JAMES ET AL. *vs.* BISCOE ET AL.

Where evidence is introduced on the trial below without objection, its competency cannot be questioned on error.

The issuance, service, and return, of a writ lost, may be proven by parol.

The original Trustees of the Real Estate Bank, who were the proper plaintiffs, commenced an action on a note before it was barred by the act of limitation, and suffered a non-suit; afterwards, and within one year from the time of such non-suit, the residuary Trustees of the Bank, who had in the meantime become the proper plaintiffs, renewed the suit. HELD, that the bar did not attach. *(Digest, sec.* 24, *ch.* 99.*)*

Writ of Error to Franklin Circuit Court.

DEBT, by Biscoe, Faulkner, Hill, Drennen, and Walters, as residuary Trustees of the Real Estate Bank, against James and others, determined in the Franklin Circuit Court, August term, 1848, before Hon. W W. FLOYD, Judge.

Action commenced by declaration filed February 2, 1848, and writ issued with a mistake in the date, but executed February 11, 1848. The cause of action, as set out in the amended dec-

laration, was a note to the Real Estate Bank, dated February 28, 1841, and due six months after date for $870, assigned by the Bank, April 2, 1842, to the original Trustees of the Bank, and by them, April 2, 1844, to the residuary Trustees, in whose names this suit was brought. Pleas *nil debet,* and *actio. non., &c. in fra tes annos.* Issue on the first plea: To the 2d, replication that on the 15th of February, 1844, less than three years after the cause of action accrued, suit was commenced on the note by the plaintiffs, and ten other persons, original Trustees of the Bank, in the same court, which continued pending until at August term, 1847, when a non-suit was taken, and the present suit brought within a year afterwards. Rejoinder in short, and issue. Trial before the court, sitting as a jury, judgment for plaintiffs, motion for a new trial overruled, and exceptions.

The evidence, as set out in the bill of exceptions, was the note and endorsements, the declaration in the original suit, filed February 15, 1844; the affidavit of a witness, Turner, that a summons issued thereon on the same day of its filing, which was served and returned, but lost, and new writs issued: the new writs issued August 28, 1845, and returned served. It was admitted that no entry was made of record in the original case until August 25. 1845, and that non-suit was suffered at the time averred in the declaration. Speigle testified that he was sheriff of Franklin county on the 15th of February, 1844, and so continued until October thereafter; that he had no recollection that any such writ as referred to in Turner's affidavit came to his hands to be executed—was disposed to think it did not. But he had a deputy during that time, and could not say whether it was executed by him or not.

BALDWIN, for the plaintiffs, contended that there was no sufficient evidence of the issuance of writ, when the declaration was filed in the first suit; that the suit commenced with the issuance of the writ appearing in the record, which was after the cause of action was barred, and the interest of a majority of the plaintiffs in the note sued on had ceased; that, as the second

suit was brought by different plaintiffs, the 24*th sec. ch.* 99, *Digest,* did not apply to this case.

PIKE, contra. The affidavit of Jesse Turner, proving the issuance and service of the original writ, being read without objection, it is too late to make the objection in this court. That parol evidence was competent to prove that the writ did issue, was served and lost. *Bailey vs. Palmer,* 5 *Ark.* 208. *Smith vs. Dudley,* 2 *Ark.* 64. *Fowler vs. More,* 4 *id.* 570.

Mr. Justice SCOTT delivered the opinion of the Court.

No objection was raised to the reading of the affidavit of Turner as evidence. The testimony of the sheriff was not only negative, but, showing that he had a deputy who might have received and executed the writ, it gave support to the statement of Turner, or, at any rate, did not controvert it. The testimony, then, established the commencement of a suit by all the Trustees at a time when they were proper parties to a suit within the rule declared in the case of *McLarren et al. vs. Thurman,* 3 *Eng.* 313, the subsequent non-suit by these plaintiffs, and the commencement of the present action within one year thereafter, when the plaintiffs in this action as assignees were proper parties, and therefore the bar of the statute did not attach; and therefore the motion for a new trial was properly overruled.

Let the judgment be affirmed.