BROWN *vs.* STATE BANK.

When a written acknowledgment is relied upon to revive a debt barred by limitation, it must be an express acknowledgment of the debt due at the time; or else it must be an express promise to pay it, which pre-supposes such an acknowledgment, as held in *State Bank vs. Alston*, 4 *Eng. R.* 455.

Such acknowledgment must be unqualified and unconditional.

Debt by the State Bank on a promissory note; plea, limitation; on trial plaintiff read a letter from defendant, addressed to the Receiver of the Fayettville Branch, where the note was payable, in substance as follows: "I have a note in Bank that should be renewed, and I have the money to do so, but have not time to ride to Fayettville now. If you could send down the old note to Mr. Rose, with a statement and instructions, he, no doubt, would receive the money and a new note, and forward to you. Your compliance will confer a favor," &c. *Held* that this was sufficient to revive the debt.

Held, moreover, that the letter did not identify the note sued on with certainty, yet it was sufficient, in the absence of rebutting evidence, to justify a verdict aganst defendant.

Writ of Error to Washington Circuit Court.

On the 3d day of April, 1848, the Bank of the State of Arkansas commenced an action of debt, in the Circuit Court of Washington county, against Robert H. Brown, on a promisory note for $136, executed to her by defendant as principal, and John B. Brown and Newton W. Brown (who were not sued) as securities, dated the 6th day of September, 1842, payable six months after date at the Branch of said Bank at Fayetteville.

Defendant pleaded *nil debet,* and that the cause of action did not accrue to plaintiff within three years next before the commencement of the suit. Issues were taken to the pleas, and the cause submitted to the court sitting as a jury, (Hon. WM. W. FLOYD, Judge,) at the May term, 1848.

Plaintiff, after proving it to be in the handwriting of defendant, read, as evidence, the following letter:

"CLARKSVILLE, ARK., 29th Dec., 1846.

Mr. R. P. Pulliam—Dear Sir: I have a note in Bank that

should be renewed; and I have the momey to do so, but have not time to ride to Fayetteville now. If you could send down the old note to Mr. Rose, Judge Floyd, William Adams, or some other person; and also a statement with instructions, &c., they no doubt would receive the money and a new note, and forward to you by first safe opportunity. Should you see proper to comply with my request, please send also W. C. Calthrop's C. B. Perry's, J. B. Brown's, and Freeman Jackson's notes: also statements and instructions. Your compliance will confer a favor upon us all.

Respectfully yours, &c., R. H. BROWN."

Defendant admitted that, at the time the letter was written, Pullium was Financial Receiver for said Bank at Fayetteville: which was all the evidence. The court found for plaintiff, and rendered judgment for the amount of the note. Defendant moved for a new trial on the ground that the finding of the court (sitting as a jury) was contrary to the evidence. The motion was overruled. Defendant excepted, set out the evidence, and brought error.

BALDWIN, for the plaintiff. The cause of action is barred by the statute of limitations, (see 1 *Eng.* 484, 513,) and the written promise is too indefinite to take the case out of the statute—the letter not identifying the note sued on.

LINCOLN, contra. As the letter of the defendant expressly acknowledges an indebtedness to the Bank on note, it must be presumed to refer to the note sued on, until the contrary appears and is sufficient to take the case out of the statute.

MR. JUSTICE SCOTT delivered the opinion of the court.

The only question in this case relates to the sufficiency of the written acknowledgment, relied upon by the Bank, to save this cause of action from the statute bar of three years. In the case of the *State Bank vs. Elijah B. Alston,* 4 *English's Rep.* 455, it

was remarked that "if a debt is sought to be revived not by part payment but by a written acknowledgment of the debt, that must be an express acknowledgment of the debt as a debt due at the time, or else it must be an express written promise to pay it, which latter necessarily presupposes such an acknowledgment (*Davidson vs. Morris,* 5 *Smedes & Marsh.* 571)"—the revival standing, in principle, upon the foundation of an acknowledgment of a subsisting debt under circumstances from which an implied promise may be fairly presumed. This is believed to be the correct rule. At one period the English courts held that the slightest acknowledgment, whether by word or in writing, would take the case out of the statute. (*Quantock vs. Englan,* 5 *Burr. R.* 2630. *Bryan vs. Horseman,* 4 *East.* 599. *Clark vs. Bradshaw and Cogland,* 3 *Esp. R.* 155. *Rucker vs. Haney,* 4 *East. R.* 604 in note.) But the more recent adjudications both in that country and in the United States have given to the statute a construction more just in furtherance of the intention of its framers. (7 *Taunt.* 608. 3 *D. & R.* 267. 4 *M. & S.* 457. 2 *Taunt.* 380. 5 *M. & S.* 74. 4 *Bing.* 313. *Bull. N. P.* 148. *Wetzell vs. Bussard,* 11 *Wheat.* 309. 2 *Pick.* 368. 8 *Cranch* 74. 1 *Pick.* 232. 15 *John.* 511. 13 *ib.* 288. 2 *Brown* 16. *Ib.* 37. 5 *Binn.* 580. 5 *Conn.* 480. 4 *Gill & John.* 509. 4 *McCord* 215. 1 *Pick.* 203. 1 *Ala. (N. S.)* 488.) And while in regard to most contracts the bar of the statute may be avoided by an admission of indebtedness or a promise such as we have shown, yet "an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new assumpsit for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition or a readiness to perform it must be shown." (*Wetzell vs. Bussard,* 11 *Wheat. R.* 309.) And "if there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledg-

ment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable for and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay,—if the expression be equivocal, vague, and indefinite, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, we think they ought not to be received as evidence of a new promise to revive the cause of action." *Bell vs. Morrison,* 1 *Peters* 351. 6 *Peters* 86. 9 *Serg. & R. R.* 128. 11 *John.* 146. 4 *Pick.* 110. 4 *Porter* 223. 3 *Peters* 278.

In the case before us no question of competency is involved, as it was admitted that R. P. Pulliam was the Financial Receiver of the Bank at Fayetteville at the time when the letter read in evidence was written to him, and the question is solely as to the sufficiency of the written acknowledgment. And we are of the opinion that the acknowledgment shown is within the rule we have laid down: for there is not only a direct acknowledgment of a subsisting debt due to the Bank, but the expression of a readiness and willingness to pay a part of it, and to renew the note for the balance. It is true that the letter does not so identify the note in Bank as to make it certain that the note sued on in this case is the same; but, in the absence of any proof whatever, on the part of Brown, to the contrary tending in any degree to rebut this evidence, and of any circumstances accompanying the written acknowledgment having the effect to lead the mind to inferences only, and to no certain conclusions, the conclusion is irresistible that this is the note that was alluded to. We are, therefore, of opinion that the court correctly overruled the motion for a new trial, and the judgment must be affirmed with costs.