

1-1-1963

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Recommended Citation

John P. Kane, *An Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (The Statute of Frauds and the Parol Evidence Rule)*, 4 B.C.L. Rev. 381 (1963), <http://lawdigitalcommons.bc.edu/bclr/vol4/iss2/16>

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AN ANATOMY OF SECTIONS 2-201 AND 2-202 OF THE UNIFORM COMMERCIAL CODE (THE STATUTE OF FRAUDS AND THE PAROL EVIDENCE RULE)

The sole purpose of this comment is to read two sections of the Uniform Commercial Code.¹ However, a worthwhile reading of any statute constitutes an anatomy for it dissects the statute to determine the relation and function of its various clauses and provisions. In addition, this comment will endeavor to indicate basic innovations and nuances promulgated by the Code.

The statute of frauds² and the parol evidence rule³ are considered within the same comment because of their similarity of purpose and operation. Both have as their object the stabilization of written agreements and the supposedly concomitant purpose of preventing fraud by limiting the use of oral testimony before the trier of fact.⁴

I. SECTION 2-201. FORMAL REQUIREMENTS: STATUTE OF FRAUDS

A. INTRODUCTION

Statutory requirements that a contract be in writing serve to accurately define the obligation and to remove the possibility of using perjured evidence to prove a non-existent contract.⁵ This is accomplished by excluding oral testimony from the trier of fact if the statute is not satisfied.

The original statute of frauds was enacted in England in 1677 and applied, in part, to the sale of "goods, wares and merchandise" in the amount "of ten pounds sterling or upward."⁶ The earliest uniform codification of the statute in the United States was incorporated in the Uniform Sales Act,⁷ which closely paralleled the quoted section of the English statute. It applies to "a contract to sell or a sale of any goods or choses in action of the value of five hundred dollars⁸ or upwards. . . ."⁹

B. THE BASIC METHOD OF SATISFYING THE STATUTE

2-201 (1). Except as otherwise provided in this section a contract for the sale of goods¹⁰ for the price of \$500 or more is not

¹ The Uniform Commercial Code may hereafter be referred to as the Code.

² The statute of frauds may hereafter be referred to as the statute.

³ The parol evidence rule may hereafter be referred to as the rule.

⁴ 3 Williston, Contracts § 448 (3d ed. 1960); 2 Corbin, Contracts § 275 (1950).

⁵ See note 4 supra.

⁶ 29 Car. 2, c. 3 (1677). .

⁷ The Uniform Sales Act may hereafter be referred to as the Sales Act.

⁸ Many states varied this amount in adopting the act. Some states reduced the amount to \$50. Williston, op. cit. supra note 4, § 506B, gives a complete listing of the required minimums.

⁹ Uniform Sales Act § 4.

¹⁰ UCC § 2-105:

(1) "Goods" means all things (including specially manufactured goods) which are moveable 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

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. [Footnote added.]

The scope of the statute of frauds within this section of the Code is narrower than under corresponding provisions of the Sales Act. Section 2-201 does not apply to choses in action¹¹ and *price* has replaced *value* in establishing a minimum worth below which the statute will not apply. "Price" may be defined as a sum of money for which an article is sold, but "value" may be regarded as including the incidental benefits of a contract and consequently is a broader concept than price.¹²

The Code's requirement testing the sufficiency of a writing may constitute a departure from decisions interpreting the Sales Act. The Code requires "some writing sufficient to indicate that a contract for sale has been made. . . ." In contrast to the Sales Act requirement that there be "some note or memorandum in writing of the contract or sale,"¹³ the official Code comment¹⁴ states that "the required writing need not contain all the material terms of the contract. . . ."¹⁵ This is contrary to some decisions interpreting the Sales Act which hold that the writing must set out *all* the essential terms of the agreement.¹⁶

Quantity is the only essential term that must be stated in order for the writing to comply with section 2-201(1). This subsection specifies that the writing will not be regarded as insufficient if it omits or incorrectly states a term, but provides that the quantity shown in the writing will limit the

8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

¹¹ See UCC § 1-206.

¹² Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code 33 (1958).

¹³ Uniform Sales Act § 4.

¹⁴ When a state legislature enacts the Code only the numbered sections become part of the statutory law of that jurisdiction. The official comments, authored by the National Conference of Commissioners on Uniform State Laws and the American Law Institute are not adopted. The first comment to the official text follows the long title of the Code. It states:

Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction these comments set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.

This argument for the interpretive authority of the Code's comments hoists itself by its own bootstraps since it is contained in a comment, but its logic appears cogent enough to furnish independent support.

¹⁵ Comment 1 to UCC § 2-201.

¹⁶ Webster v. Condon, 248 Mass. 269, 142 N.E. 777 (1924); Western Metals Co. v. Hartman Ingot Metal Co., 303 Ill. 479, 135 N.E. 744 (1922); 49 Am. Jur. Statute of Frauds § 332 (1943).

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extent to which the contract will be enforceable. It would seem manifestly fairer to allow parol evidence on the missing term while the stated quantity acts as a shield against the possible use of perjured evidence to prove a totally nonexistent agreement.¹⁷ This argument is given added impetus by those provisions of the Code which allow the formation of a contract though there be no agreement on price,¹⁸ place of payment,¹⁹ delivery,²⁰ general quality,²¹ time²² or other details of performance.²³

Although the Code does not pronounce a writing insufficient merely because it omits or incorrectly states a term, it does not expressly state what constitutes a sufficient writing. Beyond the necessity of a statement of quantity there lies the familiar gray area of statutory law which can only be defined by an accumulated body of case law. A recent Pennsylvania case has made a contribution to this definitive process.²⁴ The writing in question spoke of an "intention" to award a contract and referred to the future receipt of a formal order. On this basis the court held that the writing was nothing more than a preliminary negotiation and was therefore insufficient to bind its sender. There was no quantity stated in the writing, but the court did not elect to rest its decision solely on the absence of this essential ingredient. The case is authority for the proposition that the writing must unequivocally cover the *present* existence of a contract in order to be sufficient within the meaning of this subsection.

However, the basic question remains undefined; "how many terms other than quantity may be omitted from the writing before the courts will pronounce the writing insufficient?" It is submitted that the courts should be guided by the Code's commentators and simply require that the writing indicate the existence of a real transaction.²⁵ This indication could be safely gleaned from little more than a statement of quantity mentioned in connection with the present existence of a contract. Such a writing which must be signed²⁶ by the charged party would indicate that the allegation is based upon something more than mere fraud, *i.e.*, a real transaction, and would thus placate the purpose behind the statute.²⁷ The party seeking to prove the contract must still meet the burden of proof in establishing the agree-

¹⁷ Hawkland, *op. cit.* supra note 12, at 27.

¹⁸ UCC § 2-305.

¹⁹ UCC § 2-310.

²⁰ UCC § 2-308.

²¹ UCC § 2-312.

²² UCC § 2-309.

²³ UCC § 2-311.

²⁴ John H. Wickersham E & C Co. v. Arbutus Steel Co., 58 *Lanc. Rev.* 164 (1962). (See Annotations, *supra*.) This case determined the sufficiency of a writing under 2-201(2), but the sufficiency requirements of 2-201(2) and 2-201(1) are the same. Thus, such decisions under one subsection are applicable to the other.

²⁵ Comment 1 to UCC § 2-201: "All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction." This criteria was cited by the court in *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A.2d 472 (1959).

²⁶ Comment 1 to UCC § 2-201: "... any authentication which identifies the party to be charged"

²⁷ See note 4 *supra*.

ment.²⁸ A further margin of safety is furnished by the Code's unconscionable contract section under which the court could refuse to enforce any unconscionable contract found by the jury.²⁹ Fortified by these assurances the court should allow the proponent of the contract the opportunity of presenting oral evidence of the agreement to the trier of fact.

C. SOME ALTERNATE METHODS OF SATISFYING THE STATUTE

1. *Merchant's Confirmation*

2-201 (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.

This subsection has no parallel in the Sales Act. It establishes an alternate method of complying with the Code's statute of frauds provided both parties to the alleged contract are merchants.³⁰

If a writing in confirmation of a contract is received by a party subsequently charged with the breach of an agreement, it may preclude his use of the statute of frauds as a defense exactly as if the requirements of subsection (1) were met.

Such a writing must be sent "within a reasonable time." This time period would presumably relate to the moment when the alleged contract was entered into, but a problem presents itself when we consider how this moment is to be determined. Must the written confirmation recite when the alleged contract was formed or will extrinsic evidence of either a testimonial or documentary nature be received? If documentary evidence is necessary to prove the point of agreement, the proponent of the contract will be confronted with an illogical barrier. Such evidence must be authenticated³¹ and the most common means of accomplishing this, when the sale of goods is involved, is by the use of contemporaneous writings corresponding in time and contents³² or through an admission of the other party.³³ If either of

²⁸ Harry Rubin & Sons, Inc. v. Consolidated Pipe Co., supra note 25.

²⁹ UCC § 2-302:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

³⁰ UCC § 2-104:

(1) "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.

³¹ 7 Wigmore, Evidence § 2128 (3d ed. 1940).

³² Id. § 2131.

³³ Id. § 2132.

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these methods were open to the proponent of the contract, he presumably wouldn't be struggling to satisfy the statute by resorting to this subsection but would have the necessary writings required by 2-201(1). It does not seem that the reasonable time clause was meant to be used defensively for this would result in an admission under 2-201(3)(b), which will be subsequently considered.

There appear to be two avenues open to the courts in construing the "reasonable time" clause. The written confirmation must recite the time of the alleged agreement and thus testify to its own timeliness, or the court will receive parol evidence on the alleged date of the contract. Since it will be shown that the onus of this subsection rests on the party being charged, it would seem logical that the party seeking to overcome the statute be allowed to satisfy the reasonable time clause either by parol evidence or by the use of the confirmation itself. This construction does not conflict with the Code's definition of "reasonable time."³⁴

A lower court in Pennsylvania has rendered a decision which indicates that it would receive oral testimony on the time interval between the alleged contract and the confirmation.³⁵ The court in ruling on a demurrer to the complaint held that a confirmation written "three days after the alleged contract" would be within the reasonable time required, but made note of the fact that the writing itself did not allude to the existence of a contract. Since the court was unwilling to sustain such a demurrer it must have been prepared to receive oral evidence on the time of the alleged agreement.

The writing which constitutes the confirmation must be "sufficient against the sender." This clause presents problems of sufficiency similar to those previously discussed in conjunction with subsection 2-201(1).

The party receiving the confirmation must have "reason to know its contents." This requirement may cause the courts a good deal of trouble by way of fact situations in which the party claiming benefit of the statute had control of the confirmatory correspondence, but failed to acquire actual knowledge of the contents. Can it be maintained that such a party had "reason to know" within the meaning of the Code? Should the lack of knowledge be attributable to the failure of an employee to properly inform his superiors, the courts could resort to the common law of agency³⁶ and rule that the principal is bound by and charged with the knowledge of his agent.³⁷ It is specified that the confirmation must be received, but it is difficult to con-

³⁴ UCC § 1-204:

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

³⁵ John H. Wickersham E & C Co. v. Arbutus Steel Co., *supra* note 24.

³⁶ UCC § 1-103:

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.

³⁷ Fay v. Swicker, 154 Ohio St. 341, 96 N.E.2d 196 (1950).

ceive of a situation in which the receiving party would not have reason to know the contents once the writing came under his control.

It is highly possible that the courts may require the proponent of the contract to prove that the confirmation was actually received. The previously cited Pennsylvania case held that an allegation of receipt was essential to the complaint.³⁸ This indicates that the charging party would be expected to prove such receipt. Rigid enforcement of this requirement could do much to neutralize the operation of this subsection for it would be the rare case in which a merchant would be able to muster sufficient proof of such an allegation.

The required "notice of objection" does not have to be actually received by the confirming merchant in order to afford the objecting merchant the protection of the statute.³⁹ The official comment on the giving of notice states that "the essential fact is the proper dispatch of the notice, not its receipt."⁴⁰ The heart of this subsection is the provision that once the confirmation is received, the recipient must object to its contents within ten days or be denied the protection of the statute.

Probably one of the most sacrosanct rules of contract law is that silence, of itself, is not acceptance.⁴¹ It should be made clear that it was not the intention of the Code's draftsmen to do violence to this rule. However, under this subsection, silence is regarded as a commercial acquiescence sufficient to deprive a merchant of the statute of frauds as a defense. Silence indicates that there is some real basis to the charge that a contract exists because there would normally be a disavowal of any agreement to which the charged party was unrelated and uncommitted. Such a denial would be expected in the normal course of business.⁴² It is again emphasized that the proponent of the contract is still confronted with the task of proving the existence of a contract.⁴³

What constitutes a "notice of objection" under this subsection? How comprehensive must such an objection be in order to afford its maker the protection of the statute? An interesting situation could arise if the party charged with the contract sought to disaffirm the confirmation and inadvertently indicated by his denial that the suit rested on a real transaction. Assume, *e.g.*, the written objection mentioned only price. It is arguable that the charging party should be allowed the opportunity of circumventing the statute since anything less than an unqualified objection may testify to the

³⁸ John H. Wickersham *E & C Co. v. Arbutus Steel Co.*, *supra* note 24.

³⁹ UCC § 1-201:

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communication.

⁴⁰ Comment 26 to UCC § 1-201.

⁴¹ *Royal Ins. Co. v. Beatty*, 119 Pa. 6, 12 Atl. 607 (1898).

⁴² Hogan, Symposium: 4 Ann. Surv. of Mass. Law 14 (1957).

⁴³ *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, *supra* note 25.

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reality of the transaction and the objecting party's connection to it. This would insure that the party being charged with the contract was not being wed to a totally nonexistent transaction and would thus satisfy the basic aim of the statute of frauds.⁴⁴ However, this argument is based on the assumption that the objection mentioned the price alone and ignores the ingredient of quantity which serves as a common denominator of all the subsections under 2-201. There are several ways in which a quantity requirement may attach to the objection. Conservatives might insist on the objection containing a reference to quantity, which would set the limit of recovery if the contract was ultimately proved. This would actually demand satisfaction of the requirements of subsection (1). Liberals might argue that once the confirmation mentioned a quantity, the denying party would be deemed to have assented to it provided his objection made no specific disclaimer of the stated quantity. As a suggested middle ground a requirement could be imposed calling for some reference in the objection to the quantity stated in the confirmation. However, it would be a difficult question of fact to determine when a sufficient reference had been made.

From the foregoing it may be seen that anything short of an unequivocal and complete denial poses several problems which the courts will have to ponder before answering the question of what constitutes an effective "notice of objection."

Since there are no provisions in the Sales Act comparable to this subsection of the Code, it is possible for the unethical businessman to hold a confirmation, sufficient against the sender, while studying the market to determine if he wishes to go through with the oral contract. If he decides the contract is against his interests, he can claim the statute as a defense. The obvious inequity of this situation is remedied by this subsection which requires him to object within ten days or forfeit the protection of the statute. It is possible that a fraudulent party might send out letters in confirmation of nonexistent oral agreements in hopes that some might go unchallenged. It has been maintained that this danger "is a small price to pay for the many positive benefits effected by the subsection."⁴⁵ Care should be taken to advise clients of the consequences in neglecting to promptly object to confirmations of totally unfounded oral contracts.

2. *Specially Manufactured Goods*

2-201(3)(a). A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable 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. . . .

The Sales Act specifies that the statute of frauds does not apply "if the goods are to be manufactured by the seller especially for the buyer and are

⁴⁴ Williston, *op. cit. supra* note 4.

⁴⁵ Hawkland, *op. cit. supra* note 12, at 29.

not suitable for sale to others in the ordinary course of the seller's business."⁴⁶ The Code is more restrictive in its corresponding provision as it requires either a substantial beginning in manufacture or commitments for procurement. The change of position must take place "before notice of repudiation is received." This contraction may seem out of step with the Code's liberal cadence, but is logical when examined in light of the *raison d'être* behind this alternate method of meeting the requirements of the statute of frauds. Why should specially manufactured goods be treated any differently from the sale of other articles? One plausible reason is that manufacturers do not normally produce goods, otherwise useless to them, on the mere chance that they may be able to prove a fraudulent contract with the alleged buyer. If the buyer is attempting to prove a contract it is even more unlikely that the manufacturer would produce unique goods without some sort of existing agreement. Some authorities maintain that a strict application of the statute, where special manufacture has taken place, results in more than a loss of bargain for a change in position has taken place. If an oral contract existed its unenforceability would therefore cause greater injustice to honest manufacturers than in like situations involving standard goods.⁴⁷ Since it is the change of position which justifies this alternate method of satisfying the statute, it is logical to restrict this method to the quantum of goods affected by this change. The quantum furnishes an implied quantity requirement which will limit the extent of recovery.

The clause requiring "circumstances which reasonably indicate that the goods are for the buyer" is troublesome. It is possible that this indicates that the fact that the goods are of value to the buyer alone is not enough to bring the transaction within this subsection. This possibility exists because the "reasonable circumstance" clause follows the "specially manufactured" requirement and may be presumed to be more than a mere redundancy. If change of position as a result of special manufacture is the heart of this alternate method, it may be argued that the "reasonable circumstance" clause should be construed as incidental to the requirement of special manufacture. If it is desirable to give the phrase independent meaning, it could be regarded as a safety valve. Its function would be to preclude the operation of the exception when it is obvious that a final agreement was not reached despite the fact that special manufacture has commenced. The utility of such a safety device may be questioned for in such an obvious situation the charging party would undoubtedly fail to prove the contract to the trier of fact.

Under the Code the seller may manufacture the special product himself or may procure the product from someone else. The last sentence in this subsection makes reference to such procurement. This was not necessarily the law under the Sales Act which referred to "goods *manufactured* by the seller." (Emphasis supplied.) Some courts gave this language a literal interpretation.⁴⁸

⁴⁶ Uniform Sales Act § 4.

⁴⁷ Corbin, *op. cit.* supra note 4, § 477.

⁴⁸ *Atlas Shoe Co. v. Rosenthal*, 242 Mass. 15, 136 N.E. 107 (1922). An opposite result was reached in *E. G. Young Lumber Co. v. New York Bondstone Corp.*, 15 Misc. 2d 985, 179 N.Y.S.2d 45 (Sup. Ct. 1958).

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It has been argued that this method of satisfying the statute of frauds should be abandoned under the Code.⁴⁹ Proponents of this proposition contend that the danger of an unethical special manufacturer succeeding in proving a nonexistent contract is a real one, particularly where there have been prior dealings between the parties. They point out that special manufacturers may protect themselves in Code jurisdictions by writing letters of confirmation that would bring any transaction within the purview of 2-201(2).⁵⁰ Although this argument assumes that both parties to the oral contract are merchants, this would be the situation in most cases.

3. Admissions

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. . . .

This method of satisfying the statute of frauds has no counterpart under the Sales Act. It may or may not be consistent with the previous law of the forum regarding admissions, but is logical in that it precludes a party from admitting the contract on the one hand while denying its enforceability on the other.

The apparent key to this subsection lies in the past tense statement of the admission "that a contract for sale *was* made." (Emphasis supplied.) Again, the Code searches for assurance that "a real transaction" supports the allegation that a contract exists.⁵¹ If the denying party admits that a contract existed, this indicates that the charging party is not engaged in a mere legal powerplay designed to foist a totally unfounded claim upon the denying party. The admission that a contract did exist does not establish the present existence of a contract,⁵² but only allows the charging party to present his oral evidence to the jury.

An extension of this subsection's applicability beyond the pleadings and into the pre-trial procedure is quite feasible since admissions made in "testimony or otherwise in court" are also within the purview of 2-201(b). The Code is not specific on the subject, but the issue has been raised by one authority.⁵³ This extension might be effectively argued where the proponent of the contract was otherwise stymied by the statute.

It is arguable that a demurrer constitutes an admission of the existence of a contract, but it has been held that "a preliminary objection in the nature of a demurrer would not seem to be the type of pleading contemplated by Section 3(b) of the Act."⁵⁴

Another point of conjecture is the possibility of forcing the party, seek-

⁴⁹ Hawkland, *op. cit. supra* note 12.

⁵⁰ *Id.* at 34.

⁵¹ Comment 1 to UCC § 2-201.

⁵² Comment 7 to UCC § 2-201.

⁵³ Hawkland, *op. cit. supra* note 12, at 32.

⁵⁴ *Beter v. Helman*, 41 West. 7 (Pa. 1958).

ing the refuge of the statute, to admit the existence of an oral contract while under oath. It is again suggested that the proponent of the contract might do well to attempt such a gambit.⁵⁵

In this provision the Code draftsmen have again made restrictive use of a specific quantity requirement, *i.e.*, "not enforceable under this provision beyond the quantity of goods admitted." A party may slip on an admission and plunge into this subsection, but the quantity requirement serves as a life line restricting the party's fall to the extent of the quantity admitted.

This subsection calls for the admission of a prior "contract"⁵⁶ so it would evidently exclude admissions of certain isolated terms as sufficient to neutralize the statute. Thus, even though quantity might be admitted as a separate term, how many terms might be admitted before the court would declare that there was a prior contract?

It is questionable whether the required statement of quantity must be specifically admitted by the charged party. It might be deemed sufficient if he admitted the past existence of the contract where the proponent of the contract stated the quantity. The situation is similar to that treated under 2-201(2) where a quantity requirement was sought to be established by incorporating the confirmation and the objection. The same compromise solution might be suggested, requiring the admission to make reference to the quantity terms of the proponent's contract.

4. *Payment or Acceptance*

2-201(3)(c). A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable with respect to goods for which payment has been made and accepted or which have been received and accepted.

Under the Sales Act⁵⁷ the *entire* contract is taken outside the statute of frauds if "the buyer shall accept part of the goods."⁵⁸ The Code provides for only a partial removal from the statute if only a part of the goods are received and accepted or paid for. The official comment to the Code states that "if the court can make a just apportionment . . . the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods."⁵⁹ The textual wording and the comment's insistence on apportionment indicate that a quantitative control has been built into this subsection.

Partial performance is an overt admission of a contract but does not extend beyond the scope of the partial performance. Beyond that point there is no reasonably certain basis for granting relief. Thus the quantity paid for

⁵⁵ Hawkland, *op. cit.* supra note 12, at 31.

⁵⁶ UCC § 1-201:

(11) "Contract" means the total legal obligation which results from the parties agreement as affected by this Act and any other applicable rules of law.

⁵⁷ Uniform Sales Act § 4.

⁵⁸ *Jessup & Moore Paper Co. v. Bryant Paper Co.*, 283 Pa. 434, 129 Atl. 559 (1925); *Producers Coke Co. v. Hoover*, 268 Pa. 104, 110 Atl. 733 (1920).

⁵⁹ Comment 2 to UCC § 2-201.

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or received sets the limit of recovery and furnishes the implied quantity requirement (which was previously referred to and is common to the other subsections).

A lower court in Pennsylvania has supported the apportionment position of the official comment by holding that a down payment on indivisible goods is insufficient to take the contract out of the statute.⁶⁰ Subsection (c) makes reference to section 2-606 which defines acceptance of goods. Of particular interest is 2-606(2) which states that "acceptance of a part of any commercial unit is acceptance of that entire unit." This would modify the language of 2-201(3)(c) by taking the entire commercial unit⁶¹ out of the statute even where there has been only a partial acceptance or payment. However, when dealing with a commercial unit, there is no problem of apportionment because a party would normally not accept or pay for a portion of the unit without intending to pay for or receive the entire unit.

II. SECTION 2-202. FINAL WRITTEN EXPRESSION: PAROL OR EXTRINSIC EVIDENCE

A. INTRODUCTION—A TRADITIONAL STATEMENT OF THE RULE

"When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."⁶² Thus, succinctly stated, there is little indication that the parol evidence rule has proved to be a nominal paradox⁶³ which has been sometimes lauded,⁶⁴ sometimes lamented⁶⁵ and oftentimes litigated.

It has been said that the rule finds its justification in the stability it affords written contracts through precluding their modification by prior and contemporaneous agreements.⁶⁶ Implicit in such a statement is the object of preventing fraud via perjury.⁶⁷

⁶⁰ *Williamson v. Martz*, 11 Pa. D. & C.2d 33, 19 Mon. Leg. R. 24, 29 Northum Leg. J. 32 (1956).

⁶¹ UCC § 2-105:

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

⁶² 3 Corbin, *Contracts* § 573 (1960); quoted in *Dunlop Tire & Rubber Corp. v. Thompson*, 273 F.2d 396 (8th Cir. 1959).

⁶³ 9 Wigmore, *Evidence* § 2400 (3d ed. 1940): "It is the accepted present day view that the parol evidence rule is not really a rule of evidence but is instead a rule of substantive law."

⁶⁴ *G. L. Webster Co. v. Trinidad Bean & Elevator Co.*, 92 F.2d 177 (9th Cir. 1937): "the commerce of this vast country could not be carried on if written contracts of the character of the one here, plain and unambiguous in its terms could be breached at will without any resulting liability."

⁶⁵ Corbin, *op. cit. supra* note 62, § 575.

⁶⁶ *Hoffman v. Late*, 222 Ark. 395, 260 S.W.2d 446 (1953); *Albers Milling Co. v. Donaldson*, 156 F. Supp. 683 (W.D. Ark. 1957).

⁶⁷ Corbin, *op. cit. supra* note 65.

B. THE BASIC RULE DEFINED BY THE CODE

2-202. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. . . .

The first clause in the Code's statement of the rule is "terms with respect to which the confirmatory *memoranda* of the parties agree *or* . . ." (Emphasis supplied.) Since the disjunctive *or* separates the first and second clauses the two must be read and interpreted as independent, though related clauses.

It appears that the Code is using language which is significantly different from that which is normally used in discussing the rule.⁶⁸ Although this initial phrase is expressed in the plural referring to "confirmatory memoranda of the parties," the usual statement of the rule is in terms of a singular writing,⁶⁹ a singular contract⁷⁰ or a "single" integration⁷¹ which has been adopted by both parties. The Code's rules of construction dictate that words used in the plural include the singular.⁷² However, this explicit use of the plural in stating the rule is too unique to warrant such a cavalier dismissal of the problem by a mere reference to the cited construction clause.

It is possible for a plurality of writings to comprise the ultimate contract or final integration, but it is customary to refer to this sum of the writings in the singular. If the Code's use of the plural referred to separate parts of a single instrument, the requirement that these memoranda agree would call for a redundancy within the instrument. The only logical explanation is that the plural is used to refer to two or more writings which have been separately executed by both parties. Under this interpretation, the requirement that the terms agree does not result in a redundancy.

The Code's use of the word "memoranda" is significant apart from its plurality. Some courts have held that the rule is inapplicable when the writing involved does not constitute a complete contract,⁷³ but the word "memoranda" itself may express something less than a complete contract.

The natural import of this entire first clause is that the scope of the rule has been expanded in two directions: (1) The agreement need not be expressed in a singular writing executed by both parties, but may be voiced in two or more separately executed writings, and (2) the rule is operative on mere terms of agreement though the total effect of all the writings does not constitute a complete contract.

⁶⁸ See note 62 *supra*.

⁶⁹ *Werner v. Steele*, 8 Ill. App. 2d 460, 131 N.E.2d 820 (1956).

⁷⁰ *La Cava v. Breedlove*, 77 Cal. App. 2d 129, 174 P.2d 880 (1946).

⁷¹ Restatement, Contract § 237 (1932).

⁷² UCC § 1-102 (5):

In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular.

⁷³ *Welch v. Bombardieri*, 252 Mass. 84, 147 N.E. 595 (1925).

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Some qualification and clarification would appear to be needed as to the genesis of the confirmatory memoranda. Unless such writings originate from a common understanding, there is nothing to confirm and the rule is inapplicable. It would appear necessary to require that the confirmatory memoranda indicate that there was a meeting of the minds as opposed to a statement of identical terms at different stages of negotiation. In the latter situation there is no agreement. It would be desirable for the memoranda to recite the moment of the agreement so that there will be no difficulty in ascertaining whether parol evidence is prior to or contemporaneous with the agreement.

The second clause in the Code's statement of the rule applies to terms "which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. . . ." This clause appears to be more in line with traditional expressions of the rule,⁷⁴ but, like the first clause, it is applicable to any terms on which there has been an agreement. That agreement must be in writing, but the Code does not require the writing to contain all of the requisites of a contract.

A determination that the parties *intended* to execute a final expression of their agreement exists as a prerequisite to the operation of the rule. The Code does not attempt to dictate any method of resolving this issue and it may be presumed that the various jurisdictions will continue to settle this question by the application of pre-Code standards.⁷⁵

The codification of the rule in no way mentions a complete agreement, contract or integration. It simply provides that the rule shall extend to *terms* meeting the requirements of the section. Conspicuous by its absence is any reference to a finalized understanding. The official comment to the Code contains a rejection of any assumption that a writing final in some respects encompasses all areas of agreement.⁷⁶

This discussion has centered on what is needed to cause the operation of the rule. An examination of the Code's language stating the *effect* of the rule indicates that it prohibits the contradiction of protected writings by evidence of any *prior* agreement or of a *contemporaneous oral* agreement. The substance of this provision is very much in accord with traditional statements of the rule.⁷⁷

C. THE WRITING MAY BE EXPLAINED OR SUPPLEMENTED

The subsection following the basic rule permits the explanation and supplementation of terms otherwise within the purview of the rule. The Code does not attempt to provide an answer to the problem of how many degrees separate an explanation from a contradiction.

⁷⁴ See note 62 *supra*.

⁷⁵ 20 Am. Jur. Evidence § 1102 (1939).

⁷⁶ Comment 1 to UCC § 2-202 states:

This section definitely rejects: (a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon

⁷⁷ See note 62 *supra*.

1. *Course of Dealing, Usage of the Trade or Course of Performance*

2-202(a). Terms that are not to be contradicted because of the rule "may be explained or supplemented . . . by course of dealing or usage of trade"⁷⁸ or by course of performance."⁷⁹ [Footnote added.]

As a general distinction it might be said that "course of dealing" refers to conduct between the parties "previous to the agreement"⁸⁰ while "course of performance" refers to activity having taken place in recognition of the agreement. The term "usage of trade" may be loosely defined as any regularly observed custom within a given vocation or a geographic area.

The official Code comment states that "the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances."⁸¹ The zeal with which the courts may greet this doctrine and apply it to parol evidence cases is uncertain, but a Pennsylvania court has fervently embraced this concept of commercial custom.⁸²

In the cited case an automobile dealer personally guaranteed a loan for the purchase of a new automobile. In the written agreement he waived "all notices to which [he] might be entitled." There was evidence that the original insurance contract on the automobile was cancelled and that the plaintiff bank so notified the dealer. Another policy was obtained, but was discontinued for failure to pay the premium. Although the bank was notified of this cancellation, it failed to notify the dealer. Thereafter, an accident resulted in a total loss of the automobile. In an action on the note in which the dealer set up as a defense the bank's failure to notify him of the second cancellation, the bank argued that the dealer had specifically waived "all notices."

The trial court allowed the dealer to introduce parol evidence that it was customary for dealers to be notified of such cancellations. The superior court held that the waiver applied only to notices under the written agree-

⁷⁸ UCC § 1-205:

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

⁷⁹ UCC § 2-208:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

⁸⁰ Comment 2 to UCC § 1-205.

⁸¹ Comment 1 to UCC § 1-205.

⁸² *Provident Tradesmen Bank & Trust Co. v. Pemberton*, 24 Pa. D. & C.2d 720 (1960), *aff'd per curiam*, 196 Pa. Super. 180, 173 A.2d 780 (1961).

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ment and not to those required by usage of the trade which usage would have to be carefully negated. It should be noted that the holding is in accord with the official comment which states that unless course of dealing, usage of the trade or course of performance are carefully negated, "they have become an element of the meaning of the words used."⁸³

Two judges in a dissenting opinion stressed the fact that the dealer had waived his right to *all* notices in unequivocal language. Some support for this position might be found in the wording of section 2-208(2) which provides that "express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade" whenever a construction consistent to all the above terms would be unreasonable. The majority would probably contend that their consistent construction was not unreasonable.

While the instant case appears to be the only one under the Code that has directly considered the problem, it may indicate the manner in which liberally disposed courts might maneuver within the framework of the Code.

The cited case should also serve as a caveat to the draftsman to specifically exclude the use of such evidence if this be the desire of his client. When an individual practice or custom is specifically negated in the writing, contrary parol evidence attempts to do more than explain or supplement and must be excluded as a contradiction within the meaning of the main body of the rule. A general exclusion of parol evidence within the scope of subsection (a) might be more difficult to accomplish, but might be achieved by a written expression of intent to exclude such evidence.

Speculation on this latter possibility may be largely academic, because, unless the parties can conceive of specific usages and customs they intend to exclude, the probabilities are that they will wish to have the terms of the writing explained and supplemented by parol evidence of their customs and practices.

There is no express requirement within this subsection of finding an incomplete contract. Some courts may now receive parol evidence of custom and usage where they previously would have excluded it if the contract appeared to be complete on its face.⁸⁴ Similarly, the Code expresses no requirement for the finding of ambiguous language prior to the receipt of parol evidence which is used to explain or supplement. Some jurisdictions held this finding to be a prerequisite to the admission of such evidence.⁸⁵ The official comment states that this definitely rejects "the requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous."⁸⁶

2. *Consistent Additional Terms*

2-202 (b). Terms that are not to be contradicted because of the rule may be explained or supplemented by evidence of con-

⁸³ Comment 2 to UCC § 2-202.

⁸⁴ *In re Gill's Estate*, 314 Pa. 558, 171 Atl. 457 (1934); 32 C.J.S. Evidence § 999 (1942).

⁸⁵ E.g., *Violette v. Rice*, 173 Mass. 82, 53 N.E. 144 (1899).

⁸⁶ Comment 1 to UCC § 2-202.

sistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

It has been maintained that consistent additional terms may be added to an incomplete written contract by parol evidence.⁸⁷ This subsection codifies this position. The introduction of such terms is allowed without tethering their admissibility to usage or custom which is the subject of the prior subsection. A finding *by the court* that the writing was not intended as a complete statement of the terms of the contract operates as a "condition subsequent"⁸⁸ precluding the introduction of oral testimony. Such an inquiry into the intent of the parties was not uncommon prior to the Code,⁸⁹ but some doubt may have existed as to the propriety of the court making this determination rather than the fact finder.⁹⁰ This question of propriety now appears to be settled by the Code's express delegation of this duty to the court.

Courts dealing with the rule have long been making findings as to the intent of the parties to enter into complete and exclusive written agreements.⁹¹ These decisions will probably be applied in determining the question of intent within this subsection. The Code offers some guidance by way of an official comment which states that:

If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.⁹²

The only case decided under the Code appears to take a conventional approach to this finding of intent.⁹³

One of the most intriguing problems presented by this section of the Code concerns the possibility of drafting a merger clause that will effectively bar parol evidence. Although this possibility has been discussed in conjunction with the preceding subsection, the exclusion of additional terms, which are the subject of this subsection, might be more easily accomplished.

Parol evidence introduced under the prior subsection is used to interpret the very meaning of the words used. This presumes that the contracting parties will carry out their transactions according to established practices and will express their thoughts in the jargon of their trade. It is submitted that this presumption does not apply where the purpose of the parol evidence

⁸⁷ Corbin, *op. cit. supra* note 62, § 584; Restatement, Contracts § 240(1) (1932).

⁸⁸ The positioning of the word "unless" behind the phrase of admission indicates that the issue of intent would have to be *raised* before the court would consider the exclusion of such evidence.

⁸⁹ 4 Williston, Contracts § 633 (3d ed. 1961); Wigmore, *op. cit. supra* note 63, § 2429; Restatement, Contracts § 228 (1932).

⁹⁰ Wigmore, *op. cit. supra* note 63, § 2430, indicates that some courts have committed the error of leaving this determination to the jury.

⁹¹ 20 Am. Jur. Evidence §§ 1136-37 (1939).

⁹² Comment 3 to UCC § 2-202.

⁹³ *Holland Furnace Co. v. Heidrich*, 7 Pa. D. & C.2d 204 (1955).

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is to introduce additional terms. Hence, it would be easier to support a general exclusion of additional terms as being the intent of the parties.

While this position appears logical, it would behoove any competent draftsman to specifically exclude any additional terms with which his client is particularly concerned. However, if some additional terms are carefully negated via specific reference so as to render any parol evidence a contradiction, the draftsman must be wary of luring the court into believing that these are the only additional terms he wishes to negate.

D. PAROL EVIDENCE OUTSIDE THE SCOPE OF THE RULE

The parol evidence rule has never operated as a complete and categorical bar to the receipt of parol evidence. The rule does not operate to exclude oral testimony of events *subsequent* to the writing. Even prior and contemporaneous agreements may be supported by such testimony if the evidence is being offered for a proper purpose. When the offering party is attempting to prove that no contract existed⁹⁴ or that the transaction was actually a nullity⁹⁵ due to fraud, illegality, accident or mistake, parol evidence will normally be received though it may conflict with the contents of the writing. It is argued that under such circumstances the imposition of the rule would tend to cause rather than prevent fraud and injustice.⁹⁶

It is likely that the Code will accept this prior posture of the law for there is nothing in the Code to indicate otherwise.⁹⁷ In at least one instance a lower court has allowed parol evidence to contradict a writing where the purpose was to prove fraud.⁹⁸

III. CONCLUSION

It has not been the purpose of this comment to form a judgment on the present day utility of the statute of frauds or the parol evidence rule. Both will probably continue to be the controversial subject of case and comment, but the Code has attempted to mitigate many of the prior inequities and inconsistencies connected with the statute and the rule. With the more obvious evils eliminated by virtue of codification in a uniform act, it seems certain that both the statute and the rule will enjoy an increased longevity in the United States.

This comment, in the nature of a verbal anatomy, has endeavored to examine the operation of two Code sections and to anticipate problems that will undoubtedly be litigated as the courts undertake the ponderous process of interpreting the Code. Sir Francis Bacon observed that "some books are to be tasted, others to be swallowed, and some few to be chewed and digested." Our reading complete, it is evident that the Uniform Commercial Code is of the third variety. The bite taken is admittedly small, but I would hope that it has been sufficiently chewed and digested.

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⁹⁴ Corbin, *op. cit.* supra note 62, § 577.

⁹⁵ *Id.* § 580.

⁹⁶ *Bates v. Southgate*, 308 Mass. 170, 31 N.E.2d 551 (1941); *Dallas Farm Mach. Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233 (1957).

⁹⁷ UCC § 1-103.

⁹⁸ *Wachtman v. Derran Food Plan*, 71 Dauph. Co. 121 (Pa. 1957).