LAFFERTY ADX. VS. LAFFERTY.

Where a note is assigned to a person by a wrong name, he may aver the mistake in declaring on the note, and establish it by parol evidence.

So when the payee assigns a note by indorsing his initials instead of his full name.

But where the assignee seeks the allowance of notes thus assigned to him in the Probate Court against an estate, no declaration is necessary, and such mistakes may be explained, and his title to the notes as assignee established by parol.

By the *9th Sec., Ch.* 113, *Digest,* clerks of courts are empowered to take affidavits generally, and the *95th Sec., Ch.* 4, *Digest,* empowering judges, justices of the peace, and notaries public, to take probate affidavits of claims against deceased persons, dose not exclude the power of clerks to take such affidavits.

Such affidavit taken by the clerk of the Circuit Court of one county, may be used before the Probate Court of another county.

*Appeal from the Independence Circuit Court.*

Lorenzo D. Lafferty filed for allowance and classification, in the Probate Court of Independence county, in July, 1845, the following claims against Malinda Lafferty, as administratrix of Austin R. Lafferty, deceased:

"One day after date I promise to pay W. S. Hynson, or order, forty-one dollars and fifty cents, for value received, with interest at the rate of ten per cent. per annum till paid. January 1, 1842. AUSTIN R. LAFFERTY, [SEAL.]

I assign the within note to L. D. *Laffey*.

W. S. HYNSON."

To which was appended the usual probate affidavit, made by L. D. Lafferty, before Benjamin H. Johnson, clerk of the Circuit Court of Izard county, Arkansas. The rejection of the administratrix was also endorsed.

"One day after date I promise to pay H. R. & W. S. Hynson, or order, thirteen dollars and sixty-two cents, for value received, to draw interest at ten per cent. from the 1st of January, 1841, until paid. Given under my hand and seal, at Batesville, this 1st February, 1841. AUSTIN R. LAFFERTY, [SEAL.]

We assign the within note to L. D. *Laffey*.

H. R. & W. S. H."

To which was appended a probate affidavit made by L. D. Lafferty, before the same clerk: also endorsed rejected.

The claims were allowed by the Probate Court, the administratrix excepted, and appealed to the Circuit Court, where the judgment of the Probate Court was affirmed, at the March term, 1849, before the Hon. WILLIAM C. SCOTT, Judge.

The grounds upon which the claims were contested, and the points reserved by bill of exceptions to the decision of the Probate Judge, appear in the opinion of this Court.

FAIRCHILD, for the appellant. As the name of the payee of the note was different from that of the claimant, he should have shown his legal interest by an averment, which was material and traversable, (*Bower vs. The State Bank,* 5 *Ark.* 234. *Nicholay vs. Kay,* 1 *Eng.* 70. 2 *Stark. R.* 27, *and note,*) and this, although strict rules of pleading are not required in the Probate Court.

*Section 9, Ch. 4 Digest,* enumerating the officers authorized to take probate of a creditor's claim against a deceased person, excludes the power of all others to take such probate, (1 *Kent* 465, *note a.* 5 *Ed.* 466, *note d.* See, also, *Monk's ad. vs. Jenkin's ex.,* 2 *Hill* 12,) and controls the general law in *9th Sec., Ch.* 113, *Digest.* See, also, *Williams vs. Brummett,* 4 *Ark.* 136.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The record in this case presents but two points for our adjudication. The first relates to the correctness of the decision of the Circuit Court in admitting the parol evidence to show the identity of the claimant: and the second, to that of receiving the affidavit when it appeared to have been administered by the clerk of the Izard Circuit Court.

It is contended, on the part of the administratrix, that, in the absence of any express averment, the Court had no right to receive parol evidence going to show that the instruments produced as evidence of the indebtedness, though ostensibly assigned over to *Lorenzo D. Laffey,* were in reality assigned to *Lorenzo D. Lafferty.* It is conceded that such proof would have been admissible under an express averment to that effect. It is declared, by the 103*d Sec., Ch.* 4, *Digest,* that "The Court of Probate shall hear and determine all demands presented for allowance under this act, in a summary manner, without the forms of pleadings; and in taking testimony shall be governed by the rules of law in such cases made and provided." It was expressly ruled by this Court, in the case of *Pennington's adx. vs. Gibson, use, &c.,* (1 *Eng. R.* 449,) that the statute referred to expressly dispenses with the necessity of formal pleading; but that if a party elects to make his defence in writing, he will be held to all the strictness of special pleading. We consider it clear that, under the law, the claimant was not bound to file any written declaration or description of his demand, and, as a necessary consequence, he was not required to make the averment contended for by the representative of the deceased. The doctrine involved in this question was elaborately examined by this Court in the case of

*Nicholay et al. vs. Kay,* (1 *Eng.* 59,) and it is clear from that case that, in a suit brought by a written declaration, it would be perfectly legitimate to describe the assignments as having been made to *L. D. Lafferty* by name and description of *L. D. Laffey;* and, as a necessary consequence, parol evidence would be admissible to establish the truth of the allegation. This being settled as applicable to a written declaration, where there is an express averment, it would seem to follow, from the very necessity of the thing, that such evidence could be received in all cases where there is no declaration, and where the law expressly dispenses with the forms of pleading. The pleading in the Probate Court being *ore tenus,* every averment, which would be essential in a declaration in the Circuit Court, is presumed by the law to have been made, and consequently the same grade and kind of testimony would be admissible in both Courts.

It is also contended that the assignment endorsed upon one of the instruments is not in the names of those who were shown by the testimony to have made it. The assignment was made by *H. R. & W. S. H.,* when it appeared from the proof that it was made in reality by *Henry R. & William S. Hynson.* We have not been able to perceive any good and substantial reason why the law should not be the same whether applied to the identity of the maker or the payee of an obligation. We think that, had this suit been brought by a declaration, the mistake in this respect also could have been set up, and that the truth of the allegation would have been equally susceptible of proof by parol.

The remaining question relates to the authority of the clerk of the Izard Circuit Court to administer the oath to the claimant, so as to authorize him to claim the benefit of an allowance in the Probate Court of Independence. It is not disputed that the clerk had the power under the law of the 7th December, 1837, (which was put in operation by the proclamation of the Governor on the 20th March, 1839,) to take affidavits; but it is contended that the act of March 3d, 1838, by specifying judges, justices of the peace, and notaries public, controls that of 1837, and so operates as to exclude the clerks of the Circuit Courts. The authorities

relied upon by the counsel for the appellant, have been consulted, but have utterly failed to throw any light upon the subject. The case referred to in 2 *Hill,* after diligent search, has not been found; but the reason assigned by the counsel as having been given by the Court in that case may be admitted in its fullest force, and yet it cannot have the least effect upon the question involved here, as it will not apply to the facts of this case. The reason given is that the act specially naming certain officers and conferring upon them authority to administer the oath, introduced a proceeding not before known to the law. It is not necessary that we should intimate any opinion in respect to that position, as it is not properly presented by the record in this case. The *9th Sec., Ch.* 113, *English's Digest,* approved on the 7th December, 1837, and put in force by the proclamation of the Governor, declares that "Every court and judge, justice, and clerk thereof, and all justices of the peace, shall respectively have power to administer oaths and affirmations to witnesses and others concerning any thing or proceeding depending before them respectively, and to take affidavits within their circuits and counties." And the act of March 3, 1838, after providing that no person should be allowed to present his claim against the estate of a deceased person without first making an affidavit that nothing had been paid or delivered towards the satisfaction of such debt, except what was mentioned or credited, and that the sum demanded was justly due, further enacted as follows: "Any judge, justice of the peace, or notary public, of this State, shall have power to take the affidavit required by this act, to authenticate any claim against a deceased person." Both of the acts referred to are contained in the Revised Statutes, which were adopted by the Legislature at their October session in 1837, and were consequently put into operation by the proclamation of the Governor on the 20th March, 1839. The Legislature, at the same session of the passage of the two acts in question, also enacted that, "For the purpose of construction, the Revised Statutes passed at the present session of the General Assembly shall be deemed to have been passed on the same day, notwith-

standing they may have been passed at different times; but if any provisions of different statutes are repugnant to each other, that which shall have been last passed shall prevail; and so much of any prior provisions as may be inconsistent with such last provisions, shall be deemed repealed thereby." Under this rule of construction, it is clear that the one of the acts referred to cannot operate as a repeal of the other, either in whole or in part, as there is not the slightest discrepancy between them, and they can, therefore, well stand together. There is no error, therefore, in this respect.

The judgment of the Circuit Court of Independence county is, consequently, in all things, affirmed.