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Mortgages -- Foreclosure Sale -- Requirements for Advance Bids Under Statute

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Mortgages—Foreclosure Sale—Requirements for Advance Bids Under Statute

On the tenth day after a trustee's sale of land under foreclosure of a deed of trust,[1] the plaintiff telephoned the clerk's office, twelve miles distant, making an advance bid and offering to deliver the requisite deposit immediately. The clerk, as an accommodation to the plaintiff, authorized the mailing of a cashier's check on that day. The check was mailed during the afternoon, and arrived in the hands of the clerk next morning. After the plaintiff's conversation with the clerk, and on the tenth day, the plaintiff's attorney called at the clerk's office and offered to give him his own check, but was told that the bid had already been raised by his principal. *Held,* sufficient compliance with the statute[2] prescribing advance bids and deposits securing the bids to be paid to the clerk within ten days after the sale.

There are three recognized doctrines on the effect of advance bids as a ground for refusal to confirm judicial sales.[3] The English view, and that representing the weight of authority in the United States, is that an advance bid is not in itself sufficient;[4] confirmation by the court generally being required in the absence of gross inadequacy of price,[5] mistake,[6] fraud or other misconduct.[7] The intermediate view holds that confirmation or resale is within the discretion of the court.[8] The minority group, followed by North Carolina, holds that confirmation will be refused on receipt of a higher

[1] Clayton Banking Co. v. Green, 197 N. C. 534, 149 S. E. 689 (1929).

[2] N. C. Cons. Stat. Ann. (1919) §2591: At any time within ten days after an executor's, administrator's, or trustee's sale the sale may be reopened by an advance bid of 10% where the previous bid was $500.00 or less than 5% where it was greater, and the "same is paid to the clerk." The clerk shall then issue an order for resale on fifteen days notice.

[3] Note (1921) 11 A. L. R. 399.

[4] Grattam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839 (1885); Page v. Kress, 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052 (1890); Williamson v. Dale, 3 John. Ch. 290 (N. Y. 1819); Note (1921) 11 A. L. R. 399.

[5] To set aside the sale, the bid must be so grossly inadequate as to "shock the conscience of the court," Rospigliosi v. New Orleans, M. & C. R. Co., 237 Fed. 341 (C. C. A. 5th, 1916).

[6] Mistake, even by the strict majority rule, is held to be a valid ground for setting aside the sale and ordering resale. In the instant case, granting that the plaintiff failed to make his bid within the requirements of the statute, could not his case be supported on the ground of the clerk's mistake in misrepresenting to him the permissible means of payment?

[7] Shipe v. Consumer's Service Co., 29 F. (2d) 321 (C. C. A. 7th, 1928).

[8] State Bank v. Green, 11 Neb. 303, 9 N. W. 36 (1881); State Bank v. Murray, 84 Kan. 524, 114 Pac. 847 (1911); Aurbach v. Wolf, 22 App. D. C. 538 (1903); Note (1921) 11 A. L. R. 399.

bid;[9] and consequently, that inadequacy of price is sufficient ground for setting aside the sale, an advance bid being regarded as evidence of the inadequacy of the former one.[10]

With a view to giving every possible advantage to the mortgagor, substantial compliance with statutes and terms regulating judicial sales is well recognized.[11] The statute construed in the principal case was intended for the protection of the mortgagor where sales are made under power without a decree of foreclosure by the court.[12] This and similar statutes[13] covering other phases of judicial sales have always been construed liberally by our courts. An oral objection to a partition sale where a written objection was required to be filed was held to be sufficient compliance;[14] as was an advance bid in a partition sale made after expiration of the period set out by statute, but before confirmation of the sale;[15] payment of a mistaken amount demanded by the sheriff was valid redemption from a tax sale;[16] on an advance bid a deposit of two per cent where five was required by statute was held to be sufficient compliance;[17] the clerk may make order for delivery of deed after confirmation *nunc pro tunc* as of the

[9] N. C., Pa., W. Va., and in early cases Va. incline to this view. Note (1921) 11 A. L. R. 399; *In re* Bost, 56 N. C. 482 (1851); Childress v. Hurt, 2 Swan 487 (Tenn. 1852); Todd v. Gallego Mfg. Co., 84 Va. 586, 5 S. E. 676 (1888); Stewart v. Stewart, 27 W. Va. 167 (1885); Hamilton's Estate, 51 Pa. 58 (1865).

[10] Perry v. Perry, 179 N. C. 445, 102 S. E. 772 (1920).

[11] *In re* Baugess, 196 N. C. 278, 145 S. E. 395 (1928); Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424 (1923); Wise v. Short, 181 N. C. 320, 107 S. E. 134 (1921); Pringle v. Loan Ass'n, 182 N. C. 316, 108 S. E. 914 (1921); McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225 (1927); as well, terms of sale under power as set forth in the instrument must be strictly complied with by the trustee-vendor, Eubanks v. Becton, 158 N. C. 231, 73 S. E. 1009 (1912); Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17 (1914); Hogan v. Utter, 175 N. C. 332, 95 S. E. 565 (1918); Ricks v. Brook, 179 N. C. 204, 102 S. E. 207 (1920); see 2 WILTSIE, MORTGAGE FORECLOSURE (4th ed. 1927) §833.

[12] In sales under decree there was always an equity to decree a resale when a substantial raise in bid had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortagors whose property had been foreclosed under power of sale without decree of foreclosure, the same opportunity of a resale where there has been an increased bid, Pringle v. Loan Ass'n., *supra* note 11.

[13] Partition, N. C. Cons. Stat. Ann. (1919) §3230; Partition Sales, N. C. Cons. Stat. Ann. (1919) §3243; Tax Sales, N. C. Cons. Stat. Ann. (1919) §8038.

[14] McCormick v. Patterson, *supra* note 11.

[15] Upchurch v. Upchurch, 173 N. C. 88, 91 S. E. 702 (1917).

[16] Beck v. Meroney, 135 N. C. 532, 47 S. E. 613 (1904).

[17] Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3 (1926). But payment of deposit to trustee instead of clerk held an invalid bid. Newby v. Gallop, 193 N. C. 244, 136 S. E. 610 (1927).

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.

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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