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The Written Acknowledgement: Its Effect on the Operation of the Statute of Limitations

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THE WRITTEN ACKNOWLEDGMENT: ITS EFFECT ON THE OPERATION OF THE STATUTE OF LIIMITATIONS

B owes *A* $100. Will an acknowledgment in writing that the debt is owed, by a statement such as "I owe you $100", containing no express promise to pay, toll the statute of limitations? If so, is the time at which the acknowledgment is made, *i. e.*, before or after the statute has once run, significant?

Williston states[1] that the unqualified acknowledgment in writing of a present obligation to another, unaccompanied by any evidence showing a determination not to pay, contains the tacit or implied expression of a promise to pay; that a promise to pay is by implication of fact a part of the acknowledgment and hence operates to toll the statute.[2] This view, supported by case authority and accepted by the Restatement of Contracts, appears to be the general rule.[3] Williston points out that it is an artificial inference of fact, but that the preponderance of decisions has so held even though it is not made in respect to acknowledgments of debt in related situations.[4] There are a few jurisdictions which disregard the need of a promise, express or implied, and follow the rule popular in Lord Mansfield's day, *i. e.*, that the acknowledgment, though implying no promise, is sufficient to toll the statute.[5]

The Washington Statute of Limitations reads in part:

"No acknowledgment or promise shall be sufficient evidence

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[1] 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 161, says it has ". . . been recognized in England, and generally in the United States, that the effect of an . . . acknowledgment is merely that of evidence of a promise implied in fact. And if, taking all the circumstances into account, the admission does not indicate an intention to pay, no liability arises from it."

[2] What matters in the acknowledgment will, either by inclusion or exclusion, defeat the implication of the promise are many. Most common defects are that an acknowledgment is incomplete if the particular indebtedness is not defined or the amount left uncertain; that it is defeated if there is a statement of refusal or inability to pay or is coupled with a claim of set-off or reduction; and that it is insufficient if attended by circumstances which deny the presence of a voluntary promise to pay.

[3] RESTATEMENT, CONTRACTS (1932) § 86 states: ". . . unless other circumstances indicate a different intention: a voluntary acknowledgment to the obligee, admitting the present existence of such an antecedent [contractual or quasi-contractual] duty . . . [for the payment of money due from the promisor]," ". . . is binding if the antecedent duty was once enforceable by direct action, and . . . would be except for the effect of a statute of limitations." 6 PAGE, THE LAW OF CONTRACTS (2nd ed. 1922) § 3492. See also Bell v. Morrison, 1 Pet. 351 (U. S. 1828); Cosio v. Guerra, 67 Fla. 331, 65 So. 5 (1914); Pierce v. Seymour, 52 Wis. 272, 9 N. W. 71 (1881); Gilmour v. Johnson, 254 Mass. 294, 150 N. E. 87 (1926).

[4] 1 WILLISTON, CONTRACTS § 166. Custy v. Donlan, 159 Mass. 245, 34 N. E. 360 (1893), 38 Am. St. Rep. 422 (1894); Wooster v. Scorse, 16 Ariz. 11, 140 Pac. 819 (1914); Radigan v. Hughes, 84 Conn. 137, 79 Atl. 50 (1911); Freeman v. Walker, 67 Ill. App. 309 (1896); Berryman v. Becker, 173 Mo. App. 346, 158 S. W. 899 (1913); Windom v. Howard, 86 Tex. 560, 26 S. W. 483 (1894). Two common instances where the inference of a promise is not raised from the acknowledgment are those existing after a discharge in bankruptcy and after the discharge of a surety.

[5] Jenckes v. Rice, 119 Iowa 451, 93 N. W. 384 (1903); Disney v. Healy, 73 Kan. 326, 85 Pac. 287 (1906); Devereaux v. Henry, 16 Neb. 55, 19 N. W. 697 (1884); Cleland v. Hostetter, 13 N. M. 43, 79 Pac. 801 (1905); Andrew v. Kennedy, 4 Okla. 625, 46 Pac. 485 (1896).

> of a new or continuing contract whereby to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; . . ."[6]

This section would seem to codify the general rule and to provide two methods of avoiding the effect of the limitations statute—written acknowledgment and written promise—without qualifying or restricting the operation of either. Washington opinions, however, have been so phrased as to create uncertainty in the law.

In *Liberman v. Gurensky*[7] the defendant responded to a plea for payment:

> ". . . That little amount that I owe you will be paid sometime. I don't know just how much it is. You say $1,000, but I never could figure that much. I always thought that little Harry paid that debt, but as he did not settle it I'll see into it sometime."

The court found this to be an incomplete acknowledgment as the amount due was uncertain and the time of payment not determined. In addition it noted that the writing was fatally ambiguous in respect to the designation of the person who would pay. But the court went further than was necessary and said:

> "A mere acknowledgment of the debt is not sufficient . . . to warrant the inference of a promise by the debtor to pay the debt, and that the particular debt is unpaid."

This statement, taken literally, conflicts with REM. REV. STAT. § 176 and would seem to mean that in Washington only an express promise to pay will be sufficient, unless "mere acknowledgment" signifies something different from "acknowledgment" as used in the statute.[8] That the court intended only to distinguish between forms of acknowledgment, and not to hold all acknowledgments insufficient to toll the statute of limitations seems to be indicated by *Bank of Montreal v. Guse*,[9] in which our court stated:

> ". . . (the) acknowledgment must be clear and unequivocal and made with reference to a particular debt which is subsisting at the time. The acknowledgment must be so clear that a promise to pay must necessarily be implied."

Here we have a definition of acknowledgment which approximates that

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[6]REM. REV. STAT. § 176.

[7]27 Wash. 410, 67 Pac. 998 (1902).

[8]That such a distinction was intended is probable. The opinion at page 418 reads, "A mere acknowledgment of the debt is not sufficient. The acknowledgment must be in terms sufficient to warrant the inference of a promise by the debtor to pay the debt, and that the particular debt is unpaid."

[9]51 Wash. 365, 98 Pac. 1127 (1909). In this case the plaintiff was the holder by assignment of a number of defendant's notes which had been barred by the statute. The plaintiff wrote four requests for payment during a period of three months. In return he received three replies: the first acknowledged the "contents" of plaintiff's first letter and asked plaintiff to buy some property as "I could use a little money myself"; the second claimed some credits upon the statement of account presented and asked that plaintiff "explain matters more thoroughly"; the third disputed the entry of a certain credit. From this correspondence the plaintiff asserted that an acknowledgment arose.

of other courts, not a denial of the general rule.

Coe v. Rosene,[10] in chronological order the next case in point, re-introduced uncertainty. The debtor's statement was, "Yes, I have paid quite a few of the old losses, expect to pay more, and the next one shall be to the family of my departed friend."[11] The court found this too indefinite to revive the obligation, a conclusion with which it is difficult to quarrel, but then went on to say:

> "An expectation to pay, or a present intention to pay, cannot be construed into a promise to pay . . . the law requires more. It can be satisfied only with a distinct and clear promise to pay . . . We cannot find any words of promise in this letter. It contains nothing more than an acknowledgment of the debt and an expression of an intention to pay it, which . . . is not sufficient."

This language could be taken more readily than that of the *Liberman* opinion to mean that our court would regard only an express promise as tolling the statute; clearly it is in conflict with the wording of the *Guse* decision. But in the next case which arose involving the issue, *Griffin v. Lear,*[12] the court said:

> "If one in writing acknowledges he owes a debt, the law will presume that he intends to pay it, unless there is something in the writing which shows a contrary intent."

This was followed by *Tucker v. Guerrier*[13] in which the court returned to the phraseology of *Coe v. Rosene,* that in order to remove the bar of the Statute of Limitations,

> "A new promise must be clear, distinct and unequivocal, as well as certain and unambiguous. A mere acknowledgment of a debt, or an expression of an intention to pay, is not sufficient to revive the debt."

Though, as in the previous instances, this language was not essential

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[10]66 Wash. 73, 118 Pac. 881 (1911), 38 L. R. A. (N. S.) 577 (1912), 28 Ann. Cas. 742 (1913). Strictly, this case is not in point for the debt was barred by bankruptcy rather than by the statute of limitations. 1 WILLISTON, CONTRACTS § 158, points out that after bankruptcy an admission will not operate as a new promise to pay the debt. See cases cited *supra* note 4, which point out that the rule is contrary when the Statute of Limitations is involved. The court did not note the distinction and has not distinguished it from the other opinions.

[11]Another statement was introduced in evidence: ". . . I advised your brother . . . that circumstances had obliged me to discontinue sending checks east; but that I held my promise to Cephas good, but do not know when I can do what I want to." It adds nothing other than emphasis to the contents of the statement mentioned.

[12]123 Wash. 191, 212 Pac. 271 (1923). The court found a sufficient acknowledgment in the statements, "I can only promise to pay the $1,600 with interest in some future time. You will never lose through me." And "I am in no position to pay you now. I will say again you will never lose through me . . . I will take care of your interests some way. I have not denied that you gave me the $1,600."

[13]170 Wash. 165, 15 P. (2d) 936 (1932). Mr. Guerrier was indebted on a timber account to the plaintiffs. They sent him an accounting which read in part: "Jan. 10, 1922. 461,000 feet, $922.00. (Not Paid.) We hold the cancelled checks covering item of $674.28 and also the 90 day note." His response, which the plaintiffs sought to demonstrate as a sufficient acknowledgment, was, "The above is correct statement of the Meredith Timber a/c next time I am in the city will call on you."

to the decision, for the statement relied upon was patently an incomplete acknowledgment as it did not admit the personal indebtedness of Guerrier and only with difficulty implied a promise to pay, its inclusion operates to increase uncertainty.

The line of decisions is completed by *Dolby v. Fisher*.[14] On the facts the court might have found that no acknowledgment was made by the defendant. But again the opinion is so phrased as to make uncertain the court's position with regard to acknowledgments. The trial court instructed in part in the language of the *Tucker* case that:

> "In order to remove the bar of the statute of limitations, a new promise must be clear, distinct, unequivocal, certain and unambiguous. A mere acknowledgment of a debt or an expression of an intention to pay is insufficient to revive the debt."

This was approved on appeal by the statement, "We think the instruction was a proper statement of the law, under the facts herein."

Can the apparent conflict in these cases be resolved by reference to the time at which the alleged tolling occurred? It would seem not, because, although the statute had run in the *Liberman, Tucker* and *Dolby* cases, and not in the *Griffin* case, it had also run in the *Guse* case, which accords in language with *Griffin v. Lear*.

The Washington cases seem to justify these observations:

1. In no decision has the court held insufficient an acknowledgment clear enough to satisfy the general rule.

2. In the *Liberman, Coe, Tucker* and *Dolby* cases the court has used, in holding the statute not tolled, language which is confusing and which may induce future litigation.

3. If a clear and unequivocal acknowledgment will toll the statute of limitations in this state, if *Griffin v. Lear* is to be followed, and if REM. REV. STAT. § 176 means what it appears to mean, the court might be justified in so stating at the first opportunity.

4. And if this is the law, in future cases involving acknowledgments bad because not clear and unequivocal, judgments for the defendants might well be explained on that ground rather than by reiteration of the statements made in *Coe v. Rosene* and *Tucker v. Guerrier*.

Is the time at which the acknowledgment is made, *i. e.*, before or after the statute has run, significant? Three possible approaches have been taken: (1) An acknowledgment before the statute has run is insufficient because the obligor should not be presumed to duplicate binding promises to pay; (2) an acknowledgment after the statute has run is insufficient because, as the obligation was no longer binding, a promise can hardly inhere in the acknowledgment; and (3) an acknowl-

[14] 101 Wash. Dec. 159, 95 P. (2d) 369 (1939). The letters were long, but the essential matter was to this effect: Dolby wrote, "From time to time I have sent you itemized statements of your and his account of the balance due on the two notes . . . Now I want you to raise $250 for me and I will give you credit on these notes . . . on which there is past due $524.78 as above mentioned." Mr. Fisher answered, "I am in receipt of both of your letters and I note what you have to say . . . I am sorry I cannot help you out at this time. But as soon as I can I will." The court pointed out that this answer was ambiguous as it did not indicate whether he would loan Mr. Dolby the amount asked or pay him such amount on the notes, and was incomplete as it did not admit the accuracy of the amount Mr. Dolby claimed.

edgment is sufficient in either event for it carries an implied in fact promise to pay regardless of the time made. The last view seems to be the correct one in theory and it is supported by the weight of authority.[15]

Prior to *Dolby v. Fisher* all we have in point in Washington is a statement in *Liberman v. Gurensky* to the effect that:

> "An acknowledgment or promise made after the bar of the statute creates a new contract."[16]

and a statement, largely dictum, in *Griffin v. Lear:*

> "A writing acknowledging a debt which has already been barred ought to be construed much more strictly than a writing acknowledging a debt against which the statute has not run. In the latter instance the original debt is acknowledged and the action must be upon it . . . and . . . any acknowledgment ought to necessarily infer an agreement to pay it, unless there is something in the acknowledgment which leads to a necessarily contrary conclusion. But where the acknowledgment is made after the statute has already run . . . The debt being barred, it is possible that one may acknowledge it without intending to pay it."[17]

The *Griffin* decision amplifies as well as qualifies the broad statement made in the *Liberman* case, and suggests that an identical acknowledgment would in one event carry an implied promise to pay, and in the other, no promise.[18] This approximates one of the alternate views mentioned by Williston.[19]

The issue was raised in the *Dolby* case. The court resolved the matter by quoting the above statements from the earlier cases[20] and saying:

> "This court has recognized the distinction between ac-

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[15]1 WILLISTON, CONTRACTS § 163; RESTATEMENT, CONTRACTS (1932) § 86 (1), comment c.

[16]It will be recalled that the acknowledgment in this case was held insufficient.

[17]As the obligation in this case had not yet been tolled by the statute when the acknowledgment was made so much of the opinion as relates to obligations barred by the statute must be regarded as dictum.

[18]This excerpt might suggest that in either event an acknowledgment would suffice but that the presumption of an implied promise would disappear and the burden of showing such an implied promise would fall upon the obligee in event the obligation had been tolled by the statute. However, REM. REV. STAT. § 176 hardly supports such a concept and later decisions have failed to develop it.

[19]There is in *Tucker v. Guerrier* the statement, "The mere acknowledgment of a debt, or the expression of an intent to pay, is not sufficient to revive the debt." This seems to support the view expressed by the *Griffin* case unless the court abandoned the use of the technical meaning of "revive," *i. e.*, applicable only to obligations tolled by the statute, and deemed it to apply to all obligations, whether or not the statute had run.

[20]The court has cited and apparently relied upon Sears v. Hicklin, 3 Colo. App. 331, 33 Pac. 137 (1893), in each instance. While the opinion had language favorable to the conclusion reached by the Washington court, the decision held to the contrary. The Colorado court said, "The bar was pleaded, and could only be overcome by a replication and proof of a new promise, to take it out of the statute. It matters not whether the promise is direct or legally implied or inferred from the fact of a partial payment having been made."

> knowledgment of liability on notes and promises to pay same made prior to the running of the statute of limitations and promises made after the statute."

Since the court did not discuss the matter further, apparently the dictum of *Griffin v. Lear* was approved and became the law of the case.

Our statute reads, "No acknowledgment . . . shall be sufficient *evidence of a new or continuing contract* . . . unless . . . contained in some writing . . ."[21] While this does not expressly bring Washington to any of the views outlined above, the use of "acknowledgment" in equal application to "new" and "continuing" contracts strongly implies our acceptance of the majority rule, for in the statute "new" seems to mean a contract "revived" after being barred by the statute and "continuing" seems to mean a contract yet "existing" (*i. e.*, legally enforceable) as the statute had not run when the tolling occurred. No attention has been given by our court to this possible application of REM. REV. STAT. § 176 to the problem.

Griffin v. Lear and *Dolby v. Fisher* left for settlement in future cases the precise extent to which divergent tests of sufficiency will be applied to acknowledgments before and after the period of limitations has run. It may be that were the suggested meaning of REM. REV. STAT. § 176 considered, it might have some effect in shaping the rule ultimately adopted.

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[21]REM. REV. STAT. § 176. Italics supplied.