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CHANGES WROUGHT IN THE STATUTE OF FRAUDS BY THE UNIFORM COMMERCIAL CODE

INTRODUCTION

The purpose of this article is to analyze the Statute of Frauds provision of the Uniform Commercial Code (section 402.201(1) of the Wisconsin statutes). This will be accomplished in part by an analysis of the ways in which the Code provision differs from prior law, which in Wisconsin was the Uniform Sales Act, and the case law which has developed under the Sales Act. By analyzing cases decided under the Code in Pennsylvania, and the policies and philosophy which motivated the draftsmen, an effort will be made to indicate the manner in which Wisconsin courts will decide issues arising under the new provisions. A secondary purpose of this article is to consider the value of the Statute as it has existed and to come to a judgment as to the probable value and wisdom of the changes.

The Code Statute of Frauds does not include choses in action as did the Sales Act, but is limited to goods. The monetary limit has been changed from \$50 to \$500. Memorandum requirements have been lessened in that the requisite signature has been liberalized and terms may be absent or inaccurately stated. In so far as the contract is not enforceable beyond the quantity stated in the memo, they have been made more stringent. The letter of confirmation will change the result in a certain class of cases in which a receiver of such a letter has not responded. The law with respect to satisfaction by receipt or part payment has been changed so that the bar of the Statute is only removed as to goods actually received or paid for. There is a new proviso specifying that a judicial admission will satisfy the Statute. There is a change with respect to the special manufacturing situation; now, change of position is required.

In order to understand the Statute as it has existed under prior law and also to come to a conclusion as to its wisdom and therefore the wisdom of changing it, it is useful to consider the conditions which prompted its original enactment. Obviously a change in the conditions under which merchants and lay people must conduct their affairs would warrant a change in the law. If the common law cannot accommodate itself sufficiently to changed conditions, the legislature must take the step.

With the development of the action of *assumpsit* in the fourteenth century, oral promises became enforceable. Enforcement could be obtained on the strength of the oral testimony of witnesses. Therefore, in 1677 the Statute of 29 Charles II was enacted. The purpose was to prevent placing an obligation by perjury on a person who had never assented to assume it.¹ The results which the Statute has brought about

¹ 2 CORBIN, CONTRACTS §275, at 2(1950).

have subjected it to a great deal of criticism.² For this reason it has been construed narrowly. Besides being criticized for permitting promoters to repudiate their contracts with impunity, it has been castigated for the immense complexity it has introduced into the law. Its need has decreased with advances made in the law of evidence.³ Another criticism can be based on the fact that a motive for passage of the Statute was the condition of the jury trial which was at that time undeveloped.⁴ One may conclude that its only real value is in its in terrorem service and that it should be retained for this purpose but applied as seldom as possible in a litigated case.⁵

At this point the history and results of the Statute should be related to the purposes and policies of the Code.

The underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions.⁶

Karl Llewellyn, chief reporter of the Code, gives a more specific statement of the aim of the Code in altering the Statute of Frauds.

The effort of the Code has been to deal with the essential purposes for which the Statute was designed, while getting and keeping away from the abuses: to wit, to make utterly essential some evidence in writing and over signature, or else some pretty good other evidence that rests on something more tangible than word of mouth [T]he Code adds both the desire and a reasonable machinery for a businessman to be able to rely on what both parties sign and on the fact that he has procured a memo signed by the other party.⁷

MEMORANDUM REQUIREMENTS

The first major area of change under the Code is effected by the provision which sets forth the memorandum requirements.⁸ The purposes sought to be achieved by these changes and also some additional clarification as to the construction the draftsmen wish to see applied to these sections is afforded by the official comments. As above indi-

² *Id.* at 3. Such gain in the prevention of fraud as is attained by the Statute is attained at the expense of permitting persons who have in fact made oral promises to break those promises with impunity and to cause disappointment and loss to honest men.

³ 2 STREET, FOUNDATIONS OF LEGAL LIABILITY 196 (1906).

⁴ THAYER, EVIDENCE 430 (1950).

⁵ 2 CORBIN, *supra* note 1, at 13.

⁶ UNIFORM COMMERCIAL CODE §1-102 (2) [all references are to the 1962 Official Text with Comments].

⁷ NEW YORK STATE LAW REVISION COMM'N STUDY OF U.C.C. No. 65(B), REPORTS OF PUBLIC HEARINGS ON THE CODE 45 (1954).

⁸ UNIFORM COMMERCIAL CODE §2-201 (1): "Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing

cated, the writing need not contain all of the material terms, and the material terms that are stated need not be precisely stated. "All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction."⁹ The quantity term is the only one which must appear, and emphasis is placed on the permissibility of omitting the price term. The draftsmen summarize the requirements thus: (1) the memorandum must evidence a contract for the sale of goods, not some other kind of transaction; (2) it must be signed by the party to be charged and this signature may consist of any authentication; and (3) it must specify a quantity.¹⁰ A further limitation is that the contract is not enforceable beyond the quantity shown in the writing. Under prior law the existence of a sufficient memorandum gave a party an opportunity to attempt to prove a contract for any quantity.

The memorandum requirements are an important departure from prior law. A line of Wisconsin cases established what Wisconsin required of a memo under the Sales Act. *Wiedner v. National Fisheries Co.*¹¹ required that the memorandum state the price term. This case involved an action to recover damages for the breach of a contract for a carload of fish. Telegrams were relied on as the required memorandum. The court held the telegrams insufficient for the reason that they did not show that the price was twelve cents per pound. To ascertain that term, recourse to parol testimony was necessary.

*S. T. Edwards & Co. v. Shawano Milk Products Co.*¹² also held a memorandum insufficient. Defendant promised to sell a certain quantity of dried skim milk to plaintiff. Plaintiff's acceptance specified that the skim milk be of first quality. A telephone conversation was relied on to show that defendant offered milk of first quality. Since no memo indicated that defendant offered milk of first quality, the purported acceptance was held to be a counter offer. "[I]t must appear from the several writings, without resorting to parol evidence, what the contract is."¹³

*Erving Paper Mills v. Hudson-Sharp Mach. Co.*¹⁴ is a recent federal case applying Wisconsin law. It sets forth in some detail the Wisconsin memorandum requirements and clearly illustrates the unreasonableness of prior law in this area. The case involved an action for damages for the breach of a contract to manufacture two wrapping machines.

sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing."

⁹ UNIFORM COMMERCIAL CODE §2-201, comment at 51.

¹⁰ *Ibid.*

¹¹ 173 Wis. 559, 181 N.W. 719 (1921).

¹² 211 Wis. 378, 247 N.W. 465 (1933).

¹³ *Id.* at 381, 247 N.W. at 466.

¹⁴ 223 F. Supp. 913 (E. D. Wis. 1963).

Defendant failed to supply the machines in question to plaintiff. Two writings, a purchase order and an acceptance letter, were relied on to take the oral contract out of the Statute of Frauds. The court admitted that on its face the memorandum consisting of these two writings appeared complete. It found, however, that the sealing method to be used by the machine was an essential term not mentioned in the memorandum although it had been discussed by the parties. "The unfortunate result is that although the parties certainly knew what was intended in this regard, the terms were omitted from the memo of the contract."¹⁵ The court accordingly held the contract void under the Statute. Although the result of this finding was changed on motion for rehearing, it is illustrative of the unfortunate results to which the stringent memorandum requirements of the Sales Act have led. On rehearing also, the court found that the words "efficiently polyethylene wrap," as used in the memorandum, were too uncertain. "To establish the description of the machine intended to be sold, it would be necessary to give independent effect to the parol understanding as to the meaning of the term. This would result not in mere identification but the supplying of a portion of the description by parol."¹⁶

Until there is some case law on the subject, one can attempt to determine what a Wisconsin court under the Code will require of a memorandum only (1) by a close reading of the Statute and (2) by looking at cases arising in other jurisdictions. The statutory provision and the draftsmen's comment thereto have already been discussed. There is a paucity of cases from other jurisdictions construing section 2-201 of the Code. Pennsylvania has several, it being the only state in which the Code has been in effect for any length of time.

*Arcuri v. Weiss*¹⁷ is a Pennsylvania case construing the new Statute of Frauds. Arcuri and Weiss had discussions regarding Arcuri's intended purchase of Weiss's restaurant. A check for \$500 payable to Weiss and bearing the notation "Tentative deposit on tentative purchase of 1415 City Line Ave., Phila. Restaurant, Fixtures, Equipment Goodwill" was delivered to Weiss. Subsequently, purchaser Arcuri decided not to go through with the sale. Plaintiff relied on the check as a memorandum of the oral contract. The court held the check insufficient. It based this holding on a finding that the writing did not indicate that a contract for sale had been made. As the first decision construing section 2-201, it is appropriate to quote the court directly:

The purpose of the Uniform Commercial Code which was written in terms of current commercial practices, was to meet the contemporary needs of a fast moving society. It changed and simplified much of the law which it has supplanted but it also sets forth

¹⁵ *Id.* at 925.

¹⁶ *Id.* at 927.

¹⁷ 198 Pa. Super 506, 184 A. 2d 24 (1962).

many safeguards against sharp commercial practices. This section we feel is one such safeguard. While it does not require a writing which embodies all the essential terms of a contract, and even goes so far as to permit omission of the price, it does require some writing which indicates that a contract for sale has been made.¹⁸

The first requirement under the new Statute of Frauds as enumerated by the draftsmen in the official comment is absent here; that is, that the memorandum must evidence a contract for the sale of goods. Because of the repeated use of the word tentative, the court concluded that it was not the intention of the parties to contract. The court further found that no oral agreement had been reached, that the minds of the parties had never met.

Professor Corbin has made some comments as to what he believes will be the requirements of a writing under the Code. In particular he stresses the requirement that the memorandum must show that a contract for sale has been made "between the parties." As under earlier statutes, the parties must be in some way identified or described. He feels that the older authorities on this point will remain applicable under the Code. He also points out the fact that the writing must evidence a contract for the sale of goods and not something else.¹⁹

The remarks of Karl Llewellyn are clear and persuasive enough to warrant extensive quoting in any discussion of the wisdom of the changes wrought by the Code with respect to the memorandum. It was his conviction that one of the most damaging aspects of the Statute of Frauds was the doctrine which allowed a memorandum complete on its face to be attacked with respect to a provision not included in the memorandum. This allegation was enough to render a memorandum insufficient. With regard to this matter, Professor Llewellyn says:

Now is it really possible that any business man likes this astounding rule of law under which the other party can always and at fraudulent will throw open any memo, even when complete in appearance and signed by both, alleging some error in some term, or by alleging even some omission of some term never in fact even discussed?²⁰

He feels that this is a statute for the encouragement of perjury. Under the Code, of course, the memo need only be enough to document the existence of a deal.

Again in discussing the memo requirement, Professor Llewellyn states that as long as you are sure you have a deal you can go to the jury and the risk is small, mostly because the top limit for which you can

¹⁸ *Id.* at 26, 184 A. 2d at 26.

¹⁹ 2 CORBIN, CONTRACTS §507, at 730 (1950).

²⁰ NEW YORK STATE LAW REVISION COMM'N STUDY OF U.C.C. No. 65(B), REPORTS OF PUBLIC HEARINGS ON THE CODE 47 (1954).

be sued is the quantity stated in the memo. Because of modern business practices, there is a very low percentage of erroneous memos.²¹

Llewellyn comments on why the unit term is not required. The reason he gives is that this requirement would exclude many legitimate deals.²² Very likely if a memo is sufficient to indicate a deal, it will indicate the unit. For example, a mere notation of a quantity such as "I agree to purchase ten" without additional clarification probably would not be sufficient to indicate the presence of a deal.

A look at the results of the Wisconsin cases discussed further points up the wisdom of the Code's changes with respect to the memo requirement. It seems that in reason and justice the contract in *Wiedner v. National Fisheries Co.*²³ should be enforced. There the memo was held insufficient merely because resort to parol was necessary to establish the price term. It would not have been difficult to have established the price. *S. T. Edwards & Co. v. Shawano Milk Products Co.*²⁴ is another bad example of pre-Code law. Here the only term which had to be supplied by parol was one establishing that defendant had offered milk of first quality. For this reason a promisor was able to escape liability. As above mentioned, the result of *Ewing Paper Mills v. Hudson-Sharp Mach. Co.*²⁵ was also unfortunate. Presumably the Code would change the results of all of these cases.

One might well ask what has induced courts to arrive at such unreasonable conclusions. The only possible answer appears to be a policy which prohibits the jury from tampering with the terms of an oral contract. Courts have traditionally held the conviction that a jury was not to be trusted with determining such issues as price, quantity, terms of payment, and terms of shipment. The Code by its terms overrules this policy. The draftsmen felt that quantity was the only term which should be kept from the jury. If, however, the quantity is evidenced by a writing, the jury is free to determine all other terms. It can't err very much with respect to price since the market provides a check. The other matters such as time of delivery and terms of payment are not so essential that a departure from the intention of the parties would result in injustice.

Manifestly, the policy of the Code will be more likely to effect justice between the parties than prior policy under which one was unable to enforce his contract simply because some very minor term was inaccurately or ambiguously stated.

The following statement of Professor Llewellyn is an excellent

²¹ *Id.* at 100.

²² *Id.* at 116.

²³ Note 11 *supra*.

²⁴ Note 12 *supra*.

²⁵ Note 14 *supra*.

summation of the purpose and a very cogent argument for the wisdom of the change:

Now, just take a look for a moment at what the statute of frauds has raised in the way of trouble and see whether this isn't a wise and at the same time a very safe provision. What you have got as a requirement under the Code is that there shall be no doubt that there was a contract for sale. That is No. one. Secondly, that you can't enforce it beyond the quantity stated. You can be inaccurate about other things or leave them out, mostly—price, for example, you can leave out. You refer to the market—you have to keep the jury from going crazy. You can't swear too much of a price onto a guy when there is a market around to test whether or not it is likely that that was the term agreed upon. But here is the kind of thing you get under the present law. . . . [N]o matter how perfect a memo is . . . the law is clear . . . that the fellow who doesn't want the contract enforced can say . . . 'Sure, that is the memo I signed. But there was a term we agreed upon which is not in that memo.' And he can give all evidence as to that term and nobody can keep it from being given. He goes to the jury on whether it was agreed, and if it was agreed, the contract is unenforceable.²⁶

The other memorandum change involves the signature. The official comment provides that the word "signed" includes any authentication which identifies the parties to be charged."²⁷ *North American Seed Co. v. Cedarburg Supply Co.*²⁸ held a memo insufficient because it was merely initialled. Presumably the Code would have changed the result in this case. This liberalization of the authentication requirement is also commented upon by Professor Llewellyn. He was answering a criticism charging that the liberalization providing that any form of authentication is sufficient would cause litigation and confusion in the law. He remarks in defense that here the law as derived from about four hundred cases is simply stated.²⁹

LETTER OF CONFIRMATION

In substance section 2-201(2)³⁰ provides that between merchants a letter of confirmation will be binding on the recipient thereof if he doesn't give notice of his objection within ten days of receipt. The official comment further clarifies this section: "Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1)."³¹ It goes on to point

²⁶ NEW YORK STATE LAW REVISION COMM'N, STUDY OF U.C.C. No. 65(B) REPORTS OF PUBLIC HEARINGS ON THE CODE 99 (1954).

²⁷ Note 9 *supra*.

²⁸ 247 Wis. 31, 18 N.W. 2d 466 (1945).

²⁹ NEW YORK STATE LAW REVISION COMM'N STUDY OF U.C.C. No. 65(B), REPORTS OF PUBLIC HEARINGS ON THE CODE 95 (1954).

³⁰ UNIFORM COMMERCIAL CODE §2-201(2).

³¹ UNIFORM COMMERCIAL CODE §2-201, comment at 51.

out that the only effect of this section is to take away the defense of the Statute of Frauds. The party alleging the contract still has the burden of proving that an oral contract was entered into before the written confirmation.

This provision is entirely new. The purpose of it is to rectify an abuse which developed under the Sales Act. The custom arose among business people of confirming oral telephone contracts by sending a letter of confirmation. This letter was binding as a memorandum on the sender, but not on the recipient because he hadn't signed it. The abuse was that the recipient, not being bound, could perform or not according to his whim and the market, whereas the sender had to perform. Obviously under these circumstances, sending a letter of confirmation was a dangerous thing to do. Section 2-201(2) cures the abuse by holding an unsigned recipient bound unless he communicates his objection within ten days.

Because of the definition of "merchant" contained in section 2-104, this section will have wider application than one might at first glance anticipate.

Merchant means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.³²

Because of this definition the new rule may be applied against a person who is not a merchant, but who is familiar with the practices connected with the use of confirmations.³³ Since any person in business should know about the confirmatory memorandum custom, almost any person in business should be a merchant for purposes of this section.³⁴

Another qualification should be noted. The party receiving the memo must have reason to know of its contents. In this connection both sender and recipient should be aware of the provisions of section 1-201(27)³⁵ defining notice by an organization. The section provides that such notice is effective from the time it is brought to the notice of the person conducting the transaction or from the time it would have been brought to its attention had due diligence been exercised. Those charged with sending the confirmatory letter should accordingly take careful note of who is conducting the transaction so that the memo will be effective.

Several cases construing this provision have arisen in Pennsylvania.

³² UNIFORM COMMERCIAL CODE §2-104 (1).

³³ 2 CORBIN, CONTRACTS §507, at 731 (1950).

³⁴ NEW YORK STATE LAW REVISION COMM'N STUDY OF U.C.C. No. 65(B) REPORTS OF PUBLIC HEARINGS ON THE CODE 96 (1954).

³⁵ UNIFORM COMMERCIAL CODE §1-201(27).

In *Harry Rubin & Sons v. Consolidated Pipe Co.*³⁶ plaintiff purchaser brought an action against the seller for failure to deliver a portion of hoops and materials as per oral contracts. The court held that a letter from plaintiff to defendant took both contracts out of the Statute. The letter read:

As per our phone conversation of today kindly enter our order for the following:

60,000 Tee-Vee Hoops made of rigid polyethylene tubing from lengths of 8'10" to 9'2"; material to weigh 15 feet per lb., colors, red, green and yellow packed 2 Dozen per carton

39¢ each

It is our understanding that these will be produced upon completion of the present order of 30,000 hoops.

This case provides a good illustration of the required letter of confirmation. It makes reference to a phone conversation, is signed by the sender, and states a quantity.

In *John H. Wickersham E & C Co. v. Arbutus Steel Co.*,³⁷ plaintiff tried to establish a writing as a letter of confirmation and failed. Defendant had proposed furnishing plaintiff with a certain amount of steel. Plaintiff Wickersham sent defendant the following memo:

It is our intention to award you a contract for furnishing all short span steel joints, bridging anchors, ceiling extensions . . . for the sum of \$21,800. . . .

. . . .

This award will be contingent upon our receiving a contract from the Owners for the General Construction and upon your furnishing reasonable assurance of your ability to furnish the material when required.

. . . .

It is also understood that you will prepare Shop Drawings . . . prior to the receipt of a formal order, this work to be performed at your own risk.

Defendant did not respond to this memo within ten days, but subsequently withdrew its original proposal. Plaintiff alleged that its memo satisfied the requirements of section 2-201(2) that (1) there be a writing in confirmation of the oral contract, (2) the writing bind the sender, (3) the writing be received, and (4) no reply has been made. The court held as to (1) that this memo did not refer to a prior dealing and was not a confirmation of an oral contract. Under (2) the writing would not have bound the sender because it did not name a quantity and because the order was made contingent on the general award. Under (3) the complaint did not allege that the memorandum had been received.

³⁶ 396 Pa. 506, 153 A. 2d 472 (1959).

³⁷ 58 Lanc. L.R. 164 (Pa. 1962).

Section 2-201(2) fulfills an avowed purpose of the Code to make the law consistent with the practices of business people. It does so by making a convenient and highly useful business practice safe for the signing sender of a letter of confirmation. Hawkland points out that the section will not materially aid those trying to perpetrate fraud.³⁸ Such a person would still have to prove the existence of the oral contract.

PART PERFORMANCE

The law with respect to satisfaction by receipt or part performance has been changed. "A contract . . . is enforceable with respect to goods for which payment has been made and accepted or which have been received and accepted."³⁹ Under prior law acceptance of or payment for a portion of goods opened the door to proof of a contract for a greater amount. Thus the seller who agreed to sell one case of widgets and who had accepted payment for one case could have foisted upon him a contract for ten cases. *Gedanke v. Wisconsin Evaporated Milk Co.*⁴⁰ is illustrative of this proposition. This case was an action for damages for failure of defendant to deliver to plaintiff one hundred cases of evaporated milk. The parties entered a contract under which it was alleged that defendant was to deliver the milk to plaintiff. Plaintiff was also to purchase defendant's surplus butter. Defendant sold and delivered a quantity of butter, but failed to deliver the milk. The court in allowing recovery held that the entire contract was taken out of the Statute by plaintiff's acceptance of the butter.

As the official comment indicates, under the Code partial performance is a substitute only for goods which have been accepted or for which payment has been made and accepted. Part performance makes admissible evidence of other terms necessary to a just apportionment.⁴¹ Whether this comment will be given effect is open to question. If it is, it may subvert the purpose of the part performance limitation by allowing the introduction into evidence of terms relating to a greater quantity of goods than that actually received or paid for.

*Williamson v. Martz*⁴² provides us with a judicial interpretation of this section. Here the parties verbally agreed that plaintiff would sell and defendant purchase two two hundred gallon vats. The purchase price was \$1,600 (each vat costing \$800), defendant paying \$100 on account. Plaintiff was denied recovery, the court holding that the Code denies the enforcement of the contract where in the case of a single object the amount paid is less than the full price. The result of this case seems to indicate that if the contract is to be given effect at all,

³⁸ 1 HAWKLAND, TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE §1.120102, at 27 (1964).

³⁹ UNIFORM COMMERCIAL CODE §2-201(3)(c).

⁴⁰ 215 Wis. 370, 254 N.W. 660 (1934).

⁴¹ UNIFORM COMMERCIAL CODE §2-201, comment at 52.

⁴² 11 Pa. D. & C. 2d 33, 19 Monroe L.R. 24 (1956).

there must be full payment of some divisible part. The one vat would have to have been completely paid for. On reason, however, it seems a safe assumption that the \$100 indicates the sale of at least one vat.

The change seems a wise one. The justification for the part performance doctrine has always been its evidentiary value. The overt acts of the parties are held to indicate the existence of a contract, thus making the writing unnecessary as a protection against fraud. Part performance, however, indicates a contract only with respect to goods which have been received and paid for. The policy of the Statute should apply to an allegation respecting other goods.⁴³

SPECIAL MANUFACTURING

There is a change in the provision regarding specially manufactured goods.⁴⁴ This change results from a shift in philosophy. Under the Sales Act the special manufacturer was excepted on the ground that his contract involved "work and labor." Thus if the seller was not to do the manufacturing himself, but had procured another to do it, he was not excepted from the Statute because he was not a "worker." The Code excepts the special manufacturer on the ground that he is in a peculiarly vulnerable position with respect to resale of the goods. Therefore the seller need not himself be the manufacturer to be excepted. Consistent with the new philosophy, there is an additional requirement: the seller must have changed position in order to lift the bar of the Statute "by either a substantial beginning of their manufacture or commitments for their procurement." This requirement is consistent with the new philosophy because only those who have changed position are in a vulnerable position with respect to resale.⁴⁵

This provision is not satisfactory. The fact that goods have been specially manufactured for an alleged buyer does not necessarily indicate the existence of a contract between the parties. For this reason it provides the unscrupulous with opportunities for the commission of fraud.⁴⁶ Because the Code has liberalized the Statute of Frauds in the ways above indicated and because it is therefore much easier to come within one of the exceptions, it is at least arguable that this provision could have been dropped altogether.

ADMISSIONS

If the party against whom enforcement is sought admits in his pleading, testimony or otherwise, in court that a contract for sale

⁴³ PENNSYLVANIA BAR ASS'N NOTES 85.

⁴⁴ UNIFORM COMMERCIAL CODE §2-201(3)(b): "A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted. . . ."

⁴⁵ 1 HAWKLAND, TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE §1.120+, at 31 (1964).

⁴⁶ *Ibid.*

was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.⁴⁷

It has been made clear that a demurrer is not the pleading contemplated by the Code. The question was adjudicated in *Beter v. Helman*.⁴⁸ Defendant raised the Statute of Frauds as a defense by an objection in the nature of a demurrer. Plaintiff argued that the demurrer was an admission in a pleading of the existence of a contract. The court ruled that section 2-201 applied to an admission in a responsive pleading; to construe it otherwise would result in the elimination of preliminary objections in the nature of demurrer whenever the Statute of Frauds is being raised.

The new provision also raises the question of whether plaintiff can compel defendant at trial to admit the existence of the contract. Another question relates to the meaning of "otherwise in court," which is not defined. A strict construction would require the admission to be made at the trial, while a more liberal one would include admissions made in proceedings before trial.⁴⁹ It seems that any admission made under circumstances which are formal enough to insure its accuracy should be sufficient to remove the bar of the Statute. Such proceedings would probably include any conference held before trial in the presence of a judge or court commissioner.

In the opinion of the writer the wisdom of this section is unquestionable. The ridiculousness of allowing a party to admit the contract and still rely on the bar of the Statute is obvious. The only qualifications relate to the varying possible constructions given this section as noted above.

PLEADING

In one important respect the Statute of Frauds under the Sales Act and under the Code are identical. Both characterize a contract coming within their terms as unenforceable rather than void. Despite the specific language of the Sales Act, Wisconsin has held that the defense of the Statute may be raised by demurrer and that it need not be affirmatively pleaded. This, in effect, is a holding that the contract is void for the particular purpose of pleading. The question thus arises of whether Wisconsin courts will continue their prior pleading practice or, consistent with the statutory language, require the Statute to be raised as an affirmative defense. Since there has not been an alteration in statutory language, it is not likely that Wisconsin will change its policy in this area.

⁴⁷ UNIFORM COMMERCIAL CODE §2-201(3) (b).

⁴⁸ 41 West. L. J. 7 (Pa. 1958).

⁴⁹ 1 HAWKLAND, TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE §1.1203, at 30 (1964).

CONCLUSION

Thus it is clear that the Statute of Frauds has undergone substantial alteration. In many respects it has been liberalized. In some regards, such as the part performance and special manufacturing provisions, it has been made more stringent. The attempt underlying all of these changes has been to prevent fraud, whether on the part of the party seeking to establish a contract which was never in fact entered into, or on the part of one seeking to avoid a verbal agreement which was. The changes above discussed have been the means the draftsmen have utilized in achieving their purpose. The ultimate answer to the question of whether the Code provision will prove more effective than prior law in preventing fraud will not be available until it has been in effect for a period of time. A look at the record of the Code provision in Pennsylvania and an analysis of the ways in which it satisfies contemporary business needs, however, indicate that it will be successful.

MARY C. CAHILL