

PICKETT ET AL. vs. TRUSTEES R. E. BANK.

On a demurrer to pleas, the court will look back to the declaration, and render judgment against plaintiff if it be bad: a bad plea is good enough for a bad declaration.

Profert of the endorsement of a note is necessary.

Writ of Error to Crawford Circuit Court.

DEBT, determined in the Crawford Circuit Court, in March, 1844, before the Hon. WM. W. FLOYD, Special Judge.

The declaration was upon a note payable to the R. E. Bank, and by it endorsed to the plaintiffs; profert of the note was made, but no profert of the endorsement. The defendants demurred to the declaration, setting out the note and endorsement and assigned for cause of demurrer that the declaration alleged the endorsement to have been made on a particular day; whereas, no date appeared to the endorsement. That it was alleged in the declaration, that the Bank, by Drennen, its President, made the endorsement, when it only appeared that it was endorsed to plaintiffs by Drennen "*President.*" That it was alleged that the endorsement was made to the plaintiffs and another as Trustees, when in fact the endorsement was made to the plaintiffs and to their successors and survivors. The demurrer was overruled, and the defendants pleaded five pleas in bar. The first was, that the assignment was made without warrant or authority: 2d,

that the Bank made a deed of assignment by which all its effects were transferred, including the note sued on, whereby the endorsement on the note was nugatory and void: 3d, that the endorsement was not made on the day alleged, but long subsequent, and after the charter had been declared forfeit: the 4th, was *nul tiel corporation*: 5th, that the note was given for a fraudulent consideration, to wit, the notes of the said R. E. Bank, in that the proceedings of the corporation were not in accordance with the terms of the charter. This plea is drawn up at great length, reciting the terms of the charter in substance, but as the matters set up there were not considered in this court, the plea is not set out. The pleas were sworn to by Pickett and Brown, two of the defendants, to be true to the best of their knowledge and belief. Replications were put in to the 1st and 3rd pleas, and demurrers to the 2d, 4th and 5th. The demurrers were sustained; and on a trial of the issues formed upon the 1st and 3rd pleas, judgment went for plaintiff. The defendants brought error.

PASCHAL & OGDEN, for plaintiffs in error.

PIKE, contra.

JOHNSON, C. J. The plaintiffs in error interposed their demurrer to the defendants' declaration in the court below, which being overruled, they filed five pleas in bar of the action. To the first and third pleas, the defendants replied generally, and issues were made; and they then demurred to the residue. The court sustained the demurrer, and also gave judgment in favor of the defendants in error upon the issue joined. The first point to be considered under this state of case, is as to the propriety of the decision sustaining the demurrer to the pleas. "A party should not demur unless he be certain his own previous pleading is substantially correct, for it is an established rule that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance; as, if the plea, which is demurred to, be bad, the defendant may avail himself of a substantial defect in the declaration." See 1 *Chitty's Pleadings*,

P. 663, and the authorities there cited. It is conceived to be wholly immaterial whether the pleas be sufficient or not, in case the declaration be defective in a matter of substance. The defendants having demurred to the pleas of the plaintiffs, they did it at their peril, and must now stand or fall upon their own declaration.

In the case of *Dardenne v. Bennet et al.*, 4 *A. R.* p. 458, the court say, "craving oyer of the instrument sued on does not entitle the party to oyer of the assignment on it, nor place it on the record. And also in the case of *Merchant v. Slater*, 5 *Ark.* 330, it is laid down that "our statute has elevated assignments to the same dignity, as instruments of evidence, as the originals themselves, and they can be impeached only in the same manner." It is therefore equally necessary "to make profert of the assignment as of the original itself, and the omission of either is fatal on demurrer." It is clear that under these decisions the declaration in this case is substantially and fatally defective. The plaintiffs in the court below allege an endorsement to themselves of the note sued upon, and rely upon it to evince their title and right to recover in the action. Where a party founds his action upon an assignment or endorsement he is required to make profert of it, in order that the defendant may bring it upon the record by oyer, and interpose such defence as the circumstances of his case will permit. We are therefore clearly of opinion, whether the pleas are good or bad, that they are fully sufficient for the declaration. The court having erred in sustaining the demurrer to the pleas, it necessarily follows, for the reasons already assigned, that the judgment upon the issues made upon the other pleas is also erroneous; the judgment is therefore reversed.