STATE BANK *vs.* BARBER ET AL.

Action by the State Bank on a note executed to her by defendants; plea, limitation; replication of part payment by one of the makers of the note, and issue: HELD, That an entry made by the Financial Receiver in a book of the Bank kept for the purpose of entering part payments on notes due the Bank, was not competent evidence to establish the part payment relied upon by the Bank, to take the note sued on out of the statute of limitations, although it was shown that the Financial Receiver, who made the entry, had left the State, and gone to parts unknown.

Writ of Error to Pulaski Circuit Court.

On the 26th day of February, 1848, the Bank of the State of Arkansas commenced an action of debt, in Pulaski Circuit Court, against Luke E. Barber and Wm. Trimble, on a note executed to the Bank by Barton Richmond, as principal, Thomas J. Lacy, G. W. Causin, and defendants, as securities, on a promissory note dated January 29, 1843, due at twelve months, for $525.

Defendant Barber pleaded *nil debet,* payment, and the statute of limitations of three years. Plaintiff took issue to the first two pleas, and replied to the third, that Thomas J. Lacy, one of the makers of said note, on the 23d September, 1845, paid to the plaintiff, on said note, $102.70, to which replication issue was made up.

Trimble pleaded payment and limitation, plaintiff replied to the latter plea part payment by Lacy, to which Trimble demurred, the court overruled the demurrer, and he rested.

The issues to Barber's pleas were submitted to the court sitting as a jury, and the plaintiff, to prove the part payment relied upon by her to take the case out of the statute of limitation, offered to introduce as evidence of such payment an entry made by Abner E. Thornton, in one of the regular books of the Bank, kept by said Bank expressly for such entries, showing that on the 23d day of September, 1845, Thomas J. Lacy, one of the makers of

the note sued on, paid on said note the sum of $102.70, which was credited to Barton Richmond as a payment on said note, as appeared by said entry, which entry is as follows:

"Sept. 23d, 1845.

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Received per T. J. Lacy, for curtail and interest for renewal,	$102.70
No. 61, Amount $465, due 29th Jan'y, 1845, call	$55.00
12 months interest on $410	28.70
Interest from Jan'y to Sept., '46,	19.00
Paid as above	$102.70"

It appeared to the satisfaction of the court that said Abner E. Thornton was the Financial Receiver of the said Bank at the time the said entry was made; and it was shown to the court, after the judgment refusing to admit the entry as evidence, that he had been subpenæd to appear at the June term, A. D. 1849, to testify in this case, and that the subpenæ was regularly served; that said Thornton resided in Pulaski county up to 1st November, 1849, and that since that time it was generally understood that said Thornton had left the State and gone to parts unknown. The hand-writing of said Thornton was fully proven. Yet notwithstanding, the court refused to admit the said book, and the entry aforesaid as evidence of such payment, and the plaintiff thereupon excepted to the opinion of the court, and having no other evidence to produce in the case, judgment was rendered against said plaintiff.

The case was determined in February, 1850, before Hon. WM. H. FEILD, judge.

S. H. HEMPSTEAD, for the plaintiff.

FOWLER, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The question to be determined in this case is, whether or not the court below erred in refusing to allow an entry to be read in evidence from one of the regular books of the bank, under the state of facts presented in the bill of exceptions. To comprehend clearly the force of the objection urged against the competency of this proposed testimony, it will be well to remember that even when part payment, and its appropriation is directly proven, that even then, the main fact necessary to be established, to wit, the continued existence of the debt, notwithstanding the lapse of time since its creation, is but a presumption upon which the law implies a promise to pay it. When, then, this part payment, and its appropriation by the debtor is sought to be established to this end, by an endorsement upon the security, to be sustained on the basis of proof, aliunde, that this endorsement was in fact made at a period of time when it would be against the interest of the holder of the security to make it or have it made, still another link is added to this chain of successive presumptions.

In such case, on the primitive foundation so fixed that the endorsement was in fact made at a time when against the interest of the holder of the security, the following presumptions are successively made:

1st, The purport of the endorsement is presumed true:

2d, That the part payment was made:

3d, That it was appropriated by the debtor:

4th, That he promised to pay the residue; each of course liable to be repelled.

In the case of *Alston v. The State Bank,* (4 *Eng.* 455,) it was submitted to us that the law allowed still another link to this chain of presumptions, forged by English judges, before they fully comprehended the true character of the statute of limitations, and that was supposed to be that where the endorsement purported upon its face to have been made at a time when to make it would be against the interest of the holder of the security, that

the law would, upon this foundation, as a primitive one, presume the date true, and then that the other presumptions would follow in succession, and several English authorities were cited to sustain this position. Upon a careful examination of them, however, we found that all of them, except perhaps one or two, were cases where the evidence had been offered by the defendant, and not by the plaintiff, and that those of the other class had been distinctly and emphatically repudiated by Lord Ellenborough in the case of *Rose v. Bryant,* (3 *Cam.* 321,) whom, on this point, the English courts have followed to the present day, as well as the American courts which we cited. And we held therefore, that the date of the endorsement must be proven as a starting point.

In the case at bar, however, it is submitted that we should allow even greater latitude than was asked in *The State Bank v. Alston:* because here we are asked to presume, upon the foundation that the book from which the entry was proposed to be read, was "a regular book of the bank, kept by her expressly for such entries:" 1st, That the book was correctly and honestly kept; 2d, From this, presume the truthfulness of the purport of the entry, and then go on in succession. It is manifest, therefore, without further observation that the testimony proposed was clearly incompetent for the purpose offered.

And certainly the necessity of the case did not demand it because it was not shown that by the death of Thornton, it was impossible to obtain his testimony; nor did it appear alike improbable to obtain discovery from the defendants, and had both been shown, we know of no principle of law which makes the proposed testimony admissible to prove a part payment, the rules of law as to which having already gone to the extreme confines of law and equity: and we certainly have no statute providing for such a case. *Burr v. Byers, admr.,* 5 *Eng.* 402, 403.

Finding no error in the record, the judgment must be affirmed with costs.