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WRITTEN ACKNOWLEDGMENT NECESSARY TO WAIVE THE STATUTE OF LIMITATIONS.

In Connecticut a statute provides that "In actions against the representatives of deceased persons, no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the party to be charged thereby."[1] There are similar statutes in other jurisdictions.[2] Under such a statute the question may arise whether the bar of the statute of limitations is waived where the debtor before his death gives the creditor promissory notes of less amount than the face value of the debt, or assigns in writing policies of life insurance as security for the debt, if neither the notes nor the assignments make reference to the debt and their connection with it can be shown only by oral testimony.

[1] Section 707, General Statutes of Connecticut, Revision of 1902. The above provision "shall not alter the effect of any payment of principal or interest." Ibid.

[2] For similar statutes see 2 Wigmore on Evidence, § 1466, note 4.

In *Wagner v. Mutual Life Insurance Company*[3] this question was answered in the affirmative. The facts in this case bearing upon the question raised are not set forth at length and the statute above quoted[4] is cited but not quoted in the opinion. An examination of the record shows, however, the exact nature of the writings which were held to have satisfied the statute. It seems that a lawyer had borrowed some $11,000 of his wife. Later he made assignments to her of policies of insurance upon his life by filling out the blank form contained in the policies, so that they stated the assignments to have been made "for one dollar and other valuable considerations." He also gave her his demand notes, "for value received," amounting to the sum of $3,000. No reference to the loan is made in the assignments or in the notes, but there is oral testimony of the wife to show that the assignments were intended as security for the loan and that the notes were in acknowledgment of it. After the death of the debtor recovery upon debt is barred by the statute of limitations unless the assignments and the delivery of the notes operate as a waiver. The question arises in an action in the nature of an action of interpleader where the widow and the administrator of the husband are the claimants of the proceeds of one of the insurance policies. Although the nature of the assets owned by the estate makes it not yet ascertainable, it is highly probable that the estate is insolvent and was insolvent at the time of the assignment of the policy. The court holds that both the giving of the notes and the giving of the assignments are "unequivocal acknowledgments of the entire debt from which the law would imply a promise to pay them" (it?).[5]

The statement of the court that the giving of notes for $3,000 was an unequivocal acknowledgment of a debt of $11,000 would seem not wholly accurate in the broad form stated. The mere fact that a debtor gives his note for $10 does not acknowledge that he owes $10,000. It is only when other evidence, possibly contained in the note itself, shows that the note was given, not as payment of the debt nor for a multitude of other purposes, but as a waiver of the statute of limitations, that the statutory bar is removed. If such other evidence is not contained in the note itself, the note alone is not sufficient to constitute the acknowledg-

[3] 91 Atl. (Conn.) 1012.
[4] Section 707, *supra*, note 1.
[5] P. 1015 of 91 Atlantic. "Them" is evidently a misprint for "it."

ment. *That* consists of the note *and* the other evidence. The same reasoning applies to the assignments which are shown by parol to have been made as security for the debt. The assignments *and* the oral evidence, not the assignments alone, form the acknowledgment. The cases cited by the court hold no more than this,[6] and this would seem to be the correct theory.[7] Indeed, it is recognized by the court when the opinion states that "the consideration for the assignment was open to oral proof." Except for the statute quoted above, such acknowledgment would seem sufficient to waive the statute of limitations.[8]

The statute requiring a written acknowledgment was undoubtedly passed with the object of preventing a creditor, whose claim was outlawed, from establishing such claim by word of mouth. There is another statute in Connecticut making admissible the declarations and memoranda of a decedent in an action against his personal representatives;[9] and but for some

[6] *Merrills v. Swift,* 18 Conn. 257, 269; *Smith v. Ryan,* 66 N. Y. 352, 354; *Insurance Co. v. Dunscombe,* 108 Tenn. 724, 729; *Pollock v. Smith,* 107 Ky. 509; *Conway v. Caswell,* 121 Ga. 254; *Balch v. Onion,* 4 Cush. 559; *Begue v. St. Marc,* 47 La. Ann. 1151; 25 Cyc. 1343. In the cases cited by the court there was either no statutory requirement that the acknowledgment should be in writing, or the writing itself referred to the debt.

[7] In addition to the cases cited in note 6, compare *Wenman v. The Mohawk Insurance Co.,* 13 Wend. 267, and *Miller v. Magee,* 2 N. Y. Supp. 156. In *House v. Peacock,* 84 Conn. 54, where an administrator was also debtor to the estate, it was held that the mere fact that his account charged him with more money due the estate than was actually the case did not constitute a waiver of the statute of limitations. The account having been shown to have been made by mistake, the debt was still barred.

[8] See cases notes 5 and 6, supra. But see *Shepherd v. Thompson,* 122 U. S. 231.

[9] Section 705, General Statutes of Connecticut (1902). This statute was originally enacted in 1850 and applied only to written memoranda but was extended in 1881 (P.A. 1881, ch. 99) to include also declarations of a deceased, and at that time the provision required a written acknowledgment or promise to waive the statute of limitation (now Section 707, Revision of 1902) added to it. Of this statute it has been said that its aim was to take away the great advantage which under preëxisting law living persons had over the representatives of the deceased. "This advantage was one which found its expression in unwarranted inroads upon estates of deceased persons in favor of the living whose mouths were not closed. The object of the statute was to prevent these inroads." *Mulcahy v. Mulcahy,* 84 Conn. 659, 662; *Bissell v. Beckwith,* 32 Conn. 509, 516; *Rowland v. Ry. Co.,* 63 Conn. 415, 417.

prohibition a creditor of a decedent could testify, without fear of contradictory evidence, that the debtor had waived the bar. The statute in question therefore prevents not only the establishment of stale demands against an estate but also the wasting of the estate by fraudulent means. It would seem therefore to require that the writing should be the exclusive memorial of the acknowledgment.[10]

It has been held that under this statute any unequivocal acknowledgment, though not necessarily in express words, is sufficient.[11] Thus where the deceased's letters by reference incorporated letters of plaintiff demanding the debt, it was held that the debt was renewed.[12] A letter of the deceased signed by his direction by rubber stamp may also be sufficient.[13] In these cases the entire acknowledgment could be gathered from the matter put into the writings. Where such written acknowledgment does not exist the action is not barred.[14]

It would seem therefore that in this case there was no acknowledgment of the debt contained in some writing made or

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[10] 4 Wigmore on Evidence, § 2425. See also 2 Wigmore on Evidence, § 1466, note 4, that there are statutes generally in vogue, forbidding the removal of the limitation except by an *"express acknowledgment or new promise in writing by the debtor."* So under the Massachusetts statute (Rev. Laws Mass. c. 202, § 12) oral evidence is not admissible. *Custy v. Donlan,* 159 Mass. 245, citing *Sumner v. Sumner,* 1 Met. 394, 396, and *Chace v. Trafford,* 116 Mass. 529. See also *Smith v. Eastman,* 3 Cush. 355. Under the Illinois statute it was held that an oral promise to pay a note amounted to a redelivery of the note and hence recovery was not barred. *Sennett v. Horner,* 30 Ill. 429.

[11] *Sears v. Howe,* 80 Conn. 414.

[12] *Sears v. Howe, supra.* By reference the letters exactly identified the debt, thus: "Your letter came duly to hand . . . . I am sorry that I am not in a position to help you out as you request. . . . Just as soon as I can see my way clear I will help you out."

[13] *Deep River National Bank's Appeal,* 73 Conn. 341. Here, too, the references were explicit. They state that the deceased intended to pay the notes of the H Company, on which he was an indorser.

[14] In *Ensign v. Batterson,* 68 Conn. 298, S gave C a note secured by mortgage for $2600. Later S wrote asking C to sign a quitclaim of other property, stating that "this is not the claim on which you hold a $2600 mortgage. At the death of S recovery on the note was barred unless a new promise could be shown. The court held that the letter was not sufficient evidence of such a promise, and "oral acknowledgments by a debtor cannot, under our statutes, support an action against his estate", citing the statute. See *Watertown Eccl. Society's Appeal,* 46 Conn. 230, decided before the passage of the statute.

signed by the deceased, and that if there was a written promise to pay the debt there was at most only a promise to pay $3,000. It may perhaps be urged that the acknowledgment in writing exists, though it must be helped out by other evidence; that the dry bones are there though life and animation and vitality come from without. Yet it is difficult to see how the acknowledgment can be contained in some writing if, considering the writing alone, there is no acknowledgment. It is like the painting of a person wherein the face is blotted out and can be brought to the mind's eye only by use of the extrinsic factors supplied by the imagination. We hardly term such a painting a complete portrait. The statute affords little protection against stale claims if the vital part of the acknowledgment rests only in the oral testimony of the claimant.

The justice of the result reached in the case probably would be little questioned. Here the wife had made extensive loans to the husband and the husband wished to secure her for such loans. If the wife's recovery could be worked out upon some theory agreeable with legal principles,[15] quite possibly the equities of the case would justify the preference of the wife over other creditors. Whether such recovery should be permitted at the expense of weakening the protective effects of a special statutory provision may perhaps be doubted.

MOSES V. MACFERLAN—IS IT SOUND LAW?

In a case[1] which has but lately come before the House of Lords, the case of *Moses v. Macferlan*[2] is criticised, Lord Sumner saying that it has been dissented from, and the views there expressed have been protested against. This case has been a fertile source of argument. It has been declared unsound by some courts, while numerous others have quoted from the opinion of Lord Mansfield with approbation. What was actually decided is lost sight of in considering the general principles there laid

[15] In *Devine v. Murphy*, 168 Mass. 249, a mortgagee delivered up his mortgage upon the debtor's oral promise to pay the barred debt. It was held that no question concerning the statute of limitations arose, since the oral promise was part of a present contract upon valuable consideration. No rights of other creditors were involved.

[1] *Sinclair v. Broughan*, 111 L. T. R. 1.

[2] 2 Burr, 1005, 1 Bl. 219.

down. It might be well for us to find out exactly what was there decided and whether it is in fact sound law.

The case was as follows: Moses had four promissory notes of one Jacobs. These he indorsed to Macferlan to enable Macferlan to sue Jacobs thereon, Macferlan expressly agreeing to indemnify him against all consequences of such indorsement and agreeing not to sue him. Notwithstanding, Macferlan did sue Moses in the "Court of Conscience" and recovered £6 of him, that court holding that it had no jurisdiction over the subject matter of the defense—namely, the agreement not to sue. The present action was then brought by Moses to recover the £6 in the Court of King's Bench. The Court held that an action lay upon the special agreement, and that since this was so the plaintiff could sue in the common count for money had and received, waiving his right to sue on the special contract.

The first point of disagreement is, that as the money was awarded to Macferlan by a final unreversed judgment, his right to it was *res adjudicata* and could not be subsequently readjudicated in this second action. The reason for the doctrine of *res adjudicata* is that litigation must have a termination. So the judgments of courts having jurisdiction are held conclusive upon the parties and their privies. They are conclusive because an opportunity has been afforded to the parties thus concluded to assert or defend their rights before the court rendering judgment.[3] Manifestly, such judgment does not operate as an estoppel with respect to matters not determined therein which could not have been properly litigated under the issues in the action in which the judgment was rendered.[4] Moses had no opportunity to litigate the agreement with Macferlan, and so his rights under such agreement clearly could not have become *res adjudicata.* This is conclusive of his right to sue on the special agreement.

In our present day courts no doubt this agreement would be admissible as a good defense. If so, should the judgment be conclusive as to that cause of action if Moses should choose not to rely on it as a defense? Some of our courts would hold that the adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated as an incident thereto and coming

[3] *Oxford v. Graham,* 57 Mich. 422.

[4] *Storage Co. v. Reservoir Co.,* 25 Colo. 87; *Mershon v. Williams,* 63 N. J. L. 398; *McKinney v. Curtis,* 60 Mich. 620.

within the legitimate purview of the subject matter of the suit.[5] Other courts would make a distinction between a matter purely defensive and one which may be used for an affirmative cause of action. They would say that if the matter is one of defense, and nothing more, the defendant must present it, and if he fail to do so, a judgment would render it *res adjudicata* and no action could be brought on it. But if the matter present an affirmative cause of action against the plaintiff, as well as a good defense, the choice is the defendant's to interpose it as a defense or to reserve it and to maintain an independent action on it for all damages which he has sustained.[6]

So, where the defendant had agreed on a sufficient consideration to discontinue a suit against the plaintiff, and in breach thereof had prosecuted the suit and recovered the judgment, the court allowed the plaintiff suing on the agreement, to recover the amount of the judgment.[7] It was held that the action was on the contract and if the contract was proved and the breach of it, the recovery was for the breach of the contract, and not to recover back money paid on the judgment.

In *Hunt v. Brown,*[8] the defendant promised on a sufficient consideration to accept a certain settlement in full discharge of a note against the plaintiff. In breach thereof he sued on the note and recovered. The plaintiff thereupon brought suit for breach of the agreement. The court held that he was not bound to use the agreement as a defense in the former action. "A breach of it was a substantive cause of action, upon which the present plaintiff could bring his own suit in his own way. When a defendant has the choice of setting up a matter in defense, or of suing upon it in another action, if he chooses not to set it up in defense, of course the judgment in the action against him is no bar to a subsequent suit by him."

From these authorities it is evident that Moses could have sued on a special agreement. Could he waive this right, and sue on the common counts for money had and received? This is most vigorously denied in a leading English case,[9] which holds that Moses' only remedy lay in an action on the agreement.

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[5] *Bodkin v. Rollyson,* 48 W. Va. 453.
[6] *Brown v. First Natl. Bank,* 132 Fed. 450.
[7] *Cobb v. Curtis,* 8 Johns. 367; *Smith v. Palmer,* 6 Cush. 513.
[8] 146 Mass. 253. See also, *Snow v. Prescott,* 12 N. H. 535.
[9] *Phillips v. Hunter,* 2 H. Bl. 416.

It is important to see that the contract between Moses and Macferlan was not one of reimbursement. There was no idea that Moses should or might be forced to pay the notes, and that Macferlan should later restore such amount to him. It was expressly agreed that he should not be sued upon the notes—that he should be exonerated—and the present suit is not to enforce a primary obligation imposed upon Macferlan by the terms of the contract, but to enforce a secondary remedial obligation imposed through a breach of the primary obligation.

It is a general rule of law that where there is an express contract, the law will not imply one. As there is a remedy on the express contract, the law does not need to give another remedy on an implied contract. Yet this general rule is open to exception, and under certain circumstances, even though there be an express promise the law will imply another, and an action will lie on either.[10]

Numerous cases[11] hold that where a plaintiff has done everything which the agreement required on his part, and nothing remains to be done but the performance of a duty on the defendant's part to pay money due the plaintiff under the contract, the plaintiff may recover on the common counts in assumpsit, and need not declare specially. The duty to pay the money is a primary duty, which the defendant has expressly assumed, and not a secondary remedial obligation imposed as damages for the breach of a primary duty. As previously pointed out, Macferlan did not assume a primary duty to pay the money in question. This duty arose only as a secondary remedial obligation.

Again, money paid on an executory contract which the recipient of the payment fails to fulfil may be recovered back on the common counts.[12] The plaintiff is allowed to treat the contract as rescinded, and to demand restitution of that which is given to the defendant in expectation of the performance thereof. The measure of damage is not what the plaintiff has suffered, but what he gave to the defendant in expectation of the performance of the contract by the defendant. Does the principal case fall within this class? Apparently not. Moses is not suing for restitution of that which was obtained from him in expectation of

[10] *Princeton & Kingston Turnpike Co. v. Gulick*, 16 N. J. L. 161.

[11] *Jackson v. Hough*, 38 W. Va. 236; *Rolling et al. v. Duffy*, 14 Brad. 69; *Harper v. Claxton*, 62 Ala. 46; *Felton v. Dickinson*, 10 Mass. 287.

[12] *King v. Hutchins*, 28 N. H. 561; *Wheeler v. Board*, 12 Johns. 363.

the performance of the contract. He sues for that which was obtained by a breach of the contract. To say that he can treat the contract as rescinded, and then prove his right to the money in question by showing that it was obtained through a breach of that contract, violates the principle that when a contract is rescinded no action can be maintained in reliance thereon. To be sure the basic reason for Moses' right to his money is the same as that which leads to the restitution of money advanced on a contract subsequently rescinded—the fact that the defendant was under a duty to turn it over to the plaintiff. Yet the different state of facts giving rise to this duty would, we believe, leave the courts to hold that such a case would not fall within this class.

Even though the courts might not consider the principal case to fall within the last named class, it is submitted that it bears an even more striking similarity to those cases in which money wrongfully obtained by a defendant is recoverable on the common counts. To be sure, the wrong in such cases is a tort, and the action is allowed under the familiar principle of the waiver of tort in suit in assumpsit for the amount of the unjust enrichment of the defendant's estate. But in the principal case the enrichment is acquired by a positive wrongful act on the part of the defendant, not a tortious act, but yet a breach of his legal duty. There seems to be no valid reason why, in a like manner, the plaintiff should not be allowed to waive the right to damages for the wrongful act of the defendant, namely, the breach of the special contract, and sue for the amount of the unjust enrichment of the defendant's estate.

Underlying all these classes of quasi-contractual action is this one basic fact, that the defendant has that of the plaintiff's which he should not keep, and which he should return. Originated to supply the deficiency of the then existing forms of action, which were unable in all cases to do justice, it has, because of its more equitable nature, usurped to a certain extent the place of the former. The oft quoted argument of Lord Mansfield well merits its use wherever there is a liquidated debt due from the defendant to the plaintiff, even though there may not be a precedent directly in point to rely upon.

Whether our law courts, unsupported by other precedents exactly similar to the principal case would follow the dictum of Lord Ellenborough in *Phillips v. Hunter*[13] and say that the only

[13] 2 H. Bl. 416.

remedy lay upon the special agreement, remains an open question. But their increasing recognition of equitable principles, and the willingness with which they have freed themselves from the fetters of an over-technical system of pleading, would lead us to asseverate that, just as *Moses v. Macferlan* was, so it is, and will be considered sound law.

THE POWER OF A COUNTY TO TAX ITSELF FOR A STATE INSTITUTION TO BE LOCATED IN THAT COUNTY.

It is a fundamental principle, implied in all definitions of taxation, that taxes can be levied for public purposes only.[1] It is equally fundamental that the purpose of the tax shall be one which in an especial and peculiar manner pertains to the district upon which it is to be levied.[2] Where the purpose for which the tax is to be levied concerns the whole state, then the whole state should bear the burden of the tax; where the purpose concerns only some particular district of the state, then that district only should bear the tax.[3] These principles are universally accepted, because, as stated by Judge Cooley,[4] they are "as sound in morals as they are in law."

Counties, cities, towns, taxing districts, are all created by and under the control of the state.[5] This control, however, cannot be carried to such an extent as to transcend any of the fundamental principles just stated.[6] It therefore becomes important when levying a tax to determine whether the object reaches the whole state, or only some particular taxing district.

The Supreme Court of Arkansas in a recent case,[7] McCullough, C. J., and Wood, J., dissenting, held that a county could not

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[1] *Matter of Mayor, etc., of N. Y.*, 11 Johns. (N. Y.) 77, 80; *Van Horn v. People*, 46 Mich. 183, 185.

[2] *Hammet v. Philadelphia*, 65 Pa. St. 146, 151; *Steiner v. Sullivan*, 74 Minn. 498.

[3] *Steiner v. Sullivan, supra; Hutchinson v. Ozard Land Co.*, 57 Ark. 554. This principle is very clearly stated and explained in "Cooley on Taxation," 3d ed., vol. 1, p. 225, *et seq.*

[4] Cooley on Taxation, 3d ed., vol. 1, p. 227.

[5] *Commonwealth v. Moir*, 199 Pa. 534; *Bulkeley v. Williams*, 68 Conn. 131.

[6] *Lowell v. Boston*, 111 Mass. 454; *Matter of Jensen*, 44 N. Y. App. Div. 509.

[7] *State Agricultural School District No. 1 v. Craighead County*, 169 S. W. (Ark.) 964.

vote any part of its funds for the benefit of a state agricultural school, as a bonus to induce its location in that county.[8] The court based its decision upon the ground that the school was a state institution, and the citizens of the county in which it was located would acquire no greater rights to the use of the facilities of the school than those enjoyed by other counties. The fact that the school would be more accessible to the people of the county in which it was situated was held not to deprive the school of its character as a state institution.

A contrary decision has been reached in the other states where this question has been in issue, upholding the validity of an obligation entered into by a county for the purpose of securing within its limits a state institution.[9] These cases seem to lay down the sounder rule. The establishment of a public institution of general utility, such as an educational institution, in a particular locality is of a real benefit to the citizens of that locality in enabling them to make use of it with greater ease and at a less cost than others, who may have an equal right to make use of its facilities but who are more remotely situated. Moreover, real estate values would naturally increase, while the advantages to tradesmen are obvious. It is more in accord with principles of equality to permit those who receive the greater benefit to assume the greater burden, than to argue that because an institution belongs to the whole state, the whole state must be taxed equally without regard to locality.

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[8] Art. 7, sec. 28, of the Constitution of Arkansas, provides that the county court shall have exclusive jurisdiction of the disbursements of moneys for county purposes, and in every other case that may be held necessary for the internal improvement and local concerns of the respective counties.

[9] *Merrick v. Inhabitants of Amherst,* 12 Allen 500; *Burr et al. v. Carbondale,* 76 Ill. 455; *Hensley v. People,* 84 Ill. 544; *Marks v. Trustees,* 37 Ind. 155; *Briggs v. Johnson Co.,* 4 Dillon 148; *Co. of Livingston v. Darlington,* 101 U. S. 407. In *State of Wis. ex rel., etc., v. Haben, 22* Wis. 660, the following language is used: "The advantages incidentally accruing to the citizens of Oshkosh from the establishment of a state normal school at that place, though sufficient, with the consent of the legislature, to justify the citizens themselves . . . . in levying a tax to aid in the purchase of site or the erection of buildings. . . . The tax so levied must be with the consent of the citizens or proper city officers. The legislature has no power arbitrarily to impose such a tax. . . . This distinction does not seem to be well drawn. The question is wholly one of local concern. If the object is of that nature, then the legislature through its supreme power is able to impose such a tax. *Gordon v. Cornes et al.,* 47 N. Y. 608.