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Bob Baumfalk

University of Nebraska College of Law

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PRESENT STATUS OF SURETYSHIP DEFENSES OF AN ACCOMMODATION MAKER

INTRODUCTION

From 1907 until 1940 defenses common to the law of suretyship were sought to be introduced by an accommodation maker of a negotiable instrument against the holder of the instrument who was bringing suit upon it. Since that time, however, the practice has fallen into almost total disuse. The accommodation maker has usually sought to be discharged by drawing an analogy between himself and a surety. Thus, if the holder had given a binding extension of time to the principal debtor or had released collateral security held by him to the principal debtor, two defenses available to a surety, the accommodation maker requested to be discharged. Such requests have brought about contrary interpretations of the Uniform Negotiable Instruments Law. It is the purpose of this Note to suggest reasons for the present disuse, and to examine the influence which the Uniform Commercial Code

1 See cases collected, Annot., 48 A.L.R. 715 (1927); Annot., 65 A.L.R. 1425 (1930); Annot., 108 A.L.R. 1088 (1937); Annot., 2 A.L.R.2d 260 (1948).
now being advocated in many states would have upon the problem.²

I. PATENT ON LATENT SURETIES

If an accommodation maker in signing the instrument places after his name such terms as "surety," "guarantor," or "accommodation maker," he should be considered a patent surety. In this situation, notice of the accommodation or suretyship relation appears upon the face of the instrument. If no such term is appended to his signature, then he should be considered a latent surety, since notice of the accommodation or suretyship relation is not apparent from the face of the instrument. But why such a distinction?

If an accommodation maker has appended any of the above words to his signature, a proper interpretation of section 192³ would make such a person secondarily liable. This section provides:

The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable. (Emphasis supplied).

Is not the use of the word "surety," for example, a term of the instrument? Does not the use of this one word say, if another signature appears thereon: "as between myself and the other party whose signature appears upon this instrument, he is the one who is the principal debtor and I will pay if he does not. But if I do, he will be required to pay me"? It should be apparent that a literal construction of this section would mean that an accommodation maker or co-maker, placing upon the face of the instrument the nature of his liability, as well as notice that he is not absolutely required to pay the same as between himself and the accommodated party, would not fall into the definition of section 192. He is not by the terms of the instrument absolutely required to pay the same. He is required to pay if the principal debtor does not. If such an interpretation were adopted, he would


³ Throughout this Note the sections will be referred to as numbered in Negotiable Instruments, 5 Uniform Laws Annotated (1943). Numbering therein corresponds to that of the original Negotiable Instruments Act. Numbering coincides with that used in Beutel's Brannan, Negotiable Instruments Law (7th ed. 1948).
be a party "secondarily liable," and therefore anything which would discharge a person secondarily liable under the provisions of section 120 would also discharge him. Although the accommodation maker may be required to pay the instrument in some instances, it is apparent from the face of the instrument that the ultimate liability rests with the party accommodated, and it is he alone who is absolutely required to pay the same by the terms of the instrument.

Section 120(6) provides for discharge if a binding extension of time is given unless there is a reservation of rights against the party secondarily liable. It was held in *Cellers v. Meachem*, one of the leading cases denying the use of suretyship defenses, that although an accommodation maker has added the word "surety" to his name, he is a person "primarily liable" and not discharged by a binding extension of time given to the accommodated party. It is submitted that the provisions of section 192 do not require such an interpretation. The court in the *Cellers* case relies upon a text on commercial paper which stated that an accommodation maker is absolutely liable on the instrument. However, section 29 only provides that an accommodation maker is liable, and the word "absolutely" does not appear. Absolute liability is a proper interpretation only if the assumption is made that the accommodation party is a person primarily liable under section 192. Had the drafters wanted to make him absolutely liable they would have inserted such a term in section 29. Of course, the sole fact of accommodation is not sufficient to relieve an accommodation maker from liability. However, when notice of the suretyship relation appears on the instrument, the surety should be held to be secondarily liable. This would be all the more true, if the term "principal debtor" as used in the act was used in the suretyship sense as it was intended to be.

That a distinction should be made in those cases where the suretyship relationship is patent, from those in which the relationship is latent, is obvious. For example, the Massachusetts rule with reference to a binding extension of time was adopted in a case of latent suretyship, and parol evidence was held not to be admissible to prove the relationship. But in a subsequent case, although not citing the NIL, a patent surety was allowed the defense of a release of collateral because according to the tenor of

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4 49 Ore. 186, 89 Pac. 426 (1907).  
5 Eaton & Gilbert, Commercial Paper §§ 123(f), 550 (1903).  
6 Beutel, The Meaning of the Term "Principal Debtor" as used in the Negotiable Instruments Law, 19 Penn. B.A.Q. 206, 209 (1934).  
the note, the payee was charged with notice of the relationship between the principal and the surety.\footnote{Durfee v. Kelly, 228 Mass. 571, 117 N.E. 907 (1917).}  

If the accommodating party is a patent surety, either as maker or co-maker, then he should be allowed to come under the provisions of section 120. Although the release of collateral as well as other suretyship defenses has been excluded from section 120, it would seem that a resort to section 196, which provides that in any case not covered by the act, the rules of the law merchant shall govern, would yield the means for allowing the insertion of this defense,\footnote{Beutel's Brannan, Negotiable Instruments Law 1159 (7th ed. 1948).} even though it has been held that the provisions of section 120 are exclusive.\footnote{Dunnington v. Bank of Crewe, 144 Va. 36, 131 S.E. 221 (1926).}

The same results also would be obtained under the Uniform Commercial Code, section 3-606.\footnote{Uniform Commercial Code, Uniform Laws Annotated 424 (Official Draft 1952).}

II. EXTENSION OF TIME

The real problem arises when the accommodating party signs the instrument either as maker or co-maker, without adding words showing in what capacity he signs. In this instance he would be deemed a latent surety. From the face of the instrument it appears that he is a co-maker, or merely the maker.

At common law an accommodation maker of a negotiable instrument who was apparently a principal but in fact a surety was discharged if the holder with knowledge of the true relation of the parties granted a binding extension of time to the principal debtor.\footnote{Lauman, Hedges & Co. v. Nichols, 15 Iowa 161 (1863); 4 Williston, Contracts § 1259 (rev. ed. 1936); Henning, The Uniform Negotiable Instruments Law, 59 U. Pa. L. Rev. 532 (1911); 3 Daniel, Negotiable Instruments § 1511 (7th ed. 1933).} It was possible to show by parol that the co-maker or indorser was the principal debtor.\footnote{Ibid. But see 3 Daniel, Negotiable Instruments § 1537 (7th ed. 1933).} If the holder took the instrument in ignorance of the suretyship relation, but became aware of it before granting the extension, the weight of authority supported the view that the surety, though primarily liable by the terms of the instrument, was discharged by the binding extension of time to the principal debtor.\footnote{4 Williston, Contracts § 1259 (rev. ed. 1936); Henning, The Uniform Negotiable Instruments Law, 59 U. Pa. L. Rev. 532, 535 (1911).}

An accommodation maker, if not in fact at least in principle,
is a surety.\textsuperscript{16} If the obligation is one of a personal nature, the average accommodation maker is usually a friend or relative of the principal debtor. He usually signs the instrument because of pressure brought to bear by the principal debtor upon the insistence of the payee.\textsuperscript{16} Similarly, much of the present day accommodation is accomplished by corporate officers and stockholders signing to accommodate their corporation.\textsuperscript{17} These situations suggest strongly that accommodation parties of this type should be awarded special consideration.

\textit{A. The Majority Rule}

The so-called majority view,\textsuperscript{18} that a binding extension of time does not discharge an accommodation maker or surety, has been adopted initially in most jurisdictions in cases in which the plaintiff was a payee and the fact of the suretyship relation did not appear on the face of the instrument.\textsuperscript{19} In a lesser number of cases it has been adopted where the plaintiff was a holder who took with knowledge of the suretyship relation although the relationship was not apparent upon the face of the instrument.\textsuperscript{20} There is a surprising absence of cases where the plaintiff was a holder in due course who learned of the suretyship relationship after acquiring the instrument. It must be noted, however, that if a jurisdiction has applied the rule to a case in which the plaintiff was a payee or a holder with knowledge of the relationship, a fortiori, it would also be applied to a holder in due course who

\begin{itemize}
\item \textsuperscript{16} Raymond, Suretyship at "Law Merchant," 30 Harv. L. Rev. 141, 147 (1917).
\item \textsuperscript{17} Turner, Revision of the Negotiable Instruments Law, 38 Yale L.J. 25, 49 (1928).
\item \textsuperscript{18} Annot., 49 A.L.R. 715 (1927); Annot., 65 A.L.R. 1325 (1930); Annot., 108 A.L.R. 1088 (1937).
\item \textsuperscript{20} Union Trust Co. v. McGinty, 212 Mass. 205, 98 N.E. 679 (1912); National Citizens Bank v. Toplitz, 81 App. Div. 593, 81 N.Y.Sup. 422 (1st Dep't 1903), aff'd, 178 N.Y. 466, 71 N.E. 1 (1903).
\end{itemize}
learned of the relationship after acquiring the instrument. The reasoning upon which the majority view is based is adaptable to a situation in which the holder is a holder in due course who took it without knowledge of the relationship, and following that reasoning there could be no other conclusion than to deny a discharge to the accommodation maker.

Briefly summarized, the courts which have applied the majority rule have done so on the following reasoning:

1. The surety and accommodation maker, being primarily liable, are held to be discharged only in the methods prescribed by section 119. Since the act does not provide for a discharge of the instrument by an extension of time, it follows that a party primarily liable thereon is not discharged by such extension.\(^{21}\)

2. Section 120(6) provides for the discharge of a person secondarily liable by an extension of time, but an accommodation maker is primarily liable under the statute.\(^{22}\)

3. The NIL makes no provision for the relation of principal and surety.\(^{23}\)

4. The act makes parties signing on the face of the instrument as makers, liable as such, and does not permit another or different liability to be proved.\(^{24}\)

5. The NIL substitutes its provisions for the former law of the jurisdiction.\(^{25}\)

6. An accommodation maker is by section 29 under no dif-

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\(^{22}\) Cases cited note 21 supra.


\(^{25}\) Cellers v. Meachem, 49 Ore. 186, 89 Pac. 426 (1907); Wolstenholme v. Smith, 34 Utah 300, 97 Pac. 329 (1908); Union Trust Co. v. McGinty, 212 Mass. 205, 98 N.E. 679 (1912).
different liability than a maker who has received value, even though the holder know at the time of his accommodation character.26

7. Uniformity of decision among the jurisdictions.27

The exclusive modes of discharge provided by section 119, and the interpretation that they do not include an extension of time, have been severely criticized.28 The majority view rests upon the untrue assumption that section 119 is the only section of the act covering the discharge of instruments; whereas, section 51 provides that payment to the holder discharges the instrument, and section 122 provides that an absolute and unconditional renunciation of rights by the holder against the principal debtor made at or after the maturity of the instrument discharges the instrument.

It has been suggested that a discharge of a party, who though primarily liable as a co-maker, is known to the holder to be a surety, by giving time to the principal debtor is covered by section 119(4).29 This argument has been rejected in those cases where it has been presented,30 except in South Dakota.31 The argument has been attacked on two grounds: (1) that section 119 refers to the discharge of the instrument and not to discharge of the parties, and (2) the restrictive effect such interpretation would have as against a holder other than the immediate parties to the agreement.32 If allowed under this section, the discharge would be only a discharge of the accommodating party. The note would still be in force, at least as to the accommodated party. Therefore, there would not be a valid discharge of the instrument.33

26 Cases cited note 23 supra.
28 Beutel’s Brannan, Negotiable Instruments Law 1122 (7th ed. 1948); Greeley, The Uniform Negotiable Instruments Law in the light of Recent Criticism, 10 Ill. L. Rev. 265 (1915); Raymond, Suretyship at “Law Merchant,” 30 Harv. L. Rev. 141 (1917).
29 See note 28 supra.
30 Cowan v. Ramsey, 15 Ariz. 533, 140 Pac. 501 (1914); First State Bank v. Williams, 164 Ky. 143, 175 S.W. 10 (1915); see Case Threshing Mach. Co. v. Bridger, 133 La. 754, 63 So. 319 (1913).
32 Hilpert, Discharge of Latent Sureties on Negotiable Instruments Because of Release or Extension of Time, 50 Yale L.J. 387, 409 (1941).
An analogy has also been drawn between an accommodation maker and a mortgagor and maker of the negotiable note who has conveyed the mortgaged premises to a grantee who has assumed the mortgage. The weight of authority is: if the mortgagor, with knowledge of the conveyance of the property and assumption of the mortgage debt by the grantee, extends the time of payment by a valid agreement between himself and the grantee, such extension operates to discharge the original mortgagor, or intermediate grantee who may likewise have assumed the mortgage. This rule applies unless such extension is assented to by the mortgagor or intermediate grantee, or unless the rights of the mortgagor against such parties are expressly reserved. In such cases the mortgagor is treated as a surety, and is given a discharge.

The Rhode Island court in *Industrial Trust Co. v. Goldman,* based its decision on the provisions of section 119(4). The court distinguished this situation from that of an accommodation co-maker because in that instance, the discharge would be only a discharge of the accommodating party. This would leave the note still in force, at least as to the accommodated party, and therefore, would not discharge the instrument. Most courts, however, justify their position in various ways, but principally on the ground that they are governed by a rule of property. Although it may seem to be an inconsistency and appear in the same jurisdiction, the cases should be distinguished and section 119(4) invoked only to discharge an accommodation maker as distinguished from an accommodation co-maker, because in this instance it does serve to validly discharge the instrument.

In the jurisdictions following the majority view, in the event an accommodation maker was actually being harmed by an extension of time and was able to prove that the accommodated party was actually becoming insolvent to the detriment of the ac-

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34 Roberts, Defenses of an Accommodation Maker, 23 Iowa L. Rev. 335, 340 (1938).
36 Ibid.
37 Roberts, Defenses of an Accommodation Maker, 23 Iowa L. Rev. 335 (1938); *Jefferson County Bank v. Erickson*, 188 Minn. 354, 247 N.W. 245 (1933).
commodation maker, would it be possible for him to obtain equitable exoneration by the principal, notwithstanding the extension of time granted by the holder of the instrument? Such action would be based on the contract between the accommodated party and the accommodating party.\textsuperscript{30} Although the rule in suretyship as it presently stands would be contra, since the surety is ordinarily discharged in such a situation, the court should apply the same rules it applies when a surety is required to perform for reasons of business compulsion. Similarly, it would seem the same rule would apply in an action for reimbursement.\textsuperscript{40}

\textbf{B. The Minority View}

The minority view, that a binding extension of time does discharge either an accommodation maker or co-maker, has been applied predominantly in cases where the plaintiff is a payee.\textsuperscript{41} The reasoning adopted by the minority has not been consistent. Some of the reasons are as follows:

1. Where the action is between the original parties, section 58, which declares that “in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable” applies, and the surety is released by a definite extension of time upon a valid consideration.\textsuperscript{42}

2. The payee may not be a holder in due course.\textsuperscript{43}

\textsuperscript{30} In Peter v. Finzer, 116 Neb. 380, 217 N.W. 612, 65 A.L.R. 1419 (1928) Finzer, a maker, was held not to be discharged by an extension of time given by the mortgagee to a subsequent grantee. When the mortgagee brought the first suit in law on the note, Finzer also brought suit in equity against subsequent grantees to compel payment to Peter by them, but Finzer was required to pay before this suit was completed. In an amended petition he sought payment from the subsequent grantees. Recovery was allowed. He was permitted to proceed against the principal debtor despite a binding extension of time which had previously been held not to discharge him. Finzer v. Peter, 120 Neb. 389, 232 N.W. 762 (1930).

\textsuperscript{40} See Restatement, Security § 108 (1941).


\textsuperscript{42} Fullerton Lumber Co. v. Snouffer, 139 Iowa 176, 117 N.W. 50 (1908).

3. There is a statutory variation between the NIL and the local statute.\textsuperscript{44}

4. Section 119(4) allows for the discharge of the surety.\textsuperscript{45}

5. Section 196 applies \textit{sub silentio}.\textsuperscript{46}

In any jurisdiction which has adopted the position that a payee is not a holder in due course, suretyship defenses will be allowed, when the action is between the immediate parties. Oddly enough, the jurisdictions adopting this position coincide with those jurisdictions which allow the defenses of suretyship.\textsuperscript{47} The minority view has usually been limited to cases in which the plaintiff was a payee, and the minority view has not extended its reasoning to cover a holder in due course.\textsuperscript{48}

The one case which has allowed the defense of a binding extension of time as against a holder in due course is \textit{Hederman v. Cox}.\textsuperscript{49} Although section 196 was not cited, the case expressly rejects the majority view, and returns to the uncodified law suggested by citation of early cases. The court reasoned that the rules of suretyship were not abrogated by the passage of the NIL, and that it was not the intent of the legislature to change the previously existing law. The court was fully cognizant of all the criticism which has been leveled at the majority view.\textsuperscript{50} This case is the last one to be decided on the problem. The court was unaided by a legislative change in the Uniform Negotiable Instruments Law.

\textit{C. Statutory Variations}

The change in the uniform statute which was inserted by the legislature of Illinois has possibly prevented a clear cut decision

\textsuperscript{44}Koblegard Co. v. Maxwell, 127 W. Va. 630, 34 S.E.2d 116 (1944); see Lawrence v. Hammond, 208 Ill. App. 31 (1917).

\textsuperscript{45}Zastrow v. Knight, 56 S.D. 554, 229 N.W. 925 (1930); Citizens State Bank v. Rosenwald, 63 S.D. 50, 256 N.W. 264 (1934).

\textsuperscript{46}Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940).

\textsuperscript{47}Compare cases in note 37 supra with Beutel's Branna~', Negotiable Instruments Law 682 et seq. (7th ed. 1943); Annot., 142 A.L.R. 489 (1943) with Annot., 48 A.L.R. 715 (1927); 65 A.L.R. 1425 (1930); 108 A.L.R. 1088 (1937).

\textsuperscript{48}Long v. Mason, 273 Mo. 266. 290 S.W. 1062 (1918); Strother v. Wilkinson, 90 Okla. 247, 216 Pac. 436 (1923).

\textsuperscript{49}188 Miss. 21, 193 So. 19 (1949); 24 Minn. L. Rev. 863 (1940); 53 Harv. L. Rev. 1390 (1940); 12 Miss. L.J. 506 (1940); 38 U. Pa. L. Rev. 874 (1940). Hederman was the maker, a latent surety, and not a co-maker, on a note given as collateral for the note of the accommodated party.

\textsuperscript{50}Hederman v. Cox, 188 Miss. 21, 25, 193 So. 21, 23 (1940).
in that state. It is provided in the section similar to that of section 120:

A person secondarily liable on the instrument is discharged... By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with assent prior or subsequent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party. (Emphasis supplied).

Wisconsin has attempted to add additional suretyship defenses to section 120 such as release of collateral or failure to apply funds. West Virginia has gone even further, and has changed the section which was meant to coincide with the provisions of section 120 to provide: “This section does not include the rules governing the discharge of a surety or party secondarily liable because of such secondary liability.” An analysis of all the cases and statutes reveals that there is a great conflict in the interpretation of the pertinent sections of the NIL as well as variations in the statutory provisions of the states.

D. Criticism of the Majority and Minority Views

If the doctrine of stare decisis is allowed to come into the picture it will make re-interpretation extremely difficult, it not impossible. It may be said of the majority view that it is somewhat consistent in its reasoning. The minority view on the other hand is nothing but a jumbled mass, and the reasoning supporting this view although obtaining the more desirable result is, perhaps, less sound than the majority view. The exception is the court of Mississippi, which has decided the question solely upon the ordinary law of suretyship. This lack of uniformity of reasoning found in the cases supporting the minority view explains the inability of these cases to effectively form a weapon to combat the more consistent, but less desirable, view of the majority. Similarly, the majority view presents a vast array of cases, which may prevent the issue from being litigated because the sheer numerical weight seems to deny the use of these defenses. However, the writers on the subject have uniformly reached the conclusion that the defenses of suretyship should be allowed, although they have disagreed on occasion with the reasoning of the minority.

54 Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940).
55 See note 19 supra.
view. As indicated by subsequent legislation, the policy considerations seem to be in favor of allowing these defenses.

The courts adopting both views, as well as the attorneys who presented the issues, have assumed that somewhere within the confines of the statute the situation of the latent surety co-maker is covered. The intended effect of the statute is strictly in the realm of conjecture. These improper constructions of the act might lead to only one conclusion; namely, that the situation is not precisely, nor adequately covered by the act. Therefore, it is an omitted case, and section 196 applies. Once the assumption is made that such a situation is not covered by the act, it would merely require the application of the ordinary rules of suretyship.

After once having allowed the defenses of suretyship, it would seem wise to distinguish three important factual situations: (1) As between the immediate parties and (2) against a holder who took the instrument with knowledge of the relationship, it would seem that suretyship defenses should be allowed. (3) But as against a holder in due course who subsequently acquires the knowledge of the latent accommodation after having acquired the instrument, policy considerations drawn from the provisions of the NIL should preclude the defenses. For example section 57 provides that the holder in due course "may enforce payment" free from all defects of title and defenses. Sections 60, 61 and 62 provide that the original parties making, drawing and accepting the instrument undertake to pay it "according to its tenor," and the defense of suretyship as against him should be disallowed. If it were otherwise, the holder in due course would be subjected to making a complete, thorough, and accurate investigation as to the validity of the information purporting to convey to him the knowledge of the accommodation before proceeding upon the instrument. Such undue burden could be obviated by merely having the accommodation maker place notice of such accommodation on the face of the instrument.

Such an interpretation, however, has not met with the favor of the courts, and with the possible exception of Mississippi it has never been applied. It would seem that the only remedy that

56 See notes 13, 15, 16 and 28 supra; Comment, 7 Brooklyn L. Rev. 362 (1938); 42 Harv. L. Rev. 136 (1928); 19 Marq. L. Rev. 122 (1935); 24 Va. L. Rev. 569 (1938).
58 See discussion, Beutel's Brannan, Negotiable Instruments Law 1124 (7th ed. 1948).
would bring an immediate end to such conflict would be the adoption of a uniform amendment.

E. The Uniform Commercial Code

Pennsylvania which has recently adopted the Uniform Commercial Code is in conformity with the minority view, since the Uniform Commercial Code adopts the minority position. Section 3-606 provides:

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder (a) without express reservation of rights releases or agrees not to sue any person against whom the party has, to the knowledge of the holder, a right of recourse on the instrument or agrees to suspend the right to enforce against such person the instrument or collateral.

The words “any party to the instrument” removes an uncertainty arising under section 120 of the NIL. The suretyship defenses here provided are not limited to parties who are “secondarily liable,” but are available to any party who is in the position of a surety, including an accommodation maker or acceptor known to the holder to be such. The words “to the knowledge of the holder” would exclude a latent surety, as for example, the accommodation maker where there is nothing on the instrument to show that he has signed for the accommodation of another and the holder is ignorant of that fact. In such a case, the holder is entitled to proceed according to what is shown by the face of the paper or what he otherwise knows, and does not discharge the surety when he acts in ignorance of the relation. The words “a right of recourse on the instrument” include the right of an accommodation party against the party accommodated.

Section 3-415(5) provides that an accommodation party is not liable to the party accommodated, and if he pays the instrument he has a right of recourse on the instrument against such party. But sub-section (5) is directed, according to the comment, to instances when the accommodating party is an endorser.

52 Id. § 3-606, Comment, Purposes of Changes and New Matter, para. 1, 425.
53 Id. para. 4, p. 426.
54 The comments state that an accommodation taker is to be included in this section. If that is so, it introduces a strange new concept into the field of negotiable instruments, in that a maker has a “right of re-
Does the accommodating party who signs as a maker have a right to recourse on the instrument when the accommodated party is the payee? Or is the accommodation maker excluded in this instance? The language "agrees to suspend the right to enforce" is sufficient to cover both an extension of time of payment and a covenant not to sue. Of course, the holder may reserve his rights as against any party with a right of recourse, but such reservation is not effective as against any party whom the holder does not use due diligence to notify within ten days after the reservation. However, the holder must have notice of the relation at the time the instrument is taken. If the holder is a holder in due course who subsequently acquires knowledge of the relationship after having acquired the instrument, the defense is not available, since the accommodation may not be proved by oral proof. Section 3-415(3) provides:

As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such.

Under sub-section (3) except as against a holder in due course without notice of the accommodation, parol evidence is admissible to prove that the party has signed for accommodation.

The wording of the statute could perhaps present a problem. The statute specifically provides that "oral proof" of the accommodation is not admissible. Let us assume that the agreement between the accommodated party and the accommodating party was in the form of a written agreement. Would this be admissible to prove the accommodation? The way the statute is worded it could not be excluded. The drafters should have used the word "parol." In order to accomplish the desired result it would seem that the statute should be so construed; otherwise, a written contract could be introduced to prove the accommodation. If such proof is admissible, is the accommodation party then given the course against the payee. The previous theory was that recovery was to be had on the contract of accommodation between the parties. In this instance it could be construed to mean "on account of" the instrument, rather than merely "on" the instrument.

66 Id. § 3-606(2), p. 425.
67 Id. § 3-606(3), p. 425.
68 Id. § 3-415, Comment, Purposes of Changes and New Matter, para. 1, p. 375.
benefit of discharges dependent on his character as such? Or was it the "legislative" intent to allow written proof of the accommodation other than what appears on the instrument itself? The wording of the section does present an ambiguity.

The Uniform Commercial Code may be objected to on the ground that there is no reason why latent sureties on negotiable instruments, even as against a holder in due course, should not be discharged by an extension of time. The defense should be allowed since the discharge results from the holder's own act only after he knows of the suretyship and not from his knowledge of the relation, or previous conduct by prior parties. Such a law in no-way aids the negotiability of the instrument. But should the holder in due course be subjected to the expense and trouble of checking the authenticity of a supposed claim of accommodation? Would not such law present a procedure of obtaining delay before the holder acted on the instrument, or harrassing him, if the claim were false?

It would seem at first glance that the Uniform Commercial Code has made a change in the law as it existed under the NIL. Such change would be detrimental to lending institutions, who are primarily interested in this aspect of commercial paper. It will, however, present little difficulty to any lender who knows the law, since all that is required is a provision in the instrument expressly waiving the extension of time as a defense. Because of their superior bargaining position, individual lenders or lending institutions will have little difficulty in attaining assent to such a waiver clause. The drafters of the code are in conformity with this position.

III. RELEASE OF COLLATERAL

Prior to the adoption of the NIL the release or surrender of collateral security held by the creditor and applicable to the pay-
ment of the note operated as a pro tanto discharge of an accommodation maker or surety. 71

A. Under the Negotiable Instruments Law

The provisions of the NIL defining the persons primarily and secondarily liable, 72 and those stating the conditions under which an instrument and a person secondarily liable are discharged, 73 have served as the basis for denying discharge to an accommodation maker where the holder has released collateral or security and the plaintiffs were payees. 74 If applicable to a payee, it must also be applicable to a holder in due course. The reasoning for a denial of discharge is identical with that applied in those cases denying discharge because of a binding extension of time.

Perhaps, in number of decisions, discharge has been given to an accommodation maker because of release of collateral in more cases than it has been denied. 75 The cases which have granted the discharge have done so on the reasoning that a payee may not be a holder in due course, 76 therefore, section 58 applies. In the decided cases the plaintiff has been a payee. 77 Similarly, in the case of Goodman v. Goodman, 78 the court in applying section 119 (4) concluded that the holder was not a holder in due course, and that acts of the payee had discharged the contract. The plaintiff in this case had purchased the instrument after it was due.

71 3 Daniel, Negotiable Instruments §§ 1510, 1548 (7th ed. 1933).
72 Negotiable Instruments Law § 192.
73 Id. §§ 119 and 120.
74 German American State Bank v. Watson, 99 Kan. 686, 163 Pac. 637 (1917); Merchants Nat. Bank v. Smith, 59 Mont. 280, 196 Pac. 523, 15 A.L.R. 430 (1921); Elkhorn Production Credit Ass'n v. Johnson, 251 Wis. 280, 29 N.W.2d 64, 2 A.L.R.2d 266 (1947); see Young v. Carr, 44 Ariz. 223, 36 P.2d. 555 (1934).
75 See Annot., 2 A.L.R.2d 260 (1948).
76 The reasoning is that section 52 assumes that the holder must have had the instrument negotiated to him, and section 30 provides that if payable to order, it is negotiated by the indorsement of the holder completed by delivery, while the payee, not receiving the note in this manner, is not a holder in due course. For explanation see Beutel's Brannan, Negotiable Instruments Law 675 (7th ed. 1948); Annot., 142 A.L.R. 489 (1943).
78 127 Ohio St. 223, 187 N.E. 777 (1933).
However, such reasoning does not apply to a holder in due course when he brings the action against the accommodation maker. A recent case in Louisiana discharged an accommodation maker as against a holder in due course, but the NIL was not mentioned. This case may be explained by a provision of the Louisiana Statutes which provides:

The surety is discharged when by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety.

The discharge of sureties as parties primarily liable is nowhere expressly provided for, but neither is it anywhere expressly denied. It is argued, therefore, that it is an omitted case and section 196 applies. Such interpretation has little, if any, support in the cases.

B. The Uniform Commercial Code

Under the Pennsylvania Statutes and under the provisions of the Uniform Commercial Code discharge because of release of collateral has been adopted. The pertinent section provides:

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder ... (c) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

The general provision of section 3-606, are also applicable to the defense of a release of collateral to the accommodated party. This section applies also to an accommodation maker. Partial release or other partial discharge, or partial extension, or any impairment of security, operates as a discharge pro tanto of the party having a right of recourse. Section 9-207 covers unjustifiable dealings. The comment referring to this section states that it is new and that this defense has been generally recognized.

72 Beutel's Branan, Negotiable Instruments Law 1122 (7th ed. 1948); Street, Effect of the Negotiable Instruments Law on Liability of the Surety, 11 Law Notes 105 (1907).
73 Hilpert, Discharge of Latent Sureties on Negotiable Instruments Because of Release or Extension of Time, 50 Yale L.J. 387, 403 (1941).
74 Uniform Commercial Code, Uniform Laws Annotated § 3-606(1)(c) (Official Draft 1952).
75 Id. Comment, Purposes of Changes and New Matter, para. 1, p. 425.
76 Id. para. 2, p. 425.
as available to accommodation parties. However, such defense is not available as against a holder in due course who had no notice of the relation at the time he acquired the instrument, even though he had knowledge of the relation when he released the collateral.

The provisions of this section, however, may not be so easily waived in advance. Any person having such a stipulation explained to him would probably reject it and refuse to assent to it. Such objection, however, is not important as a practical matter, since it would generally seem undesirable to release collateral and thereby reduce the security of the instrument.

CONCLUSION

If the fact that an accommodation maker or co-maker is a surety is apparent from the face of the instrument, a proper interpretation of section 192 would make such a maker secondarily liable, and therefore within the provisions of section 120, so that a binding extension of time to the accommodated party would discharge either a maker or co-maker. Similarly a release of collateral to the accommodated party would be a pro tanto discharge of either a maker or co-maker.

However, if notice of the fact of accommodation is not apparent, then either the accommodation maker of co-maker should be considered as a latent surety. If the accommodation party is a maker as distinguished from a co-maker, then the provisions of section 119(4) should be applied to discharge the maker if a binding extension of time has been given to the accommodated party, or to discharge, pro tanto, the maker if a release of collateral has been made to the accommodated party, except as against a holder in due course who takes without knowledge of the accommodation. If the accommodation party is a co-maker as distinguished from a maker, then the provisions of section 196 should be invoked to discharge the co-maker if a binding extension of time has been given to the accommodated party, or to discharge, pro tanto, the co-maker if a release of collateral has been made to the accommodated party. The allowance of such defenses should be limited to holders who take without knowledge of the accommodation.

If the fact of accommodation is latent, that is, the accomoda-

87 Id. para. 8, p. 426.
88 Id. § 3-415(3) p. 375. Whether or not written proof could be introduced, and if admissible, what effect it will have, is dependent on the construction of the statute.
tion does not appear on the face of the instrument, then suretyship defenses should be limited to those holders who take with knowledge of the accommodation. Suretyship defenses should not be allowed against a holder in due course who subsequently learns of the accommodation since a contra result would subject a holder in due course to unnecessary harrassment, interference or expense in dealing with the instrument.

So construed and applied the Uniform Negotible Instruments Act could obtain the same results as would be obtained under the Uniform Commercial Code and would conform to the better and more equitable view that suretyship defenses should be allowed in most instances.

Bob Baumfalk, '56