12/760. Distd. in Veazey, 14/673. Cent. Bk. v.

STATE BANK *vs.* GRAY.

The rule in regard to variance is not so strict where a record is offered in evidence collaterally, as it is where the record is the foundation of the suit.

This was an action against one of several makers of a note; defendant pleaded limitation; plaintiff replied a suit against defendant within the bar, non-suit, and new suit within a year thereafter; defendant rejoined *nul tiel record*: HELD, That a record of a former suit against all the makers of the note sued on, was not variant from the replication of former suit "against defendant," and might be read in evidence.

A variance between the declaration and the writ, in the former suit, in the description of the cause of action, though so great as to be ground for quashing the writ, would not prevent the writ, in connexion with the declaration, from being evidence to establish the commencement of such former suit.

A non-suit taken before the clerk in vacation, on payment of costs, is authorized by the statute.

Writ of Error to Jackson Circuit Court.

The facts are stated in the opinion of the Court.

HEMPSTEAD and CARROLL, for the plaintiff, cited sec. 134, chap. 126, Digest, to show that the clerk legally entered the judgment of non-suit in vacation, and sec. 24, chap. 99, to show that the statute of limitations was no bar to this action, and contended that the court erred in rejecting the record of the first suit as evidence.

BYERS & PATTERSON, contra. The petition filed in the first suit against John Gray, Isaac Gray, and Jesse Gray, was properly rejected for variance—the replication simply setting forth a former suit against the *defendant*. No allegation descriptive of the identity of that which is legally essential to the claim, can be rejected. 1 *Greenl. Ev. sec.* 56, 58. 1 *Stark Ev.* 386, 388.

The writ offered to be read as evidence was properly excluded, because the former suit was in debt, and the writ in assumpsit;

and there was no evidence to prove that the writ was issued on the petition in that suit.

Mr. Justice WALKER delivered the opinion of the Court.

This is an action of debt, to which the defendant plead the statute of limitations. The plaintiff replied a former action commenced within the statute bar, a non-suit, and a second action within twelve months thereafter. To this replication, the defendant interposed five rejoinders, which, although defective, as issue was taken upon them, will be considered as a rejoinder of *nul tiel record;* for, although they were intended to put in issue distinct facts, which could alone be evidenced by the record, the whole of them present no other question than must arise under *nul tiel record.*

To sustain the issue on her part, the plaintiff offered in evidence a note, a writ, a petition in debt, and a record entry of judgment of non-suit in vacation: which evidence was objected to by the defendant, and on his motion excluded by the court. The note, writ and petition literally correspond with and sustain the pleading, with the single exception that the first suit which was discontinued, was commenced against all of the makers of the note, whilst the present suit was commenced against one of them alone. This can make no possible difference. The question was whether a former suit had been commenced against the same party defendant in the first and second suit. The record proved this. It was not the foundation of a suit where other parties in interest were disclosed, but a link in the chain of evidence to defeat the statute bar. The rule with regard to variance in cases where the record is the foundation of the action, is very different from that where it comes in collaterally as evidence. *State Bank v. Magness et al.,* 6 *Eng. Rep.* 344.

The variance between the petition and the writ in the description of the cause of action, amounted to nothing. Even admit the variance to have been ground for quashing the writ, still it was sufficient evidence in connexion with the petition to estab-

lish the commencement of the first suit. *State Bank v. Sherrill,* 6 *Eng. Rep.* 336.

The statute authorized the clerk to enter judgment of non-suit upon payment of cost. The record was competent evidence, and should have been admitted in evidence. The judgment of the circuit court must be reversed, and the cause remanded, to be proceeded in according to law, and not inconsistent with the opinion herein delivered.