

THE STATUTE OF FRAUDS AND SALE OF LAND CONTRACTS

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In this article, the author critically evaluates the provisions, evolution and present state of the Statute of Frauds in relation to sale of land agreements. While the original conditions supporting the enactment of the Statute have long been superseded, the Statute has survived, though in a greatly attenuated way as numerous judicial exceptions have been created. These inroads into the writing requirement are assessed and the Statute judged as to whether it usefully promotes the evidentiary, cautionary or channelling function of written forms. The author concludes that the Statute fails to advance any theory of forms in a coherent manner and that it is out of step with current contract law; that a partial reform enshrining common law exceptions to the writing requirement in the form of a statute is inadequate; and urges the entire repeal of the Statute so far as it relates to sale of land contracts.

Dans cet article, l'auteur analyse d'un oeil critique, sous l'angle des accords de vente de biens-fonds, les dispositions de la loi sur la fraude (Statute of Frauds), son évolution et son état actuel. Quoique les conditions premières sur lesquelles la loi se basait à l'origine aient disparues depuis longtemps, cette loi subsiste encore, bien atténuée cependant, car on a vu se créer un grand nombre d'exceptions juridiques. L'auteur examine ces poussées contres la nécessité de coucher l'accord par écrit et se demande si la loi facilite la fonction des formes qui est de servir de preuve, de mise en garde et de marque tangible de l'obligation légale des parties. L'auteur en conclut que la loi n'a pas réussi à faire progresser de façon cohérente une théorie des formes et qu'elle ne s'accorde pas avec le droit des contrats actuel. Il en conclut aussi qu'une réforme partielle enchâssant, sous forme de loi, ce qui, en droit de la common law, fait exception à la nécessité d'être couché par écrit est insuffisante et recommande l'abrogation de la loi quand elle a trait à la vente de contrats de biens-fonds.

Introduction

A colleague of mine speaks ruefully of the intelligence he squanders when teaching and monitoring inferior primary materials in the areas of evidence and civil procedure. In much the same vein, Mr. Justice Stephen, writing a century ago about sale of goods contracts and section 17

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of the Statute of Frauds,¹ lamented the fact that he had devoted "a great deal of time which might have been better employed to this piece of morbid anatomy".² No one who has spent time examining the case law decided under the Statute, particularly in respect of sale of goods and sale of land contracts, can leave the subject without experiencing at least some degree of disenchantment. Indeed, the Statute has had numerous critics over the years³ but, despite the evasions and scholasticism prompted by its application to litigated fact, the contractual writing requirement has

¹ An Act for the Prevention of Frauds and Perjuries 1677, 29 Car. II, c. 3. See J. Williams, *The Statute of Frauds* [:] Section IV (1932). Much useful material is also to be found in Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (1977) and Alberta Institute of Law Research and Reform, *Statute of Frauds* (Background Paper No. 12, March 1979). (The Alberta Institute has now issued a final report on the Statute of Frauds and Related Legislation (No. 44, June 1985)). The British Columbia report is particularly helpful for its methodological approach, involving an analysis of the functional goals served by the Statute, whose influence is clearly observable in the structure of this article.

A general treatment of sale of land contracts and the formal requirements imposed by virtue of section 4 of the Statute of Frauds is to be found in English and Canadian texts on contract law. What is perhaps surprising is that the detail given to the subject in these texts is, in its relative slightness, quite out of proportion to the treatment these same books afford other sections of contract law. This phenomenon is possibly due in part to the reluctance of authors on the general law of contract to become too deeply bogged down in the formal requirements of a special contract but is more likely attributable to a certain repulsion at the sheer mass of petty detail imposed by a conscientious treatment of the sale of land writing requirement. The attitude of these authors is to be contrasted with the achievements of S. Williston, *A Treatise on the Law of Contracts* (rev. ed. with G.T. Thompson 1936), who devotes four hundred pages to the writing requirement in its application to the particular contracts subject to it, and of A. Corbin, *Corbin on Contracts*, Vol. 2 (1950), who gives over a whole volume to the topic. Reviewing the former book, Lord Wright hardly knows whether to admire or be appalled by Williston's achievement, (1939), 55 L.Q.R. 189, at pp. 204-205: "I confess I found it, however ably and brilliantly done, somewhat depressing. There is no principle involved. It is all devoted to construing badly drawn and ill-planned sections of a statute which was an extemporaneous excrescence on the Common Law".

² J.F. Stephen, *Section Seventeen of the Statute of Frauds* (1885), 1 Law Q. Rev. 1, at p. 5 (a later portion of the article, consisting of a statutory digest, was written in collaboration with Sir F. Pollock).

³ The following is not a comprehensive list: Stephen, *ibid.*; Editorial (1927), 43 Law Q. Rev. 1; H.E. Willis, *The Statute of Frauds—A Legal Anachronism* (1928), 3 Indiana L.J. 427, at p. 528; G.H.L. Fridman, *The Necessity of Writing in Contracts within the Statute of Frauds* (1985), 35 U. of T.L.J. 43; A.L. Corbin, *op. cit.*, footnote 1, §275 (where a substantial list of critical sources and observations is to be found); English Law Revision Committee, *Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration* 1937, Cmd. 5449, reproduced at (1937), 15 Can. Bar Rev. 385; *Maloughney v. Crowe* (1912), 6 D.L.R. 471, at p. 472, 26 O.L.R. 579, at p. 581 (Ont. H.C.), per Middleton J.; *Simon v. Metivier* (1766), 1 Black. W. 600, at p. 601, 96 E.R. 347, at p. 348 (K.B.), per Wilmot J.; *Charlick v. Foley Bros.* (1916), 21 C.L.R. 249, at pp. 251-252 (Aust. H.C.), per Isaacs J. (a homily on the subject of honour, professional responsibility and the penalty for businessmen seen to be untrustworthy).

shown a remarkable degree of resilience and has survived the obsolescence of the peculiar political and forensic conditions supporting its original enactment three hundred years ago.

It is not easy to say why the Statute of Frauds has proved so enduring since, in the common law tradition, statutes are normally seen to rest on a case law foundation and to lack the intellectual coherence and penetration of the cases themselves. The absence of a doctrine of desuetude in the common law necessitates the active removal of obsolete statutes periodically by statutory means, but the Statute of Frauds has proved far too adaptable and popular in its appeal to litigants even to be considered for such treatment. In truth, the statutory content of the formalities prescribed for sale of land contracts is rather thin. In its application to such contracts, section 4 of the Statute merely states that an action may not be brought in the absence of a written memorandum of the agreement signed by the party to be charged. On this slight statutory base has been erected a monumental edifice of case law so that it might be more accurate to speak of writing as a common law requirement stimulated long ago by a statute. In this partnership of statute and common law, statute is very much the unequal partner and the sheer permanence of the writing requirement puts it in the same company as other bedrock principles of the common law of contract, such as the doctrines of privity and consideration.

The dominance of the common law is also apparent in the way that the Statute of Frauds has been shaped by limitations and curtailed by exceptions. While a literal reading of section 4 suggests the need for a comprehensive writing, this is dispelled as case after case reveals the lengths to which the courts are prepared to go in the interests of justice to smooth the rough edges of the writing requirement. Furthermore, the creation of the part performance exception to section 4, together with related developments in restitution and, possibly, promissory estoppel, demonstrates the ability of the common law in its evolutionary progress to absorb the Statute of Frauds and grow around it.

The purpose of this article is to expose to criticism the writing requirement for sale of land contracts and to advocate its repeal, in the process disturbing the complacency that characterizes so many lawyers' attitudes to the Statute of Frauds. Sale of land contracts have been chosen because they are easily the most significant category in practice of contracts governed by the Statute. In view of the one-sided nature of so many guarantees, such contracts present probably the strongest case for the protection incidentally afforded by the mandatory use of forms; an examination of guarantees, however, cannot be undertaken within the limits of this article. Sale of goods contracts, also omitted, have been exempted in a number of jurisdictions from the need for writing⁴ and Canadian law

⁴ The list includes England, British Columbia, Manitoba (see the Statute Law Revision Act, S.M. 1982-83-84, c. 93, s. 27 (1983)), New Zealand, Queensland, Hong Kong and the Australian Capital Territory.

reform commissions have recommended the same course of action.⁵ Even when the sale of goods writing requirement survives, the dearth of decided cases in modern times suggests that the business and legal communities have made up their own minds on the matter.⁶ Remaining types of contract afflicted by the demand for writing may for the most part be consigned to the historical scrap heap.⁷

The subject of the writing requirement for sale of land contracts is also a timely one. Manitoba has recently repealed it altogether for such contracts⁸ and British Columbia has just enacted a complex reform that dilutes the required amount of writing, expands the equitable exception of part performance and grants relief for reliance preparatory to performance.⁹ The alternatives of outright repeal and liberalization will be discussed in this article where relevant but the Manitoba and British Columbia reforms will not constitute its focus since numerous other jurisdictions, Canadian and Commonwealth, retain an unmodified writing requirement.

This article will start with a brief introduction to the background of the Statute of Frauds. Certain of Fuller's ideas of forms¹⁰ will next be discussed in order to prepare the ground for an inquiry into modern justifications for requiring sale of land contracts to be evidenced in writing. The application of this writing requirement in the sale of land will

⁵ Ontario Law Reform Commission, Report on Sale of Goods (1979), Vol. 1, pp. 107-117 and recommendation 13, p. 131; Manitoba Law Reform Commission, Report No. 41, The Statute of Frauds (1980); Alberta Institute of Law Research and Reform, Report No. 38, The Uniform Sale of Goods Act (1982), pp. 129-132. The Uniform Sale of Goods Act, lacking a formalities provision, was adopted in 1981 as uniform legislation by the Uniform Law Conference of Canada: see Proceedings of the Sixty-Third Annual Meeting (1981), Appendix S. It was subsequently amended for style: see Proceedings of the Sixty-Fourth Annual Meeting (1982), Appendix HH.

⁶ Stephen, *loc. cit.*, footnote 2, at p. 24 refers to the repudiation of the sale of goods writing requirement by Liverpool merchants. See also R.B. Ferguson, Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England, in G.R. Rubin, D. Sugarman (ed.), Law, Economy and Society 1750-1914: Essays in the History of English Law (1984), at pp. 192, 198 *et seq.*

⁷ *Viz.*, contracts not to be performed within one year of their formation; contracts in consideration of marriage; executors' special promises of personal liability; ratified infants' contracts and representations as to creditworthiness (treated as an extension of contracts of guarantee).

⁸ An Act to Repeal the Statute of Frauds, S.M. 1982-83-84, c. 34 (1984).

⁹ Law Reform Amendment Act, S.B.C. 1985, c. 10, ss. 7, 8, repealing the Statute of Frauds; R.S.B.C. 1979, c. 393 and adding a new s. 54 to the Law and Equity Act, R.S.B.C. 1979, c. 224. A similar reform has recently been recommended for Alberta by the Institute of Law Research and Reform, *op. cit.*, footnote 1.

¹⁰ L.L. Fuller, Consideration and Form (1941), 41 Col. L. Rev. 799. See also the interesting article of J.M. Perillo, The Statute of Frauds in the Light of the Functions and Dysfunctions of Form (1974), 43 Fordham L. Rev. 39 where the numerous functions he cites for the writing requirement seem to overpower the limited conclusions he reaches as to the prescribed content of the writing.

then be examined in order to create an informed basis for comment, but the cases and illustrations will be chosen sparingly. The undermining of the writing requirement by means of part performance, constructive trust and *quantum meruit* will next be considered. Finally, the present law will be criticized in the light of its evident failure to satisfy a coherent theory of forms and a repeal of the writing requirement will be advocated. This article will confine itself to the contractual aspect of sale of land transactions: conveyancing requirements, whether arising from title deed or registration systems, will not be considered.

To conclude this introduction, a methodological observation is in order. It is easy to apply long-standing law automatically and mechanically as a body of rules, neglecting to ask why those rules came into existence in the first place and to what extent they respond to modern needs. Anyone with an interest in the continuing vitality of the Statute of Frauds in matters of contract would be well advised to consider the following questions. First, what are the arguments in favour of a contractual writing requirement and to what extent do those arguments apply in respect of particular transactions, such as sale of land contracts? Secondly, if writing should be demanded, how much writing ought there to be? And thirdly, what should be the legal consequences of failing to comply with any prescribed forms?

I. *The Background to the Statute of Frauds*

The Statute of Frauds was passed by the English Parliament in 1677¹¹ and incorporated in the common law provinces of Canada as received legislation,¹² in some cases becoming the subject of re-enactment.¹³ At the time of its enactment, England had undergone a political upheaval, the law courts

¹¹ *Supra*, footnote 1. For discussions of the precise date of enactment see W. Holdsworth, *A History of English Law*, Vol. VI (2nd ed., 1937), pp. 380-384; G.P. Costigan, *The Date and Authorship of the Statute of Frauds* (1913), 26 Harv. L. Rev. 329, at p. 334; C.D. Hening, *The Original Drafts of the Statute of Frauds* (29 Car. II, c. 3) and Their Authors (1913), 61 U. Penn. L. Rev. 283, at pp. 312-313. The same sources discuss the authorship of the Statute. See also *Ash v. Abdy* (1678), 3 Swanst. 664, 36 E.R. 1014 (Ch.), which presents an incomplete list. For the view that the architects of the Statute of Frauds must have been influenced by European models, see E. Rabel, *The Statute of Frauds and Comparative Legal History* (1947), 63 Law Q. Rev. 174.

¹² This is still its status in Alberta, Saskatchewan and Newfoundland. It was also its status in Manitoba until its recent repeal: *supra*, footnote 8.

¹³ See R.S.B.C. 1979, c. 393, now repealed, *supra*, footnote 9; R.S.N.B. 1973, c. S-14; R.S.N.S. 1967, c. 290; R.S.O. 1980, c. 481; R.S.P.E.I. 1974, c. S-6. The P.E.I. statute deals with only a limited amount of material, omitting for example any coverage of the sale of land contract. It has, nevertheless, been held that contracts for the sale of land are governed by section 4 of the original Statute as received legislation: *Delima v. Paton* (1971), 19 D.L.R. (3d) 351, 1 N. & P.E.I.R. 317 (P.E.I. Ct. of Chancery).

had been functioning under great difficulties and perjury was rife.¹⁴ The jury had not yet evolved into independent arbiters of factual issues, retaining in part the mediaeval character of local witnesses.¹⁵ Moreover, the parties and their spouses were neither competent nor compellable witnesses,¹⁶ and the common law lacked the romano-canonical rule that at least two witnesses are needed to prove a fact. Consequently, a plaintiff might succeed only because of the averments in his declaration,¹⁷ thus facilitating a type of fraud that the Statute doubtless countered effectively.

The formalities of the Statute of Frauds that are relevant today¹⁸ are grouped in three areas: first, sections 4 and 17 prescribe the writing requirement for certain classes of contract; secondly, sections 1, 2 and 3 state that conveyances of freehold interests in land and certain leaseholds must be in writing; and thirdly, sections 7, 8 and 9 provide, subject to exceptions, that the creation of trusts of land, as well as the transfer of beneficial interests in all types of property, must be in writing. Additional material relating to the contractual writing requirement is to be found in certain nineteenth century English statutes,¹⁹ whose status in Canadian provinces depends on reception or re-enactment as the case may be.²⁰

On examination, it becomes plain that the Statute of Frauds was anchored in the conditions of its age, whose forensic and procedural peculiarities are not even remotely relevant today. This may not be a sufficient argument for a repeal of the Statute, but it compels an inquiry into the purposes and policies it currently serves.

¹⁴ A.W.B. Simpson, *A History of the Common Law of Contract* (1975), p. 599 refers to the contemporary sublimation of aggression in litigiousness and the launching of groundless suits to further "a form of sanctioned aggression".

¹⁵ Simpson, *ibid.*, p. 604. This change in the function of the jury is reflected in the decline of the venue rule which, in its heyday, required a jury to be empanelled from the county where an action was laid, with a separate jury, drawn from the relevant town, parish or hamlet, for any non-traversable fact in issue.

¹⁶ Simpson, *ibid.* The parties to most civil proceedings were made competent and compellable by the Evidence Act 1851, 14 & 15 Vict., c. 99. A similar process of statutory reform took place in the common law provinces of Canada.

¹⁷ Simpson, *ibid.*, p. 605.

¹⁸ The Statute also contains material on testamentary formalities and the execution of judgments, superseded by subsequent statutes in the jurisdictions under review in this article.

¹⁹ Statute of Frauds Amendment Act (Lord Tenterden's Act) 1828, 9 Geo. IV, c. 14; Mercantile Law Amendment Act 1856, 19 & 20 Vict., c. 97.

²⁰ The reception of the statutes, *supra*, depends on whether an individual province has simply received or has re-enacted the Statute of Frauds itself: *supra*, footnotes 12, 13. By way of exception, however, there is no provision dealing with the formalities necessary to ratify a contract entered into in infancy in British Columbia for the simple reason that such contracts could not be ratified at all: Infants Act, R.S.B.C. 1979, c. 196, s. 18. The requirement of a formal ratification was repealed in England by the Infants Relief Act 1874, 37 & 38 Vict., c. 62, s. 2, a statute not received in any Canadian province. See *Molyneux v. Traill* (1915), 9 W.W.R. 137 (Sask. D.C.).

II. *The Functional Justification of Formal Requirements*

Fuller²¹ argued that formalities in contract serve three principal functions: the evidentiary, the cautionary and the channelling function. These will now be discussed in outline and referred to later as the relevant law is dealt with and evaluated. The broad scope of the first two functions is self-evident but the third is sufficiently unclear to require understanding at the outset as signalling the point at which a contracting party reaches irrevocable legal commitment.

A. *The evidentiary function*

The Statute of Frauds was enacted in response to the difficulties posed by perjured testimony and compounded by an inadequate evidentiary system. It has been cogently argued²² that the reason behind the placing of such stresses on the underdeveloped English forensic system of the period stemmed from developments over the course of the sixteenth century in the law of contract. These developments permitted the widespread enforcement of executory contractual undertakings by means of the *assumpsit* offshoot of trespass on the case and the laying of actions in *assumpsit* when they might alternatively have been laid in debt. Removing an action from the maw of debt deprived the defendant of the opportunity to wage his law and instead threw the matter over to jury trial. In consequence, the increased weight of jury trials in matters of contract in the seventeenth century posed problems for the inadequate forensic procedures of the period, particularly in the case of informal and executory dealings.

In a period of unreliable civil trials and perjured testimony, it is hardly surprising that a search for reliable written evidence was the paramount goal of the Statute: indeed it seems to have been the only goal consciously pursued for contractual matters.²³ But the civil procedure and evidentiary rules of the twentieth century bear little resemblance to their seventeenth century counterparts. On the face of it, this appears to furnish a simple argument for the repeal of the Statute since the forensic problems it was designed to redress are no longer extant. Such a simple view of the function of statutes, however, hardly does justice to their ability to mould themselves to changing circumstances, perhaps more accurately, to the aptitude of the common law for reabsorbing statutes into its mainstream so that they come in time by a process of subtle mutation to promote goals

²¹ *Loc. cit.*, footnote 10.

²² Simpson, *op. cit.*, footnote 14, pp. 599, 619. See also *Norwood v. Read* (1558), 1 Plow. 180, 75 E.R. 276 (K.B.); *Slade's Case* (1602), 4 Co. Rep. 91a, 76 E.R. 1072 (K.B.) and the sketch of this development in M. Bridge, *The Overlap of Tort and Contract* (1982), 27 McGill L.J. 872, at pp. 873-881. See also Willis, *loc. cit.*, footnote 3, at p. 431.

²³ See the long title of the Statute, *supra*, footnote 1; Willis, *loc. cit.*, footnote 3, at pp. 427-431.

different from those originally countenanced.²⁴ The tenacity with which the legal system has clung to formal requirements over the last three hundred years, and the fidelity shown to the Statute of Frauds in different jurisdictions, clearly show that the Statute has responded to a felt need. It must therefore be asked whether the Statute may yet serve a different type of evidentiary purpose and whether it pursues the cautionary and channeling functions discussed by Fuller.

A proponent of the writing requirement might assert that it still performs an important evidentiary role, first, by further diminishing the already-reduced risk of fraud, and secondly, by obviating recourse to fallible human memory by promoting something akin to a best evidence rule. The former argument of course is inversely proportional to a court's ability and freedom to discover the truth and the force of the second argument directly proportional to the complexity of the transaction, hence stronger for sale of land than for guarantee contracts. The second argument would be out of step with contract law if pursued so vigorously as to impose a writing requirement more stringent than the certainty test levied at the threshold of binding agreement. Both arguments, moreover, must be weighed against competing claims that the Statute of Frauds causes harm by undermining confidence in contractual undertakings and is often the refuge of the unconscientious contract-breaker. Finally, any advocate of forms must be prepared to justify the application of the Statute to certain types of contract and not to others. The absence of stock exchanges and limited liability companies in 1677 may be a perfectly good historical explanation why share transactions are not within the Statute but a contemporary defender of the writing requirement is intellectually compelled to take the offensive if his arguments undercut existing exemptions from the Statute.

B. *The cautionary function*

Fuller introduced the cautionary function of legal forms by stating that a formal requirement "may also perform a cautionary or deterrent function by acting as a check against inconsiderate action".²⁵ The seal was suggested as a device inducing a circumspect frame of mind and, indeed, even though the red wafer is far removed from the impression produced by the signet ring in the molten wax of former days, its very colour and location in the document bespeak caution. Less startling forms than the seal may not be quite so eloquent in counselling caution to the party undertaking legal liability, but a cautionary purpose may still be

²⁴ For an illuminating general discussion of the functional transformation of legal norms, together with examples, see the introduction to K. Renner, *The Institutions of Private Law and Their Social Functions* (ed. with introduction and notes by O. Kahn-Freund, 1949), pp. 37-43.

²⁵ *Loc. cit.*, footnote 10, at p. 800.

served if liability is controlled by requiring the party to be charged to put his signature on the memorandum of agreement.

Furthermore, common as the lay belief is that "contracts are in writing" and "if it is not in writing, it does not count", a belief especially significant in sale of land contracts, there is something to be said for a writing requirement where the transaction is financially substantial and where lay persons might inadvertently stray into legal commitment without the benefit of legal or other professional advice. This argument gathers force when it is appreciated that many contracts for the sale of land are negotiated through the offices of real estate agents, who have a personal interest in crystallizing the event on which their entitlement to commission depends. On the other hand, the prospect of inadvertent legal commitment in sale of land cases is reduced to the extent that the certainty test requires major points of detail, such as the price²⁶ and, probably, the nature of financing,²⁷ to be settled before there can be a binding commitment. Moreover, the cautionary function might also be served by other factors, such as signing a deposit cheque for a substantial amount or a real estate listing agreement. The history of sale of land claims contested under the Statute of Frauds shows that the debate is heavily preoccupied, not with non-existent forms, but with extant though allegedly insufficient forms. Obviously, one would not expect wholly informal and executory sale of land contracts to be the subject of heated litigation in the face of a statutory writing requirement, but one is entitled to suspect that the cautionary bar is at least occasionally crossed once some, not necessarily sufficient, forms have been observed.

Asserting the cautionary, as opposed to the evidentiary, function puts the spotlight on the contracting party rather than the contract and encourages a search for the types of vendors and purchasers of land who require protection. Do all contracting parties in the sale of land deserve cautionary protection? The cautionary function of legal forms is most obviously asserted in consumer protection legislation, particularly where cancellation (or cooling-off) rights are granted.²⁸ Such legislation often

²⁶ *Hall v. Busst* (1960), 104 C.L.R. 206, at pp. 236-245 (Aust. H.C.), per Windeyer J., who considered that the Statute of Frauds had had something to do with the need to settle precisely the price. On the other hand, the law developed differently in sale of goods cases: *Hoadly v. M'Laine* (1834), 10 Bing. 482, 131 E.R. 982 (C.P.). See the explanation of the sale of goods cases by Windeyer J., *ibid*.

²⁷ See, for example, *Arnold Nemetz Engineering Ltd. v. Tobien*, [1971] 4 W.W.R. 373 (B.C.C.A.).

²⁸ See for example the Direct Sales Cancellation Act, R.S.A. 1980, c. D-35, s. 36; Consumer Protection Act, R.S.B.C. 1979, c. 65, s. 13; Consumer Protection Act, R.S.O. 1980, c. 87, s. 21. The cautionary function is also well served when it is a condition of the validity of the contract that the parties present themselves before a third party exercising notarial or similar responsibilities. A particularly good example is Alberta's Guarantees Acknowledgement Act, R.S.A. 1980, c. G-12. Cf. Family Law Reform Act, R.S.O. 1980, c. 152, s. 54(1) (voidness of "Domestic Contracts" if not made "in writing").

serves the related function of informing parties of the extent of their legal commitment which, like the cautionary function, is effectuated by formalities.²⁹ In offering a *locus poenitentiae*, however, cancellation rights serve the cautionary goal in a different and arguably more effective way than does the writing requirement of the Statute of Frauds.

C. The channelling function

Citing the example of the seal, Fuller wrote that it provides "a simple and external test of enforceability".³⁰ An outside observer, such as a court, can readily see that the parties, by signing a document under seal, have decisively passed through a gateway of legal undertaking. The seal permits the parties to make a clear and irrevocable legal step and the judicial observer is able to see a sharp transition between no legal undertaking, on the one hand, and legal undertaking, on the other. If the parties were to sign a comprehensive legal document without a seal, broadly the same channelling function would be served.

It can easily be seen, however, that the channelling function is best served in a legal system demanding a very high degree of formalism.³¹ This has never been true of the common law, and is even less true in the twentieth century when contracts are commonly enforced notwithstanding the fact that the antecedent negotiations are diffuse, rambling and often short of the precision required by the classical tools of offer and acceptance,³² and despite the fact too that there may be a great deal of uncertainty in an agreement³³ or a rough and ready marriage of written and informal parts.³⁴ Even with regard to the contracts governed by the

²⁹ There is a clear information problem in the case of the Ontario Consumer Protection Act, *ibid.*, since it does not require the merchant to inform the consumer of the existence of his cancellation right. Perillo, *loc. cit.*, footnote 10, at pp. 60-62 discusses the "educational" function of formalities.

³⁰ *Loc. cit.*, footnote 10, at p. 801.

³¹ Perhaps the most vivid example is the formal Roman contract of *stipulatio* which, before the requirement was adulterated, required a formal question and answer in a most precise verbal form: the question had to begin "Spondesne . . . ?" and the response "Spondeo . . .". See W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd ed. by P. Stein, 1963), pp. 434 *et seq.*

³² For examples of difficult cases where offer and acceptance are applied to a train of correspondence with the full wisdom of hindsight, see *Tinn v. Hoffman* (1873), 39 L.T. 271 (Exch. Ch.); *Peter Lind & Co. Ltd. v. Mersey Docks & Harbour Board*, [1972] 2 Lloyd's Rep. 234 (Q.B.D.).

³³ *Hillas & Co. Ltd. v. Arcos Ltd.*, [1932] All E.R. Rep. 494 (H.L.); *Foley v. Classique Coaches Ltd.*, [1934] 2 K.B. 1 (C.A.); *Canada Square Corp. Ltd. v. Versafood Services Ltd.* (1979), 101 D.L.R. (3d) 742, 25 O.R. (2d) 591, 8 B.L.R. 21 (Ont. H.C.).

³⁴ *Hartman et al. v. The Queen in Right of Ontario* (1973), 42 D.L.R. (3d) 488, at p. 500, 2 O.R. (2d) 244, at p. 256 (Ont. C.A.), per Estey J.A.: "The Courts have, in dealing with extended commercial relationships, frequently found that oral agreements and arrangements must be read along with the written instrument so as to form one comprehensive contract: *Couchman v. Hill*, [1947] K.B. 554; *Walker Property Investments (Brighton) Ltd. v. Walker* (1947), 177 L.T.R. 204".

Statute of Frauds, it is evident that a formal requirement permitting the use of an incomplete written memorandum, even mere pieces of paper joined by parol evidence to produce a memorandum for the purpose of the Statute, falls a long way short of the neat form that can serve as "a simple and external test of enforceability". There is practically no judicial support for this function of forms in Canadian and English cases under the Statute of Frauds³⁵ and, at a time when the whole movement of the law of contract is towards an expansion of the legally relevant, with the parol evidence rule coming under increasing fire³⁶ and collateral warranties being increasingly tolerated,³⁷ any attempt to enforce the channelling function of forms would be tantamount to turning back the clock.

III. *The Application of the Writing Requirement to Sale of Land Contracts*

The governing provision is section 4 of the Statute of Frauds which provides that "no Action shall be brought whereby to charge. . .any Person. . .upon any Contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them. . .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". This provision raises a number of major difficulties.

A. *What is land?*

The Statute of Frauds should be as clear as possible in the definition of its subject matter, intellectually, because sale of land contracts are frequently stated to be particularly appropriate for formal regulation, and practically, so that contracting parties can predict the impact of the Statute on their activities. Unfortunately, there are difficulties surrounding the definition of an interest in land for the purpose of section 4.

³⁵ See however *Rondeau v. Wyatt* (1792), 2 H. Bl. 63, at p. 68, 126 E.R. 430, at p. 433 (C.P.), per Lord Loughborough C.J.: "But though the preventing perjury was one, it was not the sole object of the statute: another object was to lay down a clear and positive rule to determine when the contract of sale should be complete . . . Something therefore direct and specific is to be done, to shew that the agreement is complete, that there may be no room for doubt and hesitation. This was the intention of the statute in all contracts of sale, above a certain value, in order to prevent confusion and uncertainty in the transactions of mankind . . .".

³⁶ See for example the Business Practices Act, R.S.O. 1980, c. 55, s. 4(7) (admissibility of "oral evidence" despite written agreement); Ontario Law Reform Commission, Report on Sale of Goods (1979), Draft Sale of Goods Bill (Appendix 1, Volume III), section 4.6 reproduced as section 17 of the Uniform Sale of Goods Act, *supra*, footnote 5; and the cases cited, *infra*, footnote 60.

³⁷ See for example *Esso Petroleum Co. Ltd. v. Mardon*, [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.); *Murray v. Sperry Rand Corp.* (1979), 23 O.R. (2d) 456, 5 B.L.R. 284 (Ont. H.C.).

The major difficulty concerns the distinction enacted by the Statute between land and goods. Contracts for both commodities have to be evidenced in writing but the statutory exceptions to this for goods, listed in section 17,³⁸ are broader than the exception for land, namely the equitable doctrine of part performance, which is not set out in section 4. The Statute, unfortunately, defines neither land nor goods.

Before the passing of the Sale of Goods Act, it was peculiarly hard to distinguish land and goods in the case of the natural produce of the soil.³⁹ Numerous criteria were invoked by the cases⁴⁰ but sparse reasoning and the use of multiple criteria made the rules difficult to discover. Such incoherence encouraged a search for rules that matched results rather than reasons and doubtless led Blackburn to assert that the parties' intention as

³⁸ "And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth day of June no Contract for the sale of any Goods, Wares or Merchandizes, for the Price of ten Pounds Sterling or upwards, shall be allowed to be good, except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in Part of Payment or that some Note or Memorandum in Writing of the same Bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized". In response to adverse decisions, s. 17 was extended to sales of future goods by Lord Tenterden's Act, *supra*, footnote 19, s. 7. There is a mild element of controversy surrounding the numbering of section 17. The Statutes Revised, before the repeal of the section in England, numbered it section 16 after conflating sections 13-14. Section 13 is indeed just a preamble to section 14 which deals with the date of entry of judgment. It is usual, however, in the case law and legal literature to refer to the sale of goods provision as section 17. Section 5 of the Sale of Goods Act, R.S.O. 1980, c. 462, repeals section 17 as amended, and adds explanatory material regarding sales of future goods as well as a statutory definition of "acceptance" of the goods.

³⁹ According to Abinger C.B. in *Rodwell v. Phillips* (1842), 9 M. & W. 501, at p. 505, 60 R.R. 607, at p. 610 (Exch.): "There is a good variety of cases, in which a distinction is made between the sale of growing crops and the sale of an interest in land; and it must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other".

⁴⁰ *Evans v. Roberts* (1826), 5 B. & C. 829, 108 E.R. 309 (K.B.) (the identity of the contracting party who was to sever the produce from the soil); *Smith v. Surman* (1829), 9 B. & C. 561, 109 E.R. 209 (K.B.) (the putting of the produce into a deliverable state and the intention of the parties to pass the property in it before or after severance); *Crosby v. Wadsworth* (1805), 6 East 602, 102 E.R. 1419 (K.B.) as discussed in *Evans v. Roberts, supra*; *Jones v. Flint* (1839), 10 Ad. & E. 753, 113 E.R. 285 (K.B.) (the practical necessity of a buyer having an interest in land in order to effect a severance); *Evans v. Roberts, supra*, and *Scorell v. Boxall* (1827), 1 Y. & J. 396, 148 E.R. 724 (Exch.) (the introduction of human labour into the growing process); *Parker v. Staniland* (1809), 11 East 362, 103 E.R. 1043 (K.B.); Sjt. Williams' notes to *Duppa v. Mayo* (1670), 1 Wms. Saund. 275, 85 E.R. 336 (K.B.) (6th ed. 1845 by E.V. Williams, at pp. 276, 342-344) (the intention of the parties to sever mature produce immediately after the contract so that the soil served merely as a form of natural warehouse); *Rodwell v. Phillips, supra*, *Scorell v. Boxall, supra*, and *Jones v. Flint, supra*, (the collateral matters of whether the produce would have been regarded as goods, so as to bring it within an executing sheriff's writ of *feri facias*, or as goods or land for the purpose of its descent to the next-of-kin or the heir-at-law).

to the passing of property was paramount; if it passed after severance of the produce from the soil, the contract was one of sale of goods, and if before severance, it was not a sale of goods and might or might not concern an interest in land.⁴¹

The cases do not neatly fit the Blackburn view⁴² and suggest instead a distinction between *fructus naturales*, the spontaneous produce of the soil such as grass and timber, and *fructus industriales*,⁴³ namely fruits and crops grown by the labour of the agricultural year. The former were treated as goods if the seller severed,⁴⁴ and as land if the buyer severed;⁴⁵ the latter were treated as goods in all cases,⁴⁶ probably because the urgency

⁴¹ Lord Blackburn, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares and Merchandise* (2nd ed. by J.C. Graham, 1885), pp. 4-15, reflecting the author's now unfashionable view that the passing of property is of vital importance in fixing the rights and duties under the contract of sale. The Blackburn assertion also encourages the possible view that a contract could escape the formal net cast by both section 4 and section 17 of the Statute of Frauds. Cf. *James Jones & Sons Ltd. v. Earl of Tankerville*, [1909] 2 Ch. 440 (Ch. D.).

⁴² But it is supported by J.P. Benjamin, *A Treatise on the Law of Sale of Personal Property* (2nd American ed., 1873), pp. 91-93.

⁴³ These are sometimes loosely translated as "emblements", which strictly has a more technical meaning: Benjamin's *Sale of Goods* (2nd ed. by A.G. Guest *et al.*, 1981), §90, footnote 71, and §91.

⁴⁴ *Smith v. Surman* and *Evans v. Roberts*, *supra*, footnote 40; *Emmerson v. Heelis* (1809), 2 Taunt. 38, 127 E.R. 989 (C.P.) (extended to emblements). Though it supports this statement in fact, *Smith v. Surman* treats seller severance as showing an intention by the seller to pass the property after the produce became goods on severance.

⁴⁵ *Crosby v. Wadsworth* and *Scorell v. Boxall*, *supra*, footnote 40; *Carrington v. Roots* (1837), 2 M. & W. 248, 150 E.R. 748 (Exch.). The same conclusion was reached in the case of growing timber in *Bulmer v. The Queen* (1893), 3 Exch. C.R. 184, *aff'd* on other grounds (1893), 23 S.C.R. 488; *Hoeffler v. Irwin* (1904), 8 O.L.R. 740 (Ont. App. Div.) (where the court noted that the grantee of a timber licence had a statutory entitlement to exclusive possession of the land in question). See also *Macdonell v. McKay* (1871), 18 Gr. 98 (Ont. C.A.); *Handy v. Carruthers* (1894), 25 O.R. 279 (Ont. Ch. D.); *McNeill v. Haines* (1889), 17 O.R. 479 (Ont. Ch. D.); *Ford v. Hodgson* (1902), 3 O.L.R. 526 (Ont. Div. Ct.). A similar result is found in cases permitting the buyer to come and sever hay; *Sharp v. Dundas* (1911), 21 Man. R. 194 (Man. C.A.); *Decock v. Barrager* (1909), 19 Man. R. 34 (Man. C.A.); *Van Berkel v. De Foort*, [1933] 1 D.L.R. 652 (Man. C.A.). But a contract of agistment need not be in writing; *MacLeod v. Brown*, [1947] 2 W.W.R. 364 (Alta. S.C.). *Fructus naturales* conveyed with the land to a buyer of the land are also regarded as land: *Saunders v. Pilcher*, [1949] 2 All E.R. 1097 (C.A.). The reason for treating buyer severance as relating to land has been seen as the buyer's need for at least a limited possessory interest in the land in order to effect this.

⁴⁶ *Evans v. Roberts*, *supra*, footnote 40; *Parker v. Staniland*, *ibid.*; *Scorell v. Boxall*, *ibid.*; *Warwick v. Bruce* (1813), 2 M. & S. 205, 105 E.R. 359 (K.B.); *Jones v. Flint*, *supra*, footnote 40; *Sainsbury v. Matthews* (1838), 4 M. & W. 343, 150 E.R. 1460 (Exch.); Sjt. Williams' notes to *Duppa v. Mayo*, *supra*, footnote 40; *Gardner v. Staples* (1915), 21 D.L.R. 814 (Sask. S.C.). But see the inconsistent results in *Rodwell v. Phillips*, *supra*, footnote 39; *Emmerson v. Heelis*, *supra*, footnote 44; also the result in *Waddington v. Bristow* (1801), 2 Bos. & Pul. 452, 126 E.R. 1379 (C.P.) where the

and dispatch of the harvesting process abbreviated a severing buyer's connection with the land.⁴⁷

Some alignment of *fructus naturales* and *fructus industriales* was achieved when *Marshall v. Green*⁴⁸ treated as goods all mature *fructus naturales* to be severed by the buyer since the land served only as a natural warehouse. Subsequently, the Sale of Goods Act, going beyond this warehouse innovation, defined as goods literally all things to be severed before or under a contract of sale without regard to any of the limiting criteria laid down in the cases.⁴⁹ Since the Act was designed to codify rather than reform, it has never been confidently believed that the Act meant what it appeared to say.^{49a}

This apparent expansion of the definition of goods has posed its own problem. Before the passage of the Sale of Goods Act, it might reasonably have been supposed that sections 4 and 17 of the Statute operated in mutually exclusive zones. But the broadened definition of goods in the Sale of Goods Act introduced the possibility of the same thing being both land under section 4 of the Statute and goods under section 5 of the Sale of Goods Act (the successor of section 17 of the Statute).⁵⁰

speculative nature of a contract for the supply of hops encouraged a disapproving court to deny the exemption from stamp duty accorded by the Stamp Act, 55 Geo. III, c. 184, to contracts for the sale of goods, wares and merchandise. The conclusion that the produce was goods was not affected by its immaturity at the date of the contract; *Evans v. Roberts* and *Jones v. Flint*, *supra*, footnote 40; *Sainsbury v. Matthews*, *supra*.

⁴⁷ *Jones v. Flint*, *supra*, footnote 40. Where the produce was mature at the date of the contract, there was the added reason that the land had no more to give and so served only as a form of natural warehouse: *Parker v. Staniland*, *supra*, footnote 40.

⁴⁸ (1875), 1 C.P.D. 35. See also *St. Catharines Milling and Lumber Co. v. The Queen* (1890), 2 Exch. C.R. 202; *Summers v. Cook* (1880), 28 Gr. 179 (Ont. Ch.); *McPherson v. U.S. Fidelity and Guaranty Co.* (1914), 33 O.L.R. 524, at pp. 545-548 (Ont. App. Div.), per Hodgins, J.A.

⁴⁹ According to section 1(1)(g) of the Ontario Sale of Goods Act, *supra*, footnote 38, "“goods” means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale . . .”.

^{49a} It is remarkable that writers (including this one) are reluctant to or dare not abandon the old law when discussing the subject. G.H.L. Fridman, *Sale of Goods in Canada* (2nd ed., 1979), does not refer to the statutory definition at all when discussing the distinction between land and goods and appears to base his treatment on the old law. Other writers take the view that the Act should be read according to its plain meaning as embracing all sales of crops though they have doubts in cases of other products in or on the land as to whether they truly “form part” of the land or have (“shall”) to be severed under the contract: see for example Benjamin, *op. cit.*, footnote 43; §91; K.C.F. Sutton, *Sales and Consumer Law in Australia and New Zealand* (3rd ed., 1983), p. 51. For a discussion of the unresolved problems posed by the statutory definition, see Ontario Law Reform Commission, *Report on Sale of Goods* (1979), Vol. I, pp. 58-60. Problems similar to those dealt with above in the text have been posed by fixtures and natural resources. For reasons of space and economy, they cannot be dealt with here.

⁵⁰ See Chitty on Contracts (25th ed. by A.G. Guest *et al.*, 1983), Volume I (General Principles), §270.

It is a nice question whether a contract governed by both enactments, and falling foul of the Statute of Frauds but saved by one of the exceptions contained in section 5 of the Sale of Goods Act, can be enforced. It has been said that such an agreement must satisfy both statutes if it is to be enforceable.⁵¹ Nevertheless, though section 4 states that no action shall be brought, its effect is to render a contract merely unenforceable, so the transaction may have legal effect for collateral purposes.⁵² It might therefore be argued that the unenforceability of a contract under one statute should not affect its enforceability under another if the plaintiff may elect to characterize it as he wishes. Moreover, the presence of section 55 in the later Sale of Goods Act to the effect that rights and duties declared by the Act may be enforced by action⁵³ favours the view that the dual contract is enforceable. The law in this area remains in a most unsatisfactory state.

B. *Collateral transactions*

The mere similarity of a contract to a sale of land agreement does not subject it to section 4. Thus royalty agreements and agreements concerning the division of proceeds arising on a sale of land are not required to be evidenced in writing;⁵⁴ likewise agreements compromising litigation arising out of a contract governed by the Statute of Frauds.⁵⁵ But the most common example is a real estate agency contract⁵⁶ which is subjected to

⁵¹ British Columbia Law Reform Commission, *op. cit.*, footnote 1, p. 11. See also *Australian Glass Manufacturers Co. Ltd. v. Auckland Products Ltd.*, [1933] N.Z.L.R. 714, at p. 724 (S.C.), per Smith J.; *Prested Miners Co. Ltd. v. Gardner Ltd.*, [1911] 1 K.B. 425 (C.A.). Both cases concerned sales of goods which were also not to be performed within a year so they do not present the same definitional dichotomy as where the choice is between goods and land.

⁵² *Maddison v. Alderson* (1883), 8 App. Cas. 467 (H.L.). The point is discussed below.

⁵³ "Where any right, duty or liability is declared by this Act, it may, unless otherwise provided by this Act, be enforced by action".

⁵⁴ *Supra*, footnote 61. See also *Stuart v. Mott* (1893), 23 S.C.R. 153; *Harris v. Lindeborg*, [1931] S.C.R. 235. Cf. *Cooper v. Critchley*, [1955] Ch. 431, at p. 439, [1955] 1 All E.R. 520, at p. 524 (C.A.), per Jenkins L.J.

⁵⁵ *Roman Catholic Archdiocesan Corp. of Winnipeg v. Rosteski* (1958), 13 D.L.R. (2d) 229, 26 W.W.R. 82 (Man. C.A.); *Pulkrabek v. Pulkrabek*, [1928] 1 W.W.R. 682 (Alta. T.D.); *McKenzie v. McKenzie*, [1976] 5 W.W.R. 214 (B.C.C.A.); *Ritland v. Ritland*, [1980] 3 W.W.R. 577, (1980), 13 R.F.L. (2d) 330, 28 A.R. 133 (Alta. Q.B.). See also *Rimer v. Rimer* (1980), 119 D.L.R. (3d) 579, [1981] 2 W.W.R. 328 (Alta. Q.B.). Contrast this with the English position in *Steadman v. Steadman*, [1976] A.C. 536, [1974] 2 All E.R. 977 (H.L.). Another example is the case where a vendor's undertaking to resell the land on behalf of the purchaser was held not to fall within the Statute of Frauds: *Canadian General Securities Co. v. George* (1918), 43 D.L.R. 20 (Ont. App. Div.), rev'd on other grounds (1919), 59 S.C.R. 641.

⁵⁶ *Bernard v. Leslie*, [1955] 5 D.L.R. 668 (B.C.C.A.). This has posed problems regarding the event governing the agent's entitlement to commission. See for example

its own statutory formalities⁵⁷ in the furtherance of evidentiary and cautionary objectives.

Sometimes promises outside the written memorandum operate as collateral contracts⁵⁸ which, not themselves contracts for the sale of an interest in land, are exempt from section 4.⁵⁹ Furthermore, their exclusion from the main contract does not prejudice the memorandum as an adequate summary of the main contract. The standard Canadian view on the parol evidence rule, however, would strike down a collateral contract inconsistent with the main contract.⁶⁰ The collateral contract, however, incrementally diminishes the prospect of section 4 attaining its goal.

C. The writing requirement

The case law dealing with the writing requirement is truly vast. Section 4 of the Statute of Frauds states that no action shall be brought to charge anyone on a contract for the sale of land or an interest in land unless the party to be charged has signed at least a note or memorandum of the agreement. This raises a number of difficult questions.

Luxor (Eastbourne) Ltd. v. Cooper, [1941] A.C. 108, [1941] 1 All E.R. 33 (H.L.); *Jaques v. Lloyd D. George & Partners Ltd.*, [1968] 2 All E.R. 187, [1968] 1 W.L.R. 625 (C.A.); *Burns Fry Ltd. v. Khurana* (1985), 51 O.R. 257 (Ont. H.C.); and the authorities discussed in W.F. Foster, *Real Estate Agency Law* (1984), pp. 125-132.

⁵⁷ Foster, *ibid.*, pp. 52-65.

⁵⁸ See for example, *Angell v. Duke* (1875), L.R. 10 Q.B. 174, with which contrast *Daulia Ltd. v. Four Millbank Nominees Ltd.*, [1978] Ch. 231, [1978] 2 All E.R. 557 (C.A.). (A unilateral contract to enter into a contract for the sale of land would confer on the promisee an equitable interest in the land and so would be a contract to dispose of an interest in land within the terms of section 40(1) of the re-enactment of that part of section 4 of the Statute of Frauds dealing with sale of land contracts).

⁵⁹ *Angell v. Duke*, *ibid.*

⁶⁰ *Smith Grain Co. v. Spencer* (1918), 42 D.L.R. 269, [1918] 2 W.W.R. 1073 (Sask. C.A.); *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, (1969), 2 D.L.R. (3d) 600, 66 W.W.R. 673; *Byers v. McMillan* (1887), 15 S.C.R. 194. It has also been stated that parol negotiations leading to the conclusion of a written agreement merge in that subsequent document which thus effaces entirely even a prior collateral warranty: *Anderson v. Douglas* (1908), 9 W.L.R. 378, at p. 384, (1908), 18 Man. R. 254, at p. 262 (Man. C.A.), per Perdue J.A. The Canadian view reflects older English authorities; see for example *Erskine v. Adeane* (1873), L.R. 8 Ch. App. 756; *Morgan v. Griffith* (1871), L.R. 6 Ex. 70. For a contradictory collateral contract see now *City and Westminster Properties (1934) Ltd. v. Mudd*, [1959] Ch. 129, [1958] 2 All E.R. 733, (Ch. D.). But see important limitations placed on the scope of the parol evidence rule in *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.*, [1976] 2 All E.R. 930, [1976] 1 W.L.R. 1078, [1976] 2 Lloyd's Rep. 165 (C.A.), where the rule was confined to cases where the written document was intended to comprise the whole of the agreement, and *Gallen v. Allstate Grain Co.* (1984), 9 D.L.R. (4th) 496 (B.C.C.A.), where it was held that the parol evidence rule raised no more than a presumption in favour of the comprehensive nature of the written document.

(1) "No Action shall be Brought"

A failure to satisfy the Statute renders contracts unenforceable rather than void.⁶¹ In consequence, the unenforceable contract has juridical significance for a number of purposes. For example, a purchaser might plead an unenforceable resale agreement as a defence to an action for specific performance of the original contract of sale.⁶²

The contract may have an effect on the restitutionary rights and duties of the contracting parties. If a purchaser, having paid a deposit under an unenforceable contract, subsequently declines to complete, his deposit will be irrecoverable.⁶³ Had the contract been void, that deposit could have been recovered as on a total failure of consideration.⁶⁴ Under an unenforceable contract where the vendor remains ready and willing to complete, there is no failure of consideration and so the purchaser may not recover the deposit.⁶⁵ If it is the vendor who defaults, a failure of consideration exists and the deposit can be recovered.

⁶¹ *Maddison v. Alderson*, *supra*, footnote 52; *Leroux v. Brown* (1852), 12 C.B. 801, 138 E.R. 1119 (C.P.); *Martin v. Haubner* (1896), 26 S.C.R. 142; *Crösby v. Wadsworth*, *supra*, footnote 40; *Britain v. Rossiter* (1879), 11 Q.B.D. 123 (C.A.); J. Williams, Availability by Way of Defence of Contracts Not Complying with the Statute of Frauds (1934), 50 Law Q. Rev. 532. *Carrington v. Roots*, *supra*, footnote 45, at pp. 255, 257 (M. & W.), 751, 752 (E.R.), which stated that such contracts were void, is now discredited.

⁶² *Frith v. Alliance Investment Co.* (1914), 49 S.C.R. 384, 20 D.L.R. 356, 6 W.W.R. 981. An unenforceable contract may also supply sufficient consideration to support a negotiable instrument with the result that a purchaser who is the drawee may find himself being sued on the instrument rather than the contract: *Low v. Fry*, [1935] All E.R. Rep 506, (1935), 152 L.T. 585 (K.B.). It may also supply a defence to a trespass action: *Carrington v. Roots*, *supra*, footnote 45. It would be more accurate to say that it is the licence granted by the vendor of the land, rather than the unenforceable contract itself, which provides the immunity. Hence, once the licence is revoked, a subsequent entry on the land by a disappointed purchaser will be a trespass: *Chitty, op. cit.*, footnote 50, §290. Occupation under an oral and unenforceable lease would not be so precarious for the lease would provide a defence to an eviction action: *Eastcal Developments Ltd. v. Whissell Enterprises Ltd.* (1980), 116 D.L.R. (3d) 174, 17 R.P.R. 30, 25 A.R. 92 (Alta. C.A.). Again, it may permit a purchaser to maintain a trespass action against a third party intruder: *Crosby v. Wadsworth*, *supra*, footnote 40.

⁶³ *Thomas v. Brown* (1876), 1 Q.B.D. 714; *Monnickendam v. Leanse* (1923), 39 T.L.R. 445 (K.B.D.); *Switzer's Investments Ltd. v. Burn* (1964), 47 D.L.R. (2d) 280, 49 W.W.R. 627 (Alta. T.D.).

⁶⁴ R. Goff, G. Jones, *The Law of Restitution* (2nd ed., 1978), chs. 18-19. In certain cases, such money may not be recoverable where public policy is transgressed or where the terms of a statute preclude recovery. In other cases, the payer may have received valuable services obliging him to pay for them on *quantum meruit* principles.

⁶⁵ *Thomas v. Brown*, *supra*, footnote 63, per Quain J. at p. 723: "Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money". Nor may the purchaser recover the deposit as money had and received to his use since the vendor is not applying it for any purpose other than the one for which it was intended: *Monnickendam v. Leanse*, *supra*, footnote 63.

The combination of unenforceability and the failure of section 4 to prescribe that the memorandum be contemporaneous with the agreement means that the contract may be cured by the execution of a later document⁶⁶ before the commencement of the action.⁶⁷ Since the document need not conform to a particular type, the contract may be commemorated in the rather strange circumstances of a will⁶⁸ or even of a letter repudiating liability under the contract.⁶⁹

Section 4 requires only the party to be charged to sign the memorandum, and not the party bringing the action, so in that sense the contract may be only partly enforceable.⁷⁰ On a falling real estate market, a non-signing vendor is unlikely to plead the Statute, but on a rising market he may put profit before honour. If the Statute of Frauds pursued an exclusively evidentiary function, such partial unenforceability would be anomalous. But the result does not look strange if a cautionary objective is sought. Such a one-sided arrangement, however, offends the principle of mutuality.⁷¹ This objection might be met if only the reliance interest of

⁶⁶ The time lag was fourteen years in *Barkworth v. Young* (1856), 4 Drew. 1, 62 E.R. 1 (Ch.).

⁶⁷ *Lucas v. Dixon* (1889), 22 Q.B.D. 357, 37 W.R. 370 (C.A.); *Farr, Smith & Co. v. Messers*, [1928] 1 K.B. 397 (K.B.D.). Since there must be a memorandum before an action may be brought, it follows that the memorandum should not be founded on or include the defendant's pleadings in the present action: *Jackson v. Oglander* (1865), 2 H. & M. 465, 71 E.R. 544 (V.-C.). But see the old case of *Child v. Godolphin* (1723), Dick. 39, 21 E.R. 181 (Ch.) and cf. *J. Materne Design & Construction Ltd. v. Gendel* (1971), 17 D.L.R. (3d) 268, [1971] 2 O.R. 176 (Ont. C.A.), a sale of goods case where the pleadings established the buyer's acceptance of the goods, one of the special exceptions to the writing requirements for sale of goods agreements.

⁶⁸ *Re Hoyle*, [1893] 1 Ch. 84, (1893), 41 W.R. 81 (C.A.); *Briese v. Dugard* (No. 2), [1936] 1 D.L.R. 723, [1936] 1 W.W.R. 193, (1936), 43 Man. R. 489 (Man. C.A.); *Barnes v. Cunningham*, [1933] 3 D.L.R. 653 (N.S.S.C.) (revoked will). See however the doubts of Osler J.A. (*per curiam*) about the use of an executed conveyance when the doctrine of merger prescribes the extinction of the contract of sale in the conveyance, at least where the conveyance fails to recite the disputed agreement: *McLaughlin v. Mayhew* (1903), 6 O.L.R. 174 (Ont. C.A.).

⁶⁹ *Thirkell v. Cambi*, [1919] 2 K.B. 590 (C.A.); *Martin v. Haubner*, *supra*, footnote 61; *Cyr v. Dufault* (1923), 55 O.L.R. 90 (Ont. App. Div.); *Campbell v. Mahler* (1918), 43 O.L.R. 395 (Ont. H.C.); *Hird v. Bessmayer*, [1942] 1 W.W.R. 233 (B.C.S.C.). The repudiation must deny liability under the contract rather than deny the existence of the contract itself.

⁷⁰ *Buxton v. Rust* (1872), L.R. 7 Ex. 279, at p. 280, per Willes J.; *Laythorp v. Bryant* (1836), 2 Bing. N.C. 735, 132 E.R. 283 (C.P.); *Mills v. Marriott* (1912), 3 W.W.R. 841 (S.C.C.).

⁷¹ The doctrine is significant in the areas of formation and specific performance: *Dickinson v. Dodds* (1876), 2 Ch. D. 463 (C.A.); *Fairline Shipping Corp. v. Adamson*, [1975] 1 Q.B. 180, [1974] 2 All E.R. 967 (Q.B.D.); *Price v. Strange*, [1978] Ch. 337, [1977] 3 All E.R. 371 (C.A.). But see the criticism of the doctrine of mutuality in specific performance cases in R. Sharpe, *Injunctions and Specific Performance* (1983), §§605-611.

a non-signing party were protected, but intractable problems would be posed by tactical late signatures prompted by market changes.

Finally, if only the vendor signs, a purchaser will abide by the contract to protect his deposit if it exceeds the amount of adverse market movement.⁷² Conversely, if only the purchaser has signed, the vendor has given no such hostage to fortune and so may feasibly default on a rising market.

(2) *The form and contents of the note or memorandum*

Since no particular form is required for the memorandum, it follows that the signing party need not intend to satisfy the Statute of Frauds, which is not concerned with contractual intent. Even a letter repudiating a contract, if not denying its existence, may afford sufficient evidence of it.⁷³ But a memorandum that is "subject to contract" is insufficient, even if joined to a later document lacking this reservation, for it denies the existence of a presently binding agreement.⁷⁴

A difficult question concerns the minimum content of the memorandum. One view is that "the memorandum must set forth *all* of the contract, and as a contract exists only in its various terms, the memorandum must therefore disclose all the terms of the contract".⁷⁵ Though this faithfully reflects the evidentiary function of the Statute, it is stronger than the test used in Canadian cases which mainly favour the view that the

⁷² Where the vendor continues to be ready and willing to perform there is of course no ground on which the purchaser could frame a recovery action. Even where the vendor, on the purchaser's unlawful repudiation, disables himself from future performance by reselling the land, he will normally be able to forfeit the purchaser's deposit since this, in addition to serving as part payment, will usually be construed under the contract as serving the role of an earnest or guarantee of the purchaser's performance: *Palmer v. Temple* (1839), 9 Ad. & E. 508, 112 E.R. 1304 (K.B.); *Howe v. Smith* (1884), 27 Ch. D. 89 (C.A.); *McDonald v. Dennys Lascelles Ltd.* (1933), 48 C.L.R. 457 (Aust. H.C.). See J. Beatson, *Discharge for Breach: The Position of Instalments, Deposits and Other Payments Due Before Completion* (1981), 97 Law Q. Rev. 389.

⁷³ *Supra*, footnote 69.

⁷⁴ *Strickland v. Ross* (1912), 5 D.L.R. 706, 2 W.W.R. 887, 5 Sask. L.R. 347 (Sask.S.C.); *Tiverton Estates Ltd. v. Wearwell Ltd.*, [1975] Ch. 146, [1974] 1 All E.R. 209 (C.A.), declining to follow the earlier case of *Law v. Jones*, [1974] Ch. 112, [1973] 2 All E.R. 437 (C.A.). If it were thought that the Statute of Frauds served only an evidentiary function, would it be right to ignore such a piece of writing if it could be shown, by parol evidence, that it represented the binding agreement of the parties at a later date? The Statute is concerned with form rather than contractual intention.

⁷⁵ *Williams, op. cit.*, footnote 1, p. 55. The same view is supported by *Saperstein v. Drury*, [1943] 4 D.L.R. 191, at p. 194, [1943] 3 W.W.R. 193, at p. 196 (B.C.C.A.), per McDonald C.J.B.C., but the learned judge also stated that the Supreme Court in *McKenzie v. Walsh* (1920), 61 S.C.R. 312, 57 D.L.R. 24, [1921] 1 W.W.R. 1017, abided by this rule.

"essential" terms must be written.⁷⁶ The similar minority view of "material" terms⁷⁷ seems indistinguishable in practice.⁷⁸ The gap between all terms and essential terms seems to be bridged by the following six exemptions from the writing requirement.

First, there are cases where parol evidence is admitted to rectify a memorandum, thus producing a document that on its face satisfies the Statute of Frauds.⁷⁹ Secondly, as referred to above, there is the collateral contract, which splits the contract into two parts, only one of which is caught by the Statute. Were this a frequent occurrence, it would be a forceful assault on the writing requirement.⁸⁰

A third exception deals with implied terms. In *McKenzie v. Walsh*,⁸¹ the Supreme Court stated that the "essential" terms of a contract of sale are the parties, the property and the price. Since such statements lend

⁷⁶ *McKenzie v. Walsh*, *ibid.*; *Green v. Stevenson* (1905), 9 O.L.R. 671 (Ont. Div. Ct.); *Evans v. Norris* (1912), 8 D.L.R. 652, 3 W.W.R. 532 (Alta. S.C. *en banc*); *Rowe v. Fidelity-Phenix Fire Insurance Co. of New York*, [1944] 3 D.L.R. 441, [1944] O.W.N. 387 (Ont. H.C.), *rev'd.* on other grounds [1944] 4 D.L.R. 265, [1944] O.W.N. 600 (Ont. C.A.).

⁷⁷ *Clement v. McFarland* (1912), 8 D.L.R. 226, at p. 228, 23 O.W.R. 613, at p. 615 (Ont. H.C.), *per Kelly J.*; *Reynolds v. Foster* (1912), 3 D.L.R. 506, 21 O.W.R. 838 (Ont. H.C.).

⁷⁸ The reach of the writing requirement is shown by the following examples of insufficient memoranda: *Evans v. Norris*, *supra*, footnote 76 (failure to state that purchase price was deferred until purchaser had cut and disposed of hay); *Patterson v. Scott* (1922), 69 D.L.R. 81, [1922] 2 W.W.R. 700, 32 Man. R. 343 (Man. K.B.) (failure to record stipulations dealing with insurance, taxes, commission and entitlement to one-third of tenant's crop); *Lesiuk v. Schneider* (1917), 36 D.L.R. 598, [1917] 2 W.W.R. 747 (Alta. S.C.) (failure to state deferment of balance of purchase money); *Reynolds v. Foster*, *supra*, footnote 77 (failure to mention terms of mortgage taken back by vendor); *Mitchell v. Mortgage Co. of Canada* (1919), 59 S.C.R. 90, 48 D.L.R. 420, [1919] 3 W.W.R. 324 (omission of date of commencement of tenancy); *Clement v. McFarland*, *supra*, footnote 77 (omission of relative amounts of downpayment and instalments). See also the strict result in *Fenske v. Farbacher* (1912), 2 D.L.R. 634, 2 W.W.R. 216, 5 Sask. L.R. 283 (Sask. S.C.).

⁷⁹ *Fordham v. Hall* (1914), 17 D.L.R. 695, 6 W.W.R. 769, 20 B.C.R. 562 (B.C.C.A.); *United States of America v. Motor Trucks Ltd.*, [1924] A.C. 196 (P.C.), *rev'g*. 52 O.L.R. 262 (Ont. App. Div.).

⁸⁰ A court inclined to the view that *all* the contractual terms should be in the memorandum may compensate for this view by a tolerance of informal collateral contracts. See *Hawkins v. Price*, [1947] Ch. 645, [1947] 1 All E.R. 689 (Ch. D.) where the court is led by the ambiguity of collateral terms and collateral contracts to the conclusion that the memorandum must contain the substantial and materially important terms but may omit those that are merely collateral to the agreement. With rare exceptions, the analysis of contractual terms according to the hierarchical test of conditions and warranties is not practised in sale of land contracts.

⁸¹ *Supra*, footnote 75. For a somewhat heterodoxical application of the requirement to state the price, see *Canadian Williston Minerals Ltd. v. Forseth* (1962), 33 D.L.R. (2d) 72 (Sask. C.A.) (reference to \$1 and "other valuable consideration" held to be sufficient).

themselves to mechanical repetition and application out of context,⁸² it should be observed that the contract in *McKenzie v. Walsh* was an open sale of land contract in which, the basic requirements of contractual certainty having been met and written down, the balance could be settled by implication.⁸³ Thus, some terms that are unspoken may be implied and so need not satisfy the writing requirement.⁸⁴ Nevertheless, simply because the absence of a particular term can be remedied by implication does not mean that the subject matter of such a term cannot be an essential part of the contract under section 4. If a term inconsistent with reasonable implication has been agreed it will oust any implied term, but its formal omission may well, subject to the next exception, vitiate the memorandum.⁸⁵

The fourth exception complements the implied terms exception. Briefly, once a contract has been concluded in which completion is impliedly set for a reasonable time, a subsequent timetable agreement will be treated as merely an "arrangement" for carrying out the contract which need not be evidenced in writing.⁸⁶ A fifth exception deals with vagueness or incompleteness in the written note or memorandum. It has been held that the extent of the interest in the land conveyed can be inferred from the amount of the agreed price.⁸⁷ Less easily solved problems arise where the

⁸² See, for example, the judicial technique employed with the complex contract in *N. Rattenbury Ltd. v. Winchester*, [1950] 3 D.L.R. 826 (P.E.I.C.A.).

⁸³ The court itself recognized that the writing requirement might be more stringent in the case of more complex contracts: *supra*, footnote 75, at p. 315.

⁸⁴ In one case, the failure to state the time of completion was cured by the implication of a reasonable time and the incomplete memorandum held good: *Rowe v. Fidelity-Phenix Insurance Co. of New York*, *supra*, footnote 76. Sale of goods contracts are usually quite a lot less formal than sale of land agreements and in consequence tend to leave a lot more to reasonable implication. It has been stated authoritatively that the certainty requirement will be satisfied with an implied reasonable price for a sale of goods contract but not for a sale of land contract: *Hall v. Busst*, *supra*, footnote 26 (Windeyer J. dissenting). Compare the sale of goods cases of *Calder v. Hallett* (1900), 5 Terr. L.R. 1 (N.W.T.S.C.) and *Campbell v. Mahler* (1918), 45 O.L.R. 395, at p. 398 (Ont. App. Div.), per Falconbridge C.J.K.B., with the sale of land case of *Clement v. McFarland*, *supra*, footnote 77.

⁸⁵ *Walford v. Narin*, [1948] 2 K.B. 176, [1948] 2 All E.R. 85 (K.B.D.). In *Reynolds v. Foster* (1912), 3 D.L.R. 506, at p. 508, 21 O.W.R. 838, at p. 841 (Ont. H.C.), Teetzel J. said: "While the Court will carry into effect a contract framed in general terms where the law will supply the details it is also well settled that if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced . . .". This passage illustrates the fine line trodden in a number of cases between declining to enforce an incompletely written agreement for want of compliance with the Statute and declining to enforce an incompletely concluded agreement for want of certainty. See also *Mandziuk v. Czahley* (1920), 55 D.L.R. 299, [1920] 3 W.W.R. 758, (1920), 16 Alta. L.R. 68 (Alta. App. Div.).

⁸⁶ *McKenzie v. Walsh*, *supra*, footnote 75. See also *Rowe v. Fidelity-Phenix Insurance Co. of New York*, *supra*, footnote 76.

⁸⁷ *Peterson v. Bitzer* (1921), 62 S.C.R. 384, 63 D.L.R. 182, [1922] 1 W.W.R. 141.

identity of the parties is not very clear in the memorandum⁸⁸ or where the land that is the subject matter of the contract is not clearly described.⁸⁹ There are many cases in this area and it is utterly impossible to reconcile them all. In principle, parol evidence is admissible to resolve ambiguities but not to vary or supplement the agreement.⁹⁰ In practice, the line between clarification of the memorandum and supplementing it is an exceedingly difficult one to draw. Though this vagueness exception may prejudice the

⁸⁸ *Potter v. Duffield* (1874), L.R. 18 Eq. 4; *Rossiter v. Miller* (1878), 3 App. Cas. 1124 (H.L.); *Richard v. Stilwell* (1885), 8 O.R. 511 (Ont. Ch.); *Williams v. Jordan* (1877), 6 Ch. D. 517 (Ch. D.); *Caling v. King* (1877), 5 Ch. D. 660 (C.A.); *White v. Tomalin* (1890), 19 O.R. 513 (Ont. C.A.); *Calori v. Andrews* (1906), 4 W.L.R. 259 (B.C. Full Ct.); *Clergue v. Preston* (1904), 8 O.L.R. 84 (Ont. App. Div.); *Bradley v. Elliott* (1906), 11 O.L.R. 398 (Ont. Div. Ct.); *Filby v. Hounsell*, [1896] 2 Ch. 737 (Ch. D.); *Selkirk Land and Investment Co. v. Robinson* (1913), 13 D.L.R. 936, 25 W.L.R. 392, 23 Man. R. 774 (Man. K.B.); *Ratham v. Caldwell* (1911), 18 W.L.R. 281, 16 B.C.R. 201 (B.C.C.A.); *Pulford v. Loyal Order of Moose* (1913), 14 D.L.R. 577, 5 W.W.R. 452, 23 Man. R. 641 (Man. C.A.); *Bailey v. Dawson* (1912), 1 D.L.R. 487, 25 O.L.R. 387 (Ont. H.C.); *Green v. Stevenson*, *supra*, footnote 76; *Evans v. Bonneau* (1911), 17 W.L.R. 243 (Alta. T.D.); *Newberry v. Brown* (1915), 23 D.L.R. 627, 8 W.W.R. 1283, 21 B.C.R. 556 (B.C.C.A.); *Imperial Bank of Canada v. Nixon*, [1926] 4 D.L.R. 1052, (1926), 59 O.L.R. 538 (Ont. App. Div.); *Litras v. Mattern*, [1938] 2 D.L.R. 401, [1938] 1 W.W.R. 381, (1938), 52 B.C.R. 500 (B.C.S.C.); *Davies v. Sweet*, [1962] 2 Q.B. 300, [1962] 1 All E.R. 92 (C.A.).

⁸⁹ *Bleakley v. Smith* (1840), 11 Sim. 150, 59 E.R. 831 (Ch.); *McMurray v. Spicer* (1868), L.R. 5 Eq. 527; *Lewis v. Hughes* (1906), 4 W.L.R. 269, 13 B.C.R. 228 (B.C.C.A.); *Davis v. Shaw* (1910), 21 O.L.R. 474 (Ont. Div. Ct.); *Foster v. Anderson* (1907), 15 O.L.R. 362 (Ont. Div. Ct.); *Sparks v. Clement* (1917), 41 O.L.R. 344 (Ont. App. Div.); *Plant v. Bourne*, [1897] 2 Ch. 281 (C.A.); *Lefley v. Moffat*, [1925] 3 D.L.R. 825, (1925), 57 O.L.R. 260 (Ont. S.C.); *Heath v. Sanford* (1907), 6 W.L.R. 203, 17 Man. R. 101 (Man. K.B.); *Kelly v. Nevers* (1970), 13 D.L.R. (3d) 513, 2 N.B.R. (2d) 823 (N.B. App. Div.); *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, (1978), 85 D.L.R. (3d) 19, 6 Alta. L.R. (2d) 156; *Harvie v. Gibbons* (1980), 109 D.L.R. (3d) 559, 12 Alta. L.R. (2d) 72 (Alta. C.A.); *Southridge Properties (1975) Ltd. v. Tiessen*, [1980] 3 W.W.R. 618, (1980), 31 A.R. 125 (Alta. Q.B.).

⁹⁰ *Williams*, *op. cit.*, footnote 1, p. 59; *Smith Grain Co. v. Spencer*, *supra*, footnote 60. See also the text accompanying footnotes 59-60. Will the evident decline of the parol evidence rule, *supra*, footnote 60 para. 2, lead to an increasingly slack attitude in this area? Outside cases where the parol evidence survives as a separate collateral contract, a degree of tension might arise between the parol evidence rule and the rule that the material or essential terms of a section 4 contract must be evidenced in writing. Assuming the existence of a single piece of writing bearing the semblance of a comprehensive agreement, should extrinsic oral evidence simply be excluded by virtue of the parol evidence rule or should that evidence be looked at so as to defeat the written instrument under section 4 for want of comprehensiveness? The *Smith Grain Co.* case, *supra*, footnote 60, favours the former approach. See also *Green v. Stevenson*, *supra*, footnote 76, per Anglin J. at p. 678, where the learned judge states the likelihood that a defendant might be permitted to introduce parol evidence on condition that he submit to specific performance of the contract as amended by that evidence. The problem would not arise with extrinsic written evidence, though a separate Statute of Frauds problem, discussed below, might emerge with the joinder of separate pieces of writing. Post-contractual variations raise quite a different issue; these will be discussed below.

evidentiary function of the Statute, it does not dispel the caution that may surround the signing of even an incomplete memorandum.

The final exception concerns the waiver of omitted terms favourable to him by the party seeking enforcement.⁹¹ Obviously, the remainder of the contract must comply with the principle of certainty; otherwise there would be no binding agreement at all. In some cases, the waiver of a favourable term will create room for a reasonable implied term.

In sum, the exceptions stated above amount to a substantial inroad into a comprehensive writing requirement. While they do not constitute a repeal of section 4, they alleviate some of its more exacting features and thereby diminish the evidentiary pretensions of the memorandum.

(3) *The signature*

Section 4 requires the memorandum to be signed by the party to be charged, which means that he must authenticate the instrument by affixing his name to it. The case law has been liberal so that initials have been upheld,⁹² likewise a printed name,⁹³ provided the name or initials serve to authenticate the instrument.⁹⁴ Nor must the signature occur at the end of the document provided it authenticates the whole.⁹⁵ Finally, section 4 permits the signature of a "lawfully authorized" agent;⁹⁶ the agency agreement itself need not be in writing.⁹⁷

⁹¹ *North v. Loomes*, [1919] 1 Ch. 378 (Ch. D.); *Scott v. Bradley*, [1971] Ch. 850, [1971] 1 All E.R. 583 (Ch. D.); *Knight v. Cushing* (1912), 1 D.L.R. 331, at pp. 334-335, 1 W.W.R. 563, at p. 567 (Alta S.C. *en banc*). See also *Ramsden v. Nunziato*, [1951] 2 D.L.R. 806, [1951] O.R. 346 (Ont. C.A.). It has been held in a suit for specific performance that a memorandum is enforceable, even if it omits a term disadvantageous to the plaintiff, provided that the plaintiff consents to perform the omitted term: *Martin v. Pycroft* (1852), 2 De G.M. & G. 785, 42 E.R. 1079 (Ch.) where the tender of performance of a tenancy premium saved an incomplete memorandum from unenforceability. This approach is capable of gutting the writing requirement outside the basic items of parties, property and price. See the discussion of this problem in *Green v. Stevenson*, *supra*, footnote 76, per Anglin J. at p. 678.

⁹² *Chichester v. Cobb* (1866), 14 L.T. 433 (Q.B.); *Standard Realty Co. v. Nicholson* (1911), 24 O.L.R. 46 (Ont. H.C.).

⁹³ *Schneider v. Norris* (1814), 2 M. & S. 286, 105 E.R. 388 (K.B.).

⁹⁴ Signing with a false name has even been held to be good: *McMeekin v. Furry* (1907), 39 S.C.R. 378.

⁹⁵ *Evans v. Hoare*, [1892] 1 Q.B. 593 (Q.B.D.).

⁹⁶ Even the signatures of the executrices of the party to be charged, made after her death, have been allowed: *Harvie v. Gibbons*, *supra*, footnote 89. Such a decision might be more easily justified on the basis of a fresh contract entered into by the estate of the deceased itself, rather than on the basis of an agency which would have terminated on the death of the deceased. The estate is not the deceased's agent but rather his personality carried on by other means.

⁹⁷ *Coles v. Trecothick* (1804), 9 Ves. 234, 32 E.R. 592 (Ch.); *McIlvride v. Mills*

Obviously, the more informal a party's signature, the less will the cautionary function be promoted. Furthermore, if the "signature" is a printed name in the body of the document, parol evidence will be required to show the circumstances surrounding the conclusion of the contract, so diminishing the evidentiary demands of section 4. If in certain cases the requirements of the Statute of Frauds are so reduced that the required form becomes a mere formality, the very existence of a writing requirement is called into question.

(4) Joinder of Documents

The cautionary function of forms is further diminished by the rule that documents may be joined to produce the requisite memorandum, provided that the signature authenticate all parts of such a compound document.⁹⁸ Joinder requires there to be a sufficient connection between the documents and appears to be allowed where the signed document refers to the existence of some other writing, which may then be identified by parol evidence.⁹⁹ A minority view holds that joinder is allowed, even without a reference in the signed document to another writing, where the connection between the two appears once they are laid down side by side.¹⁰⁰ The difference between these two views is seldom important and is bridged by the intermediate approach of requiring an implicit reference in the signed document to some other writing.¹⁰¹ However, the

(1906), 16 Man. R. 276 (Man. C.A.).

⁹⁸ Such an authentication would obviously be lacking if an unsigned part came into existence after the signed part, except for a signed writing which contemplates or authorizes the execution of a later writing; *Re Danish Bacon Co. Ltd. Staff Pension Benefit Fund*, [1971] 1 All E.R. 486, [1971] 1 W.L.R. 248 (Ch. D.) (a case based on the modern English equivalent of section 9 of the Statute of Frauds, which requires the disposition of equitable interests in all types of property to be in writing); *Koenigsblatt v. Sweet*, [1923] 2 Ch. 314 (C.A.). Where two or more parts of a memorandum, properly joined, are signed, there should obviously be no need for mutual cross-authentication by each signature.

⁹⁹ *Ridgway v. Wharton* (1857), 6 H.L.C. 238, 10 E.R. 1287 (H.L.); *O'Donohoe v. Stammers* (1884), 11 S.C.R. 358 (joinder of correspondence consisting of twenty-two letters); *Long v. Millar* (1879), 4 C.P.D. 450 (C.A.), per Baggallay and Thesiger L.JJ.; *Steine v. Korbin* (1909), 9 W.L.R. 670, 2 Sask. L.R. 6 (Sask. T.D.); *Doran v. McKinnon* (1916), 53 S.C.R. 609, 31 D.L.R. 307; *Bailey v. Dawson* (1686), 1 Vern. 363, 23 E.R. 524 (Ch.); *Stokes v. Whicher*, [1920] 1 Ch. 411 (Ch. D.); *Columbia Caterers Ltd. v. Famous Restaurants Ltd.* (1956), 4 D.L.R. (2d) 601, at p. 608, 18 W.W.R. 577, at p. 585 (B.C.C.A.), per Coady J.A.; *Harvie v. Gibbons*, *supra*, footnote 89; *Elias v. George Sahely & Co. (Barbados) Ltd.*, [1983] 1 A.C. 646, [1982] 3 All E.R. 801 (P.C.).

¹⁰⁰ *Long v. Millar*, *ibid.*, per Bramwell L.J.; *Oliver v. Hunting* (1890), 44 Ch. D. 205 (Ch. D.); *Sheers v. Thimbleby* (1897), 13 T.L.R. 451 (C.A.); *Maybury v. O'Brien* (1911), 25 O.L.R. 229 (Ont. H.C.).

¹⁰¹ *Pearce v. Gardner*, [1897] 1 Q.B. 688 (C.A.); *Burgess v. Cox*, [1951] Ch. 383, [1950] 2 All E.R. 1212 (Ch. D.).

minority view,¹⁰² by allowing parol evidence to establish rather than merely corroborate the connection between two pieces of writing, seems wrong in principle. Even a legitimate use of parol evidence weakens the evidentiary function of the Statute of Frauds. It is almost unnecessary to point out that only the most comprehensive writing requirement would promote the channelling function of forms.

(5) *Variation, waiver and promissory estoppel*¹⁰³

A section 4 contract may be rescinded by purely informal means¹⁰⁴ and where a contractual variation comprises a rescission of the old contract coupled with its supersession by a new contract, the first half of the process need not be in writing. The new contract, however, would attract the writing requirement of the Statute with the odd result that an oral variation might only rescind the old contract without effectively creating a new one.¹⁰⁵ If the oral variation, however, were designed merely to alter the contract without rescinding it, the original contract would stand and the oral variation would fall.¹⁰⁶ But the increasing incidence of relief in modern cases of forbearance has turned the flank of this rule.¹⁰⁷ The doctrine of promissory estoppel,¹⁰⁸ like the equitable doctrine of part performance, stands altogether outside the Statute of Frauds since it operates, not to vary the contract, but to prevent one party from taking

¹⁰² *Timmins v. Moreland Street Property Co. Ltd.*, [1958] Ch. 110, [1957] 3 All E.R. 265 (C.A.).

¹⁰³ S. Stoljar, *The Modification of Contracts* (1957), 35 Can. Bar Rev. 485.

¹⁰⁴ *Goman v. Salisbury* (1684), 1 Vern. 240, 23 E.R. 440 (Ch.); *Hamilton v. Taylor* (1917), 47 N.B.R. 145 (N.B.S.C.).

¹⁰⁵ *Morris v. Baron*, [1918] A.C. 1 (H.L.).

¹⁰⁶ *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, 110 E.R. 713 (K.B.); *Noble v. Ward* (1867), L.R. 2 Ex. 135 (Exch. Ch.); *Hickman v. Haynes* (1875), L.R. 10 C.P. 598; *Sierichs v. Hughes* (1918), 43 D.L.R. 297, 42 O.L.R. 608 (Ont. App. Div.); *Freedman v. French* (1921), 64 D.L.R. 494, 50 O.L.R. 432 (Ont. App. Div.); *Danforth Heights Ltd. v. McDermid Bros.*, [1923] 4 D.L.R. 757, at p. 766, (1923), 52 O.L.R. 412, at p. 421 (Ont. App. Div.), per Rose J. Even an unenforceable variation, however, may be used as a defence to an action: *Wauchope v. Maida* (1972), 22 D.L.R. (3d) 142, [1972] 1 O.R. 27 (Ont. C.A.).

¹⁰⁷ Another assault on the variation rule came in *Griffiths v. Young*, [1970] Ch. 675, [1970] 3 All E.R. 601 (C.A.), where a "subject to contract" memorandum was held to be good when the parties agreed that this condition be dropped, a clear case of variation masquerading as waiver. But *Griffiths* was disapproved of in *Tiverton Estates Ltd. v. Wearwell*, *supra*, footnote 74.

¹⁰⁸ The point, long settled in common law waiver cases, has not had to be made in promissory estoppel authorities. In estoppel by conduct cases like *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, (1968), 68 D.L.R. (2d) 354, informality was not seen as a problem. An informal estoppel was enforced in *Crabb v. Arun District Council*, [1976] Ch. 179, [1975] 3 All E.R. 865 (C.A.). For common law waiver, see *Ogle v. Vane* (1868), L.R. 3 Q.B. 272 (Exch. Ch.); *Plevins v. Downing* (1876), 1 C.P.D. 220; *Danforth Heights Ltd. v. McDermid Bros.*, *supra*, footnote 106.

advantage in full of the rights conferred on him by the contract. This would follow from the equitable maxim that the Statute of Frauds cannot be used as an instrument of fraud.¹⁰⁹ Signs in the case law that promissory estoppel is beginning to operate more actively than a mere defensive shield¹¹⁰ suggest an awkward analogy with variation and raise the question of compliance with section 4.

IV. *Relief in the Event of Non-Compliance with the Writing Requirement*

In assessing the vitality of the writing requirement of section 4, it is not sufficient merely to demonstrate by internal analysis how far the writing requirement has been whittled away. The outer walls of section 4 should also be examined by reference to the increasing number of cases where even a purely informal agreement can generate rights and liabilities. The cases most advantageous to the claimant deal with the equitable doctrine of part performance, which gives him the benefit in full of the contract.

A. *The doctrine of part performance*¹¹¹

Absent from the Statute itself, the doctrine of part performance appeared in the case law soon after its enactment.¹¹² Though the basis of the doctrine is unclear, there seem to be two principal justifications for it.¹¹³ The first treats the taking of steps towards performance of the contract as a species of alternative evidence of its existence and terms which can be tendered instead of the memorandum required by section 4. It thus becomes highly appropriate to grant the same relief as the plaintiff would have received if a memorandum had been executed. The cases

¹⁰⁹ Fraud has always been defined more extravagantly in Equity than at common law. But see the attempts to deny a separate range to the equitable idea of fraud in *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.) and in *Le Lievre v. Gould*, [1893] 1 Q.B. 491, at p. 498 (C.A.), per Esher M.R. Nevertheless, strong support for the equitable view was subsequently given in *Nocton v. Ashburton*, [1914] A.C. 932, at pp. 953-955 (H.L.), per Lord Haldane L.C. See also *Crabb v. Arun District Council*, *supra*, footnote 108, at pp. 195 (Q.B.), 877 (All E.R.), per Scarman L.J.

¹¹⁰ *Amalgamated Investment and Property Co. Ltd. v. Texas Commerce International Bank Ltd.*, [1982] Q.B. 84, [1981] 1 All E.R. 923 (C.A.); *Re Tudale Explorations Ltd.* (1978), 88 D.L.R. (3d) 584, 20 O.R. (2d) 593 (Ont. Div. Ct.).

¹¹¹ I.C.F. Spry, *The Principles of Equitable Remedies* (3rd ed., 1984); Sir Edward Fry, *A Treatise on the Specific Performance of Contracts* (6th ed. by G.R. Northcote, 1921).

¹¹² *Butcher v. Stapely*, *supra*, footnote 99.

¹¹³ J.D. Davies, *Constructive Trusts, Contract and Estoppels: Proprietary and Non-Proprietary Remedies for Informal Arrangements Affecting Land* (1980), 7 Adelaide L. Rev. 200 refers at p. 202, note 9, to three doctrinal justifications of part performance, namely alternative evidence, equities arising from the plaintiff's acts and equitable fraud. In view of the expansive nature of equitable fraud, *supra*, footnote 109, there is probably little difference between the second and third of these approaches.

reflect this view in that part performance usually leads to the grant of specific performance of the contract.

The other justification sees in acts of part performance equities favouring the performing party and is in harmony with the maxim that Equity will not allow the Statute of Frauds to be used as an instrument of fraud. In principle, the relief of the performing plaintiff should be linked to the strength of the equities in his favour, but in practice the courts treat the successful plaintiff as entitled to relief in full under the contract. Both doctrinal bases emerge from the House of Lords decision in *Maddison v. Alderson*,¹¹⁴ Lord Selborne L.C. favouring the second view¹¹⁵ but maintaining that the plaintiff's equities are to be measured by the contract.¹¹⁶ Lord Blackburn is generally seen as favouring the first view¹¹⁷ but some of his language accords with the second.¹¹⁸

Lord Selborne's position seems preferable in principle since the avoidance of fraud rather than compliance in spirit with the Statute better explains equitable intervention.¹¹⁹ If part performance truly followed an evidentiary path, the acts of part performance should have to be as cogent as the written memorandum, but they never are. Nor does the doctrine serve a cautionary purpose since the relevant acts are not those of the defendant, but of the plaintiff, whose conduct or reliance endows him with an equity.

¹¹⁴ *Supra*, footnote 52.

¹¹⁵ *Ibid.*, at p. 475. See also *Degelman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725, at p. 728, [1954] 3 D.L.R. 785, at p. 787, per Rand J; *J.C. Williamson Ltd. v. Lukey* (1931), 45 C.L.R. 282 (Aust. H.C.).

¹¹⁶ This is "the measure and test of their legal and equitable character and consequences" (*supra*, footnote 52, at p. 475); furthermore, the choice lies between undoing what the plaintiff has done and "completing what he has left undone" (*ibid.*, at p. 476).

¹¹⁷ He says that the effect of the part performance doctrine is "to construe the 4th section of the Statute of Frauds as if it contained these words, 'or unless possession of the land shall be given and accepted'" (*supra*, footnote 52, at p. 489), though elsewhere he declares his difficulty in finding the principle behind the doctrine (*ibid.*, p. 488). He is interpreted as favouring the alternative evidence view in *Evans v. Norris*, *supra*, footnote 76, per Stuart J. at p. 539 (W.W.R.). The alternative evidence view is also favoured in *Britain v. Rossiter*, *supra*, footnote 61, at p. 131.

¹¹⁸ *Supra*, footnote 52, at p. 489. Stuart J. failed to express a clear preference for the two views in *Evans v. Norris*, *supra*, footnote 76, and regretted his inability to confine part performance to cases of "substantial injustice amounting to fraud", *ibid.*, at p. 542 (W.W.R.).

¹¹⁹ The basis of the doctrine is manifestly that Equity will not allow the Statute of Frauds to be used as an instrument of fraud, and Equity would avoid taking a position that required it to contradict the words of a statute. After all, Equity acts *in personam*: *Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444, 27 E.R. 1132 (Ch.).

Pegging relief to the contract is explained by the absence of alternative equitable relief in the early days.¹²⁰ The increasing generosity of the part performance doctrine in a fused system of law and Equity makes it timely to ask if relief should be graded according to the strength of the plaintiff's equities and integrated with restitutionary exceptions to the Statute.

The plaintiff's part performance must consist of performance itself acquiesced in by the defendant¹²¹ and not acts preparatory to performance,¹²² but beyond this the proliferation of stated tests mirrors the conceptual confusion of the doctrine. One view is that the plaintiff's acts must be unequivocally referable to the very contract alleged;¹²³ another is that the acts "must be unequivocally, and in their own nature, referable to some such agreement as that alleged".¹²⁴ A third view, the most liberal one,

¹²⁰ In the earlier cases, the plaintiff had moved into occupation of premises and some measure of relief justifying his right to stay there seemed appropriate when equitable damages could not be granted and common law damages were denied by the Statute.

¹²¹ *Steadman v. Steadman*, *supra*, footnote 55, contains elements that are inconsistent with any need for acquiescence. For the proposition that the party to be charged must have knowledge of the acts of part performance, see *McInnis Farms Ltd. v. McKenzie* (1913), 4 W.W.R. 205 (Man. K.B.). Fry, *op. cit.*, footnote 111, at §588, thought that the fraud or injustice necessary to spur the doctrine of part performance could not be found in the absence of the other party's knowledge. A gap between knowledge and acquiescence opens up once it is remembered that *ex post facto* knowledge may be sufficient for the purpose of equitable fraud.

¹²² *Whitbread v. Brockhurst* (1784), 1 Bro. C.C. 404, at p. 412, 28 E.R. 1205, at p. 1209 (Ch.), per Lord Thurlow L.C. *A fortiori*, acts that are preparatory to the formation of the contract will not qualify: *Daulia Ltd. v. Four Millbank Nominees Ltd.*, *supra*, footnote 58.

¹²³ *Chaproniere v. Lambert*, [1917] 2 Ch. 356, at p. 361 (C.A.), per Warrington L.J.; *Morphett v. Jones* (1881), 1 Swans. 172, 36 E.R. 344 (Ch.) ("unequivocally referable to the agreement"). A similar statement was made by Sir Edward Fry when he said that the acts must be "referable to no other title": *op. cit.*, footnote 111, §580.

¹²⁴ *Maddison v. Alderson*, *supra*, footnote 52, at p. 479. See also *Rawlinson v. Ames*, [1925] Ch. 96 (Ch. D.). This approach is supported by Duff J. in *McNeil v. Corbett* (1907), 39 S.C.R. 608, at p. 611, who glossed Lord Selborne's test by saying that the acts had to be "unequivocally referable in their own nature to some dealing with the land in question". In subsequent decisions of the Supreme Court, this line has been consistently followed: *Degelman v. Guaranty Trust Co. of Canada*, *supra*, footnote 115, at pp. 733-734 (S.C.R.), 792-794 (D.L.R.), per Cartwright J.; *Brownscombe v. Public Trustee of the Province of Alberta*, [1969] S.C.R. 658, at p. 664, (1969), 5 D.L.R. (3d) 673, at p. 678, per Hall J. (*per curiam*); *Thompson v. Guaranty Trust Co. of Canada*, [1974] S.C.R. 1023, at pp. 1034-1036, (1973), 39 D.L.R. (3d) 408, at p. 416, [1973] 6 W.W.R. 746, at pp. 755-756, per Spence J. (*per curiam*). See also *McGillivray v. Shaw* (1963), 39 D.L.R. (2d) 660 (Alta. App. Div.); *Erb v. Wilson* (1969), 69 W.W.R. 126 (Sask.Q.B.); *Korycki v. Korycki*, [1939] 3 W.W.R. 525 (Sask. K.B.); *Kramaruk v. Kushnir* (1956), 2 D.L.R. (2d) 452, [1956] O.R. 392 (Ont. C.A.); See too *Lensen v. Lensen*, [1984] 6 W.W.R. 673 (Sask. C.A.) where it was also said that the acts of part performance need not be referable to the actual contract put forward by the plaintiff.

comes recently from *Steadman v. Steadman*¹²⁵ where the acts, on the balance of probabilities, need only refer to some contract and not be inconsistent with the one alleged. It is questionable, however, how much the precise wording affects the outcome of a case since old tests have been used to produce increasingly liberal results.¹²⁶ The acutest difficulties have come from informal arrangements affecting land¹²⁷ where the incidence of relief seems implicitly tied to the value of the plaintiff's services.

Steadman v. Steadman,¹²⁸ the latest major statement on part performance, dealt with the surrender for cash by a wife of her interest in the matrimonial home under the compromise of a matrimonial dispute. She refused to sign an instrument of transfer sent to her despite receiving a portion of the money representing arrears of maintenance. Applying various formulae consistent with the most liberal part performance view, the court held that the husband was entitled to relief for his integrated acts of preparation and sending of the instrument of transfer and payment, which could be bolstered by parol evidence.¹²⁹ *Steadman* also rejects any universal rule that payment of a deposit cannot constitute part performance,¹³⁰ whether because it is too equivocal¹³¹ or because its recoverability as on a total failure of consideration prevents the emergence of any fraud.¹³² The

¹²⁵ *Supra*, footnote 55. The way was prepared by *Kingswood Estate Co. Ltd. v. Anderson*. [1963] 2 Q.B. 169 (C.A.).

¹²⁶ Contrast the decision in *Maddison v. Alderson*, *supra*, footnote 52, with the decision in *Wakeham v. Mackenzie*, [1968] 1 W.L.R. 1175, [1968] 2 All E.R. 783 (Ch. D.), and the decision in *Degelman v. Guaranty Trust Co. of Canada*, *supra*, footnote 115.

¹²⁷ See *Kiss v. Palachik*, [1983] 1 S.C.R. 623, (1983), 146 D.L.R. (3d) 385.

¹²⁸ *Supra*, footnote 55. See the criticism of H.W.R. Wade (1974), 90 L.Q.R. 433 which represents, perhaps, a surprised recognition that the late twentieth century predilection for discretionary justice has caught up with that most "legal" of transactions, the sale of land contract.

¹²⁹ What really counted in the case was the sum of the plaintiff's conduct in all the circumstances and it is somewhat misleading to try to line individual judges up behind individual acts of part performance. Nevertheless, strong emphasis was placed even on the merely unilateral behaviour of the plaintiff in preparing and sending the deed of transfer: *supra*, footnote 55, at pp. 552-554 (A.C.), 991-992 (All E.R.), per Viscount Dilhorne, and 563 (A.C.), 1000 (All E.R.), per Lord Simon of Glaisdale. Lord Salmon was more doubtful: *ibid.*, at pp. 573 (A.C.), 1008 (All E.R.).

¹³⁰ *Infra*, footnote 142. For a contrary view, see *Johnson v. Johnson Canada Co.* (1856), 5 Gr. 558 (Ont. C.A.); *Hurd v. Roy* (1970), 74 W.W.R. 363 (B.C.S.C.); *Britain v. Rossiter*, *supra*, footnote 61; *Starlite Variety Stores Ltd. v. Cloverlawn Investments Ltd.* (1978), 5 B.L.R. 215 (Ont. H.C.).

¹³¹ *Maddison v. Alderson*, *supra*, footnote 52, at p. 479, per Lord Selborne L.C.

¹³² *Steadman v. Steadman*, *supra*, footnote 55, at pp. 541 (A.C.), 981 (All E.R.), per Lord Reid. See also *Clinan v. Cooke* (1802), [1775-1802] All E.R. Rep. 16, at pp. 22-23, per Lord Redesdale L.C. (Ire.) where the observation was also made that the presence of a part payment exception in section 17 indicated a statutory intention that no such exception should be allowed for section 4 and the sale of land.

case has also undermined the alternative evidence theory by stressing the equitable content of the doctrine¹³³ and denying that the acts of part performance must relate to land. It heralds the eventual fusion of part performance and restitutionary remedies.¹³⁴

Part performance also raises problems concerning the availability of ancillary equitable relief such as the award of damages under Lord Cairns' Act "either in addition to or in substitution for. . . specific performance" where the court "thinks fit".¹³⁵ A contract for the sale of land might be ineligible for specific performance for various reasons such as the absence of mutuality,¹³⁶ or the transfer of the legal estate to a *bona fide* purchaser for value without notice,¹³⁷ or because the grant of the remedy would entail constant supervision by the court.¹³⁸ Where available, the discretion to award specific performance is not more leniently exercised for a written memorandum than for acts of part performance, but is the same evenhandedness apparent for equitable damages where specific performance is unavailable?

¹³³ See in particular the judgment of Lord Simon.

¹³⁴ *Steadman v. Steadman* has already made a mark on Canadian case law: *Boland v. Boland* (1980), 14 Alta. L.R. (2d) 154 (Alta. Q.B.); *Shillabeer v. Driebel* (1979), 9 Alta. L.R. (2d) 112 (Alta. T.D.); *Severin v. Vroom* (1977), 76 D.L.R. (3d) 427, 15 O.R. (2d) 636 (Ont. C.A.); *Starlite Variety Stores Ltd. v. Cloverlawn Investments Ltd.*, *supra*, footnote 130; *Rimer v. Rimer*, *supra*, footnote 55; *Colberg v. Braunberger's Estate* (1978), 12 A.R. 183 (Alta. App. Div.).

¹³⁵ Chancery Amendment Act 1858, 21 & 22 Vict., c. 27. See the discussion in S. Waddams, *The Law of Damages* (1983), §§93-98; A.J. Oakley, *Pecuniary Compensation for Failure to Complete a Contract for the Sale of Land*, [1980] Camb. L.J. 58, at pp. 74-77.

¹³⁶ *Price v. Strange*, *supra*, footnote 71.

¹³⁷ Strictly speaking, there are two propositions here. First, an order of specific performance will not issue against the vendor who now lacks the capacity to perform but who of course remains able to fulfil any secondary obligation in damages: see Fry, *op. cit.*, footnote 111, ch. XXIII; *Lefley v. Moffat*, *supra*, footnote 89; *Ferguson v. Wilson* (1866), L.R. 2 Ch. App. 77 (allotment of shares). Secondly, the equitable interest of the first purchaser is overridden once the second purchaser has *bona fide* acquired the legal interest on completion, according to familiar equitable principles. Where the second purchaser has notice, see *MacIntyre v. Commerce Capital Mortgage Corp.* (1981), 34 O.R. (2d) 104 (Ont. H.C.). In registered land titles systems, the second purchaser has to have been guilty of fraud before his interest is defeated: *Kirilenko v. Lavoie* (1981), 127 D.L.R. (3d) 15, [1981] 5 W.W.R. 645, *aff'd.* [1982] 5 W.W.R. 287 (Sask. C.A.); *Pfeifer v. Pfeifer*, [1950] 2 W.W.R. 1227 (Sask. C.A.).

¹³⁸ *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116 (C.A.); *City of Kingston v. Kingston, Portsmouth & Cataraqui Railway* (1898), 25 O.R. 462, at p. 466 (Ont. C.A.), per Moss J.A. In exceptional cases, the court will overcome its reluctance, for example, where the defendant already holds the fruits of the plaintiff's performance and damages would plainly be inadequate. One group of cases concerns defendants to whom land has been conveyed by the plaintiff for building purposes: *Wolverhampton Corp. v. Emmons*, [1901] 1 Q.B. 515 (C.A.); *Tanenbaum v. W.J. Bell Paper Co.* (1956), 4 D.L.R. (2d) 177, [1956] O.R. 278 (Ont. H.C.).

The cases have failed to make a difficult distinction between two questions:¹³⁹ whether acts of part performance can only ever be vindicated by specific performance and never by ancillary equitable relief, and whether equitable damages should be denied under the terms of Lord Cairns' Act (regardless of whether the plaintiff relies on a memorandum or on part performance) when a Court of Equity either no longer can or does not wish to award specific performance. On the former question, no Canadian cases seem to assert baldly that part performance is linked only to specific performance¹⁴⁰ while some cases are quite inconsistent with any such proposition.¹⁴¹ The latter cases are to be preferred since limiting the remedial effect of part performance involves the curious assertion by a Court of Equity of the inherent inferiority of equitable rights as compared to legal rights.

As for the second question, which turns on the interpretation of Lord Cairns' Act, the practical effect of denying equitable damages in lieu of specific performance would be to throw the plaintiff back on his common law rights which, incidentally, are non-existent where the plaintiff can enter court only on the basis of part performance. In view of the assimilation of the Statute of Frauds by the common law, it would be antiquated to limit part performance because of its encroachment on the Statute. In consequence, the preferred solution would be to treat common law damages as available in a fused system of law and Equity even where only an equitable right engendered by part performance is in issue.¹⁴² An inferior solution would limit the denial of equitable damages to cases where the

¹³⁹ *Lavery v. Pursell* (1888), 39 Ch. D. 508 (Ch. D.); *McManus v. Cooke* (1887), 35 Ch. D. 681 (Ch. D.).

¹⁴⁰ See *Pearson v. Skinner School Bus Lines (St. Thomas) Ltd.* (1968), 69 D.L.R. (2d) 283, at pp. 288-289, [1968] 2 O.R. 329, at pp. 334-335 (Ont. H.C.), per Lacourciere J. and *Carter v. Irvine Oil Co. Ltd.*, [1952] 4 D.L.R. 128 (N.S.S.C.) which, like *Lavery v. Pursell*, *supra*, footnote 139, fails to separate the two questions presented in the text.

¹⁴¹ See *Pfeifer v. Pfeifer*, *supra*, footnote 137, where equitable damages were in fact awarded on the basis of part performance, and *Robinson v. McAdam*, [1948] 2 W.W.R. 425 (B.C.S.C.), where part performance was considered eligible for equitable damages but where such damages were denied because specific performance was no longer a possible remedy, the defendant having sold the premises to a *bona fide* purchaser. Cf. *Lensen v. Lensen*, *supra*, footnote 124 (price of excluded portion of land set off against balance of price due on remainder of land which was the subject of a specific performance decree).

¹⁴² This approach was adopted by Clute J. in *McIntyre v. Stockdale* (1912), 9 D.L.R. 293, 27 O.L.R. 460 (Ont. H.C.). It should also be noted that when section 4 of the Statute of Frauds, as it applies to sale of land contracts, was re-enacted in England in a modern form as section 40(1) of the Law of Property Act 1925, *supra*, footnote 58, the doctrine of part performance was preserved by a saving clause in section 40(2). Might it be said this assists in the process of a substantive fusion? Or does it, as seems more likely, amount to nothing more than the statutory recognition of an equitable doctrine? See generally, J. MacIntyre, *Equity—Damages in Place of Specific Performance—More Confusion about Fusion* (1969), 47 Can. Bar Rev. 644.

plaintiff himself is at fault because of delay or a lack of clean hands, but to award such damages where a wrongdoing defendant has disabled himself from complying with specific performance or where specific performance would not be awarded for neutral reasons, such as the impracticability of constant supervision.¹⁴³

Finally, a recent equitable development cuts rather differently than part performance into the Statute of Frauds. In the past, Anglo-Canadian law has not recognized promissory estoppel as generating rights in the plaintiff as opposed to limiting the defendant's rights. But in *Celona v. Kamloops Centennial (Pacific No. 269) Branch, Royal Canadian Legion*,¹⁴⁴ the purchaser of land had moved into possession and defaulted on the payment of a substantial early instalment. Suing for this instalment rather than for specific performance, the vendor claimed part performance and the court, extracting equitable fraud from part performance and applying it to promissory estoppel,¹⁴⁵ with the added support of fraudulent acquiescence,¹⁴⁶ allowed the action. This unorthodox use of promissory estoppel as a sword, consistent with other recent developments,¹⁴⁷ would

¹⁴³ Another aspect of equitable damages should be mentioned. It was held in *Wroth v. Tyler*, [1974] Ch. 30, [1973] 1 All E.R. 897 (Ch. D.) that equitable damages could be levied according to the value of the land at the date of the hearing, a relief to purchasers on a sharply rising market. *Wroth v. Tyler* has been considered in numerous Canadian decisions dealing with fluctuating land values: see for example *Calgary Hardwood & Veneer Ltd. v. Canadian National Railway Co.*, [1979] 4 W.W.R. 198 (Alta. App. Div.); *306793 Ontario Ltd. v. Rimes* (1979), 25 O.R. (2d) 79 (Ont. C.A.); *Woodford Estates Ltd. v. Pollack* (1978), 93 D.L.R. (3d) 350, 22 O.R. (2d) 340 (Ont. H.C.) (fall in land values). Further accommodation of the inflation problem is to be found in *Johnson v. Agnew*, [1980] A.C. 327, [1979] 1 All E.R. 883 (H.L.), where it was held that the common law rule of assessment of damages is not confined to value at the breach date but can be applied to take account of economic conditions at trial: see also *Malhotra v. Choudhury*, [1980] Ch. 52, [1979] 1 All E.R. 186 (C.A.); *306793 Ontario Ltd. v. Rimes*, *supra*. Such a relaxed attitude would dispense with any need for equitable damages except of course where a sale of land contract can be enforced *only* under the equitable doctrine of part performance, thus leaving some independent scope for Lord Cairns' Act. A problem similar to the one posed in the text in relation to equitable damages concerns the grant of an injunction to restrain the breach of a negative covenant under the rule in *Lumley v. Wagner* (1852), 1 De G.M. & G. 604, 42 E.R. 687 (Ch.). See Spry, *op. cit.*, footnote 111, pp. 540-571; Sharpe, *op. cit.*, footnote 71, §§689-690. The availability of such an injunction in part performance cases was discussed extensively but inconclusively in *J.C. Williamson Ltd. v. Lukey*, *supra*, footnote 115.

¹⁴⁴ (1972), 31 D.L.R. (3d) 305, [1972] 6 W.W.R. 257 (B.C.S.C.). Cf. the cases cited *supra*, footnote 110.

¹⁴⁵ Evidently, the problem with part performance was that the relevant acts were those of the defendant.

¹⁴⁶ *Willmott v. Barber* (1880), 15 Ch. D. 96 (C.A.), discussed in *Crabb v. Arun District Council*, *supra*, footnote 108, at pp. 193-195 (Ch.), 876-877 (All E.R.), per Scarman L.J.

¹⁴⁷ *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.*, *supra*, footnote 108; *Re Tudale Explorations Ltd.*, *ibid.*

protect a plaintiff's reliance interest when he performs acts preparatory to performance, an area where part performance has been excluded in the past.

B. *Restitution: quantum meruit*

Mention has already been made of the restitutionary action for money had and received in the event of a contract being unenforceable under the Statute of Frauds. The discussion here is devoted primarily to another restitutionary remedy, namely the *quantum meruit* action for the reasonable value of services supplied,¹⁴⁸ which can exist, not only in the form of a genuine implied contract,¹⁴⁹ but also as an action operating off the contract to prevent unjustified enrichment.¹⁵⁰ The possibilities of such an action are particularly apparent in the case of informal arrangements¹⁵¹ where fine shades of laconism and laymen's misunderstandings and prevarications separate the categories of contract and no-contract. Over sixty years ago, Roscoe Pound observed of cases dealing with oral promises to leave property by will: "As one reads these cases he cannot but have an uneasy feeling that general expectations of becoming the object of a testator's bounty often ripen into a contract after testator's death."¹⁵²

*Degelman v. Guaranty Trust Co.*¹⁵³ illustrates the interaction of restitutionary and part performance principles, holding that a restitutionary action could be pursued even in the face of an inconsistent, though admittedly unenforceable, express contract. A nephew, who had performed services for his aunt during her lifetime, failed to make out his part performance claim but was permitted to recover in *quantum meruit* a sum representing "what the deceased would have had to pay for them on a purely business basis",¹⁵⁴ since it was the intention of the parties that the services were to be paid for. This sum was assessed at \$3,000, a figure one may infer as being somewhat less than the value of the house. Apart from the difficulty of calculating the value of services made available on demand, where there is no operative market, it is submitted that, where there is no reason to be sceptical of the existence of the unenforceable agreement, even a court treating the obligation to pay a reasonable

¹⁴⁸ Goff and Jones, *op. cit.*, footnote 64, chap. 5 and pp. 377-392.

¹⁴⁹ *Sumpter v. Hedges*, [1898] 1 Q.B. 673 (C.A.).

¹⁵⁰ *Cutter v. Powell* (1795), 6 T.R. 320, 101 E.R. 573 (K.B.); *Degelman v. Guaranty Trust of Canada*, *supra*, footnote 115.

¹⁵¹ Davies, *loc. cit.*, footnote 113.

¹⁵² The Progress of the Law, 1919-1920 (1920-21), 33 Harv. L. Rev. 420, 813 and 929, at p. 933.

¹⁵³ *Supra*, footnote 115. See also *Re Mandryk* (1980), 6 E.T.R. 104 (Sask.Q.B.) (annotated by G.H.L. Fridman); *Racette v. Bearden*, [1977] 5 W.W.R. 762, (1977), 1 E.T.R. 211 (Sask. Q.B.) (annotated by I. Ramsay).

¹⁵⁴ *Supra*, footnote 115, at pp. 729 (S.C.R.), 788 (D.L.R.), per Rand J.

sum as imposed by law¹⁵⁵ rather than implied from fact should accept the parties' valuation of the services (in this case, the house) as cogent evidence of their value. In *Degelman*, the nephew had performed in full since he had worked for his aunt up to the date of her death, and arguably he should have been entitled to a money sum equivalent to the value of the house, unless the aunt's executor was able to offer convincing evidence that some other valuation was more appropriate. Obviously, a tendency to allow the parties' valuation of the services to stand would constitute a substantial inroad into the section 4 writing requirement. It should, however, be stressed that the plaintiff recovers to the extent that he has enriched the defendant: he does not recover damages for any detrimental reliance on the existence of a contract.

C. *Restitution: constructive trust*

Had it been necessary to do so, Equity could doubtless have created an exception to the section 4 writing requirement in cases of constructive trust. This, however, was not needed since section 8 of the Statute states that such a trust shall be as effective as if the Statute had not been passed.¹⁵⁶ In recent years, there has been a discernible development in Canada of the law governing constructive trusts, to the point where the principle is being asserted that the courts will infer a constructive trust to prevent unjustified enrichment.¹⁵⁷ The constructive trust remedy is thereby placed firmly at the core of the law of restitution. Such an approach to the constructive trust is in harmony with developments in other areas of restitution, where the prevention of unjustified enrichment is also sought.¹⁵⁸ Thus constructive trust and restitution are becoming hard to separate and both of them have a tendency to merge with part performance in factual situations, like the one in *Kiss v. Palachik*,¹⁵⁹ arising out of informal arrangements.

In that case, a husband and wife lived in a matrimonial home registered in her name, the parties having agreed that the husband would

¹⁵⁵ *Craven-Ellis v. Canons Ltd.*, [1936] 2 K.B. 403, [1936] 2 All E.R. 1066 (C.A.).

¹⁵⁶ "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 of the like Force and Effect as the same would have been if this Statute had not been made; any Thing herein before contained to the contrary notwithstanding".

¹⁵⁷ *Pettus v. Becker*, [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 257; *Kiss v. Palachik*, *supra*, footnote 127. See J.L. Dewar, *The Development of the Remedial Constructive Trust* (1982), 60 Can. Bar Rev. 265.

¹⁵⁸ *Degelman v. Guaranty Trust Co. of Canada*, *supra*, footnote 115; *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105, [1979] 3 All E.R. 1025 (Ch. D.).

¹⁵⁹ *Supra*, footnote 127.

receive a half-interest in the property once he had made a certain number of monthly payments to his wife. The wife died before this level of payments had been reached. In the absence of a contractual claim by the husband based on his part performance, the Supreme Court nevertheless awarded him the money he had already paid, together with interest, both on the basis of money had and received on a total failure of consideration and of a constructive trust of the money, the court being indifferent as to the precise classification of the action. The husband had also performed valuable services of maintenance, repair and caretaking of the property, which included an income producing part, and for this he recovered compensation on constructive trust principles that would be difficult to distinguish in their practical effect from *quantum meruit*.

Though *Kiss v. Palachik* blurs the distinction between the constructive trust and *quantum meruit* arms of restitution, the former action is potentially broader in its field of application than the latter and could give rise to more than money awards. As recent English developments show, informal living arrangements can give rise to a wide range of relief calibrated according to the needs, expectations and contributions (cash or otherwise) of the claimant. A court may grant an equitable life interest in the disputed home¹⁶⁰ or, where cash is more important than living quarters, an equitable tenancy in common in the fee simple commensurate with the size of the claimant's contribution to the acquisition and maintenance of the building and transferable to the proceeds of sale.¹⁶¹ The favourite device used to justify a proprietary interest in return for contributions is the constructive trust,¹⁶² though a number of cases introduce the language of resulting trusts¹⁶³ and overtones of express trusts.¹⁶⁴ Moreover, it is noteworthy that the value of any contribution to the property does not set a ceiling on the size of the equitable proprietary interest granted by the court.¹⁶⁵ In other cases, a non-contributing claimant may

¹⁶⁰ *Bannister v. Bannister*, [1948] 2 All E.R. 133 (C.A.).

¹⁶¹ *Cooke v. Head*, [1972] 1 W.L.R. 518, [1972] 2 All E.R. 38 (C.A.); *Eves v. Eves*, [1975] 3 All E.R. 768, [1975] 1 W.L.R. 1338 (C.A.); *Williams & Glyn's Bank Ltd. v. Boland*, [1981] A.C. 487, [1980] 2 All E.R. 408 (H.L.). But see *Jones v. Jones*, [1977] 1 W.L.R. 438 (C.A.) where the effect of a trust for sale was inhibited in order to permit a son to remain on the premises.

¹⁶² *Bannister v. Bannister*, *supra*, footnote 160; *Cooke v. Head*, *supra*, footnote 161; *Binions v. Evans*, [1972] Ch. 359, [1972] 2 All E.R. 70 (C.A.), per Lord Denning M.R.; *Re Sharpe*, [1980] 1 W.L.R. 219, [1980] 1 All E.R. 198 (Ch. D.). For a discussion of the Australian authorities, see M. Neave, *The Constructive Trust as a Remedial Device* (1978), 11 Melb. U.L. Rev. 343.

¹⁶³ *Hussey v. Palmer*, [1972] 3 All E.R. 744, [1972] 1 W.L.R. 1286 (C.A.); *Cooke v. Head*, *supra*, footnote 161; *Eves v. Eves*, *ibid*.

¹⁶⁴ *Eves v. Eves*, *supra*, footnote 161.

¹⁶⁵ *Cooke v. Head*, *supra*, footnote 161.

not have a proprietary interest in the home but rather an equity generated by an estoppel¹⁶⁶ or its close equivalent, a vague consensual understanding or arrangement.¹⁶⁷ Relief here will usually take the form of a licence to stay on the premises, which may be irrevocable so as to allow the claimant to stay for life,¹⁶⁸ or of substantial duration¹⁶⁹ or terminable on the giving of reasonable notice.¹⁷⁰ In unusual cases, a court may even be prepared to order a conveyance of the fee simple to a non-contributing claimant,¹⁷¹ but in principle a mere "equity" is enforced to the minimum extent necessary to do justice in a given case.¹⁷² The Statute of Frauds seems to be irrelevant in the development of this substantial body of law based on informal dealings in land, though its existence has surely inhibited relief through the development of forms of implied contract.

IV. Criticisms of the Present Law

Not even the alleviation of the harsher features of the Statute of Frauds writing requirement can protect it from the numerous criticisms, both technical and substantial, that can be aimed against it.

Possibly the most serious criticism of the Statute is that, by allowing parties to ride free of contracts and break their promises, it creates more "fraud", in the sense of injustice caused by meretricious conduct, than it prevents.¹⁷³ This criticism is brought into its sharpest focus when it is appreciated that a party can freely admit in court that he entered into what both parties believed to be a binding contract, but state that nevertheless he now wishes to take advantage of what can only be described as a legal

¹⁶⁶ *Inwards v. Baker*, [1965] 2 Q.B. 29, [1965] 1 All E.R. 446 (C.A.); *Tanner v. Tanner*, [1975] 1 W.L.R. 1346, [1975] 3 All E.R. 776 (C.A.); *Jones v. Jones*, *supra*, footnote 161; *Pascoe v. Turner*, [1979] 1 W.L.R. 431, [1979] 2 All E.R. 945 (C.A.); *Greasley v. Cooke*, [1980] 1 W.L.R. 1306, [1980] 3 All E.R. 710 (C.A.). Because of the decision it reached on the part performance issue, the court in *Lensen v. Lensen*, *supra*, footnote 124, did not have to rule on the issue of estoppel. Generally, see J.D. Davies, *Informal Arrangements Affecting Land* (1979), 8 Sydney L. Rev. 578.

¹⁶⁷ *Pascoe v. Turner*, *supra*, footnote 166.

¹⁶⁸ *Inwards v. Baker*, *supra*, footnote 166; *Binions v. Evans*, *supra*, footnote 162.

¹⁶⁹ *Tanner v. Tanner*, *supra*, footnote 166.

¹⁷⁰ *Chandler v. Kerley*, [1978] 1 W.L.R. 693, [1978] 2 All E.R. 942 (C.A.).

¹⁷¹ *Pascoe v. Turner*, *supra*, footnote 166.

¹⁷² *Crabb v. Arun District Council*, *supra*, footnote 108, at pp. 198 (Q.B.), 880 (All E.R.), per Scarman L.J.

¹⁷³ The following statement by Anglin J. in *Green v. Stevenson*, *supra*, footnote 76, at p. 679 is by no means unusual: "With much regret, because of the dishonesty of the defendant's conduct, which called forth such deservedly severe condemnation from the learned trial Judge, I find myself compelled to hold. . . that this action cannot succeed. In allowing the defendant's appeal, however, in my opinion we should mark our abhorrence of the conduct of herself and of those by whom she has been advised by withholding all costs from her".

See also the criticisms of the Statute cited, *supra*, footnote 3.

technicality. More than a hundred years ago, the following judicial regrets were uttered at the use of the Statute as a technical defence:

I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; although, believing that he had broken his contract, he could only have defended the action in the hope of mitigating the damages; and although he was not aware of the objection on which he now relies, till within a few days before the trial.¹⁷⁴

Against this criticism, however, one must balance the countervailing argument that, by requiring the observance of certain forms, the Statute has prevented injustice arising from the fraudulent claim that an informal contract was concluded when it had not been. It is not feasible, in the nature of things, to engage in the legal archaeology necessary to evaluate the competing strengths of these two arguments. Any judgment that the amount of injustice created by the Statute exceeds any injustice that the Statute has prevented, which seems likely, can only be an impressionistic one. It is quite impossible to measure a negative that never occurred, namely injustice prevented by the Statute, and impossible too to assert that injustice was created every time the Statute was pleaded. In an immeasurable number of reported cases, the Statute was pleaded as an afterthought in preference to a defence that was less easy and therefore less convenient to establish.

On balance, nevertheless, it can be said that this argument is so strong that if the writing argument is to be retained in anything like its present form, there must be compelling arguments operating in its favour. Moreover, this criticism of the effect of the Statute of Frauds is such a forceful one that it prompts serious consideration of the possibility whether, even if the writing requirement is retained as a general rule, courts should in future have the power to dispense with the requirement in the interests of justice. Such a dispensation need not take the absolute form of contract or no-contract, but could assume the shape of monetary compensation for injurious reliance falling short of full contract entitlement.¹⁷⁵

The lack of a present judicial power to award a scaled-down level of recovery prompts another criticism of the Statute, that it crudely dictates

¹⁷⁴ *Sievwright v. Archibald* (1851), 17 Q.B. 103, at p. 119, 117 E.R. 1221, at p. 1227 (Q.B.), per Lord Campbell C.J.

¹⁷⁵ Section 139 of the American Restatement Second on Contracts (American Law Institute 1979) provides for a remedy in the event of action or forbearance under a contract unenforceable for want of compliance with the Statute of Frauds. Such action or forbearance must be causally linked to the defendant's promise and should have been reasonably expected by the defendant. The remedy is "limited as justice requires" in accordance with a number of criteria laid down. Section 129 provides for specific performance of a sale of land contract where this is necessary to avoid injustice and the plaintiff has acted in "reasonable reliance" on the contract, the term "reliance" being preferred to "part performance" as more accurately descriptive of certain acts, such as taking possession

all-or-nothing solutions. The Statute of Frauds itself left unclear what was to be the legal consequence of a failure to comply with the required forms. In section 4, for example, it states that "no Action shall be brought" on certain contracts in the absence of a written note or memorandum of the agreement, but it took a long time to establish that a contract failing to satisfy section 4 was rendered unenforceable rather than void. The effect of this judicial choice of sanction was to create the circumstances in which restitutionary relief would sometimes be available for a party conferring a benefit on the other and claiming the existence of a contract that could not be enforced. Nevertheless, outside this limited range of cases, which does nothing to protect those who act in injurious reliance falling short of the conferment of a benefit on the other party to the contract, the contract is either fully enforceable or it is not enforceable at all, whether against the party who has signed the memorandum or in favour of the party who performs sufficient acts of part performance.¹⁷⁶ The Statute of Frauds itself quite fails to take account of the possibility that a balancing of the requirements of the Statute against the injustice perpetrated against the party seeking enforcement of the contract, might lead to a level of enforcement protecting injurious reliance but yet not producing the full-scale enforcement of the contract.

Of course, any judicial dispensing power permitting a discretionary part-enforcement of the contract is open to the criticism that it introduces an undesirable measure of uncertainty. The compelling force of this criticism, however, is blunted somewhat by the realization that the Statute, as it currently stands, has produced a body of uncertain law. It might be thought that by the time a statute is three hundred years old, any problems in its initial implementation will have been resolved so as to create a clear and comprehensible body of law. Unfortunately, this is far from being the case with the Statute of Frauds. For example, in the case of contracts for the sale of an interest in land, the equitable doctrine of part performance has always suffered from uncertainty as to its doctrinal justification, with the consequence that the recent decision of the House of Lords in *Steadman v. Steadman*¹⁷⁷ has thrown the law into a state of disarray. If the present state of affairs is allowed to continue, it can confidently be predicted that,

and making renovations, that came within the part performance doctrine. The two sections, moving towards common ground from different directions, do not sit easily together. See also Law Reform Commission of British Columbia, *op. cit.*, footnote 1, recommendation 10(d) (at pp. 79-80) and pp. 72-73, where the Commission takes account of the Restatement as well as section 2-201(b)(4) of the Uniform Land Transactions Act (1977) (National Conference of Commissioners on Uniform State Laws). This led to a recent British Columbia statute, *supra*, footnote 9, discussed in the text below.

¹⁷⁶ Though the contract is fully enforceable, the circumstances may of course be that only one party (when only the other has signed or when he alone performs in part) may enforce the contract.

¹⁷⁷ *Supra*, footnote 55.

while the Statute of Frauds is hardly likely to be directly repealed by the common law, which has come quite close to absorbing it completely, nevertheless a number of non-statutory exceptions, such as part performance and restitution, are likely to be created or expanded so as to render the Statute largely nugatory.

A further criticism of the Statute is that it has generated an excessive volume of litigation. In 1937, the English Law Revision Committee quoted the original editor of Smith's Leading Cases as saying in the middle of the nineteenth century that: "It is universally admitted that no Enactment of the Legislature has become the subject of so much litigation".¹⁷⁸ More than fifty years ago too, an American writer observed that the Century Digest, as updated, listed nearly eleven thousand cases on the Statute.¹⁷⁹ This figure, which must be revised to take account of the plentiful litigation since that observation, starkly reveals the considerable private as well as public cost exacted by the Statute of Frauds. It should however be noted, as stated above, that arguments based on the Statute commonly served as surrogates for less easily pressed arguments. Furthermore, it is impossible to place in the other half of the equation any quotient representing the litigation saved by the Statute, nor can it be denied that many Statute cases would have been vigorously contested in the absence of the Statute on the ground of uncertainty or something of a similar nature. It could also be argued that a modern Statute of Frauds would produce a smaller mass of litigation, though it is highly questionable that it could reduce litigation to modest proportions. The fact remains that the Statute has thrown up a welter of litigation that can only be described as intolerable in a civilized system of law seeking to give effect to promised expectations created by contracts.

Even if the Statute were not encumbered with myriad judicial decisions, it would be open to reproach for its archaic language and incompleteness. The Statute, enacted before the standardization of English spelling in the early eighteenth century, is couched in the prolix language of its time. The provision of section 4 dealing with sale of land contracts suffers to some extent from this. Affected to a greater extent, however, is that part of the section that, in its application to guarantee contracts, speaks of "any special promise to answer for the debt default or miscarriages of another person". This hardly renders plain the meaning of "miscarriages", and the idea of a "special promise", drawn from the writ of special *assumpsit*, is unlikely to be in the intellectual baggage of even the more accomplished twentieth century lawyers.

¹⁷⁸ English Law Revision Committee, *op. cit.*, footnote 3, p. 590.

¹⁷⁹ Willis, *loc. cit.*, footnote 3, at p. 537.

Different in its emphasis is the criticism that the Statute of Frauds can no longer be looked at *tabula rasa* as a reliable guide to the present law, this inability being a product of the modifications judicially introduced to temper injustice. Major exceptions to the writing requirement for guarantee contracts are not referred to¹⁸⁰ and, for sale of land contracts, there is no mention of part performance nor of the circumstances in which two or more documents may be joined to produce the requisite note or memorandum. The incompleteness of the Statute becomes increasingly troublesome once it is recognized that doctrines of Equity, including part performance, are undergoing a radical reappraisal and in some cases even an expansion. As stated above, there is a real possibility of the Statute being undermined by developments taking place outside.

The prospects of such a gradual judicial repeal of the Statute can only be enhanced by its evident lack of purpose. The principal rationalizations of the Statute in modern times, that it provides indispensable evidence and that it fulfils a cautionary purpose, have a tendency to work against each other. The evidentiary function can be served by the joinder of relatively informal pieces of paper falling far short of the solemn, perhaps sealed, document recording all the terms of the contract and containing the signatures of both parties, with the possible addition of those of witnesses. It is not always easy to see how the cautionary function can be furthered by such an informal, and frequently haphazard, process of joinder. Nor can the cautionary function be seen at work when a subsequent letter repudiating the contract is treated as the memorandum or a part thereof.

Sometimes, both rationalizations of the writing requirement appear to be in abeyance. Anyone familiar with the doctrine of part performance will recognize that sufficient acts of part performance commonly fall well short of the evidentiary cogency of a written note or memorandum. And if the doctrine of part performance is designed to supply alternative evidence to the writing demanded by the Statute, it might well be wondered why this alternative evidence is drawn from the conduct, not of the party to be charged, but of the party seeking enforcement of the contract. One might ask too what has become of the cautionary objective.

These are just a few of the many inconsistencies and shortcomings that could be referred to. Admittedly, it would not be impossible to demand that a writing requirement serve a number of different, and even occasionally inconsistent, policies, but the time has come to recognize

¹⁸⁰ These are first, the exemption of guarantees where the guarantor intervenes to safeguard his own property (*Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778 (C.A.)), and secondly, the exemption of guarantees which are part of a larger transaction. The most common example of this second exemption is that of the *del credere* agency: *Couturier v. Hastie* (1852), 8 Ex. 40, rev'd. on other grounds (1856), 5 H.L.C. 673.

that circumstances today are very different from those surrounding the enactment of the Statute in 1677 and that these differences and inconsistencies should now be resolved in an open, modern and balanced fashion.

Such a recognition is prompted by the realization that the Statute of Frauds is unsympathetic to the temper of modern contract law. The Statute flourished most in an age when contract was seen to be a decisive expression of the will which could be firmly located in the four corners of a written document. Much of the development in contract law in this century has been aimed at establishing two related propositions—that the written word no longer enjoys the mystique it had in the nineteenth century¹⁸¹ and that a wide range of informal dealings, utterances and understandings can be brought in to supplement the written word.¹⁸² In brief, contract law has been rendered much more informal in the twentieth century than was hitherto the case.

Twentieth century courts, even when not invoking any doctrine of fundamental breach, have commonly imposed limitations on exception clauses and like devices which are hard indeed to reconcile with any literal reading of the clause in question.¹⁸³ Implied terms have readily been incorporated into contracts to give them business efficacy, rather than to state the parties' obvious but unexpressed agreement.¹⁸⁴ Frequently, contracts are enforced notwithstanding a great deal of uncertainty in their formulation¹⁸⁵ and the perception gains ground that there is sometimes an inconsistency between the easy tolerance of uncertain aspects of an agreement, on the one hand, and the rule that the essential terms of a Statute of Frauds contract must be set out in the note or memorandum of the agreement.

The doctrine of promissory estoppel, a remarkable outgrowth of the last thirty or forty years, has served to undermine the notion that contract can be seen as an instantaneous occurrence neatly focused in a single four-cornered document. Indeed, it is not at all easy to see how the Statute of Frauds applies to a promissory estoppel arising during the currency of one of its agreements, and impossible of course to anticipate how the framers of the Statute would have dealt with the emergence of

¹⁸¹ This is most dramatically illustrated by *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400, 18 O.R. (2d) 601, 4 B.L.R. 50 (Ont. C.A.), discussed in M. Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?* (1984), 9 Can. Bus. L.J. 385, at pp. 416-425.

¹⁸² *Ibid.* See also developments in the area of express warranty, including the authorities cited, *supra*, footnote 37.

¹⁸³ Perhaps the most vivid example of this is *Hollier v. Rambler Motors (A.M.C.) Ltd.*, [1972] 2 Q.B. 71, [1972] 1 All E.R. 399 (C.A.).

¹⁸⁴ See for example *The Moorcock* (1889), 14 P.D. 64 (C.A.); *Liverpool City Council v. Irwin*, [1977] A.C. 239, [1976] 2 All E.R. 39 (H.L.).

¹⁸⁵ See the cases cited, *supra*, footnote 33.

legal ideas that their imagination and experience could not have foreseen. This particular difficulty is compounded as the doctrine of promissory estoppel is seen to be moving closer to a position where it can achieve much the same effects as a binding variation of contract. Recent developments concerning signed documents also tend to downplay the legal effect of writing in the law of contract.¹⁸⁶

Furthermore, restitutionary developments in the area of unenforceable contracts have done much to demonstrate that the Statute of Frauds is simply an historical embarrassment, out of touch with its contractual constituency. The doctrine of part performance is evidently in the process of expansion and, together with these promissory estoppel and restitutionary developments, is threatening a *de facto* repeal of the Statute of Frauds, particularly in the area which produces the greatest volume of litigation, namely, contracts for the sale of land. The question produced by this observation is whether a statute should remain in its present state when it presents a most misleading picture of the living law.

VI. *What is to Be Done With the Statute of Frauds?*

In response to the picture of the law presented in this article, three broad possibilities exist. First, the law can be left in its present state, as a number of common law jurisdictions have explicitly decided, leaving future change to judicial innovation. Secondly, the writing requirement for sale of land contracts can be abolished outright. This was done recently in Manitoba¹⁸⁷ despite a law reform commission report favouring a less drastic reform.¹⁸⁸ Thirdly, a half-way house reform can be implemented by liberalizing one or more of the minimum writing content, the doctrine of part performance and compensation for reliance expenditures. This last option was chosen very recently by British Columbia,¹⁸⁹ following the recommendations of its law reform commission and has also been recommended for Alberta by that province's law reform agency.¹⁹⁰

It can be argued in favour of the *status quo* that the writing requirement is now three hundred years old, is thoroughly woven into the fabric of the common law and is completely familiar to lawyers in all walks of legal life. It can also be said that reducing a sale of land contract to a written form constitutes sound business practice. On the other hand, it can be argued that if writing a memorandum is sound business practice, actors with sound business judgment will do it anyway, without the

¹⁸⁶ See *Tilden Rent-A-Car v. Clendenning*, *supra*, footnote 181.

¹⁸⁷ *Supra*, footnote 8.

¹⁸⁸ Manitoba Law Reform Commission, Report on the Statute of Frauds (1980, no. 41).

¹⁸⁹ *Supra*, footnote 9.

¹⁹⁰ *Op. cit.*, footnote 1 for the British Columbia and Alberta Reports.

presence of legal compulsion. Furthermore, it is a curious kind of legal logic to say that because a thing *is* done in practice, so should it become legally compellable. The argument that the writing requirement ought to be retained because it is familiar loses much of its attraction when it is realized just how disorganized and difficult to state is the law. Moreover, the truly immense body of cases dealing with sale of land contracts and the mass of material devoted to the Statute of Frauds by writers such as Corbin¹⁹¹ testify to the fact that too much legal talent and time have been devoted to this rather negative aspect of contract law. The exceptions to section 4 are, moreover, undergoing a process of expansion, and are undermining the writing requirement in any event, so that it could only recover its integrity if stringent legislation were enacted to turn back the clock. That would be a curious concession to legal purity in the absence of any demand for such a move. None of the many law reform agencies concerned with the subject has come close to such a recommendation. Their activities, themselves evidence of a common concern about the state of the law, cannot be put down to the vagaries of fashion in the field of law reform and to a desire by one agency to mimic the activities of another.

Quite the opposite possibility, as conceptually pure as the first, would be to abolish altogether any writing requirement for sale of land contracts.¹⁹² One argument against this proposal, however, is the (unverified) proposition that the need for writing in the case of sale of land contracts is so deeply embedded in the popular imagination that a party might make the mistake of straying into contractual obligation without any real intention of doing so. No difficulties would be posed by uninformed laymen who definitely and subjectively intend to commit themselves, since such a belief would lead them to reduce their agreement into a written form. Another response to such an argument, however, would be that someone who, by his actions and words, gives every indication of an intention to be contractually bound is not a very deserving candidate for the law's sympathy. Furthermore, there can be set in the scales against such a candidate one of the many unfortunate litigants who have been

¹⁹¹ *Ibid.*

¹⁹² The ramifications of this on the parol evidence rule, if it survives the critical scrutiny of recent years, would be interesting. If there were an upsurge of purely informal contracts, which is unlikely, there would be correspondingly fewer contractual occasions on which a parol evidence rule might apply. Incomplete forms, that might formerly have failed to satisfy the Statute of Frauds, might give trouble if additional parol evidence were excluded. But remembrance of the Statute would counter any semblance of comprehensiveness that such an incomplete form might otherwise present, and thus the parol evidence rule would not apply at all. Furthermore, incompleteness in a memorandum begs supplementation rather than correction, and *supplementary* collateral contracts have long been tolerated under the parol evidence rule: *supra*, footnote 60.

deprived of the fruits of a binding but unenforceable contract, to the evident advantage of the latter.

It might be said that the sale of land contract, by its nature, is a very complex contract indeed with important questions of title, third party rights, financing, warranty and completion to be settled, and that a verbal agreement would be a most unsafe guide to the settlement of all the important terms of such a contract. This argument carries a fair amount of conviction, but it would be lessened to a degree by the fact that standard forms of contract would continue to be used in the great majority of cases and, where they are not used, the protection conferred by the sanction of unenforceability on parties who have not signed a memorandum is more apparent than real in view of the growing exceptions to the requirement of writing.

A further objection to abolishing the writing requirement would be the argument that it serves a valuable cautionary function since it compels care to be taken when entering into what, for many people, is the most significant contract in their lives. But on the other hand, it is often questionable how much solemnity and cool reflection are induced by a standard form, especially if house prices or mortgage interest rates are threatening to rise steeply. The very personal interest of real estate agents in complying with the legal steps on which their commission entitlement depends will in the majority of cases involving laymen lead to sound and written business practices. Furthermore, an interview with the bank manager on the eve of an important transaction is likely to be as sobering for a purchaser as any form. The type of contracts likely to prove irksome if the writing requirement is abolished will probably be contracts entered into in informal and irregular circumstances, which already cause a great deal of trouble.

Another possible argument against an outright repeal of the section 4 writing requirement in sale of land contracts is that it would encourage perjury and the setting up of fraudulent and non-existent contracts, particularly against the ignorant and the oppressed. A variation of this argument is that informality would create further opportunities for unequal bargains, though one might wonder whether a rapidly concluded written contract would be any the less advantageous to the more powerful party.¹⁹³

The responses to such arguments are varied. One is to say that growing doctrines of contract-law, such as unconscionability, commonly

¹⁹³ See for example, *Royal Bank of Canada v. Kiska* (1967), 63 D.L.R. (2d) 582, [1967] 2 O.R. 379 (Ont. C.A.).

¹⁹⁴ *Lloyd's Bank Ltd. v. Bundy*, [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.) (explained as a decision concerned with the narrower doctrine of undue influence applied to the special facts of the case in *National Westminster Bank Plc. v. Morgan*, [1985] 1 All E.R. 821, [1985] 2 W.L.R. 588 (H.L.)). This may not be a sufficient requirement: *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231, 9 B.C.L.R. 166 (B.C.C.A.).

applied so as to require one party to give the other time for reflection and the taking of independent advice,¹⁹⁴ are much more likely than the Statute of Frauds itself to promote the cautionary objective allegedly furthered by the Statute. Another response would be that the sale of land contract is by no means unique in creating opportunities for misbehaviour and that our courts do not appear to be inundated with fraudulent claims in other parts of contract law. They are, moreover, better equipped forensically speaking than their seventeenth century counterparts to conduct searching trials, and have sound instincts for divining the existence of fraudulent claims. Furthermore, the repeal of the writing requirement would mean that a great deal of injustice would be averted and legal skills diverted to more constructive ends. Greater coherence would emerge in contract law and the awkwardness of a developing contract law being out of step with the Statute of Frauds would disappear. Most of all, the law would be simplified and much occult legal learning would vanish. It is far too early to say whether these arguments are supported by the experience of Manitoba.

The third possibility would be, *inter alia*, to extend (or at least codify) certain exceptions to section 4 developing in the form of part performance, *quantum meruit* and constructive trust. This could be regarded as more than a housekeeping reform if it established a fair balance between the opposite objectives of dissuading parties from entering precipitately into vitally important contracts and of protecting those who take reasonable steps in performing a binding but unenforceable contract. Such a compromise would be much in keeping with the genius of the common law, which frequently sacrifices doctrinal coherence to pragmatic balance.¹⁹⁵ It would nevertheless be something of a minimum response to the present difficulties posed by the writing requirement and would merely catch up with existing common law development that might continue to move ahead of such a reform. It might also be seen as encouraging the creation of nebulous and uncertain law.

A possible component of this third approach, that might be arrived at by our developing law without the aid of a statute, would be to authorize the courts in all cases to develop promissory estoppel so as to grant damages vindicating the reliance interest of the party deprived of his contract by the repudiation of the other.¹⁹⁶ This offers an escape from the inflexible dichotomy of contract and no-contract. It has the merit that a party's losses will be compensated though he receives less than his normal expectation entitlement. Further, the repudiating party receives par-

¹⁹⁵ See the remarks of Lord Wilberforce about the application of principles of formation and consideration in contract law in *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*, [1975] A.C. 154, at p. 167, [1974] 1 All E.R. 1015, at pp. 1019-1020 (P.C.).

¹⁹⁶ *Supra*, footnote 175.

tial protection against his unconsidered and informal contract behaviour by being allowed to retain his property on compensating the other party for his out-of-pocket expenses.¹⁹⁷ Much the same result could be reached, however, if section 4 were abolished and the courts applied shrewdly the principle of mitigation of damages and exercised their discretion in the award of specific performance benevolently when dealing with a rash but morally upright contracting party. To the extent that the latter way of doing things would have the merit of greater simplicity, it is to be preferred.

Another possible component of this third approach would be to diminish the content of the writing requirement so that a memorandum would be sufficient if it indicated merely the existence of a contract. This would come close to harmonising the writing requirement and the developing trend in part performance, but would have the great drawback of encouraging a fresh round of law suits in this much litigated corner of contract law to discover the minimum content of legal writing. The evidentiary function of forms would clearly diminish, and any cautionary function directed to individual terms rather than to overall contracting would also suffer. In its favour, this proposal would have the merit of reducing the occasions on which courts would have to look at exceptions of uncertain scope to the writing requirement, whether these exceptions be those arising under present law or under any proposed reform. It might, however, be asked whether, in such a world of legal compromise, any purpose at all would be left to be served by the writing requirement.

All of the above components of this third approach are to be found in a recent statutory addition to British Columbia's Law and Equity Act superseding the Statute of Frauds.¹⁹⁸ The new provision applies to contracts "respecting land",¹⁹⁹ a departure from the hallowed formula of contracts "concerning an interest in land", which can only cause trouble with its suggestion that contracts collateral to a sale of land agreement, hitherto excluded from the Statute of Frauds, are henceforth caught by the writing requirement. It is doubtful, however, that this statutory reform, aimed at diminishing substantially the depth of writing, was intended to increase the area of its coverage.

The doctrine of part performance is extended by the Act to reflect the broader view taken in *Steadman v. Steadman*²⁰⁰ and so has the merit of

¹⁹⁷ In some cases, especially where, as in *Wroth v. Tyler*, *supra*, footnote 143, the plaintiff is unable to mitigate, the reliance loss of an opportunity to enter a rising market will in fact be identical to an expectation loss.

¹⁹⁸ Law and Equity Act, R.S.B.C. 1979, c. 224, s. 54. Section 54 was enacted by the Law Reform Amendment Act, S.B.C. 1985, c. 10, s. 7. Section 8 of the 1985 Act repealed the Statute of Frauds, R.S.B.C. 1979, c. 393. Alberta's law reform agency has recommended the enactment of similar legislation, *op. cit.*, footnote 1.

¹⁹⁹ Law and Equity Act, *ibid.*, s.54(3).

²⁰⁰ *Supra*, footnote 55.

reflecting what courts actually do, as opposed to what they say they do. In particular, the payment (or receipt) of a cash deposit is stated to be sufficient part performance.²⁰¹ But the Act goes further than *Steadman* in extending part performance to acts of the party to be charged.²⁰² Oddly enough, if it is the plaintiff's part performance the defendant must acquiesce in it, as the doctrine already requires, but there is no need for acquiescence by the plaintiff where the defendant performs in part.²⁰³ Part performance in British Columbia is therefore no longer confined to equities generated by the plaintiff's conduct: it must also serve some modest evidentiary or cautionary goals (or both). One is entitled to wonder, however, whether the expanded doctrine will pursue any of these objectives in a coherent manner.

The British Columbia Act also retains existing restitutionary exceptions to the writing requirement and expands reliance protection. The latter is done by enforcing the contract where injustice would otherwise result,²⁰⁴ alternatively by compensating a plaintiff who disburses cash in reliance on a contract.²⁰⁵ It is difficult to see why compensation is not also available for non-pecuniary reliance where full enforcement of the contract might not be desirable. In sum, this measure of reliance protection is generally consistent with the most extreme statements of the doctrine of promissory estoppel.

The content of the memorandum that has to be signed by the party to be charged is also diminished by the Act. The omission of a term is not fatal;²⁰⁶ indeed, it is enough if the memorandum merely indicates that a contract has been made and gives "a reasonable indication of the subject matter".²⁰⁷ This formula can only be described as a bait to litigants and is about as useful as a parent's plea to a child to eat at least some peas before the rest are thrown away. The Act also quite fails to define "subject matter": this is probably confined to the land, which itself is not defined in this statutory reform,²⁰⁸ but it might also extend to the form of payment. In any event, it seems that the identity of the parties need not be inscribed in the memorandum.

²⁰¹ Law and Equity Act, *supra*, footnote 198, s.54(4).

²⁰² *Ibid.*, s.54(3)(b).

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, s.54(3)(c).

²⁰⁵ *Ibid.*, s.54(5).

²⁰⁶ *Ibid.*, s.54(7).

²⁰⁷ *Ibid.* s.54(3)(a).

²⁰⁸ See however, the definition of "land" in the Interpretation Act, R.S.B.C. 1979, c. 206, s. 29: "'land' includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, as to restrict the meaning". Distinguishing land and goods is likely to remain a problem.

It is submitted that this statutory change is the worst of all possible worlds. It encourages litigation to plumb the meaning of new phrases and merely enacts the pathological attempts of the present law to overcome the writing requirement as though they were desirable goals in themselves. Despite the complexity of the new law, the writing requirement is now too feeble to carry the objectives commonly attributed to written forms.

It is therefore submitted that a choice lies between retaining the *status quo* and outright abolition of the writing rule. The pressure exerted in the case law against the need for writing has become irresistible over the years, and the interests of simplicity, economy and realism point clearly to abolition. One may surmise that these arguments swayed the Manitoba legislature when it followed this bold path despite a law reform commission report substantially similar in direction to the British Columbia legislation. Time will tell whether Manitoba or British Columbia has been better served by its recent statute.

Postscript

It is hoped that this study of the treatment of sale of land contracts under section 4 of the Statute of Frauds has demonstrated the need for continuing critical appraisal of even the most long-standing and familiar features of the common law. A study of the need for writing in sale of land contracts is also enlightening for the lessons it demonstrates about the relationship of statute and common law, in particular, the ability possessed by the common law to absorb statute law into its mainstream. This might be seen by some as an insidious process, betraying as it does a take-over by lawyers from legislators of a statutory artefact whose provenance in the expression of the legislative will recedes from sight as time marches on. Others might see the harmony of common law and statute as an example of the common law at its dialectical best. From the point of view of those interested in contract law, an examination of the history of the Statute of Frauds is important for the light it sheds on the emergence of separate and distinguishable expectation, restitution and reliance entitlements, which should in turn prompt an appraisal of the role of contract and of how its boundaries should be laid out to accommodate that role.