

## Louisiana Law Review

---

Volume 40 | Number 3

*The Work of the Louisiana Appellate Courts for the*

*1978-1979 Term: A Symposium*

*Spring 1980*

---

# Private Law: Commercial Paper and Bank Deposits and Collections

Ronald L. Hersbergen

---

### Repository Citation

Ronald L. Hersbergen, *Private Law: Commercial Paper and Bank Deposits and Collections*, 40 La. L. Rev. (1980)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol40/iss3/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS

Ronald L. Hersbergen\*

### THE BANK-CUSTOMER RELATIONSHIP

The check typically operates as an instrument of payment rather than of credit, and the drawer no doubt expects that it will be promptly deposited or presented for payment.<sup>1</sup> The commercial expectation of prompt presentment that attends the issuance of a check is reflected both in the temporal nature of the liability of the parties whose signatures are placed on a check<sup>2</sup> and in the Commercial Laws<sup>3</sup> treatment of the drawee-bank's relationship to the drawer-customer: a "stale" check need not be paid by a drawee.<sup>4</sup> The

---

\*Faculty Member, Louisiana State University.

1. Unless otherwise agreed, however, the giving of a check operates only as *conditional* payment; the underlying obligation is not actually discharged by payment until the check is paid by the drawee. *See, e.g., Oxner v. Union Nat'l Life Ins. Co.*, 289 So. 2d 229 (La. App. 1st Cir. 1973); *Work Clothes Rental Serv. Co. v. Dupont Mfrs., Inc.*, 262 So. 2d 807 (La. App. 3d Cir. 1972); *Seliga v. American Mut. Liab. Ins. Co.*, 174 So. 2d 878 (La. App. 4th Cir. 1965). *Cf. LA. R.S. 10:3-409(1)* (Supp. 1974).

2. LA. R.S. 10:3-502 & 3-503(2) (Supp. 1974).

3. LA. R.S. 10:1-101 to 8-501 (Supp. 1974 & 1978). Section 1-101 provides that title 10 of the Revised Statutes shall be known as the "Commercial Laws." These provisions represent the enactment of articles 3, 4, 5, 7 and 8 of the Uniform Commercial Code (U.C.C.), with minor revisions where necessary to conform with the general scheme of Louisiana law. Hereinafter, any reference to the U.C.C., where different from Louisiana law, will be noted. Otherwise, any reference to "Commercial Laws" will be to title 10.

4. LA. R.S. 10:4-404 (Supp. 1974). At common law, staleness was usually held to put the drawee on notice of possible problems as to the underlying obligation, so that payment was at the bank's peril. *See Lancaster Bank v. Woodward*, 18 Pa. 357 (1852). Many courts put it in terms of inquiry notice—if an inquiry would not have revealed some defense of the drawer, the failure of the bank to inquire would not make its payment of the stale check wrongful. *See Goldberg v. Manufacturer's Trust Co.*, 102 N.Y.S.2d 144 (Mun. Ct. 1951). The theory was obviously related to the doctrine that overdueness puts a holder on notice of possible defenses.

The common law approach presented something of a problem to bankers. A refusal to pay a stale check might be a wrongful dishonor if nothing was amiss with respect to the underlying obligation, LA. R.S. 10:4-402 (Supp. 1974); to pay the check was perilous if something was wrong. Accordingly, banks usually did try to reach the drawer for instructions. Because this solution ceased to be practical, the American Bankers Association sponsored a "stale check" statute that was widely adopted, pursuant to which a bank could dishonor a stale check without liability, unless expressly instructed by the customer to make payment. Section 4-404 of the U.C.C. is based on the ABA statute, adding to it only the provision for good faith payment. One example

drawee may, however, pay a stale check if it does so in good faith.<sup>5</sup>

The matter of "good faith" is given only a general definition: "honesty in fact in the conduct or transaction concerned."<sup>6</sup> Furthermore, all banks that handle the check are, as a general matter, obliged to do so with ordinary care.<sup>7</sup> In the particular case of a collecting bank<sup>8</sup> the obligation of ordinary care receives explicit general treatment under the Commercial Laws, but the Commercial Laws fail to make clear the intended relationship between good faith and a drawee-payor bank's obligation of ordinary care.<sup>9</sup> The problem created by the Commercial Laws' treatment of that aspect of the bank-customer relationship surfaced in *Charles Ragusa & Son v. Community State Bank*.<sup>10</sup>

Ragusa had issued its check #2668, drawn on Community and payable to Southern Masonry, on June 30, 1972;<sup>11</sup> but Southern had apparently lost or misplaced that check. Upon being notified of Southern's inability to obtain payment on check #2668, Ragusa

---

of a good faith payment of a stale check is provided by the "January stale check." At the beginning of each new year, drawers often continue to date their checks with the prior year's date. Bankers expect this and routinely pay such items. See *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

5. LA. R.S. 10:1-203 & 4-404 (Supp. 1974).

6. LA. R.S. 10:1-201 (Supp. 1974). A discussion of the issue of good faith under the Commercial Laws may be found in a previous *Symposium* contribution by the author at 37 LA. L. REV. 406, 414-16 (1977).

7. See LA. R.S. 10:4-103(1) & (5) (Supp. 1974).

8. A collecting bank is defined as "any bank handling the item for collection except the payor bank." LA. R.S. 10:4-105(d) (Supp. 1974). A "payor bank" is the bank by which the check is payable as drawn. LA. R.S. 10:4-105(b) (Supp. 1974).

9. LA. R.S. 10:4-202(1) (Supp. 1974). Section 4-212(4) does seemingly make explicit reference to the failure of *any* bank to exercise ordinary care, in its observation that such a failure does not affect the right of charge-back, but the proper context of charge-back does not involve the relationship between the drawee and the drawer. Charge-back is more accurately viewed as a right of a *collecting* bank which has not received final payment from a drawee-payor bank. See Official U.C.C. Comments 2, 3, and 5, U.C.C. § 4-212. Viewed from a slightly varied perspective, the matter of a drawee-bank's right to charge-back typically affects its relationship to the holder and to the collecting banks rather than to its own customer, the drawer. Thus, the drawee's concern regarding its own customer is proper payment or proper dishonor, matters treated in sections 4-401 through 4-406; with respect to the holder and to collecting banks, the drawee's concerns are finality of payment and prompt return of unpaid items, matters treated in sections 3-418, 4-213, 4-301, and 4-302. It can also be observed that the focus of part 2 of Chapter 4 of the Commercial Laws, in which section 4-212 appears, is collection of items by depository and collecting banks.

10. 360 So. 2d 231 (La. App. 1st Cir. 1978).

11. Issuance of the check pre-dated the applicability of the Commercial Laws, but they did apply to the issue of the subsequent rights and liabilities of Ragusa and Community.

issued a substitute check<sup>12</sup> to Southern which was ultimately paid by Community. Contemporaneously with the issuance of the replacement check, Ragusa had issued to Community a verbal stop payment order on check #2668. More than *three* years later, check #2668 was deposited for collection by Southern<sup>13</sup> in its account, forwarded to and paid by Community out of Ragusa's account.

When Ragusa discovered that check #2668 had been paid, it promptly<sup>14</sup> demanded that its account be re-credited. At this point, two issues confronted Community: was check #2668—stale by some two and one-half years—properly payable; and could the bank in any event pay the check in light of the prior, but expired, stop payment order?<sup>15</sup> On the latter issue the first circuit correctly held that the expired stop payment order was not relevant to the issue of the bank's right to charge Ragusa's account.<sup>16</sup> With respect to the issue of re-crediting Ragusa's account by virtue of the staleness of the check, Community could have opted to defend its payment on the basis that it had paid a stale check in good faith, under section 4-404.<sup>17</sup> Rather than "stand and fight" on the issue of good faith payment at that point, however, Community re-credited Ragusa's account on August 4, 1975, for the amount of check #2668.

Community had re-credited Ragusa's account in the undoubted expectation that it would be able to return the check to the payee's bank and revoke the provisional credit that had been given<sup>18</sup> at the

---

12. When a check has not resulted in payment—for whatever reason—the drawer has not received a discharge on the underlying transaction, LA. R.S. 10:3-601 & 3-603 (Supp. 1974), and accordingly has no choice but to give a replacement check or make other payment arrangements with the payee. Of course, if there exists a defense unrelated to discharge by payment, the drawer will resist the payee's demands for a new check.

13. There was no suggestion that Southern was in bad faith in depositing check #2668.

14. See LA. R.S. 10:4-406 (Supp. 1974).

15. A verbal stop payment order is binding only for fourteen calendar days, unless confirmed in writing within that period. LA. R.S. 10:4-403(2) (Supp. 1974).

16. In *Granite Equipment Leasing Corp. v. Hempstead Bank*, 326 N.Y.S.2d 881 (Sup. Ct. Tr. Term 1971), it was held that section 4-403 displaced any requirement that a drawee-payor must consult a "lapsed stop order" file, or that it even maintain such a file. Thus, the drawer must renew stop payment orders previously given, in order to cast upon the bank the burden of following such orders.

17. Community could, for example, have argued that it, in good faith, did not realize the check was stale; alternatively, it could have taken the position that, while it realized the check was stale, it believed in good faith that Ragusa would, for one reason or another, want it to honor the check notwithstanding its staleness. On the latter point, the bank could buttress its argument by pointing to the size of the check—\$5,000—and to the fact that a dishonored check payable in a sizeable amount of money will usually lead to legal problems for the drawer.

18. See LA. R.S. 10:4-301 (Supp. 1974).

time the check had been forwarded by payee's bank through the Federal Reserve Bank. But, because Community had received the check at some time shortly before July 17, 1975, an August 4, 1975 return of the check was untimely;<sup>19</sup> and the Federal Reserve Bank returned the check to Community on August 6, 1975. Community held the check until September 10, 1975, at which time it once again charged the amount of the check to Ragusa's account.<sup>20</sup> Ragusa then sued for a re-crediting of the account. The issue thus framed for the first circuit was whether Community could defend its second payment of the check, and debiting of Ragusa's account, on the basis of a good faith payment of a check it knew to be stale by two and one-half years. The first circuit held that it could not so defend.

Had Community not re-credited its first debiting of the Ragusa account, it arguably could have prevailed, since theoretically a drawee—even a negligent drawee—can defend payment of a stale check by a showing of good faith, *i.e.*, subjective honesty in fact.<sup>21</sup> By

---

19. Under Revised Statutes 10:4-303(1), the bank's original payment of check #2668 was final and irrevocable. *Cf.* LA. R.S. 10:4-302 (Supp. 1974).

20. The opinion notes that there was conflicting evidence as to whether discussions were held between the parties as to return of the check, but it can safely be assumed that Ragusa did not authorize Community to charge the Ragusa account.

21. In *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 340 N.Y.S.2d 266 (Civ. Ct. 1973), the drawee bank had in good faith paid a check presented for payment fourteen months after issuance. No inquiry had been made of the drawer-customer. The court ruled for the bank under section 4-404, making this very interesting, and perhaps correct, argument of statutory construction:

Apparently, when the [U.C.C.] intends to apply a concept of "good faith" beyond "honesty in fact," a broader definition is provided. Thus, with respect to dealings of merchants, UCC 2-103(1)(b) states:

"'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealings in the trade."

Presumably, if it were intended to place a duty of inquiry upon a bank before it could safely pay a stale check, a broader definition of "good faith" would have been made applicable to this situation. It may very well be that in enacting the [U.C.C.] consideration was given, as defendant argues, to the vast number of checks being issued and the requirement that a bank accept or refuse to honor a check within a short, prescribed time limit (UCC 4-301, 302), leading to the conclusion that a bank should not be liable for paying stale checks as long as the bank was honest in fact.

*Id.* at 267. Thus, the trial court took the view that section 4-403 had cast the burden on the drawer to protect himself by issuing a stop payment order and, if necessary, renew it every six months. In the absence of a current stop payment order, the bank would have no duty to consult the drawer. This quite plausible construction of section 4-404 was reversed by the New York Supreme Court:

While UCC § 4-404 protects a bank which pays a stale check so long as it acts in good faith, it does not eliminate the requirement of ordinary care which a bank must observe in all its dealings. In our opinion, there is an issue of fact as to whether under all the circumstances, defendant Chase Manhattan Bank, N.A. acted with due care in this transaction.

360 N.Y.S.2d 142, 143 (Sup. Ct. App. Term 1973).

re-crediting and then subsequently debiting a check it *knew* its customer did not want paid, Community could not argue that it paid the check in good faith.<sup>22</sup> Thus, the result reached by the first circuit is correct; unfortunately, the court involved itself in a discussion of "ordinary care" which unnecessarily confuses the issue: "[I]t seems obvious that although LSA—R.S. 10:4-404 protects a bank which pays a stale check so long as it acts in 'good faith,' it does not eliminate the requirement of ordinary care which a bank must observe in all its dealings."<sup>23</sup> In point of fact, section 4-403 probably was intended to do precisely what the court feels it does not do<sup>24</sup>—eliminate, for purposes of stale check handling, the duty of ordinary care.<sup>25</sup> The idea that there is an omnipresent general duty of ordinary care on the part of the drawee-payor bank is understandably compelling; but, if one accepts such a proposition, one is then left to explain why it was necessary to specifically mention "ordinary care" in, for example, section 3-406.<sup>26</sup>

---

22. Although Professors White and Summers stuck the quill in the bull's eye when they penned "Good faith ranks among the most slippery concepts in the [Uniform Commercial] Code," it seems beyond doubt that the facts of *Ragusa* preclude the bank's good faith. The bank, in fact, introduced no evidence supportive of its alleged good faith. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 17-3, at 563 (1972).

23. 360 So. 2d at 234.

24. The court did not cite, but was aided in its decision by, the New York Supreme Court's analysis in *Advanced Alloys*. See note 21, *supra*.

25. See *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 340 N.Y.S.2d 266 (Civ. Ct. 1973). *But see* *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 360 N.Y.S.2d 143 (Sup. Ct. App. Term 1973), *rev'g*, 340 N.Y.S.2d 266 (Civ. Ct.). See note 21, *supra*. It is the author's position that the view expressed by the trial court's opinion in *Advanced Alloys* is correct. White and Summers disagree, but did so at a time prior to the *Advanced Alloys* case, citing *Goldberg v. Manufacturer's Trust Co.*, 102 N.Y.S.2d 144 (Mun. Ct. 1951), a decision rejected both by comment 7 to section 4-403 and by the decision in *Granite Leasing Equipment Corp. v. Hempstead Bank*, 326 N.Y.S.2d 881 (Sup. Ct. Tr. Term 1971). See note 16, *supra*. J. WHITE & R. SUMMERS, *supra* note 22, § 17-3 at 563. The statutory construction argument found in the lower court's opinion in *Advanced Alloys*, see note 21, *supra*, may be seen also in *Prudential Insurance Co. v. Marine National Exchange Bank*, 371 F. Supp. 1002 (E.D. Wis. 1974):

[C]onspicuous by its absence in [section 3-405] is a requirement that the paying or collecting bank exercise ordinary care. Compare, e.g., [sections 3-406 and 4-406]. It is clear that where the draftsman of the U.C.C. used a particular phrase in certain instances, or omitted that phrase in another, they had a different result in mind . . . . [Therefore], a determination as to the bank's alleged negligence is not relevant.

371 F. Supp. at 1003.

26. While section 3-406 is, of course, not directly affected by section 4-103's ordinary care language, the preclusion rights of a payor under section 3-406 would have been available to Community, as a payor bank, had there been negligence by Ragusa which substantially contributed to a material alteration or an unauthorized signature.

In the final analysis, "subjective honesty in fact" and "ordinary care" are not totally compatible in the bank-customer area; where the former specifically applies, the latter is implicitly made irrelevant.<sup>27</sup> To that extent, *Ragusa's* attainment of a correct result<sup>28</sup> proceeds along a line of statutory construction difficult to defend logically.

#### MARGINAL NOTATIONS

In a prior *Symposium* effort, the problems that attend the issuance of a check bearing an "in full payment" notation were highlighted.<sup>29</sup> It was then noted that while the Commercial Laws contain no express treatment of the effect of marginal notations—thereby relegating the resolution of the issues raised to local law under Louisiana Revised Statutes 10:1-103—some U.C.C. decisions had suggested that Louisiana Revised Statutes 10:1-207 might permit the creditor-payee to avoid the compromise issue, raised by the margin-

---

27. In fact, the bank-customer relationship has little to do with ordinary care. For example, a showing of ordinary care will not insulate a drawee-payor bank from the consequences of paying an item that was not properly payable, even if a reasonably prudent banker could not have known of that fact. Items bearing skilled alterations or forged signatures are examples. On the other hand, lack of ordinary care by a drawee can be a negative-outcome determinant. See LA. R.S. 10:4-406(3) & 3-406 (Supp. 1974). It is perhaps noteworthy that the preclusion idea embodied in sections 3-406 and 4-406 does not apply to stale checks.

28. A drawee-payor bank in the post-litigation posture of Community Bank is not without a theory of recovery as against the party paid, i.e., Southern, in the *Ragusa* case. Payment to Southern was a mistaken payment, that is, Southern was not entitled, on the basis of any underlying obligation owed by Ragusa, to obtain payment on check #2668. From Community's point of view, any payment that cannot be charged to the drawer's account is necessarily a mistaken payment. Under the Louisiana Civil Code, such a payment must be restored by the one who has received it. LA. CIV. CODE arts. 2301-14. But negotiable instruments law has its own ideas about the ability of a drawee bank to recover payments it has mistakenly made, ideas traceable to the ancient case of *Price v. Neal*, 3 Burrow's Reports 1354 (1762). Section 3-418 of the U.C.C. incorporates the essence of *Price v. Neal* by making all payments of an instrument final, and therefore irretrievable, in favor of a holder in due course or a party who has in good faith changed his position in reliance on payment. If section 3-418 is applicable to a given case, the section displaces the underlying Civil Code law. Cf. LA. R.S. 10:1-103 (Supp. 1974). But in the *Ragusa* case, payment would not have been final in favor of Southern because Southern was not a holder in due course, see U.C.C. § 3-302(2), comment 2, and, in any event, could not have changed its position in reliance on payment of a previously paid obligation. Accordingly, Civil Code articles 2301-14 would apply, and Community could obtain restitution, subject, of course, to the prescriptive period. Community also would have been subrogated to the drawer's rights against the payee. LA. R.S. 10:4-407 (Supp. 1974).

29. *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Commercial Paper*, 38 LA. L. REV. 384, 392-94 (1978). The case there treated is *Terra Trucks, Inc. v. Weber*, 346 So. 2d 275 (La. App. 4th Cir. 1977).

ally noted "in full payment" check, by endorsing such a check "without prejudice" or "under protest."<sup>30</sup> These issues have lately appeared in two court of appeal decisions.

The first of the two cases to deal with the "in full payment" check was *Eppling v. Jon-T Chemicals, Inc.*,<sup>31</sup> in which drawer's check (drawn in an amount less than the payee claimed was owed) contained on the back the words "By the endorsement hereof, payee releases and discharges Maker [sic] from any liability or sums claimed to be owed by Maker to Payee." Payee, however, crossed out and rendered illegible those words, adding instead the words "The endorsement of this check by Payee does not constitute a release of any claims that Payee has against the Maker hereof." In effect, the payee had sought to avoid the compromise issue by reservation of his rights under Louisiana Revised Statutes 10:1-207. When payee subsequently brought suit on the balance it alleged had thereby remained due and unpaid, drawer defended on the basis that a compromise had in fact bloomed when payee had negotiated the check.<sup>32</sup> The fourth circuit agreed with the drawer that the action of the payee in negotiating the check had resulted in an acceptance of drawer's tender of the check in compromise.<sup>33</sup>

---

30. In *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969), it was said that section 1-207 could be used to avoid the common law accord and satisfaction result by a "with reservation of rights" payee-endorsement. The opinion in *Hanna v. Perkins*, 2 U.C.C. Rep. 1044 (N.Y. Co. Ct. 1965), had earlier uttered similar remarks about a "deposited under protest" payee-endorsement. Professors White and Summers have taken the view that the *Baillie* and *Hanna* dicta was correct, i.e., that section 1-207 permitted precisely the action taken by the payees in those cases, while Chancellor Hawkland has taken the view that section 1-207 was not so intended by the U.C.C. draftsmen and that the *Baillie* and *Hanna* dicta would in any event lead to mischief by payees. J. WHITE & R. SUMMERS, *supra* note 22, § 13-21, at 452-54; Hawkland, *The Effect of UCC § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L.J. 329 (1969). See also Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48 (1978); Comment, *Accord and Satisfaction: Conditional Tender by Check Under the Uniform Commercial Code*, 18 BUFFALO L. REV. 539 (1969); Comment, *Does U.C.C. Section 1-207 Apply to the Doctrine of Accord and Satisfaction by Conditional Check?*, 11 CREIGHTON L. REV. 515 (1977).

Since 1969, the case of *A.G. King Tree Surgeons v. Deeb*, 19 U.C.C. Rep. 167 (N.J. Dist. Ct. 1976), has sided with the Hawkland view, while *Scholl v. Tallman*, 247 N.W.2d 490 (S.D. 1976), permitted a payee to avoid the defense of accord and satisfaction by scratching out drawer's typed "in full payment" condition and substituting the words "restriction of payment in full refused. \$1826.65 remains due and payable." *Id.* at 491. The case of *Miller v. Jung*, 361 So. 2d 788 (Fla. App. 1978), reaches a result consistent with *Scholl*.

31. 363 So. 2d 1263 (La. App. 4th Cir. 1978).

32. Negotiation of a check naming a payee would require an endorsement by the named payee, bringing the drawer's notation to bear.

33. The opinion terms the legal principle urged by the payee as "estoppel by accord and satisfaction." That, as Judge Lemmon points out in the subsequent and fac-

By proceeding upon an offer and acceptance basis, the court is able to point out that "the payee's unilateral action in changing or altering the [drawer's] restriction does not change the legal effect of his negotiating the check [since] negotiation is deemed an acceptance of the [drawer's] offer."<sup>34</sup> Thus, at its strongest, the *Epling* opinion implicitly rejects the notion that section 1-207 displaces the underlying Civil Code provisions as to compromise; at its weakest, it presages that, should the issue be squarely raised in the future, the court will likely rule that section 1-207 does not have applicability to the compromise issue.

The second recent case in which the "in full payment" marginal notation issue arose is *Louisiana National Bank v. Heindel*,<sup>35</sup> also from the fourth circuit. The case is important only as a reminder that the mere notation "payment in full" (in this case on the front of the check), with no accompanying letter of transmittal explaining the intended legal effect of the check, creates only a fact issue as to which the drawer-debtor may well not prevail.<sup>36</sup>

The issue not alluded to in either *Heindel* or *Epling* is perhaps the more important one: what may we fairly expect the drawee

---

tually similar case of *Louisiana National Bank v. Heindel*, 365 So. 2d 37, 39 (La. App. 4th Cir. 1978) (Lemmon, J., concurring), is an unnecessary resort to common law concepts, in that the Civil Code contains provisions specifically governing such cases.

Compromise is a contract provable by a showing that there was an unliquidated or disputed claim; a tender by the debtor of payment which, if accepted by the creditor, is understood by the creditor to be an offer of compromise; and acceptance of the tender under those circumstances. See, e.g., *Pontchartrain Park Homes v. Sewerage & Water Bd.*, 246 La. 893, 168 So. 2d 595 (1964); *Berger v. Quintero*, 170 La. 37, 127 So. 356 (1930); *Charles X. Miller, Inc. v. Oak Builders, Inc.*, 306 So. 2d 449 (La. App. 4th Cir. 1975). A literal reading of Civil Code article 3071's language ("A . . . compromise is an agreement . . . for preventing . . . a lawsuit . . . , which [each of the parties] prefers to the hope of gaining, balanced by the danger of losing"), leads one to doubt the correctness of the jurisprudential requirement that a compromise must be founded upon a *disputed* claim; but the Louisiana Supreme Court has lately reaffirmed the requirement, in *Wilson v. Sun Oil Co.*, 290 So. 2d 844 (La. 1973).

34. 363 So. 2d at 1265. Under this view, the marginal notation becomes a "condition."

35. 365 So. 2d 37 (La. App. 4th Cir. 1978).

36. The fourth circuit remanded the case for further evidentiary proceedings, finding the record before it insufficient to sustain the affirmative defense of "accord and satisfaction" by the peremptory exception of *res judicata*. Judge Lemmon's concurring opinion adds that the drawer-debtor has the burden of proving that the parties intended a compromise and that this burden "is not met by showing that a debtor, in the ordinary course of business and without additional contact or notice, simply mailed a check to a creditor with a barely noticeable inscription regarding payment in full." 365 So. 2d at 39. This view would appear to be at odds with the recent decision of the South Dakota Supreme Court in *Scholl v. Tallman*, 247 N.W.2d 490 (S.D. 1976). See note 30, *supra*.

bank to do with the "in full payment" check?<sup>37</sup> Can the drawee safely pay the check in light of the fact that its customer's condition has been scratched out? Since the drawer's expressed condition that the check must be taken by payee—if taken at all—in "full payment" cannot be called a restrictive endorsement,<sup>38</sup> it is safe to say that the drawee cannot ignore it.<sup>39</sup> If the order of the drawer to the drawee in *Eppling* is viewed as having been "pay to the order of Eppling, if he is willing to take payment in compromise," then that is the order to be obeyed by the drawee; hence, it must dishonor any such check to which the payee has added a reservation of rights stipulation.<sup>40</sup> Where the payee had obliterated or modified the drawer's condition, the payee has *altered* the order of the drawer<sup>41</sup> and for that reason alone the item is not properly payable. Of course, in a jurisdiction which subscribes to the view that section 1-207 permits payee reservation of rights, the drawee seemingly would be protected if it paid the check; but, even in such a jurisdiction, section 1-207 would not permit a drawee to honor an altered check.

In the event a drawee in Louisiana were to pay an "in full payment" check which had been altered, or on which the payee had simply added words of reservation of rights, such a payment would be recoverable by the drawee if payee could be shown not to have been in good faith.<sup>42</sup> Good faith on the part of the payee would obvi-

---

37. The issue is absent from the opinion in *Scholl*. See note 30, *supra*.

38. In both *Heindel* and *Eppling*, the drawer's marginal notation is referred to as a "restrictive endorsement." 365 So. 2d at 39; 363 So. 2d at 1265. The reference in both instances is a slip of the judicial pen; an "endorsement must be written by or on behalf of the holder," LA. R.S. 10:3-202(2) (Supp. 1974), and the drawer is not the holder of his own instrument. See LA. R.S. 10:1-201 (Supp. 1974) (definition of "holder").

39. Cf. LA. R.S. 10:3-205, 3-206(2), 4-203 & 4-205(2) (Supp. 1974).

40. Banks may well be able to contract away the problem of conditional-order checks by appropriate stipulation in the account agreement, cf. *New York Credit Men's Adjustment Bureau, Inc. v. Manufacturers Hanover Trust Co.*, 4 App. Div. 2d 912, 343 N.Y.S.2d 538 (1973); *Kalish v. Manufacturer Trust Co.*, 18 Misc. 2d 958, 191 N.Y.S.2d 61 (Mun. Ct. N.Y. 1959), but in the absence of such a stipulation, "[o]bviously, the bank must honor the conditions placed by the drawer on the check . . . because the bank can charge a payment to his account only if it complies with his order [and a] bank paying a conditioned check runs the risk of the satisfaction of the condition." W. HAWLAND, *COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS* 288 (1967). It is true, on the other hand, that courts are hesitant to penalize banks that fail to observe mere notations or memoranda on checks describing the funds, or their source, or the payment intended by the check. See *Spinazzola v. Manufacturers Nat'l Bank of Detroit*, 28 Mich. App. 207, 184 N.W.2d 265 (1970). Cf. *Southern Baptist Hospital v. Williams*, 89 So. 2d 769 (La. App. Orl. Cir. 1956); *Irving Trust Co. v. Leff*, 253 N.Y. 359, 171 N.E. 569 (1930).

41. LA. R.S. 10:3-407 (Supp. 1974).

42. LA. R.S. 10:3-418 (Supp. 1974).

ously be lacking in the *Eppling* case in light of the alteration. Even in the case of mere addition of words or reservation of rights, it would seem that the payee is lacking in good faith in trying to obtain, as unconditional, a payment he knows was clearly intended by the drawer to be conditional.<sup>43</sup>

---

43. LA. R.S. 10:1-203 (Supp. 1974). Cf. LA. CIV. CODE art. 1901.