

# Insurance - Joinder of Liability Insurers - No-Action Clauses in Policies Written Outside the Local Jurisdiction

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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

retroactive in application to policies written previous to that date. *Pawlowski v. Eskofski*, 209 Wis. 189, 244 N.W. 611 (1932); *Baker v. Tormey*, 209 Wis. 627, 245 N.W. 652 (1932). Legislation permitting direct joinder of the insurer has been held to invalidate no action clauses in many jurisdictions. *Globe Indemnity Company v. Martin*, 214 Ala. 646, 108 So. 761 (1926); *Ruiz v. Clancey*, 182 La. 935, 162 So. 734 (1935); *Lunt v. Aetna Life Insurance Company*, 261 Mass. 469, 159 N.E. 461 (1927); *Stacey v. Fidelity and C. Co.*, 114 Ohio State 633, 151 N.E. 718 (1926). The case at issue must be distinguished from *Sheehan v. Lewis*, 218 Wis. 588, 260 N.W. 633 (1935), where the no action clause was held unenforceable, the policy being written by a Massachusetts insurance company protecting a Wisconsin corporation. The court said that the statute shall govern and render the conflicting provisions inoperative. The interpretation of a personal contract is referable to the place where it was made. *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N.W. 1042 (1910); *McKnelley v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N.W. 169 (1915). An insurance policy made in and to be performed in Wisconsin by non-residents is to be governed in its validity and effect by the laws of Wisconsin. *North Western Mutual Insurance Co. v. Adams*, 155 Wis. 335, 144 N.W. 1108 (1914). The provisions or laws of the state where the contract is made will be recognized in other jurisdictions unless against the statutes, powers, rights, or the well settled public policy of the other jurisdiction. *Missouri State Life Insurance Co. v. Lovelace*, 1 Ga. App. 446, 58 S.E. 93 (1907). It was held in *Clarey v. Union Central Life Insurance Co.*, 143 Ky. 540, 136 S.W. 1014, 26 L.R.A. (N.S.) 763, (1911) that a no action clause as to the period within which to bring a suit would be recognized in another state though contrary to its public policy.

The no action clause in a liability insurance policy secures a valuable right, *Pawlowski v. Eskofski*, *supra*. To disregard the provision is to place upon the insurer a greater obligation than that contracted for, and results in an impairment of the contract between the parties, contrary to Section 10, Article I of the United States Constitution, and Article I, Section 12 of the Constitution of Wisconsin. One of the tests that a contract has been impaired is that its value has by legislation been diminished. *Planters Bank v. Sharp*, 6 Howard (U.S.) 301, 12 L.ed. 447 (1848); *Bank of Minden v. Clement*, 256 U.S. 126, 41 Sup. Ct. 408, 65 L.ed. 857 (1920). If the effect of impairment is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. *Pawlowski v. Eskofski*, *supra*. In the case at issue, the court determined that, as the no action clause would be valid in Illinois, the insurer is entitled to the rights thereunder, and to permit joinder of the insurer would be unconstitutional as an impairment of a contract. In a case directly in point and with identical facts, *Riding v. Travelers Insurance Company*, 48 R.I. 483, 138 Atl. 186 (1927), the court held that the insurer's obligation under the policy was not variable or dependent upon the jurisdiction in which the insured drove his car.

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MASTER AND SERVANT—WORKMEN'S COMPENSATION—ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—The claimant is the widow of the deceased. She made claim for compensation under the Workmen's Compensation Act against the deceased's employer. The deceased was killed while he was returning from a week-end trip at his lake home. He was on his way to assume his duties as salesman for the defendant company. The claimant contended, and proof sustained her claim, that deceased frequently made stops on return trips to deliver batteries and car accessories to his employer's customers. She failed to substan-