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THE STATUTE OF FRAUDS OF THE
UNIFORM COMMERCIAL CODE AND THE
DOCTRINE OF ESTOPPEL

CAROLYN M. EDWARDS*

INTRODUCTION

Today, Article 2 of the Uniform Commercial Code¹ is the principal statute governing transactions in goods² in every state other than Louisiana. The Article is conspicuously silent, however, on some of the issues that arise in sales transactions. Section 1-103³ provides that under these circumstances courts may supplement the Code with principles of common law and equity unless such principles are displaced by particular Code provisions.

Section 2-201⁴ is Article 2's Statute of Frauds provision. The

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1. All references in this article are to the 1972 version of the Uniform Commercial Code.

2. Article 2 applies to transactions in goods. U.C.C. § 2-102. "Goods" are defined in U.C.C. § 2-105(1) as:

   all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to reality as described in the section on goods to be severed from reality (Section 2-107).

The term "transaction" is not defined, but it is now clear that the term has broader application than to the traditional true sale. See Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 Fordham L. Rev. 447 (1971).

3. U.C.C. § 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." For a discussion of § 1-103, see Summers, General Equitable Principles Under Section 1-103 of the Uniform Commercial Code, 72 Nw. U.L. Rev. 906 (1978) [hereinafter cited as Summers].

4. U.C.C. § 2-201 provides:

   (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 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.
section applies to contracts for the sale of goods for the price of $500 or more. This article examines the question of whether the doctrine of estoppel may be applied pursuant to section 1-103 to render enforceable an oral agreement which though falling within section 2-201 fails to satisfy its requirements. This question has frequently arisen under the Code and there is a conflict of authority. Section 2-201 must therefore be analyzed in light of this disagreement to determine whether the doctrine of estoppel has been displaced.

**The Statute of Frauds**

During the fourteenth century, when the laws of contracts and evidence were in their infancy, oral agreements were commonly enforced and, as a result, assertions of fraudulent and perjured contracts were common. The English Parliament responded in 1677 by enacting the Statute of Frauds. The Statute's stated purpose was "the prevention of many fraudulent

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(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) 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; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

The 1962 and 1972 versions of § 2-201 are identical.

5. U.C.C. § 2-106(1) defines "contract for sale" to include "both a present sale of goods and a contract to sell goods at a future time."

6. The doctrine of estoppel has taken a variety of forms. See text accompanying notes 52-66 & 78-81 infra.

7. See text accompanying notes 69-82 infra.


9. 29 Car. 2, c. 3 (1677).
practices which are commonly endeavored to be upheld by perjury and subornation of perjury." 10 The Statute contained twenty-five provisions with sections 411 and 17 dealing with contracts. Section 17 applied to contracts for the sale of goods and provided that,

[No] contract for the sale of any goods, wares, and merchandizes for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall 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, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. 12

The purpose of each alternative method of compliance was to provide reliable evidence of the existence of a contract between the parties and thus to prevent the enforcement of an unfounded fraudulent claim. 13 Satisfaction of any one of the methods rendered an oral contract for the sale of goods which fell within the Statute enforceable. 14

Statutes modeled after the English Statute of Frauds, including section 17, were subsequently enacted, with some mod-

10. Id.
11. Id. Section 4 provided:

And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no action shall be brought [(1)] whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract [f]or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized.
12. Id. § 17.
14. Section 17 provided that no contract which failed to comply with the Statute "shall be allowed to be good." The intended effect of this language was to make the agreement unenforceable. 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 825 (3d ed. 1960).
lications, throughout most of the United States. In 1906 section 17 was replaced by section 4 of the Uniform Sales Act.\footnote{15} Like its predecessor, section 4 applied to any contract for the sale of goods wherein the value of the goods or choses in action was $500 or more. Alternative methods for satisfying the section were provided. For instance, a note or memorandum in writing signed by the party to be charged or his agent could be employed to meet the Statute's requirements. Alternatively, acceptance and receipt of part of the goods or choses in action were sufficient, as was the giving of something in earnest to bind the contract or in part payment. A contract which fell within the scope of the Statute but failed to satisfy its requirement was unenforceable.\footnote{16}

Section 4 of the Uniform Sales Act was later replaced by section 2-201 of the Uniform Commercial Code.\footnote{17} By its terms section 2-201 applies to contracts for the sale of goods of $500 or more.\footnote{18} The section is similar to prior law in that its purpose is to prevent the fraudulent enforcement of contracts to which the parties may not have assented.\footnote{19} The section also retains

\begin{footnotes}
\footnote{15} U.S.A. § 4 provided:
\begin{enumerate}
\item A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.
\item The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.
\item There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.
\end{enumerate}


\footnote{16} U.S.A. § 4(1).

\footnote{17} See note 4 supra. Section 2-201 was not received favorably. See, e.g., Corbin, The Uniform Commercial Code—Sales; Should It Be Enacted?, 59 Yale L.J. 821, 830-31 (1950) [hereinafter cited as Corbin]; Williston, The Law of Sales in the Proposed Uniform Commercial Code, 63 Harv. L. Rev. 561, 573-76 (1950).

\footnote{18} U.C.C. § 2-201, unlike the U.S.A. § 4, does not apply to "chooses in action." Sales of choses in action are now covered by U.C.C. §§ 8-319, 1-206.

\footnote{19} U.C.C. § 2-201, Comment 1.
\end{footnotes}
the traditional view that if this purpose is to be achieved the parties must be required to produce reliable evidence of the oral contract in order to render it enforceable. The section does not, however, merely re-enact the principles of section 4 of the Uniform Sales Act. It makes significant changes in the substance of these principles and in addition, introduces principles which are entirely new.

Subsection 2-201(1) retains the requirement of a writing as the primary method for satisfying the Statute. The writing must indicate that a contract for sale has been made in addition to being signed by the party against whom enforcement is sought or by his authorized agent or broker. This subsection makes a significant change in prior law by modifying the rule established by some courts that all material terms of the contract be contained in the writing. The rule had often resulted in injustice rather than in preventing fraud. The subsection

20. U.C.C. § 2-201, Comment 4 provides in part that, "Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced . . . ."


23. The comments to U.C.C. § 2-201 do not indicate what must be contained in the writing to indicate that a contract for sale has been made. Compare Fortune Furniture Mfg. Co. v. Mid-South Plastic Fabric Co., 310 So. 2d 725 (Miss. 1975) ("This is to confirm the agreement entered into this date" evidenced contract for sale), with Alice v. Robett Mfg. Co., 328 F. Supp. 1377 (N.D. Ga. 1970), aff'd, 445 F.2d 316 (5th Cir. 1971) ("Confirming our telephone conversation, we are pleased to offer" did not evidence contract for sale).

24. U.C.C. § 1-201(39) provides that, "'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing." See Comment, Sufficiency of the Writing and Necessity for a Signature in the Statute of Frauds of the Uniform Commercial Code, 4 U.S.F. L. Rev. 177 (1969).

25. Although U.S.A. § 4 did not require that all material terms be included in the writing, this requirement was established by some courts. See, e.g., R.H. Lindsay Co. v. Greager, 204 F.2d 129 (10th Cir. 1953), cert. denied, 346 U.S. 828 (1953). Some courts required that all terms agreed upon appear in the writing. See, e.g., Berman Stores Co. v. Hirsh, 240 N.Y. 203, 148 N.E. 212 (1925).

26. Professor Corbin observes that the requirement thereby made it possible for a dishonest contractor to admit the making of the
provides that the writing is “not insufficient because it omits or incorrectly states a term agreed upon.” \( ^{27} \) The contract, however, is not enforceable beyond the quantity of goods shown in the writing. \( ^{28} \)

Another change in prior law was made in subsection 2-201(2). This subsection provides that as between merchants, \( ^ {29} \) a confirmation of a contract which is sufficient against the sender \( ^ {30} \) satisfies the requirements of subsection (1) if the recipient has reason to know the contents of the memorandum and written notice of objection is not made within ten days after receipt. \( ^ {31} \) This subsection thus creates an exception to the requirement that the writing must be signed by the party against

\( ^ {27} \) U.C.C. § 2-201(1). U.C.C. § 2-201, Comment 1, makes it clear that this change is consistent with the purpose of the Statute to prevent enforcement of unfounded claims, since missing terms, including price, may normally be supplied without danger of fraud.

\( ^ {28} \) There has been some dispute whether the writing must state a quantity term. Professors Summers and White have suggested that, “An alternative interpretation of the language is that only if the writing states a quantitative term is that term determinative.” White & Summers, supra note 21, at § 2-4, at 51 n.44. However, U.C.C. § 2-201, Comment 1 states: “The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated.” Most courts support the view that the quantity term must appear. See, e.g., Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975); Ace Concrete Prods. Co. v. Charles J. Rogers Const. Co., 69 Mich. App. 610, 245 N.W.2d 353 (1976).

\( ^ {29} \) The term “merchant” is defined in U.C.C. § 2-104(1) to mean: 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.

Unfortunately, in some instances, the term has been a troublesome one to apply. See Note, Uniform Commercial Code—Is the Farmer a “Merchant”? , 28 Baylor L. Rev. 715 (1976).

\( ^ {30} \) To be sufficient against the sender, the confirmation must be signed by the sender and state a quantity. The contract is not enforceable beyond the quantity of goods stated. See note 28 supra.

\( ^ {31} \) U.C.C. § 2-201, Comment 3, provides that the effect of the subsection is to bar a merchant who fails to respond to a confirmation from relying on the Statute as a defense. Thus, the confirmation serves the same function as a writing signed by the party to be charged. It provides reliable evidence that an agreement exists. The confirmation letter does not eliminate the burden which the party alleging the contract has to prove that an agreement was in fact made orally prior to the confirmation. For cases interpreting the requirements of this subsection, including those which have misconstrued its effect, see 3 Bender’s U.C.C. Serv. § 2.04[2], at 2-48 (1978).
whom enforcement is sought. Its purpose is to give effect to the custom of merchants of sending confirming memoranda of prior oral agreements. Under prior law, the normal expectations of the parties were likely to be frustrated and this created opportunities for abuse in transactions between merchants. Section 4 of the Uniform Sales Act provided that a memorandum was binding only against the party who had signed it. Thus a confirming letter was binding against the sender, but not against the recipient. The recipient of the memorandum could sit back and play the market before deciding whether to accept the agreed upon consideration while binding the sender to render performance.

Subsection 2-201(3) sets forth three alternative methods of satisfying the Statute absent a writing. Subsection 2-201(3)(a) provides that a contract for goods to be specially manufactured is enforceable against the buyer if the goods are not suitable for sale to others in the ordinary course of seller's business, and the seller, before receiving notice of repudiation, has made either a substantial beginning on their manufacture or commitments for their procurement. The subsection makes two principal changes in prior law. Under section 4 of the Uniform Sales Act, the provisions of the Statute of Frauds did not apply if the goods were manufactured by the seller and were not suitable for sale to others in the ordinary course of the seller's business. The Code rejects the requirement that the goods must be manufactured by the seller and provides that the goods may be specially manufactured by the seller or by a third party. Under the Sales Act, once it was established that a contract was for specially manufactured goods, the contract was enforceable even though manufacturing had not started. The Code modified this principle by providing that the oral contract is not enforceable unless the seller has acted in reliance on the oral contract before notice of repudiation is received. Such reliance strengthens the evidence of a contract. It is more difficult
therefore under the Code for a seller to successfully assert a contract for specially manufactured goods against a buyer who has not in fact assented to the contract.

The second alternative method of satisfying the Statute absent a writing is found in subsection 2-201(3)(b), which is based on prior case law and has no counterpart in the Uniform Sales Act. The subsection provides that a contract is enforceable if a party admits in his pleading, testimony or otherwise, in court, the existence of a contract for sale. The contract, however, is not enforceable beyond the quantity of goods admitted. This subsection is based upon the notion that once a party has admitted the existence of a contract in court, the possibility of binding an innocent party to a contrived contract disappears. The subsection also eliminates the injustice and conceptual inconsistency of allowing a party to admit the contract in court and still treat the Statute as a defense.

Subsection 2-201(3)(c) provides the final alternative of satisfying the Statute without evidence of a writing. Subsection 2-201(3)(c) makes a writing unnecessary if there has been either part payment of the purchase price or acceptance and

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37. U.C.C. § 2-201, Comment 7, states that, "[T]he contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all." For a discussion of whether involuntary admissions satisfy § 2-201, see Yonge, The Unheralded Demise of the Statute of Frauds Wesley in Oral Contracts for the Sale of Goods and Investment Securities: Oral Sales Contracts are Enforceable by Involuntary Admissions in Court Under U.C.C. Sections 2-201(3)(b) and 8-319(d), 33 WASH. & LEE L. REV. 1 (1976).

38. U.C.C. § 2-201, Comment 7.

39. U.C.C. § 2-606 provides:

1. Acceptance of goods occurs when the buyer
   a. after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
   b. fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
receipt of the goods. These methods of satisfying the Statute are derived, with some modifications, from prior law. However, the Code narrows significantly the former rule. Under prior law, if a buyer made a part payment for the goods, or the buyer accepted and received a part thereof, the entire contract was rendered enforceable. This rule did not provide protection against the fraudulent assertion that a contract existed for a quantity greater than that actually agreed to by the parties. Subsection 2-201(3)(c) remedies the prior rule’s inadequacies by expressly limiting enforcement of the contract to goods for which payment has been made or which have been received and accepted.

The changes in and additions to prior law which section 2-201 makes reflect the drafters’ judgment that the old law did not adequately prevent the many fraudulent practices which had grown around the enforcement of oral contracts. In fact the old law in certain instances had failed to provide reliable evidence of the existence of an oral contract and had therefore been turned into an instrument for perpetrating frauds. As mentioned earlier, however, the section remains fundamentally faithful to prior law. Its primary objective is to avoid enforcement of a contract to which the parties have not assented, an objective which the drafters determined could be achieved only if reliable evidence as set forth in the Statute was required.

(c) does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of the entire unit.

40. U.C.C. § 2-103(1)(c) defines “receipt” of goods as “taking physical possession of them.”

41. “Acceptance” under U.S.A. § 4(3) was defined somewhat differently than “acceptance” under U.C.C. § 2-606. See note 15 supra for the definition of “acceptance” under U.S.A. § 4(3). The term “receipt” under the Code retains the same definition as under the U.S.A. See 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 551 (1960).

42. Professor Corbin observes: “No doubt this limitation was made because it has always been possible for a handy liar to testify orally that he paid a dollar on account or delivered one of the shoe strings, thus making it easy to defeat the real purpose of the Statute.” Corbin, supra note 17, at 831.

43. Where goods are apportionable, part payment takes a case out of the Statute only as to the portion for which payment is made. U.C.C. § 2-201, Comment 2. However, part payment on the sale of an indivisible unit has been held to render the contract enforceable for that unit. See, e.g., Lockwood v. Smigel, 18 Cal. App. 3d 800, 96 Cal. Rptr. 289 (1971); Starr v. Freeport Dodge, Inc., 54 Misc. 2d 271, 282 N.Y.S.2d 58 (Dist. Ct. 1967).

44. See also Corbin, supra note 17.
before an oral contract would be held enforceable by way of action or defense.

The question thus arises: are there any circumstances under which an oral contract will be held enforceable though none of the provisions of section 2-201 has been satisfied? To answer this question, it is necessary to examine briefly the development of the doctrine of estoppel and the variety of forms which the doctrine has taken.

THE DOCTRINE OF ESTOPPEL

Long before the Code was adopted, courts of equity enforced oral contracts which fell within the scope of the Statute of Frauds yet failed to satisfy the Statute's requirements if the party alleging the contract could establish all the elements of legal fraud. Legal fraud required that the promisor have an intent to deceive. Enforcement of an oral contract when the elements of legal fraud were present was not regarded as an abrogation of the Statute since "The ground upon which courts of equity interfere[d], in such cases,...[was] that of fraud. The jurisdiction...[was] founded, not upon the agreement, but upon the fraud."

Courts of equity also recognized that to permit reliance upon the Statute as a defense to defeat enforcement of an otherwise valid oral contract would perpetrate, in many cases, a moral fraud. Moral fraud as distinguished from legal fraud could be perpetrated without an intent to deceive. It consisted of using the Statute as a defense,

after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the

45. See, e.g., Newman v. Newman, 103 Ohio St. 230, 133 N.E. 70 (1921); Watson v. Erb, 33 Ohio St. 35 (1877).
47. For detailed discussions of the development of the doctrine of estoppel, see McNeil, Agreements to Reduce to Writing Contracts Within the Statute of Frauds, 15 VA. L. REV. 553 (1929); Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. PA. L. REV. 440 (1931). Courts have generally viewed the Statute with some disfavor since strict enforcement can cause hardship. As a result, they have developed a number of devices to take the agreement outside the Statute. The doctrine of part performance as applied to permit specific performance of an oral contract which falls under the land section of the Statute is probably the best known. See generally 2 A. CORBIN, CONTRACTS §§ 420-43, at 450-533 (1950).
agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscionable injury and loss.\textsuperscript{49}

Such fraud was possible because the Statute declared unenforceable any oral contract which failed to comply with its requirements even though the contract had been agreed upon and had induced detrimental reliance by the promisee. To prevent the infliction of unjust and unconscionable injury, courts of equity applied the doctrine of equitable estoppel to bar reliance upon the Statute as a defense.\textsuperscript{50} The doctrine was invoked on the grounds that courts of equity should grant relief against the unconscionable operation of the Statute. Moreover, it was frequently said that the Statute of Frauds, having been enacted to prevent fraud, should not be permitted to wreak harsh and fraudulent results.\textsuperscript{51}

Traditionally, estoppel required a misrepresentation of fact, as where the promisor stated that a writing satisfying the requirements of the Statute had been executed.\textsuperscript{52} In time, some courts extended the doctrine of equitable estoppel to include promises that a writing satisfying the Statute would be exe-

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\item \textsuperscript{49} Glass v. Hulbert, 102 Mass. 24, 35-36 (1869).
\item \textsuperscript{50} Professor Pomeroy listed six elements to establish estoppel:
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\item There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.
\item The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him.
\item The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel.
\item The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.
\item He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.
\end{enumerate}
\item \textsuperscript{51} See, e.g., Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909).
\item \textsuperscript{52} Pomeroy, supra note 48.
\end{itemize}
cuted sometime in the future. The First Restatement of Contracts supported the application of estoppel under such circumstances. It indicated, however, in an apparent attempt to distinguish misrepresentations of fact from promises relating to future intentions, that promissory estoppel should apply to defeat reliance on the Statute rather than equitable estoppel.

In 1950 the California Supreme Court in *Monarco v. Lo Greco*, a case which involved an action to enforce an oral contract for the conveyance of land, applied principles of estoppel even though the promisor had not misrepresented a fact or promised that a writing satisfying the Statute would later be executed. In rejecting these traditional elements, the court observed that, "[I]t is not the representation that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it." In other words, the representation required to invoke the doctrine of estoppel and to bar reliance upon the Statute as a defense was a promissory statement that the contract would be performed. The court did retain, however, the traditional requirement that there be either unconscionable injury to the


54. *Restatement of Contracts* § 178, Comment f (1932) provided:
   Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or a defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.

55. *Id.* Comment f did not define "promissory estoppel." *Id.* Section 90 was generally regarded as establishing the elements of promissory estoppel even though neither § 90 nor its accompanying comments so stated. See note 60 infra.

56. The doctrine of estoppel by representation is usually applicable only to representations as to facts either past or present and not to promises concerning the future. However, some courts recognized an exception where the statement related to an abandonment of an existing right and was made to influence another whose action was in fact influenced by it. See, e.g., *Union Mut. Life Ins. Co. v. Mowry*, 96 U.S. 544 (1878). *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88 (1909).


58. 35 Cal.2d at ----, 220 P.2d at 741 (emphasis added).
promisee who had relied on the oral contract or unjust enrichment to the promisor.

The rule the court formulated was subsequently applied by other courts to a variety of fact situations, including sales governed by the Uniform Sales Act.59 At about the same time, several courts construed section 9060 of the First Restatement of Contracts as displacing the Statute's requirements even though a promise to reduce the agreement to writing was lacking.61 This use of section 90 was surprising since neither section 90 nor its accompanying comments intimated that the provisions of the section could be applied to defeat reliance on the Statute. Indeed, section 178, comment (f) of the First Restatement suggested that promissory estoppel was available in Statute of Frauds cases only where a promise to reduce the agreement to writing had been made.62 Further, the provisions of section 90 had traditionally been used solely as means to create a substitute for consideration.63 In other words if the elements of the section were satisfied, a promise for which a consideration had never been requested or received was nevertheless enforceable.

As a practical matter, the doctrine of promissory estoppel as defined in section 90 and as applied to prevent inequitable use of the Statute of Frauds was indistinguishable from the doctrine of estoppel established in Monarco.64 Neither required

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60. Restatement of Contracts § 90 (1932) provides: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."
62. See note 54 supra.
64. The court in Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950), observed
a misrepresentation of fact nor a promise that the agreement would later be reduced to writing. Each focused on the extent of the reliance which the oral contract had induced and the seriousness of the injury caused thereby. Each rendered the oral contract enforceable by recognizing that reliance may furnish a compelling substantive basis for relief even though the formal requirements of the Statute were not satisfied.

As each form of estoppel was adopted, criticism mounted that its continued application constituted an abrogation of the Statute. Although the courts seldom offered an explanation of why these forms had such an effect, the courts were unquestionably concerned that their application resulted in the enforcement of an oral contract which the Statute declared to be unenforceable. It cannot be gainsaid; the Statute sets forth specific methods of compliance. Estoppel, in any form, has the effect of creating a method which is not recognized by the legislature. Indeed, the usual rule of statutory construction would suggest that since specific methods for satisfying the Statute are expressly provided for, other methods are therefore intended to be excluded. Further, the underlying purpose of each of the methods is to provide reliable evidence of the existence of an agreement. In the absence of such evidence, the possibility for the fraudulent assertion of a contract obviously increases. The doctrine of estoppel therefore deviates from the stated purpose of the act by increasing the number of instances in which a contract will be enforced without the type of evidence envisioned by the drafters. Thus, whether the usual rules of statutory construction are applied or the purposes of the Statute are considered, it seems clear that application of estop-

65. For a discussion of the cases where the courts refused to apply estoppel where there had been a promise to put the contract in writing, see McNeill, Agreements to Reduce to Writing Contracts within the Statute of Frauds, 15 VA. L. REV. 553 (1929). For a discussion of cases rejecting Restatement of Contracts § 90 (1932), see Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 YALE L.J. 343, 380-83 (1969). In Ozierv. Haines, 411 I11. 160, 103 N.E.2d 485 (1952), the court rejected the doctrine of estoppel established in Monarco by saying: "It is true that harsh results, or moral fraud . . . may occur where one has changed his position in reliance on the oral promise of another, but it is a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law." Id. at 164-65, 103 N.E.2d at 488.
pel, whether in its traditional or more modern forms, is contrary to the expressed legislative policy.66

**SECTION 2-201 AND THE DOCTRINE OF ESTOPPEL**

It was against this background that section 2-201 was adopted. Does section 2-201 displace all forms of estoppel? An examination of this question is complicated by several factors. First, section 1-103, which provides that the Code is supplemented by the principles of law and equity unless displaced by particular provisions of the act, has no precedent in prior law. Thus the question of whether or not estoppel is displaced by section 2-201 is an entirely new one. Section 1-103 does not establish rules for determining when displacement occurs,67 nor does section 2-201 or its accompanying comments contain an express statement indicating the intent of the drafters. Further, section 2-201 makes changes in and additions to prior law. Thus, the question of displacement must be examined in light of these new circumstances. Moreover, although not all courts have considered the question of whether to supplement the Statute, the majority of those that have suggest that estoppel in one form or another may be applied.68 Unfortunately, these courts have not offered a thorough examination or analysis of the question of displacement. Therefore, it is necessary to determine, in so far as it is possible, on what basis the decision

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66. See, e.g., Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777 (Fla. 1966). The Tanenbaum court observed: “Thirty-three years have passed since the Restatement . . . was adopted and there have been about 15 intervening sessions of the legislature at which the contents of Sec. 90 of the Restatement could have been incorporated into the act yet we know of no such effort or accomplishment.” *Id.* at 779.

67. Professor Summers suggests that courts adopt the following procedure for determining whether a section may be supplemented by principles of equity:

1. Which specific Code section (or sections), if any, applies or appears to apply?
2. What would be the effect of its application? In particular, would this effect be inequitable as between the parties?
3. If the effect appears inequitable as between the parties, does section 1-103 authorize resort to general equitable principles here? Does the relevant Code section (or sections) displace all such principles?
4. If the specific Code section (or sections) does not displace general equitable principles, which general equitable principle comes into play?
5. How is the applicable general equitable principle to be formulated? Does non-Code law of the jurisdiction reject it? Should this rejection be rejected?
6. If the non-Code law of the jurisdiction does not repudiate the principle, how is it to be applied to avoid an inequitable result as between the parties?


68. *See cases cited note 74 infra.*
that the section does not displace estoppel is made.

As already discussed, section 2-201 is fundamentally similar to prior law.\(^{69}\) In view of this similarity, it might be argued that application of estoppel, in any form, to supplement section 2-201 is subject to the same criticisms leveled against estoppel under the prior law. Since the effect of estoppel under prior law was to abrogate the purpose of the Statute, so too could estoppel be criticized under Article 2. If the drafters had intended to abrogate the Statute of Frauds, there was a far more direct route available. They could have simply refused to adopt the Statute as part of Article 2. The Statute of Frauds had been the subject of extensive comment and debate prior to the adoption of the Code. Though a number of commentators had urged the repeal\(^{70}\) of the Statute, the drafters ultimately chose to retain it. This suggests that the Statute was perceived as serving a valid purpose. It also suggests that the principles to be included in the section, such as those imposing quantity limits, were carefully drawn to achieve the statutory purpose and to limit the use of the Statute as a defense to cases where there was a definite possibility of fraud. Thus, reliance on an oral contract which does not meet the requirements of any one or more of the section’s provisions may create hardship but it does not satisfy the evidentiary function of the Statute. In other words, whether the intent of the drafters or the purpose of each subsection is considered, the inference arises that to enforce an oral contract to avoid unconscionability or injustice where the contract does not satisfy the Statute is contrary to the legislative policy expressed in the section. The conclusion may be drawn that estoppel should therefore be displaced. This conclusion has merit for it promotes a basic objective of the Code to provide consistent and predictable principles for governing transactions involving the sales of goods.\(^{71}\)

There are, however, several countervailing arguments which support the view that the doctrine of estoppel is not

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69. See text accompanying notes 17-21 supra.
70. See generally Burdick, A Statute for Promoting Fraud, 16 COLUM. L. REV. 273 (1916); Willis, The Statute of Frauds: A Legal Anachronism, 3 IND. L.J. 427 (1928). For a defense of the Statute, see Llewellyn, What Price Contract?—An Essay in Perspective, 40 YALE L.J. 704 (1931). Professor Corbin observes: "The total repeal of the statute would involve such a wrench to the mental habits of bench and bar that it is very unlikely to occur." 2 A. CORBIN, CONTRACTS § 275, at 14 (1950) (footnote omitted).
71. See U.C.C. §§ 1-102 & 2-103(4).
displaced. The fact that section 2-201 is relatively similar to prior law also means that the arguments which support the use of estoppel also remain equally viable. Section 2-201 eliminated a number of abuses that occurred under prior law.\textsuperscript{72} However, in declaring that any oral contract which does not satisfy its terms is unenforceable, the section may cause unconscionable injury or injustice. That is, the section may be used to defeat enforcement of a contract which the parties have in fact agreed upon, and on which one party has relied to his detriment: It may be argued that under these circumstances the doctrine of estoppel should be applied. Further, in view of the controversy which developed prior to the adoption of the Code, over use of estoppel, and the fact that section 2-201 may in certain circumstances cause injury or injustice, it is significant that neither the section nor its accompanying comments address the question of whether estoppel may supplement the provisions of the section. This silence may be interpreted to mean that the drafters did not intend to displace the doctrine and that the issue of whether the section should be supplemented in any particular fact situation should be resolved by the courts in accordance with the principles of section 1-103.\textsuperscript{73} Moreover, section 1-103 expressly provides that estoppel may supplement the Code unless displaced by particular Code provisions. In view of the reference to estoppel in section 1-103, the drafters may have thought it unnecessary to address in either section 2-201 or its accompanying comments the question of the doctrine's applicability in Statute of Frauds cases. It might be argued, therefore, that application of estoppel does not abrogate section 2-201 since section 1-103 expressly authorizes its use. In other words, estoppel is not contrary to the legislative policy expressed in section 2-201 and thus should not be displaced.

The majority of courts which have considered the question of whether section 2-201 displaces the common law doctrine of estoppel support the interpretation that estoppel may supplement the section's provisions. To these courts the controversy centers not on the question of displacement, but on the form of estoppel to be applied.\textsuperscript{74}

\textsuperscript{72} See text accompanying notes 25-43 supra.
\textsuperscript{73} See Summers, supra note 3.
\textsuperscript{74} See, e.g., Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976); Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 232 N.W.2d 921 (1975); Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N.W.2d 588 (1975);
Although section 1-103 refers to the doctrine of estoppel, it does not indicate what form the doctrine should take. As a result, the courts have incorporated into the Code, via section 1-103, all the forms which had developed under past law. Some courts have required that a misrepresentation or concealment of a material fact be established in order for an estoppel to attach. At least one court has suggested that estoppel will bar reliance on the Statute where a promise to reduce the agreement to writing has been made. Other courts have suggested that promissory estoppel should be available in appropriate circumstances.

One recent development should be noted. Section 217A of Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 244 N.W.2d 86 (1976); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736 (N.D. 1976); Farmers Coop. Elevator Ass'n v. Cole, 239 N.W.2d 808 (N.D. 1976); Farmers Elevator Co. v. Lyle, 238 N.W.2d 290 (S.D. 1976).

75. See, e.g., Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 232 N.W.2d 921 (1975) (evidence of a misrepresentation lacking); Farmers Coop. Elevator Ass'n v. Cole, 239 N.W.2d 808 (N.D. 1976) (evidence of a misrepresentation lacking); Darrow v. Spencer, 581 P.2d 1309 (Okla. 1978) (evidence of a misrepresentation lacking). In Cox v. Cox, 292 Ala. 106, 289 So. 2d 609 (1974), the court appeared to suggest that the Statute should not be supplemented by any form of estoppel. The term "estoppel" has been applied by courts to encompass a variety of doctrines. It should not be surprising, therefore, that the terms "promissory estoppel," "equitable estoppel" and "estoppel" are used interchangeably. For example, the court in Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736 (N.D. 1976) suggested that promissory estoppel requires conduct amounting to a false representation or concealment of material facts. However, the court apparently found this element satisfied since the promisor had conveyed to the promisee "the implication . . . that the sale was complete." Id. at 741. See also Darrow v. Spencer, 581 P.2d 1309 (Okla. 1978). Caution must therefore be used in interpreting the cases.

76. H. Molsen & Co. v. Hicks, 550 S.W.2d 354 (Tex. Civ. App. 1977) (promissory estoppel may be applied where there is a promise to reduce the agreement to writing).

77. See, e.g., Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976). In Farmers Elevator Co. v. Lyle, 238 N.W.2d 290 (S.D. 1976), the court cited Monarco with approval, but declined to determine whether promissory estoppel is a separate basis upon which a promisor may be barred from relying on the Statute. Courts which reject the application of promissory estoppel do so on the traditional grounds that it is intended only as a substitute for consideration and that its application abrogates the Statute. See, e.g., Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 232 N.W.2d 921 (1975); Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 244 N.W.2d 86 (1976); Farmers Coop. Elevator Ass'n v. Cole, 239 N.W.2d 808 (N.D. 1976).

78. RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Drafts Nos. 1-7, 1973) provides:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
the Second Restatement of Contracts provides that a promise upon which the promisor should reasonably expect to induce reliance on the part of the promisee, and which does induce reliance, is enforceable notwithstanding the Statute if injustice can only be avoided by enforcement of the promise. At first glance it appears that section 217A merely reaffirms those decisions which applied the Monarco rule or section 90 of the First Restatement of Contracts. However, section 217A appears to be more cautious in its approach. The section sets forth a number of factors which are to be considered in determining whether injustice can only be avoided by enforcement of the promise. One of these factors, for instance, is the availability of other remedies, such as restitution. This limitation was not contained in previous statements of promissory estoppel and it therefore suggests that the Second Restatement has attempted to establish a compromise position between the forms of estoppel developed under prior law.

To date section 217A has had only limited application. Therefore, the full effect which this section might have on contracts within the scope of section 2-201 is still unknown. It is clear, however, that courts may choose between several forms of estoppel including that expressed in section 217A to bar reliance upon section 2-201. This choice is complicated by the fact that application of any one of the forms of estoppel is based upon sound commercial reasons. It could be argued, for instance, that only equitable estoppel should be used to supple-

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
   (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
   (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
   (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
   (d) the reasonableness of the action or forbearance;
   (e) the extent to which the action or forbearance was foreseeable by the promisor.

79. See text accompanying notes 57-61 supra. One comment to § 217A observes that the "Section is complementary to § 90, which dispenses with the requirement of consideration if the same conditions are met . . . ." Restatement (Second) of Contracts § 217A, Comment a (Tent. Draft Nos. 1-7, 1973). Another comment states that "the requirement of consideration is more easily displaced than the requirement of writing." Id. Comment b.

80. See note 61 supra.

81. See, e.g., McIntosh v. Murphy, 59 Haw. 29, 469 P.2d 177 (1970).
ment section 2-201 since it keeps at a minimum the number of oral contracts which are enforced in the absence of statutory compliance. On the other hand, promissory estoppel including section 217A of the Second Restatement reflects the growing recognition that reliance provides a substantive basis for relief even though formal contract requirements are not satisfied.82

One might think that despite judicial disagreement on the precise form of estoppel to be applied in concrete fact situations that courts would concur on the extent of the reliance or the nature of the injury necessary to compel relief. Surprisingly enough this consensus is lacking in cases arising under section 2-201. Several courts, for example, have suggested that reliance on an oral contract in making resale contracts with third parties requires relief83 in the form of enforcing the oral contract despite its noncompliance with section 2-201. Other courts have refused to find that such reliance and hardship are sufficient to avoid the effects of section 2-201.84 Whether or not this conflict will extend to other fact situations that arise under section 2-201 is unknown. There are not sufficient cases to date on which such a determination could be based. Unfortunately, pre-Code cases contain similar conflicts85 and are therefore of limited value in predicting results under the Code.

Conclusion

The controversy over the question of what form of estoppel should be applied to defeat reliance on the Statute of Frauds has existed for years. This controversy lives on under section 2-201 of the Code. Today, there are at least four different forms of estoppel from which a court may choose. In the absence of a legislative amendment resolving the debate, a complete and authoritative solution appears doubtful. Section 1-103, while referring to estoppel, does not offer any indication of which alternative form the doctrine should take. Section 2-201 and its accompanying comments are silent as well. This silence has given the courts the opportunity to weigh the merits of each of

84. See, e.g., Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 244 N.W.2d 86 (1976).
the different views but has also resulted in an unpredictable and inconsistent application of the law.

A basic objective of the Uniform Commercial Code is to provide a uniform set of principles to govern transactions in the sales of goods. The cases indicate, however, that this objective will not be achieved until such time as the legislature addresses specifically the issue of estoppel and section 2-201. In view of the controversy and the fact that there are sound reasons to support application of any one of the doctrine’s forms, a legislative solution is imperative.

86. See U.C.C. §§ 1-102 & 2-103(4).