NONCONFORMING ACCEPTANCES UNDER SECTION 2-207 OF THE UNIFORM COMMERCIAL CODE: AN END TO THE BATTLE OF THE FORMS

Section 2-207 of the Uniform Commercial Code represents an attempt to resolve one of the problems engendered by the widespread use of printed forms in business negotiations. Since the forms employed in negotiations will normally contain terms that are advantageous to the party printing them, almost inevitably there will be some discrepancy between the terms on the offeree's form and those of the offeror's. As a matter of commercial practice, these discrepancies are usually either ignored by the parties or settled by them during the course of performance so that at a certain stage in the negotiations, the discrepancies notwithstanding, it becomes the expectation of the parties that they are legally bound and that the deal is "closed." Where litigation arises over the contract, however, one of the parties is apt to find to his chagrin that because of the common-law rule that an acceptance varying the terms of the offer is a counter-offer rather than an acceptance, no legal obligations

1 "Section 2-207. Additional Terms in Acceptance or Confirmation. (1) A definite and seasonable 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 to them has already been given or 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 although 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."


3 See Resnick, supra note 2, at 401, for an account of a typical "battle of forms."

4 1 CORBIN, CONTRACTS § 82 (1950); RESTATEMENT, CONTRACTS §§ 58, 59 (1932); 1 WILLISTON, CONTRACTS §§ 72, 73, 77 (3d ed. 1957). For limitations on this general rule, see 1 CORBIN § 84; RESTATEMENT, CONTRACTS § 62 (1932); 1 WILLISTON § 79 (3d ed. 1957); which provide that where acceptance is not made to depend on assent to the changed or added terms (i.e., where the additions are simply proposals for additional terms), it is not vitiated by the variances.

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have been created. The draftsmen of section 2-207 expressly undertook to remove the dichotomy between law and practice in this narrow area so that a transaction might be closed in law at the same time as it would be in "commercial understanding."

In considering section 2-207, it must be pointed out that the section makes a distinction between the case where the communications are merely confirmatory memoranda and the case where the communications represent the offer and the purported acceptance. In the former, the parties have in fact made a contract, and the only issue before the court is the determination of which of the terms on the confirmations are to be incorporated into the body of the contract. Section 2-207 provides a sufficient mechanism to expedite the treatment of such terms, and it would seem that a court should encounter

5 The irony in the situation would of course arise from the fact that a party's real reason for wanting to escape liability would usually be completely unrelated to the defect in the acceptance. Thus a party who wished to be free of a contract because of a sharp shift in the market could avoid legal obligation on the technicality that the acceptance requested an acknowledgment and was therefore a counter-offer. See Poel v. Brunswick-Balke-Collender, 216 N.Y. 310, 110 N.E. 619 (1915), and the discussion of the market situation surrounding the case in Fuller, Basic Contract Law 178 (1947). See also, e.g., In re Marcalus Mfg. Co., 120 F. Supp. 784 (D.N.J. 1954) (request for acknowledgment in acceptance renders it a counter-offer); Whitelaw v. Brady, 3 Ill. 2d 583, 121 N.E.2d 785 (1954) (where offer leaves date of installment payments open, "acceptance" which filled in the dates held not to operate as acceptance); New York Overseas Co. v. China, Japan & So. Am. Trading Co., 118 Misc. 744, 194 N.Y. Supp. 552 (Sup. Ct. 1922) (where acceptance provided for paper to "match sample as closely as possible," held no contract because offer requested paper to "conform with sample"); Cohn v. Penn Beverage Co., 313 Pa. 349, 169 Atl. 768 (1934) (held no contract because acceptance stated payment of ten per cent cash, and in absence of statement offer is presumed to be for cash). In some instances, the courts have seen fit to mitigate the harshness of the rule. See, e.g., Podany v. Erickson, 235 Minn. 36, 49 N.W.2d 193 (1951) (acceptance effective despite request for abstract); Valashinas v. Konuto, 308 N.Y. 233, 124 N.E.2d 300 (1954) (attempt by offeree to set approximate closing date did not make acceptance conditional); Orr v. Doubleday, Page & Co., 223 N.Y. 334, 119 N.E. 552 (1918) (request for acknowledgment held not essential to operation of agreement and therefore does not vitiate acceptance); cf. Celanese Corp. of America v. John Clark Indus., 214 F.2d 551 (5th Cir. 1954). These cases are, of course, in the minority.

6 Section 2-207, comment 2: "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained either in the writing intended to close the deal or in a later confirmation falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional terms."

7 Section 2-207, comment 1: "This section is intended to deal with two typical situations. The one is where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal acknowledgments or memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is one in which a wire or letter expressed and intended as the closing of confirmation of an agreement adds further minor suggestions such as 'ship by Tuesday,' 'rush,' 'ship draft against bill of lading inspection allowed,' or the like."

8 Section 2-207(2) provides the same mechanism whether the variant terms appear on an acceptance or a confirmatory memorandum insofar as "material" variances will be included in the contract only in the event of express awareness on the part of the other party, see § 2-207, comments 3 and 4, and "immaterial" variances will be included unless objection
little or no difficulty in its application in this context.\textsuperscript{9} The second situation, however, occurs where an offer has been made, typically a purchase order, and the offeree’s acknowledgment or acceptance contains additional or inconsistent terms. The problem here becomes substantially more complex since before the court can consider the variant terms it must first make the fundamental inquiry into whether or not the circumstances indicate that the parties have intended to be legally bound at all. By virtue of section 2-207, the court can no longer rest its solution of the problem on the mere presence of the variant terms, and it must therefore inquire into the history of the transaction and the surrounding commercial environment in order to ascertain the parties’ intent. The First Circuit opinion in \textit{Roto-Lith, Ltd. v. F. P. Bartlett & Co.}\textsuperscript{10} gives some indication of the judicially created difficulties in this inquiry.

\section*{I. The Roto-Lith Case}

The plaintiff-buyer, a manufacturer of cellophane bags for the packaging of vegetables, placed an order with the defendant-seller for the purchase of a quantity of cellophane adhesive manufactured by the latter. The seller’s “acceptance”\textsuperscript{11} of the order was on a printed form providing, in boldface type, that: “All goods sold without warranties, express or implied, and subject to the terms on the reverse side.”\textsuperscript{12} Included among the terms on the back of the form was the statement: “If these terms are not acceptable, Buyer must so notify Seller at once.”\textsuperscript{13} The emulsion was shipped thereafter and was received and paid for by the buyer shortly after the buyer was presumed as a matter of law to have received the acceptance.\textsuperscript{14} At no time did the buyer

to them is reasonably given, see § 2-207, comment 5. In the case of written confirmations, a conflict in terms is considered to satisfy the requirement of objection. The conflicting terms, then, do not become part of the contract. See § 2-207, comment 6. The text of this comment is set out in note 66 \textit{infra}. It appears that the previous inability of courts to resolve the problem of the disposition of the additional terms in a manner consistent with the classic “meeting of the minds” concept was a serious impediment in their attempts to reach commercially sound decisions. See, \textit{e.g.}, Nundy v. Matthews, 41 N.Y. (34 Hun) 74 (1884); Hutchinson Baking Co. v. Marvell, 270 Pa. 378, 113 Atl. 433 (1921); \textit{Restatement, Contracts} § 59, comment (1932).

\textsuperscript{9} Problems might arise in determining whether a variance is “material” or “immaterial” and in determining whether terms are actually in conflict or rather are compatible, though slightly contradictory.

\textsuperscript{10} 297 F.2d 497 (1st Cir. 1962).

\textsuperscript{11} The seller actually sent two documents, an acknowledgment and an invoice, which were identical. The acknowledgment would appear to be a “written confirmation” of the type contemplated by § 2-207(1). \textit{But see} Note, 57 Nw. U. L. Rev. 477 (1962) which makes the doubtful contention that the acknowledgment was not an acceptance because it did not use specific language of acceptance.

\textsuperscript{12} 297 F.2d at 498.

\textsuperscript{13} \textit{Id.} at 499.

\textsuperscript{14} The plaintiff-buyer’s principal witness testified that he did not know whether the acknowledgment had been received or not. The court held there was thus an unrebutted presumption of receipt. \textit{Id.} at 498.
either object to the terms contained in the acceptance or indicate his assent to them. Subsequently the emulsion failed to adhere and the buyer instituted an action for damages. The district court directed a verdict for the seller and an appeal was taken to the First Circuit.

The buyer's position, insofar as it appears in the text of the opinion, was that under section 2-207, comment 4, the disclaimer of warranty constituted a "material" variance; that the seller's communication effected a completed agreement without the disclaimer; and that when the buyer failed expressly to assent the disclaimer never became part of the contract. While conceding that the disclaimer was a "material" variance of the type contemplated by comment 4, the Court of Appeals rejected the remainder of the buyer's argument. Characterizing section 2-207 as an attempt "to modify the strict principle that a response not precisely in accordance with the offer was a rejection and a counter-offer," the court said it was nonetheless inapplicable to the facts of this case. The disclaimer was held sufficient to make the communication a counter-offer, and the buyer was held to have accepted this counter-offer when he received, paid for and used the emulsion. The court also observed that it would be an "absurdity" to apply section 2-207 where the additional conditions are "unilaterally burdensome upon the offeror" inasmuch as no offeror would ever assent to such conditions, and that under such circumstances the court would read the acceptance as being "expressly conditional" within the meaning of section 2-207(1).

15 See Note, 111 U. Pa. L. Rev. 132, 135 (1962), which takes the position that since the buyer's action was for consequential damages (Brief for Appellant, pp. 15-17), the case could have been decided on the ground that the response contained a limitation on liability, 297 F.2d at 499. However, this contention rests on the view that the limitation on liability was an "immaterial" variance. There is nothing in the Code to indicate that a limitation on liability is "immaterial" and it is highly probable that in fact most businessmen would consider it rather "material."

16 Section 2-207, comment 4: "Examples of typical clauses which would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches. . . ."

17 If the buyer was correct in his premise that the disclaimer was merely a "material" variance from the offer, then his conclusion was correct since the case would then fall squarely under § 2-207(2) and comments 3 and 4.

18 297 F.2d at 499.

19 Id. at 500.

20 "If plaintiff's contention is correct that a reply to an offer stating additional conditions unilaterally burdensome upon the offeror is a binding acceptance of the original offer, plus simply a proposal for the additional conditions, the statute would lead to an absurdity. Obviously no offeror will subsequently assent to such conditions." Ibid.

21 "To give the statute a practical construction we must hold 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.'" Ibid. The text of § 2-207(1) is set out in note 1 supra.
II. Sections 2-207 and 2-204: The Requirement of "Definite" Acceptance

Regardless of whether the outcome of the litigation is considered commercially sound, it would appear that the court's rationale for the decision is wholly unsatisfactory. To the extent that the Roto-Lith opinion may be read as suggesting that a unilaterally burdensome provision is equivalent to an express condition within the meaning of section 2-207(1), it finds little support in the language or history of the statute. From a purely semantic standpoint, a "unilaterally burdensome provision" and an "express condition" are not equivalent, and equating them contravenes explicit legislative direction. The phrase "expressly made conditional" was not originally present in the section, but it was included among the revisions proposed by the Editorial Board in 1956. The reason for the change was "to express more clearly what was intended." It was obviously an attempt to enlarge upon the freedom afforded the offeree in the 1952 text of the section. On the Board's recommendation, it was incorporated in the 1957 Official Draft and was retained unaltered in the 1958 Official Draft, the present version of the Uniform Commercial Code. In view of the careful consideration the draftsmen evidently gave this phrase, and more importantly, in view of the fact that allowing the offeree more freedom than it affords would in effect vitiate section 2-207, it would appear that literal application of the "expressly conditional" clause is the broadest definition of the offeree's freedom that should be demanded of the courts.

It appears that the difficulty which the Roto-Lith court experienced in its attempt to apply section 2-207 resulted in large part from a misunderstanding.

Section 2-207 of the 1952 Official Draft of the Uniform Commercial Code reads as follows:

"(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.
(2) The additional terms are to be construed as proposals for addition to the contract and between merchants become part of the contract unless they materially alter it or notification of objection to them has already been given or is given within a reasonable time."


Ibid.


This would be particularly true if the "unilaterally burdensome" standard promulgated by the Roto-Lith court were to be adopted by the courts. It is extremely unlikely that a businessman will have forms printed without including a few provisions that ask concessions of the offeror. On the other hand, contrary to the view of the Roto-Lith court there are numerous business reasons why an offeror might voluntarily assent to such "burdensome" terms. A desire to get goods quickly and avoid "red tape," hopes of doing business with the offeree again, and a desire to enhance one's business reputation as a fair man are among the more obvious motivations.
of the function that section is to serve in the resolution of the offer-acceptance problem. One of the primary characteristics of the Code is a constant interdependence among its various sections. Therefore, if a particular section is removed from its proper context and is considered without reference to other relevant sections, a substantial opportunity for distortion and misapplication arises. The court's treatment of section 2-207 presents a clear example of the danger inherent in such categorization. For, if section 2-207 is to be controlling in a particular transaction, it must first be found that the communication of the offeree was a "definite" acceptance,\(^\text{27}\) that he in fact intended to be legally bound. In the determination of this question, section 2-204\(^\text{28}\) is controlling and section 2-207 is of only corollary significance. The latter section only provides that the mere inclusion of additional or different terms does not render ineffective an otherwise valid acceptance. Section 2-207 is simply a device to aid the courts in the basic section 2-204 determination of whether or not the parties have reached an agreement. Moreover, regardless of the form of the expression of acceptance, the court should also ascertain whether the offeree engaged in any other activity that might constitute an acceptance under section 2-206.\(^\text{29}\) Where such conduct is present, section 2-207 becomes irrelevant to the issue of acceptance.\(^\text{30}\) The \textit{Roto-Lith} court considered neither

\(^{27}\) The text of § 2-207(1) is set out in note 1 supra. The title, text and comments of § 2-207 indicate that it applies only where all other criteria of intent indicate a contract has been formed. When such other criteria are met, § 2-207 becomes relevant as to the significance and treatment of additional terms, regardless of whether or not the acceptance contains a term of express condition.

\(^{28}\) "Section 2-204. Formation in General.
(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

\(^{29}\) "Section 2-206. Offer and Acceptance in Formation of Contract.
(1) Unless otherwise unambiguously indicated by the language or circumstances
(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance."

\(^{30}\) The structure of the Code would seem to indicate that the terms of § 2-207 should be applied only when ambiguity exists as to whether the actions of the offeree are an acceptance under § 2-206. If the conduct of the offeree is initially found to be an acceptance, then § 2-207 is no longer required in this determination and is only pertinent with respect to ascertaining the terms of the contract.
section 2-204 nor section 2-206\textsuperscript{31} but rather went directly, and exclusively, to section 2-207. As a result of its failure to apply sections 2-204 and 2-206, the court found itself confronted with a communication which it obviously felt was not an acceptance and was forced to expand the only escape section 2-207 afforded—the “expressly conditional” clause.\textsuperscript{32} If, however, it had initially turned to section 2-204(1),\textsuperscript{33} the court could have disposed of the case on the ground that the facts were not sufficient to “show agreement” between the parties. Although such a holding probably would not have made the decision any more palatable from a commercial standpoint,\textsuperscript{34} it at least would not have represented an overt distortion of section 2-207.

The Roto-Lith court is not alone in its failure to recognize that section 2-207 cannot be treated individually but rather must be considered in conjunction with the other sections of the Code concerning the formation of a contract. The same misunderstanding is apparent in the fears voiced by a number of commentators that section 2-207 may serve to bind offerees to contracts to which they do not intend to be bound or to render offerors something less than the masters of their offers.\textsuperscript{35} When it is remembered that section 2-207 operates in conjunction with section 2-204, this apprehension appears to be for the most part groundless.

Though variance is not of itself sufficient to render an acceptance ineffective, discrepancies between offer and acceptance are not irrelevant. The amount and degree of variance, when taken in conjunction with such factors as: (1) the phrasing of the communication; (2) the relevant usage of trade or course of dealing between the parties;\textsuperscript{36} (3) the conduct of the parties with respect to the alleged contract;\textsuperscript{37} and (4) the added weight that should be given to variances that appear in non-form clauses,\textsuperscript{38} may be crucial in

\textsuperscript{31} Sections 2-204 and 2-206, of course, are not the only sections of the Code that may be relevant to a consideration of the formation and contents of a contract. Sections 2-202, 2-208 and 2-209 also appear to be of importance.

\textsuperscript{32} For additional discussion on this point, see Note, 111 U. Pa. L. Rev. 132, 134 (1962).

\textsuperscript{33} Set out in note 28 supra.

\textsuperscript{34} For a discussion of the commercial soundness of the Roto-Lith decision, see pp. 550–51 infra.


\textsuperscript{36} For evidence that trade usage and course of dealing would be relevant here, see the Code definition of “agreement” in § 1-201(3).

\textsuperscript{37} The conduct of the parties would seem to be relevant insofar as it is indicative of their intentions and belief as to whether the deal has been “closed.” In addition, it is possible that the conduct of the offeree, apart from his written response to the offer, might warrant a finding of acceptance under § 2-206 set out in note 29 supra.

\textsuperscript{38} The fact that the additional or different terms appear in a non-form communication, or were added to a form, would support the position that the offeree did not intend to be bound to any contract that failed to include them. While there is no express provision in § 2-207 to exempt such written variances from its operation, consideration of comment 1,
making the section 2-204 determination as to whether the parties did in fact intend to make a contract. As Professor Hawkland states:

The critical question to answer is, has the offeree expressed the notion that the deal is closed? If the offeree expresses the notion that the deal is closed, it is "closed" even though he has made some counter-proposals to the original proposition. In each case a determination must be made to ascertain whether the counter-proposals militate against a finding of an expression of a "closed deal"; but if the expression of a "closed deal" is found, both parties are bound by a contract, even though the offeree has stated terms materially different from those offered.39

Thus the problem of determining whether a term in the "acceptance" is merely a "material" variance of the type contemplated by section 2-207, or is in fact a variance so fundamental to the contract as to vitiate its existence should be solved by recourse to the provisions of section 2-204(1) and (3),40 rather than by application of the "expressly conditional" clause of section 2-207. When sections 2-204, 2-206 and 2-207 are placed in their proper relationship, and the necessary interaction between them is recognized, a thorough-going application of section 2-207 can be entirely consistent with adequate protection for both of the parties to the contract.

III. THE PRINTED ASSENT CLAUSE

This observation should not suggest, however, that no ambiguity or difficulty exists in the application of the "expressly conditional" clause. The basic problem presented is whether form clauses in the offeree's response, which stipulate that "acceptance is conditional on the offeror's assent to any and all additional terms," should be recognized as rendering the acceptance "expressly conditional" within the meaning of section 2-207(1). It may be argued in opposition to recognition that: (1) the clauses represent a blatant attempt on the part of draftsmen to avoid section 2-207; (2) the assurance that the offeror's assent provides is rarely needed, and in effect is a "club" wielded by the offeree in order to advance his position in the so-called "battle of forms"; (3) the recognition of such clauses will to a substantial extent nullify the effect of section 2-207 since a large percentage of forms contain such an "express assent" condition or its equivalent; and (4) the clauses are not regarded by businessmen as limitations on liability but are rather inserted to

set out in note 7 supra, and comment 2, set out in note 6 supra, lends credibility to such a distinction. Also, it might be argued that a party "intends what he writes." For an argument that § 2-207 should distinguish between form and non-form communications, see Note 105 U. Pa. L. Rev. 836, 855 (1957). A.L.I., Supplement No. 1 to the 1952 Official Draft of Text and Comments of the Uniform Commercial Code 6-7 (1955) [hereinafter cited as A.L.I. Supplement No. 1], suggested such a distinction but even in the case of written communications still required words of "explicit" condition.


40 The text of these subsections is set out in note 28 supra.
placate counsel. On the other hand, if the courts categorically disregard the conditions, or disregard them when there is no independent commercial reason why express assent should be demanded, then a party who for reasons wholly sufficient to himself wishes to condition his acceptance on the offeror's assent to a seemingly trivial term cannot do so without the trouble and expense of writing in specific words of condition. Thus it remains true that complete refusal to give effect to these printed conditions would result in both a substantial reduction in the efficacy and convenience of forms and a limitation on a party's freedom of contract.

However, it may be doubted that the mere inclusion of such a printed clause is any more indicative of an intention on the offeree's part not to be unconditionally bound than is the inclusion of the additional term itself. It also may not be reasonable to assume that the assent clause actually came to the offeror's attention. Thus it would seem that an assent clause tucked away on the back of a form should be totally disregarded by the courts. If, however, the assent clause is "conspicuous" as defined by the Code, there would seem to be a valid argument for granting it limited recognition. By definition, the offeror could be held to have taken notice of it as a matter of law. Moreover, it would certainly not be unreasonable to raise the presumption that by placing the clause in conspicuous print the offeree has manifested an intention, objectively determined, to make his acceptance conditional upon the offeror's assent to the nonconforming terms. Once such an intention is ascertained, it is incumbent upon the courts to act in accordance with it.

This is not to suggest that the mere presence of a conspicuous assent clause constitutes conclusive evidence that the offeree does not intend to be bound to a contract at this stage of the negotiations. All that is meant here is that such a conspicuous clause should be given weight in the section 2-204 inquiry into the creation of the contract. Although the absence of any sound commercial reason to require assent should not constitute sufficient grounds for disregarding such clauses, any action by the offeree inconsistent with an intention not to be bound should be considered by the courts. Thus, if a manufacturer mails an acceptance with a conspicuous assent clause and then commences production of the goods without waiting for a reply, this would tend to rebut the presumption of conditional acceptance raised by the assent clause. This is particularly true where the goods are made to order. Shipment by the seller would militate even more strongly against a finding that the acceptance was

41 For a particularly cogent argument in opposition to the recognition of such conditions, see Note, 105 U. Pa. L. Rev. 836, 856-68 (1957).

42 Section 1-201(10) "‘Conspicuous’: A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is ‘conspicuous’ if it is in larger or other contrasting type or color. But in a telegram any stated term is ‘conspicuous.’ Whether a term or clause is ‘conspicuous’ or not is for decision by the court."
conditional. In addition, proof that the parties chose to ignore such clauses in previous dealings should weigh against a finding of non-acceptance.\textsuperscript{43} Indeed, it may be that production or shipment by the offeree would in itself qualify as an acceptance under section 2-206,\textsuperscript{44} in which case the entire "expressly conditional" issue would become moot. However, in the small number of cases where the assent clause is conspicuous and production, shipment or prior course of dealing do not militate against its recognition, the assent clause should be recognized as conclusive evidence that the offeree did not intend his communication to consummate the contract.

Although such a "conspicuousness" standard may seem somewhat artificial and may also lead to circularity in argument,\textsuperscript{45} it would still seem the most feasible solution to the policy dilemma fostered by section 2-207. Such a course would preserve the integrity of the form, for requiring a party to print his forms so that a court can readily ascertain his intention is certainly not an unreasonable restraint on freedom of contract. The argument that recognition of the form assent clause would serve to nullify section 2-207 also loses most of its vitality under these circumstances. Since a requirement of conspicuousness necessitates some sort of affirmative action on the part of businessmen with respect to their "acceptance" forms, it should make them aware\textsuperscript{46} of the legal significance of their action: That communications containing such conditions will leave the offeror as well as offeree free to escape the contract with immunity.\textsuperscript{47}

\textsuperscript{43} Where the parties in a prior course of dealing have chosen to ignore the assent clause, it would seem inequitable to allow one party to invoke it to avoid a disadvantageous contract. However, an argument of bad faith could be advanced in these circumstances as well as a contention that the prior course of dealing serves as a waiver of the assent clause. See §§ 2-208, 2-209.

\textsuperscript{44} Set out in note 29 supra.

\textsuperscript{45} If a court were to employ what it construes to be the intent of the offeree as a criterion in determining "conspicuousness," it would of course be clearly in error. The intent of the offeree is to be ascertained by the "conspicuousness" of the clause and not vice versa.

\textsuperscript{46} It may be that this contention is based upon an exaggerated estimate of the influence the existing law exerts on the drafting of forms. It must be assumed, however, that businessmen, and more particularly their lawyers, know something of the applicable law.

\textsuperscript{47} It could perhaps be argued that § 2-207(1) uses the phrase "expressly made conditional" and that a requirement of conspicuousness is hence precluded by clear legislative direction. However the position taken here does find support in the section's legislative history. The 1954 recommendations concerning § 2-207, contained in A.L.I., SUPPLEMENT No. 1, supra note 38, in attempting to afford the offeree some freedom to maneuver, recognized assent clauses when they were "explicit" in the case of non-form communications, A.L.I., SUPPLEMENT No. 1 § 2-207(2), and "conspicuous" in the case of form communications, A.L.I., SUPPLEMENT No. 1 § 2-207 (4)(b). The 1956 RECOMMENDATIONS and subsequent Official Drafts, see note 23 supra and accompanying text, did not purport to distinguish between form and non-form communications. Thus it is not unreasonable to assume that the drafts- men did intend to include a requirement of "conspicuousness" when they adopted the "expressly made conditional" clause to apply to all acceptances. Certainly such a require-
If one accepts this solution to the assent clause dilemma, consideration of the fact situation in *Roto-Lith* would seem to indicate that the outcome, as well as the ratio decidendi of the decision, was incorrect. Even if the printed assent clause were found to meet the Code standard of “conspicuousness,” an unlikely result, the offeree’s shipment of the goods should have precluded any assertion on his part that he did not intend the deal to be “closed” at the time the acknowledgment was mailed. It seems unlikely that a businessman would immediately ship goods without waiting for the offeror’s response to his “counter-offer” if he did not consider the contract consummated. Certainly his delivery of the goods to the offeror could reasonably have been interpreted by the latter as an acceptance of the offer. Indeed, since the offer requested immediate shipment, it could be argued that performance was precisely the form of acceptance the offer contemplated and that such performance completed the contract in accordance with section 2-206(1)(b). Thus there was nothing in the facts to indicate to the offeror that the deal was anything but “closed” when the goods arrived. It becomes evident, then, that to recognize the assent clause where shipment has been made is to grant

Ament would be entirely consistent with the desire to avoid surprise and unfairness evinced throughout the Code. See, e.g., § 2-207, comment 4.

In addition to the inference to be drawn from the legislative history of the section, the argument for reading “expressly” to mean “conspicuously” also draws support from the fact that since a limitation on acceptance could hardly be other than express, the draftsmen must have added the word “expressly” in order to require something more than a mere statement of a desire to limit the effect of the acceptance. Of course, “express” need not mean “conspicuous” elsewhere in the Code where no support for such a reading can be drawn from the legislative history and where the condition was of a sort that could be implied if the word were not included.

48 297 F.2d at 499. The court italicized this clause in the opinion but did not appear to rest its reasoning upon it.

49 Although the court made a point of mentioning that the clause was conspicuous, id. at 498, it did not indicate whether it was so holding as a matter of law under § 1-201(10).

50 Section 1-201(10) provides that “language in the body of a form is ‘conspicuous’ if it is in larger or other contrasting type or color.” There is no indication that the clause here satisfied these requirements and in fact the contrary seems likely. Moreover, its position on the back of the form would tend to militate against a finding of “conspicuousness.”

51 The purchase order was mailed on October 23 by the offeror in New York to the offeree in Massachusetts. On October 26 the offeree prepared his acknowledgment and mailed it out on the same day. The offeree then shipped the goods the following day, October 27, without having received any additional communication from the offeror. 297 F.2d at 498.

52 Indeed, it would seem that the offeror had no choice but to interpret the shipment as acceptance lest he run the risk of placing himself in breach of contract. It would be unreasonable to have expected him to anticipate the *Roto-Lith* court’s view that refusal of shipment would not have constituted breach.

53 Brief for Appellee, p. 7.

54 Set out in note 29 supra. The situation in *Roto-Lith* would appear to be exactly the type intended to be covered by this subsection. Thus, if the offeror had refused to accept the goods because of the disclaimer in the acknowledgment, the offeree could have maintained a successful action for breach of contract under § 2-206(1)(b).
the offeree both his contract and the unilateral power to strike out unfavorable provisions while adding beneficial ones. Whether the offeree's delivery of the goods is characterized as an acceptance within the meaning of section 2-206, or his entire conduct is considered as indicating agreement under section 2-204, it seems clear that the court in *Roto-Lith* should have refused to recognize even a conspicuous printed assent clause.

A discussion of the printed assent clause must also mention its counterpart, the printed term in the offer limiting acceptance to the terms of the offer. This problem, however, appears to be insignificant since such a clause's effect would necessarily be limited to immaterial variances in the acceptance. There seems to be no compelling reason why the courts should disregard these provisions. In fact they may be of some utility in relieving a court of the burden of distinguishing between "material" and "immaterial" variances. Of course conspicuousness should be required for recognition of provisions.

As is indicated by notes 52 and 54 supra, the *Roto-Lith* court's view would allow the offeree to place the offeror in an impossible situation. By apparently performing his obligations under the contract, the offeree could put the offeror in a position where he also must perform. Yet by wording his written reply so that it technically is not an acceptance, the offeree could claim in any subsequent litigation that the writings themselves are insufficient to establish a contract and that therefore the terms of the contract formed by the parties' conduct should be supplied by § 2-207(3). See note 1 supra. Thus by careful drafting, he could successfully nullify any terms in the offer that he does not consider to be to his advantage and could add terms favorable to himself. When §§ 2-204, 2-206 and 2-207 are properly applied, an offeree will rarely be in a position to engage in such devious manipulations. See *[Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code]* (2d ed. 1958).

An additional ground for refusing to give full effect to such ambiguous behavior on the part of the offeree is supplied by § 2-208. Under that section, a court could hold that by virtue of his conduct with respect to the contract, the offeree has waived the limitation of the assent clause.

Section 2-207(2)(a) provides for the recognition of such conditions. Here also the only explicit requirement for recognition is "expressness."

Since there must be express assent by the offeror for a "material" variance to become a part of the contract, any prior objection by means of a conditional offer is unnecessary.

See Application of Doughboy Indus., Inc., 233 N.Y.S.2d 488 (App. Div. 1962), involving an arbitration clause. The buyer's form contained no such clause and stated that only signed consent would bind the buyer to any additional terms. The seller's form had a general arbitration provision and stated that silence or failure to object in writing would be considered acceptance of its terms and conditions. Although the Uniform Commercial Code is not yet in effect in New York, the court hypothesized as to how the case would be decided under § 2-207 and reached the conclusion that the condition in the buyer's form would have to be given effect and that the arbitration clause would not be part of the contract. It does not appear that the clauses in either the buyer's or the seller's form were "conspicuous."

The *Doughboy* case, supra note 59, offers an example. The court reached its hypothetical § 2-207 decision on the grounds that "the arbitration clause, whether viewed as a material alteration under subsection (2), or as a term nullified by a conflicting provision in the buyer's form, would fail to survive as a contract term." *[Id.]* at 495.

Although § 2-207 gives no explicit directions as to how to distinguish between "material" and "immaterial" variances it would seem that when such a distinction becomes necessary, it should be made on the basis of trade usage or prior course of dealing.
in offers for the same reasons that it is demanded of assent clauses. Notice with respect to the conditional offer would be of particular importance.

IV. Miscarriage of an Acceptance under Section 2-207

Another problem which might arise under section 2-207 involves the acceptance or acknowledgment that miscarries. The court in *Roto-Lith* recognized this problem but withheld further comment. Under the common-law rules applicable to contracts by correspondence, an acceptance is effective upon mailing, and it does not lose this effectiveness by virtue of being lost in transit. This rule can be reconciled with section 2-207 without difficulty except where a lost acceptance contained "immaterial" variances. Although in the normal situation these variances become part of the contract without express assent by the offeror, it would seem that the opposite result is advisable in cases where the acceptance miscarries. By hypothesis, the offeree is willing to be bound with or without these non-conforming terms and hence it does not seem equitable to bind the offeror when he has neither seen them nor had the opportunity to object to their inclusion in the contract. In view, however, of the extraordinary tenacity of the common-law rule relating to contracts by correspondence and the blind devotion it inspires in some courts, it would no doubt be beneficial if section 2-207 were to be clarified on this point.

The treatment of the terms of a miscarried confirmatory memorandum should depend upon whether or not they contradict terms in the other party's confirmation. If the terms do not contradict, the rule urged for miscarried acceptances should apply because they are simply proposed additions to the contract. If the miscarried terms do contradict terms on the other memorandum, however, a slightly different problem is presented. Section 2-207, comment 6, states that a conflict between terms in confirmatory memoranda

61 Here again "conspicuousness" should be required both to avoid surprise and indicate the buyer's "real" intent to limit his offer.

62 297 F. 2d at 500 n.4.


64 Since "material" variances require express assent on the part of the offeror according to § 2-207, comment 3, miscarriage of an acceptance containing a "material" variance is equivalent to miscarriage of a proposal for an additional term and does not vitiate the contract arising from the mailing of the acceptance itself. The additional terms of course do not become part of the contract.

65 Since the confirmations are normally mailed at approximately the same time and without knowledge of the terms on the other party's memorandum, it is impossible to determine which of the conflicting terms is the original proposal and which is the variance.

66 Section 2-207, comment 6: "If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their
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will be treated as an objection by one party to the other’s terms and the contradictory terms will cancel each other. Thus providing an opportunity to object, which may be important with respect to “immaterial” variances in an acceptance or confirmation, is entirely unnecessary here since the other party by hypothesis has objected to the terms in the miscarried memorandum conflicting with his own provisions. There would seem, then, to be no reason to deny effect to those terms in a miscarried confirmation which create a contradiction between the two memoranda.

V. CONCLUSION

The decision in the Roto-Lith case is illustrative of the misunderstanding and misapprehension that have resulted from isolating section 2-207 from the other sections of the Code dealing with the formation of a contract. To some degree this isolation has been caused by the tendency of commentators to treat each section of the Code separately with the resulting failure to interrelate sections relevant to a particular area of commercial dealing. As a consequence, an individual section is distorted and its purpose largely subverted. The Roto-Lith decision presents a graphic exemplification. Operating under a misconception of section 2-207, the court reached what it felt to be an absurd result and then, in order to avoid this “absurdity,” formulated a rule of interpretation which if accepted would almost completely vitiate the section. The Roto-Lith case perhaps suggests that a minor redrafting of the section would be beneficial in facilitating its application by the courts and the bar.

The comments on section 2-207 might be altered to emphasize that it is simply a mechanism to help the courts ascertain the intent of the parties and the contents of any contract they form. As such it cannot be considered alone but must be applied in conjunction with other provisions of the Code relating to the formation of contracts. It may also be suggested that the clauses per-

67 As has been indicated, the most important of these sections are §§ 2-202, 2-204, 2-206, 2-208 and 2-209.

68 This approach is especially pronounced in the various state annotations to the Code and in those articles which attempt to compare the Code provisions with the existing commercial law in a particular state. It is usually less apparent in the general commentaries but the individual sections are isolated to some degree in almost all of these writings.

69 The absurdity that the Roto-Lith court thought it encountered was that if § 2-207 were taken literally it would require businessmen to act “by rubric.” 297 F.2d at 500. But properly applied, § 2-207 and its allied sections lead to the opposite result, since the law will seek to adapt itself to reasonable commercial expectations.
taining to conditional offers and conditional acceptances be made more explicit in regard to the necessity of "conspicuousness" so that they will be accorded consistent treatment in the courts. In addition, it should be made clear that even conspicuous words of condition are not conclusive proof of a limited acceptance, but rather raise a presumption that can readily be rebutted by evidence of conduct of the parties which indicates an intention to be legally bound. Finally, as a footnote, it is submitted that an exception should be made to the general rule governing "immaterial" variances to prevent terms in a miscarried acceptance from becoming part of the contract.

This is not to suggest, however, that section 2-207 in its present form is not capable of coherent application by the courts along the lines suggested. Indeed, the contrary is urged. Thus it is hoped that subsequent courts will reject *Roto-Lith* and its "unilaterally burdensome" standard as an abortive attempt to apply section 2-207 and that they will take cognizance of, and attempt to serve, the section's intended purpose. A change, albeit a minor one, has been made in the law of sales contracts. Given intelligent interpretation by the courts, it will be a change for the better.

70 See notes 20, 21 and 26 supra and accompanying text.