ACTS

OF THE

General Assembly of Pennsylvania:

Passed at a Session begun and held, October 14th, 1712, and ended March 27th, 1713.

1713. CHARLES GOOKIN, LIEUTENANT GOVERNOR.

CHAPTER CXCVI.

An ACT *for limitation of actions.*

What actions to be sued within six years after the cause thereof.

BE it enacted, That all actions of trespass *Quare clausum fregit*, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants) all actions of debt, grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five-and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass *Quare clausum fregit*, within three years after the said five-and-twentieth day of April next, or within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within one year next after the said five-and-twentieth day of April next, or within two years next after the cause of such actions or suit, and not after: and the said actions upon the case for words, within one year next after the words spoken, and not after.

And what within one and two years.

If judgment be given for plaintiff,

II. *And be it further enacted*, That if, in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed

by error, or a verdict pass for the plaintiff, and upon matter al- 1713.
ledged in arrest of judgment, the judgment be given against the
plaintiff, that he take nothing by his plaint, writ or bill, then, and and reversed, he may commence a new action within one year.
in every such case, the party plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action or suit, from time to time, within a year after such judgment reversed or given against the plaintiff as aforesaid, and not after.

III. *And be it further enacted*, That in all actions of trespass Where a disclaimer shall be allowed.
Quare clausum fregit, hereafter to be brought, wherein the defendant or defendants shall disclaim, in his or their plea, to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass, before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be inforced to join issue; and if the said issue be found for the defendant or defendants, or if the plaintiff or plaintiffs shall be non-suited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suit concerning the same.

IV. *And be it further enacted*, That in all actions upon the case, In actions of slander, where the damages are found under forty shillings, the costs shall be the same.
for slanderous words, to be sued or prosecuted by any person or persons, in any court within this province, after the said twenty-fifth of April next, if the Jury upon trial of the issue in such action, or the Jury that shall enquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action, shall have and recover only so much costs as the damages so given or assessed do amount unto, without any further increase of the same; any law or usage to the contrary notwithstanding.

V. *Provided nevertheless*, That if any person or persons, who is Provision for persons under age, &c. having cause of action.
or shall be entitled to any such action of trespass, detinue, trover, replevin, actions of account, debt, actions for trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be, or at the time of any cause of such action given or accrued, fallen or come, shall be, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond sea, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, after their coming to or being of full age, discoverture, of sound memory, at large, or returning into this province, as other persons.

Passed 27th March, 1713.—Recorded A. vol. II. page 71. *(l)*

(l) For the limitation of actions respecting real estates, and the recovery of forfeitures, see chap. 1134. Against what exceptions a sheriff's deed, with six years quiet possession, shall be effectual, see chap. 1134, sect. 7. Suits against the sureties of sheriffs, or coroners must be instituted within seven years after the date of the bonds. Chap. 1477. [And now, by the act of 28th March, 1803, (post. chap. 2355,) within five years.] See, also, as to the equitable effect of seven years possession, ante. chap. 145. No fine, or common recovery, nor any judgment, in any real, personal, or mixed action, shall be avoided or reversed, for any defect or error therein, unless the writ of error or appeal be brought and prosecuted with effect within seven years, (chap.

1713. 1564, sect. 20. Debts not secured by mortgage, &c. shall not be a lien on real estate, longer than seven years after the decease of the debtor, unless a suit is brought within that time, in the manner which the law prescribes, chap. 1938. Creditors not exhibiting their accounts within one year after public notice, shall be barred of any dividend in the remaining assets of the decedent's estate, (chap. 1740, sect. 14.) Relations, &c. not exhibiting their legal claims to an intestate's estate within seven years after his decease, shall be barred. *Ibid.* sect. 13. [Limitation of suits against sureties of executors and administrators, chap. 1938, sect. 2.] For the limitations of prosecuting particular offences, and of exhibiting claims on the public; see the index to this edition, title *Limitation*. By an act of the 21st of June, 1781, (chap. 934, sec. 10,) "It was provided, that no debt or demand, "which was not barred by any act of limitation on the first day of January, "1776, should be barred by such act, "until two years after the passing of "the law, and until such time as is limited by law, according to the nature "of each case." By an act of the 12th of March, 1783, (chap. 997,) it was further provided, that "No act of limitation of actions should run or be deemed or taken to have run, at any time "between the 1st of January, 1776, and "the end of one year from and after "the 21st of June, 1783, upon all debts "and contracts made or entered into "before the 1st of January 1776."

The statute of 32 H. VIII. chap. 2, making sixty years possession a valid title to lands, extends to Pennsylvania. 1 Dallas, pages 15, 67. But for the statute to operate, the possession must be adverse. *Ibid.* [This statute is superseded by the act of 1785, (post. chap. 1134.)

The Court will never open a regular judgment, to let in a plea of the statute of limitations. 1 Dallas, page 239.

The acknowledgment of a debt, *after* a suit brought, takes it out of the statute of limitations. 1 Dallas, page 65.

It is only necessary to enter the continuances, in order to prevent the bar of the statute of limitations, where the writ and declaration disagree as to the nature of the action. 1 Dallas, page 411.

Actions upon promissory notes are to be brought within the same period limited for bringing actions on the case: (See post. chap. 207. sect. 6.) *(Note to former edition.)*

In an action brought by a plaintiff, resident in *South Carolina*, against a defendant resident in *Pennsylvania*, to recover the amount of a promissory note due for more than six years, the act of limitation was pleaded; and the point was referred, upon a case stated, to the opinion of the Court. After argument, the judges unanimously decided that the action was barred, and gave judgment, accordingly, for the defendant. *Ward* v. *Hallam*. 2 Dallas, 217.

Unliquidated accounts between merchants, in the capacity of principal and factor, are not within the act of limitations.

The case was, debt on bond, dated August, 1774. Plea, payment with notice of set-off. On the trial in the Common Pleas, Nov'r 19th, 1794. The bond was exhibited, without any indorsement of a payment, for principal, or interest. The defendant, by way of set-off, offered evidence to shew, "that after the execution of the bond, and before the commencement of the suit, the plaintiff had become indebted to him in a sum exceeding the amount of the bond, upon accounts still remaining unliquidated and unsettled between them, as merchants, concerning the sales of merchandize made by the plaintiff, in parts beyond the sea, as agent and factor for the defendant."

It was objected that there was a lapse of more than 17 years, since the date of the last item of the accounts, and no proof given of any subsequent demand of the money now proposed to be set-off; and that the long acquiescence of defendant, as well as the positive bar of the act, must be sufficient to prevent his recovering, or defalking the amount. The Court, however, admitted the evidence, and the jury found a verdict in favour of the defendant, for a balance. And, upon error, the Court were, unanimously, of opinion, that the accounts on which the set-off had been claimed, were not within the act of limitations, and that the evidence was rightly admitted, and affirmed the judgment. *Stiles*, plaintiff in error, v. *Donaldson*. 2 Dallas, 264.

The act in the text does not prescribe the period when a suit on a bond shall be barred, any more than the statute of 21 James 1, c. 16. But on the principle on which those acts were passed, the law will presume payment after a certain length of time. MSS. Reports, Supreme Court. *Fleeson's Executors* v. *King*. Suit brought 25 years after bond was payable. Verdict for defendant. S. C. S. MSS.

And in *Matters' executors* v. *Bullman*, *Dauphin*, *Nisi Prius*, October, 1795, before *Yeates* & *Smith*, Justices.

Debt on bond, dated 1st of August, 1764, for payment of £. 20 with interest, in one year.

The defendant relied on the presumption of payment after so great a lapse of time.

The suit was brought to Sept'r, 1792. A small payment was indorsed on the bond, as having been paid 3d June, 1772, which was sworn by two witnesses to be the *hand writing* of the *defendant*; but another witness, who had the bond in his possession for some time, swore that the indorsement was not on the bond in 1776—but must have been made since. A demand was made from defendant in 1792, before the commencement of the suit, who said he was willing to pay what was due on the bond, but that he had paid £. 10 thereon to *J. M.* in 1771, and appointed a subsequent day for settlement, but did not keep his appointment.

To account for the length of time, plaintiffs shewed, that their testator, by his will dated 3d March, 1770, had devised to his widow certain bonds, which had been assigned to her, and after his death she possessed herself of this obligation, against the consent of at least one of the executors, and held it until the death of *J. M.* who was her second husband, in 1776, when she delivered it up, and died in 1778.

The declarations of the other executor, who was the brother-in-law of the defendant, on the morning of the trial, were given in evidence, that the widow of *Master* had received the bond, with the others from him, and that some part of the bond had been paid, but not to him, nor did he see the money paid.

The Court charged the jury, that as to the *actual* proof of payment, it must be submitted wholly to them. The declarations of the executor, in derogation of his trust, and in favour of his brother-in-law, at that late day, were very suspicious.

On the ground of presumptive payment, arising from length of time, there remained about eighteen and an half years to be accounted for. The bond was payable August 1st, 1765, and from thence to 1st January, 1776, was ten years and five months. Take off the interval from January 1st, 1776, to the 21st June, 1784, under the act of assembly (of March, 1783,) and then recur to 1784, and count to 1792, the time of commencing the suit, the period will be about 8 years and 1 month, making in the whole eighteen and an half years. The law for limitation of actions, does not include bonds and specialties; but the principle which gave rise to that act, extending also to them, it has been determined, that where the limitation act does *not* apply, *that period* shall not be computed in judging of the legal presumption of payment.

In the case of *Oswald's executors* v. *Legh*, (1 Term Rep. 271,) the latest case in the books upon this point, nineteen and an half years, *of itself merely*, were held insufficient to form the presumption; and *Buller, J.* in that case, said, that even with regard to the rule of twenty years, where no demand has been made within that time, that is only a circumstance for the jury to found a presumption upon, and is itself no legal bar. 1713.

But in this case, evidence has been given to repel the presumption. 1. The possession of the bond has been in the widow since the testator's death. 2. The defendant has acknowledged a balance due on it. 3. The defendant has indorsed on it a payment in 1772; all of which tend to weaken, if not wholly to destroy the legal presumption.

Verdict for the plaintiff. MSS. Reports.

A legacy, or trust, are not within the act of limitations, but after a length of time payment will be presumed; yet such presumption may be rebutted by other circumstances. MSS. Reports, Supreme Court.

So, where the declaration stated, that the intestate on the 7th of June, 1769, was indebted to the plaintiff in £. 47. 10. 8. for money had and received to his use, of and from the estate of *Tobias Ritter*, as administrator thereof, and so being indebted, promised to pay, &c. (the request to the now administrators was laid on the 1st June, 1789.) Pleas, *non assumpsit*, and *payment*, and *non assumpsit infra sex annos*.

The plaintiff and intestate were joint administrators of the estate of *Ritter*, and settled their administration account, which was passed in the Orphans' Court of *Lancaster* county; and on the 7th June, 1769, the Orphans' Court settled the sum due to the plaintiff from the intestate, by their decree, to be £. 47. 10. 8. for his advancements beyond what he had received, the chief of the monies having been received by the intestate.

This decree was shewn in evidence as the foundation of the present suit, which was brought to August Term, 1788, in the Common Pleas.

Smith, Justice, held, that the act of limitations applied to this case, (being a general *indebitatus assumpsit*,) and that it forms none of the exceptions thereto. The act is founded in common justice and experience; receipts may be lost, and witnesses will die. Indeed slender proof of an acknowledgment of the demand will take a case out of the act; and in one instance it has been determined, that such acknowledgment pending the suit, may be received in evidence. Here nineteen years elapsed

1713. after the decree, before any suit was brought. But the point was reserved; verdict for the defendants.

A new trial was moved for on the 27th of December following, in bank; but the Court refused to grant a rule to shew cause. *Gemberling* v. *Myers' administrators*, Dauphin, October, 1798, at *Nisi Prius*. MSS. Reports.

The act only takes place from the time when the right of action accrues, and if there be fraud, from the time of its discovery. *Jones* v. *Rees's executors*. Circuit Court, *Fayette* county, October, 1804, before *Yeates & Smith*, Justices.

This was, case in nature of deceit in the testator for affirming negro *Will* to be a slave for life, and selling him to plaintiff; whereas in truth he was a freeman, and afterwards duly liberated. There were also counts for money had and received, and money laid out and expended, at the instance of the testator.

The facts, so far as they relate to this subject were these. About 1786, *Rees* sold the negro to the plaintiff, and received the consideration money. The negro brought a writ of *homine replegiando* against the plaintiff to December term, 1799. The defendants, after the death of *Rees*, were duly notified thereof, and were required to take upon them the defence. In March, 1801, the suit was tried, and a verdict found for *Will*, the plaintiff, with damages, against *Jones*, the defendant, the now plaintiff.

In the present suit, the pleas were *non assumpsit*, and *non assumpsit infra sex annos*.

The Court said, that the act of limitations did not seem to apply to this case. The bar only takes place from the time when the right accrues, and not from the time of making the promise.

The jury are trying a question of actual or constructive fraud. Wherever there is a fraud, the act of limitations is no plea, unless the fraud be discovered within the time; nor even if the fraud be discovered within six years, unless the party were conscious of it.

While the slavery of the negro was uncontested, the plaintiff had no ground to suppose he had been injured or deceived; but when he obtained his liberty in a due course of law, his right of action accrued against the defendants. MSS. Reports.

And in the case of *Smith* v. *Porter*, in the Supreme Court, March, 1807, the opinion of the Court, which states the only question in the cause, was delivered by the Chief Justice, as follows:

This case comes before the Court on a special verdict, and the single question is, whether a debt due on account, and barred by the act of limitations, is revived by the following clause in the will of *Robert Smith*: "I order and direct all my just debts and funeral expenses to be paid." Clauses of this kind are very usual in last wills. It is a form of old standing, probably introduced from *English* precedents. There are some countries, in which it now is, or heretofore may have been useful to direct the payment of debts in a man's will, because it may tend to make certain kinds of property subject to the payment, which otherwise would not have been so. But in *Pennsylvania*, it is altogether unnecessary; because without such direction the whole property of the testator, real and personal, must be applied to the payment of his debts. To give this direction the largest import it will bear, it is no more than a desire of the testator expressed to his executor, that his just debts shall be paid. Whether the debts are just or not, must be left to the judgment of the executor before he makes a voluntary payment. And if upon a candid examination, he thinks a debt not justly due, it would be doing violence to the words of the testator, so to construe them, as to deprive the executor of the legal means of defence by pleading the act of limitations. But an executor is not allowed to plead that act against a just debt; on the contrary, if he knows it to be just, I think it is as dishonest in him to use that plea, as it would be in the case of his own debt. Considering, therefore, the clause in question, according to its obvious meaning, without regard to judicial decisions, it cannot be said that it revives a debt barred by the act of limitations.

But as this Court is bound by the authority of cases adjudged by their predecessors, it becomes necessary to inquire what decisions have been made.

Some period for the limitation of actions is necessary for the peace of society. I believe, that in all enlightened countries, regulations for the purpose have been adopted. Like all other good things, they are liable to abuse; and the indignation which is excited in honest bosoms at an attempt to evade payment of a just debt, by a legal subterfuge, has sometimes produced decisions which, although not now to be contradicted, are scarcely to be reconciled to reason. The slightest acknowledgments of a debt, though very far from any thing like a promise, have been held to be evidence sufficient to justify a jury in finding that there was an actual promise. But the industry of the plain-

tiffs' counsel has not produced a single case in which it has been decided, that a direction in a will like the present revives a debt barred by the statute. It was several times determined between the years 1690 and 1726, that where a testator creates a fund in trust to pay his debts, the creditors barred by the statute shall come in equally with the others. In the year 1727, however, the House of Lords in *England*, reversed a decree which was founded on this principle in the case of *Blakeway* v. the Earl of *Strafford*. 3 Bro. Parl. Ca. 305. In the year 1744, *Lord Hardwicke* states the rule to be, that debts barred by the statute shall be paid out of a trust fund of lands created for payment of debts, although he declares he cannot see any good reason for it. 3 Atk. 107. But in 1754, he says that this principle has been a good deal shaken by the decree of the House of Lords in *Lord Strafford's* case, and that if the case before him had turned upon that point, he should have taken time to consider it. Ambl. 231. In the case of *Legastick* v. *Cowne*, in 1730, *Mosely*, 391, it was expressly decided, that the plea of the statute of limitations is a good bar in a case where a testator *ordered his debts to be paid*. This case is reported by *Mosely*, who does not stand high in reputation; it is probable, however, that the decision was made as reported, because it was but three years after the decision in the House of Lords in *Lord Strafford's* case, and seems to have been founded on it. 1713.

In our own Courts, I know of no decision of the point in question, although I understand, that on more than one occasion, intimations have fallen from different judges unfavourable to the revival of the debt; but as no decision was made, it would not be proper to give weight to these intimations. In point of authority, then, the matter stands thus; there is one decision on the point that the act of limitations is a bar, notwithstanding the direction to pay all just debts; and there is no express decision to the contrary. This being the case, and feeling no inclination to go beyond the principles that have been established, I think myself bound to say, that I do not conceive the direction by *Robert Smith* to pay his just debts, can be fairly construed so as to deprive his executors of the right to plead the act of limitations in such cases as they think proper.

A nonsuit was accordingly ordered. 1 Binney, 209.

See the act of 1785, (post. chap. 1134,) for notes respecting the limitation of actions for real estates.

CHAPTER CXCVII.

An ACT *for establishing Orphans' Courts.*

WHEREAS by certain laws of this province, now in force, several matters of great importance are directed to be done by the Orphans' Courts, which being discontinued by the repeal of the former law of courts, and not hitherto revived, nor effectually supplied by another law, divers orphans, and persons concerned for them, or intrusted with their estates, labour under great inconveniences: *Be it therefore enacted*, That the Justices of the Court of General Quarter Sessions of the Peace in each county of this province, or so many of them as are or shall be from time to time enabled to hold those courts, shall have full power, and are hereby empowered, in the same week that they are or shall be by law directed to hold the same courts, or at such other times as they shall see occasion, to hold and keep a Court of Record in each of the said counties; which shall be styled The Orphans' Court, and to award process, and cause to come before them, all and every such person and persons, who, as guardians, trustees, tutors, executors, administrators, or otherwise are or shall be entrusted with, or any wise accountable for, any lands, tenements, goods, chattels or estate, belonging or which shall belong to any orphan or person under age, and cause them to make and exhibit, within a reasonable time, true and perfect inven-

The Justices of the Court of Quarter Sessions to hold the Orphans' Court.

Their power and duty.