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Contract Formalities and the Uniform Commercial Code

Francis E. Holahan

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INTRODUCTION.

THE UNIFORM COMMERCIAL CODE, now in force in Pennsylvania, and up for adoption elsewhere, has a considerable effect on the law of contracts. In one aspect, formalities, this Article will investigate that effect. The thesis will be that contract formalities demonstrate in microcosm the competing advantages of continuing case-law development as against legislative recasting and codification.

The analytical device used will be that suggested by Professor Fuller. He says that legal forms can serve three purposes: an evidentiary purpose, in that proof can be made and preserved for use in the event of dispute; a cautionary purpose, in that men can be deterred from making inconsiderate engagements; and a channeling purpose, in that certain rules can be invoked.

"Form" and "formality" may be unfortunate words, because they suggest technical matters which may be ignored in favor of "substance." The expression "mere formality" is almost a tautology. "Form" and "substance" are the antipodes; when the distinction between them is made, it is always to urge that the substance be preferred. What is always meant in that context, of course, is a meaningless form, but many forms do have a legal operation.

† Associate Professor of Law, Villanova University School of Law. A.B. 1949, LL.B. 1953, University of Pittsburgh.
2. Fuller, Consideration and Form, 41 COLUM. L. REV. 799 (1941). This article fully illuminates the problem and explains the analytical device.
3. Id. at 800-06.
An example of an historically important form is the sealed instrument, or "formal" contract. In a day when men of affairs might be illiterate, a writing with an individual seal attached was the strongest evidence which could be made. The solemnity incident to the affixing of a blob of hot wax to the paper and the impression of a seal onto the wax made men cautious, warned them that legal consequences followed, that a particular remedy might be invoked, as covenant, under the formulary common-law system.

Today these effects of a seal have been largely dissipated. When a seal may consist of "(L.S.)" beside the signature blanks in a pad of printed forms, the form will have no added evidentiary value because it is sealed. It will have little added cautionary value—how many laymen know what "(L.S.)" means? As for the channelling function, an action to establish promissory liability calls for the same writ whether a seal is used or not.

The courts tend to conform the law of sealed contracts to the law of informal contracts. The seal may satisfy the consideration requirement, or raise a presumption of consideration, or extend or avoid the statute of limitations. When a court says that a seal imports consideration, it means, or it ought to mean, that consideration is irrelevant in an action on a sealed instrument. When a court says that failure of consideration is a defense to an action on a sealed instrument, it is supplying a constructive condition just as it would in an action on an informal contract. When "constructive" delivery is found in acts manifesting an intention to be bound, but falling short of physical transfer, or when a theoretically rebuttable presumption of payment is applied in the courts as substantially conclusive, it is pretty clear that the judicial frame of reference is the informal contract.

So the seal would seem to be an outdated legal formality, a "stale" form which no longer serves the functions Professor Fuller prescribes. Legislation seems to be the best means to do away with a stale form, and thus it has been widely enacted that seals shall have no operation or only limited operation.

The Uniform Commercial Code provides that seals are to have no effect:

4. 1 CORBIN, CONTRACTS § 252 (1950).
5. 6. CORBIN, CONTRACTS § 1263 (1951).
6. Xenos v. Wickham, L.R. 2 H.L. 296 (1867); 1 CORBIN, CONTRACTS § 244 (1950). For a discussion of the desirability of requiring delivery of modern formal contracts, see 3 U. Chi. L. Rev. 488 (1936).
8. 1 CORBIN, CONTRACTS § 254 (1950).
"Section 2—203. Seals Inoperative.

"The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer."

The comment indicates that a seal may still be held to be an authentication or signature.

Other legal forms have been done away with. In a day, again, when men were illiterate, and society was not fluid, so that each man was likely to know only his neighbors but to know them and their activities well, livery of seizin doubtless served quite well to give due notoriety to the transfer of land, to impress on the feoffor that he was surrendering his right, and to indicate that proprietary remedies were vested in the feoffee. Today the recorded deed serves better; it seems the obvious form for real estate transfers.

A legal form should be obvious, that is, appropriate, and yet have such ceremonial value as will give the needed cautionary effect. A handshake is recognized by businessmen as signalizing the closing of a deal, though it has only limited legal effect. It is popularly the very antithesis of formality, because it is obvious, yet it is a form. The form which today suggests itself is the signed writing, because it makes strong evidence, because "signing the papers" signifies even to laymen that obligation attaches, even though the channelling function will be limited, in that the meaning of the words used in the writing will invoke the desired legal rules. Of course a signed writing can have considerable channelling operation if a given phrase has an "abstract" legal signification such as the "and his heirs" which conveys the fee, or the "pay to the order of" which permits holding in due course.

9. A handshake tends to show mutual assent and a bargaining state of mind. It is thus evidence on two questions often at issue.

10. That is, it is a ceremony having at least evidentiary value, as explained in the previous note. It is not a legal form, because it is not conclusive evidence, but, "Conclusive evidence is not evidence at all; it is something which takes the place of evidence and of the thing to be proved, as well." GRAY, NATURE AND SOURCES OF THE LAW 102 (2d ed. 1921). A legal form is distinguished from social or business ceremonies in that it inflexibly invokes certain legal rules.

11. Bentham condemned formalities as posing a mystery for laymen and as imposing a sanction of nullity for failure to meet the formal requirements. RATIONALE OF JUDICIAL EVIDENCE, book IV (1827) passim. The force of this argument is surely mitigated when the form is merely scription, or scription and onomastic authentication, writing or signed writing, and laymen are literate. In fact, businessmen, the class most affected by the Uniform Commercial Code, are likely to perceive the need for and significance of written evidence with a nicer eye than a legislature enacting a statute of general application.

12. At this point, it might be well to say that words themselves can be regarded as forms. For an amusing, but penetrating, treatment of this question, see Chafee, The Disorderly Conduct of Words, 41 COLUM. L. REV. 381 (1941). The Parties to
It will be emphasized that the writing, or the signed writing, is the obvious legal form today because it has the necessary evidentiary and cautionary effects, although the flexibility of modern procedure and the decline of terms of art give it only a general channelling effect. The writing and the signed writing are the principal forms under the Code.

The Code defines "signed" as including any authentication, and a seal may be an authentication. ‘Written’ or ‘writing’ includes printing, typewriting or other intentional reduction to tangible form.”

It is suggested that a telegram should be treated as a writing if the recipient is entitled to obtain a copy of the message from the telegraph company on request.

I.

THE RECENT HISTORY OF CONTRACT FORMALITIES.

The modern informal contract was invented in Slade's Case in 1602, when it was decided that the King's Courts would enforce an executory exchange of promises although the contract was not real in that there was no quid pro quo received by the defendant, and though the assumpsit was fictitious. Promises might be consideration each for the other. Since then, the informal contract has, as already pointed out, largely supplanted the sealed instrument.

a contract, say, must frame their intentions in words which reflect “referents” only approximately. The judge must divine the referents from the words, decide the case, then choose the words to communicate the decision. Thereafter, the argument over what the case stands for is an argument over the referents of the words used in the opinion. Language is our best means of communication, but it is faulty. The problem of words is treated under heads like “Interpretation,” “Objective Theory of Contract,” and “Mistake.”

The word formality, as here used, does not go so far. It would be better, perhaps, to let the definition of form or formality rest in illustration or explanation, but if a concise definition is needed, the following is offered: a form is an act or its product which has a conventional extrinsic significance; a legal form is a form which has a legal effect beyond its “plain meaning.”

13. Section 1—201 (30).
14. Section 1—201 (45).
16. Slade’s Case was wrong, speaking historically. See Plunkett, A Concise History of the Common Law 64 (5th ed. 1956). The bilateral contract is a judicial construction. So eminent a common lawyer as Mr. Justice Holmes could not see any logical reason why mutual promises are each consideration for the other. The contract law of Tudor England protected real contracts and sealed contracts, but the formulary system simply did not extend to the exchange of informal promises. Today it is almost inconceivable to us how a free society of any complexity could be organized without broad promissory liability: our economic institutions are founded on credit; "reasonable" expectations founded on promises must not be defeated; people must be able, by simple means, to create interests in their future conduct which society will enforce, they must be able to enact laws for themselves, that is, they must be able to make binding contracts. The capital for industrial organization cannot be recruited unless the entrepreneur or the corporation can persuade property owners to surrender
Picture the situation of a suretyship defendant in the seventeenth century: his bare oral promise bound him; he received consideration in the loan to the principal debtor; he might wish to say that he had commended the principal debtor in general terms without making a "legal" undertaking, but he could not say it in court because of the rule of party incompetency. Or take a buyer of goods who supposed that his contract had not gone beyond the dickering stage. He might find the seller suing him for the seller's idea of the price, without much assurance that he would even get the goods. Honest misunderstanding could produce unfairness here.

Rules of interpretation and constructive conditions ultimately eased the plight of these defendants, but Parliament acted to relieve them early through the Statute of Frauds in 1676. The statute imposed a requirement of legal formality, a memorandum in writing, for the enforcement of certain classes of promises. The evidentiary need is of course satisfied by a writing if the memorandum must be detailed enough. Section 17, however, made a partial delivery of goods under a contract of sale, or a partial payment for the goods, a satisfaction of the statute. This is comparable to the requirement of delivery under the law of gifts. Professor Fuller says that the Statute of Frauds has only a negative channelling effect, that is, a promisor can be sure of a defense if he does not execute a writing. It seems that the statute is not given a cautionary effect; at least, some cases have treated letters manifesting an unwillingness to perform as memorandum satisfying the statute.

A contract which is not within the Statute of Frauds may of course be put in writing by the parties for evidentiary purposes. If the parties set out their agreement in full and adopt it as the expression of their entire agreement, the parol evidence rule will exclude evidence part or all of their rights, and this means they must be given enforceable obligations in exchange. Indeed, philosophy tells us that contracts are binding. But contract means one thing in a pastoral society, where wealth is land and cattle, and another in the modern free-enterprise industrial society, where the organizing principle is contract, and a wealthy man may own a watch, clothes, and for the rest have only contract rights. The commercial growth of Tudor England, and later commercial and industrial growth, could hardly be based on the contract remedies of the early common law.

17. See 2 WIGMORE, EVIDENCE § 577 (3d ed. 1940).
18. Constructive conditions did not then impede the plaintiff's recovery as today. In Nichols v. Raynbred, Hobart, 89, 80 Eng. Rep. 238 (1615), it is reported:

"Nichols brought an assumpsit against Raynbred, declaring that in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50 shillings: adjudged for the plaintiff in both Courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note here the promises must both be at one instant, for else they will be both nuda pacta."

19. 29 CAR. 2, c. 3 (1677).
20. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 802 (1941).
of prior written agreements and prior or contemporaneous oral agreements relating to the same subject matter if the purpose of such evidence is to add to or vary the written undertakings. This seems quite a sensible rule in that a new contract should discharge prior inconsistent agreements and in that the failure to include mere talk in the writing tends to show that it was not intended to be given legal effect—or that the evidence is false. What is difficult is to say whether or not the parties have adopted the writing as the full expression of their agreement—the proponent of the oral evidence says no. It may be that the rule is a device for insulating the jury from dubious evidence. In any event, a party claiming protection of the rule will have two chances: first, the judge may reject the evidence, or second, as always, the jury may disbelieve it. So integration of an agreement is a form invoking application of the rule.

The parties may attempt to stipulate for formal modification, similar to the formality necessary to modify a sealed contract: “This agreement is not subject to change except by a further written agreement signed by the parties. No payment will be made for any extra work unless authorized in writing by the architect or the owner.” When the contractor sues for the price of extra work under a subsequent oral agreement he is entitled to prevail if his evidence is believed. It will be held that the parties could not contract away their power to contract, or that the owner or architect waived the benefit of the clause in the written contract. The stipulation is ineffective, in other words.

Lord Mansfield once held that a signed written promise did not need consideration to be binding, but the House of Lords settled the point to the contrary within a short time.

Thus, formalities in the law of informal contracts. It is a brief story indeed, owing to the judicial use of the doctrine of consideration instead to promote fairness and to supply the necessary safeguards.

For the most part, the law of contracts exists to enforce exchanges. The plaintiff must show that he gave or promised something which the defendant wanted in exchange for the promise sued on. This exchange principle is said to supply evidentiary needs and to have a cautionary effect. It also seems clear that consideration may itself be a form.

22. 3 Corbin, *Contracts* § 763 (1951).
Contract theory prescribes that both parties become bound at the same instant. Whether this is logically so is now immaterial. There must be "mutuality of obligation." But a promisor may wish to bind himself without exacting a price in order to interest the promisee in some more important transaction; a would-be seller of land may know that he cannot persuade a prospective buyer even to evaluate his naked offer to sell, because the offer to sell may be withdrawn or the price raised at any time, and the buyer will then have wasted an expensive investigation or driven up the price by a display of eagerness. What is needed is an option. Well, the law may be summoned with a sacrificial dollar-in-hand-paid. The buyer is then assured that his right to purchase at the named price will not be impaired during the stated life of the offer. The dollar is certainly not the price of anything; in some cases it seems to have been immaterial whether the dollar was paid; but the rule that only bargained-for exchanges are enforced is not offended since the buyer's right to a conveyance is conditioned on the substantial payment or the assumption of the substantial liability which is the price named in the offer. The dollar option does offend the rule that both parties to a contract must become bound at the same instant, but it is open to question whether simultaneous obligations are a necessary part of the exchange principle, however well established the prescription.

The Conference of Commissioners on Uniform Interstate Laws has offered a new form which would dispense with consideration altogether, the Uniform Written Obligations Act. The Act has met with little legislative response.

II.

THE UNIFORM COMMERCIAL CODE.

The Commissioners, and the American Law Institute, now offer a statute, running over eight hundred pages in the standard edition, which will largely displace the law of contracts. Contract law is well-settled because of the need for certainty in commercial enterprises. Further, the profession has a capital investment in the education of its members in the law-school course in contracts, an investment it is

26. See note 16 supra. And it may be that simultaneous promises tend to show that an exchange is intended, rather than a gift promise reciprocated. See the report of Nichols v. Raynbred, set out in note 18 supra.


properly reluctant to abandon. But the field to which contract law has been applied was shaped by historical accident, not by logic.

Contract is not precisely equivalent to promissory liability. On the one hand, contract rose from a tort background by way of deceit rather than from debt. If a man "promised" to do what he already "ought" to do, his promise was enforceable, and *Slade's Case* established that the promise would be presumed, conclusively. The eighteenth-century view of contract as the organizing principle of the social order was not calculated to dispel this confusion between "ought" and "promised." It is little wonder then that restitutionary duties and genuine promissory duties were enforced under the same procedural head.

In our own century, the imposition of strict liability on sellers whose chattels cause personal injuries would be difficult to reconcile with the prevailing insistence on culpability in tort law, but non-culpability does not excuse breaches of contract. So tort damages may be recovered from a non-negligent seller of poisonous canned goods in a contract action for breach of warranty. To this extent, contract is broader than promissory liability.

On the other hand, contract does not cover all promissory liability. The law of negotiable instruments concerns promissory liability only, but it arose before contracts was developed. It is often said that certain formal contracts—bills and notes—are subjected to rules designed to protect the security of third-party transactions, leaving the contract rules to operate between the immediate parties. Such an explanation has the authority of countless dicta and the appeal of simplicity. But why is an acceptor liable to a holder who does not give a new consideration or change his position in any way? The answer is that the negotiable instrument is sui generis, a mercantile specialty, with its own rules. The duties of a trustee may arise from contract, but the relation is administered by equity.

The Code has more coherency than contract law, because it is a modern law merchant. But let the reader judge. It covers sales of goods, bills and notes, bank collections, letters of credit contemplating documentary sales, bulk sales law, documents of title to goods bailed to warehousemen and carriers, transfer and registration of transfer of stocks and bonds, and certain security devices: chattel security, assignment of contract rights as security, and chattel paper—the last a term intended to cover documents embodying both an obligation and a personal property interest securing it.

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31. The Code does not purport to state its coverage. This is just the author's estimate.
The Code does not cover employment contracts, service contracts, construction contracts, leases, contracts for the sale of land, or real estate mortgages. It only touches on bailment and suretyship contracts.\(^{32}\)

The principal displacement of contract law by the Code will be in the field of sales of goods. The Uniform Sales Act did not displace contract law. Instead, it assimilated the law of sales to the law of contracts generally. Its draftsman was Professor Williston, a contracts scholar of enormous prestige who may have been guilty of empire building. Its general aim was uniformity rather than improvement.

Should sales be withdrawn from contracts? It has property aspects which seem to cause the most difficulty in litigation. Historically, the Statute of Frauds separated sales of goods, in section 17, from the other enumerated contracts, in section 4. Why not treat sales contracts differently? Professor Hawkland thinks it should be done:

"Traditionally, questions involving the formation of sales contracts have not been treated differently by the courts and legislatures from questions involving the formation of other contracts. The courts and legislatures have taken the position that, so far as formation is concerned, a sales contract is a simple contract to be governed by the same contract rules of offer, acceptance and consideration. This position has overlooked the needs of merchants engaged in buying and selling goods, and it has resulted in some very unsatisfactory answers to many commercial problems." \(^{33}\)

III. Formalities Under the Code.

It has already been noted that the Code abolishes seals insofar as they serve any purpose other than authentication. It seems a solecism to say that the affixing of seals does not constitute the document a sealed instrument, but the intention is clear. All well and good. In the present state of the law relating to seals, uniformity probably could not be achieved in their use. There are too many varieties of legislative treatment, and the judges have displayed too much resourcefulness in evading it.

With the addition of a new formal requirement, the rule of Foakes v. Beer,\(^{34}\) that a promise of discharge in consideration of payment of

\(^{32}\) Again, the author's estimate.

\(^{33}\) HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 2 (1955).

\(^{34}\) 9 App. Cas. 605 (1884). In this case, Mrs. Beer promised to forego interest on a judgment if the principal were paid according to a stipulated schedule, but the House of Lords held she was entitled to recover the interest despite this promise.
less than is conceded to be due will not be enforced, may be rejected by
the Code:

"Section 1-107. Waiver or Renunciation of Claim or Right
After Breach.

"Any claim or right arising out of an alleged breach can be
discharged in whole or in part without consideration by a written
waiver or renunciation signed by the aggrieved party."

If what is meant by this section is that a serious breach of contract
may be treated by the other party as an offer of rescission and accepted
so as to terminate all duties under the contract, then the only effect of
the section would be to require a writing signed by the injured party
where the prior law did not require it, and no change would be made
in the law of consideration. An example: A and B make a contract
by which A is to sell B 10,000 bushels of wheat at $2.00 a bushel. B
then informs A that he cannot use the wheat and will not accept delivery.
A advises B that he will regard the contract as at an end. A has
lost nothing except the benefit of the bargain, since he had rendered
no performance under it, and he has suffered no loss at all if the
market price is as high as, or higher than, the contract price. He may
"waive" this breach.35

But if the Code rule applies only to this situation, it is difficult
to see why the formal requirement of a signed writing is imposed.
Such a situation arises quite often. Even where the injury to the
seller's profit interest is substantial, owing to a decline in the market,
he may wish to forgive the breach because litigation would be too
burdensome or because he wishes to retain customer good will. Why
should a formal requirement be added? The need for a signed writing
would seem only to clog the speedy composition called for by business
convenience.

But suppose the injured party has already rendered his per-
formance under the contract. Foakes v. Beer stands for the proposi-
tion that the performance of a pre-existing duty is not a sufficient
consideration to support a discharge of the entire duty. The Restate-
ment of Contracts includes this rule,36 and its utility is obvious—the
debtor cannot hold up his creditor by exploiting the difficulty of collec-
tion, because the creditor's discharge in exchange for the part payment
is ineffective.

35. 5 CORBIN, CONTRACTS § 1236 (1951).
36. RESTATEMENT, CONTRACTS § 76 (1932).
If, under this section of the Code, the debtor need only exact a signed writing, then the anti-holdup rule is gone. It would seem that it is gone, for the term "breach" in the section is unqualified. The comment indicates that an obligation of good faith is imposed, so that the pure holdup can be averted.\(^{37}\) Under the contract rules, on the other hand, a part payment of a claim which is disputed reasonably and in good faith will support a discharge of the entire claim, though it later appears to have been valid.\(^{38}\)

Section 1-107, then, raises a question of interpretation: whether earned rights may be discharged by renunciation. It abandons the prior handling of this problem of finality versus fairness under the doctrine of consideration, but it imposes an appropriate formal requirement, calculated to produce good evidence of a waiver, to induce caution in forgiving breaches, and to invoke a negative rule of unenforceability.

One requirement which good sense ought to have introduced into the common law long ago is the receipt for contract performances. A businessman who refused to give a requested receipt for a money payment would be suspect. Probably he would not get the money. The Code provides that he must give a receipt:

"Section 1-206. Right to Signed Receipt for Goods or Payment

"Where a person tenders payment, goods or documents, he may require a signed receipt as a condition of completing delivery."

Clearly, then, a seller who refuses to complete delivery because the buyer will not receipt for the goods is not in default. Is the buyer in default? The title of this section would indicate that he is; there is a "right" to a receipt. The text of the section says only that the seller has the benefit of a condition and is excused if the receipt is not forthcoming. A statute on which so much effort has been expended ought not to fail in the elementary distinction between breach of contract and failure to perform conditions. In any event, the receipt is an established business formality which ought to be the subject of a legal duty. Progress is to be applauded.

Trade usage is admissible as an aid in interpretation, of course, and section 1-205 spells this out explicitly.\(^{39}\) But a trade usage may

\(^{37}\) The comment to this section calls for the application of § 1-203, "Obligation of Good Faith." The Code is unique in that the text specifically provides for reference to the commentary, § 1-102(f).

\(^{38}\) \textit{1 Corbin, Contracts} § 187 (1950).

\(^{39}\) § 1-205. Course of Dealing and Usage of Trade

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

(2) A usage of trade is any practice or method of dealing currently recognized.
come as a considerable surprise to the other party, the more so if he is in fact not chargeable with the usage because he has never heard of it. Subsection (6) provides that "A party intending to offer evidence of a usage of trade must give the other party such notice as will prevent surprise." There is no need to give written notice, although a writing may of course be sent. The notice requirement here is procedural law very clearly, not contract law. The evidentiary and channelling effects of a form would be equally useful on this procedural point, but the draftsmen of the Code are understandably reluctant to add procedural novelties to the drastic substantive changes proposed.

The above provisions of the Code, except for the section abolishing the effect of seals, are general provisions applying to all transactions covered by the Code. The provisions treated hereafter are, presumably, applicable only to the subject matter of the articles of the Code in which they appear.

IV.

ARTICLE 2: SALES.

This Article does not purport to state its coverage except in negative terms: it does not cover security transactions though in the form of a sales agreement, and it does not displace farmer and consumer sales legislation.40

The Statute of Frauds for the sales of goods under the Code has drawn heavy fire indeed. The section will be set out in its entirety and the individual subsections treated thereafter:

"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 as established in a particular place or among those engaged in trade or in a particular vocation or trade. Its existence and scope are questions of fact.

(3) The parties to a contract are bound by any course of dealing between them and by any usage of trade of which both are or should be aware and parties engaged in a particular vocation or trade are bound by its usages.

(4) Unless contrary to a mandatory rule of this Act:

(a) A course of dealing or usage of trade gives particular meaning to and supplements or qualifies terms of the agreement.

(b) The express terms of the agreement and any course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms shall control both course of dealing and usage of trade and course of dealing shall control usage of trade.

(5) The usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) A party intending to offer evidence of a usage of trade must give the other party such notice as will prevent surprise.

40. Section 2-102.
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 in-
sufficient 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 con-
tents, it satisfies the requirements of subsection (1) against such
party unless written notice of objection to its contents is given
within ten days after it is received.

“(3) A contract which does not satisfy the requirements of
subsection (1) but which is valid in other respects is enforceable
(a) if the goods are to be specially manufactured for the
buyer and are not suitable for sale to others in the
ordinary course of the seller’s business and the seller,
before notice of repudiation is received and under cir-
cumstances which reasonably indicate that the goods are
for the buyer, has made either a substantial beginning of
their manufacture or commitments for their procure-
ment; or
(b) if the party against whom enforcement is sought admits
in his pleading or otherwise in court that a contract for
sale was made; or
(c) with respect to goods for which payment has been made
and accepted or which have been received and accepted
(Section 2-606).”

The above section of the Code is a descendant of section 17 of the
original Statute of Frauds:

“[N]o contract for the sale of any goods, wares and merchandizes,
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 memo-
randum in writing of the said bargain be made and signed by
the parties to be charged by such contract, or their agents there-
under lawfully authorized.”

The need for such a statute in the seventeenth century has already
been suggested, and the development of printing made it probable that
literacy prevailed among the class of merchants who might be engaged

41. 29 Car. 2, c. 3 (1677).
in transactions of this size—ten pounds was possibly greater, relatively, than five hundred dollars today, especially in view of the small quantity of chattel wealth then in existence.

The sales Statute of Frauds with which American lawyers are likely to be familiar is that embodied in section 4 of the Uniform Sales Act:

"Section 4. Statute of Frauds.

(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 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.

"(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

"(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

It will be seen that the Code embodies considerable departure from prior law; Professor Williston has characterized this section as the most iconoclastic in the entire Code except for the limitation of the title conception. Professor Corbin agrees there have been many changes, but regards them as desirable; he is convinced:

"1. that belief in the certainty and uniformity in the application of any presently existing statute of frauds is a magnificent illusion; 2. that our existing judicial system is so much superior to that of 1677 that fraudulent and perjured assertions of a contract are far less likely to be successful; 3. that from the very first, the requirement of a signed writing has been at odds with the established habits of men, a habit of reliance upon the spoken word in

increasing millions of cases; 4. that when the courts enforce detailed formal requirements they foster dishonest repudiation without preventing fraud; 5. that in innumerable cases the courts have invented devices by which to ‘take a case out of the statute’; 6. that the decisions do not justify some of the rules laid down in the Restatement of Contracts to which [Professor Corbin] assented some 20 years ago.”

Subsection 1. These provisions give the usual evidentiary function and the negative channelling function previously described. Nothing is said about the cautionary purpose, but it would seem that there is none, because of the rule of section 2-201(3)(b). Although the statement is made that the contract is not enforceable by way of action or defense, surely a buyer who has received part of an indivisible performance is entitled to set up an oral contract of sale for the whole performance when sued in tort or quasi-contract for the value of what he has received, and comment 4 indicates that the buyer who takes the goods under an oral contract is not a trespasser. It is not apparent just what “by way of . . . defense” means, and the commentary ought to explain, especially since the mention of defenses is new.

As for the memorandum, the only term which need be stated is the quantity to be supplied. Comment 1 says:

“The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. . . . The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.”

Is it captious to suggest that some reference to the goods must be made? Literal minds might assume that the following would be a sufficient memorandum binding John Jones to a contract under the Code: “It’s a deal. Two boxes. J.J.” Perhaps so.

These questions are minor compared with those raised by the last sentence of subsection (1). The plaintiff is entitled to attack the memorandum with which he got into court, for instance, to show that the price is higher or lower than the price stated in the writing. An incorrect memorandum is as good as a correct one for the statute—though, as always, satisfaction of the statute merely gets the plaintiff to the jury. The only limitation is that there can be no enforcement beyond the quantity shown; again the quantity term is emphasized. Can there be enforcement for less than the quantity shown; that is, can the plaintiff say that the memorandum overstates the quantity of goods contracted for? Apparently so. Can the plaintiff procure reformation in equity so that the writing will call for more goods?

Finally, to what extent will reliance on an oral contract be protected despite the statute? It is assumed that restitution would be allowed for any goods or payments transferred as to which the contract could not be enforced. Subsection (3) (a) protects certain reliance on oral contracts for specially manufactured goods not readily resalable—should the maxim "expressio unius" be applied? If other reliance is in fact reasonable, judicial subversion is to be anticipated. A case may be supposed in which goods not ordinarily stocked are ordered, orally, from a dealer. The goods are not to be specially manufactured by the dealer, so subsection (3) (a) cannot be invoked, even though they cannot be resold.

Subsection 2. The plaintiff under this subsection may satisfy the statute by the use of his own memorandum. This rule applies only between merchants; the Code rejects the usual position that contracting parties are more or less fungible "legal men" and recognizes that businessmen can be expected to have and use a greater knowledge of law and of commercial practice. Many businessmen, commodity traders being one example, make oral contracts and later send confirmatory memoranda. The primary purpose of these memoranda is record-keeping, because non-legal business sanctions serve to control abuse of the Statute of Frauds, and businessmen are not as eager to sue for profit damages as law students often suppose. Still, the practice

44. 2 CORBIN, CONTRACTS § 321 (1950).
45. Equity will decree specific performance of a contract for the sale of land where the promisee has gone into possession and made improvements. 2 CORBIN, CONTRACTS § 434 (1950). This is only reliance and does not benefit the grantor in any way. Further,

"Cases exist in considerable number, not involving land but falling within some other clause of the statute, in which equitable relief has been given on the ground of part performance. ... It should be remembered ... that 'part performance' frequently means action in reliance and change of position that is not in fact a part of any performance that was promised in the contract." Id., § 459.
can be dangerous. For example, in a futures contract under the conventional statute, a fraudulent buyer can await the seller's memorandum, refrain from sending one of his own, then await the day for performance and enforce the contract or successfully stand suit as the market price dictates. This may cost him membership in a trade association or a seat on the exchange, but he can make a killing first, perhaps. Under the Code, unilateral satisfaction of the Statute of Frauds is enough between merchants. The seller will be able to impose his memorandum on the fraudulent buyer for this purpose. Of course, this merely costs the defendant his plea of the statute, and he may still go to the jury on a dispute as to the terms, except as he is barred by section 2-207 of the Code.

Subsection 3. Part (a) of this subsection continues the rule of the Uniform Sales Act, section 4 (2), protecting plaintiffs who stand to lose not merely contract profits but substantial costs, because the goods are specially manufactured and there is no market for them. In the absence of such a provision, the judicial construction of such contracts is likely to be that they are not sales at all, but work and labor contracts. This is undesirable because goods are involved and other sales law may still be needed in the action. Under the Sales Act, there are difficulties of interpretation: What does “specially manufactured” mean? When are goods “not suitable for sale to others in the ordinary course. . . .”? If these two questions are answered favorably to the plaintiff, the statute does not apply. The Code, however, does not protect the plaintiff unless he has relied on the contract and thus raises two more questions: What is a “substantial beginning” of manufacture? What are “commitments” for procurement of the goods to be manufactured—that is, no doubt, the raw material?

Subsection (3) (b) indicates that the Code statute is to have no cautionary effect. If the defendant admits the making of the contract in pleadings, the statute does not apply to the action. What is the effect of rules of procedure which treat averments as admitted unless denied under oath in a responsive pleading? The purpose of such rules is not to rob the statute of any utility to honest men but rather to diminish the profusion of fact issues which stem from putting the

46. § 2—207. Additional Terms in Acceptance or Confirmation
(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon.
(2) The additional terms are to be construed as proposals for addition to the contract and between merchants become part of the contract unless they materially alter it or notification of objection to them has already been given or is given within a reasonable time.
plaintiff to his proof generally. If local rules also provide that the Statute of Frauds is an affirmative defense, the complaint will be good on demurrer. It is suggested that the Code ought to incorporate a procedural rule permitting the statute to be raised as a defense in a preliminary pleading which is not responsive to the complaint. The objection which may be raised to this is that contracts in fact made ought to be enforced and the statute ought not to be available to defendants who cannot deny the oral contract as well. If so, the point should be more strongly made in the statutory text. Also, the statute then has no negative channelling effect; oral contracts may be enforced, except against perjurers. The Code does not state what the effect of a letter of repudiation which in fact embodies the minimal terms necessary to a memorandum shall be, and it is fair to suppose the usual rule will be applied; the Code statute will have no cautionary effect whatsoever. Is there only a rule of evidence here? In fact, can the plaintiff put the defendant on the stand and exact an admission that the contract was made? The Code does not say, and this writer will not venture an answer. If so, there is nothing left, no rule, except that rascals can escape trial by jury through the judicious use of section 2-201. The 1957 draft of the Code alters subsection (3)(b) by expressly, perhaps needlessly, limiting enforceability under an admission in pleadings or in court to the quantity admitted, again emphasizing the importance of the quantity term to the exclusion of others.

There is still another radical change in subsection (3). The rule that part payment, or acceptance and receipt of part of the goods, makes the entire contract enforceable has been disposed of. Since the original statute, this part performance has had the extrinsic effect of making the entire contract enforceable, just as delivery of the safe deposit key under the law of gifts, or entry on the land plus part payment in an action for specific enforcement of an oral contract for the sale of land. In other words, part payment has a formal operation under the prior statutory law. The reason for throwing out this alternative mode of satisfying the statute is apparently the fear of fraudulent expansion of a small contract and the view of the quantity term as the vital element of the memorandum.

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47. A possible reply to this objection is that oral contracts of the classes covered by the various Statutes of Frauds are as much likely to be the subject of dispute as to terms and so forth as to be made out of the whole cloth. Must the defendant admit the contract was made and then trust the jury to credit his version of the terms? Or should he be able to invoke the Statute of Frauds as a sort of fifth amendment?

48. That is, the absence of intention to make a memorandum is immaterial. Restatement, Contracts § 209 (1932); 2 Williston, Contracts § 579 (rev. ed. 1936).

49. See Hawkland, Sales and Bulk Sales (Under the Uniform Commercial Code) 31 (1955).

50. Id. at 29, 30.
On the whole, then, the Code statute, as embodied in section 2-201, offers some helpful changes: the relaxation of memorandum requirements, uniformity on this point if the Code is uniformly adopted, and, among merchants, satisfaction by use of a unilateral memorandum. But it raises questions which must be threshed out by the common law. Is the wealth of judicial precedent and definition to be exchanged for the advantages of the Code?

"Section 2-202. Final Written Expression: Parol or Extrinsic Evidence

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

(a) by course of dealing or usage of trade (section 1-205) or by course of performance (section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms agreed upon.”

This section is of course a statutory parol evidence rule. It is an unexceptionable statement of the common-law rule, avoiding the use of the term “integration,” except that some emphasis on the use of merger clauses and disclaimers is to be inferred from the distinction between supplemental terms and contradictory evidence. “Add to or vary” are spoken in the same breath by the Restatement, but contradictory terms, additional terms, and collateral agreements seem to form a linear progression from consistent application of the rule to consistent admissibility. It is more difficult to exclude consistent additional terms except by use of merger clauses. Unfortunately, subsection (b) invites, in the last line, the interpretation that there can be no integration except as to terms mentioned, nothing but partial integration. If “of their whole agreement” were substituted for “of the terms agreed upon,” the presumably intended meaning would be clear.

Professor Corbin has indicated his approval of this section. This writer will concur, for what it is worth.

51. Restatement, Contracts § 237 (1932). No one seems to have reproved the American Law Institute for setting up another definition of the parol evidence rule in competition with the Restatement.
The provisions of section 2-203, concerning the effect of a seal, have already been dealt with.2

"Section 2-205. Firm Offers

"An offer by a merchant to buy or sell goods in a signed writing which gives assurance that it will be held open needs no consideration to be irrevocable for a reasonable time or during a stated time but in no event for a time exceeding three months; but such term on a form supplied by the offeree must be separately signed by the offeror."

This section deals with what is usually called "the firm offer problem" by supplying a form which will substitute for the consideration required to make an offer irrevocable, to make an option. An example of the firm offer problem might be: A requests bids for an air-conditioning contract. B solicits C to give him a firm price on certain needed machinery in order that he may frame a bid. C gives a "firm" price, and on the basis of that price, B submits a bid to A. Thereafter, C withdraws his offer. B may then be bound by A's acceptance of his bid, or he may be reluctant to withdraw an unaccepted bid for fear of injury to his business reputation. Ordinarily, B will be unable to get equivalent goods at the same price elsewhere, and he may be compelled to deal with C on whatever terms C chooses to exact, as where C's machinery is specified in the general contract. Business pressures, and indeed business ethics, tend to restrain repudiation by C, but there is often no legal remedy against him.3 He is not bound because B is not bound; a naked offer may be revoked though the offeror has promised to keep it open. B has relied on the offer by submitting his own bid to A, but commercial offers look to acceptance and are not within the protection of rules enforcing gratuitous promises, such as that of the Restatement of Contracts, section ninety.4 What can B do?

B can accept C's offer and chance it he will get the contract. This is unworkable.

B can solicit an offer from C conditioned on B's getting the contract, and he can accept the offer, subject to the condition, thereby avoid-

52. See p. 00 supra.

53. The leading case is James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933), opinion by Learned Hand. There are critics and there are contrary cases: 1 CORBIN, CONTRACTS § 51, and cases there cited (1950); HAWKLAND, SALES AND BULK SALES (UNDER THE UNIFORM COMMERCIAL CODE) 3 (1955); 1 WILLISTON, CONTRACTS § 139, n. 25 (1936). The problem is elaborately treated in Schultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. CHI. L. REV. 237 (1952). The author concludes there that the legally firm offer would not necessarily be a blessing in the construction industry.

54. Or so says Judge Hand in the James Baird Co. v. Gimbel Bros., Inc. opinion, 64 F.2d 344, 346 (2d Cir. 1933).
ing this undue risk. Of course, when he gets the contract he will be bound to deal with \( C \), but it does not become \( B \) to raise this objection when he condemns the present rule as unfair. The difficulty with this solution is that it overlooks the psychology of the firm offer problem: businessmen regard firm offers as binding and cannot see the need for ungentlemanly niggling until too late, until the problem has materialized for them.

\( B \) can employ a form which will bind \( C \) even in the absence of acceptance and consideration. Among these are the common-law seal, the written statement of intention to be bound under the Uniform Written Obligations Act, and the written promise not to revoke under the New York firm-offer statute.\(^{55} \) These formal substitutes for acceptance and consideration do not achieve mutuality of obligation; they avoid the necessity for it. They also enable \( B \) to bind \( C \) and then, having got the contract, shop around for a more favorable price, resorting to \( C \)'s offer only if it is still the best available. \( B \) can have his cake and eat it too. It has already been remarked that \( B \) is not entitled to this much, but there is something to be said in his behalf. Contractors must usually frame their bids in a hurry, they may wish to procure sub-contract and supply bids only so they can gauge the market in which they will operate if their bids are accepted, and they assume enough risks without rigid commitments to sub-contractors. It is probably impossible, because of the difficulty of proof involved, to distinguish between the case where the contractor has sought information only and the case where he has formed an intention to accept, conditioned on his receiving the general contract, and has relied on the offer by incorporating the figures in his bid. Therefore the decision must be whether to allow creation of a unilateral obligation or not.

The Code embraces this third solution, the formal substitute for consideration. As suggested above, this use of a formality does not protect reliance as such, because the obligation attaches on execution of the offer. Does this mean that contractors may speculate with firm offers? Yes, within the three month limitation of the section. Some contractors are only brokers, who bring together the demand—the people who need construction work—and the supply—the more substantial businesses which sell materials and services. Is it wise legisla-

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tive policy to license these entrepreneurs to operate free of the doctrine of consideration? To speculate? At least, that policy can be defended.

First, it cannot be assumed that suppliers will not execute firm-offer forms under section 2-205 unless they wish to induce the general contractor to exert himself. He performs a needed service, and that need is evidenced by the willingness of suppliers to make commitments in advance when dealing with him. It is condescending to the business community to suppose that each departure from the principle of simultaneous exchange is attributable to an objectionable disparity in bargaining power or expertise which the law should redress. Under a free-enterprise system, the extent of the protection afforded contracting parties is properly a function of their bargaining power and foresight, and the heavy-handed imposition of judicial or legislative notions of fairness can only upset an economic mechanism whose delicate feedback adjustments depend on the broadest freedom of contract.

Second, only merchants are affected. The Code firm offer cannot be conscripted into the service of the high-pressure retail salesman.

Third, the enforcement of firm offers conforms not only to received business morality but to business practice and to the clearly manifested intention of the parties. The legislature ought to abrogate any rule of law which tends (needlessly, it is suggested in the first point) to defeat the reasonable expectations and the manifested will of the parties.

Fourth, if the desirability of the protection of actual reliance is conceded, then a case may be made for the protection of the likelihood of reliance. Reliance is difficult to measure. The administration of a rule protecting reliance invites the application of subjective ideas of justice; the rule itself can be phrased only in weasel words. But business requires rule-certainty in planning transactions. So it is desirable to have a fixed rule the application of which can be predicted.

Fifth, the formal requirements of the section, a signed writing, supply the usual evidentiary and cautionary needs, previously alluded to.

Section 2-205 has its faults, needless to say. Suppose $B$ has also requested and received a bid from $D$ for hauling and rigging on the contract. $D$ can revoke his offer even if he has embodied it in a signed writing giving assurance that it will not be revoked, because $D$ sells services, not goods, and the Uniform Commercial Code does not apply.

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56. The words, "if injustice can be avoided only by the enforcement of the promise," embodied in Restatement, Contracts § 90 (1932), scale new heights of flexibility or plumb new depths of uncertainty, to mix some cliches.
to the contemplated transaction. It is highly likely that there will be
litigation over who is a "merchant"; it may often be a jury question.
And the Code provision has been thrown into competition with statu-
tory forms of broader utility, such as the Uniform Written Obligations
Act, without any attempt to reconcile them (easy enough) or to dif-
ferentiate their spheres, so that the absence of any comprehensive legis-
lative design is apparent

"Section 2-209. Modification and Waiver

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

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

It has already been remarked that an agreement requiring written
or signed assent to the subsequent modification of a contract does not
prevent subsequent oral modification, and "The parties may not con-
tract away their power to contract." The common law, in other words,
does not permit the parties to a contract to erect a private Statute of
Frauds.57

The reason for the insertion of such a provision is that one of the
parties fears that the other will claim additional compensation for "extra
work" or other modified performance which was not in fact rendered.
This protection may seem justified, but if it were available it could itself
be used as an instrument to defraud the other party who in fact did
additional work in return for an oral promise of additional pay. None-
theless, the Code now makes this protection, the private Statute of
Frauds, available (but in sales transactions, not in construction con-
tracts where the problem, it is suggested, arises more often).

The common law did not leave entirely to the jury the question
whether a promise of extra compensation was in fact made. The party
claiming under the modification was bound to show an additional con-
sideration for the extra compensation. This, of course, was an aspect
of the anti-holdup rule. Presumably the new consideration supplied
the evidentiary and cautionary function usually attributed to consider-
ation.

Section 1-107, treated previously,58 seems to provide for formal
renunciation of breaches and to that extent trench.on the anti-holdup

57. 3 CORBIN, CONTRACTS § 763 (1951).
rule. 90 Section 2-209 (1) abrogates the rule as it concerns modification. The policy of the rule is criticized briefly in the note below because of its bearing on this section. 90 It is to be noted that the Code does not supply formal requirements for modification, but it does permit the parties to require them. It is apparent from subsection (1) that the draftsmen of the Code feel that the general requirement of good faith, adverted to in the comment, is sufficient to enable the courts to police modifications even without the doctrine of consideration.

On the whole, it seems to this writer that, if the danger from willful perjury or mere misunderstanding is great, then a Statute of Frauds of general applicability might be the appropriate safeguard. Subsection (2) gives no remedy for the trusting, because they will not invoke it, and yet it invites the attention of those from whom the converse evil may be anticipated—the shark draftsman who induces his victim to rely on oral promises, then asserts the stipulation for written modification as a defense.

If a modification is itself within the Statute of Frauds embodied in section 2-201 or, presumably, within any other Statute of Frauds, then it must be in writing, of course, and section 2-209 (3) so provides.

59. For convenience, the rule is restated here: the promisee may not utilize the delay and difficulty involved in enforcement to exact a greater compensation than the contract provides or to procure a discharge for a less performance than is conceded to be due; the performance of a legal duty is not a sufficient consideration for a promise of extra compensation, and the performance of part of a legal duty is not a sufficient consideration for a discharge of the whole duty. This rule is often called the rule of Foakes v. Beer, 9 App. Cas. 605 (1884). That case is summarized in note 34 supra.

60. In the course of performance, the relative bargaining power of the parties is likely to vary markedly owing to unforeseen changes in circumstances. Suppose a rise in the market—the seller's duties may prove more onerous, but he has more bargaining power because his performance has become more valuable to the buyer. He may be able to exact a promise of a higher price by posing to the buyer the alternative, "Sue me." In fact, even where there are no unforeseen changes in circumstances, a party who has received a performance without rendering the return performance may offer a settlement based on the expense, delay, and ultimate uncertainty of collection. But the promise of a higher price and the discharge are ineffective under the rule. Professor Williston thinks there is no consideration for the promise or discharge. 1 WILLISTON, CONTRACTS § 130A (rev. ed. 1936). Professor Corbin thinks the new promise is denied enforcement for reasons of public policy. 1 CORBIN, CONTRACTS § 183 (1950). Unquestionably the rule can be administered harshly, but an astute court can avoid its operation many ways. The court may find that the parties rescinded the original contract and formed another, or that the promisee was excused from his original undertaking by impossibility or mistake, so that his promise to perform notwithstanding is sufficient. The new agreement may call for additional work, and a single consideration will support the promise to pay for the new work and, at a higher rate, for the old. The parties may dispute the meaning of the contract or any of the above points, and their agreement in settlement of the dispute will be enforceable as a compromise if made reasonably and in good faith. And, of course, a formal substitute for consideration may be used to avoid the rule. It is suggested then that flexibility in the application of the anti-holdup rule now exists. It is unnecessary to provide for new formal substitutes for consideration (§ 1-107) or to repeal the rule (§ 2-209). To do both, to enact both sections, the one of more general application (Article I covers the whole Code) and the other of less (Article II is concerned with sales), seems awkward and unwise.
The Code also introduces some formal notice requirements into the law of contract conditions. This is novel.

"Section 2-605. Waiver of Buyer's Objections by Failure to Particularize"

“(1) The buyer’s failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach.

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.”

This section is part of the Code's attack on the so-called forced breach. The rule of the common law is that a repudiating party is not bound to assign a reason, and may even assign a false reason, for his repudiation. If a valid reason exists, he may thereafter assert it despite his failure, or willful refusal, to communicate it earlier, unless an estoppel has arisen. The only well-established exception is that a failure to insist on payment in legal tender, where it could seasonably have been procured and tendered, is a waiver of the condition of payment in legal tender. The Uniform Commercial Code rules on tender, cure, and waiver are all designed to minimize economic loss when default occurs or is asserted. Section 2-605 (1) (b) is the only element of this system which utilizes a formality, but it is an apt use indeed: friendly adjustment and the preservation of the goods call for prompt notice of defects; the seller may nonetheless feel that the buyer is trying to escape a contract which threatens to be unprofitable; yet the seller is constrained by knowledge of the rule that the buyer is not bound to state a correct reason or any reason and by the proverbial "strict" construction of commercial contracts (the likelihood that any failure to perform express or implied duties will be found "material"); let the buyer state the defects when formally notified to do so or be barred.

Presumably the buyer must respond to a formal request within a reasonable time. These provisions, it may be, do not improve on the best cases, but the statute should be a less fallible guide.

61. 3 CORBIN, CONTRACTS § 762 (1951); 3 WILLISTON, CONTRACTS § 839 (rev. ed. 1936).

62. RESTATEMENT, CONTRACTS § 305 (1932).
"Section 2-609. Right to Adequate Assurance of Performance

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

This section proposes a formal solution to an always troublesome question: when does a breach or a change in circumstances become so "material" as to justify the threatened party in terminating the contract. This question has always been divided—when may the threatened party terminate his own performance or suspend it, and when may he sue the other party—but the former outweighs the latter in immediacy and is appropriately given more emphasis in the Code. It may very well be that references to "reasonable grounds for insecurity" and "such assurance . . . as is adequate under the circumstances of the particular case" do not advance things very much. Rather, no mechanical device can obviate the difficulty if nice justice is to be done between the parties.

An instance of the difficulty which inheres in determining when a breach is material is the case of Norrington v. Wright. In that case, the seller promised deliveries of iron "at the rate of about one thousand (1,000) tons per month." The seller shipped considerably less than this amount in February, and somewhat less in March and in April. The buyer repudiated under a claim of right and, in response to an objection, wrote: "We are advised that what has occurred does not amount to an acceptance. . . . If we are mistaken as to our obligation for the February and March shipments, of course we must abide the

63. 115 U.S. 188 (1885).
64. Id. at 189.
consequences; but if we are right, you have not performed your contract. . . . There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage." 65 In response to an objection by the seller, the buyer again wrote: "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application." 66 The market for iron was falling, of course. The Supreme Court affirmed judgment for the buyer. "In the contracts of merchants, time is of the essence." 67

To say that performance on time is always a condition, or to say that any breach of warranty excuses the buyer, is to erect a harsh rule which is easy to apply. To say "it depends in each case on the terms of the contract the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages. . . .", 68 or to say "Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole," 69 is to authorize the weighing of all the relevant circumstances at the sacrifice of predictability.

It is suggested that a provision for formal demand for assurances only alters the tactics of the prospective default situation without reaching the difficult questions of "reasonable," "adequate," and "justified." The introduction of formalities of notice and demand into the law of conditions is, as previously mentioned, new, although notice and demand have always had evidentiary force. Sanctioning a demand for particulars (section 2-605) seems helpful. Sanctioning a demand for assurances (section 2-609) does not.

"Section 2-616. Procedure on Notice Claiming Excuse"

"(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery

65. Id. at 190-91.
66. Id. at 192.
67. Id. at 203.
68. Uniform Sales Act § 45(2).
69. This is the Code rule for installment contracts. Uniform Commercial Code § 2-612.
concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to the breach of installment contracts (Section 2-612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

"(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

"(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section."

This section relates to excuse by way of impossibility, frustration, or supervening illegality as set forth in section 2-615. There is also a provision for allocation of a diminished supply in that section. Under section 2-616, it seems, the buyer must formally—in writing—acquiesce in his quota within a reasonable time after notice from the seller or be held to have terminated his contract. Apparently he may not both have his quota and contest the rightfulness of the claim of excuse. But why is oral notice of allocation by the seller sufficient when the buyer must acquiesce in writing? If the suggested analysis of the functions of form is correct, then the effect (whether the purpose or not) of the requirement of a writing is to give the seller evidence of modification, to warn the buyer that, by acquiescing, he is foregoing the privilege of attacking the claim of excuse. Suppose the subject matter of the contract is lumber, and the seller had intended to fill the contract from certain mills. One mill burns down, so the seller tells his buyers he will allocate. It is likely to be a troublesome question whether the seller's duty in such a case is conditioned on the availability of production from the mills the seller had in mind. Under section 2-616, the seller may hold a gun to the buyers' heads and compel them to acquiesce in allocation at the peril of losing their quotas. Such a provision promotes compositions indeed, by impaling the buyer on a dilemma.

V.

SECURED TRANSACTIONS.

While the topic of security devices is outside the conventional field of contracts, and for that reason little space can be devoted to it here,
it is important to note that contract formalities have been substituted, in Article 9 of the Code, for the usual incidents of the common-law security interests.\textsuperscript{70} If the debtor executes a signed writing and, in some cases, if the parties comply with filing requirements,\textsuperscript{71} then what would otherwise be a mere contract for a preference, a mere promise by the debtor to subordinate his other creditors and give priority to the "secured" creditor in the particular assets, creates a property right in the creditor. The use of the term "floating lien" should not conceal the truth: the interest created is a contract. The policy against secret liens is not offended, because the filing provisions are calculated to put trade creditors, the subordinated class, on notice through the mercantile agency reports. But \textit{Benedict v. Ratner},\textsuperscript{72} which struck down not ostensible ownership, but dominion reserved,\textsuperscript{73} is repealed.

\textbf{CONCLUSION.}

The Uniform Commercial Code considerably expands the use of contract formalities within its domain. The signed writing, or the writing, is almost the exclusive formality under the Code, and this is appropriate in a day of universal literacy and universally expensive legal advice.\textsuperscript{74} For the most part, the use of formalities by the Code is well-calculated to achieve the policies of the Code. The author would except the sales Statute of Frauds (section 2-201).

It may be that the Code embodies so many changes that it will fail of uniform enactment because its critics, conceding it is a net improvement, will condemn the whole of it for a relatively small number of weaknesses. If the American Law Institute and the National Conference of Commissioners on Uniform State Laws have responded to Mr. Justice Cardozo's call for a Ministry of Justice,\textsuperscript{75} they have been faced with "the twin dangers of overzeal on the one hand and of inertia on the other—of the attempt to do too much and of the willingness to do too little."\textsuperscript{76} There can be no doubt which hazard they have risked.

\begin{itemize}
  \item \textsuperscript{70} Uniform Commercial Code § 9—203.
  \item \textsuperscript{71} Uniform Commercial Code § 9—302.
  \item \textsuperscript{72} 268 U.S. 353 (1925).
  \item \textsuperscript{73} Id. at 363.
  \item \textsuperscript{74} Professor Fuller attributes to Ihering an explanation of the workability of extreme formalism in the Roman law: free legal advice was always available. Consideration and Form, 41 Colum. L. Rev. 799, 802 (1941).
  \item \textsuperscript{75} Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113 (1921).
  \item \textsuperscript{76} Id. at 125.
\end{itemize}