[HIGH COURT OF AUSTRALIA.]

BUCKNELL . . . . . APPELLANT;
DEFENDANT,

AND

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED. . . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 27, 28; *July* 30.

Dixon, Evatt and McTiernan JJ.

Limitation of Actions—Debt—Acknowledgment in writing—Sufficiency—Implication of promise to pay.

In April 1926 B. was overdrawn with a bank by an amount which, with the addition of interest and bank charges, had, by December 1933, increased to the sum of £2,272 15s. The bank then sued B. on the common *indebitatus* counts to recover this amount. B. pleaded the Statute of Limitations. On the issue thus raised, the bank relied upon a letter written on 20th December 1933 to the manager of the bank's head office. In this letter B. wrote :—"I have to acknowledge the receipt of your letter of 8th November last. I remember my interview with your late general manager a few months ago when it was put before me by him that I should pay you £500 in cash in reduction of my liability to your bank . . . and at the same time giving you a promissory note for a further £500 in full liquidation of the debt, to this proposition I neither dissented nor agreed as, under the peculiar circumstances of the matter having been in abeyance for nearly seven years, I considered that your bank would make no further claim beyond the £2,000 that I had already paid." The circumstances under which the overdraft was granted were then set forth and commented upon, and the letter concluded with the words, "for this reason I should be absolved from any further payment." Before this letter was written the parties had been in negotiation for a settlement of the bank's claim. In its letter of 8th November 1933 the bank asserted that B. had agreed to discharge the claim by paying £1,000 when he received the proceeds of the sale of his wool, and inquired whether the wool had been sold.

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Held, by *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the letter of 20th December 1933 constituted a sufficient acknowledgment to take the case out of the Statute of Limitations; it admitted liability in terms which were unqualified and did not contain anything inconsistent with the promise to pay implied by law from the acknowledgment of indebtedness, and there was nothing in the circumstances of the case to preclude the bank from relying on the letter as an admission of liability to the full extent of the amount claimed.

Spencer v. *Hemmerde*, (1922) 2 A.C. 507, discussed.

Decision of the Supreme Court of New South Wales (Full Court): *Commercial Banking Co. of Sydney Ltd.* v. *Bucknell*, (1936) 36 S.R. (N.S.W.) 607; 53 W.N. (N.S.W.) 203, on this point affirmed.

APPEAL from the Supreme Court of New South Wales.

Norman Charles Bucknell obtained an advance on overdraft from the Commercial Banking Co. of Sydney Ltd., liability for which, by a payment to the bank of £2,000 in April 1926, he had reduced at that date to £1,334. Thereafter he paid nothing further to the credit of this account, and, by December 1933, with the addition of interest and bank fees, his overdraft had increased to £2,272 15s. The bank brought an action in the Supreme Court of New South Wales to recover this sum from Bucknell, who pleaded, *inter alia*, that the alleged cause of action did not accrue within six years before the commencement of the action, and that as to the sum of £938 15s. he was never indebted as alleged; and he also, by way of cross-actions, claimed the sum of £3,000 on the grounds that the plaintiff by one of its managers had wrongfully omitted to give him certain information, or had negligently given him incorrect information, whereby he had suffered damage. On the issue raised under the Statute of Limitations the plaintiff relied upon a letter bearing date 20th December 1933, written by the defendant to the manager of the plaintiff's head office, which is set out in the judgment of *Dixon* J. hereunder. The trial judge nonsuited the plaintiff and gave leave to the defendant to withdraw his cross-actions. The Full Court of the Supreme Court set aside the nonsuit and ordered a new trial: *Commercial Banking Co. of Sydney Ltd.* v. *Bucknell* (1).

The High Court gave the defendant leave to appeal from that decision on the condition that, if the appeal was dismissed, judgment

(1) (1936) 36 S.R. (N.S.W.) 607; 53 W.N. (N.S.W.) 203.

should be entered for the plaintiff for the amount claimed (*Ex parte Bucknell* (1)).

Further facts appear in the judgments hereunder.

Dudley Williams K.C. (with him *Cassidy* and *Wesche*), for the appellant. In his letter dated 14th December 1927 the appellant, in clear and unequivocal terms, repudiated the balance of the amount then said to be outstanding. There was no promise to pay made by the appellant within six years of action brought as required by the Statute of Limitations, nor was there any clear acknowledgment of the debt made under such circumstances that the court would infer therefrom a promise on the part of the appellant to pay (*Green* v. *Humphreys* (2)). An acknowledgment of the debt coupled with a refusal to pay cannot be an acknowledgment from which the court will infer a promise to pay. Where there is an acknowledgment and other words appear, then the court must determine whether on the construction of the words as a whole there is an implied promise to pay (*Spencer* v. *Hemmerde* (3)). All that the appellant addressed himself to in his letter dated 20th December 1933—the letter relied upon by the respondent—was the suggestion made on behalf of the respondent that the claim and counterclaim should be compromised by the payment by the appellant of the sum of £1,000. Having regard to the context, the words "my liability" in the second paragraph of that letter cannot be construed as an admission by the appellant of liability on his part. If the letter is so construed the position would be that, by reason of the respondent's inaction during a period of years, the appellant would be prevented by the provisions of the Statute of Limitations from setting up his counterclaim. The question when time begins to run under the statute is dealt with in *Halsbury's Laws of England*, 2nd ed., vol. 20, pp. 612-621. There was no promise to pay, or, at most, there was a promise in respect of a part only of the alleged debt, and the respondent's right to recover is limited to that part. In the circumstances the appellant was justified in his conclusion that the respondent had abandoned its alleged claim. The facts in this case are different from the facts

(1) (1936) 56 C.L.R. 221. (2) (1884) 26 Ch. D. 474.
(3) (1922) 2 A.C. 507.

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before the court in *Spencer* v. *Hemmerde* (1). Here the appellant did not show, either by express words or by implication, any willingness to pay. The facts are more like those before the court in *In re River Steamer Co.*; *Mitchell's Claim* (2), which involved a claim and counterclaim leaving, as alleged by one of the parties and disputed by the other party, a balance outstanding. An acknowledgment cannot be implied from negotiations or from an arrangement for a compromise (*Cripps* v. *Davis* (3); *Goate* v. *Goate* (4); *Everett* v. *Robertson* (5); *Francis* v. *Hawkesley* (6); *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 635, par. 805).

[DIXON J. referred to *Smith* v. *Thorne* (7).]

There was not on the part of the appellant any unconditional acknowledgment of the alleged debt, either in whole or in part (*Hepburn* v. *McDonnell* (8); see also *Cohen* v. *Cohen* (9)). The acknowledgment must be of *the* debt; it must be made in definite and precise words, and should include a promise to pay (*Ward* v. *Tibbatts* (10)). That is not the position here.

Windeyer K.C. (with him *Badham*), for the respondent. An acknowledgment prevails to take a debt out of the protection of the Statute of Limitations unless it expresses unwillingness or contains something inconsistent with a promise to pay (*Hepburn* v. *McDonnell* (11); *Spencer* v. *Hemmerde* (12)). The letter relied upon, read as a whole, establishes the debt and is not in any way inconsistent with an intention to pay. What amounts to a sufficient acknowledgment is shown in *Maniram* v. *Seth Rupchand* (13). The word " absolved " as used in the letter means " released " and thus implies a legal obligation from which a release is required. A request that a creditor forgo a part of his debt is not inconsistent with an intention on the part of the debtor to pay. It is not disputed that a mere adjustment of accounts does not amount to an acknowledgment (*Francis* v. *Hawkesley* (6)), but here it was not a case of

(1) (1922) 2 A.C. 507.
(2) (1871) 6 Ch. App. 822.
(3) (1843) 12 M. & W. 159; 152 E.R. 1152.
(4) (1856) 1 H. & N. 29; 156 E.R. 1105.
(5) (1858) 1 E. & E. 16; 120 E.R. 813.
(6) (1859) 1 E. & E. 1052; 120 E.R. 1204.
(7) (1852) 18 Q.B. 134; 118 E.R. 50.
(8) (1918) 25 C.L.R. 199.
(9) (1929) 42 C.L.R. 91.
(10) (1936) 2 All E.R. 656.
(11) (1918) 25 C.L.R., at pp. 212, 213.
(12) (1922) 2 A.C. 507.
(13) (1906) L.R. 33 Ind. App. 165; 22 T.L.R. 619.

a mere adjustment of accounts. In his letter of 14th December 1927 the appellant did not repudiate the debt; he merely sought an opportunity to ventilate a fancied grievance. The words "force me to pay" imply an admission of the existence of a relationship of debtor and creditor, and that the appellant proposed ultimately to discharge the debt. The appellant's letters were written for the purpose of bringing under notice his supposed grievance and of obtaining for him generous treatment from the respondent. Nowhere does the appellant allege anything in the nature of a legal counterclaim.

Dudley Williams K.C., in reply. The letter of 14th December 1927 constitutes a definite repudiation by the appellant of the debt. "Liability," as used in the letter of 20th December 1933, means liability on the balance of account.

Cur. adv. vult.

July 30

The following written judgments were delivered :—

DIXON J. This appeal is brought by leave against an order of the Supreme Court of New South Wales setting aside a nonsuit and ordering a new trial. The action was for the recovery of the amount of an overdrawn bank account, and the defence was that the cause of action had accrued more than six years, as was in fact the case. The plaintiff banking company in answer to the plea of the Statute of Limitations relied upon a document as an acknowledgment. *Milner Stephen* J., who presided at the trial, held that the document did not amount to an acknowledgment; on appeal the Full Court held that it did.

The question for our decision is which of these two opinions is correct. Upon his application to this court for leave to appeal from the decision of the Full Court, the defendant undertook that, if his appeal were dismissed, judgment might be entered for the amount claimed in the action.

The document said to be an acknowledgment is a letter dated 20th December 1933 and written by the defendant to the manager of the plaintiff banking company. A proper understanding of its

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contents cannot be obtained without an account of the facts to which it relates. In 1926, the bank numbered among its customers a company called "A. Gilbert Tomlinson Ltd." It carried on a merchant's business, the chief part of which consisted in the importation of hemp, tapioca and a particular brand of gin. In April of that year its overdraft stood at about £22,000 and the bank held as security a debenture creating a floating charge over the company's assets. On 16th April the defendant and his father-in-law, S. L. Cohen, between them paid to A. Gilbert Tomlinson Ltd. £5,000 for shares they took up in that company. They made the payments by cheques drawn on their respective accounts in the plaintiff bank, the defendant by a cheque for £3,334 and his father-in-law by a cheque for £1,666. The defendant's account was opened on the previous day with a deposit of £2,000. The difference, £1,334 with interest to the date of the writ, which was issued on 19th June 1934, represents the amount for which the bank sues, viz., £2,272 15s. The cheques were placed by the company to the credit of its current account and the overdraft was for the time being reduced accordingly. One Needham appears to have paid another large sum for shares and this, too, went to the credit of the current account of the company. The company, however, soon raised the overdraft to its previous amount. In August of the same year it suffered some loss by fire and its overdraft was still further increased. On 7th October 1926 a receiver went into possession under the bank's debentures. Apparently when the debt to the bank was paid little remained for ordinary creditors and nothing for shareholders. On 19th February 1927 and 20th May 1927, the bank wrote letters to the defendant asking him to close his account, upon which, except for the single payments in and out, he had never operated. On 1st June 1927 he replied :—"I cannot help at times reflecting on the influences that led up to that account, but a lesson learned at cost is perhaps the best of all lessons. I will close the account before the end of the year." From subsequent letters written by the defendant it appears that the reflections he says he was unable to avoid led him to believe that he and his father-in-law Cohen had been induced to purchase the shares in A. Gilbert Tomlinson Ltd. by the advice of the manager of the branch of the plaintiff bank where that company

had its overdrawn account, and that the advice had been given in order to provide the company with moneys to reduce its overdraft. His letters do not explain how this belief is consistent with the fact that the overdraft was allowed so soon to grow to its former amount. But it is evident that he felt strongly that he had a cause of complaint against the plaintiff bank. In answer to a letter calling his attention to his promise to close the account before the end of the year, he wrote to the manager a letter dated 14th December 1927 which said :—" I have decided, after serious consideration and after discussing the matter with several men that were interested, not to pay the balance on the Tomlinson Ltd. Coy. I want the bank to take action to force me to pay this amount so that the matter can be ventilated." He added that, when next in Sydney, he would call and see Mr. Dunlop, who was the manager by whose advice he considered that he had been misled. This he appears to have done, but the evidence does not disclose what passed between them. In the result nothing was done for nearly five years. Then, towards the end of the year 1932, a new manager having been appointed in the meantime, the defendant was called upon to reduce his liability. After some correspondence, the defendant had an interview with the new manager, apparently about Easter time 1933. The six years from the accrual of the bank's cause of action ran out in June 1932.

On 8th November 1933 the manager wrote to the defendant as follows :—" You will remember at your interview with our late general manager a few months ago, it was arranged that you would pay us £500, in reduction of your liability when your wool proceeds were received, and at the same time give us a promissory note for a further £500 to cover the balance. We shall be pleased if you will kindly advise us whether your wool has yet been sold."

In answer to this letter the plaintiff wrote the letter upon which reliance is placed as an acknowledgment. It is addressed to the manager and is dated 20th December 1933. It is as follows :— " Dear Sir,—I have to acknowledge receipt of your letter of the 8th November last, and regret that I have been unable to reply to it before. I remember my interview with your late general manager a few months ago when it was put before me by him that I should

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pay £500 in cash in reduction of my liability to your bank re the firm of A. Gilbert Tomlinson Ltd. and at the same time give you a promissory note for a further £500 in full liquidation of the debt, to this proposition I neither dissented nor agreed as under the peculiar circumstances of the matter having been in abeyance for nearly seven years I considered that your bank would make no further claim beyond the £2,000 that I had already paid. As it is probable that this letter may go before your board I desire to put before you my association with this firm from the beginning. My father-in-law, Mr. S. L. Cohen, showed me a prospectus issued by A. Gilbert Tomlinson which he informed me had been given to him by a Mr. Sindel of 'Cathcart House,' Castlereagh Street; they were asking for more shares to be taken up in this company. After reading the prospectus I thought that the venture was a good one and asked Mr. Cohen to get an interview with the directors, this he did and I met Messrs. Tomlinson, Rettie and Willis. It was proposed that I should take 5,000 shares and after a lengthy conversation I asked them could they give me a reference to any bank with whom the firm was doing business; they referred me to your late manager, Mr. Dunlop, and informed me that your bank was their bankers. I, in company with Mr. Cohen, had an interview with Mr. Dunlop, and asked him what sort of proposition he thought it was? He said it was a good one, to which I replied, if it is so good why don't you take shares in it yourself, and his reply was, 'How can I when I am their banker?' Up to this stage Mr. Cohen did not contemplate taking any shares, I then put it to him that I should take two-thirds of the £5,000 and he one-third, to which he demurred. I argued with him and said according to the prospectus we would get our money back in three years. Mr. Dunlop replied, 'Oh I don't think it's as good as that, but it's a real good little business.' Although after Mr. Dunlop's opinion I thought I would like to join the company, Mr. Cohen still refused to take his one-third share for the reason that he could not afford it not having the money available. Mr. Dunlop replied you need not find any money, deposit your scrip and you can draw on us for the full amount of your shares and it was arranged that I should pay £2,000 in cash and deposit my scrip for the balance of the money; I gave them a cheque

on my bank, the Bank of Australasia, head office. I made a condition that Mr. Cohen should be a member of the board of directors, which was agreed to; and it was not long before he discovered that the business was in a hopeless condition, in fact, it transpired that your board of directors had insisted upon the overdraft of A. Gilbert Tomlinson Ltd. being considerably reduced, and it was with this end in view that money must be obtained somehow. A Mr. Needham was also interviewed re taking 5,000 shares and having heard that myself and Mr. Cohen had taken 5,000 he got into touch with Mr. Cohen and asked his opinion as to the prospects of the concern. Mr. Cohen said he knew nothing, but he and myself had taken shares in view of what Mr. Dunlop had said as to the company being a good investment. Mr. Needham took 5,000 shares. Within seven months the business failed and your bank put in a receiver. In stock, among other things, were 1,300 tons of tapioca which cost £25 per ton, this was sold to, I understand, a client of your bank for £15 per ton, and he was given 12 months to pay, although some of the directors asked to be given the same terms so as they could recoup themselves in a measure for their losses, this was refused. Some thousands of pounds worth of screws (Nettlefolds) were sacrificed for a few hundreds and the whole of the proceeds went to your bank. I am of the opinion that at the time I took those shares the firm was not in a position to meet its liabilities. I can only reiterate that had it not been for the glowing terms spoken of the company by your late manager I would have had nothing to do with it, and for this reason I should be absolved from any further payment. Yours faithfully, N. C. Bucknell."

The rules of law and construction which govern the revival by acknowledgment of debts against which time has run or is running under 21 Jac. I., c. 16, sec. 3, have been fully explained in the House of Lords in *Spencer* v. *Hemmerde* (1). *Hepburn* v. *McDonnell* (2) contains an explanation to the same effect. To make it clear how they operate in the present case a very brief statement will suffice. An express promise in writing by the debtor to pay revives his liability. But the liability is revived only according to the tenor of the promise. If it is so expressed as to be

(1) (1922) 2 A.C. 507.

(2) (1918) 25 C.L.R. 199.

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conditional or subject to limitations, the conditions must be fulfilled before the liability becomes enforceable and the limitations must be observed. The letter upon which the plaintiff depends contains no express promise either conditional or unconditional, restricted or unrestricted. But, although a document relied upon as an acknowledgment contains no express promise, it may effect a revival of the debtor's liability if there is found in it a distinct admission of the debt. The law implies from an acknowledgment of the existence of the liability a promise to discharge it. Words clearly acknowledging that the writer is liable suffice to raise the implication. But although the promise is implied as an artificial legal consequence of the written admission of liability and is not the result of a search after the true meaning disclosed by the writing, yet if the document in which the admission occurs expresses an intention inconsistent with the making of such a promise or an intention consistent only with the making of a qualified promise, the implication will be rebutted or qualified accordingly. Thus, if the context includes a flat refusal to pay, the admission of liability cannot be made the foundation of an implied promise to discharge the debt. If the admission is accompanied by an express promise to which the writer has attached conditions or limitations in point of time or otherwise, an absolute promise cannot be implied from the acknowledgment of liability, because to imply it would involve an inconsistency, and the creditor obtains no more than a conditional or limited revival of the debt. In the same way if the document in which the admission of liability is found contains an expression of some qualification which is inconsistent with an unconditional or unrestricted promise to pay, the promise implied from the acknowledgment of the debt will be qualified by the condition or limitation expressed. Lord *Sumner* said in *Spencer* v. *Hemmerde* (1) :—" After all, what the promise effects expressly, the acknowledgment effects by implication. With an express promise, whether it is qualified or unqualified, absolute or nullified, and with an acknowledgment, the question must be the same ; if it is accompanied by other words we have to ask do they nullify or qualify the acknowledgment or simply leave

(1) (1922) 2 A.C., at p. 531.

it absolute ? " Again :—" The acknowledgment, which is the alternative to a promise, was intended to be a promissory acknowledgment as contrasted with a repudiatory one, an acknowledgment, which can be regarded as the foundation of a promise, and is not the expression of a denial of liability or a refusal to pay. It is to be observed that the word used is merely promise, not contract or obligation or assumpsit. The distinction is between saying 'It is my liability and an admitted liability,' and saying 'it was, and perhaps is, my liability, but it is disputed and will not be performed ' " (1). And :—" The whole of the words used must be considered to see (1) whether there is an acknowledgment at all; (2) whether that acknowledgment is limited or made subject to any condition, mere words of hope and fear, mere prayers for mercy, not amounting to such a limitation or negativing the technical implication of a new assumpsit to call the old one out of abeyance " (2).

The first step in applying the principles or rules stated above is to determine whether the letter contains a sufficiently clear or distinct acknowledgment of the existence of the liability. In my opinion it does. The references in the second paragraph to " my liability " and " full liquidation of the debt " are, I think, clear admissions of the liability. It is no doubt true that the statement in which they occur is, or purports to be, a narrative of what " was put before " the writer, the defendant. But in the course of stating or narrating what was laid before him, the writer clearly gives his own adherence to the description of the bank's claim as " his liability " and as a " debt." The admission of liability does not stop there. The fourth paragraph of the letter gives the defendant's account of the transaction with the bank out of which the present claim arose. The statement plainly implies and almost expressly says that the defendant did overdraw his account. When this is read with the last paragraph of the letter, the claim that, for the reason he has given, the writer " should be absolved from any further payment " must, I think, mean that he should be absolved from paying the amount of his overdraft. The admission of liability thus involved appears to me to be sufficiently distinct.

(1) (1922) 2 A.C., at p. 533. (2) (1922) 2 A.C., at p. 534.

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The next step is to interpret the letter for the purpose of determining whether it expresses a meaning inconsistent with a promise to pay, or a meaning inconsistent with an unqualified promise to pay. No such inconsistency appears to me to lie in the statement in the second paragraph that to the proposition made to him he neither dissented nor agreed, or in the reason given, namely, that in the circumstances of the transaction and after seven years he considered the bank would make no further claim.

The next four ensuing paragraphs are narrative only and express no intention of the writer. The narrative is, as the letter suggests, for the purpose of enabling the board of the plaintiff bank to consider the defendant's claim. The facts set out do not disclose any legal answer to the bank's demand, and, apart from the possibility of a cross-claim on the part of the defendant for damages, go only to the fairness or justice of the demand. The letter does not put forward or advert to the possibility of any such cross-claim and I read the final words, "for this reason I should be absolved from any further payment," as a statement that in justice the bank ought not to require a further payment in respect of a liability the existence of which is not denied. All this shows both an unwillingness on the part of the defendant to make a payment and an opinion that he ought not to be asked to do so, but I do not think that it is inconsistent with the promise to pay which the law imputes as a result of the acknowledgment of indebtedness.

Upon the question whether a qualification is contained in the letter, there is, perhaps, more to be said in the defendant's favour. The qualification suggested is a limitation in amount to £1,000. It is said that the entire letter is concerned with the arrangement alleged in the letter of the bank to which it replies; everything it says relates to a demand for £1,000 in full satisfaction of the debt, and, therefore, it would be inconsistent to imply a promise to pay more. But I do not think that this reasoning is valid. To control the promise artificially imputed as the result of the admission of the debt more is required than such a general intention gathered from the subject and purpose of the discussion in the course of which the admission is made. There must be a sufficient expression of a definite condition or limitation, and it must be attached to the

acknowledgment or to some promise displacing the promise otherwise implied, or there must be a refusal to pay beyond or outside the qualification or condition, or in some other way payment beyond or outside the qualification or condition must be repudiated.

In my opinion the decision of the Full Court is right and the appeal should be dismissed with costs.

EVATT J. *Spencer* v. *Hemmerde* (1) is the most recent decision of the House of Lords on the question of the sufficiency of a written acknowledgment of a debt to take the case out of the Statute of James. But the facts of that case were very peculiar, the essence of the debtor's letter being contained in his phrase, " It is not that I won't pay you, but that I can't do so." The debtor thereby used a formula which included an acknowledgment of the debt coupled with a further expression, not of *present* unwillingness to pay (It is *not* that I won't pay you), but merely of present inability to pay. The courts thus had to determine whether a *mere* statement of present inability, as distinct from present unwillingness, to pay was sufficient to " limit or negative " (per Lord *Sumner* (2)), " condition or narrow" (per Lord *Atkinson* (3)), " modify, supersede or displace " (per Lord *Wrenbury* (4)), the implication of a promise to pay the old debt. This is the basis of the actual decision in *Spencer* v. *Hemmerde*, Viscount *Cave* stating : " There is only a profession of present inability to carry out the promise which is implied " (5), Lord *Sumner* regarding the words as meaning only this : " When I can pay, who can tell ? " (6), Lord *Wrenbury* paraphrasing the letter as meaning : " I promise to pay you but I cannot see any prospect of paying you at present " (7), and Lord *Atkinson* saying : " The letters imply a willingness to discharge it " (the obligation) " *at once* if he possessed the means of doing so " (3).

It is significant that even in *Spencer* v. *Hemmerde* (1) there was an acute difference of opinion, distinguished judges taking the view, which did not prevail, that a statement of present inability to pay would of itself convey to most intelligent creditors that, whatever the debtor might be regarded as promising to do at some future

(1) (1922) 2 A.C. 507.
(2) (1922) 2 A.C., at p. 534.
(3) (1922) 2 A.C., at p. 518.
(4) (1922) 2 A.C., at p. 537.
(5) (1922) 2 A.C., at p. 517.
(6) (1922) 2 A.C., at p. 536.
(7) (1922) 2 A.C., at p. 539.

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time, he was certainly not promising to do at present what was in fact an impossibility. And Viscount *Cave* did not overlook the force of such reasoning (1), which had commended itself to the Court of Appeal.

The decision only shows that it is not impossible for a debtor's letter to convey the meaning, "I promise to pay you your debt at the present moment, but please remember I am quite unable to discharge it at the present moment." The improbable possibility became actual in *Spencer* v. *Hemmerde* (2) owing to the debtor's own precision of statement. Of course if a debtor adds to a statement, "I cannot pay the debt at present," the words "I will pay it as soon as I can," he is saved from being deemed to be promising to pay it at once (*Tanner* v. *Smart* (3); *Spencer* v. *Hemmerde* (4)). Similarly, in my opinion, if the debtor's letter says: "I promise to pay you, but at present I am unwilling to do so," I also think that the debtor cannot be sued as on a present liability to pay. The last example covers the present case.

Difficult cases will arise, but in my opinion the importance of the present appeal is that the Full Court has extended the doctrine of acknowledgment to a point which is not consistent with established principle. In the judgment of the Full Court, an analogy was suggested between an acknowledgment sufficient to take the case out of the Statute of Limitations and the writing of a memorandum with one intention which happens to be also an "unintentional by-product of satisfying the Statute of Frauds" (per *Sargant* J., *Daniels* v. *Trefusis* (5)). In my view the analogy is dangerous, because, in the instance of the Statute of Frauds, the intention of the writer is utterly immaterial, whereas in the case of the written "acknowledgment" the intention is very material, although it has to be deduced from the words used. In the latter case, it is extremely improbable that, if the writer's present intention is not to pay the debt, he will fail to express such intention with sufficient clearness to convince the average intelligent creditor.

In the present case, the facts are simple. In 1927 the defendant owed the plaintiff bank about £1,400 inclusive of interest. On June 1st, 1927, demands were made by the bank for payment, but

(1) (1922) 2 A.C., at p. 517.
(2) (1922) 2 A.C. 507.
(3) (1827) 6 B. & C. 603; 108 E.R. 573
(4) (1922) 2 A.C., at p. 536.
(5) (1914) 1 Ch. 788, at p. 799.

the defendant, not obscurely, hinted that the bank had treated him unfairly. Upon receipt of a further demand, the defendant, on 14th December 1927, flatly refused to pay, repeated his suggestion of unfair or unjust treatment, and added: "I want the bank to take action to force me to pay this amount, so that the matter can be ventilated." The bank wrote in 1927, regretting the defendant's attitude, but, for reasons best known to it, proceeded no further with its claim, and allowed the debt to remain uncollected until many years had elapsed.

Having regard to the later correspondence, it may be observed that the defendant's letter of December 14th, 1927, insisting upon the matter going to court so that he could ventilate his grievance, is inconsistent with the theory that he was merely uttering a complaint. It rather suggests that the defendant believed that he had a counterclaim of some kind, which would enable him to present to a court a case based on legal grounds.

It was December 1932, before the bank made a further demand on the defendant, its claim having increased in the meantime to about £2,100. In January 1933 the defendant attended a conference with the bank's general manager.

Next come the two vital letters, one of November 8th, 1933, from the bank to the defendant, and the second, on December 20th, 1933, from the defendant to the bank. The defendant's letter is relied upon as a written acknowledgment sufficient to imply a promise by the defendant to pay immediately the total indebtedness which by June 19th, 1934, the date of the issue of the writ, had amounted to over £2,200.

The letter of 8th November 1933 is of great importance because it is in relation to it that the subsequent letter must be construed. It is quite erroneous to assert that the court is so confined to the terms of the alleged written acknowledgment that it must ignore the prior correspondence. The contrary is asserted in *Spencer* v. *Hemmerde*, (1) Lord *Sumner* stating that "there are . . . connections, in which the debtor's intention as a matter of fact may be essential, e.g., where, in order to understand his written words, the circumstances under which they were written are material".

(1) (1922) 2 A.C., at p. 526.

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Evatt J.

In my opinion the letter of December 20th cannot be understood except by reference to the letter of the bank dated November 8th. The bank's letter had said that, at the conference between the parties, they had come to a final settlement by which the indebtedness of the defendant (at the time over £2,100) would be discharged by the defendant's giving the bank £500 so soon as the latter received the proceeds of his wool clip, the defendant also giving a promissory note of £500 "to cover the balance." The total liability of the defendant was thus to be discharged by paying £1,000, a reduction of over £1,000 from the then amount of the debt.

It is clear that, after sending the above letter, the bank's utmost expectations were to receive £1,000 in full discharge of the total indebtedness of over £2,000. And the letter proceeded to ask the defendant whether his wool had been sold.

The defendant's reply of December 20th has now to be interpreted. It gave no answer to the specific question, but it dealt with the contents of the earlier letter. The defendant mentioned the interview at which settlement of the matter had been discussed, and, in the course of such reference, he set out the bank's proposal in the following terms :

> "I remember my interview with your late general manager a few months ago when it was put before me by him that I should pay you £500 in cash in reduction of my liability to your bank re the firm of A. Gilbert Tomlinson Ltd. and at the same time give you a promissory note for a further £500 in full liquidation of the debt."

It is contended by the defendant with some force that all words occurring after the phrase "put before me by him that" merely express in indirect narration what the bank manager had said. I do not think that the contention need be examined more closely, because, even if the words quoted should be taken as an acknowledgment by the defendant of his indebtedness to the full amount thereof, the very method of acknowledgment by reference to the suggested settlement of the dispute also imports quite clearly the defendant's present unwillingness to pay the full indebtedness—such unwillingness being the very basis on which the correspondence was proceeding. In other words, this part of the letter means—putting it least favourably to the defendant : "I owe you £2,100, but, of course, you know as well as I do that I am unwilling to pay, as indeed I have previously

refused to pay, the full amount; now you assert that I am willing to pay £1,000 in full settlement, and have actually agreed to do so." So paraphrased, it is quite impossible to regard the acknowledgment as importing a promise to pay in full and at once.

The rest of the letter makes the meaning even clearer. The defendant treats the bank's offer of settlement as neither accepted nor rejected by him. He has dealt with the manager, but behind the manager is the board. He wants the board itself to consider all the facts of the case which he then sets out. The facts set out suggest conduct on the part of the bank's officers which might enable the defendant to bring a cross-action against it. In conclusion the defendant blames the company's manager for serious losses, and he contends: "For this reason I should be absolved from any further payment." In my opinion the important word in this last phrase is the word "any." The bank, though a creditor for £2,100, is only asking for £1,000. The defendant says: "You should not ask me even for that."

In the circumstances I do not think it is possible to read the letter as meaning "I admit I owe you £2,100; I am willing to pay it all and at once, but please be merciful to me." On the contrary, it says:—"Originally you claimed £2,100; you and I are perfectly aware that I am unwilling to pay that sum. As to the particular compromise payment of £1,000 which you suggest, you should not ask me to pay even that, and I justify my request by referring you to the conduct of your officers in this transaction."

In order to succeed and retain its judgment for the full amount, the bank must show that the letter imports, by reason of an unqualified acknowledgment of the debt, a present promise to pay all of it. Not only has it failed to do so, but, in my opinion, every word in each of the two material documents contradicts such an interpretation.

In my opinion, the judgment of nonsuit entered by *Stephen* J. was right, and the appeal should be allowed.

McTIERNAN J. The letter with which this appeal is concerned and the facts which explain it are fully set forth in the judgments of my colleagues. I propose merely to state briefly my reasons for the view that the appeal should be dismissed.

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McTiernan J.

I have no hesitation in finding in the terms of the letter a clear admission of liability to the respondent. Where a document contains a clear admission of a statute-barred debt the admission is taken in law to imply a promise to pay the debt and will be so treated in an action to recover the debt unless the other terms of the document are inconsistent with such an implication. A promise to pay cannot be implied where the terms of the document deny that the defendant has any intention of discharging the debt or if they contained only a conditional promise to pay the debt (*Spencer* v. *Hemmerde* (1)).

While the letter clearly admits the appellant's liability there is nothing in its terms to prevent the promise to pay from being implied. There is no refusal, express or implied, to pay : it does not contain a promise to pay only on some condition or to pay any amount less than the debt. By stressing some only of its terms some slight ground may be found for the view that it contained at most a limited promise. But when the letter is read as a whole it will be seen that it is really a complaint by the appellant that he should be called upon to pay the moneys claimed and a statement of the reasons for that complaint founded on what seemed to him to be fair dealing. The letter contains nothing to rebut or qualify the promise to pay which is implied from the appellant's clear admission of his liability.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs. Pursuant to the appellant's undertaking given as a condition of obtaining leave to appeal order that the order of the Supreme Court for a new trial be discharged and in lieu thereof judgment in the action be entered in the Supreme Court for the plaintiff for the amount claimed in the writ together with interest at the rate claimed in the writ from 19*th June* 1934 *to the date of judgment.*

Solicitors for the appellant, *Jennings & Jennings.*

Solicitors for the respondent, *Dibbs, Crowther & Osborne.*

J. B.

(1) (1922) 2 A.C. 507.