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original date of sale;¹⁸ where the trustee gave a deed prematurely the title derived was held valid since no injury was caused any interested party.¹⁹

In the instant case the clerk's exercise of discretion involves what constitutes actual payment to him, not the time of payment. No discretion exists to extend the time of payment laid down by the statute. Neither should the rule laid down in the principal case be extended to allow the clerk's authorization of mailing from an unreasonable distance, nor to allow his appointment of any unreasonable agency for delivery. Recognition must be given the strong argument against the North Carolina policy of allowing advance bids in that it tends to make judicial sales unstable, and chills the bidding.²⁰ Granting that a liberal interpretation is consonant with the purpose of the statute itself, in its effort to protect the mortgagor by such liberality of construction the court should take proper care that it does not lean backward and thereby defeat its own purpose.

J. G. ADAMS, JR.

Negotiable Instruments—Evidence—Parol Agreements to Vary Liability of an Indorser

In *Wrenn v. Lawrence Cotton Mills, Inc.*,¹ the payee of five sealed notes brought action on them six years after maturity. The defendants who were accommodation indorsers for the maker (now insolvent) pleaded the three year statute of limitations. Plaintiff offered oral evidence that defendants, directors of the corporation, prior to their indorsement, agreed to "remain liable and responsible until the notes were paid." Evidence excluded. Affirmed. *Held*: that prior oral agreements which change the status of an indorser to that of a surety are unenforceable. The court assumes that such an agreement if held valid would impose the liability of co-makers or sureties on the indorsers who could then plead only the ten year statute of limitations for sealed notes.²

¹⁸ *Lawrence v. Beck*, *supra* note 11.

¹⁹ No advance bids were offered during the statutory period, *Wise v. Short*, *supra* note 11; but the clerk has no power to order a resale until an advance bid has been made, where the clerk prematurely made order for deed to bidder the order may be revoked and a resale ordered, *Hanna v. Carolina Mortgage Co.*, 197 N. C. 184, 148 S. E. 31 (1929).

²⁰ *Hardy v. Coley*, 114 Va. 570, 77 S. E. 458 (1913).

¹ 198 N. C. 89, 150 S. E. 676 (2) (1929).

² This point was not raised by either of counsel's briefs or by the court. The plaintiff counsel sought to have the parol agreement enforced and thereby

There may be room for doubt as to such assumption, but apart from that question the case invites a discussion of the extremely important as well as interesting query: When will an extrinsic agreement between an indorser and another immediate party, which provides for a modification of the indorser's *prima facie* liability be enforced in North Carolina? This problem can best be understood by classifying the relevant North Carolina cases as follows: 1—Those which held such agreements valid prior to the N. I. L. 2—Those which held such agreements valid since the N. I. L. 3—Those which held such agreements invalid since the N. I. L. As a forerunner to this discussion it seems necessary to repeat the well-known rule that extrinsic negotiations between the immediate parties, which modify the indorser's liability are never enforced against a *bona fide* holder in due course.³

1. Prior to the N. I. L. parol agreements were generally enforced in this state.⁴ It was then held that a person writing his name on the back of the instrument before delivery to the payee was presumed to be a co-maker, guarantor, or surety;⁵ but if his name appeared after the payee's indorsement, the presumed liability was that of an indorser.⁶ In *Mendenhall v. Davis*⁷ the court enforced the contemporaneous oral agreement that the blank indorsement was to have no other effect than to assign the note to the payee. Other contracts were held valid where the indorsee promised to strike out the indorsement if the indorser deeded him a certain piece of land,⁸ and where the understanding was that the payee's indorsement was to be a receipt to the indorsee as agent for the maker.⁹

bind the defendants on the extended notes, but the court very properly pointed out that even if the agreement was valid there was no definite extension of time.

³ *Hill v. Shields*, 81 N. C. 250 (1879); (1915) 29 HARV. L. REV. 549; 1 DANIEL, NEGOTIABLE INSTRUMENTS (6th ed. 1919) §707; N. I. L. §57.

⁴ *Lilly v. Baker*, 88 N. C. 151 (1883); *Love v. Wall*, 8 N. C. 313 (1821); *Barden v. Hornthal*, 151 N. C. 8, 65 S. E. 513 (1909) (where the notes sued on were given about a month prior to the adoption of the N. I. L.; (1910) 23 HARV. L. REV. 396.

⁵ *Barden v. Hornthal*, *supra* note 4; *cf. Gomez v. Lazarus*, 16 N. C. 205 (1828).

⁶ *Lilly v. Baker*, *supra* note 4.

⁷ 72 N. C. 150 (1875) (where the court said the indorsement constituted no contract at all without the collateral oral agreement; see criticism of the same in II WILLISTON, CONTRACTS (1920) §643 "such decisions nullify the statute"); *cf. Comm's. v. Wasson*, 82 N. C. 309 (1880).

⁸ *Smitherman v. Smith*, 20 N. C. 86 (1838).

⁹ *Davis v. Morgan*, 64 N. C. 570 (1870).

2. Since the adoption of the N. I. L. by North Carolina,¹⁰ one writing his name on the back of an instrument before delivery to the payee, is no longer presumed to be a co-maker or surety, for sections 63 and 64 provide that such a person is "deemed an indorser" and is liable as such to the payee and all subsequent parties. Section 68 provides that successive indorsers shall be liable in the order of their indorsements, but as among themselves, agreements to the contrary will be enforced. Notwithstanding the express provisions of sections 63 and 64 our court continued to enforce extrinsic agreements which varied the ordinary liability of an anomalous indorser to the payee.¹¹ In *Sykes v. Everett*¹² the court enforced the oral agreement that the payee was to exhaust the resources of a certain estate before proceeding against the defendant who had indorsed in blank. The cases cited as authority were nearly all decided prior to the adoption of the N. I. L. which was not cited. Likewise, in *Fertilizer Co. v. Eason*¹³ the court held valid the collateral agreement, entered into at the time of the blank indorsement, that defendant would remain liable three or four years from the date of the indorsement, which was a month after maturity of the note. The N. I. L. was not cited. Both of these cases reviewed the early authorities, and repeated several times that "as between the immediate parties evidence of parol agreements would be admissible, though it would not be admissible against *bona fide* holders." The parol contract was held valid in *Lancaster v. Stanfield*¹⁴ where defendant's name appeared fifth in a list of twelve anomalous indorsers who had agreed to be mutually liable as co-sureties. This case was correctly decided under section 68 of the N. I. L., referred to above. It has been held in a comparatively recent case¹⁵ that a parol contract between a surety and an indorser that they would be equally liable was enforceable.

3. In other recent cases it was decided that parol agreements imposing primary liability on an indorser are unenforceable. This

¹⁰ N. C. Code Ann. (Michie 1927) ch. 58, §§2976-3171.

¹¹ Cf. *McRae v. Fox*, 185 N. C. 343, 117 S. E. 396 (1923), which proceeded on the ground of mutual mistake but seems insupportable on that ground. The case is criticised in (1923) 2 N. C. L. REV. 122, the writer of which said that North Carolina had lined up with the minority in enforcing parol agreements as between the immediate parties; Notes (1919) 4 A. L. R. 764; (1921) 11 A. L. R. 637; (1925) 37 A. L. R. 1222.

¹² 167 N. C. 600, 83 S. E. 585 (1914).

¹³ 194 N. C. 244, 139 S. E. 376 (1927).

¹⁴ 191 N. C. 340, 132 S. E. 21 (1926).

¹⁵ *Gilliam v. Walker*, 189 N. C. 189, 126 S. E. 424 (1925).

rule was first definitely established in *Meyers Co. v. Battle*¹⁶ which held that notice of dishonor was necessary notwithstanding a collateral agreement that the indorser would assume the liability of an "original promisor." A much later case *Busbee v. Creech*¹⁷ was to the same effect. By the language tenor of *Wrenn v. Lawrence Cotton Mills* it seems that our rule has been extended; namely, so that no collateral agreement which imposes primary liability on the indorser will be enforced, whether its tendency is to dispense with the necessity for the notice of dishonor or to repel the effect of the statute of limitations. The court's careful consideration of the terms of the N. I. L. in each of the later cases and the absence of that consideration in the earlier cases indicates the possibility that when the proper occasion arises, the court may overrule *Sykes v. Everett* and declare those parol agreements which *limit* the indorser's liability also unenforceable.

J. B. LEWIS.

Taxation—The Property Basis of Inheritance Taxation of Intangibles—Inheritance Tax on Shares of Non-Resident at Corporate Domicile

The United States Supreme Court has recently decided in the case of *Farmers' Loan and Trust Co. v. Minnesota*,¹ that the State of Minnesota cannot levy an inheritance tax upon the transfer of bonds issued by that State and by its municipal corporations, owned and held by a non-resident decedent. Such a radical departure from the opposite rule as laid down in *Blackstone v. Miller*,² affecting as it does enormous interests, is of itself a landmark in the law of taxation. Its greater interest, however lies in the indication of a trend in tax principles designed to relieve of the burdens of double taxation, and offering an avenue for a rationalization of the fundamental conceptions of tax jurisdiction.

¹⁶ 170 N. C. 168, 86 S. E. 1034 (1915); cf. *Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866 (1915) where the same point was raised but expressly left unsettled.

¹⁷ 192 N. C. 499, 135 S. E. 326 (1926) criticised in BIGELOW, BILLS, NOTES AND CHECKS (Lile 3 ed. 1928) §426, n. 7, as follows: "neither the reasoning nor the result will likely be followed elsewhere." The learned author misinterpreted the facts to mean that the defendant indorsers were accommodating the plaintiff. See also 5 WIGMORE, EVIDENCE (1923) §§2443-2445; (1924) 38 HARV. L. REV. 391; BRANNAN, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) §§63-64.

¹ 280 U. S. 204, 50 Sup. Ct. 98 (1930). See Note (1930) 43 HARV. L. REV. 792; (1930) 64 U. S. L. REV. 158.

² 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1902).