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Cover Page Footnote

Professor of Law, Fordham University School of Law. The author wishes to express his appreciation for the assistance given him by the Institute of Comparative Law, University of Florence, where this Article was written.

THE STATUTE OF FRAUDS IN THE LIGHT OF THE FUNCTIONS AND DYSFUNCTIONS OF FORM

JOSEPH M. PERILLO*

I. INTRODUCTION

TRUMPET flourishes and drum rolls are unlikely to sound in village squares on April 16, 1977,¹ to commemorate the third centennial of the enactment of sections 4² and 17³ of the Statute of Frauds. The long-lived Statute's 250th anniversary was greeted in 1927 by England's *Law Quarterly Review*, with the sardonic toasts, "*Floreat iniustitia*," and "The Law—may it never be reformed."⁴ Prodded by such comments, Parliament repealed most of the provisions contained in the fourth

* Professor of Law, Fordham University School of Law. The author wishes to express his appreciation for the assistance given him by the Institute of Comparative Law, University of Florence, where this Article was written.

1. The controversy with respect to the date of enactment of the Statute of Frauds appears to have been laid to rest. See 6 W. Holdsworth, *A History of English Law* 380-84 (1927) [hereinafter cited as Holdsworth]; Costigan, *The Date and Authorship of the Statute of Frauds*, 26 *Harv. L. Rev.* 329, 334 (1913); Hening, *The Original Drafts of the Statute of Frauds* (29 *Car. II* c. 3) and *Their Authors*, 61 *U. Pa. L. Rev.* 283, 312-13 (1913). The 1677 date will be used throughout this Article.

2. Section 4 provided: "And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract [f]or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." *An Act for Prevention of Frauds & Perjuries*, 29 *Car. 2*, c. 3, § 4 (1677) (italics deleted).

3. Section 17 provided: "And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." *An Act for Prevention of Frauds & Perjuries*, 29 *Car. 2*, c. 3, § 17 (1677) (italics deleted). Section 17 was repealed but substantially reenacted as § 4 of the *Sale of Goods Act*, 56 & 57 *Vict.*, c. 71 (1894).

4. 43 *L.Q. Rev.* 1 (1927) (Editorial Note). The editors gave the date of enactment as March 12, 1677.

and seventeenth sections in 1954.⁵ Left standing were the writing requirements with respect to a defendant's special promise to answer for the debt, default, or miscarriages of another,⁶ as well as the writing requirement governing contracts for the sale of interests in land.⁷ In the United States, every state except Louisiana adopted legislation patterned after the English original.⁸ More recently, the same forty nine states⁹ have enacted the Statute of Frauds provisions of the Uniform Commercial Code¹⁰ which deviate in important ways from section 17 of the original Statute even as revised in the United States by the Uniform Sales Act.¹¹ Nonetheless, with a few local variations, the provisions of section 4 of the tri-centenarian Statute remain in effect in forty nine states.

The Statute of Frauds does not stand alone and isolated in Anglo-American history. It is well within patterns of thought, custom, and legislation which are observable in the legal systems of the most disparate types, including ancient Babylon,¹² the Soviet Union,¹³ the tribal law of the African Akan,¹⁴ and the Code Napoléon.¹⁵ Indeed, one would be

5. 2 & 3 Eliz. 2, c. 34 (1954); see 40 Cornell L.Q. 581 (1955); 68 Harv. L. Rev. 383 (1954).

6. The English Law Revision Committee, which in 1937 had studied the Statute of Frauds, recommended that this provision be repealed with the others. English Law Revision Committee, *The Statute of Frauds and the Doctrine of Consideration: Sixth Interim Report*, Cmd. No. 5449, at 11-12 (1937) [hereinafter cited as Revision Committee] (reprinted in 15 Can. B. Rev. 585, 593-94 (1937)).

7. This was repealed and reenacted with some modifications in § 40 of the Law of Property Act, 15 Geo. 5, c. 20, § 40 (1925). The wisdom of retention of this provision is considered in Wilkinson, *Law of Property Act 1925, S. 40: A Case for Abolition*, 31 Conveyancer & Prop. Law. 182 (1967); Wilkinson, *Law of Property Act 1925, S. 40: A Case for Amendment*, 31 Conveyancer & Prop. Law. 254 (1967).

8. See the table of statutes in 4 S. Williston, *Contracts* § 567B (3d ed. W. Jaeger 1961) [hereinafter cited as Williston].

9. 10 Williston § 1160A.

10. Uniform Commercial Code §§ 1-206, 2-201, 8-319, 9-203.

11. Uniform Sales Act § 4.

12. See notes 34-37 *infra*, and accompanying text.

13. In the principal Soviet republic, with certain exceptions, all transactions between individuals in which the amount in question exceeds 100 rubles, and all transactions between public bodies or between public bodies and individuals must be in written form. R.S.F.S.R. *Grazh Kod* (Civil Code) arts. 44(1), (2) (1964). The code sections can be found in *Civil Code of the Russian Soviet Federated Socialist Republic 12* (W. Gray & R. Stults transl. 1965).

14. See Allott, *Evidence in African Customary Law*, in 1 *Readings in African Law* 83, 85 (1970).

15. There is perhaps more literature in English on the French "Ordonnance de Moulins" of 1566 and its reenactment with modifications as article 1341 of the French Civil Code (C. Civ. art. 1341 (73e ed. *Petits Code Dalloz* 1973)) than on any other form requirement outside the Anglo-American system. See O. Bodington, *An Outline of the French Law of Evidence* 42-53 (1904); P. Herzog & M. Weser, *Civil Procedure in France* 321-24 (1967);

tempted to speak of the Statute as one manifestation of a universal cultural component,¹⁶ but for the apparent absence of similar components in Chinese and Japanese law.¹⁷

The Statute laid down a rule that prescribed formalities¹⁸ be utilized in certain classes of contracts. For example, section 4 required that the "agreement . . . or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."¹⁹ Contracts for the sale of goods valued at ten pounds sterling were subject to the same form requirement except that the giving of "something in earnest" or the acceptance and receipt by the buyer of part of the goods were treated as equivalent to the written formality.²⁰

Theorists in the nineteenth and early twentieth centuries believed such requirements of form were becoming obsolescent by virtue of an evolutionary process "From Formal to Formless Law."²¹ "Liberty of Form" was declared to be the touchstone of modern contract law, meaning that parties were free to adopt any form²² they desired unless a particular provision of the law declared otherwise.²³ Modern observers, on the other

2 M. Planiol & G. Ripert, *Treatise on the Civil Law* §§ 1104-34 (11th ed. La. State Law Inst. transl. 1939). For North American offshoots of the French system, see Johnson, *Sources of the Quebec Law of Evidence in Civil and Commercial Matters*, 31 *Can. B. Rev.* 1000, 1006-16 (1953) [hereinafter cited as Johnson]; 33 *La. L. Rev.* 344 (1973).

16. On the question of regional versus universal components in law, see Wahl, *Influences Climatiques sur l'Évolution du Droit en Orient et en Occident—Contribution au Régionalisme en Droit Comparé*, 25 *Revue Internationale de Droit Comparé* 261 (1973).

17. A Japanese industrialist summed up the Eastern attitude as follows: "We, as do the Chinese, place greater value on oral commitments than on written contracts, in apparent diametrical contrast to Western businessmen." Fujino, *Get to Know the Japanese Market*, *N.Y. Times*, July 8, 1973, § 3, at 15, col. 3. Mr. Fujino is described as the president of the Mitsubishi Corporation. See also J. Toshio Sawada, *Subsequent Conduct and Supervening Events* 225 (1968) ("Contracts are viewed not as a set of legal claims, but as an evidence of certain social or personal relations."). For the almost total absence of private law, as we understand it, in the imperial Chinese tradition, see A. deRiencourt, *The Soul of China* 91-93 (rev. ed. 1965).

18. It has been argued that the Statute does not lay down a "form" requirement in the traditional sense of that term. The question is discussed at note 166 *infra*.

19. An Act for Prevention of Frauds & Perjuries, 29 *Car. 2*, c. 3, § 4 (1677).

20. *Id.* § 17.

21. This is the title of section 9 of de la Grassiere, *The Evolution of Civil Law, in Formative Influences of Legal Development* 602 (A. Kocourek & J. Wigmore eds. 1918). This was also a central theme of Sir Henry Maine, *Ancient Law* (3d Amer. ed. 1873).

22. Even a simple oral contract made with no particular ritual words has a "form." See E. Betti, *Teoria generale del negozio giuridico* 126 (1955). Throughout this Article, however, the term "form" or "formality" means any manner of expressing or memorializing an agreement other than oral or tacit non-ritual expression.

23. For example, Swiss law states: "Contracts are valid without any special form unless

hand, have spoken of the "renaissance of formalism"²⁴ which has occurred in recent decades. The realities are considerably more complex than these generalizations suggest. While there has been an increase in the "formality" required in mercantile transactions, particularly with respect to such matters as commercial paper, documents of title, and the recording of security interests, these form requirements tend to be rather simple, non-ceremonious and flexible in contrast to the forms of more primitive times. At the same time, cumbersome, ceremonious, non-functional form appears to be on the decline.²⁵ In the very recent past, however, under the banner of consumer protection, new and often complex form requirements have been imposed.

Over the course of its history, some prominent members of the legal profession have given the Statute of Frauds high praise, although more have excoriated it. Lord Nottingham, one of its draftsmen, was frequently quoted as having said "that every line was worth a subsidy."²⁶ Lord St. Leonard's rebuttal was: "Every line of it has cost a subsidy."²⁷ Chancellor Kent extolled it as "the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights."²⁸ A more recent commentator disagreed, charging that the Statute was "ambiguous, archaic, arbitrary, uneven, unwieldy, unnecessary and unjust."²⁹

the law provides otherwise." C.O. art. 11 (Payot 1962). For similar statements, see 1 E. Cohn, *Manual of German Law* § 139 (2d ed. 1968); Ylöstalo, *Remarks on the Finnish Law of Contract and the Law of Torts, in The Finnish Legal System* 150 (J. Uotila ed. 1966). The apparent banality of this principle dissolves when one recalls that Roman law "took the view that an agreement was not enforceable unless there was some reason why it should be. At first, like other systems, it found this reason in Form." W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 412 (3d ed. P. Stein 1966).

As an instrument of legal analysis, the principle of liberty of form is often used to justify narrow construction of form requirements. It has had some currency in common law analysis: "Enactments, also, which impose forms and solemnities on contracts, on pain of invalidity, are construed so as to be as little restrictive as possible of the natural liberty of contracting." P. Maxwell, *The Interpretation of Statutes* 469-70 (5th ed. F. Stroud 1912), quoted in 2 A. Corbin, *Contracts* § 275, at 13 n.19 (1950) [hereinafter cited as Corbin].

24. See Muukkonen, *Formal Provisions and the Elimination of their Detrimental Consequences*, 5 *Scandinavian Studies in Law* 79, 81 & n.1 (1961).

25. L. Friedman, *Contract Law in America* 91-95 (1965); J. Flour, *Quelques Remarques sur l'Évolution du Formalisme*, in 1 *Le Droit Privé Français au Milieu du xxe Siècle* (Études Offertes à Georges Ripert) 93, 94 (1950).

26. Revision Committee 6.

27. 43 *L.Q. Rev.* 1, 3 (1927) (Editorial Note).

28. 2 *J. Kent, Commentaries* *494 n.j.

29. Ireton, *Should We Abolish the Statute of Frauds?*, 72 *U.S.L. Rev.* 195, 196 (1938). A great number of equally passionate comments can be arrayed. Lord Kenyon characterized the Statute as "one of the wisest laws on our Statute Book," in *Chaplin v. Rogers*, 102

Among the welter of eulogies and denunciations it is rare to find a dispassionate evaluation of the Statute in terms of (1) its functions; (2) the value of those functions as weighed against other values which are thwarted or submerged by the application of the Statute; (3) the extent to which the Statute rationally and efficiently carries out its functions; and (4) the extent to which application of the Statute has thwarted or submerged other values cherished by the legal system. By examining the various legal functions which form requirements have had, or could have had, it is proposed to determine which of the many functions of form requirements the Statute serves, and how efficient and rational this service is.

II. THE FUNCTIONS OF CONTRACTUAL FORMALITIES

A. *Magical, Sacramental and Psychological Functions*

Primitive laws of promise are tightly linked to the use of ritual words and acts. In observing "surviving primitives" such as school children, we get a glimpse of primitive contract formation.

"In parts of Scotland . . . the thumbs are wetted and pressed together. In other parts both sides to the bargain spit on the ground. In yet other areas, and in particular in England, children shake hands, or slap hands, or join hands and have the grasp broken by a blow from a third party (South Molton), or stamp on each other's toes (Knighton), or, fairly commonly, link the little fingers or 'pinkies' of their right hands and shake them up and down, occasionally repeating some dirge as a warning to each other: 'Ring a ring a pinkie, Ring a ring a bell, If ye brak the bargain Ye'll go to hell.'"³⁰

We are told that " 'even the deliberately swindled' "³¹ child has no redress—

Eng. Rep. 75, 76 (K.B. 1800), and elsewhere stated: "I lament extremely that exceptions were ever introduced in construing the Statute . . ." *Chater v. Beckett*, 101 Eng. Rep. 931, 933 (K.B. 1797). See also *Shindler v. Houston*, 1 N.Y. 261, 273 (1848); *Strother v. Barr*, 130 Eng. Rep. 1013, 1018 (C.P. 1828); 7 J. Wigmore, *Evidence* § 2093, at 464 (3d ed. 1940); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *Yale L.J.* 704, 747 (1931).

The negative comments considerably out-number the positive evaluations. Only a few of the better known or more expressive of them need be cited. Lord Wilmot, with whom Lord Mansfield concurred, stated: "Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing, frauds." *Simon v. Metivier*, 96 Eng. Rep. 347, 348 (K.B. 1766). See also J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 180 (1898); Stephen, *Section Seventeen of the Statute of Frauds*, 1 *L.Q. Rev.* 1 (1885). A massive number of additional critical quotations and citations can be found in 2 *Corbin* § 275.

30. M. Freedman, *Contracts—Cases and Materials* 167-68 (1973) (quoting I. Opie & P. Opie, *The Lore and Language of Schoolchildren* 130 (1959)). The children by their hand rituals seem clearly to be continuing the on hand syllan of Anglo-Saxon times.

31. *Id.* at 167 (quoting I. Opie & P. Opie, *The Lore and Language of Schoolchildren* 121 (1959)).

if the appropriate ritual is followed. What is the glue that cements this bargain together? What factor is it that causes a child who becomes dissatisfied with his bargain to accept it? Where the dirge is added, is this factor the fear of damnation or is it some psychological predisposition towards acceptance of the efficacious power of the ritual? To the extent it is the ritual we can speak of a non-rational psychological function. To the extent it is the fear that the curse they have pronounced will be actuated, we can speak of a magical function.³² If one were to ask the participants in the ritual which of these functions motivated them the most, it is unlikely that they could supply the answer.³³

In ancient Babylonia the contracting process³⁴ involved a rather awesome array of formalities: 1) a writing (usually on clay tablets); 2) sealing; 3) witnessing by two professional witnesses;³⁵ 4) an oath (which accompanied the sealing);³⁶ and 5) registration of the writing in a public office. The oath contained a threat that the contract breaker would be accursed of the gods, each of whom would inflict a special punishment.³⁷ The functions of each of these steps were manifold, but to the extent that the contracting parties or the community seriously regarded the conditional curse contained in the oath to be enforceable by supernatural sanctions, we can speak of its having a sacramental function.

32. To the extent that an oath-taker or participant in a ritual believes that breaking the oath or other ritual promise will be penalized by a deity, it would seem appropriate to speak of a "sacramental" function. To the extent it is believed that supernatural forces other than deities will enforce the ritual promise, it would be appropriate to speak of a "magical" function. For example, a Hebrew scholar argues that early in the history of the ancient Hebrews, the awesome oaths which were taken, e.g., "Let an enemy pursue my soul, and overtake it and tread my life down to earth; yea, let him lay my glory in the dust," (Ps. 7), were enforced neither by the diety nor by denomic forces. "The curse was automatic or self-fulfilling, having the nature of a 'spell,' the very words of which were thought to possess reality and the power to effect the desired results." Blank, *The Curse, Blasphemy, the Spell, and the Oath*, 23 *Hebrew U. Coll. Ann.* 73, 78 (1950) (italics omitted). Only in later times did the oath become "a type of religious expression." *Id.* at 95. For an affirmation of the magical nature of early contract ritual, see Radin, *Contract Obligation and the Human Will*, 43 *Colum. L. Rev.* 575, 584 (1943). Regarding "the inherent potency . . . of words," see *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 *Cal. 2d* 33, 37, 442 P.2d 641, 643-44, 69 *Cal. Rptr.* 561, 563-64 (1968).

33. Cf. C. Jung, *Man and His Symbols* 64 (Dell ed. 1968). "You may ask many civilized people in vain for the real meaning of the Christmas tree or of the Easter egg. The fact is, they do things without knowing why they do them." *Id.*

34. The concept that form requirements are in essence a required procedural pattern of contracting appears in Muukkonen, *supra* note 24, at 84.

35. C. Johns, *Babylonian and Assyrian Laws, Contracts and Letters* 81 (1904).

36. *Id.*

37. See 1 *Sources of Ancient and Primitive Law* 585 (A. Kocourek & J. Wigmore eds. 1915).

To the extent that the entire formal procedure for entering into a contract impressed upon the psyches of the contracting parties the rightfulness of fulfilling their promises even if subsequently they appeared disadvantageous, we can speak of a psychological function.

Although in primitive and ancient law the sacramental and psychological functions of form were frequently found intertwined, as in the Babylonian formalities, this was not always so. The Roman law of contract had strict formalities. Whatever may have been the early religious background of Roman law, it became thoroughly secularized, but nevertheless retained its highly formalistic character in many respects.³⁸ The central contracting device, the *stipulatio*, required that the parties be in the presence of each other and say the appropriate ritual words. If they failed to carry out the ritual in any particular, there was no contract.³⁹ The efficacy of the ritual was so well known to the Roman populace (its effectiveness lasted for about one thousand years prior to Justinian's Code),⁴⁰ that the promisor who at the appropriate moment said, "*Spondeo*" in reply to the promisee's "*Dari spondes?*"⁴¹ would be psychologically impressed with the rightfulness of the promisee's subsequent call upon him to perform his promise. Later this Article will discuss a related function of contract formality, the "cautionary" function,⁴² where the stress is upon the conscious, rational processes of the mind. Here the emphasis is on unconscious, non-rational patterns of thought.⁴³ Ritual is one of the means by which the unconscious mind

38. See note 39 infra.

39. "Our starting point is free from doubt. The stipulatio was an abstract oral form which by its own force created an obligation . . . It could be proved in any manner . . . and although the written document which attested it was always treated as an easy and ready means of proving the stipulation and was therefore widely resorted to in practice, such document was devoid of any value and completely without legal force, if the oral solemnity had not in point of fact taken place." S. Riccobono, *Stipulation and the Theory of Contract* 1 (Wylie transl. 1957).

40. Its use goes back to at least the XII tables. W. Buckland, *supra* note 23, at 434. The XII tables date from about 450 B.C. *Id.* at 1.

41. The formalities in the course of time came to be relaxed somewhat; other words were allowed. Even as relaxed, the ritual required that the parties be in the presence of each other, that it be oral, that it be uninterrupted, and that the answer should be responsive to the question. *Id.* at 434-35; G. Grosso, *Il Sistema romano dei contratti* 130-31 (3d ed. 1963). At no time were either witnesses or a writing required. W. Buckland, *supra* at 434-35.

42. See text accompanying notes 85-99 infra.

43. What is here called the "psychological" function of form would by some psychologists be called a "numinous" function. A ritual or symbol is "numinous" when it can "enforce or bring about a standard of accomplishment that would be unattainable to conscious effort." C. Jung, *Psychological Types* 300 (1949). "There is also a quality of awesomeness about it." A. Dry, *The Psychology of Jung, A Critical Interpretation* 195 (1961). The

can be reached and made to submit to the conscious.⁴⁴

To have this effect, however, the ritual must be in tune with the traditions and current beliefs of the culture in which the individual has been reared.⁴⁵ Although in tune with Roman society, the Roman *stipulatio* proved grievously wanting when spread throughout the empire. Eastern Mediterranean cultures recognized and respected the written agreement but were not responsive to this exotic oral ritual transplanted from abroad. In an attempt to conform to Roman requirements by artful draftsmanship, they tended to recite in the written agreement that the oral *stipulatio* had taken place. Time after time such agreements were struck down when it was proved that the recital was false.⁴⁶ When a required form such as the oral stipulation in the eastern Mediterranean is regarded as an unnecessary bit of legalistic nonsense, it fails to serve a healthy psychological function. No matter what other functions the form may serve (evidentiary, cautionary, etc.), it becomes dysfunctional and will be discarded first by the persons subject to the law and then by the law itself.⁴⁷ In the middle of the sixth century A.D., Justinian promulgated a law providing that full faith and credit normally would be given to a recital that the stipulation had taken place, thus reconciling law and practice.⁴⁸

numinous function is accomplished by the integration of the unconscious with the conscious. *Id.* at 300. The term "numinous" is not employed in the text of this Article because it is not in general usage.

44. J. Breuer & S. Freud, *Studies in Hysteria* (Strachey transl. 1957) (case history of Mrs. Emily von N.).

45. "It appears with the passage of time the 'aura' of a symbol disappears, it becomes 'saturated with consciousness' and no longer has the same effect of reconciling conscious and unconscious." A. Dry, *supra* note 43, at 194.

Sometimes, the social psychology of a given culture endows a particular type of contractual content with special force. For example, the typical military officer of the nineteenth century felt that his honor demanded the fulfillment of gambling "obligations" even where the legal system did not regard them as binding; but as a type he tended to be less punctilious about his obligations to tradesmen than was a typical member of the middle classes. See J. Kohler, *The Philosophy of Law* 139 (1921).

46. There is a good deal of controversy among students of Roman law as to the historical development of the stipulation. See S. Riccobono, *supra* note 39, which is totally devoted to the historical development of this form of contract. For a summary discussion, see W. Buckland, *supra* note 23, at 435-37.

47. Savigny suggested that any law maker who would attempt to ordain formalities of the Roman type would succeed only in causing the contracting parties to stage a comedy. For the form to be effective it is necessary, he argued, that the parties be "penetrated . . . by the importance and significance of the act. . . . Such forms originate, rather, from the unconscious plastic forces of a people . . ." 3 F. di Savigny, *Sistema del diritto romano attuale* § 130, at 18 (V. Scialoja transl. 1900) (author's translation). As a rationalistic approach is taken towards law, formalities which had been penetrating languish and disappear. *Id.*

48. It could still be shown, however, that one of the parties was not present in the city

Similarly, a millenium later the ceremony of impressing a private seal onto sealing wax was virtually abandoned by the American populace and replaced by a scribble, which in turn was replaced by the letters "L.S." pre-printed on a blank document. Judges and legislators took note that the ritual of sealing had lost its grasp on the psyches of contracting parties and reduced the legal consequences of the presence or absence of a seal.⁴⁹ In England most of the provisions of sections 4 and 17 of the Statute of Frauds fell into complete disrepute within the commercial and legal fraternities⁵⁰ while the rest of the community was largely unaware of their existence.⁵¹ The English Parliament took note and abolished the offending provisions.⁵²

The Statute of Frauds was not enacted to serve a sacramental or psychological function. Rather, the draftsmen sought to cure, or at least to circumvent, certain deficiencies of the law of evidence and common law procedure.⁵³ Parties who formalize their contracts in writing do not normally have the psychological function in mind. They often formalize agreements, even if the Statute of Frauds does not so require, for a variety of "down to earth," "hard headed," "practical" reasons, some of which will be discussed later in this Article. The psychological effect of putting the transaction in writing should not be minimized, however. The same need for the psychic unconscious to be dominated, placated, or integrated which possessed ancient man exists today. This need is served by utilizing

in which the stipulation was said to have taken place on the stated day. Code 8.37.14. See W. Buckland, *supra* note 23, at 437; S. Riccobono, *supra* note 39, *passim*.

49. See J. Calamari & J. Perillo, *Contracts* § 120 (1970). It is interesting to note that while England has repealed substantial portions of the Statute of Frauds, the seal as a device for contracting without consideration survives. See G. Cheshire & C. Fifoot, *The Law of Contract* 19-20 (7th ed. 1969). Moreover, the seal and attesting witnesses continue to be required for certain transactions. Law of Property Act, 15 Geo. 5, c. 20, § 73 (1925). See S. Phipson, *Manual of the Law of Evidence* 284 (9th ed. Elliott 1966).

50. See 6 Holdsworth 396, and sources cited in note 29 *supra*.

51. "The lay public know nothing about the Statute of Frauds . . ." Recommendation by a Minority as to Guarantees, in Revision Committee 33. A random survey of 58 persons in the Salt Lake City area indicates that this statement is quite accurate as applied to the United States. Note, *An Appraisal of the Utah Statute of Frauds*, 9 Utah L. Rev. 978, 995-96 (1965).

52. See text accompanying note 5 *supra*.

53. The deficiencies were that first, there was no effective judicial control over jury verdicts, and second, that the parties, their spouses and any persons having an interest in the litigation were incompetent to testify. 6 Holdsworth 388-89. It has been suggested that an additional underlying cause for enactment of the Statute was the immaturity of the law of contracts at the time, doctrines such as consideration having not as yet been fully worked out to safeguard promisors. Willis, *The Statute of Frauds—A Legal Anachronism*, 3 Ind. L.J. 427, 431 (1928). On this point, see discussion in text accompanying notes 158-62 *infra*.

such formal procedural patterns of contracting as survive in the modern world,⁵⁴ or, to some extent, by putting the agreement into writing.⁵⁵ The tendency, however, has been for ritual form to lose its magical or sacramental character and for its psychological functions to be submerged into evidentiary and other rationalistic functions.⁵⁶

Despite this tendency, to the extent that the Statute of Frauds induces contracting parties to reduce their agreements to writing, the Statute may be said to serve the psychological function of form requirements. Does it, however, do so in a rational manner? The Statute's choice of agreements which must be reduced to writing has struck many observers as arbitrary and irrational.⁵⁷ With this criticism as a premise, critics have tended to deduce that the Statute ought to be repealed.⁵⁸ From the same premise, however, one could argue with equal strength that the Statute ought to be extended to a broader set of contract types.⁵⁹

B. *Earmarking and Classifying Functions*

1. Earmarking of Intent to Contract

One of the perplexing decisions that all legal systems have had to make is the determination of the point at which parties have passed negotiation and have entered into a contract. Compliance with prescribed formalities such as the recital of ritual words, the imprint of a seal on sealing wax, delivery, notarization, and, to some extent, compliance with writing re-

54. See, e.g., text accompanying note 155 *infra*.

55. It has been suggested that there is a need for sociological research into "what role writing plays in popular belief and whether it has not become a veritable form of contract rather than a means of proof." J. Carbonnier, 4 *Droit civil—Les Obligations* 140 (6th ed. 1969) (author's translation). Very often, one hears (usually erroneously) from nonlawyers in New York: "There was no contract, just a verbal agreement." A Russian author has one of his characters say: "What I hear constantly at the factory is: '. . . Let's have it in writing.'" A. Solzhenitsyn, *For the Good of the Cause* 37 (Sphere Book ed. 1971).

56. See F. di Savigny, *supra* note 47, § 130, at 320; Levy-Bruhl, *Réflexions sur le Formalisme Social*, 15 *Cahiers internationaux de sociologie* 53, 58-59 (1953); Rabel, *The Statute of Frauds and Comparative Legal History*, 63 *L.Q. Rev.* 174, 178-82 (1947).

57. See part V *infra*.

58. See note 230 *infra*.

59. "The topics included in the Statute of Frauds are so fragmentary and the phrasing of the act is so indefinite that a radical revision should be made If [a] writing is needed at all, it should not be limited merely to the subjects enumerated in the act, but should include all important agreements, i.e., those involving more than a specified amount." Hutton, *The Need to Simplify the Formal Requisites of Contracts in Mississippi by Revising the Doctrine of Consideration and the Statute of Frauds*, 7 *Miss. L.J.* 294, 306-07 (1935).

quirements, are said, somewhat overstating the case, to be "infallible signs of the maturity of deliberations."⁶⁰ One need not generally inquire, under the prevailing objective theory of contract, whether a party who has complied with such formal requirements actually intended to be legally bound.⁶¹ The correlative effect of the use of such an "infallible sign" is what Professor Fuller has called a "channelling" function.⁶² When the law provides that clothing a promise with a particular formality will transform the promise into an obligation, the formality has at least two functional consequences. First, the judicial task of determining the parties' intentions is facilitated. Secondly, and of equal importance, it enables the parties to search out and find the appropriate device to accomplish their intent to create an obligation. In Professor Fuller's phrase, the legally prescribed or recognized formality "offers channels for the legally effective expression of intention."⁶³

The Roman *stipulatio* was one such form,⁶⁴ and medieval law knew various forms which had this function, including the ritual hand-grasp, the payment of earnest, often in the form of beer or wine, the oath, and the pledge of faith.⁶⁵ Such a form continues to exist in those Anglo-American jurisdictions which have retained the pristine effectiveness of the private seal.⁶⁶ An earmarking form exists in Pennsylvania, where the use of a prescribed written statement under the Model Written Obliga-

60. 3 F. di Savigny, *supra* note 47, § 130, at 317 (author's translation); see also Levy-Bruhl, *supra* note 56, at 61.

61. There are, of course, exceptions. Parol evidence is admissible in most American jurisdictions to establish that the parties to a written and apparently complete contract had orally agreed that the terms of the writing would be inoperative. *Nice Ball Bearing Co. v. Bearing Jobbers, Inc.*, 205 F.2d 841, 845-46 (7th Cir.), cert. denied, 346 U.S. 911 (1953). It frequently is held that one may show the existence of an oral condition precedent to the formation of the apparent contract. *Cosper v. Hancock*, 163 Colo. 263, 430 P.2d 80 (1967); *Hicks v. Bush*, 10 N.Y.2d 488, 180 N.E.2d 425, 225 N.Y.S.2d 34 (1962).

62. The term "channelling function" is a very apt one. It has, however, been more widely employed to convey an unrelated concept and for that reason it is not utilized here. For example, one frequently sees references to the "channelling function" of provisions of the tax laws, to refer to attempts by the state to cause private investment funds to be channelled into certain areas of industry, commerce or mineral exploration. For a similar use see L. Friedman & S. Macaulay, *Law and the Behavioral Sciences* 198 (1969). For Professor Fuller's use of the term, see Fuller, *Consideration and Form*, 41 *Colum. L. Rev.* 799, 801-03 (1941).

63. Fuller, *supra* note 62, at 801.

64. See note 39 *supra* and accompanying text.

65. See note 151 *infra*.

66. See Restatement (Second) of Contracts, Introductory & Statutory Notes to §§ 95-110, at 189-98 (Tent. Draft No. 2, 1965); 1 *Williston* §§ 205-19A.

tions Act will accomplish an intent to be bound.⁶⁷ Certain other devices may in some circumstances also operate as an earmarking device.⁶⁸

Compliance with the Statute of Frauds does little to satisfy the earmarking function of form for several reasons. First, a writing and signature sufficient to comply with the Statute does not eliminate the uncertainty as to whether the parties have left the area of preliminary negotiations.⁶⁹ Second, the accomplishment of the parties' intent to be bound requires that, in addition to the written form requirement, the transaction be supported by consideration. The Statute does not provide that compliance with its terms will render an agreement enforceable; it merely indicates that non-compliance will render a promise unenforceable.⁷⁰ Nevertheless, an occasional judicial decision has been influenced by the idea that one objective of the Statute is to lay down a clear and positive rule to determine when a contract has been made.⁷¹

2. Earmarking the Transaction Type—Classifying Function

Discussions concerning what is here called the earmarking function have tended to focus on the utility of form prescriptions as devices for the separation of legally effective transactions from those which are void

67. Pa. Stat. Ann. tit. 33, §§ 6-8 (Purdon 1967). This was originally proposed in 1925 as the Uniform Written Obligations Act, 9C U.L.A. 378. This Act makes enforceable a promise made in a signed writing "if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." *Id.*

68. One such device is the use of nominal consideration. Normally consideration, in the sense of "bargained-for exchange," is a concept dealing with the content of the agreement. Where nominal consideration is accepted as sufficient, it serves as a formal element extrinsic to the bargain-in-fact. See generally von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 Harv. L. Rev. 1009, 1053-55 (1959). There is a large element of uncertainty in American law as to the efficacy of nominal consideration. See J. Calamari & J. Perillo, *supra* note 49, at § 58. Another such device, reminiscent of late Roman practice (note 39 *supra*) is the use of a false recital of consideration. In a minority of American jurisdictions, the parties will be estopped from denying that the consideration was in fact paid. See, e.g., *Real Estate Co. v. Rudolph*, 301 Pa. 502, 153 A. 438 (1930).

New York has a network of statutes which permit a signed writing to substitute for consideration in a variety of circumstances. See J. Calamari & J. Perillo, *supra* §§ 92-96, at 164-69. Written form substitutes for consideration in a number of jurisdictions when the promise is to pay a debt that has been barred by the statute of limitations or by bankruptcy proceedings or to perform a promise that is avoidable on the grounds of infancy. See *id.* §§ 83-85.

69. For an illustrative case, see *Scheck v. Francis*, 26 N.Y.2d 466, 260 N.E.2d 493, 311 N.Y.S.2d 841 (1970), in which the court indicated that, even if the Statute of Frauds were satisfied, one of the parties had manifested an intention not to be bound until the integrated writing had been executed. See also 2 Corbin § 517.

70. Fuller, *supra* note 62, at 802.

71. E.g., *Rondeau v. Wyatt*, 126 Eng. Rep. 430 (C.P. 1792).

or unenforceable. Within the category of legally effective transactions it is often also of prime importance to determine the type of transaction. "A business man must be able to tell at a glance whether he is taking commercial paper or not."⁷² The free flow of commerce hinges upon such ready classification. For this reason, form requirements for commercial paper are generally more rigid than for contracts and evidences of indebtednesses. Another reason for this greater rigidity in many countries is to allow court officers to determine, without undue cogitation, whether the instrument is entitled to the very special procedural privileges to which holders of commercial paper are so often entitled.⁷³ Very often statutes of limitation⁷⁴ and rules of substantive law differ depending upon the classification of a transaction as commercial or non-commercial, as a sale or as a service contract.

Bentham, the most influential theoretician of the Anglo-American law of evidence, proposed that for each species of contract, "let a distinct species of paper be provided." Thus "farm-lease paper" would be a different legislated form from "house-lease paper," and "lodging-lease paper,"⁷⁵ etc. The use of these forms would be mandatory,⁷⁶ a requirement which would be widely publicized by the state. Each form would contain an essay on the law governing the kind of transaction for which it was drafted.

It does not appear that any legal system has adopted Bentham's "ear-marking" approach in its entirety.⁷⁷ It is clear, however, that the Statute

72. Chafee, *Acceleration Provisions in Time Paper*, 32 *Harv. L. Rev.* 747, 750 (1919).

73. See, e.g., N.Y. C.P.L.R. § 3213 (McKinney 1970) (motion for summary judgment in lieu of complaint). For even greater procedural privileges available to enforce commercial paper in Europe, see M. Cappelletti & J. Perillo, *Civil Procedure in Italy* 320-21 (1965); R. Ginsburg & A. Bruzelius, *Civil Procedure in Sweden* 351-52 (1965); P. Herzog & M. Weser, *supra* note 15, at 491-93.

74. The four year period of limitations established by U.C.C. § 2-725 as to contracts for sale is, in many jurisdictions, shorter than the period of limitations applicable to other contracts. Compare N.Y. C.P.L.R. § 213 (McKinney 1972) (6 years).

75. 2 J. Bentham, *Rationale of Judicial Evidence*, bk. 4, ch. 3, § 2 (1827).

76. Although the use of the appropriate form would be legally required, it is extremely important to point out that the penalty for non-compliance would ordinarily be that proof of the alleged contract would be subject to a higher standard of proof than the normal one. *Id.* §§ 2-3.

77. There are, of course, legislative provisions which carry out some aspects of the Bentham approach. For example, in New York there is legislation that provides forms for powers of attorney and defines the legal effect of the forms. N.Y. Gen. Oblig. Law §§ 5-1501 et seq. (McKinney Supp. 1973). The use of these forms is not mandatory. Also there are statutes that prescribe the form of certain kinds of policies of insurance. See, e.g., N.Y. Ins. Law § 168 (McKinney Supp. 1973).

More to Bentham's point, however, are some of the formal requirements of recent consumer protection legislation. See text accompanying notes 116-29 *infra*.

of Frauds neither directly nor indirectly encourages such earmarking. Although the Statute does divide contracts into various classes, there is nothing in the operation of the Statute which induces the parties to indicate into which class their contract falls. The main reason that parties earmark their transactions is that labelled forms are readily available at the stationer's. Indeed the main problem in this area seems to be the parties' concerted misbranding of their transactions: partnership agreements are disguised as loan transactions to protect financiers from partnership liability;⁷⁸ mortgages are disguised as conveyances in an attempt to provide greater security to the creditor;⁷⁹ usurious loans are masked as sales with repurchase rights;⁸⁰ and schemes to confound the tax-collector are legion.⁸¹ In situations like these the common law is often willing to look behind the form of the transaction⁸² and to hear testimony to overcome the appearance created by the parties,⁸³ especially to protect the interests of third persons who have relied in good faith upon the appearance of the transaction.⁸⁴ With all of these problems, however, the Statute of Frauds is unconcerned.

78. See J. Crane & A. Bromberg, *Partnership* § 19 (1968).

79. See Fogelman, *The Deed Absolute as a Mortgage in New York*, 32 *Fordham L. Rev.* 299 (1963).

80. *Kline v. Robinson*, 83 *Nev.* 244, 428 P.2d 190 (1967); *Horn v. Keteltas*, 46 *N.Y.* 605 (1871); see also *In re 716 Third Ave. Holding Corp.*, 340 F.2d 42 (2d Cir. 1964), cert. denied, 381 U.S. 913 (1965); *Carter v. Zachary*, 243 *Ark.* 104, 418 S.W.2d 787 (1967).

81. Sometimes they work. See, e.g., the matter of the "disguised donation" in France, where what originated as a tax dodge has become an important transaction type. A. von Mehren, *The Civil Law System: Cases & Materials for the Comparative Study of Law* 634-40 (1957).

82. Whether at this point we have strayed from a discussion of form in the sense of the "manner of expressing or memorializing an agreement" (note 22 supra) into a discussion of the content of contract types is an interesting question which will not be pursued here.

83. See notes 78-81 supra, and cases cited therein. Civil law countries appear far more restrictive in admitting testimony to contest the existence of the transaction. See Lemann, *Some Aspects of Simulation in France and Louisiana*, 29 *Tul. L. Rev.* 22, 29-30 (1954); Rives, *Simulation in the Civil Law*, 10 *Tul. L. Rev.* 188, 199-200 (1936) (Argentina).

84. Protection may be accorded under the doctrine of estoppel. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942); *Mount Vernon Trust Co. v. Bergoff*, 272 *N.Y.* 192, 5 *N.E.2d* 196 (1936).

Third parties are also protected by the rule that a bona fide purchaser for value takes free of latent equities. F. Lawson, *Introduction to the Law of Property* 44, 56 (1958). Compare Italian C. Civ. art. 1415 (Hoepfli 1961) (translated in *The Italian Civil Code* 362 (M. Beltramo, G. Longo & J. Merryman transl. 1969)). "Simulation cannot be used as a defense by the contracting parties . . . against third parties who, in good faith . . . have acquired rights from the apparent owner of the right . . ." *Id.*

C. *The Cautionary Function*

A Texas statute provides that, with certain exceptions, an arbitration agreement must be made "upon the advice of counsel to both parties as evidenced by counsels' signatures."⁸⁵ This required formality seems designed to force the parties to receive advance warning of the nature and consequences of an arbitration agreement and, probably, to deter the insertion of arbitration clauses in standard form adhesion contracts.⁸⁶ This statute also serves an earmarking function in the sense that one can be certain under Texas law of the proper procedural pattern needed to create a binding arbitration agreement. Nonetheless the impression is that the legislation was designed with the cautionary effect primarily in mind. Many formalities, usually less cumbersome (and less expensive) than the Texas arbitration requirement, serve this cautionary function. In earlier days, "[t]he affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future."⁸⁷ In a good many legal systems, a highly trained legal professional,⁸⁸ usually called a *notaire*, *notaio*, or related title, must draft and supervise the execution of certain contracts as a pre-requisite to their validity. Clearly one function of these requirements is to caution the promisor that he is entering into a binding relationship. Correlatively, as a result of the formality of the transaction, the expectancies engendered in the promisee are frequently of a higher order than in the case of a more casually expressed promise.

Of all the kinds of transaction that have been singled out by legislative act or judicial decision for rigorous form requirements, four recur with great frequency: promises to make gifts, promises to guarantee the credit of another, marriage settlements, and real estate transactions.⁸⁹ If we set

85. 1A Tex. Rev. Civ. Stat. Ann. art. 224 (1973).

86. See Carrington, *The 1965 General Arbitration Statute of Texas*, 20 Sw. L.J. 21, 33-37 (1966); Dougherty, *Proposed 1965 Texas General Arbitration Act*, 27 Texas B.J. 945-46 (1964); 44 Texas L. Rev. 372 (1965). In an interesting parallel, a German arbitration agreement is ineffective if it appears in an agreement which contains any other subject matter. This effectively forecloses the burial of an arbitration clause in a lengthy standard form agreement. See Schlesinger, *The Notary and the Formal Contract in Civil Law*, Appendix to Acts, Recommendation and Study Relating to the Seal and to the Enforcement of Certain Written Contracts, in 1941 Report of the [N.Y.] Law Revision Commission 403, 405.

87. Fuller, *supra* note 62, at 800.

88. On the qualifications, training and supervision of notaries in civil law countries, see M. Cappelletti & J. Perillo, *supra* note 73, at 65-67; Schlesinger, *supra* note 86, at 403-14.

89. Schlesinger, *supra* note 86, at 404-05.

aside the question of real estate contracts for the moment,⁹⁰ we can isolate common threads running through the remaining categories. First, each is normally gratuitous, and second, each is normally made to, or on behalf of, a close friend, a relative, or a prospective spouse or in-law. In this context the earmarking function of form requirements is quite important. It is very easy, often years later, to construe words expressing high hopes and favorable omens as words of promise or vice-versa.⁹¹ Form requirements can serve to sort out promises from expressions of sanguine expectations. As such, form requirements are aids to judicial administration and also offer an earmarking instrument for parties to accomplish their gratuitous aims. Their cautionary function is equally important. It is perhaps too simple when introducing a relative or friend to a merchant or banker to praise his credit-worthiness in terms that exceed a mere credit reference and spill over into phrases that promise to make good his default.⁹² But where the law requires a notarial or other solemn form or even merely a written form, there is greater opportunity for reflection and deliberation on the wisdom of taking upon oneself the burden of another's obligation. The default of the friend or relative which at first appeared unthinkable can be better understood upon reflection as a genuine risk. Once this risk is comprehended, an affirmative decision to make the guarantee in proper form can be accepted by the legal system as a deliberate and serious act of volition.⁹³ Moreover, it is likely to be accepted by the promisor himself as his legitimate obligation, thereby serving the psychological function of form requirements. What has been said with respect to a guarantee of the obligation of a friend or relative could be repeated as to promises made in contemplation of

90. See text accompanying note 230 *infra*.

91. A creditor may "torture mere words of encouragement and confidence into an absolute promise . . ." *Davis v. Patrick*, 141 U.S. 479, 487-88 (1891); see Fuller, *supra* note 62, at 804 n.6.

In addition, where there is a close relationship, opportunities for fraud and undue influence increase. Form requirements may act as a deterrent to the extraction of consent through such devices. See Comment, *Contracts for the Sale of Land: Subscribing Witnesses?*, 24 U. Fla. L. Rev. 155, 159-60 (1971).

92. Apparently it was also deemed to be too simple for a pleader to cast an oral promise of suretyship into the guise of a fraudulent representation of creditworthiness, thus circumventing the Statute of Frauds. Consequently, England and several other common law jurisdictions enacted legislation to the effect that no action can be based upon a representation of credit unless the representation be made in writing and signed by the party to be charged. See generally Taylor, *The Statute of Frauds and Misrepresentations as to the Credit of Third Persons: Should California Repeal its Lord Tenterden's Act?*, 16 U.C.L.A.L. Rev. 603 (1969).

93. See Rabel, *supra* note 56, at 178.

marriage. Indeed, the very closeness of the relationship of the parties serves to accentuate each of the problems discussed above.

Since the provisions of the Statute of Frauds calling for a signed writing for promises to answer for the debt, default, or miscarriages of another and for promises made in contemplation of marriage have similar counterparts in other legal systems,⁹⁴ presumably these provisions serve a genuine need. Yet, it may be noted that the Statute of Frauds does not distinguish between gratuitous sureties and paid sureties. None of the rationales supporting the imposition of special form requirements for gratuitous promises justifies the imposition of those special requirements on paid sureties. Interestingly, the form requirements for suretyship promises in a number of legal systems are removed or relaxed for commercial transactions,⁹⁵ a class that naturally includes a greater number of cases in which paid sureties are employed.

Promises to make gifts, even more than suretyship promises, have been singled out for special attention by legislatures and courts.⁹⁶ The Statute

94. It will be recalled that the Statute of Frauds provision which requires a "special promise to answer for the debt, default, or miscarriages of another" to be in writing has been retained in England despite the repeal of the greater part of the Statute. See text accompanying notes 5-7 *supra*. Under the law of Scotland a subscribed writing is required. Otherwise the guarantee "shall have no Effect." Mercantile Law Amendment Act of 1856, 19 & 20 Vict., c. 60 § 6 (Scot.). It is debatable whether the ancient Scottish authentication statutes also apply. If so, a guarantee exceeding £100 Scots must be in writing and signed by two attesting witnesses. See A. Walker & N. Walker, *The Law of Evidence in Scotland* 108-09 (1964). Countries which have writing requirements for all contracts over a certain minimum amount do not generally single out guarantees for special treatment. Countries which lack such a general requirement are more likely to single out suretyship, as does Switzerland (Rabel, *supra* note 56, at 184-85), Kenya (2 P. Durand, *Evidence for Magistrates* 213 (1969)), Nigeria (J. McNeil & R. Rains, *Nigerian Cases and Statutes on Contract and Tort* 39 (1965)), South Africa (L. Hoffmann, *The South African Law of Evidence* 223 & n.11 (1970)), and Ethiopia (Civil Code Proclamation, arts. 1725, 1727 (1960)).

95. In France, all transactions governed by the Code de Commerce are exempt from the writing requirements of the Code Civile. See P. Herzog & M. Weser, *supra* note 15, at 322. In Germany, a writing is not required for a guaranty governed by the Commercial Code. See Moses, *International Legal Practice*, 4 *Fordham L. Rev.* 244, 259 (1935).

At the time of enactment of the Statute of Frauds, the law merchant was in the process of integration with the common law. It would be most interesting to discover to what extent the Statute of Frauds was applied outside of the courts of common law to mercantile transactions before the process of integration came to an end. It is at any rate clear that today the Statute of Frauds is not applicable in admiralty. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

96. Any conclusions based on this observation ought to be guarded. A primary concern of much of this legislation in civil law jurisdictions is absent in common law jurisdictions where testamentary freedom is the rule. Civil law jurisdictions which severely limit testamen-

of Frauds makes no reference to such promises for the simple reason that, at the time of its enactment, a gift promise was enforceable only if another formality—the seal—were used. Where the legal effect of the seal has been diminished or abolished, gift promises are unenforceable except to the extent that legislation provides for the enforcement of certain gratuitous promises if other form requirements have been utilized.⁹⁷ These new form requirements serve a cautionary function and have been imposed for much the same reasons as have been discussed above in connection with suretyship. Indeed, the statutes that were adopted in many common law jurisdictions in the nineteenth century requiring a written form for new promises to pay debts discharged by passage of time or by bankruptcy, or disaffirmed because of infancy, were likely a legislative response to many of the same concerns as surround the pure gift promise.⁹⁸

To the extent that the Statute of Frauds has influenced the habits of the nation by encouraging the reduction of contracts to writing, it serves the cautionary function. It cannot, however, be said to provide such service in a consistent and orderly manner. For example, if the party to be charged writes a letter repudiating his agreement, the letter may serve as a sufficient memorandum of the agreement.⁹⁹ Moreover, one may question whether the statutory categories are a carefully considered selection of the types of contract about which a twentieth century legal system ought to encourage particular deliberation.

D. *The Clarifying Function*¹⁰⁰

A form requirement, particularly the requirement of a written or notarial form, influences the content of the contract. When parties proceed

tary freedom also regulate the substantive and formal requirements of gifts and promises to give. On these form requirements, see Schlesinger, *supra* note 86, at 406-07.

97. See note 67 *supra*.

98. The leadership in this context was exercised by Lord Tenterden's Act, 9 Geo. 4, c. 14, §§ I, V (1828), applicable to infants' contracts and the effect of acknowledgements on the statute of limitations. Statutes requiring that the ratification of infants' contracts be in writing were found, by one study, to be in effect in nine American states. See 1938 Report of the [N.Y.] Law Revision Commission 139. Although the situation with respect to infants' contracts has been radically changed in England by the Infants Relief Act of 1874, 37 & 38 Vict., c. 62, the requirement of a written acknowledgement for tolling the statute of limitations was reenacted by the Limitation Act of 1939, 2 & 3 Geo. 6, c. 21, § 24(1). Statutes in most American jurisdictions require a written acknowledgement to toll the statute of limitations, although part payment is often treated as the equivalent of a written acknowledgement. 1 Williston § 164. Some have a writing requirement for a new promise to pay a debt discharged in bankruptcy. *Id.* § 158.

99. 2 Corbin § 511; 4 Williston § 579.

100. Professor MacNeil has used the term "planning function" to cover much of the

to draft a written instrument, they frequently uncover points of disagreement which are then worked out prior to execution. In addition, details not considered in the oral arrangement are likely to be dealt with in writing. Referring to form requirements for federal contracts, one court has said: "To avoid ambiguities, mistakes, and omissions of detail . . . they are to be drawn up after carefully prepared legal forms, to be furnished by the Secretaries" ¹⁰¹

The desirability of avoiding "ambiguities, mistakes, and omissions of detail" is not universally acknowledged. A leading Japanese industrialist has written of the discomfort and apprehension felt by Japanese businessmen when faced with the "American insistence on spelling out the smallest details in writing."¹⁰² His attitude is reflected in the lack of either writing requirements or of a parol evidence rule in the Japanese legal system.¹⁰³ There is a genuine possibility, then, that a legal system may wish not to induce the parties to thrash out the potential difficulties in advance, but to induce on-going informal dispute resolution in the course of the contractual relationship.¹⁰⁴ Whatever approach an American businessman may wish to make in an intercultural transaction with Japanese businessmen, there is little doubt that in domestic transactions he ordinarily prefers to settle possible points of dispute before they arise. To the extent that the Statute of Frauds induces such preventive settlement, then, it appears to serve a clarifying function in step with American cultural preferences. The role of the Statute in serving this clarifying function, however, is probably not of great significance. The Statute does not require the spelling out of the smallest details in writing,¹⁰⁵ although it may be that when the parties are induced by the Statute of Frauds to draft a writing they will also consider and reduce to writing small details. They may, for example, purchase a printed form which provides for many of the details they would not have foreseen; or they might consult an

ground discussed here as the "clarifying function." I. MacNeil, *Cases and Materials on Contracts* 1316 (1971). The author does not follow his lead because what is described later in this Article as the "managerial function" has perhaps as much to do with planning as what is discussed here under the heading of "clarifying function."

101. *South Boston Iron Co. v. United States*, 18 Ct. Cl. 165, 176 (1883), *aff'd*, 118 U.S. 37 (1886).

102. C. Fujino, *supra* note 17, at 15, col. 6.

103. There is one writing requirement. In a broker transaction, the broker is required to make a memorandum of the transaction and deliver copies of it to the parties. The Great Court of Judicature has held that failure to comply with this provision neither affects the validity of the transaction nor the ability of the parties to prove the transaction by other evidence. See *Law in Japan: The Legal Order in a Changing Society* 517-18 (A. von Mehren ed. 1963).

104. *Id.* at 41 et seq.; J. Toshio Sawada, *supra* note 17, at 226; Fujino, *supra* note 17, at 15, cols. 3-4.

105. See J. Calamari & J. Perillo, *supra* note 49, at § 309.

attorney, who would make use of "legal forms," or form books to remind him of details he otherwise might have overlooked.

Far more effective than the Statute of Frauds in accomplishing the objective of preventive law is the requirement in many countries that certain contracts be made by notarial act. This requirement is intended to insure that the parties will receive legal advice and that the instrument will be drafted by a qualified draftsman.¹⁰⁶ Such a requirement, however, would not be viable in the United States where no corps of professional notaries, civil law style, exists.¹⁰⁷

E. *Managerial Function*

If there were no Statute of Frauds it is quite likely that at least in the modern industrial sector of the economy there would be no increase in the use of oral rather than written contracts. Form requirements are imposed not only by law, but also by business management's desire to control subordinate employees and agents. Salesmen are sent into the field with order blanks which state: "This order taken subject to acceptance by seller's authorized agent at point of shipment."¹⁰⁸ With clauses of this type management inhibits its salesmen from entering into contracts at prices that are not profitable, with specifications that cannot be filled, and with quantities which are not available. Besides controlling subordinate personnel by use of required forms, written contracts are needed "if files are to be kept straight, and officers informed, and departments coordinated, and the work of shifting personnel kept track of . . ."¹⁰⁹ The writing also permits a uniform administration of contractual relationships despite personnel changes.

It is not surprising that the largest of organizations—government—should have among the most stringent form requirements.¹¹⁰ While many factors may contribute to these strict procedures, one of the more basic is "[t]hat it may be readily known in what liabilities the numerous contracting officers are involving the Government."¹¹¹ Government form re-

106. Schlesinger, *supra* note 86, at 407.

107. See authorities cited at note 88 *supra*.

108. *Ammons v. Wilson & Co.*, 176 Miss. 645, 170 So. 227, 228 (1936).

109. Llewellyn, *supra* note 29, at 747.

110. The rigidity and formality of government contract procedures are sometimes described as excessive and anachronistic. See A. Sandulli, *Manuale di diritto amministrativo* 442-43 (9th ed. 1966). The greater formality of government contracts is not strictly a modern development. See, for example, the text of a public works contract entered into about the year 300 B.C. by the Greek city of Eretria in 1 J. Wigmore, *A Panorama of the World's Legal Systems* 354-58 (1928). Each citizen of the community was required to take an oath that he would abide by the contract or be disenfranchised.

111. *South Boston Iron Co. v. United States*, 18 Ct. Cl. 165, 176 (1883), *aff'd*, 118 U.S. 37 (1886). See also *Clark v. United States*, 95 U.S. 539 (1877).

quirements also check subordinate officials who might otherwise enter into improvident and extravagant contracts.¹¹² In addition, they tend to prevent officers and agents of the government from creating liabilities for which there is no appropriation.¹¹³ In short, governmental form requirements are designed in part to serve the same managerial function as are form requirements imposed by management on subordinate personnel in private enterprise.

The Statute of Frauds, of course, does not purport to serve a managerial function. The Statute focuses on the rights of the contracting parties. It is largely unconcerned with relationships within private or public enterprise.

F. *Publicity Function*

Form requirements may be imposed for the protection of third persons and thereby also to aid the free flow of commerce. A prospective purchaser or mortgagee of real property, for example, is protected by the recording acts from unrecorded prior mortgages. Since recording often presupposes that the transaction recorded has been put into written form, a recording requirement is frequently a form requirement.¹¹⁴ Registries in many places have been expanded to encompass not only land transactions but also title to and security interests in automobiles, ships, boats, and airplanes. Under the Uniform Commercial Code, security interests in all kinds of goods and in many kinds of intangibles are subjected to writing and filing requirements. Filing is designed to protect other creditors who may, prior to extending credit, ascertain whether or not certain security interests exist in the assets of the person seeking credit. Equally important, filing is designed to protect secured creditors against transfers of assets to persons who could claim to be good faith purchasers for value.¹¹⁵

112. To the effect that government form requirements are designed to "prevent executive officials from excessive or inappropriate spending," see *United States v. American Renaissance Lines, Inc.*, 494 F.2d 1059, 1062 (D.C. Cir.), petition for cert. filed, 43 U.S.L.W. 3034 (U.S. July 27, 1974), (No. 74-25); cf. *Op. [N.Y.] Att'y Gen. 161-62 (1915)*.

113. *Op. [N.Y.] Att'y Gen. 162 (1915)*.

114. Property recording acts frequently require that the contract, conveyance or other instrument in question be itself recorded, or that it be presented to the recording office for examination or copying. This is not always so, however. The filing system instituted by the Uniform Commercial Code § 9-302(1) merely requires that a financing statement be filed. The financing statement is not the transaction itself, but a simple identification that a "security agreement" has been entered into.

115. Uniform Commercial Code § 9-203 also provides that unless the debtor has signed a security agreement, it is not enforceable against him unless the secured party is in possession of collateral. The official comments make it clear that this rule is designed primarily to serve an evidentiary function.

The Statute of Frauds is not designed to publicize transactions. Although the Statute may induce parties to formalize their agreement, such formalization does not require publicity.

G. *Educational Function*

One of the more modern functions of form requirements may well be called the "educational function." Strange as it may be to those who posited sovereignty of the will as the basis of contract,¹¹⁰ a compelling problem of modern contract law is the ignorance of contracting parties of the terms of their contracts. The utilization of standardized printed contract forms¹¹⁷ by large industrial and commercial companies has resulted in a situation in which contracting parties are frequently uninformed as to the content of the printed form. Since the form is offered on a take it or leave it basis, generally it is not read, although the handwritten or typewritten portions are often read to ascertain whether the optional parts of the transaction (e.g., color, model, type, quantity, delivery date, etc., in a sale of goods transaction) have been accurately transcribed.

In an effort to cope with the realities of mass marketing, modern legislation has attempted to cause the party supplying the printed form to educate the adhering party as to certain important terms. Under the Uniform Commercial Code the exclusion of a warranty of merchantability must specifically use the word "merchantability" and, if in writing, the exclusion must be conspicuous.¹¹⁸ Exclusion of an implied warranty of fitness for a particular purpose must be in writing and must be conspicuous.¹¹⁹ Other legislation has mandated the use of a particular size of print for the effectiveness of certain transactions.¹²⁰ The "Truth in Lending Act"¹²¹ requires that finance charges be revealed without obfuscation. Requirements that certain clauses be signed separately are in part designed to create an awareness of their existence.¹²² Legislation

116. See generally Pound, *The Role of the Will in Law*, 68 *Harv. L. Rev.* 1 (1954).

117. See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *Colum. L. Rev.* 629 (1943).

118. Uniform Commercial Code § 2-316(2). The term "conspicuous" is defined at *id.* § 1-201(10).

119. *Id.* § 2-316(2).

120. See, e.g., N.Y. Pers. Prop. Law §§ 302, 403, 413 (McKinney Supp. 1973) (installment credit agreements); *id.* § 46-c(a) (McKinney 1962) (wage assignments less than \$1,000).

In England certain statutes "set out the formal requirements in great detail and even specify the size of the lettering and the colour of the print and paper." 1 J. Chitty, *Contracts* 77-78 (23d ed. 1968).

121. 15 U.S.C. §§ 1601 et seq. (1970).

122. Uniform Commercial Code § 2-205 (firm offers). This approach appears to have

which conditions the effectiveness of certain clauses upon their being handwritten also serves this educational function.¹²³ The requirement that each party be supplied with a copy of the contract may also serve this function in a different way.¹²⁴ After contracting, the adhering party can more fully acquaint himself, at his leisure, with the rights and obligations of the contract by studying his copy. Interestingly, the British Contracts of Employment Act provides that, not later than 13 weeks *after* he is hired, an employee must be given a written statement detailing, *inter alia*, the method of computation of his pay, hours of work, vacation time, and the existence and nature of pension plans.¹²⁵

been pioneered in Italy. See Italian C. Civ. art. 1341 (Hoepli 1961) (translated in *The Italian Civil Code* 346-47 (M. Beltramo, G. Longo & J. Merryman transl. 1969) [hereinafter cited as Beltramo]) which imposes this requirement for a wide variety of clauses.

"[T]he ratio legis of the formal requirement is to give a party, faced with a mass of clauses, an opportunity to have knowledge and realize the significance of the one-sided clauses which are mixed with other clauses and are scattered here and there in a standard form." Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 *Am. J. Comp. L.* 1, 13 (1962). Professor Gorla adds, "[t]here has been a flood of litigation, as is often the case when one tries to solve problems of this kind by imposing a formal requirement." *Id.* at 20.

A requirement that bidders on certain federal government contracts fill in certain blanks and separately sign conditions with respect to minority hiring was "imposed so that bidders would be adequately impressed by the importance of the action requirements, and that if bidders took the time to complete all blank spaces properly they would know in detail what the Government expected of them in this area during contract performance." Report by Comptroller General to the Department of Labor, B-179100(2), Feb. 28, 1974, in *CCH Gov't Cont. Rep.* ¶ 90,112. The cited report recommends abolition of these requirements as unduly cumbersome.

123. French C. Civ. art. 1326 (56e ed. *Petits Code Dalloz* 1957) (text set out in H. deVries & N. Galston, *Materials for the French Legal System* 42 (1969)) requires that a unilateral promise to pay a sum of money or to give anything of value must be wholly in the handwriting of the promisor or, in addition to his signature, contain the promisor's handwritten words "good for" or "approved" and the handwritten sum of money or thing which is promised. The usual explanation given in France for this provision is the prevention of fraud as where the instrument is for an amount greater than the sum orally represented by the promisee, or where the instrument is in blank. See 2 *M. Planiol & G. Ripert*, *supra* note 15, at § 1155; A. von Mehren, *supra* note 81, at 624-25.

124. E.g., N.Y. Pers. Prop. Law § 405 (McKinney 1962) (retail installment sales). The French Civil Code requires that there be as many originals as there are persons having a distinct interest in a bilateral contract. French C. Civ. art. 1325 (56e ed. *Petits Code Dalloz* 1957) (text set out in H. deVries & N. Galston, *supra* note 123, at 41). Bentham rather quaintly labelled this kind of formality as "multiplicate scription." 2 *J. Bentham*, *supra* note 75, bk. 4, ch. 1, § 4. Apparently, the provision was originally adopted for evidentiary reasons. It was feared that a person not in possession of an original could not enforce his rights. See 2 *M. Planiol & G. Ripert*, *supra* note 15, at § 1144; A. von Mehren, *supra* note 81, at 623. Discovery devices are almost non-existent in the Napoleonic Codes. See P. Herzog & M. Weser, *supra* note 15, at 233, 319.

125. *Contracts of Employment Act* 1963, c. 49 § 4.

Only recently, however, has the law gone beyond requiring devices that call attention to certain terms of the contract to mandate that the adhering party be instructed of his statutory obligations or rights with respect to a contract. An Italian statute requires that certain retail installment sales contracts must describe the legal effect of the promissory notes signed by the purchaser.¹²⁶ Legislation in the United States requires that the customer be informed of his right to rescind certain consumer credit transactions¹²⁷ and certain other transactions, particularly home solicitation sales.¹²⁸ Thus, in small and limited ways the law is moving towards Bentham's suggestion of a century and a half ago that different contract types be labelled and contain an essay on the law applicable to the transaction.¹²⁹

The concerns of the draftsmen of the Statute of Frauds were remote from those which inspire the modern educational function of form. It cannot be said that the Statute's purpose over the years has changed to encompass this function.

H. *Regulatory and Taxation Functions*

Government's interest in and regulation of the content of private contracts has increased greatly in the last century. Regulations of the content of contracts tends to produce the requirement that the contract be in writing. For example, an Italian statute aimed at requiring high minimum down payments in retail installment sales, and providing for criminal penalties for violation, requires that contracts covered by this legislation be in writing.¹³⁰ This writing requirement appears largely to be designed as an aid to the policing of the economic regulation.¹³¹ In the People's Republic of China the requirement that leases and sales of houses be in written form and registered is said to be for "supervisory" reasons;¹³² the form requirement is an aid to policing a sector of economic activity. Price control and anti-trust legislation or regulations in non-socialist societies may require that notice of certain kinds of transactions

126. Law of September 15, 1964, No. 755 (Regolamentazione della vendita a rate), art. 2, ¶ 5 (Italy). The legal effects of promissory notes in civil law countries, including Italy, are far more drastic than in the common law. See note 96 supra.

127. Consumer Credit Protection Act, 15 U.S.C. § 1635 (1970).

128. E.g., N.Y. Pers. Prop. Law §§ 425-30 (McKinney Supp. 1973).

129. See text accompanying notes 75-77 supra.

130. Law of September 15, 1964, No. 755 (Regolamentazione della vendita a rate), art. 2, ¶ 1 (Italy).

131. For another function, see text accompanying note 126 supra.

132. Pfeffer, *The Institution of Contracts in the Chinese People's Republic*, 4 Harv. Int'l L. Club J. 1, 30-31 (1962).

be sent to regulatory bodies.¹³³ Although the transaction of which notice is sent may be oral, the notification requirement may well tend to induce parties to put their agreement in writing so that it may stand the test of a possible investigation. The Israeli Standard Contracts Law of 1964 permits a party who wishes to use a standard contract form in his dealings with customers to apply for approval of the restrictive terms.¹³⁴ Such a law may be an incentive to the preparation of standardized written forms. Although its purpose may be to control the fairness of such forms, at the same time it would give the proponent of the form a high degree of certainty as to its effectiveness and validity.

The interaction of state regulation of the content of a contract with form requirements may on occasion minimize those requirements. If the state dictates the content of fire insurance policies, an oral contract will sufficiently fulfill the clarifying function that is so important in insurance matters. There will be no doubt about its terms and, therefore, the policy can be upheld as sufficiently definite.¹³⁵ In striking contrast, the modern Ethiopian Civil Code which in general does not require formalities in contracting,¹³⁶ singles out the insurance policy for form prescriptions. The policy must be in writing and signed by all parties and two attesting witnesses.¹³⁷ This leads one to suspect that the content of insurance policies is not closely regulated in Ethiopia.

Somewhat extraneous from the kinds of government regulation just considered is the requirement in a number of countries that a stamp or other revenue duty be paid on the transaction. Failure to pay such a tax may have the effect of rendering the transaction void.¹³⁸ Generally, however, the rule is merely that the written contract is inadmissible as evi-

133. See, e.g., 3 W. Blake, *Business Regulation in the Common Market Nations* 392 (1969).

134. The statute in English translation can be found as an appendix to Lando, *Standard Contracts—A Proposal and a Perspective*, 10 *Scandinavian Studies in Law* 127 (1966). On the statute, see also Hecht, *Israel Law on Standard Contracts*, 3 *Israel L. Rev.* 586-94 (1968); Note, *The Israeli Standard Contracts Law, 5724-1964*, 14 *Int'l & Comp. L.Q.* 1410 (1965).

135. See 12 J. Appleman, *Insurance Law and Practice* §§ 7191-205 (1943); 3 G. Richards, *The Law of Insurance* § 384 (5th ed. W. Freedman 1952).

136. "Unless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree." Civil Code Proclamation, art. 1719(1) (1960) (Ethiopia).

137. *Id.* arts. 1725(b), 1727(1), (2); cf. Note, *The Requirements of Writing in Contracts of Insurance—An Exercise in Comparative Law*, 6 *Israel L. Rev.* 112 (1971).

138. *Byington v. Oaks*, 32 *Iowa* 488 (1871); *Sawyer v. Parker*, 57 *Me.* 39 (1869). For the United Kingdom this is the explicit statutory rule. A document which ought to be stamped but is not "shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever . . ." Stamp Act of 1891, 54 & 55 *Vict.*, c. 39, § 14(4); see P. Herzog & M. Weser, *supra* note 15, at § 7.40.

dence of the transaction unless the fiscal duties have been paid.¹³⁹ Compliance with such fiscal legislation may have a tendency towards formalizing transactions—one cannot paste a revenue stamp on an oral transaction. Although it is possible to pay a registration tax upon an oral transaction,¹⁴⁰ it is simply easier to deal with a tax-collector if there is a piece of paper to file or exhibit rather than an oral transaction to explain.¹⁴¹ In some countries there appears to be little compliance with such tax laws except in the event of litigation, when the tax with penalties is paid.¹⁴² This kind of tax has been described as “a tax upon justice, which is perhaps the worst of all taxes.”¹⁴³ At any rate, it is clear that the taxation function of form is totally extrinsic from any connection with the regulatory function of form in general and has very little connection with any other of the functions of form discussed in this Article. It is even clearer that the regulatory function of form, including the taxation function, is unrelated to any original intent of the Statute of Frauds or any subsequent development of the Statute, with perhaps one exception. The Statute of Frauds has been extended in a number of jurisdictions to require a written form whenever a promise is made to pay a brokerage commission on a realty contract.¹⁴⁴ Such statutes seek, in a way, to regulate a professional calling which has been subject to abuses.¹⁴⁵

I. *Evidentiary Function*

A primary function of contractual formalities is, of course, to supply and preserve evidence of the contract. Some European countries recognize a customary rustic method of keeping accounts by wooden tallies and checks.¹⁴⁶ In the American west “staking a claim,” although not con-

139. See P. Durand, *supra* note 94, at 236 (Kenya); P. Herzog & M. Weser, *supra* note 15, at § 7.40 (France); P. Sarkar & S. Sarkar, *Law of Evidence* 746-51 (12th ed. 1971) (India); Phillips, *The Italian Registration Tax*, 20 *Stan. L. Rev.* 811 (1968) (Italy).

140. See Phillips, *supra* note 139, at 812-13.

141. In some countries one of the functions served by the requirement that certain transactions be drafted by a notary is to have the notary police the fulfillment of certain fiscal duties. See Schlesinger, *supra* note 86, at 407.

142. See P. Herzog & M. Weser, *supra* note 15, at 325 n.454; cf. Phillips, *supra* note 139, at 811-13.

143. This remark was made by John Bowring in an editorial note to 6 *The Works of Jeremy Bentham* 514 (1838-43 ed. Bowring 1962 reprint). For a similar argument to the effect that the use of the rules of evidence as tools of fiscal policy violates fundamental rights, see M. Cappelletti & V. Vigoriti, *Fundamental Guarantees of the Litigants in Civil Proceedings: Italy*, in *Fundamental Guarantees of the Parties in Civil Litigation* 511, 539-40 (1973).

144. 2 *Corbin* § 416, at 437 & n.92.

145. See *id.*

146. “Tallies consist of two fragments of wood, coming from a single piece, split down the middle Upon each delivery the tally and counter-tally are put together and they

tractual, involved formalities for acquiring mineral rights and for proof of their acquisition.¹⁴⁷ Many evidentiary formalities such as these have existed and still exist in contemporary times.¹⁴⁸

In times and places where literacy is not prevalent, a frequent form requirement is that a transaction be witnessed by a number of persons. King Canute required all sales above the value of four pence to be made in the presence of four witnesses.¹⁴⁹ The Kings of Kent required that if a man of Kent bought anything in London, it "be done in the presence of two or three good citizens or of the mayor of the city."¹⁵⁰ The requirement that there be witnesses was an additional precaution and did not displace pre-existing formalities which had psychological, earmarking, cautionary and publicity as well as evidentiary functions. In Anglo-Saxon times, "the handgrasp (*on hand syllan*), the oath (*âð*, *juramentum*), and the pledge of good faith (*trýwa*)"¹⁵¹ were some of the available devices for other than real contracts.¹⁵² The situation in

make on both of them a transversal cut called coche. The number of cuts prove the number of deliveries when the cuts on both sticks correspond." 2 M. Planiol & G. Ripert, *supra* note 15, at 658. A similar but perhaps more sophisticated use of wood fragments as pre-constituted evidence would appear to have been used in China. See 39 Sacred Books of the East 121, 133 (1891 ed. J. Legge transl. 1968 reprint).

On the sometimes successful, sometimes unsuccessful attempts to introduce tallies into evidence in medieval England, see T. Plucknett, *A Concise History of the Common Law* 58-59, 633 n.3 (5th ed. 1956); H. Potter, *Historical Introduction to English Law and its Institutions* 184, 188, 205 (4th ed. A. Kiralfy 1958). Tallies with seals attached were apparently quite important in medieval English commerce. See C. Fifoot, *History and Sources of the Common Law* 223-25 (1949).

147. See *Harvey v. Ryan*, 42 Cal. 626 (1872) (custom that a notice of claim be posted on the ground).

148. See, e.g., 2 W. Blackstone, *Commentaries* *295: "If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles instar dentium, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture." *Id.* (italics omitted).

149. These and similar requirements of other rulers are summarized in 1 S. Greenleaf, *A Treatise on the Law of Evidence* 358-59 (15th ed. 1892).

150. *Id.* at 359 n.3.

151. Hazeltine, *The Formal Contract of Early English Law*, 10 Colum. L. Rev. 608, 609 (1910). A revised version is published in Association of American Law Schools, *Selected Readings on the Law of Contracts* 1, 2 (1931). The witnesses are described as a "collateral precaution." Pollock, *Contracts in Early English Law*, 6 Harv. L. Rev. 389, 392 (1893). A revised version is published in Association of American Law Schools, *supra* at 10, 13.

152. "Real" or "in rem" contract was the term used to describe transactions relating to money, goods or lands in which there was part or full performance by one side at the making of the contract, such as a sale or a loan. Even in real contracts, however, a formality often substituted for the performance. For example, the giving of something in earnest would bind a contract of sale. This normally consisted of a penny ("God's penny" or

England did not differ markedly from that in the rest of Europe.¹⁵³ The handgrasp or hand-slap as a contractual requirement continues to be demanded by rural custom in parts of Europe,¹⁵⁴ and the oath, as a formality that binds, survives in canon law,¹⁵⁵ and perhaps in American military¹⁵⁶ and constitutional law.¹⁵⁷

Eventually, the written and sealed form was added to earlier requirements. The contract under seal, often with the recital of an oath or the pledge of good faith, and often with attesting witnesses, became the contract par excellence in later medieval England.¹⁵⁸ Whatever other functions the sealed covenant may have had, it clearly provided a lasting form of evidence. Even more secure devices for the preservation of

"earnest money") and a drink of wine or beer. T. Plucknett, *supra* note 146, at 630, 665. Since the witnesses were also often compensated by a drink, the contract could become the "pretext for copious libations." J. Brissaud, *A History of French Private Law* § 373, at 494 n.2 (2d Fr. ed. R. Howell transl. 1912).

153. See J. Brissaud, *supra* note 152, at §§ 374-75; R. Huebner, *A History of Germanic Private Law* § 71 (F. Philbrick transl. 1968); 4 A. Pertile, *Storia del Diritto Italiano* 470-74 (2d ed. 1893).

154. See Camera di commercio industria e agricoltura Firenze, *Raccolta di usi e consuetudini commerciali e agrari della provincia de Firenze* tit. 1, § 6 (1965). Today's handgrasp appears to descend from other hand to hand rituals. J. Brissaud, *supra* note 152, at § 374; R. Huebner, *supra* note 153, at 494-95 ("the illuminations of the *Sachsenspiegel* [sic] show us a form a manual ritual in which the parties to the contract simply laid the palms of their hands together, holding them above their heads . . ."). Compare the rituals of British school-children described in text accompanying note 30 *supra*.

155. At one time it was the teaching of the Canonists that all promises intentionally made were binding in conscience unless founded in an immoral cause. See Vinogradoff, *Reason and Conscience in Sixteenth-Century Jurisprudence*, 24 *L.Q. Rev.* 373, 382 (1908). This is no longer the case. The canon law has "canonized" civil law, meaning that it regards as binding those promises which the law of the state whose secular law is applicable regards as binding unless they are contrary to divine law. See 6 P. Augustine, *A Commentary on the New Code of Canon Law* 590 (1923) (Can. 1529). In the middle ages where the Courts Christian asserted jurisdiction, breach of contract was punishable by a judgment for damages. See the judgments of the court of the Bishop of Ely, collected in F. Maitland & W. Baidon, *The Court Baron* 115-18, 125, 139, 144 (4 Selden Society Series 1891). At present, canon law continues to regard a promissory oath as binding under penalty of sin. See 6 P. Augustine, *supra* at 312. (Can. 1317).

156. *United States ex rel. Norris v. Norman*, 296 F. Supp. 1270 (N.D. Ill. 1969) (enlistee who did not sign oath of loyalty is a civilian although he performed military duties and received military pay). There is a conflict of authority on the point. See Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 *U. Richmond L. Rev.* 121, 124-25 (1974).

157. This was the opinion of the House Committee on the Judiciary. See, e.g., House Comm. on the Judiciary, Report on the Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, 93d Cong., 2d Sess., in 120 *Cong. Rec. H* 8967-68 (daily ed. Aug. 22, 1974).

158. See Plucknett, *supra* note 146, at 631.

evidence were available in those legal systems that required—or permitted—the covenant to be made and registered in a public place: carved in marble in Greek temples, imprinted on clay tablets at the Babylonian law court, or kept in the archives of a notary.

In seventeenth century England three major developments in the case law of contracts coincided with a major development in the law of evidence. First, by expansion of the writ of *assumpsit*, a written and sealed instrument was no longer a necessary requirement for the legal enforceability of a promise made in exchange for a mere promise.¹⁵⁹ In the event of a dispute upon an alleged contract, a jury trial was required without the necessity of written evidence. Second, the courts held that debts for money loaned, goods sold and delivered, etc., could be collected through the action of *assumpsit* rather than the action of debt.¹⁶⁰ This meant that a vast new class of cases would be tried by jury rather than wager of law. Third, the relative independence from the common law, enjoyed by merchants, was being diminished rapidly as the courts of common law expanded their jurisdiction at the expense of mercantile tribunals.¹⁶¹ This meant that another large class of cases would be tried by jury. While these three developments led to a great expansion of jury trials of contract litigation, a fourth development was the creation and solidification of rules barring testimony by a party to the action or other interested person including relatives of a party.¹⁶² The significance of this was that although disputes surrounding oral contracts were to be tried by jury, the participants and those closest to them could not be heard. It is believed that these four developments had a great deal to do with the enactment of the Statute of Frauds in the same way that similar, but earlier, developments had led to the promulgation of legislation elsewhere which served as a model for the English Parliament.¹⁶³ The best known of these statutes, and the one most likely to have been studied by the English draftsmen of the Statute of Frauds, was the French *Ordonnance of Moulins* of February, 1566, which excluded testimony attempting to prove agreements exceeding the value of 100 livres. The preamble to the *Ordonnance* is highly illuminating:

159. *Strangborough v. Warner*, 74 Eng. Rep. 686 (K.B. 1589).

160. *Slade's Case*, 76 Eng. Rep. 1074 (K.B. 1603).

161. H. Potter, *supra* note 146, at 183-210.

162. 2 J. Wigmore, *supra* note 29, at § 575; 2 M. Cappelletti, *La Testimonianza della Parte nel Sistema dell'Oralità* 421-81 (1962).

163. See generally Rabel, *supra* note 56, at 174-78. There were a large number of forerunners in Italian and French legislation going back at least as far as the thirteenth century. See 4 A. Pertile, *supra* note 153, at 469-70.

[T]o obviate the multiplication of facts heretofore put forward for judgment, all subject to proof by witnesses and to the disqualifications to which those are liable, from which there result numerous inconveniences and complications of procedure.¹⁶⁴

Obviously this legislation was designed as much for the sake of facilitating judicial administration as for the protection of the parties against perjury.¹⁶⁵ How was the legal system to cope with the embarrassing dilemma of recognizing the validity of oral contracts, entrusting disputes to an evidentiary trial rather than trial by ordeal or by wager of law, and at the same time excluding the testimony of the persons who are most likely to have knowledge of the facts? The answer in France, and later in England, was found in the requirement that agreements of specified kinds be put in writing. Thus the issues would be reduced and the proceedings shortened.

The evidentiary function of the Statute of Frauds was clearly the basic aim of its draftsmen.¹⁶⁶ Written evidence would aid the cause of doing justice between man and man, and at the same time assure the smooth functioning of the machinery of justice. Parliament could have returned to the evidentiary formalities of pre-conquest days¹⁶⁷ and have required that transactions of certain kinds be made in the presence of disinterested witnesses. Witnesses, however, die; paper (of pre-twentieth century quality) lasts for centuries. Witnesses' memories fade or become distorted with the passage of time; the written word does not change. Witnesses are subornable, but forgery is a difficult art. Paper is readily available, while the marshalling of disinterested witnesses may be difficult and expensive.¹⁶⁸

164. The translation is in Johnson, *supra* note 15, at 1011.

165. See 3 V. Marcadé, *Corso elementare di diritto civile francese lib. 3, sez. II*, at 522 (4th Fr. ed. Logatto transl. 1857).

166. Because the purpose of the Statute is to provide evidence rather than to prescribe a substantive precondition to validity, it has been suggested that the Statute does not prescribe a form requirement at all. Sharp, *Promissory Liability*, 7 *U. Chi. L. Rev.* 250, 262 (1940); cf. L. Friedman, *supra* note 25, at 94. Nonetheless, insofar as it fulfills many of the same functions as substantive form requirements, it becomes a form requirement. There are, of course, differences in concept and consequences between forms required *ad substantiam* and those required *ad probationem*, but the similarities are greater than the differences.

167. See text accompanying notes 149-58 *supra*.

168. Documentary evidence has not always been regarded as inherently superior to testimony. See A. Engelmann, *A History of Continental Civil Procedure* 678 (1927) (witness proof regarded as superior to documentary evidence by a medieval jurist); H. Lea, *Superstition & Force* 56 (4th ed. rev. 1910) (wager of law overcame charters); 2 M. Planiol & G. Ripert, *supra* note 15, at 646 (medieval maxim was: "witnesses surpass letters"). In England, see 38 *Edw. 3, stat. I, c. 5* (1363) (compurgation superior to documentary evidence).

Of the evidentiary formalities that legal history teaches us have been mandatory from time to time,¹⁶⁹ few are more simple than the requirement that the "agreement . . . or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith . . ." ¹⁷⁰ Most of those which were simpler (the use of ritual words, the handgrasp or hand-slap, and other physical rituals) did not solve the problem of the disqualification of the parties and their relatives as witnesses; even if the ritual were performed, how would it be proved? Not for another century and a half was any serious suggestion made that the testimonial disqualification of the parties be removed.¹⁷¹ Thus in 1677 Parliament had good reason to impose contractual form requirements and, in view of the general increase in literacy, to choose a relatively simple, non-ceremonial formality that conformed to the abilities and perhaps to the habits of the community.¹⁷² But at what cost?

III. DISADVANTAGES AND DYSFUNCTIONS OF FORM

The preceding discussion has shown (1) that there are many substantial advantages to be gained by the imposition of contractual formalities,¹⁷³ (2) that the Statute of Frauds serves the psychological and evidentiary functions of form reasonably well; (3) that it performs the earmarking, cautionary, and clarifying functions only modestly; (4) that it serves the regulatory function only in a special category; and (5) that it achieves the managerial, publicity, and educational functions probably

169. No attempt is made here to be exhaustive, but consider some of the more popular alternatives: (1) holography; (2) writing with a seal; (3) writing with attesting witnesses; (4) a writing cut into two pieces (the indenture); (5) a "public act" drafted by a notary or other public official; (6) a writing authenticated by a notary or other public official; (7) a writing registered; (8) "multiplicate scription."

170. 29 Car. 2, c. 3, § 4 (1677).

171. 2 J. Wigmore, *supra* note 29, at § 576 n.1, attributes to Bentham the earliest attack on these disqualifications.

172. It has been suggested that section 4 of the Statute of Frauds applies to those verbal provisions which, before the passing of the Statute, were probably in most instances reduced to writing, but not necessarily. *Smith v. Surman*, 109 Eng. Rep. 209, 213 (K.B. 1829); see Rabel, *supra* note 56, at 177.

173. The discussion has not been exhaustive. Professor MacNeil has suggested that difficult form requirements may also be imposed as a deterrent to the making of certain types of contracts. I. MacNeil, *Cases and Materials on Contracts* 1315-16 (1971). He attributes this "Kafkaesque" function of form requirements to Professor von Mehren. See von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 Harv. L. Rev. 1009 (1959). Although MacNeil appears to misread von Mehren, it may well be that certain form requirements are imposed for deterrent purposes. See J. Calamari & J. Perillo, *supra* note 49, at § 367.

Savigny suggested that there was an esthetic function of form, pointing out that in primitive times verbal forms tended to be poetic. 3 F. di Savigny, *supra* note 47, at 317.

not at all. Why then, have criticisms of the Statute been aimed primarily at securing its repeal rather than its improvement?

The classical arguments against form requirements have been first, that they restrict the sovereignty of the individual will—that is, they interfere with freedom of contract; second, that form requirements are inconvenient and slow the pace of business; and third, that noncompliance with form requirements permits a party to renege on his pledged word, thereby defeating the justified expectations of the other party.¹⁷⁴

In reply, it may be said that the common law never really adopted the sovereignty of the individual will as a contractual principle, and in the civil law its existence as a principle in the twentieth century is, at best, dubious.¹⁷⁵ It is also doubtful whether writing requirements significantly slow the pace of business. Even in the absence of such requirements, modern business tends to reduce its commitments to writing, and non-business transactions are not normally made at so hectic a pace as to inhibit a written memorandum. The argument that form requirements hamper the expeditious conduct of everyday affairs was largely aimed at more cumbersome form requirements: the notarial instrument, the use of ritual words, the impression of seals upon melted wax, and the like. It has little relevance to form requirements such as those imposed by the Statute of Frauds.

However, the third objection to form requirements is, as applied to the Statute of Frauds, both vital and serious. In the final analysis it may not be "just and decent" to decide a case merely on the basis of non-compliance with form requirements.¹⁷⁶ Insistence on form requirements has been described as a "strict and legalistic approach which sacrifices equity in the individual instance."¹⁷⁷ One may add that rules of form unduly favor the party who has easy access to legal advice over the party who does not.¹⁷⁸ Decision of a dispute on the basis of form requirements means, in effect, that each individual must sink or swim on his personal knowledge of rather esoteric law. Moreover, encouragement of written contracts in this age of mass marketing frequently means that the party who sells, leases, or buys goods or services on a mass basis will draft the

174. These arguments are summarized in *Flour*, supra note 25, at 95. Other arguments are summarized by Muukkonen, supra note 24, at 83.

175. See Gorla, *La "Logica-illogica" del consensualismo o dell' incontro dei consensi e il suo tramonto*, 12 *Rivista di Diritto civile I*, 255 (1966); Gorla, *Le Potere della volontà nella promessa come negozio giuridico*, 54 *Rivista del diritto commerciale I*, 18 (1956).

176. Muukkonen, supra note 24, at 83.

177. Danish Committee on Comparative Law, *Danish and Norwegian Law* 71 (1963).

178. "Thering explains that the extreme formalism of Roman law was supportable in practice only because of the constant availability of legal advice, gratis." Fuller, supra note 62, at 802 (italics omitted).

contract with his own interests foremost in mind. In sum, whatever the general advantages of form requirements, they have as great a potential for working injustice in specific cases.

The tension between the general laudability of form requirements and attempts to do justice in the individual case has tested courts of common law and equity to the utmost, often with highly creative results.¹⁷⁹ A "creative" decision designed to do justice in the individual case may cause a problem, however, in that it creates precedent which can be distinguished from an "ordinary" case only by tortuous logic devoid of common sense or policy content,¹⁸⁰ *i.e.*, the type of logic which laymen quite properly would regard as legalistic hair splitting.

IV. CUTTING THE KNOT: A TENTATIVE SUGGESTION

Suppose that the American legal system was like that of Turkey, which has a writing requirement in the Statute of Frauds tradition,¹⁸¹ and (if we can believe what we read) in which

[t]here are no loopholes . . . no procedural hurdles for one wishing to take advantage of the Statute, like the requirement of pleading it as an affirmative defense; no ameliorating influence of equity or the law of quasi-contracts to find other ways of enforcing a bargain.¹⁸²

If that were the state of American law one has little doubt that the outcry from the legal profession would be such that the Statute would not long remain unamended.¹⁸³ The principal disadvantage of form requirements—possible injustice in individual cases—is aggravated when the penalty for non-compliance is voidness or unenforceability.¹⁸⁴ Parliament

179. See the comment of Lord Wilmot, note 29 *supra*, made less than one hundred years after the enactment of the Statute.

180. See, e.g., text accompanying notes 213-15 *infra*.

181. "Legal transactions to establish, transfer, convert, renew, state, satisfy, or release a right must be proved by a written instrument if the same exceeds five thousand kurus (50 T.L.) in value." Introduction to Turkish Law 170 (T. Ansay & D. Wallace eds. 1966).

182. D. Karlen & I. Ansel, *Civil Litigation in Turkey* 85 (1957).

183. This is not to say that the apparent rigidity of the Turkish rule does not meet the needs of Turkey. That it does, is suggested by the following remark, the accuracy of which I have no way of evaluating: "[E]xperience has shown the utter unreliability of oral evidence in the territories formerly forming part of the Ottoman Empire." 2 C. Hooper, *The Civil Law of Palestine and Trans-Jordan* 130 (1936). "Experience shows that in a country where there is a low degree of literacy, the custom of the people is to take particular care to reduce their agreements and contracts to writing: and in the territories forming part of the former Ottoman Empire this is particularly the case, owing to the facilities afforded by the institution of the Notary Public, of which advantage is taken by all classes of the people. Experience in the Courts also shows that it is very rarely that the parties fail to reduce their contracts to writing." *Id.* at 129.

184. It has been said that "in the view of some earlier writers the neglect of a formal

decided in 1677 that such an extreme penalty would be imposed.¹⁸⁵ Courts of equity and common law have since mitigated the penalty by the doctrine of part performance, the imposition of constructive trusts, the fictions of quasi-contract, the main purpose rule, the joint obligor rule, and a variety of other devices, of which promissory estoppel has become a recent favorite.¹⁸⁶ All of these are ingenious and creative, but often erratic and undependable, means of escaping an exaggerated statutory penalty. Some of these devices, particularly the doctrines of part performance and promissory estoppel, are employed in situations where acts by the plaintiff pursuant to an oral or insufficiently memorialized agreement provide *corroborating evidence* of the existence of the agreement.¹⁸⁷ Other kinds of events could well corroborate the existence of the

requirement in the nature of things leads to invalidity. . . . The current Scandinavian legal writings stress the point that invalidity is not the only 'natural' legal consequence of failing to observe a formal provision, but rather that invalidity is only one possibility among others. There is in other words a modern trend in favour of diversifying the sanctions." Muukkonen, *supra* note 24, at 86 (emphasis and footnote deleted). For an example, see Danish Committee on Comparative Law, *supra* note 177, at 79. For some English examples, see 1 Chitty, *supra* note 120, at 78.

185. Section 4 stated that "no action shall be brought" while section 17 stated that "no contract . . . shall be allowed to be good." 29 Car. 2, c. 3, §§ 4 & 17 (1677). An early interpretation was that the Statute rendered non-complying contracts void. G. Cheshire & C. Fifoot, *supra* note 49, at 182. Today, except in a few jurisdictions, non-compliance is held to make a contract unenforceable. 2 Corbin § 279; 3 Williston § 527.

Lord Kenyon, relatively alone among common law lawyers, lamented the fact that "exceptions were ever introduced in construing the Statute." *Chater v. Beckett*, 101 Eng. Rep. 931, 933 (K.B. 1797).

186. See Note, *The Doctrine of Estoppel Gains a Foothold Against the Statute of Frauds*, 1 Capital U.L. Rev. 205 (1972). The techniques used by Anglo-American courts to cut down the penalties for the non-observance of form requirements have their equivalents elsewhere. For example, in France, narrow construction of the statutory requirements and broad construction of the exceptions has greatly reduced the importance of the French equivalent of the Statute of Frauds. Flour, *supra* note 25, at 112-14. Cases looking very much like estoppel also can be found in continental law. See R. Schlesinger, *Comparative Law: Cases—Text—Materials* 381 (2d ed. 1959); Muukkonen, *supra* note 24, at 88-89. Restitution is also generally available, but the question of whether expenditures in reliance on the agreement may be included is often a debatable one. *Id.* 90-94; cf. Perillo, *Restitution in a Contractual Context*, 73 Colum. L. Rev. 1208, 1219-22 (1973).

187. It is very likely that the part performance doctrine had its origin as an outgrowth of the concept of "livery of seisin" rather than in evidentiary considerations. Pound, *The Progress of the Law, 1918-1919*, 33 Harv. L. Rev. 929, 933-50 (1920). The present function of the doctrine, however, ought not to be confused with its origin. Rather, today the doctrine represents a mixture of evidentiary and estoppel policy bases. See *Wilson v. La Van*, 22 N.Y.2d 131, 238 N.E.2d 738, 291 N.Y.S.2d 344 (1968), noted in 35 Brooklyn L. Rev. 301 (1969); Comment, *The Statute of Frauds and Part Performance in Kansas*, 14

alleged contract. For example, in Scotland, where the form requirements are very likely the world's most demanding,¹⁸⁸ evidence of the *defendant's* actions as a partial substitute for form requirements is permitted under the doctrine of "homologation."¹⁸⁹ Georgia¹⁹⁰ and Iowa¹⁹¹ are in accord with the Scots' rule at least as to real property transactions. The Philippines has adopted a traditional version of the Statute of Frauds¹⁹² that broadly provides: "Contracts infringing the Statute of Frauds . . . are ratified . . . by the acceptance of benefits under them."¹⁹³ As in the case of the doctrine of estoppel and part performance, acceptance of benefits by the defendant provides corroborating circumstantial evidence of the existence of a contract and, at the same time, is a fact that tends to aggravate the injustice which could be done by too rigid adherence to form requirements.

Not all of the escape hatches from the rule of unenforceability, however, require action pursuant to the contract as corroborating evidence of the existence of the contract. Constructive trusts may be imposed where the actions of the parties are not corroborative of the existence of a contract. The rule in such cases is that the plaintiff must establish his case by more than a preponderance of the evidence.¹⁹⁴ The cases speak of clear and convincing evidence or of establishing the oral promise beyond a reasonable doubt.¹⁹⁵ Nonetheless, even if a promisee could establish

U. Kan. L. Rev. 647 (1966); Note, The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah, 9 Utah L. Rev. 91 (1964).

188. The following summary is indicative of the pervasiveness of form requirements in Scotland: "[C]ertain types of promises, e.g., promises in contracts relating to inheritance and personal services, contracts of insurance and guaranty, and assignments of choses in action, must be founded on 'probative writs,' i.e., must be holographic or adopted as holographic by a statement in the handwriting of the promisor or, if not holographic, must be witnessed by two signatories who must be designated as witnesses in the writing. Some other promises, including particularly gratuitous promises, must be proved 'scripto vel iuramento,' though the writing need not be probative." 1941 Report of the [N.Y.] Law Revision Comm'n 376 (italics deleted). The pervasiveness of the form requirements, their complexity, and the availability of exceptions are such that by far the most important topics in a recent evidence text concern these requirements. See A. Walker & N. Walker, *supra* note 94, chs. 10-12, 16-17, 20, 22, 24.

189. W. Gloag & R. Henderson, *Introduction to the Law of Scotland* 67 (5th ed. 1968); A. Walker & N. Walker, *supra* note 94, at 314-15.

190. Ga. Code Ann. § 37-802 (1962).

191. Iowa Code Ann. § 622.33 (1950).

192. Phil. Civil Code art. 1403(2) (Rex ed. 1972).

193. *Id.* art. 1405.

194. The cases are collected in 9 J. Wigmore, *supra* note 29, at § 2498 n.19.

195. *Strype v. Lewis*, 352 Mo. 1004, 180 S.W.2d 688 (1944).

his case beyond a reasonable doubt, the constructive trust remedy ordinarily is not available in most jurisdictions unless there is a pre-existing fiduciary or confidential relationship between the promisor and promisee or proof of fraud.¹⁹⁶ There is no functional reason for this. The rule stems from the fact that the existence of a fiduciary relationship or the perpetration of a fraud are grounds for equitable jurisdiction.¹⁹⁷

It is suggested that many of the exceptions to the rule of unenforceability could be eliminated and rationalized by the amendment of the Statute to eliminate the penalty of non-enforceability and to require that the existence of an agreement within the Statute must be proved by clear and convincing evidence.¹⁹⁸ Such facts as part performance or other acts in reliance by the promisee would be circumstantial evidence toward meeting this high standard of proof. Such an amendment would be a natural outgrowth of the centuries of judicial attempts to balance the general policies favoring formalization of contracts and doing justice in individual cases. It would leave to the trier of fact and to the court, as guardian of the standard of proof, questions which have become conceptualized questions of law under the doctrines of part performance¹⁹⁹ and estoppel. It would extend equitable relief to those victims who were not in a confidential relationship with the promisor²⁰⁰ and eliminate the

196. See J. Calamari & J. Perillo, *supra* note 49, § 325, at 497-98; R. Newman, *Some Reflections on the Function of the Confidential Relationship Doctrine in the Law of Trusts*, in *Perspectives of Law: Essays for Austin Wakeman Scott* 286 (R. Pound, E. Griswold & A. Sutherland eds. 1964).

197. See 3 J. Pomeroy, *A Treatise on Equity Jurisprudence* §§ 1044, 1056 (4th ed. 1918).

198. This suggestion is not novel. Bentham long ago suggested that non-compliance with form requirements ought to be penalized at most by raising a presumption of spuriousness. 2 J. Bentham, *supra* note 75, at bk. 4, ch. 3, § 3. Another author tentatively puts forward a similar suggestion, offering as an alternative that we "enforce only those contracts which are substantiated by some form of corroboration." Grether, *Caveat Promisee: Nebraska's "New Consideration" Test and the Anachronistic Statute of Frauds*, 33 *Neb. L. Rev.* 577, 603 (1954).

199. For an example of the technical nature of the part performance concept, see *Wilson v. La Van*, 22 *N.Y.2d* 131, 238 *N.E.2d* 738, 291 *N.Y.S.2d* 344 (1968).

200. "If a true merger of the substantive principles of equity with the main body of our law, our inner common law, is to take place, as has been the case with rules of procedure, the principles of equity should be recognized in their entirety. The adoption of such an approach would mean that in the case of constructive trusts, the underlying principle of equity that the law will not aid the unscrupulous in carrying out their plans would be applied, without qualification, to the solution of the problems we have been discussing, and would not be limited to cases arising out of breach of a confidential relationship." Newman, *supra* note 196, at 300.

vast flood of litigation over the issue of whether the Statute is satisfied.²⁰¹ The issue would shift to the question of whether it is clear that the contract was made, and, if it clearly was, who is responsible for its non-performance.²⁰² Once the attorneys for the litigants realize that this will be the issue rather than whether there is a sufficient writing, more realistic settlement negotiations will be undertaken. At the same time, by holding plaintiffs to a high standard of proof, the proposed rule would protect defendants against spurious claims.

When the Statute of Frauds is invoked, very often there is written evidence of the contract. The issue in such cases is whether the writing is a sufficient note or memorandum—that is, one which incorporates all of the essential terms agreed upon.²⁰³ Under the suggestion advanced here, if there is some evidence in writing of the existence of the contract, the question for the trier of fact and the trial judge will be whether the writing coupled with other evidence supplies clear and convincing evidence of the contract.²⁰⁴ This would put an end to litigation which centers upon the sufficiency of the memorandum even where it is certain that

201. "Under the heading of the Statute of Frauds the century digest has digested approximately 6,300 cases; the first decennial approximately 2,200 cases; and the second decennial approximately 2,300 cases." Willis, *supra* note 53, at 537. A history of contract in Wisconsin reports, "the Statute did supply the court with an inordinate share of its contract business." L. Friedman, *supra* note 25, at 94. A thumbing through any month's advance sheets of the state and federal reporter systems should satisfy anyone that this continues to be the case throughout most of the United States.

202. "[T]he use of the Statute of Frauds as a defense to a contract action is always an afterthought; parties do not breach a contract merely because the contract is not in full written form." L. Friedman, *supra* note 25, at 190-91. In other words, the Statute of Frauds issue diverts the parties from the crux of their dispute. This diversion produces such decisions as: "I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; . . . and although he was not aware of the objection on which he now relies, till within a few days before the trial." *Sievwright v. Archibald*, 117 Eng. Rep. 1221, 1227 (Q.B. 1851).

203. That the note or memorandum must contain all the essential terms appears not to have been seriously questioned since the decision of *Seagood v. Neale*, 93 Eng. Rep. 613 (K.B. 1721); see 4 Williston §§ 567, 567A. Rabel believes that this interpretation of the term "note" or "memorandum" conforms to the spirit of its draftsmen. Rabel, *supra* note 56, at 182-83. On the other hand, the litigation concerning the required content of the note or memorandum has been described as "endless." Revision Committee, *supra* note 6, at 590 n.4. This description seems to be substantiated by the 200 pages of massively footnoted text devoted to it in the current edition of Williston. See 4 Williston §§ 566-90.

204. The rule would then be similar to the rule of the French Civil Code, which bars proof by witnesses if the sum in question exceeds fifty francs, unless there "is a commencement of proof in writing." C. Civ. art. 1347 (56e ed. *Petits Code Dalloz* 1957) (text set out in H. deVries & N. Galston, *supra* note 123, at 44.)

there was a contract.²⁰⁵ It would also put the entire Statute of Frauds on a basis similar to, but not identical with, the writing requirements of Article 2 of the Uniform Commercial Code.²⁰⁶

Often, the party invoking the Statute of Frauds would not be prepared to deny the making of the contract. Rather, he relies on other grounds, such as failure of condition, impossibility of performance, and the like, which are much more likely to be at the crux of the dispute. The Statute is often "afterthought" law in the sense that it is a technical defense suggested by the defendant's attorney after a rupture between the parties has occurred.²⁰⁷ Under the suggestion made here, the existence of the contract would be a question of fact and thus could be established by an admission made by the defendant in the pleadings or in other pre-trial proceedings. In other words, the defendant ultimately could be called upon to deny or admit under oath that the contract was made. If he admits the making of the contract the issue of proper formalization is eliminated. Such a rule exists under the Uniform Commercial Code,²⁰⁸ and a similar rule apparently existed in England in the first century of the Statute's existence.²⁰⁹ Moreover, several states,²¹⁰ and the civil law²¹¹ have closely analogous rules.

In brief, by substituting a "clear and convincing evidence" requirement for the writing requirement of the Statute of Frauds, the need to resolve

205. Such a rule would also accommodate proof of contracts by videotape or other modern methods of information storage. Cf. Sweet, *The American Contract System: Today and 2001*, 7 *Ind. L. Rev.* 309, 338 (1973).

206. Uniform Commercial Code § 2-201(1) requires merely that there be "some writing sufficient to indicate that a contract for sale has been made." As the official comments make clear, all the material terms need not be contained in the writing.

207. See note 202 *supra*.

208. Uniform Commercial Code § 2-201(3)(b); see *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966); *Reissman Int'l Corp. v. J.S.O. Wood Prods., Inc.*, 10 UCC Rep. Serv. 1165 (N.Y. Civ. Ct. 1972).

209. See the case analysis in Stevens, *Ethics and the Statute of Frauds*, 37 *Cornell L.Q.* 355, 361-71 (1952).

210. *Id.* at 373-78 (discussing the Iowa, Maryland, New Jersey and Pennsylvania rules).

211. In France, even if there is no "commencement of proof in writing" as provided in C. Civ. art. 1347 (56e ed. *Petits Code Dalloz* 1957), the defendant can be put to a "decisory oath" to affirm or deny the making of the contract. *Id.* art. 1360. See P. Herzog & M. Weser, *supra* note 15, at 360. A more recent development is that a party's refusal to answer in an unsworn statement whether he has entered into the contract as alleged is deemed to be a "commencement of proof in writing." C. Civ. art. 1336 (66e *Petits Code Dalloz* 1966-67), set out in H. deVries & N. Galston, *supra* note 123, at 43; see P. Herzog & M. Weser, *supra* at 346.

In Scotland, a party may be put to an oath if he raises the defense of certain form requirements. See A. Walker & N. Walker, *supra* note 94, at 86-87.

litigation while excluding material evidence is ended; technical questions of the type and sufficiency of part performance or the applicability of other mitigating doctrines are abolished; the dichotomy between the availability of a remedy in equity but not at law is healed; serious settlement negotiations are encouraged; candor is demanded; and the constant flood of cases with respect to the sufficiency of the memorandum, the integration of several writings, the location of the signature, and the like, is dammed. At the same time the defendant is well protected against spurious claims.

V. WITHIN THE STATUTE: A FURTHER REFORM

Even if one accepts the suggestion that the Statute of Frauds would be improved by substituting for the requirement of a writing a requirement that the terms and existence of contracts within its coverage be proved by clear and convincing evidence, the truth of the charge that the classes of contract within the Statute are arbitrarily selected²¹² must still be considered. The classes of contract within section 4 of the Statute will be briefly examined.

A. *One-Year Section*

No one knows why agreements not performable within a year were selected to be within the Statute. Usually, it is speculated that the selection of this class was motivated by a policy akin to that of the statute of limitations, *i.e.*, if the interval between the making of the promise and its proof in court is overly long, the difficulties of proof make desirable a more cogent type of evidence than testimony.²¹³ If this is indeed the rationale,²¹⁴ the Statute serves it poorly. An action based upon breach of the agreement the day after it was made is hit by the Statute as hard as an action based upon a breach years later. One could marshal many other illustrations of the lack of functional logic in the effect of

212. E.g., Grether, *supra* note 198, at 601; Ireton, *supra* note 29, at 199; Willis, *supra* note 53, *passim*. Sir William Holdsworth, no admirer of the Statute, who referred to the "utter want of skill" of its draftsmanship, nonetheless argues that the selection was not arbitrary by the standards of the seventeenth century. 6 Holdsworth, *supra* note 1, at 387-88.

213. See 6 Holdsworth 392; Revision Committee 9-10.

214. It seems quite likely however, that as in the case of the other subdivisions the draftsmen had in mind a transaction type: employment and similar relationships, such as apprenticeships and fiduciary retainers. The common law rule was that a general hiring was presumed to be for a one year term. 1 W. Blackstone, Commentaries *425. But long term apprenticeships, clerkships, etc. were commonplace.

the provision.²¹⁵ For example, a promise to support the promisee for life is not within the one-year section even if the promisee lives on for fifty years because he *might have* died within the year.²¹⁶ In New York, a promise made by a brewery company to a beer distributor that the latter would have an exclusive distributorship *so long as the brewery sold beer in the area* is deemed not within the one-year section.²¹⁷ On the other hand, a promise by a brewery company to pay a salesman a commission on all sales made by the brewery to a designated client *so long as the client purchased beer from the brewery* is within the one-year section.²¹⁸

Any pretense that the one-year section effectively serves an evidentiary policy akin to the evidentiary policy of the statute of limitations must be discarded in the light of such decisions. Neither can it be said to serve efficiently the various functions of form examined in the first part of this Article. The history of the one-year section is a record of creative attempts to eviscerate it without departing from the strict letter. Creative decisions, attempting to minimize the effect of a statutory provision with no clear-cut policy basis, have led to a quibbler's paradise in which arid distinctions devoid of functional content reign supreme.²¹⁹

Dysfunctional litigation focusing upon the question of whether the alleged contract is on one or the other side of the statutory line would be sharply reduced if *all* contracts having more than a certain minimum

215. Revision Committee 9-10; Ireton, *supra* note 29, at 200; Willis, *supra* note 53, at 439-41.

216. Harper v. Harper, 57 Ind. 547 (1877). Similarly, a promise to support a toddler until the toddler should achieve the age of 21 is not within the Statute. Duncan v. Clarke, 308 N.Y. 282, 125 N.E.2d 569 (1955).

217. North Shore Bottling Co. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171, 239 N.E.2d 189, 292 N.Y.S.2d 86 (1968).

218. Martocci v. The Greater N.Y. Brewery, Inc., 301 N.Y. 57, 92 N.E.2d 887 (1950); See J. Calamari & J. Perillo, *supra* note 49, at § 305; Comment, The Cohen Case and the One Year Provision of the Statute of Frauds, 25 Fordham L. Rev. 720 (1957). The distinction is that in North Shore Bottling Co. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171, 239 N.E.2d 189, 292 N.Y.S.2d 86 (1968), the defendant had the power to terminate his liability within one year and, therefore, his obligation potentially was performable within one year.

219. In the North Shore case, the court disposes of certain cases decided by the Court of Appeals for the Second Circuit, relied upon by the defendant, as incorrectly decided. 22 N.Y.2d at 177-79 & n.4, 239 N.E.2d at 192-93 & n.4, 292 N.Y.S. at 91-92 & n.4. Thus, a contract which is to last "as long as I am in the dog food business and you are in the food brokerage business" need not be in writing. However, a writing is required for a promise to pay a commission to a salesman so long as the account he obtained remains active. Zupan v. Blumberg, 2 N.Y.2d 547, 141 N.E.2d 819, 161 N.Y.S.2d 428 (1957). The story of the litigation centering on the applicability of the one year section is told at length in 2 Corbin §§ 444-59; 3 Williston §§ 495-504.

value were to be subjected to the requirements of the Statute. If such a provision were combined with the proposed "clear and convincing proof" amendment, the Statute's scope would be considerably broadened while at the same time its effect would be mitigated.

B. *Suretyship Sections*

The suretyship provision²²⁰ has had a fate similar to that of the one-year provision, but for different reasons. Unlike the case of the one-year section, no general attempt was made to eviscerate the provision, but the courts have been sympathetic to "the gratuitous 'accommodator,' who had nothing tangible to gain and everything to lose for his kindness."²²¹ "On the other hand, puzzling and suggestive exceptions from the statute appear to depend on the feeling that a surety who has received a discernible personal benefit in the transaction should be bound by his contract whether or not it is in writing."²²² From this dichotomy stems the intricate "main purpose rule" and rules governing joint obligors.²²³ As indicated earlier in this Article, the suretyship promise is one that many legal systems surround with greater than common evidentiary, cautionary, and earmarking guarantees.²²⁴ Even England has retained the Statute of Frauds provision with respect to suretyship.²²⁵

Although some of the distinctions made under this provision have a functional basis, others apparently do not. Consider the controversies surrounding the distinction between suretyship and indemnity.²²⁰ The very intricacy of the rules developed by the cases to distinguish between contracts within and without the Statute raises the question of whether

220. There are, of course, two suretyship provisions. The Statute speaks in terms of a "special promise" of "any executor or administrator" . . . "to answer damages out of his own estate." There then follows a general provision of "any special promise to answer for the debt, default or miscarriages of another person." 29 Car. 2, c. 3 § 4 (1677). The general provision has swallowed up the more specific one in the sense that the promise of the executor or administrator is deemed to be merely a particular application of the general provision. *Bellows v. Sowles*, 57 Vt. 164 (1884); 2 Corbin § 346; Restatement (Second) of Contracts § 179 (Tent. Drafts Nos. 1-7 rev. & ed. 1973). On the historical context of the provision dealing with the promise of an executor or administrator, see 6 Holdsworth at 391-92.

221. L. Friedman, *supra* note 25, at 95.

222. Sharp, *supra* note 166, at 261.

223. The intricacies are unravelled in Calamari, *The Suretyship Statute of Frauds*, 27 *Fordham L. Rev.* 332 (1958), substantially reproduced in J. Calamari & J. Perillo, *supra* note 49, at §§ 284-93.

224. See text accompanying notes 94-98 *supra*.

225. See note 6 *supra* and accompanying text.

226. See J. Calamari & J. Perrillo, *supra* note 49, at § 290.

a more easily administered rule might not be substituted for the present one. Once again it is suggested that a requirement that all contracts having a value above a certain minimum be proved by clear and convincing evidence would do much to end dysfunctional litigation concerning the applicability of the Statute. At the same time, many of the functions of required formalities would be served as the high standard of proof would encourage contract formalization.

C. *Agreements Made Upon Consideration of Marriage*

In contrast to the history of the one-year and suretyship sections of the Statute, there has been no flood of litigation focusing on the consideration of marriage section. This is doubtless because neither contracts of this kind²²⁷ nor allegations of their existence are common. It has been authoritatively argued that this species of contract was selected for inclusion within the Statute because it was factually connected with the transfer of property, and promises to transfer property were within the Statute.²²⁸ Upon this assumption, no separate analysis need be made of the consideration of marriage section. Whatever the original reasons for its inclusion in the Statute, a contract within the consideration of marriage clause also is related closely to the promise of the gratuitous guarantor and gift promises generally. For this reason the discussion with respect to such promises is applicable here.²²⁹ To synthesize, a form requirement is desirable; but a more sensible sanction than unenforceability ought to be considered.

D. *Contracts to Sell Interests in Land*

It is quite clear that form functions are particularly important in cases of land transfers. Even imperial China, noted for the informality of its law of contracts, imposed form requirements upon land titles.²³⁰ In this context, the publicity function of form comes to the fore, but the evidentiary, cautionary, earmarking, psychological, and regulatory functions are often quite important. A promise to transfer has less need of form requirements than the transfer itself inasmuch as the publicity function is of lesser significance if there has been no actual transfer. Nonetheless, if any

227. The frequency and complexity of marriage settlements in the eighteenth century, shortly after enactment of the Statute of Frauds, is discussed in R. Robson, *The Attorney in Eighteenth Century England* 92-93 (1959). One can speculate that the situation was similar at the time of enactment.

228. 6 Holdsworth 392.

229. See discussion in text accompanying notes 94-98 supra.

230. J. Wigmore, supra note 110, at 174-78.

kind of contract is to be subjected to form requirements, the contract to transfer real property ought to be singled out. The mere fact that it is widely understood in our society that land transactions involve formalities provides a sufficient impetus for legislation with regard to such formalities. The questions concern the nature of the formal requirement and the effect of non-compliance. Under the Statute of Frauds the effect of non-compliance is unenforceability unless the case comes under the part performance, estoppel, or constructive trust concepts. Once again, the penalty appears too drastic and the litigation concerning the exceptions too often dysfunctional. If the focus of the law is shifted to the question of whether there is clear and convincing evidence of the existence of the contract, an appropriate balance may be struck between the advantages of contractual formalization and the needs of justice.

VI. CONCLUSION

While other solutions may suggest themselves,²³¹ it is certain that "carefully drawn legislation"²³² would be the appropriate mode of recognition of the 300th anniversary of the Statute of Frauds. Such legislation

231. For example, the provisions of the Italian Codes which are based upon, but are a substantial improvement over, the Code Napoleon could be looked to as an alternative model for reform of the Statute of Frauds. The Civil Code imposes a general rule that contracts over the value of 5,000 lire may not be proved by testimony, unless the court, taking into consideration the character of the parties, the nature of the contract and any other circumstance, in its discretion admits testimonial evidence. Italian C. Civ. art. 2721 (Hoepfli 1961) (translated in Beltramo 693). Moreover, the writing requirement is met by a beginning of proof in writing, and even this is dispensed with if it was materially or morally impossible to obtain a writing, or if the writing is lost without fault. Id. art. 2724 (translated in Beltramo 693-94). Somewhat stricter requirements apply to contracts of insurance, reinsurance and compromise agreements. See id. arts. 1888, 1928, 1967 (translated in Beltramo 465-66, 478, 486). Finally, testimonial evidence is excluded in an action to prove the existence of other selected agreements, particularly gift promises, real property contracts, certain special employment terms, id. arts. 782, 1350, 2096 (translated in Beltramo 211, 349, 518), and arbitration clauses, C. Pro. Civ. art. 807 (Hoepfli 1961). The rigidity of this last series of provisions has, predictably, resulted in the invention of highly creative fictions by the courts to temper their effects.

232. 3 Williston § 448; cf. Sharp, *supra* note 166, at 262 ("the statute requires reconsideration and improvement"). Other advocates of reform, although primarily advocating abolition, are Grether, *supra* note 198, at 602-03; Hutton, *supra* note 59, at 306-07; Willis, *supra* note 53, at 537; Note, An Appraisal of the Utah Statute of Frauds, 9 Utah L. Rev. 978 (1965). An uncompromisingly abolitionist view is expressed in Ireton, *supra* note 29, at 201-04. See also R. Heilman, *The Conflict of Laws and the Statute of Frauds* 105-06 (1961). Corbin, who throughout volume 2 of his treatise treats the Statute with contempt, despairs of its being repealed. 2 Corbin § 275. See also A. Corbin, *Frauds, Statute of*, in 6 *Encyclopedia of the Social Sciences* 429 (1948).

must balance the numerous advantages of contractual formalization with the primary function of the legal system—the doing of justice.²³³ At present the balance is struck by “technical and artificial rules to govern what should be a very simple matter.”²³⁴ The solution proposed here, that all contracts involving more than a specified minimum amount be brought within the purview of the Statute and that a requirement of clear and convincing evidence be substituted for the writing requirement, has the twin virtues of simplicity of formulation and ease of administration.

233. Professor Fuller has suggested that formal requirements be imposed for “relatively important transactions,” excepting those in “which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises.” Fuller, *supra* note 62, at 805 (emphasis deleted). The drafting of legislation with this suggested principle in mind would appear to require a degree of foresight which may be unattainable.

234. Hutton, *supra* note 59, at 302.