The Law Commission

(LAW COM. No. 164)

TRANSFER OF LAND

FORMALITIES FOR CONTRACTS FOR SALE ETC. OF LAND

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed*
29th June 1987

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting reform of the law.

The Commissioners are—

The Honourable Mr. Justice Beldam, *Chairman*

Mr. Trevor M. Aldridge

Mr. Brian J. Davenport, Q.C.

Professor Julian Farrand

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FORMALITIES FOR CONTRACTS FOR SALE ETC OF LAND

CONTENTS

THE LAW COMMISSION

ITEM IX OF THE FIRST PROGRAMME

TRANSFER OF LAND

FORMALITIES FOR CONTRACTS FOR SALE ETC. OF LAND

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

PART I

INTRODUCTION

1.1 In this report, we consider the law relating to the formalities for contracts for the sale of land. Our main recommendation is that all such contracts should be made by signed writing to be valid. A draft Bill to implement this reform appears in Appendix A.

1.2 Under Item IX of our First Programme (1965), we recommended that the system of conveying unregistered land should be examined with a view to its modernisation and simplification. The subject-matter of this examination was then widened to cover the whole law relating to transfer of both registered and unregistered land.[1] As part of that programme, we have considered the extent to which the law should require any formalities to be observed in the formation of contracts relating to sales and other dispositions of land or any interest in land.

1.3 Formalities for contracts for the sale of land are currently governed by the Law of Property Act 1925, section 40, which provides that:

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

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

Contracts which do not comply with the requirements of the section are not void, but are merely unenforceable by action. They are valid and can have effect provided they are enforceable in some other way than by action. Thus, if a purchaser pays a cash deposit to the vendor under an oral contract, the vendor may keep that deposit if the purchaser defaults.[2] The section does not avoid oral contracts, but only bars most of the legal remedies by which they may be enforced,[3] and it does so as a matter not of substance but of procedure which, like periods of limitation, must be specially pleaded in order to be relied on.[4] Furthermore, it actually allows oral contracts, provided they happen to be evidenced in writing, for all that is required is that a written memorandum of the contract should have come into existence.[5]

Background to the report

1.4 The history of our present concern with the question of formalities for land contracts began in 1973 when we were asked by The Law Society to look at a proposed amendment to section 40 and to consider whether there was any better alternative. This request was prompted by the case of *Law* v. *Jones*[6] which established that a solicitor's letter marked "subject to contract" might constitute evidence of a binding oral agreement. However, our work was forestalled by another Court of Appeal decision,

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[1] First Annual Report 1965–1966 (1966), Law Com. No. 4, para. 70.

[2] See, e.g., *Low* v. *Fry* (1935) 51 T.L.R. 322; *Monnickendam* v. *Leanse* (1923) 39 T.L.R. 445; *Thomas* v. *Brown* (1876) 1 Q.B.D. 714.

[3] See *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, at p. 474, *per* Lord Selborne L.C.

[4] See *Leroux* v. *Brown* (1852) 12 C.B. 801.

[5] See *Shippey* v. *Derrison* (1805) 5 Esp. 190, at p. 193; *Re Holland* [1902] 2 Ch. 360.

[6] [1974] Ch. 112, C.A.

Tiverton Estates Ltd. v. *Wearwell Ltd,*[7], which purported to reverse *Law* v. *Jones* by holding that a section 40 memorandum must acknowledge a contract, whereas the words "subject to contract" deny a contract. The precise effect of these two cases remained a matter for argument,[8] but the *Tiverton* case was generally accepted as settling the law.[9] Convenient though this may be for practitioners, the result can well be regarded as unjust: in *Tiverton* two businessmen entered into an oral contract—"they shook hands on the deal and agreed to instruct their solicitors to confirm the sale"[10]—but, after a consideration of technicalities rather than merits, escape from an admitted contract was enabled. In contrast, *Law* v. *Jones* can surely be regarded as the more just decision simply because a concluded contract was enforced.[11] Accordingly, the position ought not to be accepted as satisfactory without question.

1.5 Although the "subject to contract" issue might have been thought to be settled in a way acceptable to practitioners (at least according to one view of the cases), The Law Society felt that reform of section 40 was still necessary. In 1977, the Law Reform Committee took up the question of section 40 as "a worthwhile area of reform", but decided that the subject, having "some political flavour", was more appropriate for the Law Commission. More recently, the Government's Conveyancing Committee in its Second Report noted a need for an examination of this aspect of the transaction.[12]

1.6 In response to these calls for reform, a working paper[13] was prepared and published on 30 July 1985. For the purposes of comment and criticism, five suggestions for reform were put forward: that there should be no substantial change in the present law; that no formalities should be required; that all such contracts should actually have to be in writing; that contracts for the sale of land should be in a prescribed form; that there should be a "cooling-off" period after an oral or written contract during which either party can withdraw. The majority of those responding[14] favoured the suggestion that contracts for the sale of land should have to be in writing and we have made our recommendations in the light of that response.

Defects of the existing law

1.7 The defects of the existing law were identified and explained in the working paper.[15] The most significant of these relate to the potential operation of section 40 (i.e. not necessarily mutual and therefore unjust) and the uncertainty created by the doctrine of part performance. All of the persons responding on the working paper recognised these defects and most supported our case that section 40, in its present form, is unsatisfactory, although others adopted, in effect, a more "sleeping dogs"[16] approach, based upon a perceived lack of disputes in practice notwithstanding the implications of all the litigation.

1.8 During consultation, particular concern was expressed about the uncertainty surrounding the operation of section 40. As a result of judicial attempts to prevent the statute being used as an instrument of fraud, it is virtually impossible to discover with acceptable certainty, prior to proceedings, whether a contract will be found to be enforceable under the statutory requirements.

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[7] [1975] Ch. 146, C.A.

[8] e.g. C.T. Emery, "The Alarm Bell Continues to Ring", [1974] C.L.J. 42; *Emmet on Title* 19th ed., §2.017; M.J. Perry, "S.40 of the Law of Property Act 1925 and 'Subject to Contract'", (1974) 71 L.S. Gaz. 340; R.W. Clark, "'Subject to Contract' I, English Problems", [1984] Conv. 173.

[9] *Tiverton* was followed at first instance in *Jones* v. *Morgan* (1973) 231 E.G. 1167. Many of the text-book writers present the ratio in the *Tiverton* case as if conclusive on this point of law. See e.g. J.C.W. Wylie, *Irish Conveyancing Law* (1978), p. 342; Ruoff and Roper, *Registered Conveyancing* 5th ed., (1986) p. 358; Cheshire and Burn's *Modern Law of Real Property* 13th ed., (1982), pp. 112-113. Cp. *Emmet on Title* 19th ed., §2.017.

[10] *Per* Lord Denning, M.R., [1975] Ch. 146, at p. 154C.

[11] See Buckley L.J., [1974] Ch. 112, at p. 122C: "Once again the agreement was oral, but that it was intended to be binding admits of no doubt whatever. The defendant assured the plaintiff that he would not go back on his word; that it was his bond; and that the house was then the plaintiff's. The judge accepted the plaintiff's evidence about this... By his letter of April 13, which I can only describe as deplorable, the defendant for the second time attempted to evade obligations into which he had entered, on the second occasion at any rate, in the most explicit terms. The question is whether the law protects him in so doing, and this depends upon the effect of section 40 in this case."

[12] (1985) H.M.S.O., paras. 7.4–7.6.

[13] (1985) Working Paper No. 92.

[14] A list of persons responding appears in Appendix B.

[15] See Part III thereof, for ease of reference reproduced at Appendix D below.

[16] "It is nought good a sleeping hound to wake, Nor yeve a wight a cause to devyne", Chaucer, *Troilus and Criseyde*, iii, 764.

1.9 The decision in *Steadman* v. *Steadman*[17] has left the doctrine of part performance in a most uncertain state. Although it was decided that mere payment of a sum of money in the circumstances of the case amounted to a sufficient act of part performance, it was left open as to whether the acts performed need indicate a contract relating to land.[18] In addition, the majority of the Law Lords severally indicated that, in the ordinary circumstances of a contract for the sale of land, a sufficient act of part performance could be found in the fact of the purchaser instructing solicitors to prepare and submit a draft conveyance or transfer.[19] In consequence, it appears that an oral contract for sale can readily and unilaterally be rendered enforceable and the provisions of section 40 left to beat the air.[20] However, the precise position is not entirely clear, for it has been argued[21] that the only innovations in the *Steadman* case were the lowering of the standard of proof and allowing the payment of money to be an act of part performance. Nevertheless, even if its availability were clarified, whether or not restricted, the doctrine of part performance would remain a blunt instrument for doing justice despite non-compliance with statutory formalities. The doctrine is not itself a remedy; it merely becomes the commonest example of equity's intervention under the maxim of not allowing a statute "to be used as an instrument of fraud."[22] Such intervention depends upon the circumstance of the individual case, but the result is invariably enforcement of the contract[23] although justice between the particular parties might call for some other outcome. However, the courts have in recent years developed various more flexible ways (especially via estoppel) of dealing appropriately with the position if formalities are not observed.[24]

1.10 In view of these complexities and uncertainties, as well as the potential for injustice, section 40 would appear ripe for reform. The rest of this report is concerned with the nature of that reform.

The Aims of Reform

1.11 The working paper outlined three general principles which must be taken into account so far as possible in any reform in this area.[25] We reproduce them here as they form the basis of our conclusions and recommendations in this report. They are that:

"(i) No reform should increase the likelihood of contracts for the sale (or other disposition) of land becoming binding before the parties have been able to obtain legal advice. This is not to say, however, that any reform should itself result in formalities which can only be undertaken by lawyers and not, for example, by the parties themselves if they so decide.

(ii) Any reform if unable to reduce the risk of injustice should at least not increase it. In particular, the imposition of any formal requirements should not be so inflexible that hardship or unfairness is perceived in cases of minor non-compliance.

(iii) Any reform should simplify or at least not complicate conveyancing. Although this is an argument for reducing formalities, so containing professionals' fees and assisting 'do-it-yourself' conveyancers, certainty and reliability are often essential in dealings with land and may call for extra formalities".

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[17][1976] A.C. 536.

[18]At p. 542 *per* Lord Reid and at p. 562 *per* Lord Simon of Glaisdale.

[19]i.e. where preparation of a draft and transmission of a deed of transfer constitute performance of an obligation arising from the contract, but not where they are merely acts preparatory to performance of the contract. See Viscount Dilhorne at p. 554, Lord Simon at p. 563 and Lord Salmon at p. 573.

[20]Followed as to this in *Re Windle* [1975] 1 W.L.R. 1628.

[21]M.P. Thompson, "The Role of Evidence in Part Performance", [1979] Conv. 402, at p. 403.

[22]See, e.g., *Butcher* v. *Stapely* (1685) 1 Vern. 363 less than 10 years after the unqualified enactment of the Statute of Frauds 1677; the qualification is now expressly declared by subs. (2) of s. 40 of the L.P.A. 1925.

[23]By an order for the equitable remedy of specific performance or now damages: Supreme Court Act 1981, s. 50.

[24]See Part V below.

[25]See para. 5.2 thereof. Compare the objectives of reform stated by the Scottish Law Commission in its Consultative Memorandum, (1985) No. 66, para 3.10:
"a less formal system,
a less restrictive system,
a simpler system,
a clearer system,
a more efficient system, and
a less archaic system."

Contents of the report

1.12 As a preliminary matter, we consider in Part II the case for treating contracts for the sale of land differently from other contracts of sale. In Part III, we discuss the other suggestions for reform canvassed in the working paper and we explain our reasons for now rejecting them. The suggestion which we adopt, namely, the requirement that all contracts for the sale of land should be made by signed writing to be valid, is described in Part IV. The possibility of expanding upon the written contract by means of rectification or collateral contracts, and the availability of equitable or other relief in the event of non-compliance, are fully explained in Part V. Finally, Part VI contains a summary of the recommendations made in the report.

PART II

SPECIAL TREATMENT FOR CONTRACTS RELATING TO LAND

2.1 In this Part of the report, we examine the reasons for, and the policy behind, the requirement of more formality for contracts relating to land than for other contracts.

The Arguments For and Against Simple Repeal of Section 40

2.2 One method of simplifying the present law is repeal of section 40 without replacement. In other words, contracts could be made orally and without the need for any formality to be observed. We put forward this suggestion in the working paper, [1] but now, as then, we do not recommend it.

2.3 Doubtless, there are arguments in favour of dismantling all formalities for the sale of land. As mentioned in the working paper, [2] the advantage of oral contracts is that, in the event of a dispute, argument would focus on the substantive issue of whether there was a contract and not on the formal issue of whether there was a sufficient memorandum and signature. If one party could establish the existence of a contract, the other party would no longer be able to escape his obligation by pleading non-compliance with a formality. In practice, however, most people would continue to make the initial oral agreement "subject to contract" either expressly or by implication from conduct, [3] in which case most contracts for the sale of land would necessarily continue to be in writing. This would be so not simply as an aspect of the established practice of conveyancers—indeed solicitors are comparatively rarely consulted at that stage of the transaction—but because it has become a matter of common knowledge even amongst lay people that prudence calls for the use of the words "subject to contract", or the like, to exclude too early an implication of contractual intention. [4]

2.4 Simple repeal of section 40 may be further supported by the argument that most layman are sufficiently aware of the gravity of entering into a contract for the sale of land as to render superfluous any additional protection by means of formalities. Equally, it is a tenable view that the importance of a transaction relating to land as an argument for requiring formalities is now out-dated. Indeed, superficially it seems incongruous that writing should be required for a contract to sell land worth a few hundred pounds, when no writing is required for a contract to sell shares worth millions of pounds.

2.5 Further reasons for simply repealing section 40 may be found if it is viewed solely in its historical context. [5] The forerunner to the section is the Statute of Frauds 1677, which was passed for "preventing many fraudulent practices which [were] commonly endeavoured to be upheld by perjury". [6] At that time, the parties to any action or any persons interested in the result of litigation were precluded from being witnesses, whilst the jury had almost uncontrolled discretion. [7] These defects in the rules of evidence and procedure were capable of working grave injustices and so the statute provided that certain transactions should be capable of proof only by certain specified evidence. It is arguable, therefore, that the basis for requiring writing no longer subsists: the defects in the rules of evidence and procedure have long since been rectified. [8] Moreover, it would appear that

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[1] Paras 5.10 and 5.11 thereof.

[2] Para 5.10 thereof.

[3] See *Smith* v. *Mansi* [1963] 1 W.L.R. 26 and *F. Goldsmith (Sicklesmere) Ltd.* v. *Baxter* [1970] Ch 85. See also *Emmet on Title* 19th ed., §2.017.

[4] This at least has long been the judicial view:
"Taught by experience in these Courts it is every-day practice for intending purchasers of property who are making an offer to make their offer in the form of 'subject to contract', with the result that they are not at that time bound and have a locus penetentiae until the formal contracts are exchanged"
(*per* Maugham L.J. in *George Trollope & Sons* v. *Martyn Bros.* [1934] 2 K.B. 436, at p. 455). Cp. Pennycuick V.-C.:
"It is not necessary, although obviously prudent, in this connection that the parties should expressly use the words 'subject to contract', or the like, if they wish to exclude the implication of a contractual intention"
(*Damm* v. *Herrtage* (1974) 234 E.G. 365, at p. 371).

[5] For accounts of the history of this Act, see W.S. Holdsworth, "*A History of English Law*", Vol. VI, or A.W.B. Simpson, "*A History of the Common Law of Contract*", Ch. XIII.

[6] Holdsworth, *op. cit.* p. 380.

[7] For further detail, see Holdsworth, *op. cit.*, pp. 388-390.

[8] Persons interested were made competent witnesses by the Evidence Act 1843 and parties to an action were made competent witnesses by the Evidence Act 1851, s. 2 and the Evidence Further Amendment Act 1869 (repealed).

the statute has failed in its purpose because the formalities which it imposed have also given rise to injustice. Hence, the doctrine of part performance has been developed as an attempt by the judiciary to alleviate the harshness of a strict application of the requirement.

2.6 Although we consider these arguments for the repeal of section 40 without replacement persuasive, there was absolutely no support for this proposal. In fact, some on consultation went so far as to call it irresponsible. We are satisfied therefore that repeal of section 40 without replacement would not be acceptable. Further, we accept that simple repeal could properly be regarded as contrary to the first general principle which was stated at the outset, namely:

> "No reform should increase the likelihood of contracts for the sale (or other disposition) of land becoming binding before the parties have been able to obtain legal advice".[9]

Accordingly we have reached the conclusion that land should continue to be treated differently from other property.

2.7 One principal justification for perpetuating formalities for contracts dealing with land is the need for certainty. The existence and terms of oral contracts are always difficult to establish and the resulting confusion, despite what was said in paragraph 2.3 above, would, we anticipate, lead to increased litigation. To minimise disputes, reliable uncontrovertible evidence of the existence and terms of a transaction needs to be available for later reference. In the light of this, the value of the evidential function of writing cannot be doubted.

2.8 The evidential function of writing is also valuable in assisting the prevention of fraud. The requirement goes some way to ensuring that parties are not bound in the absence of actual agreement.[10] In fact, the prevention of fraud was the rationale of the original Act, the Statute of Frauds 1677,[11] although as we explained in paragraph 2.5 above, that Act came to be used as a means of avoiding a contract where there was no writing.

2.9 A related argument in favour of formalities for contracts for the sale of land is based upon consumer protection. Whilst it has been suggested that laymen appreciate the significance of entering into a contract for the sale of land,[12] we still consider that some form of protection imposed from outside is necessary. The consumer should be warned about the gravity of the transaction into which he is about to enter. He needs time to reflect and, if necessary, to seek legal advice. This is especially important in the case of contracts dealing with land because they often involve acceptance of a complexity of rights and duties.[13] A formal requirement of writing is, in our view, suited to this cautionary role. At least, it prevents a person from becoming bound without realizing it, since most people nowadays are aware that signature of a written document imports some binding effect. The need for consumer protection is particularly strong in the case of the sale or purchase of a dwelling, house or flat. The majority of people, at some time in their life, will enter into such a transaction, and it will involve them in major financial commitments and general upheaval. In such circumstances, it appears vital that a consumer takes all reasonable precautions and is fully protected. It is chiefly on this basis that the Scottish Law Commission in its consultative memorandum[14] provisionally recommended the retention of a requirement of writing for contracts for the sale of heritage, despite advocating a general reduction in formalities.[15]

2.10 The cautionary role of formalities is not confined to the consumer protection context. It is equally important for all types of contract dealing with land, whether in domestic or commercial conveyancing, because it prevents the parties from being bound

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[9] See para. 1.11(i) above.

[10] We recognise the fact that a requirement of writing does not preclude the possibility of forgery or perjury.

[11] See n. 6 above.

[12] See para 2.4 above.

[13] e.g. covenants in leases: see R.E. Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed., (1984), pp. 704-705.

[14] No. 66: "Constitution and Proof of Voluntary Obligations and Authentication of Writings" (published July 1985).

[15] See para 4.3 thereof.

inadvertently or prematurely. Without formalities, it may be difficult to ascertain the exact time when a contract is created, and this would lead to confusion. As a result, pre-contract negotiations would be unnecessarily uncertain and hazardous.

2.11 Another recognised function performed by formalities is the "channelling" function.[16] This describes the way in which formalities mark off transactions from one another and create a standardised form of transaction. As a result, the identification and classification of certain types of transaction are facilitated, enabling them to be dealt with routinely. Such a function contributes to certainty by making clear the effect of non-compliance with the formalities.[17] However, it is not fulfilled by the present law because the effect of non-compliance is not clearcut, as it results in unenforceability and not invalidity, and because of the uncertain operation of the doctrine of part performance.

2.12 The general uniqueness of land constitutes another argument for requiring formalities for contracts relating to it: each particular piece of land is regarded as unique[18] from which it follows that interests in or rights over it should not be created or disposed of casually. The availability of the remedy of specific performance for contracts relating to land[19] provides recognition of the fact that breach of such contracts cannot be adequately compensated by damages. It has also been argued that land is different from other property because there can exist simultaneously several interests, whether corporeal or incorporeal, in or over the same piece of land. Therefore, so the argument goes, writing is desirable to avoid so far as possible confusion about who owns what. As was said in the working paper,[20] this argument may be found persuasive but not totally compelling, because third party interests can also be created in other forms of property.

2.13 Finally, as we shall see in the next section, most other legal jurisdictions require more formality for contracts relating to land.

A comparative approach

2.14 In this section, we examine the law in some other countries relating to formalities for contracts for the sale of land. The table in Appendix C shows the source and nature of the required formality (if any), the consequence of non-compliance and the availability of equitable relief for each country considered. Seventeen countries (or states in federations) were compared on this basis and an overwhelming trend towards formalities for such contracts was found to prevail.

2.15 Before proceeding further it is important to note that there is a basic distinction between common and civil law[21] jurisdictions as to the effect of the contract for the sale of land. Thus, all common law countries follow the "traditio" principle, whereby the contract and the conveyance are treated as two separate stages in the transfer of land. In contrast, in civil law countries[22] the contract itself operates the transfer so that there is no comparable two-stage procedure. This explains why formalities for contracts for the sale of land in their jurisdictions usually require a deed and penalise non-compliance with invalidity.

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[16]For a discussion of the functions of formalities generally, see L.L. Fuller, "Consideration and Form", [1941] 41 Colum. L. Rev. 799; A.G. Gulliver and C.J. Tilson, "Classification of Gratuitous Transfers", [1941] 51 Yale L.J. 1; J.H. Langbein, "Substantial Compliance with the Wills Act", (1975) 88 Harv. L. Rev. 489; T.G. Youdan, "Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld* v. *Boustead*," [1984] C.L.J. 306. Compare the analysis given by the Scottish Law Commission in their Consultative Memorandum No. 66, wherein four functions of formalities were identified: namely, an "evidential", a "concluded intention", a "marking out" and a "protective" function (at para. 6.2).

[17]i.e. only those transactions which have complied with the formalities will be recognised as, for example, contracts for the sale of land. Other transactions which are similar but which do not comply with the formalities will not be recognised as such. Hence, the "channelling" function allows a clear distinction to be made.

[18]It is judicially recognised that land has a special and peculiar value for the purchaser. See e.g. *Re Scott and Alvarez's Contract* [1895] 2 Ch. 603, at p. 615, *per* Rigby L.J.

[19]A court of equity will always decree specific performance of a contract for land, except where the defendant has an equitable defence to the plaintiff's claim: see *Hall* v. *Warren* (1804) 9 Ves. 605, at p. 608 *per* Sir William Grant M.R. For a general discussion of the specific performance of contracts for the disposition of an estate or interest in, or licence over, land, see G. Jones and W. Goodhart, *Specific Performance* (1986), Chap. 4.

[20]Para. 5.3 thereof.

[21]"Romano-Germanic" law may be a more appropriate term to describe this legal family: see the explanation given by R. David and J.E.C. Brierley in *Major Legal Systems in the World Today* 3rd ed., (1985), pp. 22-24.

[22]With the exception of Germany and the Netherlands.

2.16 As a general rule, common law countries base their requirement on section 4 of the English Statute of Frauds 1677. Accordingly, writing is required to enforce a contract for the sale of land, and this writing must be signed by the party to be charged or by some other person authorised by him to do so. Most of these countries have also adopted the doctrine of part performance as a means of tempering the harshness of the statute. However, the American Restatement[23] has its own doctrine of equitable relief in Article 129, which allows enforcement of a contract if the party seeking enforcement, in reasonable reliance on the contract and with the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement. Although similar to part performance, the American courts have usually preferred to justify enforcement on the ground that repudiation after "part performance" amounts to "virtual fraud".[24]

2.17 The laws of Scotland and South Africa, owing to their hybrid nature,[25] form an anomaly to this pattern, since non-compliance with the formalities in those countries renders the contract void instead of unenforceable. However, some effect may be given to the agreement through the doctrines of *rei interventus*[26] and homologation[27] and unjust enrichment respectively.

2.18 Civil law countries, with a few exceptions, similarly follow a common pattern. Thus, it is generally the case that a notarial deed is required for validity and no form of equitable relief is available in the event of non-compliance. In addition, preliminary contracts, the equivalent of the common law contract stage, are sometimes subject to rules of form; for example, in Italy[28] and Switzerland[29] preliminary contracts must comply with the same formalities as definitive contracts. Two civil law countries, namely France and Germany, deviate from this general trend and have their own individual systems, distinct from each other as well as from the group.

2.19 The French legal system is notable for its lack of formalities, in theory if not in practice. Contracts for the sale of land are not governed by special rules, but by the general rules for all contracts found in Part 6 of the Civil Code. According to Article 1582, a sale may be completed by notarial deed or private document, but this rule is not mandatory. Thus, a contract for the sale of land may be created orally. Writing is of probative value only, for under Article 13/15, the party claiming execution of a legal obligation must prove its existence. In practice, therefore, a sale is effected by a written instrument because this facilitates proof of the agreement. Some form of writing is also necessary for registration, which is essential if the contract is to be enforceable against third parties.

2.20 Germany, unlike its continental counterparts, follows the "traditio" principle and recognises separate contract and conveyance. Of all the jurisdictions compared, it appears to require the most formality, since contracts for the sale of land are void unless they are authenticated by the court or notary. The reason for this rule is the desire to prevent hasty sales of land by inexperienced persons. However, a contract concluded without this formality becomes valid if the property is afterwards actually conveyed and the transfer is entered in the Land Register.[30]

2.21 Despite differences inherent in the various legal systems, it may be assumed from this brief survey of comparative law that the requirement of formalities for contracts for the sale of land is almost universal. In accordance with this trend and in view of the other arguments in favour of formalities, we *recommend* that contracts for the sale of land should continue to be treated differently from other types of contract.

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[23]Contracts 2d.

[24]See Restatement of the Law of Contracts 2d (as promulgated by the American Law Institute), pp. 322-326.

[25]Scotland and South Africa are "mixed jurisdictions" since their law embodies both civil and common law elements.

[26]i.e. where one party allows the other to act on the faith of the contract, as if it were complete, and alter his circumstances to his prejudice thereby.

[27]i.e. where one party by his own actions indicates that he is regarding the contract as binding.

[28]Italian Civil Code, Article 1351.

[29]Swiss Federal Code of Obligations, Article 216.

[30]German Civil Code, section 313, second sentence.

PART III

REJECTED REFORMS

3.1 The working paper put forward five proposals for reform of the law relating to formalities for contracts dealing with land.[1] We have already discussed and rejected proposal II involving the repeal of section 40 without replacement.[2] In this Part, we discuss proposals I, IV and V of the working paper and explain why we now find them unacceptable.

Proposal I: slight amendments to section 40

3.2 The first proposal was to preserve the present section 40, subject to certain minor amendments such as statutory definition of the scope of the doctrines of part performance and joinder and of the meaning of "agreement" and "signed".[3] This was to acknowledge the view that section 40 creates so few practical problems in the vast majority of cases that it must therefore be regarded as largely satisfactory. Indeed, such a view was put forward on consultation. However, the weight of opinion was against this proposal and for reasons to be given, we are too.

3.3 As indicated in the working paper,[4] we consider that the various problems with the existing law show a prima facie case for overall reform rather than piecemeal amendment. It would not be a justifiable use of time and resources to tinker with the law, a fortiori if a root and branch reform is required.

3.4 Furthermore, we consider that the "sleeping dogs" approach is too complacent and based on a misconception. It is complacent because it tolerates a defective system merely on the grounds that it is long established and seems on the whole to work in practice. According to this approach, occasional and potential injustices are regarded as acceptable risks. In contrast, we consider that there is no good reason for retaining a system which has an obvious risk of injustice,[5] no matter how long it has been the law. To recommend such retention here would appear quite inconsistent with our statutory duty to promote simplification and modernisation of the law.[6]

3.5 The misconception refers to the fact that the existing system works in practice only because the risks of entering immediately into a binding contract are a matter of public knowledge so that most people seek legal advice about, and assistance with, a transaction involving land. These people are therefore protected against the defects of the system. They will be aware, amongst other things, of the danger of entering negotiations without using the "subject to contract" formula. Use of that formula necessarily leads at present to a requirement that any binding contract must be made in writing.[7] It must be accepted that reform of section 40 may not be necessary in practice for the benefit of the well advised. However, our primary practical concern is for those unaware of the "subject to contract" formula or inadvertently not using it. They are in our opinion potentially the most prejudiced by the defects of the present law. However, even if practice worked perfectly so

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[1] See Part V thereof.

[2] See paras. 2.2-2.6 above.

[3] See para. 5.9 of the working paper.

[4] For the problems envisaged, see Part III of the working paper reproduced in Appendix D below; see also Part I of this report.

[5] This risk was recognised by Pennycuick V.-C. in *Farrell* v. *Green* (1974) 232 E.G. 587, at p. 589:

> "there was something distasteful to one's ideas of fairness in a transaction under which one party to an intended purchase took from another a memorandum signed by that other only, with the confidence that the other party would be bound and he himself would not be bound, having regard to section 40 of the Law of Property Act".

[6] Law Commissions Act 1965, ss. 1 and 3.

[7] In the leading case concerning the significance of "subject to contract" and exchange of contracts, Lord Greene M.R. explained:

> "When you are dealing with contracts for the sale of land, it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it. This particular procedure of exchange ensures that none of these difficulties will arise. Each party has got what is a document of title, because directly a contract in writing relating to land is entered into, it is a document of title"

(in *Eccles* v. *Bryant & Pollock* [1948] Ch. 93, at pp. 99-100).

that the risk of isolated incidents of injustice were non-existent, we still recognise a paramount concern to simplify and modernise the statute book. In our view, the best way of achieving this is to replace, and not merely amend, section 40.

Proposal IV: prescribed forms

3.6 In the working paper, the use of prescribed forms was put forward as an alternative to a simple requirement of writing. The use of prescribed forms is already quite common for certain transactions[8] and was recommended for house transfers by the Government's Conveyancing Committee in its Second Report.[9] The proposal appears attractive because it ensures a degree of certainty and, at the same time, fulfils the "evidentiary", "cautionary" and "channelling" functions of formalities.[10]

3.7 There was some support for this proposal on consultation, with most of those in favour preferring to confine the use of prescribed forms to domestic conveyancing. It was also suggested that such forms need not be used at all if solicitors were acting for both parties. There were, however, a number of individuals and bodies against the proposal. In view of the lack of consensus and of other difficulties, which we describe below, arising from the use of prescribed forms, we consider it wiser to abandon this proposal.

3.8 One major obstacle for the proposal which was emphasised during consultation was the difficulty of satisfactory drafting; attention was drawn in particular to the impracticality of designing one form to cover all possible land transactions. The lack of agreement about which contracts should be covered, which terms should be included, the types of forms and the effect of variations suggests that the drafting of a prescribed form for universal use would be an impossible task. Even if prescribed forms were to be designed for each type of transaction, these problems would not necessarily disappear.

3.9 Furthermore, the use of prescribed forms inevitably involves a conflict between certainty on the one hand and fairness on the other. Thus, there is always a risk of prescribed forms being too inflexible for sensible compliance in particular circumstances. Again it might well be thought unacceptable for a contract to fail through inadvertent use of the wrong form. At the other extreme, there is a likelihood that parties will incorporate their own terms and adapt forms for their own purposes. This would create complexity and so detract from the certainty otherwise offered by prescribed forms, as well as reducing their cautionary effect.

3.10 In fact, the view has been expressed that the cautionary role of prescribed forms appears fairly limited. In practice, warnings on prescribed forms, it is said, do not always have the desired effect. On the contrary, they may even lull a party into signing. People may be less cautious if they are signing what appears to them to be an "approved" form. Hence, the use of a prescribed form may in fact discourage the layman from seeking legal advice and so expose him to exploitation by fraudsters. In such circumstances, prescribed forms could be a charter for the unethical. Against this, our main recommendation for written contracts should provide approximately the same amount of protection for the weak and unwary, without the danger of inducing a false sense of security.

3.11 It is not to be taken from this that we condemn the use of prescribed forms altogether. We merely consider that they are not the most satisfactory or acceptable means of reforming the present law.

Proposal V: "cooling-off" periods

3.12 The fifth proposal was for a statutory provision to the effect that the parties to a contract for the sale of land should have time to reconsider. In the working paper, it was accepted that such a scheme would not be without its difficulties,[11] but these difficulties could be overcome, if a need for such a "cooling-off" period were established. On consultation, however, the proposal was overwhelmingly rejected.

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[8] e.g. Hire-purchase transactions under the Hire-Purchase Act 1965, ss. 5 and 7, and see now Consumer Credit Act 1974, s. 61 and the regulations made under it (S.I. 1983/1553).

[9] (1985), para. 9.36, and see paras. 7.4-7.11.

[10] See paras 2.7-2.11 above.

[11] Para. 5.30 thereof.

3.13 The main ground for rejecting it was the fact that a statutory "cooling-off" period would only add to the delay and complications already experienced in chain transactions. Thus, it was feared that a party in the middle of the chain would withdraw at the very end of the "cooling-off" period, resulting in a loss of more time and money. We accept that this fear may well be justified.

3.14 At a more fundamental level, the proposal was rejected because the consumer protection which it aimed to provide had not been shown to be necessary. It is true that we are not aware of any evidence of significant abuse of sales techniques on the part of estate agents or others leading to hasty or ill-considered contracts to buy or sell land or houses. Accordingly it cannot be said that any call for general "cooling-off" periods exists. Without such a call, no law reform justification for such a provision can be perceived. In reality, a more than sufficient "cooling-off" period already exists as a result of "subject to contract" agreements, searches and other delays in the system. We agree that "cooling-off" periods would be generally superfluous, or at least that their merits would not outweigh their disadvantages.

3.15 One application of the proposal did, however, receive some support on consultation. That is, some persons favoured the imposition of a "cooling-off" period in the context of new house transactions. First-time buyers of a house on a new housing estate were considered to be especially susceptible to pressurised decision-making and so in need of protection by way of a "cooling-off" period. We might perhaps have recommended this, but in light of our main recommendation, we consider that any extra protection is unnecessary. For these reasons we reject the proposal for "cooling-off" periods.

PART IV

WRITTEN CONTRACTS: THE PREFERRED SCHEME

The scheme in outline

4.1 Our recommendation, after considering carefully the views of all those who responded to the working paper, is that all contracts for the sale or other disposition of interests in land (with three exceptions) should have to be in writing signed by all parties in order to be valid. The remainder of this Part sets out the reform in more detail and, it is hoped, shows why this reform will be a real improvement on the present law.

4.2 It has already been explained[1] why we all accept that contracts concerning land require special formality, so that simple repeal of section 40 is not acceptable. It has also been explained[2] why we now reject three more of the five proposals set out in the working paper. Instead we recommend in substance proposal III.[3] The effect of this recommendation would be that unless there were the required writing, there would be no valid contract. There would be no notion, as there is now, of a contract being valid but unenforceable by action. We believe that the present law which allows oral contracts to be binding but unenforceable and which may later become enforceable, but sometimes only against one party, is indefensibly confusing. Such contracts can become enforceable inadvertently, or people who have genuinely contracted can escape their contractual obligations.[4] A simple, straightforward rule that contracts concerning land cannot be made orally would remove all these causes of confusion. More importantly, such a rule should incidentally suppress the injustice inherent in the present provision enabling enforcement at one party's option in appropriate circumstances: we consider this potential lack of mutuality to be especially indefensible.

Which contracts?

4.3 The proposal is that (subject to the exceptions below)[5] all types of contract should be within the scope of this recommendation. Thus contracts to grant leases or mortgages of land, or options to purchase, will be included as well as contracts for sale. This does not represent any change from the present requirements for formalities. However, it may not invariably be clear beyond argument whether the arrangements (to use a neutral word) between the parties which could give rise to an interest in land involve or depend upon a contract. Particularly in mind are cases concerning proprietary estoppel and constructive trusts in which reference may be made to the basis of "a bargain or common intention".[6] Plainly the distinction between this and a contract need not be obvious. Where a promise has been acted upon in such a way that equity would intervene, as in these cases, it seems to us unlikely that the promisee's position would be held to be prejudiced by the fact that the promise could constitute a contract but for being oral.[7] Nevertheless, the avoidance of doubt can surely do no harm, and we recommend an appropriate exclusion from the main recommendation.

Interest in land

4.4 Section 40 covers contracts relating to any interest in land. Since the present proposal imposes more formality, it was necessary to consider whether it would be right to exclude certain types of interests. However, at present formality is generally required as a matter of clear statutory policy to create any interest in land. The express creation or disposition of an interest in land, or the disposition of an equitable interest (in land or personalty), must be by signed writing,[8] whilst a declaration of trust of an interest in land

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[1] Paras. 2.7-2.12 above.

[2] See Part III above.

[3] (1985) Working Paper No.92, paras. 5.12-5.16.

[4] As in *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146, C.A., See para 1.4 above.

[5] Paras. 4.9-4.12 below.

[6] *Grant* v. *Edwards* [1986] Ch. 638, C.A. See also *Re Basham* [1986] 1 W.L.R. 1498.

[7] *National Provincial Bank Ltd.* v. *Moore* (1967) 111 S.J. 357.

[8] L.P.A. 1925, s. 53(1)(a) and (c) respectively. See also s. 54(1), which provides that any interest in land created by parol and not put in writing and signed, shall take effect as an interest at will only.

must be evidenced by writing.[9] In the context of section 40 it has been decided that an interest in land should include an undivided share in land, even though that might strictly be considered merely an interest in the proceeds of sale.[10] On balance therefore we have decided that all equitable interests in land should be included in this recommendation. In the cases where equitable interests in land have arisen informally, for example, under a resulting, implied or constructive trust,[11] it appears highly desirable that there should be some formality attached to contracts to dispose of them, to minimise the likelihood of creating disputes.

Contract in writing

4.5 We believe that most people, whether or not lawyers, will readily understand what is meant by a contract in writing and have little difficulty in recognising such a contract when they see one. Nevertheless, it may be useful to expand upon the matter somewhat. The question of what is a "written contract" is at the root of the parol evidence rule and in our report on that subject we essayed an answer as follows:[12]

> "The circumstances in which the parties may conclude and record or evidence their agreement vary greatly. Therefore, general rules for the making of what may properly be called a written contract cannot be laid down. However, the following categories of written contract may be postulated:
>
> (i) The offeree accepts, in writing or orally, the offeror's written offer. The large number of contracts which are negotiated and concluded entirely by exchange of letters are written contracts within this category.[13]
>
> (ii) After negotiation, the parties arrive at a provisional agreement, but do not intend to be bound by that agreement until a formal written contract setting out all the terms is drawn up and assented to.
>
> (iii) After negotiation, the parties orally agree to terms and later record them in writing, which they agree will supersede the oral agreement.[14]

The difference between the situation in (iii) and that in (ii), above, is that in (iii) the oral or partly written agreement is binding on the parties until the formal written contract is concluded, when it ceases to have effect, whereas in (ii) no terms are binding until the formal document is executed. It is a question of construction in each case whether the contract falls within (ii) or (iii)."[15]

Reference was made in that report to the full academic treatment to be found in *The Parol Evidence Rule*[16] written by D.W. McLauchlan.[17] In his Chapter 4, "The Written Contract", he states at the outset:[18]

> "The expression "written contract" *prima facie* makes reference to the form in which parties have agreed to express their contract. Where there is a written contract the parties have chosen to declare their contractual intentions in written form. Therefore, a written contract is one where the parties, whether or not they have previously concluded an oral contract, adopt a writing as their contract."

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[9] L.P.A. 1925, s. 53(1)(b).

[10] *Cooper* v. *Critchley* [1955] Ch. 431; L.P.A. 1925, s. 205(i)(ix).

[11] L.P.A. 1925, s. 53(2).

[12] (1986) Law Com. No. 154, para. 2.18.

[13] The situation may arise in which an offer is made orally but is accepted in writing, the written acceptance repeating all the terms of the oral offer. This may be treated as a written contract if it is proved or admitted that the offeror agreed that the written acceptance constituted a complete and accurate statement of the terms of the contract.

[14] It might be argued that a contract within (iii), above, is not a written contract at all but is an oral contract evidenced in writing. This may be strictly correct in some cases but the distinction is not relevant for present purposes. The parol evidence rule will still apply to the contract in question, since what is important for this purpose is not the manner in which the contract is made but the form in which the parties agree it shall be evidenced. Even if the parties made an oral agreement, the fact that it is admitted or proved that the parties intended that the document in question was to be the sole evidence of the terms of that agreement is sufficient ground for the application of the parol evidence rule. The intention of the parties will, of course, have to be judged objectively on the balance of probabilities.

[15] Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch. 284.

[16] (1976).

[17] (1986) Law Com. No. 154, para.2.6, n. 21.

[18] At p. 32.

After legal analysis in the light of decided cases, he concludes:[19] "In other words, *a document can be a written contract only when it is a contractual instrument which the parties agree or intend is to contain the whole of their contract.*" We see no reason not to accept this meaning which we consider does accord with most people's understanding of what is meant by a contract in writing.

4.6 In order to make a valid contract there must always be present the elements of offer, acceptance, consideration (or a seal) and intention to create legal relations.[20] At present, this is all that is required to make a valid contract for the sale of land.[21] We recommend that there should be an additional element, namely that each party to the contract should sign a document constituting and setting out all the terms of the contract. It is not suggested that there need be one document only. The present practice of exchanging contracts should not be inhibited: this has been said judicially to amount to a contract in writing.[22] Likewise all the terms need not be on one piece of paper. We are content in substance to allow the established rules as to joinder to apply and, in particular, the rule that it is the document which refers to the others which must be signed,[23] but propose embodying them in the legislation with a view to minimising any uncertainty. Why it is considered that all the terms should be included, and what the position will be if one or more is omitted, are discussed below.[24]

All terms

4.7 In the working paper a preference was expressed for a scheme which required only the main terms of the contract to be in writing. It was recognised that it might be difficult to arrive at a satisfactory definition of "main terms", but it was believed to be possible. Although there was considerable support for this proposal, we have now decided that it would add an unnecessary complication, and that simplicity and certainty require that all the terms of the contract should be in writing. We have reached this conclusion largely through a re-examination of the present law. It is not always appreciated that the written evidence required by section 40 to make a contract enforceable is not just written evidence of the existence of the contract but written evidence of all its terms.[25] Thus to demand that all the terms of the contract be put in writing is nothing new. Further, we have considered in more detail the present law as to what happens when a term is omitted. We discuss this in detail in Part V of this report, and do not wish to do so here too, but suffice it to say that we consider that the remedies available are sufficient to ensure that our recommendation will not cause undue injustice.

Signature

4.8 It was proposed in the working paper, and we now recommend, that the contract should be signed by all the parties to the contract or by persons authorised to sign on their behalf. One of the most frequently voiced criticisms of section 40 is that it is one sided: a person who has not signed any written evidence can choose to sue the person who has, even though he could not himself have been sued. This want of mutuality in ability to enforce a contract involves an obvious measure of injustice;[26] certainly it is contrary to the ordinary equitable requirements for specific performance, so that a somewhat strange anomaly may be detected in that this remedy may be ordered despite non-compliance by one side with the statutory formalities.[27] We do not believe that it will cause difficulty or noticeably increase expense to insist that all parties (or their agents) sign the contract. This would not only be in the interests of certainty and justice, but would also be in complete accord with current practice.

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[19]At p. 39 McLauchlan also makes the point (at p. 42) that: "The usual method of expressing assent to a written document as containing the complete expression of the contract is by the parties *executing* that document". Our proposal for signing appears entirely in line with this. Again he states (at p. 43): "Two or more documents may jointly constitute a written contract for the purposes of the parol evidence rule". This is recognised for present purposes too.

[20]See generally, e.g., *Chitty on Contracts* 25th ed., (1983).

[21]Although written evidence of the contract will be necessary to make it enforceable by action, L.P.A. 1925, s. 40(i).

[22]*Per* Lord Greene M.R. in *Eccles* v. *Bryant & Pollock* [1948] Ch. 93 at pp. 99-100; see para. 3.5, n. 7 above.

[23](1985) Working Paper No. 92, paras 3.12-3.14; see Appendix D, and see *Timmins* v. *Moreland Street Property Co. Ltd.* [1985] Ch. 110.

[24]Para. 4.7 and Part V below.

[25]*Hawkins* v. *Price* [1947] Ch. 645; as to the difficulties currently possible because of waiver of or submission to omitted but inessential terms, see paras. 3.20 and 3.21 of Working Paper No. 92 in Appendix D.

[26]See judicial comment quoted at para. 3.4, n. 5.

[27]Cp. *per* Goff L.J. in *Price* v. *Strange* [1978] Ch. 337, at p. 358.

Exceptions

4.9 There are certain contracts where it would be impracticable to insist on writing. We have therefore decided to recommend three exceptions to the general rule. Contracts which fall within an exception will be both valid and enforceable even if made entirely orally.

(i) *Short leases*

4.10 A lease can be granted orally at law if it takes effect in possession and is for a term not exceeding three years.[28] Since the grant needs no formality, it seems right to recommend that a contract to grant such a lease needs no formality, and we do so recommend. However, it should be noted that it is not recommended that contracts to assign such leases should be an exception to the general requirement of writing. At present all such contracts fall within section 40 and it appears right that writing should be required. It may be difficult to distinguish between a contract to grant a short lease and the actual grant of one. Different requirements might mean that a decision had to be made as to which had occurred, giving rise to unnecessary litigation. Contracts to assign short leases are probably not very common and requiring writing will serve the function of ensuring that those who enter into them do so with due care.

(ii) *Public auctions*

4.11 The present law and practice at auctions is that the vendor and purchaser become contractually bound at the fall of the hammer and that the auctioneer signs a memorandum of the terms of the sale as soon as possible after the sale takes place. He signs as agent of the vendor[29] and may do so also for the purchaser (i.e. if not ready, able or willing to sign for himself).[30] Thus the requirements of section 40 are fulfilled. The auctioneer's authority to sign cannot be withdrawn or revoked by the vendor or the purchaser after the fall of the hammer.[31] If sales by auction were to be included in our new provisions, there would be no contract at all until the auctioneer had signed, so that it might be open to either party to withdraw. Special provisions could have been devised to ensure that this would not happen, but these would have to be quite complex to ensure that auctions would not become legally hazardous. On further reflection we have decided that it is not necessary to insist on writing to validate a contract made at auction. The present situation where a contract is made at the fall of the hammer has caused no difficulties. We appreciate that the effect of our recommendation is that it will no longer be necessary for any written memorandum to come into being. However, at present the memorandum can come into existence and may be signed without actually involving the parties themselves. It is thus not a formality which necessarily serves the function of warning people what they are doing or making sure they understand the importance of the contract. There is little doubt that in the vast majority of cases the terms of the contract will continue to be put into writing, and if they were not, the courts would readily decide any dispute as to terms as they do now with other oral contracts. However, we propose confining this exception to public auctions since other forms of auction would still seem to call for the protective functions of formalities.

(iii) *Contracts made on a recognised investment exchange*

4.12 As was pointed out in the working paper, it has been held that a contract to sell a debenture is a contract within section 40 of the Law of Property Act 1925.[32] Presumably the same reasoning would lead to the conclusion that other forms of investment which include interests in land, perhaps unit trusts investing in land, would also fall within both section 40 and our new provision. To insist that such contracts are made in writing would be to undermine the usual methods of trading in such investments. We have already discussed[33] why we were initially attracted to the idea of requiring no formalities at all for contracts for the sale of land. In the case of debentures or other investments, we believe that these are so distanced from the land itself that the arguments against formality outweigh those in favour of formality.

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[28] At the best rent obtainable without taking a fine: L.P.A. 1925, s. 54(2).

[29] *Beer* v. *London & Paris Hotel Co.* (1895) LR 20 Eq 412, at p. 426.

[30] *White* v. *Proctor* (1811) 4 Taunt. 209; *Emmerson* v. *Heelis* (1809) 2 Taunt. 38; *Dewar* v. *Mintoft* [1912] 2 K.B. 373.

[31] *Phillips* v. *Butler* [1945] Ch. 358.

[32] *Driver* v. *Broad* [1893] 1 Q.B. 744.

[33] Paras. 2.2-2.6 above.

Part performance

4.13 The Law of Property Act 1925, section 40(2), expressly preserves the doctrine of part performance. The working paper outlined the problems, and particularly the uncertainties, that had developed with respect to part performance.[34] Inherent in the recommendation that contracts should be made in writing is the consequence that part performance would no longer have a role to play in contracts concerning land. Without writing there will be no contract for either party to perform. The next Part contains an explanation of what remedies will be available if the parties have made an agreement which fails as a contract for want of formality. We believe that those remedies are quite adequate to ensure that the recommendation will not itself lead to a multiplicity of unacceptably hard cases, if any at all. Of course, the outcome on particular facts must be expected to be different in some cases following changes of the law as to formalities and affecting enforceability and validity. Whether or not the different outcome is likely to be in accordance with the merits of the case can only be a matter of speculation. In putting forward the present recommendation we rely greatly on the principle, recognised even by equity, that "certainty is the father of right and the mother of justice".

Crown application

4.14 The Law of Property Act 1925 does to a large extent apply to the Crown.[35] We did not consult as to whether the provisions we recommend here should bind the Crown. We recognise that as a matter of normal and convenient practice, this consultation is best undertaken by your Department once this report has been submitted.

Effect on current practice

4.15 The vast majority of contracts for the sale or other disposition of land already involve writing. Where land is sold it is usual for each party to sign a document setting out all the terms of the contract, and for the parts to be exchanged. This practice can continue unaffected. Our recommendation will, however, prevent allegations that an oral contract was made at an earlier stage because it will be impossible to make an oral contract for the sale of land. This may have the beneficial effect of enabling negotiations to proceed more freely. It will still be possible to create contracts by correspondence, so it will still be desirable for the parties to use the formula "subject to contract" on letters which contain, or which refer to documents containing, the terms of the contract, if the letters are signed by a party to the contract. Use of the phrase, however, would not strictly still be necessary in letters written on behalf of the parties.[36] Thus the alarm bells rung in *Law* v *Jones*[37] and imperfectly quietened in *Tiverton Estates Ltd.* v. *Wearwell Ltd.*[38] would never need to sound again: there could be no contract to be inadvertently evidenced anyway.[39]

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[34]See paras 3.23-3.26 in Appendix D, also para 1.9 above.

[35]See s. 208.

[36]Although the written contract may be signed by a party's agent expressly authorised to make a contract, it is not intended that there should be any change in the present law that a solicitor has no implied authority to enter into a contract on behalf of a client (*North* v. *Loomes* [1919] 1 Ch. 378); it should also remain well settled law "that a solicitor has no ostensible or apparent authority to sign a contract of sale on behalf of a client so as to bind him when there is no contract in fact" (*per* Lord Denning M.R. in *H. Clark (Doncaster) Ltd.* v. *Wilkinson* [1965] Ch. 694, at p. 702).

[37][1974] Ch. 112.

[38][1975] Ch. 146.

[39]Cp. para. 1.4 above.

PART V

THE POSITION IF FORMALITIES ARE NOT OBSERVED

5.1 One of the three principles we accepted as underlying our recommendations was that any reform if unable to reduce the risk of injustice should at least not increase it. [1] Wherever the law requires specific formalities to do something, there is obviously a risk that on occasions these formalities will, through mistake or ignorance, be omitted. While it is important not to undermine the general rule that the formalities should be observed, it is equally important that the law should not be so inflexible as to cause unacceptable hardship in cases of non-compliance. As we have said, part performance will no longer be relevant. [2] However, there are a range of other possible remedies enabling justice to be achieved between the particular parties. We discussed some of them in the working paper, as follows: [3]

5.2 "Consultees and other readers should appreciate that where an anticipated contract is void because not made in accordance with statutory formalities, it does not follow that the parties will simply be left remediless by the law. Apart altogether from any possibilities there may be of suing for damages in tort (e.g. deceit or negligence), either of the parties would where appropriate be able to seek restitution. [4] Thus if money has been paid as a deposit or part of the price by a prospective purchaser, recovery would generally be permitted because there would be a total failure of consideration. [5] Again, if work had been carried out on the land in anticipation of the contract by either of the parties, a quantum meruit claim might be made, in effect, for what the work is worth. [6] In addition to any common law remedies, some significant equitable intervention would not be ruled out. In particular, the doctrines of 'promissory estoppel' and 'proprietary estoppel' respectively might be applicable: these operate, in essence, where one person (A) has acted to his detriment and another person (B) was responsible for this—under the former doctrine, B will be precluded from resiling from his promise or representation, whilst under the latter doctrine, B will be precluded from denying A's supposed rights in B's property. [7] In the present context, the most likely sort of case again will be of improvements to land by a prospective purchaser carried out with the acquiescence at least of the prospective vendor. The nature of the equitable relief given will vary with the circumstances between reimbursement of cost or value of the improvements, this being secured sometimes by a lien

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[1] (1985) Working Paper No. 92, para. 5.2; also para 1.11 above.

[2] See para. 4.13 above.

[3] (1985) Working Paper No. 92, para. 5.8.

[4] See Lord Goff of Chieveley & G.Jones, *The Law of Restitution* 3rd ed., (1986), p. 369 *et seq.* as to "Ineffective Transactions".

[5] Cp. *Bradford Advance Co. Ltd.* v. *Ayers* [1924] W.N. 152 and *North Central Wagon Finance Co. Ltd.* v. *Brailsford* [1962] 1 W.L.R. 1288 concerning void bills of sale where money advanced was held recoverable with interest at a reasonable rate.

[6] Cp. *Brewer Street Investments Ltd.* v. *Barclays Woollen Co. Ltd.* [1954] 1 Q.B. 428, C.A., where a prospective landlord who had had work done to the prospective tenants' specification was reimbursed. In argument in that case, also, Romer L.J. said (at p. 431):

> "Suppose that, whilst parties were in negotiation for a lease, the landlords allowed the prospective tenants to go on the land and spend money on it in anticipation of a lease. If the landlords subsequently broke off negotiations for no reason at all they could not get the benefit of the work without paying for it. Equity would give a remedy".

Denning L.J. added (*ibid*):

> "Whether equity would do so or not, the common law, nowadays, would give the prospective tenants the right to recover the value of the work done in an action for restitution".

[7] See *Snell's Principles of Equity* 28th ed., (1982), pp. 554-563. Especial reference may be made to the observations of Lord Denning M.R. in *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1982] Q.B. 84, at p. 122:

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

See also notes at [1983] Conv. 85-87 and [1984] Conv. 1-2.

or charge on the land, and actual conferment of the anticipated estate or interest in the land.[8] It appears to us obviously out of the question to exclude the application of these general judicial doctrines (restitution as well as equitable estoppel) in this particular area of sales etc. of land. Equally, it is thought inappropriate to attempt to spell out and perhaps circumscribe the requirements and limits of these still developing doctrines simply for present purposes or even to consider special extensions or restrictions. Nevertheless, the fact of their existence and development, as of many other relevant rules of law and equity, should be borne in mind when views are expressed as to any proposals that certain formalities should be necessary for the validity of a contract."

5.3 None of the comments we received on the working paper have led us to resile from what we said in that paper about available remedies. However, we did receive some comments which suggested that it was thought that the loss of the doctrine of part performance might cause problems, so we consider this issue below. Further, since we now recommend that all the terms of the contract should have to be in writing, we discuss two other remedies which may be of assistance where a term is omitted, rectification and the enforcement of a collateral contract.

1. Part performance and equitable estoppel

5.4 We have already pointed out that it is implicit in our recommendation that a contract will no longer be enforceable simply because one party has performed some or all of his obligations under it.[9] We believe this not to be a consequence to be regretted. The doctrine of part performance has, as explained in the working paper,[10] become very confused: it is not clear to what extent the act of part performance must relate to the contract, nor is it clear whether the act can be unilateral, without the consent or even the knowledge of the other party. Nevertheless there are clearly circumstances in which injustice could be caused through the inability to plead part performance. For example, if a person genuinely believes he has a contract to buy a piece of land and does work on it, to the knowledge of the owner, it seems wrong that the owner should be allowed to retain the improved land and the "purchaser" receive nothing. It could be argued that the would-be purchaser should be taken to know the law and therefore should have known that writing was necessary for a valid contract. However, the principles of equity have never allowed English law to be so harsh. Are there other solutions than that which might have been provided by part performance? We believe that there are, and that the courts would use doctrines of estoppel to achieve very similar results where appropriate to those of part performance.[11]

5.5 Where the doctrine of part performance is applicable the result is that the contract for sale itself is enforced which may be by an order for specific performance or by an award of damages for breach. Where doctrines of estoppel apply, the relief available is not restricted to enforcement of a contract but is flexible and will vary with the circumstances.[12] Nevertheless it cannot today be doubted that the equitable doctrines are already sufficiently strong and developed to enable the court to require that land be transferred. Thus the chapter on equitable estoppel in *Snell's Principles of Equity*[13] concludes with the following passage.

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[8] See not only *Snell, loc. cit.*, but also Goff & Jones, *op. cit.*, at p. 143.

[9] Para. 4.13 above.

[10] Paras. 3.23-3.26: see Appendix D.

[11] For example, in one of the leading cases concerning part performance of an oral contract and section 40 of the Law of Property Act 1925, a similar result might acutally have been achieved via estoppel. This is *Kingswood Estate Co. Ltd.* v. *Anderson* [1963] 2 Q.B. 169, C.A., where Willmer L.J. observed at p. 179:

> "I can deal briefly with the alternative plea of estoppel; for no argument has been addressed to us in support of the contention contained in the defence, viz., that 'the plaintiffs are estopped from denying that the defendant is entitled to the same protection at 46, Crescent Road, as if she were a statutory tenant.' Instead it was sought to argue that this was a case of what has been termed 'promissory estoppel'. The principle relied on was that stated by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.*, and it was suggested that the plaintiffs' conduct in the present case was such that it would be contrary to conscience to grant them relief now. In other words, what was alleged was that the plaintiffs were estopped by their conduct from giving the defendant notice to quit. No such contention was raised either by the defence or by the defendant's cross-notice, and upon objection being taken on behalf of the plaintiffs, we ruled that it would not be right to allow the defendant to put forward this contention now. I do not, therefore, find it necessary to say anything more about the alleged estoppel".

See also in argument *ibid*, pp. 176-177.

[12] See para. 5.2 and footnotes above.

[13] 28th ed., (1982), Part VI. chap. 5, pp. 554-563.

"(3) CONFERMENT OF TITLE. In many cases justice cannot be done by the mere use of the doctrine by way of defence, or by the recoupment of expenditure, even where this is small,[14] but A must be granted some right. Thus if O has made an imperfect gift of the land to A, as by merely signing an informal memorandum[15] or uttering words of abandonment,[16] the court will compel O to perfect the gift by conveying the land to A.[17] In such cases the court may act by analogy with the specific performance of contracts: A's expenditure with O's knowledge plays the part both of valuable consideration and of part performance.[18] If the circumstances do not suggest a gift, O may be compelled to convey the land on being paid its unimproved value,[19] or to hold the land on trust for sale, and to hold the proceeds after discharge of the respective expenditure of A and O to divide the residue between them.[20] Or the circumstances may indicate that A is to have a lease,[21] a perpetual easement,[22] a perpetual licence[23] or a licence as long as he desires to use the premises as his home[24] or a licence to remain until a loan is repaid,[25] and a lessor may be compelled to grant a licence to assign.[26] Interests created by the doctrine are not registrable as land charges.[27]"

In the case primarily cited in *Snell*,[28] acquiescence in improvements gave rise to an estoppel, and it was held that equity called for an outright conveyance of the property in fee simple rather than merely an irrevocable licence or life interest. In another case (not cited)[29] an estoppel through assurances supported a successful counterclaim for a declaration of entitlement to occupy a house rent free for life without it being made clear whether this right constituted a licence or an equitable interest. Similarly, Goulding J. accepted some time ago the submission that "the most equitable compensation for expenditure made on the faith of a contract which turns out to be invalid would be an opportunity to complete the purchase on the terms supposed to have been in force."[30] We see no cause to fear that the recommended repeal and replacement of the present section as to the formalities for contracts for sale or other disposition of land will inhibit the courts

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[14]See *Pascoe* v. *Turner* [1979] 1 W.L.R. 431 at 438.

[15]*Dillwyn* v. *Llewelyn* (1862) 4 De G.F. & J. 517.

[16]*Thomas* v. *Thomas* [1956] N.Z.L.R. 785 (husband and wife).

[17]*Pascoe* v. *Turner* [1979] 1 W.L.R 431.

[18]See *Dillwyn* v. *Llewelyn*, *supra*, at pp. 521, 522; and see Lord Russell of Killowen's restrictive interpretation of *Ramsden* v. *Dyson*, *infra*, in *Ariff* v. *Jadunath Majumdar* (1931) L.R. 58 Ind. App. 91 at 102, 103.

[19]*Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60.

[20]*Holiday Inns Inc.* v. *Broadhead* (1974) 232 E.G. 951 (proposed joint venture to build and operate hotel on O's land).

[21]*Stiles* v. *Cowper* (1748) 3 Atk. 692; *Siew Soon Wah* v. *Yong Tong Hong* [1973] A.C. 836; *Griffiths* v. *Williams* (1977) 248 E.G. 947; and see *Gregory* v. *Mighell* (1811) 18 Ves.328; *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129; *Taylors Fashions Ltd.* v. *Liverpool Victoria Trustees Co. Ltd.* [1981] 2 W.L.R. 576n.

[22]*Ward* v. *Kirkland* [1967] Ch. 194; *E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 380; *Crabb* v. *Arun D.C.* [1976] Ch. 179 (where payment was considered but not imposed in the circumstances).

[23]*Plimmer* v. *Mayor, etc., of Wellington* (1884) 9 App.Cas. 699.

[24]*Inwards* v. *Baker* [1965] 2 Q.B. 29 (son builds a bungalow on father's land).

[25]*Re Sharpe* [1980] W.L.R. 219.

[26]*Willmott* v *Barber* (1880) 15 Ch.D. 96 (where the claim failed).

[27]*E.R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379; and see J.F. Garner (1967) 31 Conv. (n.s.) 332.

[28]*Pascoe* v. *Turner* [1979] 1 W.L.R. 431, CA.

[29]*Greasley* v. *Cooke* [1980] 1 W.L.R. 1306, C.A. Cp. *Re Basham* [1986] 1 W.L.R. 1498 where proprietary estoppel arising out of a non-contractual promise was held by Edward Nugee Q.C., sitting as a deputy High Court judge, to create a quasi-testamentary absolute entitlement to a house and other property without any compliance with the formalities of s. 9 of the Wills Act 1837, never mind those of s. 40 of the L.P.A. 1925. See further the Australian case *Riches* v. *Hogben*, the Full Court of the Supreme Court of Queensland (14 November 1985 unreported) affirming the decision of McPherson J. [1985] 2 Qd. R. 292, and article by K.G. Nicholson, "*Riches* v. *Hogben*: Part Performance and the Doctines of Equitable and Proprietary Estoppel", (1986) 60 Aus L.J. 345.

[30]*Lee-Parker* v. *Izzet* (No. 2)[1972] 1 W.L.R. 755 at pp. 780-781; as he had said, the disappointed potential purchaser "claims equitable relief on the footing that she has expended money at the [potential vendor's] request under the belief induced by him that in the quality of purchaser she was the beneficial owner of the premises," but unfortunately her disapointment was due largely to her inability to borrow the balance of the purchase price so that she could not take advantage of any opportunity to complete.

in the exercise of the equitable discretion to do justice between parties in individual otherwise hard cases.[31]

2. Rectification

5.6 If the parties have reached agreement but fail to record all the terms in writing, or record one or more of them wrongly, then either party may apply to the court for the written document to be rectified.[32] If rectified, the document will satisfy the proposed requirement of writing and thus there will be a valid contract. It was thought at one time,[33] that the courts would only rectify when there was a valid concluded contract. If that were the case, then rectification would not be available after enactment of our proposals, as there would be no contract at all until the terms were reduced to writing. However the case of *Joscelyne* v. *Nissen*[34] decided that there does not have to be a prior contract, but only a prior agreement or a continuing common intention to contract and convincing proof that the written document does not adequately reflect the terms of the agreement.[35] Despite earlier conflicting authorities it now seems established that *Joscelyne* v. *Nissen* represents the true position since it has been followed in later cases.[36] The effect of an order for rectification under the existing law is retrospectively to amend the document. As *Snell* put it:[37] "The decree has retrospective force. The effect is not that the instrument continues to exist, though with a parol variation, but that 'it is to be read as if it had been originally drawn in its rectified form.'" However, this appears too inflexible a conseqence for an equitable remedy: intermediate transactions plus rights and obligations involving third parties may be validated or invalidated without regard to the justice of the situation. Accordingly we would prefer that the court enjoy a discretion in this respect and would recommend that for present purposes the effective date of rectification may be specified in the order. It will be appreciated that, as now, the court will be able to decree rectification of the writing and specific performance of the contract together in the same action.[38] We are thus persuaded that rectification will provide an adequate remedy where the parties have actually reached agreement and have signed documents which are incomplete or incorrect in some way.

3. Collateral contracts

5.7 There will be cases where documents have been signed but are incomplete (rectification not being available for some reason) and one party has suffered loss through acting on an agreement which was not a valid contract because there was no sufficient writing. Here we are satisfied that there is an alternative route to obtaining a just remedy: instead of equitable estoppel or rectification (as already considered) the party concerned

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[31]Reference should also be made to the very recent decision in *Att.- Gen. of Hong Kong* v. *Humphreys Estate* [1987] 2 W.L.R. 343 where Lord Templeman, delivering the judgment of a strong Privy Council, stated at p. 346:

> "The authorities expound and illustrate the principle upon which a litigant who is led to believe that he will be granted an interest in land and who acts to his detriment in that belief is enabled to obtain that interest."

After a consideration of the decided cases, his Lordship concluded, at p. 352:

> "In the present case the government acted in the hope that a voluntary agreement in principle expressly made 'subject to contract' and therefore not binding would eventually be followed by the achievement of legal relationships in the form of grants and transfers of property. It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be 'subject to contract' would be able to satisfy the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document. But in the present case the government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw.

The possibilities of estoppel where the agreement is *not* "subject to contract" but fails to comply with the formality of signed writing and is therefore not binding, are surely far too obvious for elaboration to be needed. Cp. *Maharaj* v. *Chand* [1986] A.C. 898, P.C., where it was held that a purely personal right arising out of promissory or equitable estoppel was not a dealing with land made unlawful by the Native Land Trust Act of Fiji.

[32]For a detailed account of this remedy, see *Snell's Principles of Equity* 28th ed., (1982), pp. 610-619.

[33]*Mackenzie* v. *Coulson* (1869) LR 8 Eq. 368; *Lovell & Christmas Ltd.* v. *Wall* (1911) 104 L.T. 85; *Faraday* v. *Tamworth Union* (1916) 86 L.J. Ch. 436; *W. Higgins Ltd.* v. *Northampton Corporation* [1927] 1 Ch. 128.

[34][1970] 2 Q.B. 86.

[35]*Following Shipley U.D.C.* v. *Bradford Corporation* [1936] Ch. 375; *Crane* v. *Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662; *Earl* v. *Hector Whaling Ltd.* [1961] 1 Lloyd's Rep. 459; *London Weekend Television Ltd.* v. *Paris and Griffith* (1969) 113 S.J. 222.

[36]*Lloyd* v. *Stanbury* [1971] 1 W.L.R. 535; *Re Butlin's Settlement Trusts* [1976] Ch. 251; *The Olympic Pride* [1980] 2 Lloyd's Rep. 67.

[37]*Snell's Principles of Equity* 28th ed., (1982), p. 619, citing *Craddock Bros.* v. *Hunt* [1923] 2 Ch. 136, p. 151, *per* Lord Sterndale M.R.

[38]*Snell, loc. cit.* and also p. 588.

may look to the possibility of there being a collateral contract. The collateral contract may in substance be regarded as another way of enforcing a term omitted from what purports to be a contract in writing.

5.8 A collateral contract is, as its name suggests, a separate contract which is in some way related to the main contract. It must be a true contract, that is, there must be an agreement supported by consideration and it must be intended to be binding. Often the consideration will be that, without the promise contained in the collateral contract, a party would not enter into the principal contract.[39] At present a collateral contract need not be evidenced in writing to be enforceable unless it is itself a contract for the sale or other disposition of land.[40] Following this, a collateral contract not itself for the sale etc. of land would not in future have to be in writing to be valid. If an important term were omitted from the main written contract, it might be possible to enforce it as a collateral contract. For example, in *Jameson* v. *Kinmell Bay Land Co. Ltd.*[41] a prospective purchaser of a building plot was promised orally on behalf of the vendor that a road shown to him on a plan would be constructed; it was not, and the purchaser was able to sue for breach of a collateral contract. Although the number of cases where it will be possible to establish a collateral contract cannot be predicted, this concept provides a useful potential remedy. The discussion of the concept for the purposes of our Report entitled "Law of Contract—The Parol Evidence Rule"[42] incidentally indicates its operation and utility in the present context and therefore the relevant paragraphs may be reproduced here:[43]

> "2.32 The concept of the collateral contract has also been seen as an exception to the parol evidence rule. The nature of such a contract was explained by Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton*,[44]
>
> > It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.
>
> 2.33 The collateral contract seems to us to be a useful conceptual tool to assist in analysing what may be a complicated situation. If it is proved that the parties did intend to enter into a collateral contract, effect may be given to that contract whether the parol evidence rule is as we now consider it to be or whether it is as our predecessors perceived it to be in the working paper. Where extrinsic evidence of terms is inadmissible under the parol evidence rule, effect will nevertheless be given to evidence of a collateral contract if it was the intention of the parties to make such a contract.
>
> 2.34 The development of the concept of the collateral contract has, perhaps, been one reason why the courts have not found it necessary fully to analyse the parol evidence rule. If it is clear that the parties agreed oral terms additional to those which they wrote down, the court can analyse the situation as being a contract and a collateral contract rather than a single contract made partly orally and partly in writing; it will rarely make any difference in practice how the court analyses the situation.[45] However, a collateral contract analysis is necessary if the parol evidence rule applies. This situation will occur if it is established that all the terms of a contract were as set out in a particular document and it is also shown that one party made the other an oral collateral promise. If the parties make a contract which must be in a certain form, it may be possible to have a collateral contract which is not in that form. It may relate to a wholly different subject matter. It may even relate to the written contract but not be

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[39] *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30.

[40] *Jameson* v. *Kinmell Bay Land Co. Ltd.* (1931) 47 T.L.R. 593.

[41] (1931) 47 T.L.R. 593.

[42] (1986) Law Com. No. 154.

[43] Paras. 2.32–2.34.

[44] [1913] A.C. 30, at p. 47.

[45] See, for example, *De Lassalle* v. *Guildford* [1901] 2 K.B. 215, and *Mendelssohn* v. *Normand Ltd.* [1970] 1 Q.B. 177, at p. 186, *per* Phillimore L.J. See, further, K.W. Wedderburn, "Collateral Contracts", [1959] C.L.J. 58, at p. 71.

of the type which is required to be in writing.[46] On the other hand, the subject-matter of the collateral agreement may be such that it must, if it is to be valid, be in the same form as the contract to which it is collateral.[47] The collateral contract analysis may be of particular value in the case of the negotiable instrument.[48] Immediate parties may be bound by an oral collateral warranty while holders in due course are bound only by the contract contained in the written instrument.[49]"

[46]For example, by s. 32 of the Arbitration Act 1950 an "'arbitration agreement' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". An oral agreement collateral to an arbitration agreement (for example, as to the identity of the arbitrator) would seem not to take the agreement outside the Act.

[47]For example, a price increase under a credit agreement which is subject to the Consumer Credit Act 1974 may be unenforceable against the debtor unless in the prescribed form.

[48]See paras. 2.37-2.41, below.

[49]Doubts may still exist on certain aspects of the collateral contract analysis. For example, does the matter in the collateral contract have to be in some manner subsidiary or secondary to the subject-matter of the contract to which it is collateral? We are not aware of an English case in which it has been suggested that a collateral contract might not be valid because its subject-matter is so important to the transaction as a whole that the contract could no longer be described as "collateral". In particular, it has been held that the breach of a collateral contract can give rise to a right to repudiate the contract to which it is collateral: *Webster* v. *Higgin* [1948] 2 All E.R. 127. In addition, it may be noted that the ordinary dictionary meaning of "collateral" does not necessarily connote subordination.

PART VI

SUMMARY OF RECOMMENDATIONS

6.1 We *recommend* that in future contracts for the sale or other disposition of an interest in land must be made by signed writing to be valid. This means that it would no longer be possible to enter into a binding oral agreement for such a sale or disposition. Our recommendations extend to all contracts relating to any interest in land, subject to three exceptions:

(a) a contract to grant a short lease (paragraph 4.10);

(b) public auctions (paragraph 4.11);

(c) contracts made on a recognised investment exchange (paragraph 4.12).

6.2 We *recommend* that each party to the contract should be required to sign a document setting out all the express terms of the contract, but that the parties should not necessarily have to sign the same document. The established practice of exchange of parts should not be inhibited. Similarly, the doctrine of joinder of documents should continue to apply (paragraphs 4.5 and 4.6).

6.3 The contract should be signed by all the parties to the contract or by persons authorised to sign on their behalf (paragraph 4.8).

6.4 Contracts failing to comply with the formalities we recommend would be void and not merely unenforceable. The doctrine of part performance would therefore cease to have effect in contracts concerning land (paragraph 4.13), but other remedies and doctrines would remain available as indicated, in particular equitable estoppel, rectification and collateral contracts (Part V).

6.5 To give effect to our proposals we *recommend* that section 40 of the Law of Property Act 1925 should be repealed and replaced by a new Sale of Land Act. A Bill drafted to give effect to our recommendations is contained in Appendix A.

(*Signed*) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

JOHN GASSON, *Secretary*
1 May 1987

APPENDIX A

DRAFT

OF A

B I L L

INTITULED

A.D. 1987.

An Act to make new provision with respect to contracts for the sale or other disposition of interests in land.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Contracts for sale etc. of land to be made by signed writing.

1.—(1) No contract for the sale or other disposition of an interest in land shall come into being unless the contract is in writing and —

(a) all the express terms of the contract are incorporated (whether expressly or by reference) in one document or each of two or more documents; and

(b) that document or, as the case may be, one of those documents (though not necessarily the same one) is signed by or on behalf of each party to the contract.

(2) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of subsection (1) above by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(3) This section does not apply in relation to —

(a) a contract to grant such a lease as is mentioned in section 54(2) of the Law of Property Act 1925 (short leases);

1925 c.20.

(b) a contract which is made in the course of a public auction; or

(c) a contract which is made on a recognised stock exchange (within the meaning of the Financial Services Act 1986);

1986 c.60.

and nothing in this section affects the creation or operation of resulting, implied or constructive trusts.

(4) In this section—

"disposition" has the same meaning as in the Law of Property Act 1925;

"interest in land" means any estate, interest or charge in or over land or in or over the proceeds of sale of land.

Clause 1

1. This clause implements the recommendation in the report that contracts for the sale or other disposition of land or any interest in land must be made by signed writing (paragraph 4.1).

Subsection (1)

2. This provides that both the fact of agreement and the terms of the agreement must be in writing, signed by each party. All the terms need not be set out in the signed document. That document may refer to and so incorporate others. Thus joinder is to be permitted as it is at present and the subsection retains the rule that the signature must be on the document which incorporates the others, rather than on one of the incorporated documents. What is essential is that each party signs a document which records the fact that they have reached agreement and which sets out in full, or incorporates by reference, all the terms. They need not sign the same document. The present practice of exchanging contracts is not to be inhibited. This subsection implements paragraphs 4.5-4.8 of the report.

Subsection (2)

3. This recognises that a document may be rectified by the court so that in consequence a contract in writing is constituted within subsection (1). The effective date of such a contract will then be in the discretion of the court (paragraph 5.6).

Subsection (3)

4. This implements the recommendation in the report that there should be three exceptions to the general rule (paragraph 4.9).

5. Paragraph (a) exempts a contract to grant a short lease from the requirement of signed writing. Section 54(2) of the Law of Property Act 1925 refers to "leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine".

6. Paragraph (b) exempts a contract made in the course of a public auction from the requirement of signed writing and implements paragraph 4.11 of the report.

7. Paragraph (c) exempts contracts made on a recognised investment exchange from the requirement of signed writing and implements paragraph 4.12 of the report.

Subsection (4)

8. Subsection (4) contains two definitions:

(a) the definition of "disposition" in section 205 (1) (ii) of the Law of Property Act 1925 includes a conveyance and a devise, bequest or an appointment of property in a will, and "conveyance" is defined so as to include a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest in property by any instrument, except a will.

(b) "interest in land" is defined as expressly including an interest in or over the proceeds of sale of land. This makes it clear that an interest behind a trust for sale of land is an interest in land.

Short title, commencement etc.

2.—(1) This Act may be cited at the Sale of Land Act 1987.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) Nothing in this Act shall apply in relation to contracts made before the commencement of this Act.

1925 c.20.

(4) Section 40 of the Law of Property Act 1925 (which is superseded by this Act) is hereby repealed.

(5) This Act extends to England and Wales only.

Clause 2

9. This clause provides for the short title, commencement, repeals and extent of the Bill. The Bill will come into force two months after it receives the Royal Assent and will only apply to contracts entered into after the date on which it comes into force.

APPENDIX B

INDIVIDUALS AND ORGANISATIONS WHO RESPONDED TO WORKING PAPER No. 92

Professor P.S. Atiyah
Professor D.G. Barnsley
Professor G. Battersby
N. Beale
British Legal Association
Building Societies Association
H.I. Chamberlain
Chancery Bar Association
Clarke, Willmott and Clarke, Solicitors
Conveyancing Standing Committee
Country Land Owners Association
Professor S. Cretney
Evershed and Tomkinson, Solicitors
S. Farren
Finance Houses Association
J.R. Gudgeon
Halifax Building Society
C. Harpum
R.L. Harris
House Owners Conveyancers Ltd.
N. Howarth
Institute of Legal Executives
Justice
H.M. Land Registry
The Law Society
Lord Chancellor's Department
D. Price
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APPENDIX C

A TABLE COMPARING THE FORMALITIES FOR A CONTRACT FOR SALE OF LAND

1 Country	2 Transfer Independent of Contract for Sale	3 Formality Required for a Contract for Sale of Land	4 Source of the Formality	5 Nature of the Formality	6 Effect of Non-Compliance	7 Equitable Relief
England	Yes	Yes	Law of Property Act 1925, s.40	Writing signed by the party to be charged	Unenforceable	Part performance
N. Ireland	Yes	Yes	Statute of Frauds (Ireland) 1965 as preserved by Law Reform (Misc Provs) Act (M.I.) 1954	Writing signed by the party to be charged	Unenforceable	Part performance
Scotland	Yes	Yes	Common Law	Probative writing or holograph of both parties	Void	"Re: Interventus" and Homologation
Republic of Ireland	Yes	Yes	Statute of Frauds (I.R.) 1965, s.2	Writing signed by the party to be charged	Unenforceable	Part performance
U.S.A.	Yes	Yes	Restatement of the Law, Second, Contracts 2d, Section 125	Writing signed by the party to be charged	Unenforceable	Action in reliance specific enforcement Section 129
Australia:						
Victoria	Yes	Yes	Instruments Act 1958, s.126	Writing signed by the party to be charged	Unenforceable	Part performance
N.S. Wales	Yes	Yes	Conveyancing Act (1919–54)	Writing signed by the party to be charged	Unenforceable	Part performance
Canada:						
Alberta	Yes	Yes	Statute of Frauds 1913, s.1	Writing signed by the parties	Estate at will	Part performance
S. Africa	Yes	Yes	Alienation of Land Act 1981, s. 2(1)	Writing signed by the parties	Void	Unjust enrichment principle

1 Country	2 Transfer Independent of Contract for Sale	3 Formality Required for a Contract for Sale of Land	4 Source of the Formality	5 Nature of the Formality	6 Effect of Non-Compliance	7 Equitable Relief
Sweden	No*	Yes	Real Property Code 1970	Writing signed by the parties	Void	–
Finland	No*	Yes	General Code of 1734	Conveyance deed certified by a public conveyance witness and one other witness called by him	Void	–
France	No*	No**	–	–	–	–
Germany	Yes	Yes	Civil code, Section 313 Section 313	Authentication by court or notary	Void	Valid if property actually actually conveyed and transfer entitled in Land Register (s. 313. 2nd sentence)
Italy	No*	Yes	Civil Code, Section 1350	Public act or private writing	Void	–
Switzerland	No*	Yes	Code of Obligations Section 216	Notarial deed	Void	–
Austria	No*	Yes	General Civil Code, Article 431	Form prescribed by law or in the form of an instrument	Void	–
Netherlands	Yes	No	–	–	–	–

* In these jurisdictions, a contract for the sale of land incorporates transfer. In Italy and Switzerland, preliminary contracts (the equivalent of the English Contract for Sale of Land) must comply with the same formalities as the definitive contract.

** Writing is only used as proof of the contract and to carry out the formality of registration.

APPENDIX D

EXTRACT FROM WORKING PAPER NO. 92

PART III

PROBLEMS

3.1 Problems arising out of section 40 may be divided into two main groups:

A. Difficulties with interpretation of the statute itself, and

B. Difficulties raised by its interaction with part performance.

In addition there are certain general criticisms which have been made and mention will be made of these first.

3.2 Section 40 was not within the terms of reference of the 1937 Law Revision Committee when they considered the Statute of Frauds 1677.[1] Many of their criticisms have been said, however, to be equally applicable to section 40.[2] The criticisms were:[3]

(1) The requirement of a note in writing was introduced at a time when the parties themselves could not give evidence.[4]

(2) Besides shutting out perjury any such requirement also more frequently "shuts out the truth."

(3) ... [Clearly not applicable].

(4) Whether or not a party makes a note of the agreement/transaction is a matter of luck; therefore the requirement is "out of accord with the way business is normally done".[5]

(5) The operation of the requirement is often lopsided and partial. In a contract between A and B, if A has signed a sufficient memorandum but B has not, B can enforce the contract whereas A cannot.

(6) The section does not reduce contracts which do not comply with it to mere nullities but merely makes them unenforceable by action. This may lead to "anomalous results", the given example being Morris v. Baron.[6] There a contract which complied with section 4 of the 1677 Act was superseded by a second contract which did not. It was held that neither contract was enforceable: the earlier contract because it was rescinded by the later, and the later one because it failed to comply with the statute.[7]

These criticisms will be referred to further when certain proposals for reform are outlined.

A. Difficulties with Interpretation of the Statute

3.3 The meaning of "agreement" The most important issue under this heading has been and may still be that already referred to in Part I, namely the interpretation of the word "agreement". The word "agreement" may be said to have at least three meanings,[8] the fact of consensus, the terms of agreement, or a document which records the agreement.

3.4 In the case of Law v. Jones[9] it was held (Russell L.J. dissenting) that a sufficient section 40 memorandum need only record the terms agreed, also that the words "subject to contract" did not prevent there being a sufficient memorandum, for a firm agreement

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[1] See above para. 2.3.

[2] See H.W. Wilkinson at (1967) 31 Conv. (N.S.) 182.

[3] See Report (1937), Cmd. 5449, para. 9.

[4] See above para. 2.2.

[5] It is a well-known practice nowadays to exchange formal written contracts yet it may still not be uncommon that an oral agreement is reached by lay parties on the property in which case the criticism would apply (see, e.g., Farrell v. Green (1974) 232 E.G. 587).

[6] [1918] A.C. 1.

[7] This was a result which the parties "could not possibly have intended". Note that had the consequence of failure to comply with the statute been invalidity instead of unenforceability, the earlier contract would have remained valid and enforceable, which would also have been an unintended result: cp. United Dominions Corporation Ltd v. Shoucair [1969] 1 A.C. 340.

[8] See A.M. Prichard "An aspect of contracts and their terms" (1974) 90 L.Q.R. 55 at p. 65.

[9] [1974] Ch. 112 and see Appendix B.

has the effect of "eliminating any qualifying effect which the presence of the words may have had ..."[10]. In the case of Tiverton Estates v. Wearwell,[11] however, a differently constituted Court of Appeal reached a contrary decision, that is, that the writing relied upon must acknowledge the existence of a contract and that the words "subject to contract" constitute a denial.

3.5 Despite the fact that these cases are "undoubtedly in conflict"[12] and the fact that it has been strongly argued[13] that the Tiverton case cannot, on grounds of precedent, be taken to overrule Law v. Jones, it is true to say that the Tiverton case often appears to be accepted as deciding the law.[14]

3.6 Buckley L.J. may well have been correct in saying in Law v. Jones[15] that section 40 "presupposes the existence of a contract and in case after case in the books one finds the existence of the contract established by extraneous evidence." However, it does not follow from this that the existence of an agreement can be contradicted or doubted in the memorandum.[16]

3.7 Which opinion is correct, however, is almost irrelevant for present purposes since any doubt as to such a crucial point is ground enough for reform. Despite The Law Society's claim that, following the Tiverton case, this aspect of conveyancing practice is reasonably satisfactory, the problem, as we have indicated, remains. Indeed The Law Society itself stressed the continuing need for reform of section 40.[17]

3.8 "Or any interest in land". Another problem arising with the words of the statute is the proper interpretation of the phrase "or any interest in land". Although "an undivided share in land" is expressly excluded from the wide definition of land in section 205(1)(ix) of the Law of Property Act 1925, section 40(1) has been, obiter, said to apply to a contract for the sale of an undivided share in land.[18] Therefore an interest once considered to be a mere interest in the proceeds of sale[19] must now be treated as an interest in land. This treatment has moreover been accepted without argument by both the Court of Appeal and the House of Lords in Steadman v. Steadman.[20]

3.9 Other contracts which have been held to fall within section 40 as concerning "land or any interest in land" include a contract for the sale of debentures charged on land[21] and a right to shoot and take away game.[22]

3.10 Land includes fixtures which have become part of the "land", so that a contract for their sale or other disposition is thus within section 40 even when sold separately from the

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[10]Buckley L.J. at p. 126.

[11][1975] Ch. 146 and see Appendix B.

[12]Per Buckley L.J. (one of the Law v. Jones majority) in Daulia Ltd. v. Four Millbank Nominees Ltd. [1978] Ch. 231 at p. 250.

[13]e.g. C.T. Emery, "The alarm bell continues to ring", [1974] C.L.J. 42; Emmet on Title 18th ed., (1983), p. 48; M.J. Perry "S. 40 of the Law of Property Act 1925 and 'Subject to Contract'", (1974) 71 L.S. Gaz. 340; R. Clark, "'Subject to contract' I, English problems," [1984] Conv. 173.

[14]J.C.W. Wylie, Irish Conveyancing Law (1978) p. 342, "After considerable controversy, the English courts seem to have reached the conclusion that such a qualification ['subject to contract'] in the alleged memorandum, by negativing the existence of an agreement between the parties, renders it insufficient". Footnotes omitted. Also Ruoff and Roper, Registered Conveyancing 4th ed., (1979), p. 304, "For the purposes of this section [s. 40] a memorandum or note must not only state the terms of the contract but must also contain an acknowledgement or recognition by the signatory to the document that a contract has been entered into". Tiverton is cited as authority for this statement with no mention in the whole book of Law v. Jones. Also Cheshire and Burn, Modern Law of Real Property 13th ed., (1982), pp. 112-113 where Tiverton is accepted and Law v. Jones is relegated to a footnote.

[15][1974] Ch. 112 at p. 125.

[16]Cp. Alpenstow Ltd. v. Regalian Properties Plc. [1985] 1 W.L.R. 721, where the words "subject to contract" were used in an agent's letter of offer; Nourse J. held that, in the exceptional context, an acceptance by letter constituted a contract despite those words; no reliance was placed on the Tiverton case as authority for the contract not being enforceable because of an insufficent memorandum.

[17]See above para. 1.4.

[18]Cooper v. Critchley [1955] Ch. 431; see also para. 2.5 and n. 10.

[19]Irani Finance Ltd v. Singh [1971] Ch. 59.

[20][1976] A.C. 536 and [1974] 1 Q.B. 161.

[21]Driver v. Broad [1893] 1 Q.B. 744.

[22]Webber v. Lee (1882) 9 Q.B.D. 315.

land.[23] Problems with the definition of land in general are also applicable with section 40, for example the distinction between a lease and a licence and the question of whether an irrevocable licence is yet an interest in land.[24] These problems are not peculiar to section 40 however, and will not be discussed further here.

3.11 Judicial construction As the section was intended to prevent fraud, the judiciary have naturally been loath to allow the lack of a sufficient memorandum to defeat an otherwise established contract. A number of extensions or exceptions have therefore been devised, aside from the doctrine of part performance, to enable or facilitate the enforcement of contracts. The operation and availability of these is not always clear.

3.12 Joinder of documents First there is what might be described as the joinder rule.[25] It is clear that the Interpretation Act 1978, s. 6(c), provides for singular words in statutes to include the plural. However, not all such words will be so read.[26] Nevertheless, even if more than one document was envisaged by the phrase "memorandum or note" in section 40, the courts have allowed plaintiffs to adduce parol evidence to explain and connect incomplete documents until a complete memorandum is collected.[27] An implied reference may suffice for this, if a number of documents when placed side by side are seen to refer to the same transaction.[28] Not all the documents need to be signed if the reference to the same transaction is "manifest".[29]

3.13 In the case of Timmins v. Moreland Street Property Co. Ltd.[30] Jenkins L.J. stated that in order to join two or more documents, one of the documents must be signed and must contain "some reference, express or implied, to some other document or transaction". After reaching the conclusion that a cheque was only evidence of "the mere fact that the payment must have been made for some purpose or for some consideration", he said that it could not "reasonably be held to amount to a reference to some other document or transaction within the principle ... stated". The dicta of Jenkins L.J. in the Timmins case have recently been approved by the Privy Council in Elias v. George Sahely & Co. (Barbados) Ltd.[31]

3.14 While in any particular case it may seem entirely reasonable to allow the joinder of documents, the development of the rule has added to the uncertainty in the application of section 40. It may be difficult to know in any particular case whether there has been a sufficient reference in one document to another to permit joinder, and the extent to which the courts will allow extrinsic evidence to be used to prove the connection between two documents is unclear.

3.15 Identification of parties, property, price Further problems have been caused by the fact that oral evidence has been allowed in order to identify the parties to an agreement where their names are not stated, or are stated incorrectly.[32] Thus a memorandum in which a party is mentioned by capacity but not by name may suffice.[33] Nevertheless a description

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[23]Cp. Morgan v. Russell & Sons [1909] 1 K.B. 357; see also s. 61(1) of the Sale of Goods Act 1979 where "goods" are defined as:
"all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money; and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;".

[24]Compare for example the case of E.R. Ives Investment Ltd. v. High [1967] 2 Q.B. 379 with that of National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175.

[25]See G. Fridman "Joinder of documents to form a memorandum", (1958) 22 Conv. (N.S.) 275.

[26]The provision reads "In any Act, unless the contrary intention appears,- ... (c) words in the singular include the plural and words in the plural include the singular"; s. 6 of the Interpretation Act 1978. This was a consolidating statute but, for present purposes, this provision only applies to Acts passed after 1850 (ss. 22(1) and 23(1) and Sched. 2, para. 2). Accordingly neither it nor its predecessor could govern the construction of the Statute of Frauds 1677 (which was consolidated in part into s. 40 of the 1925 Act: see as to construction Cooper v. Critchley [1955] Ch. 431). The joinder of documents rule was applied long before the 1925 consolidation: see, e.g., Boydell v. Drummond (1809) 11 East. 142.

[27]Long v. Millar (1879) 4 C.P.D. 450 which gave a more liberal interpretation of the rule than that laid down in the earlier case of Peirce v. Corf (1874) L.R. 9 Q.B. 210.

[28]Sheers v. Thimbleby & Son (1897) 76 L.T. 709.

[29]Burgess v. Cox [1951] Ch. 383.

[30][1958] Ch. 110, 130-131.

[31][1983] 1 A.C. 646 at p. 655.

[32]F. Goldsmith (Sicklesmere) Ltd v. Baxter [1970] Ch. 85.

[33]Auerbach v. Nelson [1919] 2 Ch. 383 per Astbury J. at p. 388.

which is too indefinite will not suffice as the parties will not be considered to be ascertainable (e.g. "my clients", in Lovesy v. Palmer[34]).

3.16 In relation to the parties this may not be an exception to the requirements of section 40 for, as Lord Evershed M.R. said in Davies v. Sweet.[35]

> "The statutory language requires that there should be a sufficient note or memorandum of the contract alleged, that is of its essential provisions. It does not in terms require that the contracting parties should be named or identified ..."

Consistently with this a memorandum may be sufficient where it does not actually identify one of the parties and yet does identify an agent who will be bound by the agreement through incurring personal liability.[36]

3.17 The property and price, however, are terms of the agreement and yet they too need only be ascertainable, not necessarily ascertained. The question is one of construction. "[T]wenty-four acres of land, freehold, at Totmonslow" was held to be a sufficiently certain description of the property in the case of Plant v. Bourne.[37] The court will assume that a man is selling his own property.[38] It will only be necessary for the property to be defined in a physical sense as, without mention of the interest being disposed of, it is implied that an unencumbered freehold is to pass.[39] Similarly an agreement to sell at a fair and reasonable valuation will be valid and enforceable as a court is capable of determining such price[40] by substituting its own machinery for that agreed by the parties. This will not be the case where the valuation machinery was of the essence. However, where no price is agreed, the court will not imply a term that a reasonable price must be paid.[41] It is important to remember in each of these cases that where a term is not certain, this will result not only in there being an unenforceable contract but in there being no contract to be enforced.

3.18 Signature The courts have perhaps been least rigid with regard to the requirement in section 40 that the memorandum be "signed" by the party charged. Names merely printed in the memorandum (or indeed initials) may be sufficient signature where the party writes them or otherwise indicates his agreement,[42] although printed names or initials will not suffice where the memorandum shows that they were not inserted as a signature, as, for example, where at the conclusion of an agreement the words "As witness our hands" were written with no signature following.[43] However there may be uncertainty in any particular case as to whether a name or initials will be accepted as a signature.[44]

3.19 Quite apart from the difficulties as to what constitutes a signature, there may be a question as to whether a document has been properly signed if the document has been altered. It has been held that where a written contract is altered subsequently to signature, an oral approval of the alteration will revive the signature only in cases where the variation is to rectify an inaccurate formulation and not where it is a variation by consent of a concluded agreement.[45] Although Goulding J. felt constrained to accept this "illogical distinction", it has since been argued[46] that the distinction is supported neither by the authority relied upon in that case nor by principle. In light of this, problems may arise in practice where due initialling of alterations is overlooked, or is not insisted upon, for example in the common situation where the completion date is only agreed after exchange of contracts: strictly speaking, without initialling, there will be no "signed" contract or memorandum.

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[34][1916] 2 Ch. 233.

[35][1962] 2 Q.B. 300, 308.

[36]Basma v. Weekes [1950] A.C. 441.

[37][1897] 2 Ch. 281.

[38]Auerbach v. Nelson [1919] 2 Ch. 383.

[39]Timmins v. Moreland Street Property Co. Ltd [1958] Ch. 110.

[40]Ibid., per Romer L.J. at p. 132.

[41]Gourlay v. Somerset (1815) 19 Ves. 429.

[42]Leeman v. Stocks [1951] Ch. 941.

[43]Hubert v. Treherne (1842) 3 Man. & G. 743.

[44]See, for example, Leeman v. Stocks, ibid.

[45]New Hart Builders Ltd v. Brindley [1975] Ch. 342.

[46]C.T. Emery "Statute of Frauds: The authenticated signature fiction—an illogicial distinction" (1975) 39 Conv. (N.S.) 336.

3.20 Waiver of a term or submission to omissions It is clear from the wording of section 40 that what is required is a memorandum of the agreement actually made between the parties. However the courts have allowed contracts to be enforced even though the memorandum does not contain all the terms of the agreement if, first, the term omitted is solely for the benefit of the plaintiff and, secondly, the plaintiff decides to waive the term.[47] The plaintiff will have to establish that there was a concluded contract and that the term was not "really an essential part of the bargain."[48]

3.21 Whether the converse is true, that is, if an omitted term is to the detriment of one party exclusively, that party may submit to its performance and then enforce the contract as evidenced by the memorandum, is perhaps more doubtful. The rule was adopted by Williams on Vendor and Purchaser[49] on the basis of the decision in Martin v. Pycroft.[50] However a contrary result was reached by Harman J. in Burgess v. Cox.[51] This case was in turn not followed in Scott v. Bradley[52] where Plowman J. followed Martin v. Pycroft in preference to Harman J's decision. In this latest case a plaintiff was held entitled to specific performance by submitting to perform the missing term that he pay half the defendant's costs.

3.22 Summary Waiver of terms, joinder of documents, acceptance of printed signatures and the other matters mentioned all appear to derive from attempts by the courts to prevent the section from being used, in effect, as an instrument of fraud: the primary example of this approach was, of course, the doctrine of part performance which is now recognised in section 40(2). The result has been that the Act has "acquired a thick crustation of legal authority and judicial gloss, much of it inconsistent and unsupported by the enactment itself."[53] The law on the matter is no longer codified within the statute but must be deduced from judgments, and doubts will inevitably exist as to the present scope and future application of section 40(1).

B. Problems with Part Performance. Is Section 40(1) a Dead Letter?

3.23 It has been said that "If ... one party to an oral contract can render it enforceable by his own unilateral act without the defendant's assent, then it is indeed difficult to resist the conclusion that s.40(1) has been judicially repealed, so opening the door wide to the evils it was designed to avoid".[54] This result is attributed to the decision in Steadman v. Steadman.[55] In that case, the House of Lords re-examined the question of what acts amount to part performance, and held that mere payment of a sum of money in the circumstances of the case amounted to a sufficient act of part performance so that the contract was enforceable despite the lack of writing. Further, the majority of the law lords severally indicated that, in the ordinary circumstances of a contract for the sale of land, a sufficient such act could be found in the fact of the purchaser instructing solicitors to prepare and submit a draft conveyance or transfer. In consequence, it appears that an oral contract for sale can readily and unilaterally be rendered enforceable by the purchaser.[56] It has similarly been suggested that a vendor might rely on the unilateral act of (part) performance constituted by actually executing a deed of conveyance or transfer.[57] However, the precise position is not entirely clear for it has been argued[58] to the contrary that the only innovations in the Steadman case were the lowering of the standard of proof and allowing the payment of money to be an act of part performance.

3.24 In that case there was no discussion of any requirement that the defendant should have knowledge of, and acquiesce in, the plaintiff's acts amounting to part performance. On the facts of the case it may perhaps be assumed that there was in fact knowledge, since

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[47]Smith v. Wheatcroft (1878) 9 Ch.D. 223. Note that implied terms need not be evidenced in writing, also as with all contracts rectification may be available.

[48]Hawkins v. Price [1947] Ch. 645.

[49]4th ed., (1936) vol 1, p. 5.

[50](1852) 22 L.J. Ch. 94.

[51][1951] Ch. 383.

[52][1971] 1 Ch. 850.

[53]Barnsley op. cit., at p. 102.

[54]Barnsley op. cit. at p. 119.

[55][1976] A.C. 536.

[56]Followed as to this in Re Windle [1975] 1 W.L.R. 1628.

[57]See a note at (1974) 38 Conv. (N.S.) 388-391.

[58]M.P. Thompson "The role of evidence in part performance", [1979] Conv. 402 at p. 413.

the sending of a document for execution after the making of a contract is a part of normal conveyancing practice. The point was, however, not canvassed and the question of whether the defendant's acquiescence is relevant was therefore left open.

3.25 A point which was canvassed but still left open was whether or not acts of part performance must indicate merely a contract of the type alleged or rather indicate a contract relating to land.[59] Walton J. in Re Gonin[60] regarded the doctrine of part performance as including an evidential factor, so that the acts relied upon must themselves be indicative of a contract concerning land. This view has been criticised.[61]

3.26 The decision in Steadman v. Steadman has left the scope of the doctrine of part performance in a very uncertain state. Any consideration of section 40 will have to address itself to this problem, and not just to the, perhaps better known, problems of section 40(1).

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[59]Steadman v. Steadman [1976] A.C. 536 at p. 542 per Lord Reid, p. 562 per Lord Simon of Glaisdale.

[60][1979] Ch. 16.

[61]M.P. Thompson "The role of evidence in part performance", [1979] Conv. 402.

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