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The Application of the Oral Admissions Exception to the Uniform Commercial Code's Statute of Frauds

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THE APPLICATION OF THE ORAL ADMISSIONS EXCEPTION TO THE UNIFORM COMMERCIAL CODE'S STATUTE OF FRAUDS

INTRODUCTION

The general principle underlying the Statute of Frauds is that, with certain exceptions,[1] contracts must be in writing to be enforceable.[2] While this rule has historically prevented a party from using the courts to enforce alleged contracts which did not actually exist, it has also produced negative effects. One such effect has been that parties to bona fide oral agreements have used the plea of non-compliance with the Statute of Frauds to escape their obligations under those contracts.[3] When this happens, the Statute of Frauds becomes an aid to fraud rather than a protection against fraud. The drafters of the Uniform Commercial Code incorporated into the Code a Statute of Frauds designed to provide a means of enforcing as many bona fide oral contracts as possible.[4]

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1. For the exceptions to the writing requirement of the Uniform Commercial Code Statute of Frauds, *see* U.C.C. §§2-201(2) (oral contract between merchants which is later confirmed in writing), 2-201(3)(a) (goods are specially manufactured for the buyer and are not suitable for others), 2-201(3)(b) (party against whom enforcement is sought admits in a judicial proceeding that a contract was made), 2-201(3)(c) (payment for goods has been made and accepted, or where goods have been received and accepted). See note 4 *infra* for text of the Uniform Commercial Code Statute of Frauds.

2. *See* U.C.C. §2-201, Official Comment 4. Failure to satisfy the requirements of the Code Statute of Frauds does not render a contract void. Such a contract is merely unenforceable in a judicial proceeding. Thus, the Statute of Frauds sets forth formalities, not elements of contract formation. See note 120 and accompanying text, *infra*, for a discussion of the effects of the separation of form and formation.

3. *See, e.g.*, Shaffer v. Hines, 573 S.W.2d 420 (1978) (Statute of Frauds employed to avoid complying with oral agreement to buy land); Cash v. Clark, 61 Mo. App. 645 (1895) (plaintiff's non-compliance with Statute of Frauds provisions circumvents obligations on oral contract); Jackson v. Oglander, 71 Eng. Rep. 544 (1865) (admission of oral contract to lease land inadequate where writing is insufficient under the Statute of Frauds).

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.

(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

Section 2-201(3)(b) of the Code was included to ensure that a party would be bound by a contract if he admitted its existence in court.[5] The effectiveness of this subsection in preventing the Statute of Frauds from aiding in the commission of fraud is contingent upon the manner in which it is interpreted and applied by the courts.

This note will examine the history and rationale of the Statute of Frauds, beginning with early common law through the drafting of the Code Statute, and emphasizing its oral admissions exception. Several issues, including whether an admission may be compelled on cross-examination and what standard should be used to determine whether an admission has been made, will be discussed. It will be seen that the resolution of these issues depends on the manner in which courts view the purposes of the Statute of Frauds. The Code Statute will be examined as a rule of evidence which describes the conditions necessary before a contract may be enforced in court. This evidential outlook will be contrasted with an outlook viewing the Statute's provisions as elements of contract formation. Finally, the procedural implications of section 2-201(3)(b) will be discussed. The note will examine issues of whether the Statute may be raised via demurrer and the manner in which a motion for summary judgment should be treated, including consideration of how far a party should be allowed to proceed in extracting an admission from his adversary. Since these issues have been treated differently in various jurisdictions, their resolution is necessary to enable the Code Statute of Frauds to inject into contract law the uniformity and fairness contemplated by the drafters.

HISTORY OF THE STATUTE OF FRAUDS LEADING UP TO THE DRAFTING OF UCC SECTION 2-201

With the development of the action of assumpsit[6] in the 14th century, oral promises became enforceable in English courts. The legal enforcement of oral promises could be obtained on the strength of the oral testimony of witnesses.[7] This facilitated the perpetration of fraud through the subornation of per-

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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)."

5. *See* U.C.C. §2-201, Official Comment 7. Comment 7 states that under §2-201(3)(b) a party may no longer "admit the contract in court and still treat the Statute as a defense." *Id.*

6. *See* 6 J. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 638 (5th ed. 1956). Assumpsit is a promise or engagement by the defendant to do some act or pay something to another. Assumpsit is not treated as an action on contract, but as one element of the plaintiff's cause of action. Professor Plucknett notes that assumpsit is closely akin to the term "covenant" and that therefore as the case law developed it became increasingly difficult to segregate assumpsit from the law of contracts.

7. *See* J. CALAMARI & J. PERILLO, CONTRACTS §282, at 441 (1970); A. CORBIN ON CONTRACTS §275, at 371 (1952). *See also* Comment, *Changes Wrought in the Statute of Frauds By The Uniform Commercial Code*, 48 MARQ. L. REV. 571, 571 (1965).

jured testimony.[8] Parliament reacted to this problem in 1677[9] by enacting a Statute for the Prevention of Frauds and Perjuries.[10] The purpose of the Statute was to provide a shield from the fraud caused by perjury by making sure that legal effect was not given to transactions never entered into and that parties were not held to promises never made.[11] To accomplish this purpose, the

8. *See* M. HOLDSWORTH, A HISTORY OF ENGLISH LAW 379-97 (1927). The perjury problem was aggravated by early courtroom procedure. Note, *Statute of Frauds: Section Seventeen in the Light of Two and a Half Centuries*, 13 CORNELL L.Q. 303 (1927). The author points out that at the time of the Statute's enactment, trial by jury was an imperfect institution. One problem was that a jury was permitted to disregard the evidence presented and decide the case from its own knowledge. Additionally, parties to a suit were not allowed to testify because it was believed their interest in the outcome of the suit would tempt them to perjury. This fact, combined with the nearly total discretion granted to the jury, tended to make collusion, false swearing, and actual fraud via subornation of perjury a real danger. *See* Stephen & Pollock, *Section Seventeen of The Statute of Frauds*, 1 L.Q. REV. 1, 7 (1885); Comment, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916). Professor Stephen states it was doubtless the Statute seemed reasonable at a time when the parties' testimony was excluded, but that under more modern courtroom conditions the Statute had become altogether antiquated. See note 45 and accompanying text, *infra*. *See also* Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 429-30 (1928).

9. *See* Note, *supra* note 8, at 304. There is some dispute as to the exact date and authorship of the Statute. The consensus is that the Statute was drafted by Lord Nottingham in 1673 and, with additions and improvements by Sir Leoline Jenkins and Lord Guilford, became effective in 1677. Willis, *supra* note 8, at 427, states that Lord Nottingham and Lord Guilford wrote different sections of the original draft and that Sir Leoline Jenkins and Sir Mathew Hale provided many changes and suggestions before the Statute became effective on April 16, 1677. Cooke, *The Seventeenth Section of The Statute of Frauds*, 37 ALB. L.J. 492, 493 (1888), attributes much of the Statute to Lord Chief Justice Hale who, although he died in 1676, presided while the Statute was in the process of development. *See also* Hening, *The Original Drafts of the Statute of Frauds and Their Authors*, 61 U. PA. L. REV. 283 (1913); Comment, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329 (1912); Letter from John F. Baker to Harvard Law Review, *reprinted in*, 2 HARV. L. REV. 42 (1888).

10. 29 Chas. II., c.3., 8 St. at Large 405 (1676). The Statute contained twenty-five sections covering a wide range of topics such as wills, trusts, land, procedure and succession to chattels. Only two sections, Section Four and Section Seventeen were important for contract purposes. They provided: "IV. 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 miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract 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 some other person thereunto by him lawfully authorized.

XVII. "And be it further enacted by the authority aforesaid That from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandises, 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 of 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."

11. *See* A. CORBIN ON CONTRACTS §275 at 371 (1952); Stevens, *Ethics and The Statute of*

Statute required contracts within its purview[12] to be reduced to a writing,[13] primarily for the unambiguous evidential character of written contracts.[14] The Statute was not intended to be a means by which defendants could escape their obligations under bona fide oral agreements. Although inconsistent with the Statute's purpose, such escape would be possible if a defaulting party maintained that there was no writing.[15] Therefore, the early English cases gave the Statute a flexible application to effectuate its purpose. They did not allow a party against whom enforcement was sought to admit making the agreement and still invoke the Statute of Frauds as a defense.[16]

Frauds, 37 CORNELL L.Q. 355, 360 (1952); Willis, *supra* note 8, at 427; Note, *The Use of Oral Admissions to Lift The Bar of The Statute of Frauds: UCC Section 2-201(3)(b)*, 65 CAL. L. REV. 150, 150 (1977) [hereinafter cited as *Oral Admissions*]; Note *supra* note 8, at 304; Comment, *supra* note 7, at 571.

12. See note 10 *supra* for the text of Section XVII of the Statute. The Statute dealt with contracts for the sale of goods costing "10 pounds sterling or upwards," or $50. This figure now stands at $500 in the Uniform Commercial Code's Statute of Frauds. *See* text of U.C.C. §2-201, *supra* note 4. *See generally* Comment, *supra* note 7, for a discussion of this and other changes brought about by the Code Statute.

13. *See* text of Section XVII at note 10 *supra*. This section permits other alternatives to take the contract out of the Statute, including partial receipt and acceptance of the goods sold, and giving of earnest money as a binder or in partial payment. These actions would also provide unambiguous evidence of a contract. *See* Smith v. Surman, 9 B. & C. 561, 571 (1829), where Lord Littledale noted the Statute "requires that the terms of contracts shall be reduced into writing, or that some other requisite should be complied with to show manifestly that the contract was completed."

14. *See* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-03 (1941). Professor Fuller discusses the various functions performed by legal formalities such as the Statute of Frauds. First, and most obvious, he cites the evidentiary function of providing "evidence of the existence and purport of the contract." *Id.* at 800. This function was the primary motivation behind the enactment of the Statute of Frauds. See note 11 and accompanying text, *supra*. Fuller also cites a cautionary function of a formal requirement such as a writing, i.e., it will check inconsiderate action by encouraging a party to carefully consider any agreement he may be about to close. Next, Fuller discusses a channeling function, reasoning that formalities provide a legal framework into which a party may fit his actions or channels for legally effective expression of intent. This function also encompasses the fact that compliance with formalities provides a simple and external test of enforceability aiding in judicial diagnosis. 41 COLUM. L. REV. at 801. Fuller goes on to note that these three functions are inextricably bound together, and when a formality accomplishes one of them, it generally accomplishes the other two. These three functions of the Statute of Frauds should be considered together whenever one considers the worth or viability of the Statute, although most commentators focus primarily upon the evidentiary function. *See* sources cited at note 45 *infra*.

15. *See* Stevens, *supra* note 11, at 360. Professor Stevens invokes familiar imagery in noting that the Statute was intended to be used as a "shield" and not as a "sword."

16. *See, e.g.*, Croyston v. Banes, 24 Eng. Rep. 102 (Ch. 1702). In *Croyston*, the Master of the Rolls declared that if a bill is brought for the execution of a parol agreement, and the defendant by his answer confesses the agreement without insisting upon the Statute of Frauds then the court will decree enforcement of the agreement. There would be no danger of perjury, "the only thing the statute [was] intended to prevent." *Id.* Stevens, *supra* note 11, at 361-62, contends this decision may be indecisive since it allows for the possibility of a defendant confessing and insisting upon the Statute. He further notes, however, that this action would be inconsistent with the court's characterization of perjury as the sole evil intended to be addressed by the statute. *Id.* In Cottington v. Fletcher, 26 Eng. Rep. 498 (Ch. 1740), the plaintiff had been a papist when he assigned an advowson to the defendant. An advowson is

The 1713 case of *Symondson v. Tweed*[17] provides an example of the early[18] English attitude toward the purpose and application of the Statute of Frauds. Although the defendant did not admit making the alleged oral contract,[19] the court discussed the potential effect of such an admission. The report of the case stated that if a party brought a bill for specific performance of an oral agreement, setting forth the terms of the agreement in the complaint,[20] the Statute of Frauds would not prevent enforcement of the agreement if the defendant admitted the oral contract in his answer. The court noted that the only "mischief" the Statute was intended to curtail was the situation in which perjured testimony is used to misrepresent or fabricate an oral agreement. Where the defendant admits to making the agreement, there is no need to prove the agreement exists, and therefore no danger of perjury on the matter.[21] This reasoning

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the right to nominate a rector or vicar of a vacant parrish. The plaintiff assigned his advowson to the defendant for 99 years, with the oral understanding that the defendant was holding the advowson in trust for the plaintiff. The plaintiff became a Protestant and sued for reassignment of the advowson. The defendant admitted the oral trust but pleaded the Statute of Frauds as a defense. The plea was overruled by the Lord Chancellor because the plea and answer admitted the oral agreement. It was noted that if the plea had stood by itself it would have been sufficient. *Id.* In Attorney Gen. v. Day, 27 Eng. Rep. 992 (Ch. 1749), Lord Hardwicke stated in dicta at 221, "[y]et on all the questions on that statute in this court, the end and purport of making it has been considered, viz. to prevent frauds and perjuries: so that any agreement in which there is no danger of either, the court has considered as out of the statute." *Id.* at 991. In Potter v. Potter, 27 Eng. Rep. 1128 (Ch. 1750), the court stated: "But though an agreement is not reduced into writing and signed by the party, yet it is well known, that if confessed, or in part carried into execution, it will be binding on the parties." *Id.* at 1131. *See also* Huddleston v. Briscoe, 32 Eng. Rep. 1215 (Ch. 1805); Whitchurch v. Bevis, 29 Eng. Rep. 306 (Ch. 1789). This early flexibility in the application of the Statute is sometimes overlooked by the commentators. *See, e.g., Oral Admissions, supra* note 11, at 150 where the author states, rather simplistically, "The English courts interpreted this [writing] requirement rigidly." *Id.*

17. 24 Eng. Rep. 169 (Ch. 1713).

18. The English majority view later changed. *See* notes 30-38 and accompanying text, *infra*. *Symondson* was disapproved in Rondeau v. Wyatt, 2 H. Bl. 68 (1792).

19. 24 Eng. Rep. at 169. The defendant refused to admit in his answer that he had agreed by parol to settle some lands and houses on the plaintiff, in consideration of his marriage to the defendant's daughter. Because there was no admission, the Statute of Frauds controlled and the bill was dismissed. *Id.*

20. The court made it clear that the complaint must stipulate not only that the agreement was made, but also the terms of the agreement, for its execution to be enforced. "[I]n all cases where the court had decreed a specific execution of a parol agreement, yet the same had been supported and made out by letters in writing, and the particular terms stipulated therein as a foundation for their decree, otherwise the court would never carry such an agreement into execution." *Id.*

21. *Id.* The report of the case stated: "In this case the court declared, and the council agreed likewise, that if a man brings a bill for specific performance of a parol agreement, setting forth the substance of it in his bill, and the defendant by his answer confesses the agreement, that the court may in such a case decree an execution thereof, notwithstanding the Statute of Frauds and Perjuries, because the defendant confessing the agreement, there can be no danger of perjury from contrariety of evidence, which was the only mischief that statute intended to obviate." 24 Eng. Rep. at 169. While this statement is dictum in *Symondson*, see note 19 and accompanying text, *supra*, it did represent the prevailing view of the time. *See, e.g.*, A TREATISE OF EQUITY printed by E. and R. Nutt and R. Gosling for D. Browne, 1737, bk. I, c. III, §8, p. 19, where it stated in language similar to that of *Symondson*, that a parol

became the basis of the early common law "admissions exception" to the Statute of Frauds.[22]

Child v. Godolphin[23] further illustrates how the Statute was initially applied strictly to provide a shield from fraudulently alleged agreements. The plaintiff sought specific performance of an agreement to assign a lease, contending that a letter which confirmed the agreement had been signed by the defendant. The defendant raised the defense of the Statute of Frauds and insisted she was tricked into signing the letter under the pretense that it was a letter of recommendation.[24] She maintained that no agreement or memorandum of an agreement to assign the lease had ever been signed.[25] The defendant further maintained that her plea of the Statute should be held sufficient without the filing of a formal answer, reasoning that if the answer was filed, the plaintiff might be able to produce witnesses who would testify falsely as to the alleged agreement, depriving the defendant of the Statute's benefit.[26] Finding this reasoning unpersuasive, the court held the plea was insufficient without an answer. If defendants wished to invoke the protection of the Statute of Frauds, they had to deny the existence of the contract in their pleadings.[27] The court reasoned that although the plea of the Statute was proper, it must be combined with a denial of the agreement, because an admission of the contract would lead to judicial enforcement. The court concluded that such an admission and the resulting enforcement was not intended to be prevented by the Statute.[28]

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agreement not signed by the parties, or somebody lawfully authorized by them, and not confessed to in the answer, cannot be carried into execution. However, the Treatise goes on to state that where a defendant "in his Answer, . . . allows the bargain to be complete, and does not insist on any Fraud, there can be no danger of Perjury; because he himself had taken away the necessity of proving it." *Id.*

22. *See, e.g.*, the language quoted from Potter v. Potter, 27 Eng. Rep. 1128, 1131 (Ch. 1750), at note 16, *supra.*

23. 21 Eng. Rep. 181 (Ch. 1723). Stevens, *supra* note 11, at 362, mistakenly states that this decision was handed down in 1732.

24. 21 Eng. Rep. at 182. The plaintiff brought a letter to the defendant that was "ready written and prepared by the plaintiff, as she believes, and to which the plaintiff earnestly desired her to subscribe her name, alleging the same to be only a letter of recommendation." The letter was addressed to the defendant's lessor, and the defendant thought it was to be carried to and left with the Dean. With this in mind the defendant signed the letter. *Id.*

25. *Id.* at 181.

26. *Id.* at 182. The defendant feared this result because the court ordered that the plea of the Statute should stand for an answer with liberty for the plaintiff to except to the answer, and that the benefit of the Statute should be saved until a hearing of the cause. *Id.*

27. 21 Eng. Rep. at 182. *See also* Rastel v. Hutchinson, 21 Eng. Rep. 183 (Ch. 1726), where the plaintiff alleged he had employed the defendant to purchase a house from a third party. He contended the defendant made the purchase and took a conveyance to himself, refusing to convey the house to the plaintiff to prevent the plaintiff from enjoying the premises, he reconveyed it to the original vendor. The defendant pleaded the Statute of Frauds as a defense to the agreement between the plaintiff and himself. The court held this plea had to be coupled with an answer either admitting or denying the existence of the agreement. *Id.*

28. 21 Eng. Rep. at 182. The reasoning of the court was reported as follows: "His Lordship said, the plea insisting on the statute was proper, but then the defendant ought by answer to deny the agreement; for if she confessed the agreement, the Court would decree a performance notwithstanding the Statute, for such confession would not be looked upon as perjury, or intended to be prevented by the statute." *Id.*

The majority view throughout most of the eighteenth century was that a defendant must admit or deny an oral agreement sought to be enforced against him. If he admitted the agreement, courts reasoned that the Statute of Frauds would not and should not prevent its enforcement.[29] However, toward the end of that century, more than one hundred years after the Statute's enactment, a different view began to predominate which soon led to a reversal of the flexible application of the Statute.[30]

Judicial doubt as to the propriety of applying the Statute as the court had in *Child v. Godolphin* centered on the effect of requiring the defendant to admit or deny the oral agreement in his answer.[31] If a defendant denied a parol agreement, and the plaintiff was allowed to bring in evidence regarding the contested fact of whether the agreement existed, there would be the danger of having a false contract proved through perjury. That was exactly the situation the Statute was intended to prevent.[32] Conversely, if a defendant's denial was immune from refutation by the plaintiff's evidence, the defendant would be under a strong temptation to commit perjury himself where an agreement actually existed, thus escaping all liability.[33] Therefore, forcing the defendant to admit or deny a claimed parol agreement was seen as a cause of perjury.

Utilizing this analysis, the majority English view throughout the 19th century held that a party was not forced to admit[34] making an oral agreement

29. See generally cases cited at notes 11 & 27 and accompanying text, *supra*.

30. *See* Stevens, *supra* note 11, at 367.

31. *See* FONBLANQUE'S EQUITY, Bk. 1, Ch. III, §8, 168-170 (1793). This influential treatise left an imprint on this area of the law just at the time doubts were growing concerning the early common law admissions exception to the Statute. The treatise was cited in a note following Pym v. Blackburn, 30 Eng. Rep. 878, 882 (Ch. 1796) and in Cooth v. Jackson, 31 Eng. Rep. 913, 918 (Ch. 1801). This treatise expounded what soon became the majority view in Statute of Frauds cases. *See* text accompanying notes 32-38 *infra*.

32. *See* note 26 and accompanying text, *supra*. This is the situation that was feared by the defendant in *Child v. Godolphin*, where the plaintiff was allowed to except to the defendant's answer. See note 23 *supra*.

33. For an example of such reasoning see Rondeau v. Wyatt, 2 H. Bl. 63 (1792). Plaintiff sought damages for breach of an alleged contract to sell and deliver corn. Defendant pleaded the Statute of Frauds. At trial there was a verdict for the plaintiff because defendant had admitted to entering into the contract in a previous suit in equity, Rondeau v. Wyatt, 29 Eng. Rep. 462 (Ch. 1790). The case was declared a non-suit on reargument, however, because it was decided that the Statute of Frauds applied in spite of the admission and the executory nature of the contract. Referring to equity cases, the court noted the common rationale that when the defendant confesses the agreement there is no danger of perjury, which is the only thing the statute intended to prevent. However, the court pointed out the fallacy of this reasoning, since calling upon a party to answer a parol agreement certainly tempts him to commit perjury. Nevertheless, the pervention of perjury was not the sole object of the statute; another object was to lay down a clear and positive rule to determine whether the contract of sale should be complete. Thus, the court's argument for a strict application of the Statute's writing requirement not only considered the objective of discouraging perjury by both sides but also recognized another function of imposing this legal formality. This is the channeling function referred to by Professor Fuller. See note 14 *supra*.

34. *See* Stevens, *supra* note 11, at 371 where it is pointed out that, while at equity a denial would not be examined but would be taken at face value, at law a denial would put a point at issue. This was what the Statute was intended to prevent — parol testimony regarding oral agreements. Therefore, when a defendant was bound by the rules of pleading to confess

when pleading the Statute of Frauds. In those cases where the defendant did admit entering into an oral agreement, he was also allowed to invoke the Statute as a defense.[35] The reasoning behind allowing use of the Statute to escape oral obligations was based on the rule that at equity, a defendant was bound to confess or deny any fact which, if confessed, would give the plaintiff a title to the relief sought.[36] Because courts would not compel a defendant to bindingly admit to an agreement, it followed that such an admission could not give the plaintiff title to the relief sought.[37] In spite of this rather circular rationale, it soon became dogma that a defendant could confes to entering into an oral agreement and still avail himself of the Statute.[38] This new English

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the agreement in his answer, such a confession was ignored. In this manner the inducement to perjury was eliminated both for the defendant and the plaintiff. Although a defendant may have been required as a matter of form to answer the complaint, he was not bound by that answer and therefore was not required to answer so as to give the plaintiff the requested relief via his confession.

35. *See* Pym v. Blackburn, 3 Ves. Jun. 34, 30 Eng. Rep. 878, (Ch. 1796). In a note accompanying the case at 3 Ves. Jun. 39 the reporter discusses the rationale behind this development before stating that: "The result of the principal cases upon this subject, while it fluctuated in a state of great uncertainty . . . seems to be, that the Statute may be used as a bar to the discovery; but it has been since settled . . . that the Defendant, by his answer admitting the agreement, but insisting upon the statute as a defence to the relief shall not be compelled upon that admission to perform the agreement." The reporter notes that while this result can lead to a defendant's use of the Statute to perpetrate fraud, he goes on to state that the frauds against which the Statute is directed are of a particular species, specifically constructing fictitious agreements and sustaining them by perjury. In spite of the fact that a defendant is encouraged to perjure himself the reporter notes that a plaintiff seeking relief on the basis of a defendant's admission is seeking relief in direct opposition to the Statute. He concludes that the Statute's object was to prevent the "mischiefs" "arising from loose contracts and devises by the general rule" and that "that ought not to give way to particular instances of hardship, arising from ignorance, carelessness, or caprice." *Id.* at 39-40.

36. *See* FONBLANQUE'S EQUITY, *supra* note 31, at 168. "It is certainly a general rule in equity, that the defendant shall discover whatever is material to the justice of the plaintiff's case." *Id. See also* W. MCCLINTOCK, EQUITY, at 27-28 (2d ed. 1948). Professor McClintock notes that at equity a plaintiff filed a bill stating the facts on which his claim was based. The defendant was then summoned to answer this bill by a writ of subpoena. The defendant's answer was not only a pleading, but also a discovery, since he was compelled to answer all of the interrogatories contained in the bill. Professor McClintock also mentioned the acknowledged exception to this process. Where the defendant alleged that a contract sued upon was oral he could be relieved from the burden of answering the whole bill, because the courts would no longer enforce admitted oral contracts. *Id.*

37. *See* Cooth v. Jackson, 31 Eng. Rep. 913 (Ch. 1801), where Lord Chancellor Eldon discussed this rationale in dictum. *See id.* at 926-27. In discussing a case where part performance would take a contract out of the Statute the Lord Chancellor stated an admission of the agreement should not oust the defendant of the benefit of the Statute. He reasoned that a party has a right to an answer from the defendant, the admission of the truth of which would entitle him to relief. However, because there might not be an admission or denial of a parol agreement in the defendant's answer, justice would require some method of determining whether such an agreement existed before the court took any action on it. Because the court had absolutely no means of determining such a factual question and still staying within the Statute, it followed that if a defendant admitted the agreement and still insisted upon the benefit of the Statute then the Statute protected him.

38. *See, e.g.*, Jackson v. Oglander, 71 Eng. Rep. 544 (1865). This was a suit for specific performance of an agreement to lease a piece of land. The fact of the agreement was ad-

viewpoint was rapidly transfused into the developing American jurisprudence.[39]

In the seminal American case of *Thompson v. Jameson*,[40] the plaintiff sought to specifically enforce the defendant's oral agreement to be responsible for the debt of another.[41] The defendant admitted making the oral agreement, but pleaded the Statute of Frauds as his defense. In dismissing the bill, the court noted that if the defendant were required to admit or deny the agreement, the Statute could never invalidate an oral agreement unless the defendant perjured himself. Such a requirement would turn the Statute into an instrument which encouraged frauds and perjuries rather than prevented them. The court stated that the defendant's right to avail himself of the Statute led to the conclusion that he was not bound to confess the making of an agreement because it would be the confession of an immaterial fact.[42] Therefore, the court concluded that "[t]he confession therefore of a parol promise is not a confession of any cause of action either at law or in equity. A court . . . may not dispense with the positive and clear prohibition of a statute."[43]

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mitted and the dispute centered on whether there was a sufficient memorandum in writing to satisfy the Statute of Frauds. Vice Chancellor Wood stated that the defendant's admission had no effect whatever on the case. The court could not find sufficient documentary evidence of the agreement so the bill was dismissed. As to the defendant's admission, the Vice Chancellor stated that he could not look at that portion of the answer that admitted the agreement because the defendant insisted upon the Statue of Frauds. He stated: "The Defendant must answer, must swear to the truth of his answer, and must sign it: if I were to make any use of an admission so extorted, I should in effect repeal the Statute." *Id.* at 548. Stevens, *supra* note 11 at 371 calls this case the "crystalization" of the new English viewpoint. In Rowe v. Teed, 33 Eng. Rep. 794 (Ch. 1808) Lord Chancellor Eldon stated it was settled that a defendant could admit an agreement and still take advantage of the Statute. He reiterated the statement that a defendant is not bound to admit a parol agreement and therefore such an agreement is not binding. 33 Eng. Rep. at 796. *See also* Blagden v. Bradbear, 33 Eng. Rep. 176, 178 (Ch. 1806) (the "modern" and "correct" doctrine is that it is immaterial what admissions are made by a defendant insisting upon the Statute of Frauds); Moore v. Edwards, 31 Eng. Rep. 12, 13 (Ch. 1798) (The defendant admitted to a parol agreement to lease a farm for twenty years and the plaintiff sought specific performance. The Lord Chancellor told the defendant that he was not exempt from discovery but that in spite of the admission and even if the agreement was proved by distinct evidence, the Statute still provided him with a valid defense.).

39. This rapid transfusion is evidenced by the case law. In Smith v. Brailsford, 1 Des. 350 (S.C. 1794) a defendant admitted in his answer that he had entered into an oral agreement with the plaintiff to purchase goods. The South Carolina court adhered to the traditional English view which had prevailed up to that time, and held the answer which admitted the agreement was a sufficient writing to satisfy the Statute and decreed specific performance. By 1806, however, the traditional English view had been replaced by the new formalistic approach to the Statute of Frauds. See notes 40-43 and accompanying text, *infra*.

40. 23 F. Cas. 1051 (C.C.D.C. 1806) (No. 13, 960).

41. *Id.* The plaintiff furnished goods to Samual M. Brown at the request and upon the credit of the defendant. Brown died insolvent leaving the defendant as his administrator.

42. *Id.* at 1052. This reasoning is consistent with the rules of equity. See note 36 and accompanying text, *supra*. Once the court concluded the defendant was entitled to the "protection" of the Statute of Frauds, any admission by the defendant became irrelevant. Because equity only requires the confession of facts that are material to the plaintiff's cause, the confession of the agreement cannot be compelled after the court has decided to adhere to the Statute's writing requirement. The court would not compel a useless confession.

43. 23 F. Cas. at 1052.

For the next one hundred and fifty years, the firmly-entrenched majority view was that a defendant could admit entering into an oral contract, either in his answer or in open court, and still take advantage of the Statute of Fraud's writing requirement as a defense.[44] Commentators argued against this rule, charging that it worked a blatant injustice, was an example of mindless formalism, and that the dishonesty it fostered was worse than the fraudulent misrepresentations the Statute of Frauds was originally intended to prevent.[45] A very small minority of judicial decisions[46] were in accordance with this voice of dissent.[47]

Trossbach v. Trossbach[48] exemplified this dissatisfaction with the majority view. In *Trossbach,* the defendant admitted an oral agreement creating an express trust for the plaintiff's benefit. However, he sought to prevent that trust from being enforced by insisting upon the writing requirement of the Statute of Frauds.[49] Returning to the rationale of the early English cases, the court re-

44. *See, e.g.,* Davis v. Stambaugh, 163 Ill. 557, 564, 45 N.E. 170, 172 (1896) (party protected by Statute of Frauds despite admission that oral contract was entered into); Aylor v. McInturf, 184 Mo. App. 691, 701, 171 S.W. 606, 610 (1914) (party allowed to invoke Statute of Frauds and escape obligations in spite of admission). *See also* cases cited at note 3 *supra.*

45. *See* 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 379-97 (1924) (concluding that Sections Four and Seventeen had outlived their usefulness); J. SALMOND, JURISPRUDENCE 447 (6th ed. 1920) ("In the case of all ordinary mercantile agreements such a requirement does more harm than good . . . [and becomes] an instrument for the encouragement of frauds rather than for supression of them"); W. THAYER, PRELIMINARY TREATISE ON EVIDENCE 180 (1898); Willis, *supra* note 8, at 432 (with the improved fact finding procedure in modern litigation the Statute of Frauds has outlived its usefulness and should be abolished); Stephen & Pollock, *Section Seventeen of The Statute of Frauds,* 1 L.Q. REV. 1, 5-6 (1885) (recommends the Statute should be abolished because it established an artificial rule about a very simple matter, because it is a relic of a former mode of procedure, and because it leads to confusion instead of certainty); Note, *supra* note 8, at 308 (the Statute may operate not to prevent fraud, but to promote it); Comment, *A Statute For Promoting Fraud,* 16 COLUM. L. REV. 273 (1916). *See also* Corbin, *The Uniform Commercial Code-Sales; Should It Be Enacted?* 59 YALE L.J. 821, 832 (1950) ("Although there have been many assertions of the beneficence of the statute, they usually betray their own superficiality.").

46. *See, e.g.,* Sealock v. Hackley, 186 Md. 49, 45 A.2d 744 (1946) (specific performance on oral land contract after defendant admits it as witness); Brender v. Stratton, 216 Mich. 166, 184 N.W. 486 (1921) (parol trust may be established by admission); Zlotziver v. Zlotziver, 355 Pa. 299, 49 A.2d 779 (1946) (Statute of Frauds no defense where defendant admits the agreement); Williams v. Moodhard, 341 Pa. 273, 19 A.2d 101 (1941) (party may waive the Statute of Frauds by admitting the contract in his pleadings or testimony); Metzger v. Metzger, 338 Pa. 564, 14 A.2d 285 (1940) (an oral trust may become enforceable by admission in court); Sferra v. Urling, 328 Pa. 161, 195 A. 422 (1937) (failure to raise the Statute in the pleadings or by timely interposition constitutes a waiver).

47. The state of Iowa reacted to this voice of dissent by enacting a legislative oral admissions exception similar to U.C.C. §2-201(3)(b) before the code was drafted. IOWA CODE §622.34 (1978) provides: "The above regulations, relating merely to the proof of contracts, shall not prevent the enforcement of those not denied in the pleadings, except in cases when the contract is sought to be enforced, or damages recovered for the breach thereof, against some person other than him who made it." IOWA CODE §622.35 (1978) provides: "The oral evidence of the maker against whom the unwrittern contract is sought to be enforced shall be competent to establish the same."

48. 185 Md. 47, 42 A.2d 905 (1945).

49. *Id.* at 50, 42 A.2d at 906. Property intended for the plaintiff by his relatives was sold

fused to allow the defendant to invoke the Statute after his admission. The court rejected the reasoning that enforcing contracts on the basis of admissions would tempt defendants to perjure. Instead, the court stated that the purpose of the Statute was to protect parties from perjured evidence used against them, rather than to guard against the temptation to commit perjury. An admission such as the defendant's was more than mere evidence; it made evidence against him unnecessary.[50] The court concluded that only the admission was required by the Statute of Frauds.[51]

Trossbach was decided on the eve of the drafting of the Uniform Commercial Code. As the drafters of the Uniform Commercial Code contemplated the inclusion of a Statute of Frauds, they faced several considerations. First, an examination of the overwhelming criticism of the Statute by legal scholars was necessary.[52] This criticism went beyond a mere outcry against the practice of allowing the Statute to be used as a defense even where the oral agreement was admitted. It was also argued that the Statute did not inject the intended uniformity and predictability into the law.[53] This inconsistent application resulted from various devices invented by courts to "take a case out of the Statute" to prevent inequitable results.[54] Another criticism was that the purpose for having a Statute of Frauds at all had been largely eliminated.[55] Many argued that the efficiency of the fact-finding process had improved so much since 1677 that the danger of fraudulent and perjured contracts was no longer grave.[56]

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to defendants with the verbal stipulation that he would be reimbursed and would convey the land to the plaintiff. *Id.*

50. *Id.* at 55, 42 A.2d at 908. It should be noted that under U.C.C. §2-201(3)(b) an admission by a party does not make evidence against him unnecessary. Such an admission does not prove the contract; it merely renders it enforceable. See note 73 and accompanying text, *infra*. Some courts, however, reason like the *Trossbach* court and demand an admission that makes evidence against the defendant unnecessary by actually proving the contract.

51. 185 Md. at 55, 42 A.2d at 908. The court also noted that admissions of a party in the form of testimony constituted a sufficient memorandum or writing, equating recorded testimony with signed depositions. *Id. Contra,* Smith v. Muss, 117 N.Y.S.2d 501 (Sup. Ct. 1952), where plaintiff alleged that he and defendant had entered a contract for the sale of lumber. In accordance with the New York Rules of Civil Procedure, the defendant signed a deposition in which the defendant admitted the contract. On the defendant's motion for judgment on the pleadings, the court held the deposition did not constitute a sufficient memorandum to satisfy the Statute of Frauds. *See* 38 CORNELL L.Q. 604 (1953).

52. *See Oral Admissions, supra* note 11, at 151. (U.C.C. §2-201 was drafted in response to scholarly criticism of the Statute of Frauds.) See note 45 *supra.*

53. *See* CORBIN, *supra* note 45, at 829 (After studying literally thousands of cases under the Statute of Frauds, the author was fully convinced that the certainty and uniformity sought to be achieved by the Statute was a "magnificent illusion."). *See also Oral Admissions, supra* note 11, at 151.

54. *See generally* 2 A. CORBIN ON CONTRACTS §275, 3-9 (1950); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §448, 343-47 (3d ed. 1960).

55. This reasoning held sway in England, where the Statute of Frauds was repealed in 1954. Law Reform (Enforcement of Contracts) Act of 1954, 2 & 3 Eliz. 2, Ch. 34, §§1-2. The Statute was repealed because the defense aided in the breach of bona fide oral contracts and injured parties with legitimate claims. For a general discussion of the repeal see Decker, *The Repeal of The Statute of Frauds in Britain,* 11 AM. BUS. L.J. 55 (1973); Note, *Contracts: Statute of Frauds,* 40 CORNELL L.Q. 581, 585 (1955).

56. See note 8 *supra. See also* Corbin, *supra* note 45, at 829 (our present judicial system

The Code drafters, in response to such criticism,[57] decided to retain the Statute of Frauds[58] but no longer emphasized the fulfillment of legal formalities. In attempting to retain the useful functions of the Statute while eliminating abuses, the drafters followed cases like *Trossbach*,[59] emphasizing the need for proof of the agreement's existence.[60] The Code Statute is an attempt to statutorily resurrect the original English interpretation that the Statute of Frauds should be used only as a means of avoiding fraudulent agreements.

THE STATUTE OF FRAUDS OF THE UNIFORM COMMERCIAL CODE

In accordance with the policies underlying the Uniform Commercial Code,[61] the drafters produced a simplified version of the Statute of Frauds tailored to business customs.[62] The writing required for contracts for the sale of goods over $500 need only indicate the party to be charged and the quantity of goods.[63]

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is so superior to that of 1677 that fraudulent and perjured assertions of a contract are far less likely to be successful).

57. See note 52 *supra*. *See also* Comment, *The Uniform Commercial Code: Statute of Frauds as to Personal Property*, 4 WAKE FOREST INTRA. L. REV. 41, 45 (1968) (the logic of these criticisms led the Code drafters to adopt a broad, flexible policy interpretation of the Statute of Frauds).

58. See 2 A.L.I., CONSIDERATION OF PROPOSED FINAL DRAFT OF THE UNIFORM COMMERCIAL CODE 296 (1950), Statement of Professor Karl N. Llewellyn (May 20, 1950): "We feel quite definitely that there is some value in a Statute of Frauds. We think this point of view is held by most businessmen in most of the mercantile communities of the country. We recognize, of course, that a number of states have gotten along without any Statute of Frauds in the sale of goods. We are not flooded with complaints that fraud rides high, far, and all over in other states. On the other hand, on the whole in those communities in which there is a Statute of Frauds, there appears to be some value derived from it in some cases." *Id.*

59. 185 Md. 47, 42 A.2d 905. See text accompanying notes 48-51 *supra*.

60. U.C.C. §2-201, Official Comment 1, clearly states the evidential emphasis of the Code Statute in detailing what is required of a writing. "All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction."

61. U.C.C. §1-102 provides: "Underlying purposes and policies of this Act are (a) to simplify, clarify, and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."

62. *See* NEW YORK STATE LAW REVISION COMM'N STUDY OF U.C.C. No. 65(B), REPORTS OF PUBLIC HEARINGS ON THE CODE 47 (1954). Professor Karl Llewellyn, discussing the manner in which the overemphasis on compliance with formalities was inconsistent with the average businessman's mode of conducting his affairs, stated: "Now is it really possible that any businessman likes this astounding rule of law under which the other party can always and at fraudulent will throw open any memorandum, even when complete in appearance and signed by both, by alleging some error in some term, or by alleging even some omission of some term never in fact even discussed?" *Id. See also* Corbin, *supra* note 45, at 831, where the author states that the new requirements of the Code Statute, particularly the merchant confirmation provision of U.C.C. §2-201(2), are in harmony with the customs of merchants.

63. U.C.C. §2-201 Official Comment 1, states that there are only three definite and invariable requirements as to the memorandum under the Code Statute. First, it must evidence a contract for the sale of "goods." Second, the writing must be signed. A signing is any authentication which identifies the party to be charged. Finally, the writing must specify a quantity. It is therefore unnecessary for a writing to include such terms as price or delivery date. See text of U.C.C. §2-201, note 4 *supra*.

The writing does not have to stipulate price, time and place of payment or delivery, or any particular warranties.[64]

The Code Statute also recognizes written confirmation of an oral agreement unless the receiving party promptly asserts its inaccuracy.[65] This provision validates the common business practice of confirming oral telephone contracts by letters of confirmation. Under previous Statutes of Frauds this type of letter was a memorandum binding the sender, but not the receiver who had not signed it.[66] Therefore, the recipient could perform or not as the market and his conscience dictated, while the sender was bound to perform. Under the Code Statute the receiver is also bound to perform unless he communicates objections to the confirmation letter within ten days.[67]

Additionally, the Code Statute permits exceptions to the writing requirement in cases where goods have been "specially manufactured,"[68] and where payment for or delivery of goods has been accepted.[69] However, the most significant departure from former Statutes of Frauds is subsection 2-201(3)(b).

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64. By not requiring that the writing include every term of the agreement the Code Statute eliminates many of the inequities inherent in the old Statute of Frauds. Under the former Statute, when a plaintiff came into court with a written memorandum, if the defendant could prove there was an additional term or terms not included in the writing, the writing was rendered insufficient as evidence of the agreement. *See* statement of Professor Karl Llewellyn (Feb. 15, 1954), *reprinted in* 1 N.Y. LAW REVISION COMM'N AMM. REC. 163 (1954). Such a result is no longer possible under §2-201. The plaintiff is only required to prove the agreement of sale and the specific quantity. The price term was not required because many valid contracts are made without mentioning the price. Additionally, the drafters believed that "market" prices and valuations could be used to supply a missing price term when necessary. U.C.C. §2-201, Official Comment 1. See also Comment, *supra* note 7, at 576, where it is stated that Llewelyn's reasoning for the exclusion of the unit is that its inclusion would render unenforceable many legitimate deals.

65. U.C.C. §2-201(2).

66. *See* Comment, *supra* note 7 at 578.

67. *See* text of U.C.C. §2-201(2), *supra* note 4. Corbin, *supra* note 45, at 831, notes that acceptance of the confirmation without objection does not conclusively prove the contract, but merely removes the bar of the Statute of Frauds. He goes on to state that the other party can easily protect himself from an erroneous confirmation by objecting to its contents within ten days. While it is not necessary to state in the confirmation the actual terms of the contract, an honest contractor will almost certainly do so. Professor Corbin also states that one should not be able to escape this rule by showing he is not a merchant if it can be shown that he in fact knew of the rule or of the merchant custom. *Id. See also* Comment, *supra* note 7, at 578. It is noted that this provision will have a wide application due to the definition of "merchant" in U.C.C. §2-104. The definition states: "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." *Id.* In light of this definition, §2-201(2) may be applied against a person who is not a merchant per se, but who is familiar with the practices connected with the use of confirmations. NEW YORK STATE LAW REVISION COMM'N STUDY OF U.C.C. NO. 65(B), REPORTS OF PUBLIC HEARINGS ON THE CODE 96 (1954) concludes that because any person in business should know about the confirmatory memorandum custom, almost any person in business should be a "merchant" for purposes of this subsection.

68. U.C.C. §2-201(3)(a).

69. U.C.C. §2-201(3)(c). Part performance had long been an exception to the writing requirement of the Statute of Frauds. *See* Pym v. Blackburn, 30 Eng. Rep. 878 (Ch. 1796).

This oral admissions exception to the Statute's writing requirement is the drafters' attempt to ensure that their Statute of Frauds cannot be used to promote fraud.[70]

THE ORAL ADMISSIONS EXCEPTION: SECTION 2-201(3)(b)

Section 2-201(3)(b) of the Uniform Commercial Code provides that a contract which does not satisfy the Statute's writing requirement, but is otherwise valid, 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."[71] Such a contract is not enforceable beyond the quantity of goods admitted,[72] and admission does not conclusively establish the existence of a contract. Instead, such an admission merely removes the bar of the Statute of Frauds.[73] The admission is only evidential, and the terms of the contract must be proved subject to the ordinary dictates of the adversary process.[74]

Section 2-201(3)(b)[75] has been adopted by all states except Louisiana and California.[76] While the provisions of the section seem to be rather straightforward, its application has engendered substantial litigation throughout the nation. The judicial interpretations of section 2-201(3)(b) have not been en-

70. U.C.C. §2-201(3)(b), Official Comment 7, states that under this section it is no longer possible to admit the contract in court and still treat the Statute of Frauds as a defense. *See* Duesenberg, *The Statute of Frauds in its 300th Year: The Challenge of Admissions in Court and Estoppel*, 33 BUS. LAW. 1859, 1860 (1978) (the motivation behind the enactment of the "innovative" admissions exception was "unhappiness" emanating from the conviction that the Statute of Frauds was used more often to perpetrate fraud than to prevent it).

71. U.C.C. §2-201(3)(b). *See* text of the subsection, *supra* note 4.

72. *See* U.C.C. §2-201(3)(b).

73. *See* U.C.C. §2-201, Official Comment 7.

74. *Id.*

75. A counterpart to §2-201(3)(b) dealing with the sale of securities is U.C.C. §8-319(d) which provides: "A contract for the sale of securities is not enforceable by way of action or defense unless: . . . (d) the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract was made for the sale of a stated quantity of described securities at a defined or stated price." This subsection differs from subsection 2-201(3)(b) only with respect to the specificity of the required admission. The Official Comments accompanying §8-319(d) state that the Statute of Frauds for sale of securities was changed to conform with the Article 2 Statute of Frauds. Therefore, courts and scholars should construe the two sections similarly and should be able to rely on cases applying §2-201(3)(b) in analyses of §8-319(d), and vice versa. *See, e.g.*, Lewis v. Hughes, 276 Md. 247, 254, 346 A.2d 231, 237 (1975) (stating the two subsections are sufficiently analogous to provide for interchangeable analysis).

76. *See generally* 1 ALI UNIFORM LAWS ANNOTATED, UCC §2-201 (master ed. 1976 and Supp. 1979). California deletes subsection (3)(b) entirely. CAL. COM. CODE. §2201 (West 1964 and Supp. 1979). The California Comments to the Commercial Code discuss the reasons for the deletion. It was thought to be unclear as to whether a demurrer would constitute an admission and whether a plaintiff could compel a defendant to make an admission under oath. It was also believed the subsection would reward a defendant's perjured denial. *See A Special Report by the California State Bar Committee on the Commercial Code*, 37 CALIF. STATE BAR J. 141, 142 (1962); *see also The Report on Proposed Amendments to the Uniform Commercial Code* by Professors Harold Marsh, Jr. & William D. Warren, *Sixth Progress Report to the Legislature by Senate Fact Finding Committee on Judiciary* (1959-1961), Part 1, The Uniform Commercial Code, 448-50.

tirely consistent.[77] Issues such as what actions will constitute an admission and whether an admission may be compelled under oath in open court have been extensively litigated. Other problems include the propriety of raising the Statute of Frauds by a demurrer and the proper manner of dealing with motions for summary judgment or dismissal. The manner in which each of these issues is resolved will have a profound effect on the degree to which section 2-201(3)(b) can achieve its dual purpose: preventing a party from admitting the contract in court and still treating the Statute as a defense, and providing for the enforcement of bona fide oral contracts.[78]

Involuntary Admissions

Since the adoption of section 2-201(3)(b), judicial confusion has centered on whether an admission compelled in a deposition or on cross-examination in open court satisfies the section and renders a contract enforceable.[79] This confusion stems from doubts expressed by a majority of commentators as to whether involuntary admissions are a permissible means of rendering a contract enforceable.[80] However, virtually all of the decisions addressing this

77. *Compare* Radix Organization, Inc. v. Mack Trucks, Inc., 602 F.2d 45 (2d Cir. 1979) (finding no right to go to trial in quest of an admission) *with* M & W Farm Serv. Co. v. Callison, 285 N.W.2d 271 (Iowa 1979) (finding plaintiff has right to go to trial in quest of an admission); Reissman Int'l Corp. v. J.S.O. Wood Prods., Inc., 10 UCC REP. SERV. 1165 (Civ. Ct. N.Y. 1972) (denying summary judgment motion) *with* Presti v. Wilson, 348 F. Supp. 543 (E.D.N.Y. 1972) (granting summary judgment motion); Garrison v. Piatt, 113 Ga. App. 94, 147 S.E.2d 374 (1966) (holding demurrer inappropriate to raise Code Statute of Frauds) *with* Fox v. Overton, 534 P.2d 679 (Okla. 1975) (allowing Code Statute of Frauds to be raised by demurrer).

78. See U.C.C. §2-201, Official Comment 7.

79. *See generally* Yonge, *The Unheralded Demise of the Statute of Frauds Welsher In Oral Contracts For The Sale of Goods and Investment Securities: Oral Sales Contracts Are Enforceable In Court Under U.C.C. Sections 2-201(3)(b) and 8-319(d)*, 33 WASH. & LEE L. REV. 1 (1976).

80. *See* 5 IND. CODE ANN. §19-2-201, Indiana Comment (Burns 1964); N.Y. U.C.C. §2-201, N.Y. Annot. 3 (62 1/2 McKinney 1964); R. DUSENBERG & L. KING, 3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE §2.04[3] (1980); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 471 (1970); L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 1003 (3d ed. 1972); D. KING, C. KUENZEL, T. LAUER, N. LITTLEFRED & B. STONE, CASES AND MATERIALS ON COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 3-31 to -33 (2d ed. 1974); W. HAWKLAND, SALES AND BULK SALES 40 (3d ed. 1976); W. HAWKLAND, SUM AND SUBSTANCE OF THE LAW ON SALES 89 (1974); W. HAWKLAND, TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 29 (1964); A. SQUILLANTE & J. FONESCA, 2 S. WILLISTON ON SALES §14-9 at 304-05 (4th ed. 1974); Braucher, *Sale of Goods in the Uniform Commercial Code*, 26 LA. L. REV. 192-202 (1966); Clifford, *Article Two: Sales*, 44 N.C.L. REV. 539, 555 (1966); Duesenberg, *General Provisions Sales, Bulk Transfers and Documents of Title*, 30 BUS. LAW 847, 849-50 (1975); Hudson, *Contracts in Iowa Revisited — 1966*, 15 DRAKE L. REV. 61, 77 (1966); Marshaw, *A Sketch of the Consequences for Louisiana Law of the Adoption of "Article 2: Sales" of The Uniform Commercial Code*, 42 TULANE L. REV. 740 (1968); Cudahy, *The Sales Contract — Formation*, 49 MARQ. L. REV. 108, 119 (1965); Squillante, *Sales Law in Iowa Under the Uniform Commercial Code — Article 2*, 20 DRAKE L. REV. 1, 64 (1970); Note, *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. IND. & COM. L. REV. 381, 389-90 (1963); Note, *The Uniform Commercial Code: Article 2 — Sales*, 29 ALB. L. REV. 231, 241 (1965).

question have held that a compelled admission satisfies the language of section 2-201(3)(b).[81]

The drafting history of section 2-201(3)(b) indicates that the drafters intended to allow involuntary admissions to satisfy the subsection. In the 1952 version of the Code, the oral admissions exception included admissions in a defendant's "pleading or otherwise in court."[82] Some authorities felt this language was too ambiguous to establish clearly whether the section included involuntary admissions.[83] They reasoned that because a pleading is voluntary, "pleading or otherwise in court" could be construed to mean an admission by pleading or other voluntary admission. The Official Comment to the subsection did not clarify the issue by stating that an admission for the purposes of the subsection was one by "pleading, by stipulation or by oral statement before the court."[84]

The Code Editorial Board was aware of this confusion over the subsection[85] and in the 1957 draft section 2-201(3)(b) was revised. The new subsection was directed at an admission in a party's "pleading, testimony or otherwise in court."[86] The word "testimony" was added to emphasize that the subsection applied to admissions made during cross-examination.[87] In spite of this clarification, many commentators continued to doubt whether involuntary admissions would satisfy the subsection. Their primary contention was that any waiver of the Statute of Frauds should be voluntarily made, because a defendant should not be forced to legally deprive himself of the Statute's benefit through an ad-

81. *See In re* Particle Reduction Corp., 5 U.C.C. REP. SERV. 242 (E.D. Pa. 1968); Hale v. Higginbotham, 228 Ga. 823, 188 S.E.2d 515 (1972); Garrisson v. Piatt, 113 Ga. App. 94, 147 S.E.2d 374 (1966); M & W Farm Serv. Co. v. Callison, 285 N.W.2d 271, 276 n.2 (Iowa 1979); Quad County Grain Inc. v. Poe, 202 N.W.2d 118 (Iowa 1972); Lewis v. Hughes, 276 Md. 247, 346 A.2d 231 (1975); Cohn v. Fisher, 118 N.J. Super, 286, 287 A.2d 222 (1972); Reissman Int'l Corp. v. J.S.O. Wood Prods., Inc., 10 U.C.C. REP. SERV. 1165 (Civ. Ct. N.Y. 1972).

82. U.C.C. §2-201(3)(b).

83. *See* W. HAWKLAND, SALES AND BULK SALES 31 (1st ed. 1955) (although it would seem that a defendant would have the right not to make an admission that would deprive him of the benefit of the Statute, subsection 2-201(3)(b) did not provide any specific answers to the question). *See also* 1956 REPORT OF THE NEW YORK LAW REVISION COMMISSION 368, Leg. Doc. (1956) No. 65(D)36. The Commission stated that under the 1952 version of §2-201(3)(b) the question might arise as to whether the party seeking enforcement of the contract could call the other party as a witness and force him to admit or deny the contract. The Commission concluded that the Comment did not indicate that such was intended, but that it was not foreclosed by the language of the section.

84. U.C.C. §2-201, Official Comment 7 (the language of Comment 7 in the current Official Text with Comments is the same as the original 1952 language).

85. The Code Editorial Board's explanation for the change in the subsection was: "Subsection (3)(b) was revised to meet the suggestion of the New York Law Review Commission that its application to admissions on cross-examination should be clarified." 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 25 (1957). The Board further stated the 1957 version was added to clarify that §2-201(3)(b) applied to admissions on cross-examination. *See also* Farnsworth, *Statute of Frauds Governing Contracts for the Sales of Goods*, 1960 REPORT OF THE NEW YORK LAW REVISION COMMISSION 257, 271 Leg. Doc. (1960) No. 65(F)13, 27; Note, *The Statute of Frauds Under Article 2 (Sales) of The Uniform Commercial Code*, 15 SYRACUSE L. REV. 532, 540 (1964).

86. U.C.C. §2-201(3)(b) (1957 version).

87. *See* note 85 *supra*.

mission.[88] It has been noted, however, that under the Code Statute a party has no right or privilege to refuse to honor an oral contract when it is admitted in court. Because the Statute explicitly provides that a contract admitted on cross-examination is enforceable, the admitting party is not giving up any right or privilege.[89]

There are several possible explanations for the legal community's resistance to the involuntary admissions doctrine.[90] One explanation is that enforcing a contract through an involuntary admission may be inconsistent with the expectations of most businessmen. A majority of businessmen do not believe that promises in oral sales contracts should be invested with legal rights,[91] particularly when the potential plaintiff has not performed in reliance on the oral promise. When the parties want the law to supervise their transactions they reduce their commitments to writing.[92] However, contracts within the Code Statute of Frauds are not void; they are simply unenforceable without either the requisite written memorandum, performance by receipt and acceptance, payment or admission.[93] Therefore, the Code considers certain contracts valid which businessmen commonly consider invalid. This problem is obvious when the involuntary admissions doctrine permits such a contract to become enforceable as well as valid. When such enforcement occurs, the result may be contrary to the original understanding of the businessmen.[94]

Another objection to the involuntary admissions doctrine results from adherence to the pre-Code philosophy of the law of discovery.[95] Formerly, one

88. *See* Yonge, *supra* note 79, at 19. *See also* 3 R. DUSENBERG & L. KING, BENDER'S UNIFORM COMMERCIAL CODE SERVICE, SALES AND BULK TRANSFERS §2.04[3] (1980), where it is stated: "On the one hand it may be argued, since the Code retains the Statute of Frauds, a party ought to have the right to assert it, and his right should not be subject to discovery rules which compel involuntary responses." 1 R. ANDERSON, UNIFORM COMMERCIAL CODE 281 (2d ed. 1970) states: "A judicial admission does not exist unless the statement is voluntarily made." Professor Anderson believes the subsection requires an admission which proves the contract as a matter of law, a "judicial admission." In reality, the subsection requires much less. *See* notes 111-119 and accompanying text, *infra*.

89. *See* Yonge, *supra* note 79, at 19. The pre-Code case of Smith v. Muss, 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952), held a compelled admission was invalid to remove the Statute of Frauds defense because the defendant was privileged not to be deprived of his right to plead the Statute. This reasoning is more persuasive under a Statute of Frauds that does not include an oral admissions exception. *See* 38 CORNELL L.Q. 604 (1953).

90. It has been argued that the very inclusion of the Statute of Frauds suggests the view that only voluntary admissions will suffice. ILL. ANN. STAT. Ch. 26, §2-201, Ill. Code Comment (Smith-Hurd 1963). It has also been argued that a defendant's denial would allow the plaintiff to bring in proof to refute it, causing the very situation the Statute was intended to prevent. 6 AM. BUS. L.J. 602 (1968), criticizing Garrison v. Piatt, 113 Ga. App. 94, 147 S.E.2d 314 (1966). Both of the arguments are refuted by a reading of §2-201(3)(b). *See* Yonge, *supra* note 79, at 22.

91. *See* Note, *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038, 1065 (1957).

92. *Id.*

93. *See* U.C.C. §2-201, Official Comment 4.

94. U.C.C. §1-205 states that when parties wish their oral promises to be non-binding until reduced to a writing or until there is some performance in reliance on them, the oral arrangements should be stated.

95. *See* Yonge, *supra* note 79, at 27-28.

party could not compel the other to help prove his case in any manner.[96] This rule helps to explain the pre-Code judicial resistance to allowing admissions compelled by the adversary process to satisfy the Statute.[97] In the modern law of discovery, a party may not refuse to respond to a question on the ground that it will aid his opponent in establishing his claim.[98] The Code admission provision may be viewed as part of this trend in the law of discovery. Those who refuse to acknowledge involuntary admissions as a component of the subsection may be influenced by outdated theories of discovery law.

One argument often raised against the involuntary admissions doctrine is that it encourages the defendant to deny the oral contract and commit perjury.[99] The rationale behind this argument is that the extraordinary temptation[100] to commit perjury presented by the involuntary admissions procedure is a greater evil than allowing defendants to escape their liability on bona fide oral agreements.[101] At least one commentator has labeled this conclusion "astonishing,"[102] and the Uniform Commercial Code's Permanent Editorial Board rejected this argument against involuntary admissions when it was raised by the state of California.[103]

While no case since the Code's adoption has rejected the use of involuntary admissions,[104] some courts have indicated that there are decisions holding

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96. Degnan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury*, 43 TEX. L. REV. 435, 448 (1965).

97. See note 89 *supra*, for a discussion of the pre-Code judicial attitude in connection with the case of Smith v. Muss, 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952).

98. *See* 4 J. MOORE, FEDERAL PRACTICE §26.02, at 26-61 to 26-64 (2d ed. 1953); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §2001, at 13-20 (1970); Degnan, *supra* note 96, at 448, 450.

99. This was one of the reasons California refused to enact the subsection. See note 76 *supra*. This analysis was also used by pre-Code courts against the idea of admission satisfying the Statute of Frauds. *See* Huffine v. McCampbell, 149 Tenn. 47, 257 S.W. 80 (1923).

100. The temptation is "extraordinary" because, unlike committing perjury over a normal fact that is still subject to the plaintiff's proof, when a defendant denies an oral contract the plaintiff can bring no further evidence. This fact apparently is still true under the Code Statute. *See, e.g.*, Cox v. Cox, 292 Ala. 106, 289 So. 2d 609 (1974), where a cotton purchaser sued a group of cotton growers for delivery of their 1973 crop. The defendant denied making an oral contract and the court refused to enforce such a contract despite the fact it made an adverse credibility finding in regard to the defendant's denial. *Id.* at 111, 289 So. 2d at 612. This situation invites a defendant to commit perjury.

101. Stevens, *supra* note 11, at 371.

102. See *id.* at 281. See also Degnan, *supra* note 96, at 448-49, where he calls this reasoning "a curious inversion of the Statute," and goes on to state that human conscience makes distinctions that rules of pleading do not. We need not accept as universal the proposition that men must lie under oath whenever it is in their interest to do so. *Id.* For further criticism of the "temptation of perjury" reasoning, *see generally* 2 A. CORBIN ON CONTRACTS §275, at 3 (1950); S.C. CODE §36-2-201, South Carolina Reporter's Comments (1976); RESTATEMENT (SECOND) OF CONTRACTS §207, Comment c at 464 (Tent. Drafts Nos. 1-7, 1973).

103. *See* 6 BENDER'S UNIFORM COMMERCIAL CODE SERV. §2-201, at 1-59, and §8-319, at 1-613 (1967). The Board rejected this objection to involuntary admissions finding California's arguments "not persuasive" on an issue of policy that "has been fully debated many times."

104. *See* note 81 *supra*, citing cases which have held in favor of the involuntary admissions doctrine.

against the doctrine.[105] Nevertheless, conflicting case law on this question simply does not exist, although some courts may be led astray by doubts expressed by commentators.[106] The only decisions cited against the doctrine are pre-Code cases.[107] An acknowledgement of the Code Editorial Board's 1957 clarification of section 2-201(3)(b)[108] by all courts and commentators would go far toward ending the confusion over the involuntary admissions issue.

The involuntary admissions doctrine is compatible with the purpose of the Code Statute of Frauds, to assure that there is sufficient evidence to prove the existence of a contract.[109] Such an admission is accorded the same probative value as a statement against interest.[110] The oral admissions provision would lose much of its effect if a party could not compel his opponent to admit the contested agreement. Few defendants attempting to renege on an oral contract would gratuitously admit the existence of the contract, knowing it would thereby become enforceable under section 2-201(3)(b).

Once an involuntary admission is determined to satisfy the section, the question becomes what constitutes an "admission" and what judicial effect an admission under the Code Statute should be given.

The Function of an Admission Under Section 2-201(3)(b)

An admission in a party's pleading, testimony, or otherwise, that an oral agreement was made does not under section 2-201(3)(b) conclusively prove the existence of a contract.[111] Such an admission merely removes the Statute of Frauds bar and allows the trier of fact to decide, on the basis of the evidence,

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105. *See, e.g.*, M & W Farm Serv. Co. v. Callison, 285 N.W.2d 271, 276 (Iowa 1979) (there is a conflict among jurisdictions as to whether the exception applies to involuntary admissions); Cox v. Cox, 292 Ala. 103, 110, 289 So. 2d 609, 613 (1974) (the cases are apparently in conflict but citing no conflicting cases); Weiss v. Wolin, 60 Misc. 2d 750, 303 N.Y.S. 2d 940 (Sup. Ct. 1969) (indicating there is conflicting case law but citing none).

106. See note 80 and accompanying text, *supra*.

107. See Presti v. Wilson, 348 F. Supp. 543 (E.D.N.Y. 1972), where the court stated the cases were in conflict as to the involuntary admissions question, citing Smith v. Muss, 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952) as an example. See note 89 *supra*.

108. See notes 82-87 and accompanying text, *supra*.

109. See note 60 and accompanying text, *supra*. In addition to the evidentiary function of the Statute of Frauds, chanelling and cautionary functions have also been noted. *See* note 14 *supra*. *See also* 1960 REPORT OF NEW YORK LAW REVISION COMMISSION 259-260, Leg. Doc. (1960) No. 65(F) 8 & 9. This Report contains a tudy concluding that the evidentiary function is the only substantial purpose of the Statute of Frauds. As for the cautionary function, the Report notes that while there may be some *in terrorem* effect by encouraging buyers and sellers to keep written records, it is not substantial. This view is supported by the fact the memorandum need not have been made with the intent to be bound or even to make a memorandum. Any cautionary function is thus incidental to the real ends of the Statute. Also the chanelling effect is seen as limited because in addition to a writing, the Statute may be satisfied by part performance and other exceptions. Therefore, it is concluded that the justification for a Statute of Frauds is its evidentiary function.

110. *See generally* 4 J. WIGMORE, EVIDENCE §1048 (1972), for a discussion of the probative value of admissions.

111. *See* U.C.C. §2-201, Official Comment 7.

whether the parties actually entered a contract.[112] It is helpful to view the Code Statute of Frauds as primarily a rule of evidence,[113] with the basic premise that oral contracts are generally unenforceable.[114] The Statute lists exceptions to this primary rule of unenforceability. The writing,[115] merchant confirmation,[116] receipt and acceptance,[117] partial performance[118] and admissions exceptions should be viewed as equal alternatives to the rule of unenforceability. These exceptions serve the same basic goal of affording "a basis for believing that the offered oral evidence rests on a real transaction."[119] Thus, the Code Statute of Frauds does not affect the validity of a contract; it simply affects a party's ability to judicially enforce a contract. Compliance with the Statute of Frauds is a matter of form rather than an element of contract formation.[120]

After establishing that the admissions provision is merely an evidentiary exception to the general rule of unenforceability, whether a party has sufficiently admitted a contract for the purposes of section 2-201(3)(b) is left to the courts.[121] Because an admission under the code merely offers a basis for believing that a real transaction exists,[122] one commentator has suggested an "evidential

112. *Id. See also* Note, *The Evidential Scope of the Admission Exception to the U.C.C. Statute of Frauds: Proving an Unwritten Contract Under Sections 2-201(3)(b) and 8-319(d)*, 56 TEX. L. REV. 915, 916 (1978).

113. *See generally* King, *The New Conceptualism of The Uniform Commercial Code*, 10 ST. LOUIS U.L.J. 30, 53-57 (1965), where the Statute of Frauds is viewed as a rule of evidence focusing primarily on methods of proving an oral contract. The statute would be viewed as a substantive rule if compliance with it was necessary for contract formation. *See* Marie v. Garrison, 13 Abb. N. Cas. 210 (N.Y. 1883) (a Statute of Frauds rendering an unwritten contract void is a substantive rule because a contract cannot be formed without complying with it). The Code Statute clearly recognizes the existence of unwritten contracts, merely limiting those that can be enforced. In this sense, the Code Statute is a rule of evidence.

The question of whether pre-Code Statutes of Frauds were rules of evidence or substantive rules has long been a matter of controversy. *Compare* Lams v. F.H. Smith Co., 36 Del. 477, 178 A. 651 (1935) (Statute of Frauds a substantive rule of contract formation) *with* Emery v. Burbank, 163 Mass. 326, 39 N.E. 1026 (1895) (Statute of Frauds is a procedural rule). *See* THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS §141, Comment b (1971), which provides that non-Code Statutes of Frauds should be treated as substantive rules, while noting that valid arguments can be made for treating them as merely procedural. 2 A. CORBIN ON CONTRACTS §294 at 71-72 (1950). Professor Corbin states that non-Code Statutes are properly viewed as being substantive in nature.

114. *See* U.C.C. §2-201(1) providing in part: "Except as otherwise provided in this section a contract . . . is not enforceable by way of action or defense."

115. U.C.C. §2-201(1). See note 4 *supra*.

116. U.C.C. §2-201(2). See note 4 *supra*.

117. U.C.C. §2-201(3)(c). See note 4 *supra*.

118. U.C.C. §2-201(3)(a). See note 4 *supra*.

119. *See* U.C.C. §2-201, Official Comment 1.

120. *See* Note, *supra* note 112, at 924. Before any admission is made an oral contract is still valid. A party to an actual parol contract may correctly say to his balking opponent, "We have a contract legally enforceable against you unless you are willing to lie under oath about its formation." *See also* King, *supra* note 113, at 52.

121. Section 2-201 offers no standard for deciding whether an admission has been made. The Official Comments to the section are also silent on this question.

122. The code states that an admission under §2-201(3)(b) does not exclusively establish a contract. *See* notes 111 and 112 and accompanying text, *supra*. *See also* note 119 and accompanying text, *supra*.

standard" for determining whether an admission is sufficient to satisfy section 2-201(3)(b).[123] Under this standard the test is whether a fair consideration of the statments and conduct[124] of the denying party, in any judicial proceeding,[125] is sufficient to induce a reasonable belief that the parties made an oral contract.[126] If there is such a reasonable belief, then the Statute of Frauds defense is removed and the proponent of the contract must prove its existence by a preponderance of the evidence.[127]

Although the suggested evidential standard is tailored to the language and purposes of section 2-201(3)(b),[128] some courts apply a more demanding standard for admissions.[129] These courts read the Code Statute as a formal rule against oral contracts and thus require that an admission prove the contract in order to be effective.[130] This interpretation of the Statute confuses the enumerated ex-

123. *See* Note, *supra* note 112, at 930-34.

124. Section 2-201(3)(b) provides that an admission may be made by "pleadings, testimony, or otherwise in court." This broad language implies that in-court acts of a party might constitute admissions if the conduct reasonably suggests recognition of the denied claim. Such conduct may produce a sufficient inference to satisfy the evidentiary standard. It has been proposed that, under the proper circumstances, even silence as a form of conduct can constitute an admission. *See* REPORT OF C. RUSSELL MATTSON TO THE NEBRASKA STATE BAR ASSOCIATION (Nov. 2, 1962), *reprinted in*, 42 NEB. L. REV. 430, 433 (1963). The proper circumstances may exist when the denying party fails to answer a request for admissions. *See* 4 J. WIGMORE, EVIDENCE §§1060, 1060a (1972). Two possible justifications could support silence as an admission. First, the silent party may intend assent. Second, belief in the contract may be inferred from his conduct. *See* Note, *supra* note 112, at 942. Other factors that may constitute an admission under the evidentiary standard include demeanor during trial, suppression or fabrication of evidence, failure to assert a claim and failure to produce documents.

125. This may not include prior judicial proceedings, depending upon the interpretation of "otherwise in court." *See* Lippold v. Beanblossom, 23 Ill. App. 3d 595, 319 N.E.2d 548 (1974), holding an admission in a deposition not filed with the court under the proper procedure does not constitute an admission. One test suggested for whether an admission in a prior proceeding should be given effect is whether the circumstances were "formal enough to insure its accuracy." Comment, *supra* note 7, at 582. Under the rules of evidence, a party's pleadings in one case are generally available to be used against him as evidentiary admissions in subsequent or collateral proceedings. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §265, at 635 (2d ed. 1972).

126. *See* Note, *supra* note 112, at 931 n.76.

127. However, the contract may not be enforced beyond the quantity admitted. U.C.C. §2-201, Official Comment 7; *See* Kirkwood & Morgan, Inc. v. Roach, 360 S.W.2d 173 (Tex. Civ. App. 1962) (preponderance of the evidence test is the only protection against perjury when enforcing an unwritten contract not covered by the Statute of Frauds).

128. It should be noted that no case construing §2-201 has applied the evidential standard. The pre-Code case of Zlotziver v. Zlotziver, 355 Pa. 299, 49 A.2d 779 (1946) applied an evidential standard where the denying party might have given the other party the impression of making a contract, although he thought the alleged agreement was tentative. The court felt this was enough of an admission to remove the Statute of Frauds and justify looking at all the evidence. In doing so it found a contract, despite the denying party's subjective belief that it was tentative. *Id.*

129. *See, e.g.*, Cox v. Cox, 292 Ala. 106, 289 So. 2d 609 (1974); Mildfelt v. Lain, 221 Kan. 557, 561 P.2d 805 (1977); Plains Cotton Coop. Ass'n v. Wolf, 553 S.W.2d 800 (Tex. Civ. App. 1977). These courts failed to accept offered evidence as an admission when a less demanding standard may have produced statutory sufficiency under the Code Statute.

130. These courts purportedly require "judicial admissions" which prove the contract as a matter of law. *See* C. MCCORMICK, *supra* note 125, §262: "Judicial admissions are not evi-

ceptions to the rule of unenforceability for elements of contract formation. The failure to distinguish between form and formation obscures the primary issue of whether an oral contract was actually entered.

The case of *Lish v. Compton*[131] exemplifies the difficulties[132] arising when a court fails to distinguish between form and formation. In *Lish*, a grain broker sued a wheat farmer for breach of an alleged oral contract to sell wheat.[133] At trial, the farmer denied making a contract, but admitted having a conversation with the broker concerning the sale of his wheat. The farmer stated that *if* he had received written confirmation within a reasonable time,[134] he would have considered himself bound.[135] The Utah supreme court reversed the jury's finding that an oral contract existed and held the hypothetical statement, taken within the total posture of the defense, did not acknowledge a valid and binding contract.[136]

The *Lish* court erroneously reasoned that the merchant confirmation exception[137] in the Code Statute involved a writing which concluded the formation of a contract. The merchant confirmation exception, which allows ten days for objection to the contents of a confirmation letter does not apply to the existence of a contract.[138] The Official Comments specify that the purpose of the letter is to confirm an oral contract entered prior to the written confirmation.[139] Therefore, the farmer's statement that he would have considered a timely confirmation letter binding admits the prior existence of an oral contract. Such an admission would be sufficient for the evidential purposes of section 2-201(3)(b). Treating a statement as an admission would have allowed the trier of fact to examine all the evidence to determine if an oral contract existed.[140]

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dence at all, but are formal admissions in the pleadings in the case, or stipulations, oral or written, by a party or his counsel which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." Under this standard an admission must be a specific declaration that a contract was made. *See* Note, *supra* note 112, at 919.

131. 547 P.2d 223 (Utah 1976).

132. See note 120 and accompanying text, *supra*.

133. 547 P.2d at 224.

134. *Id.* at 227. During the 12 day lapse before the defendant received any confirmation, the price of wheat rose about one dollar a bushel. Therefore, the defendant would lose a dollar a bushel if he accepted the plaintiff's confirmation. The court noted that although the plaintiff could watch the ebb and flow of the market while deciding whether to send a confirmation, it was equally true for the defendant. The defendant could observe the market while he decided whether to object to the confirmation during the ten days provided for in §2-201(2). The court concluded, however, that under the facts of the case, 12 days was not a reasonable time.

135. *Id.* at 226.

136. *Id.*

137. U.C.C. §2-201(2). See note 4 *supra*, and notes 65-67 and accompanying text, *supra*.

138. U.C.C. §2-201(2). The subsection speaks of a "writing in confirmation of the contract" and notes that the receiver may tender "written notice of objection to its contents." Even if the receiver of a written confirmation objects to the existence of the contract the only effect is to render subsection (2) inoperative. One of the other Statute of Frauds exceptions may still be applied to the receiver.

139. *See* U.C.C. §2-201, Official Comment 3.

140. Another problem with the result in *Lish* is that the requirement that the denying party "acknowledge that there was a valid and binding contract," 547 P.2d at 226, places the

The court in *Lish* defined an admission only as an outright statement by the defendant that an oral contract had been entered. In *Dangerfield v. Markel*,[141] the court also sought an admission proving the existence of a contract, but considered a broader range of evidence than the *Lish* court. In *Dangerfield*, a farmer counterclaimed, alleging that an independent potato buyer breached an agreement to purchase the farmer's potato crop.[142] The buyer denied the agreement, but maintained that even if one were found it would be unenforceable under the Statute of Frauds.[143] The trial court struck the counterclaim, but the North Dakota supreme court held the motion to strike was erroneously utilized to eliminate substantive portions of the counterclaim.[144]

In remanding the case to the lower court for trial, the supreme court reviewed a line of Iowa decisions[145] interpreting a statute similar to section 2-201(3)(b).[146] The court articulated a "fair consideration" standard to be used in determining whether a sufficient admission has been made. Under this standard, if fair consideration of the denying party's testimony establishes the claimed agreement, along with its implications under the circumstances established by the record, the agreement will be enforced.[147] This standard is more flexible than the *Lish* rationale; since a broader range of evidence is considered the trier of fact may draw inferences from the denying party's statements.

Although the *Dangerfield* standard is more workable than the *Lish* standard, because the former does not require an outright admission, it still fails to effectuate section 2-201(3)(b)'s purpose. Since the subsection does not con-

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decision of when and if an oral contract exists solely in the discretion of that party. This result ignores the rule of contract law that a party can objectively exhibit binding assent despite subjective intent to the contrary. *See* U.C.C. §§1-103, 1-201(3); RESTATEMENT (SECOND) OF CONTRACTS §21A (Tent. drafts Nos. 1-7, rev. ed. 1973). If a court merely required an admitted agreement, rather than a contract, misplaced emphasis on subjective intent could be avoided. The result in *Lish* also leads to problems over the issue of "fairness." If a court requires a judicial admission, it may, out of fairness, hesitate to find one absent a completely unambiguous statement. In straining to be fair to the denying party, the court may be unfair to the party seeking enforcement. See Note, *supra* note 112, at 926. There is also a conceptual problem when a court considers an admission to be an element of contract formation. Within such a framework, a contract does not exist at all until it is admitted in court. This would explain why some courts demand a legally sufficient admission. Without one, there would be no contract to enforce. *See* Yonge, *supra* note 79, at 28; Note, *supra* note 112, at 920.

141. 222 N.W.2d 373 (N.D. 1974).

142. *Id.* at 375. Dangerfield, the potato buyer, alleged in his complaint that Markel, the farmer, had breached a contract for the sale of 25,000 hundredweight of potatoes during the 1972 growing season. It was alleged that Markel failed to deliver 15,078 hundredweight of potatoes, and that the market price increased substantially during the contract period. Markel counterclaimed that Dangerfield failed to make provisions for delivery and failed to make timely payment for potatoes that were delivered. Markel also charged the buyer with breach on a contract to buy potatoes during the 1971 growing season.

143. *Id.*

144. *Id.* at 377.

145. *Id.* at 378. The court cited McCutchan v. Iowa State Bank of Fort Madison, 232 Iowa 550, 5 N.W.2d 813 (1942); Olsen v. Peregoy & Moore Co., 182 Iowa 889, 165 N.W. 202 (1917) deriving its "fair consideration" standard for establishing an admission. See text accompanying note 147 *infra*.

146. *See* note 46 *supra*.

147. 222 N.W.2d at 378.

template that an admission will conclusively establish the alleged agreement, both standards require too much probative value from the admissions. The proper standard of admissions appears to be one which, like the *Dangerfield* standard, considers all the defendant's statements and their implications, but requires only a basis for reasonable belief in the agreement's existence rather than conclusive proof of it.[148] Such a criterion will permit enforcement of more actual oral contracts, while providing the protections of the adversary process in cases where the Statute of Frauds is waived by the admissions process. Under any standard, an admission must come solely from the denying party.[149] Therefore, even if a plaintiff through testimony can convince the trier of fact, without the defendant's admission, that an agreement was made, the Statute of Frauds will remain as a defense.[150]

PROCEDURAL IMPLICATIONS OF THE ORAL ADMISSIONS EXCEPTION

Even when a court ascertains what standards it will use to determine whether an admission is made, it must face other issues in applying section 2-201(3)(b). A defendant seeking escape from his obligations under an oral contract may avail himself of several procedural devices against the pursuing plaintiff. Among these devices are the demurrer[151] and the motion for summary

148. See notes 123-127 *supra*. This is the proposed evidential standard.

149. U.C.C. §2-201(3)(b). See note 4 *supra*.

150. In *Dangerfield* it was noted that if a plaintiff relies on the defendant's testimony to establish the alleged oral contract, he must prove the contract by that testimony, and cannot supplement or contradict it. 222 N.W.2d at 378 citing Quaker Oats Co. v. Kidman, 189 Iowa 906, 179 N.W. 128, 129 (1920). *See also* Cox v. Cox, 292 Ala. 106, 289 So. 2d 609 (1974) (adverse credibility finding insufficient to overturn party's denial of oral contract).

151. *See* State v. California Packing Corp., 105 Utah 191, 145 P.2d 784 (1944). The use of the demurrer has been greatly curtailed since the promulgation of the Federal Rules of Civil Procedure. Rule 7(c) largely abolishes the demurrer and has been adopted by most states. However, it has been retained in several jurisdictions and the issue as to its use is a valid one.

The demurrer is still in use in California, Connecticut, Georgia, Oregon and Oklahoma. *See* White Lighting Co. v. Wolfson, 68 Cal. 2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968) which adopts the holding of Parker v. Solomon, 171 Cal. App. 2d 125, 340 P.2d 353 (1959) where it was held that a general demurrer may be interposed when the complaint shows on its face that the agreement sued upon is within the Statute of Frauds and does not comply with its requirements. The continued viability of the demurrer in California does not work an injustice in a Statute of Frauds case, because California is one of two states not to adopt §2-201(3)(b). *See* note 76 *supra*. However, it should be noted that the use of the demurrer will have a negative effect on any attempt to establish a common law admissions exception in California.

Connecticut also continues to recognize the use of a demurrer. In Mansour v. Clark, 5 Conn. Cir. Ct. 439, 256 A.2d 436 (1968) the court held the defense of the Statute of Frauds may be raised properly by demurrer, because if the demurrer is sustained a useless trial will be avoided. This case dealt with the sale of land, rather than the sale of goods and therefore the Code Statute was not involved. However, the court made no attempt to distinguish the Statute of Frauds for land from the Code Statute. In Georgia the attempted use of a demurrer in Garrison v. Piatt, 113 Ga. App. 94, 147 S.E.2d 374 (1966), discussed at note 161 *infra*, implies the device is still available in that state.

For a discussion of the use of the demurrer in Oklahoma see notes 155-160 and accom-

judgment.[152] The extent to which courts allow use of these devices in cases involving section 2-201(3)(b) will determine the success of the subsection's purpose to enforce valid oral contracts. In dealing with these issues, the underlying issue is how far a party should be allowed to proceed in attempting to extract an admission from his opponent.[153]

The Use of a Demurrer to Raise the Statute of Frauds

A demurrer is, in effect, an allegation that even if the facts stated in the complaint are true, their legal consequences do not require the demurring party to answer them or proceed further in the cause.[154]

An Oklahoma case decision, *Fox v. Overton*,[155] is a recent case addressing the issue of whether a demurrer may be used to invoke the Statute of Frauds. In *Fox*, plaintiffs sought to enforce an oral agreement whereby the defendant was to purchase all the capital stock[156] in plaintiffs' pancake house.[157] The defendant demurred to the complaint, specifically pleading the Statute of Frauds.[158] The trial court sustained the demurrer, and the Oklahoma supreme court affirmed. The court discussed the oral admissions exception to the Statute of Frauds and pointed out that a demurrer was not the type of admission contemplated by the Code.[159] However, the court did not discuss whether the

panying text, *infra*. The courts of Oregon have implied they will allow the Statute of Frauds to be raised by a demurrer where the application of the Statute is shown on the face of the complaint. *See* Kubik v. J. & R. Foods of Oregon Inc., 282 Or. 179, 577 P.2d 518 (1978), where the court held a demurrer was properly overruled because the paragraphs of the plaintiff's complaint could be construed to refer to separate contracts. This holding implies that were it not for the faulty pleading it would have been permissible to raise the Statute of Frauds by demurrer. This implication can also be found in a case cited in *Kubik*, Crone v. First Nat'l Bank of Oregon, 430 P.2d 563 (Or. 1967), involving a contract to make a will. The *Crone* court held: "The complaint did not show on its face whether the agreement was oral or in writing. The demurrer accordingly could not have been sustained upon the ground that the statute of frauds had been violated." 430 P.2d at 564. The use of the demurrer is statutorily provided for in Oregon. OR. REV. STAT. §16.260 (1975) provides in part: "The defendant may demurrer to the complaint within the time required by law to appear and answer, when it appears upon the face thereof: . . . (6) That the complaint does not state facts sufficient to constitute a cause of action."

152. *See* notes 167-201 and accompanying text, *infra*.

153. *See Oral Admissions, supra* note 11, at 157, where the issue is stated: "At what point should a plaintiff seeking an admission from the defendant be precluded from proceeding further?" *See also* Duesenberg, *supra* note 70, at 1860.

154. BLACK'S LAW DICTIONARY 520 (rev. 4th ed. 1968).

155. 534 P.2d 679 (Okla. 1975).

156. Since this case dealt with securities, the operative Statute of Frauds was U.C.C. §8-319. *See* note 75 *supra*.

157. 534 P.2d at 680. The plaintiffs charged that the defendant agreed on the morning of March 20th to purchase all of the stock of Stillwater Pancake House, Inc. for $128,000.00, and that defendant was to take possession at six o'clock a.m. on March 22, 1972. The plaintiffs alleged they closed their business at the defendant's insistence at that date and time. Five days later they learned that the defendant did not intend to complete the sale and as a result of closing their business, they allegedly lost it.

158. *Id.*

159. *Id. See also* Beter v. Helman, 41 WESTM. L.J. (Common Pleas, Westmoreland County,

granting of a demurrer in an oral contract situation deprived the plaintiff of a realistic opportunity to obtain an admission from the defendant.[160]

The demurrer issue was also treated in *Garrison v. Piatt*,[161] a Georgia case involving an alleged oral contract for the purchase of a house trailer.[162] The defendant demurred to the complaint on the ground that the petition on its face showed the contract sued upon was within the Statute of Frauds. The court held that the demurrer was inappropriate, because a contract which is within the Statute at the time the petition is filed can become enforceable only by admissions in the case itself by the party charged.[163] If the demurrer were sustained, the plaintiff would be denied his opportunity to determine, at discovery or trial, whether the contract would be admitted and thus become enforceable.[164] The court concluded, therefore, that due to the addition of section 2-201(3)(b) to the Statute of Frauds, a petition upon an oral contract is not demurrable.[165]

The rationale of *Garrison* is in harmony with the purposes of the oral admissions exception, while the decision in *Fox* ignores these purposes. It is doubtful that the drafters of a subsection which is intended to aid enforcement of bona fide oral agreements could have intended the subsection to become ineffective when an oral contract is evident on the face of a petition. An admissions exception is functionally irrelevant unless it allows the opportunity for a party to actually seek an admission. Therefore, the Code Statute of Frauds should not be raised by a demurrer.[166]

Pa., 1958), where the defendant filed a demurrer and assigned as one of his grounds the fact that the contract was oral. Plaintiff contended the demurrer constituted an admission in the pleadings that the contract was made, and was therefore enforceable. The court held a demurrer was not the type of admission contemplated by subsection (3)(b). The court further stated that to construe the act as the plaintiff urged would result in the elimination of preliminary objections to the Statute of Frauds in the nature of a demurrer. The court did not believe such a result was intended or contemplated by members of the Legislature when enacting the Commercial Code.

160. A recent Oklahoma case, Haskell Lemon Constr. Co. v. Independent Sch. Dist. Number 12, 589 P.2d 677 (Okla. 1979), has further clarified the Oklahoma position on the use of the demurrer in Statute of Frauds cases. The court stated: "Although the Statute of Frauds is normally [an] affirmative defense to be pled and proved, where the application of the statute is demonstrated on the face of the petition, it may be raised by a general demurrer." 589 P.2d at 681. Although the case did not deal with the sale of goods, no attempt was made to except the Code Statute from the rule that was announced.

161. 113 Ga. App. 94, 147 S.E.2d 374 (1966).

162. *Id.* at 96, 147 S.E.2d at 376.

163. *Id.* at 95, 147 S.E.2d at 375. *See* Stevens, *supra* note 11, at 375. Even before the drafting of the oral admissions exception, Professor Stevens maintained the ethical interpretation of the Statute should rule out the propriety of a demurrer. He stated that the plaintiff should be entitled to a sworn admission or denial of the making of the agreement. He concluded that a defendant who admits the agreement does not need the statutory "shield" against perjury and should not be allowed, by demurring, to use the Statute as a "sword."

164. 113 Ga. App. at 95, 147 S.E.2d at 376.

165. *Id.* at 94-95, 147 S.E.2d at 375. *See Oral Admissions, supra* note 11, at 157 where the *Garrison* decision is praised as a sound one.

166. *See* Duffee v. Judson, 251 Pa. Super. Ct. 406, 380 A.2d 843 (1977), where a suit on an oral agreement to purchase a mobile home was demurred to by the defendant. The court held a demurrer inapplicable utilizing reasoning similar to that of *Garrison*, 113 Ga. App. 94,

Treatment of the Motion for Summary Judgment in Light of the Oral Admissions Exception

A motion for summary judgment is made by a party who asserts that there is no genuine factual issue and that the moving party is entitled to judgment as a matter of law.[167] Unlike a demurrer, a motion for summary judgment goes beyond the face of the pleadings and is supportable by affidavits and other evidentiary material.[168] In cases involving section 2-201(3)(b) the motion for summary judgment can present special problems.[169] These include whether a plaintiff should be allowed to go to trial in an attempt to obtain an admission from the defendant, when the defendant's summary judgment motion is accompanied by affidavits denying the existence of the oral agreement.[170]

In *Reissman International Corp. v. J.S.O. Wood Products, Inc.*,[171] the court discussed treatment of summary judgment motions in the context of section 2-201(3)(b). In *Reissman*, plaintiff sued for damages stemming from the defendant's failure to deliver wooden cabinets according to an alleged oral contract.[172] The defendant, in his answer, denied that such a contract existed and moved for summary judgment to dismiss the complaint on the ground there was no signed writing as required by the Statute of Frauds.[173] The motion was brought prior to any discovery proceedings.[174] The court denied the motion because of the possibility that the plaintiff might have been able to obtain an admission from the defendant during discovery or at trial.[175]

The plaintiff in *Reissman* was allowed to proceed to the discovery stage

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147 S.E.2d 374 (1966), discussed at text accompanying notes 161-165 *supra*. *See also* S. WHITE & D. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 57 (1972), where it is stated that a defendant can no longer win his suit at the pleading stage by demurring to an oral contract. The authors state the language of §2-201(3)(b) is broad enough to require all cases to go to trial to allow plaintiff an opportunity to obtain an admission from defendant in open court on cross-examination.

167. F. JAMES & G. HAZARD, CIVIL PROCEDURE 149 (2d ed. 1977). *See also* FED. R. CIV. P. 56.

168. F. JAMES & G. HAZARD, *supra* note 167, at 149. *See also* FED. R. CIV. P. 56.

169. *See* Presti v. Wilson 348 F. Supp. 543 (E.D.N.Y. 1972), where after the defendant denied an oral agreement to sell his thoroughbred race horse to the plaintiff, he moved for summary judgment. The court decided the defendant's sworn denial was dispositive of the Statute of Frauds question and granted summary judgment. See *Oral Admissions*, *supra* note 11, at 159. The author states that the defendant in *Presti* admitted the contract in his deposition, but later denied it in his testimony at trial. The suggestion is made that the trier of fact should weigh the former admission against the latter denial in deciding if a contract was made. *But see* Note, *supra* note 111, at 917 n.14, where the author states that such criticism of *Presti* is well founded if the defendant actually admitted the contract in his deposition. It is pointed out, however, that the court's opinion does not reveal this asserted admission.

170. *See* notes 179-201 and accompanying text, *infra*.

171. 10 U.C.C. REP. SERV. 1165 (1972).

172. *Id.* at 1166.

173. *Id.* The contract was sent unsigned from plaintiff to defendant, and defendant denied there was such a contract.

174. *Id.* at 1168.

175. *Id.* The court cited *Garrison v. Piatt* as authority. See notes 161-166 and accompanying text, *supra*. The court also discussed the difference of opinion as to whether the Statute of Frauds was a substantive requirement, or merely a matter of form. The court decided the Statute was not an indispensable formality for a valid contract, citing Stevens, *supra* note 11.

despite the defendant's unambiguous denial of the contract. Although there was some evidence before the court that the defendant's denial may have been false,[176] this evidence apparently did not affect the court's decision. The court's language suggests that, in a case involving section 2-201(3)(b), the plaintiff should be allowed to proceed at least to the discovery stage in an attempt to elicit an admission.[177] This result allows section 2-201(3)(b) to become a tool to probe the circumstances surrounding an alleged oral contract. A contrary result, giving conclusive effect to a defendant's pre-discovery denial, would allow section 2-201(3)(b) to deteriorate into a mere exercise in formal pleading.[178]

The *Reissman* court did not address the question of whether the plaintiff should be allowed to continue to trial if the defendant maintains his denials throughout the discovery process. This issue was addressed in *Radix Organization, Inc. v. Mack Trucks, Inc.*,[179] an action to recover for defendant's breach of an alleged oral contract to manufacture buses and sell them to the plaintiffs.[180] The defendants denied that such a contract existed, affirmatively pled the defense of the Statute of Frauds, and moved for summary judgment.[181] The Second Circuit Court of Appeals granted the motion over plaintiffs' assertion that they were entitled to proceed to trial to attempt to secure an admission from the defendants.[182] The court noted that the plaintiffs had ample opportunity for discovery and there was no indication that any admission had been made or was likely to be made.[183]

The court in *Radix* concluded that section 2-201(3)(b) did not bestow upon the plaintiff a right to bring the defendant to trial in the face of his sworn denials of the oral contract in his answer and during discovery. However, in the recent case of *M & W Farm Service Co. v. Callison*,[184] the Supreme Court of Iowa stated that section 2-201(3)(b) invests plaintiffs with just such a right. In *Callison*, the defendant counterclaimed that the plaintiff had breached the terms of an oral agreement to rent the defendant a liquid petroleum gas tank and sell him liquid petroleum gas.[185] The plaintiff, in his reply, denied the oral

176. 10 U.C.C. REP. SERV. at 1166. The affidavits submitted showed that an invoice sent by the defendant to the plaintiff bore the same number as the invoice on which the defendant claimed there was no contract, casting serious doubt on the defendant's denial of the oral agreement.

177. *Id.* at 1168. The court stated: "This motion was brought on prior to any discovery proceedings. The possibility exists that plaintiff there or on trial may be able to obtain an admission by defendant of the entire contract as claimed." *Id.*

178. *See Oral Admissions, supra* note 11, at 158-59. If a defendant's pre-discovery denial was given effect, then a defendant would simply deny the oral agreement in every case in order to eliminate §2-201(3)(b). The subsection would thus be stripped of any practical effect.

179. 602 F.2d 45 (2d Cir. 1979).

180. *Id.* at 47.

181. *Id.*

182. *Id.* at 48.

183. *Id.* The court held the plaintiff's "unsubstantiated hope that, if permitted to go to trial, they can turn [defendant's] denials into admissions is not sufficient to preclude summary judgment." *Id.*

184. 285 N.W.2d 271 (Iowa 1979).

185. *Id.* at 273. Defendant claimed that plaintiff rented him four gas tanks which he agreed to keep supplied with gas and that plaintiff had later wrongfully removed one of the gas tanks. *Id.*

agreement and moved for an adjudication on points of law and dismissal of the counterclaim.[186] The supreme court, in reversing the trial court's findings for the plaintiff, held that section 2-201(3)(b) barred summary adjudication of the oral contract question.[187]

The trial court had ruled that the oral contract was unenforceable under the Statute of Frauds.[188] However, the supreme court stated that the Statute of Frauds is simply a rule of evidence, which governs only the manner of proving a contract, not its validity.[189] Therefore, a party resisting the Statute should be given the opportunity to prove the contract in two statutorily recognized ways: by a party's failure to deny the contract in a responsive pleading,[190] or by the opposing party's emitting oral evidence of the contract.[191] The court concluded that although the plaintiff had denied the contract in his reply, the defendant had been denied the right implied by section 2-201(3)(b) to continue on to trial.[192]

Several factors must be considered in determining whether the *Callison* rule, finding an implied right to trial under section 2-201(3)(b), or the *Radix* rule, holding that a party has no right to go to trial in the face of a sworn denial of the contract at the discovery stage, better effectuates the purposes of section 2-201(3)(b). One argument is that in the post-discovery stage, where there have been consistent denials of an oral agreement, a case should not be allowed to continue to trial unless the facts alleged would not be expected to have taken place but for a contractual relationship.[193] It is believed that, absent such evidence, denying parties will be subject to harassment by plaintiffs on "fishing expeditions."[194]

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186. *Id.*

187. *Id.* at 275.

188. *Id.*

189. *Id.* See note 113 and accompanying text, *supra*. The court based its rationale on Johnson v. Ward, 265 N.W.2d 746 (Iowa 1978) which construed a pre-Code Iowa statute similar to §2-201(3)(b); see note 46 *supra*.

190. 285 N.W.2d at 275. Under §2-201(3)(b) a party must either admit or deny the existence of the agreement in the majority of jurisdictions where a demurrer is not permissible. Thus, the only choice of one failing to deny the contract is to admit it.

191. *Id.*

192. *Id.* at 276.

193. *See* Duesenberg, *supra* note 70, at 1865. The author cites cases where the plaintiff was allowed to continue in his efforts to obtain an admission which showed evidence of a contractual relationship. Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972) (draft of purchase agreement exchanged by parties); Farmers Elevator Co. of Reserve v. Anderson 552 P.2d 63 (Mont. 1976) (some of goods subject to alleged oral contract were delivered); Cohn v. Fisher 118 N.J. Super. 286, 287 A.2d 222 (1972) (check delivered by defendant). Professor Duesenberg states that absent such evidence, allowing a plaintiff to continue in search of an admission would be permitting §2-201(3)(b) to effectuate the inequities the Statute was intended to eradicate three hundred years ago, that is, non-existent contracts proved through perjured testimony. This argument is weak because under §2-201(3)(b) none of the plaintiff's testimony, perjured or otherwise, will have an effect unless the defendant first makes an admission.

194. See Duesenberg, *supra* note 70, at 1865. *See also Oral Admissions*, *supra* note 11, at 158. The rationale behind a harassment suit is disclosed in F. JAMES & G. HAZARD, *supra* note 167, at 220: "Even groundless suits cost money to defend and therefore may have a nuisance

A counter consideration to possible harassment of innocent parties is the possibility of obtaining at trial an admission withheld at both pleading and discovery stages. There are several reasons why this possibility might take place.[195] First, demeanor evidence may play a part in a court's determination of whether an admission has been made. When a case is decided upon affidavit and deposition such evidence is lost.[196] Demeanor evidence would most likely have an effect in courts which apply the "evidential standard" to determine if an admission has been made.[197] Under this standard the in-court conduct of the denying party can be considered in deciding whether there is a basis for a reasonable belief in the existence of an oral agreement.[198] Another factor which may produce an admission at trial is the courtroom atmosphere.[199] Conceivably, a person who is willing to perjure himself in the informal atmosphere of a deposition may feel sufficiently awed by the formal courtroom trappings to tell the truth. This feeling may be enhanced by probing cross-examination. However, the chances of such a turnabout occurring on these grounds seem speculative at best.[200]

While allowing a party to go to trial under section 2-201(3)(b) entails possible harassment and opportunities to obtain otherwise elusive admissions, the propriety of granting such a right must be viewed in light of the section's purposes. The purposes of enforcing oral contracts and preventing the Statute of Frauds from aiding fraud will be better advanced by the *Callison* rule. A plaintiff with the option to go to trial has an extra opportunity to enforce a valid contract, and a better chance of preventing a defendant from employing the Statute to commit fraud. Any actual harassment resulting from such a rule would be overshadowed by the advancement of these purposes. Such a rule would not eliminate the Statute of Frauds, because a defendant always retains his right to deny the existence of the oral agreement, keeping it unenforceable.[201]

CONCLUSION

The Statute of Frauds of the Uniform Commercial Code has the potential

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value in settlement." However, the opposite is also true: even groundless suits cost money to litigate.

195. F. JAMES & G. HAZARD, *supra* note 167, at 222.

196. *Id.* at 223. *See also* Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 (1958).

197. *See* notes 123-127 and accompanying text, *supra.*

198. *See* note 124 *supra.*

199. F. JAMES & G. HAZARD, *supra* note 167, at 223.

200. *Id.*

201. *See generally*, Duesenberg, *supra* note 70; *Oral Admissions, supra* note 11. There is apprehension that the aggressive application of §2-201(3)(b) will eliminate the writing requirement of the Statute of Frauds. However, the admissions exception and the writing provision of the Code Statute should not be viewed as mutually antagonistic. Rather, the two provisions are accompanying text, *supra*. When viewed as a rule of evidence the Statute of Frauds becomes much more rational and less likely to be placed on a pedestal, or protected from encroachment at all costs, including the cost of injustices endured to save the Statute. See note 113 and accompanying text, *supra.*