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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 quoted⁴ 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

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 case¹ 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

¹⁵In *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.

²2 Burr, 1005, 1 Bl. 219.