DURRITT *vs.* TRAMMELL.

Action commenced 20th January, 1849, on a promissory note due 1st January, 1843: plea, limitation of three years: replication of part payment 15th May, 1845: HELD, That the legal effect of the part payment was not to take the case out of the limitation act of 1839, and place it within the act of 1844, which extended the limitation on promissory notes to five years; and that three years having elapsed from the time of the payment before the suit was brought, the action was barred.

Appeal from the Lafayette Circuit Court.

On the 20th January, 1849, Benedict G. Durritt commenced an action of assumpsit in the Lafayette circuit court against Henry Trammell, on a promissory note for $650, dated 9th April, 1842, payable on the 1st January, 1843, with common counts.

Defendant pleaded, 1st: Non assumpsit. 2d. That he did not undertake and promise within three years, &c.

3d. That he did not undertake and promise within five years, &c.

To the defendant's 2d plea, plaintiff filed two replications: 1st. That defendant did undertake and promise, within three years, &c.: 2d. That, within three years next before the commencement of the suit, to wit: on the 3d day of January, 1847, defendant paid a large sum of money, to wit: the sum of $10, upon each of the said several causes of action in the declaration mentioned.

To the 2d plea, plaintiff also filed a third replication: that, on the first day of May, 1845, and within three years next before the commencement of the action, defendant paid to the plaintiff, on each of said causes of action, a large sum of money, to wit: $272.02.

To the third plea, plaintiff filed a replication, alleging that, on the first day of May, 1845, and within five years next before the commencement of the suit, defendant paid to plaintiff, on each of said causes of action, a large sum of money, to wit: the sum of $272.02. Issue to the replications, the cause submitted to the court, sitting as a jury—QUILLIN, J., presiding—and finding and judgment for defendant. Bill of exceptions by plaintiff, setting out the evidence: from which it appears that, on the trial, plaintiff read in evidence the note sued on, together with the following endorsement thereon: "Received, of the within, two hundred and seventy-two dollars and two cents, this 15th day of May, A. D. 1845;" which he proved to be in the hand-writing of J. Sidney Smith.

Plaintiff also read the depositions of J. Sidney Smith, in substance as follows:

"I was a resident of Washington, Hempstead county, Ark., in 1845, pursuing the practice of law; and was the attorney and agent of Ben. G. Durritt, and as such had charge and control of a certain note against Henry Trammell, for $650, dated, I believe, April 9, 1842: and, on or about the 11th day of May, 1845, one Waddill, the father-in-law of said Durritt, was in Washington much embarrassed, and attachments were in the hands of an officer against him. Durritt wishing to relieve said Waddill, desired Trammell either to pay him all or a portion of the above described note. Trammell replied he could not pay the money, but would assume the payment of Waddill's indebtedness, if I would give him a credit on the note for the amount so assumed. Durritt, being present, consented to it; and thereupon I made and placed, as near as I now recollect, the following endorsement on the back of said note: 'Received, of the within, two hundred and seventy-two dollars and two cents, this 15th day of May, A. D. 1845.—J. S. Smith, for B. G. Durritt.' Trammell, at the time of said endorsement, fully consented to it, and I understood, from him, it was rather a favor that Durritt would consent to such a mode of payment of part of the note he held against him; nor did Trammell, at the time, deny that

he owed it all, and that it had been executed for a valuable consideration."

Here the plaintiff closed.

Defendant then offered, in evidence, the following paper, proved to be in the hand-writing of said Smith:

ST. LOUIS, Jan. 7, 1850.

To the Clerk of the Lafayette Circuit Court:

SIR—With the permission of the court, you will please withdraw the deposition taken in the case of Durritt vs. Trammell at the law office of Gamble & Gates, in the city of St. Louis, on the 31st of December, 1845, as since I deposed in the case, from reflection and examination of memoranda not then before me, I am satisfied I was wrong in my recollection of days, dates and circumstances; and desire, therefore, to recall my testimony, and have it cancelled, and considered as nought.

Respectfully, J. SIDNEY SMITH."

"On the opening of the court, immediately present the above to *my old friend,* the Honorable Geo. Conway, Judge of the 6th Judicial Circuit. J.S.S."

To the introduction or consideration of which, as evidence, the plaintiff objected, and the court refused to receive it as evidence.

The above was all the evidence.

S. H. HEMPSTEAD, for the appellant. Part payment forms a new point from which the statute of limitations begins to run, (*R. E. Bank vs. Hartfield,* 5 *Ark.* 551. *Biscoe et al. vs. Jenkins,* 5 *Eng.* 110,) and, as a necessary consequence, a cause of action accrues, at the time of payment, for the balance; a new promise is made, a new contract entered into, which is as much an original contract as the first agreement, and is governed therefore by the act of limitation then in force, and not by the act when the first contract was made, (*Angell on Lim.* 218, 243. *Belate vs. Winna,* 7 *Yerg.* 534. *Russell vs. Gass, Mart. & Yerg.* 270. *McKean vs. Thorp,* 4 *Mis.* 358. *Bell vs. Morrison,* 1 *Pet.* 355); and

it is not material whether such payment was before or after the bar attaches. (7 *Porter* 537.) The payment having been made after the passage of the act of 14th December, 1844, the cause of action was not barred until 5 years from the time of the payment.

Mr. Justice SCOTT delivered the opinion of the Court.

This action is founded upon a promissory note, running to maturity the 1st day of January, 1843. The statute bar of three years was interposed, and, to displace it, a part payment, made on the 15th May, 1845, was relied upon. But, as the action was not commenced until the 20th January, 1849, more than three years had then elapsed after the part payment. So, unless the legal effect of the part payment was to take the case out of the act of 1839, and to place it within that of 1844, the plea was a peremptory bar. The court below ruled it to be such, and this is assigned here for error.

The question assumed here, then, is that such was the legal effect of the part payment. And, to sustain it, the counsel insists that a part payment upon a promissory note has the same legal effect as to the balance unpaid, and as to such is to be regarded in the same light, as if the debtor making the part payment had executed a new note for such balance payable immediately. We think this proposition, thus roundly stated, cannot be maintained either upon principle or by authority, and that, even if the contrary be true, it would be difficult to show, upon the basis of either, that the appellant could derive any benefit from it under the state of the pleadings.

This proposition seems first to assume that the legal effect of a part payment is precisely the same, whether made before or after the bar of the statute has been perfected by efflux of time, and then, upon this foundation, insists that inasmuch as a debt that was once barred stands, when revived, not by its original force but by force of the new promise which imparts to it vitality that therefore the inevitable result of the promise which the law implies from part payment, whether made before or after the bar

has attached, is the instantaneous existence of a new and independent contract having a reference to the old debt only as constituting its valid consideration in law. Now, we apprehend that if this were all granted, it is by no means clear that the pleadings in this case present such allegations, either special or general, as would authorize a recovery for a breach of a new and independent contract. For upon what ground can it be maintained that a recovery can be had for the breach of a new and independent contract springing out of that declared for, although the consideration for the latter may be the moral obligation of the former?

But we deem it unnecessary to go into an examination of the doctrines shadowed forth in the latter part of the supposed hypothesis of the appellant's counsel upon which we know there has been considerable contrariety of opinion as they are not necessarily involved in the question before us, because we shall find a solution of this question satisfactory to our own minds in an examination of the former.

Doubtless, a part payment, whether made before or after the bar has attached, is precisely the same in respect of several particulars, but certainly not as to all. For "there is an obvious difference between the effect of a part payment within the term, which shall continue an existing liability in force and such payment made after the liability is barred to revive and continue a new liability," as is remarked by Chief Justice Shaw, in the case of *Sigurney vs. Drew,* (14 *Pic. R.* 391,) and that distinction is, in the two cases of *Trustees R. E. Bank vs. Hartfield et al.* (5 *Ark.* 551,) and of *Biscoe et al. vs. Jenkins et al.* (5 *Eng.* 108,) distinctly recognized by this court. On the other hand it is true that in either case, it does produce a new point from which the statute will again commence to run and prevents its running previous to such payment. But when the payment is made before the bar has attached, can it be said either to destroy a legal defence or to impart vitality to a debt in the same sense as when paid afterwards? In the one case, neither the debt or the remedy for its recovery can be said to be in the least degree impaired, be-

cause both remain in full life up to the moment when the efflux of time perfects the bar. In the other the debt has no vitality because of the presumptions of law against its existence as a valid debt; and there is no remedy at all for its recovery. Because the debtor has evidence of its satisfaction even more conclusive than a receipt would be of a payment and a defence invincibly effectual if he chooses to interpose it.

In the one case then, it would seem that the payment could not do more than to continue the life of the debt by prolonging the period during which it might be recovered and correspondingly prolong the point of time when a legal defence would exist by mere efflux of time. While in the other case it must effect more than that because, as we remarked in the case of *Biscoe et al. vs. Jenkins et al.* (5 *Eng.* 119,) "when the bar of the statute has attached the essence of the thing done when the debt is revived is the creation of a new right of action on the old debt and the distinction of a legal right of defence to any action that, before, might have been brought for its recovery." And this is doubtless done by the combined legal effect of the part payment (where that is the mode of revival) in imparting vitality to the debt and in destroying the legal defence then at the option of the debtor.

Now when the part payment is made before the bar has been perfected it is impossible in the nature of things that its effect can be to destroy such legal defence because at that period it had no existence, and therfore as to this case only postpones the point of time when it may exist. And so as to its supposed effect in imparting vitality to the debt there can be no place for this legal effect, (as the debt is then in full life) otherwise than in prolonging its existence, and therefore in such case such legal effect cannot be the creation of a new and independent life breathed into an inanimate debt. Because it would be as absurd to suppose so as it would be to suppose that the nourishment that a man had taken to sustain and continue life had created his state or subsequent life, or that two physical bodies, that

could occupy the same space only in succession, could be made to do so at the same instant of time.

We think it therefore unreasonable to hold that a part payment made before the bar of the statute has been perfected creates a new right of action for the recovery of the balance. On the contrary, we think that, although the effect of such part payment is to prolong the period of recovery, yet although the plaintiff avails himself of this prolongation in the action for this purpose, he is nevertheless but in the use of his original remedy upon his original right of action for the recovery of his original debt, neither having been at any time either destroyed or impaired. Entertaining these views we hold that the part payment in question did not take this case out of the act of 1839. And finding no error in the proceedings or judgment of the court below, the latter must be affirmed with costs.