THE STATUTE OF FRAUDS

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STATUTE OF FRAUDS

I
INTRODUCTION

The object of this study is to analyze the Statute of Frauds and related Acts which require certain legal undertakings to appear or to be evidenced in writing. The report begins with a discussion of the historical background of the Statute which sets out the reasons for its enactment. This is followed by an analysis of the requirement of writing in general. Finally, each of the undertakings required to be in writing is analyzed and recommendations are made.

II
HISTORICAL BACKGROUND

> 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.[1]

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 If these reasons are no longer valid and if present conditions no longer justify the statute, reform or repeal may be necessary.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

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[1]Law Revision Committee [of Greant Britain], Sixth Interim Report, Cmd. 5449, 1937, at 6, 7.

action could not be witnesses. Hence,[2]

> . . . 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.

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

A series of statutes between 1844 and 1854[3] 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:[4]

> 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

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[2]Lord Bowen, "Administration of Justice During the Victorian Period," Essays A.A.L.H. at 521, cited in Holdsworth, History of English Law, VI at 389.

[3]6-7 Victoria, c. 85; 14-15 Victoria, c. 99, s. 2; 16-17 Victoria, c. 83, ss. 1, 2.

[4]Marc A. Franklin, "Contracts: Statute of Frauds: Law Reform (Enforcement of Contracts) Act, 1954" (1954-1955) 40 Cornell L.Q., 581, 582.

> 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.

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"[5]

> 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:[6]

> 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.

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[5] At 431.

[6] 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.

This state of affairs was commented upon in Slade's Case:[7] "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.[8] For example c. 21 of 11 Henry VII (1495) began: "Where as pjuyre is much and custumably used within the Citie of London amonges such psons as passen and been empanelled 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 conditons 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 working and provisions of the Statute of Frauds:[9]

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[7] (1602) 4 Coke 95.

[8] 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.

[9] Willis, "The Statute of Frauds - A Legal Anachronism," (1928) 3 Ind. L.J. 427, 537.

> . . . [A]to 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.

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.'"[10] It would appear that the same is true of section 17.[11] As the conditions which fostered the enactment of the Statute of Frauds have passed, retention cannot be justified on the basis of the reasons for its original passage.

III

THE REQUIREMENT OF WRITING

A. Operation of the Statute

1. "No action shall be brought"

Judicial interpretation of the phrase "no action

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[10] Smith v. Surman (1829) 4 M. and R. 455, 465.

[11] See p. 83 below.

shall be brought" has varied over the years. In early cases such as Case v. Barber,[12] it seems to have been held that non-compliance with the statutory requirements rendered a contract unenforceable. Later cases, such as Carrington v. Roots,[13] held that contracts were rendered void. However, on the authority of Leroux v. Brown[14] and Maddison v. Alderson,[15] it is now firmly established that contracts are rendered merely unenforceable. It is also established[16] that compliance with the statute is not a substitute for consideration.

The fact that a contract is unenforceable and not void has a number of implications. Firstly, the contract may be used in defence in an action.[17] Secondly, the plaintiff's rights may be perfected if a sufficient memorandum comes into existence subsequent to the formation of the contract.[18] Thirdly, it has been held[19] that a contract rendered unenforceable by the statute is sufficient consideration to support a negotiable instrument. If the contract were void, the instrument would be invalid as between immediate parties, but not as against a holder for value.[20] Fourthly, money paid by

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[12] (1681) Raym Sir T. 450 (K.B.).

[13] (1837) 2 M & W. 249 (Exch.)

[14] (1852) 12 C.B. 801 (Common Pleas).

[15] (1883) 8 App. Cas. 467.

[16] Rand v. Hughes (1778) 7 T.R. 350; Eastwood v. Kenyon (1840) 11 Ad. & E. 438 (Q.B.).

[17] Miles v. New Zealand Alford Estate (1886) 32 Ch.D. 226.

[18] See pp. 8, 9, below.

[19] Jones v. Jones (1840) 6 M. & W. 84 (Exch.)

[20] 3 Halsbury's Laws of England 177 3d ed., 1953).

the purchaser under the contract may be forfeited if he defaults.[20a]

The law remains unsettled as to whether the discharge of one's obligations under an unenforceable contract is sufficient consideration for another contract. The earlier cases held that it was not,[21] but Williams[22] feels, on the basis of In Re Davies,[23] that such would now be considered sufficient consideration.

The fact that contracts are rendered unenforceable and not void may mean that the Statute relates to procedural and not substantive law. For example, Jervis C. J. stated in Leroux v. Brown:[24] "I am of opinion that the fourth section applies not to the solemnities of the contract, but to the procedure . . . ." This is a controversial issue and will not be discussed at length here. However, one might consider the importance of this issue with regard to conflict of laws and retroactivity.

The Law Revision Committee considered one of the consequences flowing from the fact that contracts are rendered unenforceable and not void as a criticism of the provisions of the Act:[25]

[20a] Monnickendam v. Leanse (1923) 39 T.L.R. 445.

[21] Walker v. Constable (1798) 1 Bos. and Pul. 307 (Common Pleas), Warden v. Jones (1857) 2 De G. & J. 76 (Ch.D.), Trowell v. Shanton (1878) 8 Ch.D. 318.

[22] Williams, Statute of Frauds Section IV, 203-211.

[23] [1921] 3 K.B. 628.

[24] (1852) 12 C.B. 801 (Common Pleas).

[25] Law Revision Committee Report, at 7,8.

> 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[26] 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

The word "action" was recently considered in the case of Re Solmon:[27]

> . . . action as used in the statute is not merely confined to the issue of a writ, but is sufficiently broad to cover any proceedings whereby it is sought to enforce a claim.

2. "Note or Memorandum"

The Statute of Frauds does not require that the contracts be in writing; it requires only a "note or memorandum thereof," whcih serves an evidentiary function. It is therefore not necessary that the writing be contemporaneous with the making of the contract. However, because "no action shall be brought" without the existence of a note or memorandum, it has been held that the writing must be in existence prior to the commencement of the action.[28] This has been amended so that it is now sufficient if the note or memorandum is in existence at the time when the party relying on it is joined

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[26] [1918] 1 A.C. 1.

[27] (1974) 19 C.B.R. (N.S.) 165, 168, Per Ferron, Registrar (Ont. S. Ct. in Bankruptcy).

[28] Lucas v. Dixon (1889) 22 Q.B.D. 357 (C.A.).

to the action.[29]

It was held as early as 1683 in Moore v. Hart[30] that a writing need not be in any particular form to satisfy the Statute. However, a plaintiff will not be able to rely on the pleadings of the defendant in an action,[31] and this would seem to be supported on the basis that the memorandum must be in existence before the commencement of the action. A case apparently to the contrary of this proposition was Grindell v. Bass[32] in which G. sued B. for specific performance of a contract to sell a house. In defence, B. stated in writing that he had already contracted to sell the house to E. G. added E. as a defendant and E. counterclaimed for a declaration that he was entitled to the house, successfully relying on B's defence. In this case, the issue of the timing of the memorandum was not discussed. It was, in fact, consistent with the principle established in Farr, Smith and Company v. Messers Limited,[33] although it was decided eight years earlier.

It is commonly agreed that it is not necessary for a note or memorandum to be written with the intention of satisfying the Statute.[34] Hence, a letter in which the

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[29] Farr, Smith & Co. v. Messers Ltd. [1928] 1 K.B. 397.

[30] I Vern. III, 201 (Ch.).

[31] Jackson v. Oglander (1865) 2 H. & M. 465 (V.Ch.).

[32] [1920] All E. R. Rep. 219.

[33] [1928] 1 K.B. 397.

[34] Williams, Statute of Frauds Section IV, 79; Anson, Law of Contract, 74 (23rd Ed., 1969); 8 Halsbury's Laws of England 95 (3rd Ed., 1954); 5 C.E.D. (Western) 100 (2nd Ed., 1958).

defendant admits to the terms of the contract but denies liability will be sufficient.[35] However, a letter showing that there is a dispute between the parties as to the terms of the contract[36] or a letter denying the existence of the contract[37] will not be sufficient.

The question of what a sufficient memorandum must contain has been fruitful for litigation. Williams, in his book The Statute of Frauds Section IV, states:[38] " . . . to satisfy the Statute the memorandum must set fort 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. "He relies upon a number of cases, including Pierce v. Corf,[39] and finds support from Fry, Specific Performance of Contracts.[40] However, a less strict standard is stated in Cheshire and Fifoot's Law of Contract:[41] "A 'note of memorandum' of [the contract] is sufficient provided it contains all the material in terms of the contract." (emphasis added) Similar propositions are set out in Anson's Law of Contract,[42]

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[35] Thirkell v. Cambi [1919] 2 K.B. 590.

[36] Archer v. Baynes (1850) 5 Exch. 625.

[37] In Bailey v. Sweeting (1861) 9 C.B.N.S. 843, 857 Erle C. J. stated, before finding a memorandum which satisfied the Statute: "I do not consider that the defendant intended to deny his liability by reason of the absence or insufficiency of the contract."

[38] At 55.

[39] (1874) L.R. 9 Q.B. 210.

[40] (6th Ed., 1921) at 242, 243.

[41] (8th Ed., 1972) at 185.

[42] (23rd Ed., 1969) at 75.

Halsbury's Laws of England[43] and the C.E.D. (Western).[44, 44a]

The less strict standard has found support in the Canadian courts. In McKenzie v. Walsh,[45] Sir Louis Davies C.J.C. said 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 thus 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.

This standard raises the issue of what constitutes the "essential terms" in any particular contract. According to Disbury J. in Chapman v. Kopitoski:[46] "Parties, property and price by their very nature are material parts of every contract but, dependent upon the circumstances, there may be other essential terms of a contract in addition to parties, price and property."[47, 47(a)]

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[43] Volume 8 (3rd Ed., 1954) at 100.

[44] Volume 5 (2nd Ed., 1958) at 103, 104.

[44a] By the recent cases of Tiverton Estates Ltd. v. Wearwell Ltd. [1974] 1 All E.R. 209 (C.A.) and Tweddell v. Henderson [1975] 2 All E.R. 1096 (Ch.), it appears that the memorandum must also contain an acknowledgement or recognition by the signatory to the document that a contract has been entered into.

[45] (1921) 61 S.C.R. 312.

[46] [1972] 6 W.W.R. 525.

[47] It should be noted, however, that the Mercantile Law Amendment Act (1856) 19 & 20 Victoria, c. 97, s. 3 provides that the consideration for a contract of guarantee need not appear in writing.

[47a] In the case of Tweddell v. Henderson [1975] 2 All E.R. 1096, it was held at the Chancery Division level that the payment of the purchase price in stages was a material term of the contract for the purpose of a sufficient memorandum.

Even if there were agreement as to what terms are required for a sufficient note or memorandum, a number of complicating factors arise. One is that any material term which is omitted and of benefit solely for the plaintiff may be waived by him.[48] This does not apply, however, if it is of benefit to the defendant[49] or to both the plaintiff and the defendant.[50]

A second complicating factor is that it is sufficient if a term is disclosed by reasonable interference.[51] As stated in Fitzmaurice v. Bailey:[52]

> Whether in any particular case a term can be collected by reasonable inference is often a question of very considerable difficulty. It is not enough that the memorandum is consistent with the existence of the term sought to be inferred; or that it is probable that the parties intended to include such a term in their contract. There must be reasonable certainty both as to the fact of the term and as to its contents.

A third complicating factor is that of the admissibility of parol evidence. "This evidence must be confined to explanation: so soon as it passes from explaining the memorandum to adding new terms or varying those already written it becomes inadmissible."[53] Anson demonstrates the anomalous ways in which this operates with a number of cases.[54] In Rossiter v. Miller[55] parol evidence was admissible to

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[48] North v. Loomes [1919] 1 Ch. 378.

[49] Burgess v. Cox [1941] Ch. 383.

[50] Hawkins v. Price [1937] Ch. 645. See Williams at 58.

[51] Caddick v. Skidmore (1857) 2 De G. & J. 51 (Ch.).

[52] (1860) 9 H.L.C. 79, 93.

[53] Williams at 59.

[54] At 74, 75.

[55] (1878) 3 App. Cas. 1124.

identify the "proprietors" while in Potter v. Duffield,[56] parol evidence was not admissible to identify the "vendor." In Plant v. Bourne[57] parol evidence was admissible to identify the land described as "twenty-four acres of land, freehold, and all appurtences thereto at Totmonslow, in the parish of Draycott, in the county of Stafford;" while in Caddick v. Skidmore,[58] it was held that a receipt for money paid to a party "on account of his share in the Tividale mine" could not be explained by parol evidence.

3. "Signed by the party to be charged therewith or some other person thereunto by him lawfully authorized"

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, the courts have given a very liberal interpretation to the word as it applies to the Statute of Frauds. In the first place, it need be found at the foot of the writing so long as it appears to have been written with a view to governing the whole instrument.[59] In the second place, the "authenticated signature fiction" doctrine has extended the meaning of "signature" by providing that if a writing contains the name or initials of a party, it will be held to comply with the statute if the party to be charged has recognized that the writing expresses the contract.[60]

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[56](1874) L.R. 18 Eq. 4.

[57][1897] 2 Ch. 281.

[58](1857) 2 De G. & J. 51 (Ch.).

[59]Caton v. Caton (1867) L.R. 2 H.L. 127.

[60]Stokes v. Moore (1786) 1 Cox, Eq. Cas. 219, Schneider v. Norris (1814) 2 M. & S. 286, Evans v. Hoare [1892] 1 Q.B. 593.

Similarly, if the document has been altered or completed after a party has signed his name to it and he recognizes this alteration or completion, the signature may be held to be sufficient.[61]

The statute provides that it is sufficient if the note or memorandum is signed by the agent of the party to be charged. The cases have held that the authority to act as agent need not appear in writing,[62] and that the agent need not be authorized to sign for the express purpose of satisfying the statute.[63] He may sign his own name[64] or the name of his principal.[65] A third party may be the agent for both the plaintiff and the defendant,[66] but the plaintiff cannot be the agent for the defendant.[67] In the case of Wallace v. Roe,[68] it was held that the signature of an agent may be sufficient even if he signs the memorandum in the capacity of a witness.

The doctrine of authenticated signature fiction applies to signatures of agents as well as to those of principals. In

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[61] Koenigsblatt v. Sweet [1923] 2 Ch. 314.

[62] Coles v. Trecothick (1804) 9 Ves. Jun. 234 (Ch.).

[63] Daniels v. Trefusis [1914] 1 Ch. 788.

[64] Sievewright v. Archibald (1851) 17 Q.B. 103.

[65] Graham v. Musson (1839) 5 Bing. (N.C.) 603.

[66] Sievewright v. Archibald (1851) 17 Q.B. 103.

[67] Sharman v. Brandt (1871) L.R. 6 Q.B. 720.

[68] [1903] 1 I.R. 32.

the case of Leeman v. Stocks,[69] the defendant was selling land by public auction. Before the sale, the auctioneer placed the defendant's initials on a form and after the sale he completed the form with the plaintiff's name, the description of the property and the sale price. Later, the auctioneer told the defendant of the document, but did not show it to him. The defendant did not express dissatisfaction. It was held that the auctioneer was the agent of the defendant and that the document was "signed" so as to constitute a sufficient memorandum.

4. Joinder of Documents

In order to have a sufficient memorandum, it is not required that the writing appear in only one document. This is probably a departure from the original spirit of the statute, but it has been used by the courts as a means of avoiding the statute's provisions. A distinction should be drawn 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 it is necessary that the two be connected in some way and that the authenticating influence of the signature extend to the unsigned document. It has generally been held that the signed document must come into existence in point of time after the unsigned document,[70] although it is now sufficient if the documents come into being more or less contemporaneously, regardless of the order.[71]

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[69] [1951] 1 Ch. 941.

[70] Turney v. Hartley (1848) 3 New Pract. Cas. 96.

[71] Timmins v. Moreland Street Property Co. [1957] 3 All E.R. 265.

Originally, it was required that there be an express reference from one document to the other for a sufficient connection to exist.[72] By 1852 it was held to be sufficient if the reference could be inferred[73] and five years later it was decided in Ridgway v. Wharton[74] that the reference need not show the other to be a writing. In that case, the document referred to "instructions", which could have been oral or written.

Perhaps the key case of the nineteenth century was Long v. Millar.[75] It established both a strict and a liberal test for the connection of documents. What has been known as the "side by side" test was set down by Bramwell L.J.:[76]

> . . . 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 Oliver v. Hunting[77] where Kekewich J. stated: "Whenever parol evidence is required to connect two written documents together then that parol evidence is admissible."

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[72] Dobell v. Hutchinson (1835) 3 Ad. & El. 335, Smith v. Dixon (1839) 3 Jur. 770.

[73] Morgan v. Holford (1852) 1 Sm. & G. 101.

[74] (1857) 6 H.L. Cas. 238.

[75] (1879) 4 C.P.D. 450, (C.A.).

[76] At 454.

[77] (1890) 44 Ch. D. 205.

On the other hand, Baggallay L.J. set up a stricter test in Long v. Millar:[78]

> 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. Whicher:[79]

> . . .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.

Hence, by the strict view in Long v. Millar it is necessary that there be some reference, express or implied, to the other document. By the liberal view, it is sufficient if the relationship between the documents can be seen by placing them side by side.

The position was reconsidered in the case of Timmins v. Moreland Street Property Co.[80] and Jenkins L.J. reaffirmed the strict position:

> . . . I think it is still indispensably necessary, in order to justify the reading

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[78](1879) 4 C.P.D. 450, 454. See Williams, Statute of Frauds, section IV, 134.

[79][1920] 1 Ch. 411.

[80][1957] 3 Au E.R. 265.

> of documents together for this purpose, that there should be a document signed by the party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction.
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> . . .[B]efore a document by the party to be charged can be laid alongside another document to see if between them they constitute a sufficient memorandum, there must, I conceive, be found in the document signed by the party to be charged some reference to some other document or transaction.

However, Romer L.J. did not discount the possibility that the "side by side" position might still be valid and Sellers L.J. did not discuss either position. It would therefore seem that the law on this issue remains unsettled.

If a plaintiff attempts to join two signed documents, it is not necessary that the signature on one document authenticate the other. It is therefore reasonable that the law should be more lenient as to the requirement of a connecting factor. According to Williams in his book The Statute of Frauds Section IV:[81]

> 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,[82] Verlander v. Codd[83] and

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[81] At 142.

[82] (1810) 3 Taunt. 167.

[83] (1823) Turn. & R. 352.

Studds v. Watson[84] but admits that Potter v. Peters[85] is to the contrary.

B. Means of Avoiding the Provisions of the Statute

1. Part Performance

The doctrine of part performance as a means of avoiding the provisions of the Statute is almost as old as the Statute itself. The earliest reported case was Butcher v. Stapely.[86] However, it was established in its modern sense by the case of Maddison v. Alderson.[87]

About certain of the requirements for part performance there is general agreement. The act must have been done by the party asserting the contract[88] with the knowledge of the other party[89] in pursuance of the terms of the contract.[90] It will not apply if its application affects the property or interests of a third party who is ignorant of the acts of part performance.[91]

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[84](1884) 28 Ch.D. 305.

[85](1895) 64 L.J. Ch. 357.

[86](1686) 1 Vern. 363.

[87](1883) 8 App. Cas. 467.

[88]Caton v. Caton (1867) L.R. 2 H.L. 127.

[89]McInnes v. McKenzie (1913) 23 W.W.R. 863.

[90]Cooke v. Tombs (1794) 2 Anst. 420, Thynne v. Glengall (1848) 2 H.L. Cas. 131.

[91]Trotman v. Flesher (1861) 3 Giff. 1.

However, there is considerable controvery over the nature of the act required for part performance. The classic quotation is that of Lord Selbourne L.C. in Maddison v. Alderson:[92] "All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged." Subsequent cases have fallen into two general categories, which might be called the broad and narrow views.

The narrow interpretation of the doctrine of part performance views it as serving an evidentiary function. As is stated in Fry's Specific Performance of Contracts:[93] ". . . there must be proper parol evidence of the contract which is let in by the acts of part performance." (emphasis added). The effect of such a view was stated by Lord Simon of Glaisdale in Steadman v. Steadman:[94] "If the contract alleged is such that it ought not to depend on oral testimoney, it is this contract, not merely some contract, that the acts should prove."

The first requirement under this view of the law is that the acts must be referable to a dealing with the land in question. As stated by Cartwright J. in Deglman v. Guaranty Trust of Canada & Constantineau:[95]

> . . . 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

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[92](1883) 8 App. Cas. 467, 479.

[93](6th ed., 1921) § 580.

[94][1974] 3 W.L.R. 56, 80 (H.L.).

[95][1954] 3 D.L.R. (3d) 785, 793 (S.C.C.).

> 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.

The second requirement under this view of the law is that the acts must be referable to the particular contract in question, not merely a contract. This proposition, was assumed by McDonald J. in Toombs v. Mueller[96] to be accepted in Alberta, relying upon the cases of Erb v. Wilson,[97] McGillivray v. Shaw[98] and Brownscombe v. Public Trustee of Province of Alberta.[99]

The broad interpretation is perhaps best represented by Steadman v. Steadman,[100] a decision of the House of Lords. In that case, the parties, who were husband and wife, entered into a contract whereby the plaintiff husband would pay £100

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[96](1974) 47 D.L.R. (3d) 709 (S.C.A.T.D.). This decision was reversed on appeal without reasons ([1975] 3 W.W.R. 96 (S.C.A.A.D.)). At trial, the acts done by the plaintiff were found to be sufficient to constitute part performance, but specific performance was refused on the basis that the plaintiff had not shown he was ready and willing to carry out his obligations. On appeal, specific performance was granted, so the court must have found part performance. It is unclear, however, whether the Appellate Court approved of McDonald J.'s reasons.

[97](1969) 69 W.W.R. 126 (Sask. Q.B.).

[98](1963) 39 D.L.R. (2d) 660 (S.C.A.A.D.).

[99][1969] S.C.R. 658.

[100][1974] 3 W.L.R. 56 (H.L.).

in respect of arrears of maintenance and a sum of £1500 in consideration of the defendant wife conveying her interest in the house. The parties announced their agreement to the magistrates hearing a matter with regard to the maintenance order, the husband paid the £100 and the husband's solicitors sent the transfer deeds to the wife. These acts were found to constitute part performance.

This interpretation views the doctrine of part performance as based on equities arising from the acts rather than on evidence. Hence, Viscount Dilhorne in Steadman v. Steadman[101] stated in reference to the quotation from Fry's Specific Performance:

> I think that . . . the use of the words 'let in' was a little unfortunate for it lends some support to the argument . . . that acts of part performance are the key which opens the door to the contract. I do not think that is so. They are the key to rendering the contract unenforceable.

The effect of this view was stated by Lord Simon:[102] "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. . . ." The test to be used was first set out in Fry's Specific Performance,[103] approved in Kingswood Estate Co. Ltd. v. Anderson,[104] and

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[101] Id. at 74.

[102] Id. at 80.

[103] It should be noted that there is support in Fry's for both the narrow and the broad interpretations.

[104] [1963] 2 Q.B. 169 (C.A.).

settled in Steadman v. Steadman.[105] It is that the acts must be referable to some contract and that they must be consistent with the contract alleged. Lord Reid and Viscount Dilhorne in the Steadman case went so far as to state that the acts need not even refer to a contract concerning land. In addition, all the judges with the exception of Lord Morris of Borth-y-Gest stated that the mere payment of purchase money could be a sufficient act to constitute part performance. If this is sufficient to raise equities in favour of the plaintiff so as to avoid the Statute, the impact of the Statute has been greatly reduced.

A second area of controversy is that of the standard of proof required to be met before part performance comes into operation. The conflict exists even within the case of Maddison v. Alderson.[106] According to Lord O'Hagan, the acts "must necessarily imply the existence of the contract."[107] However, according to Lord Selborne: "So long as the connection of those res gestae with the alleged contract does not depend upon mere parol testimony but is reasonably to be inferred from the res gestae themselves, justice seems to require some such limitations of the scope of the statute. . . ."[108] The former standard was accepted by McDonald J. in Toombs v. Mueller[109] and the latter by Lord Simon in Steadman v. Steadman:[110] ". . .

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[105] [1974] 3 W.L.R. 56.

[106] (1883) 8 App. Cas. 467.

[107] At 483. Emphasis added.

[108] At 476. Emphasis Added.

[109] (1974) 47 D.L.R. (3d) 709, 710.

[110] [1974] 3 W.L.R. 56, 82.

It is sufficient if it be shown that it was more likely than not that those acts were in performance of some contract to which the defendant was a party."

A third area of controversy involves the question of the types of contracts to which part performance applies. The most restrictive position is that it applies only to contracts involving the sale of interests in land and the authority cited is Britain v. Rossiter.[111] In his book The Statute of Frauds Section IV: James Williams concluded that at best Britain v. Rossiter was weak authority and that subsequent cases had overruled it. However, in Steadman v. Steadman, Lord Morris suggested a revival of this position by stating: ". . . the whole area of the law of part performance relates to contracts 'for the sale or other disposition of land or any interest in land'. . . ."[112]

The more commonly accepted position, that established in McManus v. Cooke,[113] is that the doctrine of part performance "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,[114] this would exclude, inter alia, contracts requiring the continued supervision of the courts, contracts for personal work or service and contracts lacking mutuality.

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[111](1879) 11 Q.B.D. 123.

[112][1974] 3 W.L.R. 56, 66, in dissent.

[113](1887) 35 Ch. D. 681, 697.

[114]36 Halsbury's Laws of England 267-271 (3rd ed., 1961).

An even wider position is that set down by Fry's Specific Performance.[115] The authors there felt that the law as stated in McManus v. Cooke would be more accurate if it read that part performance "applies to all cases in which a Court of Equity would entertain a suit if the alleged contract had been in writing." However, outside of Fry, there would seem to be very little support for this proposition.

A fourth area of controversy relates to the question of whether the doctrine of part performance applies to support an action for damages when specific performance is not available.[116] The more traditional position, based on Lavery v. Pursell[117] is that it is not. Part performance arose as a doctrine of equity. By the Chancery Amendment Act (Lord Cairns' Act),[118] 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

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[115] (6th ed., 1921) at 283.

[116] See MacIntyre, "Equity-Damages in Place of Specific Performance--More Confusion about Fusion" (1969) 47 C.B.R. 644; Barber, "The Operation of the Doctrine of Part Performance, in Particular to Action for Damages" (1973) 8 U. of Queensland L.J. 79.

[117] (1880) 39 Ch. D. 508, 519.

[118] (1858) 21-22 Vict., c. 27, s. 2.

> injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

Hence, the Courts of Equity could grant damages only when specific performance was available. The Judicature Act gave the Supreme Courts jurisdiction to sit as Courts of Common Law and of Equity but did not affect substantive rights. As the availability of specific performance was a prerequisite to the granting of damages before the passing of the Judicature Act, it remained a prerequisite after its enactment. This position is supported by Snell,[119] Hanbury,[120] Fry,[121] and Halsbury.[122]

However, a series of Canadian cases have taken a contrary position. Dobson v. Winton & Robbins Ltd.[123] concerned an action for specific performance and damages on the basis of an enforceable contract. Although not dealing with part performance, it undermined the position taken in Lavery v. Pursell:[124]

> The prerequisite in the Court of Chancery to the exercise of jurisdication 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

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[119] Principles of Equity 653 (26th ed., 1966).

[120] Modern Equity 561 (8th ed., 1962).

[121] Specific Performance 283 (6th ed., 1921).

[122] 36 Laws of England 351 (3rd ed., 1961).

[123] (1960) 20 D.L.R. (2d) 164 (S.C.C.).

[124] Id. at 166.

> 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. . . .

In the recent Supreme Court of Canada decision of Brownscombe v. Public Trustee of Alberta,[125] a case involving part performance, the plaintiff was awarded damages despite the fact that specific performance was impossible.

The former position has produced some anomalous results. In the case of Ellul & Ellul v. Oakes,[126] the plaintiff agreed to purchase a house from the defendant with the warranty that it was connected to a sewer. The house was transferred and the purchase price paid, but in fact the house was served only by a septic tank. The court found a sufficient memorandum in writing to allow the action for damages. However, one might consider the result if a sufficient memorandum had not been found. If the vendor had not transferred the house, the purchaser might have been entitled to specific performance combined with a reduction in the purchase price or compensation for the breach of warranty. However, as the vendor had already transferred the house, specific performance would not have been possible and no relief on the basis of breach of warranty could have been available.

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[125] [1969] S.C.R. 658.

[126] [1972] 3 S.A.S.R. 377. See the further discussion of this case at p. 30, below.

It is submitted that the law relating to part performance is in an unsatisfactory state. The case of Steadman v. Steadman[127] appears to have extended the nature of the acts sufficient to meet the requirements of the doctrine. However, the decision of the Appellate Division in Toombs v. Mueller[128] leaves the position in Alberta unsettled. In addition, the doctrine applies only to certain types of contracts and allows only certain types of relief, thereby allowing only the uneven application of just results.

2. Full performance

Whether the Statute applies when the plaintiff has completely performed his part of the contract is a thorny issue. In Cocking v. Ward[129] Tindal C.J. said:

> . . . the case appears to us to fall within the principle adverted to by Le Blanc J. in Griffith v. Young[130]: and further we think the case of Buttemere v. Hayes[131] is an authority in point that the present contract, though executed on the part of the plaintiff, yet, not being executed on the part of the defendant also, is still to be considered as a contract within the Statute of Frauds.

This was supported by Amphlett B. in Sanderson v.

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[127] [1974] 3 W.L.R. 56.

[128] [1975] 3 W.W.R. 96.

[129] (1845) 1 C.B. 858, 868.

[130] (1810) 12 East. 513.

[131] (1839) 5 M. & W. 456.

Graves:[132]

> The plaintiff also contended that the Statute of Frauds did not apply to executed contracts, although executed on one side only, and there are some old dicta, and even decisions, that appear to bear out that view, and had it been sustained, Courts of law would have certainly made a long stride towards the adoption of the equitable doctrine of part performance. I think, however, that in the face of more modern decisions, such as Cocking v. Ward and others, the older authorities on this point must be considered as overruled.

However, two more recent Canadian cases have taken the opposite view of the law. In Kinsey v. National Trust,[133] Dubac C.J. relied upon Ridley v. Ridley[134] and Coles v. Pilkington[135] in concluding that full performance by the plaintiff takes the case out of the statute. This was followed by the Manitoba King's Bench in Spencer v. Spencer,[136] which relied in addition on Halleran v. Moon.[137] There is not sufficient authority on this topic to suggest that a trend is developing in favour of the view that full performance by the plaintiff takes the case out of the Statute, and the issue remains unsettled.

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[132](1875) L.R. 10 Ex. 234.

[133](1904) 15 Man. L.R. 32 (Man. K.B.).

[134](1865) 34 Beav. 478.

[135](1874) L.R. 19 Eq. 174. In fact, this case seems to deal with part performance and not full performance by one party.

[136](1913) 4 W.W.R. 785.

[137](1881) 28 Gr. 319.

Whether the Statute applies when there has been full performance by both parties is an issue which seldom arises. In the United States the position is clearly that such a situation is outside the provisions of the Statute,[138] and if Kinsey v. National Trust[139] properly expresses the law, it would be outside the Statute in Alberta as well. However, the recent case of Ellul & Ellul v. Oakes[140] suggests that even full performance by both parties may not be sufficient to take the case out of the Statute. The court there found it necessary to find a sufficient memorandum signed by the defendant in order to allow an action for damages for breach of warranty on the contract. The result is that this area of the law remains unsettled as well.

3. The Statute of Frauds Cannot be Used an as Instrument of Fraud--Contracts

It is well settled that the Statute of Frauds cannot be used as an instrument of fraud.[141] However, it is also well established that a mere refusal to sign a memorandum by one of the parties to the contract does not amount to fraud. As was stated in Maxwell v. Mountacute:[142]

> Where . . . the parties come to an agreement but the same is never reduced into

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[138] Page, 2 Contracts § 1363 (2nd ed., 1920).

[139] (1904) 15 Man. L.R. 32.

[140] (1972) 3 S.A.S.R. 377 (South Australia Supreme Court).

[141] Halfpenny v. Ballet (1699) 2 Vern. 373.

[142] (1719) Prec. Ch. 526.

> writing nor any proposal made for that purpose, so that they rely wholly on their parol agreement, that unless this be executed in part, neither party can compel the other to a specific performance, for that the Statute of Frauds is directly in their way.

A similar proposition was set out in Wood v. Midgley.[143] What is required to take the contract out of the Statute is something more active:[144]

> . . . if there were any agreement for reducing the same into writing and that is prevented by the fraud and practice of the other party, . . . this court will in such case give relief. . . .

Originally, an admission of the contract by the party to be charged was a bar to the use of the Statute as a defence. This is shown by a series of cases beginning in 1702 with Croyston v. Baynes[145] and ending in 1789 with Whitchurch v. Bevis.[146] However, at the end of the eighteenth century, the position was reversed by reason of the fear that the defendants would perjure themselves by denying the contract in order to rely on the Statute.[147]

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[143](1854) 5 De G.M. & G. 41.

[144]Maxwell v. Mountacute (1719) Prec. Ch. 526.

[145]Prec. Ch. 208.

[146]2 Beo. C.C. 559.

[147]Rondeau v. Wyatt (1792) 2 H. Blk. 63, Moore v. Edwards (1798) 4 Ves. 23, Cooth v. Jackson (1801) 6 Ves. 12, Blagden v. Bradbear (1806) 12 Ves. 466, Rowe v. Teed (1808) 15 Ves. 375. See Stevens, "Ethics and the Statute of Frauds", (1952) 37 Cornell L.Q. 355.

A possible extension of the use of fraud as a means of avoiding the Statute was suggested in an obiter dictum by Stamp J. in Wakeham v. MacKenzie.[148] In that case, part performance was found, but the judge went on to say that even in the absence of part performance ". . . in my view it would have been fraudulent of Mr. Ball [the deceased defendant] immediately before his death to have repudiated the bargain for want of writing."[149] He then mentioned Maxwell v. Montacute[150] but left the question of whether the Statute was applicable unanswered. However, the mere suggestion that it would be a fraud for the defendant to refuse to sign a memorandum and to plead the Statute is a radical departure from the traditional position.

4. Quasi-Contract

If the plaintiff in an action is unsuccessful in pleading part performance or fraud, he may be able to recover money from the defendant on the basis of quasi-contract. The right to recover on this basis does not arise through agreement between the parties, but by operation of law so that the Statute of Frauds may be avoided.

The first head of quasi-contract upon which the plaintiff might be successful is that of money paid to the defendant's use. For example, in Meek v. Gass,[151] the parties

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[148] [1968] 2 All E.R. 783 (Ch.D.).

[149] At 788.

[150] (1719) Prec. Ch. 526.

[151] (1877) 2 R. & C. 243 (N.S.S.Ct.)

entered into a contract which was not to be performed within one year. The plaintiff paid the defendant some $200, but the defendant failed to perform his obligation and raised the Statute of Frauds in defence. In delivering the judgment of the court, Smith J. said:[152]

> . . . while no action can be sustained on the agreement itself, in the face of the words of the Statute . . . yet, if the consideration be paid, within the year or not, and the party who has received such payment or consideration repudiates the contract, and sets up the statute, a recovery back of the money under the common courts may be had.

A second head of quasi-contract relevant to the Statute of Frauds is that of money had and received. For example, in Griffith v. Young,[153] the defendant tenant entered into a contract with the plaintiff landlady on the basis that if she would accept another person as a tenant, he would pay her £40 of the £100 goodwill he would receive from the new tenant. The landlady granted her acceptance, the defendant received the £100 but refused to pay the plaintiff. The court granted judgment to the plaintiff for £40 despite the absence of a written memorandum.

A third head of quasi-contract is that of account stated. To succeed, the plaintiff must be able to show that he has executed his part of the contract and that the defendant has admitted that he owes the plaintiff money on the contract. An example of this is the case of Cocking v.

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[152] At 247, 248.

[153] (1810) 12 East 513.

Ward[154] the headnote to which reads:

> . . . an agreement respecting the transfer of an interest in land, required by the statute of frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected and nothing remains to be done but to pay the consideration: but . . . when, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered in a count upon an account stated.

The fourth head of quasi-contract available in this area is that of quantum merit. The leading case on this subject in Canada is Deglman v. Guaranty Trust Co. of Canada & Constantineau.[155] In that case, the plaintiff was to perform certain personal services for the defendant and the defendant was to devise certain land to the plaintiff. There was no memorandum of the contract and the court was unable to find that the acts of the plaintiff were sufficient to support part performance. However, the plaintiff was awarded damages on a quantum merit basis. In the words of Rand J.:

> The Statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff.[156]

Cartwright J. made it clear that the judgment was not based

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[154](1845) 1 C.B. 858.

[155][1954] 3 D.L.R. 785 (S.C.C.)

[156]At 788.

upon the contract:[157]

> . . . 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.

These heads of quasi-contract go a long way towards relieving the harshness of the Statute of Frauds. However, they do not have the effect of enforcing the contract as do the doctrines of part performance and the Statute as an instrument of fraud. If the plaintiff has paid the purchase price for land which has risen in value since the formation of the contract and the Statute applies, he may only be able to get his money back under the head of quasi-contract.

C. Problems with the Statute

1. The Act 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

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[157] At 795.

> 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.[158]

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. 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:[159]

> 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; 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, so that a defendant cannot

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[158] English Law Revision Committee Report, 7.

[159] (1851) 17 Q.B. 103.

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,[160]

> . . . the object of all rules of evidence ought to be the discovery of the truth, and accordingly since the days of Bentham, every artificial rule of evidence, every rule which professes to aid the discovery of 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.

2. Flood of Cases

> 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

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[160] Stephen & Pollock, "Section Seventeen of the Statute of Frauds", (1885) 1 L.Q.R. 1, 7.

> subject of so much litigation.' This could hardly have been so if its terms had been reasonably lucid.[161]

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."[162]

3. 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 these disadvantages.

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[161] English Law Revision Committee Report, 8.

[162] Willis, "The Statute of Frauds - A Legal Anachronism", (1928) 3 Indiana L.J. 427, 539.

IV

ANALYSIS AND PROPOSED REFORMS - CONTRACTS

A. In General

> 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. [163]

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",[164]

> 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 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.

Sections 4 and 16 may, at least in part, have been a

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[163] English Law Revision Committee Report, 7.

[164] (1947) 63 L.Q.R. 174, 184.

mere codification of the existing law.[164a] 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.

B. To Charge any Executor or Administrator upon any Special Promise to Answer Damages out of his own Estate

This provision applies both to liquidated and unliquidated damages,[165] but does not apply to a promise made before the promisor has become the administrator.[166] Despite the Mercantile Law Amendment Act[167] which provides that the consideration need not appear in writing for a promise "to answer for the debt, default or miscarriage of another person," the consideration for a promise such as this must still appear in writing.[168]

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

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[164a] "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. As to s. 16, see pp. 82, 83 below.

[165] Williams, Statute of Frauds Section IV, 4.

[166] Tomlinson v. Gill (1756) Amb. 330.

[167] (1856) 19 & 20 Vict., c. 97, s. 3.

[168] Chitty on Contracts 726 (20th ed., 1947).

this nature are very rare. Repeal would seem to make little practical difference and would simply remove an anachronism from the statute books. The equivalent provisions were repealed in British Columbia by the Statute of Frauds,[169] in Great Britain by the Law Reform (Enforcement of Contracts) Act,[170] in New Zealand by the Contracts Enforcement Act[171] and in Western Australia by the Law Reform (Statute of Frauds) Act.[172] Similar action is recommended for Alberta.

C. 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.[173] However, later judicial interpretations excluded this meaning from the Statute[174] 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 the requirement of writing served both an evidentiary and a cautionary function. However, "as a result of judicial legislation or

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[169] S.B.C. 1958, c. 18, s. 7.

[170] (1954) 2 & 3 Eliz. II, c. 34, s. 1.

[171] 1956 #23, s. 2.

[172] 1962 #16, s. 2.

[173] Philpot v. Wallet (1682) 3 Lev. 65.

[174] Harrison v. Cage (1698) Carth. 467, Cork v. Baker (1717) 1 Strange 34.

this clause of the Statute there is very little left of it, and what little is left is accomplishing little good."[175] It would therefore seem that repeal of this provision would make little practical difference. It has been repealed in the same jurisdictions and by the same Acts as the provision relating to executors and administrators.

D. Any Agreement that is not to be Performed within the Space of one Year from the Making Thereof

1. Operation

Judicial interpretation of this provision has established that if a contract does not state any definite time for performance, it is not within the Statute of Frauds unless, by its very terms, it is incapable of being performed within one year.[176] However, if the contract is not capable of performance within one year but provides for the possibility of determination which may take place within one year, it would be within the Statute.[177] If the contract is to be performed over the period of one year commencing the day after the formation of the contract, it will not be within the Statute.[178] If it is to be performed over the period of one year commencing two days after the formation of the contract, it will be within the Statute.[179]

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[175] Willis, "The Statute of Frauds - A Legal Anachronism" (1928) 3 Indiana L.J. 426, 436.

[176] McGregor v. McGregor (1888) 21 Q.B.D. 424.

[177] Hanau v. Ehrlich [1911] 2 K.B. 1056, [1912] A.C. 39.

[178] Smith v. Gold Coast & Ashanti Explorers Ltd. [1903] 1 K.B. 285.

[179] Britain v. Rossiter (1879) 11 Q.B.D. 123.

There has been some controversy as to whether a contract which is capable of performance by one party within a year is within the Statute. According to the case of Reeve v. Jennings,[180] such a contract will be outside the Statute only if it is intended by the parties that it is to be performed by one party within the year.[181] However, in Van Snellenberg v. Cemco Electrical Mfg. Co.,[182] Sidney Smith J.A. stated:[183]

> . . . the true principle was laid down . . . by North J. in Miles v. New Zealand Alford Estate Co. (1886) 32 Ch. D. 226, to the effect that if all that one of the parties has to do under the contract may possibily be performed within the year, then the contract is one which does not come within the statute.

This would seem to be the position in Canada at the present.

2. Reform

The English Law Revision Committee subjected this clause to a more thorough analysis than the other

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[180] [1910] 2 K.B. 522 (K.B.).

[181] In his book, The Statute of Frauds - Section IV, Williams states that Reeve v. Jennings stands for the proposition that the contract must expressly require performance by one party within a year to be outside the statute. The author respectfully disagrees. It is submitted that it was regarded in the case as sufficient if the parties intend that performance will take place within a year without this being a requirement of the contract.

[182] [1946] 1 D.L.R. 105, approved [1947] S.C.R. 121.

[183] At 130.

clauses in order to demonstrate that the inclusion of these classes of contracts in the Statute is illogical. Its findings were as follows:[184]

> 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.
>
> 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

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[184] At 9, 10.

> 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 artificial 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.[185]

Unlike special promises made by executors or administrators or made in consideration of marriage, contracts not capable of performance 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"[186] pointed

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[185] Cf. pp. 24, 25, above.

[186] Leg. Doc. (1957) #65 (A).

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.

This clause was repealed in British Columbia, Great Britain, New Zealand and Western Australia by the statutes which repealed the Statute of Frauds as to marriages and executors. It is recommended that Alberta follow the lead of these jurisdictions.

Outside of repeal, 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[187]--would be to exempt certain contracts from this provision. These would include contracts:

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[187] Id.

> (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, or
>
> (d) when it is a contract of employment for a period not exceeding one year from the commencement of work.

A third possible reform 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,[188] the reports of the New York Law Revision Commission,[189] and Steven in his article "Ethics and the Statute of Frauds"[190] with regard to various sections of the Statute. It has been accepted in Iowa[191] and in Alaska.[192] 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,[193] it was

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[188] §2-201.

[189] Supra, n. 186.

[190] (1952) 37 Cornell L.Q. 355.

[191] Iowa Code Ann. §622.35.

[192] Alaska Statutes Ann. § 09.25.020.

[193] See p. 31 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 Statute 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 fourth 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. However it is questionable whether this class of contract is important enough to merit such special treatment.

E. To Charge the Defendant upon any Special Promise to Answer for the Debt, Default or Miscarriages of Another person

1. Operation

The wording of this clause is ambiguous and has led to considerable confusion in the case law. In the first place, it is difficult to distinguish among the words "debt", "default" and "miscarriages". The word "miscarriage" was interpreted in Kirkham v. Marter[194] as referring to a liability in tort. "Debt" refers to a contractual liability already incurred and "default" refers to a future liability.[195]

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[194](1819) 2 B. & Ald. 613.

[195]18 Halsbury's 424 (3rd ed., 1957).

In the second place, "another person" has been narrowly interpreted. The effect of this is that the contract must be one of guarantee and not of indemnity. The test for distinguishing between the two was established as early as 1704 in Birkmyr v. Darnell:[196]

> If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, if he does not pay you, I will; this is a collateral undertaking, and void without writing, by the Statute of Frauds: but if he says, Let him have the goods, I will be your paymaster or I will see you paid, this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act but as his servant.

To be within the Statute, the promise must be made to a creditor of the principal debtor. For example, in Re Bolton,[197] the defendant was a shareholder in a company which required some money. A bank agreed to lend the money on the condition that the defendant's solicitors guarantee the debt. The solicitors agreed to this guarantee and the defendant in turn agreed to repay the solicitors should they be required to pay under the guarantee. As the solicitors were not creditors of the company, the promise of the defendant was not within the Statute. However, it is not necessary for the liability to be in existence at the time the defendant enters into the contract of guarantee.[198]

Whether the parties have entered into a contract of guarantee or indemnity will depend upon the intention of the

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[196](1704) 1 Salk. 27 (K.B.).

[197](1892) 8 T.L.R. 668.

[198]Jones v. Cooper (1774) 1 Cowp. 227.

parties determined by the general circumstances of the transaction.[199] This issue "has raised many hair splitting distinctions of exactly the kind which brings the law into hatred, ridicule and contempt by the public."[200]

Even if the court has found the contract to be one of guarantee, it may still be outside of the Statute if the guarantee is merely an incident of a larger transaction. This has operated in two types of cases. The first is where the guarantor is a del credere agent or an agent "who, for the extra commission, undertakes responsibility for the due performance of . . . contracts by persons whom he introduces to his principal."[201] This is shown by cases such as Coutourier v. Hastie[202] and Sutton & Co. v. Grey.[203] The second type of case concerns what have been called "property cases", where the defendant has rights over property subject to a liability in favour of the plaintiff. For example, in Fitzgerald v. Dressler,[204] A sold goods to B who resold them to C. A retained a lien over the goods and C guaranteed payment to A by B in consideration of A delivering the goods to C. This was held to be a contract of guarantee, but outside the Statute.

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[199] Keate v. Temple (1797) 1 B. & P. 158, Sarbit v. Booth Fisheries (Can.) Co. & Hanson (1951) 1 W.W.R. (N.S.) 115 (Man. C.A.).

[200] Yeoman Credit Ltd. v. Latter [1961] 1 W.L.R. 828, per Harman L.J. at 892. See Anson (23rd Ed., 1969) at 70.

[201] Cheshire & Fifoot (8th Ed. 1972) at 180.

[202] (1852) 8 Exch. 40.

[203] [1894] 1 Q.B. 285.

[204] (1859) 7 C.B.N.S. 374.

This exception was restricted in Harburg India Rubber Comb Co. v. Martin.[205] In that case, the defendant was a substantial shareholder in a company against which the plaintiff held a writ of execution. He agreed to guarantee notes of the company in consideration of the plaintiff withdrawing his writ. The Court of Appeal held that this was not a "property" case and that the contract was within the Statute of Frauds. It determined that the exception applied only when the guarantee is merely an incidential term of a contract with a different object.

2. Reform

The English Law Revision Committee in 1937 recommended 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 artificial distinction between guarantee and indemnity. [206]

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:[207]

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[205] [1902] 1 K.B. 778.

[206] English Law Revision Committee Report at 11.

[207] Id. at 33.

> . . . [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.

The Law Reform Committee Report in 1953[208] agreed with the minority suggestions, but recommended that such contracts be unenforceable rather than void. It considered that the fact an artificial 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 Pritain.

In an article found in the Modern Law Review[209] 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

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[208] Cmd. 8809.

[209] (1954) 17 Modern Law Review 451.

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 danager to the guarantor than no requirement of writing. "The mere requirement of evidence in writing," he said[210] "is the flimsiest of shields, which can hardly be said, with conviction, to be better than nothing at all."

This provision remains in effect 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 Statute:[211]

> (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.

A 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.

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[210] Id. at 453,454.

[211] R.S.B.C. 1960, c. 369, s. 5.

Similar provisions are in effect in the United Kingdom with regard to Hire-Purchase by the Hire Purchase Act.[212] 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 would seem logical, however, for the fate of the Statute of Frauds relating to guarantees to follow that of the Guarantees Acknowledgement Act.[213] The merits of this Act have already been considered by the Institute[214] and therefore will not be discussed here.

Section 2(a) of the Guarantees Acknowledgemtnt Act provides:

> 2. In this Act,
>
> (a) "guarantee" means a deed or written agreement whereby a person, not being a corporation, enters into an obligation to answer for an act or default or omission of another but does not include
>
> (i) a bill of exchange, cheque or promissory note, or
>
> (ii) a partnership agreement, or
>
> (iii) a bond or recognizance given

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[212] 1965, c. 66, s. 7.

[213] R.S.A. 1970, c. 163.

[214] Institute of Law Research and Reform, Report No. 5, Guarantees Acknowledgement Act (1970).

(A) to the Crown, or
(B) to a court or judge, or
(C) pursuant to a statute,

or

(iv) a guarantee given on the sale of

(A) any interest in land, or
(B) any interest in goods or chattels;

It may be noted that this definition is considerably narrower than that under the Statute of Frauds.

There would seem to be a loophole in the provisions of the Guarantees Acknowledgement Act. It defines a guarantee as a "deed or written instrument", but does not require guarantees to be in writing. Hence, a parol guarantee evidenced by a memorandum sufficient to satisfy the Statute of Frauds would be enforceable and would escape the requirements of the Guarantees Acknowledgement Act. Surely this cannot have been the intention of the Legislature.

It is suggested that the provisions relating to guarantees should appear in one Act, and that the classes of the guarantees requiring writing and certificate should be the same. The following recommendations are therefore made:

(1) The provisions of s. 4 of the Statute of Frauds relating to guarantees should be repealed.

(2) Section 2 of the Guarantees Acknowledgement Act should be amended by removing the words, "deed or written" so as to read: "'guarantee' means

an agreement whereby. . . ."

(3) Section 3 of the Guarantees Acknowledgement Act should be amended by adding the phrase: "unless it appears in the form of a written agreement or a deed" so as to read: "No guarantee has any effect unless it appears in the form of a written agreement or a deed and unless the person [complies with the existing requirements of the Act]."

It should be noted that the effect of these changes would be to require the agreement itself to be in writing and to render the guarantee void rather than unenforceable in the event of non-compliance

F. Contracts Relating to Land

The Statute of Frauds contains four sections relating to contracts involving land. By section 1, a contract making or creating an interest of freehold or leasehold must be in writing and signed by the parties or it will have the effect of a lease or estate at will. By section 3, an agreement, grant or surrender of an estate in leasehold or freehold must be in writing, signed by the party assigning, granting or surrendering the estate. By section 4 a "note or memorandum" of a "contract or sale" of lands must appear in writing, signed by the party to be charged, in order for an action to be brought on the contract.

The inter-relationships of the four sections is discussed by Leith & Smith:[215]

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[215]Leith & Smith, Blackstone's Commentaries on the Laws of England Applicable to Real Property 327 (2nd Ed., (1880).

> The first section appears to relate to cases where an estate or interest is created de novo, and actually passes to the grantee or lessee: the 3rd section to cases where an estate or interest previously existing is transferred: and the 4th to cases where a right of action only is created by an agreement, or where an agreement is made respecting the future creation or transfer of an estate or interest.

Unfortunately, these three sections do not follow a common format. Under section four, a "note or memorandum" of the contract is sufficient, under section three, a "deed or note" is sufficient, but under section one it would seem necessary to reduce the interest being created to writing. Under section four, the writing must be signed by the "party to be charged", under section three, it must be "signed by the party so assigning, granting or surrendering [the interest]" and under section one, it must be "signed by the parties so making or creating [interests of freehold or leasehold]." Under section four, failure to comply with the statute renders the contract unenforceable, under section three there is no mention of the effect of failure to comply and under section one the interest is reduced to an estate or lease at will.

An exception to the requirement of writing is provided by section two:

> 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 of the least of the full improved value of the thing demised.

The words "three years" 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.[216] 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.,[217] relying on the English Court of Appeal decision in Hand v. Hall.[218] However, it was decided to the contrary in the more recent case of Pain v. Dixon,[219] relying on the Exchequer Division decision in Hand v. Hall.[220] The former position is clearly correct.

It should be noted that s. 97 of the Land Titles Act[221] provides an exception to registration for a lease "for a term of more than three years" while s. 2 of the Statute of Frauds provides and 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.[222]

In addition to being not more than three years, it is

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[216] Re Knight, Ex Parte Voisey (1882), 21 Ch.D. 422.

[217] (1912-1913) 3 W.W.R. 814 (S. Ct. Alta.).

[218] (1877) 2 Ex. D. 355.

[219] [1923] 3 D.L.R. 1167 (Ont. S. Ct.).

[220] (1877), 2 Ex. D. 318, reversed on appeal (1877), 2 Ex. D. 355.

[221] R.S.A. 1970, c. 198.

[222] Foster v. Reeves, [1892] 2 Q.B. 255 (C.A.).

necessary that the rent be "two-third parts at the least of the full improved value of the thing devised" to avoid the requirement of writing. There would seem to be three possible interpretations of this clause.

The first accepts the clause in its literal sense, so that the rent must be equal to two-thirds of the fair market value of the land. It would seem that Bisbet J. accepted this interpretation in Cody v. Quarterman[223] when he stated:

> . . . there is no evidence of the reservation of rent to the amount of two-third parts of the improved value of the premises. It is true, that the building of a house was the consideration proven for the lease, and it may be possible that this improvement was equivalent to two-thirds of the improved value of the land, yet there is no evidence to that effect.

This interpretation, however, does not seem to be reasonable. To fit within the exception, the rent must be at least two-thirds of the value of the land and this interpretation 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 make no sense from a commercial point of view.

The second interpretation of this clause is that the rent must equal at least two-thirds of the annual value of the land. Several texts[224] refer to section two as requiring

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[223](1853), 12 GA. 386, 399.

[224]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).

a lease of not more than three years at greater than two-thirds of "rack rent". Elphinstone[225] defines "rack rent" as "rent of or approaching to the full annual value of the property out of which it issues." This view is supported by the Nova Scotia Statute of Frauds[226] which provides an exception to the requirement of writing when the term of the lease does not exceed three yars "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:[227]

> The proviso that the rent reserved in such leases must amount to 'two-thirds at the lease of the thing demised' refers to two-thirds of the rental value and not of the fee.

According to Black's,[228] "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 therefrom.

It is impossible to say that any of these three interpretations of "full improved value of the thing demised" properly expresses the law in Alberta.

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[225]Elphinstone, Rules for the Interpretation of Deeds 618.

[226]R.S.N.S. 1967, c. 290, s. 2.

[227]2 Page on the Law of Contracts 2187 (2nd ed., 1920). In Support of this proposition see Childers v. Talbott (1888), 16 P. 275, Birckhead v. Cummins (1868) 33 N.J. 44, Union Banking Co. v. Gittings (1876) 45 Md. 386.

[228]Black's Law Dictionary 1461 (4th Ed., 1968).

A further problem exists in determining to which sections the provisions of section two provide an exception. Read literally, the words "except nevertheless" following immediately after section one would seem to indicate that it applies only to the provisions of section one. This is the view taken by Leith and Smith:[229]

> It will be observed, this exception to the operation of s. 1 does not apply to s. 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:[230] "Leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth." It is possible to restrict the application of this case. The issue which was raised was that although the lease was excepted from section one by the provisions of section two, it was caught by section four as a contract not to be performed within a year. It is reasonable to say that section two is an exception to the "one year" provision of section four; otherwise section two would be of very limited effect. Whether section two is an exception to all provisions of section four is an unsettled issue.

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[229] Supra, No. 215 at 357.

[230] (1836) 5 Ad. & E. 856, 864, per Denman C.J.

Halsbury's[231] suggests that section two is an exception to section three by stating 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.[232] Taken in the literal sense, there is no reason why section two should be an exception to section three. However, if it is an exception to all of section four, it is reasonable to assume it also applies to all of section three.

The Statute of Frauds has been considerably complicated by s. 3 of the Real Property Amendment Act:[233]

> 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.

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[231] 18 Halsbury's Laws of England 546 (1st Ed., 1911).

[232] See the discussion of the Real Property Amendment Act immediately following.

[233] (1845) 8 & 9 Vict. c. 106.

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 improved value of the land which is not made by deed is void, it is construed as an agreement for a lease.[234] The difference between a lease and an agreement for a lease is set out in Halsburys:[235]

> 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

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[234] 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 Gehler v. Palmason [1930] 1 D.L.R. 475 (Man. C.A.).

[235] 18 Halsbury's Laws of England 366 (1st ed., 1911).

> 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.

As a result, the effect of the Real Property Amendment Act has been nullified, but the rights of the lessor and the lessee at common law are different from those in equity.

A final problem--that of the meaning of an interest in land--remains to be discussed. One of the main difficulties has involved the determination of whether products of the soil are land or goods. 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.'[236]

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.[237]

The situation has been complicated by the fact that

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[236] Cheshire & Fifoot, Law of Contract, 183 (8th Ed., 1972), relying on Marshal v. Green (1875) 1 C.P.D. 35 per Lord Coleridge C.J.

[237] Id.

the Sale of Goods Act,[238] s. 2(1)(h)(ii) 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.

Cheshire & Fifoot discuss the effect of this provision and point 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 the sale.[239] As a result, fructus naturales should be considered in most cases as goods. However in Saunders v. Pilcher,[240] Singleton L.J. stated that the definition of "goods" in the Sale of Goods Act applied only to that Act so that it may be that this definition does not apply to the Statute of Frauds. The result may be that in some cases, fructus naturales will be considered goods for the purposes of the Sale of Goods Act and land for the purposes of s. 4 of the Statute of Frauds.

Another problem involving which interests constitute interests in land concerns agreements for the division of

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[238] R.S.A. 1970, c. 327.

[239] Cheshire & Fifoot, Law of Contract, 184 (8th Ed., 1972).

[240] [1949] 2 All E.R. 1091.

proceeds from the sale of land.[241, 241a] The position in Canada was set out by Rinfret J. in Harris v. Lindeborg,[242] relying on Stuart v. Moss :[243] "An agreement for the division of the proceeds of the sale of land is not an agreement within the fourth section of the Statute of Frauds." However, an obiter dictum of Jenkins L.J. in Cooper v. Critchley[244] suggested that the position in England may be different:

> . . . 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.

2. Reform

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.[245]

Such contracts are especially important in Alberta with so much of the economy based upon interests in land.

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[241] For a discussion of this problem, see Waters, Law of Trusts in Canada, 180-183.

[241a] It should be noted that a further problem in this area involves the question of whether a royalty agreement on oil from land is a contract relating to an interest in land. It was held by the Supreme Court of Alberta Appellate Division in Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd. (1969) 3 D.L.R. (3d) 630 that such an agreement was not covered by the Statute of Frauds. This decision was approved on appeal by the Supreme Court of Canada (1971) 15 D.L.R. (3d) 256.

[242] [1931] S.C.R. 235, 243.

[243] (1893) 23 S.C.R. 384.

[244] [1955] 1 All E.R. 520, 524 (C.A.).

[245] Stephen & Pollock, "Section Seventeen of the Statute of Frauds", (1885) 1 L.Q.R. 1, 6.

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. It should be noted that with the possible exception of Prince Edward Island,[246] this provision applies in every common law province in Canada by virtue of the Statutes of Frauds and in Great Britain by the Law of Property Act.[247]

Although retention of a requirement of writing for contracts involving land may be desirable, it is obvious that the Statute of Frauds must be amended. Sections 1, 3 and 4 each set out different requirements. Section 2 is ambiguously worded. The Real Property Amendment Act of 1845 complicates the situation. The requirements of a memorandum and signature and the doctrine of joinder of documents add to the complication. Finally, the doctrine of part performance has made a large inroad on the Statute. It is therefore recommended that this part of the Statute of Frauds be repealed.

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[246] 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.

[247] (1925) 15 & 16 Geo. 5, c. 20.

There would seem to be no reason for distinguishing among contracts creating interests in land, contracts assigning, granting or surrendering interests in land and contracts respecting the future creation of interests in land, and it is recommended that these be covered by a single section.

If it is desirable to provide an exception to the requirement of writing for leases of less than three years, this should be in line with the exception to registration under the Land Titles Act.

One basis for the retention of the Statute of Frauds is that it serves a cautionary function. It would seem that this can best be served by requiring that the contract itself be reduced to writing. It is difficult to see how the cautionary function is served by a memorndum, formed of several documents, coming into existence after the formation of the contract.

At present, a contract is enforceable against the party who has signed the memorandum. Hence, if A and B enter into a contract and A signs a memorandum but B does not, B may sue A, but A may not sue B. It is therefore to a party's favour <u>not</u> to sign a memorandum. This situation is unsatisfactory, and it is recommended that the law require both parties to sign the contract in order to be enforceable against either of them.

The implications of the fact that contracts are rendered merely unenforceable and not void by reason of non-compliance with the statute have already been discussed.[248] It seems anomalous that the contract may be relied upon by the defendant

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[248]See pp. 6-8 above.

and not the plaintiff, that money paid under the contract by the buyer may be retained by the seller and that entering into the contract may be sufficient consideration for a promise to forbear on an earlier contract. It is suggested that if contracts fail to meet the requirements of the Statute, they should be void. As mentioned later in this paper,[249] the word "void" has been interpreted as meaning "unenforceable" in some cases relating to the Statute of Frauds. The legislation should therefore clearly spell out the intention that contracts be rendered void.

In order to prevent harsh results in particular cases and to prevent complication of the legislation by judicial interpretation, it is recommended that judges be given the discretion to make such orders as the rights of the parties as are fair and equitable in the circumstances. This reform would not be a radical departure from the position at present in which the judges utilize the doctrine of part performance, the maxim that the Statute shall not be used as an instrument of fraud and the remedies of quasi-contract to avoid the provisions of the Statute.

The main objection to judicial discretion will undoubtedly be that this will place a heavy burden on the courts. This may be challenged in two ways. Firstly, it is important that inequitable results be avoided in particular cases, and judicial discretion would seem to be the best way of achieving this result. Secondly, in the absence of judicial discretion, it is likely that actions will be brought on the contract anyway. This has certainly been the case over the past 298 years and there is no reason to believe that the flood of cases will abate.

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[249] See pp. 98, 99 below.

In conclusion, it is recommended that:

1. The provisions of the Statute of Frauds relating to land should be repealed.

2. It should be required that contracts relating to interests in land (whether creating, assigning, granting or surrendering interests or respecting the future creation of interests) should be reduced to writing and signed by both parties or be rendered void. There should be an exception to this requirement for leases of a term of less than three years.

3. Judges should be granted the discretion to make such orders with regard to the rights of the parties as are fair and equitable in the circumstances.

In the alternative, it is recommended that there be no requirement of writing for contracts relating to land.

G. Sale of Goods

1. Operation

Section 7 of the Sale of Goods Act[250] provides:

> **7.** (1) A contract for the sale of any goods of the value of fifty dollars or upwards is not enforceable by action
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> (*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

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[250] R.S.A. 1970, c. 327.

> (*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 s. 16 of the Statute of Frauds[251] as amended by s. 7 of Lord Tenterden's Act.[252]

The first problem to be faced with regard to this section is the definition of the word "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" include chattels personal, but not money, shares, insurance or debts. Section

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[251]Section 16 is commonly referred to as section 17, following the designation set out in the Statutes at Large. In the Statutes of the Realm, sections 13 and 14 were properly combined into one section. Hence, the designation of each section beyond 13 was advanced one number.

[252]Statute of Frauds Amendment Act (1828) 9 Geo. 4, c. 14.

2(1)(h)(ii) has already been discussed[253] and replaces the common law distinction between fructus naturales and fructus industriales. For a discussion of the definition of "goods" in greater detail, the reader is referred to Benjamin on Sale, [254] 171-189.

One of the thornier legal issues which section 7 of the Sale of Goods Act has presented is the necessity of distinguishing between contracts for the sale of goods and contracts for work and labour. Problems arise in situations such as one paying an artist to paint a portrait[255] or a dentist to make a set of dentures.[256] There are three key cases relating to this issue which has "vexed jurists from the earliest ages."[257]

The first case was Clay v. Yates,[258] in which 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 for work and labour, Pollock C.B. said:[259]

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

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[253] See p. 65 above.

[254] 8th ed., 1950.

[255] Robinson v. Graves [1935] 1 K.B. 579 (C.A.).

[256] Lee v. Griffin (1861) 30 L.J.Q.B. 252, 1 B & S 272 (Q.B.).

[257] Robinson v. Graves [1935] 1 K.B. 579, 589, per Slesser L.J.

[258] (1850) 1 H. & N. 73 (Exch.)

[259] At 78.

The second case was Lee v. Griffin,[260] which involved a contract to make a set of dentures. The judges there rejected the proposition that the test to be used was the value of the work as opposed to the value of the materials. The distinction was summed up by Benjamin:[261]

> . . . if the contract is intended to result in transferring for a price from B to A a chattel in which A had no previous property, it is a contract for the sale of a chattel. . . .

As a result, in the view of Blackburn J.,[262] if one employs a famous sculptor to make a statue 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.

The third case was Robinson v. Graves,[263] where the defendant commissioned an artist to paint a picture. The court held this not to be a sale of goods, deciding that if the substance of the contract was skill and labour and if the materials were only ancillary to the contract, this would be a contract for labour. This decision of the Court of Appeal, being the latest of the three cases, is probably the most authoritative.

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

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[260](1861) 30 L.J.Q.B. 252, 1 B. & S. 272.

[261]Benjamin on Sale 161, 162 (8th Ed., 1950). This quotation was approved by Smiley J. in Ross v. Sadofsky [1943] 1 D.L.R. 334 (N.S.S.C.).

[262](1861) L.J.Q.B. 252, 254.

[263][1935] 1 K.B. 579 (C.A.).

property is to pass, this relates to labour and not goods, as the contract is for the improvement of the land or principal chattel.[264]

Having discussed the word "goods", the phrase "of the value of $50 or upwards" should now be considered. If several chattels are bought in one transaction, each of the value of less than $50, but with a total value of over $50, the contract will be covered by the provisions of the Act.[265] This leaves the problem of 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.[266] Auctions, which are covered by the Act,[267] are in a somewhat different position. By s. 58(b) of the Sale of Goods Act:

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

It should be noted that non-compliance with the provisions of s. 7 renders a contract "not enforceable by action" and not void.

There are several means of compliance with section 7. The first is to produce "some note or memorandum in writing of the contract . . . made and signed by the party to be

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[264] Benjamin on Sale 167.

[265] Baldey v. Parker (1823) 2 B. & C. 37.

[266] Benjamin on Sale 190.

[267] Kenworthy v. Schofield (1824) 2 B. & C. 945.

charged or his agent in that behalf." This follows the pattern of section 4 of the Statute of Frauds and therefore need not be discussed at this point.

The second means of compliance is for the buyer to "accept part of the goods so sold and actually receive the same."

Acceptance

Section 7(3) codifies the requirements of acceptance as they were developed by judicial interpretation[268] of s. 7 of Lord Tenterden's Act:[269]

> 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.

Acceptance within the meaning of s. 7 is different from, and less than, acceptance within the meaning of other sections of the Act. Hence, s. 7 if not affected by s. 35, which provides that when goods which have not been examined by the buyer are delievered to him there shall be no acceptance until he has been given a reasonable opportunity to examine them. However, if the buyer is deemed to have accepted the goods by s. 36,[270]

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[268] Morton v. Tibbett (1850) 15 Q.B. 428, Kibble v. Gough (1878) 38 L.T. 204 (C.A.).

[269] (1828) 9 Geo. 4, c. 14.

[270] 36. The buyer shall be deemed to have accepted the goods

(a) when he intimates to the seller that he has accepted them, or

[Continued on next page.]

this will be sufficient to satisfy the acceptance requirement of s. 7.[271]

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.[272]

Henjamin sets out six points with regard to the requirement of acceptance within s. 7(3):[273]

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 the contract;

5. The contract must be pre-existing;

6. Acceptance is a different thing from actual receipt.

[Continued from p. 75.]

(b) when the goods have been delivered to him and he does in relation to the goods any act inconsistent with the ownership of the seller, or

(c) when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

[271] Re A Debtor [1938] 4 All E.R. 308.

[272] Abbott v. Wolsey [1895] 2 Q.B. 97.

[273] Benjamin on Sale, 199.

Receipt

Receipt as well as acceptance is required for compliance with the Statute. The general rule as to receipt is set out in Blackburn on Sale:[274]

> It may therefore be considered as having been settled, that the construction of the statute was that so concisely and clearly stated by Holroyd J., in Baldey v. Parker[275] and repeated in almost the same terms by Parke B., in Bill v. Bament,[276] namely, that the facts which prove that part of the goods have been delivered and taken into the buyer's control, so as to determine the seller's possession of that part, prove that he has actually received them, and that nothing short of such a delivery and taking could amount to an actual receipt by the buyer within the meaning of the Statute of Frauds.

Within the realm of receipt under s. 7, however, there exist a number of problem areas. The first relates to the situation when the goods are in the possession of the buyer as bailee for the seller before the sale. The test for receipt in such a case was set out in Lillywhite v. Devereux,[277] which is summarized in Benjamin's book:[278]

> . . . if it appears that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the

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[274] (3rd ed., 1910) with Canadian Notes, at 38.

[275] (1823) 2 B. & C. 37.

[276] (1841) 9 M. & W. 36.

[277] (1846) 15 M. & W. 285.

[278] Benjamin on Sale, 208.

> 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 problem area relates to the situation when goods are in the possession of a third party as bailee for the seller. This would seem to be covered by s. 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 that he holds the goods on his behalf.

A third problem area involves the delivery of goods to a carrier. By s. 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,[279] and if the seller does not retain a right of disposal.[280]

The fourth problem area involves the situation where goods remain in the possession of the seller. It should be remembered that the general test of receipt is the loss of control over the goods by the seller and the gaining of control by the buyer. According to Benjamin:[281]

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[279] Gorman v. Boddy (1845) 2 Car. & Kir. 145.

[280] Sale of Goods Act, Section 22(2).

[281] Benjamin on Sale 216.

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

However, by s. 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 third means of compliance with the Act is to give "something in earnest to bind the contract or in part payment." According to Blackburn:[282]

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

It 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.[283]

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

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[282] Blackburn on Sale 41.

[283] Walker v. Nussley (1847) 16 M. & W. 302.

2. Reforms

The English Law Revision Committee considered the merits of the provision of the Statute of Frauds dealing with the sale of goods and recommended its repeal. Its report included the following findings:[284]

> 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.
>
> 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.

The Law Revision Committee cited the doctrine of part performance and the narrow interpretation of the Statute as example of the early recognition of this divergence. However, a study conducted by the Yale Law Journal entitled "The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices"[285] 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

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[284] Law Revision Committee Report, 7, 9.

[285] (1957) 66 Yale L. J. 1038.

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.

Following the recommendations of the Law Revision Committee, this provision was repealed in Great Britain in 1954.[286] Similarly, it was repealed in New Zealand in 1956[287] and in British Columbia in 1958.[288]

Fridman[289] considered the merits of this provision 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.

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[286] Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. II, c. 34, s. 2.

[287] Contracts Enforcement Act, 1956, No. 23, s. 4.

[288] Statute Law Amendment Act, S.B.C. 1958, c. 52, s. 17.

[289] Fridman, Sale of Goods in Canada, 38-39.

Hence, there is considerable support for the view that this section should be repealed and this step is recommended. It may seem anomalous to recommend the repeal of the requirement of writing with regard to the sale of goods and not with regard to the sale of land. However, for the ordinary person, contracts relating to land are considerably more important than contracts relating to goods and are often more complicated.

The mere repeal of s. 7 of the Sale of Goods Act might not be sufficient. In his article "The Statute of Frauds and Comparative Legal History",[290] 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.

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[290](1947) 63 L.Q.R. 174.

Hence, it would appear that section 16 (section 7, Sale of Goods Act) was merely a codification of the law in force at the time of the enactment of the Statute. Repeal of the section might return us to the common law. It would be better, therefore, to enact that contracts for the sale of goods need not appear in writing, except as provided in other Acts.

If this recommendation as to repeal is rejected, a minimum reform must be to raise the dollar value of goods covered by the Act. The reason for the enactment of s. 16 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.

In addition, 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.

In the United States, the Uniform Commercial Code 2-201 has recommended that section 16 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.

H. Ratification of Contracts

1. Operation

Lord Tenterden's Act[291] section 5 provides:

> V. And be it further enacted, That no Action shall be maintained whereby to charge any Person upon any Promise made after full Age to pay any Debt contracted during Infancy, or upon any Ratification after full age of any Promise or Simple Contract made during Infancy, unless such Promise or Ratification shall be made by some Writing signed by the Party to be charged therewith.

This refers to a promise to pay or a ratification of a contract after reaching maturity, and therefore applies only to those types of infants' contracts which require ratification.[291a] This excludes contracts for necessaries, contracts of service and contracts concerning land, share contracts, partnership agreements and marriage settlements.[292]

The writing must contain an admission by the infant of an existing liability,[293] and the test for a sufficient writing was set out in Harris v. Wall:[294]

> Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has obtained his majority amount to a ratification.

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[291] Statute of Frauds Amendment Act (1828) 9 Geo. IV, c. 14.

[291a] The report of the South Australia Law Reform Committee on the Statute of Frauds (No. 34) points out that this section refers to a promise to pay a debt and to a ratification of any contract. Hence, an oral promise made after attaining majority on the same terms as one made during infancy and supported by fresh consideration will be valid unless it relates to a debt (see: Cheshire & Fifoot, 2nd Australian Edition, at 522, 523.

[292] A discussion of Infants' Contracts in general is beyond the scope of this paper. The reader is referred to Professor David Percy's Working Paper on Infants' Contracts.

[293] Rowe v. Howe [1868] L.R. 5 Q.B. 1,

[294] (1847) 1 Exch. 122. Quoted in Lynch Bros. Dolan Co. Ltd. v. Ellis (1909-1910) 7 E.L.R. 14.

The effect of non-compliance with this section is to render the ratification unenforceable and not void, as the wording is similar to that of section 4 of the Statute of Frauds.

It is required that the writing be "signed by the party to be charged therewith." This wording is repeated in section 6 of Lord Tenterden's Act and it is settled with regard to that section that a signature of an agent is insufficient.[295] It is therefore submitted that a signature of an agent would be insufficient to meet the requirements of section 5.

The provisions of section 5 may not apply when the infant has taken benefit under the contract for some length of time. The report of Cornwall v. Hopkins[296] reads:

> Lord Tenterden's Act had at first appeared to him [Wickens, V.C.] to be applicable, but in equity it would not apply where the infant had, as in this case, gone on for a considerable time taking the benefit of the contract. The statute would not be allowed to be made an instrument of fraud. . . .

This exception was expanded by the Ontario High Court in Blackwell v. Farrow:[297]

> Even assuming, as I do, that this contract was voidable on the plaintiff attaining his majority, the contract is voidable only within a reasonable

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[295] Swift v. Jewsbury (1874) L.R. 9 Q.B. 301; Hirst v. West Riding Union Banking Co. [1901] 2 K.B. 560 (C.A.).

[296] (1872) L.J. 41 Eq. 435.

[297] [1948] O.W.N. 7, 10.

> time of attaining his majority, and then only on returning the property he had received or its value: In re Hutton Estate etal.[298]

However, another decision of the Ontario High Court has narrowed the position. In Butterfield v. Sibbitt & Nipissing Electric Supply Co.,[299] Ferguson J. stated:

> In Re Hutton . . . it was held that the contract was voidable at the option of the infant only within a reasonable time of his attaining his majority, and then only upon his returning the property he had received or its value. Now, no authority whatever is cited for that proposition in the case, and I am of the opinion that that proposition as stated in Blackwell v. Farrow and Re Hutton is much too wide. There is no doubt that at law an infant on coming of age can repudiate a voidable acontract, yet the Court exercising its powers in equity always prevented the infant from unjustly retaining in his hands property acquired by such a transaction.

It is submitted that the position at present is as follows: if an infant has retained property under a contract such that it would be a fraud in equity for the infant to repudiate the contract, section 5 of Lord Tenterden's Act will not apply.

The same familiar principle - that the Statute may not be used as an instrument of fraud - has also been applied so as to require the infant to return the goods received under the contract or their value which he may have on hand.[300]

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[298] [1926] 4 D.L.R. 1080 at 1082-3.

[299] [1950] 4 D.L.R. 302, 308.

[300] Louden Mfg. Co. v. Milmine (1907) 10 O.W.R. 474, Molyneux v. Traill (1915) 32 Western L.R. 292.

The question of whether this section applies in Alberta must now be considered. The fact that it was repealed in the United Kingdom in 1875 does not affect its applicability in Alberta,[301] and it has been determined that it applies in Saskatchewan.[302]

However, two cases have been cited as authority questioning whether the Statute applies in Alberta. The first is Re Hutton Estate,[303] a decision of the Alberta Supreme Court, where Ives J. said:

> The ratification does not have to be in writing; this is not an action against the infant or his estate; nothing more is required of the infant or of his estate; no promise express or implied is sought to be enforced. It is a completed contract and this claim is against the money held by the Hutton Estate.

The applicability of Lord Tenterden's Act was not expressly considered in this case. In fact, it may have been assumed that it did apply, as the court stated reasons why, in this particular case, writing was not required.

The second is the Ontario case of Blackwell v. Farrow,[304] where a contract was upheld despite the lack of written ratification. In that case, the plaintiff had been an infant at the time of contracting and the fact that the ratification was unenforceable and not void was consistent with the fact

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[301] Brand v. Griffin (1908) 1 A.L.R. 510 (S. Ct. Alta.).

[302] Molyneux v. Traill (1915) 32 Western L.R. 292 (Sask. D. Ct.)

[303] [1926] 4 D.L.R. 1080.

[304] [1948] O.W.N. 7.

that the that the Statute was not applied against the defendant.[305] A provision equivalent to section 5 was at that time found in Ontario,[306] so that the case cannot have been decided on the basis that the section did not apply. In addition, as already mentioned, this decision has been judicially questioned.[307]

In conclusion, there would seem to be little doubt that this section applies in Alberta.

2. Reform

Under the law as to infants' contracts, persons under 18 years of age are deemed to require protection. Section 5 of Lord Tenterden's Act, however, provides protection for persons over 18 years of age, when the law deems them to be of full capacity. It is suggested that this protection is unnecessary and that the section should be repealed. It should be noted that it is the ratification of the contract and not the contract itself which is required to appear in writing.

The fate of this section must necessarily follow that of the law relating to minors' contracts in general. There is no requirement of writing for ratification in either British Columbia or Great Britain because, in both jurisdictions, minors' contracts are void.[308]

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[305] See p. 6 above.

[306] Statute of Frauds, R.S.O. 1937, c. 146, s. 7.

[307] See p. 87 above.

[308] Infants Relief Act 1874, 37 & 38 Vict., c. 62, ss. 1,2. Infants Act, R.S.B.C. 1960, c. 193, ss. 2,3.

V

ANALYSIS AND PROPOSED REFORMS - FRAUDULENT MISREPRESENTATIONS AS TO CREDITWORTHINESS

A. Operation

Section 6 of Lord Tenterden's Act[309] provides:

> VI. And be it further enacted, That no Action shall be brought whereby to charge any Person upon or by reason of any Representation or Assurance made or given concerning or relating to the Character, Conduct, Credit, Ability, Trade, or Dealings of any other Person, to the intent or Purpose that such other Person may obtain Credit, Money, or Goods upon death, unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith.

In order to analyze this section, it is probably expedient to look at each clause separately.

It is provided that "no action shall be brought" which has already been discussed as meaning unenforceable and not void.[310]

The phrase "to charge any person upon or by reason of any representation or assurance made or given" was interpreted by the House of Lords in Banbury v. Bank of Montreal[311] as referring only to actions for fraudulent misrepresentation. Lord Wrenbury reasoned that even if there were a duty with

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[309] (1828) 9 Geo. IV, c. 14.

[310] See p. 6 above.

[311] [1918] A.C. 626.

regard to innocent misrepresentation, the action would lie upon the breach of duty. Innocent misrepresentation would not be the cause of action, but rather evidence of negligence. On the authority of Cairns J. in W. B. Anderson & Sons Ltd. v. Rhodes (Liverpool) Ltd.,[312] this position has not been changed by the decision in Hedley Byrne & Co. v. Heller & Partners.[313] The law in this area is therefore anomalous in the extreme. If one makes a verbal representation negligently, he will be held liable; if he makes it fraudulently, he will not be held liable.

To be covered by this section, a representation must concern or relate "to the character, conduct, credit, ability, trade or dealings of any other person." The essence of this section, in other words, is a representation as to the creditworthiness of a third party. In Swann v. Phillips[314] the defendant told the plaintiff that he held a third party's title deeds, and on the strength of this the plaintiff lent the third party money. The Court of King's Bench held the Statute covered this situation as the defendant was in effect making a representation as to the third party's creditworthiness. This case was distinguished from the facts present in Bishop v. Balkis Consolidated Company[315] where the defendant company represented to the plaintiff that a share certificate had been lodged with it for transfer from a third party to the plaintiff. The Court of Appeal held that the statement that the certificate had been lodged was not within the provisions of the Act. It would appear from these cases that it may be difficult to distinguish representations

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[312] [1967] 2 All E.R. 850 (Liverpool Assizes).

[313] [1964] A.C. 465.

[314] (1838) 8 A. & E. 457.

[315] (1890) 25 Q.B.D. 512.

as to creditworthiness from other representations.

It is also required that the statement be made "to the intent or purpose that such other person may obtain credit, money or goods." This is in line with the requirements for an action for fraudulent representation as set out in the headnote to Behn v. Kemble:[316]

> No action will lie for a false representation unless the party making it knows it to be untrue, and makes it with the intention of inducing the plaintiff to act upon it, and the latter does so act upon it and sustains damage in consequence.

In order for an action to lie upon a fraudulent representation as to the creditworthiness of a third party, it is necessary that the representation "be made in writing." Unlike sections 4, 7 and 16, but like section 9 of the Statute of Frauds, it would appear that the representation itself must appear in writing and that a subsequent writing evidencing it will not be sufficient. As already mentioned,[317] the phrase "signed by the party to be charged therewith" has been interpreted as excluding the signature of an agent.

A few comments on the workings of the Statute remain to be made. It is not necessary that the defendant benefit or that he collude with the third party for an action for fraudulent misrepresentation to lie.[318] The word "person", used three times in the section, has been interpreted as including companies.[319]

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[316] (1859) 7 J. Scott 260.

[317] See p. 86 above.

[318] Pasley v. Freeman (1789) 3 T.R. 51.

[319] Banbury v. Bank of Montreal [1918] A.C. 626.

Finally, in the case where there are oral and written representations, "if the false representation in writing substantially contributed to the injury of which the plaintiff complains, the defendant is clearly responsible."[320]

B. Reforms

The rationale behind section 6 was discussed by Lord Wrenbury in Banbury v. Bank of Montreal:[321]

> The Statute of Frauds having required that in any case covered by s. 4 of that Act an action should not be brought unless the agreement upon which it was brought, or some memorandum thereof, should be in writing signed by the party to be charged or some person by him lawfully authorized, Pasley v. Freeman[322] upheld the device which had been discovered for evading that Act by founding the action, not upon a special promise which the statute supposes, but upon tort or wrong done to the plaintiff by a fraudulent represenation of the defendant. Pasley v. Freeman[323] is the authority upon the common law action of deceit. In this state of things the statute of 9 Geo. 4, c. 14 (commonly called Lord Tenterden's Act), was passed. In Tatton v. Wade[324] Pollock C.B. said that Lord Tenterden had told him that his motive in procuring the passing of the Act was that he was struck with the fact that, numerous as were actions for false representation as to character and credit of third persons, the plaintiff almost invariably succeeded, which induced him to think that there

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[320] Tatton v. Wade (1856) 18 C.B. 370, 385, per Pollock C.B.

[321] [1918] A.C. 626, 711-712.

[322] (1789) 3 T.R. 51.

[323] Id.

[324] (1856) C.B. 370, 381.

> was some latent injustice which required a remedy. In Lyde v. Barnard[325] Alderson B. and Lord Abinger C.B. stated in somewhat similar terms what in their view was the object of the Statute.

These reasons would seem to be insufficient to support retention of this section.

Since the decision in Hedley Byrne & Co. v. Heller & Partners,[326] allowing actions for negligent misrepresentation, the requirement of writing for fraudulent misrepresentation has produced an unacceptable anomaly in the law. Its repeal is therefore recommended.

V

ANALYSIS AND PROPOSED REFORMS - TRUSTS

A. Operation

The Statute of Frauds includes three sections dealing with trusts. The first is section 7:

> 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.

The first factor to consider is the extent of the application of this section. The word "confidence" is merely

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[325] (1836) 1 M. & W. 101, 107, 117.

[326] [1964] A.C. 465.

old terminology for "trust". The section refers to "lands, tenements and hereditaments" which has been held to include leases,[327] but does not otherwise include personalty. "it has even been held that a sum of money secured upon a mortgage of real estate is not an interest within the Act."[328] At one time, this was thought not to include charitable trusts, but now they are clearly included.[329] Whether the section binds the Crown has been a matter of controversy. In R. v. Portingham, the Exchequer Court held that the Crown was not bound,[330] while the Court of Queen's Bench held it was bound.[331]

This section requires that the declaration or 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 appear in writing. In the words of Lindley L.J. in Rochefoucauld v. Boustead:[332]

> . . . it is necessary to prove by some writing or writings signed by the defendnat, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been

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[327] Skett v. Whitmore (1705) Freem. Ch. 280, Foster v. Hale (1798) 3 Ves. 696.

[328] Lewin, Trusts, 53, 54 (11th Ed., 1904); Benbow v. Townsend 1 M. & K. 506.

[329] Lloyd v. Spillet (1734) 3 P. Wms. 344; Boson v. Statham (1760) 1 Eden 509.

[330] 1 Salk. 162.

[331] 3 Salk. 334. See Lewin, Trusts 55 (11th Ed., 1904), Keeton, Trusts 50 (4th Ed., 1947).

[332] [1897] 1 Ch. 196, 205-6.

> declared by such a writing in the first instance; it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial.

As with section four, documents may be joined to form a sufficient writing.[333]

Finally, it is necessary that the writing be "signed by the party who is by law entitled to declare such trust." This refers to the owner of the beneficial interest and not the person possessed of the legal estate if the two are separate.[334] It should be noted that unlike section 4, the signature of an agent is not sufficient.

Section 9 provides:

> And be it further enacted that all grants and and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same or by such last will or devise or else shall likewise be utterly void and of none effect.

The first feature of this section which one should notice is that it applies to every trust, whether of realty or of personalty. Thus, for example, in Grey v. I.R.C.,[335] the equivalent English provision[336] was applied to a trust of shares. The second noteworthy feature of this section is that the

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[333] Keeton, Trusts 51 (4th Ed., 1947), relying on Foster v. Hale (1798) 3 Ves. 696.

[334] Tierney v. Wood (1854) 19 Beav. 330.

[335] [1960] A.C. 1.

[336] Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, s. 53(1)(c).

trust "shall likewise be in writing." Unlike section 4 or 7 which require only written evidence, this section requires that the trust itself appear in writing. It is odd that the statute uses the word "likewise".

The third section dealing with trusts is section 8:

> Provided always that where any conveyance shall be made of lands or tenements by which 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 herein before contained to the contrary notwithstanding.

It is unclear whether this section provides an exception to both sections 7 and 9 or whether to only section 7. The fact that it immediately follows section 7 and uses the words "provided always" and "anything herein before contained" would tend to indicate that it is an exception to section 7 alone. Clearly, it applies only to trusts of realty, while section 9 applies to both realty and personalty. However, the fact that it applies to "any conveyance . . . by which a trust . . . may arise" would indicate that it is also an exception to section 9. In addition to this problem, it is Lewin's opinion[337] that section 8 does not apply to trusts arising by wills. It should also be noted that section 8 provides an exception to the requirement of writing for the extinguishment of a trust, while neither section 7 nor section 9 provide such a requirement.

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[337]Lewin, Trusts 210-213 (11th Ed., 1904).

Originally, it was held that parol evidence was not admissible to prove a constructive trust,[338] but such evidence is clearly admissible at present.[339] It is beyond the scope of this paper to discuss the various ways in which a trust may arise by implication or construction of law.

The effect of non-compliance with the requirement of writing under either section 7 or section 9 is a thorny issue. Both sections use the phrase "utterly void and of none effect" which would appear to be clear. With regard to a section in the old British Columbia Statute of Frauds[340] equivalent to section 7 of our Statute, non-compliance was treated as rendering the trust void in Drummond v. Drummond.[341] In Leroux v. Brown,[342] the leading case on the effect of non-compliance with the Statute, Jervis C.J. contrasted the wording of section 4[343] with that of the other sections of the Statute in holding that the effect of the section was procedural, rendering contracts merely unenforceable.

However, in the words of Pettit:[344]

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[338] Kirk v. Webb (1698) Prec. Ch. 54.

[339] Ryall v. Ryall (1739) 1 Atk. 59, Amb. 413.

[340] R.S.B.C. 1936, c. 104, s. 7.

[341] (1965) 50 W.W.R. 538, 543, 544 (B.C.S.C.).

[342] (1852) 12 C.B. 801, 804.

[343] i.e., "no action shall be brought".

[344] 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.[345] There, the Court of Appeal, by way of analogy with Leroux v. Brown, held that section 7 related to procedure.[346]

Despite the fact that the wording in question is identical in both sections 7 and 9, that of section 9 has always been interpreted literally. Again in the words of Pettit:[347]

> The requirement that the disposition must actually be in writing, if not complied with at the time, clearly cannot be rectified subsequently, and accordingly it always seems to have been assumed that the absence of writing makes the proported disposition void.

It is important to distinguish between a declaration or creation of trust under section 7 and a grant or agreement of

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[345] [1897] 1 Ch. 196.

[346] The rationale behind holding trusts to be unenforceable and not void would seem to be the following. Section 7 requires a writing only as evidence of the trust and this may come into existence at any time before the action on the trust is brought. It would be inconsistent to say that the trust is void until the writing comes into existence.

[347] Pettit, Equity and the Law of Trusts 53.

a trust under section 9 for several reasons. The former need only be evidenced in writing while the latter must itself appear in writing. The former applies only to trusts of land while the latter applies to all trusts. Section 8 is perhaps not an exception to section 9. The effect of non-compliance with section 7 may be that the trust is unenforceable; non-compliance with section 9 renders the trust void.

The word "grant" in section 9 is ambiguous. "[It] is said to be the strongest and widest word of gift and conveyance known to the law,"[348] and as such would seem to encompass declarations and creations of trusts. However, it has been interpreted as meaning the grant of an equitable interest.

The modern English cases dealing with this topic have interpreted the word "disposition" which is found in the section of the Law of Property Act[349] which replaced section 9 of the Statute of Frauds. The applicability of these cases to Alberta must remain a matter of speculation.[350]

Waters[351] and Pettit[352] both discuss the problem of classifying directions by a beneficiary to a trustee. It is suggested that if the beneficiary directs the trustee to hold the beneficial interest for another, that would fall within section

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[348] Re Board of Education for City of Toronto & Doughty [1935] 1 D.L.R. 290.

[349] 1925, 15 & 16 Geo. 5, c. 20, s. 53(1)(c).

[350] For a discussion of this problem see Grey v. I.R.C. [1960] A.C. 1.

[351] Waters, Trusts in Canada 186-192.

[352] Pettit, Equity and the Law of Trusts 51-54.

9,[353] Underhill[354] feels that Grey v. I.R.C.[355] is authority for the proposition that a declaration by the beneficiary that he is holding the interest in trust for another is within section 9 while Pettit[356] feels this is the case only when the beneficiary holds as a bare trustee.

In Oughtred v. I.R.C.,[357] the beneficiary contracted with another to have the legal and beneficial interest in certain shares transferred to that other person. It was suggested[358] that a constructive trust arose thereby taking the trust out of the operation of section 53(1)(c) of the Law of Property Act. In Alberta, however, it is submitted that the position would be different. Section 8 of the Statute of Frauds does not except constructive trusts of personaly even if it does apply to section 9.

In Vandervell v. I.R.C.,[359] the beneficiary directed the trustee to transfer both the legal and the equitable estate to another. Lord Upjohn distinguished Grey v. I.R.C.[360] and

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[353] Grey v. I.R.C. [1960] A.C. 1.

[354] Underhill, Law of Trusts & Trustees 107 (11th Ed., 1959).

[355] [1960] A.C. 1.

[356] Supra no. 352.

[357] [1960] A.C. 206.

[358] Per Lord Jenkins at 632-633.

[359] [1967] 2 A.C. 291.

[360] [1960] A.C. 1.

Oughtred v. I.R.C.[361] on the basis that only the transfer of an equitable interest was involved[362] and found that the transaction was not covered by section 53(1)(c) of the Law of Property Act. It seems anomalous that a slight distinction in the facts of various cases should make a substantial difference in their legal implications.

B. Avoiding the Provisions of the Statute - Trusts

In the area of Trusts, it has also been held that the Statute of Frauds shall not be used as an instrument of fraud. However a wider interpretation of the word "fraud" has meant that this has been more effective in Trusts than in Contracts. According to the case of Rochefouchauld v. Boustead:[363] ". . . it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it has been so conveyed, to deny the trust and claim the land himself." It is not necessary that the trustee have a fraudulent intention at the time the conveyance is made, as the fraud arises when the absolute nature of the conveyance is set up by the trustee.[364]

There is some controversy over the rationale for avoiding the provisions of the statute on the basis of fraud. According to the Rochefoucauld ease, the trust is enforced "notwithstanding

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[361] [1960] A.C. 206.

[362] This seems rather odd. According to the headnote of Oughtred v. I.R.C., "the trustees vested the legal title in the settled shares" in the other party under directions from the beneficiary.

[363] [1897] 1 Ch. 196, 206.

[364] Bannister v. Bannister [1948] 2 All E.R. 133, 136.

the statute."[365] According to the Bannister case, the express trust is not enforced, but ". . . a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest which, according to the true bargain, was to belong to another. . . ."[366] A constructive trust arises by operation of law and by section 8 of the Statute of Frauds, such trusts do not need to be evidenced in writing.

C. Reform

Trusts play a very much less important role in the average person's life than do contracts. An individual intending to create or assign a trust is more likely to seek legal advice than is a person intending to enter into a contract. Therefore, persons involved are more likely to be made aware of any requirement of writing with regard to trusts.

If it is determined that a requirement of writing serves important cautionary and evidentiary functions, it should be retained. It should be noted that with the possible exception of Prince Edward Island[367] such a requirement is in force in every common law province of Canada and in Great Britain.

If retention is deemed desirable, it is recommended that creations of trusts and assignments of equitable interests should be subject to the same provisions. There would seem to be no logical reason for setting different standards for the two and

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[365] At 206.

[366] At 136.

[367] For the same reasons set out in Footnote 246 above.

and this step would simplify the law.

It is suggested that trusts relating to personalty are likely to be as important and as complicated as trusts relating to realty. For this reason, it is recommended that all trusts, regardless of the subject matter, be subject to a requirement of writing. For the reasons set out under the section of this report dealing with contracts relating to land,[368] it is recommended that the trusts themselves be required to be reduced to writing and that failure to comply render the trusts void.

This would undoubtedly create hardships in particular cases and it is therefore recommended that the court be given the discretion to make such orders as it deems fit to ensure equitable results. This would not be a significant change from the present position where the court uses the maxim that the Statute may not be used as an instrument of fraud.

The new legislation might read as follows:

> A declaration or creation of a trust or a disposition of an equitable interest shall be in writing, signed by the party so declaring, creating or disposing, or his agent thereunto lawfully authorized, or else shall be void. This shall not apply to trusts arising or resulting by operation of law.
>
> Notwithstanding the foregoing, the Court may make such orders with regard to the rights of the parties as are fair and equitable under the circumstances.

If it is determined that the requirement of writing does not serve an important cautionary and evidentiary function, it

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[368] See pp. 68-69, above.

should be repealed. This is the view of Waters:[369]

> In the author's view the answer is for the provinces and territories to repeal those provisions of the Statute that call for written evidence of oral trusts of land or interests in land, together with those provisions that exempt trusts arising by operation of law. The object of the Statute in 1677 was to protect the courts from having to sift the truth from constantly perjured evidence. During the nineteenth century it is clear that the courts continued to weigh oral evidence, and when they were satisfied that a trust had been created, the Statute became a mere hindrance to its enforcement. There seems no reason today why this hindrance should not simply be removed.

VI

SUMMARY OF RECOMMENDATIONS

1. Sections 1, 2, 3, 4, 7, 8, 9 of the Statute of Frauds, sections 5 and 6 of Lord Tenterden's Act and section 7 of the Sale of Goods Act should be repealed.

2. Section 2 of the Guarantees Acknowledgment Act should be amended by removing the words "deed or written". Section 3 of the Guarantees Acknowledgment Act should be amended by adding the words: "unless it appears in the form of a written agreement or a deed" after the word "effect".

3. A new statute should be enacted so as to provide:

   (a) A contract for the sale or other disposition of land or any interest in land shall be in writing,

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[369] Waters, Trusts in Canada 201.

> signed by all the parties to the contract or their agents thereunto lawfully authorized, or else shall be void. Notwithstanding the foregoing, the Court may make such orders with regard to the rights of the parties as are fair and equitable under the circumstances.
>
> (b) A declaration or creation of a trust or a disposition of an equitable interest shall be in writing, signed by the party so declaring, creating or disposing, or his agent thereunto lawfully authorized, or else shall be void. This shall not apply to trusts arising or resulting by operation of law. Notwithstanding the foregoing, the court may make such orders with regard to the rights of the parties as are fair and equitable under the circumstances.

In the alternative, it is recommended that there be no requirement of writing for trusts or for contracts relating to land.

VII
CONCLUSION

Corbin summarized the problems with regard to the Statute of Frauds as follows:[370]

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[370] Corbin on Contracts 14.

> 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.

Retention is therefore justified only when the advantages - cautionary and evidentiary - of the requirement of writing outweigh these problems.

The chief fault of the Statute is that it operates ex post facto. If there is to be a requirement of writing, the general public should be aware of it so that they may conduct their affairs accordingly. This necessitates that the requirement be easily understood and well publicized.

For these reasons, it is recommended that the Statute either be repealed or significantly amended so as to meet the needs of our time.

NOTES:

The Report of the South Australia Law Reform Committee on the Statute of Frauds (No. 34) was received after the completion of this paper. The Committee recommended that the requirement of writing be repealed for promises by executors and administrators, promises in consideration of marriage, contracts not to be performed within one year, the ratification of infants' contracts and the sale of goods. It also recommended the repeal of the Statute of Frauds as to guarantees. The Committee agreed that the requirement of writing should be repealed as to the declaration of trusts, but was divided on the issue of the assignment of trusts. Finally, the majority recommended that contracts relating to land be rendered unenforceable unless reduced to writing and executed by the parties. The minority recommended outright repeal of this requirement.

This paper has been updated by the inclusion of additional footnotes, denoted by the letter 'a' following the number.

October, 1975

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 miscarraige of another
(5) contract for the sale of land
(6) sale of goods of value over $X
(7) ratification
(8) fraudulent misrepresentation
(9) trusts

	1	2	3	4	5	6	7	8	9
Newfoundland	*	*	*	*	*	*	x	*	*
Nova Scotia	*	*	*	*	*	*	*	*	*
Prince Edward Island	x	x	x	*	?	*	*	*	?
New Brunswick	*	*	*	*	*	*	*	*	*
Ontario	*	*	*	*	*	*	*	*	*
British Columbia	x	x	x	*	*	x	x	*	*
Saskatchewan	*	*	*	*	*	*	*	*	*
Manitoba	*	*	*	*	*	*	*	*	*
Alberta	*	*	*	*	*	*	*	*	*
United Kingdom	x	x	x	*	*	x	x	*	*

* currently in force
x repealed or not in force

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

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 repealed 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; replaced by s. 53, Law of Property Act
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, 1925 (c. 23) sch. 2
s. 24.	Repealed by Law of Property Act, 1925 (c. 20) sch. 7