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## Accord and Satisfaction: Conditional Tender by Check under the Uniform Commercial Code

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## COMMENTS

school they attend. It is possible to suggest that the Supreme Court may view this federal law in the same light as the New York Textbook Loan Law and accordingly sustain its constitutionality.

HELEN M. KANEY

### ACCORD AND SATISFACTION: CONDITIONAL TENDER BY CHECK UNDER THE UNIFORM COMMERCIAL CODE

Frequently, in commercial relations, a dispute arises as to the amount due on an admittedly existing debt. Assume that A and B are engaged in the trading of hay and that A has ordered five hundred bales at one dollar per bale. When the hay arrives A discovers that there are only four hundred and fifty bales in the shipment. Since A could have sold the missing fifty bales of hay at a profit of one dollar per bale, he believes that one hundred dollars should be deducted from his bill to B representing fifty dollars lost value of hay and fifty dollars lost profit. B on the other hand reasons that only the cost of the missing hay—fifty dollars—should be deducted from the purchase price. In an effort to compromise, A subtracts seventy-five dollars from the debt and tenders a check marked “payment in full.” It is at this juncture that the legal problem, which this comment considers, arises.

A tender upon the condition of full payment is often made when there is a dispute as to the exact amount owed. In order to avoid litigation, or a continuing conflict, the debtor may submit a check for more than the amount he thinks he owes but for less than the creditor claims is due.

The hypothetical above assumes the good faith of the debtor, which is certainly not always the case. In an effort to examine the problem from both sides, suppose that all five hundred bales arrive as ordered. A is unable to sell all of the hay and as a result fifty bales remain unsold. A then writes to B and claims that he ordered only four hundred and fifty bales, and as a result of the excess shipment the other fifty bales have spoiled and are useless. He sends a check for four hundred and fifty dollars to B marked “payment in full” in the hope of escaping payment of what he justly owes.

If the debtor is tendering more than he believes is due in order to compromise, he wants to be assured that the check will either be accepted in full payment or returned. He fears that the creditor will take advantage of him by cashing the check and merely applying it to reduce the debt; to guard against this prospect, the debtor marks his check “payment in full.”

Upon receiving a check from a debtor stating that it is in full payment, the creditor is confronted with a difficult problem. Naturally, he would prefer to cash the check and still preserve his right to sue for the balance that he believes is due. There is a possibility, however, that when the creditor sues for

the remainder of the debt the court will hold that the suit is barred because at common law, the creditor's act of cashing the check was considered an acceptance of the compromise agreement—an accord and satisfaction—which extinguished the creditor's right to sue on the original debt.<sup>1</sup>

This comment will briefly survey the law of accord and satisfaction prior to the Uniform Commercial Code (hereinafter cited UCC or Code) and then it will focus upon the changes wrought by the enactment of Section 1-207 of the UCC. This section may provide the creditor with the means for retaining the tendered check without foreclosing his right to sue for the balance of the debt.<sup>2</sup> It is hoped that an inquiry into the legal status of debtors and creditors in light of section 1-207 will prove useful to attorneys advising either party in disputes similar to those presented in the above hypotheticals.

#### ACCORD AND SATISFACTION

When A, our debtor in the hypotheticals, tendered the conditioned check he was performing two separate acts simultaneously. He was requesting a substitution of a new agreement in place of his original obligation to pay for five hundred bales of hay; and, at the same time, he was tendering performance to fulfill that new agreement. This method of settling disputes is known as an accord and satisfaction. The accord and satisfaction is composed of two elements: the accord, an agreement to accept something other than that which is claimed to be due; and the satisfaction, the fulfillment of that agreement.<sup>3</sup>

The accord is essentially a contractual arrangement and, consequently, to be valid it must contain the proper subject matter, mutual assent, and consideration.<sup>4</sup> The requirements of mutual assent and consideration are of particular interest, as they are the subject of most of the litigation in the area of accord and satisfaction.<sup>5</sup>

The principle that mutual assent requires an actual meeting of the minds in a subjective sense has been rejected in favor of the more objective test, which states that there is mutual assent if a party acts in such a manner as to lead the other reasonably to believe that he has assented.<sup>6</sup> In the area of accord and satisfaction, especially in check cases, the courts seem to have extended the objective test—finding assent even where the creditor's objection is manifest.<sup>7</sup>

1. 6 A. Corbin, Contracts § 1279 (2d ed. 1962); see *infra*, notes 8, 9, and 10.

2. The section has not as yet been judicially construed and the doubt as to its protective application is considered *infra*.

3. Corbin, *supra* note 1 at § 1276.

4. Eckert-Fair Construction Co. v. Capitol Steel & Iron Co., 178 F.2d 338 (5th Cir. 1949), *cert. denied*, 339 U.S. 928 (1950).

5. Barnes v. Mid-Continent Casualty Co., 192 Kan. 401, 388 P.2d 642 (1964); Kirby v. Monroe Paper Products Co., 1 Mich. 680, 137 N.W.2d 736 (1965).

6. 6 S. Williston, Contracts § 1854 (3d ed. 1957); 1 A. Corbin, Contracts § 9 (2d ed. 1962); Hoepfner Construction Co. v. United States of America for use of Trautman & Shreve, Inc., 273 F.2d 835 (10th Cir. 1960).

7. See *infra* notes 8, 9, and 10. But some jurisdictions require that in order for the agreement to constitute a valid accord it must be entered into by the parties understandingly

Thus, courts have found a valid accord and satisfaction when a check was tendered in full payment and the creditor: (1) obliterated the "payment in full" condition which the debtor had written on the check and then cashed it;<sup>8</sup> (2) cashed the check but informed the debtor that he had accepted payment only on the debtor's account and not in full satisfaction of the debt;<sup>9</sup> and, (3) cashed the check but placed an endorsement thereon stating that all rights of sue for the balance are reserved.<sup>10</sup> These findings of mutual assent have the common factor that a creditor appropriated the benefit of the other party's performance, while at the same time he endeavored to escape the corresponding obligation. The courts at common law stretched the objective test to find the necessary requirement of mutual assent in order to uphold the accord.

Two principal forms of consideration support a finding of a valid accord. The first is new consideration, such as payment before due<sup>11</sup> or a new security.<sup>12</sup> The other type of consideration is found in the existence of a bona fide dispute as to the amount of the debt.<sup>13</sup> This form of consideration is based on the theory that if the amount due is disputed or unliquidated the forbearance from suit and the willingness to compromise is in itself valuable consideration.<sup>14</sup> The critical factor is whether or not the debt is undisputed, for if it is, part payment on such a debt will not support an accord and satisfaction.<sup>15</sup> However, to avoid hardship and surprise, a minority of jurisdictions, including New York, provide either by statute or decision that if there is a written receipt or agreement to accept partial payment even a liquidated debt will be discharged.<sup>16</sup>

At common law, the principle of accord and satisfaction prevented the creditor in most cases from applying the check tendered in disregard of the debtor's condition. Unless there was no consideration the creditor could reasonably expect that his cashing of the check would result in the finding of an accord and satisfaction and the resultant loss of his right to sue for the balance.<sup>17</sup> Even if the creditor merely retained the check without cashing it he risked a

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and with a unity of purpose. *See, e.g., Kansas Power & Light Co. v. Hugoton Production Co.*, 251 F.2d 946 (10th Cir. 1958).

8. *Burgamy v. Davis*, 313 S.W.2d 365 (Tex. Ct. Civ. App. 1958); *Roberg v. Evyan, Inc.*, 7 Misc. 2d 851, 163 N.Y.S.2d 729 (Sup. Ct. 1957).

9. Restatement of Contracts, § 420 (1932); *Hudson v. Yonkers Fruit Co.*, 258 N.Y. 168, 179 N.E. 373 (1932); *Motorola Communications & Electronics, Inc. v. South Georgia Natural Gas Co.*, 104 Ga. 376, 121 S.E.2d 672 (1961).

10. *United States v. Tapor-Ideal Dairy Co.*, 175 F. Supp. 678 (N.D. Ohio 1959) *aff'd*, 283 F.2d 869 (6th Cir. 1960).

11. *Crow v. Gore*, 85 F.2d 291 (D.C. Cir. 1936); *Bandman v. Finn*, 185 N.Y. 508, 78 N.E. 175 (1906).

12. *Dickenson v. Fletcher*, 181 Ore. 316, 182 P.2d 371 (1947); *Jaffray v. Davis*, 124 N.Y. 164, 26 N.E. 351 (1891).

13. *Merriman v. Thomas*, 133 Me. 326, 177 A. 615 (1935); *Burgamy v. Davis*, 313 S.W.2d 365 (Tex. Ct. Civ. App. 1958).

14. *See supra* note 12.

15. *See supra* note 12.

16. N.Y. Pers. Prop. Law § 33, subd. 2 (1961); Real Property Law § 279, subd. 1 (1961); Annot. 119 A.L.R. 1126 (1939); 1 Am. Jur. 2d *Accord and Satisfaction* § 56 (1962), n.14 and 15.

17. *See supra* note 1.

finding that his retention was for an unreasonably long time and, therefore, that it amounted to acceptance of the accord.<sup>18</sup> The only alternatives open to the creditor were notification to the debtor of his disagreement with the condition of full payment, and either a return of, or an offer to return, the check.

The inability of creditors to use the payment and yet preserve their rights and the creditors' limited alternatives were a consequence of the common law doctrine that, "the manner of the tender of the payment shall be directed by him that maketh the tender or payment and not by him that accepteth it."<sup>19</sup> Based upon this principle, the common law demanded that, when the debtor tendered the payment on the condition of full satisfaction, the creditor either accept it as extinguishing the debt or return the check.<sup>20</sup>

#### THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code contains a provision which appears to have given additional rights to the party receiving a conditioned check. That section provides:

A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient.<sup>21</sup>

A check tendered as conditional payment is within the scope of the Uniform Commercial Code, and since it is commercial paper, Article Three of the UCC is applicable. When a conditioned check is given as payment in a transaction of a sale of goods Article Two is involved. Most importantly for present purposes, however, Article One, which "sets forth principles and definitions of general application," also determines the reciprocal rights of the parties.<sup>22</sup>

#### THE CREDITOR UNDER THE UCC

The effect of section 1-207 where a creditor, upon receipt of a check tendered as payment in full, attempts to reserve his rights, requires analysis. Since there are no reported cases construing section 1-207, reliance must be placed on the statute itself and upon the drafters' comments. Those comments, while not legally binding upon the courts, have been highly persuasive in determining the application of the UCC.<sup>23</sup>

In the hypothetical above, where A tendered to B a check to compromise the dispute growing out of the amount properly owing on A's purchase of hay,

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18. *LePage v. Lalance & Grosjean Manufacturing Co.*, 98 App. Div. 179, 90 N.Y.S. 676 (1904); *Miller v. Montgomery*, 77 N.M. 766, 427 P.2d 275 (1967).

19. *Pinnel's Case*, 5 Coke 117 A, 77 Eng. Reprint 237, 1 Eng. Rul. Cas. 368 (1813).

20. *Id.*

21. Uniform Commercial Code § 1-207.

22. *Hawkland*, Uniform Commercial "Code" Methodology Vol. 1962 Ill. L.F. 291, 300; *see also* Uniform Commercial Code § 3-102 subd. 4.

23. *Burchett v. Allied Concord Financial Corp.*, 74 N.M. 575, 396 P.2d 186 (1964).

the result would be different under the Code than at common law. Assuming consideration, B, at common law, must either accept the check tendered in full satisfaction of the debt or return it.<sup>24</sup> If he cashes the check, his later suit for the balance of the debt will be barred by a valid accord and satisfaction.<sup>25</sup> However, under section 1-207, he need only state that he accepts the payment tendered "under protest," or "without prejudice," thereby reserving his right to sue later for the amount he believes is owed.

*Hanna v. Perkins*,<sup>26</sup> the only case found mentioning section 1-207, lends support to the thesis that the section will be applied to cases concerning accord and satisfaction. In that case, the creditor indorsed and cashed a check presented upon the condition of full payment. When the suit was brought for the balance alleged to be due, the debtor moved for summary judgment on the grounds that the suit was barred by a valid accord and satisfaction. The court denied the debtor's motion because the question of the existence of consideration was a triable issue of fact.<sup>27</sup> Nevertheless, the court, in dicta, cited section 1-207 with approval, stating that but for the issue of consideration it would have denied defendant's motion because of the creditor's indorsement "under protest."<sup>28</sup>

Therefore, a creditor receiving a check conditioned on full payment and desiring to retain his right to sue for the remainder of the debt should be counselled to write above his indorsement that he accepts "under protest" or "without prejudice." Section 1-207 states that these words will be sufficient to prevent acceptance from prejudicing the rights reserved. The question of which rights are reserved, however, is not adequately answered by the words "without prejudice" or "under protest." It would seem advisable for a cautious attorney to instruct the creditor to state he is reserving the right to sue for the balance of the debt. The use of the means provided by section 1-207 seems to assure the creditor that his later suit on the debt will not be barred by an accord and satisfaction. But as this comment will later discuss, there are arguments for excluding section 1-207 from cases involving conditional checks.

#### THE DEBTOR UNDER THE UCC

In view of section 1-207, the debtor is unable to demand that his check either be accepted as full payment or returned. UCC 1-207 seems to provide the creditor with the means to reap the benefits of the tender while permitting him to ignore the condition upon which the check is submitted. It would appear that the debtor must be counselled that unless he is willing to risk the application of the check to his account without completely discharging the debt he should not tender a check conditioned on full payment.

Since section 1-207 has not been adequately construed by the courts, the

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24. See *supra* note 19.

25. See *supra* note 1.

26. 2 UCC Rep. Serv. 1044 (Co. Ct. N.Y. 1965).

27. *Id.* at 1046.

28. *Id.*

above conclusions must be regarded as tentative. In view of this uncertainty the debtor who, under prior law, used the conditioned check to his advantage may still desire to risk its continued use. During this formative period arguments to sustain the viability of the conditioned check can be made. In anticipation of these arguments it is suggested that the conditional tender be phrased in the following manner:

I, John Debtor, present this check to William Creditor in full settlement of my existing debt to said creditor arising out of (specify obligation). The creditor agrees to accept this check in full payment, to forbear from future suit on the debt, and to refrain from seeking to reserve his rights by accepting the check "under protest", or "without prejudice" or by similar reservation.<sup>29</sup> Consideration for the above promises is my tender of this check to compromise a debt disputed in good faith.<sup>30</sup> The check is not offered pursuant to, or along the lines of, the original contract, but in rescission and substitution of that contractual obligation and for an accord and satisfaction.<sup>31</sup> The return or destruction of this check will evidence the creditor's rejection of this tender, while the act of cashing the check shall be acceptance of this contract and its attendant conditions.<sup>32</sup>

The above condition upon which the following arguments are based is suggested as a means by which the creditor can be prevented from ignoring the debtor's restrictions on the tendered check. While the condition is not basically different from the old "in full payment" condition, it does provide certain advantages for the debtor. It expresses his intention fully and provides a court which is friendly to his position with legs to support its decision. The debtor's case proceeds directly from the stated condition instead of first having to establish exactly what a condition like "in full payment" implies.

The issues involved in the application of section 1-207 have not as yet been resolved in a reported case. The competing arguments below illustrate the type of advocacy that might be presented to a court considering the effectiveness of an expressed formula of conditional tender.

#### THE STATUTE'S PURPOSE

Application of section 1-207 where the check is presented with the above statement would not be consonant with the intent of the statute. The section's purpose is to permit—not demand—performance along the lines of the contract. To apply section 1-207 here is in effect to demand that any tender resembling that due under the original contract be included within the scope of the statute. Permitting the creditor to reserve his right to sue under section 1-207 would not result in performance along the lines of the contract, but rather would allow

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29. See *infra* note 38.

30. Obviates defense of failure of consideration requirement of consideration; see, *supra* notes 11, 12, 13, 14, 15.

31. See *infra* arguments under statute's purpose.

32. See *infra* note 42.

the creditor to divert a tender under a new contract to his own benefit while disregarding the contractual conditions upon which it was presented. This outcome was certainly not intended by the statute.

An alternative argument may maintain that section 1-207 was not designed to dispose of cases resembling our original accord and satisfaction hypothetical. Assume that A orders one hundred bushels of apples from B but only ninety-eight are delivered. If A accepted the shipment with knowledge of the breach, a court deciding under common law principles might consider his acceptance as a waiver; and, if the UCC were applicable, section 2-607 might cause the buyer to lose the right to revoke the acceptance.<sup>33</sup> The consequence of the risk of an adverse effect upon the buyer was to encourage him to reject the non-conforming goods. Since goods are usually most valuable when delivered to a buyer, this reaction resulted in a loss of at least transportation costs and often a decrease in value due to spoilage or obsolescence. In order to avoid the economic waste and enable performance to be continued along the lines of the contract, despite a pending dispute, the Code permits the buyer to accept the delivery and still retain his rights. It is within this context that section 1-207 accomplishes its purpose.

There is a critical difference between the above facts and the case where the check is tendered pursuant to an accord. In the latter situation performance along the lines of the contract has been consciously rejected and performance under a new contract has been tendered. Thus, in order to be consistent with the section's announced purpose, section 1-207's application should be confined to instances wherein the parties intend performance along the lines of the original contract and not expanded to include the case of an accord and satisfaction.

In rebuttal to the above argument it will be contended that UCC 1-207 was intended to control accord and satisfaction cases such as the one illustrated in our original hypothetical. The section is inapplicable to the transaction exemplified by the apple hypothetical because "the statute is not addressed to the creation or loss of remedies in the ordinary course of performance. . . ."<sup>34</sup> Other sections of the Code (2-602 and 2-607) provide solutions to the problems of acceptance arising in the ordinary course. Furthermore, even if section 1-207 applies to ordinary transactions in goods, such as the apple example, this does not preclude its application in other cases. If the scope of the section were to be so limited it would have been included within Article 2 rather than in the generally applicable Article 1.

The section was intended "to provide a method of procedure where one party is claiming as of right something which the other feels is unwarranted."<sup>35</sup> The fulfillment of this purpose is accomplished only by the application of section

33. *Einot, Inc. v. Einot Sales Co.*, 154 Neb. 760, 49 N.W.2d 625 (1951), *aff'd on rehearing* 155 Neb. 323, 51 N.W.2d 791 (1952).

34. Uniform Commercial Code § 1-207 Comment (1962).

35. *Id.*



1-207 to the accord and satisfaction situation. It is there that such a dispute occurs and in that context that the section provides its intended remedies.

GOOD FAITH

It will be contended that cashing the check without the intent to honor the condition upon which the check was presented does not fulfill the requirement of good faith. The creditor's actual knowledge of the debtor's reliance upon acceptance of the condition proves evidence that the former's disregard of the condition is not good faith.

In many instances the debtor has been induced to tender the check solely by his expectation that the creditor would abide by the condition. For example, this problem appeared in our original hypothetical when A, who had ordered five hundred bales of hay from B claimed that he was entitled to a reduction of one hundred dollars for a shortage in the delivery. B, while admitting some allowance should be granted, would permit only a fifty dollar deduction from the purchase price. In reliance that the check would either be accepted in full payment or returned, B presented a conditioned check for more than he believed to be due: seventy five dollars less than the purchase price.

Good faith, as defined in section 1-201(19) as "honesty in fact," remains a sufficiently flexible concept to permit a court to apply it to a case of subversion of the reasonable expectation and reliance of the other party.<sup>36</sup> If the underlying contract concerns a transaction in goods, the definition of good faith, in the case of a merchant, is expanded to include "observance of reasonable commercial standards of fair dealing in the trade."<sup>37</sup> Assuming that the evidence demonstrates a commercial practice of either acquiescence to the provisions of a conditional tender or a return of the check, a court would have even stronger grounds upon which to find a lack of good faith.

On the other hand, since the option of the creditor to reserve his rights while assenting "to performance in a manner demanded or offered by the other party"<sup>38</sup> has been consciously granted by legislative act, the argument that the exercise of that privilege is not good faith is arguably unsound. For the court to forbid the creditor to enjoy his statutorily conferred rights under the guise of a finding of lack of good faith would be to substitute judicial judgment as to the prudence of the legislation, rather than to apply or interpret it.

The contention based on the debtor's reasonable reliance and expectations is also weak. The creditor may never have represented that he would honor the condition of full payment, and UCC 1-207 stands as a warning to the debtor that the creditor need not heed it. With regard to transactions to which Article 2 applies—requiring fair dealing and reasonable commercial practice—the same

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36. Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 669 (1963).

37. Uniform Commercial Code § 2-103 (1962).

38. Uniform Commercial Code § 1-207 (1962).

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argument is applicable. Moreover, even if the privilege exercised is inconsistent with pre-Code commercial practice, this may be easily explained by the fact that under prior law such a privilege did not exist.

### VARIATION BY AGREEMENT

The agreement which arises upon the act of the cashing of the check contains provisions which in effect removes the privileges of the creditor granted by section 1-207.<sup>39</sup> The immediate problem which this result suggests is whether or not such variation of the Code by agreement is permissible.

In civil law jurisdictions there is a clear line drawn between categories of "jus dispositivum," a rule applicable unless otherwise agreed and "jus cogens" a rule which cannot be set aside by contract.<sup>40</sup> Although the Code does not borrow this vocabulary, it does divide the sections into similar categories. Some of the provisions are explicitly placed in the class of "jus dispositivum" by the inclusion of the phrase "unless otherwise agreed,"<sup>41</sup> while others make it clear that they may not be varied by agreement.<sup>42</sup> Within these two extremes are the majority of provisions, which do not declare into which category they fall. Most of these are placed in the "jus dispositivum" class by UCC 1-102(3) which states:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

Since section 1-207 is silent as to whether it may be varied the above section 1-102 would apply, making variation by agreement permissible.

This argument is open to criticism because it rests on the premise that the act of cashing the check is an acceptance, because if there has been no acceptance, no agreement arises; and thus the question of whether the Code can be varied becomes academic. It is necessary for a court to be persuaded that a contract exists before the argument of variation by agreement may be deemed significant. Therefore the effectiveness of the argument rests on the proof of an acceptance of the debtor's conditions.

Acceptance of the accord, based upon the act of cashing the check, will be

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39. The condition explicitly removes the creditor's right to cash the check while reserving his rights by stating that he does so "under protest" or "without prejudice."

40. Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. Ind. & Com. L. Rev. 59, 62 (1961); see also, Lenhoff, *Optional Terms (Jus Dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts*, 45 Mich. L. Rev. 39 (1946).

41. See, e.g., 1-204(1), 2-210, 2-306(2), 2-307, 2-308, 2-310, 2-311(2), 2-312, 2-314, 2-315, 2-316, 2-319, 2-320, 2-321, 2-322, 2-323, 2-324, 2-325, 2-326, 2-327, 2-401, 2-503, 2-504, 2-507, 2-509, 2-511, 2-513, 2-514, 2-601, 2-615, 2-706(2), 2-719, 2-725(1), 3-414(2), 3-506, 3-802, 4-103(1), (2), 4-206, 5-106, 5-109, 5-110, 5-111, 5-113, 5-114(2), 7-204, 7-302, 7-309, 7-507, 8-208(2), 8-314, 8-316, 9-112, 9-204(3) (5), 9-206, 9-207, 9-316, 9-503, 9-504(2).

42. See 1-102(3), 1-105(2), 1-208, 2-302, 2-718, 2-719, 5-116(2), 9-318(4).

argued by the debtor under several theories. The most obvious relies on the statement contained in the tendering condition: "The return or destruction of this check will evidence the creditor's rejection of this tender while the act of cashing the check shall be acceptance of this contract and its attendant conditions." In order to establish an acceptance based on this declaration, the debtor must prove that he had a right to declare that acceptance arises on the performance of the specified act of the creditor. It is well settled that the offeror may prescribe the mode of acceptance, which may require either a performance or a forbearance.<sup>43</sup> The offeror's right to prescribe the mode of acceptance is limited by the principle that ambiguous conduct, which is not intended as acceptance, will not be construed as such.<sup>44</sup> For example, it has been held that where a finder of a watch returns it, without the intention of accepting the unilateral offer for reward, no contract arises.<sup>45</sup>

The watch example, however, may be properly distinguished from the factual context under consideration for the reason that in the watch situation no injury is caused to the offeror. Where the offeror has been injured due to his reasonable reliance on the conduct of the offeree, even otherwise ambiguous conduct will be considered acceptance, and the resultant contract will be valid.<sup>46</sup> Therefore, unlike the watch finder, where the debtor tenders a check and specifies that the act of cashing constitutes acceptance; and the creditor, with full knowledge of that condition cashes the check, the debtor is injured, and a court may find that an acceptance has occurred.

Another theory which will support a finding that the act of cashing the check is an acceptance is based on the following principle: "Where an act may rightfully be done with certain consequences or effect, the actor cannot assert for his own advantage to avoid that effect that the act was done wrongfully."<sup>47</sup> Thus, an offeree of goods at a price in excess of their market value cannot take them and say he is converting the goods and consequently is not liable for the contract price, but instead only for the market value at the time of the conversion.<sup>48</sup>

In order to determine the applicability of this principle to our factual context, it must be determined whether the act of cashing the check and applying it inconsistently with the condition upon which it was tendered is a conversion. The Restatement of Torts defines conversion as the "intentional exercise of dominion or control over a chattel which so seriously interferes with the right

43. 1 A. Corbin, *Contracts* §§ 67, 77 (2d ed. 1962); Restatement of Contracts § 29 (1932); *Shortridge v. Giho*, 253 S.W.2d 838 (Mo. Ct. App. 1952); *Union Interchange, Inc. v. Allen*, 140 Mont. 227, 370 P.2d 492 (1962).

44. Restatement of Contracts § 71 (1932).

45. 1 S. Williston, *Contracts* § 67 (3d ed. 1957) For similar results in cases involving information leading to the arrest of criminals *see, e.g.*, *Taft v. Hyatt*, 105 Kan. 35, 180 P. 213 (1919); *Vitney v. Eley*, 51 App. Div. 44, 64 N.Y.S. 397 (1900).

46. *Rice v. Klamut*, 81 Ohio 566, 91 N.E. 1137 (1910); 1 S. Williston, *Contracts* § 67A (3d ed. 1962).

47. 6 S. Williston, *Contracts* § 1856 (rev. ed. 1938).

48. *Id.*

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of another to control it that the actor may justly be required to pay the full value of the chattel."<sup>49</sup> However, in most jurisdictions a chose in action may be converted<sup>50</sup> and case law,<sup>51</sup> as well as the UCC itself,<sup>52</sup> recognizes that a check is a possible subject of conversion. Assuming that the check is a potential subject of a conversion, the critical factor becomes the characterization of the act of cashing the check. In *Craven v. Wright*,<sup>53</sup> the court found a conversion where a check was given for a particular purpose but was diverted to another one, and this seems to be exactly what has occurred in the instant factual situation. The debtor has tendered the check for the sole purpose of having it constitute full payment of the debt but it has been diverted merely to reduce the debtor's balance. Therefore, since a check may be converted, and since an act inconsistent with the purpose for which a check is presented may be an act of conversion, a court may find that the creditor's cashing of the check was a tortious conversion.

Thus the principle which prohibits the tortfeasor's claim that he committed the act wrongfully in order to escape the effect of the rightful performance, would apply. The creditor's act of cashing the check would be given the same effect as if it had been performed rightfully, with the result that acceptance will be found to have occurred.

## CONCLUSION

It would appear that a court could limit the effect of section 1-207 in order to exclude its application from the factual context of accord and satisfaction discussed in this comment. This could be accomplished by any of the following rationales: (1) the performance is not tendered along the lines of the original contract and therefore the purpose of UCC 1-207 would not be served by its application; (2) the cashing of the check and its application inconsistently with the tendering condition lacks good faith; (3) the parties explicitly by agreement have varied the creditor's rights in such a manner that the privileges granted him under section 1-207 are not available.

When a court is deciding whether or not to use any of the above rationales it should examine the relevant policy considerations. The public greatly benefits from the private solution of disputes. If all controversies were brought to the courts, the task of solving them would overburden the judicial apparatus. Therefore, to the extent that the check tendered in full payment is an aid in effecting compromise, its condition should be given effect. If courts deny aid in enforcing agreements reached by the tendering of a conditioned check, that

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49. Restatement (Second) of Torts § 222 A (1965).

50. See Rubin, *Conversion of Choses in Action*, 10 Ford L. Rev. 415 (1941); Restatement (Second) of Torts § 242 (1965).

51. Cases of check conversion: *Lovel v. Hammond Co.*, 66 Conn. 500, 34 A. 511 (1895); *Schmidt v. Garfield, Nat'l Bank*, 64 Hun. 298, 19 N.Y.S. 252 (Sup. Ct. 1892); *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 68 P. 879 (1902).

52. Uniform Commercial Code § 3-112 (1962).

53. 114 Ore. 692, 236 P. 1043 (1925).

means of producing settlements will rapidly disappear. On the other hand, the tender of a conditioned check has been criticized as a weapon used by the powerful debtor to overcome a weak creditor.<sup>54</sup>

Even the author criticizing the conditioned check, however, admits that there is little danger of its improper use in most commercial transactions.<sup>55</sup> It is only within the class of cases where the debtor (insurance company, employer, or landlord) is in such a superior bargaining position that he is able to economically coerce the creditor into an unfair settlement. Unfortunately, this problem would not be obviated by the elimination of the tendered check but would require a more basic change in the law of accord and satisfaction, which would prevent the debtor from using this means to force an inequitable settlement on the creditor.<sup>56</sup>

There appears to be no substantial reason to permit the check tendered upon full payment to be cashed without requiring that its condition be enforced. A court may permit the condition to be effective by utilizing any of the rationales submitted above. However, since section 1-207 has not yet been judicially construed we must await future court action to discover exactly what effect that section will have upon the law of accord and satisfaction.

HOWARD T. REBEN

## THE DOUBLE VETO IN THE SECURITY COUNCIL: A NEW APPROACH

### I. INTRODUCTION

Article 27, paragraph 3, of the United Nations Charter provides that the concurring votes of the five permanent members of the Security Council<sup>1</sup> are necessary in order to adopt a non-procedural matter. Therefore, if a permanent member votes in the negative, it in effect vetoes the resolution. The determination of whether a matter is procedural, and therefore not subject to the veto, is in itself a non-procedural matter and therefore subject to the veto. If a permanent member votes in the negative on this question, it establishes the non-procedural character of the matter. Thus, by exercising its double veto power, a permanent member of the Council can establish the non-procedural character of a matter and subsequently prevent its passage.

While the double veto was invoked relatively frequently during the first

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54. Role of the Check in Accord and Satisfaction: Weapon of the Overreaching Debtor, 97 U. Pa. L. Rev. 99 (1949).

55. *Id.*

56. For example, the liberal application of the unconscionability concept, *see* Uniform Commercial Code § 2-302 (1962).

1. Under Article 23 of the U.N. Charter, the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are permanent members of the Council.