

Michigan Law Review

Volume 65 | Issue 2

1966

Commercial Law--A Farmer is Not a "Merchant" Under the Uniform Commercial Code--*Cook Grains, Inc. v. Fallis*

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Commercial Law Commons](#), [Common Law Commons](#), and the [Contracts Commons](#)

Recommended Citation

Michigan Law Review, *Commercial Law--A Farmer is Not a "Merchant" Under the Uniform Commercial Code--Cook Grains, Inc. v. Fallis*, 65 MICH. L. REV. 345 (1966).

Available at: <https://repository.law.umich.edu/mlr/vol65/iss2/6>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RECENT DEVELOPMENTS

COMMERCIAL LAW—A Farmer Is Not a “Merchant” Under the Uniform Commercial Code— *Cook Grains, Inc. v. Fallis**

Plaintiff grain company allegedly entered into an oral contract to purchase 5,000 bushels of soybeans from the defendant farmer. The grain company signed a written integration of the alleged oral agreement and mailed it to the farmer, with a request for his signature. The farmer neither signed the document nor attempted to communicate with the grain company and later refused to deliver the soybeans pursuant to the terms of the plaintiff's memorandum. In an action for breach of contract, the grain company contended that the farmer was precluded from relying on the statute of frauds, as incorporated in the Uniform Commercial Code,¹ by virtue of his failure to object to the company's memorandum of the agreement.² The trial court, however, allowed the statute of frauds defense, and, on appeal to the Supreme Court of Arkansas, *held*, affirmed.³ A farmer is not a “merchant” as that term is used in the Code and consequently, he is not obliged to give notice of an objection to a written confirmation of an oral agreement.

Section 2-201(1) of the Uniform Commercial Code provides that “a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . .” An exception to this general provision is made for dealings between merchants in section 2-201(2) which states that “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 . . . [the statute of frauds] against such party unless written notice of objection to its contents is given within ten days after it is received.” In giving special treatment to merchants, the Uniform Commercial Code has borrowed a concept that had its genesis in the common law.⁴ Perhaps it is for this reason that the court in the

* 395 S.W.2d 555 (Ark. 1965) [hereinafter cited as principal case].

1. UNIFORM COMMERCIAL CODE § 2-201(1) [hereinafter cited as U.C.C.]. The U.C.C. was adopted in Arkansas in 1961. ARK. STAT. ANN. § 85 (1961 Addendum).

2. U.C.C. § 2-201(2).

3. Principal case at 557.

4. The Official Comments to U.C.C. § 2-104 explain that merchant, as defined in the U.C.C., has its roots in the “law merchant” concept, which was a body of law developed in England and on the Continent to regulate the business dealings of merchants and mariners. See generally BEWES, *THE ROMANCE OF THE LAW MERCHANT* (pt. 1) (1923); SANBORN, *ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW* (1930). Special provisions for merchants were also found in the predecessor of the

principal case looked to the common law in determining whether farmers have been traditionally classified as merchants.⁵ The court, however, failed to recognize that the word "merchant" is incorporated in the Code as a term of art and it is given a specific definition which is not entirely coincident with the common law or commonly accepted definition of the term. Regardless of the wisdom of the drafters of the Code in describing a professional in business by a word which suggests to many a corner storekeeper,⁶ the decision in the principal case, by failing to examine the Code's purpose in formulating a higher standard of commercial conduct for merchants, only adds to the confusion.⁷

A merchant is defined by section 2-104 as a "person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." The official comments to that section set forth three criteria to be used in determining whether a given individual, in a particular situation, is to be held to the standards of a merchant: professionalism, special knowledge, and commercial experience.⁸ In light of these three criteria, it would seem that the court in the principal case should have concluded that the defendant farmer was a "merchant" within the meaning of section 2-201(2).⁹

The first criterion focuses on the professionalism of the individual. The writers of the official comments point out that the casual or inexperienced buyer or seller is not to be held to the standards set for the professional in business.¹⁰ That the defendant was a profes-

U.C.C., the Uniform Sales Act. *E.g.*, UNIFORM SALES ACT §§ 15(1), 15(2), 16(c). See generally Trisdale, *Impact of the Uniform Commercial Code on the Law of Contracts*, 39 N.D.L. REV. 7 (1963).

5. Principal case at 557. Quoting from 27 WORDS AND PHRASES 136 (1961), the court cited *In re Ragsdale*, 20 Fed. Cas. 175 (No. 11530) (D. Ind. 1876) and *Dyett v. Letcher*, 29 Ky. (6 J.J. Marshall) 541, 543 (1831).

6. Judicial decisions which have attempted to give the term merchant its ordinary meaning reflect the connotations commonly associated with that term. *E.g.*, *Seeley v. Helvering*, 77 F.2d 323, 324 (2d Cir. 1935) ("He is a middleman in distributing the goods"); *Magnolia Petroleum Co. v. City of Broken Bow*, 184 Okla. 362, 363, 87 P.2d 319, 321 (1939) ("A merchant is one who buys to sell, or buys and sells, goods or merchandise in a store or shop"); *White v. Commonwealth*, 78 Va. 484, 485 (1884) ("[A merchant is] a dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery").

7. See Hall, *Article 2—Sales—"From Statutes to Contract"?*, 1952 WIS. L. REV. 209, 212; Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 431 (1950).

8. U.C.C. § 2-104, comments 1 and 2.

9. The commentators that have considered the farmer-merchant question have generally agreed that a farmer can be a merchant under the Code. However, they have not specified the particular merchant provisions that should be applicable to farmers, nor have they explained which aspect of the merchant definition encompasses farmers. See Hall, *supra* note 7, at 212; Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROB. 3, 15 n.50 (1951); Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L. REV. 603, 618 & n.20 (1950).

10. U.C.C. § 2-104, comment 1.

sional as opposed to a casual or inexperienced seller of farm products is evidenced by the extent of his farming operations. The defendant testified that he was born and raised on a farm, and that in 1960 he had begun farming a 550 acre tract, 325 acres of which were used for growing soybeans. The value of one year's soybean crop, which covered only sixty per cent of his available acreage, was about \$12,700.¹¹ On the basis of this evidence, the conclusion seems inescapable that the farmer was a professional in the growing and marketing of soybeans and was, therefore, the type of individual with which the merchant provisions of the Code are concerned. Although the size of the defendant's operation warranted the conclusion that he was a professional, one who has a small land holding and who markets his products less frequently would not automatically be adjudicated a merchant. A case by case determination¹² of which particular farmers are to be deemed merchants is in no way inconsistent with the Code's goal of uniformity¹³—all those who are found to be merchants are treated equally, but inclusion in the class is to be determined upon an examination of individual situations.

The second criterion focuses on the reasonableness of charging a given individual with the specialized knowledge of the goods or practices involved in his particular line of trade.¹⁴ Actual knowledge is not requisite; it is sufficient that the individual merely create the impression of familiarity with the particular goods or practices. It should also be noted that the drafters of the Code did not intend to distinguish the marketing of crops from the sale of other products that are more readily associated with the generic term "goods." Indeed, the Code specifically provides that growing crops are within the definition of the general term.¹⁵ The defendant's experience in farming and the size of his operation should warrant the conclusion that he did possess the specialized knowledge of both the goods and the practices of the soybean market so as to make him a merchant in this respect.

Finally, to be a merchant, it is necessary that the individual have some expertise with regard to the particular trade practice in question.¹⁶ Again, the individual need not actually have acquired this expertise, but only be in a position where it would be reasonable to assume that he had acquired it. In the principal case, the practice at issue was the answering of a memorandum received in the mail confirming an oral contract. The writers of the official comments to

11. Letter From Elton A. Rieves, III, to the *Michigan Law Review*, June 6, 1966.

12. See generally Comments to U.C.C. § 2-104.

13. U.C.C. § 1-102(2)(c).

14. U.C.C. § 2-104(1).

15. U.C.C. § 2-105(1). See also U.C.C. § 2-107(2).

16. U.C.C. § 2-104, comment 2, states: "[A] lawyer or bank president buying fishing tackle for his own use is not a merchant." This comment suggests that a person can be a merchant with respect to some transactions and not others.

section 2-104 evidently believed that almost everyone has sufficient business expertise in the practice of answering mail to qualify as a merchant with respect to this trade practice:

Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are nonspecialized business practices such as answering mail.¹⁷

It is evident from the above, that, concerning the exception to the use of the defense of the statute of frauds, the term merchant was intended to be interpreted broadly. The purpose underlying this exception was to make persons participating in business transactions responsible for informing other parties of their intentions regarding contracts. It would not seem too great a burden upon the farmer in the principal case to require him simply to answer his mail. Certainly, if he enters the market each year to sell his products, he can and should be held to the same standard of conduct applied to others conducting their business in that market. As the comment quoted above suggests, a given farmer may be considered a merchant as to those practices of which he has specialized knowledge or some expertise, without being held to the standards of a merchant in other business dealings with which he is unfamiliar. In the principal case, the court's categorical holding that farmers are not merchants, went much farther than was necessary to decide the issue before it—whether the farmer was a merchant regarding the practice of answering mail—and, in so holding, the court apparently overlooked the intended flexibility of the merchant provisions incorporated in the Code.¹⁸

As suggested above, almost every individual in business would be considered a merchant with respect to those Code sections which deal with the statute of frauds,¹⁹ firm offers,²⁰ confirmatory memoranda,²¹ and contract modification²² because these involve simple, everyday business practices. On the other hand, another group of provisions—those dealing with the warranty of merchantability,²³

17. U.C.C. § 2-104, comment 2.

18. See U.C.C. § 2-104, comment 2.

19. U.C.C. § 2-201.

20. U.C.C. § 2-205.

21. U.C.C. § 2-207.

22. U.C.C. § 2-209.

23. U.C.C. § 2-314.

the retention of possession by a merchant seller,²⁴ and the entrusting of possession to a merchant who deals in goods of the kind²⁵—requires a professional status as to particular kinds of goods, and this would suggest that, with respect to these situations, a more restrictive definition of the term “merchant”—one limited in its application to those who, in the normal course of their business activity, deal in the particular goods in question—should be employed. This latter group of provisions bears out the fact that a farmer can be a merchant in some situations and not in others. While it would appear that concerning the sections dealing with merchantability and retention of possession a farmer should be considered a merchant if the transaction in question involves farm products of the type he usually raises,²⁶ he should not be deemed a merchant with respect to situations involving section 2-403(2). Section 2-403(2) provides that a “merchant” who is entrusted with goods of the type in which he deals can transfer all rights of the entruster to a buyer in the ordinary course of business. However, section 9-307(1) expressly excepts a farmer selling farm products from those persons who may sell goods to a buyer in the ordinary course of business free of any security interest created by the seller. That is, a farmer cannot extinguish a valid lien on crops he is marketing by the mere act of sale. If a farmer were considered a merchant under section 2-403(2), it would seem that, contrary to the language of section 9-307(1), he could invalidate a security interest in farm products entrusted to him; a possible conflict between these provisions can be avoided by denying the farmer merchant status under section 2-403(2).²⁷

A third group of Code provisions—those dealing with general contractual duties—applies specifically to persons who are merchants because they have special knowledge of either the commercial practices or the particular goods involved.²⁸ A farmer could also be

24. U.C.C. § 2-402(2).

25. U.C.C. § 2-403(2).

26. For purposes of these sections, merchant status should only be attributed to a farmer who is experienced in the raising of the particular crop in question. That is, a wheat farmer raising corn for the first time should not be held to have warranted the merchantability of the latter crop, nor should a dairy farmer, who stores grain for a neighbor be deemed to have been entrusted with possession of goods which others might think he has authority to sell.

27. In order to avoid possible conflict and confusion, the Iowa legislature has amended § 2-403(2). The following exception has been included after the language quoted in the text:

However, any entrusting of farm products to a person engaged in farming operations shall not give the farmer the power to transfer all rights of the entruster to a buyer in the ordinary course of business if the entruster perfects a security interest as provided in Article 9.

IOWA CODE ANN. § 554.2403(2) (Supp. 1965). Thus, Iowa has expressly excepted farmers from the operation of this particular “merchant” provision, in an attempt to make more explicit what was obviously intended by the drafters of the Code.

28. This group includes § 2-103(1)(b), which provides that in the case of a merchant, “good faith” includes observance of reasonable commercial standards of fair

considered a merchant with respect to these provisions because of either his experience in the commercial marketing of farm products or because of the specialized knowledge he has of the products themselves.

Because the court in the principal case placed unwarranted reliance upon common law authority and failed to consider the purpose underlying the particular Code provision in question, it is doubtful that its decision will be given much weight outside the state of Arkansas.²⁹ The decision, however, is evidence of the deep-rooted feeling of the judiciary, primarily in agricultural states, to offer protection to the proverbial "tillers of the soil." This attitude is not surprising, for the Code itself has special provisions which offer a measure of protection to the farmer.³⁰ However, to decide that the farmer in the principal case was a merchant and as such is denied the defense of the statute of frauds would not preclude a judgment in his favor. The grain company would still have the burden of proving both the existence of the oral agreement and its terms.³¹ Indeed, to allow the defense in this particular situation would be to permit the statute of frauds to be used as an instrument of fraud. Assuming that an oral agreement had actually been made and that the written integration of that agreement signed by the grain company had been received by the farmer, the farmer would be in a position to speculate on a contract to which the grain company was bound from the moment it mailed the memorandum.³² If the market price fell below the contract price, the farmer could produce the paper and hold the grain company to its contract, whereas if the market price rose above the contract price, the farmer could deny the existence of the contract and sell his crop on the open market. The statute of frauds was never intended to sanction the repudiation of promises actually made.³³

Because of the importance of agriculture to our economy, to deny that a farmer may be considered a merchant is to weaken con-

dealing in the trade; §§ 2-327(1)(c), 2-603, 2-605, dealing generally with the responsibilities of merchant buyers to follow sellers' instructions; § 2-509, concerning risk of loss; and § 2-609, providing adequate assurance of performance.

29. Although to date forty-seven states have adopted the U.C.C., the principal case is the first reported decision examining the farmer-merchant question.

30. See U.C.C. § 9-204(4)(a).

31. U.C.C. § 2-201, comment 3.

32. U.C.C. § 2-201(1), makes it clear that the signed memorandum mailed to the defendant bound the plaintiff contractually to the terms it contained. It appears that the reason the defendant did not desire to hold the plaintiff to this contract, and tried to avoid being bound to its terms himself, is that the price called for was \$2.54 per bushel which was considerably below the market price for soybeans at the time specified for delivery. The defendant could, therefore, sell his soybeans more profitably elsewhere.

33. For a general discussion of the Statute of Frauds in the U.C.C., see Corbin, *The Uniform Commercial Code—Sales; Should it be Enacted?*, 59 YALE L.J. 821 (1950).

siderably the Uniform Commercial Code as an instrument which regulates the commercial affairs of the country. There does not appear to be any reason why the contractual dealings surrounding the marketing of farm products should not be regulated by the same laws that apply to other sales when all of the parties involved are experienced in the type of transaction taking place.
