TAYLOR *vs.* SPEARS.

Where an agent receives money for his principal, no cause of action accrues to the principal for the money, until after demand and refusal to pay it over.

To constitute a legal demand, it must appear that the person who made it was authorized so to do by the principal, and that the demand was made after the agent received the money.

Where, in assumpsit, the defendant pleads non-assumpsit within three years, and the plaintiff replies a new promise in writing within that time, the replication admits that the original undertaking was not within three years, and the issue is whether the defendant made the new promise.

Where issue is taken upon a plea of the statute of limitations, the burthen of proof is upon the plaintiff.

Writ of error to the circuit court of Jefferson county.

This was an action of assumpsit by Spears against Taylor, determined in the circuit court of Jefferson county, at the April term, 1845, before judge SUTTON.

The nature of the action, the pleadings, testimony, and instructions given the jury by the court, sufficiently appear in the opinion of this court.

The verdict and judgment were for Spears; Taylor moved for a new trial, which the court refused and he excepted and took a bill of exceptions setting out the evidence, the instructions, &c.

Taylor brought error.

YELL, for the plaintiff.

CUMMINS & HAYDEN, contra.

The charge of the court to the jury, taken altogether, as to the law of the case was perfectly correct. No right of action accrued to Spears until a demand of the money, and, consequently, the statute of limitations did not begin to run until that time. *Cummins vs. McLain & Badgett,* 2 *Ark. R.* 402. *Field vs. Dickinson,* 3 *Ark. R.* 409. *Webb vs. Martin,* 1 *Lev.* 4. *Collins vs. Bearing,* 1 *Mod. R.* 44.

On issue joined upon the plea of the statute of limitations, it is necessary for the defendant to show that the statute has attached in the particular case. 2 *Phil. Ev.* 136. (*Cow. & Hill's Ed.*)

If the court below were even mistaken in stating in general terms to the jury "that the statute of limitations was an affirmative plea,

and that the *onus probandi* rested on defendant," still a new trial could not be granted; for upon the facts of this case, after the evidence was presented on part of the plaintiff, the *onus* did rest on defendant to show that the statute had attached, for such did not appear to be the case from the evidence then before the jury. The jury were not misled by the charge. To entitle a party to a new trial for misdirection of the judge, it must appear that the jury were led thereby to form a wrong conclusion. *New Castle (Duke of) vs. Braxtowe,* 1 *Nev. & M.* 598—4 *B. & Adolph.* 273.

Where justice has been done between the parties, the court will not enter into the question whether the judge was mistaken in his direction to the jury. *Edmonson vs. Machel,* 2 *T. R.* 4. *Howe vs. Strode,* 2 *Wils.* 269.

The direction of the judge cannot be objected to on account of particular expressions, if, upon the whole and in substance, it will lead the jury to form a correct conclusion. *Gascoyne vs. Smith, McClel. & Y.* 338. *Wicks vs. Clutterbark,* 2 *Bing.* 483. 10 *Moore* 63.

In this case, upon a new trial upon the same evidence, the result must be the same; and it is perfectly clear, that, however inaccurate an isolated expression of the judge may have been, the whole charge explained the law arising upon the facts of the case, with perfect accuracy. The party cannot have a new trial for misdirection unless he excepted when the instructions were given or refused. *Robinson vs. Cook,* 6 *Taunt.* 336. The record does not show that exceptions were taken in this case.

OLDHAM, J., delivered the opinion of the court.

This was an action of assumpsit, brought by Spears against Taylor, for the recovery of a sum of money received by the defendant of one John D. Moseby for the use of the plaintiff. The defendant filed two pleas, the first, *non assumpsit,* to which issue was joined, and the second, that the cause of action did not accrue within three years next before the institution of the suit. To this plea, the plaintiff filed two replications: 1st, "that the defendant, on the tenth day of December, A. D. 1844, by his written acknowledgment admit-

ted that the said demands in said declaration mentioned were justly due; and 2d, "that within three years next before the institution of this suit the defendant, by his written promise, acknowledged that the said demands in the said declaration mentioned were just and unpaid, and obligated himself thereby to pay the same to the said plaintiff."

The first plea denies the plaintiff's cause of action generally, and to entitle him to a verdict upon that issue, he should have proved the receipt of the money by Taylor, which was done; but it having been received by him as agent and attorney in fact, no cause of action accrued against him until demand made after the receipt of the money, and a refusal by him to pay it over. The rule, as laid down in *Sevier vs. Halliday,* 2 *Ark. R.* 512, and *Palmer & Southmayd vs. Ashley & Ringo,* 3 *Ark. R.* 75, is strictly applicable to this case. The evidence establishes the receipt of the money, but is wholly insufficient in establishing a legal demand and refusal to pay. Byers swore "that he demanded the amount of money claimed in the declaration within twelve months next before the commencement of this suit, and that Taylor refused to pay it." He does not state that he was authorized by Spears to make the demand in question, or that he made it in his name, or as his agent or attorney. Taylor might with propriety refuse to pay the money to a person who had no authority to receive it, and whose receipt would be no acquittance. The evidence is defective in another respect in not showing whether the money was demanded before or after the receipt of it by Taylor. The finding of the jury upon this issue was wholly unwarranted by the evidence.

The counsel on both sides seem to have misapprehended the questions involved in the issues raised upon the plea of the statute of limitations. The replications admit that the cause of action did accrue more than three years next before the commencement of the suit, and attempt to avoid the effect of the statute by averring an acknowledgement and a new promise in writing within three years. The only question thus raised is whether such an acknowledgment and promise were made by the defendant, as to which no proof whatever was introduced. It was incumbent upon the plaintiff to

establish the facts thus alleged by him to entitle him to a verdict: and having wholly failed to do so, the verdict in his favor upon these issues was in the absence of all testimony.

The instruction given by the court to the jury "that the plea of the statute of limitations was an affirmative plea on the part of the defendant, and that if proof was not introduced in the case sufficient to sustain the plea by the plaintiff, the defendant then in order to avail himself of it must introduce proof to sustain it," was erroneous, and should not have been given for several reasons. In the first place, the fact, whether the cause of action had accrued within three years was, as has already been shown, not in controversy, but it was admitted by the pleadings that it had not; and if that fact had been put in issue by a traverse of the facts alleged by the plea, the burthen of proof rested upon the plaintiff, and not upon the defendant, as stated by the court. The rule is thus laid down in 2 *Stark. Ev.* 888, "on issue taken on the plea of the statute of limitations that the cause of action accrued within six years, the burthen of proof lies on the plaintiff, and he must prove a cause of action within the limit. After proof of the cause of action itself, he must show the commencement of the action according to the issue taken." But, as before stated, no such issue was taken upon the plea in the case before the court; and the instruction, had it been correct in point of law, being inapplicable to the case and well calculated to mislead the jury, should have been refused. For these reasons the judgment must be reversed and the cause remanded.