SOUTH AUSTRALIA

THIRTY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REPEAL OF THE STATUTE OF FRAUDS AND COGNATE ENACTMENTS IN SOUTH AUSTRALIA

1975

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., Solicitor-General.

J. F. KEELER.

K. T. GRIFFIN.

D. W. BOLLEN, Q.C.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

(The Solicitor-General was absent overseas during the preparation and discussion of this report and therefore has not signed the report.)

THIRTY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REPEAL OF THE STATUTE OF FRAUDS AND COGNATE ENACTMENTS IN SOUTH AUSTRALIA RENDERING CONTRACTS UNENFORCEABLE UNLESS THE REQUIREMENTS OF THE STATUTE HAVE BEEN COMPLIED WITH.

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

We have the honour to report on the question referred by you to us as to whether the sections of the Statute of Frauds 1677 29 Charles II c.3 and similar enactments rendering contracts unenforceable unless there is some note or memorandum in writing signed by the party to be charged or his agent thereto lawfully authorised, or there is some similar memorandum in writing, should continue to form part of the law of South Australia.

We deal first with the Statute of Frauds, of which only part of Section 4 now remains as part of the inherited law of South Australia, although other sections to which we refer later have been incorporated in Acts of the Parliament of this State. This Statute was assented to on April 16, 1677 after three previous attempts to enact a similar Bill. The history of the Statute is set out in *Holdsworth*: *History of English Law Volume VI pages* 380-384.

There were similar enactments passed on the Continent of Europe in the previous century and in the same century: see an article—*The Statute of Frauds and Comparative Legal History* by Rabel in 63 *L.Q.R.* 174. The reasons behind the passing of the Statute are set out in the Volume of Holdsworth's History to which we have referred at pages 387-392. The mediaeval method of controlling the verdict of a jury by a writ of attaint had become obsolete. The method of controlling the jury by fine or imprisonment was decided in *Bushell's case* to be illegal: see (1670) *Vaughan's Reports* 135: 124 *E.R.* 1006. Neither the parties to an action nor their husbands or wives or any person who had any interest in the result of the litigation could give evidence in that action because it was feared that they would commit perjury. In general the rules of evidence were in a very elementary state and in fact were not codified in anything like modern form until the publication of Starkie's work in the second decade of the nineteenth century. Under these circumstances although the selection of the contracts set out by the Statute may seem somewhat arbitrary to our modern minds, there was good reason for requiring contracts of some kinds at least, and probably to the seventeenth century mind these contracts, to be in writing if they were to be enforceable. None of those considerations apply today.

In any case the Statute is encrusted with almost three centuries of decisions, and is today generally speaking a defence used by people who do not wish to go into the witness box because they would lose their case if they did. In fact so much is this so that Isaacs J. in

Charlick v. *Foley* 21 *C.L.R.* 249 *at* 251 after pointing out that business houses do in fact constantly do business on the pledged word of their agents, went on to say—

> "And in my opinion it is not the duty of any legal adviser to compromise the honour and reputation of such a client contracting in those circumstances by placing on the record a defence of that nature without fully explaining it and pointing out its full meaning and effect and the probable consequences of the defence in case the event turns on a question of credibility. If the law is explained and the true position indicated then if the client instructs his adviser to set up the strict legal defence let it be done; but then the client runs the risk of being regarded as personally untrustworthy should the circumstances assume the appearance that they do in this case."

Griffith C. J. said in *Bagnall* v. *White* 4 *C.L.R.* 89 *at* 96:—

> "Indeed it has been said that there is no decision on any point arising under the Statute of Frauds as to which it is not possible to find a contrary decision."

So oppressive did its provisions appear that in various ways the Courts, so far as they could, found ways around the Statute. The first decree for specific performance after part performance was made by Lord Chancellor Jeffreys in *Butcher* v. *Stapley and Butcher* 1 *Vern.* 364: 23 *E.R.* 524 on 10th February, 1685/6 less than nine years after the Statute had been enacted. In general the policy of the Chancery Judges was that the Statute should "not be made an instrument to commit frauds". Although the common law Judges in general upheld the Statute of Frauds and its policy (see *Holdsworth* op. cit. *at pages* 394-395) nevertheless even the common law Judges engrafted two exceptions. The first was that where under the Statute a defence that a guarantee was oral would have succeeded, an action in deceit was allowed in certain cases, the first of which is *Pasley* v. *Freeman* in 1789: 3 *T.R.* 51; 100 *E.R.* 450—see the discussion of the matter under the case of *Chandelor* v. *Lopus* in the 4th Edition of *Smith's Leading Cases* (1856) *at pages* 143-146. This particular judicial amendment was over-ruled by Statute: Section 6 of Lord Tenterden's Act 9 Geo. IV c.14.

The second exception was in relation to actions on a *quantum meruit.*

It was established by decisions from the first quarter of the nineteenth century at the latest, that where goods have been sold or delivered or work has been done or money paid in performance of a contract unenforceable by reason of the Statute an action will lie in *quantum meruit* for the price of the goods sold and delivered or the value of the work done, or for the money paid at the defendant's request, and that is still the law today: see also an article by A. T. Denning (now Lord Denning) *Quantum Meruit and the Statute of Frauds* 41 *L.Q.R.* 79.

The portion of Section 4 of the Statute of Frauds which remains as part of the law of South Australia reads as follows:—

> "No action shall be brought whereby—
>
> (1) to charge any executor or administrator upon any special promise to answer damages out of his own estate; or

(2) to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or

(3) to charge any person upon any agreement made upon consideration of marriage; or

(4) * * * * * * * * *

(5) 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 authorised."

Subsection (4) is now re-enacted as Section 26 (1) of the Law of Property Act, 1936 (as amended) in this State and will be dealt with separately later in this Report. Dealing with the contracts still within Section 4 of the Statute of Frauds in turn, they are as follows:—

1. *Contracts by an executor or administrator to answer damages out of his own estate*

As is pointed out in *Cheshire & Fifoot Law of Contracts 2nd Australian Edition* at page 266, until 1830 if there was no residuary legatee named in the will the executor after carrying out the provisions of the will and satisfying the debts could keep any balance of the estate for himself and therefore there was an inducement for him to promise payment to the creditors out of his own pocket. As we pointed out in our Twenty-Eighth Report this position was altered by the Statute 11 Geo. IV and 1 Will. IV c.40 which is still in force in this State and accordingly the executor no longer became entitled to the residue as of right and the inducement to make such contracts ceased. This subsection is simply obsolete today. We have been unable to find any modern cases on the section. There is no reason for keeping it as part of the law of South Australia.

2. *Promises to answer for the debt, default or miscarriage of another*

This subsection covers contracts of guarantee in the strict sense, that is a contract that if the debtor does not pay, the guarantor will, and also a contract whereby a person agrees with another to be answerable for the discharge of the liabilities, whether arising out of the contract or of tort, incurred by some third person. If the contract is a contract under which the promisor undertakes a primary and not a secondary liability these are contracts of indemnity and are not within the Statute: see *Pearson* v. *Goldsbrough Mort & Company Limited* 1931 *S.A.S.R.* 320. So, too, where the obligation to pay the debt of another is a mere incident in a contract which has other and wider objects, the contract is not within the Statute: see *Fitzgerald* v. *Dressler* 7 *C.B. N.S.* 374.

Again where the contract does not impose a personal liability but a liability on a particular asset only, the contract of guarantee is not within the Statute: see *Harvey* v. *Edwards Dunlop & Co. Ltd.* 39 *C.L.R.* 302 affirming the judgment of Dixon A. J. of the Supreme Court of Victoria (as he then was) in the Court below.

There is an early decision of the New South Wales Full Court that where A and B promise to become jointly liable for the previous debt of A that again is not within the Statute because there is an inference of law that the previous debt is *extinguished*: see *Morehead* v. *McIsaacs* (1866) 5 *S.C.R.* 295. Further it has been held that the promise must be made to the creditor or the person to whom the debt or duty is owing. A promise to a debtor to pay his debt is not within the Statute: see *Eastwood* v. *Kenyon* 11 *Ad. & E.*1 438. It is the words "default or miscarriage" which extend the liability to one to pay damages in respect of a tort: see *Kirkham* v. *Marter* (1820) 2 *B. & Ald.* 613.

If there has never been any person who can properly be described as the principal debtor the contract is not within the Statute: see *Mountstephen* v. *Lakeman L.R.* 7 *Q.B.* 196 affirmed *L.R.* 7 H.L. 17. In England and Western Australia this is the only part of the Statute which still remains in force. A majority of the Committee recommends that in South Australia it be repealed along with the rest of what remains of Section 4. The distinction between a guarantee and an indemnity is a disgrace to the law and merely a trap for the unwary. The exceptions which we have enumerated above are only some out of a larger number which could have been given. Practically all commercial guarantees are in writing in any case, so that it is only the trusting private citizen who can have the Statute pleaded against him under this clause. If a man enters into an honourable engagement to be surety for the debts of another then he should stand to his engagement. If there is a dispute as to the terms of the guarantee or as to whether one was given or not given at all then that can be decided in the same way as every other disputed question of fact. The truth of the matter is that when the Statute was entered into it was thought that the memory of man beyond one year was so uncertain that the Statute was needed. There may still be some merit in this point as everybody who has had to deal with long delayed litigation knows but there is no reason why those suing on an oral contract of guarantee should be any different position in litigation from say those suing for damages following a road accident, which has to be tried several years after its occurrence and where quite frequently conversations between a driver of a motor vehicle at the scene of the accident and another party or with eye witnesses or with a police constable are sought to be adduced in evidence. The result of keeping this particular subsection of the Statute simply means that ordinary people are penalised, because as we have already pointed out, it is only in the rarest of cases that a commercial guarantee is not in writing and in very great detail at that. Consequential on this amendment it would be necessary to repeal Section 16 of the Mercantile Law Act, 1936 dealing with consideration in relation to guarantees which is a copy of the Imperial Act 19 and 20 Vict. c.97 s.3 which was in itself an amendment to the Statute of Frauds. The Committee considers that in the case of joint or joint and several guarantees problems could arise with regard to the rights and liabilities *inter se* of co-sureties and recommends that in this restricted class of cases, a requirement as to writing be inserted in the repealing Statute, not so as to preserve the operation of Section 4 of the Statute of Frauds in such cases but stating the requirement in modern language.

3. *Agreements in consideration of marriage*

This again is completely obsolete today. A promise of marriage is not itself within the Statute although on the face of the wording one would think that it ought to be and indeed in the earliest years after the Statute was passed it was so held to be: see *Philpott* v. *Wallet* (1682) 3 *Lev.* 65: 83 *E.R.* 579, but that interpretation was soon overruled in 1698 in *Harrison* v. *Cage* 1 *Ld. Raym.* 386: 91 *E.R.* 1156, where it was ruled that the Statute was intended to cover only "agreements to pay marriage portions". The case usually referred to in the textbooks is nearly one hundred and thirty years old and that is *Hammersley* v. *DeBiel* 12 *Cl. & F.*45: 8 *E.R.* 1312. Marriage portions today are very rare and where they do exist there is no reason why if the oral promise is made by a parent or near relative, as would be usually the case, that promise should not be enforceable.

4. *Agreements not to be performed within the space of one year from the making thereof*

This is the most difficult part of the Section and one which has caused a large volume of decisions. The effect of the decisions are summarised in *Sutton & Shannon on Contracts 4th Edition pages* 111-112 as follows:—

"1. The Statute applies:

(*a*) To a contract which appears by its terms to be *incapable of complete performance by both parties* within one year from the making thereof.

(*b*) To a contract which appears by its terms to be *incapable of a complete performance* within one year by *one party*, where the time for *performance by the other party* is wholly *indefinite*.

(*c*) To a contract the *complete performance* of which will by its terms extend over more than one year from the making of it, although it is determinable by notice within the year.

2. The Statute does not apply:

(*a*) To a contract the time for performance of which *by both parties* is wholly *indefinite* or depends on some contingency which may or may not fall within one year from the making of the contract.

(*b*) To a contract which appears by its terms to be intended to be completely performed within one year by one party though it cannot be completely performed by the other party within one year from the making thereof."

Quite apart from the difficulty of deciding whether a case is within the Statute or whether it is not, the Statute has in more recent years been used as a trap by allying it with other Statutes: for example it was used to nullify the effect of the Agricultural Holdings Act, 1941 of the Parliament of New South Wales in relation to an oral sharefarming agreement in *Clarke* v. *Tyler* 78 *C.L.R.* 646. The most recent attempt was made in an attempt to nullify the Long Service Leave Act of this State in relation to

the contracts of workmen whose contracts extend beyond one year. The attempt was held to be unsuccessful by one member of this Committee in *Para Motors Pty. Ltd.* v. *Cocks* (1974) 9 S.A.S.R. 64. It is highly undesirable that this position should continue and this part of the Statute likewise serves no useful purpose at the present day.

We therefore recommend that it be enacted that the whole of what remains of Section 4 of the Statute of Frauds cease to have effect as part of the law of South Australia.

This recommendation means that we are absolved from going through a great deal of case law as to when a contract is signed by the party to be charged or his agent thereto lawfully authorised and as to when a contract can be spelt out of several documents, pleadings or solicitors' letters, all of which matters have been the subject of much judicial subtlety and ingenuity. The most recent example of the last is *Black* v. *Kavanagh* (1973) 108 *I.L.T.* 91.

The remaining subsection, subsection (4) of Section 4, is, as we said before, contained in Section 26 (1) of the Law of Property Act, 1936 (as amended) of this State. Section 26 (1) of the Law of Property Act reads:—

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

A majority of the Committee think that Section 26 (1) serves a valuable purpose and ought to be retained but that it ought to be redrafted to eliminate the case law on the execution of documents under this and cognate sections to read as follows:—

> "(1) No action shall be brought upon any agreement for the sale or other disposition of land or of any interest in land unless such agreement be in writing executed by the parties to the agreement personally or by their agent or attorney."

We have also inherited Section 17 (in some editions of the Statutes numbered 16) of the Statute of Frauds which is now Section 4 of the Sale of Goods Act, 1895 which is in identical terms with the Imperial Sale of Goods Act, 1893. Section 4 reads:—

> "4. (1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the Contract be made and signed by the party to be charged or his agent in that behalf.
>
> (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not".

We recommend, as did the English Law Revision Commission, that that section be repealed. The very first article in the Law Quarterly Review Volume 1 page 1 entitled '*Section 17 of the Statute of Frauds*' which was a joint product of the work of Mr. Justice Stephen and Mr. Frederick, later Sir Frederick, Pollock deals with the problems of the section as they existed in 1885 and those problems have assuredly not become less with the passing of nearly another century. The section was repealed in England in 1954 by the Law Reform (Enforcement of Contracts) Act 2 and 3 Eliz. II c.34 of that year which also repealed Section 4 of the Statute of Frauds and in the twenty years that have followed there seems to have been no ill-effects from those repeals.

We recommend that Section 4 of the Sale of Goods Act 1895 be repealed and with it will go the necessity for perusing twenty-four columns of decided cases in Volume 18 of the Australian Digest together with all the cases that have been decided since that Volume was printed thirty-five years ago.

The other section of the Statute of Frauds which is still in force in South Australia as re-enacted by South Australian legislation is Section 7 of the Statute which made written evidence necessary for the enforcement of a declaration of a trust of land: see Section 29 (1) (*b*) and (*c*) of the Law of Property Act, 1936 (as amended). The weakness of Sections 29 (1) (*b*) and (*c*) is immediately shown by subsection (2) of the same section which says that this section shall not affect the creation or operation of resulting implied or constructive trusts. Then follows three sections, 31, 32 and 33, which provide other exceptions to the rule so that the exceptions, even in the Act, almost eat up the rule. The lack of logic in all of this is well set out in an article by Strahan on *The Place of Writing in Conveyancing and Contract* 26 *L.Q.R. at pages* 123-125. Accordingly if a person claims directly under a trust of land which has been made orally he may be defeated but if the land has been conveyed to a third party and that third party has been told about the trust then parol evidence is admissible: see *In re the Duke of Marlborough* 1894 2 *Ch.* 133. Accordingly as Lewin points out (see *Lewin on Trusts* 16*th Edition page* 24) the sections can afford a defence only where the alleged settlor retains the legal estate in the land. The Committee agree that Section 29 (1) (*b*) be repealed but were divided as to the desirability of the repeal of Section 29 (1) (*c*).

The last section to which we refer is part of Lord Tenterden's Act 9 Geo. IV c.14 which is still part of the law of South Australia as a public general Act in force on the 28th of December, 1836. It is Section V which reads:—

> "And be it further enacted, That no Action shall be maintained whereby to charge any Person upon any Promise made after full Age to pay any Debt contracted during Infancy, or upon any Ratification after full Age of any Promise or Simple Contracts made during Infancy, unless such Promise or Ratification shall be made by some Writing signed by the Party to be charged therewith."

Cheshire & Fifoot 2nd Australian Edition pages 522-523 comment on this section as follows:—

> "The distinction drawn in all of these enactments between a promise to pay any debt and a ratification of any promise or contract is perplexing, but when it is realised that they are modelled

on an Act of 1828 it is more than likely that the original draftsman was influenced by the old system of pleading under which a debt was enforced by *indebtitatus assumpsit*, but a contract by assumpsit, and thus it would have been inappropriate at that time to speak of ratifying a debt. However, whatever may be the reason for it, the enactments clearly deal with two distinct situations:—

First, that a fresh promise, made after full age, shall not render actionable a *debt* contracted during infancy unless, in jurisdictions other than Victoria and Tasmania, that promise is in writing and signed by the former infant.

Secondly, that no ratification after full age of *any* contract made during infancy shall be a ground of action, unless in jurisdictions other than Victoria and Tasmania, the ratification is in writing and signed by the former infants.

"It follows, therefore, and has been decided, that a new promise supported by fresh consideration, made by an infant after his majority to the same effect as the one that he made in infancy, is invalid if it relates to a debt, but valid if it concerns a promise to perform any other obligation. An example is a promise to marry. This leads to a somewhat subtle distinction between ratification and a fresh and independent promise. "Ratification" is not the same as "promise". A ratification refers to the past, and is merely an intentional recognition and confirmation of a previous promise, but a fresh promise is something more than a resuscitation of the past—something more than mere repetition."

With the age of majority reduced to eighteen years it is obvious that this problem is going to arise more and more. An infant was in any case bound at common law to pay for necessaries supplied, upon beneficial contracts of service, and upon contracts under which he took a permanent interest in property, unless in this last case he repudiated in time. The fine distinctions set out by *Cheshire & Fifoot* at page 522 do not commend the section in terms of modern day thinking. If the infant agrees, then he agrees whether it is in writing or not. If he does not agree then he is not to be bound whether it is in writing or not. The difficulties and fine distinctions inherent in this branch of the law are well shown by the decision of the Full Court of this State in *DeGaris* v. *Dalgety & Company Limited* 1915 *S.A.L.R.* 102. It should be enacted that this section of Lord Tenterden's Act should cease to form part of the law of South Australia.

We have in preparing this report referred to the Sixth Interim Report of the Law Revision Committee of England in May, 1937, to the working paper of the Law Reform Commission of Queensland on these Statutes and to a report of the California Law Revision Committee relating to Lord Tenterden's Act.

We have the honour to be

HOWARD ZELLING
J. F. KEELER
K. T. GRIFFIN
D. W. BOLLEN

Law Reform Committee of South Australia

14th April, 1975

The Chairman submits a minority report on the repeal of Section 26 of the Law of Property Act as follows:—

The only value of this section is to aid the dishonest man who thinks after concluding his bargain that he can in fact get a higher price for his land elsewhere and so he does not wish to be bound to his word. All other objections can be met under other areas of the law. If the bargain cannot be spelt out in sufficient detail on the oral evidence, the contract will fail for uncertainty. If there is a conflict as to whether there was a sale or as to what the terms of the sale are, that can be decided like any other question on oral evidence. The actual conveyance of land in any event has to be in writing. If the land is under the old system the document must be by deed under Section 28 of the Law of Property Act. If the document deals with land or any interest in land under the provisions of the Real Property Act, 1886 (as amended), and that means over ninety per cent of all the land in South Australia, then the instrument must be in writing to comply with Part V of that Act. After all interests in land can be acquired under the general law and to a less extent under the Real Property Act by adverse possession which in the nature of things cannot be in writing but yet may vest the fee simple of land in the claimant. So too with natural servitudes, quasi easements, rights by prescription and other similar rights which are not registrable under the Real Property Act and did not require to be in writing under the common law. These again are and have to be proved by oral evidence and some of them provide very difficult questions of law and fact but no-one has ever suggested that they ought to be in writing. In addition to the problems to which I have adverted, there are all sorts of niceties as to things growing on land and as to the essential elements required to comply with the Statute. These are well set out in two recent articles: the first entitled *Evidence in Writing by Wilkinson* contained in 118 *L.J.N. at page* 103 and the other *Contract of Sale—Identifying the Parties by Wilkinson* in 119 *L.J.N. page* 990.

In addition there are the tangled problems of emblements, *fructus naturales* and *fructus industriales* which are referred to in *Cheshire & Fifoot's Law of Contracts 2nd Australian Edition pages* 274 *and* 275. I may also add such nice points as whether a royalty agreement on oil from land is within the Statute. It was held it was not by the Appellate Division of the Alberta Supreme Court in *Emerald Resources* v. *Sterling Oil Proprietries Management Limited* (1969) 3 *D.L.R.* 3*d.* 630 and an appeal from that decision was dismissed in 1970 by the Supreme Court of Canada: 15 *D.L.R.* 3*d.* 256.

All that Section 26 achieves is that an offer is made by a purchaser which the vendor can hold the purchaser to, whilst seeing whether he can build on that offer to get himself a better price. That seems to me to be neither socially desirable nor legally necessary and if vendors have made their bargain they should be compelled to stand by it and Section 26 of the Law of Property Act should be repealed. In consequence Section 29 (1) (*a*) and Section 30 of that Act serve no useful purpose and should also be repealed.

I say "vendors" because there was a sanction against a purchaser who pleaded the Statute, namely that he could not recover his deposit if he did so: see *Monnickendam* v. *Leanse* (1923) 39 *T.L.R.* 445 and *Switzer's Investments Limited* v. *Burn* a decision of the Supreme Court of Alberta reported in (1964) 47 *D.L.R.* 2*d.* 280.

HOWARD ZELLING

14th April, 1975