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NOTES

Bills and Notes—Recovery by Payee Against Drawee Bank on Checks Paid Over Forged Endorsement

In the recent case of *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*,¹ the North Carolina Supreme Court wiped away an old and inconsistent holding in the area of bills and notes² and laid the legal cornerstone for related future litigation. The case involved the drawer of a check who had contracted with the plaintiff-payee to have a shell home built. Upon completion of the home the drawer, along with the plaintiff's agent, who was not authorized to endorse his principal's checks, went to the drawee bank. There the drawer made out a check to the plaintiff corporation for the amount due and gave it to the agent who endorsed it, "Modern Homes Construction Company by Ray Durham."³ When the assistant cashier objected to cashing the check, the drawer told him, "This man is Modern Homes Construction Company, and you cash it for me,"⁴ which the bank did. The agent absconded and the payee brought suit against the drawee bank. The bank moved for and received a nonsuit at the close of plaintiff's evidence. The plaintiff appealed. The court reversed and indicated that if the plaintiff were to recover on retrial it would have to be on the theory of conversion rather than on either acceptance or negligence as averred in their complaint.

Prior to the present case, North Carolina had allowed recovery by a payee in similar circumstances on the theory of acceptance.⁵ This theory had survived even though the Negotiable Instruments Law (NIL) was adopted in 1899⁶ and specifically required that

¹ 266 N.C. 648, 147 S.E.2d 37 (1966).

² The legal issue in the case is presently covered by Negotiable Instrument Law enacted in North Carolina as N.C. GEN. STAT. §§ 25-1 to -199 (1953). Effective midnight, June 30, 1967, the Uniform Commercial Code, enacted as N.C. GEN. STAT. 25-1-101 to -10-107 (1965), will govern the law of bills and notes. Where applicable the Code will be cited in addition to current statutes.

³ 266 N.C. at 650, 147 S.E.2d at 39.

⁴ *Ibid.*

⁵ *Dawson v. National Bank*, 197 N.C. 499, 150 S.E. 38 (1929); *Dawson v. National Bank*, 196 N.C. 134, 144 S.E. 833 (1929).

⁶ See note 2 *supra*.

an acceptance be in writing.⁷ The acceptance cases had erroneously been based upon North Carolina General Statutes section 25-144⁸ (NIL section 137), which deems a drawee to have accepted a bill if the drawee destroys it or refuses within twenty-four hours to return it. But this section is concerned with bills that are "delivered for acceptance" and not with those, as is the situation at bar, that are presented for *payment*. As noted the inappropriate application of the above section ignores the requirement of North Carolina General Statutes section 25-139⁹ (NIL section 132) that an "acceptance . . . be in writing and signed by the drawee." The rejection of the unsound and widely criticized¹⁰ acceptance theory places North Carolina with the majority of jurisdictions, which treat the drawee's actions as a conversion.¹¹ The result is the same but the theory is different.

In applying the theory of conversion it is important to understand that the check made out to the holder-payee is not merely evidence of a promise to pay, but that it is *property*¹² and carries incidents of ownership by the payee. The value of the property is *prima facie* the face value of the check.¹³ Thus, when a bank takes

⁷ N.C. GEN. STAT. § 25-139 (1953).

⁸ "Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." N.C. GEN. STAT. § 25-144 (1953).

⁹ "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money." N.C. GEN. STAT. § 25-139 (1953).

¹⁰ See 25 ILL. L. REV. 343 (1930); 7 N.C.L. REV. 191 (1929); 38 YALE L.J. 1143 (1929).

¹¹ See Annot., 137 A.L.R. 874 (1942); Annot., 69 A.L.R. 1076 (1930); 9 C.J.S. *Banks & Banking* § 343 nn.87 & 88 (1938); BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* § 189 (7th ed. 1948); BRITTON, *BILLS AND NOTES* § 146 (2d ed. 1961); 4 ARK. L. REV. 219, 220 (1950).

¹² *Louisville & N.R.R. v. Citizens' & Peoples' Nat'l Bank*, 74 Fla. 385, 77 So. 104 (1917). For an example of the result when a court fails to recognize the property aspect of the check itself, see *Gordon Fireworks Co. v. Capital Nat'l Bank*, 236 Mich. 271, 210 N.W. 263 (1926), where the conversion theory was rejected because "the bank did not convert *funds* of plaintiff." (Emphasis added.)

¹³ *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*, 266 N.C. at 653, 147 S.E.2d at 41; *State v. First Nat'l Bank*, 38 N.M. 225, 3 P.2d 728 (1934); BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* § 60 (7th ed. 1948). The applicable Uniform Commercial Code provision is N.C. GEN. STAT. § 25-3-419(2) (1965).

a check from an unauthorized person and makes payment to that person, even in the normal course of business and unwittingly, the bank is exercising unauthorized control over the payee's property and withholding it from its rightful owner. A tort arises in favor of the payee against the converting drawee.

Although *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.* was remanded and must be retried,¹⁴ the court's particularly thorough opinion establishes a firm base upon which business, banks, attorneys, and lower courts can rely in future transactions.¹⁵

It is also important to note that the holding is consistent with the newly adopted Uniform Commercial Code which becomes effective midnight, June 30, 1967.¹⁶ Under the Code, payment over a forged endorsement is specifically covered and is treated as a conversion.¹⁷ The theoretical change from acceptance to conversion is, therefore, also a fortunate step that will enable a smoother transition to the Uniform Commercial Code as well as offer sounder law until it is effective.

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Constitutional Law—Due Process—Delay Between Offense and Arrest

The right to a speedy trial is guaranteed by the sixth amendment,¹ but this right becomes operative only upon indictment.² In

¹⁴ There are questions of fact and collateral issues which could result in a verdict for either the plaintiff or defendant in the particular case of *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.* *I.e.*, the drawer is deceased and his estate closed. There was a considerable time lapse between payment by the drawee bank to the absconded agent and the commencement of the payee corporation's action.

¹⁵ Regardless of the outcome in a particular case, the court is perfectly clear and definite in its adoption of the conversion theory.

¹⁶ N.C. GEN. STAT. §§ 25-1-101 to -10-107 (1965). The Uniform Commercial Code is treated in *The Uniform Commercial Code in North Carolina—A Symposium*, 44 N.C.L. REV. 525 (1966). See also 2 N.Y. LAW REVISION COMM'N, *STUDY OF THE UNIFORM COMMERCIAL CODE* 1079 (1955); *Scope, Purposes and Functions of the Code*, 16 ARK. L. REV. 1 (1961-62); *Comment, Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code*, 62 YALE L.J. 417, 471 (1953).

¹⁷ N.C. GEN. STAT. § 25-3-419 (1965). Faris, *Commercial Paper*, 44 N.C.L. REV. 598, 621 (1966), notes that the Uniform Commercial Code "will" force a change from North Carolina's acceptance theory to the conversion theory. The article was being printed when the court initiated the change before the Code forced it.

¹ "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . ." U.S. CONST. amend. VI.

² "[I]f there is unnecessary delay in bringing a defendant to trial, the