LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

THE *STATUTE OF FRAUDS*

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Report #41

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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INTRODUCTION

The *Statute of Frauds*[1] was enacted by the English Parliament in 1677 in an attempt to prevent fraud and perjury. Because of the unsettled state of politics and society existing at the time, and because of the undeveloped state of the law relating to evidence, it was considered imperative that certain transactions should either be in writing or at least be evidenced in writing to be enforceable in the courts. The Parliament accordingly enacted this statute, 25 sections long, which governed the enforceability of certain contracts, conveyances, wills, trusts, judgments and executions.

Almost 200 years later the statute, in its original 17th Century language, was received into the law of Manitoba. With the statute came 200 years of confusing, and often conflicting, judicial interpretation. As the English Law Revision Committee pointed out in 1937:

> Apart from its policy, the Statute is in point of language obscure and ill drafted. "It is universallary admitted," observed the original editor of Smith's leading cases, "that no enactment of the legislature has become the subject of so much litigation".[2]

Since its reception into Manitoba over 100 years have passed and while the archaic language has been tempered by relatively modern judicial interpretation, the provisions of the statute are undoubtedly ripe for review. As a result of the sophisticated nature of our present commercial and judicial systems, the compelling circumstances that produced the statute 300 years ago are either non-existent or of no consequence today.

THE LEGISLATION

As mentioned above, the *Statute of Frauds* became a part of the body of statutory law governing Manitoba by adoption on July 15, 1870, when the province was established. The statute was never enacted in any form in Manitoba, therefore no trace of it is found in the statute books. The only evidence of the fact that it is in force in Manitoba is provided by its application in a number of reported cases. Considering the significance of some of the statute's provisions, this fact alone would suggest that some action must be taken to clarify its standing. In a legal system in which every person is deemed to know the law, it seems strange that an important commercial statute affecting daily transactions cannot be discovered without an intimate knowledge of legal history, and cannot be comprehended without any moderate understanding of English society.

We therefore recommend that the *Statute of Frauds* as adopted in Manitoba on July 15, 1870 be repealed and such of its provisions with the appropriate amendments as we shall later recommend be embodied in one new statute of the province.

The content of the original statute in Manitoba has been affected by a number of factors. By 1870 the English Parliament had repealed a number of sections and added others by amendment, therefore the statute as adopted was not in its original form. Further, some of the sections extant in 1870 were clearly inapplicable in Manitoba, and others have since been superseded by provincial legislation; such as

"The Mercantile Law Amendment Act".[3] The statute as it presently stands in Manitoba is reproduced below:

An Act for prevention of Frauds and Perjuryes

For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury Bee it enacted by the Kings most excellent Majestie by and with the advice and consent of the Lords Spirituall and Temporall and the Commons in this present Parlyament assembled and by the authoritie of the same That from and after the fower and twentyeth day of June which shall be in the yeare of our Lord one thousand six hundred seaventy and seaven All Leases Estates Interests of Freehold or Termes of yeares or any uncertaine Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments made or created by Livery and Seisin onely or by Parole and not putt in Writeing and signed by the parties soe makeing or creating the same or their Agents thereunto lawfully authorized by Writeing, shall have the force and effect of Leases or Estates at Will onely and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect, Any consideration for makeing any such Parole Leases or Estates or any former Law or Usage to the contrary notwithstanding.

II. Except neverthelesse all Leases not exceeding the terme of three yeares from the makeing thereof whereupon the Rent reserved to the Landlord dureing such terme shall amount unto two third parts at the least of the full improved value of the thing demised.

III. And moreover That noe Leases Estates or Interests either of Freehold or Terms of yeares or any uncertaine Interest not being Copyhold or Customary Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments shall at any time after the said fower and twentyeth day of June be assigned granted or surrendered unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or surrendering the same or their Agents thereunto lawfully authorized by writeing or by act and operation of Law.

IV. And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June noe Action shall be brought whereby to charge any Executor or Administrator upon any speciall promise to answere damages out of his owne Estate or whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person or to charge any person upon any agreement made upon consideration of Marriage or upon any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them or upon any Agreement that is not to be performed within the space of one yeare from the makeing thereof unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.

VII. And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June all Declarations or Creations or Trusts or Confidences of any Lands Tenements or Hereditaments shall be manifested and proved by some Writeing signed by the partie who is by Law enabled to declare such Trusts by his last Will in Writeing or else they shall be utterly void and of none effect.

VIII. Provided alwayes That where any Conveyance shall bee made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law or bee 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 beene if this Statute had not beene made. Any thing herein before contained to the contrary notwithstanding.

IX. And bee it further enacted That all Grants and Assignments of any Trust or Confidence shall likewise be in Writeing signed by the partie granting or assigning the same or by such last Will or Devise or else shall likewise be utterly void and of none effect.

"The Mercantile Law Amendment Act" of Manitoba (replacing the English *Mercantile Law Amendment Act, 1856*[4])

1 This Act may be cited as: "The Mercantile Law Amendment Act".

2 No special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom the promise was made, by reason only that the consideration for the promise does not appear in writing, or by necessary inference from the written document.

3(1) Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, is entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is or is not deemed at law to have been satisfied by the payment of the debt or performance of the duty; and that person is entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as in the case may be, indemnification for the advances made and loss sustained by the person who has so paid the debt or performed the duty, and the payment or performance so made by the surety is not pleadable in bar of any such action or other proceeding by him.

3(2) No co-surety, co-contractor or co-debtor is entitled to recover from any other co-surety, co-contractor or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, the last mentioned person is justly liable.

4 Giving time to a principal debtor, or dealing with or altering the security held by the principal creditor, does not of itself discharge a surety or guarantor; in such cases a surety or guarantor

is entitled to set up the giving of time or dealing with or alteration of the security as a defence, but the defence shall be allowed in so far only as it is shown that the surety has thereby been prejudiced.

5 Stipulations in contracts as to time or otherwise which would not, before the passing of The Queen's Bench Act, 1895, have been deemed to be, or to have become, of the essence of such contracts in a court of equity shall receive in all courts the same construction and effect as they would, prior to the passing of The Queen's Bench Act, 1895, have received in equity.

6 Part performance of an obligation, either before or after a breach thereof, where expressly accepted in writing, by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to have extinguished the obligation.

7 Where any one or more joint contractors, obligors, or partners die, the person interested in the contract, obligation or promise entered into by the joint contractors, obligors, or partners may proceed by action against the representatives of the deceased contractor, obligor, or partner in the same manner as if the contract, obligation, or promise had been joint and several, and this notwithstanding there is another person liable under the contract, obligation, or promise still living, and an action pending against that person; but the property and effects of shareholders in chartered banks or members of other incorporated companies is not liable to a greater extent than they would have been if this section had not been passed.

Statute of Frauds Amendments Act 1828[5]

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.

> 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, Ability, Trade, or Dealings of any other Person, to the Intent or Purpose that such other Person may obtain Credit, Money, or Goods upon, unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith.

These last two sections are referred to as sections 5 and 6 of *Lord Tenterden's Act*.

A further provision within the purview of this study is section 6(1) of *"The Sale of Goods Act"*[6] of Manitoba; this section originated as section 17 of the *Statute of Frauds*, was repealed in England after 1870 and subsequently re-enacted in the English *Sale of Goods Act*[7] in 1893.

> 6(1) A contract for the sale of any goods of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

At this point a short review of the law in other jurisdictions is necessary to provide a wider perspective to our examination of the statute; it seems natural that such a review should begin with the law of the country in which the statute originated.

Since 1870 the contents of the statute in England have been greatly reduced. The *Law of Property Act 1925*[8] removed a number of sections and reworked them into a more

suitable form. Section 40 of that Act replaced that part of section 4 dealing with contracts for the sale or other disposition of interests in land, while section 53 did the same for sections 3, 7, 8 and 9. Section 54 replaced sections 1 and 2. Thus very little remained of the original statute. In 1954, as a result of studies done by the English Law Revision Committee in 1937 and the English Law Reform Committee in 1953, the *Law Reform (Enforcement of Contracts) Act 1954*[9] was enacted. This Act repealed what was left of the statute except for that part of section 4 dealing with guarantees (promises to answer for the debt of another), and section 6 of *Lord Tenterden's Act*, dealing with representations of credit worthiness. This Act also repealed the section of the English *Sale of Goods Act* equivalent to section 6(1) of the Manitoba Act.

The relevant sections of the *Law of Property Act 1925* and the *Law Reform (Enforcement of Contracts)Act 1954* are reproduced below:

LAW OF PROPERTY ACT 1925

40(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court.

53(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol

(a) no interest in land can be created or disposed of except by writing signed by

the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

54(1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

LAW REFORM (ENFORCEMENT OF CONTRACTS) ACT 1954

[An Act to amend section four of the Statute of Frauds 1677; and to repeal section four of the Sale of Goods Act, 1893]

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:-

1. In section four of the Statute of Frauds, 1677, the words "whereby to charge any executor or administrator upon any special promise to answer damages out

> of his own estate; or", the words "or to charge any person upon any agreement made upon consideration of marriage" and the words "or upon any agreement that is not to be performed within the space of one year from the making thereof" are hereby repealed in relation to any promise or agreement, whether made before or after the commencement of this Act.
>
> 2. Section four of the Sale of Goods Act, 1893, is hereby repealed in relation to any contract, whether made before or after the commencement of this Act.

The Canadian jurisdictions have been decidedly less energetic than England with regard to reform of the statute. Like Manitoba, there is no provincially enacted statute in Alberta, Saskatchewan, Quebec, or Newfoundland; Alberta and Saskatchewan treat the statute as being in force. In Ontario *"The Statute of Frauds"*,[10] enacted in 1913, essentially duplicates the statute as it exists in Manitoba, but in more modern language. The Acts of Nova Scotia[11] and New Brunswick[12] also contain all the salient provisions; the New Brunswick Act contains further sections governing the enforceability of real estate commissions and the validity of writs of execution. The Prince Edward Island *"Statute of Frauds"*,[13] enacted in 1939, differs dramatically in its exclusion of the contract enforceability provision found in section 4 of the original Act; the sections governing the enforceability of trusts are also absent. British Columbia is the most active of the provinces, having passed their *"Statute of Frauds"*[14] in 1958. This Act includes all those provisions found in the legislation applicable in Manitoba except the following: section 5 of *Lord Tenterden's Act* concerning infants' contracts, and those parts of section 4 concerning promises in consideration of marriage, contracts not to be performed within one year, and promises by executors. This Act makes one other significant change by expressly

including contracts of indemnity with guarantees in section 5. As will be pointed out, this is an important exception to the rule. The British Columbia legislation is reproduced below.

1. This Act may be cited as the *Statute of Frauds*.

2(1) No agreement concerning an interest in land is enforceable by action unless evidenced in writing, signed by the party to be charged or by his agent.

(2) No creation, assignment, or surrender of an interest in land is enforceable by action unless evidenced in writing, signed by the party creating, assigning, or surrendering the same or by his agent.

(3) This section does not apply to any lease of an interest in land for a term of three years or less.

3. No assignment or surrender of a beneficial interest in any property held in trust is enforceable by action unless evidenced in writing, signed by the party assigning or surrendering same.

4. Sections 2 and 3 do not apply to trusts arising or resulting by implication or construction of law.

5(1) No guarantee or indemnity is enforceable by action unless evidenced in writing, signed by the party to be charged or by his agent, but any consideration given for the guarantee or indemnity need not appear in the writing.

(2) This section does not apply to a guarantee or indemnity arising by operation of law.

6. 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 thereupon, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

It should also be noted at this point that the Law Reform Commission of British Columbia completed a report on the *Statute of Frauds* in 1977 and that the Alberta Institute of Law Research and Reform published a background paper in March 1979. These will be referred to where appropriate.

On the subject of the section governing enforceability of contracts under *"The Sale of Goods Act"*, it is enough to say that only British Columbia does not have a provision equivalent to section 6(1) of the Manitoba Act. None of the statutes stipulate a minimum value greater than $50.

Before embarking on an analysis of the separate provisions, it is necessary to clarify the meaning of certain terms that will be used in connection with a number of the sections. It should first be noted that in most sections where the requirements of the statute are not met, the transaction in question is not rendered void, but merely unenforceable in the courts. Thus, an oral agreement that falls within the statute is valid and can be employed for other purposes, as a defence to an action in trespass, for example, but performance cannot be demanded. While this interpretation of the statute is criticized for allowing certain contracts to exist for some purposes but not others, we shall see when examining the doctrine of part performance that the interpretation is useful because it allows the contract to be proved by an alternate form of evidence to that prescribed in the statute.

Another notable characteristic of the statute is that the transaction in question need not itself be in writing, but need only be evidenced by a memorandum. A vast amount of litigation has taken place over the years to determine

what constitutes a valid memorandum. The basic rules that have developed are as follows:

1. The memorandum need not be written at the time of agreement; it need only come into existence at some time before an action on a contract is instituted and need not be intended to function as a memorandum when created.

2. All the material terms of the agreement must be present in the memorandum; these include the names of the parties involved, the property affected, the consideration for the promise, and any other terms that are important in the special circumstances of the case.

3. Any material terms omitted may be introduced by parol evidence if they are referred to, by reasonable inference, in the memorandum. The parol evidence rule, that oral evidence may not add to, vary or contradict the written terms, is not breached if there is a sufficient connection between some part of the memorandum and the oral evidence.

4. When a material term for the exclusive benefit of the plaintiff is omitted, he may waive that term and enforce the contract.

5. The whole document must be authenticated by the signature of the party being charged; the signature need not be at the bottom of the document and is sufficient if it is printed and even if only the party's initials are present. The statute also permits the signature of a lawfully authorized agent of the party to authenticate a memorandum.

6. No particular form is demanded and, as stated above, a document need not be intended to function as a memorandum. It is possible to create a sufficient memorandum from a number of related documents, whose connection may be proved by parol evidence where there is a reasonable inference to suggest a connection.

With these terms clarified, then, we may proceed with our analysis of the advantages and disadvantages of each of the provisions of the statute. The sections will be examined in the order in which they occur in the statute.

CONVEYANCES OF LAND

The first three sections of the statute may be dealt with as a group, since they are all concerned with conveyances of interests in land. Section 1 states that all newly created leases and estates must be in writing (a memorandum is not sufficient in this case) and signed by both parties; non-compliance results in the creation of an estate at will only, that is to say, an estate determinable at the will of the conveyor. Section 2 creates an exception to this rule for leases not longer than three years from the date of the creation of the lease (as opposed to the date on which the lease commences); this exception is conditional on the term that the rent in the lease must equal at least 2/3 of the full improved value of the property demised. Finally, section 3 demands that where an interest in land is assigned, granted or surrendered, it must be done in writing and signed by the party conveying the interest; the section does not state what would be the effect of non-compliance.

It should be pointed out at this juncture that these sections deal with conveyances of land, and should not be confused with the provision in section 4, which deals with contracts to convey land.

It is also important to distinguish the functions of these sections from that of "The Real Property Act".[15]

Section 66(3) of that Act states that an instrument conveying an interest in land must be registered to be effectual as against the *bona fide* transferee, ie. as against a third party. This provision would seem to supplant the need for the sections of the *Statute of Frauds*. However, it is well established that as between the parties to a conveyance, registration is unnecessary to pass the equitable title. Therefore, in a case where there is neither a transfer of title by registration nor an enforceable contract to convey, a valid conveyance, in compliance with the *Statute of Frauds*, will effectively pass title.

The need for these sections does not often arise because most land transactions are conducted by persons well versed in the practices of real estate conveyancing, and consequently well aware of the advantages of preparing contracts and registering tranfers of title. The remote possibility exists, however, that a conveyance could take place, either for valuable consideration or by gift *inter vivos*, without being evidenced by registration or contract. With this possibility in mind, the need for the formalities required by the statute must be assessed.

In the case of a conveyance for valuable consideration, it is our view that the formality of writing should be retained. As will be pointed out below, we are of the opinion that contracts concerning interests in land should be evidenced in writing to be enforceable. Considering that view, it would be self-defeating to permit oral conveyances validly to pass title. An anomalous situation could result where a contract to convey land would fail for lack of writing but an oral conveyance would be successful.

The possibility of an oral conveyance by gift *inter vivos* is far more likely to occur than one for valuable consideration. This poses some problems considering the nature of land and the requirements for perfection of a gift. At common law a gift is perfected when there is a clear intention on the part of the donor to make the gift, a willingness on the part of the donee to receive the gift, and a substantial delivery of the gift to the donee; where the gift is not capable of delivery there must be some overt act to evidence the fact that custody of the property has changed hands. The problem that arises with land is that both the donor and the donee could be resident on the gifted property and consequently the question of whether or not there has been a change of control could be difficult to determine. Because of the nature of gifts, that is, that the donor receives no compensation in return for his loss, it is our view that the formal requirement of a written conveyance is a necessary evidentiary precaution.

The possibility of a donor being unjustly enriched by the labours or expenditures of the donee after an unenforceable oral conveyance is removed by the principle of estoppel, demonstrated in *Campbell v. Campbell*.[16] In that case a farmer gave his son a piece of his property on which the son built a house. No deed was executed and after the father's death the devisee of the whole farm instituted an action in ejectment. It was held that in the face of the expenditures made on the property by the donee with the knowledge and consent of the donor, the *Statute of Frauds* could not be successfully pleaded to destroy the gift.

We would recommend, then, that the substance of sections 1 and 3 should be retained. While their application

will not often be necessary, because of the prevalence both of registration under *"The Real Property Act"* and of contracts for land conveyances, they should exist for those exceptional cases where neither of these precautions is taken.

It was previously noted that section 2 creates an exception to the rule requiring conveyances to be in writing. This exception exists for leases which expire within three years of the date on which they are made, and which generate a yearly rent of at least 2/3 of the "full improved value" of the property. These two rather obscure conditions must be examined separately.

It is well established that the three year period must be computed from the date of the agreement, so that in fact it is not the length of the lease that is relevant but rather the length of the time between the making of the agreement and the end of the term of the lease. However, a lease required to be in writing must necessarily extend beyond the three year period. It would therefore seem that a lease for less than three years with an option to renew for a further term would not be required to be in writing and so it was held in *La Corporation Episcopale de St.Albert v. Sheppard & Co.*[17] which followed a decision of the English Court of Appeal in *Hand v. Hall.*[18] However, it was decided to the contrary in *Pain v. Dixon*[19] an Ontario decision where the learned judge followed the Exchequer Division decision in *Hand v. Hall,* his attention not having been called to the judgment of the English Court of Appeal. We would recommend therefore, that in the retention of section 2 and the amendment which is proposed below, there should be included a clear stipulation that any

option for renewal incorporated in a lease of which the term is less than three years should not operate as a requirement necessitating such a lease to be in writing.

Section 57 of *"The Real Property Act"* sets forth the bulk of statutory exceptions to the concept of indefeasibility of title enshrined in our "Torrens" system of registration and transmission of interests in land. It is noteworthy that subsection (1)(d) of section 57 makes specific reference to "any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land thereunder". While one cannot certify with exactitude the specific reason for such a legislative enactment, it would appear probable that the legislation in question was initially drafted with section 2 of the *Statute of Frauds* specifically in mind. Thus a three year lease commencing immediately would be within the exception of both statutes, while a two year lease commencing 13 months from the date of agreement would however require writing to satisfy the *Statute of Frauds*, but not be required to be registered under section 57(1)(d) of *"The Real Property Act"* as such a lease would be for a period "not exceeding three years". This is a situation that we feel to be both confusing and indefensible. Therefore, we recommend that while section 2 of the *Statute of Frauds* be re-enacted in the new statute, it should exempt from the formal requirements of writing leases of which the *actual* terms do not exceed three years, thus rendering the "date of the making thereof" irrelevant.

While the only verbal leases deemed to have validity pursuant to section 2 of the *Statute of Frauds* of 1677 are those that expire within three years from the making thereof, it is also provided that they generate a yearly rent of at

least two-thirds of the "full improved value of the property demised". The latter proviso relating to the full improved value of the thing demised is subject to numerous interpretations, none of which justify its continued existence. Whether or not the "full improved value" of the property is the fair market value, the yearly profit value, or the annual rental value, seems an unnecessary consideration. As the purpose of section 2 is to create an exception to the demand for written evidence of the lease; the amount of the consideration for the lease is, in our view, nowadays irrelevant and inappropriate. This is particularly true in view of the fact that the historical reasons from which this particular exception sprang are now completely irrelevant to modern times. We therefore recommend that while the provisions of section 2 should be re-enacted the condition concerning the quantum of rent be omitted.

It has already been noted by virtue of section 1 of the *Statute of Frauds* of 1677 that the creation of all estates or interests of freehold and terms of years, must be in writing. In Manitoba, the situation was further complicated by the enactment in England in 1845 of *"An Act to Amend the Law of Real Property"*.[20] For our purposes, we need only concern ourselves with section 3 of the statute, which is as follows:

> 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 Interst, and not being an Interest which might by Law have been created without Writing, made after the said First Day of October One thousand eight hundred and forty-five, shall also be void at Law, unless made by Deed; Provided always, that the said Enactment so far as the same relates to a Release or a Surrender shall not extend to Ireland.

The interpretation of the old English land law has always been an extremely arcane exercise. In order to gain insight into this area of the law, one usually has to look at it in historical perspective. Regarding freehold estates in land, section 3 *supra* refers to Feoffments and lands held by Copyhold tenure. As Copyhold tenure was one of the last direct vestiges of feudalism, it never existed in Canada. The term "Feoffment" undoubtedly has a direct application to the Canadian scene, as it is capable of several interpretations. In its most pristine sense, it was initially the most common method of conveying land in feudal times, particularly when the skill of writing was not manifest throughout the realm. In this, its original context, feoffment was a symbolic ceremony of the transfer of ownership of land from one party to another, invariably accompanied by "livery of seisin",or, the delivery, in the presence of witnesses, from the transferor to the transferee of a clod of earth or some other thing or token that represented a true transfer of ownership. Some authorities would restrict the act of enfeoffment to gifts of land only, although historically speaking, this would not necessarily be correct. Regarding the ceremonial act of enfeoffment itself, it is interesting to note that the transfer of land by this method was abolished in England by virtue of section 51(1) of their great omnibus *Law of Property Act* of 1925. Shortly after feudal times, it

became usual to put the terms of the conveyance in writing as a record of the transaction, which was called the Charter or Deed of Feoffment. In all probability, it was this Charter or Deed of Feoffment that the English Parliament had in mind in 1845 at the time of the enactment of their *Real Property Amendment Act*. Thus, for our purposes, the term "feoffment" can be taken to mean a conveyance of a freehold interest in land.

The conveyance of freehold estates by way of deed has been supplanted, insofar as "new system" or "Torrens" land is concerned, by the passage of *"The Real Property Act"* in Manitoba. This is not the situation, however, pertaining to "old system" or *"The Registry Act"* land. Our *"Registry Act"*[21] states simply that "all instruments may be registered".[22] "Deeds" are referred to only in a peripheral manner in *"The Registry Act"*.[23] Nevertheless, the Manitoba *"Short Forms Act"*[24] refers specifically throughout the Act to "a deed of conveyance, or deed of mortgage, or deed of lease". The implication is that when this particular legislation was first enacted in Manitoba during Victorian times the legislature specifically recognized the validity of the 1845 English legislation previously referred to in stipulating,at least by inference, that the transmission of all major estates or interests in land must be made by deed in order to possess validity. This conclusion was augmented by enquiries directed to the "old system" registration branch of the Winnipeg Land Titles Office, wherein it was ascertained that the Winnipeg Land Titles Office would accept for registration only those instruments that comply with the provisions of *"The Short Forms Act"*. Therefore, the inescapable conclusion is that in Manitoba, other than provided for by *"The Real Property Act"*, a conveyance of a freehold interest in land (a mortgage being nothing more than a form of conveyance of land under the "old system")

must be by deed to have any effect at law.

Regarding leasehold estates and interests, that is non-freehold estates, the situation in Manitoba has never been in doubt. Section 3 of the English legislation of 1845 states specifically that "a lease required by law to be in writing" and an "assignment of a chattel interest" shall be void at law unless evidenced by deed. A "chattel interest" is archaic English land law terminology for a non-freehold interest, or a landlord and tenant estate. A "lease required by law to be in writing" would mean a lease having a duration of more than three years from the date of the making thereof. In landlord and tenant law that particular type of leasehold estate, would, of necessity, have to provide for a fixed expiration date, and therefore it would be categorized as an "estate for years". As most important non-residential leases in Manitoba are "estates for years", the situation at law within our province is that these types of leases (and indeed an assignment of any type of leasehold interest other than a residential leasehold interest) must be evidenced by deed. This is an anachronistic situation, and one that could lead to technical pitfalls for those who are not possessed with a high degree of legal expertise in this highly specialized area of the law.

There is one further complicating factor here, and that is the law relating to corporations. The common law is to the effect that a corporation cannot make any disposition of its property otherwise than by deed sealed with their common seal. Thus, if one were to use as an example a lease for years, in the case of a corporate body, not only would the 1845 English legislation require that the corporate lease in question be by deed in order to be valid, but the common

law would be to the same effect, and further require the utilization of the company's common seal on the deed. These legal requirements are only exacerbated by modern legislative requirements which tend to relegate to the dustbin of history the overwhelming importance that was formerly placed on the affixation of a company seal. Section 23 of *"The Corporations Act"* of Manitoba[25] states as follows:

> An instrument or agreement executed on behalf of a corporation by a director, an officer or an agent of the corporation is not invalid merely because a corporate seal is not affixed thereto.

It is the opinion of this Commission, although there is no jurisprudence in this regard, that a great deal of uncertainty and confusion has been created by virtue of not having previously reformed the law relating to deeds in order to make it more compatible with modern commercial and corporate practice. The time for requiring a formal execution of a document under seal and by subsequent delivery is now long past. Section 23 of *"The Corporations Act"* (*supra*) only serves to exemplify present legal trends. Therefore, although in certain instances we do not recommend the abolition of the requirement of writing for certain conveyances, we nevertheless recommend abolition of the requirement of doing so by way of deed. We therefore recommend that *"The Registry Act"* and *"The Short Forms Act"* be amended to obviate this requirement for instruments in writing to be made by deed and that the English *"An Act to Amend the Law of Real Property"* of 1845 be repealed. In this regard cross-reference should be made to *"The Landlord and Tenants Act"* of Manitoba.

As pointed out by the Alberta Institute of Law Research and Reform in their background paper number 12, page 70, there is some question about the applicability of section 2 to the rest of the *Statute of Frauds*. Section 2 begins with

the words "Except nevertheless" which would indicate that the section only applies to section 1, and not to sections 3 and 4. By this reasoning newly created leases of less than three years would not require writing but the same lease when assigned to another, as contemplated in section 3, would have to be evidenced in writing. Pursuant to section 3 of the *Real Property Amendment Act* of 1845 the writing required would have to be in the form of a deed. Under section 4 a contract to create such a lease would be held unenforceable if not evidenced by a memorandum yet the oral lease itself would be valid.

The other question to be resolved as a matter of policy, is as to whether or not the non-requirement of writing for a conveyance or assignment in section 2 refers to the duration of the lease, or the unexpired portion of the lease. On balance and in order to be consistent, this Commission opts for the former as the measuring hallmark, that is, the measuring unit of time should be the duration of the lease itself and not the unexpired portion thereof. Thus, for example, if a lease were for ninety-nine years, and ninety-seven years of the lease had already expired, a written assignment would be necessary even though there were only two years left to run in the lease itself.

We therefore recommend that no conveyance of a lease or contract to convey a lease, of which the initial term will not exceed three years in duration, should require any written form of evidence.

In addition, some academic controversy has ensued

as to the legal position of a lease for a period of between one to three years. The lease in question having a duration of less than three years, need not, under section 2, be in writing in order to be enforceable. However, if one were to view such leases from the perspective of a contract rather than a transmission of a landlord and tenant estate, there is then a distinct possibility that certain of these leases would fall within the purview of section 4 of the *Statute of Frauds*, being "contracts not to be performed within one year from the making thereof". As this Commission recommends later on in this paper the abolition of that particular provision enumerated in section 4, this problem will resolve itself by mere repeal of the previously troublesome legislation. Nevertheless, this is just one more cogent argument in support of repeal of that portion of the *Statute of Frauds* pertaining to contracts not to be performed within one year from the making thereof.

The prime legislation in Manitoba dealing with landlord and tenant estates is, of course, *"The Landlord and Tenant Act"*.[26] Non-residential leases are dealt with in Parts I, II and III of the Act. Residential leases are dealt with in Part IV of the Act, this portion of the legislation being of relatively recent origin, having been first enacted in 1970. No specific mention is made in any of the parts of *"The Landlord and Tenant Act"* as to whether or not leases need be in writing to be enforceable. Regarding non-residential leases, it has been long established in Manitoba that the common law is clearly applicable in determining whether or not a lease need be in writing. That is, in order to make a determination of this nature the courts have always applied the relevant provisions of the *Statute of Frauds* together with the case law emanating therefrom. Although there

is yet no case law in this connection, the situation can become extremely confusing when dealing with residential tenancies as enumerated in Part IV of the Act. Section 118(1) of *"The Landlord and Tenant Act"* states that "the Lieutenant-Governor in Council may prescribe by regulation the form of tenancy agreement for residential premises, and every tenancy agreement shall be deemed to be the form so prescribed". Obviously, if section 118(1) is to be interpreted literally, there is no reason for a written tenancy agreement relating to residential tenancies. The only limitation on the term of a tenancy agreement set forth in Part IV is contained in section 103(7) which provides, in essence, that a tenancy agreement shall not provide for a term less than or longer than twelve months, except with the mutual consent of both the landlord and the tenant.

For the sake of consistency, this Commission recommends that *"The Landlord and Tenant Act"* be amended so as to state specifically that <u>any</u> lease, whether residential or non-residential, should be in writing where the <u>duration</u> of the term of the lease in question is in excess of three years with a cross-reference to the new proposed Statute of Frauds. Where a residential tenancy is the subject matter of the lease, then the written form of tenancy agreement should be in a form prescribed by the Lieutenant-Governor in Council, as is presently the case.

<u>SECTION 4</u>

Section 4,commonly referred to as "the contract section", provides that no agreement within any of the five specified classes will be enforceable in court unless a

sufficient memorandum exists. This rule is, of course, in direct conflict with the standard law of contract, which permits oral agreements.

The main disadvantage of the requirement is that it enables a party to an oral agreement, who fully intended to enter into a legally binding obligation, to avoid his obligation by pleading the statute as a defence, and thereby to use the statute to perpetrate a fraud. This problem is aggravated by the fact that the five classes of contracts to which the section applies have no consistent standard characteristic, and therefore their inclusion seems arbitrary and irrational. Further disadvantages noted by the English Law Revision Committee, which we see as extension of this same problem, are as follows:

> 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 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.[27]

Finally, as noted above, the statute was not well drafted originally, with the result that it has caused endless litigation.

The advantages of the section are generally conceded to be both cautionary and evidentiary. The act of creating a memorandum and signing it warns the parties of the seriousness and finality of their transaction, while the memorandum itself acts as the best evidence of the terms to which the

parties have agreed. The application of these advantages and disadvantages will be considered with each type of contract included in the section.

1. Contracts by Executors and Administrators for Payment of Debts Out of Their Own Estate

The first class of contracts mentioned in the section are those whereby an executor or administrator promises to answer damages out of his own estate. The representative of the deceased has no obligation, either at law or equity, to meet the liabilities of the deceased out of his own pocket; but, it sometimes occurred that the representative would undertake such an obligation. The reason for such an undertaking was often to save the credit of the estate, for until the 19th Century the executor or administrator acquired beneficial ownership of that part of the estate which was not devised. This historical reason no longer exists, therefore the section is obsolete. Its removal from the statute would have no effect on the practice of law. We recommend that it not be re-enacted. A similar recommendation has been made by all the law reform commissions who have made a study of the statute.

2. Contracts of Guarantee

The next provision in the section concerns special promises by the defendant to answer for the debt, default or miscarriage of another. This has been interpreted to include promises to accept the collateral liability for contracts entered into by another, both present and future and torts committed by another. The fact that the liability is collateral, as opposed to original or primary, creates the difficult distinction between guarantees, which are included in the statute, and indemnities, which are not.

A guarantee is a promise whereby the promisor/guarantor agrees to accept liability for another's obligation only if the other cannot meet the liability himself. A simple example is a situation in which an executive in a corporation promises to make good on a contractual obligation assumed by the corporation only if the corporation cannot make the payment itself.

An indemnity, on the other hand, is a promise whereby the promisor/indemnifier agrees to accept original liability for another's obligation. In the same example, the executive promises personally to make payment for the benefit received by the corporation. While the distinction is often of no consequence to the parties at the time of the promise, and is rarely considered or comprehended, if the agreement is disputed it becomes of great importance. Where the agreement is not evidenced by a memorandum it will only be enforceable if a liability taken on is interpreted to be original.

There are also two types of guarantees which are excepted from the statute. The first type contains cases in which the guarantor's promise is related to property in which he has a legal interest. The main rationale for requiring the formality of writing for guarantees is that the guarantor is not receiving any benefit in return for his promise, and therefore he must be cautioned against acting hastily. The reason for this first exception is, of course, that where the guarantor has a legal interest in the property to protect, then he does receive a benefit and the cautionary function is unnecessary. Thus where A acquired goods from B, over which goods C held a lien, A's guarantee of B's debt to C in consideration for which C released the goods to A, was not within the statute (*Fitzgerald v. Dressler*).[28] However, where the

interest protected is only personal or beneficial, such as that of a major shareholder in a corporation, then the guarantee will remain within the statute.

The second exception occurs when the guarantor is a *del credere* agent; this is an agent who receives a commission for recruiting customers for his principal and who receives a percentage of the profit made from the recruits, or accepts a percentage of the losses. Because of this business interest in the contracts the guarantor again needs no cautionary formality to warn him that his action carries legal consequences. In both these types of exceptions the subject matter of the agreement is not the guarantee, but the relation between the guarantor and the promisee.

There are only two viable alternatives with respect to the provision; either it should be repealed, so that no formality exists, or else indemnities should be included with guarantees so that the often uncontemplated distinction between original and collateral liability will become inconsequential.

As mentioned above, the main rationale for retaining the formality in this case is that because the guarantor does not receive the benefit of the contract, it is necessary to caution him as to the legal nature of his promise. Further, the memorandum which is required serves to evidence the terms upon which the parties are agreed.

It should be pointed out that these promises must be contracts, and therefore must be for valuable consideration. An amendment was made to the *Statute of Frauds* in 1856 in

England, which stated that the consideration for a promise of guarantee need not be in writing. A similar section is contained in *"The Mercantile Law Amendment Act"* of Manitoba.

The English Law Revision Committee, reporting in 1937, was split on this issue of written guarantees; ten of the fourteen members, including a number of eminent justices and legal scholars, were of the opinion that the provision should be removed. The four dissenting members saw the formality as a means to protect the "small man" from being pressured into guaranteeing the debts of acquaintances. In 1953 the English Law Reform Committee took the side of the minority and therefore the guarantee section was retained in the legislation. The Committee did not feel the distinction between guarantees and indemnities compelling enough to warrant a change, either by the removal of the whole provision or the inclusion of indemnities.

The majority of us believe that because of the cautionary and evidentiary usefulness of this provision it should be re-enacted, but we recommend that indemnities be included as in the British Columbia legislation noted earlier. The distinction between collateral and original liability, as mentioned above, is rarely considered by the parties, nor, we suspect, would it be recognized as significant. Therefore the fact that diametrically opposite decisions result from the two findings, when an oral promise is interpreted in court, leads us to the conclusion that the law is functioning irrationally. The fact that most litigation concerned with this provision focuses around the interpretation of a few words, which at the time of their use were not intended to carry the legal consequences imposed on them (namely in determining

whether or not evidence in writing is required for their enforcement) suggests that the provision, in an attempt to provide contractual certainty, has resulted in unpredictability.

The potential drawback caused by the inclusion of indemnities in the statute is two-fold. In the first place it extends the formality required by the statute to a new class of contracts, and thereby extends an exceptional requirement in the law of contract. Furthermore, while removing the difficult distinction between guarantees and indemnities, the change in the provision could provoke new litigation to distinguish between indemnities and some other form of three-party contract not contained in the statute. For example, it may be concluded that to say "deliver the goods to him, and if he does not pay you, I will", is a guarantee because it creates collateral liability; to say "deliver the goods to him, and I will pay you", is an indemnity because it creates original liability but does not bestow a benefit on the promisor; but the words "deliver the goods to him for me, and I will pay you", walks the fine line between a contract of indemnity and a simple contract for goods. If the words are interpreted to give the promisor a proprietary interest in the goods, then the agreement will be outside the statute, while if the benefit is for the third party receiving the goods, then it will be an indemnity and subject to the formalities.

The British Columbia legislation has contained the amended provision for twenty years and there is no suggestion that it has unleashed hordes of new disputes, therefore this objection may be without merit. It is certainly not strong enough to cause indemnities to be left out of the statute

when guarantees are being retained.

Finally on this subject, we would recommend that since the provision is being retained, it should contemplate some relief from non-compliance. As we shall discuss later in some detail with regard to contracts relating to land, we believe that if the requirement of written formalities is retained for any contracts, then there should be some accompanying enactment to provide for the enforceability of freely bargained agreements which do not comply with these strict formalities. The doctrine of part performance which will be examined extensively below has never been applied to these types of contracts and in any event would need to be extended if it were to apply since it only recognizes acts of the plaintiff. In cases of contracts of guarantee and indemnity the plaintiff is nearly always the creditor and the best evidence of the contract would not necessarily be his acts of compliance but rather the defendant's. We would therefore recommend that contracts of guarantee or indemnity which are not evidenced in writing should nonetheless be also enforceable if there are acts of the defendant which indicate that a contract of guarantee or indemnity not inconsistent with that alleged has been made between the parties. This is in accord with a recommendation made by the Law Reform Commission of British Columbia in 1977.[29]

We therefore recommend that:

(a) The provision relating to guarantees be re-enacted but indemnities also be included therein;

(b) A provision be added that if such contracts are not evidenced in writing they should still be enforceable if there are acts of the parties which indicate that a guarantee or indemnity not inconsistent with that alleged has been made between the parties.

3. Agreements in Consideration of Marriage

The third provision in section 4 demands that agreements made upon consideration of marriage be evidenced in writing. This wording was originally interpreted to include mutual marriage promises but was later limited to apply only to promises to pay money or settle property in *consideration of marriage*. *British Columbia, England and* New South Wales have all repealed this provision.

Both *"The Marital Property Act"*[30] and *"The Marriage Settlements Act"*[31] in Manitoba now provide for spousal agreements and marriage settlements to be in writing. We are at present reviewing the operation of *"The Marriage Settlements Act"*. In any event we consider it better that any provisions requiring agreements relating to marriage to be evidenced in writing should be in the appropriate statutes relating to marriage rather than in an old English statute which is unknown to the public. For these reasons we recommend that this provision not be re-enacted.

4. Agreements Relating to Land

The next provision contained in section 4 is certainly the most complex; it demands that any contract for sale of lands, tenements or hereditaments or any interest in or concerning them be evidenced by a memorandum. It is our opinion and the opinion of every jurisdiction that has reformed the *Statute of Frauds*, that this provision should be re-enacted.

The best reason for re-enactment, in our view, is that it maintains consistency in the law of real property. It is a well-established and accepted tradition in the common law world that all dealings in land must be evidenced in writing. This tradition is reflected in *"The Real Property Act"*, *"The Registry Act"* and *"The Real Estate Brokers Act"*[32] in Manitoba, which demand that conveyances through brokers and registration of interests in land follow certain statutory formalities. As mentioned above, we are of the opinion that all conveyances of land, whether by broker or not, should be in writing as contemplated by sections 1 and 3 of the *Statute of Frauds*. Considering these formal requirements, and the fact that most people realize that formalities are necessary, it would be inconsistent to allow contracts of land to be proved by oral evidence. The fact that most people think that written evidence is necessary could cause serious problems should the provision be repealed. We suggest that people do not feel bound to a land transaction until they have signed a contract, and to change the law in this respect could result in an onslaught of litigation based on oral statements that were not intended to create legal obligations.

The provision also serves both a cautionary and an evidentiary function. The cautionary function is served by the necessity of signing the contract; this action warns the unwary party to an agreement that he is entering into a legally binding contract, and therefore that the terms must be satisfactory to him. The danger of allowing oral contracts to be enforceable is that an unwary party might find he has taken on obligations unintentionally and at a great disadvantage. While the argument can be made that a contract for land is no more important, and therefore no more deserving of a cautionary formality, than many contracts that do not require

writing, it must be recalled that many lay persons without commercial experience enter into land transactions. By demanding that certain formalities be observed, the law protects these inexperienced laymen from fast-talking rogues.

The evidentiary function served by a memorandum is quite obvious. When correctly executed a memorandum is the best evidence of the agreement reached by the parties and is therefore useful both to settle disputes before they evolve into litigation and to determine litigation if the parties deem it necessary.

The main disadvantage of the provision is that it can operate to allow a defendant to deny his obligations under a valid but unenforceable oral contract. Critics of the section suggest that it has been responsible for creating more injustices than it has prevented. While this is impossible to determine, since the number of injustices prevented is an unknown quantity, it is a legitimate criticism to say that in the past the statute was frequently used to hide fraudulent practices. We are of the opinion, however, that this is no longer a serious threat, because of the development of the law of restitution and the doctrine of part performance. These two combine to provide remedies outside the statute where the statute works to enrich unjustly the defendant at the hands of the plaintiff, and they will be more closely examined below.

Thus, in weighing the balance of the advantages against the disadvantages, we are of the opinion that the provision demanding written evidence of contracts concerning interests in land should be retained.

There are two major problem areas within this provision, however; first, there has been a considerable amount of

litigation aimed at determining just what subject matters are included, and second, there has been endless effort expended to develop means by which the literal meaning of the provision can be avoided so that injustices can be prevented. Despite the number of cases decided on these subjects, or perhaps because of it, the provision has been seen to work in an unpredictable fashion.

The question of whether a contract is within the provision is usually easily resolved when dealing with a distinct interest in land. The law becomes problematic, however, when it must distinguish between the sale of commodities on, under or attached to the land, and the grant of a lease or license to use the land, which incidentally affects the personal property attached to it.

In the case of produce of the land a further distinction has arisen between *fructus naturales*, which are the natural products of the soil such as timber, hay and grass, and *fructus industriales*, which are products produced by labour and industry such as annual crops. *Fructus industriales* are always considered to be chattels; *fructus naturales* are chattels only if the contract contemplates their immediate severance from the land. If they are to derive a further benefit from the land through their continued attachment, then they are treated as land. The illogical result of these distinctions is that a contract relating to a field of wheat will concern goods while a contract relating to hay or grass will concern land, unless, of course, the contract relating to hay contemplates its immediate severance. One must only imagine attempting to explain the difference to the owner of these fields to see the irrationality of the distinction.

The problem is further confused by the definition

of goods in *"The Sale of Goods Act"*, which definition includes: "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".[33] It was pointed out in Cheshire and Fifoot, *Law of Contract*,[34] that since almost all contracts concerning agricultural products of land contemplate the severance of the product from the land, this definition includes *fructus naturales* as well as *fructus industriales*. Therefore the hay on a field could be land for the purposes of the *Statute of Frauds* and a chattel for the purposes of *"The Sale of Goods Act"*. Since the Acts have different requirements for the enforceability of contracts it is obvious that problems could arise.

The law concerning fixtures and minerals is also slightly confused in this context as well. A brief quotation from the Law Reform Commission of British Columbia's report on the *Statute of Frauds* demonstrates this.

> Turning to things attached or affixed to land, we find that the cases reveal, once again, a surprising inconsistency of interpretation. Although "fixtures" are considered, in general, to be interests in land, and to pass with the land if it is transferred, it has been held that an agreement to dispose of a tenant's fixtures is not within the statute. The tenant, in that case, was held to have sold neither goods, nor an interest in land, but merely to have assigned orally his right to sever fixtures. Agreements to sever other fixtures, however, considered, as they were, "part of the realty" have been consistently deemed to be contracts concerning an interest in land within the *Statute of Frauds*.
>
> The final area of controversy in the "goods or land" dispute concerns things which form part of the land itself, such as minerals, oil or natural gas. Agreements concerned with things which are not merely interests in land, but "the land itself", can be construed as contracts for the sale of goods. In *Benjamin's Sale of Goods* it is argued that the sale of minerals that have been extracted from the land, or an agreement to sell minerals which the

> land owner is to mine are, both at common law and under the *Sale of Goods Act*, contracts for the sale of goods.
>
> Other cases, however, suggest that such agreements come within the *Statute of Frauds*, either as contracts in respect of an interest in land, or as contracts in respect of the land itself.[35]

Although it seems that some confusion exists, we hesitate to make any suggestion as to reform in this area. The whole subject concerning the distinction between goods and land, the different points at which title passes depending on that distinction, and the need for registration of title, either under *"The Real Property Act"*, *"The Registry Act"* or *"The Personal Property Security Act"*[36] is a complex one. In our view this area of the law is better dealt with through *"The Sale of Goods Act"* which is, at present, under review by a national Committee of the Uniform Law Conference in which we are participating.

The second problem area with which we are confronted is that wherein the statute is avoided, in an attempt better to meet the demands of justice. At law, by the principle of restitution, and at equity, by the doctrine of part performance, the courts have developed means by which relief can be granted to the deserving plaintiff despite his non-compliance with the formalities of the statute.

(a) Restitution

The lesser remedy is that of restitution, whereby a plaintiff who has paid money or rendered services under an unenforceable contract, which the defendant refuses to perform, is entitled to reasonable remuneration. This is the lesser remedy because it does not give specific performance of the contract, which is, of course, the plaintiff's first

desire, but only compensation for his loss. As Goff and Jones in *The Law of Restitution* point out where the vendor refuses to complete after accepting a deposit, the plaintiff is entitled to recover the deposit because of the total failure of consideration.[37] Where services are rendered the relief is based on a *quantum meruit* reasonable remuneration. The leading case in Canada is *Deglman v. Guaranty Trust Co. of Canada and Constantineau;*[38] in this case Constantineau orally agreed to perform small chores for his aunt in consideration of her promise to leave him a house. It was decided by the Supreme Court of Canada that while the contract was unenforceable for non-compliance with the *Statute of Frauds*, and the acts were not sufficient to satisfy the doctrine of part performance, the services were not performed gratuitously. Mr. Justice Cartwright said:

> The deceased, having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, . . . the obligation to pay the fair value of the services rendered to her.[39]

It should be clearly understood that the services rendered must have been requested or else freely accepted by the defendant. Furthermore, this remedy provides compensation for services only; it does not compensate for loss of the profit involved in a contract. In the *Deglman* case, Constantineau received an award of $3,000 for his services, substantially less than the value of the house. In other words the award will equal the value of the benefit bestowed on the defendant, not the value of the benefit lost to the plaintiff. Since the award is measured by the benefit to the defendant, expenses incurred by the plaintiff in reliance on the unenforceable contract are not compensable.

(b) Doctrine of Part Performance

The most important remedy in this context is, of course, part performance. In 1677 the statute set up a hard and fast rule of law requiring the formality of writing, but within seven years the equitable doctrine of part performance was created to avoid the rule. There are two views on part performance, not necessarily exclusive of each other. The doctrine can be seen as purely equitable, that is, that the acts relied upon raise equities which demand that the contract be enforced, whether or not the acts prove the contract; this view has recently been approved in the famous English case of *Steadman v. Steadman*.[40] On the other hand, the doctrine can be viewed as evidentiary, that is, that the acts provide sufficient alternate evidence to prove the contract in spite of non-compliance with the statute. This is the traditional Canadian view, and it grows out of the fact that non-compliance does not render a contract void, but only unenforceable; it is still valid and therefore capable of being proved by some method other than by memorandum.

While the Canadian and English versions of the doctrine both grew from the same English case, *Maddison v. Alderson*,[41] they have recently taken on very different aspects. The oft-cited quotation from *Maddison v. Alderson* sets out the test:

> All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature referable to some such agreement as that alleged.[42]

This statement was interpreted narrowly to mean that the acts must be capable of explanation only by the contract alleged, and by no other means.

In Canada this test has remained in favour. The *Deglman* case held that the services rendered to the aunt were not unequivocally referable to any "dealing with the land which is alleged to have been the subject of the agreement sued upon".[43] In 1974 the Supreme Court of Canada reaffirmed this strict test in the case of *Thompson v. Guaranty Trust Company of Canada*.[44] In that case Thompson worked on a farm for 48 years in consideration of the owner's promise that he would receive the land at the owner's death. The owner died intestate but the oral contract was established because the plaintiff's acts of rebuilding the house, running the farm and constantly upgrading the operation were unequivocally referable to the very lands which were the subject of the alleged contract.

One important consequence of the strictness of this test is that part payment of the purchase price under an unenforceable contract will not be sufficient to invoke the doctrine of part performance since it will not necessarily be referable to any specific piece of land. While parol evidence could certainly prove, in most cases, what contract a deposit was paid under, it is not possible to hear parol evidence until the test of part performance has been satisfied.

It should also be noted that only acts of the plaintiff will satisfy the test. While this is not stated in the Supreme Court of Canada cases, (it is so stated in the New Brunswick Supreme Court case of *Robertson v. Coldwell*[45]), it is implied in the principle that the acts must raise equities in favour of the plaintiff. This equitable basis for the doctrine demands that the court not allow the defendant to be unjustly enriched at the hands of the plaintiff. If acts of the defendant were sufficient to invoke the doctrine then the equitable basis would be removed, since the defendant would not be unjustly enriched, but in fact would be the party to have committed himself to the contract.

If it is admitted that the primary purpose behind this doctrine is evidentiary, rather than equitable, then this argument loses its validity. Certainly if the acts of the defendant are unequivocably referable to the land in question they will evidence the contract as well as the acts of the plaintiff. For example, if a vendor under an unenforceable contract of sale were to approach a lawyer and have a written conveyance prepared for the land in the name of the purchaser, this would most probably be an act unequivocally referable to the land in question. It would also be good evidence of the existence of the contract, should the vendor/defendant then refuse to complete. The fact that the purchaser/plaintiff would not have acted on the contract would not weaken the evidentiary significance of the acts of the vendor/defendant. In our opinion the evidentiary view of the doctrine is the better one, and therefore we think the doctrine should be expanded to allow acts of the defendant, which satisfy the test of referability, to evidence the contract.

The English courts maintained the strict test well into the present century; then, in a series of cases beginning in 1963, the English test was liberalized substantially. In the case of *Kingswood Estate v. Anderson*,[46] Upjohn, L.J. stated that the idea that the acts of part performance had to be referable only to the title alleged was "long exploded". That case adopted Fry's interpretation of the rule which was that the acts "prove the existence of some contract, and are consistent with the contract alleged".[47] This test was adopted in *Wakeham v. MacKenzie*[48] where the plaintiff agreed to move in with the owner of a house to do housekeeping chores, in consideration for which the owner was to devise the house to her in his will. It was decided that her acts, which included giving up her own house, could only be explained by reference to some contract, and were consistent with the one alleged.

The final and most important case in the series was *Steadman v. Steadman*, where the husband and wife, in an effort to settle a dispute over maintenance, orally agreed that the wife would surrender her interest in a house for £1500, and the husband would make certain maintenance payments and concessions; this agreement was approved before the court hearing the maintenance dispute. The husband fulfilled his maintenance obligations and had his solicitor send a draft transfer of the interest in land, but the wife refused to sign the transfer, and pleaded in her defence the present English equivalent of section 4 of the *Statute of Frauds*. The House of Lords held that any of a number of the husband's acts were sufficient acts of part performance, including simply preparing and sending the draft transfer. In Fridman's view:

> It was enough for the acts of part performance alleged to point on the balance of probability to their having performed in reliance on a contract which was consistent with the contract alleged. (sic) They did not have to point to the exact contract, or even to a contract of the general nature alleged.[49]

The English version of the doctrine is obviously more liberal than the Canadian one, and given a literal interpretation could conceivably permit an insignificant unilateral act of the plaintiff to evidence a contract of a very significant nature. It must be pointed out, however, that the House of Lords stressed the equitable nature of the doctrine, as opposed to its evidentiary function. The acts relied upon are viewed within the context of the overall situation before the court, and therefore the doctrine as applied gives a much wider range to judicial discretion.

Whether or not the discretion exists at present in

Canada is debatable. While a literal reading of the Canadian test would not suggest so, we think it likely that the Canadian test is adaptable enough to take account of the equities of a case and to prevent injustice. The advanced state of the law of restitution in Canada reinforces this belief, and while a restitutionary remedy does not permit specific performance it does prevent unjust enrichment. A point which mitigates against the adoption of the *Steadman* approach is that it introduces a certain amount of unpredictability into the law and therefore encourages litigation. Again, whether this unpredictability exists in Canada as well is debatable. The recent case of *Colberg v. Braunberger's Estate*[50] in Alberta applied the *Steadman* approach without even a mention of the numerous Supreme Court of Canada authorities.

With this overview of the present state of the doctrine before us, we are of the opinion that certain conclusions can be drawn. First the courts have done much to provide for relief against a statute which imposes formalities on transactions that have in fact been concluded even though the formalities have not been observed. Secondly, however, such interventions by the courts, though commendable, have often been uncertain and inconsistent both in Canada and England. Accordingly, we agree with the Report of the Law Reform Commission of British Columbia that if we are to retain formalities for certain agreements under the old *Statute of Frauds* then some statutory enactment is needed to provide for the enforceability of freely bargained agreements which may for some reason fail to comply with some of the formalities. There is some guidance and a precedent for such an enactment already contained in section 6 of *"The Sale of Goods Act"* which provides as follows:

> 6(1) A contract for the sale of any goods of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment,or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
>
> 6(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not.

It will be noted that this enactment only requires the buyer to do some act which recognizes a pre-existing contract and this we believe to be more appropriate than the present strict test of "unequivocal referability" which, as outlined above, has been applied by the Supreme Court of Canada under the doctrine of part performance. However, as the British Columbia report points out,acts of the plaintiff, however unequivocal under the said doctrine, will not be sufficient to enable the Court to grant relief unless they were done with the knowledge and acquiescence of the defendant. We believe that such acquiescence should continue to be necessary under any statutory test since it provides the objective evidence to show that the defendant agreed to bind himself.

As we have stated, the test for the doctrine of part performance does not accept the payment of a deposit or part of the purchase price as a sufficient act. There are two reasons for this. First, if the doctrine is regarded as purely equitable then, since the deposit or part payment can be returned,it was felt that the plaintiff had suffered no inequity. Secondly, if the doctrine is evidentiary,then the payment of money is not of itself an act "unequivocally referable" to the contract. We believe, however, that such

a payment is the most likely way in which parties will bind a transaction if they are not aware of the statutory formalities required. Any statutory provision therefore requiring acts of part performance should specifically provide that a deposit or part payment shall constitute such an act.

At the present time, since the doctrine of part performance is premised on the injustice to the plaintiff who has done acts relying on the oral agreement, the acts of the defendant cannot be relied upon to bring the doctrine into play. Since our reason for advocating enforcement of contracts which are not evidenced in writing under the *Statute of Frauds* is that there should be enforcement of any agreement which the parties have accepted as binding, then we see no reason for denying equal value to acts of the defendant which establish that he has bound himself. We would, therefore, recommend that acts of the defendant from which the courts can deduce a contract not inconsistent with that alleged should also be included in any statutory provision. This is in accordance with the recommendation of the British Columbia Law Reform Commission regarding part performance.[51]

We are still concerned that the requirement of evidence in writing for a contract relating to land may, even with this suggested extension of the doctrine of part performance, lead to cases of hardship. We believe that there may be situations where the contract is defective in form but nevertheless judicial relief by way of enforcement is the proper remedy.

We therefore agree with the recommendation of the Law Reform Commission of British Columbia that if the plain-

tiff "has, in reasonable reliance on the contract, changed his position so that having regard to the position of both parties an inequitable result can be avoided only by enforcing the contract",[52] then such a contract should be enforced. We would add that such a reliance should be not only reasonable but also *bona fide*.

Such a situation where this might apply is given in the British Columbia Commission's report:

> A enters into a contract for the sale of his home to B. The contract does not satisfy the writing requirements of the *Contracts Enforcement Act*. In reliance upon that contract, B sells his house to C, makes binding financial commitments to D with respect to the purchase of A's house, and contracts with E, an architect, concerning renovations to that house. The market price of homes rises dramatically, and A, seeing an opportunity to take advantage of the want of formality in his contract with B resells his house at a profit to X.[53]

In the above situation, the doctrine of part performance, as outlined earlier in this Report, would not provide the grounds for assisting B. We submit that it would be unjust to permit A to avoid performance of the contract, as B in reasonable reliance on a contract, changed his position so that it would be inequitable to do anything other than enforce the contract.

We believe that if the above recommendations are adopted there will be little need for the present remedy of restitution which we outlined earlier. However, we should not like to see it abolished. Out of perhaps abundance of caution we would recommend its continuance and extension. At the present time under this doctrine a plaintiff can only recover where his acts have resulted in a benefit to the defendant. In keeping with our position concerning acts of reliance by the plaintiff being used for the enforcement of a contract not evidenced in writing, we would recommend that

relief be extended so that a plaintiff may be compensated for moneys which he may have reasonably spent in good faith in reliance on a verbal contract.

In conclusion therefore, we recommend:

1. That no contract concerning an interest in land should be enforceable unless:

(a) evidenced by memorandum in writing signed by the party to be charged or by his agent; or

(b) the defendant acquiesces in acts of the plaintiff (including such acts by the plaintiff as the payment by him of a deposit or a part of the purchase price) which indicate that a contract not inconsistent with that alleged has been made between the parties; or

(c) there are acts of the defendant from which the court can deduce a contract not inconsistent with that alleged has been made between the parties; or

(d) the plaintiff has, in reasonable and *bona fide* reliance on the contract, changed his position so that having regard to the position of both parties an inequitable situation can be avoided only by enforcing the contract.

2. If a contract should still be unenforceable notwithstanding the above recommendations, then the court should be able to grant to the plaintiff such relief

(a) by way of restitution of any benefit received by the defendant; and

(b) by way of compensation for moneys reasonably expended in good faith in reliance on the contract

as is just.

5. Contracts Not To Be Performed Within One Year from the Making Thereof

The last provision of section 4 causes contracts

not to be performed within a year of the making thereof to be unenforceable unless evidenced by memorandum. The judiciary has had mixed sentiments about this provision, with some courts showing a marked reluctance to enforce it in the tenor in which it was originally intended. The distinctions which have resulted are described in Anson's *Law of Contract* as follows:

> If the contract is for an indefinite time but can be determined by either party with reasonable notice within the year the statute does not apply. A contract to pay a weekly sum for the maintenance of a child, or of a wife separated from her husband, has been held on this ground to be outside the section.
>
> This is what is meant by the dictum that to bring a contract within the operation of the statute it must "appear by the whole tenor of the agreement that it is to be performed after the year". If the contract is for a definite period, extending beyond the year, then, though it might be concluded by notice within the year, on either side, the statute operates.
>
> If all that one of the parties undertakes to do is intended to be done, and is done, within the year, the statute does not apply. A was tenant to X, under a lease for 20 years. He promised verbally to pay an additional £5 a year for the remainder of the term in consideration that X laid out £50 in alterations. X did this and A was held liable on his promise.
>
> But if the undertaking of one of the parties cannot be performed, while that of the other might be, but is not intended to be, performed within the year, the contract falls under the section.[54]

The rationale for the section is, presumably, that the parties to a contract can only be relied on to remember the terms of the contract for one year. An extended quotation from the report of the English Law Revision Committee demonstrates the inconsistency of the provision.

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

2. This period is fixed at one year. The illogical character of these provisions is perhaps best demonstrated by simple examples of their working:

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

   (b) A contract not to be performed within a year from its making is made orally, and is repudiated the day after it is made. Five years after the breach the guilty party writes and signs (for his own use) a summary of its terms, which comes to the knowledge of the other party. The latter can then enforce the contract, for the writing need not be contemporary therewith. It is sufficient (subject to the Statute of Limitations) if the writing comes into existence at any time before action is 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 its terms. (The assumptions of section 4 are indeed utterly inconsistent with those on which the Statute of Limitations proceeds.)[55]

As seen from these two quotations the interpretation of this provision is rife with inconsistencies and irrationalities.

Furthermore, there is no definite subject matter described by the provision to which the layman can refer. Rather than focusing on one type of contract, as the other provisions do, this one embraces all forms of contracts, and all subjects. British Columbia, England and New South Wales have all removed this provision. We recommend that it not be re-enacted.

CONTRACTS UNDER SECTION 6 OF *"THE SALE OF GOODS ACT"*

As mentioned above, section 6 of *"The Sale of Goods Act"* is a direct descendant of the original *Statute of Frauds*, and consequently deserves to be included in this study. Like section 4, if not complied with, this section renders agreements unenforceable; in this case the subject matter is sales of goods with the value of over $50. Unlike section 4, *"The Sale of Goods Act"* offers other means of proof to the memorandum; if the buyer has accepted and received part of the goods or if the buyer has given something in earnest or in part payment for the goods then the agreement will be enforceable without a memorandum.

To constitute acceptance, the buyer's acts need only recognize the existence of the contract of sale and must be related to a completed chattel. Even rejection of the goods will suffice in some cases. For "actual receipt" the buyer "must acquire possession of the goods or some third party in possession must hold them on the buyer's behalf".[56]

To give something in earnest or in part payment is explained by Fridman as follows:

> Earnest is something given by the buyer, at the time of the contract, and accepted by the seller as indicating the completion of the agreement.

> To be earnest it must be given outright, by the buyer to the seller, with no hope or intention of being returned. Part payment, on the other hand, is made after the contract, and is not made as part of the process of contracting.[57]

While it is most certainly a rare practice in Canada for buyers to give something in earnest to bind a purchase, it is not uncommon for the other forms of proof to be used. Retail sales are usually sealed by part or full payment of the purchase price. In cases where orders are placed for goods for future delivery, however, especially from manufacturers, billing usually takes place sometime after delivery. It is these cases that cause litigation under the section of *"The Sale of Goods Act"* in question; the goods are manufactured and delivered on the strength of an oral request but for one reason or another acceptance is refused. In such a situation the section acts to relieve the defendant/purchaser of his obligation to pay.

The recent three volume report of the Ontario Law Reform Commission on the Sale of Goods cites the following statistics which were compiled from answers to a Canadian Manufacturers Association Questionnaire.

> The relative unimportance attached by manufacturers to receiving written confirmation of orders, or written confirmation of oral variations of earlier orders, is illustrated in other respects. A "staggering" 79.9% admit that even where they have not received a writing they will begin production or even shipment without a writing. Our research also indicates that fully 84.1% who responded submitted that they would "always" (22.3%) "usually" (35.6%) or at least "sometimes" (26.2%) start production or shipment on an oral agreement to vary the terms of the written order. There was little evidence that the respondents were sensitive to (or perhaps able to react sensitively to) the $40 exception contained in section 5; or, for that

> matter, that they might be sensitive to any higher contract values that might be substituted. It may, therefore, be concluded that manufacturers do not modify their patterns of reliance upon oral contracts according to whether or not they are legally enforceable.[58]

This quotation points out that the section does not reflect commercial practices. Furthermore, we are not of the opinion that it should be up to the commercial world to adapt to commercial law on this point. In order to expedite business dealings and remain competitive it is necessary for manufacturers and merchants to undertake contracts without having the benefit of written confirmation. While the section may have been useful in a time when all dealings were made face to face, in these times of intercontinental communication it is no longer reasonable to expect the commercial world to pay heed to this provision.

The fact that compliance with the section satisfies the standard cautionary and evidentiary functions discussed previously cannot be denied, but it is our view that these are unnecessary functions. Certainly if the value of $50 is retained there can be no question that a cautionary requirement is misplaced considering the fact that it does not exist for many more valuable transactions. As for the evidentiary function, we feel that the rules of evidence are sufficiently developed to permit the just determination of virtually all cases.

The inappropriateness of the requirement, in terms of the cautionary and evidentiary functions it serves, is well illustrated by a situation that has arisen in the past wherein a court is forced to determine whether an agreement is a sale of goods or a contract of service. An example is seen in the case of *Lee v. Griffin*,[59] where a woman orally requested a dentist to manufacture a set of dentures. No

deposit was paid nor was a memorandum created. The dentures were completed and ready to be fitted when the woman died; her executor refused to pay the bill and claimed the section as a defence. As the court decided this was a sale of goods, and not a contract for professional services, the defence was good and the contract unenforceable. If, however, the court had decided that the substance of the contract was the skill of the manufacturer and that the materials were ancillary to the contract, then no memorandum would have been needed. While the fact situation is not changed, we see that in one case the cautionary and evidentiary formality is required, while in the other it is not.

The reform position adopted by the American Uniform Commercial Code includes raising the value of bargains affected by the section to $500.[60] While this would remove the argument that the section does not reflect modern monetary values, it does nothing to deflate the argument that such contracts are no different from any contracts outside the section, and no more difficult to prove. And, as noted above, the Ontario Law Reform Commission concluded from their questionnaire that the business world would be no more sensitive to the section if the value were raised. This, we believe,is the main problem with the section, that it does not reflect modern business realities, not that the value is too low. According to Fridman,

> . . . there is no significant legal policy that is being served in modern life by the retention of the provision.[61]

The suggestion that it serves a useful purpose as consumer protection law has no merit, in our opinion. As mentioned above, businessmen generally do not make use of the section, and for obvious reasons of public relations, rarely

refuse to honour their contracts. The above-mentioned questionnaire supported this statement as follows:

> Of the respondents, 70.1% replied that they would "never" sue if a purchaser cancelled an order, whether written or oral, even after they had begun production.[62]

Therefore the main use of the section is not to provide certainty in commercial transactions, but to allow consumers to avoid their legal obligations. As Mr. Justice Stephen and Sir Frederick Pollock concluded of the section:

> . . . in the vast majority of the cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality.[63]

Considering this viewpoint, we think the only result of increasing the value in the section would be to make the injustices caused by this section less conspicuous.

Finally, we note that the section was repealed in England in 1954 and in British Columbia in 1958. According to the Ontario Law Reform Commission "no adverse consequences have been noticed during the 25 years that have elapsed since the repeal of the section in the United Kingdom and other jurisdictions; and there does not appear to be any foundation for the fear that parties may be tempted to produce perjured evidence".[64] Certainly there is no more reason to expect an onslaught of fraud in this area than in any other where no formalities exist.

For all these reasons, we recommend that the section be repealed in *"The Sale of Goods Act"*.

SECTIONS 7, 8 AND 9 OF THE *STATUTE OF FRAUDS*

The next area of the statute to be examined is that dealing with trusts; the sections involved are 7, 8 and 9. Section 7 operates so as to render unenforceable any declaration or creation of a trust of "lands, tenements or hereditaments" unless it is evidenced by a memorandum. Section 8 exempts resulting and constructive trusts from this formality. Section 9 demands that all grants and assignments of trust must be in writing (as opposed to being evidenced by memorandum).

In dealing first with section 7 we can state immediately that the memorandum requirement is identical to the requirement in section 4 except that there is no provision to allow agents to sign. Therefore the trust memorandum must be signed by the settlor, and must contain the trust terms.

The section applies both to declarations of trust, wherein the settlor declares himself trustee, and to trusts by transfer, wherein the settlor transfers the trust property to a trustee. The section also applies equally to trusts of legal and equitable interests.

Although the section says that non-compliance will result in the trust being "utterly void and of no effect," the courts have generally interpreted this to mean unenforceable, since the statute is in essence evidentiary. The case of *Rochefoucauld v. Boustead*,[65] from the English Court of Appeal took the view that section 4 and section 7 were alike in this respect.

In our view trusts of land should be evidenced in writing, for the same reasons that contracts involving land should be so evidenced. It is a well accepted tradition in the law of real property that all dealings in land must be in

writing. We think it inconsistent to demand that contracts, conveyances and registration of land be ruled by formalities, and to exempt trusts of land. Furthermore, the nature of the trust, that the settlor gives up his property often without receiving any consideration, demands that these transactions be evidenced in the best manner possible, to prevent the unjust enrichment of either the trustee or the alleged beneficiary. The fact that alternative forms of relief are available, in cases of non-compliance, as will be pointed out shortly, is not a good reason to remove a long-accepted provision that demands the best form of evidence. A written memorandum will in every case settle a dispute quickly and justly and in most cases will remove the need for expensive and time-consuming litigation.

While some critics of the section have suggested that the combined effect of section 8 and the equitable doctrine of fraud is judicially to repeal section 7, in our view these exceptions to the section in fact supplement it by permitting it to demand formal evidence without causing injustices.

As mentioned above section 8 exempts resulting and constructive trusts from the requirements of section 7. Resulting trusts occur, according to Waters:

> 1. Where A purchases property and has it transferred into the name of B, or into the joint names of himself and B,
>
> 2. Where A transfers property to B, or into the names of himself and B,
>
> 3. Where the purposes set out by an express or implied trust fail to exhaust the trust property.[66]

In the context of the *Statute of Frauds*, where an oral trust is created in favour of a beneficiary and the trust property is transferred to a trustee, if the trustee is unable to give effect to the trust terms, the resulting trust will cause the property to revert to the settlor, since the oral trust cannot be enforced. This we view as a good solution since it does not result in the unjust enrichment of either the trustee or the alleged beneficiary and gives the settlor the opportunity to recreate a valid written trust if he so intended.

The operation of the constructive trust was explained by Scott in *The Law of Trusts* as follows:

> . . . a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it . . . . The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property . . . .[67]

This view was adopted by Laskin, J., in his dissenting judgment in the recent Supreme Court of Canada case, *Murdoch v. Murdoch*.[68]

The use of the constructive trust that is objected to by some critics occurs in the situation where an oral trust is created by transfer of property to a trustee, to hold for the benefit of a third party. In imposing a constructive trust which in fact really enforces the express oral trust in favour of the beneficiary, as is done in Canada, the courts in effect ignore section 7 of the statute. The argument is

made that to give effect to the statute the constructive trust should only be imposed so as to result in restitution, that is, that the property should revert to the settlor. Like the resulting trust this would prevent unjust enrichment and would enable the settlor to recreate the trust properly if it was in fact his intention to do so.

However, it seems that the practice of enforcing the oral trust in favour of the beneficiary is deeply ingrained. This practice has grown out of the equitable principle that the *Statute of Frauds* cannot be permitted to act as a cover for fraud. The leading case which demonstrates this principle is *Rochefoucauld v. Boustead*. In that case the English Court of Appeal found that extensive lands in Ceylon purchased by the defendant from the plaintiff were held in trust for the plaintiff. Although no memorandum existed the Court held that the *Statute of Frauds* could not be used as a defence. According to Lindley, L.J.:

> It is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the Statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the Statute in order to keep the land himself.[69]

Waters analyzed the possible interpretations that can arise from this decision:

> There are two possible explanations of the court's thinking. (1) It is the express trust created by the parties that is enforced, and it is so enforced by preventing the trustee from pleading

> the Statute. The fraud that would otherwise be perpetrated justifies this ouster of the Statute, and Rochefoucauld v. Boustead is the authority for this proposition. (2) As the express trust cannot be enforced because of the Statute, equity imposes a constructive trust upon the express trustee to cause him, because of his unconscionable retention, to disgorge. The Statute is thus honoured, and moreover the constructive trust is expressly exempt from the provisions of the Statute. It is the fraud that would otherwise result which causes the courts to impose this constructive trust, and the authority for this recognition of fraud is Rochefoucauld v. Boustead.[70]

As noted above these two interpretations should result in different decisions; in the first case the beneficiary should receive the property and in the second case the property should revert to the settlor in restitution. Unfortunately the Canadian courts sometimes do not clearly distinguish between constructive trusts and resulting trusts.

It is not especially important whether or not the courts say they are enforcing the express trust because it would be to permit fraud to do otherwise, as in the *Rochefoucauld* case, or the constructive trust that arises to prevent unjust enrichment of the trustee, since they arrive at the same result, however, it cannot be denied that in both cases the statute is circumvented.

Waters is of the opinion that because of this there is no reason to retain the provision. Both England and British Columbia re-enacted the provision in their reform legislation but in its recent report the Law Reform Commission of British Columbia has taken the position that the section should be removed. According to Waters:

> The object of the Statute in 1677 was to protect the courts from having to sift the truth from constantly perjured evidence. During the 19th 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.[71]

However, as pointed out by the Alberta Institute of Law Research and Reform in their Background Paper #12, the equitable doctrine of fraud and the constructive trust do not apply in cases of declarations of trust. A declaration of trust can arise either as the alleged consideration of one party under a contract, or in the context of a gift.

In a case where the settlor orally declares himself to be holding his property on trust for a beneficiary as part of the contractual bargain, if no satisfactory memorandum of the contract exists then a court will not enforce it because of section 4. We see no reason why, if the oral contract is unenforceable for lack of written evidence, the oral trust should be enforceable. If section 7 were retained the constructive trust would not operate to remove such a case from the statute because no unjust enrichment would have taken place. The trustee was in fact the settlor and therefore no harm will be done if he is left in possession, and the trust is not enforced. The equitable doctrine of fraud as defined in the *Rochefoucauld* case would not be invoked to enforce the trust either, because as the case of *Morris v. Whiting* pointed out:

> . . . the mere breach of a contract to sell an interest in land is not a fraud which will take the case out of the Statute.[72]

If section 7 were removed this oral trust could be enforced and section 4, prohibiting the enforcement of oral contracts of land, would be defeated.

The same is true of a gratuitous oral declaration of trust. The grantor is not in a position where he will gain anything from his alleged gift therefore the law should operate in his favour so as to demand adequate proof of this gift. This is the function presently served by section 7. Again, neither the constructive trust nor the doctrine of fraud have extinguished this function, because in a case where the grantor declares himself to hold his property on trust for another, there is neither unjust enrichment nor fraud if the trust is not enforced. If the section were removed such an oral trust would be enforceable; the consequences of such a change in the law are unpredictable, but there is certainly a threat of injustice where an alleged beneficiary is capable of imposing on the rightful owner an obligation to transfer land gratuitously.

Therefore, despite the fact that section 7 has been "judicially repealed" as it relates to trusts created by transfer of land, it still serves a useful purpose in cases of trusts created by declaration, and should be re-enacted.

Section 9, in demanding that all grants and assignments of trusts be in writing, greatly extends the policy demonstrated by section 7. It includes trusts of both realty and personalty, and has been literally interpreted to render such transfers that are not actually in writing to be void. This section does not include creations of trust, of course, as that is covered by section 7. Therefore, as Waters points out, the section applies only to transfers of equitable

interests already existing under a prior trust.[73] It should be stressed that this does not include the declaration of a new trust by a beneficiary of trust property. Although the trust property of the new trust is the equitable interest created in the initial trust, the transaction is not a transfer, that is, a grant or assignment, but is in fact the creation of a new trust and therefore subject to section 7.

As noted by the Alberta Background Paper #12, there has been no Canadian litigation on this section, most probably because the transfer of an intangible property such as an equitable interest is not something people feel comfortable doing without the assistance of a lawyer. Thus, all such transfers are properly made in writing. We see the section as serving a useful evidentiary function, and while it may be unnecessary, considering the supposition that lawyers are always employed in such transactions, we think that, out of an abundance of caution, the section should be re-enacted. In conclusion therefore we recommend that the provisions contained in sections 7, 8 and 9 be re-enacted.

SECTIONS 5 AND 6 OF THE *STATUTE OF FRAUDS AMENDMENT ACT 1828*

The last two sections of the statute were added in 1828 by what is referred to as *Lord Tenterden's Act*. Section 5 of that Act provides that neither a promise by an adult to honour a debt contracted during infancy, nor a ratification by an adult of a contract made during infancy, are enforceable unless made in writing and signed by the person to be charged. This section was repealed in England in 1874 but had already been adopted in Manitoba by this time.

There are two types of voidable contracts with respect to infants. Contracts of a continuing obligation are voidable at majority but must be repudiated within a reasonable time. This group includes contracts concerning land, shares, marriage settlements and partnership agreements. All other contracts, except those which are beneficial or for necessaries, are not binding unless ratified. It is this second group that *Lord Tenterden's Act* affects.

The section has been litigated infrequently and in cases where it would have caused injustice to a party contracting with an infant, it has been avoided. This has been accomplished by deciding that the contract was not in the second group mentioned above, and capable of ratification, but rather in the first group, and therefore binding unless repudiated. The whole area of infants' contracts is difficult because of the law's desire to fulfil two opposite needs: the first need is that of protecting infants from unconscionable contracts and the second is that of offering parties contracting with infants some means of establishing their rights and enforcing their contracts. Section 5 of *Lord Tenterden's Act* serves only the first need. If it were literally enforced it would result in a situation where parties would refuse to contract with infants for anything except necessaries. (Contracts for necessaries are enforceable without special conditions.) Therefore, even in cases where the section is employed to allow an infant to avoid a contract, the courts will force the infant to restore to the other party the goods in the possession of the infant at the time of the repudiation, that is, normally at the time the infant reached majority. However, if the infant has sold or used up the subject matter of the

contract, then he is not liable. The practice that has resulted is that parties contracting with infants demand an adult's guarantee of the infant's liability.

We would propose that the whole area of infants' contracts be carefully examined with a view to replacing some of the infants' protections with a system of enforceability and equity based on unjust enrichment. In the meantime, however, we would recommend that the provisions of this section be re-enacted.

Section 6 of *Lord Tenterden's Act* provides that no representation of the credit worthiness of another is actionable unless it is in writing and signed by the person being charged. A subsequent writing is not sufficient, nor is the signature of an agent.

The leading case on the section, *Danbury v. Bank of Montreal*[74] decided that it did not refer to innocent misrepresentations, but only fraudulent ones. The reason the section was created was to prevent evasion of the guarantee provision in section 4 of the statute. In cases where there was no written memorandum of guarantee to satisfy the statute, the action of deceit was being used, based on false and fraudulent representation, to avoid the consequences of section 4. Section 6 of *Lord Tenterden's Act* rectified this situation.

In *W.B. Anderson and Sons Ltd. v. Rhodes (Liverpool) Ltd.*[75] it was held that an action for negligent misrepresenation is based on a breach of the duty of care while an action on a fraudulent misrepresentation is based on the misrepresentation

itself. The anomalous result is that a negligent misrepresentation is actionable while a fraudulent one, unless it is in writing, is not.

The possibility that a party will reduce to writing a representation that is intended to mislead is, in our view, remote. For this reason, and the fact that the section in fact acts to relieve a party from legal consequences because he has acted fraudulently, rather than negligently, we support its repeal.

SUMMARY OF RECOMMENDATIONS

1. The *Statute of Frauds* should be repealed, and such of its provisions as are hereinafter recommended with the appropriate amendments be embodied in a new statute.

Conveyances of Land

2. The substance of sections 1, 2 and 3 should be re-enacted.

3. In the re-enactment of the provisions of section 2, however, any quantum of rent should be omitted and it should be provided that:

   (a) leases, the terms of which do not exceed three years in duration, are exempt from the requirement of writing and the fact that an option for renewal is contained in such a lease will not operate to require it to be in writing.

   (b) No conveyance of nor contract to convey a lease of which the initial term does not exceed three years in duration shall require writing.

4. *"The Law of Property Amendment Act"* (U.K.) should be repealed in Manitoba, and *"The Registry Act"* and *"The Short Forms Act"* amended with cross-references to *"The Landlord and Tenant Act"* so as to obviate the requirement for instruments in writing to be made by deed.

5. *"The Landlord and Tenant Act"* should be amended so as to state specifically that any lease,whether residential or non-residential, should be in writing where its duration is in excess of three years, with a cross-reference to the new provincial Statute mentioned in Recommendation 1.

Section 4

Promises by an Executor to Answer Damages

6. Repeal.

Promises of Guarantee

7. This provision should be re-enacted but promises of indemnity should be included with guarantees.

8. A provision should be added that if such contracts of guarantee and indemnity are not evidenced in writing they should still be enforceable if there are acts of the parties which indicate that a guarantee or indemnity, not inconsistent with that alleged, has been made between the parties.

Promises in Consideration of Marriage

9. Repeal.

Agreements Relating to Land

10. The provision should be re-enacted as follows:

No contract concerning an interest in land should be enforceable unless:

(a) evidenced by memorandum in writing signed by the party to be charged or by his agent; or

(b) the defendant acquiesces in acts of the plaintiff (including such acts by the plaintiff as the payment by him of a deposit or a part of the purchase price) which indicate that a contract not inconsistent with that alleged has been made between the parties; or

(c) there are acts of the defendant from which the court can deduce a contract not inconsistent with that alleged has been made between the parties; or

(d) the plaintiff has, in reasonable and *bona fide* reliance on the contract, changed his position so that having regard to the position of both parties an inequitable situation can be avoided only by enforcing the contract.

11. If a contract should still be unenforceable notwithstanding the above recommendations, then the court should be able to grant to the plaintiff such relief,

(a) by way of restitution of any benefit received by the defendant; and

(b) by way of compensation for moneys reasonably expended in good faith in reliance on the contract

as is just.

Contracts Greater Than One Year

12. Repeal.

Section 6(1) of *"The Sale of Goods Act"*

13. Repeal.

Sections 7, 8 and 9 of the *Statute of Frauds*

14. The provisions of sections 7, 8 and 9 should be re-enacted.

Sections 5 and 6 of the *Statute of Frauds Amendment Act 1828*

15. The provisions of section 5 should be re-enacted but the whole area of infants' contractual rights and obligations should be examined.

16. Section 6 should be repealed.

This is a Report pursuant to section 5(2) of *"The Law Reform Commission Act"* dated this 11th day of August 1980.

Clifford H.C. Edwards, Chairman

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A. Burton Bass, Commissioner

Beverly-Ann Scott, Commissioner

Knox B. Foster, Commissioner

FOOTNOTES

1. 29 Car. 2, c. 3.
2. Law Revision Committee, Sixth Interim Report, Cmd. 5449, 1937, 8.
3. C.C.S.M. c. M120.
4. 19 & 20 Vic. c. 97.
5. 9 Geo. IV, c. 14.
6. *"The Sale of Goods Act"*, C.C.S.M. c. S10.
7. 56 & 57 Vic., c. 71.
8. 15 & 16 Geo. V, c. 20.
9. 2 & 3 Eliz. II, c. 34.
10. R.S.O. 1970, c. 444.
11. *Statute of Frauds*, R.S.N.S. 1967, c. 290.
12. *Statute of Frauds*, C.C.N.B., S14.
13. R.S.P.E.I. 1974, S6.
14. R.S.B.C. 1960, c. 369.
15. C.C.S.M. c. R30.
16. [1932] 3 D.L.R. 501 (N.S.S.C.).
17. (1913) 3 W.W.R. 814 (Alta. S.C.).
18. (1877) 2 Ex. D. 318.
19. [1923] 3 D.L.R. 1167 (Ont. S.C.).
20. 8 & 9 Vic. c. 106.
21. C.C.S.M. c. R50.
22. *Ibid*. s. 19.
23. *Ibid*, s. 22 and s. 45(2).

24. C.C.S.M. c. S120.

25. C.C.S.M. c. C225.

26. C.C.S.M. c. L70.

27. *Supra* n. 2, at p. 7.

28. (1859) 7 C.B.N.S. 374.

29. Law Reform Commission of British Columbia 1977, *Report on the Statute of Frauds*.

30. C.C.S.M. c. M45.

31. C.C.S.M. c. M60.

32. C.C.S.M. c. R20.

33. *Supra* n. 6, s. 2(1)(h).

34. Cheshire and Fifoot, *Law of Contract*, (9th ed. 1976) 185.

35. *Supra* n. 29 at p. 11.

36. C.C.S.M. c. P35.

37. Goff and Jones, *The Law of Restitution* (2nd ed. 1978) 319.

38. [1954] 3 D.L.R. 785 (S.C.C.).

39. *Ibid.*, p. 795.

40. [1974] 3 W.L.R. 56 (H.L.).

41. (1883), 8 App. Cas. 467.

42. *Ibid.*, p. 479.

43. *Supra* n. 38, p. 793.

44. (1974), 39 D.L.R. (3d) 408 (S.C.C.).

45. (1932), 5 M.P.R. 451 at 459.

46. [1963] 2 Q.B. 169 at 189.

47. *Fry On Specific Performance*, 276 at 277 (6th ed., 1921).

48. [1968] 2 All E.R. 783.

49. Fridman, *The Law of Contract* (1976), 225.

50. (1978) 12 A.R. 183.

51. *Supra* n. 29 at p. 71.

52. *Supra* n. 29 at p. 73.

53. *Supra* n. 29 at p. 72.

54. Anson, *Law of Contract* (15th ed. M.L. Gwyer) 1920, 81.

55. *Supra* n. 2, at 10.

56. Fridman, *Sale of Goods in Canada* (2nd ed. 1979), 52.

57. *Ibid.*, p. 53.

58. The Ontario Law Reform Commission, *Report on Sale of Goods*, 1979, Vol. 1 at p. 109.

59. (1861) 121 E.R. 716.

60. U.C.C. 2-201.

61. *Supra* n. 56 at 54.

62. *Supra* n. 58 at 109.

63. Stephen and Pollock, "Section Seventeen of the Statute of Frauds" (1885) 1 *L.Q. Rev.* 1, 4.

64. *Supra* n. 58 at 110.

65. [1897] 1 Ch. 196 (C.A.).

66. Waters, *The Law of Trusts in Canada* (1974) 18.

67. Scott, Vol. V., *The Law of Trusts* (3rd ed. 1967), p. 3215 [§ 404-664]

68. (1974) 41 D.L.R. (3d) 367.

69. *Supra* n. 65, at 206.

70. *Supra* n. 66 at 197.

71. *Ibid.*, at 201.

72. (1913) 15 D.L.R. 254 (Man. K.B.) 258.

73. *Supra* n. 66, at 187.

74. [1918] A.C. 626.

75. [1967] 2 All E.R. 850.