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ACCOMMODATION PARTIES TO NEGOTIABLE INSTRUMENTS

WILLIAM O. MORRIS

"He that is surety for a stranger shall smart for it; and he that hateth suretyship is sure."

11 Proverbs, 15

From the time man's memory runneth not to the contrary those engaged in extending credit have sought satisfactory means of diminishing the apparent financial risk. Through the years various means of protecting creditors against financial loss have been developed and used with varying degrees of success. Some of the security arrangements in most common use today include the use of pledges, mortgages, conditional sales contracts, contracts of guaranty, contracts of suretyship, accommodation cosigners and indorsers. While each of these security arrangements merits lengthy and individual consideration, this article is limited in scope to an examination and consideration of the rights and liabilities of one who has lent his credit to another by placing his signature upon a negotiable instrument as an accommodation maker or indorser.

The rights and liabilities of accommodation parties are governed not only by the laws relating to negotiable instruments, but also by the laws applicable to suretyship. The general laws of suretyship must be considered along with the Uniform Negotiable Instruments Act for a complete determination of the legal problems involved.

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The Uniform Negotiable Instruments Act has been enacted by the legislature of every state in the union in substantially the same terms. Only Pennsylvania, Massachusetts and Kentucky, after having adopted the act, have seen fit to substitute in its place the Uniform Commercial Code. The uniform act has been a part of the general laws of the state of West Virginia since 1907.\(^1\) This legislation was enacted not only for codification of the rules of the law merchant, the common law, but to aid in producing a greater degree of certainty and uniformity to the statutory laws and the judicial determinations of the various states. The failure of the several state legislatures to adopt exactly the same language for the statutes and the fact that the courts of the different states have not always given the same construction to the languages of the statutes have in some measure contributed to lack of desired uniformity in this field of the law.

The judiciary of the different states have construed the language of the act as fixing liability of the parties to a negotiable instrument by the capacity in which their signature appears on the instrument, whether as indorser, maker, drawer, or acceptor.\(^2\) The right of one to show that he intended to incur liabilities other than those associated with the position of his signature or indorsement upon the instrument is denied as being in violation of the parol evidence rule. If one places his name upon the instrument at the place where it is customary to sign as maker, the one so signing may not introduce parol evidence to show that he only intended to have the liability of an indorser. Nor may it be so shown that one who has placed his signature upon the instrument by the way of an indorsement intended to incur the liability of a guarantor.\(^3\)

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2. Union Bank of Milwaukee v. Commercial Securities Co., 183 Wis. 470, 157 N.W. 510 (1916). The court in quoting from the case of Halbach v. Trester, 102 Wis. 96, 78 N.W. 759 (1899) observed: “In Halbach v. Trester it was said in effect, that the engagement which the law implies from the circumstances of a person placing his name on the back of note, in form, as an endorser, is just as immune from danger of being varied by parol evidence as any other written contract. There being no claim of fraud in securing the endorsement, the trial court properly rejected the testimony by which it was sought to establish the fact that defendants did not intend to bind themselves as endorsers.” Lake Street State Bank v. Hunter, 170 Minn. 128, 212 N.W.2d (1927).
3. Toler v. Sanders, 77 W. Va. 395, 87 S.E. 462 (1915). Accommodation parties are liable in the capacity in which their names appear upon the instrument whether as maker or indorser, and the liability is not that of a co-maker when the signature is placed on the instrument as an indorser.
ACCOMMODATION PARTIES

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The legislature has defined an accommodation party to a negotiable instrument as "...[O]ne who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party." The use of the words "without receiving value" is slightly ambiguous. The language of the act is subject to two constructions—one, that a person so placing his name on the instrument may not receive compensation for the use of his credit; or, secondly, that he may receive consideration for the use of his name so long as he does not receive part of the consideration for which the instrument was executed or indorsed. The latter position has received acceptance by a number of our courts. One may thus be an accommodation party and be entitled to the rights of a surety, although he received consideration for incurring liability. In Gruber v. Freeman the Connecticut court said: "Without receiving value as used in this section, means without receiving value for the note and not without receiving any consideration for lending his name."

The fact that one, otherwise an accommodating party, receives security for his protection when lending his credit to the instrument does not alter his status as an accommodation party.

To give validity to the instrument and to create liability thereon it is necessary that some party part with value therefor. The Uniform Negotiable Instruments Act, section 24, deals specifically with the requirement of consideration in providing: "Every negotiable instrument is deemed prima facie to have been issued for consideration; and every person whose signature appears thereon

5 Thompson v. Whitney, 17 Hawaii 107 (1905); First National Bank v. Engebretson, 28 S.D. 185, 132 N.W. 788 (1911); McQueen v. First National Bank, 36 Ariz. 74, 283 Pac. 273 (1929).
6 "The value received within the meaning of section 29, must precede or be contemporaneous with the obligation of the note." Gruber v. Friedman, 102 Conn. 34, 127 Atl. 907 (1905); Morris County Brick Co. v. Austin, 79 N.J.L. 273, 275, 75 Atl. 550 (1910).
7 102 Conn. 34, 127 Atl. 907 (1925).
8 Carr v. Wainwright, 43 F.2d 507 (3d Cir. 1922).
9 First National Bank’s Receiver v. Boreing’s Adm’rs, 173 Ky. 327, 190 S.W. 1108 (1917).
to have become a party thereto for value."\(^{11}\) Value is defined by section 25 of the Uniform Negotiable Instruments Act\(^ {12}\) as any consideration sufficient to support a simple contract. Even an ante-
cedent or pre-existing debt constitutes value and is deemed such, 
whether the instrument is payable on demand or at a future time. 
The presumption of consideration thus established is only a prima 
facie\(^ {10}\) and not a conclusive presumption of consideration.\(^ {14}\) The 
majority of the courts which have been called upon to consider the 
question of consideration since the adoption of the Uniform Neg-
obiable Instruments Act have recognized that the burden of proving 
want of consideration, or that one is not a holder for value, must 
be borne by the defendant as would any other affirmative defense.\(^ {15}\) 
It should be noted in comparison that the plaintiff in an action or 
suit on a nonnegotiable instrument does not have the benefit of the 
 presumption of consideration, but has the burden of proving that 
the nonnegotiable contract on which the action or suit is based was 
supported by consideration.\(^ {16}\)

**Accomodation Maker**

In determining the liability of the maker of a negotiable instru-
ment, whether he placed his signature upon the note to obtain 
personal credit or to lend financial responsibility to another as an 
accommodation maker, consideration must be given to section 60 
of the Uniform Negotiable Instruments Act\(^ {17}\) which states: "The 
maker of a negotiable instrument by making it engages that he will 
pay it according to its tenor, and admits the existence of the payee 
and his then capacity to indorse." Attention also should be given 
to section 192 of the uniform act\(^ {18}\) which identifies a primary party

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\(^{11}\) The genuineness of the maker's signature having been established, the 
note is prima facie evidence that it was given for value, and the burden of 
showing want of consideration rests upon him who attacks it on that ground. 

\(^{12}\) W. VA. Code ch. 46, art. 2, § 2 (Michie 1955).

\(^{13}\) Rauschenbach v. McDaniel's Estate, 122 W. Va. 632, 11 S.E.2d 852 
(1940); Brannon, Negotiable Instruments 393 (6th ed. 1948); Note, 25 
COLUM. L. REV. 83 (1925); Britton, Bills and Notes (1943) 403.

\(^{14}\) Holley v. Smalley, 50 App. D.C. 178, 269 Fed. 694 (1921); Meyer v. 
Doherty, 133 Wis. 398, 113 N.W. 671 (1907).

\(^{15}\) The burden was not carried by the attacking party. Shinn, Ex'r v. 
Westfall, 95 W. Va. 292, 120 S.E. 762 (1923).

\(^{16}\) People's Building & Loan Ass'n v. Swain, 198 N.C. 14, 150 S.E. 668 
(1929); Spear v. Associated Producing & Refining Corp., 120 Misc. 518, 199 
N.Y. Supp. 84 (Sup. Ct. 1923).

\(^{17}\) W. VA. Code ch. 46, art. 5, § 1 (Michie 1955).

\(^{18}\) W. VA. Code ch. 46, art. 17, § 2 (Michie 1955).
to a negotiable instrument as: "The person 'primary' 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 'secondary' liable." These two sections establish absolute and unconditional liability on the part of one signing a negotiable note as maker to any holder for value,19 notwithstanding any knowledge that the holder might have had at the time he acquired the instrument as to the true relationship that existed between the makers.20 The New York court in Goldberg v. Alberts21 treated the comaker's relationship to the payee of the note the same whether such comaker actually borrowed the money or is only an accommodation comaker for the borrower.22

Presentment for payment is not necessary as a condition precedent to charge an accommodation maker upon his promissory note.23 However, if the instrument designates the place of payment, and the maker is ready, willing and able to make such payment at the designated time and place, this is equivalent to a tender of payment. Such tender does not discharge the debt, nor does the holder forfeit the sum due.24 The ultimate amount of recovery has now become fixed, interest will no longer accrue,25 and any collateral for the debt will be released,26 and the holder must bear the cost and attorney fees of collecting it elsewhere.27 The debt has now been reduced to an unsecured and noninterest-bearing obligation.

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19 The courts with practical unanimity have held that an accommodation maker is primarily liable to the holder of the instrument. The relation of the comakers to each other is of no consequence to the holder. Marshall County Bank v. Fonner, 113 W. Va. 451, 168 S.E. 375 (1933).  
22 The payee of a note does not accept one of the makers as a surety merely because he knows that he is not actually the principal debtor. Jameson v. Citizens' Nat. Bank, 130 Md. 75, 99 Atl. 994 (1917); "The act establishes a liability on the part of an accommodation maker, which is not affected by an extension of time given by the holder to any other party to the note, even though as between such party and the accommodation maker a different relation may subsist in fact from that appearing on the face of the paper. The result is to render somewhat more rigid the rights of the parties as set forth in the written instrument, and so far as the holder is concerned to establish liability to him upon a firm basis, not easily shaken by parol evidence." Union Trust Co. v. McGinty, 212 Mass. 205, 96 N.E. 679 (1913).  
24 Moore v. Altom, 156 Ala. 158, 71 So. 681 (1916).  
26 Tulane Holding Co. v. Keane, 140 Fla. 812, 195 So. 610 (1939).  
RIGHT OF REIMBURSEMENT

From the date of the very early reported cases the courts of equity have recognized the obligation of one principally liable to reimburse his surety for moneys expended by the surety to discharge the debt.\textsuperscript{28} The right of recovery is allowed upon the principle that, when one requests another to become liable for his obligation he impliedly promises to make reimbursement to his surety.\textsuperscript{29} It was not necessary for the surety to prove an express agreement on the part of the principal obligor to reimburse. It was not until the middle of the eighteenth century that the courts of law, as distinguished from the courts of equity, permitted the surety to recover from the principal obligor on the theory of an implied contract of reimbursement. Prior to this period the law courts would only permit an action for reimbursement based upon an express agreement.\textsuperscript{30}

The \textit{Restatement of Restitution} recognizes the right of the surety who has paid the principal obligator's debt to seek reimbursement from the principal obligor by stating: "A person, who, in whole or part, has discharged a duty which is owed by him, but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other. . . ."\textsuperscript{31} Certainly, as between the accommodated and the accommodation party, the former owes the latter the duty to pay the debt.\textsuperscript{32}

The right to seek reimbursement does not arise until payment in whole or in part has been actually made by the surety.\textsuperscript{33} The surety's right to seek reimbursement is not dependent upon whether he has paid before action and judgment. The accommodation party is not deemed a volunteer by making payment before action,\textsuperscript{34} judgment,\textsuperscript{35} and execution,\textsuperscript{36} if he or the principal was legally liable

\textsuperscript{29} Decker v. Pope, 1 Selw. 91 (1757); Appleton v. Bascom, Mass. (3 Metc.) 169 (1841); Kage v. Oates, 208 S.W. 126 (Mo. 1919); Lavers v. Jones, 96 Cal. App. 248, 274 Pac. 78 (1929).
\textsuperscript{30} While this case involves bail the principle applied and discussed should apply to other types of sureties. Carr v. Davis, 64 W. Va. 522, 63 S.E. 522 (1906).
\textsuperscript{31} \textit{RESTATEMENT, RESTITUTION} § 77 (1937).
\textsuperscript{32} Note, 23 HARV. L. REV. 396 (1910).
\textsuperscript{33} Bullard v. Brown, 74 Vt. 120, 52 Atl. 422 (1902).
\textsuperscript{34} Huffman v. National Surety Co., 244 Ky. 714, 51 S.W. 2d 950 (1932).
\textsuperscript{36} Stallworth v. Preslar, 34 Ala. 505 (1859).
for the debt at the time of payment. If the surety pays a judgment obtained against him alone for a valid debt, he is entitled to indemnity although the principal was not made a party to the action. When the surety and principal obligor are sued in the same action, the judgment against the surety is conclusive as to the liability and amount of recovery in his action for reimbursement.

The surety's right to reimbursement upon the implied contract does not exist until the surety has made payment, although the existence of this contract right came into being at the time the instrument was executed. The actual payment only fixes the amount of the principal's liability under the contract of indemnity. Where for some reason the surety makes payment to the creditor before the due date of the note, he must wait until the due date of the obligation before seeking indemnity. On these facts the period of the statute of limitations would start to accrue from the due date of the instrument and not from the date of the premature payment.

When the surety's right of recovery is based upon the contract implied by law for reimbursement, the period in which suit might be brought would be the statutory period for an action of assumpsit, as distinguished from the period allowed for an action on the note.

By the weight of authority payment of a negotiable instrument, at or after maturity, by one who has signed as comaker extinguishes the right to sue on the note irrespective of what might have been the intention of the parties. As the note is discharged by payment, the only remedy available to the surety is his right to recover from the accommodated party for the use of money paid for the use of the principal. The remedy is not on the bond but

37 Mims v. McDowell, 4 Ga. 182 (1847).
40 Tilnotson v. Rose, 11 Metc. 299 (Mass. 1846); Ross v. Menefee, 125 Ind. 492, 25 N.E. 545 (1890).
42 The payment of a negotiable note to the payee or holder, by one or more of the makers thereof, before maturity, and which is not reissued, amounts to a discharge of the instrument and destroys the force of a power of attorney to confess judgment on such note, incorporated therein. Perkins v. Hall, 123 W. Va. 707, 17 S.E.2d 795 (1941); Gilham v. Troeckler, 304 Ill. App. 596, 26 N.E.2d 413 (1940); Harris v. King, 113 Cal. App. 357, 298 Pac. 100 (1931); Note 48 W. Va. L.Q. 280 (1942).
on the implied promise that the debtor will repay the amount paid for his use. The surety is denied the right to treat himself as an assignee of the instrument in the majority of jurisdictions.

In Perkins v. Hall the Supreme Court of Appeals of West Virginia, speaking through Judge Fox regarding West Virginia Code, chapter 45, article 1, section 4, relating to remedies of a surety or guarantor who has made payment in behalf of the principal, said: "It is true that under our statute . . . any person liable as bail, surety, guarantor, indorser and other parties named may obtain a judgment at law for said sum for their principal, or person primarily liable but, as we view it, these statutes merely provide a remedy in addition to that which might be invoked under the equitable powers of the court providing for contribution or subrogation, and not based on the instrument evidencing the original obligation, but arises from the implied obligation of the persons whose duty it was to pay the same."

The West Virginia Code, chapter 46, article 8, section 1(d), differs in language from the corresponding section 119 of the uniform act relating to discharge of a negotiable instrument. The West Virginia Code specifies: "A negotiable instrument is discharged . . . (d) When the person primarily liable becomes the holder of the instrument at or after maturity in his own right." While the uniform act, section 119 (5) reads: "A negotiable instrument is discharged: . . . (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

It is clear that one may be primarily liable on the instrument having signed as maker, but still not be the principal debtor. Under the language of the uniform act it is possible for the courts to construe the language to permit an accommodation party who has paid to be treated as a purchaser of the instrument. In Fox v. Kroeger the Supreme Court of Texas, speaking through Judge Critz, stated: "... [W]here the surety pays the debt of the principal, he has his election to either pursue his legal remedies and bring an action on an assumpsit, or the obligation implied by law in his favor for reimbursement by the principal; or he can prosecute an action on the very debt itself, and in either event he stands in the

45 Grizzle v. Fletcher, 127 Va. 663, 105 S.E. 457 (1920).
46 133 W. Va. 707, 17 S.E.2d 795 (1941).
47 Fox v. Kroeger, 119 Tex. 511, 35 S.W.2d 679 (1931).
48 Id. at 513, 35 S.W.2d 681.
shoes of the original creditor as to any securities and rights of priority." The better view and the one supported by the weight of authority is that payment by the accommodation maker, before or at maturity of the note, bars any future action based solely on the instrument.

The measure of recovery by the surety against the principal debtor is usually limited to the sum actually paid by the surety including principal and interest, if the payment is not at once made by the principal, the surety is entitled to receive interest from the principal on the whole sum paid. If the surety extinguishes the debt for a sum less than the face amount of the instrument the surety is permitted to recover from the principal, in the absence of an agreement otherwise, only the amount actually paid. He is not entitled to recover for procuring a credit on the principal's debt. Whether the surety is entitled to recover costs and expenses incurred in defending an action by the creditor against him is somewhat uncertain.

**ACCOMMODATION AND IRREGULAR INDORSES**

Prior to the adoption of the Uniform Negotiable Instruments Act the liability of an accommodation indorser upon a negotiable instrument lacked uniformity throughout the states. In many states a party placing his name upon a negotiable instrument as an accommodation indorser before delivery was treated as a joint or joint and several maker with the one who signed on the face of the instrument, so far as the necessity for demand and notice of nonpayment were concerned. The uniform act has wrought such a change in the common law as to relieve the accommodation in-

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49 If the surety pays the debt of his principal in depreciated currency, the general rule is, that he can demand from his principal only the value of the currency at the time of payment, and the criterion of that value is the market value. Butler v. Butler's Adm'r, 8 W. Va. 674 (1873).

50 Whether the surety, who has paid costs and expenses on account of the debt of his principal, can recover the same from his principal depends upon the circumstances of each case. Circumstances did not warrant recovery of fees. Recovery limited to amount paid, principal and interest from date of such payment. Cranmer v. McSwords, 26 W. Va. 412 (1885).


52 Apgar's Adm'r v. Hiler, 24 N.J.L. 811 (1854).


54 Stuart v. Oliver, 110 Me. 208, 85 Atl. 747 (1913).
endorser from liability in any capacity other than that of an endorser. The liability of an accommodation or irregular indorser under the uniform act, sections 64\(^{55}\) and 66,\(^{58}\) may be clearly seen to be identical with that of a general indorser.\(^{57}\) Section 64 defines an irregular indorser as follows: "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as an indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties." Section 66 prescribes the conditional liability of those indorsing other than qualifiedly. This section in no way reduces or diminishes the liability of the irregular indorser.\(^{58}\)

In Ingalls v. Marston\(^{59}\) the court stated: "... [W]hether one be an irregular indorser under section 64 or a regular indorser under section 66, he is entitled to have due demand made upon the maker and due notice of dishonor given himself. The irregular indorser is no longer a joint maker or an original promisor, as he was prior to the passage of the uniform act, but an indorser with all that the term implies."\(^{60}\)

As was true in the cases involving an accommodation maker,\(^{61}\) no consideration moves to the accommodation indorser for his indorsement from the creditor. The value received by the maker or drawer supports the obligation of one who indorses for his accommodation.\(^{62}\) If the accommodation indorsement be placed upon the instrument subsequent to the delivery thereof, new consideration must be shown to so support the contractual obligation of the indorser.\(^{63}\) However, if the instrument be further negotiated for value,\(^{64}\) or where there has been a prior agreement for the indorsement and the indorser was aware of the agreement, no new

\(^{55}\) W. VA. Code ch. 46, art. 5, § 5 (Michie 1955).
\(^{56}\) Id. ch. 46, art. 5, § 7.
\(^{57}\) Whittemann v. Sands, 238 N.Y. 434, 114 N.E. 671 (1924); Case v. McKinnis, 107 Ore. 223, 213 Pac. 422 (1923).
\(^{58}\) Home Insurance Co. v. Bishop, 140 Me. 72, 34 A.2d 22 (1943).
\(^{59}\) 121 Me. 182, 116 Atl. 216 (1922).
\(^{60}\) Rockfield v. First Nat. Bank, 77 Ohio St. 311, 88 N.E. 392, 14 L.R.A. (N.S.) 842 (1907).
\(^{64}\) Francis v. Federal Reserve Bank, 69 S.W.2d 441 (Tex. Civ. App. 1934).
consideration need change hands at the time the indorsement is added.65

The *West Virginia Code* chapter 46, article 5, section 9 designates the order of liability of indorsers in slightly different language than that of the corresponding section of the uniform act.66 This section provides that the accommodation or irregular indorsers, who indorse for the same party, are prima facie equally liable; but in any case evidence is admissible to show that as between or among themselves they have agreed otherwise.67 Prior to the amendment of this section of the *West Virginia Code* the court in settling conflicts between the indorsers had been driven to the necessity of fixing the liability of coindorsers as being equal even though no agreement for such actually existed between the parties. Under the statute the coindorsers, as distinguished from successive indorsers, are equally bound in the absence of an agreement to the contrary.68 The code also makes their liability joint and several to the holder of the instrument.

In the absence of a statute69 or an agreement70 to the contrary the joint indorsers have as between themselves equal as distinguished from successive liability. They have the right to seek contribution from those with whom they are equally liable.71 An agreement between those jointly liable to be other than equally liable may be proven by parol testimony.72

Parol evidence is not admissible to show that the indorsers intended to contract for liability on the instrument other than that expressed by the statute for such indorsers,73 but it is admissible

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65 Bedrosian v. Der Manouelian, 48 R.I. 40, 134 Atl. 851 (1926); Devitt v. Foster, 159 Miss. 887, 132 So. 182 (1931).
66 "As respects one another, indorsers are liable prima facie in order in which they indorsed; but evidence is admissible to show that as between themselves, successive accommodation parties are liable in order in which their names appear, even though later signers knew that prior parties signed for accommodation." Uniform Negotiable Instruments Act § 68.
69 Blair v. Wells, 158 Ark. 470, 246 S.W. 498 (1923).
72 Holston v. Haley, 125 Me. 485, 135 Atl. 98 (1926).
to show the order of their liability and how they agreed to share the loss as between themselves. The accommodation indorser may by parol testimony establish who is the accommodated party,74 or that another indorser is equally liable with him.75 When two or more parties have become equal accommodation indorsers, they are as between themselves cosureties so far as their rights between themselves are concerned.76 If the courts were to deny the admission of parol evidence to show joint accommodation indorsers, it would be impossible for the indorser who had been called upon to make payment to establish his right to contribution from one who had agreed to be equally liable for payment.77

Likewise, if the admission of parol evidence to show the true relation of the parties were denied, the accommodation indorser would be unable to defend against the accommodated party. One might also consider the situation where A and B indorsed X's note for the accommodation of X, and H is now the holder of the instrument. Due presentment, dishonor, and notice of dishonor having been given, H has the right to proceed to collect the amount of the note from A, B or X. If A makes payment to H, A may by the use of parol testimony show that he and B, whose indorsement followed that of A, were in fact equally liable and be entitled to seek contributions from B for the sum paid. If B had paid H, instead of A, and should then seek to proceed against A, as a prior indorser, for the full amount of the instrument, clearly A should be permitted to introduce parol evidence to show that he was a coindorser with B and should only be liable to contribute to the sum paid by B. The party alleging the coindorser relationship has the burden of so proving.78

A holder paying the full value for the instrument is entitled to recover from the accommodation indorser the face amount of the instrument irrespective of whether the purchaser did or did not know of the accommodation nature of the indorsement.79 If the

77 Bringardner v. Rollins, 102 W. Va. 584, 135 S.E. 865 (1926); Gafford v. Tittle, 224 Ala. 605, 141 So. 633 (1932); In re Wingert, 89 F. 2d 305 (4th Cir. 1937).
holder has acquired the instrument for a sum less than the face amount of the instrument, there is some uncertainty and conflict in authorities as to the amount which the holder may be entitled to recover from the accommodation indorser. In the old cases in some jurisdictions the holder was only permitted to recover the sum paid for the instrument, while in others he was entitled to recover the face of the obligation. There seems to be no sound reason under the Uniform Negotiable Instruments Act why the purchaser of a negotiable instrument for less than its face value should not be permitted to recover from the accommodation indorser the face amount of the instrument as he certainly would be permitted to do from one indorsing other than by the way of accommodation.

**INDORSER'S RIGHTS UPON PAYMENT**

"Where the instrument is paid by the party secondarily liable thereon, it is not discharged, but the party paying it is remitted to his former rights regarding all prior parties. . . ." 82

Under this section of the uniform act payment by one secondarily liable does not have the effect of discharging the instrument. The accommodation indorser, unlike the accommodation maker, is entitled to pursue his remedy against prior parties in an action based solely upon the instrument. 83 Where one has indorsed for the accommodation of another it is obvious that he was never the owner of the instrument or enjoyed any rights thereon. If section 121 of the uniform act were taken literally, the accommodation party might well be considered to be restored to a nonexisting right. The words "remitted to his former rights" are restricted in their application to a party secondarily liable and do not apply to one who is secondarily liable by the way of an accommodation indorser. 84 This section refers to indorsers for value and not to accommodation indorsers. 85 It was not the intent of this section to deny an accommodation indorser, who has paid, the right to bring an action on the instrument.

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80 Holeman v. Hobson 27 Tenn. 127 (1847); Kleim v. Penn T. Bank, 1 Pa. 36 (1845).
81 Rule v. Williams, 8 Ky. L.R. 152 (1886).
82 W. Va. Code ch. 46, art. 8, § 3 (Michie 1955); UNIFORM NEGOTIABLE INSTRUMENTS ACT § 121.
84 Lili v. Gleason, 92 Kan. 754, 142 Pac. 287 (1914).
85 Noble v. Beeman-Spaulding-Woodward Co., 65 Ore. 93, 131 Pac. 1006 (1913).
The accommodation indorser upon paying the sum of the instrument is certainly entitled to institute an action based on the instrument against any prior party thereto. When the accommodation indorser has obtained the instrument at a discount, the measure of his recovery becomes important. Some courts treat the accommodation party on the same basis as a surety seeking reimbursement and limit recovery to the sum actually paid for the instrument, while the better reasoned cases will permit full recovery by the accommodation party of the amount of the instrument.

**CONTRIBUTION BETWEEN ACCOMMODATION PARTIES**

When two or more persons become joint accommodation parties to the obligation of another, they occupy the position of cosureties as to each other. As to the principal obligor, they have the right of reimbursement; as between themselves they have the right of contribution.

As with the right to seek reimbursement, the equity courts were the first to recognize the right of contribution based upon an implied understanding between the cosureties. Originally the courts of law would not entertain an action for contribution in the absence of an express agreement therefor. However, by the eighteenth century the law courts likewise began to permit recovery based on the contract implied in fact.

One cosurety is not entitled to contribution from his cosurety until he has paid more than his share of the principal's debt. If the surety is able to negotiate a settlement of the debt for a sum less than his proportionate share of the debt, the surety paying is permitted to seek contribution from his cosureties upon the amount actually paid to obtain the discharge of the debt, and not the amount of the discharged debt.

If the cosureties of the paying surety have consented to his becoming bound, their implied promise to contribute in the event of nonpayment by the principal includes the sum of attorney fees,
costs and sum paid. It was held, in *United States Fidelity & Guaranty Co. v. Naylor*, that if a surety in defending in good faith but unsuccessfully against the creditor incurs attorney fees and costs this sum is to be added to the sum paid for determining the basis for contribution. When the parties have not agreed to the cosurety arrangement, such attorney fees and court costs are not included for determining the amount of contribution.

When the surety has paid more than his share of the joint debt, his cosurety owes him the duty to immediately contribute to the sum paid. The paying surety has the legal right to receive interest at the legal rate from his cosurety on that portion over and above his proportionate share of the debt. The right to recover interest at the legal rate is permitted, even though the original obligation provided for a different rate of interest.

If all cosureties are solvent and amenable to process, it is relatively unimportant whether the proceedings for contribution be in law or equity. When, however, one or more of the cosureties is insolvent or absent from the state, the forum in which the proceedings is brought is most important.

If the action be brought at law, contribution is enforced only for the aliquot share of each cosurety. Insolvency or nonresidence of a cosurety does not exclude him from consideration in determining the amount of recovery by the paying surety. The paying surety is not permitted to collect more than his proportionate share from any one of the cosureties. If there are three cosureties, each will be liable to contribute one-third of the sum paid.

If the surety pays more than his proportionate share of the entire debt, but less than the full amount of the debt, and does not obtain a full discharge of the obligation, the determination of the amount of permitted recovery becomes more complicated. The paying surety has the right to seek from any cosurety a sum not exceed-

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91 *Simpson, Suretyship* 242, 243 (1950).
92 *United States Fidelity & Guaranty Co. v. Naylor*, 237 Fed. 314 (8th Cir. 1916).
93 *Restatement, Security* § 154 (1941).
94 Appleford v. Snake River Mining, Milling & Smelting Co., 122 Wash. 11, 210 Pac. 28 (1922).
ing the cosurety's proportionate share of the entire obligation,\(^7\) which amount may not reduce the plaintiff's payment to a sum less than his proportionate share of the entire debt. He may not collect more than a proportionate share from any cosurety.\(^8\) For example, the principal debt is $900. \(A, B,\) and \(C\) are cosureties on the obligation of \(X.\) \(A\) pays $600 on the debt of \(X.\) As between the sureties, \(A\)'s share of the total debt is $300. \(A\) may recover $300 from \(B\) or \(C,\) or $150 from each. \(A\) is not entitled to recover $200 from \(C\) as this would reduce \(A\)'s payment to a sum less than his $300 share of the total debt. Until the debt is discharged the paying surety may not simply divide the amount he has paid by the number of cosureties to determine the amount of his recovery from his cosureties.

If the surety has paid a sum less than his proportionate share of the total debt, and the balance remains unpaid, the surety has no right to seek contribution from any of the cosureties.\(^9\)

At law in the absence of statute, the parties from whom contribution is sought must be sued severally and cannot be joined as defendants in the same action.\(^10\) Many states by statute now permit a joinder of cosureties in an action for contribution. A surety is free to seek contribution from his cosureties in a law action without first proceeding against the principal obligor or showing his insolvency. Nor is it necessary for him to allege or prove the insolvency of any of the other cosureties. It might be observed that it is improper to join the principal obligor in an action against a surety when seeking contributions.

When, however, the action for contribution is in equity, the principal obligor and all cosureties must be joined as parties defendant.\(^11\) This requirement is only dispensed with upon allegation and proof of insolvency of nonjoined party,\(^12\) or upon showing his absence from the jurisdiction of the court.\(^13\) The courts of equity, unlike the courts of law, have the right to enter a conditional decree. The equity court may condition the decree against the surety upon the failure of the petitioner to gain satisfaction from the principal obligor.

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\(^7\) Phelps v. Scott, 325 Mo. 711, 80 S.W.2d 71, 68 A.L.R. 214 (1930); RESTATEMENT, RESTITUTION § 85 (1937).
\(^12\) Phelps v. Scott, 325 Mo. 711, 80 S.W.2d 71 (1930).
In the court of equity those shown to be insolvent or out of the jurisdiction are subtracted from the total number of sureties before determining the proportionate share of the solvent sureties. Suppose we have five sureties on Y's obligation in the sum of $10,000. Surety one pays Y's obligation without any discount being given. If surety one can show that surety two is insolvent, or out of the jurisdiction, he would be entitled to recover $2,500 from each surety three, four and five. That is, in equity we divide the number of solvent sureties within the jurisdiction into the sum paid to determine the amount due from each of the sureties by the way of contribution. If the action had been at law the recovery from each would have been limited to not more than $2,000 for the law court takes no cognizance of the inability of one cosurety to contribute his share of the sum paid. Many states now apply the equitable rule for determining the sum of recovery whether the proceedings be in law or in equity. In West Virginia it appears important, in determining the amount of recovery by way of contribution, whether the action be in equity or law. It is submitted that the equitable rule is more just and more likely to meet the ends of justice than the rule of the law courts.

SUMMARY

The Uniform Negotiable Instruments Act was adopted with the thought that most problems connected with negotiable instruments would be simplified and the answers more certain. It may be seen that the creditors who insist upon an accommodation maker or accommodation indorser as a device to diminish the financial risk have only accomplished this result in part.

It seems that the laws of suretyship are as important today to negotiable instruments as they were before the adoption of the uniform act. It is suggested that at some future date the legislatures should consider enactment of uniform rules of suretyship to bring even a greater degree of uniformity to the laws relating to negotiable instruments. The uniform act has accomplished much, but much still remains to be codified.

Particular attention should be given to the capacity in which one has placed his name upon the instrument, the theory under

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which recovery is sought, the various statutes of limitation, the rights of reimbursement and of contribution, and whether the proceedings might better be in equity than in law. As our commercial transactions increase, so will the legal problems relating to this subject increase and become more complex.