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ENDORSEMENT OF CHECKS. Ever since *Price* v. *Neal*, 3 Burr, 1354 (1762), litigation growing out of the respective rights of the banker, the depositor, and the endorsee of a check or draft, has been constantly growing. The latest development is seen in the recent amendment made by the various Clearing House Associations of the country to their rules concerning the attitude of the Associations toward checks bearing qualified or restrictive endorsements, such as "for collection," or "for account of."

There is no doubt that the relation between a bank and its depositor is that of debtor and creditor, unless the relation is changed by statute or by the charter of the bank. There is a quasi-contractual obligation on the part of the bank to disburse the money standing to the depositor's credit only upon his order, and in conformity with his directions. Payments made upon forged endorsements are at the peril of the bank, unless it can claim protection upon some principle of estoppel, or by reason of some negligence chargeable to the depositor: *Shipman* v. *Bank*, 126 N. Y., 319, (1891).

But in controversies arising between the bank and the endorsee to whom the bank has made payment, the rule is less stringent. Such endorsee cannot recover through the medium of a forged endorsement. If there is a forged endorsement, title has not passed, so that the payment was made under a mistake of fact, and in general may be recovered by the bank, though the endorsee to whom payment was made be a *bona fide* holder for value: *Canal Bank* v. *Bank of Albany*, 1 Hill (N. Y.), 290 (1841). Between the depositor and the endorsee to whom the bank pays, no question can arise. The drawer is not presumed to know the signature of the payee. The bank must, at its own peril, determine that question and the burden is rightly placed, for all the means of determining this are within its power, both by absolute endorsement and by identification.

The question which recently arose in *National Park Bank* v. *Seaboard National Bank*, grew out of a draft sent to defendant bank by the Eldred Bank, endorsed, "For collection for account of Eldred Bank, Eldred, Pa." Defendant was the New York correspondent of the Eldred Bank, and upon receiving the draft, presented it through the New York Clearing House to plaintiff—the drawee—for payment. The amount of the draft had been raised from eight dollars to eighteen hundred dollars. Plaintiff, through a mistake of facts, paid this amount. Defendant paid the proceeds to the Eldred Bank, who in turn paid its principal, the payee of the draft. Twenty-one days after it was paid by the Eldred Bank, plaintiff first learned of the alteration in the draft, when it immediately notified defendant of its mistake and demanded repayment. Beyond the failure to detect the alteration when the draft was presented to plaintiff, there was no negligence in the case. The court concluded that defendant "never had any title, ownership, interest or property in or to said check or draft." Plaintiff knew from the endorsement that it was dealing with an agent, and could not recover from the agent who had paid to its principal without notice. It is clear that no other conclusion could have been reached.

The amendment to the Clearing House Rules will materially protect its members and aid in placing such losses where they belong.

NEGLIGENCE—LEGAL RESPONSIBILITY OF BATH-HOUSE PROPRIETOR. In the case of *Brotherton* v. *Manhattan Beach Improvement Company*, 67 N. W. Rep. 479, which was brought before the Supreme Court of Nebraska in May, 1896, the evidence showed that Brotherton, a youth of seventeen years of age, together with one Campion, both residing in Omaha, went together, on the 8th day of August, 1892, to Lake Manawa, a summer resort in Iowa. There is on the shore of this lake an establishment maintained by the defendant company for the purpose of affording facilities to bathers. There are bath-houses, toboggan slides in the water, a platform for diving, and it seems also certain other resorts on the

shore, such as a restaurant, a photograph gallery, and a shooting gallery. These privileges are let out to the public by the defendant company for hire. Brotherton and Campion paid the customary fee for bathing privileges, put on bathing suits and entered the water, both being able to swim. Perhaps more than three quarters of an hour after entering the water, Campion was unable to find Brotherton and a search was instituted among the bathers. He was not found, and his loss was reported, which resulted in a more thorough search, through which his dead body was discovered about ten o'clock that night, at the bottom of the lake. The plaintiff, the administratrix of Brotherton, brought suit against the Manhattan Beach Improvement Company, alleging negligence on the part of the defendant in failing to provide suitable guards and notices whereby the depth of the water should be indicated; in failing to provide proper management to superintend bathing; and in failing to provide means for resuscitating persons overcome by strangulation or otherwise while in the water; and further that no person was present, on behalf of the defendant, to search for or recover Brotherton immediately upon his disappearance from the surface of the water. A verdict was rendered by the jury in the lower court for the defendant, under instructions by the Court, and an appeal having been taken by the plaintiff, the Supreme Court held that the case presented an issue which should have been submitted to the jury, saying:

"We think that it is a reasonable inference that persons of ordinary prudence, conducting a bathing resort frequented by ten thousand people a month, should, in the exercise of ordinary care, keep some one on duty to supervise bathers and rescue any apparently in danger; and, if not, that it is certainly a reasonable inference that persons so situated should, on ascertaining that a person last seen in the water is missing—without a moment's delay—exert every effort to search for that person in the water, and not merely advise a youthful companion of the missing person to search on the land, and coolly watch the result of such search. We think, in this aspect of the case, and this only, the evidence presented an issue which should have been submitted to the jury, and for that reason the peremptory instruction was erroneous."

The conclusion reached by the Court is a difficult one to sustain upon legal principles. Surely no authority exists, indeed none was apparently presented to the Court, which carries the responsibility of one individual for the actions of another to such an unwarranted extent. The contract into which the parties entered was a simple one; the defendant company agreeing to furnish bathing robes to the plaintiff's intestate in consideration of the payment of a small fee. To read into this an implied guaranty that the defendant would supervise the bathers and rescue any apparently in danger, and would diligently search for missing ones, is to make the contract for the parties and to reach a result which the legislature alone, if at any time it deems such a measure advantageous, can

properly attain. While it may be eminently desirable that bathers should be as far as possible protected from the dangers into which they necessarily place themselves, it seems improper to thrust the burden of protecting and guarding them upon a defendant who merely in return for a small fee supplies them with garments.

INTERPRETATION OF WILL. In *Conway's Estate*, Legal Intelligencer, vol. 53, p. 237, it has recently been decided by the Orphans' Court of Philadelphia County, Pennsylvania, evenly divided, that the expression "spinster or unmarried nieces," used by a testator, should include nieces who had been married, but who were widows at the time of the testator's death.

By a codicil to his will a testator had bequeathed his residuary estate to his "spinster or unmarried nieces." It appeared that there were living at the date of the execution of the codicil, and also at the time of his death, both spinster nieces and nieces who had been married, but were then widows. The argument in favor of including the widowed nieces from participation in the estate was based on the idea that the will disclosed a purpose to use the words in question synonymously. By the words "spinster nieces," those who were single and had never married were undoubtedly intended. To provide for this class exclusively was the evident primary intention of the testator. But did he mean to enlarge the class when he added the words "or unmarried?"

The dissenting opinion took the point of view that these latter words were used in a sense exactly identical with and equivalent to the words "spinster nieces;" that the testator, being fearful that his meaning might be misunderstood, added the other words so that the class intended might be specified more clearly. It appeared, also, in another provision in the will, that the testator described a legatee as "Mary or Mamie Bradley," meaning one and the same person, and from this clue it was argued that the expression "spinster or unmarried" disclosed a corresponding use of the disjunctive "or," and that, therefore, the words "or unmarried" should be construed in the sense that they merely defined and explained the testator's meaning in describing his nieces as "spinsters."

On the other hand, it was argued that, bearing in mind the well-established rule of interpretation, giving effect, if possible, to every word in a will, some meaning must be attached to the word "unmarried." The testator had a niece living at the time of his death who was not a spinster, because she had been married, but who was then unmarried, because her husband had died and she had not remarried. In order to exclude her from sharing in the estate, it would be necessary to hold the word "unmarried," which precisely designated her, redundant and meaningless. The Pennsylvania courts have always held that "unmarried women" means not only those who are not and have never been married, but also those who, having been married, have become widows and remained

such: *Commonwealth* v. *Powell*, 51 Pa. 440; *Rodgers* v. *Rodgers*, 7 Watts, 19; *Schaeffer's Appeal*, 8 Pa. 40; *Dale* v. *Dale*, 1 Harris, 446; *Fahs* v. *Fahs*, 6 Watts, 214; and hence the expression "or unmarried" cannot be considered a mere tautology, because it distinctly designates a class which is certainly not included in the word "spinster." The court, evenly divided, held that the disjunctive "or" applied simply to the adjectives, and that the testator's intention in using the expression "spinster or unmarried nieces" was the same as if he had said "my nieces, spinster or unmarried;" and that as spinster meant those who had never been married, so the word "unmarried" included those who had been married but were then widows, and hence both classes should share.

Without entering into the etymological meaning of the word "unmarried," or its significance in the common vernacular, it is beyond dispute that, in its legal acceptation, the term includes women who have been married, but who are at present widows. So that, with this point conceded, and the circumstances of the case presenting facts which would, unless effect were given to the words in question, make them mere surplusage, it is certainly consistent with principle and precedent to hold that the phrase "spinster or unmarried nieces" includes not only nieces who were never married, but also nieces who had been married but were widows at the death of the testator.

CHARITABLE BEQUEST—TRUST TO MAINTAIN DONOR'S MONUMENT. In *Smith's Estate*, 53 Legal Intelligencer, 236, the testator bequeathed a portion of his estate in trust to erect, maintain, and repair, in Fairmount Park, Philadelphia, a monumental memorial to certain heroes of the Civil War, to bear their statues in bronze, and also the testator's statue and a mural tablet inscribed with his name. The validity of the trust was disputed on the ground that it was a violation of the rule against perpetuities. Manifestly this was true, unless the bequest was a charity; and the majority of the court finally upheld its validity on that ground, holding that the purpose of the gift determined the question as to whether it was a charity. What then was its purpose? The testator directs that the mural tablet shall be inscribed with these words: "This monumental arch presented by Richard Smith, type founder of Philadelphia, in memory of Pennsylvanians who took part in the civil war;" and he designates by name those whose statues are to be placed upon the arch. If his purpose was simply to commemorate these individuals, as stated in the will, then, as the dissenting minority of the court says, "the trust lacks the essential element of indefiniteness, which is one of the characteristics of a legal charity." But the majority held, probably arguing from the character of the memorial, according to the familiar rule that a man is presumed to intend the natural consequences of his acts, that its object was the beautifying and adornment of the city's great pleasure resort, for the elevation and refinement of the people, the cultivation of their

love for the beautiful, and the stimulation of patriotism; and that it was therefore a charity. This is in accordance with Chief Justice's Gray's statement, in *Jackson* v. *Phillips*, 14 Allen, 556, that "it is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

In England a trust to maintain the donor's monument or tomb is not considered charitable unless the monument is within a church as one of the decorations of the building, since otherwise it is considered to benefit no one but the donor. In this country, as a rule, such a trust is sustained as a charity: 3 Amer. En. Law, 132; *Jones* v. *Habersham*, 17 Otto, 174; *Dexter* v. *Gardner*, 7 Allen (Mass.) 243; *Swasey* v. *Amer. Bible Soc.*, 57 Me. 523; Act of May 26, 1891 (Penna.), P. L. 119. Such bequests are generally held valid on the ground of their being in performance of religious duties; but in the present case no such duty existed, so the trust could be considered charitable only because of its educational purpose.

The fact that the motive of the testator in this case was partly to perpetuate his own name and the names of his wife and son, did not, in the opinion of the court, diminish the value or charitable character of his gift. In *Jones* v. *Habersham*, *supra*, one of the trusts created was for the establishment and maintenance of a public library to bear in a conspicuous manner the name of the testatrix. This was held a valid charity, the court saying: "The directions tending to perpetuate the memory of the founder do not impair its public character or its legal validity." And in *Fire Insurance Patrol* v. *Boyd*, 120 Pa. 624, the court asserted the test that "the motive of the benefactor is of no moment and is not to be sought after, but the purpose and object of the gift determines its character as religious, charitable or otherwise."