Bell Vs. Morrison

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Bell v. Morrison

26 U.S. (1 Pet.) 351

ERROR TO THE SEVENTH CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF KENTUCKY

SYLLABUS

The authority given by the Act of Congress of 24 September, 1789, chap. 20, to take depositions of witnesses in the absence of the opposite party is in derogation of the rules of the common law, and has always been construed strictly, and

therefore it is necessary to establish that all the requisites of the law have been complied with before such testimony is admissible.

The certificate of the magistrate taking the deposition is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury if all she necessary facts are there sufficiently disclosed.

It should plainly appear from the certificate of the magistrate that all the requisites of the statute have been fully complied with, and no presumption will be admitted to supply any defects in the taking the deposition.

The statute of limitations in Kentucky is substantially the same with the statute of 21 James II, ch. 16, with the exception that it substitutes the term of *five* years instead of *six.* The English decisions have therefore been resorted to in this case upon the construction of the statute of Kentucky, and are entitled to great consideration. They cannot be considered as conclusive upon the construction of a statute passed by a state upon a like subject, for this belongs to the local state tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence.

If the doctrines of the Kentucky courts in the construction of a statute of that state are irreconcilable with the English decisions upon a statute in similar terms, this Court, in conformity with its general practice, will follow the local law and administer the same justice which the state court would administer between the same parties.

The statute of limitations, instead of being viewed in an unfavorable light as an unjust and discreditable defense, should have received such support from courts of justice as would have made it what it was intended, emphatically, to be -- a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten or be incapable of explanation by reason of the death or removal of witnesses.

An exposition of the statute of limitations which is consistent with its true object and import is that expressed by this Court in the case of *Wetzell v. Bussard,* 11 Wheat. 309, an acknowledgment which will revive the original cause of action, must be *unqualified* and *unconditional* -- it must show positively that the debt is due in whole or in port. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it

"may amount to a new assumpsit, for which the old debt is a sufficient consideration, or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition or a readiness to perform it must be shown."

If the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner and be in its terms unequivocal and determinate, and if any conditions are annexed, they ought to be shown to be performed.

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If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expression be equivocal, vague, or indeterminate, leading, to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise, to revive the, cause of action.

The decisions of the courts of Kentucky giving a construction to the statute of limitations of that state are in accordance with the principles which have been sanctioned by this Court. Those decisions evince a strong disposition of the courts of Kentucky to restrict within very close limits any attempt to revive debts by implied promises resulting from acknowledgments or other confessions by parol. It is the duty of this Court in a case arising in Kentucky to follow out the spirit of

those decisions so far as the Court is enabled to gather the principles on which they are founded.

In the construction of local statutes, this Court has been in the habit of following the judgments of local tribunals.

The admission of a party of the existence of an unliquidated account on which something is due to the plaintiff, but no specific balance is admitted and no document produced at the time from which it can be ascertained what the parties understood the balance to be would not, by the courts of Kentucky, be held sufficient to take the case out of the statute and let in the plaintiff to prove *aliunde* any balance, however large it may be. It is indispensable for the party to prove by independent evidence the extent of the balance due to him before there can arise any promise to pay it as a subsisting debt.

The acknowledgment of a debt by one partner after a dissolution of the co-partnership is not sufficient to take the case out of the statute as to the other partners.

A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds, and this right may be restrained by the delegation of this authority to one partner.

After a dissolution of a partnership, no partner can create a cause of action against the other partners except by a new authority communicated to him for that purpose.

When the statute of limitations has once run against a debt, the cause of action against the partnership is gone.

The case was presented for the consideration of this Court upon a bill of exceptions taken by the plaintiff in error.

An action of assumpsit was instituted against Charles Wilkins, Jonathan Taylor, James Morrison, Anthony Butler, and Isaac White in 1823. The defendants, on 1 March, 1810, by articles of agreement under their respective hands and seals entered into a partnership for the purpose of manufacturing and vending salt at Saline, near the Wabash in the

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then Illinois Territory under the firm of Jonathan Taylor & Co., and the object of this suit is the recovery of about $20,000 claimed to be due on the sale and delivery of castings to that value or amount. The evidence of the sale and delivery of the articles and of their value was complete, and the questions which were presented to the court by the record were:

1st. Upon the decision of the circuit court against the admission of a deposition which had been intended to be taken in conformity with the provisions of the Act of Congress of 24 September, 1789, ch. 20, and in reference to the taking of which were was in all respects a compliance with the directions of the act, with the exception that the deposition was not certified to have been reduced to writing by the magistrate or by the deponent in his presence, and

2d. On the exclusion of certain testimony and the validity of the plea of the statute of limitations, upon which plea, the decision of the court having been in favor of the defendants, a verdict and judgment was rendered for them.

All the facts considered as proved in the case and also the written and documentary testimony essential to a full understanding of the case are stated at length in the opinion of the Court, delivered by MR. JUSTICE STORY.

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MR. JUSTICE STORY delivered the opinion of the Court.

The original action was brought by the plaintiffs in error against the defendants on 16 August, 1820, to recover the value of certain iron castings sold and delivered to

them by the plaintiff. The defendants pleaded *non assumpserunt* and *non assumpserunt* within five years, the latter being the time prescribed by the Kentucky statute of limitations in cases of this nature, upon which pleas the parties were at issue, and at the trial a verdict was returned by the jury for the defendants, upon which judgment passed in their favor. A bill of exceptions was taken to certain points ruled by the circuit court at the trial, and the validity of these exceptions has constituted the ground of the argument for the reversal which has been insisted on in this Court.

The first objection urged is the exclusion of the deposition of a Mr. Mockbee which was offered by the plaintiff as testimony in the cause. The reason assigned for the exclusion is that there was no proof by the certificate of the magistrate or otherwise that the deposition was reduced to writing, in the presence of the magistrate. This is a point altogether dependant upon the construction of the Act of Congress of 4 September, 1789, ch. 20, under the authority of which the deposition purports to be taken. The authority to take testimony in this manner, being in derogation of the rules of the common law, has always been construed strictly, and therefore it is necessary to establish that all the requisites of the law have been complied with before such testimony is admissible. The act of Congress provides

"That every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth, and shall

subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition *or by the deponent in his presence.* And the deposition so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken or shall, together with a certificate of the reasons as aforesaid of their being taken and of the notice, if any was given to the adverse party, be by him, the said magistrate, sealed up and directed to such court and remain under his seal until opened in court."

Without doubt the certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury if all the necessary facts are there sufficiently disclosed. It is not denied that the reducing of the deposition to writing in the presence of the magistrate is a fact made material by the statute, and that proof of it is a necessary preliminary to the right of introducing it at the trial. But it is supposed that sufficient may be gathered by intendment from the certificate of the magistrate to justify the presumption that it was done. The certificate is in these words:

"State of Tennessee, Dickson County, ss."

"At Charlotte, in said County, on the fourth day of July, 1822, before me, James M. Ross, justice of the peace, and one of the judges of the County Court of Dickson County, came, personally John Mockbee, being about the age of fifty-one years, and after being carefully examined and cautioned and sworn to testify the whole truth, did subscribe the foregoing and annexed deposition after the same was reduced to writing by him in his own proper hand."

The certificate then proceeds to state the reason for taking the deposition, &c.;, in the usual form. It is remarkable that the certificate follows throughout, with great exactness of terms, every requisition in the statute with the exception as to the deposition's being reduced to writing in the presence of the magistrate, and it is scarcely presumable that this was accidentally omitted. At all events, every word in the certificate may be perfectly true and yet the deposition may not have been reduced to writing in the magistrate's presence. If this be so, then there can arise no just presumption in favor of it. And we think in a case of this nature, where evidence is sought to be admitted contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken. There ought to be direct proof that the requisitions of the statute have been fully complied with. We are therefore of opinion that the deposition was properly rejected.

The more important question in the cause is that relative to the evidence introduced to repel the plea of the statute of

limitations. In the course of the trial, the plaintiff read to the jury certain articles of co-partnership made between the defendants in March, 1810, whereby the defendants entered into a joint trade and partnership in the manufacturing of salt at a place known by the name of the United States' Saline, near the Wabash River within the Illinois Territory, for the term of three years then next ensuing under the style of Taylor, Wilkins & Co. He also gave evidence that large quantities of iron castings had been sold and delivered by him to the company during the term of the co-partnership. He then introduced the testimony of one Patterson Baine, who stated

"That sometime in the year 1818, or 1819, the plaintiff, Bell, came to his house, in Lexington and stated that he had again come up to endeavor to get the amount of his account from the defendants. He requested the witness to go with the plaintiff to Col. Morrison's (one of the defendants) on that business. The witness went. The plaintiff and Morrison had a good deal of conversation on the subject of the plaintiff's account against the Saline Company for metal furnished, which is not recollected by the witness. The witness recollects that Morrison stated that the books and papers relative to the plaintiff's claim were in the hands of Jonathan Taylor (one of the defendants), which put it out of his power to settle the account at that time, and expressed a willingness, but for that reason, to settle with the plaintiff. The plaintiff bade him goodbye and declared that that was the last time he should ever apply for a settlement of his account. The plaintiff then left the house of Morrison and returned with the witness to his house, where he remained until after breakfast on the next day; that shortly after breakfast, Morrison came to the house of the witness and said to Bell (the plaintiff) that he was very anxious that his (the plaintiff's) account should be settled; adding, 'I know we are owing you, and I am anxious it should be settled.' He then mentioned to the plaintiff that he (Morrison) was getting old, and did not like to have such things hanging over him, and wished to have the business settled and to have done with it. He then proposed to give the plaintiff $7,000 and close the business. The plaintiff refused to take it, and they parted; that no account or papers of any kind were shown or

produced by Bell at the time of these conversations with Morrison, but he understood the conversations to relate to the claim for castings furnished by him to the company of Taylor, Wilkins and others. The witness observed to the plaintiff, after Morrison's departure, that he should have taken Morrison's offer; that 'a half loaf was better than no bread.' The plaintiff also introduced certain letters written by Morrison and Butler (two of the defendants) to him. The first was

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a letter from Morrison, dated 2 October, 1814, and it contains, among others, the following expressions:"

" I wish whatever is due to you should be paid; I have once more to ask you to follow the advice I am about to offer, *viz.,* to come up here, without delay (as Col. Butler may be soon ordered off), and I cannot believe your present suit will answer any purpose,"

"&c.;"

" It is not our wish to keep from you, whatever may be your just due. We have sent for the company books some two or three weeks since; they will come to Louisville by water, and on your and Mr. Wheatley's being there, I have no doubt but your account can be adjusted, and that more to your satisfaction than it ever can be from the result of your suit,"

"&c.; 'I wish your account settled, and I have no hesitation in saying, on your coming here, it will be done.'"

The next was a letter from Butler dated 26 October, 1817, in which he informs the plaintiff that on the 20 November, Messrs. Morrison and Wilkins will be at Hopkinsville "for the purpose of adjusting some of the affairs of the old Saline Company," &c.;, and desires that he "will be present, in order that a settlement may be effected, if possible, of the account which you [he] set up against the company." The next is from Butler, dated 8 November, 1817, again mentioning the intended meeting on 20 November "for the purpose of adjusting our old account

with you," and he adds

"I hope, therefore, you will be at Hopkinsville for the purpose of enabling us to settle this old affair, to which, I am sure, all must be most anxious."

The next is from Butler, dated 23 October, 1818, in which he alludes to a complaint made by the plaintiff of Butler's absence from home on the 5th of the same month, when the plaintiff called there, and reminds the plaintiff of a conversation they had at the Greenville Springs "about a day of meeting to adjust the account between the former Saline Company and yourself," and excuses himself for his absence. He adds,

"I have now, Sir, attended at three places, upon three appointments made by yourself and myself, without being able to have a meeting, &c.; If it would suit you to be at Frankfort during the sitting of the legislature, we might possibly come to some understanding on the subject."

The next is a letter from Jonathan Taylor (one of the defendants) to the plaintiff, dated 13 March, 1818, in which he says,

"I received a letter last Monday from Col. Butler inviting me to attend an appointment with you at Hopkinsville on the 26th of this month for the purpose of adjusting the old company account. I shall endeavor to attend at that time, when, if we can make an arrangement equally mutual for the metal I may hereafter want, it can be done."

Other letters

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of Taylor were read in evidence, but they all bear date in the years 1811 and 1812.

It was further proved that the plaintiff was present in 1814, when the Saline and improvements were delivered over to Bates, the succeeding lessee, and that the plaintiff was then apprised that the term of the defendants, as lessees, had terminated. After the evidence on the part of the plaintiff was closed, the

defendants' counsel moved the court to exclude the testimony of Patterson Baine and all the letters bearing date within five years before the bringing of this suit offered by the plaintiff to show a promise on the part of the defendants or any one of them or any member of said firm or partnership within five years next before the commencement of this suit, and the court so excluded from the jury the evidence of the said Bane and all the letters dated within five years aforesaid tending to prove a promise in five years next before the commencement of this suit by the defendants or either of them or any member of said firm or partnership, as prayed by the defendants' counsel, and decided that

"there was no sufficient evidence or admissions by the defendants, or either of them, or any member of said firm or partnership, to prove such a promise in five years before the commencement of this suit as would take the case out of the statute of limitations or should be left to the jury as conducing to that effect."

To which opinion of the court the plaintiff filed his bill of exceptions, and the correctness of this opinion has constituted the main ground of the elaborate argument at this bar.

Two points are necessarily involved in the discussion of this opinion. The first is whether the evidence so excluded (supposing it to be, in all other respects unobjectionable) was competent in point of law to have been left to the jury to infer a promise sufficient to take the case out of the statute of limitations. The second is whether, supposing it would be competent, in ordinary cases the fact that it was the acknowledgment or promise of one partner after the dissolution of the partnership did not justify its exclusion, as incompetent evidence to bind the other partners.

The statute of limitations of Kentucky is substantially the same with the Statute of 21 of James, ch. 16, with the exception, that it substitutes the term of five years instead of six. The English decisions have therefore been resorted to upon the present occasion as illustrative of the true construction of the statute, and, in this view, are doubtless entitled to great consideration. They are not, however, and cannot be considered as conclusive authority, upon the construction of the statute

passed by a state, upon the like subject, for this justly belongs to the local state tribunals, whose rules of

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interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence than those of any foreign tribunal, however respectable. If, therefore, upon examination it shall be found that the doctrines of the Kentucky courts upon this subject are irreconcilable with those deduced from the Statute of James, this Court would, in conformity with its general practice, follow the local law and administer the same justice which the state court would administer between the same parties.

It has often been matter of regret in modern times that in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support as would have made it what it was intended to be -- emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten or be incapable of explanation by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate) applicable to such remote times as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further and admit that loose and general expressions from which a probable or possible inference may be deduced of the acknowledgment of a debt by a court or jury; that as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt; that any admission of the existence of an unsettled account, without any specification of

amount or balance and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence, *aliunde,* to establish any debt, however large and at whatever distance of time; it is easy to perceive, that the wholesome objects of the statute must be in a great measure defective, and the statute virtually repealed.

The English decisions upon this subject, have gone great lengths -- greater, indeed, in our judgment, than any sound interpretation of the statute will warrant, and in some instances to an extent which is irreconcilable with any just

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principle. There appears at present a disposition on the part of the English courts to retrace their steps and, as far as they may, to bring back the doctrine to sober and rational limits. The American courts have evinced a like disposition. In the recent case of *Bangs v. Hall,* 2 Picker. 368, the principal cases were reviewed by the Supreme Court of Massachusetts and it was held that to take a case out of the statute, there must be an unqualified acknowledgment not only of the debt as originally due, but that it continues so, and if there has been a conditional promise, that the condition has been performed -- a doctrine, quite as comprehensive, has been asserted in the supreme court of New York. The subject was much considered in the case of *Sands v. Gelston,* 15 Johns. 511, where Mr. Chief Justice Spencer, in delivering the opinion of the court, said

"that if at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt and take it out of the statute."

In consonance with this principle, the same court has held that

"if the acknowledgment be accompanied with a declaration that the party intends to rely on the statute as a defense, such an acknowledgment is wholly insufficient. [Footnote 1]"

In the case of *Clementson v. Williams,* 8 Cranch 72, this Court expressed the opinion that the decisions on this subject had gone full as far as they ought to be carried, and that the Court was not inclined to extend them; that the statute of limitations was entitled to the same respect with other statutes, and ought not to be explained away. In that case an attempt was made to charge a partnership by an acknowledgment made after its dissolution by one of the partners when an account was presented to him that "the account was due, and he supposed it had been paid by the other partner, but he had not paid it himself, and did not know of its being ever paid." It was held that this was not a sufficient acknowledgment to take the case out of the statute. The Chief justice, in delivering the opinion of the court, said,

"In this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account. But this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not sufficient to take the case out of the act, that the claim should be proved, or be

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acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due."

In the case of *Wetzell v. Bussard,* 11 Wheat. 309, the subject again came before this Court; and the English and American authorities were deliberately examined. The Court there expressly held that

"an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim or if it be conditional, it may amount to a new assumpsit for which the old debt is a sufficient consideration, or if it be construed to revive the original debt,

that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown."

We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner and be in its terms unequivocal and determinate, and if any conditions are annexed, they ought to be shown to be performed.

If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inference which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations and betrayed by perjuries.

It may be that in this manner an honest debt may sometimes be lost, but many unfounded recoveries will be prevented; and viewing the statute in the same light in which it was viewed by English judges at an early period, as a beneficial law on which the security of all men depends, we think its provisions ought not to be lightly overturned, and that no creditor has a right to complain of a strict construction, since it is only by his own fault and laches that it can be brought to bear injuriously upon him. And if the early interpretation had been adhered to, that nothing but an express promise should take

a case out of the statute, it is far from being certain that it would not have generally been in promotion of justice.

But the present case is not left to be determined solely upon general principles and authorities. There is a series of decisions of the Kentucky courts upon the construction of their own statute of limitations which, if they differed from those of other courts, would as matter of local law govern this Court upon the present occasion. In the construction of local statutes, we have been in the habit of respecting and following the judgments of the local tribunals.

The first and leading case is *Bell v. Rowlands Administrators,* in Hardin's Reports 301. In that case, the defendant made an acknowledgment

"that he had once owed the plaintiff, but he supposed his brother had paid it in Virginia (the place where the original transaction took place in the year 1785), and if his brother had not paid it, he owed it yet."

The court held that the acknowledgment was not sufficient to take the case out of the statute; that the defendant was not bound to prove that his brother had not paid the debt; that the law would imply a promise only where the party ought to promise, and that the defendant ought not to have promised, under the circumstances of that case, to pay a debt which he supposed to be paid. But the general reasoning of the court, which is drawn up with great clearness and force, goes much further. The court said, that the English decisions were not obligatory upon them, in the construction of their own statute, although similar in its provisions to the English statute; and that so far as they had gone upon nice refinements for the purpose of evading the statute, they must be disregarded. If the slightest acknowledgment, if strained, constructive acknowledgments and promises, are held sufficient, it must multiply litigation, produce endless uncertainty, and it is to be feared, a fruitful crop of perjuries.

Slight circumstances and a man's loose expressions would be construed into a full acknowledgment of the debt when he himself neither intended to make nor understood himself as making any acknowledgment at all. Instances of this sort

are frequent in the books, but the example is too dangerous to be countenanced. And the court further declared,

"Upon the whole we are of opinion that the only safe rule that can be adopted capable of any reasonable certainty is that in order to take the case out of the statute of limitations, an *express* acknowledgment of the debt, as a debt due at the time, coupled with the original consideration, or an *express* promise to pay it, must be proved to have been made within the time prescribed by the statute."

There was another point in the case deserving of notice,

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which was whether the court ought to have instructed the jury as to the law of the case, and then have left it with them to determine whether an acknowledgment of the debt and a promise to pay it had been proved to have been made within the five years, upon which it was held that it was competent for the court either to do so or (as it did in that case), taking the whole of the evidence on the part of the plaintiff as true and the facts sworn to by the witnesses as sufficiently proved, to instruct the jury as to the law arising upon those facts.

This case has never been departed from in Kentucky, and has been frequently recognized. In *Harrison v. Handley,* 1 Bibb 443, the plaintiff, to take the case out of the statute, produced a witness who swore

"that sometime in May or June, 1796, he presented an account to W. H. [the defendant] amounting to 250 or 260; that H. objected to certain articles in the said account, and after the said articles were stricken out of the account, H. then acknowledged *it was all right.* "

The court below ruled that this was such an acknowledgment as took the case out of the statute, but the decision was reversed by the court of appeals. Mr. Chief Justice, in delivering the opinion of the court, adverted to the case of *Bell v. Rowland's Administrators* and recognized its authority in the fullest terms. And after expressing a doubt whether an *implied* promise would not be barred by the

statute, he proceeded to say,

"Be that as it may, mere loose expressions and vague acknowledgments will not suffice. The acknowledgment from which the law is to raise a promise contrary to the provisions of the statute must be clear and express, where the mind is brought directly to the point debt or no debt at the present time, not whether the debt was once an existing debt. That the law will argumentatively make it a debt *in praesenti* if the party does not in his acknowledgment say it is not or prove payment is a proposition that cannot be granted in opposition to the provisions of the statute. Where the limitation has run, to get clear of it, the whole burden of proof is thrown on the plaintiff *to prove a good and subsisting debt and a promise to pay* within the period prescribed to his action. The acknowledgment of H. does not come up to this requisition. There was no express promise to pay; there was no express acknowledgment of a then subsisting debt; there was no assent to pay. 'H. then acknowledged the *amount was all right* ' is too loose, vague, and indefinite an acknowledgment to revive a transaction and put it under investigation again after the law had closed it. That the amount was right could be true, and might well be acknowledged if the articles had been truly noted notwithstanding

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the party might have paid it or was unwilling to acknowledge it as a debt then subsisting, and that is the point to which an express acknowledgment should have been proved."

This is certainly a very strong case to illustrate the rule, adopted in Kentucky.

In *Gray v. Lawridge,* 2 Bibb 284, it was proved on the trial that the party had admitted the justice of the account within five years and that it might go in discharge of the interest due on a bond of the defendant on which the suit was brought by the plaintiff. The witness did not know the particular items of the account, nor the amount thus acknowledged by the plaintiff. The court held that the acknowledgment did not go further than that the demand should be allowed in payment of the interest, and that so much as the party could show of a debt due to

him *not exceeding the amount of the interest* then due, was taken out of the statute, and no further. In *Ormsby v. Letcher,* 3 Bibb 269, it was decided that an agreement of the defendant within five years that a settlement made with the brother of the defendant should be subject to the examination of either party did not take the case out of the statute. It may be inferred that it was a settlement of accounts between the parties, and that the action was brought for the balance due to the plaintiff, although the report does not so state. The court said "this agreement does not contain an acknowledgment of a subsisting demand and a promise to pay in consideration thereof." The language of this case, as well as that in *Harrison v. Handley,* might lead to the impression that the court thought that an acknowledgment of a subsisting debt was not alone sufficient, but that there must be also a promise to pay the debt. But perhaps it is more correct to construe it as importing no more than that there must be such an acknowledgment coupled with circumstances from which a promise to pay would naturally and irresistibly be implied.

These are all the decisions which we have met with in the Kentucky Reports on this point. They evince a strong disposition in the courts of that state to restrict within very close limits every attempt to revive debts by implied promises resulting from acknowledgments and other confessions by parol. It is our duty to follow out the spirit of these decisions so far as we are enabled to gather the principles on which they are founded, and to apply them to the case at bar.

The evidence in the case at bar resolves itself into two heads -- first whether the admission of a party of the existence of an unliquidated account on which something is due to the plaintiff, but no specific balance is admitted and no document produced at the time from which it can be ascertained what the

parties understood the balance to be; is sufficient to take the case out of the statute, and let in the plaintiff to prove *aliunde* any balance, however large it may be; secondly, if not, whether the admission on the part of Morrison of his willingness to pay $7,000 and close the business might (under all the

circumstances) entitle the plaintiff to recover that amount, and thus to furnish a just objection to the ruling of the circuit court.

In both of these views, the case is not without its difficulties, and the Kentucky decisions present no authority directly in point. The evidence is clear of the admission of an unsettled account as well from the letters of Butler as the conversation of Morrison. The latter acknowledged that the partnership "was owing" the plaintiff, but as he had not the books, he could not settle with him. If this evidence stood alone, it would be too loose to entitle the plaintiff to recover anything. The language might be equally true whether the debt were one dollar or ten thousand dollars. It is indispensable for the plaintiff to go further and to establish by independent evidence the extent of the balance due him before there can arise any promise to pay it as a subsisting debt. The acknowledgment of the party, then, does not constitute the sole ground of the new implied promise, but it requires other intrinsic aid before it can possess legal certainty. Now if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands after a lapse of time, when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission that something is due or some balance owing be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury? If there be an express promise to such an effect, that might be pressed as a dispensation with the statute; but the question here is whether the law will imply such a promise from language so doubtful and general. The language of the court in *Harrison v. Hanley* was that "mere loose expressions or vague acknowledgments, will not suffice." We think that such a general admission of an unsettled account and of an indeterminate debt would, by the courts of Kentucky, be held as too vague an acknowledgment to take the case out of the statute. It would not establish any particular subsisting debt, and therefore be destitute of reasonable certainty to raise an implied promise.

The other point is also not without its embarrassments. Was Morrison's offer of $7,000 to close the business the absolute admission of a debt to that amount, or a conditional

promise to pay that sum if the party would accept it in discharge of his claims? We think, taking all the circumstances, it scarcely admits of the former interpretation. It appears from the testimony itself that Morrison did not know the state of the partnership accounts, and had not the partnership books to enable him to ascertain it. He also expressed a personal reason for his desire to settle the account, alleging that he was growing old and was anxious for a settlement. His offer must therefore be deemed to be in the nature of a compromise, to pay the sum if the plaintiff would give a complete discharge of his claims, or, to use his own words, "and close the business." It may therefore be fairly deemed a conditional offer to pay a conjectural, not a known, balance; to buy peace, and not to acknowledge an absolute debt. If this be, as we think it is, a conditional offer, then upon the clear text of the Kentucky as well as the English and of other American decisions, the case would not be taken out of the statute unless the plaintiff had performed the condition.

But if this view of the case should be more doubtful than it seems to us to be, it still remains to consider whether the acknowledgment of one partner after the dissolution of the co-partnership is sufficient to take the case out of the statute as to all the partners. How far it may bind the partner making the acknowledgment to pay the debt need not be inquired into; to maintain the present action, it must be binding upon all.

In the case of *Bland v. Haslering,* 2 Vent. 151, where the action was against four upon a *joint* promise and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not, three judges, against Ventris, J., held that the plaintiff could not have judgment against the defendant, who had made the promise. This case has been explained upon the ground that the verdict did not conform to the pleadings

and establish a joint promise. It is very doubtful, upon a critical examination of the report, whether the opinion of the court or of any of the judges proceeded solely upon such a ground.

In *Whitcomb v. Whiting,* 2 Doug. 652, decided in 1781 in an action on a joint and several note brought against one of the makers, it was held that proof of payment by one of the others of interest on the note and of part of the principal within six years took the case out of the statute as against the defendant who was sued. Lord Mansfield said

"payment by one is payment for all, the one acting virtually for all the rest, and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due."

This is the whole reasoning

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reported in the case, and is certainly not very satisfactory. It assumes that one party who has authority to discharge has necessarily also authority to charge the others, that a virtual agency exists in each joint debtor to pay for the whole, and that a virtual agency exists, by analogy, to charge the whole. Now this very position constitutes the matter in controversy. It is true that a payment by one does enure for the benefit of the whole, but this arises not so much from any virtual agency for the whole as by operation of law, for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt pays to discharge himself, and so far from binding the others conclusively by his act as virtually theirs also, he cannot recover over against them in contribution without such payment has been rightfully made and ought to charge them.

When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt, and therefore there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But if this were not so, still

there is a great difference between creating a virtual agency which is for the benefit of all and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable, and yet refuse to authorize a charge where there at present exists no legal liability to pay. Yet if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest even though they should have utterly denied the debt at the time when such acknowledgment was made.

The doctrine of *Whitcomb v. Whiting* has been followed in England in subsequent cases, and was applied to in a strong manner in *Jackson v. Fairbank,* 2 H.Bl. 340, where the admission of a creditor to prove a debt, on a joint and several note under a bankruptcy and to receive a dividend was held sufficient to charge a solvent joint debtor in a several action against him in which he pleaded the statute as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In *Clark v. Bradshaw,* 3 Esp. 155, Lord Kenyon, at *Nisi Prius,* expressed some doubts upon it, and the cause went off on another ground. And in *Brandram v. Wharton,* 1 Barn. & Ald. 463, the case was very much shaken, if not overturned. Lord Ellenborough upon that occasion used language from which his dissatisfaction with the whole doctrine may be clearly inferred. "This doctrine," said he,

"of rebutting the statute of limitations by an acknowledgment other

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than that of the party himself began with the case of *Whitcomb v. Whiting.* By that decision, where, however, there was an express acknowledgment by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship, for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others to a debt, he may have actually paid it, he may have had in his possession the document, by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound and his liability be renewed

by a random acknowledgment made by someone of the thirty or forty others who may be careless of what mischief he is doing and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go so as to deprive a party of the advantage given him by the statute by means of an implied acknowledgment."

The English cases decided since the American Revolution are by an express statute of Kentucky declared not to be of authority in their courts, and consequently *Whitcomb v. Whiting* in Douglas and the cases which have followed it leave the question in Kentucky quite open to be decided upon principle.

In the American courts, so far as our researches have extended, few cases have been litigated upon this question. [Footnote 2] In *Smith Damor v. D. & G. Ludlow,* 6 Johns. 267, the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given that the other partner was authorized to adjust all accounts, and an account signed by him after such advertisement and within six years was introduced. It was also proved that the plaintiff called on the partner who pleaded the statute before the commencement of the suit and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were, and that he would see the other defendant on the subject and communicate the result to the plaintiff. The court held that this was sufficient to take the case out of the statute, and said that without any express authority, the confession of one partner, after the dissolution, will take a debt out of the statute. The acknowledgment will not

of itself be evidence of an original debt, for that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other so as to prevent him from availing himself of the statute. This is evident from the cases of *Whitcomb v. Whiting* and *Jackson v. Fairbank,* and it results necessarily from the power given to adjust accounts.

The court also thought the acknowledgment of the partner setting up the statute was sufficient of itself to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts after the dissolution of the partnership. There was not, therefore, a virtual, but an express and notorious agency devolved on him to settle the account. The correctness of the decision, cannot, upon the general view taken by the court, be questioned. In *Roosevelt v. Marks,* 6 Johns.Ch. 266. 291, Mr. Chancellor Kent admitted the authority of *Whitcomb v. Whiting,* but denied that of *Jackson v. Fairbank* for reasons which appear to us solid and satisfactory. Upon some other cases in New York we shall have occasion hereafter to comment. In *Hunt v. Bridgham,* 2 Pick. 581, the Supreme Court of Massachusetts, upon the authority of the cases in Douglas, H. Blackstone, and Johnson held that a partial payment by the principal debtor on a note took the case out of the statute of limitations as against a surety. The court did not proceed to any reasoning to establish the principle, considering it as the result of the authorities. *Shelton v. Cocks,* 3 Mumford 191, is to the same effect, and contains a mere annunciation of the rule, without any discussion of its principle. *Simpson v. Morrison,* 2 Bay 533, proceeded upon a broader ground, and assumed the doctrine of the case in 1 Taunt. 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases in other states as the doctrine is not so settled in Kentucky, we must resort to such recognition only as furnishing illustrations to assist our reasoning, and decide the case now as if it had never been decided before.

By the general law of partnership, the act of each partner during the continuance of the partnership and within the scope of its objects binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may therefore bind the partnership by his contracts in the partnership business, but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms, it operates as a revocation of all power to create new contracts,

and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified and restrained by the express delegation of the whole authority to one of the partners.

The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt -- we mean admitted by the whole partnership or unbarred by the statute -- but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another -- that is whether the acknowledgment or promise is to be deemed a mere continuation of the original promise or a new contract springing out of and supported by the original consideration. We think it is the latter, both upon principle and authority, and if so, as after the dissolution no one partner can create a new contract binding upon the others, his acknowledgment is inoperative and void as to them.

There is some confusion in the language of the books resulting from a want of strict attention to the distinction here indicated. It is often said that an acknowledgment revives the promise, when it is meant that it revives the *debt* or *cause of action.* The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it is what essentially constitutes its new being and is inseparable from it. It stands not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable to raise the *assumpsit,* on which an action can be maintained. It was this view of the matter which first created the doubt whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome, and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off, as a support for the old. What, indeed, would seem to be decisive on this subject is that the new promise, if qualified or conditional, restrains the rights of the party to its own terms, and if he cannot recover by those terms, he

cannot recover at all. If a person promise to pay upon condition that the other do an act, performance must be shown, before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative will not maintain the writ. Why not, since it establishes the continued existence of the

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debt? The plain reason is that the promise is a new one, by or to the administrator himself upon the original consideration, and not a revival of the original promise. So if a man promises to pay a preexisting debt, barred by the statute, when he is able or at a future day, his ability must shown or the time must be passed before the action can be maintained. Why? Because it rests on the new promise, and its terms must be complied with. We do not here speak of the form of alleging the promise in the declaration, upon which, perhaps, there has been a diversity of opinion and judgment, but of the fact itself whether the promise ought to be laid in one way or another, as an absolute or as a conditional promise, which may depend upon the rules of pleading.

This very point came before the twelve judges, in the case of *Hyling v. Hastings,* 1 Ld.Raym. 389, 421, in the time of Lord Holt. There, one of the points was

"whether the acknowledgment of a debt within six years would amount to a new promise to bring it out of the statute, and they were all of opinion that it would not, but that it was *evidence* of a promise."

Here then, the judges manifestly contemplated the acknowledgment not as a continuation of the old promise, but as evidence of a new promise, and that it is the new promise which takes the case out of the statute. Now what is a new promise but a new contract? a contract to pay, upon a preexisting consideration, which does not, of itself, bind the party to pay, independently of the contract? So, in *Boydell v. Drummond,* 2 Camp. 157, Lord Ellenborough, with his characteristic precision, said "if a man acknowledges the existence of a debt, barred by the statute, the law has been supposed to raise a *new* promise to pay it, and thus the

remedy is revived." And it may be affirmed that the general current of the English as well as the American authorities conforms to this view of the operation of an acknowledgment. In *Jones v. Moore,* 5 Binney 573, Mr. Chief Justice Tilghman, went into an elaborate examination of this very point, and came to the conclusion from a review of all the cases that an acknowledgment of the debt can only be considered as evidence of a *new* promise, and he added "I cannot comprehend the meaning of *reviving* the old debt in any other manner, than by a *new* promise."

There is a class of cases not yet adverted to which materially illustrates the right and powers of partners after the dissolution of the partnership, and bears directly on the point under consideration. In *Hackley v. Patrick,* 3 Johns. 536, it was said by the court that

"after a dissolution of the partnership, the power of one party to bind the others, wholly ceases. There is no reason why his acknowledgment of an account

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should bind his co-partners any more than his giving a promissory note in the name of the firm or any other act."

And it was therefore held that the plaintiff must produce further evidence of the existence of an antecedent debt before he could recover, even though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine was again recognized by the same court in *Malden v. Sherburne,* 15 Johns. 409, 424, although it was admitted that in *Wood v. Braddick,* 1 Taunt. 104, a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment to bind the partnership for any purpose. If it does not establish the existence of a debt against the partnership, why should it be evidence against it at all? If evidence *aliunde* of facts within the reach of the statute as the existence of a debt be necessary before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties --

viz., the introduction of stale and dormant demands of long standing and of uncertain proof? If the acknowledgment *per se* does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems difficult to find a satisfactory reason why an acknowledgment should raise a new promise when the consideration upon which alone it rests as a legal obligation is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the *debt* as a debt, but are bound by the acknowledgment of the debt as a promise upon extrinsic proof. The doctrine in 1 Taunt. 104 stands upon a clear, if it be a legal, ground that as to the things past, the partnership continues and always must continue notwithstanding the dissolution. That however is a matter which we are not prepared to admit, and constitutes the very ground now in controversy.

The light in which we are disposed to consider this question is that after a dissolution of a partnership, no partner can create a cause of action against the other partners except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action -- whether it be a supposed preexisting debt of the partnership or any auxiliary consideration which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to

create a new cause of action, to revive a debt which is extinct, and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist after a dissolution of the partnership in any partner.

There is a case in the Kentucky Reports not cited at the bar which coincides, as far as it goes, with our own views, and if taken as a general exposition of the law according to its terms is conclusive on this point. It is the case of *Walker & Evans v. Duberry,* 1 Marshall 189. It is very briefly reported, and the opinion of the court was as follows.

"We are of opinion that the court below improperly admitted as evidence against Walker, the certificate of J. T. Evans, made after the dissolution of the partnership, between Walker and Evans, acknowledging that the partnership firm was indebted to the defendant Duberry in the sum demanded in the action brought by him in the court below."

It cites 3 Johns 536; 3 Mumf. 191.

It does not appear what was the state of facts in the court below, nor whether this was an action in which the statute of limitations was pleaded, or only *nonassumpsit* generally. But the position is generally asserted that the acknowledgment of a debt by one partner after a dissolution is not evidence against the other. Whether the court meant to say in no case whatever or only when the debt itself was proved *aliunde* does not appear. Its language is general, and would seem to include all cases, and if any qualification were intended, it would have been natural for the court to express that qualification and have confined it to the circumstances of the case. The only room for doubt arises from the citations of 3 Johnson and 3 Mumford. The former has been already adverted to, and the latter, *Shelton v. Cocke,* 3 Mumf. 191, recognized the distinction asserted in 3 Johns. as sound. These citations may, however, have been referred to as mere illustrations, going to establish the proposition of the court to a certain extent, and not as limitations of its extent. In any view, it leads to the most serious doubts whether the state courts of Kentucky would ever adopt the doctrine of *Whitcomb v. Whiting* in Douglas, especially so as the early case in 2 Vent. 151 carries an almost irresistible presumption that the courts, at that time held a doctrine entirely inconsistent with the case in Douglas.

Upon the whole, it is our judgment that there is no error in the decision of the circuit court, and it ought to be affirmed.

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It is, however, to be understood that this opinion thus expressed is not unanimous, but of the majority of the Court, and as is apparent from the preceding reasoning, it has been principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject.

Judgment affirmed with costs.

[Footnote 1]

See also Brown v. Campbell, 1 Serg. & R. 176; *Tries v. Boiselet,* 9 Serg. & R. 128.

[Footnote 2]

The Reporter has been informed, by Mr. Chief Justice Gibson that at the December Term, 1827, of the Supreme Court of Pennsylvania, the court decided, after full argument, that the acknowledgment by a partner, after the dissolution of the partnership, will not take the debt out of the statute so as to make the other former partners liable. This case will be reported by Messrs. Sergeant & Rawle.