ORAL MODIFICATION OF SALES CONTRACTS AND THE STATUTE OF FRAUDS

I. INTRODUCTION

One of the established habits of men is the reliance upon the spoken word as has been evidenced in increasing millions of cases.[1] Unfortunately this habit has undoubtedly fostered fraudulent practices—especially in the field of commercial transactions. Accordingly the written document has gained monumental significance as a clear and recorded indication of the intention of the contracting parties. Without the written document, "(c)ontractual obligations would become phantoms, solemn obligations would run like pressed quicksilver, the whole edifice of business would rest on sand dunes supporting pillars of rubber and floors of turf. Chaos would envelop the commercial world."[2]

Man's habitual reliance upon the spoken word and the commercially prudent demands of a signed writing may conflict when parties to a written agreement attempt to modify that contract by a subsequent oral agreement. The possibility of false and fraudulent claims of oral modifications is clear. To minimize such dangers, the parties must be made aware of the Statute of Frauds, which in the instance of a sale of goods equal to or greater than a statutory amount, requires that such transaction, to be enforceable, must be evidenced by a signed writing. Accordingly, this Note will attempt to ascertain when a written document is necessary in the sale of goods, the effect of an attempt at oral modification, the impact of waiver, and the necessity of consideration for modification at common law, under the Uniform Sales Act, and under the Uniform Commercial Code.

II. ORIGIN & DEVELOPMENT OF STATUTE OF FRAUDS

A. *Enforceability of Oral Promises at Common Law*

At early English common law, the king's courts did not generally enforce oral promises.[3] However such promises became generally enforceable with the development of the action of assumpsit in the Fourteenth Century.[4] Consequently, fraudulent practices became commonplace. To sustain a fraudulent claim, one needed only to obtain "suborn perjured testimony."[5] Compounding the problem were certain other rules of evidence and procedure in force at the

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[1] Corbin, *New Formal Requirements Under the Code: Statute of Frauds*, 59 YALE L.J. 820, 829 (1950).

[2] C.I.T. Corp. v. Jonnet, 419 Pa. 435, 438, 214 A.2d 620, 622 (1965).

[3] 2 A. CORBIN, A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 275, at 2 (1950) [hereinafter cited as CORBIN].

[4] *Id.*

[5] *Id.*

time. For example, neither the parties, nor their husbands and wives, nor any other person interested in the outcome of the litigation could qualify as competent witnesses.[6] Consequently, "[t]he merchant whose name was forged to a bill of exchange had to sit by, silent and unheard, while his acquaintances were called to offer conjectures and beliefs as to the authenticity of the disputed signature from what they knew of his other writings."[7] Similarly, "[i]f a farmer in his gig ran over a foot-passenger in the road, the two persons whom the law singled out to prohibit from becoming witnesses were the farmer and the foot-passenger."[8] Secondly, the jury enjoyed great latitude in reaching its decisions. Hence though generally led by the evidence, the verdict might still be reached based solely upon the jury's knowledge of the facts. Accordingly, the requirements of certain kinds of evidence to prove certain kinds of transactions was viewed as a sound restraint on the heretofore unbridled discretion of the jury.[9] Consequently, these inequities presented a formidable obstacle to defendant's attempts to rebut perjured allegations. Quite obviously legislation was needed to prevent the shackling of unwilling parties with obligations they never intended to assume through perjury.[10]

B. *A Statute to Prevent Frauds and Perjuries*

Deemed to be the "adopted child of the common law,"[11] the Statute of Frauds[12] was enacted in England in 1677,[13] as the fourth in a series of attempts, commencing in 1673, to provide legislation for the prevention of frauds and perjuries. With an avowed legislative purpose for the "prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and the subornation of perjury,"[14] the Statute contains one section in particular which is of significant import to the field of commercial law—Section 17—for it necessitates written documentation of all sales of goods at a price equal to or greater than the statutory amount. Section 17 provides:

> [N]o contract for the sale of any goods, wares, merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to

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6 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 388 (2d ed. 1937).
7 *Id.* at 389.
8 *Id.*
9 *Id.* at 388.
10 CORBIN § 275, at 3.
11 2 W. PAGE, THE LAW OF CONTRACTS § 1213, at 2127 (2d ed. 1920) [hereinafter cited as PAGE].
12 29 Car. II, c.3 (1677).
13 There is some dispute as to the date of the statute's enactment. *See*, Costigan, *The Date and Authorship of the Statute of Frauds*, 25 HARV. L. REV. 329-46 (1913); Henning, *The Original Drafts of the Statute of Frauds and Their Authors*, 61 U. PA. L. REV. 283-316 (1913).
14 J. CHITTY, TREATISE ON THE LAW OF CONTRACTS 87 (18th rev. ed. W.A. MacFarlane & G.W. Wrangham 1930).

be charged by such contract, or their agents thereunto lawfully authorized.[15]

Subsequent to the enactment of the Statute, the Court of Chancery took a very restrictive view of its interpretation. To illustrate, in the case of *Simon v. Metevier*,[16] Lord Mansfield exempted auction sales from the statute if the buyer gave his name. Wilmot, J., in the same case, said, "Had the Statute of Frauds been carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing, frauds."[17] After referring to the above opinion, Lord Ellenborough, in *Hinde v. Whitehouse*,[18] stated: ". . . I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing . . . merely because the quantum of parol evidence in the case of an auction is likely to render the danger of perjury less considerable."[19]

C. *Criticism of the Statute*

The divergent judicial application of the Statute as demonstrated in the above two cases served to foreshadow the stir of controversy which the Statute eventually triggered. On one hand, it has been saluted as an eminently wise measure tending to render perjury impossible; yet it has also been condemned as promoting more injustice than it has prevented.[20]

Obviously, some of the major reasons for the passage of the Statute of Frauds nearly 300 years ago are anachronisms today because parties in interest can now testify and bring in witnesses on their behalf.[21] Similarly, contrary to early common law, jury verdicts must be based upon the evidence presented at the trial.[22] Accordingly, there are those who would argue for the repeal of the Statute;[23] Mr. Justice Stephens contends that the Statute of Frauds actually perpetuates fraud and further that it constitutes a "relic of times when the best evidence on such subjects was excluded on a principle now exploded."[24] From a more dispassioned viewpoint, Professor Arthur Corbin of Yale University offered these observations:

> [1] "[O]ur existing judicial system is so much superior to that of 1677 that fraudulent and perjured assertions of a contract are far less likely to be successful;

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15 29 Car. II, c.3 § 17 (1677).
16 [1766] 1 W. Bl. 599.
17 *Id.* at 601.
18 [1806] 7 East 558.
19 *Id.* at 568.
20 PAGE § 1213, at 2127.
21 Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427 (1927).
22 For a well-written passage illustrative of the reasons for the enactment of the Statute, and the striking change in evidentiary rules since that time, see J.B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 180 (1898).
23 Criticisms adverse to the Statute include: Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916); Firth, *A Doubt on the Statute of Frauds*, 9 L.Q. REV. 366 (1893).
24 Stephens & Pollack, *Section Seventeen of the Statute of Frauds*, 1 L.Q. REV. 1, 6 (1885).

> [2] [F]rom the very first, the requirement of a signed writing has been at odds with the established habits of men, a habit of reliance upon the spoken word in increasing millions of cases;
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> [3] [W]hen the courts enforce detailed formal requirements they foster dishonest repudiation without preventing fraud;
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> [4] [I]n innumerable cases the courts have invented devices by which to "take a case out of the statute . . ."[25]

On the other hand, Corbin is also among those who find merit in the Statute.[26] Writing in his famous treatise on contracts, he looks to the Statute as affording a considerable amount of protection to the innocent,[27] as well as preventing many of the problems which arise from absent witnesses or witnesses who have a faulty memory.[28] Another reason for the perpetuation of the Statute is that its abolition would have a disruptive effect on commercial practices. In support of this contention, a survey of 200 Connecticut manufacturers conducted by the Yale Law Journal concluded that "[b]usiness practice usually complies with the requirements of the Statute of Frauds."[29]

D. *Enactment of the Uniform Sales Act*

The proponents of the Statute prevailed, for the effect of the English Statute was preserved in the Uniform Sales Act, Section 4:

> (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or to give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.[30]

In so far as a written memorandum is concerned, Section 4 of the Uniform Sales Act and Section 17 of the original Statute are alike, but Section 17 does provide some additional methods of satisfying the Statute of Frauds for sales alone—part payment, acceptance and receipt of all or part, or a written memorandum signed by the party to be charged.[31]

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[25] Corbin, *New Formal Requirements Under the Code: Statute of Frauds*, 59 YALE L.J. 820, 829 (1950).

[26] In Dunphy v. Ryan, 116 U.S. 491, 498 (1885), Woods, J. said: "The Statute of Frauds is founded in wisdom and has been justified by long experience." *But see*, 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 448, at 343 n.1 (3d ed. Jaeger 1960) which states: "Very few, if any, writers of note have been willing to take up the cudgels in defense of the statute. Any number of them have criticized one or another aspect of the statute, and not a few condemn it in its entirety . . . ."

[27] CORBIN § 275, at 13.

[28] *Id.*

[29] Note, *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038, 1064 (1957).

[30] UNIFORM SALES ACT § 4.

[31] 1 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 72C, at 198 (rev. ed. 1948) [hereinafter cited as WILLISTON].

III. Pre-Code Law & Section 2-209(3) of the Uniform Commercial Code

A. *Uniform Sales Act*

1. *No variation by subsequent oral agreement*

The Uniform Sales Act does not contain a provision dealing with subsequent parol modifications to a contract required by the Statute of Frauds to be in writing. Prior to the enactment of the Uniform Commercial Code,[32] under both Section 17 of the original Statute and Section 4 of the Uniform Sales Act, many courts, including those of New York[33] and Pennsylvania,[34] adhered strictly to the rule that a contract required by the Statute of Frauds to be in writing could not be varied by subsequent oral agreement.[35] A minority of states, including Iowa, permitted such oral modification.[36]

In a case illustrative of the majority rule, *Willman v. Alver*,[37] Buyer and Seller made an agreement for the sale of popcorn at a monthly rate of $9.00 per 100 pounds. Subsequently, the market price on popcorn fell. Buyer and Seller then orally agreed that the popcorn would be shipped at a price of $8.00 per 100 pounds for the time being. In upholding Seller's recovery of damages for breach, the Ninth Circuit court of appeals found that there was no modification or rescission, while stating, "It is also a well-recognized principle that where a statute requires that a contract must be in writing, or evidenced by a written memorandum, the terms of that contract cannot be varied by subsequent oral agreements."[38]

2. *Slight variation as no exception*

A more difficult problem arises when the subsequent oral agreement purports to vary *slightly* some terms of the original agreement which was within the ambit of the Statute of Frauds and of which a memorandum has been made. Suppose for example, that the variation was a brief extension of time for performance.[39] According to Professor Samuel Williston of Harvard University, the degree of variation is of little significance[40]—unless of course the variation is so slight as to fall within the scope of de minimis.[41] Admittedly, this rule may seem harsh; not all states have followed it.[42] However as Baron

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32 Only Louisiana has not enacted the Uniform Commercial Code.

33 See Wajda v. Czelusta, 156 Misc. 33, 281 N.Y.S. 903 (1935); Hyman-Michaels Co. v. Senior & Palmer, 265 N.Y. 266, 192 N.E. 407 (1934).

34 Brown v. Aiken, 329 Pa. 566, 198 A. 441 (1938).

35 Annot., 118 A.L.R. 1511 (1939).

36 Neola Elevator v. Kruckman, 185 Iowa 1254, 171 N.W. 743 (1919).

37 252 F.2d 895 (9th Cir. 1958).

38 *Id.* at 897.

39 *See, e.g.*, Rice Lands & Prod. Co. v. Blevins, 61 Cal. App. 536, 215 P. 402 (1923).

40 Williston § 122, at 353.

41 With variations so small, the doctrine of *de minimis non curat lex* would apply, thereby disregarding the variation. *See generally* Williston § 255A, at 578 for an application of this doctrine to contract performance.

42 *See, e.g.*, Hawkins v. Hayward, 191 Minn. 543, 254 N.W. 809 (1934); Burstein v. Alldis, 234 Mich. 1, 208 N.W. 31 (1926).

Parke pointed out, "Every part of the contract, in regard to which the parties are stipulating, must be taken to be material."[43] On a more liberal approach, Corbin is willing to allow oral modifications in certain circumstances. Corbin would allow a written contract that is within the Statute to be modified by an oral agreement that is *not* within the Statute.[44] Yet Corbin feels, in agreement with Williston, that a written contract cannot be varied by an oral executory agreement that is itself within the Statute and therefore unenforceable.[45]

B. *Uniform Commercial Code Section 2-209(3)*

1. *Conditions for variation by subsequent oral agreement*

Focusing now on the Uniform Commercial Code, section 2-209 gives the guidelines as to oral modification of a contract within the Statute of Frauds.[46] This particular section is rather unique in that it represents the initial attempt to codify some very confusing areas of law—modification, rescission, and waiver—upon which exists a multitude of cases and an ocean of confusion. Equally surprising is the fact that the Code adopts Corbin's rule of oral modification, even though the preponderance of authority supports Williston. The appropriate codification provides that if the contract as modified is within the provisions of the Uniform Commercial Code's Statute of Frauds,[47] then those re-

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[43] WILLISTON § 122, at 353 citing Baron Parke's statement in Marshall v. Lynn, 6 M&W 116, 117 (1840). Quoted with approval by Cardozo, J. in Imperator Realty Co. v. Tull, 228 N.Y. 447, 127 N.E. 263, 265 (1920).

[44] CORBIN § 301, at 91.

[45] *Id.*

[46] Section 2-209 provides:

Section 2-209. *Modification, Rescission and Waiver.*

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed writing which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by a reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change in position in reliance on the waiver.

[47] Section 2-201 provides:

Section 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements

quirements must be satisfied.[48] Due to the lack of case law adequately explaining this section, perhaps four hypothetical situations will facilitate an understanding of the impact of this provision. The first group of hypotheticals deals with interpretation; the second group deals with possible problems which may arise.

Hypothetical one: Buyer and Seller enter into a written agreement for the sale of $500 worth of goods. Subsequently they orally agree to change the price to $800. Is this oral contract actionable under section 2-209(3)? No, since the amended contract is unsupported by any writing, and since it is for a price within the Statute of Frauds, the contract as modified is no longer within the Statute.

Hypothetical two: As above, assume the original written agreement is for $500. Later the parties agree to modify the price to $300. This price change will be enforceable since the contract as modified is no longer within the Statute of Frauds.

Hypothetical three: Consider the converse. The original contract is for $300 and is later orally changed to $500. Since the modification is within the Statute, it is not enforceable. At a minimum, the modification should be evidenced by a signed memorandum to be actionable.

As previously stated, the second set of hypotheticals will deal with interpretation. To facilitate understanding, consider the Code Statute of Frauds section 2-201 together with the Code Comment.[49] Under section 2-201 the omission or incorrect statement of a term agreed upon does not render the writing insufficient. However the contract is not enforceable beyond the quantity of the goods indicated in the writing. The Code Comment provides: " 'Modification' for the future cannot therefore be conjured up by oral testimony if the price involved is $500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is a safeguard against oral evidence."[50]

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of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

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

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

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

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

48 UNIFORM COMMERCIAL CODE § 2-209(3) [hereinafter cited as UCC].

49 For the text of UCC § 2-201, see note 47 *supra*.

50 UCC § 2-209, Comment 3.

Keeping these two provisions in mind, consider the following hypothetical: Buyer and Seller make a written agreement which states, "June 10, 1000 boxes of oranges, $500." Shortly thereafter the market shifts. Accordingly, the parties raise the price to $800 and evidence it by a memorandum which says, "July 1, 1000 boxes of oranges." The contract bears the signature of both parties. The question then arises as to whether the new contract with the oral agreement as to price is evidenced by a sufficient memorandum to be actionable. From the Code Comment and section 2-201 it appears that the only term of the agreement which must appear on the memorandum is the quantity of goods. Hence, the hypothetical contract would be rendered actionable. It might be pointed out that the fewer terms which are included in the memorandum, the more problems of proof that will arise. What extrinsic evidence will be admitted by the court will have to be decided on a case-by-case basis. Further, the implication is that since only the quantity term is absolutely necessary, other terms besides price may be fixed by subsequent oral agreement. Examples of terms which do not need to be in writing include "place of delivery,"[51] "time for shipment or delivery,"[52] and "time for payment."[53]

2. *Slight variation of terms*

Another problem presents itself when the parties slightly alter a term included in the original written agreement, such as time for performance. If the price is within the Statute of Frauds, even this slight variance from the corresponding stipulation in the original contract will not prevent the Statute from controlling the contract as modified. The absence of a new, written memorandum of the newly modified contract which will satisfy the Statute presents the problem. In pre-Code law, when the alteration was slight, some courts, as Williston has pointed out,[54] had a tendency to allow the modification. However, section 2-209 has not made provision for the slight oral change that goes to some term other than price. Courts may still seek to find some basis to allow the slight variation, especially in situations where there has not been a waiver.[55]

IV. The Contractual Statute of Frauds: Pre-Code Law and Section 2-209(2) of the Uniform Commercial Code

A. *Uniform Sales Act*

As a means of regaining the protection they have lost, parties to a contract not within the Statute of Frauds may construct their own statute of frauds within the original agreement thus precluding subsequent oral modification.

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51 UCC § 2-308.
52 UCC § 2-309
53 UCC § 2-310.
54 See cases cited note 42, *supra*.
55 For a discussion of "waiver" see text accompanying notes 63-88, *infra*.

The apparent failure of these contractual efforts under prior sales law is reflected in the following comments by noted jurists. These attempts by parties to limit by contract their freedom of dealing have been deemed "futile" by Mr. Justice Holmes.[56] Meanwhile, Mr. Justice Cardozo adds, "What is excluded by one act is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again."[57] Similarly, Mr. Justice Musmanno, as late as 1958, eloquently stated:

> Even where the contract specifically states that no non-written modification will be recognized, the parties may yet alter their agreement by parol negotiation. The hand that pens a writing may not gag the mouths of assenting parties. The pen may be more precise in permanently recording what is to be done, but it may not still the tongues which bespeak an improvement in or modification of what has been written.[58]

In accord is the Restatement of Contracts which provides: "The rule . . . [that a contract may be orally modified] is applicable even though the earlier contract provides that it can be rescinded or varied only by a written instrument."[59]

B. *Uniform Commercial Code Section 2-209(2)*

However, it is clear that the Uniform Commercial Code reverses the common law rule. For under section 2-209(2) a written agreement signed by the parties which contains a "no-modification-except-by-writing" provision can only be rescinded or modified in that manner. In the event the parties are merchants,[60] if the requirement appears on a form supplied by the merchant, it must be separately signed.[61] The indication from this section is that the parties can legislate their own Statute of Frauds.[62] In short the contracting parties, whether or not the agreement is within the Statute of Frauds, may agree that all future negotiations will not be effective unless in writing.

V. Waiver: Pre-Code Law and Sections 2-209(4) & 2-209(5) of the Uniform Commercial Code

A. *Pre-Code Law*

Neither the contractual statute of frauds nor the actual Statute of Frauds

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56 Bartlett v. Stanchfield, 148 Mass. 394, 395, 19 N.E. 549, 550 (1889).

57 Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 388, 122 N.E. 378, 381 (1919).

58 Wagner v. Graziano Constr. Co., 390 Pa. 445, 448-49, 136 A.2d 82, 84 (1957).

59 Restatement of Contracts § 407, Comment a at 768 (1932).

60 UCC § 2-104(1) defines "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

61 UCC § 2-209(2).

62 *See* UCC § 2-209, Comment 3.

constitutes a foolproof method of precluding subsequent oral modifications and consequently false allegations concerning those modifications. Under prior sales law, an attempt at oral modification could operate as a waiver.[63] This is also true under the Code.[64] However the Code explains neither the meaning of waiver nor what it is that may be waived in section 2-209.[65] Historically the definitions of waiver have varied;[66] however today waiver is generally defined as "the intentional relinquishment of a known right."[67]

In an oft-cited pre-Code case, *Imperator Realty Co. v. Tull*,[68] the parties executed a written contract for the sale of land. Pursuant to the agreement each party was to remove all violations of law or ordinances from the land. Subsequently the parties orally agreed that the violations did not need to be removed. Plaintiff, relying on this subsequent oral agreement did not remove the violations. The court decided that the defendant by his subsequent mutual agreement had made a waiver. Interestingly enough, in a concurring opinion, Mr. Justice Cardozo thought that neither the principles of waiver nor estoppel were necessary in this case; rather he felt that the decision should be based on the principle that defendant should not profit from his own wrongdoing.[69]

Similarly, in a Pennsylvania case, *Wagner v. Graziano*,[70] a construction contract contained a provision that there would be no extra work or materials except by a signed writing. However, the defendant's superintendent assured plaintiff that for the extra work and materials a writing was not necessary. The court found a waiver. It is important to note that here again the court is using a "reliance" principle.

B. *Uniform Commercial Code Sections 2-209(4) & 2-209(5)*

Waiver is dealt with under the Uniform Commercial Code in sections 2-209(4) and 2-209(5) which provide:

> (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) and (3) it can operate as a waiver.
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> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be un-

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[63] R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 43, at 124 (1970).

[64] *See* UCC § 2-209(4).

[65] *See* 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 162 (1964). *But see* Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 578 (1964).

[66] Estoppel has been equated with waiver. Globe Mut. Life Ins. Co. v. Wolff, 95 U.S. 326, 333 (1887). *Contra*, Hayes v. Manning, 263 Mo. 145, 172 S.W. 897, 907 (1914).

[67] *E.g.*, Dalton v. Leblanc, 350 F.2d 95, 98 (10th Cir. 1965); Harty v. Fay, 10 N.Y.2d 374, 375, 179 N.E.2d 483, 484, 223 N.Y.S.2d 468, 470 (1961).

[68] 228 N.Y. 447, 127 N.E. 263 (1920).

[69] *Id.* at 448, 127 N.E. at 264.

[70] 390 Pa. 445, 136 A.2d 82 (1957).

> just in view of a material change of position in reliance on the waiver.[71]

Much of the case law interpreting section 2-209(4) has dealt with the relationship of that section to section 2-209(2)—the possibility of oral modification operating as a waiver. The first such case, *Inwood Knitting Mill Co. v. Budge,*[72] involved a sale of goods by a written contract which contained a provision excluding oral modifications. A contractual provision specially waived a warranty of color fastness as to the goods to be purchased. Plaintiff-seller sought the price of the goods; defendant counterclaimed while stating that a course of dealings between the parties had given rise to a warranty of color fastness. While recognizing that subsection (2) is designed to protect against false allegations, the court expressed some doubt as to the meaning of waiver in subsection (4).[73] However, the court recognized that this contractual prohibition could be waived; yet judgment was deferred.[74]

Another Pennsylvania case, three years later, *C.I.T. Corp. v. Jonnet,*[75] created even greater confusion as to the meaning of waiver under section 2-209. Here again there was a written contract prohibiting a non-written modification. The plaintiff was the assignee of the vendor's rights under a sales contract for certain equipment. The contract of sale provided that "no waiver, or change in [the] contract or related note, shall bind such assignee unless in writing signed by one of [the] officers."[76] Later the plaintiff brought suit for payments due under the contract. Meanwhile it was defendant-buyer's contention that subsequent to the execution of the contract the plaintiff's authorized agent had agreed to release the defendant from its duties pursuant to the contract due to an assignment of all the defendant's rights and duties thereunder to a third party. While noting that a release of one of the parties constituted a modification and that section 2-209(4) provided for waiver of the writing requirement, the court emphasized that the contract contained an express provision that no waiver could be effective unless in writing. Accordingly, plaintiff's motion for judgment on the pleadings was sustained. The Supreme Court of Pennsylvania affirmed on appeal,[77] stressing that there must be a waiver of such a no-waiver provision before a modification can be effective.[78]

But in 1968, in *Universal Builders v. Moon Motor Lodge,*[79] a case involving a non-Article 2 contract, the Pennsylvania supreme court retreated from the

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71 For the text of UCC § 2-209, see note 46 *supra.*

72 1 UCC REP. SERV. 84 (Pa. Ct. C.P., Philadelphia County, 1962).

73 Specific note was taken that there were "no cases on point construing subsection (4) . . . ." *Id.* at 85.

74 The effect of the court's holding was to dismiss plaintiff's preliminary objections to defendant's counterclaim.

75 3 UCC REP. SERV. 321 (Pa. Ct. C.P., Alleghaney County, 1965).

76 *Id.* at 322.

77 419 Pa. 435, 214 A.2d 620 (1965).

78 The no-waiver clause was regarded by the court as a "stone wall in the path of defendant's contention" of a subsequent modification by oral agreement. *Id.* at 438, 214 A.2d at 622.

79 430 Pa. 550, 244 A.2d 10 (1968).

position it had taken in *C.I.T. Corp. v. Jonnet*. *Universal Builders* involved a construction contract which required all "change orders" to be in writing and signed by the defendant. Since the plaintiff performed additional labor both under the oral direction and the actual in-progress observation of the defendant's agent, the court found that the defendant was obligated to pay for that work despite the contractual provision. The court remarked that *C.I.T. Corp.* is "misleading" as it "overlooks" section 2-209 of the Code.[80] The court thought that section 2-209(5) implied that a "no-modification-except-by-writing" requirement in a contract for sale of goods may be waived in the manner prescribed in the Restatement of Contracts:[81] "[The performance of the writing requirement] may be excused by an oral agreement or permission of the promisor that the condition need not be performed, if the agreement or permission is given while the performance of the condition is possible, and in reliance on the agreement or permission, while it is unrevoked, the promisee materially changes his position."[82] Holding that "a condition is considered waived when its enforcement would result in something approaching fraud,"[83] the court concluded that the effectiveness of a non-written modification in this type of situation "depends upon whether enforcement of the [no-modification-except-by-writing] condition is or is not barred by *equitable considerations*."[84]

Finally, a more recent case dealing with waiver in section 2-209 is *Thomas Knutson v. George W. Rodgers Construction Co.*[85] which involved essentially the same fact pattern as that of *Universal Builders*. Under the terms of the agreement plaintiff was to build and furnish the defendant with certain dock floats. The court assumed that the contract provided that any modification of its terms had to be in writing to be effective since the terms of the contract were not completely clear. Plaintiff performed certain additional work under the supervision of defendant's authorized agent. The court found that the agent's instruction to perform the additional work "contained an implied promise to pay for the extra labor . . . ."[86] Consequently, the court held that any requirement that modification of the contract be in writing was waived under sections 2-209(4) and 2-209(5); accordingly the defendant was estopped from pleading such a requirement.

Construed together, with the exception of *C.I.T. Corp.*, a "no-modification-but-by-writing clause" can be waived by an attempt at oral modification. The courts seem especially disposed to construe conduct to constitute a waiver where there has been a "reliance," as in *Universal Builders* and *Thomas Knutson Shipbuilding Corp.* where plaintiffs performed additional services under oral direction of defendant or his agent. To find otherwise would certainly be a

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80 *Id.* at 556, 244 A.2d at 16.
81 RESTATEMENT OF CONTRACTS § 224 (1932).
82 430 Pa. 550, 556, 244 A.2d 10, 16 (1968).
83 *Id.*
84 *Id.* [emphasis added].
85 6 UCC REP. SERV. 323 (N.Y. Sup. Ct., Suffolk County, 1969).
86 *Id.* at 324.

harsh result. Further the proposition propounded in *C.I.T. Corp.*—that to be effective, a waiver must consist of an express declaration that a written-modification requirement is waived—finds support in neither the wording of section 2-209(4) nor the cases.

The question also arises as to whether the contractual statute of frauds can be waived. One author, Israel Packel, believes that it cannot. He says, "To say that the parties under subdivision (4) can waive the requirement that modifications be in writing is to render nugatory the very contractual prohibition authorized by subdivision (2)."[87] However in states, such as Massachusetts, which adopt the Code Comments, it will be obvious that parties can waive terms in both the contractual Statute of Frauds and in section 2-201.[88]

VI. Requirement of Consideration for Modification: Pre-Code Law and Section 2-209(1) of the Uniform Commercial Code

A. *Pre-Code Law: Consideration for Modification Required*

Under pre-Code law the modification of a written contract needed to be supported by consideration to be enforceable.[89] To have some indication as to the impact consideration has had upon subsequent oral modifications to a contract required to be in writing, consider the following sales situation. Buyer and Seller enter a written agreement for goods amounting to $700. Later Buyer and Seller orally agree to change the price to $300, a sum of money outside the Statute. Seller takes the money and then sues on the balance. Under pre-Code law, Seller would probably prevail inasmuch as the modification was not supported by consideration in light of the "pre-existing duty" rule articulated in the famous English case of *Foakes v. Beer*.[90] In this case, Beer agreed to accept 500 pounds in cash and the balance of a 2,000 pound debt from Foakes in installments. Subsequently Foakes made full payment as agreed upon; however, Beer decided that he wanted interest even though the debt had been fully discharged. The Earl of Selbourne said:

> If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law.[91]

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87 Packel, *The Commercial Code and Contracts Prohibiting Subsequent Oral Changes*, 37 Pa. B.A.Q. 400, 404 (1966).

88 *See* UCC § 2-209, Comment 4.

89 Cases on this point are collected in Note, 39 Cornell L.Q. 114 (1953). To add additional citations has been described as being like "carrying coals to New Castle." Lingenfelder v. Wainwright Brewing Co., 113 Mo. 578, 593, 15 S.W. 844, 848 (1891).

90 [1884] 9 App. Cas. 605.

91 *Id.* at 132, 133.

B. *Section 2-209(1): No Consideration For Modification*

The Code clearly reverses the rule of prior sales law; the requirement of consideration for modifications has been abolished as specifically stated in 2-209(1).[92] As an indication of the conciseness of the rule, most courts elect not to discuss it but rather to cite merely the pertinent Code provision.[93] Now that parties no longer have the protection of consideration to safeguard against false allegations of oral modifications, what protection is provided? From the Code Comment it appears that the only protection which the innocent party has against a party claiming the benefit of the oral modification is the test of "good faith".[94] "Good faith" means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"[95]—a standard which must be observed during every stage of the contractual process.[96] This is a test which a party guilty of false allegations would not find too difficult to overcome. The test is not very stringent and the terms in which it is couched are rather vague and abstract.

VII. Conclusion

At this point, some suggestions are offered as to a few precautionary measures which parties can take in order to prevent false and fraudulent claims of oral modifications. In making the contract, the parties should always insert a "no-modification-unless-in-writing" clause into the contract. Even when the contract comes within the Statute, this clause should be included. Without this clause, the contract as modified may be taken outside the Statute and hence the oral modification may be enforceable. After the contract is made, parties should be extremely careful not to vary orally a term of the written contract, because the mere attempt at modification may operate as a waiver. If a party thinks that he may have waived a term of the contract, he should immediately send notice of retraction of waiver. When the contract has reached the litigation stage, the party claiming the benefit of the Statute of Frauds must remember that the Statute must be affirmatively pled to be invoked.[97] In sum, lawyers must make buyers and sellers aware of the new rules concerning sales so that the necessary adjustments in the formation of contracts can be made.

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[92] *See* 3 S. Williston, A Treatise on the Law of Contracts § 505A at 632 (3d ed. Jaeger 1963).

[93] *See* Skinner v. Tober Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963); Inwood Knitting Mill Co. v. Budge, 1 UCC Rep. Serv. 84 (Pa. Ct. C.P., Philadelphia County, 1962).

[94] *See generally* Summers, *Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968); Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666 (1963).

[95] UCC § 2-103(b).

[96] *See* UCC § 1-203, Comment 1.

[97] The case of Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963) illustrates the necessity of pleading the statute. Defendant's failure to plead the statute of frauds precluded him from raising the issue in court.