JORDAN *vs.* MEWBORN.

Where plaintiff sues as assignee of a bond, a plea directly denying the assignment, verified by affidavit, is good.

A replication to such a plea, tracing plaintiff's title through assignments different from those alleged in the declaration, is a departure, and bad; and a general demurrer thereto is sufficient.

Defendant filed four pleas to the action: plaintiff took issue to three, and replied to the fourth: a demurrer was sustained to the replication, and without amending his replication, plaintiff went to trial on the other issues, and took judgment upon them.—HELD that he was not entitled to judgment while the fourth plea was unanswered.

Writ of Error to Bradley Circuit Court.

This was an action of debt, by attachment, brought by Joshua Mewborn against James S. Jordan, and determined in the Bradley Circuit Court, at the April term, 1847, before the Hon. WM. H. FEILD, Judge.

The declaration alleged that on the 18th November, 1842, the defendant, and one Spencer Jackson, executed their writing obligatory, to William B. Thornton, for $3600, payable at the Branch of the Bank of Tennessee, at Summerville, twelve months after its date. That Thornton endorsed the bond to plaintiff, and plaintiff endorsed it to the said Branch Bank. That at the maturity of the bond it was presented to the defendant for payment, at the Bank, and protested for non-payment, and that in consequence of the failure of defendant, to pay the bond, plaintiff was compelled to pay it, and did pay it to the Bank, and the Bank delivered it back to him, by means whereof, &c., &c. There were also common counts added.

The defendant appeared, dissolved the attachment because of a defect in the affidavit, and filed four pleas to the action, as follows:

1st. *Nil debet.*

2d. "That plaintiff, after the said assignment of said writing obligatory by him as aforesaid to the Branch of the Bank of Tennessee, at Summerville, and after protest thereof for non-payment, was not

forced to pay, and did not pay the said sum of money therein mentioned, &c.; nor did the said Bank then and there surrender the said bond to him as set forth"—concluding to the country.

3d. Payment "after this same action."

4th. "That the said William B. Thornton, to whom the said writing obligatory was made payable, did not endorse the same to the said plaintiff in manner and form as he set forth in said declaration"—concluding with a verification, and sworn to.

Plaintiff took issue to the *first, second* and *third* pleas, and filed the following replication to the fourth:

"Plaintiff comes and says as to the defendant's fourth plea, &c., *precludi non,* because he says that the said William B. Thornton assigned said writing obligatory, on the day and year in said declaration mentioned, and, *to wit*: at the county of Bradley aforesaid, to William E. Davis, and the said William E. Davis, on the day and year in said declaration mentioned, assigned the said writing obligatory to said plaintiff, and the plaintiff then and there assigned the same to the Branch Bank of Tennessee, at Summerville, as in said declaration alleged, and by means of said endorsement became liable to pay to the Bank aforesaid, and did pay said sum of money in said declaration specified, as in said declaration alleged, and that said plaintiff is now the legal holder of said writing obligatory, and has the legal interest in and to the same; and this plaintiff is ready to verify, &c.

The record states "that on leave asked and obtained by consent, the defendant entered, in short on the record, his demurrer, to said replication to said fourth plea, and the defendant joined therein."

The demurrer was submitted to the court, and the court decided "that it appearing that said demurrer extends back to said fourth plea, and that the fourth plea is insufficient, said demurrer is sustained."

"And the defendant declining to plead further, the cause was submitted to the court, sitting as a jury, by consent, and after hearing the evidence," &c., the court found for plaintiff, and rendered judgment for the amount due on the bond, for plaintiff.

Defendant brought error.

RINGO & TRAPNALL, for the plaintiff. The plea is a simple denial of the assignments as alleged in the declaration, and is under oath, according to the Statute. In what the defect consists, cannot be perceived.

The replication is a departure from the declaration, averring assignments entirely different from that alleged therein, and introducing a new state of case, and one, on which, if a recovery was had, it would have to be on the case stated in the plea, and not on that set forth in the declaration.

The causes of demurrer are not set forth: on this the court could not get back to the plea. *Davis* v. *Gibson,* 2 *Ark.* 115. *Wallace* v. *Collins,* 5 *Ark.* 46. *Sims* v. *Whitlock,* 4 *ib.* 103, unless the defect in the plea was fatal. *Byers* v. *Aikin,* 5 *Ark.* 422.

No special cause was necessary: Because "sufficient did not appear (according to the Statute) in the pleadings to enable the court to give judgment according to the very right of the cause." The court could not render judgment against the defendant in both cases, and could not determine on which judgment should have been rendered; and, therefore, the defect was fatal. *Dyson* v. *Wood, D. & R.* 295. *Sterns* v. *Patterson,* 14 *John.* 132. *Sheven* v. *Southwick,* 10 *id.* 259. *Keay* v. *Goodwin,* 16 *Mass.* 1. 2 *Saund.* 84. 2 *Willes* 96. *Stephens Pl.* 458.

YELL, contra.

JOHNSON, C. J. The court below sustained the demurrer filed by the defendant to the plaintiff's replication to his fourth plea; and this is the only decision of which he now complains. The plea avers that William B. Thornton, to whom the writing was made payable, did not endorse it to the plaintiff in manner and form as set forth in his declaration. To this plea the plaintiff replied that Thornton assigned the writing to William E. Davis, and that Davis assigned it to him. The defendant demurred to the replication, which was sustained by the court, and the reason given for the decision is that the

demurrer reached back to the plea, and that the plea itself being bad, the demurrer to the replication must be sustained. That the replication was no answer to the plea is perfectly manifest, and of course was demurrable, but not for the reason assigned by the court. If the plea was ili and the demurrer to the plaintiff's replication extended back to it, which it most undoubtedly would, the replication, though defective in point of law, would have been adjudged sufficient for a bad plea, and the demurrer would consequently have been overruled. The plea, however, is believed to be substantially sufficient, as it contains a direct and positive denial of a material allegation in the declaration, and if true, is a full and complete bar to the present action. If the allegation traversed by the plea was untrue in point of fact, the plaintiff had shown no legal interest in the subject matter of the suit, and as a necessary consequence was not entitled to recover. The demurrer to the replication, in the language of the record, was "in short," and the court below passed upon it without any specification of the causes whatever. This practice is wholly unwarranted by our Statute, and in case the replication had contained an answer to the plea, no matter how defectively it might have been stated, all such defects would have been waived by the failure of the defendant to point out the particulars upon which he intended to rely. But such is not believed to be the character of the replication, and as a matter of course the doctrine here laid down cannot be brought to bear upon it. It is neither a direct traverse, nor is it a confession and avoidance of the matter set up in the plea. It is a plain and palpable departure from the declaration, and if issue had been taken upon it, it would have been wholly immaterial, and any judgment that might have been rendered upon it, would, on motion, have been set aside, as deciding nothing between the parties. We entertain no doubt, therefore, that the Circuit Court ruled correctly in sustaining the demurrer to the replication. But an important inquiry presents itself here as to the legal consequence which resulted from the decision. If the replication was demurable upon the ground that, though it tendered an issue, it was inaptly or insufficiently pleaded, and the plaintiff elected to stand upon it and not answer over to the plea, he most unquestionably had no right to take judgment upon the other issues un-

til this court had passed upon the decision of the Circuit Court sustaining the demurrer, and reversed it for error. Had this have been the true state of case, he would, by acquiescing in the decision, have tacitly admitted that he had no cause of action, and consequently that he could not claim a recovery. The judgment, therefore, upon the other issues, upon this supposition, would have been clearly erroneous. And if an answer, though improperly pleaded, would have left the plaintiff in the condition already indicated, he certainly could not have claimed a judgment upon the other issues, when he had failed to answer the fourth plea altogether, and thereby tacitly admitted its truth. In neither case, therefore, would he have been entitled to a judgment upon the other issues. For these reasons the judgment of the Circuit Court will be reversed and remanded with instructions to permit the plaintiff to replead and tender an issue to the fourth plea of the defendant, if he desires to do so.