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A Look at a Strict Construction of Section 2-207 of the Uniform Commercial Code From the Seller's Point of View or What's So Bad About Roto-Lith?

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**A LOOK AT A STRICT CONSTRUCTION OF
SECTION 2-207 OF THE
UNIFORM COMMERCIAL CODE
FROM THE SELLER'S POINT OF VIEW**
or
WHAT'S SO BAD ABOUT *ROTO-LITH*?

INTRODUCTION

This is an examination of the workings of section 2-207 of the Uniform Commercial Code in the form contract between merchants. More specifically, the literal interpretation of the Section is to be investigated as to its effect on the practical formation of the sales contract. A basic assumption of this comment is that the terms of the Code which may, under section 2-207 be "read into" a contract, are repugnant to the seller. This, I think, is obvious. It should, however, be kept in mind that, between merchants, both parties may be assumed to be "big boys." Therefore, the problem of the mammoth corporation taking advantage of the helpless consumer, the overriding justification for the Code's implied warranties and full spectrum of Buyer's remedies, is not present.

UNDER COMMON LAW an acceptance had to exactly match the offer to which it responded—had to be the "mirror image" of the offer.¹ If it did, there was the proverbial meeting of the minds, hence, a contract. If, however, it did not, it was a rejection and a counter-offer. As was frequently the case then and now, the parties nevertheless proceeded to perform. If the seller (offeree, counter-offeror) shipped the goods and the buyer (offeror, counter-offeree) accepted, there was a contract. The terms of the contract were those of the seller; for by accepting performance under, as the UCC draftsmen were later to call it, what the parties believed to be a contract, the buyer was deemed to have accepted seller's counter-offer. This phenomenon came to be called the "last shot principle."² Dissatisfaction with this state of affairs stemmed

¹ COBBIN, CONTRACTS § 75 (One Vol. Ed. 1952); 1 WILLISTON, CONTRACTS § 75 (3d Ed. 1957).

² W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE [hereinafter cited as HAWKLAND] §§ 1.090301, 1.090302, at 15, 18 (1964). The explanation here is in its simplest form. The most acute problems arose in the "form contract" situation, wherein the parties were even more likely to ignore their conflicting writings and perform under what they believed to be a contract. In this comment, in part because § 2-207 is geared toward the form situation, and in part because, in the "between merchants" area with which this comment is concerned, the

from two shortcomings: First, it was thought to be unfair to give one party all of his terms merely because he fortuitously fired the "last shot."³ Secondly, although the "last shot" doctrine found the parties who, having performed and obviously thinking they were contractually bound to in fact be bound, thereby avoiding the absurdity of telling parties who had actually performed that there was no contract, the "last shot" doctrine essentially operated in hindsight. That is, at a point where it could not reasonably be said that there was no contract, the law graciously ratified the already blatantly existing contract. However, prior to this point whereat the contract, in spite of the law of offer and acceptance, had given birth to itself, the wooden mirror-image rule would operate to say that there was no contract. Hence, a party to one of these embryonic non-contracts could, before the law had issued its tardy birth certificate to the full grown contract, back out. The classic illustration of this is *Poel v. Brunswick Balke-Collender Co.*⁴ There, the seller, responding to buyer's offer, sent back a form which was not the mirror-image of the offer. When the buyer later backed out of the deal, seller sued. The court held that seller had not accepted the offer but had tendered a counter-offer which had not been accepted by buyer. Therefore, there was no contract and buyer could welsh with impunity. The inequity is manifest. Despite intent to contract, despite a commercially reasonable understanding that there was a contract, despite the fact that had the buyer not found some collateral reason for not performing there would most likely have been performance, and therefore a contract beyond any question, the parties, solely because their documents had failed to meet a formalistic legal requirement, were not contractually bound.

With this background in mind, we may proceed to the Uniform Commercial Code's handling of the problem in section 2-207. The 1958 official text of section 2-207 is, with the exception of Comment 7, added in 1966,⁵ the current version:

use of forms is nearly all pervasive, it may be generally assumed that references to offers and acceptances presuppose form offers and acceptances. Note, however, that in *Dorton v. Collins & Aikman Corporation*, 453 F.2d 1161 (6th Cir. 1972), the court held that § 2-207 is not restricted in operation to the form-form transaction. 453 F.2d at 1167, n.2.

³ WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1972) 32, 33 [hereinafter cited as WHITE & SUMMERS].

⁴ 216 N.Y. 310, 110 N.E. 619 (1915). The squelching of such welshing is one of the primary objectives of § 2-207. See, e.g., WHITE & SUMMERS at 24; J. STOCKTON, LAW OF SALES 10 (1968).

⁵ Comment 7 reads:

In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

Additional Terms in Acceptance or Confirmation.

(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 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.

Judicial constructions of section 2-207 are sparse. It is fair to say that there are basically two opposing constructions; the First Circuit's 1962 effort, *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*,⁶ and the Sixth Circuit's 1972 opinion in *Dorton v. Collins & Aikman Corp.*,⁷ the latter admittedly a strict construction,⁸ and the former admittedly not.⁹

In *Roto-Lith*, buyer mailed his purchase order, complete with his terms and conditions. Before shipment seller sent his acknowledgment stating that the sale was subject to the terms on the reverse side (which included a disclaimer of all warranties), that all of the conditions of the sale were in the acknowledgment, and that if these terms were not acceptable, buyer must so notify seller at once. Buyer did not reply. The goods were shipped, buyer inspected, was dissatisfied, and sued seller for breach of warranty. The issue: whether seller's disclaimer of warranty was effective. The court held that it was because (1) by stating a condition which materially altered the offer, the seller was making his acceptance expressly conditional on assent to the additional terms; and (2) the effect of section 2-207 was to make a response which differed from the offer an

⁶ 297 F.2d 497 (1st Cir. 1962).

⁷ 453 F.2d 1161 (6th Cir. 1972).

⁸ *Id.* at 1168, n.5

⁹ 297 F.2d at 500. For other decisions generally in accord with *Roto-Lith*, see *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (5th Cir. 1969); *Beech Aircraft Corp. v. Flexible Tubing Corp.*, 270 F. Supp. 548 (D. Conn. 1967). *Contra* *Matter of Doughboy Industries, Inc.*, 17 A.D.2d 216, 233 N.Y.S.2d 488 (1962); *American Parts Co. v. Amer. Arbitration Assoc.*, 8 Mich. App. 156, 154 N.W.2d 5 (1967).

acceptance of the offer, and a counter-offer only as to the differences. Hence, buyer's acceptance of seller's performance without objecting to the terms of the counter-offer was an acceptance of those terms including, of course, the warranty disclaimer.

The writers have resoundingly denounced *Roto-Lith*.¹⁰ First, it is said that the court clearly erred in holding that, by simply responding with conflicting terms, seller had made his acceptance "expressly conditional" within the meaning of section 2-207(1).¹¹ This point is well taken. However, the real crux of the issue is what happens once an expression of acceptance is made "expressly conditional" no matter what it takes to gain that status.¹² On this point it has been frequently said that the *Roto-Lith* court ignored the statute and gave the seller's reply the status of a common law counter-offer.¹³ The court said:

Its [section 2-207] purpose was to modify the strict principle that a response not precisely in accordance with the offer was a rejection and a counter-offer. . . . Now, within stated limits, a response that does not in all respects correspond with the offer constitutes an acceptance, and a counter-offer only as to the differences.¹⁴ (Emphasis added.)

On the facts of *Roto-Lith*, the effect as to what terms were part of the contract was indeed the same as it would have been at common law. However, were the only concern whether *Roto-Lith, Ltd.* had its implied warranties, the case would long since have passed into obscurity. The court's interpretation of the workings of section 2-207 is the significance of the case. If the seller's response had been a common law counter-offer, it would not have been an acceptance at all. The court, then, gave to section 2-207 its primary effect. It allowed a contract to be formed despite the parties' conflicting forms. Under *Roto-Lith* the welsher

¹⁰ See, e.g., HAWKLAND; WHITE & SUMMERS; J. MURRAY, *Intention Over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317 (1969) [hereinafter cited as Murray]; Comment, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 U. CHI. L. REV. 540 (1963); Note, 76 HARV. L. REV. 477 (1962).

¹¹ Murray at 329; 76 HARV. L. REV. at 1483; BENDER'S U.C.C. SERVICE, 3 DUSENBERG & KING, SALES AND BULK TRANSFERS, § 3.04(1) (1974) [hereinafter cited as BENDER'S].

¹² In Dorton, *supra* note 7, the court held that the language "The acceptance of your order is subject to all of the terms and conditions on the face and reverse side hereof" was not sufficient; rather, an acceptance need be expressly conditional upon the offeror's assent to the terms. 453 F.2d at 1168. Though it has the stench of a formalistic ritual, an offeree is not too hard pressed if he is required to use the precise language of the Code.

¹³ WHITE & SUMMERS at 29; HAWKLAND at 16; Note, UNIV. OF PA. L. REV. 132, 136 (1962); The writer recognizes that the court's finding that the material alteration rendered the response expressly conditional and thereby a counter-offer is indeed a common law analysis. However, the effect given to the counter-offer was by no means in line with the common law principles.

¹⁴ 297 F.2d at 500.

cannot escape with impunity. The court then went on to say that the seller's response was a counter-offer as to the differences, which counter-offer was accepted by the buyer when he accepted the goods. This clearly seems to be in conflict with section 2-207(3) which tells us what the terms of a contract formed despite conflicting forms are to be, to wit, the terms on which the forms agree plus other provisions supplied by the Code. The *Roto-Lith* court clearly states that they are attempting to give a practical construction to this "not too happily drafted" provision which, if read literally, leads to absurdity.¹⁵ Before proceeding further with the *Roto-Lith* view, let us look at the literal construction and see to what, if any, absurdities such a construction leads.

A most prestigious writer says that the proper workings of section 2-207 are: "... [I]f the seller makes his acceptance expressly conditional on assent to his different terms . . . *no contract is created, and, if the parties stop at this point, none will be.*"¹⁶ (Emphasis added.)

More importantly, one court, expressly rejecting *Roto-Lith*, has adopted the strict, literal reading of section 2-207.

In *Dorton v. Collins & Aikman Corp.*,¹⁷ in the disputed transaction, as well as 55 previous transactions, the parties had established the following pattern: Buyer placed an oral order. Seller sent a printed acknowledgment form which stated that acceptance was subject to the terms of the form, which included arbitration, and that the buyer's order form was superseded. It further listed seven types of action or inaction which the seller would deem to be assent to the conditions of the acknowledgment, including ten days without objection as well as acceptance of delivery. Buyer did not reply and, after a lapse of several weeks to several months, accepted delivery without objection. A dispute arose, and buyer sued seller in fraud. The central issue: whether the parties were bound by an agreement to arbitrate as per seller's acknowledgment. The trial court held that section 2-207(3) was controlling. Hence the terms on which the "papers" did not agree were cancelled, the gaps being filled by Code provisions. Since the Code contains no arbitration clause, there was no agreement to arbitrate.

On appeal, the Sixth Circuit dealt squarely with the section 2-207 issue, saying:

When a contract is recognized under section 2-207(1), the additional terms are treated as "proposals for addition to the contract" under Subsection (2) which contains special provisions under which such terms are deemed to have been accepted when the transaction is between merchants. *Conversely, when no contract is recognized*

¹⁵ *Id.*

¹⁶ HAWKLAND at 19; see also WHITE & SUMMERS at 27.

¹⁷ 453 F.2d 1161 (6th Cir. 1972).

under Subsection (1)—either because no definite expression of acceptance exists, or more specifically, because the offeree's acceptance is expressly conditioned on the offeror's assent to the additional or different terms—, the entire transaction aborts at this point. If, however, the subsequent conduct of the parties—particularly, performance by both parties under what they believe to be a contract—recognizes the existence of a contract, under section 2-207(3), such conduct by both parties is sufficient to establish a contract, notwithstanding the fact that no contract would have been recognized on the basis of their writings alone. Subsection (3) further provides how the terms of a contract recognized thereunder shall be determined.¹⁸ (Emphasis added.)

The court found that seller's form was not an "expressly conditional" acceptance within the meaning of the statute. Hence, the parties had formed a contract under subsection (1), with further findings of fact being necessary to determine whether there was in fact a difference between the oral offer and the written acceptance and, if there was, whether the additional terms became part of the contract under section 2-207(2). Subsection (2) being applicable and the addition of an arbitration clause being a material alteration under section 2-207(2)(b), it would not be part of the contract without the buyer's express assent to the addition.

A look at the practical workings under section 2-207 is in order at this time. We are here concerned with merchants. Buyer has sent out his purchase order, the reverse side filled with one-way terms and conditions.¹⁹ How is seller to respond?

Obviously, each sales contract can be negotiated. This in essence is Professor Hawkland's solution:

The new law obviously is designed to bring conflicts into the open at an early point in the sales negotiation, with the hope that the parties will resolve them before making their agreement. Both the seller and the buyer should be encouraged by the new law to read carefully the conditions on the other's form. If the conditions are unacceptable to one party, he should call them to the attention of the other party, and frequently the objectionable conditions will be withdrawn. Sometimes objections arise from an ambiguity or a misunderstanding of the terms, and a clarification of meaning may result in the withdrawal of the objection. Of course, if the parties cannot come to an agreement on the condition, they know they have no contract and neither will be unfairly surprised by an assumption to the contrary.²⁰

¹⁸ *Id.* at 1166. Among other ancillary questions, the court also held that § 2-207 was applicable to this oral offer-written acceptance situation and that the language "subject to" in seller's form was not sufficient to make the expression "expressly conditional." See note 12 *supra*.

¹⁹ It is common knowledge that forms are generally over-drafted. See Murray at 319, n.5. Interestingly enough, a buyer will nevertheless seldom be hurt by the loss of his terms in favor of those of the Code. See WHITE & SUMMERS at 29; HAWKLAND at 19. ²⁰ HAWKLAND at 19.

Similarly, White and Summers offer:

Under the present state of the law we believe that there is no language that a lawyer can put on a form that will always assure his client of forming a contract on his client's own terms. For example, such efforts will always be frustrated if the responsive document is expressly conditional on assent to that document's terms, for the parties will then be thrown into Subsection (3) and there the client will not get his term unless some other section of the Code gives it to him. In our judgment that is the right outcome. If the client must have a term, he should bargain with the other party for it; and if he cannot strike a bargain with the other party for that term, he should not get it by his lawyer's sleight of hand. If he must have the term but cannot strike a bargain for it, his only answer may be to raise his price, buy insurance, or as a last resort, have a couple of extra martinis every evening and capitalize his corporation more thinly than he otherwise would.²¹

Negotiate each sale! If that is all the draftsmen have to offer, better they should have ignored the whole issue. The very fact that form contracts came into prominence at all belies the efficacy of such an approach to the subject matter with which section 2-207 attempts to deal. Because the commercial sales transaction must move fast, it is not commercially practical or even possible to negotiate every term and every condition of every sales contract. Section 2-207, which makes it in the buyer's best interests not to negotiate, just makes it that much more impractical. Negotiation of each contract was always available. Due to the very same commercially practical considerations to which the Code attempts to give legal effect, "form contracts" continue and will continue unabated.²²

Suppose, then, seller accepts with his form, which is not "expressly conditional," but which does contain terms and conditions at variance with those of the buyer. Under subsection (1) there clearly is a contract. Subsection (2) tells us that:

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract. . . .

Fair enough. But what is given to the seller with the right hand is quickly taken away with the left:

unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
 - (b) they materially alter it;
- or

²¹ WHITE & SUMMERS at 32-33.

²² Note that the Code, by §§ 2(a) and 2(c), seems to recognize that forms will still fly, and gives even greater effect to a buyer's form by indicating what language he may use to take objection in advance.

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

First, the only buyer's purchase order forms which do not limit acceptance to the terms of the offer, or take objection in advance (a rather incredible feat in itself), are museum artifacts. Secondly, even if the buyer's draftsman has been off dozing in the Catskills, the buyer is still protected by subsection (2)(b) for, if either party cares about "immaterial" terms, they become material. The subsection is an empty placebo for sellers. It may as well say, "Between merchants such terms do not become part of the contract." The point is, any term which a seller would care to propose will in some fashion fall within the "unless" of subsection (2). The buyer then has only to ignore such a response and he has a most favorable contract.

The seller then will draft his response so that it is "expressly conditional." He has now clearly manifested his intent not to be bound by buyer's terms. But he does want the sale. He has, typically, also made some such statement as, "I am proceeding; please advise if you are not in agreement."²³ He has tendered the same hybrid response which in section 2-207 itself is an "acceptance" yet not an acceptance.²⁴ The buyer? Well, again, under the Code, the buyer's best interests lie in dead silence. If the parties proceed to perform, they will have a contract under subsection (3), with the buyer none the worse for wear. What is even more frightening is that, under the literal reading of section 2-207, there is no contract at all. Therefore, at some point prior to delivery and acceptance,²⁵ the buyer, or for that matter the seller, can just walk away. Hence, a primary purpose of the provision, what White and Summers say is *the* primary purpose²⁶—holding the welsher in—is not accomplished.²⁷ In many cases, some further correspondence, *e.g.*, shipping instructions, packing and marking instructions, order modifications, and the like, will indicate that the parties

²³ See, *e.g.*, Dorton, 453 F.2d at 1164; Roto-Lith, 297 F.2d at 499.

²⁴ For an interesting discussion of this curious use of the word "acceptance," see Murray at 324-325, 344, 345, wherein the writer concludes that the beast is really a counter-offer and wonders aloud why in the world the drafters didn't just call it a counter-offer and be done with it.

²⁵ The Code does not specifically say that delivery and acceptance is required, but it does require conduct by both parties; hence, buyer's silence would not constitute a Section (3) contract under any test. The consensus seems to be that delivery and acceptance is the criteria. See, *e.g.*, Dorton, 453 F.2d at 1166; Roto-Lith, 297 F.2d at 500; HAWKLAND at 19; Murray at 328; BENDER's, § 3.03(1)(c), 3.03(1)(d).

²⁶ See note 4 *supra*.

²⁷ Help under § 2-204 which expresses the drafter's intent to liberalize contract formation or § 2-206 which allows acceptance by start of performance seems promising, but it is not really available in the present context. Section 2-204 requires intent to be bound and conduct by both parties, and § 2-206 presupposes the beginning of performance without any response, followed by notice of acceptance. In either case the seller's responding form will take the case back into § 2-207. See generally, Murray at 325, 326; WHITE & SUMMERS at 35, 36. *Contra* Universal Oil Products v. SCM, 313 F. Supp. 905 (D. Conn, 1970); 30 U. CHI. L. REV. 540 (1963).

in commercial understanding consider themselves to be bound. But absent such conduct, or before such conduct, the parties are taking a terrific chance in beginning performance, or in preparing to accept performance, under what they believe to be a contract, which in fact, because of their conflicting forms, is not a contract. This is precisely the situation which section 2-207 is supposed to alleviate! It cannot be argued that the draftsmen felt that sellers should avoid such language and thereby avoid the situation. If that is the case, why even make a provision [subsection (3)] to provide for the terms where the "writings of the parties do not establish a contract"?²⁸ The very existence of such a provision presupposes that there are going to be instances wherein it is needed. But, like its common law counterpart, the "last shot" doctrine, the provision fails because it operates strictly from a hindsight point of view.²⁹ Just like the common law rule, it works quite well when a full grown contract is staring it in the face.³⁰ As pointed out above, the drafters gave the seller no other hope of getting his terms; so it is indeed quite understandable that seller's forms are going to be "expressly conditional."

The purpose, it is to be remembered, is to give legal effect to what, in commercial understanding, is thought to be a contract. The buyer, when he receives an acceptance of his order telling him that shipment will be in six months but that the acceptance is "expressly conditional upon his assent to the terms and conditions on the reverse hereof," does not for one instant come to a commercially reasonable understanding that his order has been rejected any more than did his pre-Code counterpart consider a response to be a rejection because it contained differing terms. The commercially reasonable understanding, then and now, is that seller has accepted the sale, the real, physical, practical commercial transaction which is at the root of this whole subject, and has rejected the fine print. What, if we are to have a law in tune with reality, is so preposterous about then placing the onus on the buyer, who has clear notice that he is not getting his terms and conditions, to speak up if he is not satisfied with this—to object, and to then seek negotiation with the other party who in most cases will be willing to negotiate? This is not merely a shifting of the burden from seller to buyer. It is a shifting of the burden to the party who has fair notice of disagreement, and who alone knows if the latest statement of terms and conditions is acceptable to him. It is beyond argument, White and Summers aside, that not every sales contract can be negotiated. Is it not more reasonable and more fair to give some

²⁸ UNIFORM COMMERCIAL CODE § 2-207 (3).

²⁹ Comment 7, see note 5 *supra*, is illustrative of this hindsight orientation. It does nothing for contract formation but rather merely looks to the terms of the performed contract which, despite § 2-207, was mid-wife to its own birth. It is notable that Comment 7 may well be, in White & Summers's words, the draftsmen's attempt to "shore up" § 2-207 in light of Roto-Lith. WHITE & SUMMERS at 29, 30.

³⁰ See text accompanying notes 1-4 *supra*.

motivation to negotiate to both parties? Under the strict interpretation of section 2-207, silence is the buyer's shrewdest tactic.³¹ He can, by silence, get favorable terms; and he can, should something better come along, get out of the contract with impunity. The burden to negotiate, on the other hand, is on the seller (who traditionally in the merchant-to-merchant situation is the pursuer); he must bargain for his terms with a party who has absolutely no reason to bargain.

Roto-Lith would hold the welsher in.³² To this extent, at least, it should be followed. After that, if one is so disposed, the differing terms in the forms could, contra to *Roto-Lith*, be filtered through subsections (2) and (3) to determine their place, if any, in the contract. Though it has been stated that section 2-207 totally abrogates the "last shot" principle,³³ it clearly has not abrogated the counter-offer. The "expressly conditional" acceptance, a curious animal,³⁴ can only be a counter-offer.³⁵ Clearly, section 2-207 has in whatever fashion altered the status of a counter-offer. But it is most desirable to give the "expression of acceptance" contract forming power, a la *Roto-Lith*, and then deal with its counter-offer features in whatever fashion counter-offers are to be dealt with under section 2-207. That is, if the response is not given contract forming power, the Code fails in its important objective of squelching welshing and, ironically, as discussed at length above, actually denies contract status to that which the parties commercially felt to be a contract. Whether we are going to follow *Roto-Lith* in contract formation, or whether we are going to follow the *Dorton* strict reading of section 2-207, the question is what is the status of a counter-offer under section 2-207?

Hawkland tells us that there is no longer a "last shot" principle.³⁶ If the parties go on to perform and establish a contract under subsection (3), subsection (3) handles the problem well enough. But all this is hindsight, presupposing the requisite performance.³⁷ But this, as discussed at length, does nothing for contract formation and binding the parties. The *Roto-Lith* view of subsection (1) does bind the parties who in reasonable commercial understanding believe themselves to be bound. I find the *Roto-Lith* suggestion that there is a counter-offer only as to the differences to be excellent. Hawkland tells us what becomes of a counter-offer under section 2-207. Why can this not be done as to this partial counter-offer?

³¹ See BENDER's § 3.04(1) (Supp. 1974), at 3-35.

³² See text accompanying note 15 *supra*.

³³ HAWKLAND at 18.

³⁴ See note 24 *supra* and accompanying text.

³⁵ Murray states that the "unless" proviso in § (1) was clearly intended by the drafters to give the offeree the right to make a counter-offer. Murray at 324. See ALI, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD OF THE UCC § 2-207 (1956), at 28.

³⁶ See note 33 *supra*.

³⁷ See note 25 *supra* and accompanying text.

Why cannot these terms be resolved under subsection (3)? Subsection (3) does not throw out the counter-offeror's terms. Rather, it retains them and matches them against those of the original offer. If the two documents and the Code can stand together under subsection (3) to "form" a contract which has already been performed, why can they not, at an earlier point in time, stand together to perform the crucial function of contractually binding the parties?

If the "last shot" doctrine is not truly dead, *Roto-Lith's* view may be appropriate to an even further extent. If the conduct of the parties is to be the touchstone, why is the silence of the buyer not to be relevant? The question is not to be cursorily dismissed, with such simplistic platitudes as "The common law has never recognized silence or inaction as a mode of acceptance."³⁸ At the one extreme of the silence spectrum is the situation wherein Fly-by-Night Gas Stations, Inc., writes J. Paul Filthyrich and says: "I propose that we merge and in consideration therefor you make me a full partner in Filthyrich Oil Company and you will become a full partner in Fly-by-Night. If I do not hear from you in 30 days, I will assume you to have assented." No one would reasonably argue that silence on the part of Filthyrich is acceptance. At the other extreme, in many areas such as tort law, or the estoppel concept, silence or inaction is a very meaningful form of legally significant conduct. It is a recognition of the significance of acts of silence, of abstention, of omission, that is basic to the "last shot" principle. Admittedly, the "last shot" doctrine becomes ludicrous where shipment rapidly follows the firing of the "last shot," or where there are several volleys from each side; *i.e.*, something more than a single offer and counter-offer, and one would discount all save the last shot fired. But, such situations could by statute be dealt with without abrogating the doctrine completely. What specifically, if force is to be given to "commercial understanding," is so offensive about attaching commercially reasonable significance to a buyer's silence? Is a buyer really justified, in a case such as *Dorton* or *Roto-Lith*, in just ignoring the seller's response? In both bases, the acceptances, "expressly conditional," clearly indicated that the seller was proceeding with performance and asked buyer to respond if he did not assent to such proceeding.³⁹ Under what reasoning can a buyer in such a situation consider there be no contract at all,⁴⁰ or a contract on "his" terms?⁴¹ In his excellent comment, Professor Murray has set forth the following hypothetical:

(Buyer offers to purchase 1,000 widgets at \$5.00 each. Seller replies:)

³⁸ *Dorton*, 453 F.2d at 1166. See also HAWKLAND at 17.

³⁹ *Roto-Lith*, 297 F.2d at 499; *Dorton*, 453 F.2d at 1163, 1164.

⁴⁰ *Dorton*, 453 F.2d at 1166; HAWKLAND at 19. See notes 20, 21 *supra* and accompanying text.

⁴¹ More specifically, the Code terms, which are generally recognized to be buyer's terms. See note 19 *supra*.

"I must receive \$7.00 each for my widgets and I am willing to supply them on that basis. I realize that you need the widgets now and, therefore, I am shipping them today. If you do not wish to pay \$7.00 each for them, do not accept them when they arrive."

Upon receipt of this response, could the buyer say to himself: "When they arrive I will accept them, thus forming a contract by conduct. Under subsection (3) of 2-207 I will not be bound to pay \$7.00 each for them since that subsection renounces the 'last shot' principle. I will only have to pay a reasonable price."

It is hard to believe that the result envisioned by the buyer is contemplated by 2-207(3). The buyer's interpretation is a repudiation of the seller's right to reject the buyer's offer and make a counter-offer which can only be accepted on the new terms proposed by the seller. The crucial question is: Does 2-207(3) merely indicate that the seller does not necessarily have the "last shot" or that he *cannot* have the "last shot"?

One writer believes that the offeree *cannot* have the "last shot": "There would seem to be no way to keep the last shot principle by contract." (Hawkland at 21.) This is an incredible construction of subsection (3). It suggests that once an offer is made the offeree may still be bound to its terms if he rejects the offer, clearly makes a counter-offer and the offeror, completely aware of the terms of the counter-offer and the fact that this is the only basis upon which the offeree is willing to contract, accepts the goods when they are shipped. Is this reasonable commercial understanding? Where is there any mention in the Code that the purpose is to find a contract on terms which one party (the offeree-counter-offeror) clearly did not intend and which the other party should not have reasonably expected? This kind of snarl is not intended by the Code in 2-207(3) and only the most superficial kind of statutory interpretation can lead to such an absurd result. The question is: What is the meaning of 2-207(3) if it is still possible for the offeree to retain the "last shot"? Whenever he makes a counter-offer (*i.e.*, whenever it can be said that his response to the offeror is not a definite and seasonable expression of acceptance) then ships the goods which are received and used by the offeror-buyer, will the terms of his counter-offer be the terms of the contract? The answer must be no if subsection (3) is to have any meaning at all. It is submitted that the better interpretation of subsection (3) is that the offeree *does not necessarily* have the last shot.⁴²

Thus, argues Professor Murray, the "last shot" doctrine is merely wounded, not dead. Though he denounces *Roto-Lith*,⁴³ he seems to share Judge Aldrich's (author of the *Roto-Lith* opinion) view that the drafters can't possibly have meant what they said. This writer shares the view

⁴² See note 10 *supra*.

⁴³ Murray at 329-331.

expressed by both Murray and Judge Aldrich that the literal reading of section 2-207 leads in one fashion or another to absurdity.⁴⁴

If Murray's contentions are correct, the *Roto-Lith* view in a reasonably construed section 2-207, construed so as to give effect to both the letter *and* the spirit of the law, is viable. Murray would allow the "last shot" principle to maintain vitality, only limiting it so that ". . . it will not operate to impose terms upon one party to the contract without justification."⁴⁵ For my money, I would choose the best of both worlds; *Roto-Lith* to give timely contract formation, and Murray to allow the "last shot" principle life where it is commercially reasonable to do so. Neither seems to be in accord with the strict, literal wording of the statute, but both are in accord with the spirit and purpose of the Act.

SUMMARY

To summarize, section 2-207 as interpreted by *Dorton* has put the seller in an untenable position.

The Code provisions supplied in the proper circumstances by section 2-207(3) very much favor the buyer.⁴⁶ The seller, negotiation of each sale being a commercially reasonable impossibility,⁴⁷ must find some other way to attempt to get favorable terms. An acceptance not "expressly conditional" is a futile act. The seller, then, hoping for a reasonable construction of section 2-207 must make his acceptance "expressly conditional." If however he should later be met with a *Dorton* style literal reading of section 2-207, he, like the unfortunate Mr. Poel,⁴⁸ may find himself without a contractually bound buyer or, at best, will find his "acceptance" to have been merely a meaningless flirtation with fate, and his terms disregarded, having only the effect of making him perilously work without a contract. Other than take the above chance he can only passively submit to the terms imposed upon him by law. Thus, if *Dorton* and company⁴⁹ are to be followed, the drafters have abrogated the "last shot" doctrine only to replace it with an even more noxious beast—the "shotgun" contract; wherein the reluctant seller is marched to the altar of the law with section 2-207 pointed squarely at his back, one barrel filled with the buckshot of implied warranties and remedies galore, the other with the threat of uncompensable work under a non-contract, and there forced to wed the buyer's homely terms, the adopted daughter of the Code's draftsmen. This is to be avoided and can only be done by a liberal, commercially reasonable construction of section 2-207.

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⁴⁴ *Roto-Lith*, 297 F.2d at 500; Murray at 337.

⁴⁵ Murray at 338.

⁴⁶ See note 19 *supra*.

⁴⁷ See text accompanying note 31 *supra*.

⁴⁸ See note 4 *supra*.

⁴⁹ Meaning WHITE & SUMMERS, HAWKLAND, *et al.*

