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## Ruminations on Teaching the Statute of Frauds

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## RUMINATIONS ON TEACHING THE STATUTE OF FRAUDS

JOHN KIDWELL\*

*[Class begins with a few seconds of the music of Henry Purcell,<sup>1</sup> played on a boom box. Teacher calls for a volunteer to participate in a brief class demonstration; a student is needed to improvise the part of a landowner in seventeenth century England. Student Good Sport comes forward.]*

*Teacher: “So, My Lord Good Sport, it’s agreed. You will sell Blackacre to me on the terms set forth in this document? Would you mind reading the document for the benefit of the assembled witnesses?”*

*Student Good Sport then reads a document, which Teacher has produced. The document is headed “CONTRACT” in suitably ornate gothic script and provides as follows:*

### CONTRACT

*KNOW ALL MEN BY THESE PRESENTS that Lord Good Sport, Baron of the Barony of North Umbria, agrees to bargain, sell, transfer and convey all of the land north of the River Ulm of which he is seized (to wit, Blackacre) to Baron Teacher in consideration of 500 goats, 6 sheep, 18 puncheons of Port Wine, and one river barge, to wit the Bay Breeze,<sup>2</sup> the transfer of property by each to the other to take place on the eighteenth day of June in the Year of Our Lord One Thousand Six Hundred Eighty Six, Anno Domini.*

*In witness whereof we set our hands and seals this day:*

\_\_\_\_\_  
*Teacher*

\_\_\_\_\_  
*Good Sport*

*Place Wax Seals Here*

*Teacher then says, “To make it official, let’s sign.” (Both sign.) Then Teacher gets out a wax candle and matches, and while dripping wax on the paper, says to Good Sport, “All right, now impress the melted wax with your signet ring.”*

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1. English Baroque composer (1659-95).

2. Students, by this time, will have read *Neri v. Retail Marine*, 285 N.E.2d 311 (N.Y. 1972), a widely studied case interpreting U.C.C. § 2-708(2). The notes in the textbook reveal that the boat in that notorious case was a Bay Breeze model. Speaking for myself, I think that students enjoy these little inside jokes; I confess that I do.

*At this point Good Sport inevitably looks concerned and Teacher interrupts, "What! You've forgotten your signet ring again? What are we to do? We need to finish this up today. I'm off to France on the morrow. What a mess. Well, let's just write here next to the wax seal that we are short one signet ring, but would have impressed the wax with the ring if we'd had one, initial next to it, and hope for the best." (Teacher then excuses Student Good Sport who returns to a seat in the classroom.)*

The above is, essentially, the way I begin the first day's class discussion of the Statute of Frauds; not, in fact, by addressing the Statute of Frauds at all, but rather with a discussion of the seal, and its decline. The music and the dramatization are hardly necessary, but are fun. I enjoy and am stimulated by the unexpected; I assume students react likewise and so try to inject an element of the unexpected in my classes. There is always a risk that I'll make a fool of myself, but I think that students enjoy the fact that I'm willing to take that risk. The students have read some material in the casebook about the Statute of Frauds (more about that later) but almost nothing about the significance of the seal; so they are, in some sense, unprepared for the first part of the lesson.

I should also add that I believe few topics in the first year of law school provide more opportunities for introducing ideas of enduring importance than the Statute of Frauds. Its study allows discussion of history, statutory interpretation, the role of law in shaping (or not shaping) behavior, the struggle between justice and order, and the extent to which our ideas about what ought to be collide with our conceptions of what is. At one level the Statute of Frauds is quite simple, and we all enjoy that. It is fun for first-year law students to confront some material which is relatively direct and accessible and which they can readily master at the technical level. I remember that when I was a first year law student the Statute of Frauds material was the only material in the textbook that was covered primarily in the form of an extended textual note. I think that was because the casebook author thought that such an approach was both economical and effective. There is, perhaps, less need for class discussion in order to develop the basics of the Statute of Frauds material than, for example, the material on remedies, interpretation, mistake or the policing doctrines. Like my own teacher, I rely on an extended text note to introduce the basic features of the rule(s) we call the Statute of Frauds. But the Statute of Frauds is simple only on the surface; there is more than enough complexity to earn it a prominent place in the course. This essay, I hasten to add, has no single thesis; this presents some organizational difficulties. In the face of this problem, I have concluded to begin with a recapitulation of my method for introducing the Statute of Frauds in the classroom, along with my reasons for utilizing this method, and then to move on to offer a series of

comments about the teaching points, which I think the Statute of Frauds invites.<sup>3</sup>

Let's return to the dramatization. Once Good Sport has returned to his or her seat I ask students to explain to me the possible justifications for a rule which required that, to be enforceable, a contract be in writing and bear a seal of melted wax impressed with the mark of the contract-maker. Without too much prompting, this leads someone to suggest that the seal is a formality, which is justified in terms of the three functions of form identified by Professor Lon Fuller in his classic article.<sup>4</sup> These functions are, of course, the cautionary function, the evidentiary function and the channeling function. Students have been introduced to these ideas in the textbook some pages in advance of the reading assignment for the Statute of Frauds, but have not yet used the ideas in class discussion. Fuller's taxonomy of functions of form has value far beyond the contracts course and demands, in my view, reinforcement by extended discussion. Although many will already be familiar with this taxonomy, a recapitulation would not be out of order here.<sup>5</sup>

*Cautionary function:* If people must go through a formal ceremony to create legal relationships, the ceremony may warn them that they are doing something serious and important. Such a warning should serve to prompt thought about the commitment being made. Obviously, legal formalities can provide greater or lesser degrees of caution. The requirement of a wax seal seems to have a substantial cautionary impact—enhancing the cautionary requirement of a writing alone. Requiring parties to put contracts in writing, and then appear before a government official who cross-examines them about their understanding of what they have done, provides even more caution; some legal systems which utilize public notaries require just this kind of procedure to make certain transactions legally enforceable.<sup>6</sup>

*Evidentiary function:* Some forms give us evidence that a transaction took place while others also tell us what the terms of the transaction are. The existence of a signed and sealed document provides nearly irrefutable evidence that the parties intended to engage in the exchange of promises. We must say

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3. I should also note that I have not attempted to turn this description of teaching ideas into a scholarly treatment of the Statute of Frauds itself. The result is that my citations are no more formal than my notes for class might be.

4. Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

5. Since I teach from a book, *CONTRACTS: LAW IN ACTION* (1995), which I co-authored with Professors Macaulay, Whitford and Galanter, I have taken the liberty of editing and paraphrasing the summary of Fuller's ideas from the first volume of our text at pages 292-93. I have also relied on recasting some of the material from our book later in this essay when describing the Wisconsin cases and statute, which deal with the part performance doctrine.

6. See generally *Mortgages: Absence of Notary Seal is Fatal*, REAL EST. L. REP., May 29, 2000, at 4; see also Milagros Cisneros, *Notorious Notaries-How Arizona is Curbing Notario Fraud in the Immigrant Community*, 32 ARIZ. ST. L.J. 287 (2000).

“nearly irrefutable” because there is a chance that the document contained a forged signature or seal, or that the signatories were coerced or misled in some way into executing the document. The more important the transaction, the more likely it is that there will be a temptation to adopt a form, in order to enhance the quality of the evidence.

*Channeling function:* A legal form is important to people who want to do something with legal consequences. If you want to be sure that you have a legally enforceable contract, it is useful to find a blueprint telling you how to build one. The requirement of a seal provides a useful way to distinguish between talking about making a deal and actually making one. It should be noted, however, that forms can sometimes stand as obstacles to people’s abilities to accomplish their objectives. A formal requirement works to effectively channel the behavior only of those who know about it. To the extent that formal requirements are good forms—that is, that they are separate from the substantive elements—they require that you know about them. In other words, you need to have the instruction manual in order to be able to accomplish the task. There are other ways to channel behavior. You can make the steps intuitive, and natural, for example. We know that often-effective system designers seek to make the system intuitive (and non-formal) rather than formal (and to the uninformed, impossible). In other words, good software can be used even by people who haven’t read the manual.

In fact, I would urge that one of the greatest pitfalls of the use of forms for channeling behavior is to mistakenly believe that since forms *can* channel behavior they *will*. Even those who know the forms may not follow them. You can build sidewalks in order to get people to walk where you would like them to, but if you are really interested in saving the grass you are wiser to wait to see where people are going to walk, and then build the sidewalks there.<sup>7</sup>

Although Fuller does not list it as a separate function of form, one could add judicial efficiency to the list of functions of form. Courts may benefit by having readily available signs to help them separate the valid from the invalid. Some would argue that the judicial efficiency function is easily included in the channeling function. Courts, after all, need channels too. The more objective the formal requirements, the easier it is for judges. Contrast two legal rules. One rule says that manufacturer may sell an item without responsibility for its

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7. I base this belief on observation, and refer to it as “Kidwell’s delayed sidewalks” principle. While at a venerable East Coast university, I noticed a new building on a part of campus served by gravel and dirt sidewalks. The sidewalks were added some months later than I would have expected. I then noted that, all over campus, the sidewalks seemed more “organic” than in the Midwest, and there seemed to be fewer instances of non-conformity between sidewalk and actual path. They built the sidewalks after observing where people naturally wanted to walk. It can be argued that Llewellyn, in drafting the U.C.C., was seeking to have rules, which ratified good faith business behavior, rather than trying to shape that behavior.

defects if the seller obtains a sealed release from the buyer. The other rule allows disclaimers only if a buyer “should reasonably have known” that the seller intended an “as is” sale. In the first case, the question asks little more than whether the seller used the appropriate language and secured the seal. In the second, one must weigh and balance norms and facts to determine what the buyer should have known. Moreover, the channel serves more than the judge’s convenience. It is easier for others who want to predict judicial outcomes if the law provides an unambiguous outcome and if the parties have embodied their respective promises in a sealed document. This last point concerns the legitimacy of the judicial role in a society where legislatures are supposed to have primary rulemaking power. Some think that the more clear judges are in the rule-applying rather than rule-making business, the easier it is to defend what they do.

*(Drum roll for big teaching point.)* If one sought only to achieve the ends which forms facilitate, we would still celebrate the seal, for it is a wonderful form, which is why I begin my class with the sealed writing rather than the somewhat diluted formal requirement of a mere signed writing. The wax seal seems, in many ways, the *perfect form*. It is pure ritual. There is no reason, other than to fulfill the advantages of a formal requirement, to drip melted wax on a perfectly good document, and then get your ring dirty by pressing it in the warm wax. One may, for planning purposes, or during negotiation, construct something which looks very much like a writing sufficient to satisfy the Statute of Frauds, but I can’t imagine going that last step and putting a wax seal on it, just for practice, or by accident! Perfect forms, in other words, are never practiced except on purpose. The meaning of the execution of a perfect form is entirely unambiguous.

Back to the classroom dramatization. After drawing out the advantages of the form, and the ways in which wax seals accomplish those advantages, I ask the class how it thinks a court would deal with the document executed by Good Sport and Teacher. Remember, we had no seal, and instead simply initialed our plea to be forgiven for the absence of the last step in the process, and urged that the document be treated as it would have been had Good Sport remembered the ring. If there is time, I invite someone to argue on behalf of giving the document full effect without the final step. If there is no time I simply tell them that, in the face of the claim that parties who have forgotten their rings in the castle should not be disabled from making contracts, courts have almost uniformly yielded, and enforced the almost, but not quite complete, form. If the real objective here is to honor the intentions of the parties, then the formal requirement (which is by its nature entirely extraneous to the substantive objective) stands as an obstacle to justice, and needs to be

put to one side.<sup>8</sup> And so I hypothesize the first court forgiving the absence of the ring, if the wax was there, and the second forgiving the lack of wax (if replaced by a gummed gold sticker which is less likely to fall off and make a mess in the filing cabinet), and the third accepting a hand-drawn picture of a seal, and the fourth accepting merely the recital of the Latin phrase *locus sigilli*—place of the seal—until we finally arrive at the bottom of the slippery slope at *L.S.*, the abbreviation for the Latin phrase, pre-printed on a form bought at a stationers (or downloaded from <http://www.legalforms4you.com>). And so we are left with none of the advantages which the form initially provided. There is no cautionary, no evidentiary and no channeling function to *L.S.*, and its presence or absence is appropriately ignored.

The truth is not far from my fiction. The decay of the significance of the seal is well, and engagingly, told by Corbin<sup>9</sup> in chapter ten of his treatise and, no doubt, by others<sup>10</sup> as well. The advantages of form were eroded by the relentless pressure of calls upon justice. *Finally*, we come in class to the Statute of Frauds itself.

I then suggest that (obviously) a requirement that a contract be in writing is functionally very like the requirement of a seal. Such a requirement is attractive for the same reasons that the seal requirement is attractive. If everyone knew and followed the forms there would be less conflict, and justice would be speedy and certain. Social order would be enhanced. But we don't care just about social order. We care also about individual justice. And we know that not all people know the rules, and even when they do they might find reasons not to follow them. If we enforce the formal requirement in these cases, we sacrifice individual justice in favor of social order, which always at least makes us pause. And sometimes we yield to the urge to make an exception and soften the formal rule. I then suggest that it can be argued that every formal rule is under relentless pressure from our desire for individual justice. This is not news to those who are teaching law, or to those who have completed law school, but it may be a generalization which new law students have not yet made. We *always* are tempted to make exceptions to rules that

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8. To put the point more eloquently, one might borrow from Lord Atkin's language in a quotable English case (not about the Statute of Frauds): "When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred." *United Australia, Ltd. v. Barclay's Bank, Ltd.*, [1941] 1 App. Cas. 29 (P.C. 1940).

9. See ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS*, (Joseph M. Perillo ed., rev. ed., West Publishing Co. 1993). I mention Corbin here because I would encourage those who have not consulted his work recently to do so. Although eclipsed in some respects by more modern treatises, Corbin is such a wonderful and engaging writer that he is well worth consulting, even if not for the most recent thinking on a topic.

10. See Frederick Crane, *The Magic of the Private Seal*, 15 COLUM. L. REV. 24 (1915). This article recounts the history of the decline of the private seal, and calls for its abolition in New York, in light of "the absurdities to which these rules and exceptions have now led us."

depend on form because we always care, to some extent, about the injustice, which results when we enforce the formal requirement. Thus, formal requirements tend to decay. Not always, and not perhaps as dramatically as in the case of the seal, but often. Writing requirements, notice requirements, filing requirements, statutes of limitations—all invite exceptions.

Now, before describing what I do next, I must make a confession, and an apology. At least twenty-five years ago, I read an account of the history of the Chinese civil service examination in a book. It made a big impression on me, and I have used the story, in one form or another, for years. I have no notes. I have no citations. The account may be at least somewhat apocryphal, or an author's transformation of real history into a more compelling story. But it is such an instructive story that I am going to include it even though it doesn't have an appropriate pedigree. Since this is an essay, rather than an article, I beg your indulgence. I should say in my own defense at this point that what I do is arguably no different from what judges do when they summarize the facts at the beginning of an appellate opinion. Their summary of the facts is often designed, in fact, to serve primarily as an instructive tale; dissenters or the lawyers or parties, often complain that the court's opinion takes liberties with the facts. The facts, in that sense, function as fable rather than as history; we generally don't care if fables are true, so long as they are instructive.

So, once upon a time in a country we might call China, it came to pass that the leaders created a difficult examination to be used to select people who wanted government jobs. The examination was chosen in order that the wisest and best educated of the applicants would be chosen to serve, rather than those who had good connections. The examination was challenging, and if you wanted to pass you needed to spend years in the universities studying. After the examination had been in place for some time, one of the applicants wrote an essay in a particularly effective eight-part form. As someone once said, imitation is the sincerest form of flattery, and soon most who took the examination wrote their essays in this form. Some of the questions, which were asked, worked better than others, and so those questions were used again. The answers of those who passed, written, of course, in the eight-part form, were imitated. And so those who studied for the examination spent more and more of their time memorizing eight-part answers to the questions which were more and more likely to be on the examination. Some asserted that before the examination was abandoned it had become, to a great extent, a calligraphy examination.<sup>11</sup>

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11. The outlines of the story are consistent with the Encyclopedia Britannica's description of the Chinese Civil Service system. In describing the evolved examinations given through the 19<sup>th</sup> Century (and which had begun in the 7<sup>th</sup> Century), we learn that:

Elaborate precautions were taken to prevent cheating, different districts in the country were given quotas for recruitment into the service to prevent the dominance of any one



The plausibility of this tale—true, or at least partly true—is based on a tendency nearly as powerful as the tendency of form to decay into substantive inquiry, and that is (to oversimplify it for the purpose of literary symmetry) the tendency of substantive standard to erode into form. We want to make the right decision, but we also want to make it quickly, inexpensively and predictably. We want the criteria to be objective so that we can review decisions made by people we aren't sure we can entirely trust with tasks that are either too subtle, or rife with the potential for the abuse of authority. The result is that a great many standards that embody our aspirations for justice, even when initially stated in the most general language, are implemented through the use of presumptions or rules of thumb. For example, we grant certain privileges to those who are residents—that is, who have a state of mind consisting of an intention to make a place their permanent home—but rely heavily in making this subtle determination on voting registrations, drivers licenses, and taxpaying status as surrogates for the more difficult inquiry. We aspire to protect the “best interests of the child” and indicate that this is the standard, but discover that decision-makers are applying the standard beginning (and perhaps ending) with a presumption that the child is best served by placement with the mother. We urge an equitable division of property on divorce and discover that a fifty-fifty division is what results. The more decisions we have to make, the more likely we are to avoid the difficulty of the investigations and balancing that appear necessary and to rely instead on a more formal and easily ascertainable rule.<sup>12</sup>

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region, and the testing matter was limited to the Nine Classics of Confucianism. The examination became so stylized that the set form for an examination paper came to be the famous ‘eight-legged essay’ (*pa-ku wen-chang*), which had eight main headings, used not more than 700 characters, and dealt with topics according to a certain set manner. It had no relation to the candidate's ability to govern and was often criticized for setting a command of style above thought.

ENCYCLOPEDIA BRITANNICA *Chinese Civil Service* (1998) (CD-ROM).

12. See Lawrence Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786 (1967). This article provides a more thorough exploration of the ways in which different types of rules are implemented. Friedman develops a typology of legal rules and then describes the various ways in which these rules evolve and are applied. He observes:

As a general proposition, we may guess that there is a strong tendency within the legal system toward the framing of nondiscretionary rules *at some level* and that it is strongest where it is socially important to have mass, routine handling of transactions, which are channeled through some agency of the legal system, or where relative certainty of legal expectation is important. A rule *can* be nondiscretionary in operation so long as it is formally nondiscretionary at any *one* rulemaking level of the legal system (which has many, many such levels) or if it is nondiscretionary at the point of application. Consequently, the legal system may have many more discretionary rules formally speaking than operationally speaking.

*Id.* at 794.

This counter-tendency is not, I suppose, directly relevant to the discussion of the Statute of Frauds, but seems in order nevertheless, as a counterweight to the decay-of-form idea. I think that it is important to offer observations when it seems natural to do so, and not to allow the focus on the topic under discussion to devolve into obsession. Although orderly thought is one of the most valuable of lawyerly traits, seeing connections and patterns is another. If once in a while I go in an unexpected direction, I think it not only livens the class discussion, but also authorizes students to be intellectually more venturesome.

I think of the classroom discussion as one of the ingredients in a mixture which, when fired in the mind of a law student, becomes an idea which the student owns, and which we hope resembles understanding.<sup>13</sup> Another important ingredient is the written material. Although I am a co-author of a published contracts casebook, and have used it for several years, I think that my ideas about teaching the Statute of Frauds are not idiosyncratic to those materials. It could influence the order of the discussion, or the emphasis, but I think not the dominant themes. But this might be an appropriate place to comment on the written material, which we use to facilitate the class discussion.

The Statute of Frauds material in the text is embedded in a discussion of the rules which courts use to sort statements in the form of promises which *will* be given legal effect from those that *will not*. Students have learned that social promises will not be enforced, and that the doctrine of consideration emerged as an important “validation device.” They read next about the emergence of post-promise reliance as a justification for enforcing some promises when classical consideration theory would not have permitted it. The Statute of Frauds comes next. The Statute of Frauds is introduced as part of a family of validation devices, not entirely separate from consideration and reliance. Before the students come to class to discuss the rules for the first time, they have read a brief summary of the history of the statute from its famous birth in 1677. They have read (but probably not internalized) that the courts have not been as deferential to the Statute of Frauds as courts are to most statutes. They

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13. This is a risky, and perhaps, pretentious metaphor. It may happen that either the discussion, or the written material, or the student’s manipulation of the ingredients may contain error. The result may be not a fine-glazed truth, but a cracked-pot of an idea. It is good to remember the following observation:

I know that this, like every other case, will become the parent stock from which a motley progeny will spring. In those after years when this case, elevated to high authority by the cold finality of the printed page, is quoted with the customary, “It has been said,” perchance another court will say, “Mayhaps the potter’s hand trembled at the wheel.” Possibly when that moment comes these words may give the court a chance to say, “Yea, and a workman standing hard by saw the vase as it cracked.”

Oliver v. City of Raleigh, 193 S.E. 853, 857 (N.C. 1937) (dissenting opinion).

have read about the six most common subjects of Statute of Frauds requirement—promises to convey interests in land, promises by executors, promises of suretyship, promises not to be performed within a year, promises in consideration of marriage and sales of goods over a specified amount—and about the ways in which those provisions have been applied and interpreted.

Because I find that students have some difficulty with the conventions, which lawyers use to discuss writing requirements, I take a little time to address them. Many books may explicitly address these questions, but some may not. First, lawyers generally call any requirement that a document be in writing a “Statute of Frauds requirement” even if the requirement does not, in fact, literally come from *the* Statute of Frauds. Second, because I remember my own confusion about contracts “within” and “under” the Statute of Frauds, I explicitly explain that contracts “not within” the statute are enforceable although they are not writing. Being “within” the statute means the writing requirement must be met. If the requirement is met, lawyers usually speak of the statute being “satisfied” or “met.” A contract is “outside” the statute if it need not be in writing.

Based on the discussion and lecture summarized earlier in this essay, students know what a formal requirement is, and what its vulnerabilities are to claims of individual justice. They also have a sense of the instability of at least some legal rules; rules always appear vulnerable to improvement by making them either more formal and predictable, or more responsive to the variety of particular facts that make up any single claim. Then we move to explore, through a series of cases and a statute, one particular developed exception to the language of the statute—the “part performance” exception. This is done (primarily) in the course of a review of three Wisconsin cases and a Wisconsin statute. We chose the part performance rule for a number of reasons. First, it is relatively important, and so studying it in some detail deepens students’ understanding of the Statute of Frauds in a useful way. Second, it is an example, at least initially, of the way in which the Statute of Frauds was treated almost as if it were a statement of common law principles, rather than as a statute. Third, it is a discussion which bridges back, and hopefully reinforces, the legal significance of post-promise reliance.

The part performance doctrine initially developed in cases involving land. Land is economically important and, in England where the rule developed, land ownership played a key role in the culture as well, often determining social rank. Given the importance of the transaction and the fact that many third-parties may have an interest in who owns real estate or who has mortgages or other interests, contracts involving land seem perfect candidates for a strong formal requirement. However, at least in some situations, courts have recognized the claims of those who have relied on oral promises to

convey. In fact, the Court of Chancery began to fashion the doctrine of part performance only nine years after the passage of the Statute of Frauds.<sup>14</sup>

The first case we consider is a 1901 Wisconsin case taking a not-then-atypical narrow view of the part performance rule. In *Rodman v. Rodman*,<sup>15</sup> a son sought specific performance of an alleged oral promise by his father to make a will leaving real estate to the son. The trial court entered a judgment for the estate and the son appealed. The Supreme Court of Wisconsin affirmed the trial court's decision. The facts revealed that the elder Rodman wanted to stop actively farming a 500-acre farm. In 1873, he persuaded Winfield, his twenty-two-year-old son, to return to the farm. Winfield was to operate the farm on shares, and they were to live in the homestead together. Winfield married soon after they made this arrangement. Winfield managed the farm for twenty-two years until his father's death in 1895. The Wisconsin Supreme Court's affirmance was based on two grounds. The first was that the trial court had ruled that Winfield had not successfully proved an oral contract to make a will and this finding was not against the weight of the evidence. The alternative ground for affirmance was that even if Winfield had proved an oral contract to make a will, it would have been invalid under the Statute of Frauds. The alleged contract concerned the transfer of an interest in real estate. Winfield's work on the farm for twenty-two years did not serve to take the case out of the provisions of the Statute of Frauds. The father had never given Winfield *exclusive* possession of the premises. The court determined that mere performance of services was not enough.<sup>16</sup>

Thirty-one years later, the Wisconsin court decided *Estate of Powell*,<sup>17</sup> a case with facts not so different than the facts of *Rodman*. In this case Lottie and George Wilcox sued for specific performance of an oral contract to transfer a farm to them by will or by deed. This time the trial court ruled in favor of the plaintiff, and the decree for Lottie and George was affirmed by the Wisconsin Supreme Court. Lottie alleged that her uncle had promised to transfer a farm to her if she and her husband would work it on shares until the uncle's death. The uncle had taken Lottie into his home and reared her as his own child. Lottie "performed services in the home as great as any daughter could."<sup>18</sup> Lottie cared for the mentally incapacitated son of her uncle, attending to his personal cleanliness. Some time later, Lottie married George Wilcox, who at the time, was renting on shares a large highly improved, well-stocked farm. The uncle asked them to return to his farm, and they moved back and remained until the uncle's death nearly twenty years later. The court,

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14. See *Butcher v. Stapely*, 1 Vern. 363, 23 Eng. Rep. 524 (1686).

15. 88 N.W. 218 (Wis. 1901).

16. *Id.* at 220.

17. *Wilcox v. Powell's Est.*, 240 N.W. 122 (Wis. 1932).

18. *Id.* at 124.

in its opinion, described at some length the work which the Wilcoxes had done during their time on the Powell farm. Though there was some conflicting testimony as to what had been said about the ultimate transfer of the farm to the Wilcoxes, Lottie and George testified that Powell had entered into an agreement with them before they moved back to his farm. They were to repair the place as if it were their own. They went back to the farm solely because of the agreement, and they expected Powell to will the farm to her.

The Supreme Court of Wisconsin said that a trial court should not decree specific performance of a contract unless the plaintiff establishes the promise by clear, satisfactory and convincing proof. However, “[t]he trial judge might properly find the evidentiary facts as above stated, and we consider that their cumulative force warranted the inference of ultimate fact that a contract to transfer the farm was made.” Then the Supreme Court turned to the Statute of Frauds issue:

It is urged that there was no such partial performance by the respondents [Lottie and George Wilcox] as to warrant specific enforcement of the contract because the proof does not show that the respondents entered upon the land as, and solely as, a result of the contract . . . . But there is testimony of the respondents themselves to the precise point that they did so enter, and the circumstances indicate that they would not have gone upon the farm as mere tenants and that they did not so enter. It is urged that possession alone and that services alone do not constitute sufficient performance. While it may be that no one act or no one class of acts of the respondents would alone have constituted sufficient partial performance to warrant specific enforcement, their acts in the aggregate throughout the twenty years that were beyond the requirements of ordinary tenancy and husbandry were such that to deny them specific enforcement would operate as a fraud upon them, and the prevention of fraud is the basis of and reason for, the equitable relief of specific performance.<sup>19</sup>

It is to be regretted that the wishes of the testator, which were entirely reasonable, and which he endeavored to place in legal and binding form, failed to become effective by reason of a failure to properly witness the will, of which he knew nothing. These matters, however, are of little moment in the consideration of the issues of this case.<sup>20</sup>

The Wilcoxes won, and most who read the opinion, I think, would have understood it as softening, at least, the doctrine announced in *Rodman*. It is, of course, worth observing that in both cases the Supreme Court affirmed the trial court. One could read the opinions, in that sense, as consistent.

In 1969, no doubt in part to try to clarify the possible confusion concerning the reach of the part performance rule, Wisconsin enacted a statute drafted by a

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19. *Id.* at 125.

20. *Rodman*, 88 N.W. at 219.

committee of the State Bar Association of Wisconsin.<sup>21</sup> The legislation stated both the writing requirement and the exceptions to protect reliance on oral promises. Section 706.01(1) of the Wisconsin statute provides that, subject to a few exceptions, chapter 706 of the statute “shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or equity.”<sup>22</sup> The major exceptions are wills and leases for less than a year. Section 706.02(1) provides, in relevant part, as follows:

Transactions under s. 706.01(1) shall not be valid unless evidenced by a conveyance which:

- (a) Identifies the parties; and
- (b) Identifies the land; and
- (c) Identifies the interest conveyed, . . . ; and
- (d) Is signed by or on behalf of each of the grantors; and
- (e) Is signed by or on behalf of all parties, if a lease or contract to convey . . . .<sup>23</sup>

Section 706.04 states the counterrules. It provides:

A transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition:

- (1) The deficiency of the conveyance may be supplied by reformation in equity; or
- (2) The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or
- (3) The party against whom enforcement is sought is equitably estopped from asserting the deficiency. A party may be so estopped whenever, pursuant to the transaction and in good faith reliance thereon, the party claiming estoppel has changed his position to his substantial detriment under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction, and either:
  - (a) The grantee has been admitted into substantial possession or use of the premises or has been permitted to retain such possession or use after termination of a prior right thereto; or

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21. See WIS. STAT. § 706 (1969).

22. *Id.* § 706.01.

23. *Id.* § 706.02.

- (b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.<sup>24</sup>

In addition, section 706.01(6) provides, “[t]his chapter shall be liberally construed, in cases of conflict or ambiguity, so as to effectuate the intentions of parties who have acted in good faith.”<sup>25</sup>

The statute provides a “nice” opportunity to raise questions about the clarity of statutory codifications. Does the statute clarify the reach of the part performance rule? Would it require a different result in the *Rodman* case? Would it permit affirmance of a case on the same facts as *Wilcox*, if the trial court had ruled against the alleged promises? What problems could one foresee arising under the new statute?

In any event, ten years later in *Estate of Lade*<sup>26</sup> the Supreme Court of Wisconsin confronted a case governed by section 706.04(3). The court in its opinion discusses both the *Rodman* and *Powell* decisions. The opinion tells us that Lade had agreed orally to sell his farm to his neighbor, Ketter, who had been working part of the farm on a shares basis for about ten years. Ketter sought to enforce the promise and claimed that the Statute of Frauds should not apply because of section 706.04(3). He sought damages because Lade had sold the farm to a third party. This buyer did not have notice of Ketter’s oral contract with Lade, and so specific performance could not be granted. The trial court had granted a damages award on a *quantum meruit* theory. On an appeal the plaintiff sought to sustain the damage award. The Wisconsin Supreme Court ruled that the *quantum meruit* theory was misguided, and that the award could not be sustained on a breach of contract theory because the requirements of section 706.04(3) had not been satisfied.<sup>27</sup> For reasons that will be apparent shortly, it is worth quoting the opinion at length. The court explained:

Ketter’s case for equitable estoppel-part performance is based on personal services to Lade and on improvements made on Lade’s farm. Also raised is a claim that he refrained from buying over [sic] farmland in reliance on the oral agreement. In examining acts alleged to constitute part performance, only those acts performed after creation of the oral contract may be considered, and only those acts must be solely and obviously referable to the contract . . . . Moreover, the facts alleged to remove the bar of the [S]tatute of [F]rauds must be clearly and satisfactorily proved.

Under these standards all improvements and services made or performed before the contract must be disregarded. The claim that Ketter would have

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24. *Id.* § 706.04.

25. *Id.* § 706.01(6).

26. 260 N.W.2d 665 (Wis. 1978).

27. *Id.* at 669-70.

bought other farmland may also be dismissed because it is not supported by clear and satisfactory proof.

Ketter contends that *Estate of Powell*, 206 Wis. 513, 240 N.W. 122 (1932), presents a situation closely analogous to this one. It does not. The *Powell* court characterized the acts of the successful claimants as going beyond the requirements of ordinary tenancy and husbandry. Ketter's improvements do not meet this test.

The evidence of improvements shows that after the contract, although not necessarily because of it, Ketter increased the tillable acreage by four acres. This indicates no special regard for the property. Prior to the contract Ketter had cleared 17 acres. He was merely continuing the expansion of his acreage and paying rent for the expansion which he had begun as a tenant in 1963.

In *Powell*, *supra*, the court found that the claimants would have left the property if the oral contract had not been tendered. There is nothing here which would suggest that Ketter would not have continued farming and expanding his acreage as a tenant without the oral contract.

Ketter's other improvements include repairing a culvert, adding gravel to a road, fixing fences to keep cattle out of his corn, and minor building repairs. The record does not demonstrate that these improvements were made after the oral contract was agreed upon. Therefore they should be disregarded. Even if they were made after the contract, they are not so beyond the requirements of normal husbandry or tenancy as to indicate reliance on the contract. This is also true of Ketter's fertilization of the land.

Much of the alleged part performance consists of services to Lade. Personal services to a vendor in reliance upon an oral agreement are not enough, standing alone, to constitute part performance. [citation omitted] Because Ketter made no substantial improvements which can be attributed to the oral contract, these services are not a basis for part performance.

Even if there were valuable improvements to consider along with the services, the record does not demonstrate that the services performed after the contract was agreed upon were pursuant to the contract. At one point Ketter said that the services were part of the deal. At another point he stated that the services were done as a favor and specifically denied that they were part of the agreement. It is clear that the same services performed prior to any agreement were gratuitous.

In sum, there is no clear and satisfactory proof of part performance. Ketter has not changed his position to his substantial detriment such that the estate is estopped from pleading the [S]tatute of [F]rauds.<sup>28</sup>

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28. *Id.* at 668-69.



In my discussion of *Lade*, I emphasize that the Supreme Court of Wisconsin purported to apply section 706.04, but did so without considering the express provisions of the statute in its opinion! Without elaboration, the court assumed that its decisions of 1901 (*Rodman*) and 1932 (*Powell*) controlled section 706.04(3). I ask whether section 706.04 was intended to merely codify those cases. In considering the relevance of personal services in the part performance doctrine, the Wisconsin Supreme Court stated that “[p]ersonal services to a vendor in reliance upon an oral agreement are not enough, standing alone, to constitute part performance” and cites the *Rodman* case.<sup>29</sup> I ask whether this is a reasonable reading of either subsection (3)(a) or (3)(b) of section 706.04. Is it even a fair reading of *Rodman*? It seems that, in Wisconsin at least, we may have come full circle. The Statute of Frauds was enacted in 1677. Courts began to treat it not as if it were a statute, but almost as one treats common law decisions, “amending” it with the part-performance doctrine, among others. This, quite predictably, creates a certain amount of confusion and uncertainty. Nearly three centuries after the enactment of the first version of the statute, Wisconsin’s legislature sought to codify, and presumably clarify, the rules (and to limit judicial rule-making power?). Within ten years the highest court of the jurisdiction has re-created, it seems, the confusion, which preceded the legislative effort.

The relatively extensive discussion of the series of part performance cases is, in my view, a good use of class time. The cases are in no sense important cases. They do, however, give the students a chance to see for themselves the interplay, over time, of decisions and statutes within a single jurisdiction. They get a glimpse at the problem of distinguishing cases, especially when those cases are not particularly well crafted. Students need to learn early on that most opinions are not written by judges who write (or think) as well as Hand, Cardozo, Holmes, Traynor, Posner or Kozinski.

*I see by the clock on the wall, and hear by the rustling of notebooks, that we are out of time. Remember that if we had more time we would talk about three more things. First, remember that this writing requirement had its origins in the age of the goose-quill pen. Legislators and others are struggling with the sufficiency of electronic documents, digital signatures, and so forth. Second, we didn’t have a chance to discuss whether we should repeal the Statute of Frauds altogether, or at least reduce its coverage; review the note on this in the text. Finally, remember that the CISG has chosen not to adopt a writing requirement. For tomorrow read pages 360-370.*

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29. *Id.* at 669.