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CONTRACTS-TENDER-CHECK AS TENDER

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CONTRACTS—TENDER—CHECK AS TENDER—Plaintiff had paid \$300 as down payment on a restaurant under contract of purchase from defendant. On the day specified in the contract for payment of the balance, plaintiff tendered to defendant a check drawn on the local bank and bearing the notation "OK G. R. P." Defendant refused the check, saying he did not have to accept a check in payment, and that he did not know what the notation meant, even though plaintiff had told him it was placed there by the president of the local bank, and meant that the check was good. Plaintiff recovered damages for breach of contract in the lower court. Defendant appealed. *Held*, tender of the check was a sufficient tender, and refusal to accept put defendant in default. The check showed on its face that it had been OK'd by the president of the bank. If it had turned out to be worthless, defendant would have had ample opportunity to protect himself. *Lee v. Hendrickson*, (Ky. 1946) 196 S.W. (2d) 880.

Where a contract calls for the payment of money, without specifying the medium of payment, it implies payment in legal tender.¹ It has been the universal rule that tender of a check in payment for goods is not sufficient tender in law, and does not, of itself, put the vendor who refuses to accept it in default.² The fact that the check is certified does not change the rule,³ nor does subsequent proof that the check would have been paid if accepted and presented for payment.⁴ Courts have recognized the widespread custom of paying money by

¹ *Breed v. Hurd*, 23 Mass. 356 (1828); *Pearlstein v. Novitch*, 239 Mass. 228, 131 N.E. 853 (1921); *Vick v. Howard*, 136 Va. 101, 116 S.E. 465 (1923); 6 WILLISTON, CONTRACTS, rev. ed., 5133 (1938). Legal tender is defined in 31 U.S.C. (1940) § 462.

² *Collier v. White*, 67 Miss. 133, 6 S. 618 (1889); *Rumpf v. Schiff*, (N.Y. S. Ct. 1908) 109 N.Y.S. 51; *Zimmerman v. Miller*, 206 Mich. 599, 173 N.W. 364 (1919); HUNT, TENDER 81 (1903); 6 WILLISTON, CONTRACTS, rev. ed., 5133 (1938); 26 R.C.L. 638.

³ *Hobbs v. Ray*, 29 Ky. L. Rep. 999, 96 S.W. 589 (1906); 5 PAGE, CONTRACTS, 2d ed., 5056 (1921); 23 A.L.R. 1284 (1923). Hence, in the principal case, even if the notation on the check were construed as an acceptance or certification, the same rule would apply.

⁴ *Zimmerman v. Miller*, 206 Mich. 599, 173 N.W. 364 (1919); 23 A.L.R. 1284 (1923).

check, and while the above general rule has not been questioned, there is substantial agreement that the proper medium of tender may be waived by failure to object to defective tender, or by placing refusal to accept the tender upon grounds other than improper medium.⁵ Where the vendee, after the tendered check has been refused, procures cash and makes a valid tender on the next business day, a majority of courts hold that this is a substantial performance of the contract.⁶ Almost invariably, however, this result is justified on the basis of waiver or estoppel.⁷ The facts of the principal case involve no elements of waiver, estoppel, or subsequent valid tender, but the court seems to decide squarely that the tender of a check as payment is a valid tender, and refusal to accept puts the vendor in default. This result may in many instances place an undue burden upon the vendor, forcing a choice between acceptance and risk of dishonor, and refusal and liability in damages for breach of contract. Traditional rules of tender, as qualified by the doctrines of waiver and estoppel, appear to strike a more reasonable balance between the protection of the vendor and the convenience of dealing by check.

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⁵ *Gaunt v. Alabama Bound Oil & Gas Co., Inc.*, (C.C.A. 8th, 1922) 281 F. 653; *Neal v. Finley*, 136 Ky. 346, 124 S.W. 348 (1910); 6 WILLISTON, CONTRACTS, rev. ed., 5157 (1938); 36 L.R.A. (NS) 232 (1912).

⁶ *Farris v. Ferguson*, 146 Tenn. 498, 242 S.W. 873 (1922); *Skinner v. Stone*, 144 Ark. 353, 222 S.W. 360 (1920); *Vick v. Howard*, 136 Va. 101, 116 S.E. 465 (1923); 23 A.L.R. 630 (1923).

⁷ See, for example, *Servel v. Jamieson*, 167 C.C.A. (9th) 212, 255 F. 892 (1919), where vendor evaded tender until banks were closed, then refused check; and *Simmons v. Swan*, 275 U.S. 113, 48 S. Ct. 52 (1927). It is worth noting that the bare question of whether or not a check is valid tender has rarely been presented to the courts. It seems to have been assumed by all the authorities, without discussion, that it is not. Almost without exception the cases involving checks as tender arise on questions of waiver of valid tender, or on the question of estoppel by actions or representations of the vendor.