RECENT ENGLISH DECISIONS.

Court of Common Pleas.

PENNY (EXECUTOR OF PENNY) *vs.* BRICE.

1. Where a person dies before the expiration of six years from the time when a cause of action first accrued to him, his executor, if he intends to sue upon that cause of action, must, in order to prevent the operation of the Statute of Limitations, commence his action before the expiration of the six years, and he is not entitled to any further time for the purpose of investigating the affairs of the deceased.

2. The rule laid down in 2 Williams on Executors 1706, 1 Tidd's Pract. 28, and 2 Chitty's Archbold's Prac. 1212, from Buller's N. P., declared erroneous.

Special case stated for the opinion of the court.

This cause having proceeded as far as declaration, was by an order of BYLES, J., referred under 17 & 18 Vict. c. 125, to the certificate of a barrister, who certified as follows:—

The action was brought to recover the balance of an account for money lent and money paid due from the defendant to the plaintiff's testator at the time of his death.

It was contended by the defendant's counsel that the whole demand was barred by the Statute of Limitations, and I find that it was except as to the sum of 187*l.* 13*s.* 5*d.* As to that sum, I state the following case for the opinion of the court:—

The cause of action for the sum in question arose in England, while the defendant was beyond the seas in India, whence he returned some time in September 1856, and remained.

The other material facts arose in the year 1862, as follows:—

The plaintiff's testator died on the 31st of May, never having brought any action. The plaintiff, his surviving executor, proved the will on the 12th July. On the 1st October, six years had elapsed since the defendant's return to England. On the 5th November this action was brought. The plaintiff's counsel contended that the action had been brought within a reasonable time after the death of the testator, and therefore was not barred. The defendant's counsel contended that the action was barred on the expiration of the six years, and he denied that the action had been brought within a reasonable time. In so far as that question may be treated as one of fact to be found by me for the court, I find that the action was brought within a reasonable time after the death of the testator. The question for the opinion of the

court is, whether as to the sum in question the action is barred by the Statute of Limitations: Williams on Executors, 5th edit. vol. 2, p. 1706. If it is not, judgment is to be entered for the plaintiff for that sum. If it is, judgment to be entered for the defendant barring the action.

Mellish, Q. C. (*Cowie* with him), for the plaintiff.—The passage from Williams on Executors, 5th edit. vol. 2, p. 1706, cited in the case by the arbitrator, is as follows:—"If the executor take out proper process in *assumpsit* within a year after his testator's death, the six years not having elapsed before, though they expire within that period, yet, it is said, that will be sufficient to take the case out of the statute." The note to this passage is: "Tidd 28, 9th edit., citing *Cawer* vs. *James*, Bull. N. P. 150; but see S. C. reported in Willes 255, *nom. Karver* vs. *James*." On referring, however, to the report in Willes, the case does not bear out the proposition. *Rhodes* vs. *Smethurst*, 4 M. & W. 42, was a case where the debtor died and his executor was not sued till after the expiration of six years from the time when the cause of action accrued, and the statute was held to operate. [WILLES, J., referred to *Curlewis* vs. *The Earl of Mornington*, 7 E. & B. 283, affirmed in Exchequer Chamber. There is nothing in the present case to attach the equity of sect. 4 of the statute.] In the absence of authority I can hardly ask the court to take the case out of the operation of the statute.

Coleridge, Q. C. (*J. C. Mathew* with him), for the defendant, said that it would be unnecessary for him to address the court.

[The points for argument delivered by the defendant were: 1. That the expiration of six years from the return of the defendant to this country was under the circumstances a bar to the plaintiff's action. 2. That 21 Jac. 1, c. 13, s. 3, expressly requires that an action of *assumpsit* shall be commenced within six years after the cause of action accrued; and that this general rule applies, except in cases which fall within the terms or within the equity of sect. 4 of the same statute. 3. That cases within the equity of the said 4th section are those in which actions have been begun within six years, and have abated without default of the plaintiff. 4. That the passage in Williams on Executors, 5th edit. vol. 2, p. 1706, referred to in the case, is not supported by the authority cited as reported in Willes's Reports 255. 5. That the plaintiff, as executor, might have sued without obtaining probate, and that the action was not begun within reasonable time.]

ERLE, C. J.—There has been no loss of any action commenced by the testator. Judgment must be for the defendant.

WILLIAMS, J.—The passage in Williams on Executors is inserted out of deference to the learned author of Tidd's Practice from which it is cited, but the words "it is said" are added to show that it is merely inserted for that reason. If an action had been brought by the testator, a question might have arisen as to whether the executor had continued the action within a reasonable time, but that not being so, the case seems to fall within the general rule that the statute having begun to run continues to do so.

WILLES and KEATING, JJ., concurred.

The very high authority of Williams on Executors and Tidd's Practice, in this country as well as in England, makes the correction in the foregoing case of great importance. The rule is also stated positively in Chitty's Archbold's Practice, vol. 2, p. 1212, citing Buller's N. P. 150. It is not a little remarkable, that these works should have gone through so many editions, both in England and the United States, at the hands of very careful and competent editors, without so much as a *quære* of this passage; but what is perhaps still more to be wondered at, is the fact that a case decided so long ago as 1741 (the date of Cawer *vs.* James), and reported in a notoriously second-rate book like Buller's Nisi Prius, should have been regarded as law for more than a hundred years, without an occasion arising to bring the point before a court for adjudication. When it does come up it receives a dismissal so summary as to be almost disrespectful to even an error, which is so ancient.

In the United States, although the statute of 21 James 1 is still very generally in force, this point does not appear to have been decided in any reported case, and indeed is not very likely to have arisen, as in nearly all the states there are statutory provisions in regard to the settlement of decedents' estates, which regulate the Statute of Limitations in regard to executors and administrators. There are very many cases, however, upon points closely resembling the one in discussion, and in them, singularly enough, the principle of a year's time allowed the executor does not appear to have been even contended for, the claim usually pressed with most force being for the exclusion, in computing the period of limitation, of the time between the death of the decedent and the granting of letters to his executor or administrators. The courts, however, have with great uniformity adhered to the ground, that where the statute has commenced to run the death of neither party stops or suspends it: Jackson *vs.* Hitt, 12 Verm. 285; Stewart *vs.* Spedden, 5 Md. 448; Baker *vs.* Baker, 13 B. Mon. 406; Beauchamp *vs.* Mudd, 2 Bibb 537; Johnson *vs.* Wren, 3 Stew. 180.

It may be interesting to our readers to note, that Mr. Justice WILLIAMS has very recently retired from the bench in consequence of increasing deafness. He was appointed in 1846, and has always been regarded as one of the ablest men on the English Bench, which of late years has not been so strong as it should be. His successor is Mr. MONTAGUE SMITH, a Queen's