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barred by the statute of limitations, takes the case out of the statute, and revives the original cause of action. So far as decisions have gone on this point, principles may be considered as settled, and the courts will not lightly unsettle them. But they have gone full as far as they ought to be carried, and this court is not inclined to extend them. The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away." The court proceed to observe, that in the case then in judgment, there was "no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not, then, sufficient to take the case out of the act, that the claim should be proved, or be acknowledged, to have been originally just; the acknowledgment must go to the fact that it is still due. In the case at bar, the acknowledgment of J. Clarke is, that he had not discharged the account presented to him, but he does not say, that it was not discharged. His partner may have paid it, without the knowledge of Clarke; and consequently, the declaration of Clarke that he had not himself paid it, and that he did not know whether his partner had paid it, or not, is no proof that the debt remains due, and therefore, is not such an acknowledgment as will take the case out of the statute of limitations."

*320] *FOWLE v. COMMON COUNCIL OF ALEXANDRIA.

Demurrer to evidence.

No judgment can be rendered upon a demurrer to evidence, until there is a joinder in demurrer; and issue cannot be joined upon the demurrer, so long as there is any matter of fact in controversy between the parties.

The demurrer to evidence must state facts, and not merely the evidence conducing to prove them.

One party cannot insist upon the other party joining in demurrer, without distinctly admitting upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove.

Where the demurrer to evidence is defective in these respects, and judgment has, notwithstanding, been rendered upon it for the party demurring, by the court below, the judgment will be reversed in this court, and a new trial awarded.

ERROR to the Circuit Court for the District of Columbia.

February 27th, 1826. This cause was argued by *Webster* and *Swann*, for the plaintiff; (a) and by *Jones* and *Taylor*, for the defendant. But, as it was determined by the court upon the defects in the demurrer to evidence, it has not been thought necessary to report the arguments of counsel.

March 1st. STORY, Justice, delivered the opinion of the court.—

*321] *This is a writ of error from the circuit court sitting at Alexandria for the district of Columbia. The original action was brought against the defendants, to recover damages asserted to have been sustained by the plaintiff, in consequence of the neglect of the defendants to take due bonds and security from one Philip G. Marsteller, licensed by them

(a) They cited, as to the liability of corporations in a private action for neglect of their duties, and consequent damages sustained by individuals, *Yarborough v. Bank of England*, 16 East 6; and *Riddle v. Proprietors, &c.*, 7 Mass. 169.

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as an auctioneer, for the years 1815, 1816, 1817 and 1818, according to the express provisions of the statute in this behalf enacted.

At the trial below, upon the general issue, one of the principal points in controversy was, whether the said Marsteller was, in fact, licensed by the defendants as an auctioneer, during the years above stated ; and both parties introduced a good deal of evidence, for the purpose of supporting or repelling the presumption of the fact. The defendants demurred to the evidence, as insufficient to maintain the plaintiff's action, and the record itself contains the whole evidence introduced at the trial, as well that arising from the testimony of witnesses as that arising from written documents.

There is no joinder in demurrer on the record, which is probably a mere defect in the transcript, as the court proceeded to give judgment upon the demurrer, in favor of the defendants. Without a joinder in demurrer, no such judgment could be properly entered ; and such joinder ought not to have been required or permitted, while there was any matter of fact in controversy between the parties.

*Indeed, the nature of the proceedings upon a demurrer to evidence, seems to have been totally misunderstood in the present case. [*322 It is no part of the object of such proceedings, to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony, or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is, to refer to the court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. This doctrine is clearly established by the authorities, and is expounded in a very able manner by Lord Chief Justice EYRE, in delivering the opinion of all the judges in the case of *Gibson v. Hunter*, before the House of Lords, 2 H. Bl. 187. It was there held, that no party could insist upon the other party's joining in demurrer, without distinctly admitting, upon the record, every fact, and every conclusion which the evidence given for his adversary conducted to prove. If, therefore, there is parol evidence in the case, which is loose and indeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances, which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose, indeterminate and circumstantial, before the court can compel the other side to join *therein. And if there should be such a joinder, without such admission, leaving the facts unsettled and indeterminate, it is a suffi- [*323 cient reason for refusing judgment upon the demurrer ; and the judgment, if any is rendered, is liable to be reversed for error. Indeed, the case made for a demurrer to evidence, is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. The principal difference between them is, that, upon a demurrer to evidence, a court may infer, in favor of the party joining in demurrer, every fact of which the evidence might justify an inference ; whereas, upon a special verdict, nothing is intended beyond the facts found.

Upon examination of the case at bar, it will be at once perceived, that

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the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. The plaintiff endeavored to prove, by circumstantial evidence, that the defendants granted a license to Marsteller, as an auctioneer. The defendants not only did not admit the existence of such a license, but they introduced testimony to disprove the fact. Even if the *324] demurrer could be considered as being exclusively taken to the *plaintiff's evidence, it ought not to have been allowed, without a distinct admission of the facts which that evidence conducted on prove. But when the demurrer was so framed as to let in the defendants' evidence, and thus to rebut what the other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the circuit court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the court, was not a question of law, but of fact.

This being, then, the posture of the case, the next consideration is, what is the proper duty of this court, sitting in error. It is, undoubtedly, to reverse the judgment, and award a *venire facias de novo*. We may say, as was said by the judges in *Gibson v. Hunter*, that this demurrer has been so incautiously framed, that there is no manner of certainty, in the state of facts, upon which any judgment can be founded. Under such a predicament, the settled practice is, to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried.

Judgment reversed, and a *venire facias de novo* awarded. (a)

*325] *PILES and others, Plaintiffs in error, v. BOULDIN and others, Defendants in error.

Statute of limitations.

Under the statute of limitations of Tennessee, of 1797, c. 43, § 4, peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession.

ERROR to the Circuit Court of West Tennessee.

February 15th, 1826. This cause was argued by *Isaacs*, for the plaintiffs in error; no counsel appearing for the defendants in error.

March 10th. DUVALL, Justice, delivered the opinion of the court.—This cause is brought up by writ of error from the judgment of the circuit court for the district of West Tennessee. The lessee of Bouldin and others, who were plaintiffs in the court below, brought an ejectment against Conrad Piles and others, for a tract of land, containing 2500 acres, lying in Overton county, on Wolf river, granted by the state of North Carolina, by patent dated July 10th, 1788, to Thomas and Robert King, who, by deed bearing

(a) See *United States Bank v. Smith*, ante, p. 171.