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Record No. 875

ESSIE McAULEY,

v.

MORRIS PLAN BANK OF VIRGINIA.

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND, VA.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

155 VA 777

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

ESSIE McAULEY,

vs.

MORRIS PLAN BANK OF VIRGINIA.

To the Honorable, the Justices of the Supreme Court of Appeals of Virginia:

Your petitioner, Essie McAuley, respectfully represents unto your Honors that she is aggrieved by an order entered in the Circuit Court of the City of Richmond on the 14th day of March, 1929, sustaining a demurrer filed by the defendant, the Morris Plan Bank of Virginia, to your petitioner's evidence. The pleadings, into which all the evidence is incorporated by the demurrer to the evidence, and the orders of the Court are set forth in the record accompanying this petition.

THE PLEADINGS.

This action was instituted by a notice of motion for judgment brought for the recovery of the sum of $1,250.00 with interest, being the sum alleged to be due your petitioner by the Morris Plan Bank of Virginia (hereinafter referred to as the Bank) by reason of monies from time to time deposited with it by your petitioner. Your petitioner subsequently, and by leave of Court, filed her amended notice of motion for judgment, which altered in one respect only paragraphs 5 and 6 of the original notice of motion. The defendant pleaded the general issue, and after the introduction of your petitioner's testimony, it filed its demurrer to your petitioner's evidence, assigning seven separate grounds therefor. In this demurrer to her evidence your petitioner

joined, and subject to the ruling of the Court on said demurrer the jury returned a verdict in favor of your petitioner for the full amount claimed. Subsequently the Court sustained the demurrer to the evidence, and entered judgment for the defendant.

STATEMENT OF FACTS.

There is, of course, no dispute as to the facts which are as follows:

On the 18th day of November, 1927, your petitioner had on deposit to her credit with the Bank the sum of $1,257.50. On that date she and her husband, Edward McAuley, agreed to purchase from D. Major a second-hand Packard automobile at a cash price of $1,675.00. In order to bind the agreement, Mr. McAuley gave Major his check drawn on the State-Planters Bank and Trust Company for $150.00, and it was agreed that the interested parties, including a Richmond automobile dealer by the name of Darden, who had been assisting Major, would meet at Mr. McAuley's office the next morning (Saturday) to close the deal.

In the meanwhile your petitioner drew her check on the Bank in the amount of $1,250.00, payable to cash (Rec., pp. 9, 24), which she gave to her husband. Mr. McAuley took the check to the Bank, and the Bank, following its usual custom, did not give cash for the check, but gave a check drawn by the Bank on the Virginia Trust Company, payable to the order of your petitioner for $1,250.00. (See check, Rec., p. 18.) Regarding this transaction Mr. McAuley testified as follows (Rec., p. 25):

"Q. Let me ask you this. Was there any conversation between you and that gentleman as to whether or not you would get $1,250.00 in cash or whether you would get a check for $1,250.00?

A. No, not a word."

Saturday morning, November the 19th, your petitioner, her husband, Darden and Major met at Mr. McAuley's office. Major did not have at that time a Virginia certificate of title covering the car, but he did have the New York papers. The check given by the Bank in favor of your petitioner was endorsed by her in blank, and together with another check

drawn by Mr. McAuley on the State-Planters Bank and Trust Company in favor of Major for $275.00, was given to Darden with the understanding that the checks would not be delivered to Major until a Virginia certificate of title covering the car had been issued to him and duly assigned by him to your petitioner. Later on that day, and after the Motor Vehicle Commissioner's office had closed, Darden brought to your petitioner the Virginia certificate made out in Major's name and assigned to your petitioner. (See certificate, Rec. p. 10.)

Early Monday morning, November 21st, your petitioner took this certificate to the Motor Vehicle Commissioner's office in order to obtain a certificate of title in her own name. Your petitioner was then told that the car which she had purchased was a stolen car, and this information, or a strong suspicion thereof, having reached the Commissioner, he refused to transfer the title. It is a stipulated fact in this case that the car was a stolen car, and was subsequently recovered by the true owner thereof in an action brought for that purpose.

Your petitioner telephoned to the Bank to ascertain whether the $1,250.00 check had been paid, and she was told by an unknown member of the staff that no record of payment could be found and that if she would come to the Bank a stop payment order could be put in. She hurried to the Bank, explained the circumstances to a Mr. Tyler, its Assistant Cashier, and together they went to the Virginia Trust Company, and having ascertained that the check had not been paid, directions to stop payment were given by the Bank. On returning to the Bank, Mr. Tyler dictated a letter to the Bank, which was signed by your petitioner, requesting that it have payment of the check stopped. (Exhibit "E. M. No. 4", Rec., p. 18.)

On the same date, Mr. McAuley successfully stopped payment on the check for $275.00 drawn by him on November 19th on the State-Planters Bank and Trust Company, in favor of Major.

Nothing further was heard of this matter by your petitioner until Friday morning, November 25th, when she received a letter (see Rec., p. 16) from the Bank dated November 23rd, informing her that the $1,250.00 check had been cashed by a third party in good faith and that the Bank had withdrawn its stop payment order and had directed the Virginia Trust Company to pay the check, and had charged the amount thereof to your petitioner's account. It appears

that this withdrawal and this direction was given by the Bank with no word thereof to your petitioner, and without giving her any opportunity to protect her rights in the premises.

It appears from the testimony of C. A. Hall, as Assistant Treasurer of the Richmond Trust Company, that on November 18th, Major opened an account with that Company (hereafter referred to as the Trust Company) by depositing with it the check for $150.00, which Mr. McAuley had that day given him. On the following day he deposited the check for $1,250.00 given him by your petitioner.

The deposit ticket used by Major in making the last mentioned deposit was filed by Mr. Hall (see Rec., p. 30). This deposit ticket was the usual ticket furnished by the Trust Company for the use of its customers. On its face there are printed the conditions under which the Trust Company accepted the deposit. Particular attention is invited to one provision thereof, for it is on that provision that the merits of your petitioner's claim rest. That provision reads as follows:

"The depositor using this ticket hereby agrees—that items on Richmond are credited *subject to actual payment* through the Richmond Clearing House." (Italics supplied.)

It will be noticed that under the provisions of the deposit slip agreement *only items drawn on Richmond banks were given a conditional credit.*

About half an hour after making the deposit of $1,250.00 Major presented to the Trust Company his check payable to the order of "Self" for $1,000.00. Although the credit given by the Trust Company for the deposit was conditioned upon actual payment of the item, and although that condition had not been fulfilled, Major's check was honored and he was given $1,000.00 cash. In addition thereto and on the same day there was charged to his account a check for $75.00 (see Rec., p. 32) which he had cashed the day before and which was paid by the Trust Company through the Clearing House. At the close of business, therefore, on Saturday, November 19th, Major had a conditional credit or deposit with the Trust Company of $325.00.

On November 21st Major deposited the check for $275.00

given him by Mr. McAuley on November 19th, and on the same date he cashed checks aggregating $322.50. On November 23rd his account was charged with the $275.00 item on which Mr. McAuley had succeeded in stopping payment. *The net results of these transactions is that the Trust Company still holds a balance due Major of $2.50.*

The check for $1,250.00 was forwarded by the Trust Company for payment through regular banking channels, and on November 22nd it was returned with the notation that payment had been stopped. The Trust Company at once communicated with the Bank and informed it that the check had been deposited and money paid out on Major's checks, and insisted that the stop payment order be withdrawn and the check paid. Whereupon, without any inquiry as to the nature of the deposit or the terms of the express agreement governing it, and without any word to Mrs. McAuley, the Bank withdrew the stop payment order and the check was paid.

It will be particularly noted that the day after Major opened his account with the Trust Company, the whole transaction regarding the $1,250.00 check occurred. There was, therefore, no established course of dealing between Major and the Trust Company, and although an official of the Trust Company was put on the stand by your petitioner, the defendant made no effort to show any general banking custom or practice regarding the handling of items *credited subject to actual payment.* It did try to show that the Trust Company was accustomed to handle items of this kind as cash items or as items for which an absolute credit is given. This evidence was properly excluded by the trial court for the reasons as stated by the Court that, first, Major had no knowledge of this particular custom of the Trust Company, and, second, this particular custom of the Trust Company could not be introduced to vary the written agreement existing between it and Major.

BASIS OF PETITIONER'S CLAIM.

The basis of your petitioner's claim, as alleged in her pleadings and as established by the evidence, is as follows: The Bank was indebted to her in the sum of $1,257.50, for a part of which indebtedness (i. e. $1,250.00) she drew on the Bank. The Bank did not pay this part and thus satisfy that portion of its indebtedness, but instead of so doing it gave unto your petitioner its check, the giving of which operated

only as payment in the event the check was paid according to its tenor. Before the check was paid your petitioner learned that she had been induced to part with it by fraud, and at her direction the Bank ordered that payment thereof be stopped, thereby placing the check in such position that it could not operate as payment. The effect of this was clearly to create an implied agreement that unless the check had passed into the hands of a *bona fide* holder for value without notice of the fraud, it should not be paid. The Trust Company was not such a holder, but was merely an agent for collection, and the withdrawal of the stop payment order and the breach of the implied agreement has resulted in a certain and well defined loss to your petitioner.

DEMURRER TO THE EVIDENCE.

Your petitioner's case is strengthened by the fact that this case is before the Court on a demurrer to the evidence. The defendant introduced no evidence; the concession, therefore, which it makes to your petitioner as the price of filing its demurrer to the evidence is the admission of the truth of all the evidence, and the additional admission of the truth of all proper or just inferences to be drawn therefrom. Our Court has heretofore had before it cases in which from the evidence it was reasonable to draw contradictory inferences —the one favorable to the demurrant, the other favorable to the demurree, and it has decided that when such a situation exists, the demurrant also waives the inference favorable to him, and the court must adopt that most favorable to the demurree. *Horner* v. *Speed,* 2 Pat. & H. 616; *Wash. and O. D. R. Co.* v. *Jackson's Admr.,* 117 Va. 636, 85 S. E. 496.

If, therefore, from the facts only inferences favorable to petitioner can be drawn, the Court must find for petitioner; and in addition thereto, if from the facts two reasonable inferences, differing though they may in "degree of probability", can be drawn—the one favorable to the Bank, the other favorable to petitioner—the Court must adopt that more favorable to petitioner

ARGUMENT.

Before proceeding to the specific grounds of the defendant's demurrer, it is necessary to dispose of one point. It was suggested in argument by the defendant that when the

Bank gave its check to Mrs. McAuley, it thereby satisfied to the extent of $1,250.00 its indebtedness to her. This point has more than once arisen in this Commonwealth and it has been specifically decided in the cases of *Blair* v. *Wilson,* 28 Gratt. 165; *Morriss* v. *Harvey,* 75 Va. 726, and *Kewanee Co.* v. *Norfolk, etc., Co.,* 118 Va. 628, that in the absence of special agreement between the parties to the contrary, the giving of a check for an antecedent indebtedness is not payment or extinguishment of the debt, and that "the debt will not be extinguished unless and until the check be paid". In the instant case there is not one scintilla of evidence of a special agreement, in fact Mr. McAuley's testimony is a direct negation of any special agreement.

1. *The Existence of an Implied Agreement and the Consideration therefor.*

The 6th and 7th grounds of defendant's demurrer to the evidence rest on the view that there was no contract or agreement between the parties, and that in placing the original stop payment order with the Virginia Trust Company the defendant Bank was not acting pursuant to any legal agreement. The 1st ground of demurrer is that there was no valuable consideration to support any agreement made between the parties.

No express contract was alleged, none was proved nor attempted to be proved, but a state of facts was shown which "in equity and good conscience" demand that a contract be inferred and implied, and that in the final analysis is the test of the existence of an implied contract. *Grice* v. *Todd,* 120 Va. 481, 488.

No obligation rested on the Bank to issue the stop payment order; it could have refused to concern itself further with the matter, and left Mrs. McAuley to protect herself otherwise. Instead of so doing, it issued the stop payment order, it received the benefit of retaining a deposit of $1,250.00, and by complying with your petitioner's direction, it lulled her into a sense of security and rendered it useless for your petitioner to take other steps to protect herself.

And regardless of what the law may have been prior to the passage of the Uniform Negotiable Instruments Act that act gave to your petitioner a very certain method by which protection could have been attained. Section 51 of the Negoti-

able Instruments Act (Section 5613 of the Code) provides as follows:

"The holder of a negotiable instrument may sue thereon in his own name and *payment to him in due course discharges the instrument.*" (Italics supplied.)

Section 88 of the Act (Section 5650 of the Code) provides as follows:

"Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and *without notice that his title is defective.*" (Italics supplied.)

These statutes make it clear that the Virginia Trust Company could not have discharged the instrument by a payment to Major's agent for collection (the Richmond Trust Company, as will be hereafter shown) if it had had notice of Major's defective title, and all that Mrs. McAuley need have done would have been to notify the Virginia Trust Company of the fraud, and it would have honored the check at its peril, and would have been responsible for any loss occasioned by the payment of the check.

Perhaps no student of the law of Negotiable Instruments has given more thought and study to this question than Dean Lile, whose conclusions are set forth in his (the third) edition of Bigelow on Bills, Notes and Checks. In this discussion of the right of a maker or drawee to set up as a defense against the holder the right of third parties, he says in the footnote on page 391:

"A maker or drawee, then, may not discharge the instrument by payment to one *whose title he knows to be defective* —or believes to be defective, if that turned out to be a fact. If such payment is not a discharge, then the primary debtor, in order to obviate the necessity of paying again to the rightful debtor, has not only the right but is *under a duty not to pay;* * * *. It seems a monstrous proposition that the maker, in such case, with knowledge of the theft, should be forced to stand idly by while the plaintiff thief took judgment against him; and that payment of the judgment to the thief should be a discharge of the maker's liability to the true owner." (Italics supplied.)

That consideration for the implied agreement existed is clear. In the first place it is found in the fact that by reason of the willingness of the Bank to stop payment of the check, Mrs. McAuley was relieved of the necessity of taking other action, and was, as heretofore said, lulled into a sense of security. In the second place, the same consideration existed as is found for any contract between bank and depositor. When a depositor makes a deposit, the bank agrees to repay the amount thereof on demand; the sole consideration for this agreement on behalf of the bank is the use of the depositor's money. In the instant case $1,250.00 was charged to your petitioner's account, and upon payment of its check the Bank would have been deprived of the use of this sum. When the Bank complied with your petitioner's direction and stopped payment of the check, it saved for its use this sum and received exactly the same consideration it would have received had a new deposit for $1,250.00 been made.

The above matters are mostly preliminary, but having been suggested in the argument and in the record, it became necessary to dispose of them. We are now brought to a consideration of the question of prime importance, and one upon which the courts of this Commonwealth have never fully passed.

2. *The Relation of the Richmond Trust Company to the Check.*

In its 2nd ground of demurrer (Rec., p. 41) the Bank contends that the Trust Company acquired title to the check for $1,250.00 and occupied the relation to it of a purchaser and a holder for value without notice of the defect in Major's title thereto, and this contention is reiterated in the 5th ground of demurrer.

In the 3rd ground of demurrer, it is contended that the Bank acquired a specific lien on the check "for the amount of the advances *made on the strength of said check*", and hence by the terms of the negotiable instruments law became a holder in due course; and in the 4th ground of demurrer virtually the same contention is made, modified, however, to the claim of a general lien "*on all assets of*" Major in its hands.

Each of these contentions comes back to the primary question whether or not the Trust Company was a holder for value without notice of the defect in Major's title. If the

Trust Company (a) was a purchaser for value or the owner of the check, or (b) if the Trust Company *made advances to Major on the strength of the check,* and thereby acquired a specific lien thereon, or (c) if Major's interest in the check was such as to make it subject to the general or "banker's" lien for all Major's indebtedness to the Trust Company, then your petitioner is entitled to recover nothing against the Bank other than perhaps the small amount still held by the Trust Company to the credit of Major. These are the specific grounds of the demurrer and if no one of them be sound it follows that the lower Court erred in its ruling.

a. *The Richmond Trust Company was not the owner of the check, it was simply an agent for collection.*

It is a fundamental principle of the law of negotiable instruments that one who prior to maturity gives value for a check and has no notice of any defect in the title of the person from whom he received it, acquires title free from the equities which might be asserted against the transferror. He becomes the most favored claimant known to the law. Whether or not a bank which receives a check from one of its customers occupies this favored position depends upon the circumstances surrounding the transaction.

There are but two ways in which a depositor may deposit a check with a bank. He may deposit it, and the bank may receive it, as cash, in which case the depositor is given an immediate credit together with the immediate right to draw on the bank. In other words the bank becomes at once the debtor of the depositor, and the owner of the check. Or he may deposit the check for collection, in which event the bank is simply his agent for that purpose, and has no higher right to the check than the depositor, and not until collection is made does the bank become debtor to the depositor, nor until that time does the depositor have the right (as distinguished from the privilege or favor) of drawing on the bank. *Miller* v. *Norton,* 114 Va. 609, cited with approval in *Fourth National Bank* v. *Bragg,* 127 Va. 47.

Courts are in harmony upon the proposition that title to a check credited by a bank other than the one upon which it is drawn, to the account of a depositor after its indorsement in blank by him, passes or does not pass to the bank, according to agreement, express or implied, between the parties, and that all presumptions in favor of either the Bank's title

or that of the depositor yield to such agreement. This statement which is found in an exhaustive note on the subject in 47 L. R. A. (N. S.) 552, wherein a large number of authorities are cited is fully substantiated by the Virginia cases hereafter cited. The question is one purely of intention, and *of the intention at the time the deposit was made.* In order to ascertain the intention certain rules, which in Virginia are well settled, have been given effect. These rules have been developed in four modern cases which supplement one another.

The first of these cases is *Fayette National Bank* v. *Summers,* 105 Va. 689, the opinion in which was handed down by Judge Keith in 1906. A customer of the plaintiff bank obtained by fraud a check from the defendant. The customer endorsed the check to the bank which placed the proceeds to his credit. The defendant having stopped payment on the check, the bank brought suit alleging that it was the owner of the paper. The lower court instructed the jury that if the bank received the check "as a deposit to be treated as cash and that such was *the intention of the parties* (the customer and the bank) *at the time the check was received,* then title to said check passed to the bank at that time" and the bank could recover, but if they believed it was intended that the bank should receive the check "only as an agent for collection, then title to said check did not vest in the bank *at the time of the deposit",* and the bank could not recover. Further emphasis was placed upon the question of the intention or implied agreement at the time the deposit was made, for the court further instructed the jury that "the question as to whether the parties intended the check *when deposited* to be treated as cash or merely for collection is one of fact for the jury * * * ." (Italics supplied.) These instructions were approved by the Court of Appeals.

The second case is that of *Greensburg Nat'l Bank* v. *Syer & Co.,* 113 Va. 53, the opinion in which was also handed down by Judge Keith in 1912. Here the item was deposited by the use of naked deposit slip, i. e. one which simply read "Deposited in Greensburg National Bank" and the amount thereof was credited to the depositor, and, according to the testimony, the privilege (not the right) was given to him, if his credit was good, of drawing against the credit. Here again an instruction, similar to that quoted above, of *intention at the time the deposit was made* was approved. But the court

went a step further than it had gone in the Fayette Nat'l Bank case, for it was also concerned with the effect of allowing the depositor to check against the deposit before the paper was collected, and after instructing the jury that they must first ascertain whether the intention was a deposit as cash or a deposit for collection, the following instruction was given by the lower court and approved by the Court of Appeals:

"Checks or drafts deposited or credited, if intended to be for collection only, do not become the property of the bank, even if the depositor has been allowed to check against the deposit before the paper is collected."

The third case is that of *Miller* v. *Norton,* 114 Va. 609, decided by Judge Buchanan in 1913. The strength and importance of this case has been greatly weakened by the subsequent case of *Fourth National Bank* v. *Bragg,* 127 Va. 47, to be next discussed, wherein it was expressly overruled in two particulars, but it is of importance in the development in Virginia of the principles governing the relations of bank and depositor to a deposited check.

In the Miller case, the plaintiff deposited in an Alexandria bank a check drawn on an out of town bank. The deposit was made by letter. In acknowledging the receipt of the deposit, the bank said "I credit $..... Items outside Alexandria *credited, subject to payment".* Before the check was paid by the bank on which it was drawn, the Alexandria Bank went into the hands of a receiver, who collected the item. The plaintiff sued the receiver successfully, as it was held that the Alexandria Bank was simply an agent for collection and not the owner of the item.

Three general propositions of importance are laid down in the decision: First, the principles contained in the heretofore mentioned Fayette National Bank case and the Greensburg National Bank case are expressly approved; Second, the right of the bank to charge the account of the depositor with the check in the event it should not be paid is inconsistent with the theory that title passed to the bank absolutely—(this proposition was expressly overruled in the subsequent case of *Fourth National Bank* v. *Bragg, supra*); and Third, the giving of credit to a depositor does not constitute the Bank a holder for value of the item deposited, but in order

to have that effect the credit must be drawn upon. This third proposition was also overruled in the subsequent case of *Fourth National Bank* v. *Bragg, supra,* wherein after quoting the exact language of the Miller case it was stated that "it is manifest, from the opinion as a whole that the court intended to decide" that title to the paper passed to the bank when "the credit given for the deposit carried with it the Right of the depositor to draw checks thereon and the Obligation of the bank to pay them".

The fourth and most important, because of its comprehensive nature, of the Virginia case is *Fourth National Bank* v. *Bragg, supra,* decided by Judge Kelly in 1920. This case involved the question of title to a draft between a bank in which it had been deposited and one who sought to attach the proceeds as the creditor of the depositor. The bank accepted the draft from one of its depositors and treated it "as cash" and placed the proceeds "immediately to the depositor's credit and subject to his checks", and allowed him to check against the credit, this *as was shown by the evidence, being the custom of banks in that locality.*

The lower court had allowed the case to go to the jury on instructions similar to those given in the Fayette Nat'l Bank and Greensburg National Bank cases. The jury found for the attaching creditor, but the Court of Appeals set aside this verdict and entered judgment for the bank. The decision and the reasons underlying it are of the utmost importance. It was held:

First, there is a *prima facie* presumption that "the passing to the credit of the depositor of a check bearing an endorsement not indicating that it was deposited for collection merely, passes title to the bank".

Second, it is essential to this result that the deposit for credit must be "unqualified and absolute", and give to the depositor the "unconditional" right to draw on the credit.

Third, the presumption is merely *prima facie,* and applies only when nothing appears other "than the mere fact of the deposit and credit thereof as cash, which the depositor may withdraw *at will",* and may be rebutted by evidence showing that the parties "contemplated a different relationship at the time of the deposit".

Fourth, the question is one of intention and if there is "*any* evidence to rebut the *prima facie* presumption" the question should be left to the jury under instructions similar to those given in the Fayette National Bank and Greensburg National Bank cases which were approved.

The principles established by the foregoing cases may be briefly summarized as follows: Whether the bank acquires title or the depositor retains title to the check is a question of the intention or agreement of the parties at the time the deposit is made; if no fact appears other than a naked deposit which carries with it the immediate and unconditional right of the depositor to draw thereon, it is presumed that title passed to the bank; if *any* fact to the contrary appears, then the question is one for the jury under all the facts and circumstances of the case; and lastly as set forth in Greensburg Nat'l Bank case, if the deposit be for collection only, title to the deposited item does not pass to the bank even though it allows the depositor to check against the deposit before the paper is collected.

The case of your petitioner was decided against her on a demurrer to the evidence. The error in this ruling lies in the fact that Major, the depositor of your petitioner's check, did not have the unconditional right to draw against the Richmond Trust Company at the time the deposit was made. The evidence of the intention of the parties to that effect is express, and is found in their written agreement heretofore quoted, wherein it is set forth that the Trust Company did not give an absolute credit for such an item, but gave only a conditional credit as follows: "Items on Richmond are credited subject to actual payment through the Richmond Clearing House." This language not only furnishes some evidence to nullify the presumption, which according to the rules governing a demurrer to the evidence, would necessitate a judgment in favor of your petitioner, but it offers such conclusive evidence of what the agreement was, as to have warranted the Court, had no demurrer to the evidence been filed, in instructing the jury as a matter of law that the check was taken for collection to be credited only upon its payment.

The purpose of the clause is clear. A bank does not wish to place upon itself the obligation of paying checks drawn on it prior to the time it has received payment of the items deposited with it. Its right to charge back to the depositor uncollected items gives it no protection if the depositor has withdrawn his credit. Consequently, the bank by the clause

quoted above places itself in a position where for one customer it can refuse to honor his checks until the deposited item is paid, and for another customer it can extend the privilege of permitting withdrawals. If the bank has acquired title to the check by purchase and is a holder for value, it immediately is indebted to the depositor; and until it becomes indebted to the depositor, it does not acquire title to the check.

It will further be noted that under the doctrine of the Fourth National Bank case, the Richmond Trust Company could not acquire title to the check unless the credit given Major was "unqualified and absolute," and also unless Major was given the "unconditional" right to draw on the credit. By the express terms of the agreement, the credit given was made subject to a certain condition, i. e. "actual payment" of the item—the credit then being conditional, it must follow that there was no unconditional right to draw. From these premises there can follow but one conclusion—the Richmond Trust Company did not acquire title to the check.

This sound principle enunciated by our Court of Appeals that a bank acquires title to paper only in the event that the credit is given is "unqualified and absolute", and carries with it the "unconditional" right to draw on the credit, is sustained, it is believed, by the unbroken authorities of the country—certainly by the Federal Courts, and the Courts of New York, South Carolina, Georgia, Alabama and Maryland.

Judge Kelly, in the Fourth National Bank case, relied primarily on the case of *Burton* v *United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482,—a case in which it was held as a matter of law that the bank became the owner of the deposited paper, and wherein it was said:

"There was no agreement or understanding of any kind other than such as the law makes from the transaction detailed. * * * In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper."

"In the case at bar the proof was not disputed. The checks were passed to the credit of defendant *unconditionally, and without any special agreement.*" (Italics supplied.)

Judge Kelly also relied on the Alabama cases of *Josiah Morris* v. *Alabama Carbon Co.*, 139 Ala. 620, 36 So. 764, and *Stone River National Bank* v. *Lerman Milling Co.*, 9 Ala. App. 322, 63 So. 776, of which he said:

"Both of the Alabama cases relied on clearly recognize the controlling distinction between a deposit for collection and an *unqualified* and *unconditional* deposit for credit treated as cash." (Italics supplied.)

In *Tyson* v. *Western National Bank*, 77 Md. 412, 26 Atl. 520, it was held that title to paper endorsed "for collection for account of" does not pass to the bank even though the deposit was entered to the credit of the depositor for "It was the clear understanding that this was not an *absolute* and *unconditional* credit". (Italics supplied.) And in *Ditch* v. *Western National Bank*, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, 23 L. R. A. 162, another case relied upon by Judge Kelly, it was held that title to the paper passed to the bank because "the evidence shows that the effect of the transaction was to give Ditch and Brother a credit with the bank and the *unconditional* right to check upon it." (Italics supplied.)

In the case of *In re Jarmulowsky*, 243 Fed. 319, L. R. A. 1918 E 634, the Circuit Court of the Second Circuit said:

"The bank's right, however, depends upon the depositor's *immediate* and *unconditional right, and not merely as a favor,* to draw upon the deposit, and, if it appears that the depositor did not have such right until collection the bank does not become the owner." (Italics supplied.)

To the same effect are the cases of *Spooner* v. *Bank of Donaldson*, 144 Ga. 745, 87 S. E. 1063; *Harter* v. *Bank of Brunson*, 92 S. E. 440, 75 S. E. 696; *First National Bank* v. *Stengle*, 169 N. Y. S. 218, affirmed 171 N. Y. S. 1085, and affirmed by the Court of Appeals in 126 N. E. 906; and *Fifth National Bank* v. *Armstrong*, 40 Fed. 46, to which further attention will be immediately invited.

The foregoing would be sufficient to show that the Richmond Trust Company did not acquire title to the check, for as has been pointed out, the specific agreement between Major and the Trust Company made the deposit a conditional

and qualified one, and withheld from Major the absolute right to draw against it. But your petitioner need not rest on the clear deduction to be drawn from the foregoing principles. The deduction is supported by numerous authorities, which hold that when the agreement between the bank and the depositor is that the deposit is "credited subject to actual payment" the bank does not acquire title to the deposited item.

The only Virginia case which touches upon such a provision in a deposit slip is *Miller* v. *Norton, supra,* wherein among other things the court seems to reach the conclusion that as there was nothing to throw light on the intention of the parties save "the isolated transaction itself" and as the check was "credited subject to payment" the depositor did not have the authority to draw against the deposit until the item was paid. (See pp. 614 and 617.)

There can, of course, be no question that a notice on a pass book or deposit slip may define the position of a bank toward the deposited item, and operates as an agreement between the bank and the depositor. In the excellently considered case of *Taft* v. *Quinsigamond Nat'l Bank,* 172 Mass. 363, 52 N. E. 387, the provisions of a deposit slip are mentioned as one of the methods by which a bank may "define its position as agent or purchaser". Let us examine the interpretation placed upon the particular provision with which we are concerned by the courts in which the same question has arisen.

The most frequently cited case is that of *Spooner* v. *Bank of Donaldson,* cited *supra,* 144 Ga. 745, 87 S. E. 1062. A deposit by mail was made in the defendant bank. Upon its receipt the cashier filled out a deposit slip in the name of the depositor wherein it was provided that the depositor would "not hold said bank liable to him for said items until the cash for each has been paid to" the bank; and the Cashier also sent to the depositor a notice that "All items sent to us are credited subject to actual payment". Prior to collection the check was lost, and it was held that the bank was not responsible therefor, as it was simply an agent for collection. In speaking of the notice sent to the depositor by the cashier, it was said:

"This shows beyond controversy that the check was not sold to the bank *unconditionally,* and that the credit was not *absolute* but contingent upon payment." (Italics supplied.)

In another much cited case, *King* v. *Bowling Green Trust Co.*, 129 N. Y. S. 977, the court was called upon to interpret a deposit slip which read "In receiving checks on deposit payable elsewhere than in San Francisco the bank * * * shall only be held liable when proceeds and actual funds or solvent credits shall have come into its possession", etc. Of this provision it said:

"The words on the deposit slip must be read into the contract. If title had once passed to the California Trust Co., it would have had recourse to the depositor only in case the paper was dishonored, but by its contract it assumed no responsibility, until it had received actual funds or solvent credits."

This New York case was followed in 1918 by another, hereinbefore cited, *First National Bank* v. *Stengle,* 169 N. Y. S. 218, affirmed 171 N. Y. S. 1085, and affirmed by the Court of Appeals, 126 N. E. 906. It involved a deposit slip which read "Checks and drafts on other banks subject to payment" —exactly our provision. It was held that the bank did not take title to the check but was simply an agent for collection.

The same question was presented to the South Carolina Court in 1912 in the case of *Harter* v. *Bank of Brunson,* cited *supra,* 92 S. C. 440, 75 S. E. 696. There the deposit slip read, "we will not hold the bank liable to us for said items until the cash for each has been paid to the bank", and of this provision it was said:

"It does, however, afford evidence of an agreement that the paper so deposited was not *absolutely* sold to the bank, and that the credit given a customer on the deposit of such an item is *not absolute,* but contingent upon its collection;" (Italics supplied.)

and the bank was held to be merely an agent for collection.

It seems to be self-evident that if such a provision in a deposit slip affords evidence of an agreement that the bank took the paper for collection, then in your petitioner's case there was evidence on which the jury could have found for her, and under the well settled rules of a demurrer to the evidence, the court should have overruled the demurrer.

The Kentucky Court had this question presented to it in 1911 in the case of *Falls City Woolen Mills* v. *Louisville Nat'l Bank,* 140 S. W. 66. There it was held under a deposit slip reading "All items credited subject to final payment", that the bank was an agent for collection and was entitled to a directed verdict to that effect.

The rulings of the Federal Courts are to the same effect. In *Fifth National Bank* v. *Armstrong,* cited *supra,* 40 Fed. 46, the deposit slip provided that the bank credited the item "subject to payment". Of this provision, it was said:

"That credit was merely provisional—that is conditional on payment—and that it did not intend to assume the risk of payment, or give an *absolute* credit, or put itself in any other relation to the paper than that of an agent for collection." (Italics supplied.)

The recent case of *In re Ruskay,* 5 Fed. (2nd) 143, is of importance in demonstrating the decisive effect of restrictive provisions in a deposit slip. There the deposit slip simply read "deposit to the credit of", and on the basis of the same reasoning applied by the Virginia Court in the Fourth National Bank case, it was held that the bank took title to the check. But the Court went further and distinguished the case before it, from such cases as *King* v. *Bowling Green Truck Co., supra,* wherein the deposit slip contained restrictive provisions, saying that in such cases the deposit slip must be read into the contract and prevented the bank from acquiring title—"But", the court added, "the deposit slips used in the case now before us contained no statement whatever limiting the bank's responsibility or indicating in any way that the checks were not received as so much cash."

But what of authorities to the contrary? There are but two of which your petitioner is advised, each of which was strongly relied upon by the defendant before the court below, and each of which is easily distinguished from the case at bar.

In *Jefferson Bank* v. *Merchants Refining Co.,* 236 Mo. 407, 139 S. W. 545, the deposit book provided that the bank acted only as depositor's "agent". On the day of the deposit, the depositor drew out the whole of it, and the evidence further showed that *for a period of three weeks the depositor had*

been making a large number of deposits and on the same day checking against them. The court held that the bank took title to the deposited item, but explained its holding in part as follows:

"This conclusion is also sustained by the course of dealing between plaintiff and the company, from which it appears that on every business day between the 1st and 18th of July, 1904, the said company deposited checks in the plaintiff bank and was allowed by plaintiff to check out the amounts so deposited on the very days the deposits were made. *In view of this course of dealing we are warranted* in holding that the indorsement printed on the cover of the deposit book of the company, to the effect that plaintiff only received out of town checks subject to collection, had been waived by the plaintiff bank—a right it unquestionably had." (Italics supplied.)

This case, as is evident, turns upon "a course of dealing" which by implication overrode the agreement. In the instant case there was no course of dealing between Major and the Trust Company.

The other case so strenuously relied upon by defendant is *Raynor* v. *Scandinavian-American Bank,* 122 Wash. 150, 210 Pac. 499, 25 A. L. R. 716. There the deposit slip read: "Checks on this bank and on other Tacoma Clearing-house banks will be credited conditionally. If not found good at the close of business, they will be charged back to depositors and the latter notified of the fact. In making this deposit, the depositor hereby assents to the foregoing conditions." These were the full provisions of the deposit slip and of them the court spoke as follows:

"The condition written on the deposit slips amounted to nothing more than an agreement between the bank and each of the several depositors that if the check deposited was not found to be good at the close of business on the day of the deposit, it could be charged back to the depositor."

In other words, the Court held that this deposit slip simply set forth that which is the right of all banks to charge back to the depositor's account uncollected items. In the case of *Fourth National Bank* v. *Bragg, supra,* the Virginia Court held that such a provision did not affect the question of title, as it might be regarded simply as a method of enforcing the

liability which rested upon the depositor by reason of his endorsement.

Such a provision is, however, different from the provision that items are credited subject to actual payment, and that this is admitted by the Richmond Trust Company is clear from the deposit slip used by Major in depositing Mrs. McAuley's check, for that slip (Rec., pp. 30-31) not only provides as heretofore pointed out that "items on Richmond are credited subject to actual payment through the Richmond Clearing House"—the provision on which your petitioner relies,—but it also provides "that this bank shall have the right to charge back to the depositor's account any item for which actual payment is not received". The Trust Company certainly regarded these as different provisions—else why the two statements? The latter has no effect upon title, and if it alone were used the Trust Company would give absolute credit against which a depositor would have the immediate right to draw; but when the former was also included, the Trust Company specifically protected itself against the exercise of such a right by the depositor and in so doing constituted itself an agent. If, however, it permitted a check to be cashed, then the latter provision becomes effective, for if the deposited item be not paid, the bank then has the right to charge it back to the depositor's account.

Principle and authority then combine to declare that the Trust Company took the check as Major's agent for collection. Is its relation to it changed by reason of the fact that Major was permitted to draw against the deposit? It is of course admitted that the original intention of the parties could have been changed by subsequent agreement, but the burden of proving such a change rests upon the defendant. Only one fact is advanced, i. e, checks drawn against the deposit, and this is not sufficient to show a change of intention.

It will be recalled in *Greensburg Nat'l Bank* v. *Syer, supra,* the court, speaking through Judge Keith, held that where an item was deposited for collection, title thereto did not pass to the bank, even though the bank permitted the depositor to draw against the deposit before the deposited item was collected. And in *Fayette National Bank* v. *Summers, supra,* our court, also speaking through the same Judge, approved the language used by the Alabama court in *National Bank* v. *Miller, supra,* (a case also relied upon by Judge Kelly in the Fourth National Bank decision) in speaking of a deposit for collection as follows:

"But the bank may permit, as a matter of favor and convenience, checks to be *drawn against it before payment—the depositor in the event of non-payment being responsible for the sums drawn*—not by reason of endorsement, the check not having ceased to be his property, but for money paid."

To the same effect are *In re State Bank,* 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454; *Peoples State Bank* v. *Miller,* 185 Mich. 565, 152 N. W. 257; *First National Bank* v. *Stengle,* 169 N. Y. S. 218, cited *supra;* and *In re Jarmulowsky,* cited *supra,* 243 Fed. 319, L. R. A. 1918 E. 634.

The one case which above all others was relied upon by the defendant is *Old National Bank* v. *Gibson,* 105 Wash. 578, 179 Pac. 117, 6 A. L. R. 247. This case is worthy of the closest scrutiny. The defendant gave his check on The Fidelity Bank to one White. White deposited this check with the plaintiff bank, the deposit slip providing that the item was "taken for collection only". On the same date White checked out his *entire* balance with the plaintiff bank. Thereafter when the check was presented for payment to the Fidelity Bank, it was returned with the statment that payment had been stopped by the maker, the defendant. The plaintiff bank then brought suit allging that it honored White's check *on the faith of his credit balance which included the check given by the defendant, and that it advanced to White the amount of the check, upon the faith and credit of the check itself.* The defendant demurred to the declaration, thereby admitting for the purpose of the demurrer, all the allegations of the declaration. The lower court sustained the demurrer, but by a four to three decision the Supreme Court overruled it. It was of course conceded that originally the check had been taken simply for collection, and that the bank did not take title thereto or acquire a lien thereon; but the declaration alleged that thereafter, and by permitting the depositor to draw, the agreement was changed. There being nothing illegal in the making of a new and supplemental agreement, the majority held that the declaration stated a good case. But three of the court rested their dissent on the principle enunciated by Judge Keith in the Greensburg National Bank case, that as a matter of law when a check is taken for collection, the bank's relation thereto is not altered by reason of the fact that the depositor was permitted to draw, and that this is simply "the granting of a mere gratuitous privilege which did not make it a holder for value of the deposited check".

The Circuit Court of the City of Richmond in sustaining the demurrer to the evidence in the instant case was forced to decide that as a matter of law the relationship of a bank which allowed a depositor to check on a collection credit was changed from that of an agent for collection to that of a holder for value. This even the majority of the Washington Court was unwilling to hold for they carefully point out that when a depositor presents a check against a conditional credit, there are four things a bank may do: (1) It may rest on its contract with the depositor and refuse to pay the check; (2) It may cash the depositor's check "solely upon his individual credit" without reference to the deposited item; (3) It may waive the provision of the original agreement created for its own protection, and pay the depositor's check on the credit of the check theretofore deposited by him; (4) or, It may combine the last two methods and pay the depositor's check on the combined credit of the depositor and the deposited check. It must not be forgotten that the case was before the Washington court on a demurrer to a declaration which alleged that the bank had adopted the third course; the allegation was therefore sufficient, the demurrer was overruled and the plaintiff bank was given an opportunity to prove its case. But a demurrer to a declaration is much different from a demurrer to the evidence. So far as the evidence in the instant case shows, the Trust Company may have adopted anyone of the last three courses, and if from the evidence (and it must be remembered that the evidence contains not one line showing the custom of banks in this respect) the jury could have concluded that the second method adopted by the bank was in this case pursued by the Richmond Trust Company, your petitioner was entitled to a judgment. Even under the decision of the majority of the Washington court, the jury would have been warranted in so finding. Much more so would this be the result under the views of the minority, which are the same as those adopted by the Virginia Court in two cases.

b. *The Richmond Trust Company acquired no Specific Lien on the Check.*

The third ground assigned in the demurrer to the evidence is that, in the event the check after deposit be held to have still been the property of Major, the Richmond Trust Company acquired a specific lien thereon by making advances on the strength of the check, and under the terms of the ne-

gotiable instruments law became a holder for value thereof. This contention is based upon Section 27 of the Negotiable Instruments Law (Section 5589 of the Code) which provides:

"Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of the lien."

Clearly no lien arose by contract, if any arose by implication, that implication must be drawn from the one fact that Major's checks were honored. The defendant says that this fact is tantamount to advancing monies on the strength of the deposited check. Again, we call attention to the fact that this case is before the Court on a demurrer to the evidence. Even under the decision of the majority of the Washington Court in the last case cited, no one implication can be drawn from the one fact that Major's checks were honored. There are three possible implications, each consistent with the one fact, and where such is the case the jury could have found for petitioner and the demurrer must be overruled. The error in this ground of demurrer is not one of conclusion, it is to be found in the premise which presupposed that advances were made on the strength of the deposited check—the well known logical fallacy of assuming as true the fact which must be proved. We simply have the fact of payment of Major's checks from which anyone of three conclusions, under the most favorable view of the case to the defendant, may be drawn, and the burden rested on it to show that it had a specific agreement to that effect with Major, or that in this locality the well known custom of bankers would give rise to such an implication. It tried to do neither—being a bank it knows the custom of local banks—whatever that custom may be. The conclusion to be drawn from its failure to produce evidence which could not have been controverted can be no other than that such evidence did not exist.

But what said the Virginia Court in the two decisions quoted above written by Judge Keith, the one in 1905 and the other in 1912? The Negotiable Instruments Act was adopted by this Commonwealth at the Legislative session of 1897-8. Our court has flatly stated in those decisions—the statute law being the same then as now—that a bank which has taken an item for collection, acquired no proprietary interest in the item even though it allows the collection credit to be checked against; that this is a mere favor extended on the personal

credit of the depositor, and the bank remains a mere agent, and is not a holder for value either by reason of purchase or lien, for there has been no purchase and no lien has been acquired.

c. *The Richmond Trust Company had no General Lien on the Check.*

As its fourth ground of demurrer, and in the eevnt it be held that after making the deposit Major still retained title to the check, it is contended that the Richmond Trust Company held a general lien on all assets of Major for monies due it by Major, and under the terms of the Negotiable Instrument Act above quoted, it became a holder in due course of the check. The error in this contention is in part the same as that which vitiates the contention advanced on the strength of the specific lien. Section 27 of the Negotiable Instruments Law, above quoted, refers only to the effect of a lien, it is silent as to the methods by which a lien may be acquired.

A specific lien may be acquired by agreement, express or implied, to that effect—that matter we have disposed of. But this so-called general or "Banker's Lien" is really not a lien, but is nothing more than the right of a bank to set off against a debt due it *property of the debtor* in its hands. In other words, the bank holds on to property belonging to the debtor to safeguard its claim. The bank acquires no higher right thereto than is possessed by its debtor. It claims his rights, and no others, for it has given no value for his property, which in the case of a negotiable instrument, is essential to the acquisition of rights greater than those of the debtor. The Bank's claim to the property is the same as that of the person who owes it money, and if one appears who has higher rights than those of the debtor, he may successfully assert them against the bank. This is clearly recognized by Mr. Michie in his much cited work on Bank & Banking, Vol. II, p. 1036, for in discussing this question he there points out that "as against the money of third parties obtained by * * * a depositor, a bank has no higher right or better title than the depositor himself". See also the cases there cited, and in particular *Anderson* v. *Market Nat'l Bank*, 1 N. Y. S. 136. In the instant case, Major obtained petitioner's check by fraud; the Bank now claims in this ground of demurrer that the Trust Company holds that check (or its proceeds) as Major's property in its possession to protect it

against loss by reason of a debt due it by Major in no way created on the faith of the check. Asserting Major's rights, as it must do when it rests on the so-called "Banker's Lien", it is evident that against your petitioner this contention must fail.

There are innumerable authorities on this and the closely analogous subject of the specific lien, collected in many exhaustive notes found in 111 Am. St. Rep. 426, L. R. A. 1915 A 715, 13 A. L. R. 324, 31 A. L. R. 756, 50 A. L. R. 632. Many of the cases seem to lay down the rule that in all circumstances the bank has a "lien" on funds deposited to secure debts of the depositor, even though a third party has rights superior to those of the depositor. In most of them, the deposit which the bank sought to hold was passed to the immediate credit of the depositor and under the implied agreement with him treated as cash, and the deposited item was actually collected by the bank prior to the assertion by the third party of his rights. *Arnold* v. *San Ramon Valley* Bank (Cal.), 194 Pac. 1012, 13 A. L. R. 320, is a good example of this type of case. It need scarcely be added that if Mrs. McAuley's check had been paid to the Richmond Trust Company without any stop payment order intervening, the Richmond Trust Company would have had a lien on the proceeds; but prior to its payment it had simply the rights of Major, for it was his agent for a specific purpose.

This principle, to which as a last resort the defendant appeals, goes back and rests on the original case of *Bank of Metropolis* v. *New England Bank,* 1 How. 234, 6 How. 212, which was twice before the Supreme Court and is cited in almost every case wherein this question has been discussed. The well recognized doctrine of that case is that a bank in which paper is deposited for collection may retain that paper or its proceeds to satisfy a claim for a general balance due by the depositor, *provided that indebtedness arose by reason of reliance on the deposit;* and further that the mere fact of a deposit and indebtedness is not sufficient to indicate such reliance, but that this reliance must be evidenced by some further fact, which in that case was furnished by the long established custom between the parties. In other words these cases which give the bank a "lien" on collection items rest on the fact that advances were made on the strength of the deposit, and set forth nothing more than the specific lien contended for in a former ground of demurrer. Where custom indicates that advances were so made, or where the bank became, under its express or implied agreement with the de-

positor, the owner of the deposited item, then it is considered that the bank has relied on the deposit and it acquires the "lien", but where, as in our case, there is no custom, or the bank has not taken title to the item, or can show no affirmative fact indicative of its reliance on the deposit, but is forced to fall back upon the right of the depositor, then the higher rights of a third party prevail.

SUMMARY.

The case of your petitioner against the defendant bank rests on the breach of their implied agreement, that the check given to your petitioner by the defendant would not be paid unless it had fallen into the hands of one who for value and without notice of Major's fraud had acquired proprietary interests therein. The defendant Bank contends that in directing that the check be paid to the Richmond Trust Company, it did not violate the agreement inasmuch as the Richmond Trust Company had acquired proprietary interests therein for value and without notice, either as purchaser or lien holder, and was therefore a holder for value within the meaning of the Negotiable Instruments Law. The agreement between the Richmond Trust Company and its depositor, expressly drawn by the Trust Company, negatives (particularly so where the case is heard on a demurrer to the evidence) the theory of purchase; and the failure to show affirmatively some fact to override the express agreement, or some fact indicating that advances were made on the strength of the check, negatives the theory of lien, for, particularly in this jurisdiction the sole fact that the depositor is allowed to draw is not sufficient to change the relation of a bank to a collection item. The Richmond Trust Company then had no higher rights than Major, who, as against your petitioner, had none.

Wherefore, your petitioner prays that a writ of error be granted unto her to the above mentioned judgment, and that said judgment be reviewed and reversed, and that judgment be entered in favor of your petitioner for the full amount claimed in accordance with the verdict of the jury.

ESSIE McAULEY.

By DENNY & VALENTINE,
Her Counsel.

I, Collins Denny, Jr., an attorney practicing in the Supreme Court of Appeals of Virginia, do hereby certify that I am of opinion that the judgment complained of should be reviewed and reversed.

COLLINS DENNY, JR.

Received August 15, 1929.

R. H. L. C.

Writ of Error allowed. Bond $300.00.

HENRY W. HOLT.

Received Sept. 24, 1929.

H. S. J.

VIRGINIA:

PLEAS before the Circuit Court of the City of Richmond, held in the Court room in said City in the City Hall thereof on Thursday, the 14th day of March, 1929.

BE IT REMEMBERED, that heretofore, to-wit: In the Clerk's office of the Circuit Court of the City of Richmond, in the City Hall thereof, on the 2nd day of November, 1928, came ESSIE McAULEY, by her attorneys and filed her Notice of Motion for Judgment against MORRIS PLAN BANK OF VIRGINIA, which Notice of Motion for Judgment is in the words and figures following, to-wit:

Essie McAuley
vs.
Morris Plan Bank of Virginia.

NOTICE OF MOTION FOR JUDGMENT.

To the Morris Plan Bank of Virginia:

Take notice that at 10 o'clock on Monday, the 19th day of November, 1928, the undersigned will move the Circuit Court of the City of Richmond at its Court room for a judgment against you in the amount of TWELVE HUNDRED AND FIFTY DOLLARS ($1,250.00), with interest thereon from November 21, 1927, and costs, for this, to-wit:

1. That heretofore, to-wit, on the 18th day of November, 1927, you were indebted to the undersigned in a large sum of money, to-wit, $1,257.50, on account of certain monies aggregating that sum which from time to time the undersigned had deposited with you in her savings account No. 9889, together with interest at five per cent per annum, which had accrued thereon, which monies you contracted and agreed to repay on demand to the undersigned or as she might direct by checks drawn by the undersigned in you in favor of herself or of any other person.

page 2 } 2. That on November 18, 1927, the undersigned presented her check for $1,250.00 drawn on you, payable to cash, together with her savings account book to you, and that instead of giving her $1,250.00 in cash, you gave her your check No. 4372, drawn by you on the Virginia Trust Company, payable to the order of the undersigned, and entered in said savings account book a withdrawal of $1,250.00.

3. That said check was not given by you nor was it received by the undersigned as an unconditional or absolute payment to her of $1,250.00 on account of your indebtedness to her, but it was given and received solely as a payment conditioned upon the check being paid according to its tenor.

4. That on the following day, to-wit, November 19th, 1927, the undersigned endorsed said check and delivered it to one D. Major, as part payment for a certain Cadillac automobile, which automobile the undersigned later on the same day discovered was stolen from certain parties in New York State, and which has been since recovered by them from her in a certain action in the Law and Equity Court of the City of Richmond.

5. That this information of the fraud which had been practiced upon her was obtained by the undersigned on Saturday, November 19, 1927, at too late an hour to give you notice thereof on that day, but that before the opening of your office on Monday, November 21, 1927, the undersigned gave you notice of said fraud and requested and directed you to have the payment of said check stopped; and that thereupon you and she having ascertained that said check had not been paid by the said Virginia Trust Company, you directed said Virginia Trust Company to stop the payment of said check,

which was accordingly done, and you and the undersigned thereby agreed that said check should not be paid and should in no sense operate as a payment by you to her of $1,250.00 of your indebtedness to her and that the undersigned should be credited by you with the amount thereof, which should remain on deposit with you subject to her right as page 3 } theretofore to check thereon.

6. That thereafter, to-wit, on November 23, 1927, without any word to the undersigned and without her knowledge, consent or agreement and in violation of your agreement with her, you directed the Virginia Trust Company to pay said check, which was accordingly done and you refused and have since constantly refused despite your agreement and in violation thereof, to credit the undersigned with the amount of said check, payment of which was stopped as heretofore recited, or to pay over to the undersigned said sum of $1,250.00, despite her demand therefor and have thereby caused her to be damaged to the extent of $1,250.00 with interest thereon from November 21, 1927, for the recovery of which she brings this action.

ESSIE McAULEY,
By Counsel.

DENNY & VALENTINE,
Counsel for Plaintiff.

SHERIFF'S RETURN.

Executed in the City of Richmond, Va., 11-2-28, by delivering a copy of within Notice of Motion to E. P. Mangum, Asst. Cashier of Morris Plan Bank of Virginia, place of business of said Mangum being in said City of Richmond, Va.

J. HERBERT MERCER,
Sheriff, of the City of Richmond, Va.

By W. M. LUCK,
Deputy Sheriff.

Sheriff's Fee, due 50c.

And at another day, to-wit: At a Circuit Court of the City of Richmond, held in the Court room of said Court in the City Hall thereof on Monday, the 19th day of November, 1928.

This day came the plaintiff by her attorneys and the defendant being called and not appearing on the motion of the plaintiff by her attorney, it is ordered that this Motion be docketed.

page 4 } And at another day, to-wit: At a Circuit Court of the City of Richmond, held in the Court room of said City in the City Hall thereof on Tuesday, the 5th day of March, 1929.

This day came again the parties by their attorneys and the plaintiff by her attorney moved the Court to be allowed to file an amendment to her Notice of Motion, which Motion the Court granted and said amendment is filed, the defendant by its attorneys pleaded the general issue and put itself upon the country and the plaintiff likewise, and thereupon came a jury, to-wit: W. J. Hudson, Horace Upshur, H. W. Stein, R. D. Thompson, Albert Wallerstein, P. M. Wiley, and E. W. Weeks, being sworn well and truly to try the issue joined in this case, and having heard the plaintiff's evidence, the defendant by its attorneys filed its Demurrer to the plaintiff's evidence, and the plaintiff joined in the said demurrer. Whereupon the jury being required to say what damages the plaintiff hath sustained, returned a verdict in the words and figures following, to-wit: "We, the jury, find for the plaintiff and assess her damages at $1,250.00 with interest thereon from November 21, 1927, subject to the opinion of the Court on the Demurrer to the evidence." And the said Demurrer being argued, the Court takes time to consider thereof.

Essie McAuley,
vs.
Morris Plan Bank of Virginia.

AMENDED NOTICE OF MOTION.

To the Morris Plan Bank of Virginia:

Take notice that at 10 o'clock on Monday, the 19th day of November, 1928, the undersigned will move the Circuit Court of the City of Richmond at its Court room for a judgment against you in the amount of TWELVE HUN-
page 5 } DRED AND FIFTY DOLLARS ($1,250.00), with interest thereon from November 21, 1927, and costs for this, to-wit:

1. That heretofore, to-wit, on the 18th day of November, 1927, you were indebted to the undersigned in a large sum of money, to-wit, $1,257.50 on account of certain monies aggregating that sum which from time to time the undersigned had deposited with you in her saving account No. 9889, together with interest at five percent per annum, which had accrued thereon, which monies you contracted and agreed to repay on demand to the undersigned or as she might direct by checks drawn by the undersigned on you in favor of herself or any other person.

2. That on November 18, 1927, the undersigned presented her check for $1,250.00 drawn on you, payable to cash, together with her savings account book to you, and that instead of giving her $1,250.00 in cash, you gave her your check No. 4372, drawn by you on the Virginia Trust Company, payable to the order of the undersigned, and entered in said savings account book a withdrawal of $1,250.00.

3. That said check was not given by you nor was it received by the undersigned as an unconditional or absolute payment to her of $1,250.00 on account of your indebtedness to her, but it was given and received solely as a payment conditioned upon the check being paid according to its tenor.

4. That on the following day, to-wit, November 19, 1927, the undersigned endorsed said check and delivered it to one D. Major, as part payment for a certain Cadillac automobile, which automobile the undersigned later discovered was stolen from certain parties in New York State, and which has been since recovered by them from her in a certain action in the Law and Equity Court of the City of Richmond.

5. That this information of the fraud which had been practiced upon her was obtained by the undersigned Monday Morning, November 21, 1927, whereupon she immepage 6 } diately gave notice thereof to you and directed you to have payment of said check stopped; and that theerupon you and she having ascertained that said check had not been paid by the said Virginia Trust Company, you directed said Virginia Trust Company to stop the payment of said check, which was accordingly done, and you and the undersigned thereby agreed that unless said check had passed into the hands of a *bona fide* holder for value without notice

of the fraud it should not be paid and should in no sense operate as a payment by you to her of $1,250.00 of your indebtedness to her and that the undersigned should be credited by you with the amount thereof, which should remain on deposit with you subject to her right as theretofore to check thereon.

6. That thereafter, to-wit, on November 23, 1927, without any word to the undersigned and without her knowledge, consent or agreement and in violation of your agreement with her, and despite the fact that said check had not passed into the hands of a *bona fide* holder for value without notice of the fraud, you directed the Virginia Trust Company to pay said check which was accordingly done and you refused and have since constantly refused despite your agreement and in violation thereof to credit the undersigned with the amount of said check, payment of which was stopped as heretofore recited, or to pay over to the undersigned the said sum of $1,250.00 despite her demands therefor, and have thereby caused her to be damaged to the extent of $1,250.00 with interest thereon from November 21, 1927, for the recovery of which she brings this action.

ESSIE McAULEY,
By Counsel.

DENNY & VALENTINE,
Counsel for Plaintiff.

page 7 } DEMURRER TO EVIDENCE.

Essie McAuley
vs.
The Morris Plan Bank of Virginia.

Be it remembered that after the jury was sworn to try the issue joined in this cause, the plaintiff introduced the following evidence, which is all the evidence that was introduced, and which is made a part of this Demurrer to Evidence.

The plaintiff to prove and maintain the said issue on her part introduced the following evidence:

Note: It is agreed that the car purchased by the plaintiff from D. Major, was a stolen automobile which was subse-

quently recovered from the plaintiff in a suit brought for that purpose by the real owner of the car in the Law & Equity Court of the City of Richmond.

MRS. ESSIE McAULEY,
the plaintiff introduced in her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Denny:

Q. Mrs. McAuley, what is your name?

A. Essie McAuley.

Q. Are you the plaintiff in this suit?

A. Yes, sir.

Q. Mrs. McAuley, did you meet sometime in November, 1927, an alleged automobile salesman by the name of D. Major?

A. I did.

page 8 } Q. Did you finally agree to purchase an automobile from him?

A. Yes.

Q. What kind of car was it?

A. It was a Packard.

Q. What day did you finally give Major your acceptance of his offer to sell that car? Do you remember the date?

A. You mean the day we agreed to buy it?

Q. Yes?

A. On the 18th day of November.

Q. 1927?

A. Yes.

Q. What took place on that date between you and your husband and Major?

A. Well, we agreed to buy the car for the $1,675.00, but we had $1,250.00 of it in the Morris Plan Bank and you can't check on that; you have to go to the bank to give them your check and they give you their check. So we couldn't really finish it up that day; all we could do was to agree to do it and give him a check to make him perfectly safe that we wouldn't change our minds.

Q. Did you give him a check that day?

A. Yes, for $150.00.

Q. Did you on Mr. McAuley drew that check?

A. Mr. McAuley drew that one.

Q. When did you meet Mr. Major to close that transaction?

A. You mean the Friday or the Saturday.

Q. The Saturday.

A. About I should say nine-thirty at Mr. McAuley's office.

Q. Who was present at that time?

A. Mr. Major and Mr. Darden and Mr. McAuley and myself.

Q. In the meanwhile had you gotten any money out of your bank account at the Morris Plan Bank?

page 9 } A. Yes, Mr. McAuley took this $1,250.00 check I drew on the Morris Plan Bank to them and they, in turn, gave him a check for $1,250.00 made payable to me, which I endorsed and gave to Mr. Darden to give to Mr. Major as soon as he got the title.

Q. Did Major have with him early Saturday morning the Virginia certificate of title?

A. No. He had all his New York titles and they were clear of lien, he had no lien on them at all, but just had his New York Certificate.

Q. To whom did you give this $1,250.00 check that morning?

A. Mr. Darden, who is supposed to be an automobile dealer, and he was going to look after the title.

Q. Was it understood Mr. Darden was not to give that check to Major until a Virginia title had been issued to Major?

A. It was. In fact, I filled out an application blank to be presented to the Motor Vehicle Department, but I filled it out on the new car instead of the second hand one and that is the real reason it wasn't gotten in my name on Saturday. It was my error there.

Q. Did Mr. Darden later on that day bring you a certificate on this car in Major's name and assigned to you?

A. Yes, he did, before a Notary public down at the Capitol Building.

Q. I hand you for identification a certificate of title of the Motor Vehicle Department, title number 490948, of a Packard, made out to D. Major. On the back of it it is assigned to Mrs. Essie McAuley by D. Major and it is acknowledged before a Notary. Is that the title certificate which Darden brought you on Saturday?

A. It is, yes, sir.

page 10 } EXHIBIT E. M. #1.

Title
Number
490948

DEPARTMENT OF FINANCE

DIVISION OF MOTOR VEHICLES

Commonwealth of Virginia

CERTIFICATE OF TITLE OF A MOTOR VEHICLE

I, James M. Hayes, Jr., Director, Division of Motor Vehicles of the Commonwealth of Virginia, do hereby certify, pursuant to the provisions of Chapter 149 of the ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, passed at the session of 1926, that an application has been made to me, as by said ACT prescribed for a Certificate of Title of a Motor Vehicle as follows:

Make	Body	Year	Engine No.	H. P.	Date
	Packard	Sedan U119816	C 29	Weight	Nov.
	490948	27 Weight 4145		or Ton	19 1927

D. Major,
Whitehall Hotel,
Broadway, N. Y. B

And that the applicant has stated under oath that said Motor Vehicle is subject to the following liens:

Amount	Kind	Date	Favor of

I do further certify that I have used reasonable diligence in ascertaining whether or not facts stated in said application for a Certificate of Title are true, and that I am satisfied that the applicant is the lawful owner of the above described Motor Vehicle, or is otherwise entitled to have the same registered in his name:

Wherefore, I do hereby certify that the above named applicant has been duly registered in my office as the lawful

owner of the above described Motor Vehicle, or as otherwise entitled to have the same registered in his name, and that it apepars upon the official records of my office that at the date of the issuance of this Certificate, said Motor Ve-
page 11 } hicle is subject to the liens hereinbefore enumerated, if any, and none other.

As witness, my hand and the Seal of my office the day and year set opposite, the name of the applicant in the aforegoing Certificate.

Note: To transfer ownership the assignment of title on the back hereof must be properly filled and acknowledged before a Notary Public or other officer authorized to administer an oath.

SEAL JAMES HAYES, JR., Director.

READ CAREFULLY BEFORE BUYING OR SELLING.

INFORMATION.

For your own protection, do not buy a used car from outside of this State unless the party selling same has registered car in Virginia.

See that Motor Number on Certificate of Title corresponds with Number on Motor, and that Motor Number has not been changod or altered.

The Certificate is transferrable only when recorded and filed at the Office of the Director Division of Motor Vehicles, and is valid only while the car described above is owned by the individual, firm or corporation named hereon.

The Certificate of title need not be carried in the car. It should be kept in a secure place, as are other valuable papers. Its possession by the applicant may become necessary to prove title in the event of question as to the ownership of the car.

Any one operating a machine in this State after July 1, 1924, without first procuring a Certificate of Title, as herein provided, shall be guilty of a Misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than $25.00 nor more than $1,000.00.

Anyone selling a Motor Vehicle after June 30,
page 12 } 1924, without first procuring Certificate of Title, as herein provided shall be giulty of a felony, and upon conviction thereof, shall be punished by a fine of not

less than $50.00 nor more than $1,000.00, or by imprisonment for not less than 90 days nor more than five years, or by both such fine and imprisonment.

Anyone making a false statement in his application for the Certificate of Title, or in any assignment thereof, shall be deemed guilty of a felony, and, upon conviction, shall be punished by a fine of not less than $100.00 nor more than $5,000.00, or by imprisonment for not less than one year nor more than five years, or both such fine and imprisonment.

Any person who shall alter or forge, or cause to be altered or forged, any certificate of Title issued by the Director, Division of Motor Vehicles, or any assignments thereof, or who shall hold or use any such Certificate or Assignment knowing the same to have been altered or forged shall be deemed guilty of a felony, and upon conviction thereof, shall be liable to a fine of not less than $100.00 nor more than $5,000.00 or to imprisonment for a period of not less than one year nor more than five years, or both.

ASSIGNMENT OF TITLE.

When properly filled out and acknowledged must be presented to the Director Division of Motor Vehicles accompanied by a properly filled and acknowledged application for registration.

For value received (I hereby sell, assign or transfer unto
We

MRS. ESSIE McAULEY

Address, 3156 Floyd, Richmond, Va.
Street No. or R. F. D. City or Town State

page 13 } The Motor Vehicle described on the reverse side of this certificate, and (I hereby warrant the
We
title to said Motor Vehicle, and certify that at the time of delivery the same is subject to the following liens or encumbrances, and none other.

NONE

Amount	Kind	Date	Favor of

D. MAJOR.

By.....

On this 19th Day of November, 1927, Before me, the subscriber, a Notary Public of the State of Va residing at Richmond, personally appeared the above named Assignor, residing at.....and being prsonally known to me (or satisfactorily identified to me by..... residing at.....) makes oath in due form of law, that the matters and things set forth in the foregoing statement are within his personal knowledge and are true as therein set forth.

Witness My Hand

HARVEY E. ATKINSON,
Notary Public or Inspector.

My Commission expires April 30, 1928.

page 14 } Q. About what time on Saturday did you receive that Saturday?

A. I should say between one and one-thirty. I didn't look at the clock, but I know it was just after lunch.

Q. Did you take that certificate of title to the Motor Vehicle Commissioner's office to have the title changed to your name and, if so, when?

A. I did that on Monday morning. I called them Saturday and they were closed. So I went down Monday morning early.

Q. Did you present that certificate with the usual form for having a car transferred to you?

A. I did.

Q. Did they give you a title?

A. No.

Q. What happened?

A. Well, he said—

Mr. Dashiell: Has that anything to do with the purpose of this case? We admit the automobile was bought by Mrs. McAuley and turned out to be a stolen car.

Mr. Denny: The whole purpose of this is to show Mrs. McAuley was guilty herself of no negligence in purchasing this car when she was given an authorized and genuine Virginia certificate for it.

The Court: I don't see the materialty of it. Practically all of that is admitted in the stipulation. Now, of course,

if they raise some question about the plaintiff not being diligent you can put that evidence in.

page 15 } Q. Mrs. McAuley, when the Motor Vehicle Commissioner refused to give you a certificate what did you do?

A. Well, I was rather panicky. The first thing I did was to call Mr. McAuley on the phone, because it came such a shock to us, kind of took me off my feet. So I asked Mr. Hayes, "What can I do about it?"

Q. Did you got to the Morris Plan Bank?

A. I was going to tell you. He said the thing to do was to stop payment of this check right away. I said, "I don't know if I can. It may be he cashed it." So then,—no, I called the Morris Plan Bank, trying to save time, and one of the clerks answered; I don't know which one, but I spoke to one of them on the phone and he said, "If you come right down you can stop payment on it. It hasn't been paid." So I beat it. That was Mr. Tyler down there I talked to, and he said, "We will have to go to the Virginia Trust Company to see if it had been paid." That was the first I realized that—when they drew attention they don't pay them in their own bank, that they depend on another bank to pay it for them. So I went with him after we got the number of the check and things of that kind—I don't know the number of the check. We went then to the Virginia Trust Company and we got there in time; the check had not been paid. So he then asked the man if he would consider this verbal stop payment until he could write one and send it to him, and he told him he would. So I went back with him to the Morris Plan. In the meantime I had signed the stop payment; I don't know whether before we went to the Virginia Trust or after. The thing I was directly interested in was *wether* it had been paid. I signed a paper to stop payment on it and

page 16 } when I left I left rejoicing the thing had not been paid, and I was perfectly save; I was in $1,250.00, until Friday—I think it was Friday morning I got the letter. That was when I got the next shock that they had paid it.

Q. After you left the Morris Plan Bank on Monday and you had learned you had been successful in stopping payment on that check how did you learn they had permitted or directed that the check be paid?

A. I had a letter from them telling me and that was the letter I think I got on Friday morning.

Q. Is this the letter you received from them?
A. Yes, sir, that is the letter.

NOTE FILED AS EXHIBIT E. M. #2.

Thomas C. Boushall, President,
Philip Woollcott, Vice-President
Anton C. Adams, Cashier.

L. H. Fairbanks, Ass't Cashier
D. P. Tyler, Asst Cashier,
J. E. Dowd, Ass't Cashier,
O. S. Woodward, Auditor.

THE MORRIS PLAN BANK

of Richmond

The
Morris
Plan

Richmond, Virginia.
November 23, 1927.

Mrs. Essie McAuley,
3156 Floyd Avenue,
Richmond, Virginia.

Dear Mrs. McAuley:

Several days ago you requested us to stop payment of our Check No. 4372 dated November 18, 1927, drawn on the Virginia Trust Company, payable to yourself for $1,250.00, which check we had issued you and charged against your Savings Account No. 9889. Upon this request we requested page 17 } the Virginia Trust Company to stop payment on the above mentioned check, which they did, but in view of the fact, that in the meantime a third party had cashed this check in good faith, it was necessary for us to have the stop payment order cancelled and authorize check to be paid.

We regret that this was necessary, but was the only course open, and, therefore, the $1,250.00 charged against your account will have to stand.

Yours very truly,

D. P. TYLER,
Assistant Cashier.

DPT-P

Mr. Denny: There is one other matter that was agreed to be stipulated instead of being a representative of the Virginia Trust Company here, that it is stipulated that by letter of November 23rd, 1927, the Morris Plan Bank of Virginia directed the Virginia Trust Company to cancel the stop payment order given to it on November 21st.

Mr. Dashiell: *My* it please the Court, counsel for the defendants moves the entire testimony of the plaintiff be stricken from the record on account of variance in said testimony with the notice of motion. There is no agreement as outlined in the notice of motion in Mrs. McAuley's testimony.

The Court: Motion overruled.

Mr. Dashiell: Exception.

CROSS EXAMINATION.

By Mr. Dashiell:

Q. Mrs. McAuley, I merely want you to identify
page 18 } one or two papers. Is this the check?

A. That is the check, yes.

NOTE FILED AS "EXHIBIT E. M. #3".

Richmond, Va. Nov. 18, 1927. No. 4372.

Countersigned

J. E. DOWD,
Ass't Cashier.

THE
MORRIS
PLAN

THE MORRIS PLAN BANK OF RICHMOND. 68-677

5

Pay to the Order of Mrs. Essie McAuley.....$1,250.00

Exactly One Thousand Dollars Two Hundred Fifty Dollars Exactly—Dollars

To Virginia Trust Company
68-10
Richmond, Va.

D. P. TYLER,
Ass't Cashier.

PAYMENT STOPPED.

Virginia Trust Co.
No. 20, 1927.
Richmond, Va.

ENDORSEMENT ON BACK
Mrs. Essie McAULEY,
D. MAJOR.

Pay to the order of any Bank Banker or Trust Co.,
Prior Endrosements Guaranteed,
Nov. 18, 1927.
Richmond Trust Co., Richmond, Va.

R. C. McINTYRE, Treasurer.

Q. Is that the letter that you wrote at the Morris Plan Bank to stop payment?
A. Yes, this is the one I signed.

NOTE FILED AS EXHIBIT "E. M. NO. 4".

November 21, 1927.

Morris Plan Bank of Richmond,
Richmond, Va.

Gentlemen:
You are requested to stop payment on your Virginia Trust Company Check No. 4372 issued in my name November, 18, 1927, for $1,250.00 as I suspect fraud in connection with the party to whom the check was given by me.

Yours very truly,

MRS. ESSIE McAULEY.

page 19 } Q. Mrs. McAuley, that Monday morning when you found that you couldn't get the title to that Packard car at Mr. Hayes' office, you say that you called the Morris Plan Bank.
A. I did.
Q. You said you didn't know to whom you talked?
A. No, I didn't know who I talked to.
Q. Where did you call?
A. I called from home. I went back home and called over the phone from there.
Q. Did you ask to speak to anyone?

A. No, I didn't know anyone down there.

Q. What did the person say?

A. Why I asked him if Major had been there to cash a check and he said he had no record of it having been paid and I think—I can't swear that I told him anything, went into the details of the thing because I don't know. I know he told me if I came straight on down a stop order—stop payment could be put in, that he could fix it for me.

Q. Did you tell that man over the phone that it was a check on the Morris Plan Bank of Virginia or on the Virginia Trust Company?

A. I didn't know that the Virginia Trust Company figured in it at all. I will tell you, I didn't look to see. I really thought it was just a check drawn on the Morris Plan Bank like you do on the State Planters. I didn't know they kept bank accounts around at different banks and then drew on the other banks for it. I didn't understand that you can't draw there, that if you put your money in that bank you can't draw it out, you can't write a check on them. I didn't know about that until I talked to Mr. Tyler.

page 20 } Q. That man told you to come down and stop payment on the check, that it hadn't been paid.

A. That he didn't have any record of it being paid.

Q. What time was that?

A. That was early. I wasn't *look* at the clock, but I know I didn't lose any time that morning; I stepped on it.

Q. Was it ten o'clock?

A. I won't say because I know I didn't lose a bit of time. I won't say what time it was. I know I went to Mr. Hayes' office early and I went home as quickly as I could get there and came back down just as quick as I could make it.

Q. Are you positive of that telephone talk?

A. Oh, I know I talked to him, sure.

Q. And that he said he had no record of the check being paid?

A. I know that. When I went into that bank a small fellow at the window—I told him what I wanted. He said, yes, and referred me to this Mr. Tyler then; he knew what I was talking about. I don't know which one of these tellers you call it, but it was one of the tellers there.

Q. And then after that phone talk you came down to the bank?

A. Yes.

Q. And talked to Mr. Tyler?

A. Mr. Tyler.

Q. When did you first learn it was a check on the Virginia Trust Company?

A. Well, he said, "Wait a minute and I will see. Do you know the number of the check?" I really wasn't thinking of any suit coming up and I don't mean to say I took any memorandum of what was said, but the whole gist of it was that he got up and went back in the vault or somewhere and got some numbers and then he said, "Come on; we will go over to the Virginia Trust Company and see about
page 21 } it". And that was what struck me funny. I didn't as him if the check was on the Virginia Trust Company. I was hanging to a thread and I went along with him and went in there and the fellow at the Virginia Trust Company said it hadn't been paid, and he said, "We are just in time. Will you take my order on that and I will send"—I think he said he would send him the notice on it.

Q. You went to the Virginia Trust Company after you learned it was a check on the Virginia Trust Company?

A. No, I went with Mr. Tyler. I didn't know why we were going there. He said, "We will walk over to the Virginia Trust and see if it has been paid." I didn't know really what we went to the Virginia Trust Company for because I thought the thing was drawn on the Morris Plan. I didn't know they even figured in it at all.

Q. Your claim against the bank shows that you agreed with the bank that unless the check had passed into the hands of a *bona fide* holder for value with notice of the fraud it shouldn't be paid?

Mr. Denny: I object to that question. The allegation in the notice of motion is that it was agreed that payment of the check should be stopped and the notice of motion then goes further and says thereby a resulting agreement was established. There is no allegation of a specific agreement here. That allegation is an agreement implied from the agreement to stop payment. My notice doesn't state any specific agreement between Mrs. McAuley and the bank. My whole case is implied agreement which grows out of the fact of stopping payment.

page 22 } The Court: You may read that part of the notice of motion to the jury. She can only agree what is in the pleadings there. You can read that to the witness and ask if she agreed to that. That is part of the notice of motion, unless you have some other agreement, whether she signed any agreement to that or not.

Q. Mrs. McAuley, I will now read to the jury and to you Sections five and six, and I will ask you whether that was your agreement with the Morris Plan Bank. I am reading five and six: "That this information of the fraud so practiced on her was obtained by the undersigned on Monday, November 21st, 1927; whereupon she immediately gave notice to you and directed you to have payment of said check stopped; that thereupon you and she, having ascertained the check had not been paid by the Virginia Trust Company, you directed said Virginia Trust Company to stop the payment of said check, which was accordingly done, and you and the undersigned thereby agreed that unless said check had passed into the hands of a *bona fide* holder for value without notice of the fraud it should not be paid and should not in any sense operate as a payment by you to her." I will ask you if that was your agreement with the bank?

A. Not without it was implied. There was no conversation in the world between Mr. Tyler and myself on that point. I don't know whether you would say that really was an implied agreement, but that I have thought it; Nothing was said like that.

Q. Mr. Tyler, acording to your recollection, when you came down there agreed to stop payment on the check?

page 23 } A. He didn't agree to stop payment on it. He took me over to the Virginia Trust Company and when the paying teller, I reckon you would call him, over there said the check had not been paid he said, "You are just in time; you are lucky". But he didn't—just said, "Come on and go with me over to the Virginia Trust Company", and I went with him after he got the check number.

Q. Do I understand you to say you and Mr. Tyler made no agreement, but he just went over to the Virginia Trust Company and stopped payment on the check?

A. Then I went back to the bank with him and I think it was then I signed this paper. It may have been before, but I don't think so. I signed this letter you introduced here a few minutes ago and then he said, of course, that was the stop payment.

Q. That is what he said?

A. Yes, he said that payment had been stopped on it.

Q. That is all the agreement between you?

A. That is all I remember. I know he acted like it was bothering him greatly; he wasn't very nice about it, I didn't think, but when I left I was satisfied that the whole thing

was ended, and I had $1,250.00 more than I had when I went in.

Mr. Dashiell: I renew my motion to exclude the plaintiff's evidence in view of the additional facts brought out on cross examination.

The Court: Motion overruled.

Mr. Dashiell: Exception.

RE-DIRECT EXAMINATION.

By Mr. Denny:

page 24 } Q. When you went to the Morris Plan Bank did you tell Mr. Tyler the circumstances under which you had given this check to Major?

A. Oh, I did.

Q. Did you ask him whether you could stop payment on it?

A. Yes, and he said—the way I put it was this: I asked him if I could stop payment and he said, "Well, we will see. Come and go over to the Virginia Trust Company and we will see if it has been paid."

Q. This letter here *wich* was signed by you—

A. He dictated it and his stenographer wrote it and I signed it.

Witness stood aside.

EDWARD McAULEY,

a witness introduced in behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Denny:

Q. Are you Mr. Edward McAuley, the husband of the plaintiff in this suit?

A. Yes, sir.

Q. Did you give to D. Major on Friday, November 18th, a check for $150.00 as a deposit for the purchase of this Packard automobile?

A. Yes, sir.

Q. Did your wife give you on that date a check drawn by her on the Morris Plan Bank, payable to cash, for $1,250.00?

A. Yes, sir.

Q. What did you do with that check?

page 25 } A. I took the check to the Morris Plan Bank, together with the pass book. I presented it at Window No. 2 and told the teller I wished to draw out $1,250.00 and he referred me to window No. 6; he said, "They will attend to you over there." At window No. 6, the gentleman—I don't recall his name—said, "How do you want this check made payable?" I said, "Well the funds belong to my wife. Make the check out payable to her," which he did.

Q. Was that all the conversation that took place between you and the gentleman at window No. 6?

A. No, prior to him writing the check out he asked me why did I desire to withdraw the money and I told him.

Q. Let me ask you this. Was there any conversation between you and that gentleman as to whether or not you would get $1,250.00 in cash or whether you would get a check for $1,250.00?

A. No, not a word.

Q. Did you turn that check over to your wife?

A. I did.

Q. Saturday morning did you and your wife and Darden and Major meet at your office to close the transaction?

A. Yes, sir.

Q. Did you give Major on that occasion a check for $275.00 drawn by you on the State Planters Bank?

A. I did.

Q. After you discovered the fraud which Major had practiced upon you did you stop payment of that check?

A. I did.

Q. Has it ever been paid?

A. No, sir.

page 26 } CROSS EXAMINATION.

By Mr. Dashiell:

Q. Is this that $275.00 check?

A. Yes, sir.

Witness stood aside.

NOTE FILED AS EXHIBIT "ED M." NO. 1.

Richmond, Va. November 19, 1927,
192—NO.....

STATE PLANTERS BANK & TRUST COMPANY 68-5
5

of Richmond, Va.

Pay to the Order of D. MAJOR.....$275.00
Two Hundred Seventy-five . . ..no/100 Dollars

EDWARD McAULEY.

PAYMENT STOPPED

Richmond, Va. Nov. 22, 1927.

PROTESTED FOR NON PAYMENT

CLINTON A. HALL.

My Commission Expires on Jan. 18, 1928.

Endorsed on Back.

For Deposit in Richmond Trust Co.,
Richmmond, Va.

D. MAJOR.

Attached check is returned for reason below.

PAYMENT STOPPED

Mr. Denny: If Your Honor please, I think we have progressed far enough in this case to show that these checks were deposited in the Richmond Trust Company—this check for $1,250.00, and after payment was stopped was paid to the Richmond Trust Company. It, of course, is necessary for me to show the relation that the Richmond Trust Com-
page 27 } pany bore to this check. That can be done only by testimony of some gentleman of the Richmond Trust Company and by its records. I talked with Mr. Dashiell and he said he would have one of those gentleman here so as to save me the trouble of summoning them. I wish now to

call Mr. Hall and ask leave of the Court to put him on as an adverse witness for cross examination. Another ground of my motion is this: the check having been paid to the Richmond Trust on the ground that it is a holder for value without notice, if in this suit it is found it is not a holder, I don't think I go far afield when I say the Morris Plan Bank will, no doubt, *se* to it that the Richmond Trust settles with it.

Mr. Dashiell: I ask the Court to dismiss the jury.

Note: The jury retires from the Courtroom.

Mr. Dashiell: Mr. Denny has referred to the liability of the Richmond Trust Company to the Morris Plan Bank, if liability exists in this case, and I ask you to withdraw one juror and let the jury stand discharged.

The Court: Do you think this is similar to an automobile case where the question of insurance is brought in?

Mr. Dashiell: No, it is nothing like as strong.

The Court: I don't think there is any prejudice there.

Mr. Dashiell: Then I will ask you to instruct the jury to disregard it.

Mr. Marks: Mr. Hall is here and has no interest in this case at all, but merely produces the records of the
page 28 } Richmond Trust Company for either party to the suit and the interest of the Richmond Trust Company is not involved, as your Honor says, in any way. We do not think Mr. Hall is an adverse witness; he is certainly not hostile. We think if the counsel for the plaintiff puts him on he should put him on as his own witness.

The Court: I think so. He is coming here to produce the records to show what the transaction was. If you examine him I will take the attitude of the witness, I will watch his conduct on the stand and if there is any question of his hostility I think you can take advantage of it then.

Note: The jury returns into the courtroom.

The Court: Gentlemen, as I stated to you awhile ago, this is an action between Mrs. McAuley and the Morris Plan Bank. When the Richmond Trust Company's name is injected in it is purely a question of evidence. The Richmond Trust Company, so far as you are concerned in the trial of this case, is not interested at all and anything that the counsel says with reference to any supposed liability that might rest upon the Richmond Trust Company in its deal-

ings with the Morris Plan Bank you will disregard as it is not a part of this case.

C. A. HALL,

a witness introduced in behalf of the plaintiff, being first duly sworn, testified as follows:

page 29 } DIRECT EXAMINATION.

By Mr. Denny:

Q. Mr. Hall, are you an officer of the Richmond Trust Co.?

A. Yes, sir.

Q. What is your office?

A. Assistant Treasurer.

Q. Did a man by the name of D. Major have an account with the Richmond Trust Company in November, 1927?

A. Yes, sir.

Q. Have you statement of that account with you?

A. Yes, sir.

Q. Will you file a statement of Mr. Major's account with the Richmond Trust Company?

A. Yes, sir.

NOTE FILED AS EXHIBIT "C. A. H." NO. 1.

STATEMENT.

D. MAJOR.

In account with RICHMOND TRUST COMPANY.

Richmond, Va.

Date	Checks & Other Vouchers		Date	Deposits
Nov. 19	75.00	1,000.00	Nov. 18 '27	150.00
Nov. 21,	35.00		Nov. 19,	1,250.00
Nov. 21 '27	287.50		Nov. 20	
23 '27	275.00		Nov. 21 '27	275.00
Nov. 7, 1928,	Balance $2.50			

CC Signifies Certified Check D Signifies Discount
C Signifies Collection OD Signifies Overdrawn

Q. Mr. Hall, this account shows, I believe, that Mr. Major made a deposit of $150.00 on November 18th?

A. Yes, sir.

Q. That on November 19th, he made a deposit
page 30 } of $1,250.00?
A. Yes, sir.
Q. On that same date, namely; November 19th, he drew two checks, one for $75.00 an done for $1,000.00?
A. Yes, sir.
Q. Now on November 20th—that is corrected to 21st?
A. Yes, sir.
Q. On November 21st he drew a check for $35.00?
A. Yes, sir.
Q. And on that same date he drew another check for $287.50, and on November 21st he deposited $275.00?
A. Yes, sir.
Q. Now there is a final charge on November 23rd of $275.00?
A. Yes, sir.
Q. What does that final charge represent?
A. A check drawn on the State Planters Bank returned—payment stopped.
Q. That is this check which has been introduced a few minutes ago made by Mr. Edward McAuley?
A. Yes, sir.
Q. Mr. Hall, have you the deposit ticket which was used by Mr. Major in making the deposit on November 19th of $1,250.00?
A. Yes, sir.

NOTE FILED AS EXHIBIT "C. A. H. NO. 2".

DEPOSITED BY

D. MAJOR,

IN THE

RICHMOND TRUST COMPANY,

Nov. 19, 1927. 1-9-2

The depositor using this ticket hereby agrees that all items payable outside of Richmond shall be forwarded by this bank at the depositor's risk; that this bank shall not be re-
sponsible for negligence, default or failure of cor-
page 31 } respondents, nor for losses in the mails; that this bank shall have the right to charge back to the depositor's account any item for which actual payment is

not received; that items may be sent direct to the banks on which drawn without waiving any of the above conditions; that checks or drafts may be accepted in settlement for any collection and this bank shall not be liable except for its own negligence, until actual payment in cash is received; that items on Richmond are credited subject to actual payment through the Richmond Clearing House; and that checks on this bank not good at close of business on day deposited may be charged back to the depositor's account.

	Dollars—Cents
Cirrency.....	
COIN.....	
Checks and Drafts.....	1250 00
	$1250 —

CROSS EXAMINATION.

By Mr. Marks:

Q. The first deposit in this account of Mr. Major's at the Richmond Trust Company was made on November 18th, was it not?

A. Yes, sir.

Q. In the amount of $150.00?

A. Yes, sir.

Q. Then the second deposit was November 19th—$1,250.00?

A. Yes, sir.

Q. And the $1,250.00 deposit on November 19th was this cashier's check of the Morris Plan Bank introduced in evidence as Exhibit E. M. #3, was it not?

A. Yes, sir.

Q. That check was payable to whom?

page 32 } A. Payable to Mrs. McAuley.

Q. Was it endorsed by her?

A. It seems to be, yes, sir.

Q. That is her endorsement on the back of the check?

A. Yes, sir.

Q. Now, then, on November 19th, you have charged against the account two items, one of $75.00 and the other of $1,000.00. Were those two checks actually paid by the Richmond Trust Company against that account on November 19th?

A. Yes, sir.

Q. I hand you a check numbered 101, dated November 18th, 1927, payable to cash, signed D. Major, and bearing the en-

dorsement of the Hotel William Byrd, and will ask you to state whether that was the $75.00 check that was cashed on November 19th or paid by the Richmond Trust Company on November 19th against this account?

A. That was paid by the bank, yes, sir.

NOTE FILED AS EXHIBIT "C. A. H." NO. 3.

No. 101. Richmond, Va., Nov. 18, 1927.

RICHMOND TRUST CO. 68-28

5

Pay to the Order of Cash $75.00
Seventy-five . . . . . no/100 Dollars

(N. P. 68-4) D. MAJOR.

ENDORSEMENT ON BACK

B. HOTEL WILLIAM BYRD,

Pay to the order of FIRST & MERCHANTS NATIONAL BANK
of Richmond, Va.

RICHMOND HOTELS INC.

Pay to the Order of any Bank or Banker, Nov. 18, 1927.

First & Merchants National Bank of Richmond,

Boulevard Office, Richmond, Va.

68-1 H. Mason Smith, Manager, 68-1

page 33 } Endorsement on Back

Paid
Through Clearing House,
November 19, 1927.

All Prior Endorsements Guaranteed,

FIRST & MERCHANTS NATIONAL BANK
68-1 of Richmond, Va. 68-1

Q. I hand you another check for $1,000.00, signed D. Ma-

jor, payable to self, dated November 19th, 1927, and will ask you if that is the check upon which the $1,000.00 was paid out on November 19th?

A. Yes, sir.

NOTE FILED AS EXHIBIT "C. A. H. #4."

No. 103. Richmond, Va., Nov. 19, 1927.

RICHMOND TRUST CO. 68-28

5

Pay to the ORDER OF.....Self.....$1000.00
One Thousand Dollars .....no/100 Dollars

D. MAJOR.

Q. Now on November 21st there was a check of $35.00 paid out. Have you got that check?

A. Yes, sir.

Q. Is this the check?

A. Yes, sir.

Q. Was that actually paid out and charged against that account on November 21st?

A. November 21st, yes, sir.

page 34 } NOTE FILED AS EXHIBIT "C. A. H. #5".

No. 102. Richmond, Va. 192

RICHMOND TRUST CO. 68-28

5

Pay to the Order of WM BYRD HOTEL, $35.00
Thirty-Five Dollars .....no/100 Dollars

(N. P. 68-4) D. MAJOR.

ENDORSEMENT ON BACK

B. HOTEL WILLIAM BYRD,

Pay to the Order of
First & Merchants National Bank
of Richmond, Va.

Richmond Hotels Inc.

Pay to the Order of any
Bank or Banker
Nov. 19, 1927
First & Merchants National Bank of Richmond

Boulevard Office
Richmond, Va.

68-1 H. Mason Smith, Manager 68-1

PAID

Through Clearing House
Nov. 21, 1927

All Prior Endorsements Guaranteed

First & Merchants National Bank
68-1 of Richmond, Va. 68-1

Q. Then on November 21st Major made another deposit of $275.00 which, as I understood you, is this check of Mr. McAuley, filed as Exhibit Ed. M. #1. Is that right?

A. Yes, sir.

Q. Also on November 21st it appears there was also paid out against this account $287.50. Is this the check against which that item was paid?

A. Yes, sir.

page 35 } NOTE FILED AS EXHIBIT "C. A. H. #6".

No. 104. Richmond, Va., Nov. 21, 1927.

RICHMOND TRUST CO. 68-28

5

Pay to the Order of.....J. T. DARDEN.....$287.50
Two Hundred Eighty-Seven.....50/100 Dollars

D. MAJOR.

ENDORSEMENT ON BACK

J. T. DARDEN.

Q. Was that check actually paid on November 21st?
A. Yes, sir.
Q. Now on November 23rd there is an item charged against the account of $275.00. That, as I understand you, is Mr. McAuley's check filed as EXHIBIT ED. M. #1, upon which payment was stopped or which was returned and therefore charged back against the account?
A. Yes, sir.
Q. What was the balance to the credit of that account on November 23rd?
A. $2.50.
Q. This $1,250.00 cashier's check on the Morris Plan Bank was forwarded through regular banking channels by the Richmond Trust Company for payment, was it not?
A. Yes, sir.
Q. When did the Richmond Trust Company receive notice that payment had been stopped on that check?
A. In their returned checks listed November 22nd, I think.
Q. Is that the letter from the First & Merchants National Bank with which it was returned?
A. Yes, sir.
Q. When was that letter received by the Richmond Trust Company with this cashier's check returned?
A. November 22nd.

Q. Now when that check was returned did the
page 34 } Richmond Trust Company communicate with the Morris Plan Bank about the matter?
A. Yes, sir.

Q. Who communicated with the Morris Plan Bank?
A. Mr. Williams, the president.
Q. Did he do it in your presence?
A. Yes, sir.
Q. What did he tell the Morris Plan?
A. He said that he would hold them in due course for the check?
Q. And going to hold them responsible for its payment?
A. Yes, sir.
Q. Did Mr. Williams in that conversation insist that that stop order be withdrawn and the check paid?
A. Yes, sir.
Q. Did he explain to the Morris Plan Bank that the check had been deposited with the Richmond Trust Company and the money paid out on Major's checks?
A. Yes, sir.

Mr. Denny: Mr. Williams couldn't be here with convenience today and I waive the objection which I could have made to this line of conversation.

Q. After Mr. Williams had informed the Morris Plan Bank that the Richmond Trust Company was the holder of that check in due course and insisted on payment did the Morris Plan Bank agree to withdraw the stop order and pay the check?
A. Yes, sir.
Q. Did the Richmond Trust Company get the proceeds of that check?
A. The $1,250.00?
Q. Yes.
page 37 } A. Yes, sir.
Q. It insisted on its being paid that day, did it not?
A. Yes, sir.
Q. November 22nd, the day it was returned?
A. Yes, sir.
Q. And it was paid that day by the Morris Plan?
A. Yes, sir.
Q. When that cashier's check of $1,250.00 was presented at the Richmond Trust Company by Major and deposited to his account was it credited as a cash item or a collection item?

Mr. Denny: I object to that question. The deposit ticket

itself, which states the agreement of the bank with the depositor, reads: "The depositor using this ticket hereby agrees that all items on Richmond are credited subject to actual payment through the Richmond Clearing House." That is the contract between the two which the Court will have to construe.

The Court: The record shows that check of $1,250.00, drawn on the Virginia Trust Company, was deposited to the credit of D. Major in the Richmond Trust Company and then D. Major drew his personal check for $1,000.00. So the objection is sustained.

Q. Mr. Hall, the Richmond Trust Company is a banking institution engaged in business in the City of Richmond, is it not?

A. Yes, sir.

Q. Incorporated under the laws of Virginia?

A. Yes, sir.

Q. Does the Richmond Trust Company handle
page 38 } items treated as cash items at one window and collection items at another window through a different clerk?

Mr. Denny: It makes no difference in this case by what method the Richmond Trust Company handled these items. The deposit slip which has been introduced here shows a contract which the Richmond Trust Company wrote with its depositors which says that all items on Richmond are credited subject to actual payment through the Richmond Clearing House. That is the contract and I object to any testimony on the part of this witness which has a tendency to change that contract.

The Court: What is the relevancy of that?

Mr. Dashiell: It may save time if the jury would be excluded for a few minutes and let us put this evidence down on the record.

Note: The jury retires from the courtroom.

A. Yes, sir.

Q. Was this deposit of this cashier's check handled through the window in which cash items are handled or the window through which collection items are handled?

A. Handled through the window that handles cash items.

Q. Was it credited as a cash item and the depositor allowed to check against it right away?

A. Yes, sir.

Q. Do you enter collection items short and cash items long in the books?

A. Yes, sir.

Q. Was this entered short or long?

A. Long; in the far column.

page 39 } Q. If it had been entered for collection would any payment have been made against it before it was actually collected and the collection received?

A. No, sir.

Jury Out.

Note: The objection was argued.

The Court: I am not going to let that evidence go to the jury at this time. If I am called to rule now I will rule in favor of the plaintiff, but if you want to take this up later on, all right. I think with that deposit slip there showing the agreement between the depositor and the bank I don't think you could be permitted to come in and show a different method of handling accounts which would nullify your contract between your depositor and yourselves. Now if he knew about it that would be a different proposition, but you must bring it to his knowledge, but as far as this case is concerned you are bound by the written contract because that is a written contract. You are attempting to introduce a custom of your bank for the handling of accounts to vary this written agreement here with the depositor. That is the way it looks to me.

Mr. Dashiell: We except, and I will ask one more question.

By Mr. Dashiell:

Q. Mr. Hall, in the event a customer of the Richmond Trust Company comes into the bank and makes the deposit of a check the worth of which you question so you don't want that customer to have the right to draw on that check, how is that transaction handled?

page 40 } A. It is handled as a collection item, handled through the notes window.

Q. And entering it short on the books?

A. Yes, sir.

By the Court:

Q. Mr. Hall, in this particular transaction here do you know whether the depositor Major made the deposit at the regular window?

A. Yes, sir.

Q. When he drew his check for the $1,000.00 was that paid at that same window?

A. The same window, yes, sir.

By Mr. Marks:

Q. Paid at the same time the deposit was made, wasn't it?

A. Well, I couldn't say. It was a few minutes difference.

By Mr. Denny:

Q. Do you know?

A. It was within half an hour. He hadn't gone out of the bank. I feel reasonably sure it wasn't more than that.

Note: The jury returns to the Courtroom.

Witness stood aside.

Plaintiff rests.

Mr. Marks: It is agreed by counsel that the Richmond Trust Company had no notice of the fraud practiced upon the plaintiff by Major, or any knowledge of the transaction between Major and the plaintiff relating to the automobile until the check was returned to it by the Virginia Trust Company through the First & Merchants National Bank and until the Richmond Trust Company communicated with the Morris Plan Bank, as set out in the testimony.

Mr. Dashiell: We demur to the evidence.

page 41 } And the defendant says that the matter aforesaid, so introduced and shown in evidence to the jury by the plaintiff is not sufficient in law to maintain the said issue on the part of the plaintiff, and that it, the said defendant, is not bound by the law of the land to answer the same. Wherefore, for want of sufficient matter in that behalf to the said jury shown in evidence, the said defendant prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the said plaintiff may be barred from having or maintaining her aforesaid action against it.

And the said defendant states in writing that the grounds of demurrer relied on in this demurrer to the evidence are specifically as follows:

(1) There was no valuable consideration to support any promise or agreement made by the defendant to the plaintiff, as set out in the pleadings or evidence, and hence there can be no liability upon the defendant.

(2) The Richmond Trust Company became a holder in due course of the defendant's check to the plaintiff's order for $1,250.00 before notice of any imperfection in its transferror's title was given it, and hence according to law and by the terms of the said agreement, if any existed, the plaintiff cannot recover.

(3) In the event the Court holds the check of the defendant to the order of the plaintiff for $1,250.00 to have been, at the close of business on November 21, 1927, the property of D. Major, then the Richmond Trust Company, by making or having made advances on the strength of said check to the full amount thereof before notice of any imperfection in Major's title was given it, acquired a specific lien on such check for the amount of the advances made on the strength of said check, and by the terms of the negotiable instrument law became a holder in due course, and hence by law, and the terms of said agreement, if any, the said plaintiff cannot recover.

pgae 42 } (4) In the event the Court holds the check of the defendant to the order of the plaintiff for $1,250.00 to have been, at the close of business on November 21, 1927, the property of D. Major, then the Richmond Trust Company, as a duly licensed State bank, held a general lien on all assets of its customer, the said D. Major, for any moneys due to it by the said customer. The said check was the only asset of the said D. Major in the hands of the said bank on said date, and the said bank, before notice of any imperfection in Major's title thereto, had advanced to him the full amount thereof, so that he was indebted to it in not less than $1,250.00. By the terms of the negotiable instrument law, the said bank was a holder in due course of said check on said date, and hence, by law, and under the terms of said agreement, if any, the plaintiff cannot recover.

(5) The plaintiff waived notice of the dishonor of the said check of the defendant to her order for $1,250.00 by requesting that it be dishonored, and so became unconditionally bond

as endorser and liable to the Richmond Trust Compnay as the holder thereof. Under these circumstances, there can be no liability on the defendant, the drawer of the check, to the plaintiff, the bound endorser, for paying the same.

(6) No contract existed between the plaintiff and the defendant upon which this alleged cause of action, or any recovery therein, can legally be based or allowed.

(7) The defendant bank in placing the stop payment order with the Virginia Trust Company was not acting under or pursuant to any legal agreement with the plaintiff, but did so merely as an accommodation in an effort to assist the plaintiff if possible, and when it found that said check was in the hands of the *the* Richmond Trust Company under the circumstances shown in evidence it had the legal right to cancel said stop payment order and to direct that said check be paid.

MORRIS PLAN BANK OF VIRGINIA,

By R. GRAYSON DASHIELL, Counsel.

page 43 } And now at this day, to-wit: At a Circuit Court of the City of Richmond held in the Court room of said City in the City Hall *there,* on Thursday, the 14th day of March, 1929, being the day and year first herein written.

This day came again the parties by their attorneys, and the Court having maturely considered the defendant's demurrer to the plaintiff's evidence, is of the opinion and doth decide that the law of the case is with the defendant. Wherefore, it is considered by the Court that the Demurrer of defendant to the evidence be, and is hereby sustained. It is therefore considered by the Court that the plaintiff take nothing by her bill, and that the defendant go thereof without day and recover against the plaintiff its costs by it about its defense herein expended. To which action and ruling of the Court the defendant excepted.

page 44 } Virginia:

In the Circuit Court of the City of Richmond.

Essie McAuley
vs.
Morris Plan Bank of Virginia.

CERTIFICATE OF THE JUDGE.

I hereby certify that there is contained in the demurrer to the evidence found in the accompanying transcript of the record in the above styled case a true copy of all the oral and written evidence taken at this trial on the 5th day of March, 1929, and that there is also contained therein the other incidents of the trial requiring the ruling or judgment of the Court, such as exceptions as to the admission of or the refusal to admit evidence, and motions and the rulings of the Court thereon and the exceptions noted thereto; and I further certify that the plaintiff made due exception to the opinion, ruling and judgment of the Court on said demurrer to the evidence.

Teste: This 10th day of May, 1929.

JULIEN GUNN, Judge.

Transcript of the Record.

Teste:

GARLAND B. TAYLOR, D. C.

Fee for Transcript, $22.00.

I, Garland B. Taylor, Deputy Clerk of the Circuit Court of the City of Richmond, do certify that the Attorneys for the Defendant have had due notice of the intention of the plaintiff to apply for this transcript.

Given under my hand this 13th day of May, 1929.

GARLAND B. TAYLOR, D. C.

A Copy—Teste:

H. STEWART JONES, C. C.

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