

Court of Appeals June Term 1819

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See Cases in
the E. S. Court
of Appeals at
June term 1819
to be reported
before the following

Barney

Appeal from Ball

Reports

Jun 15. Pr^o. Chap, Ch. J.

Johnson & Martin, J.

Crosby, J. withdrew &c.

Buchanan & Clark, J. absent

Samuel Smith Jun^r
part of Sam^l & John Smith

(see notes in writing files)

Williams for appellant - Request^o turns entirely upon the
pleadings - a single point - Decd. in ap^{te} writ of July 1809.

The Decd. states that Barney indebted to S. & J. Smith & promise
to pay to S. & J. Smith in the life time of John - all the counts
the same promise - Plea, 1st non ap^{te} - 2^d Limit - 3^d actio non
accert. - Cause of action arose in 1803. - J. Smith died in

June 1805 - 4 yrs before suit bro^t. - Resp^o relied upon ^{acknowledgments} a promise
to S. Smith made in June 1809 to take the cap out of him^t.

as to the sufficiency of the promise as stated in the Bill of Receipt
he reads the 1st Bill of Receipt.

when promise relied upon to take ^{a case} out of the Stat^o; it is
necess^o. it sh^d. be an express promise 2H 362 561.

1st Point upon the assumption made to S. & J. Smith since
the death of J. S. - not evid. under the counts in the Decd. -
similar to cap^o ap^{te} v adm^r. where him^t pleaded & promise
to E. v adm^r. there must ^{be} counts or promise to E. v adm^r.

It is no answer to the Decd. unless there be such counts, & it
is the same as to jur. & part? 2 Saund. 63. (note 6). The
law the same as to ap^{ts} of insol. as Ex. adm. or jur.
2 Stra. 919 cited - 2 N. B. 581 by ap^{ts} of insol. debtor -

There must be an express promise & none such proved in the
case - 2 Saund. 63. (note 6). If in ap^{ts} by Ex. & Lim. to
commence &c. Willes Rep 27. cause of action did not accrue on the
granting letters of adm - Cd 29. If 2 Jff. had replied a promise to
refuse & part it w^d. not have been good for it w^d. have been
a departure from the promise laid in the Decd.

2 Saund. 63 (note 6) where action by adm. for
ins. &c. Statute of lim. pleaded - so where in ap^{ts} by Ex. - The
case in Carthrew not law -

By analogy the case of ^{ap^{ts} of} Bankrupt, ap^{ts} of insol. &c.
&c. in the case of jur. & part. the law the same -

1 Chitty on plead. § 204. an Ex. cannot join with and. - Ex.
may declare as such. where the Ex. to avail himself of promise
must have a count on a promise to himself as Ex.

3 East. 409.

2 N. B. Raymond 1101

1 Chitty 343. counts must be added if promise made to
Ex. or adm.

2 Chitty 45. 46. The forms of pleading correspond - Jur. & part
cd 46 N. B. If the debt be considerable a dir. partner &c.

The probata & allegata must agree - The allegation a promise to S. of J. in the life time of J. & the proof the promise to S. since the death of J.

1 H. Bk 102 an action ag. adm. when aft. by ad. must be a count on that promise by him as adm.

3 Han. & M. Hen. 152 aft. by Ex. ag. Ex. Lim. pleaded. no promise made by dep. to prest as Ex.

1 Han. Ent. 101. 102 Terms of Dec. when promise made by Ex. or adm.

2 Johnson N. Y. 213 action ag. firm & part. action by all the partners alive at the time - Decided the promise must be stated by the part. alive when made

3 Chitty 20 (as 2 Vol. 84. 85.) man by firm & payee & as firm payee in an act. by firm & part he cannot join on a count of act. to himself - Chitty.

Winder for the appellee. The 1st Excep. seems to be abandoned by the counsel for the appt. - But the 2^d Excep. is stated to set out proof wh. do not apply to the issue

It has been decided it may be left to the jury to ascertain whether a promise or not - and here they have said there was a promise - money recd. in 1803 & acknow. in 1807 & 1809.

2 T. R. 762 to shew such a chron. Suff. - letter of ambiguous terms left to the jury whether it amt. to a promise wh. took the case out of the act of him.

Peaker N. P. 93 lin. plead. - what an estovant bill just

Ball. on dem. 188. Ch. 9. so also - id 190 I am ready to acc^t,

These cases show that Luft. provd in the case at bar
to take the case out of the act of dem.

2 Branch of the arg. - some deduction of analogy to the case
of ly. de. to that of suw & part.

Question whether a promise or a acknow. made
since the death of one the partners can sustain a case
where promise laid to both - No case produced to show
that a case like the present cannot be sustained. If it c^d
not there must be such cases in the books. - The practice of such
decd. seem to have only as to Ex. adm. cases of Inol. de.
and not by suw & part. ~~who~~ Ex. de. appear in a representative
character having nothing to do with the cause of action. They are
voted with the rights of the test: Bankrupt de. in the same manner
as if the orig. person had no right - But different as to ^{suw &} partners
the right of action the same & the suw & part. enforces the right
and is not in the predicament of an Ex. de. who come in by
apportionment de. by transfer of law, as prom. note by indorsement
transferred & the Indorsee ~~therein~~ the legal title -
Supp. suit in prom. note indorsed by A to B & suit by B.
and him. and acknow. to A. w^d. enable B to recover

an acknow^d. by the party restores the right of action wh^{ch} was taken away. no new confid. necess^{ry} to take it out of the Stat. of limit. a simple acknow. revives the orig. confid. ~~restores~~ the party to Ball. 190th. The stat. does not extinguish the debt, but ban the remedy - wh^{ch} may be revived by a promiss^o.

The acknow. is that Dr^W was liable to S^r J. Smith & revives the orig. cause of action.

2 Laird 63 (note 6) aff^{rs} of a Bankrupt - If it was a proper plea might give the promiss in Evid^o - If issue taken upon the plea the promiss in the Dec^t. that Dr^W promised the aff^{rs} & he pleads he did promiss the Bankrupt - This did not put in issue what alleged in the Dec^t. - But this not similar to Law & Part. who gets no title by assignment, but by survivorship - a continuation of the same engagement?

Id 63 (7) simply the case where sett^ler dies, letters granted and Dec^d that limit. began to run from the time of the cause of action & that letters within 6 yrs. did not take the case out of the Statute.

Willes 29 from wh^{ch} the above case is taken.

1 Chitty 204 nothing more than a reiteration of what has been stated & for the first time gives Dec^t. as to promiss, &c. and he refers to 3 East 409 & Willes 29. Salk 28. 6 mod. 25 & 890.

Carthew is said to be overruled by William's Saunders - but no case shown where it has been overruled - The reason given by Carthew appear to be a very sensible one - The case in Willes is Exha
Judicial

The acknow. does not give a new cause of action, but only
renews the orig. consideration

~~Chitty~~ 3 East 409 which has been relied on
principally by the counsel on the other side - could not give
in Evid. the promise made to the Exr. - But the court do not say
it is a new debt, ~~but~~ & that it is not a revival of the old debt -

The new acknow. does not make a new debt, because
that c^d. not be without a new consid^r. - but is a revival of the
old debt -

2 D. Ray 1101. Here a promise as well as an owning. The
promise to the Exr. & out of the issue.

Still incumbent on the counsel to shew that the case
as to Exr. &c. apply to joint partners -

2 Chitty 46 - NB added by Chitty that a count should be
on promise to joint part. & he refers the count to 3. East 409th is the
case of Paul &c - no reference to any case by joint part. & there
being no case it is strong evidence that the case never did occur
and was never necessary - It is a form made by Chitty & never
did occur ^{before} & is entitled to no weight

3 Chitty 20 also new forms given referring to his 2^d
Vol. Shews his desire to be very cautious.

3 Han. & M. Hen. 152 - The point did not come before the Ct.
and only an obiter dictum. not shewn whether the Exr. intended
to make a promise to the Exr. or to the testator -

2 Johnson N. Y. 213. To involve a person as a partner
he must be alive at the time when the debt was created.

Pinkney in reply - Two questions, 1. as to the sufficiency of the
acknow. without reference to the plea

2^d as to

as to the 1st question he thinks there is nothing in it if the
pleadings are correct.

The Stat. of Lim. almost considered as a dead letter, the
courts seem to interpret so as evade the statute.

The C. has said an acknow. w^d take the case out of the statute
& altho it was not a new promise yet it implied a new promise.

The tide now setting another way. Courts now more strict &
will not go further to evade the statute & were they now for the
first time to be decided ~~the~~ courts w^d not go so far as former courts
have gone.

What is the issue in this case - 3 - one gen. issue
2 & 3 dem & act. non accedit - as to the Stat. of Lim. the issue that
the def^t did assume in manner & form &c.

If expressly proved that def^t had promised to pay J. S. W.
it be the promise as laid in the Dec. & as the plff undertook to
prove - But no express promise is proved - an acknow. that
a debt did exist - and implied promise & plff bound to prove that w^d
he w^d be bound if the promise expressly proved on wh. the cause of action was
founded

The plaintiff not in a better situation than if the promise had been made more than 3yrs. — a promise to a dead man of no effect — a promise to S. S. cannot be relation be a promise to S. J. S. If it can why cannot a promise to an Ex^r by relation be a promise to the testator — There can be no reason why not to be done in the one case & not to the other. — The Dec^d. counts on one promise & the proof on another — This will apply as well in the case of an Ex^r. as a surviving partner. The surviving partner no more in his own right than Ex^r. is in his own right — He comes in a representative character altho an interest — He does not claim to be entitled exclusively for himself; but as a surviving partner who represents the firm — whatever he recovers he recovers under an accountability the same as Ex^r. — The representation of the dec^d. partner may call on him & make him account — The predicament in the eye of reason is identically the same of surviving partner & Ex^r. — The doctrine of relation wholly inadmissibly that the acknowledgment should relate to the original promise — Here a promise made to S. J. S. w^h the dec^d. denies — That if made it was not made to S. J. S. within 3yrs. The proof that dec^d. acknowledged to S. S. & that J. S. when promise made was dead — Is this maintaining the issue joined? — The case cites an of Ex^r. &c. that promise made to the Ex^r. & him. pleaded — there must be a count on that promise.

2d^d. Ray 1801 The dec^d. owned the debt, & promised him ^{to the Ex^r} to pay the debt w^h was due to the testator — no count on the promise to the Ex^r. — The couple here & the case at bar do not rely on the same point

The promise was made to the Exr. & therefore out of the issue

The case of Exr. may be distinguished in point of fact, but not in principle - They are both in representative character - If not in a representative character - they are not the persons to whom the promise was made - a promise made to one man ~~then~~ is not a promise made to two -

But said there is no case in point - It may be asked why no case produced showing ~~where~~ that the case not decided otherwise - It may be answered that ever since the point settled as to Exr. as ^{exr.} the case of Swing part. confided settled & the forms as to Swing part. made to conform to the case of Exr. &c. - Chitty repeats over over again ^{in 2 & 3 Vol} that if you sue in a particular way, add counts &c. so as to take in the case. Where promise made to sundry persons & any die & the promise to the Swing part. add counts on 2^d promise - not cap. &c. decide over over again cases ~~meaning~~ having the same principle bearing on the same question. Elementary writers to be regarded & Chitty if alone w^d be high authority - But without his auth^y the case clear -

But said a note indorsed over & him, pleaded = and Evid. given that drawer promised one of the Ind. within 3y^s - w^d be taking a greater liberty with the act of him. than has been done.

July 3^d. Judge affirmed - see opinion of Judge Johnson