WOODS *vs.* STATE BANK.

Suit by the Bank of the State, commenced 18th February, 1848, on a note due 1st April, 1844. Defendant plead the limitation act of three years; plaintiff replied a payment on the day of the maturity of the note; and insisted that the effect of such payment, under the Liquidation Act of 31st Jan'y, 1843, was to renew the note for twelve months, and that the statute would not commence to run until the expiration of that period—But HELD, that in the absence of special allegations in the plaintiff's replication to bring the case within the provision of the Liquidation Act referred to, the general law must govern; that the statute run from the date of the payment, and the note was barred.

The Bank could not properly prove the contents of a receipt executed by the Financial Receiver to defendant for a payment on the note, without notice to him to produce it, &c.

The plaintiff having obtained judgment, the cause is reversed, and a repleader awarded, to enable the Bank to amend her replication, &c.

Writ of Error to Pulaski Circuit Court.

On the 18th February, 1848, the Bank of the State brought suit, in Pulaski Circuit Court, against Moses R. Woods, on the following note:

STATE OF ARKANSAS,
$650. County ———, 1 April, 1843.

Twelve months after date, we, Moses R. Woods, as principal, and Reuben Raynes and B. J. McHenry, jointly and severally, promise to pay to the Bank of the State of Arkansas, or order, six hundred and fifty dollars, negotiable and payable at the principal Bank in the city of Little Rock, without defalcation for value received. Witness our hands, (and the Financial Receiver of said Bank is hereby authorized to cause the date of renewal to be inserted.)

MOSES R. WOODS,
R. RAYNES,
B. J. McHENRY."

"Endorsed credit:

For curtail on 1st April, '44, $70;

Interest on $580 to 1st April, '45, $40.60."

The declaration is in the usual form in debt, describing the note, and alleging non-payment.

The defendant plead 1st, payment: 2d, *nil debet,* and 3d, that the cause of action did not accrue to plaintiff at any time within three years next before the commencement of the action.

The plaintiff took issue to the 1st and 2d pleas, and replied specially to the third, "That the said defendant, previous to the institution of this suit, *to wit:* on the 1st day of April, 1844, made a certain payment on said promissory note, amounting to the sum of one hundred and ten dollars and sixty cents, and that said cause of action did accrue within three years previous to the institution of this suit," &c.

To which replication the defendant rejoined "that the said

cause of action did not accrue to the plaintiff within three years next before the commencement of this suit," &c.; to which plaintiff took issue.

The issues were submitted to the court, sitting as a jury, the court found for the plaintiff, and gave judgment for balance of debt, $580, with interest, &c.

The defendant moved for a new trial on the grounds that the finding was contrary to law and evidence, and that the court admitted irrelevant and incompetent evidence on the trial: the motion was overruled, and defendant took a bill of exceptions setting out the evidence.

From the bill of exceptions, it appears that, on the trial, the plaintiff read in evidence the note, and payment endorsed, as above copied; and then introduced John H. Crease, as a witness, who testified that on the 1st April, 1844, the note sued on was in his care and control as Financial Receiver of the Bank, and as such Receiver, acting under the Liquidation Act of 31st Jan'y, 1843, he received, on the 1st April, 1844, from Edward Woods, the brother and agent of defendant, Moses R. Woods, the sum of $110.60, being for curtail required on said note, and for twelve months interest on renewal of said note up to the 1st April, 1845, and gave a receipt to said Woods for the money; and that it was in renewal of his note, as above stated, up to 1st April, 1844.

On cross-examination, witness stated that he did not know whether Edward Woods was the agent of Moses R. Woods, or not: nor did he know that he was authorized to make payment—that it was enough for him that the money was paid. Neither the principal, nor his securities in the note, was present when said payment was made, nor did he know that either of them authorized said Edward to make such payment, nor did he know whether said securities assented to the payment, and arrangement made by said Edward as aforesaid. Witness executed a receipt for the aforesaid sum of money, in the name of Moses R. Woods, and handed it to Edward, as his agent, and at the same time entered said credit in a book kept for that purpose in Bank. Said Edward was in the habit of doing the banking business of said

Moses R. Woods. Witness was asked if he ever knew the said Edward did attend to any other banking business of the said Moses R., than the transaction above spoken of? He answered he did not, but he presumed he attended to the former transaction in bank, when the note in question was given.

The defendant objected to the testimony of the witness as to the contents of the said receipt, and moved the court to exclude and disregard the same, on the ground that the receipt would be the best evidence, and that no call had been made on him for its production, and that he had no knowledge of any such receipt being given, which motion the court overruled.

Defendant brought error.

The first point stated in the opinion of the court in this case, was argued at length by JORDAN, and PIKE & CUMMINS, for the plaintiff.

LINCOLN, CARROLL, and S. H. HEMPSTEAD, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

We have considered the main question discussed in this case, as to when the statute of limitations begins to run upon notes executed to the State Bank under the provisions of the 9th, 10th and 11th sections of Liquidation Act, approved the 31st Jan'y, A. D. 1843, (*Pamph. Acts, p.* 80.) and are prepared to decide it; but, upon a more careful examination of the transcript, find that that question does not arise upon this record.

The declaration is in the usual form, upon a note bearing date the 1st April, 1843, payable twelve months after date. To this, the bar of the statute of limitations was interposed by plea, and to remove it the Bank replied specially that the defendant made a payment on the note in question on the 1st day of April, 1844, but alleged no other facts.

Now, if to this replication a demurrer had been interposed, it is perfectly clear that the law would have been for the defendant. Because the promise alleged in the declaration being to pay

twelve months after the first day of April, 1843, the note matured at that time, and the cause of action accrued under the general law, immediately upon default of payment, in accordance with the alleged promise. And as the payment set up in the replication was alleged to have been made on the day of the maturity of the note, under the general law, its effect could not under that law, defer the time when the statute would begin to run, and consequently the bar was perfect on the 1st day of April, A. D. 1847, more than ten months before this action was commenced.

Nor could this result have been avoided by any obligation upon the court to apply the provisions of the three sections cited of the liquidation statute to the state of facts as shown by the pleadings. Because it is manifest that these provisions of law are applicable only to a particular class of debtors, and never did apply to every person, who might, after the day when that statute took effect, execute a note to another person at twelve months with satisfactory security; nor to every person who might execute such a note to any bank; nor indeed did they ever apply to every person who might execute such a note to the State Bank itself after that day, as is apparent by the further provisions of the twelfth (§ 12) section of the statute for the sale of "property purchased for the use and benefit of the bank," and of certain "contingent interests" of the bank and branches "for cash in hand or upon a credit not to exceed one year, upon the purchaser executing a note to said bank with good and sufficient security, to be approved by said Receivers." Therefore, there could not have been any place for the court to have applied the provisions of the three first cited sections of the statute, unless in addition to the fact of payment it had been also alleged in the pleadings, that the note in question was one of those that were executed under these provisions.

And this is clear, when it is remembered that for any thing that appears to the contrary in the pleadings, the note in question may have been, in fact, one of those that were executed under the provisions of the twelfth section on a sale of property, or of

some contingent interest of the bank or one of its branches; and, if so, stood upon a different footing as to the question of law mooted.

It is true, however, that in the case at bar, a demurrer was not interposed, and that issue of fact was taken on the special replication. Nevertheless upon the trial the defendant below excepted to a part of the testimony, and was overruled, and moved for a new trial, as well upon this ground as upon that, that the finding of the court was contrary to law and evidence.

As no foundation was laid for verbal testimony touching the receipt, the witness ought not to have been permitted to speak of it. But if this objection was waived, and it was considered that the Bank had made out, by proof, every allegation both of the declaration and the replication, still a case for a judgment against the defendant below, was not made out to displace the statute bar interposed by him. The court below erred, therefore, in refusing the motion for a new trial, and for this error the judgment must be reversed, and the cause remanded, not that a judgment *non obstante veredicto* shall be rendered for the defendant below, but that a repleader shall be awarded on the application of the Bank, so that that party may have an opportunity to file an amended new special replication, and displace the statute bar if she can by allegations and proof. 1 *Chitty Pl.*, 10 *Amer. Ed.* 583, *Marg.* 3 *Call R.* 1, *Bogle et al. Conway ex.* 4 *Leigh R.* 480, 483, *Rice v. White.*