

BANK OF THE STATE vs. STEEN ET AL.

Though a writ be voidable for variance from the declaration, yet it may be used as evidence of the commencement of a suit within the period of limitation, in a subsequent suit on the same cause of action, as held in *State Bank v. Sherrill*, 6 *Eng. Rep.* 334, &c.

On a proper showing, under *Digest*, p. 810, sec. 93, the plaintiff is entitled to a discovery from defendant.

Writ of Error to Jackson Circuit Court.

On the 14th of March, 1839, the Bank of the State commenced an action of debt, in the Jackson circuit court, against William Steen, John H. T. Webb, and Jeremiah Webb, on a note executed to the Bank by them for \$888, due 1st July, 1844.

The defendant, Jeremiah Webb, filed two pleas: 1st, the statute of limitation of three years; and 2d, *nil debet*, sworn to.

Defendant, John H. T. Webb, pleaded *nil debet*, limitation, and payment.

Defendant, Steen pleaded limitation.

To each of the defendants' pleas of limitation, the plaintiff filed a special replication, of a former suit within the bar, non-suit, and commencement of the present suit within a year thereafter; to which the defendants filed rejoinders putting in issue

the allegations of the replications. Issues were made up to the other pleas.

The plaintiff filed a petition for discovery, alleging that defendant, Jeremiah Webb, by his plea of *nil debet*, had put the execution of the note sued on, by him, in issue. That, upon the face of the note, it appeared that the said Jeremiah executed it by making his mark, which was witnessed by one Francis Morrow, who had left the country, and was reported to be dead, and plaintiff was unable to prove his handwriting. That plaintiff could not prove the execution of the note by the said Jeremiah, except by a discovery from the defendants. Interrogatories were propounded to defendants in reference to the execution of the note by said Jeremiah, and an order prayed that they be compelled to answer them. The petition was verified.

The plaintiff had filed a similar petition at a previous term of the court, to which the court sustained a demurrer.

The defendants filed a motion to strike out the above petition, on the ground that it was filed out of time; which motion the court overruled, but refused to make an order for defendants to answer, and plaintiff excepted.

A jury was empaneled, and the issues submitted to them.

The plaintiff read in evidence a petition in debt, filed by her against the defendants, on the same cause of action, in the same court, on the 27th June, 1847.

The petition is in the usual form, sets out the note, and demands judgment for the debt, damages for its detention, &c.

The plaintiff then offered to read in evidence the following writ:

“STATE OF ARKANSAS, }
COUNTY OF JACKSON. } ss.

The State of Arkansas, to the sheriff of Jackson County—GREETING:

You are hereby commanded to summon William Steen, John H. T. Webb, and Jeremiah Webb, if they be found within your county, to be and appear before the judge of our circuit court, at a court to be begun and held at the court house in the town of Elizabeth, in said county of Jackson, on the third Monday af-

ter the fourth Monday in October, 1847, then and there to answer unto the Bank of the State of Arkansas of a *plea of trespass on the case on promises to her of eight hundred and eighty-eight dollars, together with damages*, and have you then and there this writ, with your proceedings thereon. In testimony whereof," &c.; attested by the clerk in the usual form, 28th June, 1847, and sealed with the seal of the court. Upon which was endorsed the sheriff's return of service upon the defendants, 13th July, 1847.

The defendants objected to the introduction of the writ as evidence, and the court excluded it.

Plaintiff then offered to read in evidence a record entry, showing that she dismissed said suit in vacation, on the 12th day of March, 1849, which the court excluded.

Plaintiff excepted to the decisions of the court excluding from the jury the writ and record evidence aforesaid.

Verdict and judgment for defendants, and writ of error by plaintiff.

S. H. HEMPSTEAD, for the plaintiff, cited *State Bank v. Sherrill*, 6 Eng. 334; *State Bank v. Magness*, 6 Eng. 343, as to the error of the court in rejecting the writ as evidence; and *sec. 93, p. 810, Digest, Story's Eq. Pl., sec. 311*, as to the right of the plaintiff to discovery.

Mr. Justice SCOTT delivered the opinion of the Court.

The objection to the reading of the writ in evidence has been heretofore disallowed, (*State Bank v. Sherrill*, 6 Eng. 334; *same v. Magness, ib.* 343:) its reading ought to have been allowed. The court also erred in denying the prayer for discovery under the statute, (*Dig. p. 810, sec. 93*).

Let the judgment be reversed, and the cause be remanded to be proceeded with.