## SMITH *vs.* TALBOT AD.

Suit by an administrator on a note: plea limitation; replication of a written acknowledgment of the debt, and promise to pay, &c.: proof, that defendant made out and swore to an account against plaintiff's intestate, in which he charged intestate with a large amount, credited him with the amount of the note sued on, and struck the balance in his, defendant's, favor—HELD, that this was no such acknowledgement as would take the note out of the statute of limitation, as it was accompanied by what was equivalent to a declaration that nothing was due.

To revive a debt barred by the statute of limitations, there must be an express promise, or an acknowledgment of a present indebtedness, a subsisting liability and willingness to pay.

Upon an issue of former recovery, parol evidence is admissible to show that the cause of action in suit, although set forth in the pleadings of a former suit was not in fact put in issue or decided upon by the court or jury.

*Writ of Error to Hot Spring Circuit Court.*

DEBT by Jesse W. Talbot, as administrator of Lavina Huddleston, against Moses Smith, commenced September 6th, 1847, in the Hot Spring circuit court, on a promissory note for $130, made by Smith to plaintiff's intestate, and due 25th February, 1839.

Defendant pleaded the statute of limitations: set-off, payment; and former recovery, in substance as follows: That prior to the institution of the suit, Smith presented an account duly verified by his affidavit, against the estate of Lavina Huddleston, in the probate court of Hot Spring county, for a large amount, in which account he gave the estate credit for the note sued on: That the parties litigated the account in that court, and in that

proceeding an allowance was made him for a small amount, and the note credited on the account, which judgment remained in full force, &c.

Issue to the pleas of set-off and payment. To the plea of limitation a general replication was entered, and a special replication setting up a written acknowledgment of the debt within three years before suit brought, and a promise to pay. A general replication and denial was entered to the plea of former recovery. Issues were formed and tried upon these pleas and replications.

The evidence produced by the plaintiff was the note sued on; the account and affidavit of defendant exhibited in the probate court against the estate of Huddleston, wherein the estate was charged with items amounting to $469.59, and credited with the note sued on, and other items amounting to $176, and the balance struck. The affidavit of defendant to the account was in the form prescribed by the statute.

The defendant read in evidence also the account aforesaid, with the proceedings and judgment of the probate court thereon. The judgment of the probate court is as follows:

"Moses Smith, *Plaintiff*,

*vs.*

Jesse Talbot, administrator of Lavina Huddleston.

Now on this day come the parties by attorneys, and this being an action of debt founded on an open account now filed, and shown to the court for $469.59, upon which there is a credit of $176, which has been duly probated as well by the plaintiff as the defendant, the court doth find that $108 be allowed said Moses Smith against said administrator, and that said claim be classed No. 4, and that he recover his costs, &c."

Which judgment was rendered at April term, 1847, of said probate court.

The plaintiff then proved by the probate judge, and other persons, that the note sued on, although mentioned in the account

and credited thereon by the defendant, was not acted upon or taken into consideration by the probate court; that the administrator contested all the charges defendant made against the estate, and he succeeded in establishing only the amount allowed and classed; to the introduction of which evidence defendant objected as incompetent but the court overruled the objection. The court, setting as a jury, found for plaintiff; a new trial was moved for and refused, and exceptions taken.

FLANAGIN, for the plaintiff. The statement offered in evidence is not a promise or acknowledgment in writing sufficient to revive the debt; on the contrary, the legal effect of the statement is, that the debt has been fully discharged. An acknowledgment must always be taken with the conditions and qualifications expressed: (*Wash. C. C. R.* 317); and must be an express promise, or admission of indebtedness and willingness to pay it. (*Stafford vs. Richardson,* 15 *Wend.* 302. *Ib.* 308. *Allen vs. Webster, ib.* 286. 7 *ib.* 267.) So far from admitting a present indebtedness, the defendant below claimed a balance in his favor.

PIKE & CUMMINS, contra. Where a plaintiff sues on several demands and on the trial offers proof and takes judgment only for one, he may, in a subsequent suit upon the omitted demand, prove by parol that the claim was not adjudicated in the former suit. (*Seddon and others vs. Tulop,* 6 *T. R.* 607. *Webster vs. Lee,* 5 *Mass.* 333. *Bridge et al. vs. Gray et al.* 14 *Pick.* 55. 16 *J. R.* 136. 1 *Greenl. Ev.* 597, *sec.* 532. 2 *Pick. Rep.* 22, 23, and notes; and so, of the note placed by the defendant below as a credit on his account filed in the probate court.

The credit of the note upon the account and affidavit is a written, unconditonal acknowledgment of a debt sufficient to remove the bar of the statute. A statement by a debtor that he had certain accounts for which he was entitled to credit on his note is sufficient to take a case out of the statute. (*Chapin vs. Warder,* 15 *Verm.* 560.) So, where he requested the account and credits to be sent him, and promised to settle in some way.

(*Barnard vs. Bartholomew*, 22 *Pick.* 291.) So, where he offers to discount his own claim against the creditor and settle with him. (*Johnson vs. Bonnethean*, 3 *Hill* (*S. C.*) *Rep.* 15. *S. Car. Riley R.* 9.) So, where he acknowledges that the debt still exists and is unsatisfied, the law presumes a promise (*Aiken vs. Benton*, 2 *Brevard* 330. *Rodrique vs. Fronty*, *ib.* 31.) See also *Sothoron vs. Hardy*, (8 *Gill. & John.* 133.) *Purdy vs. Austin*, (3 *Wend.* 187.) *Oliver vs. Gray*, (1 *Har. & Gill.* 204.) *Austin vs. Bostwick*, (4 *Conn. R. 2d Series*, 496.) And where each party claims a balance, both admitting mutual demands. 6 *T. R.* 189. 3 *Mason* 459.

Mr. Justice WALKER delivered the opinion of the Court.

Two questions are presented for our consideration: 1. Upon an issue of former recovery, is parol evidence admissible to show that the cause of action in suit, although set forth in the pleadings in a former suit, was not in fact put in issue or decided upon by the court or jury? 2. Is a written admission of the existence of a contract accompanied with a positive declaration that nothing is due upon it, to be received as evidence of an acknowledgment of an existing indebtedness, such as will raise an implied promise to pay and thereby take the case out of the statute bar?

As regards the first question: It is true that the record of the proceedings in the probate court, in which the note in suit was credited on the account, did, *prima facie*, evidence a former recovery of this particular debt; but it was clearly competent for the plaintiff to show by parol evidence that the note was not offered as a credit on the trial and that the court, in its decision, expressly excluded credits and decided upon the items proven in the claimant's account. Upon this point the authorities are decided. (*Van Veeten vs. Croy*, 2 *John. Rep.* 229. *Phillips vs. Berrick*, 16 *John. Rep.* 139. 1 *Greenl. Ev.* 680.) If however the court had passed its judgment upon this credit or taken it into consideration in determining the amount due the claimant, such decision would then have been conclusive. The evidence shows that such was not the case, but that the credit was wholly dis-

regarded in the adjudication of the claim before the probate court. The plaintiff had a right to show this by parol evidence, not to contradict the record, for such is not the effect or purpose intended, but to show what was really under consideration when the decision was made. And in our opinion the evidence did conclusively repel the presumption that the note in suit was taken into consideration or considered in the former judgment rendered between the parties in the probate court.

Upon the second point the authorities are not altogether so clear: yet when we consider the grounds upon which the law raises a presumption of a promise to pay, to-wit: "a present indebtedness," there is strong reason for taking the whole admissions together that it may be seen whether the party did in truth admit such a present indebtedness as that the law would imply a promise to pay. Suppose the defendant should say, "I did execute the note but I paid it," "I owe the note but you owe me a larger amount and there is nothing due to you, but on the contrary you owe me a balance of $293.39," surely this could not be said to be such an acknowledgment of the existence of a debt as would raise an implied promise to pay, for the implication is repelled by an express declaration that nothing is due. Thus, in the case of *Bell vs. Morrison*, (1 *Peters Rep.*) it was held that there must be a present subsisting debt which the party is willing to pay. See also *Dean vs. Hewett*, (5 *Wend. Rep.* 257,) and *Goulden vs. Van Rensclear*, (9 *Wend.* 293.)

Chief Justice SAVAGE, in the case of *Allen vs. Wester*, (15 *Wend.* 289) says, "Since the case of *Sands vs. Gleston*, there has been no dispute as to what the rule is, to-wit, that to revive a debt barred by the statute of limitations, whether the statute theoretically operates upon the debt itself or upon the remedy only, there must be an express promise or an acknowledgment of a present indebtedness, a subsisting liability and a willingness to pay it."

No one can for a moment believe that the defendant in this case ever did intend to admit an indebtedness to the plaintiff at the time he made out his account, or a promise to pay. So far

from it he swears that there is an existing unsatisfied balance due to him of $293.39 cents. The issue upon the plea of limitations should have been found for the defendant. It was therefore error in the circuit court to refuse to set aside the judgment and grant the defendant a new trial. Let the judgment be reversed, and the cause remanded to be proceeded in according to law.