LEE *vs.* LEECH.

Previous to March 20, 1839, (the time *chap.* 91, *Rev. Stat.*, took effect,) there was no act of limitation in this State as to writings obligatory, and causes of action then existing on such instruments were not barred until after the expiration of five years from the time the act went into operation.

Debt on a penal bond, conditioned that defendant would convey to plaintiff a lot of ground, by a particular day, which he had sold to him for a specified price, and received the purchase money: breach, failure to convey. HELD, that on default of defendant, the court could not render final judgment for the purchase money specified in the bond with interest thereon, but should order a writ of inquiry as to the truth of the breach, and damages sustained, under *Digest, chap.* 120, *sec.* 7.

Writ of Error to Pulaski Circuit Court.

DEBT, by Leech, against Lee, determined in the Pulaski Circuit Court, in May, 1845, before CLENDENIN, judge. The action was commenced 9th of December, 1842, and the declaration was, in substance, as follows:

"John H. Leech complains of Bushrod W. Lee, of a plea that he render unto him the sum of $1,500, which he owes to, and unjustly detains from, him:

"For that whereas, heretofore, to wit: on the 17th day of July, A. D. 1833, at, &c., the said defendant and one John H. Cocke, since deceased, and whom defendant hath survived, by their certain writing obligatory, sealed, &c., of that date, acknowledged themselves held and firmly bound, unto said Leech, in the penal sum of $1,500, for the payment of which they bound themselves, their heirs, &c., jointly and severally, &c. Which writing obligatory was, and is, subject to a certain condition thereunder written, whereby, after reciting that whereas the above named Cocke had, that day, sold, to said Leech, a certain lot, or parcel of ground, situated in Little Rock, which was designated, on the map of said town, as, &c., [*here the lot is described,*] to have and to hold the said lot, or parcel of ground, as above described, to him, the said Leech, his heirs or assigns forever, in consideration of the sum of $75, the receipt whereof was thereby acknowledged, then, therefore, if the said Cocke should make, or cause to be made to said Leech and his heirs or assigns, a conveyance for said lot, in fee simple, by deed with general warranty, on or before the first day of May then next ensuing, then said obligation was to be void, else, &c. Yet, plaintiff avers that said Cocke did not, nor would, though often requested so to do, make, or cause to be made, on or before the first day of May next, ensuing the date of said writing obligatory, nor at any other time whatsoever, to the said Leech and his heirs or assigns, a conveyance for said lot, or any part thereof, conveying, in fee

simple, &c., by deed, with general warranty, &c., &c., or otherwise, howsoever, but herein, during his lifetime, wholly failed and refused, nor have his heirs, or legal representatives, or any other person or persons whatsoever, since his death, done the same, but, &c. And said plaintiff avers that, by means of said failure and refusal on the part of said Cocke, &c., the said sum of $75, the purchase money paid by plaintiff for said lot, with interest thereon from the date of said writing obligatory, hath been and is wholly lost to said plaintiff: by means of which said premises the said plaintiff hath sustained damages to a large amount, to wit: to the amount of $1,500: by means of which said breach the said writing obligatory hath become and is forfeited, and thereby an action hath accrued, &c., Concluding with the usual negation of the payment of the penalty of the bond.

Defendant craved oyer of the bond sued on, which was granted by filing the original, and he then pleaded that the cause of action did not accrue to plaintiff at any time within five years next before the commencement of the suit; to which the court sustained a demurrer, and then follows:

"And now on this day comes the said plaintiff, by attorney, and the said defendant saying nothing further in bar or preclusion of the said plaintiff's action; and it appearing to the satisfaction of the court here that this action is founded upon a penal bond, conditioned for the conveyance of certain land, by the condition whereof the damages recoverable in this action are ascertained and reduced to a certainty, and the truth of the breaches alleged in said declaration being admitted by the default of said defendant: it is, therefore, considered, by the court, that said plaintiff do have and recover of and from said defendant the sum of $1,500, in penalty as aforesaid, and that he have execution for the sum of $128.25 damages, ascertained as aforesaid, besides his costs," &c. Defendant brought error.

FOWLER, for the plaintiff. It was by law the duty of the court to make an order that the truth of the breach assigned be inquired into and the damages be assessed by a jury; and the ver-

dict so finding the breach true and assessing the damages must be entered on the record. *Digest, p.* 775, *sec.* 6, 7, 8. *Ib. p.* 809, *sec.* 81, 82. *McKiel vs. Porter,* 4 *Ark.* 534. *Prattle vs. Cabanne,* 9 *Miss. Rep.* 166. 5 *Ark.* 640. 2 *Ark.* 390. 1 *Eng. R.* 505.

CUMMINS, contra. Every fact necessary for the recovery of damages was admitted by the deed, and no other evidence could have been adduced upon an inquiry: the purchase money and interest, in such case, should be considered as liquidated damages, (*Smith vs. Smith,* 4 *Wend.* 468. 13 *Wend.* 587. 7 *J. R.* 72,) and are fixed by law as the damages. *Kelly vs. Church of Schenectady,* 2 *Hill,* 105. *Kinney vs. Watts,* 14 *Wend.* 41. *Armstrong vs. Percy,* 5 *Wend.* 535.

The default admitted the facts charged, and the law fixed the damages. *Leech & Gibson vs. Pirani,* 5 *Ark.* 118.

As to the plea of the statute of limitations, see *Lucas vs. Tunstall,* 1 *Eng.* 443.

JOHNSON, C. J. The plea of the statute of limitations was clearly demurrable, as it is manifest that, although five years had elapsed since the cause of action arose, yet it was no bar to the action, because there was no law limiting the time within which it should have been brought until the 5th of March, A. D. 1838, and five years had not elapsed from that period before the institution of the suit. The court below, in rendering the judgment, treated the instrument sued upon as a bond for liquidated damages, and, upon that view of it, proceeded to pronounce the judgment without the intervention of a jury. It is this portion of the record that requires our special attention. The bond described most clearly contains a penalty, the object of which is to enforce the undertaking of the defendant below, or, in case of his failure or refusal to perform his covenant, to indemnify the plaintiff. A penalty, in the nature of liquidated damages, is never designed to secure the payment of a less sum or to remunerate the party in damages. The amount sitpulated as the penalty is itself the measure of damages, and, that sum being

ascertained and settled by the parties to the contract, there can be no necessity for a jury to reduce it to a certainty by their verdict. It certainly would not be contended that the penalty expressed in the bond in question was agreed upon and settled by the parties as the measures of the damages to which the obligee would be entitled upon the failure of the obligor to perform his covenant. The judgment recites that the sum to which the plaintiff below is entitled, is ascertained and reduced to a certainty by the condition of the bond. The condition of the bond is in the usual form, and evidently designed for no other purpose than to secure the conveyance of the land described in it. True it is that the amount of the purchase money is specified in it, and its receipt acknowledged, yet this cannot be said to amount to an ascertainment and liquidation of the sum recoverable upon a forfeiture. It is, in strictness, a penal bond, with a condition annexed, and, in any action upon it, the only proper subject of inquiry would necessarily be the breaches of the condition and the damages thereby sustained. The 120th chapter of the Digest declares that "when an action shall be prosecuted in any court of law upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant, or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought:" that, "upon the trial of such action if the jury find that any assignment of such breaches is true, they shall assess the damages occasioned by the breach in addition to their finding:" and that "if, in such action the plaintiff shall obtain judgment upon demurrer, by confession or default, the court shall make an order therein that the truth of the breaches assigned be inquired into and the damages sustained thereby assessed at the same or the next term, and the court shall proceed therein in the same manner as in other cases of inquiry of damages." The plaintiff in this case obtained judgment upon demurrer to the plea, and there can be no doubt but that the court should have made an order for a jury to come either at that or the next term to inquire into the truth of the

breaches assigned, and to assess the damages sustained. The omission to make such order, we consider a fatal error, and for which the judgment ought to be reversed. The judgment is therefore reversed.