BULLARD V. LOPEZ, 1894-NMSC-009, 7 N.M. 561, 37 P. 1103 (S. Ct. 1894)

E. D. BULLARD, Plaintiff in Error,
vs.
LORENZO LOPEZ, Assignee, Defendant in Error

No. 420

SUPREME COURT OF NEW MEXICO

1894-NMSC-009, 7 N.M. 561, 37 P. 1103

September 04, 1894

Error, from a Judgment in Favor of Plaintiff, to the Fourth Judicial District Court, San Miguel County.

The facts are stated in the opinion of the court.

COUNSEL

Frank Springer for plaintiff in error.

The court should enter final judgment in favor of plaintiff in error under section 2190, Compiled Laws, 1884.

An acknowledgment, or new promise, to be effectual to revive a debt, must be unqualified and unconditional. Wood, Lim., p. 183-185, et seq.; Angell, Lim., sec. 235, et seq.

It must also relate to the identical debt, and this must clearly appear. Angell, Lim., sec. 238.

The word "revived" has been used in the discussions as applicable indifferently to cases where the promise was made before as well as after the bar. Wood, Lim., secs. 64, 65, 81; Briskoe v. Anketell, 28 Miss. 361; Wheelock v. Doolittle, 18 Vt. 440. See, also, Chitty on Con. 821; Penley v. Waterhouse, 3 Iowa, 434, 435.

Where a statute has received a judicial construction in one state and is afterward adopted by another, it is taken with the construction which has been so given it. Draper v. Emerson, 22 Wis. 144.

Chapter 116 of the Iowa revision of 1860, which is similar to the New Mexico statute of limitation, particularly to sections 1860, 1873, has been repeatedly construed by the supreme court of Iowa. See Parsons v. Carey, 28 Iowa, 431; Price v. Price, 34 Id. 404;

Palmer v. Butler, 36 Id. 576; Lindsey v. Lyman, 37 Id. 206; Hale v. Wilson, 30 N. W. Rep. Iowa, 739.

T. B. Catron for defendant in error.

JUDGES

Collier, J. Smith, C. J., and Fall, Laughlin, and Freeman, JJ., concur.

AUTHOR: COLLIER

OPINION

*{*562}* **{1}** The case in the court below was an action of assumpsit, wherein defendant in error, as assignee of one Andres Sena, brought suit against plaintiff in error, as a member of a partnership doing business under the firm name of Rupe & Bullard, upon a promissory note made by said firm, dated June 5, 1883, due sixty days after date, and being for the sum of $ 1,475.44, with interest at the rate of one and one *{*563}* half per cent per month. The action was begun on October 14, 1889, and by a second count in the declaration plaintiff averred a parol promise by the defendant, made to plaintiff's assignee on November 10, 1885, to pay the amount of said note and interest, and that "by said parol promise and undertaking the said defendant became liable to pay the said Andres Sena the sum of money mentioned." There is an averment of the said Sena making a general assignment for the benefit of his creditors on July 3, 1886, and of the same being duly recorded, and of assignee succeeding to all rights. Defendant filed two pleas, -- one of non assumpsit, and the other that he did not, at any time within six years next before the commencement of the plaintiff's action in this behalf, undertake and promise, etc. There was a similiter to first plea, and replication to the second, and similiter thereto. On the trial, plaintiff introduced the firm note in evidence, and the testimony of Andres Sena of a conversation between him and the defendant in February, 1884, showing an oral promise by defendant to pay said note. This testimony was objected to on the ground that "it would not be competent evidence to remove the bar of the statute of limitations." There was also testimony showing calculation of interest which, added to the principal, made $ 3,113.17 due on the day of trial. The assignment of Sena to Lopez was put in evidence. Plaintiff here closed, and defendant, by his attorney, moved the court "to instruct the jury to find for the defendant upon the ground that the note is barred by the statute of limitations, and that there has been no competent or relevant evidence to take it out of the statute." The court instructed the jury to find for the plaintiff in the sum of $ 3,113.17, which they did. Other questions are raised, relating to alleged failure by plaintiff to show that defendant was a member of the firm of Rupe & Bullard, and to the admissibility of the deed of assignment.

*{*564}* **{2}** It is deemed necessary to notice the contention made by the counsel, respectively, upon the plea of the statute of limitations filed in this cause, and to do this intelligently we quote such parts of our law as apply:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue and not afterwards -- except when otherwise specially provided." * * *

"Sec. 1862. Those founded upon any bond, promissory note, * * * within six years."

{3} Several sections here intervene, prescribing the limitation for various causes of action, and then occurs the following:

"Sec. 1873. Causes of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as by a promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith."

{4} The contention of plaintiff in error is that section 1873 refers to acknowledgments and new promises which occur both before and after the bar of the statute has attached, and that the testimony showing parol promise is irrelevant, and of no legal effect. The contention contra is that the section refers only to actions already barred, and to be "revived" in the manner specified. If this contention be admitted, counsel for defendant in error then claims that new promises, made prior to the running of the statute, remain good as at common law. If the contention of plaintiff in error is sound, the latter proposition of defendant in error falls with his first. In volume 13, at page 758, of the American and English Encyclopedia of Law, title "Limitations, Statute of," the text reads "that it is immaterial whether the new promise relied on is before or after the bar of the statute has fallen. In either case it sets the statute running afresh." A great many *{*565}* decisions of the courts of different states are cited, and upon examination they are found to bear out the text to which they are cited. To the same effect is the doctrine laid down in Wood on Limitation of Actions, at section 81. In the Missouri statute the words are "shall be evidence of a new or continuing contract," and the repeated argument was there advanced that, under such words, promises made prior to the bar of the statute attaching were not embraced in the statute. But the decisions of that state are uniform against such a contention. We cite the last of those decisions that we have examined. Chidsey v. Powell, 91 Mo. 622, 4 S.W. 446. The argument on such a statute would seem to be that it could not be contended that there was any evidence of a new or continuing contract, the old one being not yet barred, because at the time of the supplying of such evidence it was not needed, the old contract being sufficient of itself, and needing nothing of evidence to rehabilitate, or, as we may say, "revive" it. The use of the word "new," it seems to us, just as much as the word "revive," found in our statute, might imply that the old promise has been revitalized, if that is to-day described as "new" which yesterday was "old." Running back through the Missouri cases, we find that the decisions of many other state courts are cited, construing statutes similar in language, and these courts put similar construction thereon. Though it has been often contended for, our attention has not been called to any decided case construing any statute in this country where provision is made for causes of action being reestablished after the attaching of the bar of the statute of limitations, so as to exclude from its application the period before bar. For decisions upon a statute nearly identical in language to ours, we are referred to the supreme court of Iowa. The case of Lindsey v.

Lyman, 37 Iowa 206, is directly in point. In that case, as in the one at bar, the contention turned *{*566}* on the meaning to be given to the word "revived," one side asserting that "revived" meant to bring again to life, as a cause of action dead by the statutory bar; and the other for a less strict interpretation and a less limited sense, to include both the revitalization of a dead cause of action and the restoring of the lapsed period of its statutory life. This was expressly held in Lindsey v. Lyman, supra.

{5} It is claimed by the plaintiff in error that it is apparent, from the similarity of the language employed in the Iowa and our statute, that we adopted the Iowa statute with the construction placed on it up to the time of such adoption; and he cites for this contention Draper v. Emerson, 22 Wis. 147. In answer both to this contention and, we may infer, also to the doctrine cited from 13 Am. and Eng. Encyclopedia Law, and Wood, Lim. Act., supra, counsel for defendant in error claims that such construction is in derogation of common law, and not applicable to New Mexico, where the common law is made "the rule of practice and decision." Comp. Laws, sec. 1823. It is not our view that this statutory requirement imposes so stringent a rule of policy as its exact terms imply. For example, where we find the general policy in this country to make contractual obligations renewable in the same manner before as after the bar of the statute attaches, we think some consideration in construction should be given to that fact when we incorporate into our law a statute of this kind from a sister state. Without undertaking to say what might be our decision upon the meaning of the word "revive," were we attempting a construction in harmony with the common law, we think that the fact of the general policy of this country, and the principle recognized by this court in Armijo v. Armijo, 4 N.M. 57, 13 P. 92, of adoption of construction of a statute of another state or territory along with the statute itself, are sufficient to make us *{*567}* conclude that our statute applies to acknowledgments and new promises made both during and subsequent to the running of the period of limitation. So holding, we decide that the testimony tending to show a parol promise made before the six-year period of limitation expired did not avail as a new promise.

{6} It is urged, however, that the plea interposed in this case being "non assumpsit infra sex annos," instead of "non accrevit," etc., presented an immaterial issue, and that in effect no plea of the statute of limitation was filed. It is true that our statute prescribes a limitation of actions "after their causes accrue." Section 1860. It is laid down in the books on pleading, also, that to all simple contracts the plea of "non accrevit," etc., is always the safer plea, and that, where obligation of performance is not coincident with promise, it is the only proper plea. If "non assumpsit," etc., is pleaded instead of "non accrevit," etc., a demurrer will lie, even though it appears on the face of the pleadings that the action is barred, even from the date of accrual. 3 Chit. Pl. 258; Banks v. Coyle, 9 Ky. 564, 2 A.K. Marsh. 564. In this case no demurrer has been interposed, but replication was filed and issue joined on it. Does this cure the fault? In 1 Chit. Pl. 456, we find that in the case of a plea in abatement so fatally defective that the plaintiff might either sign judgment, apply to have the court set the plea aside, or demur generally, if he replies to it instead of doing either of these things, the fault is aided. It is also laid down in Angell on Limitations (see sec. 290) that if "non assumpsit," etc., instead of "non accrevit," etc., was put in, and plaintiff replied a new promise, and gave evidence

in support of his replication, the issue, though informal, was held to be material in a case where neither the promise nor the accruing of the action was within six years. We think, therefore, that, though plaintiff might have successfully *{*568}* demurred to the plea of the statute filed in this case, his not doing so has presented a material issue, and, for the reasons above stated, the court below should, instead of instructing the jury to find for the plaintiff, have instructed for the defendant. This holding being conclusive between the parties of the entire controversy, we reverse the judgment of the lower court, and render judgment in favor of plaintiff in error, and for his costs; and it is accordingly so ordered.