LUCAS *vs.* TUNSTALL.

The statute of limitations, Rev. Stat. Chap. 91, is no bar to debt on a bond commenced within five years from the time the statute took effect—*as held in Baldwin vs. Cross*, 5 *Ark. Rep.* 510.

Where defendant pleaded the above statute to debt, on a bond, brought within five years from the time the statute went into effect, and there was replication, issue and finding for defendant, held that the plaintiff was entitled to judgment *non obstante veredicto—as in Dickerson vs. Morrison, Ante.* 264.

Where the plaintiff replied to such a plea, held that the court should have permitted him to withdraw the replication and demur, even at a term subsequent to putting in the replication.

Writ of error to the circuit court of Independence county.

DEBT, determined in Independence, before Hon. THOS. JOHNSON, then circuit judge.

The declaration was filed 12th April, 1843, and the action was upon a bond for the payment of money, dated 2d February, 1837, due one month after its date.

The defendant, Tunstall, pleaded that the cause of action did not accrue within five years next before the commencement of the suit; the plaintiff replied that at the time the cause of action accrued, and ever since, he was, and had continued to be, a non-resident of the State; and the cause was then continued until the next term, by consent, without issue upon the replication. At the subsequent term, February, 1844, before issue upon it, the plaintiff moved the court for leave to withdraw his replication, and demur to the plea, upon the grounds "that the plea tendered an immaterial issue, was demurable, not proper to be replied to, and that a trial upon an issue to the replication would decide no material point in the cause &." The court overruled the motion, and permitted defendant to take issue to the replication, to which plaintiff excepted. The case was then submitted to the court, sitting as a jury, and the finding and judgment were for defendant. Lucas brought error.

It is assigned for errors, that the court below erred in refusing the plaintiff leave to withdraw his replication and demurrer to the plea, and in rendering judgment for defendant upon a bad plea &c.

PIKE & BALDWIN, for the plaintiff.

The main question to be decided here is, was the plea of the statute a bar to the suit? Closely connected with that is another of similar moment, and is, did the court err in refusing leave to the plaintiff to withdraw his replication and demur to the plea?

The plea was bad, because five years had not intervened between the 20th March, 1839, the day when the Revised Statutes went into force, and the 12th April, 1843, the day on which the declaration was filed; and this has been expressly ruled in *Baldwin vs. Cross,* 5 *Ark.*

The bar being bad, the replication was also bad, and a repleader should have been awarded. *Perkins vs. Burbank,* 2 *Mass.* 81. *Staples vs. Hayden,* 2 *Salk.* 579. *S. C.* 3 *Salk.* 121. 2 *Saud.* 319, *N. C.* 6 *Mod.* 1; and hence it was error to refuse to allow the plaintiff to withdraw his replication and demur to the plea. 1 *Ch. Pl.* 693, 4.

FOWLER, contra.

Amendments of matters of form rest entirely in the discretion of the courts below, and their refusal to permit such an amendment cannot be revised in this court: and after Lucas had replied to the plea, thereby curing any defect which might have existed in it, the court very properly refused to permit him to withdraw his replication and demur to the plea. And even if the court erred in that particular, Lucas waived the right to object thereto by voluntarily submitting the issue to the court to be tried. See 1 *Ark. Rep.* 97. *Eason vs. Fisher. Rev. Stat.* 634, 635, *et seq.* 2 *Ark. R.* 472, *Wilson vs. Fowler.*

If the plea is defective in form, it was cured by verdict. See *Rev. Stat.* 635 *et seq.,* 1 *Ark. R.* 97, *Eason vs. Fisher.*

The plea is substantially good. It was decided by the Supreme Court of the United States in the case of *Ross et al. vs. Duval et al.* (13 *Peters R.* 64.) that where a statute of limitations prescribes the time within which suit shall be brought, and a part of the time has already elapsed, effect may be given to the act, and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases.

JOHNSON, C. J., not sitting.

MACLIN, special judge, delivered the opinion ofthe court.

THIS was an action of debt instituted by Lucas against Tunstall determined in the circuit court of Independence county at the February Term, 1844. The action was founded on a bond for the payment of money, dated 7th February, 1837, and due one month after its date. The defendant pleaded that the "cause of action did not

accrue to the plaintiff at any time within five years next before the commencement of the suit'' &c. The plea was filed 12th August, 1843. The plaintiff replied, and the cause was continued. At the February term, 1844, and before the defendant had taken issue to the plaintiff's replication, he asked permission to withdraw it with leave to demur &c. which was refused. The cause was determined by the court sitting as a jury, and verdict for defendant.

In *Baldwin vs. Cross*, 5 *Ark. R.* 510, it was held that the statute of limitations in actions of debt upon a foreign judgment brought within five years after the 20th of March, 1839, when the act took effect, was no bar to the action. The principle in that case must govern in the determination of the plea in this case.

The principle involved in this case was also settled in the case determined in this court at the July term, in *Dickerson vs. Morrison, Ante* 264. It was held in that case that the plea of the statute of limitations did not go to the merits, and by no manner of pleading could be made a bar to the action, and that the plaintiff was entitled to judgment notwithstanding the finding of the issue against him.

This suit was commenced the 13th day of April, 1843; five years had not elapsed from the taking effect of the act of limitations, and consequently, the plea set up no bar to the action. The plaintiff ought to have been allowed to withdraw his replication to the plea with permission to file his demurrer, which should have been sustained. Notwithstanding the finding against the plaintiff, he was entitled to a judgment *non obstante veredicto.*

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