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SALE OF GOODS CONTRACT NOT TO BE PERFORMED WITHIN A YEAR: IS THE UNIFORM COMMERCIAL CODE STATUTE OF FRAUDS PROVISION EXCLUSIVE?

Sidney Kwestel

A contract for the sale of goods for a price of $500 or more is unenforceable unless it satisfies the requirements of Section 2-201 of the Uniform Commercial Code (U.C.C.).[1] Suppose, however, that the sales contract is a contract that cannot be performed within a year from its making. Must the sales contract also satisfy the one-year provision of the statute of frauds?[2] Put somewhat differently, does Section 2-201 displace the one-year provision or does the one-year provision supplement it? The cases under the U.C.C. seem to favor the view that Section 2-201 is exclusive and that a sales contract need not satisfy the requirements of the one-year provision.[3] In effect these cases hold that Section 2-201 has displaced contract law in this area and accordingly, under U.C.C. Section 1-103 the statute of frauds one-year provision does not supplement the requirements of Section 2-201.[4]

In *AP Propane Inc. v. Sperbeck*,[5] plaintiff sought to enforce a written sales contract that allegedly was not performable within a year. The Appellate Division assumed, without deciding, that the contract did not comply with New York's one-year statute of frauds provision because the contract did not adequately state the price term. It nevertheless held that the sales contract was enforceable because the writing satisfied Section 2-201, which does not require that the writing contain the price term.[6] The court explained that there was a direct conflict between the requirements of the "more general Statute of Frauds contained in [New York's] General Obligations Law § 5-701

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[the one-year provision] and the statute of frauds made particularly applicable to contracts for the sale of goods under UCC 2-201" and thus concluded that Section 2-201 should control.[7] In holding that Section 2-201 displaced New York's one-year provision, *AP Propane* relied on the Court of Appeals' decision in *Henry L. Fox Co. v. William Kaufman Org.*[8] It viewed the holding in *Fox Co.* as supporting the proposition that a writing that satisfies Section 2-201 is sufficient even though it is insufficient under the one-year provision. The court stated:[9]

> As recently pointed out by the Court of Appeals in *Fox Co. v. Kaufman Org.* [citation omitted] New York has enacted several Statutes of Frauds with varying language and requirements, but each for the purpose of avoiding fraudulent enforcements of various kinds of contracts that were never actually made. The court explained the variations in requirements among the statute of frauds as reflecting "the Legislature's perception regarding the risk of false claims inherent in the contractual setting [citation omitted]." Notably, the court included as an example the different requirements for inclusion of a contractual term as to price under General Obligations Law § 5-701 and UCC 2-201. We think the clear implication of the holding in *Fox Co.* is that a contractual writing covering the sale of goods which is sufficient for enforceability under UCC-2-201 is valid despite its insufficiency under General Obligations Law Section 5-701. . . . In the light of the direct conflict between UCC 2-201 [without a price term] and the pre-UCC, more general statute of frauds relied upon by defendants, the latter is no longer applicable to the sale of goods, having been "displaced by [a] particular provision[ ] of [the code]" (U.C.C. 1-103).

The Appellate Division's reliance on *Fox Co.* appears to be misplaced. First, there was no issue in *Fox Co.* as to whether the one-year provision is applicable to a contract which also falls within another statute of frauds provision. Nor was there any issue as to which statute of frauds provisions should apply if two or more provisions conflict with each other. The only issue in *Fox Co.* was whether the contract was unenforceable under a specialized statute of frauds provision applicable to insurance-consulting services, more particularly, whether signed and unsigned writings could be combined to satisfy the writing requirement of that provision.[10] To be sure, *Fox Co.* did note that different statute of frauds provisions ". . . may require more or less particularity in the writings depending upon the Legislature's perception regarding the risks of false claims inherent in the contractual setting."[11] Thus, as *AP Propane* stated, in the setting of a sales contract Section 2-201 represents a legislative assessment that the inclusion of a written price term "is not necessary to prevent false claims."[12] However, in the setting of a sales contract that cannot be performed within one year, under *Fox Co.*'s reasoning, the one-year provision, which represents a legislative assessment that the writing needs more particularity, should also apply to that contract. In other words, far from supporting the view that U.C.C. Section 2-201 would displace the one year provision, *Fox Co.*'s dicta would lead to the conclusion that the more stringent one-year provision should also be applied to a sales contract not performable within a year in order to give effect to the legislative intent to prevent risks of false claims in that contractual setting. [13]

This is the approach taken pre-U.C.C. in *Riley v. Capital Airlines, Inc.*[14] There, in holding the executory portion of a sales contract unenforceable under both Alabama's one-year provision and its sales statute of frauds provision, the court reasoned:[15]

> There is no basic difference in the policy of Title 20, section 3 [Alabama's one-year statute of frauds provision] and Title 57, section 10 [Alabama's sale of goods statute of frauds provision] of the Code of Alabama of 1940. Both of these sections were devised for the prevention of fraud in contracts. It would be a fallacy to hold that one section permitted the enforcement of a contract, and at the same time find the identical contract to be unenforceable under another section of the [Alabama] Code. Clearly, this was not the legislative intent. The Court therefore concludes as a matter of law that both sections of the Alabama code are applicable to the contract in issue . . . [16]

The reasoning of *Riley* would appear to apply equally where the U.C.C. is in effect and the sales contract is not to be performed within a year. Thus, to paraphrase *Riley*, since Section 2-201 and a state's one-year provision were devised to prevent

fraud in contracts, both those provisions should apply to a sales contract not to be performed within a year in order to fulfill the legislative intent of avoiding false claims.

Second, the Appellate Division did not consider the Court of Appeals' decision in *Freedman v. Chemical Constr. Corp.*[17] in which plaintiff sought to enforce an oral agreement in which defendant purportedly agreed to pay plaintiff a fee for participation in defendants securing a certain construction contract. Defendant claimed that the contract was unenforceable under New York's one-year statute of frauds provision and in addition under a more particular provision which required a writing for contracts relating to business brokers and finders.[18] The Court of Appeals treated these statute of frauds provisions as cumulative and addressed both of them rather than addressing only the more specific provision relating to business brokers and finders.[19]

Third, *AP Propane* states that there is a direct conflict between Section 2-201 and ". . . the pre-UCC, more general statute of frauds. . ." and accordingly the more general one-year provision has been displaced by Section 2-201 and "is no longer applicable to the sale of goods."[20] A similar argument was made by the Sixth Circuit in *Roth Steel Products v. Sharon Steel Corp.*—that Section 2-201 was exclusive because there was an irreconcilable conflict between Section 2-201 and Ohio's one-year statute of frauds provision and that it was Ohio's policy to interpret special statutes as an exception to general statutes unless the legislature manifested a contrary intent.[21] However, a direct conflict existed pre-U.C.C. between the sales provision of the Uniform Sales Act (USA) and the general statute of frauds one-year provision[22] and nevertheless the prevailing view was that both provisions were applicable to a sales contract that could not be performed within one year.[23] Thus, prior to the U.C.C., it was generally recognized that if a sales contract fell within the one-year provision as well as the sales provision the contract was unenforceable unless it satisfied both statute of frauds provisions. For example in *David Taylor Co. v. Fansteel Prods. Co.*[24] plaintiff sought to enforce a sales contract which was not be performed within one year. Defendant asserted New York's one-year provision (PPL Section 31 (1)) as a defense even though the sales statute of frauds provision (PPL Section 85) had been satisfied because the contract had been partly performed.[25] The court concluded that both statutes of fraud provisions applied even though there was a direct conflict between the requirements necessary to satisfy New York's one-year provision and the requirements necessary to satisfy PPL Section 85. In so doing, the court stated that in 1911 the Legislature had repealed the sale of goods provision, which had been part of PPL Section 31 and substantially reenacted it as Section 85 but noted that "[i]n making that change, the Legislature did not manifest an intent to alter the statute so as to exempt such a contract, when not to be performed within one year from its making, from compliance with the requirements of both sections."[26] The same may be said regarding U.C.C. Section 2-201. There appears to be no manifest intent that a sales contract should be excluded from complying with the one-year provision. Stated otherwise, there is nothing to indicate that in adopting Section 2-201 the Legislature intended to change the law existing under PPL Section 85. Quite the contrary, in a detailed analysis of various sections of Article 2, Professor Honnold specifically addressed the relationship of Section 2-201 to other statute of frauds provisions, in particular, the one-year provision.[27] He stated:[28]

> The "one year" statute of frauds of Personal Property Law, Section 31 and the sales statute of frauds in Personal Property Law, Section 85 operate independently on sales contracts. Even if the sales statute of frauds is satisfied, as by partial payment or partial receipt, enforcement may be barred if the agreement "is not to be performed within one year" within Personal Property Law Section 31. [citing *David Taylor Co.*] . . . The independent operation of the two provisions would continue on adoption of the Code, since the statute of frauds provision in the Sales Article of the Code specifies that the various types of validation thereunder apply only to "satisfy the requirements of sub-section 1" of Section 2-201. (Cf. subsection (3): 'valid in other respects'.)

This view that statutes of frauds provisions were cumulative was widely held at the time the U.C.C. was drafted.[29] It is the view the Second Restatement espouses.[30] No doubt, Professor Karl Llewellyn and all others involved in drafting the U.C.C. were aware of this view and yet chose not to expressly displace the one-year provision.[31]

After all is said and done, the existing conflict between statute of frauds sales provision and the one-year provision is not a new phenomena. It existed when the USA was in effect and it exists today. There is no indication that the drafters of Section 2-201 or the state legislatures that have enacted the U.C.C. intended to change the basic view that existed pre-U.C.C.—that the two provisions—the sales provision and the one-year provision—are cumulative. Perhaps a middle road approach can be adopted where the one-year provision would supplement Section 2-201 to the extent of requiring that the contract period be included in any writing or be contained in a party's admission. In this way, the purpose of both provisions can be fulfilled.

1. Unless otherwise indicated all citations to the U.C.C. are to the unrevised version.

Section 2-201 provides in part:

> (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 . . . 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 . . .

As between merchants subsection 1 can be satisfied under certain circumstances by a written confirmation signed by the sender even though not signed by the party to be charged. Further, under subsection 3 a contract which does not satisfy subsection 1's requirements is nevertheless enforceable if the goods are to be specially manufactured for the buyer or the party to be charged admits the contract or "with respect to goods for which payment has been made and accepted or which have been received and accepted."

2. *See* Restatement (Second) of Contracts (1981) (Second Restatement), § 110(1)(e), which provides that a statute, commonly called the Statute of Frauds, forbids enforcement of a contract that is not to be performed within one year from the making thereof (the one-year provision) unless there is a written memorandum or an applicable exception.

3. *See, e.g.*, Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir. 1996); Roth Steel Prods. vs. Sharon Steel Corp., 705 F.2d 134 (6th Cir. 1983); H & W Indus., Inc., v. Formosa Plastics Corp., 860 F.2d 172 (5th Cir. 1988); AP Propane Inc. v. Sperbeck, (N.Y. App. Div. 3d Dept. 1990), *aff'd*, 568 N.Y.S.2d 908 (1991). *But see* Oskey Gasoline & Oil Co. vs. Continental Oil Co., 534 F.2d 1281 (8th Cir. 1976).

4. Section 1-103 provides in pertinent part:

> Unless displaced by the particular provisions of this Act, principles of law and equity . . . shall supplement its provisions.

U.C.C. Article 1 has been revised and adopted in more than 40 states but not in New York or New Jersey. So far as relevant, Revised Section 1-103 is basically identical to Section 1-103.

5. AP Propane Inc. v. Sperbeck, 555 N.Y.S.2d 211 (N.Y. App. Div. 3d Dept. 1990), *aff'd*, 568 N.Y.S.2d 908 (1991).

6. *AP Propane*, 555 N.Y.S.2d at 212.

7. Id.

8. Henry L. Fox Co. v. William Kaufman Org., 544 N.Y.S.2d 565 (N.Y. 1989).

9. *AP Propane*, 555 N.Y.S.2d at 213.

10. *Fox Co.*, 544 N.Y.S.2d at 566, 568-569.

11. *Id.* at 568.

12. *AP Propane*, 555 N.Y.S.2d at 213.

13. For the reasons given in the text and contrary to the view expressed in *AP Propane*, *Fox Co.* does not in any way render inapposite the holding in David Taylor Co. v. Fansteel Prods. Co. discussed in the text accompanying note 24 *infra*.

14. Riley vs. Capital Airlines, Inc., 185 F.Supp. 165, 170 (S.D. Ala. 1960).

15. Although *Riley* is a pre-U.C.C. case and the Uniform Sales Act applied, there is nothing to indicate that the U.C.C. intended to change the law that existed under the Uniform Sales Act. *See infra* note 23 and accompanying text.

16. The Court therefore concluded that the executed part of the contract was enforceable under both sections but ". . . that the unexecuted portion fell within the Statute of Frauds and is unenforceable in an action at law for damages resulting from the breach."

17. Freedman v. Chemical Constr. Corp., 401 N.Y.S.2d 176 (N.Y. 1977).

18. NY Gen. Oblig. Law § 5-701(1), (10).

19. *Freedman*, 401 N.Y.S. 2d at 14-15.

20. *AP Propane*, 555 N.Y.S. at 213.

21. Roth Steel Prods. vs. Sharon Steel Corp., 705 F.2d 134, 141-142 (6th Cir. 1983).

22. Under the USA § 85 the statute of frauds could be satisfied not only by a note or memorandum but also if the buyer paid for part of the goods or received and accepted part of the goods. By the terms of the one year provision, the statute could only be satisfied by a note or memorandum. Indeed, under the USA the conflict between the sales provision and the one-year provision in one respect was greater than the conflict under the U.C.C. For under the USA, payment for part of the goods or delivery and acceptance of part of the goods would permit enforcement of the *entire* contract whereas under the U.C.C. the contract is enforceable only as to the goods paid for or delivered. USA § 85; U.C.C. § 2-201(3)(c).

23. *See* Tradeways Inc. v. Chrysler Corp., 342 F.2d 350, 355-56 (2d Cir. 1965); White v. So. Kraft Corp., 132 F.2d 381 (8th Cir. 1942); Lieberman v. Templar Motor Co., 140 N.E. 222, 224 (N.Y. 1923); Bryant v. Credit Serv., 175 A. 923 (Del. Super. Ct. 1934); Keller v. Meyer Fertilizer Co., 132 S.W. 314 (Miss. Ct. App. 1910); David Taylor Co. vs. Fansteel Prods. Co., 255 N.Y.S. 270 (N.Y. App. Div. 1st Dept. 1932), *aff'd*, 185 N.E. 718 (N.Y. 1933); Prested Miners Co. v. Gardner Ltd. [1910] 2 K.B. 776, *aff'd*, [1911] 1 K.B. 425. *Cf.* Haire v. Cook, 229 S.E.2d 436 (Ga. 1976) (land and one-year provision). *See also* E. Allen Farnsworth, *Contracts* § 6.2 (4th ed. 2004) (traditionally statute of frauds provisions have been regarded as cumulative

and ". . . if more than one applies to a single contract, all must be met. If one of the requirements is more exacting, that requirement must be met." However, Professor Farnsworth notes that some courts departed from this view when the one-year provision and the U.C.C. sale of goods provision were involved); Joseph M. Perillo, *Calamari and Perillo on Contracts* § 19.25 (6th ed. 2009) ("[O]rdinarily the various clauses of the Statutes of Frauds are considered separately and the most restrictive is applied. . . The traditional view has been that the one-year section applies to all contracts no matter what their subject matter. Thus, for example, it has been held that a contract for the sale of goods must comply with both the one year and sale of goods provisions of the Statute." Nevertheless, Calamari continues and points out that "[T]he weight of recent authority, holds that if a contract for the sale of goods satisfies the UCC's Statute of Frauds, it need not satisfy the one year section even if performance is not performable within a year from the making of the contract"). *See* Samuel L. Williston, *Williston on Sales* § 52 (2d ed. 1924); 2 Corbin, *Corbin on Contracts* § 276 (1950).

24. David Taylor Co. vs. Fansteel Prods. Co., 255 N.Y.S. 270 (N.Y. App. Div. 1st Dept. 1932), *aff'd*, 185 N.E. 718 (N.Y. 1933).

25. Personal Property Law § 31(1) is presently General Obligation Law, § 5-701, and Personal Property Law § 85 is the same as USA § 4.

26. *David Taylor*, 255 N.Y.S. at 273.

27. See 1 N.Y. State Law Revision Commission Report, *Study of the Uniform Commercial Code*, pp. 366-373 (1955) (analysis of Section 2-201 of 1952 official text by Professor Honnold of the University of Pennsylvania Law School) (1955 Law Revision Commission Report).

28. 1955 Law Revision Commission Report, pp. 372-73.

29. See note 23, *supra*. Professor Corbin's statement is particularly appropriate. He said:

> But the requirements made in Section 17 [the sales provision] of the [English] statute are not identical with those made in Section 4 [of the English statute]. Therefore, if a particular contract happens to fall within both sections of the statute, its enforceability is affected by the requirements of both sections.
>
> Thus, the mere fact of a part payment will fully satisfy the requirements of Section 17, and make an oral contract for the sale of goods enforceable. But a part payment does not satisfy the requirements of Section 4; and therefore, if an oral contract for the sale of goods is also one that is not to be performed within one year, a part payment will not make it enforceable. 2 Corbin, Corbin on Contracts, § 276.

However, Professor Corbin further pointed out that :

> In a few cases, also, the court has thought that only one of the clauses was meant to be applicable at a time, or that since contracts for the sale of goods were specifically dealt within Section 17 they were not meant to be affected by the provisions of Section 4. *Id.*

But he immediately continued and added :

There is not much reason for this, however; but it can be used if the court wishes to put this kind of a limit upon the operation of the statute. So far as it has been considered by the courts, it has usually been disapproved. It has been held that the clause of Section 4 referring to contracts not to be performed with one year is applicable to contracts for the sale of goods that are not to be performed within that period. *Id.*

30. Second Restatement, § 110, cmt. b which states:

> The clauses of the English statute apply separately; one contract may be within more than one clause of the statute and facts which except it from one class may not except it from another. Thus contracts " . . . for the sale of land or goods may also be contracts not to be performed within a year and the statutory requirements in one clause may be satisfied and those of another clause unsatisfied."
>
> See also Second Restatement, § 129, cmt. f.

31. Further, if it were clear that state legislatures intended Section 2-201 to be exclusive, Revised U.C.C. § 2-201 would not have provided, as it does, that

> (4) A contract that is enforceable under this section is not unenforceable merely because it is not capable of being performed within one year or any other period after its making.

For the reasons given in the text accompanying notes 23-31 supra the view expressed in *AP Propane*, 555 N.Y.S.2d at 213, that U.C.C. § 1-103 renders the *David Taylor* case "inapposite" should not be taken at face value.

MATTERS OF MAJOR INTEREST

CONTRACT FOR SUPPLY OF HELIUM-FILLED TANKS WAS FOR LEASE OF PERSONAL PROPERTY

[See UCC Case Digest 2102.5(1)(b), 2A102.4].

An oral contract between a supplier and a customer for the supplier to provide eight helium-filled tanks at a hotel where the customer had scheduled time-share presentations was for a lease of personal property, not for the sale of goods, held the court, applying **California** law, in **C9 Ventures v. SVC-West, L.P.,** 2012 WL 248393, 76 U.C.C. Rep Serv 2d 699 (Cal. App. 4th Dist. 2012). The contract arguably involved both the sale of the helium and the rental of the tanks in which the helium was transported. The customer had the supplier's permission to use as much of the helium in the tanks as was needed. The supplier thus relinquished title to the helium, to the extent that any person could have title to a gas, either upon delivery to the customer or when the customer used the helium. Title to the tanks, however, never changed hands. The contract anticipated, as in previous transactions