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BILLS AND NOTES-LIABILITY OF INDORSER AFTER STATUTE OF LIMITATIONS HAS BARRED ACTION AGAINST MARKER

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BILLS AND NOTES—LIABILITY OF INDORSER AFTER STATUTE OF LIMITATIONS HAS BARRED ACTION AGAINST MAKER—Defendant company made a note which was indorsed personally by defendant Heiselt, its president. The lower court, in rendering judgment against defendant Heiselt personally, held that the statute of limitations had run in favor of the defendant company but that it had not run in favor of the defendant Heiselt, as his absence from the state during a portion

of the period had tolled the statute as to him. On appeal, *held*, affirmed. Under section 120(3) of the N.I.L.[1] there had been no "discharge of a prior party" which would allow one secondarily liable to escape liability. *Upton v. Heiselt Const. Co.*, (Utah 1949) 208 P. (2d) 945.

Section 120(3) of the N.I.L. provides: "A person secondarily liable on the instrument is discharged: . . . (3) By the discharge of a prior party." The construction and application of this language in the principal case accords with what little direct authority there is on the precise issue here involved and the reasoning derived from closely analogous situations. As a preliminary consideration it is questionable whether the barring of an action against the maker of a promissory note by the running of the statute of limitations amounts to a "discharge" within the purview of section 120(3). From the frequency with which courts assert the proposition, it seems axiomatic that generally a statute of limitations is not considered as going to the substance of a right, but only to the remedy; that in the case of a debt it does not, after the period, have the same effect as payment or discharge, but operates on the remedy only, and does not extinguish the obligation.[2] At common law it was well settled that the discharge of a prior party which would discharge one secondarily liable was only such as arose from some affirmative act of the holder, as distinguished from a discharge said to arise by "operation of law."[3] While there was some question whether the failure to preserve this distinction expressly in section 120(3) would work a change in this aspect of the rule,[4] the courts have quite uniformly construed the section as excluding discharges arising by operation of law. So it has been held that the following discharges of the maker will not discharge the indorser from his obligation: a discharge in bankruptcy;[5] a discharge resulting from a confirmed composition in bankruptcy;[6] the barring of a claim against the estate of the deceased maker of the note by a failure to present the claim to the administrator before maturity;[7] and, as in the principal case, a discharge resulting from the running of the statute of limitations against the maker.[8] It is said that whether the indorser may plead in his own

[1] Utah Code Ann. (1943) §61-1-122.

[2] Campbell v. Haverhill, 155 U.S. 610, 15 S.Ct. 217 (1894); Ludlow v. Van Camp, 7 N.J.L. 113 (1823); Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582 (1910); Newhall v. Field, 13 N.M. 82, 79 P. 711 (1905).

[3] Roberts v. Chappell, 63 Ohio App. 397, 26 N.E. (2d) 930 (1939); Phillips v. Solomon, 42 Ga. 192 (1871); Post v. Losey, 111 Ind. 74, 12 N.E. 121 (1887); Guild v. Butler, 122 Mass. 498 (1877).

[4] McKeehan, "A Review of The Ames-Brewster Controversy," 50 AM. L. REG. 561 (1902).

[5] Corn Exchange Bank v. Taubel, 113 N.J.L. 605, 175 A. 55 (1934); Brooks v. American Nat. Bank of Beaumont, (Tex. Civ. App. 1937) 103 S.W. (2d) 246; Everding & Farrell v. Toft, 82 Ore. 1, 160 P. 1160 (1916).

[6] Silverman v. Rubinstein, (Sup.Ct. 1917) 162 N.Y.S. 733; Easton Furniture Mfg. Co. v. Caminez, 146 App. Div. 436, 131 N.Y.S. 157 (1911); In re American Paper Co., (D.C. N.J. 1919) 255 F. 121.

[7] Roberts v. Chappell, supra, note 3.

[8] Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922); Nelson v. First Nat. Bank, (C.C.A. 8th, 1895) 69 F. 798; Finance Corp. of New England v. Parker, 251 Mass. 372, 146 N.E. 696 (1925). *Contra*: First Nat. Bank of Shenandoah v. Drake, 185 Iowa 879, 171 N.W.

defense the same facts which operated to free his principal depends on the law of suretyship.[9] The decided weight of authority holds that the surety is not relieved of his obligation by the mere fact that the statute of limitations prevents the creditor from bringing an action against the principal.[10] The rule is not a harsh one, for the creditor does not contract to sue the principal before the statute of limitations operates, or otherwise to protect the surety against loss.[11] The surety has it within his power to protect himself fully from harm by paying the note, as he has obligated himself to do, and proceeding against the principal for reimbursement. The bar of the statute does not relieve the principal from his obligation to reimburse the surety.[12] As the surety's action for reimbursement is not on the instrument signed by the principal, but on an implied promise of the principal to indemnify, his cause of action does not arise until he has paid the debt of the principal, and the statute of limitations does not begin to run against his right to recover indemnity until such payment.[13] If for any reason the surety is unable to secure reimbursement from the principal it would seem to be the result of his own lack of diligence.

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115 (1919), which applies a minority view of suretyship law. See, BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., 1143-47 (1948).

[9] Broadly speaking, an indorser of a promisory note has the status of a surety as to the maker. See, Roberts v. Chappell, supra, note 3, and 4 WILLISTON, CONTRACTS, §§1213-1219 (1936).

[10] Bull v. Coe, 77 Cal. 54, 18 P. 808 (1888); Camp v. Bostwick, 20 Ohio St. 337 (1870); Newhall v. Field, supra, note 2; Villars v. Palmer, 67 Ill. 204 (1873); Willis v. Chowning, 90 Tex. 617, 40 S.W. 395 (1897).

[11] Reid v. Flippen, 47 Ga. 273 (1872); Nelson v. First Nat. Bank, supra, note 8; Villars v. Palmer, supra, note 10; Whiting v. Clark, 17 Cal. 407 (1861).

[12] Arnold, "The Statute of Limitations in the Law of Suretyship," 17 ILL. L. REV. 1 (1922).

[13] Arnold, "The Statute of Limitations in the Law of Suretyship," 17 ILL. L. REV. 1 (1922); Willis v. Chowning, supra, note 10; Leslie v. Compton, 103 Kan. 92, 172 P. 1015 (1918); Gieseke v. Johnson, 115 Ind. 308, 17 N.E. 573 (1888).