

Negotiable Instruments--Action Against Accommodation Party--Promise Not to Enforce the Instrument (Callery v. Lyons, N.Y.L.J., Feb. 2, 1944, p. 431, col. 1, not officially reported))

St. John's Law Review

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Recommended Citation

St. John's Law Review (1944) "Negotiable Instruments--Action Against Accommodation Party--Promise Not to Enforce the Instrument (Callery v. Lyons, N.Y.L.J., Feb. 2, 1944, p. 431, col. 1, not officially reported))," *St. John's Law Review*: Vol. 18 : No. 2 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol18/iss2/12>

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reasonable even though the specified period is shorter than the statutory term of limitation of the state.¹¹ In the event there is no contractual provision, the statutes of limitation of the states govern the action. In a suit by the carrier to collect an undercharge in express rates on interstate shipments, a defense was the prescription of two years under the Louisiana statute, but it was held that the three-year federal statute applied.¹² In an action by a carrier to recover an excessive refund, the action was held to be one on implied contract to refund money and not barred by the statute.¹³

A. J. D.

NEGOTIABLE INSTRUMENTS—ACTION AGAINST ACCOMMODATION PARTY—PROMISE NOT TO ENFORCE THE INSTRUMENT.—In an action brought by the payees against an indorser of a promissory note (the end note of a series of renewals), the indorser set up the specific defense that the indorsement was without consideration and for the accommodation of the payees upon the understanding that he would not be liable to them. Defendant testified that when the maker asked him to indorse the original note, defendant, before doing so, called the payees and asked them why the indorsement was wanted; that payees replied they intended to discount the note and needed another name because they were "afraid the bank wouldn't take it" with the only indorsement it then bore, that of the maker's wife; that there was an agreement that as between defendant and payees, defendant would not be liable; that with this agreement in mind he signed the renewal notes; and that at no time had he received any consideration. The note had been discounted by the bank and the proceeds credited to the payees' account. At maturity it had not been paid, but renewed, and further renewals had thereafter been made, the defendant indorsing the note on each occasion. The end note had been protested and charged into the account of the payees, who thereupon brought the action. The jury returned a verdict favorable to the defendant, upon which verdict judgment was entered dismissing the complaint. The Appellate Division of the Third Judicial Department, by a non-unanimous order,¹ reversed the judgment of the Trial Term upon the law² and the facts, holding that denial of plaintiffs' motion for a directed verdict was error, inasmuch as there was no

¹¹ *Adams v. Standard Accident Ins. Co.*, 124 Cal. 393, 12 P. (2d) 464 (1932); *Provident Fund Society v. Howell*, 110 Ala. 508, 18 So. 311 (1895). *Contra*: *Aetna Casualty Co. v. U. S. Gypsum Co.*, 239 Ky. 247, 39 S. W. (2d) 234 (1931).

¹² *Strawberry Growers' Selling Co. v. American Railway Express*, 31 F. (2d) 947, 83 A. L. R. 246 (1929).

¹³ *T. M. Partridge Lumber Co. v. Michigan Central R. R.*, 26 F. (2d) 615 (1928).

¹ *Callery v. Lyons*, 265 App. Div. 604, 42 N. Y. S. (2d) 191 (1943).

² See NEGOTIABLE INSTRUMENTS LAW § 55.

evidence to the effect that anyone had said to the defendant that he would not be held liable on the note. It was directed that judgment be entered for the plaintiffs. In a dissenting opinion, two of the justices held that the defendant was an accommodation indorser for the payees, not for the maker, and that he should not be compelled to pay a note to the persons for whose accommodation he had indorsed it. The Court of Appeals held that on the record the trial court was disabled from directing a verdict; that there was evidence to support the jury's finding, and that the payees could not recover. By a unanimous order the judgment of the Appellate Division was reversed, and a new trial granted. *Callery v. Lyons*, N. Y. L. J., Feb. 2, 1944, p. 431, col. 1, not officially reported.

At common law as well as under the Negotiable Instruments Law, the general rule is that an accommodation party is not liable to an accommodated party, regardless of their apparent relation on the paper.³ In *Higgins v. Ridgway*,⁴ the receiver of a bank sought to collect on a note which was part of the assets of the bank, and the maker set up the defense that the note had been given without consideration and upon the express promise of the president of the bank that it would not be enforced. The maker succeeded, the Court of Appeals ruling that such an agreement was a good defense as between original parties, and that as between them and others having notice, parol evidence was admissible. In *Whiffler v. Murphy*,⁵ the payee asked the maker to get an indorsement, and the maker, to induce the accommodation indorser to sign the note, promised that the indorser would never be called on for payment. When the payee sued the indorser, he could not collect, for the court held that when the maker made the promise, he must be deemed the agent of the payee, and that the payee was bound. This was not a bank case.

The transaction which gave rise to the *Ridgway* case occurred before the Negotiable Instruments Law became effective, but, under the *N. I. L.* it was the leading case and governed the results in similar situations, irrespective of the class of plaintiff against whom the agreement was interposed as a defense. After the financial disturbances of the early 1930's, however, the courts began to inquire more closely into the circumstances under which such promises were made, and in 1936 two decisions by the Court of Appeals modified the rule. In *Bay Parkway National Bank v. Shalom*,⁶ the accommodation party, defending an action brought by the payee bank, sought to maintain that he had signed the note upon a promise by the directors of the bank that they would not hold him liable. The purpose of the transaction was to conceal the true condition of the bank from the bank examiners. He was not released from his liability,

³ 8 AM. JUR., Bills and Notes, § 465.

⁴ 153 N. Y. 130, 47 N. E. 32 (1897).

⁵ 52 App. Div. 621, 65 N. Y. Supp. 105 (1900).

⁶ 270 N. Y. 172, 200 N. E. 685 (1936).

the Court of Appeals deciding that he should be estopped from setting up such a defense. A few months later the case of *Mt. Vernon Trust Co. v. Bergoff*⁷ came before the court. The defendant in that case had executed a note and delivered it to the bank, receiving simultaneously a writing exempting her from liability, while the bank had used the note to conceal a substitution among its assets. The defendant was compelled to pay the note, and in the opinion, Lehman, J., stated the modified rule more explicitly. It has become apparent, he said, that the rule in the *Ridgway* case might be a cloak for fraud, and that such agreements would not always be enforceable, at least where bank examiners and depositors were to be deceived. Then in 1937 the application of the modified rule was extended. *Lawrence-Cedarhurst Bank v. Ruth*⁸ was a similar action to collect a note from an accommodation party. There was, however, no suspicion of concealment or of any but the most praiseworthy intention. The arrangement provided for the defendant giving a note without consideration, for the purpose of improving the financial position of the bank, upon the promise that no payment of interest or principal would be called for unless and until the bank should go into liquidation. The agreement was specifically approved by the stockholders and consented to by the bank examiners and by the Comptroller of the Currency before the bank was reopened after the nationwide closing in 1933. When the maker was sued by the bank, which had not gone into liquidation, he sought to be released from the obligation by relying on the agreement. Public policy, the court held, forbade that such collateral agreements with banking institutions be deemed valid, even when everything had been done openly and with no attempt at misrepresentation. In *Federal Deposit Ins. Corporation v. Lynch*⁹ the defendant's answer alleged a failure to tender return of collateral securities which had been pledged when the note was executed, at the time payment was demanded, and sought to set up the maker's status as an accommodation party as relieving him from liability. On the motion of plaintiff, the liquidator of the bank which had held the note, the answer was struck out as sham and frivolous, and judgment granted on the pleadings, the opinion pointing out that in cases where a bank was concerned, public policy entered into the determination.

The result reached in the principal case shows no such disposition to extend the rule to cases between individuals. Here, indeed, it would seem that the section has received a construction somewhat more restricted than heretofore, in view of the fact that the court found in the conduct of the payees, an implied promise not to hold the accommodation party, even in the absence of any express engagement. Promises were held to be implied by the conduct of the

⁷ 272 N. Y. 192, 5 N. E. (2d) 196 (1936).

⁸ 162 Misc. 82, 294 N. Y. Supp. 810 (1937).

⁹ 46 F. Supp. 466 (D. C. N. Y. 1942).

parties in *George v. Bacon*¹⁰ and in *Levin v. Schickler*,¹¹ but in each instance the effect was to compel contribution from an indorser who would not otherwise have been liable. No example of the release of an accommodation party on the strength of an implied promise has been found, prior to the principal case.

The decision would appear to make clear, then, that the general rule has lost none of its force in cases between individuals, despite the fact that it will no longer be applied when a bank is a party. And the limitation of the suspension of the rule in bank cases is well illustrated in *Citizens' First Nat. Bank of Frankfort v. Parkinson*.¹² In that case the accommodation co-maker's defense was that the bank had neglected to foreclose on collateral security which the maker had deposited, although the co-maker had demanded that the bank do so at a time when the security was ample to pay the note. While recognizing that by the rule in the *Shalom* and *Bergoff* cases, any agreement by the bank to relieve the accommodation party would be void, the court nevertheless held that the defendant might invoke the equitable doctrine in *Pain v. Packard*,¹³ and that the accommodation party was released by the failure of the bank to respect his right of exoneration. The principal case will distinguish the rules of construction to be applied to the accommodation party's undertaking in cases between individuals from those which govern when a bank is a party. Once the contract has been construed, the accommodation party in both types of cases will be accorded all the benefits of the doctrine of *strictissimi juris*.

H. L. D.

NEGOTIABLE INSTRUMENTS—CHECK USED BY AGENT TO PAY HIS OWN DEBT TO PAYEE—RIGHT OF MAKER TO RECOVER FROM PAYEE.—George Shuman, owner of the capital stock of a country club, induced plaintiff to give him a check for \$775 for the purpose of paying certain deposits to the utilities people which, if not paid, would jeopardize negotiation of an important contract and bring about foreclosure of the country club property. Upon these representations and to provide for these deposits, the plaintiff gave to Shuman his check for \$775 drawn to the order of defendant herein, who was the president of the country club. Defendant applied the proceeds of this check in payment of a personal indebtedness owing to him from Shuman.¹ At the close of the trial the complaint was dis-

¹⁰ 138 App. Div. 208, 123 N. Y. Supp. 103 (1910).

¹¹ 155 Misc. 372, 374, 279 N. Y. Supp. 491, 493 (1935).

¹² 178 Misc. 630, 35 N. Y. S. (2d) 615 (1942).

¹³ 13 Johns. 174, 7 Am. Dec. 369 (1816).

¹ An agent must act within authority granted, and persons dealing with an agent appointed for a particular purpose, must inquire as to the extent of the agency. See *Miles v. Smith*, 141 S. E. 314, 37 Ga. App. 619 (1928).