

STATE BANK *vs.* ARNOLD ET AL.

Action of debt on a note; plea, limitation; replication that plaintiff brought a former suit within the period of limitation, suffered a non-suit on the 7th March, 1849, and commenced this action within one year thereafter &c.; rejoinder, *nul tiel record*, and issue; the record of the former suit offered in evidence by plaintiff, showed a dismissal of the case on the 6th of March, 1849: HELD, that a judgment by dismissal or non-suit, was in effect the same, and the variance immaterial, as decided in *The State Bank vs. Magness et al., ante*.

HELD, further, that the allegation in the replication as to the particular day of the term on which the judgment in the former suit was rendered, was immaterial—the whole term being but one day in contemplation of law—and therefore the variance between the allegation and the record offered in evidence in respect to the day of the term on which the judgment was rendered was immaterial.

Writ of Error to Independence Circuit Court.

Action of debt by the Bank of the State against Arnold, Magness and Arnold, on a note. Plea, limitation; replication, former suit within the bar, non-suit 7th March, 1849, and this suit commenced within one year thereafter; rejoinder, *nul tiel record*, and issue. The record of the former suit offered in evidence on the trial by plaintiff, showed a dismissal of the case on the 6th March, 1849—finding and judgment for defendants, bill of exceptions, and error brought by plaintiff.

BEVENS, for the plaintiff. If a record of one day of a term be

pleaded and a record of another day be brought in: this is no variance, for the whole term is as but one day in the eye of the law. 2 *Esp. N. P.* 436.

The judgment of dismissal in the circuit court, March term, 1849, meets the statute. (*Dig. ch. 99, sec. 24, page 699,*) the legal effect of a judgment by *non-suit* and *dismissal* being the same.

BYERS & PATTERSON, contra, contended that the proof materially varied from the allegation in that the replication averred that the plaintiff suffered a non-suit in the former suit, and the record offered was of a suit that had been adjudicated upon by the court and judgment of dismissal rendered. When a statute creates certain exceptions all others are excluded; and a party to bring himself within the benefit of *sec. 24, ch. 99 Digest*, must show that he comes within its terms. There was also a variance between the allegation and proof as to the date of the dismissal. The same certainty ought to be adhered to in setting out a note or record, and in describing a note such variance would be fatal.

Mr. Justice WALKER delivered the opinion of the Court.

In this case two points of variance between the allegation and proof are raised. The first has been settled at the present term of the court by the decision of *The Bank vs. Magness et al.* It is there held that the legal effect of the judgment by dismissal or non-suit, so far as the question before us is concerned, is the same; and consequently the alleged variance is immaterial.

The second ground of objection is that the replication states the judgment of non-suit to have been entered on the 7th, whilst the evidence offered shows a judgment rendered on the 6th of March, 1849; both dates of the same term. The particular day of the term on which the judgment was rendered is wholly immaterial. The whole term is but one day in contemplation of law. The record offered proved a judgment rendered at the same term as that set forth in the replication. And if the term in contemplation of law is held as one day, then the day set forth

in the pleading and that shown in evidence, being of the same term, is in contemplation of law one day, and consequently there was no variance in this respect.

There being no other alleged variance between the allegation and proof, and we find none upon inspection of the record, we think the court erred in rejecting the evidence and finding the issue for the defendant.

Let the judgment be reversed.

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11/349. Dist'd. in Mason v. Bull.
26-167.