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COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS

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THE NEGOTIABILITY OF CORPORATE BONDS AND OTHER INVESTMENT SECURITIES

The Negotiable Instruments Law did not specifically encompass corporate securities, though the issuance of corporate bonds as a method of raising capital had come into general use with the building of the national system of canals and railroads[1] prior to the War Between the States, and though the consensus of turn-of-the-century investors was that such instruments were undoubtedly negotiable.[2] Thus, the N.I.L. apparently by design, did not attempt to resolve the then existing split in authority as to the negotiability of corporate bonds, debentures and other investment securities.[3] Perhaps it was assumed that corporate securities would be treated in the courts as falling outside of the specific substantive provisions of the statute, and that negotiability could therefore be predicated upon N.I.L. § 196, a section of the statute designed to permit cases not therein provided for to be governed by the law merchant.[4]

In any event, many courts continued the pre-N.I.L. practice of requiring such securities to adhere to the formal requisites of negotiability incorporated into N.I.L. § 1[5] and predictably—and presumably to the detriment of the market for such securities—negotiability was often found wanting. Applying the N.I.L. to investment securities was perhaps a rigged game in the sense that "investment paper" was, and is, quite different than

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1. *See generally* POOR, HISTORY OF RAILROADS AND CANALS (1860), *cited in* R. STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER 198 (3d ed. 1964).

2. *See* W. HAWKLAND, COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS 29-30 (1967) [hereinafter cited as HAWKLAND]; Israels, *Investment Securities as Negotiable Paper*, 13 BUS. LAW. 676 (1958).

3. Some pre-N.I.L. decisions seemingly held corporate bonds negotiable as a matter of routine, perhaps in deference to the expectations of investors. *See, e.g.*, The Junction R.R. Co. v. Cleneay, 13 Ind. 161 (1859); American Nat'l. Bank v. American Wood Paper Co., 19 R.I. 149, 32 Atl. 305 (1895). But other decisions found negotiability to be a matter of the ability of the instrument to satisfy the formal requisites of negotiability as developed in common law decisions. See authorities collected at note 5, *infra*.

4. HAWKLAND at 30. The provision was enacted as § 195 in Louisiana.

5. *See, e.g.*, Kohn v. Sacramento Elec. Gas & Ry. Co., 168 Cal. 1, 141 Pac. 626 (1914); King Cattle Co. v. Joseph, 158 Minn. 481, 199 N.W. 437 (1924); President and Directors of Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594 (1926).

ordinary "commercial paper,"[6] and that difference, usually taking the form of lengthy, complicated language, "incorporating" recitals, "subject to" clauses and other "luggage,"[7] made it quite difficult for a court to both find negotiability under N.I.L. § 1 and to maintain judicial peace of mind.[8] Yet, many decisions did find negotiability in cases involving investment paper, even in the face of "subject to" clauses which would ordinarily have relegated such paper to the non-negotiable bin—with the unfortunate result that cases containing the strained reasoning necessary to hold investment paper negotiable became precedent for cases involving "subject to" clauses in commercial paper.[9] Thus, the formal exclusion of investment securities from the scope of the N.I.L. not only had an obvious negative effect on the securities market but also led to judicial action equally harmful to the predictability and administrative ease intended by the N.I.L. to attend the handling of commercial paper.

Article 3 of the Uniform Commercial Code excludes from its scope the entire field of investment securities[10] and Chapter 3 of the Louisiana Commercial Laws, as a substantive adoption of that UCC article, does likewise.[11] Thus, a decision such as *Schulingkamp v. Vista Shores Club*,[12] finding a corporate debenture note negotiable, will, to the extent that such debenture notes are in fact "investment securities" within the meaning of LA. R.S. 10:3-103(1), be difficult to duplicate under the Commercial Laws,[13] for at present an instrument can only be negotiable in Louisiana if Chapter 3 so permits. In the other forty-nine states negotiability of investment securities can be found in Article 8 of the UCC. Not only did Louisiana not adopt that Article,[14] but our courts are presently left with the perplexing

6. UCC Comment 1 to § 3-103 (LA. R.S. 10:3-103 (1974)) makes it clear that when the statute refers to "commercial paper" it means drafts, checks, certificates of deposit, and notes as defined in § 3-104(2).

7. Professor Hawkland attributes the well-known description of negotiable instruments as "couriers without luggage" to Chief Justice Gibson in *Overton v. Tyler*, 3 Pa. 346 (1846). HAWKLAND at 31 n.30.

8. The "subject to" clause was a common cause of the difficulty.

9. See Dean Beutel's discussion of *Newman v. Schwarz*, 180 La. 153, 156 So. 206 (1934), and the so-called "same sentence doctrine" in Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions*, 9 TUL. L. REV. 64, 73-76 (1934).

10. *See* UCC § 3-103(1).

11. LA. R.S. 10:3-103(1) (1974).

12. 318 So.2d 907 (La. App. 4th Cir. 1975).

13. The case arose prior to the effective date of the Commercial Laws.

14. Dean Hebert pointed out what he referred to as the "temporary hiatus resulting from the non-enactment of Article 8" shortly after the 1974 enactment of the Commercial Laws. *See* "Message from Paul M. Hebert, Dean, Louisiana State University Law School," at page *v.* of R. HERSBERGEN, COMMERCIAL PAPER AND

problem of defining "investment security"—the solution to which problem is not in the least aided by § 10:3-103(1) or by other definitional sections of the Commercial Laws such as §§ 10:1-201 and 10:3-102.[15] In short, we know that investment securities cannot be negotiable under Chapter 3 of the Commercial Laws (and therefore cannot be negotiable at all, in the absence of the adoption of UCC Article 8), but we have no guidance at all in defining the creature. In view of the definitional orientation of the Commercial Laws, a judicially supplied definition would seem to be an undue encroachment into the legislative arena. And, while LA. R.S. 10:1-103 performs for the Commercial Laws about the same function as did former LA. R.S. 7:195 (N.I.L. § 196) by applying the other laws of Louisiana to cases or situations not covered by the Commercial Laws,[16] that section would not seem to apply to the issue of the negotiability of investment securities, since that situation *is* covered by § 10:3-103(1).[17]

THE LIABILITY OF PARTIES TO NEGOTIABLE INSTRUMENTS—ESTABLISHING THE VALIDITY OF THE SIGNATURE OF THE PARTY TO BE CHARGED

The Commercial Laws contain procedural requirements that will change the tactics of counsel regarding denial of signatures on negotiable

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15. Comment 2 to UCC § 3-103 points out, however, that an instrument can be both "negotiable" under § 3-104 and a "security" under Article 8, and observes that such is possible because the formal requisites of negotiability (§ 3-104) go to matters of *form* exclusively, while the definition of "security" in § 8-102 looks principally to the manner in which the instrument is *used*. An instrument falling under both definitions would be controlled by Article 8, not Article 3. *See* UCC § 3-103(1); LA. R.S. 10:3-103(1) (1974).

16. See Comment of the Louisiana State Law Institute, LA. R.S. 10:1-103 (1974).

17. But see Justice Cardozo's comments in *President and Directors of Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926), in reply to the argument of counsel that § 196 of the N.I.L. permitted negotiability of corporate certificates to be based on the law merchant:

> The law merchant cannot prevail against prohibitions so specific. In holding otherwise, we should do more than supplement the statute. We should disregard and contradict it. The plaintiff's case is not helped by section [196] . . . to the effect that, "in any case not provided for in this chapter the rules of the law merchant shall govern." The difficulty is that the case is provided for. Unforeseen situations may reveal gaps in the statutory rules. In such circumstances the law merchant is competent to fill them. It is without power to annul what the statute has ordained.

Id. at 49-50, 150 N.E. at 597-98. What the Louisiana statute appears to "ordain" is that investment securities, however defined, are not negotiable. *Cf.* White Sys., Inc. v. Hall, 219 La. 440, 53 So.2d 227 (1951). It is anticipated that Article 8 will be instruments. In *Allen Brothers Feed Co. v. Slaven*,[18] the defendant and purported maker of a promissory note in default pleaded by way of general denial to the allegations of the plaintiff pertaining to, *inter alia*, his signature on the note and under cross examination at trial repeatedly denied the validity of his signature on the note and ultimately equivocated by proclaiming that if he signed the note it was not a conscious act.[19]

The Commercial Laws may short-circuit such theatrics, for under LA. R.S. 10:3-307(1) a signature on an instrument[20] is *admitted* unless *specifically* denied in the pleadings. In addition, when the effectiveness[21] of a signature is put in issue—as in the *Slaven* case—the burden of establishing it is on the holder or other party claiming under the signature,[22] but that burden is considerably aided by a presumption under § 3-307(1)(b) that the signature is genuine or authorized, as the case may be. "Burden of establishing" the effectiveness of the signature means that the plaintiff has the burden of persuading the trier of fact that the effectiveness of the signature is more probable than its non-effectiveness,[23] while "presumption" is defined by the statute to mean, in the case of § 3-307(1), that the trier of fact *must* find that the signature is effective "unless and until evidence is introduced which would support a finding" of non-effectiveness.[24] A party denying the effectiveness of his signature need not bring forth evidence sufficient to support a summary ruling in his favor,[25] but the mere self-serving denial exemplified in *Slaven* would clearly seem to fall short of rebutting the presumption of § 3-307(1)(b). In the majority of cases in which the genuineness of signature is at issue, that presumption can only be rebutted by the testimony of a handwriting expert.

THE RIGHTS OF A MERE TRANSFEREE OF NEGOTIABLE PAPER

Under LA. R.S. 10:3-201(1) the "transfer of an instrument vests in the transferee such rights as the transferor has therein. . . ." To the casual

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proposed for adoption by the Louisiana State Law Institute at the next regular session of the Louisiana legislature.

18. 325 So.2d 631 (La. App. 1st Cir. 1976). The case arose prior to the effective date of the Commercial Laws.

19. *Id.* at 633.

20. Defined in LA. R.S. 10:3-102(1)(e) (1974) as a "negotiable instrument [under La. R.S. 10:3-104]."

21. That is, the genuine nature of the signature as that of the party charged, or the authority of that party's alleged agent.

22. LA. R.S. 10:3-307(1)(a) (1974).

23. *See id.* 10:1-201 (1974) (definition of "Burden of establishing").

24. *See id.* (definition of "Presumption" or "presumed").

25. *See* Comment 1 to UCC § 3-307(1).

student of the Commercial Laws it may seem, therefore, that if the transferor was a holder in due course of the instrument and could have not only brought suit on the instrument, but also have cut off almost all of the defenses the maker, drawer, or acceptor had,[26] the transferee can by virtue of § 3-201 do the same. But as the plaintiff in *N. E. England Associates, Inc. v. Davis*[27] learned from the Fourth Circuit, the transfer of an instrument doesn't always vest in the transferee the ability to get to—and stay at—the courthouse. In the *Davis* case the payee obtained a promissory note from the defendant maker and transferred it to the plaintiff but neglected to endorse it. Thus the Fourth Circuit, in a non-dispositive portion of the opinion, points out that the plaintiff's mere possession of the unendorsed instrument cast upon it the burden of proving his ownership—a burden not met in the case. A case involving similar facts and arising under the Commercial Laws[28] might well be decided similarly.

Section 3-201(1) of the Commercial Laws does state, in a simplistic fashion, that the transferee of a negotiable instrument gets what the transferor had. But like so many of the provisions of the new law, section 3-201(1) does not lend itself to a simplistic analysis. First, unlike its N.I.L. predecessors,[29] § 3-201(1) does not operate only as to transfers between a *holder*-transferor and a *holder*-transferee, and it is this distinction that leads to the conclusion that the dictum in *Davis* would be correct under the Commercial Laws. In the typical case arising under § 3-201(1), both transferor and transferee are holders. If the transferor is not the holder of the instrument, he may literally have no rights at all to pass on to the transferee. If the transferor is not only a holder, but also a holder in due course, then he transfers whatever *rights* he has as such in the instrument. The most important of the "rights" of the holder in due course are spelled out in LA. R.S. 10:3-305: "To the extent that a holder is a holder in due course he takes the instrument free from * * * (2) all defenses of any party to the instrument . . . except" the "real" defenses set forth therein. Reading §§ 3-201(1) and 3-305 together, a transferee from a holder in due course is vested with, and can assert in his own name, the defense cut-off rights of the transferor. That observation, it turns out, may be true only so long as the transferee is himself a holder and not a mere transferee.

"Transfer" is a word of broad legal meaning, and has, in fact, no

26. *But see* F.T.C. Trade Regulation Rule, Preservation of Consumers Claims and Defenses, 16 C.F.R. § 433 (1975) (Effective May 14, 1976).

27. 333 So. 2d 696 (La. App. 4th Cir. 1976).

28. The *Davis* case arose prior to the effective date of the Commercial Laws, but the court cited § 3-201 of the statute.

29. *See* N.I.L. §§ 49, 58.

particular significance in the commercial paper context.[30] This is made clear by resort to other sections of the Commercial Laws. Attention to § 3-202(1) quickly reveals the real problem of the plaintiff in *Davis*: without the endorsement of the payee on the order paper transferred to him the plaintiff as not the "holder" of it, for only by "negotiation," a special form of transfer, does one become a "holder"[31] of instruments that are payable to order; "negotiation" under § 3-202(1) is the transfer of an instrument *in such form* that the transferee becomes a *holder*, and only a "holder" can maintain an action on an instrument.[32] In the case of order paper, negotiation under § 3-202(1) is a transfer by delivery[33] *with* any necessary endorsement.[34] It might be argued that the lack of holder status would not impede the transferee's action on the note, so long as the transferor was a

30. *Cf.* Scheid v. Shields, 524 P.2d 1209, 1210 (Ore. 1974). The word "assignment" likewise has little or no utility in the commercial paper context. *See* McIlroy Bank v. First Nat'l Bank, 252 Ark. 558, 480 S.W. 2d 127 (1972); Northside Bldg. & Inv. Co. v. Finance Co. of America, 119 Ga. App. 131, 166 S.E. 2d 608 (1969).

31. Defined as a person who is in possession of a [negotiable] instrument "drawn, issued or indorsed to him or his order or to bearer or in blank." LA. R.S. 10:1-201 (1974). *See* United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596 (D.C. Md. 1974).

32. *See* Investment Serv. v. Martin Bros., 255 Ore. 192, 465 P.2d 868 (1970); Lloyd v. Lawrence, 472 F.2d 313 (5th Cir. 1973). The *Martin Bros.* case was later qualified by *Scheid v. Shields*, 524 P.2d 1209 (Ore. 1974), in which the Supreme Court of Oregon permitted a plaintiff to maintain an action *on the instrument*, even though plaintiff at no time had been in possession of the instrument and admittedly could not, therefore, be a "holder" of it. The court justified its ruling on the unique circumstances of the case, including the fact that the defendant himself had possession of the note and therefore could not be subjected to double liability on it, and the fact that the instrument was not "lost." Compare in that regard, UCC § 3-804; LA. CIV. CODE art. 2280; LA. R.S. 6:69 (1950) and Sweedler v. Oboler, 65 N.Y. Misc. 2d 789, 319 N.Y.S.2d 89 (1971). The court may simply have refused to prolong the inevitable, but technically speaking, the plaintiff in *Scheid* should not have been allowed to bring an action on the instrument in the absence of possession and necessary endorsement. See discussion in text accompanying notes 33-45, *infra*. Some N.I.L. decisions held that a non-holder could maintain an action on an instrument by virtue of § 49. *Denver-Metro Collections, Inc. v. Kleeman*, 30 Col. App. 218, 491 P. 2d 64 (1971), is an example of such decisions, but the reasoning tends to be strained in view of the fact that § 49 also gave the transferee the right to have the missing endorsement, and the fact that § 51 entitled only the *holder* to sue in his own name. Furthermore, discharge of the maker's liability on the instrument revolved around "payment in due course" (§ 119) defined in § 88 as payment *to the holder*.

33. Defined as a "voluntary transfer of possession, actual or constructive, from one person to another." LA. R.S. 10:1-2-1 (1974).

34. *See* Northside Bldg. & Invest. Co. v. Finance Co. of America, 119 Ga. App. 131, 166 S.E. 2d 608 (1969). Possession is as important as a necessary endorsement—the absence of either element is fatal to holder status. *See* Scheid v. Shields, 524 P. 2d 1209 (Ore. 1974).

holder, since among the transferable rights of a holder is the right to "enforce payment in his own name,"[35] and that right is vested in the transferee by § 3-201(1).[36] But once again, close inspection of the statute reveals that a transferee, who is not himself a holder, is not vested with the right of the transferor-holder to enforce payment in his own name,[37] for not only must § 3-301, setting forth the "rights" of a holder, be read in conjunction with § 3-201(1), but attention must also focus on § 3-603(1): "The liability of any party is discharged to the extent of his payment . . . to *the holder* . . . ."[38]

Thus, only payment to the holder will discharge the liability of a party to a negotiable instrument; payment to one who has acquired the *rights of a holder* under § 3-201(1) would not under § 3-603(1) result in discharge. A court, then, could hardly compel a defendant in a case such as *Davis* to pay, as a matter of liability *on the instrument*, the amount of the instrument, to a party to whom payment will not result in a discharge to the defendant on that instrument.[39] Such a result is consistent with the distinctions drawn in the

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35. LA. R.S. 10:3-301 (1974).

36. *Cf.* Bowling Green, Inc. v. State St. Bank, 425 F.2d 81, 84 (1st Cir. 1970); Scheid v. Shields, 524 P.2d 1209 (Ore. 1974). To the extent that *Bowling Green* and *Scheid* permit a transferee to sue on the instrument in his own name, without proving his status as the holder, the cases are wrong. See discussion in text accompanying notes 37-45, *infra*.

37. LA. R.S. 10:3-301 (1974) states that it is the *holder* who may enforce payment of the instrument in his own name, *except* as otherwise provided in LA. R.S. 10:3-603 (1974). *Cf.* Canyonville Bible Academy v. Lobemaster, 108 Ill. App. 2d 318, 247 N.E. 2d 623 (1969).

38. Emphasis added.

39. *See* Feldman Constr. Co. v. Union Bank, 28 Cal. App. 3d 731, 104 Cal. Rptr. 912 (1972); Lloyd v. Lawrence, 472 F.2d 313 (5th Cir. 1973). *Cf.* Scheid v. Shields, 542 P.2d 1209 (Ore. 1974). The United States Court of Appeals, First Circuit, has held in *Bowling Green, Inc. v. State St. Bank*, 425 F.2d 81, 84 (1st Cir. 1970), that a depository bank taking an unendorsed order paper item for collection from a customer who was himself a holder need not establish that it took the item by negotiation, that is, by endorsement, the court expressing doubt that the concept of "holder" applies with full force to Article 4 of the UCC. In view of § 4-209 (requiring compliance with the requirements of § 3-302), the First Circuit may not be correct, but the issue tends to become academic, since under § 4-205 (1) such a bank could supply the missing endorsement anyway. It should also be observed that the State Street Bank was asserting holder in due course status *defensively*, so that no question of compelling the party liable on the instrument to pay a non-holder arose in the case. *Bowling Green* was followed in *Nida v. Michael*, 34 Mich. App. 290, 191 N.W.2d 151 (1971), but criticized in *United Overseas Bank v. Veneers, Inc.*, 375 F. Supp. 596, 603-605 (D. Md. 1974). Commentary has been uniformly critical; *see* Hawkland, *Depositary Banks as Holders in Due Course*, 76 COM. L.J. 124 (1971); Note, 12 BOST. COL. IND. & COM. L. REV. 282 (1970); Note, 71 COLUM. L. REV. 302 (1971).

Commercial Laws between *being* a holder, or a holder in due course, and having the *rights* as such via § 3-201.[40] Section 3-603's "payment . . . to the holder" language has previously been mentioned; likewise, it can be observed that the drawer of a draft or check "engages that upon dishonor . . . and . . . notice of dishonor . . . he will pay the amount of the draft *to the holder*"[41] or to any endorser who takes it up; he does not engage to pay one who has only the rights of a holder. All endorsers and guarantors make the same engagement.[42] Similarly, those who transfer an instrument by endorsement make warranties only to their transferee and to subsequent *holders*.[43]

Transferees who find themselves in the *Davis* predicament are not without enforcement possibilities. Under § 3-201(3) a transferee for value of an order instrument has, unless otherwise agreed, the "specifically enforceable right to have the unqualified endorsement of the transferor."[44] But the section goes on to state that *negotiation*, and therefore holder status under § 3-202, "takes effect only when the endorsement is made" and until that time "there is no presumption that the transferee is the owner" of the instrument.[45] Lacking the presumption of ownership, the transferee may be forced to compel the endorsement of the transferor by suit or impleader, or recover—as the plaintiff in *Davis* did—on the underlying transaction rather than on the instrument.

40. *Compare* LA. R.S. 10:3-305 (1974) *with* LA. R.S. 10:3-306 (1974).

41. LA. R.S. 10:3-413(2) (1974) (Emphasis added).

42. *See* LA. R.S. 10:3-414, 3-416 (1974).

43. *See* LA. R.S. 10:3-417(2) (1974). The same would not be true as to the warranties arising in the course of bank collections under Chapter 4 of the Commercial Laws. *See* LA. R.S 10:4-207(2) (1974).

44. *See* United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596, 603-605 (D. Md. 1974). The analysis theoretically should be unchanged where the party invoking the rights of a holder in due course does so defensively (*e.g.*, a bank resisting the re-crediting of a customer's account) as opposed to offensively. *Cf.* Bowling Green, Inc. v. State St. Bank, 425 F.2d 81, 83 (1st Cir. 1970).

45. See Northside Bldg. & Inv. Co. v. Finance Co. of America, 119 Ga. App. 131, 166 S.E.2d 608 (1969). UCC Comment 1 to § 3-201 states that, "Any person who transfers an instrument transfers whatever rights he has in it" and that the transferee acquires such rights even though they do not amount to "title" to the instrument. In view of the language in § 3-201(3), the "title" statement certainly refers to a transfer of bearer paper, since the transferee of bearer paper may be holder (and hence the owner) of the paper even though his transferee was a thief or finder who had no title to the paper. Compare § 3-201(1), with the language of UCC Comment 5 to § 3-306(d): "The claimant who has lost possession of an instrument so payable [to bearer] or so indorsed [in blank] that another [the transferee of the thief or finder] may become a holder [under §§ 1-201, 3-202(1)] has lost his rights on the instrument. . . ."

GOOD FAITH UNDER THE COMMERCIAL LAWS

Good faith is a very important ingredient in the overall scheme of the Commercial Laws. Every contract or duty within Title 10 "imposes an obligation of good faith in its performance or enforcement."[46] Holders must take an instrument in good faith if they are to be holders in due course.[47] One who has the right to accelerate payment or performance, or to require additional collateral "at will" can do so only if he believes in good faith that the prospect of payment or performance is impaired.[48] To take advantage of the preclusive effects of § 3-406, a drawee or other payor must have paid the instrument in good faith, and a non-holder-in-due-course can assert finality of payment under § 3-418 only if he has in good faith changed his position in reliance on the payment. Good faith is also an important ingredient in the relationship between bank and customer.[49] All such obligations of good faith, whether expressly set forth in the statute or implied therein by virtue of § 1-203, are immune from disclaimer by agreement.[50]

The term is given, however, only the most general definition: "good faith" means "honesty in fact in the conduct or transaction concerned."[51] Comment 19 to UCC § 1-201 suggests that the definition may be only a starting point, a bottom line, so to speak, and that observance of reasonable commercial standards of fair dealing may embellish the term, in an appropriate case.[52] Given § 1-201's definition, the intended standard in any event is a subjective one.[53] The courts, however, appear to modify that standard so that subjective honesty in fact has a minimum level of credulity and fairness below which one cannot venture in confidence that a trier of fact will not be permitted to find a lack of good faith.[54]

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46. LA. R.S. 10:1-203 (1974).

47. *Id.* § 10:3-302(1)(b) (1974).

48. *Id.* § 10:1-208 (1974). The burden of establishing *lack* of good faith is on the party against whom the power of acceleration has been exercised. *Id.*

49. *See id.* §§ 10:4-103(1); 4-401(2); 4-404 (1974).

50. *See id.* §§ 10:1-201(3); 4-103(1) (1974). *See generally* Hersbergen, *The Bank-Customer Relationship Under the Louisiana Commercial Laws*, 36 LA. L. REV. 29, 43-55 (1975).

51. LA. R.S. 10:1-201 (1974).

52. *Cf.* First Nat'l Bank v. Crone, 301 N.E. 2d 378 (Ind. App. 1973). *But see* Third Nat'l. Bank v. Hardi-Gardens Supply of Illinois, Inc., 380 F. Supp. 930 (M.D. Tenn. 1974).

53. *See* Balon v. Cadillac Auto Co., 113 N.H. 108, 303 A.2d 194 (1973).

54. *See, e.g.*, National Car Rental v. Fox, 18 Ariz. App. 160, 500 P.2d 1148 (1972); Hollywood Nat'l. Bank v. International Business Machines Corp., 38 Cal. 3d 607, 113 Cal. Rptr. 494 (1974) (permitting negligence to be considered in determining good faith); Integrity Ins. Co. v. Davis, 116 N.J. Super. 417, 282 A.2d 452 (1971).

Believable honesty of intent, rather than the absence of circumstances which would put an ordinarily prudent holder on inquiry, appears to be the test of good faith,[55] so that the failure of a wholesale automobile buyer to conduct a lien search, for example, would not prevent it from being in good faith.[56] Thus, the focus is: of what facts and circumstances did the party in question actually have knowledge at the crucial time? Application of the test—unchanged by the Commercial Laws—is seen in *O'Neal v. Cascio*.[57] Defendant, having been charged with a violation of federal criminal law, retained the services of an attorney, giving the latter a promissory note in the amount of $15,000 as a retainer, payable in twelve monthly installments of $1250. The $15,000 figure had been arrived at by the defendant and his lawyer upon the latter's investigation into the nature of the charges and the kind of legal services needed. Defendant thereafter volunteered to appear before a grand jury hearing, as a result of which the charges against him were dropped. Several days after defendant had informed his lawyer that the charges would be dropped, defendant received from plaintiff a letter advising defendant that plaintiff had purchased the note from defendant's lawyer.

At the trial the jury returned a verdict in favor of the defendant, and the Second Circuit, convinced that the verdict necessarily implied that the jury had found that plaintiff was not a holder in due course for lack of good faith, affirmed the lower court's judgment on the verdict, pointing out, as evidence from which the jury could reasonably have determined that the plaintiff was lacking in good faith: a) that defendant's lawyer knew, prior to the execution of the note, that the criminal case against the defendant was weak, possibly fatally so; b) the suspicious circumstances under which defendant received notice of plaintiff's purchase of the note shortly after he had informed his lawyer that charges would be dropped; c) the close friendship and business relationship between plaintiff and defendant's lawyer; d) believable evidence of a prior subterfuge perpetrated by plaintiff and defendant's lawyer for the apparent purpose of defeating the creditor's rights of plaintiff's former wife; e) lack of solid evidence that any "consid-

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55. *See, e.g.*, Third Nat'l. Bank v. Hardi-Gardens Supply of Illinois, 380 F. Supp. 930 (M.D. Tenn. 1974); Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 207 N.W. 2d 282 (1973); Riley v. First State Bank, 469 S.W. 2d 812 (Tex. Civ. App. 1971).

56. *See* Hempstead Bank v. Andy's Car Rental Sys., Inc., 312 N.Y.S. 2d 317, 35 App. Div. 2d 35 (1970). *Cf.* Hollywood Nat'l Bank v. International Business Machines Corp., 38 Cal. 3d 607, 113 Cal. Rptr. 494 (1974). *But* see Slaughter v. Jefferson Federal Sav. & Loan Ass'n, 361 F. Supp. 590 (D. D.C. 1974).

57. 324 So. 2d 539 (La. App. 2d Cir. 1975). The case arose prior to the effective date of the Commercial Laws.

eration" was given by plaintiff for the note. The theoretical distinction between the subjective and objective standards of good faith—"what did he in fact know?" versus "would a reasonable person in similar circumstances have been suspicious?"—becomes blurred when the jury is addressing the crucial question in applying the subjective test: can we reasonably believe what the plaintiff says he actually knew or did not know?

ITEMS IN THE BANK COLLECTION PROCESS

Chapter 4 of the Commercial Laws, which governs both the relationship between bank and customer, and the collection of items, is completely new to Louisiana law.[58] If the decision of the Fourth Circuit in the pre-Commercial Laws case of *Magee v. T. Smith & Son, Inc.*,[59] is taken as a reliable indicator, the new law will take some "getting used to," at least in the Fourth Circuit. In *Magee*, an employer drew and delivered to an employee its check, drawn on the First National Bank of Commerce, in settlement of an injury claim arising out of the course of employment. The check, which was made payable to the employee, Magee, and to his attorney, was properly endorsed by the latter in his own behalf and as agent for co-payee Magee[60] pursuant to a power of attorney, and deposited in the attorney's account in the Hibernia National Bank in New Orleans. Prior to the endorsement and deposit, but unknown to the attorney, Mr. Magee died. Upon learning of the posthumous endorsement, the drawer somehow concluded, for reasons best known to it, that the transaction was not valid, and apparently demanded that the drawee, First National Bank of Commerce, recredit drawer's account for the amount of the check. Drawee, already having honored or "paid" the check, made a demand on the depositary bank for a return of the amount of the check. Hibernia did not honor the demand, but debited the account of the attorney,[61] and held the funds. Though multiple litigation resulted,[62] the present suit was brought against the employer by Magee's heirs to enforce the settlement, and against Hibernia for return of the funds. The Fourth Circuit held that the heirs of Magee were not proper parties to assert a claim against Hibernia for the

58. The prior law was found in §§ 34, 36, 42, 51, 52, 53, 67, 68 of Title 6 of the Revised Statutes.

59. 319 So. 2d 489 (La. App. 4th Cir. 1975).

60. *See* LA. R.S. 7:41 (repealed in 1974); *Cf.* LA. R.S. 10:3-116 (1974).

61. 319 So. 2d at 490. The opinion is unclear as to whether Hibernia merely reversed provisional credit previously given, or actually debited the account on a charge-back basis against a prior "cashing" of the item. Given the amount of the check—$12,500.00—it seems unlikely that Hibernia "cashed" the item, though that is entirely possible.

62. *See id.* at nn. 1 & 2.

return of the funds, but in the course of the opinion dicta appears that is potentially misleading in relation to Chapter 4 of the Commercial Laws.

The Fourth Circuit's opinion in *Magee* rests upon two premises: first, that no relationship or privity existed between Hibernia and the Magee heirs; second, that ownership in the decedent-payee was divested by the endorsement and deposit of the check. With respect to co-payee Magee alone, the court is probably correct under chapter 4, at least insofar as the effect of the endorsement of Magee's name is concerned; but the court also states that endorsement and deposit likewise divested ownership in the attorney—which could only be correct under Chapter 4 if one adds the further premise that the check was "cashed" that is, negotiated, rather than deposited for collection.[63]

Ordinarily, when a holder of an item deposits it, "unless a contrary intent clearly appears" the depositary bank[64] is an *agent*[65] of the holder-owner, regardless of the form of—or lack of—endorsement.[66] The agency status thus created ends only when the collection process is completed;[67] until then, the holder-owner, for example, bears the risk of loss.[68] The fact that Magee's lawyer endorsed and deposited the check in question would not rebut the agency presumption of R.S. 10:4-201(1), much less divest him of ownership of the item. Since the collection process arguably was not completed in *Magee*—inasmuch as Hibernia retained the funds—the agency relationship was not terminated;[69] and while Hibernia might be a "debtor," the ordinary relationship of bank-debtor and customer-creditor which results when the collection process is completed, would not arise.[70] Magee's attorney could, then, have a cause of action against the depositary bank.[71]

63. See note 61, *supra*.

64. *See* LA. R.S. 10:4-105(a) (1974).

65. *See* LA. R.S. 10:4-201(1) (1974).

66. *Id.* The presumption of agency under § 4-201 prevails even if the depositary bank gives credit for the item or permits immediate withdrawal of the credit.

67. *See* UCC Comment 4, § 4-201.

68. *See* LA. R.S. 10:4-212 (1974).

69. *See id.* 10:4-201(1) (1974); UCC Comment 4, UCC § 4-201.

70. *Id.*

71. *See* LA. R.S. 10:3-419(3) (1974); 10:4-103(1) (1974); 10:4-202(1)(a) (1974); 10:4-103(5) (1974). The opinion in *Magee* seems to suggest that Magee's attorney might be "the rightful party to assert a cause of action against the bank for return of the funds," 319 So. 2d at 491; though the court may in fact be correct, such a cause of action is logically impossible if one is willing to agree with the statement uttered one judicial breath later that "the check (after endorsement and deposit) is not *owned* by the depositor, *i.e.*, the attorney. . ., but becomes the property of the bank." *Id.*

With respect to the relationship between the Magee heirs and Hibernia Bank, the court may be on more solid ground, though it would be more precise to say that the heirs have no cause of action against Hibernia, not because privity is lacking, but because Magee ceased to be a "holder" when his attorney obtained possession of the check and properly endorsed it.[72] One could argue forcefully, in fact, that the Commercial Laws are almost totally impervious to the concept of "privity," focusing rather on "holder" status in Chapter 3 and "ownership" of the item—which is usually in the holder—under Chapter 4. Thus, a payee-depositor may have a right of action under R.S. 10:3-419(1) against a drawee despite the obvious lack of privity between them.

Checks made payable to co-payees (i.e. not in the alternative) do present conceptual, as well as practical, problems for banks. Both payees may be holders, and therefore holders in due course,[73] and, if one equates holder status with "ownership" rights, both payees can be owners. But holder status is defined in light of the dual requirements of possession and method of obtaining possession.[74] Clearly, both payees cannot be in actual possession, but by the same token a drawer or maker cannot technically "issue" an instrument to co-payees[75] for the same reason—both cannot be in possession. The Commercial Laws obviously contemplate that possession of an instrument by one payee is constructive possession by the other, so that both comply with the definition of "holder" in § 1-201; consistently therewith, both payees must endorse if a subsequent transferee is to acquire holder status.[76] Thus, without Magee's valid endorsement, his attorney could neither have negotiated the check, nor deposited it for collection.[77] With Magee's valid endorsement, his attorney's possession ceased to be constructively Magee's also, and as the court correctly states, Magee's ownership, *i.e.*, holder status, likewise ceased therewith. But the ownership of Magee's lawyer, vis-à-vis Hibernia Bank, became whole as a result of the endorsement, and contrary to the suggestion of the court, his

(Emphasis added). If the attorney was not the "owner" of the check, not only could he not sue any party in his own name (LA. R.S. 10:3-301 (1974); 3-603 (1974)), he could not bring an action under LA. R.S. 10:3-419 (1974) either.

72. The act of deposit would be irrelevant to the status of Magee.

73. *See* LA. R.S. 10:3-302(2) (1974); Comment 2, UCC § 3-302.

74. *See id.* 10:1-201 (1974) (definition of "holder"); 10:3-202(1).

75. *See id.* 10:3-102(1)(a) (1974).

76. *See id.* 10:3-116 (1974); 3-202(1) (1974). *Cf.* Feldman Const. Co. v. Union Bank, 28 Cal. App. 3d 731, 104 Cal. Rptr. 912 (1972).

77. A depositary bank in such circumstances could not supply the missing endorsement of the co-payee. *See* LA. R.S. 10:4-205(1) (1974); 10:4-104(1)(e) (1974).

ownership would be divested only by a *negotiation* to the bank, not by a deposit for collection.[78]

THE BANK-CUSTOMER RELATIONSHIP—DEATH OF JOINT DEPOSITOR

For a bank, significant problems arise upon the death of its customer, for competing claimants to the decedent's deposited funds often appear, wearing different labels and presenting various credentials. In the case of the check, draft, or other item drawn or issued by the customer against the deposited funds, and presented for payment or acceptance after his death, § 4-405 of the Commercial Laws neatly solves the potential problems by permitting the bank to accept or pay such items until the bank knows[79] of the death.[80] Even with knowledge of the customer's death a bank may, for ten days after the date of death, pay or certify checks drawn on or prior to that date, unless ordered to stop payment by a person claiming an interest in the account.[81] The bank's position is ideal: authority to pay, collect, or accept continues in any event until the bank actually knows of the fact of death; thereafter the authority to pay or certify checks *may* continue to a day certain unless any person claiming an interest in the decedent's checking account orders payment stopped; the bank has no responsibility as to the validity of the claim,[82] so that it may refuse payment without fear of wrongful dishonor. But, as demonstrated by *Beals v. City National Bank*,[83] the death of a customer can still create litigation for the bank.

The plaintiff in *Beals* had maintained a joint savings account with the decedent, and was the latter's universal legatee. However, three brothers and a sister survived decedent, and these heirs opened decedent's succession,[84] and obtained a judgment of possession; pursuant to a certified copy

78. The opinion cites *Planters Bank v. Union Bank*, 83 U.S. (16 Wall.) 483 (1872), as supportive of the proposition that the check in *Magee* became the property of the bank, but the case is inapposite. The Supreme Court's statements in *Planters Bank* are in reference to a deposit of money or moneys collected; a bank would become the "owner" of such moneys, subject, of course to its obligation as a debtor vis-à-vis the depositor. The case in no way stands for the proposition that a check deposited for collection becomes the property of the depositary bank; alternatively a check "cashed" at the bank would involve neither a deposit of money nor the collection of that item for the person so "cashing" it.

79. "Knows" is defined in LA. R.S. 10:1-201 (1974) in terms of actual knowledge of the fact.

80. Items deposited by the decedent for collection also may be collected.

81. LA. R.S. 10:4-405(2) (1974). Items other than checks cannot be paid or certified with knowledge of death. The justification for the 10-day rule in the case of checks is found in UCC Comment 3, § 4-405.

82. *See* UCC Comment 4, § 4-405.

83. 329 So. 2d 828 (La. App. 1st Cir. 1976).

84. Apparently without knowledge of the existence of decedent's will.

of the judgment the bank released to them the balance of the joint account. The plaintiff as the universal legatee ultimately prevailed, however, and the judgment of possession was vacated. Plaintiff thereafter instituted an action against the bank on the theory that he had not given authority nor received notice regarding the release of the funds which plaintiff alleged belonged to him under LA. R.S. 6:32(a). The bank relied in defense of its actions upon LA. R.S. 6:66, a statute apparently permitting precisely the action taken by the bank. The First Circuit affirmed the trial court's judgment in favor of the bank, finding no real conflict between §§ 32(A) and 66 of Title 6. Rather, the opinion points out that, as in the case of the post-death presentment of a decedent's check, the bank holds all the trump cards when a joint depositor dies. Under the court's ruling LA. R.S. 6:32(A) creates no proprietary interest in the surviving depositor[85] and does not require the decedent's heirs to give notice to the surviving depositor of their intention to withdraw the deposited funds, nor the bank to give notice of its intention to release the funds to the heirs. On the other hand, the bank could, under R.S. 6:32(A), have released the funds in the joint account to the plaintiff upon proper demand by the latter, and without undue concern for competing interests not yet having appeared, in which case the litigation postures of the surviving depositor and the heirs in *Beal* might well have been reversed. Thus, viewing the two statutes in conjunction, the First Circuit holds that, in essence, the bank may release the balance of a joint account to whichever of the competing claimants utilizing either statute first appears, so long as no prior statutorily based notice to the contrary from the other claimants has been received.[86] Left unresolved in the *Beals* opinion is the proper action by the bank confronted with competing claims to still unreleased funds, but certainly the bank can utilize Louisiana Code of Civil Procedure article 4658.

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85. The view was expressed by the court that a contrary ruling would too closely approximate the creation of the common law relationships of joint tenancy (with right of survivorship) and/or tenancy in common—rules of law contrary to Louisiana property regimes. 329 So. 2d at 831.

86. The opinion notes, however, that a § 32(A) claimant faces the additional hurdle of a prior notice to the contrary under § 32(B). Section 32 was amended and restated during the 1976 Regular Session of the Louisiana Legislature. *See* La. Acts 1976, Nos. 216, 316.