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BILLS AND NOTES-LIMITATION OF ACTIONS-RUNNING OF THE STATUTE OF LIMITATIONS AGAINST THE HOLDER OF A CHECK

Gordon I. Ginsberg
University of Michigan Law School

BILLS AND NOTES—LIMITATION OF ACTIONS—RUNNING OF THE STATUTE OF LIMITATIONS AGAINST THE HOLDER OF A CHECK—Defendant issued a check to plaintiff's intestate on July 1, 1942 for services rendered. On April 21, 1943, the payee deposited the check in her bank, but it was returned to her uncollected because the bank on which it was drawn refused to make payment on account of its "stale" date. Nothing further was done to enforce payment of the check during the payee's lifetime, and she died on September 20, 1948. This action on the check was brought by her administrator on July 28, 1949. On appeal from a judgment for plaintiff, *held*, the action is barred by the statute of limitations. Being a demand instrument, the action should have been commenced within six years from the date of issue, by July 1, 1948. *Farrell v. City of New York*, (N.Y. 1950) 98 N.Y.S. (2d) 56.

The court's decision in the principal case is based on its declaration that the statute of limitations begins to run on a check from the date of issuance. It is

true that under the Negotiable Instruments Law the maker of a demand note is primarily liable thereon immediately after issuance regardless of demand, and an action therefore accrues to the payee immediately.[1] But such is not the case in regard to checks; rather the drawer is only secondarily liable.[2] Accordingly, he is ordinarily not liable until presentment for payment and subsequent dishonor by the drawee.[3] The N.I.L. provides that "except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers,"[4] and that it is not until the instrument is dishonored by nonpayment, that "an immediate right of recourse to all parties secondarily liable thereon accrues to the holder."[5] It is when a cause of action accrues so that suit may properly be brought thereon that the running of the statute of limitations begins.[6] The rule is no different for checks. "The period of limitations runs from the date of dishonor, since the cause of action then arises."[7] In the case of checks this rule gives rise to a situation in which the holder, by his own failure to act, may be able to delay indefinitely the running of the statute. Consequently many cases have evolved the theory that the statute will begin to run after a reasonable time in which plaintiff could have made presentment, rather than after presentment and dishonor.[8] Under either view, however, the statute does not begin to run at the issuance of a check. Had the court in the principal case correctly determined the time at which the statutory period began to run, it might have reached the same result; that is, that the action was barred by the statute of limitations. Nevertheless, without deciding that question, it can

[1] N.I.L. §70; Shuman v. Citizens State Bank of Rugby, 27 N.D. 599, 147 N.W. 388 (1914); Esslinger v. Spragins, 236 Ala. 508, 183 S. 401 (1938).

[2] N.I.L. §192; Binghampton Pharmacy v. First Nat. Bank, 131 Tenn. 711, 176 S.W. 1038 (1915).

[3] N.I.L. §61; Fick v. Jones, 185 Wash. 365, 55 P. (2d) 334 (1936); Wachtel v. Rosen, 249 N.Y. 386, 164 N.E. 326 (1928); First Nat. Bank of Belle Plaine v. McConnell, 103 Minn. 340, 114 N.W. 1129 (1908); Haynes v. Wesley, 112 Ga. 668, 37 S.E. 990 (1900). See also 25 MINN. L. REV. 371 (1941).

[4] Sec. 70. The rule was the same at common law. See Fick v. Jones, 185 Wash. 365, 55 P. (2d) 334 (1936); Rodriguez v. Hardouin, 15 La. App. 112, 131 S. 593 (1930), holding that the N.I.L. has not changed the rule that the holder of a check payable to his order cannot bring suit against the drawer without proving presentment to the drawee and refusal of payment.

[5] Sec. 84; Amy v. Dubuque, 98 U.S. 470, 25 L.Ed. 228 (1878); Sweester v. Fox, 43 Utah 40, 134 P. 599 (1913).

[6] Dusek v. Pennsylvania R. Co., (7th Cir. 1933) 68 F. (2d) 131; Paulson v. United States, (10th Cir. 1935) 78 F. (2d) 97; Bass v. Standard Accident Ins. Co. of Detroit, (4th Cir. 1934) 70 F. (2d) 86; Smith v. Smith, 231 Ky. 229, 21 S.W. (2d) 246 (1929); Conway v. Plank, 136 Misc. 403, 243 N.Y.S. 215 (1930).

[7] BIGELOW, BILLS, NOTES AND CHECKS, 3d ed. by W. M. Lile, §540 (1928); In re Boyse, 33 Ch. Div. 612, 56 L.J. Reports (Ch. Div.) 135 (1886). See also Haynes v. Wesley, 112 Ga. 668, 37 S.E. 990 (1900); Wright v. MacCarty, 92 Ill. App. 120 (1900).

[8] For a discussion of this view in relation to Dean v. Iowa-Des Moines Nat. Bank & Trust Co., 227 Iowa 1239, 290 N.W. 664 (1940), see 25 MINN. L. REV. 371 (1941); 38 MICH. L. REV. 90 (1939). *Accord*: Wagner & Co. v. Smith, 114 S.C. 159, 103 S.E. 527 (1920); Wrigley v. Farmers and Mechanics State Bank of Beatrice, 76 Neb. 862, 108 N.W. 132 (1906); Pan American Petroleum Corp. v. American Nat. Bank, 165 Tenn. 66, 52 S.W. (2d) 149 (1932).

be said that the court was clearly in error in declaring that the statute begins to run at the time a check is issued. Further, the view indicated by Professor Simpson, in the New York University Law School Annual Survey for 1949, that in view of section 186 of the N. I. L. an action may be maintained by a checkholder against the drawer without presentment (that lack of presentment and notice are matters of defense in the case of checks), may well be doubted. It would seem to warp a provision covering a particular situation into one implying a general rule.

Gordon I. Ginsberg