DICKINSON ET AL. *vs.* BURR.

In a suit by B. upon bonds executed to him by defendants, assigned by him to R., and by R. re-assigned to B., the declaration should negative the payment of the bonds, by defendants, to R. while he held them; otherwise the breach is bad.

To suit upon bonds, a plea that before the commencement of the suit, plaintiff assigned the bonds to the Bank of the State of Arkansas, and therefore had no legal interest in them at the time the suit was brought, but that the legal interest in the bonds was in the bank, is a good plea in bar; as held in *Block v. Walker, 2 Ark. Rep.* 4.

To an action of covenant upon several bonds for the payment of certain sums of

money in Arkansas funds, with a specific rate of interest thereon, a general plea of performance is bad: the plea should specially set forth the mode of performance.

On demurrer to a plea in bar, the court should see that there is a good declaration: a bad plea is a sufficient answer to a bad declaration.

Covenant on bonds: oyer of the bonds, and pleas of payment, accord and satisfaction, and issues to the pleas—Held that, the pleas being in confession and avoidance, the burthen of proof, under the issues, was upon the defendants: that the allegations of the declaration were all admitted by the pleas: that plaintiff was not bound to introduce as evidence the bonds sued on, but that on his offering them, defendants could not object to their introduction on the ground that they varied from the description of them in the declaration:

That if there was really a variance between the bonds described in the declaration, and those produced on oyer, defendants should have set forth the bonds exhibited on oyer, and demurred for variance; or should have interposed a plea which would have made it necessary for the plaintiff to produce the bonds declared on to sustain his action on the trial, when the variance could have been taken advantage of.

In a suit by the indorsee of a bond against the maker, the indorser is a competent witness either for plaintiff or defendant.

Declaration alleges the bonds sued on to have been executed to Edwin T. Burr, the plaintiff: defendants pleaded payment and accord and satisfaction, to which there were issues—Held that defendants admitted by their pleadings that the bonds were executed to plaintiff as averred in the declaration, and that the court below properly refused to permit defendants to prove upon the trial, that the bonds sued on were made by them, and were payable to Edwin T. Burr and Joseph Andrews, merchants and partners, doing business under the name and style E. T. Burr, and that they were not made to Edwin T. Burr, the plaintiff in the suit.

As to the proper mode of taking advantage of the non-joinder of a party who should be made a plaintiff in actions *ex contractu.*

Writ of Error to the Circuit Court of Independence County.

COVENANT, determined in the Independence Circuit Court, at the February term, 1844, before the Hon. THOMAS JOHNSON, then one of the circuit judges.

The declaration in substance, follows:

"Edwin T. Burr, assignee of John Ringgold, who is assignee of Edwin T. Burr, plaintiff, by attorney, complains of William H. Dickinson, William Moore and John Ruddell, of a plea of breach of covenant: For that defendants on the 10th April, 1841, at &c., made their certain writing obligatory, dated ——, with their seals,

which is here to the court shown, the date whereof is the day and year aforesaid, promised, three months after the date thereof, to pay plaintiff, or order, $1450, value received, with interest at ten per cent. per annum from maturity until paid, to be paid in Arkansas funds. And the said Burr, on the 10th August, 1841, at &c., by endorsement thereon, assigned the same to said John Ringgold, which assignment is shown to the court. And the said Ringgold on the 10th December, 1843, at &c., by endorsement thereon, assigned the same to plaintiff, which is shown to the court· by means whereof &c. an action hath accrued to plaintiff, &c. The breach negatived the payment of the obligation to Burr before the assignment to Ringgold, to Ringgold before he re-assigned to Burr, and to Burr afterwards.

Second count:

"For that also said defendants, on the 10th April, 1841, at &c., made their certain writing obligatory, sealed with their seals, and now to the court shown, the date whereof is the day and year last aforesaid, promised, six months after date, to pay plaintiff, or order, $1486.25, value received, with interest at the rate of ten per centum per annum from maturity until paid, to be paid in Arkansas funds. And plaintiff, on the 10th December, 1841, at &c., by endorsement thereon, assigned the said obligation (the same being still unpaid) to said John Ringgold, which assignment is to the court shown. And said John Ringgold, on the 10th December, 1843, at, &c., by endorsement thereon, assigned the said writing obligatory (the same being still unpaid) to plaintiff, which assignment is to the court shown, &c. By means whereof, &c., an action has accrued to plaintiff, &c. Yet plaintiff avers that said defendants did not well and truly keep said covenant, in this, that defendants (though often requested) did not, six months after the date of said last mentioned writing obligatory, or at any other time, pay said last mentioned sum of $1486.25 in Arkansas funds, nor the interest that accrued thereon, at the rate of ten per cent. per annum, from maturity until paid, or any part thereof, to the said Edwin T. Burr, before the assignment by him to said John Ringgold, nor before the said assignment by said John Ringgold to said

plaintiff, nor to said plaintiff since the assignment to him by said Ringgold, but so to do have hitherto wholly neglected and refused, &c. to the damage of plaintiff,'' &c. &c.

The writ not being served upon Moore, the suit was discontinued as to him. On the prayer of the other two defendants, oyer was granted of the bonds sued on, and the endorsements upon them. They then filed three joint pleas, as follows:

1. ''That after the making of said writings obligatory, and before the commencement of this suit, to wit: on the 1st day of August, 1841, at, &c., the said Edwin T. Burr, by his written assignment by him made upon said writings obligatory, thus: 'pay to order of J. Ringgold, Cash,' assigned, made over, transferred and endorsed all his right, title, claim and interest of, in and to the said writings obligatory to the Bank of the State of Arkansas, at its Branch at Batesville, and delivered said writings, so assigned, then and there to said Bank, and by said assignment and delivery ordered and directed the several sums therein specified, to be paid, in Arkansas funds as aforesaid, to the said Bank. Whereby he the said Burr, then and there parted with and transferred all his right, title, interest and claim in and to said writings obligatory to said Bank of the State of Arkansas; and the said defendant thereby then and there became liable to pay the several sums therein as specified in Arkansas funds, with interest thereon as therein specified, according to the tenor and effect of said writings obligatory to the said Bank of the State of Arkansas, and are still liable to pay the same: and the said Burr has not now, nor had he at the commencement of this suit, any interest, whatever, in or to said writings obligatory, or in this suit, and this,'' &c.

2d. Payment, and, 3d. Accord and satisfaction.''

The defendant, Dickinson, filed a separate plea of performance as follows:

''And the said defendant, William H. Dickinson, by attorney, comes &c., and says *actio non,* because he says that always after the sealing and making of said covenants in the said declaration mentioned, to the day of the commencement of this suit, he hath fulfilled, performed, and kept all and singular the covenants, payments,

and contracts on the part of him the said defendant to be fulfilled, performed and kept, according to the form, and effect of said covenants, and this he is ready to verify; wherefore he prays judgment &c.''

The defendant, Ruddell, filed also a separate plea of payment.

The plaintiff moved to strike out the first joint plea of defendants, which motion the court sustained, and they excepted.

Plaintiff replied to the second and third joint pleas of defendants, to which issues were taken; demurred to Dickinson's separate plea of performance, which was sustained; and replied to Ruddell's separate plea of payment, to which issue was joined.

The defendants also entered, in short upon the record, a joint plea of payment, to which issue was taken.

Upon these issues the cause was submitted to a jury, and the verdict was for the plaintiff. Pending the trial the defendants took three bills of exception, from the first of which it appears:

That after the issues were submitted to the jury, the plaintiff offered to read to them, as the bonds sued on, two writings obligatory, with the endorsements thereon, which are set out in the bill of exceptions, to the reading of which defendants objected, on the ground that they varied from the bonds and endorsements as described in the declaration; but the court overruled the objection, and permitted them to be read to the jury, to which decision defendants excepted.

From the second bill of exceptions it appears, that during the trial plaintiff introduced John Ringgold, who endorsed the bonds sued on to plaintiff, as a witness, and proposed to prove by him the kind of funds a payment of $500, which was credited upon one of the bonds in his hand-writing, was made in; that defendants objected to his competency to testify for plaintiff in the case, but the court overruled the objection, and permitted him to testify, to which defendants excepted.

From the third bill of exceptions, it appears, that pending the trial, defendants asked a witness, by the name of Shaw, who had been introduced and examined in chief by plaintiff, the following questions: ''At the time the bonds named in the declaration were

executed by defendants, were not the plaintiff, Edwin T. Burr, and one Joseph Andrews merchants and partners, doing business under the name, style and description E. T. Burr? And were not said bonds executed, by defendants, and given to plaintiff and said Andrews, merchants and partners under the style aforesaid, for goods sold by said firm to the defendant Dickinson?" That plaintiff objected to witness answering the questions, the court sustained the objection, and defendants excepted. Defendants brought error.

BYERS & PATTERSON, for the plaintiffs—1st. The declaration is insufficient in this, that the breach in the second count does not negative the payment of the bond therein described to John Ringgold during the time he had the legal title thereto.

2d. The court erred in striking out the plea that Burr had assigned the bond to the Bank before the commencement of the suit. Pleas should not be stricken out unless they are wholly frivolous. *Blakemore et al. vs. President & Directors &c.* 4 *Ark. R.* 455. *Crary vs. Ashley & Beebe,* 4 *Ark. R.* 203. *Graham's Practice,* 249, and authorities there cited. Pleas can only be stricken out where they could be treated as nullities, and judgment taken for want of a plea. *Platt vs. Robins et al. Coleman's Rep.* 81. If pleas are not clearly void the party must demur. 1 *John. Cas.* 328. *Jackson vs. Webster,* 6 *Mun.* 463. *Thomas vs. Sneithies,* 4 *Taunt.* 668. This court, in the case of *Crary vs. Ashley & Beebe* has laid down the rule "that if the pleas are informal, but still go to the substance of the action, then the party will not be allowed to sign judgment (or strike out) but must demur." This plea is both formal, and goes to the substance of the action. That it is a formal plea, see *Block vs. Walker,* 2 *Ark. R.* 4. We believe that the plea in this case contains every allegation which that plea contained, which was sustained by the court. See *Purdy vs. Brown & Taylor,* 4 *Ark. R.* 536. Such plea is good *puis darrein continuance, Gray et al. vs. R. E. Bank,* 5 *Ark. R.* 93. *Beebe et al. vs. R. E. Bank,* 5 *Ark. R.* 183. The plea is in bar and goes to the substance of the action. See the authorities last referred to.

The court erred in quashing Dickinson's plea of performance.

It is an inflexible rule that a bad plea is a sufficient answer to a

bad declaration, and that if the plea is bad, and the declaration also bad, upon demurrer to the plea, judgment must be for the defendant and the declaration quashed. 10 *Wheaton* 287. 1 *Sanders* 285 *n.* *Childress vs. Foster,* 3 *Ark. R.* 258. The declaration is defective in two points of view. 1st, Because the assignments given on oyer vary from those set forth in the declaration, in this, in the declaration the assignments are described as bearing a particular date, while those given on oyer have no date. 2d, The breach in the second count is insufficient as it does not negative the payment of the money and interest in the bond specified to John Ringgold while he had the legal interest therein. Upon the subject of variance, see 3 *Starkie Ev.* 1532. *Same,* 1543, 1548. 5 *Ark. R.* 66, *Field vs. Pope.*

The court erred in permitting the bond and assignments to be read to the jury as evidence, because they varied from those set forth in the declaration. The authorities cited above apply to this point.

The court erred in permitting Ringgold, the assignor of Burr, to testify in Burr's behalf. We think there is no better settled rule of law than that a party cannot call upon an interested witness to testify in favor of the interest of the witness. See 2 *Starkie on Ev.* 784, 744, 747, 748. *Phillips on Ev. by Cowen & Hill,* notes, part 2, *p.* 1531, 1534, 1536. *Same, Vol.* 1, *p.* 62, 55, 59, 63.

The court erred in not permitting the defendants to prove that the bonds were given to Burr and Andrews by the description of "E. T. Burr." The suit must be brought in the name of all the parties legally interested in the cause of action. 1 *Chitty's Pl.* 2, *id.* 14, 15.

FOWLER, contra.

JOHNSON, C. J., not sitting.

OLDHAM, J., delivered the opinion of the court.

Several questions are presented for the decision of this court by the record and assignment of errors in this case. These questions will be disposed of in the order in which they appear.

It is insisted that the declaration is insufficient, as the breach in the second count does not negative the payment of the bond therein set forth to John Ringgold during the time he possessed it as assignee. The breach in that count alleges that the "defendants did not pay the sum of fourteen hundred and eighty-six dollars and twenty-five cents in Arkansas funds, nor the interest that accrued thereon at the rate of ten per centum per annum from maturity until paid or any part thereof to said Edwin T. Burr, before the assignment by him to the said John Ringgold, nor before the said assignment by said John Ringgold to said plaintiff, nor to the said plaintiff since the assignment to him by the said John Ringgold, but so to do have hitherto wholly neglected and refused." The breach does not either expressly or by implication deny payment to Ringgold, while he held the note as assignee. It is clear from the language that the omission was a clerical misprision. It does not require argument or authority to prove that such a breach is insufficient, as it does not contain a full and complete denial of performance of the covenant on the part of the defendants.

The second error assigned is that the court erred in striking out the first plea filed by the defendants, averring an assignment of the covenants set forth in the declaration to the Bank of the State of Arkansas. This plea is precisely the same as that filed in the case of *Block vs. Walker,* 2 *Ark.* 4, which was decided by this court to be a good plea in bar. Under the principles settled in that case this objection is well taken.

The third and fourth errors assigned are that the court erred in sustaining the demurrer to Dickinson's separate plea of performance, and quashed the plea when the declaration should have been adjudged insufficient. "The plea of performance *generally* is only allowable when all the covenants are in the affirmative and comprehend a multiplicity of matters, which are general in their nature, as to return all writs, account for all monies received &c. But if there be any thing specific in the subject, though consisting of a number of acts, they must all be enumerated, as on a covenant "to enfeoff all his lands," the covenantor in showing performance must state them all. So, if a person be bound to pay "all legacies in a

will" he must specify them all and aver payment of each: and the reason is, because all these facts are in the knowledge of the party. *Story Pl.* 215, *note;* 292, *note.* The covenants sued upon in this case are specific for the payment of certain sums of money in Arkansas funds, with interest thereon. A general plea of performance in such a case is not good; it should specially set forth the mode of performance; consequently the demurrer to this plea was well taken. But according to the well settled rules of pleading, the demurrer should have reached back to the first error, and as the declaration, as has already been shown, contained a defective breach, it should have been adjudged bad, as the plea was a sufficient answer to a bad declaration.

It is also contended that the circuit court erred in permitting the bonds with the assignments &c. declared on to be read in evidence upon the trial. There was no issue made up by the pleadings, by which the plaintiff below was required to produce or read the bonds in evidence. The pleas filed by the defendants, upon which issue was taken, were in confession and avoidance, admitting the cause of action as set forth in the declaration and avoiding it by the introduction of new matter, to wit: payment and accord and satisfaction. There was no issue upon any averment contained in the declaration, but only upon the pleas of accord and satisfaction and payment. The burden of proof rested upon the defendants; the plaintiff was not bound to prove a single allegation contained in his declaration, as they were all admitted by the pleadings upon the record. If there was in truth such a variance between the bonds described in the declaration and those produced on oyer, the defendants should have set forth the bonds produced on oyer and demurred for the variance, or they should have interposed a plea by which the plaintiff would have been under the necessity of producing the bonds described in the declaration to sustain his action, when the variance could have been pointed out to the court and advantage taken of it.

It is also contended that the circuit court erred in permitting John Ringgold, the endorser, to testify. It is a clearly established rule of evidence that the indorser is a complete witness either for

the plaintiff or defendant. 4 *Phill. Ev.* 20. (Cow. & Hill Ed.) *Bayley on Bills,* 422, and therefore Ringgold was a competent witness for either party.

The last error assigned is that the court below erred in refusing to permit the defendants to prove on the trial that the bonds sued on were made by them, and were payable to Edwin T. Burr and Joseph Andrews, merchants and partners, doing business under the firm, name, style and description of E. T. Burr, and that they were not made to Edwin T. Burr, the plaintiff in this suit. The defendants by their pleadings admitted that the bonds were executed to Edwin T. Burr as averred in the declaration. Such proof would have been in contradiction of the admissions so made by the pleadings. "In all cases of contracts, if it appear upon the pleadings that there are other obligees, covenantees or parties to the contract, who ought to be but are not joined in the action, it is fatal on demurrer, or on motion in arrest of judgment, or on error, and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it by plea in abatement, or as a ground of non-suit upon the trial upon the plea of the general issue." 1 *Chitty Pl.* 7, 8. There are but two modes of taking advantage of the non-joinder of a party who should be made a plaintiff in actions *ex contractu,* where the objection does not appear upon the face of the pleadings. The defendant must either plead the non-joinder in abatement, or plead the general issue and avail himself of the omission as a ground of non-suit upon the trial. Neither of these modes was adopted by the defendants in this case. They neither pleaded the general issue, nor a plea in abatement, and there was therefore no issue to which the evidence offered would be applicable and it was consequently properly excluded by the court from going to the jury upon the trial.

For the defective breach contained in the second count in the declaration, and the error in striking out the first plea of the defendant, averring an assignment of the bonds declared on to the Bank of the State of Arkansas, the judgment of the circuit court must be reversed, and the cause remanded with leave for the parties to amend their pleadings if they should desire to do so.