THE JUDICIAL ADMISSIONS EXCEPTION TO THE STATUTE OF FRAUDS: A CURIOUSLY GRADUAL ADOPTION

Wayne R. Barnes[*]

The statute of frauds requires certain categories of contracts to be evidenced by a signed writing. The original purpose of the statute of frauds, indeed its titular purpose, is the prevention of the fraudulent assertion of a non-existent oral contract. Although a signed writing is the formal way in which to satisfy the statute of frauds, courts have long recognized various exceptions to the writing requirement which will be held to satisfy the statute absent a writing. The effect of such exceptions is that they constitute an alternative form of evidence for the presence of a contract. One such exception is the judicial admission of a contract – where the defendant admits in his pleadings, testimony, or otherwise in court under oath that a contract (and its terms) exists. Such judicial admission of the existence of a contract seemingly completely vindicates the primary and original purpose of the statute of frauds. A defendant that judicially admits that he or she entered into a contract, has no concern that such contract is fraudulently being asserted against him. It is, therefore, "astonishing" (to use Professor Robert Stevens's phrase) that the judicial admissions exception completely fell out of favor in England, and then the United States in the eighteenth and nineteenth centuries, and instead the dominant majority rule became the elimination of the exception. For the stated purposes of removing the defendant's incentive to commit perjury and falsely deny the contract in order to avoid liability, the now longstanding majority rule became that a defendant could admit the contract and yet still assert the statute of frauds defense. Such a rule is of dubious justification, which is why Article 2 of the Uniform Commercial Code reinstated the judicial admissions

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exception in the case of contracts for the sale of goods. The rule remained virtually absent in non-goods cases, however. Thankfully, and as reported by Professor Shedd in published articles in 1984 and 1991, an embryonic judicial admissions rule began to reemerge in the early twentieth century, but he observed that it remained a very small minority rule. This article updates the research to the present and observes that the rule appears to still be a minority rule although the number of adoptions has increased. Nevertheless, the rule represents sound statute of frauds policy, and should be fully implemented by case decision or statute.

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I. INTRODUCTION

The statute of frauds ("the statute") has been part of the law of contracts for over three centuries.[1] The statute's requirement for certain categories of contracts to be in writing and signed by the party to be charged has several claimed purposes.[2] Paramount among those purposes is the prevention of fraudulent claims of the existence of an oral contract, when in fact none has been entered into. Indeed, the original title of the English statute enacted in 1677 was "An Act for the Prevention of Fraud and Perjuries."[3] The statute's ultimate aim, therefore, is to prevent fraudulent claims that a contract exists when it does not.[4] Stated another way, the statute of frauds is concerned with false claims that a contract has been formed. Conversely, when satisfactory evidence otherwise exists that a contract was formed between the parties, most courts have found that the underlying

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1. Strictly speaking, of course, there is no single "statute of frauds" in the United States. Nor is the statute generally a matter of the common law of the jurisdiction. *See* 4 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 12.4 (2019) ("All treatises on the law of contracts deal with the statute of frauds, almost as if it were a part of the common law of the land; yet it is not a part of the common law in the same sense as are the doctrine of consideration and the rules as to mutual assent. Court decisions of one state are regularly cited as authority in the courts of other states; yet the statutes that are being interpreted and applied may have substantial differences. Accuracy always requires a knowledge of the specific statute in every case that is cited as authority. There is not one statute of frauds; there are many statutes of frauds.").

2. 9 RICHARD LORD, WILLISTON ON CONTRACTS § 21:1 (4th ed. 2011) ("The statute of frauds was designed to prevent the enforcement of unfounded fraudulent claims by requiring written evidence. Alternatively, as it is sometimes expressed, the statute was enacted to prevent fraud by requiring certain enumerated contracts to be evidenced in writing. It has also been recognized, however, that the statute ensures that the parties will act with deliberation and not improvidently, suggesting not only an evidentiary but also cautionary and channeling functions.") (citations omitted).

3. *Id.* (citing C.R. Klewin, Inc. v. Flagship Props., Inc., 600 A.2d 772, 775 (1991)). The Connecticut Supreme Court, commenting on the statute, observed:

> The Connecticut statute of frauds has its origins in a 1677 English statute entitled 'An Act for the Prevention of Fraud and Perjuries.' The statute appears to have been enacted in response to developments in the common law arising out of the advent of the writ of assumpsit, which changed the general rule precluding enforcement of oral promises in the King's courts. Thereafter, perjury and the subornation of perjury became a widespread and serious problem. Furthermore, because juries at that time decided cases on their own personal knowledge of the facts, rather than on the evidence introduced at trial, a requirement, in specified transactions, of 'some memorandum or note . . . in writing, and signed by the party to be charged' placed a limitation on the uncontrolled discretion of the jury . . . . Although the British Parliament repealed most provisions of the statute, including the one-year provision, in 1954 . . . the statute nonetheless remains the law virtually everywhere in the United States.

C.R. Klewin, 600 A.2d at 775.

4. LORD, *supra* note 2.

policy concerns of the statute have been satisfied, and the contract should be enforced in spite of the lack of a formal, signed writing.[5]

Hence, certain exceptions to the statute's formal writing requirements have developed over the years, including notably the part-performance exception for land sale contracts,[6] the full performance exception for contracts not performable within one year,[7] and the "main purpose" exception to the guaranty statute of frauds.[8] To say nothing of the innovations of the statute of frauds provision of Article 2 of the Uniform Commercial Code ("U.C.C."), including a goods-based part-performance rule,[9] the merchant's confirmation rule,[10] and the specially manufactured goods rule.[11] In all these instances, courts are authorized to find an enforceable contract, in spite of the lack of a formal, signed writing, because of other evidence that provides a strong suggestion of the existence of a contract. Such other evidence—when established—dispenses with the need for a formal, signed writing, and the danger of fraud in assertion of the contract is largely eliminated by the presence of such other alternative evidence.

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5. *See, e.g.*, C.R. Klewin, Inc. v. Flagship Props., Inc., 936 F.2d 684, 686 (2d Cir. 1991) ("[T]he Statute of Frauds only invalidates oral contracts of an express definite duration in excess of one year.").

6. 10 RICHARD LORD, WILLISTON ON CONTRACTS § 28:3 (4th ed. 2011) (citing Townsend v. Vanderwerker, 160 U.S. 171, 184 (1895)) ("From an early day, courts of equity have excepted from the operation of the Statute of Frauds contracts for the sale of land when there has been part performance of the contract.").

7. *Id.* § 28:9 ("Except in contracts for the sale of land, an agreement not performable within a year is generally not validated by part performance although performance of one entire side of the contract or of a divisible portion of it is often held to make the Statute inapplicable.") (citations omitted).

8. *Id.* § 22:20 ("Where the leading purpose of a person who agrees to pay the debt of another is to gain some advantage, or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another's debt, and the promise is made on a sufficient consideration, it will be valid although not in writing.") (citations omitted).

9. U.C.C. § 2-201(3)(c) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . with respect to goods for which payment has been made and accepted or which have been received and accepted.").

10. *Id.* § 2-201(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 10 days after it is received.").

11. *Id.* § 2-201(3)(a) ("A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.").

One other type of evidence that a contract exists is a simple admission of its existence by the parties.[12] And, when the admission is in the context of a judicial proceeding—a so-called "judicial admission"—the evidence of the existence of a contract is quite strong indeed.[13] In fact, the entire original concern of the statute of frauds—that someone would falsely and fraudulently claim that a contract had been formed when it had not—is completely eliminated if the one against whom the contract is asserted *admits* in a court proceeding that the contract is indeed legitimate and was entered into between the parties.[14] As one court noted:

> Under existing procedure, the purpose of the Statute of Frauds is to protect a party . . . from perjured evidence against him. The purpose of evidence is to prove facts. Admissions of a party in testifying, though in form evidence, are in essence not mere evidence, but make evidence against him unnecessary.[15]

Therefore, a defendant's admission of the existence of the contract should clearly remove the statute of frauds as a defense in the action. No fraud is present in the assertion of the contract, since it admittedly exists just as the proponent claims. So, there is no "fraud" being perpetrated, as originally feared and targeted by the statute of frauds. In fact, it is well known that the statute of frauds provision of Article 2 of the U.C.C. (applicable to transactions in goods) does exactly that.[16] It provides in section 2-201(3)(b) that

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12. *Id.* § 2-201(3)(b) ("[I]f the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.").

13. *See, e.g.*, Gibson v. Arnold, 288 F.3d 1242, 1246 (10th Cir. 2002) (referring to U.C.C. § 2-201(3)(b) as the "judicial admission exception").

14. *See, e.g.*, Zlotziver v. Zlotziver, 49 A.2d 779, 781 (Pa. 1946) ("The statute of frauds, however, does not absolutely invalidate an oral contract relating to land but is intended merely to guard against perjury on the part of one claiming under the alleged agreement. Accordingly, if the title holder admits, either in his pleadings or his testimony, that he did in fact enter into the contract, the purpose of the statute of frauds is served and the oral agreement will be enforced by the court.").

15. Trossbach v. Trossbach, 42 A.2d 905, 908 (Md. 1945).

16. U.C.C. § 2-102. It is commonplace for commentators and courts to state that Article 2 of the U.C.C. applies to contracts for the "sale of goods." *See* Crystal L. Miller, Note, *Goods/Services Dichotomy and the U.C.C.: Unweaving the Tangled Web*, 59 NOTRE DAME L. REV. 717, 718 (1984). However, technically speaking, Article 2 applies to all "transactions in goods." U.C.C. § 2-102. Notwithstanding the technically broader scope of applicability, the cases decided under Article 2, as well as many of its provisions, are primarily concerned with contracts for the sale of goods. *See* 1 HAWKLAND U.C.C. SERIES § 2-102:2 (2019), *Transactions in Goods* ("Two requirements must be met in order for Article 2 to apply: there must be a 'transaction' and the transaction must be 'in goods.' The term 'transaction' is undefined, but generally includes a sale. The title of Article 2 is 'Sales' and many of the provisions of Article 2 are geared toward a buyer or a seller. A 'sale' is defined in Section 2-106(1) as the passing of title from a seller

> [a] contract which does not satisfy the requirements of subsection (1) [writing signed by party to be charged] but which is valid in other respects is enforceable . . . if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.[17]

But Article 2 of the U.C.C. only applies to transactions in goods.[18] What about all other types of contracts besides those concerning goods (real estate, services, employment, construction, etc.)? Is there a judicial admissions exception analog outside the applicability of the U.C.C.? The current answer, and the history of the path to that answer, is one that is somewhat surprising. The brief answer, which will be discussed in more detail in the Parts that follow, is that such an exception did arise shortly after the promulgation of the original English statute in 1677, but then fell out of favor throughout the eighteenth and nineteenth centuries.[19] In the middle of the twentieth century, and in fact late into the 1980s and beyond, it remained the dominant majority rule in the United States that there was no effective judicial admissions exception outside the U.C.C.[20] Therefore, a party was entitled to judicially admit that a contract was formed between the parties, and yet still interpose the statute of frauds as a defense to avoid obligation under the contract.[21] An early law review article on the issue, written in 1951 by Professor Robert S. Stevens, noted that three early exceptions to the statute of frauds' applicability arose in the immediate aftermath of its passage, such that a defendant was not allowed to utilize the defense: "a) where his own fraud was responsible for the non-existence of the required signed memorandum, b) under the equitable doctrine of part performance, and c) where the defendant admits the contract."[22] After observing that the judicial admission exception fell out of favor and was eliminated throughout the United States as an exception to the statute's applicability, Stevens observed that it was "astonishing" that it should have failed to persevere as an exception to the statute,

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to a buyer for a price. [However, t]he scope of Article 2 is in fact broader than sale of goods transactions[, including] . . . option contracts, distributorship or exclusive dealing agreements, and franchise agreements.") (citations omitted).

17. U.C.C. § 2-201(3)(b).

18. *Id.* § 2-102.

19. MURRAY, *supra* note 1, § 14.2.

20. *See* Peter J. Shedd, *Statute of Frauds: Judicial Admission Exception - Where Has It Gone? Is It Coming Back?*, 6 WHITTIER L. REV. 1, 5 (1984).

21. *See* Robert S. Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L. Q. 355, 356 (1952) (citing BROWNE, STATUTE OF FRAUDS § 515 (5th ed. 1895); 2 REED, STATUTE OF FRAUDS §§ 526, 537 (1884)) ("But by the unbroken course of more modern decisions, it is now well settled that although the defendant admits the agreement, it cannot be enforced without the production of a written memorandum, if he insist upon the bar of the statute.").

22. *Id.* at 378 (citations omitted).

given its probative value towards establishing the genuineness of the contract at issue.[23] Such was the state of the law of the statute of frauds in 1951 when Professor Stevens wrote his article, noting the ethical dilemma faced by lawyers and litigants who admit a contract was entered into, but nevertheless chose to assert the statute of frauds in order to escape liability.[24]

In 1984, Professor Peter Shedd wrote an article that looked at the state of the judicial admissions exception outside of the U.C.C. to that point.[25] In the article, Professor Shedd noted (as had Professor Stevens) that the dominant majority rule in the United States at that time was that a litigant could admit that he had entered into a contract, and yet still assert the statute of frauds as a defense in the event that there was no signed, written memorialization of the agreement.[26] That is, effectively, the dominant majority rule in the United States as of 1984 was that there was no judicial admissions exception that would take the contract out of the non-U.C.C. statute of frauds.[27] Shedd documented a small number of states that had apparently adopted the judicial admissions exception anew as a revolt from the majority rule. In all, as of 1984, Shedd reported that eight states (plus the District of Columbia) had recognized and adopted the judicial admissions exception to the non-U.C.C. statute of frauds.[28] These adoptions had been decided, both judicially and in some instances by statute, throughout the decades of the twentieth century through the 1970s. In two follow-up articles in 1991, Professor Shedd updated his research, and found that two more states had adopted the judicial admissions exception under their respectively applicable non-U.C.C. statutes of fraud, through approximately that date.[29]

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23. *Id.* at 381.
24. *Id.* at 378.
25. Shedd, *supra* note 20.
26. *Id.* at 4–5.
27. *Id.* at 5.
28. *Id.* at 26–27; *see also* Peter J. Shedd, *The Judicial Admissions Exception to the Statute of Frauds: An Update*, 12 WHITTIER L. REV. 131, 140 (1991) (app. I). Shedd reported that a ninth state, Illinois, had upheld an agreement made and announced in open court, as enforceable without a separate, signed writing, as against a statute of frauds challenge. *See* Shedd, *supra* note 25, at 23–24 (citing Kalman v. Bertacchi, 373 N.E.2d 550, 556 (Ill. App. Ct. 1978); 740 ILL. COMP. STAT. ANN. 80/2 (West 2016); Szymkowski v. Szymkowski, 432 N.E.2d 1209, 1212 (Ill. App. Ct. 1982)).
29. *See* Shedd, *supra* note 28. Shedd reported that a third state, Massachusetts, had upheld an agreement made and announced in open court, as enforceable without a separate, signed writing, as against a statute of frauds challenge. *Id.* at 134 (citing Dominick v. Dominick, 463 N.E.2d 564, 568 n.2 (Mass. App. Ct. 1984)). Professor Shedd published a second article in 1991 which appears to contain his findings from his 1991 Whittier Law Review article, presented in condensed form. *See* Peter J. Shedd, *The Admissions Exception to the Statute of Frauds in Real Estate Transactions*, 19 REAL EST. L.J. 232, 232–33 (1991).

Accordingly, as of 1991, Professor Shedd reported that in total ten states (plus the District of Columbia) had adopted the judicial admissions exception in the context of the non-U.C.C. statute of frauds, with two more states holding to the more limited position of enforcing oral agreements made in open court.[30] Professor Shedd believed the judicial admissions exception made good, pragmatic legal sense, and hoped to see it become the majority rule in the United States, to match the similar rule provided by the U.C.C.[31] While he was heartened by the seemingly steady adoption of the judicial admissions exception through the 1970s, as reported in his 1984 article,[32] he was discouraged by what he saw as a reduced pace of adoption through the period reported in his follow-up 1991 articles.[33]

The purpose of this Article is to update Professor Shedd's research on the adoption and recognition of the judicial admissions exception to the non-U.C.C. statute of frauds. Like Professor Shedd, this Article posits that the rule makes good legal sense, since one who is willing to judicially admit that he entered into the contract has no fear or danger of being defrauded by a false allegation that he made the agreement. The prevention of such fraud being the overwhelmingly dominant (and indeed titular) purpose to be served by the formal writing requirement of the statute of frauds, no compelling reason exists to deny the enforcement of the contract once such a judicial admission has been made. Part II of this Article will briefly chronicle the enactment of the statute of frauds, its underlying policy goals, and the exceptions which have developed. Part III will discuss the rise and fall of the judicial admissions exception specifically in the United States. Part IV will briefly discuss and summarize the findings of Professor Shedd's articles regarding the adoption of the judicial admissions exception through the 1980s. Part V will update the research on the state of the judicial admissions exception through the present, and whether the exception has attained majority status in the United States. Part VI will offer policy justifications for the judicial admissions exception and urge its

30. Shedd, *supra* note 28, at 140–41 (apps. I and II).

31. Shedd, *supra* note 2025, at 33 ("The purpose and conclusion of this article is to encourage all jurisdictions to adopt the judicial admissions exception at least in the situation when an admission clearly is made.").

32. *Id.* at 27 ("The judicial decisions examined indicated there is a strong and rapidly growing—albeit still small—number of jurisdictions that may someday result in the judicial admission exception to the statute of frauds to be the position accepted by the majority of states. Such a trend clearly seems to have started.").

33. Shedd, *supra* note 28, at 138–39 ("An update concerning the cases involving the judicial admissions exception to the statute of frauds causes speculation about the existence of a 'growing' minority of jurisdictions recognizing the exception. While Appendix I seems to reveal a quickening pace of recognition during the latter part of the 1970s and into 1980, Appendix II shows that this pace has slowed considerably during the 1980s.").

adoption in the remaining jurisdictions. Part VII will briefly conclude.

II. THE STATUTE OF FRAUDS, POLICIES, AND EXCEPTIONS

Oral promises were not originally enforceable in the English King's courts, but they eventually became enforceable through the historical expansion of the writ of assumpsit.[34] Once oral promises were enforceable, perjury became rampant as litigants were enabled to make false claims that oral contracts had been entered into.[35] Partially in response to this development, in 1677 the English Parliament enacted an "Act for the Prevention of Fraud and Perjuries."[36] The Act applied to several areas of law, but only two sections dealt with writing requirements specifically for contracts.[37] One of those sections, Section 4 of the Act, provided as follows:

> Sec. 4. And be it further enacted . . . . That . . . no action shall be brought [(1)] whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any arrangement made upon consideration of marriage; (4) or upon any contract [f]or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.[38]

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34. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 19.1 (4th ed. 1998).

35. *Id.* (citing 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 379–97 (1927)).

36. *Id.* (citing Statute of Frauds, 29 Car. 2 c. 3 (1677) (Eng.), http://www.legislation.gov.uk/aep/Cha2/29/3).

37. *Id.* (citing Philip Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEGAL HIST. 354, 374–78 (1983)) ("This Statute contained twenty-five sections which dealt with conveyances, wills, trusts, judgments and executions in addition to contracts.").

38. *Id.* The 1677 Act also included Section 17, which required all contracts for the sale of goods for the price of ten pounds or more, to be in writing and signed. *Id.* This provision, of course, has its current day American counterpart in section 2-201 of the U.C.C. (requiring all contracts for the sale of goods of $500 or more to be in writing and signed by the party to be charged). U.C.C. § 2-201(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

These categories of contracts were somewhat arbitrary,[39] but nevertheless the 1677 categories have tended to be adopted by most American jurisdictions.[40]

The obvious and predominant purpose of the English Parliament in enacting the original statute of frauds was, as the title of the Act suggests, to prevent fraudulent and perjured claims that a contract exists.[41] As Professor Stevens stated in his seminal 1951 article: "Undeniably, the purpose of the statute was to give assured protection against the risk, which existence had shown to be real, of convincing proof through perjured testimony of an agreement that had never actually been entered into."[42] The Act was deemed necessary, given that perjured claims had increased in the advent of England's new allowance of the enforcement of oral promises and agreements.[43]

The ultimate goal to be achieved by the statute of frauds is to ensure that judicial enforcement is limited to those agreements that are actually and honestly entered into, and to screen out false allegations that contracts were formed. An agreement legitimately proven is therefore seen as worthy of enforcement. The statute is thus a means to an end—to ensure that contracts were legitimately formed before allowing the coercive power of the state to be accessed for their enforcement.

Although the avoidance of fraud and perjury is the paramount policy basis for the statute of frauds, other policies are arguably served by the statute's writing requirement.[44] Other goals include certainty, as well as a channeling/deliberative function.[45] As Professors John D. Calamari and Joseph M. Perillo observe in their treatise: "An agreement reduced to writing promotes certainty; false testimony stems from faulty recollection as well as from faulty morals. In addition, the required formality of a writing 'promotes deliberation, seriousness . . . and shows that the act was a genuine

39. CALAMARI & PERILLO, *supra* note 34, § 19.1 ("The kinds of transactions selected to be put in writing do not seem to constitute a rational catalog of transactions which ought to be singled out for formalization.").

40. *See* RESTATEMENT (SECOND) OF CONTRACTS § 110 cmt. A (AM. LAW INST. 1981); *see, e.g.*, TEX. BUS. & COM. CODE ANN. § 26.01 (West 2005) (Texas version of the statute of frauds, codifying the same categories as Section 4 of the original Act). Of note, in 1954 the English parliament repealed all categories except for land and suretyship contracts. CALAMARI AND PERILLO, *supra* note 34, § 19.1 (citing 2 & 3 Eliz. 2 c. 34 (Eng.), https://www.legislation.gov.uk/ukpga/Eliz2/2-3/34/contents/enacted).

41. CALAMARI & PERILLO, *supra* note 34, § 19.1 ("While the writing requirement is imposed in large part to obviate perjury, it is clear that other policy bases for the requirement exist.").

42. *See* Stevens, *supra* note 21, at 360.

43. *See id.* at 380–81.

44. CALAMARI & PERILLO, *supra* note 34, § 19.1.

45. *Id.*

act of volition.'"[46] These are all desirable aims, although it has been observed that adhering strictly to a formal writing requirement for its own sake can have the undesirable effect of excluding legitimately made oral agreements and frustrating the expectations of performing parties.[47]

After the adoption of the statute of frauds, both in England and eventually in the United States, courts developed exceptions to the statute's formal writing requirement in various instances in which it was very likely that a contract had been entered into between the parties.[48] One of the earliest such exceptions was the part-performance exception to the real estate provision of the statute of frauds.[49] This exception was originally decreed by the English courts, making the statute of frauds inapplicable once the buyer of land had taken possession.[50] The rationale was that the contract was already considered to be executed at that point.[51] Eventually, the courts required more than mere possession alone, with most jurisdictions now requiring possession coupled with either some payment of the price, or the buyer's making of improvements on the land with the seller's consent.[52] The point of the part-performance evidence is plain: "[T]he conduct must convincingly evidence the existence of the agreement."[53] In short, if the parties conduct themselves as though there was a contract (e.g., buyer takes possession and pays seller money which seller accepts, or buyer makes improvements with seller's consent), then this is good evidence that there was, in fact, a contract formed. Why else were the parties behaving in that manner? The overarching goal of the statute of frauds—prevention of false and fraudulent claims that a contract exists—is therefore achieved even though there is no formal signed writing. Although the statute of frauds has the additional policy goals discussed above—certainty and

46. *Id.* (citing E. Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L.Q. REV. 174, 178 (1947)).

47. *Id.*

48. *See* TRACEY FARRELL ET AL., 73 AM. JUR. 2D *Statute of Frauds* § 290 (1962).

49. CALAMARI & PERILLO, *supra* note 34, § 19.15.

50. *Id.* (citing Butcher v. Stapley, (1865) 23 Eng. Rep. 524, 1 Vern. 363, (Eng.); Roscoe Pound, *The Progress of the Law, 1918-1919 Equity,* 33 HARV. L. REV. 929, 933–36 (1920)). The exception developed in the English courts as an outgrowth of a method of conveying land: "Prior to the enactment of the Statute of Frauds a permissible method of conveyance of land was 'livery of season,' an oral transfer accompanied by a symbolic handing over of a twig or clump of earth in the presence of witnesses." *Id.* (citing 14 POWELL ON REAL PROPERTY § 81A.01 (1997)).

51. *Id.*

52. *Id.* Justice Cardozo described the requirement thusly: "[There must be] performance which alone and without the aid of words of promise is unintelligible or at least extraordinary unless as an incident of ownership, assured if not existing . . . . [W]hat is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done." *Id.* (quoting Burns v. McCormick, 135 N.E. 273, 273 (N.Y. 1922)).

53. *Id.* (citations omitted).

channeling/deliberativeness—these goals give way in the case of the part-performance exception, to the predominant statute of frauds goal of ensuring that the claim of contract is genuine and not fraudulent or perjured.[54]

Similar results are seen with other developed exceptions to the statute's applicability. The courts have developed a performance-based exception to the statute of frauds provision requiring that contracts not capable of being in full by their terms within one year of formation are generally required to be signed and in writing.[55] Generally, the majority view is that "full performance on one side renders a contract within the one year section enforceable."[56] So, if a contract requires three years of performance, for instance, performance of one year would not take the contract out of the statute. That is, part-performance is not sufficient under the one-year provision.[57] Rather, performance of all three years would meet the exception. The idea behind the exception is the same as the real estate part performance exception—the performance demonstrates a strong likelihood that an actual contract was entered into.[58]

Another exception developed under the non-U.C.C. statute of frauds is the "main purpose" exception to the guaranty provision of the statute of frauds.[59] The traditional guaranty provision of the statute of frauds requires a signed writing when the alleged contract is "to charge the defendant upon any special promise to answer for the debt [or] default . . . [of] another person . . . ."[60] The historical reason for the guaranty provision is that there is typically no direct economic benefit flowing to the alleged guarantor for making the guaranty, and thus a writing is deemed necessary to prove the obligation was undertaken.[61] That is, the guaranty benefits the creditor, and probably the primary debtor (without which guaranty the creditor may not have extended credit to the primary debtor), but

54. Rabel, *supra* note 46, at 182.

55. *See* RESTATEMENT (SECOND) OF CONTRACTS § 130 (AM. LAW INST. 1981).

56. CALAMARI & PERILLO, *supra* note 34, § 19.23 (citations omitted).

57. *Id.*

58. It is not always clear why the courts have required full performance as an exception to the one-year provision and not allowed part performance to suffice, as in the case of the real estate provision. According to Corbin: "The explanation typically given for refusing to recognize the part performance doctrine as an exception to the one-year statute is that the statute's evidentiary purpose is not satisfied by part performance." MURRAY, *supra* note 1, § 19.15.

59. *See* RESTATEMENT (SECOND) OF CONTRACTS § 116 (1981).

60. CALAMARI & PERILLO, *supra* note 34, § 19.1 (citing 29 Car. 2 c. 3, 8 Stat. at Large 405).

61. LORD, *supra* note 2, § 22:1 ("Such promises, more than others, are subject to that requirement principally because the promisor has received no benefit from the transaction. This circumstance may make perjury more likely; when one has received something, that fact itself, which is capable of proof, shows probable liability while in the case of a guaranty, nothing but the promise is of evidentiary value.").

no economic benefit derives to the guarantor. However, the main purpose exception applies when the guarantor's execution of the guaranty does, in fact, have the principal effect of economically benefitting him.[62] That is, if the main purpose of the guarantor is to protect his own economic interests, rather than merely to benefit the primary debtor, the statute of frauds is not applicable and the guaranty contract will be enforceable notwithstanding the lack of a formal, signed writing.[63] Again, the formalistic requirement of the statute of frauds gives way to the overarching policy goal of avoiding fraudulent claims of contract, when there is seen to be strong evidence that the contract was actually entered into.

The U.C.C. statute of frauds provision also has several exceptions to the formal writing requirement where the evidence that an agreement was entered into is strong. First, the U.C.C. contains a part performance exception, similar in principle to the part-performance exception to the real estate provision.[64] The provision simply requires both parties to the sale of goods contract to have performed (either the seller has delivered the goods and the buyer has accepted them, or the buyer has paid money for the goods which the seller has accepted).[65] As with the real estate part-performance exception, such behavior by the parties is highly indicative that a contract has in fact been entered into.[66]

Second, the U.C.C. contains a "merchant's confirmation" exception. Under this exception, if one merchant sends a written, signed confirmation of a contract to another merchant, then the recipient merchant is bound to the contract, losing his statute of frauds defense, if he does not object to the confirmation in writing within ten days.[67] Here again is strong evidence that a contract has been entered into—if the recipient merchant disagrees with the contract confirmation, he will speak up more often than not.

Third, the U.C.C. contains a "specially manufactured goods" exception. Under this exception, a formal writing will be excused

62. CALAMARI & PERILLO, *supra* note 34, § 19.6 ("Where the party promising has for his object a benefit which he did not enjoy before his promise, which benefit accrues immediately to himself, his promise is original, whether made before, after or at the time of the promise of the third party, notwithstanding that the effect is to promise to pay or discharge the debt of another.").

63. *See* RESTATEMENT (SECOND) OF CONTRACTS § 116 (1981).

64. U.C.C. § 2-201(3)(c) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . with respect to goods for which payment has been made and accepted or which have been received and accepted.").

65. *Id.*

66. HAWKLAND, *supra* note 16, § 2-201:7.

67. U.C.C. § 2-201(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 10 days after it is received.").

where there is special or custom manufacture of goods obviously intended for a particular buyer, and that buyer does not try to back out of the contract until after the seller has made a substantial effort to manufacture the custom goods.[68] In all of these instances, the U.C.C. statute of frauds deems other evidence to be sufficiently indicative of the fact that a contract has been entered into, thus excusing the formal requirement of a writing signed by the party to be charged.[69]

Accordingly, the statute of frauds was enacted in England in 1677, and carried over to the United States, where to this day it provides that certain categories of contracts are required to be in writing and signed by the party to be charged in order to be enforceable.[70] The paramount policy goal furthered by the statute is undoubtedly the prevention of false, fraudulent, perjured claims of a contract's existence.[71] Other purposes can be proffered for the statute's writing requirement, including certainty, and a channeling/deliberative function. However, these purposes are seemingly subordinate to the dominant purpose of avoiding fraud, especially given that in multiple instances the courts and legislatures have developed exceptions to the writing requirement where strong alternative evidence exists that a contract has in fact been entered into.[72] Ultimately, the goal of the statute of frauds is to ensure that any claims of contract are legitimate.[73]

III. THE INITIAL RISE AND SUBSEQUENT FALL OF THE JUDICIAL ADMISSIONS EXCEPTION IN ENGLAND AND THE UNITED STATES

The exception that is the subject of this Article is the judicial admissions exception. As mentioned at the outset, practitioners in the United States might well assume that judicially admitting the existence of the contract completely satisfies the applicable statute of frauds. However, if the contract is not one for the sale of goods (making U.C.C. section 2-201(3)(b) applicable)[74], then the question is

68. *Id.* § 2-201(3)(a) ("A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.").

69. The U.C.C. also contains, of course, the judicial admissions exception. *Id.* § 2-201(3)(b). However, this will be the subject of the next Part.

70. *See id.* § 2-201.

71. LORD, *supra* note 2, § 21:1 and accompanying text.

72. *Id.*

73. *Id.*

74. U.C.C. § 2-201(3)(b) ("A contract which does not satisfy the requirements of subsection (1) [writing signed by party to be charged] but which is valid in other respects is enforceable . . . if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale

a complicated one, likely without a single answer across the jurisprudential history of any one particular jurisdiction. The purpose of this Part is to briefly trace the initial rise, and surprising subsequent fall, of the judicial admissions exception in England, and then in the United States. The subsequent Parts will then be devoted to its revival in the United States, and whether such rise has yet attained majority rule status.

As described in the previous Part the English Parliament promulgated and passed the initial statute of frauds in 1677.[75] In his 1951 article, Professor Stevens noted that several English decisions in the early eighteenth century presupposed that if the defendant confessed or admitted the contract, such would be sufficient for purposes of removing the statute of frauds as an impediment to enforcement.[76] One case in 1713, *Symondson v. Tweed*[77] stated the following:

> In this case the Court declared, and the Council agreed likewise, that if a man brings a bill for specific performance of a parol agreement, setting forth the substance of it in a bill, *and the defendant by his answer confesses the agreement*, that the Court may in such case decree an execution thereof, notwithstanding the Statute of Frauds and Perjuries, because *the defendant confessing the agreement, there can be no danger of perjury from contrariety of evidence, which was the only mischief that statute intended to obviate.*[78]

Although this statement was dicta because the defendant did not actually admit the agreement in the proceeding, it was nevertheless supportive of the general concept of a judicial admissions exception to the statute.[79] A similarly approving statement was set forth in a treatise printed in 1737: "If an Agreement be by Parol, and not signed by the Parties . . . if such Agreement is not confess'd in the Answer, it cannot be carried into execution. But where in his Answer, he allows the bargain to be compleat, and does not insist on any Fraud, there can be no danger of Perjury; because he himself had taken away the necessity of proving it."[80] Later in the century, the 1789 case

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was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.").

75. CALAMARI & PERILLO, *supra* note 34, § 19.1 (citing 29 Car. 2 c. 3, 8 Stat. at Large 405).

76. Stevens, *supra* note 21, at 361–67.

77. (1733) Precedents in Chancery 374 (Eng.).

78. Stevens, *supra* note 21, at 362 (emphasis added) (quoting *Symondson*, Precedents in Chancery 374).

79. *Id.*

80. *Id.* (citing A TREATISE OF EQUITY bk. 1, ch. 3, § 8, at 19 (printed by E. and R. Nutt & R. Gosling 1737)).

Whitchurch v. Bevis[81] stated the following regarding the state of English judicial exceptions to the statute:

> [T]his Court has laid down two exceptions, by which, if they are to be sustained, it amounts to the same thing as if the statute had made the exception of the two cases, that is *where the agreement is confessed by the answer*, or where there is a part performance . . . . So, where the Court has laid it down as a clear exception from the statute, that the danger of fraud and perjury is avoided where the defendant admits the agreement, it is requisite that he should answer the agreement . . . .[82]

Professor Stevens cited multiple additional English cases throughout the eighteenth century, which are consistent in their acceptance of a defendant's admission of the contract in a judicial proceeding as waiving the statute as a defense and making the contract fully enforceable.[83] After reviewing these English eighteenth century decisions, Professor Stevens summarized the state of the judicial admissions principle in the first century after the 1677 enactment of the statute:

> Thus, for more than one hundred years after the passage of the Statute of Frauds, there continued to be expressions of belief in the principle that the statute was not intended to be used to defeat performance of an admitted oral agreement. It is true that the actual decisions to this effect are few, but the continuity

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81. (1789) 2 Bro. C.C. 559 (Eng.).

82. Stevens, *supra* note 21, at 365 (emphasis added) (citing *Whitchurch*, 2 Bro. C.C. at 559).

83. *See* Simon v. Metivier (1766) 1 W. Bla. 599, 600 (Eng.) ("[W]here a man admits the contract to have been made, it is out of the statute; for there can be no perjury."); Attorney General v. Day (1749) 1 Ves. Sr. 218, 220 (Eng.) ("Yet on all the questions on that statute in this court, the end and purport of making it has been considered, viz. to prevent frauds and perjuries: so that any agreement, in which there is no danger of either, the court has considered as out of the statute; upon which there have been many cases: as in a bill by purchaser of lands against the vendor, to carry into execution the agreement, though not in writing, nor so stated by the bill: the vendor puts in an answer admitting the agreement as stated in the bill; it takes it entirely out of the mischief; and there being no danger of perjury, the court would decree it . . . ."); Cottington v. Fletcher (1740) 26 Eng. Rep. 498; 2 Atk. 156 498 (Eng.) ("I am of opinion that the plea ought to be overruled. Undoubtedly if the plea stood by itself, it might have been a sufficient plea; but coupled with the answer, which is a full admission of the facts, it must overrule the plea."); Stevens, *supra* note 21, at at 362–66 (quoting Child v. Godolphin (1732) I Dickens 39 (Eng.)) ("His Lordship said, the plea insisting on the statute was proper, but then the defendant ought by answer to deny the agreement; for if she confessed the agreement, the Court would decree a performance notwithstanding the statute, for such confession would not be looked upon as perjury, or intended to be prevented by the statute.").

> of the dicta demonstrates the force of the principle and an inclination to adhere to it.[84]

Accordingly, it is clear that, although not frequently litigated, the judicial admissions exception was fairly well ensconced with the English case law at the close of the eighteenth century.

This established principle began to change, however, at the close of the eighteenth century and into the beginning of the nineteenth century. As Professor Stevens put it, "conflicting notions began to creep in and these supplied the foundation for the ultimate reversal of the old rule and the establishment of the [then] present-day majority rule."[85] An English law treatise, *Treatise of Equity,* had first been published in 1737.[86] Although it had previously seemed to support the judicial admission as an exception to the statute's applicability,[87] it was republished in 1793 with additional notes by John Fonblanque.[88] Fonblanque added a new note to the 1793 edition, as follows:

> If a defendant confess the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a mere parol agreement not alleged to be in any part executed? or, if he do confess it, whether he may not insist on the statute, in bar of the performance of it? . . . If the defendant's answer be not liable to contradiction by evidence *aliunde*, *the rule would furnish a temptation to perjury, by giving the defendant a certain interest in denying the agreement*; since, if he confessed it, he would be bound to perform it . . . .[89]

The English courts soon followed suit and began to hold that a defendant could admit the contract, and yet still interpose the Statute as a defense.[90] For example, an 1865 English case observed that:

> I do not think I can look at that portion of the answer which admits the agreement, seeing that the defendant insists on the statute of frauds. The defendant must answer, must swear to the truth of his answer, and must sign it: if I were to make any use of an admission so extorted, I should in effect repeal the statute.[91]

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84. Stevens, *supra* note 21, at 367.
85. *Id.*
86. *Id.*
87. *See id.* at 367; *supra* text accompanying note 82.
88. Stevens, *supra* note 21, at 367 (citing FONBLANQUE'S EQUITY (1793)).
89. *Id.* at 367–68 (citing FONBLANQUE'S EQUITY, note 40, bk. 1, ch. 3, § 8, 168, *et seq.* (1793)) (emphasis added).
90. *Id.* at 369–71.
91. *Id.* at 371 (citing Jackson v. Oglander (1865) 71 All ER at 544 (Eng.)).

The key policy concern Fonblanque identified at this time (and that which was followed by the courts) appeared to be that, if a defendant were to be held to a contract if he confessed or admitted it under oath, this would tempt such defendants to testify falsely that no such agreement was entered—in a word, to commit perjury.[92] As Professor Stevens summarized this line of new cases by the English courts:

> These excerpts from Fonblanque and [cited English cases] reveal the evolution of the thinking leading to the change in attitude and in decisions. The rule that required the defendant to admit or deny, under oath, every material allegation in the complaint meant that if he confessed the agreement, it should be enforced because it was proved by his own admission and without the danger of the perjured testimony of others. But such a result supplied the defendant with an inducement to make a perjured denial of the agreement. It was considered better to remove the temptation than to hold the defendant to an agreement conscientiously admitted to have been entered into. The way to do that, it was thought, was to expect his answer to state the truth, but then to ignore the confession which the rules of pleading and his conscience required him to make, and to justify this under the pretext that the Statute of Frauds itself exhibited that legislative intent, a theory first evolved about a century and a quarter after the passage of that act.[93]

As Professor Stevens noted, "[t]he decisions and texts are replete with the statement that the statute was intended to be used as a shield, not a sword."[94] But, he noted, with respect to this newly developed rule allowing the defendant to use the defense notwithstanding his confession of the contract: "Is this not permitting the statute to be used as a sword?"[95]

The law in the United States, of course, generally followed the English law in many important respects. As Professor Stevens described, very early on in the history of the Republic, the decisions

92. *Id.* at 368 ("Such was the dilemma which the courts fashioned for themselves as the eighteenth century turned into the nineteenth. Having for one hundred years believed that the statute was intended to prevent fraud as well as perjury and that it would be against good conscience for defendant to defeat performance of a parol agreement, the making of which he could not deny, they came to the point where they would permit the defendant to perjure himself by denying the making of the agreement or, if he admitted it, would ignore the admission as a confession enforced by their own rules of pleading. This indeed sounds inconsistent with our present-day ideas that one must admit or deny, under oath, every material allegation in a verified complaint, and it must seem to us as foreign to the purposes both of eighteenth and nineteenth century rules of pleading and of the seventeenth century Statute of Frauds.").

93. *Id.* at 371.

94. *Id.* at 360.

95. *Id.*

may have followed the eighteenth century English view that confession or admission of the contract would support its enforcement.[96] Therefore, an early South Carolina decision, *Smith v. Brailsford*,[97] decreed specific performance of a contract against a defendant, "by his answer which he signed, having acknowledged the agreement, [which] the court considers . . . such an assent in writing as overrules his plea of the statute of frauds."[98] That is, a judicial admission was held to clearly take the contract out of the statute of frauds.

However, as Professor Stevens noted, "the influence of the views of [English courts] and of Fonblanque very promptly crossed the Atlantic, and we find the latter's treatise cited and his thoughts paraphrased by Cranch, C.J., in *Thompson v. Jameson* in 1806."[99] In that case, the court denied the defendant's assertion of the statute of frauds defense, and reasoned as follows:

> If the defendant is obliged to answer and confess a parol agreement, there is no possible case in which a parol agreement can be vacated by that statute; unless the defendant will commit perjury by denying it. Instead therefore of preventing frauds and perjuries, the statute would tend to increase them; for by preventing the plaintiff from proving a parol agreement by any other evidence than the defendant's own oath, *it holds out to the defendant the strongest temptation to perjury*, and at the same time gives him a perfect security against detection. If the defendant is bound to confess the parol agreement it must be because when *confessed* he could not avail himself of the statute. But it is settled that he may avail himself of the statute. Hence it seems to follow that he is not bound to confess; for this would be to compel him to confess an immaterial fact.[100]

Stevens remarked that

> [i]t seems not unnatural that, in the infancy of our national life, our newly established courts, struggling to apply their own replicas of the English statute of frauds, should have adopted the changed English viewpoint that became current at the close of the [eighteenth] century. That is the explanation of what we find as the majority view in this country today [1951].[101]

From and after the turn of the nineteenth century, and into the twentieth century, the American courts adhered to the rule that a

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96. *Id.* at 372–73.
97. 1 S.C. Eq. (1 Des. Eq.) 350 (S.C. 1794).
98. Stevens, *supra* note 21, at 372 (citing *Brailsford*, 1 S.C. Eq. (1 Des. Eq.) at 352).
99. *Id.* (citing Thompson v. Jameson, 23 F. Cas. 1052 (C.C.D.C. 1806) (No. 13, 960)).
100. *Id.* (emphasis added) (quoting *Thompson*, 23 F. Cas. No. at 1052).
101. *Id.* at 372–73.

defendant could admit the contract, and yet also assert the statute of frauds defense in the case of an oral agreement, with such regularity that it became the unquestioned, dominant majority rule among the states.[102] This is reflected in a leading American treatise of the day on the statute of frauds, where it is reported: "[B]y the unbroken course of more modern decisions, it is now well settled that although the defendant admits the agreement, it cannot be enforced without the production of a written memorandum, if he insist upon the bar of the statute."[103] Professor Stevens objected to this development of the law when he stated the following:

> Equity courts found ways of preventing the statute from being used to perpetrate a fraud in the three instances mentioned above [(1) defendant's fraud in preventing a writing from being executed, (2) part performance, and (3) judicial admissions] in each of which there was proof to the court's satisfaction that a contract had existed. Of the three, the most convincing, the one with no attendant risk of perjured proof of a non-existent contract, was the class of cases in which the defendant confessed the contract. It is astonishing, therefore; that this is the only one of the three exceptional instances that has not been universally perpetuated, and it is more astonishing that the removal of the temptation to the defendant to perjure himself by denying the making of an agreement should have been employed as a device for permitting him unethically to escape an honest obligation.[104]

Although there were, at the time of Professor Stevens's article in 1951, a tiny handful of dissenting jurisdictions which allowed the efficacy of judicial admissions to enforce the contract[105] (a phenomenon which this article will address in the next Part) this was the state of American statute of frauds law in 1951 and beyond. But, as Stevens observed, at the time of his article, "there [was] evidence of increasing dissatisfaction with the majority rule."[106] The next Part will explore the germination and growth of the minority position—allowing a judicial admissions exception—in the mid-twentieth century and beyond.

IV. THE REBIRTH OF THE JUDICIAL ADMISSION EXCEPTION IN NON-U.C.C. CASES THROUGH 1991, AS REPORTED BY PROFESSOR SHEDD

As has just been established, by the turn of the nineteenth century—in both England and the United States—the dominant

102. *Id.* at 356 (describing it as the "overwhelmingly accepted view").
103. *Id.* (quoting BROWNE, STATUTE OF FRAUDS § 515 (5th ed. 1895)).
104. *Id.* at 381.
105. *Id.* at 373–77.
106. *Id.* at 373.

majority rule was that there effectively was no judicial admissions exception under the statute of frauds. Meaning, a defendant was allowed to admit the existence of an oral contract and yet still plead the statute of frauds as a defense in order to avoid liability under the contract.[107] This rule continued to be the dominant majority rule through the time of two articles that Professor Shedd published in 1984 and 1991.[108] However, in these articles, Professor Shedd traced the beginnings and growth of a small minority of jurisdictions that began to reassert the efficacy of a judicial admissions exception for rendering an oral contract fully enforceable, and removing the applicability of the statute of frauds.[109] The purpose of this Part is to briefly summarize Professor Shedd's findings and conclusions so as to set the stage for the following Part which will update Professor Shedd's research to the present day.

A. Professor Shedd's 1984 Article

In his first 1984 article, Professor Shedd grouped his judicial admissions research findings into four groups: "(1) the early cases decided by courts in Iowa, Maryland, New Jersey, and Pennsylvania; (2) the cases decided during the 1960s; (3) those decided during the 1970s; and (4) those decided during the early 1980s."[110] Each of Shedd's groupings will be briefly summarized.

1. Early Adopting Cases: Iowa, Maryland, New Jersey, and Pennsylvania

Professor Stevens, in his 1951 article, had actually first identified Shedd's "early cases" when he noted a small handful of jurisdictions which had recognized the judicial admissions exception in the early part of the twentieth century, and Shedd began with an examination of these jurisdictions.[111] Iowa and New Jersey provided the earliest reported decisions.[112] In the Iowa Supreme Court case of *Hagedorn v. Hagedorn*[113] the court enforced an oral contract to sell land, in part because the defendant admitted the formation of the contract.[114] Shedd also noted that a longstanding novel Iowa statutory provision

107. Shedd, *supra* note 20, at 4–5 (citing Stevens, *supra* note 21, at 371).
108. *Id.* at 1–2; Shedd, *supra* note 28, at 131–33.
109. Shedd, *supra* note 20, at 1–2; Shedd, *supra* note 28, at 131–33.
110. Shedd, *supra* note 20, at 5.
111. Stevens, *supra* note 21, at 373–77 (identifying the jurisdictions adopting the judicial admissions exception as Iowa, Maryland, New Jersey, and Pennsylvania); *see also* Shedd, *supra* note 20, at 5 n.18 ("Professor Stevens briefly discussed some pre-1952 decisions in these jurisdictions. . . . These cases are reviewed, and the subsequent decisions, if any, are examined in this article.").
112. *See* Stevens, *supra* note 21, at 373, 375–76.
113. 188 N.W. 980 (Iowa 1922).
114. *Id.* at 981–82.

provided for enforcement of oral contracts not denied by the charged party's pleadings.[115] Shedd observed that

> [t]he clarity of the Iowa statute in requiring enforcement of an oral contract when the defendant admits that the agreement existed is demonstrated by the fact that the *Hagedorn* case has not been cited in other Iowa decisions pertaining to the judicial admission exception. Apparently, the concept of this exception is so well accepted that it no longer causes litigation in Iowa.[116]

New Jersey was next cited by Shedd (and Stevens) as an early adopter of the judicial admissions exception.[117] *Degheri v. Carobine*[118] involved an oral agreement to release a property lien.[119] Although no writing existed, the court nevertheless upheld the oral contract because the promising mortgagee admitted it had been made: "[T]here is enough in this case to take it out of the mischief that the Legislature sought to render impossible by the adoption of the statute; and that is the fact that the promisor frankly admits the making of the promise . . . ."[120] Thus, Iowa and New Jersey were the earliest adopters of the nascent American reborn judicial admissions exception.

In 1945, the Maryland Court of Appeals decided *Trossbach v. Trossbach*,[121] a case which Shedd noted "could be called the first modern-day opinion by the highest court in a state judicial system regarding the acceptance of the judicial admission exception."[122] *Trossbach* involved an oral agreement to purchase real estate. The

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115. Shedd, *supra* note 20, at 6 n.25 (citing IOWA CODE ANN. § 622.34 (West 1950)) ("The [provisions of sections 622.32 and 622.33], relating merely to the proof of contracts, shall not prevent the enforcement of those not denied in the pleadings, except in cases when the contract is sought to be enforced, or damages recovered for the breach thereof, against some person other than the person who made it.").

116. *Id.* at 6–7.

117. Shedd, *supra* note 20, at 7; Stevens, *supra* note 21, at 375–76.

118. 135 A. 518 (N.J. Ch. 1927), *rev'd on other grounds*, 140 A. 406 (N.J. 1928).

119. Shedd, *supra* note 20, at 7 (citing *Degheri*, 135 A. at 518).

120. *Id.* (quoting *Degheri*, 135 A. at 521–22). Degheri was cited by both Stevens and Shedd for the proposition that New Jersey recognizes the judicial admission exception. Importantly in that case, the admission appeared to come after the pleadings, in the live testimony portion of the case. Somewhat contrariwise, see the following New Jersey decisions seemingly citing the rule allowing both admission of the contract and also pleading the statute of frauds as a defense. *Cf. In re* Estate of Yates, 845 A.2d 714, 719 (N.J. Super. Ct. App. Div. 2004) ("[W]hen one admits the parol agreement without offering a defense based on the Statute of Frauds the benefit of the statute is waived."); Droutman v. E.M. & L. Garage, 20 A.2d 75, 76 (N.J. 1941) ("The third [exception to the writing requirement] is where the parol contract alleged in the bill is admitted in the answer *without invoking the statute*.") (emphasis added). For purposes of this Article, I will continue to view New Jersey as having adopted the judicial admissions exception, as have numerous other courts and commentators.

121. 42 A.2d 905 (Md. 1945).

122. Shedd, *supra* note 20, at 7 (citing *Trossbach*, 42 A.2d 905).

seller, in resisting the agreement, both admitted the contract had been entered, but also pleaded the statute of frauds in defense.[123] The court, noting the primary purpose of the statute of frauds was to protect against fraudulent assertions of formed contracts, stated the following:

> This rule, that the Statute of Frauds may be "insisted upon" even though the oral contract is admitted in the answer, was not indigenous to the statute, but rather to now forgotten lore of equity pleading. After decisions to the contrary, the rule was established more than a century after the enactment of the statute. It was based largely on the view that "calling upon a party to answer a parol agreement certainly lays him under a great temptation to commit perjury."
>
> Under existing procedure, the purpose of the Statute of Frauds is to protect a party, not from temptation to commit perjury but from perjured evidence against him. The purpose of evidence is to prove facts. Admissions of a party in testifying, though in form evidence, are in essence not mere evidence, but make evidence against him unnecessary. We think the Statute of Frauds requires no more.[124]

Thus, as of 1945, Maryland had firmly adopted the judicial admissions exception to its statute of frauds. Multiple subsequent decisions affirmed this as the law in Maryland.[125]

In 1946, the Pennsylvania Supreme Court decided *Zlotziver v. Zlotziver*,[126] an oral separation agreement between a husband and wife, whereby the husband was obligated to convey real and personal property to her.[127] The husband admitted that he had entered into the agreement, but nevertheless asserted the statute of frauds as a defense since the agreement was oral and involved promises to convey real estate.[128] In responding to this argument, the Pennsylvania Supreme Court stated the following:

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123. *Id.* at 8.

124. *Trossbach*, 42 A.2d at 908. The opinion alternatively stated: "Furthermore, admissions of a party in the form of testimony would constitute sufficient 'memoranda' under" the statute of frauds. *Id.*

125. *See* Shedd, *supra* note 20, at 9–11 (citing Sealock v. Hockley, 45 A.2d 744, 746 (Md. 1946); Dove v. White, 126 A.2d 835, 838–39 (Md. 1956); Pollin v. Perkins, 165 A.2d 908, 911 (Md. 1960); Janowitz v. Slagle, 242 A.2d 123, 145 (Md. 1968); Friedman v. Clark, 248 A.2d 867, 870–71 (Md. 1969); Lambdin v. Przyborowski, 242 A.2d 150, 152 (Md. 1968); Adams v. Wilson, 284 A.2d 434, 438–39 (Md. 1971)).

126. 49 A.2d 779 (Pa. 1946).

127. Shedd, *supra* note 20, at 12 (citing Zlotziver v. Zlotziver, 49 A.2d 779, 781 (Pa. 1946)).

128. *Id.*

> The statute of frauds . . . does not absolutely invalidate an oral contract relating to land but is intended merely to guard against perjury on the part of one claiming under the alleged agreement. Accordingly, if the title holder admits, either in his pleading or his testimony, that he did in fact enter into the contract, the purpose of the statute of frauds is served and the oral agreement will be enforced by the court.[129]

Subsequent Pennsylvania decisions have confirmed Pennsylvania's adherence to the judicial admissions exception.[130] Thus, as of 1950, these four jurisdictions—Iowa, New Jersey, Maryland, and Pennsylvania—had recognized that a judicial admission of an oral contract fully satisfied the predominant underlying purpose of the statute of frauds, thus removing the applicability of the defense and rendering the contract fully enforceable.[131]

2. 1960s Cases: No Further Adoptions

Shedd cited two 1960s cases discussing the judicial admissions exception, one in Minnesota and one in Arkansas.[132] Neither case conclusively adopted the judicial admissions exception in their respective jurisdictions, although both were notably sympathetic towards the doctrine. In *Radke v. Brenon*,[133] the Minnesota Supreme Court stated: "Although we have followed the majority rule that admission of the contract does not preclude assertion of the statute of frauds, an admission that a contract was made certainly cannot be

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129. *Id.*

130. *Id.* at 12–15 (citing Suchan v. Swope, 53 A.2d 116, 118 (Pa. 1947); Mezza v. Beilotti, 53 A.2d 835 (Pa. Super. Ct. 1947)).

131. Although not the focus of Shedd's article (nor of the present Article), it should be noted that it was also around this point in the timeline that the U.C.C. was created. First approved in its initial form by the Uniform Law Commission in 1953, the U.C.C. gradually became the law in all of the states throughout the 1950s and 1960s. *See* William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. Miami L. Rev. 1, 8-10 (1967). Article 2 of the U.C.C. governs transactions in goods, including contracts for the sale of goods. *See supra* note **Error! Bookmark not defined.** and accompanying text. And, as has already been seen, the U.C.C. bucked then-existing laws regarding the statute of frauds and judicial admissions, when Section 2-201(3)(b) provided that "[a] contract which does not satisfy the requirements of subsection (1) [writing signed by party to be charged] but which is valid in other respects is enforceable . . . if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted." U.C.C. § 2-201(3)(b) (AM. LAW INST. & UNIF. LAW COMM'N 1977). Because this provision only governs the statute of frauds when contracts for the sale of goods are involved, the discussion will continue with the state of the judicial admissions exception in non-U.C.C. cases. *Id.*

132. *See* Shedd, *supra* note 20, at 15–16 (citing Radke v. Brenon, 134 N.W.2d 887 (Minn. 1965); Arnett v. Lillard, 436 S.W.2d 106 (Ark. 1969)).

133. 134 N.W.2d 887 (Minn. 1965).

ignored when all other evidence submitted supports the same conclusion."[134] Shedd pondered this result and noted:

> The real question that *Radke* poses is why did the Minnesota Supreme Court refuse to go the next logical step and join the view of Maryland's and Pennsylvania's judiciary regarding the judicial admission exception? From a logical viewpoint, the answer to this question is not clear. The best explanation probably rests in any court's hesitancy to leave a majority position when a case can be rightly decided within the scope of the position.[135]

In *Arnett v. Lillard*,[136] the Arkansas Supreme Court upheld an oral trust agreement involving real estate, since neither party raised the statute of frauds as a defense.[137] The court noted that neither party thought the tatute was applicable (the appellants believed the part-performance exception applied, and the appellee believed the Statute inapplicable to a constructive trust, which was part of the relief that had been sought).[138] However, the court added by way of dicta its own sua sponte observation, citing the Maryland authorities: "Further, in this case both parties, in their testimony, admitted the existence of the oral agreement which constituted the express trust. This fact has been held to prevent the application of the statute of frauds to an express oral trust of an interest in land."[139] Thus, although both cases expressed some support for the judicial admissions doctrine, neither adopted it—*Radke* because the court avoided unnecessarily departing from the majority view, and *Arnett* simply because the issue was not before the court. Accordingly, as the 1960s drew to a close, Shedd observed that the four early adoption jurisdictions were the only ones that had adopted the judicial admissions exception outside of the sale of goods context.

3. The 1970s Cases: Additional Adoptions

Shedd reported that in the 1970s three additional jurisdictions had adopted the judicial admissions exception.[140] In *Adams-Riker, Inc. v. Nightingale*,[141] the Rhode Island Supreme Court adopted the

134. Shedd, *supra* note 20, at 16 (citing *Radke*, 134 N.W. at 891).
135. *Id.*
136. 436 S.W.2d 106 (Ark. 1969).
137. Shedd, *supra* note 20, at 16 (citing *Arnett*, 436 S.W.2d at 111).
138. *Arnett*, 436 S.W.2d at 111.
139. *Id.* (citing Trossbach v. Trossbach, 42 A.2d 905, 907–08 (Md. 1945)).
140. *See* Shedd, *supra* note 20, at 16–23 (citing Adams-Riker, Inc. v. Nightingale, 383 A.2d 1042, 1044 (R.I. 1978)). The Rhode Island Supreme Court had previously cited the authorities allowing a judicial admissions exception with some favor, as in the *Radke* case, but stopped short of adopting the exception fully. *Id.* at 16–17 (citing Peacock Realty Co. v. E. Thomas Crandall Farm, Inc., 278 A.2d 405, 409–10 (R.I. 1971)).
141. 383 A.2d 1042 (R.I. 1978).

exception in a case where both parties admitted the oral agreement, noting that commentators (including Corbin) advocated for its applicability.[142] In *Wolf v. Crosby*,[143] the Delaware Court of Chancery also discussed the history of the judicial admissions exception in the United States, and expressly adopted the minority position that allows the exception to satisfy the statute of frauds.[144] Shedd also reported that, in *Powers v. Hastings*,[145] the Washington Court of Appeals discussed the minority position held by Maryland, Pennsylvania, Delaware, and Rhode Island, and held in favor of the plaintiff based on the defendant's multiple admissions of the oral agreement.[146]

Shedd reported other decisions of interest to the judicial admissions discussion in the 1970s. First, a Maine case mentioned the exception with some approval, but avoided establishing a judicial admissions exception to the applicable non-U.C.C. statute of frauds because the court concluded that the contract at issue was predominantly for the sale of goods (and thus the U.C.C. statute of frauds, and its express judicial admissions exception, applied).[147] Second, two Illinois cases held that the statute of frauds would not be considered an impediment to the enforcement of agreements that had been reached and admitted in an open court session.[148] The Illinois appeals court stated:

> In the case at bar, an agreement was arrived at by the parties and stated in open court; it was dictated to a court reporter and made a matter of record; each of the parties and their respective attorneys agreed to and understood the terms of the agreement. The entire proceeding was under the guidance and supervision

142. *See* Shedd, *supra* note 20, at 17–18 (citing *Adams-Riker*, 383 A.2d at 1044).

143. 377 A.2d 22 (Del. Ch. 1977).

144. *See* Shedd, *supra* note 20, at 20–22 (citing Wolf v. Crosby, 377 A.2d 22, 25–26 (Del. Ch. 1977)).

145. 582 P.2d 897 (Wash. Ct. App. 1978).

146. Shedd, *supra* note 20, at 22–23 (citing Powers v. Hastings, 582 P.2d 897, 900 (Wash. Ct. App. 1978), *aff'd*, 612 P.2d 371 (Wash. 1980)). Unbeknownst to Shedd at the time of his article, the Washington Supreme Court subsequently retracted its support for the judicial admission exception and decided it would not be applicable in Washington. Key Design, Inc. v. Moser, 983 P.2d 653, 659–61 (Wash. 1991).

147. Shedd, *supra* note 20, at 19–20 n.105 (citing Dehahn v. Innes, 356 A.2d 711, 718 (Me. 1976)) ("We note that the present contract is predominantly a contract for the sale and purchase of goods and that the gravel pit involved represented only about 5% of the total price agreed upon. Under the circumstances of this case, we hold that the salutary principle embodied in 11 M.R.S.A., § 2-201(3)(b) applicable to a contract for the sale of goods alone should apply equally to the instant oral contract involving both goods and real estate.").

148. *Id.* at 23–24 (citing Kalman v. Bertacchi, 373 N.E.2d 550, 556 (Ill. App. Ct. 1978); Szymkowski v. Szymkowski, 432 N.E.2d 1209, 1212 (Ill. App. Ct. 1982)).

> of the court and clearly, the mischiefs anticipated by the Statute of Frauds could not arise in this case.[149]

The Illinois cases were reported by Shedd, although their circumstances are significantly different than the typical scenario where the judicial admissions exception is otherwise applicable. Not including these atypical Illinois cases, Shedd determined that seven jurisdictions had clearly adopted the judicial admissions exception outside the sale of goods context by the end of the 1970s.

4. The First 1980s Cases: Two Additional Adoptions

The final part of Shedd's 1984 article continued into the early 1980s, reporting two additional jurisdictions adopting the judicial admissions exception.[150] First was Alaska, which enacted the judicial admissions exception explicitly by statute, in language similar to U.C.C. section 2-201(3)(b).[151] Second was the District of Columbia, Court of Appeals which adopted and applied the judicial admissions exception in a case involving attorney stipulations of an oral contract, citing the U.C.C. and the Maryland cases.[152] One New York decision included a dissenting opinion arguing that the judicial admissions exception should be adopted, but the majority felt it unnecessary because it determined that no judicial admission was actually made.[153]

5. Shedd 1984 Article Conclusion

Shedd observed from the above findings that, as of the publication of his article in 1984, there were nine jurisdictions (eight states and the District of Columbia) that had squarely adopted the minority position judicial admissions exception outside the applicability of Article 2 of the U.C.C.[154] The Illinois decisions additionally approved the limited principle of upholding agreements made in open court.[155] Shedd noted that five of the adoptions had come since 1977—in what was then a short seven-year period leading

149. *Kalman*, 373 N.E.2d at 556.

150. *See* Shedd, *supra* note 20, at 24–25 (citing ALASKA STAT. § 09.25.020 (1982); Hackney v. Morelite Constr., 418 A.2d 1062, 1065 (D.C. Cir. 1980)).

151. *Id.* at 24 (citing ALASKA STAT. § 09.25.020 (1982)) ("*Exceptions to statute of frauds*. A contract, promise, or agreement which is subject to [section] 10 of this chapter, which does not satisfy the requirements of that section, but which is otherwise valid is enforceable if . . . (4) the party against whom enforcement is sought admits, voluntarily or involuntarily, in his pleadings or at any other action or proceeding the making of an agreement."). A subsequent Alaska case applied the section to determine that an oral contract was enforceable under the newly enacted provision. *See* Fleckenstein v. Faccio, 619 P.2d 1016, 1018 (Alaska 1980).

152. *See* Shedd, *supra* note 20, at 25 (citing *Hackney*, 418 A.2d at 1065).

153. *Id.* at 25–26 (citing Haskins v. Loeb Rhoades & Co., 429 N.Y.S.2d 874, 877 (N.Y. App. Div. 1980)).

154. *Id.* at 26–27.

155. *Id.* at 27.

up the publication of his article. Based on this small, but seemingly clear trend, Shedd observed:

> The judicial decisions examined indicated there is a strong and rapidly growing—albeit still small—number of jurisdictions that may someday result in the judicial admission exception to the statute of frauds to be the position accepted by the majority of states. Such a trend clearly seems to have started.[156]

Thus, Shedd's 1984 article was hopeful that the judicial admissions exception was on its way towards growing into the dominant national majority rule. That optimism, it turned out, may have been premature.

B. Professor Shedd's 1991 Article: Two More Adoptions

Seven years after his initial article in 1984, Professor Shedd wrote additional follow-up articles published in 1991, which were designed to update his research of jurisdictions adopting the judicial admissions exception.[157] His update found that two additional jurisdictions had adopted the judicial admissions exception.[158] In *Bentley v. Potter*,[159] the Utah Supreme Court noted that "[t]he statute of frauds is a defense that can be waived by a failure to plead it as an affirmative defense, admitting its existence in the pleadings, or admitting at trial the existence and all essential terms of the contract."[160] Citing cases from Maryland and Delaware in support of the judicial admissions exception, the *Bentley* court held that "[s]ince a purpose of the statute of frauds is to prevent fraud and perjury on the part of one claiming that another had guaranteed a debt, the one opposing the claim cannot complain if he admits the existence of the guarantee."[161] In *Paris Utility District v. A.C. Lawrence Leather Co.*,[162] a Maine federal district court concluded that the following represented Maine law: "The purpose of the statute of frauds is primarily evidentiary, and to deny enforcement of an agreement despite the charged party's admission of the facts essential to the agreement's existence would be an impermissible use of the statute of frauds to perpetrate a fraud."[163] Additionally, a Massachusetts

156. *Id.*

157. Shedd, supra note 28; Shedd, *supra* note 29.

158. Shedd, *supra* note 28, at 134–35 (citing Bentley v. Potter, 694 P.2d 617, 621 (Utah 1984); Paris Util. Dist. v. A.C. Lawrence Leather Co., 665 F. Supp. 944, 957 (D. Me. 1987)).

159. 694 P.2d 617 (Utah 1984).

160. *Bentley*, 694 P.2d at 621 (citations omitted).

161. *Id.* (citations omitted).

162. 665 F. Supp. 944 (D. Me. 1987)).

163. *Paris Util. Dist.*, 665 F. Supp. at 957 (citations omitted). This view was subsequently expressly accepted by the Maine Supreme Court. Lush v. Terri & Ruth F/V, 324 F. Supp. 2d 90, 95 (D. Me. 2004) ("Under Maine law, admitting the

decision joined Illinois in expressly upholding an oral agreement made in open court, notwithstanding the statute of frauds.[164]

Thus, in the span of a decade, only two additional states had adopted the judicial admissions exception: Utah and Maine.[165] Shedd had concluded in 1984 that the trend was toward a rapid adoption of the exception, but his conclusion was more tempered in 1991: "The law in the area of the judicial admissions exception in non-U.C.C. cases is developing very slowly. Although some additional jurisdictions have recognized the logic of the exception, the trend has not kept pace with the late 1970s."[166] As of the conclusion of Shedd's published research in 1991, he surmised that ten states (plus the District of Columbia) had statutes or decisions adopting the judicial admissions exception.[167] Clearly, Shedd believed that the judicial admissions exception should be the majority rule, but just as clearly, it was still a distinct minority rule at the conclusion of his published research as of 1991.[168]

V. AN UPDATE ON THE ADOPTION OF THE JUDICIAL ADMISSIONS EXCEPTION THROUGH THE PRESENT

The state of the judicial admissions exception outside the U.C.C. context does not appear to have been updated or reported since Professor Shedd's 1991 publication. One of the primary purposes of this Article is to provide such an update. This Part will: (1) report cases from the 1980s adopting or applying the exception that Professor Shedd may have overlooked, (2) report cases from the 1990s to the present that have adopted or applied the exception, and (3) report cases which have explicitly rejected the doctrine within the past few decades.

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existence of facts necessary to the formation of a contract takes the oral agreement outside the statute of frauds.").

164. Shedd, *supra* note 28, at 134 (citing Dominick v. Dominick, 463 N.E.2d 564, 568 n.2 (Mass. App. Ct. 1984)). As Shedd observed: "This decision, while seemingly acknowledging the positive attributes of the judicial admissions exception, cannot be cited as adding Massachusetts to the jurisdictions that have given the exception full recognition. Indeed, *Dominick* reaches a conclusion similar to that found in the Illinois case of *Kalman v. Bertacchi*." *Id.* (citing Kalman v. Bertacchi, 373 N.E.2d 550, 556 (Ill. App. Ct. 1978)).

165. Shedd, *supra* note 28, at 141.

166. *Id.* at 133.

167. The states, according to Shedd's final research published in 1991, were: Iowa, New Jersey, Maryland, Pennsylvania, Delaware, Rhode Island, Washington, Alaska, Utah, and Maine. The District of Columbia had adopted it as well, and Illinois and Massachusetts had limited holdings upholding oral agreements made in open court. *Id.* at 140–41.

168. *Id.* at 139.

A. Overlooked 1980s Cases Adopting the Exception

There are several cases decided during the 1980s that Shedd did not report, that seemingly adopt the judicial admissions exception or at least hold that an admission satisfies the applicable statute of frauds.[169] In some instances, the cases do not cite the longstanding history of the exception, in the same way as some of the seminal cases cited by Shedd. Nevertheless, the following five cases from the 1980s do allow for judicial admissions to render an oral contract within the applicable statute of frauds enforceable.

In *Robert Harmon & Bore, Inc. v. Jenkins*,[170] a South Carolina court of appeals held that

> a pleading admitting a parol agreement that is within the statute of frauds may constitute a sufficient writing within the statute so as to enable the court to enforce the contract . . . . A pleading can be regarded as a sufficient writing within the statute even if the pleader at the same time sets up and relies upon the statute as a defense.[171]

In *Stoetzel v. Continental Textile Corp. of America*,[172] the Eighth Circuit Court of Appeals countenanced the judicial admissions exception as the law of Missouri.[173] In *Hayes v. Hartelius*,[174] the Montana Supreme Court acknowledged the judicial admissions exception when it stated "it would be a fraud on the defendant to allow plaintiffs to admit to the contract, and then allow them to avoid its obligations by asserting the statute of frauds. We refuse to countenance such a result."[175]

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169. *See* Stoetzel v. Cont'l Textile Corp., 768 F.2d 217, 222 (8th Cir. 1985); Hayes v. Hartelius, 697 P.2d 1349, 1353 (Mont. 1985); Harmon v. Jenkins, 318 S.E.2d 371, 373 (S.C. Ct. App. 1984); Troyer v. Troyer, 341 S.E.2d 182, 185 (Va. 1986); Timberlake v. Heflin, 379 S.E.2d 149, 153 (W. Va. 1989).

170. 318 S.E.2d 371 (S.C. Ct. App. 1984).

171. *Id.* at 373–74 (citations omitted). The *Harmon* case cites, among other cases, *Smith v. Brailsford*, 1 S.C. Eq. (1 Des. Eq.) 350, 352 (1794). Interestingly, the *Smith* case was cited by Professor Stevens as establishing that, in the early days of the United States, the judicial admissions exception was the law in England and the United States, just before the tendency to deny the exception "very promptly crossed the Atlantic." *See* Stevens, *supra* note 21, at 372. Given that *Robert Harmon* cites *Smith* directly, it would appear likely that South Carolina never discarded the judicial admission exception in the first place.

172. 768 F.2d 217, 222 (8th Cir. 1985).

173. *Id.* ("[W]e are not prepared to say the District Court misconstrued Missouri law if it relied on the judicial admission theory to remove the contract from the operation of the Statute.").

174. 697 P.2d 1349 (Mont. 1985).

175. *Id.* at 1353. Subsequent Montana Supreme Court cases have confirmed that the judicial admissions exception is the law in Montana. Kluver v. PPL Mont., LLC, 293 P.3d 817, 823 (Mont. 2012); *see* Morton v. Lanier, 55 P.3d 380, 384 (Mont. 2002).

Additionally, in *Troyer v. Troyer*,[176] the Virginia Supreme Court upheld the admission of a deposition, given under oath, as sufficient to satisfy the statute of frauds: "To hold otherwise under the facts and circumstances of this case could result in a fraud or perpetrate a wrong, the particular evils the statute seeks to prevent."[177] In *Timberlake v. Heflin*,[178] the West Virginia Supreme Court adopted the judicial admissions exception: "We recognize, as have other courts, that a pleading may, in appropriate circumstances, be sufficient to take a parol contract out of the statute of frauds. In a related line of cases, representative of the modern trend, courts have crafted a 'judicial admission' exception to the statute of frauds."[179]

Thus, by the end of the 1980s, the judicial admissions picture was somewhat brighter than what Shedd had concluded. Rather than only ten states (plus the District of Columbia) adopting the exception, it appears to have been fifteen states (plus the District of Columbia). Nevertheless, as of 1990, the exception was still a decidedly minority position.

B. Updating to the Present: Furthering Shedd's Research

This Article updates Professor Shedd's research from the point that he published his last article on the subject, in several ways. First, by reporting the states which have adopted the judicial admissions exception from 1991 to the present, either by case decision or by legislation. Second, by considering states which contemplated the exception during the same timeframe but stopped short of fully admitting it for various reasons—sometimes because the issue was not properly before the court. Third, this Article will go further than Shedd's articles by pointing out several states which have rendered decisions explicitly *rejecting* the judicial admissions exception.[180] After all decisions are collected and reported, whether the judicial admissions exception remains a minority rule will be considered, with additional suggestions for implementation of the rule nationwide.

1. Jurisdictions Adopting the Exception

Multiple jurisdictions have adopted or applied the judicial admissions exception since the publication of Shedd's articles. The 1990s brought several such adoptions or applications—apparently

176. 341 S.E.2d 182 (Va. 1986).

177. *Id.* at 186. Although the *Troyer* opinion contained no prior citations to support its judicial admissions holding, it has been subsequently cited as supporting the judicial admissions exception. *See* Vienna Props., Inc. v. Cudd, No. 99787, 1990 WL 10039339, at *1 (Va. Cir. Ct. Oct. 24, 1990) (citing *Troyer*, 341 S.E.2d 182).

178. 379 S.E.2d 149 (W. Va. 1989).

179. *Id.* at 152.

180. *See, e.g.*, Durham v. Harbin, 530 So. 2d 208, 210–11 (Ala. 1988); Brown v. Gravlee Lumber Co., Inc., 341 So. 2d 907, 912 (Miss. 1977).

seven in total. Starting in 1991, in *Kelly v. Hodges*,[181] an Idaho appellate court held that "the statute of frauds is inapplicable when a contract . . . is mutually acknowledged to exist."[182] In 1992, in *Bower v. Jones*,[183] the Seventh Circuit Court of Appeals held that admissions in a deposition satisfied the statute of frauds under Illinois law.[184] In Connecticut, a 1993 (unpublished) opinion found that admissions that certain promissory notes were executed obviated the need for proof and thus defeated the statute of frauds argument.[185] In 1994, the New York legislature enacted a statutory judicial admission exception for non-real estate cases, which is substantially similar to the U.C.C. exception.[186] Although the New York real estate statute of frauds contains no such judicial admissions exception, there is case law support for the judicial admissions exception as well.[187] In 1998, California also enacted a statutory judicial admissions exception much like the U.C.C. version of the exception.[188] A 1996 Tennessee bankruptcy court opinion found that the statute of frauds was inapplicable in Tennessee when "the party asserting it as a defense admits the existence and validity of the oral

181. 811 P.2d 48 (Idaho Ct. App. 1991).

182. *Id.* at 50 (quoting Frantz v. Parke, 729 P.2d 1068, 1071–72 (Idaho Ct. App. 1986)).

183. 978 F.2d 1004 (7th Cir. 1992).

184. *Id.* at 1009 (quoting II FARNSWORTH ON CONTRACTS § 6.7, at 134 (1990)) ("To the extent that the statute's function is viewed as evidentiary, it is difficult to see why the statute should not be satisfied by a written admission in a pleading, stipulation, or deposition.").

185. Vernes v. State St. Mortg. Co., No. CV90 033966S, 1993 WL 171363, at *4 (Conn. Super. Ct. May 18, 1993) ("The defendants also raise the statute of frauds, which requires an instrument in writing before someone can be bound to answer for the debt, default or miscarriage of another. The simple answer to this argument is that by their answer, the defendants admitted 'that they executed promissory notes in the sums alleged'. That admission is a binding one upon them and obviates need for proof.").

186. N.Y. GEN. OBLIG. LAW § 5-701(b)(3)(c) (McKinney 2002) ("There is sufficient evidence that a contract has been made if . . . [t]he party against whom enforcement is sought admits in its pleading, testimony or otherwise in court that a contract was made . . . .").

187. *Id.* § 5-703; *see* Roberts v. Karimi, 79 F. Supp. 2d 174, 179 (E.D.N.Y. 1999), *rev'd on other grounds*, 251 F.3d 404 (2d Cir. 2001) (holding that an affidavit regarding a real estate contract provided in another lawsuit was a sufficient "writing" and defeated a statute of frauds defense); Estate of Meledandri, 437 N.Y.S.2d 996, 997 (Sur. Ct., N.Y. 1981) (stating that "[c]learly pleadings and court affidavits can be a memorandum, writing, sufficient to bring an oral contract out of the [real estate] Statute of Frauds," but failing to find such a memorandum where the facts indicated that the parties contemplated signing a particular written form before being bound to the agreement).

188. CAL. CIV. CODE § 1624(b)(3)(c) (West 2015) ("There is sufficient evidence that a contract has been made in any of the following circumstances . . . [t]he party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made."). Notably, California did not add the judicial admissions exception to its version of U.C.C. § 2-201 until the 1988 legislative session, which amendment was effective in 1990.

contract in his answer to the complaint."[189] At the close of the 1990s, in *Herrera v. Herrera*,[190] a 1999 New Mexico Court of Appeals decision, the court applied the U.C.C. judicial admission exception to a martial settlement agreement by analogy: "Although the [U.C.C.] applies to sales of goods and not marital settlement agreements, this statute codifies a general exception to the statute. This 'sensible provision represents legislative recognition of a policy common' to the statute of frauds."[191]

Since the year 2000, only two additional states appear to have applied or adopted the judicial admissions exception. The first was a 2002 Tenth Circuit Court of Appeals decision applying Oklahoma law, *Gibson v. Arnold*.[192] In *Gibson*, the party asserting the statute of frauds cited an earlier Oklahoma case that allowed a litigant to both admit the contract was made and yet still assert the statute of frauds as a defense.[193] The Tenth Circuit declined to follow the older case, and stated:

> [The older case is] at odds with the growing weight of authority in this country because virtually every court that has addressed the issue during the last twenty-five years has held that judicial admissions are an exception to the statute of frauds.
>
> Assuredly, the rationale for the judicial admission exception is "that the purpose of the statute of frauds is to shield persons with interests [covered by the statute] from being deprived of those interests by perjury, not to arm contracting parties with a sword they may use to escape bargains they rue." . . . "If the defendant admits under oath that a contract was formed, the purposes of the statute of frauds are served, and the contract will be afforded full legal effect."[194]

The Tenth Circuit accordingly applied the judicial admissions exception as the law in Oklahoma.[195] The last case discovered applying or adopting the judicial admissions exception is a 2008 Arizona case, *Owens v. M.E. Schepp Partnership*.[196] In *Owens*, the Arizona Supreme Court concluded that the judicial admission exception was applicable in Arizona: "An admission under oath by the party opposing enforcement of an oral contract that the contract exists can take the agreement outside of the statute of frauds."[197] The

189. *In re* Fowler, 201 B.R. 771, 776 (Bankr. E.D. Tenn. 1996) (citing Love & Amos Coal Co. v. United Mine Workers of Am., 378 S.W.2d 430, 439 (Tenn. Ct. App. 1963)).
190. 974 P.2d 675 (N.M. Ct. App. 1999).
191. *Id.* at 679.
192. 288 F.3d 1242 (10th Cir. 2002).
193. *Id.* at 1246 (citing Purcell v. Corder, 124 P. 457, 460 (Okla. 1912)).
194. *Id.* at 1246–47 (citations omitted).
195. *Id.* at 1247.
196. 182 P.3d 664 (Ariz. 2008).
197. *Id.* at 671 (citing MURRAY, *supra* note 1, § 129 cmt. D).

court found no reason not to recognize the judicial admissions exception, given that it is a "common-sense recognition that if the defendant admitted in a pleading that he had made a contract with the plaintiff, the purpose of the statute of frauds—protection against fraudulent or otherwise false contractual claims—was fulfilled."[198]

In all, from the time of Shedd's published 1991 articles through the present, it appears that nine additional jurisdictions have adopted or applied some form of the judicial admissions exception outside the U.C.C. sale of goods context. The pace has continued since Shedd's initial observations, albeit not rapidly. Coupled with Shedd's own findings, and my observations of cases that Shedd may have overlooked through 1991, this brings the total number of apparent adoptions or applications to twenty-four states, plus the District of Columbia. However, before finalizing any counts and observations of the state of the rule, this Article next turns to cases decided since 1991 addressing the exception without a seemingly clear adoption. The Article then looks at states which have rejected the doctrine explicitly.

2. Inconclusive Cases

Taking the period from 1991 through the present, there were several cases that implicated the judicial admissions rule in some way but stopped short of fully adopting or applying it in the traditional sense.[199] Three states—Wyoming, Kansas, and Nevada— reported cases which upheld oral agreements that had been recited and agreed to orally and in open court.[200] Other cases discussed the admissions

198. *Id.* (citing DF Activities Corp. v. Brown, 851 F.2d 920, 923 (7th Cir. 1988)). In *Owens*, no admission had in fact occurred, but the court nevertheless granted a motion for summary judgment, thereby denying a request to forestall such ruling on the hope that an admission may yet be forthcoming if the litigation were extended. *Id.* at 671–72. A bankruptcy court in Arizona, citing *Owens,* has subsequently applied the judicial admissions exception as the law in Arizona. *In re* Cottontail, LLC, 498 B.R. 242, 248 (Bankr. D. Ariz. 2013).

199. *See* Orthome Inc. v. A.B. Med., Inc., 990 F.3d 387, 391 (8th Cir. 1993); E.C. Menendez v. Tex. Comm. Bank, 730 S.W.2d 14, 15 (Tex. Ct. App. 1987).

200. *See* Brockman v. Sweetwater Cty. Sch. Dist. No. 1, 826 F. Supp. 1328, 1333 (D. Wyo. 1993), *aff'd*, 25 F.3d 1055 (10th Cir. 1994) (holding that an oral settlement agreement agreed to at a settlement conference conducted by a magistrate judge was not within the statute of frauds); *In re* Marriage of Takusagawa, 166 P.3d 440, 447 (Kan. Ct. App. 2007) (holding the statute of frauds did not prevent an oral separation agreement between spouses in open court); Grisham v. Grisham, 289 P.3d 230, 235 (Nev. 2012) (upholding hearing transcript as sufficient to fulfill the purposes of the statute of frauds). In *Takusagawa*, the court added further support for a judicial admissions doctrine generally, based on the presence of the explicit U.C.C. exception:

> [S]tatutory and caselaw developments over the past few decades support an exception to applicability of the statute of frauds when a judicial admission of the agreement has been made. The key statutory development has been U.C.C. § 2–201, adopted in 1965 in Kansas as K.S.A. 84–2–201. It explicitly provides a judicial-admission exception

exception but stopped short of fully adopting or applying it, generally because an admission was not found to have been made under the facts at issue.[201] For example, in *Edwards Industries, Inc. v. DTE/BE, Inc.*,[202] the Nevada Supreme Court agreed that "[a] complete admission in court by the party to be charged should dispense with the necessity of any writing whatever," but found that the resisting party had not made a complete admission factually.[203] A Michigan appellate decision held similarly, stating: "Even if this Court were to adopt a judicial admission exception, plaintiff has not presented sufficient evidence to invoke such an exception."[204] A Seventh Circuit Court of Appeals opinion found similarly with regard to Indiana law.[205] A 2015 Massachusetts decision, *Barrie-Chivian v. Lepler*,[206] affirmed a judgment against a defendant who orally promised to guarantee a loan, under a theory of promissory estoppel (rather than formal contract), and held his statute of frauds argument was unavailing based on his "trial testimony, [which,] like a partial writing, performs an evidentiary function that obviates the concerns implicated by the Statute of Frauds."[207] Depending on how one views them, it can be argued that these states should be "counted" as recognizing the judicial admissions exception. Certainly, they could be cited by any subsequent cases in these states that decide to formally adopt or apply the exception.[208] But, because these cases do

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> to the statute of frauds for cases covered by the U.C.C. Because statutes on the same subject are *in pari materia* and are to be construed to achieve consistent results whenever possible, the general statute of frauds and the U.C.C. statute of frauds should be construed in similar ways to the extent possible. Thus, if possible, the general statute of frauds should be interpreted to include a judicial-admission exception since the U.C.C. statute of frauds has one.

Id. at 447 (citations omitted). Although this language is very supportive of the judicial admissions exception in Kansas generally, the issue was not before the court beyond the limited issue of upholding the oral agreement made in and acknowledged in open court.

201. *See* Consolidation Servs., Inc. v. KeyBank Nat'l Ass'n, 185 F.3d 817, 820 (7th Cir. 1999); Edwards Indus., Inc. v. DE/BTE, Inc., 923 P.2d 569, 573 (Nev. 1996); Barrie-Chivian v. Lepler, 34 N.E.3d 769, 772 (Mass. App. Ct. 2015); Wilhelm & Assocs. v. Orchards Golf Ltd. P'ship, No. 202541, 1998 WL 1988591, at *4 (Mich. Ct. App. Dec. 15, 1998).

202. 923 P.2d 569 (Nev. 1996).

203. *Id.* at 573 (quoting ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 498, at 683 (1950)).

204. *Wilhelm & Assocs.*, 1998 WL 1988591, at *4.

205. *Consolidation Servs., Inc.*, 185 F.3d at 820 (noting that a judicial admission can take the place of a memorandum under the statute of frauds but finding that the statements at issue did not constitute such an admission).

206. 34 N.E.3d 769 (Mass. App. Ct. 2015).

207. *Id.* at 772.

208. For instance, even though the *Consolidation Services, Inc.* case did not involve an actual admission that was made factually, it has been cited as standing for the proposition that the judicial admissions exception is the law in Indiana. *See, e.g.*, Gibson v. Arnold, 288 F.3d 1242, 1246

not actually apply the exception to defeat a statute of frauds defense to a claimed oral contract, they are not quite in the category of states where the exception is firmly rooted in the law (nor did Shedd "count" such decisions that held similarly, in his articles).[209]

3. States That Firmly Reject the Exception

In spite of a slowly growing number of states that have adopted or applied the judicial admissions exception, there are a number of states where the exception has not only not been accepted—but, in fact, has been soundly rejected.[210] In his articles, Shedd did not highlight these decisions, perhaps because they were unremarkable because they were simply reiterating the then-dominant majority rule. However, some of the decisions have come since the publication of Shedd's work and the emergence of some states' support for the exception. Therefore, because these more recent decisions disfavoring the exception shed light on the rationale behind retaining the longstanding majority rule and reluctance to embrace the judicial admissions exception, they will be briefly reported and explored.

As Shedd reported in his 1984 article, a spate of decisions through the 1970s and early 1980s came out in favor of the judicial admissions exception, adding to an embryonic minority rule in favor of such an exception.[211] However, several decisions noted this trend and yet resisted it. In *Brown v. Gravlee Lumber Co.*,[212] the Mississippi Supreme Court observed:

> We see no reason to depart from the generally prevailing rule that a party might rely on this defense despite his admission of the existence of the contract. Any other rule would require a party to lie in his pleadings in order to retain the protection afforded him by the statute.[213]

Thus, the court was reiterating the traditional support for the rule—to keep from giving an incentive for the defendant to commit perjury in order to avoid being held to be bound to a contract.

In 1986, the Vermont Supreme Court added its voice to those states resisting any attempts to reverse the longstanding majority rule, stating in *Chomicky v. Buttolph*[214] as follows:

(10th Cir. 2002); Stender v. BAC Home Loans Serv., LP, No. 2:12 CV 41, 2013 WL 832416, at *3 (N.D. Ind. Mar. 6, 2013).

209. *See e.g.*, Shedd, *supra* note 20, at 15–16 (citing Arnett v. Lillard, 436 S.W.2d 106, 111 (Ark. 1969); Radke v. Brenon, 134 N.W.2d 887, 891 (Minn. 1965)).

210. *See, e.g.*, Brown v. Gravlee Lumber Co., 341 So.2d 907, 912 (Miss. 1977).

211. *See supra* notes 140–56 and accompanying text.

212. 341 So.2d 907 (Miss. 1977).

213. *Id.* at 912.

214. 513 A.2d 1174 (Vt. 1986).

> [W]e do not believe that . . . an admission takes the contract outside the Statute of Frauds . . . . [W]hile the writing requirement is imposed primarily as a shield against possible fraud, . . . it also "promotes deliberation, seriousness, certainty, and shows that the act was a genuine act of volition." In short, it helps to ensure that contracts for the sale of land or interests therein are not entered into improvidently. Thus, . . . we [have] expressly stated that "[o]ne may admit the sale of land by a verbal contract, and yet defend an action for specific performance by pleading the statute."[215]

In *Chomicky*, the Vermont Supreme Court thus emphasized the deliberative functions of the statute of frauds, rather than the more traditional ground of eliminating fraudulent claims that a contract had been formed when in fact it had not.[216] In 1988, in *Durham v Harbin*,[217] the Alabama Supreme Court also declined to adopt the admission noting: "We are not wholly deaf to the strong arguments by the commentators favoring a judicial admission exception to the Statute, and, in a proper case, might be inclined to consider whether the legislative intent behind the Statute of Frauds favors such a construction."[218] However, the court declined to do so because it did not find a sufficient admission made in the case.[219]

At least two states appear constrained by statute or statutory interpretations from adopting or applying a comprehensive judicial admissions exception. A Georgia statute seems to provide an admission exception. The statute states: "The specific performance of a parol contract as to land shall be decreed if the defendant admits the contract . . . ."[220] However, cases decided under this statute make clear that it has a very limited effect. In *Haire v. Cook*,[221] the Georgia Supreme Court in 1976 reaffirmed a 1941 interpretation of the statute which stated:

> [M]erely because it is alleged and proved that at some time, somewhere, the defendant orally admitted it. Even an admission to that effect in an answer will not be a sufficient basis for a decree of specific performance of an oral contract for the sale of land, where the defendant duly invokes the statute of frauds.[222]

Instead, in Georgia where a defendant asserts the statute of frauds, "the admission of a contract must itself be in writing to satisfy the

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215. *Id.* at 1175–76 (citations omitted) (Radke v. Brenon, 134 N.W.2d 887, 889–90 (Minn. 1965); quoting Rabel, *supra* note 46, at 178).
216. *Id.* at 1175.
217. 530 So.2d 208 (Ala. 1988).
218. *Id.* at 212 n.5.
219. *Id.*
220. GA. CODE ANN. § 23-2-131 (2019).
221. 229 S.E.2d 436 (Ga. 1976).
222. West v. Vandiviere, 14 S.E.2d 711, 713 (Ga. 1941).

conditions of [the Georgia admission exception.]"[223] Requiring any "admission" to be in writing is, in reality, little different than requiring a formal memorandum evidencing the agreement. In Louisiana, the only civil law state in the country, unique code provisions essentially require written contracts for real estate and other contract categories; little room is left for parol or oral evidence of such agreements.[224]

From the 1990s to the present, at least three additional states have resisted adopting the judicial admissions exception outside the sale of goods. In 1996, the North Carolina Supreme Court stated: "[E]xcept for cases decided under the [U.C.C.] Statute of Frauds, . . . inapplicable here, our courts have consistently held that a party's admission of the contract in a deposition or answer does not bar that party from pleading the statute of frauds as a defense."[225] Similarly, in a 2004 a Kentucky Court of Appeals stated:

> [W]e note that Kentucky law recognizes only limited exceptions to the statute of frauds. There is no 'judicial admission' exception recognized under Kentucky law; that is, one may admit in a court proceeding the existence of an oral contract for the sale of land and still invoke the statute of frauds to bar the enforcement of the oral contract.[226]

In 1999, the Washington Supreme Court also resisted the plea to join the modern trend of states adopting the judicial admission exception.[227] Notably, Washington was one of the states that Shedd

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223. Johnson v. Bourchier, 263 S.E.2d 157, 158 (Ga. 1980).

224. *See* LA. CIV. CODE ANN. art. 1839, 1847 (1985) ("Louisiana law specifically provides that if the contract is legally required to be in writing, it cannot be proved through other means unless it 'has been destroyed, lost, or stolen.' In other words, witness testimony or other evidence cannot establish a contract existed if it is one of the types of contracts that must, by law, be in writing. Again, the legislative intent was to avoid fraud and promote certainty.") *Is an Unwritten Contract Enforceable in Louisiana?*, WRIGHT & GRAY L. FIRM (Sept. 22, 2016), https://wpglawfirm.com/is-an-unwritten-contract-enforceable-in-louisiana/.

225. Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C., Inc., 477 S.E.2d 262, 264 (N.C. Ct. App. 1996).

226. Mangrum v. Davidson, No. 2002–CA–002180–MR, 2004 WL 691598, at *2 (Ky. Ct. App. Apr. 2, 2004) (citing Cornett v. Clere, 236 S.W. 1036, 1037 (Ky. 1922)).

227. Key Design, Inc. v. Moser, 983 P.2d 653, 659–61 (Wash. 1999) (en banc). In fact, the court cited Shedd and noted the lack of any large trend, per Shedd:

> Key Design's claim that this court should become part of a trend by recognizing judicial admissions has several weaknesses. The trend is virtually non-existent. Although there was a trend toward recognition in the 1970s, only one state adopted a broad-based exception in the 1980s. As of 1991, only twelve states and the District of Columbia had adopted the judicial admissions doctrine.

Id. (citing Shedd, *supra* note 20, at 241, 243). Of course, the court may have been more impressed with the number of states adopting the exception had it seen the updates provided in this article, since, as this article has established, Shedd likely underreported the number of states that had adopted or applied the judicial

had previously counted as having adopted the exception by virtue of an intermediate appellate court decision, but in *Key Design, Inc. v. Moser*,[228] the Washington Supreme Court firmly rejected the exception:

> Allowing a party to make a judicial admission while also pleading the statute of frauds does not necessarily perpetrate a fraud. The majority rule permits a defendant who admits the oral contract to insist at the same time upon the statute of frauds. The defendant is simply carrying out one of the purposes of the statute, which is to forbid the enforcement of verbal contracts for the sale of real property. Given that the statute prohibits such oral contracts, it is impossible to see how one can be bound by a contract the statute declares void. The defendant is not perpetrating a fraud upon the court when he exercises his legal right under the statute. The narrower issue in the case before us presents us with analogous reasoning. The defendant who admits to the legal description of a property while pleading the statute of frauds carries out the purpose of the *Martin* rule [requiring real estate contracts to be in writing and contain formal legal descriptions of land], which is to encourage parties to include such proper descriptions in their contracts so that courts will not have to resort to extrinsic evidence in order to find out what was in their minds. A defendant is not perpetrating a fraud upon the court when he honestly admits to the legal description while insisting that a land contract without a proper description is unenforceable under *Martin*.
>
> The statute of frauds in general provides a channeling function, as well as the evidentiary function just discussed. The formal requirements of the statute for land contracts helps to create a climate in which parties often regard their agreements as tentative until there is a signed writing . . . .
>
> Finally, having affirmed the rule in *Martin*, which seeks to retain clarity in the formalities required for a conveyance of real property, this court would be acting in a contrary manner by also creating a new exception to that rule. Not adopting the judicial admissions doctrine is consistent with our decision to reaffirm the rule in *Martin*.
>
> Accordingly, we continue to decline to adopt a judicial admissions exception to the *Martin* rule requiring that contracts for the sale of real property contain a legal description of the property.[229]

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admissions exception as of the date of the *Key Design* decision. *See supra* Subpart V.A and accompanying text.

228. 983 P.2d 653 (Wash. 1999) (en banc).

229. *Id.* at 660–61 (citations omitted).

As a Washington legal commentary describes the state of the judicial admissions exception in Washington:

> At one time, there was authority in Washington case law for the 'judicial admissions' doctrine, which permitted a party to avoid the application of the Statute of Frauds by demonstrating that the opposing party had admitted in court or during discovery that an oral contract existed. However, that doctrine was firmly rejected in *Key Design Inc. v. Moser*.[230]

The holding in *Key Design* demonstrates that there may yet be significant resistance to further adoptions of the judicial admissions exception. Universal adoption of the exception appears to be far from a *fait accompli*. Countervailing arguments, such as the channeling and evidentiary functions cited by the Washington Supreme Court, can be proffered in favor of maintaining the longstanding rule allowing admission of the contract and simultaneous assertion of the statute of frauds.[231]

4. Summing Up Update to Shedd Research and State of Adoption of Judicial Admissions Exception

Taking all of Shedd's prior research and adding this Article's contributions updating that research through the present, it appears that twenty-three states and the District of Columbia have adopted or affirmatively applied the judicial admissions exception outside the sale of goods. As of 1991, Professor Shedd believed that only ten states (plus the District of Columbia) had done so.[232] This Article has demonstrated that, due to some overlooked decisions, the number of states adopting or applying the exception as of 1991 was probably closer to fifteen (plus the District of Columbia).[233] An additional nine states adopted or applied the exception after 1991, and one state that Shedd had previously counted as adopting the exception—Washington—rejected it in 1999.[234] Thus, by this Article's count, twenty-three states have presently adopted or applied the exception. This does not count the three states that have limited holdings upholding agreements reached and recited in open court.[235] Thus, although several more states have seemingly embraced the exception, it has not quite yet attained even slim majority rule status. Rather, strictly speaking, the longstanding majority rule that a defendant

230. 25 WASHINGTON PRACTICE SERIES: CONTRACT LAW AND PRACTICE, § 3:17 (3d ed. 2019).

231. *Key Design, Inc.*, 983 P.2d at 660, 665 (Madsen, J., concurring).

232. Shedd, *supra* note 28, at 132 n.13.

233. *See* cases cited *supra* Subpart V.A.

234. *See supra* notes 181–98, 229 and accompanying text.

235. *See supra* notes 112–31, 140–46, 150–65, 170–98, 200–08 and accompanying text. This article actually cites at least four such states, but one of them (Illinois) subsequently adopted or applied the judicial exception in full subsequent to the limited open court decision. *See* Shedd, *supra* note 20, at 24.

may both admit the contract and also assert the statute of frauds as a defense is still the majority rule nationwide, if only by a thin margin.[236]

If one were to add the half-dozen or so states that have voiced support for the exception, but yet not factually been in a position to adopt or apply it, then the picture of adoption looks brighter. But, on the other hand, eight states have fairly recent decisions or statutes firmly rejecting the doctrine, and instead have held to the longstanding majority rule designed to prevent giving the defendant an incentive to commit perjury.[237] Finally, not mentioned until this point is the fact that eleven states do not seem to have any decisions or statutes taking a position on the judicial admissions exception outside the applicable U.C.C. statute of frauds provisions.[238] Thus, the state of the exception seems to be that it has advanced some since Professor Shedd's findings—even more than he had thought as of his reported findings—but has still not quite achieved the status of even a majority rule, let alone universal adoption. Although Professor Shedd might have been glad to see some progress, he and many others would surely be surprised and disappointed the exception has not been much more predominantly embraced.

VI. TOWARDS THE UNIVERSAL ADOPTION OF THE EXCEPTION: POLICY JUSTIFICATION AND IMPLEMENTATION

This Article posits that the judicial admissions exception makes eminent sense and should clearly be the uniformly applicable law in every American jurisdiction. This Part will briefly discuss the policy grounds supporting the exception. It will then discuss the historical and suggested subsequent means for implementing the exception in

236. *See supra* notes 181–231 and accompanying text.

237. *See supra* notes 210–30 and accompanying text.

238. The states where no cases or statutes were found are: Colorado, Florida, Hawaii, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, South Dakota, Texas, and Wisconsin. Of these, only one case seems to directly mention the exception at all. *See* Orthomet, Inc. v. A.B. Med., Inc., 990 F.2d 387, 391 (8th Cir. 1993) ("Florida case law addresses the judicial admission exception only within the context of Article 2 of the [U.C.C.]."). A Texas case seems at first glance to give some support for the rule, but it was a case regarding a guarantee on a negotiable instrument, or "formal contract." *See* Menendez v. Tex. Comm. Bank, McAllen, N.A., 730 S.W.2d 14, 15 (Tex. Ct. App. 1987) ("When . . . one judicially admits that he signed an instrument in the capacity of guarantor, no other evidence of the guaranty is required."). However, strictly speaking, the statute of frauds does not apply in the context of negotiable instrument guarantors, or "accommodation parties." *See* U.C.C. § 3-419(b) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation."); *see also* MURRAY, *supra* note 1, § 12.6 ("The statute of frauds is applicable only to informal contracts. Among those to which it is not applicable are contracts under seal, recognizances, and negotiable instruments.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 120 (AM. LAW INST. 1981)).

all jurisdictions throughout the country, given the current pace of adoptions to date. A brief conclusion follows.

A. Policy Soundness of the Judicial Admissions Exception

Recall that the original, primary purpose of the statute of frauds is to prevent the fraudulent assertion that a contract has been formed—the original English Act in 1677 was literally titled an "Act for the Prevention of Fraud and Perjuries."[239] That is, the *titular* purpose of the statute of frauds is to prevent *fraud*.[240] England at the time of the Act's promulgation had seen an increase in perjured claims once oral contracts were allowed to be enforced in English courts.[241] Professor Stevens stated that fraud prevention was the "undeniable" purpose of the statute of frauds.[242] Professors Calamari and Perillo stated that the purpose of the statute of frauds is "in large part to obviate perjury . . . ."[243] Commentators invariably agree that the prevention of fraud is the predominant purpose for the writing requirement.[244] Of course, the evil sought to be prevented is that a court would wrongly enforce a non-existent contract against an unwitting victim who never entered into it, based on someone's fraudulent assertion that such a contract exists.[245] Such a result is obviously at cross-purposes with the cause of justice.

Since the primary purpose of the statute of frauds is to ensure that no fraud is committed in establishing the existence of a contract, recognizing the judicial admissions exception completely vindicates that purpose. There is no danger of a fraudulent assertion of the existence of a contract between the parties, when the defendant *admits* that a contract was formed. In that case, fraud is completely absent. In the words of one of the early English cases recognizing the judicial admissions exception, once a defendant admits or confesses the contract, "there can be no danger of perjury from contrariety of evidence, *which was the only mischief that statute intended to obviate*."[246] On this side of the Atlantic, it is much the same, as the Pennsylvania Supreme Court observed that if the defendant

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239. CALAMARI & PERILLO, *supra* note 34, § 19.1 (citing 29 Car. 2 c. 3, 8 Stat. at Large 405).

240. *See* Stevens, *supra* note 21, at 359.

241. Albert Roland Kiralfy et al., *Common Law*, BRITANNICA, https://www.britannica.com/topic/common-law/The-16th-century-revolution#ref40233 (last visited July 30, 2020).

242. *See* Stevens, *supra* note 21, at 360.

243. CALAMARI & PERILLO, *supra* note 34, § 19.1.

244. *See, e.g.*, LORD, *supra* note 2, § 21:1 ("The statute of frauds was designed to prevent the enforcement of unfounded fraudulent claims by requiring written evidence."); MURRAY, *supra* note 1, § 12.1 ("The purpose of [the statute of frauds] was to prevent plaintiffs from foisting certain kinds of obligations upon those who had never assented to assume them.").

245. Stevens, *supra* note 21, at 360.

246. *Id.* at 362 (quoting Symondson v. Tweed, (1733) Precedents in Chancery 374) (emphasis added).

judicially admits the contract, "*the purpose of the statute of frauds is served* and the oral agreement will be enforced by the court."[247] The point is so obvious that, in 1951 when Professor Stevens observed the fall of the judicial admissions exception in England and the United States, he exclaimed that it was "*astonishing*" that the rule had not been "universally perpetuated," given that the presence of a judicial admission was a "most convincing" basis for enforcement, and "one with no attendant risk of perjured proof of a non-existent contract."[248] In short, a judicial admission of the contract completely eliminates the concern of any fraud, satisfies the original purpose of the statute of frauds, and thus should universally serve as the basis for allowing enforcement of the contract.

Are there other possible policy goals of the statute of frauds, beyond the paramount goal of preventing fraud in the assertion of a contract? As discussed previously, some goals have been proffered for the statute in its present form and usage. One goal is a channeling function, whereby certain contracts are funneled towards being evidenced by a writing.[249] Certainty is another suggested goal.[250] It is also suggested that "the required formality of a writing 'promotes deliberation, seriousness . . . and shows that the act was a genuine act of volition.'"[251]

However, as laudable as these additional goals may be, it is doubtful they share the same prominence as the titular, original goal of the prevention of fraud and perjury. In addition to the historical observations of commentators noted above, an additional significant indicator that this is so lies in the reality and operation of other recognized exceptions to the statute of frauds. One of the earliest such exceptions (along with judicial admissions) is the part-performance exception to the real estate statute of frauds.[252] Under this well-established exception, most jurisdictions hold that if a buyer performs some combination of payment, possession, and/or improvements, the contract is enforceable even without a writing.[253] Such behavior is taken to provide good alternative proof of the

247. *See* Shedd, *supra* note 20, at 12 (citing Zlotziver v. Zlotziver, 49 A.2d 779, 781 (Pa. 1946)) (emphasis added).

248. Stevens, *supra* note 21, at 381.

249. *Id.* at 360; *see also* Key Design, Inc. v. Moser, 983 P.2d 653, 660–61 (Wash. 1999) ("The statute of frauds in general provides a channeling function, as well as the evidentiary function just discussed. The formal requirements of the statute for land contracts helps to create a climate in which parties often regard their agreements as tentative until there is a signed writing.") (citations omitted).

250. CALAMARI & PERILLO, *supra* note 34, § 19.1 ("While the writing requirement was imposed in large part to obviate perjury, it is clear that other policy bases for the requirement exist.").

251. Rabel, *supra* note 46 .

252. CALAMARI & PERILLO, *supra* note 34, § 19.15.

253. *Id.*

existence of the contract.[254] If the other proffered goals— particularly channeling and deliberation—were on equal footing with the utmost goal of fraud prevention, the presence of part-performance would not be enough to dictate enforcement because those goals would not be vindicated by the part-performance. And yet, the part performance exception is unquestionably the dominant majority rule.[255]

Similarly, the "main purpose" exception to the guaranty statute of frauds allows enforcement of an oral guarantee promise, so long as it is determined that the promisor's primary purpose was to benefit his own economic interests, rather than that of the party accommodated (as is more typical with guaranty arrangements).[256] This circumstance is deemed probative that the guaranty contract really existed.[257] Again, this vindicates the fraud purposes of the statute, but not the supposed channeling and deliberation purposes. And yet, the vindication of the fraud purposes appears to be determinative in the operation of these exceptions, demonstrating its greater importance. That is, the exceptions work like this—taking care of the fraud concern satisfies the court and allows enforcement, even though the channeling and deliberative policy goals have not been satisfied by the existence of a formal, executed writing. These goals must, therefore, be seen as secondary or ancillary in comparison to the original, titular goal of the statute of frauds. Preventing the fraudulent assertion of an oral contract is paramount.

Further indication that the other purposes for the statute of frauds are lesser in their importance comes by way of a study that Professor Farnsworth made as part of the New York Law Revision Commission in 1960 as initial passage of the U.C.C. was being considered. With regard to the purposes of the statute of frauds, Farnsworth observed that "[t]hree possible functions are commonly suggested: (1) a cautionary, (2) a channeling, and (3) an evidentiary function."[258] At least with respect to the sale of goods context, Farnsworth found that the evidentiary, or fraud prevention, purpose of the statute of frauds remains paramount: "[T]he justification of a Statute of Frauds as to the sale of goods must be today, just as it was in the time of its origin in 1677, its evidentiary function, the prevention of fraudulent claims."[259] Farnsworth further rejected the

254. David G. Epstein et al., *Reliance on Oral Promises: Statute of Frauds and Promissory Estoppel*, 42 TEX. TECH L. REV. 913, 931 (2010).

255. *See* H.R. Wilhoit, *The Statute of Frauds and Part Performance of Land Contracts in Kentucky*, 22 KY. L.J. 434, 435 (1934).

256. CALAMARI & PERILLO, *supra* note 34, § 19.6.

257. *See supra* notes 59–63 and accompanying text.

258. Philip K. Yonge, *The Unheralded Demise Of The Statute Of Frauds Welsher In Oral Contracts For The Sale Of Goods And Investment Securities: Oral Sales Contracts Are Enforceable By Involuntary Admissions In Court Under U.C.C. Sections 2-201(3)(b) And 8-319(d)*, 33 WASH. & LEE L. REV. 1, 9 n.38 (1976) (citing STATE OF N.Y., REPORT OF THE LAW REVISION COMMISSION 259-260 (1960)).

259. *Id.* at 9.

cautionary/deliberation function as "insignificant," compared to the paramount evidentiary/fraud prevention function.[260]

Further to be conversely considered is the insufficient justification for the longstanding majority rule, that denies the judicial admission exception and rather provides that a defendant may admit the contract and yet still assert the statute of frauds as a defense.[261] One justification for such a rule by modern courts clinging to it is, in fact, the channeling function just described.[262] But, as discussed above, this justification should be considered of lesser importance than the titular goal of preventing fraudulent assertions of contract. But, of course, the more longstanding, traditional reason for the majority rule is to remove the incentive for the defendant to commit perjury by falsely stating he did not enter into a contract, when in fact he did.[263] Rather, operation of the rule lets the party admit the contract truthfully, and then assert the statute of frauds as a defense—vindicating, apparently, not just the appreciation for defendant's truthful testimony, but also the secondary deliberation and channeling functions.[264]

For one, this highlights that the longstanding majority rule, denying the judicial admissions exception, completely turned the statute of frauds on its head in terms of original policy justifications. The rule discards the primary anti-fraud/evidentiary purposes of the rule, since it denies enforcement of the contract even though the defendant has admitted its existence is not being fraudulently asserted to be true, *but rather is really true*—that is, the original concern of the statute of frauds has been satisfied and yet, defendant's assertion of the defense is allowed to nevertheless remain.[265] In furtherance of what policies? As Professor Corbin stated in his important Contracts treatise, *"[i]t is far from carrying out the true purpose for which the statute exists to permit its invocation by one who admits the contract*."[266] In the words of Professor Stevens, "the statute was intended to be used as a shield, not a sword."[267] The goal of perjury prevention has always been dubious. The theory of this supposed legislative intent, Stevens noted, did not emerge until over a century after the passage of the original statute of frauds.[268]

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260. *Id.* I do not wish to overstate the Farnsworth report, or take it too much out of its sale of goods context. In fact, Farnsworth was careful to mention that the channeling function might be more important for real estate contracts than for sale of goods contracts. *Id.* at 9 n.38. But he undoubtedly stated that the evidentiary function was the most important.

261. *See* Stevens, *supra* note 21, at 361.

262. Key Design, Inc. v. Moser, 983 P.2d 653, 660 (Wash. 1999).

263. *See supra* notes 89–95 and accompanying text.

264. *See id.*

265. Stevens, *supra* note 21, at 360.

266. MURRAY, *supra* note 1, § 14.2 (emphasis added).

267. Stevens, *supra* note 21, at 360.

268. *Id.*

Moreover, there is nothing terribly unique in oral contracts cases about the defendant's incentive to commit perjury in order to refrain from admitting certain facts which may hurt his case. This is true in all litigation. If I was looking at my smartphone while I was driving and hit a pedestrian committing negligence, I have an incentive to lie and say my phone was in my pocket. All witnesses take an oath to give honest, truthful testimony.[269] The incentive not to commit perjury, aside from any moral incentives, is criminal peril.[270] The reasons for giving a defendant in a contracts case the additional benefit of the longstanding majority rule are far from persuasive. As Professor Stevens remarked in 1951, it is simply "*astonishing* that the removal of the temptation to the defendant to perjure himself by denying the making of an agreement should have been employed as a device for permitting him unethically to escape an honest obligation."[271] The longstanding majority rule should, therefore, be discarded, and a judicial admissions exception implemented in all jurisdictions.

B. Caselaw Adoption and Alternative Legislation

The adoption of the judicial admissions exception outside the sale of goods context (governed by U.C.C. section 2-201), with a few exceptions,[272] has been by case law holdings. And, as noted by Professor Shedd—and further observed by this Article—such adoption has been exceedingly gradual.[273] After the establishment of the longstanding majority rule denying the exception, only four jurisdictions had adopted the exception before the 1970s.[274] Subsequent to these initial four, the pattern has been as follows (not counting the District of Columbia): (1) two states adopted it in the 1970s (originally three but one, Washington, later retracted);[275] (2) eight states adopted it in the 1980s (three, including the District of Columbia, according to Shedd,[276] and another five found by this Article);[277] (3) seven states adopted or applied the exception in the 1990s;[278] and (4) two states have so far adopted or applied the

269. *See, e.g.*, FED. R. EVID. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.").

270. *See, e.g.*, 18 U.S.C. § 1621 (2018) (stating that under federal law, perjury is a felony punishable by up to five years in prison).

271. Stevens, *supra* note 21, at 381.

272. *See* ALASKA STAT. § 09.25.020 (1962); CAL. CIV. CODE § 1624(b)(3)(C) (2015); IOWA CODE § 622.34 (2013); N.Y. GEN. OBLIG. § 5-701(b)(3)(c) (2002).

273. Shedd, *supra* note 28, at 133.

274. *See supra* Subpart IV.A.1 and accompanying text.

275. *See supra* notes 140–49 and accompanying text.

276. *See supra* notes 150–52 and accompanying text.

277. *See supra* notes 169–79 and accompanying text.

278. *See supra* notes 181–91 and accompanying text.

exception in 2000 and beyond.[279] The rate of adoption or application appears to have peaked in the 1980s and 1990s, and has since slowed to a crawl.

Common law develops, as it always has, by a slow and steady reaction of courts to the cases that are before them. "The persistent movement of the common law towards satisfying the needs of the times is soundly marked by *gradualness.* Its step by step process affords the light of continual experience to guide its future course."[280] Sometimes, in fact, the resistance of courts to form new precedent in the name of stare decisis can lead to odd gyrations in order to seem as though such precedent is adhered to. For instance, in the Minnesota Supreme Court case of *Radke v. Brenon*,[281] a litigant's oral assent to the contract was admitted.[282] The court, however, was apparently loathe to appear as though it was abandoning the longstanding majority rule that a defendant could both admit the contract and still assert the statute of frauds.[283] Instead, the court decided to find a writing, that was of somewhat doubtful sufficiency under the statute, as fully complying with the requisites of the applicable statute of frauds, *given* the defendant's admission: "Although we have followed the majority rule that admission of the contract does not preclude assertion of the statute of frauds, an admission that a contract was made certainly cannot be ignored when all other evidence submitted supports the same conclusion."[284]

It may be that we will just have to be content to wait for the judicial admissions exception to develop, gradually, during the course of decisions in the remaining jurisdictions that have not adopted or applied it. Such has happened over and over in the course of the development of the common law. But litigants would benefit from the courts' clear adoption of the judicial admissions exception, for the policy reasons outlined above. Stare decisis is a hallowed principle of the common law, but a rule must not outlive its usefulness or sensibility, especially when, as in the case of the longstanding majority rule here, it was of dubious justification to begin with.

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[285]

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279. *See supra* notes 192–98 and accompanying text.

280. Falcone v. Middlesex Cty. Med. Soc., 170 A.2d 791, 799 (N.J. 1961) (emphasis added).

281. 134 N.W.2d 887 (Minn. 1965).

282. *Id.* at 889.

283. *Id.* at 891–92.

284. *Id.* at 891.

285. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

The longstanding majority rule is such a revolting rule, and an "astonishing" one—one that should be discarded entirely.[286]

The courts have a persuasive authority ready at their disposal in deciding to adopt a judicial admissions exception—the U.C.C. The U.C.C. statute of frauds, section 2-201, contains a statutory judicial admissions exception.[287] Although Article 2 only applies to contracts for the sale of goods or other "transactions in goods",[288] it can be applied persuasively to contracts outside that context.[289] Moreover, since there are at least two different statutes of frauds in all jurisdictions, there is some justification for applying them consistently—that is,

> [b]ecause statutes on the same subject are *in pari materia* and are to be construed to achieve consistent results whenever possible, . . . the general statute of frauds and the U.C.C. statute of frauds should be construed in similar ways to the extent possible. Thus, if possible, the general statute of frauds should be interpreted to include a judicial-admission exception since the U.C.C. statute of frauds has one.[290]

In the states where the courts have not yet acted, and especially in the states where the courts have firmly rejected the doctrine, a different tactic may be warranted. In these states, there is a more direct solution—legislation. Since the statute of frauds is, of course, generally a statutory provision, promulgating the judicial admissions exception directly in the statutory provisions makes eminent sense, and would avoid the delay of waiting years, maybe decades, for a court to adopt the exception in a litigated case. As noted above, the U.C.C. statute of frauds provision has the judicial admissions exception included in the statute (along with several others).[291] A few states—Iowa, Alaska, New York, and California—have already amended their statute of frauds provisions to include express statutory judicial admissions exceptions.[292] For the policy reasons discussed, non-adopting states would do well to follow their lead.

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286. Stevens, *supra* note 21, at 381.

287. U.C.C. § 2-201(3)(b) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

288. *Id.* § 2-102.

289. *See, e.g.*, Stoetzel v. Cont'l Textile Corp. of Am., 768 F.2d 217, 222 (8th Cir. 1985) ("We note, moreover, that the judicial admission theory as a basis for removing an oral contract from the Statute of Frauds has been recognized by the Missouri legislature, albeit in a different context: in sales of goods under the U.C.C., the legislature has specifically excluded from the operation of the sales article's Statute of Frauds contracts admitted by the party to be charged in his pleading, testimony or otherwise in court.") (internal quotation marks omitted).

290. *In re* Marriage of Takusagawa, 166 P.3d 440, 447 (Kan. Ct. App. 2007) (citing Newman Mem. Hosp. v. Walton Constr. Co., 149 P.3d 525, 542 (Kan. App. 2007)) (citations omitted).

291. U.C.C. § 2-201(3)(b).

292. ALASKA STAT. § 09.25.020 (1962); CAL. CIV. CODE § 1624(b)(3)(C) (2015); IOWA CODE § 622.34 (2013); N.Y. GEN. OBLIG. § 5-701(b)(3)(c) (2002).

VII. CONCLUSION

The purpose of the statute of frauds is primarily to avoid the fraudulent assertion of a contract by requiring a writing to evidence the contract in certain cases.[293] However, when a party judicially admits the existence of the contract, the evidentiary need for the writing is eliminated, and the titular purpose of the statute of frauds is vindicated.[294] Although the judicial admissions exception was at one point commonly accepted, it fell out of favor and instead the longstanding majority rule became that one could admit the contract and yet still assert the statute of frauds.[295] This rule was, as Professor Stevens has noted, an "astonishing" development and a complete abandonment of the original purpose of the statute.[296] It has been heartening, therefore, for jurisdictions to begin adopting the judicial admissions exception again, as well as for the U.C.C. to adopt it expressly in the context of Article 2 governing the sale of goods. However, as Professor Shedd observed, and as this Article has highlighted and traced to the present, such adoption has proceeded at a slow pace. It is hoped that courts in non-adopting states will proceed to adopt the exception at their earliest opportunity. Absent that, the state legislatures should act to adopt the exception. The policies of the statute of frauds, and the interests of justice, would be furthered by the adoption of the exception and recognition and enforcement of contracts that have been plainly admitted.

293. *See supra* notes 239–45 and accompanying text.
294. *See supra* notes 246–48 and accompanying text.
295. *See supra* Part III.
296. Stevens, *supra* note 21, at 381.