

## STATE BANK vs. RODDY ET AL.

Action against two of three makers of a promissory note. plea limitation; replication that plaintiff commenced a former suit on same note against defendants, within the bar, suffered a non-suit, and brought the present action within a year thereafter. Under an issue to this replication, plaintiff offered in evidence a record of a former suit against all the makers of the note, which the court below ruled out for variance: HELD, That the variance was immaterial, that it was sufficient to support the replication that the former suit was against defendants, as held in the *Bank v. Gray, ante*.

*Writ of Error to Jackson Circuit Court.*

This was an action of debt by the Bank of the State, against Thomas A. Roddy and George J. Hatch, on a note executed to the Bank by the defendants and one John Roddy, not sued.

The pleadings, and result of the case below, are stated in the opinion of this court.

HEMPSTEAD AND BEVINS for the plaintiff. That there was no variance between the record offered in evidence and that set out in

the replication, because in the former it appeared that others also were sued at the same time with the defendants in the former suit. See *Bro. Abr. Pl.* 4. 2 *Esp. N. P.* top page 435, 748—*Leach C. L.* 179. 1 *Stark. Ev.* 417. *Rex v. Powell, Ryan & Wood* 101. 2 *Phil. Ev.* 500. *Rex v. Benson*, 2 *Camp.* 508. 1 *Stark. Ev.* 418, 415, 424. 7 *Greenl. Rep.* 131. The replication averred a former suit against the defendants—the record proved the truth of the averment. It was certainly immaterial how many others were sued at the same time.

BYERS & PATTERSON, contra.

Mr. Justice WALKER, delivered the opinion of the Court.

To the plea of the statute of limitations, the plaintiff replied a former action commenced within the statute bar, a non-suit and the commencement of the present action, upon which issue was taken.

Upon the trial, the plaintiff offered as evidence of the commencement of her first action, the petition and summons issued upon it: but the defendant objected to its introduction for variance, and the circuit court sustained his objection. The only perceivable ground of objection to the record is, that the first action was commenced against other makers of the same note which are not sued in the present action. The defendants in this suit, were, however, parties also to the first suit. As we have repeatedly decided, the question is not whether a joint liability exists against the makers of the note, but whether a former suit was commenced against the defendants in this suit on the same cause of action. In such case, it has been decided that it is no variance that other parties appear to have been sued in the first action not declared against in the second. *State Bank v. Magness et al.*, 6 *Eng.* 344. *State Bank v. Sherrill*, 6 *Eng.* 334. *State Bank v. Isaac Gray*, decided at the present term. (*Ante.*)

The circuit court erred in excluding the record as evidence; and for this error the judgment must be reversed, and the cause remanded to be proceeded, in according to law.