DICKERSON *vs.* MORRISON.

The statute of limitations, Rev. Stat. chap. 91, which took effect 20th March, 1839, is no bar to an action of debt, upon a bond, commenced within five years from the time the statute went into effect. *Baldwin vs. Cross,* 5 *Ark. Rep.* 510, *cited.*

Where the issue is found for the defendant upon a plea setting up matter, which, by no manner of pleading, whatever, could be made available as a defence to the action, the court should render judgment for the plaintiff *non obstante veredicto.*

Thus: in an action of debt upon a bond, commenced 14th April, 1843, the defendant pleaded that he did not "*undertake*" within five years next before the commencement of the suit, to which there was replication, issue, and finding for defendant—Held, that the court should have rendered judgment for plaintiff *non obstante veredicto,* because the statute of limitations did not take effect until 20th March, 1839, and, by provision of the statute, the plaintiff had five years to bring his action from the time the act went into effect, which had not expired when he sued.

Writ of error to the circuit court of Independence county.

ACTION of debt, by Dickerson against Morrison. The case was first determined, on demurrer to the declaration, at the August term of the Independence circuit court, 1843, and the judgment, then rendered, reversed on appeal. See *Dickerson vs. Morrison,* 5 *Ark. Rep.* 316. It was again determined at the August term, 1844, before the Hon. THOMAS JOHNSON, then one of the circuit judges.

The suit was commenced on the 14th April, 1843, and was founded on a writing obligatory for $104, dated 11th Feb., 1837, due twelve months after date, and executed by J. Barnett, who was not sued, and the defendant, Morrison, to Wm. Thompson, who assigned it to plaintiff, on the 16th April, 1842.

The defendant pleaded that he "did not *undertake* and *promise,* in manner and form as alleged in the declaration, within five years next before the commencement of the suit." The plaintiff replied that he "did undertake and promise in manner and form &c., within five years" &c., to which the defendant took issue. It appears from a bill of exceptions, taken by the plaintiff, that the issue was submitted to the court, sitting as a jury; that the plaintiff introduced the bond sued on, as above described, and showed from the record that the declaration was filed on the 14th day of April, 1843. This being all the evidence introduced, the court found for the defendant; and the plaintiff moved the court for judgment *non obstante veredicto,* on the ground that the plea was insufficient and no answer to the declaration, and that the issue upon it was wholly immaterial. The court overruled the motion, and gave judgment for defendant, to which the plaintiff excepted.

BYERS, for the plaintiff. The issue joined was immaterial, and the court should have disregarded it, and given judgment for the plaintiff.

The action being upon a bond, the plea is no answer to the cause of action. It should have been that the *cause of action did not accrue within five years.*

The issue was wholly immaterial. Our statute of limitations did not go into force until the 20th March, 1839, and the suit was brought within five years from that time, and the fact stated in the plea, if true, was no defence to the action. *Tidd's Practice, pages* 830, 831, 828, 829. 1 *Chitty on Pleading,* 691, 692, 693. *Com. Dig. Pleader R.* 3. 3 *Bos. & Pul.* 348, 352. 3 *Caines Rep.* 163. *Bar. & Cres.* 449.

FOWLER, contra. The plea was substantially good, and the issue a material one; and the presumption of law is in favor of the verdict.

JOHNSON, C. J., not sitting: MACLIN, special judge, sitting with Oldham.

OLDHAM, J., delivered the opinion of the court.

This was an action of debt, brought in the circuit court, against Morrison, upon a writing obligatory, executed by him and one Barnett, who was not sued. Morrison pleaded non assumpsit within five years, to which there was a replication and issue.

It was decided in *Baldwin against Cross,* 5 *Ark. Rep.* 510, that the statute limitations, in action of debt upon a foreign judgment, brought within five years after the 20th March, 1839, when the act took effect, was no bar to the action. The principle settled in that case governs in the determination of the plea in this case. This suit was commenced on the 14th April, 1843; five years had not elapsed from the taking effect of the act of limitations, consequently the plea sets up no valid bar to the action.

The next question to be determined is, whether the circuit court properly overruled the plaintiff's motion for judgment, notwithstanding the finding of the court, sitting as a jury, upon the issue in favor of the defendant. In *Bellows vs. Shannon,* 2 *Hill* 86, the Supreme Court of New York held, "that judgment *non obstante veredicto* is rendered where the defendant by his pleading confesses without sufficiently denying the action." The court further said "the distinction between a repleader and a judgment *non obstante*

veredicto is accurately stated by Mr. Tidd. He says, where the plea is in good form, though not in fact, or in other words, if it contain a defective title, or ground of defence, by which it appears to the court, upon the defendant's own showing, that in any way of putting it, he can have no merits, and the issue joined thereon be bound for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title as in the manner of stating it, and the issue joined therein is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader. A judgment therefore *non obstante veredicto* is always upon the merits, and never granted but in a very clear case: a repleader is upon the form and manner of pleading." 2 *Tidd's practice* 953 (Phila. 1828.) This distinction is adopted in 1 *Chit. Pl.* 695. "*Staple vs. Hayden,*" continues the court, "is a leading case on this subject. It is there said that when the defendant pleads an ill plea, but the matter, if well pleaded, might have amounted to a bar or justification, judgment can never be given against the defendant as by confession; but where the matter, though never so well pleaded, could signify nothing, judgment may in such case be given as by confession." This case is also reported in 2 *Ld. Raymond* 924, where HOLT, C. J., took this difference; that "where the defendant confesses a trespass and avoids it by such matter as never can be made good by any sort of plea, there judgment shall be given upon the confession without regard to such an immaterial issue. But, where the matter of the justification is such as, if it were well pleaded, would be a good justification, there though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action." See also, 1 *Chit. Plead.* 650.

The doctrine governing the practice upon this subject, thus deduced from the authorities, and declared by the Supreme Court of New York, is conclusive upon the question now before this court. The matter contained in the plea could, by no manner of pleading whatever, be made available as a defence to the action. For, at the

time of bringing the suit, five years had not elapsed since the taking effect of the act of limitations, and consequently the act was not available at that time as a defence to any suit limited by the act to five years. In *The People vs. Haddock,* 12 *Wend.* 475, the defendant pleaded four several pleas, three of which were found against him, and one for him, the court held, that inasmuch as the issue which was found in favor of the defendant, did not go to the merits of the cause, the plaintiffs were entitled to judgment upon the whole record, notwithstanding the verdict of the defendant upon that issue. And in *Hale vs. Andrews,* 6 *Cowen* 225, the court held that, *non assumpsit infra sex annos* to a declaration on a promise of indemnity is bad in substance, and though issue be taken thereon, and there be a verdict found for the plaintiff, subject to the opinion of the court, and the evidence be plainly against the plaintiff upon the issue, if the cause be in other respects with him, he shall have judgment: and although such an issue be found for the defendant, the plaintiff shall have judgment *non obstante veredicto.* See also *Burdock vs. Green,* 18 *J. R.* 14.

Here an issue which did not go to the merits, and which, by no manner of pleading could be made a bar to the action, was by the court sitting as a jury found for the defendant. The plaintiff was entitled to judgment notwithstanding the finding the issue against him, and his motion therefor should have been sustained, and judgment entered accordingly.

The judgment of the circuit court is therefore reversed, and this cause remanded to be proceeded in, in accordance with this opinion.