SANGER *vs.* SUMNER.

A plea denying that a blank assignment was made on the day alleged in the declaration, and averring that it was made after suit brought, must be sworn to, under our statute.

So a plea alleging that an intermediate assignee was the agent of the original payee, that the note sued on was assigned to him merely for collection, and that he had no right or authority to assign it to plaintiff, must be sworn to.

Writ of Error to Pulaski Circuit Court.

Action of debt by Sumner against Sanger, on a money bond. The declaration avers that, on the 14th November, 1849, Sanger executed his bond to John Newland Maffitt, for $150, payable 12 months after date, "with a stipulation to the tenor and effect, and according to the true meaning and intention thereof, that the same should bear interest at the rate of ten per cent. per annum from date of said obligation, until paid." That on the same day, John N. Maffitt assigned said note to F. A. Maffitt, and he to plaintiff. Usual breach.

Defendant craved oyer of the bond and assignments; and plaintiff filed the original, as follows:

"$150. LITTLE ROCK, Nov. 14, 1849.

Twelve months after date, I promise to pay to John Newland Maffitt, or order, one hundred and fifty dollars, to bear at the rate of ten per cent. per annum, from date until paid.

STEPHEN S. SANGER, [L. S.]"

"Pay to the order of F. A. Maffitt. J. N. MAFFITT.

Pay to Samuel Sumner, or order. F. A. MAFFITT."

Both assignments are without date. Defendant filed four pleas:

1. Payment.
2. That said F. A. Maffitt did not assign said obligation to

plaintiff on the day alleged in the declaration, but that said *assignment was made* long thereafter, and after the commencement of this suit, *to wit:* on the 27th day of April, 1851—concluding with a verification.

3. That John N. Maffitt assigned the said obligation to F. A. Maffitt for the sole purpose of enabling him to collect the same of defendant, as the agent of said John N.; and that said F. A. Maffitt, without right or authority, sold the said obligation to plaintiff, and made said assignment thereof, "and so the defendant says that, at the time of the commencement of this suit, and now said obligation was, and is, the property of the said John N. Maffitt, or his legal representatives, and not of the said plaintiff"—concluding with a verification.

4. That defendant did not promise and bind himself by the said writing obligatory to pay interest on the said sum of $150 from the date of said obligation until paid, in manner and form as alleged in said declaration—concluding to the country.

Plaintiff took issue to the first plea, and moved to strike out the others. He moved to strike out the 2d and 3d pleas, on the ground that they, in *effect, denied the assignments,* and were not sworn to: and moved to strike out the fourth plea, on the ground that it amounted to a plea of *non est factum,* and was not sworn to. And that neither of said pleas presented a material issue.

The court struck out the 2d, 3d and 4th pleas, and defendants excepted, and put them on record.

The case was tried on the plea of payment, and finding and judgment for plaintiff; and Sanger brought error.

ENGLISH, for the plaintiff, contended that the Circuit Court erred in striking out the second and third pleas. The statute (*Digest* 812,) dispensing with proof of the *execution* of an assignment, unless denied by plea under oath, certainly dispenses with nothing but proof of the execution; and every fact alleged of the assignment, must be proven except the execution. This principle is settled in the case of *Norris v. Kellogg & Co.,* 2 *Eng.* 112. The plea does not question the genuineness of the assignment,

and, therefore, it was not necessary to be sworn to: it simply tenders an issue as to the time when it was made: and this is a material issue, because if the plaintiff was not the legal owner of the note at the time of suit brought, he had no right to sue in his own name. *Block v. Walker,* 2 *Ark.* 4. 4 *Ark.* 535. 5 *Ark.* 649. Neither does the third plea deny the execution of the assignment; but its validity—it denies the power of the first assignee, who was a mere agent, to sell and assign to the plaintiff: and when a special agent acts without authority, or exceeds his authority, his acts are void. *Paley on Agency* 150, 164, 182. 2 *Kent's Com.* 620.

The defendant might have sworn to the facts alleged in his pleas, but he could not have sworn that the assignment was a *forgery,* as the statute requires where the genuineness of the assignment is disputed.

WATKINS & CURRAN, contra. The plea setting up that the note was not assigned on the day stated in the declaration, but a plea denying the assignment, and an assignment cannot be put in issue, except by plea under oath. *Dig., ch.* 15, *sec.* 4. *Sevier v. Wilson,* 3 *Eng. R.* 496. The date of the assignment is immaterial; but, if it were, it could be put in issue only by plea under oath.

It makes no difference to whom the note really belonged: it is sufficient for the purposes of this action, that the legal title is in the plaintiff, as evidenced by the assignment. If the note were assigned merely for the purpose of collection, it is sufficient, (*Purdy v. Brown & Taylor,* 4 *Ark.* 535,) and even if without authority, (*Sevier v. Wilson, ub. sup.*) it is not for the defendant to protect the rights of the beneficiary.

Mr. Justice WALKER delivered the opinion of the Court.

This is an action of debt upon an obligation assigned by the obligee to F. A. Maffitt, and by him to the plaintiff, who averred, in his declaration, that the assignments were made on the day

that the obligation was executed. In point of fact, the assignments were not dated.

The defendant appeared to the action, and filed four pleas: the 2d and 3d of which admitted the execution of the assignments, but were intended to traverse material parts of the assignment, as in the second plea, that the assignment was not made at the time set forth in the declaration, but after the commencement of the suit. And in the third plea, that F. A. Maffitt was in fact but the agent for John Newland Maffitt, and had no power to make the assignment to him.

It is unnecessary to remark upon the legal sufficiency of these pleas, as they were not demurred to; and the only question is, as to the propriety of striking them out, because they were not sworn to, as required by *sec.* 6, *Dig., ch.* 15.

The assignment was not the less valid because there was no date to it; because, if made in blank, the simple endorsement and delivery of the obligation would have constituted a valid assignment, (*Sterling and Snapp vs. Rider,* 2 *Eng.* 202,) and have vested in the holder of such obligation the right, at any time before or after suit brought, to fill up the blank, and thereby to furnish evidence of the specific character of such right, (*Cope vs. Daniel,* 9 *Dana Rep.* 417,) and, when so filled up, it related back and took effect as of the day when the obligation was endorsed in blank and delivered to the assignee, and although in this instance, no date was affixed to the assignment, as a consequence resulting from the endorsement and delivery, upon a legal presumption, the obligation is to be considered as having been endorsed on a day antecedent to its becoming due. *Pettis vs. Wertlake et al.,* 3 *Scam. Rep.* 538.

It follows, therefore, that this question arises just as it would have arisen had the assignment been dated as of the day alleged in the declaration; and brings the question fairly up as to whether a plea may be allowed under the statute, which admits the execution of the assignment, and yet controverts the facts, or a material part of the facts which the assignment evidences, without affidavit. The counsel for the defendant has referred to the

practice of filing pleas of nil debet without affidavit, and contends that, upon principle, pleas denying the assignment may be also filed without affidavit, the effect of which would be to dispense with proof of the execution of the note or assignment, but to require proof of the allegations traversed by the plea. But when we refer to these statutes, we find a very marked difference between them. That in regard to pleas of nil debet expressly authorizes the filing of such plea without affidavit, but provides that unless there is such affidavit of the truth of the plea, the plaintiff shall not be required to prove the execution of the note. But the statute in regard to assignments makes no such provision for filing pleas denying the assignment of an instrument sued upon, without affidavit. So far from this, like the statutes in regard to pleas in abatement and pleas impeaching the consideration of the note or bond sued upon, it expressly requires that the plea shall not be filed without such affidavit, making the affidavit a condition precedent to the right to file the plea; nor is this all the statute requires: the truth of the plea is to be sworn to, just as in matters of abatement and failure of consideration, for it provides that an affidavit shall be filed denying the assignment, (and denying any one material part of the assignment, is denying the assignment,) and also stating that the affiant verily believes such assignments, or one of them, to have been forged. Unless this be done, the statute denies the right to file such plea; and as the pleas in this case were filed without affidavit, they were properly stricken out on motion for the purpose; and such was our decision in the case of *Sevier vs. Wilson,* 3 *Eng.* 498, where the same question was presented.

The 4th plea was objectionable upon the same ground that we have held the 2d and 3d pleas properly stricken out.

Finding no error in the judgment and decision of the circuit court, the same is in all things affirmed.

Chief Justice WATKINS not sitting.