STATUTE OF FRAUDS*

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The Statute of Fraud is approaching its 300th anniversary. This article analyzes the provisions and workings of those sections of the Statute of Frauds and Lord Tenterden's Act requiring some form of writing for various legal transactions. It begins with a brief analysis of the historical framework in which the Statute of Frauds was passed. It then looks at the requirement of writing for contracts—discussing firstly the operation of the requirement, then the means of avoiding the Provisions of the Statute and finally at the classes of contracts covered by the Statute. The provisions of the Statute as to trusts and of Lord Tenterden's Act as to fraudulent representations of creditworthiness are similarly analyzed.

I. INTRODUCTION

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

II. HISTORICAL BACKGROUND

> First and foremost, it is urged that the Act is a product of conditions which have long passed away. . . . [T]he provisions of Section 4 are an anachronism. A condition of things which was advanced in relation to 1677 is backward in relation to 1937.[1]

In analyzing the Statute of Frauds, it is first necessary to review the reasons for its passage in 1677.

In 1677, parties to an action, their husbands or wives, and persons with an interest in the result of the action could not be witnesses. Hence,[2]

> . . . the merchant whose name was forged to a bill of exchange had to sit by, silent and unheard, while his acquaintances were called to offer conjectures and beliefs as to the authenticity of the disputed signature from what they knew of his other writings. If a farmer in his gig ran over a foot-passenger in the road, the two persons whom the law singled out to prohibit from becoming witnesses were the farmer and the foot-passenger.

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

A series of statutes between 1844 and 1854[3] permitted litigants to give evidence on oath, removing this rationale for the provisions of the Statute of Frauds.

In addition, trial by jury was in a state of transition:[4]

> The jury's verdict was practically unappealable despite the evidence, and it was therefore felt necessary to limit the cases which a jury might decide. For, when a party introduced convincing evidence, the jury could still decide the case on the basis of facts personally

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

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

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

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

> known to the jurors which had not been offered at the trial. . . . In addition, as basic as it appears today, the concept of granting a new trial for error was just emerging and was not yet already understood nor often utilized.

This basis would seem to have passed as well. Jury trials in Alberta are rare, control over the jury has been strengthened and the right of appeal has been further developed. As Thayer said in his *Preliminary Treatise on Evidence*[5]

> It is not probable that so wide reaching an act could have been passed if jury trial had been on the footing which it holds today.

In addition to these two factors, conditions in England were unsettled at the time of the passage of the Statute:[6]

> For 50 years England had been torn with political dissension. The Civil War had been followed by a period of the dictatorship of Oliver Cromwell. This was followed by the Restoration. Parliamentary power had been virtually nullified. No legislation had been enacted affecting ordinary litigation. The ordinary law courts had been functioning under great difficulties. Subordination and perjury evidently were rife.

This state of affairs was commented upon in *Slade's Case*: [7] "And I am surprised that in these days so little consideration is made of an oath, as I daily observe."

It would be wrong to conclude, however, that the Statute of Frauds arose solely out of conditions peculiar to England in the seventeenth century. It was only one in a series of statutes both in England and on the continent dealing with the problem of perjury which began as early as 1228.[8] For example c. 21 of 11 Henry VII (1495) began: "Where as perjury is much and custumably used within the Citie of London amonges such psons as passen and been empanelled upon issues joyned between ptie and ptie. . . ." This tends to show that perjury was not a problem unique to the mid-seventeenth century, although the unsettled political conditions may have made such especially prevalent at that time.

A review of the state of English law at that time also serves to explain some of the working and provisions of the Statute of Frauds:[9]

> . . . [A]t the time of the enactment of the Statute of Frauds in the seventeenth century the modern informal contract was in the making. At that time there had not as yet been formulated the principles of agreement, consideration, conditions and illegality. Consequently the draftsmen did not know what terms to employ and they did the best they could at that time.

Finally, it seems that the Statute of Frauds was to some extent a codification of the law as it existed at that time. "It is a good surmise that Section 4 of the Statute 'applies to those verbal provisions which, before the passing of the Statute, were probably in most instances reduced to writing, though not necessarily'."[10] It would appear that the same is true of section 16.[11]

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[5] At 431.

[6] Drachsler, *The British Statute of Frauds—British Reform and American Experience*, (1958-1960) 3-4 Am. Bar Assoc. Section of International and Cooperative Law Bulletin, 24.

[7] (1602) 4 Coke 95.

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

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

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

[11] *Supra*, n. 8. Section 16 is commonly referred to as section 17. *See* n. 228 below.

III. CONTRACTS

A. Operation of the Statute

1. "No action shall be brought"

Judicial interpretation of the phrase "no action shall be brought" has varied over the years. In early cases such as *Case* v. *Barber,*[12] it seems to have been held that non-compliance with the statutory requirements rendered a contract unenforceable. Later cases, such as *Carrington* v. *Roots,*[13] held that contracts were rendered void. However, on the authority of *Leroux* v. *Brown*[14] and *Maddison* v. *Alderson,*[15] it is now firmly established that contracts are rendered merely unenforceable. It is also established[16] that compliance with the statute is not a substitute for consideration.

The fact that a contract is unenforceable and not void has a number of implications. Firstly, the contract may be used in defence in an action.[17] Secondly, the plaintiff's rights may be perfected if a sufficient memorandum comes into existence subsequent to the formation of the contract.[18] Thirdly, it has been held[19] that a contract rendered unenforceable by the Statute is sufficient consideration to support a negotiable instrument. If the contract were void, the instrument would be invalid as between immediate parties, but not as against a holder for value.[20] Fourthly, money paid by the purchaser under the contract may be forfeited if he defaults.[21]

The law remains unsettled as to whether the discharge of one's obligations under an unenforceable contract is sufficient consideration for another contract. The earlier cases held that it was not,[22] but Williams[23] feels, on the basis of *In Re Davies,*[24] that such would now be considered sufficient consideration.

The fact that contracts are rendered unenforceable and not void may mean that the Statute relates to procedural and not substantive law. For example, Jervis C.J. stated in *Leroux* v. *Brown*:[25] "I am of opinion that the fourth section applies not to the solemnities of the contract, but to the procedure. . . ." This is a controversial issue and will not be discussed at length here. However, one might consider the importance of this issue with regard to conflict of laws and retroactivity.

The Law Revision Committee considered one of the consequences flowing from the fact that contracts are rendered unenforceable and not void as a criticism of the provisions of the Act:[26]

> The Section does not reduce contracts which do not comply with it to mere nullities, but merely makes them unenforceable by action. . . . Anomalous results flow from this: e.g., in *Morris* v. *Baron*[27] a contract which complied with the Section was superceded by a second

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

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

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

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

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

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

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

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

[20] *3 Halsbury's Laws of England* 177 (3rd ed. 1953).

[21] *Monnickendam* v. *Leanse* (1923) 39 T.L.R. 445.

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

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

[24] [1921] 3 K.B. 628.

[25] *Supra*, n. 14.

[26] *Supra*, n. 1.

[27] [1918] 1 A.C. 1.

contract which did not so comply. It was held that neither contract could be enforced: the first because it was validly rescinded by the second, the second, because, owing to its purely oral character, no action could be brought on it. This was a result which the parties could not possibly have intended.

The word "action" was recently considered in the case of *Re Solmon*[28]

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

2. "Note or Memorandum"

The Statute of Frauds does not require that the contracts be in writing; it requires only a "note or memorandum thereof," which serves an evidentiary function. It is therefore not necessary that the writing be contemporaneous with the making of the contract. However, because "no action shall be brought" without the existence of a note or memorandum, it has been held that the writing must be in existence prior to the commencement of the action.[29] This has been amended so that it is now sufficient if the note or memorandum is in existence at the time when the party relying on it is joined to the action.[30]

It was held as early as 1683 in *Moore* v. *Hart*[31] that a writing need not be in any particular form to satisfy the Statute. However, a plaintiff will not be able to rely on the pleadings of the defendant in an action,[32] and this would seem to be supported on the basis that the memorandum must be in existence before the commencement of the action. A case apparently to the contrary of this proposition was *Grindell* v. *Bass*[33] in which G. sued B. for specific performance of a contract to sell a house. In defence, B. stated in writing that he had already contracted to sell the house to E. G. added E. as a defendant and E. counterclaimed for a declaration that he was entitled to the house, successfully relying on B.'s defence. In this case, the issue of the timing of the memorandum was not discussed. It was, in fact, consistent with the principle established in *Farr, Smith and Company* v. *Messers Limited*,[34] although it was decided eight years earlier.

It is commonly agreed that it is not necessary for a note or memorandum to be written with the intention of satisfying the Statute.[35] Hence, a letter in which the defendant admits to the terms of the contract but denies liability will be sufficient.[36] However, a letter showing that there is a dispute between the parties as to the terms of the contract[37] or a letter denying the existence of the contract[38] will not be sufficient.

The question of what a sufficient memorandum must contain has been fruitful for litigation. Williams, in his book *The Statute of Frauds Section IV,* states: ". . . to satisfy the Statute the memorandum must set forth *all* of the contract; and as a contract exists only in its various terms, the memoran-

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[28] (1974) 19 C.B.R. (N.S.) 165, 168, *per* Ferron, Registrar (Ont. S.Ct. in Bankruptcy).

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

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

[31] I Vern. 111, 201 (Ch.).

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

[33] [1920] All E.R. Rep. 219.

[34] *Supra*, n. 30.

[35] Williams, *supra*, n. 23 at 79; Anson, *Law of Contract*, 74 (23rd ed. 1969); 8 *Halsbury's Laws of England* 95 (3rd ed. 1954); 5 *C.E.D. (Western)* 100 (2nd ed., 1958).

[36] *Thirkell* v. *Cambi* [1919] 2 K.B. 590.

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

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

dum must therefore disclose all the terms of the contract."[39] He relies upon a number of cases, including *Pierce* v. *Corf*,[40] and finds support from Fry, *Specific Performance of Contracts*.[41] However, a less strict standard is stated in Cheshire and Fifoot's *Law of Contract*:[42] "A 'note of memorandum' of [the contract] is sufficient provided it contains all the *material* terms of the contract." (emphasis added) Similar propositions are set out in Anson's *Law of Contract*,[43] *Halsbury's Laws of England*[44] and the *C.E.D. (Western)*.[45]

The less strict standard has found support in the Canadian courts. In *McKenzie* v. *Walsh*,[46] Sir Louis Davies C.J.C. said at 313:

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

This standard raises the issue of what constitutes the "essential terms" in any particular contract. According to Disbery J. in *Chapman* v. *Kopitoski*:[47] "Parties, property and price by their nature are material parts of every contract but, dependent upon the circumstances, there may be other essential terms of a contract in addition to parties, price and property."[48] In the case of *Tweddell* v. *Henderson*[49] it was held that the payment of the purchase price in stages was a material term of the contract for the purpose of a sufficient memorandum.

In addition, by the recent cases of *Tiverton Estates Ltd.* v. *Wearwell Ltd.*[50] and *Tweddell* v. *Henderson*[51] it appears that the memorandum must also contain an acknowledgment or recognition by the signatory to the document that a contract has been entered into.

Even if there were agreement as to what terms are required for a sufficient note or memorandum, a number of complicating factors arise. One is that any material term which is omitted and of benefit solely for the plaintiff may be waived by him.[52] This does not apply, however, if it is of benefit to the defendant[53] or to both the plaintiff and the defendant.[54]

A second complicating factor is that it is sufficient if a term is disclosed by reasonable inference.[55] As stated in *Fitzmaurice* v. *Bailey*:[56]

> Whether in any particular case a term can be collected by *reasonable inference* is often a question of very considerable difficulty. It is not enough that the memorandum is *consistent with the existence* of the term sought to be inferred; or that it is *probable* that the

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[39] At 55.

[40] (1874) L.R. 9 Q.B. 210.

[41] (6th ed. 1921) at 242, 243.

[42] (8th ed. 1972) at 185.

[43] (23rd ed. 1969) at 75.

[44] Volume 8 (3rd ed. 1954) at 100.

[45] Volume 5 (2nd ed. 1958) at 103, 104.

[46] (1921) 61 S.C.R. 312.

[47] [1972] 6 W.W.R. 525.

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

[49] [1975] 2 All E.R. 1096 (Ch.).

[50] [1974] 1 All E.R. 209 (C.A.).

[51] *Supra*, n. 49.

[52] *North* v. *Loomes* [1919] 1 Ch. 378.

[53] *Burgess* v. *Cox* [1951] Ch. 383.

[54] *Hawkins* v. *Price* [1947] Ch. 645. *See* Williams, *supra*, n. 23 at 58.

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

[56] (1860) 9 H.L.C. 79, 93.

parties intended to include such a term in their contract. There must be reasonable certainty both as to the fact of the term and as to its contents.

A third complicating factor is that of the admissibility of parol evidence. "This evidence must be confined to explanation: so soon as it passes from explaining the memorandum to adding new terms or varying those already written it becomes inadmissible."[57] Anson demonstrates the anomalous ways in which this operates with a number of cases.[58] In *Rossiter* v. *Miller*[59] parol evidence was admissible to identify the "proprietors" while in *Potter* v. *Duffield*,[60] parol evidence was not admissible to identify the "vendor." In *Plant* v. *Bourne*[61] parol evidence was admissible to identify the land described as "twenty-four acres of land, freehold, and all appurtences thereto at Totmonslow, in the parish of Draycott, in the county of Stafford"; while in *Caddick* v. *Skidmore*,[62] it was held that a receipt for money paid to a party "on account of his share in the Tividale mine" could not be explained by parol evidence.

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

Signature, in the normal use of the word, implies that a party has written his own name at the end of a document as a means of authenticating it. However, the courts have given a very liberal interpretation to the word as it applies to the Statute of Frauds. In the first place, it need not be found at the foot of the writing so long as it appears to have been written with a view to governing the whole instrument.[63] In the second place, the "authenticated signature fiction" doctrine has extended the meaning of "signature" by providing that if a writing contains the name or initials of a party, it will be held to comply with the statute if the party to be charged has recognized that the writing expresses the contract.[64] Similarly, if the document has been altered or completed after a party has signed his name to it and he recognizes this alteration or completion, the signature may be held to be sufficient.[65]

The Statute provides that it is sufficient if the note or memorandum is signed by the agent of the party to be charged. The cases have held that the authority to act as agent need not appear in writing,[66] and that the agent need not be authorized to sign for the express purpose of satisfying the Statute.[67] He may sign his own name[68] or the name of his principal.[69] A third party may be the agent for both the plaintiff and the defendant,[70] but the plaintiff cannot be the agent for the defendant.[71] In the case of *Wallace* v. *Roe*,[72] it was held that the signature of an agent may be sufficient even if he signs the memorandum in the capacity of a witness.

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[57] Williams, *supra*, n. 23 at 59.

[58] *Law of Contract*, *supra*, n. 35 at 74, 75.

[59] (1878) 3 App. Cas. 1124.

[60] (1874) L.R. 18 Eq. 4.

[61] [1897] 2 Ch. 281.

[62] (1857) 2 De G. & J. 51 (Ch.).

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

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

[65] *Koenigsblatt* v. *Sweet* [1923] 2 Ch. 314.

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

[67] *Daniels* v. *Trefusis* [1914] 1 Ch. 788.

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

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

[70] *Supra*, n. 68.

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

[72] [1903] 1 I.R. 32.

The doctrine of authenticated signature fiction applies to signatures of agents as well as to those of principals. In the case of *Leeman* v. *Stocks*,[73] the defendant was selling land by public auction. Before the sale, the auctioneer placed the defendant's initials on a form and after the sale he completed the form with the plaintiff's name, the description of the property and the sale price. Later, the auctioneer told the defendant of the document, but did not show it to him. The defendant did not express dissatisfaction. It was held that the auctioneer was the agent of the defendant and that the document was "signed" so as to constitute a sufficient memorandum.

4. Joinder of Documents

In order to have a sufficient memorandum, it is not required that the writing appear in only one document. This is probably a departure from the original spirit of the Statute, but it has been used by the courts as a means of avoiding the Statute's provisions. A distinction should be drawn between the joining of documents, both of which are signed and the joining of signed and unsigned documents.

In the joining of signed and unsigned documents it is necessary that the two be connected in some way and that the authenticating influence of the signature extend to the unsigned document. It has generally been held that the signed document must come into existence in point of time after the unsigned document,[74] although it is now sufficient if the documents come into being more or less contemporaneously, regardless of the order.[75]

Originally, it was required that there be an express reference from one document to the other for a sufficient connection to exist.[76] By 1852 it was held to be sufficient if the reference could be inferred[77] and five years later it was decided in *Ridgway* v. *Wharton*[78] that the reference need not show the other to be a writing. In that case, the document referred to "instructions," which could have been oral or written.

Perhaps the key case of the nineteenth century was *Long* v. *Millar*.[79] It established both a strict and a liberal test for the connection of documents. What has been known as the "side by side" test was set down by Bramwell L.J.:[80]

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

This was extended in *Oliver* v. *Hunting*[81] where Kekewich J. stated: "Whenever parol evidence is required to connect two written documents together then that parol evidence is admissible."

On the other hand, Baggallay L.J. set up a stricter test in *Long* v. *Millar*:[82]

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

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[73] [1951] 1 Ch. 941.

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

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

[76] *Dobell* v. *Hutchinson* (1835) 3 Ad. & El. 335; *Smith* v. *Dixon* (1839) 3 Jur. 770.

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

[78] (1857) 6 H.L. Cas. 238.

[79] (1879) 4 C.P.D. 450 (C.A.).

[80] *Id.* at 454.

[81] (1890) 44 Ch.D. 205.

[82] *Supra*, n. 79 at 454. *See* Williams, *supra*, n. 23 at 134.

This was expanded by Russell J. in *Stokes* v. *Whicher*:[83]

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

Hence, by the strict view in *Long* v. *Millar*[84] it is necessary that there be some reference, express or implied, to the other document. By the liberal view, it is sufficient if the relationship between the documents can be seen by placing them side by side.

The position was reconsidered in the case of *Timmins* v. *Moreland Street Property Co.*[85] and Jenkins L.J. reaffirmed the strict position:

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

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

If a plaintiff attempts to join two signed documents, it is not necessary that the signature on one document authenticate the other. It is therefore reasonable that the law should be more lenient as to the requirement of a connecting factor. According to Williams:

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

He relies upon *Allen* v. *Bennet*,[87] *Verlander* v. *Codd*[88] and *Studds* v. *Watson*[89] but admits that *Potter* v. *Peters*[70] is to the contrary.

B. Means of Avoiding the Provisions of the Statute

1. Part Performance

The doctrine of part performance as a means of avoiding the provisions of the Statute is almost as old as the Statute itself. The earliest reported case was *Butcher* v. *Stapely*.[91] However, it was established in its modern sense by the case of *Maddison* v. *Alderson*.[92]

About certain of the requirements for part performance there is general agreement. The act must have been done by the party asserting the contract[93] with the knowledge of the other party[94] in pursuance of the terms

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[83] [1920] 1 Ch. 411.
[84] *Supra*, n. 79.
[85] *Supra*, n. 75.
[86] *Supra*, n. 23 at 142.
[87] (1810) 3 Taunt. 167.
[88] (1823) Turn. & R. 352.
[89] (1884) 28 Ch.D. 305.
[90] (1895) 64 L.J. Ch. 357.
[91] (1686) 1 Vern. 363.
[92] *Supra*, n. 15.
[93] *Supra*, n. 63.
[94] *McInnes* v. *McKenzie* (1913) 23 W.W.R. 863.

of the contract.[95] It will not apply if its application affects the property or interests of a third party who is ignorant of the acts of part performance.[96]

However, there is considerable controversy over the nature of the act required for part performance. The classic quotation is that of Lord Selbourne L.C. in *Maddison* v. *Alderson*:[97] "All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged." Subsequent cases have fallen into two general categories, which might be called the broad and narrow views.

The narrow interpretation of the doctrine of part performance views it as serving an evidentiary function. As is stated in Fry's *Specific Performance of Contracts*:[98] ". . . there must be proper parol evidence of the contract which is *let in* by the acts of part performance" (emphasis added). The effect of such a view was stated by Lord Simon of Glaisdale in *Steadman* v. *Steadman*:[99] "If the contract alleged is such that it ought not to depend on oral testimony, it is *this* contract, not merely *some* contract, that the acts should prove."

The first requirement under this view of the law is that the acts must be referable to a dealing with the land in question. As stated by Cartwright J. in *Deglman* v. *Guaranty Trust of Canada & Constantineau*:[100]

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

The second requirement under this view of the law is that the acts must be referable to the particular contract in question, not merely *a* contract. This proposition, was assumed by McDonald J. in *Toombs* v. *Mueller*[101] to be accepted in Alberta, relying upon the cases of *Erb* v. *Wilson*,[102] *McGillivray* v. *Shaw*[103] and *Brownscombe* v. *Public Trustee of Province of Alberta*.[104]

The broad interpretation is perhaps best represented by *Steadman* v. *Steadman*,[105] a recent decision of the House of Lords. In that case, the parties, who were husband and wife, entered into a contract whereby the plaintiff husband would pay £100 in respect of arrears of maintenance and a sum of £1,500 in consideration of the defendant wife conveying her interest in the house. The parties announced their agreement to the magistrates hearing a matter with regard to the maintenance order, the husband paid the £100 and the husband's solicitors sent the transfer deeds to the wife. These acts were found to constitute part performance.

This interpretation views the doctrine of part performance as based on

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[95] *Cooke* v. *Tombs* (1794) 2 Anst. 420; *Thynne* v. *Glengall* (1848) 2 H.L. Cas. 131.

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

[97] *Supra*, n. 92 at 479.

[98] (6th ed. 1921) § 580.

[99] [1974] 3 W.L.R. 56, 80 (H.L.).

[100] [1954] 3 D.L.R. 785, 793 (S.C.C.).

[101] (1974) 47 D.L.R. (3d) 709 (Alta. T.D.). This decision was reversed on appeal without reason ([1975] 3 W.W.R. 96 (Alta. A.D.)). At trial, the acts done by the plaintiff were found to be sufficient to constitute part performance, but specific performance was refused on the basis that the plaintiff had not shown he was ready and willing to carry out his obligations. On appeal, specific performance was granted, so the court must have found part performance. It is unclear, however, whether the Appellate Court approved of McDonald J.'s reasons.

[102] (1969) 69 W.W.R. 126 (Sask. Q.B.).

[103] (1963) 39 D.L.R. (2d) 660 (Alta. A.D.).

[104] [1969] S.C.R. 658.

[105] *Supra*, n. 99.

equities arising from the acts rather than on evidence. Hence, Viscount Dilhorne in *Steadman* v. *Steadman*[106] stated in reference to the quotation from Fry's *Specific Performance*:[107]

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

The effect of this view was stated by Lord Simon:[108] "If the plaintiff has so performed his obligations under the contract that it would be unconscionable for the defendant to plead the Statute, it is immaterial whether or not the plaintiff's acts prove the contract. . . ." The test to be used was first set out in Fry's *Specific Performance*,[109] approved in *Kingswood Estate Co. Ltd.* v. *Anderson*,[110] and settled in *Steadman* v. *Steadman*.[111] It is that the acts must be referable to some contract and that they must be consistent with the contract alleged. Lord Reid and Viscount Dilhorne in the *Steadman Case*[112] went so far as to state that the acts need not even refer to a contract concerning land. In addition, all the judges with the exception of Lord Morris of Borth-y-Gest stated that the mere payment of purchase money could be a sufficient act to constitute part performance. If this is sufficient to raise equities in favour of the plaintiff so as to avoid the Statute, the impact of the Statute has been greatly reduced.

A second area of controversy is that of the standard of proof required to be met before part performance comes into operation. The conflict exists even within the case of *Maddison* v. *Alderson*.[113] According to Lord O'Hagan, the acts "must *necessarily imply* the existence of the contract."[114] However, according to Lord Selborne: "So long as the connection of those *res gestae* with the alleged contract does not depend upon mere parol testimony but is *reasonably to be inferred* from the *res gestae* themselves, justice seems to require some such limitations of the scope of the statute. . . ."[115] The former standard was accepted by McDonald J. in *Toombs* v. *Mueller*[116] and the latter by Lord Simon in *Steadman* v. *Steadman*:[117] ". . . It is sufficient if it be shown that it was more likely than not that those acts were in performance of some contract to which the defendant was a party."

A third area of controversy involves the question of the types of contracts to which part performance applies. The most restrictive position is that it applies only to contracts involving the sale of interests in land and the authority cited is *Britain* v. *Rossiter*.[118] In his book *The Statute of Frauds Section IV*, James Williams concluded that at best *Britain* v. *Rossiter*[119] was weak authority and that subsequent cases had overruled it. However, in *Steadman* v. *Steadman*,[120] Lord Morris suggested a revival of this position

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[106] *Id.*

[107] *Id.* at 74.

[108] *Id.* at 80.

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

[110] [1963] 2 Q.B. 169 (C.A.).

[111] *Supra*, n. 99.

[112] *Id.*

[113] *Supra*, n. 92.

[114] *Id.* at 483. Emphasis added.

[115] *Id.* at 476. Emphasis added.

[116] *Supra*, n. 101 at 710.

[117] *Supra*, n. 99 at 82.

[118] (1879) 11 Q.B.D. 123.

[119] *Id.*

[120] *Supra*, n. 99.

by stating: ". . . the whole area of the law of part performance relates to contracts 'for the sale or other disposition of land or any interest in land'. . . ."[121]

The more commonly accepted position, that established in *McManus* v. *Cooke*,[122] is that the doctrine of part performance "applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing."[123] According to Halsbury's,[124] this would exclude, *inter alia*, contracts requiring the continued supervision of the courts, contracts for personal work or service and contracts lacking mutuality.

An even wider position is that set down by *Fry's Specific Performance*. The authors there felt that the law as stated in *McManus* v. *Cooke* would be more accurate if it read that part performance "applies to all cases in which a Court of Equity would entertain a suit if the alleged contract had been in writing."[125] However, outside of Fry, there would seem to be very little support for this proposition.

A fourth area of controversy relates to the question of whether the doctrine of part performance applies to support an action for damages when specific performance is not available.[12] The more traditional position, based on *Lavery* v. *Pursell*[127] is that it is not. Part performance arose as a doctrine of equity. By the Chancery Amendment Act (Lord Cairns' Act),[128] it was provided that:

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

Hence, the Courts of Equity could grant damages only when specific performance was available. The Judicature Act gave the Supreme Courts jurisdiction to sit as Courts of Common Law and of Equity but did not affect substantive rights. As the availability of specific performance was a prerequisite to the granting of damages before the passing of the Judicature Act, it remained a prerequisite after its enactment. This position is supported by Snell,[129] Hanbury,[130] Fry,[131] and Halsbury.[132]

However, a series of Canadian cases have taken a contrary position. *Dobson* v. *Winton & Robbins Ltd.*[133] concerned an action for specific performance and damages on the basis of an enforceable contract. Although not dealing with part performance, it undermined the position taken in *Lavery* v. *Pursell*:[134]

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[121] *Id.* at 66 (in dissent).

[122] (1887) 35 Ch.D. 681.

[123] *Id.* at 697.

[124] 36 *Halsbury's Laws of England* 267-271 (3rd Ed. 1961).

[125] *Supra*, n. 98 at 283.

[126] *See* MacIntyre, *Equity—Damages in Place of Specific Performance—More Confusion About Fusion* (1969) 47 Can. Bar Rev. 644; Barber, *The Operation of the Doctrine of Part Performance, in Particular to Action for Damages* (1973) 8 U. of Queensland L.J. 79.

[127] (1889) 39 Ch.D. 508, 519.

[128] (1858) 21 & 22 Vict., c. 27, s. 2.

[129] *Principles of Equity* 653 (26th ed. 1966).

[130] *Modern Equity* 561 (8th ed. 1962).

[131] *Supra*, n. 98 at 283.

[132] 36 *Halsbury's Laws of England* 351 (3rd ed. 1961).

[133] (1960) 20 D.L.R. (2d) 164 (S.C.C.).

[134] *Id.* at 166.

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

In the recent Supreme Court of Canada decision of *Brownscombe* v. *Public Trustee of Alberta*,[135] a case involving part performance, the plaintiff was awarded damages despite the fact that specific performance was impossible.

The former position has produced some anomalous results. In the case of *Ellul & Ellul* v. *Oakes*,[136] the plaintiff agreed to purchase a house from the defendant with the warranty that it was connected to a sewer. The house was transferred and the purchase price paid, but in fact the house was served only by a septic tank. The court found a sufficient memorandum in writing to allow the action for damages. However, one might consider the result if a sufficient memorandum had not been found. If the vendor had not transferred the house, the purchaser might have been entitled to specific performance combined with a reduction in the purchase price or compensation for the breach of warranty. However, as the vendor had already transferred the house, specific performance would not have been possible and no relief on the basis of breach of warranty could have been available.

2. Full Performance

Whether the Statute applies when the plaintiff has completely performed his part of the contract is a thorny issue. In *Cocking* v. *Ward*[137] Tindal C.J. said:

> . . . the case appears to us to fall within the principle adverted to by Le Blanc J. in *Griffith* v. *Young*:[138] and further we think the case of *Buttermere* v. *Hayes*[139] is an authority in point that the present contract, though executed on the part of the plaintiff, yet, not being executed on the part of the defendant also, is still to be considered as a contract within the Statute of Frauds.

This was supported by Amphlett B. in *Sanderson* v. *Graves*:[140]

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

However, two more recent Canadian cases have taken the opposite view of the law. In *Kinsey* v. *National Trust*,[141] Dubac C.J. relied upon *Ridley* v. *Ridley*[142] and *Coles* v. *Pilkington*[143] in concluding that full performance by the plaintiff takes the case out of the Statute. This was followed by the Manitoba King's Bench in *Spencer* v. *Spencer*,[144] which relied in addition on *Halleran* v. *Moon*.[145] There is not sufficient authority on this topic to suggest

[135] *Supra*, n. 104.

[136] [1972] 3 S.A.S.R. 377. *See* the further discussion of this case at p. 30 below.

[137] (1845) 1 C.B. 858, 868.

[138] (1810) 12 East. 513.

[139] (1839) 5 M. & W. 456.

[140] (1875) L.R. 10 Ex. 234.

[141] (1904) 15 Man. L.R. 32 (Man. K.B.).

[142] (1865) 34 Beav. 478.

[143] (1874) L.R. 19 Eq. 174. In fact, this case seems to deal with part performance and not full performance by one party.

[144] (1913) 4 W.W.R. 785.

[145] (1881) 28 Gr. 319.

that a trend is developing in favour of the view that full performance by the plaintiff takes the case out of the Statute, and the issue remains unsettled.

Whether the Statute applies when there has been full performance by both parties is an issue which seldom arises. In the United States the position is clearly that such a situation is outside the provisions of the Statute,[146] and if *Kinsey* v. *National Trust*[147] properly expresses the law, it would be outside the Statute in Alberta as well. However, the recent case of *Ellul & Ellul* v. *Oakes*[148] suggests that even full performance by both parties may not be sufficient to take the case out of the Statute. The court there found it necessary to find a sufficient memorandum signed by the defendant in order to allow an action for damages for breach of warranty on the contract. The result is that this area of the law also remains unsettled.

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

It is well settled that the Statute of Frauds cannot be used as an instrument of fraud.[149] However, it is also well established that a mere refusal to sign a memorandum by one of the parties to the contract does not amount to fraud. As was stated in *Maxwell* v. *Mountacute*: [150]

> Where . . . the parties come to an agreement but the same is never reduced into writing nor any proposal made for that purpose, so that they rely wholly on their parol agreement, that unless this be executed in part, neither party can compel the other to a specific performance, for that the Statute of Frauds is directly in their way.

A similar proposition was set out in *Wood* v. *Midgley*.[151] What is required to take the contract out of the Statute is something more active:[152]

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

Originally, an admission of the contract by the party to be charged was a bar to the use of the Statute as a defence. This is shown by a series of cases beginning in 1702 with *Croyston* v. *Baynes*[153] and ending in 1789 with *Whitchurch* v. *Bevis*.[154] However, at the end of the eighteenth century, the position was reversed by reason of the fear that the defendants would perjure themselves by denying the contract in order to rely on the Statute.[155]

A possible extension of the use of fraud as a means of avoiding the Statute was suggested in an *obiter dictum* by Stamp J. in *Wakeham* v. *MacKenzie*.[156] In that case, part performance was found, but the judge went on to say that even in the absence of part performance ". . . in my view it would have been fraudulent of Mr. Ball [the deceased defendant] immediately before his death to have repudiated the bargain for want of writing."[157] He then mentioned *Maxwell* v. *Mountacute*[158] but left the question of whether

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[146] Page 2 *Contracts* § 1363 (2nd ed. 1920).

[147] *Supra*, n. 141.

[148] *Supra*, n. 136.

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

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

[151] (1854) 5 De G.M. & G. 41.

[152] *Maxwell* v. *Mountacute*, *supra*, n. 150.

[153] Prec. Ch. 208.

[154] 2 Bro. C.C. 559.

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

[156] [1968] 2 All E.R. 783 (Ch.D.).

[157] *Id.* at 788.

[158] *Supra*, n. 150.

the Statute was applicable unanswered. However, the mere suggestion that it would be fraud for the defendant to refuse to sign a memorandum and to plead the Statute is a radical departure from the traditional position.

4. Quasi-Contract

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

The first head of quasi-contract upon which the plaintiff might be successful is that of money paid to the defendant's use. For example, in *Meek* v. *Gass*,[159] the parties entered into a contract which was not to be performed within one year. The plaintiff paid the defendant some $200, but the defendant failed to perform his obligation and raised the Statute of Frauds in defence. In delivering the judgment of the court, Smith J. said:[160]

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

A second head of quasi-contract relevant to the Statute of Frauds is that of money had and received. For example, in *Griffith* v. *Young*,[161] the defendant tenant entered into a contract with the plaintiff landlady on the basis that if she would accept another person as a tenant, he would pay her £40 of the £100 goodwill he would receive from the new tenant. The landlady granted her acceptance, the defendant received the £100 but refused to pay the plaintiff. The court granted judgment to the plaintiff for £40 despite the absence of a written memorandum.

A third head of quasi-contract is that of account stated. To succeed, the plaintiff must be able to show that he has executed his part of the contract and that the defendant has admitted that he owes the plaintiff money on the contract. An example of this is the case of *Cocking* v. *Ward*[162] the headnote to which reads:

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

The fourth head of quasi-contract available in this area is that of quantum meruit. The leading case on this subject in Canada is *Deglman* v. *Guaranty Trust Co. of Canada & Constantineau*.[163] In that case, the plaintiff was to perform certain personal services for the defendant and the defendant was to devise certain land to the plaintiff. There was no memorandum of the contract and the court was unable to find that the acts of the plaintiff were sufficient to support part performance. However, the plaintiff was awarded damages on a quantum merit basis. In the words of Rand J.:[164]

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[159] (1877) 2 R. & C. 243 (N.S.S.C.).

[160] *Id.* at 247, 248.

[161] (1810) 12 East 513.

[162] *Supra*, n. 137.

[163] *Supra*, n. 100.

[164] *Id.* at 788.

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

Cartwright J. made it clear that the judgment was not based upon the contract:[165]

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

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

C. Classes of Contracts

1. In General

> The classes of contracts to which Section 4 applies seem to be arbitrarily selected and to exhibit no relevant common quality. There is no apparent reason why the requirement of signed writing should apply to these contracts, and to all of them, and to no others.[166]

Although the classes of contracts selected by the Statute of Frauds do appear to be rather arbitrarily selected this is in part due to the change in conditions between 1677 and the present. As Rabel explained in his article "The Statute of Frauds and Comparative Legal History,"[167]

> The French model was to be used for a selected number of transactions. It is submitted that their list was the product of contributions by the various judicial experts and that it presented the types of transactions appearing both important and a source of litigation. As the method of the lawbooks suggests, the method was made in a highly retrospective survey, and it tended to conservative aims. However, the fact was that experienced lawyers looked for the groups of cases in which the courts had encountered trouble because of uncertainty of evidence and difficulty in ascertaining the scope of individual transactions.

Sections 4 and 16 may, at least in part, have been a mere codification of the existing law.[168] As history has progressed, the classes of contracts for which the requirements of the Statute of Frauds have been appropriate have undoubtedly changed. It is beyond the scope of this paper to suggest new classes of contracts to be protected.

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

This provision applies both to liquidated and unliquidated damages,[169] but does not apply to a promise made before the promisor has become the administrator.[170] Despite the Mercantile Law Amendment Act[171] which provides that the consideration need not appear in writing for a promise "to answer for the debt, default or miscarriage of another person," the consideration for a promise such as this must still appear in writing.[172]

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[165] *Id.* at 795.

[166] *Supra*, n. 1 at 7.

[167] *Supra*, n. 8 at 184.

[168] *See* p. 5 above.

[169] Williams, *supra*, n. 23 at 4.

[170] *Tomlinson* v. *Gill* (1756) Amb. 330.

[171] (1856) 19 & 20 Vict., c. 97, s. 3.

[172] *Chitty on Contracts* 726 (20th ed. 1947).

The basis for the inclusion of this class of contract was that at the time of the enactment of the Statute of Frauds, the executor or administrator of an estate took beneficially if there was no residuary gift and the estate was not liable for the wrongful acts of the deceased. This placed moral pressure on the executor or administrator to make restitution out of his own funds, so that such special promises were common and important. At present, of course, promises of this nature are very rare.

3. To Charge any Person upon any Agreement made upon Consideration of Marriage

The wording of this phrase would seem to include mutual promises to marry, and originally it was so construed.[173] However, later judicial interpretations excluded this meaning from the Statute[174] so that it now covers, for example, promises to settle property upon a person in consideration of marriage.

This class of contract was probably included in the Statute because of the importance accorded to it at that time, and the requirement of writing served both an evidentiary and a cautionary function. However, "as a result of judicial legislation on this clause of the Statute there is very little left of it, and what little is left is accomplishing little good."[175]

4. Any Agreement that is not to be Performed Within the Space of One Year from the Making Thereof

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

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

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

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

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

[175] Willis, *supra*, n. 9 at 436.

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

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

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

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

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

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

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

[183] *Id.* at 130.

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

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

The wording of this clause is ambiguous and has led to considerable confusion in the case law. In the first place, it is difficult to distinguish among the words "debt," "default" and "miscarriages." The word "miscarriage" was interpreted in *Kirkham* v. *Marter*[184] as referring to a liability in tort. "Debt" refers to a contractual liability already incurred and "default" refers to a future liability.[185]

In the second place, "another person" has been narrowly interpreted. The effect of this is that the contract must be one of guarantee and not of indemnity. The test for distinguishing between the two was established as early as 1704 in *Birkmyr* v. *Darnell*:[186]

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

To be within the Statute, the promise must be made to a creditor of the principal debtor. For example, in *Re Bolton*,[187] the defendant was a shareholder in a company which required some money. A bank agreed to lend the money on the condition that the defendant's solicitors guarantee the debt. The solicitors agreed to this guarantee and the defendant in turn agreed to repay the solicitors should they be required to pay under the guarantee. As the solicitors were not creditors of the company, the promise of the defendant was not within the Statute. However, it is not necessary for the liability to be in existence at the time the defendant enters into the contract of guarantee.[188]

Whether the parties have entered into a contract of guarantee or indemnity will depend upon the intention of the parties determined by the general circumstances of the transaction.[189] This issue "has raised many hair splitting distinctions of exactly the kind which brings the law into hatred, ridicule and contempt by the public."[190]

Even if the court has found the contract to be one of guarantee, it may still be outside of the Statute if the guarantee is merely an incident of a larger transaction. This has operated in two types of cases. The first is where the guarantor is a *del credere* agent or an agent "who, for the extra commission, undertakes responsibility for the due performance of . . . contracts by persons whom he introduces to his principal."[191] This is shown by cases such as *Couturier* v. *Hastie*[192] and *Sutton & Co.* v. *Grey*.[193] The second type of case concerns what have been called "property cases," where the defendant has rights over property subject to a liability in favour of the plaintiff. For

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[184] (1819) 2 B. & Ald. 613.

[185] 18 *Halsbury's* 424 (3rd ed. 1957).

[186] (1704) 1 Salk. 27 (K.B.).

[187] (1892) 8 T.L.R. 668.

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

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

[190] *Yeoman Credit Ltd.* v. *Latter* [1961] 1 W.L.R. 828, *per* Harman L.J. at 892. *See* Anson, *supra*, n. 35 at 70.

[191] Cheshire & Fifoot, *Law of Contract* 180 (8th ed. 1972).

[192] (1852) 8 Exch. 40.

[193] [1894] 1 Q.B. 285.

example, in *Fitzgerald* v. *Dressler*,[194] A sold goods to B who resold them to C. A retained a lien over the goods and C guaranteed payment to A by B in consideration of A delivering the goods to C. This was held to be a contract of guarantee, but outside the Statute.

This exception was restricted in *Harburg India Rubber Comb Co.* v. *Martin*.[195] In that case, the defendant was a substantial shareholder in a company against which the plaintiff held a writ of execution. He agreed to guarantee notes of the company in consideration of the plaintiff withdrawing his writ. The Court of Appeal held that this was not a "property" case and that the contract was within the Statute of Frauds. It determined that the exception applied only when the guarantee is merely an incidental term of a contract with a different object.

6. Contracts Relating to Land

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

The inter-relationships of these sections is discussed by Leith & Smith:[196]

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

Unfortunately, these sections do not follow a common format. Under section 4, a "note or memorandum" of the contract is sufficient, under section 3, a "deed or note" is sufficient, but under section 1 it would seem necessary to reduce the interest being created to writing. Under section 4, the writing must be signed by the "party to be charged," under section 3, it must be "signed by the party so assigning, granting or surrendering [the interest]" and under section 1, it must be "signed by the parties so making or creating [interests of freehold or leasehold]." Under section 4, failure to comply with the Statute renders the contract unenforceable, under section 3 there is no mention of the effect of failure to comply and under section 1 the interest is reduced to an estate or lease at will.

An exception to the requirement of writing is provided by section 2:

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

The words "three years" have been interpreted as meaning that a particular case will be within the exception unless it must *of necessity* last for more than three years.[197] It would seem to follow that a lease for less than three years with an option to renew would fit within the exception, and it

[194] (1859) 7 C.B.N.S. 374.

[195] [1902] 1 K.B. 778.

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

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

was so held in *Le Corporation Episcopale De St. Albert* v. *Sheppard & Co.*,[198] relying on the English Court of Appeal decision in *Hand* v. *Hall*.[199] However, it was decided to the contrary in the more recent case of *Pain* v. *Dixon*,[200] relying on the Exchequer Division decision in *Hand* v. *Hall*.[201] The former position is clearly correct.

It should be noted that s. 97 of the Land Titles Act[202] provides an exception to registration for a lease "for a term of more than three years" while s. 2 of the Statute of Frauds provides an exception for "all leases not exceeding the term of three years from the making thereof." Hence, for the purpose of the Statute of Frauds, it is not the length of the lease which is relevant, but rather the length of time between the making of the contract and the termination of the lease. A lease to last for three years and to begin at a date subsequent to the formation of the contract is therefore required to be in writing.[203]

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

The first accepts the clause in its literal sense, so that the rent must be equal to two-thirds of the fair market value of the land. It would seem that Bisbet J. accepted this interpretation in *Cody* v. *Quarterman*[204] when he stated:

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

This interpretation, however, does not seem to be reasonable. To fit within the exception, the rent must be *at least* two-thirds of the value of the land and this interpretation would mean that virtually no lease would meet the requirements. Even if this clause were read as meaning that a rent of two-thirds of the value of the land must be paid in total over a three year period, this would make no sense from a commercial point of view.

The second interpretation of this clause is that the rent must equal at least two-thirds of the *annual* value of the land. Several texts[205] refer to section 2 as requiring a lease of not more than three years at greater than two-thirds of "rack rent." Elphinstone[206] defines "rack rent" as "rent of or approaching to the full annual value of the property out of which it issues." This view is supported by the Nova Scotia Statute of Frauds[207] which provides an exception to the requirement of writing when the term of the lease does not exceed three years "whereupon the rent reserved amounts to two-thirds at the least of the annual value of the land demised."

The third interpretation is that accepted most frequently by the American authorities:[208]

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[198] (1912-1913) 3 W.W.R. 814 (Alta. S.C.).

[199] (1877) 2 Ex. D. 355.

[200] [1923] 3 D.L.R. 1167 (Ont. S.C.).

[201] (1877) 2 Ex. D. 318, Reversed on Appeal (1877) 2 Ex. D. 355.

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

[203] *Foster & Reeves* [1892] 2 Q.B. 255 (C.A.).

[204] (1853) 12 G.A. 386, 399.

[205] *Chitty on Contracts* 84 (16th ed. 1912); 18 *Halsbury's Laws of England* 384 (1st ed. 1911); *Sugdon on Vendors and Purchasers* 175 (14th ed. 1873).

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

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

[208] 2 *Page on the Law of Contracts* 2187 (2nd ed. 1920). In support of this proposition *see Childers* v. *Talbott* (1888) 16 P. 275; *Birckhead* v. *Cummins* (1868) 33 N.J. 44; *Union Banking Co.* v. *Gittings* (1876) 45 Md. 386.

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

According to Black's, [209] "rental value" is

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

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

A further problem exists in determining to which sections the provisions of section 2 provide an exception. Read literally, the words "except nevertheless" following immediately after section 1 would seem to indicate that it applies only to the provisions of section 1. This is the view taken by Leith and Smith:[210]

> It will be observed, this exception to the operation of s. 1 does not apply to s. 4; so that there is this singularity; that a lease not exceeding three years at such a rent, if *actually made*, is good by parol, whilst a parol *agreement* for such a lease is void as against the party making it. This is the reverse of the policy of the legislature, which was to place the actual creation of an interest on a higher footing than an *agreement* for its creation; thus, in the latter case, it will be seen they required only verbal authority to the agent, but in the former a written one.

However, a contrary position was taken in the case of *Lord Bolton* v. *Tomlin*:[211] "Leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth." It is possible to restrict the application of this case. The issue which was raised was that although the lease was excepted from section 1 by the provisions of section 2, it was caught by secition 4 as a contract not to be performed within a year. It is reasonable to say that section 2 is an exception to the "one year" provision of section 4; otherwise section 2 would be of very limited effect. Whether section 2 is an exception to *all* provisions of section 4 is an unsettled issue.

Halsbury's[212] suggests that section 2 is an exception to section 3 by stating that the surrender of a lease not exceeding three years at a rent greater than two-thirds rack rent need not be evidenced by deed.[213] Taken in the literal sense, there is no reason why section 2 should be an exception to section 3. However, if it is an exception to all of section 4, it is reasonable to assume it also applies to all of section 3.

The Statute of Frauds has been considerably complicated by s. 3 of the Real Property Amendment Act:[214]

> Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the Authority of the same, as follows; (that is to say,)
>
> III. That a Feoffment, made after the said first Day of October, One thousand eight hundred and forty-five, other than a Feoffment made under a Custom by an Infant, shall be void at Law, unless evidenced by Deed; and that a Partition, and an Exchange, of any Tenements or Hereditaments, not being Copyhold, and a Lease, required by Law to be in Writing, of and Tenements or Hereditaments, and an Assignment of a Chattel Interest, not being Copyhold, in any Tenements or Hereditaments, and a Surrender in Writing of an Interest in any Tenements or Hereditaments, not being a Copyhold Interest, and not being

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[209] *Gittings* (1876) 45 Md. 386.

[210] *Black's Law Dictionary* 1461 (4th ed. 1968).

[211] *Supra*, n. 196 at 357.

[212] (1836) 5 Ad. & E. 856, 864, *per* Denman C.J.

[213] 18 *Halsbury's Laws of England* 546 (1st ed. 1911).

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

[214] (1845) 8 & 9 Vict. c. 106.

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

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

Although a lease exceeding three years or at a rent of less than two-thirds of the full improved value of the land which is not made by deed is void, it is construed as an agreement for a lease.[215] The difference between a lease and an agreement for a lease is set out in Halsbury's:[216]

> An instrument by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee—either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently—is a lease; it is said to operate by way of actual demise, and when the lessee has entered under it the relation of landlord and tenant is fully created. An instrument which only binds the parties, the one to create and the other to accept a lease hereafter, is an agreement for a lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created unless he also pays rent, in which case he becomes tenant from year to year, upon the terms of the agreement so far as applicable to a yearly tenancy. If, however, a question of the legal rights and liabilities of the parties arises in a court which has jurisdiction to order specific performance of the agreement, and if the agreement is one of which specific performance will be ordered, then the parties are treated as having the same rights and as being subject to the same liabilities as if the lease had been granted; consequently the lessor is entitled to distrain, and the lessee, on the other hand, is entitled to hold for the agreed term.

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

A final problem—that of the meaning of an interest in land—remains to be discussed. One of the main difficulties has involved the determination of whether products of the soil are land or goods. Such products may be divided into two classes, *fructus industriales* and *fructus naturales*.

> *Fructus industriales* have been defined as 'corn and other growths of the earth produced not spontaneously, but by labour and industry'; *fructus naturales* as the spontaneous product of the soil, such as grass and even planted trees, where 'the labour employed in their planting bears so small a proportion to their natural growth.'[217]

Fructus industriales have always been regarded as goods while, at common law, the status of *fructus naturales* depended upon the time for severance. If they were to remain attached to the soil for some time so that the buyer would benefit from the continued attachment, they were considered to be land.[218]

The situation has been complicated by the fact that the Sale of Goods Act,[219] s. 2(1)(h)(ii) defines "goods" as including:

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

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[215] *Band* v. *Rosling* (1861) 1 B. & S. 371. *See also Rogers* v. *National Drug & Chemical Co.* (1911) 24 O.L.R. 486 (Ont. C.A.) and *Gehler* v. *Palmason* [1930] 1 D.L.R. 475 (Man. C.A.).

[216] 18 *Halsbury's Laws of England* 366 (1st ed. 1911).

[217] Cheshire & Fifoot, *supra*, n. 191 at 183, relying on *Marshal* v. *Green* (1875) 1 C.P.D. 35 *per* Lord Coleridge C.J.

[218] *Id.*

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

Cheshire & Fifoot discuss the effect of this provision and point out that in most cases the purchaser buys the produce of the soil intending at some time to effect its severance so that the severance will take place under the contract of the sale.[220] As a result, *fructus naturales* should be considered in most cases as goods. However, in *Saunders* v. *Pilcher*,[221] Singleton L.J. stated that the definition of "goods" in the Sale of Goods Act applied only to that Act so that it may be that this definition does not apply to the Statute of Frauds. The result may be that in some cases, *fructus naturales* will be considered goods for the purposes of the Sale of Goods Act and land for the purposes of s. 4 of the Statute of Frauds.

Another problem involving which interests constitute interests in land concerns agreements for the division of proceeds from the sale of land.[222] The position in Canada was set out by Rinfret J. in *Harris* v. *Lindeborg*,[223] relying on *Stuart* v. *Moss*:[224] "An agreement for the division of the proceeds of the sale of land is not an agreement within the fourth section of the Statute of Frauds." However, an *obiter dictum* of Jenkins L.J. in *Cooper* v. *Critchley*[225] suggested that the position in England may be different:

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

Finally, it should be noted that a royalty agreement on oil from land is not a contract relating to an interest in land and is therefore not covered by the Statute of Frauds.[226]

7. *Sale of Goods*

Section 7 of the Sale of Goods Act[227] provides:

> 7. (1) A contract for the sale of any goods of the value of fifty dollars or upwards is not enforceable by action
>
> (*a*) unless the buyer accepts part of the goods so sold and actually receives the same, or gives something in earnest to bind the contract or in part payment, or
>
> (*b*) unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
>
> (2) The provisions of this section apply to every such contract notwithstanding that the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, procured or provided or fit or ready for delivery or that some act may be requisite for the making or completing thereof or rendering the same fit for delivery.
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer does any act, in relation to the goods, that recognizes a pre-existing contract of sale whether there is an acceptance in performance of the contract or not.

This is a revised version of s. 16 of the Statute of Frauds[228] as amended by s. 7 of Lord Tenterden's Act.[229]

The first problem to be faced with regard to this section is the definition of the word "goods." Section 2(1)(h) of the Sale of Goods Act states:

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[220] *Supra*, n. 191 at 184.

[221] [1949] 2 All E.R. 1091.

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

[223] [1931] S.C.R. 235, 243.

[224] (1893) 23 S.C.R. 384.

[225] [1955] 1 All E.R. 520, 524 (C.A.).

[226] *Emerald Resources Ltd.* v. *Sterling Oil Properties Management Ltd.* (1969) 3 D.L.R. (3rd) 630 (Alta. A.D.). Affirmed, (1971) 15 D.L.R. (3d) 256 (S.C.C.).

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

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

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

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

Section 2(1)(h)(i) is fairly clear; "goods" include chattels personal, but not money, shares, insurance or debts. Section 2(1)(h)(ii) has already been discussed[230] and replaces the common law distinction between *fructus naturales* and *fructus industriales*. For a discussion of the definition of "goods" in greater detail, the reader is referred to *Benjamin on Sale*,[231] 171-189.

One of the thornier legal issues which section 7 of the Sale of Goods Act has presented is the necessity of distinguishing between contracts for the sale of goods and contracts for work and labour. Problems arise in situations such as one paying an artist to paint a portrait[232] or a dentist to make a set of dentures.[233] There are three key cases relating to this issue which has "vexed jurists from the earliest ages."[234]

The first case was *Clay* v. *Yates*,[235] in which the plaintiff printer entered into a contract with the defendant to print a book. Referring to the distinction between contracts for the sale of goods and for work and labour, Pollock C.B. said: ". . . the true criterion is, whether work is of the essence of the contract or whether it is the materials supplied."[236]

The second case was *Lee* v. *Griffin*,[237] which involved a contract to make a set of dentures. The judges there rejected the proposition that the test to be used was the value of the work as opposed to the value of the materials. The distinction was summed up by Benjamin:[238]

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

As a result, in the view of Blackburn J.,[239] if one employs a famous sculptor to make a statue and the sculptor supplies the marble, this is a sale of goods, even though the value of the marble may be much less than the value of the labour.

The third case was *Robinson* v. *Graves*,[240] where the defendant commissioned an artist to paint a picture. The court held this not to be a sale of goods, deciding that if the substance of the contract was skill and labour and if the materials were only ancillary to the contract, this would be a contract for labour. This decision of the Court of Appeal, being the latest of the three cases, is probably the most authoritative.

If a contract is formed for the sale of a chattel which is to be affixed to land or to another chattel before the property is to pass, this relates to labour and not goods, as the contract is for the improvement of the land or principal chattel.[241]

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[230] *See* p. above.

[231] 8th ed. 1950.

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

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

[234] *Robinson* v. *Graves*, *supra*, n. 232 at 589, *per* Slesser L.J.

[235] (1856) 1 H. & N. 73 (Exch.).

[236] *Id.* at 78.

[237] *Supra*, n. 233.

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

[239] *Supra*, n. 237 at 254.

[240] *Supra*, n. 232.

[241] *Benjamin on Sale*, *supra*, n. 238 at 167.

Having discussed the word "goods", the phrase "of the value of $50 or upwards" should now be considered. If several chattels are bought in one transaction, each of the value of less than $50, but with a total value of over $50, the contract will be covered by the provisions of the Act.[242] This leaves the problem of determining whether goods have been bought in a series of transactions or a single transaction. Factors such as whether the price is paid as a lump sum, whether the goods are bought at the same time and whether the goods are included in one account may be relevant.[243] Auctions, which are covered by the Act,[244] are in a somewhat different position. By s. 58(b) of the Sale of Goods Act:

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

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

There are several means of compliance with section 7. The first is to produce "some note or memorandum in writing of the contract . . . made and signed by the party to be charged or his agent in that behalf." This follows the pattern of section 4 of the Statute of Frauds and therefore need not be discussed at this point.

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

Section 7(3) codifies the requirements of acceptance as they were developed by judicial interpretation[245] of s. 7 of Lord Tenterden's Act:[246]

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

Acceptance within the meaning of s. 7 is different from, and less than, acceptance within the meaning of other sections of the Act. Hence, s. 7 is not affected by s. 35, which provides that when goods which have not been examined by the buyer are delivered to him there shall be no acceptance until he has been given a reasonable opportunity to examine them. However, if the buyer is deemed to have accepted the goods by s. 36,[247] this will be sufficient to satisfy the acceptance requirement of s. 7.[248]

Section 7(3) states that the act of the buyer need only recognize *a* pre-existing contract and not *the* pre-existing contract. Hence, there may be a rejection of the goods, but an act so as to recognize the existence of a contract and to constitute acceptance.[249]

Benjamin sets out six points with regard to the requirement of acceptance within s. 7(3):[250]

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

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

[243] *Benjamin on Sale, supra*, n. 238 at 190.

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

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

[246] *Supra*, n. 229.

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

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

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

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

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

[249] *Abbott* v. *Wolsey* [1895] 2 Q.B. 97.

[250] *Benjamin on Sale, supra*, n. 238 at 199.

2. There must be an act;
3. The act may be done, not only to, but merely in relation to, the goods;
4. The acceptance is not an acceptance of the goods, but only a recognition of the contract;
5. The contract must be pre-existing;
6. Acceptance is a different thing from actual receipt.

Receipt as well as acceptance is required for compliance with the Statute. The general rule as to receipt is set out in *Blackburn on Sale*:[251]

> It may therefore be considered as having been settled, that the construction of the statute was that so concisely and clearly stated by Holroyd J., in *Baldey* v. *Parker*[252] and repeated in almost the same terms by Parke B., in *Bill* v. *Bament*,[253] namely, that the facts which prove that part of the goods have been delivered and taken into the buyer's control, so as to determine the seller's possession of that part, prove that he has actually received them, and that nothing short of such a delivery and taking could amount to an actual receipt by the buyer within the meaning of the Statute of Frauds.

Within the realm of receipt under s. 7, however, there exist a number of problem areas. The first relates to the situation when the goods are in the possession of the buyer as bailee for the seller before the sale. The test for receipt in such a case was set out in *Lillywhite* v. *Devereux*,[254] which is summarized in Benjamin's book:[255]

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

A second problem area relates to the situation when goods are in the possession of a third party as bailee for the seller. This would seem to be covered by s. 30(5) of the Sale of Goods Act:

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

A third problem area involves the delivery of goods to a carrier. By s. 33(1) of the Sale of Goods Act:

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

However, delivery to a carrier will only amount to receipt if the goods are in accordance with the contract,[256] and if the seller does not retain a right of disposal.[257]

The fourth problem area involves the situation where goods remain in the possession of the seller. It should be remembered that the general test of receipt is the loss of control over the goods by the seller and the gaining of control by the buyer. According to Benjamin:[258]

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[251] (3rd ed. 1910) with Canadian Notes, at 38.
[252] (1823) 2 B. & C. 37.
[253] (1841) 9 M. & W. 36.
[254] (1846) 15 M. & W. 285.
[255] *Benjamin on Sale*, *supra*, n. 238 at 208.
[256] *Gorman* v. *Boddy* (1845) 2 Car. & Kir. 145.
[257] Sale of Goods Act, *supra*, n. 227, Section 22(2).
[258] *Benjamin on Sale*, *supra*, n. 238 at 216.

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

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

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

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

The third means of compliance with the Act is to give "something in earnest to bind the contract or in part payment." According to Blackburn:[259]

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

It is not given as part of the price and is an outright gift to the seller. Both earnest and part payment must be independent of the contract; they cannot be in pursuance of the terms of the contract in order to meet the statutory requirements.[260]

8. Ratification of Contracts

Lord Tenterden's Act,[261] section 5, provides:

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

This refers to a promise to pay or a ratification of a contract after reaching maturity, and therefore applies only to those types of infants' contracts which require ratification.[262] This excludes contracts for necessaries, contracts of service and contracts concerning land, share contracts, partnership agreements and marriage settlements.

The writing must contain an admission by the infant of an existing liability,[263] and the test for a sufficient writing was set out in *Harris* v. *Wall*:[264]

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

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

It is required that the writing be "signed by the party to be charged therewith." This wording is repeated in section 6 of Lord Tenterden's Act and it is settled with regard to that section that a signature of an agent is insufficient.[265] It is therefore submitted that a signature of an agent would be insufficient to meet the requirements of section 5.

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[259] *Blackburn on Sale, supra*, n. 251 at 41.

[260] *Walker* v. *Nussey* (1847) 16 M. & W. 302.

[261] *Supra*, n. 229.

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

[263] *Rowe* v. *Howe* [1868] L.R. 4 Q.B. 1.

[264] (1847) 1 Exch. 122, quoted in *Lynch Bros. Dolan Co. Ltd.* v. *Ellis* (1909-1910) 7 E.L.R. 14.

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

The provisions of section 5 may not apply when the infant has taken benefit under the contract for some length of time. The report of *Cornwall* v. *Hopkins*[266] reads:

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

This exception was expanded by the Ontario High Court in *Blackwell* v. *Farrow*:[267]

> Even assuming, as I do, that this contract was voidable on the plaintiff attaining his majority, the contract is voidable only within a reasonable time of attaining his majority, and then only on returning the property he had received or its value: *In re Hutton Estate et al.*[268]

However, another decision of the Ontario High Court has narrowed the position. In *Butterfield* v. *Sibbitt & Nipissing Electric Supply Co.*,[269] Ferguson J. stated:

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

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

The same familiar principle—that the Statute may not be used as an instrument of fraud—has also been applied so as to require the infant to return the goods received under the contract or their value which he may have on hand.[270]

The question of whether this section applies in Alberta must now be considered. The fact that it was repealed in the United Kingdom in 1875 does not affect its applicability in Alberta,[271] and it has been determined that it applies in Saskatchewan.[272]

However, two cases have been cited as authority questioning whether the Statute applies in Alberta. The first is *Re Hutton Estate*,[273] a decision of the Alberta Supreme Court, where Ives J. said:

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

The applicability of Lord Tenterden's Act was not expressly considered in

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[266] (1872) L.J. 41 Eq. 435.

[267] [1948] O.W.N. 7, 10.

[268] [1926] 4 D.L.R. 1080 at 1082-3.

[269] [1950] 4 D.L.R. 302, 308.

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

[271] *Brand* v. *Griffin* (1908) 1 A.L.R. 510 (Alta. S.C.).

[272] *Molyneux* v. *Traill* (1915) 32 Western L.R. 292 (Sask. D.C.).

[273] [1926] 4 D.L.R. 1080.

this case. In fact, it may have been assumed that it *did* apply, as the court stated reasons why, in this particular case, writing was not required.

The second is the Ontario case of *Blackwell* v. *Farrow*,[274] where a contract was upheld despite the lack of written ratification. In that case, the *plaintiff* had been an infant at the time of contracting and the fact that the ratification was unenforceable and not void was consistent with the fact that the Statute was not applied against the defendant.[275] A provision equivalent to section 5 was at that time found in Ontario,[276] so that the case cannot have been decided on the basis that the section did not apply. In addition, as already mentioned, this decision has been judicially questioned.[277]

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

IV. ANALYSIS: FRAUDULENT MISREPRESENTATIONS AS TO CREDITWORTHINESS

A. Operation

Section 6 of Lord Tenterden's Act[278] provides:

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

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

It is provided that "no action shall be brought" which has already been discussed as meaning unenforceable and not void.[279]

The phrase "to charge any person upon or by reason of any representation or assurance made or given" was interpreted by the House of Lords in *Banbury* v. *Bank of Montreal*[280] as referring only to actions for fraudulent misrepresentation. Lord Wrenbury reasoned that even if there were a duty with regard to innocent misrepresentation, the action would lie upon the breach of duty. Innocent misrepresentation would not be the cause of action, but rather evidence of negligence. On the authority of Cairns J. in *W. B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.*,[281] this position has not been changed by the decision in *Hedley Byrne & Co.* v. *Heller & Partners*.[282] The law in this area is therefore anomalous in the extreme. If one makes a verbal representation negligently, he will be held liable; if he makes it fraudulently, he will not be held liable.

To be covered by this section, a representation must concern or relate "to the character, conduct, credit, ability, trade or dealings of any other person." The essence of this section, in other words, is a representation as to the creditworthiness of a third party. In *Swann* v. *Phillips*[283] the defendant told

[274] *Supra*, n. 267.
[275] *See* p. above.
[276] Statute of Frauds, R.S.O. 1937, c. 146. s. 7.
[277] *See* p. above.
[278] *Supra*, n. 229.
[279] *See* p. above.
[280] [1918] A.C. 626.
[281] [1967] 2 All E.R. 850 (Liverpool Assizes).
[282] [1964] A.C. 465.
[283] (1838) 8 A. & E. 457.

the plaintiff that he held a third party's title deeds, and on the strength of this the plaintiff lent the third party money. The Court of King's Bench held the Statute covered this situation as the defendant was in effect making a representation as to the third party's creditworthiness. This case was distinguished from the facts present in *Bishop* v. *Balkis Consolidated Company*[284] where the defendant company represented to the plaintiff that a share certificate had been lodged with it for transfer from a third party to the plaintiff. The Court of Appeal held that the statement that the certificate had been lodged was not within the provisions of the Act. It would appear from these cases that it may be difficult to distinguish representations as to creditworthiness from other representations.

It is also required that the statement be made "to the intent or purpose that such other person may obtain credit, money or goods." This is in line with the requirements for an action for fraudulent representation as set out in the headnote to *Behn* v. *Kemble*:[285]

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

In order for an action to lie upon a fraudulent representation as to the creditworthiness of a third party, it is necessary that the representation "be made in writing." Unlike sections 4, 7 and 16, but like section 9 of the Statute of Frauds, it would appear that the representation itself must appear in writing and that a subsequent writing evidencing it will not be sufficient. As already mentioned,[286] the phrase "signed by the party to be charged therewith" has been interpreted as excluding the signature of an agent.

A few comments on the workings of the Statute remain to be made. It is not necessary that the defendant benefit or that he collude with the third party for an action for fraudulent misrepresentation to lie.[287] The word "person", used three times in the section, has been interpreted as including companies.[288] Finally, in the case where there are oral and written representations, "if the false representation in writing substantially contributed to the injury of which the plaintiff complains, the defendant is clearly responsible."[289]

V. ANALYSIS: TRUSTS

A. Operation

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

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

The first factor to consider is the extent of the application of this section. The word "confidence" is merely old terminology for "trust". The section refers to "lands, tenements and hereditaments" which has been held to

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[284] (1890) 25 Q.B.D. 512.

[285] (1859) 7 J. Scott 260.

[286] *See* p. above.

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

[288] *Banbury* v. *Bank of Montreal*, *supra*, n. 280.

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

include leases,[290] but does not otherwise include personalty. "It has even been held that a sum of money secured upon a mortgage of real estate is not an interest within the Act."[291] At one time, this was thought not to include charitable trusts, but now they are clearly included.[292] Whether the section binds the Crown has been a matter of controversy. In *R.* v. *Portingham*, the Exchequer Court held that the Crown was not bound,[293] while the Court of Queen's Bench held it was bound.[294]

This section requires that the declaration or creation of trust must be "manifested and proved by some writing". Like the requirements of section 4, it is not necessary that the declaration or creation *itself* appear in writing. In the words of Lindley L.J. in *Rochefoucauld* v. *Boustead*:[295]

> . . . it is necessary to prove by some writing or writings signed by the defendant, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing in the first instance; it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial.

As with section 4, documents may be joined to form a sufficient writing.[296]

Finally, it is necessary that the writing be "signed by the party who is by law entitled to declare such trust." This refers to the owner of the beneficial interest and not the person possessed of the legal estate if the two are separate.[297] It should be noted that unlike section 4, the signature of an agent is not sufficient.

Section 9 provides:

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

The first feature of this section which one should notice is that it applies to every trust, whether of realty or of personalty. Thus, for example, in *Grey* v. *I.R.C.*,[298] the equivalent English provision[299] was applied to a trust of shares. The second noteworthy feature of this section is that the trust "shall likewise be in writing." Unlike sections 4 or 7 which require only written evidence, this section requires that the trust *itself* appear in writing. It is odd that the statute uses the word "likewise".

The third section dealing with trusts is section 8:

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

It is unclear whether this section provides an exception of both sections 7 and 9 or whether to only section 7. The fact that it immediately follows section 7 and uses the words "provided always" and "anything herein

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[290] *Skett* v. *Whitmore* (1705) Freem. Ch. 280; *Foster* v. *Hale* (1798) 3 Ves. 696.

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

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

[293] 1 Salk. 162.

[294] 3 Salk. 334. *See* Lewin, *Trusts* 55 (11th ed. 1904); Keeton, *Trusts* 50 (4th ed. 1947).

[295] [1897] 1 Ch. 196, 205-6.

[296] Keeton, *supra*, n. 294 at 51, relying on *Foster* v. *Hale* (1798) 3 Ves. 696.

[297] *Tierway* v. *Wood* (1854) 19 Beav. 330.

[298] [1960] A.C. 1.

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

before contained" would tend to indicate that it is an exception to section 7 alone. Clearly, it applies only to trusts or realty, while section 9 applies to both realty and personalty. However, the fact that it applies to "*any* conveyance . . . by which a trust . . . may arise" would indicate that it is also an exception to section 9. In addition to this problem, it is Lewin's opinion[300] that section 8 does not apply to trusts arising by wills. It should also be noted that section 8 provides an exception to the requirement of writing for the extinguishment of a trust, while neither section 7 nor section 9 provide such a requirement.

Originally, it was held that parol evidence was not admissible to prove a constructive trust,[301] but such evidence is clearly admissible at present.[302] It is beyond the scope of this paper to discuss the various ways in which a trust may arise by implication or construction of law.

The effect of non-compliance with the requirement of writing under either section 7 or section 9 is a thorny issue. Both sections use the phrase "utterly void and of none effect" which would appear to be clear. With regard to a section in the old British Columbia Statute of Frauds[303] equivalent to section 7 of our Statute, non-compliance was treated as rendering the trust void in *Drummond* v. *Drummond*.[304] in *Leroux* v. *Brown*,[305] the leading case on the effect of non-compliance with the Statute, Jervis C.J. *contrasted* the wording of section 4[306] with that of the other sections of the Statute in holding that the effect of the section was procedural, rendering contracts merely unenforceable.

However, in the words of Pettit:[307]

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

An example of a case taking this view is *Rochefoucauld* v. *Boustead*.[308] There, the Court of Appeal, by way of analogy with *Leroux* v. *Brown*, held that section 7 related to procedure.[309]

Despite the fact that the wording in question is identical in both sections 7 and 9, that of section 9 has always been interpreted literally. Again in the words of Pettit:[310]

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

It is important to distinguish between a declaration or creation of trust under section 7 and a grant or creation of a trust under section 9 for several reasons. The former need only be evidenced in writing while the latter must

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[300] Lewin, *supra*, n. 294 at 210-213.

[301] *Kirk* v. *Webb* (1698) Prec. Ch. 84.

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

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

[304] (1965) 50 W.W.R. 538, 543, 544 (B.C.S.C.).

[305] *Supra*, n. 14 at 804.

[306] *i.e.* "no action shall be brought."

[307] Pettit, *Equity and the Law of Trusts* 51 (2nd ed. 1970).

[308] *Supra*, n. 295.

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

[310] Pettit, *supra*, n. 307 at 53.

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

The word "grant" in section 9 is ambiguous. "[It] is said to be the strongest and widest word of gift and conveyance known to the law,"[311] and as such would seem to encompass declarations and creations of trusts. However, it has been interpreted as meaning the grant of an *equitable* interest.

The modern English cases dealing with this topic have interpreted the word "disposition" which is found in the section of the Law of Property Act[312] which replaced section 9 of the Statute of Frauds. The applicability of these cases to Alberta must remain a matter of speculation.[313]

Waters[314] and Pettit[315] both discuss the problem of classifying directions by a beneficiary to a trustee. It is suggested that if the beneficiary directs the trustee to hold the beneficial interest for another, that would fall within section 9.[316] Underhill[317] feels that *Grey* v. *I.R.C.*[318] is authority for the proposition that a declaration by the beneficiary that he is holding the interest in trust for another is within section 9 while Pettit[319] feels this is the case only when the beneficiary holds as a bare trustee.

In *Oughtred* v. *I.R.C.*,[320] the beneficiary contracted with another to have the legal and beneficial interest in certain shares transferred to that other person. It was suggested[321] that a constructive trust arose thereby taking the trust out of the operation of section 53(1)(c) of the Law of Property Act. In Alberta, however, it is submitted that the position would be different. Section 8 of the Statute of Frauds does not except constructive trusts of personalty even if it does apply to section 9.

In *Vandervell* v. *I.R.C.*,[322] the beneficiary directed the trustee to transfer both the legal and the equitable estate to another. Lord Upjohn distinguished *Grey* v. *I.R.C.*[323] and *Oughtred* v. *I.R.C.*[324] on the basis that only the transfer of an equitable interest was involved[325] and found that the transaction was not covered by section 53(1)(c) of the Law of Property Act. It seems anomalous that a slight distinction in the facts of various cases should make a substantial difference in their legal implications.

B. Avoiding the Provisions of the Statute—Trusts

In the area of Trusts, it has also been held that the Statute of Frauds shall not be used as an instrument of fraud. However a wider interpretation of the word "fraud" has meant that this has been more effective in Trusts than in

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

[312] *Supra*, n. 299, s. 53(1)(c).

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

[314] Waters, *Trusts in Canada* 186-192.

[315] Pettit, *supra*, n. 307 at 51-54.

[316] *Supra*, n. 313.

[317] Underhill, *Law of Trusts & Trustees* 107 (11th ed. 1959).

[318] *Supra*, n. 313.

[319] *Supra*, n. 307 at 352.

[320] [1960] A.C. 206.

[321] *Id., per* Lord Jenkins at 632-633.

[322] [1967] 2 A.C. 291.

[323] *Supra*, n. 313.

[324] *Supra*, n. 320.

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

Contracts. According to the case of *Rochefouchauld* v. *Boustead*:[326] ". . . it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it has been so conveyed, to deny the trust and claim the land himself." It is not necessary that the trustee have a fraudulent intention at the time the conveyance is made, as the fraud arises when the absolute nature of the conveyance is set up by the trustee.[327]

There is some controversy over the rationale for avoiding the provisions of the statute on the basis of fraud. According to the *Rochefoucauld Case*, the trust is enforced "notwithstanding the Statute."[328] According to the *Bannister Case*, the express trust is not enforced, but ". . . a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest which, according to the true bargain, was to belong to another. . . ."[329] A constructive trust arises by operation of law and by section 8 of the Statute of Frauds; such trusts do not need to be evidenced in writing.

VI. CONCLUSION

A. The Act Causes Injustice

> 'The Act', in the words of Lord Campbell . . . 'promotes more frauds than it prevents.' True, it shuts out perjury; but it also and more frequently shuts out the truth. It strikes impartially at the perjurer and the honest man who has omitted a precaution, sealing the lips of both. Mr. Justice Fitz James Stephen . . . went so far as to assert that 'in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality.'
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> The operation of the section is often lopsided and partial. A and B contract: A has signed a sufficient note or memorandum, but B has not. In these circumstances, B can enforce the contract against A, but A cannot enforce it against B.[330]

That the Statute of Frauds frequently creates injustice is widely documented and admitted. An example of such injustice is demonstrated by the effect of an admission of the existence of the contract by the party to be charged when there has not been compliance with the Statute. Even if one admits making the contract, the Statute applies to make it unenforceable. There is no longer any reason for a defendant to perjure himself by denying the contract, because the Statute allows him to disregard his obligations with impunity. This leads to results such as those expressed by Lord Campbell in *Sievewright* v. *Archibald*:[331]

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

There is no doubt that the Statute of Frauds cannot be used as an instrument of fraud, so that a defendant cannot rely upon the Statute when his own fraud has been responsible for the non-existence of the required signed memorandum. However, when for any other reason there is no such memorandum, the Statute may be relied upon whether or not the result is unjust.

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[326] *Supra*, n. 295 at 206.

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

[328] *Supra*, n. 295 at 206.

[329] *Supra*, n. 327 at 136.

[330] *Supra*, n. 1 at 7.

[331] (1851) 17 Q.B. 103.

It is somewhat anomalous that the doctrine of part performance should act as an estoppel to the use of the Statute while an admission of the contract under oath does not. No act, no matter how unequivocally it attests to the presence of the contract, can be as conclusive as a direct admission of the contract. Finally,[332]

> . . . the object of all rules of evidence ought to be the discovery of the truth, and accordingly since the days of Bentham, every artificial rule of evidence, every rule which professes to aid the discovery of truth can be ascertained, has been viewed with just suspicion. If one wishes to know what were the terms of a verbal contract, the best possible evidence would be that of the persons who made it, or of the bystanders who heard what was said. No, says the Statute; in order to avoid fraud, such evidence shall be of no avail unless it is confirmed by a particular kind of written memorandum.

B. Flood of Cases

> Apart from its policy the Statute is in point of language obscure and ill-drafted. 'It is universally admitted,' observed the original editor of Smith's Leading Cases, 'that no Enactment of the Legislature has become the subject of so much litigation.' This could hardly have been so if its terms had been reasonably lucid.[333]

Although the effect of the Statute of Frauds is to make actions unenforceable, it has resulted in a mass of litigation as to whether particular cases are within or without the Statute. For example, the Century Digest, First Dicennial and Second Dicennial list 10,800 cases on the Statute. After almost 300 years, ". . . the flood of cases under the Statute of Frauds continues unabated, with the consequent expense to clients and society."[334]

C. Review

The Statute of Frauds serves both a cautionary and an evidentiary function. It is designed to exclude all oral evidence with regard to certain classes of contracts in order to prevent perjured testimony, and to warn persons of the binding effect of their actions. However, the Statute also serves to exclude valid oral testimony from evidence and allows parties to ignore their obligations with impunity. The cases relating to the Statute are numerous and complicated, so that the law resulting from the Statute is incomprehensible to the very persons the Statute is intended to protect. It must be seriously questioned whether the advantages outweigh these disadvantages and whether retention of the Statute can be justified.

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[332] Stephen & Pollock, *Section 17 of the Statute of Frauds*, (1885) 1 L.Q.R. 1, 7.

[333] *Supra*, n. 1 at 8.

[334] *Supra*, n. 9 at 539.