FORGERY BY MEANS OF A RUBBER STAMP.

The late case of *Robb* v. *Pennsylvania Company*,[1] presents the novel question as to a bank's liability where a depositor, without the bank's knowledge, procures a rubber stamp, which is a substantial facsimile of his bank signature, and which is stolen from his safe and used to obtain money from the bank by means of forged checks. The trial court charged the jury that it was not illegal *per se* to have such a stamp in one's possession, and left it to them to decide whether or not the plaintiff had been negligent in his manner of keeping the stamp. It appeared that the stamp had been kept locked in plaintiff's safe, and, of course, the jury found for the plaintiff. Defendant appealed to the Superior Court, and the judgment was affirmed, in an able opinion written by President Judge Rice, by an unanimous court. The theory of the trial judge as to the plaintiff's right of recovery depending upon the absence of negligence in the manner of keeping the stamp is accepted by the appellate court, which holds that the depositor is bound to use such a stamp and keep it with prudent care, so as to secure it against unlawful use by others. The appellants contended for an application of the doctrine that "where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act."[2] But the Superior Court held that this rule did not apply in a case "where the two persons are not equally without fault, but where one owes a duty to the other to do, or to refrain from doing, a particular thing, and has failed in the performance of that duty." The cases relative to the alteration of negotiable instruments by filling up blanks left by the maker were easily distinguished as containing an element of

[1] 3 Pa. Superior Court, 254 (1897); 186 Pa. 456 (1898).

[2] Grant on Law of Bankers, 17; Morse on Banks and Banking, 2d Ed. 331; Van Schaack on Bank Checks, 119; Young *v.* Grote, 4 Bing. 253 (1827); Garrard *v.* Hadden, 67 Pa. 82 (1870).

either negligence or of agency. In passing, it is doubted by the court whether the procurement of the stamp was the proximate cause of the loss.

The Supreme Court of Pennsylvania allowed an appeal from this judgment. The case was argued before five justices, Mr. Chief Justice Sterrett and Justices Green, Williams, McCollum, and Fell. There was again an affirmance, but by a divided court, Mr. Chief Justice Sterrett and Mr. Justice Williams dissenting. The opinion of the court is written by Mr. Justice McCollum, who adopts the conclusions and reasoning of the lower courts as to negligence, saying:[1]

"If, however, the forger obtained possession of the stamp through the negligence of the plaintiff, the responsibility for the loss occasioned by the forgeries would not rest upon the defendant if its cashier exercised due care in the inspection of the check."

Mr. Justice Williams handed down a short dissenting opinion some time after the opinion of the court was filed. In this dissent the Chief Justice joined. Their opinion proceeds upon the theory that the mark produced by the stamp was identical with, and impossible to detect from, the plaintiff's own signature, and that to hold the defendant liable would be to place an additional burden upon it which was not contemplated by the contract of banking.

The case in hand, owing to the wide prevalence in the community of the use of autograph stamps, is of great importance, and it becomes of more than academic interest to consider whether the conclusions, reasoning and dicta of the court are sound in principle.

It is somewhat difficult to grasp the theory upon which this case was presented to the jury by the learned trial judge. The court held, as matter of law, that it was not negligence in the plaintiff to procure the stamp to be made, or to have it in his possession; the sole question for the jury being whether he had taken prudent care of it thereafter. It would seem, if the stamp were really a dangerous thing, and likely to be

[1] 186 Pa. 458 (1898).

made an instrument of mischief, that the jury were entitled to be heard as to whether the mere possession of such an article was not negligence. If, on the other hand, the stamp was harmless and not likely to cause damage, what was the necessity for locking it up, and what question could there be for the jury? In other words, the whole case, or nothing at all, should have been left to the jury.

If the element of negligence is to be seriously considered, the recent case of *Knox* v. *Eden Musee*,[1] decided by the New York Court of Appeals, is of great interest. That was an action for damages for negligence in not cancelling certificates of stock and in thus permitting them to be used as security for a loan. The certificates in question were delivered to the company for surrender and cancellation, and for the issue of new certificates in lieu thereof. These were so issued, but the original certificates were not cancelled, but placed in a safe, of which one of the clerks had the key. This clerk, with another, took them out and hypothecated them to secure a loan made to them by plaintiff. The principle upon which the case was rested was that there was no negligence in placing these certificates in a safe from which they had been taken by the clerk who was intrusted with the key of it and used by him. Chief Justice Andrews, said:

"We are of opinion that the company was not chargeable with any negligence which gives a right of action for the injury caused to the plaintiff by the fraudulent use by Jurgens of the surrendered certificates. The surrendered certificates were placed by the company in its safe in its office, of which Jurge s had the key, and thereby, it may be said, afforded him the opportunity to commit the crime of which he was guilty, in abstracting and uttering them as valid. But it is not true, as a general rule, that a man may not intrust his property to the custody of his servant, except at the peril of losing his title thereto if the servant steals and disposes of it to another. There must be something more than the mere intrusting to a servant of the custody of a chattel, and the

[1] 148 N. Y. 458 (1896).

consequent opportunity for theft, in order to preclude the master from reclaiming it if stolen by the servant and sold to another. (Rapallo, J., in *McNeill* v. *Tenth National Bank.*[1]) The rule declared by Ashhurst, J., in *Lickbarrow* v. *Mason,*[2] frequently quoted, 'that whenever one of two innocent persons must suffer by the act of a third, he who has enabled the former to occasion the loss must sustain it,' has no application to such a case."

Again, on page 460, he says: "In other words, the claim is that the company ought to have anticipated that Jurgens might commit the crimes of forgery and larceny and put the certificates on the market if they were left uncancelled under his control. We do not assent to this suggestion. If the company knew that Jurgens was dishonest, or had reason to suspect his honesty, a different question would be presented. But it is not generally an omission of ordinary prudence that an employer deals with his employes on the assumption that those who have hitherto been faithful in the performance of their duties will continue so to be, or because he does not anticipate and provide against the possibility of their criminal acts. Breaches of trust and confidence unfortunately are not infrequent. But honesty is, nevertheless, we believe, the general rule of human conduct, and one may indulge in this faith in human nature and trust those who have proved themselves worthy of it, without subjecting himself to a charge of negligence if it should turn out that they afterwards yielded to temptation and used their position to the injury of others. It is one thing to say that a man shall be amenable for such immediate consequences of his acts as a reasonable man might foresee and dread and therefore shun. But it is another and very different proposition to maintain that a man shall forfeit his property because he has done an act which will not be perilous unless others are guilty of misconduct which that act does not cause."

It is submitted, however, (1) that while the plaintiff, Robb,

[1] 46 N. Y. 325 (1882).
[2] 2 T. R. 70 (1787).

should undoubtedly have been allowed to recover, an unjust burden was placed upon him by injecting into the case the wholly irrelevant question of his negligence; and (2) that, the decision not having been placed upon the proper grounds, the courts were misled into erroneous dicta as to the law in case the rubber stamp in question had not been locked in plaintiff's safe, but had been left, in the language of the trial judge, "lying around where people could probably stumble on it."

In *People's Savings Bank* v. *Cupps*,[1] the by-laws of the savings bank provided that the pass-book must be presented at the time of drawing money. The depositor allowed her son-in-law to obtain possession of the pass-book, and he drew out the money by means thereof in connection with forged checks. The by-laws provided that "when money is to be drawn out, the book must be brought to the office to have the payment entered therein." There was the further provision that

"If any person shall present a book and falsely allege himself or herself to be the depositor named therein and thereby obtain the amount deposited, or any part thereof, this institution will not be liable to make good any loss the actual depositor may sustain thereby unless previous notice of his or her book having been lost or taken shall have been given at the office of the corporation."

It was held, that there was no evidence of contributory negligence on the plaintiff's part, and the bank must bear the loss.

The general rule has been stated as follows: "The bank, when it receives money on deposit, agrees that such money *shall be paid out only on the order of its depositor;* hence, when it pays a forged check, it must be held to have paid out its own funds, and cannot, therefore, charge its depositor with the amount so paid out, but as against him the bank must bear the loss, provided that the depositor has been free from blame, and has not contributed to the forgery by his negligence."[2]

[1] 91 Pa. 315 (1879).

[2] 5 Amer. & Eng. Encycl. of Law (Second Edition), 1066 and cases cited. For an interesting collection of cases on this subject, see Germania Bank *v.* Boutell, 27 L. R. A. 635.

In *Georgia R., Etc., Co.* v. *Love, Etc., Soc.*,[1] the depositor did not know how to write his name, and the bank was cognizant of this fact. A check was paid with his name forged thereon. The court held: "When a bank receives money on deposit from a person, *it must be certain when it pays it out, that it does so upon the depositor's order.* It cannot avoid liability by showing that it acted in good faith, and that it believed from inquiry of the person presenting the checks, that he was authorized to sign the name of the depositor to the same. Under the facts of this case, the signatures were forgeries and the bank is liable for the money paid out thereon."

In *Hardy* v. *Chesapeake Bank*,[2] the court, after stating the well-settled rule that the relation between banker and customer is that of debtor and creditor, and that the money received on deposit becomes the funds of the bank, said: "There is no question of trust, therefore, between the parties, but their relation is purely a legal one; and if the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank, *for it acts at its peril, and pays out its own funds, and not those of the depositor.* It is in view of this relation of the parties and of their rights and obligations that the principle *is universally maintained that banks and bankers are bound to know the signatures of their customers and that they pay checks purporting to be drawn by them at their peril.*"

In *Leavitt* v. *Stanton*,[3] it was held that the facts that the check was one of the printed checks used by the plaintiff bank; that part of it, to wit, the name of the defendant bank, was in the handwriting of one of the plaintiff's clerks; that it must have come from the check book; that the book had been kept upon the counter of the bank, an unusual place; that the cashier had sent a letter of advice to the bank upon

[1] 85 Ga. 293 (1890).
[2] 51 Md. 585; 53 Amer. Rep. 325 (1879).
[3] Lalor's Suppl. to Hill & D. (N. Y.) 413 (1844).

which the check was drawn enclosing the signature of the party; and that the party paid ¼ per cent. premium for two drafts of $3000 and $5000, were not sufficient evidence of negligence to charge the drawer bank on the forged draft.

And in *Mackintosh* v. *Elliot Natl. Bank*,[1] the bank paid three checks purporting to be signed by the plaintiff which had, however, been forged by the clerk. The forgery was committed on a blank form, taken from the depositor's check book which was lying about in his office during the day, and the *checks were stamped with the plaintiff's hand stamp.* The clerk was allowed to fill up checks and had been introduced by the plaintiff to the bank as a proper person to receive money on his checks. It was held, that these facts did not exempt the bank from liability for the loss. See, also, *Bank of Ireland* v. *Evans's Charities*.[2]

It is well settled that the relation of bank and banker does not partake of a fiduciary character. " . . . The banker is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it." The check must bear the drawer's signature; the handwriting must be that of the customer.[3]

The drawee is bound to know the signature of his drawer. Hence, it has been held that if the banker or drawee makes a payment or gives credit upon the strength of a forged signature, the loss must be his as between himself and the holder.[4]

The rule " that the banker is presumed to know the signature of his depositor, and that a loss arising from a forged signature must be borne by the bank," was first announced by Lord Mansfield, as long ago as 1762, in the leading case of *Price* v. *Neal*,[5] and has received the approval of the authorities since.[6] In 1825, Mr. Justice Story said of the rule: " It has

[1] 123 Mass. 393 (1877).
[2] 5 H. L. Cas. 410 (1855).
[3] Grant on Law of Bankers (Fifth Edition), 2.
[4] Morse on Banks and Banking, 762, and cases cited.
[5] 3 Burr, 1355.
[6] See numerous cases cited; 2 Morse on Banks and Banking, 763; 4 Harvard Law Review, 297.

never been departed from, and has always been deemed a satisfactory authority."[1]

The rule seems founded upon the bed-rock of principle, and made impregnable by every consideration of justice. Forgery, it has been often said, can confer no civil rights and create no civil liability. A forged deed is no deed.

The leading case of *Price* v. *Neal* forms the subject of an able and interesting article from the pen of Professor Ames.[2] The plaintiff was the drawee of a bill of exchange; the defendant was an endorsee for value in due course. The bill was paid on presentment, the drawee and holder being alike ignorant that the signature of the ostensible drawer was forged. Upon discovery of the forgery, the plaintiff sought to recover the money on the ground that it had been paid under a mistake. But the Court of King's Bench gave judgment for the defendant. "The rule established by *Price* v. *Neal*," says Professor Ames, "that a drawee pays (or accepts) at his peril a bill, on which the drawer's signature is forged, has been repeatedly recognized," in England, in the United States, in Scotland, and on the continent of Europe. The author, after a critical discussion of the authorities, reaches the conclusion that the doctrine is entirely sound and is to be supported on the theory that "equity will not interfere as between two persons having equal equities, but will let the loss lie where it has fallen." It would be a work of supererogation to attempt to add anything to the author's learned remarks, but of course there is an evident distinction between *Price* v. *Neal* and the case now under discussion. It is the difference between the position of a drawer and that of an endorsee. If the drawee in *Price* v. *Neal* had sued the apparent drawer, whose name had been forged, the analogy would be complete. It cannot be conceived that he would have been allowed to recover. And, as was said, in *Smith* v. *Mercer*,[3] a banker "is even more bound" to know a customer's handwriting than a drawee is bound to know a drawer's.

[1] See Levy *v.* Bank of U. S., 4 Dall. 234 (1800), the first case involving this question decided in this country.

[2] 4 Harvard Law Review, 297 (1891).

[3] 6 Taunt. 76 (1815).

Even Mr. Justice Williams in his dissenting opinion[1] recognizes the general rule here contended for, saying:

"When an account is opened at a bank by the deposit of money, the depositor leaves his genuine signature with the banker for his guidance and protection in the payment of checks. When checks are presented bearing this signature, they must not be refused; but if the signature is a forgery, no matter how skilfully it is done, or how difficult of detection, they must not be paid. The contract which the commercial law raises upon the deposit of money with a banker is that the deposit shall be paid out only to the depositor or his order. Payment upon a forged check, is therefore, no payment, and in no way affects the depositor."

It is submitted that the learned President of the Superior Court correctly laid down the law as to a bank's duty when he said:[2]

"A bank is bound to know the signature of its depositors, and if it pay out money on a forged check it cannot charge the depositor with the amount, but as against him must bear the loss."[3]

In what respect does the case at bar differ from any other forgery? The signature on the check was undoubtedly not the signature of the depositor or made by his authority. That it was very similar to, or even almost indistinguishable from, the plaintiff's real signature, cannot be allowed to alter the case; otherwise the bank could defend on the ground that the forgery was so clever, the likeness so striking, that, notwithstanding the utmost care and diligence on its part, it was impossible to detect the difference. To hold that a bank might ever pay a forged check, that is to say, a check which really did not bear the signature of the drawer, and charge it

[1] July 21, 1898, 40 Atl. 969.

[2] 3 Pa. Superior Court, 262 (1897).

[3] This language seems to have been adopted from Van Schaack on Bank Checks, 105. Van Schaack cites: Bank *v.* Bank, 3 N. Y. 230 (1848); La Borde *v.* Ass'n, 4 Rob. (La.) 190 (1843); Bank *v.* Bank, 46 N. Y. 77 (1862); Bank *v.* Bank, 30 Md. 11 (1868); Bernheimer *v.* Marshall, 2 Minn. 28 (1858); Mackintosh *v.* Bank, 125 Mass. 393 (1878); Bank *v.* Ricker, 71 Ill. 439 (1877); Bank *v.* Bank, 10 Vt. 141 (1838).

to his account, would be to introduce a startling principle into the law of banking. To state such a contention is to refute it. The bank's duty is an absolute one, not one involving ordinary (or extraordinary) care. In a word, it is a bank's business to know its depositors' signatures. When the depositor sues for his account, and shows that the money was actually deposited with the defendant, the burden is upon the defendant to prove that it has paid out the money to the plaintiff or upon his order. If the depositor has signed a check and negligently allowed it to be stolen, or has so filled it out that the amount can be changed without ready detection, the loss, of course, is the depositor's, because the order to pay was *his*. The plain distinction between this class of cases and the autograph stamp case is that in the former the signature is that of the depositor, —the order to pay is his; in the latter it is not.

Two vital and controlling facts seem to have been overlooked as well by counsel as by the courts. These are: (1) that *anyone could have obtained the depositor's signature and procured to be made therefrom a rubber stamp in imitation thereof;* and (2) that the likeness produced by any stamp is not, and of necessity cannot be, an exact facsimile of the real signature, so as to deceive either an expert or a novice exercising ordinary care.

As to the first point, it is admitted by the courts that the stamp was a "necessary and useful" thing; that it was not unlawful to have one made and in one's possession. How, then, can there be any legal liability from the misuse of this lawful, innocent, labor-saving device? Because it is used to deceive a third person? But anyone else could obtain such a stamp and use it for a similar purpose, and it behooves the bank, at its peril, to be on the lookout for such deceptions.

Again, to consider the second point, *it is impossible to make a stamp which will produce an impression that is indistinguishable from a pen-and-ink autograph.* Mr. Justice Williams' remarks to the contrary can only be regarded, with all deference, as resulting from a singular misapprehension of fact. The impression from rubber can never so simulate the clear-cut outlines of a pen as to seem, to clear eyes, a replica. Hun-

dreds of experts and thousands of laymen would testify to this fact. The writer has seen the impressions from many autograph stamps, but never one which could not be detected at a glance, even without comparison with the original signature.

A paying teller who accepts such a check must be guilty of gross negligence. The best proof of this, perhaps, is the circumstance that *this is not an accepted method of forgery.* The pen-and-ink imitations have been much more successful. The stamp forgery has never obtained criminal vogue, because so evidently likely to fail.

If it were possible to produce a stamp, the impression of which would defy discrimination from the original, or even casual expert inspection, the alert forger would long ago have exploited in many instances this ready means of victimizing the banks. It has not been done because it was not practical from the criminal standpoint.

It being undoubted that a bank is bound, at its peril, to know its depositors' signatures, it follows that it cannot defend on the ground of payment on a stamp-forged signature, whether the stamp was procured to be made by the depositor himself, or by a third person. The depositor is not chargeable with negligence because, first, he only does what anyone else can do, and second, because, if there is any additional peril created, it is one against which the bank is bound to guard, and no one need presume that another will be negligent.

It is to be deplored that the law on this very clear point should be unsettled by the dissent of two out of the five learned justices sitting when the case was argued in the Supreme Court. And it is also to be regretted that doubt has been thrown, by unnecessary dicta, upon the true rule governing such cases.

To recapitulate, my contentions are briefly these:

1. A bank is bound, at its peril, to know the signatures of its customers and to pay only checks properly signed.

2. A bank cannot, in any event, defend on the ground of a payment on a stamp-forged check any more than on a payment on any other forgery, because,

(a) The depositor's possession of such a stamp is entirely legal and is no evidence of negligence.

(b) Anyone else could procure a similar stamp.

(c) Such a stamp cannot be made so as to deceive the initiated or the ordinarily prudent.

3. The conclusion reached in *Robb* v. *Pennsylvania Co.* is correct, so far as allowing a recovery is concerned, but binding instructions should have been given for the plaintiff, irrespective of the plaintiff's careful keeping of the stamp.

Ira Jewell Williams.

Philadelphia, September, 1898.