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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 By Involuntary Admissions In Court Under U.C.C. Sections 2-201(3)(B) And 8-319(D)

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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 BY INVOLUNTARY ADMISSIONS IN COURT UNDER U.C.C. SECTIONS 2-201(3)(b) and 8-319(d)

*Philip K. Yonge**

I. INTRODUCTION

Can a plaintiff bring suit on an oral contract for the sale of goods or investment securities within the Uniform Commercial Code Statute of Frauds and then, by pre-trial discovery procedure or at trial, ask the defendant to admit that the oral contract was in fact made, and by such an admission enforce the contract? He can, because "the party against whom enforcement is sought admits in his . . . testimony . . . in court" that the contract was made. The contract is therefore enforceable under this admission provision of Uniform Commercial Code Sections 2-201(3)(b) and 8-319(d).¹ The admission thus obtained is known as a compelled or involuntary admission because the defendant can be compelled by the contempt power of the court to respond to plaintiff's request for the admission.

The Code admission provision had no counterpart in pre-Code sales Statutes of Frauds.² As Professors Lon Fuller and Melvin Eisenberg have remarked, if an involuntary admission does make such an oral contract enforceable, the impact of the admission provision is

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¹ These sections are set out in the text at notes 31 & 32 *infra*. The contract is not enforceable, however, beyond the quantity and, in the case of investment securities, beyond the price admitted.

² *E.g.*, UNIFORM SALES ACT § 4.

striking.³ Pre-Code law allowed a party to defeat an action on an oral contract by pleading the Statute of Frauds even though he recognized its existence and would admit it in court. That is, it legalized his renegeing on a contract—which he would, under questioning, admit making.⁴ The impact of the new involuntary admission procedure is to eliminate this situation.

This impact has not, however, been generally recognized because the propriety of this use of the involuntary admission is viewed as uncertain by a majority of Code commentators.⁵ The minority of commentators⁶ who approve the use of the involuntary admission to enforce an oral contract is, on the other hand, unanimously supported by the half-dozen courts which have considered the question.⁷ The decisions of these courts are sound and the doubts of the majority of the commentators are without foundation.

II. BACKGROUND OF THE CODE STATUTE OF FRAUDS ADMISSION PROVISION

Pre-Code sales Statutes of Frauds provided for enforcement of oral contracts within the Statute only by written memorandum, receipt and acceptance or payment.⁸ In the absence of an admission provision in the pre-code Statutes, the courts generally refused to allow a defendant's in-court admission to satisfy the Statute. When, pre-Code, a defendant, in an action on a contract within the Statute, did not plead the Statute and admitted the oral contract in his answer, some courts held that the oral contract was enforceable because of the defendant's pleaded admission.⁹ A sounder reason for such a position, however, was that the defendant waived the affirmative Statute of Frauds defense by not asserting it.¹⁰ When the defendant

³ L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 1003 (1972). Their comment is set out in note 52 *infra*.

⁴ See text accompanying notes 8-22 *infra*.

⁵ See text accompanying notes 51-55 *infra*.

⁶ See text accompanying notes 76-85 *infra*.

⁷ See text accompanying notes 121-139 *infra*.

⁸ *E.g.*, UNIFORM SALES ACT § 4.

⁹ *Sandling v. Kearney*, 154 N.C. 596, 70 S.E. 942 (1911) (land transaction). See 1 S. WILLISTON, SALES § 101, at 251 (rev. ed. 1948); Annot. 22 A.L.R. 735 (1923).

¹⁰ Early procedure codes were divided on the question of whether the Statute of Frauds had to be affirmatively pleaded, C. CLARK, CODE PLEADING 420-21 (1928); but modern codes generally designate it an affirmative defense. See, *e.g.*, FED. R. CIV. P. 8(c); N.Y. R. CIV. PRAC. 3018(b). Failure to plead an affirmative defense results in its waiver, 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1278, at 339 (1969).

in such an action did plead the Statute of Frauds, yet in his answer admitted the oral contract or later in the action admitted it sua sponte, most pre-Code courts read the Statute strictly and refused to allow the admission to make the oral contract enforceable.¹¹ Some of these courts were influenced by the fear of encouraging defendant's perjury.¹² Other courts held, however, that such a voluntary admission by the defendant did make the oral contract enforceable. Some courts so held on the ground that the admission, particularly where made in a signed pleading or deposition, satisfied the written memorandum provision of the Statute.¹³ An occasional court so held, not on the basis of any provision of the Statute, but because the "purpose of the Statute" had been satisfied as the defendant's admission showed that plaintiff was not fraudulently misrepresenting the existence of the contract.¹⁴

The few courts which squarely faced the involuntary admission question prior to the Code generally encountered additional difficulties.¹⁵ Two often-cited cases, *Cash v. Clark*¹⁶ and *Smith v. Muss*,¹⁷ held that an involuntary admission did not satisfy the pre-Code Statute, reasoning first, that to allow it to do so would wrongfully deprive

¹¹ *Thomas J. Baird Inv. Co. v. Harris*, 209 F. 291 (8th Cir. 1913) (land contract, admission in pleading); *Cornett v. Clere*, 193 Ky. 590, 236 S.W. 1036 (1922) (land contract, admission in pleading). See C. BROWNE, *STATUTE OF FRAUDS* § 515, at 566 (4th ed. 1880); 4 S. WILLISTON, *CONTRACTS* § 568, at 32 n.11 (3d ed. 1961); Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355 (1952); Annot. 22 A.L.R. 723 (1923).

¹² See text accompanying notes 97-109 and cases cited in note 98 *infra*; Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355 (1952).

¹³ *Pollin v. Perkins*, 223 Md. 532, 165 A.2d 908 (1960) (land contract, admission in testimony); *McCall v. Lee*, 182 N.C. 114, 108 S.E. 390 (1921) (land transaction, signed pleading a memorandum). See 2 A. CORBIN, *CONTRACTS* § 519, at 757, 760 (1950); L. VOLD, *SALES* § 22, at 133 (2d ed. 1959); 1 S. WILLISTON, *SALES* § 101, at 251 (rev. ed. 1948); Note, 38 CORNELL L.Q. 604 (1953).

¹⁴ *Carlsen v. Carlsen*, 49 N.J. Super. 130, 139 A.2d 309 (1958) (land agreement, admission in court); *Zlotziver v. Zlotziver*, 355 Pa. 299, 49 A.2d 779 (1946) (land agreement, admission in testimony); *Huffine v. McCampbell*, 149 Tenn. 47, 257 S.W. 80 (1923) (land agreement, admission in voluntary deposition). See 2 A. CORBIN, *CONTRACTS* § 519, at 761 (1950).

¹⁵ *Huffine v. McCampbell*, 149 Tenn. 47, 257 S.W. 80 (1923) (land agreement, dictum); *Davis v. Stambaugh*, 163 Ill. 557, 45 N.E. 170 (1896) (land agreement, admission compelled by court). See 2 A. CORBIN, *CONTRACTS* § 519, at 758 (1950); Degnan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury*, 43 TEX. L. REV. 435, 447 (1965).

¹⁶ 61 Mo. App. 636 (1895) (admission in compelled deposition).

¹⁷ 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952), *app. den.*, 281 App. Div. 957, 122 N.Y.S.2d 377 (1953) (lumber contract, admission in compelled deposition in prior action), noted in 38 CORNELL L.Q. 604 (1953). See discussion of the case in text accompanying notes 58 & 59 and in note 68 *infra*.

defendant by judicial duress of his right to use the Statute as a bar,¹⁸ and second, that such a doctrine would make the Statute impotent.¹⁹ An additional obstacle to the use of an involuntary admission encountered by early pre-Code courts was the then-prevailing attitude in the law of discovery that one party to an action could not compel the other to help prove his case.²⁰ A rare pre-Code case such as *Trossbach v. Trossbach*,²¹ which was hailed by Corbin as showing "the finest understanding of the purposes of the statute,"²² overcame all these obstacles and held that the defendant's involuntary admission in court did make an oral sales contract enforceable.

Thus, prior to the addition of the Code admission provision to the Statute of Frauds, although some liberal courts allowed satisfaction by a voluntary admission, the plaintiff was not, except in the rarest case, permitted to satisfy the Statute by compelling defendant's admission. As a result, the defendant was permitted, even though he would admit the oral contract in court, to renege on that contract with impunity.

Criticism of the pre-Code Statute of Frauds on the ground that the dishonesty it allowed was as bad or worse than the fraudulent misrepresentation which it sought to prevent is almost as old as the Statute itself.²³ Leading commentators urged amending the Statute

¹⁸ See discussion of this objection in text accompanying notes 56 & 57 *infra*.

¹⁹ See discussion of this objection in text accompanying notes 68-71 *infra*.

²⁰ See discussion of this objection in text accompanying notes 94 & 95 *infra*.

²¹ 185 Md. 47, 42 A.2d 905 (1945). This was an action for specific performance of an oral contract to sell land. The court held the Statute of Frauds satisfied by defendant's admission of the contract in his testimony in court, saying, "the purpose of the Statute of Frauds is to protect a party, not from temptation to commit perjury but from perjured evidence against him." 185 Md. at 55, 42 A.2d at 908. The facts did not show whether defendant's admission was voluntary or involuntary, but the court in speaking of defendant's temptation to commit perjury was clearly referring to the situation where defendant is asked by his opponent to admit the contract, for the temptation occurs only on such questioning.

In *Brender v. Stratton*, 216 Mich. 166, 184 N.W. 486 (1921), the court held that testimony, both voluntary and involuntary, which admitted the oral land contract satisfied the Statute of Frauds.

²² 2 A. CORBIN, CONTRACTS § 519, at 761 (1950). See also *Id.*, § 317, at 142.

Williston also approved the *Trossbach* decision. 4 S. WILLISTON, CONTRACTS § 267A, at 19-20 (3d ed. 1961).

²³ Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916). Corbin stated, "It is believed by many that . . . the statute perpetrates more injustice than it prevents," and "gain in the prevention of fraud is attained by the Statute . . . at the expense of permitting persons who have in fact made oral promises to break those promises with impunity and to cause disappointment and loss to honest men." 2 A. CORBIN, CONTRACTS § 275, at 38 (1950). Stevens found the welshing permitted by the

to control this abuse. Williston for instance, advocated legislation "liberalizing the means of enforcing oral contracts once these have been found to exist."²⁴ Similarly, Corbin suggested that "[a]n amendment to the statute would probably be desirable providing that it shall not be effective as a defense except to a party who is willing to submit himself to examination in court on the merits of the case and who under oath denies making the promise as alleged."²⁵

In 1954, Parliament repealed the English Statute of Frauds provi-

Statute contrary to "conscience and morals." Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355, 356 (1952). Willis concluded that the Statute "no longer [prevents] fraud, if [it] ever did, but rather [is] a cause of fraud." Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 541 (1928). G. BOGERT, W. BRITTON & W. HAWKLAND, *CASES AND MATERIALS ON THE LAW OF SALES AND SECURITY* 23 (4th ed. 1962); Note, 38 CORNELL L.Q. 604 (1953); Note, *Statute of Frauds: Section Seventeen in the Light of Two and a Half Centuries*, 13 CORNELL L.Q. 303 (1928).

²⁴ 3 S. WILLISTON, *CONTRACTS* § 448, at 347 (3d ed. 1960). See also Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355, 356, 381 (1952). That commentator recommended "changing the law so that it will conform with conscience and morals" and that "[t]he statute should not be recognized as a defense except where the defendant can and does deny the contracting." *Id.*

²⁵ 2 A. CORBIN, *CONTRACTS* § 257, at 13 (1950). In addition, the New York Law Revision Commission, in a study prior to its well-known critique of the UNIFORM COMMERCIAL CODE, recommended amending the Statute of Frauds to make an oral contract enforceable when defendant voluntarily or involuntarily admitted it in court. The Commission's Report stated:

The ethics of using the Statute of Frauds to avoid an undisputed agreement have been questioned. The Commission believes that, at least, the defense should not be available to a party who has admitted the agreement. This approach is particularly appropriate to the Statute governing the sale of goods, which is designed to discourage fraudulent claims and not to caution against the making of unwise and ill-considered promises.

1960 REPORT OF [NEW YORK] LAW REVISION COMMISSION 252-53, Leg. Doc. (1960) No. 65(F) 8, 9.

The Report recommended the addition of the following provision to the Statute of Frauds relating to the sale of goods, making the oral contract enforceable if:

The party against whom enforcement is sought admits voluntarily or involuntarily in his pleading or at any other stage of an action or special proceeding facts which if stated in a memorandum would have made a sufficient memorandum of the agreement sought to be enforced, but the contract is not enforceable under this provision beyond the quantity of goods admitted.

Id. at 249. The Commission had earlier recommended a similar amendment to the Statute of Frauds relating to contracts not to be performed within one year. 1953 REPORT OF [NEW YORK] LAW REVISION COMMISSION 536, Leg. Doc. (1953) No. 65(0) 4. Neither recommendation was enacted into law.

sions requiring that contracts for the sale of goods be in writing.²⁶ Parliament's study committees had found that "on the whole [the Statute of Frauds provisions] promote rather than restrain dishonesty."²⁷

The Uniform Commercial Code draftsmen rejected the English suggestion that the Statute of Frauds be repealed, determining that it should be preserved in order to retain its benefits in the prevention of fraud, but that it should be revised to prevent its use as a device to evade valid oral contracts.²⁸ To this end, the required contents of the written memorandum which satisfied the Statute were greatly simplified;²⁹ a provision was added allowing satisfaction between merchants by a written memorandum sent to the party to be charged;³⁰ and the Code admission provision was added.

III. THE CODE STATUTE OF FRAUDS ADMISSION PROVISION

Uniform Commercial Code Section 2-201(3)(b), dealing with contracts for the sale of goods, states:

A contract which does not satisfy the requirements of subsection (1)³¹ but which is valid in other respects is enforceable . . .

²⁶ Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. II, c. 34. See Note, *Contracts: Statute of Frauds*, 40 CORNELL L.Q. 581, 585 (1955).

However, the English Statute of Frauds pertaining to contracts of guaranty was retained because of its "cautionary" function, as was the Statute regarding contracts for the sale of land because of the "importance, longevity and technicality" of land transactions. Note, 68 HARV. L. REV. 383, 384 (1954).

²⁷ LAW REFORM COMMITTEE, FIRST REPORT, CMND. No. 8809 at 3 (1953); See also LAW REVISION COMMITTEE, SIXTH INTERIM REPORT, CMND. No. 5449 at 11 (1937).

²⁸ UNIFORM COMMERCIAL CODE § 2-201, Comments 1, 2, & 7. Comment 1 is quoted in note 43 *infra*. Professor Hawkland has stated, "The philosophy underlying the Statute of Frauds as it appears in section 2-201 is that formal requirements for sales contracts do more good than harm, but that they should be formulated in such a way that they prevent fraud, and not aid it." W. HAWKLAND, *SALES & BULK SALES* 26 (2d ed. 1958).

²⁹ UNIFORM COMMERCIAL CODE § 2-201(1), set out in note 31 *infra*.

³⁰ UNIFORM COMMERCIAL CODE § 2-201(2). Mr. Richard Duesenberg recently stated: To meet this criticism [that pre-Code Statutes of Frauds permitted a party to renege on an oral bargain], the Code liberalized certain rules on how the statute might be satisfied. One of these is found in section 2-211(3)(b)

Richard Duesenberg, Chairman of the Subcommittee on General Provisions, Sales, Bulk Transfers and Documents of Title of the American Bar Association's Section on Corporation, Banking and Business Law, 30 BUS. LAW 847, 849 (1975).

³¹ UNIFORM COMMERCIAL CODE § 2-201(1) states:

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

(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 [Footnote added].

Section 8-319(d) dealing with contracts for the sale of investment securities is to the same effect but adds that the contract is not enforceable beyond the price admitted.³²

IV. DOES THE CODE ADMISSION PROVISION INCLUDE INVOLUNTARY ADMISSIONS?

Many commentators deny or doubt that the language "admits in his . . . testimony or otherwise in court" covers admissions made on the interrogation of an adversary, that is, involuntarily;³³ and they, therefore, would read this new language as allowing only voluntary admissions to satisfy the Statute. But when would a party who has pleaded the Statute of Frauds voluntarily admit the oral contract in court and thus give up the defense? He might, of course, admit it inadvertently. It seems that the only situation in which he would intentionally admit it and abandon the defense would be when he had determined during the suit that he wished to rely on another defense stronger than the Statute, but which required the admission of the oral contract. One example of this type of defense would be that the oral contract had been satisfied or released. It is clear, however, that the above-quoted language was not added to the Statute of Frauds solely to cover these limited situations.

A. *The Ordinary Meaning and Construction of the Admission Provision*

The ordinary meaning of the word "testimony"—evidence given

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.

³² UNIFORM COMMERCIAL CODE § 8-319(d) states:

A contract for the sale of securities is not enforceable by way of action of defense unless . . . the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

³³ See text accompanying notes 50-55 *infra*.

by a witness under oath³⁴—includes *all* testimony. To read the word as meaning only evidence given voluntarily and to hold that evidence given on cross-examination is not “testimony” is clearly unwarranted unless other language in the Statute or some independent principle of law compels the limitation. No such language or principle exists. Furthermore, even if “testimony” could be read to mean only that testimony given voluntarily, the additional statutory language “or otherwise” would include that given on examination of the adversary. Similarly, the ordinary meaning of the word “admit”—to grant or accept something as true or valid³⁵—is broad enough to include the acceptance of the truth of a fact in response to a question of an adversary. The cross-examiner’s question “Do you admit that . . . ?” properly uses the word.³⁶ It is therefore difficult to understand why eminent commentators have argued that the admission provision may not apply to involuntary admissions on the ground that this language is unclear and ambiguous.

A possible source of confusion as to the meaning of “admit” is that in certain situations the only proper and legal admission is one made voluntarily and thus, in these situations, its meaning may be said to be implicitly limited to voluntary admissions. For example, in a fifth amendment or a privileged-communication situation, the legal principle involved can be effective only if the party is privileged to remain silent; and therefore the only proper admission comes voluntarily, by waiver of that privilege. It is essential, though, to recognize that this limitation of the ordinary meaning of “admit” occurs only when a compelling need exists, such as the need for protection against self-incrimination or for the encouragement of privileged communications. It is further necessary to recognize that in the Statute of Frauds situation there is no need to allow a party to renege on a valid and admitted oral contract. The law nowhere grants such a right. The only possible source of a privilege to renege would be the Code Statute of Frauds itself; but the Statute states that an oral contract is unenforceable, and hence a party may renege on it, only if there is no writing, receipt and acceptance, payment or admission specified by the Statute. Where an admission or one of the other methods for

³⁴ See BLACK’S LAW DICTIONARY 1646 (4th ed. 1951); WEBSTER’S NEW INTERNATIONAL DICTIONARY 2619 (2d ed. 1957).

³⁵ See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 17 (1970); WEBSTER’S NEW INTERNATIONAL DICTIONARY 35 (2d ed. 1957).

³⁶ Professor Hawkland so uses the word in asking whether plaintiff can compel defendant on the stand “to admit the fact that an oral contract was made.” W. HAWKLAND, SALES & BULK SALES 31 (2d ed. 1958).

satisfying the Statute exists, the contract is enforceable. Hence the Statute of Frauds situation is one where the law does not give a special right the preservation of which requires that a party be privileged to remain silent, and therefore there is no basis here for limiting the meaning of "admit" to a voluntary admission.

The Code admission provision does unambiguously apply to involuntary admissions. If, however, the provision is ambiguous in this regard, Uniform Commercial Code Section 1-102 (1) provides that, "This Act shall be liberally construed and applied to promote its underlying purposes and policies." The purpose of the original English Statute of Frauds of 1677 was stated in its preamble to be, "For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury."³⁷ Defendant's admission, voluntary or involuntary, of the oral contract alleged by plaintiff insures that plaintiff is not fraudulently proving the contract by perjured testimony and so accomplishes the original purpose of the Statute.

Are there other functions served by the written memorandum provision of the sales Statute of Frauds today, in addition to its original function, which might not be fulfilled by an involuntary admission? Professor Allan Farnsworth made a study of this question for the New York Law Revision Commission and rejected as insignificant both the need of a writing to caution the parties against making an ill-considered sales agreement and the special need of a writing found in land contracts. Professor Farnsworth found that "the justification of a Statute of Frauds as to the sale of goods must be today, just as it was in the time of its origin in 1677, its evidentiary function, the prevention of fraudulent claims."³⁸

³⁷ 29 Car. II, c. 3 (1677).

³⁸ Professor Farnsworth's report reads:

Before discussion of the specific problems raised by the existing provision [of the pre-Code sales Statute of Frauds] and the Code proposal, it would be well to examine briefly the purpose of such a statute. Three possible functions are commonly suggested: (1) a cautionary, (2) a channeling, and (3) an evidentiary function. The first of these has as its goal the discouragement of bargains hastily entered upon and is well illustrated by the provision requiring a writing for a promise to pay the debt of another. While there may be some ground for the belief that the requirement of a writing in the case of a contract for the sale of goods has had a healthy *in terrorem* effect by encouraging buyers and sellers to keep written records, it is doubtful that this is one of its primary purposes, for it is generally held that the required memorandum need not have been made with the intent to be bound or even to make a memorandum and even a repudiation may satisfy

It may be argued that in the furtherance of this purpose of the Statute of Frauds to prevent proof of false and fraudulent claims, its admission provision should be construed, if it is ambiguous, to encourage the reduction of *all* terms of the contract to writing, and that to allow the involuntary admission of only the fact of the contracting and the quantity term to satisfy the Statute will improperly discourage the reduction of the entire contract to writing. The general desirability of encouraging contracting parties to reduce their entire agreement to writing in order to avoid disputes as to its terms cannot be denied.³⁹ However, construing the Statute to prohibit the use of the involuntary admission has only a minimal and incidental effect in encouraging the reduction of the full contract to writing; and such construction is in disregard of another important policy of the Statute, that of preventing its use as a device to renege on an oral contract. The addition of the involuntary admission procedure to the Statute has only minimal effect in discouraging a writing since a writing is still needed where there is any danger of the opposite party's forgetting the fact of the contracting or the quantity involved or where he may be willing to perjure himself on these matters. In

the statute. Any cautionary function is thus only incidental to the real ends of the statute. Nor is a principal end of the statute as to the sale of goods the channeling of transactions so as to make it easy to identify those agreements which are legally enforceable. This may be a substantial function of the statute as to sales of land, but the statute as to sales of goods may be satisfied not only by a memorandum but also by part payment or by receipt and acceptance, and from the thousands of cases in which the parties have brought before the courts their controversies as to these requirements, the channel must indeed be a murky one.

If the cautionary and channeling effects are negligible, the justification of a Statute of Frauds as to the sale of goods must be today, just as it was in the time of its origin in 1677, its evidentiary function, the prevention of fraudulent claim claims. And on one point most would agree—that the statute is not intended to deny enforcement to agreements *admittedly* made but lacking in the required formalities.

1960 REPORT OF [NEW YORK] LAW REVISION COMMISSION 259-260, Leg. Doc. (1960) No. 65(F) 8 & 9. The English Parliament came to this same conclusion in repealing the sales Statute of Frauds while retaining the Statute for contracts of guaranty and for the sale of land. See text accompanying notes 26 & 27 *supra*.

See also I. MACNEIL, *CASES AND MATERIALS ON CONTRACTS, FUNCTIONAL SUCCESS OF WRITING REQUIREMENT STATUTES* 1316 (1971); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-804 (1941); Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39 (1974).

³⁹ A classic statement of this proposition is found in Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747-48 (1931).

addition, since the writing required by the Statute need contain only a statement of the contracting and the quantity term,⁴⁰ the encouragement given to reduce all contract terms to writing comes only incidentally, from the likelihood that more than the minimal terms will be included in the writing.

On the other hand, the aim of the Code draftsmen to prevent the use of the Statute as a device for renegeing on an oral contract is apparent from its background.⁴¹ It is likewise apparent in the written memorandum provision of the Statute.⁴² Plaintiff can prevent defendant's renegeing by the production of a simple written memorandum showing only the contracting and the quantity, even though the result of this provision is to afford plaintiff the opportunity to falsely prove terms of the contract other than the quantity term. In sum, the Code's position is that the evil of allowing a defendant to use the Statute to renege is greater than the danger of plaintiff's misleading the court by false proof of terms not required in the written memorandum.⁴³ Applying this same Code policy in construing the admission provision results in allowing the use of the involuntary admission in the interest of preventing renegeing, even at the expense of minimally and incidentally discouraging the reduction of the entire contract to writing.

These conclusions as to the purposes and policies of the sales Statute of Frauds have found general support.⁴⁴ If the Code admission

⁴⁰ The Statute of Frauds on investment securities also requires a statement of the price term. See text accompanying note 31 *supra*. See also note 32 *supra*.

⁴¹ See text accompanying notes 8-30, particularly at note 28 *supra*.

⁴² See note 31 *supra*.

⁴³ UNIFORM COMMERCIAL CODE § 2-201, Comment 1 reads in part:

The required writing need not contain all the material terms of the contract . . . All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction . . . Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud.

Professor Allan Farnsworth in his study of the pre-Code New York sales Statute of Frauds noted:

There is a . . . pressing question . . . whether the evil to be prevented [by the Statute] relates only to the false claim of an agreement when in fact there was none, or whether an attempt should also be made to minimize the danger of fraudulent misstatement of terms by one party to an admitted agreement. The Code adheres to the former view in requiring only a scant memorandum . . .

1960 REPORT OF [NEW YORK] LAW REVISION COMMISSION 260, Leg. Doc. (1960) No. 65(F) 16.

⁴⁴ The New York Law Revision Commission supported these conclusions in recommending that the sales Statute of Frauds be amended so as to make an oral contract

provision is ambiguous it should therefore be construed to include involuntary admissions to promote such purposes and policies.

B. *Drafting History of the Admission Provision*

The 1952 version of the Code Statute of Frauds admission provision provided that an oral contract was enforceable "if the party against whom enforcement [was] sought [admitted] in his pleading or otherwise in court" that a contract was made; it did not include the present additional language regarding an admission in "testimony."⁴⁵ Some authorities, including Professor William Hawkland, commented that it was unclear whether this language applied to an involuntary admission.⁴⁶ Their reasoning presumably was that since an admission in a pleading is voluntary, "pleading or otherwise in court" could be read as meaning in a pleading or other voluntary admission in court. This uncertainty was compounded by the fact that the Official Comment to the provision spoke only of an admission by "pleading, by stipulation or by oral statement before the court." In addition, the Comment made no mention of a change in the law which had, pre-Code, almost invariably refused to allow an involuntary admission to satisfy the Statute.⁴⁷

enforceable by defendant's involuntary admission. See text accompanying notes 25 & 38 *supra*.

The RESTATEMENT OF CONTRACTS generally supports the use of the involuntary admission. See text accompanying notes 88-91 *infra*.

Corbin, in his pre-Code treatise, while asserting that the Statute "renders some service by operating *in terrorem* to cause contracts to be put in writing" and suggesting that the Statute be retained for this purpose, urged that it be amended so as to be available as a defense only to a defendant who denied under oath the making of the contract. 2 A. CORBIN, CONTRACTS § 275, at 13 (1950).

Professor Ronan Degnan, stating that the principal argument advanced in modern justification of the Statute is that its very existence is an admonition that important matters be put in writing, pointed out that "[t]his incentive would remain" under a system which allows an involuntary admission to satisfy the Statute. Degnan, *The Evidence Law of Discovery: Exclusion Because of Fear of Perjury*, 43 Tex. L. Rev. 435, 450 (1965). See also authorities cited in note 38 *supra*.

⁴⁵ UNIFORM COMMERCIAL CODE § 2-201(3)(b) (1952 version).

⁴⁶ W. HAWKLAND, SALES & BULK SALES 31 (1st ed. 1955), set out in note 53 *infra*. See also the New York Law Revision Commission's comment in note 48 and accompanying text *infra*.

⁴⁷ UNIFORM COMMERCIAL CODE § 2-201, Comment 7. The language of Comment 7 in the 1972 Official Text with Comments is the same as the original 1952 language of the Comment; it was not revised when the statute was revised in 1957. The Code Editorial Board's explanation of the statutory revision, set out in the text accompanying note 49 *infra*, must however be read into the current Comment. See the New York Law Revision Commission's reference to the language of Comment 7 in note 48 *infra*.

The influential New York Law Revision Commission's study of the 1952 Code draft noted "[a] question . . . whether paragraph (b) [of section 2-201(3)] applies to involuntary admissions—*e.g.*, admissions elicited by cross-examination."⁴⁸ Section 2-201(3)(b) was revised in the 1957 draft of the Code by adding "testimony or" after "pleading." The Code Editorial Board gave this explanation for the change, "Reason: Subsection (3)(b) was revised to meet the suggestions of the New York Commission that its application to admissions on cross-examination should be clarified."⁴⁹

C. Commentaries on the Code Admission Provision

An occasional commentator has asserted flatly that an involuntary admission does not satisfy the Code sales Statute of Frauds.⁵⁰

As to pre-Code law on involuntary admissions, *see* text accompanying notes 15-22 *supra*.

⁴⁸ 1956 REPORT OF THE [NEW YORK] LAW REVISION COMMISSION 368, Leg. Doc. (1956) No. 65(D) 36. The 1955 REPORT OF THE [NEW YORK] LAW REVISION COMMISSION 372, Leg. Doc. 65(C) 38 stated, "There may arise the question whether under this language [of the 1952 version of § 2-201(3)(b)] the party seeking to enforce an oral agreement may call the other party as a witness and force him to admit or deny the making of the contract. The Comment does not indicate that such was intended, but it is not clearly foreclosed by the language of the section."

⁴⁹ The 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 25 (1957) states, "In the 1957 version of the Code the 1952 version [of § 2-201(3)(b)] was changed . . . to make it clear that it applied to admissions on cross-examination." 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 states, "The word 'testimony' was added . . . to be certain that statements made during cross-examination would qualify as admissions under this section [2-201(3)(b)]." *See* Note, *The Statute of Frauds Under Article 2 (Sales) of the Uniform Commercial Code*, 15 SYRACUSE L. REV. 532, 540 (1964). UNIFORM COMMERCIAL CODE § 8-319(d) was similarly revised in the 1957 Code revision. 6 BENDER'S UNIFORM COMMERCIAL CODE SERVICE § 8-319, at 1-613 (1968). This section is set out in note 32 *supra*.

⁵⁰ R. ANDERSON, UNIFORM COMMERCIAL CODE (2d ed. 1970) originally took this position, but the position is qualified in the 1973 Supplement. *See* note 54 *infra*.

⁵⁰ NEW YORK JURISPRUDENCE, *Sales* § 26, at 553 (1966) states, "It is unlikely that a party can be forced to admit the contract in his testimony. Accordingly, a deposition signed by a party under duress is not a sufficient memorandum or writing to take the case out of the statute of frauds."

Mr. William Davenport, when chairman of the Subcommittee on Sales, Bulk Sales and Documents of Title of the American Bar Association's Section on Corporation, Banking and Business Law, stated, "Although Official Comment 7 may not clearly indicate, the admission referred to [in § 2-201(3)(b)] is a voluntary admission, whether in testimony by deposition or in open court. The very inclusion of a statute of frauds in the Code suggests the foregoing view of its character as a defense. An opposite

More than a score of commentators⁵¹ have stated that it is uncertain whether an involuntary admission satisfies the Statute.⁵² Included in

view would destroy it as a defense for the honest party." Annotation, 26 SMITH HURD ILL. ANN. STATS. Ch. 26, § 2-201, at 112 (1963).

⁵¹ See notes 52-54 *infra*.

⁵² Professor (now Justice) Robert Braucher said of § 2-201(3)(b), "[T]here seems as yet to have been no clear ruling on the question whether the admission can be sought by examination before trial." (Professor Braucher cites Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355 (1952), the New York Law Revision Commission Report recommending that the 1952 Admission Provision be amended to make clear its application to cross-examination, see text accompanying note 48 *supra*, and Smith v. Muss, 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952), *app. den.*, 281 App. Div. 959) Braucher, *Sale of Goods in the Uniform Commercial Code*, 26 LA. L. REV. 192, 202 (1966). Perhaps the uncertainty expressed by Professor Braucher is limited to the propriety of the use of the pretrial device, but since all three citations deal not with that question but with the general one of the propriety of an involuntary admission, the uncertainty seems to go to the latter question.

Professor Donald Clifford stated, "The draftsmen of the provision have given no answer to the question [of the involuntary admission], and it appears to be in doubt." Clifford, *Article Two: Sales*, 44 N.C.L. REV. 539, 555 (1966).

Mr. Richard Duesenberg, as chairman of the Subcommittee on General Provisions, Sales, Bulk Transfers and Documents of Title of the American Bar Association's Section on Corporation, Banking and Business Law, remarked in discussing the 1974 Alabama Supreme Court case, *Cox v. Cox*, 292 Ala. 106, 289 So.2d 609 (1974), (which he incorrectly attributes to the Arkansas Supreme Court), that there is "considerable speculation" whether § 2-201(3)(b) applies to involuntary admissions. Duesenberg, *General Provisions, Sales, Bulk Transfers and Title*, 30 BUS. LAW. 847, 849 (1975). Mr. Duesenberg also asserted that the Alabama court, which stated it was not passing on the involuntary admission question in that defendant had denied the contract and the question was therefore not before it, did not "enthusiastic[ly] embrace" the involuntary admission doctrine. *Id.* However, he seems to base this assertion on the ground that the defendant had *voluntarily* admitted the contract in his testimony. He also indicated that *Com v. Cox* was the first Supreme Court commentary on involuntary admissions, but his treatise with Professor Laurence King, see note 56 *infra*, notes that the Iowa Supreme Court approved the use of an involuntary admission in *Quad County Grain, Inc. v. Poe*, 202 N.W.2d 118 (Iowa 1972). See note 127 and accompanying text *infra*. The Georgia Supreme Court also approved the involuntary admission doctrine in 1972 in *Hale v. Higginbotham*, 228 Ga. 823, 188 S.E.2d 515 (1972). See note 129 and accompanying text *infra*.

Professors Lon Fuller and Melvin Eisenberg in their casebook BASIC CONTRACT LAW 1003 (3d ed. 1972), say of § 2-201(3)(b):

The ambit of the provision is unclear, but its impact may be striking. For example, under this section can a plaintiff bring suit on an oral contract, file a notice of deposition, force the defendant to admit that the oral contract was in fact made, and thereby use modern discovery procedure to effectively blunt the thrust of the basic requirement of a writing in a sale-of-goods case?

this latter group are some of the most widely recognized authorities in the field of commercial law. This position is also taken in most of the current commercial law treatises, including those of Professor William Hawkland.⁵³ *Anderson's Uniform Commercial Code*⁵⁴ now

Professor William Hogan in his New York Annotation to § 2-201(3)(b) stated, "It is unlikely that a party can be forced to admit the contract in his testimony." (Professor Hogan cites *Smith v. Muss*, 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952), *app. den.*, 281 App. Div. 957, 122 N.Y.S.2d 377 (1953)). The Historical Note which follows states, "Subsection (3)(b) was revised to meet suggestions of the Law Revision Commission that its application to admissions on cross-examination be clarified . . ." 62 ½ MCKINNEY'S CONSOL. LAWS OF N.Y. § 2-201, at 121 (1964).

Professor Richard Hudson stated, "Another question [with regard to § 2-201(3)(b)] is . . . whether the opposite party may be compelled to admit on the trial, or in other pre-trial procedures, that a contract was made. [W]ithout attempting to thoroughly explore the subject, and with awareness of the futility of attempts to decide what legislative intent was as to changing prior law, it is suggested that the general thrust of the Iowa situation is to prohibit compelling a party to admit that a contract was made." Hudson, *Contracts in Iowa Revisited—1966*, 15 DRAKE L. REV. 61, 77 (1966).

Professors Donald King, Calvin Kuenzel, T.E. Lauer, Neil Littlefield & Bradford Stone in their *CASES AND MATERIALS ON COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* 3-31 to 33 (2d ed. 1974), pose the questions, "To what extent will a party relying on an oral agreement be permitted to destroy the statute of frauds by compelling his adversary, through modern procedural devices, to admit the existence of the oral agreement? What is the fate under the Code of a party who wishes to use the statute of frauds to welch on a deal?" They find that, "Unfortunately, the language of Section 2-201(3)(b) is not altogether clear or definitive as might be wished."

Professor Jerry Mashaw stated, "[T]he U.C.C. [§ 2-201] . . . may through its exceptions now render unenforceable only the oral contracts of persons willing to risk perjuring themselves." 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).

Professors Harry Pratter and Bruce Townsend have said of § 2-201(3)(b), "This subsection does not make it clear whether a party can *involuntarily* be made to admit, from the witness stand . . . the making of a contract." Annotation, 5 BURNS IND. STATS. Pt. 2, at 34.

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 (1963) (It is a "point of conjecture," citing W. HAWKLAND, *SALES & BULK SALES*, (1st ed. 1955); Cudahy, *The Sales Contract—Formation*, 49 MARQ. L. REV. 108, 110 (1965) ("It is an interesting question of policy"); Note, *The Uniform Commercial Code: Article 2—Sales*, 29 ALBANY L. REV. 231, 241 (1965) (It is an "unresolved" problem, citing Hawkland, the New York Law Revision Commission's recommendation on revising the 1952 admission provision, and Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355 (1952)).

⁵³ Professor William Hawkland, in the First Edition of his *SALES & BULK SALES* (1955), after quoting UNIFORM COMMERCIAL CODE § 2-201(3)(b) (1952 version), says:

There is no such provision in the Uniform Sales Act, but a num-

ber of courts have held that a party cannot admit the contract in court and treat the Statute of Frauds as a defense. A more difficult problem, which seldom has been adjudicated, is whether or not the plaintiff, over proper evidentiary objection, can compel the defendant on the stand to admit the fact that an oral contract was made. It would seem that the defendant should be privileged not to make the admission if it has the legal effect of depriving him of the defense of the Statute of Frauds, but this is a matter upon which lawyers and judges are not in agreement, and a plaintiff would be well advised to try to compel the admission. Subsection 2-201(3)(b) has no specific answer to the question.

Id. at 31. The Second Edition of this work in 1958, after quoting the 1957 revision of § 2-201(3)(b), repeats the First Edition comment set out above verbatim. *Id.* at 31.

Professor Hawkland's TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1964), says of § 2-201(3)(b), "This provision is novel, but a few courts operating under the U.S.A. have held that a party cannot admit the contract in court and treat the Statute of Frauds as a defense . . ." *Id.* at 29. He then discusses the question of a demurrer as an admission, after which he states:

A more difficult question is whether or not the plaintiff, over proper evidentiary objection, can compel the defendant on the stand to admit that an oral contract was made. Subsection 2-201(3)(b) does not answer this question, and it will have to be resolved on policy grounds. In this connection, it may be urged, on the one hand, that the defendant should not be required to make the admission, because any waiver of the Statute of Frauds should be exercised voluntarily and not under the threat of perjury. On the other hand, it may be contended that the Statute of Frauds is not designed to protect the welsher. If the defendant made the contract, why should it not be enforceable? If he did not make it, he can deny it and set up the Statute of Frauds. It is only the welsher, therefore, that faces the problem of the "compelled admission," and the law should have little solicitude for him. Since judges are not in general agreement as to how this matter should be handled, the plaintiff would be well advised to try to compel the admission.

Id. at 30.

The identity of the "judges" who disagree on the question of involuntary admission ["which seldom has been adjudicated"] is confusing, no cases being cited, but reading the 1955, 1958 and 1964 comments together and recognizing that no Code decision on the question or an involuntary admission was handed down until 1966, the adjudications referred to must all be pre-Code. The impropriety of using pre-Code decisions which refuse to allow an involuntary admission to satisfy the Statute as authority under the new Code admission provision is discussed in the text accompanying notes 58-59 *infra*.

The effect of Professor Hawkland's failure in his Second Edition to notice that § 2-201(3)(b) had been revised in 1957 to make clear that it applies to involuntary admissions is discussed in the text accompanying notes 64-67 *infra*. His argument that a defendant should not be deprived of his right to the Statute of Frauds defense by an involuntary admission is discussed in the text accompanying note 59 *infra*.

Professor Hawkland's SUM AND SUBSTANCE OF LAW ON SALES (1974) has this to say:

UCC 2-201(3)(b) does not specifically indicate whether a plaintiff, over proper evidentiary objection, can compel the defendant to

admit the fact that an oral contract was made, and thus, in effect, deprive him of the defense of the Statute of Frauds. Nor does UCC 2-201(3)(b) define the phrase "otherwise in court." As a result, it may be argued that the satisfying admission can be made in any proceeding proximately related to the trial, such as pre-trial discovery proceedings, etc.

Under this theory, it is proper to ask the defendant through deposition or interrogatory whether or not he made the oral contract. He should be required to answer the question. The reason why courts should require a defendant to state whether or not he made an oral contract with the plaintiff is that the Statute of Frauds is not designed to shield the witness.

In addition, Richard Duesenberg and Lawrence King, in 3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE § 204(3) (1968), state:

The Code does not speak to the issue of an enforced or compulsory answer, and it is conceivable that jurisdictions will vary on their attitudes as to whether an involuntary response . . . is within the scope of Subsection (3)(b). One attitude is that presumably the answer is truthful, and if it admits the existence of the contract, the statutes should no longer be available in bar of the action. The voluntariness of the answer is viewed to be wholly irrelevant. Indeed, the logic of this attitude could extend to refusing to dismiss on motion of a defendant prior to completion of discovery proceedings, since in those proceedings an admission of the contract might be made. On the other hand, since the Code retains the statute of frauds, a party ought to have the right to assert it, and this right should not be subject to surrender by discovery rules which compel involuntary responses. Which of these views will prevail remains for future cases to determine. (Footnotes omitted.)

Duesenberg and King cite no authority opposed to the use of an involuntary admission. In support of the involuntary admission doctrine they cite (1) *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966), and (2) *Reissman Int'l Corp. v. J.S.O. Wood Prods.*, 10 UCC REP. SERV. 1165 (N.Y. Civ. 1972), both of which held § 2-201(3)(b) barred dismissal of a complaint based on an oral contract, saying that the court in the former case makes "a strong suggestion" and that the court in the latter "added" that compelled testimony can be used to satisfy the Statute, (3) *Cohn v. Fisher*, 118 N.J. Super. 286, 287 A.2d 222 (1972), as strongly suggested that an involuntary admission satisfies the Statute, and (4) *Quad County Grain, Inc. v. Poe*, 202 N.W.2d 118 (Iowa 1972), holding that an admission in testimony, both on direct and cross-examination, is sufficient to satisfy the Statute.

The validity of the above argument opposed to involuntary admission is examined in the text accompanying note 57 *infra*.

Professors John Calamari and Joseph Perillo in *CONTRACTS* 471 (1970) assert that, "The principal question the Code provision [§ 2-201(3)(b)] raises is whether and to what extent the party against whom enforcement is sought can be compelled to admit the existence of the oral contract either during the trial or in pre-trial proceedings." They give no response to the question other than citing Duesenberg and King's prediction that courts will divide on the question. *But see* Professor Perillo's conclusion in 1974 that a party can be compelled to admit the existence of the contract, in text accompanying note 73 and in note 79 *infra*.

takes this position although originally it had stated flatly that an involuntary admission did not satisfy the Statute.⁵⁵

In view of the policies and purposes, plain language, and drafting

Finally, Professor Alphonse Squillante and Professor John Fonesca in 2 S. WILLI-
SON, SALES § 14-9, at 304-5 (4th ed. 1974) say:

What of the question of an admission by the party against whom enforcement is sought concerning the oral agreement; made while he is giving the testimony on the stand in open court? Whether or not the party against whom enforcement is sought can be compelled, over proper objection, to admit the existence of an oral contract is not easily answered . . . The Code does not provide any specific answers to the questions posed above. It does not define any of the phrases which it gives in § 2-201(3)(b). It would be equally forceful to argue that one may satisfy § 2-201(1) by the alternate methods provided in § 2-201(3)(b).

The appended "Practice Pointer" states:

If you represent defendant, the arguments should be made that if the defendant can be compelled to admit the existence of the contract, he should be able to use the statute as a defense and that only formal judicial admissions are contemplated by Sec. 2-201(3)(b) . . . The plaintiff's representative would, on the other hand, seek to broaden the impact of this section by claiming it related to such things as pre-trial conferences, discovery proceedings, and so on. There is no Code law on any of these matters and pre-Code law favors the plaintiff.

They cite no authority directed to the question of the propriety of satisfying the Statute of Frauds by an involuntary admission, although *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966), is cited in connection with the question whether a demurrer is an admission. *Cohn v. Fisher*, 118 N.J. Super. 286, 287 A.2d 222 (1972), is cited in connection with the use of an admission by deposition, and *In re Particle Reduction Corp.*, is cited to illustrate that a casually stated admission can satisfy the Statute.

Professor Squillante similarly stated, "This problem has in no way been answered by either the comments to the Code or through litigation." Squillante, *Sales Law in Iowa Under the Uniform Commercial Code—Article 2*, 20 DRAKE L. REV. 1, 64 (1970), citing Hudson, *Contracts in Iowa Revisited—1966*, 15 DRAKE L. REV. 61 (1966).

⁵⁴ I.R. ANDERSON, UNIFORM COMMERCIAL CODE 281 (2d ed. 1970) states, "A judicial admission does not exist unless the statement is voluntarily made. Hence the answer of a defendant when examined under oath as to whether there was a contract is not to be regarded as an admission for the purpose of the statute of frauds." The only authority cited is *Hawkland*, who, as a New York court has pointed out, does not support this proposition. *Reissman International Corp. v. J.S.O. Wood Products, Inc.*, 10 UCC REP. SERV. 1165 (N.Y. Civ. 1972). The 1973 Supplement to *Anderson* states, "An oral contract is enforceable when there has been an admission of the existence of the contract in pre-trial discovery and the admission is confirmed by the existence of a deposit check given by the buyer. There is conflict of authority, however, as to whether the admission of a contract in a deposition removes the bar of the statute of frauds, the negative view being based on the consideration that the admission was not voluntary."

⁵⁵ See notes 50-54 *supra*.

history of the Code admission provision discussed above, why have so many eminent commentators expressed doubt that it applies to involuntary admissions? The chief argument, as stated by its original proponent Professor William Hawkland, is as follows: "[I]t may be urged, on the one hand, that the defendant should not be required to make the admission, because any waiver of the Statute of Frauds should be exercised voluntarily and not under the threat of perjury," and "the defendant should be privileged not to make the admission if it has the legal effect of depriving him of the defense of the Statute of Frauds."⁵⁶ Professor Hawkland, and the other commentators who make this argument, however, support their contentions only with pre-Code cases and one another as authority.

This argument is specious. The simple error is that under the Code Statute of Frauds a party *has no right or privilege* to renege on an oral contract in this situation, and thus he is not being forced to give up any right or privilege; for this is a situation where the Statute of Frauds provides that the oral contract *is enforceable*, and hence there is no right to renege, because the party against whom enforcement is sought testifies in court to its existence. The only possible source of a right to renege on an otherwise valid and enforceable oral contract is the Statute of Frauds itself, which gives the right only if a writing, a receipt and acceptance, payment, and an admission are all absent.⁵⁷ Here the last of these alternatives is present and the Statute therefore gives no right to renege.

Furthermore there is here no improper duress. Defendant is only asked to speak the truth. He is subjected only to the normal process of interrogation by an adversary; and his admission, rather than being considered ineffective, should be accorded the high degree of probity usually given to statements against interest.

This argument did have force under pre-Code law, when the Statute of Frauds contained no admission provision. Thus in the pre-Code case of *Smith v. Muss*,⁵⁸ a New York court held that an oral contract

⁵⁶ W. HAWKLAND, *SALES & BULK SALES* 31 (1st ed. 1955).

In addition, Professor Lawrence King and his coauthor say, "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 surrender by discovery rules which compel involuntary responses." 3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE, *SALES & BULK TRANSFERS*, § 204(3). Mr. Ronald Anderson has said, "A judicial admission does not exist unless the statement is voluntarily made." 1 R. ANDERSON, *UNIFORM COMMERCIAL CODE* 281 (2d ed. 1970).

⁵⁷ See text accompanying notes 31, 32 *supra*.

⁵⁸ 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952), *app. den.*, 281 App. Div. 957, 122 N.Y.S.2d 377 (1953). See note 17 *supra*.

was unenforceable, even though the defendant had admitted it in a signed deposition, because he "did so *under compulsion* of legal process."⁵⁹ There was validity to this reasoning because the pre-Code Statute contained no admission provision. In addition, pre-Code courts interpreted the Statute strictly, refusing to allow an involuntary admission to make the contract enforceable; and a defendant therefore had the right to renege by asserting the Statute. Thus, pre-Code, to have allowed a party's involuntary admission to satisfy the Statute would have taken this right from under compulsion of legal process. Those who continue to make this argument under present law and who continue to cite *Smith v. Muss* and similar pre-Code cases as current authority overlook the critical change wrought by the addition of the admission provision to the Statute of Frauds.

Sometimes coupled with the argument that a party cannot be compelled to give up the right to the Statute of Frauds defense by an involuntary admission is the argument that the Code admission provision is unclear and ambiguous.⁶⁰ For instance, Professor Donald King and his coauthors state, "The language of Section 2-201(3)(b) is not altogether as clear or definitive as might be wished" on the question of the compelled admission, and therefore its answer "boils down to whether a court wants to constrict the applicability of the statute of frauds as a defense, or whether it wishes to give the statute a broad play."⁶¹ Professor Hawkland says, "Subsection 2-201(3)(b) does not answer this question, and it will have to be resolved on policy grounds."⁶² These commentators and others who have the same difficulty with the language of the admission provision do not explain why they believe it may be necessary to read "admit in his . . . testimony . . . in court" to mean in his voluntary testimony only, rather than to give the language its ordinary meaning. They do not analyze the language or explain what word or part of the provision they find unclear. None of these commentators explains why he believes that the Code Editorial Board may have failed in its avowed purpose of revising the provision to make clear its application to admissions on cross-examinations. Indeed, perhaps significantly, none of these com-

⁵⁹ 203 Misc. at 358, 117 N.Y.S.2d at 503.

⁶⁰ Professor Lawrence King and his coauthor say, "The Code does not speak to the issue of an enforced or compulsory answer, and it is conceivable that jurisdictions will vary in their attitudes as to whether an involuntary response . . . is within the scope of Subsection (3)(b)." 3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE, SALES & BULK TRANSFERS, § 204 (1974).

⁶¹ See note 52 *supra*.

⁶² W. HAWKLAND, SALES & BULK SALES (1st ed. 1955).

mentators mentions the revision or the Board's purpose in making it.⁶³

The above arguments are unconvincing and puzzling. The solution to the puzzle may be Professor Hawkland's position of doubt as to the Code admission provision's application to involuntary admissions. This position was originally taken in the 1955 (First) Edition of his *Sales and Bulk Sales*, which was based on the then-current 1952 draft of the Code.⁶⁴ As related above, because of his and other criticism that the 1952 draft version of the admission provision was ambiguous as to its application to involuntary admissions, the Code Editorial Board revised the provision in its final 1957 Code Revision to make clear that it does apply to involuntary admissions.⁶⁵ Nevertheless, Professor Hawkland in the 1958 (Second) Edition of his *Sales and Bulk Sales*, although setting out the revised provision, repeated verbatim his criticism of the 1952 provision without any mention of the revision.⁶⁶ Either Professor Hawkland concluded that the Editorial Board had been unsuccessful in its effort to answer his criticism and that its effort was so clearly unsuccessful that it was unnecessary to explain why he found it so, or he overlooked the change. The latter explanation of Professor Hawkland's failure to deal with the revision is the more reasonable, and therefore his statement of doubt as to the availability of involuntary admissions to satisfy the Statute of Frauds should be considered applicable to the 1952 version of the admission provision only. Professor Hawkland was the first commentator to doubt the application of the admission provision to involuntary admissions, and for a number of years his was the only treatise dealing with the matter. A number of the later commentators who express the same doubt and who seemingly also fail to recognize the significance of the revision of the admission provision cite Professor Hawkland as authority; others were undoubtedly influenced by his position.⁶⁷ Thus the foregoing arguments against the use of involuntary admissions to satisfy the Statute of Frauds are without substance and, indeed, their very existence is probably attributable to an oversight.

Another argument against the use of involuntary admissions is

⁶³ Professor Hogan does call attention to the revision and the Board's purpose, but his basis for doubting that the Code admission provision permits an involuntary admission to satisfy the Statute of Frauds is pre-Code decisional law, not ambiguity of the language of the provision.

⁶⁴ W. HAWKLAND, *SALES & BULK SALES* (1st ed. 1955). See note 53 *supra*.

⁶⁵ See text accompanying notes 45-49 *supra*.

⁶⁶ W. HAWKLAND, *SALES & BULK SALES* (2d ed. 1958). See note 53 *supra*.

⁶⁷ See note 53 *supra*.

made by Mr. William Davenport, who states, "The very inclusion of the Statute of Frauds in the Code suggests the . . . view [that only voluntary admissions satisfy the Statute]. An opposite view would destroy it as a defense for the honest party."⁶⁸ This argument is fallacious. Involuntary admission procedure by no means destroys the Statute of Frauds defense; for in the situation where it is most needed, that is, where plaintiff seeks to testify falsely to the existence of an oral contract or to the quantity therein, and where defendant will therefore deny these matters, the defense is still fully available to bar plaintiff's claim.

Another commentator reveals a misconception which may be the basis of the argument that involuntary admissions destroy the Statute of Frauds.⁶⁹ He apparently assumes that upon a defendant's denial of the existence of an oral contract on plaintiff's interrogation, plaintiff would then be entitled to introduce proof of the oral contract (and so possibly perjured proof) to disprove the denial. He further assumes that in that case, a finding by the court that defendant's denial was false would constitute an admission by defendant and thus satisfy the Statute. Plaintiff could thus recover on the basis of his perjured testimony, and the Statute of Frauds would indeed be destroyed. The Code admission provision cannot be so read, however. The disproof by plaintiff of defendant's denial is not an admission by defendant.⁷⁰ Only when the defendant actually admits the oral

⁶⁸ Annotation, 26 SMITH HURD ILL. ANN. STATS. Ch. 26, § 2-212 (1963). See note 50 *supra*.

Other commentators, in suggesting that since the Code retains the Statute of Frauds an involuntary admission should not satisfy the Statute, may have this same reasoning in mind. *E.g.*, Duesenberg and King, 3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE, SALES & BULK TRANSFERS, § 204(3) (1974).

Refusing to enforce an oral contract which had been admitted by defendant in his deposition on the ground that the admission was involuntary, a New York court in the pre-Code case *Smith v. Muss* said, "If the compulsory signing of the deposition is to be regarded as thereby [satisfying the Statute], this device, so employed, if recognized, would render the defense of the Statute of Frauds impotent." 203 Misc. 356, 358, 117 N.Y.S.2d 501, 503 (Sup. Ct. 1952). See note 17 *supra*. One commentator criticizes this reasoning saying, "a decision contrary to that in the *Smith* case would further the purpose of the Statute rather than render it ineffective." 38 CORNELL L.Q. 604, 606 (1953).

⁶⁹ 6 AMERICAN BUS. L.J. 602 (1968), criticizing *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 314 (1966).

⁷⁰ *Cox v. Cox*, 292 Ala. 103, 289 So.2d 609 (1974). This case held that where the party against whom enforcement of an oral contract was sought denied the contract in court, a "credibility determination" adverse to the party made by the trial court did not constitute an admission. See also 23 N.Y.S.B. Bull. 116, 118 (1951) ("[I]t

contract does the admission provision come into operation.

It is true that involuntary admission procedure does destroy the Statute of Frauds defense for the defendant who honestly admits to making a contract and to the quantity agreed upon, but would like to use the Statute to bar plaintiff's claim because he is at variance with plaintiff as to other terms of the contract. The Code's position is that the danger of plaintiff's falsely proving such additional terms is not great, and that the advantage obtained by allowing defendant's minimal statements to satisfy the Statute is greater than the danger of plaintiff's falsely proving the additional terms.⁷¹

If the Code admission provision is ambiguous, the courts must answer the question whether it encompasses involuntary admissions. The decisions of the half-dozen courts which have addressed themselves to the question unanimously support the use of involuntary admissions. These decisions came after most of the above commentators' statements, many of these statements having been made in surveys published at the time of the adoption of the Code. Whether the judicial authority has settled the uncertainty of these early commentators is not known. However, five of these statements were made after 1972, when the line of cases had developed.⁷² Of these five, Professor Joseph Perillo, who in 1970 indicated that the question was unanswered, by 1974 had concluded that an involuntary admission could be used to satisfy the Statute. This change was apparently based on the intervening decisions.⁷³ Mr. Ronald Anderson was also forced by the case law to qualify his original position that the admission provision forbids the use of an involuntary admission.⁷⁴ Professor Lawrence King and his coauthor, although stating that certain Code cases strongly support the involuntary admission doctrine, persist in

would seem that a perjurer who refused to admit the making of an oral contract would have a defense")

3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE, SALES & BULK SALES § 2.04 [3], at 2-80 n.33.3 (1975 Supp.) states:

"A denial is not an admission. It sets up a controversy which it is the very purpose of the statute to prevent. To permit the trier of facts to judge the credibility of the denial would be to flaunt the directive of the statute. A judicial recognition of this is expressed in *Cox v. Cox*."

⁷¹ See text accompanying notes 39-44 and note 43 *supra*.

⁷² The cases are set out in the text accompanying notes 121-139 *infra*. One case was decided in 1966, one in 1968 and four in 1972. An additional case, decided in 1974, is set out in the text accompanying note 118 *infra*.

⁷³ See note 79 *infra*.

⁷⁴ See note 54 *supra*.

their earlier position that an answer to the question "remains for future cases to determine."⁷⁵

More than a dozen commentators,⁷⁶ however, support the proposition that the Code admission provision does permit an involuntary admission to satisfy the Statute of Frauds. Included among these commentators are the editors of the latest editions of several texts on sales⁷⁷ and on the Uniform Commercial Code⁷⁸ and other widely recognized authorities. Some of these commentators have expressly taken this position,⁷⁹ while others have implicitly recognized it in stating that the Code admission provision was revised to make clear that it applies to admissions on cross examination,⁸⁰ or in discussing

⁷⁵ See note 53 *supra*.

⁷⁶ See notes 77-85 *infra*.

⁷⁷ Professor Robert Nordstrom in SALES 69 (Hornbook Series 1970) says, "[O]ral admissions in court will likewise assure the trier of facts that some contract has been entered into by the parties. Thus, section 2-201(3)(b) provides that *any* admission in court will suffice to satisfy the statute of frauds . . ." (emphasis added), *citing* In re Particle Reduction Corp., 5 UCC REP. SERV. 242 (1968), which held that an involuntary admission satisfies the Statute.

⁷⁸ Professors James White and Robert Summers in UNIFORM COMMERCIAL CODE 57 (1972), say § 2-201(3)(b) "contemplates the possibility that an oral contract within the statute may become enforceable by virtue of an admission in 'open court' on cross-examination. One recent New York lower court case and a Georgia case support this interpretation." These professors, along with Professor Richard Speidel, also discuss § 2-201(3)(b) in their TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW 753-54 (2d ed. 1974), saying of it:

The underlying policy has been succinctly stated by the late Dean Stevens of Cornell: '[The Statute] should not be recognized as a defense except where the defendant can and does deny the contracting.' Should the defendant be privileged not to make an admission which would deprive him of a defense? It has been held that admissions compelled under oath are sufficient to satisfy the statute of frauds.

⁷⁹ Dean Robert Foster says of § 2-201(3)(b), "Presumably, a party may institute suit on an oral contract and force an admission of the contract under oath from the party sought to be bound." Reporter's Comments, 2A CODE OF LAWS OF S.C. § 10.2-201 at 61 (1966).

Professor Joseph Perillo says, "Under the suggestion made here . . . the defendant . . . could be called upon to deny or admit under oath that the contract was made . . . Such a rule exists under the Uniform Commercial Code [§ 2-201(3)(b)]." Perillo, *The Statute of Frauds in the Light of Functions and Disfunctions of Form*, 43 FORDHAM L. REV. 39, 70 (1974).

⁸⁰ Professor Allan Farnsworth so states, 1960 REPORT OF THE [NEW YORK] LAW REVISION COMMISSION 257, 271 Leg. Doc. (1960) No. 65(F) 13, 27.

Professor William Hogan in his New York Annotations to § 2-201(3)(b) states that the section was revised to make clear that it applies to admissions on cross-examination, but the annotation also states that it is unlikely that a party can be

a defendant's possibly perjured denial under the provision,⁸¹ or in noting that the purpose of the provision is to prevent welshing.⁸² Rarely have these commentators noted any doubt as to the proposition, and hence they have rarely discussed it.⁸³ The only strident voices raised in protest against the doctrine of doubt are those of two law student commentators: one student dismissed the doubt as "ridiculous,"⁸⁴ and the second demanded, "Why shouldn't the defendant be compellable? [I]f there was a contract, he should have to admit it."⁸⁵ The most cogent arguments in support of involuntary admissions can be found in the comments of those who are uncertain about the use of such admissions. For instance, Professor Lawrence King and his coauthor say, "One attitude is that presumably the answer is truthful, and if it admits the existence of the contract, the statute should no longer be available in bar of the action. The voluntariness of the answer is viewed as wholly irrelevant."⁸⁶ Professor Hawkland, after setting out his argument against involuntary admissions, says:

compelled to admit the contract. 62 ½ MCKINNEY'S CONSOL. LAWS OF N.Y. § 2-201, at 121 (1964).

Professors Warren Shattuck and Richard Cosway, Mrs. Marjorie Rombauer and Mrs. Beverly Roseman, so state. Comments, REV. CODE OF WASH. ANN. Title 62A, § 2-201(3)(b), at 125 (1966).

⁸¹ Professor Walter Jaeger remarks, "It has been suggested that given the fallibility of human memory: Does the aforementioned section [2-201(3)(b)] of the UCC encourage or discourage denial under oath of the making of an oral contract?" 3 S. WILLISTON, CONTRACTS § 527, at 711 n.6 (3d ed. 1970).

Professor Norman Lattin questions the soundness of California's refusal to enact § 2-201(3)(b) (see text accompanying note 99 *infra*), asking, "Is it not equally immoral to permit one to escape an honest contract which honest men would likely admit in pleading or on the witness stand, if called by plaintiff?" Lattin, *Uniform Commercial Code, Article 2 on Sales: Some Observations on Four Fundamentals*, 16 HASTINGS L.J. 551, 571 (1965).

Professor Ian MacNeil states, "[U]nder the UCC, an honest man or one unwilling to perjure himself may be bound to a noncomplying oral agreement entered into hastily, because he will admit its existence when called as a witness in the action brought to enforce the agreement . . ." CASES AND MATERIALS ON CONTRACTS 1318-19 (1971).

Spies, *Sales: Article II*, 16 ARK. L. REV. 6, 10 (1961); McKinney, *Personal Property and Sales*, 19 MERCER L. REV. 154, 155 (1968); 23 N.Y.S.B. BULL. 116, 118 (1951).

⁸² Professor Lawrence Vold so states, SALES 88 (2d ed. Hornbook Series 1959).

⁸³ But see discussions of Professors Speidel, Summers and White referred to in note 78 *supra*.

⁸⁴ Comment, *Changes Wrought in the Statute of Frauds by the Uniform Commercial Code*, 48 MARQ. L. REV. 571, 582 (1965).

⁸⁵ Note, *Uniform Commercial Code: Statute of Frauds as to Personal Property*, 4 WAKE FOREST INTRAMURAL L. REV., 41, 72 n.101 (1968).

⁸⁶ See note 53 *supra*.

On the other hand, it may be contended that the Statute of Frauds is not designed to protect the welsher. If the defendant made the contract, why should it not be enforceable? If he did not make it, he can deny it and set up the Statute of Frauds. It is only the welsher, therefore, that faces the problem of the "compelled admission," and the law should have little solicitude for him.⁸⁷

D. *Restatement of Contracts*

Although the *Restatement of Contracts* does not cover contracts for the sale of goods or investment securities, leaving these matters to Uniform Commercial Code coverage, Comment *d* to Section 209 of the *Restatement* dealing with the Statute of Frauds is of interest.⁸⁸ The Comment says that a written deposition may satisfy the Statute and that where the deposition "is made under legal compulsion, it is nonetheless effective unless there is a contrary procedural policy in the state."⁸⁹ Non-Code oral contracts would, under the *Restatement*, generally be enforceable by involuntary admissions. The special "procedural policies," although perhaps precluding use of involuntary admissions to enforce non-Code oral contracts in certain situations⁹⁰ would not seem to apply to Code sales contracts.

⁸⁷ W. HAWKLAND, *SALES & BULK SALES* (1st ed. 1955).

⁸⁸ RESTATEMENT (SECOND) OF CONTRACTS § 209 (Tent. Drafts Nos. 1-7, 1973), reads, "Except in the case of a writing evidencing a contract upon consideration of marriage, the Statute may be satisfied by a signed writing not made as a memorandum of a contract." Comment *a.*, *Rationale* reads, "The rule of this Section reflects the general assumption that the primary purpose of the Statute is evidentiary, that it was not intended to facilitate repudiation of oral contracts. The marriage provision, however, performs a cautionary function as well . . ." *Id.*

⁸⁹ Comment *d* to RESTATEMENT (SECOND) OF CONTRACTS § 209 (Tent. Drafts Nos. 1-7, 1973). The Comment also says that, "An oral statement before the court is treated in some states as the equivalent of a signed writing. See UNIFORM COMMERCIAL CODE §§ 2-201(3)(b), 8-319(d)" and that where such oral statement "is made under legal compulsion, it is nonetheless effective unless there is a contrary procedural policy in the state." *Id.*

⁹⁰ Comment *d* does not say what these contrary procedural policies might be, but the accompanying Reporter's Note cites these pre-Code cases holding that the admission was ineffective because involuntary: *Smith v. Muss*, 203 Misc. 356, 117 N.Y.S.2d 501 (Sup. Ct. 1952), *app. den.*, 281 App. Div. 957, 122 N.Y.S.2d 377 (1953) (*See* text accompanying notes 17, 58-59, and 68 *supra*); *Davis v. Stambaugh*, 163 Ill. 557, 45 N.E. 170 (1896); *Cash v. Clark*, 61 Mo. App. 636 (1895) (*See* text accompanying note 16 *supra*). Two reasons were given in these decisions: First, that defendant should not be compelled by the contempt power of the court to surrender the right to renege on an oral contract by pleading the Statute of Frauds given him by the pre-Code sales law.

E. *Other Possible Bases of Opposition to Involuntary Admissions*

The following matters in connection with the use of involuntary admissions, although not mentioned by the commentators who doubt that such admissions satisfy the Statute of Frauds, may help explain the widespread reluctance to approve their use.

Contracts within the sales Statute of Frauds are not void, but are unenforceable unless there is the requisite written memorandum, performance by receipt and acceptance or by payment, or admission.⁹¹ However, it seems that in certain quarters, oral sales contracts, even though by their terms binding, are considered by the parties to be unenforceable until reduced to writing or performed. One empirical study made prior to the adoption of the Code found that, "The majority of businessmen [surveyed] does not believe that this class of promises [promisees in oral sales contracts] should have legal rights, especially when the potential plaintiff has not performed in reliance upon the oral promise And if the parties do want the law to supervise their transactions, it seems fair to assume that they will reduce their respective commitments to writing."⁹² If this finding is correct, such business parties may well have difficulty in accepting the proposition that the Code admission provision produces a result contrary to their understanding whenever either party chooses to utilize its involuntary admission procedure. Where such parties desire that their oral promises be non-binding until reduced to writing or some performance is made in reliance on them, their oral arrangements should clearly so state.⁹³

As Professor Ronan Degan has pointed out, the pre-Code judicial attitude against allowing coerced admissions to satisfy the Statute of Frauds was a manifestation of the then-prevailing view in the law of discovery that one party could not compel the other to help prove his

In non-Code contract situations today, where the applicable Statutes of Frauds do not contain admission provisions, such policy may still be controlling; but in Code sales contracts it has no pertinence as the Code admission provision has eliminated the right to renege. See text accompanying notes 57-59 *supra*. Second, it was asserted that the temptation to commit perjury afforded by involuntary admission procedure should preclude its use. This reasoning has been rejected in all Code states except California. See text accompanying notes 97-108 *infra*.

⁹¹ UNIFORM COMMERCIAL CODE § 2-201, Comment 4 states, "Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract."

⁹² Note, *The Statute of Frauds in the Business Community: A Re-appraisal in the Light of Prevailing Business Practices*, 66 YALE L.J. 1038, 1065 (1957).

⁹³ See UNIFORM COMMERCIAL CODE § 1-205.

case.⁹⁴ As Professor Degan emphasizes, however, a revolution has occurred in this attitude with the development of modern discovery, and no longer may one refuse to give answers because the answers will aid the questioner in establishing his claim.⁹⁵ Properly viewed, the Code admission provision is a part of this reversal in attitude. Perhaps some of those who are reluctant to recognize the application of the admission provision to involuntary admissions are influenced by the outmoded philosophy of the law of discovery.

The anomaly of a successful suit on a contract which was unenforceable when the suit was brought may be the source of some uncertainty as to the propriety of using the involuntary admission. The Code lawmakers, though, have seen no impropriety in allowing an event which occurs during the suit to make the oral contract enforceable. There is no doubt that a defendant's voluntary admission during the suit satisfies the Statute; there should be no objection to the fact that an involuntary admission satisfying the Statute comes after the suit is brought.

Possible procedural problems must be met in order to prevent dismissal of the suit before the admission is extracted, but modern procedure is sufficiently flexible to implement this new Code right to enforce an oral contract by an involuntary admission.⁹⁶

Dean Robert Stevens demonstrated that the original reason given by the courts for refusing to allow a sworn admission of an oral contract to satisfy the Statute of Frauds was the fear of encouraging defendant to perjuringly deny the oral contract,⁹⁷ and this reasoning

⁹⁴ Degan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury*, 43 TEX. L. REV. 435, 448 (1965).

Corbin, speaking of pre-Code decisions which held that a compelled admission did not satisfy the Statute of Frauds, remarked, "Perhaps this is on the theory that a party should not be compelled to give evidence against himself, even in a civil action; but the doctrine should not be carried so far." 2 A. CORBIN, CONTRACTS § 519, at 758 (1950).

⁹⁵ Degan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury*, 43 TEX. L. REV. 435, 448, 450 (1965); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2001, at 13-20 (1970); 4 J. MOORE, FEDERAL PRACTICE § 26.02, at 26-61 to 26-64 (2d ed. 1953).

⁹⁶ Procedure is available in modern civil procedure codes to prevent dismissal of the suit by defendant before plaintiff has the opportunity of attempting to extract an admission from defendant. *E.g.*, N.Y.R. CIV. PRAC. § 3211(c) (motion to dismiss) and § 3212(f) (summary judgment). *See* Garrison v. Piatt, 113 Ga. App. 94, 147 S.E.2d 374 (1966), discussed in text accompanying note 128 *infra*; Reissman International Corp. v. J.S.O. Wood Products, Inc., 10 UCC REP. SERV. 1165 (N.Y. Civ. Ct. 1972), discussed in text accompanying note 130 *infra*.

⁹⁷ Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355, 371 (1952). *See also* Degan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear*

was used by a number of later pre-Code courts.⁹⁸ California refused to enact the Code admission provision in part because "the provisions would reward a defendant's perjured denial."⁹⁹ This position is based on the reasoning that the special temptation¹⁰⁰ to commit perjury provided by the involuntary admission procedure is a greater evil than the welshing which is allowed in the absence of the involuntary admission procedure.¹⁰¹ Dean Stevens found this conclusion "astonishing"¹⁰² and it has been criticized by many other commentators¹⁰³ and courts¹⁰⁴ such as, for example the Maryland court in *Trossbach v. Trossbach*.¹⁰⁵ That court declared "the purpose of the Statute of Frauds is to protect a party, not from temptation to commit perjury, but from perjured evidence against him."¹⁰⁶ The Uniform Commercial Code's Permanent Editorial Board rejected this objection to the involuntary admission, saying of the California action, "[t]his issue of policy has been fully debated many times . . . [The Board] considers the arguments advanced against this provision in California not persuasive."¹⁰⁷ This position has also been taken by the legislatures of all Code states other than California by their adoption of the admission provision.¹⁰⁸

of Perjury, 43 TEX. L. REV. 435, 444 (1965).

⁹⁸ See, e.g., *Thompson v. Jamesson*, Fed. Cas. No. 13, 960, 1 Cranch C.C. 295 [282], (C.C.D.C. 1806); *Huffine v. McCampbell*, 149 Tenn. 47, 257 S.W. 80 (1923).

⁹⁹ 23A ANN. CALIF. CODES § 2201, at 131 (1964).

¹⁰⁰ The reward of the perjurer comes more easily here than in ordinary perjury where the success of the perjurer depends on his convincing the court of the truth of his perjured testimony. Here the denial of the oral contract ipso facto rewards the perjurer with victory in the suit; disproof of the denial does not constitute an admission. See note 70 and accompanying text *supra*.

¹⁰¹ See authorities cited in notes 97, 98 *supra*.

¹⁰² Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355, 381 (1952). Professor Degnan calls this "a curious inversion of the Statute." Degnan, *The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury*, 43 TEX. L. REV. 435, 448 (1965).

¹⁰³ 2 A. CORBIN, CONTRACTS § 275, at 3 (1950); Dean Robert Foster, Reporter's Comments, 2A CODE OF LAWS OF S.C. § 10.2-201, at 61 (1966); Rationale to RESTATEMENT (SECOND) OF CONTRACTS § 207, at 464 (Tentative Draft Nos. 1-7, 1973).

¹⁰⁴ *Sealock v. Hackley*, 186 Md. 49, 53, 45 A.2d 744, 746 (1946).

¹⁰⁵ 185 Md. 47, 42 A.2d 905 (1945). See text accompanying note 21 *supra*.

¹⁰⁶ 145 Md. at 55; 42 A.2d at 908.

¹⁰⁷ 6 BENDER'S UNIFORM COMMERCIAL CODE SERV. § 2-201, at 1-59, and § 8-319, at 1-613 (1967).

¹⁰⁸ 6 BENDER'S UNIFORM COMMERCIAL CODE SERV. § 2-201 at 1-58 (1967).

F. *Judicial Interpretation of the Code Admission Provision*

No Code case opposed to the use of an involuntary admission to satisfy the Statute of Frauds has been found, and there have been only a few suggestions of possible judicial authority opposed to its use.¹⁰⁹ The courts in *Cox v. Cox*¹¹⁰ and *Weiss v. Wolin*,¹¹¹ although asserting that the question of the use of an involuntary admission was not before them and that they were not answering the question, indicated that there are cases opposed to its use but cited none. Similarly, in *Presti v. Wilson*¹¹² the court held the admission provision inapplicable because the defendant denied the contract. The court then remarked that the cases are in conflict on the question, citing as opposed to the use of an involuntary admission only one pre-Code case which the court indicated might not be authority under the Code.¹¹³

It has been suggested¹¹⁴ that cases such as *Williamson v. Martz*¹¹⁵

¹⁰⁹ See note 53 *supra*. Professor Hawkland states that judges disagree on the question whether an involuntary admission can be used to satisfy the Code Statute of Frauds, but he cites no case opposed to its use and seems to have in mind pre-Code decisions.

¹¹⁰ 289 So.2d 609, 613 n.3 (Ala. 1974). The only authority opposed to the involuntary admission doctrine cited is *Anderson*. See note 54 *supra*; Annot. 17 A.L.R. 3d 1010 (1968), discussed in the text accompanying note 117 *infra*.

¹¹¹ 60 Misc.2d 750, 303 N.Y.S.2d 940 (Sup. Ct. 1969). The only citation of authority opposed to the use of an involuntary admission is the New York Law Revision Commission Report which found the 1952 version of the Code admission provision possibly ambiguous in its application to an involuntary admission. See text accompanying note 48 *supra*. The case is discussed in note 117 *infra*.

¹¹² 348 F. Supp. 543 (E.D.N.Y. 1972).

¹¹³ The court stated:

There is New York law indicating that an admission in a deposition is involuntary and does not take the case out of the statute of frauds. *Smith v. Muss* The New York decision dealt only with the question whether a deposition was a 'memorandum' of the sale, since the Uniform Commercial Code, with its express exception for an admission of the contract, had not yet been adopted.

348 F. Supp. at 545.

¹¹⁴ 17 A.L.R. 3d 1010, 1141 (1968).

¹¹⁵ 29 NORTHUM. L.J. 32, 11 Pa. D & C.2d 33 (Ct. Com. Pls. 1956).

A similar case in *Scarpinato v. National Patent Development Corp.*, 75 Misc. 2d 94, 347 N.Y.S.2d 623 (Sup. Ct. 1973). The court stated:

[T]he plaintiffs fail because assuming the existence of an [oral] agreement containing an option to purchase stock it is unenforceable since '[a] contract for the sale of securities is not enforceable by way of action or defense unless . . . (a) there is some writing signed by the party against whom enforcement is sought . . .' U.C.C. § 8-319.

75 Misc. at 97, 347 N.Y.S.2d at 625. The admission provision was not mentioned.

are opposed to the use of the involuntary admission. This was a case where a complaint was dismissed on the ground that it showed that the oral contract sued on was unenforceable under the Statute of Frauds in that the part payment alleged was not sufficient to satisfy the Statute. There is no suggestion that the court in this case considered the possibility of using an involuntary admission and determined that it was improper. The case is therefore no authority on this proposition. Thus, no case decided under the Code admission provision opposes the use of an involuntary admission to satisfy the Statute of Frauds.

While some Code cases apply the admission provision without indicating whether the admission was voluntary or involuntary,¹¹⁶ and others give limited support to the involuntary admission doctrine,¹¹⁷ the following Code cases clearly support the use of the involuntary admission to satisfy the Statute of Frauds.

In *Dagerfield v. Markel*,¹¹⁸ the trial court had stricken seller's counterclaim for damages for buyer's failure to accept delivery of potatoes under an oral sales contract on the ground the contract was unen-

¹¹⁶ *E.g.*, *Oregon Ridge Dinner Theatre, Inc. v. Hamlin*, 253 Md. 462, 253 A.2d 382 (1969). The defendant had "conceded on the record that there was [an] agreement" to transfer shares of stock. The court said, in response to defendant's objection that the agreement was unenforceable under § 8-319, "[W]e think that [defendant's] concession of record that such agreement was made gratifies [sic] the statute." 253 Md. at 468, 253 A.2d at 385. *See also* *Blankenfeld v. Smith*, 290 Minn. 475, 188 N.W.2d 872 (1971); *Ellis Canning Co. v. Bernstein*, 11 UCC Rep. Serv. 443 (D. Colo. 1972). *Ellis Canning* was an action for breach of an oral contract to sell stock. The parties' tape recording of the contract was submitted in evidence, apparently by plaintiff; and defendant "at time of trial acknowledged its accuracy." The court gave defendant's admission of the contract as an alternate ground for holding the contract enforceable. In so holding, the court cited UNIFORM COMMERCIAL CODE § 8-319(d). It seems likely that defendant's "acknowledgement" of the accuracy of the tape came at the request of plaintiff or the court, rather than sua sponte, but the opinion does not state this as a fact.

¹¹⁷ *E.g.*, *Weiss v. Wolin*, 60 Misc.2d 750, 303 N.Y.S.2d 940 (Sup. Ct. 1969). In denying defendant's motion to dismiss a complaint which sought to enforce an oral contract to sell securities as premature under § 8-319(d), the court said, "an analogy may be drawn to those cases which have enunciated the principle . . . [that] summary judgment will be denied because the facts are wholly within the knowledge of the moving party and might be disclosed by cross-examination or examination before trial." 60 Misc. at 753, 303 N.Y.S.2d at 943. However, the court expressly stated, "Whether or not the defendant can be compelled to submit to an examination before trial and to deny or admit the making of the agreement which plaintiff pleads need not be determined at this time." 60 Misc. at 753, 303 N.Y.S.2d at 943. *See* mention of this case in text accompanying note 111 *supra*; *Freeman v. Applied Digital Data Systems, Inc.* 7 UCC REP. SERV. 1052, (N.Y. Sup. Ct. 1970).

¹¹⁸ 222 N.W.2d 373 (North Dakota 1974).

forceable under the Statute. In vacating the order striking the counterclaim because of procedural errors and returning the case for additional proceedings consistent with its opinion, the North Dakota Supreme Court stated:

[S]ome observations on the application of the Statute of Frauds appear in order Subsection [2-201] 3(b) of the statute contains an exception which is in issue here It is to be noted that . . . other provisions of the Uniform Commercial Code . . . do not contain these exceptions to nonenforceability of an oral contract¹¹⁹ The exception contemplates that for this type of agreement, involving sale of goods, a less strict standard be applied. *The other party to the purported agreement may be required to admit or deny the oral agreement.* If it is legally enforced it must be on the testimony of the party against whom it is sought to be enforced.¹²⁰

The Iowa Supreme Court, in *Quad County Grain, Inc. v. Poe*¹²¹ affirmed a judgment enforcing an oral contract for the delivery of corn because “[d]efendant’s testimony, both as an adverse witness called by plaintiff and as a witness in his own behalf, establishes evidence to bring the claimed oral contract within the exception set out above [Section 2-201(3)(b)].”¹²²

Similarly, the Georgia Supreme Court in *Hale v. Higginbotham*¹²³ upheld a lower court ruling that an oral contract to sell a quantity of milk was enforceable on the basis of defendant’s admission of the contract made on cross examination at the trial, saying without elaboration that the contract was enforceable, “since the seller admitted in his testimony that the contract of sale, as alleged in the plaintiff’s complaint, was made. See . . . 2-201(3)(b).”¹²⁴

In *Cohn v. Fisher*,¹²⁵ a New Jersey Superior Court, in an action for breach of an oral contract for the sale of a boat, granted plaintiff’s

¹¹⁹ 222 N.W.2d at 377. The Court also stated, “The contract for the sale of goods is treated differently than the sale of other personal property (Section 41-01-16, NDCC [U.C.C. § 1-206]) or security agreements (Section 41-09-16, NDCC [U.C.C. § 9-203]).” *Id.* The court is in error as to the North Dakota securities Statute of Frauds, which contains essentially the same admission provision as is contained in the sale of goods Statute. N.D. CENTURY CODE § 41-08-35(4) (1968). See note 32 *supra*.

¹²⁰ 222 N.W. at 378 (Emphasis added).

¹²¹ 202 N.W.2d 118 (Iowa 1972).

¹²² *Id.* at 120.

¹²³ 228 Ga. 823, 188 S.E.2d 515 (1972).

¹²⁴ 228 Ga. at 862, 188 S.E.2d at 517.

¹²⁵ 118 N.J. Super. 286, 287 A.2d 222 (1972).

motion for summary judgment in support of which plaintiff had submitted defendant's admission of the contract contained in his response to demands for admissions made on him and in his deposition. The court noted Professor Hawkland's doubt as to the propriety of using an involuntary admission to satisfy the Statute and his argument that "the defendant should be privileged not to make the admission if it has the legal effect of depriving him of the defense of the Statute of Frauds," then stated:

This court is of the opinion that if a party admits an oral contract, he should be held bound to his bargain. The statute of frauds was not designed to protect a party who made an oral contract, but rather to aid a party who did not make a contract, though one is claimed to have been made orally with him. This court would therefore hold that the check [which contained a memorandum of the contract] together with the defendant's admission of an oral contract, would constitute an enforceable contract under . . . 2-201(3)(b).¹²⁶

Although defendant's admission in response to the demand for admissions was involuntary, the opinion does not show whether his admission in his deposition came as a result of plaintiff's questioning; possibly the deposition admission was volunteered and conceivably the court is enforcing the contract solely on the basis of such a voluntary admission, but even so the court is rather clearly rejecting Hawkland's arguments against involuntary admissions.

In re Particle Reduction Corp.,¹²⁷ was a bankruptcy case in a United States District Court in Pennsylvania. The Referee had asked the party against whom enforcement of an oral agreement to sell electrical equipment was sought whether the agreement had been made. The defendant had replied that he "guessed" so, and the court held the oral contract enforceable under the admission provision, without discussion. This admission, of course, was involuntary, coming in response to the Referee's question.

In *Garrison v. Piatt*¹²⁸ the Georgia Court of Appeals held that a demurrer to a petition which showed on its face that an oral contract for the sale of a house trailer was within the Statute of Frauds was improperly granted because the contract might thereafter be made enforceable by the defendant's admission. The court stated that the

¹²⁶ 118 N.J. Super. at 296, 287 A.2d at 227.

¹²⁷ 5 UCC REP. SERV. 242 (E.D. Pa. 1968).

¹²⁸ 113 Ga. App. 94, 147 S.E.2d 374 (1966). See analysis of criticism of this case in text accompanying notes 69-70 *supra*.

admission provision "was designed to prevent the statute of frauds itself from becoming an aid to fraud" and "[i]f a demurrer on this ground should be sustained to the petition, the plaintiff is denied his opportunity of determining on trial whether the making of the contract would be admitted and thus made enforceable for the first time."¹²⁹ Surely this opportunity of plaintiff to determine if defendant admits the contract would come on plaintiff's interrogation of defendant.

Finally, the dispute in *Reissman International Corp. v. J.S.O. Wood Products, Inc.*¹³⁰ arose when a New York Civil Court denied defendant's motion for summary judgment made on the ground that plaintiff's action on an oral contract for the sale of cabinets was barred by the Statute of Frauds. 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 Whether or not plaintiff may, through the use of discovery proceedings after answer obtain a testimonial admission of the alleged contract from defendant has not yet been passed on in New York This court concludes that it may, and therefore . . . the motion seeking a dismissal of the complaint is denied.¹³¹

Judge Evans in his thorough opinion in this case dismissed Hawkland's doubt¹³² and Anderson's denial¹³³ that an involuntary admission satisfies the Statute, pointing out that the Code admission provision was revised to make clear that it applies to admissions on cross examinations,¹³⁴ and that the purpose of the Statute of Frauds is fully satisfied by defendant's involuntary admission.¹³⁵ Judge Evans also took note of the pre-Code critics who condemned the old statute as a haven for welshers,¹³⁶ and cited the Code cases *Cohn v. Fisher*,¹³⁷

¹²⁹ 113 Ga. App. at 94, 95 147 S.E.2d at 375, 376.

¹³⁰ 10 UCC REP. SERV. 1165 (N.Y. Civ. Ct. 1972).

¹³¹ 10 UCC REP. SERV. at 1167, 1168.

¹³² See note 53 *supra*.

¹³³ See note 54 *supra*. The court pointed out that the authority cited by Anderson does not support his position.

¹³⁴ The court quoted the portion of the 1960 New York Law Revision Commission Report set out in note 49 *supra*.

¹³⁵ See text accompanying notes 37-44 *supra*.

¹³⁶ See text accompanying notes 23-26 *supra*. The court cited approvingly Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355 (1952).

¹³⁷ 118 N.J. Super. 286, 287, A.2d 222 (1972). See note 125 and accompanying text *supra*.

*Garrison v. Piatt*¹³⁸ and *In re Particle Reduction Corp.* in support of his position.

V. CONCLUSION: STATE OF THE LAW

Judge Evans' reasoning and conclusion in the *Reissman* case are eminently sound and correct. There is no valid basis for doubting that defendant's admission of an oral contract for the sale of goods or investment securities, obtained by plaintiff's interrogation in court, does satisfy the Code sales Statute of Frauds under its admission provision.¹³⁹ The purpose and policy of the Code sales Statute of Frauds, the plain language and the history of the revision of its admission provision and all Code courts support this use of the involuntary admission.¹⁴⁰

Consequently, where a party to such an oral contract knows that the contract was made and would admit it on interrogation in court, the contract is legally enforceable. Such a party is no longer able to renege on his oral contract by asserting the Statute of Frauds. In recognition of this doctrine, such party should, without compulsion of the court, perform this oral contractual obligation just as he should perform any other legal obligation enforceable in court.

Unfortunately, there is a widespread failure to recognize this involuntary admission doctrine and thus a failure to appreciate that the old pre-Code right to welsh by asserting the Statute of Frauds no

¹³⁸ 113 Ga. App. 94, 147 S.E.2d 374 (1966). See note 128 and accompanying text *supra*.

¹³⁹ It should be noted that even with a clear recognition of the application of the Code admission provision to involuntary admissions, involuntary admission procedure will not always be successful in enforcing an existing oral sales contract. It is never available to enforce an oral contract where the party against whom enforcement is sought denies the existence of the alleged contract. If the facts regarding the existence of the alleged contract are, to his mind, ambiguous or uncertain, the party will deny them. He may of course feign a loss of memory. Even where he realizes that the contract was made, his interrogator's questions may not be successful in extracting the facts of contracting from him. The Code admission provision can do nothing to prevent his deliberately perjuring himself in denying the contract. These problems become more serious when it is remembered that the admission provision provides that the oral contract is not enforceable beyond the quantity (and, in the case of investment security, the price) admitted. It therefore remains highly desirable for the parties to reduce sales contracts to writing and not to rely on their enforcement by the Admission Provision.

¹⁴⁰ It should be noted that even with a clear recognition of the involuntary admission doctrine, troublesome questions as to the meaning of the admission provision, and as to the procedure for handling involuntary admissions will remain, which may require resolution by the courts or rule-making bodies.

longer exists. The demise of the Statute of Frauds reneger has gone largely unheralded. The Official Comment to the Statute has not been revised to reflect the revision of the Statute which was made to clarify its application to involuntary admissions. Most commentators profess doubt as to the propriety of using the involuntary admission to satisfy the Statute, and the great majority of sales and contract treatises proclaim the same doubt. Those commentators who have recognized the propriety of the use of the involuntary admission have usually done so without elaboration or only inferentially. Only the courts have firmly asserted that involuntary admissions do satisfy the Statute of Frauds and their decisions have been little noted.

Considerable mischief has undoubtedly been done by the commercial law commentators who have so widely disseminated this false doctrine of doubt, and danger exists that the full benefits of the Code admission provision in promoting honesty in sales contract relations may be lost. It is therefore now incumbent upon these doubting commentators to take heed of the unanimous decisions of the courts which have found no basis for doubt, to reassess their own reasons for such doubt, and unless they find the judicial authority unpersuasive and their reasons for doubt compelling, to give full recognition and support to the doctrine that involuntary admissions do satisfy the Code sales Statute of Frauds.