STATE BANK *vs.* BATES.

Declaration filed 30*th June*, 1847, on a promissory note due 4th July, 1844: writ issued 11*th September*, 1847: plea that the cause of action did not accrue within three years next before the commencement of the suit—HELD that the note was barred, because the suit was not commenced until the writ issued. *Ruddell & McGuire vs. Walker*, 2 *Eng. R.* 458, and *McLarren et al. vs. Thurman*, 3 *Eng. R.* 316, cited as conclusive of this point.

Writ of Error to the Independence Circuit Court.

On the 30th of June, 1847, the Bank of the State of Arkansas filed in the office of the clerk of the Independence Circuit Court, a petition in debt against Robert Bates, on a promissory note dated July 1st 1843, and payable twelve months after its date.

On the 11th day of September, 1847, a writ was issued upon the petition, returnable to the following November term, which was returned served upon Bates.

At the return term, this order appears of record: "Ordered by the court that the writ issued in this case be quashed and held for naught."

At the following May term, an order of continuance, on motion of plaintiff, appears of record.

At the March term, 1849, the defendant appeared, and filed two pleas, first, *nil debet,* and second, that the cause of action did not accrue within three years next before the commencement of the suit, to which issues were taken. The issues were submitted to the court, sitting as a jury (the Hon. WM. C. SCOTT, presiding) and the following is the finding and judgment of the court as put upon the record.

"Upon hearing all the evidence in this case adduced, the court, sitting as a jury, finds the following facts, *to wit:* that the petition of the plaintiff was regularly filed in the office of the clerk of this court on the 30th day of June, 1847. That on the 4th day of July, 1843, the defendant was indebted to the plaintiff herein upon his promissory note, negotiable and payable at the Branch of said Bank at Batesville—that said indebtedness matured and became payable on the 4th July, 1844. That the writ sued out in this case was issued and tested on the 11th day of September, 1847, which facts, together with the introduction of the note sued upon, was all the testimony in the case; whereupon, after the argument of counsel, and all and singular the premises being seen, and by the court fully understood; it is the opinion and judgment of the court, that the law arising upon the facts herein found is in favor of the plaintiff upon the issue to the plea of *nil debet;* and that the law arising thereon is in favor of the defendant upon the issue to the plea of the statute of limitations."—Judgment in favor of defendant for costs.

Plaintiff brought error.

CARROLL, for the plaintiff.

BYERS & PATTERSON, *contra,* relied upon the cases of *McGuire & Ruddell vs. Walker,* 2 *Eng.* and *McLarren et al. vs. Thurman,* 3 *Eng.* 313, to show that the suit was not commenced until the issuance of the writ.

MR. CHIEF JUSTICE JOHNSON delivered the opinion of the court.

The defendant pleaded that the cause of action did not accrue within three years next before the institution of the suit. The court sitting as a jury found for the defendant upon the issue formed upon this plea, and rendered judgment for him accordingly. It appears from the special finding of the court that the cause of action was evidenced by a promissory note, and that it did not accrue until the fourth of July, 1844, and that the writ was tested and issued on the eleventh of September, A. D. 1847. It is admitted by both parties that the only question presented is as to what the law requires to constitute the institution of a suit: because, it is conceded by the Bank that if the suit is not commenced without the issuance of the writ, her right of action in this case is gone, and that she must necessarily fail in her suit. The point attempted to be raised can no longer be considered an open question. The cases of *Ruddell & McGuire vs. Walker,* 2 *Eng.* 458, and *McLarren et al. vs. Thurman,* 3 *Eng.* 316, are conclusive of the question. It is there expressly held that the declaration and voluntary appearance of the defendant, or the declaration and suing out of the writ are necessary for the commencement of the action, and that in the latter case the suit cannot be said to be commenced until the writ is actually sued out. It is clear therefore that three years had elapsed from the time the action accrued before the institution of the suit, and that being the statute bar at the time, the judgment of the Circuit Court is consequently right and ought to be affirmed. The judgment of the Independence Circuit Court herein rendered is therefore in all things affirmed.