

# Effect of Extrinsic Acceleration Agreement Upon Accomodation Indorser's Obligation

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serve as a warning to future testators to so frame their charitable intent as to fall within the confines of charitable trusts recognized to-day.

ANTHONY CURRERI.

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EFFECT OF EXTRINSIC ACCELERATION AGREEMENT UPON  
ACCOMMODATION INDORSER'S OBLIGATION.

In a recent New York case,<sup>1</sup> the plaintiff was the payee-holder of a series of four promissory notes, payable at monthly intervals. The defendant was an accommodation indorser of the second and third notes in the series. These had been signed before delivery and plaintiff took with knowledge as to the nature of defendant's liability. Contemporaneously with the delivery of the notes to plaintiff by the maker, an acceleration agreement, providing that all four notes would be due and payable immediately upon default in payment of any one, was made and entered into without the knowledge or consent of the defendant herein. Default in payment of the first note occurred, whereupon demand and protest was made on all four notes against all parties liable thereon other than defendant. Upon the due date of each of the respective notes that defendant had endorsed, demand and protest were again made, this time as against defendant as well as the maker. There was a refusal to pay, whereupon action was commenced.

Upon such state of facts, the Court of Appeals absolved defendant from liability, holding that the acceleration agreement constituted a material alteration of the note, consequently voiding it as against the non-assenting party. While it is submitted that the decision reaches a correct conclusion, it is urged that the court's reasons therefor are entirely fallacious from a legal viewpoint.

At the outset, it must be distinctly borne in mind that the acceleration agreement was an extrinsic agreement, not being incorporated in the note by any physical means whatsoever.<sup>2</sup> Equally well must it be remembered that no question of fraud is involved herein; indeed it has been the common practice of the banks, and other lenders, to enter into just such an acceleration agreement as was involved herein whenever there exists a series of notes.<sup>3</sup>

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<sup>1</sup> *Manufacturers Trust Co. v. Steinhardt*, 265 N. Y. 145, 191 N. E. 867 (1934), *reargument denied*, 265 N. Y. —, 191 N. E. — (1934).

<sup>2</sup> *Cf. BRANNAN, NEGOTIABLE INSTRUMENTS LAW* (5th ed.) 143, 912, 913.

<sup>3</sup> *Chafee, Acceleration Provisions in Time Paper* (1919) 32 HARV. L. REV. 747. As a practical matter, the acceleration agreement is in form a physically separate instrument inasmuch as there exists some conflict in the cases as to whether or not the inclusion of such acceleration, or extension, provision in the instrument itself has any effect upon negotiability. *BRANNAN, NEGOTIABLE INSTRUMENTS LAW* (5th ed.) 139 *et seq.*

The acceleration agreement and the note or notes must be viewed as one inasmuch as

“The rule \* \* \* requires all papers and instruments relating to the same subject and executed simultaneously, to be read together, and as constituting, when thus read, a single contract or agreement.”<sup>4</sup>

Yet the fact—that the two must be considered to be the one contract<sup>5</sup>—does not alter the result.

### *Reasoning of the Court.*

The case is controlled by the Negotiable Instruments Law,<sup>6</sup> Sections 125 [206]<sup>7</sup> and 124 [205].<sup>8</sup> By virtue of N. I. L. Section 125 [206], it is to be observed that any change in the time of payment is deemed a material alteration. It cannot be doubted that the acceleration agreement constitutes a change in the time of payment, and it is immaterial whether the change be by way of advancement or postponement of the due date. Consequently, there has been a material alteration within the meaning of the section.

Therefore, the only thing to do is to apply N. I. L. Section 124 [205] which section discharges a non-assenting party to a material alteration.

<sup>4</sup> *Benedict v. Cowden*, 49 N. Y. 396, 401 (1872).

<sup>5</sup> Decision (1934) 4 BKLYN. L. REV. 89.

<sup>6</sup> Throughout, whenever reference be made to the Negotiable Instruments Law (sometimes hereinafter called “N. I. L.”) the section of the Uniform Negotiable Instruments Law will be first mentioned and the corresponding section of the New York act will immediately follow in brackets.

<sup>7</sup> N. I. L. §125 [206]: “What Constitutes a Material Alteration.

Any alteration which changes:

\* \* \*

(3) The time of payment;

\* \* \*

Or which adds the place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.”

<sup>8</sup> N. I. L. §124 [205]:

“Alteration of Instrument—Effect of.

Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.”

*Inconsistencies in the Court's Argument.*

A. *A physical change on the instrument itself is contemplated by N. I. L. Sections 125 [206] and 124 [205].*

An examination of the holding reveals that the key to it is the word "alteration" as used in N. I. L. Section 125 [206]. The learned court's determination is that an alteration, not physical in the sense of not being a change *on* the instrument itself, is within the purview of the section.<sup>9</sup> Undoubtedly, that is so from a layman's viewpoint.<sup>10</sup> Unfortunately, however, it is without legal basis.

Before the adoption of the Negotiable Instruments Law by the Legislature of the state of New York, the New York Court of Appeals had said:

"It is desirable for many reasons that the decisions of the several states upon questions affecting commercial paper should be uniform, and unless we are shut up to a different judgment by our own courts, we should apply the rule well established by authority elsewhere, and sustained by the rules governing analogous cases, \* \* \*." <sup>11</sup>

Such statement constituted nothing more than a reiteration of a long recognized truth, which recognition was culminated in the drafting and adopting of an Uniform Negotiable Instruments Law by the several states. In view of this acknowledged desire for unanimity as evinced both by the cases and by the adoption of the Negotiable Instruments Law, the decisions of sister states should be given considerable weight in the interpretation accorded.

The identical issue, *i. e.*, as to whether N. I. L. Section 125 [206] is operative only in so far as are concerned physical alterations to the instrument itself, was squarely presented and decided in *Richards v. Market Exchange Bank Co.*<sup>12</sup> The court therein said:

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<sup>9</sup> It is noteworthy that the parties themselves did not even consider that the decision could be based on the grounds of alteration. The counsel, on argument in the Court of Appeals, did not mention the point until the hearing of the motion for reargument. See briefs of counsel submitted to Court of Appeals. Indeed, in the Appellate Division (240 App. Div. 887, 267 N. Y. Supp. 990 [1st Dept. 1933]) defendant-respondent stated in his brief (at 14):

"Respondent agrees in every respect with every statement made by appellant on this point. No claim is raised herein of any alteration of the notes in suit within the meaning of Section 205 of the Negotiable Instruments Law."

<sup>10</sup> Funk & Wagnalls, New Standard Dictionary of the English Language, *sub. tit.* "alteration."

<sup>11</sup> Benedict v. Cowden, *supra* note 4, at 406.

<sup>12</sup> 81 Ohio St. 348, 90 N. E. 1000 (1910).

"The question thus made is: Does the extension work a 'material alteration' in the instrument? The argument in support of the claim that it does is rested upon the proposition laid down by Brandt on Suretyship, as follows: 'Any agreement between the creditor and principal which varies \* \* \* the terms of the contract by which the surety is bound \* \* \* will release him from responsibility.' We think this does not satisfy the requirements of the sections. \* \* \* It does not imply an alteration of the instrument. \* \* \* It must be borne in mind as an absolute controlling condition, that it is the instrument itself which the foregoing sections \* \* \* treat of, not the contract which the instrument is intended to evidence. This, it seems to us, is so manifest on the face of the printed word that it can not be more clearly shown by comment, and hardly needs authority in its support."<sup>13</sup>

And in *Dart National Bank v. Burton*<sup>14</sup> the court said:

"A material alteration, to fall within the Negotiable Instruments Act (Secs. 124 [205] and 125 [206]) must be of the writing itself."

The text books adhere to the same view that "the addition of a memorandum which does not purport to form part of the document itself is not an alteration; \* \* \*"<sup>15</sup> It is inescapable that "the term 'alteration' in this connection is applicable only to actual changes upon the face of a written instrument."<sup>16</sup>

*B. The decision renders N. I. L. Section 120 (6) [201 (6)] unnecessary.*

N. I. L. 120 (6) [201 (6)] provides:

"A person secondarily liable on the instrument is discharged:

\* \* \* \* \*

<sup>13</sup> 81 Ohio St. at —, 90 N. E. at 1005, 1006.

<sup>14</sup> — Mich. —, 241 N. W. 858, 859 (1932); see *Huff v. Cole*, 45 Ind. 300 (1873); *Oklahoma State Bank v. Seaton*, 69 Okla. 99, 170 Pac. 477 (1910).

<sup>15</sup> WILLISTON, *CONTRACTS* (1920) §1906; DANIEL, *NEGOTIABLE INSTRUMENTS* (7th ed. 1933) §1629.

1 R. C. L. 966: "In the ordinary acceptance of the word an 'alteration' is a change of a thing from one form or state to another, that is, making a thing different from what it was, but without destroying its identity. As applied to written instruments the meaning is restricted to that particular kind of change in the sense or language which is effected by an act done on an instrument by the party entitled to it."

<sup>16</sup> Note (1903) 16 HARV. L. REV. 511, 512. For further discussion of the point, see Appellant's brief, Point II, on motion for reargument. *Manufacturers Trust Co. v. Steinhardt*, 265 N. Y. —, 191 N. E. — (1934).

"6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."<sup>17</sup>

In theory at least there is no distinction between a collateral extension agreement and a collateral acceleration agreement inasmuch as both affect the time of payment.<sup>18</sup> If the one be an alteration within the meaning of N. I. L. Section 125 [206] the other necessarily must be an alteration. Therefore, under the court's construction, the section would be surplusage for the extension would constitute a material alteration.

This identical conclusion was reached in the case of *Richards v. Market Exchange Bank*<sup>19</sup> wherein it was said:

"If these sections [§§125 (206), 124 (205)] were intended to apply to a condition other than a physical alteration of the instrument, we would expect to find the provisions under section 3175-j [§119 (200)], where the subject of discharge of instruments is specially treated, *and we should not expect to find it elsewhere repeated. We should be slow to ascribe careless and needless tautology to the law making body.*"<sup>20</sup> (Italics writer's.)

It is needless to add that the courts should be more than ordinarily loathe to ascribe carelessness and redundancy to this particular statute, so carefully planned and drawn by the most eminent authority on the subject.

Moreover, it will be seen that the decision would have a similar, though not so drastic, effect upon N. I. L. Section 119 (4) [200 (4)].<sup>21</sup> If an acceleration, or an extension, agreement is to be in-

<sup>17</sup> The words "unless made with the assent of the party secondarily liable, or" have been omitted from the New York statute.

<sup>18</sup> *Palomaki v. Laurell*, 86 Ore. 491, 168 Pac. 935, 936 (1917); *STEARNS, SURETYSHIP* (4th ed. 1934) §73.

<sup>19</sup> *Supra* note 12.

<sup>20</sup> 81 Ohio at —, 90 N. E. at 1005.

<sup>21</sup> N. I. L. §119 (4) [200 (4)]:

"Instrument—How Discharged.

A negotiable instrument is discharged:

\* \* \*

(4) By any other act which will discharge a simple contract for the payment of money.

\* \* \*"

terpreted as constituting a material alteration, it is of course utterly immaterial whether the person who will be discharged therefrom be a maker or an endorser—in either event, he will have the note voided as to him.<sup>22</sup> Consequently, the decision has the revolutionary effect of declaring all of the multitudinous decisions rendered thereunder concerning extensions of time given without the assent of an accommodation maker to be unnecessary, for, if there be an alteration, then N. I. L. Section 124 [205] is the properly controlling section.

In addition to the contrary case law, the same objection is raised with respect to the voluminous discussion on the matter by the various commentators.<sup>23</sup>

The inescapable deduction is that such collateral extension agreements have *never* been considered as being material alterations—indeed, hitherto the matter has not even been mentioned in that light.<sup>24</sup>

C. *The authority cited by the court does not sustain its contention.*

The eight cases<sup>25</sup> cited by the court in support of its contention fail to bear it out, for they all involve physical alterations on the very document in question.<sup>26</sup> Of the two cases cited for comparison,<sup>27</sup> neither support. Indeed, the *Cambridge* case<sup>28</sup> might well be used to aid in establishing that this was not a material alteration. It was said therein :

“In cases where it has been held that a material alteration of a note or other contract avoids it, there has been some change or interlineation in the paper writing. \* \* \* The memorandum on the back is evidence of a collateral agreement, and has no more effect than if it had been written on a separate paper. *Stone v. White*, 8 Gray 589.”<sup>29</sup>

<sup>22</sup> *Supra* note 8.

<sup>23</sup> *Infra* notes 35, 47.

<sup>24</sup> It is submitted that the learned Court might have been misled by a loose usage of the terms “alteration” and “variation” which, although having separate and distinct imports, have been used interchangeably by the various courts. Note (1903) 16 HARV. L. REV. 511, 512.

<sup>25</sup> “*Warrington v. Early*, 2 El. & Bl. 763, 23 L. J. Q. B. 47; *Benedict v. Cowden*, 49 N. Y. 396; *Greteau v. Foote & Thorne Glass Co.*, 40 App. Div. 215; *State v. Stratton*, 27 Iowa 420; *Johnson v. Heagan*, 23 Me. 329; *Gray v. Williams*, 91 Vt. 111; *Mertz v. Fleming*, 185 Wis. 58.”

<sup>26</sup> N. Y. L. J., Nov. 7, 1934, at 1664. For analysis of each, see Appellant’s brief, Point II, on motion for reargument. *Manufacturers Trust Co. v. Steinhardt*, *supra* note 16.

<sup>27</sup> *Cambridge Savings Bank v. Hyde*, 131 Mass. 77; *Lewis v. Blume*, 226 Mass. 505, 116 N. E. 271 (1917).

<sup>28</sup> *Supra* note 19.

<sup>29</sup> Italics here, and in all subsequent quotations, writer’s unless otherwise indicated.

*Conclusion.*

In summation, it is respectfully submitted that the reasoning of the court herein is fallacious for at least three reasons:

- (1) The holding has the effect, whether or not so intended, of rendering nugatory. N. I. L. Section 120 (6) [201 (6)].
- (2) The only alteration within the contemplation of N. I. L. Sections 125 [206], 124 [205] is a physical alteration of the instrument itself.
- (3) The cases relied upon by the court do not support its contention, nor has the writer been able to find any so holding.

It having been shown that the ground of material alteration is improper as a basis for the decision, by process of exclusion the only other grounds for a decision must be found in N. I. L. Section 120 (6) [201 (6)].

A cursory examination thereof reveals that provision is made therein for the discharge of a person secondarily liable provided that an extension agreement (without reservation of a right of recourse as against such person),<sup>30</sup> binding upon the holder of the instrument and without the indorser's assent, is entered into; but there is no mention whatsoever made of discharge in the case of an acceleration agreement similarly entered into. Thus, the question arises as to whether the section is mandatory and exclusive on matters of discharge or whether it is merely directory, restating the common law, and permitting the interposition of suretyship defenses.

In the first place, it is well settled that an irregular or accommodation endorser occupies the same position as does a surety.<sup>31</sup> The proposition has been questioned inasmuch as suretyship was not a part of the "law merchant." Such proposition is untenable inasmuch as that subject did not develop as an entirely separate branch of the law, as did equity and admiralty, but rather has been a unique de-

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<sup>30</sup> *Infra* note 53.

<sup>31</sup> *Blanchard v. Blanchard*, 201 N. Y. 134, 138, 94 N. E. 630, 631 (1911) wherein it was said: "The relation, as to the debt, between the defendant and Flint [plaintiff's testator] insofar as it is involved in this action was that of principal and surety. *Pitts v. Congdon*, 2 N. Y. 352; *Nat'l Exchange Bank v. Silliman*, 65 N. Y. 475, *First Nat'l Bk. of Buffalo v. Wood*, 71 N. Y. 405"; *National Park Bank v. Koehler*, 204 N. Y. 174, 97 N. E. 468 (1912), *rev'g*, 137 App. Div. 785, 122 N. Y. Supp. 490 (1st Dept. 1910).

Neither today under the statute nor at common law did the relation of principal and surety exist where the endorsement was made for value. N. I. L. §29 [55]; *Colgrove v. Tallman*, 67 N. Y. 95 (1876); *Woodruff v. Moore*, 8 Barb. 171 (N. Y. 1850).

velopment within the common law itself.<sup>32</sup> "This recognition of fundamental resemblance the courts have evidently followed up by imposing upon accommodation parties liabilities, and granting them rights, similar to those of sureties."<sup>33</sup> "Certainly, on first principles again, the analogy goes far enough, and the situations of the parties are sufficiently similar to warrant the conclusions that the equities which release or protect the accommodation party ought to be the same as those which release or protect the surety."<sup>34</sup>

Therefore, in view of the nature of the liability of the accommodation indorser, the question properly reframed is: Has N. I. L. Section 120 (201) served to deprive an accommodation endorser of defenses otherwise available to him as a surety at common law?<sup>35</sup>

An indiscriminate usage of the term "accommodation party" has resulted in a confusion and, if not improper, then, at least, unnecessary merger of Sections 119 [200] and 120 [201], in so far as is involved the questions relating to suretyship. By virtue of definition<sup>36</sup> the term "accommodation party" is inclusive of both accommodation makers and accommodation indorsers. Consequently, in a general sense, the two are synonymous. Nevertheless, in a particularized sense, their respective meanings and usages have been indicated by Sections 119 [200] and 120 [201].

The Act itself indicates beyond any possibility of doubt that the distinction between these two types of sureties was deliberately made. It is found that the definition of an accommodation party given by N. I. L. Section 29 [55] is qualified by N. I. L. Section 192 [3].<sup>37</sup>

<sup>32</sup> Raymond, *Suretyship at "Law Merchant"* (1916) 30 HARV. L. REV. 141.

<sup>33</sup> *Id.* at 146. The common law is to the same effect. Hubly v. Brown, 16 Johns. 70 (N. Y. 1819).

<sup>34</sup> Raymond, *supra* note 32, at 147.

<sup>35</sup> It is not within the scope of this article to discuss whether or not N. I. L. §119 [200] has had a similar effect. That point has been the source of extensive litigation, resulting in such hopeless conflict as to make uniformity hopeless, as well as a fertile field for the commentators. BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (5th ed.) 883-895.

<sup>36</sup> N. I. L. §29 [55]:

"Liability of an Accommodation Party.

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 the instrument knew him to be only an accommodation party."

<sup>37</sup> N. I. L. §192 [3]:

"Person Primarily Liable on Instrument.

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."

This latter section defines one as being primarily liable on an instrument when "by the terms of the instrument" he "is absolutely required to pay the same." Any other party to the instrument not so situated is secondarily liable. Thus, accommodation parties are classified into two groups, firstly, that wherein there is a primary liability, and, secondly, that wherein there is a secondary liability.<sup>38</sup> This clear and carefully maintained distinction is indicative of the conclusion that it is not necessary to interpret the one section in connection with the other.

That the Act does not purport to be a complete code is evidenced by N. I. L. Section 196 [7].<sup>39</sup>

It has well been said that:

"The act does not purport to embody all the law relating to sureties; indeed the word 'surety' does not appear in the text at all \* \* \*." <sup>40</sup>

But is it permissible to introduce evidence as to suretyship rights?

It is to be conceded that the law merchant cannot prevail as against specific provisions of the Act.<sup>41</sup> But the instant situation is not one which is specifically provided for; rather it is one not so provided for.<sup>42</sup> While the law merchant cannot prevail as against specific provisions, it does prevail in unforeseen situations, unprovided for. It would seem as though the proper test as to when to admit evidence as to the law merchant is: Has the statute spoken on the subject? If so, then any such evidence is inadmissible; if not, then any such evidence may be introduced to fill the gap thus left.<sup>43</sup>

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<sup>38</sup> Obviously, the grouping is dependent upon whether the party appear as maker or as indorser, it being immaterial as to the actual nature of his liability. *Niotaze State Bank v. Cooper*, 99 Kan. 731, 162 Pac. 1169 (1917); *Ford v. Schall*, 110 Ore. 21, 221 Pac. 1052 (1924), *rehearing denied*, 222 Pac. 1094 (1924).

Such is true as to third parties although the relation between the principal debtor and the indorser be that of principal and surety. *WILLISTON, CONTRACTS* (1921) §1211.

<sup>39</sup> N. I. L. §196 [7]:

"Cases Not Provided for in Act.

In any case not provided for in this act the rules of the law merchant shall govern."

The New York statute differs in that it is captioned: "Law Merchant; When Governs" and in the substitution of the word "chapter" for "act."

<sup>40</sup> *Richards v. Market Exchange Bank Co.*, *supra* note 12, 81 Ohio St. at —, 90 N. E. at 1003; see *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682 (1908). But *cf.* *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679 (1912).

<sup>41</sup> *The President, etc., of the Manhattan Company v. Morgan*, 242 N. Y. 38, 150 N. E. 594 (1926).

<sup>42</sup> N. I. L. §120 [201].

<sup>43</sup> *The President, etc., of the Manhattan Company v. Morgan*, *supra* note 41; *Mechanics & Farmers Savings Bank v. Katterjohn*, 137 Ky. 427, 125 S. W. 1071 (1910).

The failure of N. I. L. Section 120 (6) [201 (6)] to mention acceleration as a basis for discharge cannot logically be deemed anything other than an omission<sup>44</sup> for it is unquestioned that the Act does not embody all of the suretyship defenses and it is equally unquestioned that it was never so intended.<sup>45</sup> Consequently, the door is open for the operation of N. I. L. Section 196 [7].

The view of the commentators on the question is epitomized:

"Certain it is that the Negotiable Instruments Law does not attempt to codify the previously applicable law of suretyship. It is almost equally certain that its failure to mention suretyship does not excise it from the law of bills and notes."<sup>46</sup>

It may well be that N. I. L. Section 119 [200] constitutes such a specific provision as to prohibit any evidence as to the suretyship defenses, *i. e.*, any evidence as to the law merchant. On that point no opinion is expressed.<sup>47</sup> Sufficient has been shown to establish that the two sections are not necessarily read together. That being so, the writer contents himself with the section immediately involved herein.

In view of the foregoing, the correct view is that suretyship defenses are still available, at least in so far as is concerned one secondarily liable. To hold otherwise is "to ignore both the fundamental nature of his (accommodation party's) contract and the purpose of the Uniform Act."<sup>48</sup>

What, then, are defendant's rights as a surety?

As a surety, the indorser's obligation is *strictissimi juris*<sup>49</sup> just as it was before the passage of the statute.<sup>50</sup> He is consequently

<sup>44</sup> But *cf.* Oklahoma State Bank v. Seaton, 69 Okla. 99, 170 Pac. 477 (1910).

<sup>45</sup> Brannan, *Some Necessary Amendments of the Negotiable Instruments Law* (1913) 26 HARV. L. REV. 588, 594; Richards v. Market Exchange Bank, *supra* note 12.

<sup>46</sup> Note (1925) 38 HARV. L. REV. 954, 956; Chafee, *Progress of the Law—Bills and Notes* (1919) 33 HARV. L. REV. 255, 277: "Section 120 states other acts discharging a secondary party but fails to mention several defenses ordinarily available to sureties. Does this mean that a secondary party cannot set up such a defense? The cases are in serious conflict, but the correct view is that this section is not exclusive and that under section 196 cases not expressly governed by the Act fall under the law merchant which includes the principles of suretyship."

<sup>47</sup> For an excellent discussion, with copious references, of the point, see BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (5th ed.), *supra* note 35.

In New York, the question is an open one, the court having twice refused to pass on the matter. National Citizens Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1 (1904); Building and Engineering Co. v. Northern Bank, 206 N. Y. 400, 99 N. E. 1044 (1912).

<sup>48</sup> Raymond, *supra* note 32.

<sup>49</sup> National Park Bank v. Koehler, *supra* note 31.

<sup>50</sup> Page v. Krekey, 137 N. Y. 307, 33 N. E. 311 (1893).

entitled to have his obligation preserved without variation of risk<sup>51</sup> unless he be acquainted with such change and his assent there to be obtained,<sup>52</sup> or unless the right of recourse against the surety has been reserved.<sup>53</sup> It is so well settled as to make a citation of authority needless that a change in the duration of the obligation, whether it be to hasten or to delay the maturity date, though it be by extrinsic agreement,<sup>54</sup> is such a variation.<sup>55</sup>

To conclude, then, the extrinsic acceleration agreement can not be a material alteration inasmuch as it is not a physical change *on* the instrument itself. In addition thereto, such construction is improper for it would eliminate any need for N. I. L. Section 120 (6) [201 (6)]. Consequently, by process of elimination, it is deduced that a proper decision must be based on that latter section.

In said section there is no provision for discharge in a case wherein there is an acceleration of the time for payment. Nevertheless, the interposition of such suretyship defense is proper in view of the fact that the section contains no provision to the contrary.

<sup>51</sup> *Miller v. Stewart*, 6 U. S. 233 (1824); *Peru Plow & Wheel Co. v. Ward*, 1 Kan. App. 6, 41 Pac. 64 (1895).

<sup>52</sup> *Rees v. Berrington*, 2 Vesey, Jr., 540 ( ).

<sup>53</sup> *Nat. Park Bank v. Koehler*, *supra* note 31, 204 N. Y. at 179, 97 N. E. at 470: "It is a rule, long recognized, that an accommodation indorser, or surety, is entitled to have the engagement of the principal debtor preserved, without variation in its terms, and that his assent to any change therein is essential to the continuance of his obligation. The reason of the rule is that his right must not be affected, upon the maturity of the indebtedness, to make payment and, by subrogation to the creditor's place, to, at once, proceed against the principal debtor to enforce repayment. Therefore, it is that any agreement of the creditor, which operates to extend the time of payment of the original debt and suspends the right to immediate action, is held to discharge the non-assenting surety; *as the law will presume injury to him thereby*. The creditor may arrange with his debtor in any way, which does not result in effecting either of these results. He may take, as collateral to the old note, new security, or other notes, and, if time is not given to the debtor, the indorser, or surety, will not be discharged. To prevent such a result, the agreement must expressly reserve all the remedies of the creditor against the indorser, or surety; \* \* \*"; *Morgan v. Smith*, 70 N. Y. 537 (1877); *Calvo v. Davis et al.*, 73 N. Y. 211 (1878); *Peoples Nat. Bank of Pulaski v. Hewitt*, 226 App. Div. 412, 235 N. Y. Supp. 392 (3d Dept. 1929), *modified*, 253 N. Y. 523, 171 N. E. 765 (1930).

<sup>54</sup> *Greenberg v. Ginsberg*, 82 Misc. 415, 143 N. Y. Supp. 1017 (1913); *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421 (1907).

<sup>55</sup> But *cf.* *Hatfield v. Jackaway*, 102 Neb. 831, 170 N. W. 181 (1918). The agreement of extension or acceleration must be binding. *National Citizens Bank v. Toplitz*, *supra* note 47; Ann. Cas. 1913C 527: "Under the law merchant, it was generally held that a binding agreement between the principal debtor and the holder of a negotiable instrument, whereby the time of its payment was extended without the assent of an accommodation party, relieved the latter from all liability thereafter. \* \* \* 1 AM. & ENG. OF LAW (2d ed.) 375, 378."

That being so, the defendant is discharged, both legally and theoretically, of liability for there has been a variation of his risk without his assent and without reservation of a right of recourse against him.

WILLIAM E. SEWARD.

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#### RAILROAD RETIREMENT ACT.

On June 30, 1934, there was presented to the President of the United States for his signature a bill which may be the forerunner of a host of similar legislative enactments affecting the social and economic condition of the nation. President Roosevelt signified his approval by signing the bill, thereby creating an Act "to provide a retirement system for railroad employees, to provide unemployment relief, and for other purposes". Thus the Railroad Retirement Act, which the Seventy-third Congress had passed by a narrow margin and which had encountered tremendous opposition from the carrier systems of the country as well as various other moneyed interests, became law.

The purposes of the Act are, according to its own language, manifold. It is for the purpose of: (1) providing adequately for the satisfactory retirement of aged employees; (2) promoting efficiency and safety in interstate transportation; (3) making possible (a) greater employment opportunity, (b) more rapid advancement of employees in the service of carriers.

Under this Act every employee, including executives, is required to pay into the Retirement Fund a percentage of his compensation, except that all compensation exceeding \$300 per month is excluded. The carrier is required to pay a contribution equal to twice that of its employees. The percentage of compensation to be thus paid is to be determined by the Railroad Retirement Board, but until otherwise determined, is declared to be 2 per cent for the employees. The carrier is directed to deduct its employees' contribution from their compensation and to pay the deducted amounts along with its own contribution into the Treasury of the United States, which will hold it in a special Retirement Fund.<sup>1</sup>

Retirement is compulsory under the Act upon all employees attaining the age of 65, except that such compulsory retirement does not "apply to an employee who from and after the effective date (August 1, 1934) occupies an official position". The carrier and the employee may, by written agreement filed with the Railroad Retirement

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<sup>1</sup> Payments into the Treasury of the United States of the amount deducted and of the carriers' own contribution are directed to be made quarterly, or otherwise as the Board may order.