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THE STATUTE OF FRAUDS AND THE DOCTRINE OF CONSIDERATION

Report of the English Law Revision Committee

(With the kind permission of the Controller of H.M. Stationery Office, the REVIEW is able to publish the Sixth Interim Report of the English Law Revision Committee (Cmd. 5449) dealing with the Statute of Frauds and the Doctrine of Consideration, as it appeared in the English Weekly Notes for August 14 and 21, 1937.)

SIXTH INTERIM REPORT

(STATUTE OF FRAUDS AND THE DOCTRINE OF CONSIDERATION)

To the Right Hon. The Viscount HAILSHAM, D.C.L., LL.D., D.Litt., Lord High Chancellor of Great Britain.

MY LORD,

1. We were appointed a Committee on the 10th January, 1934,

"to consider how far, having regard to the Statute Law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions;" and on 1st November, 1934, we are required "to report specially as soon as may be upon the following :—

A. *Whether all or any of the following enactments should be amended or repealed :—*

Statute of Frauds, 1677, section 4.
Statute of Frauds Amendment Act, 1828.
Mercantile Law Amendment Act, 1856.
Sale of Goods Act, 1893, section 4.

B. *Whether and, if so, in what respect the doctrine of consideration requires modification, and, in particular, to consider the following aspects of the observations upon that doctrine :—*

(a) *The rule in* Pinnel's Case (1602) 5 *Rep.* 117, *See Notes to* Cumber and Wane (1719) 1 *Smith's Leading Cases* (13*th Ed.*)

p. 373, *and especially the observations at p.* 385. *See also the remarks of Jessel M.R. in* Couldery *v.* Bartrum (1881) 19 *Ch.D.* 399.

(b) *The rule that a promise to perform an existing duty is no consideration. See Leake on Contracts* (1*st Ed.*) *p.* 321; *Pollock on Contract* (9*th Ed.*) *pp.* 198 *et seq.*

(c) *The rule that consideration must move from the promisee, including the attitude of the Common Law towards the* jus quaesitum tertio. *See* Dunlop Tyre Co. *v.* Selfridge [1915] *A.C.* 847, *and especially the observations of Lords Haldane and Dunedin at pp.* 853 *and* 855.

(d) *The need for consideration to make simple contracts enforceable.* Pillans *v.* Van Mierop (1765) 3 *Burr.* 1663 *and of* Rann *v.* Hughes (1773) 7 *T.R.* 350.

C. *To consider and report whether the Statutes and rules of law relating to the limitation of actions require amendment or unification, and in particular to consider the rules relating to acknowledgments, to part payments, the disabilities of plaintiffs, the circumstances affecting defendants which prevent the periods of limitation from beginning to run, and the scope of the rules as to concealed fraud.*"

2. On December 21st, 1936, we presented to your Lordship an Interim Report with regard to the third of these questions. The report we are now presenting to your Lordship is concerned with the first two questions submitted for our consideration.

3. Our Report is divided into the following sections :

A. Discussion of Section 4 of the Statute of Frauds, Section 4 of the Sale of Goods Act and kindred provisions with proposals for repeal.

B. Discussion of the doctrine of consideration.

C. Proposals for alteration in the law relating to consideration.

D. The *jus quaesitum tertio* with proposals for alteration in the law.

E. Summary of Recommendations.

A. Section 4 of the Statute of Frauds.

4. The provisions on which we are asked to report read as follows :—

Section 4 of the Statute of Frauds, 1677 :—

"*No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage;* [*or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them;*] *or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought,*

or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

The words in brackets are now repealed, and re-enacted with some modifications by Section 40 of the Law of Property Act, 1925. They are, therefore, outside our terms of reference, and we make no recommendation with reference to them.

5. Section 3 of the Mercantile Law Amendment Act, 1856 :—

"*No special promise to be made by any person after the passing of this act to answer for the debt default or miscarriage of another person being in writing and signed by the party to be charged therewith or some other person by him thereunto lawfully authorised shall be deemed invalid to support an action suit or other proceedings to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.*"

6. Section 4 of the Sale of Goods Act, 1893 :—

"(1) *A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.*

(2) *The provisions of this Section apply to every such contract notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made procured or provided or fit or ready for delivery or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.*

(3) *There is an acceptance of goods within the meaning of this Section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.*"

The Act by its Schedule repeals, and in this section reenacts Section 17 of the Statute of Frauds (with certain changes) and Section 7 of the Statute of Frauds Amendment Act, 1828.[1]

[1] Section 17 of the Statute of Frauds now repealed and (with certain changes) re-enacted by the Sale of Goods Act, 1893, was as follows :—

"*And be it further enacted by the authority aforesaid that from and after the 24th day of June no contract for the sale of goods wares or merchandizes for the price of £10 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 payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.*"

Section 7 of the Statute of Frauds Amendment Act, 1828, now repealed and re-enacted by the Sale of Goods Act, 1893, was as follows :—

7. Of these Sections, far the most important are Section 4 of the Statute of Frauds, and Section 4 of the Sale of Goods Act. The other sections are mere addenda and corrigenda, and as noted above have been in some cases absorbed and reproduced in these major provisions.

The Statute of Frauds, which was passed in 1677, contained originally twenty-five sections, dealing with a great variety of subject matters—wills, declarations of trust, conveyances, leases, contracts—but professing in regard to all of them a single object, the prevention of fraud and perjury. Of the original twenty-five Sections, only two (Nos. 4 and 23) survive to-day, though some of the repealed Sections have been re-enacted with changes in other Statutes.

8. In the two and a half centuries during which the Statute has been in operation, widely divergent opinions have been expressed by high authorities as to its policy and merits.

Lord Kenyon's verdict:—"One of the wisest laws in our Statute Book" (*Chaplin* v. *Rogers*, 1800, 1 East at p. 194), and, "I lament extremely that exceptions were ever introduced in construing the Statute" (*Chater* v. *Beckett*, 7 T.R. at p. 204) contrasts with that pronounced by Wilmot J., and concurred in by Lord Mansfield (in *Simon* v. *Metivier*, 1766, 1 Bl.W. at p. 601:—"Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing frauds." The Statute, as these words imply, has not been "carried into effect according to its letter". Mitigating expedients, such as the doctrine of part performance, strained construction of its language, such as that which excluded contracts to marry from agreements in consideration of marriage, and Statutory amendments, have softened its asperities. Yet in 1851 so experienced a common lawyer as Lord Campbell could record the opinion that "the Act promotes more frauds than it prevents". Lord Nottingham (who, since the Act was his offspring, may well have felt for it some parental partiality) used to claim that "every line of it was worth a subsidy"; upon which claim a learned lawyer, nearly two centuries later, commented that "every line has cost one".[2]

"Be it enacted that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards notwithstanding the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made procured or provided or fit or ready for delivery or some act may be requisite for the making or completing thereof or rendering the same fit for delivery."

[2] J. W. SMITH. LECTURES ON THE LAW OF CONTRACT (1847), p. 39.

Contemporary opinion is almost unanimous in condemning the Statute and favouring its amendment or repeal.

9. The main criticisms directed against Section 4 may be summarised under the following heads :—

(1) First and foremost, it is urged that the Act is a product of conditions which have long passed away. At the time when it was passed, essential kinds of evidence were excluded (e.g., the parties themselves could not give evidence), and objectionable types of evidence were admitted (e.g., juries were still in theory entitled to act on their own knowledge of the facts in dispute). It was an improvement on this state of affairs to admit the evidence of the parties, even though only to the extent that such evidence was in signed writing. To-day, when the parties can freely testify, the provisions of Section 4 are an anachronism. A condition of things which was advanced in relation to 1677 is backward in relation to 1937.

(2) "The Act", in the words of Lord Campbell already cited "promotes more frauds than it prevents". True, it shuts out perjury; but it also and more frequently shuts out the truth. It strikes impartially at the perjurer and at the honest man who has omitted a precaution, sealing the lips of both. Mr. Justice FitzJames Stephen (writing of Section 17, but his observation applies equally to Section 4) went so far as to assert that "in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality". (Law Quarterly Review, 1885, Vol. 1, p. 1.)

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

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

(5) The operation of the Section is often lopsided and partial. A and B contract: A has signed a sufficient note or memorandum, but B has not. In these circumstances B can enforce the contract against A, but A cannot enforce it against B.

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

efficacy (for *what* other purposes precisely, is doubtful; *see* Law Quarterly Review, 1936, Vol. 51, p. 49). Anomalous results flow from this: e.g. in *Morris* v. *Baron*, [1918] 1 A.C.1, a contract which complied with the Section was superseded by a second contract which did not so comply. It was held that neither contract could be enforced: the first, because it was validly rescinded by the second, the second because, owing to its purely oral character, no action could be brought on it. This was a result which the parties could not possibly have intended.

(7) Apart from its policy the Statute is in point of language obscure and ill-drafted. "It is universally admitted", observed the original editor of Smith's Leading Cases, "that no Enactment of the Legislature has become the subject of so much litigation".[3] This could hardly have been so if its terms had been reasonably lucid.[4]

10. Most of the above criticisms apply, both to Section 4 and to Section 17 of the Statute of Frauds, and therefore to Section 4 of the Sale of Goods Act, 1893, so far as it reproduces that Section.

A word or two should perhaps be said in amplification of the criticisms under heads (3) and (4) above.

Criticism (3). Assuming that there may be classes of contracts in respect of which special evidentiary requirements should be insisted on as a condition of their enforceability, can it be said that there is any ground for singling out the particular classes of contracts named in Section 4 (and 17) of the Statute of Frauds?

It cannot be supposed that the framers of this legislation selected them purely at random. They would seem to have had in mind more than one criterion :—

(A) the value or importance of the subject matter. The more considerable the subject matter, the greater the induce-

[3] J. W. SMITH. LECTURES ON THE LAW OF CONTRACT, p. 39.

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

ment to commit perjury, and the desirability of evidence which shall be proof against perjury. (This seems to have been the criterion applied by the Legislature in including Contracts affecting land: contracts for sale of goods of a value (or price)[5] of £10 or upwards—a more substantial amount then than now: and possibly agreements in consideration of marriage);

(B) the interposition of a long interval between the making of the contract and its complete performance. The longer this interval, the worse will be the recollection of witnesses, and the more difficult it will be to expose an invention ("contracts not to be performed within a year of the making thereof");

(C) the one-sided or disinterested character of the ostensible bargain. The law, perhaps cynically, regards such bargains with scepticism, and is inclined to require specially cogent evidence of their existence[6] (promises by an executor or administrator to answer damages out of his own estate: contracts of guarantee).

As to (C), it may be observed that at the time the Statute was passed, although contracts of this kind by personal representatives were commoner relatively than to-day, they were often less disinterested, since unless the will named a residuary legatee, the personal representative took the residue beneficially.

11. What is the position as to criteria (A) and (B)?—It is submitted that either these criteria should be applied generally, or they should not be applied at all.

(A) *Importance of the subject matter.*

As this criterion is applied by the provisions under review, a man who by an oral contract buys or sells £10 worth of goods, cannot (subject to acts of part performance) enforce his bargain, yet a man who orally contracts to do work or to sell shares or to insure property (against other than marine risks) can enforce his bargain, and have it enforced against him, *however great the amount involved.* Again, a promise to settle money on a person in consideration of marriage is not enforceable without a note or memorandum: but a promise to marry (surely a transaction not less momentous) is.

(B) *Time intervening between contracting and complete performance of the contract.*

[5] "Price" in S. 17 of the Statute of Frauds, becomes "value" in S. 4 of the Sale of Goods Act, 1893.

[6] For instance, a deed in the case of gratuitous promises.

The Statute assumes the span of reliable human memory to extend to one year and no further. When the contract and its performance are more widely separated a note or memorandum is called for.

This seems illogical. There would be nothing ridiculous in a provision that all transactions, between which *and their proof in a Court of Law* there intervenes a period of more than X years, must be proved by some exceptionally cogent type of evidence: X years being a reasonable estimate of the maximum normal limit of clear recollection. But this is not what Section 4 provides.

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

(2) This period is fixed at one year.

12. The illogical character of these provisions is perhaps best demonstrated by simple examples of their working:—

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

(*b*) A contract not to be performed within a year from its making is made orally, and is repudiated the day after it is made. Five years after the breach the guilty party writes and signs (for his own use) a summary of its terms, which comes to the knowledge of the other party. The latter can then enforce the contract, for the writing need not be contemporary therewith. It is sufficient (subject to the Statute of Limitations) if the writing comes into existence at any time before action brought; by which time recollection (if one year is its maximum normal span) may have completely faded.

(*c*) A contract made orally is to be performed within less than a year of its making, and is broken. The innocent party can sue nearly six years after the breach; by which time the parties must (on the assumptions of Section 4) have forgotten its terms. (The assumptions of Section 4 are indeed utterly inconsistent with those on which the Statute of Limitations proceeds.)

13. Apart from these considerations, the meaning of the words "not to be performed within a year of the making" has

given rise to great difficulty and complicated artificial rules (see for instance *Hanau* v. *Ehrlich* [1912] A.C. 39); and the doctrine that acts done in part performance of the contract will excuse the absence of signed writing—(a doctrine which equity applies in the case of contracts affecting land, and which express statutory provisions apply in a somewhat different form to sales of goods of a value of £10 or upwards) is not available in the case of contracts "not to be performed within a year"; even if such contracts are also contracts for sale of goods of a value of £10 or upwards (*Prested* v. *Gardner*, [1910] 2 K.B. 776); indeed, the equitable doctrine of part performance probably does not apply to any classes of contracts covered by Section 4 of the Statute of Frauds, now that contracts for sale of land have been removed from that Section.

14. *Criticism* (4). *Divergence between practice and legal requirements*, with advantage to the unscrupulous who exploit the absence of the legal requirement, is one of the main weaknesses of the Statute.

This seems to have been recognised early. The doctrine of part performance, as applied in the case of contracts in respect of land, is one example of its recognition. Another is the artificially contracted meaning attached to the expression "contracts in consideration of marriage". These words might be supposed to cover contracts to marry, and at first were so construed (*Philpot* v. *Wallet*, 3 Lev. 65). Later the construction was narrowed so as to cover only contracts to pay marriage portions and the like: no doubt because in practice a person accepting a proposal of marriage did not as a rule cold-bloodedly demand a "note or memorandum" from the party whom she might later desire to "charge" on the promise. Again, in practice, contracts of guarantee commonly did not specify the consideration for the surety's promise. By 1856 a legislative concession had to be made to the practice and the Mercantile Law Amendment Act of that year by Section 7 provided that a note or memorandum of such a contract should be sufficient though it did not specify such consideration.

These makeshifts were needed to make the Statute tolerable, but we think the time has come when its fourth Section and the provision contained in Section 4 of the Sale of Goods Act, should be repealed, on the grounds indicated above; that these provisions have outlived the conditions which generated and in some degree justified them; that they operate in an illogical and often one-sided and haphazard fashion over a field arbitrarily

chosen; and that on the whole they promote rather than restrain dishonesty. None of these provisions apply to Scotland (though under Scots law some contracts must be evidenced by writing).

15. We have also considered whether we ought to recommend that the contract of guarantee should be treated separately in our recommendations by providing that signed writing should be made essential for this type of promise but we have come to the conclusion that there is no reason for making such a new provision.[7] At present the fact that a memorandum in writing is not essential for the enforceability of the very similar contract of indemnity does not appear to be giving rise to injustice and we should be sorry to do anything which perpetuated the rather artificial distinction between guarantee and indemnity.

16. In conclusion upon Section A of our terms of reference, we recommend that the following enactments should be repealed :—

(*a*) So much as remains of Section 4 of the Statute of Frauds;

(*b*) Section 3 of the Mercantile Law Amendment Act, 1856;

(*c*) Section 4 of the Sales of Goods Act, 1893.

B. The Doctrine of Consideration.

17. No doctrine of the Common Law of England is more firmly established at the present day than the doctrine of consideration, which in general terms provides that a promise not made under seal shall only be binding in law if the person to whom the promise is given furnishes something in turn. It is unnecessary for us to discuss the question whether detriment to the promisee is the exclusive element or whether benefit to the promisor should be regarded as an alternative element. We are content to accept Sir Frederick Pollock's definition which was adopted by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, 855: "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable." It might be thought that if the parties concerned intend a promise to be one which will be effective in law there is no valid reason why it should not be enforced, but it is clear, nevertheless, that this

[7] Some of the members of the committee recommend that contracts of guarantee should be in writing. See *infra*.

intention will be of no avail if consideration is not present. The doctrine and the cluster of highly technical rules which have sprung from it cannot be understood without some reference to the history of the matter, though we shall only examine the history to the minimum extent that appears to us to be necessary.

18. *The History of the Doctrine.*—Early English law, in common with most other primitive legal systems, only enforced promises which had been entered into or reinforced by means of some formal act. Before the end of the reign of Edward I the King's Courts were enforcing by the action of covenant agreements in writing which had been duly sealed and delivered, though it seems that at an earlier date sealing and delivery were not necessary. In addition many promises were enforceable by means of actions which were really in origin actions to recover something such as a fixed sum of money or a chattel. Instances of these actions are debt, detinue, and account. But the medieval legal mind shrank from the notion that a man could be sued in a Court of law merely because he had broken a promise made in an informal way, and it was only with great difficulty, and, as the result of a process of almost imperceptible development, that promises of this kind ultimately became actionable. This happened when the ingenuity of the lawyers of the fifteenth and sixteenth centuries had developed the expedient of treating the breach of a simple promise as a wrongful act similar in kind to the wrong which is suffered when an injury is done to the person or the property of an individual.

In this way it was possible gradually to extend the action of trespass on the case, which offered a remedy for actionable wrongs of this character so as to cover broken promises, a development which is sometimes described in the following manner. First, a remedy was given for cases of malfeasance, i.e., the causing of damage by a deliberate and wrongful act. The next stage was the extension of a writ of trespass on the case to cases of misfeasance, a term which comprised the wrong of negligently or imperfectly doing what the defendant had promised to do. But it was not until the fifteenth century, and not without help from another form of action (the writ of deceit) that the action of trespass on the case came to cover nonfeasance, i.e., the failure or refusal of the defendant to carry out a duty which he had "assumed" (*quare assumpsisset*). It was thus that the so-called action of *assumpsit* came into being, as a variety of the action for trespass on the case which could

be adapted to provide a remedy for breaches of contract in general. Thereupon the flexibility and wide scope of this new remedy rendered it necessary to define the limits of its operation, and to find some criterion by which it might be ascertained whether the action ought to lie or not. The gist of the action was that the defendant had "assumed" or undertaken a duty, and it was therefore natural to ask why he had "assumed" it. The answer was that the plaintiff must be able to point to an "occasion" or a "cause" or a "consideration" for the defendant's undertaking, these terms being used at first interchangeably and in a non-technical sense to denote the act or other circumstances leading up to, or constituting the motive for, a given transaction which it was sought to enforce by one of the existing forms of action. (See Holdsworth *History of English Law*, Vol. VIII, p. 7.) Towards the end of the sixteenth century the facts which had to be established before a remedy could be sought by means of the action of *assumpsit* came to be known as the "consideration". They usually consisted of some detriment incurred by the person to whom the promise was given or of the simultaneous exchange of promises. Moreover, it was necessary to show that the facts or circumstances relied upon as constituting "consideration" were connected with the promise and contemporaneous with it: past consideration could, therefore, not constitute consideration in the eyes of the law. Nevertheless, somewhat illogically, at the beginning of the seventeenth century it was held that a pre-existing debt both implied a promise to pay it and supplied that promise with the consideration necessary to make it enforceable (*indebitatus assumpsit*). In some such manner as this the doctrine of consideration came into being not as an essential part of a theory of the law of contract, but more or less fortuitously as an expedient adopted in order to determine when persons injured by the breach of a promise ought to be allowed to bring an action.

19. Soon the origin of the doctrine became obscured and it hardened into a substantive rule of law, the working of which sometimes produced injustice, so that we find attempts being made to modify its rigidity. Thus for a time the notion prevailed that a moral obligation might in itself be sufficient consideration for a promise, and this idea was not finally disposed of until it received its death-blow from the decision in *Eastwood* v. *Kenyon* (1840) 11 Ad. & E. 438. Again, Lord Mansfield went further and took the view that the existence of consideration for a

promise was only of importance in so far as it furnished evidence that the parties had intended to make a binding contract. (*Pillans* v. *Van Mierop* (1765) 3 Burr. 1663.) He said (at p. 1669): "I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialities, bonds, etc., there was no objection to the want of consideration." In his opinion other forms of evidence could discharge this function equally well and, in particular, he held the view that, where the parties had reduced their contract to writing, this was sufficient evidence of their intention (at any rate in the case of commercial contracts, for he lays emphasis on the practice of merchants), so that the necessity for consideration did not arise. However sound this view might be as a statement of what the law ought to be, Lord Mansfield was in error so far as the then existing state of the law was concerned, and his view of the matter was overruled by the House of Lords in *Rann* v. *Hughes* (1778) 7 T.R.350.

It thus came about that a doctrine, which originally was no more than a test by which it could be ascertained whether the breach of a promise was actionable or not in *assumpsit*, developed into a definite rule of law which requires that something of material value shall be given, or some other detriment shall be sustained, by the recipient of a promise in order to make that promise enforceable. In other words a device designed to provide a test for the enforceability of simple promises by one particular form of action, *assumpsit*, has become a fundamental rule of the law of contract.

20. *The present state of the law.*—The reasons which gave rise to the doctrine of consideration have ceased to be of importance at the present day. What then is the purpose of the continued existence of the doctrine? It cannot be to distinguish between onerous and gratuitous agreements because adequacy of consideration is wholly immaterial, and some promises which are technically held to be supported by consideration are, in fact, nothing more or less than purely gratuitous promises. Some might attempt to justify the continued existence of the doctrine on the ground that it enables the law to distinguish between a so-called "gentleman's agreement" and one which is intended by the parties to affect their legal relations, but the Courts have shown by such decisions as *Balfour* v. *Balfour* [1919] 2 K.B. 571, and *Rose and Frank* v. *Crompton* [1925] A.C. 445, that even when circumstances which

would normally constitute consideration are present, the parties may have had no intention to affect their legal relations. Further, the doctrine often compels the Courts to invalidate a promise which the parties intended to be binding: thus Lord Dunedin said in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, at p. 885, that the doctrine may "make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."

21. The result is that it has been necessary in the interests of elementary justice to allow exceptions from the doctrine which cannot be justified on any grounds of logic. For instance, although past consideration is no consideration, it has been held that a promise to pay a statute-barred debt is binding, though there is recent judicial opinion to the effect that this case is not a real exception. So also a past consideration, given at the request of the promisor, has been allowed in certain cases to support a subsequent promise, on the ground that the subsequent promise merely fixed the amount payable under an earlier promise (to be implied from the circumstances) to pay a reasonable sum. But in many, if not all, such cases this is a pure fiction. Then again the so-called "nominal" consideration —a peppercorn or the like—is merely a pretence adopted to render a gratuitous promise enforceable.

22. But much more serious than these aspects of the doctrine which bring it into ridicule, are those of its consequences which so often involve hardship to the parties or cause serious business inconvenience. A striking instance is the rule that a promise to pay a smaller sum in discharge of a greater is invalid unless made under seal. Many cerditors are willing to reduce a debt if they can get a fresh promise of the payment of a part of it, and yet a debtor who fulfils such a promise (unless it is under seal) finds himself liable to be sued for the balance. It is true that various devices have been found to circumvent this rule, such as that a change in the time or mode of payment, often quite illusory in character, or the addition by the debtor of a canary or a tom-tit, will suffice to constitute consideration for the creditor's promise to forgo part of his debt. That the rule, in spite of such devices, does cause serious inconvenience in practice is evident from such cases as *Foakes* v. *Beer* (1884) 9 App. Cas. 605, and is illustrated in particular by the problem, still unsolved, of discovering the consideration for a debtor's composition with his creditors. Another instance of the incon-

venience which may arise in business owing to the existence of the doctrine is to be found in the case of Bankers' Commercial Credits. Where goods are sold on terms requiring payment of the price by a banker who is not a party to the contract of sale, it has been argued that there is no consideration for the banker's promise to pay the seller the price because such consideration as exists for this promise moves to the banker from the buyer of the goods and not from the seller. This defence has never been pressed hitherto, owing to the reluctance of English bankers to rely on technicalities of the law, but it might be insisted on in the type of case in which a dispute arises whether the buyer has carried out his obligation to secure payment by a proper form of Bankers' Credit (See *Panoutsos* v. *Raymond Hadley Corporation* [1917] 2 K.B. 473), and the liquidator of a banking company might be virtually compelled to take this point.

23. It is also possible that the doctrine may lead to hardship where a man promises to do something which he is already bound in law to do. A promise of this kind is sometimes held void for want of consideration, though it is a matter of controversy, in cases where the original obligation is a contractual one, whether this rule applies only where the parties are the same or extends to the case where the second promise is given to a third party. But in either event there seems to be no good reason why the second promise should be treated as invalid, provided that the Court has power to decline to enforce it on grounds of public policy when they exist.

24. The doctrine may also have the effect of defeating the reasonable expectations of a party in the very common case of a gratuitous promise to keep an offer open for a stated period. The party receiving and relying upon a promise of this kind may incur considerable trouble and expense in consequence, but if the offer is revoked before the period runs out he is left without any remedy because there is no consideration for keeping the offer open. It is small consolation to him to be told that he ought to know the law. His retort would probably be that the law should be altered.

25. Again, as the law now stands certain promises to subscribe to an educational or other charitable institution cannot be enforced because they are given without consideration. It can easily happen (and has happened) that an institution of this character embarks upon a scheme of expenditure in reliance upon such a promise and then suffers heavily when the promise

is not performed. The general conscience of mankind regards such a promise as one which should be carried out if it is made after due deliberation, but the law gives no assistance if such a promise is repudiated.

Enough has been said to show that to-day in very many cases the doctrine of consideration is a mere technicality, which is irreconcilable either with business expediency or common sense, and that it frequently affords a man a loophole for escape from a promise which he has deliberately given with intent to create a binding obligation and in reliance on which the promisee may have acted.

C. Proposals for Changes in the Law Relating to Consideration.

26. The inconvenience and possible injustice resulting from the doctrine of consideration raise the question whether it presents countervailing advantages which justify its retention.

There is no doubt much to be said in favour of its abolition. A lawyer instructed to prepare a code of the law of contract and starting with a clean slate would be most unlikely to adopt the doctrine. It is peculiar to Anglo-American law and is found nowhere else. The law of Scotland, for certain purposes, recognizes the difference between gratuitous and onerous promises, but has always rejected the idea that consideration is essential to the formation of a contract. The French Civil Code recognizes "cause" as an element in a contract, but this requirement, which seems to refer either to the motive underlying the making of the contract or to the purpose for which it is made, appears to be largely academic in character. It does not resemble "consideration" or give rise to any of the difficulties which have been discussed. German law, so far as concerns the formation of the contract, has regard solely to the intention of the parties to a contract and does not concern itself either with "cause" or "consideration". This shows that highly developed systems of modern law can function quite satisfactorily without the aid of the artificial common law doctrine of consideration with its subtle distinctions and refinements.

27. Many of us would like to see the doctrine abolished root and branch. But a recommendation to this effect would probably be unwise. It is so deeply embedded in our law that any measure which proposed to do away with it altogether would almost certainly arouse suspicion and hostility. An

opportunity should, however, be taken to prune away from the doctrine those aspects of it which can create hardship or cause unnecessary inconvenience. If the proposals which follow are accepted, the doctrine will still survive, though deprived of most of its mischievous features.

We have not attempted in this Report to deal with the use of the seal. It is firmly established in other branches of the law and it is not at present, without a special investigation, practical to abolish it. It is outside the terms of our reference on this occasion. It is a question which involves many ramifications and it will no doubt be the subject of some future reference to this Committee.[8]

28. We wish to make it clear that the proposals which follow do not claim to be a comprehensive, logical and final statement of the requirements which our law ought to demand for the enforcement of contracts otherwise free from objection or defect. They are an attempt to remove certain obstacles which have accumulated in the course of our history and are impeding our Courts in the task of developing a rule of practice in the matter most likely to serve the needs of our modern community.

If the view is accepted that all that is necessary in order to render an agreement enforceable is that there should be evidence that the parties intend to create a relationship binding in law, then it seems to follow that this requirement can be satisfied equally well either by consideration regarded as evidence of that intention or by some other evidence of that intention. On this basis, it becomes possible to frame proposals which will carry into effect this purpose, and will, while doing as little violence as possible to any long-established theories, remove the hardships arising from the technical applications of the doctrine which have crept into the law of contracts.

(1) *Promise in Writing.*

29. Basing themselves on the views of Lord Mansfield stated in *Pillans* v. *Van Mierop*, which we have quoted above, many judges and writers of textbooks (see, in particular, Professor Holdsworth, *History of English Law*, Vol. VIII, p. 48) have advocated that a promise in writing, though not under seal and not supported by consideration, should be enforceable. The only justification for the doctrine of consideration at the present day, it is said, is that it furnishes persuasive evidence of

[8] On the use of the seal Mr. Justice Goddard has appended a separate memorandum. See *infra*.

the intention of the parties concerned to create a binding obligation, but it does not follow from this that consideration should be accepted as the *sole* test of such intention. This intention ought to be provable by other and equally persuasive evidence such as, e.g., the fact that the promisor has put his promise in writing. We agree with this view, and we therefore recommend that consideration should not be required in those cases in which the promise is in writing.

We must make it clear that when we speak of the promise being in writing we mean the promise which is being sued upon, and we do not mean that, in the case of a contract consisting of mutual promises both the promises must be in writing.

30. On the other hand we are of the opinion that the entire promise should be in writing to bring it within the rule and that no other evidence of the promise, whether in writing or partly in writing and partly oral, should be considered sufficient. Nor do we recommend that the written promise must be signed: all that is necessary is that the Court should be satisfied that the writing (which includes typescript and print) is that of the promisor or his agent. This can be proved in the same way as any other question of fact is proved. Thus the requirement of writing which we are now recommending has nothing to do with the old "memorandum or note" of the Statute of Frauds. It differs both in purpose and in content.

This recommendation does not mean that a promise in writing will be binding in every case. It will still be necessary for the Court to find that the parties intended to create a binding obligation. Just as the presence of consideration to-day does not convert a social engagement into a legal contract, so the presence of writing will not convert a gratuitous promise into a legally binding one unless the Court determines that the parties intended it to be legally binding.

Other Amendments of the Doctrine of Consideration.

31. It would be possible to leave the doctrine of consideration otherwise untouched if these proposals are accepted and to defend this course on the ground that parties to an agreement can, by resorting to writing, escape any inconvenience or hardship consequent on the present state of the doctrine. But there would still continue to be promises not in writing in dealing with which the Courts might find themselves obliged to give effect to the absurdities of certain aspects of consideration. Moreover, the policy of leaving untouched rules which are

admittedly inconvenient or unjust is one which we should only adopt with the greatest reluctance.

We therefore recommend that any enactment dealing with the questions before the Committee should, in addition to our preceding recommendations, amend the doctrine of consideration in the following points, which follow the order of the items mentioned in our terms of reference in regard to consideration, and add other points in regard to which the doctrine calls for amendment.

(2) *The Rule that past Consideration is no Consideration.*

32. The inconvenience of this rule is frequently evaded by means of the fiction that the promise made subsequent to the consideration merely fixes the amount due under an earlier promise deemed to exist contemporaneously with the consideration. In a very important class of case, namely, actions upon cheques and other bills of exchange, the rule does not apply and we can see no reason why it should apply at all. The fact that the promisor has already received consideration for his promise before he makes it, so far from enabling him to break his promise seems to us to form an additional reason for making him keep it. We therefore recommend the abolition of this rule, but we consider that its abolition should not be permitted to affect the rule which requires a written promise or acknowledgment for the revival of a statute-barred debt, nor do we desire to make enforceable any promise made on attaining majority to pay a debt incurred in infancy.

(3) *The Rule in Pinnel's Case* (1602) 5 *Rep.* 117*a*.

33. The part of the decision in *Pinnel's Case*, with which it is proposed to deal, is in the words of Coke's Report as follows: "payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk or robe, etc., in satisfaction is good." This passage was a dictum and was not necessary to the decision, which was in favour of the plaintiff upon an insufficiency of pleading, but owing to the weight of Coke's authority it in time acquired the force of law. It is unnecessary for us to trace the whole course of its history and the many subtleties and evasions which were adopted in order to minimize the mischief done by it. It has been shattered by argument and ridicule from the judicial bench, and we need only refer to the comments of a

great equity lawyer, Sir George Jessel, M.R., in *Couldery* v. *Bartrum* (1881) 19 Ch. D. 394, and of a great common lawyer, Lord Blackburn, in *Foakes* v. *Beer* (1884) 9 App. Cas. 605. As Sir George Jessel said in the former case at p. 399 :

> According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tom-tit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take nineteen shillings and sixpence in the pound; that was *nudum pactum.*

Speaking of a composition with creditors he continued :

> Therefore it was necessary to bind the creditors; and as every debtor had not a stock of canary birds or tom-tits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement constituting an addition to the dividend, so as to make the agreement no longer *nudum pactum*, but an agreement made for valuable consideration; then there would be satisfaction.

34. In *Foakes* v. *Beer* Lord Blackburn was evidently disposed to hold that it was still open to the House of Lords to reconsider the rule based on the dictum, but in deference to his colleagues who were of a different opinion he did not press his views. In a few words (at p. 622) he summed up what appears to us to be a powerful argument for the abolition of the rule. He said :

> What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.

35. In our opinion this view is as valid as it was fifty years ago, and we have no hesitation in recommending that legislation should be passed to give effect to it. This legislation would have the additional value of removing the logical difficulty involved in finding a consideration for the creditors' promises in a composition with creditors when not under seal. It would be possible to enact only that actual payment of the lesser sum should discharge the obligation to pay the greater, but we consider that it is more logical and more convenient to recommend that the greater obligation can be discharged either by a promise to pay a lesser sum or by actual payment of it,

but that if the new agreement is not performed then the original obligation shall revive.

(4) *The Rule that a promise to perform an existing duty is no Consideration.*

36. Three cases must be discussed :

(*a*) Where A makes a promise to B in consideration of B doing or promising to do something which he is already bound to do by reason of a duty imposed upon him by the law, whether by a Statute or otherwise: for instance, the duty of a local police authority to afford adequate protection to A and his property;

(*b*) Where A makes a promise to B in consideration of B doing or promising to do something which he is already bound to do under a contract with A;

(c) Where A makes a promise to B in consideration of B doing or promising to do something which he is already bound to do under a contract with C.

In cases (*a*) and (*b*) where the thing promised or performed is precisely the thing which the promisor is already bound to do, and no more, and there is no dispute that he is bound to do it, there is said to be no consideration or only illusory consideration for the new promise, and it is not enforceable. In case (*c*) the law is not so clear and frequently other factors are present out of which a consideration for the promise can be manufactured.

In our opinion, in all three cases, a promise made by A to B in consideration of B doing or promising to do something which he is already bound to do should be enforced by the law, provided that in other respects such as legality and compatibility with public policy it is free from objection; thus a promise in return for an agreement by a police authority to give precisely the amount of protection it was by law bound to give and no more should be unenforceable as being against public policy.

The dominant factor is that A thought it worth his while to make the promise to B in order that he should feel more certain that B would do the thing bargained for, and we can see no reason in general why A, having got what he wanted, should be allowed to evade his promise. Moreover, why did the promisor make a new promise if it was to have no legal effect? The connection between the general rule under discussion and the dictum in *Pinnel's Case*, which is a particular application of it, will not have escaped notice, and the

observations by Lord Blackburn already quoted are equally relevant to the cases now under discussion.

(5) *The Rule that Consideration must move from the promisee.*

37. This rule is not the same as that which has caused difficulty of the kind discussed below in Section D in connection with the *jus quaesitum tertio* as the following example will show. A, B, and C are all parties to a contract. A promises B and C to pay C £100 if B will do a certain piece of work desired by A. A declines to pay the £100 and C cannot compel him to do so. C is a third party to the consideration but not to the contract. The emergence of the rule can doubtless be explained on historical grounds, but we can see no reason either of logic or of public policy why A, who has got what he wanted from B in exchange for his promise, should not be compelled by C to carry out that promise merely because C, a party to the contract, did not furnish the consideration. We therefore recommend the abolition of this rule.

(6) *The Rule that a Promise to keep an offer open for a definite period of time is not enforceable unless the Promisee gave some Consideration for keeping the offer open.*

38. It appears to us to be undesirable and contrary to business practice that a man who has been promised a period, either expressly defined or until the happening of a certain event, in which to decide whether to accept or to decline an offer cannot rely upon being able to accept it at any time within that period. If the offeror wants a consideration for keeping it open, he can stipulate for it and his offer is then usually called an "option". Merely because he does not so stipulate, he ought not to be allowed to revoke his offer with impunity. We consider that the fixing of a definite period should be regarded as evidence of his intention to make a binding promise to keep his offer open, and that his promise should be enforceable. If no period of time is fixed, we think it may be assumed that no contractual obligation was intended.

It may be noted here that according to the law of most foreign countries a promisor is bound by such a promise. It is particularly undesirable that on such a point the English law should accept a lower moral standard.

(7) *Part Performance in Unilateral Contracts.*

39. English law traditionally divides parol contracts into two classes, the bilateral contract of a promise for a promise, and the unilateral contract of a promise for an act. In the

case of bilateral contracts one promise is held to be consideration for the other, the agreement therefore becoming effective at the moment when the promises are exchanged. In the case of a unilateral contract, however, the promise does not become binding until the act has been completely performed. A promisor may therefore withdraw his promise at any time before completion of the act, even though he knows that the promisee has already entered upon the performance and has nearly completed it. Where performance of the requested act requires considerable time and effort, it is obvious that grave injustice may be done if the offeror is permitted to revoke his offer because he has not as yet received the whole consideration for it. A simple illustration will make this clear: A promises B fifty pounds if he walks from London to York in three days. A can withdraw his promise at any time before B has reached York. It is suggested in some of the books that in these circumstances A is estopped from withdrawing his offer, but this is clearly incorrect as estoppel is only a rule of evidence and cannot create a cause of action where none exists. It is true that in some cases B can recover on a *quantum meruit* for the services he has rendered, but this may be an unsatisfactory remedy, as the damages in *quantum meruit* are measured by the value of the services to A and not by the loss suffered by B. To avoid this undesirable result the Courts have in certain cases implied a second promise on the part of the promisor that he will not do anything to interfere with the promisee's performance of the required act, the consideration for this implied promise being the promisee's beginning of the requested act. This, however, is not satisfactory, for there is considerable doubt at the present time as to when this second promise can be implied and what are its terms. We therefore recommend that a promise made in consideration of the promisee performing an act shall be enforceable as soon as the promisee has entered upon performance of the act, unless the promise includes expressly or by implication a term that it can be revoked before the act has been completed. It is desirable to emphasize that this provision will in no way affect the rule in *Cutter* v. *Powell* (6 T.R. 320) that if the promisee fails fully to perform the requested act, he is not entitled to recover anything under the contract.

(8) *Promise made with the knowledge that the promisee will act in reliance on it.*

40. The rule as to representations of fact has been thus stated: "Where one by his words or conduct wilfully causes

another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." (*Pickard* v. *Sears* (1837) 6 Ad. & E. 469.) This doctrine, however, does not apply to a case where the representation is not of a fact, but a statement of something which the party intends or does not intend to do; in the latter case the party may be sued if the statement is put into contractual form, but not otherwise. In spite of a strong dissent by Lord St. Leonards in *Jorden* v. *Money* (1859) 5 H.L.C. 185, Lord Cranworth L.C. and Lord Brougham felt that in the case of a promise "there is no reason for the application of the rule, because the parties have only to enter into a contract, and then all difficulty is removed." Unfortunately people are not always so far-sighted; if they were, there would be little need for law or lawyers. The result of the rule has been stated by Stephen, J. in *Alderson* v. *Maddison* (1879-80) 5 Exch. D. 293, 296: "Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only cites an expectation than it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it." The injustice of this rule has been illustrated in a number of cases in which the promisee has, to the knowledge of the promisor, acted to his detriment in reliance of the promise. Two illustrations may be given here. (1) A promises to cancel B.'s bond, knowing that B is not in a position to get married if he is forced to pay the bond. In reliance on A's promise, B marries. Under the present law A is not bound by his promise. (2) A promises not to foreclose for two years the mortgage he holds over B's land, knowing that B, in reliance on his promise, intends to make certain improvements. Under the present law A is free to foreclose in spite of his promise. Such hard cases can be avoided by providing that a promise made by the promisor with the knowledge that the promisee will rely on it, shall be enforceable even though no consideration has been given by the promisee. To hold the promisor liable in these circumstances would accord not only with what most persons would consider to be the justice of the case, but would also be consonant with the historical basis of the English law of contracts which in the first instance gave the promisee damages because he had suffered injury through the promisor's failure

to perform his promise. We therefore recommend that a promise which the promisor knows, or reasonably should know, will be relied on by the promisee, shall be enforceable if the promisee has altered his position to his detriment in reliance on the promise.

D. The Jus Quaesitum Tertio.

41. The Common Law of England stands alone among modern systems of law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract, even though the sole object may be to benefit him. It has virtually been abandoned in the law of Scotland from which the expression *jus quaesitum tertio* is derived, and also in the law of the Continent of Europe. In the United States the tendency is to mitigate the rigour of the rule. (See the American Restatement, Ch. VI.) In the case of English law, experience has shown that the rule is apt on occasion to lead to inconvenience and, in certain cases, to hardship. For this reason it has been found necessary in England to modify the rule, though only in certain isolated cases.

(*a*) Section 11 of the Married Women's Property Act, 1882, provides that certain policies of life insurance taken out by a husband or wife shall create a trust in favour of the objects named in the policy.

(*b*) Another exception is to be found in Section 36 (4) of the Road Traffic Act, 1930, which gives a cause of action to persons specified in policies covering accidents caused by motor vehicles, although such persons are not parties to the contract of insurance.

(*c*) The Marine Insurance Act, 1906, Section 14 (2), enables a mortgagee or other person interested in the subject matter to insure on behalf of, and for the benefit of, other persons interested as well as on his own behalf.

(*d*) The Law of Property Act, 1925, Section 47 (1), provides that in certain events the benefit of a policy of insurance against fire shall enure to the purchaser of property although he is not a party to the policy.

(*e*) The Law of Property Act, 1925, Section 56 (1), enables the benefit of any condition, right of entry, covenant or agreement over or respecting property to be taken by a person although he is not named as a party to the conveyance or other instrument. This section greatly extends the scope of Section 5 of the Real Property Act, 1845, which applied only to

covenants relating to land. Section 56 (1) in terms applies to all property and all instruments in accordance no doubt with the general scheme of assimilating the law of real and personal property. (See the section considered by Luxmoore J. in *Re Ecclesiastical Commissioners' Conveyance* [1936] 1 Ch. at p. 438.) Whether the words "conveyance or other instrument" would cover a commercial contract, e.g. a banker's letter of credit or a contract in writing for the sale of goods must be regarded, however, as exceedingly doubtful.

42. Apart from these few statutory enactments, the most important exception is that which has been introduced by equity, which provides that in certain circumstances the promisee can be regarded as trustee for the third party.[9] Thus in *Tomlinson* v. *Gill* (1756) Ambler 330 (the case in which the origin of the rule is to be found), the defendant had promised a widow that, if she would consent to his being appointed an administrator of her deceased husband's estate, he would pay the debts of the deceased to the extent of any deficiency in the assets of the estate. The plaintiff, a creditor of the deceased, brought a bill in equity to enforce this promise and obtained a decree. Lord Hardwicke said: "the plaintiff is proper for relief here. . . . . He could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them." Similar cases are *Gregory & Parker* v. *Williams* (1817) 3 Mer. 582, *Lamb* v. *Vice* (1840) 6 M. & W. 467, and *Robertson* v. *Wait* (1853) 7 Exch. 299. Perhaps the most important case on this point is *Lloyd's* v. *Harper* (1880) 16 Ch. D. 290. In consideration of the admission of R. H. Harper as an underwriting member of Lloyd's, Samuel Harper wrote to Lloyd's, "I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagements in that capacity." R. H. Harper afterwards defaulted on certain marine insurance policies that he had issued; and suit was thereupon brought by Lloyd's on the guarantee contract for the benefit of the holders of such policies. It was argued by the defendants that Lloyd's had suffered no injury and should be given judgment for nominal damages only. It was held, however, that Lloyd's could recover the amount that was due to the holders of the insurance policies. In the Court of Appeal Lush L.J. said (p. 321): "I consider it to be an established rule of

[9] On this subject see Professor A. L. Corbin's article *Contracts for the Benefit of Third Persons* (1930) 46 L.Q.R. 12.

law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself." The last case to which we wish to refer here is *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford Ltd.* [1919] A.C. 801. Leopold Walford Ltd. were brokers employed to negotiate the charter of a ship from its owners. The charter-party contained a clause in the customary form providing for a commission to be payable to the brokers. An action was brought by the brokers, who were not parties to the charter-party, against the ship-owners to recover this commission. By consent, the action, though brought in the name of the brokers, was treated as one brought by the charterers as trustees on their behalf, and judgment was entered for the brokers, the plaintiffs. Viscount Finlay said (p. 811): "We must regard the charterer as having entered into that bargain in the interests of the broker and as a trustee for the broker." And Lord Wrenbury was even more explicit (p. 814): "Directly it is conceded that the broker, although not a party to the contract, can sue on the contract, inasmuch as he can sue by the charterer as trustee for him, it appears to me that the case really is over."

It will be noted that in none of the cases cited above was the word *trust* used in the contract, nor were they concerned with property held by the defendant for the benefit of the plaintiff. The trust *res* in each case was the contractual promise made by the defendant to the promisee, which thereupon was held by the latter as trustee for the third party.

43. If this trust doctrine had been applied in all cases, it would be possible to say that English Law did include a *jus quaesitum tertio*, although it would be necessary to add that this right had to be enforced by a clumsy procedure. But there are a number of cases which hold that although a contract is made for the benefit of a third party it is, as far as he is concerned, *res inter alios acta*. Thus in *In re Empress Engineering Company* (1880) 16 Ch.D. 125, Jessel M.R. remarked in the course of the argument (p. 127): "I know of no case where, when A simply contracts with B to pay money to C, C has been held entitled to sue A in equity." The next case to which we wish to refer, *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* [1915] A.C. 847, is mentioned in our terms of reference. The defendants had promised Messrs. Dew to pay a sum of money to the plaintiffs, if they (the defendants) sold certain tyres below a fixed price. It was held that the plaintiffs could

not recover this sum as they were not parties to the contract. (It is not necessary to discuss here the point relating to absence of consideration to which reference has been made *supra.*) Viscount Haldane L.C. said (p. 853): "Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam.*" Finally in *Vanderpitte* v. *Preferred Accident Corporation of New York* [1933] A.C. 70, the Judicial Committee held that the intention to create a trust must be affirmatively proved. In that case A promised B to hold insured those persons who used B's car with his permission. It was held that B's daughter, who had received permission to use his car, was not covered by the insurance policy.

44. We feel that this summary of cases—and many might be added to those we have cited—will at least have made one point clear, and that is that the law on this point is uncertain and confused. For the ordinary lawyer it is difficult to determine when a contract right "may be conferred by way of property", in Viscount Haldane's phrase, and when it may not. A promises B to guarantee C against loss: in *Lloyd's* v. *Harper* this is held to be a trust. A promises B to insure C against loss: in *Vanderpitte* v. *Preferred Accident Corporation of New York* this is held not to be a trust. Undoubtedly these cases can, or, at any rate, must be distinguished, but we find some difficulty in stating the simple grounds on which the distinction can be made. In the circumstances it seems to us that there is a strong argument for attempting to frame a rule which will be more easily understandable.

45. There is an important practical reason for taking this step at the present time. Bankers' Commercial Credits are now playing a leading part in the business world, especially where foreign trade is concerned so that it is highly desirable that no legal doubt should be cast on their validity. It is, to say the least, doubtful whether the third party, namely the seller of the goods, is entitled to sue the banker issuing the credit in the event of a refusal by the latter to honour it. Not only could it be argued that such consideration as exists for the banker's promise moves from the buyer and not from the seller of goods, but that the seller is a stranger to the contract between the banker and the buyer by which the credit is brought into existence. These points have been raised before the Courts,

but have not been pressed, and still remain undecided owing to the reluctance of bankers to rely on technical defences of this description. But we do not think that this is a situation which can be regarded with equanimity. As we have said (*supra* at p. 599) bankers might be tempted in times of financial stress to act otherwise, and a liquidator of a banking concern might come under a duty to raise a defence of this kind in the interests of the creditors in spite of its technical character. We feel that it is very undesirable that the validity in law of a commercial contract of such importance should remain in doubt.

46. Two further points may be noted here. Apart from the major disadvantages of its uncertainty, the remedy dependent on a trust involves certain procedural difficulties. The trustee must always be a party to an action for enforcement of the contract either as plaintiff or defendant and this may lead to unnecessary and vexatious delay and expense as is illustrated by the unfortunate case of *Gandy* v. *Gandy* (1885) 30 Ch. Div. 57. But as long as the *jus quaesitum tertio* remains based on the trust principle it seems difficult to provide that the third party beneficiary should be allowed to sue in his own name without joining the trustee either as plaintiff or defendant. To omit the trustee is to leave him in the air, for under the principle of equity the contract is always enforced in the name of, and for the benefit of, the trustee (cf. *Harmer* v. *Armstrong* [1934] 1 Ch. at p. 95). The fact that it would be reasonable to omit the trustee's name in the case of these trusts is strong evidence that the trust concept is an unnecessary complication in these circumstances. Perhaps the analogy of the assignment of rights may be apposite here. At common law, apart from the Law Merchant, a chose in action was not assignable, novation being practically the only way in which rights under a contract could be transferred. To remedy a situation which was both inconvenient and frequently unjust equity stepped in and inferred from the assignment of the common law right a duty on the assignor, on receiving a proper indemnity against costs, to lend his name to the assignee in order that the latter might bring an action at law. This complicated procedure was necessary because theoretically the common law right remained in the assignor. Then in 1873, s. 25 (6) of the Judicature Act gave the legal right directly to the assignee and thus enabled him to sue in his own name subject to certain safeguards. This statutory provision has proved entirely satisfactory and has given rise to no criticism. As the history of the *jus quaesitum tertio* is in part similar to that of assignment viz. the common

law refusing to recognize the right of the third party and equity stepping in to remedy this by the trust concept, it is reasonable to suggest that the final statutory step will prove equally satisfactory in this instance, in our view it is desirable that the third party should become privy to the contract, his position being more analogous to that of an assignee of a contractual right than to that of a cestui que trust.

47. But just as the statutory assignment of contractual rights is subject to certain important limitations, so the statutory recognition of third party rights ought to be carefully limited. The first and most important provision ought to be that no third party right can be acquired unless given by the express terms of the contract. A third party right ought not to be acquired by implication, e.g. merely because the performance of the contract will benefit the third party. Secondly, the promisor should be entitled to raise against the third party any defence, such as fraud or mistake, that would have been valid against the promisee. Thirdly, the right of the promisor and of the promisee to cancel the contract at any time ought to be preserved unless the third party has received notice of the agreement and has adopted it either expressly or by conduct. It may be pointed out here that one of the disadvantages of the trust concept as applied in *Lloyd's* v. *Harper* and the other cases, is that, as the agreement is held to create a trust, the promisor and the promisee cannot cancel it after it has been made, however desirable it may be for them to do so.

48. We therefore recommend that where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise as against the third party any defence that would have been valid against the promisee. The rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.

49. The above recommendation, if adopted, will give the third party a contract right but not a trust right. It does not go far enough, therefore, to cover the situation which arose in *Re Engelbach's Estate* [1924] 2 Ch. 348. In that case a father took out an endowment policy of insurance in his own name which provided that the policy monies should be payable to his daughter if she survived a certain date, and that if she should not do so the premiums were to be refunded to the father. The

policy was not expressed to be for the benefit of the daughter. It was held that the father, in these circumstances, a trustee for his daughter and that the policy monies belonged to his estate and not to the daughter. We are of the opinion that the provisions of S. 11 of the Married Women's Property Act, 1882, should be extended to all life, endowment and education policies in which a particular beneficiary is named. It is true that anyone who knows the law can attain this same result by creating an express trust, but, as it is not the practice of the average man to consult his solicitor before taking out an insurance policy, we feel that it is desirable to make a statutory provision on the subject.

E. Summary of Recommendations.

50. It may be convenient to summarize our recommendations which are as follows :—

(1) That the following enactments shall be repealed :—

(*a*) So much as remains of Section 4 of the Statute of Frauds;

(*b*) Section 3 of the Mercantile Law Amendment Act, 1856;

(*c*) Section 4 of the Sale of Goods Act, 1893. (Paragraph 16.)

(2) That an agreement shall be enforceable if the promise or offer has been made in writing by the promisor or his agent, or if it be supported by valuable consideration past or present. (Paragraphs 29 and 32.)

(3) That an agreement to accept a lesser sum in discharge of an enforceable obligation to pay a larger sum shall be deemed to have been made for valuable consideration, but if the new agreement is not performed then the original obligation shall revive. (Paragraphs 33 to 35.)

(4) That an agreement in which one party makes a promise in consideration of the other party doing or promising to do something which he is already bound to do by law, or by a contract made either with the other party or with a third party, shall be deemed to have been made for valuable consideration. (Paragraph 36.)

(5) That a promise shall be enforceable by the promisee though the consideration is given by or to a third party. (Paragraph 37.)

(6) That an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event shall not be unenforceable by reason of the absence of consideration. (Paragraph 38.)

(7) That a promise made in consideration of the promisee performing an act shall constitute a contract as soon as the promisee has entered upon performance of the act, unless the promise includes expressly or by implication a term that it can be revoked before the act has been completed. (Paragraph 39.)

(8) That a promise which the promisor knows, or reasonably should know, will be relied on by the promisee shall be enforceable if the promisee has altered his position to his detriment in reliance on the promise. (Paragraph 40.)

(9) That where a contract by its express terms purport-to confer a benefit directly on a third party, it shall be enforces able by the third party in his own name subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provides, it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct. (Paragraph 48.)

(10) A life, endowment, or education policy shall be enforceable by the person for whose benefit the policy is expressed to be issued subject to such provisions for the protection of creditors as are contained in S. 11 of the Married Women's Property Act, 1882. (Paragraph 49.)

(Signed) WRIGHT, M. R. (*Chairman*).
MARK L. ROMER.
RIGBY SWIFT.
RAYNER GODDARD.
S. L. PORTER.
CYRIL ASQUITH.
A. L. GOODHART.
H. C. GUTTERIDGE.
H. C. HALDANE.
ARNOLD D. MCNAIR.
WM. EGERTON MORTIMER.
T. J. O'CONNOR.
CLAUD SCHUSTER.
ALFRED F. TOPHAM.

JOHN FOSTER (*Secretary*).

RECOMMENDATION BY A MINORITY AS TO GUARANTEES.

While we agree with the recommendation that Section 4 of the Statute of Frauds should be repealed, we are of opinion that it should be provided that a guarantee is to be invalid unless the terms thereof (other than the consideration, if any) have been embodied in a written document and signed by the guarantor. We realise that most guarantees, such for instance as those given to a Bank, will, whether the section is repealed or not, always be contained in a written document; but, if oral contracts of guarantee are allowed, we feel that there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand, and that opportunities will be given to the unscrupulous to assert that credit was given on the faith of a guarantee which in fact the alleged surety had no intention of giving. A guarantee is in any case a special class of contract; it is generally one-sided and disinterested as far as the surety is concerned, and the necessity of writing would at least give the proposed surety an opportunity of pausing and considering, not only the nature of the obligation he is undertaking, but also its terms. The contract often gives rise to many questions, e.g., whether it is to apply to the whole of the debt or to a portion only, and, if the former, whether it is to be limited in amount or to a certain period. We think these questions ought to be definitely settled and recorded before the contract becomes binding on the surety. Parliament has in the Law of Property Act, 1925, re-enacted the requirement of a signed note or memorandum in writing in the case of contracts for the sale of land, and has quite recently enacted that a money-lending contract is invalid unless the exact terms are embodied in a document which must be given to the proposing borrower so that he may see exactly to what he is agreeing, and, while it may be doubted if a needy borrower has ever been deterred from taking a loan by this provision, at least he cannot say that he did not know to what he was consenting. We see nothing unreasonable in putting sureties in a like position and giving them the same opportunity. No doubt it may be said that there is no greater difficulty for a Court to decide between a creditor and a surety than between any other contracting parties. But neither Judges nor juries are infallible on questions of fact, and in the vast majority of cases the surety is getting nothing out of the bargain; hence the greater reason for securing, if possible, that no mistake shall occur. It is the "small man" we desire to protect, the father or father-in-law of the small tradesman who may be pressed to guarantee the

account for goods supplied to stock the shop of his son or son-in-law. Moreover, we believe that guarantees are a class of contract that at present most people know quite definitely must be in writing. The lay public know nothing about the Statute of Frauds: but they do, we believe, appreciate that writing is necessary for a guarantee; so our proposal only perpetuates that to which they are accustomed.

The last thing we desire is to see a new body of case law grow up around guarantees. Questions as to whether the contract can be embodied in one or in a series of documents, or as to whether the whole agreement must appear in the written document, and other questions that have given rise to a mass of decisions on the fourth section, could, we think, be avoided by providing that a contract of guarantee must be embodied in a document signed by the guarantor or his authorised agent, and that otherwise the contract, or any term thereof not included in the written document, should be void.

(Signed) RAYNER GODDARD.
S. L. PORTER.
WM. EGERTON MORTIMER.
ALFRED F. TOPHAM.

MEMORANDUM BY MR. JUSTICE GODDARD AS TO CONTRACTS UNDER SEAL.

While I fully agree with the recommendations as to the doctrine of consideration which are contained in the Report, it appears to me that it is unsatisfactory to eliminate consideration as a necessary element in written contracts, and yet to leave untouched contracts under seal. It is difficult to see what good reason remains for preserving specialties as a separate class once the necessity for consideration in written contracts is gone. It is unnecessary to consider whether the distinction between specialty and simple contracts, which historically is very ancient, ever rested on a sound basis. For many centuries there has been that distinction, and in practice it has meant that where parties enter into a contract for which there is no consideration they must do so under seal, while if there be consideration they can contract under hand only, or, save for certain statutory exceptions, by parol. One theory advanced for the distinction is that there is some solemnity attaching to the sealing and delivery of a deed. Whatever truth there may have been in this view in medieval times, or in the days of Lord Coke, a seal nowadays is very much in the nature of a

legal fiction. The seal is no longer a wax impression of a man's crest or coat of arms; it is usually no more than an adhesive wafer attached by the law stationer when the document is engrossed. It is the party's signature, and not his seal, which in fact authenticates the document. Provision for a discarded mistress must at present be made by a document bearing a red wafer or some such device, while a document involving the expenditure of thousands of pounds, perhaps affecting the employment or welfare of hundreds of workpeople, can be under hand only. It is difficult to believe that there is any greater solemnity attaching to the execution of the former agreement than to the latter. In view of the reform suggested, it appears that the practical advantage (a doubtful one as I venture to think) of a specialty will be that it is subject to a longer period of limitation, with the disadvantage of attracting a higher stamp duty. Moreover, if specialties are preserved as a separate class, the highly technical rule will still prevail that a specialty cannot be discharged by a simple contract, whether the latter is in writing or not. This rule has before now worked injustice and inconvenience and might I think well be abrogated. I do not forget that, by somewhat artificial reasoning, judgment debts and debts created by statute have been classed as specialties, and it may well be reasonable that to judgment debts a period of limitation longer than that for ordinary debts should apply, but I see no reason for preserving what has been, at least in modern times, an anomalous division of contracts, and which will be still more anomalous with the disappearance of consideration as a necessary element where the agreement is in writing. No doubt contracts by corporate bodies involve different considerations. In the case of trading companies incorporated under the Companies Act the matter is dealt with by Section 29, under which the seal of the company is required only in the case where if the contract had been made between private parties it would be required by law to be in writing, and if made according to English law to be under seal: so in substance trading companies can contract in the same form as individuals. In the case of non-trading corporations, or trading corporations created otherwise than under the Companies Act, I think the signatures of persons who are at present authorised to affix the seal ought to be enough to authenticate a document as the contract of the corporation. These observations are not intended to relate in any way to conveyances of land, which are not within the reference to the Committee.

(Signed) RAYNER GODDARD.