Married Women's Contracts of Suretyship

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At common law a married woman had no capacity to contract and her attempted contracts were altogether void. This was a result of the theory that by marriage she became one with her husband and her legal existence was suspended; and of the fact that she had no property in respect of which she could contract.¹ The first statutory alteration of this common law rule in Pennsylvania was the act of 1848,² which provided that all property owned by a married woman at the time of her marriage, or acquired thereafter, should remain her separate property. This gave her no general power to contract, though she could contract, thereunder, to a limited extent with reference to her separate statutory estate.³ This was followed by a more liberal statute in 1887,⁴ conferring upon her a general capacity to contract, with stated exceptions; which, in turn, was supplanted by the Act of June 8, 1893,⁵ which, as to her contractual capacity, is the law of Pennsylvania today. Section two of the Act of 1893 provides:

"Hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing, or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation endorser, maker, guarantor, or surety for another . . ."⁶

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²See I Schouler, "Marriage, Divorce, Separation and Domestic Relations" (6th Ed. 1921), 239-246; Madden, "Persons and Domestic Relations," 96.
³P. L. 536.
⁵P. L. 332.
⁶P. L. 344, 48 PS. Sect. 32. The first two sections are quoted in full in n. 7 of the Note: "Right of a Married Woman to Sue Her Husband on Contract," which appears in this issue of the Law Review.

The following states have statutes substantially the same as this: Alabama—Ala. Code 1907, Sect. 4497; 1923, Sect. 5272 (only forbids suretyship for husband); Georgia—Civil Code 1910, Sect. 3007; Kentucky—Ky. St., Sect. 2127-28 (for husband only); New Hampshire—Pub. St. 1891, c. 176, Sect. 2; and Vermont—Act 1884, No. 140. G. L. 3523, as amended Acts 1919, No. 90 (for husband only). Indiana had such a statute until 1926, when married women were given capacity to contract as surety—see Burns Ann. St. 1926, Sect. 8738. The same was true of New Jersey, full capacity to contract being conferred in 1927—see Comp. Stat. N. J. p. 943; and of the Dist. of Columbia—Code Sect. 1155, repealed Act May 28, 1926, 44 Stat. 676. The present article will be confined to the law of Pennsyl-
It would seem, at first glance, that little difficulty should be encountered in determining, in any specific case, whether a married woman was an accommodation party or surety in respect to her contractual commitments. However, a reading of the cases which have arisen since this enactment will readily dispel such a cursory conclusion. It is evident that if she is to be given the protection against suretyship obligations which the statute assures her the courts can not be governed by the usual, technical rules of suretyship, but must look at the realities of the transaction rather than the formalities. The purpose and intent of the statute would be defeated and its provisions nullified if it could be circumvented by some formal device whereby apparently she is a principal, but actually a surety. This article is an endeavor to ascertain what is really meant by an "accommodation endorser, maker", etc. within the meaning of this provision; and an attempt, by collecting and comparing the numerous decisions, to evolve some fairly definite and workable rules and tests, which may be of assistance in applying the statute to particular factual situations. It is felt that this can be accomplished most effectively by considering separately the various typical contractual dealings of married women and thus, while proceeding, delineate the scope of the statutory rule.

Before embarking upon this process a few observations may be ventured as to the general effect and purpose of the statute. First it is to be noted that married women have been given a general capacity to contract, subject only to the prescribed exceptions. The effect of this is to put the burden of proof upon the person who wishes to invalidate her contract to show that it comes within the statutory prohibition. As was said by Justice Dean:

"Formerly her capacity was exceptional and her disability general; now the disability is exceptional and her capacity general; the burden is on her, when she seeks to avoid her contract, to bring it within one of the few exceptions."

In connection with this general rule it should be noted that where husband and wife join in the execution of an obligation, they are prima facie joint debtors. There is no presumption that either is a surety. Either may show, as against any party to be affected, in law, by such proof, that he or she is in

vania, but decisions from these jurisdictions are pertinent in determining the meaning of the Pennsylvania provision and will be cited wherever helpful; and should be consulted when dealing with problems under the Act of 1893.

"The form of the obligation is not decisive in determining the liability of a married woman. If the object be to evade the protection of the statute her liability will be determined by the fact, not by the form." Keystone Brewing Co. v. Varzaly, 39 Super. 155,159 (1909). See Goldsleger v. Valella, 106 Super. 62 (1932); Munn v. Lorch, 305 Pa. 55 (1931); Brady v. Equitable Trust Co., 199 S. W. 1082 (Ky., 1918).

fact a surety for the other. When the wife does this the Act of 1893 makes her obligation void. Another change wrought by this act is that whereas formerly only her property could ever be subject to her debts and contractual liabilities, now her obligation is personal and a judgment against her is enforced like any other personal judgment.

A further effect of the act must be kept in mind. That is that there is nothing in the act to prevent her from borrowing money and then turning it over to her husband, or another, and the wisdom of her act in so doing is not for the courts. There is nothing in the act to protect her from her own improvidence. So, it has been said:

"This provision applies only to the technical contract of endorsement, guaranty, or suretyship included in the words of the act, and it has been ruled that while a married woman may not become surety for her husband there is no law to prevent her paying his debts or giving him money to use in his business, even though she may have borrowed it." 10

"If the contract was one which the defendant had the power to make, she was the sole judge of its necessity and of its wisdom. 'If we concede that it is not necessary, but on the contrary, a foolish expenditure of money, it must be remembered that the Act of Assembly now permits her to do foolish things!' Milligan v. Phipps, 153 Pa. 208." 11

The question as to whether the married woman really borrowed the money and then turned it over to her husband, or whether in fact he borrowed it and she pledged her credit for its repayment, is the one which must be answered in the cases arising under the act. It is a question not always easily answered.

Except in clear cases the question can not be answered satisfactorily without some understanding as to the reason why the Act of 1893 prohibits the enumerated types of contracts. What was the legislative policy? 12 What is the purpose, the end to be accomplished by the act? It will be said that it is a

9 Algeo v. Fries, 24 Super. 427 (1904); Atkins v. Girst, 44 Super. 310 (1910).
10 New Phila. L. Ass'n v. Druian, 101 Super. 62, 64 (1930). The use of the word "technical" here would seem to be ill-considered. The cases discussed infra clearly show that she may not be liable, though by the strict technical law of suretyship or negotiable instruments she is not a surety or accommodation party. All that is meant by this language is that it must appear that in fact she was pledging her credit for another. That may appear though technically or formally she is a principal debtor.
11 Class & Nachod Brewing Co. v. Rago, 53 Super. 418, 424 (1913). Cases in other jurisdictions are to the same effect; Evans v. Jones, 170 S. E. 541 (Ga. 1933); Van Derslice v. Merchants Bank, 104 So. 663 (Ala. 1925).
12 The writer is not here suggesting what the legislative policy should be. Rather, his purpose is to attempt to determine what the legislative policy is, in fact. Whether a married woman still requires or is entitled to some protective restrictions with respect to her contractual dealings, is a question worthy of careful consideration; but that is a matter for the legislature and until it acts our interest will be in the application of the existing statutory provisions.
recognition of the belief that a married woman lacks business experience and hence lacks the judgment and acumen necessary to protect her from imprudent and foolish dealings which will dissipate her estate. That may have been the policy back of her common law lack of capacity, but it is not true of the Act of 1893. It gives her credit for having ordinary business ability, and permits her to deal with her property and enter into contracts generally. If those contracts prove to be foolish she is no more to be protected than a man who lacks the ability to preserve his estate. It may be said, however, that it is one thing to borrow money yourself, realizing that you must repay it or lose your property for the default, while it is an entirely different proposition to merely agree to a contingent liability, arising only if the husband, or other borrower, fails to pay; and a married woman has sufficient knowledge or experience to understand the nature of the former, but not the latter type of obligation. We can agree that there is a difference between the two types of commitments, but not with the conclusion as to the relation of this difference to a married woman’s knowledge. If she can deal with her property, handle her money, and engage in business generally on a par with her husband (and the act says she can do that) she can realize the difference between a primary and a secondary obligation. The difference goes, not to the state of her business knowledge, but rather to the relative ease with which a husband, or one close to her, can persuade a married woman to enter into such a contract.\(^\text{13}\)

The law recognizes that the husband is still, in many respects, the head of the family; that the wife is still substantially dependent upon him and peculiarly submissive to his demands and susceptible to his importunities.\(^\text{14}\) Most wives would be slow to refuse to sign on the dotted line when told to do so by their husbands, especially when he can reassure her that it is his debt and that there is really no possibility of her having to pay it; and this is true in the absence of any actual coercion or undue influence. This susceptibility to imposition is not

\(^\text{13}\)That the real reason for these statutes, forbidding suretyship contracts, is because of the opportunity for the husband to impose upon her, rather than because of any lack of business judgment on her part, is shown by the fact that several of these statutes confine the restriction to cases where she is surety for her husband, permitting her to enter into suretyship obligations generally. See note 6 supra. And see Simmons v. Marey, 47 S. W. (2nd) 530, 531 (Ky. 1932).

\(^\text{14}\)For example, the defense of condonation in a divorce proceeding is not enforced so rigorously against the wife as against the husband; Shackleton v. Shackleton, 21 A. 935 (N. J. Eq. 1891), where it was said, "Notwithstanding the radical changes which . . . . have been made respecting the property rights of a married woman, the husband is still, in many respects, the ruler and his wife his subject." Also, there is still a presumption, despite the Married Women’s Acts, that a crime or tort committed by a wife in the presence of her husband, is committed under his compulsion and he alone is guilty or liable. Crime: Comm. v. Dwyer, 29 Co. Ct. 73 (1903); Comm. v. Bore, 13 D. & C. 681 (1930); and note the charge in Comm. v. Newhard, 3 Super. 215, 217 (1897). Tort: Gelheiser v. Wogniak, 72 Pitts. L. J. 651 (1923).
confined to importunities by her husband. It applies also, though to a less extent, to the requests of her children and those close to her in the family relationship. Therefore the statute, to protect her from any such impositions, goes the whole way and prohibits her contracts of suretyship for anyone. The policy of the statute might then be stated thus: A married woman is on a par with other adults so far as business experience and judgment is concerned. Therefore her contracts, in general, are to be given no exceptional treatment before the law. However she is peculiarly susceptible to the importunities of others in respect to suretyship obligations. Therefore while we will not protect her from her own improvidences, we will protect her from bearing the additional burden of paying for the improvidences of others, which, without our protection, will likely be imposed upon her. As was said in *Harrisburg National Bank v. Bradshaw*:

"The purpose of the limitation is to protect her from contracts not connected with the management of her estate and from which she could derive no advantage. As to contracts relating to her own estate or affairs the existing restraint was removed; it remains as to a class of contracts into which she might be induced or constrained to enter for the benefit of others."

In determining whether the married woman was the real borrower or merely a surety, in those cases where by the apparencies of the transaction she is a principal, we must consider whether she freely entered into the contract, or on the other hand, did so only as a result of the urgency and insistence of the person who benefited by it. It is only where the husband wants the benefit of the loan (i.e. where he is the real borrower) that he will importune her to borrow money; hence the fact that a loan has been made as a result of his importunity indicates that the loan was to him and she was but surety thereon. No discussion is necessary as to those cases where a married woman is, according to the general law of suretyship or negotiable instruments, merely an accommodation party to the instrument which she signs; as where she joins with her husband as co-maker of a note given as a renewal note for the husband's personal note to which she was not a party. It should be

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15 That the statutory prohibition is needed only as a protection against the urgencies of their husbands or close relatives is shown by the fact that of all the cases cited in this article all but two involve a case of suretyship for her husband, while in those two the contract was for the benefit of her son. 1678 Pa. 180, 184 (1896).

16 Language to the following effect will be found in several of the cases. "If not given as surety for her husband, it was given upon his importunity, and to aid him in his business, one of the very perils from which the law ought to protect a married woman." *Patrick & Co. v. Smith*, 165 Pa. 526, 528 (1895).

17 Wiltbank v. Tobler, 181 Pa. 103 (1897).
noticed, however, that where such a direct contract of suretyship exists the fact that the proceeds were used by the husband for the benefit of the wife’s estate, or to pay a debt she owed, is immaterial. She is still but an accommodation maker on the note.\(^{19}\)

Let us then take as our initial situation that which is illustrated by the case of *Newall v. Arnett.\(^{20}\)* There the husband owed his partners $9000. The partners agreed to take his wife’s note for the amount and she gave them her personal note for $9000. Two arguments were advanced to sustain her liability. First, she was not an accommodation party on the note, for she was the only signer and the only party obligated by it to pay its amount. Second, a married woman may pay her husband’s debts and here she merely gave her note in payment of his debt. The answer to the first was that we must look beyond the mere form of the instrument; to the second, that the note was not taken as a discharge of his debt, but merely to secure its payment. She owed the payees nothing and received no consideration or benefit from her note. Hence we have a clear case of an attempt by a married woman to pledge her credit for the debt of her husband and her note is void.

A similar attempt is a transaction whereby the wife gives her note “to secure anything which I may now owe or hereafter be owing to the payee.” The payee is in fact engaged in selling merchandise to her husband for his business. He charges this to both husband and wife and then takes judgment on her note for the debt incurred. The judgment must be opened for clearly she was merely pledging her credit to secure payment of her husband’s obligations.\(^{21}\) Another example of such direct contract of suretyship on her part is where she gives her note as collateral security for the husband’s note, on which he borrowed money.\(^{22}\)

Now let us carry our transaction one step further. The wife gives her note as payment of her husband’s debt and the creditor accepts it as a discharge of his obligation. Here it may well be argued that she merely paid her husband’s debt, which the statute allows her to do, and that it cannot be contended she is merely a surety, for there is no debt running from the husband to her payee which her note could secure. This argument fails however to consider the realities of the transaction. True, the debt, as the husband’s, has been discharged. But in fact the same debt of $9000 still remains and that debt was incurred by the husband, not by the wife. Hence the wife is pledging her credit to secure the payment of her husband’s ante-

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\(^{20}\)279 Pa. 317 (1924).

\(^{21}\)Keystone Brewing Co. v. Varzaly, supra n. 7. Acc: Bank v. Short, 15 Super. 64 (1900), where, as part of the purchase price of stock purchased by the husband, he gave the seller his wife’s note, endorsed by his father.

\(^{22}\)Murray v. McDonald, 236 Pa. 26 (1912).
cedent debt. It is, in effect, a promise to pay the debt of another. She receives no consideration, or benefit from her note and it is void. Here we may frame a rule. Where a married woman gives her personal obligation to her husband's creditor as security for his debt, or as payment thereof, she is a surety only, and her purported obligation void, irrespective of the form of the instrument evidencing the obligation.

Our transaction may be carried still further. Suppose she gives her note to her husband's creditor and receives the cash therefor. She then pays the cash back to the creditor in payment of her husband's debt. Again the debt of $9000 in fact remains and the creditor has her note for it, so it would seem she is still but a surety. But there is a further fact here. She did receive consideration for her note (cash from the creditor), though no benefit. To decide this case it will first be necessary to digress and make clear certain fundamental principles and distinctions which may be applicable. First we must reiterate (and evaluate) the principle that it is not necessary that the married woman receive any benefit from her contract in order that she be held liable thereon as a principal. If she borrows money, from a person who is not her husband's creditor, and thereafter uses that money to pay her husband's debt to a third party she is not a surety as to her borrowing contract. A second principle is that if the person furnishing her the money, as a part of the contract upon which the money is advanced, requires that she should at once turn the money over to another, she is merely surety for the person so receiving it. Here she in fact receives no consideration (though she may receive the money or check long enough to transfer it) and no benefit, and the money in fact is being advanced to the other party on her credit. Such an express agreement cannot often be shown, but an agreement or understanding to that effect may be implied from the circumstances surrounding the transaction. Nor will the lender require it unless he is to get the money or benefit therefrom, directly or indirectly. A strong illustration of this principle is found in the case of Jacquette v. Allabaugh. There one J agreed to sell a store to the husband.

23Henry v. Bigley, 5 Super. 503 (1897); Platt, Barber & Co. v. Crawford, 23 Co. Ct. 148 (1899). The case of Kile v. Kilner, 37 Super. 90 (1908), a four-three decision, can not be reconciled with this principle.

24This is illustrated by the cases cited supra notes 10-12. In the Class Nachod Brewing Co. case a married woman borrowed money and then gave it to her son to buy a liquor license. The lower court charged that if she took the money simply to help her son in his business and had no interest in the business herself, and received no benefit from the money, then she was substantially going surety for him and not liable on the note. This was held to be error, upon the above principle. The court pointed out that there was no antecedent debt from the son to the plaintiff to be secured.

2516 Super. 557 (1901). This principle was first enunciated in Patrick and Co. v. Smith, supra n. 8.
The husband gave his note for half the price, but could not raise the balance in cash, as J wanted. So, J, husband and wife agreed to the following transaction. The wife was to give J her note for the amount of the balance and he give her his check for that amount. Then she was to endorse the check over to her husband and he in turn to endorse it over to J and receive a receipt therefore. The plan was carried out and J took judgment on her note. This judgment was opened by the lower court and the appellate court affirmed, saying:

"At the end of the proceedings the plaintiff had his check again and also the note of the wife for a like amount. The debt of the husband was paid by the wife and the property of the wife was liable under the note for the sum she had paid for her husband. As in Patrick & Co. v. Smith it was a transparent device adopted to evade an express statutory enactment."26

This second principle obviously limits the first. The distinction between the two situations is that in the first the lender parts with his beneficial interest in the money and gives it to her to use as she pleases. She receives the consideration in fact and whether she will benefit by it is a matter to be governed by her own wishes. In the second situation she never has any beneficial use of the money. The wife is a mere conduit of money which she obligates herself to repay.27

Now let us turn back to our third situation and apply these principles. Since no express agreement on her part is shown (as in the Jacquette case) the lender, of course, will contend that the first principle applies and that she is liable since she merely borrowed and received the money and then used it to pay her husband's debt. But an important fact here is that she borrowed the money from her husband's creditor. True, if she can borrow from a third person and then use the money to pay her husband's debt, there is no reason why she can not accomplish the same end by borrowing from his creditor. There is nothing in the act to prevent her from having financial dealings with the same person as her husband. But when she does borrow from his creditor and pays that debt, that fact tends strongly to show that the purpose of the transaction was to have her assume liability for her husband's indebtedness; and that there was an agreement, or understanding, among the parties that the money was to be turned back to the creditor. Certainly where she borrows from the husband's creditor the amount of her husband's debt and the proceeds are immediately returned to that creditor,

2616 Super., at 560.
27These principles are discussed and the distinction pointed out in the Class & Nachod Brewing Co. case, supra n. 11. In New Phila. Loan Ass'n. v. Druian, supra n. 10, the court pointed out that if the money borrowed was placed in the wife's account and she had full control over the money and used it as she saw fit, the mere fact that she used much of it to pay his debts would not take away the underlying fact that she was a principal.
our natural conclusion is that it was done pursuant to a scheme or device whereby she was to be colorably the principal, but in fact was to pledge her credit as security for the husband's debt. Until the contrary is satisfactorily proved we will treat her as a surety. Though we can not say, as a matter of law, that she is merely a surety whenever such facts are present, the facts do raise such a presumption and the burden should be upon the lender to show, by further facts and the preponderance of the evidence, that she borrowed the money free from the importunities of her husband and the lender; and paid it to him as a matter of choice and not according to any agreement that the money was to be returned to him. The problem of this third situation is well stated in Van Derslice v. Merchant's Bank, an Alabama case:

"As a general proposition ... a married woman may borrow money and give it to her husband directly, or use it in the payment of his debts, without offending the statute .... But where the wife borrows money from the husband's creditor, giving her own obligation therefor, and forthwith pays over the money to that creditor in satisfaction of her husband's debt to him, she indirectly becomes a surety for her husband's debt within the inhibition of the statute .... In such a case the law presumes an intention to evade the statute by the mere substitution of the wife's obligation for that of the husband—the original debt of the husband remaining in fact unpaid, notwithstanding its change of raiment."

Such an agreement would be inferred only where the lender is a creditor of the husband. One to whom the husband is not indebted would not be interested in what she did with the money. Further, the lender's agreement when he is the husband's creditor would be confined to a requirement that she turn the money back to him, or turn it over to her husband, or a straw man, who in turn had agreed to return it to the creditor (as in Jacquette v. Allabough.) Where she immediately gives the money to her husband and he, in turn, immediately turns it back to the lender (in payment of his debt) it would seem that the presumption should still be that the parties understood that the husband's debt was to be paid with the money; especially where the loan was preceded by negotiations between the husband and the lender. However this was what actually occurred in the Van Derslice case and it was held that the presumption would not arise on such facts and that the burden of proof was upon the wife to show that that was the agreement of the parties at the time of the loan.

28 Query: Suppose she borrows an amount in excess of the husband's debt and returns the amount of his debt, using the balance for herself? Of course she would not be surety as to the amount in excess of his debt; but would the larger borrowing affect the presumption of suretyship? The Van Derslice case, infra n. 29, says "no."

29 104 So. 663, 666 (Ala. 1925).
The contractual dealings of married women may be classified roughly as of two types — those where she contracts with a creditor of her husband, and those where she contracts with a person to whom no antecedent debt is due from her husband. The problems presented by each type are substantially dissimilar. Thus far we have been dealing with the former type. Proceeding to those cases where the husband owed no debt to the lender when the loan to the wife was made, the case of Oswald v. Jones\(^\text{80}\) will serve as a type transaction. There the husband applied to the plaintiff for a loan, for the purpose of financing his entry into the hotel business, and offered his wife and one X as sureties on his note. The plaintiff refused but said that he would loan the money to the wife if the husband was eliminated from the transaction. Thereupon the husband had his wife sign a note, which X endorsed, and the plaintiff accepted this and made out a check for the amount payable to the wife. She endorsed the check over to her husband and he used the proceeds to set himself up in business. The facts showed that the plaintiff and the wife were at no time face to face with each other in the transaction, the husband carrying on the negotiations with her. Declarations were made by the plaintiff after the loan wherein he referred to the loan as Mr. Jones' loan and the plaintiff's own testimony showed that he treated it as a loan to the husband. On a suit against the wife on her note the question as to whether she was surety or principal was submitted to the jury and the verdict was for the plaintiff. On motion for judgment n. o. v. the lower court entered judgment for the defendant and this was affirmed on appeal. The per curiam opinion is too brief and its language too general to be of substantial aid in our development of general principles and a fuller and more analytical discussion of the case is warranted.

What is the problem in this case? Several arguments may be advanced to differentiate this from the cases already discussed and to sustain the defendant's liability as principal. First it is said there was no debt running from the husband to the plaintiff upon which the wife could be surety and a suretyship contract must have a principal debtor. Second, the plaintiff did not require as a part of the loan contract that the defendant should turn over the money to her husband. So far as the facts show it was immaterial to him what she did with the money, though he did know that she intended to give it to her husband. Nor could we infer such an agreement. Where the lender is not a creditor of the husband he has no purpose to serve in requiring the wife to turn over the money to her husband. Third, a married woman may borrow money and give it to her husband and that is all that the defendant did here. Answering these briefly: the first is true, looking to the form of the transaction, but we must look to the substance: admitting the

\(^{80}\text{254 Pa. 32 (1916). Reference has been made to the paper books to complete the facts.}\)
second to be true, such an agreement, though making her an accommodation party, is not necessary to make her such; the third assumes the fact to be proved, viz. that the wife was the borrower. The decision in this case depends upon the answer to one question: who was the real borrower, the husband or the wife? This suggests a further question: what is meant by the "real borrower"? If the question is left to the jury as to who is the real borrower what should they interpret this to mean; what should be their guide or test? Should it be used in its popular sense, as meaning the person who gave the note and received the check for it? If so the case is over and the defendant is liable—and incidentally the purpose and policy of the act is vitiates. The interpretation of the phrase and the answer to the question must be governed by the policy underlying the statutory prohibition. We must look for the "real borrower" in the statutory sense, not in the popular sense of the word. The policy of the act is to protect a married woman from entering into personal obligations benefitting another because of the impositions or deceits of others. Therefore if it is found that the husband wants to borrow money for his personal use; that to obtain it he importunes his wife to borrow it and turn the money over to him, then, in fact, he is the real borrower and she but the surety.

Now let us determine who was the real borrower in this case before us. First, we find that the husband attempted to borrow the money from the plaintiff himself and was refused. This of itself indicates that the husband was the real borrower; and with the additional fact that the plaintiff suggested that he loan the money to the wife after eliminating the husband from the transaction, we can reasonably infer that the husband thereupon exerted his powers upon his wife and urged her to make the loan for him. Of course this is but an inference and not conclusive. A married woman may of her own volition borrow money and give it to her husband, and there is no reason why she could not do this after he had made an attempt to borrow it himself. However, in the absence of a showing that she acted voluntarily and free from his imposition the inference from these facts is compelling that he was the real borrower and that she pledged her credit for a loan to him; and that the whole transaction was a mere device to evade the statute.31

31It should be noted that the fact that she borrowed from the the same person to whom the husband applied for a loan is not controlling in raising this inference. If the husband attempts to borrow from A, or from A and B, and then the wife borrows from C, it would still leave the impression that she borrowed from C only because her husband could not raise the money and insisted upon her borrowing it for him. The fact that she borrows from A and that A suggested this to the husband strengthens our inference, and makes A a party to the imposition, or, at least, puts him on notice that the husband is the real borrower. But such knowledge by the lender is immaterial in determining whether she was surety, as will be shown in the discussion on estoppel, infra. However, in such a case it is more likely that the wife herself will negotiate with C for the loan. The effect of this is considered in the discussion to follow, particularly with reference to Scott v. Bedell.
A further fact is that the plaintiff and defendant were at no time face to face with each other in the whole transaction. Where the husband makes all the arrangements for the loan, the wife’s only part in the transaction being to sign the note and turn over the check to her husband, again our natural inference is that the husband was the real borrower. This too is not conclusive. If the wife, free from imposition, makes a loan and receives the proceeds to use as she pleases, the fact that she had her husband act as her agent in procuring and arranging the loan would not alter the fact that she was the principal. On the other hand, even though the wife deals with the lender face to face she might well be a surety; as where she took part in the negotiations wherein a colorable scheme to avoid the act was evolved or where she is brought to the lender by her husband according to a pre-arranged plan of lender and husband to make her ostensibly the principal. At least in the absence of an affirmative showing that the wife acted of her own volition and was to have the beneficial use of the money our conclusion should be that she merely signed the instrument to enable the husband to borrow the money himself. Therefore in the case of Oswald v. Jones there are cumulative inferences that the husband was the real borrower and, with the additional fact that the plaintiff recognized him as the real borrower, the court properly held, as a matter of law, upon the evidence, that the defendant was merely an accommodation party and not liable.

The case of Kemper v. Richardson presents almost identical facts, except that it was a son who applied for the loan and that the plaintiff went to see the mother at her home where she signed the note. The proceeding was one by the mother to open the judgment taken against her on the note and the Superior Court, reversing the lower court, ordered that the rule to open the judgment be made absolute. The court pointed out that the circumstances showed the real borrower to be the son and used the following language:

"A jury could fairly find that the device in this case was a transparent attempt to make the mother surety or guarantor for the money her son was borrowing from Kemper. The law places a barrier around a married woman to protect her from all kinds of deceit and impositions. He (the plaintiff) did know sufficient facts to advise him that he was furnishing the money upon the importunities of W. E. Richardson to aid him in his personal business, which is one of the very perils from which the law ought to protect a married woman.

32New Phila. Loan Ass’n. v. Druian, supra n. 10.
33As in Jacquette v. Allabaugh, discussed supra; cited supra n. 25.
3672 Super. 115 (1919). And see Goldsleger v. Velella, 106 Super. 65 (1932) — a similar case, quoting from the Kemper case at length.
There was no contractual capacity in Mrs. Richardson to bind herself by a note for the payment of the money which Kemper loaned to her son. The evidence taken in connection with the circumstances of the case admits of no other interpretation.  

It will be noted that the court did not hold that she was not liable as a matter of law, but that it was a question of fact for the jury. The fact that the mother did deal directly with the plaintiff differentiates it from the Oswald case. Where it appears that upon the husband's failure to procure a loan the wife herself thereafter negotiated for a loan and arranged personally to borrow the money from the person who refused him, these facts indicate that it was her own independent contract; that it was a case of her borrowing the money and then turning it over to her husband. This would conflict with the inference to be drawn from the fact of his attempted loan and it would be a question of fact for the jury as to who, on all the evidence and from all the circumstances, was the real borrower. However when we consider the fact that in the Kemper case the lender came to her and the brief meeting was arranged by the son, after and pursuant to his negotiations with the lender, and at the latter's suggestion, any significance attached to the fact she dealt face to face with the plaintiff would seem to be removed. From all the undisputed facts and circumstances it would certainly seem that a directed verdict for the defendant would have been proper had suit been brought on the note, and the court was evidently of that opinion, as shown by the last sentence quoted above. The language relative to the function of the jury is explained by the fact that the appellate court was merely passing upon the right of the defendant to open the judgment and put in her defence.

This brings us to the case of Scott v. Bedell. In it the proceeding was a rule by Mrs. Bedell to open the judgment entered on a judgment note by Scott against Mr. and Mrs. Bedell. Briefly, the facts were as follows. The husband, who was financially embarrassed, wanted to go into business and had an opportunity to purchase a saloon in New York. He consulted Scott, an attorney, who agreed to advance $5500 pursuant to an arrangement whereby a judgment note signed by the wife and husband payable to Scott was given to Scott; and another note was given to Scott, signed by the husband and payable to and endorsed by one G. The latter was given to aid Scott in raising the money and need not be considered further here. Scott then sent two checks to the husband in New York; one for $4000 payable to the seller of the saloon; and the other for $500 payable to the husband. The other $1000 represented the plaintiff's fee. The wife took part in the negotiations with the plaintiff and G. There was

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27 Super., at 118.
28269 Pa. 167 (1920).
no conflict in the evidence on these facts. As to the nature and extent of her participation in the transaction there was conflicting evidence. Competent evidence was introduced by Scott which showed that she had talked to Scott, and told him she was anxious to set her husband up in business; that she called on G and asked him to go on the note; and that she knew she was the principal maker and if there was anything to lose she would be the loser. The lower court found as a fact that she was the borrower and discharged the rule.\(^{39}\) This was affirmed on appeal.

It will be noted that this case was similar to *Oswald v. Jones* in that the husband consulted Scott first; and that case was cited by the petitioner as controlling. Though it does not appear that the husband himself tried to borrow the money from Scott he did consult him as to how it could be raised and the inference would be that he was the real borrower, and she a party to a device imposed upon her. However it differs from the *Oswald* case in that here the wife took part in the negotiations. As pointed out above, this indicates that she herself was the borrower and, the inferences being conflicting, it becomes a question of fact from all the evidence and circumstances as to whether she was the real borrower. It being a question of fact there was ample evidence to show that she was anxious to borrow the money and that she, of her own free will, conducted the negotiations and borrowed the money so that she could give it to him to use in his business. On these facts she was the principal debtor. As the court said:

"*Oswald v. Jones*, relied upon by appellant, is plainly distinguishable on its facts from the case now before us. There the court below found that the person who loaned the money and the married woman, who gave the note, "were at no time face to face with each other in the transaction"; whereas, here the evidence shows that Mrs. Bedell, herself, was active in obtaining the loan. Again, in that case, the trial court found as a fact that the husband was the real borrower, while in this case the opposite fact is found, on ample evidence."\(^{40}\)

The petitioner stressed the fact that the lender knew the money was to be used for the benefit of her husband. This alone could have no weight. Since a married woman may borrow money and give it to her husband the

\(^{39}\)The facts do not appear in opinion and have been taken from the paper books.

\(^{40}\)269 Pa. at 169. The language to the effect that the court in *Oswald v. Jones* found, as a fact, that she was a surety, is somewhat confusing. The question as to whether she is surety or principal is a question of law. The function of the jury is to find as a fact whether she was the real borrower; i.e., whether she, free from imposition, made the loan and received the beneficial interest in the money. If it so finds, on competent evidence, she is the principal debtor and liable; and judgment should be entered on the verdict for the plaintiff. However, in the *Oswald* case there was no evidence from which the jury could so find. Hence the court, as a matter of law, entered judgment n. o. v. for the defendant.
fact that the lender knew that was her intention could scarcely be said to change her contract into one of suretyship. Petitioner also contended she was merely a surety because she never handled any of the money, the proceeds of the loan going directly to the husband from the lender. However, the fact that she ordered the lender to pay over the money to her husband, instead of going through the formality of having it pass through her hands, would not make it his debt. In other words, if she had gone to Scott first and arranged for a loan and then turned the money over to her husband she would clearly have been a principal. That being so, the fact that Scott knew of her intention, or that she ordered him to turn it over to her husband for her, would not alter the case. The inference deductible from the fact that Mr. Bedell went to Scott first having been overcome by clear evidence, that is our case. It must be remembered that she was not dealing with her husband's creditor and hence it can not be said she was assuming liability for his indebtedness to another.

This consideration of the typical fact situations and the cases dealing therewith has indicated the problems met in applying the statute. Also, it is hoped, the discussion has developed and evaluated the applicable rules and principles to an extent sufficient to serve as a guide to the proper approach to any different or more involved transaction that may present itself for solution. No further analysis will be attempted. However a brief reference to a few miscellaneous cases will serve to round out the discussion.

Several cases have arisen where husband and wife gave a note or bond for a loan, the proceeds of which were used to purchase, to pay off a mortgage on, or to improve real estate conveyed to or held by them as tenants by the entireties. Of course, if the husband borrows money and the wife joins in the note as a technical accommodation party, the fact that he used the proceeds to improve their joint property would not change her status to that of principal. However where she signs the instrument as co-maker, knowing that it is to raise money for one of these purposes, and it is so used, she can scarcely contend that she was only a surety; by showing, for example, that her husband conducted the negotiations and she never saw any of the money. She receives a direct consideration for the loan and signs it as maker to conserve her own property interest and to accomplish a purpose of her own. The fact that she is directly interested for her own purpose in the transaction is the determining factor, and that being the case she is liable.

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42 See: Kemper v. Weidler, 23 Dist. 453, 454 (1914); Hill v. Cooley, 37 S. E. 109 (Ga. 1900).

43 See: Wiltbank v. Tobler, supra n. 18, and explanatory discussion there to.
as a principal debtor." The same conclusion has been reached as to a joint note given in payment of rent for property leased jointly by husband and wife. Our discussion would not be complete without a reference to the recent case of \textit{Munn v. Lorch}, which involved an ingenious device to evade the statute. There the Lorch brothers were refused a loan by the bank to their corporation. Then the bank and the brothers evolved a plan for securing the loan. Pursuant to it each brother's wife subscribed for stock in the company and gave her note therefor. Then the company endorsed the notes over to the bank as collateral for the loan. Of course the decisions centered upon the question as to whether the subscription agreements were valid. If it was a bona fide agreement the wives were debtors of the company and liable on their notes. If it was a mere colorable transaction to enable the company to pledge the notes for the loan, it never being intended to issue the stock as consideration for the notes, it was simply a case of their giving their notes as collateral security for the debt of another and the notes were void. The question was so submitted to the jury and it found, on ample evidence, for the defendant. The judgment entered on the verdict was properly affirmed. With this we will leave the problem of what constitutes a suretyship obligation and proceed to those further problems which arise after it has been determined she was but a surety on her contract.

\textbf{ESTOPPEL}

In all of the cases thus far discussed the plaintiff was a party to the whole transaction and hence knew that the wife was merely a surety if such was the fact. In such a case, even though the wife certified in the instrument that she was borrowing the money for her personal benefit and estate and not as an accommodation party, the plaintiff could not plead estoppel, since he knew the facts were otherwise and was not misled.\textsuperscript{47} Where, however, the married woman, by the form of the instrument or express representations, leads the lender to believe that she is the principal and the lender in good faith ad-

\textsuperscript{44}Morris v. Duer, 90 Super. 285 (1927); Kaufman v. Lehman, 94 Super. 306, (1928); Humphreys v. Logan, 242 Pa. 427 (1913). \textit{A fortiori} she is liable on her note given as payment for property conveyed to her. However, if her husband is the real purchaser and the property is put in her name merely to enable him to avoid his creditors, her signing a note given in payment of the purchase price would be a suretyship obligation. She would be pledging her credit to secure his purchase debt. If she does not know that the property is put in her name and give her consent to it, she has incurred no debt for the purchase price and her note given for the price is invalid. See Ponevyezh B. \& L. Ass'n. v. Shandelman, 170 A. 340, Pa. Super. Ct. (1934), distinguishing Stahr v. Brewer, 186 Pa. (1898).

\textsuperscript{45}Slater v. Chiccarino, 109 Super. 353 (1933); and see Le Goullon v. Greer, 15 D. \& C. 583 (1930).

\textsuperscript{46}305 Pa. 55 (1931).

\textsuperscript{47}Pine Brook Bank v. Kearney, 303 Pa. 223 (1931); First Nat. Bank v. Rutter, 104 A. 138 (N. J. L. 1918); Crumbaugh v. Postell, 49 S. W. 334 (Ky. 1899).
vances the money in reliance thereon, the question is presented as to whether she is estopped to deny that she was the borrower and to show that she merely signed for the accommodation of another. At common law it was held that a married woman could not be liable on her note or bond even though she represented at the time of giving it that she was single. The reason was that she had no legal capacity to contract and therefore could not, by her own acts, confer upon herself a power which the law denied her. It was said, "As in the case of infancy, it is not a question of privilege, but of legal incapacity to contract, that stands in the way of the plaintiff's recovery on the bond." Again, "Legal incapacity can not be removed even by fraudulent representation, so as to create an estoppel in the act to which the incapacity relates."

That being the principle applicable to total incapacity it would seem necessarily to follow that the same principle must be applied to those contracts of suretyship which the statute expressly prohibits the wife to incur. The statute has removed her general incapacity to contract, but it has not removed the bar as to her accommodation obligations. She is still incapable of contracting this type of contract and therefore can not give herself the capacity by her own representations. If it were held otherwise the statute designed for the protection of married women would be rendered wholly ineffective. The leading case on this point is *Farmington Nat. Bank v. Buzzell*, where it was held that she could not be estopped. The reason is well stated in the following excerpt from the opinion:

"The proviso in the statute is, in effect, a reenactment of the common-law disability of a married woman to be a surety for her husband. . . . Concealment, fraud, or falsehood as to her relation to the contract, cannot confer capacity on her so as to entitle the plaintiffs to an action against her on the contract. . . . Her disqualification as a party to a contract prevents the application of an estoppel; otherwise it could be said that though she cannot make a contract because of her incapacity, when she attempts to make one by fraud or misrepresentations, legal ability is in some way conferred by estoppel; that is, she is not qualified to make a contract for herself, but is liable on one that she unsuccessfully tries to make. . . . In cases of torts she may be estopped to deny that her representations are true; but in such cases her legal incapacity to bind herself by contract is not denied or qualified, and is not material as a ground of defence."}

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49Innis v. Templeton, 95 Pa. 262, 268 (1880).
5060 N. H. 189 (1880).
51As to this last proposition, a married woman may of course be estopped by her conduct in reference to transactions she has legal power to perform. So she could be estopped by conduct independent of contract (such as by telling X that her property belongs
With the exception of Indiana\textsuperscript{52} this case has been followed in the other jurisdictions having this type of statute.\textsuperscript{63} It should also be noted that the parol evidence rule would not preclude her evidence of suretyship, despite her certification to the contrary, on the instrument. Such a certification is not an integral part of the contract upon which her obligation is founded, and, further, this evidence is not introduced to vary the terms of a written contract, but to show that, as to her, there was no contract.\textsuperscript{54}

There seems to be no appellate court decision in Pennsylvania directly deciding this question. However, the language and general tenor of the cases is significant. In \textit{Wiltbank v. Tobler}\textsuperscript{55} the court, in construing the effect of the Act of 1893, said, "This species of liability she is still unable to incur, and hence her inability to make such contracts must be adjudged upon the same principles and authorities that were applicable prior to the new legislation." In \textit{Murray v. McDonald}\textsuperscript{66} the wife gave her note, concluding with a certification that it was for her personal use and not made as an accommodation party, to the plaintiff. It was given as collateral for the husband’s note, given to the plaintiff for his own personal loan. The plaintiff, knowing this, could not have been misled by her statement and the doctrine of estoppel was not applicable.\textsuperscript{57} However the court treated it as a case where estoppel could ordinarily be pleaded and concluded that estoppel could not be pleaded against a married woman, saying:

"But no conclusion, however adverse to the wife with respect to this feature of the case (certification) can influence our determination of the controversy. The judgment was not opened to permit her to show a claim to equitable relief, for she had asserted none, and had none. . .

\textsuperscript{52}Wright v. Fox, 103 N. E. 422 (Ind. 1913)—where the court indulged in some sophistry in attempting to explain away the paradox of asserting that a void note may be rendered valid by the application of an equitable principle. Trinkle v. L. B. L. F. & S. Ass’n., 117 N. E. 542 (Ind. 1917).

\textsuperscript{53}Bank v. Pride, 79 So. 255 (Ala. 1918); Peuples Bank v. Baker, 38 S. W. (2d) 225 (Ky. 1931); First National Bank of Belmar v. Shumard, 103 A. 1001 (N. J. L. 1918)—where the wife represented to the plaintiff that she was a widow. Barton v. Bickford, 122 A. 582 (Vt. 1923) is often cited as contra to this principle. In it estoppel was permitted, however, only because a third party was joint maker with her, and by the statute she could be surety except for her husband. A later case, confined the estoppel to that precise situation and held she could not be estopped where she was a party to a contract with her husband; Nat. Bank v. Hole, 129 A. 155 (Vt. 1925).

\textsuperscript{55}Pine Brook Bank v. Kearney, supra n. 47; Nat. Bank v. Hole, supra n. 53.

\textsuperscript{56}Supra n. 18.

\textsuperscript{57}Supra n. 22.

\textsuperscript{58}See the cases supra n. 47.
It was opened solely because the transaction as exhibited in her application was one not only contravening public policy, but one which offended against a positive statute. ... Unless the principle here asserted is to prevail in cases like the present, the statutory prohibition against a married woman becoming surety for her husband would be of no effect, and the policy of the law in this regard liable to circumvention by flimsiest device."

Though not a square decision on the point, this case leaves no room for doubt as to what the law is in Pennsylvania. She can not be estopped.

NEGOTIABLE INSTRUMENTS

Having determined that a married woman may not be estopped by her misrepresentations, a further question arises as to whether, when she is a party to a negotiable instrument, she may avoid liability as against a holder in due course, by showing that she was merely an accommodation party (there being nothing in the instrument to show this). It is possible to hold that she may not, without being inconsistent with the estoppel doctrine, by adopting the theory that a holder in due course takes an instrument free from all defenses available between the original parties. Incapacity to contract, natural or legal, was recognized at common law as a real defense; i.e. a defense which is not cut off by the transfer of a negotiable instrument to a holder in due course. The most common examples of legal incapacity, under this principle, were presented by the case of lunatics, infants, and married women (under their common law disability). Whether this principle is applicable to the suretyship contracts of a married woman, under the statutory provision before us, presents a two-fold problem. First, does a married woman lack the legal capacity to enter into a contract of suretyship, in the same sense that she lacked capacity to contract at all at common law? Second, if that is the case, is there anything in the Negotiable Instruments Law which has changed

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58236 Pa., at 29-30. In Atkins v. Girst, supra n. 9, a similar case, it was said that such a declaration was entitled to weight in the absence of evidence that it was a mere device adopted to evade the statute. Evidence to contradict it was admitted and considered in determining whether she was in fact surety or principal.

59In Platt, Barber & Co. v. Crawford, 23 Co. Ct. 148 (1899), it was held that a married woman could not be estopped because of any conduct on her part subsequent to entry of judgment on her note. The opinion is well reasoned and discusses at length the question of estoppel as against a married woman.

60The rule in Alabama is that she can not be estopped but is liable to a holder in due course. However these decisions are not based upon the theory suggested, but upon the principle that her lack of power is not a real defense, which is necessarily inconsistent with the estoppel doctrine. See the language quoted infra n. 68.

61See Bigelow, Bills, Notes, and Checks (3rd. Ed. 1928) p. 425, (coverture); Joyce, Defences to Commercial Paper (2nd. Ed. 1924), Sect. 105.
the common law rule? The first question has been answered in the affirmative, in the discussion on estoppel. The basis of those decisions was her complete lack of capacity to enter into a suretyship contract. To answer the second we must turn to the N. I. L.

There is no express provision in the N. I. L. relative to incapacity to contract as a real defence. It might be argued that the broad language of Sect. 57 demonstrates a change of policy in the law, in favor of the free circulation of negotiable paper, and intends to exclude from liability only persons who have been discharged by payment, or release, or by lack of proper proceedings to dishonor. However other sections of the Act indicate an intention to preserve lack of capacity as a real defence. For example, Sect. 22 provides that an assignment by an infant passes the property therein “notwithstanding that from want of capacity . . . . the infant may incur no liability thereon.” Thus the infant’s incapacity remains a defence to a holder in due course. It may be said that the maxim expressio unius est exclusio alterius applies and hence the act excludes want of capacity in others as a real defence. However, Sect. 65 (3) provides that every person negotiating an instrument warrants “that all prior parties had capacity to contract”. Why such a warranty if lack of capacity to contract would be no defence to the holder? In view of these sections it would not be improper to conclude that no change in the common law rule was intended. Further, the proviso in the Act of 1893 was intended to carry out a definite public policy to absolve married women from liability on this type of contract. The N. I. L. should not be construed as changing that policy, in the absence of a clearly expressed intention to that effect. To hold that she may be liable on negotiable instruments would be to defeat materially that policy.

The authority on this question is scarce. Two jurisdictions hold that suretyship is no defence against a holder in due course. In Alabama it was held, prior to the N. I. L., that if a married woman signed a note with her

62 The English Bills of Exchange Act provides in Sect. 22 (1): “Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.” This provision was not incorporated into the N. I. L.

63 A holder in due course holds the instrument free from any defects of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.” 56 P. S. Sect. 137.

64 See Bigelow, supra n. 61, at p. 407, n. 1; Brannon, The Negotiable Instruments Law (5th ed. 1932), p. 558.

65 56 P. S. Sect. 27.

66 56 P. S. Sect. 156. This section was constructed in Young’s Estate, 234 Pa. 287 (1912) where it was held that the endorser of a note could not deny the capacity of the maker (a married woman) to defeat his liability as endorser. Other sections of the act are similar: see Sects. 60-62. 56 P. S. Sects. 151-153.

67 Scott v. Taul, 22 So. 447 (Ala. 1897).
husband as co-maker, she was not estopped as to the payee, but her defence was cut off by negotiation. The court merely applied the general rule that a holder in due course takes an instrument free from defences available between the original parties. This rule was reaffirmed, reluctantly, in two cases decided after the N. I. L. was adopted. The situation is the same in Georgia, the early case saying that a contract was valid after negotiation unless both illegal and immoral, and that her surety contracts were not immoral. (This rule would eliminate any type of lack of capacity as a real defence.) These cases do not help us any on the problem as to the effect of the N. I. L., for they do not hold that that Act has changed the rule that lack of capacity is a real defence. Rather, they merely show that the statutory prohibition against suretyship was construed to create a personal defence only, which defences are not available against a holder in due course either under the law merchant or the N. I. L. They are inconsistent with our rules as to estoppel, which is based upon the wife’s lack of capacity to contract as surety—a real defence. Three jurisdictions take a contrary view. In commenting upon the effect of the N. I. L. it was said, in a Vermont case:

“'That statute has nothing to do with the policy of the state as to the contractual rights, privileges and liabilities of a married woman. . . . The N. I. L. presupposes the paper to be such as the parties are in law capacitated to make and the courts to enforce.'”

Thus the only authority really in point holds that the N. I. L. has made no change in the common law rule that lack of capacity is a real defence.

The only case on the negotiable instrument question in Pennsylvania is Bank v. Short, which was decided prior to the adoption of the N. I. L. There a bank sued a married woman on a note, on which she was the maker, which it had purchased before maturity in the usual course of business. The trial court charged that if the note was in effect given for the husband’s debt it was absolutely null and void. It refused plaintiff’s requested charge that “if the jury find . . . that the plaintiff became the owner and holder of the

68 Davies v. Simpson, 79 So. 48 (Ala. 1918); Birmingham Trust & Savings Co. v. Howell, 79 So. 377 (Ala. 1918), where the court said, “Although the result may be a material emasculation of the statute prohibiting suretyship by the wife . . . . and although that decision may be inconsistent with the established theory that the wife’s contracts of suretyship are per se void, we nevertheless feel bound to adhere to the principle declared in Scott v. Taul.”


72 15 Super. 64 (1900).
negotiable note in question for value, before maturity, in the regular course of
business, without notice of the defence now attempted to be made thereto, the
verdict must be for the plaintiff." The Superior Court affirmed the judgment
for the defendant, saying:

"The proviso of (the Act of 1887) and the positive declaration (in
the Act of 1893) . . . . leaves the instrument on which this suit is
founded subject to the common law defences of a married woman.
Under the facts, as determined by the verdict, it was absolutely void for
the reason that she had no power to make such an accommodation note.
. . . The plaintiff's cashier, when he purchased this note for the
bank, knew that the defendant was a married woman, and if he had
made inquiry at that time he would have learned that she was an accom-
modation maker on this note, for her husband. . . . So given, the
note was absolutely void, it being of a kind expressly prohibited by the
Act of Assembly."73

From the opinion it is difficult to say whether the ground of the opinion was
that the plaintiff, due to its knowledge that she was married, was not a holder
in due course; or was that her suretyship was a real defence. In view of the
lower court's charge, which was affirmed, and the language employed, to the
effect that her contract was void, the latter would seem to have been the basis
of the decision. Furthermore it is doubtful whether the court could have
properly treated the plaintiff as other than a holder in due course. Prima
facie when a married woman signs a note as maker she is the debtor, and the
transferee's mere knowledge that she is married would not put him on notice
that she is also a surety.74

It would seem that the only proper rule which the court could have ap-
plied was that her suretyship was a real defence. In view of the repeated
language of the courts to the effect that a married woman's contract of surety-
ship must be treated in the same manner as her contracts at common law; and
the decisions that her incapacity prevents an estoppel; it is a proper conclusion
that negotiation can not breathe life into her void contracts, nor confer a
capacity which does not exist. Suretyship being a real defence under the
Act of 1893, there is nothing in the N. I. L. which compels, nor indicates, a
change in that principle. Nor should this clearly defined public policy be en-

73Id., at 67, 68.
74See the cases supra n. 9. In Birmingham T. & S. Co. v. Howell supra n. 68, where
the wife was a co-maker with her husband, the court cited the rule that prima facie, they
are joint debtors and said, "It follows that knowledge by a transferee of the fact that the
joint makers of a negotiable note are husband and wife does not put him on notice that the
wife is but a surety, and hence does not affect the defence of holder in due course."
croached upon by implication from any general language employed in that Act.\textsuperscript{75}

**RENEWAL NOTES**

Special reference should be made to the cases on renewal notes. Where a woman becomes an accommodation party to an instrument while she is single and after her marriage signs a renewal note, in the same capacity, she is liable upon the renewal note. \textit{Harrisburg National Bank v. Bradshaw}\textsuperscript{76} so held and the reason for her liability is well stated in the opinion:

"The defendant was liable on the endorsement of the note which became due two months after her marriage. True, her liability was conditional only, but it would have been fixed and made absolute by protest and notice. By the renewal of her indorsement she did not enter into a new obligation for the benefit of another, but she continued and extended for her own benefit an existing obligation by which she was bound. By so doing she did not become an accommodation endorser and enter into a new forbidden contract. The contract already existed and its continuance was for the relief and benefit of her estate. . . . . . The renewal of an obligation contracted before marriage, we think, does not come within the meaning of the Act, although the obligation may belong to the prohibited class."\textsuperscript{77}

By reversing the situation a different problem is presented. That is, a married woman gives her note as collateral security for her husband’s debt and, after discoverture, gives a renewal note to take up her original one. Here the question is simply whether there was any consideration for her renewal note. Prior to the Acts of 1887 and 1893 it was held that if a married woman contracted a debt during coverture, though it was invalid, it imposed a moral obligation upon her, which was sufficient to support her promise to pay it made after discoverture.\textsuperscript{78} Upon the same theory it was held that where she gave a note, as principal, prior to the Act of 1887 and a renewal note after that Act, but during coverture, she was liable on the renewal note.\textsuperscript{79}

\textsuperscript{75}In Martin \textit{v. Hess}, 23 Dist. 195 (1914) it was held that a negotiable note given in payment of a gambling debt was absolutely void, under the Act of 1794, and that the N. I. L. did not repeal this act by implication. In discussing the effect of the N. I. L. the court said it only applies to paper that it was legally possible for the parties to make. "The construction sought for by the plaintiff would likewise repeal existing laws for the protection of infants, married women, and insane persons; and it is evident that such was not the intention of the legislature."

\textsuperscript{76}178 Pa. 180 (1896).

\textsuperscript{77}Id., at 184.

\textsuperscript{78}Hemphill \textit{v. McClimans}, 24 Pa. 367 (1855).

In Rathfon v. Locher\textsuperscript{80} this doctrine of moral consideration was applied to her accommodation paper given during coverture and she was held liable on her renewal note given after the termination of her marriage.\textsuperscript{81}

MORTGAGE OR PLEDGE OF PROPERTY

A married woman had the power in Pennsylvania from earliest times to convey or mortgage her real property, by complying with certain requirements as to the husband's joinder, separate acknowledgement, etc. Early cases held that since she could sell or mortgage her realty and give the money received to her husband or another she could subject her estate to a contingent liability for the same purpose.\textsuperscript{82} In the case of Kuhn v. Ogilvie\textsuperscript{83} the question was raised as to whether the provision of the Act of 1893 changed this rule and rendered her mortgage as security for the debt of another invalid. The court concluded that it did not, on the ground that the general intent of the act was plainly to enlarge her contractual capacity and therefore nothing "less than explicit negative words should be construed as narrowing powers admittedly possessed before the passage of the act."\textsuperscript{84}

The question of a transfer of her personal property as security for the debt of another did not arise at common law, since by marriage her chattels

\textsuperscript{80}215 Pa. 571 (1906).

\textsuperscript{81}The language of the court in Young's Estate, 234 Pa. 287 (1912) carries this moral consideration theory to the point of absurdity. There a married woman was the accommodation maker of a note, payable to her husband, for which the plaintiff advanced money to the husband, knowing she was an accommodation maker. The husband became insane and, upon the plaintiff's insistence, she gave a renewal note with a new indorser. The suit was against the indorser and the court held the defendant liable on the warranty of indorsement (see supra n. 66). Nothing more was before the court, but it nevertheless volunteered the dictum that the wife was liable as maker—upon the theory that a moral obligation rested upon her to pay the debt and hence when she gave the renewal note "a consideration moved directly to her in the extension allowed her to redeem her moral obligation." (citing Rathfon v. Locher). What is an extension of a moral obligation? What of the fact that her first note was a promise to pay the debt of her husband and the second was a mere renewal of that promise? By it she did not promise to pay her own debt, but the debt which her husband incurred. If this is law the statute is worthless. All that the wife needs do to be liable is to give her note as accommodation maker and then give a renewal note. The moral obligation to pay the first note is consideration for her second promise and she is a principal; i.e., she has no capacity to promise to pay the debt of another, but if she promises twice she is liable. Moral consideration may support a contract she has capacity to make, as in the Rathfon case, but it can not support or validate an obligation she is legally incapacitated from incurring.

\textsuperscript{82}Hoover v. Samaritan Society, 4 Whart. 445 (1839); Haffey v. Carey, 73 Pa. 431 (1873).

\textsuperscript{83}178 Pa. 303 (1896).

\textsuperscript{84}Acc: Siebert v. Valley Nat. Bank, 186 Pa. 233 (1898); Righter v. Livingstone, 214 Pa. 28 (1906).
automatically became the husband's. However, the Act of 1848\textsuperscript{85} provided that title to her property of any kind should not be divested by marriage and it was thereafter held that she could assign her chattels or choses in action as security for her husband's debt.\textsuperscript{86} The Act of 1893 could have no different effect upon such a pledge of her personal property than upon a mortgage of her realty and the courts so held.\textsuperscript{87} In the case of \textit{Herr v. Reinoehl} the court explained the purpose of the act thus: "What the statute prohibits is the incurring of a personal liability for the forbidden purpose, a liability which carries the risk of a general judgment."\textsuperscript{88} So, to epitomize, a married woman may pledge her property, but not her credit, for the debt of another. To illustrate, where a bond and mortgage is given to secure the husband's debt the mortgage is valid but the bond is void.\textsuperscript{89} In this connection it should be noted that if a married woman mortgages her property as security for the debt of another and thereafter borrows money to pay off the mortgage debt and preclude foreclosure, she would be liable on this loan. She would not be an accommodation party as to the loan, despite the fact that the mortgage was originally given as surety, for the money is borrowed and used by her in direct relief of her own debt and property in the foreclosure suit.\textsuperscript{90}

\textsuperscript{85}Supra n. 2.
\textsuperscript{86}Lytle's Appeal, 36 Pa. 131 (1860).
\textsuperscript{88}209 Pa. 483, 487.
\textsuperscript{90}See Alliance Finance Corp. v. Abrams, 97 Super. 528 (1929).