CAMP ET AL. *vs.* GULLETT & WIFE.

It is not necessary for a justice to mark an account filed, brought in as a set-off; it is sufficient, on appeal, that it appear from his transcript that it was filed.

Where A executes a note to B it raises the presumption that an account held by A against B, due prior to the execution of the note, has been paid, but the presumption may be rebutted by other evidence.

It is erroneous to exclude an account from the jury, offered as a set-off, because, on its face, it appears to be barred by the statute of limitation, for the party offering the account may introduce evidence to take it out of the statute.

Where a party suffers a mass of evidence introduced without objection, and then moves to exclude the whole, the court will not regard his motion if any portion of the evidence be competent to go to the jury.

This court will not review the evidence for the purpose of determining whether it supports the verdict, when there has been no motion for a new trial.

Appeal from the Circuit Court of Pulaski County.

Camp sued Gullett and Wife before a justice of the peace of Pulaski county in August, 1845, on a note for $50, made by Mrs. Gullett (formerly Mrs. Gray,) before her marriage with Gullett, to Camp, dated 12th Sept. 1841, due 25th Dec. 1842. Defendants filed (as the justice states in his transcript) an account against

plaintiff for $78.08 consisting of various items running from a period before the execution of the note to 13th Sept. 1842, as a set-off. The justice rendered judgment for defendants for $30.27, the balance of their account after deducting the amount of plaintiff's demand; and Camp appealed to the circuit court of Pulaski county, giving Pleasant Jordan Esq. as security in the appeal bond. The case was submitted to the court sitting as a jury, by consent of parties, at the April term 1846, (Clendenin judge) and the court found in favor of, and rendered judgment for appellees, and against Camp and security in the appeal, for $9. Pending the trial, appellants took a bill of exceptions, from which it appears:

On the submission of the case to the court, appellant gave notice to appellees that he would interpose the statute of limitation to any account they might offer as a set-off to his claim. He then read in evidence the note sued on, which is exhibited in the bill of exceptions, and closed. Appellees then offered to introduce their account as a set-off, to which appellant objected on the grounds stated in the opinion of this court, but the court overruled the objections, permitting the account to be introduced, and appellant excepted. The bill of exceptions then recites the testimony of a number of witnesses introduced on the trial by appellees to prove their set-off, and concludes by saying "this was all the testimony introduced in the case, to all of which appellant at the time objected, and asked leave to tender his bill of exceptions," &c.

Camp and Jordan appealed, and assigned for errors.

1st, The overruling of appellants' motion to exclude the account offered by appellees as a set-off; 2d, admitting evidence to prove the account, and allowing it as a set-off, when it bore date prior to the execution of the note sued on: and 3d, refusing to exclude the items in the account which appeared on the face of the account, to be barred by the limitation act.

JORDAN, for appellant. A writing, purporting to be an account found among the papers sent up from a justice's court but not marked filed, is no part of the papers relating to the case, and could

not be used on the trial in the circuit court. *Rev. St. ch.* 87, *sec.* 176. *Jones vs. Buzzard,* 2 *Ark. R.* 415.

The giving a promissory note is a presumption in law that the maker and payee have accounted together and that the balance due is the amount expressed on the face of said note, and that all debts existing between them at the date of said note, are cancelled. This presumption is still stronger while the maker of the note continues to make payments on the same and cause the credits to be endorsed thereon.

"A promissory note is evidence of money due from the maker to the payee on an account stated, especially if it be expressed for value received." *Chit. on Bills, tenth Amer. Ed.,* 582. *Story vs. Atkins,* 2 *Strange* 719. *Bull. N. P.* 136. *Harris vs. Huntback,* 1 *Bur.* 373. *Clayton vs. Gosling,* 5 *Bar. & Cres.* 360. 8 *Dow. & Ry.* 110. *Highman vs. Primrose,* 5 *Maule & S.* 65. 2 *Chit. Rep.* 333.

The statute of limitations commences to run against an account from the date of each item in said account, except such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants. This extends only to mutual or reciprocal accounts current or open between merchants, not to accounts stated between them. *Chit. on Con.* 5 *Amer. Ed.* 807. That there are cross demands between the parties unaccompanied by a written and signed statement of account or evidence that the subject of one demand was given and accepted in reduction of the other is not sufficient to constitute a mutual open account current so as to take the case out of the statute of limitations. *Chitty on Con.* 807. *Williams vs. Griffith, C. N. & R.* 45. 1 *Bing. N. C.* 441. 1 *Gale* 65 *S. C. Mills vs. Fokes,* 9 *Scott* 444. *Union Bank vs. Knapp,* 3 *Pick.* 113. *Bass vs. Bass,* 6 *Pick.* 362. 5 *Cranch* 15. 6 *Greenl.* 308.

One item of an account, though not barred by the statute, does not draw after it other items which are barred. *Blair vs. Drew,* 6 *N. Hamp.* 235.

Where all the items of an account are on one side, as in an ac-

count between a tradesman and his customer, the circumstance of there being some items of the bill within six years will not defeat the statute as to those that are of a longer standing. *Chit. on Con.* 808, and authorities there cited.

One item of an account within six years before suit brought will not draw after it items beyond six years, so as to protect them from the operation of the statutes of limitations, unless there have been mutual accounts and reciprocal demands between the parties. *Kimbal et al. vs. Brown,* 7 *Wend.* 322. 5 *John. Ch. R.* 524. *Edmonston vs. Thompson,* 15 *Wend. R.* 554. 6 *Cowen.* 193. *Buntin vs. Lagon,* 1 *Blackf.* 373.

No principle of law is better settled than that to bring a case within the exception of merchandise accounts between merchant and merchant, in the statute of limitations, there must be an account, and that an account open or current; that it must be a direct concern of trade: that liquidated demands on bills or notes, which are only traced up to the trade or merchandise are too remote to come within the description. But when the account is stated between the parties, or when any thing shall have been done by them, which by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. *Toland vs. Sprague,* 12 *Peters* 300.

BERTRAND, contra. This case comes within the rule of this court established in the case of *Campbell vs. Thurston,* 1 *Eng. Rep.,* "were a case is submitted to the court below sitting as a jury, and a bill of exceptions taken upon the ground that the finding is contrary to evidence, this court will not review the testimony for the purpose of determining whether the finding was correct unless there was a motion for a new trial."

The account filed as a set-off could be allowed only upon proof; and the motion to exclude the account was made before any proof offered by the defendant: and therefore before it could be known to the court whether it was barred by the statute of limitations.

It clearly appears from the justice's transcript that the account was filed by the defendant on the trial of the case before him.

JOHNSON, C. J. The appellant moved the court below to exclude the account offered by the appellee; first, because it was not marked filed by the justice; and secondly, because all the items contained in it appeared to bear date prior to the execution of the note sued upon and the endorsements thereon, and also moved the court at the same time to exclude such items as were barred by the statute of limitations. The first objection is unsupported by the record, as it is expressly stated by the justice that the defendants filed their account against the plaintiff. It is not essential that the bill of particulars should be actually marked filed, in case it shall appear by the transcript of the justice that it was filed in his office. It certainly cannot be contended that the court should have excluded the account because the items bore date prior to the execution of the note upon which the action was founded. The note, though it should raise a presumption against the account, yet it could not possibly amount to conclusive evidence of payment. The court was not at liberty to exclude the set-off upon mere motion, as the appellees, for aught that appeared, might have been in possession of sufficient evidence to rebut and even destroy any presumption of payment that could have been raised by the execution of the notice. It is clear that it was the duty of the court to decline any action in reference to the claim set up by the appellees until the testimony was entirely closed, and then if called upon, to have instructed as to the law arising upon the facts as detailed before the jury. That branch of the motion which sought to exclude such items of the account as were barred by the statute of limitations, was equally ill-timed as the court could not by any possibility have foreseen what additional evidence the appellees might have offered to take such items out of the operation of the act. It did not necessarily follow that the claim, though it should appear on its face to be barred by the statute, would not be competent to go to the jury, as it was susceptible of proof to take it out of the limitation act. The moment the appellant attacked the set-off, upon the ground that it was barred by the statute of limitations, it was the right of the appellees to have introduced any matter calculated to defeat that plea. The

court could not by thus excluding the account deprive the party offering it, of his right to support it by such proof as would have destroyed the statute bar. We think it clear therefore that the court decided correctly in refusing the motion.

The next objecton is that the evidence was not sufficient to warrant the verdict of the jury. Upon this point we are not at liberty to express any opinion as the jury have passed upon all the evidence adduced upon the trial and no steps have been taken by which their judgment could be brought in review before this court. True it is, that the appellant, after the testimony was closed, objected to the whole of it and asked leave to tender his bill of exceptions. This court, in the case of *Johnson vs. Ashley* decided at the present term, laid down the rule upon this subject. It was there held that where a party rests till his adversary has gone through a mass of testimony and then moves for the first time to exclude the whole, that the court is not bound to regard his motion in case that any part of the testimony is competent to go to the jury. If a party wishes to avoid the influence of testimony offered against him, he must move to exclude it at the time, and if the motion is overruled, file his exceptions and reserve the questions of law arising upon the testimony; but if he perfers to waive his exceptions at the time and to permit it all to go the jury he can then bring it before this court only by a motion for a new trial. This point is broadly laid down in the case of *Campbell vs. Thruston*, 1 *Eng. Rep.* 442. It is manifest that the appellant has failed to adopt any one of the modes recognized by law to revise the questions either of law or fact which were adjudicated in the court below. We are therefore of opinion that the judgment of the circuit court ought to be affirmed. Judgment affirmed.