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BILLS AND NOTES—ASSENT BY INDORSER TO RELEASE OF MAKER AS UNDERTAKING BY FORMER TO CONTINUE LIABLE—SECTION 120, N.I.L.—The indorser on the note in suit gave his assent to the holder's release of the insolvent maker in return for a deed to certain real estate given by the maker. In reply to demands of the holder for the balance remaining due after sale of the real estate, the indorser stated he would pay the note, but asked for time. On failure of the indorser to pay, this suit was brought. *Held*, for the plaintiff. Consent of the indorser to release of the maker is not equivalent to an express reservation of rights as required by section 120(5) of the N.I.L. to preserve the liability of the indorser. Consent to the release, however, when considered with the other facts, was sufficient evidence for a jury to find a valid and binding agreement that the indorser was to remain liable after release of the maker, which agreement is to be treated as a *casus omissus* to section 120(5) and governed by the common law. *Howard Nat. Bank & Trust Co. v. Newman*, (Vt. 1947) 50 A. (2d) 896.

The liability of an indorser who gives his assent to the release of the principal debtor has been the subject of but few decisions under the N.I.L., and these have not been uniform in results. Although the common law rule was not entirely settled, apparently in most jurisdictions an indorser's consent to the release of the maker operated of itself to preserve the liability of the indorser.¹ The N.I.L., section 120, provides that a person secondarily liable on the instrument is discharged "(3) By the discharge of a prior party; . . . (5) By a release

¹ *Parks v. Ingram*, 22 N.H. 283 (1851); *Morse v. Huntington* 40 Vt. 488 (1868); *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N.E. 982 (1913); 3 R.C.L. 1279. *Contra*, *Eggemann v. Henschen*, 56 Mo. 123 (1874):

of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved." It has been held that an implied consent to release of the maker does not prevent discharge of the indorser.² Similarly, in most of the cases decided under the N.I.L. it has been held that an express consent to release of the maker does not itself prevent discharge of the indorser.³ The principal reasons for this construction of the N.I.L. are (1) that at common law there was a distinction, presumably known to the framers of the N.I.L., between a release with an express reservation of rights against the indorser, and a release with the consent of an indorser,⁴ and (2) that section 120(5) is significantly silent as to the effect of consent on discharge of the indorser, whereas section 120(6) expressly provides that assent to extension of time preserves the liability of a secondary party. This construction has not met with the approval of the text writers who have argued for a different result under section 120(5).⁵ Some of the cases have merely decided that assent to release of the maker does not preserve the liability of the indorser under section 120(5) of the N.I.L.⁶ In *Arlington Nat. Bank v. Bennett*,⁷ however, it was recognized that the N.I.L. should not be construed as intended to preclude the indorser and the holder from entering into an agreement by which the indorser's liability should continue unimpaired.⁸ It would seem that the language of section 120(5) is entirely inappropriate to cover such an agreement, and that the common law rules should govern when such an agreement can be found.⁹ Clearly,

² *National Bank of La Crosse v. Funke*, 215 Wis. 541, 255 N.W. 147 (1934); *Diamond Nat. Bank v. Peck*, 13 Pa. Dist. & Co. Rep. 632 (1930).

³ *Phenix Nat. Bank of N.Y. v. Hanlon*, 183 Mo. App. 243, 166 S.W. 830 (1914); *National Bank of La Crosse v. Funke*, 215 Wis. 541, 255 N.W. 147 (1934); *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N.E. 982 (1913), although the basis of the decision here is not entirely clear and is cited by Britton as authority for a contrary rule, BRITTON, BILLS AND NOTES, § 291, note 5 (1942), it was said in the principal case to have been based on an agreement by the indorser to remain liable after release of the maker. In *Newman v. Ryman*, (La. App. 1938) 181 S. 216, it was held that mere consent to a release does not continue an indorser's liability under section 120(3).

⁴ In the case of a release with reservation of rights against the indorser, the maker is still liable to the indorser, but where the release is consented to by the indorser, the indorser is barred of any right of recourse. *Sohier v. Loring*, 6 Cush. (60 Mass.) 537 (1850); *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N.E. 982 (1913).

⁵ BIGELOW, BILLS, NOTES & CHECKS, 3d ed., § 604a (1928); BRANNON, NEGOTIABLE INSTRUMENTS LAW, 6th ed., § 120(5) (1938); BRITTON, BILLS AND NOTES, § 191 (1942), who argues that it would be a highly mechanical and literal interpretation of language to hold that a release accompanied by an express reservation of rights against an indorser without his knowledge of or consent to the release is more effective than an affirmative consent thereto by the secondary party.

⁶ *Phenix Nat. Bank of N.Y. v. Hanlon*, 183 Mo. App. 243, 166 S.W. 830 (1914); *National Bank of La Crosse v. Funke*, 215 Wis. 541, 255 N.W. 147 (1934).

⁷ *Supra*, note 6.

⁸ To the same effect, see *Newman v. Ryman*, (La. App. 1938) 181 S. 216. Several common law cases seem to have been decided on the basis of such an agreement, of which assent to release was regarded as evidence. See *Gloucester Bank v. Worcester*, 10 Pick. (27 Mass.) 528 (1830); and *Reed v. Tarbell*, 4 Metc. (45 Mass.) 93 (1842).

⁹ The language of section 120(5) applies only to agreements between the holder

for the validity of an agreement of this sort, there must be found both an intent on the part of the indorser to remain liable, and consideration for his undertaking. It would seem that the indorser's assent to release of the maker might readily lead to the inference that he intended to remain liable. Since any detriment to the holder or benefit to the indorser is sufficient consideration for his undertaking to remain liable, the result thus reached would seem plausible in most cases where the express assent of the indorser is obtained. Assuming that a valid contract can be found, it is held in the principal case that it constitutes a waiver of the statutory rights of the parties thereto, and, consequently, the case may be resolved either on the theory of a *casus omissus* to the N.I.L. or on that of waiver by contract.

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of a note and the maker, evidenced by an express reservation of rights against the indorser in the instrument, and not to an agreement between the holder and indorser outside of the instrument. *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N.E. 982 (1913).