RINGGOLD & HYNSON *vs.* DUNN.

Where plaintiff replies a new promise to a plea of the Statute of limitation, the replication must aver that the promise was in writing, otherwise it is bad under the Statute.

A new promise cannot be given in evidence under an issue to such plea, but must be replied. (*a*)

Writ of Error to Independence Circuit Court.

This was an action of debt brought by Ringgold & Hynson, as surviving partners of the firm of Ringgold, Redman & Co., for the use of Simpson, against Dunn, determined in the Independence Circuit Court, in November, 1847, before the Hon. WM. C. SCOTT, Judge.

The plaintiffs declared on a writing obligatory executed by defendant to them on the 7th January, 1832, for $253.26, due two months after its date. The suit was commenced 13th Nov. 1846.

Defendant pleaded that the cause of action did not accrue to plaintiffs within five years next before the commencement of the suit. Plaintiffs filed two replications to this plea: *First,* that the cause of

(*a*) But see *Trustees R. E. Bank* v. *Hartfield et al.* 5 *Ark. R.* 557, last page of the opinion. REPORTER.

action did accrue to them within five years, &c. *Second,* as follows:

"And for a further replication, &c., the said plaintiffs say *precludi non*: because they say that the said defendant executed the said writing obligatory in the plaintiffs' declaration mentioned at the time and in the manner in said declaration alleged, and that the said writing obligatory is now, and hath always been from the time of its execution and delivery as aforesaid, in full force and effect against the said defendant, and hath not ever been paid or discharged; and the said writing obligatory so being in full force against the said defendant as aforesaid, and in no wise discharged, the same writing obligatory, on the first day of December, 1845, at, &c., was presented and shown to the said defendant for payment, and the said defendant then and there acknowledged the said writing obligatory, to be just and binding upon him, and promised to pay the same to the said plaintiffs; and this said plaintiffs are ready to verify: wherefore," &c.

The defendant demurred to the second replication, on the ground that there was no law authorizing plaintiffs to reply a parol promise to his plea of the Statute of limitation. The court sustained the demurrer; the cause was tried on the other issue, and verdict and judgment for defendant. Pending the trial, plaintiffs took a bill of exceptions, from which it appears:

Plaintiff offered to prove, on the trial, that about the 25th of November, 1845, and within five years next before the commencement of the suit, the writing obligatory sued on, was presented to the defendant for payment, by plaintiffs, and that defendant acknowledged the same to be his bond, binding upon him, just and unpaid, and expressly promised the plaintiffs to pay the same; to the introduction of which evidence the defendant objected, and the court sustained the objection; "and would not suffer any proof whatever to be introduced to prove a subsequent acknowledgment of the existence of said debt by said defendant; and decided that a promise made by the said defendant, although within the Statute of limitation as above stated, was not competent proof; to which decision of the court, plaintiffs excepted," &c.

Plaintiffs brought error.

BYERS & PATTERSON, for plaintiffs.

FOWLER, contra.

OLDHAM, J. The plaintiffs, to avoid the effect of the Statute of limitations pleaded by the defendant, replied that the defendant had made a new promise within the time, &c. To the replication, the defendant demurred, and the demurrer was sustained by the court.

The bar given as a limitation, and the causes which take a case out of its operation, depend upon the Statute, and, therefore, whoever will avail himself of the benefits or privileges of the Statute in either case, must, by his pleading, bring himself strictly within its provisions. A verbal promise will not take a case out of the operation of the act. Every pleading is to be construed most strongly against the party pleading. The presumption is that inasmuch as the replication does not aver that the new promise was in writing, such was not the case. Such an averment is necessary, and without it the replication is defective. *Rev. Stat. ch.* 91, *sec.* 14.

For the reasons already given in reference to the replication, the evidence offered by the plaintiffs was properly excluded. Besides, evidence showing a new promise was not admissible under the issue. That fact should have been replied and an issue formed upon it, before competent testimony could have been admitted respecting it.

Affirmed.