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Cashier's Check-Failure of Consideration-Non-Liability of Bank

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.

that the drawee would pay the checks on presentment, and in default thereof that it would pay them.[6] To say that the cashier's check was presumed to be given for a valuable consideration can mean only that consideration is unnecessary. In the principal case such a presumption would be based upon a false fact and it would only be justifiable to make such a presumption if there were some public policy that demanded a cashier's check to be an absolute promise to pay under and all conditions.

Many cases support the two views as stated.[7] Their object in making a cashier's check more than an ordinary inland bill of exchange is not without merit but as seen by the facts in the principal case its application would work a great hardship on innocent parties.

The view that supports the principal case may be stated that notes are prima facie payment but the presumption upon which the *contra* cases are based that the note was given in satisfaction of the debt may be repelled and controlled by evidence that such was not the intention of the parties, and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact.[8] Such a rule tends to give effect to the intention of the parties when entering into the transaction and in the principal case, certainly, it could not be said that the bank intended to incur direct liability on issuing its cashier's check, even if the consideration failed nor would the payee in such circumstances as in the principal case expect the bank to make such an agreement. To say that this plaintiff is a holder in due course is a very doubtful statement.

The cashier's check being a negotiable instrument the defense made by the defendant in the principal case is established by statute in Indiana. As between original parties to a negotiable instrument failure of consideration is a valid defense.[9]

J. D. W.

CORPORATIONS—INSOLVENCY—PROOF OF CLAIMS—X corporation, for a valuable consideration, assumed all the liabilities of Y corporation. One of these liabilities was a claim held by appellant for $24,198.62 in the form of five promissory notes. Neither corporation at any time furnished any collateral for this indebtedness, or paid any part of same. Receivers were subsequently appointed for both corporations.

At the time of the insolvency of X corporation, the total amount of appellant's claim, including interest and attorney's fees, was $33,732.34. Appellant filed a verified claim with the receiver of X corporation for this amount.

One S, an officer of Y corporation, had prior to his death created a trust in favor of appellant in certain insurance policies on his own life.

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[6] *Bobrick v. Second Nat. Bank of Hoboken* (1916), 162 N. Y. S. 147.

[7] *Iron Co. v. Brown* (1874), 63 Me. 139; *Munroe v. Bordier* (1849), 8 C. B. 862, 137 Engl. Repr. 747; *Bergstrom v. Ritz-Carlton Restaurant & Hotel Co.* (1916), 157 N. Y. S. 959.

[8] *Butts v. Dean* (1840), 2 Metc. (Mass.) 76; *Duncan v. Kimball* (1865), 3 Wall. (U. S.) 37, 18 L. Ed. 50; *Briggs v. Holmes* (1888), 118 Pa. St. 283, 4 Am. St. Rep. 597. See *Nixon v. Beard* (1887), 111 Ind. 137, 12 N. E. 131.

[9] Sec. 28, Negotiable Instruments Law, 1926 Burns, Sec. 11387.