SMITH *v.* FARMERS' & MERCHANTS' BANK.

Opinion delivered February 16, 1931.

1. LIMITATION OF ACTIONS—ACCRUAL OF ACTION ON GUARANTY.—A cause of action on a guaranty of a note accrued upon the execution of the guaranty where the note was past due at the time the guaranty was executed.
2. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION.—An action is not commenced, as regards the statute of limitations, until the issuance of summons.

3. LIMITATION OF ACTIONS—PART PAYMENT BY STRANGER.—Part payment on a note by a stranger did not arrest the running of the statute of limitations against a guarantor of the note.
4. LIMITATION OF ACTIONS—PART PAYMENT.—Part payment on a note made out of the proceeds of the sale of mortgaged property, not being voluntary, would not stop the running of the statute of limitations on the note.
5. LIMITATION OF ACTIONS—ABSCONDING DEBTOR.—A guarantor of a note who left the State openly and within the knowledge of the officers of a bank holding the note was not an "absconding debtor" within Crawford & Moses' Dig., § 6974.

Appeal from Baxter Circuit Court; *John C. Ashley*, Judge; reversed.

STATEMENT OF FACTS.

This suit was brought upon a contract of guaranty for the payment of a promissory note attached thereto, and the statute of limitations was pleaded, and the execution of the contract was denied.

T. F. Neel made the appellee bank the note on the 6th day of January, 1920, for $650, due 60 days after date, with 10 per cent. interest from date until paid. Pinned to this note, on a separate piece of paper, was the guaranty contract, not indicating clearly whether it purported to be signed R. F. or R. J. Smith, reading as follows:

"Mountain Home, Arkansas, November 24, 1920.

"For and in consideration of the property secured by a chattel mortgage, to secure the payment of the attached note, being turned over to us, we, the undersigned, accept said property and guarantee the payment of the attached note.

"T. E. Neel,
"R. F. (R. J.) Smith."

The bank brought suit on the 6th day of August, 1927, against T. F. Neel, T. E. Neel and R. J. Smith. Summons was issued against T. F. and T. E. Neel on the same day the suit was filed, and judgment was taken against both of them by default on the 12th day of September, 1927, for the full amount sued for. R. J. Smith was a nonresident of the State living in California on

the date suit was filed, and no summons or other process was issued against him until the 3rd day of August, 1929, when he was visiting the State. The note bore four indorsements of interest paid by "E. Taylor," the last being "11-1-23. Received interest $5." Under stipulation made on the 14th day of August, 1929, R. J. Smith's deposition was taken by consent, all the original papers in the case being before the parties at the time. Before the regular September term of 1929 of the Baxter Circuit Court, at which time the case would have been tried, the file containing all of the original pleadings and papers was lost. The loss of the papers was stipulated, that the defendants in the case are T. F. Neel, T. E. Neel and J. F. Smith, the filing of the suit on the 6th day of August, 1927, the issuance of summons against T. F. and T. E. Neel on that day, and the rendition of judgment against them by default. Further that summons was issued against the defendant R. J. Smith, now appellant, on August 3, 1929, and served on the 5th day of August, 1929. A copy of the note and guaranty contract was attached as a basis of the action, and that Smith's defense was a plea of the bar of the statute of limitations and "2. that he did not sign nor authorize any one else to sign his name to the original instrument, which is the basis of this action against him, and that the signature appearing on said contract, which plaintiff alleged to be his, is forged." It was also agreed that the cause should be heard on the plea of the statute of limitations without a jury, the parties introducing at the time any evidence they may desire on the point, and also that, if the plea and defense of the statute of limitations were not sustained, the cause should be continued until the next term of court for a thorough search for the lost papers.

The cause was submitted to the court on the issue of the statute of limitations at the September term, 1929, and the court took the matter under advisement and rendered a decision in vacation, under the agreement entered as of September 9, 1930.

The bank attempted to avoid the plea of the statute of limitations by showing that appellant was an absconding debtor within the meaning thereof. Judgment was rendered against appellant from which the appeal was prosecuted.

Dyer & Dyer, for appellant.

Wm. U. McCabe, for appellee.

KIRBY, J., (after stating the facts). The note, for payment of which the guaranty contract was alleged to have been executed, was due according to its terms 60 days after its date of January 6, 1920, long before the execution of the alleged guaranty contract on November 24, 1920. The liability of the guarantor was unconditional and absolute at the time of the execution of the guaranty contract, the principal debtors having failed to pay the note or obligation at maturity, for the payment of which the guaranty contract was made, and a cause of action accrued against the guarantor upon the execution thereof. *Bank of Morrilton* v. *Skipper-Tucker Co.,* 165 Ark. 49, 263 S. W. 54; *First National Bank of Helena* v. *Solomon,* 170 Ark. 555, 280 S. W. 659.

Summons was not issued against appellant in the suit brought August 5, 1927, until August 3, 1929, and, even if the payment of the interest had the effect to make a new date for the beginning of the statute of limitations to run, November 1, 1923, there had elapsed between that date of such payment and the issuance of the summons more than 5 years and 9 months. The action was not commenced against appellant, of course, until the issuance of the summons. *Jernigan* v. *Pfeifer,* 177 Ark. 145, 5 S. W. (2d) 941; *Clemmons* v. *Davis,* 163 Ark. 452, 260 S. W. 402; *Hollum* v. *Dickerman,* 47 Ark. 120, 14 S. W. 477. There was no proof, however, showing that the partial payment or the payment of interest credited on the note was made by appellant or any one for him. The evidence shows only that it was made by E. Taylor, a stranger to the whole transaction, so far as the record discloses, and it could not operate therefore to arrest

the running of the statute of limitations and form a new period from which the statute should be computed, so far as the liability of appellant was concerned. Even if such payment was made out of the proceeds of the sale of the mortgaged property, alleged to have been delivered to appellant, it could not operate as a voluntary payment which would form a new period from which the statute of limitations should run under the circumstances of this case. *Taylor* v. *White,* 182 Ark. 433, 31 S. W. (2d) 745.

The undisputed testimony shows that appellant did not leave the State until in the fall of 1921, more than 10 months after the cause of action against him accrued; the bank, appellee, having cashed his last check upon its presentation by appellant on October 6, 1921, as stated by Morris, its cashier. His testimony is undisputed that he had enough money in the banks, appellee and another bank in the county, to more than pay all his obligations, and enough money in appellee bank to purchase a farm in Missouri, which the cashier of appellee bank was trying to sell him prior to his removal from the State, knowing at the time that he contemplated such removal. His testimony is also undisputed that he asked Mr. Eatman, the cashier of the bank, what should be done with the team of mules that had been mortgaged to the bank, and which he had in his possession, having attempted to sell them for the bank and received an offer of $190, which the bank declined to accept, and was told by Mr. Eatman to put them in a certain pasture, which was done. His leaving the State was openly done and publicly known, and his intention to leave was also known to the officers of the appellee bank before his departure. He was not an absconding debtor within the meaning of the statute of limitations. Section 6974, Crawford & Moses' Digest; *Rock Island Plow Co.* v. *Masterson,* 96 Ark. 447, 132 S. W. 216; *Keith* v. *Hiner,* 63 Ark. 244, 38 S. W. 13.

According to the principles announced, it follows that the court erred in holding the claim of appellee not barred by the statute of limitations, the undisputed tes-

timony showing such to be the case. The judgment is reversed, and the cause will be dismissed. It is so ordered.