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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6912

In the Supreme Court of Appeals of Virginia at Richmond

WILLIAM J. KIRBY, ET AL.

v.

FIRST AND MERCHANTS NATIONAL BANK

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m., Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6912

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 6th day of March, 1968.

WILLIAM J. KIRBY AND MARGARET KIRBY, Plaintiffs in error,

against

FIRST AND MERCHANTS NATIONAL BANK, Defendant in error.

From the Circuit Court of the City of Virginia Beach
Paul W. Ackiss, Judge

Upon the petition of William J. Kirby and Margaret Kirby a writ of error is awarded them to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 6th day of October, 1967, in a certain action at law then therein depending, wherein First and Merchants National Bank was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $300, with condition as the law directs.

RECORD

* * * * *

page 1 } Commonwealth of Virginia, City of Virginia Beach, To-wit: to the High Constable of said City:

I hereby command you in the name of the Commonwealth to summon William J. & Margaret Kirby, Lillian Ave., Va Beach, Va. to appear before the Judge of Municipal Court of the City of Virginia Beach, to try this warrant, at City Hall, Borough of Princess Anne, Princess Anne, Virginia, in said City, on the 8th day of February 1967—10:AM to answer the complaint of First & Merchants National Bank upon a claim for money, to-wit: for the sum of $543.47 due Open Account with interest from 12/30/66 of 6% per annum until paid, and costs, and then and there make your return.

Given under my hand this 18th day of January 1967.

ALVIN L. RODGUS, Justice of the Peace

* * * * *

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* * * * *

AFFIDAVIT AND PETITION FOR REMOVAL

* * * * *

This day personally appeared before me, Margaret S. Kindley, a Notary Public in and for the City of Norfolk, State of Virginia, in my City aforesaid, William J. Kirby and Margaret Kirby, who being duly sworn according to law, made oath and stated: That they are the defendants in the above entitled action; that the amount in controversy, exclusive of interest, exceeds the sum of Three Hundred ($300.00) Dollars; and that they have a substantial defense to the plaintiff's claim.

WILLIAM J. KIRBY

MARGARET KIRBY

* * * * *

Filed in the Clerk's Office the 10 day of Feb., 1967.

Teste:

J. V. F., Clerk
BILLY W. BALLOU, D. C.

* * * * *

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* * * * *

VIRGINIA:

In the Clerk's Office of the Circuit Court of the City of Virginia Beach:

First & Merchants National Bank, Plaintiff
vs.
William J. Kirby & Margaret Kirby, Defendant

To First & Merchants National Bank
31st Street & Pacific Ave
Virginia Beach, Virginia

YOU ARE HEREBY NOTIFIED That the above suit was removed from the Municipal Court of City of Virginia Beach to the Circuit Court of said City of Va. Beach on the 8th day of February, 1967, and that said case has been duly docketed in said Circuit Court for trial, as provided by law.

WITNESS, John V. Fentress, Clerk of our said Court, at the Courthouse, this 10th day of February, 1967, and in the 191st year of the Commonwealth.

JOHN V. FENTRESS, Clerk.

By BILLY W. BALLOU, D.C.

* * * * *

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* * * * *

ORDER

For good cause shown and upon motion duly made, the defendants each being agreeable thereto, Reid M. Spencer is

permitted to withdraw from further participation in this case, and his name, as counsel for the defendants, shall be struck from the record.

Enter 8/29/67. P. W. A.

* * * * *

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* * * * *

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH ON THE 11TH DAY OF SEPTEMBER, 1967.

* * * * *

ORDER

This day came the parties, and their attorneys, and a jury not being demanded, the whole matter of law and fact was submitted to the Court for consideration and after hearing the evidence and argument of counsel, the Court doth find for the plaintiff, in the amount of Five Hundred Forty Three Dollars and forty seven cents, ($543.47), said amount being due by open account.

Whereupon, it is considered by the Court that the plaintiff recover against the defendants, the amount of Five Hundred Forty Three Dollars and Forty Seven Cents ($543.47), with interest from September 11, 1967, until paid and his costs in this behalf expended.

* * * * *

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* * * * *

MURPHY AND McGEEIN
Attorneys at Law
2474 East Little Creek Road
Norfolk 18, Virginia

September 19, 1967

Mr. Floyd E. Kellam, Jr.
Kellam and Kellam
Board of Trade Building
Norfolk, Virginia

Re: First & Merchants National Bank
v.
William J. Kirby and Margaret Kirby

Dear Floyd:

In accordance with your letter of September 18th indicating that September 27th would be a convenient time for you to argue my motion to set aside judgment in connection with the above matter, I shall at that time move the Court to set aside the judgment.

At 9:30 A.M.

The reason for the motion is that I believe the judgment is contrary to the law. First, 8.4-213 of the Code of Virginia (Uniform Commercial Code) indicates a item is finally paid when the bank has paid the item in cash. The testimony of Floyd Waterfield indicated that his bank had cashed the check in question and, of course, the check was also drawn on his bank. Therefore, once the bank had cashed the check drawn on itself the item, according to the above mentioned Code section, is finally paid and the matter then rests between the bank and the drawer of the check.

Secondly, should the Court determine that the check was not cashed, and frankly I can see no conclusion by the Court that the check was not, in fact, cashed, but if it had not been cashed and was merely accepted for deposit, Section 8.4-302 indicates that if the bank retains the item beyond its midnight deadline, it is still accountable for the check, if it does not send notice of dishonor as required by this section. So, in any event, it would seem that since First & Merchants was both the depository bank and the payor bank, it would be

stuck with the check under this section, even if the check had been in fact deposited.

I had always considered the point so elementary as far as the law of negotiable instruments is concerned that page 8 } I had not checked the case law on the subject. I still have not had an opportunity to completely brief the point, but I have checked Michie's Jurisprudence and under Banks and Banking in Volume 3, page 57, it cites the case of *Citizens Bank* versus *Schwarzschild* as follows:

"In the case of a check, the cashier is called upon to pay away the funds of the bank. If the drawer has no funds there, it is the folly of the bank's officer to pay it; whereas the payee is in no default, and therefore he should not be bound to refund, since it would be hard to turn him round to the drawer, who may no longer be solvent."

In the same annotation the following quote is taken from an article in 2 Va. L. Rev. 447:

"Generally, money paid under a mistake of fact may be recovered back, but the payment of a check or note by a bank upon which it is drawn, or at which it is made payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note seems to be an exception to the general rule. Such payments cannot be recovered back. The payment is a finality, and the fact that the drawer or maker had no funds on deposit does not alter the situation."

I have asked the court reporter to type a transcript of the testimony, which I have been promised will be completed prior to the 27th. I will have this at the hearing on my motion in the event there is any controversy or misunderstanding as to the testimony in the case.

You will note I am sending a copy of this letter to Judge Ackiss in the event he should desire to check the applicable statutes and the cases mentioned prior to the date of the argument and at that time I expect to present additional authority in support of my motion.

Very truly yours,
JAMES A. MURPHY, JR.

JAM/zb

Copy to: The Honorable Paul W. Ackiss
Judge of the Circuit Court
City of Virginia Beach

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* * * * *

KELLAM AND KELLAM
Attorneys and Counselors at Law
Board of Trade Building
Norfolk, Virginia

September 29, 1967

Honorable Paul W. Ackiss, Judge
Circuit Court of Virginia Beach
City Hall
Princess Anne Station
Virginia Beach, Virginia, 23456

Dear Judge Ackiss:

Re: First & Merchants National Bank vs.
William J. Kirby and Margaret Kirby

As attorney for the plaintiff in the above styled case, I desire to submit the following brief memorandum in reply to the memorandum of James A. Murphy, Jr. dated September 19, 1967.

The suit by the plaintiff on an open account was originally filed in the Municipal Court of Virginia Beach, Virginia, and subsequently removed to the Circuit Court of Virginia Beach, Virginia.

It is the plaintiff's contention that the open account was created by virtue of both defendants endorsing a check which was presented to the plaintiff bank on December 30, 1966. Both defendants by so endorsing the check agreed to pay the instrument according to its tenor at the time of their endorsement to the holder (this case, the plaintiff bank). In support of this position I quote the following provisions of Section 8.3-414 of the Code of Virginia, 1950, as Amended (Uniform Commercial Code):

"Contract o indorser; order of liability.—(1) Unless the indorsement otherwise specifies (as by such words as 'without recourse') every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes

it up, even though the indorser who takes it up was not obligated to do so."

In view of the foregoing, the question of whether or not the check in question was finally paid, as contended by counsel for the defendants, is immaterial. Assuming, however, the question of whether or not payment was finally page 10 } made by the bank is material, counsel for the plaintiff asserts such payment or credit is controlled by the depositor's contract, which was received in evidence as a plaintiff exhibit. The contract provided that First & Merchants National Bank acts only as depositor's collecting agent and assumes no responsibility beyond its exercise of due care. All items are credited subject to final payment and to receipt of proceeds of final payment in cash or solvent credits by this bank at its own office.

Defendants contend that Section 8.4-302 of the 1950 Code of Virginia might control in this particular case. As set forth in Mr. Murphy's letter of September 19, 1967, defendants claim that the bank is accountable for the check if the bank retains the check beyond its midnight deadline, if notice of dishonor is not sent. The evidence at the trial (testimony of Mr. Floyd E. Waterfield, Jr.) was as follows: The check in question was deposited after 4:00 P.M. on Friday, December 30, 1966. Any deposit received after 2:00 P.M. on a Friday is considered Monday's work, except when Monday is a holiday, in which case it would be considered Tuesday's work. Therefore, in this particular case, for banking purposes, the check was deposited on Tuesday, January 3, 1967 (Monday being a holiday). On the night of January 3, 1967, the check was forwarded by the branch bank to the main branch of First & Merchants National Bank and in accordance with normal procedure was posted the following day, that is, January 4, 1967. This is the date that the bank discovered that the maker of the check did not have sufficient funds in its account. Therefore, the check was returned to the branch bank on the following day (January 5, 1967). On January 5, 1967, the endorsers, the defendants herein, were notified that there were insufficient funds in the maker's account. According to Mr. Waterfield's testimony, the defendants were notified of this situation several times each day.

The official comment to Section 8.4-213 of the 1950 Code of Virginia, at Page 381, states as follows:

"If the receipt, deposit ticket, passbook or other agreement with A is to the effect that any credit so entered is provisional and may be revoked pending the time required by the

payor bank to process the item to determine if it is in good form and there are funds to cover it, such reservation or agreement keeps the receipt or credit provisional and avoids it being either final settlement or final payment."

In the case at hand, the depositor's contract provided that all items are credited subject to final payment and receipt of proceeds of final payment in cash or solvent credit by this bank at its own office.

In summary, plaintiffs contends that both defendants are liable on an open account by virtue of their endorsement of the check in question. Whether or not payment was final (according to the defendants' contention) is immaterial; however, if material, the defendants are still liable, and the judgment of the Court rendered on September 11, 1967 should not be set aside.

page 11 } In conclusion, the defendants should not be allowed to receive money from the plaintiff bank on a worthless check which they had agreed to pay according to its tenor. They agreed to pay the instrument by virtue of their endorsement which runs to any holder. (See official comment to Section 8.3-414, above)

With kindest regards, I remain,

Very truly yours,
FLOYD E. KELLAM, JR.

FEK:smw

cc: Mr. James A. Murphy, Jr.
Filed Oct. 2, 1967.

JOHN V. FENTRESS, Clerk

By R. H. WENT, D.C.

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* * * * *

JUDGMENT

This 29th day of September, 1967, both parties appeared before this Court by Counsel to agrue the motion of the Defendants to set aside the judgment of this Court rendered on the 1t1h day of September, 1967, to which judgment the

Counsel for the Defendant took exception and made motion to set aside the judgment and upon which motion the judgment was suspended and the cause continued; a written motion to set aside the judgment of the Court was filed by the Defendant under a plea dated September 19, 1967, and the motion was answered by a written plea of Counsel for the Plaintiff of September 29, 1967, which pleas are filed with the papers in this cause; after due consideration of the pleas of counsel for all parties to this cause and the argument of Counsel and the record of trial, the Court doth overrule the motion of the Defendant to set aside the judgment of this Court rendered on the 11th day of September, 1967, and the Court doth find for the Plaintiff in the amount of Five Hundred Forty-three and 47/100 Dollars ($543.47) due by open account and whereupon it is considered by the Court that the Plaintiff recover against the Defendants Five Hundred Forty-three and 47/100 Dollars ($543.47), together with interest from the 29th day of September, 1967, until paid and costs; to which judgment and action of the Court Counsel for the Defendants doth duly except.

Enter this 6 day of October, 1967.

PAUL W. ACKISS, Judge

I ask for this:
FLOYD E. KELLAM, JR., p.q.

Seen and Except:
DONALD C. GREY, p.d.
JAMES A. MURPHY, JR., p.d.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court of the City of Virginia Beach:

Counsel for William J. Kirby and Margaret Kirby, the defendants in the above styled case in the Circuit Court of Virginia Beach, Virginia, hereby gives notice of appeal from the Judgment and order entered in this case on October 6th, 1967, and sets forth the following assignments of error:

1. That the court erred in refusing to grant the defendants' motion to strike the plaintiff's evidence and in failing to grant the defendants a summary judgment.

2. That on September 11th, 1967, the day of the trial before the Judge, the court erred in finding for the plaintiff and awarding judgment to the plaintiff in any amount because the judgment and the order of the court entered that day were unsupported by the evidence and contrary to the law.

3. That on September 29th, 1967, the court erred in refusing to grant the defendants' motion to set aside the judgment of the court rendered on September 11th, 1967, in that the judgment was contrary to the law and evidence.

4. That on October 6th, 1967, the court erred in entering an order finding for the plaintiff and granting judgment to the plaintiff in the amount of $543.47 or in any amount on open account or otherwise, as such finding and judgment are unsupported by the evidence and contrary to the law.

JAMES A. MURPHY, JR.
Counsel for William J. Kirby and
Margaret Kirby

Filed Nov. 10, 1967.

JOHN V. FENTRESS, Clerk

By BILLY W. BALLOU, D.C.

* * * * *

page 14 } I certify that a copy of the foregoing Notice of Appeal and Assignments was mailed to Floyd E. Kellam, Jr., Counsel for the Plaintiff, and that a copy thereof was personally delivered to him, at his offices in Virginia Beach, Virginia, on the 10th day of November, 1967.

JAMES A. MURPHY, JR.

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* * * * *

NOTICE

TO: Floyd E. Kellam, Jr., Esquire
Counsel for the Plaintiff
115 North Plaza Trail
Virginia Beach, Virginia

PLEASE TAKE NOTE that on the 10th day of November, 1967, at 5:15 O'clock P.M., I delivered the stenographic report (original copy only) of the testimony and other proceedings of the trial to the desk of Judge Paul W. Ackiss, Judge of the Circuit Court of Virginia Beach, at his office in the Court House of the Circuit Court of Virginia Beach, Princess Anne Station, Virginia Beach, Virginia.

PLEASE TAKE NOTICE that I will appear before Judge Paul W. Ackiss at 10:00 O'clock A.M. Friday, November 17, 1967, or as soon thereafter as counsel may be heard, to make any corrections, deletions or additions in the said transcript and stenographic report that Judge Ackiss may direct and to make any additions, deletions or corrections to the record that counsel may agree to and/or have approved and authorized by Judge Ackiss, and at that time I will ask that counsel affix a certificate to the record certifying that the record and transcript and stenographic report are a true and correct report of all trial proceedings.

WILLIAM J. KIRBY and
MARGARET KIRBY

By DONALD C. GREY
Of Counsel

* * * * *

Filed Nov. 13, 1967.

JOHN V. FENTRESS, Clerk

By R. H. WEST, D. C.

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* * * * *

KELLAM AND KELLAM
Attorneys and Counselors at Law
Board of Trade Building
Norfolk, Virginia

November 16, 1967

The Honorable Paul W. Ackiss
Judge of the Circuit Court of Virginia Beach
City Hall, Princess Anne Station
Virginia Beach, Virginia, 23456

Dear Judge Ackiss:

Re: First & Merchants National Bank, Plaintiff
vs.
William J. Kirby and Margaret Kirby, Defendants

In connection with the above-styled case, it is respectfully submitted that the transcript of the oral testimony, which counsel for the defendants have purportedly tendered to you, cannot under the Rules of Appellate Proceedings be certified by you.

Rule 5:1, Section 3 (e) provides that the transcript be *tendered* to the judge within 60 days after final judgment. Rule 5:1 Section 3 (f) further provides that counsel tendering the transcript must fulfill two requirements: first, give opposing counsel reasonable written notice of the time and place of tendering the transcript; and second, give opposing counsel a reasonable opportunity to examine the original or a true copy of the transcript.

Counsel for the plaintiff submits that the transcript was not tendered to the judge within sixty days after final judgment. In fact, notice of counsel for the defendants indicates on its face that the transcript has never been tendered to the judge. The notice states that "on the 10th day of November, 1967, at 5:15 o'clock P.M., I delivered the stenographic report (original copy only) of the testimony and other proceedings of the trial *to the desk* of Judge Paul M. Ackiss—." Counsel for plaintiff at this time knows of no action taken by counsel for the defendants to tender the transcript to the judge, as required by Rule 5:1, Section 3 (e).

Notwithstanding the foregoing, counsel for the plaintiff further respectfully submits that counsel for the defendants did not give counsel for the plaintiff (1) reasonable written notice of the time and place of the tendering of the transcript or (2) a reasonable opportunity to examine the transcript.

page 17 } Counsel for the defendants delivered to counsel for the plaintiff on November 10, 1967, at 4:30 o'clock P.M. at the law offices of Kellam and Kellam, Attorneys, Board of Trade Building, Norfolk, Virginia written notice that "on the 10th day of November, 1967, the undersigned (counsel for defendants) will bring to the Honorable Paul W. Ackiss, Judge of the Circuit Court of the City of Virginia Beach, Virginia, at the courthouse of said city, the stenographic report of the testimony and other proceedings of the trial for the purpose of presenting the same to the Supreme Court of Appeals of Virginia—." It is apparent on the face of the notice that counsel for the plaintiff was not given reasonable written notice or a reasonable time to inspect the record. In fact, the record was hurriedly presented to counsel for the plaintiff with the request that he accept legal service so that the transcript could be immediately taken to the "courthouse." Counsel for plaintiff never had any opportunity to examine the transcript.

In *Steingold* v. *Seaton,* 187 Va. 923, 48 S.E. 2d 908, the Supreme Court of Appeals held that the tender of the transcript within the sixty days is mandatory. Furthermore, the Supreme Court of Appeals held in the case of *Kornegay* v. *Richmond,* 185 Va. 1013, 41 S.E. 2d 45, that the requirement that counsel tendering the transcript shall give opposing counsel reasonable written notice is an important step in perfecting an appeal, and that its plain purpose is to give opposing counsel an opportunity of examining the purported record and ascertaining whether it contains an accurate detail of what has transpired in the court below.

The Supreme Court of Appeals held in *Falls Church* v. *Myers,* 187 Va. 110, 46 S.E. 2d 31, that with regard to giving opposing counsel reasonable written notice, what is a reasonable time depends upon circumstances and usually is determined by the trial judge; and in the case of *Stockely* v. *Owens,* 189 Va. 248, 52 S.E. 2d 164, the same Court stated that the provision as to reasonable notice is governed by the circumstances in each case and that the notice should be given at such time as will afford opposing counsel an opportunity to appear and to examine the transcript.

In this particular case, counsel for the defendants insisted that counsel for the plaintiff "accept legal service." In *Falls*

Church v. *Myers,* infra, the Court stated that leaving a copy of the notice at the office of opposing counsel and talking to him two days later, just before tendering the transcript to the trial judge, and *insisting, over the objection of opposing counsel, upon immediate certification,* is not reasonable notice within the purview of the statutes or the rule. And in the case of *Snead* v. *Commonwealth,* 200 Va. 850, 108 S.E. 2d-399, the Court stated that notice delivered to the Commonwealth's Attorney at his residence thirty minutes before tendering a narrative statement of the evidence to the trial judge for his signature, does not constitute reasonable notice within the plain meaning of Rule 5:1, Section 3 (f).

Although counsel for the plaintiff desires to accommodate counsel for the defendants to any extent possible,
page 18 } the undersigned cannot waive the rights and protections guaranteed the plaintiff in this case, especially, where plaintiff and its counsel are of the opinion that the defendants seek to be unjustly enriched to the detriment of the plaintiff.

Therefore, in view of the foregoing, it is respectfully submitted that the transcript cannot and should not be certified by the Court.

Respectfully submitted,

FLOYD E. KELLAM, JR.

This is to certify that counsel for the plaintiff mailed a copy of the foregoing letter to Murphy and McGeein, 2474 East Little Creek Road, Norfolk, Virginia, on November 16, 1967.

FLOYD E. KELLAM, JR.

FEK:smw

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* * * * *

TO: Floyd E. Kellam, Jr., Esquire
Counsel for the Plaintiff
115 North Plaza Trail
Virginia Beach, Virginia

PLEASE TAKE NOTE that on November 17th, 1967, I formally presented the original of the trial transcript and

stenographic report of the trial proceedings in this cause to Judge Paul W. Ackiss, one of the Judges of the Circuit Court of the City of Virginia Beach, Virginia, for his review and examination prior to certification, and in accordance with his order of that day, with both Counsel present, and later announced in an order entered, I was required to give you notice of the date on which Counsel for the Defendant would request certification of the record.

PLEASE TAKE NOTICE that I will appear before Judge Paul W. Ackiss at 10:00 A.M., Friday, December 8th, 1967, or as soon thereafter as Counsel may be heard, and request certification of the transcript and stenographic report of the trial proceedings by the trial judge.

WILLIAM J. KIRBY and
MARGARET KIRBY

By DONALD C. GREY
Of Counsel

DONALD C. GREY, p.d.
2474 East Little Creek Road
Norfolk, Virginia

I certify that a true copy of the foregoing notice was mailed to Floyd E. Kellam, Jr., Esquire, at his offices at 115 North Plaza Trail, Virginia Beach, Virginia, and to Paul W. Ackiss, Judge of the Circuit Court of the City of Virginia Beach, Virginia, this 28th day of November, 1967.

DONALD C. GREY

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* * * * *

This 17th day of November, 1967, Donald C. Grey, Counsel for the Defendants, and Floyd E. Kellam, Jr., Counsel for the Plaintiff, appeared before me, Paul W. Ackiss, one of the Judges of the aforesaid Court. They appeared upon the notice of Counsel for the Defendants addressed to Counsel for the Plaintiff dated November 11, 1967, a copy of which is filed with the papers in this cause, wherein it was stated that Counsel for the Defendants desired to appear before the Judge to make corrections, deletions and additions in the transcript and stenographic record of the trial proceedings

as the Judge or the Counsel for the Plaintiff may require and to have the record certified by Counsel for both sides; and they also appeared upon the notice and motion of Counsel for the Plaintiff that he was opposing any certification of the record on the grounds that the record of the trial was not in fact tendered to the trial Judge within sixty (60) days of the final judgment, and the fact that there was no reasonable notice to Counsel for the Plaintiff as to when the record would be tendered for certification, and also upon the grounds that Counsel for the Plaintiff did not have a reasonable opportunity to examine the transcript of the trial proceedings before certification of the transcript by the trial Judge.

Counsel for the Plaintiff refused to certify the transcript of the trial proceedings at the time of this appearance on November 17th, 1967.

Whereupon, Counsel did argue their motions.

Counsel for the Defendants did declare:

1) That he did not want certification of the transcript of the trial proceedings by the Judge on this date or any time before Counsel for the Plaintiff or the Judge had a reasonable time to review the transcript of the proceedings and, if necessary, to make appropriate corrections, deletions or additions thereto;

page 21 } 2) That when the record was left on the trial judge's desk at 5:15 P.M. on November 10, 1967, he was only providing the judge with the original of the transcript and stenographic report in order that the judge might begin review thereof;

3) That Counsel for the Plaintiff was notified of this fact by Counsel for the Defendants at 4:30 P.M., November 10th, 1967, so that Counsel for the Plaintiff could later appear and object to any portion of the record and make or have made any corrections that he may desire;

4) That by giving notice of the time it was presented to the judge, he did not desire to limit the Court or Counsel for the Defendants in the time available for examination and review of the trial transcript and stenographic report;

5) That he was in fact formally presenting the transcript of the trial testimony and other proceedings to Paul W. Ackiss, Judge, this 17th day of November, 1967, upon notice to Counsel for the Plaintiff dated November 11th, 1967; and that he did not desire certification of the record and transcript until both Counsel for the Plaintiff and the trial judge had a reasonable opportunity to review and examine the transcript and make any appropriate or necessary changes therein.

Counsel for the Plaintiff did argue, in accord with his brief

dated November 16, 1967, which was filed with the Court on November 17, 1967, that the final judgment in this cause was entered on September 11th, 1967, and that therefore the time of presenting the record for certification and the reasonableness of the advance notice thereof on November 10th, 1967, was critical as to the perfection of an appeal.

UPON CONSIDERATION WHEREOF, the Court does ORDER and ADJUDGE:

1. That a judgment was rendered by this Court on September 11th, 1967, to which action of the Court Counsel for the Defendants took exception.

2. That Counsel for the Defendants made a motion to set aside the judgment by his letter dated September 19th, 1967, addressed to Floyd E. Kellam, Jr., Attorney for
page 22 } the Plaintiff, a copy of which letter is filed with the papers in this cause and which was furnished to the trial judge.

3. That Counsel for the Plaintiff opposed the motion to set aside the judgment of the Court by his letter dated September 29th, 1967, addressed to the Honorable Paul W. Ackiss, Judge, a copy of which was furnished to Counsel for the Defendants.

4. That on September 29th, 1967, Paul W. Ackiss, one of the Judges of this Court, did hear the motion of Counsel for the Defendants and, after hearing arguments from Counsel for the Plaintiff and Defendants, did overrule the motion to set aside the judgment of this Court rendered on the 11th day of September, 1967, and did find for the Plaintiff in the amount of $543.47 and give judgment for the Plaintiff in said amount, together with interest from the 29th day of September, 1967 until paid and costs, all of which action of the Court was announced in an order entered by Paul W. Ackiss, Judge, on the 6th day of October, 1967.

5. That the judgment of September 11th, 1967, was not a final judgment.

6. That Counsel for the Defendants has not demanded, requested or insisted upon an immediate certification of the record by the trial judge.

7. That the record and transcript of trial was formally presented for certification by Counsel for the Defendants on November 17th, 1967.

8. That Counsel for the Plaintiff shall have a reasonable time, beginning with November 17th, 1967, within which to examine the transcript of the trial proceedings and propose any corrections, additions or deletions, that he may consider

appropriate or necessary, prior to certification by the trial judge.

9. That the trial judge will not certify the transcript and stenographic report of the trial proceedings as presented to him on November 17th, 1967, unless and until Counsel for the Defendants shall appear before him, upon reasonable notice to Counsel for the Plaintiff, requesting such certification.

page 23 } To which action of the Court, Counsel for the Plaintiff duly excepted.

ENTER THIS 5 DAY OF DECEMBER, 1967.

P. W. A., Judge

I ask for this:
DONALD C. GREY, p.d.

SEEN and EXCEPT:
FLOYD E. KELLAM, JR., p.q.

* * * * *

TRANSCRIPT OF TESTIMONY

Following is stenographic transcript of the testimony introduced and proceedings had upon the trial of the above entitled case, in said court, on the 11th day of September, 1967, before the Honorable Paul W. Ackiss, Judge of the Circuit Court of the City of Virginia Beach.

APPEARANCES:
FLOYD E. KELLAM, JR., ESQ.
Counsel for the Plaintiff

DONALD C. GREY, ESQ.
JAMES A. MURPHY, JR., ESQ.
Counsel for the Defendants

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* * * * *

(Editor's Note: Page numbers refer to transcript of evidence)

EXHIBITS

Plaintiff's Exhibit 1 (Record of Account)	Page 8
Plaintiff's Exhibit 2 (Check)	8
Plaintiff's Exhibit 3 (Signature card)	10

Defendant's Exhibit 1 (Deposit slip) 18
Defendant's Exhibit 2 (Debit memo) 24
Defendant's Exhibit 3 (Checks) 36
Defendant's Exhibit 4 (Statement) 39

page 3 }

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TO: FLOYD E. KELLAM, JR., ESQ.
Counsel for the Plaintiff

PLEASE TAKE NOTE that on the 10th day of November, 1967, the undersigned will bring to the Honorable Paul W. Ackiss, Judge of the Circuit Court of the City of Virginia Beach, Virginia, at the court house of said city, the stenographic report of the testimony and other proceedings of the trial for the purpose of presenting the same to the Supreme Court of Appeals of Virginia with a petition for a writ of error and *supersedeas* to the final judgment in the trial court in said case.

WILLIAM J. KIRBY and
MARGARET KIRBY

DONALD C. GREY
Counsel for the Defendants

* * * * *

I certify that a copy of the foregoing notice was delivered to Floyd E. Kellam Jr. at 4:30 P.M. November 10, 1967.

DONALD C. GREY, p.d.

page 4 } Mr. Grey: Counsel at this time moves the Court to direct the plaintiff in this action to furnish counsel for the defendant with a statement of the account between the plaintiff and the defendant with respect to the banking account at First and Merchants National Bank, none of which statements have been received since January of this year.

Mr. Kellam: Your Honor, this case has been pending since January 1 of this year and I think it's a little late—

The Court: I think it's a little late to come in and ask for the ground—

Mr. Grey: Our position is, according to their warrant, they have proceeded on open account. Of course, we are a little

in the dark in that respect. However, if they are talking about some contracts or relationship between the parties, this would include a statement of account which would be due each month under agreement between the parties and none of which have been furnished to the defendant to put him in a position of presenting to this Court a history of the transactions between the individual and the institution
page 5 } which brings this action.

The Court: Of course, the amount sued for is $543.47, January 18, 1967. After that date, I think it is admissible.

Can you give him an account up to that date?

Mr. Kellam: They had an account prior to that date and it was not necessary to render them one afterwards.

Mr. Grey: The evidence in this case will indicate, I am sure, that they intend to rely on matters that have taken place both before and after the date referred to and, of course, the evidence will certainly relate the matters before and after that date, and there has been no statement of account furnished to the defendant in that case since December 9, 1966.

The Court: It seems you all could have gotten it. This was set at the regular docket call, wasn't it, Mr. Kellam?

Mr. Kellam: Yes, sir. This is the third time it has been set.

Mr. Grey: We actually came in this case a couple of weeks ago as counsel.
page 6 } The Court: I know. Wasn't it Mr. Spencer?

Mr. Kellam: Correct.

The Court: I overrule your motion to which action you note your exception.

Mr. Grey: We except.

(Witness sworn).

(Reporter sworn).

Mr. Kellam: I have no opening statement, Your Honor.

Mr. Grey: We have no opening statement.

The Court: Call your first witness.

(Floyd E. Waterfield called to witness stand by Mr. Kellam).

Floyd E. Waterfield

FLOYD E. WATERFIELD, Witness called by Counsel for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Examined By Mr. Kellam:

Q. State your name.

A. Floyd E. Waterfield.

Q. What is your position in First and Merchants National Bank?

page 7 } A. Vice-president.

Q. Where are you located?

A. Princess Anne Plaza.

Q. How long have you been there?

A. With the Princess Anne Plaza, two years last September.

Q. How long have you been with the bank?

A. Eleven and a half years.

Q. Does the bank have an account with Mrs. William J. Kirby, or did they have an account?

A. They did.

Q. Is this a record of Mrs. Kirby's account at the bank?

A. That is correct.

Q. What was the unpaid balance as of December 30, 1966, on that account?

A. 1966?

Q. Yes, 1966. What is the unpaid balance on that account at this time?

A. At this time, we show that they have an overdraft which we have closed out at the present time.

Q. What was the amount?

A. $543.47.

Mr. Kellam: Your Honor, we would like to have this marked for identification and admitted into evi-

page 8 } dence.

The Court: So marked. (P1).

Mr. Kellam:

Q. Did Margaret Kirby or William Kirby bring you a check to deposit on December 29, 1966?

A. Yes, sir, they did.

Q. Was that check presented to the bank?

A. Correct.

Floyd E. Waterfield

Q. Who is the maker of that check?
A. Neuse Engineering and Dredging Company. This was on a Friday night.
Q. Is that check endorsed?
A. Yes, sir, it is.
Q. By whom?
A. By William J. Kirby and Margaret Kirby.
Q. What is the amount of that check?
A. The amount is $2,500.00.

Mr. Kellam: We offer that in evidence, Your Honor.
The Court: P2.

Mr. Kellam:
Q. Tell what happened to this particular check.
A. We received it for deposit on Friday night, the 29th. We deposited $2,300.00 and gave back cash, $200.00.
page 9 } This check on Friday's work did not go through until the following day. In other words, our Friday night's work goes through on Monday. So, in other words, you will find on the back of the check it wouldn't be stamped the 29th. Our work is carried over until the following day. I think you will find all banks continue their work over.
Q. Did the check clear?
A. No, sir, it did not clear because the Neuse Engineering Company, well, they had insufficient funds and it was returned back to Mr. and Mrs. Kirby.
Q. When the bank discovered that there were not sufficient funds in the Neuse account, what did the bank do?
A. Well, we contacted Mr. and Mrs. Kirby in reference to this to let them know that the check had come back, for them to reimburse us because at that particular time we could not charge it to their account because they had overdrawn their account and there was insufficient funds to charge it back to the account.
Q. And what happened? Did they make the check good?
A. They did not make the check good and we continued to hold this check which they stated they would be
page 10 } in to cover and, at the present time, it has not been covered.
Q. So when it was not covered, what did the bank do?
A. Well, we had to charge it off as a loss.
Q. Did you apply the funds of Mrs. Kirby's account to this check?

Floyd E. Waterfield

A. Yes.

Q. And that left a balance of what in this account?

A. $543.47.

Q. Mr. Waterfield, is this a record of Mrs. Kirby's account with the bank? Is that her account card?

A. Yes. That is her signature card when she opened the account.

Mr. Kellam: Your Honor, we offer this in evidence.

The Court: P3.

Mr. Kellam: I have no further questions of this witness, Your Honor.

CROSS EXAMINATION

Examined By Mr. Murphy:

Q. Mr. Waterfield, I am going to place this in front of you so you can see it. It might be helpful in answering the questions.

This statement begins on January 10, 1967, is page 11 } that correct?

A. Yes, sir.

Q. It shows at that time a balance in the account of $1,654.53?

A. That is right.

Q. On January 9, there was some activity on this account. Does this indicate a deposit that was made to the account of $302.00?

A. That is correct.

Q. So your records, then, reflect a deposit to this account of $302.00 on January 9?

A. Yes, sir.

Q. Can you determine whether this was actually a deposit or another check that had originally been honored by the bank and the bank received the funds and then credited the amount back to the depositor?

A. I don't have the accurate records here with me. I couldn't tell exactly what the $302.00 was, but—No, sir, I don't know about the $302.00.

Q. On January 10, we see $2,500.00-TDT indicated on the bottom. This reflects a debit to the account, is that true?

A. Yes, sir.

Q. I assume that was the check of Neuse En-
page 12 } gineering that you have previously identified, is
that correct?

Floyd E. Waterfield

A. Yes, sir.

Q. So, then, do I understand that the bank reflects a charge back to this account of $2,500.00 on the 10th of January?

A. Yes, sir.

Q. That is when you charged the account back?

A. Yes, sir.

Q. This check for $2,500.00 that I show you again is also drawn on your bank, isn't it?

A. That is true, yes, sir.

Q. And you have indicated that the deposit was received by the bank on the 29th of December, is that right?

A. That is correct.

Q. Does the record of the bank reflect that you have sent to Mr. and Mrs. Kirby a statement such as the one you have presented in court this morning?

A. They should have gotten one. I could not tell you if they got one or not. They should have gotten one.

Q. But you have no knowledge, then? Is that what you are saying?

A. No, sir. In other words, I can't tell if any-
page 13 } one gets a statement.

Q. How could you tell if you received the deposit of $2,500.00 that you referred to on the 29th of December?

A. $2,300.00. How do I know we took it in? We had a deposit slip for it.

Q. Do you have it with you today?

A. I believe it's in the folder. Yes, sir, I have a photostat of the deposit slip.

Q. May I see it?

A. Yes, sir.

Q. This indicates, Mr. Waterfield, that currency in the amount of $2,300.00 was deposited to the account on the 30th of December.

A. We have our check number there of—Well, you can see where we have subtracted the difference on it. We did not deposit the full check, correct.

Q. You mean you cashed half the check and deposited half the check?

A. We deposited $2,300.00 of the $2,500.00 check.

Q. Did you cash the check before you credited this deposit?

A. Yes, sir.

page 14 } Q. So the bank, in effect, cashed the check for $2,500.00 and then gave the defendant here a credit of $2,300.00 to their account and gave them $200.00 in cash?

A. Correct.

Floyd E. Waterfield

Q. After they had cashed the check?

A. Correct.

Q. Now, you are positive that that is what happened?

A. Yes, sir. The teller took the check in. She put $2,300.00 in the account and gave them back $200.00.

Q. And you have no reservations when you say that this check for $2,500.00 was cashed, that the defendant got $200.00 and that the other $2,300.00 in currency was deposited to the account?

A. $2,300.00 was deposited to the account. $200.00 was given back in cash.

Q. Did you understand the question as I asked you? I said, you have no reservations with regard to exactly what happened and this is what happened?

A. We deposited $2,300.00 to the account and gave back $200.00.

Q. So you cashed the check for $2,500.00?

page 15 } A. Yes, sir.

Q. Now, can you tell the Court why you waited until the 10th of January to charge the account back?

A. Yes, sir. Because we had contacted Mr. Kirby to see if he would come in and deposit more money in the account to cover this check which came back to us.

Q. When did you contact him?

A. Several times.

Q. When did you first contact him?

A. When the check came back.

Q. When did the check come back?

A. I do not have the exact date on this, but the check, of course, we had a holiday in there and I do not know the exact date that it did come back. May I check?

Q. Yes, indeed.

(Witness looks in folder).

A. No, I do not have the exact date that it came back to me.

Q. Do you have any way of determining the exact date?

A. Yes, sir. We have a record that we keep at the bank when it came back.

page 16 } Q. What records would reflect the date that it came back, Mr. Waterfield?

A. We have a record when it comes back to our particular office.

Q. Where would that record be now?

A. It would be at the Virginia Beach office, 31st Street.

Q. What would the record show?

A. It would show the date that it came back from Neuse Engineering and Dredging Company and went back to our office.

Q. Would you say from looking at these records that it was around the 10th of January?

A. No, sir. We had it earlier than that. In other words, we had it earlier and we were holding it in our work with the understanding that Mrs. Kirby was coming in to pick this up.

Q. Didn't you know that today you would be called upon to answer these questions?

A. Yes, sir.

Q. This matter has been discussed at length with you, right?

A. Well, yes, sir.

Q. Did you have any reason for not coming prepared to answer these questions?

page 17 } Mr. Kellam: Your Honor, I don't think that is a proper question.

The Court: This is cross examination. I will permit it.

Mr. Murphy:

Q. Why didn't you come prepared?

A. The reason I didn't come prepared—Well, in other words, I am in banking and I am in court now and I had no idea—In other words, I have my records in the bank to show when it did come back. We keep accurate records on it.

Q. For the purposes of the record, then, on January 10, this statement, going back, it shows a red balance. Would you call that a debit balance as far as the bank is concerned?

A. It would be an overdraft.

Q. Of $543.47?

A. Yes, sir.

Q. And you have a $2.00 SC. Is that service charge?

A. Yes, sir.

Q. Entered on what date?

A. Entered on the 17th.

Q. Of January, 1967?

A. Yes, sir.

page 18 } Q. And then what is this transaction on January 18, 1967, Mr. Waterfield?

Floyd E. Waterfield

A. January 18, 1967, was a $2.00 deposit memo which was a reimbursement of the $2.00 service charge.

Q. That brought the balance back to what?

A. $543.47.

Q. Overdraft?

A. Yes, sir.

Q. And then on May 24, what is that entry that you have on the 24th of May?

A. That is a deposit of $543.47 which closed the account out. We charged this account off.

Q. With $543.47?

A. Yes, sir.

Mr. Murphy: I would like to offer this in evidence, Your Honor, if I may. It's the deposit slip.

(D1).

Q. Do you recognize this, Mr. Waterfield?

A. This is one of our regular forms that we have at the bank.

Q. Does it indicate a deposit in your bank of $250.00?

A. This shows a deposit to the First and Merchants National Bank, correct.

page 19 } Q. That is your bank, isn't it?

A. That is true. We have many branches. This doesn't say which office. This is not our regular deposit slip.

Q. It shows a deposit on January 3 of $250.00?

A. It doesn't say—

Q. Just answer the question, please. It shows a deposit on January 3 of $250.00?

A. Yes, sir.

Q. After $250.00, it has D37. Does that mean anything to you?

A. No, sir.

Q. What does this symbol designate?

A. It did not come to my office. It has nothing to do with the Virginia Beach office.

Q. Does this designate the office? That is my question.

A. No.

Q. What does it designate, the teller? It must designate something.

A. It would be a teller's machine. I don't know. I have never seen that slip before.

Mr. Kellam: May I see that?

(Mr. Murphy hands deposit slip to Mr. Kellam).

page 20 } Mr. Murphy:

Q. I show you another check, Mr. Waterfield. It's a check for $250.00 drawn by Mrs. William J. Kirby payable to the order of Billy Rhodes. Can you tell whether your bank has handled that check or not?

Mr. Kellam: I object, Your Honor. This deposit slip does not show what account or anything else.

Mr. Murphy: The whole thing is tied up to this account, Your Honor.

The Court: You have a check there payable to Billy Rhodes.

Mr. Murphy: It's drawn by the defendant in this case.

The Court: It's not payable to First and Merchants, is it? How could it be a credit on his account?

Mr. Murphy: For the purpose of this line of questioning, Your Honor, it's to show that on January 17, this item was charged back and there is nothing on the record of the statement submitted by the bank to show any activity on this thing after the 10th of January except a service charge and a credit back of that service charge.

page 21 } The Court: You go ahead. I don't see what the Rhodes check has to do with it.

Mr. Kellam: Your Honor, I believe it's immaterial trying to proceed with that phase of it.

The Court: If he can show the Rhodes check went to this account—

Mr. Murphy: It was drawn on this account, Your Honor.

Mr. Kellam: At that time, the account was already overdrawn.

Mr. Murphy: It was overdrawn prior to that time, too.

The Court: Go ahead.

Mr. Murphy:

Q. Can you tell whether your bank ever handled this check, Mr. Waterfield, by looking at it?

A. Well, we have our stamp on the back, but it has been canceled.

Q. Can you tell the date that it was canceled?

A. I don't know if that is the 11th or not.

Q. Can you tell on the front of the check the reason it was returned?

Floyd E. Waterfield

A. It was returned for insufficient funds.

The Court: That is the check to Rhodes?

page 22 } A. Yes, sir.

Mr. Murphy:
Q. Drawn on the account of the defendant, is that correct?
A. That is right.

The Court: The returned check for insufficient funds does not reflect on the customer's account, the Kirby account?
A. No, sir. It would never be posted on their account.
The Court: That is what I mean.
A. No, sir.

Mr. Murphy:
Q. I show you another memo from your bank. That is dated January 17, 1967, is that true?
A. Right. This is dated January 17, right.
Q. And it indicates that the account of Mrs. Althea Rhodes was debited on that date with $250.00 for the check of Mrs. William J. Kirby, does it not?
A. That is correct.
Q. Now, can you explain to the Court why the date of January 17 would appear on this for the debit of this account when the last item you have on Mrs. Kirby's is January 10?
page 23 } A. This deposit of $250.00 doesn't have anything to do with Mrs. Kirby as far as the deposit is concerned. This was charged back to Mrs. Rhodes' account.
Q. This account was credited with this item on January 3, according to this deposit slip, was it not?
A. I cannot say this went to Mrs. Kirby's account.
Q. I am asking you if it went to Mrs. Rhodes' account on January 3, can you explain to the Court why it was not charged back to her account until the 17th of January?
A. I am not familiar with Mrs. Rhodes' account at all.
Q. You are familiar with the operations of your bank, aren't you?
A. Yes, sir.

Mr. Kellam: He can't be expected to know everybody's accounts. It has nothing to do with this case.

Mr. Murphy: It is difficult for counsel to understand how a check drawn on the defendant's account on the 2nd of January and deposited in the plaintiff's bank on the 3rd of January is not charged back to the payee's account until the 17th of January. I want to know what happened in the meantime. As a matter of fact, I am questioning the accuracy of this statement submitted by the bank, if Your Honor please.

page 24

The Court: At no time is that required to be posted. That is insufficient funds. It doesn't have to be posted on the Kirby account.

Witness: May I say something?

Mr. Murphy: If the Court will allow you.

The Court: Yes.

The Witness: We have many branches and First and Merchants has tellers' machines in other branches. This looks like the yellow slip you have there was not taken in the Virginia Beach offices and I cannot know whether this went through a machine—Well, I don't know anything about Mr. Rhodes. I am just not familiar with that.

Mr. Murphy: I would offer these in evidence, Your Honor.

The Court: All right. I will clip them together, all three of them, Defendant's Exhibit Number 2.

page 25

Mr. Murphy:

Q. I show you Plaintiff's Exhibit Number 3 which you have previously identified, Mr. Waterfield. What do you call that card?

A. That is a signature card, authorization of the signature.

Q. What is the purpose of that card? How do you use it?

A. How do we use it? Well, we have to have some way of knowing this particular account, which happened to be opened in Mrs. William J. Kirby's name, so she signed the card. We have also the day it was opened and the initial deposit.

Q. Does it serve as any contractural relationship between the plaintiff and the defendant?

A. That is true, yes, sir.

Q. And what is that contractual relationship, Mr. Waterfield?

A. Well, they agree to abide by the bank's laws.

Q. Regulations?

A. Regulations.

Floyd E. Waterfield

Q. And are the regulations of the bank printed on the reverse side of that card?

page 26 } A. Yes, sir.

Q. And is that the total and complete contract between the defendant in this case and your bank?

Mr. Kellam: Your Honor, I don't think this witness can be expected to know whether there were other agreements that modified that.

The Court: If he knows of his own knowledge.

Witness: To my knowledge, there are other regulations in the bank that would govern this too, as far as I know.

Mr. Murphy:

Q. You don't have anything else with Mrs. Kirby's signature on it, do you?

A. No, sir.

Q. Now, you have sued in this instance William J. Kirby and Margaret Kirby. Could you tell the Court the purpose of the name William J. Kirby in this action?

A. I believe in endorsing the check, I believe here we have William J. Kirby and Margaret Kirby endorsed the check.

Q. Are you proceeding on the endorsement of the check or the open account, the way the suit was brought, Mr. Waterfield?

page 27 } Mr. Kellam: All the witness can testify to is the facts. I can argue the law when the time comes.

The Court: Yes.

Mr. Murphy: Does the Court sustain the objection?

The Court: Yes.

Mr. Murphy: We take exception to it, if Your Honor please.

The Court: Yes.

Mr. Murphy: If Your Honor please, I would like to have into the record the depositor's contract which is on the reverse side of Plaintiff's Exhibit Number 3 and, with the Court's permission and counsel's indulgence, I would simply give this to the reporter and ask her to write it in the record.

The Court: It has already been introduced into evidence?

Mr. Murphy: Yes, sir.

The Court: Then it's in evidence. I have forgotten what the exhibit is.

Floyd E. Waterfield

Mr. Murphy: All right, sir. It's the so-called signature card.

Q. I show you several other checks, Mr. Waterfield, drawn on your bank by the defendant, Mrs. William J. page 28 } Kirby, and I ask you if these checks—

Mr. Kellam: May I see them?
Mr. Murphy: I am sorry.

(Mr. Murphy hands checks to Mr. Kellam).

Mr. Kellam: Your Honor, I am going to object to the introduction of these checks into evidence. All of the transactions occurred after the account was overdrawn and reached the bank after these events had taken place and apparently they are returned marked 'insufficient funds'. I don't see that they are material.

Mr. Murphy: These are the checks drawn on the plaintiff bank, each of which the defendant's bank handled and it would be the purpose of my inquiry to determine the different reasons indicated on the items that were returned for returning them.

The Court: All of them were returned for insufficient funds?

Mr. Murphy: Yes, sir.

The Court: None of them have been paid?

Mr. Murphy: None of them have been paid, but all of them have been handled by the defendant's bank and page 29 } they were checks drawn on the funds in question.

Mr. Kellam: That is "not sufficient funds" and they were returned.

Mr. Murphy: "Holding funds" is one you skipped, Mr. Kellam. That is the purpose of my inquiry.

The Court: "Holding funds"?

Mr. Murphy: "Holding funds" is on some checks, "Insufficient funds" on the others. There were different reasons.

Mr. Kellam: They weren't going to honor them.

The Court: They were all returned after January 17 or the 10th?

Mr. Kellam: They were all returned after—

Mr. Murphy: Wait a minute, Mr. Kellam, unless you are prepared to answer the Court's questions. There are dates on the back of this thing which looks to me like it was handled by this bank on the 7th of January.

Floyd E. Waterfield

Mr. Kellam: Your Honor, that is after the check for $2,500.00 had bounced at the bank.

Mr. Murphy: That was prior to the 10th of the month when the $2,500.00 debit—

The Court: Up to the 10th, the time the check was charged against the account—

page 30 } Mr. Grey: May it please the Court, will you hear from other counsel for the defendant?

The Court: Sure.

Mr. Grey: We seem to be tied to this one date of January 10. I don't understand the Court's position. We have a suit on what is brought on what was stated to be open account. The warrant doesn't specify any specific period of time and plaintiff in this case introduced an account which runs up to May of 1967. In other words, there hasn't been any specifity on the charge of the open account.

The Court: The Court will consider everything up to that charge.

Mr. Murphy:

Q. I show you a check dated December 29, 1966, to the Investors Loan in the amount of $52.00. Can you tell me if your bank ever handled that check from the dates and stamps on it?

A. When it came to our bank, we canceled it in error.

Q. What do you mean, canceled it in error?

A. The cut that we have on the check, it was canceled. This we canceled also. This was cut in error.

page 31 } Q. When do you cut a check or cancel it?

A. When it's being—

Q. Paid?

A. No, sir, not at that particular time. We cancel it before it's filed.

Q. That is after it's paid and put with the customer's account or ledger?

A. Normally.

Q. When was this cut and canceled?

A. I don't know, sir. In other words—Well, I could not tell you. Like I say, it was cut and it was canceled in error, it states on the back.

Q. Under what other conditions of payment would your bank cancel or cut a check, Mr. Waterfield?

A. It's possible that it could be done in error. We all make mistakes.

Q. When you do that, you reflect that on the customer's account, do you not?

A. Not necessarily, no, sir.

Q. All right. Can you tell the Court when this check reached your bank, then, the date reflected on the back of it by your bank stamp?

A. No, sir. I can't see it from that. I don't know what that figure is.

page 32 } Q. It has to be one digit, does it not? So it has to be prior to the 10th of January? Would you say that is true?

A. It could be true.

Q. All right. I show you now, Mr. Waterfield, a check drawn on your bank by the defendant, Mrs. William J. Kirby, payable to C & P Telephone Company in the amount of $30.67 and dated January 3, 1967. Can you examine this check and tell what time it was handled by your bank after it was drawn?

A. It looks like January 5.

Q. Can you explain to the Court the reason that that wasn't honored if you didn't charge the account back until January 10 with this $2,500.00 item?

A. The balance was being held. That was at a different time.

Q. You were holding the balance?

A. Yes, because of the $2,500.00 check that we were going to charge back and Mr. and Mrs. Kirby led us to believe that they would be in to take care of this check.

Q. The reason for the return of this check was "Holding funds"?

A. That is what is indicated on there.

page 33 } Q. By your bank?

A. By our bank.

Q. I show you another check dated January 3, 1967 drawn by Mrs. Kirby on your bank payable to the order of GMAC in the amount of $120.00. Can you tell the Court when that check was presented to your bank for payment?

A. Not by looking at the check, I cannot.

Q. Can you tell what time it was handled by another deposit at the bank which received that check?

A. January 4, 1967.

Q. What bank was it?

A. That was Virginia National Bank of Norfolk.

Q. If that was received by the Virginia National Bank

Floyd E. Waterfield

on Wednesday, the 4th of January, when would it be normally presented to your bank for payment in accordance with established bank procedures and the regulations of the local clearing house?

A. It's possible it could get there, depending on what office of Virginia National took it in, on Thursday or Friday, depending on when they received it themselves.

page 34 } Q. In the regular course of banking, if they got it on Wednesday, would you say Friday would be generally the latest day your bank would have received it for payment?

A. Generally, yes, sir.

Q. If your bank received it on Friday, can you explain to the Court why this is not paid or reflected on the defendant's account here?

A. Because it was returned.

Q. Why was it returned?

A. It states here they were holding the balance. That is what it states here. It's still insufficient funds at that particular time.

The Court: It was drawn on uncollected funds?

A. That is correct. This was written in by the bookkeeper and—Well, this was written in by the bookkeeper, sir.

The Court: Same thing prior to all these checks you have shown, drawn on uncollected funds?

A. Yes, sir. We normally hold the balance until the check is cleared.

Mr. Murphy:

Q. Do you do that when cash is deposited instead of a check?

A. We can, yes, sir. We have every right to hold that account until the check is paid.

page 35 } Q. That is not responsive. I said, do you hold the deposit when the deposit has been in cash?

A. Yes, sir.

Q. What is the purpose of that?

A. If we had $2,500.00 cash in your account and you came in and wanted to cash a check for $2,500.00, we could hold the $2,500.00 in your account until it was cleared. This is one of the banking—

Q. Cash doesn't have to clear, does it?

A. Cash?

Q. That doesn't have to clear anything, does it?

The Court: There was a check which had been cashed, endorsed by the defendant, and I think if you look at your contract, the bank actually paid it for the depositors and until that check is paid, they have a right to go back on the depositor.

Mr. Murphy: Your Honor, this suit is brought against Mr. Kirby and Mrs. Kirby.

The Court: Isn't that the way the account was?

Mr. Murphy: No, sir. The account is Mrs. Kirby only.

Mr. Kellam: Your Honor, the suit was brought in Municipal Court on both defendants; not necessarily this
page 36 } particular banking account, on an open account, because Mrs. Kirby owed it under her arrangement with the bank and Mr. Kirby owed it because he endorsed the check for which they received cash.

The Court: Both endorsed the check?

Mr. Kellam: Yes, sir.

Mr. Murphy: They are not proceeding on the endorsement of the check but the open account.

We have several other checks, but I will not belabor it.

The Court: We will allow you to put them in. Defendant's Exhibit Number 3. I will put them all together.

Mr. Murphy:

Q. Do you have with you today the records of the defendant's account immediately prior to January 9, 1967, when this statement starts?

A. I believe so. Let me check.

I have from December 13, 1966, until then. December 13.

Q. May I examine it?

A. Yes, sir.

Q. This shows on January 3 a deposit of $2,300.00. That is the one in question, I assume?

page 37 } A. Yes, sir.

Q. What does "CC" indicate? Is that Certified Check?

A. No, sir.

Q. What does it mean in your statement?

A. It says "Collection" on that statement, but—

Q. What does "Collection" mean?

A. I haven't seen the check. I would have to see the check before I could give you an answer on it.

Floyd E. Waterfield

Q. This is an item of $327.10. Is that the 4th or 3rd of January?

A. On the 4th. I would need to see the check.

Q. It was charged on this account and you can't tell exactly what it was?

A. I would have to see the check.

Q. But you do know it was on the 4th of January?

A. Correct.

Q. Would that be any time during the 4th of January from the time your office opened until the posting was completed at the end of the day?

A. Well, it normally would. We don't go by
page 38 } numbers at the present. We go by alphabetical order and it would be posted in order more than likely and at this time it would be sorted. It would be posted on January 4.

Q. Do you have central bookkeeping for all of your offices in Tidewater?

A. No, sir, not in Tidewater. We have our Virginia Beach region where it is kept at one of the locations, Virginia Beach office. Of course, we have one in Chesapeake and various other places.

Q. On the 4th of January, then, for the purpose of the record, you show a service charge of $2.00, is that correct?

A. That is correct.

Q. And then you show a charge of $327.10 that has "CC" after it, and you don't know what that means?

A. That could be just a regular check.

Q. And we have an item of $250.00 which apparently is a check that was honored, correct?

A. Correct.

Q. And we have an item of $52.00 which apparently was a check that was honored, correct?

A. Correct.

Mr. Murphy: I would like to introduce this into
page 39 } evidence, if I may, Your Honor.

Those are all the questions I have.

The Court: This is D4.

Mr. Waterfield, is Mrs. William J. Kirby and Margaret Kirby one and the same person?

A. Yes, sir.

The Court: Was this check, which is in question, for $2,500.00 taken in the afternoon of December 29 during the banking hours?

Floyd E. Waterfield

A. Yes, sir.

The Court: January 3 was the first business day after December 29 and New Years Day?

A. Yes, sir.

Mr. Murphy: Monday was a holiday because New Years Day came on a Sunday. The next business day was Tuesday, January 3.

RE-DIRECT EXAMINATION

Examined By Mr. Kellam:

Q. This check for $125.00 bore an endorsement?

A. Yes, sir.

Q. Who endorsed it?

A. William J. Kirby and I think Mrs. Margaret Kirby on the back of the check. The reason for the delay
page 40 } was the holiday. William J. Kirby and Margaret Kirby.

Q. What are the notations indicated on that check?

A. Cash for deposit.

Mr. Murphy: If Your Honor please, may we have a short recess to give Mr. Grey and I a chance to read the contract on the reverse side of that deposit card there so that we can be prepared?

I have one question of Mr. Waterfield, Your Honor.

RE-CROSS EXAMINATION

Examined By Mr. Murphy:

Q. I show you Plaintiff's Exhibit Number 1 which is the statement of the defendant. Attached to it is a service charge of $2.00 and a copy of a notice dated January 10 to Mr. and Mrs. Kirby notifying them of the returned check, is that correct?

A. That is correct.

Q. Now, what would have happened to the original of this note?

A. It was attached to the check.

Q. And then what do you do with that?

A. We send it back to the customer, normally.
page 41 } Q. Did you do that in this case?

A. No, sir.

Q. This is it right here? Isn't this the notice and the $2,500.00 check?

A. Yes, sir.

Q. So you never sent Mr. and Mrs. Kirby anything in writing?

Floyd E. Waterfield

A. No, sir. They should have gotten a statement, the overdraft. They should have gotten a copy just like I have here.

Q. But this is the copy they would normally get?

A. No. I am speaking of the statement. They would not get this because we charged the check back to their account.

Q. So what you are saying is they should have gotten this statement here?

A. Yes, sir.

Q. When did you mail it out? Do you have any records?

A. They should have gotten it around May 24 or 25. It was closed on the 24th. Our records show it should have been mailed out that day, 24th or 25th.

Q. So they would have been notified formally and officially in writing at that time?

page 42 } A. They should have gotten the statement, yes, sir.

Q. So since you kept this, they didn't get anything until the last part of May, then?

A. That is true.

RE-DIRECT EXAMINATION

Examined By Mr. Kellam:

Q. Mr. and Mrs. Kirby were notified that the Neuse check dated—

Mr. Grey: Objection.

The Court: He already answered that he talked to them two or three times.

Witness: I talked to them two or three times a day on it. I talked to them quite a bit.

RE-CROSS EXAMINATION

Examined By Mr. Murphy:

Q. When did the check come back?

A. I don't have the exact date, but as the records show on the statement, if I may see the statement—

Q. Yes, sir.

A. Could I have the photostat one? I cannot give you the exact date on this, but it would have been right after or around the 5th of January, and the reason I say

page 43 } this is because we started holding the balance on

the 4th when we found that the check was returned for insufficient funds from Neuse Engineering and Dredging.

RE-DIRECT EXAMINATION

Examined By Mr. Kellam:

Q. Mr. Waterfield, you testified this statement was mailed in May, correct?

A. Yes, sir.

Q. Were monthly statements mailed prior to that one?

A. Well, at that particular time, we were mailing the statements out whenever the sheet was filled. Whenever the sheet was filled at the end, we mailed it out, unless they requested it, and we would send them out each month if they requested it. We would have gotten one out. Any time it's closed, we would send a statement to them.

RE-CROSS EXAMINATION

Examined By Mr. Murphy:

Q. How can you tell by looking at this it was the 4th you started holding the funds?

A. We started holding funds after January 4, right, after paying the other checks, right.

Q. And you realize that by this penciled handwriting in here, is that right, this penciled note?

page 44 } A. Yes, sir.

Q. And that runs the 4th, 5th, and almost to the 9th, doesn't it?

A. That is right.

Q. So it could have been any time between the 4th and the 10th, then, really, couldn't it?

A. No. We held it. It was before the 10th. I say I cannot give you a definite date. I would say it would be around the 4th or 5th because we put a "Hold" on it. I can check the records at the bank and give you the exact date on it. I do not have those records.

Q. So of your own knowledge, you can't say when any statements were sent out or any notice was given, correct?

A. I can't keep up with every statement, but normally we send them out, whenever a sheet is filled or once a month if they ask for it.

In this particular case, we would mail it out just as soon as we charged the account and then right after the 24th.

Floyd E. Waterfield

Mr. Murphy: I have no other questions.

Mr. Kellam: I have no other questions.

Mr. Kellam: The plaintiff has no other evidence.

page 45 } The Court: I understand. You rest.

Mr. Murphy: We move to strike, if Your Honor please.

Referring to the Uniform Commercial Code, Section 8.4-213, it defines final payment; it says, "An item is finally paid by a payer or bank when the bank has done any of the following, whichever happens first:

A. Paid the item in cash."

It's out contention that when this check was presented to the bank by Mrs. Kirby that they cashed the check. Mr. Waterfield testified they did, and they show a currency credit to the account of $2,300.00 on the records of the bank.

In addition to that, Section 8.4-302 entitled "Payer Bank's Responsibility for Return of Late Item", it says, "In the absence of a valid defense such as breach of presentment warranty, settlement is affected or the like if settlement is received by the payer bank and is accountable for the amount of a demand item other than the deposit of a documentary draft whether properly payable or not at the bank

page 46 } in any case where it is not also the depository bank retained the item beyond midnight of the banking period or regardless of whether the depository bank does not pay the item until its midnight deadline."

And then the midnight deadline is defined by Section 8.4-104, "Midnight deadline with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item."

So it's our contention in this case, Number 1, that the item was finally paid as not being able to be charged back after it was presented to the bank and cashed which Mr. Waterfield testified that it was and, Number 2, even if we consider that it's an item accepted for deposit, they have a midnight deadline in this case of not later than Wednesday night.

Now, the contracts, which Your Honor has, the contracts; it's the first paragraph on the reverse of this so-called signature card. The last sentence in this paragraph which we think is controlling here says, "The bank may

page 47 } charge back at any time prior to midnight on its business day next following the day of receipt of any item drawn on this bank which is ascertained to be

drawn against insufficient funds or otherwise not good and payable.

Any item received after this bank's closing hour is the next business day."

The Court: That says "May charge back".

Mr. Murphy: May charge back, provided they do it at any time prior to midnight on its business day next following the day of receipt. That qualifies the whole thing, if Your Honor please.

The Court: It's permissive. It says they can do it if they want.

Mr. Murphy: But it doesn't mean they can go outside this contract, and if they wait past this midnight deadline—

The Court: It's simply because it shows this check was cashed which, in reality, it was not. That is the banking jargon, so to speak. He got $200.00 and then the $2,500.00. They are still liable as endorsers on the check. The fact they got cash on it doesn't mean they can go to the page 48 } bank and cash a check that is no good and then come into court and say, "We are not liable."

Mr. Murphy: Your Honor, they could have taken this to any bank in the world other than First and Merchants National Bank and cashed that check and what the Court has said would be absolutely true, but once the payer bank cashes the check, that is the end of the line.

Number 1, and Number 2, if they don't charge it back, if they don't charge it back, accept the position that it might have been an item for deposit, unless they charge it back by their midnight deadline, they are stuck with it. That is the whole purpose of the section.

The Court: The Court doesn't see it like you do.

The Court overrules your motion to which action you except.

Mr. Murphy: We except. We don't desire to—

The Court: Judgment will be for the plaintiff, to which action of the Court counsel duly excepts.

Mr. Murphy: Yes, sir.

CERTIFICATE OF ATTORNEYS OF RECORD

I, Donald C. Grey, counsel of record, in the case of First and Merchants National Bank vs. William J. Kirby and Margaret Kirby, tried in said court in Virginia Beach, Virginia, on September 11, 1967, do certify that the foregoing is a true and correct report of all the evidence, together with all motions, objections, and exceptions on the part of

the respective parties, the action of the Court, all exhibits, and all other proceedings of said trial.

I do further certify that the exhibits offered in evidence as described by the foregoing record and designated as Plaintiff's Exhibits 1 through 3 and Defendants' Exhibits 1 through 4 are all the exhibits offered upon said trial and the originals thereof have been initialed by the Judge for the purpose of identification.

Given under my hand this 8 day of December, 1967.

FLOYD E. KELLAM, JR.

DONALD C. GREY, p.d.

page 49 } JUDGE'S CERTIFICATE

I, Paul W. Ackiss, Judge of the Circuit Court of the City of Virginia Beach, Virginia, who presided over the foregoing trial in the case of First and Merchants National Bank Vs. William J. Kirby and Margaret Kirby, tried in said court in Virginia Beach, Virginia, on September 11, 1967, do certify that the foregoing is a true and correct report of all the evidence, together with all motions, objections, and exceptions on the part of the respective parties, the action of the Court, all exhibits, and all other proceedings of said trial.

I do further certify that the exhibits offered in evidence as described by the foregoing record and designated as Plaintiff's Exhibits 1 through 3 and Defendants' Exhibits 1 through 4 are all the exhibits offered upon said trial and the originals thereof have been initialed by me for the purpose of identification.

I further certify that the attorneys for the Plaintiff and for the Defendants had reasonable notice in writing of the place at which the same would be tendered for certification.

Given under my hand this 8th day of December, 1967.

PAUL W. ACKISS, Judge

A copy, teste:

.....

Judge

page 50 } CLERK'S CERTIFICATE

I, John V. Fentress, Clerk of the Circuit Court of the City of Virginia Beach, Virginia, do hereby certify that the

foregoing transcript of the testimony and other proceedings of the trial of the case of First & Merchants National Bank Vs. William J. Kirby and Margaret Kirby, duly certified by the Judge of the said court, together with the original exhibits introduced upon the trial of said case, identified by the initial of said Judge, was filed in my office on the 8 day of December, 1967.

JOHN V. FENTRESS, Clerk

By: R. H. WEST, D.C.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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