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NOTES

Contracts—Meeting of the Minds and U.C.C. § 2-204

In a recent Illinois decision, *Euclid Engineering Corporation v. Illinois Power Company*,¹ the court had to determine the extent to which the liberal approach of the Uniform Commercial Code² toward contract law would be applied in the formation of a contract. Defendant wrote plaintiff a letter inviting offers on certain generator units “subject to our acceptance of purchaser’s assurance that the units will be used outside of the Illinois area.” Following a telephone conversation between the parties, plaintiff offered by letter to pay 30,000 dollars for the units “subject our inspection and approval.” Defendant accepted the offer by letter and, had no further correspondence ensued, plaintiff would have proved the existence of a contract. But plaintiff then mailed a check for the amount with a letter stating, “It is regrettable that our negotiations for the purchase of the equipment should result in controversy regarding our ultimate disposition for re-sale,” and clarifying its intention to be free in disposing of the units throughout the United States except for the Illinois area.

On the basis of section 2-204³ of the Code plaintiff argued that the correspondence between the parties constituted a valid contract. The existence of a contract under that section became the decisive issue on appeal. It appears that this court faced the dilemma of having not only to do justice between the parties but also to promote uni-

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² *Uniform Commercial Code* § 1-102(1): “This Act shall be liberally construed and applied to promote its underlying purposes and policies.” [Hereinafter cited as Code; textual section references are to the Code unless otherwise indicated.]
³ *Code* § 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.
formity under the Code. The court disposed of the case by engrafting upon section 2-204 the theory of a meeting of the minds to find that there was no contract when all of the correspondence was construed together.

The necessity of finding a meeting of the minds or mutual assent as an indispensable element of a contract is justified by the unfairness of holding one to an agreement to which he did not assent. Therefore the attention of the court traditionally focused upon the nature of "assent" and induced analyses in terms of subjective and objective theories of contractual liability. The hypothetical basis of the subjective theory is that the measure of agreement depends upon actual mental assent, that is, whether both of the parties mentally determined and intended to enter into the same contract. The obvious disadvantage of such an approach is that "the devil himself knoweth not the thought of man." However, the parties should be able to rely on representation rather than speculation in transacting business. It is equally necessary for the court to be able to rely upon something less elusive than thoughts to render justice in a particular situation. Since the subjective mental state is determinable only by permitting one to say what it was, perjury and a large element of self interest are encouraged, further discrediting the subjective theory. To minimize the foregoing difficulties courts generally have adopted the objective theory that manifested intent is supreme, not to be

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Footnotes:

5 "The Uniform Commercial Code has not made any change in the basic law." 79 Ill. App. 2d at 152, 223 N.E.2d at 413.
8 See G. Grismore, supra note 6, § 12.
9 Y.B. Pasch. 17 Edw. 4, 2 (1462).
11 Id.
12 Restatement of Contracts § 20 (1932): A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do these acts; but . . . neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.
"frustrated or altered by the secrets and undisclosed intent of one of the parties to the contrary." 13 The subjective theory, however, is likely to remain an undercurrent in decisions 14 because not all problems will be solvable through the objective approach. 15

In typical business transactions the buyer and seller enter into many sales based on their knowledge of good business practice, custom, usage and perhaps commercial law, but generally they do not contemplate the legal consequences of each action. Problems of contract formation arise, nevertheless, where human discord or, more frequently, changing market conditions effect a change in one's intention to have a contract. 16 Rather than adhering to the traditional analyses of contract formation in such a situation, the Code approach in section 2-204 dispense[s] not only with formalities in contracting, but also with the necessity of finding an exact time when the contract for sale was made . . . and with exactness or definiteness of "one or more terms" of the contract . . . . In these respects its purpose is apparently to empower or require courts to give legal consequences to the rough-hewn deals of business men, even though they lack the precision which the judicial mind would find indispensable . . . . 17

Section 2-204(1) provides for a contract involving the sale of goods to be made in any manner showing agreement, including conduct by the parties recognizing that a contract exists. Its purpose was to permit the court to treat "informal dealings as creating bind-

13 Rodgers, McCabe, & Co. v. Bell, 156 N.C. 378, 382, 72 S.E. 817, 818 (1911); see White v. Corlies, 46 N.Y. 467 (Ct. App. 1871) ("unevinced mental determination" without legal effect).

14 It has been said of the subjective theory that "it must necessarily be reckoned with even today, whatever the avowed theory may be. Moreover it is only by keeping constantly in mind the possibility of a conflict of theory . . . that one can hope to understand and to harmonize decisions . . . ." G. Grismer, supra note 6, § 12.

15 In Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 325 F.2d 2, 18 (3d Cir. 1963) appellee's representative testified that he thought his automobile financing was being handled by a company other than appellant, although the objective manifestations of appellee indicated that the contract under examination was with appellant. Held, "[R]egardless of appellant's objective manifestations . . . [appellee] never intended to accept appellant's offer, if any, and that his conduct never reflected the recognition of a financing contract's existence . . . ."


ing obligations." No basic change was made in prior law except to the extent that recognition of a contract by the parties creates a test, unknown at common law, by which a contract may be found when there is a bargain in fact. Subsection (1) is probably of little practical importance in view of the reliance by courts upon similar language in section 2-207(3).

Section 2-204(2) initiates the principle that the precise moment when a contract is made may be unknown without vitiating liability. Its aim was to facilitate the formation of contracts by correspondence, but the Code does not say that the court cannot find a calen-

19 Code § 2-204, Comment; N.C. Gen. Stat. § 25-2-204, N.C. Comment (1965); 1955 Report 269; see Restatement of Contracts § 21 (1932): "The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct."
21 In Associated Hardware Supply Co. v. Big Wheel Distributing Co., 355 F.2d 114 (3d Cir. 1965), the court relied upon the "liberal policy regarding formation of contracts of sale" of section 2-204(1) to find a contract in a course of dealing between the parties.
"Contract" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law. (Compare "Agreement.")
with Code § 1-201(3):
"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). (Compare "Contract.")

One reason that it has not been necessary for the court to use § 2-204(1) in a situation represented by Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (Ct. App. 1915) should be noted. There, following plaintiffs' offer, defendant made a "counter-offer" by making acceptance of plaintiff's offer contingent on a prompt acknowledgment by plaintiff. Held, no contract because plaintiff never acknowledged receipt of the offer. Today the court seems to rely upon Code § 2-207 to find a contract in a Poel situation. In re Doughboy Industries, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962); cf. Valashinas v. Konitu, 308 N.Y. 233, 124 N.E.2d 300 (Ct. App. 1954) (liberal decision, much criticized, antedating Code in New York). But see Roto-Lith, Ltd. v. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962). Arguably Code § 2-204(1) is an equally valid ground for finding the existence of a contract in a factual setting of the Poel type. However, section 2-207 has permitted courts to disregard material differences between offer and acceptance and to overlook or incorporate additional terms in acceptance in construing the terms of a contract. See generally 57 Nw. U.L. Rev. 477 (1962). But section 2-207 is of limited utility in determining when a contract exists.
23 Code § 2-204, Comment.
dar date for the commencement of a contract where necessary because of a statute of limitations.\textsuperscript{24}

Section 2-204(3) states that even if certain terms are left "open" a contract will not fail for indefiniteness if the parties intend to make a contract and a reasonably certain basis exists for a remedy. Contracts with open terms are intentionally approved,\textsuperscript{25} reflecting their practical utility, but two pre-requisites must be met. The first—that the parties intended to make a contract—restricts the operation of the principle if it must be shown that the parties intended to assume a binding legal obligation in the course of informal agreements.\textsuperscript{26} Proof requirements are less stringent, however, if an intent to enter into a "bargain in fact" is sufficient.\textsuperscript{27} In determining whether parties have intended to make a contract the courts, as in \textit{Euclid}, are likely to adhere to the salient policy of examining the whole correspondence between the parties to ascertain whether the latest expressed intent was to have a contract.\textsuperscript{28} The second pre-requisite to an open terms contract is the existence of a "reasonably certain basis for giving an appropriate remedy."\textsuperscript{29} Neither certainty concerning the performance contemplated nor exactitude concerning the amount of damages is required.\textsuperscript{30} Subsection (3) seems to change prior law to some extent\textsuperscript{31} for reports are laden with cases stating that minds must meet as to all terms of a contract.\textsuperscript{32}

\textsuperscript{24} \textit{See} 1955 \textit{Report} 269-271.
\textsuperscript{25} Code § 2-204, Comment.
\textsuperscript{26} 1955 \textit{Report} 279.
\textsuperscript{27} This conflict between technical language ("contract") and a liberal policy may have been created deliberately to enable courts to "do justice" in each case. The difference in results will probably depend upon the extent to which the courts choose to overlook differences in terms of acceptance, Code § 2-207, or to disregard omissions. \textit{See} Pennsylvania Co. v. Wilmington Trust Co., 39 Del. Ch. 453, 463, 166 A.2d 726, 732 (1960) where it was said that "those drafting the statute intended that the omission of even an important term does not prevent the finding under the statute that the parties intended to make a contract."
\textsuperscript{28} Elks v. North State Life Ins. Co., 159 N.C. 619, 75 S.E. 808 (1912); Bristol, Cardiff, & Swansea Aërated Bread Co. v. Maggs, 44 Ch. Div. 616 (1890).
\textsuperscript{29} Code § 2-204(3). It appears from the two reported cases concerning this subject that subsection (3) applies to a transfer of shares of stock, Wilmington Trust Co. v. Coulter, 41 Del. Ch. 458, 200 A.2d 441 (1964), and includes situations wherein a contract may not be "sufficiently definite to be specifically enforced yet which, upon breach, justifies the granting of damages." Pennsylvania Co. v. Wilmington Trust Co., 39 Del. Ch. 453, 465, 166 A.2d 726, 733 (1960).
\textsuperscript{30} Code § 2-204, Comment.
\textsuperscript{31} \textit{See} N.C. \textit{Gen. Stat.} § 25-2-204, N.C. Comment (1965), and cases
tent to which prior law is changed depends upon the number of exceptions which the particular jurisdiction has made to this stricter rule.\textsuperscript{33} How indefinite a contract is permitted to be depends upon commercial standards, but the greater the number of "open" terms the less likely a contract will be found,\textsuperscript{34} unless conduct is decisive under section 2-204(1) or section 2-207(3).

The general tenor of the Code is, in summary, that ordinary and technical contract rules should not govern sales contracts unless they can further principles "unique to the commercial world."\textsuperscript{35} But the court in \textit{Euclid} relied upon the older common law principles in approaching contract formation instead of finding clear and fixed authority within the Code itself.\textsuperscript{36} The court seems to have violated Code policy by not finding contractual liability where conduct clearly indicated contractual intent in terms of Code law. The Code formulation of mutual assent has received scant attention. This may be because section 2-204 has not been thought needed when section 2-207\textsuperscript{37} and basic contract principles\textsuperscript{38} are available; it may also be because counsel have not recognized that section 2-204 makes subtle variations in common law concepts of mutual assent which may be used to advantage. Yet these concepts and their variations should be recognized and implemented within the Code structure to produce a more complete and reliable body of Code law, thereby facilitating business transactions.\textsuperscript{39} Within the breadth of section 2-204 social justice in terms of business relationships is readily accessible with-
Evidence—Privileged Communications Between Husband and Wife

The North Carolina Supreme Court recently reconsidered its position regarding privileged confidential communications between husband and wife. In *Hicks v. Hicks,* the wife had instituted a suit under the provisions of N.C. GEN. STAT. § 50-16 (Supp. 1967), for the custody of their eight-year-old daughter, for maintenance and support for her and the child, and for counsel fees. The trial record reveals that the husband had installed a tape recorder in the basement of the home. There was no evidence that the wife knew of the tape recorder. On three different occasions, in the presence of their eight-year-old child, conversations between the husband and wife were recorded. The opinion does not disclose what was said on

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The legal relations consequent upon offer and acceptance are not wholly dependent, even upon the reasonable meaning of the words and acts of the parties. The law determines these relations in the light of subsequent circumstances, these often being totally unforeseen by the parties. In such cases it is sometimes said that the law will create that relation which the parties would have intended had they foreseen. The fact is, however, that the decision will depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions being inarticulate and subconscious.

1 Common law developed four distinct rules regarding testimony between husband and wife. These rules have not always been kept separate in legal writings. These four categories are: (1) one spouse could not testify in the other's behalf (2) one spouse could not testify against the other (3) one spouse could not testify about confidential communications with the other (4) neither spouse could testify to nonaccess so as to bastardize a child conceived or born during the marriage. See generally J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 78-101 (1947); D. STANSBURY, NORTH CAROLINA EVIDENCE §§ 53-61 (2d ed. 1963) [hereinafter cited as STANSBURY]; 8 J. WIGMORE, EVIDENCE §§ 2285-87, 2332-41 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; Comment, *Evidentiary Privileges and Incompetencies of Husband and Wife,* 4 ARK. L. REV. 426 (1950).

2 271 N.C. 204, 155 S.E.2d 799 (1967).