

# Bills and Notes - Accommodation Co-Makers - Subrogation

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the act of bankruptcy category. *Standard Accident Insurance Co. v. E. T. Sheftall & Co.*, 53 F. (2d) 40 (C.C.A. 5th, 1931). And while a trustee in bankruptcy supersedes receivers who have been appointed to conserve or to liquidate assets of a corporation, it has been suggested that even a trustee in bankruptcy could not interfere with a receiver put into possession at the request of a mortgagee in a foreclosure suit. Compare the two cases, *Gross v. Irving Trust Co.*, 289 U.S. 342, 53 Sup. Ct. 605, 77 L.ed. 1243 (1933) and *Stratton v. New*, 283 U.S. 318, 322, 327, 51 Sup. Ct. 465, 75 L.ed. 1060 (1931).

OLIVER H. BASSUENER.

**BILLS AND NOTES—ACCOMMODATION CO-MAKERS—SUBROGATION.**—The plaintiff's husband owed the bank \$62,500. The debt was secured by the pledge of collaterals. To procure an extension of time, and to cover depreciation in the value of the pledged collaterals, the debtor executed and delivered to the bank his note for \$15,000, secured by a mortgage on certain of his real estate. The plaintiff signed the note as a co-maker. She joined in the execution of the mortgage. Eventually the plaintiff paid the \$15,000 note. Her husband died. The bank filed a claim against the estate for the balance of the indebtedness. The plaintiff demanded that the mortgage be assigned to her. When the bank refused to make the assignment, the plaintiff began this suit for subrogation. The bank contended that the sale of collateral left a substantial part of the total indebtedness unpaid, and the bank demanded that the court declare the premises to be a part of the decedent's estate, free from the lien of the mortgage and subject to the claims of the decedent's creditors. The trial judge gave relief to the plaintiff. On appeal, *held*, judgment reversed; the note was paid and the mortgage satisfied and the bank was entitled to judgment as requested. *Strelitz v. First Wisconsin Nat. Bank* (Wis. 1936) 264 N.W. 649 (three justices dissenting).

The language of the majority opinion is general and cryptic. The court speaks of the wife's being a party primarily responsible and as such not entitled to subrogation. Without some qualification by way of reference to the specific facts in the case that proposition is unsound. There is nothing in the Negotiable Instruments Law to justify it. By the terms of that act an accommodation co-maker is a party primarily responsible on the instrument. Wis. STAT. (1935) § 116.01. After the enactment of the Negotiable Instruments Law it has been held in some jurisdictions that extension of time by the holder to the principal debtor is no defense to the accommodation co-maker [*Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N.E. 697 (1912); *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426 (1907)]; that tender at maturity to the holder thereof by an accommodation co-maker, a party primarily responsible, does not discharge the instrument [*Jameson v. Citizens Nat. Bank*, 130 Md. 75, 99 Atl. 994 (1917)]; that release of security by the creditor does not discharge the accommodation co-maker [*Merchants' Nat. Bank v. Smith*, 59 Mont. 280, 196 Pac. 523 (1921)]. These decisions do lay down propositions which supersede the traditional rules of suretyship, the common law rules. Cf. Note (1935) 19 MARQ. L. REV. 122. It is absurd, however, to generalize from them, and to suppose that since the enactment of the Negotiable Instruments Law these courts pretend to decide that the law of suretyship no longer applies in the field of bills and notes. See *Mueller v. Jagerson Fuel Co.*, 203 Wis. 453, 456, 233 N.W. 633, 72 A.L.R. 1059 (1931). The Wisconsin court has suggested that it will follow what has probably become the dominant view, that "extension of time" is no longer available as a defense to a party primarily responsible on a negotiable note, primarily responsible as the principal debtor or the accommodation party. *Rosendale State Bank v. Holland*,

195 Wis. 131, 132, 217 N.W. 645 (1928). But the court has definitely decided that "release of security" is still available as a defense to an accommodation co-maker. *State Bank of LaCrosse v. Michel*, 152 Wis. 88, 139 N.W. 748, 1131 (1913). That "payment" by the principal debtor-mortgagor to the holder-assignee does not "discharge" the debt so as to prevent recourse against a sub-grantee who has assumed and agreed to pay the mortgage indebtedness, see *Mueller v. Jagerson Fuel Co.*, *supra*.

Subrogation as between the accommodating party and the creditor is not literally affected by any prescription in the Negotiable Instruments Law. Nor do the courts generally hold that the act has that effect. *O'Neal v. Stuart*, 281 Fed. 715 (C.C.A. 6th, 1922); *Clifford v. West Hartford Creamery Co.*, 103 Vt. 229, 153 Atl. 205 (1931); *Wakonda State Bank v. Fairfield*, 53 S.D. 268, 220 N.W. 515 (1928). The Kansas court refused to permit an accommodating party to reach collateral security in the hands of the creditor so long as the creditor himself was claiming a security interest in the collateral to cover some other separate indebtedness, a security interest for which the creditor had literally bargained. *Spire v. Spire*, 104 Kan. 500, 180 Pac. 209 (1919). Even that decision, isolated as it is, does not justify the assertion that that an accommodating co-maker is not entitled to subrogation. Payment by a volunteer obviously gives the payor no right to subrogation at the expense of any other possible interested person. See *Bank of Baraboo v. Prothero*, 215 Wis. 552, 558, 255 N.W. 126 (1934). But the wife in the principal case was no volunteer; she had an interest to protect when she made the payment.

In the principal case it is probably true that the court felt the record justified the classifying of the \$15,000 deal as an associated transaction with the previous extension of credit. The wife in all probability knew about the account between her husband and the bank. If that were true the decision is understandable. The dissenting opinion, however, calls attention to the fact that the bank was not claiming to hold the mortgage lien to secure the balance still owing, and the minority felt that the bank thereby had waived its claim to make this out to be an associated transaction.

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INSURANCE—JOINDER OF LIABILITY INSURERS—NO-ACTION CLAUSES IN POLICIES WRITTEN OUTSIDE THE LOCAL JURISDICTION.—An automobile insurance policy covering the insured defendant's automobile was written and issued in Illinois to a resident thereof upon an automobile kept, licensed, and usually operated therein. The policy contained a clause to the effect that no action shall lie against the insurer until the amount of the damage is determined by final judgment or agreement. The plaintiff sued the defendant upon an accident in Wisconsin and joined the insurance company under authority of Section 260.11 of the Wisconsin Statutes of 1933. The insurance company filed a plea in abatement which was overruled in the trial court. On appeal, *held*, judgment reversed; the trial court should have sustained the plea because the statute did not apply to the case. *Ryerly v. Thorpe* (Wis. 1936), 265 N.W. 76.

In Wisconsin, the permissive joinder statute [Wis. STAT. (1935) § 260.11], making an insurer a proper party defendant in any action brought against an insured under a policy to recover damages caused by the latter's negligent operation of an automobile, is effective as against a no action clause in the policy. *Lang v. Baumann*, 213 Wis. 258, 251 N.W. 461 (1933); *Oertel v. Fidelity and Casualty Co.*, 214 Wis. 68, 251 N.W. 465 (1933). But it is effective only against those policies entered into subsequent to the adoption of the statute. It is not