60 12/5/68

Memorandum 69-13

Subject: Study 60 - Representations as to Credit (Code of Civil Procedure Section 1974)

Attached to this memorandum are an initial draft of a tentative recommendation on this subject, a research study prepared by the staff, and an extract from the Commission's Annual Report for 1958. The extract (gold page) generally indicates the reason this topic was placed on the Commission's agenda.

The first effort that must be made in dealing with any provision of the Statute of Frauds is to attempt to discover the range of business or commercial practice that depends upon the particular requirement of a writing. The suggestion in the attached materials is that nothing in the way of routine practice turns upon Section 1974. Having in mind that the section presumably applies only to the tort of intentional deceit, one can understand that bankers, credit men, credit reporting agencies, and others would be reluctant to say that they have repeated and routinized need for the protection of the section.

If a requirement of writing has no routine application (i.e., a "channeling" effect), then one must look for, and attempt to analyze, the social policy behind the provision. As pointed out in the study, Section 1974 has a miscellaneous, almost unpredictable, "incidence." It seems impossible even roughly to characterize the section as either creditor-protection or debtor-protection legislation. Yet, one of the recognized (albeit illegitimate) uses of a Statute of Frauds is to disfavor certain causes of action. The illegitimacy, of course, is that the imposition of the requirement of a writing is a fatherless compromise between recognizing liability without a writing and precluding liability

altogether. This justification appears to be the only one that can be seriously urged in support of Section 1974 as that section has been interpreted by the Court of Appeal. In other words, it is possible for a person to have qualms about liability in connection with any representation as to the credit of a third person. These doubts probably run to the law of deceit and misrepresentation rather than to any evidentiary need for a writing, but the requirement of a writing at least operates as a crude deterent to claims that might be made.

The case against Section 1974 can be summarized thus:

1. Statutes similar to Section 1974 exist in only 15 states, England, and three or four commonwealth countries; the other states and jurisdictions--including the most important commercial states--appear to get along very well without the provision.

2. As interpreted by the Court of Appeal, Section 1974 has no counterpart in any other jurisdiction. In other words, if interpreted by the "plain meaning" rule, the section is an entirely original and novel statute. It may be acceptable legislation, but it is clearly the product of the courts rather than the Legislature.

3. The case law results under the section are uniformly unsatisfactory. Either the results are harsh (as when invoked to shelter flagrant fraud) or leave a gnawing uncertainty. For example, we may never know whether the section applies to negligent misrepresentations.

4. The particular mischief at which the section is directed--circumvention of the suretyship provision of the Statute of Frauds (Code of Civil Procedure Section 1624(2))--appears not to be a significant contemporary problem. Courts can distinguish between an unenforceable suretyship promise and an actionably fraudulent misrepresentation as to

credit. In any event, this problem (if it is one) should be dealt with by the courts in the disposition of their business, rather than by legislative formula.

5. It is not logically necessary to provide that, whenever a promise as to the undertaking of a third person must be in writing, any fraudulent representation as to the credit of that third person must also be in writing. A promise is a promise, a fraud is a fraud, and the difference is significant.

6. Section 1974 does not routinize, regularize, or authenticate any range of acceptable business or commercial practice. Insofar as there is a need to protect the maker of a casual, off-hand representation as to the credit of another person, that is a prime concern of the law of deceit and of negligent misrepresentation. The problem, if there is one, is not logically dealt with by the imposition of a requirement of writing.

7. Section 1974 was repealed as part of an omnibus revision of the Code of Civil Procedure in 1901, but this act was held void for unconstitutional defects in form.

There appear to be only four alternatives in dealing with Section 1974:

1. Let it stand. Here, the hope would be that judicial decisions eventually will make sense out of the section.

2. Repeal it, as proposed in this study and tentative recommendation.

3. Attempt a revision that would do nothing more than prevent circumvention of the suretyship provision of the Statute of Frauds. The resulting provision would be an addendum to Civil Code Section 1624(2) and would probably prove to be nothing more than an admonishment to courts to find facts more carefully. The only merit to this revision would be that it would exactly capture the purpose and application in other jurisdictions of Lord Tenterden's Act.

4. Revise Section 1974, as outlined in the "conclusion" of the research study, to keep the applications of the section within bounds, but still to bar actions of deceit in cases where, had the representation been a promise, a writing would be required by Civil Code Section 1624(2).

It would be very helpful in disposing of this topic if we could, at the January meeting, at least determine which of these alternatives seems most promising and what further efforts we might make to dispose of the topic.

Respectfully submitted,

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PRELIMINARY STAFF DRAFT

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

REPRESENTATIONS AS TO THE CREDIT OF THIRD PERSONS AND THE STATUTE OF FRAUDS

BACKGROUND

Section 1974 of the Code of Civil Procedure is a seemingly simple provision that bars liability upon an unwritten representation as to the credit of a third person. The section--first enacted as a part of the 1872 code and not significantly changed since[1]--states:

> No person is liable upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be held liable.

Although the particular reason for including Section 1974 in the code can no longer be determined, the section paraphrases a statute known as Lord Tenterden's Act, adopted in England in 1828.[2] That act

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1 Section 1974 was amended in 1967 in the bill that enacted the Evidence Code. Cal. Stats. 1967, Ch. 299, § 114, p. 1363. The amendment was not intended to make any substantive change in the law. See Law Revision Commission Comment to Section 1974, Recommendation Proposing an Evidence Code, 7 Cal. L. Revision Comm'n Reports 1, 345 (1965).

2 Section 6 of the Statute of Frauds Amendment Act of 1828, commonly known as Lord Tenterden's Act, provides as follows:

> No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such person or other person may obtain credit, money or goods upon [sic; thereupon (?) upon it (?)] unless such representation or assurance be made in writing, signed by the party to be charged therewith.

was adopted to prevent circumvention of the suretyship provision of the original Statute of Frauds which required a purely gratuitous promise to answer for the debt, default, or miscarriage of a third person to be in writing. After enactment of the Statute of Frauds, the common law courts came to recognize the tort of intentional deceit; a practice then arose of circumventing the suretyship provision of the Statute of Frauds by alleging, on behalf of the recipient of an unenforceable suretyship promise, that actionable misrepresentations had also been made as to the credit of the third person. The courts at that time were unable to exercise effective control over juries and liability was sometimes found on evidence consisting of little more than the making of the unenforceable suretyship promise. Lord Tenterden's Act thus was designed to prevent artful practitioners from converting unactionable suretyship promises into actionable misrepresentations.

Statutory provisions based on Lord Tenterden's Act are found in 15 states, although not in such important commercial states as New York, Pennsylvania, Ohio, and Illinois. In jurisdictions other than California, these statutes are given a very narrow construction and in many jurisdictions are interpreted to apply only in situations where, had the misrepresentation been a promise, the provision would have been unenforceable under the suretyship provision of the Statute of Frauds. The statutes do not, for example, apply to misrepresentations made by fiduciaries to their principals, nor to misrepresentations made in breach of a contractual or other duty to use care in providing credit information.

In California, however, Section 1974 has received a different and much more expansive application by the Court of Appeal. (The California Supreme Court has never considered the section.) The section has been applied even though the maker of the fraudulent representation receives a benefit or consideration which, had the misrepresentation been a promise, would have taken the case out of the suretyship provision. For example, in Beckjord v. Slusher,[3] defendant-lessee induced plaintiff-lessor to release him and substitute another lessee by making allegedly false representations as to the credit standing of the new lessee. The Court of Appeal held that Section 1974 barred relief. The result was that Section 1974 protected the defendant even though, by his fraudulent misrepresentations, he obtained a release from his continuing obligation to pay rent.[4]

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[3] 22 Cal. App.2d 559, 71 P.2d 820 (1937).

[4] See also Bank of America v. Western United Constructors, 110 Cal. App.2d 166, 242 P.2d 365, 32 A.L.R.2d 738 (1952)(A induced B to lend construction funds to C, fraudulently representing that he would control the funds and see that they were used to complete the project but intending instead that the funds be applied to discharge a debt owed by C to A. The funds were used to discharge C's debt to A and A successfully defeated B's action based on the fraud by invoking Section 1974).

Section 1974 has also been applied to protect a fiduciary who makes a fraudulent misrepresentation to his principal. Thus, where a real estate broker induces his principal to enter a transaction by making fraudulent representations as to the credit of another party to the transaction, any action against the broker is barred unless the misrepresentations are in writing.[5] Moreover, although there is no decision precisely in point, the section as interpreted by the Court of Appeal presumably would apply to misrepresentations made in breach of a contractual or other duty to use care in providing credit information.

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[5] Carr v. Tatum, 133 Cal. App. 274, 24 P.2d 195 (1933); Cutler v. Bowen, 10 Cal. App.2d 31, 51 P.2d 164 (1935).

RECOMMENDATION

The barring of at least some meritorious causes of action is an unavoidable consequence of any provision of the Statute of Frauds, i.e., any provision requiring a writing. Presumably this unfortunate result is more than offset by the benefits derived from the requirement. However, Section 1974 has caused not only generally unsatisfactory results but has produced no identifiable social benefits.

The particular mischief at which the section is directed--circumvention of the suretyship provision of the Statute of Frauds--appears not to be a significant contemporary problem. Whatever may have been the case in 18th century England, courts are now adept at dealing with actions for alleged fraud that are calculated to circumvent a requirement of the Statute of Frauds and can distinguish between an unenforceable suretyship promise and an actionable fraudulent misrepresentation as to credit.[6] In any event, it is not logically necessary or desirable to provide that, whenever a promise as to the undertaking of a third person must be in writing, any fraudulent representation as to the credit of that third person must also be in writing. A promise is a promise, a fraud is a fraud, and the difference is significant. Of course, one can argue that the very existence of the section has prevented many fraudulent and perjured assertions that

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6 California courts deal with the general problem of determining when an action for fraud or other tortious activity can be maintained notwithstanding the Statute of Frauds by closely analyzing the facts of the particular case and by applying equitable precepts that are calculated to maintain the policy of the Statute of Frauds without permitting it to be misused as a shelter for actual fraud. See 1 Witkin, Summary of California Law Contracts §§ 111-114 at 119-124 (1960).

misrepresentations as to credit have been made. The difficulty with this argument is the lack of any evidence to support it. Because the application of the section has been so uncertain, it is reasonable to suppose that counsel and their clients have not been deterred--and will not be deterred--from bringing any action merely because it might fall within the section. Although the proposition cannot be demonstrated, one can reasonably assume that Section 1974 has led to more litigation than it has prevented and has sheltered more fraud than it has suppressed.

Section 1974 does not routinize, regularize, or authenticate any range of acceptable business or commercial practice. The decisions under the section have exonerated such miscellaneous persons as bankers, real estate brokers, subcontractors, lessees, and fathers of aspiring young businessmen. Insofar as there is a need to protect the maker of a casual, off-hand representation as to the credit of another person, that is a prime concern of the law of deceit and of negligent misrepresentation. The requirements for a successful action of deceit on a misrepresentation as to the credit of another person are not easily met, with or without a writing. The plaintiff must affirmatively prove the misrepresentation of fact, the defendant's knowledge of the falsity, the defendant's intention to defraud, the plaintiff's justifiable reliance, and the resulting damage.[7] The requirements for a successful action for negligent misrepresentation are even more difficult to satisfy. For example, liability for negligent misrepresentation is

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[7] See 2 Witkin, Summary of California Law Torts §§ 186-207 at 1371-1392 (1960).

imposed only on one who supplies information for business purposes in the course of a business or profession.[8] Moreover, it is unlikely that the section was ever intended to apply to negligent, as distinguished from fraudulent, misrepresentations.[9] It should be noted that repeal of Section 1974 would make no change in existing law other than eliminating the requirement of a writing. No change would be made with respect to the substantive question of liability, whether that liability allegedly is based upon fraud and deceit, negligence, or the breach of a contractual, fiduciary, or other duty.

There is no provision comparable to Section 1974 in most common law jurisdictions and its absence has not been missed. Section 1974 was repealed as a part of the omnibus revision of the Code of Civil Procedure in 1901[10] but the 1901 act was held void for unconstitutional defects in form.[11] For the reasons set forth above, the Commission recommends that this section be repealed.

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8 See 2 Witkin, Summary of California Law Torts §§ 207-209 at 1392-1398 (1960).

9 See Taylor, The Statute of Frauds and Misrepresentations as to the Credit of Third Persons--Should California Repeal Its Lord Tenterden's Act? [citation].

10 Cal. Stats. 1901, Ch. 102, p. 117.

11 Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901).

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to repeal Section 1974 of the Code of Civil Procedure, relating to representations as to the credit of third persons.

The people of the State of California do enact as follows:

Section 1. Section 1974 of the Code of Civil Procedure is repealed.

~~1974.--No person is liable upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be held liable.~~

Comment. Section 1974 formerly precluded liability "upon a representation as to the credit of a third person" unless the representation was in writing. For the history and applications of the repealed section, see Taylor, The Statute of Frauds and Misrepresentations as to the Credit of Third Persons--Should California Repeal Its Lord Tenterden's Act? [citation].

Section 1974 and similar statutes in a few other common law jurisdictions were derived from Lord Tenterden's Act (9 Geo. 4, c. 14). That act was adopted in England in 1828 to bulwark the provision of the Statute of Frauds (29 Car. 2, c. 3) which required a suretyship promise--a promise "to answere for the debt default or miscarriages of another person"--to be in writing. The act was intended to bar an action in those cases in

which the recipient of an unwritten, and therefore unenforceable, suretyship promise otherwise might avoid the requirement of a writing by pleading an unwritten misrepresentation as to the credit of the debtor. The repeal of Section 1974 permits the maintenance of an action based on an unwritten misrepresentation as to the credit of the debtor but has no effect on the suretyship provision of the Statute of Frauds (Civil Code Sections 1624(2) and 2794).

The repeal of Section 1974 makes significant the distinction between an unwritten misrepresentation as to the credit of a third person (action not barred by the Statute of Frauds) and an unwritten suretyship promise (action barred by subdivision (2) of Civil Code Section 1624 unless otherwise provided in Civil Code Section 2794 or by decisional law). California courts deal with the general problem of determining when an action for fraud or other tortious activity can be maintained notwithstanding the Statute of Frauds by closely analyzing the facts of the particular case and by applying equitable precepts that are calculated to maintain the policy of the Statute of Frauds without permitting it to be misused as a shelter for actual fraud. See 1 Witkin, Summary of California Law, Contracts §§ 111-114 at 119-124 (1960). The repeal of Section 1974 permits the same process to be used to prevent circumvention of subdivision (2) of Civil Code Section 1624 by the making of unfounded allegations that oral misrepresentations were made as to the credit of the debtor.

The effect of Section 1974 was limited to imposing the requirement of a writing; it had no other bearing upon the rules of law that determine the liability, if any, incurred by the making of a misrepresentation as to the credit of another person. Accordingly, apart from eliminating

the requirement of a writing, repeal of the section does not affect such rules. See 2 Witkin, Summary of California Law, Torts §§ 186-209 at 1371-1398 (1960).

Topic No. 3: A study to determine whether Section 1974 of the Code of Civil Procedure should be repealed or revised.

Section 1974 of the Code of Civil Procedure, enacted in 1872, provides that no evidence is admissible to charge a person upon a representation as to the credit of a third person unless the representation, or some memorandum thereof, be in writing and either subscribed by or in the handwriting of the party to be charged. Section 1974 is open to the criticism commonly leveled at statutes of frauds, that they shelter more frauds than they prevent. This result has been avoided by the courts to a considerable extent with respect to the original Statute of Frauds by liberal construction of the Statute and by creating numerous exceptions to it.[63] However, Section 1974 has been applied strictly in California. For example, in *Baron* v. *Lange*[64] an action in deceit failed for want of a memorandum against a father who had deliberately misrepresented that his son was the beneficiary of a large trust and that part of the principal would be paid to him, thus inducing the plaintiff to transfer a one-third interest in his business on the son's note.

Only a few states have statutes similar to Section 1974.[65] The courts of some of these states have been more restrictive in applying the statute than has California. Thus, some courts have held or said that the statute does not apply to misrepresentations made with intention to defraud [66] but fraudulent intent will not avoid Section 1974.[67] Again, some states hold the statute inapplicable when the defendant had an interest in the action induced,[68] but this interpretation was rejected in *Bank of America* v. *Western Constructors, Inc.*[69] And in *Carr* v. *Tatum*[70] the California court failed to apply two limitations to Section 1974 which have been applied to similar statutes elsewhere: (1) construing a particular statement to be a misrepresentation concerning the value of property rather than one as to the credit of a third person;[71] (2) refusing to apply the statute where there is a confidential relationship imposing a duty of disclosure on the defendant.[72] Indeed, the only reported case in which Section 1974 has been held inapplicable was one where the defendant had made the representation about a corporation which was his alter ego, the court holding that the representation was not one concerning a third person.[73]

Section 1974 was repealed as a part of an omnibus revision of the Code of Civil Procedure in 1901 [74] but this act was held void for unconstitutional defects in form.[75]

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[63] See e.g., Wills, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L. J. 427, 528 (1928); 2 CORBIN, CONTRACTS, *passim* (1950).

[64] 92 Cal.App.2d 718, 207 P.2d 611 (1949).

[65] 5 WILLISTON, CONTRACTS §1520A, p. 4267 (rev. ed. 1937); *Credit—Representations—Writing*, 32 A.L.R.2d 743, 744 n. 3 (1953).

[66] See e.g., Clark v. Dunham Lumber Co., 86 Ala. 226, 5 So. 560 (1889); W. G. Jenkins & Co. v. Standrod, 46 Idaho 614, 269 Pac. 586 (1928) (dictum); *cf.* Bank of Commerce & Trust Co. v. Schooner, 263 Mass. 199, 160 N.E. 790 (1928).

[67] Beckford v. Slusher, 22 Cal. App.2d 559, 567, 71 P.2d 820, 824 (1937); Carr v. Tatum, 133 Cal. App. 274, 24 P.2d 195 (1933); *cf.* Cutler v. Bowen, 10 Cal. App.2d 21, 51 P.2d 164 (1935). *Accord:* Cook v. Churchman, 104 Ind. 141, 3 N.E. 759 (1885); Knight v. Rawlings, 205 Mo. 412, 104 S.W. 38 (1907).

[68] See e.g., Dinsmore v. Jacobsen, 242 Mich. 192, 218 N.W. 700 (1928).

[69] 110 Cal. App.2d 106, 242 P.2d 365 (1952).

[70] 133 Cal. App. 274, 24 P.2d 195 (1933).

[71] Walker v. Russell, 186 Mass. 59, 71 N.E. 86 (1904) (representation as to the financial credit of a corporation, made to induce the purchase of shares in the corporation, held to be a representation of fact bearing upon value of the shares and thus not within the statute).

[72] See e.g., W. G. Jenkins & Co. v. Standrod, 46 Idaho 614, 269 Pac. 586 (1928) (misrepresentation made in violation of fiduciary relationship held not within statute).

[73] Grant v. United States Electronics Corp., 125 Cal. App.2d 193, 270 P.2d 64 (1954).

[74] Cal. Stat. 1901, c. 102, p. 117.

[75] Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901).

#60 12/5/68

THE STATUTE OF FRAUDS AND MISREPRESENTATIONS AS TO THE CREDIT OF THIRD PERSONS--SHOULD CALIFORNIA REPEAL ITS LORD TENTERDEN'S ACT?

by

Clarence B. Taylor*

#60 12/5/68

THE STATUTE OF FRAUDS AND MISREPRESENTATIONS AS TO THE CREDIT OF THIRD PERSONS--SHOULD CALIFORNIA REPEAL ITS LORD TENTERDEN'S ACT?

Introduction

The California Legislature has directed the Law Revision Commission to undertake a study to determine whether Section 1974 of the Code of Civil Procedure should be repealed or revised.[1] Section 1974 is derived from Lord Tenterden's Act[2] which was enacted in England in 1828 to bulwark the suretyship provision of the Statute of Frauds. The California variation reads as follows:

> No person is liable upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be held liable.

One venturing upon Section 1974 for the first time might suppose the section to be an unremarkable provision of the Statute of Frauds meaning approximately what its words imply, imposing merely a requirement of form (i.e., writing) upon representations as to credit, and, therefore, being of most interest to persons in the business world who have repeated occasion to make "representations" as to the credit of other persons. This is not the case, however. The section is one of the most unusual provisions of the Statute of Frauds. It is not susceptible to literal interpretation and is limited in intended effect to a rather technical application in connection with the tort of deceit and the suretyship provision of the Statute of Frauds.

The Legislature's interest in having Section 1974 reviewed appears to stem from the incongruous and harsh results reached in several decisions of the Court of Appeals. (Interestingly, the section has never been considered by the California Supreme Court.) It must be

borne in mind, however, that a case for repeal or revision of a provision of the Statute of Frauds is not made by pointing to instances in which meritorious causes of action have been barred. This unfortunate result is simply the "price" paid for the supposed benefits of the statute. Presumably this benefit is "the prevention of frauds and perjuries" (to paraphrase the title of the original Statute of Frauds[3]) that would have been perpetrated or committed but for the statute.

This article concludes that Section 1974 should be repealed or--as a much less desirable alternative--be amended to limit its application to those cases originally intended to be covered by Lord Tenterden's Act. To support this conclusion, the historical origins of the section are traced in detail and its judicial applications are analyzed in light of its intended effect. However, a studied effort is made to set forth whatever considerations can be arrayed in support of the section.

The conclusion that Section 1974 should be repealed is not based, as it might be, upon any general criticism of the Statute of Frauds. Although that statute has been variously damned and praised for three centuries, a clear answer has never appeared to the basic question whether the statute prevents more fraud than it shelters. Currently, the statute seems to be at its lowest ebb of favor. As the California Supreme Court recently stated in support of its view that the statute is to be narrowly construed, "The commentators almost unanimously urge that considerations of policy indicate a restricted application of the statute of frauds, if not its total abolition."[4] Section 1974, of course, is susceptible to most, if not all, of the general criticisms that have been leveled at the Statute of Frauds. This article, however,

does not undertake to state or analyze many of these general criticisms. Rather, the view taken is that the need for repeal or revision of Section 1974 can be demonstrated by considerations limited to the section itself.

The English Background

Lord Tenterden's Act (and, by indirection, Section 1974 of the Code of Civil Procedure) derives from a conflict between two lines of legal development in late 18th Century England.[4a] Section 4 of the original Statute of Frauds (enacted in 1677) required a writing "to charge the defendant upon any speciall promise to answere for the debt default or miscarriages of another person." This provision of the statute spread throughout the common law world. It is paraphrased in subdivision (2) of Section 1624 of the Civil Code, with several of the many recognized exceptions being stated in Civil Code Section 2794. This "suretyship" clause proved, almost from the beginning, to be one of the most difficult provisions of the statute to apply. It also gave rise to the most elaborate efforts to rationalize the application of the Statute of Frauds to particular classes of promises. In general, the reason most frequently advanced for requiring a surety's promise to be in writing is the presumably one-sided and disinterested quality of the promise. In any event, it was settled very early that a purely gratuitous promise to answer for the debt of another cannot be enforced unless it is in writing.

Before it had progressed very far in legal history, the suretyship provision of the Statute of Frauds seemingly came into conflict with a landmark development in the law of torts. Early English law recognized misrepresentation and referred to it as "deceit." However, all of the common law cases down to Pasley v. Freeman,[5] decided in 1789, involved breaches of contract or misrepresentations that induced the plaintiff to contract with the defendant. In Pasley v. Freeman, the defendant represented to the plaintiff that a third person's credit was good although he knew the contrary to be the fact. The plaintiff contracted

with the third person on the faith of that representation and suffered loss as a consequence. Although the action was clearly novel, the plaintiff prevailed, and the court established the principle that "an action on the case in the nature of deceit" would lie in such a situation.[6] The decision thus broke away from the restricted notion of deceit as an inducement to contract and established a new branch of tort liability.

The misrepresentation in Pasley v. Freeman, however, was oral; and the judges who disapproved of the result could not understand how the defendant could have been held liable in that particular case, for, if he had been prepared to go further and guarantee the third person's credit, no action could have been maintained against him for lack of a writing to comply with Section 4 of the Statute of Frauds. This point was mentioned in a few decisions following Pasley v. Freeman, but the majority of the English judges uniformly took the view that the tort and contract rules were distinct and that the decision was correct notwithstanding the suretyship provision of the Statute of Frauds.[7]

On reflection one can persuade himself that there is no inconsistency in holding liable the maker of a fraudulent, but unwritten, "representation" as to credit while excusing the maker of an innocent, but unwritten, suretyship promise. The problem that arose following Pasley v. Freeman did not have to do with the law of deceit or misrepresentations as to credit, but rather with circumvention of the suretyship provision of the Statute of Frauds. That problem is described in a recent English decision[8] as follows:

> Because § 4 of the Statute of Frauds (1677) made a promise to answer for a debt, default or miscarriage of another unenforceable unless in writing, a custom grew up in the profession of alleging a fraudulent representation as to credit in order to circumvent the statute.

> Apparently juries, displaying their traditional anxiety to find verdicts in favour of plaintiffs, were easily induced to find fraud where no actual fraud existed. To put an end to this practice, LORD TENTERDEN introduced the bill containing this section, and it was passed by Parliament. . . . [T]he House of Lords, taking the view that the section was ambiguous, interpreted it narrowly, according to the presumed intention of Parliament to overcome a particular grievance; so they held that it applied only to fraudulent representation.

Lord Tenterden's Act[9] dealt with this "particular grievance" as follows:

> No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such person or other person may obtain credit, money or goods upon [sic; thereupon (?) upon it (?)] unless such representation or assurance be made in writing, signed by the party to be charged therewith.

Although the purpose of Lord Tenterden's Act was limited to preventing circumvention of the suretyship provision, its intended effect was broader. To prevent artful pleaders from converting unactionable suretyship promises into actionable misrepresentations, the Parliament was willing to bar an action for intentional deceit in a situation where--had the defendant's conduct been promissory rather than "representational"--the action would have been barred by the suretyship clause. The English and commonwealth courts have never mistaken the origin or purpose of Lord Tenterden's Act. They have limited application of the act to fraudulent misrepresentation rather than giving the act the broad application that would be required if its language were literally interpreted.

As one might suppose, the act has had a very sparse application. In fact, it has given rise to only one reported decision in England in the last half-century.[10] There are at least three reasons for this. First, factual situations involving representations as to third parties seem to arise very infrequently. As a contemporary English lawyer has remarked,

"Although Pasley v. Freeman broke away from the restricted notion of deceit as an inducement to contract, misrepresentations have remained, down to the present day, the subject of complaint in very few cases other than where they induce the person to whom they are made to enter into a contract with the maker of the statement."[11] Second, the requirements of a successful action of deceit on a misrepresentation as to the credit of another person are not easily met, with or without a writing. The plaintiff must affirmatively prove the misrepresentation of fact, the defendant's knowledge of falsity (scienter), the defendant's intention to defraud, the plaintiff's justifiable reliance, and the resulting damage.[12] Third, and most important, the English courts uniformly have taken the view that Lord Tenterden's Act applies only to actions of deceit and only in factual situations similar to Pasley v. Freeman. In other words, the act does not apply to the liability, if any, for negligent misrepresentation as to credit or for misinformation given in breach of a contractual, fiduciary, or other duty.[13]

After Pasley v. Freeman, common law courts (both British and American) turned to the question whether there might not also be liability for misrepresentations made without "scienter" but made in breach of a duty to use care. It is not necessary to trace the development of this lively and controversial subject.[14] Suffice it to say that (in connection with misinformation as to the credit of third persons) this basis of liability is surely of much greater factual importance than the tort of intentional deceit, and that it is unaffected by Lord Tenterden's Act. The only recent English decision dealing with the act is a reexamination of this inconsistency. The opinion[15] discusses it thus:

It is argued with force before me by counsel for the defendants that all that the House of Lords can really be considered to have decided in Banbury v. Bank of Montreal[16] is that Lord Tenterden's Act did not apply to a representation made in breach of contractual duty of care. Now, before 1828 it had been realised that an action might be found in tort for negligence by making a representation as to credit. The pleaders of the day would no doubt have framed their statements of claim in negligence with a still greater confidence in being able to persuade juries to make a finding of negligence and so defeat the Statute of Frauds and LORD TENTERDEN would have included this inclination among the mischiefs to be suppressed. Further, it is contended for the defendants that to hold that a fraudulent oral misrepresentation is not actionable in tort, while a negligent oral misrepresentation is so actionable, is an absurdity. What possible sense can there be in making the author of a representation liable in negligence, but relieving him if he can establish that he perpetrated a fraud?

As against this, it is said for the plaintiffs that to distinguish for the purposes of the Act of 1828 between tortious and contractual negligence is a still greater absurdity, and passages in the speeches in Banbury's case are relied on as showing that the Act of 1828 applies to actions for fraudulent representation only and not to actions for breach of any duty of care. . . .

* * * * *

It appears to me that the effect of these citations as a whole is this. An action for fraudulent misrepresentation as to credit is an action on the representation and is barred by Lord Tenterden's Act unless in writing. An action in respect of a negligent misrepresentation is not an action on the representation and is an action for breach of a duty of care. This reasoning is not based on deriving a duty of care from a contract. LORD FINLAY speaks of

"any contractual or other duty". LORD PARKER says that the Act of 1828 does not apply to a "duty to take care". LORD WRENBURY says that negligence is the cause of action. The conclusion is that an action for breach of a duty of care in making a representation is not barred by the Act of 1828.

Thus, in its homeland, Lord Tenterden's Act is treated almost as though it were a principle of adjective law--as though it were directed to the function of pleaders, courts, and juries--rather than to affairs of the market place.

Adoption of the Act in California and Other States

By the time of the American Revolution, the working elements of the Statute of Frauds already had been reduced to Sections 4 and 17 of the original statute.[17] Even these provisions had been eroded by judicial decisions until the exceptions, qualifications, and limitations were more numerous than the applications.[18] Nonetheless, statutes denying legal consequences to various transactions in the absence of a writing were enacted throughout the common law world. Apparently, statutes incorporating at least Sections 4 and 17 of the original statute were adopted in all states except those few in which judicial decisions held that those sections had been "received" as a part of the common law.[19]

The section of Lord Tenterden's Act relating to representations as to credit did not fare nearly as well. Massachusetts adopted the provision in 1834,[20] but that direct import spread only to Maine.[21] Eventually, however, the provision came to be adopted in 15 states,[22] but notably not in such commercial states as New York, Pennsylvania, Ohio, or Illinois. Of the 15 states, three are accounted for by Idaho, Montana, and Utah which copied Section 1974 of the California Code of Civil Procedure.

The reasons for adopting Section 1974 and including it in the chapter of the Code of Civil Procedure relating to "indispensable evidence" are obscure.[23] California first adopted a Statute of Frauds in 1850. Interestingly, this statute, which preceded the 1872 Code of Civil Procedure, contained one section of the Statute of Frauds Amendment Act of 1828--the familiar provision requiring a written acknowledgment or promise to take a case out of the Statute of Limitations.[24] However, prior to

1872, the California statutes contained nothing similar to Lord Tenterden's provision on representations as to credit. Also, New York legislation which served as a model for the 1872 California codes never included such a provision. Thus, inclusion of Section 1974 apparently was an original notion of the code commissioners. In any event, there is no reason to suppose that the section was intended to have any meaning other than that of its English predecessor.

As enacted in 1872, Section 1974 read as follows:

> 1974. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged.

The section has been amended only once: In 1965, in connection with enactment of the Evidence Code, the Legislature amended Section 1974 to substitute, at the beginning of the section, the words "No person is liable" for "No evidence is admissible to charge a person," and at the end of the section the words "held liable" for "charged." The amendment was not intended to make any significant change, but only to make it clear that the section "is a substantive rule of law, not a rule of evidence."[25] A recent decision, however, indicates that problems can arise from characterizing Section 1974 as a rule of "substantive law." In Bank of America v. Hutchinson,[26] a banker allegedly imposed upon one depositor by inducing him to lend his deposit and an additional amount borrowed from the bank to another, financially distressed, depositor. The case was tried on the supposition that the Statute of Frauds had no application. At the end of the trial, the court inquired whether Section 1974 should be treated as a matter of evidence (and therefore as having been waived) or as a matter of substantive law (and therefore to be considered by the court). Two weeks after the case was tried, the defendant

bank moved to strike all evidence relating to the oral representations as to the credit of the other depositor. The trial court gave judgment for the plaintiff depositor and the Court of Appeals disposed of the matter by ruling that the trial court's denial of the belated motion to strike was not an abuse of discretion.

There is no single answer to the question whether Section 1974 or any other provision of the Statute of Frauds operates upon the plane of substantive law, of procedure, or of evidence. The English phrasing (in the Statute of Frauds, Lord Tenterden's Act, and, incidentally, the Statute of Limitations) is "no action shall be brought," and there is no exact synonym for that expression. Professor Corbin, for example, lists 10 respects in which an unwritten transaction is valid, operative, or effective notwithstanding the bar of the Statute of Frauds.[27] And, of course, the general question whether the Statute of Frauds is "substantive" or "procedural" has been debated without end and without answer.[28]

Even if nothing else is done with Section 1974, it should be placed in direct connection with the Statute of Frauds (Civil Code Section 1624) so that it will be clear that the section is merely a provision of the Statute of Frauds and is subject to the judicial learning respecting the substantive, procedural, and evidentiary effects of that statute. This would at least clarify such questions as the manner in which the bar of the provision is to be invoked by the defendant.

The Judicial Decisions

In other states, the pattern of litigation under Lord Tenterden's Act consists of a few early decisions and no notable recent developments.[29] In California, the converse is the case as no appellate decision arose between 1872 and 1933, and several cases have come before the courts in recent years. Because there are only eight pertinent California decisions, they are discussed in chronological order. References to decisions from other jurisdictions are interspersed at appropriate points.

The California courts first considered Section 1974 in Carr v. Tatum,[30] decided in 1933. The case was a simple one in which the plaintiff, a vendor of land, alleged that he had been defrauded by the defendant, his own real estate broker. The broker allegedly had induced the plaintiff to accept a third purchase-money deed of trust as a portion of the purchase price by making intentionally false oral representations as to the financial responsibility of the buyer. The appellate court affirmed the sustaining of a demurrer to the complaint and expressed two views with respect to Section 1974 that apparently still prevail. First, the court held that the section applies notwithstanding "actual fraud" (i.e., a calculated intent to deceive) on the part of the defendant. Second, the court held that the section applies notwithstanding the existence of a fiduciary relationship between the plaintiff and the defendant. If history is the gauge, the court was entirely correct as to the first point[31] and entirely wrong as to the second.

The plaintiff in Carr v. Tatum relied upon those anomalous decisions from other states which hold that Lord Tenterden's Act does not apply to representations made with an actual intention to deceive. Oddly, such decisions obtain in about half of the states that adopted the Act.[32]

The anomaly, of course, is that the Act was intended to apply only to deceitful representations. Some of these decisions can be explained as refusals to apply the Act where the defendant derives a benefit to himself (an "exception" discussed hereinafter). Others seem to hold that an oral misrepresentation as to credit may be shown--the Act notwithstanding--to prove a scheme or conspiracy to defraud the plaintiff. Still others are merely cogent examples of the general and traditional reluctance of courts to permit any provision of the Statute of Frauds to be used as a cover for "actual fraud." Significantly, none of the decisions appear to involve an effort to distinguish between intentional fraud and negligent misrepresentation and to apply the Act only to the latter.

As applied in Carr v. Tatum, Section 1974 is the only provision of the California Statute of Frauds that applies to tort actions. In addition, California's appellate courts have gone about as far as courts can go in recognizing and effectuating a "fraud exception" to the more orthodox provisions of the Statute of Frauds.[33] In other words, with two minor exceptions mentioned in the note, allegation and proof of "actual fraud" will take the case out of any provision of the statute except Section 1974.[34] Nonetheless, Carr v. Tatum was clearly correct in refusing to apply the "fraud exception" to Section 1974. To have done so would have been equivalent to repealing the section, and that should be left to the Legislature.

The second conclusion reached in Carr v. Tatum--that Section 1974 applies to misrepresentations by fiduciaries to their principals--seems indefensible. Apparently, the court is the only one ever to reach that result under any variation of Lord Tenterden's Act.[35] The court

did not consider the question separately, but rather regarded it as foreclosed by decisions from other states which correctly hold that Lord Tenterden's Act applies notwithstanding an actual intention to defraud. Oddly, the decision principally relied upon by the court plainly pointed out that the parties in that case (family friends) did not bear a "confidential relationship" "within the meaning of the law."[36]

In general, the Statute of Frauds may not be invoked by persons in a fiduciary relationship to exclude unwritten evidence of the relationship[37] or of any right or duty that arises from it.[38] This generic exception to the Statute of Frauds is not merely a casual or historic one; rather, it is based on the courts' adamant view that the statute simply is not worth the candle insofar as it might apply to denials or breaches of fiduciary relationships.[39]

The court did observe in Carr v. Tatum that the language of Section 1974 contains no exceptions and seemingly applies to any person.[40] This "plain meaning" approach, however, is at odds with the court's own historical derivation of the section and with the fact that very few of the many "exceptions" to the Statute of Frauds are based on statutory language.[41] Moreover, this approach grossly "over applies" Lord Tenterden's Act by overlooking the very limited and precise purpose of that Act and applying it to situations upon which it could never have had any bearing.[42] This last consideration has led courts in other jurisdictions to refuse application to the Act not only in the case of fiduciaries,[43] but also in cases involving only confidential or contractual relationships such as banker and depositor.[44]

Section 1974 was next considered in Cutler v. Bowen[45] in 1935. That case and the decision are the same as Carr v. Tatum, except that the defendant-real estate broker had arranged an exchange, rather than a sale, and had induced his principal, the plaintiff, to accept a third deed of trust as part of the consideration received in the exchange. The opinion relies entirely upon Carr v. Tatum and makes only the additional observation that Section 1974 "requires no interpretation."

In 1937, in Beckjord v. Slusher,[46] the court dealt with a simple case in which the defendant (a lessee) induced the plaintiff (his lessor) to release the defendant and substitute another lessee by making allegedly false representations as to the credit standing of the new lessee. The appellate court held that Section 1974 barred relief without considering one of the most difficult questions that has arisen in applying Lord Tenterden's Act. As Professor Williston notes, courts in jurisdictions other than California generally deny the applicability of the Act where the party making the misrepresentation derives a benefit from the transaction it induces.[47] This interpretation can be readily understood if one recalls that the Act was adopted to preclude allegations of unwritten fraudulent representations where the suretyship provision of the Statute of Frauds requires a promise to be in writing. The suretyship provision (in California, Civil Code Section 1624(2)) is subject to explicit exceptions in various situations where a "consideration" (in the technical contract sense) flows to the surety. Specifically, Civil Code Section 2794 dispenses with the need for a writing where the surety has received "a discharge from an obligation in whole or in part" (subdivision (1)) or "a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person" (subdivision (4)).

Thus, if Beckjord v. Slusher had involved contract principles, rather than allegedly fraudulent representations, there would have been no need for a writing. The defendant (original lessee) received a direct consideration by obtaining his release from the continuing obligation to pay rent notwithstanding assignment of the leasehold to another party. The case seems to demonstrate the wisdom of construing Lord Tenterden's Act (or Section 1974) to be subject to the same exceptions that exist under the suretyship provision of the Statute of Frauds. Although the alleged misrepresentation was as to the credit of the new tenant, the consequence of the misrepresentation desired by the defendant was his release from the obligation to pay rent. Therefore, the loss allegedly suffered by the plaintiff stemmed as much from that release as from the new tenant's failure to make the rental payments. In short, the case was one of direct dealing between obligor and obligee (or, allegedly, between defrauder and defrauded) and should have been unaffected by Section 1974.

In Baron v. Lange,[48] decided in 1949, the defendant induced the plaintiff to sell the defendant's son an interest in a business for $20,000 on credit. The defendant allegedly represented that his son was the beneficiary of a $500,000 trust and that the trustees, including the defendant, would shortly distribute $180,000 in accumulated income to the son. The deal was closed, the son's note was dishonored, and the plaintiff was surprised to learn that there was no such trust. On demurrer, Section 1974 was held to be a complete bar to any relief against the defendant-father. Had the case been tried, it might well have raised interesting questions as to the "justifiable reliance" of the plaintiff,[49] a necessary element in any action for deceit. The appellate court,

however, merely held that all of the alleged representations were "as to the credit" of the son and laid down this governing rule:[50]

> Where the primary purpose in making the representation is to procure credit for another, the representation comes within the purview of the statute, even though in making it the person also makes false representations concerning himself or derives an incidental benefit therefrom.

The decision raises the sometimes vexed question of what sort of misrepresentations are "as to the credit of a third person." Perhaps, the court was correct in not limiting the section to abstract representations as to the general capacity or propensity of the third person to repay. But it is interesting to note (as a phenomenon of statutory construction) that the cryptic expression "as to credit" in Section 1974 is given at least as expansive a meaning as the rambling wording of the original English Act.

Section 1974 received its most debatable application in Bank of America v. Western United Constructors, decided in 1952.[51] Professor Corbin describes the decision as "a drastic application of the statute so as to protect a defrauder."[52] However, the case was resolved against the plaintiff on the pleadings and the alleged facts are not set forth very clearly in the appellate opinion. It appears, however, that the plaintiff[53] was a construction lender, and that its loss allegedly resulted from a diversion of the construction funds. The defendants appear to have been persons interested in the project, perhaps materialmen and subcontractors, and the misrepresentation alleged was that the construction funds would be used to complete the project and further that the defendants would see to it that the funds advanced would be applied to the project. Allegedly, the defendants never intended that the funds would be used for the purposes represented but intended that they would be used to discharge antecedent

debts to themselves from the contractor-debtor. In holding that no recovery was possible in the absence of a writing, the appellate court noted and rejected decisions from other states which hold that Lord Tenterden's Act is not applicable where the party making the misrepresentation derives a benefit from the transaction induced. The court also stated that:[54]

> A test, if not the sole test, for determining whether a misrepresentation is within the statute, is whether the representation induced the recipient thereof to enter into a transaction which resulted in a debt due to him from the third person. If so, then any benefit that accrued thereby to the person making the fraudulent representation is a false quantity--evidence of which is barred by the statute.

In other words, so long as the person defrauded becomes an obligee to the third person (however empty or unenforceable the obligation may be), the case is within Section 1974. The court also considered this test to encompass any promise or representation by the defendants that they would control the construction funds so as to prevent their diversion.

The problem in Bank of America v. Western United Constructors is more subtle than the court supposed it to be. As mentioned in connection with Beckjord v. Slusher, the problem is whether the section is to be applied by analogy to the suretyship provision of the Statute of Frauds. All courts agree that,if the promisor receives any "direct" benefit or consideration in connection with his suretyship promise, the promise is not within the Statute of Frauds. Most courts, including those of California, go considerably farther and hold that, if the "main purpose" of the promisor is anything other than to obtain credit for the third party, the promise is taken out of the statute.[55] The Restatement of Contracts, for example, would exclude any suretyship promise where the transaction induced by the promise is desired by the promisor "for his own pecuniary or business

advantage, rather than in order to benefit the third person."[56] Perhaps the clearest application of the "main purpose" rule is to prevent A from inducing B to extend credit to C, taking the funds from C (because of an antecedent debt from C to A or otherwise), and then asserting the Statute of Frauds. This, however, was exactly the result allegedly accomplished by the defendants in Bank of America v. Western United Constructors. To summarize, it is clear that, if the "representations" and "promissory representations" in that case had been mere promises, the Statute of Frauds would have had no bearing.[57] The "test" used by the court not only applies Section 1974 with a vengeance; it completely severs Lord Tenterden's Act from its long-standing relationship to the suretyship provision of the Statute of Frauds.

After its decision in Bank of America v. Western United Constructors, the Court of Appeals seems to have lost its enthusiasm for Section 1974. In Grant v. United States Electronics Corp.,[58] decided in 1954, the court held, on good authority, that the "third person" in Section 1974 may be a corporation in which the defendant is interested. But in the particular case, the corporation was determined to be the mere "alter ego" of the defendant. In "piercing the corporate veil" the decision is unremarkable, but the language of the court may be significant. The court seems to have said that the case was taken out of Section 1974 because the representations were not made to obtain credit for "another" but "to advance the defendant's own interests." Pressing that rationale would overrule Bank of America v. Western United Constructors and eventually bring Section 1974 into line with the "main purpose rule" under the suretyship provision of the Statute of Frauds.

In Bank of America v. Hutchinson,[59] decided in 1963 and discussed heretofore,[60] the appellate court held that the trial court did not abuse its discretion in denying the defendant's belated motion to strike evidence of oral misrepresentations as to a third person's credit. Had the case been resolved on its merits, the decision might have answered several questions that still persist as to the application of Section 1974. Because the banker's alleged misrepresentations caused the plaintiff-depositor to withdraw his deposit and take a loan from the bank (in order to lend the money to another depositor), the decision might have decided whether the "main purpose" rule has any bearing upon the application of Section 1974. The decision might also have resolved the question whether a banker-depositor relationship or a financial adviser-client relationship takes the case out of Section 1974.

In Southern Cal. Thrift & Loan v. Sylvania Elec. Products, Inc.,[61] decided in 1967, the plaintiff was an accounts receivable financier and the defendant was a manufacturer. The defendant's distributor was known to be in financial difficulty and the plaintiff had refused to make any further advances to the distributor from the accounts receivable fund. To induce the plaintiff to release funds to the distributor, the defendant allegedly promised or represented that it would continue to supply the distributor with products for a reasonable period. Apparently, the defendant had second thoughts about continuing to supply the distributor and the plaintiff allegedly lost its advances as a result. The appellate court disposed of the case on the eminently simple ground that the promise or representation was not "as to the credit of a third person" but rather was related to the future activity of the defendant itself.

The result runs counter to the earlier California decisions, but would appear to be beyond criticism. The only disturbing feature of the

decision is that the court seemed willing to assume that Section 1974 applies, at least in certain situations, to promises as well as to misrepresentations. Section 1974 was intended to bar actions on alleged misrepresentations in cases where a promise would not be enforceable under the Statute of Frauds. But it is incorrect to reverse the proposition and maintain that a promise enforceable under the Statute of Frauds is not actionable because, had it been a misrepresentation, it would have been barred by Section 1974. In short, the enforceability of promises is to be gauged by direct application of other provisions of the Statute of Frauds. There is no need to consider Section 1974 in connection with them.

Discussion

It is certain that Lord Tenterden would no longer recognize Section 1974--as applied in California--as his handiwork. It also seems clear that the section needlessly bars some meritorious causes of action and raises difficult questions as to its applicability in most cases in which it is invoked. But these considerations alone do not dictate repeal or revision of the section. The Court of Appeal seems to have discovered something abhorrent about a person's being held liable upon an oral fraudulent representation as to the credit of a third person. This unanalyzed dread probably can be traced to doubts about the law of deceit as it applies to credit representations, rather than to the matter of a writing and the Statute of Frauds. Nonetheless, the barring of disfavored causes of action is a possible use of the Statute of Frauds and Section 1974, as expansively interpreted, is entitled to consideration on its merits.

In assessing the merit of any provision of the Statute of Frauds, it has become almost conventional to consider the provision in connection with the three general functions of the statute. These three functions have been described as "evidentiary," "cautionary," and "channeling."[62]

The evidentiary function of the statute, of course, is the "prevention of fraud and perjury" and the dispatch of judicial business by providing ready and reliable evidence. Certainly Section 1974 does serve these ends by limiting the concern of the courts with representations as to the credit of third persons to those made in writing. However, in this connection, one must notice that Section 1974 applies only to fraudulent misrepresentations allegedly made by the defendant; the purpose of the section, as of any provision of the Statute of Frauds,

is to prevent fraud and perjury on the part of the plaintiff; therefore, it is apparent that cases properly governed by Section 1974 allegedly are cases of fraud and counterfraud. In short, the assumption underlying the section must be that both parties are lying, or would lie, but for the section, and the provision automatically resolves this evidentiary problem in favor of the defendant. In this type of case, courts need all the evidence they can obtain, and the familiar rule of wide evidentiary range in fraud cases should apply.

The cautionary function of the Statute of Frauds inheres in its effect of requiring the promisor (or in the case of Section 1974, the defrauder) to deliberate, at least to the extent of making his mark, before becoming bound. It is interesting to note that the dissenting members of the English Law Revision Committee opposed repeal of the suretyship provision of the Statute of Frauds because of their view that "there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand."[63] In the view of those members, would-be creditors have a propensity to impose not only upon would-be debtors, but also potential sureties or guarantors, and this tendency should be curbed by retaining the requirement of a writing. In view of the aggressive extension of credit in our economy, a great many people might currently agree with those members. Applying this logic to Section 1974, however, yields the peculiar result that a person should be cautioned before reducing his fraudulent misrepresentations to writing. Perhaps this is a social protection that should be restricted to "innocent" sureties and guarantors.

The "channeling" function of the Statute of Frauds inheres in its underlying support of such reifications of transactions as deeds, mortgages, stamps, coins, negotiable instruments, and the like. But here the practice does not always follow the statute. For example, a contract of insurance is not required to be in writing although it invariably is. The channeling function of Section 1974, if any, seems remote. A century of experience under the section has failed to even indicate the class or classes of persons most affected by the section. The decisions have exonerated such miscellaneous persons as bankers, real estate brokers, subcontractors, lessees, and fathers of aspiring young businessmen. Certainly, the section does not "channel" any significant range of recurrent business transactions.

One can see that this mode of analyzing the function of a provision of the Statute of Frauds can be applied only obliquely to Section 1974. Perhaps the most telling argument against retention of the section is more direct: it has produced litigation with unsatisfactory results, and it is impossible to identify any tangible benefit that it has produced. Of course, one can argue that the very existence of the section has prevented many fraudulent and perjured assertions that misrepresentations as to credit have been made. The difficulty with this argument is the lack of any evidence to support it. It is reasonable to suppose that, because the application of the section has been so uncertain, counsel and their clients have not been deterred, and will not be deterred, from bringing any action that might fall within the section.

The real support for Lord Tenterden's Act (and Section 1974) lies in the traditional view of courts, lawyers, and legislators that we would "rather bear those ills we have than fly to others that we know not of."[64] As Professor Corbin has observed, repeal of the Statute of Frauds "would involve such a wrench to the mental habits of the bench and bar that it is very unlikely to occur."[65] That view applies, in measure, to any particular provision of the statute. Analysis of the history, applications, and uncertainties of Section 1974, however, indicates that it is an expendable element of the statute and that its repeal would not "wrench the mental habits" of bench, bar, or anyone else who can be identified.

Conclusion

Inclusion of Section 1974 in the Code of Civil Procedure was ill considered from the beginning. There is no comparable provision in most of the common law jurisdictions and the absence of such a provision has not been missed. Although we will never know, one can reasonably guess that Section 1974 has led to more litigation than it has prevented and has sheltered more fraud than it has suppressed. Courts have no need for the "indispensable evidence" of a writing in dealing with cases of fraud. The law of deceit, and particularly the law of misrepresentations as to credit,[66] will best evolve without the incongruous requirement of a writing imposed by Section 1974. Further, whatever may have been the case in 18th century England, courts are now adept at dealing with actions for alleged fraud that are calculated to circumvent a requirement of the Statute of Frauds.[67] Insofar as Section 1974 is intended only to prevent circumvention of the suretyship provision of the Statute of Frauds, it serves a purpose that could better be accomplished by judicial decision. Section 1974 should be repealed.

If repeal of Section 1974 should be unacceptable, the provision should be revised as follows:

(1) The section should be recast to make it clear that it is merely a provision of the Statute of Frauds and may be invoked or waived as any other provision of that statute.

(2) The section should be revised to clearly frame it as a supplement to the suretyship provision of the Statute of Frauds and it should be made clearly subject to the "exceptions," including the "main purpose rule," that apply to the suretyship provision.

(3) The section should be made clearly inapplicable to breaches of fiduciary duties, to breaches of a contractual duty to use care in providing credit information, and to negligent misrepresentation.

With these modifications, the section would apply to such a limited range of cases that it might seldom, if ever, come to the attention of the courts or the Legislature again. Perhaps the most cogent argument against legislating these changes is that they may merely represent existing law despite several decisions of the Court of Appeal seemingly to the contrary. However, Section 1974 is the Legislature's product and that body should deal with it.

APPENDIX

STATE STATUTES BASED ON LORD TENTERDEN'S ACT

Ala. Code Tit. 20, § 6 (1958):

> 6. No action can be maintained to charge any person, by reason of any representation or assurance made, concerning the character, conduct, ability, trade, or dealings of any other person, when such action is brought by the person to whom such representation or assurance was made, unless the same is in writing, signed by a party sought to be charged.

Ga. Code Ann. § 105-303 (1968):

> 105-303. No action shall be sustained for deceit in representation to obtain credit for another, unless such misrepresentation is in writing, signed by the party to be charged therewith.

Idaho Code Ann. § 9-507 (1948)(same as Cal. Code Civ. Proc. § 1974 as originally enacted).

Ind. Ann. Stat. § 33-103 (1949):

> 33-103. No action shall be maintained to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation be made in writing and signed by the party to be charged thereby, or by some person thereunto by him legally authorized.

Ky. Rev. Stat. § 371.010 (1962):

> 371.010. No action shall be brought to charge any person:
>
> (1) For any representation or assurance concerning the character, conduct, credit, ability, trade or dealings of another, made with intent that such other may obtain thereby credit, money or goods; . . .
>
> unless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. The consideration need not be expressed in the writing, but it may be proved when necessary or disproved by parol or other evidence.

Me. Rev. Stat. Ann. Tit. 33, § 53 (1964):

> 53. No action shall be maintained to charge any person by reason of any representation or assurance, concerning the character, conduct, credit, ability, trade or dealings of another, unless made in writing and signed by the party to be charged thereby or by some person by him legally authorized.

Mass. Gen. Laws Ch. 259, § 4 (1932):

> 4. No action shall be brought to charge a person upon or by reason of a representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance is made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

Mich. Comp. Laws § 26.924 (1948):

> 26.924. No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

Mo. Rev. Stat. § 432.040 (1959):

> 432.040. No action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

Mont. Rev. Codes Ann. § 93-1401-8 (1964)(same as Cal. Code Civ. Proc. § 1974 as originally enacted).

Ore. Rev. Stat. § 41.530 (1968):

> 41.530. No evidence is admissible to charge a person upon a representation as to the credit, skill or character of a third person, unless the representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged.

Utah Code Ann. § 25-5-5 (1953):

> 25-5-5. To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith.

Va. Code Ann. § 11-2 (1964):

> 11-2. No action shall be brought in any of the following cases:
>
> (1) To charge any person upon or by reason of a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, to the intent or purpose that such other may obtain thereby, credit, money, or goods; . . .
>
> Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence.

W. Va. Code Ann. § 55-1-1 (1966)(same as Virginia).

FOOTNOTES

1. Cal. Stats. 1958, Res. Ch. 61, p. 135.

2. 9 Geo. 4, c. 14 § 6 (1828). For the language of this statute, see text at note 9, infra.

3. 29 Car. 2, c. 3 (1677).

4. Sunset-Sternau Food Co. v. Bonzi, 60 Cal.2d 834, 838, n. 3, 36 Cal. Rptr. 741, , 389 P.2d 133, 136 (1964). The court quotes Professor Corbin as follows:

> ". . . The writer's study of the cases, above referred to, has fully convinced him as follows: 1. that belief in the certainty and uniformity in the application of any presently existing statute of frauds is a magnificent illusion; 2. that our existing judicial system is so much superior to that of 1677 that fraudulent and perjured assertions of a contract are far less likely to be successful; 3. that from the very first, the requirement of a signed writing has been at odds with the established habits of men, a habit of reliance upon the spoken word in increasing millions of cases; 4. that when the courts enforce detailed formal requirements they foster dishonest repudiation without preventing fraud; 5. that in innumerable cases the courts have invented devices by which to 'take a case out of the statute'; 6. that the decisions do not justify some of the rules laid down in the Restatement of Contracts to which the present writer assented some 20 years ago." [See Corbin, The Uniform Commercial Code --Sales; Should It Be Enacted?, 59 Yale L.J. 821, 829 (1950).]

Other writings to which the court might have referred include: Brancher, General Reexamination of the Statute of Frauds, 1953 Report, Recommendations and Studies, New York Law Revision Commission, 545; Burdick, A Statute for Promoting Fraud, 16 Colum. L. Rev. 273 (1916); Drachsler, The Statute of Frauds--British Reform and American Experience, 3 Int'l & Comp. L. Bull. 24 (A.B.A., Dec. 1958); Fuller, Consideration and Form, Colum. L. Rev. 799 (1941); Ireton, Should We Abolish the Statute of Frauds?, 72 U.S.L. Rev. 195 (1938);

Monroe, An Appraisal of the Utah Statute of Frauds, 9 Utah L. Rev. 978 (1965); Stevens, Ethics and the Statute of Frauds, 37 Corn. L. Q. 355 (1952); Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. Pa. L. Rev. 440 (1931); Willis, The Statute of Frauds--A Legal Anachronism, 3 Ind. L.J. 528 (1928); Comment, Equitable Estoppel and the Statute of Frauds in California, 53 Cal. L. Rev. 590 (1965); Comment, The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices, 66 Yale L.J. 1038 (1957); Note, Past Performance, Estoppel, and the California Statute of Frauds, 3 Stan. L. Rev. 281 (1951). For an exceptional defense of the statute, at least insofar as it "channels" orthodox commercial transactions, see Llewellyn, What Price Contracts?--An Essay in Perspective, 40 Yale L.J. 704, 747 (1931).

4a. This history is set forth fairly accurately in Carr v. Tatum, 133 Cal. App. 274, 24 P.2d 195 (1933). It is analyzed in greater detail in Sheridan, Fraud in Equity 12 (1956) and in Annot., 32 A.L.R.2d 743 (1953).

5. 3 T.R. 51, 100 Eng. Rep. 450 (1789).

6. The judicial reasoning usually quoted from Pasley v. Freeman is as follows:

> If A by fraud and deceit cheats B out of £ 1,000, it makes no difference to B whether A, or any other person pockets that £ 1,000. He has lost his money and if he can fix fraud upon A, reason seems to say that he has a right to seek satisfaction against him. . . . The fraud is . . . by asserting that which he knows to be false. . . . All that is required of a person in the defendant's situation is that he shall give no answer, or that if he do, he shall answer according to the truth as far as he knows. [3 T.R. 51, 58]

7. See Evans v. Bicknell, 6 Ves. 174 (1801); Tapp v. Lee, 3 B. & P. 367 (1803); Clifford v. Brooke, 13 Ves. 131 (1806); Hutchinson v. Bell, 1 Taunt. 558 (1809); Ex parte Carr, 3 V. & B. 108 (1814).

8. W. B. Anderson & Sons v. Rhodes, [1967] 2 All E.R. 850, 862.

9. 9 Geo. 4, c. 14, § 6 (1828).

10. W. B. Anderson & Sons v. Rhodes, note 8, supra.

11. Sheridan, Fraud in Equity 13 (1956).

12. See Civil Code §§ 1709, 1710; 2 Witkin, Summary of California Law, Torts §§ 186-206 at 1371-1392; Annot., 32 A.L.R.2d 184 (1952). See also Traynor, Unjustifiable Reliance, 42 Minn. L. Rev. 11 (1957).

13. See Behn v. Kemble, 7 C.B. (N.S.) 260 (1859); Banbury v. Bank of Montreal, [1918] A.C. 626; W. B. Anderson & Sons v. Rhodes, note 8 supra.

14. See, e.g., Smith, Liability for Negligent Language, 14 Harv. L. Rev. 184 (1900); Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733 (1929); Seavey, Reliance Upon Gratuitous Promises or Other Conduct, 64 Harv. L. Rev. 913 (1951); Restatement of Torts § 552; 2 Witkin, Summary of California Law Torts §§ 207-208 at 1392-1395.

15. W. B. Anderson & Sons v. Rhodes, note 8 supra, at 863, 865.

16. Note 13, supra.

17. See Monroe, An Appraisal of the Utah Statute of Frauds, 9 Utah L. Rev. 978 (1965). Section 4 provided for the familiar applications of the statute now covered by Civil Code Section 1624, and Section 17 covered the sale of goods of a value beyond a specified amount now covered by Section 2201 of the Commercial Code (formerly Section 1624a of the Civil Code). The history of the Statute of Frauds is recounted in 6 Holdsworth, History of English Law 379-397 (1924).

18. Analyses of the case law under the Statute of Frauds are contained in 2 Corbin, Contracts (1950); 2 Williston, Contracts §§ 448-600 (rev. ed. 1936); Brown, Statute of Frauds (5th ed. 1895). See also Restatement of Contracts §§ 178-225; 1 Witkin, Summary of California Law Contracts §§ 87-114 at 94-124.

19. See Monroe, note 17, supra.

20. See Mass. Gen. Laws, Ch. 259, § 4 (1932).

21. See Me. Rev. Stat. Ann., Tit. 33, § 53 (1964).

22. See Appendix for text of these statutes.

23. Cal. Stats. 1850, Ch. 127, § 31.

24. See Cal. Code Civ. Proc. § 360.

25. See the Law Revision Commission Comment to the amended section in West Ann. Cal. Codes.

26. 212 Cal. App.2d 142, 27 Cal. Rptr. 787 (1963).

27. See Corbin, Contracts § 279 (1950).

28. See Lorenzen, The Statute of Frauds and the Conflict of Laws, 32 Yale L.J. 311 (1923); Stevens, Ethics and the Statute of Frauds, 37 Corn. L.Q. 355 (1952); Comment, The Statute of Frauds in the Conflict of Laws: Law and Reason Versus the Restatement, 43 Cal. L. Rev. 295 (1955). See also 1 Witkin, Summary of California Law Contracts §§ 88-89 at 95-97.

29. The appellate decisions through 1953 are collected and analyzed in an Annotation, Construction of Statute Requiring Representations as to Credit, etc., of Another to be in Writing, 32 A.L.R.2d 743 (1953).

30. 133 Cal. App. 274, 24 P.2d 195; noted 22 Cal. L. Rev. 358 (1934); 8 So. Cal. L. Rev. 57 (1934).

31. See the foregoing discussion of "The English Background."

32. See Annot., 32 A.L.R.2d 743, 750 (1953).

33. See, e.g., Monarco v. Lo-Greco, 35 Cal.2d 621, 220 P.2d 737 (1950). The California cases, which use the formula of an "estoppel" to assert the Statute of Frauds, are analyzed in Comment, Equitable Estoppel and the Statute of Frauds in California, 53 Cal. L. Rev. 590 (1965). See also Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. Pa. L. Rev. 440 (1931); 1 Witkin, Summary of California Law Contracts §§ 111-114 at 119-124.

34. The two instances in which "actual fraud" is unavailing to take the case out of the Statute of Frauds stem from peculiarities of the statutory provisions that require the writing. Subdivision (5) of Civil Code Section 1624 requires an agreement employing a real estate broker (or other person serving the same function) to be in writing. The calculated effect of the subdivision is to prevent the broker from recovering his commission unless his employment is in writing. See 1 Witkin, Summary of California Law Contracts § 106 at 113-115. A decision holds that this subdivision cannot be avoided by merely pleading that the defendant's oral promise to pay a commission was made falsely because of the lack of any intention to perform it. Kroger v. Baur, 46 Cal. App.2d 801, 117 P.2d 50 (1941). See also Beach v. Arblaster, 194 Cal. App.2d 145, 14 Cal. Rptr. 854 (1961).

In the other instance, the result was reached not by judicial decision but by legislation that overcame judicial decisions to the contrary. Subdivision (3) of Civil Code Section 1624 requires a writing for any promise made in consideration of marriage. Also, the "anti-heart balm statute" (Civil Code Section 43.5(d)) precludes

an action for breach of a promise to marry whether written or unwritten. The courts created a "fraud exception" to both provisions. See Mack v. White, 97 Cal. App.2d 497, 218 P.2d 76 (1950)(Statute of Frauds); Langley v. Schumacker, 46 Cal.2d 601, 297 P.2d 977 (1956)(anti-heart balm statute). In 1959, the Legislature reversed both decisions, in effect, by enacting Civil Code Section 43.4 to provide that: "A fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages."

35. See Annot., 32 A.L.R.2d 743, 755-756 (1953).

36. Knight v. Rawlings, 205 Mo. 412, 104 S.W. 38 (1907).

37. See, e.g., Gerhardt v. Weiss, 247 Cal. App.2d 114, 55 Cal. Rptr. 425 (1966).

38. See, e.g., Sunset-Sternau Food Co. v. Bonzi, note 4, supra.

39. For example, in Gerhardt v. Weiss, note 37 supra, Justice Fleming begins his opinion thus:

> According to the pleadings, this is yet another case of the faithless agent attempting to hide his double-dealing behind the skirts of the statute of frauds. But skirts are not as voluminous as they once were nor the coverage of the statute as comprehensive as it was sometimes thought to be. Unshapely limbs and unsightly conduct alike are today disclosed to public view, and both must risk the consequences of full exposure.

40. The change made in Section 1974 in 1965 (Cal. Stats. 1965, Ch. 299, § 114, p. 1363) may be unfortunate in seemingly reenforcing this interpretation by substituting the words "No person is liable" for "No evidence is admissible to charge a person" at the beginning of the section.

41. About all that can be said for a "plain meaning" interpretation of any provision of the Statute of Frauds was said by Justice Peters, dissenting in Sunset-Sternau Food Co. v. Bonzi, note 4, supra.

42. See the foregoing discussion of "The English Background."

43. The leading American decision refusing to apply Lord Tenterden's Act to misrepresentation by a fiduciary is W. G. Jenkins & Co. v. Standrod, 46 Idaho 614, 269 Pac. 586 (1928).

44. E.g., Banbury v. Bank of Montreal [1918] A.C. 626; Goad v. Can. Imperial Bank of Commerce [1968] 1 O.R. 597.

45. 10 Cal. App.2d 31, 51 P.2d 164.

46. 22 Cal. App.2d 559, 71 P.2d 820 (1937).

47. See 5 Williston, Contracts § 1520A at 4257 (rev. ed. 1937).

48. 92 Cal. App.2d 718, 207 P.2d 611.

49. See 2 Witkin, Summary of California Law Torts § 203 at 1388-1389.

50. 92 Cal. App.2d 718, 721, 207 P.2d 611, 613 (1949).

51. 110 Cal. App.2d 166, 242 P.2d 365, 32 A.L.R.2d 738.

52. See Corbin, Contracts § 347 (1964 Supp.).

53. As the case arose, the party referred to in the text as the plaintiff was a cross-complainant, and the person referred to in the text as the defendant was a cross-defendant.

54. 110 Cal. App.2d 166, 169, 242 P.2d 365, 367.

55. Discussions of the "main purpose" rule under the suretyship provision of the Statute of Frauds are too numerous to cite exhaustively. One might see 1 Witkin, Summary of California Law Contracts § 100 at 107-109; 2 Corbin, Contracts, Ch. 16 (1950); 2 Williston, Contracts § 475 (rev. ed. 1936). The rule is applied and discussed at length in Michael Distrib. Co. v. Tobin, 225 Cal. App.2d 655, 37 Cal. Rptr. 518 (1964).

56. See Restatement of Contracts § 184.

57. See Fuller v. Towne, 184 Cal. 89, 193 Pac. 88 (1920); Michael Distrib. Co. v. Tobin, supra, note 55.

58. 125 Cal. App.2d 193, 270 P.2d 64.

59. 212 Cal. App.2d 142, 27 Cal. Rptr. 787.

60. See the text at note 26, supra.

61. 248 Cal. App.2d 642, 56 Cal. Rptr. 706.

62. This mode of analysis is usually traced to Professor Fuller's article, Consideration and Form, 41 Colum. L. Rev. 799 (1941). See also Comment, Equitable Estoppel and the Statute of Frauds in California, 53 Cal. L. Rev. 590 (1965).

63. Law Revision Committee, 6th Interim Report (Statute of Frauds and the Doctrine of Consideration 33 (1937)).

64. See Monroe, note 17, supra.

65. 2 Corbin, Contracts § 275 (1950).

66. See 2 Witkin, Summary of California Law Torts §§ 186-209 at 1371-1398. The American cases on misrepresentations as to credit are helpfully collected and analyzed in an Annotation, Misrepresentations as to Financial Condition or Credit of Third Person as Actionable by One Extending Credit in Reliance Thereon, 32 A.L.R.2d 184 (1953).

67. See 1 Witkin, Summary of California Law Contracts § 112 at 120-121; 2 id., Torts § 193 at 1378.