

applied on a balance of past indebtedness, the dealings of each year would constitute a transaction by itself, and the balance would be a new item on which a right of action accrued at the end of each year that would be barred in six years. When the balance was struck, it was no longer the open running account, but a closed account stated, on which the statute would run if not applied as expected. Neither would the balance be a new item in a new account, as such was not the agreement. It formed no item in the open running account. *Bank v. Knapp*, 3 Pick. 96, 109; *Belchertown v. Bridgman*, 118 Mass. 486, 487. But in this case no balance has ever been struck. No part of the annual statement of accounts has ever been performed, or the understanding in any way recognized or renewed by any acknowledgment or new promise as to past transactions. *Brown v. Latham*, 58 N. H. 30. The agreement as to stating and applying the account annually cannot be discarded in part and retained in part: it must stand or fall as a whole.

*Judgment for the plaintiff.*

CARPENTER, J., did not sit: the others concurred.

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GAGNON, *Adm'r.* v. CONNOR.

64	276
66	476
64	276
87	194
64	276
70	211

In a suit seasonably brought, the declaration may be amended after the time when a new action for the same cause would be barred by the statute of limitations.

The question of fact whether justice requires an amendment of a declaration, and the question of fact raised by a motion to set aside a verdict on the ground of excessive damages, are determinable at the trial term.

CASE, for personal injuries, brought within two years of the intestate's death. Laws 1879, c. 35. Plea, the general issue. At the trial, after the expiration of the two years, the plaintiff was allowed, subject to exception, to amend his declaration. Verdict for the plaintiff, which the defendant moved to set aside on the ground of excessive damages. The motion was denied, and the defendant excepted.

*Sulloway, Topliff & O'Connor*, for the defendant.

*Burnham & Brown (Joseph Le Bœuf with them)*, for the plaintiff.

DOE, C. J. In *Brigham v. Feste*, 2 Pick. 420, the writ was abated because it contained no declaration. The law allows an insufficient declaration to be amended for the purpose of curing a defective statement of the cause of action. In a suit seasonably brought, the declaration may be amended after the time when a new action for the same cause would be barred by the statute of limitations. *Merchants' Bank v. Stevenson*, 7 Allen 489, 490. In that case, and in *Wiley v. Yale*, 1 Met. 553, 555, an amendment was denied on the ground that as a matter of fact justice did not require it. In this case, the question of fact whether justice required the amendment, and the question of fact raised by the motion to set aside the verdict on the ground of excessive damages, were determinable at the trial term, and no error of law appears. *Merrill v. Perkins*, 61 N. H. 262.

*Judgment on the verdict.*

SMITH, J., did not sit: the others concurred.

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LANE v. BARRON.

A declaration against a surviving partner as endorser of a note may be amended by the addition of a count against him as an individual endorser.

ASSUMPSIT. Plea, the general issue, and the statute of limitation. Replication, a new promise within six years. Facts agreed.

*Salloway & Topliff*, for the plaintiff.

*R. E. Walker, D. Cross, and J. L. Spring*, for the defendant.

DOE, C. J. The defendant is sued as endorser of notes which, within six years, he promised to pay. The notes were payable to a firm of which he was a member, and were endorsed by the firm, and also by him. If the action is brought against him as surviving partner, another count, declaring against him as an individual endorser, will justly dispose of the question of the capacity in which he made the new promise. The plaintiff's foreclosure of the mortgage by which the notes were secured was a payment to the amount of the value of the land. *Dearborn v. Nelson*, 61 N. H. 249; *Fletcher v. Chamberlin*, 61 N. H. 438, 493, 494. The value is a matter of fact to be determined at the trial term. The debt is not barred by the statute of limitations. There is nothing to avoid the new and absolute promise.

*Case discharged.*

SMITH, J., did not sit: the others concurred.