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NOTES AND COMMENTS

**Accord and Satisfaction—Cashing Check Marked In Full
Payment—Conditional Request to Stop Payment
of Check**

A dispute having arisen over coal transportation charges, the debtor, on May 26th, sent a check marked in full payment as shown in voucher. The voucher showed that the check covered the admitted difference between the freight and the claim for damages, but there was no further indication of the debtor's desire for an accord and satisfaction. That the creditor so understood the desire was shown, however, in his reply of the 27th, saying the check was acceptable only on account and, if not agreeable, for the debtor to stop payment on it. This letter reached the debtor on the 31st, the same day the check was collected, having been deposited on the 28th. The debtor did not stop payment and on June 3rd replied, reiterating the position taken in his first letter. *Held*, there was no accord and satisfaction, as the creditor did not voluntarily assent; and there was no compromise, as no new consideration was given, since the debtor had paid only the sum he admittedly owed and no part of the disputed amount.¹

Did not the creditor voluntarily assent? There must be mutual assent but this does not necessarily involve mental assent, since assent will be implied from the circumstances and conduct inconsistent with a refusal.² It has been held that the acceptance of a check necessarily involves an acceptance of the conditions upon which it was tendered, even though at the time the creditor protests.³ It is generally held that the creditor has but one alternative and must accept the amount

¹ Moore and McCormack Co. v. Valley Camp Coal Co., 37 F. (2d) 308 (C. C. A. 4th, 1930).

² Redmond v. Atlanta & B. Air Line Ry., 129 Ga. 133, 58 S. E. 874 (1907); Woburn National Bank v. Woods, 77 N. H. 172, 89 Atl. 491 (1914).

³ Northern Trust Co. v. Knowles, 208 Ill. App. 258 (1917); G. & L. Realty Co. v. Friedman, 105 Misc. Rep. 632, 173 N. Y. Supp. 376 (1919); (1923) 9 VA. L. REG. (N. S.) 307; 3 WILLISTON, ON CONTRACTS, 1924, §1854; Note (1925) 34 A. L. R. 1044. But *cf.* Goldmith v. Lichtenberg, 139 Mich. 163, 102 N. W. 627 (1905); Day v. McLea, L. R. 22 Q. B. Div. 610, 60 L. T. (N. S.) 947, 58 L. J. Q. (N. S.) 293, 37 Week. Rep. 483, 53 J. P. 532 (Eng. 1889). But *cf.* Hirachand Punamchand v. Temple, 1911 2 K. B. Div. 330.

tendered upon the terms of the condition or return the check.⁴ The right to name the terms rests alone with the debtor.⁵

Can the creditor shift the onus of acting upon the debtor and take the failure to stop payment as a confirmation? The offeree is at liberty to accept wholly, or reject wholly, but one of these things he must do; for if he answers proposing to accept under a modification, this is a rejection of the offer and constitutes a counter offer which necessitates an acceptance as did the original offer.⁶ Generally speaking, if an offeror makes no reply to a counter offer, his silence and inaction cannot be construed as assent, and this is true even in the face of a statement that his silence would be taken as an acceptance.⁷ A debtor must at least be given time to waive the conditions and, if the creditor acts before the conditions are waived, it should be considered as an acceptance of the former terms.⁸ In the principal case the creditor evidently understood the debtor's desire⁹ for an accord and satisfaction and, despite this, he acted before receiving the debtor's letter of June 3rd which was certainly no waiver of the conditions.

It is submitted that public policy will be better served by encouraging settlements and compromises out of court and that the result attained here will discourage such attempts, since the creditor

⁴ *Seeds, Grain & Hay Co. v. Conger*, 83 Ohio St. 169, 93 N. E. 892, 32 L. R. A. (N. S.) 380 (1910); *Ex parte Southern Cotton Oil Co.*, 207 Ala. 704, 93 Sou. 662, aff'd. 20 Ala. App. 1, 102 Sou. 149 (1922); 3 WILLISTON, ON CONTRACTS (1924) §1856; *Hoop v. Kansas Flour Mills Co.*, 124 Kan. 769, 262 Pac. 544 (1928).

⁵ *Cunningham v. Standard Const. Co.*, 134 Ky. 198, 119 S. W. 765 (1909).

⁶ *Cozart v. Herndon*, 114 N. C. 252, 19 S. E. 158 (1894).

⁷ *Felthouse v. Bindley*, 11 C. B. (N. S.) 869, 31 L. J. C. P. 204, 6 L. T. 157, 10 W. R. 423, 142 Eng. Rep. 1037 (1862); *Prescott v. Jones*, 69 N. H. 305, 41 Atl. 352 (1898); 1 WILLISTON, ON CONTRACTS (1924) §§91-92. But cf. *Haddow v. Owens Co.*, 172 Wis. 391, 179 N. W. 508 (1920); *Burton Coal Co. v. Gorman Coal Co.*, 22 Ohio App. 383, 153 N. E. 863 (1926) (In face of obvious duty the debtor must act or otherwise the creditor's using the check will be no accord and satisfaction). Discussed in (1927) 1 CIn. L. Rev. 218.

⁸ *Policastro v. Pitske*, 65 Misc. Rep. 524, 120 N. Y. Supp. 743 (1910). (Creditor's using the check without waiver of the conditions by the debtor is an accord and satisfaction and the debtor's mere silence in face of a counter proposal was no waiver of his conditions); 4 PAGE, ON CONTRACTS (1920) §2504; *Sylva Supply Co. v. Watt*, 181 N. C. 432, 107 S. E. 451 (1921). When there is a fiduciary relationship between the parties then it is otherwise; *Egan v. Crowther*, 48 Cal. App. 362, 241 Pac. 900 (1925), discussed in (1925-26) 14 CALIF. L. REV. 250.

⁹ In a few states the burden is on the debtor to make absolutely positive that the creditor understands his intention for an accord and satisfaction. *Dimmick v. Banning, etc. Co.*, 256 Pa. 295, 100 Atl. 871 (1917). But cf. *Davis Sulphur Ore Co. v. Powers*, 130 N. C. 152, 41 S. E. 6 (1902) (Where, "which balances account," is held to sufficiently show intent).

can impose new duties on the debtor while having the advantage of the debtor's check in his possession as a threat. In any event, the reasoning of the present case seems open to criticism as it results in permitting the creditor to shift the burden of acting upon the debtor without giving a reasonable length of time in which to act. The same result could more logically be attained on the ground of lack of consideration, since no part of the disputed amount was paid but only the sum admittedly due.¹⁰

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Agency—Bills and Notes—Agent's Indorsement of Check Drawn to Principal's Order

An attorney, with authority to settle his client's claim, received a check payable jointly to himself and the client. He indorsed for both, cashed the check, and retained the proceeds. *Held*, the transaction amounted to payment to the attorney of the amount of cash represented by the check and received thereon, and was payment of client's claim.¹

Although some courts show a tendency to hold that an attorney with authority to settle a client's claim has implied authority to indorse a check received in payment,² the rule generally laid down is that authority to indorse negotiable paper will not be implied unless it is absolutely necessary to the carrying out of the purpose of the agency.³ By this rule, the check in the instant case was wrongfully indorsed.

¹⁰ *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 216 Mass. 204, 103 N. E. 695 (1913) (Refuses to follow idea of no voluntary assent by creditor but gets the same result on ground of no consideration); *Hamburger v. Economy Dept. Store*, 222 N. W. 603 (S. D. 1928); (1929) 14 Iowa L. Rev. 474. *Contra*: *Chicago, etc. R. Co. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. ed. 1099 (1899); 1 WILLISTON, ON CONTRACTS (1924) §129; *Schnell v. Perlman*, 238 N. Y. 362, 144 N. E. 641, 34 A. L. R. 1023, aff'd 239 N. Y. 504, 147 N. E. 171 (1924). Discussed in (1924) 2 N. Y. L. Rev. 414; *Shapleigh Hardware Co. v. Farmer's Federation Inc.*, 195 N. C. 702, 143 S. E. 471 (1928). See also, *May Bros. v. Doggett*, 124 Sou. 476 (Miss., 1929). If the disputed portion belongs to a separate and distinct transaction then it cannot carry over so as to apply to the admitted indebtedness and create a dispute as to it, *Brent v. Whittington*, 214 Ala. 613, 108 Sou. 567 (1926). But cf. *Sylva Supply Co. v. Watt*, *supra* note 8. For general discussion see (1925) 9 MINN. L. REV. 458; (1929) 8 N. C. L. REV. 71.

¹ *Patterson v. Southern Ry. Co.*, 151 S. E. 818 (Ga. App. 1930).

² *Nat. Bank of the Republic v. Old Town Bank*, 112 Fed. 726 (C. C. A. 7th, 1902); *Brown v. Grimes*, 74 Ind. App. 655, 129 N. E. 483 (1921); 1 THORNTON, ATTS. AT LAW (1914) 363, 364.

³ *Bank of Morganton v. Hay*, 143 N. C. 326, 55 S. E. 811 (1906); *Crahe v. Mercantile etc. Bank*, 295 Ill. 375, 129 N. E. 120 (1920); Note (1921) 12 A. L.