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Bills and Notes-- Note Given as Fictitious Bank Asset--Defense of Lack of Consideration (Bay Parkway National Bank v. Shalom, 270 N.Y. 172 (1936))

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and if the attorney has fully performed prior to the discharge, he may stand upon his contract so as to measure his damages. An action for breach of contract only arises from a contract of employment for a definite period.[7]

A client has the right to settle in good faith [8] the litigation at any stage [9] without the knowledge or consent [10] of the attorney. The clause in the contract of retainer which prohibits the client from settling the litigation without the consent of the attorney is void as being against public policy.[11]

In the instant case, the fact that the attorney has a cause of action against his client does not exonerate the parties who wrongfully induced the breach.[12] The attorney has chosen to bring action against them and the jury having found that they induced the client to repudiate the agreement, they are liable to the attorney for such amount as the attorney would have been entitled to receive from the client down to the date of cancellation. It is true that the attorney was mistaken as to the rule of damages in the case at bar; however, he is not precluded from recovering, because there is no requirement of law that the measure of damages alleged to have been sustained shall be stated in the complaint.[13] It is sufficient if the complaint states facts from which damages can properly be inferred, without specifically enumerating the items of damages or the rules of law controlling the measure of damages.[14]

V. E. C.

BILLS AND NOTES—NOTE GIVEN AS FICTITIOUS BANK ASSET—DEFENSE OF LACK OF CONSIDERATION.—Action on a promissory note of which the defendant is the maker. The note was drawn by the defendant to his own order and indorsed over to the plaintiff bank so as to deceive the bank examiner by enhancing the bank's assets. The bank president, fearing a "run" on the bank, entreated and procured the defendant to execute the note, promising not to hold him liable on it. In an action by the bank to recover the value

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[7] Greenberg v. Resnick & Co., 230 N. Y. 70, 129 N. E. 211 (1920).

[8] Matter of Levy, 249 N. Y. 168, 163 N. E. 244 (1928); Fisher-Hausen v. Brooklyn Heights R. R., 173 N. Y. 492, 66 N. E. 395 (1903).

[9] Matter of Levy, 249 N. Y. 168, 163 N. E. 244 (1928).

[10] *In re* Snyder, 190 N. Y. 66, 82 N. E. 742 (1907); Lee v. Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018 (1891); Bailey v. Murphy, 136 N. Y. 50, 32 N. E. 627 (1892).

[11] *In re* Snyder, 190 N. Y. 66, 82 N. E. 742 (1907); (1929) 6 N. Y. U. L. Q. REV. 201.

[12] Hornstein v. Podivitz, 254 N. Y. 443, 173 N. E. 674 (1930).

[13] Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427 (1887); Winter v. American Airline Products Inc., 236 N. Y. 199, 140 N. E. 561 (1923).

[14] Winter v. American Airline Products Inc., 236 N. Y. 199, 140 N. E. 561 (1923).

of the note, the defendant pleaded among other defenses, lack of consideration. *Held,* judgment for defendant reversed. The defendant is estopped from asserting the defense of lack of consideration. *Bay Parkway National Bank* v. *Shalom,* 270 N. Y. 172, 200 N. E. 685 (1936).

Evidence, although parol, between immediate parties to a note, that a note is not to be paid and is made for the accommodation of the plaintiff and also lacks consideration, is ordinarily admissible.[1] But when the purpose of the instrument, be it a note, bond or mortgage, is to deceive state examiners of financial institutions, then the defendant will be estopped from setting up personal defenses.[2] A note executed with such intent is against public policy and illegal.[3] Generally, courts do not aid parties to an illegal contract.[4] When, however, the public good can best be served by enforcing an illegal contract, the courts will do so, not as a benefit to the plaintiff but as a detriment to the defendant.[5] A note executed for the purpose of deceiving state bank examiners, serves in effect to deceive all the bank's creditors, including depositors, who relying upon the examination of the state banking department continue doing business with the bank. If the court here refused to enforce payment of the note, the very result sought to be prevented would have been attained; therefore, the bank is allowed to recover.[6]

A question arises whether the doctrine of estoppel should be invoked against a bank which has not been superseded by receivers.[7] The bank being a party to the transaction cannot plead that the

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[1] Higgins v. Ridgway, 153 N. Y. 130, 47 N. E. 32 (1897); Bernstein v. Kritzer, 253 N. Y. 410, 171 N. E. 690 (1930); *cf.* 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2444.

[2] Hurd v. Kelly, 78 N. Y. 588 (1879); Best v. Thiel, 79 N. Y. 15 (1879); County Trust Co. v. Mara, 242 App. Div. 206, 273 N. Y. Supp. 597 (1st Dept. 1934), *aff'd,* 266 N. Y. 540, 195 N. E. 190 (1935); Mars National Bank v. Hughes, 256 Pa. 75, 100 Atl. 542 (1917); Cedar State Bank v. Olson, 116 Kan. 320, 226 Pac. 995 (1924); New England Fire Insurance Co. v. Haynes, 71 Vt. 306, 45 Atl. 221 (1899). Compare Smouse v. Waterloo Savings Bank, 198 Iowa 306, 199 N. W. 350 (1924), with Bandel v. Shaw, 115 Kan. 185, 222 Pac. 62 (1924) (defense of the maker of a note, as in instant case, that it was executed for the accommodation of the bank, is a misuse of the term "accommodate").

[3] Cedar State Bank v. Olson, 116 Kan. 320, 226 Pac. 995 (1924).

[4] 3 WILLISTON, CONTRACTS (1927) § 1632; WHITNEY, CONTRACTS (2d ed. 1934) § 64.

[5] 13 C. J. § 441 (2); Renier v. No. American Newspaper Alliance, 259 N. Y. 250, 181 N. E. 561 (1932) (judgment rendered for defendant, "not as a protection to the defendant, but as a disability to the plaintiff").

[6] 3 WILLISTON, CONTRACTS (1927) § 1632; RESTATEMENT, CONTRACTS (1932) § 601, gives the following illustration: *A, B,* and *C,* directors of a bank, make notes payable to the bank in order to deceive a bank examiner. An agreement is made by all the directors on behalf of the bank when the notes are given that they shall be returned and cancelled after they have served their purpose in deceiving the examiner. The bargain is illegal but the notes will be enforced according to their terms.

[7] Note, *Liability on a note given to banks as fictitious asset* (1924) 38 HARV. L. REV. 239.

defendant maker is estopped. Estoppel is invoked by the court because creditors suffered a loss by continuing to do business with the bank on the assumption that the bank was solvent.[8] If, however, the bank had not failed and then brought suit in its own name, it would seem that the action should fail, and the original agreement between the bank and the maker should prevail.[9] The creditors have sustained no loss and the doctrine of estoppel need not be applied.[10] And, therefore, even if the receiver should bring suit, it would seem that he should collect, not the face value of the note but only to the extent of the loss suffered by the creditors.[11] New York courts, however, have extended the doctrine of estoppel in favor of both receivers and banks regardless of loss to creditors.[12]

It is submitted that the rule that the maker of a note of this kind should be held liable is sound. The only practical way to enforce this policy is to make him pay. In the recent case of *In re Hudson River Trust Co.*,[13] a director gave his note to the trust company to be repaid when the financial conditions of the bank improved. The bank failed. The estate of the director was estopped from setting up the defense of no consideration, since the note was listed as assets in the published statements of the bank, and the depositors had relied upon it. This estoppel, invoked by the court to protect the unwary bank depositor against fraud is rooted in what has been termed "good morals and sound public policy." [14]

S. L.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—DISCRIMINATION ON BASIS OF WELL ADVERTISED TRADE NAME—DENIAL TO NEWCOMERS OF MILK PRICE DIFFERENTIAL.—Pursuant to an amendment to the New York Milk Control Act,[1] permitting price fixing in the milk industry, discrimination was made between

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[8] Niblack v. Farley, 286 Ill. 536, 122 N. E. 160 (1910); Prudential Trust Co. v. Cronin, 245 Mass. 311, 139 N. E. 645 (1923).

[9] First National Bank v. Felt, 100 Iowa 680, 69 N. W. 1057 (1896).

[10] *Ibid.*

[11] Payne v. Burnham, 62 N. Y. 71 (1875); see note 7, *supra* ("The receiver sues to protect private rights, not to punish falsifiers").

[12] Hurd v. Kelly, 78 N. Y. 588 (1879) (suit brought by receiver); Best v. Thiel, 79 N. Y. 15 (1879) (suit brought by receiver); County Trust Co. v. Mara, 242 App. Div. 206, 273 N. Y. Supp. 597 (1st Dept. 1934), *aff'd*, 266 N. Y. 540, 195 N. E. 190 (1935) (suit brought by bank); Bay Parkway National Bank v. Shalom, 270 N. Y. 172, 200 N. E. 685 (1936) (suit brought by bank).

[13] *In re* Hudson River Trust Co., *In re* Gifford's Estate, — App. Div. — (3d Dept. 1936), 287 N. Y. Supp. 916 (1936).

[14] Best v. Thiel, 79 N. Y. 15 (1879); Schmid v. Haynes, 115 N. J. Law. 271, 178 Atl. 801 (1935).

[1] N. Y. LAWS 1935, c. 158.