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Negotiable Instrument--Forged Indorsement--Liability of Bank (Fitzgibbons Boiler Co. v. National City Bank, et al., 387 N.Y. 326 (1942))

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NEGOTIABLE INSTRUMENT—FORGED INDORSEMENT—LIABILITY OF BANK.—The plaintiff depositor sues to recover sums wrongfully paid out of its account on forged checks. The instruments were prepared by the plaintiff's own treasurer who forged indorsements of payees' signatures and then cashed them. There was evidence of contributory negligence in that the depositor omitted to investigate the suspicious state of the company affairs and that had they done so, the forger might have been apprehended in the early stages of his thievery. *Held*, despite its negligence the depositor can still recover the sums paid out on the forged checks because the negligence was not the proximate cause of the bank's failure to fulfill its obligation of paying funds only to authorized payees. *Fitzgibbons Boiler Co. v. National City Bank, et al.*, 287 N. Y. 326, 39 N. E. (2d) 897 (1942).

A depositor though negligent, will always recover for wrongful payments on forged indorsements unless its negligence was the substantial factor¹ of the bank's misfeasance. Mere omission on the part of the drawer to protect itself against a fraud, does not cast upon it the risk of the bank's neglect of duty toward a depositor.² The bank is under an absolute duty to investigate the indorsements and make sure that payment is made only to authorized payees.³ This binding obligation is imposed by statute,⁴ tort,⁵ and contract law.⁶ Although there are many responsibilities placed upon the depositor to prevent forgeries,⁷ *no New York decisions have ever gone so far as to extend the depositor's duty to an examination of the endorsements.*⁸ This rule evolved because the depositor normally has no genuine copies of endorser's or payees' signatures on hand with which he might

¹ *National Surety Co. v. Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372 (1929); *Prudential Ins. Co. v. Nat. Bank of Commerce*, 227 N. Y. 510, 125 N. E. 824, 15 A. L. R. 146 (1919); *Kobre v. Corn Exchange Bank*, 79 Misc. 212, 139 N. Y. Supp. 890 (1913); *Jordan Marsh Co. v. Nat. Shawmut Bank*, 210 Mass. 397, 87 N. E. 740, 22 L. R. A. (n.s.) 250 (1909); *Frank v. Chemical Nat. Bank*, 84 N. Y. 209 (1881).

² *American Surety Co. of N. Y. v. Empire Trust Co.*, 262 N. Y. 181, 186 N. E. 436 (1933).

³ *City of N. Y. v. Bronx County Trust Co.*, 261 N. Y. 64, 169 N. E. 372 (1933).

⁴ *National Exchange Bank of Albany v. Lester*, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (n.s.) 402 (1906); (1918) 31 HARV. L. REV. 780.

⁵ *Spaulding v. First Nat. Bank*, 210 App. Div. 216, 205 N. Y. Supp. 492, aff'd, 239 N. Y. 586, 147 N. E. 206 (4th Dep't 1924); *Szwento Juozupo Let Draugytes v. Manhattan Saving Inst.*, 178 App. Div. 57, 164 N. Y. Supp. 498 (1st Dep't 1917).

⁶ *Gutfreund v. East River Nat. Bank*, 251 N. Y. 58, 167 N. E. 170, 64 A. L. R. 1103 (1929); *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529 (1902).

⁷ *London Joint Stock Bank v. MacMillan*, [1918] A. C. 777; *Trust Co. of North America v. Conklin*, 65 Misc. 1, 119 N. Y. Supp. 367 (1909); *Timbel v. Garfield Nat. Bank*, 121 App. Div. 870, 106 N. Y. Supp. 497 (1907); *Colonial Bank v. Marshall*, [1906] A. C. 559; *Schofield v. Londesborough*, [1895] 1 Q. B. 536.

⁸ *Critten v. Chemical Nat. Bank*, cited note 6 *supra*; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. R. 175 (1878); (1930) 9 TEX. L. REV. 41.

compare the forgery and thus is in no position to make a reasonable examination for genuineness.⁹ When this is not so, as in the famous *Prudential* case¹⁰ wherein the depositor did have a genuine signature on file, the Court of Appeals held that it was a question of fact for the jury whether or not the depositor was negligent in omitting to compare the signatures with those on the cancelled checks. The depositor when receiving a cancelled check has a right to rely upon the bank's inquiry and warranty of genuineness.¹¹ It is no defense to the bank that it relied upon the inspection and investigation of agents or associate banks¹² or on clearing houses;¹³ if it chooses to pay away the depositors' funds relying on the investigation of another, then it must hazard the consequences, for the legal liability between the drawer and drawee will remain the same as if no funds were paid out.¹⁴ Neither will the depositor be precluded from enforcing its rights on any theory of agency because the forging officer is not acting within the scope of his authority.¹⁵ Estoppel will never lie to bar a recovery unless the negligent act of the depositor was relied upon by the bank and it was the substantial factor of the wrongful payment.¹⁶

C. S.

TESTAMENTARY TRUST—CY PRES DOCTRINE—CONSTRUCTION OF WILL.—Frances Paget Price, a widow, died having no descendants. In her will and the two codicils thereto she left her farm and personal property in trust for the maintenance of a home where retired Presbyterian ministers and their wives might live. The testatrix made alternative dispositions should her intent "because of illegality fail, or become impossible of realization"; thus, in the second codicil to the testament she designated Elmira College her contingent legatee. Mrs. Price's Alma Mater petitioned the Surrogate for a construction of the instrument, and asserting that the improvements demanded by

⁹ *Shipman v. The Bank of the State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821 (1891).

¹⁰ *Prudential Ins. Co. v. Nat. Bank of Commerce*, cited note 1 *supra*.

¹¹ *Potts & Co. v. Lafayette Nat. Bank*, 269 N. Y. 181, 199 N. E. 50, 103 A. L. R. 1142 (1935).

¹² *American Surety Co. of N. Y. v. Empire Trust Co.*, cited note 2 *supra*.

¹³ *Jordan Marsh Co. v. Nat. Shawmut Bank*, cited note 1 *supra*.

¹⁴ *National Surety Co. v. Nat. Shawmut Bank*, cited note 1 *supra*; *Gutfreund v. East River Nat. Bank*, cited note 5 *supra*; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829 (1909); *Mechanics Nat. Bank v. Harter*, 63 N. J. L. 578, 44 Atl. 715 (1899).

¹⁵ *Prudential Ins. Co. v. Nat. Bank of Commerce*, cited note 1 *supra*; *Seaboard Nat. Bank v. Bank of America*, cited note 14 *supra*; *Henry v. Allen*, 151 N. Y. 1 (1896).

¹⁶ *Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 871 (1913).