PEEL & PELHAM *vs.* RINGGOLD & WILLIAMS.

Where a bond was given to partners, and one of them became a bankrupt, a suit upon the bond in the name of the solvent partner, and the assignee of the bankrupt was properly brought.
Where a plaintiff sues as assignee of a bankrupt, a plea denying him to be such, is a plea in bar and not in abatement.
Where no objection is made to the introduction of testimony, when offered on the trial of the cause, its legality or competency cannot be questioned on error.

Writ of error to the circuit court of Independence county.

THIS was an action of debt determined in the Independence circuit court, at the August term, 1844, before the Hon. THOMAS JOHNSON, then one of the circuit judges.

The declaration was, in substance, as follows:

"John Ringgold and Robert Williams (the said Robert Williams being assignee of the estate and effects of Henry R. Hynson, a bankrupt, according to an act of Congress concerning bankrupts, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved the 19th day of August, 1841, and suing as such assignee,) plaintiffs, by, &c., complain of John Peel and James E. Pelham, defendants, of a plea that they render to the said plaintiffs, (the said Williams being assignee as aforesaid,) the sum of $995.96, which they owe to and unjustly detain from them (the said Williams being assignee as aforesaid.")

For that, whereas the said defendants heretofore, and before the said Henry R. Hynson became a bankrupt, to wit, on the 26th day of September, 1839, at, &c., by their certain writing obligatory, sealed with their seals, and now to the court shown, the date whereof is the day and year aforesaid, promised to pay, on the 1st day of January, 1839, to John Ringgold and Henry R. Hynson, merchants and partners in trade, and doing business by the name, style, and firm of John Ringgold & Co., the sum of $995.96, to bear interest at, &c., for value received."

The breach negatived the payment of the bond to Ringgold &

Hynson, before the bankruptcy of the latter, and to Williams, as his assignee, or Ringgold, since the bankruptcy.

The writ was made returnable to the February term, 1844, was served upon Pelham, and returned *non est,* &c., as to Peel.

At the return term, Pelham demurred to the declaration, which was overruled. He then filed two pleas, the first as follows:

"And the said James E. Pelham, one of said defendants, by attorney, comes and defends the wrong and injury when, &c., and says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against the said defendant, because he says that the said Robert Williams is not assignee of the estate and effects of Henry R. Hynson, a bankrupt, as set forth in the above declaration, and this the said defendant is ready to verify, and therefore he prays judgment, if the said plaintiffs ought to have or maintain their aforesaid action against him, &c."

The second plea was that "Hynson was not a bankrupt according to an act of Congress establishing a uniform system of bankruptcy throughout the United States, approved 19th August, 1841" —concluding to the country.

The plaintiffs demurred to both pleas, and assigned as causes of demurrer to the first, "that it contained matter in abatement only, and not in bar: it tendered no issue, only as to the right of one of the plaintiffs to prosecute the suit: that the right of a plaintiff to sue could not be pleaded in bar: that the conclusion of the plea was bad, and it was not sworn to."

The court sustained the demurrer to the first, and overruled it as to the second plea.

Pelham then took issue to the second plea, filed a plea of payment, and the cause was continued.

An alias writ was issued, and served on Peel, at the August term, 1844, he appeared. Pelham then withdrew his plea of payment, and Peel filed a similar plea, to which issue was taken. The cause was then submitted to the court, sitting as a jury, and there was a finding and judgment for plaintiffs.

The defendants excepted to the finding and judgment of the court and took a bill of exceptions, setting out the evidence given on the

trial: from which it appears that the plaintiffs introduced, without objection on the part of the defendants, as evidence, the interlocutory decree, and final judgment of the district court of the United States for the district of Arkansas, declaring Hynson a bankrupt, and discharging him from all his debts: also, the obligation upon which the suit was founded, which was all the evidence given on the trial.

The defendants brought error.

BYERS & PATTERSON, for the plaintiffs.

The circuit court erred in sustaining the demurrer to Pelham's plea that Williams was not Hynson's assignee. The plea was aptly pleaded—is good in form and substance. The plea is a transcript of the most approved precedents.

If Williams was not Hynson's assignee, he had no authority to sue; had no legal interest in the cause of action; and the plea was a full and complete answer to the declaration. If the plaintiffs have no legal title, or if any one of those joined have no legal title or interest in the cause of action, such defect of title can be taken advantage of by demurrer, arrest of judgment or writ of error, where the defect is apparent upon the record: or by special plea when the defect does not appear upon the face of the declaration. *Lafferty vs. The Trustees of the Real Estate Bank, Ark. R.*, 1 *Ch. Pl.*, 25 *to* 29, 1 *Phil. on Ev.*, (by Cowen & Hill,) 210: *Leglise vs. Champante*, 2 *Strange*, 820. *Graham vs. Robertson*, 2 *T. R.*, 282; 1 *Saund.* 291, f. *n. Teed vs. Elworthy*, 14 *East* 120. *Phillips Ev. by Cowen & Hill, Notes, part* 1*st*, *p.* 196, 448. *Best vs. Strong*, 2 *Wend.* 319, *Phil. Ev., part* 2, 977.

If the plea was defective the demurrer thereto would run back to the first error upon the record. *Childress vs. Foster*, 3 *Ark. Rep.* 258.

The declaration does not show with sufficient certainty when, where, or how Hynson became or was at that time a bankrupt.—Neither does it show with sufficient certainty when, how, or in what manner Williams was assignee or had any right to sue. Wil-

liams, if he was in fact Hynson's assignee, could only sue as assignee in his fiduciary capacity, and if judgment was rendered thereon it should correspond with the character of the plaintiffs, and would be inconsistent. Ringgold would have the absolute control of the fund until all the partnership debts were paid. Williams would only be liable for costs so far as assets in his hands. Williams was only trustee, the equitable interest being in Hynson's creditors. We think it very questionable whether the solvent partner and the assignee of the bankrupt partner can join in an action on a bond given to the firm. They could not join in England until expressly authorized so to do by statute. 1 *Chitty Plead*—27, our statute is silent on the subject.

There is also a variance between the bond given on oyer and the one described in the declaration. And for these reasons the declaration should have been quashed.

There is a mistake in the bill of exceptions taken at the trial: the bill represents that the evidence therein incorporated was given in support of the issue that Williams was assignee: there was no such issue before the court. The evidence was in fact given in support of the issue that Hynson was a bankrupt, and we think was not sufficient to prove that issue. The act of Congress does not make the final certificate of bankruptcy evidence that the party, to whom granted, is a bankrupt. As to what proof is necessary to prove bankruptcy, see 2 *Stark. on Ev.*, 141 *to* 160.

From a careful examination of those authorities we think it clear that the plaintiffs failed to prove that Hynson was a bankrupt, or that Williams was his assignee.

FOWLER, contra.

The demurrer to the first plea, that Williams was not assignee of Hynson, was properly sustained. Indeed, the plea, being one strictly in abatement, should have been treated as a nullity or stricken out, because it came too late—after a demurrer to the declaration—and was not sworn to. 1 *Ch. Pl.*, 435. *Odle vs. Floyd & Erwin*, 5 *Ark. Rep.*, 249. *Heard & Co. vs. Lowry, id.* 524. It

was a plea to the disability of the plaintiff, which is technically one in abatement. 1 *Ch. Pl.*, 435, 436.

On a demurrer to a plea in abatement, the court cannot look back further than the plea itself. The plea itself, not extending to the count, but only to defects in the writ or disabilities of the party, the court will not look into the count to correct defects found there. 1 *Ch. Pl.*, 457, *Hastrop vs. Hastings,* 1 *Salk. Rep.*, 212, 1 *Bac. Abr.* 15. 1 *Com. Dig.* 69.

The declaration however in this case is substantially good: and if not so, in form, three pleas in bar and issues thereon, and a verdict of a jury, certainly put the objections to the declaration at rest, under the statute of *jeofails,* and the well settled doctrine of curing defects by pleading over.

The evidence was sufficient. The bankruptcy of Hynson was established by the records of the court; and what higher evidence of the fact could, in the nature of things, be produced to the court? And it being admitted without objection, the plaintiffs in error are estopped from objecting now.

The first plea, to which a demurrer was sustained, was in effect that there was a misjoinder of plaintiffs: which when it does not appear on the face of the declaration, must be pleaded in abatement. 1 *Chit. Pl.* 444, *et seq.*

The joinder was proper. Where one of several partners becomes bankrupt, the action must be brought in the name of the solvent partner and the assignees of the bankrupt. 1 *Ch. Pl.* 15.

Even if in fact there is a variance between the declaration and the note, no advantage can be taken of it now: because, first, the parties waived it by pleading over: and, second, because they made no objection to the reading of the note in evidence, thereby admitting it to be competent. It was decided by the Supreme Court of the United States, in the case of *Evans vs. Hettick,* 5 *Cond. Rep.*, 327, and 7 *Wheat. Rep.*, 453, that a deposition read in evidence without opposition, and the opposite party afterwards moved to reject it, because not taken according to the rules of the court, that such motion could not be sustained, because having been once introduced with his acquiescence, he waived his right to object. This

decision, it is insisted, is an ample response to the entire objection to the competency or sufficiency of the evidence in this case, both as to the note and record.

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

This was an action of debt instituted in the circuit court of Independence county, by Ringgold, as the partner, and Williams, as assignee of Henry R. Hynson, a bankrupt, against Peel & Pelham. Pelham appeared at the first term of the court and filed his demurrer to the declaration, which was overruled by the court. He then filed two pleas, the first denying that Williams was the assignee of Hynson, and the second denying that Hynson was a bankrupt; the plaintiffs demurred to both pleas, and the demurrer was sustained to the first and overruled as to the second. Pelham also filed a plea of payment which at the next term he withdrew. At the next term the defendant, Peel, appeared and filed his plea of payment, and upon this plea and that of Pelham, the cause was submitted to the court without a jury, who found in favor of the plaintiffs, and gave judgment accordingly.

The suit was properly brought in the name of the solvent partner and assignee of the bankrupt. 1 *Chitty,* 16. *Murray vs. Murray* 5, *J. C. R.,* 70.

The plea of Pelham, to which the demurrer was sustained, denies the right of the plaintiff, Williams, to sue. It is not a plea in abatement to the disability of the person, such as, that the plaintiff is an alien enemy, attainted of treason or felony, infancy, &c., but denies his right to maintain the suit, because he has no interest whatever in the subject matter in controversy. The plea goes to the merits of the case and denies that the plaintiff has any cause of action. 1 *Chitty,* 407.

The true distinction between what should be pleaded in bar and what in abatement, is clearly stated in 1 *Chitty Pl.,* 386. It is there said that "whenever the subject matter of the plea or defence is, that the plaintiff cannot maintain any action at any time in respect of the supposed cause of action, it may and usually should be pleaded in bar: but matter which merely defeats the present pro-

ceeding and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement."

The question, whether the testimony offered by the plaintiffs below, was legal or competent does not arise at this time. If the plaintiffs in error intended to except to its admissibility, they should have done so at the time it was offered.

For the error in sustaining the demurrer to Pelham's first plea, the judgment of the circuit court is reversed.