STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Representations as to the Credit of Third Persons and the Statute of Frauds

October 1969

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

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NOTE

This pamphlet begins on page 701. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 9 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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STATE OF CALIFORNIA RONALD REAGAN, *Governor*

CALIFORNIA LAW REVISION COMMISSION
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October 4, 1969

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 61 of the Statutes of 1958 to make a study to determine whether Code of Civil Procedure Section 1974 should be repealed or revised.

The Commission herewith submits its recommendation and a research study relating to this subject. The study was prepared by Mr. Clarence B. Taylor, a member of the Commission's legal staff. Only the recommendation (as distinguished from the research study) expresses the views of the Commission.

Respectfully submitted,

SHO SATO
Chairman

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 unwritten "representations" as to the credit of third persons. The section—first enacted as a part of the 1872 code and not significantly changed since [1]—provides:

> 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.

Although the particular reasons, if any, 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 was adopted to prevent circumvention of the suretyship provision of the original Statute of Frauds which required that a purely gratuitous promise to answer for the debt, default, or miscarriage of a third person 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 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 of that era 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 was enacted to overcome the problem by preventing 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 commercially important states as New York, Pennsylvania, Ohio, and Illinois. In jurisdictions other than Cali-

[1] Section 1974 was amended in 1965 in the bill that enacted the Evidence Code. Cal. Stats. 1965, Ch. 299, § 114, p. 1363. The amendment was not intended to make any substantive change in the law. See Law Revision Commission Comment (1965) in CAL. CODE CIV. PROC. § 1974 (West Supp. 1968).

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

> [N]o 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 other Person may obtain Credit, Money or Goods upon [*sic*], unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith. [9 Geo. 4, c. 14.]

fornia, these statutes generally are given a very narrow construction consistent with the original purpose of Lord Tenterden's Act. In several jurisdictions, they are interpreted to apply only in situations where, had the representation been a promise, the promise would have been unenforceable under the suretyship provision of the Statute of Frauds. For example, the statutes do not 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 about half of the 15 states, the statutes have been held inapplicable to misrepresentations made with an actual intention to deceive.

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 a fraudulent representation as to credit 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 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 he allegedly used fraudulent misrepresentations to obtain a release from his continuing obligation to pay rent.[4]

Section 1974 has also been applied to protect a fiduciary who misleads 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 may apply to misrepresentations made in breach of a contractual or other duty to use care in providing credit information.

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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, Inc., 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). Professor Corbin describes this decision as "a drastic application of the statute so as to protect a defrauder." 2 A. CORBIN, CONTRACTS § 347 (1964 Supp.).

[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 benefits derived from the requirement. However, Section 1974 has caused not only generally unsatisfactory results but has produced no identifiable social benefits.

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. 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 circumvention of the Statute of Frauds and can distinguish between an unenforceable suretyship promise and an actionable 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.

3. The appellate decisions under Section 1974 are unsatisfactory. Either the results are harsh (as when invoked to shelter flagrant fraud)[7] or leave great uncertainty. For example, it is impossible to determine whether the section applies to actionable negligent misrepresentations, as well as to those made with "scienter." 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.

4. Section 1974 is the only provision of the Statute of Frauds that applies to tort actions, and the tort to which it presumably is addressed

[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 (7th ed. 1960).

[7] The rule established under the general Statute of Frauds (Civil Code Section 1624) is that the writing requirement does not protect a defrauder. 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 (7th ed. 1960). No similar exception is recognized under Section 1974. See discussion in Carr v. Tatum, 133 Cal. App. 274, 24 P.2d 195 (1933). See also Baron v. Lange, 92 Cal. App.2d 718, 207 P.2d 611 (1949). As to other jurisdictions that have provisions based on Lord Tenterden's Act, however, see Annot., 32 A.L.R.2d 743 (1953).

(third-party deceit) is a rare and limited one. The section does not appear to routinize, regularize, or authenticate any range of acceptable business or commercial practice.[8] 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 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.[9] The requirements for a successful action for negligent misrepresentation are even more difficult to satisfy. For example, liability for negligent misrepresentation is imposed only on one who supplies information for business purposes in the course of a business or profession.[10] Moreover, it is unlikely that the section was ever intended to apply to negligent, as distinguished from fraudulent, misrepresentations.[11] 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.

5. Section 1974 was repealed as a part of the omnibus revision of the Code of Civil Procedure in 1901,[12] but the 1901 act was held void for unconstitutional defects in form.[13]

For these reasons, the Commission recommends that Section 1974 of the Code of Civil Procedure be repealed.

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[8] In fact, the defendant has sometimes failed to raise the defense provided by Section 1974. For example, in *Burckhardt v. Woods*, 124 Cal. App. 345, 12 P.2d 482 (1932), the appellate court reversed a judgment sustaining a demurrer to a complaint that the plaintiff had been induced by the defendant corporate officers to purchase stock in an insolvent corporation and to make a loan to that corporation. The defense of Section 1974 would have been applicable to the loan, but the defense was not raised. See also Bank of America v. Hutchinson, 212 Cal. App.2d 142, 27 Cal. Rptr. 787 (1963).

[9] See 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 186–207 at 1371–1393 (7th ed. 1960). See also Lord v. Goddard, 19 U.S. 461, 13 How. 198 (1851); Russell v. Clark's Ex'rs, 2 U.S. 459, 7 Cranch 69 (1812); Williams v. Spazier, 134 Cal. App. 340, 25 P.2d 851 (1933).

[10] See 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts*, §§ 207–209 at 1392–1398 (7th ed. 1960).

[11] See 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), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 701,711 (1969).

[12] Cal. Stats. 1901, Ch. 102, § 492, p. 251.

[13] Lewis v. Dunne, 134 Cal. 291, 66 P. 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?*, 16 U.C.L.A. L. REV. 603 (1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 701,711 (1969).

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 requires a suretyship promise—a promise to answer for the debt, default, or miscarriage of another person—to be in writing. The act was intended to bar an action in those cases where 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 (7th ed. 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 (7th ed. 1960).

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

Clarence B. Taylor*

I. INTRODUCTION

Lord Tenterden's Act[1] was enacted in England in 1828 to bulwark the suretyship provision of the Statute of Frauds.[2] The California variation of this Act, section 1974 of the Code of Civil Procedure, 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 reading section 1974 for the first time might suppose it to be an unremarkable fragment of the Statute of Frauds. On the surface, the section seems to have a "plain meaning," to impose a requirement of form (*i.e.*, writing) upon representations as to credit, and, therefore, to be of most interest to persons in the business world who have repeated occasion to make "representations" as to the credit of others. The section, however, 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. Section 1974 has never been construed by the California Supreme Court, and the results in decisions of the District Court of Appeal have often seemed harsh or incongruous.[3]

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This article was prepared to provide the California Law Revision Commission with background information on this subject. However, the opinions, conclusions, and recommendations contained are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

[1] 9 Geo. 4, c. 14, § 6 (1828). For the language of this statute, see text accompanying note 13 *infra*.

[2] 29 Car. 2, c. 3 (1676).

[3] *See* § IV, *infra*.

This article concludes that section 1974 should be repealed. 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 also made to set forth whatever considerations can be arrayed in support of the section.

Although the Statute of Frauds 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 judicial 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 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 these general criticisms in any detail. Rather, an effort is made to demon-

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[4] Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834, 838 n.3, 389 P.2d 133, 136 n.3, 36 Cal. Rptr. 741, 744 n.3 (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*, in N.Y. LAW REVISION COMM'N, 1953 REPORT RECOMMENDATIONS AND STUDIES 545; Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916); Drachsler, *The British Statute of Frauds—British Reform and American Experience*, 3 A.B.A. SEC. INT'L & COMP. L. BULL. 24 (1958); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Ireton, *Should We Abolish the Statute of Frauds?*, 72 U.S. L. REV. 195 (1938); Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL 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 CALIF. L. REV. 590 (1965); Note, *Past Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951); Comment, *The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038 (1957); Note, *An Appraisal of the Utah Statute of Frauds*, 9 UTAH L. REV. 978 (1965). For an exceptional defense of the statute, at least insofar as it "channels" orthodox commercial transactions, *see* Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931).

strate the need for repeal of section 1974 by considerations limited to the effect of the section itself.

II. The English Background

Lord Tenterden's Act derives from a conflict between two lines of legal development in late 18th Century England.[5] Section 4 of the original Statute of Frauds required a writing "to charge the defendant upon any special promise to answer 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 California Civil Code and several of the many judicially recognized exceptions are stated in section 2794. The "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 elaborate efforts to rationalize the application of the Statute of Frauds to particular classes of promises. The reason most frequently advanced for requiring a surety's promise to be in writing was the presumably one-sided and disinterested quality of the promise.[6] In any event, it was settled very early that a purely gratuitous promise to answer for the debt of another could not be enforced unless it was 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 decided before *Pasley v. Freeman*[7] involved either breaches of contract or misrepresentations that induced the plaintiff to contract with the defendant. In *Pasley*, the defendant represented to the plaintiff that a third person's credit was good although he knew this to be false. The plaintiff contracted with the third person in reliance upon 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.[8] The decision thus broadly extended the restricted notion of

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[5] 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 L. Sheridan, Fraud in Equity 12 (1957) and in Annot., 32 A.L.R.2d 743 (1953).

[6] *See* L. Sheridan, *supra* note 5, at 12-14.

[7] 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789).

[8] The judicial reasoning usually quoted from Pasley v. Freeman is as follows: "If A. by fraud and deceit cheat B. out of 1000£ it makes no difference to B. whether A., or any other person, pockets that 1000£. He has lost his money, and if he can fix fraud

"deceit" as an inducement to contract with the defendant and established the new tort of "third-party" deceit.[9]

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 case. If he had gone further and guaranteed the third person's credit, no action could have been maintained against him for lack of a writing as necessitated by section 4 of the Statute of Frauds. This point was mentioned in a few decisions[10] following *Pasley*, 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.

Whether it is inconsistent to hold liable the maker of a fraudulent, but unwritten, "representation" as to credit of another while excusing the maker of an innocent, but unwritten, suretyship promise has been much discussed since *Pasley v. Freeman*.[11] The practical problem that arose after that decision, however, did not involve deceit or misrepresentations as to credit, but rather circumvention of the suretyship provision of the Statute of Frauds. That problem is described succinctly in a recent English decision 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 real 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.[12]

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upon A., reason seems to say that he has a right to seek satisfaction against him . . . . The fraud is . . . 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." *Id.* at 58-60; 100 Eng. Rep. at 454-55.

[9] *See* § VI, *infra*.

[10] Tapp v. Lee, 3 B. & P. 367, 127 Eng. Rep. 200 (H.L. 1803); *Ex parte* Carr, 3 V. & B. 108, 35 Eng. Rep. 420 (Ch. 1814); Clifford v. Brooke, 13 Ves. 131, 33 Eng. Rep. 244 (Ch. 1806); Evans v. Bicknell, 6 Ves. 174, 31 Eng. Rep. 998 (Ch. 1801); Hutchinson v. Bell, 1 Taunt. 558, 127 Eng. Rep. 950 (C.P. 1809).

[11] *See* note 5 *supra*.

[12] W. B. Anderson & Sons v. Rhodes, [1967] 2 All E.R. 850, 862 (Liverpool Assizes).

Lord Tenterden's Act[13] dealt with this "particular grievance" by declaring that:

> [N]o 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 may obtain Credit, Money, or Goods upon [*sic*], 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 unenforceable suretyship promises into actionable misrepresentations, the Parliament was willing to bar an action for deceit where—had the defendant's conduct been promissory rather than "representational" —the action would also have been barred by the suretyship clause. The English and Commonwealth courts have never mistaken the origin or purpose of Lord Tenterden's Act. 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.[14] There are at least three reasons for this. First, factual situations involving tortious representations as to the credit of third parties seem to arise very infrequently. As a contemporary English lawyer has remarked:

> [A]lthough *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.[15]

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 factual matters, the defendant's knowledge of falsity, the defendant's intention to defraud, the plaintiff's justifiable reliance, and the resulting damage.[16] Third, and most important, the English courts uniformly have taken the view that Lord Tenterden's Act applies only in factual situations similar to *Pasley*. In other

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[13] 9 Geo. 4, c. 14, § 6 (1828).

[14] W. B. Anderson & Sons v. Rhodes, [1967] 2 All E.R. 850 (Liverpool Assizes).

[15] L. SHERIDAN, *supra* note 5, at 13.

[16] *See* CAL. CIV. CODE §§ 1709, 1710 (West 1954); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS §§ 186-206, at 1371-1392 (1960) [hereinafter cited as WITKIN, TORTS]; Annot., 32 A.L.R.2d 184 (1953). *See also* Traynor, *Unjustifiable Reliance*, 42 MINN. L. REV. 11 (1957).

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.[17]

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.[18] Suffice it to say that, in connection with misinformation as to the credit of third persons, this basis of liability would seem to be of greater 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 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*[19] 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 realized 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 speech 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

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[17] *See* Banbury v. Bank of Montreal, [1918] A.C. 626; Behn v. Kemble, 7 C.B. (N.S.) 260, 141 Eng. Rep. 816 (C.P. 1859); W. B. Anderson & Sons v. Rhodes, [1967] 2 All E.R. 850 (Liverpool Assizes).

[18] *See* RESTATEMENT OF TORTS § 552 (1934); 2 WITKIN, TORTS, *supra* note 16, §§ 207-208, at 1392-95; 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); Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184 (1900).

[19] [1918] A.C. 626.

> 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.[20]

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.

III. ADOPTION OF THE ACT IN CALIFORNIA AND OTHER STATES

By the time of the American Revolution, the working elements of the Statute of Frauds had been reduced to sections 4 and 17 of the original statute.[21] Even these provisions had been eroded by judicial decisions until the exceptions, qualifications, and limitations were more numerous than the applications.[22] 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.[23]

The section of Lord Tenterden's Act relating to representations as to credit did not fare nearly as well. The provision eventually was adopted in 15 states,[24] but notably not in such commercial states as

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[20] W. B. Anderson & Sons v. Rhodes, [1967] 2 All E.R. 850, 863, 865.

[21] *See* Note, *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 California Civil Code § 1624, and § 17 covered the sale of goods of a value beyond a specified amount now covered by § 2201 of the California Commercial Code (formerly section 1624a of the California Civil Code). The history of the Statute of Frauds is recounted in 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 379-97 (3d ed. 1922).

[22] Analyses of the case law under the Statute of Frauds are contained in C. BROWN, STATUTE OF FRAUDS (5th ed. 1895); 2 A. CORBIN, CONTRACTS (1950); 3 S. WILLISTON, CONTRACTS §§ 448-599 (3d ed. 1960). *See also* RESTATEMENT OF CONTRACTS §§ 178-224 (1938); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS §§ 87-114, at 94-124 (7th ed. 1960) [hereinafter cited as WITKIN, CONTRACTS].

[23] *See* Note, *An Appraisal of the Utah Statute of Frauds*, 9 UTAH L. REV. 978 (1965).

[24] ALA. CODE tit. 20, § 6 (1958); CAL. CODE CIV. PRO. § 1974 (West 1957); GA. CODE ANN. § 105-303 (1968); IDAHO CODE ANN. § 9-507 (1948); IND. ANN. STAT. § 33-103 (1949); KY. REV. STAT. § 371.010 (1962); ME. REV. STAT. ANN. tit. 33, § 53 (1964); MASS. GEN. LAWS ch. 259, § 4 (1932); MICH. COMP. LAWS § 26.924 (1948); MO. REV. STAT. § 432.040 (1959); MONT. REV. CODES ANN. § 93-1401-8 (1964); ORE.

New York, Pennsylvania, Ohio, or Illinois. Of the 15 states, three—Idaho, Montana, and Utah—appear to have simply 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. California first adopted a Statute of Frauds in 1850.[25] This statute contained one section of Lord Tenterden's Act—the familiar provision requiring a written acknowledgment or promise to take a case out of the Statute of Limitations.[26] However, before 1872, the California statutes contained nothing similar to Lord Tenterden's provision on representations as to credit. Inclusion of section 1974 apparently was an original notion of the California code commissioners since it had no precedent in former California law or in the New York legislation which served as a model for the California codes. 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:

> 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."[27] 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."[28] A recent decision, however, indicates that problems can arise from characterizing section 1974 as a rule of "substantive law."[29]

REV. STAT. § 41.530 (1968); UTAH CODE ANN. § 25-5-5 (1953); VA. CODE ANN. § 11-2 (1964); W. VA. CODE ANN. § 55-1-1 (1966).

[25] Law of April 22, 1850, ch. 127, § 31, [1849-50] Cal. Stat. 346.

[26] *See* CAL. CODE CIV. PRO. § 360 (West 1967).

[27] Ch. 299, § 114, [1965] Cal. Stat. 1363; CAL. CODE CIV. PRO. § 1974 (West Supp. 1969).

[28] *See id.* at Law Revision Commission Comments.

[29] In Bank of America v. Hutchinson, 212 Cal. App. 2d 142, 27 Cal. Rptr. 787 (1963), a banker allegedly induced a depositor to lend his deposit and an additional amount borrowed from the bank to another depositor who was financially distressed. 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 § 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

There appears to be 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.[30] And, of course, the general question whether the Statute of Frauds is "substantive" or "procedural" has been debated without end and without answer.[31] If section 1974 is to be retained, it should be amended to make it clear that the section is merely a provision of the Statute of Frauds and is subject to the judicial qualifications and policy interpretations of the substantive, procedural, and evidentiary effects of the 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.

IV. Judicial Interpretation in California

In other states, the pattern of litigation under Lord Tenterden's Act consists of a few early decisions and no notable recent developments.[32] 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 California decisions, they are considered in detail and in chronological order.

The California appellate courts first considered section 1974 in *Carr v. Tatum*,[33] 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

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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.

30 *See* A. Corbin, Contracts § 279 (1950).

31 *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 Cornell L.Q. 355 (1952); Comment, *The Statute of Frauds in the Conflict of Laws: Law and Reason Versus the Restatement*, 43 Calif. L. Rev. 295 (1955). *See also* 1 Witkin, Contracts, *supra* note 22, §§ 88-89, at 95-97.

32 The appellate decisions through 1953 are collected and analyzed in Annot., 32 A.L.R.2d 743 (1953).

33 133 Cal. App. 274, 24 P.2d 195 (1933), *noted in* 22 Calif. L. Rev. 358 (1934); 8 S. Cal. L. Rev. 57 (1934).

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 correct as to the first point and wrong as to the second.

The plaintiff in *Carr v. Tatum* relied upon decisions in about half the states that have adopted statutes based on Lord Tenterden's Act which hold that the Act does not apply to representations made with an actual intention to deceive.[34] These decisions ignore the fact that Lord Tenterden's Act was intended to apply *only* to deceitful representations. Some of the decisions can be explained as refusals to apply the statute where the defendant derives a benefit to himself;[35] others seem to hold that an oral misrepresentation as to credit may be shown—the statute notwithstanding—to prove a scheme or conspiracy to defraud the plaintiff.[36] 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 shield 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 statute only to the latter.

As applied in *Carr v. Tatum*, section 1974 is the only provision of the California Statute of Frauds that has direct application to tort actions. Moreover, California's appellate courts have gone far in recognizing and effectuating a generic "fraud exception" to all other provisions of the Statute of Frauds.[37] With two minor exceptions,[38]

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[34] *See* Annot., 32 A.L.R.2d 743, 750 (1953).

[35] *See* 5 S. WILLISTON, CONTRACTS § 1520A (rev. ed. 1937).

[36] *See* discussion in Annot., 32 A.L.R.2d 743, 753 (1953).

[37] *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 CALIF. L. REV. 590 (1965). *See also* 1 WITKIN, CONTRACTS, *supra* note 22, §§ 111-114, at 119-24; Summers, *supra* note 4, at 440.

[38] 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 California Civil Code § 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, CONTRACTS, *supra* note 22, § 106, at 113-15. 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

allegation and proof of "actual fraud" will take the case out of any provision of the statute except section 1974. Nonetheless, by refusing to apply a "fraud exception" to section 1974, *Carr v. Tatum* followed the English decisions which recognize the intended effect of Lord Tenterden's Act.

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.[39] The court did not consider the question separately, but rather regarded it as foreclosed by decisions from other states which hold that Lord Tenterden's Act applies notwithstanding an actual intention to defraud. Oddly, the Missouri decision upon which the court principally relied pointed out that the parties in that case, family friends, did not bear a "confidential relation[ship] . . . within the meaning of the law."[40]

In general, a fiduciary may not invoke the Statute of Frauds to exclude unwritten evidence of the relationship[41] or of any right or duty that arises from it.[42] 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 is not to be used to shield fiduciaries from denials or breaches of that relationship.[43]

The court did observe in *Carr v. Tatum* that the language of section 1974 contains no exceptions and seemingly applies to *any* person.[44] This "plain meaning" approach, however, is at odds with

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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 California Civil Code § 1624 requires a writing for any promise made in consideration of marriage. Also, the "anti-heart balm statute," California Civil Code § 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* Langley v. Schumacker, 46 Cal. 2d 601, 297 P.2d 977 (1956) (anti-heart balm statute); Mack v. White, 97 Cal. App. 2d 497, 218 P.2d 76 (1950) (statute of frauds). In 1959, the Legislature reversed both decisions, in effect, by enacting California Civil Code § 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."

[39] *See* Annot., 32 A.L.R.2d 743, 755-56 (1953).

[40] Knight v. Rawlings, 205 Mo. 412, 434, 104 S.W. 38, 44 (1907).

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

[42] *See, e.g.*, Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834, 389 P.2d 133, 36 Cal. Rptr. 741 (1964).

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

[44] The change made in California Civ. Code § 1974 in 1965 (ch. 299, § 114, [1965] Cal. Stat. 1363; CAL. CODE CIV. PRO. § 1974 (West Supp. 1969)) 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.

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.[45] Moreover, this approach grossly "overapplies" 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.[46] This last consideration has led courts in other jurisdictions to refuse application of the Act not only in the case of fiduciaries,[47] but also in cases involving confidential or contractual relationships such as banker and depositor.[48]

Section 1974 was next considered in 1935 in *Cutler v. Bowen*.[49] The facts and decisions are generally 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."[50]

In 1937, in *Beckjord v. Slusher*,[51] the defendant, a lessee, had induced the plaintiff, his lessor, to release the defendant and substitute another lessee by making allegedly false representations as to the credit of the new lessee. The appellate court held that section 1974 barred relief without considering the most difficult question that has arisen in applying Lord Tenterden's Act. As Professor Williston notes, courts in other jurisdictions generally hold the Act inapplicable where the party making the misrepresentation derives a benefit from the transaction it induces.[52] 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 California suretyship provision, Civil Code section 1624(2), is subject to explicit exceptions in various situations where a "consideration" in the technical contract sense is received by the surety. Specifically, Civil Code section 2794 dispenses with the need

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[45] 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, 60 Cal. 2d 834, 389 P.2d 133, 36 Cal. Rptr. 741 (1964).

[46] *See* § II, *supra*.

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

[48] *E.g.*, Banbury v. Bank of Montreal, [1918] A.C. 626; Goad v. Canadian Imperial Bank of Commerce, [1968] 1 Ont. 579 (High Ct. of Justice).

[49] 10 Cal. App. 2d 31, 51 P.2d 164 (1935).

[50] *Id.* at 34, 51 P.2d at 165.

[51] 22 Cal. App. 2d 559, 71 P.2d 820 (1937).

[52] *See* 5 S. WILLISTON, CONTRACTS § 1520A (rev. ed. 1937).

for writing where the surety has received "a discharge from an obligation in whole or in part"[53] or "a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."[54]

Thus, if *Beckjord v. Slusher* had involved a suretyship promise by the lessee, rather than misrepresentations as to the credit of another, there would have been no need for a writing. The defendant received a consideration by obtaining a discharge from his continuing obligation to pay rent notwithstanding assignment of the leasehold to another party.

The *Beckjord* case seems to demonstrate the wisdom of construing Lord Tenterden's Act 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 suffered by the lessor 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 and should have been unaffected by section 1974.

In *Baron v. Lange*,[55] decided in 1949, the defendant induced the plaintiff to sell to 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 have raised interesting questions as to the "justifiable reliance" of the plaintiff, a necessary element in any action for deceit.[56] 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:

> 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.[57]

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[53] CAL. CIV. CODE § 2794(1) (West 1961).
[54] *Id.* § 2794(4).
[55] 92 Cal. App. 2d 718, 207 P.2d 611 (1949).
[56] *See* 2 WITKIN, TORTS, *supra* note 16, § 203, at 1388-89.
[57] 92 Cal. App. 2d at 721, 207 P.2d at 613

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 extensive 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.[58] Professor Corbin describes the decision as "a drastic application of the statute so as to protect a defrauder."[59] 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[60] 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 held that Lord Tenterden's Act is inapplicable where the party making the misrepresentation derives a benefit from the transaction induced. The court also stated:

> 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.[61]

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

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[58] 110 Cal. App. 2d at 166, 242 P.2d 365, 32 A.L.R.2d 738 (1952).

[59] *See* A. CORBIN, CONTRACTS § 347 (Supp. 1964).

[60] 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.

[61] 110 Cal. App. 2d at 169, 242 P.2d at 367.

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 subject to the Statute of Frauds. Most courts, including those in 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.[62] 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."[63] 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 the result seemingly 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 promises, the suretyship provision of the Statute of Frauds would have had no bearing.[64] The "test" used by the court not only applies section 1974 with a vengeance; it completely severs Lord Tenterden's Act from its longstanding relationship to the suretyship provision of the Statute of Frauds.

After the decision in *Bank of America v. Western United Constructors*, the appellate courts seem to have lost their enthusiasm for section 1974. In *Grant v. United States Electronics Corp.*,[65] 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

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[62] *See, e.g.*, 2 A. CORBIN, CONTRACTS, ch. 16 (1950); 3 S. WILLISTON, CONTRACTS § 475 (rev. ed 1936); 1 WITKIN, CONTRACTS, *supra* note 22, § 100 at 107-09. The rule is applied and discussed at length in Michael Distrib. Co. v. Tobin, 225 Cal. App. 2d 655, 37 Cal. Rptr. 518 (1964).

[63] *See* RESTATEMENT OF CONTRACTS § 184 (1932).

[64] *See* Fuller v. Towne, 184 Cal. 89, 193 P. 88 (1920); Michael Distrib. Co. v. Tobin, 225 Cal. App. 2d 655, 37 Cal. Rptr. 518 (1964).

[65] 125 Cal. App. 2d 193, 270 P.2d 64 (1954).

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*,[66] decided in 1963, 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.[67] Had the case been resolved on the 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 whose credit was represented as "good," 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 California Thrift & Loan Co. v. Sylvania Electric Products, Inc.*,[68] decided in 1967, the plaintiff was an account-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

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[66] 212 Cal. App. 2d 142, 27 Cal. Rptr. 787 (1963).
[67] *See* note 29 *supra*.
[68] 248 Cal. App. 2d 642, 56 Cal. Rptr. 706 (1967).

misrepresentations.[69] Section 1974 was intended to bar actions on alleged oral misrepresentations in cases where an oral promise would not be enforceable under the Statute of Frauds. But it is incorrect to reverse the proposition and maintain that an oral suretyship promise is not actionable even if it is excepted from the Statute of Frauds because, had it been an oral misrepresentation as to credit, 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.

V. Section 1974 and the Policy Underlying Writing Requirements

It is certain that Lord Tenterden would no longer recognize section 1974—as applied in California—as a progeny of 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 of the section. Substantially the same objections can be made to other provisions of law that require a writing and can be justified as the "price" paid for the supposed benefits of the writing requirement. Even as expansively interpreted, section 1974 is entitled to consideration on its merits.

In attempting to determine the wisdom of any particular 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 functions have been described as "evidentiary," "cautionary," and "channeling."[70]

The evidentiary function of the statute 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 to 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 governed by section 1974 are cases of alleged fraud and

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[69] *Id.* at 649, 56 Cal. Rptr. at 710.

[70] 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 Calif. L. Rev. 590 (1965).

counterfraud. In short, the section assumes that either of the parties might be lying, and automatically resolves this evidentiary problem in favor of the defendant. However, in this type of case, it would seem that courts need all the evidence they can obtain and that 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."[71] In the opinion of those members, certain creditors have a propensity to impose not only upon debtors, but also upon sureties or guarantors, and this tendency should be curbed by retaining the requirement of a writing. In view of current aggressive credit practices, many persons might agree with those members. Applying this logic to section 1974, however, yields the peculiar result that a person should be cautioned before reducing his intentional misrepresentations to writing. Perhaps this "cautionary function" is a social protection that should be restricted to "innocent" sureties and guarantors.

The "channeling" function of the Statute of Frauds lies in its effect of providing tangible symbols of certain typical transactions and giving or denying those transactions legal efficacy depending upon the existence or nonexistence of a written instrument. Deeds, mortgages, and negotiable instruments are examples of transactions "channeled" by the statute. However, the channeling function of section 1974, if any, seems remote. The section has not given rise to any accepted form for credit references and representations, and a century of experience under it has failed even to indicate the classes of persons most affected by its operation. The California 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 acceptable business practice.

Obviously this traditional mode of analyzing the function of a provision of the Statute of Frauds can be applied only indirectly to section 1974. Of course, one can argue that the very existence of the section has prevented many perjured assertions that misrepresenta-

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71 ENGLAND LAW REVISION COMMITTEE, 6TH INTERIM REPORT, STATUTE OF FRAUDS AND THE DOCTRINE OF CONSIDERATION 33 (1937).

tions 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.

As one writer has observed, the support for section 1974, as for any other longstanding writing requirement, actually lies in the traditional view of courts, lawyers, and legislators that it is better to "bear those ills we have than fly to others that we know not of."[72] Professor Corbin notes that curtailment 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."[73] That view applies, in measure, to any particular provision of the statute. Analysis of the history and conflicting applications of section 1974, however, indicates that it is an expendable element of the statute and that its repeal should not "wrench the mental habits" of bench, bar, or businessman.

VI. Section 1974 and the Substantive Law of Deceit

The California appellate courts seem to have discovered something abhorrent about a person's being held liable upon an oral misrepresentation as to the credit of a third person. These misgivings probably can be traced to doubts about the law of deceit as it applies to credit representations, rather than to any policy supporting the Statute of Frauds. Nonetheless, the barring of disfavored causes of action is a possible justification for imposing or retaining any writing requirement. The result is to effect a compromise, albeit not an entirely logical one, between recognizing liability without a writing and precluding liability altogether.

This conceivable justification for section 1974 suggests brief inquiry into the precise bases of the liability to which the section is directed and the law in the 35 states where Lord Tenterden's Act is unknown.

The primary basis of liability envisioned in section 1974 is that of "third-party" deceit denounced by sections 1709 and 1710 of the Civil Code—not the "transactional" fraud condemned in sections 1571-1574.[74] In other words, section 1974 ought not to apply if the

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[72] *See* note 23 *supra*.

[73] 2 A. Corbin, Contracts § 275 (1950).

[74] California Civil Code § 1709 provides that: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers." § 1710 then defines "a deceit" as follows: "A deceit, within the meaning of the last section, is either: (1). The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2). The assertion, as a

person who makes the misrepresentation is a party to the transaction induced or has his legal relationships changed by that transaction.[75] It should also be reiterated that if the "representation" as to credit is promissory or contractual—that is, if the person making the representation assumes any responsibility as to the debt induced—the matter is covered directly by the suretyship provision of the Statute of Frauds, rather than by section 1974.[76]

Apart from "third-party" or "non-privity" deceit, the only other possible bases of liability affected by section 1974 would appear to be (1) breach of a fiduciary relationship, (2) breach of a contract to provide accurate or reliable credit information, and (3) "negligent speech." As indicated earlier, it seems clear that section 1974 should not be considered applicable to the misconduct of a fiduciary.[77] With respect to contracts to furnish credit information, it appears that the law of credit reporting (on which there seems to be no reported legal experience in California) founds the liability of the reporter on his contract, rather than upon deceit or noncontractual negligence. And, contractual disclaimers and waivers aside, the "implication" is that the reporter does not undertake to verify or vouch for the information he supplies. The deceiver, if there is one, in the credit reporting fact pattern is the person, typically the debtor, who supplies the information to the reporter.[78] It therefore is understandable that section 1974 has never been invoked in a case involving a credit reporting or credit rating agency. Thus in the one area in which it might be thought to have frequent application, section 1974 appears to be an irrelevance.

With respect to the possibility that a person might be held liable for a "negligent" statement as to a third person's credit, it should be

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fact, of that which is not true, by one who has no reasonable ground for believing it to be true; . . . ." On the other hand, § 1572, in dealing with fraud or deceit as a defense to a contract action, defines "actual fraud" thusly: "Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1). The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2). The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; . . . ."

[75] *See* text accompanying notes 58-64 *supra.*

[76] One should notice that identical language is used in the Statute of Frauds, California Civil Code § 1624, and the Civil Code provisions that govern "suretyship." § 1624 requires a writing for "a special promise to answer for the debt, default, or miscarriage of another." § 2787 provides, in part: "The distinction between sureties and guarantors is hereby abolished. . . . A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another . . . ."

[77] *See* text accompanying notes 39-48 *supra.*

[78] The infrequent judicial decisions are collected in Annot., 32 A.L.R.2d 184 (1953).

noted that the liability in California for negligent speech is fragmentary to say the least. Insofar as such liability exists, it is traceable to subdivision (2) of Civil Code section 1710, which defines "deceit" to include "the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."[79] Most importantly, the liability appears to be imposed only on those who supply information for business purposes in the course of a business or profession.[80] Hence, there seems to be no reason to suppose that repeal of section 1974 would jeopardize the existing immunity of the casual, but careless, credit informant.

Since section 1974 applies solely to "third-party" deceit actions, its justification in terms of barring a disfavored cause of action would be that the section deters a large number of claims of this type of "credit deceit." If this were true, one might expect to find a substantial number of actions relating to *written* representations[81] as to the credit or solvency of a third person, since such actions are *not* barred by section 1974. However, there appear to be only three appellate decisions in California involving written representations.[82] In light of the fact that there have been only eight additional appellate decisions involving unwritten representations,[83] it appears that the totally disinterested deceiver is much better known to law writers than to businessmen or courts.

In states without Lord Tenterden's Act, the question of liability turns on the "substantive" law of deceit. All jurisdictions accept

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[79] *See* Williams v. Spazier, 134 Cal. App. 2d 340, 25 P.2d 851 (1933); 2 WITKIN, TORTS, *supra* note 16, § 208, at 1393.

[80] *See* Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954); 2 WITKIN, TORTS, *supra* note 16, § 207, at 1393.

[81] Significantly, California Civil Code § 1974 requires only the "handwriting" of the person who makes the representation.

[82] In Beeman v. Richardson, 185 Cal. 280, 196 P. 774 (1921), corporate officers were held liable for inducing the plaintiff to purchase stock in their nearly bankrupt corporation. Section 1974 was not mentioned, but the section would have been unavailing inasmuch as it applies only where the plaintiff becomes a creditor (*e.g.*, rather than a stockholder) as a result of the misrepresentation. *See* Bank of America v. Western United Constructors Inc., 110 Cal. App. 2d 166, 242 P.2d 365, 32 A.L.R.2d 738 (1952). In Burckhardt v. Woods, 124 Cal. App. 345, 12 P.2d 482 (1932), the appellate court reversed the sustaining of a demurrer to a complaint that the plaintiff had been induced by the defendant corporate officers to purchase stock in their insolvent corporation and to make a loan to the corporation. Presumably the defense of § 1974 would have been applicable to the loan, but it was not raised. Lastly, in Williams v. Spazier, 134 Cal. App. 340, 25 P.2d 851 (1933), a judgment for the plaintiff stock purchasers was reversed where the defendant, a major stockholder, had induced the purchase and had misled the plaintiffs as to the financial condition of the corporation. The decision goes off on the ground that it is extremely difficult to prove the element required by subdivision (2) of California Civil Code § 1710, at least as to a person who has some fragmentary basis for believing the asserted fact to be true or, perhaps, has only his own hope that it is true.

[83] *See* § IV, *supra*.

Pasley v. Freeman (that there can be actionable deceit as to the credit of a third person), but according to the reported decisions the tort is an extremely rare one.[84] The law of third-party deceit seems almost calculated to thwart an overanxious relier upon casual credit information. The misconduct of the defendant entirely apart, the plaintiff must mind his own actions. Specifically, his reliance must be "justifiable" and be upon a misrepresentation that is "material"; he must rely upon the truth of the representation, rather than his own investigation; and he must not be "one who does not rely upon [the misrepresentation's] truth but upon the expectation that the maker will be held liable in damages for its falsity."[85]

These rules of substantive law, of course, do not overcome any problems that might be thought to exist as to the unfounded pleading of credit deceit and the foibles of factfinders. In this connection, however, the courts seem to override expansive pleading and debatable factfinding with a free hand. For example, in the era when there was a federal common law, the Supreme Court of the United States took occasion virtually to eliminate liability in connection with two common credit information devices. With respect to the "credit letter of introduction," the Court opined that the maker "can be presumed" to speak only to the reputation of the debtor and to speak only from his knowledge of that reputation.[86] With respect to one merchant's credit inquiry of another merchant, the Court surmised that the second merchant is merely passing along information furnished to him or his impressions gained from that information and is not to be held liable in the absence of "fraudulent design."[87]

Apparently all that can be learned from the states that have no Lord Tenterden's Act is that, if there is a problem of onerous claims being based on credit deceit, the problem is difficult to discover. At least no state in the last 75 years has adopted a Lord Tenterden provision to deal with the matter.

VII. 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 the proposition cannot be conclusively demonstrated, one can reasonably believe that the section

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84 The cases, mostly antiques, are collected in Annot., 32 A.L.R.2d 184 (1953).

85 *See* Restatement of Torts §§ 537, 538, 547, 548 (1934).

86 *See* Russell v. Clark's Ex'rs, 11 U.S. (7 Cranch) 69 (1812).

87 *See* Lord v. Goddard, 54 U.S. (13 How.) 198 (1851).

has led to more litigation than it has prevented and has sheltered more fraud than it has suppressed.

The historic "mischief" to which the section is directed—circumvention of the suretyship provision of the Statute of Frauds—appears not to be a current problem. Whatever may have been the case in 18th Century England, courts are now adept at dealing with tort actions that are calculated simply to circumvent a requirement of the Statute of Frauds.[88] Further, it is neither necessary nor desirable to provide that, whenever a *promise* as to the undertaking of a third person must be in writing, a *misrepresentation* as to the credit of that third person must also be in writing. Promises are promises, deceits are deceits, and the difference is significant. It should be emphasized that repeal of section 1974 would make no change other than eliminating the incongruous 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.

If section 1974 is not repealed, it should be construed as a supplement to the suretyship provision of the Statute of Frauds and as subject to all of the "exceptions," including the "main purpose rule," that apply to the suretyship provision. It should also be held inapplicable to fiduciaries and to persons under a contractual duty to use care in providing credit information.

As thus interpreted, 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. Nonetheless, such an interpretation would capture exactly the purpose and effect of Lord Tenterden's Act. Perhaps the only cogent argument against repealing the section is that the California Supreme Court almost predictably would so construe it, despite several decisions of the Court of Appeal seemingly to the contrary.[89] However, section 1974 is the Legislature's product and that body should deal with it.

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[88] *See* 1 WITKIN, CONTRACTS, *supra* note 22, §§ 111-14, at 119-24.

[89] *See* Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834, 389 P.2d 133, 36 Cal. Rptr. 741 (1964).

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