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Joshua Barney vs Saml. Smith, Surv. Partn. of Saml. & John Smith	Appeal from Balt. June 15th Present. Chase. Ch. J. Johnson & Martin. J. Dorsey. J. withdrew; Buchanan & Earle abst.

Williams for Appellt. – The question in this case, arises out of the pleadings. 1. count money had & recd. – 2. They are all laid as being made by Saml. & Jno. in Jno's. life time. – Plea. Non asst. & limitations –

The cause of action is stated in 1813 –

To avoid the Stat of limitations, Pltff relies on a promise made in 1819 –

There are 2 exceptions, 1. That the promise in 10. p. rec. – (ads. exceptns.) is not suff.t to avoid the act of limitations. 2nd. – That

Nothing but an express promise is suff.t to take a debt out of the act of limitations. – 2. H. Bla. 561 – But The point on which we principally rely is, that the promise here, was made after the death of J. Smith, which we say is not suff.t on the counts in the nar in this cause – Such promise should have been specially counted on. – This is illustrated by analogy to promises of exrs. or admrs. and assignees of bankt. 2. 16. Saund. – 63 p. n. 6 –, and also in all cases where the Pltff sues in a representative character – 2. Stra. 919 – 2. H. Bla. 561 – (ads. latt case) – Willes. Rep. 27 – 29. (ag.st 1 Wm. Saund. – ad page. Where the promises declared on are laid as having been made to a testator the Pltff. Exct., cannot apply to the plea of limitations, a promise to himself, as that would be a departure in pleading – It thus appears, that no Pltff who sues in a representative character, can get clear of the Stat of limitns. by giving in evidence a promise to himself, or plead it, unless he has decld. on th. 1. point – 1. Chitt. – 104.

If an Exct. could defeat the Stat, tho he has decld. generally, by giving evidence of a promise to himself, there would be no need for his declaring on any such promise – It is because such evidence cannot be given, that he is

required to declare on such promise. Cites also - 3. East. 60) - a case in point. 2. Ld Rayd. 1101 - 1. Chitty 343 - 3. Vol. Do 20 -

The forms of pleading in 2 Vol. Chitt. 45.6, is in obedience to the rule above laid down - as to this. See M. S. book - (strong in point) - This principle may be said to depend on the principle of pleading that the probata & allegata should correspond - Proof then of a promise to an Admr does not agree with a count in which the allegata is a promise to Testator.
See also. 1. H. Bla. 102 - 3. Har & Mch. 152. Heard &c. vs. Mayo &c. - (strong in point). Also 1. Har Entr. 162 - To shew the practice in this State in matters like this - Also. 2. John. N.Y. Rep. 213 -

Thus, I think, I have satisfied the Court, that in this case the Plff cannot recover by reason of his evidence of a promise to a surviving partnr, in as much as he has no count on such promise -

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Genl. Winder for Appellee.

The 1st exception I take it for granted has been abandoned - On the 2nd two questions have been raised, 1. Whether the promise proved is in any circumstances, suff! to destroy the plea of limitations -
2. Whether, admitting it to be suff! it here can be taken advantage of as it was made to a surg partnr, and there is no count on such promise in this case.

As to the 1st question (reads the proof of the promise) as stated in the 2nd exceptn and states it be a suff! promise - as to this. 2. D. & E. East. 760. 762 - Also. P. N. P. 93. Val. Lim - 188. Ch. J. & J. O. - that an acknowledgt alone is suff! tho there be no express promise -

As to the 2nd question - I apprehend the cases cited have no direct bearing on this - It is whether a surg partner on a count laying a promise to himself & decd partner, can give evidence of a promise to himself only, as suff! to prevent the operation of the Stat. of Limtns. He has produced no case like this - It can hardly be supposed that if a Special count on a promise to a surg partnr was held necessary, that we should not have it so laid down, as expressly, as it is in cases of exrs, admrs, &c.

In none of the cases cited either, have the Plffs any original interest in the debt, they are merely representatives - But in this case, the surviving partner had an original interest, in the debt, & has not

therefore any thing of a representative character.

A promise or acknowledgt to any disinterested person bars the Stat of limtn. as for instance, a promise made to an indorser is sufft to prevent the drawer from availing himself of the Stat of limtn to an action by the indorsee. limtn only takes away the remedy and not the debt itself. No consideration is necessary to support such a promise. As to the

Val. 188. Such a promise does not create another debt, it only revives a preexisting one. To give any other effect to the Stat. would prove very injurious, instead of beneficial.

Here the cause of action arose during the life of both the Plffs. The promise only shows that such was the fact. That promise creates no new obligation, creates no new debt.

(Most of the cases supposed to have no bearing on this question. The 5th case is from 2. W. Saund. 63. (n. 6) - It was the case of an assignee of a bankrupt - by the act he has obtained the whole legal title, but that not the case here - where the survg partner continues in the same state in which he was at the time when the debt originated -

Same. book. 63. f. (only goes to show that the Stat of limitations runs from the date of the debt & not from the date of the letters of admon = Replication there contains no new promise) -

Also. 1. Chitt. 206 - (this was the case of Exrs & Admrs) he cites 3. East. 409. & Wilkes. 27. 29. In these cases the question was not in issue - It was only the dicta of the Judges - The case there in Carthew which was contra to this dictas, has not been overruled - The case in Carthew was a solemn decision the other not - The reason given in Carthew is adopted by Coleridge. 188. (viz. That a promise does not create a debt, but only revives one already existing -

also. 3. East. 409 - (which seems to be much relied on) - This was only a case - of Exrs also - The Court do not go the length of the Counsel in the case -

The one in Ld. Raym. 1181. cited in 3. East - does not justify Gibbs argt - But if the Court should think that the cases cited establish the case as to Exrs admrs &c yet I apprehend they cannot affect this question. No case has been cited directly in point. Nor has any from showing the relations of this principles to surv partners except. 2. Chit 46. He refers to 3. East 409, which was the case of Exrs. Chitty not having been able to find any case direct on the point, it is reasonable to think none such can be found. It has been formed by him

sic abeundo ubi cautela. Also 3. Chitt. 20. where the 2nd vol. only is referred to. There is therefore no additional force given to his note in his 2nd vol.

As to 3. Har. & McH. 152. the only point there was whether an exr. Plff could release his interest so as to make himself a Competent witness to prove a promise to himself. It is true the Court do state, that a promise to an exr. could not be given in evidence, as it had not been declared on. But it does not appear there that the promise he wished to prove was made to himself or to his testator. At any rate no other question was involved by it except the Competency of the Exr. as a witness.

As to 2. John 213, It was a case where the debt declared on arose & had its being after the death of a partner. It does not appear therefore that if the debt had originated during the life of the deceased partner, that a promise to the surv. partner would not have been admitted, tho there was no Count on it. The case therefore is altogether wide of this case.

Upon the whole then I think, it is evident that there is no authority direct in point on the part of the Deft. and that the Court will not extend the principle laid down by the cases cited, further than they have altogether gone.

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Mr. Pinkney for Appellant.

There are 2 questions. 1. As to the sufficiency of the acknowledgt.

2. As to the pleadings.

Upon the first. I shall not rely, because I doubt whether it can be sustained. But the second I am ready to support.

= It seems to be strange that the Stat. of limtns, notwithstg its peremptory language, should be frittered away, by the artifices of a liberal interpretation.

This liberality of interpretation however seems now to be abandoned. The tide seems to be setting a diff.t way. Courts now only adopt it

when they are bound to do so, by positive authority - If the quest. on this Stat. were res integra, I am inclined to think, the decisions would have been different, from those already made - The pleadings here call on the Plff to shew that the Defft has promised in manner & form, as he is alleged to have promised - The promise in the declaration is one to Sam.l I. Smith, that cant be supported by evidence of a promise to I. Smith afore, after the death of I. Smith - If that be true, proof only of an acknowledg.t to I. Smith only, can not place him in a better situation - I. Smith being dead nothing but the doctrine of relation, can make such an acknowleg.t as having influence to I. Smith. That doctrine is denied by all the authorities cited - No living reason can be given why an exr. or admr. should stand as to this matter in a worse predicament than a surv.g partner -

The reason is, upon which the principle is found as to the promise charged & the one proved are not ad idem -

What reason has been given for the distinction -

It has been stated that Execrs & admrs, &c, have only a representative character - And is not that the case with a surv.g partner. It is true he has an interest in the debt but he is stile only the representative of the firm now dead - What he recovers, he recovers not only for his own benefit, but also for that of the representatives of the deceased partner - To such representatives he is liable - Where therefore is the distinction between exr.s & a surv.g partner.

The cases cited have a direct analogy to this - in as much as a surv.g partner, stands as to this question, in the same situation with exrs & admrs

2. Ld. Ray.d 1101. I will notice - In that case there was both an express acknowledg.t & promise - And on this promise, I. Daniel, rel.d as strengthening the Plffs. case -

The promise declared on was one made to the Testator, and the one proved, was one made to the Exrs. therefore the evidence did not support the issue.
But whether Smith be a representative or not, can make no difference, as still the promise counted on & the one proved are not the same.
But we are asked why are not same cases directly in point, produced. This might be answered by returning the question. But I can give a satisfactory answer - and it is, that since the principle as it relates to exrs & admrs was settled, the question as to its application to surv. partrs has never been raised, as it has been always guarded agt by counting on a promise to the surv. partner. The cases of exrs & admrs have served as beacons to warn us of the danger of relying on a genl. Count of promise to the issue.
Indeed the principle is now established as applying to all cases, standing in a similar predicament -
I might here contend myself with relying on the authority of such a pleader as Chitty, by whom the opinion I entertain, has been adopted even if it had been unsupported by analogy - but here it cannot be questioned where you find it justified by strong analogy -
As to the illustration made by Genl. Winder, of the indorsee of a promissory note. He is only getting clear of one difficulty by giving us another. For I deny, that the case put by him is law.
As to the necessity of an additional consideration to support a promise to pay an insolvent debt, I agree with Genl. Winder. The reason is because the debt is still due in Conscience - This the same with infants &c -
These cases however have no bearing to shew that any subsequent promise is sufft. to get clear of the act of limitations

or whether its declaration on a promise to two partners is supported by evidence of one promise to one of them - which is the case here -

July 3. Judt. affd. on both exceptions. Opinions given by Chase Ch. J. & Ste. J. 1819 - Johnson. J.

Court of Appeals -

Nathan Sypow and Saml. Byrnes

vs

Frederick C. Graff

16th June 1819. Present Chase C. J. Johnson and Martin and Dorsey J. Dorsey dissentiente

Appeal from Balt.

(Winder for Appellant -

1. Quest. is, whether the Nar be sufficient - 2nd That the facts do not entitle the Plff to recover -

1. As to the sufficiency of the Nar (reads it). The objections to the Nar, are, 1st The Plff should have alleged that they were ready & willing to have received the Cargo on board - It is true that there is an averment that the Vessel was at the wharf & ready to take in the Cargo, but that cannot be taken as meaning the willingness of the Plffs to take such Cargo. The Vessel might be ready & they the Plff unwilling to receive it - & that willingness he should have clearly stated -

2. The Plff should have stated a particular time at which the Vessel was prepared to take in the Cargo - It should have stated what time she remained in that situation - Not having done so the Nar is defective -

3. The ~~Charter party~~ Nar states that the Vessel was to take on board as many bbls as she was competent to receive, the Charter party states that she was able to carry as many bbls on the voyage as she was able to carry on such voyage.

4. The declaration does not state how many bbls of flour the Vessel was able to receive on board. For aught that appears we cannot tell what Cargo of flour the Vessel was competent to take. The Court cannot tell how much damage the Plff sustained, because of the want of such an averment -