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Bills and Notes--Part Payments by Maker on Demand Note--Effect on Statute of Limitations as to Extending Liability of Guarantor (People's Trust Company of Malone v. O'Neil, 273 N.Y. 312 (1937))

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BILLS AND NOTES—PART PAYMENTS BY MAKER ON DEMAND NOTE—EFFECT ON STATUTE OF LIMITATIONS AS TO EXTENDING LIABILITY OF GUARANTOR.—Appellant was the guarantor [1] of a demand note. The maker made several payments thereon over a period of several years, but not with the authority of the guarantor nor as his agent. After a lapse of more than six years from the date of the instrument, this action was brought against the maker and the guarantor. A judgment against both at Trial Term was affirmed by the Appellate Division and the guarantor appealed. Plaintiff's contention was that the part payments by the maker had delayed the running of the Statute of Limitations as to both defendants. Appellant contended that because six years had elapsed since the date of the note, he was discharged notwithstanding the payments by the maker. On appeal, *held,* reversed. As the note was payable on demand, the Statute of Limitations commenced to run immediately in appellant's favor and he was discharged after six years. *People's Trust Company of Malone* v. *O'Neil,* 273 N. Y. 312, 7 N. E. (2d) 245 (1937).

In the case of a note payable on demand, the Statute of Limitations begins to run in favor of the maker from its date,[2] and this is so whether the note be payable with or without interest.[3] The word "demand" is not treated as part of the contract, but is used to show that the debt is presently due [4] and the liability of the guarantor becomes fixed [5] immediately, with the result that suit [6] may be maintained against him on the note at once. A demand by the holder on the maker was not necessary to start the liability operating against the guarantor because the guaranty involved was an absolute [7] and not a conditional [8] one. Even if it is conceded that a demand was necessary to complete the liability of the guarantor, the result today

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[1] Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888 (1910), where it is said: "The contract of one who indorses a promissory note in the words 'for value received, I hereby guaranty payment of the within note and hereby waive presentment, demand, protest and notice of protest' and who receives no consideration or benefit from the loan, is that of guarantor of payment."

[2] Cary v. Koerner, 200 N. Y. 253, 93 N. E. 979 (1910); Northrop v. Hill, 57 N. Y. 351 (1874); Muller v. Manhattan Ry., 124 App. Div. 295, 108 N. Y. Supp. (1st Dept. 1908), *aff'd,* 195 N. Y. 539, 88 N. E. 1126 (1909).

[3] Howland v. Edmonds, 24 N. Y. 307 (1862); Bartholomew v. Seaman, 25 Hun 619 (N. Y. 1881); Wenmann v. Mohawk Ins. Co., 13 Wend. 267 (N. Y. 1835).

[4] McMullen v. Rafferty, 89 N. Y. 456 (1882).

[5] Lloyd v. Mathews, 223 Ill. 477, 79 N. E. 172 (1905).

[6] Getty v. Schantz, 100 Fed. 577 (C. C. A. 7th, 1900); Litchfield First Nat. Bank v. Jones, 219 N. Y. 312, 114 N. E. 349 (1916); Higginbottom v. Manchester, 113 Conn. 62, 154 Atl. 242 (1931).

[7] Litchfield First Nat. Bank v. Jones, 219 N. Y. 312, 114 N. E. 349 (1916); Bank of Italy v. Merchants Nat. Bank, 113 Misc. 314, 185 N. Y. Supp. 43 (1920).

[8] Nelson v. Bostwick, 5 Hill 37 (N. Y. 1843), where an actual demand was necessary and the statute did not commence to run until such demand was made.

in New York State[9] would be practically the same.[10] A contract of guaranty is entirely separate and distinct from that contained in the negotiable instrument to which it is appended and the remedy of the holder of the note against the guarantor must be pursued as a distinct cause of action.[11] The liability on the part of the guarantor is thus distinguished[12] from that of the maker and it matters not that the note continues to be a valid obligation of the maker.[13] An admission to be operative must be made by the party to be charged *or by his authorized agent.* Was there such an agency between the maker and the guarantor? Prior to the *Van Keuren* case,[14] the courts of this state along with other jurisdictions followed the decision[15] laid down by Lord Mansfield in *Whitcomb* v. *Whitney*[16] and held that by a joint contract a unity of interest existed and a *quasi* agency was created between the joint contractors. The *Van Keuren* case, overruling many prior cases, settled the law in this state to the contrary and held that no mutual agency existed between joint debtors. Consequently, a payment by one is not sufficient to revive the demand as to the other joint debtors. Following the reasoning in this case, it was also decided that it makes no difference whether the payment was made before or after the action had been barred by the statute.[17] Since

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[9] N. Y. CIV. PRAC. ACT § 15: "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete."

[10] 3 WILLISTON, CONTRACTS (1st ed. 1920) § 2004: "Where plaintiff's right of action depends upon a preliminary act to be performed by himself, he cannot suspend indefinitely the running of the statute by delaying performance of the act." Brown v. Curtis, 2 N. Y. 225 (1849); Sewell v. Swift, 151 App. Div. 584, 136 N. Y. Supp. 371 (1st Dept. 1912).

[11] Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888 (1910).

[12] But see 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 193, where the author points out the importance of the *content* of the collateral agreement of guaranty insofar as preventing the statute from beginning to run against the guarantor's liability as it does against the principal's indebtedness.

[13] Harper v. Fairley, 53 N. Y. 442 (1873).

[14] 2 N. Y. 523 (1849).

[15] This decision by Lord Mansfield was rendered at a time when the statute of limitations (21 James I, c. 16) was looked upon by the courts with great disfavor and the slightest acknowledgment was held sufficient to deprive the defendant of the benefits of the statute. Hence an agency was implied in the relationship of joint debtors so that an admission by one bound the others where ordinarily no agency would be found. This decision was in direct conflict with the decision in Bland v. Haselrig, 2 Vent. 151 (K. B. 1690), which was decided more than 90 years before, at a time when the statute was in better repute. See opinion of Justice Storey in 1 Pet. 351 (U. S. 1828), where the learned Justice upholds the statute as a wise and beneficial law which should be upheld by the courts. See 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 191 for further explanation.

[16] 2 Doug. 652 (Mich. 1781).

[17] Shoemaker v. Benedict, 11 N. Y. 176 (1854), stating that if there never was an agency between the joint debtors, then it is true that one never existed while the statute was running just as one never existed after the statute had already barred the claim.

then, many cases have been decided involving joint debtors, principals, and sureties and it has been consistently held that payments made by one, without authorization from the others, did not affect the liability of the others.[18] If an agency between debtors primarily liable for a debt does not exist, there is no authority or reason for holding that such a relationship exists between a maker of a note who is primarily liable and the guarantor who is only secondarily liable.

G. A. R.

CARRIERS—FAILURE TO FURNISH SEATS—DAMAGES.—Plaintiff purchased a ticket from the defendant for transportation from Albany to New York City. When the plaintiff arrived on the station platform, an announcement was made that cars would be added to the train in order to accommodate, more comfortably, the attendant crowd of passengers. Additional cars were annexed, but the seating capacity was still inadequate to supply the needs of the passengers and the plaintiff was one of the many who were forced to stand. Under protest, and after being threatened with ejection, plaintiff surrendered his ticket. As a result of the discomfort suffered, plaintiff's health was temporarily impaired and he sues to recover damages thus sustained. On appeal from a dismissal of the complaint by the Municipal Court, *held,* reversed. There is a duty upon common carriers to furnish passengers with reasonable and adequate accommodations. *Davis* v. *New York Central R. R.,* 163 Misc. 710, 298 N. Y. Supp. 44 (1937).

The duty of a common carrier to furnish "reasonable and adequate accommodations" is imposed by Sections 61 and 62 of the Railroad Law,[1] in connection with Section 26 of the Public Service Law.[2] These statutes simply affirm the common law principles and "enforce a duty springing from their relations as carrier of passengers, and their undertaking with each passenger to transport him safely

[18] Harper v. Fairley, 53 N. Y. 442 (1873); Ulster County Savings Inst. v. Deyo, 191 N. Y. 505, 84 N. E. 1112 (1908); Hoover v. Hubbard, 202 N. Y. 289, 95 N. E. 702 (1911); State Bank of Binghampton v. Mangan, 269 N. Y. 598, 199 N. E. 689 (1935).

[1] RAILROAD LAW (1910) c. 481, § 61, which states the rule that a passenger may be ejected for refusing to pay the fare. RAILROAD LAW (1910) c. 481, § 62, the railroad corporation shall be liable for sleeping, drawing room and parlor cars, it contracts to carry, in the same way it is for ordinary cars, and it shall furnish sufficient ordinary cars for the reasonable accommodation of the traveling public.

[2] PUB. SERV. COMM. LAW (1910) c. 480, § 26, this is the statute which puts the onus of furnishing facilities, safe and adequate, and service, in all respects just and reasonable, on the carrier.