BUCKNER *vs.* GREENWOOD.

By pleading over, a party abandons his demurrer, and cannot, on error, take advantage of the objections raised by it to the declaration.

By the law merchant, a bill or note, payable to bearer, may pass by delivery, so as to vest the legal interest in the holder, and authorize him to sue upon it in his own name.

But this rule of the law merchant, is not applicable to bonds.

By the common law, a bond could not be assigned so as to enable the assignee to sue in his own name, but, by the modern practice, he may sue upon it in the name of the obligee.

Courts of common law, as well as courts of equity, will take notice of the assignment of choses in action, and, to every substantial purpose, protect the assignee.

This protection, which is given to the holder of a specialty, by assignment, with authority to sue in the name of the obligee to his own use, is as far as the common law has ever gone to vest in sealed instruments a negotiable quality.

By statute, however, all bonds are assignable, and the assignee may sue in his own name as such.

A bond can be transferred alone by assignment, under our Statute, so as to enable the holder to sue in his own name.

A bond payable *to bearer*, cannot pass by delivery so as to enable the holder to sue in his own name.

The maker of a bond can give it no form so as to change its character, or give it a negotiable quality unknown to common law, and unauthorized by statute.

Appeal from the circuit court of Pulaski county.

THIS was an action of debt, by Moses Greenwood against Simeon Buckner, determined in the circuit court of Pulaski county, at the May term, 1844, before the Hon. J. J. CLENDENIN, judge.

There were three counts in the declaration, setting out the grounds of action as follows:

In the first count, it was alleged, that defendant, (and one Thomas B. Flournoy, not sued,) on the 5th day of May, A. D. 1840, made their certain writing obligatory, signed, &c., sealed, &c., bearing the date above mentioned, and thereby promised, six months after the date thereof, that they, the said defendant as principal, and the said Flournoy as security, would *pay to the bearer,* the sum of $836.50, and then and there delivered the said writing obligatory to the plaintiff, and the plaintiff then became, and was, and is, the lawful bearer thereof, by means whereof, &c.

The second count was upon a bond, similar in all respects to the above, except it was payable at twelve months, with an averment, as above, "that the plaintiff then became, and was, and is, the lawful bearer thereof." The third count charged an indebtedness on the part of defendant, of $1,673, upon an account stated.

The bonds, as exhibited upon oyer, were as follows:

"May 5th, A. D. 1845.

Six months after date, we, Simeon Buckner, as principal, and Thompson B. Flournoy, his security, promise to pay *to the bearer* the sum of eight hundred and thirty-six dollars and fifty cents—value received. Given under our hands and seals the date above written. SIMEON BUCKNER, [SEAL.]

T. B. FLOURNOY, [SEAL.]

Endorsed—"Jas. D. Turner, administrator of the estate of William Montgomery."

"Twelve months after date, we, Simeon Buckner, as principal, and Thompson B. Flournoy, as his security, promise to pay to the

bearer the sum of eight hundred and thirty-six dollars and fifty cents—value received. Witness our hands and seals, this fifth day of May, A. D. 1845.

SIMEON BUCKNER, [SEAL.]
T. B. FLOURNOY, [SEAL.]

Endorsed as the first.

The defendant pleaded *nil debet* to the third count; and demurred to the first two counts in the declaration, on the grounds, 1st, That plaintiff showed no legal right, therein, to sue upon the pretended writings: 2nd, That said writings were void in law, and imposed no legal obligation upon the defendant to pay them to plaintiff, or any other person: 3rd, That said counts attempted, by averments, which must be proved by parol, to show that plaintiff was the obligee in said pretended bonds, when no such fact appeared upon their face, &c.

The court overruled the demurrer, and the defendant pleaded to the courts, a special plea, in substance as follows: "That the said pretended writings, in said first and second counts mentioned, if any such were ever made, executed or delivered by said defendant, were so made, executed, and delivered, by said defendant, to one James D. Turner as administrator of the estate of William Montgomery, deceased, and not to any other person or persons whatever, and not to said plaintiff or any person for him, to wit: at, &c.; and said defendant, in fact, further avers, that the legal title, in and to said pretended writings, is not, and never was, vested in the said plaintiff, legally, by the acts of said defendant, by the delivery of said writings to said plaintiff, or otherwise, &c., and of this he puts himself upon the country. To this, and the first plea, the plaintiff took issue, the case was submitted to the court, sitting as a jury, and the court found, and gave judgment in favor of plaintiff, for the amount of the bonds.

The defendant moved for a new trial, on the grounds: 1st, That the finding of the court upon the issues was contrary to law and evidence: 2nd, The evidence did not warrant the finding: 3rd, The finding should have been for the defendant. The court over-

ruled the motion, the defendant excepted, and filed a bill of exceptions, setting out the evidence, from which it appears:

The plaintiff introduced the bonds sued on, as copied above, and the endorsements thereon, as shown above. The defendant proved, and the plaintiff admitted, that the bonds sued on were given to James D. Turner, as administrator of William Montgomery, for lots conveyed to Buckner by Turner, as such adm'r., and they afterwards came to the hands of plaintiff. The plaintiff also proved, by A. Pike, Esq., that he, Pike, received the bonds of plaintiff, as his attorney, receipted him for them; that he always claimed to be the owner of them, and that this suit was brought upon them, in his name, and for his use, &c.

The defendant appealed to this court, and assigns as errors: 1st, The refusal of the court below to grant a new trial: 2nd, That the finding of the court was contrary to evidence: 3rd, The judgment was upon instruments, void in law, and such as could not sustain an action.

CUMMINS, for the appellant. Every fact averred in the plea was fully proven. The court sitting as a jury could do no otherwise than find upon the plea according to the evidence. If an immaterial issue had been formed, a re-pleader should have been awarded. 2 *Tidd's Pr.* 830.

The plea was a complete bar to the action.

Bonds, at common law, were not assignable; nor were they even commercial instruments, or governed in any respect by the law merchant.

When the defendant had shown that the bonds were executed, and delivered to a party different from the plaintiff, it was sufficient to defeat the action, unless he showed that he had acquired title thereto legally. How could this be done? Certainly only by showing an assignment under our Statute. There is no other law in force here making bonds negotiable. *Black vs. Walker,* 2 *Ark. Rep.* 4. *Small vs. Strong,* 2 *Ark. Rep.* 198. *Gamblin et al. vs. Walker,* 1 *Ark. Rep.* 220. *Ch.* 11 *Rev. Stat.* 107.

A bond payable to bearer is void. *Pelham vs. Grigg et al.*, 4 *Ark. Rep.* 141.

TRAPNALL & COCKE, on the same side. The principal questions raised by the record in this case, are, whether a bond made on its face payable to bearer, is an obligation on which an action can be founded; and secondly, if it be a valid obligation, can it be transferred except by assignment, so as to enable a subsequent holder to sue in his own name.

In every obligation, there must be an obligor and an obligee.—*Com. Dig. title "Obligation" A. Shep. Touch.* 56, 367. 2 *Black. Com.* 290: and the obligee must be a person able to contract and be contracted with. 5 *Com.* 191. *Dodson vs. Keys, Yelv.* 192. 2 *Comyn* 298.

Regularly, it is requisite that the purchaser be named by the name of baptism and surname, and that special heed be taken to the name of baptism. 1 *Coke,* 3 *b.* The obligee may be described as well as named as, "Uxori, J. S." or "*primo genito filio.*" 1 *Coke,* 3 *b.;* and mistake will not invalidate, if the description be otherwise sufficient, as to *Robert, Earl of Pembroke,* when his name is Henry: to John, Bishop of Norwich, when his name is John, *id.* But in pleading, the proper name must be shown and set forth. *idem. Dyer* 86. In this case parol proof is necessary to identify the obligee; yet a bond cannot be explained, added to, or diminished by parol proof. *Nichal vs. Thompson,* 1 *Yerger* 150. An instrument under seal, without an obligee, is void. *Pelham et al. vs. Grigg & Elliott,* 4 *Ark.* 141.

Bills of exchange and promissory notes are parol, and made payable to holder or bearer, and pass by delivery, by the custom of merchants; but this rule never had reference to bonds which are instruments of a different nature, and not governed by the law merchant. *Chitty* 9, 10, 11, 324. At common law an obligee is indispensable to the validity of a bond, and no variation of this rule is made by the statute. In the whole range of judicial decisions, in England and the United States, so far as they come within our reading or researches, there has not a single case been found which

unsettles, in the slightest degree, the common law principle: and there can be no difference in principle in omitting the obligee in a bond altogether, and describing him by the name of holder or bearer, and leaving it to change, or external circumstances to be proved by parol, to determine who he is. *Howard vs. Rogers,* 4 *Har. & John.* 278.

2nd. Is it transferrable by delivery, admitting it to be a valid bond? A bond is a chose in action, which cannot be assigned, so as to enable the assignee to sue in his own name. Yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. 5 *Bac. abr.* 155. *Coke Litt.* 232.

A note for the payment of money, under seal, though in other respects like a promissory note, is not negotiable, and an action cannot be maintained upon it, in the name of a person to whom it is transferred. *Clarke vs. Farmers Man. Co.,* 15 *Wend.* 256-7.—*Chit. on Bills,* 6, 9, 10, 11. *note f. & g.*

A bond is transferrable by virtue of the statute of assignments only, and is not governed by the law merchant. *Desha vs. Johnson, Hardin* 218. 3 *Marshall* 163. 2 *Bibb.* 425. *Mandeville vs. Riddle, Cranch* 290. *Norton vs. Rese,* 2 *Wash.* 240. *Block vs. Walker,* 2 *Ark.*

Instruments under seal do not come within the operation of the law merchant, and are excepted out of the statute of Anne. *Chitty* 324.

PIKE & BALDWIN, contra. Debt may well be maintained on a bond payable to bearer. As in the case of a note, payable to bearer, there is an original and direct promise moving from the maker to the bearer. *Crawley vs. Crowther,* 2 *Freem.* 257. *Anon.* 1 *Salk.* 126. *Bank of England vs. Newman,* 1 *Ld. Raym.* 442. *Gibson vs. Minet,* 1 *H. Bla.* 606. *Bullard vs. Bell,* 1 *Mason* 257. *Rankin vs. Woodworth,* 2 *Watts* 134. *Gorgier vs. Mieville,* 3 *B. & C.* 16.

The law will presume that the person in possession of the instrument, is so *bona fide. Picquet vs. Curtis,* 1 *Sumn.* 478. *Dugan vs. U. States,* 3 *Wheat.* 172.

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

The appellant, by pleading over, abandoned the matters of defence contained in his demurrer, and cannot now rely upon them to question the sufficiency of the declaration, as has been repeatedly ruled by this court. We will therefore not enquire whether a bond made payable to bearer upon its face, is a valid obligation, but will only determine whether such a bond may pass by delivery to a third person, so as to vest in him a right of action in his own name without regard to the original obligee.

It was an ancient rule of the common law, that no sanction would be given to give effect to the transfer of any possibility, right, or any other chose in action (which was defined to be a right not reduced to possession) to a stranger. *Chitty on Bills,* 7. But courts of law, anxiously attending to the interests of the community in support of commercial transactions, established the law merchant, *id.* 11. The transferrability of promissory notes and bills of exchange, by delivery or assignment, depends alone upon the law merchant for its support, by which a bill or note made payable to bearer may pass by delivery, and vest in the holder the legal interest, and authorize him to maintain an action in his own name upon it. But this innovation upon the ancient rules of the common law, never obtained in favor of sealed instruments, nor was the law merchant ever extended in its application to such instruments.

At common law a bond cannot be assigned so as to enable the assignee to sue in his own name, yet he has, by the assignment, such a title to the paper and wax that he may keep or cancel it, 5 *Bacon's Abr.* 155, and by the modern practice he may sue for it in the name of his obligee, *id. note e.* Courts of equity, first, and now courts of law take notice of such assignments of choses in action, and afford them every protection, not inconsistent with the principles and proceedings of tribunals, acting according to the course of the common law. *Mandeville vs. Welsh,* 3 *Con. Rep. S. C. U. S.* 554, and courts of common law, as well as courts of equity, will take notice of the assignment of choses in action, and, to every substantial purpose, will protect the assignee. *Corser vs. Craig,* 1 *Wash. C. C. R.* 424. *Andrews vs. Beecher,* 1 *John. Cas.* 411.

Littlefield vs. Story, 3 *J. R.* 426. *Wardell vs. Eden.* 2 *Johns. Cas.* 121. *Raymond vs. Squire,* 11 *J. R.* 47. This protection, which is given to the holder of a specialty, by assignment, with authority, to sue in the name of the obligee to his use, is as far as the common law has ever gone, to vest in sealed instruments a negotiable quality. The Legislature has, however, enacted that all bonds, &c. shall be assignable, and that the assignee may sue in his own name as assignee thereof. *Rev. Stat. chap.* 11, *sec.* 1, 2. A bond is therefore negotiable in only one way, so as to vest in the holder a right of action in his own name, and that is by a regular assignment under the statute, and no suit can be maintained upon a bond except in the name of the obligee, or in the name of the person who has acquired the legal interest in the bond, through him, by assignment. It therefore follows that a mere delivery will not vest in the holder a right of action in his own name. The maker of a bond can give it no form so as to change its character, or give it a negotiable quality unknown to the common law, and unauthorized by statute. The doctrine, contended for, that a bond, made payable to bearer, may pass by delivery in the ordinary course of business or trade, would place such an instrument upon the same footing with bills of exchange and promissory notes, and subject bonds to the government of the law merchant, which has never been applicable to them, and would thereby introduce a new rule at war with principle, and unsupported by precedent. The law upon this subject is too firmly established to be shaken, and this court must be governed by it. We cannot confer a character upon bonds which they never possessed, or recognize and enforce rights in violation of well known and long established principles of law. The rights acquired by, and the remedies given upon bonds, must be recognized and enforced according to the rules of the common law, subject to the changes and modifications enacted by the legislature upon the subject. At common law they are not negotiable, so as to vest the holder with the right of action upon them in his own name, and the statute has not made them so except by assignment.

In this case Greenwood was not the obligee to whom the bonds were originally given; it was proven upon the trial that they were

executed and delivered to a different person, and this fact was admitted by the plaintiff himself; nor does he claim the interest or sue upon the bond as assignee. Having sued upon the bonds as obligee it was essential to the sustaining of his action, to prove their execution, and delivery to him, if denied, which was done by the defendant's plea; but so far from establishing the fact of the delivery to him, the reverse was proven by the defendant, and it was also admitted by the plaintiff. For these reasons the judgment of the circuit court is erroneous, and must be reversed.