

## STATE BANK vs. WARD ET AL.

DEBT, against *three* on a promissory note: joint plea of *nil debet*, sworn to by *one* of the defendants: plea demurred to on the ground that all the defendants should have joined in the affidavit—HELD, that the objection to the affidavit was no cause of demurrer to the plea, but the effect of the affidavit was a question for the court on the trial.

*Appeal from the Washington Circuit Court.*

This was an action of debt by the Bank of the State against John C. Ward, Reese B. Ward, and Augustus M. Ward, determined in the Washington Circuit Court, in November, 1847, before SNEED, Judge.

The action was founded on a promissory note alleged to have been executed by the defendants to plaintiff. The defendants filed a joint plea of *nil debet* in the usual form, verified by the affidavit of Augus-

tus M. Ward, *one* of the defendants. Plaintiff demurred to the plea upon the ground that it was sworn to by but one of the defendants. The court overruled the demurrer, plaintiff declined replying to the plea, judgment for defendants, and appeal by plaintiff.

LINCOLN, for appellant.

OLDHAM, J. The affidavit required to a plea denying the execution of the instrument sued upon forms no part of the plea. The insufficiency or want of the affidavit is no cause of demurrer. *Hawkins v. Campbell*, 2 *Eng. R.* 118. The demurrer admits the facts pleaded and merely refers the question of their sufficiency to the court, and in deciding upon it the court will not look to extrinsic facts. 1 *Ch. Pl.* 700.

“*Nil debet* and *non assumpsit* may be filed in all actions of debt or assumpsit on any instrument of writing not under seal; but such pleas shall not put in issue the execution of such instrument unless verified by affidavit. *Rev. St. ch.* 116, s. 104.

The question sought to be raised by the demurrer is one of evidence under an issue formed upon the plea. Upon the trial the question would have presented itself to the court, whether the execution of the note was put in issue. The Circuit Court correctly overruled the demurrer. Affirmed.

