

## VEEDER vs. WRIGHT.

Where a demurrer to a plea in abatement is sustained, and the defendant then files a second plea, setting up different matter in abatement, he abandons the first plea, and the decision on the demurrer cannot be questioned on error.

A plea in abatement for variance between the writ and declaration should specify wherein the variance consists—in other words it should give the plaintiff a better writ; otherwise the plea is bad on demurrer.

*Writ of error to the circuit court of Benton county.*

THIS was an action of debt, by attachment, brought by Wright

against Veeder, and determined in the circuit court of Benton county, at the May term, 1845, before the Hon. S. G. SNEED, judge.

The plaintiff declared against the defendant as *C. H. Veeder*, demanded \$149.13½ debt, with interest at 10 per cent. from 15th Aug., 1843, and set out as the cause of action a writing obligatory executed by defendant to plaintiff for that sum, dated 15th Aug., 1843, payable one day after date, with interest at ten per cent. from its date until paid—concluding, after usual breach, to plaintiff's damage, \$110.

The plaintiff filed an affidavit with the clerk that defendant was indebted to him \$109.13½, with interest thereon from 15th Aug., 1843, at ten per cent., and was about to remove his goods and effects out of the State: also filed the usual bond. Whereupon the clerk issued a writ, commanding the sheriff to attach *C. H. Veeder*, by his goods and chattels, &c., sufficient to secure the debt of \$109.13½ as sworn to, with interests and costs, &c., and that he summons Veeder to appear, &c., and answer plaintiff of a plea that he render to him \$109.13½, with interest thereon from 15th Aug., 1843, at ten per cent., which, &c., to his damage \$110.

The defendant appeared, by counsel, and pleaded in abatement of the declaration and writ that his name was *Charles H. Veeder* and not *C. H. Veeder*. The plaintiff demurred to the plea for informality, and the court sustained the demurrer. The defendant then filed the following plea:

“And the said defendant comes and prays judgment of the said writ and declaration, because he says the amount the said plaintiff claims in and by his declaration, and the amount set forth in the writ are different and variant, wherefore, he prays judgment and that the said writ be quashed, &c.”

To this plea the plaintiff demurred, upon the grounds: 1st, that the plea does not show in what particular sum or amount the writ and declaration differ or vary: and 2d, that it was only necessary for the writ to correspond with the affidavit. The court sustained the demurrer, “and the defendant having nothing further to say in

bar or preclusion of the plaintiff's demand," as the record states, rendered final judgment for plaintiff.

Veeder brought the case to this court, and his counsel assigns for errors: 1st, that the court below erred in sustaining the demurrer to defendant's first plea: 2d, in sustaining the demurrer to his second plea: 3d, in rendering final judgment on demurrer to a plea in abatement.

D. WALKER, for plaintiff in error.

To the second plea in abatement, two causes of demurrer are assigned. The first is, "the plea does not show the particular amount in which the sums in the writ and declaration vary or differ." And the second cause assumes that "admitting a variance, it is no ground of demurrer." It is thought this is good plea under our statute, where substance only is regarded, even allowing it to be ill at common law.

A. FOWLER, contra.

OLDHAM J., delivered the opinion of the court.

The question whether the court below properly sustained the demurrer to the first plea in abatement filed by the plaintiff in error does not arise in this case, as he abandoned the matters of defence contained in that plea and resorted to other and different grounds by pleading over; and so it has been repeatedly ruled by this court. *Funk vs. The State*, ante 142. *Walker vs. Wills*, 5 Ark. R. 166. *Wilson vs. Fowler*, 3 Ark. R. 463. The only question presented by the record is as to the sufficiency of the second plea. The principle was determined in *Cravens & Wilson vs. Mileham*, ante 215, decided at the last term of this court and against the plea. It was there held that a demurrer for variance should point out and specify wherein the variance consists, that the opposite party in a subsequent proceeding may obviate the objection: in other words it should give the plaintiff a better writ, which the plea in the present case does not do.

Affirmed.