

RECENT CASES

Banks and Banking—Accommodation Paper—Right of Receiver To Recover on “Window Dressing” Bond—[Federal].—A bank’s officer persuaded the general agent of the defendant to issue security bonds which were to be shown as collateral for several worthless loans, so that the loans would pass inspection of the bank commissioners. No premiums were paid, and the officer gave the general agent letters releasing the defendant from liability. The examiners permitted the bank to remain open and several large deposits were made in partial reliance upon the apparent security of the loans. The bank became insolvent and the receiver brought this action to recover on the bonds after default of the loans. On appeal from a judgment for the defendant, *held*, affirmed. The receiver is subject to all defenses available against the bank. *Deitrick v. Standard Surety and Casualty Co.*¹

The receiver of an insolvent bank is its “statutory assignee”² and represents both creditors and stockholders.³ He is usually⁴ appointed by the Comptroller of Currency for national banks,⁵ or by the superintendent of banking for the state banks.⁶ The prevalent maxim in respect to the power of a receiver is that “he stands in the shoes of the bank.”⁷ A line of federal cases,⁸ which follow *Rankin v. City Nat’l. Bank*⁹ have held that there is no exception to this general doctrine in situations similar to the instant case. Hence, since the bank is bound by the acts of its officers,¹⁰ a third person, whose fraudulent “window dressing” bonds have made possible a deception of the examiners and creditors of a bank, can invoke the defense of either lack of consideration or a collateral contract granting release from liability, in an action by the receiver on the bonds. Although the generalization, upon which the *Rankin* case is based, that the

¹ 90 F. (2d) 862 (1937), *cert. granted*, 58 S. Ct. 143 (1937).

² *Kennedy v. Gibson*, 8 Wall. (U.S.) 498, 506 (1869); *Hazen v. Hardee*, 78 F. (2d) 230, 232 (App. D.C. 1935).

³ *Braver, Liquidation of Financial Institutions* § 1068 (1936); 9 *Zollmann, Banks and Banking* § 6317 (1936).

⁴ *King v. Pomeroy*, 121 Fed. 287 (C.C.A. 8th 1903) (exception in case of voluntary liquidations).

⁵ 19 Stat. 63 (1876), 12 U.S.C.A. §§ 191, 192 (1936).

⁶ See Ill. Rev. Stat. 1937, c. 16½, ¶ 11; *Throckmorton’s Ohio Code* 1936, § 710-88(a); *Cahill’s Cons. L. N.Y.* 1930, c. 3, § 62.

⁷ *Lincoln Joint Stock Land Bank v. Barlow*, 217 Iowa 323, 251 N.W. 501 (1933) (trust agreement); *Campbell v. Vining*, 101 Fla. 939, 133 So. 555 (1931) (mortgage transaction); *Braver, op. cit. supra* note 3, § 1069.

⁸ *Andresen v. Kaercher*, 38 F. (2d) 462 (C.C.A. 8th 1930); *Peterson v. Tillinghast*, 192 Fed. 287 (C.C.A. 6th 1911); *Cutler v. Fry*, 240 Fed. 238 (D.C. Kan. 1915). But see *Pauly v. O’Brien*, 69 Fed. 460 (C.C. Cal. 1895).

⁹ 208 U.S. 541 (1908).

¹⁰ *Braver, op. cit. supra* note 3, § 1123.

receiver acquires no greater rights than the bank,¹¹ has been applied in the fraudulent accommodation note cases, the courts have recognized exceptions to its universal application, and have allowed the receiver to recover in situations where it is at least doubtful that the bank could have recovered. Thus, where the bank has acquired deposits by wrongful pledging of securities, the receiver can demand the return of the securities without restoring the deposits.¹² In cases where stock has been sold for less than par, the receiver can demand the unpaid balance,¹³ although it seems possible in this situation that a minority stockholder could also, through action in the name of the corporation, force the payment of the balance.

In contrast to this federal authority there is general unanimity in the state supreme courts,¹⁴ supported by some Federal decisions,¹⁵ that where a third party's fraudulent bonds have induced creditors' reliance, there is an exception to the doctrine that the receiver stands in the position of the bank.¹⁶ These courts allow the receiver recovery in an action on the bonds. In clothing their decisions in familiar legal concepts, the courts occasionally speak as though the bank itself, as a solvent corporation, might have recovered. Thus, some of these courts base their conclusions on finding what they call sufficient consideration to support the contract;¹⁷ others find the bank was not the "accommodated party."¹⁸ A few courts have felt that the proper legal concept for disallowing the maker's defense could be found in the "parol evidence rule."¹⁹ If the bank, however, rather than the receiver, were to bring the action, it seems unlikely that the courts would employ these concepts to allow the bank recovery, since there was no *quid pro quo* and the officer in granting release from liability by the collateral contract would be considered to have bound the bank.²⁰ Two Illinois decisions have held that the receiver "when attempting to marshal the assets of such bank for the

¹¹ 208 U.S. 541, 546 (1908).

¹² "It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so," Brandeis, J., in *Texas & P. Ry. v. Pottorff*, 291 U.S. 245, 261 (1933). See also *City of Marion v. Sneed*, 291 U.S. 262, 272 (1933); *Granzow v. Village of Lyons*, 89 F. (2d) 83 (C.C.A. 7th 1937); *Queenan v. Mays*, 90 F. (2d) 525 (C.C.A. 10th 1937); *Ross v. Lee*, 15 F. Supp. 972 (Fla. 1936).

¹³ 39 Harv. L. Rev. 757 (1926).

¹⁴ *Niblack v. Farley*, 286 Ill. 536, 122 N.E. 160 (1919); *Lyons v. Benney*, 230 Pa. 117, 79 Atl. 250 (1911); *Hurd v. Kelly*, 78 N.Y. 588 (1879); see also notes 17-19, 21, 22.

¹⁵ *Pauly v. O'Brien*, 69 Fed. 460 (C.C. Cal. 1895); *Lyons v. Westwater*, 181 Fed. 681 (C.C.A. 3d 1910).

¹⁶ *Deitrick v. Standard Surety & Casualty Co.*, 90 F. (2d) 862, 865 (1937); 9 *Zollmann, op. cit. supra* note 3, § 6294; *Braver, op. cit. supra* note 3, § 1107.

¹⁷ *Union Bank of Brooklyn v. Sullivan*, 214 N.Y. 332, 108 N.E. 558 (1915) (stockholder's interest in bank); *Prudential Trust Co. v. Moore*, 245 Mass. 311, 139 N.E. 645 (1923) (director's desire to keep bank open); *Best v. Thiel*, 79 N.Y. 15 (1874) (deemed real consideration).

¹⁸ *Neal v. Wilson*, 213 Mass. 336, 100 N.E. 544 (1913); *Smouse v. Waterloo Savings Bank*, 198 Iowa 306, 199 N.W. 350 (1924). See also, *Lyons v. Westwater*, 181 Fed. 681 (C.C.A. 3d 1910).

¹⁹ *Dominion Trust Co. v. Ridall*, 249 Pa. 122, 94 Atl. 464 (1915); 38 Harv. L. Rev. 239, 240 (1924); 5 *Chamberlayne, Evidence* § 3553 (1916).

²⁰ *Braver, op. cit. supra* note 3, § 1123.

benefit of its creditors is in law an innocent holder of such assets"²¹ and, therefore, the defense of the third party available against the bank would not run against the receiver. A majority of the state courts have avoided this fiction and the difficulties of the other concepts by basing their decisions on estoppel.²² This principle, which seems more clearly to explain what the courts are actually doing, is that a party to a fraud perpetrated against the bank examiners and the creditors is estopped from alleging lack of consideration, release from liability and illegal contract.

The reasoning and result of these cases employing estoppel are in keeping with demands of public policy²³ that neither bank examiners nor creditors should be victims of fraudulent arrangements with outsiders. Even the federal courts allow receivers to recover against officers and directors²⁴ whose fraudulent acts were detrimental to creditors. There seems to be little justification for a limitation in suits against the officers' co-tortfeasors.²⁵ Yet the court in the instant case, invoking the principle of *stare decisis*, allows one who has made the fraud possible to go with impunity.

Constitutional Law—Municipalities—Minimum Wage Law for Firemen—[Illinois].—The Illinois "Firemen's Minimum Wage Act"¹ provides that the salary to be paid regular firemen in any municipality having a population of more than 25,000, but less than 150,000 inhabitants shall be not less than \$175.00 per month. A petition for mandamus was filed on the relation of the active members of the fire department of the city of Springfield to compel the city of Springfield and certain of its officers to pay the amounts required by the act and to levy taxes for that purpose. The defendants contended that the act was unconstitutional in that it was special legislation,² and it created a corporate debt of the city without its consent,³ and that the act is incomplete and in conflict with existing statutes. On appeal from a judgment and orders granting the petition, *held* (one dissent), affirmed. *People ex rel. Moshier v. City of Springfield*.⁴

The decision in the instant case destroys most of the few remaining vestiges of

²¹ *Harwick v. Davis*, 220 Ill. App. 40, 45 (1920); *Mueller v. Novak*, 251 Ill. App. 262 (1929).

²² See cases cited in note 15 *supra*; *State Bank of Pittsburg v. Kirk*, 216 Pa. 452, 65 Atl. 932 (1907); *Golden v. Cervenka*, 278 Ill. 409, 427, 116 N.E. 273, 281 (1917); *Engen v. Mattleys*, 50 N.D. 487, 196 N.W. 550 (1923).

²³ "The business of banking is affected with public interest" (*German-American Finance Corp. v. Merchants' & Manufacturers' State Bank*, 177 Minn. 529, 535, 225 N.W. 891, 893 (1929)), since "public faith, credit and honesty in business transactions are a bank's main assets" (*Cedar State Bank v. Olsen*, 116 Kan. 320, 323, 226 Pac. 995, 997 (1924)).

²⁴ *Bowerman v. Homner*, 250 U.S. 504 (1919) (for violation of common law duty); *Bates v. Dresser*, 251 U.S. 524 (1920) (for failure to catch embezzling cashier); *Freeman v. Jackson*, 227 Fed. 688 (D.C. Ga. 1915) (for disregard of duties); *Fed. Reserve Bank of Kansas City v. Omaha Nat'l. Bank*, 45 F. (2d) 511, 518 (C.C.A. 8th 1930) (for fraudulent handling of funds).

²⁵ The problem as to whether or not notice to the general agent with "apparent authority" was notice to the defendant surety company was not discussed by the court.

¹ Ill. Rev. Stat. 1937, c. 24, ¶ 860(c)(d).

² See Ill. Const. 1870, Art. IV, § 22.

³ See Ill. Const. 1870, Art. IX, § 10.

⁴ Sup. Ct. Ill., Dec. 22, 1937. Not yet reported.