WEIR & MILLER *vs.* PENNINGTON ET AL.

A judgment may be transferred by verbal agreement so as to vest an equitable interest in the transferee, with the right to control its collection, to use the name of the plaintiff therein for that purpose, and to receive the money when collected: no greater right can be conferred by a written assignment, as judgments are not within the provisions of the statute of assignment.

Special contracts, whether declared on, or pleaded as a defence, must be truly described, and a material variance between the description and proof is fatal.

Where several pleas are filed, and demurrer to one, the demurrer should be disposed of, before the parties proceed to trial on issues to the others.

Writ of Error to Bradley Circuit Court.

This was an action of debt brought by Thomas Weir and Isaac N. Miller, merchants and partners, under the style of Weir & Miller, against Isaac H. Pennington and William Flynn, in the Bradley circuit court.

The action was founded on a writing obligatory made by the defendants to the plaintiffs for $290.75, dated on the 24th April, 1848, and payable first January thereafter, with interest at six per cent. from date.

The defendants filed three pleas, 1st. *nil debet:* 2. a general plea of failure of consideration; and 3d. a special plea of failure of consideration in substance as follows:

"*Actio non,* because defendants say that said plaintiffs, on the 26th day of April, 1841, at the circuit court of Bradley county, recovered against Denarbus W. Pennington the sum of $204.80, together with the further sum of $7.17½ for their costs. And their agent and attorney, Martin W. Dorris, contracted and agreed to and with said defendants, on, &c., that if they would execute to the said plaintiffs the said writing upon which said suit is founded, that he the said Martin W. Dorris, their agent and attorney, would transfer, assign and set over all their right, title, claim and interest in and to the said judgment against De-

narbus W. Pennington to the said defendants, and the said plaintiffs, and their agent and attorney, have wholly failed to make said assignment or transfer to the said defendants; and the promise and agreement aforesaid was the whole and all the consideration upon which said note was executed to the plaintiffs, and the said plaintiffs have wholly failed to comply as aforesaid, and said judgment has not been assigned to the defendants and this, &c., wherefore, &c."

Plaintiffs took issue to the first plea, and demurred to the second and third, and the demurrer to the third being overruled, they filed five replications thereto, as follows:

1. *Nul tiel* record of the judgment mentioned in the plea.

2. That Dorris never made, as the plaintiffs' agent, any such contract or agreement as in the said plea alleged.

3. That the pretended promise and contract in said plea mentioned was not the sole and only consideration for the execution and delivery of said writing obligatory.

4. That said Dorris did set over and transfer, in equity, the said judgment in said plea mentioned to the said defendant Isaac H. Pennington, and transfer and surrender to him all right to manage and control the said judgment, and receive the proceeds thereof.

5. That plaintiffs ever had been and were then ready to assign said judgment to defendants, with a tender of an assignment, and an allegation that the assignment had never been demanded, &c.

With the last replication, a written assignment of the judgment was filed in court.

The court sustained a demurrer to the first and fifth replications, defendants took issue to the others, the case was submitted to a jury, and verdict for defendants. Plaintiffs filed a motion for a new trial, which was overruled, and they excepted, and set out the evidence, &c.

From the plaintiff's bill of exceptions, it appears that, on the trial, they introduced the obligation sued on, and rested.

Defendants then offered to read in evidence the record of a

judgment in the circuit court of Bradley county recovered by Weir & Miller against Denarbus W. Pennington, on the 26th April, 1841, for the sum of $204.82, with costs. To the introduction of which plaintiffs objected on the grounds that it varied from the judgment set forth in the third plea, and did not support said plea. The court sustained the objection, and excluded the record.

Defendants then introduced James Bradley as a witness in their behalf, who testified that he could only identify the obligation sued on by circumstances. That he had heard a conversation between Martin W. Dorris and Isaac H. Pennington, concerning the purchase of a judgment in favor of Weir & Miller against Denarbus W. Pennington, and that said Pennington agreed to give Dorris a note with good security for said judgment, which Dorris was to assign to him. That he afterwards heard Dorris say that Pennington had executed the note with William Flynn as security, and he believed from this circumstance that the note in suit was the same. Dorris said in the same conversation, that he had not assigned the said judgment to Pennington, but that he would do so. Witness did not know whether it had been or not. Witness could not state the amount of the judgment but believed that there was but one judgment in said court in favor of Weir & Miller against Pennington.

Plaintiffs objected to witness proving any thing about a judgment which he could not identify. The court suffered the evidence to go to the jury, but instructed them that the testimony of Bradley would not be considered by them as proving any judgment, but as proving the consideration upon which the obligation sued on was founded: to which instruction plaintiffs excepted.

The court instructed the jury, at the request of the plaintiffs, that evidence of an agreement by Dorris to assign the judgment to Pennington, did not sustain the allegation in the third plea of an agreement to assign to Pennington and Flynn.

The court also instructed the jury that "the parties were bound to prove the issue tendered, and that a judgment must be proven by the record."

PIKE & CUMMINS, for the plaintiffs. Upon the exclusion of the judgment offered in evidence there was nothing before the jury warranting them in finding the plea true. Parol evidence was not admissible to prove the existence of the judgment, or that it was the consideration of the bond. *Stone vs. Waggoner,* 3 *Eng.* 204. 6 *J. R.* 9. 10 *J. R.* 248.

But the plea itself, admitting it to be true, exhibits no failure of consideration. A judgment cannot be assigned so as to vest the legal title; and the equitable interest may well pass by parol, so as to authorize the party to control the judgment and collect the money.

Mr. Justice WALKER delivered the opinion of the Court.

The issue in this case was evidently formed under a misapprehension by the defendants of the legal effect of the parol agreement and transfer of the judgment purchased by them of the plaintiffs; and which they aver was the sole consideration upon which the bond in suit was executed. It was not necessary to the validity of the sale, or their use and enjoyment of their purchase (as defendants seem to have supposed) that the contract should have been evidenced by writing to enable them to take and control the judgment or collect and receive the money. Their interest was precisely the same under the verbal agreement that it would have been under a written transfer. The statute of assignment does not extend to judgments. So that the defendants could only, in any event, have acquired an equitable interest in the judgment, with a right to control its collection, to use the name of the plaintiffs for that purpose and to receive the money when collected. All this they acquired by their purchase. This point was expressly decided at the present term of this court in the case of *Huldah Clark vs. William & M. Moss,* and is sustained by the supreme court of New York in the cases of *Briggs vs. Dorr,* 19 *John.* 95. *Ford vs. Stewart, id.* 344. 17 *id.* 284. 11 *id.* 532. 1 *id.* 580.

Had the defendants averred that the judgment was void, had been collected before the transfer to them, or other cause of like

legal effect, a very different issue might have been formed. This however they did not do, but, on the contrary, they affirmatively show that they acquired all the interest in the judgment which the plaintiffs possessed, or were capable of transferring by any other mode, without the slightest pretext that the judgment is not valid, may not be collected, or that the plaintiffs have in any manner prevented them from doing so. This plea therefore, so far from showing a failure of consideration, affirmatively shows a good and valid consideration, and is evidently no bar to the plaintiffs' recovery. This being the case it is unnecessary to consider the points of law raised upon the admissibility of evidence under it.

There is moreover a fatal variance between the contract set forth in the plea and the evidence offered in support of it, which, aside from all other objections, would have been fatal to a recovery by defendants on that issue. The contract for the purchase of the judgment is alleged to have been made with both the defendants; the proof is that the judgment was purchased by one of them. Special contracts, whether declared upon by the plaintiff, or set forth by plea as a defence, must be truly described, and a material variance in the description between the allegation and proof is fatal. 1 *Chitty Pl.* 305, 307.

It was error to proceed to trial upon the issues formed on part of the pleas, without having first disposed of the issue of law raised by demurrer to the second plea.

The verdict of the jury should have been set aside and a new trial awarded, the issue of law upon the demurrer disposed of with leave to the defendant to plead over if he desired to do so. Let the judgment of the circuit court be reversed and the case remanded to be proceeded in according to law.