[HIGH COURT OF AUSTRALIA.]

THE EXECUTOR, TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED . . . . . Appellant;
Defendant,

AND

THOMPSON . . . . . Respondent.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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Adelaide, *Sept.* 29; *Oct.* 3.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Limitation of Actions—Goods sold and delivered—Account stated—Oral promise to pay at future day—Consideration—Action for breach—New and continuing contract—Limitation of Suits and Actions Act 1866 (*S.A.*) (30 *Vict. No.* 14), *secs.* 36, 43.

Sec. 36 of the *Limitation of Suits and Actions Act* 1866 (S.A.) provides that "All actions grounded upon any . . . contract, express or implied, without specialty, . . . shall be commenced and sued within six years next after the cause of such action . . . but not after." Sec. 43 provides that "In any action of debt, or upon the case grounded upon simple contract, no acknowledgment by words only shall be deemed sufficient evidence of a new and continuing contract whereby to take any case out of the operation of this Act, or deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party to be charged thereby, or by his agent . . . Provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

Held, that, where an account had been stated in respect of goods sold and delivered, an action would lie for a breach of a new oral agreement then made for valuable consideration that the debtor would on a certain future day pay the amount found to be due on stating the account and interest which the creditor had from time to time charged but the debtor had never before

agreed to pay, if brought within six years from the day fixed for payment, such an action not being barred by sec. 36 or affected by sec. 43.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

An action was, on 8th November 1918, brought in the Local Court at Quorn, South Australia, by Robert Thompson against the Executor, Trustee and Agency Co. of South Australia Ltd. as executor of Edward Saint, who died on 27th March 1917, alleging that at the time of his death Saint was indebted to the plaintiff upon a balance of moneys due for goods sold and delivered, and for interest, and for moneys found to be due upon a balance of account and upon an account stated. Particulars attached to the summons showed, on 9th November 1917, a balance of account for goods amounting to £106 3s. 6d., and interest from 1900 to 30th September 1918 amounting to £275 12s. 5d. The material defence was that the alleged cause of action did not accrue within six years before the action and was barred by sec. 36 of the *Limitation of Suits and Actions Act* 1866 (S.A.). At the close of the plaintiff's case the Local Court nonsuited him on the ground that the action was so barred.

On appeal by the plaintiff to the Supreme Court the nonsuit was set aside, and a new trial was ordered. *Murray* C.J., in delivering his judgment, stated the facts as follows :—" The plaintiff is a storekeeper carrying on business at Quorn. The defendant is the executor of Edward Saint, a farmer at Willochra near Quorn, who died in March 1917. Saint became a customer of the plaintiff in the year 1890, and was supplied with goods on credit until 1912. He made occasional payments on account, but owing to bad seasons was unable to pay the amount due by him in full. From 1900 onward the plaintiff charged interest on the outstanding balance of his account at the close of each year. Saint disputed his liability to pay interest, and also questioned some of the other items, but in June 1912, according to the facts found by the Local Court, 'at the request of the plaintiff he made a thorough examination of the account with Will Thompson, a son of the plaintiff, with the result that an account was stated orally (after certain set-offs were allowed). Under that stated account £106 3s. 6d. was found to be

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due to the plaintiff by Saint, being the balance due for goods sold and delivered. At that date plaintiff had debited Saint's account with the sum of £134 17s. 6d. for interest. Upon the account being stated between them, the plaintiff proposed that if Saint would promise to pay the sum of £134 17s. 6d. charged for interest, making the amount due for goods sold and delivered (£106 3s. 6d.) the sum of £241 1s., he would give him time to pay until 1st January 1913. This proposal was accepted by Saint.' Saint did not pay the £240 1s. or any part of it on 1st January 1913, or afterwards, and he did not agree to pay any further interest. Subsequent transactions between him and the plaintiff were all for cash, except one in February 1917 for goods to the value of £1 15s., which was paid in the following month. The plaintiff does not contend that that payment was an acknowledgment of the earlier indebtedness of the deceased."

From the evidence given for the plaintiff the following portions are referred to in the judgment of *Barton* J. hereunder :—

The plaintiff said :—" I had a conversation with Saint with regard to the question of interest ; that was in June 1912 and not before. I had rendered accounts every year to him which included interest. He never objected to the charge for interest. At the interview in June 1912, after he had gone through the items with my son Will, which I mentioned in my examination-in-chief, I said to Saint : 'Are you agreeable to pay what is there and with bank interest every year ? ' He said : ' All right ; that will do me.' I then said : ' I will wait until 1st January 1913.' "

William Robert Thompson said :—" I am a son of the plaintiff. In June 1912 I had an interview with plaintiff and Saint. In the presence of Saint, plaintiff said to me : ' Have you time to go through the account with Saint ? ' On our way to the office, plaintiff said to Saint : ' If you will agree to this account, I will extend the time until 1st January 1913.' Saint said : ' I will go through the account with Will.' We went to the office, and together he and I went through the account item for item. Saint continually disputed items—the bigger items being a ton of flour, which he said was charged to his account instead of to William Perry. I turned up all the old

books, and the question cropped up of interest; he raised the question. He said: 'It looks a lot of interest.' I got a Ready Reckoner and worked out with him certain amounts. He agreed to the items right through. I said: 'The interest is getting my father down.' He said: 'I will pay the interest.' I gave him the total amounts up to June 1912. After going through all the items he said: 'I am satisfied; I was always under the impression that this flour and other items were on the account.' I found that there was no debit of a ton of flour on his account. The amount at that time and agreed upon by Saint was £241 1s. Account for that amount was rendered on 1st January 1913. At conclusion of interview in June 1912, I called the plaintiff and told him, in the presence of Saint, that we had been through the account and that Saint was satisfied. Saint said to the plaintiff: 'I am satisfied with the account, and the items were not included in my account.' I left Saint and plaintiff together in the shop. I kept the books of the business and I added interest under the direction of the plaintiff."

From the decision of the Supreme Court the defendant appealed to the High Court. On the appeal coming on for hearing the respondent objected that an appeal did not lie as of right, but the Court, without deciding the point, granted special leave to appeal in order to ensure that the appeal was regular.

Cleland K.C. (with him *C. L. Abbott*), for the appellant. The claims in the action were for goods sold and delivered and on an account stated. As to the former claim, it is undoubtedly barred by the *Limitation of Suits and Actions Act* 1866. As to the latter claim, on the evidence there was on 13th June 1912 an investigation of the account by Saint, and an admission by him that it was correct, and an unconditional promise to pay it. The only agreement as to the time for payment was that the respondent agreed to extend the time for payment of the old debt; and that is what the Local Court found. Such an agreement does not extend the time within which the creditor must sue. There is no contract proved which would make the liability commence on 1st January 1913. Such a contract must be in writing under sec. 43 of the Act. A contract whereby it is agreed that an existing indebtedness shall be cancelled

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and a new indebtedness shall be created payable in the future, even for a fresh consideration, is a " new and continuing contract " within the meaning of sec. 43, and must be in writing. [Counsel referred to *Chasemore* v. *Turner* (1).]

Parsons K.C. (with him *H. Homburg*), for the respondent.—The evidence shows that there was an account stated and that the parties agreed that it should be paid on 1st January 1913. There was a new agreement for valuable consideration, the evidence showing that Saint promised to pay the amount found to be due and the interest charged by the respondent, if the respondent would extend the time for payment until 1st January 1913. That is not within sec. 43, and the cause of action in respect of that contract did not begin to run until a breach of it by non-payment on 1st January 1913. [Counsel referred to *Irving* v. *Veitch* (2).]

Cleland K.C., in reply.

Cur. adv. vult.

Oct. 3.

The following judgments were read :—

BARTON J. The respondent sued the appellant Company, the executor of Edward Saint deceased, for debt (1) upon a balance of money due for goods sold and delivered by the respondent to the deceased and for interest, (2) for money found to be due upon a balance of account and upon an account stated.

The summons was issued in the Local Court on 12th November 1918. The defendant pleaded the *Statute of Limitations*, and upon the evidence contended that the Statute began to run at the latest in June 1912, and had therefore barred the claim before the issue of the summons.

The evidence is sufficiently stated in the judgment appealed from [the passage referred to is set out above], but it will tend to clearness if I refer, without quoting them, to two passages, one from the evidence of William Robert Thompson, a son of the plaintiff, and the other from the evidence of the plaintiff himself [the passages are set out above].

(1) L.R. 10 Q.B., 500.

(2) 3 M. & W., 90, at p. 107.

Before the events of June 1912 Saint had never agreed to pay interest on his account for the goods sold and delivered previously to that time. The evidence is that in that month the plaintiff, having up to then charged the deceased with £134 17s. 6d. for interest, proposed to him that if he would pay that sum, and with it the sum previously owing for goods, £106 3s. 6d., that is, if he would pay the total sum of £241 1s., he, the plaintiff, would give him time until 1st January 1913 to make the payment, and that the deceased agreed. Obviously, upon the making of this arrangement the plaintiff could not sue Saint upon it at any time between its date in June 1912 and 1st January 1913. For the arrangement superseded the old debt by a new promise of the deceased, the new consideration coming from the plaintiff in the shape of the promise to give the specified time. I agree with the learned Chief Justice that it makes no difference whether the proposal came from one party or the other. The resulting contract would be exactly the same. If this was an agreement legally binding upon Saint, it still could not be the subject of a breach affording a cause of action until 1st January 1913, and the action could not be barred until the end of 1918. Therefore, if Saint was legally bound by the new agreement, the action upon it against Saint's executor, the appellant, was begun in time.

Then, does the evidence, if accepted, show an agreement binding upon Saint; and is the defendant therefore, in that event, liable for what would be an undeniable breach?

Secs. 36 and 43 of the *Limitation of Suits and Actions Act* 1866 (S.A.) have been sufficiently stated in the judgment appealed from. I agree completely with the Supreme Court in the deduction which they have drawn from the cases of *Jones* v. *Ryder* (1) and *Hopkins* v. *Logan* (2), "that the plaintiff may rely on an agreement which is not in writing to take the debt out of the provisions of the Statute if he can show that it was made upon a fresh consideration. . . . The Statute applies independently to that agreement, and time begins to run from the breach" of it, namely, in this case 1st January 1913.

If, then, the evidence for the plaintiff is believed, and in the absence of successful rebuttal, his case is established.

(1) 4 M. & W., 32. (2) 5 M. & W., 241.

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The Local Court having granted a nonsuit, it was set aside by the Supreme Court and the case sent back to the Local Court for rehearing. I am of opinion that their Honors of the Supreme Court were right in making that order.

Consequently, I think the appeal must be dismissed with costs.

ISAACS J. There are two causes of action sued upon : the first is the price of goods sold and delivered with interest, and the second for the amount of an account stated with interest. The only defence with which this appeal is concerned is the *Limitation of Suits and Actions Act* 1866 (30 Vict. No. 14), sec. 43 of which is almost the same as the enacting part of sec. 1 of Lord Tenterden's Act (9 Geo. IV., c. 14). The two enactments are not absolutely identical, but for the present purpose may be regarded as identical.

The question we have to consider turns, as I think, upon whether there was evidence before the Local Court upon which that tribunal could reasonably find (1) that in June 1912 Thompson and Saint came to an agreement for valuable consideration in respect of the goods delivered and interest, and (2) that that agreement superseded their previously existing obligations in respect of those matters. If those questions are answered in the negative, then the nonsuit was right, and should be restored.

I agree with Mr. *Cleland's* argument that the mere fact that there was a new contract for valuable consideration whereby Thompson bound himself not to sue until January 1913, would not entitle the respondent to succeed. In *East India Co.* v. *Oditchurn Paul* (1) the Privy Council say : " There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the *Statute of Limitations* in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement ; but if to an action for the original cause of action the *Statute of Limitations* is pleaded, upon which issue is joined—proof being given that the action did clearly accrue more than six years before the commencement of the suit—the defendant, notwithstanding any agreement to inquire, is

(1) 7 Moo. P.C.C., 85, at p. 112.

entitled to the verdict." On the other hand, if the double proposition stated be answered in the affirmative, then, in my opinion, the appeal should be dismissed, and the case go for rehearing as directed in order that the Local Court should come to its own conclusion on the matter. Mr. *Cleland's* argument went so far as to contend that no oral agreement of any nature could prevent the operation of the Statute. That argument went too far.

As to the claim for the price of goods sold and delivered and interest thereon, that is, " the original cause of action, " I agree with him that no oral agreement, however founded on valuable consideration, could avoid the Statute, and the authority has been already stated. And I agree for this reason : that the Statute says that the oral agreement shall not be deemed sufficient *evidence* of a new or continuing contract whereby to take the case out of the operation of the Statute. It being a matter of *evidence* only, the same result must follow whether there is consideration or not, but the question is of what contract or obligation is it tendered in evidence. If it is the original cause of action, the contention is perfect, because then the account stated is only a new agreement that the old claim is well founded. Therefore, as to the claim for goods sold and delivered, the respondent must fail. But the second claim —account stated—taken on its own footing may be different. Lord Tenterden's Act made no change in the law except to require written evidence signed by the debtor himself (*Haydon* v. *Williams* (1)). In South Australia an agent may sign ; the necessity for written evidence is, however, the same. But the point to be observed for the purpose in hand is as above stated, and is clearly demonstrated by *Wigram* V.C. in *Philips* v. *Philips* (2). The legal effect of the acknowledgment of a debt barred by the Statute is a promise to pay *the old debt*, and for this purpose the old debt is a consideration in law. And it may be repeated that the Act, in requiring a written acknowledgment or promise, is dealing with a claim *for the old debt*.

Now, an account stated is a distinct cause of action. This was very pointedly decided by the Court of Appeal in *Grundy* v. *Townsend* (3), where it was held that the admission of a debt made in

(1) 7 Bing., 163.

(2) 3 Ha., 281, at p. 300.

(3) 36 W.R., 531.

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the City of London gave, on acceptance by suit, jurisdiction to the Mayor's Court, when the original obligation was outside that jurisdiction. And, because it is a distinct cause of action, Mr. *Parsons* contended that that was sufficient to oust the Statute. But I cannot go so far as that. An account stated may be a mere admission of a debt, merely evidence of it, to which, in the circumstances, the law attaches a promise to pay. In such a case the obligation as to the old debt remains unaltered, and the account stated, though a new ground of action, is not conclusive or exclusive (*Fidgett* v. *Penny* (1) and *Perry* v. *Attwood* (2)). And then the *Statute of Limitations* applies, as it does here to the first claim made even though the account, if stated, was for valuable consideration, provided it was a mere promise to pay the old debt at a future time. But an account stated may be something quite different. It may, as Lord *Blackburn* (when *Blackburn* J.) said in *Laycock* v. *Pickles* (3), be " a real account stated, called in old law an *insimul computassent*, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge *the balance was agreed to be due.*" Now, no doubt, he says it is as if payment had been made, but the point is that the constructive payment is referred to only as the reason for the constructive discharge ; and then it is in consideration of the discharge that the new balance is agreed to be paid. That balance supported by new valuable consideration is a new obligation, entirely superseding the old. To use the language of *Rolfe* B. in *Ashby* v. *James* (4), " it is a transaction between the parties, out of which a new consideration arises for a promise to pay the balance." And it is not what *Alderson* B., in the same case, calls " a mere parol statement of, and promise to pay, an existing debt " which, as he observes, would not take the case out of the Statute " because to hold otherwise would be to repeal the Statute." Now, if that be the principle, it has to be seen whether the interview of June 1912

(1) 1 C. M. & R., 108.
(2) 6 El. & Bl., 691.
(3) 4 B. & S., 497, at p. 506.
(4) 11 M. & W., 542, at p. 544.

was merely—even though for valuable consideration—an arrangement to admit an existing debt, coupled with a binding agreement to give time to pay it until January 1913, or was a bargain for valuable consideration to place everything on a new footing, to supersede the old debt entirely and to create a new obligation, namely, to pay the price of goods already delivered taken as at the entered amounts, and interest as claimed, the period of payment of this new debt being fixed at January 1913. In that case it would resemble in principle the case of *Helps* v. *Winterbottom* (1). In the first alternative, the plaintiff fails because the evidence is inadmissible or insufficient in law; in the second the plaintiff succeeds, so far as the Statute is concerned, because the bargain, though oral, is not offered as evidence of the original cause of action to which alone the Statute applied, but to a cause of action not only new but entirely independent, the former one having ceased to exist. Which of these two alternatives should prevail it is, of course, beyond my province to say or even suggest. I can only say that on the evidence before us it is not legally impossible to find either: whichever on the new evidence to be given appears the more probable and more reasonable will be for the tribunal of fact to determine for itself. Our duty is simply to say that it is on present materials open to adopt either, and therefore the nonsuit was wrong and the appeal should be dismissed.

GAVAN DUFFY J. I agree in thinking that the judgment appealed against is right, and that the appeal must be dismissed.

RICH J. I agree that on the facts before us it is competent for the Local Court to hold, if they think fit—as to which I express no opinion,—that by a new agreement for valuable consideration a new obligation was substituted for the old debt, the new obligation being to pay on 1st January 1913 the agreed amount for goods and interest to date.

Appeal dismissed with costs.

Solicitors for the appellant, *Rollison & Abbott.*

Solicitors for the respondent, *Homburg, Melrose & Homburg.*

B. L.

(1) 2 B. & Ad., 431.