PETTUS *vs.* HARRIS.

Suit brought 31st July, 1849, on a bond due 5th July, 1841: plea, limitation: replications setting up the absence of defendant from the State, under *sec.* 20, *ch.* 91, *Rev. Stat.*, held bad, on demurrer, because that section of the limitation law had been repealed before the replications were interposed, citing *Calvert, use, &c. vs. Lowell,* 5 *Eng. R.* 155.

Replications alleging that defendant prevented the institution of the suit within the bar, by absconding, &c., under *sec.* 29, *ch.* 99, *Digest,* held bad, because they did not aver that defendant was within the State when the cause of action accrued, or at some time between the accrual of the cause of action and the expiration of the limitation.

On demurrer, judgment is given against the party committing the first error in the pleadings.

Appeal from the Sevier Circuit Court.

On the 31st July, 1849, Allen T. Pettus commenced an action of debt, by attachment, against William R. Harris, in the Sevier circuit court, on a writing obligatory for $171.25, dated 5th of July, 1841, payable to Rob. Wilson, at date; by Wilson assigned to Penny, and by him assigned to plaintiff.

Defendant pleaded that the cause of action did not accrue within five years before suit brought.

To which plea, plaintiffs filed six replications, as follows:

1. *Precludi non,* because, on the 5th of July, 1841, the day on

which the cause of action accrued, defendant was not a citizen or, or resident, or domiciled, in the State of Arkansas; and was not a subject of the laws of said State, or entitled to the protection thereof; and said defendant, on said day, and after the cause of action accrued, left the said State, and resided and remained out of its limits from thence continually up to, and was so absent from and resided out of the limits of said State on the 14th December, 1844, and up to and within five years next before the institution of this suit, whilst plaintiff and his assignors were all the while residents of the State, &c.

2. *Precludi non*, because said defendant was out of the State of Arkansas, and resided beyond the limits thereof, when said cause of action accrued, to wit: on the 5th July, 1841, and continued to remain and reside out of the State from thence up to within five years next before the commencement of this suit, &c.

3. *Precludi non*, because, after the accrual of said cause of action, to wit: on the 6th July, 1841, defendant departed from, and resided out of the State, and from thence continuously up to, and on the 14th Dec., 1844, remained out of the limits of the State; and from the accrual of said cause of action, up to said 14th of December, 1844, defendant never resided or was domiciled in said State, and between said periods was not in fact in said State the term of ten days; and so plaintiff in fact says that the period said defendant was in said State after the accrual of said cause of action, and before the 14th December, 1844, added to the period elapsed from said 14th December, 1844, up to the 31st July, 1849, when this suit was commenced, does not constitute the period and term of five years, &c.

4. *Precludi non*, because said defendant has not been a citizen, resident or inhabitant of the State of Arkansas, or been in fact within, or domiciled within said State for the term of five years, between the execution of said writing obligatory and the institution of this suit, &c.

5. *Precludi non*, because plaintiff says that the said defendant prevented the institution of any suit against him, or any pro-

ceedings against his property, for the recovery of said debt in the declaration mentioned, within five years next after the accrual of said cause of action, and up to the time of the institution of this suit, solely by fraudulently keeping himself and property beyond the jurisdiction of this State, and by fraudulently concealing himself and property, when in the State, in such manner that the process of law could not be served on him personally, or his property seized, and this, &c.

6. *Precludi non*, because plaintiff says that said defendant, solely by his own fraudulent conduct in concealing himself and his property, so that no legal process could be served on him, or his property seized for the satisfaction of said cause of action, prevented said plaintiff from instituting suit therefor until within five years next before the institution of this suit; and by the said fraudulent and improper conduct of said defendant, it was rendered impossible for said plaintiff to institute any action, or suit, whatever, on the said cause of action, in said declaration mentioned, within five years after the accrual of said cause of action, and until within less than five years next before the institution of this suit, and this, &c.

Defendant demurred to the 1st, 2d, 3d and 4th replications, upon the ground (among others) that the statute upon which they were based had been repealed. The court sustained the demurrer. He also filed four rejoinders to the 5th, and three to the 6th replication, in substance, as follows:

To the 5th replication—

1st. A denial of the truth of the allegations of the replication, concluding to the country.

2d. That suit might have been instituted against defendant in this State for the debt in the declaration mentioned within five years next after the said cause of action accrued: concluding with a verification.

3d. That, at the time the cause of action accrued, defendant resided and was domiciled, and from thence hitherto has continued to reside and be domiciled within one mile of the line of

the county of Sevier and State of Arkansas, in which county said plaintiff, and the holder and owner of said cause of action, during all the period aforesaid, resided; and that defendant, from the time said cause of action accrued, and until the commencement of this suit, was in the habit of visiting and frequently coming into said county of Sevier—*absque hoc,* traversing the allegations of the replication, and concluding to the country.

4th. That defendant never was a resident citizen of, or domiciled within, the State of Arkansas: concluding with a verification.

To the 6th replication—

1st. Traversing the matter of the replication.

2d. Same in substance as the 3d rejoinder to the 5th replication.

3d. Same as the 4th rejoinder to the 5th replication.

The plaintiff demurred to the rejoinders, the court held the replications bad, and overruled the demurrer. Plaintiff rested, and final judgment was given for defendant.

PIKE & CUMMINS, for the appellant, contended that, under the 20*th sec. of ch.* 91, *Rev. Stat.,* prohibiting certain debtors from availing themselves of the statute of limitations, the plaintiff had five years from the 14th December, 1844, the date of the repeal, within which to institute suit, and therefore the replications were sufficient answers to the plea.

WATKINS & CURRAN, contra. The 20*th sec. of ch.* 91. *Rev. Stat.,* was repealed by the act of December, 1844, and was no reply to the plea. (*Calvert, use, &c. vs. Lowell,* 5 *Eng.* 147.) The prohibition contained in the 20*th* and 26*st secs. ch.* 91, *Digest,* embraced only citizens of the State, and did not extend to citizens of other States, who had never been within this State after the accrual of the cause of action.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first four replications filed to the defendant's plea of the

statute of limitations, were predicated upon the 20*th sec. of ch.* 91, *Rev. Stat.* That section was expressly repealed by the act of 1844, and as a necessary consequence, the privileges conferred by the former where thereby taken away by the latter. We consider it wholly unnecessary therefore to enter upon a discussion of the merits of such of the replications as are based upon the repealed section of the act of 1839, as the effect of that repeal has been directly and emphatically declared by this court in the case of *Calvert, use Lawson vs. Lowell,* (5 *Eng. R.* 155.) This court, in that case, said that, "As to the first four replications, they were bad for the reason that they were predicated upon a section of the act of 1839 (*Rev Stat., ch.* 91, *sec.* 20) that had been expressly repealed by the act of December 14, 1844." The court below, therefore, ruled correctly in sustaining the demurrers to the first four replications.

The next question to be determined is, whether the court erred in not overruling the demurrer to the rejoinders, to the fifth and sixth replications, upon the ground that the replications themselves were bad, and that the rejoinders, whether good or bad, were all-sufficient for the replications. The fifth and sixth replications were based upon the 26th section of the act of 1839, already referred to. That section provides that "If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented. These two replications are substantially the same. They are both rather inartificially drawn, yet they are believed to be a substantial compliance with the 26th section of the act of 1839. It is objected that they do not aver that the defendant below ever was in the State of Arkansas. The fifth alleges that he prevented the institution of the suit by fraudulently keeping himself and his property beyond the jurisdiction of this State, and by fraudulently concealing himself and his property when in the State, &c.; and the sixth charges that he prevented suit, &c., solely by

his own fraudulent conduct in concealing himself and his property, so that no legal process could be served upon him or his property seized, &c. The section, upon which these two replications were based, was manifestly designed as an exception to the general limitation law, and that upon the happening of any one of the causes specified or contemplated by it to arrest its operation during the continuance of such cause. Such being the sole object of the section referred to, it follows, as a necessary consequence, that, in order to give it force and effect, the defendant, who is proposed to be brought within such exception, must have been within this State at the time of the accrual of the cause of action, or at some time thereafter and before the expiration of the time limited for the institution of the suit. It was absolutely essential, in order to deprive the defendant below of the benefit of the general limitation act, and to bring him within the scope of the exception, to show that he was in the State at a time when the statute had commenced running, and that he perpetrated the act complained of before it actually run out and become a fixed and perfect bar. These are material, traversable facts, and as such are essential to be averred in a replication predicated upon the 26th section of the act of 1839. It is not alleged in either of the replications, in expresss terms, that the defendant ever was within the State of Arkansas, much less is it averred that he was within it at such time as the statute would have run against him. Where any party attempts to bring another within a particular saving or exception, he is required to state with distinctness and particularity all such facts as are essential to bring him within such exceptions. It may be that the defendant never was within this State until the bar had become perfect and fixed, and, if so, he had the unquestionable right to show it in his defence; which he could not do unless it had been charged against him in the replication. True it is that he is charged with concealing himself and his property beyond the jurisdiction of this State, and of fraudulently concealing himself and property when in the State, and it is alleged that by so doing he prevented the institution of any suit against himself or any

proceeding against his property within five years next after the cause of action accrued and up to the time of the institution of this suit. Every allegation in these replications may be literally true, and yet the defendant may never have been within this State since the accrual of the cause of action and before the bar became perfect and complete. The fifth and sixth replications were therefore bad, and, as a necessary consequence, the plaintiff's demurrer to the defendant's rejoinders, extending back to the defects in his own pleading, the court ruled correctly in overruling such demurrers, regardless of any defect in the rejoinders.

The judgment of the court below is therefore in all things affirmed.

PETTUS *vs.* HARRIS.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

This case is the same in every essential particular as the one decided at the present term between the same parties, and, as a necessary consequence, the law applicable to it must be the same.

The judgment therefore is in all things affirmed.