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## Notes

### THE STATUTE OF LIMITATIONS AND DEMAND NOTES

The question propounded for consideration in this article embraces primarily the application of the statute of limitations to the various types of negotiable instruments payable on demand. Although a superficial examination of the language employed in such statutes creates an impression that the problem can be categorically solved in every instance, a more detailed investigation reveals that in few fields of the law is there greater vacillation and obscurity.

Concerning the time at which the statute of limitations begins to run, it is an elementary principle universally adhered to that the statute is not set in operation until the cause of action has been perfected.<sup>1</sup> Although this rule is regarded as fundamental in all jurisdictions, the chief difficulty is encountered in determining when a cause of action has accrued. It is this latter troublesome problem that has caused American and English courts to become quagmired in confusion when applying the statute to negotiable demand obligations. Realizing that the statute cannot be set in operation until all conditions precedent to the accrual of a cause of action have been fulfilled, the courts have strained logic and reason to the breaking-point in their endeavors to justify a conclusion that although such notes are expressly proclaimed to be payable "on demand," yet an actual demand is not necessary in order to perfect a cause of action. This construction has resulted in such shallow law that the courts have been forced to pyramid exceptions in order to harmonize jurisprudence, to some degree, with existing business and commercial conditions.

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<sup>1</sup> Williston, *Contracts*, sec. 2040; 1 Wood, *Limitations*, sec. 118; *Minnehaha County v. Boyce* (1912) 30 S. D. 226, 138 N. W. 287.

## I. THE STATUTE OF LIMITATIONS AND ORDINARY DEMAND NOTES

### A. *The General Rule*

The great weight of authority, with but few cases announcing the contrary doctrine, is to the effect that with regard to ordinary promissory notes payable on demand the statute of limitations begins to run in favor of the maker as against the payee from the date of the note.<sup>2</sup> This rule necessarily includes another rule, namely, that a demand by the holder is not essential to the perfecting of the cause of action on the note.<sup>3</sup> The modern situation in England is represented by the widely cited case of *Norton v. Ellman*.<sup>4</sup> In that case the note sued upon was in the following form: "I promise to pay 400£ on demand with lawful interest." Plaintiff made a demand thereon within six years after the date of the note, but he did not institute proceedings thereon until after six years from the date of the note. The question presented to the appellate court was whether the statute began to run from the date of the note or from the date of the demand. In holding that the plaintiff was barred by the statute the court said, "A promissory note payable on demand is a present debt, and is payable without any demand, and the statute begins to run from its date—a demand prior to the bringing of the suit is unnecessary."<sup>5</sup>

The general rule was established very early in Missouri and has remained undisturbed to the present time. In the case of *Easton v. McAllister*,<sup>6</sup> the Missouri Supreme Court in a short opinion decided that as regards the instant problem the statute must be construed to mean that "whenever the debt is in a situation to be sued upon," thenceforward the statute runs. With this as a major premise the court then completed a syllogism by adding, "Now on a demand note, suit can be brought as soon as it is made. Hence it follows that the statute runs on such a note from its date."<sup>7</sup> Though in the opinion of the writer, the court begged

<sup>2</sup> For supporting citations in addition to those to be subsequently noted see 44 A. L. R. 397.

<sup>3</sup> The parentage of both these rules is generally attributed to several early English cases. (See 2 Ames, *Bills and Notes*, p. 61) The earliest of these cases is *Capps v. Lancaster* (1597) Cro. Eliz. 548, 78 Eng. Rep. 794, in which it was held that an actual demand was not a condition precedent to the bringing of an action on a demand note and that the suit itself was sufficient demand. This case was followed by *Rumball v. Ball* (1711) 10 Mod. 38, 88 Eng. Rep. 616, holding that a demand note "was a debt in praesenti and even if a demand was necessary the action itself was sufficient demand." A year later the case of *Collins v. Denning* (1712) 3 Salk. 227, 91 Eng. Rep. 792, announced a similar ruling.

<sup>4</sup> (1837) 2 M. & W. 461, 150 Eng. Rep. 839.

<sup>5</sup> *Ibid.* *Accord, Hartland v. Jukes* (1863) 158 Eng. Rep. 1052.

<sup>6</sup> (1826) 1 Mo. 662.

<sup>7</sup> *Ibid.*

the question in its second contention, the fact remains that the principle announced has been sustained and concurred in by an unbroken line of Missouri decisions.<sup>8</sup>

While most of the jurisdictions follow the majority rule as stated,<sup>9</sup> in one jurisdiction the issue is in doubt and in another a modification of the rule prevails. In an early South Carolina case<sup>10</sup> the courts of that jurisdiction followed the general rule, holding that since "the holder can bring suit on the same day that the note is made \* \* \* a cause of action has accrued to him, and from that time the statute of limitations begins to run."<sup>11</sup> Despite this clear statement the same court some forty years later involved itself in a direct contradiction in the case of *Nash v. Woodward*.<sup>12</sup> The Supreme Court held that the right of action on a demand note did not accrue until there was a demand, and therefore the statute did not begin to run until that time. In reaching this result the court relied on the rule announced in the earlier South Carolina case of *Smith v. Steen*.<sup>13</sup> However, an examination of that decision reveals that the instrument sued upon was a certificate of deposit and not an ordinary promissory demand note. As will appear later, cases involving certificates

<sup>8</sup> *Jameson v. Jameson* (1880) 72 Mo. 640; *Boyd v. Buchanan* (1914) 176 Mo. App. 56, 162 S. W. 1075; *St. Charles Savings Bank v. Thompson* (1920) 284 Mo. 72, 223 S. W. 734.

<sup>9</sup> *Ala.*: *First National Bank of Union Springs v. Blue* (1924) 20 Ala. App. 107, 101 So. 75. *Ark.*: *McCullum v. Neimeyer* (1920) 142 Ark. 471, 219 S. W. 746. *Cal.*: *O'Neil v. Magner* (1889) 81 Cal. 631, 22 Pac. 876; *Bell v. Sackett* (1869) 38 Cal. 407; *Vermilyea v. Vermilyea* (1923) 61 Cal. App. 608, 215 Pac. 686. *Ill.*: *Knecht v. Boshold* (1908) 138 Ill. App. 430. *Ky.*: *Hodges' Adm'r v. Asher* (1928) 220 Ky. 431, 6 S. W. (2d) 451. *La.*: *Darby v. Darby* (1908) 120 La. 847, 45 So. 747. *Md.*: *Blick v. Collins* (1917) 131 Md. 625, 102 Atl. 1022. *Mass.*: *Fletcher v. Sturtveant* (1920) 235 Mass. 249, 126 N. E. 428. *Miss.*: *Spiro v. Shapleigh Hardware Co.* (1925) 141 Miss. 38, 106 So. 209. *N. J.*: *DeRaismes v. DeRaismes* (1903) 70 N. J. L. 15, 56 Atl. 170. *N. Y.*: *McMullen v. Rafferty* (1882) 189 N. Y. 456; *Wenman v. Mohawk Ins. Co.* (1835) 13 Wend. 267; *Howland v. Edmonds* (1862) 24 N. Y. 307; *Wheeler v. Warner* (1872) 47 N. Y. 519; *Knapp v. Greene* (1894) 79 Hun. 264, 29 N. Y. Supp. 350; *Loewer's Gamrinus Brewery Co. v. Precker et al.* (1921) 185 N. Y. Supp. 829; *Cottle v. Marine Bank* (1901) 166 N. Y. 53, 59 N. E. 736; *Mills v. Davis* (1889) 113 N. Y. 243, 21 N. E. 68; *In Re Nellis' Will* (1926) 214 N. Y. Supp. 378; *In Re Van Vranken's Estate* (1923) 198 N. Y. Supp. 445; *In Sewell v. Swift* (1912) 136 N. Y. Supp. 371, the court said that "section 410 of the Code of Civil procedure provides that where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the *right to make a demand* is complete." Therefore the court held that the statute began to run from the date of the notes.

<sup>10</sup> *Smith v. Blythewood* (1839) Rice (S. C.) 245, 33 Am. Dec. 111.

<sup>11</sup> *Ibid.*

<sup>12</sup> (1902) 62 S. C. 363, 16 S. E. 1003.

<sup>13</sup> *Smith v. Steen* (1908) 138 Ill. App. 430.

of deposit form an exception to the general rule. Hence it would seem that the Nash case is based upon authority not in point.

As has been previously noted, wherever the general rule is recognized, it is also held that a demand before suit is not necessary. Indiana, however, has gone a step farther, and in the widely cited case of *Kraft v. Thomas*<sup>14</sup> has considered the problem from an alternative viewpoint. After deciding that the note sued upon was a demand promissory note and as such embraced within the general rule, the court said, "But conceding that a demand was a condition precedent to the right to sue, still we think the right of action is barred for the reason that the demand must be made within the statutory period. If the rule were otherwise, a party, by his own act or failure to act, could preclude the running of the statute until such time as might suit his interest, convenience or pleasure to put it in motion."<sup>15</sup> It is the contention of the writer that to be consistent on this point, it must be held either that a demand is not necessary and the statute begins to run at once, or that a demand is essential and the statute does not begin to run until the demand is made. In connection with this case, it might be noted that the alternative portion of the decision has been refuted by Section 70 of the Negotiable Instruments Law which, codifying the general rule, provides, "presentment for payment is not necessary in order to charge the person primarily liable on the instrument."

The courts have seemingly advanced four different reasons for the general rule. One has already been mentioned, namely that a demand promissory note represents a debt in praesenti and hence a cause of action exists against which the statute of limitations can run.<sup>16</sup> New York has rationalized the general rule by holding that "the word 'demand' is not to be treated as a part of the contract, but is used to show that the debt is due."<sup>17</sup> The Supreme Court of Kentucky has said, "The reason for the rule is that as payment can be 'easily' demanded, an actual demand is not necessary to complete the cause of action, but the commencement of the suit is a sufficient demand."<sup>18</sup> Still another basis is to be found in the doctrine of the Illinois court that "the duty to make a demand upon the holder and pay his note rested upon the maker."<sup>19</sup> To apply this rule of non-negotiable paper to negotiable instruments is absurd as the writer will attempt to illustrate subsequently.

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<sup>14</sup> (1889) 123 Ind. 513, 24 N. E. 346.

<sup>15</sup> *Ibid.*, 123 Ind., l. c. 515.

<sup>16</sup> See *Norton v. Ellman*, *supra* note 4.

<sup>17</sup> *McCullen v. Rafferty*, *supra* note 9.

<sup>18</sup> *Hodges' Adm'r v. Asher*, *supra* note 9.

<sup>19</sup> *Hunt v. Divine* (1865) 37 Ill. 137.

### B. *The Effect of Particular Provisions*

In the application of the majority rule it is frequently necessary for the courts to determine, as a preliminary step, whether the instrument under consideration is payable on demand or not. To do this it often becomes necessary for the courts to pass upon the effect of particular expressions used in the instrument.

The expression "on demand, after date" does not alter the nature of an ordinary demand note.<sup>20</sup> The theory back of this conclusion is based on the idea that "the words, 'on demand, after date' are more nearly analogous to such an expression as 'with interest after date'; if a promissory note, payable on demand, with inter-after date, is paid the next day after it is given, one day's interest is due and payable. In the case at bar, the intention of the parties was apparently that it should be payable immediately, and no intention appears on the face of the note that the parties intended to stipulate for at least on day's time before a demand should be given."<sup>21</sup> A similar result has been reached, when the promise is to pay "at any time within six years from date"<sup>22</sup> or "when kald for."<sup>23</sup>

A rather dubious and strained decision was reached by the New York court in *Knapp v. Greene*.<sup>24</sup> It was held that the words "on demand, after three months notice," immediately preceding the promise to pay, did not so qualify the note as to take it out of the general rule. It was the theory of the court that the provision for notice was for the benefit of the debtor and not for that of the creditor, the court holding that the words merely limited the right of the creditor to sue presently.

An interesting example of judicial construction is afforded by the case of *Harris v. Townsend*<sup>25</sup> in which the note in suit was dated March 14, 1904 and stated that "on demand or at my death I or my estate promise to pay the sum of \$292, with interest, etc." The maker of this note lived for more than six years after the execution of this note, and suit was filed against his administrator, who pleaded the statute. The upper court was of the opinion that while it was true that the holder could sue on the note at any time he desired, it was also true that he had a right to wait until the death of the maker to do so. Hence the court concluded that the statute did not begin to run until that event occurred.

Frequently an ordinary promissory demand note calls for the

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<sup>20</sup> *Fenno v. Gay* (1888) 146 Mass. 118, 15 N. E. 87; *O'Neil v. Magner* 81 Cal. 631, 22 Pac. 876.

<sup>21</sup> *Hitchings v. Edmonds* (1882) 132 Mass. 338.

<sup>22</sup> *Young v. Weston* (1855) 39 Me. 492.

<sup>23</sup> *Kraft v. Thomas*, supra note 14.

<sup>24</sup> (1894) 79 Hun. 264, 29 N. Y. Supp. 350.

<sup>25</sup> (1912) 101 Miss. 590, 58 So. 529.

payment of interest and the question then arises as to whether such a provision takes the note out of the general rule. Numerically, the weight of authority in this country and in England favors the view that a provision for interest does not prevent the statute from running from the date of the note.<sup>26</sup> However there is well reasoned authority for the contrary position.<sup>27</sup> The basis for the latter view has been thus expressed, "It can hardly be supposed that this money was hired with the expectation on the part of anyone concerned that the payment of the note was to be immediately demanded or made, or, indeed, within any short period. We think, on the contrary, that the note, given for a loan, was intended to be a continuing security, an investment of a more or less permanent value."<sup>28</sup>

### C. *The Intention Rule*

Many courts have lessened the severity of the general rule by applying the so-called "intention rule" in some cases. The Indiana court has thus stated the principle, "Although the general rule is that the statute begins to run at once on a promissory demand note, yet, where a speedy demand, or notice to pay, would manifestly violate the intent and purpose of the contract, or where delay in making demand was contemplated by the contract, actual demand is necessary to mature the note, and the statute does not run until that time."<sup>29</sup> This rule is now a generally recognized exception to the general rule.<sup>30</sup>

The manner in which the "intention rule" has been applied is illustrated by two interesting cases. In a Missouri case<sup>31</sup> the note read, "one day after date I promise to pay to E. J. the sum of \$600 with interest at the rate of 6% per annum . . . . The condition of the above obligation is such, that if the above E. J. shall demand any or all of the above during her natural life, it shall be due and payable according to the tenor of the above; but in case of her death before any or all of the above shall be liquidated, it shall remain with me and my heirs forever, as my por-

<sup>26</sup> Norton v. Ellman, supra note 4; Wheeler v. Warner (1872) 47 N. Y. 519; McMullen v. Rafferty, supra note 9; In Re Van Vranken, supra note 9; In Re Doremus (1919) 215 Ill. App. 164; DeRaimes v. DeRaimes, supra note 9.

<sup>27</sup> Spiro v. Shapleigh Hardware Co., supra note 9; Yates v. Goodwin (1901) 96 Me. 90, 51 Atl. 804; Baxter v. Beckwith (1913) 25 Colo. App. 322, 137 Pac. 901; Boyd v. Buchanan, supra note 8.

<sup>28</sup> Yates v. Goodwin, supra note 27.

<sup>29</sup> Daugherty v. Wheeler (1890) 125 Ind. 421, 25 N. E. 543.

<sup>30</sup> See: Wenman v. Mohawk (1835) 13 Wend. (N. Y.) 268; Blick v. Collins, supra note 9; New England Fire Ins. Co. v. Haynes (1898) 71 Vt. 306, 45 Atl. 221; Baxter v. Beckwith, supra note 27; Boyd v. Buchanan, supra note 8; Hartland v. Jukes, supra note 5; Vermilyea v. Vermilyea, supra note 9; Sullivan v. Ellis (1915) 219 Fed. 694.

<sup>31</sup> Jameson v. Jameson, supra note 8.

tion of her estate." The court held that the payment was unequivocally conditioned upon demand being made at any time during the life of the payee, and if made within that time the sum was to be paid, and if not so made, it was not to be paid at all, but to be forever retained by the payor. The court concluded, "Here the parties contemplated a delay in making a demand, and the limit to the delay was the lifetime of the payee. And therefore the statute does not bar the action." In the Maryland case of *Blick v. Collins*<sup>32</sup> it was held that the terms of the following note indicated that the parties intended it to represent a continuing liability which should mature only upon actual demand of payment, or upon the failure to provide further collateral if required: "Dec. 9, 1907. On demand for value received, I promise to pay to J. C., or order, \$2250 with interest, having deposited with said J. C. as collateral security for the payment of this note certain shares of stock, with such additional security as may from time to time be required by said J. C., and which said additional security I promise to give at any time demanded. If these additional collateral be not so given when demanded, then this note shall be due; and rebate of interest taken shall be allowed on payment prior to maturity."

#### D. Rule With Regard to Indorsers

As the courts have unanimously agreed on the general rule with regard to makers of demand notes, so also have they agreed on the view that a contrary rule should be adopted with reference to indorsers of demand notes. It has never been doubted that the statute of limitations should not begin to run against an indorser's liability on a promissory demand note until the holder has made an actual demand. In reaching this result the courts have relied upon the peculiar nature of the indorser's contract.

The leading case on the point is *Parker v. Stroud*<sup>33</sup> in which an action was brought against the representatives of the estate of an endorser of a demand note. The note was dated November 23, 1870, and payment was demanded and refused at the bank in February, 1880; due notice of nonpayment was given the indorser. The action was begun in March, 1881, and the defendants plea of the statute of limitations was sustained. In reversing the lower court, the New York Court of Appeals quoted from and followed the equally famous case of *Merritt v. Todd*<sup>34</sup> holding that "A promissory note payable on demand, with interest, is a continuing security, and an indorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time. Therefore,

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<sup>32</sup> *Supra* note 9.

<sup>33</sup> (1885) 98 N. Y. 379.

<sup>34</sup> *Merritt v. Todd* (1861) 23 N. Y. 28.

as against indorsers, the statute does not begin to run until after an actual demand is made." In differentiating between the rule generally applied to makers of demand obligations and the rule then announced with reference to indorsers, the court in substance held that the plain import of the indorser's contract is that the maker of the note will pay the same at a certain time and place; and if it remains unpaid after demand is made at such time and place, he will pay it upon notice of its nonpayment. On the other hand, the theory behind the general rule applied to makers of such paper is of a different tenor since such parties are under a general obligation to pay the debt. In other words, the former's contract is conditional, while the latter's is absolute.

## II. THE STATUTE OF LIMITATIONS AND BANK NOTES

The extreme dogmatism of the general rule, with its frequent thwarting of the intentions of the parties, and the fundamental difference between promissory demand notes and bank notes, have combined to establish an exception to the general rule with regard to bank notes—the statute does not begin to run until demand and refusal.

The earliest recognition of the individual attributes of bank notes, and the first statement of the theory upon which this exception is based, was in an opinion by Lord Mansfield<sup>35</sup> in which he said, "These notes are not like bills of exchange, mere securities or documents for debts, nor are they so esteemed, but are treated as money in the ordinary course and transaction of business, by the general consent of mankind."

The earliest recognition of the exception in the United States was in a case in 1853<sup>36</sup> which supported the exception by holding that bank notes serve the purposes of money. Two years later a Tennessee case<sup>37</sup> expounded this theory more fully, holding that "bank notes differ essentially from promissory notes. They are not evidences of debt or security for money, strictly speaking, but are treated as money: they are transferable by delivery, and are issued and put in circulation with intention that they shall pass hand to hand and circulate as money, and with the further intention that they shall continue in circulation as money during the continuance of the banking corporation; or, at least, that they shall be returned as seldom as possible; and that when returned, they shall again be reissued, and thus remain in circulation indefinitely. Hence the statute does not begin to run until a demand is made and the bank refuses to pay."

A second theory on which this exception is based is illustrated by the case of *Butts v. Vicksburg Ry. Co.*<sup>38</sup> in which the court

<sup>35</sup> *Miller v. Race* (1758) 1 Burr. 457, 97 Eng. Rep. 398.

<sup>36</sup> *Dougherty v. Western Bank of Ga.* (1853) 13 Ga. 287.

<sup>37</sup> *F. & M. Bank of Memphis v. White* (1855) 2 Sneed (Tenn.) 482.

<sup>38</sup> (1886) 63 Miss. 462.



said, "The general rule is that the statute does not apply to bank bills because their date is no evidence of the time they were issued, as they are continuously being returned and reissued by the banks."<sup>39</sup>

However, when such bills have ceased to circulate as money and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character which excepts them from the operation of the statute. Hence the rule is that when this occurs, the statute runs from the time the bank note loses its singular nature.<sup>40</sup> In Tennessee this rule has received statutory change. The Tennessee Code<sup>41</sup> provides that the statute of limitations shall not apply to notes issued by a banking corporation under the laws of Tennessee, whether the notes have ceased to circulate as money or not, or whether the bank has or has not ceased to exist as a corporation.<sup>42</sup>

### III. THE STATUTE OF LIMITATIONS AND CERTIFICATES OF DEPOSIT

Considerations such as the nature of the contract, the language employed, ordinary business customs and usages, and the intentions of the parties, have persuaded the majority of the American courts to hold that the statute of limitations does not begin to run against certificates of deposit until after an actual demand has been made.<sup>43</sup> In England there is no judicial authority on the question for the reason that certificates of deposit are not used there.<sup>44</sup> Some American courts while professing to adhere to the above rule hold that despite the fact that the statute does not begin to run until a demand is made, the holder must make the demand within a reasonable time—and this means within the period of limitations.<sup>45</sup>

In differentiating the rule with regard to promissory demand notes from the majority rule as certificates of deposit, the Pennsylvania court has said,<sup>46</sup> "The certificate of deposit is not a mere

<sup>39</sup> Cf. *Dougherty v. Western Bank of Ga.*, supra note 36.

<sup>40</sup> *Butts v. Vicksburg & Meridian Ry. Co.*, supra note 38.

<sup>41</sup> Tenn. Code, sec. 2779.

<sup>42</sup> For other statutes which recognize the distinctive features of bank notes and which excepts them from the general rule, see: Public Laws of Vt. (1933) sec. 1654; Rev. Stat. of Me. (1930) Chap. 95 sec. 1; Gen'l Laws of Mass. (1932) Chap. 260 sec. 1; N. Y. Code of Civil Procedure, Chap. 4, sec. 393.

<sup>43</sup> *Howell v. Adams* (1877) 68 N. Y. 314; see also, *Riddle v. First National Bank of Butler* (1886) 27 Fed. 503; Morse, *Banks and Banking* (3rd ed.) sec. 301.

<sup>44</sup> Thus in the case of *Richer v. Yoyer* (1896) L. R. 5 P. C. 461, the court quotes from Sir Montague Smith who declared that such instruments were not in use in England.

<sup>45</sup> Accord: *Pierce v. National State Bank of Boston* (1913) 215 Mass. 18, 101 N. E. 1060. Contra: *Gardner's Estate* (1910) 228 Pa. 282, 77 Atl. 509.

<sup>46</sup> *McGough v. Jamison* (1884) 107 Pa. 336.

due bill—it is not payable on demand merely, but is payable on the return of the certificate. This superadded condition changes its character, and the statute only begins to operate after a demand and return of the certificate.” The court was also of the opinion that a certificate represents an amount of money deposited with the intention of securing a safe resting place for the currency, and that consequently it could not be held that the bank was under an immediate duty to pay. Another reason for the rule was expressed in a South Dakota case<sup>47</sup> in which the court said, “Neither party contemplated the execution of a contract inceptively bearing a stamp of dishonor, upon which a cause of action accrued instantaneously without first calling on the banker for payment, and the terms of the note bear no such construction.” It has been said in a very enlightening Iowa case,<sup>48</sup> “The fundamental error in the cases which hold that the statute runs from the date of the certificate is in holding that an ordinary deposit of money is a *loan* thereof to the bank. On the contrary, deposits in a bank are neither loans or bailments in the strict sense of the terms. A deposit is a transaction peculiar to the banking business, and one that the courts should recognize and deal with according to commercial usage and understanding. The primary purpose of a general deposit is to protect the fund, and some of the incidental purposes thereof are the convenience of checking and transacting large business transaction without keeping and handling large sums of money. The transaction is in reality for the benefit of the depositors, and while a relation of debtor and creditor exists, and the bank has the use of the money for commercial gain, it assumes no further obligation than to pay the amount received when it shall be demanded at the banking house. Hence a demand is necessary to mature the instrument, and the statute does not run until that time.”<sup>49</sup>

In a number of jurisdictions a deposit in the bank is considered as a loan, and a certificate of deposit considered as having all the earmarks of a promissory note payable on demand, and in effect nothing but such. This doctrine has been fully explained by the Wisconsin Supreme Court in *Curran v. Witter*<sup>50</sup> in which the court said, “The cases which hold that such a certificate is not due until presented for payment, and hence that the statute does not run until that date, seem to go on the ground that the transaction is not a loan of money, but rather that it is in the nature of a bailment, upon which no cause of action accrues until

<sup>47</sup> *Tobin v. McKinney* (1901) 15 S. D. 257, 88 N. W. 572.

<sup>48</sup> *Elliot v. Capitol City State Bank* (1905) 128 Ia. 275, 103 N. W. 777.

<sup>49</sup> For further statements of the theory see: *Fells Point Savings Institution v. Weedon* (1862) 18 Md. 320; *Smiley v. Fry* (1885) 100 N. Y. 262, 3 N. E. 186; *Daniel*, *Negotiable Instruments*, Vol. 2 (5th ed.) sec. 1707a.

<sup>50</sup> (1887) 68 Wis. 16, 30 N. W. 706.

demand; in other words it is said that the transaction is in contemplation of law a deposit and not a loan. We cannot approve such a doctrine. We think that when a person deposits money in a bank in the usual course of business, he loans it to the bank, and the bank thereby becomes his debtor to the amount of the deposit—not his bailee of the money. By the deposit the title to the money passes to the bank, and it is therefore its money, subject to its absolute control and disposition. The depositor cannot reclaim the specific money. He cannot maintain replevin or trover (as he might were it a bailment) but only assumpsit for the money deposited.”<sup>51</sup>

Because of the conflict with respect to certificates of deposit it is interesting to note the Negotiable Instruments Law on the point. As previously mentioned, section 70 of the Law provides that “presentment for payment is not necessary in order to charge the person primarily liable on the instrument.” Certificates of deposit receive no special mention and since the section has been held to have adopted the majority rule with respect to ordinary promissory demand notes<sup>52</sup> many think that the section changes the majority rule with regard to certificates of deposit and bank notes.<sup>53</sup> While one case, decided since the adoption of the Negotiable Instruments Law, has held that an action could be brought on a certificate of deposit without a previous demand,<sup>54</sup> yet section 70 was not cited nor relied upon. There seems to be no cases at present which settles the problem.

#### IV. CRITICISMS AND CONCLUSIONS

The general rule that the statute of limitations begins to run from the date of the note depends, as has been previously noted, upon the rule that suit can be brought on the note without any previous demand. This latter rule is justly open to the criticism that it is an anomaly in the law that a breach of contract should be made out by the very fact of suing. Indeed, this criticism can be predicated to an even earlier point in the history of the demand note, namely, that the general rule makes it necessary to hold that there is a breach of contract the moment the note is

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<sup>51</sup> See also: *Tripp v. Curtenius* (1877) 36 Mich. 494; *Mereness v. First National Bank* (1900) 112 Ia. 11; *Mitchell v. Easton* (1887) 37 Minn. 335, 33 N. W. 910.

<sup>52</sup> *Kelly v. Eggers* (1929) 225 App. Div. 511, 233 N. Y. Supp. 638; *Shuman v. Citizens State Bank of Rugby* (1914) 27 N. D. 599, 147 N. W. 388.

<sup>53</sup> Ames, “This section changes the law in a number of states as to certificates of deposit and bank notes, and should be amended to except them.” McKeehan, “The statute would begin to run against certificates of deposit from their date, which is contrary to the business custom and the language of such instruments.” Brannan, “This section (70) was intended to apply to makers of notes and acceptors of bills, and its effect on certificates and bank notes was evidently overlooked.”

<sup>54</sup> *First National Bank v. Capps* (1922) 208 Ala. 235, 94 So. 112.

given. The fallacy in such a view is obvious because it cannot be said, without violating the evident intentions of the parties, that they intended to execute an instrument tainted at its inception with the mark of dishonor.

In adhering to the general rule the courts treat the word "demand" as not being a part of the contract, but as being used only to show that a debt is due. This theory is in clear conflict with the rule usually applied by the courts that words are to be given their plain and ordinary meaning. As the rule stands it makes the provision that the instrument shall be payable on demand mean just the opposite of what the language indicates. Consider the situation when the ordinary business man, unversed in legal technique, borrows a sum of money from another ordinary business man, who as security therefor takes the former's note expressed to be "payable on demand." Is it not likely that the parties never contemplated that the creditor could at once subject the debtor to legal proceedings without giving the latter some prior indication that the former desired immediate payment? And is it not unreal to say that suit can be instituted upon the note at once, especially when we consider that in the ordinary course of human affairs, a man who is so distressed financially as to have to secure a loan, is seldom able to make payment before the lapse of a definite period of time? Yet the law states that despite the fact that the debtor was so low in funds that he had to secure a loan, he must, nevertheless, be considered financially able to make payment immediately—that within the space of an hour he must have changed from a man in sore need of money to one with a sufficient surplus to meet his outstanding obligations. The writer contends that this is a very unnatural position to assume. It is more logical to say that the creditor by allowing his security to be expressed as "payable on demand" understands that he is to allow the debtor sufficient time to reinforce his financial position, and that he will not have to pay until the creditor requests payment. This position is strengthened by notes bearing interest. In such notes it is manifest that the parties contemplated that the obligation evidenced by the note should be continuing and outstanding; otherwise there is no purpose to the interest provisions. It is not sound to say that effect of the interest provision is to increase the principal debt *ex die in diem*. It is more plausible to say that by inserting such a provision in a note, the creditor was making an investment on the sum of money he had loaned, and desired that the note should remain outstanding so that the interest to be due him would accumulate.

The corollary of the general rule, namely that the bringing of the suit is sufficient demand, is fallacious and results in a logical circle. By holding that a suit is sufficient demand the courts

imply that a demand is necessary. But then the necessity of a demand is negatived by sustaining a suit which is supposed to be founded on a demand, when none in fact has been made. The writ is in no sense the demand upon which the suit is founded.

The general rule contravenes the modern theory of the purpose of the statute of limitations. It has been said that<sup>55</sup> "at present the view most prevalent is that the statute is one of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory, death or removal of witnesses." If we apply this view of the statute it is clear that the general rule should not be as it is. It is extremely rare for the holder of a demand note to allow his claim to become stagnant with the lapse of an unreasonable length of time. The question of fraud seldom enters into the cases. The death or defective memory of witnesses is a minor point since the face of the instrument usually speaks for itself.

To maintain the general rule, moreover, one must also adhere to the view that it is the duty of the maker of the note to seek out the holder and tender payment, even though there has been no demand for payment. In the first place, it is very doubtful that the parties contemplated such a course. If they had they would probably have omitted the words "on demand" from the instrument. In the second place, it is not always possible for the promisor to find the holder and tender payment. Frequently the promisor does not know who the holder is since a note changes hands. Moreover, distances separating the parties are great and more often the holder has changed his location without the maker's knowledge. Thus the rule applicable to non-negotiable paper is out of place when applied to negotiable instruments.

Although most proponents of the general rule recognize the "intention rule," they have failed to recognize its applicability in most of the cases. That is to say, that although they profess not to apply the general rule to cases where a contrary intent is apparent, nevertheless, they do overlook the obvious design of the parties in most of the cases to which they have applied the general rule. Take for example, the case of *Loewer's Gamrinus Brewery Co. v. Precker*<sup>56</sup> in which the general rule was applied although the court was cognizant of the fact that there was a custom among brewers, and the parties in the case were brewers, that when a demand note was made, there was an understanding that the note was to be allowed to run while the party was in

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<sup>55</sup> 17 R. C. L. 664.

<sup>56</sup> *Supra* note 9.

business. Again, consider the case of *Sewell v. Swift*<sup>57</sup> in which the court ignored the fact that the notes were placed in the plaintiff's hands with the understanding that they were not to be regarded as promissory notes obligating the defendant to pay, but were to be held by the plaintiff as evidence of an indebtedness in the event of the defendant's death before the formation of a certain company. The writer believes that the absurdity of applying the general rule to such cases is patent when the court admits that it would reach an opposite decision if a contrary intent were shown.

In brief the author contends that by judicial decision or by statute, the rule applicable to ordinary demand notes should be changed so as to require an actual demand as a condition precedent to the accrual of a cause of action; that being the case the statute of limitations would not begin to run until the demand had been made. In this way resort to the "intention rule," at best always an uncertain and unreliable doctrine, would be rendered unnecessary, and an uniformity, at present unknown in this field, would be attained.

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### THE USE OF MANDAMUS IN MISSOURI

Mandamus is a writ of very ancient and obscure origin. It seems originally to have been one of the many writs or mandates by which the sovereign of England directed the performance of any desired act by his subjects. These were not judicial writs, merely commands. The command being a law in itself from which there was no appeal, it was not merely declaratory of a duty under existing law but created the law and imposed the duty, the performance of which it commanded. It later assumed a judicial nature, and as a judicial writ mandamus probably appeared in use as early as the 14th and 15th centuries.<sup>1</sup> It, however, did not come into systematic use until the latter part of the 17th century and was then a purely prerogative writ proceeding from the king himself in the court of King's Bench. Its original purpose was to prevent disorder from a failure of justice and defect of police and grew out of the necessity of compelling inferior courts to exercise judicial and ministerial powers invested in them, by not only restraining their excesses but also preventing their negligence and restraining their denial of justice.<sup>2</sup>

The modern writ of mandamus may be defined as a command

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<sup>57</sup> *Ibid.*

<sup>1</sup> High, *Extraordinary Legal Remedies*, (1884), sec. 2. (For convenience this work will hereinafter be cited merely as "High.")

<sup>2</sup> Ferris, *Extraordinary Legal Remedies*, (1926), p. 219.