Opinion No. 22-3608

October 19, 1922

BY: HARRY S. BOWMAN, Attorney General

TO: Mr. J. B. Read, State Bank Examiner, Santa Fe, New Mexico.

Payment of Interest and Part Payment of Principal as Affecting Statute of Limitations. Release of Joint Maker.

OPINION

*{*185}* In reply to your letter of the 16th instant, submitting three inquiries concerning negotiable instruments, I wish to advise you as follows:

You ask if the payment of interest on a promissory note keeps it alive. By this, I presume that you mean to ask if the payment of interest upon a note postpones the beginning of the running of the statute of limitations until six years from the date of the last payment of such interest.

The payment of interest does not toll the running of the statute of limitations. In other words, a note upon which interest is paid becomes outlawed six years from the date of its maturity, regardless of the payment of interest at any time prior or subsequent thereto.

Your second inquiry is: "Does a part payment on a promissory note revive it, or is it necessary to have a written agreement?"

Part payment upon a note against which the statute of limitations has run does not revive the instrument, but it is not necessary to have a written agreement as to the revivor.

Section 3356, Code 1915, provides as follows:

*{*186}* "Cause of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as a new promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith."

You will note that a writing is necessary in order to revive an outlawed instrument, but the writing need be only an admission that the debt is unpaid. No agreement between the parties is required.

In the case of Joyce-Pruitt Company vs. Meadows, 26 N.M. 529, 203 Pac. 537, recently decided by our Supreme Court, it was held that "the admission that the debt was unpaid" does not require, that the admission acknowledge a present existing liability. In

other words, if the admission is simply that at the time, the debt was unpaid, that is sufficient to revive the instrument, but such admission must be in writing.

In your third inquiry, you ask if a note which bears the usual clause "waiving demand, notice," etc., by the makers, is extended at the request of one of the makers without the consent of the others, are such others released from liability thereon.

If the joint makers of the note received value therefor, and one or more of them were not accommodation makers, both under the Law Merchant and under the Negotiable Instruments Act, the extension of the note for the benefit of one of such makers does not release the others.

If one of the joint makers sign for the accommodation of the others, under the Law Merchant he stands in the relation of a surety to a co-maker, and is discharged by a valid extension of time given to his principal by the payee or creditor with knowledge of the relationship and without the consent of the accommodation maker.

Under the Negotiable Instruments Act, however, which is now in effect in New Mexico, and which was adopted in 1907, it may be regarded as well settled that the accommodation maker is primarily liable and is not discharged by any extension of time given to the endorser or co-maker for whose benefit he became a party to the instrument, without regard to whether the party suing on the instrument is a party thereto as a payee and had knowledge of the relation subsisting between the accommodation maker and the principal debtor.

In the case of Union Trust Company vs. McGinty, 212 Mass 205, 98 N.E. 619. Ann. Cas. 1913 C. 525, this very question was before the court for consideration. The Negotiable Instruments Act was adopted in Massachusetts and was in effect at the time the instrument under consideration by that court was executed. The court, in construing Section 77 of their act, which is identical with Section 654 of our Code, and Sections 208 and 46 of their act, which are identical with Sections 786 and 623 of our Code, held that these sections providing that the maker of a negotiable instrument engages that he will pay it according to its tenor, and that the person primarily liable on an instrument is the one who is required to pay it absolutely, and that an accommodation party is liable to a holder for value although the holder, when he took the instrument, knew him to be an accommodation party, made such accommodation maker of the note primarily liable and, therefore, that such accommodation maker was not discharged by an extension of time for payment granted to his co-maker.

While this question has never been passed upon by the Supreme Court of this state, in view of what is now regarded as the well settled rule, I am satisfied the court would follow the holding in the *{*187}* Massachusetts case, and that the co-maker would not be discharged or released by reason of an extension granted to the other maker.