply of skill and labour Pollock C.B. said, at p. 78:

> . . . the true criterion is, whether work is of the essence of the contract, or whether it is the materials supplied.

The court ultimately held that the contract to print the book was not a contract for the sale of goods.

In Lee v. Griffin (1861), 30 L.J.Q.B. 252, 1B. & S. 272 a contract to make a set of dentures was held to be a contract for the sale of goods. The court rejected a contention that the test to be used was the value of the work as opposed to the value of the materials. As a result, in the view of Blackburn J., at 254, if one employs a famous sculptor to make a statute and the sculptor supplies the marble, this is a sale of goods, even though the value of the marble may be much less than the value of the labour. This statement is, however, difficult to reconcile with the next case.

In Robinson v. Graves [1935] 1 K.B. 579 (C.A.) the defendant commissioned an artist to paint a picture. This was held to be a contract for the supply of skill and labour and not for the sale of goods. The court stated that if the "substance" of the contract was skill and labour and if the materials supplied were only "ancillary" to the contract then it is a contract for skill and labour. (Contra, see Isaacs v. Hardy (1884), Cab. & El. 287 in which a contract to paint a picture was held to be a contract for the sale of goods.)

If a contract is formed for the sale of a chattel which is to be affixed to land or to another chattel before the

property is to pass, this relates to labour and not goods, as the contract is for the improvement of the land or principal chattel.--Benjamin on Sale, 167.

One further problem area arises as a result of the words, "of the value of $50 or upwards." If several chattels are bought in one transaction, each of the value of less than $50, but with a total value of over $50, this will be a contract for the sale of goods of more than $50--Baldey v. Parker (1823), 2 B. & C. 37. This necessitates determining whether goods have been bought in a series of transactions or a single transaction. Factors such as whether the price is paid as a lump sum, whether the goods are bought at the same time and whether the goods are included in one account may be relevant--Benjamin on Sale, 190. Auction sales are in a somewhat different position. By Section 58(b) of the Sale of Goods Act:

> . . . where goods are put up for sale by action in lots, each lot shall be prima facie deemed to be the subject of a separate contract of sale.

D. Evaluation of the Law and Proposals for Reform

In considering whether Section 7 of the Sale of Goods Act should be repealed we have come to the conclusion that contracts for the sale of goods do not have the same unique characteristics which justify formalities for contracts concerning land. Whereas contracts concerning land are almost always of monetary significance, there are many contracts for the sale of goods of over $50 which cannot be so characterized. Hence, cautionary objectives are less important. (This particular fact in itself would not justify repeal, only a raising of the dollar value of contracts covered by the Act.) Land, being immoveable, is unique; thus there may be sentimental considerations necessitating formalities as a cautionary device. Most goods, on the

other hand, have substitutes on the open market. A person may need some protection from rashly contracting to sell his farm where he has lived for 20 years. It is difficult to make the same argument as forcefully in the instance of a rashly entered contract to sell a used tractor. He cannot necessarily buy an equivalent piece of land; he can always buy another tractor. Whereas many individuals will enter contracts for the sale or purchase of land at most only a few times in the course of their lives, most people can be expected to enter into contracts for the sale of goods over $50, several times each year.

All these differences point to a conclusion that contracts for the sale of goods are more akin to other contracts not having any special evidentiary requirements than they are to contracts concerning land. As the English Law Revision Committee Report, 9 states:

> As this criterion is applied by the provisions under review, a man who by an oral contract buys or sells £10 worth of goods, cannot (subject to acts of part performance) enforce his bargain, yet a man who orally contracts to do work or to sell shares or to insure property (against other than marine risks) can enforce his bargain, and have it enforced against him, however great the amount involved.
>
> The Section is out of accord with the way in which business is normally done. Where actual practice and legal requirement diverge, there is always an opening for knaves to exploit the divergence.

Following the recommendations of the English Law Revision Committee the equivalent of our Section 7 was repealed in Great Britain [Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. II, c. 34, s. 2]. It has also been repealed in New Zealand (Contracts Enforcement Act, 1956, No. 23, s. 4) and in British Columbia, (Statute Law Amendment Act, S.B.C. 1958, c. 52, s. 17.

In Fridman, Sale of Goods in Canada, 38-39 the merits of this provision were considered in the following terms:

> The repeal of these provisions in the English Sale of Goods Act in 1954 has not resulted in any detriment to commercial life generally. Indeed it would seem that there is no significant legal policy that is being served in modern life by the retention of the provisions. The general law of sale of goods would not suffer in quality if this section of the Act were repealed, and such a general requirement of writing (or some equivalent) no longer made mandatory. The lack of any such provision in British Columbia does not appear to have had any ill effects, which leads to the conclusion that no really vital purpose is being served in the modern law of sale of goods by the retention of this archaic provision.

Can it be argued that the provision should be retained as a piece of consumer protection legislation? i.e. when the dollar value is large do consumers need protection from entering into rash or impulsive bargains? In considering this question we note that in most such cases the contract will be enforceable against the consumer under existing law in any event. Many consumer contracts involve immediate delivery and probably thus satisfy the "receipt and acceptance" requirement. If there is no immediate delivery it is quite likely that a deposit or a signed sales slip has been taken from the consumer. There cannot be many cases of completely oral, totally executory consumer sales contracts. In these rare cases, given business practice and the difficulties of proving such a contract (quite apart from any statutory evidentiary requirements) it is not likely that business sellers would attempt to enforce the contract anyway. In fact, retention of the present legislation under the guise of protecting the consumer might have just the opposite effect. Businessmen, in their dealings with consumers in large monetary sales transactions, are probably going to take sufficient

steps to ensure the transaction is enforceable against the buyer. On the other hand, retention can result in consumers not being able to enforce contracts against sellers, such as where goods are not in stock and where the note or memorandum of the contract is signed only by the consumer, and not by the retailer.

Is there then any argument in favour of formalities for sale of goods contracts entered into exclusively between business entities? In a study entitled, "The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices" (1957) 66 Yale L.J. 1038, it was discovered, based on responses by manufacturers in Connecticut to a questionnaire circulated, that business practice usually complied with the Statute of Frauds requirements. It was also discovered that such compliance was not because of the Statute but rather because it was deemed sound business practice. The study therefore concluded that repeal of the Statute of Frauds would have little effect on business practice. Further, we do not see any special cautionary objectives in an exclusively business transaction. We assume that business entities do not buy or sell impulsively and that due reflection is given in most transactions. As for evidentiary objectives, we cannot see how contracts for the sale of goods merit special evidentiary provisions, when other, often very large, commercial contracts (e.g. sales of shares), do not.

If Section 7 is not repealed it would certainly be desirable to raise the dollar value of goods covered by the Act. In 1677, £10 was of considerably greater value than is $50 at present. The sale of goods is a daily occurrence for most persons, and contracts for $50 and more are increasingly frequent. Given the current rate of inflation, this provision may become totally unrealistic.

We invite comment on the following questions.

QUESTION 20

Should Section 7 of the Sale of Goods Act be repealed?

QUESTION 21

If Section 7 is not repealed, should the dollar value of sales contracts covered by the provision be raised?

If Section 7 is not repealed there are other measures which can be taken to reform the law. Some such measures are found in the Uniform Commercial Code 2-201:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted.

Besides raising the dollar value to $500, the main changes proposed by the Uniform Commercial Code are:

1) By subsection (1) the writing need only "indicate" a contract for sale has been made and will not be insufficient merely because of omission or misstatement of a term. The arguments for and against such a proposal have already been canvassed in our discussion of the memorandum requirements in Chapter IV.

2) By subsection (2), acquiescence for 10 days by a party receiving a memorandum in confirmation of the contract will render the contract enforceable. Here the acquiescence is a substitute for a signature in a writing.

3) By subsection (3)(a) a contract for the sale of goods to be specially manufactured for the buyer and which cannot be sold in the ordinary course

of business is enforceable if the seller has begun manufacture or committed himself for procurement. The main reason for such a provision is that in this fact situation, because of the commitment or reliance of the seller and the inability to sell such goods elsewhere there will be an injustice arising from unenforceability not normally the case in unenforceable contracts for the sale of goods.

(4) By subsection (3)(b) an admission in pleadings or testimony will render the contract enforceable. This is a difficult issue. An admission would seem to be compelling evidence. On the other hand, such a proposal might encourage less than full disclosure and perhaps perjury.

On the assumption that Section 7 of the Sale of Goods Act is not repealed we invite comments on the following questions.

QUESTION 22

Should the requirements of a sufficient note or memorandum be lessened for contracts for the sale of goods?

QUESTION 23

Should the acquiescence of a party to a confirming writing by the other party render such contract for the sale of goods enforceable against the party receiving the memorandum?

QUESTION 24

Should a contract for the sale of goods be enforceable where the goods are to be specially manufactured for the buyer, where such goods could not be sold in the ordinary course of business, and where the seller has relied on the contract either by beginning manufacture or committing himself for the procurement of the goods?

QUESTION 25

Should an admission in the pleadings or testimony render the contract enforceable against the party making the admission?

CHAPTER VII

SECTION 7 OF THE STATUTE OF FRAUDS

DECLARATION AND CREATION OF TRUSTS OF LAND--

A. Operation of the Section

Section 7 of the Statute of Frauds provides:

> And be it further enacted by the authority aforesaid that from and after the said four and twentieth day of June [1677] all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing or else they shall be utterly void and of none effect.

1. Scope of Application

The section refers only to declarations or creations of trusts of ". . . lands, tenements, or hereditaments. . . ." This has been held to include leases--Skett v. Whitmore (1705) 2 Freem. Ch. 280, Forster v. Hale (1798) 3 Ves. 696--but the section does not otherwise include personalty. A sum of money secured upon a mortgage of real estate is also not within the ambit of the section--Lewin, Trusts, 53, 54 (11th ed., 1904); Benbow v. Townsend 1 My. & K. 506. Charitable trusts are included--Lloyd v. Spillet (1734) 3 P. Wms. 344; Boson v. Statham (1760), 1 Eden 509. Whether or not the section binds the Crown is in dispute. In R. v. Portington, 1 Salk 162, the Exchequer Court held the Crown was not bound while the Court of Queen's Bench, (3 Salk. 334) held it was bound. (On this point see also Lewin, Trusts 55 (11th ed., 1904), Keeton, Trusts 50 (4th ed., 1947).

This section applies to the creation of every trust of land, howsoever it is created, and whether the subject matter of the trust is a legal or an equitable interest. "Whether a trust is brought into being by the owner of an interest declaring himself to be a trustee, or he transfers the interest to trustees to hold on certain trust terms, this trust is caught by the language of the section. This is so whether the interest in question is legal or equitable."--Waters, Law of Trusts in Canada, 184. There is some authority for stating that a direction by a beneficiary to the trustee will constitute a declaration of trust by the beneficiary, thus bringing the section into operation.--Tierney v. Wood (1854), 19 Beav. 330, 52 E.R. 377.

2. The Writing Requirement

The section requires that the declaration of creation of trust must be "manifested and proved by some writing." Like the requirements of section 4, it is not necessary that the declaration or creation itself be in writing; thus a writing subsequent to the trust creation may be sufficient--see Wilde v. Wilde (1873), 20 Gr. 521, 531 (C.A.), Rochefoucauld v. Boustead [1897] 1 Ch. 196, 205-206. It is, however, necessary that the writing prove not only the existence of the trusteeship, but also the trust terms.--Smith v. Matthews (1861), 3 De G.F. & J. 139, 45 E.R. 831. As is the case with section 4, documents may be joined to form a sufficient writing--Keeton, Trusts 51 (4th ed., 1947), relying on Forster V. Hale (1798) 3 Ves. 698. Unlike section 4, there is no provision for signature by an agent.

Finally, it is necessary that the writing be "signed by the party who is by law entitled to declare such trust." This means that if the subject matter of the trust created is itself a beneficiary's equitable interest under a trust, the

signature of the beneficiary is required--Tierney v. Wood.

3. Legal Effect Where Writing Requirement is not Satisfied

In spite of the wording in section 7 that creations and declarations not complying with the writing requirement "shall be utterly void and of none effect," there is controversy over whether non-compliance renders the trust void or only unenforceable.

In Drummond v. Drummond (1965), 50 W.W.R. 538, at 543, 544 (B.C. S.C.) non-compliance with the old B.C. Statute of Frauds equivalent to section 7 (R.S.B.C. 1936, c. 104, s. 7) was treated as rendering the trust void. In Leroux v. Brown (1852), 12 C.B. 801, 804 Jervis C.J. contrasted the wording of section 4 ("no action shall be brought") with section 7 in holding that the effect of section 4 was procedural, rendering contracts merely unenforceable.

However, it is stated in Pettit, Equity and the Law of Trusts 51 (2nd Ed., 1970):

> It seems generally to have been assumed, consistently with the view that writing was merely required as evidence, [Leroux v. Brown], that the effect of absence of writing was the same under section 7 of the Statute of Frauds as under section 4. No point seems to have been taken in any reported case on the difference in wording-- "no action shall be brought" in section 4, "or else they shall be utterly void and of none effect" under section 7.

An example of a case taking this view is Rochefoucauld v. Boustead. There, the Court of Appeal, by way of analogy with Leroux v. Brown, held that section 7 related to procedure. Thus, the rationale for holding trusts to be unenforceable would seem to be that section 7 requires a writing only as

evidence of trust. This may come into existence at any time before the action on the trust is brought. It would seem inconsistent to say that the trust is void until the writing comes into existence.

In conclusion, the effect of non-compliance with section 7 is uncertain.

B. Available Relief Where Non-Compliance with Section 7

There are two avenues of relief available where an oral trust of land does not comply with the Statute of Frauds, section 7. Indeed, the relief provided by the courts has been such that some commentators have concluded that this particular section of the Statute of Frauds has been repealed in fact, if not in law.--see the British Columbia Law Reform Commission Working Paper, 60.

The first avenue of relief arises as a result of section 8 of the Statute of Frauds itself: section 8 basically excepts trusts arising by implication or construction of law from the operation of section 7. The second avenue of relief arises as a result of the equitable doctrine of fraud that the Statute of Frauds cannot be used an instrument of fraud.

1. Section 8 of the Statute of Frauds

Section 8 of the Statute of Frauds provides:

> Provided always, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this Statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

Trusts arising by "construction or implication of law" are basically resulting trusts and constructive trusts. In fact, the English equivalent to section 8 is found in section 53(2) of the Law of Property Act which provides:

> This section does not affect the creation or operation of resulting implied or constructive trusts.

In the context of an express oral trust which does not comply with section 7, the circumstances in which a court might find a resulting trust excepted by section 8, are outlined in Waters, Law of Trusts in Canada, 197-198:

> There is no resulting trust if A purchases land in his own name, the arrangement with B being that A will hold the land as security until B has paid A the purchase price. But if X buys land and has it conveyed to Y on terms that Y is to hold on trust for X, there is an express trust and the situation also gives rise to a resulting trust; under each trust X is the trust beneficiary. Like the constructive trust, the resulting trust arises by operation of law, and is expressly exempt from the provisions of the Statute. A resulting trust arises whenever one party buys property and has it gratuitously conveyed to another or into the joint names of himself and another. It also arises when one party gratuitously transfers his own property into the name of another or into the joint names of himself and another. It will therefore be seen that in many situations where land is conveyed on oral trust, the law would in any event presume a resulting trust in the purchaser's, or transferor's favour. In this way the burden of proof is placed upon the transferee if he wishes to argue that a gift was intended.

Can a resulting trust be found in favour of the settlor where A conveys land to T on trust for B? The B.C. Law Reform Commission has concluded in its Working Paper, at page 53 that a resulting trust can be found in such circumstances:

> The significance of the resulting trust exception in the context of the Statute of Frauds is that where A orally declares T a trustee of certain property for the benefit of B, a resulting trust will cause the property to be returned to A. In other words, the oral trust is not enforced, the law choosing, in effect, to give the grantor the opportunity to recreate the trust in writing if in fact it was his intention to do so.

However, this conclusion is complicated by the possibility of a court enforcing the oral trust in favour of B (on the basis of the equitable doctrine of fraud) or finding a constructive trust in favour of B. Such possibilities conflict somewhat with the conclusion of the B.C. Law Reform Commission. (The circumstances in which a court might enforce an oral trust of land or find a constructive trust in favour of the express beneficiary will be discussed in the next section.)

Besides resulting trusts section 8 also expressly exempts constructive trusts. While a discussion of the many different ways in which a constructive trust may arise are outside the scope of this Working Paper, it is sufficient to note that in the case of an express oral trust the facts necessary to establish a constructive trust are precisely those necessary to bring into operation the equitable doctrine of fraud; in fact the concept of the constructive trust may be the juridical basis for the equitable doctrine. The constructive trust concept will therefore be discussed under that heading in the section immediately following:

2. The Equitable Doctrine of Fraud--The Statute of Frauds Cannot be Used as an Instrument of Fraud

We have noted that the doctrine that the Statute of Frauds will not be allowed to be used as an instrument of fraud has, in the case of unenforceable contracts, been very narrowly

confined so that it provides little relief from the rigors of the Statute. In the case of oral trusts not complying with section 7 the doctrine has provided substantial relief. The reason for the difference in application is not difficult to understand.

In the case of a contract the inability, by reason of non-compliance with requisite formalities, to enforce such contract will result for the most part in a loss of the plaintiff's expectation interest. Because the defendant will not be allowed to retain any monies or property so long as he refuses to perform (such monies or property are recoverable by the plaintiff on quasi-contractual grounds), the plaintiff will not be deprived of any property interests. Given the original evidentiary function and the now more widely recognized cautionary function of formalities, and given that what was at stake was only an expectation interest, it is not difficult to understand why the courts were reluctant to hold that the mere failure to perform a contract was sufficient to find that the Statute was being used as an instrument of fraud.

In the case of land conveyed to a trustee with an oral trust in favour of either the settlor or some other beneficiary, the considerations are materially different. If the trustee were allowed to retain the land for his own benefit, on the basis of the settler's non-compliance with the Statute, the trustee would be getting an interest in land which was never intended to be for his benefit, at the expense of someone else. The result would be not just a deprivation of an expectation interest, but unjust enrichment on a scale which truly would work a fraud. No sophisticated legal system could tolerate such a confiscation of property, merely because of the failure to comply with certain formalities. Thus equity developed the concept that where a trustee to whom land was conveyed on trust denied the trust and claimed the land for himself, that

would be a fraud, despite the fact that the trust was oral. This doctrine was set forth in its modern form in the leading case of Rochefoucauld v. Boustead [1897] 1 Ch. 196, 206:

> ...it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the Statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.

The principle has been applied in Canada in a number of different contexts (see Waters, at p. 193). The exact juridical basis of the doctrine has, however, received little judicial comment and is still unclear. Waters, at p. 197, points out two possible bases for the doctrine:

> There are two possible explanations of the court's thinking. (1) It is the express trust created by the parties that is enforced, and it is so enforced by preventing the trustee from pleading the Statute. The fraud that would otherwise be perpetrated justifies this ouster of the Statute, and Rochefoucald v. Boustead is the authority for this proposition. (2) As the express trust cannot be enforced because of the Statute, equity imposes a constructive trust upon the express trustee to cause him, because of his unconscionable intention, to disgorge. The Statute is thus honoured, and moreover the constructive trust is expressly exempt from the provisions of the Statute. It is the fraud that would otherwise result which causes the courts to impose this constructive trust, and the authority for this recognition of fraud is Rochefoucauld v. Boustead.

Where the settlor and beneficiary are the same it is only of academic interest which explanation is accepted. Whether the trust enforced is the express oral one, a constructive one imposed by reason of fraud or even a resulting trust the same person will be the beneficiary.

Where the settlor and beneficiary are different then the explanation accepted may make a difference. If A conveys land to B orally imposing trust conditions in favour of C, and if it is the express trust which is enforced, then clearly C will be entitled to the land. If, on the other hand, a constructive trust is imposed, the question still remains: in whose favour is the constructive trust, the settlor or the beneficiary? Both Waters, at 200, and the B.C. Law Reform Commission in its Working Paper, at 55, are of the opinion that, as a matter of principle, if a constructive trust is to be imposed it should be in favour of the settlor. The basis for their conclusion is that the purpose of a constructive trust is to work a restitutio in integrum and this can be accomplished only if the constructive trust is worked "backward" in favour of the grantor. Working a constructive trust forward in favour of the intended beneficiary effectively amounts to enforcing the express trust. As is pointed out in Waters, 200, referring to the judgment of Duff J. in Scheuerman v. Scheuerman, (1916), 52 S.C.R. 625, 636-637:

> Patently the constructive trust would not justify the court in enforcing the settlor's purposes. The constructive trust, as Duff J. points out, works a restitutio in integrum... The present author fails to see how a constructive trust can work anything forward. Such a "constructive trust" is in fact the express trust created by the parties.

Effecting a constructive trust in favour of the grantor is probably the soundest solution in conceptual terms. By not enforcing the express oral trust it gives effect to the Statute, and, at the same time, it prevents unjust enrichment (by not allowing the trustee to hold for himself). However, it must be conceded that this is not the position taken by most courts in Canada. It is clear that in Rochefoucauld v. Boustead it was the express oral trust and not a constructive

trust, which was being enforced; and in the words of Waters, 198, "...subsequent Canadian courts which have followed Rouchefoucauld v. Boustead have shown no particular interest in what trust it was they were enforcing..." In fact there is little support in Canadian jurisprudence for the constructive trust concept. In Scheuerman v. Scheuerman (1916), 52 S.C.R. 625 Duff J. referred to the concept in an obiter comment, at 636-607, and in Langille v. Nass (1917) 36 D.L.R. 368 (N.S.S.C. A.D.) the court found a constructive trust but held that the express trust purposes should be enforced.

In short, while there is little authority for the concept of a constructive trust, whatever authority exists would seem to indicate that such a trust works "forward" in favour of the intended beneficiaries of the express oral trust.

To this point our discussion of the equitable doctrine of fraud has been confined to cases where a purchaser has bought allegedly on trust for another or where a grantor has conveyed land to a trustee on trust for either himself or for another. We have not yet considered the question of whether the equitable doctrine set forth in Rochefoucauld v. Boustead can be used to circumvent section 7 where the section is raised as a defence to an allegation that a trust has been created by way of declaration only. That is, where T has orally declared that he holds land on trust for B, and where T raises the Statute of Frauds in defence to a claim on the oral trust by B, can B circumvent this defence by arguing the equitable doctrine of fraud? Such a trust declaration may arise in two contexts, either as alleged performance under a contract, or by way of gift.

The answer to this question appears to be that in this context the doctrine in Rochefoucauld v. Boustead does not apply. In Morris v. Whiting (1913), 15 D.L.R. 254 (Man. K.B.),