

\*HICKS ET AL. [\*403

v.

BADHAM.

The questions of law arising upon a demurrier to the declaration, which has been overruled by the court, will be considered as waived by filing a plea in bar.

(The case of *State Bank v. Conway*, 13 Ark. 354, and subsequent cases, as to new trials.)

*Appeal from Phillips Circuit Court.*

*Pulmer and Watkins & Gallagher,*  
for appellants.

*Fowler & Stillwell,* for appellee.

HANLY, J. This was an action of assumpsit instituted at the May term, 1855, of the circuit court of Phillips county by the appellee, for the use, &c., against appellants, founded on a

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promissory note. The plea of the general issue, *non-assumpsit*, was interposed by the defendants below, and issue thereto joined by the plaintiff. This issue was submitted to the court, sitting as a jury, by consent, and there was a finding and judgment by the court in favor of the plaintiff, for the amount of the note sued on, with interest. There was an exception taken to the finding of the court upon the evidence, and a bill of exceptions signed and sealed, purporting to embody and contain all the evidence adduced at the trial, but which we do not deem material to state, or farther notice, in the view of the disposition which we shall make of the case.

There was a demurrer to the declaration interposed and overruled by the court; to which, the defendants below excepted, but having interposed their plea in bar afterwards, and not saving the point by their bill of exceptions **404**\*) taken to the finding of the \*court upon the evidence, the question of law arising on such demurrer, must be considered as waived by their subsequent plea in bar.<sup>1</sup>

There was no motion for a new trial.

This case, therefore, falls fully within the rule laid down by this court in *State Bank v. Conway*, 13 *Ark. Rep.* 354, 355; *Jones et al. v. Gatlin*, 16 *Ark. Rep.* 35, and *Kinney et al v. Heald*, just decided. *Lefils & Christian v. Sugg*, 15 *Ark. Rep.* 137.

Judgment of the circuit court of Phillips county, is, therefore, affirmed, with costs.

Absent, Mr. Justice Scott.

1. Pleading waives demurrer. *Jarrett v. Wilson*, 1-140, note 1.

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