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Bills and Notes -- Depository Bank As Holder in Due Course

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NOTES AND COMMENTS

Bills and Notes—Depository Bank As Holder in Due Course[1]

Walnut Cove Motor Company was a depositor of plaintiff State Planters Bank and, as of the close of business October 17, 1957, had a balance of 712 dollars, against which there were then awaiting payment its checks in an amount over 12,000 dollars received that afternoon by the bank in the mail from its correspondents. The president of the bank told Massey, the president of the motor company, that unless he got funds in to cover these waiting checks by noon the next day, October 18, they would be returned dishonored to the presenting banks. To raise the demanded funds Massey sold to defendant the next morning in Charlotte at full price several cars which were burdened with mortgages and received defendant's check for over 11,000 dollars payable to the motor company. He deposited this check with a few other small items to the credit of the motor company and the bank forthwith paid the waiting checks which the deposit was to cover. The defendant having learned of the fraud perpetrated on it, stopped payment on its 11,000 dollar check, and since the motor company thereafter never made any deposits of consequence[2] and its president, Massey, disappeared,[3] the bank could not collect from the account or the depositor the money it had put out on the strength of this check so it sued the defendant drawer.

If the law is to recognize any class of people who can trample under foot the defenses of defrauded makers of commercial paper, it would look as if this bank, admittedly without notice of the fraud and with its money sunk beyond recall in this check should be one of such. The court so held but not without effort because of complications introduced by pronouncements in earlier cases.

Depository Bank as Collecting Agent

The check in suit was indorsed[4] and presented by Massey to the receiving teller for credit to the motor company along with a deposit slip carrying a standard stipulation that "this Bank acts only as de-

[1] State Planters Bank v. Courtesy Motors, Inc., 250 N.C. 466, 109 S.E.2d 189 (1959).

[2] Also large amounts of additional checks of the motor company were later presented and returned unpaid. Problems presented by the subsequent deposits and withdrawals are dealt with in note 15, *infra*.

[3] Record, p. 28; 250 N.C. at 469, 109 S.E.2d at 192.

[4] The endorsement was by rubber stamp and in blank. It was admitted to have been authorized and valid, Brief for Appellant, p. 26, although the erroneous contention was there made that it was a restrictive endorsement under N.I.L. § 36(2), G.S. § 25-42(2). Of course as between the parties by separate agreement an agency may be created though the form of the endorsement does not disclose it and subsequent parties would not be on notice of the agency.

positor's collecting agent and . . . . it may charge back any [unpaid] item . . . ."[5] Examining the case first on the assumption that this stipulation represented the binding agreement of the parties, it is evident that the bank was indorsee, hence holder,[6] from the moment of deposit and could become holder for value by making advances to or on behalf of its principal[7] even though, under our holdings, it, as agent, would not have title or be "owner" of the paper.[8] A commission merchant to whom produce is consigned by a grower can get a lien on the produce by advances to the shipper even though he does not get title or become owner and the North Carolina court long since recognized the similarity of that situation to that of advances made by a collecting bank.[9]

That would seem to be an end to the matter and it would be so if the bank in fact, as assumed above, had paid out the full amount of the check, *i.e.*, as collecting agent had made advances to the full amount. Under the first in, first out rule once approved in North Carolina[10] there is no question but what the bank here did so.[11] But where, as in this case, the right to charge back exists, North Carolina has apparently

[5] Record p. 39; 250 N.C. at 469, 109 S.E.2d at 191.

[6] NIL § 191, G.S. § 25-1: "'Holder' means the payee or indorsee of a bill or note, who is in possession of it. . . ."

[7] NIL § 27, G.S. § 25-32: "Where the holder has a lien on the instrument . . . . he is deemed a holder for value to the extent of his lien." National Bank of Phoenixville v. Bonsor, 38 Pa. Super. 275 (1909); Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958). The Uniform Commercial Code (hereafter U.C.C., now the law in Pennsylvania, Massachusetts and Kentucky) §§ 4-208, -209, adopts and extends this doctrine by enacting the first in, first out rule. Section 4-208(2) and comment 2.

[8] The N.I.L. does not use the term "owner" though it often refers to title. *Cf.* American Bankers' Ass'n Bank Collection Code (adopted in 18 states, not N.C.) § 2 which treats depository banks as agents absent a contrary agreement but gives them "the rights of an owner" to the extent that a credit given has been drawn against. See also U.C.C. § 3-301. First Nat. Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1926) and other cases in North Carolina even deny that the bank as agent is the real party in interest. *Cf.* Wellons v. Warren, 203 N.C. 178, 180, 165 S.E. 545, 546 (1932); *but see* Federal Reserve Bank v. Whitford, 207 N.C. 267, 176 S.E. 584 (1934). Those decisions would probably be otherwise if the bank had made irretrievable advances as in the present case and had thus acquired an "interest" in the paper. See language in Ledwell v. Shenandoah Milling Co., 215 N.C. 371, 376, 377, 1 S.E.2d 841, 844 (1939), quoted in note 9, *infra*. No such claim was made. It is believed the decisions are wrong anyway under N.I.L. §§ 37(2) and 51.

[9] Armour Packing Co. v. Davis, 118 N.C. 548, 555, 24 S.E. 365, 366 (1896), quoting from *In re* State Bank, 56 Minn. 119, 124, 57 N.W. 336, 337 (1894); Giles v. Perkins, 9 East 12, 14 (K.B. 1807), quoted in the principal case: Ledwell v. Shenandoah Milling Co., 215 N.C. 371, 376, 377, 1 S.E.2d 841, 844 (1939): "[T]he bank becomes a holder of the instrument, at least as collateral."; "the . . . bank has an interest in the paper . . . ."

[10] United States National Bank v. McNair, 114 N.C. 335, 19 S.E. 361 (1894); Standing Stone Nat. Bank v. Walser, 162 N.C. 54, 77 S.E. 1006 (1913).

[11] By the close of business on October 19th the bank had paid out more on the motor company's checks (12,303 dollars) than the sum of the company's opening balance on October 18 (700 dollars) plus the total deposit that day of the check in suit (11,142 dollars) and 300 dollars of small items credited at the same time. (All sums in round figures.) Record p. 35. The deposit on the 19th of 421 dollars which kept the account from being overdrawn would be irrelevant in a first in, first out calculation.

held that the collecting bank cannot be a holder for value to the extent that it can recoup from the account by charge back after it has notice of a defect in the paper it received.[12] Usually that has resulted in complete defeat for the depository bank because the payee's account was found ample to permit complete reimbursement by charging back.[13] This is a purely equitable doctrine disregarding practicalities and technicalities as to when funds are paid out. There is something phony sounding in a bank's claim to the harsh special rights of a holder in due course against defrauded parties when all it has to do to make itself whole is to write some debit figures on its depositor's account and return the paper to him.[14]

Here the case is different however. As a result of some small deposits and withdrawals during the ensuing two days[15] the account of

[12] Worth Co. v. International Sugar Feed No. 2 Co., 172 N.C. 335, 90 S.E. 295 (1916); Sterling Mills v. Saginaw Milling Co., 184 N.C. 461, 114 S.E. 756 (1922) (jury question whether right to charge back existed). The facts in other cases are so clear as to require no jury finding. See, *e.g.*, Denton v. Shenandoah Milling Co., 205 N.C. 77, 170 S.E. 107 (1933), discussed in note 13 *infra*.

[13] Cases cited note 12. In Denton v. Shenandoah Milling Co., 205 N.C. 77, 80, 170 S.E. 107, 109 (1933), where no deposit slip language was introduced but other facts pointed to an agency, there was testimony that the depositor's account was not always sufficient to stand a charge back but that would seemingly be no reason why the bank should not get off the hook when it was. It is evident that under the first in, first out rule an active account is likely to make the bank a holder for value very soon while under the charge back rule a substantial balance will usually defeat that claim for moderate sized items.

[14] In language of Hoke, J., dissenting in Standing Stone Nat. Bank v. Walser, 162 N.C. 54, 65, 66, 77 S.E. 1006, 1011 (1913), "[T]here is no evidence that . . . plaintiff, if it fails to recover, is or is likely to be out of pocket one cent by reason of its alleged purchase," i.e., if it was denied recovery as a holder in due course against a defrauded drawer. The implications of that statement cannot of course be pushed too far or no one could be a holder in due course when he had an amply solvent endorser who had received or waived notice of dishonor. The whole basic principle of negotiability would be scrapped by such a sweeping doctrine. Limited to the case of a bank with the right of charge back against a sufficient balance it has equitable appeal. *Accord,* National Bank of Commerce v. Morgan, 207 Ala. 65, 92 So. 10 (1921) (account was always sufficient for charge back). This same equitable approach—how is the bank hurt?—was carried to the point of technical error in the homespun reasoning and language of the trial judge in Latham v. Spragins, 162 N.C. 404, 78 S.E. 282 (1913), where the bank had applied the deposited item to an overdraft (pre-existing debt, N.I.L. § 25) and later, on its dishonor, had charged it back, restoring the overdraft. The bank, said that worthy judge to the jury, "were in the same fix after the transaction as before . . . ." *Id.* at 405, 78 S.E. at 283.

[15] Record p. 35. The record is not satisfying on the matter of the small additional deposits received and the small charges made to the company's account during this period. The president of the bank testified that it returned to correspondents unpaid a large total of checks ("way up into the thousands," Record p. 20) which came through on October 18th and on later days because the account was insufficient and no new funds were produced to cover them. It may be that the bank paid some small locally held checks which were presented later though the president's testimony was that the practice of the bank was not to pay out of order. Record p. 27, 2d par.; *cf.* Record p. 2 last par. While a bank has some latitude in determining what order to follow in paying simultaneously presented items, Chadd v. Byers State Bank, 111 Kan. 279, 206 Pac. 880 (1922); Castaline v. National City Bank of Chelsea, 244 Mass. 416, 138 N.E. 398 (1923), it may violate a duty to its correspondent in returning checks unpaid and paying others presented later. See Standard Trust Co. v. Commercial National Bank, 166 N.C. 112, 122,

the motor company stood at 124.90 dollars on October 22 when the bank got notice of dishonor of the 11,000 dollar check of the defendant.[16] One might take the view that the bank was thus a holder for value only for the amount of the check less this 124 dollars which stood on its books subject to being appropriated under the banker's lien. That would seem to carry out logically the theory of earlier North Carolina cases. And had the motor company's balance been 5,000 dollars instead of 124 dollars, it is believed the court would have so limited plaintiff's recovery on the fraudulently obtained check in suit.[17]

Depository Bank as Purchaser

So much for the case analyzed on the basis of plaintiff bank's being a collecting agent. The complaint did not adopt that theory. It alleged instead that the bank was the owner of the check.[18] This approach of

81 S.E. 1074, 1078 (1914) (also holding the drawee on the minority, constructive acceptance doctrine); Note 7 N.C.L. Rev. 191 (1929). See also Jacobson v. Bank of Commerce, 66 Ill. App. 470 (1896), which, however, was decided under the check-as-assignment doctrine then followed in that jurisdiction. *But see* U.C.C. § 4-303(2) and comment 6 (Offic. Text, 1958).

[16] Or on October 23d. Record p. 19. There was some testimony by plaintiff's president that this 124 dollars was not a real balance because of some collateral transaction on which the bank was "stuck." Record p. 28. That collateral transaction seems to have been substantially a duplicate on a small scale (check of 200 dollars) of the one in dispute, *i.e.*, plaintiff bank received for deposit from the motor company and sent through for collection a check which the motor company had fraudulently obtained for a mortgaged car delivered to the buyer without the assent of the mortgagee. There was however, inter alia, a striking difference: the drawee bank on this check overlooked a stop order and paid it to plaintiff. Under the doctrine of Price v. Neal, 3 Burr, 1354, 97 Eng. Rep. 871 (1762), accepted to the full extent in North Carolina, Woodward v. Savings & Trust Co., 178 N.C. 184, 100 S.E. 304 (1919); National Bank of Sanford v. Marshburn, 229 N.C. 104, 47 S.E.2d 793 (1948), the drawee bank there would seem precluded from recovering its mistaken payment from plaintiff (unless plaintiff bank as to that check were considered to be only bare agent of the motor company, fraudulent payee, and so without rights of its own). Britton, Bills & Notes 638 (1943). That being so, it is questionable whether plaintiff bank by voluntarily refunding the money which it was lawfully entitled to keep, could diminish the motor company's balance by charging the item back and thus increase its investment in the check on which it is now suing (*i.e.*, become a holder for value to a larger amount).

[17] Of course in no realistic sense can a check of 11,000 dollars be charged back against an account of 124 dollars. As a matter of bookkeeping it could be done and a heavy overdraft be created but that might be a poor tactical move since it might be regarded as relinquishing rights on the paper and substituting a claim against the depositor on his overdrawn account, although it ought to be regarded as still having a security interest in the paper. *Cf.* Latham v. Spragins, 162 N.C. 404, 78 S.E. 282 (1913). In Lowrance Motor Co. v. First Nat'l Bank, 238 F.2d 625 (5th Cir. 1957), relied on in the principal case, the judgment was for less than the amount of the items in question "the difference being represented by an amount recaptured by the bank from Moore's account." Perhaps the court would have so limited the judgment if the bank had not appropriated the balance.

[18] "That the plaintiff is the owner and holder in due course . . . ." Complaint, para. III, Record p. 2. The findings, para. 9, even more emphatically adopt that theory. (The intent of the parties was that the transaction constituted a sale.) Record p. 52; 250 N.C. at 470, 471, 101 S.E. at 192, 193. The Uniform Commercial Code has deliberately written down in importance the matter of status, although "it may have importance in some residual areas not covered by specific rules." U.C.C. § 4-201, comments 1, 2 (Official Text, 1958).

course involves a collision with the terms of the deposit slip which declared the bank a collecting agent. The motor company listed its deposit on that slip and would normally be considered to have adopted the printed recital.[19] But this deposit was not a normal one. The bank, with some 12,000 dollars of the motor company's checks received from correspondents and in hand for payment from a wholly insufficient account, demanded that the motor company bring in fresh deposits to prevent those checks being returned dishonored.[20] It was in response to this demand that the motor company procured from the defendant by fraud the check in suit and offered it to plaintiff bank to serve as the source of funds for payment of the waiting checks. Disregarding the agency recitals on the deposit slip and the technicalities of the parol evidence rule it might be found (and it was found)[21] that the bank did buy the check and made immediate[22] payment for it by honoring that amount or a greater amount of the motor company's checks then in hand awaiting payment.

[19] See Oliver v. United States Fid. & Guar. Co., 176 N.C. 598, 600, 97 S.E. 490, 491 (1918); Coppersmith v. Aetna Ins. Co., 222 N.C. 14, 17, 21 S.E.2d 838, 839 (1942); 1 CORBIN, CONTRACTS §§ 32, 33 (1950). Compare cases of principal adopting by delivery to a third party documents made out by an agent unauthorized to execute them. Mondragon v. Mondragon, 113 Tex. 404, 257 S.W. 215 (1923). There is authority that the deposit slip is only a receipt and its recitals are not binding (do not create a contract), 9 C.J.S. *Banks & Banking* § 270 (1938), perhaps by analogy to the rule as to such stipulations on parcel checkroom tickets and the like handed to the bailor without his advance inspection or assent. The differences however, are evident. The depositor uses the form repeatedly, he lists his items on it and puts his name to it, perhaps not as a signature, but as a voluntary affirmative act. He first delivers the form to the teller before the copy is returned to him as a receipt. Opportunity to know the terms is certainly present. Some banks go to great lengths to charge the depositor with knowledge and concurrence. A bank in the writer's vicinity, for example, prints a stipulation like that in the principal case on the face of the slip, a somewhat differently worded one, with charge back right repeated, on the back and the added assertion, "Delivery to the Bank of items for collection or credit [Quaere, what distinction is intended?] shall constitute acceptance of the above conditions by the depositor, in the absence of written notice to the contrary at the time." Finally, the teller's rubber stamp endorsement of the duplicate declares, "Out of town items received and forwarded for collection at depositor's risk only until we have actual final payment." (Quaere, what is *final* payment?) Compare Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929). At any rate many cases have treated the recital as creating a contract. Ledwell v. Shenandoah Milling Co., 215 N.C. 371, 1 S.E.2d 841 (1939) (contract found waived), which quotes Fine v. Receiver of Dickinson County Bank, 163 Va. 157, 160, 175 S.E. 863, 864 (1934). See also language in Taft v. Quinsigamond Nat'l Bank, 172 Mass. 363, 52 N.E. 387 (1899): "So a bank by general notices printed on its pass-books or deposit slips, or otherwise brought to the knowledge of its depositor . . . may define its position as that of agent or purchaser."

[20] Record p. 15.

[21] Findings, para. 9, Record p. 52. Since nothing was said in the conversations between the bank and depositor about purchase or sale this is a probably permissible but certainly not a necessary interpretation of the intended agreement. The evidence would not seem sufficient for the purpose under the agency presumption of U.C.C. § 4-201(1) (contrary intent must clearly appear) and comment 2 (calling for written evidence of intent to revoke agency).

[22] Because of some complications in the bank's routine, Record pp. 25-26, about half of these checks were not debited to the motor company's account until the next day, October 19, Record p. 35, although remittance seems to have been made to the presenting banks on the 18th. Record pp. 33-34.

But can the parol evidence rule properly be disregarded? Various arguments suggest themselves.[23] One approach is to declare, as did the opinion in the principal case, "The deposit contract is a matter about which plaintiff and Motor Company had a legal right to make their own contract, so long as the rights of third parties are not injuriously affected,[24] and it is not contrary to law or public policy. . . . What the contract between them is with respect to the title of this cheque depends on their intention to be determined as a fact from the evidence."[25]

Put in this broad form it might seem that the trier of the facts, here the trial judge, may give controlling effect to the oral preliminary discussion which he here interprets to mean that a sale was intended, although as so interpreted, it contradicts the printed stipulation accompanying the actual deposit. If this wide open view of the matter is taken little seems left of the parol evidence rule, especially that rule as it has usually been applied in North Carolina, where the test for rejection seems to have been, Does the claimed oral agreement contradict the ultimate writing?[26] It certainly does so here.

But, as pointed out by writers on evidence,[27] the parol evidence rule properly considered requires first a finding by the court whether under all the circumstances the final written terms would normally be intended by the parties to embody, "integrate" in Wigmore's word, their agreement and so render any preceding oral commitments on the specific matter of no effect. If, objectively tested, that was not their intention, then the jury will find whether there were in truth such oral commitments and what they were.

[23] If it were the depositor seeking to escape the consequences of the printed stipulation he might try to invoke the fine print or "trap for the unwary" doctrine recognized in some states, for the stipulation is usually in fine print. But not only does the present fact situation seem to fit poorly into that rule (depositor repeatedly used the form and had put his name to a like stipulation on the signature card when opening the account) but certainly the bank which furnished the form can put forward no claim to being prejudiced. For an interesting case where such an argument was summarily rejected see People v. Michigan Ave. Trust Co., 242 Ill. App. 579, 597 (1926).

[24] This clause presents an interesting area of speculation: since in the view of the plaintiff, and apparently of the court, the plaintiff, to extinguish defendant's defense of fraud, must make itself out a purchaser rather than an agent, the defendant, a third party, will be most injuriously affected by allowing the intent of the parties, as shown by their oral arrangements, to prevail.

[25] 250 N.C. at 472, 109 S.E.2d at 194.

[26] Chadbourn and McCormick, *The Parol Evidence Rule in North Carolina*, 9 N.C.L. REV. 151, 156, 176 (1931); STANSBURY, *North Carolina Evidence*, § 253 (1946). Compare: "This agreement [deposit slip stipulation] being in writing it is not subject to contradiction by proof that another and a different agreement was in fact at the time made." Ledwell v. Shenandoah Milling Co., 215 N.C. 371, 376, 1 S.E.2d 841, 844 (1939), quoted by the court in the present case but in another connection (waiver) and without noting its bearing on this point.

[27] WIGMORE, EVIDENCE, §§ 2425, 2430 (3d ed. 1940): Chadbourn & McCormick, *supra* note 26 at 154. The statement in Neal v. Marrone, 239 N.C. 73, 78, 79 S.E.2d 239, 242 (1953), quoted in Walker v. Horne, 149 F. Supp. 457, 460 (W.D. N.C. 1957), comes close to stating the rule in the same form.

Here there seems ample reason for finding that in special pressing circumstances, where urgent exchanges took place between the depositor and the top officer of the bank, it was not the intent of the parties that a printed stock form later used in depositing with a teller the item in question should be regarded as an integration of the transaction. That effectively disposes of the parol evidence rule for this case and the decision can be reached, it seems, with the blessing of Mr. Wigmore.

Our supreme court in fact seemed very near to placing the matter on this basis when just following the language quoted above and again later in the opinion it laid emphasis on the "facts and attendant circumstances surrounding the making of the deposit."[28] This is especially true when the trial judge here sat as a jury and made whatever findings were to be made.

Another way to avoid the force of the printed terms is to say, as did the opinion, that they are in the interest of the bank, may be waived by it and can be found to have been waived by paying the depositors checks.

It is true, as already noted, that the banks or their counsel prepare the recitals and supply the forms on which they appear and that presumably the terms are in their interest in the sense that the stipulations are what in general the banks want.[29] And if, for example, the form says that the bank will not honor checks drawn against uncollected funds, it might later waive this restriction by nevertheless paying such checks.

But to say that by making advances even up to the full amount of the checks it "waives" its status of agent and becomes a buyer seems to go beyond the normal implications of the term. The bank certainly does not waive its right to charge back and that, in North Carolina at least, it is a key indicator of agency.[30]

Nevertheless the court had ample outside and some North Carolina authority for this position[31] and no matter how unsatisfactory it seems analytically and how unnecessary it is as justification for finding the bank a holder in due course, the result reached seems sound.

[28] Cases elsewhere have found the printed stipulations overriden by far less impressive special facts than those here, often solely on the ground that drawings were permitted. 59 A.L.R.2d 1173, 1187 (1958).

[29] Like most other people the banks want what they think is best for their own interests but in the complicated area of bank collections, where any position of advantage one way may be disadvantage another, their vacillation over the years indicates that they are not at all sure what they want. Right now they say in their forms that they will be agents. But note the shift in position from restrictive to unrestrictive endorsements described in First Nat'l Bank of Belmont v. First Nat'l Bank of Barnesville, 58 Ohio St. 207, 214, 50 N.E. 723 (1898), followed by the contrary shift in the banks' own legislation, A.B.A. Bank Collection Code § 4, making "For Deposit" and "Pay any bank or banker" endorsements restrictive.

[30] Denton v. Shenandoah Milling Co., 205 N.C. 77, 170 S.E. 107 (1933), discussed in note 13, *supra*.

[31] 59 A.L.R.2d 1173, 1188-89 (1958).

SUMMARY

The court said in the present case: "The real determinative question presented to the Trial Judge was whether plaintiff is the owner or a collecting agency of this cheque . . . ."[32]

If the plaintiff had not chosen to sue as purchaser and owner[33] that question would not have been determinative, perhaps not even important. The N.I.L. recognizes no such person as "owner" or "owner in due course."[34] All that plaintiff need be is *holder* in due course.

Considering, however, the poor reception often accorded in North Carolina cases to depository banks dressed in the garb of agent and that the charge-back right is part of that garb, it is understandable why plaintiff's counsel preferred to present their client in other attire if possible.

But the crucial question for such a plaintiff in cases where it wishes to assert rights[35] against drawers or claimants[36] is not whether it is or is not an agent but whether it has given value either by making advances, if agent, or paying part or all of the purchase price, if buyer. And that in turn will depend in most cases on the answer to the questions what is the giving of value and when is it determined?

The following analysis and conclusions are ventured as representing the now state of the North Carolina law:[37]

[32] 250 N.C. at 472, 109 S.E.2d at 194.

[33] Defendant in turn largely pinned its hopes on arguing that plaintiff was only an agent. Understandably it would not want to becloud the issue which it thought might give it complete victory by arguments promising only to reduce an adverse verdict of 12,000 dollars by 124 dollars.

[34] See the discussion of this point in note 8, *supra.*

[35] Where other questions are concerned, such as who shall bear the loss in case of a failed intermediary bank, the depository, charged with being owner, will of course hasten back into its agency role and its exculpatory recitals. See a still useful analysis of the whole area, Steffen, *The Check Collection Muddle,* 10 TUL. L. REV. 537 (1936).

[36] Many of the cases where the bank seeks to be found a holder in due course involve attachments by the depositor's creditors. Those cases are considered generally to present the same ultimate problem as ours and are cited indifferently herein as they are by others, although owner and holder in due course are not by any means the same. For example, a donee may be owner. There may be less public interest in aiding creditors of payees who, as creditors, throw monkey wrenches into the collection process by their attachments than there is in encouraging banks to aid business by allowing drafts against items in process, especially when a very small percentage of paper is dishonored. On the other hand the attaching creditors are commonly local people who, without this weapon, may have to go abroad to assert their claimed rights.

[37] Many cases have involved claims of out of state depository banks and those banks might in some of them have fared better if counsel had noted the possibilities of that fact. The legal effect of transfers, by endorsement or otherwise, is governed by the law of the place where made. Embiricos v. Anglo-Austrian Bank [1905] 1 K.B. Div. 677, 74 L.J..K.B. 326 (Ct. App.) (leading case—forged endorsement in Roumania); RESTATEMENT, CONFLICT OF LAW, § 349 (1934); U.C.C. § 4-102(2). comment c (Official text 1958); Hatcher v. McMorine, 15 N.C. 122, 124 (1833) (endorser's liability). *Contra,* Badger Mach. Co. v. U.S. Bank & Trust Co., 166 Wis. 18, 163 N.W. 188 (1917) (transfer for pre-existing debt).

In Ledwell v. Shenandoah Milling Co., 215 N.C. 371, 374, 1 S.E. 2d 841, 843 (1939) the court said, "As to this, [the contention that Virginia law governed the deposit in a Norfolk bank] we do not take issue," though its examination of Virginia authority did not help plaintiff. Similarly in a case where the depository

(1) Where a right to charge back is reserved but that right has become permanently worthless by payings out from the account before the depository bank has notice of equities, the bank becomes a holder for value, whether it is agent or purchaser.[38]

(2) Where a right to charge back is reserved and the depositor's account remains ample or is replenished at any later time before suit so that the right can be exercised effectively, the depository bank is not a holder for value but must look to the account for reimbursement. And if the account is only partly sufficient, the bank will be a holder for value only for the excess, *i.e.*, for the amount of the item less the maximum balance it can appropriate.[39]

(3) In situations like those in paragraph (2) it is possible that the distinction between agent and purchaser takes on significance in North Carolina and that the first in, first out rule[40] will be applied in case of a purchase so that the bank becomes a holder for value once and for all when under that rule[41] the full amount of the item in question has been

was a San Francisco bank and the garnishment was in Milwaukee, the Wisconsin court after noting California law, found it to be "the majority rule" and the same as that in Wisconsin. Blatz Brewing Co. v. Richardson & Richardson, Inc. 245 Wis. 567, 15 N.W.2d 819 (1944).

[38] Past North Carolina cases seem to have held that the right to charge back makes the bank an agent, Denton v. Shenandoah Milling Co., 205 N.C. 77, 170 S.E. 107 (1933), which doctrine would open the above statement to criticism in its speaking of a purchaser who had such a right. But the present case, in finding the bank a purchaser, does not find that the right to charge back was given up and the writer does not believe the facts would warrant such a finding. So North Carolina may now recognize, as does the United States Supreme Court, City of Douglas v. Federal Reserve Bank of Dallas, 271 U.S. 489 (1926), such a combination as a purchaser with a right to charge back, paralleled in chattel transactions by a purchase on condition with a right to return for credit.

[39] Cf. Lowrence Motor Co. v. First Nat'l Bank, 238 F.2d 625 (5th Cir. 1957), discussed in note 17, *supra*. The doctrine of United States Nat'l Bank v. McNair, 114 N.C. 335, 19 S.E. 361 (1894), that when a substantial amount has been paid out the bank is a holder for value for the full amount is no longer supportable under N.I.L. § 54, at least unless the view of Professor Beutel is adopted, that the mere giving of bank credit or the giving of it with the privilege of drawing makes the bank a holder for value. BRANNAN, NEGOTIABLE INSTRUMENTS LAW 499 (7th ed. 1948). That would go further than the "substantial amount" rule.

[40] An alternative rule would make the bank a holder for value to some extent only when the depositor's balance fell below the amount of the item in suit and a holder for full value only when and if the balance fell to zero. But this too would defeat the full equitable effect of the charge back rule since it would disregard later deposits once the account had been enough depleted. It is usually impossible to tell from the cases what the state of accounts was after the crucial deposit. In Moon-Traylor Co. v. Gray Smith Milling Co., 176 N.C. 407, 97 S.E. 213 (1918) the depositor's account became heavily overdrawn a few days after the bank had credited the item whose proceeds were attached by a creditor of the drawer but the mistake was made of having an intermediary collecting bank assert ownership rather than the depository which had gotten thus deeply involved.

[41] Some support for this once-for-all cut off date may be found in N.I.L. § 26, G.S. § 25-31: "Where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time." When read in connection with N.I.L. § 54, G.S. § 25-60, however, it may be that the object of the section, which was taken from the British Bills of Exchange Act, is in its final clause, indicating the parties whose rights are affected by the giving of value.

paid out[42] and subsequent replenishment of the account will not defeat that status, once so obtained. It may be argued that the principal case supports this position. If it does so, it repudiates in large measure the strong equitable basis of the charge back rule, *i.e.*, that to the extent that a bank can avoid loss by merely debiting or appropriating a depositor's balance it ought not be regarded as a holder for value and so prevail against a maker or drawer with defenses.

(4) Where there is no right to charge back[43] the bank becomes a holder for value under the first in, first out rule, *i.e.*, after the previous balance and perhaps any simultaneously deposited good funds are paid out. This rule would apparently have no relation to an agent since agency almost certainly implies the right to charge back.

M. S. B.

Constitutional Law—Due Process—Right to Counsel in Pre-Trial Situations—When It Arises

The due process clause of the Fourteenth Amendment to the Constitution of the United States has been interpreted as requiring that every defendant charged with a capital crime be represented by counsel.[1] How soon this right arises, however, is often an extremely difficult question. In *Crooker v. California*[2] the United States Supreme Court in a five-to-four decision held that due process was not violated when the accused who requested counsel shortly after his arrest was denied it for almost thirty hours during which time he made a confession which was admitted in evidence at the trial where he was convicted of murder. The Court stated that "due process does not always require immediate honoring of a request to obtain one's own counsel in the hours after arrest . . . ."[3] Rather, the Court ruled that the accused is entitled to

[42] Universal C. I. T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958) applied this rule without inquiry as to the later state of the depositor's account in a case where the agency relationship was found. This decision, per Wyzanski, D.J., is the best reasoned of recent cases in this area, although in applying Massachusetts law (and influenced by the Uniform Commercial Code, then shortly to become effective in the Commonwealth) it properly ignored what has become so important in North Carolina cases, the right to charge back.

[43] This was the situation in Franklin Nat'l Bank v. Roberts Bros. Co., 168 N.C. 473, 84 S.E. 706 (1915). This assumes an almost non-existent state of affairs today with banks universally inserting stipulations in their dealings not only on deposit slips but on advice forms, etc. Even if one of these forms was not used, as in case of acknowledging receipt of an item by letter, there is the original signature card and the continuous custom to fall back on to support the claimed right.

[1] Powell v. Alabama, 287 U.S. 45 (1932).

[2] 357 U.S. 433 (1958). The majority was composed of Frankfurter, Burton, who since has retired, Clark, who wrote the opinion of the Court, Harlan, and Whittaker, JJ. Douglas, J., with the concurrence of Warren, Ch. J., and Black and Brennan, JJ., dissented.

[3] *Id.* at 441.