KING & HOUSTON *vs.* STATE BANK.

The actual commencement of a suit, is sufficient to stop the running of the statute of limitations, without any regard to, or dependence upon, any after diligence of the plaintiff in its prosecution.

Appeal from Pulaski Circuit Court.

This case has been in this court before. See *King & Houston v. Bank of the State,* 4 *Eng. Rep.* 185.

When the case was remanded, King & Houston were granted leave to plead the statute of limitation, to which issue was taken, and submitted to the court sitting as a jury.

The facts appearing of record, and the evidence, are substantially as follows:

The Bank of the State sued Stevenson, Ward, King and Houston, on a note which was not barred by the statute of limitation when the suit was commenced. The declaration was filed, and writ issued to Conway County against all the defendants, on the 3d October, 1843, returnable to the then next term of Pulaski Circuit Court, which was not served on King & Houston. On the 12th January, 1844, Stevenson was discharged on demurrer overruled to a plea of bankruptcy filed by him, the death of Ward was suggested, and the case discontinued as to him, and an alias writ ordered against King & Houston, and the case ordered to be continued.

On the 7th June, 1844, another writ was ordered against King & Houston, and the case continued. The fall term of the court was postponed by act of the Legislature.

On the 7th May, 1845, an alias writ was ordered against King & Houston to Perry County, and the case continued.

On the 12th July, 1845, a writ was accordingly issued, and returned "not found," 29th August, 1845.

On the 27th October, 1845, an alias writ was ordered to Perry County, and the case continued.

On the 11 May, 1846, a similar order was made, and accordingly a writ issued on the 24th July following, which was executed upon King & Houston.

There was no positive evidence that any writs were issued, after the original, but the two to Perry County above named. The clerk of the court testified that he was in the habit of issuing writs in all cases where they were ordered, and in Bank cases generally handed them to the attorney of the Bank. If he had issued other writs in this case, they had not been returned, or if returned, were lost—they were not on file. The note was barred, counting the time to the service of the writ upon King & Houston, but was not barred when the suit was commenced. The court found for the plaintiff, and rendered judgment accordingly, and defendants excepted and appealed.

PIKE & CUMMINS, for the appellant. The question is whether

the statute bar has attached. There is no controversy about the fact that much more than three years elapsed from the *falling due* of the note, and the *date* of suing out the process on which service was had on the defendants.

The statute of limitations is entitled to the same respect as other statutes, and should be favorably construed. *Clementson vs. William,* 8 *Cranch* 72. *Bell v. Morrison et al.,* 1 *Pet.* 360. 5 *Ohio Rep.* 445. *Hawkins vs. Campbell,* 1 *Eng.* 513. 2 *ib.* 475. 3 *ib.* 499. 4 *ib.* 411, 454. 5 *ib.* 108, 120, 134, 163, 147, 228, 597. 7 *ib.* 29, 283.

It is undoubtedly true that a suit can only be instituted by filing a declaration and getting the voluntary appearance of the defendant to the action, or by filing the declaration and issuing the writ. *State Bank v. Cason et al.,* 5 *Eng.,* 479. 5 *Eng.* 120. 2 *ib.* 458. 3 *ib.* 316. And no accident, mistake or official neglect by the clerk, or other officer in either the filing the declaration or issuing the writ; even although plaintiff had used the utmost diligence or exhausted all means in his power to compel such clerk to do his duty, can be replied in avoidance of the statute. (*State Bank v. Cason et al., ub. sup. State Bank v. Bates,* 5 *Eng.* 120.) The party, to avoid the stature bar, must use the means given him by law to bring the defendant before the court. See *Green v. Rivett,* 2 *Salk.* 421. *Wille's Rep.* 258. 2 *Bay* 194. *Jackson v. Brooks,* 14 *Wend.* 649. *Low, quitams, &c. v. Little,* 17 *J. R.* 346.

It is well settled, every where, that, to avoid the statute bar, the party must show the issuance and return of the original writ and regular continuances down to the process finally served, and that the latter was based on the former. *Davis & Custer v. West,* 6 *Wend.* 63. *Soulden et al. v. Van Rensaeller,* 3 *Wend.* 472. And if the process be not shown expressly to be an alias, pluries, &c., of the first writ issued, the party must fail, (3 *Wend.* 476,) and the last process be deemed the commencement of the suit. In the case before the court, the process served does not purport to be an alias or a pluries; nor does it appear that the previous writs were returned, so as to connect them with the one served. *Kamer v. James, Wille's Rep.* 255. 15 *East* 378. 2 *Speers.* 481.

And although the declaration was filed, and the first writ issued before the statute bar was perfected, yet, as the plaintiff failed in that diligence which the authorities and policy of the law require to bring the defendant into court by the regular issuance and return of process, the last writ must be deemed the commencement of the suit.

S. H. HEMPSTEAD, contra. The filing of a declaration and issuance of a writ, constitute the commencement of a suit, and not the delivery of the writ to the officer or service upon the defendant. *McLarren v. Thurman,* 3 *Eng.* 315. *State Bank v. Cason,* 5 *Eng.* 479. *Soc. Prop. Gospel v. Whitcomb,* 2 *N. Hamp.* 227. *Jackson, v. Brooks,* 14 *Wend.* 649. *Bird v. Carital,* 2 *J. R.* 346.

Although a writ may be defective and quashed, yet it is still a part of the record, and in connection with the declaration is evidence of the institution of a suit so as to avoid the statute of limitation. *State Bank v. Sherrill,* 6 *Eng.* 334. *State Bank v. Peel, ib.* 750.

The alias writs were issued to bring the party into court, not to avoid the statute, because that had been achieved by filing the declaration, and issuing the first writ upon it. And although the writs may be lost, that cannot prejudice the plaintiff. Nor will the fact that the writs were issued to the wrong county: for that is a good commencement of the suit. *Angell on Lim.* 336. *Jackson v. Brooks,* 14 *Wend.* 649.

Mr. Justice SCOTT delivered the opinion of the Court.

It is insisted, in this case, that a fair and just interpretation of the statute of limitations will require a plaintiff not only to commence his suit within the time prescribed by law, but to pursue it with diligence until the defendant is brought into court by the service of process or its equivalent. And that want of diligence on the part of the plaintiff, after the commencement of his suit, and before the accomplishment of this end, should have the effect to open the way for the running on of the statute through the first point of time up to the day when continuous and effective

diligence would be resumed. Thereby, in all cases where, after the commencement of the suit, the plaintiff had become negligent before he had brought the defendant into court, in effect making the time of the resumption of continuous and effective diligence the point at which the statute would cease to run, instead of the time of the commencement of the suit, as expressed in the statute. And leaving, for this operation of the statute at the commencement of the suit, only such cases as would be diligently pursued continuously after the joint act of the filing of the declaration and issuing of the writ.

In thus stating the question, we have had no regard to degrees in diligence, because such questions can only be relevant in case the principle of diligence itself shall be found admissible as a part of this statute rule. And this is conceded to be a positive establishment of law—an iron rule cutting its way whether consonant with the right and justice of the particular case or not, founded in the public convenience and necessity, and designed to achieve quiet and repose by closing the door to litigation after a reasonable time shall have been allowed the citizen to assert his claim.

And although this rule is beneficial to both parties, in protecting the defendant from stale demands, and in stimulating the plaintiff to the assertion of his just rights, its greatest benefits are reaped by the public at large in its tendency to diminish litigation. and remove cause for quarrel and strife. And hence it would seem to be a rule that should be firmly upheld by the courts, and not frittered away either for the benefit of the plaintiff, or the defendant, and especially not so if the great public ends in the view of the Legislature would be in anywise jeopardised by any interpretation or construction that might be asked for the particular benefit of either.

And the history of this law is full of evidences of the wisdom of such a cause for the courts, consisting no less in the known evils which flowed into society from the encouragement of litigation and the stimulus to perjury resulting from the construction of the English Judges that a new promise would displace the

statute bar, than in the interminable labyrinth into which the courts soon found themselves in this attempt thus to construe away the rule for the benefit of the plaintiff. From all of which, they, and the public were finally released only, by a direct appeal to Parliament, after nearly a century of fruitless efforts at relief otherwise. Nor would it seem that a different result, either as to the public or the courts, could have been reasonably expected from any like attempt to construe away the statute for the benefit of the defendant. And yet the courts, both English and American, have since, in many instances, seemed strongly stimulated to such a course of decision, but with much better show of reason. Of which course, one of the consequences is, a contrariety of decisions of opposite tendency, both leading from the iron rule of the statute in vain attempts at logical results and coalescence with the common law: as if the statute of limitations was regarded as an evident principle of natural justice from which harmonious subordinate rules would naturally flow; and was not, as it is in fact, but an arbitrary rule founded upon public policy, in no way dependent for its operation, in any case, upon the condition that such be either just or unjust.

And it is precisely upon such mistaken notions of the real nature of the statute, that the application, before us, to make the interpretation in question, is to be sustained, if sustained at all. And, at a glance, it is apparent that such an interpretation would be in the face of that fundamental rule of construction which forbids the interpretation of that which needs no interpretation, because the meaning of the Legislature is evident, and is expressed in clear and precise language, and leads to no such absurd conclusions, when considered in reference to the subject matter and other provisions of the statute, as to authorize the inference that such consequences were not anticipated.

True, there may be some margin for abuses, but the legislature, contemplating such, may have deemed it better to tolerate these, as an inevitable incident to a general rule, that being certain and simple, was easily comprehended by the people, than to adopt another—like that sought to be derived by the interpre-

tation in question—more complex because uncertain as to time, and as to this dependent on contingencies rife with litigation and strife. For, it is easy to be foreseen that if diligence were once admitted as an essential element of this statute rule, that, in the various questions relating to its degree, as well as in those relating to its want of manifestation in defective declarations and defective writs, and in various matters *in pais* connected with the institution of the suit, and its prosecution up to the time when the defendant shall be brought into court by the service of process, or its equivalent, a field of litigation would be opened as difficult to be maintained by the courts, and as prolific of evil to the public at large, as that thrown open by the English judges, when they held that a new promise would remove the statute bar, and ultimately would probably have to be made tolerable, as that was, by legislative interpretation.

In the only case in which this question of diligence, as an ingredient in the statute rule, has been heretofore in this court, it was held specifically that it was "no answer to the plea of the statute, that, before the action was barred, the plaintiff filed his declaration, and instructed the clerk to issue the writ, but the clerk did not do so until after the limitation had expired." (*The State Bank v. Cason et al.*, 5 *Eng. R.* 479.) And, inasmuch as in that case, the court expressly affirmed the correctness of the instruction of the court below on that point, the case goes the length of asserting the doctrine that no quantum of diligence, short of an actual commencement of the suit, can stay the running of the statute.

In these doctrines thus promulged, we see nothing to disapprove, and much reason to affirm their correctness, and in harmony with them shall hold, in the case before us, that the actual commencement of the suit is sufficient to stop the running of the statute without any regard to, or dependence upon, any after diligence of the plaintiff in its prosecution.

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