SLOAN *vs.* SLOAN.

Plaintiff presented to defendant for settlement some half dozen notes and accounts, all of which were barred by the statute of limitations; defendant examined them, rejected some of the items, verbally admitted a specific sum to be due, and promised to pay it—HELD that the admission and promise not being in writing did not, under our statute, revive the claims, and that an action could not be maintained upon an account stated for the amount admitted, by the defendant, to be due, as a new and independent contract, because there was no consideration to support it.

Writ of Error to Lawrence Circuit Court.

Assumpsit by Hiram L. Sloan against Hugh M. Sloan, determined in the Lawrence circuit court, in May 1849, before the Hon. WM. C. SCOTT, judge. Declaration contained counts for work and labor, merchandize, moneys, and upon an account stated. Defendant pleaded non-assumpsit, and the statute of limitations; plaintiff took issue to the first plea, entered a general replication to the second, to which defendant took issue. Trial, and verdict, and judgment in favor of plaintiff for $190.76 damages. Motion for new trial on the grounds that the verdict

was contrary to law and evidence: motion overruled. and bill of exceptions by defendant setting out the evidence, which was, in substance, as follows:

Stuart, a witness for plaintiff, testified that some time previous to the 20 May, 1847, the plaintiff, who resided in Missouri, had placed in his hands certain notes and accounts against defendant, and authorised him to make any settlement he could with defendant. That at different times before that date, he conversed with defendant upon the subject of his paying or settling the amount due on the claims, but that defendant had gone into no settlement with him, protesting that the claims were unjust, and that he was not indebted to plaintiff on a fair settlement: that plaintiff had defrauded him in the settlement of the estate of a deceased uncle. That on the 20th May, 1847, witness urged him to come to some conclusion upon the notes and accounts; defendant then took them, made some calculations, rejected some of the items of the claims, but after going through his calculations, he acknowledged that he owed the plaintiff $190.76, and requested witness to write to him and enquire if he would take the amount in horses.

On cross-examination, witness stated, that the notes and accounts upon which defendant acknowledged the above indebtedness, were for transactions which occurred before he left Missouri, some ten or twelve years previous to the 20th May, 1847, that the acknowledgment was made verbally, and not in writing. Witness requested defendant to give his note for the $190.76, but he refused to do so, alleging as a reason for the refusal that plaintiff was hard upon his debtors, and would sue him—he afterwards told witness that his acknowledgment was as good as his note. The aggregate amount of the claims presented to defendant by witness, with interest thereon for seven or eight years was $241.34, of which defendant rejected an amount sufficient to reduce it to $190.76, which he acknowledged he owed plaintiff on the claims. Witness did not surrender the notes to defendant, or receipt the accounts, but retained them in his possession.

Witness wrote to plaintiff, as requested by defendant, about taking horses in payment of the sum acknowledged, and plaintiff authorized him to take them. Afterwards, he called on defendant for the horses, but he said he had none. At the time of the settlement, witness had authority from plaintiff to make a final settlement with defendant, and he understood the $190.76 to be a final liquidation of the old notes and accounts referred to.

FAIRCHILD for the plaintiff. An acknowledgement of the debt is not sufficient to avoid the statute of limitations; there must be an express promise to pay, and under our statute, in writing. *Story on Con.* 707. 2 *Greenl. Ev.* 440, 441. *Ch.* 90, *Dig.* 13 *John. Rep.* 288. *Chit. on Bills* 613; *note* 2, (10 *Amer. Ed.*)

The promise or acknowledgement in this case is not in law or fact an account stated; there was no account presented; no settlement of debits and credits, but a mere statement embracing a portion of the old notes and accounts, without any new contract, consideration or promise, and insufficient to avail the plaintiff in this action. *Chit. on Bills,* 611, (10 *Amer. Ed.*) *note. Chit. on Con.* 808, (6 *Amer. Ed.*)

BYERS & PATTERSON, contra. The different claims against the defendant were submitted to him for settlement; he made the calculation, deducting what he said was improper and acknowledged on such statement. This was an account stated, and formed on a new debt, upon which the statute of limitations would then begin to run. See 2 *Atk.* 251. 1 *Story's Eq. Ju. sec.* 526. 7 *Cranch* 147. 2 *Edw. Rep.* 1. 2 *Stark. Ev.* 97, *n.* (*G.*) & (*J.*) *ib.* 98, 99, *n.* (*y.*) *Bull. N. P,* 129. 1 *T. R.* 40. 4 *Phil. on Ev. by Cowen & Hill,* 124, 125. 1 *Arch. N. P.* 205.

Mr. Justice SCOTT delivered the opinion of the Court.

The testimony shows distinctly that the stated account relied upon was nothing more or less than a mere verbal promise to pay $190.67, parcel of an aggregate sum claimed of $241.34, founded upon some half dozen stale notes and accounts; all of

which were sufficiently ancient to have been barred by the statute of limitations some years before. There was no evidence at all of any new consideration to support the alleged stated account as a new and independent contract.

Whatever may have been the decisions of the English courts before the passage of Lord Tenterdon's act, of which our statute is very nearly a literal copy, since that time, it is beyond cavil that no stated account, short of one amounting to a written promise or acknowledgement will take a case out of the operation of the statute unless there be evidence of a new consideration sufficient to support it as an independent contract. To hold otherwise would be to permit the provisions of the statute requiring the new promise to be in writing to be evaded and the policy of the act to be defeated, (*Turbuck vs. Bispham,* 2 *Mees. & Welb* 2. *Angell on Lim. ch.* 15, *sec.* 5, *p.* 302, 2 *ed. Chit. on Con.* 6 *Amer. Ed. p.* 808, and the authorities cited in these two works.)

This is a very different case from the actual settlement of mutual accounts and the striking a balance. Such a process converts the set-off into payment. But the mere going through an account where there are items on one side only does not alter the situation of the parties at all or constitute any new consideration. *Ashby vs. James,* 11 *Mees. & Welb.* 543.

The verdict and judgment being unsupported by the evidence the court erred in overruling the motion for a new trial.

Let the judgment be reversed and the cause remanded.