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BILLS AND NOTES—ACCOMMODATION PARTIES—LIABILITY BY ESTOPPEL—In November of 1926, $271,000 in Liberty Bonds were stolen from the Wild Bank. An examination of the bank, shortly afterwards, revealed an impairment of capital. The bank commissioner required that the capital of the bank be increased and, as a condition upon which the bank be allowed to continue operation, required that high-grade securities worth $100,000 be delivered to him to hold for the protection of creditors. In December of 1926, Wild, the president of the bank, asked Millikan, Todd and Appel to lend accommodation paper to the bank. Todd executed a note for $25,000 to the bank, Appel executed a $25,000 note to the bank, and Millikan executed a $50,000 note to the bank. The notes were executed without consideration and the makers did not know of the impairment of capital or to what use the notes were to be put. Millikan and Appel knew of the bond theft, which had been published in the papers. Wild abstracted $100,000 of Indianapolis school bonds from the assets of the bank and delivered them to the banking commissioner, substituting the notes as assets of the bank. Statements to the public of the bank's financial condition included the notes as assets of the bank, as did reports to the bank commissioner, which did not disclose the fact that part of the bank's assets consisted of accommodation paper. This fact was discovered on a later

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[12] 53 A. L. R. 779.

[13] *American Railway Express Co. v. Bender* (1926), 20 Ohio App. 436, 152 N. E. 197.

examination of the bank and the bank was closed. In actions by the makers for surrender and cancellation of the notes, the receivers of the Wild Bank filed cross-complaints for recovery on the notes. Recovery on the notes in question would inure to the benefit of the creditors of the bank and not merely to its stockholders. A few of the creditors of the bank testified that they would not have left deposits in the bank and would not have made new deposits had they known that part of the assets of the bank consisted of accommodation paper. *Held*, that as the accommodation makers placed no restriction on the use to be made of the notes by the bank, they were estopped to deny consideration for the notes.[1]

The bank, having received the accommodation notes, might make either of two practical uses of them. It might transfer them to another for value or it might list them as assets. If the notes had been transferred to another for value, Burns (1926), Sec. 11388 would apply. This section provides, "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving face value thereof and for the purpose of lending his name to some other person. Such person is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party." While the statute provides that an accommodation party shall be liable to a holder for value, it does not purport to make him liable only to a holder for value and to none other, and does not preclude liability based upon estoppel. In refusing to infer a negative meaning to the statute, the court in this case has avoided the error made by many courts and has construed the statute with the reasonable liberality with which a codifying statute should be construed in order to insure that uniformity of construction which the codification was intended to obtain.[2]

There is little, if anything, relating to estoppel to set up defenses to a bill or note which is not merely an application of the general rules of estoppel and governed thereby.[3] The elements essential to make out an equitable estoppel as applied to cases of misrepresentation are: (1) Misrepresentation of a material fact by the party sought to be estopped, (2) made with knowledge of the fact, (3) with the intention that another party shall act upon it, (4) who was ignorant of the truth, (5) relied upon such representations and was induced thereby to act to his injury, (6) which he would not have done except for such representation.[4] The representation may be by declaration, act or conduct, so long as it is of a material fact.[5] If the party sought to be estopped was careless in making statements about which he ought to have known the truth, he may in some cases be held to constructive knowledge of the facts.[6] It is not necessary, in order to create an estoppel, that the person who makes the representa-

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[1] *Iglehart, et. al. v. Todd, et al.; Same v. Appel, et al.; Same v. Millikan, et al.;* Supreme Court of Indiana, Dec. 8, 1931, 178 N. E. 685.

[2] 6 Tulane Law Review 11 (1931).

[3] 8 C. J. 720.

[4] *Taylor v. Griner* (1913), 55 Ind. App. 617, 104 N. E. 607.

[5] 21 C. J. 1120.

[6] *Wright v. Fox* (1913), 56 Ind. App. 315, 103 N. E. 442; *Taylor v. Griner* (1913), 55 Ind. App. 617, 104 N. E. 607.

tions upon which another acts should, at the time of making them, intend to defraud the person to whom they are made, for the fraud consists in subsequently attempting to gainsay or deny the representations to the injury of the person who acted upon them.[7] The doctrine of estoppel, so defined and explained, has been applied in many cases on bills and notes. In the principal case, while a recovery inures to the benefit of all creditors, it was not shown that all creditors relied upon the appearance of assets created by means of the notes, it being shown that only a part of the bank's creditors actually relied upon this appearance of assets. While the court does not discuss the element of reliance in its opinion, it relies upon *Golden v. Cervenka*[8] for the receiver's right of recovery, and in that case the court said that so long as subsequent creditors had a right to rely upon the representations there was an estoppel in their favor and it was immaterial that they did not rely upon the representations or even know of them. There seems to be little authority in support of this position, the cases holding that it is not sufficient that there might have been a change of position if in reality there was none.[9] However, there seems to be an exception to this rule where some creditors have relied upon a representation and some have not. Where the debtor's property is taken away because of the estoppel set up by some creditors, such creditors do not thereby gain a superiority over other creditors.[10] If the property is to be taken away from the true owner because he is estopped as against some creditors, fairness seems to require that it be shared in by all the creditors; and this may be no detriment to the true owner, the only other person interested.

A receiver of an insolvent corporation represents creditors as well as stockholders, holding the property for the benefit of both, and as their trustee may maintain and defend actions which the corporation could not. It has been held that the receiver of a national bank will not be permitted to recover on an accommodation note where it does not appear that the money is required to pay creditors of the bank.[12]

In the principal case, however, a recovery will inure to the benefit of creditors. The acts of the makers of the notes assisted in making possible the misrepresentation and if they might reasonably have anticipated some change of position consequent upon such assistance, there is an estoppel by "assisted" misrepresentation.[13] Because, as mentioned above, the bank made one of only two possible practical uses of the notes, it would appear that the makers of the notes might reasonably have anticipated some change of position due to their acts. Therefore, the case seems to have been correctly decided upon the basis of estoppel.[14]

O. M. B.

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[7] *Maxon v. Lane* (1890), 124 Ind. 592, 24 N. E. 683.

[8] 278 Ill. 409, 116 N. E. 273 (1917).

[9] *Davis v. Bank of England* (1824), 2 Bing. 393, 130 Engl. Repr. 357. See also *Barton v. London, etc. Co.* (1889), 24 Q. B. Div. 77, 59 L. J. Q. B. 33.

[10] Ewart on Estoppel, p. 142 (1900).

[11] *Franklin Nat. Bank v. Whitehead* (1898), 149 Ind. 560, 49 N. E. 592, 32 L. R. A. 725, 63 Am. St. Rep. 302; *Marion Trust Co. v. Blish* (1908), 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, 18 L. R. A. (N. S.) 347.

[12] *Lyons v. Westwater* (1909), 173 Fed. 111.

[13] Ewart on Estoppel, pp. 169-170 (1900).

[14] The principal case has been noted in 45 Harv. L. Rev. 926 (1932), the objection there being taken that the maker does not acquiesce in the representations

CASHIER'S CHECK—FAILURE OF CONSIDERATION—NON-LIABILITY OF BANK—Oris O. Kinder, plaintiff, acted as auctioneer in selling real estate for one Schultz. The purchaser, one Edstom, gave Schultz a check of $500.00 as down payment. Plaintiff and Schultz took the check to the bank after closing hours, explaining to the acting cashier the circumstances under which the check was made and that they wished to cash it so Schultz could pay plaintiff his commission, the amount of which had been agreed upon. The acting cashier explained to them that he could not cash the check as it was after closing hours, but he could give cashier's checks to them in consideration of Schultz endorsing the check of Edstom to the defendant bank. This was done. Payment on Edstom's check was stopped and plaintiff sues the defendant bank upon the cashier's check. *Held,* that there was a total failure of consideration. Judgment for defendant, affirmed.[1]

The probable majority of jurisdictions recognize a cashier's check merely as an inland bill of exchange and subject to the same rules as govern bills of exchange.[2] The cases reaching the opposite result from the principal case seem to be based upon the belief that a cashier's check should be more than an ordinary check. The question has been settled in some states by decisions and in at least one state by statute.[3] In that state "all deposits not otherwise secured and all cashier's checks, certified checks or sight exchange issued by banks operating under this law shall be guaranteed by this act." A more moderate statement of the same rule is that a cashier's check is not subject to countermand like an ordinary check.[4]

Plaintiff in the principal case might be considered in some jurisdictions as a holder in due course. Although he knew of the transactions which gave rise to the execution of the cashier's check he apparently was not guilty of any fraud in procuring the execution of it, and also was apparently under the belief that the maker had executed it upon a valuable consideration. These last two elements being true it would leave the plaintiff in the position of a *bona fide* purchaser of the note for value before maturity.[5]

Another view *contra* to the one in the principal case is where cashier's checks were issued at a depositor's request, it is to be "presumed" that there was a consideration moving from the depositor to the bank, and the want of consideration moving from the payee to the bank is immaterial. It was further held that a bank, by issuing a cashier's check in reliance upon the sufficiency of the balance or credit of the depositor, who requested the issuance of the check, incurs a direct primary obligation to the payee

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unless mere delivery of the notes be regarded as acquiescence, although the desirability of the result is admitted. A note in 6 Univ. of Cin. L. Rev. 242 (1932) objects to the case for the same reason.

[1] *Kinder v. Fisher's Nat. Bank,* Appellate Court of Indiana, Oct. 16, 1931, 177 N. E. 904.

[2] *Culter v. Reynolds* (1872), 64 Ill. 321; *People v. Miller* (1917), 278 Ill. 490, 116 N. E. 131; *Duke v. Johnson* (1923), 127 Wash. 601, 221 Pac. 321; *Drinkall v. Bank* (1901), 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341.

[3] Sec. 3596, Hemingway's Code (Miss.); *Anderson v. Bank* (1924), 135 Miss. 351, 100 So. 179.

[4] *Krinkall v. Bank* (1901), 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341.

[5] *Gagle v. Lane* (1887), 49 Ark. 465, 5 S. W. 790.