Solicitors for the appellant, *Sly & Russell.*

Solicitor for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

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NATHAN *v.*, FEDERAL COMMISSIONER OF TAXATION.

[HIGH COURT OF AUSTRALIA.]

HEPBURN . . . . . APPELLANT;
PLAINTIFF,

AND

McDONNELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 13, 19.

Barton, Isaacs and Gavan Duffy JJ.

Limitation of Action—Action for debt—Acknowledgment in writing—Implied promise to pay—Contradiction of implied promise—Statute of Limitations 1623 (21 *Jac. I. c.* 16), *sec.* 3—*Statute of Frauds Amendment Act* 1828 (9 *Geo. IV. c.* 14), *sec.* 1.

The plaintiff, by his solicitor, wrote to the defendant a letter stating that the defendant owed the plaintiff a specified sum of money, that the defendant had made no attempt to reduce her indebtedness, that the plaintiff required payment of the money and interest, and that any reasonable proposal put forward by the defendant would be considered. In reply the defendant wrote to the plaintiff:—"I was indeed more than surprised to receive a letter through your solicitor *re* my indebtedness to you. Well in the first place I always knew, and had intended to pay you a certain sum, which I knew I was indebted . . . . I am offering you £26 per year until the War is over and when my daughter is of age we can sell some land which I shall advise them to give you a portion. . . . At any rate this is the best offer I can offer at present—what the future brings forth rests in God's hand. . . . I trust you will see your way clear to answer this at once, and trust my word to do what I say I will." In an action brought by the plaintiff against the defendant

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to recover a sum including the sum specified in his letter to the defendant, the defendant pleaded the *Statute of Limitations*, and the plaintiff relied on the defendant's letter as being an acknowledgment in writing of the debt sued upon.

Held, that the defendant's letter contained an unconditional acknowledgment of the debt to the extent of the sum specified in the plaintiff's letter, that there was nothing in the defendant's letter to contradict the implied promise to pay arising from that acknowledgment, and therefore that there was a sufficient acknowledgment within *Lord Tenterden's Act* (9 Geo. IV. c. 14) of the plaintiff's claim to the extent of the specified sum.

Decision of the Supreme Court of New South Wales (*Street* J.): *Hepburn* v. *McDonnell*, 17 S.R. (N.S.W.), 567, reversed.

APPEAL from the Supreme Court of New South Wales.

A suit in the Supreme Court in Equity was brought by Charles Graham Hepburn against Grace McDonnell in which, by the statement of claim, it was alleged that the plaintiff, the defendant and Henry Gregory Quinlan were the executors and executrix and the trustees of the will of William McDonald, deceased, to whom probate was granted on 29th July 1914; that by a decree of the Supreme Court made on 14th December 1908 it was declared that there had been wrongly paid out of the capital of the estate of the testator by the trustees the sum of £1,626 6s. 8d., and that the trustees were indebted to the estate in that sum; that of that sum a portion amounting to £1,105 19s. 3d. consisted of moneys paid to the defendant at her request and in breach of trust, which moneys the defendant retained and had not refunded any portion thereof, the balance, with the exception of £14 5s. 10d., which was interest on portion of the £1,105 19s. 3d., consisting of moneys paid to a beneficiary of the estate in excess of the moneys to which that beneficiary was entitled; that the plaintiff was called upon to refund the sum of £1,626 6s. 8d. to the estate and was obliged to do so; and that the plaintiff had received from neither the defendant nor Quinlan any contribution to the sum of £1,626 6s. 8d. so paid by him. The plaintiff claimed (*inter alia*) that the defendant might be ordered to pay to the plaintiff the sum of £1,105 19s. 3d. before mentioned, and that her interest under the will might be impounded for that purpose; that the defendant might be ordered to pay to the plaintiff the sum of £168 13s. 10d., being one-third of the sum

of £506 1s. 7d., the balance of the sum of £1,626 6s. 8d. refunded by the plaintiff; and accounts and inquiries. One of the defences raised was the *Statute of Limitations*. The plaintiff by his replication said, as to that defence, that there was an acknowledgment of the debt sued upon in writing signed by the defendant comprised in two letters, the first of which was a letter written on 17th November 1916 by the solicitor for the plaintiff to the defendant in the following terms:—"In addition to the moneys due by you to Mr. C. G. Hepburn under the mortgage given by you to Mr. Quinlan and Mr. Hepburn dated the 1st November 1906, there is a substantial amount due by you to him in respect of payments made to you in connection with the estate of your late father by the then trustees, Mr. Hepburn, Mr. Quinlan and yourself. The whole of these payments were made good by Mr. Hepburn personally to your father's estate to the extent of £1,625 16s. 8d., of which you are liable to refund him £1,120 5s. 1d. with interest. You have never so far made any attempt to reduce your liability to Mr. Hepburn, and I have to give you notice that he requires payment of these moneys and interest, and to ask you to let me know not later than Wednesday next the 22nd instant what you propose to do towards settling this claim. Any reasonable proposal you may put forward will be considered by Mr. Hepburn, but if you do not see fit to meet him in the matter he will take such steps as he may be advised to compel payment." The second was a letter written by the defendant to the plaintiff on 20th November 1916 in reply to the first letter, and was in the following terms:—"I was indeed more than surprised to receive a letter through your solicitor *re* my indebtedness to you. Well in the first place I always knew, and had intended to pay you a certain sum, which I knew I was indebted, although my solicitor advised me to let you bring it to Court as you haven't got a leg to stand on, but as I am not taking advice from solicitors in this case and expect you to do the same as I absolutely refuse to have any correspondence with them. What will be done must be between ourselves. I am offering you twenty-six pounds (£26) per year until the War is over and when my daughter is of age we can sell some land which I shall advise them to give you a portion. You are not the only person that has a claim on me; my boys left "Riverview" with a big debt

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hanging over me and I still owe them £260 which I am trying to reduce by small instalments. Your solicitor has written my trustees not to pay me any more money, but to tell you the truth it will not affect me very much. My monthly cheque has been so small—after taxes and rates are taken—that I can assure you I don't look forward to getting it. . . . At any rate this is the best offer I can offer at present—what the future brings forth rests in God's hand. . . . I trust you will see your way clear to answer this at once, and trust my word to do what I say I will."

By consent of the parties the point of law whether the letters above mentioned constituted a sufficient acknowledgment was set down for argument before the hearing of the suit, and was argued before *Street* J., who made an order declaring that the letters did not constitute a sufficient acknowledgment of the plaintiff's claim, costs of the hearing and determination of the point to be costs in the suit: *Hepburn* v. *McDonnell* (1).

From that decision the plaintiff now, by leave, appealed to the High Court.

Flannery (with him *Mason*), for the appellant. The letter written by the respondent begins with an acknowledgment of indebtedness. Where there is in a letter an acknowledgment of indebtedness, a promise to pay will be implied to which full effect will be given unless conditions or limitations are placed upon that implied promise by other parts of the letter (*Cooper* v. *Kendall* (2)). It is not necessary that the acknowledgment of indebtedness should be of any particular sum, but it is sufficient if there is a general acknowledgment of indebtedness. The respondent's letter does not contain any conditions or limitations of the implied promise to pay. It merely states her present inability to pay, and, in answer to the inquiry as to what proposal she can make, it states what is the best she can do at present and expresses her hope to be able to do something more in the future. The acknowledgment goes to the whole amount of the indebtedness, whatever that is shown to be. In any event it is an acknowledgment to the extent of the offer which is

(1) 17 S.R. (N.S.W.), 567. (2) (1909) 1 K.B., 405, at pp. 407, 409.

made. [Counsel also referred to *Parson* v. *Nesbitt* (1); *Brown* v. *Mackenzie* (2); *Skeet* v. *Lindsay* (3).]

Loxton K.C. (with him *Bethune*), for the respondent. There is nothing in the respondent's letter to show whether her acknowledgment of indebtedness refers to the mortgage debt or to the debt in respect of the overpayments to her. The direct object of her letter is to give a promise to pay something, and not merely to state her inability to pay. A promise to pay is only implied from an acknowledgment of indebtedness in the absence of any express promise. Here the acknowledgment is coupled with an express conditional promise, and no other promise will be implied. If the respondent's offer had been accepted, all that the appellant could have sued for would have been £26 as and when it became due (*Philips* v. *Philips* (4)). The meaning of the offer cannot be altered according to whether the appellant accepted or refused it, and it does not appear whether the offer was accepted or refused. If the offer had been accepted, the cause of action would have been one arising at the date of the letter (*Buckmaster* v. *Russell* (5)). The cause of action arising out of the old debt and that arising out of the offer cannot exist together, and are inconsistent with one another. The respondent's letter, looked at as a whole, cannot be read as a simple acknowledgment of indebtedness, but must be read as a statement to the following effect: "You have a claim against me which is no longer enforceable, and this is the bargain I propose to make with you."

Cur. adv. vult.

Aug. 19.

The following judgments were read:—

BARTON J. The plaintiff, now appellant, was one of three trustees under a will, and the defendant, now respondent, was one of his co-trustees. The Supreme Court of this State made a decree in Equity on 14th December 1908 in a suit brought against the three, declaring that they had wrongfully paid £1,626 6s. 8d. out of

(1) 85 L.J. K.B., 654.
(2) 29 T.L.R., 310.
(3) 2 Ex. D., 314.
(4) 3 Ha., 281, at p. 300.
(5) 10 C.B. (N.S.), 745, at p. 750.

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the capital of the testator's estate, and that they were indebted to the estate in that sum. The appellant was called upon to make good the amount to the estate, and was obliged to do so. He now sues the respondent for contribution, asking (1) an order for payment to him by the respondent of £1,105 19s. 3d. "paid or lent" to her by the trustees and remaining unpaid, and (2) an order for her to pay to the appellant £168 13s. 10d., being one-third of a sum of £506 1s. 7d. paid by the trustees to a beneficiary in the estate in excess of the moneys to which that beneficiary was entitled. One of the defences is that the debt is barred by the *Statute of Limitations*, the equity proceedings and the appellant's payments under the decree having taken place more than six years before the suit. To this part of the defence the appellant replied by setting out two letters. The first is from the appellant's solicitor to the respondent, dated 17th November 1916. The second is the respondent's reply dated the 20th of that month. The material parts of these letters will be referred to presently.

The appellant contends that the respondent's letter, taken in conjunction with that to which it is a reply, constitutes a new contract, and so removes the bar of the *Statute of Limitations*. This contention the respondent necessarily resists.

The case came before *Street* J. in Equity upon an order for the argument of this point of law, and this is an appeal from his declaration that "the replication does not constitute a sufficient acknowledgment of the appellant's claim."

There is no later authority which questions the law laid down in 1884 by the Court of Appeal in *Green* v. *Humphreys* (1). In that case *Cotton* L.J. used these words (2):—"What is necessary . . . is this, that there should be an absolute acknowledgment uncontrolled by anything else, an acknowledgment in such terms that the Court may properly infer from it an intention by the writer to pay the debt. . . . What I think we must find from the writing is not merely an acknowledgment of such a state of circumstances as will throw a duty upon the writer to pay, but words of such a character that you may reasonably infer from the words a promise to pay. It may be put in this way,

(1) 26 Ch. D., 474. (2) 26 Ch. D., at p. 478.

that on a fair construction of the language there must be an acknowledgment of the claim as one which is to be paid by the writer." In his judgment *Bowen* L.J. said (1):—"Now, first of all, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt which would if it stood by itself be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition" (meaning the well known proposition of Lord *Tenterden* in *Tanner* v. *Smart* (2)); "because, not merely is there found in the words something that expresses less than a promise to pay (which, as Lord *Bramwell* pointed out in *Lee* v. *Wilmot* (3), will not necessarily put an end to the implication of the promise to pay), but because the words express the lesser in such a way as to exclude the greater." The Lord Justice considered the above two tests established. He had already said (1): "The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the Court applies the principle." *Fry* L.J., in agreeing with his brethren, said (4): "In order to take the case out of the Statute there must upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt." In the argument of that case there was an abundant citation of previous decisions. The principal authority since its date is *Cooper* v. *Kendall* (5), a decision of the Court of Appeal. There is not in that case, which is not unlike the present one, any variation from the principles laid down in *Green* v. *Humphreys* (6).

Let us apply the law there stated to the correspondence forming the replication. It will be observed that the letter from the appellant's solicitor speaks of a "substantial amount" due by the respondent in respect of payments made her in connection with her late father's estate, all made good to the estate by the appellant

(1) 26 Ch. D., at p. 479.
(2) 6 B. & C., 603, at p. 606.
(3) L.R. 1 Ex., 364, at p. 367.
(4) 26 Ch. D., at p. 481.
(5) (1909) 1 K.B., 405.
(6) 26 Ch. D., 474.

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personally to the extent of £1,625 16s. 8d., of which, he tells her, she is liable to refund him £1,120 5s. 1d. with interest. She is told that the appellant requires payment of these moneys and interest, and she is asked to say not later than the 22nd November what she proposes to do towards settling this claim. The letter concludes thus: "Any reasonable proposal you may put forward will be considered by Mr. Hepburn, but if you do not see fit to meet him in the matter he will take such steps as he may be advised to compel payment."

There were here a clear statement of liability and its amount, viz., £1,120 5s. 1d. and interest, and an intimation that action was imminent unless she put forward proposals with which the appellant would be satisfied. It may be stated here that the respondent's proposal, which was clearly evoked by the letter just quoted, was not satisfactory to the appellant. Indeed, that may be inferred from the fact of the taking of proceedings. Now, no doubt the respondent's letter must be looked at as a whole, but in arriving at a conclusion on the whole it is necessary to consider the weight of each part. In her letter written to the appellant the respondent speaks of her indebtedness to him, and says that she always knew and had intended to pay him "a certain sum," which she knew she was indebted. But she does not dispute the amount stated by the solicitor. She goes on to offer yearly payment "until the War is over," and says that when her daughter is of age "we" (probably meaning mother and daughter) "can sell some land, which I shall advise them to give you a portion." This may mean a portion of the land or of the proceeds. After other remarks she calls this "the best offer I can offer at present," and observes "what the future brings forth rests in God's hand." She concludes by asking the appellant to trust her word to do what she says she will. Now, it cannot be questioned that there is here an acknowledgment of indebtedness, which would, if it stood by itself, be clear enough. Is that acknowledgment controlled by anything else? Are there "words . . . combined with it which prevent the possibility of the implication of the promise to pay arising"? "Something that expresses less than a promise to pay . . . will not necessarily put an end to the implication of the promise to pay." She makes

an offer of a method of payment. That does not make her letter less than a sufficient acknowledgment. See *Dabbs* v. *Humphries* (1). No doubt it is a proposal such as the appellant could have considered had he chosen, but if he did not choose to accept it I cannot see that the making of it can, in face of the clear acknowledgment of the debt, keep up the statutory bar against him. From first to last the respondent does not say a word to question the debt. She does not impose any condition, nor is anything that she says a limitation upon the promise that is to be inferred from the clear acknowledgment.

Taking into view the whole of her letter in relation to that which called it forth, it seems to me that the respondent must be held, as to the sum of £1,120 5s. 1d. with interest, to have made a sufficient acknowledgment of the debt to take the case out of the Statute.

For these reasons I think the appeal must be allowed, and a declaration substituted that the facts pleaded in the replication constitute, as to the sum just named, part of the money claimed, a sufficient acknowledgment of the appellant's claim. I think also that the costs of the appeal should be costs in the suit. The order of *Street* J. as to costs to remain intact.

ISAACS J. The question in this appeal relates to the acknowledgment of a simple contract debt so as to avoid the *Statute of Limitations* (9 Geo. IV. c. 14), commonly called *Lord Tenterden's Act*. Before that Act the Courts had laid down the law as applicable to the Statute of James I., but in varying language. Except for the statutory requirement of writing signed by the party chargeable, the law remains the same. The passage from the judgment of *Wigram* V.C. in *Philips* v. *Philips* (2) states the law so finally settled. The liability of the debtor by reason of the acknowledgment is a new one, arising from his new promise to pay the debt, a promise supported by the consideration of the old debt, which though unenforceable exists until it has been replaced by the new promise. The liability henceforth is what the Statute calls "a new or continuing contract," since the acknowledgment may be made "before or after the expiration of the period of limitation." It

(1) 10 Bing., 446. (2) 3 Ha., at p. 300.

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is manifest that no such contract can exist without the new promise and the creditor's acceptance of it so as to abandon his old debt, and it is equally manifest that the creditor's rights must be measured by the nature and extent of that promise. So much is clear. The difficulty in this case is as to the proper method of ascertaining whether such new promise has been made, and, if so, its nature and extent.

It would be idle to deny that the law has only reached its present position after passing through a number of judicial expressions, not only varying in terms but sometimes differing in principle.

In 1894 *Vaughan Williams* J. said, in *In re Buskin*; *Ex parte Farlow* (1), that the current of authority had changed since *Hart* v. *Prendergast* (2). That case was in 1845, and in the course of it *Parke* B. referred to the change already made by *Tanner* v. *Smart* (3), which was in 1827. Even the words used by the various Judges in *Green* v. *Humphreys* (4) differ greatly in principle. There is always a risk when the words of the earlier cases are read without the distinctions later adverted to. The more recent cases, however, place the matter on a basis which cannot, I think, be misunderstood.

In *In re River Steamer Co.*; *Mitchell's Claim* (5), *Mellish* L.J. said: "Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." The Lord Justice also said (6): "It is not the admission which takes a case out of the Statute, but the promise to pay, which is implied from an unconditional admission." This case was expressly approved by the Privy Council in *Maniram* v. *Seth Rupchand* (7) in 1906. In that case a statement had been filed by the debtor in probate proceedings, in which he said: "For the last five years he (the debtor) had open and current accounts with the deceased." That was all. No amount was

(1) 15 R., 117, at p. 118.
(2) 14 M. & W., 741.
(3) 6 B. & C., 603.
(4) 26 Ch. D., 474.
(5) L.R. 6 Ch., 822, at p. 828.
(6) L.R. 6 Ch., at p. 829.
(7) L.R. 33 Ind. App., 165.

stated. No promise to pay was made. No mention was made as to whether the balance was in favour of the debtor or against him. It is a striking illustration of the modern tendency of regarding these acknowledgments. Sir *Alfred Wills*, in the course of the judgment, says :—" There is, therefore, a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that whoever on the account should be shown to be the debtor to the other was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative if the balance should be ascertained to be against him." " We have, therefore," said his Lordship, " the bare question of whether an acknowledgment of liability, if the balance on investigation should turn out to be against the person making the acknowledgment, is sufficient." After saying there was no difference in this respect between the English and the Indian law, his Lordship proceeded to refer with approval to the above quoted passage from *Mitchell's Case*, and said :—" An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do." And his Lordship added : " There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant." The Judicial Committee held that the acknowledgment was conditional in the first instance, and, the condition having been performed, was on the same footing as if it had been unconditional in the first instance, and therefore a promise to pay must be inferred, or, in other words, was implied. Later on, the phrase is used, " an unqualified admission and an admission qualified by a condition which is fulfilled stand upon precisely the same footing." This case is valuable, not only for its authority but also for the definiteness with which it states the law and extends its application.

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To satisfy the first proposition of *Mellish* L.J. we have to find an acknowledgment; then we have to see whether it is unconditional (that is unqualified) or conditional (qualified). If unconditional in the first instance, or if being conditional the condition is performed, the law—not the jury, so to speak—*implies*, or *necessarily infers*, an unconditional promise to pay. If the acknowledgment is conditional, then the implied promise is conditional also. But it must be observed that so far I am referring to the implication which the law itself makes from an actual acknowledgment, and not to the construction of a promise expressly or impliedly to be gathered from any actual words of promise used by the debtor.

Then, what amounts to an unconditional acknowledgment as distinguished from a promise? In *Green* v. *Humphreys* (1) *Fry* L.J. says:—"In my view an acknowledgment is an admission by the writer that there is a debt owing by him . . . . In order to take the case out of the Statute there must upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt." That admission, as is seen in *Maniram's Case* (2), need not mention the amount of the debt and need not even be an unconditional admission of a debt, but it must be an admission of a debt conditionally or unconditionally. And it must, of course, be an admission of the debt sued for. And in order to raise the implication of a promise an admission must be made *as* an acknowledgment. That is, it must be so made as to stand on its own footing, and to be made as an admission. It may be preceded or followed by words which prevent the implication of an unconditional promise or even a conditional promise arising. But the presence of those words does not prevent an admission from being an acknowledgment capable in itself—if it were not qualified—of supporting the implication. That is the first proposition of *Mellish* L.J. On the other hand, if words referring to the debt are used, not by way of an admission but as part of the promise, and in order merely to form and explain the promise, the promise must be taken as it is in fact, and there is then no clear admission from which the implication of a different promise can in law arise. In that case either the second or the third of the propositions of *Mellish*

(1) 26 Ch. D., at p. 481. (2) L.R. 33 Ind. App., 165.

L.J. must be relied on, and if either is satisfied in fact, the law implies the acknowledgment required by the Statute. This is shown by the judgments of *Cotton* L.J., *Bowen* L.J. and *Fry* L.J. in *Green* v. *Humphreys* (1), of *Collins* M.R. in *R. Barrett & Son Ltd.* v. *Davies* (2), and of *Buckley* L.J. in *Cooper* v. *Kendall* (3). *Richardson* v. *Barry* (4) is an earlier, and *Parson* v. *Nesbitt* (5) a later, illustration of these principles.

Now, in the present case, having regard to the distinct reference to the £1,120 5s. 1d. in the plaintiff's letter, the statement in the defendant's letter in reply, "I always knew, and had intended to pay you a certain sum, which I knew I was indebted," is a clear unqualified unconditional admission of the debt claimed—not of its amount, but of the debt identified by the figures claimed in the plaintiff's letter. The words are manifestly used as an admission, and detached both in position and, what is more important, in sense from any words of promise and offer. From this admission the law implies an equally unconditional promise to pay "if," to repeat the words of Sir *Alfred Wills*, "nothing is said to the contrary." That phrase sums up and gives effect to the language of *Cleasby* B. in *Chasemore* v. *Turner* (6), quoted by Lord *Cozens-Hardy* M.R. in *Cooper* v. *Kendall* (7), and to the language of that learned Lord himself and of Lord *Wrenbury* (then *Buckley* L.J.). It also supports the observation of *Bowen* L.J., in *Green* v. *Humphreys* (8), that it is not sufficient, in order to prevent the implication arising, that the words of promise should be less than that implication but they must express the lesser promise in "such a way as to exclude the greater."

In order to find that implication destroyed or qualified we have then to see something "contrary" in the rest of the document. What is there contrary? As *Fry* L.J. said, we have to read the debtor's letter by the light of surrounding circumstances, and one material circumstance is that in the plaintiff's letter, to which the defendant's is a reply, there is not only a definite claim for the debt,

(1) 26 Ch. D., at pp. 479-481.
(2) 91 L.T., 736, at p. 737.
(3) (1909) 1 K.B., at pp. 409-410.
(4) (1860) 29 Beav., 22.
(5) (1915) 85 L.J. K.B., 654.
(6) L.R. 10 Q.B., 500, at p. 517.
(7) (1909) 1 K.B., at pp. 407-408.
(8) 26 Ch. D., at p. 480.

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but a threat to proceed unless some reasonable proposal towards settling the claim is made by her. Reading the letter as an answer to this, it appears, besides being an unqualified admission of liability, to be an offer—not a definite promise—but an offer for consideration, stating what her present ability is, in view of other claims, upon her. She says: "At any rate this is the best offer I can offer at present—what the future brings forth rests in God's hand." Really there is no qualification of the admission of liability; there is no promise of payment at all; there is in response to a threat of proceedings an offer, and an explanation, that apparently are intended as an inducement not to resort to compulsion.

I cannot read into the rest of the letter anything "to the contrary" of the implied promise arising by force of law from the unconditional admission. There is certainly a statement of present inability to satisfy that liability, and also meet other responsibilities. But a mere statement of present inability is not sufficient to rebut the implied promise. An honest man does not repudiate his promise to pay because he is presently unable to perform it. He takes the consequences if the creditor insists on pursuing his rights. He may offer less in the hope of inducing the creditor to show clemency or forbearance, but that is quite consistent with standing to his contract. See per *Cozens-Hardy* M.R. (1) and *Buckley* L.J. (2) in *Cooper* v. *Kendall*. In *In re Buskin*; *Ex parte Farlow* (3), *Vaughan Williams* J. says: "It is clear that a mere appeal for indulgence or for time is not inconsistent with a promise or not so inconsistent as to displace the inference of a promise." *Parson* v. *Nesbitt* (4) was relied upon on this branch also, but if the words of the learned Judge go beyond the debtor's present inability, I prefer to rest on other cases.

On the whole, whatever sympathy is aroused for the defendant by reason of her difficult circumstances, the matter must be determined as the law requires it, and, judging it by that standard, her letter avoids the Statute, and leaves her bound to pay whatever debt may—apart from the Statute—be found to be existing.

I therefore agree that this appeal should be allowed as to £1,120

(1) (1909) 1 K.B., at p. 408.
(2) (1909) 1 K.B., at p. 410.
(3) 15 R., at p. 118.
(4) 85 L.J. K.B., 654.

5s. 1d., and that a declaration should be made accordingly, and to that extent the judgment varied.

GAVAN DUFFY J. This case has caused me much anxious thought, but in the end I have come to the conclusion that the plaintiff's claim to the sum of £1,120 5s. 1d., mentioned in his solicitor's letter of 17th November 1916, is not barred by the *Statute of Limitations*. The defendant's answer to this letter contains this passage:— "I was indeed more than surprised to receive a letter through your solicitor *re* my indebtedness to you. Well in the first place I always knew, and had intended to pay you a certain sum, which I knew I was indebted."

I entirely agree with the luminous statement of law contained in the judgment of my brother *Isaacs*, and the question for our consideration is whether the defendant's answer contains anything inconsistent with the unconditional promise to pay which would be implied from these words if they stood alone. The solicitor's letter states that the defendant owes the plaintiff £1,120 5s. 1d., and then proceeds: "You have never so far made any attempt to reduce your liability to Mr. Hepburn, and I have to give you notice that he requires payment of these moneys and interest, and to ask you to let me know not later than Wednesday next the 22nd instant what you propose to do towards settling this claim. Any reasonable proposal you may put forward will be considered by Mr. Hepburn, but if you do not see fit to meet him in the matter he will take such steps as he may be advised to compel payment."

This statement, in my opinion, does not mean that the plaintiff is willing to abandon his claim or a part of it, and accept instead a new undertaking from the defendant. It means that he persists in his claim, and intends to enforce it at once, unless the defendant will make some satisfactory payment on account of the indebtedness. The defendant's answer is no more than an appeal for mercy; it admits that a debt exists, and states that she always had intended to pay it, and it recognizes her present liability by proceeding to deal with the request for payment on account. She is asked to state what she proposes to do towards settling the plaintiff's claim and she does so, but her proposal is not intended to alter her obligation

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to pay the sum due, or to produce any alteration in the legal relations existing between the plaintiff and herself. She may be taken as saying, I owe you a sum of money which I have always intended, and still intend, to pay, but when you ask me to make some reasonable proposal towards settling the claim so that you may consider whether you will take immediate proceedings against me to recover the debt or not, the best proposal I can make is this, and these are the means I have at my disposal for satisfying your debt. " This is the best offer I can make at present—what the future brings forth rests in God's hand." It is well established that the allegation of a present inability to pay is not inconsistent with the promise to pay which should be implied from an acknowledgment of the debt, and I see nothing else in the defendant's letter, as I construe it, which is inconsistent with such a promise. In my opinion the order of the Supreme Court should be varied by declaring that the sum of £1,120 5s. 1d. is not barred by the Statute, but as the defendant has succeeded with respect to the sum of £506 1s. 7d. which was in issue before the Supreme Court and before us, I think that the costs of this appeal should abide the result of the action.

Appeal allowed. The following declaration to be substituted for the declaration appealed from: Declare that the replication filed herein discloses as to £1,120 5*s.* 1*d. and interest, part of the money claimed, a sufficient acknowledgment of the plaintiff's claim. Costs of appeal to be costs in the suit.*

Solicitor for the appellant, *A. G. de L. Arnold.*

Solicitors for the respondent, *Salwey & Primrose.*

B. L.