ANALYSIS AND PROPOSED REFORMS WITH REGARD TO THE STATUTE OF FRAUDS

Douglas R. Stollery

I

INTRODUCTION

This study has been undertaken in order to determine whether Sections 4 and 17 of the Statute of Frauds should be revised or repealed in Alberta. There exists a vast amount of excellent literature on this topic including articles, entire books and reports of Law Reform Committees. Hence, this report relies heavily on these resources and is not intended to be a thorough analysis of the operation and desirability of the Statute. It is, instead, intended to present the arguments for and against the Statute and the possible reforms, as discussed in these other sources, as they apply in Alberta.

II

ANALYSIS

A. Conditions in Great Britain in 1677

> 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, Sixth Interim Report, Cmd. 5449, 1937, pp. 6,7)

In assessing the desirability of maintaining the Statute of Frauds among the laws of Alberta, it is first necessary to review the reasons for its passage in 1677. If these reasons are no longer valid and if present conditions no longer justify the statute, reform or repeal may be necessary.

In 1677, parties to an action, their husbands or

wives, and persons with an interest in the result of the action could not be witnesses. Hence,

> the merchant whose name was forged to a bill of exchange had to sit by, silent and unheard, while his acquaintances were called to offer conjectures and beliefs as to the authenticity of the disputed signature from what they knew of his other writings. If a farmer in his gig ran over a foot-passenger in the road, the two persons whom the law singled out to prohibit from becoming witnesses were the farmer and the foot-passenger. (Lord Bowen, "Administration of Justice during the Victorian period," Essays A. A. L. H.; at p. 521, cited in Holdsworth, History of English Law Vl at p. 389)

Under such a state of affairs, a requirement of evidence in writing was obviously valuable.

A series of statutes between 1844 and 1854 (16,7 Victoria c.85; 14,15 Victoria c.99§2; 16,17 Victoria c.83 §§1,2) permitted litigants to give evidence on oath, removing this rationale for the provisions of the Statute of Frauds.

In addition, trial by jury was in a state of transition.

> The jury's verdict was practically unappealable despite the evidence, and it was therefore felt necessary to limit the cases which a jury might decide. For, when a party introduced convincing evidence, the jury could still decide the case on the basis of facts personally known to the jurors which had not been offered at the trial . . . . In addition, as basic as it appears today, the concept of granting a new trial for error was just emerging and was not yet already understood nor often utilized. (Marc. A. Franklin, "Contracts: Statute of Frauds: Law Reform (Enforcement of Contracts) Act, 1954" (1954-1955) 40 Cornell L.Q., 581,582)

This would no longer seem to be a compelling

reason for maintaining the Statute. Jury trials in Alberta are rare, control over the jury has been strengthened and the right of appeal has been further developed. As Thayer said in his "Preliminary Treatise on Evidence" at p. 431: "It is not probable that so wide reaching an act could have been passed if jury trial had been on the footing which it holds today."

In addition to these two factors, conditions in England were unsettled at the time of the passage of the Statute.

> For 50 years England had been torn with political dissension. The Civil War had been followed by a period of the dictatorship of Oliver Cromwell. This was followed by the Restoration. Parliamentary power had been virtually nullified. No legislation had been enacted affecting ordinary litigation. The ordinary law courts had been functioning under great difficulties. Subordination and perjury evidently were rife. (Drachsler, "The British Statute of Frauds - British Reform and American Experience," A. B. A. Section of International and Cooperative Law Bulletin 3-4,24 (1958-60))

This state of affirs was commented upon in Slade's Case (1602) 4 COKE 95: "And I am surprised that in these days so little consideration is made of an oath, as I daily observe."

It would be wrong to conclude, however, that the Statute of Frauds arose solely out of conditions peculiar to England in the seventeenth century. It was only one in a series of statutes both in England and on the continent dealing with the problem of perjury which began as early as 1228.[1] For example c. 21 of 11 Henry VII (1495) began:

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[1]For a discussion of these statutes, see the article by C. Rabel, "The Statute of Frauds and Comparative Legal History", (1947) 63 L. Q. R. 174.

"Where as pjuyre is much and custumably used within the Citie of London amonges such psons as passen and been x empa elled upon issues joyned between ptie and ptie . . . ".

This tends to show that perjury was not a problem unique to the mid-seventeenth century, although the unsettled political conditions may have made such especially prevalent at that time. If perjury at present in Alberta is not as serious a problem as it was in 1677, it may be that the measures enacted to deal with it are no longer justified.

A review of the state of English law at that time also serves to explain some of the wording and provisions of the Statute of Frauds.

> . . . [A]t the time of the enactment of the Statute of Frauds in the seventeenth century the modern informal contract was in the making. At that time there had not as yet been formulated the principles of agreement, consideration, conditions and illegality. Consequently the draftsmen did not know what terms to employ and they did the best they could at that time. (Willis, "The Statute of Frauds - A Legal Anachronism," (1928) 3 Ind. L. J. 427,537)

Since the seventeenth century, the concepts of contract law have been clarified and terminology has become more precise. It is rather anomalous that we should continue to accept as law the wording of the Statute of Frauds as formulated at that time.

Finally, it seems that the Statute of Frauds was to some extent a codification of the law as it existed at that time. "It is a good surmise that Section 4 of the Statute 'applies to those verbal provisions which, before the passing of the Statute, were probably in most instances reduced to writing, though not necessarily.'" (Smith v. Surman (1829) 4 M.&R. 455, 465, cited by Rabel at p. 177) It

would appear that the same is true of section 17.'[1] As the conditions which fostered the enactment of the Statute of Frauds have passed, retention cannot be justified on the basis of history.

B. The Statute of Frauds Causes Injustice

> 'The Act,' in the words of Lord Campbell . . . 'promotes more frauds than it prevents.' True, it shuts out perjury; but it also and more frequently shuts out the truth. It strikes impartially at the perjurer and the honest man who has omitted a precaution, sealing the lips of both. Mr. Justice Fitz James Stephen . . . went so far as to assert that 'in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality.'
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> The operation of the section is often lopsided and partial. A and B contract: A has signed a sufficient note or memorandum, but B has not. In these circumstances, B can enforce the contract against A but A cannot enforce it against B.
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> The Section does not reduce contracts which do not comply with it to mere nullities, but merely makes them unenforceable by action . . . . Anomalous results flow from this: e.g., in Morris v. Baron [1918] 1 A. C. 1, a contract which complied with the section was superceded by a second contract which did not so comply. It was held that neither contract could be enforced: the first because it was validly rescinded by the second, the second, because, owing to its purely oral character, no action could be brought on it. This was a result which the parties could not possibly have intended. (Law Revision Committee Report supra pp. 7, 8)

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[1]See p. 20 following.

That the Statute of Frauds frequently creates injustice is widely documented and admitted. 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. Originally, such an admission was a bar to the party using the Statute as a defence. This is shown by a series of cases beginning in 1702 with Croyston v. Baynes (Precedents in Chancery 208 (Ch. 1733) and ending in 1789 with Whitchurch v. Bevis (2 Bro. C. C. 559 (Ch. 1789)).[1] However, at the end of the eighteenth century, the law began to change, out of the fear that defendants would perjure themselves by denying the contract in order to rely on the statute.[2]

Hence, at present, even if one admits making the contract, the statute applies to make it unenforceable. There is no longer any reason for a defendant to perjure himself by denying the contract, because the statute allows him to disregard his obligations with impunity. This leads to results such as those expressed by Lord Campbell in Sievewright v. Archibald 17 Q. B. 103:

> 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 his action in the hope of mitigating the damages;

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[1]For a discussion of these cases, see Stevens, "Ethics and the Statute of Frauds", 37 Cornell L. Q. 355.

[2]See Rondeau v. Wyatt (1792) 2 H. Blk. 63, Moore v. Edwards (1798) 4 Ves. Jr. 23 (1801) Cooth v. Jackson 6 Ves. Jr. 12 (1806) Blagden v. Bradbear 12 Ves. Jr. 466, Rowe v. Teed (1808) 15 Ves. Jr. 375.

> and although he was not aware of the objection on which he now relies till a few days before the trial.

There is no doubt that the Statute of Frauds cannot be used as an instrument of fraud (Halfpenny v. Ballet (1699) 1 Eg. Abr. 20, pl. 6, 2 Vern 373), so that a defendant cannot rely upon the Statute when his own fraud has been responsible for the non-existence of the required signed memorandum. However, when for any other reason there is no such memorandum, the statute may be relied upon whether or not the result is unjust.

It is somewhat anomalous that the doctrine of part performance should act as an estoppel to the use of the Statute while an admission of the contract under oath does not. No act, no matter how unequivocally it attests to the presence of the contract, can be as conclusive as a direct admission of the contract. Finally,

> the object of all rules of evidence ought to be the discovery of the truth, and accordingly since the days of Bentham, every artifical rule of evidence, every rule which professes to aid the discovery of truth by excluding the means by which the truth can be ascertained, has been viewed with just suspicion. If one wishes to know what were the terms of a verbal contract, the best possible evidence would be that of the persons who made it, or of the bystanders who heard what was said. No, says the statute; in order to avoid fraud, such evidence shall be of no avail unless it is confirmed by a particular kind of written memorandum. (Stephen & Pollock, "Section Seventeen of the Statute of Frauds", (1885) 1 L. Q. R. 1, 7)

Hence, the Statute of Frauds serves to allow a party to disregard his obligations and excludes the truth from evidence in an attempt to prevent perjury. The question therefore arises whether the means of attaining this objective are still justified.

C. Wording

> 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. (Law Revision Committee Report p. 8)

Although the effect of the Statute of Frauds is to make actions unenforceable, it has resulted in a mass of litigation as to whether particular cases are within or without the Statute. For example, the Century Digest, First Dicennial and Second Dicennial list 10,800 cases on the Statute. After almost 300 years, " . . . the flood of cases under the Statute of Frauds continues unabated, with the consequent expense to clients and society." (Willis, p. 539)

Undoubtedly, one reason for this confusion is the mere fact that the Statute is almost 300 years old. Perhaps the part of the Statute which best demonstrates this problem is the first sentence of Section 10. While not directly relevant to this paper, it is included for illustrative purposes:

> And be it further enacted by the authortie aforesaid that from and after the said fower and twentyeth day of June it shall and may be lawfull for every Sheriffe or other Officer to whom any Writt or Precept is or shall be directed at the Suite of any person or persons of for and upon any Judgment Statute or Recognizance hereafter to be made or had, to doe make and deliver execution unto the partie in that behalfe sueing of all such Lands Tenements Rectories Tythes Rents and Hereditaments as any other person or persons be in any manner of wise seised or possessed [or hereafter shall be seised or possessed] in Trust for him against whome execution is soe sued like as the Sheriffe or

> other officer might or ought to have done if the said partie against whome execution hereafter shall be soe sued had been seised of such Lands Tenements Rectories Tythes Rents or other Hereditaments of such estate as they be seized of in Trust for him at the time of the said execution sued.

This wording is such that it cannot be understood by the average citizen, the very person affected by the Statute. Hence, any reform of the Statute must include a revision of the wording.

A second cause of the confusion has been the fact of the immaturity of contract law in 1677. Thus, for example, "the words 'promise,' 'agreement,' ' contract' and 'bargain' are used under such circumstances as to leave a doubt as to whether or not they were used with identical or with different meanings. The courts have generally tended to treat all these words as requiring about the same things. Yet a promise is only half an agreement, an agreement is only one element of an informal contract and a bargain is a word of indefinite meaning." (Willis, p. 536)

A third reason for the confusion has been the tendency of the Courts to construe the terms narrowly so as to exclude cases from the Statute. An example of this is the meaning given to the term "goods" in Section 17 (Section 7 of the Sale of Goods Act.) It has been held not to include shares, stocks, documents of title or right of action, things fixed upon or built upon the land and the natural growth of the land such as timber, fruit and trees, growing and not severed. It does include standing timber which is to be severed immediately and crops produced by human labour, such as corn, potatoes and hops. It does not, however, include crops which require more than one year to mature or which produce more than one crop when

mature, such as madder, clover and teazels.[1]

Contracts for work, labour or materials are not included by the term "goods". Thus, it may be a sale of goods for A to paint a picture of great value for B, A to supply the paint and canvas, of small value and B to pay for the whole as a work of art. It may be a contract for work, outside of the Statute, for A to carve a block of marble belonging to B into a statue, B to pay a large sum of money for the completed work.[2]

Because of the confusing judicial interpretation given to the Statute of Frauds, mere updating of the wording would be insufficient. A revised statute should clearly state the intentions of the legislators.

D. Contrary to Business Practices

> 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. (Law Revision Committee Report p. 7)

The Law Revision Committee cited the doctrine of part performance and the narrow interpretation given to the phrase "contracts in consideration of marriage" as examples of the early recognition of this divergence. However, a study conducted by the Yale Law Journal entitled "The Statute

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[1] Stephen & Pollock, "Section 17 of the Statute of Frauds", (1885) 1 L. Q. R. 1.

[2] Lee v. Griffin 1 B & S 272, cited in Stephen & Pollock, "Section 17" at p. 10. It should be noted that this decision has subsequently been doubted: See Robinson v. Graves [1935] 1 K. B. 579. This would seem to be another example of the confusion surrounding the terminology of the Statute of Frauds.

of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices"[1] reached a somewhat different conclusion. As a result of responses by 87 manufacturers in Connecticut to the questionnaire circulated, it was discovered that business practice usually complied with the requirements of the Statute of Frauds. 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 practices.

Whether or not businessmen usually require signed memoranda for large sales of goods, it is unlikely that they appreciate the technical interpretations which have been given to the terms of the statute.

E. Analysis of Sections 4 and 17

> The classes of contracts to which Section 4 applies seem to be arbitrarily selected and to exhibit no relevant common quality. There is no apparent reason why the requirement of signed writing should apply to these contracts, and to all of them, and to no others. (Law Revision Committee Report p. 7)

Although the classes of contracts selected by the Statute of Frauds do appear to be rather arbitrarily selected this is in part due to the change in conditions between 1677 and the present. As Rabel explained in his article "The Statute of Frauds and Comparative Legal History", supra:

> The French model was to be used for a selected number of transactions. It is submitted that their list was the product of contributions by the various judicial experts and that it presented the types of transactions appearing both important and a source of litigation. As the method of the lawbooks suggests, the method was made in a highly retrospective survey, and it

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[1] (1957) Yale L. J. 1038.

> tended to conservative aims. However, the fact was that experienced lawyers looked for the groups of cases in which the courts had encountered trouble because of uncertainty of evidence and difficulty in ascertaining the scope of individual transactions.

As already mentioned, Sections 4 and 17 may, at least in part have been a mere codification of the existing law. As history has progressed, the classes of contracts for which the requirements of the Statute of Frauds have been appropriate have undoubtedly changed. It is beyond the scope of this paper to suggest new classes of contracts to be protected. Instead, each of the present classes will be analyzed in order to determine whether retention, repeal or reform is desirable.

> 1. To charge any executor or administrator upon any special promise to answer damages out of his own estate.

At the time of the enactment of the Statute of Frauds, the executor or administrator of an estate took beneficially if there was no residuary gift, and the estate was not liable for the wrongful acts of the deceased. This placed moral pressure on the executor or administrator to make restitution out of his own funds, so that such special promises were common. At present, of course, promises of this nature are very rare. Repeal would seem to make little practical difference and would simply remove an anachronism from the statute books.

> 2. To charge any person upon any agreement made upon consideration of marriage.

The wording of this phrase would seem to include

mutual promises to marry, and originally it was so construed (Philpot v. Wallet (1682) 3 Lev. 65, cited by Law Revision Committee Report, supra at p. 11) However, later judicial interpretations excluded this meaning from the statute so that it now covers, for example, promises to settle property upon a person in consideration of marriage.

This class of contract was probably included in the statute because of the importance accorded to it at that time, and served both an evidentiary and a cautionary function. However, "as a result of judicial legislation on this clause of the Statute there is very little left of it, and what little is left is accomplishing little good." (Willis, supra at p. 436). It would therefore seem that repeal of this provision would make little practical difference.

> 3. Any agreement that is not to be performed within the space of one year from the making thereof.

The Law Revision Committee subjected this clause to a more thorough analysis than the other clauses in order to demonstrate that the inclusion of these classes of contracts in the Statute is illogical. Its findings were as follows:

> The Statute assumes the span of reliable human memory to extend to one year and no further. When the contract and its performance are more widely separated a note or memorandum is called for.
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> This seems illogical. There would be nothing ridiculous in a provision that all transactions, between which and their proof in a Court of Law there intervenes a period of more than X years, must be proved by some exceptionally cogent type of evidence: X years being a reasonable estimate of the maximum normal limit of clear recollection. But this is not what Section 4 provides.

(I) The period it treats as material is the period intervening, not between fact and proof of that fact, but between the making of the contract and the time which is to elapse before it is fully performed.

(2) This period is fixed at one year.

The illogical character of these provisions is perhaps best demonstrated by simple examples of their working: --

(a) A contract not to be performed within a year from its making is made orally. It is repudiated the day after it is made, viz.: at a time when its terms are fresh in the minds of everyone. Yet for want of writing no action can be brought to enforce it.

(b) A contract not to be performed within a year from its making is made orally, and is repudiated the day after it is made. Five years after the breach the guilty party writes and signs (for his own use) a summary of its terms, which comes to the knowledge of the other party. The latter can then enforce the contract, for the writing need not be contemporary therewith. It is sufficient (subject to the Statute of Limitations) if the writing comes into existence at any time before action brought; by which time recollection (if one year is its maximum normal span) may have completely faded.

(c) A contract made orally is to be performed within less than a year of its making, and is broken. The innocent party can sue nearly six years after the breach; by which time the parties must (on the assumptions of Section 4) have forgotten the terms. (The assumptions of Section 4 are indeed utterly inconsistent with those on which the Statute of Limitations proceeds.)

Apart from these considerations, the meaning of the words "not to be performed within a year of the making" has given rise to great difficulty and complicated artifical rules (see for instance Hanau v. Ehrlich [1912] A.C. 39); and the doctrine that acts done in part performance of the contract will excuse the absence of signed writing--(a doctrine which equity applies in the case of contracts affecting land, and which express statutory provisions apply in a somewhat

> different form to sales of goods of a value of £10 or upwards) is not available in the case of contracts "not to be performed within a year"; even if such contracts are also contracts for sale of goods of a value of £10 or upwards) Prested v. Gardner, [1910] 2 K.B. 776); indeed, the equitable doctrine of part performance probably does not apply to any classes of contracts covered by Section 4 of the Statute of Frauds, now that contracts for sale of land have been removed from that Section. (pp. 9, 10)

Unlike special promises made by executors or administrators or made in consideration of marriage, contracts not to be performed within the space of a year are common. The New York Law Reform Commission in its paper "Oral Contracts not to be Performed Within One Year" Leg. Doc. (1957) #65 (A) pointed out that the purpose of the inclusion of this type of contract is purely evidentiary. If the courts have no serious problems obtaining reliable evidence with regard to contracts to be performed within one year, but adjudicated upon after several years, it would seem that repeal of this clause would work little hardship on the courts. At the same time, the injustices worked by the Statute and the complicated case law would be eliminated.

> 4. To charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person.

This clause has been interpreted to include only technical guarantees and not indemnities. As a result of this judicial construction, it acts in rather arbitrary ways. Willis, in his article "The Statute of Frauds, A Legal Anachronism" supra demonstrated this by the following examples. If one serves his own interest at the time he makes his promise, his promise is to answer for his own debt, and not for that of another. If the creditor makes

the charge against the promisor alone and not against the one receiving the benefit, the promisor is promising to answer for his own debt. If one promises to answer for the obligation of another when this obligation is in fact void this is not a promise to answer for the debt of another, as that debt has been extinguished. If one's promise is not identical in scope with the promise of the primary debtor, his promise is outside of the Statute.

These sorts of anomalies prompted the majority of the Law Revision Committee in 1937 to recommend the repeal of this clause from the Statute of Frauds. "At present, the fact that a memorandum in writing is not essential for the enforceability of the very similar contract of indemnity does not appear to be giving issue to injustice and we should be sorry to do anything which perpetuated the rather artifical distinction between guarantee and indemnity." (p.11)

However, a minority of that Committee recommended that a guarantee be "invalid" unless embodied in a written document and signed by the guarantor, on the basis that this would serve an important cautionary function.

> . . . [W]e feel that there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand, and that opportunities will be given to the unscrupulous to assert that credit was given on the faith of a guarantee which in fact the alleged surety had no intention of giving. A guarantee is in any case a special class of contract, it is generally one-sided and disinterested as far as the surety is concerned, and the necessity of writing would at best give the proposed surety an opportunity of pausing and considering, not only the nature of the obligation he is undertaking but also its terms (p.33)

The Law Reform Committee Report in 1953 (Cmd. 8809) agreed with the minority suggestions, but recommended that such contracts be unenforceable rather than void. It considered that the fact an artifical distinction between indemnity and guarantee existed should not be the basis for repealing that part of the Statute dealing with guarantees. In addition, it noted that it was rare to find injustice caused by the fact that contracts were unenforceable rather than void. As a result, this part of the Statute of Frauds remains unchanged and in force in Great Britain.

In an article in (1954) 17 Modern Law Review 451, C. Grunfeld discussed the view favouring retention of guarantees in the Statute of Frauds. He questioned how a father backing his son's future with his own money - the type of person intended to be protected by the statute - could be considered a disinterested party and he mentioned that in the absence of misrepresentation, the nature of the obligation undertaken by a guarantor is plain. Also, he pointed out that banks generally use standard forms for guarantees, which may be a greater danger to the guarantor than no requirement of writing. "The mere requirement of evidence in writing is the flimsiest of shields, which can hardly be said, with conviction, to be better than nothing at all." (pp. 453,454)

> 5. Upon any contract or sale of lands, tenements, or hereditaments or any interest in or concerning them.

As this part of the Statute of Frauds was repealed and replaced in Great Britian by sections 40, 53 and 54 of the Law of Property Act, 1925, 15 & 16 George V, C.20, it was outside the scope of the reports of the Law Revision Committee in 1937 and the Law Reform Committee in

1953.

It would appear that there is greater justification for the requirement of a signed memorandum for this class of contract than for the classes already discussed. "Such transactions require time and consideration. They are of great importance, of rare occurrence in the life of most persons, and are usually designed to carry into effect arrangements intended to last for a length of time, and of which it may probably become necessary to have a written record long after the parties are dead." (Stephen & Pollock, p.6) Such contracts are especially important in Alberta with so much of the economy based upon interests in land.

It may be questioned, however, whether exclusion of possibly valuable oral evidence is desirable when such important contracts are being considered in court. The danger of perjury, by itself, would not seem to be sufficient justification for the requirement, as the courts are quite competent in recognizing perjured testimony in other important areas of the law.

In addition to its evidentiary role, however, the requirement of a signed memorandum serves a cautionary function. People are more apt to recognize the binding effect of their actions when the terms of a contract are reduced to writing and a signature is required.

As with every clause of Section 4, the case law is rather confused and complicated with regard to the types of contracts included within the Statute. Willis, in his article "The Statute of Frauds - A Legal Anachronism" supra pointed out that "interest in land" is held to include profits, easements, rents, mortgages, leases equitable interests, growing trees and fixtures. It is held not to include mortgage debts, licenses and agreements for the construction of buildings and the planting of trees.

A reform of this clause might include a codification of what constitutes an "interest in land" so that the average citizen could know with greater certainty which contracts must be evidenced in writing.

> 6. A contract for the sale of any goods of the value of $50 or upwards is not to be enforceable by action 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 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. (S. 7(1) Sale of Goods Act R.S.A. 1970 c. 327).
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> 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 hence have it enforced against him, however great the amount involved. (Law Revision Committee Report, p. 9)

In his article "The Statute of Frauds and Comparative Legal History", supra, Rabel discusses the origins of this section. He quotes from Touchstone by William Shephard, published before the enactment of the Statute of Frauds.

> If a man by word of mouth sell to me his horse, or any other thing, and I give or promise him nothing for it, this is void, and will not alter the property of the thing sold. But if one sells me a horse, or any other thing for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or all or part of the money is paid in hand or I give earnest money (albeit it but a penny) to the seller, or I take the thing bought by agreement into my possession where no money is paid, earnest given, or day set for payment: in all these cases there is a good bargain and sale of the thing to alter the

> property thereof. And in the first case, I may have an action for the thing, and the seller for his money; in the second case, I may sue for, and recover the thing bought; in the third case I may sue for the thing bought, and the seller for the residue of his money; and in the fourth case where earnest is given, we may have reciprocal remedies one against another; and in the last case the seller may sue for his money.

Hence, it would appear that Section 17 (Section 7, Sale of Goods Act) was merely a codification of the law in force at the time of the enactment of the Statute.

As already discussed, a rather narrow interpretation has been given to the phrase "contract for the sale of any goods." If it is considered that injustices have not resulted by reason of the fact that contracts for the sale of shares, or for work or materials need not be in writing, the value of this requirement for the sale of goods might be questioned.

F. Review

The Statute of Frauds serves both a cautionary and an evidentiary function. It is designed to exclude all oral evidence with regard to certain classes of contracts in order to prevent perjured testimony, and to warn persons of the binding effect of their actions. However, the Statute also serves to exclude valid oral testimony from evidence and allows parties to ignore their obligations with impunity. The cases relating to the Statute are numerous and complicated, so that the law resulting from the Statute is incomprehensible to the very persons the Statute is intended to protect. Retention of each section would seem justified only when its advantages are found to outweigh its disadvantages.

III

REFORMS

> Such good as the statute renders in preventing the making of perjured claims and in causing important agreements to be reduced to writing is attained at a very great cost of two different sorts: First, it denies enforcement to many honest plaintiffs; secondly, it has introduced an immense amount of litigation as to whether a promise is within the statute or can by any remote possibility be taken out of it. (Corbin on Contracts, Volume 2, p. 14)

Repeal of the provisions as to contracts made in consideration of marriage and special promises made by executors and administrators would seem to be uncontroversial, as it would have little practical effect. The equivalent provisions were repealed in British Columbia by the Statute of Frauds 1958, S.B.C. 1958 c. 18 s. 7; in Great Britain by the Law Reform (Enforcement of Contracts) Act, 1954 2 & 3 Elizabeth II c. 34 s. 1; in New Zealand by the Contracts Enforcement Act, 1956 #23 s. 2; and in Western Australia by the Law Reform (Statute of Frauds) Act, 1962 #16 s. 2.

There are several feasible reforms with regard to contracts not to be performed within the space of one year. One would be to provide that when more than X years have elapsed between the formation of the contract and its proof in Court, the contract must be in writing and signed by the party to be charged to be enforceable (X years being a reasonable estimate of the span of clear human memory.) However, one cannot know at the time of formation when, if ever, the contract will be adjudicated upon. To ensure certainty of enforcement, parties would have to reduce all contracts to signed memoranda.

A second reform - as recommended by the New York Law Revision Commission Report - would be to exempt certain contracts from this provision. These would include

contracts:

> (a) when there has been full performance on one side, accepted by the other in accordance with the contract,
>
> (b) when there is a memorandum which would satisfy the statute except for error or omission in the recital of past events or except for error or omission which could be corrected by reformation if it occurred in a formal contract,
>
> (c) when the party against whom enforcement is sought admits, voluntarily or involuntarily, the making of the agreement,[1] or
>
> (d) when it is a contract of employment for a period not exceeding one year from the commencement of work.

Although such a reform might make the operation of the statute more fair, it would fail to meet the criticisms of the British Law Revision Committee.[2]

A third possibility would be the repeal of this provision. Unlike repeal of the clauses dealing with marriages and executors or administrators, such a move would affect many contracts. However, if the courts are currently not put at a disadvantage by virtue of the fact that a contract to be performed within a year, being adjudicated upon five years after formation need not be in writing, it would seem that they would not be put at a disadvantage by the repeal of this provision. The equivalent clause was repealed

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[1] See p. 23 following.

[2] See pp. 13, 14, 15 above.

in British Columbia, Great Britain, New Zealand and Western Australia by the statutes which repealed the Statute of Frauds as to marriages and executors.

The most controversial provision of the Statute of Frauds is that relating to guarantees. The arguments for and against retention have already been discussed. It might be noted that this provision is still in effect in Great Britain and in every common law province in Canada. In British Columbia, the distinction between guarantees and indemnities was eliminated by the inclusion of indemnities within the Statue. R.S.B.C. 1960 c. 369.

> 5(1) No guarantee or indemnity is enforceable by action unless evidenced in writing, signed by the party to be charged or his agent, but any consideration given for the guarantee or indemnity need not appear in writing.
>
> (2) This section does not apply to a guarantee or indemnity arising by operation of law.

Outside of repeal, a number of alternate reforms would be possible. One would be to bar a defendant from using the Statute if he admitted making the contract in his pleading or testimony. This was suggested by the Uniform Commercial Code § 2-201, the reports of the New York Law Revision Commission supra, and Steven in his article "Ethics and the Statute of Frauds" supra with regard to various sections of the statute. It has been accepted in Iowa (Iowa Code Ann. §§ 622.34, 622.35, 1950 and in Alaska (Alaska Statutes Ann. § 09.25.020, 1962). This reform would make the operation of the Statute more fair and perhaps reduce litigation. One might question, however, whether this might not be an incentive to the party to be charged to commit perjury. As already mentioned[1], it was

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[1] See p. 6 above.

this fear which led the courts in the early nineteenth century to rule that admission would not be a bar to the use of the Statute. If the contract were reformed in this way, a denial of the contract would make it unenforceable, despite evidence which, although insufficient to maintain a perjury charge, might attest to the existence and the terms of the contract. Repeal of this part of the Statute, on the other hand, would allow the court to determine the existence of the contract on all the evidence.

A second possible reform would be to repeal the Statute and to introduce a requirement of a higher standard of proof and/or corroboration of the making of the contract, either written or oral. Although this would satisfy the evidentiary function, it would not serve the important cautionary function.

A third possible reform would be to require contracts of guarantee (and perhaps indemnity) to be completed on standard forms as prescribed by statute. At the top of the form, in bold letters, could be a note warning the guarantor of the nature of such a contract and of the obligations he is about to undertake. The body of the form could include spaces for all the relevant terms, eliminating the problem of what constitutes a sufficient memorandum. It would replace the standard forms used now by the lending institutions which may be biased in their favour.

Similar provisions are in effect in the United Kingdom with regard to Hire-Purchase by the Hire Purchase Act, 1965, c. 66 s. 7. This states the terms which must be in writing and requires a notice describing the nature of the contract in letters at least as prominent as the rest of the agreement. Such a reform could ensure less confusion and greater fairness.

It could be argued that such a safeguard is unnecessary in Alberta in light of the Guarantees Acknowledgment Act R.S.A. 1970, c. 163.

The recommendations as to guarantees could be applied with equal force to contracts dealing with the sale of interests in land. In addition, codification of what constitutes an interest in land could give greater certainty to the Statute. It should be noted that with the possible exception of Prince Edward Island[1], this provision applies in every common law province in Canada by virtue of the Statute of Frauds and in Great Britain by the Law of Property Act supra.

The reason for the enactment of s. 17 of the Statute of Frauds (s. 7 of the Sale of Goods Act) was undoubtedly related to the importance of the subject matter. 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. Should the current rate of inflation continue, this provision might have ridiculous consequences in the future. It would seem logical that the current dollar level must be raised as a minimal reform to this section.

In the United States, the Uniform Commercial

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[1]The English Statute of Frauds formed part of the law of Prince Edward Island by virtue of settlement. In 1939, the legislature passed a new Statute of Frauds, S.P.E.I. 1939, c. 20. This Act makes no mention of contracts for the sale of interests in land, nor does it expressly purport to repeal the old Statute of Frauds. Hence, it may or may not be that the provision as to land has been replaced. It should be noted that s. 6 of the Real Property Act R.S. P.E.I. 1951 c. 138 which requires a deed, deals with conveyances of land and not the enforceability of contracts for the sale of land.

Code 2-201 has recommended that Section 17 be replaced by the following provisions:

> (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.

The objective of this recommendation is to clarify the law. The wording has been brought up to date, the requirements of a sufficient memorandum have been more clearly stated, admission of the contract has been introduced as a bar and the doctrine of part performance has been restricted.

An alternative of these reforms would be outright repeal. This has been effected in Great Britain by the Law Reform (Enforcement of Contracts) Act supra, in British Columbia by the Statute Law Amendment Act S.B.C. 1958, c. 52, s. 17 and in New Zealand by the Contracts Enforcement Act supra.

IV

CONCLUSION

> The Law Revision Committee recommended that these sections [4 and 17] should be repealed on the grounds that they had outlined the conditions which generated and, in some degree, justified them; that they operate in an illogical and often one-sided and haphazard fashion over a field arbitrarily chosen; and that on the whole they promote rather than restrain dishonesty . . . . We believe that this is a matter on which [the Commonwealth countries and the United States] might well be prepared to follow the lead of this country. (Law Reform Committee Report, pp. 3, 4)

APPENDIX 1

Provisions of the Statute of Frauds currently in force in other jurisdictions.

KEY: (1) special promise by an executor or administrator

(2) agreement made in consideration of marriage

(3) agreement not to be performed within the space of one year

(4) special promise to answer for the debt, default or miscarriage of another

(5) contract for the sale of land

(6) sale of goods of value over $X

* currently in force

x repealed or not in force

	1	2	3	4	5	6
Newfoundland	*	*	*	*	*	*
Nova Scotia	*	*	*	*	*	*
Prince Edward Island	x	x	x	*	?	*
New Brunswick	*	*	*	*	*	*
Ontario	*	*	*	*	*	*
Quebec	x	x	x	x	x	*
British Columbia	x	x	x	*	*	x
Saskatchewan	*	*	*	*	*	*
Manitoba	*	*	*	*	*	*
Alberta	*	*	*	*	*	*
United Kingdom	x	x	x	*	*	x
New Zealand	x	x	x	*	*	x
Western Australia	x	x	x	*	*	*

APPENDIX 2

Status of Statute of Frauds in Alberta

ss. 1 - 3	in force
s. 4	amended by Mercantile Law Amendment Act, 1856 (c. 97) s. 3
s. 5	repealed by Wills Act, R.S.A. 1970 c. 393 ss. 4, 5
s. 6	repealed by Wills Act, R.S.A. 1970 c. 393 ss. 16, 19
ss. 7 - 11	in force
s. 12	repealed by Wills Act, R.S.A. 1970 c. 393 s. 3(a)
ss. 13 - 15	in force
s. 16	amended by Statute of Frauds Amendment Act, 1828 (c. 14) s. 7 repeated by Sale of Goods Act, R.S.A. 1970 c. 327 s. 7
s. 17	in force
ss. 18 - 20	repealed by Wills Act, 1837 (c. 26) s. 2
s. 21	repealed by Wills Act, R.S.A. 1970 c. 393 ss. 16, 19
s. 22	repealed by Wills Act, R.S.A. 1970 c. 393 s. 6
ss. 23 - 24	not in force as not applicable

It will be noted that in Appendix 2 and Appendix 3, reference is made to only twnety-four sections of the Statute of Frauds. This follows the numbering found in Statutes of the Realm and followed by all the recent British statutes making reference to the Statute of Frauds. The earlier and now familiar twenty-five section designation, which has been used throughout the rest of this paper, was properly corrected by the Statutes of

the Realm, by combining sections thirteen and fourteen. The effect of this is to make section sixteen the predecessor of section seven of the Sale of Goods Act

APPENDIX 3

Status of Statute of Frauds in U. K.

ss. 1 - 3	repealed by Law of Property Act, 1925 (c. 20) s. 207 sch. 7
s. 4	amended by Mercantile Law Amendment Act, 1856 (c. 97), s. 3 Repealed in part by Law of Property Act, 1925 (c. 20, s. 207 sch. 7) and repeated in part by same act, s. 40. Repealed in part by Statute Law Revision Act, 1948 (c. 62), sch. 1 Repealed in part by Law Reform (Enforcement of Contracts) Act, 1954 (c. 34) s. 1.
ss. 5 - 6	Repealed by Wills Act, 1837 (c. 26) s. 2
ss. 7 - 9	Repealed by Law of Property Act, 1925 (c. 20) s. 207 sch. 7
s. 10	Repealed in part by Statute Law Revision and Civil Procedure Act, 1881 (c. 59) Repealed as to the rest by Administration of Estates Act, 1925, (c. 23) sch. 2
s. 11	Repealed by Administration of Estates Act, 1925 (c. 23) sch. 2.
s. 12	Amended by Statute of Frauds Amendment Act, 1741 (c. 20) Repealed by Wills Act, 1837 (c. 26), s. 2
ss. 13 - 14	Repealed by Civil Procedure Acts Repeal Act, 1879 (c. 59)
s. 15	Continued by Sale of Goods Act, 1893 (c. 71) s. 26
s. 16	Amended by Statute of Frauds Amendment Act, 1828 (c. 14) s. 7 Continued by Sale of Goods Act, 1893 (c. 71) s. 4 Repealed by Law Reform (Enforcement of Contracts) Act, 1954 (c. 34) ss. 1, 2

s. 17	Repealed by Statute Law Revision and Civil Procedure Act, 1881 (c. 59)
ss. 18 - 21	Repealed by Wills Act, 1837 (c. 26) s. 2
s. 22	Repealed by Administration of Estates Act, 1925 (c. 23) sch. 2 Repealed by Statute Law (Repeals) Act 1969 (c. 52)
s. 23	Repealed by Administration of Estates Act, 1925 (c. 23) sch. 2
s. 24	Repealed by Law of Property Act, 1925 (c. 20) sch. 7