

PHILIPPINE NATIONAL BANK, PLAINTIFF AND APPELLEE, VS. THE NATIONAL CITY BANK OF NEW YORK, AND MOTOR SERVICE COMPANY, INC., DEFENDANTS. MOTOR SERVICE COMPANY, INC., APPELLANT.

G. R. No. 43596. October 31, 1936

Ponente: RECTO, J.

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RECTO, J.:

This case was submitted for decision to the court below on the following stipulation of facts:

- That plaintiff is a banking corporation organized and existing under and by virtue of a special act of the Philippine Legislature, with office as principal place of business at the Masonic Temple Bldg., Escolta, Manila, P. I.; that the defendant National City Bank of New York is a foreign banking corporation with a branch office duly authorized and licensed to carry and engage in banking business in the Philippine Islands, with branch office and place of business in the National City Bank Bldg., City of Manila, P. I., and that the defendant Motor Service Company, Inc., is a corporation organized and existing under and by virtue of the general corporation law of the Philippine Islands, with office and principal place of business at 408 Rizal Avenue, City of Manila, P. I., engaged in the purchase and sale of automobile spare parts and accessories.
- That on April 7 and 9, 1933, an unknown person or persons negotiated with defendant Motor Service Company, Inc., the checks marked as Exhibits A and A-1, respectively, which are made parts of the stipulation, in payment for automobile tires purchased from said defendant's stores, purporting to have been issued by the 'Pangasinan Transportation Co., Inc. by J. L. Klar, Manager and Treasurer', against the Philippine National Bank and in favor of the International Auto Repair Shop, for P144.50 and P215.75; and said checks were indorsed by said unknown persons in the manner indicated at the back thereof, the Motor Service Co., Inc., believing at the time that the signatures of J. L. Klar, Manager and Treasurer of the Pangasinan Transportation Co., Inc., on both checks were genuine.
- The checks Exhibits A and A-1 were then indorsed for deposit by the defendant Motor Service Company, Inc, at the National City Bank of New York and the former was accordingly credited with the amounts thereof, or P144.50 and P215.75.
- On April 8 and 10, 1933, the said checks were cleared at the clearing house and the Philippine National Bank credited the National City Bank of New York for the amounts thereof, believing at the time that the signatures of the drawer were genuine, that the payee is an existing entity and the endorsements, at the back thereof regular and genuine.
- The Philippine National Bank then found out that the purported signatures of J. L. Klar, as Manager and Treasurer of the Pangasinan Transportation Company, Inc., in said Exhibits A and A-1 were forged when so informed by the said Company, and it accordingly demanded from the defendants the reimbursement of the amounts for which it credited the National City Bank of New York at the clearing house and for which the latter credited the Motor Service Co., but the defendants refused, and continue to refuse, to make such reimbursements.

- The Pangasinan Transportation Co., Inc., objected to have the proceeds of said check deducted from their deposit.
- Exhibits B, C, D, E, F, and G, which were introduced at the trial in the municipal court of Manila and forming part of the record of the present case, are admitted by the parties as genuine and are made part of this stipulation as well as Exhibit H hereto attached and made a part hereof."

Upon plaintiff's motion, the case was dismissed before trial as to the defendant National City Bank of New York. A decision was thereafter rendered giving plaintiff judgment for the total amount of P360.25, with interest and costs. From this decision the instant appeal was taken.

Before us is the preliminary question of whether the original appeal taken by the plaintiff from the decision of the municipal court of Manila where this case originated, became perfected because of plaintiff's failure to attach to the record within 15 days from receipt of notice of said decision, the certificate of appeal bond required by section 76 of the Code of Civil Procedure. It is not disputed that both the appeal docket fee and the appeal cash bond were paid and deposited within the prescribed time. The issue is whether the mere failure to file the official receipt showing that such deposit was made within the said period is a sufficient ground to dismiss plaintiff's appeal. This question was settled by our decision in the case of *Blanco vs. Bernabe and Lawyers Cooperative Publishing Co.* (page 124, ante), and needs no further consideration. No error was committed in allowing said appeal.

We now pass on to consider and determine the main question presented by this appeal, namely, whether the appellee has the right to recover from the appellant, under the circumstances of this case, the value of the checks on which the signatures of the drawer were forged. The appellant maintains that the question should be answered in the negative and in support of its contention appellant advanced various reasons presently to be examined carefully.

I. It is contended, first of all, that the payment of the checks in question made by the drawee bank constitutes an "acceptance", and, consequently, the case should be governed by the provisions of section 62 of the Negotiable Instruments Law, which says:

"SEC. 62. Liability of acceptor.—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

"(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

"(b) The existence of the payee and his then capacity to indorse."

This contention is without merit. A check is a bill of exchange payable on demand and only the rules governing bills of exchange payable on demand are applicable to it, according to section 185 of the Negotiable Instruments Law. In view of the fact that acceptance is a step unnecessary in so far as bills of exchange payable on demand are concerned (sec. 143), it follows that the provisions relative to "acceptance" are without application to checks. Acceptance implies, in effect, subsequent negotiation of the instrument, which is not true in case of the payment of a check because from the moment a check is paid it is withdrawn from circulation. The warranty established by section 62, is in favor of holders of the instrument after its acceptance. When the drawee bank cashes or pays a check, the cycle of negotiation is terminated, and it is illogical thereafter to speak of subsequent holders who can invoke the warranty provided in section 62 against the drawee. Moreover, according to section 191, "acceptance" means "an acceptance completed by delivery or notification" and this concept is entirely incompatible with payment, because when payment is made the check is retained by the bank, and there is no such thing as delivery or notification to the party receiving the payment. Checks are not to be accepted, but presented at once for payment. (1 *Bouvier's Law Dictionary*, 476.) There can be no such thing as "acceptance" in the ordinary sense of the term. A check being payable immediately and on demand, the bank can fulfill its duty to the depositor only by

paying the amount demanded. The holder has no right to demand from the bank anything but payment of the check, and the bank has no right, as against the drawer, to do anything but pay it. (5 R. C. L., p. 516, par. 38.) A check is not an instrument which in the ordinary course of business calls for acceptance. The holder can never claim acceptance as his legal right. He can present for payment, and only for payment. (1 Morse on Banks and Banking, 6th ed., pp. 898, 899.)

There is, however, nothing in the law or in business practice against the presentation of checks for acceptance, before they are paid, in which case we have a "certification" equivalent to "acceptance" according to section 187, which provides that "where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance", and it is then that the warranty under section 62 exists. This certification or acceptance consists in the signification by the drawee of his assent to the order of the drawer, which must not express that the drawee will perform his promise by any other means than the payment of money. (Sec. 132.) When the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon (sec. 188), and then the check operates as an assignment of a part of the funds to the credit of the drawer with the bank. (Sec. 189.) There is nothing in the nature of the check which intrinsically precludes its acceptance, in like manner and with like effect as a bill of exchange or draft may be accepted. The bank may accept if it chooses; and it is frequently induced by convenience, by the exigencies of business, or by the desire to oblige customers, voluntarily to incur the obligation. The act by which the bank places itself under obligation to pay to the holder the sum called for by a check must be the expressed promise or undertaking of the bank signifying its intent to assume the obligation, or some act from which the law will imperatively imply such valid promise or undertaking. The most ordinary form which such an act assumes is the acceptance by the bank of the check, or, as it is perhaps more often called, the certifying of the check. (1 Morse on Banks and Banking, pp. 898, 899; 5 R. C. L., p. 520.)

No doubt a bank may by an unequivocal promise in writing make itself liable in any event to pay the check upon demand, but this is not an "acceptance" of the check in the true sense of that term. Although a check does not call for acceptance, and the holder can present it only for payment, the certification of checks is a means in constant and extensive use in the business of banking, and its effects and consequences are regulated by the law merchant. Checks drawn upon banks or bankers, thus marked and certified, enter largely into the commercial and financial transactions of the country; they pass from hand to hand, in the payment of debts, the purchase of property, and in the transfer of balances from one house and one bank to another. In the great commercial centers, they make up no inconsiderable portion of the circulation, and thus perform a useful, valuable, and an almost indispensable office. The purpose of procuring a check to be certified is to impart strength and credit to the paper by obtaining an acknowledgment from the certifying bank that the drawer has funds therein sufficient to cover the check, and securing the engagement of the bank that the check will be paid upon presentation. A certified check has a distinctive character as a species of commercial paper, and performs important functions in banking and commercial business. When a check is certified, it ceases to possess the character, or to perform the functions, of a check, and represents so much money on deposit, payable to the holder on demand. The check becomes a basis of credit—an easy mode of passing money from hand to hand, and answers the purposes of money. (5 R. C. L., pp. 516, 517.)

All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual. By the law merchant, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties is to enable the holder to use it as money. The transferee takes

it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption, and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and a delusion. A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in a certified check account, and, when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process. (*Merchants' Bank vs. States Bank*, 10 Wall., 604, at p. 647; 19 Law. ed., 1008, 1019.)

Ordinarily the acceptance or certification of a check is performed and evidenced by some word or mark, usually the words "good", "certified" or "accepted" written upon the check by the banker or bank officer. (1 Morse, Banks and Banking, 915; 1 Bouvier's Law Dictionary, 476.) The bank virtually says, that check is good; we have the money of the drawer here ready to pay it. We will pay it now if you will receive it. The holder says, No, I will not take the money; you may certify the check and retain the money for me until this check is presented. The law will not permit a check, when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder without discharging the drawer. The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check subject to its future presentment at any time within the statute of limitations. (1 Morse on Banks and Banking, p. 920.)

The theory of the appellant and of the decisions on which it relies to support its view is vitiated by the fact that they take the word "acceptance" in its ordinary meaning and not in the technical sense in which it is used in the Negotiable Instruments Law. Appellant says that when payment is made, such payment amounts to an acceptance, because he who pays accepts. This is true in common parlance, but it is not "acceptance" in legal contemplation. The word "acceptance" has a peculiar meaning in the Negotiable Instruments Law, and, as has been above stated, in the instant case there was payment but no acceptance, or what is equivalent to acceptance, certification.

With few exceptions, the weight of authority is to the effect that "payment" neither includes nor implies "acceptance".

In *National Bank vs. First National Bank* ([1910], 141 Mo. App., 719; 125 S. W., 513), the court asks, if a mere promise to pay a check is binding on a bank, why should not the absolute payment of the check have the same effect? In response, it is submitted that the two things,—that is acceptance and payment,—are entirely different. If the drawee accepts the paper after seeing it, and then permits it to go into circulation as genuine, on all the principles of estoppel, he ought to be prevented from setting up forgery to defeat liability to one who has taken the paper on the faith of the acceptance, or certification. On the other hand, mere payment of the paper at the termination of its course does not act as an estoppel. The attempt to state a general rule covering both acceptance and payment is responsible for a large part of the conflicting arguments which have been advanced by the courts with respect to the rule. (Annotation at 12 A. L. R., 1090 [1921].)

In *First National Bank vs. Brute National Bank* ([1917], 12 A. L. R., 1079, 1085), the court said:

"We are of the opinion that 'payment is not acceptance'. Acceptance, as defined by section 131, cannot be confounded with payment. * * *

"Acceptance, certification, or payment of a check, by the express language of the statute, discharges the liability only of the persons named in the statute, to wit, the drawer and all indorsers, and the contract of indorsement by the negotiator of the check is discharged by acceptance, certification, or payment. But clearly

the statute does not say that the contract of warranty of the negotiator, created by section 65, is discharged by these acts."

The rule supported by the majority of the cases (14 A. L. R., 764), that payment of a check on a forged or unauthorized indorsement of the payee's name, and charging the same to the drawer's account, do not amount to an acceptance so as to make the bank liable to the payee, is supported by all of the recent cases in which the question is considered. (Cases cited, Annotation at 69 A. L. R., 1076, 1077, [1930].)

Merely stamping a check "Paid" upon its payment on a forged or unauthorized indorsement is not an acceptance thereof so as to render the drawee bank liable to the true payee. (Anderson vs. Tacoma National Bank [1928], 146 Wash., 520; 264 Pac, 8 ; Annotation at 69 A. L. R., 1077 [1930].)

In State Bank of Chicago vs. Mid-City Trust & Savings Bank (12 A. L. R., 989, 991, 992), the court said:

"The defendant in error contends that the payment of the check shows acceptance by the bank, urging that there can be no more definite act by the bank upon which a check has been drawn, showing acceptance, than the payment of the check. Section 184 of the Negotiable Instruments Act (sec. 202) provides that the provisions of the act applicable to bills of exchange apply to a check, and section 131 (sec. 149), that the acceptance of a bill must be in writing signed by the drawee. Payment is the final act which extinguishes a bill. Acceptance is a promise to, pay in the future and continues the life of the bill. It was held in First National Bank vs. Whitman (94 U. S., 343; 24 L. ed., 229), that payment of a check upon a forged indorsement did not operate as an acceptance in favor of the true owner. The contrary was held in Pickle vs. Muse (Fickle vs. People's Nat. Bank, 88 Tenn., 380; 7 L. R. A., 93; 17 Am. St. Rep., 900; 12 S. W., 919), and Seventh National Bank vs. Cook.(73 Pa., 483; 13 Am. Rep., 751) at a time when the Negotiable Instruments Act was not in force in those states. The opinion of the Supreme Court of the United States seems more logical, and the provisions of the Negotiable Instruments Act now require an acceptance to be in writing. Under this statute the payment of a check on a forged indorsement, stamping it 'paid' and charging it to the account of the drawer, do not constitute an acceptance of the check or create a liability of the bank to the true holder or the payee. (Elyria Sav. & Bkg. Co. vs. Walker Bin Co., 92 Ohio St., 406; L. R. A., 1916D, 433; 111 N. E., 147; Ann. Cas. 1917D, 1055; Baltimore & O. R. Co. vs. First National Bank, 102 Va., 753; 47 S. E., 837; State Bank of Chicago vs. Mid-City Trust & Savings Bank, 12 A. L. R., pp. 989, 991, 992.)"

Before drawee's acceptance of check there is no privity of contract between drawee and payee. Drawee's payment of check on unauthorized indorsement does not constitute "acceptance" of check. (Sinclair Refining Co. vs. Moultrie Banking Co., 165 S. E., 860 [1932].)

The great weight of authority is to the effect that the payment of a check upon a forged or unauthorized indorsement and the stamping of it "paid" does not constitute an acceptance. (Dakota Radio Apparatus Co. vs. First Nat. Bank of Rapid City, 244 N. W., 351, 352 [1932].)

Payment of the check, cashing it on presentment is not acceptance. (South Boston Trust Co. vs. Levin, 249 Mass., 45, 48, 49; 143 N. E., 816; Blocker, Shepard Co. vs. Granite Trust Company, 187 Me., 53, 54 [1933].)

In Rauch vs. Bankers National Bank of Chicago (143 111. App., 625, 636, 637 [1908]), the language of the decision was as follows:

"* * * The plaintiffs say that this acceptance was made by the very unauthorized payments of which they complain. This suggestion does not seem forceful to us. It is the contention which was made before the Supreme Court of the United States in First National Bank vs. Whitman (94 U. S., 343), and repudiated by that court. The language of the opinion in that case is so apt in the present case that we quote it:

" It is further contended that such an acceptance of a check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based

upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end to the claim against it. The bank supposed that it had paid the check, but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. * * * We cannot recognize the argument that payment of the amount of the check or sight draft under such circumstances amounts to an acceptance creating a privity of contract with the real owner.

"It is difficult to construe a payment as an acceptance under any circumstances. * * * A banker or individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent."

And in *Wharf vs. Seattle National Bank* (24 Pac. [2d]), 120, 123 [1933]):

"It is the rule that payment of a check on unauthorized or forged indorsement does not operate as an acceptance of the check so as to authorize an action by the real owner to recover its amount from the drawee bank. (Michie on Banks and Banking, vol. 5, sec. 278, p. 521.) A full list of the authorities supporting the rule will be found in a footnote to the foregoing citation." (See also, *Federal Land Bank vs. Collins*, 156 Miss., 893; 127 So., 570; 69 A. L. R., 1068.)

In a very recent case, *Federal Land Bank vs. Collins* (69 A. L. R., 1068, 1072-1074), this question was discussed at considerable length. The court said:

"In the light of the first of these statutes, counsel for appellant is forced to stand upon the narrow ledge that the payment of the check by the two banks will constitute an acceptance. The drawee bank simply marked it 'paid' and did not write anything else except the date. The bank first paying the check, the Commercial National Bank and Trust Company, simply wrote its name as indorser and passed the check on to the drawee bank; does this constitute an acceptance? The precise question has not been presented to this court for decision. Without reference to authorities in other jurisdictions it would appear that the drawee bank had never written its name across the paper and therefore, under the strict terms of the statute, could not be bound as an acceptor; in the second place, it does not appear to us to be illogical and unsound to say that the payment of a check by the drawee, and the stamping of it 'paid', is equivalent to the same thing as the acceptance of a check; however, there is a variety of opinions in the various jurisdictions on this question. Counsel correctly states that the theory upon which the numerous courts hold that the payment of a check creates privity between the holder of the check and the drawee bank is tantamount to a pro tanto assignment of that part of the funds. It is most easily understood how the payment of the check, when not authorized to be done by the drawee bank, might under such circumstances create liability on the part of the drawee to the drawer. Counsel cites the case of *Pickle vs. Muse* (88 Tenn., 380; 12 S. W., 919; 7 L. R. A., 93; 17 Am. St. Rep., 900), wherein Judge Lurton held that the acceptance of a check was necessary in order to give the holder thereof a right of action thereon against the bank, and further held in a case similar to this, so far as this question is concerned, that the acceptance of a check so as to give a right of action to the payee is inferred from the retention of the check by the bank and its subsequent charge of the amount to the drawer, although it was presented by, and payment made to, an unauthorized person. Judge Lurton cited the case of *National Bank of the Republic vs. Millard* (10 Wall., 152; 19 L. ed., 897), wherein the Supreme Court of the United States, not having such a case before it, threw out the suggestion that, if it was shown that a bank had charged the check on its books against the drawer and made settlement with the drawee that the holder could recover on account of money had and received, invoking the rule of justice and fairness, it might be said there was an implied promise to the holder to pay it on demand. (See *National Bank of the Republic vs. Millard*, 10 Wall. [77 U. S.], 152; 19 L. ed., 899.) The Tennessee court then argued that it would be inequitable and unconscionable for the owner and payee of the check to be limited to an action against an insolvent drawer and might thereby lose the debt. They recognized the legal principle that there is no privity between the drawer bank and the holder, or payee, of the check, and proceeded to hold that no particular kind of writing was necessary to constitute an acceptance and that it

became a question of fact, and the bank became liable when it stamped it 'paid' and charged it to the account of the drawer, and cites, in support of its opinion, *Seventh National Bank vs. Cook* (73 Pa., 483; 13 Am. Rep., 751); *Saylor vs. Bushong* (100 Pa., 23; 45 Am. Rep., 353); and *Dodge vs. Bank* (20 Ohio St., 234; 5 Am. Rep., 648).

"This decision was in 1890, prior to the enactment of the Negotiable Instruments Law by the State of Tennessee. However, in this case Judge Snodgrass points out that the *Millard* case, *supra*, was dicta. The *Dodge* case, from the Ohio court, held exactly as the Tennessee court, but subsequently in the case of *Elyria Bank vs. Walker Bin Co.* (92 Ohio St., 406; 111 N. E., 147; L. R. A. 1916D, 433; Ann. Cas. 1917D, 1055), the court held to the contrary, called attention to the fact that the *Dodge* case was no longer the law, and proceeded to announce that, whatever might have been the law before the passage of the Negotiable Instruments Act in that state, it was no longer the law; that the rule announced in the *Dodge* case had been 'discarded'. The court, in the latter case, expressed its doubts that the courts of Tennessee and Pennsylvania would adhere to the rule announced in the *Pickle* case, quoted *supra*, in the face of the Negotiable Instruments Law. Subsequent to the *Millard* case, the Supreme Court of the United States, in the case of *First National Bank of Washington vs. Whitman* (94 U. S., 343, 347; 24 L. ed., 229), where the bank, without any knowledge that the indorsement of the payee was unauthorized, paid the check, and it was contended that by the payment the privity of contract existing between the drawer and drawee was imparted to the payee, said:

" 'It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check; but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer; and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before.

" 'We cannot recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent.'

"Counsel for appellant cite other cases holding that the stamping of the check 'paid' and the charging of the amount thereof to the drawer constituted an acceptance, but we are of opinion that none of these cases cited hold that it is in compliance with the Negotiable Instruments Act; paying the check and stamping same is not the equivalent of accepting the check in writing signed by the drawee. The cases holding that payment as indicated above constituted acceptance were rendered prior to the adoption of the Negotiable Instruments Act in the particular state, and these decisions are divided into two classes: the one holding that the check delivered by the drawer to the holder and presented to the bank or drawee constitutes an assignment pro tanto; the other holding that the payment of the check and the charging of same to the drawee although paid to an unauthorized person creates privity of contract between the holder and the drawee bank.

"We have already seen that our own court has repudiated the assignment pro tanto theory, and since the adoption of the Negotiable Instruments Act by this state we are compelled to say that payment of a check is not equivalent to accepting a check in writing and signing the name of the acceptor thereon.. Payment of the check and the charging of same to the drawer does not constitute an acceptance. Payment of the check is the end of

the voyage; acceptance of the check is to fuel the vessel and strengthen it for continued operation on the commercial sea. What we have said applies to the holder and not to the drawer of the check. On this question we conclude that the general rule is that an action cannot be maintained by a payee of the check against the bank on which it is drawn, unless the check has been certified or accepted by the bank, in compliance with the statute, even though at the time the check is that an action cannot be maintained by a payee of the drawer of the check out of which the check is legally payable; and that the payment of the check by the bank on which it is drawn, even though paid on the unauthorized indorsement of the name of the holder (without notice of the defect by the bank), does not constitute a certification thereof, neither is it an acceptance thereof; and without acceptance or certification, as provided by statute, there is no privity of contract between the drawee bank and the payee, or holder of the check. Neither is there an assignment pro tanto. of the funds where the check is not drawn on a particular fund, or does not show on its face that it is an assignment of a particular fund. The above rule as stated seems to have been the rule in the majority of the states even before the passage of the uniform Negotiable Instruments Act in the several states."

The decision in the case of *First National Bank vs. Bank of Cottage Grove* (59 Or., 388), which appellant cites in its brief (pp. 12, 13) has been expressly overruled by the Supreme Court of Massachusetts in *South Boston Trust Co. vs. Levin* (143 N. E., 816, 817), in the following language:

"In *First National Bank vs. Bank of Cottage Grove* (59 Or., 388; 117 Pac., 293, 296, at page 396), it was said: 'The payment of a bill or check by the drawee amounts to more than an acceptance. The rule, holding that such a payment has all the efficacy of an acceptance, is founded upon the principle that the greater includes the less. We are unable to agree with this statement as there is no similarity between acceptance and payment; payment discharges the instrument, and no one else is expected to advance anything on the faith of it; acceptance contemplates further circulation, induced by the fact of acceptance. The rule that the acceptor makes certain admissions which will inure to the benefit of subsequent holders, has no applicability to payment of the instrument where subsequent holders can never exist.'"

II. The old doctrine that a bank was bound to know its correspondent's signature and that a drawee could not recover money paid upon a forgery of the drawer's name, because, it was said, the drawee was negligent not to know the forgery and it must bear the consequence of its negligence, is fast fading into the misty past, where it belongs. It was founded in misconception of the fundamental principles of law and common sense. (2 Morse, *Banks and Banking*, p. 1031.)

Some of the cases carried the rule to its furthest limit and held that under no circumstances (except, of course, where the purchaser of the bill has participated in the fraud upon the drawee) would the drawee be allowed to recover bank money paid under a mistake of fact upon a bill of exchange to which the name of the drawer had been forged. This doctrine has been freely criticized by eminent authorities, as a rule too favorable to the holder, not the most fair, nor best calculated to effectuate justice between the drawee and the drawer. (5 R. C. L., p. 556.)

The old rule which was originally announced by Lord Mansfield in the leading case of *Price vs. Neal* (3 Burr., 1354), elicited the following comment from Justice Holmes, then Chief Justice of the Supreme Court of Massachusetts, in the case of *Dedham National Bank vs. Everett National Bank* (177 Mass., 392). "Probably the rule was adopted from an impression of convenience rather than for any more academic reason; or perhaps we may say that Lord Mansfield took the case out of the doctrine as to payments under a mistake of fact by the assumption that a holder who simply presents negotiable paper for payment makes no representation as to the signature, and that the drawee pays at his peril."

Such was the reaction that followed Lord Mansfield's rule which Justice Story of the United States Supreme Court adopted in the case of *Bank of United States vs. Georgia* (10 Wheat., 333), that in *B. B. Ford & Co. vs. People's Bank of Orangeburg* (74 S. C., 180), it was held that "an unrestricted indorsement of a draft and presentation to

the drawee is a representation that the signature of the drawer is genuine", and in *Lisbon First National Bank vs. Wyndmere Bank* (15 N. D., 299), it was also held that "the drawee of a forged check who has paid the same without detecting the forgery, may upon discovery of the forgery, recover the money paid from the party who received the money, even though the latter was a good faith holder, provided the latter has not been misled or prejudiced by the drawee's failure to detect the forgery."

Daniel, in his treatise on Negotiable Instruments, has the following to say:

"In all the cases* which hold the drawee absolutely estopped by acceptance or payment from denying genuineness of the drawer's name, the loss is thrown upon him on the ground of negligence on his part in accepting or paying, until he has ascertained the bill to be genuine. But the holder has preceded him in negligence, by himself not ascertaining the true character of the paper before he received it, or presented it for acceptance or payment. And although, as a general rule, the drawee is more likely to know the drawer's handwriting than a stranger is, if he is in fact deceived as to its genuineness, we do not perceive that he should suffer more deeply by a mistake than a stranger, who, without knowing the handwriting, has taken the paper without previously ascertaining its genuineness. And the mistake of the drawee should always be allowed to be corrected, unless the holder, acting upon faith and confidence induced by his honoring the draft, would be placed in a worse position by according such privilege to him. This view has been applied in a well considered case, and is intimated in another; and is forcibly presented by Mr. Chitty, who says it is going a great way to charge the acceptor with knowledge of, his correspondent's handwriting, 'unless some bona fide holder has purchased the paper on the faith of such an act Negligence in making payment under a mistake of fact is not now deemed a bar to recovery of it, and we do not see why any exception should be made to the principle, which would apply as well to release an obligation not consummated by payment.'" (Vol. 2, 6th edition, pp. 1537-1539.)

III. But now the rule is perfectly well settled that in determining the relative rights of a drawee who, under a mistake of fact, has paid, and a holder who has received such payment, upon a check to which the name of the drawer has been forged, it is only fair to consider the question of diligence or negligence of the parties in respect thereto. (*Woods and Malone vs. Colony Bank* [1902], 56 L. R. A., 929, 932.) The responsibility of the drawee who pays a forged check, for the genuineness of the drawer's signature, is absolute only in favor of one who has not, by his own fault or negligence, contributed to the success of the fraud or to mislead the drawee. (*National Bank of America vs. Bangs*, 106 Mass., 441; 3 Am. Rep., 349; *Woods and Malone vs. Colony Bank* supra; *De Feriet vs. Bank of America*, 23 La. Ann., 310; *B. B. Ford & Co. vs. People's Bank of Orangeburg*, 74 S. C., 180; 10 L. R. A. [N. S.], 63.) If it appears that the one to whom payment was made was not an innocent sufferer, but was guilty of negligence in not doing something, which plain duty demanded, and which, if it had been done, would have avoided entailing loss on any one, he is not entitled to retain the moneys paid through a mistake on the part of the drawee bank. (*First Nat. Bank of Danvers vs. First Nat. Bank of Salem*, 151 Mass., 280; 24 N. E., 44; 21 A. S. R., 450; *First Nat. Bank of Orleans vs. State Bank of Alma*, 22 Neb., 769; 36 N. W., 289; 3 A. S. R., 294; *American Exp. Co. vs. State Nat. Bank*, 27 Okla., 824; 113-Pac., 711; 33 L. R. A. [N. S.], 188; *B. B. Ford & Co. vs. People's Bank of Orangeburg*, 74 S. C., 180; 54 S. E., 204; 114 A. S. R., 986; 7 Ann. Cas., 744; 10 L. R. A. [N. S.], 63; *People's Bank vs. Franklin Bank*, 88 Tenn., 299; 12 S. W., 716; 17 A. S. R., 884; 6 L. R. A., 724; *Canadian Bank of Commerce vs. BinzsT ham*, 30 Wash., 484; 71 Pac., 43; 60 L. R. A., 955.) In other words, to entitle the holder of a forged check to retain the money obtained thereon, he must be able to show that the whole responsibility of determining the validity of the signature was upon the drawee, and that the negligence of such drawee was not lessened by any failure of any precaution which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had the right to believe he had taken. (*Ellis vs. Ohio Life Insurance & Trust Co.*, 4 Ohio St., 628; *Rouvant vs. Bank*, 63 Tex., 610; *Bank vs. Ricker*, 71 111., 429; *First National Bank of Danvers vs. First Nat. Bank of Salem*, 24 N. E., 44, 45; *B. B. Ford & Co. vs. People's Bank of Orangeburg*,

supra.) The recovery is permitted in such case, because, although the drawee was constructively negligent in failing to detect the forgery, yet if the purchaser had performed his duty, the forgery would in all probability have been detected and the fraud defeated. (First National Bank of Lisbon vs. Bank of Wyndmere, 15 N. D., 209; 10 L. R. A. [N. S.], 49.) In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud. (National Bank of America vs. Bangs, supra; First National Bank vs. Indiana National Bank, 30 N. E., 808-810; Woods and Malone vs. Colony Bank, supra; First National Bank of Danvers vs. First Nat. Bank of Salem, 151 Mass., 280.) Where a loss, which must be borne by one of two parties alike innocent of forgery, can be traced to the neglect or fault of either, it is reasonable that it would be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded. (Gloucester Bank vs. Salem Bank, 17 Mass., 33; First Nat. Bank of Danvers vs. First National Bank of Salem, supra; B. B. Ford & Co. vs. People's Bank of Orangeburg, supra.) Again if the indorser is guilty of negligence in receiving and paying the check or draft, or has reason to believe that the instrument is not genuine, but fails to inform the drawee of his suspicions the indorser according to the reasoning of some courts will be held liable to the drawee upon his implied warranty that the instrument is genuine. (B. B. Ford & Co. vs. People's Bank of Orangeburg, supra; Newberry Sav. Bank vs. Bank of Columbia, 93 S. C., 294; 38 L. R. A. [N. S.], 1200.) Most of the courts now agree that one who purchases a check or draft is bound to satisfy himself that the paper is genuine; and that by indorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he has performed his duty, the drawee, who has, without actual negligence on his part, paid the forged demand, may recover the money paid from such negligent purchaser. (Lisbon First National Bank vs. Wyndmere Bank, supra.) Of course, the drawee must, in order to recover back the holder, show that he himself was free from fault. (See also 5 R. C. L., pp. 556-558.)

So, if a collecting bank is alone culpable, and, on account of its negligence only, the loss has occurred, the drawee may recover the amount it paid on the forged draft or check. (Security Commercial & Sav. Bank vs. Southern Trust & C. Bank [1925], 74 Cal. App., 734; 241 Pac, 945.)

But we are aware of no case in which the principle that the drawee is bound to know the signature of the drawer of a bill or check which he undertakes to pay has been held to be decisive in favor of a payee of a forged bill or check to which he has himself given credit by his indorsement. (Secalso, Mckleroy vs. Bank, 14 La. Ann., 458; Canal Bank vs. Bank of Albany, 1 Hill., 287; Rouvant vs. Bank, supra; First Nat. Bank vs. Indiana National Bank, 30 N. E., 808-810.)

In First Nat. Bank vs. United States National Bank ([1921], 100 Or., 264; 14 A. L. R., 479; 197 Pac., 547), the court declared: "A holder cannot profit by a mistake which his negligent disregard of duty has contributed to induce the drawee to commit. * * * The holder must refund, if by his negligence he has contributed to the consummation of the mistake on the part of the drawee by misleading him. * * * If the only fault attributable to the drawee is the constructive fault which the law raises from the bald fact that he has failed to detect the forgery, and if he is not chargeable with actual fault in addition to such constructive fault, then he is not precluded from recovery from a holder whose conduct has been such as to mislead the drawee or induce him to pay the check or bill of exchange without the usual security against fraud. The holder must refund to a drawee who is not guilty of actual fault if the holder was negligent in not making due inquiry concerning the validity of the check before he took it, and if the drawee can be said to have been excused from making inquiry before taking the check because of having had a right to presume that the holder had made such inquiry."

The rule that one who first negotiates forged paper without taking some precaution to learn whether or not it is

genuine should not be allowed to retain the proceeds of the draft or check from the drawee, whose sole fault was that he did not discover the forgery before he paid the draft or check, has been followed by the later cases. (Security Commercial & Savings Bank vs. Southern Trust & C. Bank [1925], 74 Cal. App., 734; 241 Pac., 945; Huteheson Hardware Co. vs. Planters State Bank [1921], 26 Ga. App., 321; 105 S. E., 854; [Annotation at 71 A. L. R., 337].)

Where a bank, without inquiry or identification of the person presenting a forged check, purchases it, indorses it generally, and presents it to the drawee bank, which pays it, the latter may recover if its only negligence was its mistake in having failed to detect the forgery, since its mistake did not mislead the purchaser or bring about a change in position. (Security Commercial & Savings Bank vs. Southern Trust & C. Bank [1925], 74 Cal. App., 734; 241 Pac., 945.)

Also, a drawee bank could recover from another bank the portion of the proceeds of a forged check cashed by the latter and deposited by the forger in the second bank and never withdrawn, upon the discovery of the forgery three months later, after the drawee had paid the check and returned the voucher to the purported drawer, where the purchasing bank was negligent in taking the check, and was not injured by the drawee's negligence in discovering and reporting the forgery as to the amount left on deposit, since it was not a purchaser for value. (First State Bank & T. Co. vs. First Nat. Bank [1924], 314 111., 269; 145 N. E., 382.)

Similarly, it has been held that the drawee of a check could recover the amount paid on the check, after discovery of the forgery, from another bank, which put the check into circulation by cashing it for the one who had forged the signature of both drawer and payee, without making any inquiry as to who he was, although he was a stranger, after which the check reached, and was paid by, the drawee, after going through the hands of several intermediate indorsees. (71 A. L. R., p. 340.)

In First National Bank vs. Brule National Bank ([1917], 12 A. L. R., 1079,1085), the following statement was made:

"We are clearly of opinion, therefore, that the warranty of genuineness, arising upon the act of the Brule National Bank in putting the check in circulation, was not discharged by payment of the check by the drawee (First National Bank), nor was the Brule National Bank deceived or misled to its prejudice by such payment. The Brule National Bank by its indorsement and delivery warranted its own identification of Host and the genuineness of his signature. The indorsement of the check by the Brule National Bank was such as to assign the title to the check to its assignee, the Whitbeck National Bank, and the amount was credited to the indorser. The check bore no indication that it was deposited for collection, and was not in any manner restricted so as to constitute the indorsee the agent of the indorser, nor did it prohibit further negotiation of the instrument, nor did it appear to be in trust for, or to the use of, any other person, nor was it conditional. Certainly the Pukwana Bank was justified in relying upon the warrant of genuineness, which implied the full identification of Kost, and his signature by the defendant bank. This view of the statute is in accord with the decisions of many courts. (First National Bank vs. State Bank, 22 Neb., 769; 3 Am. St. Rep., 294; 36 N. W., 289; First National Bank vs. First National Bank, 151 Mass., 280; 21 Am. St. Rep., 450; 24 N. E., 44; People's Bank vs. Franklin Bank, 88 Tenn., 299; 6 L. R. A., 727; 17 Am. St. Rep., 884; 12 S. W., 716.)"

The appellant leans heavily on the case of Fidelity & Co. vs. Planenscheck (71 A. L. R., 331), decided in 1929. We have carefully examined this decision and we do not feel justified in accepting its conclusions. It is but a restatement of the long abandoned rule of Keal vs. Price, and it is predicated on the wrong premise that payment includes acceptance, and that a bank drawee paying a check drawn on it becomes ipso facto an acceptor within the meaning of section 62 of the Negotiable Instruments Act. Moreover in a more recent decision, that of Louisa National Bank vs. Kentucky National Bank (39 S. W. [2d], 497, 501) decided in 1931, the Court of Appeals of Kentucky held the following:

"The appellee, on presentation for payment of the \$600 check, failed to discover it was a forgery. It was bound to know the signature of its customer, Armstrong, and it was derelict in failing to give his signature to the check sufficient attention and examination to enable it to discover instantly the forgery. The appellant, when the check was presented to it by Banfield, failed to make any inquiry of or about him and did not cause or have him to be identified. Its act in so paying to him the check is a degree of negligence on its part equivalent to positive negligence. It indorsed the check, and, while such indorsement may not be regarded within the meaning of the Negotiable Instrument Law as amounting to a warranty to appellant of that which it indorsed, it at least substantially served as a representation to it that it had exercised ordinary care and had complied with the rules and customs of prudent banking. Its indorsement was calculated, if it did not in fact do so, to lull the drawee bank into indifference as to the drawer's signature to it when paying the check and charging it to its customer's account and remitting its proceeds to appellant's correspondent.

"If in such a transaction between the drawee and the holder of a check both are without fault, no recovery may be had of the money so paid. (Deposit Bank of Georgetown vs. Fayette National Bank, supra, and cases cited.) Or the rule may be more accurately stated that, where the drawee pays the money, he cannot recover it back from a holder in good faith, for value and without fault.

"If, on the other hand, the holder acts in bad faith, or is guilty of culpable negligence, a recovery may be had by the drawee of such holder. The negligence of the Bank of Louisa in failing to inquire of and about Banfield, and to cause or to have him identified before it parted with its money on the forged check, may be regarded as the primary and proximate cause of the loss. Its negligence in this respect reached in its effect the appellee, and induced incaution on its part. In comparison of the degrees of the negligence of the two, it is apparent that of the appellant excels in culpability. Both appellant and appellee inadvertently made a mistake, doubtless due to a hurry incident to business. The first and most grievous one was made by the appellant, amounting to its disregard of the duty, it owed itself as well as the duty it owed to the appellee, and it cannot on account thereof retain as against the appellee the money which it so received. It cannot shift the loss to the appellee, for such disregard of its duty inevitably contributed to induce the appellee to omit its duty critically to examine the signature of Armstrong, even if it did not know it instantly at the time it paid the check. (Farmers' Bank of Augusta vs. Farmers' Bank of Maysville, supra, and cases cited.)"

IV. The question now is to determine whether the appellant's negligence in purchasing the checks in question is such as to give the appellee the right to recover upon said checks, and on the other hand, whether the drawee bank was not itself negligent, except for its constructive fault in not knowing the signature of the drawer and detecting the forgery.

We quote with approval the following conclusions of the court a quo:

"Check Exhibit A bears number 637023-D and is dated April 6, 1933, whereas check Exhibit A-1 bears number 637020-D and is dated April 7, 1933. Therefore, the latter check, which is prior in number to the former check, is however, issued on a later date. The circumstance must have aroused at least the curiosity of the Motor Service Co., Inc.

"The Motor Service Co., Inc., accepted the two checks from unknown persons. And not only this; check Exhibit A is indorsed by a subagent of the agent of the payee, International Auto Repair Shop. The Motor Service Co., Inc., made no inquiry whatsoever as to the extent of the authority of these unknown persons. Our Supreme Court said once that 'any person taking checks made payable to a corporation, which can act only by agents, does so at his peril, and must abide by the consequences if the agent who indorses the same is without authority. (Insular Drug Co. vs. National Bank, 58 Phil., 684).

* * * * *

"Check Exhibit A-1, aside from having been indorsed by a supposed agent of the International Auto Repair Shop is crossed generally. The existence of two parallel lines transversally drawn on the face of this check was

a warning that the check could only be collected through a banking institution (Jacobs, Law of Bills of Exchange, etc., pp., 179, 180; Bills of Exchange Act of England, sees. 76 and 79). Yet the Motor Service Co., Inc., accepted the check in payment for merchandise.

"* * * In Exhibit H attached to the stipulation of facts as an integral part thereof, the Motor Service Co., Inc., stated the following:

"The Pangasinan Transportation Co. is a good customer of this firm and we received checks from them every month in payment of their account. The two checks in question seem to be exactly similar to the checks which we received from the Pangasinan Transportation Co. every month.

"If the failure of the Motor Service Co., Inc., to detect the forgery of the drawer's signature in the two checks, may be considered as an omission in good faith because of the similarity stated in the letter, then the same consideration applies to the Philippine National Bank, for the drawer is a customer of both the Motor Service Co., Inc., and the Philippine National Bank." (B. of E., pp. 25, 28, 35.)

We are of opinion that the facts of the present case do not make it one between two equally innocent persons, the drawee bank and the holder, and that they are governed by the authorities already cited and also the following": The point in issue has sometimes been said to be that of negligence. The drawee who has paid upon the forged signature is held to bear the loss, because he has been negligent in failing to recognize that the handwriting is not that of his customer. But it follows obviously that if the payee, holder, or presenter of the forged paper has himself been in default, if he has himself been guilty of a negligence prior to that of the banker, or if by any act of his own he has at all contributed to induce the banker's negligence, then he may lose his right to cast the loss upon the banker. The courts have shown a steadily increasing disposition to extend the application of this rule over the new conditions of fact which from time to time arise, until it can now rarely happen that the holder, payee, or presenter can escape the imputation of having been in some degree contributory towards the mistake. Without any actual change in the abstract doctrines of the law, which are clear, just, and simple enough, the gradual but sure tendency and effect of the decisions have been to put as heavy a burden of responsibility upon the payee as upon the drawee, contrary to the original custom. * * *" (2 Morse on Banks and Banking, 5th ed., sees. 464 and 466, pp. 82-85 and 86, 87.)

In First National Bank vs. Brule National Bank (12 A. L. R., 1079, 1088, 1089), the following statement appears in the concurring opinion:

"What, then, should be the rule? The drawee asks to recover for money had and received. If his claim did not rest upon a transaction relating to a negotiable instrument plaintiff could recover as for money paid under mistake, unless defendant could show some equitable reason, such as changed condition since, and relying upon, payment by plaintiff. In the Wyndmere Case, the North Dakota court holds that this rule giving right to recover money paid under mistake should extend to negotiable paper, and it rejects in its entirety the theory of estoppel and puts a case of this kind on exactly the same basis as the ordinary case of payment under mistake. But the great weight of authority, and that based on the better reasoning, holds that the exigencies of business demand a different rule in relation to negotiable paper. What is that rule? Is it an absolute estoppel against the drawee in favor of a holder, no matter how negligent such holder has been? It so rely is not. The correct rule recognizes the fact that, in case of payment without a prior acceptance or certification, the holder takes the paper upon the credit of the prior indorsers and the credit of the drawer, and not upon the credit of the drawee; that the drawee, in making payment, has a right to rely upon the assumption that the payee used due diligence, especially where such payee negotiated the bill or check to a holder, thus representing that it had so fully satisfied itself as to the identity and signature of the maker that it was willing to warrant as relates thereto to all subsequent holders. (Uniform Act, sees. 65 and 66.) Such correct rule denies the drawee the right to recover when the holder was without fault or when there has been some change of position calling for equitable relief. When a holder of a bill of exchange uses all due care in the taking of bill or check and the drawee thereafter

pays same, the transaction is absolutely closed—modern business could not be done on any other basis. While the correct rule promotes the fluidity of two recognized mediums of exchange those mediums by which the great bulk of business is carried on, checks and drafts, upon the other hand it encourages and demands prudent business methods upon the part of those receiving such mediums of exchange. (Pennington County Bank vs. First State Bank, 110 Minn., 263; 26 L. R. A. [N. S.], 849; 136 Am. St. Rep., 496; 125 N. W., 119; First National Bank vs. State Bank, 22 Neb., 769; 3 Am. St. Rep., 294; 36 N. W., 289; Bank of Williamson, vs. McDowell County Bank, 66 W. Va., 545; 36 L. R. A. [N. S.], 605; 66 S. E., 761; Germania Bank vs. Boutell, 60 Minn., 189; 27 L. R. A., 635; 51 Am. St. Rep., 519; 62 N. W., 327; American Express Co. vs. State National Bank, 27 Okla., 824; 33 L. R. A. [N. S.], 188; 113 Pac., 711; Farmers' National Bank vs. Farmers' & Traders Bank, L. R. A., 1915A, 77, and note [159 Ky., 141; 166 S. W., 986].)

"That the defendant bank did not use reasonable business prudence is clear. It took this check from a stranger without other identification than that given by another stranger; its cashier witnessed the mark of such stranger thus vouching for the identity and signature of the maker; and it indorsed the check as 'Paid' thus further throwing plaintiff off guard. Defendant could not but have known, when negotiating such check and putting it into the channel through which it would finally be presented to plaintiff for payment, that plaintiff, if it paid such check, as defendant was asking it to do, would have to rely solely upon the apparent faith and credit that defendant had placed in the drawer. From the very circumstances of this case plaintiff had to act on the facts as presented to it by defendant, and upon such facts only.

"But appellant argues that it so changed its position, after payment by plaintiff, that in 'equity and good conscience' plaintiff should not recover—it says it did not pay over any money to the forger until after plaintiff had paid the check. There would be merit in such contention if defendant had indorsed the check for 'collection,' thus advising plaintiff that it was relying on plaintiff and not on the drawer. It stands in court where it would have been if it had done as it represented."

In Woods and Malone vs. Colony Bank (56 L. R. A., 929, 932), the court said:

"* * * If the holder has been negligent in paying the forged paper, or has by his conduct, however innocent, misled or deceived the drawee to his damage, it would be unjust for him to be allowed to shield himself from the results of his own carelessness by asserting that the drawee was bound in law to know his drawer's signature."

V. Section 23 of the Negotiable Instruments Act provides that "when a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

It not appearing that the appellee bank did not warrant to the appellant the genuineness of the checks in question, by its acceptance thereof, nor did it perform any act which would have induced the appellant to believe in the genuineness of said instruments before appellant purchased them for value, it can not be said that the appellee is precluded from setting up the forgery and, therefore, the appellant is not entitled to retain the amount of the forged check paid to it by the appellee.

VI. It has been held by many courts that a drawee of a check, who is deceived by a forgery of the drawer's signature may recover the payment back, unless his mistake has placed an innocent holder of the paper in a worse position than he would have been in if the discovery of the forgery had been made on presentation. (5 R. C. L., p. 559; 2 Daniel on Negotiable Instruments, 1538.) Forgeries often deceived the eye of the most cautious experts; and when a bank has been so deceived, it is a harsh rule which compels it to suffer although no one has suffered by its being deceived. (17 A. L. R., 891; 5 R. C7L., 559.)

In the instant case should the drawee bank be allowed recovery, the appellant's position would not become worse than if the drawee had refused the payment of these checks upon their presentation. The appellant has lost nothing by anything which the drawee has done. It had in its Jiands some forged worthless papers. It did not purchase. or acquire these papers because of any representation made to it by the drawee. It purchased them from unknown persons and under suspicious circumstances. It had no valid title to them, because the persons from whom it received them did not have such title. The appellant could not have compelled the drawee to pay them, and the drawee could have refused payment had it been able to detect the forgery. By making a refund, the appellant would only be returning what it had received without any title or right. And when appellant pays back the money it has received it will be entitled to have restored to it the forged papers it parted with. There is no good reason why the accidental payment made by the appellee should inure to the benefit of the appellant. If there were injury to the appellant said injury was caused not by the failure of the appellee to detect the forgery but by the very negligence of the appellant in purchasing commercial papers from unknown persons without making inquiry as to their genuineness.

In the light of the foregoing discussion, we conclude:

- That where a check is accepted or certified by the bank on which it is drawn, the bank is estopped to deny the genuineness of the drawer's signature and his capacity to issue the instrument;
- That if a drawee bank pays a forged check which was previously accepted or certified by the said bank it cannot recover from a holder who did not participate in the forgery and did not have actual notice thereof;
- That the payment of a check does not include or imply its acceptance in the sense that this word is used in section 62 of the Negotiable Instruments Law; *
- That in the case of the payment of a forged check, even without former acceptance, the drawee can not recover from a holder in due course not chargeable with any act of negligence or disregard of duty;
- That to entitle the holder of a forged check to retain the money obtained thereon, there must be a showing that the duty to ascertain the genuineness of the signature rested entirely upon the drawee, and that the constructive negligence of such drawee in failing to detect the forgery was not affected by any disregard of duty on the part of tile holder, or by failure of any precaution which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had the right to believe he had taken;
- That, in the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion and without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud;
- That one who purchases a check or draft is bound to satisfy himself that the paper is genuine, and that by indorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he performed his duty;
- That while the foregoing rule, chosen from a welter of decisions on the issue as the correct one, will not hinder the circulation of two recognized mediums of exchange by which the great bulk of business is carried on, namely, drafts and checks, on the other hand, it will encourage and demand prudent business methods on the part of those receiving such mediums of exchange;
- That it being a matter of record in the present case, that the appellee bank is no more chargeable with the knowledge of the drawer's signature than the appellant is, as the drawer was as much the customer of the appellant as of the appellee, the presumption that a drawee bank is bound to know more than any indorser the signature of its depositor does not hold;

- That according to the undisputed facts of the case the appellant in purchasing the papers in question from unknown persons without making any inquiry as to the identity and authority of the said persons negotiating and indorsing them, acted negligently and contributed to the appellee's constructive negligence in failing to detect the forgery;

- That under the circumstances of the case, if the appellee bank is allowed to recover, there will be no change of position as to the injury or prejudice of the appellant.

Wherefore, the assignments of error are overruled, and the judgment appealed from must be, as it is hereby, affirmed, with costs against the appellant. So ordered.

Avanceña, C. J., Villa-Real, Abad Santos, Imperial, Diaz, and Laurel, JJ., concur.

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