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WAIVER OF STATUTE OF LIMITATIONS. The curious diversity of opinion existing among the judges of the Supreme Court of Missouri, in the decision of *Bridges* v. *Stephens*, 34 S. W. Rep. 555 (1896), as to the waiver of the statute of limitations, may render pertinent a statement of the rule as now applied in a majority of the courts.

In *Bridges* v. *Stephens* it appeared that the defendant, a receiver of a national bank, orally promised a creditor before the period of the statute had expired, that he would not plead the statute of limitations if the creditor would then refrain from bringing suit. Subsequently, when suit was brought, the court below found that the promise was not in writing, as required by Rev. St. 1889, § 6793, and accordingly gave judgment for the defendant. To this the plaintiff excepted. The statute declares that "no acknowledgment or promise hereafter made, shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this article, or deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable thereby."

On the question of interpretation, three judges held that the promise made by the defendant was not within the purview of the statute; three judges held that it was; the seventh judge found

other grounds upon which to rest his reversal. Of course such lack of unanimity renders the law of the case very unsatisfactory. The reversing judges, having once concluded that the defendant's agreement was without the statute, selected, from the conflict of decisions in the country, eminent authorities, for their position that the defendant, having agreed not to plead the statute, was estopped by contract from pleading it, quoting, *inter alia*, *Armstrong* v. *Levan*, 109 Pa. 177 (1885), 1 Atl. 204.

We are inclined to agree with the dissenting judges in the two positions maintained by them: first, that the promise of the defendant was within the act; second, assuming it to be without the act, such agreement was void as contravening public policy. The former construction is held in New York, where the code contains almost the same words used in the Missouri act. The latter is supported by *Crane* v. *Fitch*, 38 Miss. 505; *Wright* v. *Gardner*, (Ky.), 33 S. W. Rep. 622; *Cowart* v. *Perrine*, 21 N. J. Eq. 101; see also *Kellogg* v. *Dickinson*, 147 Mass. 432; *Shapely* v. *Abbot*, 42 N. Y. 432. For both propositions see authorities collected in Am. & Eng. Ency. of Law, Vol. XIII, pp. 717, 718.

That the statute may be tolled by a debtor is not questioned. The validity of his promise to pay, made after the statute is a bar, is no longer placed upon the ground of moral obligation, but exclusively on the right of a party to waive the protection of a statute relieving him from indebtedness: Whart. on Contr., § 513. Indeed, the bar of the statute will be tolled by a mere acknowledgment of the debt; a specific promise to pay is not required: *Patton's Ex'rs.* v. *Hassinger*, 97 Pa. 311 (1871); *Palmer* v. *Gillespie*, 9 W. N. C. 348 (1880). From such acknowledgment a promise to pay is implied: *McCollugh's Est.*, 18 W. N. C. 348; *Custy* v. *Donlan*, 159 Mass. 245. The statute then runs from the acknowledgment: *Kellog* v. *Dickinson*, 147 Mass. 432.

The declaration is upon the original undertaking, and "when the statute is pleaded the new promise is proved; not to raise a cause of action, but to show that the legal objection to the old promise has been waived:" *Yaw* v. *Kerr*, 47 Pa. 333.

The difficulty encountered in the application of the rule arises in determining what is sufficient acknowledgment. In England, and in many of the states the acknowledgment must be in writing, signed by the party to be charged. In Pennsylvania, the common law rule still prevails. Lord Mansfield, in *Freeman* v. *Fenton*, Cowper 544 (1777), said: "The slightest acknowledgment has been held sufficient; as saying 'Prove your debt and I will pay you,' and much slighter acknowledgments than these will take a debt out of the statute." But the courts now are less liberal. The acknowledgment must be a clear and unambiguous recognition of an existing debt, and must be consistent with a promise to pay: *Palmer* v. *Gillespie*, [*supra*]. It must be plainly referable to the very debt upon which the action is based: *Burr* v. *Burr*, 26 Pa. 285 (1856). Loose, conditional and indefinite statements are insufficient: *Linder-*

man v. *Pomeroy*, 142 Pa. 178; *Simrell* v. *Miller*, 169 Pa. 326 (1895); and it has been held that a new promise to pay will not be implied where the circumstances rebut the inferences of such promise: *Jones* v. *Langhorn*, (Colo. Sup.) 34 Pac. Rep. 997; *Christian* v. *State*, 7 Ind. App. 417. The tendency seems toward holding the plaintiff with a stale claim to strict proof of a waiver of the statute.

It is well settled in Pennsylvania that the acknowledgment must be made to the owner or to some one on his behalf: *Hosteller* v. *Holinger*, 117 Pa. 606; but in England and in some of the states, an acknowledgment to a stranger is sufficient.

A partial payment of the very debt in dispute is sufficient acknowledgment, but when such payment is relied upon, it must be shown that it was made by some one authorized to make it on the debtor's behalf, and that it was so accepted by plaintiff: *Furst* v. *Association*, 128 Pa. 183.

Where statutes upon this subject exist, courts should hold a plaintiff to strict compliance with their terms. Where the common law rule prevails, a strict application should be made.

NEGOTIABILITY OF PROMISSORY NOTES. The opinion in *Nicely* v. *Commercial Bank*, App. Court of Indiana, 44 N. E. Rep. 573 (1896), is interesting, in that the court upon one phase of the question of negotiability, arising in Indiana for the first time, allies itself with sound principle by its decision, and upon another phase arrays itself against principle by a dictum. The plaintiff declared, as endorsee for valuable consideration, before maturity, without notice of any defence, of a promissory note in the usual form, containing, however, the words "with exchange and cost of collection." The defendant's answer alleged failure of consideration, to which the plaintiff demurred. The court below sustained the demurrer; this was reversed by the appellate court.

The defendant's contention obviously was, that the note was non-negotiable; that the words "with exchange and costs of collection" rendered the note indefinite and uncertain as to the amount due; and that, therefore, the plaintiff took the note, subject to the equities between the original parties. The word negotiable has been defined to apply to any written security transferable by endorsement or delivery, so as to vest in the transferee the legal title, and enable him to maintain an action on the security in his own name: *Odell* v. *Gray*, 15 Mo. 337, (1851). In its commercial sense, a negotiable instrument is one the assignee of which may bring action in his own name, subject to no equities between prior parties. In this sense negotiable is opposed to non-negotiable: *Bank* v. *Bynum*, 63 Mo. 27 (1873).

Mr. Justice Sharswood, in *Woods* v. *North*, 84 Pa. 409 (1877), said: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency," and Chief Justice Gibson in *Overton* v. *Tyler*, 3 Pa. 347, (1846), char-

acterized a negotiable bill or note as a "carrier without baggage." Agreeing with this, the Indiana court says: "Ordinarily, the essential requisites of a promissory note to be negotiable by the law merchant, are (1) a date; (2) an unconditional promise to pay money; (3) a fixed time for payment; (4) a definite amount to be paid; (5) a place where payment is to be made."

The court decides, after due consideration of contrary opinions, that the provision "*with exchange*," "introduces into the obligation an element of uncertainty which destroys its negotiability." This, we think, is in accord with principle and the weight of authority. But the part of the opinion from which we dissent appears thus: "We think it is clear that the stipulation to pay 'costs of collection' does not render the promise as to the amount uncertain, because no costs of collection could accrue if the note was paid promptly at maturity. The only stipulation which we are to consider in determining whether the note sued on is indefinite or uncertain as to the amount to be paid, is that for the 'payment' of exchange.'" Of such a collateral stipulation, Justice Sharswood, in *Woods* v. *North* (*supra*), where the note contained the clause "and five per cent. collection fee, if not paid when due," said, "How then can this note be said to be certain as to its amount, or that amount unaffected by any contingency? Interest and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability. Neither does a clause waiving exemption for that in no way touches the simplicity and certainty of the paper. But a collateral agreement as here, depending too, as it does, upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may well be characterized, like an agreement to confess a judgment was by Chief Justice Gibson, as 'luggage' which negotiable paper, riding as it does on the wings of the wind, is not a carrier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contentions and litigations result. It is the best rule *obsta principiis*."

Since there is considerable difference of opinion as to the effect of such words upon the negotiability of promissory notes, we append a list of some of the authorities *pro* and *con*. Notes containing the following were held to be non-negotiable, "given as collateral security with agreement" on the margin: *Costello* v. *Crowell*, 127 Mass. 293; "foreign bills" at foot of note: *Jones* v. *Fales*, 4 Mass. 245; "in facilities:" *Bank* v. *Merrick*, 14 Mass. 322; "return notice ticket with this order" and "deposit book must be at bank before money can be paid:" *Bank* v. *McCord*, 139 Pa. 53; "a warrant to confess judgment:" *Overton* v. *Tyler*, 3 Pa. 347; *Sweeny* v. *Thickstun*, 77 Pa. 131; "and it is the understanding it (the note) will be renewed at maturity:" *Bank* v. *Poillet*, 126 Pa.

195; "*with exchange*," or with exchange on some particular place: *Lowe* v. *Bliss*, 24 Ill. 168 (1860); *Bank* v. *Bynum*, 84 N. C. 27 (1881); *Read* v. *McNulty*, 12 Rich. (S. C.) 445; *Bank* v. *Strother*, 6 S. E. (S. C.) 313 (1888); *Hughitt* v. *Johnson* (U. S. Cir. Ct. Mo.), 28 Fed. Rep. 865 (1886); *Bank* v. *McMahon*, 38 Fed. Rep. 283 (1887); *Flagg* v. *School District* (N. Dak.), 58 N. W. Rep. 499 (1894); *Culbertson* v. *Nelson*, 61 N. W. 854; *counsel fees and expenses of collection* or similar words: *Bank v. Bynum*, 84 N. C. 27 (1881); *Bank* v. *Gay*, 63 Mo. 35 (1873); *Johnson* v. *Spree*, 92 Pa. 227 (1879); *Woods* v. *North*, (*supra*); *Bank* v. *Larson*, 60 Wis. 206 (1884); *Garrettson* v. *Purdy*, (Dak.), 14 N. W. Rep. 102; *Hardin* v. *Olson*, (Minn.), 14 Fed. Rep. 705; *Altman* v. *Rittenhoffer*, 36 N. W. 74; *Altman* v. *Fowler*, 37 Fed. Rep. 708 (1887).

In the following cases they were held negotiable: "*with exchange*" or similar words: *Hastings* v. *Thompson*, (Minn.), 55 N. W. Rep. 988; *Bullock* v. *Taylor*, 39 Mich. 137; *Orr* v. *Hopkins*, 3 N. M. 45; see *Daniels on Neg. Ins.*, § 54; "*costs of collection*" or similar words: *Stoneman* v. *Pyle*, 35 Ind. 103; *Nickerson* v. *Sheldon*, 33 Ill. 373; *Sperry* v. *Howe*, 32 Iowa 184; *Seaton* v. *Scoville*, 18 Kan. 433; *Deitrich* v. *Bayhi*, 23 La. Ann. 767; *Schlesinger* v. *Arline* (U. S. Cir. Ct. Ga.), 31 Fed. Rep. 649 (1887); *Adams* v. *Addington*, 16 Fed. Rep. 89; *Bank* v. *Ellis*, 2 Fed. Rep. 44.

IMPAIRMENT OF THE OBLIGATION OF CONTRACTS. In 1883 the Legislature of Texas passed an act withdrawing from sale lands held by the state. In 1879 an act had been passed prescribing certain conditions upon compliance with which such land would be sold to individuals. One of these conditions was that a survey should be made. This act was a practical re-enactment of a prior statute containing a similar provision. Under the prior statute, an actual survey was not deemed necessary, a so-called "adoptive survey," *i. e.*, a survey copied from a former survey, being regarded by the court of last resort of Texas as sufficient compliance with such provision.

In the *State of Texas* v. *Bacon, et. al.*, 16 Sup. Ct. Rep. 1025 (1896), suit was brought on behalf of the state to recover land alleged to have been purchased after the act of 1879, the state claiming that defendants had not complied with the provisions of the Act of 1879, in failing to have an actual survey made. The Court of Civil Appeals of Texas held, reversing its former decisions, that an "adoptive survey," which had been made by defendants, was not a compliance with the Act of 1879. The case reached the Supreme Court of the United States on a writ of error to the Texas court. To give this court jurisdiction it was claimed by counsel for *Bacon, et al.*, first, that the earlier decisions of the Court of Civil Appeals of Texas, to the effect that an "adoptive survey" was suf-

ficient compliance with a statute providing for a survey of the land had become rules of property, and that the subsequent alteration of this view by the court was an impairment of the contract, sufficient to give the Supreme Court of the United States jurisdiction on a writ of error to a state court; second, that the passage of the Act of 1883, withdrawing the lands from sale, for the same reason gave the court jurisdiction.

The record showed that the case had been disposed of by the Texas court, without any reference to the Act of 1883, and it was therefore held that the mere existence of such an act was not enough to bring the case within the jurisdiction of the national Supreme Court, Mr. Justice Peckham, speaking for the court, saying: "If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract."

The first proposition was thus dismissed: "Where the federal question upon which the jurisdiction of this court is based, grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on a writ of error to a state court by some subsequent statute of the state, which has been upheld or effect given to it by the state court," and "It (the argument) ignores the limit to our jurisdiction in this regard, which, as has been seen, is confined to legislation, which impairs the obligation of a contract." For both rulings he cites ample authority.

It has been thought by some that the word *law* as used in the clause of the Constitution under discussion comprehended judicial decisions, impairing contracts then existing and entered into pursuant to and valid under the prior contrary decisions of the same court. The series of recent cases, ending with this opinion of Mr. Justice Peckham, clearly establishes that such a judicial decision is not an impairment of a contract within the constitutional provision. In considering this question, it is important to distinguish that class of cases which have come to the United States Supreme Court on writs of error to state courts, from that class of cases which have found their way thither from the Circuit Courts of the United States. The Supreme Court of the United States can review the judgment of a state court only when some federal question appears on the record to have been decided against the plaintiff in error: Rev. St. § 709. But in addition to causes involving federal questions, causes which do not involve any federal question may, where the diverse citizenship of the parties exists to give a Circuit Court of the United States jurisdiction, reach the national Supreme Court. The latter class of cases has given rise to the confusion, and only such cases are cited as authority by those writers who maintain that judicial decisions are comprehended in the word law as used in the

impairment of contract clause. It is obvious that this is erroneous.

The line of cases beginning with *Gelpcke* v. *Dubuque*, 1 Wall. 200, is said to be the authority for the statement. Agreeably to the anomalous result of what Mr. Justice Mitchell, in 128 Pa. St. Reports 228, characterized as "the unfortunate mis-step that was made in the opinion of *Swift* v. *Tyson*, 16 Pet. 1," the federal courts frequently refuse to follow the decisions of state courts of last resort, giving various reasons for the refusal. The issue of bonds, which gave rise to the unfortunate decision in *Gelpcke* v. *Dubuque*, furnished another case which shows that the impairment of contract which followed from the reversal of its former decisions by the Supreme Court of Iowa, was not such an impairment as was sufficient to give the Supreme Court of the United States jurisdiction on a writ of error to a state court: *Railroad Co.* v. *McClure*, 10 Wall. 511. Speaking of the dismissal of the latter case, Mr. Justice Peckham says: "There was no subsequent legislative act impairing their obligation, and hence this court had no jurisdiction to review the judgment of the state court." It is true that in some of these decisions the court adverts to the impairment of contracts. In *Gelpcke* v. *Dubuque*, Mr. Justice Swayne, at page 205, says: "It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority," and quotes from 16 How. 432, "The sound and true rule is, that if the contract when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." It was not pretended, however, that this gave the court jurisdiction. Mr. Justice Peckham's opinion is an affirmance of the most recent utterances of the court upon this question. In *Lehigh Water Co.* v. *Easton*, 121 U. S. 392 (1887), Mr. Justice Harlan states the rule thus: "The argument in behalf of the company seems to rest upon the general idea that this court, under the statutes defining its jurisdiction, may re-examine the judgment of a state court in every case involving the enforcement of contracts. But this view is unsound. The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void, which, in our opinion, is valid; it may adjudge a contract to be valid, which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither of such cases would the judgment be reviewable by this court, under the clause of the Constitution protecting the obligation of contracts against impairment by State legislation, and under existing statutes, defining and regulating its jurisdiction, unless that judgment in terms, or by its necessary operation, gives effect to some provision of the state Constitution, or some legislative enactment of the state, which, it is claimed by the unsuccessful