WAKEFIELD *vs.* SMART.

The term *"beyond seas"* in the Territorial Statute of limitations. (*Steel & McCamp. Dig.* 381), applies to persons beyond the jurisdiction of the State, as well to foreigners who have never come within the jurisdiction, as to our own citizens who may be absent, and against whom the statute never commenced running—as held in *Field* v. *Dickinson*, 3 *Ark. R.* 409.

Suit brought 13th April, 1846, by one who has never resided in the State, against a citizen, on a note due 5th Feb., 1835—HELD that the note was not barred by any act of limitation.

Objections to the competency of testimony, must be made on the trial—it is too late to raise them on error.

Appeal from the Ouachita Circuit Court.

On the 13th April, 1846, Hiram Smart sued Amos Wakefield, on a promissory note for $41.10, dated 5th Feb., 1835, and payable on demand, before a justice of the peace of Ouachita. Judgment for defendant, and plaintiff appealed to the Circuit Court, where the cause was tried in April, 1847, before the Hon. GEORGE CONWAY, Judge. Wakefield relied upon the statute of limitations as a defence, the cause was submitted to the court, sitting as a jury, and judgment for Smart for the amount of the note. Wakefield moved for a new trial, which was refused, and he excepted and set out the evidence as follows:

Samuel Moore, esq., deposed that he received the note sued on, for collection, some four years ago, and about a year afterwards pre-

sented it to Wakefield for payment—he said it was a hard case, and he would not pay it until compelled by law. Witness presented it as coming from, and belonging to, Mr. Smart, Wakefield's old friend of New York; to which Wakefield made no definite reply. Witness had received several letters from Smart, two of which he presented to the court, post-marked Nashau, New Hampshire, and received by mail. Witness had always understood from the Crosses, as well as from tacit admissions of Wakefield—from the letters received from Smart as aforesaid, and from general report of all knowing any thing about it, that Smart had never been a resident of the State of Arkansas—had never been in the State at all.

Dews, another witness, deposed that he had known Wakefield since the spring of 1835 or 1836, and he had been a citizen of Arkansas ever since he first saw him.

This is the substance of all the material evidence in the case.

Wakefield appealed to this court.

E. H. ENGLISH, for appellant.

PIKE & BALDWIN, contra.

OLDHAM, J. Smart sued Wakefield before a justice of the peace upon a promissory note for forty-one dollars and ten cents, dated February 5th, 1835, and payable on demand. The justice rendered judgment for the defendant, and the plaintiff appealed to the Circuit Court. Upon a trial *de novo* in that court the defendant relied upon the statute of limitations as a defence; in avoidance of which the plaintiff proved that he was, at the time of the execution of the note until that time, a non-resident of the Territory and State of Arkansas.

The holder of the note being a non-resident of the State and Territory, the Territorial Statute did not bar his action. In *Field* v. *Dickinson*, 3 *Ark. R.* 409, it was held that the expression beyond seas, as used in that Statute, applied to persons beyond the jurisdiction of the state, as well to foreigners who have never come within the jurisdiction, as to our own citizens who may be absent, and against

whom the statute never commenced running. That the action was not barred by the limitation act contained in the *Rev. St. ch.* 91, nor by the acts of 1842 nor 1844, was decided in the cases of *Couch* v. *McKee,* 1 *Eng. Rep.* 484; *Hawkins* v. *Campbell, ib.* 513; and *Watson* v. *Higgins,* 2 *Eng. R.* 495.

The appellant contends, however, that the appellee did not prove his non-residence by competent proof. The objection to the competency of the testimony, should have been taken upon the trial. It is too late to raise the objection in this court.

Let the judgment of the Circuit Court be affirmed.