

UNIFORM COMMERCIAL CODE COMMENTARY

THE DOCTRINE OF PART PERFORMANCE UNDER U.C.C. SECTIONS 2-201 AND 8-319

Sections 2-201(1) and 8-319(a) of the Uniform Commercial Code provide that a contract for the sale of goods and securities is enforceable only if it is evidenced by a writing signed by the party against whom enforcement is sought.¹ Code sections 2-201(3)(c) and 8-319(b) recognize an exception to this rule by providing that an oral contract is enforceable with respect to goods or securities for which payment has been made and accepted.² Several interpretative problems have recently arisen with regard to these part-performance provisions. One problem is whether the performance of an act or a service may be considered sufficient "payment" of the contract "price" to render the alleged oral contract enforceable under these provisions. Under the Uniform Sales Act, an act or a service could not constitute "price" in a sale of goods.³ Thus, the performance of such acts or services was never considered sufficient "payment" of the "price" to render the alleged

¹ U.C.C. § 2-201(1) states:

[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. . . .

U.C.C. § 8-319(a) states:

A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price

(All Uniform Commercial Code citations are to the 1962 Official Text).

² Section 2-201(3) states that "[a] contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606)."

Section 8-319 states that "[a] contract for the sale of securities is not enforceable by way of action or defense unless . . . (b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment"

³ Uniform Sales Act § 9(2) (act withdrawn 1962) stated that "[t]he price may be made payable in any personal property." As construed by the courts, however, the "price" had to be paid in money or a thing of value; an act or a service to be performed under the contract was insufficient. See, e.g., *Patterson v. Beard*, 227 Iowa 401, 406, 288 N.W. 414, 417 (1939); *Cassidy v. Kraft-Phenix Cheese Corp.*, 285 Mich. 426, 433, 280 N.W. 814, 817 (1938); *Young v. Gerosa*, 11 App. Div. 2d 67, 71, 202 N.Y.S.2d 470, 476 (1960); *Show of the Month, Inc. v. Shubert Theatre Corp.*, 202 Misc. 379, 384-85, 109 N.Y.S.2d 484, 489-90 (Sup. Ct. 1951).

oral contract enforceable.⁴ Section 2-304(1) of the Uniform Commercial Code alters prior law, and provides that "[t]he price can be made payable in money or otherwise. . . ." Since this section does not expand on the meaning of the word "otherwise," it is unclear whether acts or services may constitute "price" under the Code. Once this is resolved, a further issue arises as to whether there are any tests applied under sections 2-201(3)(c) and 8-319(b) which limit the acts, as performed, that may constitute "payment." One recent case has applied a limiting test, maintaining that when an act is required as the price, performance of the act must be "unequivocally referable" to the alleged contract to bring the agreement within the scope of section 8-319(b).⁵

A further interpretative problem which has recently arisen is whether an oral contract for the sale of an indivisible item is enforceable under sections 2-201(3)(c) and 8-319(b) when a partial payment of the contract price is made and accepted.⁶ According to the Uniform Sales Act, once partial payment was established the entire alleged contract was taken out of the Statute of Frauds and a plaintiff was given the opportunity to prove an agreement for a larger quantity of goods than the payment proportionately evidenced.⁷ Code sections 2-201(3)(c) and 8-319(b), however, provide that an oral contract is enforceable with respect to goods or securities for which payment has been made and accepted. Where the goods are apportionable to the amount of payment, the Code clearly limits enforcement of the alleged contract to that quantity.⁸ Section 2-201(3)(c) and 8-319(b) are unclear, however, when the part payment is made for unapportionable goods. Either the contract is totally unenforceable, or it must be allowed for a quantity disproportionate to the amount of the payment. Two courts have reached contrary results on this issue.⁹

The purpose of this comment is to examine the correctness of these recent Code interpretations, specifically in relation to the language and intent of sections 2-201(3)(c) and 8-319(b). These interpretations will also be analyzed in conjunction with related Code provisions as an indication of

⁴ Uniform Sales Act § 4(1) states that "[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 . . . give something in earnest to bind the contract or in part payment. . . ."

⁵ *Mortimer B. Burnside & Co. v. Havener Sec. Corp.*, 25 App. Div. 2d 373, 269 N.Y.S.2d 724 (1966).

⁶ An indivisible or unapportionable quantity is one which, by its use and nature, is not reasonably susceptible of division into separate parts. An example of an indivisible quantity would be "one automobile." An example of a divisible quantity would be "10,000 bolts." Securities may also be classified as divisible or indivisible. Thus, an indivisible quantity of securities would be one share of stock valued at \$100. A divisible quantity would be 100 shares of stock valued at one dollar each.

⁷ As construed by the courts, part payment under Uniform Sales Act § 4(1) allowed a plaintiff to prove the entire alleged contract. E.g., *Phillips-Jones Co. v. Reiling & Schoen, Inc.*, 193 App. Div. 716, 726-27, 184 N.Y.S.2d 387, 394 (1920); *Moskewitz v. White Bros.*, 166 N.Y.S. 15, 16 (App. T. 1917). See *Jessup & Moore Paper Co. v. Bryant Paper Co.*, 283 Pa. 434, 442-43, 129 A. 559, 562-63 (1925).

⁸ See U.C.C. § 2-201, Comment 2.

⁹ Compare *Starr v. Freeport Dodge, Inc.*, 282 N.Y.S.2d 58 (Dist. Ct. 1967), with *Williamson v. Martz*, 11 Pa. D. & C.2d 33 (Northumberland County Ct. 1956).

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overall Uniform Commercial Code intent and policy. Where sections 2-201 and 8-319 are similar, they shall be treated interchangeably.¹⁰

*Mortimer B. Burnside & Co. v. Havener Sec. Corp.*¹¹ raises the first interpretative issue: whether, under the Code, the performance of an act or a service may constitute "payment" of the contract "price." The plaintiff, Burnside, alleged that the defendant, Havener Securities Corporation, orally agreed to assign him one-third of the 25,000 common-stock-purchase warrants issued to the defendant by the Ormont Drug Company, on the condition that the plaintiff purchase Ormont stock from a specified third party, Friedman. Burnside, in a written contract with Friedman, purchased 10,000 shares of Ormont stock. When the plaintiff confronted Havener, however, the Securities Corporation denied the contract and refused to transfer the warrants pursuant to the alleged oral agreement. Burnside sued for breach of contract, alleging that his purchase of the stock from Friedman was "payment" under section 8-319(b) for the warrants held by Havener, and that, on the basis of this section, the oral contract was enforceable regardless of the lack of a writing.

To include the alleged contract within section 8-319, the court first had to determine that the transaction contemplated a sale. Since Code section 2-106 provides that "[a] 'sale' consists in the passing of title from the seller to the buyer for a price . . .," the court held that the transaction was a sale if the transfer was for a price.¹² Referring to section 2-304 of the Code, which states that the "price can be made payable in money or otherwise," the New York court held that an act, such as Burnside's purchase of stock from Friedman, could be considered the "price" under the contract.¹³ The *Burnside* court further stated, however, that since there was no writing present, the plaintiff's act of payment had to be "unequivocally referable" to the alleged oral contract in order to render such contract enforceable under section 8-319(b).¹⁴ Since the purchase of stock from Friedman did not alone evidence the specific alleged contract, the plaintiff's performance was held not "unequivocally referable" to the alleged agreement, and thus the contract was held unenforceable due to the lack of a writing. The court reasoned that if the "unequivocally referable" test were not applied, a plaintiff could fraudulently assert that any action, on his part, was done in reliance on a supposed oral contract.¹⁵

In a dissenting opinion, Justice Steuer maintained that Burnside's act did not constitute "price" and that the transaction, therefore, was not a "sale."¹⁶ On this basis he maintained that Burnside did not have to satisfy section 8-319, dealing with the sale of securities, in order to gain entrance into court. Even if an act could be construed to constitute "price," asserted

¹⁰ Because of the similarities between §§ 2-201(3)(c) and 8-319(b) it has been asserted that courts should give a similar construction to both. U.C.C. § 8-319, Comment; Ill. Ann. Stat. ch. 26, § 8-319, Comment (Smith-Hurd 1963); 2 R. Anderson, Uniform Commercial Code § 8-319:2 (1961).

¹¹ 25 App. Div. 2d 373, 269 N.Y.S.2d 724 (1966).

¹² Id. at 374-75, 269 N.Y.S.2d at 726.

¹³ Id. at 375, 269 N.Y.S.2d at 726.

¹⁴ Id.

¹⁵ Id. at 375, 269 N.Y.S.2d at 727.

¹⁶ Id. at 376, 269 N.Y.S.2d at 728.

Justice Steuer, the plaintiff's performance of the required act was "payment" under section 8-319(b) so as to overcome the defense based on the lack of a writing.¹⁷ He claimed that whether the plaintiff's performance evidenced a specific contract was not a question of law to be determined by the "unequivocally referable" standard set out by the majority. Instead, the Justice felt that once "payment" has been asserted by the plaintiff, the defense of the Statute of Frauds should be denied, and the jury should be allowed to decide whether in the light of other relevant oral testimony, there was evidence sufficient to prove the contract.

Under pre-Code law, there was a conflict of authorities as to whether acts called for by such an oral contract could constitute "price." Jurisdictions which adopted the Uniform Sales Act held, as Justice Steuer suggested, that "price" must be paid in money or a thing of value, and that an act or service to be performed under the contract was insufficient.¹⁸ Other courts maintained, however, that such acts or services could constitute the contract price.¹⁹

The majority in *Burnside* settled the above dispute by construing the word "otherwise" in Code section 2-304(1) to include acts, services or any other consideration sufficient to support a contract.²⁰ That the Code draftsmen intended "acts and services" to constitute "price" is evidenced by official comment 1 to section 2-201, which specifically provides that the price may be payable in services. Various state legislatures and Code reporters have agreed with *Burnside's* inclusion of acts and services within the scope of section 2-304(1).²¹

Although the Code does allow acts or services to be the agreed price, it does not state any specific guidelines for determining whether such acts, as performed, will be sufficient to constitute "payment" and thereby render the oral contract enforceable. Faced with this problem, the *Burnside* court turned to the "unequivocally referable" standard, a test applied in part-performance cases concerning the sale of real property. In adopting this standard, however, the court did not elaborate on how the test was to be applied within the Code. Thus, it is necessary to evaluate the court's application of the "referable" standard in relation to the policy factors underlying the Code's adoption of a Statute of Frauds.

The Statute of Frauds has generally required that contracts be in writing in order to avoid the enforcement of fraudulently alleged agreements.²² Inherent in the Statute is the concept that parol testimony is not a reliable

¹⁷ Id. at 377, 269 N.Y.S.2d at 728.

¹⁸ See cases cited note 3 supra.

¹⁹ E.g., *Hightower v. Ansley*, 126 Ga. 8, 11, 54 S.E. 939, 940 (1906); *Osborn v. Chandeysson Elec. Co.*, 248 S.W.2d 657, 662 (Mo. 1952). See 2 A. Corbin, *Contracts* § 495, at 671 (1950).

²⁰ 25 App. Div. 2d at 375, 269 N.Y.S.2d at 726.

²¹ See R. Anderson, *Uniform Commercial Code Legal Forms* 139 (1963); W. Willier & F. Hart, *Forms and Procedures under the Uniform Commercial Code* ¶ 23.05 (1965); Del. Code Ann. tit. 5A, § 2-304, Comment (1967); 1 New York Law Revision Commission Report, *Study of the Uniform Commercial Code* 374 (1955); Okla. Stat. Ann. tit. 12A, § 2-304, Comment (1963); Wis. Stat. Ann. § 402.304, Comment (1964).

²² See 2 A. Corbin, *Contracts* § 275 (1950).

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basis for proving a contract. If all plaintiffs alleging oral contracts were permitted to go before a jury to prove their claims, the determination of whether a contract existed could rest on the perjured representations of an asserting plaintiff. This would open the door to fraudulent claims against innocent parties. It was also felt, however, that performance of the contract by one of the parties would sufficiently evidence an actual contract to prevent such fraud, and bar the writing requirement.²³

Not all such alleged performances were considered satisfactory evidence of a contract to allow exemption from the requirement of a writing. Accordingly, in realty cases, the "unequivocally referable" test evolved. This test provided that, in order to take the alleged oral contract out of the Statute of Frauds, such acts as performed must themselves be so clear and definite in their object as to refer exclusively to the complete agreement.²⁴

In applying the "unequivocally referable" test to the Code, the *Burnside* court cited *Burns v. McCormick*,²⁵ the case in which Justice Cardozo enunciated the expression for the first time. In that case a party allegedly promised to devise his land to the plaintiff if the latter would give up his business and care for the promisor in his later years. The plaintiff performed the oral request, and at the promisor's death sued for title to the land, claiming that his performance excused the contract from the writing requirement of the Statute of Frauds. Although the act of the plaintiff in caring for the promisor may have implied some contractual agreement, the court held that the alleged contract was unenforceable, since the performed acts themselves were not "unequivocally referable" to a specific alleged contract for the sale of land.²⁶ The court would not admit oral testimony in support of the contract, asserting that this would open the door to perjured claims.²⁷ Thus, under this test, the performed act itself must evidence the identical contract alleged, and must permit no other reasonable interpretation.

The trend in realty cases, however, has been away from the *Burns* rule toward a less stringent standard.²⁸ A substantial majority of jurisdictions recognize that it would be manifestly impossible for a performed act, taken by itself, to evidence exclusively the precise terms of any alleged contract, and thus satisfy the "unequivocally referable" standard.²⁹ These courts maintain that the acts need point only to *some* contractual relationship,

²³ See 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code § 1.1202, at 28 (1964).

²⁴ *Bright Radio Laboratories, Inc. v. Coastal Commercial Corp.*, 4 App. Div. 2d 491, 494, 166 N.Y.S.2d 906, 909-10 (1957), *aff'd*, 4 N.Y.2d 1021, 152 N.E.2d 543, 177 N.Y.S.2d 526 (1958).

²⁵ 233 N.Y. 230, 135 N.E. 273 (1922).

²⁶ *Id.* at 234, 135 N.E. at 274.

²⁷ *Id.*

²⁸ In fact, New York courts have been paying lip service to the *Burns* rule while actually applying a less strict test. E.g., *Roberts v. Fulmer*, 301 N.Y. 277, 93 N.E.2d 846 (1950), where the court looked not only to the plaintiff's possessing and improving certain real estate, but also to the circumstances surrounding such acts. The court then asserted that when viewed against the whole record, the acts of the plaintiff were part performance "solely and unequivocally referable" to the contract within the *Burns* rule. 301 N.Y. at 284, 93 N.E.2d at 849.

²⁹ See Annot., 101 A.L.R. 923, 960 (1936).

either in regard to the parties to the suit, or in regard to the subject matter being sold.³⁰ Parol evidence may then be introduced in court to show the precise terms of the alleged contract.

Some jurisdictions have deemphasized the "referable" standard, and deal primarily with the equitable aspects of part performance. These courts will not extend the Statute of Frauds to cases in which one party has changed his position to his detriment in reliance on the oral contract.³¹ Courts utilizing this approach hold that where unjust enrichment or unconscionable injury would result from the nonenforcement of an oral contract, the defendant is estopped from invoking the Statute of Frauds as a defense.³² The necessity of protecting against unjust injury and enrichment appears to outweigh the risk of possible fraudulent allegations. The estoppel is used only to bar the assertion of the Statute of Frauds: thus the plaintiff's claims are limited to those which can be proved in court.

Since Code sections 2-201(3)(c) and 8-319(b) do not specify any test qualifying the term "payment," this provision is susceptible of interpretation by the states in accordance with their varying standards. Therefore, in keeping with the Code policy of uniformity³³ it is appropriate to suggest the adoption of a particular, uniform interpretation consistent with the underlying policy and intent of the Uniform Commercial Code. An examination of sections 2-201 and 8-319 reveals that the requirements necessary to satisfy the Statute of Frauds have been lessened considerably. Of special note are the less demanding requirements concerning the makeup of a written memorandum. Under the Uniform Sales Act all the material terms of an agreement had to be included in the writing for the memorandum to be deemed sufficient evidence of an oral contract.³⁴ Under section 2-201 of the Code, however, the memorandum may be sufficient even though it omits the price, time and place of payment or delivery, the general quality of the goods, or any particular warranty.³⁵ It has been stated that "[a]ll that is required is that the writing afford a basis for believing that the offered oral evidence rests on a

³⁰ E.g., *Rutt v. Roche*, 138 Conn. 605, 608, 87 A.2d 805, 807 (1952); *Rienzo v. Cohen*, 112 Conn. 427, 429, 152 A. 394, 395-96 (1930); *Frizzell v. Frizzell*, 149 Va. 815, 823-24, 141 S.E. 868, 870 (1928).

³¹ See, e.g., *Mosekian v. Davis Canning Co.*, 229 Cal. App. 2d 118, 40 Cal. Rptr. 157 (1964); *Buice v. Scruggs Equip. Co.*, 194 Tenn. 129, 250 S.W.2d 44 (1952).

³² See, e.g., *Brewood v. Cook*, 92 App. D.C. 386, 389, 207 F.2d 439, 441 (D.C. Cir. 1953); *Associated Creditors' Agency v. Haley Land Co.*, 239 Cal. App. 2d 610, 617, 49 Cal. Rptr. 1, 5-6 (1966).

³³ U.C.C. § 1-102(2) states that the "[u]nderlying purposes and policies of this Act are . . . (c) to make uniform the law among the various jurisdictions."

³⁴ Uniform Sales Act § 4(1), as construed by the courts, required that all the material terms of the contract be included in the memorandum. See, e.g., *Clinton Mills Co. v. Saco-Lowell Shops*, 3 F.2d 410, 413-14 (1st Cir. 1925), where the time of delivery was not included in the written memorandum thus rendering the contract unenforceable; *Franklin Sugar Ref. Co. v. Howell*, 274 Pa. 190, 200-201, 118 A. 109, 113 (1922), where a memorandum was held insufficient in the absence of a clear statement of the price of the goods.

³⁵ See Committee on Legislative Research, Proposed Uniform Commercial Code: Its Effect Upon Cognate Missouri Statutes 35 (1954).

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real transaction."³⁶ The only necessary items are the signature of the party against whom enforcement is sought, and the quantity, which may even be stated incorrectly.³⁷

Section 2-201(2) further liberalizes prior law. Applying to transactions between merchants,³⁸ this section treats the failure to reply to a written confirmation as tantamount to the writing required by section 2-201(1). Under the Uniform Sales Act, the writing requirement would not be satisfied by such a failure to reply and thus, the alleged oral contract would be unenforceable.³⁹

It is submitted that this less stringent policy underlying the "writing" requirements of the Code Statute of Frauds is also applicable to the "payment" provisions of sections 2-201(3)(c) and 8-319(b). Thus, if the alleged act of payment affords a basis for believing that the offered oral evidence rests upon a real transaction, the asserting party should be given the opportunity to prove the alleged contract. In conformance with this Code policy the word "payment" in sections 2-201(3)(c) and 8-319(b) should not be limited by a requirement that the performance be "unequivocally referable" to the alleged contract.

The Code's rejection of a "referable" standard is further evidenced by comment 2 to section 2-201, which states that "[t]he overt actions of the parties make admissible evidence of the other terms of the contract" The

³⁶ *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co. of America*, 396 Pa. 506, 512, 153 A.2d 472, 476 (1959); U.C.C. § 2-201, Comment 1.

³⁷ U.C.C. § 2-201, Comment 1. The memorandum requirements for § 8-319 differ slightly from those of § 2-201. Section 8-319(a), while incorporating the overall liberality of § 2-201(3)(c), states that the memo must also contain a statement of the price. However, it has been asserted that the statements in the official comments to § 2-201 shall apply to § 8-319 in all other respects; Cal. Comm. Code § 8319, Comment 1 (West 1964).

³⁸ U.C.C. § 2-104(3) states that "[b]etween merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants."

³⁹ E.g., *Webster v. Condon*, 248 Mass. 269, 271, 142 N.E. 777 (1924); *Sall v. Mueller Brass Co.*, 361 Pa. 449, 452-53, 65 A.2d 236, 237-38 (1949).

The requirements regarding the memorandum in §§ 2-201 and 8-319 are fully consistent with the overall lack of stringency in the Code toward the formation and enforcement of contracts. Section 2-204 provides that contracts will not fail for indefiniteness as long as there is some reasonable basis for finding an intent to contract. Section 2-207 demonstrates this policy favoring enforcement by providing that an acceptance which varies the terms of the offer is to be construed as an acceptance, with any additional terms to be considered as proposals for addition to the original contract. By this section, the Code adds contractual finality to the situation, whereas under prior law, the variant acceptance would have been considered a counter-offer, not binding on the parties. E.g., *Snow v. Schulman*, 352 Ill. 63, 71, 185 N.E. 262, 266 (1933); *Cohn v. Pennsylvania Beverage Co.*, 313 Pa. 349, 352, 169 A. 768, 769 (1934). Furthermore, § 2-305 provides that the parties can make a contract even though no price term is settled. By pre-Code law, contracts with no price term would be held void for indefiniteness unless they were requirements contracts. E.g., *McNeely v. Bookmyer*, 292 Pa. 12, 15, 140 A. 542, 543 (1928). Where an intent to contract is present, the Code supplies the requisite terms to allow a reasonable enforcement of the agreement. See U.C.C. § 2-308, where the Code designates the place of delivery if none is provided in the contract; § 2-309, where the Code applies a standard of "reasonable time" if the time of delivery provision is omitted.

comment goes on to state that "this is true even though the actions of the parties are not inconsistent with a different transaction such as a consignment for resale of a mere loan of money." At this point the Code is specifically rejecting the "referable" test in regard to cash payments of the price. Since, as noted above, section 2-304 of the Code allows "price" to be payable by the performance of acts or services called for in the contract, it is evident that the "referable" standard should also be rejected as to this type of "payment." Thus, once it is determined that an act or service may constitute "price," "payment" of the "price" is merely doing the required act or service. This is, in effect, the approach used by the courts applying the estoppel concept.⁴⁰ Sections 2-201(3)(c) and 8-319(b), therefore, allow the enforcement of such oral contracts, if proved, on the basis of statutory law, rather than forcing the courts to rely on the equitable doctrine of estoppel.

It is thus apparent that the majority in *Burnside* was correct in stating that the plaintiff's act of purchasing the stock could constitute "price," but incorrect in applying the "unequivocally referable" test to the Code Statute of Frauds. Burnside's purchase from Friedman was "payment" under section 8-319(b), and he thus was entitled to present oral evidence in an effort to prove the contract.

II. PARTIAL PAYMENT FOR AN INDIVISIBLE ITEM

A further issue regarding the performance needed to take an oral contract out of the Statute of Frauds sections of the Code concerns partial payment of the price under an indivisible contract for sale. There have been two cases decided under the Uniform Commercial Code on this issue, and they present contrary interpretations of section 2-201(3)(c). The Pennsylvania case of *Williamson v. Martz*⁴¹ involved an oral agreement for the sale of two 200-gallon milk vats for \$800 apiece. The defendant buyer paid \$100 on account, with the remaining \$1500 to be paid on the plaintiff seller's delivery of the vats. Although the plaintiff tendered delivery of the vats, the defendant refused to accept, denying the existence of an enforceable contract. Williamson admitted that the value of the goods was more than \$500 and that there was no writing which would render the contract enforceable under section 2-201(1). He did contend, however, that the defendant's \$100 payment brought the contract within the scope of section 2-201(3)(c), thereby rendering the contract enforceable.

The court held that since the \$100 payment was less than the price of one vat, section 2-201(3)(c) did not apply to exempt the contract from the application of section 2-201(1).⁴² The Uniform Sales Act provision that partial payment of the contract price takes the entire contract out of the Statute of Frauds was held repealed by the Code.⁴³ Under section 2-201(3)(c), a partial payment allows an oral contract to be enforceable, "with respect to goods for which payment has been made and accepted."⁴⁴ On the basis of

⁴⁰ See text p. 360 supra.

⁴¹ 11 Pa. D. & C.2d 33 (Northumberland County Ct. 1956).

⁴² *Id.* at 35.

⁴³ *Id.*

⁴⁴ *Id.*

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this change, the *Williamson* court asserted that the Code denied the enforcement of an oral agreement where in the case of a single, indivisible object, the payment made is not the full amount.⁴⁵

In *Starr v. Freeport Dodge, Inc.*⁴⁶ a New York court reached an opposite result. In this case the plaintiff allegedly made a \$25 down payment to the defendant car dealer on an oral contract for the sale of an automobile. On the day the car was to be delivered, the defendant demanded an additional \$175. Starr refused to pay the increased price and sued for breach of contract. The dealer claimed there was no enforceable contract, however, since the writing requirement was not satisfied in accordance with section 2-201(1).

Ruling that the \$25 payment was sufficient to make the oral contract enforceable under section 2-201(3)(c), the court specifically rejected the *Williamson* decision.⁴⁷ The *Starr* court maintained that even if subparagraph (c) *validates* a *divisible* contract for only as much of the goods as have been paid for, it does not necessarily follow that such a rule *invalidates* an *indivisible* oral contract where some part of the agreed price has been paid and accepted.⁴⁸ The court felt that any other decision would render unconscionable results by denying the enforcement of contracts actually made in good faith.⁴⁹ This would encourage rather than discourage fraud since a deceitful seller would be able to deny any oral contract where there has been part payment for an indivisible item. Furthermore, the court stated that the \$25 deposit was certainly not intended to be for the purchase of a portion of a car, but was intended to be towards the purchase of the entire automobile.⁵⁰

When a case deals with divisible, apportionable goods, the Code remedy is clear with respect to partial payment. Delivery may be demanded only for the quantity of goods evidenced by the amount of payment. The problem arises when part payment of the alleged contract price is made on an indivisible item as in the *Williamson* and *Starr* cases. The solution to this problem lies in an understanding of the policy behind the adoption of section 2-201(3)(c).

Under the Uniform Sales Act once part payment was established, the entire alleged contract was taken out of the Statute of Frauds, and a plaintiff was given the opportunity to prove an agreement for a larger quantity of goods than the payment implied.⁵¹ Although the partial payment provision of the Uniform Sales Act assured the enforceability of contracts in fact made, it also opened the door to false claims of contracts for greater quantities than

⁴⁵ Id.

⁴⁶ 282 N.Y.S.2d 58 (Dist. Ct. 1967).

⁴⁷ Id. at 61.

⁴⁸ Id. In this regard, it is relevant to note the language of U.C.C. § 2-201, Comment 2 which states that, "[i]f the court can make a just apportionment, . . . the seller can be forced to deliver an apportionable part of the goods." This statement plainly allows the enforceability of divisible contracts with respect to the amount of payment. However, the comment, like § 2-201 itself, does not explicitly deny the enforcement of indivisible contracts. To read the latter into the comment without an understanding of the overall policy of the Uniform Commercial Code is misleading.

⁴⁹ 282 N.Y.S.2d at 61.

⁵⁰ Id.

⁵¹ See cases cited note 7 *supra*.

actually agreed upon. For example, suppose a plaintiff buyer made a \$5000 payment to the defendant seller and alleged that this was a partial payment under an oral contract for the sale of \$10,000 worth of goods. By the Uniform Sales Act, a court would hold that the \$5000 payment sufficiently evidenced a contract to satisfy the Statute of Frauds. The court would then allow the plaintiff to attempt to prove the larger quantity in court. Assume, however, that the actual oral agreement had been for \$5000 worth of goods. By allowing the plaintiff to assert a contract for more, the court would provide him with an opportunity to fraudulently claim a larger quantity. Thus, the basic policy behind the Statute of Frauds of protecting against the enforcement of fraudulent contracts would be defeated.

To protect against the assertion of a quantity larger than that actually agreed upon, the Code draftsmen included sections 2-201(3)(c) and 8-319(b).⁵² These sections, like the Uniform Sales Act, admit that a partial payment sufficiently evidences an oral contract to protect against the wholly feigned allegation of a contractual relationship.⁵³ Sections 2-201(3)(c) and 8-319(b) limit the enforceable quantity of the alleged contract, however, to that amount actually evidenced by the payment.⁵⁴

Relying on the principle behind the change from prior law in these sections, the *Williamson* court, in essence, held that a partial payment with regard to an oral indivisible contract would not provide a sufficient quantity limitation to satisfy the Statute of Frauds.⁵⁵ The Code's provision for a quantity term, however, was not meant to be so restrictive as to bar the enforcement of oral indivisible contracts in these cases. This becomes apparent after a review of the possibilities of fraud in conjunction with Code policy under both the *Williamson* and *Starr* interpretations. *Williamson* protects completely against the false assertions of quantity exemplified in the hypothetical case. By utilizing this approach with indivisible contracts, however, *Williamson* permits a seller falsely to deny the existence of any contract. Thus, the inequity which *Williamson* permits is greater than the inequity it supposedly protects against. If the contract is declared unenforceable, the decision is final, leaving an innocent party who relied on the oral contract with no opportunity to prove the contract. By the *Starr* approach, however, section 2-201 is satisfied and the parties may present evidence as to the reality of the contract. Since, in order to render the contract enforceable, the asserting party still must prove the terms of the alleged contract, some protection against fraudulent assertions is provided and, at the same time, the potential inequity of the *Williamson* result is avoided.

The *Starr* decision is in accord with the general policy of sections 2-201 and 8-319 in that it allows contracts, if proved, to be enforceable where there has been "a basis for believing that the offered oral evidence rests on a real transaction."⁵⁶ As noted earlier, the Code's Statute of Frauds sections are

⁵² See 1 W. Hawland, A Transactional Guide to the Uniform Commercial Code § 1.1202, at 28 (1964).

⁵³ Connecticut Temporary Commission to Study and Report upon the Uniform Commercial Code, Study and Report 70 (1959).

⁵⁴ See U.C.C. § 2-201, Comment 1.

⁵⁵ 11 Pa. D. & C.2d at 35.

⁵⁶ U.C.C. § 2-201, Comment 1.

considerably less demanding than prior law. While seeking to carry out the contractual intent of the parties, these sections reject many of the strict requirements which previously prevented the enforcement of actual agreements, such as the former limitation that the memorandum contain a statement of the time and place of payment or delivery.⁵⁷ In addition, the general Code policy of substituting commercially reasonable terms where they have been omitted from a written contract also supports the *Starr* decision. This policy implies that the Code takes the risk of substituting terms different from those actually agreed upon in order to protect against the possibility of an innocent party, who relies on the agreement, being injured by its nonenforcement. Similarly, the *Starr* rationale implies that the risk of injury to a party who relies on the contract outweighs the possibility of any fraud which may result from denying the Statute of Frauds as a defense.

The *Starr* approach finds further support in an examination of Code policy concerning the enforceability under section 2-201(3)(c) of contracts for goods which have been "received and accepted." Section 2-201(3)(c) refers specifically to section 2-606 which defines the term "acceptance." Section 2-606(2) states that "acceptance of the part of any commercial unit is acceptance of that entire unit."

A hypothetical situation best expresses the relevance of this section to section 2-201(3)(c). Suppose a seller orally contracts with a buyer for the sale of a machine which is considered a "commercial unit."⁵⁸ The machine being too large for a single delivery, the seller ships the unit in parts. After accepting one half of the parts, the buyer denies that the contract was for a larger quantity of goods. Under section 2-201(3)(c), the contract is enforceable with respect to "goods which have been received and accepted." It would appear on the basis of this section that the seller could not assert a contract for a larger quantity, and the buyer would have to pay a price apportionable to the quantity accepted. Section 2-201(3)(c), however, is modified by section 2-606(2). The latter section recognizes the validity of partial acceptance, but asserts that the buyer may exercise this right only as to whole "commercial units."⁵⁹ Thus, in the hypothetical case, if the contract were proved, the buyer would have to accept the rest of the machine parts.

In "commercial unit" situations, the Code is manifesting a policy which allows the seller to enforce, if proved, a contract for a quantity greater than that actually accepted. Similarly, in situations involving *payment of the contract price* for a "commercial unit," this Code policy would dictate that the defense of the Statute of Frauds be held inapplicable and that the buyer be afforded an opportunity to prove that the alleged contract was for that "commercial unit." Thus, in the *Williamson* case, the contract should have been

⁵⁷ See note 39 *supra*.

⁵⁸ U.C.C. § 2-105(6) states:

"Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

⁵⁹ U.C.C. § 2-606, Comment 5.

held enforceable for one vat,⁶⁰ which, under the definition in section 2-105-(6), is obviously a "commercial unit." Also, in the *Starr* case, the contract for the automobile should have been held enforceable.

The *Burnside* and *Starr* cases have presented significant issues concerning the enforceability of oral sales contracts under the Code. With respect to *Burnside*, it is evident that the court was correct in holding that an act or a service could constitute "price" under section 2-304. It is submitted, however, that the court was incorrect in holding that the performance of such acts must be "unequivocally referable" to the specific alleged contract in order to render the oral contract enforceable. The policy underlying the Code Statute of Frauds merely requires that the performance provide a basis for the presentation of evidence in proof of the contract.

It is also evident that the *Starr* decision was correct in holding that oral sales contracts are enforceable where partial payment has been made for an indivisible item. This decision eliminates the possible inequity inherent in *Williamson* in which a seller could falsely deny an agreement that was actually concluded, and thus furthers the Code policy toward less demanding conditions for the enforcement of contracts. By utilizing the "commercial unit" concept in conjunction with *Starr*, moreover, a party would not be able to allege a contract for a larger amount than the partial payment evidenced.

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⁶⁰ See 1 W. Hawkland, *supra* note 52, at 29.