WILSON *vs.* KELLER & CO.

To debt on a promissory note, defendant pleaded the statute of limitations: plaintiffs replied beyond seas: defendant rejoined that the note sued on was executed and delivered to plaintiffs within the State, and had ever since remained within the State in the hands of their agent—HELD, that a demurrer was properly sustained to the rejoinder.

Appeal from the Washington Circuit Court.

DEBT, by Keller, Adison, and Clendennen, late partners, under the firm name of Jacob Keller & Co., against John W. Wilson, on a promissory note, determined in the Washington Circuit Court, in June, 1847, before the Hon. W. W. FLOYD, Judge.

The pleadings are stated by this court. The rejoinder of defendant, to which a demurrer was sustained by the court below, is in substance, as follows:

After the usual commencement—"Because he says that the said promissory note in plaintiffs' declaration mentioned was made, executed and delivered by him to them, the said plaintiffs, within the State of Arkansas, and that the said note has been and remained within the limits of said State, in the hands of the agent of said plaintiffs, ever since the date of its execution and delivery until the institution of this suit: and this," &c.

E. H. ENGLISH, for appellant. Was the rejoinder a good answer to the replication?

The exception in favor of non-residents having been repealed by act of January, 1843, the note sued on was barred before suit, unless the two years provision of the act of January, 1844, operates in favor of plaintiffs—and if it did not, the judgment should have been for Wilson, notwithstanding the pleadings.

Was the saving in the statute intended to apply to a case of this kind?

At the time the limitation act of the Rev. St. was passed this was (as now) a new State. Persons indebted in other States were coming in, and but for the exception in the statute, debts against them would have been barred before their creditors could in many instances have found out their residence. To prevent this, the exception in favor of non-residents was inserted in the statute. But this case does not fall within the mischief intended to be prevented by the statute. Here the note was executed in this State—to a resident agent of plaintiffs —who, with the note, continued in the State until suit brought, as

shown by the rejoinder. The plaintiffs' agent having the note here, and knowing the residence of defendant, could have sued before the note was barred. Upon a fair interpretation of the statute, it seems to me that this case is taken out of the exception by the rejoinder, and the demurrer was improperly sustained.

CONWAY B, J. This was an action of debt instituted 2d October, 1846, on a promissory note, due 7th August, 1842. The defendant below pleaded *nil debet,* and the statute of limitations; plaintiffs joined issue on the first plea, and to the second, replied non-residence of the State at and ever since the accrual of their cause of action. Defendant demurred to the replication and his demurrer was overruled . He then rejoined and alleged that the note sued on was made within the State, and had remained within the same in the hands of plaintiffs' agent, from its execution until suit. Plaintiffs demurred to this rejoinder and their demurrer was sustained; defendant rejoining nothing further, the case, by consent, was referred to the court for trial, and the finding and judgment were for the plaintiffs, and the defendant appea ed.

The only question presented, is as to the correctness of the court's decision on the demurrer to the rejoinder. The appellees, by their replication, had brought themselves within the privilege of the statute, and their right to the note was undisputed. It was therefore utterly immaterial where the note was made or remained, or who had possession of it until suit. The rejoinder was insufficient, and the court properly sustained the demurrer to it. The judgment is in all things affirmed.