## CONWAY B. ET AL. *vs.* STATE BANK.

Under the act of March 3d, 1838, (*Pamph. Acts,* 1837-8, *p.* 136,) the Bank of the State may sue upon notes payable to her, in Pulaski Circuit Court, and issue writs to the counties where the defendants reside; and this, without any allegation in the declaration, as to the residence of defendants.

The Bank of the State is yet a corporation, and a plea denying it, should be stricken out.

Where written evidence of part payment would be incompetent if produced, parol evidence is admissible.

As a general rule, where there is written evidence of a fact, parol or secondary evidence is inadmissible; but it has been held, that written acknowledgments, and receipts of payment, where question of such payments is in issue, form exceptions to this rule.

*Writ of Error to Pulaski Circuit Court.*

ON the 3d day of October, 1849, the Bank of the State com-

menced an action of debt, in Pulaski Circuit Court, against William Conway B., George Conway, Robert H. Conway, and Benjamin P. Jett, on a promissory note, executed by the defendants, to the bank for $600, payable 1st March, 1844.

The declaration is in the usual form, without averment as to the residence of defendants.

A writ was issued to Independence for Conway B., and to Hempstead county for the other defendants.

Robert H. Conway filed a motion to quash the other writs, on the grounds: "1st. That they were issued, and run into the counties of Hempstead and Independence, without any authority of law. 2d. That they were issued and run into said counties, without any allegation in the declaration that said defendants resided out of the county of Pulaski, and in said counties of Hempstead and Independence, or part of them in one, and part in the other of said counties."

The court overruled the motion to quash the writs.

Defendant Jett, filed a plea in abatement of the writs on the same grounds taken in the motion to quash, which was struck out on the motion of plaintiff, and he excepted.

Conway B. filed five pleas:

1st. *Nil debet*:

2d. That the cause of action did not accrue to the plaintiff at any time within three years next before the commencement of the suit:

3d. Payment on the 29th February, 1844:

4th. Payment on the 1st October, 1849:

5th. *Nul tiel* corporation.

Plaintiff took issue to the 1st, 3d, and 4th pleas: replied to the 2d plea, a part payment on the 5th March, 1847, of $130; and moved to strike out the 5th plea.

Conway B. took issue to the replication of part payment. The court struck out his 5th plea, and he excepted. The issues upon his other pleas were submitted to a jury, and verdict for plaintiff for balance of debt $377.60, and $138.97 damages, and judgment against all of the defendants.

Conway B. moved for a new trial, on the grounds: "1st. That the court erred in permitting witnesses Carroll and Ross, to testify to the jury the admission of said Conway B. of the correctness of an entry of a payment said to have been made by him on the books of the bank, without producing the book or entry referred to. 2d. The finding of the jury was against the instructions of the court, law, evidence, and for a larger amount than the evidence showed to be due."

The court overruled the motion, and Conway B. took a bill of exceptions, setting out the evidence introduced upon the trial, which is, in substance, as follows:

The plaintiff read in evidence the note sued on, and proved that Conway B. paid thereon $102.45, on the 22d day of March, 1844, and $97.95, on the 3d April, 1845. The plaintiff also proved by D. W. Carroll, Esq., her attorney, that after suit was instituted, Conway B. asked him if he was not credited with further payments on the books of the bank than those above proven, and told him that he had sent to *Thornton,* Financial Receiver of the Bank, funds to be applied as a payment upon the note in suit.

Plaintiff then proved by John M. Ross, present Financial Receiver, (against the objection of Conway B.) that after this suit was instituted, Conway B. came to the Banking house, inquiring about his credits, and witness showed him an entry, in the proper book of the bank, where such entries are made, the substance of which entry was, that on the 5th March, 1847, said Conway B. was credited as received for renewal, $130, on No. 2, due 1st March, 1846, $465—call, $65, 12 months interest, $28, back interest, $31.20 — which entry, the said Conway B., then and there admitted to be correct, and that he had paid it at that date on the note in suit, which was endorsed No. 2. That said note was turned over to said witness, by his predecessor, as for $470, then due thereon.

Mr. Carroll also testified, that he was present when Mr. Ross showed the said entry to Conway B., and that he admitted it to be correct, and paid as of that date, on said note. The book of

the bank, in which said entries were made, not being produced, defendant objected to the above testimony in relation thereto.

The above being all the evidence, the Court instructed the jury as follows:

"That in order to find for the plaintiff on the issue made upon the plea of the statute of limitation, they must be satisfied, from the evidence, that the defendant, Conway B., did make an actual payment on the identical note in controversy, and thereby acknowledged that the same was unpaid within three years next before the commencement of this suit."

Defendants brought error.

FOWLER, for the plaintiffs.

S. H. HEMPSTEAD, for the defendant. The transactions which written acknowledgments and receipts are designed to evince, may be proved by parol testimony of witnesses without producing the receipts or accounting for the absence of them. 2 *Phil. Ev.* (*Cowen & Hill's Notes,*) 420, and cases cited. 7 *Cowen,* 334, *Kenne v. Meade,* 3 *Peters* 7. The entry by the plaintiff, if produced, would not have been evidence. *State Bank v. Barber,* 7 *Eng. Rep. State Bank of North Carolina v. McNeill,* 1 *Hawks* 36.

The motion to quash the writ was properly overruled, (*Acts of* 1837, *page* 136, *sec.* 4. 5 *Ark.* 25,) and the plea of *nul tiel corporation* stricken out. *Mahony v. State Bank,* 4 *Ark.* 623. 5 *Ark.* 251. 1 *Eng.* 137. 2 *Eng.* 58. 3 *Eng.* 420.

Mr. Justice WALKER delivered the opinion of the Court.

The motion to quash the writs was properly overruled. *Acts* 1837, *page* 156. 5 *Ark. Rep.* 251. The plea of *nul tiel corporation,* was properly stricken out. 4 *Ark. Rep.* 623. 1 *Eng.* 137. 2 *Eng.* 58.

The remaining question is, where an entry is made of a payment in the books of the bank, in part discharge of a note executed to the bank, can parol evidence be given of such payment without accounting for the non-production of the record entry?

It is true, as a general rule, that where there is written evidence of a fact, parol or secondary evidence is inadmissible. It is held, that written acknowledgments and receipts of payment, where the question of such payment is in issue, form exceptions to this rule. 2 *Phillips Evidence, (Hill & Cowen's Notes,)* 420. *South wick v. Haydon,* 7 *Cow.* 331.

In this instance, however, the record would not have been legitimate evidence as decided by this court in *State Bank v. Barber et al.,* at the present term. The parol evidence, then, was clearly admissible, and the proof positive. There was, then, no error in the judgment and decision of the Circuit Court in this case. Let the judgment be affirmed.