

CRAVENS & WILSON vs. MILEHAM.

The 60th and 61st sections, chap. 116, of the Revised Statutes, as to demurrers amendments, were properly construed, by this court, in *Davies vs. Gibson*, 2 Ark. Rep. 115.

To demur for *variance* between the instrument declared upon, and the one given on oyer, is not such a special pointing out of the causes of demurrer as is contemplated by the Statute; it is necessary to show in what the variance consists.

And so, it has been said, the Statutes oblige the party demurring to lay his finger upon the very point.

If the special matter of variance be not pointed out in the demurrer, it is waived, and if the declaration show a state of facts, which, if well pleaded, would constitute a good cause of action, the court should proceed to amend any defect which may appear in it, and give judgment according to the very right of the matter.

Writ of error to the circuit court of Franklin county.

ACTION of debt, by plaintiffs in error, against Mileham and Ake, determined in the circuit court of Franklin county, at the February term, 1845, before the Hon. R. C. S. BROWN, judge.

The declaration was upon a writing obligatory, alleged to have been made to plaintiffs, by defendants, Joseph T. Mileham and

Claburn Ake. The writ was not served upon Ake, and the cause was discontinued as to him. Mileham craved oyer of the bond sued on, and the plaintiff filed the original. He then demurred to the declaration, and assigned as cause of demurrer, that there was a variance between the writing declared on, and the one exhibited on oyer, but did not point out the variance. The court sustained the demurrer, and gave judgment for defendant.

The declaration was in the usual form, and the bond exhibited on oyer corresponded with the one described in the declaration, in all respects, except that it was signed Joseph T. *Mleham*, instead of *Mileham*.

The plaintiffs brought the case to this court, by writ of error; and assign as error, that the court sustained the demurrer to their declaration.

W. WALKER, for the plaintiff. The circuit court erred in sustaining the defendant's demurrer to the plaintiff's declaration. The party demurring upon the ground of variance between the writing as described in the declaration, and that given on oyer, must point out the variance. 1 *Chitty* 667. *Davies vs. Gibson*, 2 *Ark. Rep.* 115. There can be no variance when the writing declared upon is set out according to its legal effect.

D. WALKER, contra. This case presents but one point, to wit, the variance between the declaration and the note given on oyer. The declaration and cause of action was described as being against Joseph T. Mileham. The note given in oyer was executed by Joseph T. Mleham. The names are entirely different, and not of the same sound. Mileham and Mleham variant. See 5 *Ark. Rep.* and 6 *Wend.* 629.

JOHNSON, C. J., delivered the opinion of the court.

The plaintiffs in error have presented but one question for the consideration and decision of this court. The question is, did the court below err in sustaining the defendant's demurrer to the plaintiff's declaration? The 60th section of chapter 116, of the Revised

Statutes of Arkansas, declares, that "when any demurrer shall be filed in any action, and issue joined thereon, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear, without regarding any defect or other imperfection in any process or pleading, so that sufficient appear in the pleadings to enable the court to give judgment according to the very right of the cause, unless such defect or imperfection be specially expressed in the demurrer; but no such defect or imperfection shall be set out in any demurrer that would only be cause of special demurrer at common law." And the 61st section of the same act, further provides, that, "if a demurrer be filed in any action, the court shall amend every such defect or other imperfection in any process or pleading in the preceding section mentioned, other than those which the party demurring shall express in his demurrer. It was ruled by this court in the case of *Davies vs. Gibson*, 2 *Ark. Rep.* 115, "that this general rule, as prescribed by the statute in order to carry into complete effect the paramount object and design of the law as before stated, as well as to prevent it from depriving parties of their legal rights, instead of assisting them in the investigation to ascertain them, must be understood with this exception, that the court cannot amend as to matters of fact, which are not in any manner stated by the parties, because it is a universal maxim that the law never requires of any person an impossibility, and the court cannot by possibility know what facts do, or do not exist, and, therefore, when the facts stated cannot, under any form of stating them, be made to exhibit a legal cause of action or ground of defence, the pleading cannot be maintained, notwithstanding this particular defect is not specially expressed in the demurrer; and the court, in enforcing the law, by proceeding to give judgment according as the very right of the cause and matter in law shall appear, is bound to decide the matter against the party whose pleading is so defective; because he does not show any legal right to the thing in demand." This construction is fully sustained, as well by principles of natural justice as by the plain and obvious intent of the act itself. The statute requires the court to "proceed and give judgment according as the very right of the

cause and matter in law shall appear, so that sufficient appear in the pleadings to enable the court to give judgment according to the very right of the cause." The demurrer in this case cannot be said to contain any specification whatever. To demur for a variance between the instrument declared upon, and the one given on oyer, is not such a special pointing out of the causes of demurrer as is contemplated by the law. It is also necessary to show wherein the variance consists. When it is necessary to demur specially it is not sufficient that the demur be, because there is a variance, but it must be shown specially in what point in particular the variance consists: and so, it has been said, the statutes oblige the party demurring to lay his finger upon the very point. The object of the legislature in requiring the defendant to express specially his causes of demurrer, was that the plaintiff, in the exercise of a sound discretion, might elect either to join in demurrer, or amend, or discontinue his action.

Oyer granted is part of the previous pleading, and the plaintiffs are bound by it, so long as it remains of record in the case, and the defendant can avail himself of any defect or imperfection manifest upon, or produced by it. When oyer of the instrument was given, it became a part of the pleadings, and if the defendant desired to object for a variance between the instrument declared upon, and the one given on oyer, he should have specially pointed out the objection in his demurrer. The declaration might then have been amended on such terms as the court should have deemed just and proper. But the defendant having failed to point out specially his objection, has thereby waived any misdescription of the instrument given on oyer.

Such being the view of the law taken by the court, the decision must necessarily turn upon the question whether the plaintiffs have stated and set forth in their pleading such facts as, in any form in which they can be presented, legally entitle them to a recovery against the defendant. The plaintiffs have declared with a profert upon a writing obligatory, dated on the 16th of October, 1841, whereby the defendant, together with one Clabourn Ake, bound themselves to pay to the plaintiffs, as administrators of the estate

of Joseph Cravens, deceased, the sum of one hundred and fourteen dollars and forty-three cents, with ten per cent. interest from the 18th of March, 1841, till paid, and alleged that the same remains unpaid. These facts are clearly sufficient in law to entitle the plaintiffs to recover that sum with interest, of the defendant, and they are pleaded with sufficient certainty; but if they are not so pleaded the defendant has waived any defect or imperfection in the pleading, since he has wholly omitted to specify in his demurrer, in what particular, if any, such defect or imperfection consists. The court, therefore, is not authorized to regard such defect or imperfection, but is required by law to amend the same, and give judgment according to the very right of the cause, as the circuit court in this case ought to have done. Judgment reversed.

