NSW Law Reform Commission REPORT 57 (1988) - COMMUNITY LAW REFORM PROGRAM: FOURTEENTH REPORT - REPRESENTATIONS AS TO CREDIT

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Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable J R A Dowd LLB, MP

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

REPRESENTATIONS AS TO CREDIT

Dear Attorney General,

We make this Report pursuant to the reference received from the then Attorney General for New South Wales, the Honourable T W Sheahan BA, LLB, MP on 22 December 1986.

Helen Gamble

(Chairman)

Paul Byrne

(Commissioner)

Keith Mason QC

(Commissioner)

June 1988

Terms of Reference

On 22 December 1986, the Attorney General of New South Wales, the Honourable T W Sheahan BA, LLB, MP made the following reference to the Commissioner:

> To inquire into and report on the following matters:
>
> 1. Whether s 10 of the Usury, Bills of Lading, and Written Memoranda Act 1902 should be repealed; and
>
> 2. Any related matter.

Participants

Commissioners

For the purpose of this reference a Division was created by the Chairman in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

> Ms Helen Gamble (Chairman)
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> Paul Byrne
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> Keith Mason QC

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Chapter 1 - Introduction

I. SCOPE OF THIS REPORT

1.1 This report traces the legislative history of s10 of the Usury, Bills of Lading, and Written Memoranda Act 1902 and examines the section's current operation. The recommendations of law reform agencies in other jurisdictions with respect to provisions corresponding to s10 are considered. The report concludes with the recommendation that the section be repealed (see para 5.2).

II. THIS REFERENCE

1.2 This is the fourteenth report in the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F J Walker QC MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter contained the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act, 1967.

The background and progress of the Community Law Reform Program are described in greater detail in the Commission's Annual Reports since 1982.

1.3 This reference has its beginning in a letter dated 29 April 1986 to the Commission from Mr W W Caldwell, a Sydney barrister. Mr Caldwell pointed out various anomalies, discussed at para 3.1, in the operation of s10 and suggested this as a possible area of statutory law reform for consideration by the Commission. The Commission is particularly grateful to Mr Caldwell for his involvement and his helpful critical assessment of the issues.

1.4 A background paper was prepared by Mr Kalinga Wijeyewardene, a legal officer of the Commission, and a reference was sought by the Commission in October 1986. The reference was granted by letter dated 22 December 1986 from the then Attorney General for New South Wales, the Honourable T W Sheahan BA, LLB, MP, to inquire into and report on the following matters:

> Whether s10 of the Usury, Bills of Lading, and Written Memoranda Act 1902 should be repealed; and
>
> Any related matter.

1.5 The background paper, which recommended the repeal of s10, was submitted to a number of interested bodies. The Law Society of New South Wales, Australian Society of Accountants, Australian Bankers' Association, Permanent Building Societies Association (NSW) Ltd and the Commercial Law Association of Australia Ltd supported the repeal of the section.

1.6 The draft report was prepared by Mr Kalinga Wijeyewardene in 1987 and considered and revised by the Division in consultation with Dr John Carter, a consultant to the Division and now a part-time member of the Commission.

Chapter 2 - The Development of the Requirement of Writing

1. LEGISLATIVE HISTORY

2.1 The Usury, Bills of Lading, and Written Memoranda Act 1902 consolidated certain Imperial enactments already in force in New South Wales. The certificate of the Commissioner for the Consolidation of the Statute Law, appended to the Bill, stated:

> The various subjects here placed together have this in common that they are of interest to mercantile men and deal with some mercantile instruments. On the whole, it has seemed better to join them in one Act than to make four or five separate and very short Acts ... I certify that this Bill solely consolidates, and in no way alters, adds to, or amends the law as contained in the enactments therein consolidated.[1]

2.2 One of the enactments consolidated in the Usury, Bills of Lading, and Written Memoranda Act 1902 was the Written Memoranda Act 1834 which adopted and re-enacted the Statute of Frauds Amendment Act 1828 (Imp), generally known as Lord Tenterden's Act.[2]

2.3 The preamble to the Written Memoranda Act 1834, after referring to Lord Tenterden's Act, stated as follows:

> And whereas it is expedient to adopt and apply the said recited Act of Parliament in the Administration of Justice in New south Wales Be it therefore enacted by His Excellency the Governor of New South Wales with the advice of the Legislative Council thereof That the said recited Act of Parliament and every clause revision and enactment therein contained shall e and the same is and are hereby adopted and directed to be applied in the Administration of Justice in the said Colony and its Dependencies in like manner as other Laws of England are therein applied and as if the same and every part thereof had been repeated and re-enacted in this Act or Ordinance.

2.4 Thus the provisions of Lord Tenterden's Act were introduced and adopted in New South Wales without any amendment.

2.5 Section 10 of the Usury, Bills of Lading, and Written Memoranda Act 1902 with which this report is concerned reproduced s6 of Lord Tenterden's Act. The section survives in its original form.

2.6 Section 6 of Lord Tenterden's Act states that a representation as to "the character, conduct, credit, ability, trade, or dealings of any other person" should be made in writing signed by the representor for that representation to be enforceable. The full text of the section is 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 other person way obtain credit, money or goods upon [sic][3], unless such representation or assurance be made in writing, signed by the party to be charged therewith.

2.7 Lord Tenterden's Act was as its short title clearly states, an amendment to the Statute of Frauds 1677 (Imp).

2.8 Section 6 of Lord Tenterden's Act was enacted specifically to supplement the second limb of s4 of the Statute of Frauds 1677 (Imp).4 Section 4 states (emphasis added):

> And be it further enacted that from and after the said 24th day of June [1677] **no action shall be brought** whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or **whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person;** or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof , **unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in**

> **writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.**

The second limb of s4 refers to contracts of guarantee.[5]

2.9 Section 4 of the Statute of Frauds 1677 (Imp) enabled a defendant sued in respect of any of the contracts enumerated therein to raise a successful defence if the contract did not conform to the requirement of writing set out in s4.

2.10 In 1789, however, it was decided in *Pasley v Freeman*[6] that where there was no guarantee in writing a plaintiff could bring an action in tort for deceit at common law for a fraudulent oral representation of the defendant. Damages could thus be obtained not for breach of contract but for commission of a tort.

2.11 The decision in *Pasley v Freeman* had the practical effect of allowing a plaintiff to circumvent s4 of the Statute of Frauds 1677 (Imp). This was the "mischief" that s6 of Lord Tenterden's Act sought to remedy.

2.12 Both the Statute of Frauds 1677 (Imp) and the Statute of Frauds Amendment Act 1828 were received into Australia under s24 of the Australian Courts Act 1828 (Imp).[7]

2.13 Amongst Australian jurisdictions only Tasmania[8] and the Northern Territory[9] have retained in its entirety s4 of the Statute of Frauds 1677 (Imp). That part of s4 dealing with contracts of guarantee continues to operate in Western Australia[10] and, in modernised form, Queensland[11] and Victoria.[12] Section of the Statute of Frauds 1677 has been repealed in New South Wales,[13] South Australia[14] and the Australian Capital Territory.[15] The Credit Act 1984 contains a provision similar to s4 of the Statute of Frauds 1677 so far as it relates to contracts of guarantee.[16] There are corresponding provisions in other Australian jurisdictions.[17]

2. 14 Section 6 of the Statute of Frauds Amendment Act 1828 (Imp) (Lord Tenterden's Act) remains in force as part of the received law in South Australia, Western Australia and the Northern Territory. it has been re-enacted in the same form in New South Wales, as discussed above in paras 2.1-2.5, by s10 of the Usury, Bills of Lading, and Written Memoranda Act 1902, in Tasmania by s 11 of the Mercantile Law Act 1935 (Tas), in Victoria by s128 of the Instruments Act 1958 (Vic), and in the Australian Capital Territory by s16 of the Mercantile Law Ordinance 1962 (ACT). It has been repealed expressly only in Queensland by s3 of the Statute of Frauds 1972 (Qld).

2.15 The second limb of s4 of the Statute of Frauds 1677 (Imp) and s6 of Lord Tenterden's Act are still in force in England.[18]

II. THE NATURE OF THE REPRESENTATION

2.16 The section provides that no action may be brought charging any person by reason of any representation made or assurance given concerning the character, conduct, credit, ability, trade or dealings of any other person in order that the other person may obtain credit, money or goods, unless the representation is made in writing. To fall within the scope of the section the representation has to be in respect of "the character, conduct, credit, ability, trade or dealings of any other person". This means, in effect, the representation must be in respect of the credit of a third person.

2.17 The representation need not be a guarantee. it is sufficient if the statement induces the person to whom it is made to rely and act on it and thereby suffer damage. The statement must be untrue to the maker's knowledge. Judicial interpretation of the section has limited its application to fraudulent, as opposed to innocent or negligent, misrepresentation.[19] In *Pearson v Seligman*[20] it was held that a representation made in order that its maker may obtain a benefit from the credit allowed to the third party, was within the section. In *Swann v Phillips*[21] the defendant represented to the plaintiff that he held the title deeds of a third party thereby inducing the plaintiff to lend money to the third party. The representation was held to be within the section. In *Devaux v Steinkeller*[22] a representation by a partner as to the credit of his firm was held to be a representation as to the credit "of another person".

2.18 The representation must be in writing. It may, however, be partly verbal and partly written provided the plaintiff was substantially induced to give credit by the written representation.[23]

2.19 The representation must be signed by the principal and not by an agent. This raises a fundamental issue as to the liability of a corporation in respect of representations made by its agents. This issue is yet to be settled satisfactorily.

FOOTNOTES

1. *The Statutes of New South Wales* (1902 Vol VI) at 544.

2. Named after Lord Tenterden who drafted the Act.

3. There is some controversy as to the word which has been omitted from the Section by a clerical error. It is generally believed that the word was "credit": *Lyde v Barnard* (1836) 1 M & W 101 at 115, 150 ER 363 at 369. It has also been suggested that "upon" read originally as "thereupon": *Id* at 372.

4. In *Tatton v Wade* (1856) 18 CB 371, 139 ER 1413, Pollock CB at 1417 stated:

> Lord Tenterden told me that his motive for introducing that provision into the bill, was that he was struck with the remarkable fact, that, numerous as actions of the sort were, - actions for false representations as to the character and credit of third persons, - the plaintiff almost invariably succeeded; which induced him to think there was some latent injustice, which required a remedy. That is the true history of that enactment.

5. A contract of guarantee has to be distinguished from a contract of indemnity:

> Although a contract of guarantee may be described as a contract of indemnity in the widest sense of the term, yet contracts of guarantee are distinguished from contracts of indemnity ordinarily so called by the fact that a guarantee is a collateral contract to answer for the default of another person, and thus is a contract that is ancillary or subsidiary to another contract, whereas an indemnity is a contract by which the promisor undertakes an original and independent obligation: *Halsbury's Laws of England* (4th ed) Vol 20 para 108.

For a recent Australian statement see *Sunbird Plaza Pty Ltd v Maloney* (1988) 62 ALJR 195 at 196.

6. (1789) 3 Term Rep 51, 100 ER 450.

7. The Act, which was passed on 25 July 1828, provides in s24:

> All Laws and Statutes in force within the Realm of England at the Time of the passing of this Act ... shall be applied in the Administration of Justice in the Courts of New South Wales ... so far as the same can be applied within the said [colony].

Lord Tenterden' s Act was assented to on 9 May 1828 but only took effect , by virtue of s 10, on 1 January 1829. In South Australia at least Lord Tenterden's Act was inherited as part of the law of England which was regarded as applicable to local conditions: *De Garis v Dalgety & Co Ltd* [1915] SALR 102.

8. Mercantile Law Act 1935 (Tas), s6.

9. Statute of Frauds 1677 (Imp).

10. Statute of Frauds 1677 (Imp) as amended by the Law Reform (Statute of Frauds) Act 1962 (WA), s2.

11. Property Law Act 1974 (Qld), s56.

12. Sale of Goods (Vienna Convention) Act 1987 (Vic), s8.

13. Imperial Acts Application Act 1969, s8.

14. Statutes Amendment (Enforcement of Contracts) Act 1982 (SA), s3.

15. Imperial Acts (Substituted Provisions) Ordinance 1986 (ACT), s3.

16. Section 136 (paras 3.12-3.14 below).

17. Credit Act 1987 (Qld), s133 (not yet proclaimed); Credit Act 1984 (Vic), s136; Credit Act 1984 (WA), s136; Credit Ordinance 1985 (ACT), s136.

18. Following upon the recommendations of the *First Report* of the Law Reform Committee (Cmd 8809), published in 1953, the Law Reform (Enforcement of Contracts) Act 1954 (UK) s 1 amended s4, preserving the second limb but repealing the rest of the section. Section 6 of Lord Tenterden's Act has not been amended since its enactment.

19. *Banbury v Bank of Montreal* [1918] AC 626; *Mutual Life and Citizens' Assurance Company Limited v Evatt* (1968) 122 CLR 556.

20. (1883) 48 LT 842.

21. [1838] 8 Ad & El 457, 112 ER 912.

22. (1839) 6 Bing NC 84, 133 ER 33.

23. *Tatton v Wade* (1856) 18 CB 371, 139 ER 1413.

Chapter 3 - Criticism of the Requirement of Writing

1. THE ISSUES RAISED BY MR CALDWELL

3.1 Mr Caldwell has drawn the attention of the Commission to three anomalies in the operation of s10 of the Usury, Bills of Lading, and Written Memoranda Act 1902. He identifies these as follows:

> The underlying purpose of the section appears to have been removed. The main purpose of section 6 was to prevent plaintiffs from overcoming the requirement of the Statute of Frauds that contracts of guarantee be in writing by suing the "guarantor" upon an oral representation as to the credit of the person guaranteed (*Banbury v Bank of Montreal* [1918] AC 626; *Lyde v Barnard* (1836) 1 M & W 101; 150 ER 363). In New South Wales, since the repeal of the Statute of Frauds by the Imperial Acts Application Act 1969, a guarantor may be sued upon an oral guarantee. Hence, the purpose of the enactment has disappeared and it is anomalous that, in contrast with a guarantor, the maker of an oral representation as to credit, subject to what appears below, will not be liable in respect of false statements made in it.
>
> Section 10 does not afford any defence to an action based on negligence (*Banbury v Bank of Montreal* [1918] AC 626 at 640, 693 - 694, 708, 713). This was conceded by the defendant in *Compafina v ANZ* [(Unreported) 11 May 1981 Supreme Court of NSW, Common Law Div, transcript at 36]. It may be seen as extraordinary that a defendant will have a defence for statements fraudulently made, but if the same statements are made only negligently, then there will be no defence.
>
> The words of the section "made in writing signed by the party to be charged therewith" have, until the decision of the English Court of Appeal in *UBAF Ltd v European American Banking Corp* [1984] 1 QB 713, led to anomalous difficulties in suing banks upon representations as to credit. Previously, it had been accepted that *Hirst v West Riding Union Banking Co* [1901] 2 KB 560 required the writing to be signed by a principal, not by an agent, even where the agent is a bank manager and has actual authority to write the particular letter. If the decision in *UBAF* is good law in New South Wales, then the problems will be to some extent alleviated. However, Hunt J in *Compafina* considered the arguments against the correctness of the decision in *UBAF* and found it unnecessary to resolve them (pp31-32).[1]

3.2 The first issue raised by Mr Caldwell deals with the purpose of the section while the other two issues deal with substantive aspects of its operation.

II. REASONS FOR ENACTMENT

3.3 The preamble to the Statute of Frauds 1677 (Imp) states that it was enacted “[f]or prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and *subordination of* perjury." Unsophisticated rules of procedure and evidence and the law of contract no doubt prompted the enactment of the statute. As Holdsworth states:

> At the period when the Statute of Frauds was passed the institution of trial by jury was in a transition state. In the first place, the mediaeval method of controlling the jury by writ of attaint was obsolete, the sixteenth and early seventeenth century method of controlling it by fine or imprisonment had been decided by *Bushell's Case* [(1670) Vaughan's Rep 435; Vol i 344-347] to be illegal, and the modern device of getting an order for a new trial, when the verdict was clearly against the weight of evidence, was in its infancy. In the second place, the jury, though generally guided by the evidence, might still decide a case from its own knowledge of the facts - the fact that it had this power was assigned by Vaughan CJ, in *Bushell's Case*, as one of the main reasons why it could not be punished for finding a verdict contrary to the directions of the court. It was therefore a wise precaution to make certain kinds of evidence necessary for the proof of certain transactions, because it placed a limitation upon the uncontrolled discretion of the jury. There was also another reason for the adoption of this precaution ... Neither the parties to an action, nor their husbands or wives, nor any persons who had any interest in the result of the litigation, were competent witnesses.[2]

Most of these rules were still valid and current in 1828 when Lord Tenterden's Act was enacted.

3.4 As stated earlier Lord Tenterden's Act was enacted specifically to prevent the circumvention of the Statute of Frauds 1677 (Imp). Its preamble states:

> ... Whereas various Questions have arisen in Actions founded on Simple Contract, as to the Proof and effect of Acknowledgments and Promises offered in Evidence for the Purpose of taking Cases out of the Operation of the said Enactments; and it is expedient to prevent such Questions, and to make Provision for giving effect to the said Enactments, and to he Intention thereof.

Cairns J, tracing the reasons for the enactment of s6 of Lord Tenterden's Act, stated in *W B Anderson & Sons Ltd v Rhodes (Liverpool) Ltd*:

> Because s4 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.[3]

3.5 The New South Wales Parliament has already given effect to the view that, except in respect of contracts for the sale of land or any interest therein, s4 has no place today. The possibility of juries. circumventing its operation is no longer present. In any event the discretion of juries is no longer uncontrolled and parties to a contract are competent witnesses. The New South Wales Law Reform Commission considered specifically s4 of the Statute of Frauds 1677 (Imp) and the requirement of writing in relation to contracts of guarantee before recommending the repeal of the requirement.[4] It is in this context that the continued operation of s6 of Lord Tenterden's Act, which was enacted to supplement the provision relating to contracts of guarantee in s4 of the Statute of Frauds, is called in question.

3.6 As Mr Caldwell has stated, "the underlying purpose" for which Lord Tenterden's Act was enacted, namely to prevent the evasion of the Statute of Frauds, has been removed in New South Wales by the repeal of the latter in 1969. Normally this would be sufficient reason to recommend repeal of the provision. However, as a provision similar in effect was enacted in s136 of the Credit Act 1984, the question has to be asked whether that provision merely replaces s4 of the Statute of Frauds so far as contracts of guarantee are concerned.

3.7 After a period of time the reasons prompting the enactment of a statute may no longer be present or valid. Other reasons may appear in time to validate the continuing operation of the statute, and supplant the original basis. In the case of s6 of Lord Tenterden's Act the only justification for its continuation is the relevance and importance attaching to the formal requirement of writing contained in the section. It has been suggested this formal requirement has three important functions, the evidentiary, the cautionary and the channelling functions.[5]

3.8 The evidentiary function of the Statute of Frauds 1677 (Imp) was "the prevention of fraud and perjury" on the part of the plaintiff, by providing the court with ready and reliable evidence. In actuality, however, it could assist a dishonest person in escaping an obligation under a contract simply because it was not recorded with sufficient formality. While preventing fraud and perjury on the part of the plaintiff it merely encouraged the defendant to evade his or her obligations and to defeat just claims. The same criticism can be levelled at the evidentiary function of s6 of Lord Tenterden's Act. it has been observed that "the section assumes that either of the parties might be lying, and automatically resolves this evidentiary problem in favour of the defendant".[6] The solution is quick but it may prove to be incorrect if all the facts are allowed to be admitted in evidence.

3.9 The cautionary function of a requirement for writing is to give a party time to pause and think before entering into an obligation. The second limb of s4 of the Statute of Frauds was retained in England because, as some members of the English Law Revision Committee stated:

> there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand.[7]

However if the same reasoning is applied to s6 of Lord Tenterden's Act it would produce the strange result that a person should be cautioned before reducing an intentional misrepresentation to writing. The aim of the cautionary function is to help innocent parties, though this is not the result when applied to s6 of Lord Tenterden's Act.

3.10 The third function that a requirement of writing performs is the "channelling" function. The format of a written agreement is derived from the various requirements laid down by statute. Whether the document will be given effect will depend on its compliance with these statutory requirements. Examples of agreements "channelled" by statute are mortgages and negotiable instruments. The degree of "channelling" achieved by s6 of Lord Tenterden's Act, however, appears to be negligible. As one writer has observed:

> 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.[8]

3.11 Thus the requirement of writing in s6 of Lord Tenterden's Act fails to achieve a sufficient evidentiary, cautionary or channelling role.

3.12 One other matter to be considered before deciding whether the purpose for enacting s6 of Lord Tenterden's Act continues to exist in New South Wales is the role played by s136 of the Credit Act 1984.

3.13 Though s4 of the Statute of Frauds was repealed in New South Wales a provision similar to that part of s4 dealing with contracts of guarantee has been enacted in s136 of the Credit Act 1984 which states:

> A contract of guarantee between a guarantor and a credit provider in respect of the obligations of the debtor under a regulated contract is not enforceable against the guarantor unless
>
> (i) it is in writing signed by the guarantor; or
>
> (ii) it was made by the acceptance of an offer in writing signed by the guarantor to enter into the contract of guarantee
>
> and any copy of the regulated contract, or of any offer to enter into the regulated contract, that is required pursuant to this Act to be given to the debtor has been given to the guarantor before he enters into the contract of guarantee.

3.14 An examination of s136 reveals that it does not apply to contracts of guarantee generally but to a class of contracts regulated by the Credit Act 1984. There are other differences as well. For example, s4 of the Statute of Frauds could be satisfied by a sufficient memorandum of the promise signed by the party to be charged. Section 136 does not fill the vacuum created by the repeal of the second limb of s4 of the Statute of Frauds which applied to contracts of guarantee generally.

3.15 The original reason for the enactment of s6 of Lord Tenterden's Act disappeared in New South Wales with the repeal of s4 of the Statute of Frauds in 1969. As no alternative justification has emerged for its retention the provision should be repealed.

III. FRAUDULENT AND NEGLIGENT MISREPRESENTATION

3.16 The second issue raised by Mr Caldwell deals with the substantive application of the section. Though the words of the section refer to "any representation or assurance" the courts have interpreted the section to apply only to cases of fraudulent misrepresentation.

3.17 In *Banbury v Bank of Montreal*,[9] the leading case on misrepresentation under s6 of Lord Tenterden's Act, the plaintiff brought an action against the defendant bank claiming damages for negligence and breach of duty while acting as his bankers and advisers. The cause of action was based upon the oral representations as to the credit of a company, made honestly by a branch manager of the bank as its agent, which induced the plaintiff to invest a sum of $Can125,000 in the company. The company failed shortly thereafter, resulting in the loss of the plaintiff's investment. One of the defences raised by the bank was that the representation made to the plaintiff

came within the ambit of s6 of Lord Tenterden's Act and as the representation was not in writing the plaintiff's action should be dismissed. The Court of Appeal[10] agreed with this submission and held that s6 applied to representations made negligently.

3.18 The House of Lords reversed the decision of the Court of Appeal on this point and held that the section applies only to fraudulent misrepresentations. In arriving at this conclusion the House of Lords gave two reasons. First, the intention of the Legislature at the time of enacting the provision was that it should apply only to fraudulent misrepresentations. As Lord Atkinson stated:

> The question then is, does this section of Lord Tenterden's Act apply to innocent representation? No doubt the words of the section are general. On its face it applies to every representation, innocent or fraudulent; but one cannot construe these words, general in character though they be, without having regard to the circumstances in reference to which they were used, and to the object appearing from the statute which the Legislature had in view in using them. Lord Coke in the well-known passage in *Heydon's Case* (1584) 3 Rep 7b lays it down that to get at the scope and object of an Act one should consider (1) what the law was before it was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; (4) the reason for the remedy.[11]

After discussing the history of s6 of Lord Tenterden's Act Lord Atkinson came to the following conclusion:

> This statute was, I think, designed to deal with false and fraudulent representations and those alone, and, being of that opinion, I think that, despite the generality of the words "Any representation or assurance", I am, acting on the principle of interpretation of statutes laid down in *Stradling v Morgan* (1560) Plowd 199, bound to construe the Act so as to carry out the intention of the Legislature which passed it, and to hold that it applies to representations and assurances of this latter character and to those alone.[12]

3.19 The second reason adduced by the House of Lords was that the section had since its enactment been applied by courts only to cases of fraudulent misrepresentation. As Lord Finlay LC stated:

> [t]he most significant feature in the long list of authorities cited to your Lordships in this case is that the section is uniformly treated as applying to actions for fraudulent misrepresentations only ... The new departure made by the decision of the Court of Appeal in the present case as to the construction of the law of s6 of Lord Tenterden' s Act would lead to results of a somewhat startling nature. A merchant may employ at a salary a traveller to make inquiries about the standing and credit of possible customers and to report to him thereon. The traveller negligently, without inquiry or on insufficient inquiry, reports orally that a particular. person may safely be trusted, and his employer acts upon his information and sustains loss thereby. In the view of the Court of Appeal the employer would have no remedy because the report falls within the terms of s6 of Lord Tenterden's Act. The same thing might apply in the case of an action against a solicitor for negligence in the discharge of his duty as such. Such a construction of the Act is a complete novelty. During the ninety years which have elapsed since it was passed it has always been applied only to actions upon representations as such, not to actions in which the gist of the action is breach of duty. This action appears to me not to fall within s6 at all, and in my opinion the judgment of the Court of Appeal on this point is erroneous.[13]

3.20 Analysing the judgment in *Banbury* Cairns J in *W B Anderson and Sons v Rhodes (Liverpool) Ltd* stated:

> It appears to me that the effect of [the decision in *Banbury*] 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 ... 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.[14]

3.21 The decision in *Banbury v Bank of Montreal*[15] settled the law on the question of the scope of applicability of s6. The High Court of Australia held in 1968 in the case of *Mutual Life and Citizens' Assurance Company Ltd v Evatt*[16] that the House of Lords was correct in its decision that s6 is applicable only to a case of fraudulent misrepresentation and not to negligent misrepresentation. In that case the defendant had given the plaintiff incorrect information and advice as to the security of his investments in a third company. The plaintiff sued for damages, alleging negligence on the part of the defendant who, it was claimed, was under a duty of care to give correct information. The defendant sought to rely on the New South Wales' equivalent of s6 of Lord Tenterden's Act, s10 of the Usury, Bills of Lading, and Written Memoranda Act 1902. Menzies J, applying the decision in *Banbury* to s10, stated:

> I have found no reason for distinguishing the decisions in *Banbury v Bank of Montreal* that Lord Tenterden's Act has no application to an action, not for fraud, but for negligence. That powerful fifty-year-old decision of the House of Lords reversing the decision of the Court of Appeal is not, I think, open to question.[17]

3.22 The restrictive judicial interpretation of s10 of the Usury, Bills of Lading, and Written Memoranda Act 1902 makes that section inapplicable to instances of negligent misrepresentation as to credit or for misrepresentation as to credit in breach of a contractual, fiduciary or other duties. The result is anomalous. Section 10 is a defence to fraudulent misrepresentation but not to negligent misrepresentation.

IV. SIGNATURES AND THE AGENT'S ROLE

3.23 The third issue raised by Mr Caldwell concerns the interpretation given by courts to the words "made in writing signed by the party to be charged therewith" appearing in s10, in relation to a corporation.

3.24 The term "person" appearing at the beginning of the section is synonymous with the term "party" appearing at the end of the section. Unless the context otherwise requires the term "person" is generally construed to include corporations.[18]

3. 25 The Commission has considered the case where a duly authorised agent makes a representation falling within s10 on behalf of a corporation, reduces such representation to writing and signs it. The question to be asked is whether the corporation could deny liability on the basis that the agent's signature was not its signature so that the representation was not "made in writing signed by the party to be charged therewith".

3.26 In contrast with some statutes, s10 does not require the party charged to sign the writing personally. For example s13 of the Lending of Money Act 1915 (Tas) requires that the writing be "made and signed personally by the borrower". Interpreting these words the High Court held in *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd*[19] that the addition of the word "personally" excluded signature by an agent and, therefore, by a corporation which can act only through an agent. The context of the section therefore excluded corporations from the meaning of the term "person".

3.27 In the case of s6 of Lord Tenterden's Act, however, it has been held in *Hirst v West Riding Union Banking Company Ltd*[20] that the term "person" in the section includes a corporation. In Hirst's case the defendant was a banking company incorporated under the Companies Acts. The action sought to recover damages for a statement alleged to be a misrepresentation made by one of the defendant's branch managers. The statement concerned the credit and position of a certain trading company, a customer of the defendant, and it was made in the scope of the manager's employment and in the defendant's interests. The plaintiff, acting on the faith of the representation contained in a letter signed by the branch manager, incurred loss. On the facts in *Hirst*, the court held that the written representation signed by the manager was not “made in writing signed by the party to be charged therewith” and that the bank was not liable for the agent's representation. The court, however, did not specify the circumstances in which a corporation would be liable for a written representation made on its behalf.

3.28 *Hirst's* case was decided by the English Court of Appeal on the authority of the earlier decision in *Swift v Jewsbury*.[21] *Swift v Jewsbury* did not deal with a company, having a separate legal personality, but with a partnership, and the case turned upon the individual liability of the person who signed the representation on behalf of the partnership. Thus *Swift v Jewsbury* cannot be regarded as authority for the proposition that an

authorised agent's written representation signed by the agent on behalf of a corporation is not "made in writing signed by the party to be charged therewith".

3.29 If , as suggested in *Hirst's* case, the agent's signature is not sufficient to render the corporation liable, what manner of signature would satisfy the requirements of s6? Scrutton U thought the seal of the company would suffice. He said in the Court of Appeal decision of *Banbury*:

> ... it has been held in *Swift v Jewsbury* that where the defendant is a company, as a banking company, the signature of an agent such as a branch manager will not suffice; there must be the seal of the company.[22]

Ackner LJ in *UBAF Ltd v European American Banking Corp*[23] did not agree that the seal of the company would be adequate. He said, commenting on the dicta of Scrutton LJ:

> It is, of course, common ground that *Swift v Jewsbury and Goddard* ... decided no such thing. Indeed, the seal itself is not a signature. In addition to the seal there are, of course accompanying signatures, but their function is, generally speaking, merely to authenticate the seal.[24]

3.30 The English Court of Appeal in *UBAF Ltd v European American Banking Corp* reviewed the decisions in *Swift v Jewsbury* and *Hirst v West Riding Union Banking Co Ltd* and came to the conclusion that those cases did not purport to decide that a company cannot sign by a properly authorised officer or employee acting in the course of his or her duties in the business of the corporation.

3.31 One issue confronting the Court in *UBAF* was whether the signature of the agent could, as a matter of law, constitute the signature of the party to be charged within the meaning of s6 of Lord Tenterden's Act. The Court held, in what it termed its "short answer", that evidence was required to determine this issue.[25] In its "long answer" the Court went on to say "that the signature on behalf of a company of its duly authorised agent acting within the scope of his authority is, for the purpose of s6 of the 1828 Act, the signature of the company".[26]

3.32 This “long answer” seems soundly based. For the Court to have decided otherwise would have led “... to the absurd conclusion that, although a company being a 'person' is entitled to claim the protection of the Act, it is never capable of losing that protection because, as a legal abstraction, it cannot literally and physically ‘sign’ anything".[27]

3.33 In *Compafina Bank v Australia & New Zealand Banking Group Limited*[28] Hunt J regarded the "long answer" of the Court of Appeal in *UBAF* as mere *obiter* and of no more than persuasive authority. [29] His Honour found it unnecessary to resolve the issue, as on the facts the agent did not have the requisite actual, as opposed to ostensible, authority to sign the document in question. Thus the uncertainty relating to this issue continues.

3.34 The issues raised by Mr Caldwell highlight the anomalies present in the current operation of s10. There is no doubt the provision needs reform. The question is should it be amended or repealed?

3.35 Under s52 of the Trade Practices Act 1974 (Cth) a representor may be liable for an oral representation as to credit where this constitutes conduct that is misleading or deceptive. Similar provisions exist under state legislation in some jurisdictions. In New South Wales, for example, s42 of the Fair Trading Act 1987 states:

> A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

These provisions provide further justification for the repeal of s 10.

FOOTNOTES

1. Letter dated 29 April 1986 to the Chairman, NSW Law Reform Commission.

2. Sir William Holdsworth, *A History of English Law* Vol VI (2nd ed 1937) at 388.

3. [1967] 2 All ER 850 at 862.

4. New South Wales Law Reform Commission, *Report on the Application of Imperial Acts* (1967 LRC 4) at 99. See also *Second Report on the Sale of Goods* (1987 LRC 51) at Chapter 4.

5. Lon Fuller, "Consideration and Form" (1941) 41 *Columbia Law Review* 799.

6. Clarence B Taylor, "Research study - The Statute of Frauds and Misrepresentations as to the credit of third persons: should California repeal its Lord Tenterden's Act?" (1969) 9 *California Law Reform Commission Reports* 711 at 728.

7. England Law Revision Committee, *Statute of Frauds and the Doctrine of Consideration* (1937 Interim Report 6) at 33.

8. Note 6 at 728. The writer was commenting on the equivalent section in California. The comment equally applies to England and Australia.

9. [1918] AC 626.

10. [1917] 1 KB 409.

11. Note 9 at 691.

12. Note 9 at 693-694.

13. Note 9 at 640-641.

14. [1967] 2 All ER 850 at 865.

15. [1918] AC 626.

16. (1968) 122 CLR 556.

17. *Id* at 618.

18. Interpretation Act 1987 s21(1).

19. (1964) 110 CLR 9.

20. [1901] 2 KB 560.

21. (1874) LR 9 QB 301.

22. [1917] 1 KB 409 at 431.

23. [1984] 1 QB 713.

24. *Id* at 722-723.

25. *Id* at 720.

26. *Id* at 724.

27. *Id* at 719.

28. (Unreported) 11 May 1984, Supreme Court of New South Wales, Common Law Division.

29. *Id*, transcript at 30-31.

Chapter 4 - Proposed Reform in Other Jurisdictions

4.1 It is pertinent at this point to consider recommendations for reform made by law reform agencies in other jurisdictions in respect of provisions corresponding to s6 of Lord Tenterden's Act.

1. ENGLAND

4.2 In England, the Law Revision Committee was appointed in 1934 to report *inter alia*:

> whether all or any of the following enactments should be amended or repealed:
>
> Statute of Frauds, 1677 s4
>
> Statute of Frauds Amendment Act, 1828
>
> Mercantile Law Amendment Act 1856
>
> Sale of Goods Act, 1893, s4.[1]

The Committee issued an Interim Report in 1937 recommending reform of the Statute of Frauds 1677, Mercantile Law Amendment Act 1856 and the Sale of Goods Act 1893. It did not, however, consider the Statute of Frauds Amendment Act 1828. In respect of the Statute of Frauds 1677 the Committee recommended that s4 be repealed, although a minority recommended that the requirement of writing for contracts of guarantee be retained. In 1952 the Law Reform Committee considered whether the recommendation made in 1937 by the Law Revision Committee should be adopted in whole or in part. In its Report[2] published in 1953 the Committee recommended inter alia that the earlier minority recommendation be implemented in relation to s4 of the Statute of Frauds. This recommendation was implemented by the Law Reform (Enforcement of Contracts) Act 1954 (UK). The position in England today is that the second limb of s4 of the Statute of Frauds and s6 of Lord Tenterden's Act remain in force.

II. CANADA

4.3 The Law Reform Commission of British Columbia in its *Repor on the Statute of Frauds*[3] published in 1977, considered an equivalent provision to s6 of Lord Tenterden's Act and stated:

> Section 6 of the *Statute of Frauds* applies formal requirements of writing to representations as to credit. The section, it appears, was enacted to avoid the circumvention of the "guarantee and indemnity" provisions of the statute, and was not, as were the other sections of the statute, founded on a considered judgment as to the importance of writing *per se*.
>
> Little can be said in support of the writing requirement in this context. In the first place, the mischief to which the section was directed no longer exists, and we believe that the courts of this province are perfectly qualified to distinguish between oral guarantees and oral representations as to credit; and are not prone to use the latter as a means of avoiding the difficulties resulting from the unenforceability of the former.
>
> Secondly, oral representations may give rise to liability both in contract and in negligence, and we see little reason why protection should be afforded to those who make *fraudulent representations* as to credit.
>
> Thirdly, situations which give rise to actions in deceit for oral misrepresentation as to credit are extremely rare, and there is little more than a handful of cases on point. It follows that section 6 does not serve to channel or regularize any form of common or accepted commercial practice - a function which may justify writing requirements in other contexts.
>
> That section 6 is concerned with fraudulent behaviour is, we believe, the essential argument in favour of repeal. It is one thing to relieve a party from his contractual obligations if formalities of

> writing are absent, and even this aspect of formalities has given us some concern. It is altogether different to relieve a party from the consequences of his fraudulent acts, and we find it difficult, if not impossible, to support a statutory provision which has precisely that effect.[4]

The Commission recommended the repeal of the provision.

4.4 The Institute of Law Research and Reform in Alberta, in a Background Paper[5] published in 1979 on the Statute of Frauds, discussed s6 of Lord Tenterden's Act and stated:

> The apparent rationale for the enactment of the section was the fear that without such a requirement, plaintiffs who could not sue on guarantees because of a lack of writing, could circumvent section 4 of the Statute of Frauds by bringing an action in the tort of deceit.
>
> Little can be said in favour of retaining this provision ...
>
> Secondly, it is an unacceptable anomaly that oral negligent misrepresentations are actionable but oral fraudulent misrepresentations are not. A party should not be able to place himself in a better position by proving his own fraud.[6]

In its Report[7] published in 1985 the Institute recommended the repeal of the provision.

III. UNITED STATES

4.5 The California Law Revision Commission in its *Recommendation and Study relating to Representations as to the Credit of Third Persons and the Statute of Frauds*,[8] published in 1969, considered section 1974 of the Code of Civil Procedure of California, equivalent to s6 of Lord Tenterden's Act, and recommended the repeal of the section. In so doing the Commission stated:

> 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. In any event, it is not logically necessary or desirable to provide that, whenever a *promise* as to the undertaking of a third person made 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.
>
> 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 is the only provision of the Statute of Frauds that applies to tort actions, and the tort to which it presumably is addressed (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. 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.[9]

IV. QUEENSLAND

4.6 The Law Reform Commission of Queensland in its Report[10] published in 1970 on the Statute of Frauds considered s13 of the Statute of Frauds and Limitations Act 1867 (Qld) which reproduced s6 of Lord Tenterden's Act and stated:

> Section 13 imposes a requirement of writing as a prerequisite to an action upon any representation, assurance, etc., relating to the character, conduct, credit, ability, trade or dealings of a person, *which is* intended to enable that person to obtain credit, money or goods thereon. Judicial interpretation has limited the application of the section to representations which are

> fraudulent in character (see *Banbury v Bank of Montreal* (1918) AC 626; *M L & C Assurance Company Limited v Evatt* (1968) 42 ALJR 316, at pp325, 341), which has the surprising consequences that it may prove to be in the interest of a defendant to establish his own fraud and so escape liability in reliance upon the absence of the written memorandum required by section 13. Repeal of the section will thus remove this anomaly and also abolish a provision which experience has not shown to have produced an improvement in the law.[11]

In response the section was repealed by s3(2) of the Statute of Frauds 1972 (Qld).

V. SOUTH AUSTRALIA

4.7 The Law Reform Committee of South Australia in its *Report Relating to the Repeal of the Statute of Frauds and Cognate Enactments in South Australia* recommended the repeal of s4 (including the provision on guarantees) of the Statute of Frauds 1677[12] in its application to South Australia. Subsequently, it recommended major reforms in the law relating to suretyship in 1977 in a report on the reform of the law of suretyship.[13] In 1980 the Commit tee published a report on inherited imperial statute law on practice and procedure,[14] in which it considered Lord Tenterden's Act. The Committee recommended the repeal of the Act with the exception of s6. It stated:

> Section VI which relates to character references and guarantees is of importance in the law. it should not be repealed until a statute is passed in terms of the Thirty-Ninth Report of this Committee relating to suretyship.
>
> ...
>
> Accordingly with the exception of the section relating to guarantees which requires separate legislation the statute can be repealed in South Australia.[15]

The Committee did not discuss the operation of the section nor did it expand on its view that the section was "of importance in the law" and the report on suretyship to which the Committee refers did not deal with the question of representations as to credit.

FOOTNOTES

1. Law Revision Committee (England), *Statute of Frauds and the Doctrine of Consideration* (1937 Interim Report 6).

2. Law Reform Committee (England), *First Report: Statute of Frauds and s4 of the Sale of Goods Act, 1893* (1953 Cmd 8809).

3. Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (1977 LRC 33). The recommendations have been enacted in the Law Reform Amendment Act 1985 (BC).

4. *Id* at 61-62.

5. Institute of Law Research and Reform (Alberta), *Statute of Frauds* (1979 Background Paper No 12).

6. *Id* at 132-133.

7. Institute of Law Research and Reform (Alberta) *The Statute of Frauds and Related Legislation* (1983 Report 44) at 64.

8. California Law Revision Commission, *Reports, Recommendations and Studies* (1968-1969 Vol 9) at 701. The recommendations were enacted in 1970 Cal Stats ch 720.

9. *Id* at 707-708.

10. Queensland Law Reform Commission, *Report on a Review of the Statute of Frauds* (1970 QLRC 6).

11. *Id* at 5.

12. South Australia Law Reform Committee, *Report Relating to the Repeal of the Statute of Frauds and cognate Enactments in South Australia* (1975 Report 34) at 8. This recommendation was implemented by the enactment of the Statutes Amendment (Enforcement of Contracts) Act 1982 (SA) s3.

13. South Australia Law Reform Committee, *Report Relating to the Reform of the Law of Suretyship* (1977 Report 39).

14. South Australia Law Reform Committee, *Report Relating to the Inherited Imperial Statute Law on Practice and Procedure in this State* (1980 Report 55).

15. *Id* at 26-27.

Chapter 5 - Conclusion and Recommendations

I. REPEAL OF SECTION 10

5.1 All the law reform agencies which have considered s6 of Lord Tenterden's Act at some length recommended that it be repealed. No consideration was given by them to prolonging the life of the section by amending it. This reflects the fact that the section has outlived its usefulness. The mischief it sought to prevent in 1828 has no relevance today, especially in New South Wales where the Statute of Frauds has been repealed. The section does not perform any useful function. On the contrary it merely provides a shield for fraudulent oral representations. The rigid interpretation of the requirement of writing has resulted in corporations taking cover behind its provision and escaping liability for the acts of their agents. There is no valid reason for retaining the section, even in an amended form.

5.2 **1t is therefore recommended that s10 of the Usury, Bills of Lading, and Written Memoranda Act 1902 be repealed.** The repeal of the section would remove from a defendant who makes a fraudulent oral representation an unfair advantage over a defendant who makes a negligent representation, placing both on the same footing. The repeal of the section would also result in the general law of vicarious liability applying to the acts of an agent of a corporation, thus making a corporation liable for the fraudulent representations as to credit of third parties made by an agent. Finally it would remove from the Statute Book a provision which has outlived its usefulness.

II. REPEAL OF SECTION 12

5.3 As a consequence of its recommendation to repeal s10, **the Commission also recommends that s12 of the Usury, Bills of Lading, and Written Memoranda Act be repealed.** Section 12 provides:

> No memorandum or other writing made necessary by section ten shall be deemed to be an agreement within the meaning of any Act relating to stamp duties.

5.4 Our research has revealed no reason to retain either s10 or s12 for stamp duty purposes[1] and the Office of State Revenue in the NSW Treasury has advised that it has no objection to the repeal of s12.[2] On the repeal of s10, s12 will serve no purpose and should be repealed as well.

III. NO RETROSPECTIVE OPERATION

5.5 Whilst it is difficult to see how it would wish to adjust its practices to conform to the law following repeal of s10, we believe that an opportunity should be given for the business world to become aware of the change before being subjected to it. **The Commission therefore recommends that the repealing legislation should operate prospectively only.** Representations made before the date of commencement of the repealing legislation should not be affected by the repeals.

FOOTNOTES

1. The equivalent provision in England, Statute of Frauds Amendment Act 1828, s8, was repealed by the Limitations Act 1939 (UK) while the equivalent of s10 (Statute of Frauds Amendment Act, s6) remain in force.

2. Letter dated 19 May 1988 from Office of State Revenue to the Chairman of the Commission.

Appendix A - Submissions Received

Australian Bankers' Association

Australian Finance Conference

Australian Merchant Bankers' Association

Australian Society of Accountants

The Institute of Chartered Accountants in Australia

The Law Society of New South Wales

Permanent Building Societies Association (NSW) Ltd