AN AGENT'S RIGHT TO SUED UPON CONTRACTS.

I.

Sec. 1. In General.—Right of Action in Principal Alone.—It is ordinarily the function and the duty of an agent in his contractual dealings for his principal, to act not only for and on account of his principal, but in the principal's name. Where the contract is express and formal, and particularly where it is in writing, there is ordinarily no difficulty in determining whether this requirement has been complied with. Even though the dealings are not express and formal, the function and the duty of the agent are still the same, and there is a constant presumption that a known agent, acting as such, intends to impose the obligations of the contract upon the principal and secure its advantages to him. The effect of the proper discharge of the agent's duty in such cases, therefore, is to invest the principal with the right to all the benefits and advantages which result from it, to invest him with the legal interest in the contract, and to clothe him with the power to bring all necessary actions to enforce the contract. As a general rule, therefore, where the contract is thus made for and on account of the principal and in his name, and the agent has no beneficial interest in the contract, the right of action upon the contract is in the principal alone and the agent cannot sue upon it.¹

¹Evans v. Evans, 3 Ad. & El. 132; Buckbee v. Brown, 21 Wend. (N. Y.) 110; Garland v. Reynolds, 20 Me. 45; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Medway Cotton Manufactory v. Adams, 10 (517)
SEC. 2.—CONSIDERATIONS AFFECTING THIS RULE.—But it has been seen that, notwithstanding the fact that the agent has authority, and is expected to bind the third person with whom he deals, to the principal, yet, through failure to disclose his principal, or to use apt and appropriate language, or from a deliberate intention to deal with the agent exclusively, the result of the negotiation may be that the third person has assumed obligations, either *prima facie* or exclusively, to the agent alone. It may thus happen that the legal interest in the contract will be, or will appear to be, in the agent alone, and, in accordance with the well-settled rule that an action upon a contract is to be brought in the name of the party in whom the legal interest in the contract is vested, the right of action may be either in the agent alone, or it may be subject to an action by the agent or the principal. This question as to the agent's right of action may arise under a variety of circumstances. Thus the contract may be (a) an unwritten one, or it may be (b) a written contract, and if in writing, it may


"*Prima facie*," says Blackburn, J., in Fisher v. Marsh, 6 B. & S. 411, "when an agent makes a contract for a person named, the principal and not the agent is considered as making the contract."

An agent who ships by the carload the goods of several principals to a foreign commission merchant for sale, with the understanding that the proceeds of each owner's goods, less the commissions, shall be remitted directly to him, the names and quantities received from each owner being separately entered on the shipping bill, and each owner's goods also being marked in his own name, cannot maintain an action in his own name against the commission merchant for damages caused by delay in selling the goods, even though the shipment was made in the agent's name. The contract is not to be found in the mere act of shipment, but from all the facts and circumstances of the case. So considered, it was held that the contract was not made either in the name of the agent as principal or as the representative of undisclosed principals. Denver Produce & Commission Co. v. Taylor, 73 Miss. 702, 19 So. 489.

Where goods are shipped to an agent to deliver, on a contract made with the principal, the agent cannot maintain an action for the price. Phillips v. Henshaw, 5 Cal. 599.

After termination of the agency.—Where an agent had deposited his principal's money in a bank in the name of "A. J. Miller, Agent," it was held that, whether he could or could not have sued for it while his agency continued, he certainly could not do so after his agency had been terminated by the principal's bankruptcy. Miller v. State Bank, 57 Minn. 319, 59 N. W. 309.
be (c) under seal. So in his negotiation the agent may have acted (a) as the agent of a known principal, or (b) he may have disclosed the fact of his agency, but concealed the name of his principal, or (c) he may have bargained as the real principal. In doing so, he may have acted (a) with the express or implied authority of his principal to keep the principal concealed, or (b) against the principal's express or implied desire. So the contract upon which the question arises may be (a) fully executed, or (b) partially executed, or (c) wholly executory. There may, of course, also be cases in which, though the contract was not originally made with the agent at all, the principal may since have clothed the agent with an authority or a title to sue.

Each of these cases may justify consideration.

Sec. 3.—Agent May Sue When Principal Has Clothed Him With Title or Authority For That Purpose.

—In the first place it may be noticed that the power of the agent to sue is not necessarily confined to the cases in which the agent was originally a party to the contract. If the principal, having contract rights, assign the contract to the agent in such a way as to vest in him the legal title, in a state wherein the assignee of a chose in action may sue in his own name; or if the principal, having bonds or notes or other negotiable instruments, endorse and deliver them to the agent so as to vest in him the legal title.

*Where a judgment paid by a surety is assigned to an agent for collection, the agent is the real party in interest and can collect the judgment. Searing v. Berry, 58 Ia. 20, 11 N. W. 708. Likewise where one in whose favor judgment has been rendered assigns to an agent for collection. Cottle v. Cole, 20 Ia. 481. Where an account is assigned for collection the assignee can sue in his own name. Sheridan v. Mayor, 68 N. Y. 30.

*In Bell v. Tilden, 16 Hun (N. Y.), 346, a draft endorsed in blank to the principals was handed over to an agent for collection. Held: The mere handing over of the draft did not pass the legal title and this is necessary for the agent to sue. In Iselin v. Rowlands, 30 Hun (N. Y.), 488, endorsement and handing over of drafts to agent for collection did not invest sufficient title to sue. In Hays v. Hathorn, 74 N. Y. 486, held that mere handing over for collection of note endorsed in blank was not sufficient to enable agent to sue. But where it is clear that the bare legal title has passed for the purpose of collection the agent can sue: Hunter v. Allen, 106 N. Y. App. Div. 557, 94 N. Y. Suppl. 880, where note was endorsed to agent for collection. In Leach v. Hill, 106 Ia. 171, 76 N. W. 667, where a check had been endorsed to a bank and a guaranty made by third person that it would be paid, the cashier, as such, was allowed to sue. Note endorsed in blank for collection passes sufficient legal title to enable agent to sue. Boyd v. Corbitt, 37 Mich. 52; O'Brien v. Smith, 1 Black (66 U. S.), 99; Abell Note Co. v. Hurd, 85 Ia. 559, 52 N. W. 488. Where municipal
the agent may sue in his own name. The test of the sufficiency of the agent’s right to sue in such cases seems to be whether his title is sufficient to protect the other party in responding to the agent’s claim. The fact that the agent’s recovery is to be for the benefit of the principal, and that therefore the principal is the real party in interest would not defeat the agent’s action, since most of the statutes contain exceptions which would cover such a case. A mere agent for collection, however, not having been vested with the legal title, would have no right to sue in a state wherein the action must be in the name of the real party in interest.

It has, nevertheless, been held in several cases,—statutes requiring action by the real party in interest not being involved—that the principal may confer authority upon an agent to sue for and recover claims belonging to the principal in the agent’s own name.

SEC. 4.—AGENT MAY SUE ON CONTRACT MADE WITH HIM PERSONALLY.—Where the contract is made with the agent bonds, transferable by delivery, are handed over to an agent to collect, he may sue in his own name. Village of Kent v. Dana, 100 Fed. 56; Salmon v. Rural Ind. School Dist., 125 Fed. 235.

"In Sheridan v. Mayor, supra, the court said: "It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment to or recovery by the assignee." Same statement in Hunter v. Allen, supra.


In Eggleston v. Colfax, 4 Martin (La.), N. S. 481, an agent authorized to collect a claim due to his principal was held entitled under the power of attorney filed with the petition, but not given in the report, to maintain an action in his own name. The court held there was no objection to his maintaining the action in his capacity as agent, and that a judgment in his own name would have the same effect as res adjudicata as though the action had been brought in the name of the principal. In Frazier v. Willcox, 4 Rob. (La.) 517, the same holding was made. The court said: "A power to sue, to collect a debt, to give an acquittance, may be deputed, and an action may be maintained in the name of the agent as well as in that of the principal when power is given to that effect. The debtor will be protected if the power to receive is sufficient." In Kendall v. Calder, 2 Tex. Unrep. Cases, 732, an agent authorized to collect money belonging to his principal was permitted to recover it in an action in his own name. In Varney v. Hawes, 68 Me. 442, it was held that a man may mortgage to an agent in order to procure credit from his principal, and that the agent may enforce the mortgage as the trustee of his principal.
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personally, whether as a result of an omission to disclose the fact of the agency or the name of the principal, or of failure to use apt and sufficient language to bind the principal, or of a deliberate intention to deal with the agent alone, the latter is, as has been seen, personally liable upon the contract, even though the principal also may in many cases be liable upon it. And this obligation is reciprocal,—the other party is bound to the agent, and in the latter vests a legal interest in the contract, and, consequently, a right of action upon it, though his recovery is, of course, ordinarily for the benefit of his principal. It is, therefore, a general rule that where a contract, whether written or unwritten, entered into on account of the principal, is, in terms, made with the agent personally, the agent may sue upon it at law. At the same time, as will be seen hereafter, by what are, in many cases, wholly


In Short v. Spackman, 2 B. & Ad. 962, the plaintiffs, brokers, bought goods of defendant, on account of and by the authority of H. The purchase was made in their own names, but the defendant was notified that there was an unnamed principal. The plaintiffs afterwards, under a general authority from H, contracted in their own names for a resale of the goods. H repudiated the whole transaction, in which plaintiffs acquiesced. Held: H's repudiation was no objection to plaintiffs' recovery for the damages sustained by not being able to carry out their contract of resale.

In Equity.—Under the general equitable rule that actions shall be prosecuted by the real parties in interest, a mere agent having only a legal interest, could not sue. See Fry on Specific Performance, §264; Morton v. Stone, 39 Minn. 275.
anomalous rules, the principal has also a right of action upon the contract which usually is paramount to that of the agent.

SEC. 5.—UNDISCLOSED PRINCIPAL.—This rule is of frequent application in the case of the agent of an undisclosed principal.\(^9\) In 1833, Denman, C. J., said: “It is a well established rule of law that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it.”\(^10\) In such a case the agent is the ostensible party to the contract; the other party may hold him liable upon it, although, as has been seen, the principal may also usually be held liable when discovered; and, as such ostensible party, the agent may enforce the contract, subject in most cases, as will be seen, to a paramount right in the principal to enforce it himself if he so prefers.

SEC. 6.—DISCLOSED PRINCIPAL.—But the rule also applies although both the fact of the agency and the name of the principal were disclosed. If the fact that the agent acts as such appears, but the name of the principal does not appear, the action may be sustained in the name of the agent as the only party disclosed to whom the promise is made.\(^11\) And so, although the name of the principal appears, this fact is not conclusive of the absence of the agent’s power to sue. The question here, as in the cases that have been considered, is, are the words used in respect to the principal descriptive of the person merely, or do they declare that the promise runs to the principal directly.\(^12\)

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In the following case the court put the decision on both common law and statute: Simmons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791.

\(^10\) In Sims v. Bond, supra.


An equitable action for specific performance of the contract cannot be maintained by the agent: Morton v. Stone, 39 Minn. 275.

\(^12\) See Considerant v. Brisbane, 22 N. Y. 389; Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451, and cases cited; Leach v. Hill, 106 Ia. 171, 76
SEC. 7.—Statutes Requiring Suit by Real Party in Interest.—The agent’s right to sue in these cases is not defeated by the statutory provisions found in many of the states that actions shall be brought in the name of the real party in interest; since these statutes either contain express exceptions, or, under the right of a trustee of an express trust to sue, provide such comprehensive definitions of such a trustee as to include an agent who has made a contract for his principal.\footnote{Rhoades v. Blackiston, 109 Mass. 334, 8 Am. Rep. 332.}

SEC. 8.—Assignees of Bankrupt Agent.—Where the agent has no beneficial interest of his own in the subject matter, his right to sue does not, upon his bankruptcy, pass to his assignees.\footnote{Rhoades v. Blackiston, 109 Mass. 334, 8 Am. Rep. 332.}

SEC. 9.—Illustrations of Rule Permitting Agent to Sue.—These principles are of frequent application to the

\footnote{The New York statute provides as follows: “Every action must be prosecuted in the name of the real party in interest. . . . A trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is brought. A person with whom, or for whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.” The statutes in the other States are substantially similar. Under these statutes it is held that the agent may sue.}

case of commercial paper. Thus upon a note or bill payable to "A. B., agent," or to "A. B., agent for C. D.," or to "A. B., trustee," or to "A. B., executor," etc., or to "A. B., for the use of C. D.," the action may be maintained in the name of A. B.\(^5\)

The same rule applies to a promise made to "A. B., cashier," or "A. B., president of C. D. Company." In such cases the action may be brought in the name of the officer, although it is now generally held that the corporation also may sue.\(^6\)

But where the promise is made to the "agent of C. D.," or the "cashier of the E. Bank," or to the "treasurer of the F. Co.," and the like, the name of the agent or officer not being disclosed, it is usually regarded as made to the principal directly.\(^7\)

Sec. 10.—So where an agent carries on business for his principal and appears to be the proprietor and sells goods as the apparent owner, he can sustain an action in his own name for the price.\(^8\) And where the principal carries on business in the name of the agent, actions may be sustained in the name of the agent upon contracts made to him in that name.\(^9\) So where an agent ships goods, taking the bill of lading in his own name, he may sue upon the contract of carriage for damages arising from a breach of it.\(^20\) So one who describes himself as agent,

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\(^{19}\) Alsop v. Caines, 10 Johns. (N. Y.) 396.

but covenants as in his own right, may maintain an action in his own name against the other party upon the covenants.\textsuperscript{21} And a broker may sue a telegraph company in his own name for a breach of contract to transmit an order, in his own name, though on behalf of his principal, for the purchase or sale of goods;\textsuperscript{22} an agent who, having sold his principal's land, remits the money by express, may sue the express company for a loss of the money through its negligence;\textsuperscript{23} and one who has insured property as agent may sue in his own name to recover upon the policies.\textsuperscript{24}

SEC. 11.—An agent who sells his principal's goods, not as agent but as principal, may sue the purchaser for the price,\textsuperscript{25} or for refusing to perform the contract.\textsuperscript{26} Upon a contract for the purchase made by the agent in his own name, the agent may sue to recover damages for the seller's failure to deliver the goods.\textsuperscript{27} An agent who has in his own name leased land for his principal may sue to recover the rent reserved.\textsuperscript{28} An agent who has performed services for another, e. g. the threshing of grain, in pursuance of a contract made in his own name, may sue to

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\textsuperscript{22} United States Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519.

\textsuperscript{23} Snider v. Adams Express Co., 77 Mo. 523.


\textsuperscript{26} Davis v. Harness, 38 Ohio St. 397; Tustin Fruit Ass'n v. Earl Fruit Co., (Cal.) 53 Pac. 593.

\textsuperscript{27} Colburn v. Phillips, 13 Gray (Mass.) 64.

\textsuperscript{28} Manett v. Simpson, 61 Hun 620, 15 N. Y. Supp. 448; Spence v. Wilson, 102 Ga. 762, 29 S. E. 713.
recover the agreed compensation. An agent entrusted with the management of funds and who has loaned money and taken securities in his own name may sue in his own name to recover the money and enforce the securities.

Sec. 12.—Agent May Sue When He Has a Beneficial Interest.—Mr. Chitty lays down the rule which has often been cited, that "when an agent has any beneficial interest in the performance of the contract, as for commission, etc., or a special property or interest in the subject matter of the agreement, he may support an action in his own name upon the contract, as in the case of a factor or a broker, or a warehouseman or carrier, an auctioneer, a policy broker whose name is on the policy, or the captain of a ship for freight." So in another English book, in which, in conformity with the rule of the preceding section, it is laid down that an agent may sue in his own name on contracts made by him on behalf of his principal, where the agent contracts personally, an additional class of cases is also mentioned in which the agent may sue, viz., "where, as in the

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29 Hewitt v. Torson, 124 Ill. App. 375. An agent who has deposited his principal's money in a bank in his own name may maintain an action to recover the sum so deposited. National Bank v. Nolting, 94 Va. 263, 26 S. E. 826.
30 Dawson v. Burrus, 73 Ala. 111.
31 1 Chitty on Pleadings, 8 (16 Am. Ed.).
34 Citing per Lord Ellenborough in Martini v. Coles, 1 M. & S. 147.
35 Citing Williams v. Millington, 1 H. Bl. 81; Coppen v. Craig, 2 Marsh. 501; Farebrother v. Simmons, 5 B. & Ald. 333; Grice v. Kenrick, L. R. 5 Q. B. 340.
37 Citing Shields v. Davis, 6 Taunt. 65; Brown v. Hodgson, 4 Taunt. 189.
38 Bowstead on Agency, 3 Ed., 400-401.
case of factors and auctioneers, he has a special property in, or a lien upon the subject matter of the contract, or has a beneficial interest in the completion thereof.”

SEC. 13.—Just how much is meant by the rule in either case is not entirely clear. If the contract has been made with the agent personally, he needs no additional reason to enable him to sue. No case has been found which holds that where the contract is made in the principal’s name, the agent may sue upon the contract merely because he has an interest in its performance, except perhaps where he sues because of the loss of incidental benefits personal to himself. On a contract made for his benefit, but to which he was not a party, he might or might not be able to sue according to the state in which the question arose. If the action were in tort a special property might sustain an action, but the question here involves actions of contract only. The rule might very well mean that, in determining whether the contract was made with the principal or the agent, under the doctrine laid down in Section 4 above, the fact that the agent had an interest may show that the contract was made with him; or that in applying the rule that the action

38 In Bleecker v. Franklin, 2 E. D. Smith (N. Y.) 93, it was held that where the terms of a sale made by an auctioneer require that his fees should be paid by the purchaser, he may maintain an action against the purchaser, for such fees in his own name. So, in Livermore v. Crane, 26 Wash. 529, 67 Pac. 221, it was held that a real estate broker, who, in pursuance of a contract made with a prospective purchaser, procured a contract of sale to be entered into between the owner of land and such prospective purchaser, may maintain an action for damages for the loss of his commissions against the purchaser for failure to carry out such agreement, although he had agreed to look to the vendor for his commissions. The cases of Cavender v. Waddingham, 2 Mo. App. 551; and Atkinson v. Pack, 114 N. C. 597, 19 S. E. 628, were relied upon. In Evrit v. Bancroft, 22 Ohio State 172, plaintiff, an agent to sell his principal’s land and receive as commission all money over a certain price, and who had entered into a contract in his own name with defendant, was not allowed to recover the amount of commission he would have received had defendant performed, it not appearing that the principal had been damaged by the defendant’s breach. In Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946, plaintiff, who was to get a commission from his principal out of the purchase price of land, was not allowed to recover against the purchaser for breach of a contract made in the principal’s name.

40 This idea, that a nominal party may become the real party by reason of some special interest, seems to underly many of the cases. Thus in Porter v. Raymond, 53 N. H. 519, 526, the court says, “The authorities seem uniform that, where the nominal promisee is an agent and has a beneficial interest in the performance of the contract or a special property in the subject-matter of the agreement, the legal interest and right of action is in him.”
must be brought in the name of the real party in interest, the fact that the agent has an interest would enable him to sue where an agent without interest might not be allowed to sue, although the contract was nominally made with him. In practically all of the cases in which this rule was originally laid down, the contracts had either been made in the agent’s name or involved the dealings of an agent like a factor, who is impliedly authorized to sell in his own name and is therefore given the right to recover the price, or who had come under some obligation to the principal, like the factor who sells under a del credere commission or the auctioneer who has given credit for the price without authority, and who is given the right of action for the price in order that he may recoup himself. All these cases seem in fact to be referable to the rule already given which permits the agent to sue where he has contracted personally.

41 Thus, for example, in New York, where there are many cases holding that a mere agent, having no interest and not within the statute as the trustee of an express trust, cannot sue, (see Barkley v. Wolfskehl, 12 Misc. 245, 54 N. Y. Supp. 934; Bell v. Tilden, 16 Hun 346; Iselin v. Rowlands, 30 Hun 488; Hays v. Hathorn, 74 N. Y. 486.) It is also held that an auctioneer has such a special property or interest in the subject-matter of the sale that he may sue in his own name; Minturn v. Main, 7 N. Y. 220.

42 The case most frequently cited to sustain this proposition is Williams v. Millington, 1 H. Bl. 81. In this case the plaintiff, an auctioneer, had sold goods upon the premises of the owner, who was described as such in the announcement of the sale and the catalogue of the goods. The defendant bought certain of the goods and they were placed in his cart. Defendant thereupon put into the hands of the plaintiff a sum of money representing part of the price and a receipt for a debt which he claimed the owner owed him covering the rest of the price, and immediately drove off with the goods. The owner refused to recognize the receipt as part payment and the plaintiff thereupon paid him the amount represented by it. Plaintiff then brought this action of assumpsit to recover from the defendant such amount. It was held that the action might be maintained. Lord Loughborough, C. J., put the case upon the ground, “that an auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction room; for on the premises of the owner, an actual possession is given to the auctioneer and his servants, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment. If it be otherwise the auctioneer gives credit to the vendee entirely at his own risk.” Heath, J., said, “the possession is in the auctioneer and it is he who makes the contract; if they should be stolen he might maintain trespass or an indictment for larceny; he therefore has a special property in them, which is all that is necessary to support this action.” Wilson, J., concurred with some hesitation. He said, “I think the verdict right because the defendant having contracted with the plaintiff
Nevertheless, this rule is constantly repeated in the books and a reference to the cases which have been wholly or partially based upon it may be desirable.

**SEC. 14.**—Under this rule it has been held that a mere interest in commissions to be earned would not, of itself, be sufficient; but the rule must be limited to those cases in which the agent has a lien upon, or a special property in, the subject-matter. In pursuance of this rule it has been held that cotton factors who have sold cotton consigned to them may, in their own names, recover the damages resulting from a breach of the contract by the buyer, although they may be bound to pay the damages, when recovered, to their consignors. The factors have a special property in the cotton, and have a lien upon it for their commissions, which commissions attach on the very damages they may recover, and would be increased thereby. So a broker may sue in his own name for the breach of contract to transmit a telegraph message sent by him, and directing the sale of property of his principal, in which the broker has a special interest and for the sale of which he is entitled to a commission. And agents who have a special interest in goods by reason of advances made for freight upon them and who have delivered them to another carrier for further transportation, may maintain an action in their own names against the latter carrier by whose negligence they were injured.

for the goods shall not be permitted to say that the plaintiff had no right to contract." He was evidently of opinion that the contract was one which might be regarded as having been made in the plaintiff's name and therefore he was entitled to sue upon it.

In Grove v. Dubois, i T. R. 112, the contract of insurance was made in the name of a *del credere* broker. In Atkyns v. Amber, 2 Esp. 493, the plaintiff, a factor, to whom timber had been given to sell and pay a debt due him from principal, was allowed to recover on a contract made in his name. In Williams v. Millington, 1 H. Bl. 82, an auctioneer was allowed to recover for goods sold at the disclosed principal's house. In Johnson v. Hudson, 11 East 180, a factor recovered for goods sold. It does not distinctly appear whether he was the nominal party. In Sadler v. Leigh, 4 Camp. 195, the factor was the nominal party. In Morris v. Cleasby, 1 M. & S. 576, the plaintiff was a *del credere* broker with an undisclosed principal.

"Fairlie v. Fenton, L. R. 5 Ex. 169; Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946.


*United States Tel. Co. v. Gildersleeve, *supra.*

*Steamboat Co. v. Atkins, 22 Penn. St. 522.* To the same effect is
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So an auctioneer has such a special property in the goods sold by him that he may maintain an action for the price, though they were sold as the goods of a named principal. A fortiori is this true where, by the terms of the sale, the purchase price is to be paid to him.

So a factor has such an interest as will enable him to sue for the price of the goods he sells. But a mere broker cannot sue.

SEC. 15. SAME SUBJECT—PRINCIPAL MAY SUE OR CONTROL ACTION.—As has already been suggested, however, the agent is not the only party who may maintain the action; for, as will be more fully seen in the following chapter, it is a well-settled rule that when a contract, not negotiable or under seal, is made by an agent for his principal, even though the latter were not disclosed, the principal may usually sue upon it instead of the agent. And this right of the principal to sue upon the contract ordinarily takes precedence over that of the agent; the principal being always at liberty to interfere and bring the action in his own name to the exclusion of the agent's right, except where the agent, by lien


Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353. In Pinkham v. Benton, 62 N. H. 687, plaintiff, an attorney, had several claims in his hands for collection and among these claims a certain judgment. He had made advances to his client relying upon the collection of these several claims for reimbursement. In this situation defendant applied to plaintiff to purchase the judgment. Plaintiff replied that he must obtain his client's consent, and having done so, sold the judgment to defendant. No formal conveyance was entered into, but the plaintiff charged the amount upon his books to the defendant. Defendant not having paid any one for the judgment, plaintiff brings this action to recover the agreed price. It was held that he might maintain the action. The judgment was put upon two grounds, viz.: first, that the defendant's promise was made to plaintiff personally by his client's consent; and secondly, that "plaintiff had an interest or property in the subject-matter of it." If he had such an interest or property, it must have been by virtue of some general lien for the balance of his account, or a special lien upon the judgment for his services in procuring it.


Fairlie v. Fenton, L. R. 5 Ex. 169; White v. Chouteau, 10 Barb. (N. Y.) 202; see also Buckbee v. Brown, 21 Wend. (N. Y.) 110.

or otherwise, has an interest or estate in the subject-matter of
the action which would be impaired if the principal were allowed
to sue. Thus, for example, if a factor has a lien upon the pro-
cceeds of goods sold by him to secure him for advances made to
his principal, the principal would not be permitted to destroy the
factor's security by recovering the proceeds upon which the fac-
tor's lien attached. The right of the agent in such a case to
sue exists notwithstanding any settlement with the principal,
unless the agent has not been prejudiced by the settlement,
or unless he has estopped himself from setting up his claim. Obviously, if the agent's claim has been otherwise satisfied by the
principal, the principal may recover.

It will be evident that the interest here referred to which
will prevent the action by the principal, is not necessarily the same
interest which has been referred to in the preceding section as
entitling the agent to sue.

The University of Chicago.

Floyd R. Mechem.

(To be concluded.)

Ludwig v. Gillespie, 105 N. Y. 653; Considerant v. Brisbane, 22 N. Y. 389;
Schaefer v. Henkel, 75 N. Y. 378; Rowe v. Rand, 111 Ind. 206.
5 The leading case is Drinkwater v. Goodwin, 1 Cowp. 251. Here a
factor made advances to his principal in reliance upon the security of
the proceeds of goods which the principal put in the hands of a factor.
Before these advances were repaid the principal became insolvent and both
his assignees and the factor demanded payment from the purchaser of
the goods. The purchaser paid the factor and was sued in this action by
the assignees of the principal. Held, they were not entitled to recover.
To same effect, where defendant sought to set off a claim against the
principal in an action by the agent who had made advances to more than
the value of the goods sold by him: Young v. Thurber, 91 N. Y. 388. See
also Beardsley v. Schmidt, 120 Wis. 405, 98 N. W. 235, 102 Am. St. R. 991.
6 Dickenson v. Naul, 4 B. & Ad. 638; Robinson v. Rutter, 4 El. & Bl.
954;
See Holmes v. Tutton, 5 El. & Bl. 65; Grice v. Kendrick, 5 L. R. Q. B.
340.
7 See Coppin v. Walker, 7 Taunt. 237.
Fed. 66; Grice v. Kendrick, 5 L. R. Q. B. 340; Merrill v. Thomas, 7 Daly
(N. Y.) 393.
THE UNIFORM NEGOTIABLE INSTRUMENTS LAW, IS IT PRODUCING UNIFORMITY AND CERTAINTY IN THE LAW MERCHANT?

II.

[The references to the various sections of the Act are to the Standard Act, as generally adopted, and as given in Brannan on the Negotiable Instrument Law.]

(6) The rights of a party to commercial paper who is the real but not the apparent surety. Secs. 119, 120, 192, 63, 64.

Before the Act parol evidence was almost universally admitted to show that the payee, or any holder, when he took the joint commercial paper of two makers or acceptors, knew of the suretyship of one for the other. The knowledge of that fact...
imposed upon the taker the duty of equitable conduct toward the surety. By the general law of suretyship the creditor is required to observe certain equitable duties toward the surety. The creditor must not give a binding extension of time to the principal debtor, that is to the person primarily liable. The creditor must not surrender collateral to the principal; nor commit any one of a number of other acts prejudicial to the surety, to which we shall presently refer, on pain of discharging him.

In like manner, before the Act, parol evidence was almost universally admitted to prove that the payee or holder knew on taking the paper that an acceptor or maker was in reality only

Helmrick, 57 Mo. 100 (1874); (seemle) Young v. Cleveland, 33 Mo. 126 (1872); Stillwell v. Aaron, 69 Mo. 539 (1879) (extension of time); Coats v. Swindle, 55 Mo. 31 (1874) (notice to sue under statute); O'Howell v. Kirk, 41 Mo. App. 523 (1890) (notice to sue under statute); Neel v. Harding, 2 Met. (Ky.) 247 (1859); Weller v. Ralston, 89 S. W. 698 (1905); Osborn v. Low, 40 Oh. St. 347 (1883) (extension of time); McComb v. Kittridge, 14 Ohio, 348 (1846) (extension of time); Billington v. Wagener, 33 N. Y. 31 (1865) (joint maker discharged by extension); Hubbard v. Gurney, 64 N. Y. 437 (1876); (seemle) Draper v. Trescott, 29 Barb. 401 (1859); Holt v. Bodey, 18 Pa. 207 (1852) (but see Diffenbacher's Estate, 31 Pa. Sup. 35 [1906], note 95, post); Adle v. Metoyer, 1 La. Ann. 254 (1846); Jones v. Fleming, 15 La. Ann. 522 (1860); McCarter v. Turner, 49 Ga. 309 (1873) (failure to sue under statute); (seemle) Stewart's Adm. v. Parker, 55 Ga. 656 (1876) (extension of time); Perry v. Hodnett, 38 Ga. 103 (1868) (extension of time); Matheson v. Jones, 30 Ga. 306 (1860) (fraud as to collateral fact known to plaintiff endorsee); Fraser v. McConnel, 23 Ga. 368 (1857) (notice to sue under statute); (obiter) Glenn v. Morgan, 23 West Va. 467 (1884) (admitting defence good at law except in specialty contracts, but deciding specialty contracts not dischargeable by parol at law); Harris v. Brooks, 21 Pick. 195 (1838) (statement of creditor that he will look to principal only); Horne v. Bodwell, 5 Gray, 457 (1853) (extension of time); (seemle) Guild v. Butler, 122 Mass. 498 (1877); Scott v. Scruggs, 60 Fed. 721 (1894); Vary v. Nielson, 6 Fed. 808 (1881) (extension of time); Flynn v. Mudd, 27 Ill. 323 (1855); (seemle) Stewart's Trustees, etc. v. Southard, 31 Ill. App. 359 (1853) (obiter) Ward v. Stout, 32 Ill. 399 (1853); (obiter) Voss v. Bank, 83 Ill. 599 (1876); Riley v. Gregg, 16 Wis. 666 (1865); (seemle) Irvine v. Adams, 48 Wis. 468 (1879); Moulton v. Posten, 52 Wis. 169 (1881).

Contra: California, &c., Bank v. Ginty, 108 Cal. 148 (1895) (practically overruling Capital, &c., Bank v. Reel, 62 Cal. 419 [1882]); Kritzter v. Mills, 9 Cal. 21 (1858); Yates v. Donaldson, 5 Md. 389 (1854 (denying the defence at law, but by dictum admitting relief to be in equity); Anthony v. Fritts, 45 N. J. (Law) 1 (1883) (held that the defence is inadmissible in a court of law, but a ground of equitable relief). See Westervelt v. Frech, 33 N. J. (Eq.) 451 (1881).

*Brandt on Suretyship, vol. i, chap. xiv (3rd ed.); De Coly on Guar-antees, *pp. 369-382; Ames's Cas. on Suretyship, pp. 153-183; Hening's Cas. on Suretyship, pp. 426-471.

*Brandt on Suretyship, vol. i, § 369, §§ 498-505 (3rd ed.); De Coly on Guarantees, *pp. 391-395; Ames's Cas. on Suretyship, pp. 192-216; Hening's Cas. on Suretyship, pp. 471-516.
an acceptor or maker for accommodation\textsuperscript{85} and that the drawer or the endorsing payee was the principal debtor. It is safe to assert that by the year 1890 all American courts of last resort with about six exceptions,\textsuperscript{86} had established as a uniform rule of the law merchant that knowledge by the payee, or holder, of the fact of suretyship before taking the paper could be shown by parol evidence despite forms or appearances.

American courts, with hardly an exception, held such real surety on commercial paper discharged by any act of the creditor which would discharge any other surety.

Recently the supreme courts of five states\textsuperscript{87} have held that the above doctrine of suretyship is overthrown by the Act. One

\textsuperscript{85} Laxton v. Peat, 2 Camp. 185 (1809); Davies v. Stainbank, 6 De. G. M. & G. 679 (1855) (accommodation acceptor discharged by extension); Meggett v. Baum, 57 Miss. 22 (1879) (accommodation acceptor); Daggett v. Whiting, 35 Conn. 366 (1888) (maker of check held surety without recourse to him); Hall v. Bank, 71 Ga. 715 (1883); Morehead v. Citizens Bank, 130 Ky. 414 (1908) (extension of time) [practically overruling Anderson v. Anderson, 4 Dana. (Ky.) 352 (1836)]; (semble) Marsh v. Bank, 48 Pa. 510 (1865) (maker of note surety for endorsee); Hoffman v. Habighorst, 38 Oregon, 261 (1901) (maker of note surety for third person not a party to the paper); Lacy v. Lofton, 26 Ind. 324 (1866) (statutory duty of creditor when so ordered to levy and exhaust principal's property) [practically overruling Lambert v. Sandford, 2 Black, 137 (1828)]; (semble) Boatmen's Bank v. Johnson, 24 Mo. App. 316 (1887); (semble) St. Joseph, &c., Co. v. Hauck, 71 Mo. 465 (1889); (semble) Canadian Band, etc. v. Coumbe, 47 Mich. 358 (1882) (accommodation acceptor discharged by extension of time to drawer); (semble) Guild v. Butler, 122 Mass. 498 (1877); Jennings v. Moore, 189 Mass. 197 (1905) (maker treated in equity as surety for anomalous endorser to payee and discharged pro tanto by loss of securities).

\textit{Contra:} (Semble) Wilson v. Isbell, 45 Ala. 142 (1871); Bank v. Walker, 9 S. & R. 229 (1823); Walker v. Bank, 12 S. & R. 382 (1823) (time given to the accommodated endorser held to be no discharge to the accommodating maker by the holder, who subsequently learned of the suretyship); White v. Hopkins, 3 W. & S. 99 (1841); Stephens v. Bank, 88 Pa. 157 (1878); Fourth Nat. Bank v. Fraizer, 9 Phila. 213 (1874); Delaware, &c., Co. v. Haser, 190 Pa. 7 (1901); but in Holt v. Bodey, 28 Pa. 207 (1854), one joint obligor of a bond was permitted to prove his suretyship by parol and obtained a discharge by showing the release of security by the creditor; Cronise v. Kellogg, 20 Ill. 11 (1858); Diversy v. Moor, 22 Ill. 330 (1859); Clopper's Ad'mr v. Bank, 7 H. & J. 92 (1826); Van Alstyne v. Sorley, 32 Tex. 518 (1870); Hoffman v. Bignall, 1 Tex. Ap. Civ. (Condensed Reports), p. 386 (1879).

\textsuperscript{86} As is shown in notes 92, 93 and 96, the only American jurisdictions to the writer's knowledge where this principle was not established were California. In New Jersey and Maryland the principle was applied by equitable process, but not at law.

\textsuperscript{87} Vanderford v. Farmers' Bank, 105 Md. 164 (1907); Bradley Engineering Co. v. Heyburn, 106 Pac. Rep. 170 (1910); Cellers v. Meachem, 49 Oregon, 186 (1907); Wolstenholme v. Smith, 34 Utah, 300 (1908); Richards v. Market Exch. Bank Co., 61 Oh. St. 348 (1910); s. c. 90 N. E. 1000.
supreme court has held otherwise.\textsuperscript{98} In a seventh state, the act being in force, the supreme court, without mentioning the Act has adhered to the above mentioned long established doctrine of suretyship.\textsuperscript{99} We will examine these cases presently.

Not only did the American courts before the Act apply the doctrines of suretyship where paper was taken with knowledge of the fact of suretyship, but in a great number of jurisdictions in this country, likewise in England, those doctrines were also applied where the payee, or any holder, learned after taking the paper, that an apparent principal was in reality a surety. If a holder with knowledge of that status acted prejudicially and inequitably toward the surety he was discharged. Illustrations of frequent occurrence were, binding extensions of time to the joint maker or to the acceptor or maker for accommodation.\textsuperscript{100} The surrender or waste of collateral was similarly treated in very many jurisdictions as inequitable conduct on the part of any holder of paper with notice of the suretyship. In some states the extension of time and the surrender of collateral did not effect a discharge when the creditor's knowledge was acquired after transfer.\textsuperscript{9} The above are only two illustrations of inequit-

\textsuperscript{98} Lumber Co. v. Snouffer, 139 Iowa, 176 (1908).
\textsuperscript{99} Farmers' Bank v. Wickliffe, 134 Ky. 627 (1909); see Fritts v. Kirch-dorfer, 124 S. W. 882 (1910).
\textsuperscript{100} Ewin v. Lancaster, 6 B. & Sm. 571 (1865) (accommodation acceptor discharged by time given by holder to the accomodated drawer; knowledge existed only at time of extension; Cropmton, J., said “that is the time to be looked at, because it is the time when the equity arises”); Laxton v. Peat, 2 Camp. 185 (1809); Bailey v. Edwards, 4 B. & S. 761 (1864) (accommodation acceptor surety for endorser); Lauman v. Nichols, 15 Iowa, 161 (1865) (joint maker discharged by extension of time); Zapalac v. Zapp, 22 Tex. Civ. App. 375 (1900); Wheat v. Kendall, 6 N. H. 504 (1834); Fuller v. Quesnel, 63 Minn. 302 (1895); Smith v. Clopton, 48 Miss. 66 (1873); Valley Bank v. Meyers, 17 Nat. Bank Rep. 257 (circ. 1877) (D. C. E. Dist. of Mo.) (maker of note surety for endorser discharged by extension of time); Westervelt v. Frech., 33 N. J. Eq. 451 (1881) (maker of note surety for payee for endorser discharged by extension of time); Shelton v. Hurd, 7 R. I. 403 (1863) (payment by endorsee to holder causing a discharge of the payee endorser of whose surety the holder had notice before payment). \textit{Contra}: Hoge v. Lansing, 35 N. Y. 136 (1866) (maker accommodating the payee); \textit{(obiter)} Farmers', &c., Bank v. Rathbone, 24 Vt. 19 (1853) (acceptor in fact not for accommodation); Gano v. Heath, 36 Mich. 441 (1877) (joint makers); Diversy v. Moor, 22 Ill. 330 (1859) (accommodation acceptor not discharged by statutory notice to sue drawer); Heath v. Derry, 44 N. H. 174 (1862) (the note reading “all as principals promise to pay”).
\textsuperscript{9} See cases cited as \textit{contra} in note 100, ante.
able conduct as a defence. We shall later note that there are a number of other defences in the law of suretyship.

Rules of commercial law and of suretyship, so long continued, so widely adopted and so generally regarded by our courts as being consonant with justice should never have been overthrown unless upon démonstration that the American courts had all along been deceived by perjurers into discharging parties to commercial paper who pretended to be sureties, but were in reality, as in appearance, primarily liable. There was no English inspiration for the novelty. The Bills of Exchange Act introduced no change in England, where the law was as liberal to the surety as in the most liberal of the United States.

Yet, as above stated, a complete reversal in the law of suretyship in relation to commercial paper has already been accomplished in five states—contrary minded one state—by the interpretations of Secs. 119, 120 and 192 of the Act.

"Sec. 120. A person secondarily liable on the instrument is discharged:

* * * 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."

"Sec. 192. 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."

The following case is typical of those which have given rise to the interpretations of the Act now under consideration.

A and B are joint makers of a promissory note to the order of C, who is aware upon taking the note that A in reality is principal debtor and B is only his surety. After maturity, C gives to A a binding extension of time. What is the effect of such extension on the right of C against B if C's knowledge of the fact of B's suretyship is proved by parol evidence? Before the Act, B was discharged in practically all the states. The writer finds only a few exceptional jurisdictions where the defence is not

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*See ante, note 92.
valid both at law and in equity. These are given at the conclusion of the preceding note. Under the Act, B is not a discharged in Maryland,\(^2\) in Washington,\(^3\) in Oregon,\(^4\) in Utah,\(^5\) in Ohio.\(^6\)

But B is discharged in Iowa\(^7\) and in Kentucky.\(^8\)

The Act has admittedly reversed the rule in Oregon,\(^9\) Utah,\(^10\) and Ohio.\(^11\)

By what reasoning are the above sections so interpreted as to turn upside down the pre-existing uniform law? The judicial reasoning just now in vogue is, (1) that a joint maker cannot under Sec. 192 be "secondarily liable" but must be "primarily liable"; (2) that a joint maker being so liable cannot be otherwise discharged than as set forth in Sec. 119; (3) that the modes of discharge of a person "secondarily liable" set forth in Sec. 120 can apply only to him who appears on the paper to be "secondarily liable."

The Supreme Court of Iowa (the dissenting state), felt such a reluctance to wholly annihilate the previously settled rule of suretyship in that state that its Supreme Court held the inequitable conduct of the payee in the foregoing hypothetical case to be a discharge of the joint maker.\(^12\) This interpretation of the Act in Iowa distinguishes between the duty of a payee taking with notice and a bona fide purchaser.\(^13\)

It must likewise follow that in the above named five juris-

\(^{12}\) Vanderford v. Farmers' Bank, 105 Md. 164 (1907).
\(^{14}\) Cellers v. Meachem, 49 Oregon, 186 (1907).
\(^{15}\) Wolstenholme v. Smith, 34 Utah, 300 (1908).
\(^{17}\) Fullerton Lumber Co. v. Snouffer, 139 Iowa, 176 (1908).
\(^{18}\) Farmers' Bank v. Wickliffe, 134 Ky. 627 (1909); see Fritts v. Kirchendorfer, 124 S. W. 882 (1910).
\(^{19}\) See authorities cited in Cellers v. Meachem, 49 Oregon, at p. 189.
\(^{20}\) In Wolstenholme v. Smith, 34 Utah, at p. 302, the court says: "There is no doubt that under the decisions of this court prior to the enactment of (the law) relating to negotiable instruments, the facts alleged in the answer and found by the court constituted a defence and discharged Darmer."
\(^{22}\) See Chambers v. Cochran, 18 Iowa, 159.
\(^{23}\) Fullerton Lumber Co. v. Snouffer, 139 Ia. 176 (1908).
\(^{24}\) Ib., p. 178.
dictions wherever the drawer or endorsing payee is in fact the principal debtor, and the maker or acceptor has signed solely for the accommodation of the principal, the creditor or holder owes no equitable duty to the accommodation maker or acceptor. His suretyship cannot be proved for the purpose of showing his discharge because, according to the foregoing interpretation, he is not secondarily liable. Only those are held to be secondarily liable who so appear on the paper. Hence if A is the accommodation maker of a note to the order of B, who is the principal, and C, taking the paper by indorsement from B with knowledge of these facts, gives to B a binding extension of time, A would not be discharged.

It has been previously shown that in England and in very many states, before the Act, A was discharged upon parol proof of C's conduct in so extending the time of payment to B. Under the Act the case of the accommodated drawer is the same as that of the accommodated payee. Parol evidence to show that the accommodated drawer is primarily liable must of course be excluded if the above five courts adhere consistently to their interpretation. If other courts follow those five, the result of course, is the overthrow of much law which prior to the Act had been uniformly settled.

And yet, according to the now prevailing interpretation of the Act, if the extension were given to the maker A, the indorser B would be discharged in the above case. This result, as pointed out by Professor Ames involves the farcical conclusion that under the Act time given to a surety discharges the principal debtor.

Finally, according to this now dominant interpretation, the case is no different where the holder after obtaining title to the

34 See ante, note 95.
35 "It certainly discharges the accommodated endorser of a note, if the holder with knowledge of the accommodation should release the accommodating maker. This would be a shocking result and contrary to all the reported decisions on this point." 14 H. L. R. 448 (1901). Reprinted in Brahan on The Negotiable Instrument Law (2nd ed.), p. 200.

Professor Ames' final utterance, so far as I am aware, was in February, 1903, in 16 H. L. R. 255, 259: "Sections 120-5 and 120-6. No elasticity of interpretation can correct the errors of these sub-sections. They declare in effect that a release or the giving of time to an accommodation acceptor or maker will discharge the accommodated drawer or endorser, and thereby overturn well established doctrines of suretyship; these inaccurate statements of the law of suretyship should be eliminated."
instrument acquires knowledge of the suretyship and acts inequitably to a joint maker or any maker or acceptor who signs for accommodation only.

The surety in such cases cannot be discharged in Maryland, Washington, Oregon, Utah, or Ohio without an inconsistency scarcely thinkable in the interpretation of the Act. Obviously, in those five jurisdictions knowledge of the suretyship acquired by the holder after taking title to the paper can impose no greater duty to do equity than knowledge acquired before transfer. The effect of the dominant interpretation in the five above mentioned jurisdictions (and those which will follow them) is the overthrow of the law as previously laid down in Iowa, Texas, New Hampshire, Minnesota, Mississippi, New Jersey, Rhode Island.10

But we are told that the Maryland, Washington, Oregon, Utah, Ohio interpretation is a misinterpretation of the Act. It is argued by commentators17 on the Act (and with plausibility), that inasmuch as Section 119 provides that: "A negotiable instrument is discharged * * *. (4) By any other act which will discharge a simple contract for the payment of money," the rule applicable to simple joint contracts allowing parol evidence of the suretyship of one joint maker for the other also applies to negotiable instruments. But is it not true that the more forcibly this proposed interpretation may strike the judges of other states the more diversity will exist in the interpretation of the Act? And how does the proposed interpretation apply to the maker for accommodation? Is the accommodated indorser bound by "simple contract"?

Plainly it is now too late to hope for uniformity of the law on this point by any uniformity of interpretation of sections 119, 120, 192. To reach a uniform rule either Iowa must change her interpretation and with other states must follow the five states above mentioned, or, on the other hand, those five states must abandon their interpretation. Is there less hesitancy on the part of judges to correct a prior misinterpretation of a code than

10 See ante, note 100.
to correct a prior erroneous declaration of the common law? But absolute uniformity could not be attained even by a harmony of judicial interpretations of Sections 119, 120 and 192. Three states, Wisconsin, Illinois and Kansas, never adopted sections 119, 120 and 192 in the form adopted by the other states. These three states were influenced to adopt a modification of the sections in question by the criticism of the Act offered by Professor Ames, who predicted in 1900\(^8\) that very eclipse of the surety’s rights accomplished over seven years later by the Act in the five States of Maryland, Washington, Oregon, Utah and Ohio.

The three states above mentioned, viz: Wisconsin in 1899,\(^9\) Kansas in 1905,\(^{10}\) and Illinois in 1907,\(^{11}\) when they adopted the Act, attempted to avoid certain predicted wrongs to the surety by introducing somewhat different phraseology into the sections under examination. But even as between Wisconsin, Illinois and Kansas there is no uniformity. The equitable defences are different in Wisconsin from the equitable defences in Illinois and Kansas. The situation will be apparent from a glance at the varied enactments of the three states.

The Wisconsin edition of the Act consists in substance of an attempt to confer upon the “person secondarily liable upon the instrument” a number of the equitable defences of the surety.

By the Wisconsin Act:

“A person secondarily liable on the instrument is discharged:
1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party.

\(^{8}\) 14 H. L. R., p. 254 (1900).

\(^{9}\) Laws of Wisconsin, 1899, ch. 356, sec. 1679-1.
The Wisconsin variations are noted in Brannan on The Negotiable Instrument Law (2nd ed.), p. 120.

\(^{10}\) In Kansas the variation consists in omitting from section 192 of the act, the last line—“All other parties are ‘secondarily liable.’” Kansas Laws of 1905, chap. 310, sec. 2.

See Brannan (2nd ed.), p. 158.

\(^{11}\) Laws of Illinois, 1907, p. 478, sec. 119. The Illinois variations are noted in Brannan on The Negotiable Instrument Law (2nd ed.), p. 120.
4a. By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder’s hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes.

5. By an 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 prior or subsequent of the party secondarily liable, unless the right of recourse against such party is expressly reserved, or unless he is fully indemnified.”

Here then are certain defences recognized by the law of suretyship and incorporated into the law of negotiable paper in Wisconsin for the benefit of the “person secondarily liable upon the instrument” which do not exist as defences under the Act or in the Illinois variation of the Act.

The Wisconsin Act has preserved the definition of a person secondarily liable given in the Act. The question seems to be as yet undetermined in that state since the Act, whether an apparent principal can be shown to be in reality a surety.

The Illinois act has modified the Act by incorporating for the benefit of the real surety, but apparent principal, provisions designed to permit equitable defences based on a binding extension of time, and on the release of the principal without reservation; but has omitted altogether the words of the Act (as recommended) which provide that the discharge of a prior party works the discharge of a subsequent party. The Illinois modification of Section 120 of the Act is given in the note. The Illinois

2 Sec. 192.
3 The Illinois Act reads as follows:

“A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By a valid tender of payment made by a prior party.
4. By a release of the principal debtor, unless the holder’s right of recourse against the party secondarily liable is expressly reserved, or unless the principal debtor be an accommodating party.
5. By an agreement in favor of the principal debtor 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 prior or subsequent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party.” Laws of Illinois, 1907, p. 418, sec. 119.
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act omits the two defences peculiar to the Wisconsin act—the surrender of collateral and the failure to apply available property.

The Kansas modification\(^2\) consists in dropping from Section 192 of the Act the concluding sentence—"All other parties are secondarily liable." The Kansas act\(^2\) adopts Section 120 of the Act without change. Hence it would seem that in Kansas the person who is an apparent principal can be shown to be in reality a surety.

The omission above noted removes the basis for that interpretation which, as heretofore shown, has been put upon the Act in the five states that have destroyed the defences of the surety on commercial paper.

These variations from the Act in Wisconsin, Illinois and Kansas are not the only variations.\(^2\) But the writer's purpose is not to emphasize the point that local patchings and mendings of an act, which is intended to introduce uniform rules of law, defeat the entire program of uniformity. Professor Patten has clearly pointed out and illustrated this unfortunate local tendency.\(^2\)

The question is, what is to be done to prevent the destruction of the rights of the surety on commercial paper? Uniformity cannot be accomplished by judicial interpretation of the Act. The question then must be answered, should the surety's rights be saved by supplemental legislation in the various States, substituting for the Act the Wisconsin or the Illinois or the Kansas modification, or a modification different from each?

It is the writer's view that no legislation of the kind should be attempted but that Sections 120 and 192 should be totally repealed.

The reasons for this view will be presently elaborated, but

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\(^2\) Kansas Laws, 1905, chap. 310, sec. 2.

\(^2\) Kansas Laws, 1905, chap. 310, sec. 127.

\(^2\) In New York and Maryland, by the act as there modified and adopted, a binding extension given with the assent of the surety would seem nevertheless to work the discharge of even the actual and apparent surety. Such a result, it is needless to say, is contrary to the well settled principles of suretyship. But that conclusion would seem to be inevitable from the omission of the words "unless made with the consent of the party secondarily liable or" in sub-section 6 of section 120 of the act.

The New York and Maryland variation is noted in Brannan (2nd ed.), p. 120.

in substance they amount to this—that unless all defences of the surety are codified none should be; that all cannot be successfully codified owing to the diversity of the suretyship rules under both the decisions and statutes of the different states. Professor Ames in criticising the Act very truly said:

"There seems to be no sufficient reason, on the one hand, for inserting these doctrines of suretyship in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance."

But there would seem to be a sufficient reason for not inserting any defences unless all are inserted. The omission of a defence from the code indicates an intention that the omitted defence shall no longer exist.

The Wisconsin act does not mention the defence of the surety who has been misinformed by the creditor as to the condition of the principal's accounts and transactions, nor the defence that the surety has been told by the creditor that he will look only to the debtor, nor the defence of the surety growing out of dealings between the creditor and co-surety. Are these defences taken away in Wisconsin? Does the rule *expressio unius*, &c., apply? If not, why not? So too no reference is made in the Wisconsin act to a statutory defence now existing in many states and based upon a request by the surety to the creditor to sue the debtor. Are all such prior statutes repealed by implication in the states which have adopted the original text of section 120? So the Ohio court believes (*obiter*) to be the

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2 14 H. L. R. 254, 448 (1901).
3 Frank Fehr Brewing Co. v. Mulligan, 66 S. W. 627 (1902); s. c. 23 Ky. Law Rep. 2100.
5 Harris v. Brooks, 21 Pick. 195 (1838).
6 See Ames' Cases on Suretyship, chap. II, sec. XIII.
7 Professor Ames (Case Book on Suretyship, p. 223, n. 2) remarks: "In several states there are statutory provisions in regard to a request by a surety to the creditor to sue the debtor. Nearly all of such statutes require a request in writing and by some of them a failure to sue, releases the surety even though the surety has suffered no loss by such failure. But there is no uniformity in these statutes." He then cites a large number of state decisions discussing the statutes in question.
Reference to some of these statutes is also given in Stimson's American Statute Law (1886), vol. I, sec. 5105, (A), (B), (C).
present situation in Ohio. These prior statutes have received a liberal construction, and have been applied where the surety appears as an apparent principal on commercial paper.

But is it not a vain hope that all state courts will uniformly adopt this view of an implied repeal by the Act of so many pre-existing express statutory defences? Mr. Jeremy Bentham, no doubt, would say, let these pre-existing statutes and the general doctrines of suretyship be all incorporated into a New Comprehensive Code of Suretyship and let that be promulgated by the Commissioners and adopted by the states. Uniform Codification of Suretyship is however something much easier said than done. As to the defence based on a request to sue, we must note that all states do not have this statutory defence; and as, apart from statute the defence does not generally exist, the enactment of this defense in a code of suretyship must alter the law now existing in many states.

It is not the writer's purpose to discuss the general question of the feasibility of uniform codification either of suretyship or of other branches of the law. Certainly the results of the uniform codification of the law of commercial paper cannot be called an auspicious augury for the draftsman of a code of suretyship. It may be suggested, however, that he should avoid an ambiguity existing in the Wisconsin act. See the peculiar Wisconsin words: "There being in the holder's hands or within his control the means of complete or partial satisfaction the same are applied to other purposes." A bank, holding a note of A its depositor payable generally and not at the bank, permits A at maturity to check out his balance. Is the endorser discharged? The Wisconsin words might or might not be held to so import. If they do then the Wisconsin law will be exactly the contrary of the now existing rule in the adjoining state of

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34 Some of these cases are in note 92, ante.
36 Ames' Cases on Suretyship, p. 22, note 2: "But in most of the states the courts have repudiated the doctrine of Pain v. Packard."
38 This subject as a present day problem is discussed by Professor Patten in University of Pennsylvania Law Review, vol. 59, p. 203.
Illinois,\(^{37}\) and in the states of Indiana,\(^{38}\) Maryland,\(^{39}\) Massachusetts\(^{40}\) and Pennsylvania.\(^{41}\)

It will be noted that Professor Ames' advice, given before section 120 had been construed by any court is the inspiration of this present argument for the repeal of Sec. 120. Said he:

"The wise course is to drop sub-sections five and six from the act."

His final opinion was:

"No elasticity of interpretation can correct the errors of these sub-sections * * *. These inaccurate statements of the law of suretyship should be eliminated."\(^{42}\)

Professor Ames, profoundly learned in both the law of suretyship and of negotiable instruments, based his judgment that suretyship defences should be excluded from section 120 upon grounds already stated. For needed additional emphasis let us repeat them here:

"There seems to be no sufficient reason, on the one hand, for inserting in a negotiable instrument code, the doctrines of suretyship in sub-sections 5 and 6, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance."\(^{43}\)

It is submitted that the entire argument of the present writer is merely an expansion and elaboration into detail of the above sentence.

It is submitted that we wholly miss the meaning of this great master of the common law if we understand him to advise a fragmentary codification of suretyship incorporated into the negotiable instrument code as has been done in Wisconsin.

\(^{37}\) Second Wabash Bank, &c., v. Hill, 76 Ind. 223 (1881).
\(^{38}\) Voss v. Bank, 83 Ill. 599 (1876).
\(^{42}\) National Bank, &c., v. Smith, 66 N. Y. 271 (1876).
\(^{43}\) 14 H. L. R. 259 (1903).
\(^{44}\) 14 H. L. R., p. 448 (1901).
It is true that Professor Ames in addition to the above advice also said:

"If these sub-sections are retained even in amended form, another should be added to the effect that an accommodating acceptor or maker will be discharged if the holder with knowledge of the accommodation releases or gives time to the accommodated drawer or endorser. The authorities are almost unanimous on this point."

But it is submitted that this is a suggestion to correct an obvious inaccuracy and not a recommendation of fragmentary codification of suretyship.

Section 120 contains also an ambiguity in sub-section 3—in the word "discharge." This word has already been the subject of controversy between commentators. In fact, there appears to be nothing in the section except erroneous statements of law, the ambiguity noted, and a few truisms universally admitted.

It should be borne in mind that the law generally prevailing before the Act did not impose upon the bona fide purchaser of commercial paper any latent equities of an unknown surety. The payee taking a joint note with knowledge of a relation of principal and surety between the joint makers or with knowledge of the relation between an accommodation acceptor or maker and a drawer was merely required to respect the rights of a known surety. If this general rule is to be preserved the surest method of preserving it is the repeal of the sections which now endanger it.

The case of the anomalous indorser may present various contracts of suretyship. To fasten some sort of law merchant liability upon him various fictions have from time to time been resorted to by the courts. He has been called and treated as "a new drawer," "a joint maker," "a second indorser," "a first indorser," "a surety," "a guarantor."

Inconsistent as these fictions are with each other, they usually have been applied in conformity to one doctrine common to all—the admissibility of parol evidence to show inter partes the

*A résumé of the discussion of this ambiguity by various commentators is given in Brannan on The Negotiable Instrument Law (2nd ed.), pp. 120, 121."
person for whom and the person to whom this irregular signer became responsible and the terms of that undertaking.

A codification therefore of the liabilities of the anomalous indorser as surety should provide also for his rights as surety—his right of reimbursement against his principal, his right of contribution against his co-sureties.

Sections 63 and 64 of the Act define the liability of an anomalous indorser, but here again the fundamental doctrines of suretyship are not compatible with the words of these sections.

Thus under section 64 no adequate provision is made for the case where the drawer has a debt against the drawee, who accepts the bill drawn to the drawer's own order, and the bill is then anomalously endorsed for the benefit of the acceptor before delivery by the acceptor. Here the acceptor is the principal debtor. The anomalous indorser is his surety to the drawer-payee, who should obviously be entitled to recover on the bill.

But by the strict wording of sub-section 2 of section 64 of the Act, the inference is certainly a fair one that the anomalous indorser is liable (only) to all parties subsequent to the maker or the drawer. An interpretation of the Act as applied to the above stated situation has been given by the New York Court of Appeals. That court holds that such anomalous indorser is liable to the drawer-payee, where parol evidence shows that the anomalous indorser was surety for the acceptor to the payee. The court's exegesis of the statute is somewhat forced; particularly, where it is said that "the maker of the bill is in legal effect and within the intention of this section an indorser." Nevertheless, the following general positions taken by the court are likely to be followed in those jurisdictions which respect long-established doctrines of suretyship:

"Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated. * * * There is no reason

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46 This defect in section 64 was pointed out by Professor Ames in XIV H. L. R., p. 250 (1900).
47 Haddock, &c., Co. v. Haddock, 192 N. Y. 499 (1908).
that we can conceive why the legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in their state many years."

As contended by Professor Brannan, the New York decision seems incompatible with the view that the section states an absolute and not merely a *prima facie* liability.

In this view the writer fully concurs. There seems to be no doubt that sections 63 and 64 taken together are not the statement of disputable presumptions, subject to modification by parol evidence of intention. Section 63 asserts that such a signer is to be deemed to be an indorser. Only one exception is mentioned where this inference does not apply—his indication by appropriate words of his intention to be bound in some other capacity. This one exception clearly negatives any other exception. If the case of parol evidence to prove a contrary intention from the writing were also an exception, mention would certainly have been made of it.

It would also have seemed to be quite plain that sections 63 and 64 were not designed to define the liabilities of the anomalous indorser merely in respect to purchasers for value without notice. If such had been the intention then the words "holder in due course" would doubtless have been used. They occur in section 56 of the Bills of Exchange Act—of which section 63 of the Act is a partial reproduction.

An intention to define the anomalous indorser's liability to the other parties to the paper is indicated by the implications contained in the expressions "he is liable to all parties subsequent to the maker or drawer," and "he is liable to all parties subsequent to the payee." The implication is, that the anomalous indorser in the situation described in sub-section 2 is not to be liable to the maker or drawer, or to the acceptor. The implication in sub-section 3 is that the anomalous indorser is not to be liable to the payee nor to any parties prior to the payee.

And yet the Supreme Court of Tennessee as one of several grounds of decision, in holding an anomalous indorser to be a maker, says:

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Brannan on the Negotiable Instruments Law (2nd ed.), pp. 78, 79.
"We are of opinion that the real contract between the parties can be shown now as fully as it could have been shown before the passage of the negotiable instrument Act."\textsuperscript{47a}

The above mentioned New York theory also seems incompatible with that of those five previously enumerated states where the Act is held to exclude parol evidence of known suretyship. In other words, when the question of the effect of a binding extension of time knowingly given by a holder to an apparent surety, but real principal, shall again arise in New York it is likely that the real surety, though an apparent principal, will be held to be discharged. Such was the New York rule before the Act.\textsuperscript{48} When a court to preserve the doctrines of suretyship calls a drawer an indorser within the intention of section 64, that court will hardly hesitate to construe "person secondarily liable" in section 120 as meaning the person who is in reality secondarily liable. In section 191, the terms "person primarily liable" and "person secondarily liable" could by such a court be treated as fluid terms stating only the \textit{prima facie} liability, but where "the context otherwise requires," the true \textit{status} could be shown. Parol evidence of the facts together with the whole law of suretyship would then be the context.

Professor Brannan very truly observes that: "The construction put by the New York Court of Appeals on section 64-2 seems fatal to uniformity."\textsuperscript{49}

Again, the drawer of the bill may be the accommodated party and the anomalous signer may lend his credit to secure the acceptor for accommodation, who would therefore be entitled to reimbursement from the anomalous signer. If the drawer was also the payee, and the irregular signing was done before delivery, such signer would by the Act be "liable to all parties subsequent to the maker or drawer." But he would not be liable to the acceptor for accommodation. Or suppose in the given case the anomalous signer had agreed with the acceptor for accommodation to divide the loss equally with him?

\textsuperscript{47a} Bank v. Busby, 120 Tenn., at p. 666 (1908).

\textsuperscript{48} See \textit{ante}, notes 92, 95.

\textsuperscript{49} Brannan on \textit{The Negotiable Instrument Law} (2nd ed.), p. 79.
The anomalous indorser may be a principal debtor. The bill or note may be drawn to the drawer's own order and the anomalous indorser be the principal debtor. Rare though such a case may be, a correct administration of the law merchant requires that the anomalous indorser, if he be in fact the principal, should reimburse his surety regardless of the fact whether that surety is a subsequent indorser, the drawer, the payee or the acceptor.

If it be argued that the section does not pretend to apply to a case where the anomalous indorser is a principal, the answer is that the words of sub-section two make the anomalous indorser "liable to all parties subsequent to the maker or drawer," wherever the drawer is the payee.

If the payee were surety for the anomalous indorser and, having paid, sued him for reimbursement, section 64 would apparently preclude recovery.

Again the anomalous signer may be indeed a surety, but a surety for the indorsee. Suppose the bill is drawn for the accommodation of the indorsee of the payee. This indorsee or second indorser is then the principal debtor. Suppose the drawer-payee-indorser is a co-surety with the anomalous signer for the second indorsee. If the drawer-payee pays the bill, and sues the anomalous indorser for contribution, how can he recover when the Act says such anomalous signer "is liable to all parties subsequent to the maker or drawer?"

A and B are joint makers of a note to their own order, but A is the acknowledged principal, B and the anomalous indorser C agree to be liable equally as sureties for A.

If A and B endorse to X and B pays the entire note can he recover one-half from C?

The several hypotheses above given obviously raise the following question:

To what actions do sections 63 and 64 apply? Do they define the rights and liabilities of the irregular signer in only those actions which are based upon the bill or note? Or, do these two sections also apply to actions for reimbursement and for

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50 Jennings v. Moore, 180 Mass. 198 (1905), 75 N. E. 214 (1905) (Mass.).
contribution based upon those express or implied contracts of suretyship which fix between the parties themselves their liability on the paper?

On this point the sections are hopelessly ambiguous. In cases where the drawer is not the payee and the instrument is not payable to bearer as specified in sub-section 2, free play may be given under the Act to the doctrines of suretyship. Thus, the anomalous indorser can recover against the maker, “but the action is not on the note.”

The radical defect throughout section 64 is that it makes the rights and liabilities of the irregular signer dependent upon the form and not the substance of the contract. The expression: “If the instrument is payable to the order of”—makes formality a test of liability.

The writer believes that section 64 of the Act should be repealed in toto, as it is likely to lead to interpretations contrary to that of New York. The desirable result reached in that state by doing some violence to language, would then be possible on acknowledged principles of the law merchant and of suretyship.

But section 63, in the writer’s opinion should not be repealed, but amended so as to express more satisfactorily the liability and the rights of the anomalous signer.

The suggestion of Professor Ames is to amend section 64 by striking out the first two sub-sections and substituting the following (as has been done in Illinois):

(1) “If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties.

(2) If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer.”

Though these suggestions obviate two of the difficulties above hypothetically suggested by the writer they do not obviate them all.

They do not provide for the cases where the anomalous signer is a surety for the indorsee as principal, nor where the

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1 Quimby v. Varnum, 190 Mass. 211 (1906).
anomalous signer is a co-surety for the drawer with the acceptor, nor where the anomalous signer and one joint maker of a note are co-sureties for the other joint maker.

Nor, it is submitted, are the changes advised by Professor Ames free from the ambiguity of the original section as to the extent of liability in an action for contribution where the anomalous signer is a co-surety. Thus, suppose the drawer-payee and the anomalous signer are co-sureties with equal liability for the acceptor as principal. The drawer-payee having paid the bill sues the anomalous signer. To what extent would he be allowed to recover?

Moreover, any legislative enactment which makes the irregular signer conclusively an indorser as to any immediate parties will either work injustice or breed contradictory interpretations. The New York and Tennessee decisions prove the futility of a legislative fiat that courts of justice shall disregard the equitable doctrines of suretyship in relation to commercial paper.

But, if repealing section 64 in toto we substitute for the section 63 of the Act, the section 56 of the English Bills of Exchange Act with some modification, the writer believes that a better codification of the subject will be accomplished than to adopt the suggestions of Professor Ames. Section 56 of the Bills of Exchange Act provides:

"Where a person signs a bill otherwise than as drawer or acceptor he thereby incurs the liabilities of an indorser to a holder in due course."

This section can be made applicable to notes by inserting after the word "acceptor" the words "or signs a note otherwise than as a maker or drawer."

The English Bills of Exchange Act, sec. 56, in dealing with the anomalous indorser attempts no such rigid solidification of the law of suretyship as is supposed by American commentators to be the effect of the American Act, and as future decisions (conflicting with those of New York and Tennessee) are practically certain to hold.

The English Section 56 applies only to a holder in due course and the rights of immediate parties against the anom-
alous signer; and his rights against them are left (unfettered by presumptions) to be determined by parol evidence. A presumption of liability by one signer to another presupposes that a certain order of signing is tantamount to the expression of a certain liability. But if the signing is anomalous or irregular then no presumption whatever should exist between immediate parties.

The English Section 56 fortunately therefore creates not even a *prima facie* liability between the parties and the anomalous signer. The *bona fide* holder for value or holder in due course is in a different position.

In Pennsylvania the repeal of section 64 and the substitution of section 56 of the Bills of Exchange Act would destroy the presumption of the Act that the anomalous signer is as an indorser liable to the payee. Before the Act, in Pennsylvania, he was not so liable even on parol proof of intention. But that view should give place to the broader idea that the anomalous signer is a law merchant surety like the *aval* of the Civil Law, and is neither a fictitious "second indorser" nor a Common Law within the Statute of Frauds. Glenie v. Smith, L. R. 1 K. B. 263 (1908) adopts this view.

On the question of notice of dishonor to the anomalous signer the writer believes that such a clause as the following at the conclusion of the substituted section, would promote uniformity:

"A person so signing is, if secondarily liable, entitled to notice of dishonor before he can be held liable either to an immediate party or to a holder in due course."

A surety, at common law not being entitled to notice of his principal's default, uniformity may thus be promoted between jurisdictions of which some might treat the anomalous signer as entitled to notice, and others, as a surety entitled to none. The immediate parties like the holder in due course would then be obliged to give notice of dishonor in all cases of secondary liability.

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