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Liability of Accommodation Indorser

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LIABILITY OF ACCOMMODATION INDORSER.

Prior to the enactment of the Negotiable Instruments Law in 1905 the rule in this State was well established that an indorser was a person secondarily liable, and being secondarily liable, he was discharged, amongst other things, by an agreement entered into between the payee and maker of the note for the extension of time of payment without his consent.[1]

A person placing his signature on the back of a negotiable instrument before delivery was prior to 1905 *prima facie* a comaker and primarily liable upon the instrument.[2]

The enactment of the Negotiable Instruments Law in this State in 1905 followed its adoption in many other States and was intended to remove any doubt that the decisions of the various States created as to the liability of parties to a negotiable instrument. In spite of the fact that the various provisions of the act have been construed by the courts whose States enacted the Negotiable Instruments Law before its adoption in 1905 in this State, and in spite of the fact that no ambiguity at all is to be found in any provisions of the law, the status of an accommodation indorser of negotiable paper is somewhat in doubt in this State. This doubt has been created by a rather extraordinary and peculiar decision of the St. Louis Court of Appeals in the case of Night & Day Bank v. Rosenbaum,[3] which is one of the very late decisions of that court dealing with the liability of such an indorser. This opinion deserves consideration not only because its conclusions seem to be in conflict with the plain provisions of the statute, but also because it is undoubtedly in conflict with the construction placed upon those provisions of the statute by earlier decisions of the St. Louis Court of Appeals.

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1. 69 Mo. 543; 19 Mo. 263; 27 Mo. 501; 63 Mo. 46; 65 Mo. 562; 68 Mo. 234.
2. Brannan's N. I. L., p. 238.
3. 191 Mo. App. 559.

The facts in that case were these: The Southwestern Produce Distributors, a corporation, executed and delivered several notes to the Night & Day Bank, which notes were indorsed by L. Rosenbaum for the accommodation of the Southwestern Produce Distributors at and before their delivery to the Night & Day Bank. Suit was brought by the Night & Day Bank against the maker, the Southwestern Produce Distributors, and Rosenbaum, the accommodation indorser. Rosenbaum in his defense pleaded first, that the notes were paid, and second, that the time of payment was extended to the principal debtor, the Southwestern Produce Distributors, without his knowledge or consent. The question for the consideration of the court, as stated by Judge Nortoni, was the defense of the defendant, Rosenbaum, to the effect that, being an accommodation indorser, he was discharged from liability because of a valid and binding agreement for an extension of the time of payment entered into between the plaintiff bank and the principal debtor, Southwestern Produce Distributors, without his consent.

After discussing the question as to whether or not there was evidence of a binding agreement for an extension of time for the payment of the notes by the principal debtor, Judge Nortoni, on page 566, continues:

"The evidence is not clear as to this, but for the purposes of the case, it may be conceded that such consideration appears. We say this, for that, in any view, the defendant, Rosenbaum, is not entitled to be discharged because of an extension of time to the principal debtor under the provisions of our Negotiable Instruments Law, and this is true even though such extensions were granted to the maker for a definite period on a valid consideration. Under each of the several notes that is an assent. * * * * * Formerly a valid and binding agreement entered into between the principal maker and the holder of the note on sufficient consideration, by which the time for payment was extended to the maker to a day certain,

operated to discharge an accommodation indorser who was then regarded secondarily liable and stood in the relation of surety, but this is no longer true. All the notes in suit here were executed and delivered subsequent to the adoption of our Negotiable Instruments statutes which materially changed the rule in respect of this matter. (Daniels on Negotiable Instruments.) * * * * * It is conceded for the purpose of this case, and indeed there is no evidence to the contrary, that defendant is an accommodation indorser in each instance, and if as such he was secondarily liable on the instrument, he is entitled to his discharge; otherwise not."

After quoting Sec. 10000, R. S. of Mo., 1909, the opinion further states:

"The statute expressly declares that such person is liable on the instrument to the holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. This being true, he is to be regarded as primarily liable thereon, under the provisions of Sec. 10161, R. S. of Mo., 1909. Indeed, an accommodation maker was primarily liable to the holder of the instrument before the statute as has been determined by our Supreme Court; *and the statute now renders such an indorser the same.*"

A further examination of the opinion clearly indicates that it is based upon the conclusion reached by Judge Nortoni, that the Negotiable Instruments Law abrogated the rule formerly existing in this and other States to the effect that an indorser, whether he be an accommodation indorser or otherwise, is a party secondarily liable, and that it rendered such indorser primarily liable on the instrument.

Unless then, the Negotiable Instruments Law does in fact create that liability for the indorser, Judge Nortoni's decision is absolutely without foundation.

Section 10000, R. S. of Mo., 1909, now Section 816, R. S. of Mo., 1919, defines an accommodation party and fixes his liability as follows:

"An accommodation party is one 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 such instrument knew him to be only an accommodation party.*"

Section 10033, R. S. of Mo., 1909, now Section 849, R. S. of Mo., 1919, defines the status of a person indorsing an instrument, and provides as follows:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, *is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity.*"

Section 10034 defines the status of a person not otherwise a party to the instrument, who places his signature thereon, before delivery, and fixes his liability in accordance with certain rules.

Section 10161, R. S. of Mo., 1909, now Section 981, R. S. of Mo., 1919, provides as follows:

"The person primarily liable on an instrument is a person *who, by the terms of the instrument, is absolutely required to pay the same.* All other parties are secondarily liable."

Section 10090, R. S. of Mo., 1909, now Section 906, R. S. of Mo., 1919, provides that:

"A person secondarily liable on an instrument is discharged (sub-section 6) by an agreement binding upon the holder to extend the time of payment or to postpone the hold-

er's right to enforce the instrument unless made with the assent of the party secondarily liable or unless the right or recourse against such party is expressly reserved."

It will thus be seen that according to the plain provisions of the Negotiable Instruments Law, a person placing his signature upon an instrument, otherwise than as maker, drawer or acceptor, *is deemed to be an indorser;* that as an indorser he is not the person who, by the terms of the instrument, is absolutely required to pay the same; that he is not primarily but *secondarily* liable, and therefore becomes discharged under Section 10090, by an agreement binding upon the holder to extend the time of payment.

The Negotiable Instruments Law insofar as the liability of an indorser is concerned merely enacted the rule of the common law. What it did abrogate was the rule at common law, that a person placing his name upon the back of an instrument before delivery was *prima facie* a co-maker and primarily liable, and renders such person liable as an indorser and precludes the introduction of parol testimony to change his status.[4]

It also changed the rule of common law that an accommodation maker was liable as surety by providing that parties signing for the accommodation of others, whether as acceptors, drawers, makers or indorsers, should be liable according to the capacity in which they signed the instrument, be it as maker, drawer, acceptor or indorser, without regard to the fact that they were merely parties to the instrument for the accommodation of others.[5]

This construction has been placed upon the various provisions of the Negotiable Instruments Law by courts of every State in which it has been enacted, including courts of our own State.

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4. Winters v. Overland Auto Co., 277 Mo. 429; Brannan's Negotiable Instruments Law, p. 238; Canada v. Chuttee, 235 S. W. 824.

5. Union Trust Co. v. McGinty, 98 N. E. 679; Wolstenholme v. Smith, 34 Utah 300; Greenberg v. Ginsberg, 143 N. Y. S. 101

Thus in National Bank v. Hanlon,[6] a case in which suit was brought upon a promissory note executed by the Hanlon Millinery Company, a corporation, and indorsed by Richard Hanlon for the accommodation of the corporation, the court held that the rights of the parties were governed by the Negotiable Instruments Law, and referring to Section 10033, R. S. of Mo., 1909, now Section 849, R. S. of Mo., 1919, the Court said:

"The effect of this Section was to alter the rule previously existing in this State to the effect that one who places his name on the back of a negotiable promissory note before delivery was to be considered *prima facie* as a co-maker.

"In the case before us, there is absolutely nothing to indicate that the defendant's intention was to be bound in any capacity other than as indorser and hence under the statute he is to be treated as such. And under Section 10161, R. S. of Mo., 1909, now Section 906, R. S. of Mo., 1919, it is clear that defendant is a party *secondarily liable on the instrument.*"

In the case of Walker v. Dunham,[7] one of the first cases after the adoption of the Negotiable Instruments Law, the same conclusion was reached by Judge Reynolds of the St. Louis Court of Appeals. That was a case in which suit was filed against defendant, Dunham, and others on a promissory note executed by Dunham in favor of the plaintiff, Walker. On the back of the note appeared the signatures of the defendant, Dunham, and others.

In his opinion, Judge Reynolds at page 407, says: "The law of 1905 was in force at the time the note in controversy was executed, and governed by the provisions of that law, and

6. 183 Mo. App. 243.
7. 135 Mo. App. 396.

appellants herein, except the maker of the note, are liable on the note as *indorsers and not* as joint makers."

In Canada v. Shuttee,[8] the same result was reached. That was a case in which suit was brought upon a note which was signed by the defendant on the back before delivery to the plaintiff, who was the payee. Defendant contended that under the statute his liability was that of an indorser only. The Court, at page 825, says:

"We are of the opinion that the status of the defendant in the case at bar is governed by our Negotiable Instruments Law and not by the law merchant. By Section 849, R. S. of Mo., 1919, it is provided that a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity. By section 850 it is provided that where a person not otherwise a party to the instrument, places thereon his signature in blank before delivery, etc. In Brannan's Negotiable Instruments Law, page 238, it is stated that the law has been changed in States which have adopted the Negotiable Instruments Law, and that where a person signs a note otherwise than as maker, in blank, before delivery for the accommodation of the maker, that such person is now chargeable only as an indorser.[9] In support of this statement of the law the text cites: Deahy v. Choquet, 28 R. I., 338; Peck v. Easton, 74 Conn., 456; Thorpe v. White, 188 Mass., 333; Toole v. Crafts, 193 Mass., 110; Wilson v. Hendee, 74 N. J. Law, 640; Gibbs v. Guaraglia, 75 N. J. Law, 168."

L. C. 826.

"The overwhelming weight of authority is undoubtedly to the effect that if one signed a note under the circumstances

8. 235 S. W. 824.

in the case at bar he is an indorser under the Negotiable Instruments Law.

"To summarize, we hold that the defendant is relieved in this case because Section 849, R. S. of 1919, under our Negotiable Instruments Law, makes the relation of a party placing his signature to an instrument otherwise than as maker, drawer, or acceptor, that of an indorser. The following section, 850, makes such party liable to the payee of a note as an indorser. Section 875 requires that indorsers under this chapter have notice of dishonor, and such indorser in this case does not fall within the exceptions provided in Section 901, R. S. of Mo., 1919.

"As we construe these sections, the payee of a note can only hold one who has placed his signature upon the note otherwise than as maker, drawer, or acceptor, *to the liability of an indorser,* unless such person indicates his status otherwise, and in order that he may be held liable by such payee as indorser, the statutory notice of dishonor must have been given him."

The Supreme Court in the case of Havlin v. Continental National Bank,[9] held: "The respondent, an accommodation indorser for Havlin, the maker, on the notes of the bank, was in contemplation of law *a surety.*"

It will thus be seen that the decision in Night & Day Bank v. Rosenbaum not only fails to find support in the plain provisions of the Negotiable Instruments Law, but is in conflict with three opinions by Courts of Appeal of this State in that it confers primary liability on a person who by his signature assumes only secondary liability.

The provisions of our Negotiable Instruments Law had been adopted by other States and at the time of its enactment in this State had been construed by other courts. Invariably an accommodation indorser has been held only to secondary liability.

9. Havlin v. Continental Nat. Bank, 253 Mo., *l. c.* 300.

Thus in Gibbs v. Guaraglia,[10] Judge Pitney, page 169, says: "The appellant insists that Frank Guaraglia was primarily liable upon the note. * * * * The act abrogated the rule of Chaddock v. Vanners and subjects a person not otherwise a party to the instrument who places his signature thereon in blank before delivery to the *liability of indorser* in favor of the payee and subsequent parties. We think the trial judge probably held that the obligation assumed by Frank Guaraglia was merely the conditional obligation of an ordinary indorser."

And in National Park Bank v. Koehler,[11] a decision of the Court of Appeals of New York, wherein defendant was sued as an *accommodation indorser* and pleaded in defense his discharge because of an extension of time to the maker of the note without his assent, the Court states: "An accommodation indorser or surety is entitled to have the engagement of the principal debtor preserved without variation in its terms and his assent to any change therein is essential to the continuance of his obligation. Any agreement of the creditor which operated to extend the time of payment of the original note and suspends the right to immediate action is held to discharge the non-assenting indorser or surety."

In Greenberg v. Ginsberg,[12] wherein the defendant was sued as an accommodation indorser and defended on the ground that an extension of time had been granted the principal, the Court, at page 1019, says: "It is a well established rule of law that an indorser of negotiable paper, like any surety, is entitled to have the engagement of the principal debtor preserved without variation, and any change or extension of time granted by the holder to the maker of a promissory note, without the consent of the indorser, discharges

10. 75 N. J. L, 168
11. 204 N. Y. 174.
12. 143 N. Y. Supp. 1017.

his liability as indorser unless the right of recourse against the indorser is expressly reserved."

In Deahy v. Choquet,[13] one of the defendants sued as an accommodation indorser defended on the ground that he had been discharged by an extension of time granted to Choquet, the maker.

After quoting provision 6 of the Negotiable Instruments Law, which is exactly the same as provision 6 of Section 906, R. S. of Mo., 1919, the Court said: "We agree with the Superior Court that the promise not to press the suit on the note against Choquet was a postponement of the holder's right to enforce the instrument within the meaning of the law, and so discharged defendant, Carroll."

Examining the authorities cited by Judge Nortoni in support of the conclusion reached by him will show beyond doubt that he was confused into calling an accommodation indorser a maker. Not only does he use those words interchangeably, but the cases cited by him were all cases in which the defendant was an *accommodation maker* and attempted to avoid his primary liability on the ground that as accommodation maker he was a surety. The courts in those cases very properly held that although that was the rule at common law, it had been abrogated by the Negotiable Instruments Law, and that under the Negotiable Instruments Law, a person was liable on the instrument according to the liability he took upon himself at the time of its execution; that a maker could not be heard to say that he was merely an accommodation maker and only secondarily liable. Not a single case, however, is cited by Judge Nortoni, nor is there one to be found, in which the liability of maker was placed upon a person who, by the very terms of the instrument, and by the statutes, had only assumed the liability of an indorser.

The quotation from Daniels on Negotiable Instruments Law undoubtedly refers only to the change in the law as to

13. 28 R. I. 338.

accommodation makers, for immediately following the paragraph set out in the opinion is the following: "An indorser, however, is a person secondarily liable, is discharged from his obligation by a promise not to press a suit on the note against the maker as it is a postponement of the holder's right to enforce the instrument within the meaning of the law."

It is unfortunate that Judges Reynolds and Allen, who had in the early cases properly construed the Negotiable Instruments Law, lent weight to the decision in Night & Day Bank v. Rosenbaum, by their concurrence.

An examination of the opinion in the light of the statutes and the earlier decisions in this and other States will easily convince one that it is bad law and that it merits the criticism found in Brannan's Negotiable Instruments Law, 3rd Ed., page 317, which is as follows:

"This peculiar result is reached by holding an accommodation indorser to be a party primarily liable because Section 29 makes an accommodation party, whether he is maker, drawer, acceptor or indorser, liable to a holder for value; but Section 29 does not enact that all accommodation parties are liable as principal debtors or otherwise than according to the liability usually attached to their position on the paper.

"Such a construction of Section 29 is also in the teeth of Section 192 (Sec. 10161, R. S. of Mo., 1909,) which defines the person primarily liable on an instrument as the person who *by the terms of the instrument is absolutely required to pay the same.*"

With all due deference to the learned Judge who wrote the opinion, we respectfully submit that the decision is unsupported in either authority or reason and should, at the earliest possible moment, be repudiated by our Appellate Courts so that any doubt that it creates might be entirely removed.

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