

THE UNIFORM COMMERCIAL CODE—SALES; SHOULD IT BE ENACTED?

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THIS article is written in support of the proposed Uniform Commercial Code, insofar as it deals with Sales of Goods and is intended to supplant the Uniform Sales Act. In the process of its construction, the present writer acted for several years as an adviser to the reporter, being appointed for that purpose by the American Law Institute. He attended all the conferences of the committee, regarding the undertaking with respect to its effect upon the general law of Contracts as well as upon the law of Sales. The Director of the Institute, Mr. William Draper Lewis, presided over these conferences. In addition to the reporter and associate reporter, the active participants included a judge of the United States Court of Appeals who had formerly been a law school dean, a New York lawyer who had represented the New York Merchants' Association, and three lawyers in active commercial practice representing the Commissioners on Uniform State Laws.

Without question, the leading spirit in the whole undertaking was the reporter, K. N. Llewellyn; but every other member took an active and critical part in discussion and construction of all provisions. Arguments were animated, compromises were necessary, rewriting was a continuous process. The result was that the Code as submitted is a committee product, not the product of the reporter as an individual. This can be seen, just as in the case of "Restatements" by the Institute, by a comparison of the final draft with the earlier tentative drafts. The greatest variety of suggestion and the main driving force were supplied, as should be the case, by the reporter; but in no case did he insist upon his personal preference as against the collective judgment of the committee. No one could be quicker to perceive the soundness of a criticism or readier to adopt a revision of his own previous construction if it could survive the test of debate. Exhibiting plenty of capacity at fiery and pertinent retort, he never once betrayed that "pride of opinion" that closes the mind to new reasoning and insight and ruins the result.

The Sales provisions were submitted to the Council of the Institute in complete form in the same manner and spirit in which they had

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been drafted in committee. The Council gave its enthusiastic approval; and at the end of the session, Director William Draper Lewis remarked that he had attended all the presentations of all the Restatements and that "this has been the best presentation to the Council that I have heard."

No one can assert perfection of the completed document. Anyone can pick out selected sections and make a plausible argument for their amendment. At one point they disturb old doctrine that we have become accustomed to repeat with approval, without awareness that it has long been undermined by both business practice and judicial decision; at another point they fail to adopt new views in accordance with the desires of reformers and pressure groups. This is certainly true of every one of the Restatements. The writer, like others, has his dissatisfactions with both Code and Restatement, as will be made to appear herein; but if he can not bring custom and decisions to his support sufficiently to induce assent by committee and Council, his preferences must perforce be yielded up.

Of course, it can not be attempted in any article to follow the sections of the proposed Code, to present arguments pro and con as if still in committee, or to produce conviction of the Code's merits and demerits. No more can be done than to present certain aspects of the Code and to discuss a few specific matters that may be regarded as controversial. Even on these few, no exhaustive or even extended presentation is possible; the writer's views must be stated briefly and more or less dogmatically, with such supporting suggestions as may indicate why the Code as drafted was approved by the committee and the Council, these consisting of men of intensely practical rather than theoretical experience.¹

IS THERE A LAW MERCHANT?

William Murray, Lord Mansfield, was regarded by some of his successors as a dangerous innovator. He was a Scot whose training in Civil Law had given him a juristic outlook far beyond the English shores. He was aware that the growth of British commerce had carried British merchants far afield and that their business rules and customs

1. The writer has carefully read the critical article in the *HARVARD LAW REVIEW* by his dearly beloved friend and revered teacher (outside the schoolroom), Samuel Williston. While differing in its conclusions the present article is not written as an "answer" to that criticism; our relations for many years have been such that a "controversy" between us is inconceivable. This is being written, without the knowledge or advice of any person, as an affirmative support of the Code by an enthusiastic advocate of its enactment by Congress and the States. The Code and its accompanying comment have been made use of at every relevant spot in the writer's forthcoming general treatise on the law of Contracts. Just as in the case of the Restatements, they will serve a useful purpose there even if the Code should never be enacted as a statute.

and documents had little in common with the doctrines and procedure of the revered "common law" having its sources in the custom of rural England. What did the rustics, the craftsmen, or the gentry know about bills of exchange, letters of credit, negotiability, or banking?

Of course, the "common law" had not been static, in spite of the prevailing notions that "principles" are eternal, that the "common law" had been handed down instead of built up, and that "judge-made law" is usurpation. The action of *assumpsit* eventually displaced the action of debt, nullified "wager of law" as a mode of trying an issue of fact, made possible the enforcement of a bargain consisting solely of mutual promises, and wrote the developing mores of a people into law through the medium of the "implied promise" and the "implied condition" of an express promise. But all this had to be done by the liberal use of fiction and pretense. By the device of the "implied promise," legal duties could be created and enforced against persons who had never cast even the shadow of an assent; and by the device of an "implied condition," persons who had unconditionally promised in express words could be protected against an unconscionable promisee who stood firmly on the letter of his bond.

This process of development was very slow and confused; the courts of "common law," without even admitting that it was going on, were moved by the pressure of competition from the Chancery and by the conscious action of an occasional judge of superior intelligence who was aware of the evolutionary process in social and business life and of the backwardness of the doctrines and procedure of his own court. Lord Mansfield was one of these exceptional judges. He used the action of *assumpsit* to lay a foundation for the large body of law now generally described as *Quasi Contract*; ² he drew upon equity and the Civil Law so often that *assumpsit* came to be described as "equitable" in nature; and when "merchants" were in litigation in his court he empanelled a jury of their kind to advise him as to the customs of their business in London, in overseas commerce and in all the marts of trade.

The law that Mansfield and other judges thus caused the Court of King's Bench to know, and in proper cases to apply, was the law merchant, based on the customs and mores of merchants. It did not become at once applicable to farmers and artisans; it became applicable to them only as they also, in some degree, became merchants, using the documents of merchants and knowing or having reason to know the merchant customs and rules. The use of negotiable notes and bills has long since become so general that the rules applicable to them are at least as well known to farmers and artisans as are the rules of contract and of tort. So much, at least, of the law merchant has thus become

2. See *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760), long disregarded, sometimes said to be overruled, at last fully approved and followed by the House of Lords, after nearly two centuries, in the *Fibrosa* case, [1943] A.C. 32.

applicable to all alike, except when special circumstances of ignorance and sharp dealing make an equitable melioration necessary.

Nevertheless, there are still large and important areas in which the average citizen may never do business, areas in which new usages and customs and linguistic forms are in continual growth. For those who know, or have reason to know, these usages, forms, and customs, they are already a part of the law by which the parties are judged. This is true even though they have not yet got into the books or the reported decisions. Such areas are those of overseas commerce, banking, commercial financing, and trading on exchange. From these areas came the first movement for revision of written commercial law, not from teachers of the law of contracts or of sales.³

The Commercial Code has taken notice of the developing law merchant and in a comparatively small number of sections has constructed rules based on merchant custom, applicable to those who regularly deal within its coverage and to others who know or have reason to know it. This does not prevent the Code from operating as a "uniform" code; it will operate alike to all men under the prescribed circumstances and conditions. It is not the kind of uniformity applied by Procrustes to his unfortunate guests. No doubt there will be cases in which it may be hard to determine whether a party has reason to know and should be governed by the particular rule. That problem is already before the courts, with respect to the customs and usages of traders in any field, and to those of farmers and artisans as well. In fact, the provisions of the Code should ease the problem in considerable degree by laying down fairly definite rules, to be applied with commercial sense and some judicial discretion.

THE USE OF LEGAL TERMS IN THE CODE—"TITLE"

In writing a new code or restatement, it is almost impossible to avoid the use of legal terms on the ground that they are variables with several usages and meanings. All language, including the language of the law, consists in large part of such terms, deeply embedded in the usage of every man. The user of such a term may have no clear and well-defined thought in his own mind; and even if he has such a thought, the

3. Cardozo, in his masterpiece on *THE NATURE OF THE JUDICIAL PROCESS*, page 61, quotes an English judge: "The law merchant is not fixed and stereotyped, it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Lord Chief Justice Cockburn, capable of being expanded and enlarged to meet the wants of trade." This remains true in spite of efforts at codification, such as the Sales Act and the N.I.L. One of the great merits of the Commercial Code is that it is drawn so as to expressly require the judicial recognition of future mercantile development. After the adoption of this Code, bringing the stated rules and remedies up to date, a new Cardozo can still say: "The law merchant is not fixed and stereotyped, it has not yet been arrested in its growth."

term is unlikely to convey it to the hearer or reader. Variability of terms is both the effect of unclarity of mind and the cause of such unclarity; it produces misunderstanding, litigation, and even war.

The word "title" is such a variable term, one that can create an illusion of certainty. With respect to its use, a reporter has several alternatives: 1. he can avoid its use altogether, with or without an explanation, substituting other terms in common use, such as ownership, property, property interest, rights; 2. he can continue to use it, accompanying it by a sort of strait-jacket in the form of a statutory definition, more or less verbose and perhaps containing several other variable terms; 3. he can use it in a cheerful spirit, without fear and without reproach—without fear that others will give it any specific meaning that will cause misunderstanding, and without the reproaches that are sure to follow if he tries to require his readers to accept it with a specific and limited meaning.

The American Law Institute, in its Restatement of the law of Property in five volumes, adopted the first of these three methods. It purports to restate the whole law of property, its creation and extinguishment, its various classifications of interests and estates, without once making use of the word "title." The term does not appear in any of the indexes to the several volumes; and the reporters give no explanation of its absence. Probably few users of this Restatement have missed it. Without a doubt, the learned reporters and advisers were aware that everyone makes frequent use of the word "title," and that it is embedded in many important statutes, including those dealing with taxation, bankruptcy, and sales; but they must also have known that their adoption of a specific and limited definition would have caused added difficulty in the application of those statutes.

When the word "title" is found in any one of these statutes, its meaning, like that of any other statutory word, must be determined with due reference to the entire statute, its purposes, the circumstances and time of its enactment, and the effects that will be produced by giving it one meaning or another. The solution will require a lively intellectual scramble and will not be controlled by a law dictionary or by definitions adopted by the authors of codes or restatements. It would be grievous error to give to the word "contract," as used in our Constitution, the limited meaning adopted for the purposes of the Restatement of Contracts, or to give to the "privileges and immunities" of the Constitution the limited meanings found in the Restatement of Property.

It would have been more difficult to avoid the use of the word "title" if the Restatement had included a volume on Conveyancing; and the Director of the Institute, Mr. William Draper Lewis, was aware that it was being used in the Restatement of the Law of Torts and Restitution. In the first volume of the Property Restatement,

therefore, the Director inserted in Section 10 a special "Note," signed with his own "title." He explains that the word may be used to denote the legal relations of which the various "property interests" may be composed, or the various "operative facts" by which those legal relations are created. Whether the word "title" is used with either one of these meanings, or with both, it is obvious that "titles" are of great variety and that neither a legal doctrine nor a court decision can be based upon "title" as a uniform and invariable concept. In any particular case, a "title" may perhaps be discovered and defined; but what it is and why it exists are determined as a result of the reasoning and decision, without itself playing any part in the process of determination.

The Uniform Sales Act of 1906 adopted the third of the alternatives listed above. The word "title" is used in various sections; but it is never used in such a way as to make the operation of the Act upon the legal relations of the parties dependent upon one specific meaning to be given to the word. It could not do so without enacting a specific and limited definition; and this it does not do. Section 76 of the Act presents a list of terms and definitions; "title" is not among them. "Document of title" is found there; but in its definition the elusive pea slips out from under the shell. Such a "document" is one "for the delivery of *goods*" or is one "used in the ordinary course of business in the sale or transfer of *goods*, as proof of the possession or control of the *goods*, or authorizing or purporting to authorize the possessor of the document to transfer or receive . . . *goods*."

"Documents of title" are dealt with chiefly in Sections 23 to 40 of the Sales Act. In Sections 23 and 24 we are informed that a "title" may be "voidable" or "defective" or "good." We are told that "the buyer acquires *no better title* to the goods than the seller had" (with exceptions), thus clearly warning us that "title" is a variable, including the good and the bad, the better and the worse. From this it is obvious that a buyer can never know what he gets by telling him that he gets "title"; nor can the buyer's counsel know, or the judge who reads his brief. It is necessary to know the facts and events that occur and recur in business life, and to be informed on what courts have done, or are instructed by the law to do, for and against the men involved in such facts and events. This knowledge and direction the Uniform Sales Act attempts to give us, with some degree of success; it makes no attempt to do so by telling us where and how "title" may be found or what it is when we find it. It frequently uses the phrase "the property in the goods" as if it were constant and invariable; in one or two places it uses the word "title" as if it might be a synonymous term.

The new Code, in defining "document of title," follows Section 76 of the Sales Act, with some amendment and a paragraph of explanatory comment. See Section 1-201. As in the Sales Act, no attempt is made

to define the term "title." Under both the Act and the Code, a seller with "no title" or with a "defective title" can sometimes create a "better title" or even a "good title" in the buyer. Usually he has this power because he holds a "document of title," one of several types of documents that must be defined with reference to the facts and the usages of trade and with no dependence on "title." The seller's power is derived from the fact that he has the "document," not from the fact that he has "title." In this and in their usage of the terms, both the Act and the Code adopt the "cheerful" alternative that is listed above; neither one attempts a definition. They differ primarily in this, that the Code everywhere puts more emphasis upon the operative facts on which stated legal results depend and warns us that those legal results are not determined by such undefined concepts as "title" or "property in the goods." By such emphasis and warning, the attention of both merchant and lawyer are focussed on the vitally important factors and not on the undefined and inoperative concepts.

"FIRM OFFERS" AND THE LAW OF CONTRACTS

Section 2-205 of the Commercial Code contains the following provision: "An offer by a merchant to buy or sell goods expressed in a signed writing to be 'firm' or otherwise irrevocable for a period not exceeding three months needs no consideration to be irrevocable during that period; but such an expression in a form clause prepared by the offeree does not under this Section bind the offeror unless separately authenticated."

This Section recognizes a growing custom among merchants in both Britain and America, to differentiate between two kinds of offers. Knowing that offers are generally revocable by notice, at the will of the offeror, there is a felt need for a type of offer on which the offeree can rely, for a reasonable time or for a definitely stated time. More and more frequently, offerors are making what they describe as a "firm offer," understanding by that term that the offer so described shall be irrevocable for a limited time. Sometimes the offer is made in this form at the special request of the offeree, and sometimes by the offeror's own motion in order to make it more attractive to the offeree and to induce his serious consideration. Unless the law gives effect to the intention of the parties in these cases, an offer represented to be "firm" and "irrevocable" becomes a trap to the offeree and a special advantage to those offerors who are willing to be guilty of bad faith.

It is only three quarters of a century since a very learned author could write that "an irrevocable offer is a legal impossibility." No doubt, the statement was incorrect when made; but theory and practice alike have grown continually more opposed to it. It required no more than that the offeror should add a scrawl or the word seal after

his signature, or that the offeree should give a dime or a peppercorn for the offeror's promise that his offer should stand firm. The option contract, an irrevocable offer, plays a very valuable part in our business economy. The Restatement of Contracts recognized that much old doctrine had become obsolete; it flatly declares that an offer of a unilateral contract becomes irrevocable as soon as part of the requested performance is "given or tendered" (Section 45) and that any promise (including a promise not to revoke) may be made binding by certain kinds of action in reliance (Section 90).

There is nothing surprising in a statutory validation of "firm offers" in accordance with the intention of the parties who make them; and there is nothing difficult in the enforcement of the rule. It is already the statutory law in New York, no difficulty having been perceived by reason of the fact that other States have not yet adopted it.⁴ It is true that the Uniform Written Obligations Act may now be in force in only one State, this being the commercial State of Pennsylvania; but unlike the firm offer provision this Act is not the recognition of an already existing and growing custom. Moreover, it departs much farther from the antecedent law. Under it, one who promises to make a gift of valuable property is bound to do so. An irrevocable offer, or option contract, is very different. The offeree is merely assured that his power of acceptance will not be destroyed. One who makes a "firm offer" to buy or sell goods is never compelled to pay without getting his money's worth, or to deliver without getting his money. The law merely enforces the agreed exchange. Equity never refused specific enforcement of an option on the ground that the price paid to make it irrevocable was only a dollar.

There can be little doubt that if the Code provision as to "firm offers" in writing is adopted with respect to contracts for the sale of goods, the rule will rapidly expand to cover all contracts alike, as it already does in New York. Yet no harm is done if it does not. Differences have long been recognized between contracts for the sale of goods and other contracts. The requirements of Section 17 of the statute of frauds were from the beginning different from those of Section 4. The Code provision is an excellent one for the contracts that are included within it, and for the merchants and for all others who make written offers declaring expressly that they shall be "firm" or "irrevocable." It will operate with uniformity and definiteness. The Sales Act was not the

4. N.Y. PERS. PROP. LAW § 33(5): "When hereafter an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time."

less a "uniform" statute because it re-enacted old Section 17 of the statute of frauds.

NEW FORMAL REQUIREMENTS: STATUTE OF FRAUDS

The Code makes some changes in the formal requirements for enforceability of a contract for the sale of goods for the price or value of \$500 or more. The purposes in view are chiefly these: to make the formal requirements more definite and more easily applied; to make the repudiation of genuine contracts less likely to be successful while at the same time in no way increasing the probability of successful fraud.

In the present writer's forthcoming treatise on the law of Contracts, one entire volume is devoted to the statute of frauds and its extremely variable application by the courts. This work involved the comparative study of some thousands of cases in all jurisdictions, one result of which is that he can say with assured confidence that the adoption of the Code provisions will not in the least increase the difficulty of interpretation of the statute or the uncertainty of its application.

The purpose of the statute of frauds is to prevent the enforcement of alleged promises that never were made; it is not, and never has been, to justify contractors in repudiating promises that were in fact made. The writer's study of the cases, above referred to, has fully convinced him as follows: 1. that belief in the certainty and uniformity in the application of any presently existing statute of frauds is a magnificent illusion; 2. that our existing judicial system is so much superior to that of 1677 that fraudulent and perjured assertions of a contract are far less likely to be successful; 3. that from the very first, the requirement of a signed writing has been at odds with the established habits of men, a habit of reliance upon the spoken word in increasing millions of cases; 4. that when the courts enforce detailed formal requirements they foster dishonest repudiation without preventing fraud; 5. that in innumerable cases the courts have invented devices by which to "take a case out of the statute"; 6. that the decisions do not justify some of the rules laid down in the Restatement of Contracts to which the present writer assented some 20 years ago.

It is much easier to escape from under the domination of an old rule than it is to induce the abandonment of the old and accustomed words in which it has been expressed.⁵ If the purpose of a new code or of a

5. For example, for more than a century it continued to be said, and to be taught in our leading schools, that at common law a chose in action was not assignable, even though the assignee obtained all the desired results by merely suing in the name of the assignor. In England it is still the stated "law" that impossibility of performance is no defense to a contractor; but he may be discharged by "frustration of the contract." It is still not admitted in England that two parties can by contract create an enforceable right in a third party; but there are more than a score of cases in which the third party got the money

"restatement" were merely to put old wine in new bottles, merely to express the good old common law rules in a clarified form, it would seldom if ever be worth making. There is a strong argument for the retention of the old, much-litigated, and often-interpreted words, except when the purpose of change is to change the result to be reached and the rule to be applied. When such is the purpose, the continued use of the old expressions may defeat the end in view, as well as lay a trap for those who must interpret and apply the law.

The new Code provisions are the result of a conscious effort to change the rules laid down in the former statutes; necessarily the words also must be changed, but a close examination will show that there are fundamental similarities. There is much less variation than can be found in many sections of the Restatement of Contracts. It is highly probable that the men responsible for those sections would have rejected them outright, if they had first seen them without the benefit of the testing (and sometimes testy) discussions in many personal conferences. Suppose, for example, that they had been suddenly presented with a completed document drawn by a different committee, including these rules: 1. an offer of a unilateral contract becomes irrevocable as soon as part of the requested performance is "given or tendered" (Section 45); 2. a promise without consideration may become enforceable by reason of substantial action in reliance on it (Section 90); 3. a creditor has a directly enforceable right against a person who contracts with his debtor to pay the debt (Section 136); 4. the consideration for a promise may be sufficient even though there is no "gain or advantage to the promisor or loss or disadvantage to the promisee" (Section 81); 5. an assignee has an enforceable right against the obligor even though the right assigned was created by a bilateral contract and is conditional on a performance yet to be rendered by the assignor (Sections 155, 161); 6. an accord executory is an enforceable contract and suspends enforcement of the antecedent claim (Section 417).

The new provisions of the Code deal with the same old requirements: a signed writing, a part payment, acceptance and receipt of the goods, and with goods to be made to special order, just as do the Sales Act and the old Section 17. But the kind of a writing that will serve is much more definitely prescribed and is much more limited than has been held in some of the cases that have amplified the requirements of the old statute. All that is required by the Sales Act or by Section 17 is that "the contract" or, in the alternative, "some note or memorandum thereof" should be in writing. It was by outright addition to this that some courts held that every material term of the contract must be in the writing. They thereby made it possible for a dishonest contractor

sued for by using the verbal device of asserting that the contract was made for his benefit by one of the parties acting as a "trustee."

to admit the making of the contract and yet to repudiate it; indeed, even to go so far as to make proof themselves of the terms of the contract that they had made in order to repudiate the very memorandum that they had signed.

The Code provides in Section 2-201 that a signed memorandum is a sufficient protection against fraud if it is "sufficient to indicate that a contract for sale has been made between the parties," but that the contract shall not be enforced "beyond the quantity of goods shown in the writing." With that much of a writing in evidence, the parties must be ready to put themselves upon the country. So far as interpretation is concerned, the trial court's problem is simple; and its chief attention can be directed, as it ought to be, to the quality of the evidence offered.

The custom of merchants to send written confirmation of an oral agreement is given practical effect, so as to enable one party to make his own confirmatory memorandum sufficient for enforcement unless the other promptly asserts its inaccuracy. This does not mean that it is conclusive proof. The other party can easily protect himself against an erroneous confirmation; it is not even necessary for him to state in his writing what the contract really was, although an honest contractor will be almost certain to do so. It should not be easy for one to escape the application of this rule by showing that he is not a merchant, if it can also be shown that he in fact knew either the rule of the Code or the merchant custom.

The Code provides that no signed writing of any kind is necessary as against a party who "admits in his pleading or otherwise in court that in fact a contract for sale was made." Some courts have already applied a similar rule on the ground that it is in clear harmony with the purposes of the statute and that such an admission in court is a sufficient protection against fraud.⁶ A contractor who fears that court or jury may disbelieve his own testimony as to the special terms of the contract need make no admission in court.

Just as in the Sales Act, the Code makes a writing unnecessary if there has been a part payment or an acceptance and receipt of part of the goods; but unlike the Act it limits enforcement to that part of the goods proportionate to the payment actually made or to that part of the price proportionate to the goods actually received. No doubt this limitation was made because it has always been possible for a handy liar to testify orally that he paid a dollar on account or delivered one of the shoestrings, thus making it easy to defeat the real purpose of the statute.⁷

6. See the convincing opinion in *Trossbach v. Trossbach*, 185 Md. 47, 42 A.2d 905 (1945).

7. The fact that the statute thus expressly provided an easy method for its own avoidance is strong evidence of the lack of necessity for any such statute. The present

With respect to goods to be made to special order, the Code follows the Sales Act, except that in addition to the special character of the goods the seller must have made a substantial change of position before notice of repudiation by the buyer.⁸ This addition will seldom prevent enforcement of the contract except when notice of repudiation is promptly given. Moreover, the statutory requirements may be fully satisfied in other ways. The written repudiation may itself be a sufficient memorandum.

It can not be undertaken in this brief article to demonstrate that the supposed certainty and uniformity with respect to existing statutes of frauds are illusory. A consideration of the cases, many thousands in number though the collection is far from exhaustive, has required a large volume. Although there have been many assertions of the beneficence of the statute, they usually betray their own superficiality;⁹ and many jurists have expressed a contrary opinion.¹⁰ The

writer would have preferred to leave unchanged the old provisions as to part payment and acceptance and receipt. This is for two reasons, with which others appear to disagree: first, he believes that the statutory provisions should be wholly abandoned because they increase litigation, greatly promote dishonest repudiation, and do not greatly aid our judicial system to frustrate fraud and perjury; and secondly, because a true apportionment of the goods or the price can not be made without first proving the terms of the contract, and having proved them the contract should be enforced in full. A small amendment of this kind could be made easily enough; but the rule without the amendment is as readily applied as is the rule of the existing statutes.

8. Here again the writer would not have made this addition, for reasons similar to those given in the preceding footnote.

9. Lord Kenyon (who disapproved of Mansfield's progressiveness) in *Chater v. Beckett*, 7 T.R. 201, 101 Eng. Rep. 931 (K.B. 1797) ("a very beneficial statute"); Sir William Grant in *Woolam v. Hearn*, 7 Ves. Jr. 211, 32 Eng. Rep. 86 (Ch. 1802), but the Privy Council held in direct conflict with his decision, without even mentioning it, in *United States v. Motor Trucks Ltd.*, [1924] A.C. 196; Lilienthal, *Judicial Repeal of the Statute of Frauds*, 9 HARV. L. REV. 455 (1896), attacking the "part performance" doctrine.

In *Leland v. Creyon*, 1 McCord 100, 105 (S.C. 1821) the court said: "No statute has been so much and, in my opinion, so justly eulogized for its wisdom as the statute of frauds. This branch of it tends to repress evil practices which would otherwise spring up to the insecurity of all. But for the salutary influence of this statute, thousands would tumble into ruin by having their estates taken from them to answer for the debts, defaults, and miscarriages of others."

Lord Nottingham, who naturally approved his own statute, said that every line was worth a subsidy. To this SMITH, *CONTRACTS* 70 (6th ed. 1877), retorted: "Every line has cost a subsidy, for it is universally admitted that no enactment of any Legislature ever became the subject of so much litigation."

10. Criticisms adverse to the statute may be found as follows: Justice Stephen, in 1 LAW Q. REV. 1 (1885), approved by Sir Frederick Pollock; a sarcastic editorial note by Goodhart "celebrating" the 250th anniversary of the statute in 43 LAW Q. REV. 1 (1927); 6 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 379-97 (6th ed. 1922): "these clauses have outlived their usefulness"; note by Pollock in 29 LAW Q. REV. 247 (1913): "piece of antiquated legislation"; SALMOND, *JURISPRUDENCE* 447 (6th ed. 1920): "In the case of all ordinary mercantile agreements such a requirement does more harm than good. . . . an instrument for the encouragement of frauds rather than for the suppression of them";

courts have used so many devices to "take the case out of the statute" that its living application is confined within limits that have become ever more narrow.¹¹ The devices used can by no means be described as reasonable interpretation. By an actual count, in a thousand cases dealing with oral promises to pay the debt of another, the promise was enforced in about three-fourths of them on the ground that "sole credit" was given to the defendant, although the reported facts create conviction that had the suit been against the other party who profited by the transaction he never could have defended successfully on the ground that he had made no promise and no "credit" was given to him.

The provision in old Section 17, re-enacted in the Uniform Sales Act, contains within itself a number of devices for its own avoidance. The old Section was never re-enacted at all in a dozen States, including some commercially important ones; and the Sales Act has not been adopted in about the same number. There is no evidence to show that frauds and perjuries are flourishing in these States. A strong case could be made out for the entire omission of a "statute of frauds" from the Commercial Code; but very few could make the extensive study of cases necessary to conviction or to legislative agreement.

Section 197 of the Contracts Restatement will be given brief consideration merely to show the possibility of error and illusion (in both of which the present writer participated). It deals with the "part performance" doctrine affecting the specific enforcement of oral contracts for the transfer of land. The problem does not arise with respect to contracts for the sale of goods, because both old Section 17 and the Sales Act expressly provide that a very slight part performance will make an oral contract enforceable.

Section 197 states that an oral contract for the transfer of land may be specifically enforced if the purchaser "makes valuable improvements on the land, or takes possession thereof . . . and also pays a portion or all of the purchase price." The illustrations given with this indicate that specific performance will not be enforced in favor of a promisee whose part performance of the oral contract consists solely of the rendition of personal services, not accompanied by taking possession or the making of improvements. That court decisions to the contrary are far too numerous to justify the restricted rule of Section 197 will be indicated by a collection of cases, far from complete, in the footnote below, cases in which an oral contract was enforced solely

Bacon, V. C., in *Morgan v. Worthington*, 38 L.T. 443, 445 (1878), "that unfortunate statute, the misguided application of which has been the cause of so many frauds."

See also the criticism and discussion by 2 STREET, *FOUNDATIONS OF LEGAL LIABILITY* 196; THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 180 (1893); Corbin, *Statute of Frauds*, 6 *ENCYC. SOC. SCI.* 429 (1931).

11. In *Reeve v. Jennings*, [1910] 2 K.B. 522, 529, Lord Coleridge said: "The statute of frauds has been much buffeted about by decisions, but its life is not quite extinct."

because of the rendition of services.¹² It is to be remembered that the whole "part performance" doctrine is a judicial variation of the statute in cases where its application would be grossly unjust.

CONCLUSION: ENACT THE CODE

The fact that the Code does more than follow the Sales Act, section by section, with amendments of each, is special reason for its approval. To say this is not to intimate that the Act of 1906 and the English Sale of Goods Act were bad jobs; their authorship is in itself a guarantee that they represented the best scholarship of their time. But after the 50 years through which we have just lived, the old rules need some

12. *Illinois*: *Holmes v. Ackley*, 400 Ill. 372, 81 N.E.2d 178 (1948); *Anson v. Haywood*, 397 Ill. 370, 74 N.E.2d 489 (1947); *Chambers v. Appel*, 392 Ill. 294, 64 N.E.2d 511 (1946); *Fleming v. Dillon*, 370 Ill. 325, 18 N.E.2d 910 (1938); *Fierke v. Elgin City Bkg. Co.*, 359 Ill. 394, 194 N.E. 528 (1935); *Mayo v. Mayo*, 302 Ill. 584, 135 N.E. 90 (1922); *Aldrich v. Aldrich*, 287 Ill. 213, 122 N.E. 472 (1919); *Willis v. Zorger*, 258 Ill. 574, 101 N.E. 963 (1913); *Vail v. Rynearson*, 249 Ill. 501, 94 N.E. 942 (1911); *Dalby v. Maxfield*, 244 Ill. 214, 91 N.E. 420 (1910).

Missouri: *Jones v. Jones*, 333 Mo. 478, 63 S.W.2d 146 (1933); *Carlin v. Bacon*, 322 Mo. 435, 16 S.W.2d 46 (1929); *Dillman v. Davison*, 239 S.W. 505 (Mo. 1922); *McQuitty v. Wilhite*, 247 Mo. 163, 152 S.W. 598 (1912); *Hall v. Harris*, 145 Mo. 614, 47 S.W. 506 (1908); *Berg v. Moreau*, 199 Mo. 416, 97 S.W. 901 (1906); *Sharkey v. McDermott*, 91 Mo. 647; 4 S.W. 107 (1887); *Hiatt v. Williams*, 72 Mo. 214 (1880); *Sutton v. Hayden*, 62 Mo. 101 (1876); *Gupton v. Gupton*, 47 Mo. 37 (1870).

Michigan: *Woods v. Johnson*, 266 Mich. 172, 253 N.W. 257 (1934); *Willard v. Shekell*, 236 Mich. 197, 210 N.W. 260 (1926); *Bassett v. American Baptist Pub. Soc.*, 215 Mich. 126, 183 N.W. 747 (1921); and at least eight other cases.

New Jersey: *Ferrando v. Casella*, 113 N.J. Eq. 119, 165 Atl. 726 (Ch. 1933), *aff'd*, 115 N.J. Eq. 578, 171 Atl. 795 (Ct. Err. & App. 1934); *Laune v. Chandless*, 99 N.J. Eq. 186, 131 Atl. 634 (Ch. 1926); *Dougherty v. Dougherty*, 98 N.J. Eq. 126, 130 Atl. 833 (Ch. 1925); *Clawson v. Brewer*, 67 N.J. Eq. 201, 58 Atl. 598 (Ch. 1904), *aff'd*, 70 N.J. Eq. 803, 67 Atl. 1102 (Ct. Err. & App. 1906); *Winfield v. Bowen*, 65 N.J. Eq. 636, 56 Atl. 728 (Ch. 1903); *Vreeland v. Vreeland*, 53 N.J. Eq. 387, 32 Atl. 3 (Ch. 1895); *Schutt v. Missionary Soc.*, 41 N.J. Eq. 115, 3 Atl. 398 (Ch. 1886); *Vanduyne v. Vreeland*, 11 N.J. Eq. 370 (Ch. 1857), 12 N.J. Eq. 142 (Ch. 1858).

Selected miscellaneous cases: *Danciger Oil & Ref. Co. v. Burroughs*, 75 F.2d 855 (10th Cir. 1935); *Brooks v. Yarbrough*, 37 F.2d 527 (10th Cir. 1930) (Oklahoma law); *Naylor v. Shelton*, 102 Ark. 30, 143 S.W. 117 (1912); *Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432 (1917); *Ballou v. First N. Bank*, 98 Colo. 101, 53 P.2d 592 (1935); *Brewer v. Mackey*, 177 Ga. 813, 171 S.E. 273 (1933), at least eight others in Georgia; *Jackson v. First N. B. and T. Co.*, 115 Ind. App. 313, 57 N.E.2d 946 (1944); *Smith v. Nyburg*, 136 Kan. 572, 16 P.2d 493 (1932), several others in Kansas; *Lang v. Chase*, 130 Me. 267, 155 Atl. 273 (1931); *Shives v. Borgman*, 69 A.2d 802 (Md. 1949); *Nichols v. Reed*, 186 Md. 317, 46 A.2d 695 (1946), and several others in Maryland; *Morrow v. Porter*, 161 Minn. 396, 202 N.W. 53 (1925); *Weber v. Crabill*, 123 Neb. 88, 242 N.W. 267 (1932); *Emery v. Darling*, 50 Ohio St. 160, 33 N.E. 715 (1893); *Popejoy v. Boynton*, 112 Ore. 646, 229 Pac. 370, 230 Pac. 1016 (1924); *Lawton v. Thurston*, 46 R.I. 317, 128 Atl. 199 (1925); *Fishburne v. Ferguson*, 85 Va. 321, 7 S.E. 361 (1888); *Velikanje v. Dickman*, 98 Wash. 584, 168 Pac. 465 (1917); *Bryson v. McShane*, 48 W. Va. 126, 35 S.E. 848 (1900).

replacement, the old words need changing, the analysis and organization can be improved, the remedies can be made more effective. The Code is to be judged by the usefulness and convenience of its own organization, by the ease with which it can be understood and applied by the merchants without litigation, by the aid that it gives to the courts in reaching just decisions in accord with the mores and usages of honest dealers, and by the flexibility and effectiveness of its suggested remedies.

Without doubt the Code has imperfections. No individual critic, considering it seriously in his study without the benefit of the discussions and debates in the many conferences of which it was the offspring, can fail to find sections and comment that he would eliminate or amend. But the imperfections discovered by such critics, thus operating individually, would not be the same ones. It is certain that critical suggestions, if supported ardently and with conviction in conference, would have affected the forms finally adopted; but in this process the amendments would so change their own form as to be largely unrecognizable by their original advocates. Such is the universal experience of reasonable men—of legislative committeemen drafting a statute, of a reporter and his advisers trying to “restate” the existing law for a Law Institute, of a bench of appellate judges in deciding a case before them and expressing their far from “uniform” reasons for the decision.

In an address before the Association of American Law Schools in 1921, Judge Cardozo spoke of the work of the proposed Institute for the restatement of the law: “We are to substitute for the attitude of mind, the temper, that spends itself in hostility and distrust, the attitude and temper of mutual helpfulness, of willing co-operation, a fusion of diverse types and capacities and attainments. Of course, in such a process there are losses as well as gains. Sometimes one has to scrap the things that one would like to keep. One’s pet hobbies are sometimes derided, and one’s dearest formulas rejected. One who sits in an Appellate Court with the necessity of convincing or placating six minds or more, becomes finally more or less inured to these scenes of carnage and mutilation. But in exchange one gains other things that mitigate the sacrifice. One gains a fusion of points of view; a balance, a moderation, and above all a prestige and an authority that could not otherwise be won.”¹³

In his lectures on *The Growth of the Law*, in 1924, Judge Cardozo quoted with approval the following words of a young man who more than 25 years later is now the reporter in the creation of a Uniform Commercial Code: “The law needs to act far more quickly than it does in recognizing and giving effect to new business institutions as they

13. HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 120 (1921).

arise; it needs to permit to those institutions far greater flexibility than at present in the modification from case to case of their lesser details; it needs to do both of these things with an earnest view to the economic function, and not to the legal incrustations, of the institution concerned; and the restatement of the law, to satisfy business needs, must work, and work vigorously, toward these ends."¹⁴

In the adoption of any code or restatement, we may well take to heart other expressions of the wisdom of Judge Cardozo. "In our worship of certainty, we must distinguish between the sound certainty and the sham, between what is gold and what is tinsel; and then, when certainty is attained, we must remember that it is not the only good; that we can buy it at too high a price; that there is danger in perpetual quiescence as well as in perpetual motion; and that a compromise must be found in a principle of growth. . . . If we were to state the law today as well as human minds can state it, new problems, arising almost overnight, would encumber the ground again. . . . The law, like the traveler, must be ready for the morrow. It must have a principle of growth. . . ."¹⁵

"We seek to find peace of mind in the word, the formula, the ritual. The hope is an illusion. . . . Hardly is the ink dry on our formula before the call of an unsuspected equity—the urge of a new group of facts, a new combination of events—bids us blur and blot and qualify and even, it may be, erase."¹⁶

The new Code should be enacted because it builds soundly on the existing Uniform Sales Act, because it rebuilds freely upon the decisions and mercantile customs of the 50 years since that Act, and because more than any previous code or restatement it provides within itself a method and principle of future growth.

14. CARDOZO, *THE GROWTH OF THE LAW* 125 (1924).

15. *Id.* at 16-20.

16. *Id.* at 66.