

MADDIN, AS AD. *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, as held in *King & Houston vs. State Bank, ante.*

It is not indispensable to the *maintenance* of a suit against an administrator, that an affidavit of the justness and non-payment of the claim sued for, should have been *exhibited* to the administrator before suit brought; nor is the plaintiff liable for costs for failing to exhibit such affidavit before suit, where the defendant controverts the suit. *Digest, ch. 4, sec. 93-4.*

Appeal from Pulaski Circuit Court.

On the 23d April, 1850, the Bank of the State brought debt against Thomas Maddin, administrator of James Maddin, deceased, upon a note executed to the Bank by James Maddin, in his lifetime, and Jeremiah Moreland and William W. E. Moreland, not sued, due 28th day of August, 1844. Attached to the declaration, and filed with it, was an affidavit, made by the Financial Receiver of the Bank, on the 23d April, 1850, that the claim sued for was justly due, and unpaid, &c.

The defendant pleaded payment, and the statute of limitation; to both of which pleas plaintiff replied generally, with leave, by agreement, to introduce special matter in evidence to remove the bar of the limitation act, and the issues were submitted to the court.

The plaintiff read in evidence the affidavit of the justness and non-payment of the claim filed with the declaration, and proved that it was made before the filing of the declaration, but not presented to the defendant. Whereupon, defendant moved the court to non-suit the plaintiff, because the affidavit was insufficient, and the plaintiff had not shown it to defendant, or demanded payment, or allowance of the claim before suit brought; but the court overruled the motion.

Plaintiff then read in evidence the note sued on, and proved a credit thereon of \$2.85, September 25, 1843, which was an over-payment on renewal.

Plaintiff next read in evidence the record and papers of a former suit brought against all the makers of the note, in which she suffered a non-suit. From these, it appears, that, on the 17th March, 1845, she filed her declaration, in the same court, against the makers of the note, and issued a writ to Johnson County, which was served on the Morelands but not upon James Maddin. On the 4th June, 1845, an alias writ was ordered to Perry County against Maddin, and the case continued. Writ accordingly issued, on the 26th July, 1845, and returned not found. At the Oct. term, 1845, Wm. W. E. Moreland moved to quash the return of service as to him, which was overruled: on his prayer, oyer was granted, and, on the motion of plaintiff, an *alias* writ was ordered to Perry County, against Maddin, and the case continued. On the 5th February, 1846, writ issued accordingly; and on the 23d of the same month, another writ issued, and both returned not found. At the May term, 1846, *alias* ordered to Pope County, and case continued. Writ issued 24th July, 1846, and defective return of service upon Maddin. November, term, 1846, writ and return quashed on motion of Maddin: *alias* ordered to Pope, and case continued. Writ issued 22d February, 1847, and returned served by leaving a copy at his residence, &c. April term, 1847, return of writ quashed, on motion of Maddin. On motion of plaintiff, *alias* ordered, and case continued. In the margin of the record, opposite this entry, the word "*issued*" is written, and a note by the clerk that the writ has been lost.

October term, 1847, case continued on motion of the plaintiff.

April term, 1848, *alias* ordered, and case continued. Word "*issued*" written in the margin, and note, by the clerk, "*Writ lost.*"

October term, 1848, cause again continued, and *alias* ordered, "*Issued*" written in the margin.

June term, 1849, plaintiff took a non-suit.

The clerk of the court testified that he had issued all the writs

ordered in the above cause, but no writ after that dated 22d February, 1847, was on file; and he knew nothing of the missing writs. It was his usual habit to hand writs, issued in Bank cases, to the attorney of the Bank, though some times he mailed them himself, he had no recollection of what was done with the writs issued after 22d February, 1847, but supposed they took the usual course, and were delivered to the Bank Attorney, though it was not impossible that the writs were returned, and mislaid or lost. But it was his habit, on the return of writs, to put them with the papers of the case to which they belonged, and he had done so in this case, and he had no recollection of receiving the writs in question after their issuance.

On the above evidence, the court found, and rendered judgment for plaintiff, and defendant excepted.

PIKE & CUMMINS and F. W. & P. TRAPNALL, for appellant.

S. H. HEMPSTEAD, for the appellee.

Mr. Justice SCOTT delivered the opinion of the Court.

It was not indispensable to the maintenance of the suit, that the affidavits should have been previously exhibited to the administrator; nor was this a case where costs should have been adjudged against the plaintiff below, because the suit was controverted. *Dig.*, p. 127, *ch.* 4, *sec.* 94.

The other question, as to the statute of limitations, has been settled in the case of *King & Houston vs. The State Bank*, decided during the present term.

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