WOODDY ET AL. *vs.* STATE BANK.

A new promise in writing by one joint maker of a note, does not take the debt out of the statute of limitations as to other makers. *Digest, p.* 698, *sec.* 19.

Where several makers of a note are sued, and the debt is barred as to some, but a new promise proven as to others, plaintiff is entitled to judgment against the defendants making the new promise, (*Digest p.* 699, *sec.* 20,) but not against the others.

Appeal from Benton Circuit Court.

On the 30th July, 1847, the Bank of the State sued Wm. B.

Wooddy and A. Whinnery, before a justice of the peace of Benton county, on a note executed to the Bank, payable at the branch at Fayetteville, by the defendant Wooddy, as principal, and Whinnery and another, as securities, for $87.39, dated 6th December, 1841, and due at six months. Judgment for defendants before the justice, and appeal by the Bank to the Circuit Court. The defendants interposed as a defence the statute of limitations; the case was submitted to the court, sitting as a jury, and the plaintiff read in evidence the note sued on, and the following letters, after proving them to be in the hand-writing of defendant Wooddy:

"Maysville, March 23d, 1846.

SIR: I have just received your note inforr ing me that my last note in Bank was not received. I will just say to you that I will be to see you about the 15th May, and will fetch a new note with good security, and about five hundred dollars in money. Your letter lay in the office a week before I got it; I was away from home at the time. Please not to put my notes out for collection, as it will put me to a great deal of trouble and expense, and I intend to pay the last cent; and will draw money in a few days, I expect. You will please to not sue, if you can avoid it.

In haste, your friend,
WM. B. WOODDY.

To R. P. PULLIAM, Esq.,
Fayetteville.

Bentonville, March 15, 1844.

To COL. JAS. McKISSICK:

Dr. Sir—I now have to inform you that I have been able to make a *rise* of money, to renew my notes in Bank, except about $40, which I will have shortly, and as soon as I can get it, I will be in. I want you, if you please, not to put them in suit, as I am determined to pay all as soon as possible.

In haste, your friend,
W. B. WOODDY.

The above being all the evidence introduced, the court found

for the plaintiff; defendants moved for a new trial, which was refused, and they excepted, and appealed.

S. H. HEMPSTEAD, for the plaintiffs, contended that the letters read in evidence, were too vague and indefinite to constitute a written acknowledgment—there being no evidence that they were written to the plaintiff or her officers; (*Brown v. State Bank*, 5 *Eng.* 137,) and if sufficient to constitute an acknowledgment by Wooddy, yet the judgment was erroneous, as there was no evidence to avoid the statute as to Whinnery.

CARROLL, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The record presents no testimony whatever upon which the verdict and judgment can rest, as against Whinnery. (*Digest, p.* 698, *sec.* 19.) And although we would not disturb it as to Wooddy, against whom the testimony is by no means conclusive, if it was not against both, (*Dig.*, p. 699, *sec.* 20,) yet being joint and clearly without testimony, as to one, it must be reversed, and the cause remanded.

12/782. Distgd. in Smyth v. State, 13/699.