

Sufficient Acknowledgment of Indebtedness to Remove Bar of Statute of Limitation - Doughty v. Bane

Ronald M. Naditch

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Ronald M. Naditch, *Sufficient Acknowledgment of Indebtedness to Remove Bar of Statute of Limitation - Doughty v. Bane*, 21 Md. L. Rev. 166 (1961)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol21/iss2/10>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Sufficient Acknowledgment Of Indebtedness To Remove Bar Of Statute Of Limitation

*Doughty v. Bane*¹

Plaintiff brought suit on a promissory note executed by defendant on May 25, 1954, as security for the purchase of stock. No request for payment of principal or interest had been made between the date of the loan and March 18, 1959. Since the note, which was payable on demand, was not under seal the applicable period of limitations was three years from the date of the note's making.² Subsequent the expiration of the statutory period plaintiff telephoned defendant and requested payment. During the course of the conversation defendant admitted the possibility of indebtedness, after initially contending that he did not remember anything about the note. Defendant concluded by saying that at any rate he had no money, and that the plaintiff would have to take the matter to an attorney.³

The plaintiff received a jury verdict in the Circuit Court of Somerset County. In affirming the verdict of the Circuit Court, the Court of Appeals held that the defendant's admission of possible indebtedness, followed by his refusal to pay for lack of funds, was sufficient to permit a jury to properly find that he had acknowledged the existence of a debt which would otherwise have been barred by the statute of limitations.⁴

¹ 222 Md. 361, 160 A. 2d 609 (1960).

² 5 MD. CODE (1957) Art. 57, § 1. Cf. 5 MD. CODE (1957) Art. 57, § 3, providing for a twelve year limitation on specialties.

³ *Supra*, n. 1, 364. Bayne's version of the conversation:

"Of course, after the usual greetings you always make when you make a 'phone call, I asked him about the note and told him I needed the money and that I would like to have the \$2,000.00, plus interest. At first he said he didn't remember the note. Then after I refreshed his memory he said, 'Well, possibly I did sign it. But don't you think I have lost enough?' I said, 'Yes, I realize you have lost quite a bit.' 'But', I said, 'this \$2,000.00 that I personally loaned you is a lot of money to me.' He said, 'Well, I can't pay you.' I proceeded to go ahead. I said, 'I want my money.' You said you would be liable for it.' 'And', I said, 'I want my money. I need my money.' He said, 'Well, I haven't got it. I can't pay it. If you want to take it to an attorney and see what he can do about it, all right.'"

⁴ The Court of Appeals, in *Oliver v. Gray*, 1 H. & G. 204, 216-217 (Md. 1827), established the general rule for the revival of debts barred by the statute of limitations:

"... that the Act does not extinguish the debt, but only bars the remedy and that an acknowledgment by the defendant of the debt, or a promise to pay it within the time prescribed, is sufficient to revive. * * * *An acknowledgment of the debt with a naked refusal to*

The opportunity of enforcing a valid claim after a stated period is denied by a legislature's prescribing a time limit on the assertion of rights.⁵ The primary consideration underlying such legislation is one of fairness to the debtor, for there comes a time when a party ought to be secure in his reasonable expectation that the slate has been wiped clean⁶ and that he will not be called upon to defend a claim when "evidence has been lost, memories have failed, and witnesses have disappeared."⁷ However, a statute of limitations normally does not operate to extinguish the defendant's obligation; it merely bars the plaintiff's remedy at law.⁸

To relieve the harshness of the statute of limitations, the English common law courts, at an early date, seized upon the action of general assumpsit to allow the plaintiff to recover on an express promise to pay an antecedent debt barred by the statute of limitations.⁹ This doctrine of revival now extends to those claims originally cognizable at common law under the action of general assumpsit.¹⁰

pay, or a refusal accompanied with an excuse for not paying it, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient."
[Emphasis added.]

⁵ See Comment, *Developments In The Law — Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950).

⁶ Holmes, *The Path of The Law*, 10 Harv. L. Rev. 457, 477 (1897), states:

"... the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them and not in the loser. . . . A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instinct in man."

⁷ Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944), quoted in *Doughty v. Prettyman*, 219 Md. 83, 92, 48 A. 2d 438 (1959).

⁸ Frank v. Warehelm, 177 Md. 43, 7 A. 2d 186 (1939); Donaldson v. Raborg, 26 Md. 312 (1867); Baltimore & Ohio R. Co. v. Clark, 19 Md. 509 (1863); Oliver v. Gray, 1 H. & G. 204 (Md. 1827); Barney v. Smith, 4 H. & J. 485 (Md. 1819).

⁹ 1 WILLISTON, CONTRACTS (3rd ed. 1957) § 160, 661. See also Kocourek, "A Comment on Moral Consideration and the Statute of Limitations", in SELECTED READINGS IN THE LAW OF CONTRACTS (1931) 521, where the author gives a resume of the various theories advanced in support of the doctrine of revival. See also RESTATEMENT, CONTRACTS (1932) §§ 85, 86, pp. 100, 101.

¹⁰ 1 WILLISTON, CONTRACTS (3rd ed. 1957) § 188, 594. The major categories of revivable promises are: express or implied promises to pay money, *Luther & Morgan v. Payne*, 197 Ky. 359, 247 S.W. 39 (1923); and quasi contractual obligations, *In re Stratman's Estate*, 231 Iowa 480, 1 N.W. 2d 636 (1942). See also RESTATEMENT, CONTRACTS (1932) § 86 (1).

Maryland, by its legislative recognition of a difference in rules as to the limitations of simple contract claims, 5 MD. CODE (1957) Art. 57, § 1, and actions on bonds, judgments and specialties, 5 MD. CODE (1957)

To revive a cause of action barred by the statute of limitations, a majority of the American jurisdictions will accept an unconditional promise to pay the debt; a conditional promise to pay, where there is evidence that the condition has been performed; or a mere acknowledgment of the debt from which a new promise to pay may be implied.¹¹ In a few states, the courts have construed statutes as removing the defense of limitations from any defendant who acknowledges a subsisting indebtedness, notwithstanding the absence of any facts from which a willingness to pay could be implied.¹²

Maryland requires, as do other jurisdictions, that an acknowledgment, to be legally sufficient, consist of a "clear, distinct and unqualified admission of a subsisting debt,"¹³ evidence of which must be considered in its entirety.¹⁴ But earlier cases seem to indicate, in accord with the holding in the instant case, that a peculiar doctrine prevails in Maryland, to the effect that an acknowledgment of indebtedness is sufficient to toll the statute in spite of a

Art. 57, § 3, has aligned itself with those jurisdictions which will not revive an obligation on a specialty after it has been barred by limitations. See *McMahan v. Dorchester Fertilizer Co.*, 184 Md. 155, 40 A. 2d 313 (1944), noted in 8 Md. L. Rev. 294 (1944); *Felty v. Young*, 18 Md. 163 (1862); *Young v. Mackall*, 4 Md. 362 (1853); and *Veasey's Admr. v. Bassett's Admr's.*, 7 H. & J. 461 (Md. 1822), which recognize and discuss the difference between the revival of limitations on simple contract claims and actions on bonds, judgments and specialties. Although an express promise may be admitted as evidence of consideration in an action based on the new promise, such promises have been held insufficient to revive the antecedent obligation once barred by limitations. *Frank v. Wareheim*, 177 Md. 43, 7 A. 2d 186 (1939). Despite an absence of direct authority as to the Court's construction of the statutes as applied to money judgments, the Court, by indicating its inclination to accord similar treatment to actions on bonds, judgments and specialties, *Brooks v. Preston*, 106 Md. 693, 68 A. 294 (1907), seems likely to refuse revival of such claims.

¹¹ *Custy v. Donlan*, 159 Mass. 245, 34 N.E. 360 (1893); *Easton v. Gidler*, 28 Wash. 2d 674, 183 P. 2d 780 (1947); 34 Am. Jur. 233, 234, *Limitations of Actions*, § 290, n. 1. See also 1 WILLISTON, *CONTRACTS* (3rd ed. 1957) § 162.

Lord Tenterden's Act, 9 George IV., c. 14 (1833), required that new promises and acknowledgments be in writing. Most states have enacted similar statutes, but Maryland is among those states which has not.

¹² *E.g.*, *Fort Scott v. Hickman*, 112 U.S. 150 (1884); *Nelson v. Hanson*, 92 Ia. 356, 60 N.W. 655 (1894); *Bennet-Brewer Hardware v. Wakeman*, 160 La. 407, 107 So. 286 (1926); *Devereaux v. Henry*, 16 Neb. 55, 19 N.W. 697 (1884); *Cleland v. Hostetter*, 13 N.M. 43, 79 P. 801 (1905); *Weir v. Bauer*, 75 Utah 498, 286 P. 936 (1930).

¹³ *Crawford v. Richards*, 197 Md. 289, 293, 79 A. 2d 143 (1951); *Owings v. Dayhoff*, 159 Md. 403, 415, 151 A. 240 (1926).

¹⁴ *Higdon v. Stewart*, 17 Md. 105, 111 (1861) ("As we have said, the declaration of acknowledgment must be taken as a whole, and it cannot be disproved as to any part; offered by the plaintiff as his proof, he will not be allowed to adopt the admission and reject the qualification. . ."). See also *Stockett v. Sasscer*, 8 Md. 379 (1855).

contemporaneous refusal to pay, unless that refusal is based upon an excuse which would exempt the debtor from a moral obligation to discharge the debt.¹⁵

Despite frequent litigation as to the application of the unique Maryland position, there is no record of a Maryland case involving the combination of facts present in the instant case, *i.e.*, the admission of *possible* indebtedness followed by a refusal to pay because of a lack of money. As the Court points out,¹⁶ the defendant's statements in this case are subject to more than one interpretation. The defendant argued that his statements can be divided into three component parts: (1) that he did not remember the note; (2) that he may possibly have signed it; (3) that at any rate, he had no money, he could not pay, and therefore the plaintiff would have to take the matter to an attorney.

The first statement, the defendant pointed out, was clearly not an acknowledgment of a subsisting debt. Therefore, he argued, his admission of possibly signing the note must have been the basis of the plaintiff's case. To refute the validity of such an allegation, he asserted that a statement of this nature is not the clear, distinct, and unqualified admission demanded by the Court in previous cases, and he cited *Higdon v. Stewart*¹⁷ as being analogous to the instant case. In that decision the Court said:

"He said he did not think he owed anything; again, that he did not think he owed more than fifty dollars; which we take to mean this, that he thought he owed nothing, but if he owed anything, it was not more than the sum stated. If we say that, under this loose conversation, the plaintiff may recover a thousand

¹⁵ *Crawford v. Richards*, 197 Md. 289, 79 A. 2d 143 (1951) (defendant's expression of willingness to renew promissory notes executed by him at an earlier date held not to be an unconditional promise to pay, where they were expressly conditioned on a complete compromise between the parties, which was never reached); *Knight v. Knight*, 155 Md. 243, 141 A. 706 (1928) (statement by a debtor that as soon as he sold his business he intended to pay the debt, held a sufficient acknowledgment to remove the bar of the statute of limitations); *Stockett v. Sasser*, 8 Md. 535, 175 A. 602 (1855) (defendant's agreement not to plead limitations to a just claim, coupled with a statement that the plaintiff's claim was not just, held insufficient to take the claim out of the statute).

See also *Nardo v. Favazza*, 206 Md. 122, 110 A. 2d 676 (1955); *Brown v. Hebb*, 167 Md. 535, 175 A. 602 (1934); *Beeler v. Clark*, 90 Md. 221, 44 A. 1038 (1899); *Higdon v. Stewart*, 17 Md. 105 (1861). In none of the cases cited has the Court recognized an acknowledgment as reviving a barred claim where the defendant has explicitly refused to recognize a moral obligation to pay the debt. See also 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 167; and 54 C.J.S. 383, Limitation of Actions, § 313.

¹⁶ *Supra*, n. 1, 366.

¹⁷ 17 Md. 105 (1861).

or more dollars, if the plaintiff can prove that much as originally due, would it not be turning the man's words into something he did not say, by construing his admission, qualified as it was, into a promise to pay a much larger amount, which his other remarks clearly, as we think, showed he deemed an unjust demand? It is of no consequence that he did not speak confidently of owing nothing, but merely expressed his opinion. The plaintiff offers these opinions, and cannot discard them from consideration any more than other parts of the conversation."¹⁸

The defendant submitted that the meaning normally attributed to the phrases "I don't think I did" and "possibly I did" are similar, and that in fact the phrases are often used interchangeably and in conjunction with one another. However, the Court felt the phrases were clearly distinguishable. It emphasized the fact that the *Higdon* case contained a direct denial of the debt, while in the instant case the debtor said he did not remember the note but admitted the possibility of his signing it.¹⁹

Moreover, the defendant contended that his statements as to the possibility of indebtedness were merely recitals of a past occurrence rather than the acknowledgment of a subsisting debt. Relying on the case of *Owings v. Dayhoff*,²⁰ the defendant cited the following comments of the Court in that case:

"The mere fact that the Defendant's decedent had declared that the Plaintiff had 'worked for him and performed services' was certainly not an acknowledgment of a subsisting debt, but at most a mere narrative of a past occurrence. To say that at some time a person was in one's employ, or that one owned a certain automobile, or that a contractor had built a home for him, carries no implication that the employee or the contractor or the automobile dealer has not been paid."

In the instant case, the Court adopted the plaintiff's contentions by placing great weight upon the conversation which followed the defendant's admission of possible indebtedness. Examining all of the defendant's remarks together, the Court found his original statements could

¹⁸ *Id.*, 112.

¹⁹ *Supra*, n. 1, 364.

²⁰ 159 Md. 403, 414, 151 A. 240 (1926).

properly be interpreted as being subordinate to his subsequent refusal to pay because of financial difficulties. His last words showed that he acknowledged the note was his, and that the only reason he could not pay was a lack of money.²¹

A majority of jurisdictions have held that an acknowledgment of indebtedness coupled with a refusal to pay qualifies the admission so as to prevent the implication of a promise to pay.²² Generally, courts in these jurisdictions will not find that a debtor has waived the defense of limitations unless the acknowledgment is supported by some indication that the debtor is shouldering his obligation to pay the antecedent debt, which thus survives the technical bar of the statute. In holding that the continued existence of a debt carries an implied *assumpsit* raised by law, which is not rebutted by a refusal to pay, the position of the Maryland Court represents an extension of the doctrine of acknowledgment as it is presently applied in other jurisdictions.²³

RONALD M. NADITCH

²¹ The Court has held that a mere declaration of inability to pay a debt does not vitiate an otherwise sufficient acknowledgment. *Nardo v. Favazza*, 206 Md. 122, 110 A. 2d 676 (1955).

²² 1 WILLISTON, CONTRACTS (3rd ed. 1957) § 168.

²³ The Court held in *Knight v. Knight*, 155 Md. 243, 249, 141 A. 706 (1928), quoting the case of *Oliver v. Gray*, 1 H. & G. 204, 218 (Md. 1827) :

“When, therefore, a party admits the debt to be due, but standing upon the act of limitations alone, in the same breath refuses to pay it, he admits a case, to which the act, according to its spirit and reason, does not apply, under the interpretation given to it, and his refusal cannot avail him. But the continuing existence of the debt continues and carries with it the implied *assumpsit* that the law raises, which is not rebutted by his refusal to pay.”