GRANT AD. *vs.* ASHLEY ET AL.

A written acknowledgment to take a debt out of the statute of limitations, must be an unequivocal acknowledgment of the debt, as a debt then due, or an express promise to pay the debt which pre-supposes such acknowledgment.

In this case, one of the makers of a note became public administrator of an estate to which the note was due, and afterwards made a settlement with the Probate Court, with the view of surrendering the administration, in which he returned, as part of the effects of the estate in his hands, the note in question, and claimed a credit therefor: HELD, that being chargeable with the note, he was bound to return it that he might obtain credit therefor in his settlement, and that this was no such acknowledgment in writing, as would take the debt out of the statute of limitations.

An acknowledgment by one joint and several maker of a note, made after the bar, does not take the case out of the statute as to the others.

Proof of acknowledgment by one maker, does not sustain a replication that all the makers of a note made such acknowledgment.

Writ of Error to Ouachita Circuit Court.

On the 31st day of August, 1849, Green L. Grant, as public administrator on the estate of Albert Reynolds, deceased, brought an action of assumpsit against Hugh W. Ashley and Sterling C. Buchanan, in the Ouachita Circuit Court, on a promissory note,

executed by the defendant, to W. B. Shepherd, as administrator of said Albert Reynolds, bearing date March 9th, 1844, and due nine months after date.

Defendants pleaded the general issue, and the statute of limitations. Plaintiff filed a general replication to the second plea, and several special replications setting up a new promise and acknowledgment in writing, on the part of defendants; to which they took issue.

The cause was submitted to the Court, sitting as a jury, and the plaintiff produced and read in evidence, the records of the Probate Court of Ouachita county, by which it appeared that defendant, Ashley, in January, 1845, became public administrator of the estate of said Albert Reynolds, and so continued until November, 1848, when he returned the effects of the estate to the Probate Court, the note sued on being part of the effects, and was discharged from the administration, and Grant, the plaintiff, appointed in his stead. In his settlement, Ashley claims a credit for the note sued on, amongst others, returned as effects, &c. On this evidence, the court found for defendants, and plaintiff excepted, and brought error.

HUIE & CASE, for the plaintiff. The statute of limitations did not run during the time that Ashley, one of the defendants, was administrator, as all remedy on the note was thereby suspended. 2 *Will. on Exrs.*, 940, 1335. *Toller on Exrs.* 347, 348. *Hudson v. Hudson,* 1 *Atk. Rep.* 461. 2 *Wheat's Selw.* 811.

But if the statute was a good plea, yet the plaintiff was entitled to judgment, on his special replication against Ashley. The return of the note by Ashley to the Probate Court, as assets, was a written acknowledgment sufficient to avoid the statute; and under the pleadings, there might well have been judgment against Ashley, and in favor of his co-defendant. 1 *Chitty Pl.* 45. 19 *Wend.* 643. *Sec.* 20, *ch.* 99, *Dig., p.* 699.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was commenced on the 31st August, 1849. The note

sued on was due the 9th December, 1844; so that the action was barred by limitation. To this defence it was replied, that the statute bar had been removed by a written acknowledgment of the debt, upon which issue was taken.

The question presented for consideration is, did the proof sustain the issue? In such cases, it requires that the acknowledgment should be an unqualified acknowledgment of the debt as a debt then due, or an express promise to pay the debt, which pre-supposes such acknowledgment. *Brown v. State Bank*, 5 *Eng.* 134. Such was not the character of the evidence in this case. It was the record of a settlement made by the defendant, Ashley, as public administrator, with the Probate Court, in which the note in suit was set forth. Due or not due he was chargeable with the note, and upon his settlement with the court, he was bound to render an account of it in order to get credit for that amount in settlement. This act was neither an admission nor a denial of indebtedness, nor of a willingness or unwillingness to pay. That debt stood upon the same footing that all other claims did in this respect, and was turned over to the court to be received by his successor, who might or might not put him to an issue of indebtedness.

Suppose, however, the acknowledgment to have been direct and positive on the part of Ashley, if made after the statute bar had attached to the debt, it was not sufficient to remove the statute bar as to Buchanan. *Biscoe et al. v. Jenkins et al.*, 5 *Eng.* 108. And by reference to the date of settlement with the probate court, such is found to be the case. The replication would, in any event, have been bad as to Buchanan, and as the replication sets up a joint acknowledgment, the defence would fail as to one, and, being joint, it must also fail as to both. But it is wholly unnecessary to press the inquiry even thus far, because it is evident that no sufficient written acknowledgment was offered in evidence to charge either of the defendants.

We are therefore of opinion that the circuit court did not err in deciding the issues for the defendant, and rendering judgment thereon. Let the judgment be in all things affirmed.