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Sufficiency of a New Promise to Take an Account Out of the Statute of Limitations

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extra-judicially dissented. But the result is admittedly salutary.

Of course the courts should not be hasty in changing the law; for, among other reasons, the social interest in stability must be adequately secured—therefore, *stare decisis* as a rule. But the equally important social interest in progress must also be properly protected; and progress will be unduly impeded and often completely prevented if we must always wait for a judicial change until there is no substantial difference of opinion as to the social desirability of the change. Let us therefore have judges who, though not hasty leaders of a minority, will *cautiously* progress with a preponderant majority, *when progress is socially desirable*,[3] even though, as is commonly the case, there is a substantial minority of reasonable men who think it socially desirable that our law, like the law of the Medes and Persians, should change not.

—T. P. HARDMAN.

[3] As to when such progress is socially desirable and therefore justifiable, see my paper, "Stare Decisis and the Modern Trend," 32 W. VA. L. QUAR. 163 (1926).

SUFFICIENCY OF A NEW PROMISE TO TAKE AN ACCOUNT OUT OF THE STATUTE OF LIMITATIONS.—In West Virginia, an action upon an account is barred by the statute of limitations after five years from the date at which "the right to bring same shall have accrued";[1] but it is further provided, in the chapter dealing with the limitation of suits that:

> "If any person against whom the right shall have so accrued on an award, or on any other contract, shall by writing signed by him or his agent promise payment of money on such award or contract, the person to whom the right shall have so accrued, may maintain an action or suit for the moneys so promised, within such number of years after the said promise, as it might originally have been maintained within, upon the award or contract, and the plaintiff may either sue on such a promise, or on the original cause of action, and in the latter case, in answer, to a plea under the sixth section, may, by way

[1] WEST VIRGINIA CODE, c. 104, § 6.

of replication, state such promise, and that such action was brought within the said number of years thereafter; but no promise, except by writing as aforesaid, shall take any case out of the operation of the said sixth section, or deprive any party of the benefit thereof. An acknowledgement in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this section."[2]

From the above statute it appears that a new promise to pay money, or an acknowledgement of a debt, to remove the bar of limitations, must be in writing, signed by the promisor or his agent, and that such a "promise of payment may be implied"—in other words, the written acknowledgement of the debt may be in the form of either an express or an implied promise to pay it. The question of the sufficiency of writing—as to whether or not they constitute such acknowledgement as is required by our law—has several times been passed upon by the West Virginia Supreme Court of Appeals, and from the court's decisions one can determine with a fair degree of certainty whether or not any given letter, memorandum, or other writing is sufficiently definite and unequivocal as to amount to a new promise under the West Virginia statute.

In the comparatively early case of *Abrahams* v. *Swann*,[3] the court held that if a new promise or clear and definite acknowledgment "is contained in a letter of the defendant to the plaintiff, it is not necessary, that the amount of the debt or that its date should be specified in the letter, but the particular debt, to which the letter refers, may be identified by extrinsic evidence written or parol; and if so identified clearly, and the promise is unequivocal, or the acknowledgment is of a subsisting debt, for which the defendant is liable and willing to pay, the bar of the statute of limitations is thereby removed." In this case the debtor wrote to his creditor as follows: "On my honor you shall be paid as I get the money over and above my bread and meat * * * * * *. If I get the money I will then pay you * * * * *. I have acknowledged the debt to you in my letters again and again; therefore it stands as good as if you had my bond." This letter was held by the court to be a sufficient

[2] WEST VIRGINIA CODE, c. 104, § 8.
[3] 18 W. Va. 274 (1881).

acknowledgment or new promise to remove the bar of the statute of limitations.

In a case arising soon thereafter, a creditor obtained judgment against two joint defendants for $852.25, upon which judgment execution was returned "No property found." When an administrator's suit was brought, more than ten years later, against the estate of one of the defendants, the aforesaid judgment creditor presented his claim, and, to take the case out of the bar of the statute of limitations, he relied upon a letter written to him by the decedent, in which the latter stated: "I have received both of your letters, but I have so much to pay that I had to have time to consider. I will pay you the agreed balance on your judgment on the 2nd day of January next, at my office, at 12 o'clock." In this case, the court arrived at an opposite conclusion to that in *Abrahams* v. *Swann*,[4] by holding that the letter here did not constitute an acknowledgment or new promise within the statute. The court conceded that this letter sufficiently identified the judgment, and that it would have constituted a new promise to pay it if it had not been for the word "agreed" used therein, which indicated that the defendant did not promise to pay the balance, but the "agreed balance." "This imports that they [the parties] had before that agreed upon an amount to be paid, but, if so, that amount does not appear. The new promise cannot operate, because of want of certainty as to amount, in the absence of that amount appearing * * * the letter meant that Quarrier [the debtor] had been considering whether he would pay anything at all, but that he had concluded that, if he and Grogan [the creditor] could thereafter agree upon an amount, he would pay that. This would be a conditional promise to pay; that is, if they should agree, and, moreover, uncertain as to the amount, in the absence of an actual agreement on the amount * * *. The new promise must not be vague, indefinite, uncertain." The debtor must acknowledge a sum certain, or at least a readily ascertainable balance.[5]

In another case, an administrator brought suit against a mining company, for salary, in the amount of $31,200.00, due to the decedent as agent of the defendant company

[4] *Supra*, n. 3.
[5] Quarrier's Adm'r *v.* Quarrier's Heirs *et al.*, 36 W. Va. 310, 15 S. E. 154 (1892).

over a period of twenty-six years; and the plaintiff, in his bill, admitted that a sum of $4,553.90 was due out of the decedent's estate to the defendant company. The court, in holding that the acknowledgment in the bill did not constitute a new promise, described the admission in the pleading as "conditional, not an unqualified acknowledgment * * * * for it is only a proposition to allow said sum of $4,553.90, provided there should be allowed to the credit of the estate its whole demand of $31,200.00 * * * *. It must be unconditional and indicate that the party is actually liable and willing to pay—unconditionally willing."[6] In other words, the acknowledgment, required to operate as a new promise to remove the bar of the statute of limitations, must be a clear, definite, and unequivocal acknowledgment in writing of a subsisting debt.

Where a debt is within the bar of the statute of limitations, and a new promise or acknowledgment is relied upon to remove the statutory bar, there must be an express promise to pay, or an acknowledgment of the debt, unaccompanied by reservations or conditions, from which an implied promise will arise, and the writing ought to be such a one as, if declared upon, would support the action —and the West Virginia Court so hold, in *Bank of Union* v. *Nickell et al.*[7] In this case—a creditor's suit against a decedent's estate—the following letter from the administrator's intestate was relied upon by a creditor to take his claim out of the statute of limitations, by which it would otherwise be barred:

> "Sinks Grove, W. Va., Jan. 12, 1899
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> "Mr. J. B. Fisher, Dear Sir:—I enclose a check for $15.00, it is the best I can do for you at present. I just happened to get it yesterday. Hope this will be satisfactory. Love to all. With kind wishes to all the family I am your obedient servant,
>
> "C. Patton Nickell.
>
> "Please send me a receipt for the $15.00 fifteen dollars."

The court was of the opinion that:

> "There is nothing contained in this letter that even shows an acknowledgment upon the part of Nickell that he is indebted to Fisher and, if it could be so construed,

[6] Stiles *v.* Laurel Fork Oil & Coal Co. *et al.*, 47 W. Va. 838, 35 S. E. 986 (1900).
[7] 57 W. Va. 57, 49 S. E. 1003 (1905).

> it certainly does not fix any specific sum, which would have to be done in order to remove the statute. In order to create such a promise under the law as to take the claim without the statute of limitations there must be an express promise to pay, or an acknowledgment, unaccompanied by reservations or conditions, from which an implied promise will arise * * * . All that Nickell did was to send Fisher the check for $15.00 and say to him, 'This is the best I can do for you at present.' How could this be construed as a promise to pay or an acknowledgment of the debt? There is no sum named and no reference to anything by which it could be ascertained, and nothing in the letter to show that he did not intend to rely upon the statute of limitations."

Turning to the decisions in point, of Virginia, a state whose case law is often of peculiarly persuasive (though since the separation not binding) authority of this State, it is to be noted that the Supreme Court of Appeals of that State has held[8] that a new promise sufficient to remove the bar of the statute of limitations "must be determinate and unequivocal; and that to imply a promise of payment from a subsequent acknowledgment, such an acknowledgment must be an unqualified admission of a subsisting debt which the party is liable for and willing to pay," citing in support of this doctrine *Bell* v. *Morrison et al.*,[9] and *Bell* v. *Crawford.*[10]

In another Virginia case decided the following year, the plaintiff conceded that partial payments made on a promissory note upon which he was seeking recovery in an action of assumpsit did not take the note out of the statute of limitations, but argued that the case was taken without the statute by a new promise in writing. But the court rejected the plaintiff's contention, holding that:

> "Upon a careful consideration of the evidence we are satisfied that such is not the case; for, giving to the language of the letters relied upon to establish the new promise its largest import, it does not amount to such an acknowledgment of the debt as that a promise to pay may be implied from it, and it is well settled that a prom-

[8] Switzer *v.* Noffsinger, 82 Va. 518 (1886).
[9] 1 Pet. 351 (1828).
[10] 8 Gratt. 110 (1851). This case holds that a "promise which will remove the bar of the statute of limitations must be a promise to pay a debt: And a promise to settle with a claimant is not sufficient."

ise merely to settle with the claimant is not sufficient."[11]

In *Cole's Ex'r.* v. *Martin*,[12] a physician endeavored to recover for services to an executor's testatrix. While in a partnership, terminated in 1880, and while alone from 1880 to 1888, the claimant rendered services for which no bills were ever presented. For his services from 1888 to 1895, when he removed to another city, annual bills were presented and paid, with the exception of the year 1894. Testatrix wrote to her physician, when he moved in 1895, that:

> "It is a shame that this move has been made necessary by our failing to pay what we owe you. Let me have my bill, and you shall have what I owe you in a short time. I shall borrow the money if I can't get it any other way * * * * . If I could only draw in my means, I could pay you every cent I owe you tomorrow. Enough, however. You send the bill, and I will arrange everything for you."

The court was of the opinion that it was reasonable to conclude that the letter of testatrix had reference only to the bill for the unpaid services from January 1, 1894, to the date of her letter, and not to the partnership account of the claimant, which was from fifteen to twenty-six years old, or to the account from 1880 to 1888, for neither of which accounts had appellee ever presented a bill—that, since the letter relied upon did not clearly refer to the partnership and individual accounts prior to 1888, it did not remove the bar of the statute of limitations as to them, but applied only to the unpaid bill of 1894. However, if there were "an unequivocal admission that the debt is still due and unpaid, unaccompanied by an expression, declaration, or qualification indicative of an intention not to pay, the state of facts out of which the law implies a promise is then present, and the party is bound by it."[13]

It may be said, in conclusion, that, to repel the bar of limitations the statute[14] requires that there must be in writing either an express promise to pay, or a clear, defi-

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[11] Gover *v.* Chamberlain, 83 Va. 286, 5 S. E. 174 (1887).

[12] 99 Va. 223, 37 S. E. 907 (1901).

[13] Rowe's Adm'rs *v.* Marchant, 86 Va. 177, 9 S. E. 995 (1889), quoting with approval Tindal, C. J., in Linsell *v.* Bonsor, 2 Bing. N. C. 241, 29 E. C. L. 519; to the effect that: "A distinct and unqualified acknowledgment would have the same effect as a promise because from such acknowledgment the law implies a promise to pay."

[14] *Supra*, n. 2.

nite and unequivocal acknowledgment of a subsisting debt which the party is actually liable for and unconditionally willing to pay. The acknowledgment must clearly refer to the particular account, or accounts, sought to be saved from the statutory bar. In such a written acknowledgment by the debtor to the creditor, it is not necessary that the amount of the debt or that its date should be specified therein, but the particular debt, to which reference is made, may be identified by extrinsic evidence, written or parol. A new promise cannot operate, to repel the bar of the statute, in the event of there being a want of certainty as to the amount of the debt, or the part thereof revived by such new promise—as where the party promised to pay the "agreed balance,"[15] the amount of which remained undetermined. Neither partial payments made on an account, nor a promise merely to settle with a claimant, is sufficient to stop the running of the statute—there must be a new promise or an acknowledgment of a fixed sum, or at least a balance which "should admit of a ready and certain ascertainment."[16]

—GEORGE D. HOTT.*

[15] *Supra*, n. 5.
[16] Huff *v.* Richardson, 19 Pa. St. 389 (1852).
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