LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
THE STATUTE OF FRAUDS

1977

LRC 33

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TO THE HONOURABLE GARDE B. GARDOM, Q.C.
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE STATUTE OF FRAUDS

June 24, 1977 marks the tercentenary of the coming into force in England of the *Statute of Frauds*, originally introduced "For Prevention of many Fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury." The Statute which requires certain transactions, notably those concerning land, to be evidenced in writing, was received into British Columbia, and has been reenacted in a somewhat modified form, as part of the statute law of the Province.

Our examination of the *Statute of Frauds* was prompted by a growing body of criticism of the inconsistency and uncertainty of its application; and of the hardship and inequity that it not infrequently causes. In this Report, we examine the complex body of law that has grown up around the Statute, and attempt to evaluate the arguments and criticism that it has generated. We conclude that while some of the original reasons for its enactment are no longer persuasive, in respect of certain transactions there do exist sound social policies that are sought to be advanced by it; and that its more harsh and inequitable results can be avoided by appropriate changes. We accordingly recommend the repeal of the *Statute of Frauds*, and its replacement by new legislation which we have called the *Contracts Enforcement Act*, to embody these sound policies, and provide mechanisms for the avoidance of inequity.

In May 1976, the Commission published a working paper in which we set out our tentative proposals for reform of the *Statute of Frauds*; and this working paper was widely distributed. In addition, a summary of those proposals was published in the JuneJuly 1976 issue of The Advocate, the journal of the Vancouver Bar Association, (volume 34, no. 4). The response to our attempt to solicit comment and criticism was, however, regrettably small. We have nonetheless taken into account in formulating the final recommendations that are set out in this Report, the comment that we did receive.

CHAPTER I THE PRESENT LAW

A. Introduction

In 1677, after an era of severe civil unrest, the English Parliament became aware of defects in the law of evidence which assisted the perpetration of fraud, and enacted a statute "For Prevention of many Fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury." The statute, known by most as the *Statute of Frauds*, was received into British Columbia law in 1858 and reenacted, and although now radically different from the original statute, it remains as chapter 369 of the Revised Statutes of British Columbia, 1960. The reenacted version of the statute is set outin Appendix A; the current version is set out in Appendix B.

To ascertain the present law relating to the statute is no easy task; the cases in which its provisions have been applied and interpreted number in the thousands, and recent amendments in the Province have, in the opinion of some, drastically altered its application.

In British Columbia, the *Statute of Frauds* provides, with limited exceptions, that:

(i) all agreements concerning interests in land,
(ii) all creations, assignments or surrenders of interests in land,
(iii) all assignments or surrenders of interests in any property held in trust,
(iv) all guarantees and indemnities, and
(v) all misrepresentations as to credit,

must be evidenced in writing, and signed (in most cases) by the person against whom it is sought to enforce the transaction at issue.

While the classes of transactions which must be in writing are few, the incidence of the transactions within each class is so high that each has given rise to an inordinate amount of litigation and commentary about the scope and effect of the statute. Unfortunately, the decided cases and the commentaries reveal only that the statute has been inconsistently applied, aid has fostered both favourable and critical comment.

This inconsistency has not, however, obscured the major issues to which the litigation has been directed. These issues, which have been resolved somewhat differently with regard to each class of transaction, and which we believe merit separate discussion, are:

(i) whether a specific transaction comes within the terms of the statute;
(ii) whether there is sufficient evidence in writing for a court to enforce the agreement; and

(iii) whether, notwithstanding the fact that a transaction is unenforceable under the statute, there is alternative relief available to a person seeking to enforce an otherwise valid transaction.

In this chapter we set out, so far as we have been able to ascertain it, the present law in Canada in general, and British Columbia in particular, with regard to each of the transactions on which formal requirements of writing are imposed. In doing this we have laid particular emphasis on the three issues noted above.

B. ___Contracts Concerning Land

1. Agreements Within s. 2(1) of the Statute of Frauds

Section 2(1) of the *Statute of Frauds* provides that:

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

The corresponding provision of the original *Statute of Frauds* was applicable to:

> ... any Contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them.

Section 40(1) of the English *Law of Property Act, 1925* similarly refers to:

> ... any contract for the sale or other disposition of land, or any interest in land.

Most of the important cases which have considered whether a specific agreement comes within this section, and whether, therefore, the agreement must be evidenced by writing, have been concerned with either the original wording of the statute, or its amended form under the English *Law of Property Act*.

It may be said with some confidence that the English amendments in 1925 did not alter the substance of the statute, but where appropriate an attempt will be made to assess the likelihood of a different result under the *British Columbia Act*.

Over three hundred years of judicial interpretation have yielded but an imprecise notion, to say the least, of what agreements will be construed as "concerning an interest in land." To be sure, a disposition of the fee simple, an agreement to convey an equity of redemption, and an agreement to grant a lease, come within the judicial definition of interests in land. The same may be said of agreements creating easements and "profits a prendre" in land. On the other hand, a mere licence, not being an interest in land, has been held to fall outside the *Statute of Frauds*, and hence to be enforceable on the basis of a parol agreement.

Difficulties have arisen, however, when the courts have been asked to consider agreements which, in the nature of things, are more ambiguous. For example, because an agreement must, in the words of the English *Law of Property Act*, be "for the sale or other disposition of an interest in land," agreements for other purposes, notwithstanding a peripheral involvement of an interest in land, have been held to fall outside the statute. Thus contracts to form a partnership, or to receive shares in a company, each of which involved land, have been excluded.

The law in British Columbia on this point is not clear. It is not inconceivable that "concerning" may be given a wider meaning than the phrase "for the sale or other disposition," with the result that a partnership agreement could be characterized as concerning an interest in land within section 2(1) of the *Statute of Frauds* in British Columbia.

Serious difficulties have also arisen with other types of agreements which may or may not concern an interest in land. Thus agreements which involve "goods" derived from, or affixed to, the soil have, in some circumstances, been held to come within the judicial definition of agreements concerning land. In other contexts, agreements which create a right to proceeds from the sale of land, agreements which are not *for the sale or other disposition* of an interest in land, agreements to sell land as distinct from agreements for the sale of land (such as agreements between a vendor of land and his agent with respect to the sale) and agreements collateral to agreements concerning land, have been held to fall, in or outside the statute, depending on the circumstances. In the following section these "borderline" cases are discussed in some detail.

The reason for this discussion is twofold. First, a detailed examination of the caselaw is necessary to a full appreciation and understanding of the meaning of the statute as it has developed over the past three centuries. As Buckley L.J. said:

> It is now two centuries too late to ascertain the meaning of section 4 by applying one's own mind independently to the interpretation of its language. Our task is a much more humble one; it is to see how that section has been expounded in decisions and how the decisions apply to the present case.

Corbin, explaining his lengthy dissertation on the *Statute of Frauds*, has commented:

> The statute has been set up as a defence in many thousands of cases; and it has been interpreted so strictly and applied so narrowly that its meaning as applied can now be determined only by a comparative study of the cases not merely by the simpler methods of statutory interpretation ... No doubt the same could be said of almost any written constitution or statute, but usually with a lesser degree of truth.

Secondly, an analysis of the statute reveals a degree of unpredictability which, although explicable on principles of fairness and equity, raises a question whether the costs of its application can be justified regardless of the purpose it was intended to serve:

> Statutory rules in the beginning usually create an illusion of certainty; with experience the illusion vanishes. Safe prediction as to the exact operation of the statute must await actual experience in its application. It is always true that along the boundaries of its application the statutory rule varies and is recreated exactly the same as a common law rule, and for the very same reasons. This is not judicial usurpation; it is merely inevitable necessity.
>
> The statute of frauds has now been a part of the law of the land for more than one quarter of a millenium. It has been interpreted and applied by the courts in tens of thousands of cases. Surely there have been experience and time enough to create uniformity and to make prediction a pleasure. It is safer, however, merely to say that they have sufficed to destroy the illusion.

(a) *Goods and Interests in Land*

Any definition (whether judicial or statutory) of interests in land must distinguish between goods and real property. The principal issue involves identifying the distinction between an agreement which provides merely for the removal of commodities, as a sale of goods, and an agreement to grant an interest in land in the nature of a lease, easement, or profits-a-prendre, in which the involvement of personal property is incidental.

The problem has surfaced with respect to three classes of goods:

produce of the soil such as crops, hay, or timber;

(b) manufactured objects (fixtures) attached to the land; and

(c) the land itself, in the case of, say, sales of oil, gas, minerals and the like.

With regard to natural products of the soil, a distinction has been drawn between *fructus naturales* the natural product of the soil such as grass, timber or hay, and *fructus industriales* fruits and crops produced by annual labour and cultivation. *Fructus industriales* were traditionally viewed as chattels, and accordingly, an agreement in relation to them was not construed as a contract concerning an interest in land.

Agreements in relation to *fructus naturales* - crops grown with little or no cultivation, however, have been uniformly dealt with as agreements for the sale or other disposition of an interest in land, the crops being viewed as part of the land itself.

The distinction which, in principle, is untenable in any event, was further complicated when it was decided that *fructus naturales*, if subject to an agreement which required their immediate severance, were not an interest in land since they were not to derive any further benefit from the land.

A substantially different analysis, concentrating not on the physical nature of the "goods," but rather on the package of rights granted to the buyer, may result in the opposite conclusion. That analysis and others similar to it are discussed in detail in the following section.

Interwoven with this issue is the statutory definition of goods under section 2 of the *Sale of Goods Act* which includes, *inter alia:*

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

Emblements have been described as such products which are the annual result of cultivation and labour, that is, *fructus industriales*. It has been suggested, however, that the remaining words of the definition refer to *fructus naturales,* commodities which, prior to the *Sale of Goods Act*, were thought to be interests in land.

The distinction is not unimportant, as the *Sale of Goods Act*, in direct opposition to the *Statute of Frauds*, provides that:

> Subject to the provisions of the Act and of any Statute in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties; provided that nothing in this section shall affect the law relating to corporations.

Atiyah, Cheshire and Fifoot, and the editors of *Benjamin's Sale of Goods* and *Chitty on Contracts* are unanimously of the opinion that the sale of naturally growing crops may be both a contract for the sale of goods under the *Sale of Goods Act*, and a contract for the sale of an interest in land within the *Statute of Frauds*. It is clear that where an agreement comes within both statutes it must comply with both, and thus must be evidenced in writing.

Turning to things attached or affixed to land, we find that the cases reveal, once again, a surprising inconsistency of interpretation. Although "fixtures" are considered, in general, to be interests in land, and to pass with the land if it is transferred, it has been held that an agreement to dispose of a tenant's fixtures is not within the statute. The tenant, in that case, was held to have sold neither goods, nor an interest in land, but merely to have assigned orally his right to sever fixtures. Agreements to sever other fixtures, however, considered, as they were, "part of the realty," have been consistently deemed to be contracts concerning an interest in land within the *Statute of Frauds*.

The final area of controversy in the "goods or land" dispute concerns things which form part of the land itself, such as minerals, oil or natural gas. Agreements concerned with things which are not merely interests in land, but "the land itself" can be construed as contracts for the sale of goods. In *Benjamin's Sale of Goods* it is argued that the sale of minerals that have been extracted from the land, or an agreement to sell minerals which the land owner is to mine are, both at common law and under the *Sale of Goods Act*, contracts for the sale of goods.

Other cases, however, suggest that such agreements come within the *Statute of Frauds*, either as contracts in respect of an interest in land,

37. *See Saskatchewan Minerals* v. *Keyes* (19721, 23 D.L.R. (3d) 573, 584; *Dominion Supply Co*. v. *Folby et al*. (1919), 53 N.S.R. 333. *See also, Atlantic Concrete Ltd*. v. *LaVatte Construction Co. Ltd*., (1976) 62 D.L.R. (3d) 663

(N.S.C.A.). or as contracts in respect of the land itself. While that distinction is of little concern in those jurisdictions in which the original statute, or a statute which retains the original wording is in force, it may be important in British Columbia. Unlike the original *Statute of Frauds* which speaks both to land and interests therein, section 2(1) of the British Columbia statute refers only to the latter. It would not follow that because an agreement concerning minerals was within the English statute because it concerns the land itself, the game result would be reached under the *British Columbia Act*.

The reasons underlying the inconsistencies evident in this area are obscure. It may be that, where agreements were construed as concerning interests in land, the court in fact concentrated not on the physical nature of the oil, minerals, or gas referred to in the contract, but on the "package of rights" transferred thereunder. In the following section this analysis will be considered in more detail.

(b) *The Substance of the Agreement*

Throughout the foregoing discussion of "interests in land or goods," reference was made to an analysis which concentrates not on the physical nature of the goods transferred, but on the agreement as a whole. In this analysis, consideration is given to other conditions and terms of the agreement, which may justify its characterization as a contract concerning an interest in land.

A concrete fact situation may assist in elucidating this analysis. Assume an agreement entered into between A and B, whereby B agrees to sell a certain timber on B's land. Clearly, the sale of timber may be the sale of a chattel falling outside the *Statute of Frauds*. On the other hand, the timber may be viewed as *fructus naturales* grown without any cultivation, and thus the agreement may be viewed as the sale of an interest in land. Going further, if the timber is already severed, and could be seen as deriving no further benefit from the land, then the agreement could be viewed as a sale of goods. These lines of reasoning emphasize the physical nature of the "goods" transferred under the terms of the Agreement.

By contrast, if the agreement is considered as a whole, it may be possible to construe it as creating a mere licence or permit allowing A to go onto B's land and take timber away. Since a licence is not generally considered to be an interest in land, A could enforce the agreement notwithstanding its parol nature. Conversely, however, there are cases which have held such agreements to be analogous to profits a prendre, or leases, both of which are interests in land. Similar arguments have been raised successfully with regard to dispositions of minerals and growing crops.

The result in any specific case appears to rest on such factors as the length of time before the objects are to be severed from the land, the extent of exclusive possession granted under the agreement, and the relevant provisions of any statute at issue.

Not only do the cases fail to provide any clear guidance as to what agreements will be construed as "concerning an interest in land," but in addition, it is difficult, apart from section 2(1) of the *Statute of Frauds*, to see why any of these factors should have any bearing upon a decision as to the necessity of their being in writing.

(c) *Proceeds of Sale of an Interest in Land*

A number of cases have considered whether an agreement which relates to the proceeds of the sale of land, rather than to the land itself, comes within the terms of the statute. The Canadian authorities clearly favour the position that an agreement concerning the proceeds of a sale or other disposition of an interest in land (e.g., royalty agreements) need not comply with the writing requirements of section 2(1). Thus in *Stuart* v. *Mott*, Duff J. was of the opinion that:

> ... the agreement ... was not ... one conferring an interest in land but exclusively relating to an interest in money; it is true this money is to arise from the sale of land ..., but that, on authority can ... make no difference after the land or money interest has actually been sold.

In England the result is different; although the difference is more apparent than real, as Canadian courts will not allow a plaintiff to succeed in an action on a parol agreement for the proceeds of a sale of an interest in land if, on a true construction of the agreement, it relates to the land itself.

(d) *Agreements to Sell or Purchase Land*

The wording of the original statute has given rise to the question whether an agreement between A and B that B should buy or sell land from or to a third party, comes within the statute. The courts, without exception, have held that such agreements are contracts for personal services, their "land" aspect being of a nonessential nature.

Under section 2(1) of the British Columbia *Statute of Frauds*, however, agreements must be in writing if they *concern* an interest in land. It is not inconceivable that these "agency" agreements might be classed as contracts concerning an interest in land, and thus unenforceable unless evidenced in writing.

(e) *Collateral Contracts*

A not uncommon technique of distinguishing "contracts concerning an interest in land" from others, is to construe the agreement at issue as a collateral, independent agreement which is severable from the agreement in relation to land.

The principle that an agreement not related to land, entered into at the time of making a contract concerning land, need not be evidenced in writing is well accepted both by English and Canadian courts, and it has been used by one commentator to explain why agreements for the proceeds of sale of a mine, to sell land and for a partnership involving land are not within the terms of the statute.

2. Relief Notwithstanding Unenforceability Under the Statute of Frauds

Under section 2(1) of the *Statute of Frauds* a parol agreement concerning an interest in land is unenforceable if it is not sufficiently evidenced in writing. The evidentiary requirements of the statute are substantially the same throughout sections 2(l), 3 and 5, and will be discussed at the conclusion of this chapter. In this section we discuss the effect, if any, which may be given to a parol agreement which is not evidenced in writing.

Notwithstanding the imperative words of section 2(1), the judiciary has exhibited a considerable reluctance to adopt a position which would leave a party to an unenforceable contract bereft of any redress whatsoever. This reluctance has resulted in the creation of a number of legal devices whereby the force of the statute is somewhat reduced. For purely historical reasons

these devices can be divided into two classes. The first are those created by the common law courts. The second, and most important, are techniques created by the courts of equity.

(a) *_At Common Law*

The original *Statute of Frauds* provided that "no action shall be brought" on an insufficiently evidenced parol agreement concerning land. Eventually the courts retreated from the view that these contracts were void, and by 1883 it was accepted that such agreements were merely unenforceable. The doctrine of unenforceability has been given legislative approval in British Columbia, section 2(1)providing only that "no agreement shall be enforceable."

Although unenforceable, a parol agreement can have other substantive effects. To be sure, it may not be *enforced* indirectly, and if A and B orally agree that B may enter on A's land, and A subsequently evicts B, B cannot sue A in trespass. A *plaintiff* will be caught by the statutory provisions whenever he attempts to rely on the agreement in a common law action, notwithstanding the fact that his claim is not in damages for its breach.

It is clear, however, that a *defendant* can rely on the parol agreement in a common law action. Thus it has been held that where A and B orally agree that B may enter on A's land, then B may present evidence of the agreement as a defence if A, alleging that no enforceable agreement exists, sues in trespass. In another context, if a purchaser repudiates an oral agreenent, a vendor may raise the agreement as a defence in an action brought by the purchaser for the recovery of his deposit.

Another effect of mere unenforceability is that an action may be brought upon a cheque given as a deposit under an oral agreement. The rationale for this is that a negotiable instrument given to satisfy an obligation under an oral agreement is not void for want of consideration. The agreement constitutes the consideration necessary to establish the validity of a negotiable instrument, notwithstanding the fact that the agreement itself is unenforceable.

The Commission is in agreement with the policies behind these decisions, but at the same time we acknowledge, as some critics have pointed out, that the result is illogical. The result is an oral agreement which is unenforceable, ostensibly because of the danger of fraud and perjury, yet which, notwithstanding the same danger of fraud and perjury, has been used in one case to prevent a person from enforcing his legal rights, and in another to imprison a defendant for two years on a charge of perjury. In a later chapter we discuss how this inconsistency may be resolved.

(b) *In Equity: The Doctrine of Part Performance*

(i) *_General*

In British Columbia, the systems of equity and the common law have always been administered as one. Nonetheless, each has retained distinctive features. While procedural difficulties caused by the division have been ame-

liorated to a degree, the substantive rules of law remain, to a large extent, as they were. For this reason equity must be studied and analyzed apart from the common law.

The courts of equity, faced with the injustice and hardship which often resulted when the statute was strictly enforced, began a frontal assault on its provisions within ten years of its enactment, an assault provoked and fueled by the obvious unfairness of a statute intended to prevent fraud being used as an instrument of fraud.

The form of intervention by equity, developed over the past three centuries, is now commonly referred to as the doctrine of part performance. Using it, a litigant can in certain circumstances, obtain an order for specific performance of an oral agreement which would be unenforceable in the common law courts.

The theoretical foundations of the doctrine of part performance are equally as important as a review of the case law which reveal its application in specific cases. These foundations are, as we shall see, obscure, yet an understanding of them is essential to an appreciation of the function of the doctrine, and an assessment of its adequacy to prevent abuses of the statute.

In 1879 the English House of Lords, in the leading case of *Britain* v. *Rossiter,* dispensed with the evidentiary requirements of the *Statute of Frauds* on the ground that the statute was seen merely to require a certain type of evidence, and not to render agreements void. Unlike the common law courts, the courts of equity were accustomed to dispensing with evidentiary requirements and thus could disregard those laid down by the statute.

Four years later, in *Maddison* v. *Alderson*, Lord Selbourne rationalized the intervention in the following manner:

> In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow ... The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible or, if possible, just) and completing what has been left undone ... It is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities ...

Spry, in his treatise on *Equitable Remedies,* bases the intervention of equity on the principle that the evidentiary provisions of the statute merely create a right which may be effectively waived by the party who might otherwise rely on it. It follows that the right given by the statute, and its waiver may be controlled according to established equitable principles.

On the other hand, Sir Frederick Pollock argued that a defendant who, by his conduct, plainly admits the existence of an agreement, is estopped from sheltering behind the statute. The notion of "equitable estoppel," however attractive in its simplicity, has failed to attract a significant number of adherents. It has been applied and discussed extensively in various American jurisdictions, but only on rare occasions has it received judicial acceptance in Canada or England.

It maybe best to view the doctrine of part performance as resulting from Equity's abhorrence of defendants who set up statutory provisions when it is patently unfair and unjust to do so. Lord Salmon, in a recent decision of the English House of Lords, argued that:

> ... soon after the Statute of Frauds was enacted, the Court of Chancery laid down the principle that should A be sued by B on a parol contract disposing of an interest in land, A could not be allowed to rely on the absence of a written memorandum of the contract in order to defeat B's claim if there had been part performance of the contract. This was because it would be unconscionable in such circumstances for A to seek to take advantage of the statute. For example, if B had performed his obligations under the parol contract, the benefit of which had been accepted by A, it would clearly be an abuse of the statute if A were then allowed to take the point that the contract was unenforceable against him when sued by B to perform his corresponding contractual obligations.

That generalization, regardless of its validity, offers some explanation for the concern voiced by Lord Blackburn in *Maddison* v. *Alderson*. In that case, after he had held that the circumstances did not give rise to an equitable right in the plaintiff to have an oral agreement enforced, he qualified his view with the following words:

> ... though I speak with diffidence, as I have not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity on the subject.

Regardless of the theoretical justification for equitable intervention, it was soon realized that such intervention, if left as a vague principle, would effectively repeal the *Statute of Frauds*. Accordingly, restrictions began to emerge, in an attempt

> ... to prevent a reoccurrence of the mischief which the Statute was passed to suppress.

These restrictions took the form of, and have evolved into, the doctrine of part performance. Put in its simplest terms, if a plaintiff can produce evidence of acts done pursuant to an alleged parol agreement, the agreement will be enforced by a court of equity notwithstanding the fact that it was not evidenced in writing as required by section 2(1) of the *Statute of Frauds*.

Little would be gained by an attempt to illustrate the application of the doctrine. Suffice it to say that the decisions reveal a degree of unpredictability rivalled by few statutory enactments:

During the last 300 years there has been a mass of authority on this topic. Unfortunately many of the cases are irreconcilable with each other and it is by no means easy to discover the true answer to the question with which we are faced, namely, what are the essential elements of part performance in relation to contracts disposing of an interest in land.

This unpredictability, however, is not surprising. Many decisions turn not on the acts alleged as part performance, but on an assessment of whether the agreement "ought to be enforced." Put another way, instead of first analyzing the acts of part performance to determine if they meet the legal criteria set down by precedent, the courts will often first determine whether, in all fairness, the agreement ought to be enforced, and only then say whether the acts alleged as part performance suffice.

Corbin has adverted to this phenomenon in another context, in words equally applicable to the doctrine of part performance:

> The narrowing process has been in part one of supposed interpretation of language and in part one of permitting the jury to determine the application of the statute by a general verdict under instructions that do not in fact hamper the jury in its effort to do "justice."

Cheshire and Fifoot comment somewhat cynically:

> But here again the judges, in their anxiety to protect honest intentions from the undue pressure of technicality, have departed widely from the original severity of the statute. The reports reveal a progressive laxity of interpretation.

Nonetheless, it is useful to consider the principles of law which govern the application of the doctrine. Their enunciation does offer some guidance in evaluating its effectiveness in reducing abuses of the statute, and reveals differences between the evolution of the doctrine in England and elsewhere.

In England, until 1963, to succeed in obtaining specific performance of an alleged oral agreement, it had to be shown that the acts of part performance were, in the words of Lord Selbourne L.C., in *Maddison* v. *Alderson:*

> ... unequivocally, and in their own nature referable to some such agreement as that alleged.

Those words were applied without exception in the English courts for over eighty years, and as recently as 1972 a leading commentator wrote that a plaintiff, in order to succeed in an action for specific performance of an oral agreement concerning land:

> ... must therefore satisfy the court that the conduct of the parties is *inexplicable* save on the assumption that some such contract as that which he alleges has in fact been made.

Fry L.J., in his treatise on *Specific Performance*, wrote:

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

In 1962, Upjohn L.J., of the English Court of Appeal, rejected the argument that the part performance must be referable to no other title, considering it to be a long exploded idea: Instead he adopted another of the assertions of Fry, L.J.:

> The true rule is, in my view, stated in Fry on SPECIFIC PERFORMANCE: "The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one: that they prove the existence of some contract, and are consistent with the contract alleged."

These exact words were adopted five years later in *Wakeham* v. *Mackenzie,* and a prophetic commentator on this case argued that:

> ... *Wakeham* v. *Mackenzie* simply represents a more lax approach to the doctrine of part performance; and that the courts have become bolder in the application of the doctrine since its recognition and confirmation by statute.

This boldness reached its apogee in a decision of the House of Lords in *Steadman* v. *Steadman,* which some have said virtually repeals the English equivalent of section 2(1) of the *Statute of Frauds*.

In that case, the House of Lords held that the acts of part performance necessary for an order of specific performance need refer only on the balance of probabilities to some contract to which the defendant was a party. Lord Reid, echoing the words of two other members of the House, stated that:

> In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not.
>
> Authorities which seem to require more than that appear to be based on an idea, never clearly defined, to the effect that the law of part performance is a rule of evidence rather than an application of an equitable principle. I do not know on what ground any court could say that, although you cannot produce the evidence required by the *Statute of Frauds*, some other kind of evidence will do instead. But I can see that if part performance is simply regarded as evidence then it would be reasonable to hold not only that the acts of part performance must relate to the land but that they must indicate the nature of the oral contract with regard to the land. But that appears to me to be a fundamental departure from the true doctrine of part performance ...

Elsewhere in his judgment in *Steadman* v. *Steadman*, Lord Salmon commented:

> Although I accept the authorities which show that acts of part performance if they are to take a parol contract out of the statute must be acts from which the nature of the contract can be deduced, I do not accept the line of authority which, overruling Lord Hardwicke in *Lacon* v. *Mertins* and *Owen* v. *Davies*, laid down that payment can never constitute such an act

> because it is impossible to deduce from payment the nature of the contract in respect of which the payment is made. It is no doubt true that often it is impossible to deduce even the existence of any contract from payment. For example, a payment by a parent to his child or a husband to his wife is in general no evidence of a contract; indeed, the presumption is to the contrary. Nevertheless the circumstances surrounding a payment may be such that the payment becomes evidence not only of the existence of the contract under which it was made but also of the nature of that contract.

My Lords, let us assume evidence of the following facts: A is anxious to sell an attractive house at a reasonable price of, say, 920,000. Full particulars of the house are sent to B by A's estate agents. The estate agents tell B, truthfully, that there are several people anxious to buy the house for the price asked but that owing to present economic conditions they have not yet been able to complete the necessary financial arrangements. They are expecting to do so at any moment. The estate agent, at B's request makes an immediate appointment for B to inspect the house and meet A. B keeps the appointment. No written contract of sale comes into existence. B's cheque in favour of A for 20,000 is specially cleared by A the day after the appointment. A then refuses to convey the house to B and there is good reason to suppose that he is unable to repay the 20,000. Can anyone doubt that this evidence, unexplained, establishes a strong *prima facie* case that A orally agreed with B to sell him the house for 20,000 and that B performed his part of the contract by paying A the purchase price? If B sues A for specific performance of the parol agreement and applies for an interlocutory injunction to restrain A from parting with the house pending the trial of the action, it is surely inconceivable that our law can be so defective that it would allow A to shelter behind the statute. Yet A could succeed in doing so if the authorities which hold that payment can never constitute part performance for the purpose of taking a contract out of the statute were correctly decided. In my opinion, they were not.

Whether or not this view can be reconciled with the restricted scope of the doctrine as enunciated in *Maddison* v. *Alderson*, it is clear that, at least in England, the doctrine of part performance is now capable of preventing much of the abuse fostered by the *Statute of Frauds*.

In British Columbia and other provinces of Canada, however, the law of part performance has not evolved so far. The Supreme Court of Canada, in a series of decisions dating from 1907, has consistently and without exception applied a test of part performance which, in the view of some, is more restrictive even than that laid down in *Maddison* v. *Alderson*.

In 1974 Spence J., speaking for a majority of the Supreme Court of Canada in *Thompson v. Guaranty Trust Co. of Canada*, stated that:

> ... practically every act of part performance as to which evidence was given, and I have read the record carefully, were acts which were *unequivocally referable to a contract in reference to the very lands in question*, ...

and continued:

> I would, therefore, hold without hesitation that the appellant has proved acts which are *unequivocally referable to the very lands and that*

> *therefore he has adduced the evidence of part performance which takes the case out of the provisions of s. 4 of the Statute of Frauds.*

This formulation of the doctrine of part performance has led to a number of decisions which undoubtedly have "divorced the law from reason and principle."

For example, it is clear that moneys given to and accepted by a vendor either as a deposit, or as part payment of the purchase price under a parol agreement, will not suffice as acts of part perform and to take an oral agreement out of the statute. In *Johnson* v. *Canada Co*. it was held that payment of the *whole amount of purchase money* would not operate as part performance to take the case out of the *Statute Of Frauds*.

In our view the importance of acts of part performance lies in the evidence they provide of the defendant's commitment to a contractual bargain. Thus the receipt of a deposit by a vendor should, in principle, bind the vendor as much as his signature would.

It is clear that Canadian courts have hesitated to relax the doctrine of part performance despite the abuses encouraged by the *Statute of Frauds*. Recent appellate decisions in Nova Scotia and New Brunswick have failed even to mention the recent English decisions.

The doctrine of part performance as applied in Canada is not the sole reason for the view that it is, at present, somewhat ineffective in ameliorating the harshness of the statute. In the following discussion we set out several aspects of the doctrine which support that opinion.

In addition to the criteria set out in *Maddison* v. *Alderson, Robertson* v. *Colwell* stands for the proposition that the acts of part performance must be performed by the plaintiff, not by the defendant. That rule appears to be based on the principle of detrimental reliance. In *Caton* v. *Caton* Lord Cranworth said:

> The ground on which the Court holds that part performance takes a contract out of the purview of the *Statute of Frauds* is, that when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, ... there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money. But such cases bear no resemblance to that now under consideration. The preparing and executing of the will [by the defendant] caused no alteration in the position of the [plaintiff], *and I presume it will not be argued that* any *consequence can be attached to acts* of part performance by *the party* sought to be charged. If I agree with A, by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A to complete the purchase, but it certainly would afford no foundation for a claim by A to compel me to sell on the ground that I had partly performed the contract.

Moreover, it is clear that the acts alleged as part performance must be done by the plaintiff with the knowledge, acquiescence or consent of the defendant.

This notion of estoppel has been described by one commentator in the following way:

> ... [the defendant's] acquiescence in A's act was in effect a substitute for [the defendant's] signature to a memorandum in writing: it prevented [the defendant] from complaining that he had been defrauded. Thus while still violating the letter of the statute, the doctrine accorded with its spirit.

It follows that in Canada, for a plaintiff to succeed in an action for specific performance of an alleged oral agreement, he must prove evidence of acts of part performance which refer unequivocally to the contract in question and in addition, the acts must be done by himself. Acts performed by the defendant, regardless of their unequivocal nature,will not suffice.

Yet it appears that even that is not enough. In order for a court of equity to intervene, there must not only be sufficient acts of part performance performed by the plaintiff, but in addition, as Fry L.J. has stated:

> ... they [the acts of part performance] must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing.

In *Caton* v. *Caton* it was held that:

> ... the Act of part performance must be such that the plaintiff will remain at a special disadvantage or will be specially prejudiced unless specific performance is granted.

This additional requirement illustrates that the intervention of equity is based not on evidentiary requirements that are satisfied by acts of part performance, but rather on vague principles of fairness. It is this principle which justifies the nonenforcement of parol agreements notwithstanding the fact that a deposit or part of the purchase price has been paid to a vendor who seeks to rely on the statute. Since the plaintiff may be compensated by the return of the money, it is not unconscionable to set up the lack of writing.

Whether to enforce agreements or not is usually decided not by reference to “unconscionability,” but rather upon principles of contractual intent. It is puzzling, therefore, for a court to say, on the basis of acts of part performance and oral testimony, that a valid, binding contract has been entered into, and to follow this by refusing to enforce the contract because the nonperformance of the defendant was not “unconscionable.”

The equitable foundation of the doctrine of part performance is confirmed by the principle that, notwithstanding sufficient unequivocal acts of part performance by the plaintiff, if circumstances exist which make it unconscionable for the defendant to deny the agreement, a court will refuse to order specific performance if the plaintiff has himself not done equity.

In *Harris* v. *Robinson*, Strong J., of the Supreme Court of Canada stated that:

> The jurisdiction which courts of equity formerly exercised by way of specific performance, a jurisdiction which is now in Ontario, since the *Judicature Act*, administered, but upon the same principles and subject to the same limitations, by all courts, is peculiar. It is not sufficient to entitle a party seeking this peculiar relief to show what would be sufficient to entitle him to recover in a court of law, namely, that a contract existed, but, as is well shown by the quotations made in the judgment of the learned Chief Justice of the Court of Appeals from the judgment of the House of Lords in *Lamare* v. *Dixon* and from Lord Justice Fry's Treatise; the exercise of the jurisdiction is a matter of judicial discretion, one which is to be said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shown to the conduct of the party seeking the relief.

The same point was made in *J.C. Williamson Ltd.* v. *Lukey and Mulholland* where it was held that a plaintiff, because of unfairness on his part, could not succeed in an action for specific performance on the basis of acts of part performance.

Thus we are left with a doctrine which is able, only in the most extraordinary circumstances, to ameliorate what many regard as the injustice and hardship engendered by the *Statute of Frauds*.

(ii) *Availability of damages as an alternative remedy*

Even should a plaintiff be fortunate enough to satisfy the requirements of the doctrine of part performance, he may have difficulties in obtaining redress if, without fault on his part, the agreement cannot, in the circumstances, be specifically performed. This is because the equitable basis of the doctrine of part performance largely prohibits the availability of damages for breach of a parol agreement concerning land.

Until 1858, the Court of Chancery in England could not award damages in lieu of, or in addition to, an order for specific performance. In that year, jurisdiction to award damages was granted to the Court of Chancery pursuant to section 2 of the *Chancery Amendment Act* (*Lord Cairns Act*). Section 2 of the Act provides:

> 2. In all cases in which the Court of Chancery has jurisdiction to entertain an application 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 ... specific performance, and such damages may be assessed in such manner as the Court shall direct.

Lord Cairns Act, passed on June 28, 1858 is in force in the Province of British Columbia by virtue of section 2 of the *English Law Act:*

> 2. The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, are in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof.

Although the law is, once again, somewhat obscure, what is certain is that *Lord Cairns Act* does not simply transfer the jurisdiction to award damages from the common law courts to a court of equity. In *Lavery* v. *Pursell*, Chitty J. held that:

> It was suggested that after *Lord Cairns Act* the Court of Equity could give damages in lieu of specific performance. Yes, but it must be in a case where specific performance could have been given. It was a substitute for specific performance. It did not give the old Court of Chancery a general jurisdiction to give damages whenever it thought fit, it was only in that kind of case where specific performance would have been the right decree and there were reasons why it would be better to substitute damages, *but that could not apply to a case where you could not have given specific performance.* As is well known, the Court of Chancery would not grant specific performance of an agreement for a holding for a year, the reason being that it was one of those matters which were best dealt with by damages, and another being the practical reason that you could not get your suit heard and obtain a decree within a year il ordinary course.

Accordingly, he held that since it would have been impossible to grant specific performance in that case, the plaintiff could not recover damages.

The availability of damages in lieu of, or in addition to, specific performance rests upon the definition of "jurisdiction" in section 2 of *Lord Cairns' Act*. Under that section, damages can be awarded only in the case' where the court had, prior to the coming into force of the Act, *jurisdiction* to award specific performance.

The use of the word "jurisdiction" is unfortunate, and has resulted in some confusion. It is clear that "jurisdiction" does refer to the type of contract alleged. Thus if an agreement is one of personal service, or requiring supervision by the court, then because a court of equity *could not* give specific performance, it is disabled from awarding damages. To do so is beyond its jurisdiction.

On the other hand, although the authorities are not clear, a refusal to award specific performance on a discretionary ground (such as delay, or hardship) is irrelevant. In determining if a court of equity may give damages, matters of discretion do not go to jurisdiction.

There is, however, a third situation which has been viewed by some as affecting the courts jurisdiction to order specific performance, and by inference, its jurisdiction to award damages. Let us suppose that A and B orally agree that B will sell land to A. Subsequently, B sells the property to a *bona fide* purchaser for good value and A sues for specific performance, alleging the oral agreement and producing unequivocal acts of part performance.

In these circumstances, specific performance of the agreement is *impossible*, the land in issue having been sold. The issue which must be resolved, if A is to recover any damages, is whether the court has jurisdiction to award specific performance, which under section 2 of *Lord Cairns' Act*, is a prerequisite to its jurisdiction to award damages.

In *Hippgrave* v. *Case,* where a defendant purchaser refused to perform his obligations under an oral agreement to buy land, and the plaintiff vendor had sold the land at issue, the court held that, since specific performance was *impossible*, the plaintiff could not recover damages. The result is that a vendor, under an oral agreement for the sale of land, cannot mitigate his losses for fear of precluding relief under the doctrine of part performance.

Hippgrave v. *Case* does not stand only for the proposition that "when a *plaintiff* disables himself from performing his part of the bargain then he cannot ask for damages," for as is clear from *Ferguson* v. *Wilson* the issue is not the cause of impossibility but rather the impossibility itself. In that case a plaintiff had contracted to receive certain shares of a railway company from the defendant directors. The directors refused to allot the shares to the plaintiff, and instead allotted them to a *bona fide* third party. Sir H.M. Cairns L.J., interpreting the statute which he had recently piloted through Parliament, stated:

> The important words of the Act are these: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract, or agreement." That, of course, means ... *among other things where there is the subject matter whereon the decree of the Court can act ...* But that seems to me not in any way to give to the Court a power, where it has no jurisdiction, to decree specific performance, for want of the subject matter whereon its decree would operate, to give damages by reason of some antecedent breach of contract.

The law in Canada is confused on this issue. The High Court of Ontario, in *McIntyre* v. *Stockdale,* considered the English decisions but nonetheless, awarded damages to a plaintiff, notwithstanding the fact the specific performance of the oral agreement was impossible.

In *Bennet* v. *Stodgell*, however, the Ontario Court of Appeal considered *McIntyre* v. *Stockdale* and in *obiter dicta*, cast doubt on the ability of the court to grant damages to a plaintiff when specific performance was made impossible through acts of the defendant. In 1968, in *Pearson* v. *Skinner School Business (St Thomas) Ltd.* the Ontario High Court followed *Lavery* v. *Pursell*, and *Bennet* v. *Stodgell* and refused to award damages to a plaintiff seeking to enforce a parol agreement. Finally, in *Carter* v. *Irving Oil Co. Ltd.* a decision of the 124 Nova Scotia Supreme Court, it was held that:

> > It is clearly established (at least for this Court) that part performance can only enable an action of damages to succeed (where s. 7 of the *Statute of Frauds* is not satisfied) if the case in hand is one in which specific performance would otherwise have been granted by the Court of Chancery; and that neither *Lord Cairns' Act* of 1858 [c. 27] nor the fusion of law and equity declared by the *Judicature Act* affects this result ...

On the other hand the Saskatchewan Court of Appeal in *Pfiefer* v. *Pfiefer,* awarded $5,000 to a plaintiff who sought to enforce a paid agreement concerning land which had been sold by the defendant to a *bona fide* third party.

In British Columbia, this issue was considered in the case of *Robinson et al.* v. *MacAdam.* In that case the property had been sold by the defendant to a *bona fide* purchaser, and in an action on a prior oral agreement between the plaintiff and the defendant, in respect of which there had been sufficient acts of part performance, Whittaker J. held:

> Part performance is an equitable doctrine which gives rise to a claim for specific performance but not to a claim for damages except in those cases coming within *Lord Cairns' Act* ... however desirable it may appear to be that the equitable doctrine of part performance should be invoked to permit of damages being given in cases in which the impossibility of performance is due to some act or default of the covenantor, ... in this case specific performance is not possible, nor is the substitute remedy of damages ...

On balance, it would appear that *Pfiefer* v. *Pfiefer* represents an isolated departure from the general rule that damages are not recoverable for breach of a parol agreement where sufficient acts of part performance are proved, if specific performance is impossible. This will be the result whether the impossibility results from the nature of the agreement, the acts of the plaintiff, or acts of the defendant.

The issue of damages under the equitable doctrine of part performance is further complicated by questions of *quantum*. That is, even when damages are recoverable, the actual measure may differ from that applicable to an action at law. In general the measure of damages will be the same:

> [If] it appears to a court of equitable jurisdiction that it is appropriate under a *Lord Cairns' Act* provision to award damages either in lieu of or in addition to specific performance or an injunction, the measure of damages in equity will generally be found to be the same as the measure of damages at law.

Nonetheless, in a number of cases it has been held that "equitable damages" could be given in respect of future injury, a manifest impossibility in an action at law.

In another context, it has been said that at common law the measure of damages for breach of a contract for the sale of land is:

> ... the difference between the contract price and the market price of the land at the date of breach, normally the date of completion.

In *Wroth* v. *Tyler,* however, Megarry J. held that section 2 of the *Chancery Amendment Act, 1858* empowered the court to award damages on a scale different from that applicable at law.

There seems to me to be adequate authority for the view that damages under *Lord Cairns'Act* may be awarded in cases in which there is no claim at all at law, and also that the quantum of damages is not limited by the rules at law. No doubt in exercising the jurisdiction conferred by the Act a court

with equitable jurisdiction will remember that equity follows the law, and will in general apply the common law rules for the assessment of damages; but this is subject to the overriding statutory requirement that damages shall be "in substitution for" the injunction or specific performance. In the words of Cardozo C.J., "Equity follows the law, but not slavishly nor always": *Graf* v. *Hope Building Corporation*. Obedience to statute, whether in its precise words or in its spirit, is an excellent and compelling reason for not following the law.

The quantum of damages, therefore, was calculated not as of the date of completion of the agreement, but from the date on which judgment was given. The difference in time resulted in an award of L5,500 instead of L1,500, the latter being the amount which, in all probability, would have been awarded if the action had been commenced at law.

Although some may quarrel with the criteria used to calculate damages either at law or in equity, it seems to us that whether a parol agreement is "sufficiently evidenced in writing" to be enforceable at law under s. 2(1) of the *Statute of Frauds*, or whether it is sufficiently performed to be enforceable at equity, ought to be irrelevant in calculating the measure of damages awarded to a plaintiff. In principle, the better rule would appear to be that:

> ... where the plaintiff has no right to legal damages it will ... be appropriate to adopt in equity similar rules to those which are applicable at law both as to the measure of damages and as to remoteness of damage. This will be so in particular if, for example the inability to recover damages at law is attributable merely to the lack of a sufficient writing for the purposes of a *Statute of Frauds* provision, ...

(c) _*Fraud*

The preceding analysis of the doctrine of part performance illustrates that notions of unfairness and inequity have played a predominant role in forcing the courts of equity to ameliorate the severity of the *Statute of Frauds*. From the somewhat imprecise impression that the *Statute of Frauds* ought not to be allowed to be used as an instrument of fraud, has arisen the quite complex and seemingly narrow doctrine of part performance.

We now examine another doctrine which was developed for the same end, but which, in contrast to the complexity of the doctrine of part performance, remains comparatively unrefined both in its formulation and application:

> In certain cases courts of equity have shown themselves prepared to grant specific performance, and to restrain the defendant from setting up the lack of a sufficient writing, where his conduct is shown to have been dishonest ... If, for example, pursuant to a fraudulent promise to sign a memorandum the plaintiff has transferred property to the defendant, or has similarly acted to his disadvantage, or if indeed for any reason at all the absence of a memorandum has arisen through the completion of an actual fraud, in the legal rather than equitable sense of that term, an equity to prevent the setting up of the statute will arise.

In *Maxwell* v. *Lady Montacute* it was held that if a defendant fraudulently prevented the written evidence of an agreement from coming into existence, a plaintiff would succeed in an action on the agreement.

This principle, roughly analogous to the device developed over the centuries which prevents the *Statute of Frauds* being used as an instrument of fraud in trust situations has not, however, had a great deal of significance. Indeed, except for a series of cases in the eighteenth century, the doctrine appears to have been mentioned only once in the English courts, and it has never been exploited by Canadian courts in relation to contracts concerning interests in land, being relegated exclusively to the prevention of fraud in trust situations.

Furthermore, the cases on part performance indicate that the "actual fraud" which would allow a court to enforce a parol agreement in the absence of part performance, must involve more than mere reliance on the statute which happens to operate for the defendant's benefit. A defendant's refusal to sign an agreement is not enough, nor is detrimental reliance by a plaintiff on what, in his opinion, was an enforceable contract.

The restricted application of this doctrine even in England, and its conspicuous absence in Canadian jurisprudence, suggests that little weight ought to be given to it as a device which significantly reduces the hardship of the statute.

(d) *Restitution*

Principles of fairness, equity and justice have not been limited to the doctrines of part performance and fraud. Since the enactment of the *Statute of Frauds* in 1677, the courts have, to a limited extent, used the principle of unjust enrichment in order to afford some measure of compensation to parties who are foreclosed at law by the *Statute of Frauds*, and in equity by the narrowness of the doctrine of part performance, from enforcing their contractual rights.

In this section we look at the principle of unjust enrichment, commonly referred to as *restitution* to ascertain first, its scope as evidenced by the decided cases, and secondly, its ability to reduce the hardship worked by the statute.

The progenitor of the doctrine of *restitution* is often identified as the House of Lords decision in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson Combe Barbour Ltd*. where Lord Wright made the following remarks:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it i against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasicontract or restitution ...

This principle, in the context af the *Statute of Frauds*, may apply when a parol agreement concerning land is unenforceable under the statute, and when sufficient evidence of acts of part performance cannot be adduced. In that case, the principle of restitution may be invoked to prevent the defendant fram retaining benefits obtained at the plaintiff's expense.

The operation of the principle is best described by Rand J. of the Supreme Court of Canada in the leading case of *Degiman* v. *Guaranty Trust Co. and Constantineau*. In that case, the plaintiff alleged that he and the defendant had entered into an agreement wherein it was agreed that the defendant would leave certain property to him under her will, and that he would perform certain services for her, at her request.

The Supreme Court, in a unanimous decision, awarded $3,000 to the plaintiff. Nonetheless, since the value of the property promised was far in excess of that amount, it is clear that the award was not based on the alleged parol agreement:

> Here, the acts of performance by themselves are wholly neutral and have no more relation to a contract connected with premises No. 548 than with those of No. 550, or than to mere expectation that his aunt would require his solicitude in her will, or that they were given gratuitously or on terms that the time and outlays would be compensated in money ... The facts here are almost the classical case against which the statute [of Frauds) was aimed: they have been found to be truly stated and I accept that; but it is the nature of the proof that is condemned, not the facts, and their truth at law is irrelevant. Against this, equity intervenes only in circumstances that are not present here.
>
> There remains the question of recovery for the services rendered on the basis of a *quantum meruit*. On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. 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. This is exemplified in the simple case of part or frill payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money; and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

While the theoretical basis of the doctrine of restitution is in some dispute, its application has been relatively consistent. Where the acts of part performance do not satisfy the criteria which would allow the court to order specific performance, the plaintiff may be awarded an amount equal to the value which the defendant would have had to pay for the services rendered pursuant to the agreement.

Thus, in 1975, the Appellate Division of the Alberta Supreme Court awarded a plaintiff $1,500 per year, which, in the Court's opinion represented:

> ... adequate compensation of the [plaintiff] for services rendered and moneys expended on the [defendant's] behalf;

Again, in *Ross* v. *Ross Jr.*
Pearson v. *Skinner School Bus Lines (St Thomas) Ltd. et al.* n. 122 *supra.* in an action brought by a son against his father's estate, wherein he alleged a parol agreement for the sale of the family house, Sirois J. awarded the plaintiff a sum equal to what the defendant would have had to pay for his services on a purely business basis.

It is generally accepted that principles of restitution or "unjust enrichment" have worked well in reducing much of the inequity resulting from the *Statute of Frauds*, and in fact, there is little doubt that the development of the doctrine has been motivated, at least in part, by the "unenforceable contract" and the difficulties associated with it.

On the other hand, it is clear that the restitutionary nature of the doctrine enables a court to award a plaintiff only an amount of money limited to the benefit obtained by the defendant. For example, a plaintiff who, relying on a parol contract for the sale of a house, has his possessions put in storage, cannot recover that expense from the defendant. The defendant has received no benefit, and thus principles of restitution are of no avail to a plaintiff who seeks recovery of damages of this sort.

In a later chapter we discuss whether there are reasons which justify reliance on the doctrine of restitution notwithstanding its faults, and whether there are methods whereby the difficulties associated with it may be reduced.

C. Creations, Assignments, and Surrenders of Interests in Land

1. Transactions Within Section 2(2) of the Statute of Frauds

In British Columbia, section 2(2) of the *Statute of Frauds* provides that:

> No creation, assignment, or surrender of an interest in land shall be enforceable by action unless evidenced in writing, signed by the party creating, assigning, or surrendering the same or by his agent.

In order to appreciate fully the meaning of section 2(2) it is necessary to determine what transactions come within it.

Although there is no conclusive authority on this point, it is probable that section 2(2) of the present statute refers to the transactions formerly included in sections 1, 3 and 7 of the original statute.

> 1. All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments made or created by livery of seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents there unto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol, leases, or estates, or any former law or usage to the contrary notwithstanding.
> 3. No leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents there unto lawfully authorized by writing, or by act and operation of law.
>
> 7. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June 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.

It appears that sections 1 and 3 of the original statute referred to the actual conveyance of an interest in land whether that conveyance was by creation, assignment, grant or surrender.

The conveyance of an estate in land (a somewhat imprecise description of section 2(2) of the present act) must be evidenced in writing in order to be enforceable and may be at issue in either of two contexts. The first involves an allegation that a defendant has *conveyed* an interest in land to a plaintiff pursuant to an oral agreement. In that case, the courts are apt to look at the oral agreement, and the validity of the conveyance will, in fact, depend upon the enforceability of the underlying contractual arrangement which itself must be evidenced in writing in order to be enforceable. The second involves an allegation that a defendant has orally conveyed an interest in land as a gift. In those cases the gift is incomplete, and in most cases the transaction will be ineffective to transfer the donor's interest in

land to the donee, because of the lack of writing. Both of these situations are more fully considered in Chapter III, Section A, 2 of this Report.

The other predecessor of section 2(2) (i.e. section 7 of the original statute), imposed formalities on all "declarations or creations of trusts" and it is generally accepted that it referred to several situations. One was a trust created by an owner of an interest in land who declared himself a trustee of that interest for someone else. Another was a trust created by an owner transferring his interest to trustees to hold on certain trust terms.

Section 2(2) of the British Columbia *Statute of Frauds* differs significantly from section 7 of the original statute. Waters, however, in the *Law of Trusts* in *Canada* suggests that:

> ... the British Columbia legislation, though it is more radical [than the Ontario, New Brunswick and Nova Scotia Acts] in its change of wording has not to date produced difficulties. ''No creation, assignment, or surrender of an interest in land ..." would extend to any transfer whether it arose by trust or in any other way.

Section 2(2), like suction 2(1), requires evidence in writing of "creations, assignments, or surrenders of interests in land." Arguments, similar to those described in the previous discussion of section 2(1), have resulted in determinations of the section's inapplicability to trusts of chattels personal, moneys secured upon a mortgage of realty and partnerships in land. Thus, in *Harris* v. *Lindeborg*, the Supreme Court of Canada decided that a trust of an interest in the proceeds of a sale of land was not within section 7 of the *Statute of Frauds* since the *proceeds* were not an interest in land.

Once again it is difficult to justify the different treatment afforded trusts of realty and trusts of personalty. At first glance it may seem that trusts of real property generally involve substantial sums of money while trusts of personal property do not, but this, of course, is not always the case:

> It is one of the anomalies of our law that although a trust of a square yard of land requires a signed writing, a trust of L10,000 of pure personalty to which the settlor is entitled both at law and in equity may be declared orally.

2. Relief Notwithstanding Unenforceability Under the Statute of Frauds

(a) *Unenforceable transfers of interests in land*

Under section 1 of the original *Statute of Frauds* an oral creation of an interest in land could have the effect only of an estate at will. Section 3, however, provided that all assignments, surrenders, and grants of interests in land must be by note in writing, signed by the assignor, grantor or surrender or as the case might be; the section did not expressly set out the effect of an oral assignment, grant or surrender (i.e. whether it would result in the creation of an estate at will, would merely be unenforceable, or would be completely void).

There are only a handful of cases in which it has been considered whether there is jurisdiction to grant relief from invalidity under these provisions. In most cases, the alleged transfer will arise from an oral agreement, and in those cases it is the effectiveness of an oral agreement concerning an interest in land which will be in issue.

In some circumstances, however, the alleged transfer is by way of gift and in that case it is clear that a court of equity has jurisdiction to give relief from the effects of the statute.

At the same time, relief is available only in cases where the donee of an oral transfer of land, with the knowledge and consent of the donor, has taken possession of the land, and made significant expenditures of money upon the faith of the transfer. The donor, in such a case, is said to be estopped from denying the title of the donee because it would be inequitable for him to do so. Although analogous to the doctrine of part performance in the case of an unenforceable oral *agreement* concerning an interest in land, the doctrine of estoppel, in the context of "informal" gifts, is much more limited in scope.

(b) *Unenforceable declarations of trust at commonlaw*

Section 7 of the original *Statute of Frauds* provided that a declaration of trust which did not comply with the required formalities was "void and of none effect." The courts, nonetheless, consistently took the position that such declarations were merely unenforceable. In British Columbia, amendments to the *Statute of Frauds* have recognized the judicial attitude on this point and section 2(2) now provides, in express terms, that the effect of a lack of writing is only that the oral trust is unenforceable.

Although little has been made of this point, one result of mere unenforceability might be that an oral declaration of trust could be used as a defence.

The matter is, however, somewhat academic since most oral trusts have, in the past, been *enforced* notwithstanding their parol nature. This enforcement has been justified on either of two distinct grounds. The first is section 4 of the *Statute of Frauds* itself; the second is a principle of law enunciated in a series of decisions in the latter half of the nineteenth century.

It is to those matters that we now turn, and in the following discussion we set out the law in Canada, as far as we have been able to ascertain it, concerning:

section 4 of the *Statute of Frauds*; and

(ii) the equitable doctrine of fraud.

_____(c) *Section 4 of the Statute of Frauds*

Section 4 of the British Columbia *Statute of Frauds*, in apparent recognition of the difficulties likely to result from an unrestricted application of the writing requirement of section 2(2), provides that:

> [Section ... do[es] not apply to trusts arising or resulting by implication or construction of law.

The original *Statute of Frauds*, 1677 provided in section 8 that:

> Provided always, That where any Conveyance shall be made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law, or be transferred or extinguished by an Act or Operation of Law, then and in every such Case such Trust or Confidence shall be the like Force and Effect as the same would have been if this Statute had not been made; any Thing therein before contained to the contrary notwithstanding.

The modern English equivalent provides that:

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

The cases leave no doubt that section 4 and provisions like it in other jurisdictions have, to a large extent, reduced the hardship which the statute would otherwise have worked.

A resulting trust will arise in a number of different situations. The first is the case of a gratuitous transfer between strangers:

Since equity assumes bargains, and not gifts, he who has title gratuitously put into his name must prove that a gift was intended. In the case of purchase by one person taking title in the name of another, the resulting trust produces this effect, namely, of putting the onus of proof of a gift upon the transferee. It is not enough for the transferee to show that the transfer was "complete and perfect," in the sense that the transferee is fully vested with title to the property, he must also show that a gift was intended.

Thus, where A gratuitously transfers property to B, equity will, in the absence of evidence to the contrary, presume that B holds the property in trust for A. This "resulting" trust is, pursuant to section 4 of the *Statute of Frauds*, enforceable notwithstanding th.e fact that there is no written evidence of it.

A resulting trust will also arise where A purchases property and puts it in the name of B, and in the context of the *Statute of Frauds*, where there is an otherwise unenforceable oral declaration of a trust of an interest in land. In both cases a court, pursuant to section 4, will order the property returned to the grantor.

In *Scott on Trusts it* is stated that:

> ... a resulting trust arises in favor of the person who transferred the property or caused it to be transferred under circumstances raising an inference that he intended to transfer to the other a bare legal title and not to give him the beneficial interest.

Lewin, in a similar vein, argues that:

> The general rule is that wherever, upon a conveyance, devise, or bequest, it appears to have been the intention of a donor that the grantee, devisee, or legatee was not to take beneficially, the equitable interest, or so much of it as is left undisposed of, will result to the donor or his representatives.

In *Modgson* v. *Marks* Russell L.J., of the English Court of Appeal, recently held that the English equivalent of section 2(2) did not preclude the recognition of an unenforceable parol trust, and imposed a resulting trust on the property which a transferee alleged to be his own. In considering the relationship between section 53(1) of the English *Law of Property Act, 1925* (section 2(2) of the British Columbia *Statute of Frauds*) and section 53(2) of that Act (section 4 of the British Columbia statute), he said:

> I turn next to the question whether section 53(1) of the *Law of Property Act*, *1925* prevents the assertion by the plaintiff of her entitlement in equity to the house ... The evidence is clear that the transfer was not intended to operate as a gift, and, in those circumstances, I do not see why "there was not a resulting trust of the beneficial interest to the plaintiff, which would not, of course, be affected by section 53(1). It was argued that a resulting trust is based upon implied intention, and that where there is an express trust for the transferor intended and declared albeit ineffectively - there is no room for such an implication. I do not accept that. *If an attempted express trust fails, that seems to me just the occasion for implication of a resulting trust, whether the failure be due to uncertainty or perpetuity, or lack of form*. It would be a strange outcome if the plaintiff were to lose her beneficial interest because her evidence had not been confined to negativing a gift but had additionally moved into a field forbidden by section 53(1) for lack of writing ... The accepted evidence is that this was not intended as a gift, ... and section 53(1) does not exclude that evidence.

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

Section 4 of the *Statute of Frauds* provides for a second exception to the requirements of section 2(2). This exception - the constructive trust - has been described as one imposed:

> ... wherever a person, clothed with a fiduciary character gains some personal advantage by availing himself of his situation as trustee [if] the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his beneficiary.

A better view, in our opinion, is that suggested in *Scott on Trusts*, and quoted with approval by Laskin J. of the Supreme Court of Canada in *Murdoch* v. *Murdoch:*

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

The view that "unjust enrichment" lies behind the imposition of a constructive trust is more than academic since it follows that:

> ... by enforcing a constructive trust a court of equity *puts the parties in the same position in which they were before the fraud was committed*.

Where, for example, A conveys property to B and there is an oral agreement that the land is to be held as security for a debt of A to B, section 2(2) of the *Statute of Frauds* does not prevent the showing of this oral agreement. In an appropriate case a constructive trust of the property will be imposed since:

> ... the transferee would be unjustly enriched if he were allowed to retain the property, and ... this unjust enrichment should be prevented by compelling him to return the property on the payment of the debt.

In principle, the constructive trust, and the doctrine of *restitutio in integrum* should produce the same result whether A conveys.land to B in trust for A, or whether he conveys land to B upon an oral trust for C. In *Langille* v. *Nass*, however, the Nova Scotia Supreme Court, in the latter situation, held that thd property should go to C. That result - enforcing the terms of the oral trust rather than ordering the property to be returned to the grantor - is, nonetheless, consistent with most other Canadian decisions.

It is our view, however, that enforcing the oral trust in this manner amounts to a judicial repeal of the *Statute of Frauds*. If returning the property to the original creator of the trust is not enforcing the trust, and prevents the unjust enrichment of the trustee, there seems to be no reason to go any further. Scott has pointed out that:

> ... this result can be reached only by a clear violation of the Statute of Frauds ... The better view would seem to be that ..."If A conveys land to B upon an oral trust for C, and B refuses to perform the trust, the rights of the parties are easily defined. C obviously cannot enforce the express trust, nor since he has parted with nothing, can he have relief upon any other ground. But A ... may recover his land, for B may not honestly keep it if he will not fulfill his promise which induced A to part with it. "Since B would be unjustly enriched if he were allowed to keep the property ... B should be compelled to return the property to A, and in the meantime should be held as constructive trustee for A. The policy of the Statute of Frauds, which does indeed forbid going forward with the transaction, does not forbid going back and putting the parties in *status quo*.

Professor Waters, in the *Law of Trusts in Canada*, has argued that:

> ... [if] preventing fraud involves the consequence that when the court allows evidence of the oral trust to be adduced, and enforces that trust, it is in fact refusing effect to the Statute.

If enforcing the parol declaration of trust is, in fact, a refusal to give effect to the statute, and runs counter to the theory of constructive trusts, is there an explanation for the decisions of the courts? The answer, it seems, involves the equitable doctrine of fraud, a doctrine developed over the past century in order to prevent the injustice which the *Statute of Frauds* often fostered. It is to that doctrine that we now turn.

(d) *In Equity*

In the exercise of their equitable jurisdiction the judiciary have as a matter of course refused to give effect to the directions of section 2(2). In their efforts to prevent a trustee from avoiding his obligations under the terms of an oral trust, the courts have proved much less reluctant to interfere with the legislative directions of the statute than they were with regard to contracts concerning land.

Over one hundred years ago, applying principles which were much narrower than those now current, Spragge V.C., speaking for the Court of Appeal of Upper Canada, stated that:

> ... the doctrine, to the full extent ... has been sanctioned by very high authority, but we cannot help feeling that it reduced the *Statute of Frauds* [now section 2(2) of the British Columbia statute] to a dead letter.

The doctrine with which Spragge V.C. had so much concern is described in his own words:

> ... We must ascertain whether there is such a trust, because if there is, and the *cestui que trust* were not allowed to show it, the statute, by preventing his showing it by ordinary evidence would serve as a cover for fraud, and in this way a party alleging a parol trust of real estate *is, in a court of equity, in precisely the same position as if the 7th section of the Statute of Frauds had no existence*; he shows the same thing in the same way, only he gets at it in a less direct manner, by a process of reasoning appealing to the court to prevent a possible fraud.

This principle was given its modern form and applied in the leading case of *Rochefoucauld* v. *Boustead*, where Lindley L.J. held that:

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

The principle has been applied by Canadian courts in a number of contexts, including transfers of land intended only as security; "absolute" transfers to a person (the defendant), to hold jointly for himself and other claimants; and a conveyance to a party which was intended only to enable him to vote. While the facts of these cases are distinguishable, the principle behind the intervention of the courts remains the same a refusal to allow a "trustee" to rely on the *Statute of Frauds* and thus obtain absolute title to property which is not truly his. In fact, the principle is so entrenched in Canadian jurisprudence that the statute has been ignored by the courts when enforcing an oral trust.

A more exact definition of the "fraud" referred to in *Rochefoucauld* v. *Boustead* reveals that it is not fraud in the strict, legal sense of the term. The cases suggest that it is enough if the plaintiff merely alleges and proves that a grantee of land agreed to hold it in trust.

It is generally accepted, therefore, that the doctrine of fraud enunciated in *Rochefoucauld* v. *Boustead* has transformed section 2(2) into a minor hurdle to be overcome in the course of enforcing an oral trust. While the doctrine is, in our view, a necessary one, there are difficulties associated with it.

The first, and most important, is the characterization of the trust enforced:

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

There are, in addition, situations where the trust recognized by the courts is neither an express oral trust nor a constructive trust. In the proper circumstances a court may, under the terms of the statute, enforce a resulting trust. In that case, the "trust property" will under the definition of a resulting trust, revert to the original owner.

In both the constructive and resulting trust situations, the court must, in principle, order that the property be returned to the original grantor. In these circumstances, the express trust is not enforced, the court choosing instead to return the parties to the positions they were in immediately prior to the declaration of trust.

On the other hand, if the express trust is enforced, the trust beneficiaries will receive the property. The problem, however, has not been analyzed in this manner in Canadian jurisprudence, with the result that what have been described as "constructive trusts" are enforced in favour of trust beneficiaries.

In *Scheuerman* v. *Scheuerman*, however, Duff J: recognized a parol trust for the following reasons:

> ... but there is no answer to an action on the part of the [husband] for *restitutin in integrum* on the ground that the wife's fraudulent refusal to effectuate the express trust under which she acquired the property constitutes her a trustee for the person from whom she received it.

Except for the reasoning of Duff J. in *Scheuerman*, the Canadian courts have in the past admitted parol evidence of a trust and enforced the trust in the favour of the trust beneficiaries, notwithstanding the statute. This has been the case even when, as in *Lahgille* v. *Nass*, the court speaks in terms of a constructive trust.

Some authorities explain the intervention of equity in the following terms:

It is a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land as his own. A person claiming land conveyed to another may therefore prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him.

The conclusion, it seems, is that for all intents and purposes section 2(2) of the *Statute of Frauds* has little, if any, adverse effect on a plaintiff seeking to enforce an oral declaration of trust. This repeal in fact (if not in law) has been accomplished by ignoring the provision and invoking the principle enunciated in *Rochefoucauld* v. *Boustead*, or by imposing a constructive trusteeship on the perpetrator of the fraud and enforcing the oral trust in favour of the beneficiaries.

While we believe that some relief must be available when formal requirements of writing are not observed, there are two issues which remain to be resolved and which we discuss in greater detail in the following chapter. The first is whether, in the light of the judicial repeal of the requirement of writing, the formality is in fact a necessary one. The second, which rests upon a positive conclusion regarding the first issue, is whether the relief available to parties seeking to enforce oral trusts should be so very different from the relief available to those seeking to enforce oral agreements.

3. *Transactions Within Section 3 of the Statute of Frauds*

In British Columbia, section 3 of the *Statute of Frauds* provides that:

> No assignment or surrender of a beneficial interest ih any property held in trust shall be enforceable by action unless evidenced in writing signed by the party assigning or surrendering same.

Its predecessor, section 9 of the *Statute of Frauds, 1677*, provided:

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.

In England, under section 53(l) (c) of the *Law of Property Act, 1925*:

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

The House of Lords, speaking to the English equivalent of section 3, has stated that its purpose is:

> ... to prevent hidden oral transactions in equitable interests in fraud of those truly entitled ... making it difficult if not impossible, for the trustees to ascertain who are in truth the beneficiaries.

The section differs from sections 2(1) and 2(2) in several respects. The first is that, unlike section 2(1) and section 2(2), this section is referable to transactions involving *personality* as well as to real property. The reason for the distinction is not clear, but may, in part, be a matter of historical accident. Section 9 of the original *Statute of Frauds* was applicable to testamentary dispositions as well as to inter *vivos* transactions, while the predecessor of section 2(1) was concerned only with the latter.

The second is that the requirements of the section are applicable anly ip respect of *beneficial interests*. While there have been no Canadian decisions on point, it seems that the term "interest in any property held in trust" must be given a more restrictive meaning than the corresponding English provision which refers to "equitable interest or trust.'

The third aspect of this provision which deserves some attention is the meaning of the words "assignment or surrender."

The issue may be critical in determining the enforceability of oral trusts of personalty. If the transaction at issue is a creation of an equitable interest in personalty, it need not be in writing since a trust of personalty may be declared orally. If, on the other hand, the transaction is a *surrender or assignment* of an interest under a trust, in order to be enforceable it must, under the terms of section 3, be evidenced in writing.

The English courts have attempted to come to grips with this problem under the terms of their statute in the situation where the beneficiary of a

trust of personalty directs the trustees to hold the beneficial interest for another. In *Grey* v. *I.R.C.*, the House of Lords considered that situation and held that the word "disposition" in the *Law of Property Act*, *1925*, must be given a wide meaning, Lord Radcliffe being of the opinion that:

> ... it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries, or in other cases, a release or surrender of it to the trustee.

In *Vandervell* v. *I.R.C.* the provision was held inapplicable where a person assigned the whole of his interest (both legal and equitable) to another. Thus where B, a beneficiary of a trust of personalty, orally directed his trustee to convey the property (i.e. both the legal and equitable interest therein) to C, the "disposition" was enforceable.

Turning to the equivalent provisions in British Columbia, the situation is at once simpler and more complex. Section 3, which refers to "assignments and surrender,"should cover the situation described in *Grey* v. *I.R.C.*, where a beneficiary directs his trustee to hold the trust property for another. Waters, however, points out that the transaction in *Vandervell* v. *I.R.C.* should also come within the terms of section 3, since regardless of what happens to the legal interest, the equitable interest is, in fact, surrendered.

The result (once it is determined that a trust comes within the terms of section 3, and is not sufficiently evidenced in writing) is the same as that discussed previously in connection with section 2(2). The *Statute of Frauds*, in section 4, expressly provides that constructive and resulting trusts can be "imposed" notwithstanding the parol nature of the assignment or surrender of a beneficial interest; and the principle enunciated *in Roahefoucauld* v. *Boustead* is equally as appropriate to the situation where a beneficiary of a trust of real property orally declares himself a trustee of the property for another (section 2(2)) as it is where a beneficiary orally directs his trustee to hold the property for a third party (section 3).

The capriciousness of the distinction between assignments of interests of personalty under a trust and the creation of such interests has given us some concern. In a later chapter we set out what we consider to be the function of requiring written evidence of such transactions and whether, in the light of judicial attitudes on this point, sections 2(2) and 3 do, in fact, serve that function.

D. Guarantees and Indemnities

Agreements Within Section 5 of the Statute of Frauds

Section 5(1) of the British Columbia *Statute of Frauds* provides that:

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

The predecessor of this section is section 4 of the *Statute of Frauds*, *1677* which *inter alia*, provided that:

> ... no Action shall be brought ... whereby to charge the Defendant upon any special Promise to answer for the Debt, Default or Miscarriages of another Person; ... unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing, and signed by the Party to be charged therewith, or some other Person thereunto by him lawfully authorized.

In theory, section 5 is applicable to any promise by A to compensate B for contractual or tortious liability incurred by a third party. Under the terms of section 5, in order for B to enforce the agreement against A, there must be some evidence of it in writing. The exact nature of that evidence will be discussed in the following section.

To determine what "guarantees and indemnitied" must, in fact, be evidenced in writing is a matter of extreme difficulty. In England, for example, because the *Statute of Frauds* was applicable only to "promises to answer for *another's* debt," it has been held inapplicable to an indemnity. A guarantee, which must be evidenced in writing, is a promise to pay *another's* debt if he default, the original debtor retaining his primary liability. An indemnity, which is enforceable even if made orally, is a promise to compensate the creditor for any loss arising out of the original contract, the guarantor assuming the primary liability promising to indemnify the promisee whether or not the promisee has enforceable rights under the principle contract.

The illogical nature of the distinction is now irrelevant in British Columbia, since section 5 of the *Statute of Frauds* expressly covers promises of compensation where the promisor is primarily liable (an indemnity) and where he assumes only secondary liability (a guarantee).

Other agreements which need not be in writing are promises of compensation which are merely incidental to a wider transaction. If the main object of the parties is that one should guarantee the liability of someone else, then that promise must be evidenced in writing. If, however, their main intent was something else, then the guarantee is enforceable even if made orally. For instance, a promise given by a *del credere* agent to guarantee the solvency of a third party in a transaction between the third party and his principal, need not be in writing.

The main object of such transactions has been viewed as the effecting of a business transaction between the principal and third party, not the guarantee of a debt:

Though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration was given.

Another class of guarantees which are enforceable even if made orally are those whose objective is determined as being the protection of the guarantor's own property:

> Thus A may buy goods from B which Are held by C as security for a debt owed by B to C. If A induces C to deliver the goods (which are, in fact A's goods) to him (A) by promising to pay B's debt if B does not pay it, then A's promise is not within the *Statute of Frauds*.

This exception, however, does not apply where the guarantor has only a personal, as compared to a proprietary,interest in the goods. Thus in *Hamburg India Rubber Comb Co*. v. *Martin* an oral guarantee given by a shareholder of a company in order to protect the company's property,was unenforceable under the English equivalent of section 5 of the *Statute of Frauds*.

The foundation of the "agency" and "property" exceptions to the statute was explained by Vaughan Williams L.J. in the following terms:

> Whether you look at the "property cases" or at the "*del credere* cases," it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the section because of the object of the contract. In each of these cases there was in truth a main contract a larger contract and the obligation to pay the debt of another was merely an incident of the larger contract ... If the subjectmatter of the contract was the purchase of property, the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office in all those cases there was a larger matter which was the object of the contract, the mere fact that as an incident to it" - not as the immediate object, but indirectly the debt of another to a third person will be paid, does not bring the case within the section.

Much has been said about the logic of the distinction between unenforceable and enforceable oral guarantees and in a later chapter we discuss whether, in fact, such distinctions are valid. For now, it is enough to justify the restrictions placdd on section 5 on the basis that the availability of alternative relief, once a guarantee is held unenforceable under the *Statute of Frauds*, is extraordinarily limited. It is to the unavailability of alternative relief that we now turn.

2. Relief Notwithstanding Unenforceability Under the Statute of Frauds

(a) *At Common Law*

Under the terms of section 5, failure to comply with the section will result only in unenforceability, leaving the guarantee valid for other purposes. One of these purposes, in theory, ought to be that an unenforceable oral guarantee should be available as a defence.

In *Coady* v. J. *Lewis and Sons Ltd*., however, the Supreme Court of Nova Scotia refused to allow an oral guarantee as a defence. In that case, the plaintiff had orally promised to pay a debt owed by a third party to the defendant, and when the third party defaulted, he (the plaintiff) refused to honour his obligations. Subsequently, in an unrelated action, the defendant sought to set off the amount owed by the plaintiff on the oral guarantee from the amount awarded against him (the defendant) in the second action. In those circumstances, the oral guarantee was not a valid defence since:

> ... the only time when the contract which is within the statute can be admitted as a defence is when the plaintiff is seeking to recover money or property which has passed in pursuance of the contract. E.g., if I am sued for the return of a deposit, I can justify my retaining it by showing an oral agreement for the sale of land which the plaintiff refused to complete.
>
> I am of opinion that an oral guarantee is not available as a defence in a suit for a matter quite independent of the contract of guarantee ...

(b) *In Equity*

We have seen that oral agreements concerning an interest in land (section 2(1) of the *Statute of Frauds*) may be enforced, for example, if there is evidence of acts of part performance pursuant to the agreement; add oral declarations of trusts and dispositions of interests under trusts (sections 2(2) and 3) may be enforced by virtue of section 4 of the statute, or of the doctrine in *Rochefoucauld* v. *Boustead*. Oral guarantees and indemnities have not, however, been treated in a similar manner.

It is clear, for example, that the doctrine of part performance is inapplicable to oral guarantees. In the view of some, the doctrine is applicable only to transactions concerning land, but others consider it to be wider in scope:

> The doctrine of part performance of a parol agreement ... though principally applied in the case of contracts for the sale or purchase of land or for the acquisition of an interest in land, has not been confined to these cases. Probably it would be more accurate to say it 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.

This wider formulation of the doctrine is, however, of no aid to a plaintiff seeking to enforce an oral guarantee. Guarantees are not within the class of transactions of which specific performance might be given.

The limitation led Montague J., of the Manitoba King's Bench, notwithstanding his opinion that:

> ... from the beginning there was a verbal guarantee by the defendant ... that it would pay the plaintiffs for the goods supplied to Hanson, and that on February 5th the defendant paid the plaintiffs $500 in part performance of such contract.

to conclude:

> In this case tried before me the contract was a voluntary one and one which I must hold the Court would not have granted the specific performance of, and with regret I must hold that I have no justification for allowing the plaintiffs' claim ...

The disparate treatment of guarantees, oral agreements concerning land and oral declarations of trust seems to have been a matter of pure historical accident specifically, the distinction prior to 1875 between the Court of Chancery and the common law courts. In a later chapter we set out what are considered to be the functions of the writing requirements in the context of guarantees, our view of these functions, and our recommendations for change.

3. Transactions Within Section 6 of the Statute of Frauds

Section 6 of the British Columbia *Statute of Frauds*, provides 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 thereupon, unless such representation or assurance be made in writing signed by the party to be charged therewith.

The original *Statute of Frauds, 1677* did not include a provision such as section 6; it arose as a result of later circumstances which deserve some explanation.

In 1789, the decision in *Pasley* v. *Freeman*, established the principle that, notwithstanding the unenforceability of an oral guarantee, an action on the case in the nature of deceit (an action in fraud) would lie where a defendant had represented to a plaintiff that a third person was creditworthy where the defendant knew this to be false.

Reference was made in several subsequent cases to the view that *Pasley* v. *Freeman* allowed the plaintiff to circumvent what is now section 5 of the *Statute of Frauds*. The problem was described in the recent decision of W.B. *Anderson & Sons* v. *Rhodes* where the court discussed the history of section 6 in the following manner:

Because [s] 4 of the Statute 6f Frauds (1677) made a promise to answer for a debt, default or miscarriage of another unenforceable unless in writing, a customgrew up in the profession of alleging a fraudulent representation as to credit in order to circumvent the statute. Apparently juries, displaying their traditional anxiety to find verdicts in favour of plaintiffs, were easily induced to find fraud where no real fraud existed. To put an end to this practice, LORD TENTERDEN introduced the bill containing this section [now section 6 of the British Columbia *Statute of Frauds*] ...

In *Fleming on Torts* it is suggested that:

> A not uncommon type of fraud consists in misrepresenting a third person's credit. Yet here the tort action was liable to be exploited for the purpose of circumventing the Statute of Frauds which requires guarantees to be in writing. Precluded from suing on a verbal promise guaranteeing the debt of another, the plaintiff might instead frame his claim in deceit, alleging that the defendant had made a false representation, express or implied, as to the debtor's credit. To discourage this practice, the courts at first resorted to the device of urging juries not to act on the oral testimony of a single witness, but later the legislature intervened ...

Lord Tenterden's Act, introduced in 1828, effectively precluded reliance on the device described by Fleming. It provides, as does section 6 of the *British Columbia Act*, that:

> [N]o 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 Person may obtain Credit, Money, or Goods upon, unless such Representation or Assurance be made in Writing, signed by the party to be charged therewith.

It was soon realized that section 6, although designed to prevent fraud, often fostered it, and the courts responded by severely limiting its application.

It has been consistently held that if the person giving or making the oral assurance or representation does so in order to procure a benefit for himself, he cannot invoke the section in a subsequent action brought against him by the person to whom the representation was made.

The reason for this limitation appears to be the same as that supporting the corresponding limitation placed on the enforcement of oral guarantees under section 5. If the object of the assurance is to benefit the assuror then it is not, under the terms of section 6, made "with the intent or purpose that another may obtain credit thereupon."

Rose J., of the Ontario Supreme Court, explained the limitation in the following manner:

> ... the false representation, it is true, was made concerning [another's] credit, but it was not made to the intent that [the other] might obtain money or credit upon it; it was made to the intent that the plaintiff should agree with the [defendant] to pay the money to the [defendant]; and the fact that the plaintiff was to look to McLean for reimbursement was only incidental.

The second limitation placed on section 6 was to hold it inapplicable to all matters except those concerning *fraudulent* representations. In a series of cases whose authority cannot now be questioned, representations as to credit in matters of contract, *and negligent* representations have given rise to liability notwithstanding the fact that they were made orally.

While we have no quarrel with these limitations, the results are unsatisfactory. For example, if A makes a false representation to B which induces B to lend money or extend credit to C, then B could succeed in an action against A for negligent misrepresentation if A was, in fact, negligent. If, however, A could *establish his own fraud*, he could escape liability due to the absence of a written memorandum required by section 6.

That possibility raises serious questions concerning the value of a provision such as section 6. In addition, the infrequency of litigation involving section 6 suggests that, in fact, it is of relatively minor importance.

In a later chapter we discuss the value of requiring writing in order to succeed in an action for a fraudulent representation as to credit, and the logic, if any, of the distinctions created by the courts.

E. ___Evidentiary Requirements of the Statute of Frauds

So far in our exposition of the present law regarding the *Statute of Frauds*, we have devoted little attention to the writing requirement itself. The evidentiary requirements, however, are of critical importance.

Both section 2(1) and section 5 require that the agreement or guarantee, as the case may be, must be evidenced in writing, signed by the party to be charged or by his agent. Under section 2(2), the creation, assignment or surrender of an interest in land must be evidenced in writing signed by the party creating, assigning or surrendering the same or by his agent, but written evidence of an assignment or surrender of a beneficial interest in any property must, under section 3, be signed by the party so assigning or surrendering the interest. An agent's signature will not suffice in the latter case.

Under section 6, however, a representation as to credit *must be made in writing* signed by the party to be charged, and once again, the signature of an agent will be insufficient.

1. ___Evidentiary Requirements Under Sections 2(1) and 5

If an agreement concerns an interest in land pursuant to section 2(1) it is unenforceable unless *evidenced in writing*. Similarly, section 40(1) of the English *Law of Property Act, 1925* provides, in the words of the original *Statute of Frauds, 1677*, that:

> ... the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing, and signed by the Party to be charged therewith, or some other Person thereto by him lawfully authorized.

The "memorandum or note" referred to in the *Law of Property Act* and, presumably, the "evidence in writing" required by section 2(1) of the British Columbia *Statute of Frauds*, need not have been intended as a contractual document. Thus writings contained in letters, wills, and the like will suffice.

A recent decision of the English Court of Appeal in *Tiverton Estates Ltd*. v. *Wearwell Ltd*. suggests, however, that the evidence in writing cannot expressly, or by implication deny that an agreement, in fact, exists. The decision in that case was that even if a "subject to contract" document contained the necessary terms of an alleged agreement, the document was also evidence that no agreement was concluded.

A plaintiff must provide evidence in writing not of the agreement itself but "only the essential terms of the agreement" which it has been said, must include a description of the parties, the consideration, and a description of the property at issue.

The cases make it clear, nonetheless, that other terms may be deemed "essential" or "material." For example, the date of possession under an agreement for sale, and the term of a lease have been held "essential." Their absence, as part of the "evidence in writing;"has resulted in the unenforceability of otherwise valid agreements.

We believe, however, that the significance of the "evidence in writing" is that it constitutes a written document signed by a defendant which confirms his contractual intent with regard to the transaction at issue. If in fact there is a signed writing which proves a defendant's intent to sell land, we believe that the agreement ought to be enforced notwithstanding the fact that the date of possession, or the liability for taxes, hasbeen inadvertently excluded. In a later chapter we set out those legislative amendments which we believe would accurately reflect the policy of the requirement of writing in this context.

Difficulties have also arisen when more than one document is tendered as the "memorandum or note" or, in British Columbia, as the requisite "evidence in writing," of a parol agreement.

The cases suggest that two or more documents may be joined in order to "evidence" the alleged agreement, and parol evidence is admissible to connect documents which, although not *necessarily* referring to one another, may be reasonably inferred to go together.

Parol evidence is, however, not permitted if its purpose is to join two documents which are totally unconnected.

Over three hundred years of interpretation has left the precise meaning of "note or memorandum in writing" virtually impossible to determine. In 1937 the Law Revision Committed of England commented:

The meaning of "note of memorandum in writing" ... signed by the party to be charged" has been the subject of endless decisions. Whether the note or memorandum need contain all or some, and if so, which of the terms of the contract; whether, and subject to what conditions, it can be extracted from a number of documents; by what time it must be in existence; whether the parties' names must appear in it or whether an identifiable description of them will suffice; whether a written and signed offer accepted orally will do; whether a signature by initials or rubber stamp, or a mark is valid; when an agent signs, whether he must have been authorised in writing to do so; whether a document unsigned, but sealed and delivered, is within the Section these are only a fraction of the problems which the words of this Section have posed and the Courts have tried to solve.

Further discussion would serve us little. First, the decisions on the multifarious issues are, as many have said, irreconcilable. Secondly, a resolution of the cases is impossible due, in part, to an:

> ... interpretation of [the] provision [which] illustrates the reluctance of the courts to enforce the full vigour of the statute.

Finally, the rules established by the cases turn on difficult questions of evidence and construction, depending to a large degree on the facts and circumstances surrounding the particular agreement sought to be enforced.

Lest it be believed that a simple change in phraseology will simplify matters, it has been held, in a recent decision of the British Columbia Supreme Court, that:

> ... "evidenced in writing" means that every term or element of the agreement of transaction [must be] found in a document or documents ... in using this language, the Legislature did not intend any change in the law as to what must be contained in the writing.

The evidentiary requirement of section 5 has been interpreted in a similar fashion.

Again, the requirement is that all material particulars of the agreement be evidenced in writing.

In *Ontario Marble Co*. v. *Creative Memorials Ltd*. the Saskatchewan Court of Appeal held that the evidentiary requirements were met either when the names of the parties appeared on the face of the memorandum, or could be ascertained by reasonable construction or by reference to other documents. Disberry J. admitted parol evidence to clarify the memorandum, and held that:

> A memorandum of a promise to pay the debt of another must show who is the promisee as well as the promisor: ... However, I cannot find in the authorities any requirement that such should appear either in the body or in any other particular part of the writing. The requirements of the statute are satisfied if the

> names of the parties appear upon the face of the memorandum, either expressed or by reasonable construction or by reference to other documents physically or referentially attached thereto: ...

The reluctance of the courts to enforce the full rigours of section 5, and their concomitant wide view of its evidentiary requirements, is well illustrated in the judgment of the British Columbia Court of Appeal in *Fleetwood Corporation* v. *Imperial Investment Corp. Ltd.* In that case, the plaintiff, a retailer, sought to enforce a guarantee which he alleged had been given by a finance company. The only evidence of the guarantee, however, was the signature of the finance company representative on a purchaseorder which evidenced a contract between the plaintiff and a purchaser. The plaintiff successfully enforced the alleged guarantee against the finance company, the court holding, on the basis of parol evidence of discussions among the retailer, purchaser and finance company representative, that the signed purchase order was sufficient evidence in writing of the guarantee.

Maclean J.A. admitted the parol evidence to explain, first, that the document was in fact, a guarantee, and second, that:

> ... what was guaranteed was payment of the account set out in detail in the purchase order ...

Conversely, Davey J.A., *diseentiente*, held that the evidence in writing was insufficient to satisfy the *Statute of Frauds*. The significance to him of the plaintiff's oral testimony is best described in his own words:

> It is only the existence of Fraser's oral agreement to guarantee the account that gives the memorandum the significance on which the respondence relies. But as has already been said parol evidence of the promise cannot be introduced for that purpose ... To hold otherwise would defeat the purpose of the statute, which was to protect parties against parol guarantees.

2. Evidentiary Requirements Under Sections 2(2) and 3

Under section 2(2), any written document, signed by a party assigning, surrendering, or creating an interest in land, even if the document comes into existence after the transaction, will constitute compliance with the statute.

The writing, however, must not only evidence the existence of the transaction, but must also reveal its terms:

> ... when the court is called upon to establish or act upon a trust of lands by declaration or creation, it must not only be manifested and found by writing signed by the party by law entitled to declare the trust that there is *a trust*, but it must also be manifested, and found by writing signed as required *what that trust is*.

Again parol evidence is admissible to explain the circumstances surrounding the transaction and signature. Moreover, as in the case of agreements concerning land and guarantees, an unsigned writing which evidences the transaction may be joined to one which is signed, if the latter can be connected with or is referable to the former.

There are, however, several dissimilarities between the evidence required under sections 2(1) and 5 (contracts and guarantees) and those under sections 2(2) and 3 (creations, assignments or surrenders of interests in land, and the assignment or surrender of beneficial interests).

The first is the description of the signatory to the writing. Under sections 2(1) and 5, the document must be signed by "the party to be charged." Under sections 2(2) and 3, the document must be signed by the party creating, assigning or surrendering the interest.

The explanation for this difference lies in the nature of the transactions with which the sections are concerned. Under the former (sections 2(1) and 5), the transactions are, of necessity bilateral, involving an agreement between twoparties who are to benefit from the transaction. The latter transactions (sections 2(2) and 3) may, however, be

unilateral in character, involving the disposition of an interest by one party who may stand to gain no tangible benefit from the transaction. It follows that in the latter situation, it is the party who is surrendering his interest whose signature is of importance if he is to be held to his alleged obligations.

There is, however, another difference for which justification is more difficult. Under sections 2(1) and 5 of the *Statute of Frauds*, the signature of an agent will bind his principal to an agreement concerning land (section 2(1) or to a guarantee or indemnity (section 5). The same is true, under section 2(2), of a creation, assignment or surrender of an interest in land.

Under section 3, however, a party, in order to enforce an assignment or surrender of a beneficial interest in any property, must produce written evidence of it, *signed by the principal himself*. The signature of an agent will not suffice. That an agent can bind a principal who is assigning his legal interest, while a principal who assigns his beneficial interest through an agent can avoid his obligations is, in our opinion, inexplicable.

The arbitrariness of the distinction is revealed further by the fact that the English *Law of Property Act*, *1925* is precisely to the opposite effect.

3. Evidentiary Requirements Under Section 6

It must be noted that the writing requirements of section 6 are much more stringent than those under the other provisions of the statute. Under sections 2(1), 2(2), 3 and 5, the contract creation, assignment, surrender, or guarantee, need only be *evidenced in writing*. As a result, receipts, statements in a will, and letters written some time after the transaction, will suffice. Under section 6, however, the representation itself must be in writing.

Furthermore, section 6, like section 3, provides that the principal party must sign in order to be bound. The signature of a duly authorized agent will not suffice, given where the defendant is a company unable to sign except through the services of an agent.

In the next chapter we discuss whether the evidentiary requirements of the *Statute of Frauds* are, in fact, appropriate, and whether the variations among them are justifiable, and present a critical evaluation of the present law as we have ascertained it. The evaluation will involve an assessment of each of the provisions under the statute, a determination of their advantages and disadvantages, and an evaluation of the mechanisms now available to mitigate any disadvantages.

The work of law reform organizations in Britain, Australia and the United States has been of considerable assistance to us, and while the respective statutes involved are somewhat different, the issues presented by them are identical. The principle that "formal requirements are necessary in order to create binding legal relationships" has been adopted in so many jurisdictions which differ not only in their legal regimes, but also in their cultural and commercial practice, that we believe it merits careful examination before any recommendations for change are suggested. It is to this examination that we now turn.

CHAPTER II EVALUATION OF THE PRESENT LAW

A. Introduction

In the preceding chapter we set out, as far as we were able to ascertain it, the present state of the law in British Columbia with regard to the *Statute of Frauds*. Few doubt, and the previous discussion well illustrates, that the

statute has resulted in some measure of hardship especially in those situations where a court is obliged to declare an otherwise binding agreement unenforceable because of noncompliance with the requirements of the *Statute*.

In this chapter we first set out, without comment, the more important criticisms and disadvantages of the writing formalities required by the *Statute of Frauds*, and then secondly, the benefits and advantages which we perceive such formalities to produce. We then set out our evaluation of the arguments, and our conclusions as to the most appropriate reconciliation of the competing policies reflected in the arguments. In Chapter III, we set out and explain our Recommendations for change.

B. ___Criticism and Disadvantages of the Statute of Frauds

There are several major disadvantages associated with requirements of writing, which some have considered to justify the repeal of the *Statute of Frauds*. A number of the arguments offered in support of repeal, however, may equally be said to justify only reform. In addition, many of these disadvantages do not arise from the requirement of writing *per se*. For example, it is clear that the difficulty in obtaining damages in an action based on acts of part performance of a parol agreement concerning land is not due solely to the *Statute of Frauds*. It arises as much as a result of the separate jurisdictions of the Court of Chancery and the common law courts prior to 1875.

Although the *Statute of Frauds* has been criticized on many grounds, it seems to us that the most persuasive arguments against the statute ban be reduced to five, and we note them here without, for the time being, offering our own views on their meats.

1. A Product of Conditions Which No Longer Exist

A criticism of the statute which has been voiced by many, including the English Law Revision Committee, is that, in the light of its original purpose, the statute is no longer necessary as a means of providing concrete evidence of the transactions with which it is concerned.

In 1677, when the statute was first enacted, essential evidence of oral transactions was often inadmissible in court, due to a principle of the law of evidence that any party who was "interested in the outcome of any litigation" was incompetent to testify. This rule, of course, precluded the parties to an oral transaction from giving evidence of it. Moreover, highly questionable evidence was often admissible in litigation arising out of oral transactions because juries were still, in theory, “entitled to act on their own knowledge of the facts in dispute.”

Conditions in 1677, then, justified the statute, and as one commentator has remarked:

> ... though ... it does not preclude the risk of forgery or perjury, it does ensure that some evidence of these transactions is submitted to the court; and it thereby renders the prosecution of wholly baseless claims more difficult.

The Law Revision Committee of England, aware of the historical antecedents of the *Statute_of Frauds*, made the following remarks:

> It was an improvement of this state of affairs to admit the evidence of the parties, even though only to the extent that such evidence was in a signed writing. Today, when the parties can freely testify, the provisions ... are an anachronism. A condition of things which was advanced in relation to 1677 is backward in relation to 1937.

2. Arbitrariness

The English Law Revision Cpmmittee was of the opinion that:

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.

A superficial glance at the present *Statute of Frauds* reinforces that view. It must be noted, however, that the twentyfive sections of the statute as originally enacted in 1677 applied to most transactions involving real or personal property. Some formalities, such as the requirement of writing with regard to testamentary dispositions, have been enacted in other statutes. Others, such as the requirement of writing with regard to the sale of goods, were enacted in other statutes and have been repealed.

Although the remaining provisions of the statute may possess, in the words of the English Law Revision Committee, no relevant *common* quality," they may severally possess characteristics which justify special treatment. In a later chapter we discuss whether the transactions at issue (contracts concernipg land, transfers of land, trusts, and guarantees) possess relevant characteristics which would suggest that they need special treatment and, if so, whether the writing requirements of the *Statute of Frauds* are the most appropriate form of treatment.

3. Mere Unenforceability

Another criticism directed at the *Statute of Frauds* stresses what are believed to be the anomalous results which flow from mere unenforceability. The Law Committee of England argued for the repeal of formalities of writing because:

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

The argument of the Law Revision committee and others, may be set out in the following terms:

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

4. Lack of Accord with Actual Practice

Several critics of the *Statute of Frauds* have pointed out that:

> The chief objection to the statute, and the cause to which most of its difficulties may be traced, seems to lie in this, that the prescribed mode of transacting business is so far at variance with the natural mode, that there is always in practice a conflict between them ... The statute, in prescribing a general use of writing, is at variance with a natural law of social action. Hence it is very commonly disregarded instead of a safeguard ... If it comes to pass that men may act, almost habitually, in a manner which will bring on them the penalties of the law, or at least deprive them of' its protection, and yet without any imputation of moral blame on the score of dishonesty or even of negligence, it surely affords a strong argument to show, that in such case the law is in fault, and has attempted to guide the conduct of men in a wrong direction and such seems to be the case with the *Statute of Frauds* ...

In 1937, the English Law Revision Committee recommended the repeal of several provisions of the *Statute of Frauds*, basing their proposal, in part on the argument that:

> The Section is out of accord with the way in which business is normally done. Where actual practice and legal requirement diverge, there is always an opening for knaves to exploit the divergence.

5. ___Hardship

Probably the most serious criticism of.the *Statute of Frauds*, or for that matter, of all legal formalities, concerns the hardship and injustice suffered by innocent parties who, by reason of a seemingly minor technicality, are precluded from enforcing their legal rights. This hardship may often be due to a measure of bad faith on the part of a defendant who enters into a contractual relationship with the expectation that he will fulfil his obligations under it, but who, upon discovering that its oral nature will preclude its being enforced against him, attempts to escape his obligations by invoking the *Statute of Frauds*.

It is with reference to this behaviour that the remark "the Act promotes more frauds than it prevents" takes on its fullest meaning.

C. Benefits of the Statute of Frauds

The values of formal requirements of writing, in the light of the functions which have been attributed to them, have been the subject of extensive comment. We set them out here without comment, leaving until later our conclusions on the relationship between their advantages and disadvantages.

1. The Evidentiary Function

There is little doubt that when the *Statute of Frauds* was originally enacted, its major function was to denote what evidence was acceptable of transactions considered to be relatively significant.

Holdsworth, in his *History of English Law*, goes to great lengths to explain and justify the original statute on that ground, and it has been said that:

> It is clear from the historical evidence, including the preamble of the English Statute, that the primary purpose of the Statute of Frauds was evidentiary, the insurance of a trustworthy memorial of the transaction and its terms.

The same argument has been made with regard to Article 313 of the German Civil Code which provides, *inter alia*, that:

> A contract whereby one party binds himself to transfer ownership of a piece of land requires judicial or notarial authentication.

Article 313, although more limited in scope, and more stringent in its formal requirements, is analogous to section 2(1) of the British Columbia *Statute of Frauds*. A major function of Article 313, and by analogy, of the *Statute of Frauds*, is to provide evidence of important transactions:

An advantage of a written formulation of legal transactions, as against an oral statement of them, lies in the fact that it renders later proof secure. The presence of witnesses serves a similar purpose, but fixing a legal transaction in the memory of an individual is, in the first place, a less dependable and certain way of preserving it than fixing it in writing, for memory generally retains only the sense of what was done, and not the words used, when as a

matter of fact it is often the precise words employed which are mobt important. Furthermore, the transaction will be less durably preserved when its proof depends upon the memory and the continued life of the witnesses.

The same point has been made by Fuller, who, in a discussion of the formalities of writing required by the *Statute of Frauds*, argued that:

> The most obvious function of a legal formality is, to use Austin's words, that of providing "evidence of the existence and purport of the contract, in case of controversy." The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing, or attestation, or the certification of a notary.

The evidentiary difficulties of 1677 are no longer with us, but that does not detract from the value of having written evidence oi the terms and existence of an alleged agreement.

2. ___The Cautionary Function

One of the fundamental assumptions of the law of contract is that both parties to a transaction are aware of its substance, and intend to enter into a binding legal relationship.

The importance of "*consensus ad idem*" usually arises when a term of an agreement is in dispute when one party to an agreement denies that he directed his mind to that issue. The principle is of equal importance, however, where the issue in dispute is whether or not a party intended to enter into any agreement at all.

The value of a device that pramotes an awareness of entering into a binding legal relationship, and that prevents unconsidered action is not lightly to be discounted. The requirement of writing in the *Statute of Frauds*, although perhaps imperfect, is a device to this end.

Fuller has described what he believes to be the "cautionary function" of legal formalities, and Article 313 of the German Civil Code appears to serve a similar function:

> "In the interest of legal commerce," says Savigny, "it is desirable that contracts should not be entered hastily, but rather with a deliberate consideration of the ensuing consequences. The nature of formal contracts (such as the Roman stipulation) is such that they awaken and encourage this desirable attitude." In the case of such forms as necessitate a certain delay ... this is without question correct ... It would, however, be a mistake to suppose that the beneficial effect of form lies purely in the delay which it causes. It lies more especially in the form itself, in the impression which it produces on the transacting party in warning him that he is binding himself, that "this is business" ...
>
> If formalism involves the danger that someone who really had the intention to bind himself legally may go free because of a defect of form, a lack of prescribed forms carries the opposite danger, namely, that someone who did not have this intention may against his will be charged with a legal responsibility. Which danger is the more serious can scarcely be an object of doubt ...

In 1953, the Law Revision Commission of New York State made the following remarks:

> ... there is a good deal of authority for the proposition that certain portions of the Statute have a cautionary function as well. The dissenting members of the English Law Revision Committee urged with respect to guaranties that "there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand." There are similar indications with respect to marriage settlements, which have sometimes been held unenforceable under the Statute despite the subsequent execution of a memorandum, and with respect to new promises after discharge in bankruptcy.

The Law Reform Commission of Queensland, in recommending the retention of writing requirements with respect to guarantees, justified their conclusions

> ... [on] wider considerations of policy, such as the desirability of retaining an element of formality and deliberation in a form of transaction having such consequences that it ought, we think, not to be lightly undertaken or enforced.

3. The Channelling Function Certainty of Contractual Intention

> Though most discussions of the purposes served by formalities go no further than the analysis just presented, this analysis stops short of recognizing one of the most important functions of form. That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to make or signalize the enforceable promise; it furnishes a simple and external test of enforceability ...

There can be no doubt that whatever its original purpose the *Statute of Frauds* serves to delineate which relationships are legally enforceable, and which are not.

The Law Revision Commission of New York State acknowledged the importance of this with respect to several of the substantive provisions of the *Statute of Frauds*.

> But in the realm of conveyances of land, the requirement of a writing, together with statutory provisions for short forms and requirements of acknowledgment and recording, has had a distinct and positive channeling effect. And the danger that mere words of encouragement and confidence or mere expressions of intention will be misinterpreted as promises has been suggested as a reason for the Statute of Frauds with respect to guaranties, contracts to make testamentary dispositions, and commission agreements.

The Commission concluded that contracts concerning land should continue to be unenforceable unless in writing:

> For the Statute performs a definite channelling function in this field, and it's widely understood that real estate transactions, whatever the form of words, are tentative until something is signed or performance is begun.

The importance of the channelling function, which allows both parties to a transaction to know with some degree of certainty if and when they are entering into a binding legal relationship, has received same indirect approval in a recent seriesof decisions of the English Court of Appeal. These decisions illustrate that, whatever their attitude towards the *Statute of Frauds*, some members of the judiciary consider the existence of a dividing line between negotiation and contract to have some importance.

In 1970 Widgery L.J., in *Griffiths* v. *Young*, held that the words "subject to contract" in a letter written during contractual negotiations between two parties, could be waived by a subsequent oral agreement between them. In that case it was held, on the basis of parol testimony, that the condition "subject to contract" was in fact waived, and the court enforced a parol agreement for the sale of land on the basis that the letter was "a note or memorandum" sufficient to evidence the agreement under the English equivalent of section 2 (1) of the *Statute of Frauds*.

In March 1973, the English Court of Appeal, in *Law* v. *Jones*, extended *Griffiths* v. *Young* and held that a series of letters, most of which were "subject to contract," but the last of which, from the plaintiff to the defendant, merely read "amend the contract in your possession to read a purchase price of L7,000," constituted a sufficient "memorandum or note ... in writing" within the meaning of that term in section 40 of the English *Law of Property Act, 1925* (the equivalent of section 2(1) of the British Columbia *Statute of Frauds*).

In October 1973 the Court of Appeal took the virtually unprecedented course of reversing their previous opinion in *Law* v. *Jones*, and in an identical situation held that a series of letters written "subject to contract" could not constitute a sufficient memorandum for the purposes of the *Statute of Frauds*.

Denning M.R. said:

> *Law* v. *Jones* has sounded an alarm bell in the offices of every solicitor in the land. And no wonder. It is everyday practice for a solicitor, who is instructed in the sale of land, to start the correspondence with a letter "subject to contract" setting out the terms or enclosing a draft. He does it in the confidence that it protects his client. It means that the client is not bound by what has taken place in conversation. The reason is that, for over a hundred years, the courts have held that the effect of the words "subject to contract" is that the matter remains in negotiation until a formal contract is executed ... But *Law* v. *Jones* has taken away all protection from the client. The plaintiff can now assert an oral contract in conversation with the defendant before the solicitor wrote the letter and then rely on the letter as a writing to satisfy the statute, even though it was expressly "subject to contract" or, alternatively, the plaintiff can assert that after the solicitor wrote the letter, he met the defendant and in conversation orally agreed to waive the words "subject to contract." If this is right, it means that the client is exposed to the full blast of "frauds and perjuries" attendant on oral testimony. Even without fraud or perjury, he is exposed to honest difference of recollections leading to law suits, from which it was the very object of the statute to save him.

The value of a technique which reinforces certainty during contractual negotiations is unquestionable:

> However sharply we may distinguish in concept between the legal transaction itself and preparatory acts, whatever difference in theory there may be between the act of binding oneself and the mere announcement of a present inclination to bind oneself, in the actual concrete case the boundaries between these things are often blurred ... Just suppose for a moment that a testament required no special form. What endless controversies would be stirred up over the meaning of these informal communications, so frequent in actual life. Where a system of formality prevails, the expression of mere intention as to the future is wholly without danger; there is never the risk that it will be confused with a present intention to create legal relations. Where formalities are not prescribed there is always the danger that the one will be taken f or the other ...
>
> According to what has been said, the utility of form lies in facilitating and rendering certain the diagnosis of the parties' intentions. In appearance this advantage profits only the judge, but in reality it also benefits the parties and commerce generally ...

The requirement "that a party must sign written evidence of an agreement in order to be legally bound" does, in many cases, focus his attention on the legal implications of his acts. This advantage is not often perceived, and is never spoken of in litigation which involves a *signed* agreement. Yet there can be no doubt that in thousands of cases, the requirement of a signature does in fact raise an awareness of the importance of the transaction to countless numbers of individuals.

D. Evaluation of the Arguments

There can be little doubt that the historical basis of the statute (a device created in order to facilitate the introduction of otherwise inadmissible evidence) is no longer relevant. In the working paper which preceded this Report, however, a majority of the members of the Commission expressed the view that there existed other considerations which favoured the imposition of formal requirements of writing upon certain transaction, and that the cumulative effect of these, in the statute, was sufficient to justify the retention of these requirements in some instances, though it was also the view of that majority that the statute should be modified so as to mitigate the hardship that unsued from a failure to comply with its requiremdnts and that were insufficiently ameliorated by the intervention of the courts. Briefly, the considerations which were thought by a majority of the Commission to justify the retention of the statute in some modified form are those identified earlier in this chapter as the evidentiary, channelling and cautionary functions of writing requirements.

The view of a minority of the members of the Commission, as set out in the working paper, was that, while conceding the force of some of the arguments in favour of retaining the formal writing requirements imposed by the *Statute of Frauds*, the hardship and inequity which ensued from insistence upon those requirements was, on balance, a more potent consideration, and justified repeal of the statute.

The changes that we recommend in this Report go some distance beyond those tentatively proposed as the majority view in the working paper, and they now reflect the conclusions of all of us. What we are recommending in this Report differs from the earlier proposals in the working paper in giving a somewhat broader power to the courts to hold a contract enforceable despite noncompliance with the requirements of the statute. These recommendations reflect a reconciliation of the competing policies and points of view which has the support of all members of the Commission.

We are all impressed by the criticism that arises from cases in which an innocent purchaser has been denied the right to enforce an otherwise valid contract. On the other hand, we have been impressed by the fact that formalities continue to be imposed by statute in every common law province of Canada, most of the Australian states, a majority of the American states, and by the Civil Codes of Germany, France and the Province of Quebec; and by the fact that while law reform bodies have periodically studied and evaluated the utility of formalities they have, *without exception*, concluded that the repeal of many of them is not warranted.

We have stated before that the value of formal requirements of writing, in the light of the hardship which may result when they have not been observed, is directly related to the *significance of the transaction*, and we thus acknowledge that they may be unnecessary in numerous transactions of relatively minor importance. It follows, in our view, that the device should be limited to those transactions having characteristics which suggest, for example, that some deterrent against unconsidered action ought to be present; and that provision should be made that permits hardship and inequity to be avoided in proper cases.

Formalities are, we believe, of special importance in two situations. The first, and most easily identifiable, is that in which the *subjectmatter* of the transaction is of *particular significance*. For example, for most people the purchase of a house or land is the most important and expensive transaction of a lifetime. Because the transaction is of particular significance, and because the hardship would be so great if a party were to be unintentionally burdened with the kind of debt associated with the purchase of a house, we believe it to be an unquestionable advantage to have a device which goes some way to ensuring that a purchaser has considered and realized the implications of his acts, which provides evidence of the transaction, and which distinguishes between negotiation and contract with some degree of certainty.

The second situation in which formalities are of particular significance is that in which one party to a transaction stands to gain little from it. For example, an individual who guarantees another's debt often receives no tangible benefit. On the other hand, a creditor in that situation stands to gain a great deal, for he now has two parties who are liable on the debt.

We have therefore concluded that, to varying degrees, the writing requirements of the *Statute of Frauds* serve the three functions attributed to them, though we differ among ourselves as to the relative weight to be attached to each. While formalities inevitably give rise to difficulties, we have sought, in the next chapter, to devise a set of recommendations which produces an appropriate balance of the competing concerns.

E. ___Relief Under the Statute of Frauds

Much of our discussion of the present law regarding the *Statute of Frauds* involved an exposition of the methods available to reduce the hardship and injustice which it often causes

In this section we set out what we consider to be the major criticisms of the relief now available under the Statute, leaving to a later chapter our specific recommendations for change.

1. ___At Common Law

The common law courts, although restricted in their ability to circumvent the legislative directions of the *Statute of Frauds*, have limited its impact in a number of ways.

The most important limitation, and one which is applicable to all transactions under the statute, is the principle that although the statute renders certain transactions unenforceable, it does not render them void for other purposes.

We have explained what we believe to be the logic and value behind such a limitation and we reiterate it now. In furtherance of the evidentiary, channelling and cautionary functions of the *Statute of Frauds*, some sanction must be provided for those who seek to enforce parol agreements. The most appropriate sanction, it seems, is to prohibit the enforceability of the agreement. But this of course does not mean that the agreement never existed, and there is no reason to provide any further sanction such as to deny all validity to the agreement.

The sanctions ought to be limited, therefore, to unenforceability, and if it is determined that a transaction was in fact concluded, then oral evidence of it should be available as a defence, or as evidence in a perjury charge, or as the basis for a decree of specific performance if acts of part performance are proved.

The principle of mere unenforceability has existed as a concomitant of the *Statute of Frauds* for a number of years, and we believe it to be an essential element in furtherance of the policies underlying the requirements of writing in that context.

Another common law restriction of the *Statute of Frauds* provides that if the statute is not pleaded, it cannot, ordinarily, be raised as a defence at a later time. That principle, which first appeared in the nineteenth century, is now embodied in Rule 19(15) of the British Columbia Supreme Court Rules.

Pleading the *Statute of Frauds* does appear to raise several issues of an ethical nature. The use of the statute in this way often involves an admission of an agreement, coupled with an assertion that the defendant refuses to perform his obligation under it; and such a privilege ought, perhaps, to be granted with a measure of hesitation. This is a view which the present rules of pleading reflect.

2. Statutory Relief

The *Statute of Frauds* itself provides, in section 4, that constructive and resulting trusts may be imposed when oral transactions are held unenforceable under sections 2 and 3. The result that parties who are unjustly deprived of their property may ask the court for a declaration that the person holding the property does so on a constructive or resulting trust has, to a large extent, reduced the hardship which might otherwise have resulted.

It appears, however, that the imposition of resulting and constructive trusts is restricted, in most cases, to unenforceable transactions under section 2(2) and 3, though a similar result is achieved under the doctrine of restitution in the contractual transactions described in section 2(1).

We have set out what we believe to be a major area of concern in this context, namely, that the imposition of constructive trusts has often resulted in the enforcement of these transactions notwithstanding the statute.

If the requirement of writing is retained for the transactions described by sections 2(2) and 3, we believe that the principle of "unjust enrichment" which allows the imposition of a constructive trust, should also govern the relief created thereby.

We also believe, however, that this ought to be a matter for legislation. Not only would this enhance clarity and consistency of application, but it would also highlight what relief is, in fact, available. In a later chapter we set out our recommendations directed at correcting those inadequacies.

3. ___In Equity

The intervention of equity, developed over the past three hundred years in an effort to reduce the hardship caused by the statute, has resulted in three distinct modes of relief.

The first is the doctrine of part performance, restricted in its application to those transactions of which equity could order specific performance. The second is the equitable doctrine of fraud, which has been applied almost exclusively to transactions under sections 2(2) and 3. The third is the doctrine of restitution which, in contrast to the equitable doctrine of fraud, has had significant impact only on contractual transactions under section 2(1).

We have found little, if any, quarrel with the proposition that some measure of relief is necessary if the hardship which the statute might otherwise work is to be mitigated. Nonetheless, the relief as it is at present formulated, is characterized by restrictions on its applicability which cannot, in most cases, be justified in logic. Furthermore, the nature of the relief itself has often provoked critical comment fram those who have argued for the repeal of the statute.

It has became apparent that a major inadequacy of the relief now available under the statute is due to its restricted applicability. In some cases this can be explained only on historicalgrounds for example, the rule that part performance will not take a guarantee out of the *Statute of Frauds* arose only because guarantees were not subject to specific enforcement at the hands of equity. In other cases, the restricted scope of the relief may be justified by the nature of the transaction at issue. For instance, in the case of promises of guarantees, there is usually no objective benefit moving fram a creditor (promisee) to a guarantor. Thus, while a creditor might suffer damage as a result of the unenforceability of an oral guarantee, the guarantor, in most cases, is not unjustly enriched as a result. In that situation, the creditor cannot, under principles of restitution, obtain compensation.

While it is difficult to think of a completely just solution in this specific case, we believe that, in principle, where the functions of the statutory provisions are the same, the relief available should also be similar. We are aware, however, that the functions of requirements of writing may differ for each of the provisions of the statute, and thus the relief should also be of a different nature. In the next chapter we set out what we believe to be the appropriate form of relief for those transactions the enforceability of which will continue to depend on compliance with statutory formalities.

A more important criticism of the equitable relief available to parties whose rights are avoided under the statute, is the nature of the relief itself.

There can be no doubt that narrow Canadian interpretations of the doctrine of part performance have resulted in hardship to parties who might otherwise be able to enforce parol agreements. In addition, the unilateral nature of the doctrine, whereby acts of part performance by a *defendant*, notwithstanding their sufficiency with regard to the doctrine, will not enable the court to enforce the agreement, has given us some concern. Finally, the unavailability

of dampges in some cases has clearly caused a great deal of hardship and is inexplicable except on historical grounds.

CHAPTER III RECOMMENDATIONS FOR CHANGE IN BRITISH COLUMBIA

A. Introduction

In the preceding chapters we set out the present law in British Columbia with respect to the *Statute of Frauds*, and in our evaluation of the statute, we stated our conclusion that, in principle, formal requirements of writing ought to continue as essential elements in the enforceability of certain transactions. The considerations which have led to this conclusion are fully canvassed in Chapter II.

Since we believe that the functions served by writing requirements go beyond the prevention of fraud, it is our view that the *Statute of Frauds* is inaptly titled. Our first recommendation is, accordingly:

1. *That the* Statute of Frauds*, R.S.B.C. 1960, c. 369 be repealed, and replaced by a new enactment, entitled the* Contracts Enforcement Act*, embodying the principles contained in the succeeding recommendations.*

B. Transactions Within the Act

The *Statute of Frauds* now imposes formal requirements of writing on contracts concerning interests in land (section 2(1)), conveyances of interests in and declarations of trusts of land (section 2(2)), assignments and surrenders of beneficial interests unden trusts (section 3), contracts of guarantee and indemnity (section 5), and representations as to credit (section 6).

A decision to afford special treatment to a particular class of transaction must be made in the light of the policies which that treatment is designed to further. In this section we consider the six transactions on which formal requirements are now imposed, and set out our recommendations concerning those transactions.

Contracts Concerning Land

In the preceding chapter we set out the policies which we believe justify the imposition of formal requirements of writing. At the same time, we conceded that the hardship which may result from noncompliance makes it logical that formalities be restricted to transactions which are considered to be significant.

Any definition of "significant contracts" will, of course, be arbitrary both in its formulation and application, and the definition set out in section 2(1) of the *Statute of Frauds* is no exception. It is our opinion, nonetheless, that the phrase "contracts concerning an interest in land" as it has been interpreted, does in fact describe what most would concede to be significant transactions, and it is unlikely that an attempt to improve upon it would be successful.

The statute, however, now provides for a major exception to the proposition that all contracts concerning an interest in land must be evidenced in writing in order to be enforceable. Section 2S3) of the Act provides that the requirement of writing does not apply to leases of interests in land for a term of three years or less.

This exception has existed since the enactment of the statute in 1677, and although we have been unable to discover the specific reason for its inclusion, we have concluded that the exception is sound.

In the first place, it acknowledges the frequent occurrence of shortterm arrangements, and reflects the accepted practice of entering into commonplace transactions with less formality than would normally surround permanent arrangements. Secondly, the shortterm lease, in contrast with other agreements concerning land, is of relatively minor importance, and accordingly need not be encumbered by formalities which we believe ought to be imposed only on significant transactions.

Once again the exception is arbitrary but we see merit in the substance of section 2(3).

Other agreements which may be of a temporary nature such as profitsa-prendre, easements, and options to purchase land, which may allow possession of another's land for a limited period of time, or create rights in land of a temporary nature do, in our opinion, differ significantly from shortterm leases. Such agreements are not normally entered into lightly, and in addition, generally involve consequences of much greater importance than do shortterm leases. We believe that they should be treated differently from shortterm leases, and thus should continue to be unenforceable unless evidenced in writing.

The Commission accordingly recommends:

2. *Subject to Recommendation (3) the* Contracts Enforcement Act *should apply to a contract concerning an interest in land.*

3. *The* Contracts Enforcement Act *should not apply to any contract to lease, or lease of an interest in land for a term of three years or less.*

2. ___Conveyances of Land

(a) ___*Conveyance Otherwise Than By Way of Gift*

In the working paper that preceded this Report, the Commission proposed that "the *Contracts Enforcement Act* should apply to the conveyance of an interest in land." That proposal was principally intended to cover the possibility that an interest in land could be conveyed by one person to another by one of the ancient methods of conveyance, such as livery of seisin or enfeoffment. Upon reconsideration, it is our view that the possibility is so remote that it does not justify specific attention. Moreover, section 15 of the *Conveyancing and Law of Property Act* (Bill 64, introduced and given first reading on June 22, 1977) would abolish these ancient forms of conveyance. In the circumstances, we have now concluded that no recommendation on this point is necessary.

(b) *Oral Gifts of Land*

In the working paper which preceded this Report, we proposed that “the *Contracts Enforcement Act* should not apply to a conveyance of an interest in land by way of gift.” We said:

> It is our belief that gifts of land present issues which differ significantly from those raised in the contractual situation.
>
> Gratuitous dispositions of land are commonly effected in circumstances in which formalities are not observed - for example, between members of a family, or between persons in other close relationship - and we have stated

> previously that, in principle, formalities should be imposed only where popular behaviour suggests that formality is an accepted practice.
>
> > In addition, we believe that the policies of certainty of contractual intent and caution, though relevant where contractual negotiations are involved, are less important where the act of the promisor is gratuitous.

We also pointed out that "the common law of gifts requires the clearest evidence of the donor's intention to give a gift *and actual or constructive delivery of the gift* to the donee," and expressed the opinion that the evidentiary requirements of the common law concerning oral gifts, which require that the donee prove delivery of the gift and offer undeniable evidence of the donor's intention to make a gift, sufficiently satisfy the evidentiary function performed by the writing requirements of the *Statute of Frauds*.

At present, the courts will only give relief to the donee of an oral gift of land from the consequences of non-compliance with the *Statute of Frauds*, if he has made extraordinary expenditures of time, effort and money in respect of the land, so as to make it manifestly inequitable to deny his title.

We have now reconsidered our view on oral conveyances of an interest in land by way of gift, and have come to the conclusion, contrary to that expressed in the working paper, that they should be subject to our proposed *Contracts Enforcement Act*.

Two considerations have led to this change in view. First, while it may well be true that gratuitous dispositions of land are commonly effected in circumstances in which formalities are not observed, it is also true that disputes ver the enforceability of such dispositions frequently involve the competing claims of the purported donee, and other claimants to the estate of the donor, represented by his executors. In these circumstances, it seems to us, there is an evidentiary value in the requirement of writing to support the gift.

Second, if the requirement of writing were to be abandoned, as it would have been under the proposal in our working paper, the result may very well have been to put the donee in a position that is, in the light of the recommendations we make below concerning the enforceability of transactions that do not conform to the legislation, significantly worse than if he were subject to our recommendations. This possibility is more fully explained below in our explanation of our recommendations concerning judicial relief from non-compliance with the writing requirements that we recommend. We can see no justification for treating donees in this way, and accordingly recommend:

4. That the Contracts Enforcement Act *should apply to a disposition of an interest in land by way of gift.*

3. Declarations of Trust and Disposition of Interests Under Trusts

Section 2(2) of the Statute of Frauds, in addition to re-enacting sections 1 and 3 of the original Statute of Frauds, re-enacts section 7 of the statute, which imposed formalities of writing on the declaration or creation of any trust or confidence in land. Section 3 of the Statute of Frauds re-enacts, with some modification, section 9 of the original Statute of Frauds, which imposed formal requirements of writing on dispositions of interests under trusts.

Once again, declarations of trust and dispositions of interests under trusts do not correspond to the contractual transactions involving land which were the subject of Recommendations (2) and (3). In fact, it has been said that:

> There are three modes by which a gift *inter vivos* can be made, namely: - (1) by deed or other instrument in writing; (2) by delivery in cases where the subject of the gift admits of delivery; and (3) by declaration of trust, which is the equitable equivalent of a gift.

If a disposition of an interest under a trust, or a declaration of trust arises in a contractual context, then the force and effect of the declaration or disposition will depend upon the validity of the *contract*, which if land is involved, will continue to be enforceable only if evidence in writing and signed by party to be charged.

In theory, the repeal of sections 2(2) and 3 will allow parol declarations of trust, and parol dispositions of interest under trusts, but the courts have not in the past been constrained by the evidentiary requirements in this context, and have recognized and enforced oral declaractiosn of trusts, and dispositions of interests under trusts, by invoking the equitable doctrine of fraud set out in *Rochefoucauld* v. *Boustead*, or by imposing a constructive trust on the property pursuant to section 4 of the *Statute of Frauds*.

It does not appear to us that serious harm has resulted from what most consider to be the judicial repeal of section 2(2) and 3 as they apply to trusts, and we can perceive no compelling reasons for supporting their continued existence.

In addition, "secret" oral declaration of trust, or disposition of interests under trusts, if they involve real property, cannot affect right of third parties who claim that they have a valid interest in the land, since the priority of persons who allege that they hold interests in land depends on the registration of that interest under the *Land Registry Act*, not merely on proof of a valid conveyance to them.

The Commission therefore recommends that:

5. *The* Contracts Enforcement Act *should not apply to an assignment or surrender of an interest under a trust*.

6. *The* Contracts Enforcement Act *should not apply to an assignment or surrender of an interest under a trust*.

4. Representations as to Credit

Section 6 of the *Statute of Frauds* applies formal requirements of writing to representations as to credit. The section, it appears, was enacted to avoid the circumvention of the "guarantee and indemnity" provisions of the statute, and was not, as were the other sections of the statute, founded on a considered judgment as to the importance of writing *per se*.

Little can be said in support of the writing requirement in this context. In the first place, the mischief to which the section was directed no longer exists, and we believe that the courts of this province are perfectly qualified to distinguish between oral guarantees and oral representations as to credit; and are not prone to use the latter as a means of avoiding the difficulties resulting from the unenforceability of the former.

Secondly, oral representations may give rise to liability both in contract and in negligence, and we see little reason why protection should be afforded to those who made *fraudulent representations* as to credit.

Thirdly, situations which give rise to actions in deceit for oral misrepresentation as to credit are extremely rare, and there is little more than a handful of cases on point. It follows that section 6 does not serve to channel or regularize any form of common or accepted commercial practice - a function which may justify writing requirements in other contexts.

While requirements of writing may be valuable in channelling orthodox commercial transactions (that is, enhancing certainty of contractual intent), and in acting as a check against unconsidered action in respect of contrac-

tual arrangements in general, they do not, nor should they, serve similar functions in cases of fraudulent representations, for to argue otherwise:

> ... yields the peculiar result that a person should be cautioned before reducing his intentional misrepresentations to writing.

That section 6 is concerned with fraudulent behaviour is, we believe, the essential argument in favour of repeal. It is one thing to relieve a party from his contractual obligations if formalities of writing are absent, and even this aspect of formalities has given us some concern. It is altogether different to relieve a party from the consequences of his fraudulent acts, and w find it difficult, if not impossible, to support a statutory provision which has precisely that effect.

The Commission therefore recommends that:

7. *The* Contracts Enforcement Act *should not apply to a representation as to credit*.

5. Guarantees and indemnities

The principle that formal requirements of writing ought to be applied in a limited fashion to transactions of significance may be of importance in two situations. In most cases that policy requires the imposition of formalities in circumstances where the *subject-matter* of the transaction is significant, and it is that aspect o formal requirements which, we believe, justifies their imposition on contracts concerning, and conveyance of, interests in land.

Contracts of guarantee and indemnity are, however, transactions of significance for an entirely different reason.

The situation to which section 5 of the Statute of Frauds speaks may be described as follows:

A agrees to sell B certain goods. For one reason or another, A doubts B's ability to pay for the goods and thus requires B to furnish a guarantor or indemnitor before going through with the agreement. Accordingly, C agrees to indemnify or guarantee B's debt.

C's promise to A is binding on him notwithstanding the fact that he is to receive no benefit from A. The issue of consideration is, in one sense, tangential to formalities of writing, since the courts have enforced promises of indemnity or guarantee.

> ... even if (as is commonly the case) the surety derives no benefit from the transaction, [since] the creditor suffers a detriment which is sufficient consideration.

Nonetheless, because the guarantor "derives no benefit from the transaction," yet is bound by what may be purely gratuitous representations, the polices which favour the imposition of formal requirements of writing, *require* their imposition in this context.

If it is accepted, in the case of bilateral contracts, that it is advantageous to have a device which allows a party to know when he is legally bound, and which induces a measure of circumspection prior to that time, then it seems logical that a party who is legally binding himself, but is to receive nothing, should be afforded the same, if not a greater, measure of protection.

In 1937, a minority of the English Law Revision Committee recommended the continued imposition of formal requirements of writing in this context:

> ... if oral contracts of guarantee are allowed we feel that there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand, and that opportunities will be given to the unscrupulous to assert that credit was given on the faith of a guarantee which in fact the alleged surety had no intention of giving ... [T]he necessity of writing would at least give the proposed surety an opportunity of pausing and considering, not only the nature of the obligation he is undertaking, but also its terms ... [I]n the vast majority of cases the surety is getting nothing out of the bargain; hence the greater reason for securing, if possible, that no mistake shall occur.

In 1953, the English Law Reform Committee adopted the 1937 minority position, and recommended retention of the formalities in the case of guarantees.

The Queensland Law Reform Commission also recommended that the requirements of written guarantees be retained, basing their decision on

> ... wider considerations of policy, such as the desirability of retaining an element of formality and deliberation in a form of transaction having such consequences that it ought, we think, not to be lightly undertaken or enforced.

While we agree, in general, with the position taken by the English Law Reform Committee and by the Queensland Commission, we do have serious doubts as to the effectiveness of the *Statute of Frauds* in providing the protection thought necessary in the context of *consumer guarantees*.

In addition, it seems to us that there are some inconsistencies and uncertainties about the law governing guarantee and indemnification generally, and guarantees and indemnification in relation to consumer transactions in particular. We are currently in the midst of an examination of the law in this respect, and we expect to publish a working paper on this subject within a fairly short time.

In this Report, accordingly, we have limited ourselves to a consideration of formalities of writing as a means of "protection" in the context of guarantees and indemnities *in general*, and have reached the conclusion that guarantees and indemnities ought to continue to be unenforceable unless formalities are observed.

The Commission therefore recommends that:

8. The Contracts Enforcement Act *should apply to contracts of guarantee and indemnity.*

In the succeeding sections of this chapter we set out, in detail, our view of what the appropriate evidentiary requirements should be, and the relief that should be available if they are not observed. We have stated our view that where the policies which favour the imposition of formalities differ, then consequential matters such as their nature, and the relief available if the formalities are absent, should also differ in order to reflect those policies.

Accordingly, in the following section we discuss the nature of the formalities which we recommend for contracts concerning land, and the relief that should be available if the formalities are disregarded in that context. Those same issues, in the context of conveyances of interests in land, and in respect of contracts of guarantee and indemnity, are discussed separately.

C. Contracts Concerning Interests in Land

1. EVIDENTIARY REQUIREMENTS UNDER THE ACT

The present *Statute of Frauds* requires that contracts concerning interests in land must be *evidenced in writing and signed by the party to be charged or by his agent* in order to be enforceable.

It is generally accepted that "authenticated" is the meaning which has been given to the word "signed." Thus initials, stamps, and letterheads, as well as proper signatures, have been held sufficient if they evidence a defendant's intention to assent to, and confirm, a contractual bargain. The signature requirement has, in our opinion, been interpreted substantially as was intended.

There is, however, a rather unsettling line of cases in which the essential terms of an agreement which must be embodied in the document tendered as the required writing, have been considered. Although the Supreme Court of Canada has suggested that only a description of the parties, property and price need be evidenced in writing, it has been held that the absence of other, relatively minor, terms such as the date of possession, or the liability for taxes, may result in the unenforceability of the agreement.

We have stated, and it is suggested above, that the signature requirement will be met if it evidences the defendant's contractual intention with regard to the alleged agreement. We believe that the requirement of a written document ought to be satisfied if it similarly evidences a contractual intent. While it is true that the term "evidenced in writing" is capable of such an interpretation, it is obvious that the cases do not support it.

On the other hand, the present requirement as to the evidence of the *terms* of the agreement is tempered, to a degree, by the principle that a writing will be sufficient under the Act, notwithstanding the fact that the document itself was *not made with the intention* of affirming the agreements. Thus letters to a third party, and possibly an entry into a personal diary, could constitute evidence in writing of an alleged agreement.

Although we agree with the latter principle (that the written document need not be made with the intent to confirm an agreement so long as it evidences that a contractual intent existed at some time), we have come to the conclusion that to require all essential terms of an agreement to be evidenced in writing, does little to further the policies of the act. What often results is a defendant escaping liability under a written agreement which he has signed, by proving that, in fact, he and the plaintiff had agreed to an additional term. Because that term is not embodied in the written document, the *Statute of Frauds* is not complied with, and the agreement is unenforceable.

Corbin expressly notes his dissatisfaction with the judicial interpretation of "note or memorandum thereof," and has argued that:

> All that is required by the [Statute of Frauds] is that "that contract" or, in the alternative, "some note or memorandum thereof" should be in writing. It was by outright addition to this that some courts held that every material term of the contract must be in writing. They thereby made it possible for a dishonest contractor to admit the making of a contract and get to repudiate it., indeed, even to go so far as to make proof themselves of the terms of the contract that they had made in order to repudiate the very memorandum that they had signed.

The present law in Canada as to the effect of omitted terms is clearly unsatisfactory. If a term is deemed "essential" to the agreement at issue, its absence, *regardless of a determination as to the existence of an agreement* evidenced by the signed writing, will render the whole agreement unenforceable.

To this must be added an important exception. A term which has been omitted from the document tendered as the required evidence in writing, but which is solely for the benefit of the party seeking to enforce the agreement, may be waived by him, with the result that the remaining terms may be enforced. This exception, although it has relieved some hardship, does not apply to a term inserted for the benefit of the defendant, or both parties.

Article 2-201 (1) of the Uniform Commercial Code is, in principle, the *Statute of Frauds* applied to contracts for the sale of goods and provides that:

> Except as otherwise provided in this section a contract for the sale of goods for the price of *$500* or more is not enforceable by way of action *or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the* quantity of goods shown in such writing.

The intention of Article 2-201 (1) was to make it clear, in the words of the Official Comments to the Code, that:

> 1. The required writing *need not contain all the material terms of the contract* and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.
>
> Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed," a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

The Commission considered whether, in the context of contracts concerning interests in land, the required evidence in writing ought to contain a description of the property, parties and the price, but we have concluded that even those requirements would detract from the policies served by formalities in this context.

In any event, those terms will, in most cases, be required in order to prove the existence of an agreement, and for that reason we consider that a provision such as that contained in the Uniform Commercial Code is the most satisfactory.

The precise formulation of evidentiary provisions is of critical importance. Should it be sufficient that the evidence in writing merely demonstrates the existence of a contract? Or should it be necessary that it evidence a contract such as that alleged by the plaintiff (i.e. that it indicate the nature of the agreement)? There are obvious arguments in favour of both positions. If one is concerned to inhibit unwary individuals from entering into contractual bargains without an appreciation of their legal obligations, and if one considers evidence of the terms of an agreement to be important, then clearly the second is the better course. On the other hand, if one favours enforcing contractual bargains which have, in fact, been entered into, the first test would be more appropriate.

The analysis of the functions of formalities set out in Chapter II reflects our concern with the policies of caution, evidence and enforceability of contractual bargains, and so we have sought to effect a compromise.

The Crowther Committee on Consumer Credit faced this issue in the context of the formal requirements for security interests, and concluded that:

> We do not think it necessary or desirable to stipulate that the memorandum should contain all the terms of the agreement - a requirement which has caused great hardship and injustice in the past - or indeed that it need do anything other than to create or provide for a security interest in identifiable security.

To avoid the hardship and injustice that has occurred in the past, it is our view that the evidence in writing should suffice if it indicates the existence of an agreement between the parties and reasonably identifies the property at issue. The substance of our view on this matter is contained in Recommendation (10) (a), which is more fully explained below. In addition, however, we consider that it should be made clear in any legislation on this subject that the omission of a term which does not affect the conclusion that an agreement exists between the parties, and reasonably identifies the property at issue, does not vitiate that agreement.

We accordingly recommend:

9. A writing required by the statute should not be insufficient merely because it omits or incorrectly states a term agreed upon.

At the same time, we wish to point out that the evidentiary provisions which we recommend are not intended to affect the general law of contract, which may invalidate an agreement on some other ground, such as mistake, uncertainty or a failure to show the necessary *concensus ad idem*.

The effect of satisfying the evidentiary provisions of a *Contracts Enforcement Act* would be to enable a plaintiff to demonstrate compliance only with that Act, and if, for example, the omission of a contractual term resulted in the absence of the necessary *consensus ad idem,* the agreement would remain unenforceable at common law notwithstanding compliance with the statute.

2. RELIEF UNDER THE ACT

We have stated our view that a statute which imposes formalities on certain transactions, yet which does not provide for relief when, in fact, transactions have been concluded, is incomplete. The original *Statute of Frauds* suffered from that omission, and for three hundred years the courts have, with varying degrees of success, attempted to remedy the inadequacy.

We have also stated our belief that requirements of writing may in differing circumstances serve one or more of several valuable functions. First, they protect parties from fraudulent allegations of oral agreements. Secondly, the formalities may provide evidence of the existence of the terms of an agreement, thus reducing the time spent in resolving conflicting parol testimony. Thirdly, the requirement of a signed written document increases the formality of the procedure, making the parties to a transaction aware that they will be legally bound by their acts. Finally, the rules enhance the ability of a court and, more importantly, of the parties themselves to know if and when an agreement has been concluded.

It is clear, however, that in some cases, parties do intend orally to create legal relationships. Once this occurs, much of the justification for refusing enforcement collapses, and other policy considerations call for judicial recognition of the contract.

These considerations are not difficult to identify. First, the danger of fraudulent allegations of oral agreements is counter-balanced by the danger that, under a strict rule invalidating oral agreements, a party can fraudulently induce performance by making an oral agreement he knows to be invalid, and then avoid his reciprocal obligations by relying upon the *Statute of Frauds*.

Secondly, even in the absence of actual fraud, a refusal to enforce or recognize oral agreements on which one party has relied, may result either in an unconscionable loss to the party who has relied on the agreement, or in the unjust enrichment of the party who denies it. Finally, the most persuasive argument in favour of allowing some relief from noncompliance with statutory formalities, is that the rule invalidating oral agreements conflicts with the fundamental policy of enforcing bargains between private parties.

Immediately upon the enactment of the *Statute of Frauds,* which on its face ignores those considerations which favour enforceability, the courts took upon themselves the task of resolving the policies brought into conflict by the statute.

The result - the doctrines of part performance and restitution - may be viewed as a judicial attempt to resolve and balance those conflicting policy considerations, and in the light of a statutory enactment which obviously reflects a decision in favour of unenforceability, has achieved a large measure of success.

On the other hand, we have stated our view that the intervention by the courts has been inconsistent, and that statutory enactment of the relief available once an agreement is orally concluded, would go some way towards introducing consistency and clarity of application. Accordingly, in the following section we set out what we believe to be the proper resolution of the conflict of those policy considerations which favour the unenforceability of agreements unless formalities are observed, with those policies which favour the enforceability of freely bargained exchanges between private parties.

For reasons of convenience, the resolution of those policy considerations will be analyzed in four contexts. A number of factors, including the possibility of unjust enrichment of a defendant, the probability of fraudulent allegations, the necessity of written evidence of the agreement, and the possibility of loss incurred by a plaintiff, all vary with those four situations, and have thus influenced our proposals for each.

The first situation in which the enforceability of an alleged parol agreement may be at issue is that involving the fully executory agreement where neither party has rendered performance or changed his position in reliance on an oral agreement; the second is the situation involving the fully executed agreement where both parties have performed their obligations under an oral agreement; the third occurs where the party seeking to enforce the agreement has acted on it; and the fourth concerns the case in which the party who subsequently denies the agreement has acted on it.

(a) Fully Executory Oral Agreements

The California Law Revision Commission has described this situation, and has set out the policy considerations which should influence a decision as to the enforceability of an agreement where *neither* party has acted on it:

> When neither party has rendered referable performance or otherwise changed his position in reliance on an oral [agreement], refusal to enforce it will result in a loss of the parties' expectancy under the agreement ... it will not result in a loss of reliance by one party or a windfall to the other. In addition, since there is no referable performance, the sole evidence of the oral agreement will normally be the conflicting, self-serving parol claims of the parties. In such a case, the interest of the judicial system in inducing the certainty and formality of written agreements and in avoiding litigation over the existence and terms of parol agreements justifies the unenforceability of the agreement].

We agree with those arguments, and see little to support the position that oral agreements evidenced *only* by the parol claim of a plaintiff ought to be enforced. Canadian jurisprudence on this matter also suggests that the courts have not, in general, concerned themselves with the loss of a party's expectation interest in this situation and in the light of persuasive arguments in favour of formalities, we see no reason to recommend any modification of that position.

(b) Fully Executed Oral Agreements

When *both parties* have performed their obligations under an oral agreement, it is clear that a rule which invalidates the agreement would be senseless. The danger that a plaintiff will fraudulently allege an agreement is negligible since the party seeking to avoid the agreement has himself performed it. More importantly, concepts of certainty of contractual intent and protection are irrelevant where a party to an agreement seeks to undo it when, in fact, both he and the plaintiff have performed all their contractual obligations.

The present law, although unsettled, again reflects those conclusions and it has been held that the *Statute of Frauds* does not apply to fully executed agreements concerning interests in land. Accordingly, we have concluded that no alteration of the present law is called for.

Partially Executed Oral Agreements

(i) Acts of the party seeking to enforce the agreement

We have stated our view that a rule which prevents the enforcement of oral agreements without exception is unrealistic. Indeed, the judicial attitude towards the *Statute of Frauds* reveals that such a rule will be circumvented either to prevent injustice when a party has relied to his detriment on it, or to prevent the unjust enrichment of a defendant who invokes the statute against a party who has acted in good faith.

The circumvention of the statute has been limited to these situations, and is rooted in the doctrine of part performance and the principles of restitution. The availability of this relief mitigates the disadvantages of formal requirements of writing, and the Law Reform Commission of Queensland recently recommended their retention since

> ... the equitable doctrine of part performance has mollified many of the worst features of the legislation.

Yet we have set out what we consider to be a number of significant difficulties in this area and believe that logic as well as fairness call for their resolution.

The first, and most important, criticism of the doctrine of part performance is the requirement that, for the court to enforce an oral agreement, there must be acts "*unequivocally referable to a contract in reference to the very lands in question*."

It has become apparent that this formulation of the doctrine precludes the enforceability of many agreements in respect of which there have been acts which do, in fact, point to the existence of a binding contractual relationship. This test of part performance was described by the English House of Lords as divorced from reason and principle and after much consideration we have concluded that there is little to be said in favour of the Canadian position.

In 1937, the Supreme Court of Canada considered a similar doctrine under the Civil Code of the Province of Quebec. In that province, the "*Statute of Frauds*" is framed as an evidentiary provision and Article 1235 of the Civil Code provides, *inter alia,* that:

> In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former ...
>
> 4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain;

An important exception to the requirement of writing outlined in Article 1235, is Article 1233, which provides that:

> Art. 1233. Proof may be made by testimony: ...
>
> 7. In cases in which there is a commencement of proof in writing. In all other matters proof must be made by writing or by the oath of the adverse party.

Rinfret J., in delivering the judgment of the Court, held that the "commencement of proof in writing" (an unsigned document which emanates from a defendant), need only *render probable* the existence of the fact to be proved.

The proposition that a "commencement of proof *in writing*" will enable a plaintiff to avoid the "*Statute of Frauds*" in Quebec, is not entirely accurate, since the jurisprudence suggests that commencement of proof may arise from *any fact* which has been clearly established. In *Sirois* v. *Parent,* Gagne J. said:

> It is well recognized that this commencement of proof can result from a material fact, clearly established, from which one may deduce the probable, if not absolutely certain, existence of an agreement.

In 1975, La Comite du Droit de la Preuve de L'Office de Revision du Code Civil, reviewed the existing law concerning formal requirements of writing, and after recommending the re-enactment of formalities for any juridical act with an object of more than $300, they excepted the situation where:

> ... there is a commencement of proof [whether in writing or not] which makes the alleged juridical act appear probable.

It should also be noted that the *Sale of Goods Act* now in force in the common law provinces of Canada, and in force in British Columbia prior to 1958, provided for a similar exception to the requirement of formalities imposed under those statutes.

For example, section 11 of the *Sale of Goods Act,* in force in British Columbia prior to 1958, provided that:

> 11. (1) A contract for the sale of any goods of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf.
>
> (3) There is an acceptance of goods within the meaning of this section when the *buyer does any act in relation to the goods which recognizes a preexisting contract of sale,* whether there be an acceptance in performance of the contract or not.

We have reached the conclusion that the English test, which requires acts which point, on the balance of probabilities, to the existence of an agreement, the civil law test which requires a similar degree of proof, and the “performance” under the *Sale of Goods Act* which required only that the buyer do some act which recognized a preexisting contract, are more appropriate that the test of "unequivocal referability" which has been applied to the *Statute of Frauds* in the common law provinces of Canada.

If there are acts performed by a plaintiff which, on the balance of probabilities, point to a binding contractual relationship with the defendant, the policies in favour of enforcing freely negotiated bargains between private parties ought to be given priority.

There is, however, a critical element of the doctrine of part performance which, we believe, reveals its true nature. Under the present law, acts of a plaintiff, regardless of their unequivocal nature, will not enable the court to enforce the agreement unless they were done with the knowledge and acquiescence of the defendant.

In Delanev v. *T. P. Smith* a plaintiff, relying on an alleged parole agreement bad actually taken possession of the land at issue. The possession, however, had taken place unknown to the defendant, and in the opinion of the court,

the possession could not constitute a sufficient act of part performance since it showed "no agreement by the defendant to anything."

The critical element of the doctrine of part performance, therefore, is not the plaintiffs behaviour which constitutes objective evidence of the existence of a contract, but *consent and acquiescence of a defendant* in that behaviour. That acquiescence is, in effect, a substitute for the defendant's signature, providing objective evidence which confirms that he (the defendant) agreed to bind himself.

In our opinion the conflict between the policy considerations which favour formalities, and those which favour enforcement, can be resolved, to some degree at least, by the proposition that acquiescence of a defendant in acts of a plaintiff, whether it takes the form of allowing the plaintiff to take possession of the land at issue, or accepting money as a deposit on, or part payment of, the purchase price, should bind him as extensively as his signature.

Although our recommendations are intended to provide for the enforceability of an agreement wherever a plaintiff has done *any act,* to the knowledge of a defendant, which points to the existence of a contract, there are difficulties when that act takes the form of a deposit on, or part payment of, the purchase price of the property. They arise from the fact that, for three hundred years, the courts have denied that a deposit or part payment of the purchase price could constitute "part performance" of the alleged agreement.

Any statute which embodies our recommendations should therefore provide specifically that a deposit or part payment of the purchase price, do constitute acts of the party alleging the contract within the meaning of that term under our recommendations.

(ii) Acts of the party to be charged

Because the equitable doctrine of part performance is based on the injustice to a plaintiff who has relied on an oral agreement, acts of a defendant, regardless of their nature, cannot be relied upon by a plaintiff in an action to enforce a parol agreement under the doctrine of part performance. There is, however, no doubt that the crucial element of the doctrine of part performance is, under the present law, the acquiescence *of the defendant* in acts of the plaintiff. In our view, no reason exists for denying equal value to *positive acts* of a defendant which establish that he has bound himself. The danger of a fraudulent allegation of an oral agreement is reduced to a significant degree, once the defendant himself has acted and confirmed his intent with regard to the agreement.

We have concluded, therefore, that where a defendant has acted in such a manner that a court can, from that alone, deduce the existence of a contract, not inconsistent with that alleged by the plaintiff, the contract should be enforceable notwithstanding the absence of a written document.

(iii) The avoidance of inequitable results

The propositions that we have advanced thus far are concerned, in essence, with placing the doctrine of part performance upon a rational foundation, and the recommendations which embody those propositions which are set out below will, if enacted, go some distance towards effecting a sensible balance between the policies favouring formalities, and those favouring the avoidance of injustice and hardship.

The proposals in our working paper stopped at this point. Upon reconsideration, however, we have come to the conclusion that they did not go far enough. They would leave uncatered for a number of potential hardship cases in which, in our opinion, judicial relief by way of enforcement of a contract concerning an interest in land that is defective in point of form, should be available. We have in mind a situation such as the following:

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

In a situation of this kind, the recommendations that we have made thus far would provide no ground upon which relief could be granted to B, since there will have been no conduct on the part of A or B which would satisfy the reformulation of the doctrine of part performance. Yet, it seems to us, it would, on a balancing of the equities, be manifestly unjust to allow A to avoid performance of his obligations under the contract.

A similar view has been taken by the National Conference of Commissioners on Uniform State Laws in the United States. At the Annual Conference of the Commissioners in 1975, approval was given to a *Uniform Land Transactions Act*. Section 2-201 (b) of that Act provides:

> (b) A contract not evidenced by a writing satisfying the requirements of subsection (a), but which is valid in other respects, is enforceable if:
>
> (1) it is for the conveyance of real estate for one year or less;
>
> (2) the buyer has taken possession of the real estate and has paid all or a part of the price;
>
> (3) the buyer has accepted a deed from the seller;
>
> (4) either party, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to the extent that an unreasonable result can be avoided only by enforcing the contract; or
>
> (5) the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that the contract for conveyance was made.

Clause (4) of paragraph (b) is intended, in our opinion, to permit a court to enforce a contract in circumstances of the kind that we have outlined above. It is based upon, though somewhat broader in scope than, a provision contained in section 197 of the Restatement of Contracts, Second, and, while we do not favour the particular drafting of section 2-201 (b) (4) of the *Uniform Land Transactions Act,* it does, in our view, incorporate the correct principle, and should be included, in the somewhat modified version that we recommend below, in any legislation enacted in British Columbia.

The Commission accordingly recommends:

10. No contract concerning an interest in land should be enforceable unless,

(a) there is some evidence in writing which indicates that a contract has been made between the parties, reasonably identifies the subject-matter of the contract, and is signed by the party to be charged or by his agent; or

(b) the party to be charged acquiesces in acts of the party alleging the contract, which indicate that a contract, not inconsistent with that alleged, has been made between the parties, or

(c) there are acts of the party to be charged which indicate that a contract, not inconsistent with that alleged, has been made between the parties, or

(d) the party alleging the contract has, in reasonable reliance on the contract, changed his position so that having regard to the position of both parties an inequitable result can be avoided only by enforcing the contract.

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

Implicit in these recommendations is the principle that full contractual damages for breach of the contract, either in lieu of, or in addition to, specific performance, should be available regardless of the test of enforceability which is relied upon in a particular case.

(iv) Restitution

In the preceding section we set out what we believe to be the most satisfactory resolution of the conflict between policies supporting the continued existence of formal requirements of writing and those policies supporting the enforceability of freely negotiated bargains notwithstanding the absence of writing.

Our major conclusion, to this point, has been that the arguments in favour of formal requirements of writing justify the loss of a plaintiff's "expectation interest" where neither party to an agreement has acted on it. We have also concluded that the principle of enforceability should not apply to the situation where the party who denies the agreement has acquiesced in acts of the plaintiff which point to the existence of the agreement, or to the situation where the defendant himself has acted in that manner, or it is otherwise inequitable to refuse to enforce the bargain. In those situations, the evidentiary value of the performance, as well as principles of detrimental reliance and estoppel, prevail over continued unenforceability.

Nonetheless, policies supporting formal requirements of writing have never justified the unjust enrichment of a defendant which may occur when a plaintiff has relied on an oral agreement which, in fact, was concluded. The courts have recognized this principle, and under those circumstances have ordered restitution of benefits received by a defendant pursuant to an unenforceable oral agreement. Thus, where a defendant who has orally agreed to sell his property, has received moneys on deposit, or the benefits of services from a plaintiff purchaser, the court has ordered the deposit, or the monetary equivalent of the services, to be returned to the plaintiff.

The relief available by way of restitution is, however, limited to the unjust enrichment of the defendant. Thus a plaintiff who in good faith relies on a parol agreement cannot, unless his reliance points to the alleged agreement, or results in a benefit to the defendant, recover that reliance interest.

Recovery of what might be called the *"full reliance interest,"* incurred by a plaintiff is, however, difficult to justify since in many cases to do so would be to detract seriously from those policies which favour the imposition of formalities. On the other hand, we believe that a plaintiff ought to be compensated for money expended in reliance on a parol agreement which, in fact, has been concluded, whether or not the defendant has benefited from the expenditure.

Although we consider that the liability of a defendant under restitutionary principles should be identified as one "imposed by law" rather than as one based on an "implied contract," we have concluded that, where the liability "imposed by law" is consequent upon an unenforceable contract, an argument in favour of expanded liability can be made. To be sure, the liability is no longer restitutionary in nature (since there is no benefit received by the defendant), but principles of fairness and justice do, in our opinion, support this approach.

The Commission therefore recommends that:

12. Where a contract is unenforceable pursuant to the preceding recommendations, a court should be able to grant to the plaintiff such relief,

(a) by way of restitution of any benefit received by the party to be charged, and

(b) by way of compensation for moneys expended in reliance on the contract, as is just.

We point out, however, that in view particularly of the provisions of Recommendation (10(d)), it is unlikely that occasions will frequently arise upon which resource to the provisions of Recommendation (12) will be necessary.

D. Gifts of Interests in Land

We have set out earlier the reasons that have led us to the conclusion, contrary to that taken in our earlier working paper, that the enforceability of gifts of land should be governed by the same principles as those that we have recommended with respect to contracts, and we accordingly recommend:

13. No disposition of an interest in land by way of gift should be enforceable unless;

(a) there is some evidence in writing which indicates that a gift has been made, reasonably identifies the subject-matter thereof and is signed by the donor or by his agent; or

(b) the donor or the party to be charged acquiesces in acts of the party alleging the gift which indicate that a gift, not inconsistent with that alleged, has been made; or

(c) there are acts of the donor or the party to be charged which indicate that a gift, not inconsistent with that alleged, has been made; or

(d) the party alleging the gift has, in reasonable reliance thereon, changed his position so that having regard to the position of both parties an inequitable result can be avoided only by enforcing the gift.

While these recommendations to some degree reflect the requirements of the common law concerning the proof of oral gifts of land, as outlined earlier in this Report, they also mitigate the rigorous requirements of that body of law in two respects: (1) it will be unnecessary for the donee under our recommendations to establish actual or constructive delivery of the subject-matter of the gift; and (2) something less than the proof of extraordinary expenditures of time, effort and money required by the common law as a condition precedent to relief, may, in principle, be sufficient to prove the making of the gift.

In this connection, it is worth observing that the Legislature, at its 1976 Session, amended the *Evidence Act* by the repea1 of section 11, which provided that:[52]

In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

52. *Attorney-General Statutes Amendment Act, 1976*, S.B.C. 1976 c. 2, s. 20(a).

In our view, the repeal of that provision was a sensible step, which will go some way towards easing the burden of proof facing the donee of a testamentary gift; and the recommendation that we now make with respect to gifts of interests in land is made in furtherance of the same general policy of eliminating unnecessary obstacles to the attainment of just results.

The provisions of Recommendation (12) should, in our opinion, be applicable as well to gifts of interests in land which are unenforceable pursuant to our recommendations.

E. Guarantees and lndemnities

In the preceding chapter we argued that the policies which support the imposition of formal requirements of writing, should also influence related decisions concerning the evidentiary requirements of the formalities, and the relief available to plaintiffs who seek to enforce agreements when the formalities have not been observed.

While formal requirements may serve several valuable and essential functions in respect of contracts concerning, and gratuitous dispositions of, interests in land, it is the cautionary or protective function of formalities which we consider crucial in the context of guarantees and indemnities. It is important to note, at the outset, that this discussion, and our recommendations, are directed at guarantees and indemnities in general, and we acknowledge the fact that certain classes of guarantees and indemnities may deserve an even greater measure of protection.

Bearing those points in mind, we now turn to the specific aspects of formal requirements of writing which we believe are essential if the policies supporting their imposition are to be carried into effect.

1. EVIDENTIARY REQUIREMENTS UNDER THE ACT

The Statute of Frauds now provides that no guarantee or indemnity is enforceable unless it is *evidenced in writing* and signed by the party to be charged or by his agent.

We have earlier stated our opinion that whatever may have been its original purpose, the *Statute of Frauds* now ensures, to some degree at least, that there is introduced into the making of a guarantee or indemnity an element of formality and circumspection that might otherwise be absent.

The formal requirements set out in the *Statute of Frauds* have, in the past, been satisfied, however, by the initialling by a guarantor of a document which creates a contractual relationship between the promisee of the guarantee and the principle debtor. In view of the unilateral benefit obtained by a creditor once the guarantee has been concluded, it may be thought that compliance with the formalities of the Statute in so perfunctory a way, is hardly sufficient to bring about that awareness of the implications of the guarantee or indemnity that seems desirable.

In the working paper which preceded this Report, we expressed the view that "more substantial and precise formalities" were, in the circumstances, necessary. While we pointed out that there might exist special policy considerations calling for special treatment for guarantees given in respect of consumer transactions, we proposed that, for guarantees and indemnities in general, any new legislation should require that they be unenforceable unless “set out in writing” (as contrasted with the present requirement that they be “evidenced” in writing), and signed by the guarantor or by his agent.

We expect shortly to publish a working paper in which we shall make particular proposals concerning guarantees of consumer transactions. With respect to guarantees in general, however, we have reconsidered our proposal for more precise formalities, and have come to the conclusion that we should make no recommendation for any change in the

present requirements. There are essentially two reasons for this decision. First, we believe that the proposals that we intend to make concerning consumer guarantees will significantly reduce the area of concern. The second reason is this. Guarantees are frequently effected by means of making or endorsing a negotiable instrument, and it is not constitutionally possible for the Province to enact the legislation effecting the form of such negotiable instruments that would be necessary to implement the proposal that we made in our working paper. It would be permissible, in our opinion, for the Province to enact legislation prescribing collateral formalities in connection with guarantees executed in the form of negotiable instruments, and we will, indeed, be making proposals to this end in our forthcoming working paper on this subject. We do not think, however, that the policy considerations which argue in favour of such collateral requirements operate with anything like the decisive force outside the field of consumer transactions that they do within that field.

Accordingly, subject to such specific formalities as may be appropriate in the context of consumer guarantees and indemnities, the Commission recommends that:

14. Subject to Recommendation 15, a guarantee or indemnity should not be enforceable unless it is evidenced in writing and signed by the guarantor or by his agent.

2. RELIEF UNDER THE ACT

We have argued, in other contexts, that relief from non-compliance with statutory formalities should be available where a plaintiff has relied to his detriment on the alleged agreement, especially when that reliance points to the existence of the agreement at issue. It is that combination of factors which we believe justifies the enforcement of oral agreements concerning interests in land. here are, however, a number of reasons why this would be inappropriate in the context of guarantees and indemnities.

First, we suspect that in many cases, the reliance by the promisee of the guarantee or indemnity (the creditor) will take the form of his entering into an agreement with the principal debtor, or forbearing to enforce legal rights against a third party. The triangular nature of the contract of guarantee will result, in most cases, in reliance by a plaintiff which will bear no relationship to the contract of guarantee, but points, instead, to an agreement with a third party.

In addition, the function of the formalities in this context is, we believe, essentially one of protection, and the necessity for protection does not decrease merely because a creditor completes his part of the bargain. For these reasons the Commission believes that acts of the party in whose favour the guarantee was given should not by themselves lead to the enforcement of the agreement.

An argument supporting the enforceability of agreements which do not comply with formal requirements, focuses on acts of the party charged on the agreement (the guarantor or indemnitor), which may take the form of part performance of the obligations under the contract of guarantee or indemnity. At present, acts of a guarantor or indemnitor, regardless of their nature, cannot be relied on by a creditor in an action to enforce the guarantee or indemnity. At the same time, a guarantor or indemnitor who has paid money on an "informal" guarantee or indemnity cannot recover that money from the creditor since the transaction, although unenforceable under the *Statute of Frauds,* is available as a defence in an action brought by a party who denies the agreement.

In some cases a defendant has knowingly entered into a contract of guarantee, met part of his obligations thereunder, and only upon discovering that the guarantee is deficient in point of form, has successfully used the Statute to avoid his contractual obligations. In other cases, part payment may indicate no more than the confused reaction of someone confronted by a document purporting to record, or by a demand purporting to be made pursuant to, a transaction the legal effect of which he did not in fact understand.

We have had great difficulty in coming to a conclusion upon what should be the appropriate solution to the problem of the enforceability of a guarantee where there have been acts of part performance by the guarantor.

Three solutions are possible. First, one might provide that the guarantee should be unenforceable in any event, and that any payment made should be recoverable. This, of course, would result in a change in the present law. Secondly, one might provide that the guarantee should be enforceable only to the extent of any payments made, but no further. And thirdly, one might provide that a guarantor who acts on a guarantee and confirms it by his behaviour should be bound, and should not be able to recover any money paid out.

The objection to the first approach is that it enables obligations in fact undertaken, with a full appreciation of their significance, to be evaded. All of us are agreed that this is a result that should be avoided. Some members of the Commission, if left to themselves, would opt for the second solution on the ground that it represents the fairest compromise than can be worked out in the form of a rule of general application, to a problem that is in many respects intractable. On the other hand, the concern of those members of the Commission arises particularly in the context of guarantees of consumer transactions, and we expect to make suitably tailored proposals in that connection shortly. We have come to the conclusion that the appropriate recommendation to make is:

15. A guarantee or indemnity that does not meet the requirements of Recommendation 14 should, nonetheless, be enforceable if there are acts of the party to be charged which indicate that a guarantee or indemnity, not inconsistent with that alleged, has been made between the parties.

The final exception to our recommendations is set out in section 5(2) of the *Statute of Frauds*. This provides that section 5(1) (which imposes formal requirements of writing on guarantees and indemnities) is inapplicable to guarantees and indemnities arising by operation of law.

The precise meaning of "guarantees and indemnities arising by operation of law" is not clear, but the term might refer both to guarantees or indemnities imposed pursuant to other provincial statutes, and to guarantees and indemnities *imposed* by the court in certain special circumstances. While it is highly unlikely that a court would hold that a statute embodying our recommendations restricts its jurisdiction to impose such indemnities and guarantees, we see little harm in expressly excepting those situations.

The Commission therefore recommends that:

16. The Contracts Enforcement Act *should not apply to guarantees and indemnities imposed by statute, or arising by operation of law.*

CHAPTER IV CONCLUSIONS

A. Summary of Recommendations

The following is a summary of the recommendations made in this Report. The recommendations contained in this summary appear, for convenience, in a somewhat different order from that in which they appear in the body of the Report. The figures in parentheses that appear after each recommendation are the pages in the Report in which the recommendation in question is discussed.

The Commission recommends:

1. REPEAL AND REPLACEMENT

1. That the Statute of Frauds, *R.S.B.C. 1960, c. 369 be repealed, and replaced by a new enactment, entitled the* Contracts Enforcement Act, em*bodying the principles contained in the succeeding recommendations*. (58)

II. SCOPE OF NEW LEGISLATION

(a) Transactions in land

(i) Contracts

2. Subject to Recommendation (3), the Contracts Enforcement Act *should apply to a contract concerning an interest in land*. (58-59)

3. The Contracts Enforcement Act *should not apply to any contract to lease, or lease of an interest in land for a term of three years or less*. (59)

(ii) Gifts

4. The Contracts Enforcement Act *should apply to a disposition of an interest in land by way of gift*. (59-60)

(b) Trusts

5. The Contracts Enforcement Act *should not apply to a declaration of trust*. (60-61)

6. The Contracts Enforcement Act *should not apply to an assignment or surrender of an interest under a trust*. (60-61)

(c) Representation as to Credit

7. The Contracts Enforcement Act *should not apply to a representation as to credit*. (61-62)

(d) Guarantees

8. The Contracts Enforcement Act *should apply to contracts of guarantee and indemnity*. (62-63)

9. The Contracts Enforcement Act *should not apply to guarantees and indemnities imposed by statute, or arising by operation of law*. (78)

III. ENFORCEABILITY OF TRANSACTIONS CONCERNING INTERESTS IN LAND

(a) Contracts

10. No contract concerning an interest in land should be enforceable unless

(a) there is some evidence in writing which indicates that a contract has been made between the parties, reasonably identifies the subject-matter of the contract, and is signed by the party to be charged or by his agent; or

(b) the party to be charged acquiesces in acts of the party alleging the contract, which indicate that a contract, not inconsistent with that alleged, has been made between the parties; or

(c) there are acts of the party to be charged which indicate that a contract, not inconsistent with that alleged, has been made between the parties; or

(d) the party alleging the contract has, in reasonable reliance on the contract, changed his position so that having regard to the position of both parties an inequitable result can be avoided only by enforcing the contract. (64-73)

11. Without limiting the generality of the meaning of "acts of the party alleging the contract" in Recommendation (10 (b)), that term should include the situation where the party alleging the contract has made a deposit, or part payment of the purchase price. (73)

(b) Gifts

12. No disposition of an interest in land by way of gift should be enforceable unless

(a) there is some evidence in writing which indicates that a gift has been made, reasonably identifies the subject-matter thereof and is signed by the donor or by his agent; or

(b) the donor or the party to be charged acquiesces in acts of the party alleging the gift which indicate that a gift, not inconsistent with that alleged, has been made; or

(c) there are acts of the donor or the party to be charged which indicate that a gift, not inconsistent with that alleged, has been made; or

(d) the party alleging the gift has, in reasonable reliance thereon, changed his position so that having regard to the position of both parties an inequitable result can be avoided only by enforcing the gift. (75)

(c) Relief Notwithstanding Unenforceability

13. Where a contract or gift is unenforceable pursuant to the preceding recommendations, a court should be able to grant to the plaintiff such relief,

(a) by way of restitution of any benefit received by the party to be charged, and

(b) by way of compensation for moneys expended in reliance on the contract, as is just. (73-74)

IV. ENFORCEABILITY OF GUARANTEES

14. Subject to Recommendation (15), a guarantee or indemnity should not be enforceable unless it is evidenced in writing and signed by the guarantor or indemnitor or by his agent. (75-77)

15. A guarantee or indemnity that does not meet the requirements of Recommendation (14) should, nonetheless, be enforceable if there are acts of the party to be charged which indicate that a guarantee or indemnity, not inconsistent with that alleged, has been made between the parties. (77-78)

V. SUFFICIENCY OF WRITING

16. A writing required by the statute should not be insufficient merely because it omits or incorrectly states a term agreed upon. (66-67)

B. Acknowledgments

The preparation of this Report would have been impossible without the dedicated work and exhaustive scholarship of Mr. David Cohen, formerly Legal Research Officer to the Commission. Mr. Cohen was responsible for all of the research involved in this project, and for writing the working paper which preceded this Report; and we wish here to record our considerable indebtedness to him. Our former colleague, Professor Allen Zysblat, played a large role in our consideration and debate of the issues involved in this project, and we are grateful to him too, for his participation. Prof. Zysblat resigned from the Commission prior to completion of this Report, however, and accordingly is not a signatory to it. And finally, we wish to record here our great sadness at the death, a few weeks before this Report was ready for his signature, of our colleague Ronald C. Bray. Mr. Bray played a large part in shaping our recommendations.

LEON GETZ, *Chairman*
PAUL D. K. FRASER
PETER FRASER
DOUGLAS LAMBERT

June 24, 1977

APPENDICES

APPENDIX A

REVISED STATUTES OF BRITISH COLUMBIA, 1897

CHAPTER 85

An Act for prevention of Frauds and Perjuries. (For prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury.)

Short Title.

Short title.

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

Parol leases and interest of freehold shall have the force of estates at will only.

2. All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments or created by livery of seisin only, or by parol, and not put in writing and signed by the parties of making or creating the same, or their agents thereunto lawfully authorised by

writing, shall have the force and effect of leases or estates at will only, and shall not, either in low or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol, leases, or estates, or any former law or usage to the contrary notwithstanding. 29 Car. 2, c. 3, s. 1.

Except leases not exceeding three years.

3. 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 to two-third parts at the least of the full improved value of the thing demised.

No leases not exceeding three years.

4. No leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law. 29 Car. 2, c. 3, s. 3.

Promises and agreements by parol.

5. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby the charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. 29 Car. 2, c. 3, s. 4.

Consideration for guarantee need not appear by writing.

6. No special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. 19 & 20 Vict. (Imp.), c. 97, s. 3.

Declarations or creations of trusts to be in in writing.

7. 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 writing or else they shall be utterly void and of none effect. 29 Car. 2, c. 3, s. 7.

Trusts arising by implication of law excepted.

8. Provided always, that where any conveyance shall be made of any lands or tenements by which a trust of confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this Statute had not been made, anything hereinbefore contained to the contrary 2, c. 3, s. 8.

Assignments of trusts to be in writing.

9. All grants and assignments of any trust or confidence shall likewise be in 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. 29 Car. 2, c. 3, s. 9.

Lands, etc., shall be liable to judgments of cestui que trust.

10. It shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute or recognizance hereafter in that behalf suing, of all such lands, tenements, rectories,

tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done if the said party against whom execution hereafter shall be so sued had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of, in trust for him at the time of the said execution sued.

And held free from the incumbrances of the persons seised in trust.

Which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held or enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed, in trust for the person against whom such execution shall be sued.

No heir shall by reason thereof become chargeable of his own estate

And if any cestui que trust hereafter shall die, leaving a trust in fee simple to descend to his heir, there and in every such case such trust shall be deemed and taken, and is hereby declared to be, assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended, any law, custom, or usage to the contrary in anywise notwithstanding. 29 Car. 2, c. 3, s. 10.

No heir shall by reason thereof become chargeable of his own estate.

11. No heir that shall become chargeable by reason of any estate or trust made assets in his hands by this law shall, by reason of any kind of plea of confession of the action, or suffering judgment by nient dedire, or any other matter, be chargeable to pay the condemnation out of his own estate; but by descent, in those hands soever it shall come after the writ purchased, in the same manner as it is to be at and by the common law, where the heir-at-law pleading a true plea judgment is prayed against him thereupon, anything in this present Act contained to the contrary notwithstanding. 29 Car. 2, c. 3, s. 11.

Representations of character and credit.

12. No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods thereupon, unless such representation or assurance be made in writing, signed by the party to be charged therewith. 9 Geo. 4, c. 14, s. 6.

APPENDIX B

REVISED STATUTES OF BRITISH COLUMBIA, 1960

CHAPTER 369

Statute of Frauds

Title.

1. This Act may be cited as the *Statute of Frauds*. 1958, c. 18, s. 1.

Agreement or assignment thereof to be in writing.

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

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

(3) This section does not apply to any lease of an interest in land for a term of three years or less. 1958, c. 18, s. 2.

Assignments of trusts to be in writing.

3. No assignment or surrender of a beneficial interest in any property held in trust in enforceable by action unless evidenced in writing, signed by the party assigning or surrendering same. 1958., c. 18, s. 3.

Exceptions.

4. Sections 2 and 3 do not apply to trusts arising or resulting by implication or construction of law. 1958, c. 18, s. 4.

Guarantee or indemnity to be in writing

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

(2) This section does not apply to a guarantee or indemnity arising by operation of law. 1958, c. 18, s. 5.

Representations of character and credit.

6. No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods thereupon, unless such representation of assurance be made in writing, signed by the party to be charged therewith. 1958, c. 18, s. 6.