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the doctrine in these cases is that the engineer does not have opportunity to stop in time to prevent the collision after the plaintiff comes from behind obstructions onto the track in front of the train.⁴⁶

The present strict application of the rule that a traveler must, if possible, get a clear view of a railroad track which he is crossing may be a part of an increasing trend by the North Carolina Court to decide contributory negligence cases as questions of law.⁴⁷ At any rate, the acceptance of this rule is now settled. The conflicting cases on its application can probably be explained by the presence of modifying factors, rather than by reason of any doubt as to its acceptance.

DICKSON McLEAN, JR.

Negotiable Instruments—Discharge of Prior Party by Statute of Limitations—Effect on Guarantor and Surety

If the statute of limitations has run in favor of the maker of a negotiable instrument, is a guarantor or surety on the instrument discharged under Negotiable Instruments Law §120(3),¹ which provides that "A person secondarily liable on the instrument is discharged by the discharge of a prior party?" This question gives rise to two fundamental problems: first, is a surety or guarantor secondarily liable under the Negotiable Instruments Law; second, does §120(3) include a discharge of a prior party by the statute of limitations?

Negotiable Instruments Law §192² stipulates that "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." Obviously, under this section, the liability of a guarantor of collection is secondary, as it is dependent upon the creditor pursuing the principal debtor with due diligence. Whether the liability of a guarantor of payment is primary or secondary, however, is subject to some dispute. One court has held that a guarantor of payment is primarily liable, but only after the maturity of the note, since after

⁴⁶ The rule of "last clear chance" is applied in some cases in which the plaintiff is guilty of contributory negligence as a matter of law, as where he goes to sleep on the tracks. Note, 16 N. C. L. Rev. 50 (1938). In *Miller v. Southern Ry.*, 205 N. C. 17, 169 S. E. 711 (1933), where the view was obstructed, the court said the doctrine would not be applied because there was no evidence that the engineer could have stopped after he discovered the driver was in a position of peril, and this seems the better justification for refusing the application of the rule in this situation.

⁴⁷ This trend may be reflected in the "insulation" of the railroad's negligence by the driver's negligence depriving a passenger of his right to recover, and finding contributory negligence as a matter of law where an automobile driver "out-runs his headlights." Note, 27 N. C. L. Rev. 153 (1948).

¹ N. C. GEN. STAT. §25-127(3) (1943).

² N. C. GEN. STAT. §25-2 (1943).

maturity he is absolutely liable for the payment of the debt.³ Apparently, this result is reached by construing §192 to mean that any person who is immediately obligated to pay the instrument is a primary party. Thus, where a party's obligation is not dependent upon demand, presentment, and notice nor upon the creditor first suing the principal, his liability has been said to be primary.⁴ Conversely, other courts treat the guarantor of payment as secondarily liable, even though he waives demand, presentment, and notice.⁵ The reasoning used to reach this result is that the liability of a guarantor is not predicated upon the *terms of the instrument*, but upon the contract of guaranty, which is treated as a separate and distinct contract.

Practically all courts which have passed on the matter have held the surety to be primarily liable regardless of whether or not he indicates his suretyship on the face of the instrument.⁶ In so holding, it is often stated that the surety is bound by the terms of the instrument, and that his liability is coextensive with that of the maker. This result seems justified when the suretyship is not indicated on the face of the instrument, for then the surety appears to be a person who by the terms of the instrument is absolutely required to pay. However, when the suretyship is indicated on the face of the instrument, it seems that a different result should be reached. When the surety expresses his suretyship on the face of the instrument, he qualifies his liability; and although the creditor may immediately proceed against the surety, the relationship between the two is significantly changed by this express manifestation. Under the old doctrine of *Pain v. Packard*,⁷ for example, the surety may give the creditor notice to sue the maker; and if suit is not brought within a reasonable time, the surety is discharged to the extent of his prejudice. This doctrine has been adopted by statute in many states with some variations.⁸ Even in those states where no such rule

³ *Frost v. Harbert*, 20 Idaho 336, 118 Pac. 1095 (1911); *cf.* *Beebe v. Kirkpatrick*, 321 Ill. 612, 152 N. E. 539 (1926); *In re Menzer's Estate*, 189 Wis. 340, 20 N. W. 703 (1926).

⁴ *Night & Day Bank v. Rosenbaum*, 191 Mo. App. 559, 177 S. W. 393 (1915) (accommodation indorser who waived demand, protest, and notice held primarily liable).

⁵ *First Nat'l Bank of Shenandoah v. Drake*, 185 Iowa 879, 171 N. W. 115 (1919); *Merchants Nat'l Bank v. Lewis*, 86 N. H. 144, 164 Atl. 773 (1933); *Northern State Bank v. Bellamy*, 19 N. D. 509, 125 N. W. 888 (1910).

⁶ *Hardesty v. Young*, 34 F. 2d 310 (D. Minn. 1929) (suretyship indicated on face of instrument); *Vanderford v. Farmers & Mechanics Nat'l Bank*, 105 Md. 164, 66 Atl. 47 (1907) (suretyship not indicated); *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430 (1906) (not clear whether suretyship indicated on face of instrument); *Cellars v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907) (suretyship indicated on face of instrument).

⁷ 13 Johns. 174 (N. Y. 1816).

⁸ ARIZ. CODE ANN. §27-1701 (1939); KY. REV. STAT. §412.110 (1948); MISS. CODE ANN. §253 (1942); MO. REV. STAT. ANN. §3318 (1939); N. C. GEN. STAT. §26-7 (1943).

obtains, the surety, under certain circumstances, may bring an action in equity to compel the creditor to proceed against the debtor before resorting to the surety.⁹ Also, where property of both the principal and the surety has been hypothecated, the surety can insist that the principal's property be resorted to before that of the surety,¹⁰ and if the surety and principal are sued jointly, then on execution the property of the maker is to be exhausted before resorting to that of the surety.¹¹ To say that the surety who indicates his suretyship on the face of the instrument is *by the terms of the instrument* absolutely required to pay the same ignores these qualifications of the absolute obligation to pay which the existence of a suretyship carries with it. When the suretyship is indicated on the face of the instrument it seems a more logical and equitable result would be reached by holding that the obligation to pay has been expressly qualified. As stated by one court,¹² "When a party on signing clearly indicates upon the instrument the capacity in which he is willing to be bound, the holder in accepting it cannot misapprehend its true quality, for he then knows that the party may be held in that capacity and no other." If the surety is not treated as a secondary party, it seems he will be deprived of many of his common law defenses.¹³

⁹ *Bingham v. Mears*, 4 N. D. 437, 61 N. W. 808 (1894). In *Davis v. Patrick*, 57 Fed. 909 (8th Cir. 1893) it is stated that where the surety is likely to sustain loss by the delay and forbearance of the creditor, or where the creditor has access to a fund for the payment of his debt which the sureties cannot make available, a court of equity, at the instance of the surety, will coerce the creditor to proceed with the collection of his claim against the principal debtor.

¹⁰ *Weil v. Thomas*, 114 N. C. 197, 19 S. E. 103 (1894).

¹¹ N. C. GEN. STAT. §26-2 (1943).

¹² *Northern State Bank v. Bellamy*, 19 N. D. 509, 125 N. W. 888, 890 (1910). The UNIFORM COMMERCIAL CODE §3-606(1) (Proposed Final Draft, Text and Comments Ed., 1950), suggested by its drafters as a replacement of NEGOTIABLE INSTRUMENTS LAW §120, provides in part that "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." In Comment 1 it is said "The words 'any party to the instrument' remove an uncertainty arising under the original section. 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." And in Comment 4 it is stated "The words 'to the knowledge of the holder' exclude the latent surety, as for example the accommodation maker where there is nothing on the instrument to show that he has signed for accommodation 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."

¹³ Negotiable Instruments Law §120 includes several defenses which were available to the surety at the law merchant. Since §120 applies only to secondary parties, it would seem that these defenses would no longer be available to a surety where he is treated as a primary party. However, in *Prudential Insurance Co. of America v. Bass*, 357 Ill. 72, 191 N. E. 284 (1934) the court avoided this

Even if the guarantor or surety be considered secondary parties, it is still necessary to determine whether a discharge of a prior party by the statute of limitations is sufficient to discharge secondary parties under §120(3).¹⁴ Before the Negotiable Instruments Law there was some conflict as to what constituted such a discharge of a prior party as would discharge a surety or guarantor. One view was that only a discharge created by some *affirmative act* of the creditor was sufficient to discharge secondary parties.¹⁵ In contrast to this was the view that a discharge initiated by some *affirmative act or neglect* of the holder was sufficient.¹⁶

This conflict has not been settled by the Negotiable Instruments Law. Professor Brewster, in his interpretation of §120(3), indicated that it contemplates a discharge by the holder and not a discharge by operation of law.¹⁷ On the other hand, Dean Ames contended¹⁸ ". . . that if the maker is discharged by the statute of limitations, all the indorsers are *ipso facto* discharged." Most of the courts have adopted Professor Brewster's view.¹⁹ Yet, there is at least one decision holding that a guarantor of payment is discharged by the discharge of the maker by the statute of limitations.²⁰ Strong arguments can be advanced for the result reached in the above case. Generally, the guarantor is permitted to set up any defense which the maker of the note has against the holder, and there is no reason why the statute of limitations should be an exception to this rule.²¹ The discharge of the debtor by the statute of limitations, though not caused by some affirmative act of the holder, is

result by holding that the Negotiable Instruments Law did not apply to sureties or guarantors and therefore the law merchant was resorted to in order to determine the rights of such parties. See, NEGOTIABLE INSTRUMENTS LAW §196.

¹⁴ Generally, the statute of limitations will discharge both the surety and the maker at the same time; however, where the surety has been out of state long enough to toll the statute as to him, this question is likely to arise. See, N. C. GEN. STAT. §1-21 (1943).

¹⁵ *Nelson v. First Nat'l Bank*, 69 Fed. 798 (8th Cir. 1895); *Eickhoff v. Eickenbary*, 52 Neb. 332, 72 N. W. 308 (1897); cf. *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808 (1888).

¹⁶ *Auchampaugh v. Schmidt*, 70 Iowa 642, 27 N. W. 805 (1886); *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588 (1885).

¹⁷ Brewster, *A Defense of the Negotiable Instruments Law*, 10 YALE L. J. 84, 94 (1901).

¹⁸ Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241, 253 (1900).

¹⁹ *Finance Corp. of New England v. Parker*, 251 Mass. 372, 146 N. E. 696 (1925) (discharge of a prior indorser by statute of limitations did not discharge subsequent indorsers); *Romero v. Hopewell*, 28 N. M. 259, 210 Pac. 231 (1922) (discharge of a prior party by the statute of limitations did not discharge secondary parties).

²⁰ *First Nat'l Bank of Shenandoah v. Drake*, 185 Iowa 879, 171 N. W. 115 (1919).

²¹ *First Nat'l Bank of Shenandoah v. Drake*, 185 Iowa 879, 171 N. W. 115 (1919); *Auchampaugh v. Schmidt*, 70 Iowa 642, 27 N. W. 805 (1886); *Skoggs v. Marcum*, 247 Ky. 712, 57 S. W. 2d 670 (1933).

due directly to the laches of the holder.²² If the secondary party is not discharged, the statute of limitations is circumvented; for the holder, by collecting from the guarantor or surety, permits the surety or guarantor to pursue the debtor.²³ If the surety or guarantor is permitted to take advantage of the debtor's defense, the diligent creditor can still protect himself against the discharge of the surety or guarantor due to the running of the statute against the debtor, by obtaining a judgment against the debtor prior to the running of the statute.

No definitive answer to all the questions raised herein is discernible from the few North Carolina cases available. The court has held that the liability of a guarantor of collection is conditional.²⁴ Thus it seems that he will be considered a secondary party under the Negotiable Instruments Law. Also, it has been held that a guaranty of payment is an absolute promise to pay the debt.²⁵ But this does not necessitate the holding that a guarantor of payment is primarily liable, since it has been stated by the court that a contract of guaranty is separate and distinct from that of the debtor and that a guarantor's liability is not the same as that of a surety.²⁶ Further, it has been held that a surety is primarily liable notwithstanding the fact that the suretyship was expressed on the face of the instrument.²⁷ There appear to be no North Carolina cases indicating what kind of discharge is intended within the meaning of §120(3).²⁸

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²² In *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 590 (1885) the court remarks, "Where such consequences are produced by the direct action of the creditor all authorities concur in holding that it constitutes a good defense to the indorser, and it is difficult to see why the same consequences produced by the deliberate laches and inaction of the creditor should not lead to the same result."

²³ As a general rule the statute of limitations does not begin to run against the surety until the time of payment by the surety, since the cause of action is not upon the note itself but upon the implied promise of reimbursement arising from the payment of the note. *Blanchard v. Blanchard*, 201 N. Y. 134, 94 N. E. 630 (1911); *Bishoff v. Fehl*, 345 Pa. 539, 29 Atl. 2d 58 (1942); *Holland v. Tjosevig*, 109 Wash. 142, 186 Pac. 317 (1919).

²⁴ *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585 (1914); *Jones v. Ashford*, 79 N. C. 172 (1878).

²⁵ *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979 (1904); see *Chemical Co. v. Griffin*, 202 N. C. 812, 813, 164 S. E. 577 (1932).

²⁶ *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175 (1890).

²⁷ *Dry v. Reynolds*, 205 N. C. 571, 172 S. E. 351 (1934). In *Raleigh Banking & Trust Co. v. York*, 199 N. C. 624, 155 S. E. 263 (1930) and *Horton v. Wilson*, 175 N. C. 533, 95 S. E. 904 (1918) the surety was held primarily liable but the suretyship was not expressed on the instrument. In *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430 (1906) it is not clear whether or not the suretyship was expressed on the instrument. *But see Roberson v. Spain*, 173 N. C. 23, 25, 91 S. E. 361, 362 (1917) where the court remarks, "On the face of the notes the defendant Bullock was primarily liable, and an extension of time to Spain would not release him, in the absence of proof that he was a surety."

²⁸ See *Carter v. Jones*, 40 N. C. 196, 199 (1848) where the court recites the proposition that mere delay by the creditor will not discharge the surety.