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# Contracts -- Offer and Counter-Offer Under the Uniform Commercial Code

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## NOTES AND COMMENTS

### Contracts—Offer and Counter-Offer Under the Uniform Commercial Code

In *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*,<sup>1</sup> plaintiff, a corporation doing business in New York, mailed a written order to defendant requesting emulsion for use as cellophane adhesive in "wet-pack spinach bags." Upon receiving plaintiff's order, defendant, a Massachusetts manufacturer, mailed an acknowledgment on which was printed in conspicuous type, "All goods sold without warranties, express or implied . . ." The goods were shipped the following day. When vegetable bags produced with this emulsion failed to adhere, plaintiff brought suit for breach of implied warranty. Defendant contended that the contract expressly negated any warranties. The United States District Court for the District of Massachusetts directed a verdict for the defendant, and the First Circuit Court of Appeals affirmed holding section 2-207 of the Uniform Commercial Code,<sup>2</sup> as adopted by Massachusetts,<sup>3</sup> controlling.

The common-law rules for the formation of an informal contract require that all parties manifest assent to its terms.<sup>4</sup> An offer is a sufficient manifestation only when its terms are such that the promises and performances to be rendered by the parties are reasonably cer-

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<sup>1</sup> 297 F.2d 497 (1st Cir. 1962).

<sup>2</sup> AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE [hereinafter cited as U.C.C.].

<sup>3</sup> MASS. GEN. LAWS ANN. ch. 106, § 2-207 (1958) provides: "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection is given within a reasonable time after notice of them is received. (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale even though the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

<sup>4</sup> *E.g.*, *Dodds v. St. Louis Union Trust Co.*, 205 N.C. 153, 170 S.E. 652 (1933). See generally RESTATEMENT, CONTRACTS § 20 (1932); 1 WILLISTON, CONTRACTS § 18 (3rd ed. 1957).

tain.<sup>5</sup> An acceptance is sufficient only if it complies exactly with the requirements of the offer;<sup>6</sup> otherwise it is a counter-offer.<sup>7</sup>

The drafters of the Uniform Commercial Code sought to revise the law of commercial sales transactions to conform with accepted commercial practices.<sup>8</sup> Accordingly, there are no comparable requirements of certainty in the provisions of the Code dealing directly with the formation of a contract for the sale of goods.<sup>9</sup> Such a contract "may be made in any manner sufficient to show agreement including conduct by both parties which recognizes the existence of such a contract,"<sup>10</sup> and agreement may be shown by establishing the existence of a bargain between parties from their language or "by implication from other circumstances including course of dealing or usage of trade or course of performance."<sup>11</sup> Once the existence of an agreement is established, the problem is to determine the legal obligation which results.<sup>12</sup>

Section 2-207 is one of the sections which aids in determining the extent of this "legal obligation." Subsection one provides that the formation of a contract is not prevented by the inclusion of additional terms in a definite expression of acceptance or a written confirmation, unless acceptance is made expressly conditional on inclusion of the additional or different terms. Subsection two provides that these additional terms are to be construed as proposals for addition to the contract and will not become a part thereof if their inclusion would materially alter the obligations of the parties.

<sup>5</sup> *E.g.*, Yeager v. Dobbins, 252 N.C. 824, 114 S.E.2d 820 (1960). See generally RESTATEMENT, CONTRACTS § 32 (1932); 1 CORBIN, CONTRACTS § 22 (1950); 1 WILLISTON, *op. cit. supra* note 4, § 24.

<sup>6</sup> *E.g.*, Standard Sand & Gravel Co. v. McClay, 191 N.C. 313, 131 S.E. 754 (1926). See generally RESTATEMENT, CONTRACTS § 59 (1932); 1 CORBIN, *op. cit. supra* note 5, § 82; 1 WILLISTON, *op. cit. supra* note 4, § 77.

<sup>7</sup> *E.g.*, Northeastern Constr. Co. v. City of Winston-Salem, 83 F.2d 57 (4th Cir. 1936). See generally RESTATEMENT, CONTRACTS §§ 38, 60 (1932).

<sup>8</sup> "[T]he draftsmen of the Uniform Commercial Code . . . took the sensible position that no simple contract rule should control a sales contract unless it could be demonstrated that such a rule would be useful and efficacious in the commercial world of sales." HAWKLAND, SALES AND BULK SALES 1 (2d ed. 1958). See also Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821 (1950) (approving the validity of the drafters' premise); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950) (criticizing the validity of the premise).

<sup>9</sup> The provisions of the Code dealing directly with the formation of a contract for the sale of goods are sections 2-201 to 2-210.

<sup>10</sup> U.C.C. § 2-204(1).

<sup>11</sup> U.C.C. § 1-201(3).

<sup>12</sup> U.C.C. § 1-201(11).

In the principal case, plaintiff sought to invoke this section by urging that defendant accepted the terms of the order and thereby completed the agreement when it mailed the acknowledgment; that the attempted disclaimer of warranties was a proposal for addition to the contract materially altering the terms; and that this proposed addition never became part of the contract because express assent to its inclusion had never been given. The court found section 2-207 applicable but construed it to mean that "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an 'acceptance . . . expressly . . . conditional' on assent to the additional . . . terms." <sup>13</sup> Thus, if the additional terms in the response would materially alter the obligations of the parties there is no contract. The court pointed out that if the offeree's reply sets out conditions burdensome only to the offeror, and that if such a reply consummates a contract, there is no reason for the offeror to agree to the additional terms. It further concluded that if there is no reason for the offeror to accept such terms, there is no reason for the offeree to propose them and in the event he does, it must be because he does not intend to make a contract on the original terms proposed.

The court, therefore, limits section 2-207 to conform with results <sup>14</sup> commonly reached under common-law rules that an acceptance may include requests for addition to the contract, <sup>15</sup> and that silence may be a manifestation of assent if previous dealings or other circumstances are such that it would reasonably be interpreted as having that meaning. <sup>16</sup> An analysis of two earlier New York cases <sup>17</sup> illus-

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<sup>13</sup> 297 F.2d at 500.

<sup>14</sup> See a collection of these results in 34 N.C.L. REV. 225 (1956).

<sup>15</sup> Carver v. Britt, 241 N.C. 538, 85 S.E.2d 888 (1955). See generally RESTATEMENT, CONTRACTS § 62 (1932).

<sup>16</sup> Vaughan's Seed Store, Inc. v. Morris April & Bros., 123 N.J.L. 26, 7 A.2d 868 (1939). See generally RESTATEMENT, CONTRACTS § 72(1)(c) (1932). The court agreed that section 2-207 changed the common law, but only to the limited extent of modifying "the strict principle that a response not precisely in accordance with the offer was a rejection and a counter-offer." 297 F.2d at 500.

<sup>17</sup> Nordic Trading Co. v. Imperial Forwarding Co., 197 Misc. 27, 96 N.Y.S.2d 745 (Spec. Term, N.Y.C., 1949) *aff'd mem.*, 197 Misc. 1042, 98 N.Y.S.2d 412 (Sup. Ct. 1950); Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915). See also Catz Am. Sales Corp. v. Holleb & Co., 272 App. Div. 689, 74 N.Y.S.2d 485 (1947), *aff'd* 298 N.Y. 504, 80 N.E.2d 656 (1948). However, the problems in these cases are not exclusive to New York. See Gettier-Montanye, Inc. v. Davidson Granite Co., 75 Ga. App. 377, 43 S.E.2d 716 (1947); Schneider Constr. Co. v. Fraser Brick & Tile Co., 297 S.W.2d 298 (Tex. 1957); W. S. Hoge & Bro. v. Prince William Co-op. Exch., 141 Va. 676, 126 S.E. 687 (1925).

trates that though the common-law rules may prevent the enforcement of unintended contracts, they may also defeat the legal effectiveness of certain commercial bargains by which the parties have intended to impose binding obligations.

In *Nordic Trading Co. v. Imperial Forwarding Co.*<sup>18</sup> defendant sent a letter to plaintiff offering to purchase goods. Plaintiff confirmed on an order blank that contained the following printed provisions: "All orders are booked subject to availability of goods" and "We reserve the right to make part shipments against this order." Defendant objected to these printed clauses and refused to receive the goods even after assurance from plaintiff that the printed clauses were never intended to become part of the contract. In granting defendant's motion for judgment on the pleadings in an action for breach of contract, the court held that the writings of the parties had never manifested assent to the same terms. The fact that plaintiff did not intend the printed clauses to be incorporated in the contract made no difference because if the situation had been reversed, and if defendant had sued plaintiff, the latter could have relied on either clause as a defense.<sup>19</sup> Moreover, the Statute of Frauds prevented the enforcement of any agreement contrary to the terms of the order blank that might have been shown by the admission of oral testimony.

In *Poel v. Brunswick-Balke-Collender Co.*<sup>20</sup> defendant's agent made an oral offer to plaintiff, and plaintiff accepted in writing. Two days later, the agent sent one of defendant's standard order forms to plaintiff with the exact terms of the plaintiff's acceptance written on its face; however, one of the printed provisions of the standard order form required that acceptance of the order be acknowledged. Plaintiff did not acknowledge, and shortly before shipments were to begin, plaintiff received a letter from defendant cancelling the agreement. In an action for breach of contract, the court held that the order form was a counter-offer because it contained an

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<sup>18</sup> *Supra*, note 17.

<sup>19</sup> Whatever ambiguity existed did not concern the meaning of the clauses, but rather the intent of the parties. In interpreting contracts courts give language its natural and appropriate meaning and will not admit evidence of what the parties may have thought the meaning to be. See *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541 (9th Cir. 1949); *Richardson v. Travelers Ins. Co.*, 171 F.2d 699 (9th Cir. 1948); *Campbell v. Rockefeller*, 134 Conn. 585, 59 A.2d 524 (1948); *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N.E. 263 (1912).

<sup>20</sup> 216 N.Y. 310, 110 N.E. 619 (1915).

additional term requiring acknowledgment and that it was not for the court to say that such an addition was not material to the defendant. The court further said that plaintiff could not rely on defendant's cancellation letter as a memorandum of an oral agreement because such a contract would not have come into existence until plaintiff acknowledged, which it failed to do.

The decision in both cases required an interpretation of printed clauses which were probably not considered part of the bargain by either party at the time of attempted consummation of the contract. Moreover, neither court was concerned with enforcing the true intent of the parties. They purported to give effect to the manifestations of the parties while at the same time excluding evidence that might have shown the terms to which the parties actually assented. Such interpretations are based on the reasoning that when parties have reduced their intentions to writing, those intentions are going to be most accurately reflected by the writing itself.<sup>21</sup> Although this reasoning may be valid in most situations,<sup>22</sup> it is questionable whether it is applicable to the accepted commercial practice of using forms. These forms are drafted to protect the parties in any situation which might arise and do not necessarily reflect the intentions of the parties in any particular transaction. In such a situation agreements reached either orally or by informal correspondence are apt to reflect the intentions of the parties more accurately than forms containing standard printed clauses.

The drafters of the Uniform Commercial Code intended the provisions of section 2-207 to determine the effect of these printed clauses.<sup>23</sup> If they involve no element of unreasonable surprise and if notice of objection to their inclusion is not seasonably given, the clauses will be incorporated in the contract.<sup>24</sup> Conversely, if their incorporation would result in surprise or hardship to the other party, they will not be incorporated unless expressly agreed to.<sup>25</sup> A party using forms may protect himself by providing in the form that the expression of acceptance is not effective unless the additional or different terms are assented to.<sup>26</sup>

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<sup>21</sup> *E.g.*, *Neal v. Marrone*, 239 N.C. 73, 79 S.E.2d 239 (1953).

<sup>22</sup> Under the Code consistent additional terms may not be proven if the court finds that the writing was intended as a complete and exclusive statement of all the terms. U.C.C. § 2-202, comment 3.

<sup>23</sup> See U.C.C. § 2-207, comment 1.

<sup>24</sup> See U.C.C. § 2-207, comment 5.

<sup>25</sup> See U.C.C. § 2-207, comment 4.

<sup>26</sup> See U.C.C. § 2-207, comment 2.

The court in the principal case found the printed clauses in the acknowledgment to be the controlling expression of defendant's intent. By doing so, however, it ignores comment two of section 2-207 which prohibits such a finding when there is an agreement in existence between the parties at the time the acknowledgment is dispatched, unless the acknowledgment states that its expression of acceptance will not be effective until assent is given to the additional or different terms.<sup>27</sup>

At the end of 1960, the Uniform Commercial Code had been adopted in only six states;<sup>28</sup> since then, it has been enacted in twelve more.<sup>29</sup> Consequently, litigation concerning the interpretation of the Code is bound to increase. However, until considerable litigation has ensued, the only mutually applicable authority courts will have in interpreting it will be the comments which the drafters have appended to the various sections. Unless courts explain their decisions in terms of these comments, the uniformity of the law of commercial transactions which the Code contemplates<sup>30</sup> will not be realized.

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#### Criminal Law—Procedure—Indictments—Principal Includes Accessory Before the Fact as Lesser Offense

The common law defines a principal in crime as a person who actually participates in the commission of a felony.<sup>1</sup> A principal in the first degree commits the crime either by his own hand or by the hand of his agent, and such principal must be actually or constructively present at the act. A principal in the second degree is present, actually or constructively, and aids or abets in the commission of

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<sup>27</sup> The result reached by the court may have been contemplated by comment 2, but this is impossible to determine since the court did not consider the possibility that the relationship of the parties and their prior dealings indicated that an agreement may have been reached at the time the acknowledgment was dispatched.

<sup>28</sup> Connecticut, Kentucky, Massachusetts, New Hampshire, Pennsylvania and Rhode Island.

<sup>29</sup> Alaska, Arkansas, Georgia, Illinois, Michigan, New Jersey, New York, Ohio, Oklahoma, Oregon and Wyoming.

<sup>30</sup> Section 1-102(2) provides: "Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."

<sup>1</sup> There are no accessories to treason and misdemeanors at common law. I WHARTON, CRIMINAL LAW AND PROCEDURE § 102 (1957).