JOHN F. BOLAND, EXECUTOR OF WALTER JOSEPH BOLAND, DECEASED (DEFENDANT) } APPELLANT;

AND

EDWARD T. SANDELL (PLAINTIFF) AND THE SAID JOHN F. BOLAND (DEFENDANT) ..... } RESPONDENTS.

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*Dec. 10, 11.
*Dec. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of actions—Sufficiency of notice filed under s. 67 (1) of The Surrogate Courts Act, R.S.O. 1937, c. 106, to save claim from being affected by The Limitations Act, R.S.O. 1937, c. 118—Material particulars lacking in notice but supplied in affidavit attached—Whether delivery of a certain unsigned memorandum was effective to avoid operation of The Limitations Act.

This Court affirmed the judgment of the Court of Appeal for Ontario, [1942] O.R. 226, holding that plaintiff was entitled to recover from defendant, executor of B. deceased, upon a certain promissory note made by the deceased to plaintiff, and that defendant was not entitled to recover against plaintiff the amount of a certain account, claimed as owing by plaintiff to the deceased's estate, on the ground that defendant's remedy was barred by *The Limitations Act,* R.S.O. 1937, c. 118.

Held (1) That a certain notice of claim which plaintiff had filed under s. 67 (1) of *The Surrogate Courts Act,* R.S.O. 1937, c. 106, was a substantial compliance with said s. 67 (1), so as to save plaintiff's claim upon the promissory note now sued upon from being affected by *The Limitations Act,* notwithstanding that certain material particulars regarding the promissory note were not given in the notice itself but were given in a verifying affidavit attached thereto.

(2) That the delivery by plaintiff to defendant of a certain memorandum, not signed by plaintiff, in which appeared the sum now claimed as owing by plaintiff to the deceased's estate and a list of payments made which in amount more than covered it (which payments, defendant claimed, were in fact not made on the account now claimed for) did not (even if the memorandum could be regarded as an admission by plaintiff that there was a pending unsettled account; and, *semble,* it could not be so regarded) have the effect of avoiding the operation of *The Limitations Act* against the account claimed to to be owing to the deceased's estate.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) dismissing his appeal from the judgment of Roach J.

In the action, which was commenced by writ issued on June 21, 1940, the plaintiff sued the defendant as executor of W. J. Boland, late of the City of Toronto, in the County

PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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of York, deceased, upon a promissory note made by the said deceased in favour of the plaintiff, dated April 28, 1932, payable three months after date.

On or about April 25, 1938, the plaintiff caused to be filed in the office of the Registrar of the Surrogate Court of the County of York a notice of claim, expressed to be filed pursuant to the provisions of *The Surrogate Courts Act,* R.S.O. 1937, c. 106, s. 67 (1). Sec. 67 (1) of that Act provides that the provisions of *The Limitations Act* shall not affect the claim of any person against the estate of a deceased person "where notice of such claim giving full particulars of the claim and verified by affidavit" is filed as provided for in said section prior to the date upon which the claim would be barred by the provisions of *The Limitations Act.* The notice in question gave the amount claimed to be due and owing and the computation of such amount, in which computation was stated the face amount of the note and its date; but the notice itself did not say whether said deceased became liable on the note as maker or as endorser; it did not say that plaintiff was the payee or that he became a subsequent holder; it did not say when the note matured, nor where it was made payable. The notice stated that "the amount of the said indebtedness is verified by affidavit hereto attached." The attached affidavit said that the deceased signed the note as promissor, that it was dated at Toronto on April 28, 1932, that it was in the principal sum of $3,500 and was payable to the plaintiff's order three months after date at the Bank of Toronto, at St. Catherines, Ontario, and that the note did not specify the rate of interest.

The Court of Appeal held that, "having regard to the nature and purpose of s. 67 (1), what was done in this case was a substantial compliance with it, and accordingly the provisions of *The Limitations Act* do not affect the claim upon the promissory note."

The defendant alleged, by way of defence and by counterclaim, an indebtedness of plaintiff to said deceased for professional services rendered in 1927, as set out in a bill of costs for $5,001.90 forwarded to plaintiff on or about April 20, 1932. Against this claim the plaintiff pleaded (*inter alia*) *The Limitations Act,* R.S.O. 1937, c. 118, particularly ss. 48 and 49 thereof.

The account for said services was rendered in the name of Macdonell & Boland, the members of which firm were

the deceased and the defendant, but the defendant claimed that the account belonged to the deceased himself and had been so regarded and treated by the deceased. At defendant's request, the trial judge made an order adding defendant in his personal capacity as a party defendant and a party plaintiff by counterclaim. The Court of Appeal held that all necessary parties were before the Court to overcome any technical difficulty there might have been, arising from the fact that the account stood or was rendered in the name of Macdonell & Boland, and that, for the purposes of set-off or counterclaim in the action, the account might be treated as if it were the account of said deceased alone.

To avoid *The Limitations Act* the defendant relied upon a certain memorandum of account, not signed by plaintiff, which had been delivered by plaintiff to defendant, in which appeared the said sum of $5,001.90 and a list of payments made which in amount covered it and left a balance against Macdonell & Boland (1). Defendant claimed that the payments set out in the memorandum were in fact not made on said account now claimed for.

Dealing with said memorandum the judgment in the Court of Appeal said:

> This memorandum is not signed by the respondent, even if its contents can be taken to be sufficient to prevent the operation of *The Limitations Act,* and s. 54 of *The Limitations Act,* which requires that to take a case out of the operation of the statute an acknowledgment or promise by words only must be made or contained by or in some writing signed by the party chargeable thereby or by his agent, would seem to prevent the appellant from avoiding the operation of *The Limitations Act* and succeeding in respect of the account.
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> Counsel for the appellant argued, however, that there is a class of case, of which this is one, where the provisions of s. 54 of *The Limitations Act* do not apply. As I understand his argument it is that, while s. 54 requires some writing signed by the party to be charged or by his agent in the case of an acknowledgment of a debt or a promise to pay, either conditional or unconditional, yet where there is an admission of a pending unsettled account between the parties that is neither an acknowledgment nor a promise to pay coming within s. 54 of the statute, it is as effective as either of them to take the claim out of the operation of the statute. * * *

The Court of Appeal held against that contention. It further said:

> Even if the signature of the party to be charged could be regarded as unnecessary, I find it difficult to read Ex. 13 [the said memorandum] as an admission by the respondent that there is a pending unsettled account. * * *

(1) The memorandum is set out in the judgment of the Court of Appeal, [1942] O.R. 226, at 235; [1942] 2 D.L.R. 404, at 410.

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In the appeal to this Court, defendant's counsel raised the question of defendant's right of "retainer"—his right, notwithstanding the barring of remedy by *The Limitations Act,* to retain and apply, as against any balance due to plaintiff from the deceased's estate on the promissory note sued upon, the said indebtedness claimed to be owing by the plaintiff to the estate and which remains and forms part of the estate; referring to *Noecker* v. *Noecker* (1), *In re Akerman; Akerman* v. *Akerman* (2), and other cases.

D. L. McCarthy K.C. for the appellant.

J. L. Y. Keogh for the respondent.

The judgment of the Court was delivered by

KERWIN J.—At the conclusion of the argument of counsel for the appellant, the Court intimated that it would not require to hear from the respondent on the question as to the effect of subsection 1 of section 67 of *The Surrogate Courts Act.* This is a comparatively new provision but we see no reason to disagree with the decision of the Court of Appeal for Ontario as to its meaning. The provisions of *The Limitations Act,* therefore, do not affect the respondent's claim upon the note.

As to the account of $5,001.90, which is set up as being an account for services rendered by the late Walter J. Boland to the respondent, an examination of the record convinces us that this account was an account of the legal firm of Macdonell and Boland. The question, therefore, raised for the first time in this Court, that there is a right of retainer by the appellant as executor of his brother's estate, does not arise and need not be considered.

On the remaining point that, irrespective of section 54 of *The Limitations Act,* there was an admission of a pending unsettled account between the respondent and Walter J. Boland, effective to take the claim out of the operation of the statute, we agree with the Chief Justice of Ontario and have nothing to add.

The appeal should be dismissed with costs to be paid by the appellant John F. Boland as executor of the estate of Walter Joseph Boland according to the usual form in such cases.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Snyder.*

Solicitors for the respondent (plaintiff): *Bench & Cavers.*

(1) (1917) 41 Ont. L.R. 296. (2) [1891] 3 Ch. 212.