A

TREATISE

ON THE

LIMITATION OF ACTIONS,

AS AFFECTING

Mercantile and other Contracts,

WITH

THE IMPORTANT CHANGES THEREIN

OCCASIONED

BY SEVERAL LATE DECISIONS,

AND BY

LORD TENTERDEN'S ACT, 9 GEO. IV. C. 14.

WITH

Practical Observations

ON THAT AND OTHER RECENT STATUTES REQUIRING WRITTEN ENGAGEMENTS,

AND

RESPECTING VARIANCES.

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OF GRAY'S INN.

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TO

THE RIGHT HONOURABLE

CHARLES LORD TENTERDEN,

LORD CHIEF JUSTICE OF ENGLAND,

&c. &c. &c.

THIS TREATISE

IS

(BY HIS LORDSHIP'S PERMISSION)

MOST RESPECTFULLY DEDICATED

BY HIS OBLIGED AND OBEDIENT SERVANT,

THE AUTHOR.

PREFACE.

THE late decisions on the Statute of *Limitations*, 21 Jac. I. c. 16, and the provisions of the new Statute, 9 Geo. IV. c. 14, (founded on a bill brought into Parliament by Lord *Tenterden*, the present Lord Chief Justice of *England*,) having worked great and important changes (more or less obvious) in the Law respecting the Limitation of Actions in *mercantile* and other contracts, (a branch of the law affecting almost every person in *England* and *Ireland*), the Author was induced, in the course of his professional duties, to make this the subject of his particular consideration, and the result of his labours is now offered to his profession and the public.

The *Common Law* respecting actions for debts and demands of long standing is first treated of, and then the reason of the non-existence of a Statute of *Limitations* of personal Actions till 1623, in the reign of King *James* I. which does not appear to have been before fairly accounted for.—The Statute, 21 Jac. I. c. 16, has been commented upon and the Actions included in it (1).

(1) Chap. I.

The new Statute, 9 Geo. IV. c. 14, generally speaking, requires the promise or acknowledgment, to take a case out of the Statute of Limitations, to be in *writing*; without such promise or acknowledgment the Statute, 21 Jac. I. c. 16, would be a bar to any action unless the case be brought within some of the *exceptions* in that Statute, or in the new Statute, many of the exceptions (by the operation of the new Statute) therefore become of considerable importance; *and cases are now likely frequently to arise upon them.*

The exceptions are—1st. That relating to Specialties (1), &c. 2d. The important and very difficult exception relating to Merchants' Accounts (2); which is considered much in detail; it was intended, and may now be so construed as to afford considerable protection to the commercial interests of the country (3). 3d. The exception in favour of *Infants* and persons under disability (4); and 4th. The exception allowing a new action after error, &c. (5).

The times limited for bringing actions are next considered, and when they begin and when they end, and the various constructions given from time to time to the Statute of *Limitations* in favour of just debts, by permitting the Plaintiff

(1) Chap. I.
(2) Chap. II.
(3) I am informed a similar privilege was allowed to merchants by the old French law.
(4) Chap. III.
(5) Chap. III.

(notwithstanding the strong words and intention of the Statute of *Limitations*, 21 Jac. I. c. 16, § 3,) to recover, if he could bring forward the proof of a promise, or even the *most trifling* acknowledgment within six years, to *evade* the Statute or take the case out of its provisions (1).

The late highly important decisions on promises and acknowledgments, overruling many prior cases and showing the inclination of the Courts at present "to bring back the construction so as to give effect to the Statute and the (real) intention thereof," are also fully stated and considered (2).

Our more prudent ancestors, both before and after the Statute of *Limitations*, 21 Jac. I. c. 16, appear to have generally obtained from their debtors *securities* for their debts; these, it is evident, would not have been given till after accounts had been fairly examined and the balance agreed to by both parties; but when it was held that acknowledgments even of the *most trifling* nature were sufficient to take the case out of the Statute, then a more formal security was considered unnecessary by both creditors and debtors, and the interests of both frequently suffered by the defects and uncertainty of the parol evidence of transactions of long standing, and particularly respecting the amount of the sum due and the promise or acknowlegment; and, no doubt, "great reason

(1) Chap. IV. (2) Chap. V.

given for perjury," a crime which, even so early as the reign of Queen *Elizabeth*, was considered to have been frequently committed (1); and was, no doubt, (and it is a melancholy reflection,) one principal reason of the new Statute, 9 Geo. IV. c. 14, with the Statute of Frauds, 29 Car. II. c. 3, and other important Statutes, requiring engagements to be in writing, "which cannot err." The new Statute requiring (as observed before) the promise or acknowledgment to take the case out of the Statute of Limitations to be in writing, it will have a highly beneficial effect, if it should lead to the good old practice of taking securities with all its concomitant advantages.

After some observations on securities (2), the new Statute is considered much in detail in two Chapters (3); and then the mode of taking advantage of the Statute of Limitations by *plea*, &c. (4).

The remainder of this Book is dedicated to *practical Observations on several recent Statutes important to the Common Lawyer*, including the rest of the Statute, 9 Geo. IV. c. 14, § 5, of Promises in case of Infancy (5); § 6, of Fraudulent Representations of Character and Credit (6); § 7, of the extension of the Statute of *Frauds*, 29 Car. II.

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(1) See the resolution of the Judges of England, *Slade's case*, 4 Rep. 95, *post*, xvi. 5.
(2) Chap. VI.
(3) Chap. VI. and VII.
(4) Chap. VIII.
(5) Chap. IX.
(6) Chap. X.

c. 3, § 17. (1), to certain *Executory* Contracts. The other Sections follow—§ 8, (concerning Stamps); § 9, (Scotland); and § 10, fixing the time when the new Statute, 9 Geo. IV. c. 14, was to commence and take effect, which has given rise to questions seriously affecting the interest of creditors and debtors, how far the Statute be retrospective, not only as to the *remedy*, but, in some respects, as to the *contract* and prior vested right of the creditor (2); the Law respecting new promises by *Bankrupts* and *Insolvent Debtors*, including some recent Statutes little known to the profession. Lastly, the important Statute, 9 Geo. IV. c. 15, (another of Lord *Tenterden's* Acts,) to prevent a failure of justice by *variances* (3). The method generally adopted has been, *like the ancient readings*, to treat of the Common Law, or Law before each of these Statutes, and the change made by the Legislature, with a Commentary.

No pains have been spared to render the Book useful, and every effort has been made to put the profession in possession of all the recent cases that could be obtained from the printed books, and many from MS. notes, upon the important subjects treated of in these pages.

1, Pump Court, Temple, 1*st November*, 1829.

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(1) Chap. XI.
(2) Chap. XII.
(3) Chap. XIV.

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NAMES

OF THE

CASES REFERRED TO.

* 4 Rep. 95. 1 MS. Rep. *temp. Eliz.* 130. S.C. (*this MS. is in my possession.*)

A

TREATISE

ON THE

LIMITATION OF ACTIONS.

CHAPTER I.

OF THE COMMON LAW, BEFORE THE STATUTE 21 JAC. 1, C. 16, AND OF THAT STATUTE.

AT Common Law there was not any limitation to actions on contracts, though with respect to wrongs the maxim *actio personalis moritur cum persona* (1), confined the action to the life of the parties: for it is a principle of the common law, that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person by whom and to whom the wrong was done.

Lord *Holt* and Lord *Ellenborough* say expressly, that at common law a man might bring his action at any

(1) See the late Mr. Serjeant *Williams's* excellent note on this maxim. *Wheatly* v. *Lane*, 1 Saund. R. 216.

time (1); and the latter adds, the suitor had an unlimited right of suit till restrained by the Statute of Limitations; it was a maxim, that "a right never dies;" and it was urged against the Statute of Limitations, that it had taken away the common law.

It appears, both from the testimony of Lord *Coke* (2) and from a review of the cases in the old books, that anciently personal actions were seldom brought, and indeed demands to the amount of forty shillings, (which would include most of the demands not secured by the prudence of our ancestors by single bill, bond, or statute,) were required to be brought in the county and other inferior courts, so that in times when little credit was given there would be very few actions on simple contracts in the superior courts, and it is probable, that persons living in the same neighbourhood, in which there was little change, from the difficulty of travelling from place to place, and still more of removing families, would frequently meet, and demands would be more regularly settled or secured than they are at present.

In cases of simple contract, the ordinary action formerly was the action of *debt;* and though there were no limitations of time at common law, yet our ancestors had adopted an expedient by which the action was kept within due bounds, so that no statute of limitations was considered to be necessary (3) so long as the subject re-

(1) *Blackmore* v. *Tidderley*, 2 Ld. Raym. 1100. 2 Salk. 423. *Williams* v. *Jones*, 13 East R. 449. But see Brac. lib. 2, f. 428, *contra*.

(2) 2 Inst. 95.

(3) Our ancestors had, before the 21 Jac. I, frequently resorted to statutes of limitation, where they found it necessary, as *Merton*, 20 Hen. III. c. 8. *West.* 1st, 3 Edw. I. c. 39. *Winton*, 13 Edw. I. st. 2. c. 1. 13 Edw. I. st. 2. c. 6. 1 Rich. II. c. 12. 4 Hen. VII. c. 24. 7 Hen. VIII. c. 3. 32 Hen. VIII. c. 2. 27 Eliz. c. 13. 31 Eliz. c. 5.

sorted to that action only: this was by the *wager of law*, by which the defendant was allowed to plead, that he did not owe the debt, and rely upon what was termed his law, and (for proof under the plea) was allowed to take an oath that he owed not the debt nor any penny thereof, but, in addition, he was required in confirmation of his oath to bring with him eleven persons (1) of his neighbours, to avow upon their oaths, that in their consciences he said truth.

Wager of law did not lie where there was a specialty or deed to charge the defendant, but when it grew by word, so as he may have paid or satisfied the party in secret, whereof the defendant had no testimony of witnesses (2); or as Sir William Blackstone says (3): "For our ancestors considered that there were many cases, where an innocent man of good credit might be overborne by a multitude of false witnesses, and therefore established this species of trial by the oath of the defendant himself; for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and for ever acquitted of the debt or other cause of action."

This was the only mode of trial originally in courts-baron, and no doubt prevailed much in the county as well as in the superior courts (4).

There are several reasons given for the wager of law; in a celebrated case (5) *Hatsell*, Baron, says "it lies not where there is a specialty or deed to charge the defendant; but only where the cause of action is a bare parol transaction, which, as it may create a duty, yet it is such

(1) *Scd quære* the number; see *King* v. *Williams*, 4 Dowl. & Ryl. 3.

(2) Co. Litt. 295 (a).

(3) 3 Bl. Com. 341.

(4) 2 Inst. 142. Per *Littledale*, J. *Dyson* v. *Wood*, 3 Barn. & C. 453. 5 Dowl & R. 295. S. C.

(5) City of *London* v. *Wood*, 12 Mod. 669.

a duty as may be discharged in the same manner it is contracted; the presumption of law is, that no one for worldly consideration will forswear himself. It is an argument, that the matter is of no great value, that the plaintiff did not take care to have better security for his debt than the slippery memory of man and the uncertainty of a verbal contract, so that since the lien or tie is so light, it is no wonder the law should lightly discharge it. Another reason for the wager of law is in 2d Inst. 45 (*b*): "That the defendant might have witnesses of his discharge who might be dead, as none can keep his witnesses alive."

Lord Chief Baron *Gilbert* says, "pleas were tried by the law-wager on debts upon simple contract, for they thought if the plaintiff trusted to the honesty of the defendant in lending his money without specialty, he ought to trust his conscience in the discharge" (1).

I have been thus particular in explaining the reasons of law upon which the wager of law was founded, because it does appear to me to account for the non-existence of a general statute of limitation in personal actions till the reign of James I.; and the books attest what a fear there was in all cases where the wager of law (called in the old cases the birthright of the subject,) was allowed, that the defendant would wage his law: it is by no means improbable that two effects might follow from this; 1st. That creditors might obtain a single bill or other specialty or statute for their debts; and 2dly. That stale demands would be thus kept out of courts of justice; and this accounts for the small number of cases reported in the old books, where suits were brought for old debts.

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(1) Gilb. Com. Pleas, Introduction.

To the allowance of the wager of law there were many exceptions; amongst others, it did not apply to the Court of Exchequer, though the privilege was considered of so much consequence that an application was made by the Commons in the reign of King Edward the Third, that a man might have his wager of law in that court, but it was not granted (1). Secondly, the wager of law was not allowed in an action on the case; and though the law presumed, that no man would forswear himself for any worldly thing, "yet men's consciences," Lord Coke says (2), "did grow *so large*, especially in this case passing with impunity, (for no indictment for perjury lies in wager of law,) that suitors choose rather to bring an action on the case upon the promise, than an action of debt;" the decision of *Slade's case* in the 44 Eliz. in which it was held by the twelve judges, after repeated arguments and great consideration, that the plaintiff had his election to bring either assumpsit, or debt upon simple contract (3), had a very important effect.

Lord Coke observes (4), "it was (thus) in the election of the party either to charge the defendant by witnesses, if he will, and to oust him of his law; or to refer it to the defendant's oath." "*It was considered good* (the judges say in one of their resolutions in *Slade's case*,) *in those days* (44 Eliz.) *in as many cases as may be done in the law, to oust the defendant of his law, and try the same by the country, for it otherwise would have been a great reason of perjury.*"

At a time when the whole of the County Courts in England are intended to be turned into Courts of summary

(1) Manning's Exchequer Pr. 530, (*n*).

(2) Co. Litt. 295. *Slade's case*, 4 Rep. 95.

(3) *Slade's case*, 4 Co. Rep. 91. *Vide Edgecomb* v. *Dee*, Vaugh. 101, *contra*.

(4) *Slade's case*, 4 Rep. 95.

jurisdiction, and the trials are to be by the always questionable testimony of the parties, it may be worth while to remember this resolution of the judges of England in Queen Elizabeth's time, when there was great complaints of perjury; and no more certain mode can be adopted of still more increasing perjury, than trying causes by the testimony of parties, which testimony has been justly rejected by our superior courts (1).

The decision in *Slade's case*, though made by the twelve judges, did not meet with universal approbation. In the 22 Charles II. Lord Chief Justice *Vaughan* (2) speaks of it, "as that illegal resolution in *Slade's case*, founded upon reasons not fit for a declamation, much less for a decision at law, by which the natural and genuine action of debt upon a simple contract be turned into an action on the case, wherein a man is deprived of waging his law."

Among the abuses of the law in 1661 was stated to be the taking away the wager of law upon contracts (3).

Slade's case was one of great favour to plaintiffs, after which the action of *assumpsit* became, and is, very general (4), and ultimately the Statute of Limitations became necessary. "The reason of the Statute of Limitations, 21 Jac. I. c. 16, is," says Lord Chief Baron *Gilbert*,

(1) See the excellent observations of the present Attorney-general, Sir *James Scarlett*, on the testimony of parties. 18 Hans. Parl. Debates. The wishes of litigant parties are well described by him; the creditor looks for expedition in the process, certainty in the law, despatch in the decision, facility in the execution; the debtor, on the other hand, naturally seeks for caution, discussion, delay; it was impossible to satisfy both. In consulting the eagerness of the plaintiff for an expeditious termination, it was necessary to afford to the honest defendant some time for reasonable preparation, deliberate discussion, and security from oppression, and it may be added particularly in a court without appeal.

(2) *Edgecomb* v. *Dee*, Vaugh. 101.

(3) Jenk. Rep. ix. 1 ed. 1661.

(4) Per Buller, J. *Walker* v. *Witter*, Dougl. 6.

"because the debt must be supposed to be paid if the action be not brought within six years, for witnesses may die, or change their abode, so that it may be a very hard thing to prove the payment of the debt; and since the law-wager is avoided by giving the *assumpsit*, it is convenient to limit a time, in which if the debt was not demanded payment should be supposed" (1).

I am happy in being supported by the opinion of Lord Chief Baron *Gilbert*, that the wager of law prevented the passing of the Statute of Limitations till after the decision in *Slade's case*, in the 44 Eliz.

In the present age, when the wager of law is esteemed so lightly, it is only doing justice to this ancient mode of trial, to consider it as for many hundred years preventing unjust demands, and inducing persons to urge a settlement of accounts, and to obtain proper securities.

In cases where stale demands were proceeded for, and the wager of law was not allowed, questions must always have arisen, (as it appears to me,) how far such demands, under the peculiar circumstances, might have been previously satisfied, and rules, somewhat similar to those established as to the presumption of payment in actions of debt on bonds, must have always been (as it appears to me) acted upon, at least in flagrant cases of stale demands (2), only it would be left to the opinion of the judge in each particular case to say, how far the demand might be intended or presumed to have been satisfied, and much litigation would no doubt arise from the want of some uniform rule. Lord *Bacon* complains of the multiplicity of suits in his time (3).

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(1) Gilb. Evid. 158.

(2) See *Williams* v. *Jones*, 13 East R. 439, the question there was a question of law on a demurrer.

(3) 2 Lord Bacon's Works, 4to. 542. Proposition to King *James* the First, by Sir *Francis Bacon*, then attorney-general and one of the privy council.

It is said by a very eminent judge, (the late Mr. Justice *Buller*,) "that it is manifest the doctrine of twenty years presumption was first taken up by Lord *Hale* (1), who only thought it a circumstance from which a jury might presume payment," in which he was followed by Lord *Holt*, C. J., and by Lord *Raymond*, C. J. in the case of *Constable* v. *Somerset* (2), in which that learned judge says, "the presumption of money being paid, which was due on bond, if it were put in suit after twenty years standing, was not an old but a new doctrine, which had been introduced in Lord Hale's time."

I have met with an early case in which it was ruled, not only that a bond should be intended after thirty-five years to have been paid, but it was said *the usage was so in such cases;* the case (which may have escaped notice) was ruled in 8 Car. I. by *Whitfield* (3), Serjeant, at York, (ten years after the statute 21 Jac. I. c. 16;) it was an action of debt upon bond for £440 against the defendant, as executor of one Cooper; the bond was dated thirty-five years since, and no suit commenced or interest paid during all this time, and for these reasons it was held by good construction, that this bond shall be intended to be paid, and the judge said, the usage was so in such cases, and the jury found accordingly (4).

In the case ruled by Lord *Holt*, C. J. (5), he said,

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(1) Per Buller, J. *Oswald* v. *Legh*, 1 Durnf. & E. 271. Lord Hale was made a judge in 1653, Woolrych, Series, 47.

(2) Hil. T. 1 Geo. II. at *Guildhall*, 1 Durnf. & E. 271.

(3) *Sir Ralph Whitfield* never was elevated to the bench, but he frequently took cases at the assizes at *York;* he was afterwards prime serjeant to King *Charles* the First, and was of Teuterden in the county of Kent;—he was knighted at Hampton Court, 4th October, 1635. 1 Clutterbuck's Hertfordshire, 190.

(4) *Shellitoe* v. *Horsefall*, Clayt. Rep. 102.

(5) *Anonymous*, 6 Mod. 22, M. 2 Ann.

"that if a bond was of twenty years standing, and no demand proved, or good cause of so long forbearance shown, he would intend it paid on *solvit ad diem*, and *a fortiori* in case of a note, if it be any considerable sum" (1).

The rule is stated thus in the *Irish* Statute, 8 Geo. I. c. 4, "it may be reasonably presumed, that debts due by the space of twenty years or more, which have not been demanded, nor any suits prosecuted for the recovery thereof, or any interest or sums of money paid or received on account thereof, by the space of twenty years past, are satisfied and paid, though no legal discharge can be proved, nor proof made of the payment;" and by sect. 2, "if any person shall commence or prosecute any action or suit either at law or in equity in *Ireland*, for the recovery of any debt due by single bill, or bond under hand and seal, or by judgment, &c. where no suit hath been prosecuted for the recovery thereof, nor any interest of money hath been paid, or other satisfaction made on account thereof, within the space of twenty years before the commencement of such suit, the defendant may plead payment."

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(1) See also the early cases in Chancery. *Coles* v. *Emerson*, 1 Chan. Rep. 42. *Geofry* v. *Thorn*, 1 Chan. Rep. 47, and Vin. Abr. tit. *Length of Time*, and *Blackett* v. *Wall*, in the Court of Pleas at Durham, Durham Ass. 1812. MS. where the plaintiff recovered in an action on a judgment of forty-eight years standing, the defendant's great poverty being proved; and *Wood*, Baron, who tried the cause, refused a new trial; and see *Christopher* v. *Sparke*, 2 Jac. & W. 233, and of *Wynne* v. *Waring*, (cited in *Fladong* v. *Winter*, 19 Ves. jun. 196.) *Duffield* v. *Creed*, 5 Esp. R. 52. *Cooper* v. *Dame Turner*, 2 Stark. 497. *Bigg* v. *Roberts and another*, 3 Carr. & P. 43. And see Tidd's Prac. 18. In *Wynne* v. *Waring*, the obligor on an old bond was known to have been distressed during the latter part of his life, having no property but real estate covered with mortgages, and the Master of the Rolls, after having directed an action on an issue, the jury upon these and other circumstances, though fifty years had elapsed, found the presumption of payment was rebutted.

To impose diligence and vigilance in him that was to bring the action, and by which means old suits might be avoided, *nam leges vigilantibus non dormientibus subvenient* (1), and to relieve persons who might have paid, and whose vouchers may have been lost or destroyed (2), and witnesses dead, in 1623 was passed the statute 21 Jac. I. c. 16, intituled "An Act for the Limitation of Actions, and for avoiding Suits at Law;" and by sect. 3 it was enacted, "That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, *all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrears of rent*, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of that Session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) the said *actions upon the case*, (other than for slander,) *and the said actions for account*, and the said actions for trespass, *debt*, detinue, and replevin, for goods or cattle, and the said action of trespass *quare clausum fregit, within three years next after the end of that Session of Parliament, or within six years next after the cause of such actions or suit, and not after;* and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of that Session of Parliament, or within four

(1) 2 Inst. 95, 96. Bac. Abr. tit. Limitations, E. 5.

(2) *King* v. *Morrall*, 6 Price Exch. Rep. 26.

years next after the cause of such actions or suit, and not after; and the said actions upon the case for words within one year after the end of that Session of Parliament, or within two years next after the words spoken, and not after."

The framers of this statute have not escaped censure. Lord C. J. *Bridgman*, in *Benyon* v. *Evelyn* (1), says, "the statute 21 Jac. I. c. 16, has been ill framed, or much abused in the print;" and it must be acknowledged that there are several inaccuracies in the statute; the actions included in the third section it clearly appears were intended to be twice enumerated; and the action *sur trover* is mentioned in the first instance, but omitted in the second; it has however been held, that actions of *trover* are implied under the general terms of actions on the case (2). And in § 7, where the same actions are meant to be included, actions *sur trover* are mentioned, but actions on the case are omitted; it has however been held, that actions on the case are included under the term actions of trespass; and that though there are particulars words in the enacting clause which relate to the action on the case, yet this proviso in § 7 restrains the severity of that clause, and restores the common law, and so is to be taken favourably; and this action, being within the same reason with other actions therein mentioned, ought also to be within the same remedy (3). It is singular, that the proviso in favour of infants, &c. appears to have been omitted in the original bill, and

(1) O. Bridgman Rep. 356.

(2) *Swayn* v. *Stephens*, Cro. Car. 245.

(3) *Benyon* v. *Evelyn*, O. Bridg. Rep. 356. *Chandler* v. *Villett*, 2 Saund. 121, and Mr Serjeant *Williams'* note, and *Crosier* v. *Tomlinson*, 2 Mod. 71. *Anonymous*, Fitzgibb. 81.

is now annexed to the original act in a separate schedule (1).

Although the *Irish* Statute, 10 Car. I. sess. 2, c. 6, has the same clauses as the stat. 21 Jac. I. c. 12, with some trifling verbal alteration, yet the evident mistakes in the latter as to the action of *trover* was not corrected in the general clause, nor the omission of the action on the case in the exception relating to infants, &c.

The Statute of Limitations, 21st Jac. I. c. 16, does not appear at first to have been received with universal approbation. It was argued in one case, that the statute abridged the common law, taking away from the party his just and true damage, and therefore should be taken strictly (2). And in another, that the statute tolled the common law, and should not be extended by equity (3); and that this statute is in the nature of a penal law, because it restrains the liberty which the plaintiff has by the common law to bring his action when he will, and must therefore be construed beneficially for the plaintiff (4); but Lord *Holt*, C. J. said, the Statute of Limitations was one of the best of statutes, and the pleading thereof no disparagement to any body. *Wilmot*, J. said, it was a noble beneficial act, *interest reipublicæ, ut sit finis litium* (5). It has also been said, that the Statute of Limitations (on which the security of all men depends) is to be favoured (6). Lord *Kenyon* was a strong advocate for the uniform con-

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(1) See the late edition of the statutes, 4 vol. 1223, and *Benyon* v. *Evelyn*, O. Bridg. Rep. 356; q. was not the Statute of Limitations penned by Lord Bacon?

(2) *Harwood* v. *Lowe*, Palm. R. 530.

(3) *Sherwin* v. *Curtwright*, Hutt. 109.

(4) *Farrington* v. *Lee*, 1 Mod. 269.

(5) *Green* v. *Rivett*, 7 Mod. 12. *King* v. *Walker*, 1 Sir W. Black. Rep. 287.

(6) *Per curiam*, *Green* v. *Rivett*, 2 Salk. 422

struction of the Statute of Limitations, which were, he said, of the greatest importance, as they are statutes of repose (1). Although it will now and then prevent a man from recovering an honest debt, yet it is his own fault he postponed his action so long (2). The statute may in one or two cases, through the laches of the party, have barred a just demand, yet it has the constant effect of shutting out unjust claims, founded on experiments made to take advantage of carelessness or misfortune, on the chance of vouchers being lost or mislaid; great care has also been taken by the courts to prevent its working injury (3); in answer to what may be said to have been done by the operation of the statute, infinite injustice has been prevented by it (4). The object of the statute, the reporter *Saunders*, argued (5), intended to limit those actions only which arise upon a bare contract without any writing under seal, the prosecuting of which actions, a long time after they first accrued, was often a great occasion of perjury in witnesses, and oppressive to the defendants.

This statute was passed to protect persons who were supposed to have paid the debt, but to have lost the evidence of payment (6).

It is not proposed to give a general treatise on the Statute of Limitations, 21 Jac. I. c. 16, but only such parts of it as relates to contracts.

It has been held the rights of the crown are not affected by the Statute of Limitations, the *king* not being named

(1) *Doe* d. *Duroure* v. *Jones*, 4 Durnf. & E. 308.

(2) 1 Saund. Rep. 64 a, n. 6, (Mr. Serjt. *Williams*).

(3) Per *Gurrow*, Baron. *The King* v. *Morrall*, 6 Price Exch. Rep. 31.

(4) Per *Richards*, C. B. *The King* v. *Morrall*, 6 Price Exch. Rep. 28.

(5) *Hodsden* v. *Harridge*, 2 Saund. 63.

(6) Per Lord *Tenterden*, C. J. *Mountstephen* v. *Brook*, 3 B. & A. 142.

in it (1). The proposition that the crown is not bound by the statute is true to this extent, that it cannot be pleaded in bar by the crown's immediate debtor, therefore the statute may be pleaded to a *scire facias* issued by the crown against the drawer of a bill of exchange in the hands of the crown debtor, which has been seized by the sheriff under an inquisition on the prerogative process (2).

The words of the statute are, that no *action* shall be brought within the times limited; but it was not intended that after those periods the right should be extinguished and taken away from the party. The statute meant to act upon the remedy (3). So the Statute of *Frauds*, 29 Car. II. c. 3, s. 4, enacts, "That no action shall be brought to charge any person upon any contract or sale of lands, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing;" "but the statute does not expressly and immediately (says Lord *Ellenborough* (4)) vacate such contracts, if made by parol, it only precludes the bringing of actions to enforce them, by charging the contracting party and his representatives on the ground of such contract or of some supposed breach thereof; but although the contract may not be in itself wholly void under the statute, merely on account of its being by parol, so that if the same had been executed, the parties could have treated it as a nullity, yet being executory, and as for the non-performance of it no action could have been maintained, we think such a contract might be discharged before any thing was done under it, which would amount to a part execution."

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(1) *Lambert* v. *Taylor*, 6 Dowl. & R. 199.

(2) *The King* v. *Morrall*, 6 Price Exch. R. 24.

(3) *Williams* v. *Jones*, 13 East, 450.

(4) *Crosby* v. *Wadsworth*, 6 East Rep. 611.

The *actions* of contract mentioned in this recital of the stat. 21 Jac. I. c. 16, are actions of account, on the case, and actions of debt. The action of *account* (1) was in full operation when the statute passed, but accounts have been long litigated by bill in equity, though the jurisdiction at common law has its advocates, and the action of account has been lately revived. Actions on the case meant by the statute, are actions on the *case ex contractu* or *assumpsit;* by the stat. 3 & 4 Anne, c. 9, s. 2, all actions on promissory notes (2) within that act, shall be commenced, sued and brought within the times appointed for commencing and suing actions on the case by the statute 20 Jac. I. c. 16.

The actions of debt are actions grounded on any lending or contract *without specialty*, all actions of debt for arrearages of rent: in an action (3) by a landlord for rent against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any other act as a tenant, the Statute of Limitations was held to be a good defence to the action, though the tenancy had not been determined by a notice to quit.

The Statute of Limitations mentions "actions of debt grounded upon any lending or contract *without specialty*, and all actions of arrearages for rent:" it is held that not only actions of debt on bonds and deeds are out of the Statute of Limitations, but also actions of debt on judgments, and grounded on statutes, being of a higher degree than specialties, as for an escape of a debtor in execution under the statute 1 *Rich.* II. c. 12 (4); and on the statute

(1) Paley on Prin. and Agent, 45, &c.

(2) 2 *Anne, Anon.* 2 Mod. 22.

(3) *Leigh and Wife* v. *Thornton,* 1 Barn. & A. 625. See *Steward* v. *Budger,* 2 Vern. 516.

(4) *Jones* v. *Pope,* 1 Saund. 37. 1 Sid. 305-6. 2 Keb. 93. 1 Lev. 191. S. C.

2 & 3 Edw. VI. c. 13, for not setting out tithes (1); though now by the statute 53 Geo. III. c. 127, s. 5, no action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity or in any ecclesiastical court to recover the value of any tithes, unless the action be brought or suit commenced within six years from the time when such tithes became due. It is probable it will be attempted to bring within this exception actions for canal and road calls, and other causes of action now of frequent occurrence grounded on statutes. It has been held that a special action of debt against a sheriff for money levied under a *fieri facias* is not within the statute, because, it is said, the action was brought against the defendant as an officer who acted under an execution, in which case the law did create no contract (2); and it has been held that debt on an award under the hands and seals of the arbitrators is not within the Statute of Limitations, on account of the notoriety of the thing being in writing under hand (3): debt for rent reserved on a parol lease is limited by the statute, but the rent reserved on a lease by indenture is within the exception (4). So that in this case the exception "without specialty" is carried forward and applied to actions for rent; the Statute of Limitations, 32 Hen. VIII. c. 2, applies to avowries for rents by parol, but an avowry for rent created or reserved by deed is out of the statute (5).

(1) *Talory* v. *Jackson*, Cro. Car. 513. *Warren* v. *Consett*, 2 Ld. Raym. 1502.

(2) *Cochram, Executor*, v. *Welby*, 2 Mod. 212. 1 Mod. 245. 2 Show. 79. 1 Freem. 236. S. C.

(3) *Hodsden* v. *Harridge*, 2 Saund. 64. Watson on Awards, p. 209.

(4) *Freeman* v. *Stacey*, Hutt. 109.

(5) Co. Litt. 115, (a). *Hodsden* v. *Harridge*, 2 Saund. 65, (a), Mr. Serj. *Williams'* note.

CHAPTER II.

OF THE EXCEPTION OF MERCHANTS' ACCOUNTS IN THE STATUTE 21 JAC. I. C. 16, § 3.

THE third section of the statute 21 Jac. I. c. 16, excepts "*such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants*" (1). Upon this exception, *which may now deeply affect the mercantile interests*, much discussion has arisen, and may now arise, for the statute 9 Geo. IV. c. 14, applies to new or continuing contracts only; and no new or continuing contract is presumed to be necessary where the case comes, and so long as it continues, within this exception.

This exception seems to have been introduced in favour chiefly of merchants trading to and from foreign parts, (indeed there was little inland commerce in the reign of King James I.) a merchant here might have had a merchant with whom he dealt at *Venice*, or a factor there; their accounts had been unsettled for several years, and many of their transactions with others unsettled, and yet new business still going on, the merchant waiting for an opportunity, when the parties might meet to state the *account* honestly. It was considered hard to confine them within six years, as the distance and the state of the

(1) The exception in the *Irish* Statute, 10 Car. I. sess. 2, c. 6, is in the same terms.

accounts might prevent a settlement, and until the balance was struck, the creditor could not ask for payment or a security; but this was to be confined to merchants, factors, and servants, and to accounts concerning the trade of merchandize (1).

The meaning of this exception has never (although 200 years have elapsed since the making of the statute 21 Jac. I. c. 16,) been settled; this has partly arisen from merchants' accounts having been for many years carried to Courts of Equity, and chiefly from its having been decided that the most trifling promises and acknowledgments would revive debts, and from the last items being considered to revive the whole account; so that there was no occasion to resort to the exception of merchants' accounts: now, however, when promises and acknowledgments must be in writing, and amount to an express or implied promise, the exception in the statute 21 Jac. I. c. 16, may come to be relied on, as taking the case out of the statute in times of greatly increased commerce, where questions for accounts are likely frequently to arise.

This exception may, therefore, deserve grave consideration.

Notwithstanding the words of the statute 21 Jac. I. c. 16, § 3, are "all actions of account and upon the case, (other than such as concern the trade of merchandize,") yet it was for some time supposed that the exception was confined to actions of *account*, which were common actions at the time when the statute was made for unsettled accounts, and continued so for a long time after-

(1) This exception of accounts between merchants and their factors, it was argued in an old case, (*Farrington* v. *Lee*, 1 Mod. 269,) must be expounded for their benefit; because the law-makers in making such an exception had an eye to the encouragement of trade and commerce.

wards, till it was supposed unsettled accounts were better decided in a Court of Equity.

In the case of *Farrington* v. *Lee*, it was held that the exception of the statute goes only to actions of account, and not to other actions; but it was law at that time, that till the account was stated an action of account lies, and not an action on the case; but when the account is once stated, an action on the case did lie, and not an action of account; for after the account is stated, the certainty of the debt appears, and all the intricacy of account is out of doors; the action must then be brought within six years after the account stated. It was likewise argued in the case of *Webber* v. *Tivell* (1), that actions of account on accounts between merchants are only excepted, and therefore a bare action on the case was not excepted at all; and *Morton*, J. said, that no action but an action of account was excepted by the statute.

In a case (2) on a bill of exchange, the defendant, protesting that the bill of exchange did not concern merchandize between merchants, their factors or servants, pleaded *non assumpsit infra sex annos*—the plaintiff demurred to this plea (3), supposing the bill of exchange to be a specialty, and not within the statute, but this was determined against him. In a subsequent case (4), the defendant pleaded the Statute of Limitations, and the plaintiff replied *(inter alia)*, that he and the defendant were merchants, and that the bill was upon an account between them concerning merchandize; but it was held that bills of exchange were not intended by the exception in the

(1) 2 Saund. Rep. 125. 1 Lev. 287. 2 Keb. 624. 634, S.C.

(2) *Renew* v. *Axton*, Carth. 3.

(3) 30 Car. II. *Fincham* v. *Hobbs*, Finch, 370.

(4) *Cheveley* v. *Bond*, Carth. 226. 4 Mod. 105. 1 Show. 341, Holt, 427. S. C. *Skirme* v. *Meyricke and others*, Com. Rep. 709, 10.

statute, and that by the exception in the statute, no other actions were intended but actions of *account*.

The doctrine above stated, that account is the only action upon an open account, is not now law (1). For, as was said by *Dampier*, Justice, that whatever doubt might have been made upon the subject a century back, the action of *assumpsit* for the balance due on the result of numerous mercantile transactions had been so long maintained, that it was now much too late to make any objection; and the use of the action of account at the present day, he added, is, "where the plaintiff wants an account, and cannot give evidence of his right without it;" so that the argument that account is the only action upon an open account completely fails; and in other cases this exception in the statute was held to be equally applicable to an action of *assumpsit*, as to an action of account (2); but I am not aware that it has ever been expressly determined, that it is equally applicable to an action of *debt* upon lending or contract; the words of the statute being "actions of account and actions upon the case, other than such accounts as concern the trade of merchandize between merchant, &c.; actions of debt upon lending or contract without specialty."

It seems to be probable, that originally the statute was drawn thus—"all actions of account other than such accounts as concern the trade of merchandize between merchant and merchant;" and even then there is nothing to which the word "such" can in strictness apply; subse-

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(1) *Speake* v. *Richards*, Hob. 209. *Arnold* v. *Webb*, *Taunton* Spring Assizes, 1814. 5 Taunt. R. 432 (a). And see *Scott* v. *Mackintosh*, 2 Camp. 238.

(2) *Cranch, Executor, &c.* v. *Kirkman and others*, Peake N.P.C. 164. *Catling* v. *Skoulding*, 6 Durnf. & E. 289.

quently the words "and actions on the case" were introduced immediately after "actions of account," and actions of debt, having an exception of their own, were introduced after the exception, perhaps under the idea that actions of debt at that time were not likely to be adopted in the cases of unsettled accounts.

It is still a question *of great practical importance*, what *persons* are meant by the exception, "such accounts as relate to the trade of merchandize between merchants, their factors, and servants;" notwithstanding an opinion seems to be entertained that the cases have settled, that all persons are included in that exception, provided the accounts are open and current; in short, that it relates to accounts in the nature of merchants' accounts, composed of cross items, as well between merchants as others.

The words would in a modern statute not be construed so liberally (1).

The term "*merchant*," in the time of King *James* I. seems to have meant a merchant trading to or from foreign parts. According to an old case there are said to be four kinds of merchants—merchant adventurers, merchants dormant, travellers, and merchants resident (2). Lord Chief Baron *Comyns* says, every man is a merchant who traffics by way of buying, or selling, or bartering of goods or any merchandize within the realm or foreign parts (3). Merchants, according to Lord *Holt*, C. J. includes all sorts of *traders* as well and properly as merchant adventurers (4).

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(1) See the exception in the *Stamp* Act, in 55 Geo. III. c. 184, Appendix. "Memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandize," which seems in some respects to have been construed *strictly*.

(2) 2 Brownl. 99.

(3) Com. Dig. tit. *Merchant*, A.

(4) *Mayor and Commonalty of London* v. *Wilks*, Salk. 445.

In the *Bankrupt* Act, 21 Jac. I. c. 19, (which was passed in the same year as the Statute of Limitations,) the *trader* is thus described, "Every person that uses the trade of merchandize by way of bargaining, exchange, bartering, chevizance, or otherwise, by gross or by retail, or seeking his or her living by buying and selling shall be liable to be a bankrupt." The description in the former act, 13 Eliz. c. 7, is somewhat different, "Any *merchant*, or other person using or exercising the *trade of merchandize* by way of bargaining, exchange, re-change, bartering, chevizance, or otherwise, in gross or by retail, or seeking his or her trade by buying and selling, may be a bankrupt" (1).

It seems from the whole of the clause, and particularly from the word "factor," that mercantile persons only were intended to be included in this exception. In the case of *Sir George Sandys* v. *Blodwell* (2), both parties were merchants; in *Sherman* v. *Withers*, 21 Car. (3) the plaintiff was an inland merchant, and the defendant was a *factor*, the bill was for an account of fourteen years standing, and the defendant, to all but what was within six years, pleaded the Statute of Limitations; and upon debate of the plea, the Lord Keeper conceived the exception in the statute as to merchants' accounts did not extend to this case, but only to merchants trading beyond sea. *Atkyns*, J. thought no other sort of tradesmen but merchants were within the benefit of this exception, and that it did not extend to shopkeepers, they not being within the same mischief (4). So it is said the action of account is not saved to all dealers

(1) See the last *Bankrupt* Act, 6 Geo. IV. c. 16.

(2) W. Jones, 401.

(3) 2 Chanc. Cases, 132.

(4) *Farrington* v. *Lee*, 1 Mod. 270.

but to merchants and their factors, because many times these factors continued long beyond sea (1).

In *Bridges* v. *Mitchell* (2) the bill stated that the plaintiff and defendant were partners as merchants, and had settled an account upon which the plaintiff had a balance, and then prayed a discovery, account, and satisfaction; the Statute of Limitations was pleaded, and the plea was allowed by the Court that after such a length of time, upwards of twenty years, without suit, it should be *presumed* the balance was satisfied. The Court seemed to think this was not a merchant's account within the Statute of Limitations, these persons not dealing as merchants with one another, but as one merchant with others, but gave no positive opinion on this head, but allowed the plea on the other.

In another case (3) the bill was by a lay impropriator for tithes for about twenty-four years, the defendant pleaded the Statute of Limitations; it was overruled by the whole Court, for the defendant, as to the tithes, was in the nature of a receiver or bailiff for the plaintiff, in which case the Statute of Limitations did not operate. In *Sir William Jolliffe* v. *Pitt and Whistler* (4), in Chancery, the Statute of Limitations was pleaded to a claim on a note made at *Tripoli;* but it was agreed that the demands were barred, for although the original parties were merchants and the debts contracted in the way of trade, yet it appeared the accounts were long since *stated*, and only open accounts were saved by the *statute*.

Lord *Hardwicke* observed in one case (5), the plaintiff

(1) *Anon.* 1677. 2 Freem. 22. See *Astrey's case*, 2 Freem. 54. and 19 Vez. jun. 181.

(2) Bunb. 224. Gilb. 217.

(3) *Marston* v. *Clypole and another*, Bunb. 213.

(4) 2 Vern. 694; and see *Sherman* v. *Sherman*, 2 Vern. 276.

(5) *Sturt* v. *Mellish*, 2 Atk. 612.

was a merchant and came within the statute, but did the transaction (then before him) concern the trade of merchandize? It did not, these were transactions with the King of *Portugal* and his government, and are like transactions here with the government offices. It was not the dealing of a merchant with any other person, which will make that person a trader within this statute. Suppose a merchant who has debts owing him gives another merchant a letter of attorney to get in those debts, such a transaction will not make such a person so deputed a merchant (1) within the exception, no more than if he had given the letter of attorney to a person not a merchant.

In *Cotes* v. *Harris and another* the defendants were executors of the executor of *W.*, and, in an action of *assumpsit*, pleaded *non assumpsit infra sex annos;* the plaintiff replied, that on the 3d of June, 28 Geo. II. he sued out a bill of Middlesex against the defendants, and that the testator in his life-time promised to pay the demand within six years before the bill of Middlesex was sued out; the first item in the bill whereon this demand arose was in 1746, and all the items, except the last, were above six years standing before the bill of Middlesex sued out. Mr. *Norton* insisted, for the plaintiff, that the last item being within six years, and this being a current account never liquidated, should draw the former items out of the statute. But *Denison*, Justice, held, that the clause in the Statute of Limitations about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands between two persons; if there were only a demand by *A.* against *B.* in the common way of business, as by a tradesman on his customer, that can-

(1) But *query*, would it make him a factor or servant within the exception?

not be called merchants' accounts; and he was very clearly of opinion that in this case the statute was a bar to all demands above six years standing (1).

Another Report (2) states, that *Denison*, J. ruled that the clause in the statute about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands between two persons, not to cases between a tradesman and his customers, for those are not merchants' accounts.

I have thus stated the old cases upon this important subject—some other cases remain to be considered. The first, *Cranch, Executrix*, v. *Kirkman* (3). It was an action for goods sold and delivered by the testator, the defendant pleaded the general issue and notice of set-off for goods sold, (and it may be observed that this notice left the plaintiff completely at large what defence he should make to the set-off); the set-off, in fact, consisted of items for goods sold from 1783 to 1788. The plaintiff's demand accrued chiefly in 1783, but there were two articles in 1789. It was contended on the part of the plaintiff that the greatest part of the set-off was within the Statute of Limitations, no promise being proved within six years. Lord *Kenyon* thought that this was within the exception in the statute as to merchants' accounts; he agreed that where the demand of one party arises long after the demand of the other, this shall not revive the antecedent account, but this was in the nature of a running and mutual account between the parties, and was precisely the case put by Mr. *J. Denison* in *Cotes* v. *Harris*. Mr. *Bearcroft*, for the plaintiff, then contended, that the

(1) *Cotes* v. *Harris and another*, Sittings at *Guildhall*, T. 29 & 30 Geo. II. *Wace* v. *Wyburn*, T. 19 Geo. III. K. B. Bull, N. P. 149, 150. Lord *Kenyon's* MS. note.

(2) 1 Esp. Dig. 4th edit. 181.

(3) Peake, N. P. C. 164.

exception extended to no other description of persons but merchants, in which he was overruled by Lord *Kenyon*(1). The plaintiff had a verdict for the balance of accounts.

It does not appear what description of persons the plaintiff and defendants were, but it may be inferred that they were in some business, for it is a case of cross-account of goods for goods, nor does it appear whether Mr. *Bearcroft* insisted that merchants in the act meant merchants generally as opposed to retail traders. It may be admitted that the question came fairly before Lord *Kenyon*, but it may be questioned whether his lordship might not partly determine the case on the exception as to merchants' accounts, and partly on the ground that the antecedent account was revived by the latter items; for he says in a subsequent case of *Catling* v. *Skoulding* (2), here are mutual items of account, and I take it to be clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained, and any act which a jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute.

The case of *Catling and another, Executor of Tuthill*, v. *Skoulding and another* (3), was *assumpsit* for use and occupation of premises of the testator, with the common counts. The defendant, *Skoulding*, pleaded—1st. *Non-assumpsit*. 2d. The Statute of Limitations. 3d. A set-off. The

(1) Mr. Justice *Park*, in a late case, *Scales* v. *Jacob*, 3 Bing. 649, considers that in *Cranch* v. *Kirkman*, the exception in the statute as to *merchants'* accounts was held not to be confined to persons of that description.

(2) 6 Durnf. & E. 193.

(3) *Ibid.* 189.

replication to the second plea was, that the defendant did promise within six years; and to the third plea, that the testator was not indebted. The testator was an *attorney* at *Halesworth* in Suffolk, and the defendants were merchants, dealers in spirituous liquors and tallow-chandlers. There were cross-accounts between the parties, and on the trial of the case before *Ashhurst*, Justice, a verdict was found for the plaintiff, with leave to the defendant to move for a nonsuit if the Court should be of opinion that the plaintiffs could only recover for the rent that became due within the last six years; the amount of the articles furnished by the defendants being more than sufficient to pay the last half-year's rent.

The rule was obtained on two grounds—first, that the case was not within the exception in the Statute of Limitations, because it was not an account between merchant and merchant; and, secondly, if it were, it should have been replied specially. On showing cause, it was urged, first, that the objection to the form of the replication was not taken at the trial, and could not be insisted on, as the defence was of an unfavourable nature; and, secondly, that there was an open unliquidated account between the parties, which was evidence of a promise, and *Cranch, Executor*, v. *Kirkman and others*, was cited; to which it was answered that there was no evidence of a promise or acknowledgment within six years; that the exception of the statute was confined to actions of account between merchant and merchant; and, thirdly, to such as concern merchandize, that at any rate the replication was bad, being too general; (it will be borne in mind that the replication was, that the defendant did promise within six years;) and that as to *Cotes* v. *Harris* no objection was there taken to the generality of the replication, nor to their not being merchants' accounts. Lord *Kenyon*, C. J. said, it will most likely

be found, on looking into the cases which have been cited on the part of the defendants, that the doctrine therein laid down was applicable only to cases where six years had elapsed before the bringing of the action without any new transaction having taken place between the parties, so as to form new items of account. Where there is no item of account at all within six years before the action brought, the plaintiff will be precluded, unless he bring his case within the exception in the statute concerning merchants' accounts, and in such a case his replication must bring his case within the statute; but it must be remembered that there the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years; for by his replication he insists that his case never was within the statute, for the accounts were between merchant and merchant (1); but the present case steers wide of that objection; it is not doubted but that a promise or acknowledgment within six years will take the case out of the statute, and the only question is, whether there is not evidence of an acknowledgment in the present case. *Ashhurst*, J. entertained some doubts on the question, but afterwards Lord *Kenyon*, C. J. said the Court had considered the matter, and were clearly of opinion the plaintiffs were not barred by the Statute of Limitations, and the rule was discharged.

In *Foster* v. *Hodgson* (2), the question of merchants' accounts was again brought before the Court of Chancery. The bill stating that the plaintiffs were merchants was for an account against the defendant as the solvent partner of *bankers*, but no demand or any continuation of

(1) See *Forster* v. *Hodgson*, 19 Ves. jun. 180; and *Gregory* v. *Hurrill*, 8 Moore Rep. 189. 1 Bing. 324.

(2) 19 Ves. jun. 180.

the account was stated for twelve years; the defendant demurred, and after argument upon the demurrer, the Lord Chancellor, *Lord Eldon*, said, "This bill has no allegation that the foundation of the suit is accounts relative to merchandize between merchant and merchant, unless it is considered as alleging, that by implication from the statement of the character in which the plaintiffs stood, and the business they carried on as merchants. *Lord Kenyon* thought such an implication might be made, and in *Scudamore* v. *White* (1), it is stated generally, that the Statute of Limitations is no plea in bar to an open account; but *Lord Talbot* held, that an open mutual account was within the statute, unless there was some *item* of charge and debt within six years before the bill over-ruling that case in *Vernon*."

"This case, however, has two grounds on which the demurrer may be supported.—*First*, that the plaintiff states fairly upon the bill that no transaction has passed since 1800; *secondly*, attending to *Bridges* v. *Mitchell* (2), a very important case, that this Court, following the law by analogy to the statute, does not adopt it in all cases. If there has been that delay or forbearance that makes it not illegal, but inequitable, to demand payment, this Court will tell the plaintiff that the law to which he is entitled is not that which is administered here, he may bring his action."

There is another ground also deserving consideration. The doctrine upon the question, whether the same law that applies to open accounts applies to merchants' accounts, is not to be reconciled. *Lord Hardwicke*, on the 9th July 1737, as I find by a note of a very experienced practitioner in this Court, said, that the exception as to

(1) 1 Vern. 474. (2) Bunb. 224. Gilb. 217.

merchants' accounts is not to be confined to open accounts merely; for between common persons, as long as the account is continued, the statute does not bar: the exception must therefore mean something more; and the note adds, that *Lord Hardwicke* seemed to think, that between merchants an open account would do, though there had been no dealing within six years. In *Catling* v. *Skoulding* (1), *Lord Kenyon* seems of the same opinion, stating, that where there is no item of account within six years before the action brought, the plaintiff will be precluded, unless he can bring his case within the exception in the statute concerning merchants' accounts, and that he must do by his replication. In *Welford* v. *Liddel* (2), however, *Lord Hardwicke* certainly appears not to have that opinion, holding, that a merchant's account will be barred if there is no item within six years; and the same doctrine is to be found in several other cases (3)."

"I think, however," continued *Lord Eldon*, "that upon the statement of this bill there can be no relief; whether this is to be taken as an open or a merchant's account, and whether the doctrine upon the statute is to be applied to the one only, or to both;"—the demurrer was allowed, and leave to amend was refused (4).

A *factor* was defined, in the case of *Baring and others* v. *Corry and another* (5), to be a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name.

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(1) 6 Durnf. & E. 189, *see* 192.
(2) 2 Ves. 400.
(3) *Barber* v. *Barber*, 18 Ves. 286.
(4) *Ibid.*
(5) Per *Abbott*, C. J. 2 Barnw. & A. 137.
jun.

It now remains to be considered, what *accounts* are within the exception.

With respect to factors or agents, it is one of their chief duties, and is implied in the contract of a factor or agent, to keep a clear account (1), and communicate the results of it from time to time, and, when called upon to account, without suppression, concealment, or over-charge (2). It has been laid down as a rule in the Court of Chancery, not to be departed from but upon very special circumstances, that an agent is bound to keep regular accounts of his transactions on behalf of his employer's accounts of receipts (3).

The case of *Sandys* v. *Blodwell* (4) was referred out of Chancery to *Jones*, *Croke*, and *Berkley*, J. in 13 Car. I.; an account was made between *Freeman*, the testator, and *Blodwell*, both being merchants; and *Blodwell* acknowledged a large sum to be in arrear, but *Freeman* claimed more; before the entire account was finished, *Freeman* died, and his executor filed a bill against *Blodwell*, who pleaded the Statute of Limitations; the judges certified that the executor was not barred, for that the account was not finished, and both were merchants.

The next case is *Martin* v. *Delboe* (5). This was a special action on the case, in which the plaintiff declared, that he and the defendant were merchants, and that the latter was indebted to him in a certain sum, and promised that the plaintiff should have a share in a ship then bound for Barbadoes; and upon the return of the ship would

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(1) Paley on Princ. & Agent, 46.

(2) *Topham* v. *Braddick*, 1 Taunt. R. 572.

(3) *White* v. *Lady Lincoln*, 8 Ves. 369. *Morgan* v. *Lewis*, 4 Dow Rep. 52.

(4) Sir W. Jones R. 401.

(5) *Martin* v. *Delboe*, 1 Lev. 298. Sid. 465. 1 Mod. 70. 1 Vent. 89. 2 Keb. 674. 696. 717. S. C.

give him an account, and pay him his proportion, of the profits. The Statute of Limitations was pleaded, to which the plaintiff demurred; and one question was, whether there appeared on the declaration to have been an account stated between the parties. In this case it was said, that accounts may continue twenty years, or more, between merchants, without any danger of the Statute of Limitations, in respect of the exception, which was made upon good reason. And it seems to have been agreed, that if an action be brought for a debt upon account stated between merchants, the statute is pleadable; but if no account was stated, it is directly within the statute. It appears by one Report of *Martin* v. *Delboe*, that the plaintiff had leave to discontinue on paying costs, "to the intent to have an account," which, I presume, means to bring an action of account, it could not, at that time, be brought upon an account stated (1).

In the case of *Farrington* v. *Lee* (2), the court took a diversity between an account current and an account stated: after the account stated, the certainty of the debt appears, and all the intricacy of account is out of doors, and the action must be brought within six years after the account stated; but if after an account stated, upon the balance of it, a sum appears due to either of the parties, and which sum is not paid, but is afterwards thrown into a new account between the same parties, it is now slipped out of the statute again.

In equity it has been held (3) that the Statute of Limitations is no bar to an open account; and in another case (4), Lord *Hutchins* agreed that length of time was

(1) *Martin* v. *Delboe*, 2 Keb. 717.

(2) 1 Mod. 268. 2 Mod. 311.

(3) *Scudemore* v. *White*, 1 Vern. 455.

(4) *Sherman* v. *Sherman*, 2 Vern. 276.

no bar to a bill for an account, but after differences had arisen, and acquiesced in to the time of the death of the plaintiff's testator, the court dismissed the bill; and it was added, that among merchants it is looked upon as an allowance of an account current, if the merchant who receives it does not object to it in a second or third post.

In a very late case (1) it was determined, that the statute was a bar in a court of equity, where all accounts had ceased for six years.

On a bill for an account of the estate of plaintiff's father (2), the Statute of Limitations was pleaded to part of the account, Lord *Hardwicke*, L. C. said, "a plea of the Statute of Limitations covers the discovery always. It is a pretty difficult construction how to apply that exception in the statute relating to merchants' accounts. It is not, that defendant may not plead (3) the statute in all cases where the account is closed and concluded between the parties, and the dealing and transaction over. It was not the meaning to hinder that; but it was to prevent dividing the account between merchants where it was a running account, when perhaps part might have begun long before and the account never settled, and perhaps there might have been dealings and transactions within the time of the statute. But that is not the case here."

In *Crawford* v. *Liddle* (4), the bill prayed an account of transactions under a patent for extracting oil from tar. A plea of the statute was put in with an averment that

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(1) *Barber* v. *Barber*, 18 Ves. jun. 286. See *Forster* v. *Hodgson*, 19 Ves. jun. 180.

(2) *Welford* v. *Liddell*, 2 Ves. sen. 400.

(3) As to the plea of merchants' accounts in equity, see Beames on Pleas, 163. Plea of *Account stated*, Id. 222, 3.

(4) Before Lord *Rosslyn*, 1796, cited 6 Ves. jun. 582; and see *Jones* v. *Pengree*, 6 Ves jun. 586. *Duff* v. *E. I. Company*, 15 Ves. jun. 198.

these were not merchants' accounts. For the plaintiff, *Catling* v. *Skoulding* (1) was cited, but Lord *Rosslyn* was of opinion that the meaning of the exception in the statute was, that if any transaction between the parties took place within six years, none of the transactions shall be barred, but that where all the transactions were over more than six years, the statute might be pleaded as well to merchants' accounts as others, and the plea was allowed.

I have already considered the cases of *Cotes* v. *Harris* and *Catling* v. *Skoulding* (2).

Upon the whole it seems that the Statute of Limitations is, so far as the account is concerned, no bar to an open account, but where the account has been stated the statute is a bar. I have already referred to what is said by Lord *Hutchins* as to a constructive *statement* of accounts. Lord *Hardwicke* (3) says that if one merchant send an account current to another in a different country, on which a balance was due by himself, and the other keeps it above two years without objection, the rule of a court of equity and of merchants is, that it is considered as a stated account. Perhaps some questions may arise where merchants are in the habit of making *rests* half-yearly, and from time to time transmitting their accounts, and in that case what is before observed may be material, that if an account be adjusted and a following account is added, in such case the plaintiff shall not be barred by the statute, because it is a running account (4).

It was held by Mr. *J. Denison* that the clause in the

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(1) 6 Durnf. & E. 189.

(2) *Ante.*

(3) *Tickel* v. *Short*, 2 Ves. sen. 239, and cases cited in Beames on Pleas in Equity, 229.

(4) *Farrington* v. *Lee*, 1 Mod. 266. 2 Mod. 311.

Statute of Limitations about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands between two persons (1), but I apprehend this is laid down too generally, and though it might apply to merchants, yet it would not apply to *factors* or servants, whose accounts may or may not consist of items on each side of the account, as where the goods are delivered into the hands of the factor free of expense; still I apprehend such case would be within the statute.

Cases within the exception do not appear to want a new or continuing contract, and therefore are not governed by the statute, 9 Geo. IV. c. 14, § 1.

Accounts delivered may, by the memorandum in frequent use, "errors excepted, *A. B.*," operate as an acknowledgment in writing against the debtor within the new statute, and accounts should always be required to be so signed; if by partners, by *all* the partners.

It was argued in the case of *Forster* v. *Hodgson* (2), that by the effect of the exception in the Statute of Limitations, a notion had prevailed that there was no limitation to a suit upon merchants' accounts, but the meaning of that exception was only, that if the last item of the account was within six years, that preserved all the preceding items of debt and credit from the operation of the statute, not that an account which has been closed above six years without any demand upon it could be made the subject of suit. That was argued to be the result of the authorities cited in *Jones* v. *Pengree* (3), but I apprehend

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(1) *Cotes* v. *Harris*, Bul. N. P. 149, 150.

(2) 19 Ves. jun. 180.

(3) 6 Ves. jun. 580. And *Duff* v. *E. I. Company*, 15 Ves. jun. 198. *Barber* v. *Barber*, 18 Ves. jun. 286.

this is answered by Lord *Eldon*, L. C. that the Court of Chancery following the law by analogy to the statute, does not adopt it in all cases; if there has been that delay or forbearance that makes it not illegal but inequitable to demand payment, that court would tell the plaintiff that the law to which he is entitled is not that which is administered in a court of equity: he may bring his action.

It was in a precedent Bill after a Judgment pronounced will not take the items of. to the Judgment out of the statute Hatherly v. [illegible] (2 Barn & Adol 15. (June 16. 1830)

Goods were sold at six months credit payment to be then made in a Bill at 2 or 3 months at the purchasers option, Held, Parke J. dubitante, that this was in effect a nine months credit and consequently that an action for goods sold and delivered commenced within six years from the end of the nine months was in time to save the statute. Helps & anr v. —— Winterbottom 2 Barn. & Adol 431. (H. T. 1831)

CHAPTER III.

OF THE EXCEPTIONS ARISING FROM THE REMAINING SECTIONS IN THE STATUTE 21 JAC. I. C. 16.

AT the time when the Statute of Limitations, (21 Jac. I. c. 16,) was passed, there was comparatively little commerce in England, and debts and demands were generally examined into, and settled, or properly secured; therefore, the exceptions in the statute were of little importance, and as the commerce and trade of the kingdom increased, the disposition of the courts, very favourable to the plaintiff in his attempts to *evade* the statute, increased, until, in process of time, it was decided, that the most trifling promise or acknowledgment made *or proved*, was sufficient to take the case out of the statute; the exceptions were little regarded, when the object was attained by other and easier means.

At present, however, the case is widely different; the recent decisions have over-ruled many of the previous cases; and the statute 9 Geo. IV. c. 14, requires a promise or acknowledgment *in writing*, to take the case out of the statute. Looking at the whole of the cases of promises and acknowledgment, it will be seen in what few cases, a writing of any description was produced, so that the only chance the plaintiff has in many cases is to bring his case within some of the exceptions, which now rise to considerable importance, and will occasion much discussion..

We have already considered the exception (if so it may be termed) of debts by *specialty*, and impliedly those of a higher nature, and also the highly important exception of *merchants' accounts*. The remaining exceptions will be now discussed.

By the statute 21 Jac. I. c. 16, § 6, if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account (1), actions of debt, actions of trespass, for assault, menace, battery, wounding, or imprisonment; actions upon the case for words, be or shall be at the time of any such cause of action, given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same action, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no *such impediment* should have done (2).

This exception was introduced to protect the interest of those persons, which there was no one of competent age, competent understanding, or competent in point of residence in this country, to protect (3).

Upon this exception it has been observed, that the statute being general, *infants* would have been bound if they had not been expressly excepted (4).

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(1) "Actions of *accompts*," *Irish* Statute, 10 Car. I. sess. 2, c. 6, § 17.

(2) In the *Irish* Statute, 10 Car. I. sess. 2, c. 6, § 17, there is a provision in the same terms as in the stat. 21 Jac. I. c. 16, § 6.

(3) *Perry and others* v. *Jackson, Bart. and others*, 4 Durnf. & E. 517.

(4) *Prideaux* v. *Webber*, 1 Lev. 31.

But although the infant is excepted, yet if an infant, during his infancy, by his guardian, do bring an action, the defendant cannot plead the Statute of Limitations (1) against the infant, for the infant is not bound to wait till he comes of age; a similar point has been determined on the Statute of *Fines*, 4 Hen. VII. c. 24; the words of which statute are, "that infants and their heirs shall take their action or entry within five years next after they are of the full age of twenty-one years:" still it has been resolved, that an infant may, if he pleases, enter or have his action before he attain his full age, and avoid the fine (2). Although infants are excepted, yet in actions brought where they are substantially, though not nominally, the defendants, (as being *cestui que trusts,)* the statute will operate without the exception (3).

Although persons *beyond the seas* are privileged by this proviso of the statute, which preserves the demand, it cannot be objected, that the plaintiff should have returned to England before he had commenced proceedings. The act of parliament was intended to allow privileges, and not to abridge any right which the persons mentioned in the proviso had; for if they were obliged to return from beyond seas into England before they can maintain an action here, the statute would not be any benefit to them, and might, in many cases, virtually extinguish the demand; as if a person constantly resident in the East or West Indies were to sell goods in England, it might not be worth while for him to proceed to England to bring an action: In a case in Chancery, where it was

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(1) *Chandler* v. *Villett*, 2 Saund. R. 121. Mr. Serj. *Williams'* note. A third party cannot take advantage of the statute. Per *Gaselee*, J., *Mavor* v. *Pyne*, 11 Moore R. 6.

(2) *Stowel* v. *Zouch*, Plowd. 366. *Caton's case*, 1 Leon. 215. 2 Inst. 519, S.C.

(3) *Wych* v. *East India Company*, 3 P. Will. 309.

objected, that a person beyond seas ought to return to enable him to commence an action: *Lord Hardwicke*, L. C., held, that the case was not to be distinguished from the case of the infant in *Saunders* (1), and therefore he overruled the plea.

The words of the statute being, "that if the persons entitled to the actions shall be beyond the seas, they shall have their actions afterwards." A question arose, whether debtors, as well as creditors, were within the meaning of this exception: and in the 2d William and Mary it was said by *Dolben*, J., to have been an *old* question, and never then settled, whether the defendant be within the proviso. It was urged this case was within the equity of the statute, but the Court in one case thought otherwise—the defendant had judgment (2). In a subsequent case, where an action was brought on a bill of exchange, and the defendant pleaded the statute, and the plaintiff replied, that the defendant was all that time out of the realm—the replication was adjudged ill (3).

This question was set at rest by the statute 4 & 5 Ann. c. 16, § 19; "If any person or persons against whom there shall be any cause of action of account or upon the case, or of debt, grounded upon any lending and imprisonment, or any of them be or shall be at the time of any such cause of suit or action, given or accrued, fallen or come beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action, shall be at

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(1) *Chandler* v. *Villett*, 2 Saund. 120, *ante*, 39. *Gage* v. *Bulkeley*, Ridgeway's Rep. *temp.* Hardw. 284.

(2) *Hall* v. *Wyburn*, 1 Show. 98. Carth. 136. 3 Mod. 311. 2 Salk. 420.

(3) *Cheveley* v. *Bond*, 1 Show. 98. 226; and see *Swayne* v. *Stephens*, Cro. Car. 334.

liberty to bring the said actions *against* such person and persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this act, and by the said other act made in the twenty-first year of the reign of King *James* the First.

A similar enactment was made in *Ireland* by the *Irish* Statute, 6 Anne, c. 10, § 17.

The *return* contemplated by these statutes must be looked at in their general sense, and in its well known and popular sense; the mere landing on English ground cannot be considered as a return within either of the statutes (1).

In 1792 a question arose whether, if *one* plaintiff be abroad and others in England, the action must be brought within six years after the cause of action arises; and it was held that the action was so limited (2).

The terms in the statute, 21 Jac. I. c. 16, and 4 & 5 Anne, c. 16, are, "*beyond the seas;*" the old term in the previous Statutes of Limitation was, "out of the realm," but the legislature altered it in the statute, 21 Jac. I. c. 16, and the subsequent act, and it has been therefore held that Glasgow, in *Scotland*, is not within the proviso (3). But it has been held by Lord *Holt*, Ch. J. that Dublin, or any other place in *Ireland* beyond sea, is within the statute (4). It has also been held that this exception extends to foreigners who are constantly residing abroad (5).

In the case of *Fines*, if the party be beyond sea at the

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(1) *Gregory* v. *Hurrill*, 8 Moore, R. 189. 1 Bing. R. 324.

(2) *Perry and others* v. *Jackson, Bart. and others*, 4 Durnf. & E. 516.

(3) *King* v. *Walker*, 1 Sir W. Blackst. Rep. 287.

(4) *Nightingale* v. *Adams*, 1 Show. 91. *Sed quere* since the union with Ireland.

(5) *Stethorst* v. *Græme*, 2 Sir W. Black. Rep. 723.

time of the fine levied, and never return but die there, it seems the fine will not bar the heir, but if they be in England at the time of levying the fine, and afterwards go beyond sea, and suffer the five years after the proclamations to pass; in this case they shall have no more time except they be sent on the king's service and by his commandment (1).

It seems to have been very early considered to be in many cases advisable and in some cases absolutely necessary for the plaintiff to bring his action within six years, and to sue out process, in order that if the defendant should afterwards plead the statute, it may be replied that the plaintiff had brought his action within the time limited.

Cases were, however, likely to happen where the first action might be rendered inoperative by writ of error, motion in arrest of judgment, and in some other cases, and therefore it was also *enacted*, as an exception, by § 4, that if in any of the actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, writ, or bill; or if any of the said actions be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a *new* action or suit from time to time within a year (2) after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

The *Irish* stat. 10 Car. I. c. 6, § 15, is nearly in the same words.

(1) *Sir Thomas Cotton's case*, 27 Eliz. Shep. Touchst. 31, 34.

(2) The Irish statute, 10 Car. I. sess. 2, c. 6, § 15, has the word "next" after "year."

There are few cases upon this section. In one old case (1) it was held to be immaterial whether the outlawry mentioned in the statute be reversed by writ of error or avoided by plea; where a person brings an action before the expiration of six years and dies before judgment, the six years being then expired: it has been held, by an *equitable* rule of construction of the act (2), that his executor or administrator may, within the equity of the fourth section of the statute, 21 Jac. I. c. 16, bring a new action (3), provided he does it recently, or within a reasonable time, and it seems that though the new action should never be delayed, yet the statute is the best guide upon the subject, and the action should at least be commenced within the year (4). In one case the action was allowed to have been well brought within fourteen months after the testator's death (5).

Where an action was brought by a *feme sole* within six years, and the six years expired and then she married, it was holden that she and her husband were allowed to bring a new action within the equity of the statute. The new suit in this case was within two terms (6).

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(1) *Sir T. Finch* v. *Lamb*, Cro. Car. 294, 5. Sir W. Jones, 312.

(2) *The King* v. *Morrall*, 6 Price Exch. Rep. 30.

(3) *Matthew* v. *Phillips*, 2 Salk. 225. *Kinsey* v. *Hayward*, 1 Lutw. 260.

(4) *Hodsden* v. *Harridge*, 2 Saund. 63, Mr. Serjeant *Williams'* note; and see *Wilcocks* v. *Huggins*, 2 Str. 907. Fitzgib. 170. 289.

(5) *Lethbridge* v. *Chapman*, 15 Vin. Abr. 103.

(6) *Lord Middleton* v. *Forbes and Wife*, Willes Rep. 260. Note by the late Mr. *Durnford*.

CHAPTER IV.

OF THE LIMITATION OF ACTIONS, AND OF ACKNOWLEDGMENTS AND PROMISES, TO TAKE THE CASE OUT OF THE STATUTE OF LIMITATIONS.

THE words of the statute, 21 Jac. I. c. 16, § 3, are, "That the actions (of account, upon the case and of debt included in it), shall be commenced within three years after the end of the then session of parliament, or within six years next after the cause of action or suit and not after.

The first period of limitation, *three years* after the passing of this statute, (which certainly introduced a new and probably, in the estimation of the public, a severe law,) was given to allow suitors sufficient time to proceed for and recover their debts (1).

The second limitation, within six years after the cause of action or suit (2), has given rise to much discussion.

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(1) There is one case where it was pleaded that the cause of action arose in the 9th Jac. I., before the statute limiting the plaintiff to three years, (*Swayn and others* v. *Stephens*, Cro. Car. 245. 333, 4. Sir T. Jones, 252. *Lord Say and Sele* v. *Stephens*, S. C.) It was there laid down (*Croke*, J. *dissentiente*,) that if *A.* converts goods beyond sea, and after six years return, and upon demand refuses the delivery here, it will be a *new* conversion, from which the statute will run; this was evidently showing the inclination of the court in favour of the plaintiff's right.

(2) See a case on the *Irish* Revenue Act, 25 Geo. III. c. 34, § 108, which directs that the action against an officer "shall be commenced within three months next

It seems obvious, that it would have been the best mode of taking advantage of the statute in pleading, in all cases to have adhered strictly to the words of the statute, and alleged that the cause of action did not accrue within six years next before the suit. But two modes of pleading were very early adopted, the one probably borrowed from the general issue, *non assumpsit*, that the defendant did not promise within six years; and the other, that the cause of action did not accrue within six years. It has often happened, that the former mode of pleading the statute, dating the time from the promise, has been adopted when obviously the statute could not begin to operate from the making of the promise, but at a subsequent period, as upon a promissory note to pay at the end of two years, the statute would begin to operate when the note became payable, for then the cause of action accrued, and the time when the note was made would be wholly immaterial (1).

These cases, however, have had the good effect of settling the law upon this subject. If a demand arises for goods sold, money lent, or money paid, the statute generally runs from the time of the promise or contract, for the cause of action was complete at that time, and the plaintiff might have sued immediately afterwards, and so where there is a promise to pay on demand; and it has been held in a number of cases, that where a promissory note is payable on demand, the statute runs from the date of the note (2).

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after the *cause of action* shall accrue." This, it was held, must be from the actual seizure of goods by the officer. *Magrave* v. *Gilbourne*, 1 *Irish* Term Rep. 135. Though a suit in the revenue court be depending at the expiration of three months. *Wilchkin, in error*, against *Gahan, Irish* Term Rep. 591. *Goden* v. *Ferris*, 2 Hen. Blackst. 14. S. P.

(1) *Gould* v. *Johnson*, 2 Salk. 422. 2 Ld. Raym. 838.

(2) *Collins* v. *Benning*, 12 Mod. 144. Bull. N. P. 150. *S. C.*

Where, however, a note is payable a certain time after demand, or after sight, or after date, the statute does not begin to run until that time has expired (1). In these cases the statute runs from the last day of grace, and where notice is to be given of the dishonour, a further time must be allowed for giving notice.

Where money is payable on a *contingency*, the statute runs from the time when the contingency happens, though it may be many years after the making of the promise or contract (2).

In an action on a special agreement, the cause of action arises at the time when the contract is broken, and from that period the statute begins to run, and though particular damage may be afterwards, at a considerable distance of time, ascertained to have resulted from that breach of contract, yet still the breach is the gist of the action in assumpsit, and the statute does not run from the time of the discovery of such special damage. Some very hard cases have occurred on this subject.

In one case, *Batty* and another v. *Faulkner* and another (3), the declaration stated, that in consideration that the plaintiff would buy of defendant wheat for seed, the defendant undertook that it should be *spring* wheat, and the breach was, that it was not of that description but winter wheat. It was stated as special damage, that the plaintiffs had again sold the wheat as spring wheat, and

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Walmsley v. *Child*, 1 Ves. sen. 342. *Dick and Wife* v. *Gourney*, *Irish* Term R. 242. *Christie* v. *Fonsecк*, C. P. *coram* Sir *James Mansfield*, C. J. London Sittings after *Michaelmas* Term, 52 Geo. III. 1 Selw. N. P. 344, MS.

(1) *Thorpe* v. *Coombe*, 1 Ryan & M. 388, note. 8 Dowl. & R. 347. It is said, that *Christie* v. *Fonsecк*, was doubted by Lord *Tenterden*, C. J. in a late case at *nisi prius*. 1 Selw. N. P. 341.

(2) *Hodsden* v. *Harridge*, 2 Saund. Rep. 63. n. (6). Bac. Abr. tit. Limitation. 1 Tidd Pr. 14.

(3) 3 Barnew. & A. 288.

that his vendee had sown it in 1810, and that the wheat was unproductive, and that the present plaintiffs were sued in Scotland for damages, and had to pay damages and costs; the defendant pleaded the general issue and the Statute of Limitations. The facts were as stated in the declaration; the suit in Scotland terminated in 1818(1), the Chief Justice, in 1820, nonsuited the plaintiffs, and a rule was obtained to set aside the nonsuit, and for a new trial; but it was held, that although the special damage had occurred within six years before the commencement of the action, yet that the breach of contract which in *assumpsit* was the gist of the action, having occurred and become known more than six years, the Statute of Limitation was properly pleaded, and it was said, that if the present plaintiff had sold the wheat and the wheat had been sold several times afterwards, and each party had taken several years to sue, each party having acquired a new cause of action, the plaintiff might, upwards of twenty years after the original transaction, bring an action against the present defendant.

In a subsequent case, *Short* v. *M'Carthy* (2), the declaration stated, that the defendant was retained to ascertain whether a sum of money was standing in the books of the Bank of England in the names of certain trustees for the benefit of one *Shaun*, and that the defendant undertook to perform and fulfil his duty in the premises, but although it was his duty diligently and sufficiently to search at the Bank of England, yet the defendant did not do so, but afterwards falsely represented to the plaintiff that the

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(1) There are several cases where it might have been convenient to wait till certain proceedings terminated. See *Wilchkin*, in error, v. *Gahan*, *Irish* Term Rep. 591. *Golden* v. *Ferres*, 2 H. Black. 14.

(2) 3 Barn. & A. 626.

money was standing in the names of the trustees, by reason whereof the defendant paid a sum of money as a consideration for the purchase of the interest of Shaun in that money, whereas, in truth and in fact, the money was not standing in the names of the trustees or either of them for the benefit of Shaun, so that the plaintiff lost his money, and was put to great charges and expenses; the defendant pleaded the general issue and the Statute of Limitations. At the trial before *Abbott*, C. J., in 1820, it appeared, that in December, 1812, the plaintiff having agreed to buy Shaun's interest in £700 Bank Annuities, applied to the defendant, an attorney, to have the bargain carried into effect. The instructions to him were, that he should see that every thing was right. The deeds were prepared and executed, and the money paid by the plaintiff, but no inquiries had been made at the Bank of England, and no such stock was standing in the trustees' names; this discovery was made in August, 1818, after the six years expired, and the defendant, on being applied to, said it was owing to an omission of his clerk, and he was responsible. The jury found a verdict for the plaintiff, and on a motion for setting aside this verdict and entering a nonsuit, it was held, that the plaintiff was not entitled to recover, for the cause of action (being the omission of the defendant to make due enquiries at the Bank) did not arise within six years before the commencement of the action. A similar case occurred in the Common Pleas; and in a subsequent case (1), where a special action on the case was brought against an attorney for negligence, and the Statute of Limitations pleaded; it was held, that it made no difference whether the plaintiff elected an action of *assumpsit* founded upon a breach of promise or a spe-

(1) *Brown* v. *Howard*, 2 Brod. & B. 73.

cial action on the *case*, founded on a breach of duty, and that the Statute of Limitations was a bar to the original cause of action, and to all the consequential damages resulting from it, unless indeed, it could be shewn that those damages, or any part of them, constituted a *new* cause of action, which accrued within six years (1), and the Statute of Limitations is a bar to an action of *trover* commenced more than six years after the conversion, though the plaintiff was ignorant of the conversion till within the six years, no fraud having been committed by the defendant to prevent the plaintiff's earlier knowledge (2).

Cause of action is the right to prosecute an action with effect, and no one can have a complete cause of action unless there be some person that he can sue, and no *laches* can be attributed to a person for not suing, whilst there is no one against whom he may bring his action (3).

There are several cases on this subject. *Stanford's case* (4) arose upon the Statute of *Fines*, (4 Hen. VII. c. 24,) the object of that statute being to limit the time of entry or suit to a person *in esse*, capable of entering or suing. A term of years was granted in remainder expectant on another existing term; before the expiration of the first term the grantee died; at the expiration of the first term the lessor entered and levied a fine before administration granted; the five years passed, administration was granted; it was held that the administrator should have five years, for none had title of entry before.

In an action of *assumpsit* (5) for money had and received

(1) *Howell* v. *Young*, 5 Barn. & A. 259. 8 Dowl. & R. 14. *S. C.*

(2) *Granger* v. *George*, 7 Dowl. & R. 729. See the singular case of *two* conversions just after the stat. 21 Jac. I. c. 16. *Swayn* v. *Stephens*, Cro. Car. 245, 333, 4. Sir T. Jones, 252. S. C.

(3) *Joliffe* v. *Pitt*, 2 Vern. 694.

(4) Cro. Jac. 61.

(5) *Cary and wife* v. *Stephenson*, Salk. 421. Carth. 335. Skin. 555. 4 Mod. 372. *S. C.*

against one who had received money belonging to the estate of the intestate after his death and before administration granted, the receipt being six years before the action, but the grant of administration within six years: the court held, that the time of limitation did not begin to rise until the grant of administration.

In another case (1) there was a gift of a term of years to *A.* for life, remainder to *B.* for life, remainder to *C.*; *C.* died in 1736; *A.* in 1757; *B.* in 1779. Administration of the effects of *C.* was first granted in 1816, *eighty years from the death*, and the administrator brought an ejectment: he was nonsuited at the trial, but the court of Common Pleas granted a new trial.

And in an action (2) by an administrator *de bonis non*, upon a bill of exchange, payable to the testator, but accepted after his death: it was held, that the Statute of Limitations begins to run from the time of granting the letters of administration, and from the time of the bill becoming due, there being no cause of action until there be a person capable of suing.

In a subsequent case (3), where the testator resided and died abroad, it was held, his executor in England might be sued within six years after he had taken out probate; for though an executor may do many acts before he has proved the will, and when he has proved the will his right to the testator's property has relation to the time of testator's death, no action can be maintained against him as executor, as he may renounce until he has taken upon himself to act as such, or has proved the will.

(1) *Fairclaim* v. *Little*, cited in *Murray* v. *E. I. Company*, 5 Barn. & A. 214.

(2) *Murray, Administrator*, v. *The E. I. Company*, 5 Barn. & A. 204.

(3) *Douglas and another* v. *Forrest, Executor*, 4 Bing. 686. 1 Moore & P. 663. *S. C. Webster* v. *Webster*, 10 Ves. 93.

There must not only be a cause of action, and persons to sue and be sued, but a *jurisdiction* in which the action may be maintained; at the same time it is not every interruption which will prevent the statute from running. Several cases (1) occurred after the restoration of King *Charles* II. when the previous troubled state of the kingdom was pleaded and urged as an excuse for not suing, but without effect. In the subsequent revolution in 1688, to prevent such questions and to give the subject his full statute time, it was expressly enacted by the statute of 1 *Wm. & Mary*, c. 4, that from the day King *James* departed till the time when King *William* assumed the government, should not be accounted any part of the time within which actions must be brought (2).

Previous to the Statute of Limitations, 21 Jac. I. c. 16, there appears to have been always a defence to an action for a stale demand, arising from an intendment of payment from length of time, but that was at a considerable interval and the time not settled; the statute was passed to fix a shorter definite time within which actions should be brought, and though, since the statute, judges seem always to have favoured the right of the plaintiff where the debt appeared to be justly due, yet in an early case on the Statute of *Fines*, followed by others on the other Statutes of Limitation, it has been uniformly held, that where any of the Statutes of Limitation had once begun to run, no subsequent disability would prevent its running (3); there is no calculating how far the time

(1) *Benyon* v. *Evelyn*, O. Bridgm. Rep. 356. *Prideaux* v. *Webber*, 1 Lev. 32.

(2) *Snode* v. *Ward*, 3 Lev. 283. 2 Vent. 185.

(3) *Stowell* v. *Lord Zouch*, Plow. 374. *Doe* d. *Count Duroure* v. *Jones*, 4 Durnford & E. 311. *Doe* d. *Griggs and another* v. *Shane*, 4 Durnford & E. 306, 7. As to several disabilities in the same or different persons, see *Cotterell* v. *Dutton*, 4 Taunt. 826. *Doe* v. *Jesson*, 6 East, 80.

might be extended, if several disabilities in succession had been allowed. This rule has been applied to the different Statutes of Limitation, though they are in very different terms, yet, as observed by Lord *Tenterden* (1), the several Statutes of Limitation being *in pari materia*, ought to receive a uniform construction notwithstanding any slight variation of phrase, for their object and intention is the same; the last-mentioned cases afford a strong contrast to the various and unsatisfactory cases on promises and acknowledgments, which will be soon mentioned.

The Statute, after the limitations of three years from the passing of the act, and six years from the cause of action, adds, "and not after;" looking at these words, "and not after," *Best*, Ch. J. (2) says, (and which, it may be observed, have been twice repeated in the cause,) "one might be led to conclude that in no instance could a remedy for a debt be had after six years;" and certainly no stronger words could be used.

"*Expedit reipublicæ ut sit finis litium*," *Bridgman*, Ch. J. observed, in 1664, (the statute having passed in 1623,) "it is better to suffer a particular mischief than a general inconvenience; and such a one must happen, if way be given to equitable constructions against the letter of the act, which is, that they shall be sued within six years after the cause of action. But it rests not there, but adds, '*and not after*,' which negative words are the strongest that can be in a law. By another statute of this parliament, 12 Jac. I. c. 4, it is enacted, that informations and other popular actions shall be in the proper counties, and before justices of assise, *nisi prius*, *oyer and terminer*, and gaol delivery, *and not elsewhere*. These negative

(1) *Murray* v. *E. I. Company*, 5 Barnw. & A. 215.

(2) *Ham* v. *Raynall and others*, 2 Bing. 306.

words exclude the superior courts, even the king's court, which had an universal and unlimited jurisdiction before. And so here the negative words exclude all time for bringing the action but that which the statute doth expressly allow, for statutes in the negative bind the common law, as it is said, 10 Edw. IV. 7" (1).

I suspect that the statute was at first looked upon as laying down a strict and severe rule. It was argued against it that it had taken away the common law. And Lord *Holt* (2), in one case, says, after twenty years he would presume a bond or a note for a large sum paid, as if six years limitation were not enough.

However that may be, the courts early took up the idea that the effect of the statute might be prevented by a new agreement, and perhaps it was first considered that a new consideration and promise made within the six years might prevent the operation of the statute, afterwards the old debt might be considered as a good consideration for a subsequent promise to pay.

In *Dickson* v. *Thompson* (3), which was *assumpsit*, and the Statute of Limitations was pleaded, it was ruled by Lord *Scroggs*, upon evidence, and agreed by all the counsel, that promise of payment within six years, though the debt were contracted long before, will *evade* the Statute of Limitations, but confession, or only an acknowledgment that he owed the plaintiff so much, would not do it. In *Bland* v. *Haselrig* (4), *Pollexfen*, C. J. seemed to be of opinion that if the promise were renewed within the six years, yet if not upon a new consideration, it should not bind, and if there were a new consideration, the action

(1) *Benyon* v. *Evelyn*, O. Bridg. Rep. 363.

(2) In 2 *Anne*, *Anon.* 6 Mod. 22.

(3) 32 Car. II. 2 Show. 126.

(4) 2 Vent. 152.

would be against him that promised only (1), although the original promise was by two; but the Reporter adds, "*Sed quære,* for the *common practice* is, upon a plea of the Statute of Limitations, to prove only a renewing of the promise, without any further consideration; but a bare avowing of the debt is not taken to be sufficient. *Quære,* if the first consideration upon repeating the promise within six years be not enough to raise a new cause of action."

In the celebrated case of *Hyleing* v. *Hastings* (2), the plaintiff gave evidence that after six years were elapsed since the contract, he, being executor to the person who sold the goods, came to the defendant and demanded the money, but the defendant denied he had bought them, and said, "If the plaintiff would prove it, he would pay him." *Holt,* Ch. J. tried the cause, and kept the *postea* till he had the opinions of his brothers of the *King's Bench. Holt,* Ch. J. said, "doubtless an express promise would revive the debt though it were twenty years afterwards;" ultimately he reported in the *King's Bench,* "that he had put this case to all the judges in *England* (except *Lechmere*) assembled at *Serjeants'* Inn, and that they were all of opinion this conditional promise had brought the case out of the Statute of Limitations, and that a general *indebitatus assumpsit* might be well maintained, *because the defendant has waived the benefit of the statute,* and it is as strong as an express promise after the condition is performed, *being* the proof of the debt, which ought to be done in evidence upon the *indebitatus assumpsit.*"

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(1) See the provision as to a promise in writing by *one* only, 9 Geo. IV. c. 14, § 1.

(2) Com. Rep. 154. Carth. 470. Salk. 29. 12 Mod. 223. Holt, 427. 1 Lord Raym. 329. 421.

It was also moved, whether the acknowledgment of a debt within six years would amount to a new promise and to bring it back out of the statute, and they were all of opinion that it would not, but that it was *evidence of a promise;* and *Rokeby*, J. compared it to the case of *trover* and conversion, where a demand and denial is held to be evidence of a conversion but not a conversion.

It was settled about 1717, (near 100 years after the passing of the act,) that an acknowledgment of the debt takes it out of the Statute of Limitations (1).

It has been since held, that the slightest acknowledgment is sufficient to take the case out of the Statute of Limitations (2) even after action brought (3), as saying, "I am ready to account, but nothing is due to you," or "if there be any demand on me it shall be settled (4)." And if the acknowledgment be to a different debt, the defendant must prove it (5). So where the defendant said, when he was arrested, "I will go to my attornies and pay the debt and settle it." This was lately ruled to be sufficient to take the case out of the statute (6). And where the defendant stated in an *affidavit* in the cause, that since the bill of exchange no demand of payment had

(1) *Per Price*, Baron, *Exeter Lent Ass.* 1717. 12 Vin. Abr. 192.

(2) *Trueman* v. *Fenton*, Cowp. 548. *Per Lord Mansfield*, C. J. *Lloyd* v. *Maund*, 2 Durnf. & E. 762. *Per Ashhurst*, J. The Statute of Limitations is a bar, on the supposition that after a certain time a debt has been paid and the vouchers lost, but wherever it appears by the acknowledgment of the party that it is not paid, that takes the case out of the statute. *Per Bailey*, J. 2 Barn. & C. 154.

(3) *Yea* v. *Fouraker*, 2 Burr. 1099.

(4) *Truman* v. *Fenton*, Cowp. 548. *Quantock* v. *England*, 5 Burr. 2630. *Richardson* v. *Fenn*, Loft, 45. *Baillie* v. *Lord Inchiquin*, 1 Esp. N. P. C. 435.

(5) *Baillie* v. *Lord Inchiquin*, 1 Esp. N. P. C. 435.

(6) *Triggs* v. *Newnham*, 1 Carr. & P. 631.

been made, it was left to the jury (1) as an acknowledgment.

So where *A.* improperly received of *B.* and several other persons, his tenants, sums to which he was not entitled, and *B.* applied to him to have the money returned, stating, that he and the other tenants had paid more than was due; and *A.* said, "if there is any mistake it shall be rectified:" it was held, this obviated the statute as to payment by the other tenants as well as *B.* (2). So where the defendant wrote to the plaintiff's attorney, "I received yours respecting the plaintiff's demand, it is not a just one. I am ready to settle the account whenever he thinks proper to meet me; I am not in his debt 90*l.* or any thing like it. Shall be happy to settle the difference by his meeting me in London, or at my house. I shall write to the plaintiff on the subject." After this letter the statute is out of the question (3).

And where the defendant said, "what an extravagant bill you have delivered me," it was held a sufficient acknowledgment (4). Where to an action on a promissory note the defendant pleaded the Statute of Limitations, and the plaintiff gave in evidence a letter written by the defendant to him, stating "business calls me to *Liverpool;* should I be fortunate in my adventures you may depend on seeing me in *Bristol* in less than three weeks; otherwise I must arrange matters with you as circumstances will permit. I shall leave town to-morrow night." And it was not shown that the letter referred to any other transaction between the parties: it was held,

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(1) *Rucker* v. *Hannay*, 4 East R. 604.

(2) *Clark* v. *Hougham*, 3 Dowl. & R. 322. 2 Barn. & C. 149.

(3) *Colledge* v. *Horn*, 10 Moore R. 431. 3 Bing. R. 119. *S. C.*

(4) *Lawrence* v. *Worrall*, Peake, N. P. C. 93.

that it was properly left to the jury to determine whether it related to the note, so as to amount to a sufficient acknowledgment to take the case out of the statute; and they having decided in the affirmative, their verdict was conclusive (1).

And so where the defendant said, "he would not pay, there were none paid, and he did not mean to pay unless obliged;" this was held sufficient (2):—so where the defendant said, "if others pay, I will do the same" (3); and where a man, on being arrested, said, "I will go to my attorney, pay the debt, and settle it," it is sufficient; for it is not necessary there should be a new contract, or a new promise; an acknowledgment is all that is required; if a man acknowledges a debt to be still due, the law implies a promise (4).

Where there are mutual items of *account*, every new item and credit in an account given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which a jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute (5). But perhaps a question may arise, when the demand of one party is long after the demand of the other, whether it will revive the antecedent account (6); this doctrine is of mutual accounts. In a late case (7), where the plaintiff having lent defendant money, took from him the following

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(1) *Frost* v. *Bengough*, 3 Moore, 180.

(2) *Dowthwaite* v. *Tibbut*, 5 Maule & S. 75.

(3) *Cowth* v. *Fothergill*, 4 Camp. 185.

(4) *Triggs* v. *Newnham*, 1 Carr & P. 632.

(5) *Per Lord Kenyon*, *Catling* v. *Skoulding*, 6 Durnf. & E. 193.

(6) *Cranch*, *Executor*, v. *Kirkman and others*, Peake, N. P. C. 121.

(7) *Robarts* v. *Robarts*, 1 Moore & P. 487.

memorandum, "I. O. U. £100, C. R. 30th July, 1821. August 17, Received £50, C. R." and the last item was *infra sex annos*, and the defendant pleaded the Statute of Limitations: it was held that such memorandums might be produced without being stamped (1); but that the last item did not amount to an acknowledgment of the prior debt so as to take the case out of the Statute of Limitations. *Park*, J. however, said, the items were perfectly distinct; if they had been added together the effect would have been altogether different.

To give accounts *now* in evidence as an acknowledgment to save the statute, they should be signed, and if by partners, by each of them. In the case of *Honey* v. *Honey* (2), where a tenant for life rendered accounts to the remainder man, of timber cut by him during a period of more than six years before a bill is filed against him for an account of such timber, and the value of it, the Statute of Limitations cannot be pleaded to the bill; for though if the remainder man had brought an action of *trover*, the tenant for life might, notwithstanding the rendering of such accounts, have successfully pleaded the statute, he could not have done so if the plaintiff had brought an action of *assumpsit*, the bill in equity being considered in that case as analogous to that action.

Where the defendant said, "I cannot afford to pay my new debts, much less my old debts," meaning promissory notes over-due ten years; it was held, the jury were warranted in saying, there was not a subsisting debt to take the case out of the statute (3):—so where the de-

(1) *Brooke* v. *Davies*, 2 Carr. & P. 186. *Tomkins* v. *Ashby*, 6 Barn. & C. 541.

(2) 1 Simons & S. 568. In this case it was admitted that the action of *waste* was not within any Statute of Limitations.

(3) *Knott* v. *Farren*, 4 Dowl. & R. 179.

fendant said, " I would pay, if you have not removed fixtures;" this was held not sufficient (1). And where the defendant wrote, " that he would wait on the plaintiff, whom he should be able to satisfy concerning the misunderstanding between them;" this was held to be no sufficient acknowledgment (2):—so where the defendant said in a letter, " that his solicitors were in possession of his determination and ability," and afterwards said, " if the plaintiff had any letter which would bind defendant, the debt would be paid;" the Court of *Common Pleas* thought this did not take the case out of the statute (3). Nor where the defendant said, to a demand for an old debt, he would see his attorney and do what was right (4).

Cases have arisen where the defendant acknowledged the debt, but at the same time qualified his admission; as where a defendant acknowledged the debt, but said, " he did not consider himself as owing the plaintiff, it being more than six years since," this was held to be a sufficient acknowledgment (5).

But where the defendant said, " he knew all about it," (an accountable receipt,) but when asked for the amount, answered, " it is not worth a penny, he would never pay it, though it was his signature, but he had never had the money and never would pay it, it is out of date, and no law will make me pay it;" it was held, this was not a good acknowledgment (6): and where the defendant said, " I owe you not a farthing, it is more than six years

(1) *Evans* v. *Verity*, 1 Ryan & M. 239.

(2) *Craig* v. *Cox*, Holt, N. P. C. 380.

(3) *Bicknell* v. *Keppell*, 1 New Rep. 20.

(4) *Miller* v. *Caldwell*, 3 Dowl. & R. 267.

(5) *Bryan* v. *Horseman*, 4 East, 599. 1 Smith R. 125. 5 Esp. R. 81.

(6) *Rowcroft* v. *Lomas*, 4 Maule & S. 457.

since;" it was held not sufficient to take a debt out of the statute (1).

Where the defendant said, "that the plaintiff had paid money for him twelve or thirteen years ago, and that he had since become a bankrupt, by which he was discharged as well as by law from the length of time;" it was held, this took the case out of the statute (2). But where the defendant said, "you owe me more money, I have a set-off against the note;" it was held, this was not a sufficient acknowledgment (3).

Where the defendant said, "he had paid the amount and would show the receipt;" it was held, that the acknowledgment was sufficient, if the defendant was not able to produce a receipt (4).

Where a defendant admitted a debt, but claimed to be discharged by a written instrument, the acknowledgment was held sufficient: but where the defendant said "he thought the attorney's bill had been settled when the annuity was granted, but that he had been in so much trouble since, he could not recollect anything about it:" it was held, though it was proved the bill was not then paid, this was not a sufficient acknowledgment (5). And where a defendant, an acceptor, in answer to a demand of payment from the drawer of a bill of exchange, acknowledges the bill, but said there was no consideration for the acceptance; this was held not a sufficient admission (6).

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(1) *Coltman* v. *Marsh*, 3 Taunt. 380. And see *De la Torre* v. *Barclay*, 1 Stark. R. 7.

(2) *Clarke* v. *Bradshaw*, 3 Esp. N. P. C. 157.

(3) *Swann* v. *Sowell*, 2 B. & A. 759.

(4) *Anonymous*, Holt, 381.

(5) *Hallinger* v. *Shaw*, 1 Moore, 340. 7 Taunt. 608, S.C.; and see *Beal* v. *Nind*, 4 Barn. & A. 568.

(6) *Easterby* v. *Pullen*, 3 Stark. 186.

The promise may be to pay when the defendant is able; and there are cases to show that the ability of the defendant to pay need not be proved (1): but by other and subsequent decisions the ability must be proved at the trial, as will be afterwards stated more at length (2).

It has been held, that payment of money into Court is not sufficient to take the case out of the Statute of Limitations, as to the residue of the demand (3), and that where the principal is paid into Court, the claim for which is barred by the Statute of Limitations, the claim of interest is not taken out of the statute (4).

It will have been observed, that very many of these cases of promises and acknowledgments have been verbal, several by letter, and one by *affidavit*, and another as an admission under a rule of Court; and there is one case where a recital in an agreement was considered as an admission (5); and in another, where the existence of a debt was acknowledged within six years in a deed between the defendant and third person, in which case such acknowledgment was held to be sufficient (6).

An acknowledgment of liability may be inferred from the conduct of the party (7).

It has been held, that the acknowledgment may be made by the party, and, in certain circumstances, by his

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(1) *Thompson* v. *Osborn*, 2 Stark. 98.

(2) *Davies* v. *Smith*, 4 Esp. R. 36. *Ayton* v. *Bolt*, 4 Bing. 105. *Tanner* v. *Smart*, 4 Barn. & A. 603.

(3) *Long* v. *Greville*, 4 Barn. & C. 10. 4 Dowl. & R. 632.

(4) *Collyer* v. *Willock*, 4 Bing. 313.

(5) *Froysell* v. *Llewellyn*, 9 Price, 122.

(6) *Mountstephen and others* v. *Brook and others*, 3 Barn. & A. 141.

(7) *East India Company* v. *Prince*, 1 Ryan & M. 407.

wife (1): and to the party, or even to a stranger, as in the case of the acknowledgment in the deed just mentioned.

It has been held, that a letter written by a defendant (who pleaded the Statute of Limitations) to the plaintiff's attorney, on being served with a writ couched in ambiguous terms, neither expressly admitting or denying the debt, should be left to the jury to consider whether it amounted to an acknowledgment of the debt, so as to fully take it out of the Statute of Limitations (2); and with this agrees the case of *Frost* v. *Bengough* (3); but in another case it was proved, that a defendant had, after having denied the existence of a debt demanded of him, replied, to an assertion of the plaintiff, that he had documents in his possession which would prove it, "that it was of no use for him to look at them, for I have no money to pay it now:" the Court of *Exchequer* held, that a nonsuit, which had been directed on such a case, made and relied on by the plaintiff, was right: the *legal effect* of such conversations, as to how far they may be considered as admitting debts to be due or amounting to promises to pay them, is a question rather for the determination of the Court than the jury (4).

(1) *Gregory* v. *Parker*, 1 Camp. 394. *Palethorp* v. *Furnish*, 2 Esp. 511 (n.) *Anderson* v. *Sanderson*, 2 Stark. 204. Holt R. 591.

(2) *Lloyd* v. *Maund*, 2 Durnf. & E. 760.

(3) 8 Moore R. 180.

(4) *Snook* v. *Mears*, 5 Price, 636.

CHAPTER V.

OF PROMISES AND ACKNOWLEDGMENTS TO TAKE THE CASE OUT OF THE STATUTE OF LIMITATIONS CONTINUED.

HAVING now considered most of the cases on promises and acknowledgments, upon which it has been observed the judges have gone far to keep alive the debt and avoid the bar (1), I have purposely reserved some very recent decisions, which have a general bearing upon the whole.

The first case is *A'Court* v. *Cross* (2), in the *Common Pleas;* it was an action of *assumpsit* to recover a debt, and the defendant pleaded the Statute of Limitations; the cause was tried before *Gaselee, J.*, and the evidence to take the case out of the statute was, that the said defendant said, on being arrested, "I know that I owe the money, but the bill I gave was upon a three-penny bill stamp, and I will never pay it." The learned judge did not consider this a promise to pay so as to take the case out of the statute, and nonsuited the plaintiff, giving him leave to move to set the nonsuit aside and enter a verdict for £30. *Wilde*, Serj. obtained a rule *nisi* on the ground that the acknowledgment of the debt had taken the case out of the statute, and cited *Bryan* v. *Houseman* (3), *Swann* v. *Sowell* (4), *Mountstephen* v. *Brooke* (5), *Rowcroft* v. *Lomas* (6), *Leper* v. *Tatton* (7).

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(1) *Maddock* v. *Bond, Irish* Term Rep. 336.

(2) 3 Bing. 329. 11 Moore R. 198, S.C.

(3) 4 East, 599.

(4) 2 Barn. & A. 759.

(5) 3 Barn. & A. 141.

(6) 4 Maule & S. 457.

(7) 16 East, 420.

Spankie, Serj. contended, that the effect of the recent cases was almost to throw the statute into *desuetude*, but even in *Bryan* v. *Houseman* (1), the Court intimated, that if the matter had been *res integra*, their decision might have been the other way; and in the earlier and better authorities, because they came nearer to contemporaneous expositions of the statute, it had always been holden, that a mere acknowledgment was not sufficient, but that there must be an express promise, to take a case out of the statute. *Bass* v. *Smith* (2), *Lacon* v. *Briggs* (3). In *Hyeling* v. *Hastings* (4) the Court thought that the acknowledgment was at most only evidence of a promise, but not matter upon which, if found specially, the Court could give judgment for the plaintiff. If, however, the Court would imply a promise from a bare acknowledgment unaccompanied with a refusal to pay, they could never imply a promise in the face of such an express refusal as had been proved in the present case. To do so would carry the consequence of an acknowledgment far beyond any thing hitherto decided. The statute was passed with the salutary intention of preserving tranquility, and of protecting men against claims which might be brought forward after a lapse of time, during which the evidence necessary to repel them might entirely have disappeared. But the intention of the statute would obviously be defeated if an unguarded acknowledgment were holden to bind a party at any distance of time.

Wilde relied on the recent decisions, particularly *Bryan* v. *Houseman* (5), *Trueman* v. *Fenton* (6), and

(1) 4 East, 599.
(2) 12 Vin. Abr. 229.
(3) 3 Atk. 105.
(4) Com. Rep. 154. Carth. 470. Salk. 29. 12 Mod. 223. Holt, 427. 1 Lord Raym. 329. 421.
(5) 4 East, 599,
(6) Cowp. 548.

Lloyd v. *Maund* (1), in which the point had been settled after much consideration.

Best, C. J.—" I am sorry to be obliged to admit, that courts of justice have been deservedly censured for their vacillating decisions on the 21 Jac. I. c. 16. When, by distinctions and refinements, which, Lord *Mansfield* says, the common sense of mankind cannot keep pace with, any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute, or, if it be in the common law, settling it on some broad and intelligible principle. But this must be done with caution, otherwise we shall increase the confusion that we attempt to get rid of, the authority of no one court is sufficient in such a case; I will, therefore, go no further to-day than I am authorized to go by the authority of modern decisions.

" The statute says, that actions on the case, account, trespass, debt, detinue, and replevin, shall be brought within six years after the cause of action, and not after—these actions it will be observed are mentioned in the same section of the act, and the limitation of the time within which they must be brought is the same in all of them.

" In all of them, except *assumpsit*, the six years commence from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgment (2). But in *assumpsit* it has been holden, that although six years have elapsed since the debt was contracted, if the

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(1) 2 Durnf. & E. 762.

(2) *Quære*, In an action of debt upon simple contract, the declaration stating, the defendant was indebted to the plaintiff in so much for goods sold, &c., might not an *acknowledgment* be given in evidence to take the case out of the Statute of Limitations?

debtor promises to pay it within six years, he cannot avail himself of the protection of this statute, because this promise, founded on a moral consideration, is a new cause of action. It seems to me, the plaintiff should have been required to declare specially on this new promise, and ought not to have been permitted to revive his original cause of action, for which the statute expressly declares no action shall be brought. By the present practice the defendant has not such distinct information as I think he is entitled to, that the plaintiff means to avail himself of some promise to recover a stale demand; the real cause of action is kept entirely out of view, and one that cannot be supported brought forward; this is inconsistent with what is said to be the intent of special pleading.

"The courts, however, have not stopped here, they have said an acknowledgment of a debt is sufficient, without any promise to pay it, to take a case out of the statute. I cannot reconcile this doctrine either with the words of the statute, or the language of pleadings. The replication to the plea of *non assumpsit infra sex annos* is, that the defendant did undertake and promise within six years.

"The mere acknowledgment of a debt is not a promise to pay it, a man may acknowledge a debt which he knows he is incapable of paying; and it is contrary to all sound reasoning to presume from such acknowledgment that he promises to pay it; yet without regarding the circumstances under which an acknowledgment was made, the Courts, on proof of it, have presumed a promise.

"It has been supposed that the legislature only meant to protect persons who had paid their debts, but from the length of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have often heard it called by great judges, an

act of peace. Long dormant claims have often more of cruelty than of justice in them: Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. *The legislature thought, that if a demand was not attempted to be enforced for six years, some good excuse for the nonpayment might be presumed, and took away the legal power of recovering it:* I think if I were now sitting in the *Exchequer Chamber* I should say, that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it the protection of the Statute of Limitations. But I should not, after the cases that have been decided, be disposed to go so far in this court, without consulting the judges of the other courts. There are many cases from which it may be collected, that if there be anything said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the Statute of Limitations.

"In the present case, the defendant, at the time he acknowledged the debt, said he would not pay it, because the plaintiff had arrested him.

"I cannot therefore say, that there was any cause of action within six years before the bringing of the action; the other judges concurring, the rule for setting aside the nonsuit was discharged."

In *Ayton* v. *Bolt* (1), it appeared in evidence that the defendant, on being applied to for the debt which was barred by the Statute of Limitations, said, he would be happy to pay it if he could; no evidence was given of the defendant's ability to pay; and the Court of *Common Pleas* said, the case fell within the rule laid down in *A'Court* v.

(1) 4 Bing. 105.

Cross (1), and a verdict having been found for the defendant, a new trial was refused.

In a subsequent case in the *King's Bench* (2), which was an action on a promissory note, to which the defendant pleaded the Statute of Limitations at the trial, the plaintiff proved the following acknowledgment by the defendant within six years, "I cannot pay the debt at present, but I will pay it as soon as I can;" there was no proof of any ability on the part of the defendant to pay the debt, a verdict was given for the plaintiff; a rule *nisi* for a new trial was obtained on the ground that the acknowledgment was not sufficient to take the case out of the statute, without proof of ability: after the cause had been argued, the court took time to consider of their judgment.

Lord *Tenterden*, C. J., (on delivering judgment,) said, "The question in this case was whether an *acknowledgment*, which *implied* that the debt for which the action was brought had not been paid, was an answer to the Statute of Limitations? The action was in *assumpsit*. Issue was joined upon the statute, and the acknowledgment proved was, "I cannot pay the debt at present, but I will pay it as soon as I can." The point, therefore, is, whether this is such an acknowledgement as, without proof of any ability on the part of the defendant, takes the cause out of the statute?

"There are, undoubtedly, authorities that the statute is founded on the presumption of payment, that whatever repels that presumption is an answer to the statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt, and that though such an acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law

(1) 3 Bing. 329. (2) *Tanner* v. *Smart*, 6 Barn. & C. 603.

considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the statute; and if these authorities be unquestionable, the verdict which has been given for the plaintiff ought to stand, and the rule for a new trial to be discharged.

"I refer to the cases of *Yea* v. *Fouraker* (1), *Lloyd* v. *Maund* (2), *Bryan* v. *Horseman* (3), *Leaper* v. *Tatton* (4), *Dowthwaite* v. *Tibbutt* (5), *Frost* v. *Bengough* (6), *Rowcroft* v. *Lomas* (7), *Swan* v. *Sowell* (8), *Mountstephen* v. *Brooke* (9). But if there are conflicting authorities upon the point, if the principles upon which the authorities I have mentioned are founded appear to be doubtful, and the opposite authorities more consonant to legal rules (10), we ought, at least, to grant a new trial, that the opportunity may be offered of having the decision of a court of error upon the point, and that for the future we may have a correct standard by which to act."

Though this statute (21 Jac. I. c. 16,) puts all these actions upon the same footing, it is only in actions of *assumpsit*, that an acknowledgment has been *held* an answer; and when in the case of *Hurst* v. *Parker* (11) it was decided to be inapplicable to actions of *trespass*, Lord *Ellenborough* gave what appears to be the true reason

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(1) 2 Burr. 1099.
(2) 2 Durnf. & E. 760.
(3) 4 East, 599.
(4) 16 East, 420.
(5) 5 Maule & S. 75.
(6) 1 Bing. 266.
(7) 4 Maule & S. 457.
(8) 2 Barn. & A. 759.
(9) 3 Barn. & A. 141.
(10) Lord *Kenyon*, at *nisi prius*, said, he was not now to put a construction on the Statute of Limitations for the first time; it had been decided, that an acknowledgment of the debtor was sufficient to take the case out of the statute, and he was bound to hold it so. *Bradshaw* v. *Coghlan*, 3 Esp. Rep. 157. If the matter has been *res integra*, the point might have admitted of doubt. 4 East R. 599.
(11) 1 Barn. & A. 92.

that in *assumpsit* "an acknowledgment of the debt is evidence of a fresh promise," and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states: If an acknowledgment had the effect which the cases in the plaintiff's favour attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute; whereas, the constant replication ever since the statute, to let in evidence of an acknowledgment is, that the causes of action accrued (or the defendant made the promise in the declaration) within six years, and the only principle upon which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, (though it may show clearly that the debt never has been paid, but is still a subsisting debt,) the plaintiff fails. In one of the earliest and leading cases upon the statute, *Heylin* v. *Hastings* (1), (reported also in Lord Raym. 389. 421; Salk. 29; and 5 Mod. 425; and mentioned 6 Mod. 309;) in *assumpsit* by an executor for goods sold by his testator, the defendant pleaded the statute, and the plaintiff proved that within six years the defendant had said, "if you can prove your debt I will pay it." The debt had been contracted above six years when this occurred, and whether this evidence would prove the issue for the plaintiff, *Holt*, C. J., doubted. On motion in court, it was

(1) Com. 54, &c.

agreed by the whole bench, that if six years elapse after a debt is contracted, and then the debtor acknowledges the debt and promises to pay, evidence of such a promise is good to maintain an action; but they doubted whether such evidence would support an action upon the first contract, *and whether the plaintiff should not have declared specially upon the conditional promise,* and *Roke-by*, J., thought that an acknowledgment in such a case, *without a promise*, would not bind; but *Holt*, C. J., thought it would, and said it had often been so held, though the contrary had also been held. *Holt*, C. J., afterwards talked the point over with ten judges, at *Serjeants' Inn*, including the *King's Bench* judges, and they agreed, upon consideration, that this promise, after six years elapsed, was sufficient evidence to maintain the declaration; for the defendant expressly promises, on proof of the debt, which proof may be made in the same action. They all agreed, also, that if a man acknowledged a debt after six years, it was good evidence of an *assumpsit* upon *non assumpsit infra sex annos* pleaded, for the jury to find a verdict for the plaintiff, but it is not a matter upon which, if found specially, the court could give judgment for the plaintiff: and the reason for this is, because the jury must draw the conclusion from evidence, not the court. Lord *Raymond* and *Salkeld* both state that the judges thought that a general *indebitatus assumpsit* might well be maintained, because the defendant had *waved* the benefit of the statute, but as the pleadings do not appear to have been calculated to raise the question of waver, and as neither of the reports in 5th or 6th Mod. Rep. notice this point, we have cited the case from Com. Rep., because that report appeared to accord best with legal principles.

In *Green* v. *Crane* (1), in *assumpsit* by an executor upon promises to his testator and *non assumpsit infra sex annos*, the plaintiff proved, that within six years the defendant owned the debt, and promised payment, but the acknowledgment and promise were made not in the testator's lifetime but after his death, and whether that evidence would maintain the issue was the question; and after the case had been stirred twice and the court had taken further time to advise, *Holt*, C. J., delivered the resolution of the court, that they were all of opinion that the action could not be maintained, the promise being made to the executor, *and so out of the issue*. In *Sarel* v. *Wine* (2), the facts were exactly similar to those in *Green* v. *Crane* (3), and the court acted upon that decision. In *Ward* v. *Hunter* (4), there was a similar determination. In *Manton* v. *Sculthorp* (5), the same point occurred again, in the *King's Bench*, and they decided accordingly, that the acknowledgment to the executor was not evidence upon promises to the testator, and a nonsuit was entered. In *Pittam* v. *Foster* (6), in an action against *Foster* and the wife, *dum sola*, the defendant pleaded the statute, that the cause of action did not accrue within six years: issue was taken thereupon, and the plaintiff proved an acknowledgment by *Foster* after the marriage of *Norris and wife*, and whether that supported the issue and entitled the plaintiff to a verdict was the question; and upon argument, the court was clear it did not, for the issue was, whether there was any such promise within six years as the declaration stated, *viz.* a promise whilst the wife was

(1) Lord Raym. 1101. 6 Mod. 309. Salk. 28. 11 Mod. 37.
(2) 3 East, 409.
(3) Lord Raym. 1101.
(4) 6 Taunt. 210.
(5) MS. *Trin.* 1818.
(6) 1 Barn. & C. 248.

sole, and a promise after the wife was married was not within that issue.

All these cases proceed upon the principle that under the ordinary issue on the Statute of Limitations, an acknowledgment is only evidence of a promise to pay, and unless it is conformable to and maintain the promises in the declarations, though it may show to demonstration that the debt has never been paid and is still subsisting, it has no effect. The question then comes to this, is there any promise in this case which will support the promises in the declaration? The promises in the declaration are absolute and unconditional to pay, when thereunto afterwards requested. The promise proved here was, "I'll pay as soon as I can;" and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise into one that was absolute and unqualified. Had it been in terms what it is in substance, "Prove that I am able to pay and then I will pay," it would have been what the promise was taken to be in *Heylin* v. *Hastings* (1), a conditional promise; and when the proof of ability should have been given, but not before, an absolute one. Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, why shall not the rule *expressum facit cessare tacitum* apply? In *Bicknell* v. *Keppell* (2), where the question was whether the case was taken out of the statute by a letter in which the defendant referred the plaintiff to his solicitors, and said, "They are in possession of my determination and ability," *Mansfield*,

(1) *Ante*, 70.

(2) 1 New Rep. 20.

C. J., seemed to think the defendant's ability would come in issue upon the trial, and that the solicitors might be examined as to the defendant's ability, as well as to the determination he had communicated to them; and in the late case of *A'Court* v. *Cross* (1), where the defendant said, "I know I do owe the money, but the bill I gave is upon a threepenny stamp, and I will never pay it," *Gaselee*, J., thought this acknowledgment did not amount to a promise to pay, or take the case out of the statute; and the court, upon argument on both sides, were of opinion that he was right, and that where the defendant distinctly and expressly declared that he would not pay, a promise could not be raised by implication that he would. "Upon legal principles it appears to us that this decision was right, and that in this case the rule for a new trial ought not to be made absolute."

These cases are highly important; besides the points determined, they also show the disposition of the judges of the *King's Bench* and *Common Pleas* to reconsider the decisions upon promises and acknowledgments to take the case out of the Statute of Limitations. Some of the principal cases on the Statute of Limitations were formerly decided with the approbation of the twelve judges, and one reason why a new trial was granted in *Tanner* v. *Smart* (2) was, that an opportunity may be offered of having the decision of a court of error upon the point, and that for the future the judges might have a correct standard by which to act.

The truth is, much more importance has been given to acknowledgments than they really deserve; they have been frequently proved to have been made in the course

(1) 3 Bing. 239. 11 Moore R. 193. S. C. (2) 6 Barn. & C. 603.

of conversations, perhaps even with a stranger, and more frequently *proved* by a perjured witness where no promise or acknowledgment was made, or intended to be made; *they are also frequently made upon an unsettled demand, and let in most* UNSATISFACTORY *proof of the quantum of damages.*

A most able judge lately retired from the Bench, (Sir *George S. Holroyd,*) lays down the rule thus, "a mere acknowledgment of the existence of a debt is not sufficient, unaccompanied with a promise, express or implied, to pay, to take a case out of the Statute of Limitations."

CHAPTER VI.

OF THE STATUTE 9 GEO. IV. C. 14, § 1, 2, 3, 4.

I HAVE now stated the Common Law with respect to the time of bringing actions upon contracts, and supposed that the *wager of law* kept the common action of debt within due bounds; but that as soon as *Slade's case* had given the subject his election either to bring debt or *assumpsit*, it then became necessary to pass a law for the limitation of personal actions, which gave rise to the Statute of Limitations, 21 Jac. I. c. 16, and a uniform rule was intended to have been laid down upon the subject; the exceptions in the statute as to debts by specialty, and relating to merchants' accounts, and the other exceptions relating to infants and other persons under disability, and for allowing time after error and outlawry, have been also considered. I have also detailed the different cases on promises and acknowledgments, to take the case out of the statute.

It was anciently the course to take SECURITIES from debtors, among others, by *single bill*, of which a good idea may be formed by supposing, that the debtor executed the obligatory part of a bond only, without any condition, and bound himself in the precise sum due (1). The next step was a *bill obligatory*, where the obligor

(1) Com. Dig. tit. *Obligation*, C.

bound himself in a penalty without any formal condition; as if *A.* acknowledges himself indebted in £20, and for the payment binds himself in £40(1), sometimes the single bill was accompanied by a separate deed or instrument of *defeazance*, controlling the bill(2).

At last the *bond* in its present form was adopted, consisting of the obligatory part in a penalty, and of the condition in the nature of a defeazance; our ancestors were led to take security by specialty under the fear there was, that if the creditor had no specialty, the debtor, if sued, would wage his law—this accounts for the trifling number of debts due by simple contract.

The *Statutes Merchant* and *Statute Staple* had been long adopted as a security for merchants, giving an immediate execution to the creditor; when another security for the protection of private creditors got into use(3), I allude to the *Recognizance in the nature of a Statute Staple*, by which the creditor became also entitled to an immediate execution; and it is singular, that this new security continued for some time, until it was thought proper to legalize it by the stat. 23 Hen. VIII. c. 6, which enacted, that a recognizance in the nature of a Statute Staple might be taken before either of the Chief Justices of the King's Bench and Common Bench, or in their absence out of term, the Mayor of the Staple of *Westminster* and the Recorder of *London* jointly; and the form of the recognizance is given. These instruments, notwithstanding what would be now considered the *public exposure* in court in taking the recognizance, continued until 1721,

(1) Com. Dig. tit. *Obligation*, D.

(2) Shep. Touchst. tit. *Obligation*, c. 21.

(3) See Shep. Touchst. tit. *Statute*. 2 Black. Comm. 162. 342. And as to some of the rights of the cognusee, or creditor, in the real property, see Bradby on *Distresses*, (2 edit.) 50.

and were then "common and beneficial securities," and were by the statute 8 Geo. I. c. 25, improved; at present they are unknown in practice, and it is said, they have been superseded by *warrants of attorney* to confess judgment (1), which made it unnecessary for the debtor to appear personally in court.

Between the reigns of Henry the Eighth and George the First arose the security by *Inland Bills of Exchange* and *Promissory Notes*. It is said Inland Bills of Exchange did not originate at a much earlier period than the reign of *Charles the Second* (2), and Lord *Holt*, in the case of *Buller* v. *Cripps* (3), said, he remembered when actions on *Inland* Bills of Exchange first began—a particular custom was laid between the parties, as merchants trafficking with one another in different towns; in Lord *North's* time it was said, the custom was part of the common law of England, and these actions became frequent as the trade of the nation increased; afterwards the custom was extended to tradesmen and persons in business, being a general custom to all traders within and without the realm (4); and then to all, whether tradesmen or not: and it was lastly held, not to be necessary to allege the custom (5). *Inland* bills were further *legalized* by the statutes 9 & 10 Will. III. c. 17, and 3 & 4 Anne, c. 9.

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(1) Manning Rev. Exch. Prac. 3: It appears that judgments have been long a favourite security in *Ireland;* by one statute there, they have been made capable of assignment, and by another statute, (*ante*, p. 9,) the twenty years presumption of payment is applied to them.

(2) Chitty on Bills, 11.

(3) 2 *Anne*, 6 Mod. 29. *And see Bromich* v. *Loyd*, 2 Lutw. 1582. *Sarsfield* v. *Witherley*, Carth. 82.

(4) 20 *Car.* 2. Hardres. 485. *Keafe* v. *Archdeken*, 1 Vern. & Scriv. *Irish* Rep. 199, 200.

(5) *Pearson* v. *Garrett*, 4 Mod. 242. *Buller* v. *Crips*, 6 Mod. 29. *Pinkney* v. *Hall*, 1 Ld. Raym. 175. *Erskine* v. *Murray*, 2 Ld. Raym. 1542. Chitty on Bills, 11. *Foreign* Bills were of much earlier date.

Lord Chief Justice *Holt*, who was a most determined enemy to *promissory notes*, says, in the 2 *Anne* (1), that two of the most famous merchants in *London* had told him it was then very frequent with them to make such notes, and that they looked upon them as bills of exchange (2), and they had been then used for thirty years; and that not only notes, but *bonds* for money, were *indorsed* frequently as bills of exchange. Lord *Holt* agreed a bill might be made by two persons without a third; but (he said) if there be such necessity of dealing that way, why do not dealers use that way which is legal? The notes were an invention of the *Goldsmiths* in *London*, then commencing as bankers, who had a mind to make a law to bind all those who dealt with them.

Lord *Holt* thought no action would lie on the notes as an instrument, but they were only to be considered as evidence of a debt (3), this question exercised the judgments of the most able men of that time; but the authority and weight of Lord *Holt's* opinion made others yield to him (4): it was thought necessary to *legalize* promissory notes, as being within the custom of merchants, by the statute 3 & 4 Anne, c. 9, made perpetual by the 7 Anne, c. 25, § 3.

It is singular, that as well recognizances as inland bills of exchange and promissory notes were in frequent use as securities, at times when their legality was disputed (5), and such use induced the legislature to legalize them.

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(1) *Buller* v. *Crips*, 6 Mod. 30.

(2) The *bank post bill* of the Bank of England is a promissory note of probably an ancient form.

(3) See *Sutton* v. *Toomer*, 7 Barn. & C. 416.

(4) *Brown* v. *Harraden*, 4 Durnf. & E. 151.

(5) An *indorsed* bond must have been a doubtful instrument: I am not aware of any cases on this subject among the early cases in equity.

It will be a very beneficial result of Lord *Tenterden's* act, if creditors, under the idea that a simple contract debt of six years standing is almost always in hazard from one circumstance or other, will press for investigation into accounts, and payment, or security by bond, or bill of exchange, or note, or other security; and I beg to suggest, as a bond is certainly preferable, in case of the death of a debtor, to a bill of exchange or promissory note; that the *stamp* duty on bonds might be advantageously lowered, it would be in the end more productive to the revenue by the increased use of the good old security of a bond; at present a money bond of £101, is subject to a duty of £2; a very heavy duty of nearly £2 per cent.—the bond will stand good for at least twenty years—the security by bill or note is generally subject to the operation of the Statute of Limitations six years after it becomes due, as a bill payable two months after date, six years after two months and three days grace; a note payable any certain time after notice in writing, does not within a considerable distance of time come within the statute, until notice in writing be given, so that it rests with the creditor to fix the time to put the note in force.

The late case of *Thorpe* v. *Coombe* (1) will illustrate what I have just been observing: a promissory note was made in 1810, payable two years after demand. In an action on the note, the defendant pleaded the general issue and the Statute of Limitations; the plaintiff proved that the note was presented and payment demanded in 1823; the defendant said "something about interest, and promised he would write about it(2);" other applications

(1) 8 Dowl. & R. 337, and see *Clayton* v. *Gosling*, 5 Barn. & C. 360.

(2) This is an instance of a *loose* acknowledgment.

were made, but without success: the action was commenced in 1825; the jury, under the direction of the learned judge, (Lord *Tenterden*, C. J.) found for the plaintiff. *Scarlett* moved to enter a non-suit, on the ground that the Statute of Limitations was a bar to the action, as it must be presumed, after a lapse of *thirteen* years, payment of the note had been demanded and the account paid, and he cited *Holmes* v. *Kerrison* (1), *Christie* v. *Fonseck* (2). *Bayley*, J. was clearly of opinion, that the Statute of Limitations did not begin to run until two years after demand of payment of this note had been made. Here the cause of action did not arise until the two years after demand had elapsed, and consequently the statute affords the defendant no protection; after the evidence given in this case, there could be no ground for the jury to presume that there had been previous payment or satisfaction of the note, and the rule was refused.

In another case at *nisi prius* (3), where an action was brought on a promissory note, dated in 1813, for £700, payable twenty-four months after demand; and the note was presented for payment in 1823, and the cause tried in 1826; it was contended that there was no evidence to take the case out of the statute, and *Christie* v. *Fonseck* was also cited; but it was answered, that the cause of action did not accrue till twenty-four months after demand, and no demand was made till 1823; *Holmes*

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(1) 2 Taunt. 323.

(2) *Mich.* T. 52 Geo. III. *coram* Sir J. *Mansfield*, C. J. MS. Selw. N. P. 137, 344, 7th edit. (note.) *Christie* v. *Fonseck* is said to have been doubted in a late case in K.B. Selwyn, N. P. 344; on inquiry I learn it was a case at *nisi prius* before Lord *Tenterden*, C.J.

(3) *Thorpe and others* v. *Booth*, 1 Ryan & M. 388.

v. *Kerrison* (1) was cited. Lord *Tenterden*, C. J. said, "this is certainly a point of some doubt and difficulty, but I am of opinion on the authority of *Holmes* v. *Kerrison*, that the Statute of Limitations will not, in the present case, be a bar to the plaintiff's right to recover on this promissory note; but that my opinion, if wrong, may be corrected, I shall give the defendant liberty to move to enter a non-suit." In the following term a motion was made accordingly, but the Court refused to grant it.

Had the construction of the statute 21 Jac. I. c. 16, § 3, been strictly confined to the words, or at any rate confined to clear and decided promises of payment, it is by no means improbable but creditors would have continued in the good old practice of requiring securities, either by specialty, or by bills of exchange, or promissory notes, &c.; but when the judges held, that acknowledgments, even the most trifling, would establish debts, and take cases out of the statute, creditors grew careless of requiring proper securities, and in many cases relied upon acknowledgments to answer the purpose, and trusting to the memory of witnesses, the precise terms of the acknowledgment could not be well remembered, so that in many cases the real interests of the creditor suffered, while in others it was a great temptation to perjury, especially in cases where the whole depended on the evidence of a friend of the creditor's, as to a private conversation between the debtor and the witness.

Few statutes are of more practical importance, either to the public or the profession, than the new statute, 9 Geo. IV. c. 14; its effects are very general; there are few persons in England, but are entitled to or owe debts of six years standing.

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(1) 2 Taunt. 323.

The statute recites, that by the act passed in *England* (21 Jac. I. c. 16, § 3) (1), "it was (amongst other things) enacted, that all actions of account and upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants;) all actions of debt grounded upon any lending or contract, without specialty, and all actions of debt for arrearages for rent should be commenced within three years after the end of that session (21 Jac. I.) or within six years next after the cause of such actions or suit, and not after; and that a similar enactment was contained in an act pased in *Ireland* (10 Car. I. sess. 2, c. 6) (2); and that various questions had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking the cases out of the operation of the said enactments, and that it was expedient to prevent such questions, and to make provisions for giving effect to the said enactments and the intention thereof, it was therefore enacted, that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to 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 chargeable thereby; AND that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in

(1) *Ante*, p. 10. (2) *Ante*, p. 12.

respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them. Provided always, 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 (1). Provided also, that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff" (2).

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(1) Payment by one is payment by all; the one acting virtually as agent for the rest. Per Lord *Mansfield*. The defendant has had the advantage of the partial payment, and therefore must be bound by it. Doug. 629.

(2) The latter part of the first section in the original bill, which was brought into parliament by Lord *Tenterden*, was as follows—it will be perceived that it has been *considerably altered* in its progress—"That in actions of debt or upon the case, grounded upon any simple-contract, no acknowledgment or *promise* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to 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 chargeable thereby, *or shall be proved by the actual payment of some part of some entire demand or sum of money sought to be recovered in whole or in part by such action, or of some interest thereon;* and that where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or *by reason* of any acknow-

And by § 4 "no *indorsement* or memorandum *of* any *payment*, written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange, or other writing by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment to take the case out of the operation of the statute."

The question, when the act generally takes effect, is reserved for future consideration (1).

It becomes important to inquire, when a *new* or *continuing* contract, to take the case out of the operation of the enactments, or to deprive any party of the benefit thereof, becomes necessary: and no such contract can be necessary till six years from the accruing of the cause of action have expired, which, in some cases, we have seen (2) commence from the making of the promise or contract, but in others may be many years after the date of the original transaction; nor, as it seems, would any such contract be necessary, first, where the contract is by specialty judgment or statute; nor secondly, where the parties come within the exception relating to merchants or their

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ledgment or promise *made* by any other or others of them, *or by any payment made by any other or others of them, unless such payment shall be proved to have been made with his or their privity or consent.* Provided *always*, that in actions to be commenced against two or more, such joint contractors or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the said defendants by virtue of a new acknowledgment or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

(1) See Chap. XII.

(2) *Ante*, 45, &c.

factors or servants, or within any of the other exceptions in the statute 21 Jac. I. c. 16, and statute 4 Anne, c. 16: I have before observed, that the meaning of the exception relating to merchants' accounts, appears to me to be unsettled by decision.

The act 9 Geo. IV. c. 14, § 5, particularly provides, that it shall not alter or take away or lessen the effect of the *payment* of any principal or interest made by any person whatsoever; if, therefore, principal or interest has been paid, and can be duly proved, there can be no need of any new or continuing contract till six years from the time of such payment.

A case occurred at the last *York Assizes* (1) on this exception of payment, it was an action on a promissory note: the plea was the Statute of *Limitations;* to avoid this plea the plaintiff proposed to prove part-payment of interest within six years; and for this purpose called a sheriff's officer, who proved, that when he arrested the defendant he said, "it is a hard case, for I paid £10 lately in part of the interest."

Bayley, J. said, "this case comes within the mischief intended to be remedied by the late act; I am of opinion that proof of acknowledgment of payment is not sufficient to take the case out of the statute; there must be proof of actual payment, but the plaintiff may take a verdict, and the defendant has leave to move to enter a nonsuit." (2)

This case shows that the exception is likely to be construed *strictly;* it is certainly as easy to prove an acknowledgment of payment as an acknowledgment of a

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(1) *Willis* v. *Newham*, MS. (2) *Jones*, Serj, for the plaintiff, (Exch.) *York* Summ. Ass. 1829, *Brougham*, for the defendant. *coram Bailey*, J.

debt, to take the case out of the statute, and nearly the same danger of perjury in both (1); at the same time it is to be observed, that payment is excepted out of the statute 9 Geo. IV. c. 14, and may be proved without a writing; perhaps something may have turned on the species of evidence, an acknowledgment to a sheriff's officer, and it might be considered as suspicious and unsatisfactory evidence (2).

It has been doubted whether accounts delivered, though unsigned, would not be an implied exception, even when the parties are not merchants: a cause in the *Exchequer*, in which this point was likely to have occurred, came on for trial in the sitting after Trinity Term last, but it was referred, with liberty for the arbitrator to state the facts in his award, that the opinion of the Court might be obtained. I have suggested before that the accounts of partners with others should be required to be signed by each of the partners, to affect all by the acknowledgment arising out of the accounts within the new statute.

It will have been observed, that by the statute 9 Geo. IV. c. 14, § 3, that no indorsement or memorandum of any payment, written or made after the time ap-

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(1) A case of the *Executors of Baldwin* v. *Clarke*, is said to have occurred at *Lincoln* before Lord *Tenterden*, C.J. (Aug. 4, 1829), *Lincoln Ass.* in which it was held that payment by the executors of one of two makers of a promissory note, would bind the other maker. I have not been able to obtain a report of this case.

(2) I am informed that in many of the innumerable causes in the *Courts of Requests* (of which in some, several hundreds are tried, or rather *disposed of* in a day;) the verdict is obtained upon proof of an acknowledgment by the plaintiff's agent, who is in fact the attorney, and probably relies on the success of the cause for his charges —*what a fruitful source of perjury in a court where almost every cause is tried.*

pointed for the act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, is to be deemed sufficient proof of such payment so as to take the case out of the operation of the Statute of Limitations; perhaps this was not intended entirely to prevent such indorsement being evidence, but that it should not be evidence for that particular purpose (1).

The actions to which the first section applies are actions of debt or upon the case upon simple contract. The action of *account* is not mentioned: it will be seen how far that action may be resorted to, to evade the new statute.

I presume the acknowledgment and promises mentioned, must mean the same acknowledgments and promises which existed before the act, as modified by the late important decisions (2), with this addition, that they must be *in writing;* but it seems to me, that while promises and acknowledgments in writing will be certainly allowed, yet the present inclination of the courts is to hold the plaintiff to *strict* proof of the promises; and many of the old cases are now in effect over-ruled. Lord *Tenterden*, C. J. states the result of the late cases thus (3): —"it is now settled that a mere acknowledgment of the subsistence of the debt, unless coupled with or amounting to evidence of a promise to pay, is not sufficient to take the case out of the operation of the Statute of Limitations." *see p. 89. 22.*

The new statute speaks of a new or continuing contract; the word "*continuing*," I presume, applying to

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(1) See *post*, chap. VII. and *Bosworth and another* v. *Cotchett*, MS.

(2) See *ante*, chap. IV.

(3) *Burley* v. *Stott*, 2 Manning & R. 96.

cases of promises to pay simply upon the original consideration, and a *new* contract where the consideration is new, or where the promise is to pay upon consideration or otherwise different from the original promise; and the contract in the act is to take the case out of the operation of the statute 21 Jac. I. c. 16, in *England*, or the 10 Car. I. sess. 2, c. 6, in *Ireland*, or to deprive the party of the benefit thereof. "Such acknowledgment or promise must be made or contained by or in some writing to be signed by the party chargeable thereby;" the meaning of this, I presume, is, that it must be in some writing made for the express purpose, or be contained in some other writing, as in the case of *Mountstephen* v. *Brooke* (1), in a recital of a deed, and the writing must be signed by the party chargeable, excluding any signature by an agent; by the new *Bankrupt Act*, 6 Geo. IV. c. 16, § 131, the *new* promise under that act may either be signed by the bankrupt or by an agent, but in this case the act of the agent seems to be cautiously excluded (2).

It will probably be considered frequently advisable to declare specially on any new promise; this is strongly urged by Lord *Wynford* in *A'Court* v. *Cross* (3).

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(1) 3 Barn. & A. 141.

(2) See *post*, chap. XIII. of *new* promises by insolvent debtors and bankrupts, and *Hubert* v. *Moreau*, 2 Carr. & P. 528.

(3) *Ante*, chap. V.

CHAPTER VII.

OF THE STATUTE 9 GEO. IV. C. 14, § 1, 2, 3, 4, CONTINUED.

THE case of *Heyling* v. *Hastings* (1) having decided, that an acknowledgment took the case out of the Statute of Limitations. It has been followed by several decisions upon the effect of the promise or acknowledgment of *one of several parties* to a contract, to take the case out of the Statute of Limitations.

The leading case upon the subject is *Whitcomb* v. *Whiting* (2) in 1781; but previous to that case, and also previous to the case of *Heyling* v. *Hastings*, 10 Wm. III. occurred the case of *Bland* v. *Haselrig and others* (3): in which the verdict, after a plea of the Statute of Limitations, was, that one of the defendants assumed within six years, and the other *non assumpsit;* and it was moved that no judgment could be given against the defendant upon whom the verdict was found, for it was an entire contract, and all must be found to promise. *Pollexfen*, C. J. *Powell* and *Rokeby*, J. were of opinion the plaintiff could not have had judgment: *Ventris*, J. inclined to the contrary; he admitted that if several defendants pleaded

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(1) *Ante*, chap. IV.
(2) Doug. 629.
(3) 2 Ventr. 151

the general issue, and the verdict was, that one promised, the plaintiff failed, but here it may be taken that they did all promise at first, and one only renewed the promise within six years; the plea of *non assumpsit infra sex annos* implied a promise at first, and if one only renewed his promise within six years, it would bind him, and the plaintiff must sue all, or vary from the original contract; the Chief Justice *Pollexfen* seemed to be of opinion, that if the promise was renewed within six years, yet if not upon a new consideration, it would not bind; *and if there were a new consideration, the action would lie against him that promiseth* (1).

There were, no doubt, considerable difficulties attending this case, but it seems to have been the opinion of three of the judges, that if one of the defendants had promised within six years and the others not, that promise would have bound him alone; and subsequently, in an action against the drawer of a note, proof was given that the indorser had acknowledged his handwriting to the indorsement, but such proof was considered insufficient against the drawer, on the ground that no person's confession but the defendant's could be evidence against him (2).

The case of *Whitcomb* v. *Whiting* (3) occurred in 1781; it was an action on a promissory note, and the pleas were the general issue and the Statute of *Limitations;* the plaintiff produced in evidence a joint and several note by the defendant and three others, and then proved payment by one of the others of interest, and of part of the principal within six years (4), *Hotham*, Baron, thinking,

(1) See the provision in the statute 9 Geo. IV. c. 14, § 1.

(2) *Hennings* v. *Robinson*, Barnes, 436.

(3) Doug. 629.

(4) See the exception of payment in the statute 9 Geo. IV. c. 14, § 1.

that it was sufficient to take the case out of the statute as against the defendant—a verdict was found for the plaintiff. On a motion for a new trial, *Bland* v. *Haselrig* (1), *Hennings* v. *Robinson* (2), were cited; and it was urged that a door would be open to frauds and collusions if the evidence were admitted; a plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the remainder, although it has been already paid. Per Lord *Mansfield*—The question is only whether the action is barred by the Statute of Limitations; when cases of fraud appear, they will be determined on their own circumstances; payment by one is payment for all, the one acting virtually as agent for the rest (3); and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due. The rule for a new trial was discharged.

The doctrine of rebutting the Statute of Limitations by an acknowledgment other than that of the party himself, began, says Lord *Ellenborough* (4), with the case of *Whitcomb* v. *Whiting*; by that decision, however, there was an express acknowledgment by the actual payment of a part of the debt by one of the parties liable. But that case was full of hardship. For this inconvenience may follow from it—suppose a person liable with thirty or forty others (5) to a debt he may have actually paid, may have had in his possession the document by which that payment was proved, but he may have lost his re-

(1) *Ante*, 90.

(2) *Ante*, 91.

(3) See the stat. 9 Geo. IV. c. 14, § 1.

(4) *Brandram* v. *Wharton*, 1 Barn. & A. 468.

(5) This might be the case to an alarming extent, if a person were a shareholder of one of the joint stock companies, of six years standing.

ceipt, then, though this was one of the very cases which the statute was passed to protect, he may still be bound, and his liability be revived by a random acknowledgment made by some one of the thirty or forty others, who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, (continued his Lordship,) I am not prepared to go, so as to deprive a party of the advantage given him by the statute by means of an implied acknowledgment.

Whitcomb v. *Whiting* has been, (says Lord *Tenterden* (1),) relied upon to shew, that such payments would take the case out of the Statute of Limitations; *it is not necessary to say whether that case, which is contrary to a former decision in Ventris* (2) *would be sustained, if reconsidered;* but I am warranted in saying, by what fell from Lord *Ellenborough* in *Brandram* v. *Wharton* (3), that it ought not to be extended; the payment was by one of several, originally liable, here (that is in *Atkins* v. *Treadgold,*) we are called upon to go further and say, that a payment by one of several, liable *alieno jure,* will raise an implied promise by them all, such a decision would introduce great difficulty in administering the affairs of testators; suppose an executor to have waited six years, and then no claim having been made, to dispose of the assets in payment of legacies, he might be subsequently rendered liable to the payment of demands to any amount, by the acknowledgment of a person originally joint debtor with the testator; the inconvenience and hardship arising from such a liability satisfies me that the principle of *Whitcomb* v. *Whiting* ought not to be extended to this case.

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(1) *Atkins* v. *Treadgold,* 2 Barn. & C. 28.

(2) *Bland* v. *Haselrig,* 2 Vent. 151.

(3) 1 Barn. & A. 463.

Mr. J. *Bayley* said (1), " it is said that a joint promiser, having made a payment within six years, the executors of the others are liable, and *Whitcomb* v. *Whiting* is relied upon, *that is certainly a very strong case, and it may be questionable whether it does not go beyond proper legal limits.*"

Holroyd, J. (2) " *Whitcomb* v. *Whiting* has gone far enough, even if that case be law."

Best, J. (3) " beyond *Whitcomb* v. *Whiting* this court ought not to go."

Best, C. J. (4) in a subsequent case supports *Whitcomb* v. *Whiting*, and considers *Bland* v. *Haselrig* as of no authority; in that case it was held, that an acknowledgment within six years by one of several joint makers of a promissory note, would revive the debt against the other, although he has made no acknowledgment, and only signed the note as a surety; in a subsequent case, also of a surety, where the action was brought against the administrators of the surety, proof was given of a payment made by the other maker in the lifetime of the surety, and it was held, such payment operated as a new promise by the surety to pay, and his administrator was liable (5); and in an action on a joint and several note, a letter written by the defendant to the other maker within six years desiring him to settle the money, was ruled (6) to be evidence to take the case out of the Statute of Limitations.

In an action on a joint and several promissory note, it was proved that the payee received a dividend under a commission of *bankrupt* against one of the makers on ac-

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(1) 2 Barn. & C. 29.
(2) 2 Barn. & C. 31.
(3) 2 Barn. & C. 31.
(4) *Perham* v. *Raynell*, 2 Bing. 307.
(5) *Burley and others, executors,* v. *Stott, administratrix*, 2 Manning & R. 96. 8 Barn. & C. 36.
(6) *Halliday* v. *Warde the elder*, 3 Camp. 32.

count of the note, it was held, that it was such an acknowledgment of the debt as would prevent the other maker from availing himself of the Statute of Limitations (1); but in a subsequent case, where one of two joint drawers of a bill of exchange became bankrupt, and under his commission the indorsees proved a debt beyond the amount of the bill for goods sold, and they exhibited the bill as a security, and afterwards received a dividend, it was held in an action by the indorsees of the bill against the solvent partner, that the Statute of Limitations was a good defence, though the dividend had been paid within six years; and when *Jackson* v. *Fairbank* was cited, it was answered, that it wanted one material circumstance which existed in *Whitcomb* v. *Whiting*, for the party who revived the debt by his acknowledgment, became himself liable to contribute to it; and Lord *Tenterden*, (then *Abbott*, J.) said, "he was by no means satisfied that *Jackson* v. *Fairbank* was a sound or good decision" (2).

Lord *Tenterden*, C. J. has lately ruled, where one of two partners, then a certificated bankrupt, acknowledged a debt formerly due to the plaintiff from his partner and himself, that it was not a sufficient acknowledgment to take the case out of the statute (3).

It has been contended that the case of *Whitcomb* v. *Whiting* extended to *executors* so as to make them liable by a payment made after the death of their testator; but in an action brought on a joint and several promissory note, by the executors of the payee against the executors of one of the makers, it was held, that the payment of interest by the other maker *ten* years after the death of the testator, did not take the case out of the Statute of Limita-

(1) *Jackson* v. *Fairbank*, 2 H. Black. 340.

(2) *Brandram* v. *Wharton*, 1 Barn. & A. 463.

(3) *Marten* v. *Bridges*, 3 Carr. & P. 83.

tions, so as to make the executors liable (1). And where an action was brought against *A.* and *B.* and *C.* his wife, upon a joint promissory note made by *A.* and *C.* before her marriage, and the promise was laid by *A.* and *C.* before her marriage, and the defendant pleaded the Statute of *Limitations*, whereupon issue was joined: it was held that an acknowledgment of the note by *A.* within six years, but after the marriage of *B.* and *C.* was not evidence to support the issue (2).

It has been ruled by Lord *Ellenborough*, C. J. (3), that an acknowledgment, to bind a partner, ought to be clear and distinct, and unless there be an express and unequivocal acknowledgment of an existing debt by one, it would not bind the other.

This was the state of the law when the stat. 9 *Geo.* IV. c. 14, was passed, in which by § 1, it was enacted, "that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts, or that act as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise judgment may be given and

(1) *Atkins and another, executors*, v. *Treadgold and another, executors*, 2 Barn. & C. 23. 3 Dowl. & R. 200.

(2) *Pittam* v. *Forster*, 1 Barn. & C. 248.

(3) *Holme* v. *Green*, 1 Stark. N. P. C. 488.

costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff" (1).

This clause will render it necessary that plaintiffs should act with great caution where there are two or more joint contractors, or the personal representative of any contractor, for not only will the joint contractor or personal representative be not bound by the written acknowledgment or promise signed by his co-contractor or joint representative; but if an action be commenced against them, and it shall appear at the trial or otherwise (so is the act worded,) that one of the defendants has signed, but not the others, though the plaintiff will recover against those who have signed, yet judgment shall be given, and *costs* allowed for the defendants who have not signed.

By § 2, " if any defendant or defendants in any action

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(1) It should be observed that part of this clause is *materially* varied from the *original bill;* it stood thus: " that where there shall be two or more joint contractors, or executors, or administrators, of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or *by reason of* any acknowledgment or promise *made* by any other or others of them, *or by any payment made by any other or others of them, unless such payment shall be proved to have been made with his or their privity or consent;* provided *always*, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise, that the plaintiff though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

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After the death of one maker of a joint & several promissory note signed by him a payment upon it by the Executor of the deceased party will not take the debt out of the stat. as against the [illegible]
Barn. & Adol. 326, 1833

on any simple contract, shall plead any matter in *abatement* to the effect that any other person or persons ought to be jointly sued and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts, or this act, or of either of them, be maintained against the other person or persons named in such plea or any of them, the issue joined on such plea shall be found against the party pleading the same."

This section contemplates, that to the declaration, which, in some cases, will be upon the original contract, and in others, necessarily upon the new promise, and this may hereafter frequently be the case; the defendant may plead in abatement the *non joinder* of any of the parties originally liable, or of any personal representatives; and in that case if it appear at the trial that the action could not, by reason of the Statute of Limitations, or of the statute 9 Geo. IV. c. 14, be maintained against the persons named in such plea or any of them, the issue joined in such plea shall be found against the party pleading the same.

The next section applies to *indorsements* or memorandums *of payment* upon any promissory note, bill, or other writing, by the party to whom the payment shall have been made. I was not aware till I met with the case of *Bosworth* v. *Cotchett*, (of which a report will be afterwards given,) of any cases in which it has been held that such indorsements on bills or notes would be admissible; but they appeared to rest on the same principle as indorsements, on bonds, of payment of interest or principal.

In the case of *Serle* v. *Lord Barrington* (1), which is the

(1) 2 Str. 826. 8 Mod. 279. 2 Ld. Raym. 1370. 3 Brown. Parl. C. 593.

earliest reported case, the question was much discussed, and ultimately, after trials at *nisi prius*, writs of error into the *Exchequer Chamber*, and subsequently to the *House of Lords*, were brought: this principle was established, that indorsements by the obligee, purporting to be made after twenty years after the date of a bond, though not proved by direct evidence to have been made within that time, are yet admissible to repel the presumption of payment after the lapse of twenty years, and are proper to be left to the consideration of the jury, provided there are any circumstances in the case to show that the indorsements have been made before the presumption could arise (1).

Lord *Ellenborough* (2) observes, that if such indorsements were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment, and he had been at a loss to see the principle on which these receipts in the handwriting of the creditor have sometimes been admitted as evidence against the debtor, and he was of opinion they could not be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest.

It was decided in the case of *Bosworth and Parr* v. *Cotchett* (3) in the *House of Lords*, in an action by the

(1) Phill. Evid. 172. *Glynn* v. *Bank of England*, 2 Ves. sen. 42. *Turner* v. *Crisp*, 2 Str. 827.

(2) *Rose* v. *Bryant*, 2 Camp. 323.

(3) *Leicester* Summer Assizes, 1819, *coram Richards*, C. B. verdict and judgment for the defendant, and judgment of reversal in the *House of Lords*, 6th May, 1824. 2 Phill. Evid. 143. *Bosworth and Parr*, executors of *George Loseby*, who was executor of *John Loseby*, v. *Cotchett*, MS. The plaintiffs in error in Hilary Term, 1819, brought an action of *assumpsit* as executors of the last will and testament of *George Loseby*, deceased, who was

executors of an executor of the payee of promissory notes against the maker, that when the payee had written

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the executor of the last will and testament of *John Loseby*, deceased, against the defendant in error, *Thomas Cotchett*, on two promissory notes, by one of which promissory notes, bearing date 29th September, 1803, *Thomas Cotchett* promised to pay to *John Loseby* £500 with interest on demand, and by the other of which promissory notes, bearing date the 25th March, 1805, *Thomas Cotchett* promised to pay *John Loseby* the sum of £400 with interest on demand. The defendant in error pleaded to the action, first, the general issue, and secondly, thirdly, and fourthly, *non assumpsit infra sex annos* to different counts; the plaintiff replied, that the defendant did undertake within six years to the second, third, and fourth pleas. This action came on at the Summer Assizes at *Leicester* in the year 1819, and at the trial the counsel for the plaintiffs, in error, after having produced in evidence the promissory notes, and having proved that they were made by *Thomas Cotchett*, and delivered by him to *Joseph Loseby*, tendered in evidence certain indorsements on each of the promissory notes; of which indorsements a part was proved to be in the handwriting of *John Loseby*, and other part was proved to be in the handwriting of *George Loseby*. Indorsements of the payment of a half year's interest purported to have been made half-yearly upon the note of 29th September, 1803, the first of which bearing date April 2, 1804, and the last May 16th, 1808, these were respectively signed "*J. Loseby*," and were proved at the trial to be in the handwriting of *John Loseby*, deceased: indorsements of a like description and signed in the same manner, and proved to be in the same handwriting, were at the trial shown to be on the note dated the 25th March, 1805, the first of these indorsements bearing date the 14th October, 1805, and the last the 16th of May, 1808; there were similar indorsements by *George Loseby*.

It was admitted by the counsel for *Thomas Cotchett*, that a notice had been duly served on the attorney of *Thomas Cotchett*, calling upon him to produce at the trial of the said cause any receipts or other papers in his possession, or in the possession of *Thomas Cotchett*, relative to the matter in issue, under which notice no papers were produced by the attorney at the trial.

It was proved on the part of the plaintiffs, that *John Loseby* died in

indorsements of the half-yearly payment of interest from the time of making the notes till his death, which hap-

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the month of April, 1809, no evidence of any kind was offered at the trial on the part of the defendant in error.

The counsel of the plaintiffs in error admitted, when the said indorsements were tendered in evidence, that they had no evidence *extrinsic* of the said indorsements, as to the time of the making of the said indorsements; the counsel for the defendant in error then insisted, before the Lord Chief Baron, that the indorsements ought not to be admitted in evidence. And the counsel for the plaintiffs in error insisted, that they ought to be admitted. *Richards*, Lord Chief Baron, delivered his opinion, that the indorsements so tendered in evidence on the part of the plaintiffs in error, could not be admitted, *unless supported by sufficient extrinsic evidence*, and refused to admit the indorsements in evidence. The jury gave their verdict for the defendant in error. The counsel for the plaintiffs in error then excepted to the opinion of the Lord Chief Baron, and tendered a bill of exceptions, which was signed and sealed; the plaintiffs in error sued out a Writ of Error to the *House of Lords*, to reverse the judgment entered up for the defendant, *Thomas Cotchett*.

The printed reasons for the

plaintiffs in error; "first, because *extrinsic* proof as to the time of the making of the said indorsements was not indispensably necessary to be produced previous to the admission of them in evidence, such indorsements are properly admissible, if they contain sufficient *intrinsic* evidence as to the time of their being made; and the said indorsements do contain *intrinsic* evidence as to the time of their being made, sufficient without extrinsic proof. The said indorsements, therefore, were strictly admissible, and fit to be considered by a jury. Secondly, because nothing appeared in proof at the trial that could reasonably suggest any ground for presuming fraud or false representation in the making of the said indorsements; and it being the daily practice for holders of promissory notes, obligees in bonds, &c. at the request of the makers of the notes, or of the obligors, to make indorsements on promissory notes, bonds, &c. &c. of interest received from time to time; and this practice being for the benefit of the debtor, it ought to be taken in the absence of all proof to the contrary, that the indorsements in this case were made in the usual manner at the request of the maker of the said notes, and that great and manifold inconveni-

pened within six years of the date of the notes, and the like indorsements of his executor, who died before the commencement of the action, they were admissible in evidence in answer to a plea of the Statute of *Limitations*, though there was no extrinsic evidence offered of the time when the indorsements were made.

By the statute 9 *Geo.* IV. c. 4, § 3, no indorsement or memorandum of any payment written or made, after the time appointed for that act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed a sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Perhaps this section will not entirely destroy the effect of indorsements of payment in all cases, but only where the indorsement or memorandum is produced as proof of payment to take the case out of the Statute of Limitations.

I think parties should not be deterred from making indorsements of payments, for though they are not evidence to take a case out of the statute, yet they state items for

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ences would arise from the total exclusion of such evidence."—(THOMAS DENMAN, S. M. PHILLIPPS.)

Reasons for the defendant in error; "first, because the admission of such indorsements, by whatever extrinsic evidence supported, is in violation of the rule of law, that no person shall make evidence for himself, and is not within any exception to the rule that may have been allowed in other cases. Secondly, because without extrinsic evidence the indorsements are not proved to have been made at a period when it was contrary to the interest of the maker of them to have fabricated them."—(W. READER, A. AMOS.)

On the 6th of May, 1824, the *House of Lords* ordered and adjudged, that the judgment given in the Court of *King's Bench* be reversed; and it was further ordered, that the said court do award a *venire facias de novo*, and proceed according to law.

the honest account between the parties, and may still be evidence in some cases: it would in future be advisable either to obtain the debtor's signature to the indorsement, or to state it thus, "1st May, 1830. Payment of £50 by *B.* to *A.* on account. Witnesses, *C. D.* of ——, and *E. F.* of ——." In which case recourse may be always had to the particular witnesses during their lives, though the indorsement may not be evidence.

CHAPTER VIII.

OF THE MODES OF TAKING ADVANTAGE OF THE STATUTES OF LIMITATIONS.

THE general rule with respect to the Statutes of Limitations is, that where an action is required by statute to be brought within a limited time, it is the duty of the plaintiff to prove that he has done so, or he will fail in his suit, as for instance, the statute 31 Eliz. c. 5, § 5, limits actions upon *penal* statutes to two years after the commission of the offence, where forfeiture is given to the king only, and to one year where it is to the king and any other person, is in terms similar to the present, yet the defendant is allowed to take advantage of that statute on the general issue, and need not specially plead it, and the practice at *Nisi Prius* has long been, and is, for the defendant to call upon the plaintiff to prove the commencement of his action within the limited period (1).

The true ground of distinction between the statute 21 Jac. I. c. 16, and the statutes limiting penal actions, is said to be, that the statute 21 Jac. I. c. 16, § 3, limits those actions where a debt or other cause of action is already vested in the plaintiff by means of some contract between the parties, prior to the bringing of the action;

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(1) *Hodsden* v. *Harridge*, 2 Saund. R. 62, n. (6). Mr. Serjeant *Williams'* note. *Lee* v. *Clarke*, 2 East. R. 336. Per *Lawrence*, J.

but in penal actions the duty or right of action attaches in the plaintiff, merely by bringing the action, and did not exist in him before; and unless he bring his action within the time prescribed, there is no right of action attached in him, therefore he seems as much bound to prove the commencement of his action within time, which is the cause or consideration of it, in order to entitle himself to a verdict, as a person who brings *assumpsit* or debt for goods sold and delivered, or money lent, and the like, is to show the cause or consideration of his action to entitle him to a verdict; and if he fail therein, it appears that he has no cause of action. But the Statute of Limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy, so that a promise within six years without any other consideration is sufficient to revive the action; therefore if he will take advantage of that circumstance it is necessary he should plead the statute (1).

It was very soon after the passing of the statute 21 Jac. I. c. 16, made a question, whether if it appeared by the *declaration* that the debt accrued more than six years before, the plaintiff could recover. It has been long settled that he may, for, it is said, the debtor may take advantage of the statute if the debt be older than the time limited for bringing the action, or he may wave the advantage: and there might be divers causes that the plaintiff could not bring his action sooner, as that he was in prison, or within age, or beyond the seas, or that he

(1) *Hodsden* v. *Harridge*, 2 Saund. R. 63, (*a*), n. 2. Mr. Serjeant *Williams*' note. *Quantock* v. *England*, 5 Burr. 2630. *Petrie* v. *White*, 3 Durnf. & E. 11. Is it not the true reason that the Court always favoured the plaintiff, and thought it hard for him to lose his just debt after six years, and therefore refused to allow the defence of the statute unless it were pleaded?

had sued the defendant to outlawry, and the defendant had reversed the outlawry, and this action brought within a year after the reversal, (and that was the case in one instance,) and then the action was well brought (1).

By the statute 9 Geo. IV. c. 14, § 2, if any defendant in any action upon simple contract, shall plead the non-joinder of another in *abatement*, and issue be joined on such plea, and it shall appear at the trial that the action could not be maintained against the person not joined, the verdict shall be against the party pleading such plea.

There are some *early* cases in which the *general issue* was pleaded, and the jury found specially that the actions were brought six years after the causes of action accrued, and the Court decided the cases upon the special verdicts (2); thus allowing the statute to be given in evidence upon the general issue. It has been said (3), that if the defendant plead *non assumpsit*, he cannot give in evidence the statute, because the *assumpsit* goes to the *præter tense*, and therefore the statute must be specially pleaded. But it was ruled by Lord *Holt*, C. J. that upon *nil debet* pleaded, the statute is good evidence, because the issue is joined by words in the present tense, and by virtue of the statute it *is* no debt, although it *was* a debt; the modern practice, however, is not to rely upon the plea of *nil debet* only in such a case, though it is still said, that under a replication of *nil debet* to a plea of set-off, this statute may be given in evidence.

Before dismissing the plea of general issue it may be right to observe, that under such a plea the defendant

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(1) *Trankersley* v. *Robinson*, Cro. Car. 163. *Style* v. *Finch*, Cro. Car. 181. *Hawkins* v. *Billhead*, Cro. Car. 404.

(2) *Brown* v. *Hancock*, Cro. Car. 115. *Sherwin* v. *Cartwright*, Hutt. 109.

(3) Per *Holt*, C. J. *Hertford Ass.* 1690. 1 Salk. 278. *Draper* v. *Glassop*, 1 Ld. Raym. 153.

may give in evidence such circumstances as show that the debt, from length of time, must be presumed to have been paid.

I have before referred to a case anterior to the statute 3 & 4 Anne, c. 9, where Lord *Holt*, C. J. said, he would presume payment of a note of any considerable sum after a lapse of *twenty years:* in the case of *Duffield* v. *Creed* (1), the action was upon a note dated in 1782, payable seven days after *sight*, and was brought *twenty years* after the date of the note; the defence was, that the note had been paid, then been lost, and got into circulation again. Lord *Ellenborough*, C. J. said, "if this had been a bond, twenty years would have raised a presumption of payment, in which case he would have left the presumption of payment to the jury; and he thought, as this note was unaccounted for, the same rule of presumption of payment ought to apply." In the case of *Cooper* v. *Dame Turner*, a widow (2), the question arose in an action of *assumpsit*, where the defendant pleaded a set-off for money lent; the replication denied the set-off; evidence was given that the defendant had lent to the plaintiff £50 thirteen years before; *and although there was no replication of the Statute of Limitations*, yet *Dallas*, C. J. said, "it was for the jury to consider, whether after so great a length of time, the debt set off had not been satisfied"—the jury found for the whole of the plaintiff's demand.

But in a subsequent case (3), which was *assumpsit* on a promissory note, dated 1787 at *Paris*, payable six months after date; the defendant pleaded the general

(1) 5 Esp. 52, and see *Fladong* v. *Winter*, 19 Ves. jun. 196. *Ante*, 7, 8, 9.

(2) 2 Stark. R. 497.

(3) *Du Belloix* v. *Lord Waterpark*, 1 Dowl. & R. 16.

issue and the Statute of Limitations, and the issues were, first, on the general issue, and secondly, whether the plaintiff had been living in *Great Britain* within six years before the action brought: there was no evidence that the plaintiff had been in *England* since the note was made; and it was contended at the trial, that the jury were bound to presume, by analogy to the case of a bond, that after twenty years the note had been paid, although there was no proof that the payee had been within the realm, and *Duffield* v. *Creed* (1) was referred to. But *Abbott*, C. J. who tried the cause, was of opinion, that the case of a bond was distinguishable from promissory notes and bills of exchange, which were simple contract debts, and were subjected to the provisions of the Statute of Limitations; whereas the rule for presuming payment of a bond after twenty years was founded on the common law, there being no statutable provision with respect to obligations of that nature, and, therefore, without some decisive authority upon the point he could not direct the jury in the way contended for. The jury found a verdict for the plaintiff for the principal sum, but not for the interest, which seems to have been the principal question in the cause (2). On a motion to increase the verdict by adding the interest, the Lord C. J. said, "the plaintiff was singularly fortunate in recovering his principal money after a lapse of *thirty-four* years," and the Court refused to give the interest.

The words of the statute 21 Jac. I. c. 16, § 3, are, "that the actions first mentioned shall be brought within six years next after such action or suit;" and therefore it would seem always to be best to follow the words of the statute in the plea.

(1) 5 Esp. R. 52.

(2) See *Du Belloix* v. *Lord Waterpark*, S. C. Bayley on Bills, 21, n. 40.

There has, however, prevailed two modes of pleading the statute in *assumpsit*, first, *non assumpsit infra sex annos*, and secondly, *actio non accrevit infra sex annos* (1).

The plea of *non assumpsit infra sex annos* is insufficient in many cases; for if the cause of action accrued within six years, it is immaterial when the promise was made, or the original transaction was.

Thus where the declaration stated a promise made seven years before to pay money three months after, and the defendant pleaded *non assumpsit infra sex annos*, it was held it ought to have been *actio non accrevit infra sex annos* (2). So in an action upon a promise to pay money three months afterwards, the defendant pleaded *non assumpsit infra sex annos:* it was held he ought to have pleaded, that the cause of action did not accrue within six years, and *Twisden*, Justice, said, "if I promise to do a thing upon request, and the promise were made seven years ago and the request yesterday, I cannot plead the statute; but if the request were made six years ago, it must be pleaded specially, viz. that *causa actionis* was above six years since (3): and where the defendant pleaded *non assumpsit infra sex annos* to a declaration in *assumpsit*, which stated, that in consideration that the plaintiff would receive certain persons into her house as guests, and provide for them meat, drink, and other necessaries; the defendant promised to pay so much money as the plaintiff deserved,

(1) These should be always pleaded with the general issue *non assumpsit*. See Lawes (Serj. Edw.) on Assumpsit, 533. 723: the act of parliament ought to be pleaded in the very words of the act. Per *Littledale*, J. *Pratt* v. *Swaine*, 2 Manning & R. 352: or at least in words of equivalent import. Per *Bayley*, J. *Id. ibid.* 3 Barn. & C. 237.

(2) *Puckle* v. *Moor*, 1 Ventr. 191.

(3) 1 Mod. 89, and see *Webb* v. *Martin*, 1 Lev. 48. 1 Sid. 66. 1 Keb. 177, S.C.

which persons were received into the house and provided with necessaries; the plaintiff demurred to the plea, and there was judgment for the plaintiff, for this being an executory collateral promise, the defendant could not plead *non assumpsit infra sex annos*, but should have pleaded "*causa actionis non accrevit infra sex annos;*" if the cause of action accrued within the six years, it matters not when the promise was made, the dieting might be long afterwards, but if it had been *indebitatus assumpsit*, that plea had been good (1).

Where a count stated that the defendant promised payment of £150 upon the 30th of January, and the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff demurred, because the six years were to be computed from the time of the performance, and not of the promise, so that the plea might be true, and the plaintiff not barred by the statute, and that the plea ought to have been *actio non accrevit infra sex annos*, and of that opinion was the Court (2).

But where the plaintiff declared, in *indebitatus assumpsit*, on a promise to pay on demand, and the defendant pleaded *non assumpsit infra sex annos*—the plaintiff demurred, because the plea should have been, that there was no demand within six years, or *non assumpsit infra sex annos* after demand: but the Court held, that an *indebitatus assumpsit* shows a debt due at the time of the promise, and, therefore, the plea was good; but if the promise had been of a collateral thing, which would create no debt till demand, it might be otherwise (3).

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(1) *Gould* v. *Johnson*, 2 Ld. Raym. 838. 2 Salk. 422. 6 Mod. 26.

(2) 10 Mod. 104. 206.

(3) *Powel* v. *Pierce*, *Mich.* 4 Geo. I. Bull. Ni. Pri. 151. 1 Camp. 539.

Although the statute should take place from the time of making the promise, yet the plea of *actio non accrevit infra sex annos* is proper, therefore it has been considered the safest and best way of pleading the statute, in all cases of *assumpsit*, or debt on simple contract, to say, "that the said several causes of action in the said declaration mentioned, or any, or either of them, did not accrue to the said plaintiff within six years next before the commencement of the suit," or in actions by bill "exhibiting the bill of the plaintiff."

It was at one time questioned, whether to the plea of *non assumpsit infra sex annos*, it was necessary to conclude to the country, or with a verification, though it seems clear on principles of pleading, that the latter is the proper course.

The plea of *actio non accrevit infra sex annos*, as before observed, may be safely pleaded in all cases, and is peculiarly necessary where the statute does not begin to run from the time of the transaction or promise (1).

If the defendant regularly pleaded the Statute of Limitations, of course he was always entitled to the advantages given by the statute, but for a long period the courts were not inclined to favour this plea. In 1748, the Court of *Common Pleas* refused to set aside a judgment to allow the defendant to plead the Statute of Limitations (2); and in 1764, that court refused to permit a plea of the Statute of Limitations to be added to the general issue, saying, "the

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(1) *Castles* v. *Merchant, executor of Merchant*, 1 Vern. & Scriv. *Irish* Rep. 212. *Quære*, whether this plea as usually pleaded admits that a cause of action ever existed! *Bland* v. *Haselrig*, 2 Vent. 151. *Lambert* v. *Taylor*, 6 Dowl. & R. 199. *The King* v. *Morrall*, 6 Price Exch. Rep. 26. 29.

(2) *Willett* v. *Atterton*, 1 Sir Wm. Blackst. Rep. 35.

statute excluded the merits (1); and in 1788, where the defendant was under terms of pleading issuably, and pleaded the general issue, and a set-off, and the Statute of Limitation, the Court set aside the last plea, also saying, "it excluded the merits" (2). But in *Rucker and another* v. *Hannay, (Bart.)* (3), the defendant was under terms of pleading issuably, and pleaded the general issue, and the Statute of Limitations, the Court of *King's Bench* refused to set aside the latter plea; the Statute of Limitations having been considered by the Court of *Common Pleas* as an issuable plea within the meaning of the order. And it was held that the defendant was not precluded from pleading the Statute of Limitations after an order for time, and it was observed that in many cases it was a very fair plea; and the Court of *Common Pleas,* in a subsequent case, refused to restrain a defendant from pleading the Statute of Limitations on setting aside a regular interlocutory judgment, for the plea of the Statute of Limitation was not necessarily unconscientious (4).

The usual *replication* to a plea of *non assumpsit infra sex annos,* is, "that the plaintiff did promise within six years;" and to the plea of *actio non accrevit infra sex annos,* "that the causes of action did accrue within six years before the exhibiting of the bill, or the commencement of the suit," (as the plea may be). But if the bill or declaration was beyond six years, and the plaintiff had

(1) *Cox* v. *Rolt,* 2 Wils. 253.

(2) *Stadtholm, executor,* v. *Hodgson,* 2 Durnf. & East, 390. See *Stafford* v. *Rowntree,* East. T. 24 *Geo.* III. K. B. *Benson* v. *King,* Hil. T. 25 *Geo.* III. K. B. Tidd, Prac. 471.

(3) 3 Durnf. & E. 124.

(4) *Maddocks* v. *Holmes and others,* 1 Bos. & Pul. 228. And *Drinkwater* v. *Claridge,* MS. Hil. T. 27 *Geo.* III. C. P. Impey C. P. 253.

issued his writ within time, it will be necessary to reply specially, setting out the process and the proceedings thereon, and that it was issued for the purpose of proceeding against the defendant, and that the causes of action accrued within six years next before the issuing of the process; or if the process has been continued, it will be necessary to set out the continued process, in which case the first must be shewn to have been returned (1). (a)

The plaintiff may also reply, that "he was abroad, or that the defendant was abroad, and the action was commenced within six years after the return" (2); or "that the plaintiff was an infant, and the action was brought either during his infancy, or within six years next after he became of age" (3); or "that a judgment between the parties for the same debt had been arrested or reversed for error, and that the plaintiff sued within a year afterwards," &c. (4); or "that the plaintiff being an executor, his testator commenced an action within six years, which abated by his death, and that the plaintiff's action was commenced recently, or in a reasonable time after the death (5); or the plaintiff to a plea of *set-off* may reply in his turn the Statute of Limitations (6).

The form of pleading the statute to a set-off is not yet settled, whether it should be "was not indebted within six years before the plea," or "the commencement of the action," the latter is said to be safest, as it must include

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(1) *Hodsden* v. *Harridge*, 2 Saund. R. 62, n. (6). *Quære* the effect of the statute 9 *Geo.* IV. c. 14, upon this replication of process issued?

(2) Statutes 21 *Jac.* I. c. 16, § 7, and 4 & 5 *Ann.* c. 16, § 19. *Chandler* v. *Vilett*, 2 Saund. R. 121, n. 4. 2 Chitty Plead. 1161, 1162.

(3) *Chandler* v. *Vilett*, 2 Saund. 118.

(4) *Hodsden* v. *Harridge*, 2 Saund. R. 63, (*n*).

(5) *Hodsden* v. *Harridge*, 2 Saund. R. 63, 64.

(6) *Remington* v. *Stevens*, 2 Str. 1271.

(a) See Taylor case appeal of Walsh on Bkt &c Gregory 2 Barr & Ard 257 as to writs continuances

the former (1). It should seem the statute may be given in evidence under a replication of *non indebitatus* to a plea of set-off; as the plaintiff can only reply singly, he must give up the advantage of pleading *non indebitatus*, or of pleading the statute (2).

The plaintiff may also reply that the plaintiff and defendant are merchants, and that the debts or accounts concern the trade of merchandize between them as merchants, I do not find this replication has been pleaded for a great length of time, and therefore I shall refer to what is said in the books on that subject.

With respect to the form of pleading to bring the case within the exception relating to *merchants' accounts*, in *Farrington* v. *Lee*, according to one report (3), to a plea of *non assumpsit infra sex annos*, the plaintiff replied, that he was a merchant, the defendant was his factor, he then recited the clause in the statute 21 *Jac.* I. c. 3, relating to merchants' accounts, and averred that the money became due to the plaintiff upon an account between him and the defendant concerning merchandize, &c. The defendant to this replication made an impertinent rejoinder, to which the plaintiff demurred.

The plaintiff in *Webber* v. *Tivill* (4), to a plea of *non assumpsit infra sex annos*, replied, that the money in the several promises and undertakings in the declaration became due and payable on trade had between the parties as merchants, and wholly concerned the trade of merchandize (5).

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(1) *Macfadzen* v. *Oliphant* 6 East R. 387. See *Ord* v. *Ruspini*, 2 Esp. Rep. 570.

(2) See *Laces* (Serjeant *Edward*) on Assumpsit, 533. 723. *Qu.* whether the plea of the statute admits the debt?

(3) 1 Mod. 269.

(4) 2 Saund. 123.

(5) See also *Godfrey* v. *Saunders*, 3 Wils. 94, which was an action of *account*.

Lastly, as it has been said that the statute only runs from the time fraud is discovered, such fraud must be specially replied to a plea of the Statute of Limitations (1).

(1) *Bree* v. *Holbeck*, 2 Doug. 654. *Brown* v. *Howard*, 4 Moore, Rep. 508. 2 Brod. & B. 73, S.C. *Macdonald* v. *Macdonald*, 1 Bligh Rep. 315. *Clarke* v. *Hougham*, 2 Barn. & C. 153.

CHAPTER IX.

OF THE STATUTE 9 GEO. IV. C. 14, § 5, AS TO PROMISES IN WRITING, AFTER FULL AGE, TO PAY DEBTS CONTRACTED DURING INFANCY.

AN infant is by the common law liable for necessaries suitable to his rank and degree in life; but generally speaking all contracts, except for necessaries, may be avoided by the infant.

It is probable that before the reign of King *William* the Third, persons under age had little credit: the common action then in use (the action of debt) was not well adapted to charge persons when of age with promises to pay simple contract debts contracted during infancy, and until after *Slade's case* (1), (44 Elizabeth,) the action of *assumpsit* was not much in use.

Before that decision had brought the action of *assumpsit* into use, our cautious ancestors seem to have taken single bills and bonds from infants, (questionable securities as they might be,) and cases on the confirmation of these securities are to be met with; but I have met with no decisions upon the question how far an adult could make a promise to pay a simple contract debt during infancy, until the following by Lord *Holt*, C. J. in *Ball* v. *Hesketh* (2);

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(1) 4 Rep. 95.

(2) Sittings at *Guildhall*, 8 Wm. III. Comb. 381. If an infant sell a horse for £10, and bring debt for the money at full age, he shall not avoid the contract. Vin. Abr. tit. Infant, K. 14 Hen. VIII. 29. Per *Brudenell*. See Godbolt, 138.

it was ruled (as apparently a new point) that where the defendant, under age, borrowed money of the plaintiff, and afterwards, at full age, promised to pay him, this is a good consideration for the promise, and the defendant shall be charged; and in *Southerton* v. *Whitlock* (1) it was ruled by *Raymond*, C. J. that if goods, which are not necessaries, be delivered to an infant, who, after full age, ratifies the contract by a promise to pay, he is bound.

It is by no means improbable but that these decisions have been partly the means of young men obtaining credit, under an idea that any promise after the debtor had come of age would be a security. A promise to pay part, will however bind to that extent, and no farther (2), and the payment of part will not bind to pay the remainder. Bare acknowledgment is not sufficient after a majority (3), and a promise under arrest is not binding (4).

The distinction between promise to pay a debt contracted during infancy, and a promise to take a case out of the Statute of Limitations, has been much considered in a late case (5): under a replication (to a plea of infancy) that the defendant promised to pay after he became of age; proof was given of a promise after the action was commenced; and the case of *Yea* v. *Fouraker* (6) was relied upon, that an acknowledgment of the debt after

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(1) *Guildhall*, 12 Geo. I. 1 Str. 690.

(2) *Green* v. *Parker*, *Abingdon Spring Ass.* 1755. Per *Forster*, J. MS. Peake Evid. 278.

(3) *Lara* v. *Bird*, Sitting after Hil. 31 Geo. III. MS. Peake Evid. 278.

(4) *Harmer* v. *Killing*, 5 East, R. 102.

(5) *Thornton* v. *Illingworth*, 4 Dowl. & R. 545. 2 Barn. & C. S.C.

(6) 2 Burr. 1099.

the commencement of the action, would take the case out of the Statute of Limitations; but it was held that there was a plain and important distinction between the two cases; where the Statute of Limitations applies, it operates only to extinguish the claim for a pre-existing debt, it allows that the debt has existed, but presumes that it has been discharged, and then the subsequent promise rebuts the presumption of payment, and revives the original debt without creating any new obligation; but where infancy is pleaded and proved, there is neither debt nor obligation existing until the party comes of age, because any promise made by him during his infancy is void in law: if, upon arriving at full age, he makes a promise to pay a debt incurred during his infancy, that promise is binding upon him. But why?—because it constitutes a new debt and a new liability, and that debt and liability date their existence from the precise period of the promise only, without reference to the commencement of the action.

It must be apparent, that even where the infant is liable to a demand for necessaries, many questions may arise both as to what are necessaries, and as to what ought to be the *extent* of such necessaries, and their reasonable amount in value; and where the contract is not for necessaries, the debtor may be placed in a very dangerous situation, and subjected to much oppression, more particularly where personal applications are made to entrap him. It was therefore decided by Lord *Alvanley*, C. J. that where an infant, under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection afforded him, he, Lord *Alvanley*, would hold (1), that the infant was not bound by it.

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(1) *Harmer* v. *Killing*, 6 Esp. N. P. C. 102.

In the case of *Thrupp* v. *Fielder* (1), where the payment of a part by the defendant after he became of age was proved, Lord *Kenyon* said, "I am of opinion this is not such a promise as satisfies the issue. The case of infancy differs from the Statute of Limitations; in the latter case a bare acknowledgment has been held to be sufficient: in the case of an infant I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay made by the infant after he has attained that age, where the law presumes that he has discretion. Payment of money made, as in the present case, is no such promise."

To give a person, when he became of age, an opportunity of making a promise to pay any of his just debts contracted during infancy, and at the same time to relieve him from the oppression which may be exercised upon him by extorting a promise to pay such debt, and not to trust such promise to the evidence of interested persons, the legislature hath required that such promise shall be in writing; for by the 9th Geo. IV. c. 14, § 5, "no action shall be maintained upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." Upon this section it may be observed, that it does not declare such promise or ratification to be illegal, but that no action shall be maintained, a distinction to which I have before adverted (2). It seems to apply to any debt contracted during infancy, and to any promise or simple contract made during infancy, and,

(1) 2 Esp. N. P. C. 628. Peake Evid. 278, S.C.

(2) *Ante*, 14.

therefore, to contracts for necessaries as well as other contracts made by infants: but on a contract for necessaries, unless for the purpose of taking a case out of the Statute of Limitations, or other case requiring a promise or ratification after full age, the action for necessaries will, it seems, remain at common law; the promise or ratification must be made by writing signed by the party to be charged with it; and it should seem, from the words of the act, that a writing signed by an agent would not be sufficient.

The act speaks not only of a promise, but also of a ratification to a plea of infancy; the old form of replication to a plea of infancy was, that the defendant promised after he became of age, but latterly it has been usual to state that the defendant attained his age of twenty-one years, and that he afterwards ratified and confirmed the promises in the declaration (1); and this I apprehend accounts for the terms "promise and ratification."

This statute will materially reduce the number of actions on promises to pay debts contracted, and to ratify simple contracts made during infancy.

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(1) See *Cohen* v. *Armstrong*, 1 Maule & S. 724.

CHAPTER X.

OF THE STATUTE 9 GEO. IV. C. 14, § 6, RESPECTING REPRESENTATIONS IN WRITING OF CHARACTER AND CREDIT.

MERCHANTS frequently have customers recommended to them, or they desire from a new or suspected buyer a reference to some respectable person, or request a guarantee.

When an inquiry is made of the degree of credit which ought to be given to any person previous to a commercial transaction, the person applied to may give no answer; but if he do, it must be according to the truth as far as he knows; for if he affirmed falsely with intent to defraud the person applying, and the latter received damage, an action on the case lay for the deceit, and in such an action it was not necessary that the person applied to should be benefited by the deceit, or collude with the person who is (1). This was decided in the *King's Bench* by Lord *Kenyon*, Mr. J. *Buller*, and Mr. J. *Ashurst*, against the opinion of Mr. J. *Grose*, in the celebrated case of *Pasley* against *Freeman*, and is now well established (2), though Mr. Justice *Grose* held his former opinion in a subsequent case (3).

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(1) *Pasley* v. *Freeman*, 3 Term R. 51. *Eyre* v. *Dunsford*, 1 East R. 328, 329.

(2) *Haycraft* v. *Creasy*, 2 East R. 104.

(3) In *Pasley* v. *Freeman*, Mr. Justice *Grose* said, "that he had

The doctrine in this case has since been much observed upon. Lord *Eldon* in *Evans* against *Bicknell* (1), after observing that as to *Pasley* and *Freeman* it was almost improper now to say anything to shake it, and the doctrine laid down in that case is in practice and experience most dangerous, says, "I state that upon my own experience, and if the action is not to be maintained in opposition to the positive denial of the defendant, against the stout assertion of a single witness, where the least deviation in the account of the conversation varies the whole, it will become necessary, in order to protect men from the consequences, that the Statute of Frauds should be applied to that case (2); suppose a man asked whether a third person may be trusted, answers, 'you may trust, if he does not pay you, I will;' upon that the plaintiff cannot recover, because it is a verbal undertaking for the debt of another; but if he does not undertake, but simply answers, 'you may trust him, he is a very honest man and worthy of trust,' &c. then an action will lie; whether it is fit the law should remain with such distinctions it is not for me to determine. Upon the case of *Pasley* v. *Freeman*, I have always said, when I was chief justice, that I so far doubted the principles of it, as to make it not unfit to offer, as I always did to the counsel, that a special verdict should be taken, but that offer was so uniformly rejected, that I suppose I was in some error upon this subject; I could

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not met with any case of an action upon a false affirmation, except against a party to a contract, and where there had been a promise either express or implied, that the fact is true which is misrepresented." *Pasley* v. *Freeman*, 3 Durnf. & E. 53.

(1) 6 Ves. jun. 174. And see *Eyre* v. *Dunsford*, 1 East R. 328. *Thompson* v. *Bond*, 1 Campb. 4. 13 Ves. jun. 134. 1 Taunt. 564.

(2) See statute 9 *Geo.* IV. c. 14, § 6.

therefore only point out to the jury the danger of finding verdicts upon such principles, and I succeeded in impressing them with a sense of that danger so far that the plaintiffs in such actions very seldom obtained verdicts. It appears to me a very extraordinary state of the law, that if the plaintiff in the case of *Pasley* v. *Freeman* had come into equity, insisting that the defendant should make good the consequence of his representation, and the defendant positively denied that he had made that representation, and only one witness was produced to prove it, the Court of *Equity* would give the defendant so much protection that they would refuse the relief, and yet upon the very same circumstances the law would enable the plaintiff to recover; whether that is following equity, or quite outstripping equity, is not a question for discussion now: but *it leads to the absolute necessity of affording protection by a statute* (1) *requiring that these undertakings shall be in writing.*"

In a subsequent case (2), Lord *Eldon*, L. C. also said, "the Statute of Frauds requiring a written engagement for the debt of another has been considerably cut down ever since the case of *Pasley* v. *Freeman* at law, where this was determined, that if you throw into the declaration an allegation that the engagement was fraudulent, and in the form of a representation that the party is of sufficient substance to pay the debt, the recovery is not of the debt as debt upon the contract, but a recovery of damages to compensate what they call a fraud. It was long before I was reconciled to that, but with those doubts, I know it has been settled as law by subsequent decisions."

"I am old enough," observes *Gibbs*, C. J. in *Ashlin* v.

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(1) See the statute 9 *Geo.* IV. c. 14, § 6.

(2) *Exparte Carr*, 3 Ves. & Beames Rep. 110.

White (1), "to remember when this species of action came into use, it was dexterously intended to avoid the Statute of Frauds; by that statute no man was bound to answer for the debt of another without an undertaking in writing; but the design of this action, when first introduced into our courts of law, was to make a man responsible for having given a better character of another than such person deserved: when the principle of this action first gained ground, I remember a flood of causes followed, and such mischief and injustice would have ensued had it not been brought back, after some struggle, within its proper legal limits; *Haycraft* v. *Creasy*, has marked the boundaries, it has wisely and justly established that the foundation of this action was fraud and falsehood in the defendant, and a damage to the plaintiff, by the occasion of such fraud and falsehood."

"Actions of this description ought not to be encouraged, it is absolutely necessary that a clear case of an intention to defraud must be made out" (2).

The objection has been started, that this is an undertaking to answer for the debt of another, and not being in writing is void by the Statute of Frauds, it has been answered by saying, that that statute, however, has no relation to these cases, and it raises certain legal presumptions of fraud for the want of certain formalities in contracts and other transactions, against which it guards by avoiding them, but that has no application to actions founded on actual fraud and deceit in order to recover damages by the party grieved (3).

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(1) Holt's N. P. C. 338.

(2) Per *Dallas*, C. J. *Ames and others* v. *Milward*, 2 Moore C. P. Rep. 715.

(3) *Eyre* v. *Dunsford*, 1 East, 328.

Where *A.* having a credit upon the defendant, in consequence alone of his having deposited goods to a much greater value, was represented by the defendant as a person generally entitled to credit, and the plaintiff trusted him with goods, and *A.* soon after failed—an action on the case was held to lie, even though the information given was said to be without prejudice; and where *A.* fraudulently represented (1) the circumstances of *B.* to be good, in order to induce *C.* to give him credit, and added, "if he does not pay for the goods I will," an action may be maintained against *A.* for the misrepresentation, notwithstanding the addition of the promise.

The foundation of such action (which must be an action on the tort or wrong, and not for goods sold, for there is no contract) (2), is fraud and deceit in the defendant (3), and damage to the plaintiff (4); and, therefore, where to an inquiry concerning the credit of another, who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from his own knowledge, and not from hearsay, will not sustain an action on the case for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit, if it appear that such representation were made by the defendant *bonâ fide*, and with a belief of the truth of it, and taking the assertion of knowledge *secundum subjectam materiam*, viz. the credit of another; it meant no other than a strong belief founded on what appeared to the defendant to be reasonable and certain grounds;

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(1) *Hamer* v. *Alexander*, 2 New Rep. 241.

(2) *Thompson* v. *Bond*, 1 Camp. 4.

(3) *Haycraft* v *Creasy* 2 East, 92.

(4) *Ibid.*

and the action was held not to lie (1) where the inquiry was made of the defendant, with a view to entrap him, and thereby to obtain his guarantee for payment of a debt contracted by a person in insolvent circumstances.

The person making such fraudulent representation of the credit of another, is only answerable to the merchant for goods sold to the creditor to a reasonable extent; and the merchant should be cautious of trusting too far on the faith of such representation; if he tell the buyer he will sell him no greater amount without further references, and after that entrusts him with more goods, the author of the representation is not liable beyond the sum due at the date of the plaintiff's declaration (2).

I have before adverted to what was said by Lord *Eldon*, L. C. (3), "in that there was an absolute necessity of affording protection by a statute requiring these undertakings to be in writing." And now by the 9 Geo. IV. c. 14, § 6, "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith" (4).

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(1) *Tapp* v. *Lee*, 3 Bos. & Pul. 367.

(2) *Hutchinson* v. *Bell*, 1 Taunt. 558.

(3) 6 Ves. jun. 174.

(4) The clause in the original bill was somewhat different, "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings, of any other person, to the intent or purpose that such other person may obtain *credit* or *confidence*, unless such representation or assurance be made in writing signed by the party to be charged therewith." the action commenced before 1 Jan 1829 but tried after that day, on a representation made by parol before this statute is maintainable Fellowes v Williamson 1 Mor & Scott 306. and see Haswell & Tenterden's observations in Haswell v Haswell 1 Moo & Scott 299 as to the difference between sec 6 of 9 G 4 c. 14.

In this case, also, the writing is to be signed by the party, and therefore it seems that a signature by an agent will not be sufficient.

The effect of this enactment will be to reduce the number of actions on fraudulent representations; if a person is really anxious to obtain a valid representation or assurance under the statute, and another willing to give it, it must be fairly and honestly requested to be in writing.

In Corbett Vance v Brown 2 Moody & Rob 108 Tenterden C.J. held that a person misrepresenting the credit of another, though without any intention of defrauding the party to whom he makes the representation, is liable to make good damages occasioned by that party's giving credit in consequence to the subject of the representation But only to the whole extent of the loss in consequence of credit reasonably given on the representation (June 1831)

The plaintiffs declarations at the time that they trusted the debtor in consequence of the Defendants representation are admissible in evidence for them Pellows Vance v Williamson 1 Pellow & Hal. 306

CHAPTER XI.

OF EXECUTORY CONTRACTS UNDER THE STATUTE OF FRAUDS, AND OF THE STATUTE 9 GEO. IV. C. 14, § 7.

BY the Statute of Frauds, 29 Car. II. c. 3, § 17, it is enacted, "that from and after the 24th day of June, 1677, no contract for the sale of any goods, wares, and merchandizes, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum *in writing* of the said bargain be made and signed by the parties to be charged by such contract or their agents, thereunto lawfully authorized" (1).

The statute 9 Geo. IV. c. 14. recites, as a legislative deduction from the cases, "that the enactments 29 Car. II. c. 3, § 17, *(English)* and 7 Wm. III. c. 12, *(Irish)* do not extend to certain executory contracts for the sale of goods, which, nevertheless, are within the mischief intended to be remedied by these acts, and that it is expedient to extend the enactments to such executory contracts;" and from the latter part of the clause it may be

(1) The *Irish* Statute on this subject is the 7 Wm. III. c. 12, § 13.

gathered, that the contracts alluded to are those in which the goods are intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making and completing thereof, or for rendering the same fit for delivery.

I will now proceed to the cases themselves under the Statute of *Frauds* applicable to *executory contracts.*

The first is the case of *Towers* v. *Sir John Osborne* (1). The defendant had bespoken a chariot, and when it was made refused to take it; in an action for the value, *Pratt,* C.J. (afterwards Lord *Camden,)* ruled this not to be a case within the Statute of *Frauds,* which, he said, related only to contracts for the actual sale of goods, where the buyer was immediately answerable without time being given him by special agreement, and the seller is to deliver the goods immediately.

This case of *Towers* v. *Osborne* has been much observed upon: it has been said that it was out of the statute as a contract for work and labour; the thing contracted for did not exist at the time; and it was also observed by *Grose,* C.J. upon this case, that it went upon the general principle, that executory contracts were not within the meaning of the statute; if by that were meant contracts for the sale of goods to be executed on a future day, such a construction would be a repeal of the act, but if it only meant such contracts as were incapable of being executed at the time, then the decision was right (2).

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(1) At *Guildhall, coram Pratt,* C.J. 1 Str. 506.

(2) *Cooper* v. *Elston,* 7 Durnford & E. 16, and also *Garbutt* v. *Watson,* 5 Barn. & A. 614.

In *Clayton* v. *Andrews* (1), the defendant agreed to deliver one load and a half of wheat within three weeks or a month, at the rate of twelve guineas a load, to be paid on delivery, which wheat was at that time unthrashed. The court, on the authority of *Towers* v. *Osborne*, (which *Aston*, J. said, had always been considered an authority upon questions of this kind,) decided that this agreement was not within the statute. This case, *Clayton* v. *Andrews*, has also met with the disapprobation of subsequent judges, and *Holroyd*, J. in *Garbutt* v. *Watson* (2), said, he could not agree with *Clayton* v. *Andrews*. It was, however, followed in the case of *Alexander* v. *Comber* (3). In a subsequent case, *Groves* v. *Buck* (4), a contract for the purchase of oak-pins, which were not then made, but were to be cut out of slabs and delivered to the buyer, was held not to be within § 17 of the statute, for Lord *Ellenborough* said, the subject-matter of the contract was incapable of delivery and of part acceptance, and so out of the statute.

In *Rondeau* v. *Wyatt* (5), the defendant entered into a *verbal* contract to sell and deliver flour to be put in sacks to be sent to the mill, and shipped on board of vessels to be provided by the plaintiffs. The case of *Towers* v. *Osborne*, and the subsequent cases, were pressed; but the court decided that the contract was void, being within the Statute of *Frauds*, though it were executory, for the words are "no contract for the sale of *goods*," and it was observed, that *Clayton* v. *Andrews* was an agreement to

(1) 4 Burr. 2101. 1 Sir Wm. Black. Rep. 602. Such a contract by *local* measures or weights will now be void, unless it be according to the statute 5 *Geo.* IV. c. 14, § 15; the *ratio* of the *local* with the *standard* weight or measure must be expressed.

(2) 5 Barn. & A. 613.

(3) 1 H. Blac. 20.

(4) 3 Maule & S. 178.

(5) 2 H. Blac. 63. 3 Bro. C. C. 154.

deliver corn at a future period, and some work was to be performed, for the corn was to be thrashed; and that the intention of this statute was, that something direct and specific should be done, to show that the agreement was complete, to prevent confusion and uncertainty in the transactions of mankind: it has been observed of this case, that the construction was brought back to the manifest intention of the legislature (1).

In a subsequent case (2), it was held, in accordance with *Rondeau* v. *Wyatt*, that a sale of wheat by sample, at *Nottingham*, to be delivered at *Gainsborough*, was clearly within the statute.

In the late case of *Garbutt and another* v. *Watson* (3), the plaintiffs, who were millers, made an agreement with the defendant, a corn merchant, for the sale of flour, to be got ready to ship in three weeks, the flour at the time of the bargain was not prepared or capable of being immediately delivered; *Bayley*, J. was of opinion, at *Nisi Prius*, that the case fell within the 17th section of the Statute of Frauds, and the plaintiffs were nonsuited: on a motion by leave to enter a verdict for the plaintiff, *Towers* v. *Osborne* and *Clayton* v. *Andrews* were cited, in all which the goods were not capable of an immediate delivery; but it was said *by the court*, that it was *substantially* a contract for the sale of flour, and whether the flour was ground or not was immaterial, and the question, *Bayley*, J. said, was, whether this was a contract for goods, or for work and labour and materials, and if so, it fell within the Statute of Frauds.

It being considered expedient to extend the Statute of

(1) Per Lord *Kenyon*, in *Cooper* v. *Elston*, 7 Durnf. & E. 16.

(2) *Cooper* v. *Elston*, 7 Durnf. & E. 14.

(3) 5 Barn. & A. 613. 1 Dowl. & R. 219.

Frauds to the *executory contracts* after mentioned, it was enacted by the 9 *Geo.* IV. c. 14, § 7, that the enactments (29 *Car.* II. c. 3, § 17, (*English,*) and 7 *Wm.* III. c. 12, § 13, (*Irish,*)) should extend to all contracts for the sale of goods of the value of £10 sterling (1), notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(1) The bill originally stood thus, " of the value of £10 sterling and upwards, of which the whole price shall not be paid."

CHAPTER XII.

OF THE CONCLUDING SECTIONS OF THE 9 GEO. IV. C. 14, § 8, 9, 10.

BY section 8, "no memorandum or other writing *made necessary by this act*, shall be deemed to be an agreement within the meaning of any statute relating to the duties of *stamps*."

Though this clause be expressed clearly, yet I conceive it will be necessary to act with great caution before a cause is carried into court upon an unstamped agreement or instrument under this act (1).

(1) There is frequently a great failure of justice by reason of non-suits, where instruments are attempted to be produced in evidence and rejected, because they are not sufficiently stamped; this might be remedied by a short enactment to the following effect:—"That in all cases when any trial may be had before any court of record, or any judge sitting at *nisi prius*, it shall be the duty of the officer of such court, or of the officer at *nisi prius*, to inspect the stamps upon all deeds, instruments, and writings attempted to be produced or produced in evidence therein; and in case any question should arise, that the same are not properly stamped, it shall and may be lawful in all cases where any additional or other stamp may be required by law, for any court of record, or any judge sitting at *nisi prius*, to ascertain and determine the amount of such additional or other stamp, and that it shall be lawful for the party producing such deed, instrument, or writing, to pay into the hands of the officer of the court the amount of such additional duty, with a penalty of £5, for the use of his Majesty, his heirs, and successors, and then, and in such case, the cause or trial shall proceed as if the instrument had been properly stamped."

By section 9, nothing in this act shall extend to Scotland. This confines the operation of the act to England, Wales, and Ireland.

The times of limitation or *prescription* in Scotland are entirely different from that of England, and any alteration must be made by particular enactment; the acts for the Limitation of Actions on Contracts appear to have commenced *early* in Scotland.

There are questions of great importance on the last section of the statute 9 *Geo.* IV. c. 14, that the act shall commence and take effect on the 1st day of *January*, 1829.

This may deserve *full* consideration. As to the *commencement of statutes* in general it was decided in the *House of Lords*, according to the unanimous opinion of the judges in the *Attorney General* v. *Panter* (1), that where no specific day be mentioned in an act of parliament from which it is to take effect, it commences by legal relation from the first day of the sessions; in that case an act of parliament in the 7 *Geo.* III. enacted, that a duty of sixpence in the pound should be paid upon all rice exported out of the kingdom, which had been imported duty free; the act did not receive the royal assent till the 29th June, 1767, and the question was whether it attached upon such rice as had been imported between the first day of the session and the day on which the act passed. The *House of Lords* held that it did; the act of parliament by which the duties were imposed referred to another act of the same sessions, which, it was unsuccessfully contended, took the case out of the general rule.

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(1) Dom. Proc. 1772. 6 Bro. P. C. 553. And see 4 Inst. 25. Bro. Abr. tit. Parliament, pl. 86. Bro. Relation, pl. 43. And see the cases cited in *Latless, executrix,* and *Patten* v. *Holmes*, 4 Durnf. & E. 660.

A case (1) also arose on the *annuity* act, on a motion to set aside some annuity deeds, because they were not properly registered; it appeared the annuity was secured by an indenture bond and warrant of attorney, dated the 14th January, 1777. On the 13th of August, 1777, a proportionable part of the annuity was assigned by a deed-poll. By the annuity act, 17 *Geo.* III. c. 26, it is enacted, that every deed, bond, &c. whereby any annuity shall be granted after the passing of the act, shall within twenty days after the execution thereof be enrolled in the Court of *Chancery* in the manner in the said act mentioned, otherwise every such deed, bond, &c. shall be null and void: that act did not receive the royal assent until May, 1777, being nearly four months after the execution of the said assurances; and the session in which the act passed commenced on the 31st of October, 1776: no memorial of any assurances for securing the annuity, or of the said deed-poll of *Patten*, was enrolled in *Chancery* until the 1st of December, 1791, when memorials of both were enrolled. No judgment was entered up by virtue of the warrant of attorney, nor any action or suit commenced on the said bond. The question was whether this annuity, and the instruments by which it was secured, were void.

The *court* made the rule absolute for setting aside the securities, and held, that the act operated by legal relation from the first day of the session; and they said with respect to the argument, that the annuity act required an impossibility, the act only rendered the thing which is done, void, unless certain requisites are complied with.

To remedy this inconvenience it was enacted by the statute 33 *Geo.* III. c. 13, that the clerk of the parliament should *indorse* on every act passed after the 8th of April,

(1) *Latless, executrix, and Patten* v. *Holmes*, 4 Durnf. & E. 660.

1793, after the title of the act, *the time when the same shall have passed,* and such indorsements shall be the date of its commencement, if not otherwise provided (1).

The above cases and observations relate to the time when a statute begins to operate; in some instances from the first day of the session, in others, from the time when the act receives the royal assent, in others, from particular specified times.

Another class of cases more particularly bears upon the question, in what manner the statute 9 *Geo.* IV. c. 14, § 10, may operate as to the time of its commencement.

The words of the Statute of Limitations, 21 *Jac.* c. 16, § 6, were, that all actions upon the case for slanderous words to be sued or *prosecuted* in any court after the end of that parliament, if the damages be assessed under forty shillings, then the plaintiff should recover only so much costs. In *Sendal's* case (2) the action was brought before the parliament, and the prosecution was afterwards; it was resolved, after argument in the *King's Bench,* that the prosecution afterwards, though the commencement was before the parliament, is within the statute, by the word in the statute "*prosecute.*"

A similar difficulty also arose on the statute 29 Car. II. c. 3, one provision of which is extended by the statute 9 Geo. IV. c. 14; the words of the Statute of *Frauds,* 29 Car. II. c. 3, § 4, are, "that from and after the 24th day of June, 1677, no action shall be brought whereby to charge any person upon any agreement in consideration of marriage, &c. unless some note or memorandum thereof be in writing signed by the party, or some other person by him lawfully authorized."

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(1) And see stat. 48 *Geo.* III. c. 106, *(an act little known,)* as to *continuing* acts taking effect from the expiration of the former act.

(2) 1 Latch. 2, 3.

In an action against an executor (1) on a promise by the testator by parol, in consideration of marriage, to pay in his lifetime, or leave at his death, a sum of money; the promise was stated to have been made in February, 1676, the action was brought in Michaelmas Term, 1677. The defendant's testator died in August, 1677, between the promise and *that* time was the Statute of *Frauds*, 29 Car. II. c. 3, made; all this was found in a special verdict: it was argued for the defendant, that the promise was void by the statute, the action being commenced after the statute, although the promise was made before; and the words of the enacting clause were likewise insisted upon; but it was urged that the statute plainly intended only promises after the 24th day of June, 1677, and never was designed a retrospect to avoid marriage agreements made and concluded any time before; and so were the judges' opinions at *Serjeant's Inn*, in the case of a devise by will in writing, not having three witnesses to it, made and published before the act, whose testator died after the act. Now it is no devise till after the testator's death, and yet it was held good enough, and though this was no judicial opinion (2), yet it was said, the title and style of the whole act was plain enough, that

(1) *Elmore* v. *Shuter and others*, 2 Show. Rep. 16. *Gillmore* v. *Shuter*, T. Jones R. 108. 1 Ventr. 330. 2 Lev. 227. *Gillmore* v. *Executor of Shooter*, 2 Mod. 31. *S. C.*

(2) See 2 Show. 16. The following case is in Prec. Chan. 77.—A man made his will several years *before* the Statute of Frauds, and the will had but *two* witnesses to it; the testator lived several years after the statute, and then died without altering his will. *Master of the Rolls*—"I think this is a good will to pass the lands, being made before the statute, though the testator died after;" but the other side insisted to have it tried at law—he directed it accordingly—(what became of the case does not appear.) See 1 Vern. & Scriven *Irish* Rep. 471.

it designed only a prospect for the future, the title being "An Act for the *Prevention of Frauds.*"

Lord *Scroggs*, *Wylde*, and *Jones*, J. (*Twisden*, J. absent,) said, they believed the intention of the makers of that statute was only to prevent for the future, and that it was a cautionary law; and if a motion were made in the *House of Lords* concerning it, they would all explain it so; besides, it would be a great mischief to explain it otherwise; to annul all promises made by *parol* before that time, upon which men had trusted and depended, reckoning them good and valid in law, as they are yet amongst honest men, and, therefore, judgment was given for the plaintiff.

There are several reports of this important case; according to one by Sir *Thomas Jones*, one of the judges who decided it, it was urged for the plaintiff, that no act of parliament should be intended to be taken to be made against natural justice, as it would be if this act was taken literally, for then good and legal causes of action for debts and other things upon promises, made upon good and valuable consideration, would be destroyed, and entirely taken away by the retrospect of a law, which no one could divine would be made; the whole Court, except *Twisden*, J. (absent from illness) said, that the action lay notwithstanding the act, and the justices agreed that the act did not extend to promises before the 24th day of June, 1677; and judgment was given for the plaintiff: and they further said, that by an easy transposition of the words of the act, a construction agreeable to justice may be made—the words are, "after the 24th day of June, 1677, no action shall be brought for any promise without note or writing," &c. these words being transposed would be thus, "no action should be brought upon any pro-

mise after the 24th day of June, 1677," then no retrospect or other injury to any one; and it was usual to make such transposition of words, that private contracts might agree with the intention of the parties, as upon a lease made the 26th March for years, rendering rent at the Annunciation and Michaelmas during the term; the first rent shall be payable at Michaelmas; *à fortiori*, this should be done to make acts of parliament agreeable to common justice.

This case was cited in the case of *Couch, qui tam*, v. *Jeffries* (1), to show that there was a right *vested*, which right should not be taken away; and it was observed, *Gilmore's* case was plain and clear upon the words of that act of parliament, 29 Car. II. c. 3; and Lord *Mansfield*, C. J. observed, "*here is a right vested, and it is not to be imagined that the legislature could by general words mean to take it away from the person in whom it was so legally vested.*"

A case (2) also occurred on the *Irish* Statute, 25 Geo. III. c. 34, § 108, which enacts, "that in case any action shall be brought for anything done by virtue of that act or any other act relating to his Majesty's revenue in *Ireland*, the action shall be commenced within three months next after the alleged cause of action shall accrue." An action of trespass was brought in the *Exchequer* in *Ireland*, for taking tobacco; the defendant pleaded the general issue; it was proved that the defendant acted as a revenue officer in taking the tobacco, whereupon it was objected that the plaintiff's action was

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(1) 4 Burr. 2460, and see the observations of the late Mr. Serj. *Williams* on *vested* Causes of Action, *Hodsden* v. *Harridge*, 2 Saund. Rep. 63, n. 6, and 1 Sir W. Black. Com. 45.

(2) *Cochran* v. *Spillar*, Vern. & Scriv. *Irish* Rep. 463.

barred, not having been commenced within three months next after the action accrued, according to the before mentioned statute; to this it was answered, that the act did not extend to causes of action which accrued before the act passed; the plaintiff had a verdict, subject to the opinion of the Court upon this point.

It was urged for the plaintiff to be a clear principle in the construction of statutes, that they should not have a retrospect, unless such an intention of the legislature *manifestly* appeared; that the words of the statute extended only to subsequent causes of action; that if its operation be extended one instant back, it might have taken away the remedy against a revenue officer for a trespass, however flagrant and oppressive, if committed three months before the passing of the act; and though a man had brought his action before the passing of the act, yet he would be barred if such action were not commenced within three months after the passing of the act; that it cannot be presumed the act had a retrospect to take away the plaintiff's right, and *Gilmore* v. *Executor of Shooter* (1) was cited, and *The King* v. *Sparrow* (2): it was also objected that the defendant had not pleaded the statute.

It was urged for the defendant, but very slightly, that the case came within the statute; that the words "done and executed," and "shall have arisen," where the act directs the action to be brought in the proper county, gave it a retrospective operation.

The Court (*Yelverton*, C. B. *Hamilton*, and *Metge*, B.) was of opinion, that it did not extend to rights of action accrued before; that to take away a common law vested right, strong and clear words were necessary;

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(1) *Ante*, 137. (2) 2 Str. 1123.

that the statute not having specified any time for the commencement of its operation, took effect from the first day of the session; that there were no words in it which could seem to give it an earlier operation, except the words "done or executed," but that they were capable of another reasonable construction, that is, "to be done or executed;" that the words "shall have arisen," &c. are not a mode of speaking of the time then passed, but mean that when an alleged cause of action should thereafter arise, the action should be brought in the proper county. The Court ought not to be ingenious in construing the act, so as to work an argumentative wrong. (*Postea* to the plaintiff.)

It has lately been held that the New *Bankrupt* Act, 6 Geo. IV. c. 16, is *retrospective*; in one case (1), a payment made in June, 1825, by a debtor, *bonâ fide*, without intention of fraudulent preference, eight days before a commission of bankrupt was issued against him, was held to be protected by § 82, "payment made," as well as "hereafter to be made," being in the clause; and in another case (2), the bankruptcy took place on the 26th July, 1822, and the bankrupt paid the defendant, who knew of his insolvency, a sum of money in August, 1822, and a commission was sued out in May, 1823; it was urged that the § 82 must be construed with § 135, and that the assignees had an *existing right* when the act was passed, and that it is a general principle that a law shall not have an *ex post facto* operation, unless where its terms are precise to that effect; but it was held that the assignees could not, after the act came into operation,

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(1) *Churchill and another, Assignees of Cadogan*, v. *Crease*, 5 Bing. 177.

(2) *Terrington, Assignee of Pulleu*, v. *Hargreaves*, 5 Bing. 489.

sue the defendant for money had and received, confirming *Churchill* v. *Crease:* but Lord *Wynford* said, it has been contended on the one side, and conceded on the other, that the provisions of a statute cannot be retrospective, unless declared to be so by *express words*, he acceded to that position; but there were words in § 82 which expressly render that section retrospective, and which have no meaning, unless such a construction be adopted.

By § 10 of the statute 9 Geo. IV. c. 14, that act shall commence and take effect on the 1st January, 1829 (1).

The language of the clauses is different.

By § 1, no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract to take a case out of the statute, unless such acknowledgment or promise shall be in writing.

By § 3, no indorsement or memorandum of payment made after the time appointed for the act to take effect

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(1) It is said the noble Lord, who framed the bill, was applied to, to extend the time in his bill beyond the 1st January, 1829, but he did not think it proper to make any alteration; the time was *eight* months, including part of Easter, and the whole of Trinity and Michaelmas Terms, and one assizes and the sittings in and after Easter, Trinity, and Michaelmas Terms; (*post*, 143, 144,) but considering the unwillingness of the creditor to make out *old accounts*, and difficulty of ascertaining old debts, and collecting the means of proving them, particularly in large concerns, and that many persons *(from the multiplicity of acts of parliament in each year)* were not aware of the provisions or consequences of the new statute, until even after the 1st January, 1829; the time might perhaps have been extended; besides, in many cases, the plaintiff might not know the residence of his debtor, or he might not be in *England;* in either case the plaintiff could not commence an action to save the statute; on the other hand, had a longer time been given, it would have given rise to considerable litigation, and to many *experimental* and *oppressive* actions, which the noble Lord no doubt wished to prevent.

by the creditor, is sufficient proof of such payment to take the case out of the statute.

By § 5, no action shall be maintained to charge any person upon any promise made after full age, &c.

By § 6, no action shall be brought to charge any person upon any representation, &c.

By § 7, the said enactments (in the Statute of *Frauds*) *shall* extend to all contracts for the sale of goods, &c.

By § 10, (as before) the act shall *commence and take effect* on the 1st January, 1829.

The act 9 Geo. IV. c. 14, passed on the 9th of May, 1828, and in November the first case occurred (1); it was an action of *assumpsit:* the defendant obtained a rule to change the *venue*, in answer to which an affidavit was produced, stating that the defendant's attorney was informed of the defendant's admissions and promises of payment, when he said, "that Lord *Tenterden's* Act came into operation on the 1st of January, and that he should change the *venue* and beat the plaintiff, as he had no promise in writing." *Best*, C. J. thought the *venue* ought not to be changed, and said that it was with a view to prevent an *ex post facto* operation with respect to suits already commenced, that the period of the act's coming into force was postponed till six months after it passed. To make this rule absolute, would be in effect to put off the trial till after the next term, while, if it were tried after the present term, the plaintiff might succeed on a parol promise, which, when the act came into operation, might prove insufficient, though upon that point he abstained from pronouncing any opinion; but acting on the spirit of the postponing clause, they ought not to pre-

(1) *Aumer and another* v. *Cattle*, 5 Bing. 208. 2 Moore & P. 367, and MS.

vent the plaintiff from trying his cause, if he be enabled to do so within the time limited by the act for the continuance of the old law.

Park, J. said, "with respect to the new statute requiring a *written* promise to render a party liable in respect of a debt extinguished by the statute, no one approves of it more than I do; but in seeking to further the object of that statute, we must be careful not to do injustice. When the legislature gives six months before allowing the act to come into operation, it indicates an intention to enable parties, now relying on *parol* promises, to sue on them effectually. The plaintiff for that purpose lays his *venue* in *London*, where his cause will come to trial before the six months have elapsed; the defendant seeks to defeat the claim by removing the cause to *Warwick*, and we should be lending ourselves to injustice if we were to assist him in his attempt." *Burrough*, J. said, "upon the present occasion he proposed that the defendant's attorney should be allowed to answer the affidavit of the plaintiff's attorney, but was willing to concur in discharging the rule, if such affidavit should not prove to be an answer to the former."

Gaselee, J. *dissentiente* (1).

The Court then permitted the defendant's attorney to answer the affidavit of the plaintiff's attorney; but the answer not containing, in the opinion of the Court, an explicit denial of the language ascribed to him in the affidavit of the plaintiff's attorney, the rule was discharged.

About the same period as the preceding case occurred an application to Lord *Wynford*, (then *Best*, C. J.) at *nisi prius*, to take out of turn a case, in which the Statute of Limitations had been pleaded, which was al-

(1) See 2 Moore & P. 367, &c.

lowed, that the cause might be tried before the 1st January, 1829 (1).

In *Ansell* v. *Ansell* (2) the action was *assumpsit*, the pleas were the general issue and the Statute of Limitations. The only evidence given to take the case out of the statute was a *parol* acknowledgment. *Gurney*, for the defendant, submitted, that since the act of the 9 Geo. IV. c. 14, such an acknowledgment was not sufficient. Sir J. *Searlett*, for the plaintiff, stated, that the action was commenced before the 1st day of January, 1829, when that act came into operation, and contended, that, therefore, its provisions did not apply. Lord *Tenterden*, C. J. was of opinion, that *the words of the new statute had relation to the time of the trial*, and, therefore, that the *parol* promise was not sufficient evidence to take the case out of the operation of the Statute of Limitations—afterwards a juror was withdrawn. and see Hilliard v Lenard 1 Moody and Mal. 297.

The case of *Kirkhaugh* v. *Herbert* (3), was an action for goods sold and delivered, the defendant pleaded the Statute of Limitations. The action was brought in Michaelmas Term, 1828. The cause came on to be tried before the late Mr. Baron *Hullock*, at the *Cumberland* Lent Assizes, in March, 1829. Evidence was tendered of a verbal acknowledgment of the debt made by the defendant, and it was urged by *Aglionby*, for the plaintiff, that the statute 9 *Geo.* IV. c. 14, § 1, was only meant to refer to promises or acknowledgments made after the 1st day of January, 1829, and could not have a retrospective effect.

But *Hullock*, Baron, ruled that it contemplated the time of the trial, and that no promise or acknowledgment,

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(1) *Anon.* 3 Carr. & P. 564.
(2) 3 Carr. & P. 563. and 1 Moody & Malkin 299 qy?
(3) *Cumberland* Lent Assizes, 1829, *coram Hullock*, Baron, MS. Kirkhaugh v Herbert

6 Bingham 258 Fowler v Chatterton
Jones v Matthews Sittings after Trinity Term 1829 London

unless made in writing, could be admitted in evidence after the 1st January, 1829, and he therefore nonsuited the plaintiff.

The same point has been determined in the same way by Mr. Justice *Bayley*, on the *northern*, and Mr. Justice *Gaselee*, on the *western*, circuits (1).

The following case (2) was also ruled on the *midland* circuit, it was an action of *assumpsit*, and the defendant pleaded the Statute of Limitations, upon which issue was joined at the trial before Lord *Wynford*, (then *Best*, C. J.) at *Lincoln*, the plaintiff relied on a *parol* acknowledgment within six years, to take the case out of the Statute of Limitations; the action was brought before Lord *Tenterden*'s act, but not tried till after; the chief justice nonsuited the plaintiff, with liberty to move accordingly. *Mereweather*, Serjeant, moved and obtained a rule *nisi* to enter a verdict for the plaintiff for the sum (7*l.* 10*s.*) which the jury, under his lordship's directions, found to be due, if the plaintiff could use the evidence of the parol acknowledgment. *Adams*, Serjeant, for the defendant, on showing cause, contended strongly the meaning and intent of the act was clear, that such parol acknowledgment could not be admitted. *Mereweather*, Serjeant, cited the cases of *Gilmour* v. *Shuter* (3), and *Cochran* v. *Spillar* (4), and strongly urged the injustice of a *retrospective* operation of the act. The chief justice said, he understood the Court of *King's Bench* had granted rules to show cause in *two* actions on the point; the court would therefore postpone its judgment until they had consulted with the judges of the *King's Bench*. *Cur. adv. vult.*

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(1) 3 Carr. & P. 564.

(2) *Towler* v. *Chatterton*, MS. *coram Best*, C. J. *Lincoln Spring Assizes*, 1829, and in *Common Pleas*, *Easter* and *Trinity* Terms, 1829.

6 Barn 258. Anner v. Cattell 5 Barn 208

(3) *Ante*, 137.

(4) *Ante*, 137. 149.

No judgment on the point has yet been given, either in the *King's Bench* or *Common Pleas*, but I am informed, Lord *Tenterden*, C. J. since, at the sittings in August last, stopped a cause in which Mr. *Gurney* stated the action was brought before the act, and that he had a parol acknowledgment to take the case out of the Statute of Limitations. And Lord *Tenterden* also decided a case (1) in accordance with his former opinions at the last *Warwick* Assizes.

(1) *Holmes* v. *Wright*, MS. *coram* Lord *Tenterden*, *Warwick* Summer Assizes, 1829.

T Com Pleas Michaelmas Term 1829 The Judgment of the Court was given in the case of Tarleton v Chatterton in which the Judges were unanimous in discharging the rule thereby deciding that the Statute had relation to the time of action and that the new promise must be within the words of the statute — 2 Bingham 258.

CHAPTER XIII.

OF NEW PROMISES BY INSOLVENT DEBTORS AND BANKRUPTS.

AT the time when Lord *Tenterden* brought in his bill "for rendering a written memorandum necessary to the validity of certain promises and engagements," there was the following clause inserted, being the *fifth* clause in the bill. "And be it further enacted, that no person who by virtue of any act for the relief of *insolvent debtors* hath been, or hereafter shall be, adjudged to be discharged and entitled to the benefit of such acts, either forthwith, or at any future time, shall be made liable to pay or satisfy any debt, claim, or demand, or any part thereof, to which such adjudication shall extend, upon any contract, promise, or agreement made, or to be made after the filing of the petition of such person, unless such contract, promise, or agreement be made *in writing*, signed by such person."

This clause was *withdrawn*, not because the principle of Lord *Tenterden*'s act ought not to be extended to new contracts by insolvent debtors, but probably because there were particular provisions in an *existing* act which, in a great measure, rendered it unnecessary.

The existing law relating to *new* promises by Insolvents and Bankrupts is little known, the present chapter will

therefore contain the law respecting new promises by *Insolvent Debtors* and *Bankrupts*.

The first observations on this subject in the books are relating to bankrupts. It is said, if a bankrupt has since his certificate made a *new promise*, that deserves a consideration, and entitles the plaintiff to a discovery in equity (1). Can it be doubted if the bankrupt give a *new security* his effects are all liable (2)? If a bankrupt apply to an old creditor, after a discharge by certificate, to lend him a new sum of money to carry on his trade, or to become security for any office, this *ought* to be a good consideration for the remainder of the old debt (3).

The first case at law on this subject is that of *Turner* v. *Shomberg* (4); a man gave a promissory note for £36, and was afterwards discharged on the *Insolvent* Act, 16 *Geo.* II. c. 17, § 18, he verbally promised to pay the debt at two guineas per month, and paid part; being sued and *arrested* for the balance, he was on motion discharged, the court saying it was no new consideration, but the old debt. This is observed in another case to have only been a question as to bail, that case also determining the question of *bail;* the defendant being indebted to the plaintiff became bankrupt, the creditors did not appear to have come in under the commission, but after the certificate was obtained the plaintiff produced his account to the bankrupt, who desired time to examine it, and then acknowledged the balance, and *verbally* promised to pay it when he should be able; the defendant was arrested, and the general question was argued; the promise was com-

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(1) *Twiss* v. *Massey*, (1737,) 1 Atk. 67.

(2) 1 Atk. 255.

(3) Per *Lord Chancellor*, 1 Atk. 255.

(4) 2 Str. 1233.

pared to a promise to pay a debt barred by the Statute of Limitations, or a promise made by an infant, ratified after full age; and it was said, that Lord *Raymond*, C. J. (1). had held the infant was bound. The Court gave no opinion on the general question, but discharged the defendant on common bail; in one report the court added they would not say he (the defendant) might revive the old debt, which was clearly due in conscience. In a subsequent case of *Barnardiston* v. *Coupland* (2), 1761, Lord Chief Justice *Willes* said, the revival of an old debt is a sufficient consideration.

In the case of *Lewis* v. *Chase*, in *Chancery* (3), a bankrupt brought a bill in equity, to be relieved from a bond given for payment of his debt in consideration of withdrawing a petition against the allowance of the bankrupt's certificate. It was decided that equity would not relieve against such a bond. This case is not wholly reconcilable with subsequent decisions (4); but the language of the Court is strong to show their feelings, for they say, "here is an honest creditor, and the bankrupt, if he pays him all, still pays but what in conscience he ought."

In *Trueman* v. *Fenton* (5), (1777) the general question was determined, that a bankrupt, after a commission of bankruptcy sued out, may, in consideration of a debt due before the bankruptcy, and for which the creditor agreed to accept no dividend or benefit under the commission, make such creditor a satisfaction in part, or for the whole

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(1) *Southerton* v. *Whitlock*, 1 Str. 190, *ante*, 116. 150.

(2) MS. Cowp. 544.

(3) 1 P. Will. 620.

(4) *Smith* v. *Bromley*, Dougl. 696. *Sumner* v. *Brady*, 1 H. Black. 647.

(5) Cowp. 544.

of his debt, by a new undertaking or agreement (1). It was an action brought on a promissory note given after the plaintiff had delivered up two acceptances to be cancelled, and Lord *Mansfield*, C. J. said, "a bankrupt may undoubtedly contract new debts: therefore, if there be an objection to his reviving an *old* debt by a *new* promise, it must be founded upon the ground of its being *nudum pactum;* as to that, all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate." This is a leading case, and the doctrine has been extended to cases where the creditor proved under the commission, and the certificate has been obtained (2), and afterwards the *bankrupt* makes a new promise to pay the balance of the old debt (3); and so it has been held, that a promise by an *insolvent debtor,* after his discharge, will revive an antecedent debt (4).

The case of *Trueman* v. *Fenton* was very favourable to the introduction of the doctrine, for Lord *Mansfield*, C. J. observed, there was no fraud, no oppression, no scheme whatever on the part of the plaintiff to deceive or impose upon the defendant; the transaction excluded the plaintiff from having anything to do with the certificate—he relinquished all hope or chance of benefit under the commission, the proposal first moved from and was the bankrupt's own voluntary request.

Subsequent cases have not been of the same favourable

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(1) But where a party thus agrees not to prove his debt, if he does prove, he cannot recover on the agreement. *Colls* v. *Lovell,* 1 Esp. N. P. C. 282, and see *Carpenter* v. *White (an insolvent,)* 3 Moore Rep. 231.

(2) *Birch* v. *Shareland,* 1 Durnf. & E. 715.

(3) *Roberts* v. *Morgan,* 2 Esp. 736. *Brix* v. *Braham,* 8 Moore Rep. 161. 1 Bing. 281. S. C.

(4) *Hutt* v. *Verdier,* 2 Sir W. Blackst. 724. *Best* v. *Barker,* 8 Price Rep. 533, (n.)

description, and there is no doubt that in many of them the greatest oppression has been exercised to extort promises, both from bankrupts and insolvents; and the witnesses being frequently friends of the creditor, have in many cases been guilty of perjury, by proving a verbal promise, where none was either made or intended to be made; so that in one case, *Fleming* v. *Hayne* (1), Lord *Ellenborough*, C. J. directed the jury that they ought to be *satisfied* that the defendant made a *distinct unequivocal* promise to pay, before he is to be placed again in the responsible situation from which the law had discharged him; and if they thought that the defendant, being under no legal obligation to pay the debt, but contemplating his legal and moral situation, deliberately promised to pay the debt, the plaintiff would be entitled to a verdict, otherwise they ought to find for the defendant, and they did find for the *defendant*.

A general promise to pay *every one*, has been held not to be sufficient (2). The promise may be either to pay generally or conditionally; in the first case, *assumpsit* will lie on the original consideration and promise (3), but where the promise is to pay conditionally, the plaintiff should, it seems, where he relies on the new promise, declare specially, and allege the conditions to be performed (4); and, at any rate, the conditions must be *proved* to have been performed at the trial; and that if

(1) 1 Stark. 371.

(2) *Lynbuy* v. *Weightman*, 1 Esp. N. P. C. 198.

(3) *Williams* v. *Dyde and others*, Peake N. P. C. 99. *Penn* v. *Bennett*, *Gent. one*, *&c.* 4 Camp. R. 205.

(4) *Hylcing* v. *Hastings*, 1 Ld. Raym. 309. *Trueman* v. *Fenton*, Cowp. 544. *Penton* v. *Bennett*, *Gent.* 4 Camp. 205. *Colls* v. *Lovell*, 1 Esp. N. P. C. 282. *Brix* v. *Braham*, 8 Moore R. 261. 1 Bing. 281, S.C. *Ayton* v. *Bolt*, 4 Bing. 105. *Tanner* v. *Smart*, 6 Barn. & C. 603.

a bankrupt promise to pay when he is able, in an action on that promise, his ability to pay must be shewn and proved (1).

With respect to *insolvents* there seems to have been a distinction between contracts to pay existing debts, previous to the discharge of the insolvent, and contracts after the discharge to pay debts from which the insolvent has been discharged. It seems in the former case the contract would be void, but in the latter case it would have been good (2).

An insolvent is not discharged from debts negligently or fraudulently omitted by him in his schedule (3): but if the creditor be implicated in the fraudulent omission, he cannot afterwards sue the insolvent for any part of the debt (4).

It is now enacted by the 7 Geo. IV. c. 57, § 46, "not only that the insolvent should be discharged from the debts in his schedule, but also as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be the indorsees or holders of any negotiable security set forth in the schedule."

To protect insolvents from the oppression of their creditors in requiring a new contract, it was by the statute 7 Geo. IV. c. 57, § 61, enacted, "that after any person shall have become entitled to the benefit of *this act* by any such adjudication as aforesaid, no writ of *fieri facias* or *elegit* shall issue on any judgment obtained against

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(1) *Ante*, 66, &c.

(2) *Wilson and another* v. *Kemp*, 3 Maule & S. 595. *Horton* v. *Moggridge*, 6 Taunt. 563. *Best* v. *Barker*, 8 Price, 533, (n.) *Jackson* v. *Davison*, 4 Barn. & A. 691. *Rogers* v. *Kingston*, 2 Bing. 441.

(3) *Baker* v. *Sydee*, 7 Taunt. 179. *Taylor* v. *Buchanan*, 4 Barn. & C. 419.

(4) *Carpenter* v. *White*, 3 Moore R. 231. *Reeves* v. *Lambert*, 4 Barn. & C. 214.

such prisoner, for any debt or sum of money with respect to which such person shall have so become entitled, *nor in any action upon any new contract or security for payment*, except upon the judgment entered up against any such prisoner according to this act; and that if any suit or action shall be brought, or any *scire facias* be issued against such person, his or her heirs, executors, or administrators, for any such debt or sum of money, or *upon any new contract or security* for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by such person for the same, except as aforesaid, it shall and may be lawful for such person, his or her heirs, executors, or administrators, to plead generally, that such person was duly discharged according to this act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially; whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matters pleaded aforesaid, or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof, specially."

The discharge under the present Insolvent Act, 7 Geo. IV. c. 57, thus, it appears, protects the insolvent where an action is brought against him on any new contract, engagement, or security for the payment of any debt which arose before his discharge, by allowing him to plead his discharge generally in the terms prescribed by the act as a bar, and also protects him from every execution upon any judgment in respect of the old debt, or on

account of the new contract; but the creditor is entitled under the general judgment entered up according to the act.

It is probable that this provision will have the effect of preventing creditors from taking from insolvents bills or notes, or other securities, by which they derive an advantage over the rest of the creditors (1).

The former acts do not contain the provision as to new contracts, and, therefore, it seems, the old law will apply to them.

For the further prevention of both fraud and perjury, the legislature have required new promises from *bankrupts* to be in *writing;* by the statute 6 *Geo.* IV. c. 16, § 131, no bankrupt after his certificate shall have been allowed under any (then) present or future commission, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged, or any part of such debt, claim, or demand, upon a contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized *in writing* by such bankrupt.

It is by no means improbable, as many would give a verbal promise to revive a debt barred by the Statutes of Bankrupts, who would not give a promise in writing, that the effect of the statute will be to reduce considerably the number of actions on new promises to revive debts discharged by the certificate, an effect which will show clearly that many of these actions were grounded in oppression, as well as fraud and perjury, and that the wis-

(1) Cooke on the Insolvent Court, 13..., &c.

dom of the legislature was wisely exerted in repressing the increasing crime of perjury.

A case (1) has arisen upon this section of general importance; a person became bankrupt, and a commission issued; afterwards, and before the certificate was obtained, he called at the office of his attorney (to whom he had been indebted before the bankruptcy,) and there, in the absence of the attorney, wrote a letter promising to pay the attorney £100; the only *signature* was a flourish of the pen, which it was contended formed the letter "*M*," the initial letter of the defendant's name (*Moreau*); it was ruled, that if it was an "*M*," it was not a sufficient signature under the Bankrupt Act, 6 Geo. IV. c. 16, § 131, and it seems if such a letter be without *date*, the time when it is written cannot be proved by parol evidence; the Court of *Common Pleas* refused a rule to set aside the nonsuit.

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(1) *Hubert* v. *Moreau*, 2 Carr. & P. 528. And see *Elmore* v. *Kingscote*, 8 Dowl. & R. 343, a case on the Statute of *Frauds*, § 17, that the *note in writing* must state the *price*.

CHAPTER XIV.

OF VARIANCES, AND OF THE STATUTE 9 GEO. IV. C. 15.

INSTANCES of variances between writings produced in evidence and recitals, and notices of such writings upon the record, in matters not material to the merits of the case, have frequently occurred, and occasioned many lamentable failures of justice; for instance, in an action on a bill of exchange or note, a misdescription of such bill or note, as in the date, in the name of the party, in the direction of the bill, in the consideration for it, in the species of currency, these have all been held grounds of nonsuit. In an action of *assumpsit*, where the plaintiff declares specially on the contract, nonsuits have frequently occurred, notwithstanding Pleaders have endeavoured to state the contract in every possible way; the truth is, that contracts are frequently so loosely and irregularly made, it is difficult even when in writing, in which the precise terms are known, and little liable to be varied by parol evidence, to state their legal effect, particularly where the contract is to be taken from contradictory papers: in contracts depending upon parol testimony the difficulties are considerably increased. In actions of debt and covenant, variances between the instruments and the proofs have frequently occurred.

It seems that at common law a Judge of the Court in which the cause was depending might make the amendments in the progress of a trial at *Nisi Prius* (1).

To cure mistakes in setting out *written* instruments, it was provided by the statute 9 *Geo.* IV. c. 15, that every Court of *Record* holding plea in civil actions, any judge sitting at *Nisi Prius*, and any Court of *Oyer* and *Terminer*, and general gaol delivery in *England*, *Wales*, the town of *Berwick-upon-Tweed*, and *Ireland*, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any *misdemeanor*, when any variance shall appear between any matter in writing, or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such Judge or Court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared. And in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly.

This statute applies to Courts of Record holding plea in

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(1) 3 Taunt. 81. The liberality of the courts in allowing amendments, (so essential frequently to a good and perfect record, and to a fair trial,) is materially affected by the *costs* of amendments, which are sometimes very heavy; and occasionally plaintiffs will be induced, on this account only, to venture to trial upon a defective record: upon *trifling amendments* might not the costs of amendment (as is the case in equity,) be a certain fixed sum?

civil actions and to Judges sitting at *Nisi Prius*, so that, what is very useful in practice, a Judge of the *King's Bench*, sitting at *Nisi Prius*, may amend a record of the *Common Pleas* or *Exchequer*, and *vice versa;* it would be very desirable if during the circuits any Judge had authority to make amendments, though the cause be not in his own court.

To return to the statute, it seems it will apply to indictments, and informations in the crown office of the *King's Bench*, which are tried at *Nisi Prius*, but it will not apply to Courts not of Record, as County Courts; in other criminal cases it will apply to misdemeanors in Courts of *oyer* and *terminer* and general gaol delivery, but not to felonies or to Courts of Quarter Sessions, &c. to which the provisions will probably in time be extended.

The statute extends to *England*, *Berwick-upon-Tweed*, *Wales*, and *Ireland*.

The amendment is only to be made if the Judge see fit.

Very early after the making of this statute, in an action on the case for a *malicious arrest*, the declaration alleged, that the plaintiffs in the original action did not prosecute it, but made default, whereupon it was considered that they should take nothing by their bill and the pledges to prosecute should be in mercy, which was the legal description of a nonsuit; the proof was a discontinuance: on an application to amend, Lord *Tenterden*, C. J. thought it right to consult the other Judges, *Bayley*, *Holroyd*, and *J. Parke*, J. and his Lordship, then said, "it was not a case within the statute, it was nothing like a *mere mistake* in setting out a written instrument, it was the allegation of a matter totally different from that offered in evidence, and he accordingly refused to allow the plaintiff to amend" (1).

(1) *Webb* v. *Hill and another*, 1 Moody & M. 253.

In a case on the *Oxford* circuit, before *Vaughan*, Baron (1), which was an action of *covenant*, and the date of the deed was mistaken, the learned Judge only allowed the plaintiff to amend upon payment of costs; the defendant alleging that the declaration in its original form, and a recovery upon it, would not have been sufficient to have prevented another action against him, and that he had defended the action on that ground. In a subsequent case (2) of *replevin*, where there were eighteen avowries for rent, and the pleas in bar were *non tenuit* and *riens in arrear*, the lease, when produced in evidence, showed that the terms of the holding were different from those stated in any of the avowries. On an application for leave to amend, under the statute 9 *Geo.* IV. c. 15, *Park*, J. said, it was not a case contemplated by the act, there was no recital of any particular deed, and that if he were to suffer them to amend the plaintiff might be let in to plead *de novo;* he also said, that the case neither fell within the spirit or the letter of the act, and that he was of opinion that that act of parliament only applied to cases where some particular written instrument was professed to be set out or recited in the pleadings.

This is a hard case, for at common law it would have been requisite to set out in the avowry on replevin the whole of the title of the lessor, and also the lease, and then it would have come within the statute, and it is only in compliance with the statute 11 Geo. II. c. 19, that the defendant shortened his avowries (3), and as he had so many, the probability is, that the lease was in the possession of the plaintiff, and could not be obtained by

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(1) *Anon. coram Vaughan*, Baron, Lent Ass. 1829.

(2) *Rider* v. *Malbon*, *coram Park*, J. 3 Carr. & P. 594.

(3) Wilk. on Replev. 54, &c.

the defendant: the statute 9 Geo. IV. c. 15, will certainly be less beneficial, if it be held not to apply to the common avowries in replevin, and may induce defendants occasionally to resort to the avowry at common law. It will be a great advantage if the statute 9 Geo. IV. c. 15, can be extended to the trial by the *record*, in which sometimes, from a variance, there is a serious and most vexatious failure of justice.

APPENDIX

OF

STATUTES.

STATUTE 21 JAC. I. c. 16,

An Act for Limitation of Actions, and for avoiding Suits at Law.

SECT. III. (1). And be it further enacted, that all actions of trespass quare clausum fregit, *all actions of trespass*, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account (2), and upon the case (3), other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants (4), all actions of debt (5), grounded upon any lending or contract without specialty (6), all actions of debt for arrearages of rent, and all

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(1) For the common law before the statute, see *ante*, 1, &c. Slade's *case*, *ante*, 5. (I have a MS. report of this case. 1 MS. Rep. *temp. Eliz.* 130.) Lord *Coke* in his Second Institute (2 Inst. 96) says, "seeing personal actions are at this day more frequent than they have been times past, it were to be wished *for establishing a quiet and avoiding of old suits*, that *Bracton's* Rules (Brac l. 2, fo. 228) by some *new* provision, extended to them also, and that they were limited within some *certain* time;" and he adds, after the act was passed, "since we wrote this commentary, there is a GOOD statute made concerning certain personal actions in *Anno* 21 *Jacobi Regis*, c. 16."

(2) Actions of account, *ante*, 15.

(3) Actions on the case, *ante*, 15.

(4) For the exception of *Merchants' accounts*, *ante*, p. 17.

(5) Actions of debt, *ante*, 15, for rent, *ante*, 15, 16.

(6) For the exception relating to specialties, *ante*, 15, 16.

actions of assault, *menace*, battery, wounding, and imprisonment, or any of them, which should be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, *and not after* (1), (that is to say) the said actions upon the case (other than for slander,) and the said actions for account and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and *not after* (2); and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit and *not after;* and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and *not after* (3).

IV. And nevertheless be it enacted, That if in any of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time *within a year* after

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(1) These words, "not after," occur *five* times in this statute; shewing the strong feeling of the legislature, that the creditor was to be satisfied with the times of limitation, and that they were not to be extended. See *ante*, 12. 44, &c.; in addition to the opinions against the act, *ante*, 12, *Ellis*, J. (2 Mod. 71) said, he was for restoring the common law as much as he could.

(2) *Ante*, 44, &c.

(3) By this clause certain actions enumerated are declared to be limited, and then the actions are again enumerated with their respective times of limitation; the actions *first* mentioned are, 1, trespass *quare clausum fregit* —2, trespass—3, detinue—4, actions *sur trover*—5, replevin for goods and cattle—6, actions of account—7, upon

such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, and *not after* (1).

VII. Provided nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of account, actions of debt, actions of trespass for assault, *menace*, battery, wounding, or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done (2).

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the case—8, debt on lending and contract without specialty, and for rent—9, actions of assault—10, menace—11, battery—12, wounding—13, imprisonment — this arrangement (not good in itself) is lost sight of in the second enumeration, which is, 1, case, other than slander—2, account—3, trespass—4, debt—5, detinue—6, replevin—7, trespass *quare clausum fregit*, in six years; and 8, assault—9, battery—10, wounding—and 11, imprisonment, within *four* years; and 12, case for words, within *two* years. It will be observed, that not only *trover* (*ante*, 11), but actions for menace (no doubt a branch of trespass) are omitted in the second enumeration; the first enumeration includes account 6, *assumpsit* (a division of case), 7, debt 8, detinue 3, case 7, (including trover 4) replevin 5, trespass, 1, 2, 9, 10, 11, 12, 13— the second, account 2, assumpsit 1, debt 4, detinue 5, case 1, replevin 6, trespass 3, 7, 8, 9, 10, 11; and section 7 has account 5, debt 6, detinue 2, of case only, trover 3, and slander 13, replevin 4, trespass 1, 7, 8, 9, 10, 11, 12; *seven* different actions of trespass are mentioned in § 3: the legislature seem to have been anxious to limit this action, depending much on *parol* evidence. I believe the framing of the bill has been attributed to Lord *Bacon*, it must have been left by him in a very imperfect state: the Journals only say the bill was brought in, and do not say by whom: § 7, in favour of infants, &c. was probably added afterwards: *it is to be regretted provisions of such great importance and utility were not re-enacted in a more perfect state.* Time has now in a great measure settled the construction with respect to these inaccuracies; the *Irish* statute on the subject, 10 Car. I. sess. 2, c. 6, is nearly in the same *words as the statute* 21 *Jac. I.* c. 16.

(1) See *ante*, 42, &c.

(2) This clause it appears was added to the original bill, and is now

4 Anne, c. 16.

An Act for the Amendment of the Law and the better Advancement of Justice.

XIX. And be it further enacted by the authority aforesaid, That if any person or persons against whom there is or shall be any such cause or suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, actions *sur trover*, or replevin for taking away goods or cattle, or of action of account or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be at the time of any such cause or suit or action, given or accrued, fallen or come beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions *against* such person and persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by this act, and by the said other act made in the one and twentieth year of the reign of King James the First (1).

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to be seen in a separate parchment tacked to the other clauses; the actions here mentioned are 1, trespass —2, detinue—3, trover— 4, replevin —5, account—6, debt—7, trespass —8, assault—9, menace—10, battery—11, wounding—12, imprisonment—13, case for words, (here case except slander and trover, is omitted, *ante*, 11)

By the 12 & 13 Wm. III. c. 4, § 3, where any plaintiff shall by reason of *privilege of parliament* be stayed or prevented from prosecuting any suit by him commenced, such plaintiff shall not be barred by any statute of limitation, but shall from time to time upon the rising of the parliament be at liberty to proceed to judgment and execution. (See Earl *Lonsdale* v. *Littledale*, 2 H. Black, 273, &c. 300, &c. Tidd's Prac. 166, 9th edit.)

(1) This clause includes 1, trespass —2, detinue—3, trover—4, replevin for taking goods or cattle—5, actions of account—6, upon the case—7, debt—8, assault—9, menace—10, battery—11, wounding—12, imprisonment.

Statute 9 Geo. IV. c. 14.

An Act for rendering a Written Memorandum necessary to the Validity of certain Promises and Engagements.

[*9th May*, 1828.]

Whereas by an Act passed in *England*, in the twenty-first year of the reign of King *James* the First (1), it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit, and not after: and whereas a similar enactment is contained in an Act passed in *Ireland*, in the tenth year of the reign of King *Charles* the First (2): and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments (3); and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments and to the intention thereof: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in actions of debt or upon the case grounded upon any simple contract no *acknowledgment or promise* by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to 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 chargeable thereby (4); and that where there shall be two

(1) *English* Act, 21 Jac. I. c. 16, *ante*, 163.

(2) *Irish* Act, 10 Car. I. sess. 2, c. 6.

(3) *Ante*, 53, &c.

(4) *Ante*, 83, &c. 53 ss.

or more *joint contractors*, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them (1): PROVIDED always, 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 (2): PROVIDED also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

II. And be it further enacted, that if any defendant or defendants in any action on any simple contract shall plead any matter in *abatement*, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited Acts or this Act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same (3).

III. And be it further enacted, that no *indorsement* or memorandum *of any payment* written or made after the time appointed for this Act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes (4).

IV. And be it further enacted, that the said recited Acts and

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(1) *Ante*, 90.
(2) *Ante*, 86, &c.
(3) *Ante*, 97.
(4) *Ante*, 98, &c.

this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of *set-off* on the part of any defendant, either by plea, notice, or otherwise (1).

V. And be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during *infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith (2).

VI. And be it further enacted, that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such *representation* or assurance be made *in writing*, signed by the party to be charged therewith (3).

VII. And whereas by an Act passed in *England*, in the twenty-ninth year of the reign of King *Charles* the Second, intituled *An Act for the Prevention of Frauds and Perjuries*, it is, among other things, enacted, that from and after the twenty-fourth day of *June*, one thousand six hundred and seventy-seven, no contract for the sale of any goods, wares, and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed

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(1) This section has been omitted in its proper place, the Statutes of *Limitation* and the statute 9 *Geo.* IV. c. 14, are expressly applied to debts on simple contract, alleged by way of set-off, the statute 21 *Jac.* I. c. 16, had been before applied to the case of set-off, (*ante*, 113, 114,) though the statutes of set-off have no provision to that effect; the clause applies only to debts on simple contract, but to pleas and to notices of set-off and evidence under them, and to such cases where it is not requisite the set-off should be either pleaded, or under notice, as in actions by assignees of a bankrupt, where it may be given in evidence under the general issue. 1 Durnf. & E. 115. Per *Buller*, J. and *Anon.* MS. *coram Hullock*, Baron, *York* Ass. 1826, it seems to me desirable in the case of set-off to allow the defendant to plead several matters; they are allowed in replevin, where the plaintiff may plead in bar several matters; in each case two causes are *in effect* tried, and if defences are allowed on the one side, why not on the other?

(2) *Ante*, 116.

(3) *Ante*, 121.

to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized: and whereas a similar enactment is contained in an Act passed in *Ireland* in the seventh year of the reign of King *William* the Third: and whereas it has been held, that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied; and it is expedient to extend the said enactments to such *executory* contracts (1); be it enacted, that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery (2).

VIII. And be it further enacted, that no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of *stamps* (3).

IX. And be it further enacted, that nothing in this Act contained shall extend to *Scotland* (4).

X. And be it further enacted, that THIS ACT SHALL COMMENCE AND TAKE EFFECT ON THE FIRST DAY OF JANUARY, ONE THOUSAND EIGHT HUNDRED AND TWENTY-NINE (5).

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(1) *Ante*, 128.
(2) *Ante*, 131.
(3) *Ante*, 135.
(4) *Ante*, 134.
(5) *Ante*, 134.

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It seems that the Statute of Limitations bars the remedy only and not the debt for in Spears v Hartley 3. Esp. 81. Lord Eldon held that altho' the Statute was run against a demand, if a Creditor obtain possession of goods on which he has a lien for a general balance he may hold them for that demand by virtue of the lien and this doctrine was acted upon and acted upon by the Court in Higgins v Scott 2 Bar & Adol. 413. (1831) where an Attorney for a first bond obtained Judgment under the Defendant was discharged under the Lords Act but at a subsequent period a fi fa was issued against his goods upon which the Sheriff levied the damages and costs. it was held that the Atty (though he had taken no step in the cause) for to recover the amount of his bill of costs within six years) had still a lien on the Judgment for his Bill of Costs and the Court directed the Sheriff to pay him the amount out of the proceeds of the goods.

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