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Pacific Metals Company Division of A.M. Castle & Company v. Tracy-Collins Bank and Trust Company and Bank of Salt Lake v. Tracy-Collins Bank and Trust Company v. Olympus Heating and Air Conditioning : Brief of Respondent

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N THE SUPREME COU[illegible]
F THE STATE OF UT[illegible]

CIFIC METALS COMPANY,
Division of A. M. Castle &
Company, a Corporation,
Plaintiff and Cross-Appell[illegible]

— vs. —

ACY COLLINS BANK &
RUST COMPANY,
Defendant and Ap[illegible]

nd

NK OF SALT LAKE,
Defendant and Respond[illegible]

— vs. —

ACY COLLINS BANK &
RUST COMPANY,
Cross-Defendant and
Third Party Plaintiff,

— vs. —

MPUS HEATING & AI[illegible]
ONDITIONING, a Corpor[illegible]
Third Party [illegible]

BRIEF OF R[illegible]

Appeal From the [illegible]
Third Judicial District Cou[illegible]
HONORABLE STEWART M. [illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

PACIFIC METALS COMPANY,
Division of A. M. Castle &
Company, a Corporation,
Plaintiff and Cross-Appellant,

— vs. —

TRACY COLLINS BANK &
TRUST COMPANY,
Defendant and Appellant,

and

BANK OF SALT LAKE,
Defendant and Respondent,

— vs. —

TRACY COLLINS BANK &
TRUST COMPANY,
Cross-Defendant and
Third Party Plaintiff,

— vs. —

OLYMPUS HEATING & AIR
CONDITIONING, a Corporation,
Third Party Defendant.

Case
No. 11083

BRIEF OF RESPONDENT

NATURE OF CASE

The case on appeal herein involves an action by plaintiff, Pacific Metals Company, Division of A. M. Castle and Company (hereinafter called Pacific Metals)

against Tracy Collins Bank and Trust Company (hereinafter called Tracy Collins) and Bank of Salt Lake to recover the sum of $5,321.70 representing the face amount of a check payable to Olympus Heating and Air Conditioning (hereinafter called Olympus) and plaintiff. The check was presented to Tracy Collins for payment by Olympus with the check bearing the endorsement of Olympus only; Tracy Collins paid Olympus the face amount of the check, guaranteed all endorsements, and sent the check for collection to the Bank of Salt Lake who debited its depositor's account for the amount of the check and transferred that amount to Tracy Collins. Apparently, Pacific Metals did not receive any of the funds from the joint payee check.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, Salt Lake County (Judge Stewart M. Hanson) granted judgment in favor of Pacific Metals and against Tracy Collins but denied plaintiff's motion for summary judgment against Bank of Salt Lake. From that ruling both Pacific Metals and Tracy Collins appeal.

RELIEF SOUGHT

Respondent seeks to have the action of the lower court affirmed in entering judgment of no cause of action in favor of Bank of Salt Lake and against Pacific Metals.

STATEMENT OF FACTS

Mayne Plumbing and Heating Company (hereinafter called Mayne Plumbing), a depositor of Bank of Salt Lake, and not a party to this law suit, had a contract for certain work to be performed on East High School in Salt Lake City. Olympus, a depositor of Tracy Collins, was one of Mayne Plumbing's sub-contractors on that particular job. Olympus was indebted to Pacific Metals for materials supplied prior to the East High job and was apparently getting materials from Pacific Metals for the East High job. At no time referred to herein was Mayne Plumbing indebted to Pacific Metals.

Prior to the issuance of the particular check involved in this litigation, and probably near the time of the inception of work on the East High job, representatives of both Pacific Metals and Olympus requested Mr. Richard Brown of Mayne Plumbing to pay all amounts owed by Mayne Plumbing by checks payable to Olympus Heating & Air Conditioning and Pacific Metals Company as joint payees. At no time was Mayne Plumbing indebted to Pacific Metals, but Mr. Brown agreed to make the checks payable in the manner requested as an accommodation to Olympus and Pacific Metals.

On or about October 18, 1965, Mayne Plumbing issued its check drawn on the Bank of Salt Lake and payable to Olympus Heating & Air Conditioning and Pacific Metals Company in the amount of $5,321.70 and delivered it to Olympus. An employee of the latter stamped the check on the back with a stamp providing for the following:

PAY TO THE ORDER OF
TRACY-COLLINS BANK AND TRUST COMPANY
SALT LAKE CITY, UTAH
FOR DEPOSIT ONLY
OLMYPUS HEATING & AIR CONDITIONING
PAYROLL ACCOUNT
02 12 605 0

The check was then sent to Tracy Collins for deposit to the account of Olympus. Without the endorsement of Pacific Metals, employees of Tracy Collins credited the account of Olympus and then sent the check through regular banking channels for collection from the Bank of Salt Lake with their stamp providing the following:

31-61 PAY ANY BANK 31-61
P. E. G.
TRACY-COLLINS
BANK AND TRUST CO.
31-61 SALT LAKE CITY, UTAH 31-61

Upon receipt of the check by the Bank of Salt Lake, and relying on the Prior Endorsements Guaranteed stamp by Tracy Collins, it transferred funds in the face amount of the check from the account of Mayne Plumbing to the collecting bank, Tracy Collins.

Plaintiff Pacific Metals, not having received any of the funds from the particular check, brought this action against both Tracy Collins and Bank of Salt Lake to recover the face amount of the check.

One other element that respondent feels is of significance in this matter is the proportionate share that

Pacific Metals and Olympus would each receive from the joint payee checks. It seems clear that after the issuance of each check by Mayne Plumbing that Kenneth L. Williams representing Pacific Metals and Clark Stott representing Olympus would negotiate for the division of funds. In each case each party would attempt to get as large a share as possible, but in no case was the amount that each would receive set, nor in any two cases was the same amount received by either of the parties. See (Deposition of Kenneth L. Williams pp. 7-8, 16-17; Deposition of Clark Stott pp. 24-27, 29-30, 37).

The contention of Bank of Salt Lake that it is not liable to plaintiff in this matter is based upon Points I, II, and III which will be set forth under the points indicated and with authorities to be discussed under each point.

ARGUMENT

POINT I

BANK OF SALT LAKE IS NOT LIABLE TO PACIFIC METALS BECAUSE THERE HAS BEEN NO ACCEPTANCE OF THE CHECK BY BANK OF SALT LAKE.

In this case it should be pointed out again, for the sake of clarity, that Mayne Plumbing was the maker of the check in question; Olympus and Pacific Metals were just payees of said check; Bank of Salt Lake was the bank on which the check was drawn; and Tracy-Collins Bank and Trust Company was the collection bank and the one to whom the check was presented for payment.

Under the Uniform Negotiable Instruments Law, which law was in force and effect in Utah at the time of the transactions, acceptance of a bill of exchange is necessary to render a drawee liable thereon, and the drawee is not liable thereon until he accepts it. 11 Am. Jur. 2d, *Bills and Notes,* Section 501.

Title 44, Chapter 2, Section 2, Utah Code Annotated, 1953, which is the same as Section 127 Uniform Negotiable Instruments Law, provides as follows:

> A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and *the drawee is not liable on the bill unless and until he accepts the same.* (Emphasis added)

However, as between the drawer and the drawee, the latter may be under an obligation to accept a bill of exchange drawn by the former, but that problem is not before the court in this controversy.

It is the position of Bank of Salt Lake that it did not, has not, and cannot have accepted the check in question because the check was not a negotiable instrument, and therefore no liability could have arisen to Pacific Metals on the check. Acceptance, the basis of liability of a drawee under the N.I.L., is a procedure peculiar to negotiable instruments and has no application to non-negotiable instruments.

Bank of Salt Lake contends that when Tracy-Collins accepted the check of Mayne Plumbing with the endorsement of one of the joint payees the instrument failed of negotiability or lost its negotiable character and

became an assignment as between Tracy-Collins and Trust Company and Bank of Salt Lake.

American National Bank of Denver v. *First National Bank of Denver, and Hereford State Bank*, 277 P.2d 951 (1954) is in point. The facts of the case are as follows: Hugo Sells Motors, a depositor in plaintiff's bank, on November 21, 1952, issued its check in the sum of $5,050 payable to the order of Frontier Motor Company and General Credit, Cheyenne, Wyoming. On the face of the check appeared the following: "By endorsement this check is accepted in full payment of the following account" listing two 1952 automobiles with the motor numbers thereof. There also appeared on the face of the check, "Know Your Endorser — Require Identification." The check, when it was presented to defendant Hereford, bore the following endorsement only, "Pay to the order of The Hereford State Bank, Hereford, Colorado, For Deposit Only, Frontier Motor Co."

Hereford State Bank, on the endorsement of Frontier Motor Company, credited it with $5,050, and then endorsed the check "Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsement Guaranteed Hereford State Bank 82-418 Hereford, Colo. 82-418," and the check as thus endorsed was sent through banking channels to The American National Bank of Cheyenne, Wyoming (which was not a party to the action) and by it sent to defendant The First National Bank, each thereafter having endorsed the check, "Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed." Defendant, First National Bank then pre-

sented the check to plaintiff through the Denver Clearing House; it was paid, and charged by plaintiff to Hugo Sells Motors deposit. Hugo Sells Motors, the maker and drawer of the check, objected to the payment thereof because "General Credit endorsement was not thereon," and General Credit having refused to endorse the check, plaintiff reimbursed Hugo Sells Motors in the amount of $5,050 by paying said amount to General Credit.

Plaintiff thereafter brought an action against the two defendants for the amount paid by it to General Credit.

The court held that where Hugo Sells Motors, depositor in American National Bank, plaintiff bank, issued its check payable to the order of an automobile dealer and a credit company, and when the check was presented to Hereford State Bank, it bore the endorsement of only one payee, the automobile dealer, and defendant Hereford State Bank credited the account of the automobile dealer with the amount of the check, guaranteed prior endorsements, and sent the check through banking channels to defendant, First National Bank of Denver, who endorsed the check, guaranteed prior endorsements, and presented the check to plaintiff bank, who paid the check but thereafter reimbursed its depositor because the check was not properly endorsed, plaintiff, American National Bank of Denver could recover the amount of the check from Hereford State Bank but not First National Bank of Denver.

In so holding the court made the following statements:

> Under the common law, as well as by our Negotiable Instruments Law where one of the payees fails to endorse, the negotiability of the check is completely destroyed. *Mills* v. *Poper,* 90 Mont. 569, 4 P.2d 485; *Rosecky* v. *Tomaszewski,* 225 Wis. 483, 274 N.W. 259; *Bonuso* v. *Shroyer Loan & Finance Company, Inc.,* D.C. Mun. App. 37 A.2d 760; *Newton County Bank* v. *Holdeman,* 223 Mo. App. 164, 9 S.W. 2d 852. The holder of the check, after this failure to endorse, acquires the interest of an assignee only, and as such his interest in the proceeds of the check are to be determined. p. 956.

The court further stated that:

> We conclude that when defendant Hereford, being charged with the absolute duty of determining that the payees on the check endorsed the same if it was to become a holder in due course, neglected to do so, and accepted the check with the endorsement of Frontier Motor Co. only thereon, it acquired only such interest in the check as Frontier Motor had therein. Hereford acquired an assignment of Frontier's interest in the check and could not, without the endorsement of the co-payee, transfer title thereto as a negotiable instrument. At best Hereford acquired an interest in a non-negotiable chose in action. *Blake* v. *Weiden,* 291 N.Y. 134, 51 N.E. 2d 677, 149 A.L.R. 1050; *Hopple* v. *Cleveland Discount Co.,* 25 Ohio App. 138, 157 N.E. 414; *Hoffman* v. *First National Bank of Chicago,* 299 Ill. App. 290, 20 N.E.2d 121; *Plattsmith State Bank* v. *Redding,* 128 Neb. 268, 256 N.W. 661; *Schoolfield* v. *Barnes,* 18 Tenn. App. 333, 77 S.W.2d 66; *Bonuso* v. *Shroyer Loan & Finance Co., Inc.,* supra; *Karsner* v. *Cooper,* 195 Ky. 8, 241 S.W. 346, 25 A.L.R. 159; *Edgar* v. *Haines,* 109 Ohio St. 159, 141 N.E. 337, 33 A.L.R. 795; *Columbia Hotel Co.* v. *Rosenberg,* 122 Or. 675, 260 P.

> 235; *Conrad* v. *James*, 174 Okl. 54, 49 P.2d 718; *Bank of Marshall County* v. *Boyd*, 308 Ky. 742, 215 S.W. 2d 350; *Home Indemnity Co. of New York* v. *State Bank of Fort Dodge*, 233 Iowa 103, 8 N.W. 2d 757; *Foxman* v. *Hanes*, 218 N.C. 722, 12 S.E. 2d 258; *Fink* v. *Scott*, 105 W. Va. 523, 143 S.E. 305; *Virginia-Carolina Joint Stock Land Bank* v. *First & Citizens Nat. Bank of Elizabeth City*, 197 N.C. 526, 150 S.E. 34; 2 Daniels on Negotiable Instruments (7th Ed.) p. 787, Sec. 758, p. 956.
>
> . . . .
>
> We conclude that neither Hereford nor other endorsers on the check here in question became holders in due course; and that by reason of the absence of the endorsement of General Credit, Cheyenne, Wyo., the check became a non-negotiable chose in action. p. 956.

In line with *American National Bank of Denver* v. *First National Bank of Denver and Hereford State Bank*, op. cit., and the cases cited therein, Bank of Salt Lake contends that by reason of the acceptance by Tracy-Collins of the check involved in this action without the endorsement of Pacific Metals caused the check to fail in its negotiability. Thereafter instead of being a negotiable instrument the check became a non-negotiable chose in action. Acceptance is a procedure that is peculiar to negotiable instruments and has no application and cannot have any application to non-negotiable items. Title 42, Chapter 2, Article 7, Utah Code Annotated, 1953, provides as follows:

> The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by

> the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

It has already been pointed out that 44-2-2 U.C.A., 1953 provides that "the drawee is not liable on the bill unless and until he accepts same."

Inasmuch as Bank of Salt Lake is the drawee on the check involved in this action it cannot be liable to any of the payees of said check unless and until it accepted the check. Since acceptance is a procedure that has meaning and application to negotiable instruments only, and since the check in question herein is not a negotiable instrument but a non-negotiable chose in action Bank of Salt Lake did not and could not have accepted it as a negotiable instrument, and hence could not be and is not liable to plaintiff, Pacific Metals Company, one of the payees on the check. Defendant, Bank of Salt Lake, urges this contention and earnestly claims that the contention is meritorious and is correct.

POINT II

BANK OF SALT LAKE IS NOT LIABLE TO PACIFIC METALS BECAUSE OF THE CONDUCT OF TRACY COLLINS IN ACCEPTING THE CHECK WITH A MISSING ENDORSEMENT.

The obligation, if any, exists by either of the two defendants to this action, to pay plaintiff the face amount of the check is the obligation of Tracy-Collins and not the Bank of Salt Lake. This assertion is based upon the general rule of law to the effect that one who takes a

transfer of the ownership of an instrument from less than all of the joint payees and collects the instrument or money thereon, is liable to the other payee or payees for their proportionate share. In this regard see *Rybener* v. *Feickert,* 92 Ill. 305; *Kaufman* v. *State Savings Bank,* 151 Mich. 65, 114 N.W. 863. See also the annotation at 38 A. L. R . 807.

The evidence is without conflict that Tracy-Collins accepted the joint payee check from only one of the payees with one payee's endorsement missing; it credited the account of the one payee with the full amount of the check and then sent the check through regular banking channels for collection from Bank of Salt Lake, the drawee bank. Tracy-Collins was paid the full amount of the check by the Bank of Salt Lake and therefore collected the full amount of the check. Based upon the facts and the law it is then the obligation of Tracy Collins to pay Pacific Metals its proportionate share of the check and not the obligation of Bank of Salt Lake to do so.

POINT III

BANK OF SALT LAKE IS NOT LIABLE TO PACIFIC METALS ON THE THEORY OF THIRD PARTY BENEFICIARY CONTRACT.

A third party beneficiary contract is an agreement entered into between two parties, with all the necessary elements for the validity of a simple contract present, which contract or the result thereof is designed for the benefit of a third party who is not a party to the contract.

As a general proposition, the determining factor as to the rights of a third party beneficiary is the intention of the parties who actually made the contract. The real test seems to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts. *W. D. Anderson & Sons v. Samedan Oil Corp.,* (CA5 Tex.) 210 F2d 600; *Hamill v. Maryland Casualty Co.* (CA 10 N.M.) 209 F2d 338; *Brooklawn v. Brooklawn Housing Corp.,* 124 N.J.L. 73, 11 A.2d 83.

In order for one not privy to a contract to maintain an action thereon as a "third-party beneficiary," it must appear that the contract was made and intended for his benefit. *Fagliarone v. Consolidated Film Industries,* 20 N.J. Misc. 193, 26 A.2d 425, 426; and the benefit must be one that is not merely incidental, but must be immediate in such a sense and degree as to indicate the assumption of a duty to make reparation if the benefit is lost. *Associated Flour Haulers & Warehousemen v. Hoffman,* 282 N. Y. 173, 26 N.E. 2d 7, 10. See also 17 Am. Jur. 2d, *Contracts, Secs.* 302 & 304, pp. 721-730, and the cases there cited.

Bank of Salt Lake contends that neither the check over which this action arose nor the placing of Pacific Metals on the check involved created a third party beneficiary contract in favor of Pacific Metals.

It is undisputed that Olympus was a sub-contractor of Mayne Plumbing on what has been called the East High School job and that although Mayne Plumbing became indebted to Olympus from time to time at no time

was it ever indebted to Pacific Metals. Apparently Olympus was indebted to Pacific Metals and had been for some time. On the occasion when the request was made of Mayne Plumbing to issue all checks payable to both Pacific Metals and Olympus Heating, Mayne Plumbing did not have an account with Pacific Metals and the transaction was not tied to any account in any way. It was merely an accommodation by Mayne Plumbing to both Pacific Metals and Olympus because they requested it. Mr. Williams of Pacific Metals indicated that they "were asking him to do this out of the goodness of his heart so to speak" and not because he was obligated to do so nor to create any obligation on the part of Mayne Plumbing. (Deposition of Kenneth L. Williams p. 31.)

The record is clear that the request to Mayne was not couched in terms of a contract between the parties, it was not intended to be a contract and certainly there was no intention between Olympus and Mayne Plumbing that the transaction would give Pacific Metals any right that could be enforced in a court of law. If Pacific Metals acquired any rights it would have been on the check not on the arrangement to include both names on the check.

Respondent also contends that even if the arrangement could be construed as a contract it fails in its validity as such because of lack of consideration extended by the other parties or either of them to Mayne.

Inasmuch as the transaction, upon this action is brought, occurred in about October, 1965, the Negotiable Instruments Law is applicable rather than the Commer-

cial Code. The pertinent provisions of the N.I.L. as incorporated into the Utah Code provide as follows:

> 44-2-1. "Bill of exchange" defined. — A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.
>
> 44-3-2. "Check" defined. — A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this title applicable to a bill of exchange payable on demand apply to a check.
>
> 44-2-2. Bill not an assignment of funds in hands of drawee. — A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Bills and notes in their various forms are contracts and the fundamental rules governing contract law are applicable to the determination of the legal questions which arise over such instruments. However, bills and notes are capable of being cast in such form as to have the quality of negotiability. Instruments having this quality of negotiability, while their nature as contracts in unimpaired are distinguished from ordinary contracts. 11 Am. Jur. 2d, Bills and Notes, Section 501. A bill of exchange or check of itself is not an assignment or a third party beneficiary contract. A check is a simple contract until it takes on peculiar features through negotiation by the payee or as may expressly be declared by statute.

Annis v. *Pfeiffer,* 278 Mich. 692, 271 N.W. 568. A check is an order given by a credit (the depositor), to his debtor (the bank) to pay part or all of the debt (the deposit) to some designated person. It is a conversation, if you will, between a creditor and his debtor.

The bank takes its orders from the depositor. As far as it is concerned, the debt is due to him until it receives an order to the contrary in the form of a check and makes final payment along those lines. The payee is out of the picture until he actually gets his hands on the money since the bank has undertaken no liability to him. This is why a bank feels no misgivings about honoring a stop order even though this may seriously inconvenience the payee. Further, the only recourse the payee has is against the drawer on the debt; there is no liability on the part of the drawee bank to the payee until actual acceptance (which cannot occur on the instrument which has lost its negotiability).

Thus the disappointed payee is left to get his money from the depositor, not the bank. *State Bank of Southern Utah* v. *Stallings,* v. *Hurricane Branch of the Bank of St. George* v. *Kaze,* 19 Utah 2d 146, 427 P.2d 744 (1967).

In that case appellants as general contractors constructed a public school building. Defendant, Stallings, was the electrical sub-contractor and bought his merchandise from Westinghouse Supply Company. Stallings owed Westinghouse approximately $8,000 of which $2,200 was past due.

Appellants made out a check to Stallings in the amount of $2,250 and requested him to endorse it so

appellants could take it to Westinghouse and apply it on the delinquent account. Stallings claimed that Westinghouse had requested only $2,200 and refused to endorse the check, whereupon appellants gave the check to Stallings to be deposited in his checking account in Hurricane Branch of the Bank of St. George; Stallings then gave his own check made payable to Westinghouse in the amount of $2,200 to the appellants to deliver to Westinghouse.

Respondent, State Bank of Southern Utah, had a couple of judgments against Stallings, and before the Westinghouse check could pass through the clearing house, respondent had placed two garnishments against Stallings' account in the Hurricane Branch Bank. Appellants intervened in the two cases from which the garnishments were issued and now claim that the check from Stallings was an assignment of $2,200 of the bank account when and if the $2,250 check from appellants was deposited.

In disposing of this case the court said at 19 Utah 2d 147:

> "We do not think that the giving of the check operated as an assignment in this case . . . ."

And at page 148:

> "In this case there can be no question but that Stallings had the power to stop payment on the check.
>
> "Of course, the assignor and the assignee may by agreement make an assignment by means of a check. See *Merchant's National Bank of St. Paul*

v. *State Bank,* 172 Minn. 24 ,214 N.W. 750, *Slaughter* v. *First National Bank,* Tex. Civ. App., 18 S.W. 2d 754. However, no such agreement was ever made by the parties to the alleged assignment. Stallings and Westinghouse never spoke to each other about the check. The appellants planned the transactions but did not foresee the consequences. Had they wished an assignment, they could have taken the Stallings' check to the bank and had it certified."

The same may be said in the instant case. Even though Mayne Plumbing had issued its check payable to Pacific Metals and Olympus jointly it could have stopped payment on it before the check was presented for payment. It also seems apparent that even though the parties could have entered into a third party beneficiary contract for the benefit of Pacific Metals no such agreement was made, and that Pacific Metals and Olympus, without Mayne Plumbing being involved in the planning, planned the transactions but did not foresee the consequences.

Respondent has been unable to find any cases squarely in point to assist the court in resolving the question presented herein. Furthermore, respondent takes the position that none of the cases cited by Pacific Metals in Point IV of its brief are in point.

Bank of Salt Lake has no quarrel with *Utah National Bank of Salt Lake City* v. *Nelson,* 38 Utah 169, 111 Pac. 907 (1910) as cited by cross-appellant. That case involves a promissory note not a check. It is true that a contract for the benefit of a third party gives rights to the third party upon which he may sue to pro-

tect his interests; however, the instant action is not such a case.

The case of *Walker Bank and Trust Company* v. *First Security Corp.*, 9 Utah 2d 215, 341 P.2d 944 (1959) is not in point. There, the Commercial Bank of Utah, First Security Corp. predecessor, failed to pay premiums on an insurance policy upon the life of Nancy Gallagher in accordance with an authorization furnished it by her.

Nancy Gallagher, the insured, took out a policy with American Investors Life Insurance Company of Dallas, Texas, on August 9, 1955. She signed a "Sight Draft Authorization," which requested and authorized the Commercial Bank at Spanish Fork, Utah, to charge her account with drafts to be drawn by the insurance company for the monthly premiums on the policy. The bank accepted the authorization and paid drafts for the months of September, 1955, through March, 1956. Sometime after the March payment the bank mislaid the authorization, which resulted in the drafts for April and May, 1956, being returned to the insurance company with the notation "Not authorized." The bank did not notify the insured of the dishonored drafts and no further premiums were paid. The policy became lapsed and was so when the insured died on August 12, 1956. The insurance company refused to pay the policy proceeds to the beneficiaries. The action was brought on the ground that the negligence of the bank in failing to honor the April and May drafts resulted in the lapse of the policy and loss of the proceeds to the children.

In deciding the case the court said at 9 Utah 2d 218:

> "Under the circumstances here shown it was evident to the bank that the monthly drafts covered insurance premiums and that failure to pay them would result in lapse of the policy and loss of protection thereunder. Having accepted the responsibility, the duty to fulfill it ran both to the depositor and to her beneficiaries for whom she maintained the policy, and the bank was obliged to exercise due care in performing that duty at least until it notified the insured to the contrary."

In the Walker Bank case Mrs. Gallagher was the depositor of defendant bank. She had a direct agreement with the bank to honor sight drafts in order to keep her insurance policy in force and effect for the benefit of her children. These facts are a far cry from the case on appeal herein. In the instant case Mayne Plumbing did not enter into an agreement with the Bank of Salt Lake for the benefit of Pacific Metals. It merely named Pacific Metals as one of the payees on a check representing money owed to Olympus, and did so as an accommodation to the latter, even though Bank of Salt Lake was not indebted to Pacific Metals. That a third party beneficiary contract for the benefit of the Gallagher children was involved in the Walker Bank case seems apparent. By no stretch of the law or the facts can a third-party beneficiary contract for the benefit of Pacific Metals be made to appear.

Cross-appellant, Pacific Metals, makes much in its brief about the Bank of Salt Lake's duty to Mayne Plumbing, its depositor. It should be pointed out here

that Pacific Metals has not taken any legal action against Mayne Plumbing to recover the amount of the check in question, and rightly so because it has no cause of action against Mayne. It should also be pointed out that Mayne Plumbing has commenced no action against the Bank of Salt Lake for any violation of its duties to Mayne Plumbing. Therefore, it seems to respondent that any and all questions about the duties of Bank of Salt Lake to its depositor, Mayne Plumbing, are moot.

The last case cited by cross-appellant under Point IV of its brief is *American National Bank of Denver* v. *First National Bank of Denver*, supra, also discussed at length under Point I of this brief. That case is not in point in discussing third-party beneficiary contracts, because no such question is presented therein either under the law or the facts. There, the drawee bank brought an action against the bank to whom the check was first presented for payment, after first having reimbursed its depositor for having debited its account for the face amount of the check. Again, respondent has no quarrel with the propositions cited in that case, but contends that neither the case nor the propositions quoted from it are applicable to the instant case.

CONCLUSION

In view of the facts, authorities and argument presented herein, respondent, Bank of Salt Lake, concludes and therefore asserts that it is not liable to cross-appel-

lant, Pacific Metals, on any theory presented by the latter in its brief. Respondent respectfully prays the court that the judgment of the lower court, as it applies to the Bank of Salt Lake, be affirmed.

Respectfully submitted,

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