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Uniform Commercial Code: The Farmer is Not a Merchant Under the UCC –Promissory Estoppel to Avoid the Operation of the Statue of Frauds

by

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Uniform Commercial Code: The Farmer is Not a Merchant Under the UCC—Promissory Estoppel to Avoid the Operation of the Statute of Frauds

The controversy over whether a farmer is a merchant under the Uniform Commercial Code (UCC) is in full flame. *Decatur Cooperative Association v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976), adds another log to the fire and gives Kansas farmers a reprieve from the strict standards imposed upon merchants by the Code. The Kansas court holds a farmer who merely sells his crops to a grain elevator is not a merchant. *Urban* also establishes a unique precedent in Kansas by allowing promissory estoppel to render enforceable an otherwise non-enforceable oral agreement within the statute of frauds.[1]

The "merchant" concept the Code employs[2] is by no means a modern one. The "law merchant" was an early body of special rules developed in England and Europe to govern business dealings between mariners and merchants. The common law courts eventually expanded these rules to apply not only to merchants but also to other persons,[3] and the Uniform

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1. KAN. STAT. ANN. § 84-2-201 (1965), provides in pertinent 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 by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

2. KAN. STAT. ANN. § 84-2-104(1) and (3) (1965) define "merchant" as follows:
(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill . . .
(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

The Official Comment following these sections states in part:
Purposes:
1. This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable "between merchants" and "as against a merchant," wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. This section lays the foundation of this policy by defining those who are to be regarded as professionals or "merchants" and by stating when a transaction is deemed to be "between merchants."
2. The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provision . . . .

3. *See generally* Trisdale, *Impact of the Uniform Commercial Code on the Law of*

Sales Act, predecessor of the UCC, included provisions which applied stricter standards of conduct to persons who were knowledgeable about business customs and practices than to persons who were relatively inexperienced.[4] The UCC maintains this double standard in commercial transactions,[5] and because of it the definition of "merchant" becomes crucial in application of the Code to commercial transactions.

In *Urban*, the Kansas court states three criteria for determining merchant status under *Kansas Statutes Annotated* section 84-2-104. A "merchant" is (1) a dealer who deals in the goods of the kind involved in the transaction in question, or (2) one who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, even though he may not actually have such knowledge, or (3) a principal who employs an agent, broker or other intermediary who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.[6] One who fits within one of these classifications will be held to the standards of conduct imposed upon a merchant by the Code.[7] In addition to these criteria, the official comments to this section supply three others to assist the court in determining whether a person is to be classified as a "merchant": professionalism, special knowledge, and commercial experience.[8]

Initially these appear easily applicable standards. However, the determination is not simple; the cases before *Urban* deciding the issue of whether a farmer is a merchant reflect the difficulty of applying the criteria.

The first reported case to deal with this issue was *Cook Grains, Incorporated v. Fallis*.[9] The Arkansas Supreme Court held a farmer was not a merchant under the Code, and had not been so considered prior to the Code.[10] *Oloffson v. Coomer*,[11] an Illinois decision, was the next case to

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Contracts, 39 N.D. L. REV. 7 (1963); Whiteside, *Uniform Commercial Code—Major Changes in Sales Law*, 49 KEN. L.J. 165 (1960).

4. UNIFORM SALES ACT 15(1), 15(2), 16(c).

5. Some examples of this double standard are: KAN. STAT. ANN. § 84-2-201(2) (1965) (merchant is bound to an oral agreement if the other party sends him a written confirmation of the agreement; a non-merchant would not be bound), KAN. STAT. ANN. §§ 84-1-201(19) and 84-2-103(1)(b) and Official Comment (1965) (a non-professional is held to "honesty in fact" in a commercial transaction; a merchant is held to this standard, in addition to "[t]he observance of reasonable commercial standards of fair dealing in the trade."), and KAN. STAT. ANN. § 84-2-314 (1965) (requires a merchant to stand behind his products by imposing warranties of merchantability; no warranties are attached to sales by non-merchants). For further discussion of this double standard, see 7 J. HOWE & W. NAVIN, VERNON'S KANSAS STATUTES ANNOTATED, Kansas comment to §§ 84-2-104 and 84-2-201 (1968); 8 U.C.C. LAW LETTER 1, no. 12 (1975); Newell, *The Merchant of Article 2*, 7 VAL. U.L. REV. 307 (1973).

6. Decatur Cooperative Ass'n v. Urban, 219 Kan. 171, 176, 547 P.2d 323, 327 (1976).

7. *See* 1 ANDERSON, U.C.C. § 2-104:3 at 78 (2d ed. 1961).

8. KAN. STAT. ANN. § 84-2-104 and Comments 1 and 2 (1965).

9. 239 Ark. 962, 395 S.W.2d 555 (1965).

10. The Arkansas court reached this result by applying the Code criteria, ARK. STAT. ANN. § 85-2-104(1) (Addendum, U.C.C., 1961), to defendant Fallis, a farmer whose sole occupation was to raise soybeans on his 550 acres of land. The court also went beyond the Code to justify its decision and cited cases defining the words farmer and merchant and stated they could find no case where the word farmer was construed to mean merchant. The Arkansas court concluded that the words in a statute must be

hold a farmer was not a merchant. In a careful analysis of the definition of "merchant" under the Code,[12] the Alabama Supreme Court held in *Loeb and Company, Incorporated v. Schreiner*[13] that a cotton farmer does not, solely by his occupation, hold himself out as a professional, and thus is not a merchant.[14]

Other jurisdictions have not been so generous. The first reported case which holds a farmer to strict standards of conduct in sales of crops was *Ohio Grain Company v. Swisshelm.*[15] Later, in *Campbell v. Yokel,*[16] Illinois farmers who had sold their soybean crops to grain companies for several years were deemed to be persons who "dealt in goods of the kind involved in the transaction,"[17] and professionals in the business,[18] and thus merchants for purposes of an oral agreement to sell soybeans to plaintiff grain company.[19]

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given their "plain and ordinary meaning", and that the statute could not be read to hold a farmer to the standards of conduct of a merchant in a sales transaction with a grain company involving 5,000 bushels of soybeans. Cook Grains, Inc. v. Fallis, 239 Ark. 562, 565, 395 S.W.2d 555, 557 (1965). For a good discussion of this case, see 65 MICH. L. REV. 345 (1966).

11. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973). This Illinois appellate court held that in an oral contract to deliver corn on a future date, a farmer was not estopped to assert the statute of frauds as a defense to its enforcement when the farmer refused to plant the corn because of the wet season. The court indicated a farmer who is simply in the business of growing grain and not merchandising it is not a merchant under these facts.

12. UNIFORM COMMERCIAL CODE § 2-104.

13. 321 So. 2d 199 (Ala. 1975).

14. *Loeb*'s farmer had sold cotton to a cotton marketing company for four or five years and had been engaged in cotton farming for ten years. Schreiner, the farmer, allegedly made an oral agreement over the telephone with the president of the Loeb corporation, and the president then mailed Schreiner a written confirmation of their oral agreement. The farmer neither signed, returned, nor took exception to the confirmatory mailing. In holding the oral agreement was unenforceable under the Code statute of frauds, UNIFORM COMMERCIAL CODE §§ 2-201(1) and (2), the Alabama court stated that even though the farmer had a good deal of knowledge about cotton farming, this was not the test to determine if he was a merchant. There was no evidence to show the defendant had ever sold any cotton that he had not grown. Thus, Schreiner was not a professional cotton merchant, but merely a "casual or inexperienced seller or buyer," UNIFORM COMMERCIAL CODE § 2-104 Comment 2, in this transaction. The court concluded that just because a farmer sells his cotton every year, this should not take him out of the "casual seller" category and place him in the "professional" category. Loeb and Co., Inc. v. Schreiner, 321 So. 2d 199, 202 (Ala. 1975).

15. 69 O.O.2d 192, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973). The Ohio court held, in contradiction to *Loeb*, that even though Swisshelm had not sold soybeans for a number of years, his many years of farming corn and his familiarity with the soybean market in Cincinnati coupled with his knowledge of how foodstuffs were marketed qualified him as a professional. Thus he was unable to avail himself of the defense of the statute of frauds to avoid being bound to an agreement over the telephone involving the sale of soybeans. The court reasoned that a farmer's increased responsibility is not predicated upon his being a merchant in the narrow professional sense of the word, but arises in any transaction in which both parties are chargeable with the knowledge or skill of merchants. Here, the Ohio Grain Company was held to merchant standards because of the nature of its business and Swisshelm was deemed a professional because of his previous dealings in which he sold foodstuffs for a profit in a marketplace of merchants.

16. 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974).

17. ILL. STAT. ANN. ch. 26, § 2-104(1) (Smith-Hurd 1974).

18. *Id.* Comments 1 and 2.

19. Illinois is the state where the issue of whether a farmer is a merchant has received the greatest judicial attention. One state appellate court determined a farmer is not a merchant under the Illinois Code definition. Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973). On every other occasion the issue has reached an Illinois

The Illinois Supreme Court corrected the inconsistency between the holdings of the appellate courts in *Oloffson* and *Campbell* in *Sierens v. Clausen.*[20] The court held that a farmer who had farmed for 34 years and had sold soybeans to grain elevators in "cash sales" and "future contracts" for five years was a merchant and that a written confirmation of an oral agreement to deliver soybeans was sufficient to satisfy the statute of frauds provision of the UCC. A United States District Court sitting in Illinois, in *Continental Grain Company v. Harbach,*[21] decided a farmer who has been president of a farming cooperative and sold corn for several years, and who owned and leased farmlands for over twenty years, was a merchant for purposes of an oral agreement he made to sell 25,000 bushels of soybeans to a grain company.[22]

Against this background, the Kansas Supreme Court decides *Decatur Cooperative Association v. Urban.*[23] Plaintiff cooperative's principal business was buying wheat and other grains from area farmers and then reselling the grains to a terminal elevator. Sales to terminal elevators were generally made over the telephone; thereafter a written confirmation of sale was sent to the cooperative by the purchasing elevator. This procedure was well known in the county and plaintiff had established the policy of never speculating on the price of grain. A general manager and assistant manager ran the daily operations of the cooperative and were authorized to enter into binding sales contracts.

Defendant Urban was a member of the cooperative and a resident of the county. He had been a farmer for twenty years. Urban was engaged solely in the business of raising wheat and livestock and had sold grain to the

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court, the courts have held the farmer to the standards of merchants in commercial transactions.

In *Campbell*, an oral agreement to sell approximately 7,000 bushels of soybeans was deemed enforceable as fitting into an exception to the Illinois statute of frauds, ILL. STAT. ANN. ch. 26, § 2-201(2) (Smith-Hurd 1974), when the grain company mailed a sufficient confirming memorandum of the oral agreement. The court reasoned that imposing the standards of merchants upon farmers in this type of situation was a small burden as the Code provisions concerning merchants involve "normal business practices which are or ought to be typical of and familiar to any person in business." ILL. STAT. ANN. ch. 26, § 2-104(1) Comment 2 (Smith-Hurd 1974).

The Illinois court in *Campbell* discussed another case pertinent to the farmer-merchant issue: Fear Ranchers, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972). This case involved an action by a cattle buyer for breach of an implied warranty of fitness against a rancher who had sold him diseased cattle. The defendant rancher was in the business of selling cattle to meat packers; this sale was the first sale to a non-packer, and the court held the rancher was not a merchant in this transaction as this was the sale of cattle for resale and not a sale of cattle for slaughter and thus a sale of a different type of goods. The Illinois court analogized this case to the *Campbell* defendants and stated that since they were in the business of selling soybeans, they should be considered merchants in a transaction involving a sale of soybeans.

20. 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

21. 400 F. Supp. 695 (N.D. Ill. 1975).

22. The court stated that even though Harbach had sold soybeans for only five months, this lack of experience concerning soybeans did not negate his status as a merchant, as he had failed to show corn and soybeans are too different to be classified as goods of the same kind. Since Harbach was clearly a merchant regarding sales of corn, he was also a merchant regarding sales of soybeans. Continental Grain Co. v. Harbach, 400 F. Supp. 695, 699 (N.D. Ill. 1975).

23. 219 Kan. 171, 547 P.2d 323 (1976).

cooperative and other area elevators since 1966. On July 26, 1973, Urban placed a call to the cooperative and spoke to the assistant manager. Plaintiff contended that as a result of this call the parties entered into an oral contract in which Urban agreed to sell the cooperative 10,000 bushels of wheat at a certain price. It was plaintiff's practice to mail a written confirmation of sale to the farmer immediately after the oral agreement; Urban was informed of this practice during the phone conversation. A confirmation, signed by the assistant manager and binding on the cooperative, was sent to Urban. He read it and sent no written objection. Relying upon the alleged oral contract, plaintiff made a sale of the wheat to a terminal elevator at a higher price. The price of wheat then rose substantially, and Urban notified the cooperative that he would not deliver the wheat. Plaintiff brought an action to obtain possession of the 10,000 bushels of wheat under the oral contract or alternatively for damages for Urban's failure to deliver. Defendant denied any contract of sale was made. The trial court held[24] the oral contract of sale unenforceable under the statute of frauds[25] and found the term "merchant" inapplicable to defendant, thus rendering the written confirmation unenforceable as a contract. It sustained Urban's motion for summary judgement.[26]

The primary issue on appeal is whether a farmer is a merchant under *Kansas Statutes Annotated* section 84-2-104. The Kansas Supreme Court holds the trial court was correct in its determination. The court cites many previous cases which have dealt with this issue,[27] but does not examine them in its opinion. Yet the court follows the principles set forth in *Loeb and Company, Incorporated v. Schreiner.*[28] In an examination of the Code definition of "merchant",[29] the court determines, under the facts, Urban is not a dealer in goods of the kind involved in the transaction, nor does he by his occupation hold himself out as having special knowledge or skill in regard to the practices or goods involved in the transaction.[30] The court holds the

24. *Id.* at 174, 547 P.2d at 326.

25. The trial court erroneously based its ruling upon KAN. STAT. ANN. § 84-2-106 (1965), dealing with personal property not otherwise covered by KAN. STAT. ANN. § 84-2-201 (1965). The definition of "goods" includes "growing crops . . . to be severed from realty," KAN. STAT. ANN. § 84-2-107 (1965), and thus sales of wheat are encompassed by KAN. STAT. ANN. § 84-2-201 (1965), and KAN. STAT. ANN. § 84-2-106 (1965) is clearly inapplicable to these facts. When KAN. STAT. ANN. § 84-2-201(1) (1965) is applied to this case, it is apparent the oral contract between the cooperative and Urban was unenforceable unless the transaction was "between merchants," in which case KAN. STAT. ANN. § 84-2-201(2) would apply. At least the court reached the correct conclusion that there was no valid oral contract of sale between the parties, even though it apparently applies the wrong section.

26. 219 Kan. at 174, 547 P.2d at 326.

27. Loeb and Co., Inc. v. Schreiner, 321 So. 2d 199 (Ala. 1975) (farmer is not a merchant); Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W.2d 555 (1965) (farmer is not a merchant); Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (farmer is a merchant); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974) (farmer is a merchant); Ohio Grain Co. v. Swisshelm, 69 O.O.2d 192, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973) (farmer is a merchant).

28. 321 So. 2d 199 (Ala. 1975).

29. KAN. STAT. ANN. § 84-2-104 (1965).

30. Decatur Cooperative Ass'n v. Urban, 219 Kan. 171, 177, 547 P.2d 323, 328 (1976). *See* Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W.2d 555 (1965) ("farmer" cannot be construed to mean merchant).

concept of professionalism is crucial in determining who is a merchant under the Code, as the writers of the official comment to UCC 2-104

> virtually equate professionals with merchants—the casual or inexperienced buyer or seller is not to be held to the standard set for the professional in business. The defined term 'between merchants', used in the exception proviso to the statute of frauds, contemplates the knowledge and skill of professionals on each side of the transaction. . . .[31]

The court concludes even though Urban probably has special knowledge and skill in raising wheat, this should not be the test to determine whether he is a professional. Even when this special knowledge is coupled with Urban's annual sales of wheat and other grains for the past twenty years, these factors do not qualify him as a merchant in regard to a cash sale of wheat to a grain cooperative.[32]

The court does, by implication at least, indicate if a farmer were to sell farm products other than those he has raised, he could be held to be a merchant.[33] The court states, "There is no indication any of these sales were other than cash sales to local grain elevators, where conceivably an expertise reaching professional status could be said to be involved."[34] Three cases dealing with this issue have been decided since *Urban*. They do little to clarify when a farmer is or is not a merchant, but do seem to indicate a trend by some courts toward holding a farmer is a merchant.[35] Because of

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31. 219 Kan. at 177, 547 P.2d at 328.
32. *Id.*
33. *Id.*
34. 219 Kan. at 177, 547 P.2d at 328. This concluding statement gives rise to the inference that in a sale, other than "cash" sale by a farmer to a grain elevator, for example, a contract of sale based upon a future contingency, a farmer could be a merchant. Read another way, this statement could also imply that if the sale were to a non-local elevator, the farmer could be a merchant.
35. In Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976), the Supreme Court of North Carolina refused to state directly a farmer was a merchant in a sale of corn and soybeans within the Code statute of frauds, but in effect, and by implication, so ruled when they reversed the trial court's granting of defendant farmer's motion for summary judgment. The court rejected the farmer's argument that the words "farmer" and "merchant" are not interchangeable. *Id.* at 564, 222 S.E.2d at 2. The court also admitted the unfairness of this farmer being free to sell on the open market if prices rose, or being able to enforce a written confirmation against a merchant buyer if grain prices fell below the oral contract price. *Id.* at 566, 222 S.E.2d at 4.

The most recent case dealing with the farmer-merchant issue is Nelson v. Union Equity Co-Op. Exchange, 536 S.W.2d 635 (Tex. Civ. App. 1976). This case involved an oral sale of wheat by a farmer to a grain cooperative. The cooperative mailed a sufficient confirmatory memorandum of the sale to Nelson. The Texas court stated *Cook Grains* did not constitute useful authority for Nelson, that *Loeb* was applicable but uninfluential, and accepted Union Equity's authority, Fear Ranchers, Inc. v. Berry, 470 F.2d 905 (10th Cir. 1972); Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N.D. Ill. 1975); Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974); Ohio Grain Co. v. Swisshelm, 69 O.O.2d 192, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973), as controlling. Nelson v. Union Equity Co-Op. Exchange, 536 S.W.2d 635, 638 (Tex. Civ. App. 1976). In holding farmer Nelson was a merchant, the court explained:

> Every good reason exists for holding that the fact finder should be entitled to determine the question. In most instances where an ignorant, innocent, and inexperienced farmer fails to consummate a contract of the kind under consideration he will probably be protected by the finding made. In most instances where a knowledgeable and experienced trader who happens to be a farmer

the uncertainty in defining the "merchant" concept, state courts are free to decide the merchant issue as they see fit. Perhaps in the future the drafters of the Code will once again join together and give us a more precise definition. The holding of the Kansas court is not surprising when *Urban* is viewed in the light of its potential ramificiations. If the court had held otherwise a farmer would have to observe standards wholly foreign to the traditional nature of his activities.[36] To a small farmer the classification as a merchant would be onerous. He would be faced with the possibility of expensive and time-consuming litigation if he failed to observe the merchant standards of the Code. This possibility may be discouraging to the farmer and could move him to abandon farming as a vocation. It is no surprise the court offers this protection to the backbone of the Kansas economy.

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fails to consummate such a contract in order to take advantage of the purchaser, to his resultant loss by the latter in good faith reliance upon the commitment, the purchaser will probably be protected by the fact finder.

Only in the exceptional case would circumstance remove the responsibility for factual determination from the fact finder and require the holding that the farmer was not a merchant as applied to the transaction which is subject of a suit by a purchaser who believes himself protected by the law upon mailing the written confirmation of sale and purchase agreement. . . . *Id.* at 641.

The Texas court in *Nelson* seemed to take a middle ground position on the farmer-merchant issue. The court did not state that a farmer is a merchant as a matter of law and thus is not so different from the *Urban* result. In actuality the Kansas court utilizes promissory estoppel to prevent Urban from taking advantage of his own wrong while the Texas court accomplished this result with its middle ground decision. However, the Texas court did indicate a farmer has a heavy burden of proof to show he is not a merchant, and the farmer by his occupation alone is a "professional" under the UNIFORM COMMERCIAL CODE § 2-104 Comments 1 and 2.

In a case adding strong support to *Urban*, the Idaho Supreme Court in Lish v. Compton, — Idaho —, 547 P.2d 223 (1976), held a farmer who sells the crops he grows each year to grain companies is not a merchant in regard to an oral contract for the sale of 15,000 bushels of wheat. The Idaho court took the unique position that just because a farmer keeps conversant with current market prices and tries to make the most profitable sale of his crops, he is not by this fact alone a merchant. The Idaho court then stated that the term "merchant" as used in UCC § 2-201 refers primarily to a person whose occupation is that of buying and selling goods. *Id.* at —, 547 P.2d at 226. In the concurring opinion, Chief Justice Henriod cautioned that the majority opinion may have drawn too broad a conclusion in that a corporation that owns many farms and simply sells the products it raises may escape being held to the standards of a merchant even though the corporation is a professional in the business of selling grain. *Id.* at —, 547 P.2d at 227.

In an examination of the cases and authorities dealing with the issue of whether a farmer is a merchant one thing is clear: there is no definite or all-encompassing answer to the question. The problems in defining the chameleon concept of merchant are numerous and difficult. One commentator has arrived at thirteen definitions of "merchant" under the Code, Newell, *The Merchant of Article 2*, 7 VAL. U.L. REV. 307 (1973), and the cases contribute still more definitions.

36. For example, if a farmer were to be classified as a merchant under the Code, he would then be subject to the following statutory standards: KAN. STAT. ANN. § 84-2-103(1)(b) (1965) (observance of reasonable commercial standards of fair dealing in the trade), KAN. STAT. ANN. § 84-1-201(19) (1965) (observance of honesty in fact in the conduct or transaction concerned), KAN. STAT. ANN. § 84-2-314 (1965) (warranties of merchantability and fitness requiring a merchant to stand behind the products he sells), KAN. STAT. ANN. § 84-2-205 (1965) (firm offers), KAN. STAT. ANN. § 84-2-207 (1965) (confirmatory memoranda), KAN. STAT. ANN. § 84-2-209 (1965) (contract modification), KAN. STAT. ANN. § 84-2-402(2) (1965) (retention of possession by a merchant seller), and KAN. STAT. ANN. § 84-2-403(2) (1965) (the entrusting of possession to a merchant dealing in goods of the kind).

For more detailed discussion on the standards of conduct for a merchant, see generally 7 J. HOWE & W. NAVIN, VERNON'S KANSAS STATUTES ANNOTATED (1968); 8 U.C.C. LAW LETTER 1, no. 12 (1975); Whiteside, *Uniform Commercial Code—Major Changes in Sales Law*, 49 KEN. L.J. 165 (1960); 65 MICH. L. REV. 345 (1966).

The secondary issue in *Urban* is whether a farmer can be precluded by the doctrine of promissory estoppel from raising the defense of the statute of frauds[37] to an oral agreement for the sale of goods.[38] The plaintiff

37. KAN. STAT. ANN. § 84-2-201(1) (1965).

38. Promissory estoppel is a different concept from equitable estoppel. The Kansas court states the difference as follows: "Promissory estoppel differs from ordinary 'equitable' estoppel in that the representation is promissory rather than to an existing fact. . . ." Decatur Cooperative Ass'n v. Urban, 219 Kan. 171, 178, 547 P.2d 323, 329 (1976); *see* Marker v. Preferred Fire Ins. Co., 211 Kan. 427, 506 P.2d 1163 (1973).

Equitable estoppel can be used in the proper circumstances to prevent a party from asserting the statute of frauds as a defense; *see* Oxley v. Ralston Purina Co., 349 F.2d 328 (6th Cir. 1965); Texas Co. v. Sloan, 171 Kan. 182, 231 P.2d 255 (1951); Hazen v. Garey, 168 Kan. 349, 212 P.2d 288 (1949); Rose v. Hayden, 35 Kan. 106, 10 P. 554 (1886); Farmers Elevator Co. of Elk Point v. Lyle, — S.D. —, 238 N.W.2d 290 (1976); 66 MICH. L. REV. 170 (1967).

The doctrine of promissory estoppel has also been utilized by the courts to bar the assertion of the statute of frauds. However, courts are split as to what is required before promissory estoppel can be used to defeat the defense of the statute of frauds. Some courts have applied the standards of the RESTATEMENT OF CONTRACTS § 178 comment f (1932), which states in applicable part: "Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground . . . and a promise to make a memorandum . . . may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud. . . ." Cases which represent this position are: 21 Turtle Creek Sq., Ltd. v. New York State Teachers' Retirement Sys., 432 F.2d 64 (5th Cir. 1970) (construing Texas law); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954); Tiffany Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 493 P.2d 1220 (1972); Wolfe v. Wallingford Bank and Trust Co., 124 Conn. 507, 1 A.2d 146 (1938); Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956). *Cf.* Del Hayes and Sons, Inc. v. Mitchell, — S.D. —, 230 N.W.2d 588 (1975). *Contra*, Kahn v. Cecelia Co., 40 F. Supp. 878 (S.D.N.Y. 1941). *See generally* 3 WILLISTON ON CONTRACTS § 533A (3d ed. Jaeger 1936); 66 MICH. L. REV. 170 (1967).

Other courts have applied the RESTATEMENT (SECOND) OF CONTRACTS § 217A (Rev. Tent. Draft 1973), which states:

> *Enforcement by Virtue of Action in Reliance*
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> (1) A promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does induce the action or forebearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
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> (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
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> (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
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> (b) the definite and substantial character of the action or forebearance in relation to the remedy sought;
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> (c) the extent to which the action or forebearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
>
> (d) the reasonableness of the action or forebearance;
>
> (e) the extent to which the action or forebearance was foreseeable by the promisor.

Cases following this section of the RESTATEMENT (SECOND) OF CONTRACTS are: McIntosh v. Murphy, 52 Haw. 29, 469 P.2d 177 (1970); Miller v. Lawler, 245 Iowa 1144, 66 N.W.2d 267 (1954). *Cf.* Readmond v. Matsushita Elec. Corp., 355 F. Supp. 1073 (E.D. Pa. 1973); Clifton v. Ogle, 526 S.W.2d 596 (Tex. Civ. App. 1975); "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934 (Tex. Sup. Ct. 1972); Texarkana Constr. Co. v. Alpine Constr. Spec., Inc., 489 S.W.2d 941 (Tex. Civ. App. 1972). *See generally* Annot. 56 A.L.R.3d 1037 § 6(a) (1974); 73 AM. JUR. 2d, *Statute of Frauds* § 565 (1974).

And still other courts have refused to allow promissory estoppel to defeat the statute of frauds. Cases representing this position are: Keller v. Penovich, 262 So. 2d 243 (Fla. App. 1972); Tanenbaum v. Biscayne Osteo. Hosp., Inc., 190 So. 2d 777 (Fla. Sup. Ct. 1966); Sinclair v. Sullivan Chevrolet Co., 31 Ill. 2d 507, 202 N.E.2d 516 (1964). *Cf.* N. Litterio and Co. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963); Janke Constr. Co., Inc. v. Vulcan Materials Co., 386 F. Supp. 887 (W.D. Wis. 1974); Sacred Heart Farmer Co-Op. Elevator v. Johnson, — Minn. —, 232 N.W.2d 921 (1975). *See generally* Annot., 56 A.L.R.3d 1037 § 4(a) (1974).

cooperative contended that Urban, because of his long association with the cooperative and other grain elevators, knew or should have known the cooperative would immediately resell the wheat it had agreed to purchase from him.[39] Thus the cooperative asked that Urban be prevented from asserting the statute of frauds as a defense to the enforcement of the oral agreement.

The Kansas Supreme Court has adopted the *Restatement of Contracts*[40] definition of promissory estoppel and cites this definition in *Urban*.[41] It finds justification for the application of promissory estoppel in *Urban* from the Code, which provides certain principles of law and equity, unless specifically displaced by Code provisions, shall supplement its provisions,[42] and from Kansas case law,[43] which represents the principle that the statute of frauds was enacted to prevent fraud and injustice and should not be used to protect fraud or enable one to take advantage of his own wrong.

The Kansas court outlines the requirements that must be met before promissory estoppel can be invoked in a statute of frauds case: the promisee must show (1) competent evidence to indicate that a valid and otherwise enforceable contract was entered into by the parties;[44] (2) evidence of conduct by the promisor which amounts to something more than a mere refusal to perform the oral contract;[45] and (3) that the facts of the case and conduct by the promisor justify the application of the doctrine, *i.e.*, that (a) the promise was made under the circumstances where the promisor reasonably expected and intended that the promisee would rely on it, (b) the promisee acted reasonably in his reliance on the promise, and (c) refusal to enforce the doctrine of promissory estoppel would result in injustice or operate to sanction perpetration of a fraud.[46]

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39. 219 Kan. at 178, 547 P.2d at 329.

40. RESTATEMENT OF CONTRACTS § 90 (1930) states: "A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise." *See* Kirkpatrick v. Seneca National Bank, 213 Kan. 61, 515 P.2d 781 (1973) (promissory estoppel applied); Marker v. Preferred Fire Ins. Co., 211 Kan. 427, 506 P.2d 1163 (1973) (court refused to apply promissory estoppel).

41. 219 Kan. at 178, 547 P.2d at 329.

42. KAN. STAT. ANN. § 84-1-103 (1965).

43. Texas Co. v. Sloan, 171 Kan. 182, 231 P.2d 255 (1951) (equitable estoppel allowed to defeat defense of statute of frauds in an oral agreement to execute an oil and gas lease); Hazen v. Garey, 168 Kan. 349, 212 P.2d 288 (1949) (equitable estoppel would be allowed to defeat defense of statute of frauds, even though court held that an oral agreement to have exclusive use of a patent could be performed within one year, thus was not covered by the statute of frauds); Rose v. Hayden, 35 Kan. 106, 10 P. 554 (1886) (equitable estoppel allowed to defeat defense of statute of frauds in an oral sale of land). No Kansas case was found which utilized the doctrine of promissory estoppel to defeat the statute of frauds.

44. *See* 3 WILLISTON ON CONTRACTS § 533A at 802 (3d ed. Jaeger 1936).

45. *See* 37 C.J.S., *Frauds, Statute of*, § 247 at 755 (1943).

46. Decatur Cooperative Ass'n v. Urban, 219 Kan. 171, 179, 547 P.2d 323, 330 (1976). In the discussion of the requirements for the application of promissory estoppel to a statute of frauds case, even though the Kansas court does not specifically so state, the court has aligned itself with the cases which support the RESTATEMENT (SECOND) OF CONTRACTS § 217A (Rev. Tent. Draft 1973).

The facts and pleadings in *Urban* indicate (1) an enforceable oral sale of 10,000 bushels of wheat but for the statute of frauds, (2) Urban's refusal to deliver the wheat to the cooperative coupled with the obvious intention to resell his wheat for almost twice the price, and (3) Urban's familiarity with the cooperative's procedure of reselling grain immediately after making a purchase. The cooperative would stand to sustain an actual loss of $10,400[47] if Urban were allowed to ignore the oral contract of sale. Thus, the Kansas Supreme Court holds, under these facts, the cooperative is entitled to invoke promissory estoppel to bar Urban's defense of the statute of frauds.[48]

In *Urban*, the Kansas Supreme Court protects this state's economic mainstay, the farmer, by holding a farmer is not a merchant under the UCC. To hold a farmer to the strict standards of a merchant when he negotiates the sale of his crops would be unduly burdensome. However, the court does not give farmers unlimited freedom from strict merchant standards. The court includes the caveat that if a farmer abuses this freedom he will not be allowed to profit from his own wrong. While an examination of the cases makes it difficult to generalize, it appears that states with agricultural economies are more reluctant to equate farmers with merchants than states with non-agricultural economies. It will be interesting to see whether other jurisdicitions, finding the farmer is not a merchant, will follow the lead of the Kansas court in setting boundaries on a farmer's crop-selling freedom with "traditional" legal and equitable doctrines like promissory estoppel.

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47. This figure was obtained by subtracting the price of plaintiff's contract with the Kansas City terminal elevator ($34,600—$3.46 a bushel x 10,000) from the price the cooperative would have to pay for wheat at the time Urban announced that he would not perform the oral agreement ($45,000—$4.50 a bushel x 10,000).

48. 219 Kan. at 180, 547 P.2d at 330.