Denver Law Review

Volume 16 | Issue 8 Article 3

January 1939

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For corporations earning less than $25,000, 12½% of the first $5,000, 14% of the next $15,000, 16% of the last $5,000;

Corporations earning slightly over $25,000 will pay, first, 18% of their normal tax net income, or, second, $3,525, plus 32% of the amount of the normal tax net income in excess of $25,000, whichever is less. The $3,525 figure is the full tax for corporations earning $25,000 under the above schedule.

9. *Individual Tax Rates.* No change.

10. *Stamp Tax.* The 1939 Act permits transfer of stock by an executor or administrator without stamp taxes, if the value of the shares is not greater than the amount of the tax that otherwise would be imposed.

AUGMENTING THE ANOMALOUSNESS OF THE ANOMALOUS INDORSER

By R. HICKMAN WALKER, *of the Denver Bar*

THIS relates to *Winton vs. Sullivan,* 104 Colo. 450, decided June 12, 1939. En Banc. No dissent. Mr. Justice Francis E. Bouck not participating. Opinion by Mr. Justice Bock.

The writer hereof would not have been bothered by Winton vs. Sullivan if it were not for the fact, intrinsically unimportant, that during a period of years he personally conducted annual excursions at a nearby university into the alien scenery of the Law Merchant. Among the curiosities rather closely examined on these explorations was the Anomalous Indorser. This was the accommodating person who, prior to the delivery of a negotiable instrument, wrote his name upon the back thereof for the purpose of lending credit to the maker or payee and without sustaining any other relation to the instrument. Before the adoption of N. I. L. (a symbol, perhaps, also of what is generally known about it) there was no uniformity in the views of the courts of the United States as to the nature of the contract of the anomalous indorser. Some courts held that his contract was that of an indorser; others that his contract was that of a maker (in the case of a note); and still others that his contract was to be established by parol

evidence. Colorado held to the second of these views. *Good vs. Martin,* 1 Colo. 165; *Kiskadden vs. Allen,* 7 Colo. 206; *Tabor vs. Miles,* 5 Colo. App. 127; *Byers vs. Tritch,* 12 Colo. App. 377; *Edmonston vs. Ascough,* 43 Colo. 55.

Among the purposes (as it is alleged) of the Uniform Negotiable Instruments Law was the removal of the conflict in authority above noted. 10 C. J. S. 468. The section designed for this purpose is found as Section 64, Chapter 112, '35 C. S. A., reading in part as follows:

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable *as indorser* in accordance with the following rules:

"First—If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties."

To take a bond of fate upon this particular question and also to cover other similar situations, Section 63, Id., reads:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

In *Edmonston vs. Ascough,* supra, Edmonston signed on the face of the note below the maker's signature, adding the word "surety" and so the court said:

"We do not consider what the effect would have been under our negotiable instrument law had Edmonston's name been indorsed in blank on the back of the instrument. Prior to the adoption of that law this would have made no difference; he would, even had he signed solely for the accommodation of Dustin, have been regarded as a joint maker."

In this state of the law, and probably ignorant of it, the aforesaid Sullivan, prior to the delivery of a note to the payee, indorsed it as follows: "Demand, notice and protest waived. Payment guaranteed. E. J. Sullivan." Thereafter the holder accepted from a person claiming to be the trustee for the creditors of the maker twenty per cent of the amount due "in full satisfaction of all indebtedness to the payee" from the maker. However, the holder credited upon the note only the amount so received, and afterwards transferred it to the plaintiff Winton. Sullivan contended that he was discharged from liability under the note by the following provision of the Act (Section 120, Chapter 112, C. S. A.):

"A person secondarily liable on the instrument is discharged: * * *

"Fifth—By a release of the principal debtor unless the holder's right of recourse against the party secondarily liable is expressly reserved."

Apparently he also contended that he was to be deemed a mere guarantor and not an indorser, and therefore released by the settlement made between the holder and the maker.

As its first task the opinion addressed itself to the proposition that notwithstanding the phrase "payment guaranteed," the writing on the back of the note was a commercial indorsement and Sullivan an indorser. This task the opinion performed with vigor and considerable success, and with an imposing show of authorities. Up to this point the mind perusing the opinion feels no particular strain, and looks confidently ahead to an early and easy solution of the problem. For if, as the court has thus established, Sullivan's contract was not merely a guaranty, then there stands Section 64 precisely prepared to take care of the situation and to say what Sullivan's liability is, namely, that "he is liable *as indorser*" to the payee and to all subsequent parties. The court, however, finds it unnecessary or deems it unworthy to invoke such obvious support for its conclusion that Sullivan is indorser, and this perhaps is not important except to sensitive friends of Section 64. What is important is that Sullivan, at pages 454 and 455 of the opinion, is given such assurance that he occupies the position of indorser that it would seem he could relax and enjoy the remainder of the opinion. For, being an indorser, his first and excusable impression is that he is a party "secondarily liable" (as indorsers typically are) and therefore released in accordance with the terms of Section 120, supra. His security, however, is both false and transient, for the court makes an indorser out of him in order to destroy him, and this it does by the disconcerting announcement of a general rule to the effect that an accommodation party is primarily liable. The Negotiable Instrument Act itself has its own notion of what constitutes primary liability, since it says: "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." The Act therefore distinguishes primary from secondary liability *by the terms of the contract*. The court appears to ground *its* distinction upon the presence or absence of consideration given for the contract.

In other words, under the rule of Winton vs. Sullivan, one who writes his name upon the back of a note to accommodate his friend, the maker, becomes primarily liable, but one who demands twenty-five dollars for the same service is only secondarily liable. The only decision cited in support of this distinction is *Hall vs. Farmers Bank,* 74 Colo. 165, in which case it was held that one who signed *as a maker* for the accommodation of the co-maker was primarily liable and that the rules of suretyship were not applicable to such a situation. That holding, of course, was inevitable since the accommodating contract by its terms was a primary contract, namely, that of a maker. Under Winton vs. Sullivan, however, if you wish to be safe, you have to be mercenary. If you wish to preserve the rights of an indorser, you have to charge for your indorsement.

It might have been a pretty question in Winton vs. Sullivan whether the waiver of demand, notice and protest contained in the indorsement did not have the effect of making the indorser's liability primary. There are some courts that have said that it would, but others have held to the contrary, and it does seem as if an indorser could waive demand, notice and protest without also waiving the right which an indorser has to have the contract between the maker and the holder kept intact as against the maker. We do not, however, find in Winton vs. Sullivan any airing of this question. It is true the opinion says as a preface to the discussion of the question of guarantor or indorser, that there is no contention nor any facts to support one if made "that the indorsement on the note signed by defendant is a collateral contract or undertaking and not a direct liability." This seems at best but a remote allusion to the effect of the waiver in Sullivan's indorsement, and other portions of the opinion seem to indicate that this waiver was playing no part in the reasoning of the court, but that the simple *ratio decidendi* is that any accommodation party is primarily liable.

If this be the correct interpretation of the opinion, then Winton vs. Sullivan must be deemed a "re-examination" of a fundamental rule of commercial law and to constitute a "shift" in doctrine. It will be interesting to observe what the annotators do with Winton vs. Sullivan.