

## SEVENTEENTH CENTURY EVIDENTIARY CONCERNS AND THE STATUTE OF FRAUDS

*Slade's Case*<sup>1</sup> (1602) is pointed to as the precipitating event in the process which resulted in the passage in 1677 of the Statute of Frauds.<sup>2</sup> Although *Slade's Case* was not the first case allowing the trespassory action of *assumpsit* to be used as a contract remedy in lieu of debt *sur contract*,<sup>3</sup> it was the first case which was followed by the Court of Common Pleas, the court which has jurisdiction over the heavily used action of debt,<sup>4</sup> and which court Coke referred to as the "lock and key of the common law". The importance of the decision was that it supplanted debt's archaic wager of law with *assumpsit's* trial by jury. This change in the mode of proof caused the widespread evidentiary problems which Parliament attempted to solve by the Statute of Frauds.

During the Middle Ages wager of law had provided an advantage to the defendant in an action on a parol promise. Then *Slade's Case* abruptly shifted the advantage to the plaintiff. After 1602 the plaintiff's burden was simply to aver the existence of an informal promise supported by promised consideration.<sup>5</sup> The defendant was shackled from averting those verdicts which might be grossly unfair because the rules of evidence barred the parties' testimony and because both wager and attainder were soon effectively inoperative in *assumpsit* cases. The defendant could now be held to debts on the mere discretion of the jury. In a litigious era, the pendulum had swung too far in favour of the plaintiff. The Statute of Frauds would attempt to remedy the defendant's loss of wager of law.

Wager of law was an ancient proof recognized since Anglo-Saxon days; it had been available to a defendant in a debt action since time immemorial.<sup>6</sup> Trespass actions used trial by jury.<sup>7</sup> Maitland explained that the difference in mode of proof for debt and trespass was because the later action to arrive on the scene (here, trespass) would take on the more modern proof (here, trial by jury).<sup>8</sup> Wager had seemed to work

---

\* Associate Professor, Bradley University, Peoria, Illinois, USA.

1 *Slade v Morley* (1602) 4 Co Rep 92b, commonly referred to as *Slade's Case*.

2 Stat 29 Car II, c 3 (1677). See Plucknett, *A Concise History of the Common Law* (5th edn 1956) 648; Simpson, *A History of the Common Law of Contract* (1975) 298f, 599 (hereinafter referred to as Simpson, *History*); and Baker, *An Introduction to English Legal History* (1979) 288-290, (hereinafter referred to as Baker, *Introduction*).

3 *Pickering v Thurgood*, decided in the King's Bench in 1532: Baker (ed), *Spelman's Reports* vol 1 (1976) 93 Selden Society 4 (hereinafter referred to as Baker, *Spelman's Reports*). *Pickering's Case* did involve the making of a partial payment, whereas the consideration was wholly executory in *Slade's Case*.

4 Baker has pointed out in his important article, "New Light on *Slade's Case*" (1971) 51 Camb LJ 213, 231f (hereinafter referred to as Baker, "New Light") that *Slade's Case* was not the decision of the new Exchequer Chamber, created in 1585 and which included the Common Pleas justices, but was rather the decision of the King's Bench alone after an impasse had been reached in the old informal Exchequer Chamber. Baker refers to Common Pleas' subsequent acquiescence in *Slade's Case* as a mystery.

5 Simpson, *History* 407.

6 Maine, *Early Law and Custom* 144.

7 Stat 12 Edw II Statute of Wales.

8 Maitland, *The Forms of Action at Common Law* (originally in *Equity* (1909), published separately in 1936) 40. A revisionist view is suggested in McGovern Jr, "Contract in Medieval England: Wager of Law and the Effect of Death" (1968) 54 Iowa LR 19, 20f.

adequately in the local courts, where neighbors knew each other, but it failed badly once the courts were centralized in the anonymity of Westminster, where the use of paid oath-helpers, known as "knights of the post", made a farce of the process.<sup>9</sup> Perjury was not a crime in wager; the only control was that the defendant would fall into mortal sin.<sup>10</sup>

As the Age of Faith waned, perjury in wager of law became enticing. Coke was addressing himself directly to the problems of perjury in wager when he said that it was good "to oust the defendant of his law, and to try it by the country, for otherwise it would be occasions for much perjury . . . And I am surprised that in these days so little consideration is made of an oath, as I daily observe."<sup>11</sup> Blackstone would later say that wager was inappropriate because "otherwise any hardy delinquent might escape any penalty of the law by swearing that he never incurred or else had discharged it".<sup>12</sup> Wager weighted the balance in favour of the defendant, who alone selected the compurgators, unlike trial by jury. *Slade's Case* effectively ended wager, and in those exceptional cases in which a plaintiff brought debt *sur contract* after 1602, wager was refused the defendant,<sup>13</sup> though wager was not formally ended until 1833.<sup>14</sup>

Notwithstanding the attacks on wager of law, it had some strengths which were lacking in trial by jury, and certain of those weaknesses in the jury system would prompt the passage of the Statute of Frauds. The experience of the seventeenth century would make it apparent that the rules of evidence and the jury system were simply inadequate to handle the enforcement of private, parol, executory promises. The only real control over a defendant was the fear of mortal sin, but the possibility of mortal sin was avoided if an Englishman waived his birthright of wager of law and elected a trial by jury. More importantly, there was no proof that trial by jury was any freer of perjury than wager. Lord Keeper Egerton had been refusing to enforce unwritten agreements because so many witnesses of that day were *testes diabolices*. Furthermore, hardships arose in cases where a payment was made but there was no evidence of payment; if the defendant could not wage his law, he would be forced to pay twice.<sup>15</sup> This example leads us to the elementary weakness of trial by jury: since most simple, parol contracts were private and not known to the community, the men of the country (or jury), who were to come informed of the transaction, had no cognizance of the facts.

The Statute of Frauds would attempt to make those arrangements apparent to third parties by requiring that certain agreements be memorialized in written form. In order for the jury to be effective, the facts regarding the contract must have been notorious; and when facts were notorious, the courts had refused to allow wager even before

9 Milsom, *Historical Foundations of the Common Law* (2nd edn 1981) 67, (hereinafter referred to as Milsom, *Foundations*); Simpson, *History* 298.

10 Simpson, *History* 138.

11 *Slade's Case*, supra n 1 at 94b, 95b.

12 Blackstone, *Commentaries on the Laws of England* vol 3 (1765) c 22, 347f. (hereinafter referred to as Blackstone, *Commentaries*).

13 Simpson, *History* 298. *Slade's Case* would shift the balance to the plaintiff, and then the Statute of Frauds would shift the balance back to the defendant, whence it came, thus protecting vested property interests once more.

14 Stat 3 & 4 Wm IV c 42 s13, where it was enacted "that no wage of law shall be hereafter allowed".

15 Baker, "New Light" 229.

*Slade's Case*. An early example of that is found in Bracton where wager is disallowed in a waste cause of action because wager would be a flagrant denial of facts visible to a sheriff visiting the site.<sup>16</sup> Other examples of notorious facts include: contractual relationships apparent to the community, such as labour contracts;<sup>17</sup> debt actions brought on account before auditors;<sup>18</sup> and actions for rent arrears against a tenant.<sup>19</sup>

### Primitive Nature of Jury and Law of Evidence

Professor Thayer said that the English law of evidence is the "child of the jury".<sup>20</sup> His thesis is still the accepted view, though there is a revisionist theory.<sup>21</sup> Unlike England, none of the countries on the Continent developed a law of evidence, nor did those countries have trial by jury. The appearance of an early form of trial by jury during the era of Glanvill (c 1180) set the wheels in motion for the development of a set of exclusionary rules in order to avoid confusing these lay folk, who were unschooled in the law and were often uneducated. Judicial logic and experience dictated that irrelevant information be excluded from the ears of the fact-finding jury.<sup>22</sup> Although forms of trial by jury and the related law of evidence had existed for four centuries prior to the seventeenth century, both were still in a primitive state. A modern law of evidence was barely peeking its head on the horizon. Jurors would still be selected even though they had personal knowledge of the dispute, and they could rely heavily on it when rendering their decision.

Jurors did not hear significant evidence at the trial prior to the early Renaissance period. It was not until the late fifteenth century that witnesses regularly testified in open court before the jury.<sup>23</sup> Prior to that time there was a sporadic use of witnesses in open trial; the first Year Book case providing a somewhat full report of the trial testimony and

16 Bracton, f 315b.

17 YB 2 Hen IV, H, f 14, pl 12. See also Baker's discussion of the caselaw developed under the Statute of Labourers (1349-1351) in Baker, *Introduction* 277f.

18 YB 9 Hen V, P, f 3, pl 9.

19 YB 9 Edw IV, P, f 1, pl 1.

20 Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898) 47 (hereinafter referred to as Thayer, *Treatise*).

21 Professor Langbein has suggested that the rules of evidence did not develop as a response to the appearance of trial by jury but rather as a judicial reaction to lawyers' attempts to take control of the trial in the eighteenth century: Langbein, "The Criminal Trial Before the Lawyers" (1978) 45 Univ Chic LR 263, 306-308. There is an important connection between the appearance of lawyers in criminal trials and the budding of a modern law of evidence. Much of Langbein's research concerns sensational state criminal trials in the second half of the Seventeenth Century. During that period, in criminal cases there was no right of attainr for control of jurors and no right to the appearance of counsel for the defendant: Milsom, *Foundations* 412f. See also the first statute authorizing counsel for the criminal defendant, Stat 7 & 8 Wm III, c 3 (1696). However, civil cases of that period provided for attainr (see *Bushell's Case*, infra n 42) and representation by counsel during the trial for both parties (see cases such as *Babington v Venor*, infra n 24). The development of a modern law of evidence in the eighteenth century was probably more directly related to the increasing, though not complete, passivity of jurors. The mixed character of the seventeenth century jury is reflected in two decisions which both writers were aware of: *Babington v Venor* shows a passive jury listening to witness testimony, and yet nearly a century later in *Bennett v Hartford* (1650) Style 233, 83 ER671, 672 (Upper Bench) the jurors' private knowledge could be used but it had to be testified to on oath in open court. See Thayer, *Treatise* 111, 133, 168f, 174 and Langbein supra herein at 299. On these latter points generally, see nn 76 and 71, respectively.

22 Thayer, *Treatise* 1-5, 263f.

23 Ibid 125-133.

arguments was *Babington v Venor* in 1465.<sup>24</sup> In that case witnesses *and counsel* made evidentiary statements, the bulk of it coming from the latter.<sup>25</sup> During the first part of the sixteenth century jurors were still talking to witnesses outside of court. Sir Thomas More argued in 1533 that no one should give evidence to jurors except at the bar. During Spelman's time the instances of calling witnesses by subpoena was rare, and the issue of the competence of witnesses was usually not raised.<sup>26</sup> During Coke's time the law of evidence was still scanty, and as late as the seventeenth century Coke could still say that the evidence of witnesses was no part of the trial, that the trial was the verdict of twelve men of the vicinity.<sup>27</sup>

Only in the seventeenth century was an interested witness disqualified from testifying.<sup>28</sup> Prior to the mid-seventeenth century, the rule regarding interested witnesses was diametrically opposed to the modern rule. The old view was that a disinterested witness was suspect. A witness committed the tort of maintenance (unlawful interference with a lawsuit) if he testified to a jury without an interest or connection with a party, such as, through privity, a familial relationship, employment, etc. Indeed, the law of maintenance was very influential in discouraging testimony in open court, a consequence being the slow development of the law of evidence.<sup>29</sup> This rule discouraged disinterested witnesses from testifying, and it generated obvious credibility problems. As late as 1613 courts were directly allowing interested witnesses to testify.<sup>30</sup> The mid-seventeenth century exclusion of interested parties seems to have been influenced by Coke's *A Commentary Upon Littleton*, written in 1627, but not published until 1642. Coke stated that interested witnesses should be barred but admitted that some courts were still allowing interested witnesses to testify.<sup>31</sup>

Perhaps the most crucial witnesses to a parol promise excluded from testifying since the late medieval period were the parties themselves.<sup>32</sup> This rule was still rigorously enforced in the seventeenth century.<sup>33</sup> Frequently the parties were the only witnesses to an informal agreement, and a defendant who could not testify found it difficult to defend against the plaintiff's rather easily established *prima facie* case in *assumpsit*. Parties continued to be excluded from testifying until the

24 *Babington v Venor* (1465) Long Quint (4 Edw IV) 58. Contemporaneous with *Babington* was the publication before 1470 of Fortescue's *De Laudibus Legum Angliae*, which also recognized the use of witnesses at the trial. See also YB 11 Hen IV, f 43, pl 36 (1433).

25 Through the eighteenth century it was recognized that counsel could put in evidence by mere allegation to the jury: *Cocksedge v Fanshaw* (1779) 1 Doug 119.

26 Baker, *Spelman's Reports* vol 2, 110.

27 Thayer, *Treatise* 135.

28 Wigmore, *Evidence in Trials at Common Law* vol 2 (revised edn 1979) s575; Gilbert, *The Law of Evidence* (4th edn) 220-225 (hereinafter referred to as Gilbert, *Evidence*).

29 YB 11 Hen VI, 43; YB 21 Hen V, 15, 30. See also Thayer, *Treatise* 127.

30 *Anon* (1613) 1 Bulstr 202.

31 Thayer, *Treatise* 130-132.

32 *Dymoke's Case* (1582) Savile 34, pl 81. Spouses were also excluded. Gilbert, *Evidence* 252; Simpson, *History* 605. Thayer cites Stat 6 Hen VI, c 2 (1427) to show that in an earlier period parties were permitted to speak to the jurors before the trial: Thayer, *Treatise* 92.

33 Gilbert, *Evidence* 220-222. This was also true of the eighteenth century: Blackstone, *Commentaries* vol 2 c 23, 381f.

passage of the Evidence Act of 1851.<sup>34</sup> A party's papers also could not be subpoenaed, thus barring the book of accounts of a merchant-party from admission even though such evidence could have often been decisive.<sup>35</sup>

The law of evidence of the 1670s bore little resemblance to our modern law of evidence. Many of the rules of today were then either unknown or rarely applied. There was no distinct system of rules for excluding evidence.<sup>36</sup> The principle of cross-examination did not develop until the early 1700s. Impeachment and corroboration of witnesses did not appear until the eighteenth century.<sup>37</sup> Likewise the best evidence rule did not originate until Chief Justice Holt's time in a 1699 case.<sup>38</sup> Judicial notice was only beginning to develop; in a 1588-1589 case Coke himself, as attorney for the plaintiff, argued that the judge should not recognize references to two hospitals as the same Savoy unless it was in the record, even though they knew it to be so of their knowledge.<sup>39</sup> Isolated presumptions were only beginning to be recognized.<sup>40</sup> Imperfect notions of hearsay and the best evidence rule were barely recognized by the late seventeenth century courts,<sup>41</sup> and throughout the seventeenth century jurors were allowed to use their own privately acquired hearsay information.<sup>42</sup> Recognition of the parol evidence rule was beginning, but it was unsettled.<sup>43</sup> The parol evidence rule did not develop as a modern rule until subsequent to the passage of the Statute of Frauds.<sup>44</sup> Furthermore, it was not possible to appeal the improper admissibility of oral testimony because there was no record of it on the plea rolls; evidentiary appeals that were allowed were restricted to the admission of written evidence.<sup>45</sup>

The backwardness of the law of evidence in the seventeenth century reflected the lack of development of its parent, trial by jury. Maitland saw Blackstone's description of trial by jury as similar to the trial by jury of Edward I's reign.<sup>46</sup> Jurors were required to give a unanimous

---

34 It then took over one hundred years after the qualification of parties testifying for the British Parliament to point to that crucial change in the law of evidence as a justification for repealing the Statute of Frauds: "The End of an Anachronism" (1954) 104 LJ 436f.

35 Blackstone, *Commentaries* c 23, 382.

36 Thayer, "The Statute of Frauds, Section 17" (1891) 4 Harv LR 91.

37 Wigmore, *Evidence in Trials at Common Law* vol 1 (revised edn 1979), s8.

38 *Ford v Hopkins* (1699-1700) 1 Salk 283.

39 *Marrott v Pascall* (1588-1589) 1 Leon 159.

40 Stat 1 Jac I, c 11 (1604) Bigamy Act, provided that it was not bigamy to remarry after one's spouse had been absent for 7 years. Stat 19 Car II, c 6 (1667) allowed a reversionary interest subsequent to a life estate to be claimed if the life tenant was absent for 7 years. Thayer points to these as early examples of presumptions: Thayer, *Treatise* 319-321.

41 Thayer, *Treatise* 498. Thayer said that the late seventeenth century was "an early period for anything like a rule of evidence, properly so called. Such rules could not well come into prominence, or be much insisted on, while the jury were allowed to find verdicts on their own knowledge." See also Gilbert, *Evidence* 279 and Blackstone, *Commentaries* vol 3 c 23, 368f.

42 *Bushell's Case* (1670) Vaughan 135.

43 Holdsworth, *A History of English Law* vol 6 388 (hereinafter referred to as Holdsworth, *History*). The first parol evidence rule case was *Countess of Rutland's Case*, (1604) 5 Co Rep 25.

44 Gilbert, *Evidence* 311. The use of parol evidence to clarify ambiguities was not permitted until Mansfield followed Maxim 25 of *Bacon's Maxims* (published in 1629-1630): Thayer, *Treatise* 360-370.

45 Milsom, *Foundations* 58f.

46 Pollock and Maitland, *The History of English Law Before the Time of Edward I* 641 (hereinafter referred to as Pollock and Maitland).

verdict, and jurors were under a good deal of duress until their verdict was given.<sup>47</sup> Jurors were kept like prisoners until a unanimous verdict was rendered — without meat, drink, fire or candle.<sup>48</sup> Jurors were selected by the sheriff, and if a party had influence with the sheriff, then he could obtain a favourable jury. Bribery of jurors was common. In order to avoid bribery of poor men, there was a forty shilling land wealth requirement to be a juror.<sup>49</sup> It has been suggested that some plaintiffs may have preferred trial by jury over wager because it was easier for a dishonest plaintiff to suborn a juror than the defendant's compurgators.<sup>50</sup> The judicial methods of controlling this jury of men of the country were infantile. A compelling explanation for the court's lack of control was due to the right of jurors to base their verdict on information acquired independently of the evidence submitted at the trial.<sup>51</sup> In the seventeenth century Sir Matthew Hale wrote with approval that in a trial by jury a juror may personally know that testimony is false or know of facts not raised at the trial because the juror is of the vicinity.<sup>52</sup>

If the jury made a bad decision, the only real solution was by writ of attain. In attain a special body of twenty-four men could review on oath the jury decision, and if a perjured verdict was found, the twenty-four could convict the original twelve. The decision of the twenty-four would then replace the decision of the twelve.<sup>53</sup> Jurors would try to avoid the possibility of attain by rendering a special verdict, but most courts opposed this move and would force the jury to a yes or no answer.<sup>54</sup> There were also complaints of perjury, bribery and delays in the attain.<sup>55</sup> As juries began to change from a body of witnesses, who could commit perjury, to passive judges of facts, attain jurors became unwilling to convict a juror for what was probably a mistaken judgment of the facts rather than a perjury.<sup>56</sup> If there were any remnants of vitality left in attain by 1670, they were then effectively extinguished.<sup>57</sup> The modern substitute for attain is a new trial; however, this motion was hardly recognized at this time.<sup>58</sup>

In addition to the exclusionary rules mentioned, there were other imperfect attempts at judicial control of juries, eg pleadings, rules

47 Baker, "New Light" 51, 64.

48 This was still the case in the mid-eighteenth century: Blackstone, *Commentaries* vol 3 c 23, 375.

49 Baker, *Spelman's Reports* vol 2, 107.

50 Simpson, *History* 140.

51 Holdsworth, *History* vol 6, 388; Rabel, "The Statute of Frauds and Comparative Legal History" (1947) 63 LQR 174 (hereinafter referred to as Rabel, "Statute of Frauds").

52 Sir Matthew Hale, *The History of the Common Law* 292-294.

53 Thayer, *Treatise* 131f, 143. Although a diluted form of attain was permitted in civil jury cases in the Seventeenth Century, it was not permitted in criminal jury cases. Milsom, *Foundations* 411. On attainments generally see supra n 21 and infra nn 55 and 66.

54 Pollock and Maitland, 631; see also Bracton, f 290b. The Statute of Westminster II, c 80 forbade a court from demanding a general verdict, but it was systematically avoided by the courts.

55 Stat 11 Hen VI, c 4 (1433) provides damages for the mischief caused by "the usual perjury of jurors" and Stat 14 Hen VI, c 5 (1436) speaks of the shameless perjury and 10 year delays in attain. Punishments were so great in attain that attain was rarely used: Thayer, *Treatise* 153. The fine was lowered to £20 in 1495 (Stat 11 Hen VII, c 21). Attain was rarely seen in the Seventeenth Century, though it was not officially abolished until 1825. See also supra n 66.

56 Milsom, *Foundations* 412.

57 *Bushell's Case*, supra n 42.

58 Thayer, *Treatise* 180.

regarding the effect of a writing, statutes requiring witnesses to an event, new trial motions, attain, voir dire, jury instructions and others. The need for pleadings arose with the emergence of the jury. It was a technique for making sure that the jury's frame of reference was narrowed to the issue presented.<sup>59</sup> There was a distrust of the jury in separating the law from the facts. It was further thought that jurors would pay more attention to a written pleading than to the evidence.<sup>60</sup> By the sixteenth century written pleadings had completely replaced oral pleas. With the replacement of the ancient oral tentative pleas,<sup>61</sup> there were complaints from Hale and others that mere form and tricky paper pleadings had replaced the more flexible system of the Year Book days.<sup>62</sup> Also alternative pleas were not allowed until 1705.<sup>63</sup> In regard to the effect of a sealed writing, jurors frequently could not read; and in certain instances courts would allow an authenticated document to be the mode of proof, thus bypassing the jury, in order to avoid the jury deciding wrongly.<sup>64</sup> Statutory requirements of witnesses in order to prove certain events had the same effect as the Statute of Frauds. It barred the jury from deciding a specific factual question unless the pre-condition of the witnesses were present.<sup>65</sup> The allowance of a motion for a new trial was recognized by the seventeenth century, but this motion was not widely used nor fully developed by the time that the use of attain was effectively terminated in *Bushell's Case*.<sup>66</sup> The holding in *Bushell's Case* made it difficult for a court to grant a new trial anyway because jurors were allowed to use knowledge unknown to the court.<sup>67</sup> As to the use of voir dire, challenges were rarely made. And the use of jury instructions was irregular and skimpy at best.<sup>68</sup>

### Prelude to the Statute of Frauds

If *Slade's Case* created the need for greater control over the jury, *Bushell's Case* awakened Parliament to the need for immediate action to guide the jury's deliberation of an alleged parole promise. The defendant in *Bushell's Case*, Edward Bushell, who had been a juror in an unlawful assemblage case, was charged with acquitting three persons against the manifest weight of the evidence. The court recognized the old nature of the jury and its reliance on private knowledge and concluded that it could not allow attain when a juror could have been relying on knowledge the judge was unaware of.<sup>69</sup> Vaughan C J stated:

59 Baker, *Introduction* 62, 77f.

60 YB 22 Edw IV, 39, 24; YB 20 Hen VII, 21.

61 Baker, *Spelman's Reports* vol 2 96-99.

62 *Anon* (1672) Treby Rep, MS in Middle Temple, 717; Hale, *History of the Common Law* (1971 edn) 111; see also Baker, *Introduction* 74f.

63 Stat 4 & 5 Anne, c 16 (1705).

64 Thayer, *Treatise* 205-207.

65 There was one case suggesting that at least one witness was required to a parole promise: *Wiver v Lawson* (1626) Litt 33, Hetley 14, 15. Two witnesses were required in a case of treason: Stat 1 Edw VI, c 12 (1547) s22; Stat 5 & 6 Edw VI, c 11 (1552) s12. Two witnesses were required to charge a mother with murder for concealing the death of her child: 21 Jac 1, c 27 (1623). The common law never adopted the canon law rule of requiring two witnesses to establish a fact: Simpson, *History* 605; see also Blackstone, *Commentaries* vol 3, c 23, 370 and Langbein, *Prosecuting Crime in the Renaissance* (1974) 55, 119.

66 *Bushell's Case*, supra n 42. By the eighteenth century attain was in total disuse and had been replaced by new trials: Blackstone, *Commentaries* vol 3, c 23, 375.

67 Thayer, *Treatise* 153-155.

68 Langbein, "Criminal Trial Before the Lawyers" (1978) 45 Univ Chic LR 273-276.

69 This characteristic of trial by jury continued into the eighteenth century: Blackstone, *Commentaries* vol 3 c 23, 374. However, there was a requirement of such jurors

“for being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger.”

The recognized right of the jury to act on its own knowledge continued well into the eighteenth century.<sup>70</sup> *Bushell's Case* arguably rendered the existing rules of evidence, albeit embryonic, impotent; for a jury could base its decision on anything whether relevant or not, whether introduced at the trial or note. But it is accepted that Vaughan CJ purposely described trial by jury as being the same as it was in a bygone era as a way of justifying his holding. Notwithstanding his disingenuous opinion, it is clear today that by 1670 the fact-finding role of the jury was somewhat giving way to a more passive, judgmental role.<sup>71</sup>

The stage was set for the passage of the Statute of Frauds, an Act which did not prescribe the evidence required to enforce a written agreement, but rather constituted a substantive legal requirement for an action or a defence to be allowed into the hands of a largely unfettered jury.<sup>72</sup> Professor Thayer labelled the Statute of Frauds a “very un-English piece of Legislation” because it was so comprehensive and far reaching, and he questioned whether such a wide-reaching Act would have passed if trial by jury was on the footing it enjoyed by the late nineteenth century.<sup>73</sup>

It was an un-English time, what with the country restoring itself from the Civil War. It was a period of dramatic change. The century had opened under the influence of Sir Edward Coke, who has been referred to as that “mean and untidy man”.<sup>74</sup> Coke forcibly pulled English law out of its medieval state, urging it to catch up with a changing world. Reform continued under Sir Matthew Hale’s Commission on Law Reform of 1652.<sup>75</sup> Indeed, in view of the political climate, it has been argued

69 *Cont.*

which the *Bushell* Court conveniently failed to mention; that if a juror had private knowledge he must divulge it on oath in open court: *Bennett v Hartford*, supra n 21 and *Powys v Gould* (1702) 7 Mod 1.

70 Blackstone, *Commentaries* vol 3 c 23, 367, 374. During the eighteenth century judges began to require that a jury state what they knew; by 1816 a juror was to be unfamiliar with the facts when seated, *R v Sutton* (1816) 4 M & S 532.

71 See Langbein, “The Origins of Public Prosecution at Common Law” (1973) 17 Am J of Leg Hist 313, 314f. In Langbein’s book, *Prosecuting Crime in the Renaissance* (1974) 1190 he cites the Statute of Pirates (Thayer, *Treatise* 135, n 1) to support his view of the jury as a passive body by the seventeenth century. The Statute of Pirates Stat 27 Hen VIII, c 4 (1535-1536) and 28 Hen VIII, c 15 (1536) allowed jurors to hear cases involving offences committed thousands of miles from the men of the country. Thayer does not take the exclusivist view that Langbein does. Thayer sees a jury in 1670 which had characteristics of both the old fact-finding jury and the modern purely judgmental jury: “This double character of the jury was no novelty ... the jury had much evidence long before the parties could bring in their witnesses, and in so far as they acted on evidence they were always judges.” Thayer, *Treatise* 168f. See also supra n 21.

72 Thayer, supra n 36.

73 Thayer, *Treatise* 180, 430f. See also *Hoare v Evans* (1892) 1 QB 593, 597.

74 Milsom, *Historical Foundations of the Common Law* (1969) 53.

75 Henry Rolle CJ of the “Upper Bench” and Matthew Hale CJ of Common Pleas, were instrumental in fostering a number of the legal reforms enacted during the Interregnum. Hale’s Commission produced a recommendation for the registration of gifts and transfers of property: Plunkett, *A Concise History of the Common Law* (2nd edn 1936) 54; see also Simpson, *History* 609.



that the decision in *Bushell's Case* was prompted by political considerations.<sup>76</sup>

Although the Commonwealth encouraged reform, the Civil War also encouraged unscrupulous claimants to take advantage of the confusion in government and the uncertainties created by the jury system's difficulties in adapting to the increased influx of *assumpsit* actions.<sup>77</sup> The spirit of reform survived into the Restoration,<sup>78</sup> though it can be argued that the reform undertaken by the Statute of Frauds was reactionary. Hale was openly concerned about the evidentiary problems *Slade's Case* had created when he said in 1672:

"For it had become a great grievance, two men can hardly talk together but a promise is sprung. It were well if a law were made that no promise should bind, unless there were some signal ceremony, or that wager did lie upon a promise . . . And *Slade's Case* . . . had done more hurt than ever it did or will do good."<sup>79</sup>

Hale's suggestion of a "signal ceremony" was a harbinger of the writing requirements of the Statute of Frauds.<sup>80</sup>

Prior to *Slade's Case* the King's Bench had primarily allowed the action of *assumpsit* for hardship cases, that is, for those infrequent fact situations in which the old contract remedies failed to provide a remedy.<sup>81</sup> Debt *sur contract*, with its wager of law, was still carrying the bulk of the contract litigation in its home in Common Pleas.<sup>82</sup> *Slade's Case* was momentous because the Court of Common Pleas fell into line with the use by the King's Bench of *assumpsit* in lieu of debt, spelling the death of wager, and thrusting upon the infant jury system an awesome task it was not ready for. Contract law had now been taken over by *assumpsit*. The law of evidence and the jury were not equipped to handle a *Slade*-type fact situation. *Slade's* agreement was private, so it was not within the knowledge of the country. Furthermore, *Slade's* consideration was executory, so there was no property of the plaintiff's in the hands of the defendant to raise the inference of a consensual

76 Langbein, "The Criminal Trial Before Lawyers" (1978) 45 Univ Chic LR 263, 298-300. There was a strong reaction against the central authority during this period. Three years previously Parliament had nearly impeached a judge for daring to fine a county juror, and Vaughan CJ shied away from the use of the judicial authority to fine in a case as politically sensitive as *Bushell's Case*. See also Thayer's discussion of this same point. Thayer emphasizes that the right to fine civil jurors had ended before *Bushell's Case* arose: Thayer, *Treatise* 165-167.

77 Rabel, "The Statute of Frauds" 178; see also Cheshire and Fifoot, *Law of Contract* (1945) 106.

78 Thayer, *supra* n 36.

79 Treby Rep, MS in Middle Temple, 747; see also 651. Hale was not alone among the justices in opposing *Slade's Case*. Vaughan CJ denied the validity of *Slade's Case* in *Edgcomb v Dee* (1670) Vaughan 89, and nearly a century later Lord Mansfield CJ voiced his objections in *Robinson v Bland* (1760) 2 Burr 1077, 1086.

80 Sir Francis North said Hale was chief in fixing the Statute of Frauds and North himself did the urging in Parliament on behalf of Hale and the other justices. North, Hale's successor as Chief Justice of Common Pleas, was quite influential in the Parliamentary drafting of the Statute of Frauds in its final form: North, *Lives of the Norths* vol 1, 141; see also Costigan (ed), *Wigmore Celebration Legal Essays, Interpretation of the Statute of Frauds* (1919) 475f.

81 Milsom, *Foundations* 346f.

82 In the 1572 Trinity Term of Common Pleas there was 503 debt *sur contract* actions and only three *assumpsit* actions: Kiralfy, *The Action of the Case* (1951) Appendix A.

relationship.<sup>83</sup> A private, executory agreement was extremely difficult for the uncontrolled seventeenth century jury to intelligently consider, particularly when the only witnesses to the transaction, the parties themselves, were barred from testifying. It would have been much easier for the jury in a *Slade*-type case if the defendant had received the consideration, or in the alternative, the agreement was documented in writing.<sup>84</sup>

### Evidentiary Bases of the Statute's Categories

Lord Keeper Finch, later the Earl of Nottingham, prepared the first draft of the Statute of Frauds in 1673.<sup>85</sup> It was titled "An Act for Prevention of Frauds and Perjuries"; this name would continue through the final draft of the Act. It provided unsigned writing requirements for leasehold, land, wills and trusts; but most importantly for this discussion, it provided that damages for breach of a parol agreement could not be recovered for greater than a to-be-established monetary amount.<sup>86</sup> This ceiling on recovery of damages provision may have been borrowed from the 1566 French Ordinance de Moulins, which restricted the amount recoverable on a parol promise to 100 livres.<sup>87</sup> Finch's draft was a simple solution; in the main, it required that agreements concerning land be in writing and that the damages for breach of parol agreements be limited. It did not concern itself with the problems left by *Slade's Case*.

The Committee of the House of Lords charged with drafting the Bill then ordered that the common law judges attend and offer amendments to Finch's draft.<sup>88</sup> As a result the common law courts' evidentiary concerns about the use of *assumpsit* actions before a jury were reflected in the redraft. Finch, representing Chancery, had not been worried about the evidential ramifications of *Slade's Case* because there was no jury in the Chancellor's Court. Chief Justice Francis North, of the Court of Common Pleas, was in the forefront in almost totally rewriting the contract portion of the 1573 Bill.<sup>89</sup> The contract portion of the final draft in 1675, ultimately signed into law in 1677, contained writing requirements for six categories of agreements, all of which had formerly been enforceable in *assumpsit* as parol agreements. Sections 4 and 17 were the contract sections of the Statute.<sup>90</sup> Section 4, drafted by North

83 At least when the passage of debt's *quid pro quo* was fictionalized as a passage of property, the proof used was wager, a proof better suited than the medieval jury for private, executory agreements. See Milsom, "Sale of Goods in the Fifteenth Century" (1961) 77 LQR 257, 283f.

84 *Sharrington v Strotton* (1567) Plowden 298, 308 stated that a contract by words needed consideration but one by sealed deed operated of its own force.

85 Chancery was active in the enforcement of parol promises and actively promoted these writing requirements in Parliament in order to combat the high incidence of perjury.

86 Hening, "The Original Drafts of the Statute of Frauds and Their Authors" (1913) 61 Univ Penn LR 283, 285, 289 (hereinafter referred to as Hening, "Drafts").

87 Rabel, "Statute of Frauds" 175. Rabel argued extensively that much of the English Statute of Frauds was borrowed from the 1566 French Ordinance and its predecessors. Professor Simpson questions the extent of the impact of that particular French Statute, but does acknowledge there was the general influence of a trend toward more formality all over Europe. Simpson, *History* 605-608.

88 The judges attending the Lords' Committee included Sir Francis North CJ, Common Pleas; Hugh Wyndham, Common Pleas; William Scroggs, Common Pleas; Thomas Jones, Kings' Bench; Sir Heneage Finch, Chancellor; and Sir Leoline Jenkins, Civilian Judge of Prerogative Court of Canterbury. Hening, "Drafts" 297-311.

89 Hening, "Drafts" 303, 314-316.

90 Stat 29 Car II, c 3, Statute of Frauds. The preamble to the Act states, "For the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury". The Statute had 24 sections. The 22

and the other Judges of Common Pleas, required a signed writing for promises of an executor, guaranty contracts, marriage contracts, land sales and agreements not to be performed within one year. Section 17, drafted entirely by North, required a signed writing for sales of goods of £10 sterling or more.

The only unifying feature to these six categories seemed to be that all of these categories of contracts had first become enforceable in parol form through the innovations of *assumpsit* in the sixteenth and seventeenth centuries. Prior to *assumpsit* for nonfeasance, all of these contracts required a sealed writing in order to be enforceable. Parliament tried to return to the pre-*assumpsit* writing requirement days, substituting the mercantile signature for the aristocratic seal.<sup>91</sup> Some writers view the Statute as so reactionary that it is a revival of obsolete witness requirements of the Anglo-Saxon period<sup>92</sup> and of the alternatives to writings of the Age of Glanvill.<sup>93</sup> The Statute reflects the English common law tradition of looking to the past for a solution rather than making a wholesale statutory overhaul of the law of contract.<sup>94</sup> The reactionary spirit of the Restoration should also probably not be ignored.

Turning to the categories of contracts included in the Statute, the first provision of s4 requires that there shall be a writing "to charge any executor or administrator upon any special promise, to answer damages out of his own estate". An estate was not held liable for the debts of the decedent until the 1611 *assumpsit* case of *Pinchon's Case*.<sup>95</sup> Due to *Pinchon's* complete reversal of a centuries-old rule shortly after *Slade's Case*, executors were fearful that when the other shoe dropped they would find themselves individually liable for estate debts.<sup>96</sup> The making of contracts with executors individually were more common than they are today.<sup>97</sup> It was only beginning with the Restoration that a beneficiary could bring an action against an executor to compel distribution.<sup>98</sup> If

90 *Cont.*

non-contract sections of the Statute did not deal with the preamble's stated objective of prevention of perjury. Rather they were reform provisions aimed at clearing up defects in land law and the law of trusts and testaments: s5 prevented a jury from finding a devise of real property unless it was a witnessed writing; the same rule applied to wills of personality, subject to Jenkins' expectations in ss19 - 23.

91 Simpson, *History* 1610; see also 1 Reed, *Statute of Frauds* 20, s14. Both of these works address themselves to s4; this writer is adding s17 to the point.

92 *Greenleaf on Evidence* vol 1, s262 (14th edn) provides a complete discussion of the formal witness requirements for transactions during the Anglo-Saxon period. It even points out that all of the Statute of Frauds categories had writing requirements under Roman Law. It is suggested that the Statute was a revival of these obsolete provisions, fashioned to the circumstances of the Seventeenth Century.

93 Pollock and Maitland suggested that North's alternatives to the s17 writing requirements of "accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment" is the same as Glanvill's badges of a completed sales transaction (Glanvill, Book X c 14; Bracton, f 61b): 2 Pollock and Maitland 207f. A more bizarre example of the drafters' reach into the distant past was contained in Nottingham's 1673 draft, which was ultimately deleted from the final 1675 draft. The 1673 Bill declared a deathbed will invalid, unless the testator thereafter went abroad in public, which appears to be related to Glanvill's statement that the testator must take three to seven steps in order to show that he is physically fit: Rabel, "Statute of Frauds" 186.

94 Simpson, *History* 619f.

95 *Pinchon's Case* (1611) 9 Co Rep 86b. The King's Bench had earlier come to the same conclusion in *Norwood v Read* (1558) Plowden 180.

96 Plucknett, *A Concise History of the Common Law* (2nd edn 1936) 578f.

97 Holdsworth, *History* vol 6 691f.

98 Stat 22 & 23 Car II, c 20 Statute of Distribution.

there was no residuary beneficiary named, the executor took the residue, and it was common for him to personally agree to satisfy the individual legatees since it was to his benefit to do so. It has been suggested that executors' liability was included in deference to Hale, who had made an outburst against *Slade's Case* in such a fact situation in 1672 (supra). Since this type of promise was on its face a promise for the benefit of someone other than the promisor, the courts (and Parliament) were reluctant to find liability unless there was strong proof of such an extraordinary undertaking.<sup>99</sup>

The second contract listed in s4, guarantee contract, is like the executor's promise a third party transaction. Common Pleas had always disallowed an action of debt *sur contract* here because the guarantor had no *quid pro quo*.<sup>100</sup> The benefit, or *quid pro quo*, in the hands of the defendant was a form of proof that could be relied on to prove the relationship; but in a guaranty contract, the guarantor received nothing. This point prompted the fact-finder to ask the question: why would the alleged guarantor make such a promise? Clear evidence was demanded. If there was no evidence in such an unusual situation, then it was thought that perjury was likely.<sup>101</sup> The landmark case, which first permitted an *assumpsit* action on a guaranty contract, was *Cleymond v Vincent*.<sup>102</sup> The decision was a prime example of both the use by the King's Bench of *assumpsit* to fill a gap in the common law and of the evidentiary problem created for the jury in the process.

The third contract listed in s4 is an "agreement made upon consideration of marriage", which can also be a third party transaction.<sup>103</sup> Debt *sur contract* was not proper because the defendant-promisor received no *quid pro quo*.<sup>104</sup> Then in a 1557 *assumpsit* action such a third party contract became remediable.<sup>105</sup> The same evidentiary difficulties exist with this third party transaction as with guaranty contracts and promises of executors; the writing requirement of the Statute of Frauds documents an otherwise suspect transaction. Due to the delicate nature of such contract negotiations, Parliament wanted to protect the unaware against a lightly-made contract; the signed writing would attest to the seriousness of the defendant.<sup>106</sup>

99 Hale said he would "always require marvellous strong evidence for such a promise", such as, "some signal ceremony". Treby Rep, Middle Temple MAA 747; see also Simpson, *History* 610f.

100 Simpson, *History* 265.

101 Williston, *Contracts* s452.

102 (1521) YB 12 Hen VIII, f 11, pl 3. It was a revolutionary decision in a number of ways; it was the first King's Bench decision which allowed (1) a guaranty contract, (2) on a gratuitous promise and (3) against an estate. Fitzherbert later argued that it was bad law as to the estate liability portion (*Anon* YBT 27, Hen VIII, 23, pl 21). Perhaps because of the controversy over *Cleymond's Case*, *Norwood v Read* supra n 95 is usually pointed to as setting the King's Bench precedent allowing recovery against an estate. When the Statute of Frauds was repealed by the British Parliament in 1954, the writing requirements for guaranty contracts and land contracts were kept. Guaranty contracts were kept because unscrupulous persons were leading inexperienced people into obligations they did not understand: Law Revision Committee, Cmnd 8809 (April 1953).

103 In *Philpott v Wallet* (1682) 3 Lev 65, Freeman 541, it was held that an agreement to marry is not within the Statute; it only applies to a promise to do something in consideration of marriage, as a father promising his prospective son-in-law a sum of money if he marries his daughter.

104 *Alice's Case* (1458) YB 37 Hen VI, M, f 8, pl 18.

105 *Joscelin v Shelton* (1557) 3 Leon 4.

106 Barbour in Vinogradoff (ed) *Oxford Studies in Social and Legal History* vol IV (1914) 124, 160, said this point was a subject of endless debate in the Year Books.

The fourth contract category in s4 was a contract for sale of land or any interest therein. Perhaps this was the one provision in s4 which almost everyone could agree was proper and which modern courts still apply rather strictly.<sup>107</sup> It was an important transaction, certainly not commonplace in the lives of the parties, and one which had a tradition of formality until *assumpsit* had allowed oral contracts for land to be enforced.<sup>108</sup> The ritual of livery of seisin had preceded *assumpsit*'s informality, but as land spread to the middle class, the notoriety of this ancient ceremony was lost.<sup>109</sup> The drafters of the Statute of Frauds attempted to recreate a modicum of that formality. This was consistent with such trends as the Statute of Enrolments of 1536, which required registration of sales of land, and the recommendations of Hale's Commission of 1652 providing for the registration of gifts and transfers of property.

The final category of s4 is "any agreement that is not to be performed within the space of one year from the making thereof". This is the only provision of s4 which deals with the period of performance rather than the subject-matter of the contract.<sup>110</sup> In the main, the cases which fit under this provision are contracts for personal services. Most of these actions for services originated under the Statute of Labourers (1349-1351); the normal contract term under that Statute was one year.<sup>111</sup> An independent contractor, say a carpenter, was not answerable for breach of an informal agreement of employment until *assumpsit* for nonfeasance covered it in 1498.<sup>112</sup> Perhaps the most compelling reason for the House of Lord's inclusion of this provision was an evidentiary point made by Lord Hold in 1697: "The design of the statute was, not to trust to the memory of witnesses for a longer time than one year."<sup>113</sup>

The sixth category of contract for which a writing is required is in s17: "contract for the sale of any goods . . . for the price of ten pounds sterling or upward . . ." subject to the alternatives of the buyer's acceptance of the goods or payment of earnest money. As stated above, *Slade's Case* allowed executory consideration in a sales contract, thus relieving the plaintiff of his former burden of establishing that the defendant possessed a benefit derived from the agreement. The Statute of Frauds required a showing of a writing in place of the benefit. Furthermore we may never know if it was sheer coincidence that the £10 barrier would have barred the plaintiff in *Slade's Case* from recovery (the oral bargain was for £16 of goods). Sir Francis North here placed the burden on the plaintiff to protect himself by demanding a writing in these more valuable contracts, where it would make good business sense to do so anyway. The buyer's acceptance or payment of earnest are obvious evidentiary indicators for a jury to hang their hat on,

107 Lord Denning reaffirmed the British Courts' adherence to this requirement in *Tiverton Estates Ltd v Wearwell Ltd* (1974) 2 WLR 176.

108 *Doige's Case* (1442) YB T 20 Hen VI, f 34 pl 4.

109 Browne, *Construction of the Statute of Frauds* (5th edn 1895) 4.

110 *Ibid* 359.

111 23 Edw III, st 1 & 2 (1349-1351) Statute of Labourers. Scots law required services contracts of more than one year to be in writing: Simpson, *History* 612.

112 YB (1498) 21 Hen VII, M, f 41, pl 66, per Fineux. But informal covenant had been a permissible action against a labourer (not an independent contractor) who wrongfully departed employment. Perhaps it was the greater awareness of the individual's right of freedom from feudalism's form of involuntary servitude that prompted Parliament to mandate more proof of such relationships.

113 *Smith v Westhall* (1697) 1 Ld Raym 316.

notwithstanding the absence of a writing; it is reminiscent of *quid pro quo*.

There are several ways of grouping the contract categories in ss4 and 17 as a way of trying to explain why they were included. One such grouping was provided by Holdsworth. He stated that guaranty contracts and contracts of a year or more are continuing contracts, which, with the poor law of evidence, might be difficult to prove later, unless there was a writing. Holdsworth also stated that the group of marriage contracts, sales of goods and land contracts are in the Statute because they all concerned the transfer of property, and there was a long-standing principle that conveyances should be in writing.<sup>114</sup> As to promises of executors, marriage contracts and guaranty contracts they were all third party beneficiary contracts. There was uncertainty about the enforceability of such contracts because of the lack of evidence of a benefit accruing to the promisor. This uncertainty continued into the sixteenth century when they became remediable by *assumpsit*.<sup>115</sup> The group consisting of land contracts, sales of goods over £10 and contracts of one year or more are arguably in the Statute because Parliament was reluctant to allow an uncontrolled jury to consider these more valuable subject-matters without a minimum of evidence present.

#### Post 1677

Over the centuries since its passage, the Statute of Frauds has been frequently criticized for its many deficiencies. The courts have therefore tended to interpret its provisions restrictively so as to exclude from its operation many types of contract which seemed prima facie to fall under it.<sup>116</sup> It has been complained that it was drafted in a piece-meal fashion, resulting in statutory construction problems.<sup>117</sup> It has been objected that it protected more frauds than it deterred. In the nineteenth century Justice J F Stephen wrote that the Statute enables "a man to escape from the discussion of the question of whether he has or has not been guilty of a deliberate fraud by breaking his word". He went on to say, "The cases in which a man of honour would condescend to avail himself of it must, I should think, be very rare indeed. Indeed, I can think of no such case, except indeed the case of deliberate perjury."<sup>118</sup>

Another objection to the Statute was that it unsuccessfully attempted to change the trading habits of a nation. Since it was at variance with the natural law of social action, it was commonly disregarded and hence acted as a danger rather than as a safeguard.<sup>119</sup> Indeed there is no body of law, other than the common law, which makes a commercial contract unenforceable for want of a writing.<sup>120</sup> It was this impediment to commerce which caused Lord Mansfield to take an innovative evidentiary

114 Holdsworth, *History* vol 6 392.

115 Simpson, *History* 158-160.

116 Gilbert, *Evidence* 141f, 146.

117 Holdsworth, *History* vol 6 381-383, 391, 395f. In defence of the drafting, Holdsworth mentions that modern contract law was embryonic and unclear at the time the Statute was drafted and that the Statute was so long-lived that it outlived the law of evidence for which it was prepared (there was the suggestion in the original Committee discussions that the Statute be made temporary).

118 Stephen, "Section Seventeen of the Statute of Frauds" 1 LQR 1, 4. In *Simon v Metivier* (1766) 1 Wm Bl 599, Lord Mansfield said, "no advantage shall be taken of this Statute to protect the fraud of another".

119 Stephen, *ibid* 6f.

120 Rabel, "Statute of Frauds" 187.

position in 1765 when he said that in commercial contracts a writing or consideration should be considered alternatives. He wrote:

"I take it that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialities, bonds, etc. there is no objection to want of consideration. And the Statute of Frauds proceeded upon the same principle."<sup>121</sup>

The House of Lords reversed Lord Mansfield's position in 1778.<sup>122</sup>

The long-term opposition to the Statute finally carried the day in 1954 when the British Parliament repealed ss4 and 17, with the exception of land sales and guaranty contracts.<sup>123</sup> Western Australia, Queensland, South Australia and New Zealand are examples of other jurisdictions following the British lead.<sup>124</sup>

The common law jurisdictions of the Commonwealth and of the United States which still retain the contract sections of the Statute now find themselves in the curious position of enforcing an archaic rule which the originating jurisdiction has abandoned. There are a variety of alternatives open to those jurisdictions retaining the Statute: (a) retaining ss4 and 17, (b) total repeal,<sup>125</sup> (c) selective repeal of unsatisfactory provisions,<sup>126</sup> and (d) the courts' use of promissory estoppel to ameliorate the ill effects of the Statute.<sup>127</sup>

This article was not written for the purpose of advocating retention or repeal of the Statute of Frauds, though it is hoped that it will provide readers with an understanding of Parliament's attempted solution to the shortcomings of the still undeveloped law of evidence and the jury system of the seventeenth century in handling the new *assumpsit* action by the passage of the Statute of Frauds, and of how those evidentiary concerns dictated the types of contracts included in the Statute.

121 *Pillans v Van Mierop* (1765) 3 Burrow 1663.

122 *Rann v Hughes* (1778) 4 Brown PC 27.

123 Stat 2 & 3 Eliz II, c 34 (1954) Law Reform Act. A part of the 1937 Law Revision Committee Report was read into the Parliamentary record: "In 1677 a party could not give evidence and juries could act on their own knowledge. This statute permitted written evidence of a party for the first time. The types of contracts were arbitrarily selected. They do not reflect present business dealings."

124 See Law Reform (Statute of Frauds) Act 1962 (WA); Statute of Frauds Act 1972 (Qld); Statutes Amendment (Enforcement of Contracts) Act 1982 (SA); and Contracts Enforcement Act 1956 (NZ). Western Australia has retained s17 in the Sale of Goods Act s4; South Australia has not made an exception of guaranty contracts.

125 "Demise of the Statute of Frauds" (1954) 70 LQR 441; "The End of an Anachronism" (1954) 104. Decker, "Repeal of the Statute of Frauds in England" (1973) 11 Am Bus LJ 55.

126 Cunningham, "Proposal to Repeal Sect. 2-201: Statute of Frauds Sect. of Art. 2" (1980) 85 Commercial LJ 361; Yonge, "Unheralded Demise of Statute of Frauds Welsher in Oral Contracts for Sale of Goods" (1976) 35 Wash & Lee LR 1.

127 Mooreburger, "Promissory Estoppel Marches On" (1976) 28 Baylor LR 703; "Promissory Estoppel and the Statute of Frauds in California" (1976) 66 Cal LR; "Promissory Estoppel and the Georgia Statute of Frauds" (1980) 15 Georgia LR 204.