DAVIS EX'X, USE OF MCGUIRE *vs.* SULLIVAN.

By the 91st chapter of the Revised Statutes, suits upon writings obligatory were barred by the lapse of five years, unless the plaintiff came within one of the exceptions contained in the 13th section.

The plaintiff having proved himself within the exception, the presumption is that he so continued until within five years of the institution of the suit.

The person to whom a "note is passed" and for whose use the suit is brought, being a non-resident, is entitled to the benefit of the exception.

Writ of Error to the Circuit Court of Hempstead County.

THIS was a suit originally commenced before a justice of the peace, instituted on the 9th January 1846 by Julia Davis as executrix of Aquilla Davis for the use of William McGuire against Daniel A. Sullivan upon a note bearing date the 6th January 1832 and due 1st June 1832, for $50. Upon the trial of the cause before the justice the defendant, amongst other things, pleaded the statute of limitations, which was found for him and judgment accordingly.

The plaintiff appealed to the circuit court. Upon trial in the circuit court, the court found that the cause of action did not accrue within five years before suing out the writ, and that for other causes the plaintiff ought not to recover; and thereupon rendered judgment for the defendant. The plaintiff moved for a new trial and upon the overruling his motion, set out the evidence and excepted. The proof was that "Davis lived in Tennessee when the note was given and moved to Arkansas before it fell due: a note of the character of the one now in suit was passed by Davis to one McGuire previous to Davis leaving Tennessee. When the note fell due McGuire lived in Tennessee.

The plaintiff has brought the case before this court, by writ of error, and assigned for error the overruling his motion for a new trial.

PIKE & BALDWIN, for the plaintiff.

RINGO & TRAPNALL, for the defendant. The defendant insists that so far from committing any error in its finding in the case, or refusing to grant a new trial on the motion of the plaintiff, the testimony as shown by the record proves affirmatively the statute bar insisted on by the defendant, and that no different finding could have been lawfully made thereupon: for it clearly establishes the fact that both the plaintiff and the defendant were resident in the State of Tennessee when the contract was made. That Davis removed to Arkansas in 1832 before the debt was payable; that "a note of the character of the one now in suit was passed by Davis to one McGuire previous to Davis leaving Tennessee: when the note fell due McGuire lived in Tennessee," which was all the evidence adduced on the trial.

By our statute the right of action on such contract is limited to five years from the time the money becomes due, and to avoid the bar the plaintiff was bound to prove (if he relied upon the exception in favor of non-residents of this State) not only that he was a non-resident when the debt became due, but also that he remained beyond the limits of this State from that time until some period of time less

than five years before the institution of this suit. This the proof in the case wholly fails to establish, but establishes the fact affirmatively that the obligee who is the testator of the plaintiff removed to this State in 1832, nearly fourteen years prior to the institution of the suit. *Rev. St. chap.* 91, *sec's* 11, 13. *Doe ex dem. Smith vs. Harrow &c.* 3 *Bibb* 446. *May's Hrs. & Devisees vs. Slaughter,* 3 *Marshall* 507. *Thomas vs. White &c.* 3 *Littell* 183.

In this case the time having run against the plaintiff, the burthen of proving himself clearly within the exception in favor of non-residents was by law thrown upon him, and without establishing a continuous absence from the State until within five years prior to commencing this suit, he could not recover—for this alone would entitle him to maintain the action.

JOHNSON, C. J. It is stated as a reason for the judgment rendered in this case that the appellant's cause of action did not accrue within five years from the issuance of the original writ by the justice of the peace. After the finding and judgment of the court the plaintiff filed his motion for a new trial; which motion being overruled, he then filed his bill of exceptions purporting to set out all the testimony introduced upon the trial. The plaintiff introduced Richard F. Sullivan as a witness, who testified that A. Davis lived in Tennessee when the note was given and moved to Arkansas before the note fell due, a note of the like character of the one now in suit was passed by Davis to one McGuire previous to Davis leaving Tennessee; when the note fell due McGuire lived in Tennessee. This is said to have been all the testimony offered upon the trial in the circuit court. The note certified up by the justice and the one to which we presume the witness refers, purports to have been executed on the 6th of January 1832 by D. A. Sullivan in favor of A. Davis for the sum of fifty dollars and fifty-five cents and made payable on the first day of June next. The writ issued by the justice bears teste the 9th January 1846. We have not been informed but the presumption is that the testimony in regard to the residence of the parties was offered to prevent the operation of the statute of limitations. The 13th section of the 91st chapter of the

Revised Statutes provides that "If any person entitled to bring any action in the preceding seven sections mentioned, except in actions against sheriffs for escapes and actions of slander, shall at the time the cause of action accrued, be either within the age of twenty-one years or insane, or beyond the limits of this State, or a married woman, such person shall be at liberty to bring such action within the time specified in this act after such disability is removed." The instrument offered being a writing obligatory the right of action was barred by the lapse of five years, unless the circumstances of the case bring it within one of the exceptions, specified in the act. The proof is that McGuire for whose use and benefit the suit was instituted was a resident of the State of Tennessee when the cause of action accrued. The plaintiff having established the fact of his non-residence at the time of the accrual of the cause of action, brought himself within the exception of the statute and the legal presumption is that he so continued until within five years of the institution of the suit, as the defendant wholly failed to show the contrary. Under this view of the law, we think that the circuit court clearly erred and that therefore the judgment ought to be reversed.

Judgment reversed.