

PITCHER & WALTERS vs. MORRISON & MORRISON.

That the writ does not set out the Christian names of the plaintiffs; and that there is a variance between the writ and declaration, in the names of the plaintiffs, and the capacity in which they sue; are neither objections to the writs, or in bar of the action; and cannot be taken advantage of, on general demurrer.

When, in a declaration on a note drawing ten per cent. interest per annum, the breach negatives the payment of the debt, but is silent as to the interest, on general demurrer, the Court will disregard or amend the defect, unless it is specially stated as ground of demurrer.

THIS was an action of debt, instituted by Pitcher & Walters, and determined in Van Buren Circuit Court, in May, A. D. 1841, before the Hon. THOMAS JOHNSON, one of the Circuit Judges. It was founded on a promissory note for \$169 28, payable ten days after date, with interest at the rate of ten per cent. per annum. The breach assigned in the declaration, negatives the payment of the debt, but is wholly

Pitcher & Walters vs. Morrison & Morrison.

silent as to the interest. The defendants moved the Court to quash the writ, but the Court overruled their motion. They thereupon appeared, and demurred to the writ and declaration; the appellants joined; and the Court gave judgment, "that said demurrer be sustained, and that the writ be abated, and that the defendants have and recover of the plaintiffs all the costs in this case." The causes of demurrer are stated in the opinion of the Court. The plaintiffs appealed.

Fowler, for the appellants.

By the Court, RINGO, C. J.

The causes of demurrer, specially assigned, are: 1st, That the writ does not set out the Christian names of the plaintiffs; and, 2d, There is a variance between the writ and declaration, in the names of the plaintiffs, and the capacity in which they sue.

These are unquestionably not objections to the merits, or in bar of the action; and, therefore, according to the principles acted upon by this Court, in the case of *Stone vs. Bennett et al.*, just decided, could not be taken advantage of by general demurrer.

The breach assigned is not commensurate with the contract as stated in the declaration, and is therefore defective; but as no objection to the breach is specially assigned in the demurrer, we are bound to disregard or amend it. And inasmuch as the declaration shows a legal right in the appellants to demand and recover of the appellees the debt, without the conventional interest mentioned in the contract, the demurrer, according to the principles adjudged by this Court, in the case of *Davies vs. Gibson*, 2 Ark. Rep. 115, ought to have been overruled. We are therefore of the opinion that the Circuit Court did err in sustaining the demurrer, and thereupon abating the writ.

Judgment reversed.