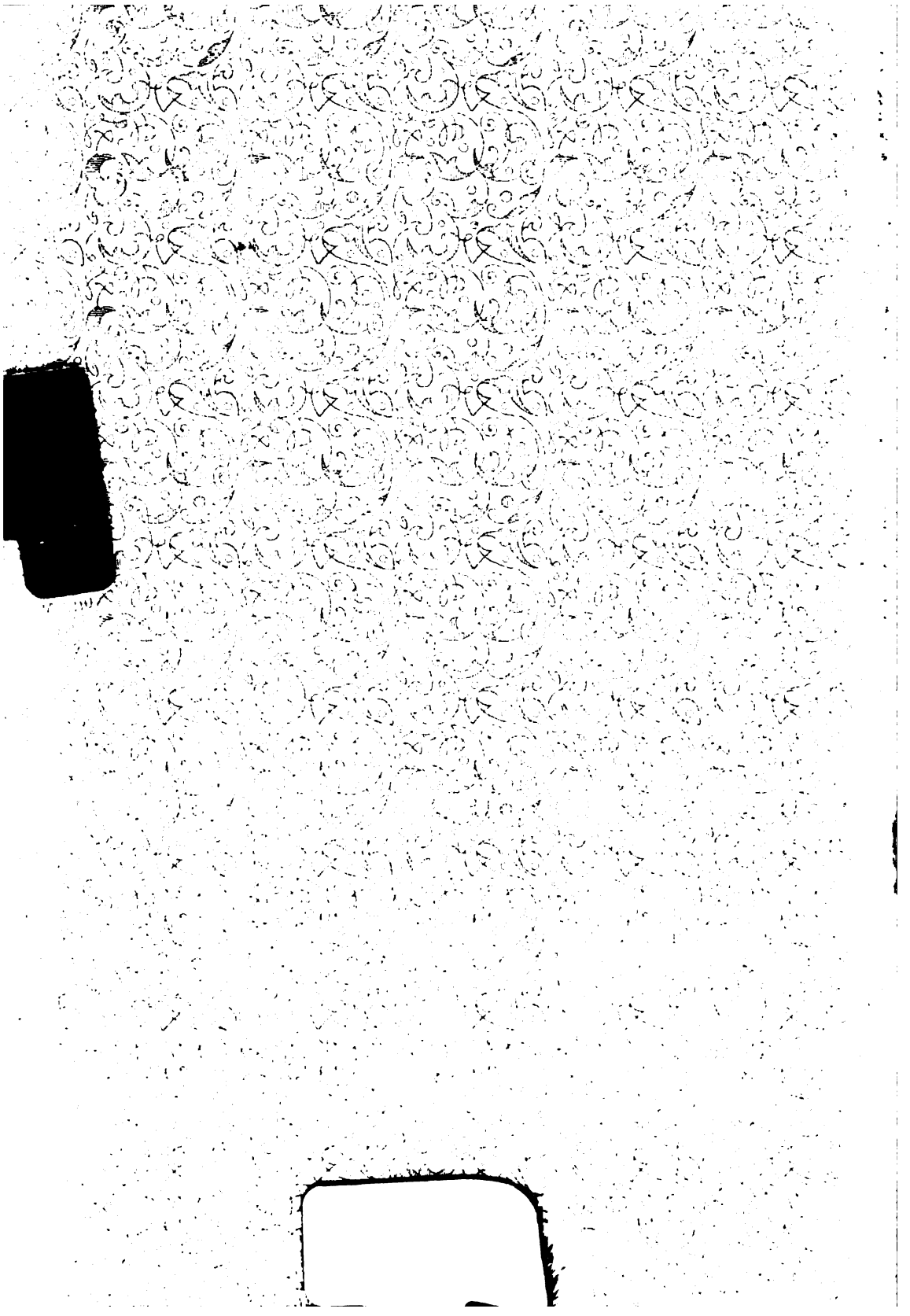

A SELECTION OF CASES

ON

PLEADING

WITH REFERENCES AND CITATIONS

By JAMES BARR AMES
DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY

PREPARED FOR USE AS A TEXT-BOOK IN HARVARD LAW SCHOOL

"Cases arise by Chance, and are many Times intricate, confused, and obscured, and are cast into Form and made evident, clear, and easie by good and fair Pleading; so that this is the principal Art of Law, for Pleading is not Talking." — Hob. 295.

"Et saches mon fils, que est un des pluis honorables laudables et profitables choses en nostre ley, de aver le science du bien pleader en actions reals et personels; et pur ceo, jeo toy counsaile especialement de metter ton courage et cure de ceo apprender." — Litt. Ten. Sect. 534.

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CHAPTER I.

DEMURRERS.

SECTION I.

General Demurrers.

NOTE.

[*Coke upon Littleton*, 71 *b*.]

A demurrer cometh of the Latin word demorari to abide; and therefore he which demurreth in law, is said, he that abideth in law: Moratur or demoratur in lege. Whensoever the learned counsel of a party is of opinion that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgment of the court.[1]

HAITON AND OTHERS, ASSIGNEES *v.* JEFFREYS.

IN THE KING'S BENCH, HILARY TERM, 1715.

[*Reported in* 10 *Modern Reports*, 280.]

The court was moved for leave to plead a plea, and demur to the declaration, at the same time, upon the 4 Anne, c. 16, § 1, the words of which are, "that it shall be lawful for any defendant, or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several

[1] The concise form of a general demurrer is as follows: —

State of ——

—— Co. ss.

Defendants / Plaintiff(s) } The defendant [or "plaintiff"] by —— his attorney says that the declaration [or "plea"] is not sufficient in law.

The demurrer was formerly very prolix. 2 Chitty (1st ed.), 678. By statute in many states the reason of the insufficiency of a pleading must be specified in the demurrer.

A demurrer is effective although informal. Leaves *v.* Bernard, 5 Mod. 131 (a demurrer framed as a plea). Davies *v.* Gibson, 2 Ark. 115 (a mere statement that "defendant demurs to the declaration of the plaintiff." But see, *contra*, Tooke *v.* Berkley, 57 Kan. 111.)

A pleading is none the less a demurrer, although described by the demurrants as a reply. Thompson *v.* Foss, 16 Ind. 297.

In Stokes *v.* Grant, 4 C. P. D. 25, the informality of a demurrer being such as to make it embarrassing, the demurrer was stricken out on motion. — ED.

matters thereto as he shall think necessary for his defence; provided, nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs," etc.

THE COURT. The words of the act of Parliament are, "That it shall be lawful to plead as many several matters," etc. Now a demurrer is so far from being a plea, that it is an excuse for not pleading.[1] Here you plead, and at the same time pray that you may not plead. The word "matter" imports a possibility that the other party may demur to it; but there can be no demurrer upon a demurrer. This was never attempted before.[2]

BARBER v. VINCENT.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1680.

[*Reported in Freeman*, 531.]

Indebitatus assumpsit for a horse sold for £20. The defendant pleaded *deins age*.

The plaintiff replied, that he sold him the horse for his conveniency to carry him about his necessary affairs; to which the defendant demurred.

[1] But a demurrer filed is so far a pleading as to preclude a judgment for default of an answer. Oliphant v. Whitney, 34 Cal. 25; Fletcher v. Maginnis, 136 Cal. 362, 363; Winter v. Winter, 8 Nev. 129, 136.

[2] The error of pleading and demurring to the same pleading is dealt with differently in different jurisdictions. In England, formerly, both the plea and the demurrer were treated as expunged and the opposite party was entitled to sign judgment for default. Bayley v. Baker, 1 Dowl. N. S. 891. In this country it is customary to treat the demurrer as non-existent. Bell v. R. R. Co., 4 Wall. 598; Gayle v. Smith, Minor (Ala.), 83; Taylor v. Rhea, Minor (Ala.), 414; Morrison v. Morrison, 3 Stew. (Ala.) 444; Grigsby v. Nance, 3 Ala. 347; Hosier v. Eliason, 14 Ind. 523; Earhart v. Farmers' Creamery, 118 Ind. 79; Fisher v. Scholte, 70 Iowa, 221; Cicotte v. Wayne Co., 44 Mich. 173; Fisher v. Wayne, 128 Mich. 543; Taber v. Wilson, 84 Mo. Ap. 89; Trusdale v. Shaw, 58 N. H. 207; Rickert v. Snyder, 5 Wend. 104; Clark v. Van Densen, 3 N. Y. Code Rep. 219; Snyder v. Hearman, 2 How. Pr. 279; Slocum v. Wheeler, 4 How. Pr. 372; Spellman v. Weider, 5 How. Pr. 5; Munn v. Barnum, 12 How. Pr. 563, 6 Abb. Pr. 281 n. c.; Struyer v. Ocean Co., 76 How. Pr. 422; Slack v. Heath, 4 E. D. Sm. 95; Ransom v. McClees, 84 N. Ca. 17, 20; Stocking v. Barnett, 10 Oh. 137; Calvin v. State, 13 Oh. St. 60; McFate v. Shallcross, 1 Phila. 75; Commw. v. Housekeeper, 6 Lanc. Bar, 105; Lang v. Lewis, 1 Rand. 277; Chesapeake Co. v. American Bank, 92 Va. 495. (But see, Eppes v. Smith, 4 Munf. 466; Jones v. Stevenson, 5 Munf. 1; Syme v. Griffin, 4 Hen. & M. 277.)

In the following cases the party who demurred and pleaded to the same pleading was compelled to elect between his demurrer and plea: Bridges v. Reed, 9 Bush, 329; Angell v. Kelsey, 1 Barb. 16; Bernard v. Morrison, 34 How. Pr. 108, Sp. T., 29 Hun, 410 G. T. (*semble*); Craighead v. Kemble, Tapp. (Oh.) 246; Pa. Co. v. Webb, 9 Oh. 136; Davis v. Hines, 6 Oh. St. 473; Smead v. Chrisfield, 1 Disn. (Oh.) 17; Stahn v. Catawba Mills, 53 S. Ca. 579.

In England, to-day, by the Common Law Procedure Act, 1852, § 80, either party may, by leave of the court, plead and demur to the same pleading at the same time. There has been similar legislation in some of the states in this country. Furniss v. Ellis, 2 Brock. 14; Curtiss v. Bachman, 84 Cal. 216; Hurley v. Ryan, 119 Cal. 71; Wade v. Doyle, 18 Fla. 630; Myrick v. Murritt, 22 Fla. 336; Hobson v. Satterlee, 163 Mass. 402; Middleby v. Effler, 118 Fed. 201 (Massachusetts law); Riggs v. Pope, 3 Tex. Civ. Ap. 179; Deckert v. Chesapeake Co., 101 Va. 804. — ED.

And the sole question was, whether an action would lie against an infant for money for a horse sold. It was urged on the defendant's part, that an infant was chargeable only for necessaries, as meat, drink, clothes, lodging, and education.[1]

But the court were of a contrary opinion; for the plaintiff having averred that he sold him the horse to ride about upon his necessary occasions, and the defendant having confessed it by his demurrer, it must now be taken to be so. If the defendant had traversed, then the jury must have judged of it,[2] whether it were necessary or convenient, or not; and so likewise of the price of the horse, whether it were excessive or not. *Jud' pro quer' nisi.*[3]

HODGES v. STEWARD.

In the King's Bench, Easter Term, 1693.

[*Reported in 3 Salkeld*, 68.]

This case is reported in 1 Salk. 125; to which may be added, that this was an action on the case brought upon an inland bill of exchange, in which the plaintiff declared upon a special custom in London for the bearer to bring the action, etc.; and upon a demurrer to the declaration, besides the other points adjudged in this case, it was held, that the defendant having demurred, without traversing the custom, he had thereby confessed there was such a custom, though in truth there was not, and for that reason the plaintiff had judgment; for though the court takes notice of the law of merchants, as part of the law of England, yet they cannot take notice of the customs of particular places; and this custom, as set forth in the declaration, being sufficient to

[1] Cro. Eliz. 920; Ayliff v. Archdale, Latch, 169.

[2] Ryder v. Wombwell, L. R. 4 Ex. 32. Makarell v. Bachelor, Cro. El. 583, to the contrary is no longer law. *Accord.* — Ed.

[3] Tatem v. Perient, Yelv. 195; Speccot v. Sheres, Cro. El. 823; Gundry v. Feltham, 1 T. R. 338; Gas Co. v. Turner, 6 B. N. C. 327; Tyler v. Bland, 9 M. & W. 341; Tancred v. Allgood, 4 H. & N. 444; Evelyn v. Evelyn, 42 L. T. Rep. 248; P. M. Gen. v. Ustick, 4 Wash. C. C. 347; Woodroff v. Howes, 88 Cal. 184; Brown v. Corporate Bank, 34 Fed. 776; Lamphear v. Buckingham, 33 Conn. 237; Nispel v. La Parle, 74 Ill. 306; Fish v. McGann, 205 Ill. 179; City of Lowell v. Morse, 1 Met. 475; Troy & G. R. R. v. Newton, 1 Gray, 544; Sage v. Culver, 147 N. Y. 241; Coatsworth v. Lehigh Co., 156 N. Y. 451; Campbell v. Heiland, 55 N. Y. Ap. Div. 95; Hall v. Gilman, 77 N. Y. Ap. Div. 458, 461; Ellsworth v. Franklin Socy., 99 N. Y. Ap. Div. 119 *Accord.* — Ed.

In Lamphear v. Buckingham, *supra*, the court said (p. 249): "The facts if well pleaded and sufficient are admitted, not because the demurrer admits them expressly or by force of any office it performs, but because the defendant has not denied and has defaulted them. A defendant therefore who demurs to a declaration admits, not by his demurrer but by his omission to deny them all the material well-pleaded facts alleged in it; and when his demurrer is overruled the case is in the condition precisely that it would have been if he had suffered a default and not demurred."

By statute in Maryland the constructive admission, by a demurrer or default, of the allegations in a petition for a *mandamus* does not warrant a judgment for the petitioner. The court must be satisfied by evidence *ex parte* of the truth of the petition. Legg v. Mayor, 43 Md. 203; Sudler v. Lankford, 32 Md. 142; Beasley v. Ridout, 94 Md 641. — Ed.

maintain the action, and the defendant confessing it by his demurrer, he hath given judgment against himself.[1]

TRESHAM *v.* FORD.

In The Common Pleas, Hilary Term, 1601.

[*Reported in Croke's Elizabeth*, 880.]

Account, supposing him to be receiver of £120 of his money by the hands of Vavasor, *ad compotum reddendum*. The defendant pleaded *nunques son receiver*, etc., and the jury find that he was receiver of such a sum. The defendant, before the auditors, pleaded that he was possessed of divers obligations, wherein Francis Tresham, son and heir to the plaintiff, was obliged unto him in £400, and that the said Vavasor paid unto him this £120 in satisfaction of those bonds, and thereupon he delivered unto him the said bonds to the use of the plaintiff, which he accepted. And thereupon the plaintiff demurred. And it was held by the whole court to be no plea, for it is contrary to the verdict, which found him to be receiver, to render, etc.; and the plea amounts to no more but that he was not receiver to account.[2]

COLE *v.* MAUNDER.

In the King's Bench, Hilary Term, 1635.

[*Reported in 2 Rolle's Abridgment*, 548.]

If one enters my close, and with an iron sledge and bar breaks and displaces the stones on the land, being my chattels, and I request him to desist, and he refuses, and threatens me if I shall approach him; and upon this I, to prevent him from doing more damage to the stones,

[1] A demurrer admits the truth of an allegation as to the law of another State. Liegeois *v.* McCracken, 10 Fed. R. 664.

Compare Finney *v.* Guy, 189 U. S. 335. In this case the plaintiff, after setting forth sections of a foreign statute and referring to several decisions in the foreign jurisdiction, made an allegation as to the law in that jurisdiction. On demurrer to the declaration, the court decided that it was not bound by the plaintiff's interpretation of the foreign statute and decisions. — Ed.

[2] Taylor *v.* Page, Cro. Car. 116; Holabird *v.* Burr, 17 Conn. 556, 563; People *v.* Shaw, 13 Ill. 581; Housh *v.* People, 66 Ill. 178; North Co. *v.* Morse, 107 Ill. 340; Eylenfeldt *v.* Ill. Co., 165 Ill. 185; Chicago Co. *v.* Gillison, 173 Ill. 264; Cooke *v.* Tallman, 40 Iowa, 133; Columbia Co. *v.* Townsend, 74 Vt. 183 *Accord*.

Similarly, a demurrer does not admit the truth of allegations contrary to legislative acts and records, of which the court must take judicial notice. Southern Co. *v.* Groeck, 68 Fed. 609 (official act of Secretary of the Interior); Griffin *v.* Augusta Co., 72 Ga. 423; Scofield *v.* McDowell, 47 Iowa, 129; Rauh *v.* Board, 66 How. Pr. 368; Pratt *v.* Lincoln Co., 61 Wis. 62. — Ed.

not daring to approach him, throw some stones at him *molliter et molli manu*, and they fall upon him *molliter*, still this is not a good justification, for the judges say that one cannot throw stones *molliter*, although it were confessed by a demurrer; and it would be perilous to give men liberty to throw stones in defence of their possession, for when a stone is thrown from the hand, it cannot be guided, and [here] a justification of a battery in defence of possession, although this arises from the possession, still [in] the conclusion is in defence of the person. *Judgment for plaintiff.*[1]

FREEMAN v. FRANK.

SUPREME COURT, NEW YORK, SPECIAL TERM, FEBRUARY, 1860.

[10 *Abbotts' Practice Reports*, 370.]

THE complaint alleged that the defendant assaulted, beat, imprisoned, and ravished the plaintiff. The defendant pleaded that after service upon him by the summons in the action, he was convicted of the crime of rape and sentenced to the state prison for life. "Wherefore said defendant, by his attorneys, avers that he is civilly dead,[2] and that this action has abated." Demurrer to this answer.[3]

BALCOM, J. — The Revised Statutes contain this section: "A person sentenced to imprisonment in a state prison for life shall thereafter be deemed civilly dead." (2 Rev. Stat. 701, § 20.) If the defendant was sentenced to the state prison at Auburn for life, as alleged in the answer, there can be no doubt but that such sentence abated the action. For causes of action for assault and battery and false imprisonment do not survive, they die with the person. (Gr. Pr. 2d ed. 93.)

When the cause of action does not survive, no step can be taken in the action after the plaintiff or defendant dies.

The rights and liabilities of a person civilly dead are as entirely gone as though he were actually dead; and his estate may be administered upon in like manner as if his body were a corpse. A deceased person, whether he died a civil or natural death, cannot have an attorney.

[1] Weston v. Carter, 1 Sid. 9; *Re* Gosch, 121 Fed. 604 (allegation, that a sash and door factory was a sawmill); Southern Co. v. Covenia, 100 Ga. 46 (allegation that a child less than two years old rendered service worth two dollars a month). Atty-Gen. v. Foote, 11 Wis. 14 (allegation that a statute took effect on a certain day); State v. Weiss, 76 Wis. 177 (an allegation that there is no difference between the King James version of the Bible and the Douay version "is against common knowledge, and therefore not well pleaded") *Accord*.

Similarly, if a plaintiff alleges his freedom from contributory negligence, but states the special circumstances from which it appears that the plaintiff must have been negligent, the demurrer will not admit the truth of the general statement. Indianapolis Co. v. Wilson, 124 Ind. 95; Baumler v. Narragansett Co., 23 R. I. 430; Donohoe v. Lonsdale Co., 26 R. I., 85 Atl. R. 326 s. c. — ED.

[2] By force of 2 Rev. St. 701, § 20. — Ed.

[3] The statement of the case is condensed, and a part of the opinion is omitted. — Ed.

His executor or administrator represents him, and no other person can act or speak for him.

Does the new matter in the answer, demurred to, upon its face, constitute a defence to the action? The fact that the defendant has answered, though by attorney, shows he is neither civilly nor physically dead. It is conclusive that he is living, and not under any disability that prevents him defending the action. The defendant, by answering, proves he is alive; and when he avers in his answer that he is dead, he is not to be believed. The answer, therefore, contains two contradictory averments, one of which in judgment of law is a fiction. If the defendant was dead, he could not answer. Hence the averment that he is civilly dead must be deemed untrue. The demurrer only admits the allegations in the answer, *when contradictory*, which the law adjudges to be true. For this reason the demurrer does not admit that the defendant is civilly dead. It only admits he is living. The new matter in the answer, therefore, upon its face, does not constitute a defence to the action. The demurrer should be sustained; and the plaintiff is entitled to judgment thereon, with costs. But the defendant may answer over within twenty days, on payment of costs.

THE STATE *v.* HENRY HAMLIN AND OTHERS.

SUPREME COURT OF ERRORS, CONNECTICUT, MAY TERM, 1879.

[47 *Connecticut Reports*, 95.]

INDICTMENT for murder, in the Supreme Court of Hartford County, one count charging the three defendants, Henry Hamlin, William Allen, and John H. Davis as principals, with the murder of Wells Shipman.

HOVEY, J.[1] The next error assigned is that the Superior Court overruled that portion of the defendant Davis's plea in abatement in which it is alleged that there were not twelve members of the grand jury in favor of finding a true bill against that defendant; that a number of members desired to take a separate vote upon the question of his guilt, but the foreman ruled, as matter of law, that a true bill could not be found against the defendants Hamlin and Allen, unless a true bill was also found against the defendant Davis, and refused to allow a separate vote to be taken upon the question of finding a true bill against Davis alone, and that the grand jury, believing that a true bill ought not to be found against Davis, nevertheless found a true bill against him for the sake of finding a true bill against Hamlin and Allen. This ground of abatement, though demurred to by the state's attorney, was properly overruled by the court. The state's attorney had no authority, by demurrer or otherwise, to admit the truth of the

[1] Only so much of the opinion is given as relates to the effect of the demurrer. — ED.

allegations contained in that part of the plea, because the law, in furtherance of justice, requires that the proceedings of grand juries should be conducted in secret, and that the secrets of the jury room should not be revealed. The jurors, as has been shown, are sworn to secrecy — the secrets of the cause, their own and their fellows', they will duly observe and keep.

The allegations in that part of the defendant Davis's plea in abatement, which is now under consideration, could not, if they are true, be proved, except by the testimony of the grand jurors themselves. The grand jurors could not have been allowed to give testimony in respect to them. And the admission of the state's attorney could not be received by the court in proof of them. When the plea containing those allegations was filed, the state's attorney should have objected to its allowance; and the court, upon such objection, would have ruled it out. But as that course was not adopted, the demurrer to the plea cannot be allowed to operate as an admission of the truth of the allegations pleaded, or to have any other operation or effect than an objection or exception to the filing and allowance of the plea.[1]

AMORY AND OTHERS v. M'GREGOR.

SUPREME COURT, NEW YORK, AUGUST, 1815.

[12 *Johnson*, 287.]

THIS was a special action on the case for negligence in the transportation of goods.

The first count stated, that the defendant, at the time of the making of the promise therein mentioned, was the owner of a ship, called the Indian Hunter, then in the port of Liverpool, in Great Britain, and bound to New Orleans; and that the plaintiffs, on the twenty-first of July, 1812, at Liverpool aforesaid, at the special instance of the defendant, caused to be shipped on board the said ship, whereof James L. Stevens was master, divers goods, wares, and merchandise, to wit, nine trunks and one bale of merchandise, and 127 crates of earthenware, in good order and condition, of the value of 15,000 dollars, to be taken care of, and safely and securely carried and conveyed by the defendant to New Orleans, and there to be safely and securely delivered, in the like good order and well conditioned, all and every the dangers and accidents of the seas, and navigation of whatsoever nature and kind excepted; and in consideration thereof, and of certain freight, the defendant undertook to take care of, and securely carry and con-

[1] Brooke v. Widdicombe, 39 Md. 386; Bower v. Chess, 83 Miss. 218 *Accord.* In this case the demurrer did not admit the allegation in the plaintiff's bill that a tax deed reciting that the tax sale was made in 1897 for the taxes of 1897 was the result of a clerical error in writing "taxes of 1897" instead of "taxes of 1896." — ED.

vey, and deliver the goods, the dangers and accidents of the seas and navigation excepted. And although a reasonable time for carrying and delivering the said goods had elapsed, yet that the defendant, not regarding his duty nor his said undertaking, but contriving, etc., did not, nor would take care of, and safely and securely carry and convey, the goods to New Orleans, and there safely and securely deliver them to the plaintiff, and although no dangers and accidents of the seas and navigation did prevent him; but that, on the contrary, the defendant so fraudulently, negligently, and carelessly behaved and conducted himself with respect to the goods, that by, and through the mere fraud, carelessness, negligence, and improper conduct of the defendant and his agents, in that behalf, the goods became, and were totally lost to the plaintiffs.[1]

To this count there was a general demurrer.

Per Curiam. This case comes before the court on a general demurrer to the declaration. And the ground upon which it has been attempted to support the demurrer is, that the day laid in the declaration is during the existence of hostilities between this country and Great Britain; and that, of course, the contract set forth in the declaration is void, being contrary to the laws of the United States. Without giving any opinion upon the validity of the contract, if, in point of fact, it was made at the time laid in the declaration, it is sufficient, in this case, to say, that the day being immaterial, the plaintiff would not be obliged to prove the contract to have been made on the day laid. Nothing appears upon the face of the declaration, showing the contract to be illegal or void. And it is a general rule, that a party cannot demur, unless the objection appears on the face of the pleadings. And so are all the cases referred to, and relied upon, by the defendant's counsel. In Cheetham *v.* Lewis,[2] and Waring *v.* Yates,[3] it appears, from the declaration, when the suit was commenced, and that the cause of action arose afterwards. The plaintiff must, therefore, have judgment, with leave to the defendant, however, to plead to the declaration.[4]

Judgment for the plaintiff.

[1] The second count and the argument for the plaintiff are omitted. — Ed.

[2] 3 Johns. Rep. 42.

[3] 10 Johns. Rep. 119.

[4] Similarly, a demurrer does not admit the amount of the damage alleged, if the claim is for unliquidated damages. Lamphear *v.* Buckingham, 33 Conn. 237; Daniels *v.* Saybrook, 34 Conn. 377; Crogan *v.* Schick, 53 Conn. 186; Randel *v.* Chesapeake Co., 1 Harringt. 234; Lindley *v.* Miller, 67 Ill. 244; Minear *v.* Hogg, 94 Iowa, 641, 645; State *v.* Peck, 60 Me. 498, 503; Darrah *v.* Lightfoot, 15 Mo. 181.

See also the following cases deciding that upon a demurrer superfluous allegations will be ignored. Lord *v.* Houston, 11 East, 62; Alderson *v.* Johnson, 2 M. & W. 70; Johnson *v.* Killian, 6 wrk. 172; Martin *v.* Warren, 11 Ark. 285; McDaniel *v.* Grace, 15 Ark. 465, 485; Gillette *v.* Peabody, (Colo. Ap. 1904) 75 Pac. R. 18; Childs *v.* Griswold, 15 Iowa, 438; Tucker *v.* Randall, 2 Mass. 283; Loomis *v.* Youle, 1 Minn. 175; Hurt *v.* Southern Co., 40 Miss. 391; Eichlin *v.* Holland Co., 68 N. J. 78; Tappan *v.* Powers, 2 Hall, 277; Groesbeck *v.* Dunscombe, 41 How. Pr. 302, 321. — Ed.

BARBER AND ANOTHER *v.* SUMMERS.

SUPREME COURT, INDIANA, JUNE 8, 1840.

[5 *Blackford*, 339.]

ERROR to the Rush Circuit Court.

DEWEY, J. This was an action of debt commenced before a justice of the peace. It was founded on a bond conditioned for the delivery of certain property, which had been taken by a constable on execution in favor of the defendant in error against Gosnel, one of the plaintiffs in error. The bond was filed before the justice as the cause of action; the plaintiff below also filed with the justice a declaration setting forth the bond and condition, and assigning the non-delivery of the property as the breach of the condition. The defendants pleaded, 2dly,[1] that the articles mentioned in the condition belonged to Gosnel, and that at and before the period when they were to have been delivered, Gosnel claimed them from the constable as being exempted from execution by law, "on the ground that Gosnel had not personal property of the value of 100 dollars, including said articles," and that he had a family; the plea then avers that Gosnel had not "100 dollars' worth of personal and household property over and above the property" levied on. The plaintiff demurred generally to the second plea; the demurrer was sustained; and upon a trial of the issue of fact, the justice rendered judgment for the plaintiff. The defendants appealed. The Circuit Court also sustained the demurrer.

The second plea is evidently an attempt to set up the benefit of the statute, which entitles the head of a family to claim property to the value of 100 dollars as exempt from execution, in bar of an action on the delivery bond. The plea, however, is too defective to bring the question of the validity of such a defence before us in this case. If the allegation, that the execution defendant claimed the exemption "on the ground" that he had not property to the value of 100 dollars, including that taken on the execution, can be considered as an averment that all his property was not worth that sum, it is inconsistent with the subsequent averment that his property, exclusive of that levied on, did not amount in value to 100 dollars. And a plea, which contains repugnant allegations respecting material matter, is bad on general demurrer; the contradictory averments destroy each other. Gould's Pl. 155. But the averment in the plea, that the execution debtor claimed the property levied on from the constable, as being exempt from execution, on the ground that he had not property to the value of 100 dollars, is not, in truth, a direct allegation that his property was not worth that sum. It tenders no issue as to that point. The only statement in the plea as to the value of his property is that which avers, that, exclusive of the articles taken in execution, Gosnel

[1] Only so much of the case as relates to this plea is given. — ED.

did not own 100 dollars' worth of property. The plea, with this defect, certainly cannot bar the action.

Per Curiam. The judgment is affirmed, with 1 *per cent.* damages and costs.[1]

MILLARD *v.* CYRUS BALDWIN.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1855.

[*Reported in 3 Gray, 484.*]

ACTION of contract, commenced at June term, 1854, of the Court of Common Pleas. The declaration alleged that the defendant and Cyrus Hewitt, by agreement in writing, submitted certain matters in dispute between them, relating to the late copartnership between Hewitt and Charles A. Baldwin, to the arbitration of Ralph Taylor, William Stoddard, and Orrin Curtis, their decision in the premises to be final and binding upon the parties; that the defendant bound himself to Hewitt to assume, so far as Charles A. Baldwin was concerned, all the debts and liabilities of said partnership; that there was then due from said partnership to the plaintiff a debt of one hundred and twenty-five dollars, which was submitted to said arbitrators, and which the defendant "was, in and by said award, ordered to pay to the plaintiff, and is by law bound to pay the same. And the plaintiff says, the defendant owes him one hundred and twenty-five dollars, the sum so awarded to him by said arbitrators."[2]

The defendant demurred, on the ground that the declaration did not state a legal cause of action substantially in accordance with the rules contained in statute 1852, c. 312; and particularly assigned the following cause of demurrer: "That said plaintiff is not a party to any agreement or award between the defendant and said Hewitt, and the plaintiff cannot sue on any agreement or award set forth in said declaration, or in the copy to said declaration annexed."

I. Sumner, for the defendant.

J. Branning, for the plaintiff.

The allegation in the last clause in the declaration, that the defendant owes the plaintiff one hundred and twenty-five dollars, the sum so awarded by said arbitrators (the truth of which, as of all other facts distinctly stated, is admitted by the demurrer), is of itself a

[1] King *v.* Stevens, 5 East, 244 (*semble*); Jacksonville Co. *v.* Thompson, 34 Fla. 346, 352 (*semble*); Fla. Co. *v.* Ashmore, 43 Fla. 272; So. Co. *v.* Covenia, 100 Ga. 46; Bower *v.* Chess, 83 Miss. 218 *Accord.*

Nevil *v.* Soper, 1 Salk. 213, is an extreme, not to say fantastic, evidence of repugnancy. "In covenant against an apprentice the plaintiff assigned for breach that the apprentice, before the time of his apprenticeship expired, and *durante tempore quo servivit*, departed from his master's service. The defendant demurred, and had judgment, because the declaration was repugnant, for it should have been *durante tempore quo servire debuit*." — ED.

[2] Only so much of the case is given as relates to the question of the demurrer. — ED.

sufficient declaration, under the new practice act (statute 1852, c. 312), and all that precedes may be rejected as surplusage.

METCALF, J. This demurrer must be sustained.

The last clause in the declaration cannot aid the plaintiff; for it is not an allegation of fact, and as such admitted by the demurrer, but a mere statement of the plaintiff's conclusion of law resulting from the facts already alleged. Gould, Pl. c. 9, § 29.

Declaration adjudged bad.[1]

[1] "A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint. It is to the soundness of those conclusions, whether stated in the complaint or not, that a demurrer is directed, and to which it applies the proper test." Branham v. Mayer, etc., 24 Cal. 602.

See to the same effect Rex v. Knollys, 1 Ld. Ray. 111; Burton's Case, 5 Rep. 69; Brown v. Mallett, 5 C. B. 599, 615; Mallan v. May, 11 M. & W. 653; Seymour v. Maddox, 16 Q. B. 326; White v. Crisp, 10 Ex. 312, 320 (*semble*); Metcalf v. Hetherington, 11 Ex. 269; Dutton v. Powles, 30 L. J. Q. B. 169; Grenville v. Clarendon, 9 Eq. 11; Chilton v. London Co., 7 Ch. D. 735; Moss v. Riddle, 5 Cranch, 351; Pennie v. Reis, 132 U. S. 464; U. S. v. Arnold, 1 Gall. 348; Savage v. Walsh, 26 Ala. 619; Wood v. King, 57 Ark. 284; Wadsworth v. Champion, 1 Root, 393, 395; State v. Sykes, 28 Conn. 225, 228; Hayden v. Manuf'g Co., 29 Conn. 548, 560; McCune v. Gas Co., 30 Conn. 521; Hewison v. New Haven, 34 Conn. 136; Compher v. People, 12 Ill. 290; Binz v. Tyler, 79 Ill. 248; Johnson v. Roberts, 102 Ill. 655, 658; Fish v. Farwell, 160 Ill. 236; Ill. Co. v. Three States Co., 90 Ill. Ap. 599; Goddard v. Stockman, 74 Ind. 400; Worley v. Moore, 97 Ind. 567; Harkins v. Edwards, 1 Iowa, 426, 430; Games v. Robb, 8 Iowa, 193, 199; Stuckslegar v. Smith, 27 Iowa, 286; Alston v. Wilson, 44 Iowa, 130; Minn. Co. v. Hiams, 58 Iowa, 501; Freeman v. Hart, 61 Md. 525; State v. Nichols, 78 Iowa, 747; Parish v. Municipality, 8 La. An. 145; Brooke v. Widdicombe, 39 Md. 386; Shepherd v. Baer, 96 Md. 152; Sistermans v. Field, 9 Gray, 331; Hollis v. Richardson, 13 Gray, 392; Read v. Smith, 1 All. 519; Everett v. Drew, 129 Mass. 150; Jones v. Dow, 137 Mass. 119; Haskell v. Equitable Co., 181 Mass. 341; Grigge v. St. Paul, 9 Minn. 246; Wilson v. Clarke, 20 Minn. 367; Perkins v. Gay, 55 Miss. 153; Bradley v. Franklin Co., 95 Mo. 638; Kleckamp v. Meyer, 5 Mo. Ap. 444; American Co. v. State, 46 Neb. 194; Bellecne Co. v. Kayser, (Neb. 1903) 95 N. W. R. 499; State v. Porter, (Neb. 1903) 95 N. W. R. 769; Cal. Co. v. Patterson, 1 Nev. 150, 157; Van Doren v. Tjader, 1 Nev. 380, 392; Tinsman v. Belvidere Co., 26 N. J. 148 (*semble*); Neinaber v. Weehawken, (N. J. 1904) 57 Atl. R. 267; Kennedy v. North Co., (N. J. 1905) 60 Atl. R. 40; First Bank v. Lewinson, (N. Mex. 1904) 76 Pac. R. 288; Starbuck v. Murray, 5 Wend. 148, 159; Kinnier v. Kinnier, 45 N. Y. 535; Kip v. N. Y. Co., 67 N. Y. 227, 230; Bonnell v. Griswold, 68 N. Y. 294; Lange v. Benedict, 73 N. Y. 12; Buffalo Inst. v. Bitter, 87 N. Y. 250; Walsh v. Trustees, 96 N. Y. 427, 438; Bogardus v. N. Y. Co., 101 N. Y. 328; Masterson v. Townshend, 123 N. Y. 458; Talcott v. Buffalo, 125 N. Y. 280; Park Co. v. Nat. Ass'n, 175 N. Y. 1; Boyce v. Brown, 7 Barb. 85; Hall v. Bartlett, 9 Barb. 301; Angell v. Van Schaick, 56 Hun, 247; Douglas v. Phenix Co., 63 Hun, 393; Armatage v. Fisher, 74 Hun, 167; Rector v. Huntington, 82 Hun, 125; Supervisors v. Seabury, 11 Abb. N. C. 461; Rauh v. Board, 66 How. Pr 368; Farrar v. Lee, 10 N. Y. Ap. Div. 130; Baxter v. McDonnell, 18 N. Y. Ap. Div. 235; Swan v. Mutual Ass'n, 30 N. Y. Ap. Div. 256; Burdick v. Chesebrough, (N. Y. Ap. Div. May, 1904) 88 N. Y. Sup. 13; Schenck v. Taylor, 2 Duer, 675; N. Y. Co. v. McGrath, 23 N. Y. St. Rep. 209; Johnstown v. Rogers, 20 N. Y. Misc. Rep. 262; Mauney v. Ingram, 78 N. Ca. 96; Hamilton Co. v. Cincinnati Co., 29 Oh. St. 341; Watts v. Ruh, 30 Oh. St. 52, 41; Peterson v. Roach, 32 Oh. St. 374; R. R. Co. v. Moore, 33 Oh. St. 284; Crockett v. McLanahan, (Tenn. 1903) 72 S. W. R. 950; Catlin v. Glover, 4 Tex. 151; Holman v. Criswell, 13 Tex. 38, 44; Blaisdell Co. v. Citizens' Bank, 96 Tex. 626; Best v. Nix, 6 Tex. Civ. Ap. 349; Prokop v. Gulf Co., (Tex. Civ. Ap. 1904) 79 S. W. R. 101; Kellogg v. Larkin, 3 Pinn. (Wis.) 125; State v. Collins, 5 Wis. 339, 347; Sherwood v. Sherwood, 45 Wis. 357; Brown v. Phillips, 71 Wis. 229.

In Rauh v. Board, *supra*, LAWRENCE, J., said: "It is equally well settled, however, that the demurrer only admits the facts that are relevant and well pleaded, but not conclusions of law. . . . So, too, averments in a complaint as to the meaning or contents of a paper set forth therein, or annexed to and made part thereof, are not admitted by a demurrer." — ED.

TYRWHITE *v.* KYNASTAN.

IN THE COMMON BENCH, HILARY TERM, 1608.

[*Noy*, 146.]

AN ACTION upon the case upon an *indebitatus* assumpsit. And the plaintiff [defendant?] demurs because there is not shewed how and for what things he was indebted. And, without argument, it was clear by the court against the plaintiff. And in P. 28 Eliz. B. R., Wood *v.* Draper, that the defendant may safely plead non debet as well as in debt, by FENNER and GAWDY. And in M. 7 Jac. B. R., Ivers *v.* Ingram, it was adjudged that he ought to shew how he became indebted, viz., for merchandises, or for ready money.[1]

NAUVOO *v.* RITTER.

SUPREME COURT, UNITED STATES, OCTOBER, 1878.

[97 *United States Reports*, 389.]

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The declaration was upon bonds, and there was filed with it a copy of the bonds. The bond recited on its face that it was issued under authority of an ordinance which was printed on the back of the bond. To the second, third, fourth, and fifth pleas, alleging the invalidity of

[1] "It was holden by the court that the action as it was brought, would not lie, for the inconvenience which might follow; for the defendant should be driven to be ready to give an answer to the plaintiff to the generality. And therefore the plaintiff ought to bring a special action for the particular things." The Baker's Case, Godb. 186. See to the same effect, Case of the Marshalsea, 10 Rep. 68, 77 *a*; Gardiner *v.* Bellingham, Hob. 5 (*semble*); Woolaston *v.* Webb, Hob. 18 (*semble*); Woodford *v.* Deacon, Cro. Jac. 206; Buckingham *v.* Costendine, Cro. Jac. 214; Mayor *v.* Harn, Cro. Jac. 642; Janson *v.* Colomore, 1 Roll. R. 396 (*semble*); Holmes *v.* Cheuie, Hetl. 106 (*semble*); Limbey *v.* Hemmurse, 1 Bulst. 167; Holm *v.* Lucas, Cro. Car. 6; Foster *v.* Smith, Cro. Car. 31; Cook *v.* Samburne, 1 Sid. 132; Potter *v.* James, 1 Show. 347, Comb. 187, 12 Mod. 16, s. c.; Palmer *v.* Stavely, 12 Mod. 510, 511 (*semble*); Wise *v.* Wise, 2 Lev. 152; Barker *v.* Barker, Palm. 171; Maury *v.* Olive, 2 Stew. 472; Beauchamp *v.* Bosworth, 3 Bibb, 115; Chandler *v.* State, 5 Har. & J. 284; Taylor *v.* N. J. Co., 70 N. J. 24.

But, in the absence of a statute to the contrary, it is enough to allege the defendant's indebtedness for "goods sold," "money lent," "money paid at the defendant's request," "work done at the defendant's request," and the like, without further particulars of the transaction creating the debt. Woodford *v.* Deacon, *supra*; Bellinger *v.* Gardiner, 1 Roll. R. 24, Hob. 5; Rooke *v.* Rooke, Cro. Jac. 245; Babington *v.* Lambert, Moo. 854; Ambrose *v.* Roe, Skin. 217, 218; Fowk *v.* Pinsacke, 2 Lev. 153; Hibbert *v.* Courthope, Carth. 276; Russell *v.* Collins, 1 Mod. 8, 1 Sid. 425, s. c.

In some jurisdictions, however, the common counts are abolished, and in others they are allowed only when accompanied by a bill of particulars. This matter will be dealt with later in this volume. — ED.

the bond, the plaintiff demurred. Judgment was given for the plaintiff.[1]

Mr. Chief Justice Waite delivered the opinion of the court.

By a statute of Illinois "in regard to practice in courts of record," passed February 22, 1872, the plaintiff in a suit upon a written instrument is required to file with his declaration a copy of the instrument sued upon. Rev. Stat. Ill. (1874), c. 110, p. 777, sect. 18. In obedience to this statute, the plaintiff in this case filed with his declaration copies of the bonds and coupons declared upon. In this way, we think, the bonds became a part of the pleadings in the case.[2]

The bonds upon their face refer to the ordinance of the city council authorizing their issue, printed on the back; and in the ordinance it is distinctly recited that the election required by law was held pursuant to notice given in accordance with the provisions of the act authorizing a subscription, and that upon a canvass of the votes "it appeared that there had been cast for subscription a large majority of the votes of said city, the number of votes given being a large majority of all the votes polled at the last general election in said city, and much larger vote than that required by the act aforesaid to authorize said subscription." With this recital, in effect, upon the face of the bonds in the hands of an innocent holder, it was certainly not error in the court below to sustain a demurrer to the second, third, fourth, and fifth pleas, which simply tendered an issue as to the authority of the city to issue the bonds, and as to the fact of the election.

Judgment affirmed.

SETH X. METZGER *et al.* v. THE CANADIAN AND EUROPEAN CREDIT SYSTEM COMPANY.

Supreme Court, New Jersey, November Term, 1896.

[59 *New Jersey Reports*, 340.]

The opinion of the court was delivered by

Van Syckel, J. The declaration is in due form for covenant, and the instrument sued on is not expressly made a part of the declaration.

A copy is attached to the declaration which appears to be not under seal.

Defendant demurred to the first count, and assigned as cause for demurrer that the declaration is in covenant on an instrument not under seal.

It does not appear that the instrument declared on is not under seal. Resort cannot be had to the copy of the paper annexed to the

[1] The statement of the case is abridged. — Ed.

[2] Dumbould v. Rowley, 113 Ind. 353 (*semble*); State v. Helms, 136 Ind. 122 (*semble*); Burton v. White, 1 Bush, 9; Marshall v. Hamilton, 41 Miss. 229 (*semble*) *Accord*. — Ed.

declaration to show that fact; it is technically no part of the declaration. To enable the defendant to take advantage of the alleged defect, the body of the declaration must refer to the instrument sued on as so annexed; it thereby becomes part of the pleading.[1] Otherwise the court cannot, on demurrer, take notice of it. Gen. Stat. p. 2554, pl. 123; Harrison *v.* Vreeland.[2]

There is no fault, so far as appears, in the declaration, and the demurrer must be overruled, with costs.[3]

ISAAC COOK *v.* PABLO DE LA GUERRA AND OTHERS.

SUPREME COURT, CALIFORNIA, JANUARY TERM, 1864.

[24 *California Reports*, 237.]

By the Court, RHODES, J.[4] The complaint in this case is in the usual form of complaints for the foreclosure of mortgages of real estate. All of the defendants except Oreña demurred to the complaint on the grounds that there is a defect of the parties defendants,

[1] New Co. *v.* Whelan, 75 Conn. 456; Miller *v.* Miller, 63 Iowa, 387; Chicago Co. *v.* Wilson, 25 Ky. L. Rep. 525; Sleeper *v.* Gagne, (Me. 1904) 59 Atl. R. 472; Pefley *v.* Johnson, 30 Neb. 529; Harrison *v.* Vreeland, 38 N. J. 366; Merlick *v.* Foster, 64 N. J. 394; Fairbanks *v.* Bloomfield, 2 Duer, 349,353; Taylor *v.* MacLea, 11 N. Y. S. 640; Goldstein *v.* Nicholson, (Misc. Rep. Dec. 1904) 91 N. Y. S. 33; Caspary *v.* Portland, 19 Oreg. 496 (*semble*); Riley *v.* Pearson, 21 Oreg. 15 (*semble*); McLeod *v.* Lloyd, 43 Oreg. 260; Burks *v.* Watson, 43 Tex. 107; Hays *v.* Dennis, 11 Wash. 360; Lockhead *v.* Berkeley Co., 40 W. Va. 553 *Accord*.

Currey *v.* Lackey, 35 Mo. 389; Bowling *v.* McFarland, 38 Mo. 465; Kern *v.* South Co., 40 Mo. 19; Pomeroy *v.* Fullerton, 113 Mo. 440; Hickory Co. *v.* Fugate, 143 Mo. 71; Reed *v.* Nicholson, 158 Mo. 624, 631; Aultman *v.* Siglinger, 2 S. Dak. 442; Rust Co. *v.* Fitch, 3 S. Dak. 213 *Contra*. — ED.

[2] 9 Vroom, 366.

[3] Hobson *v.* MacArthur, 3 Mich. 243 (*semble*); Steamboat *v.* McCraw, 31 Ala. 659; Brennan *v.* Ford, 46 Cal. 7 (*semble*); Los Angeles *v.* Signoret, 50 Cal. 298; Triscony *v.* Brandenstein, 66 Cal. 514; Beckett *v.* Griffith, 90 Cal. 532; Hooker *v.* Gallagher, 6 Fla. 351; Hator *v.* So. Co., 118 Ga. 874; Harlow *v.* Boswell, 15 Ill. 56; Norfolk *v.* People, 43 Ill. 9; Hust *v.* Conn, 12 Ind. 257; Jones *v.* Bradford, 25 Ind. 305; Thames Co. *v.* Beville, 100 Ind. 309; Huseman *v.* Sims, 104 Ind. 317; Fleetwood *v.* Brown, 109 Ind. 567; American Co. *v.* Replogle, 114 Ind. 1; Fuller *v.* Cox, 135 Ind. 46; State *v.* Helms, 136 Ind. 122; Lane *v.* Krekle, 22 Iowa, 399; Childs *v.* Limback, 30 Iowa, 398; Polk Co. *v.* Hierb, 37 Iowa, 361; Miller *v.* Miller, 63 Iowa, 387; State *v.* Simpkins, 77 Iowa, 676; Yewall *v.* Bradshaw, 2 Duv. 573; Baltimore Co. *v.* Ritchie, 31 Md. 191; Marshall *v.* Hamilton, 41 Miss. 229; Curry *v.* Lackay, 35 Mo. 389; Bowling *v.* McFarland, 38 Mo. 465; Kern *v.* South Co., 40 Mo. 19; Pomeroy *v.* Fullerton, 113 Mo. 440; Hickory Co. *v.* Fugate, 143 Mo. 71; Reed *v.* Nicholson, 158 Mo. 629, 631; Cassatt *v.* Vogel, 14 Mo. Ap. 317; Wells *v.* Jackson, 44 N. H. 61; Harrison *v.* Vreeland, 38 N. J. 366; Brown *v.* Warden, 44 N. J. 177; Voorhees *v.* Barr, 59 N. J. 123, 125; Snyder *v.* Marsh Co., 59 N. J. 69; Heller *v.* Duff, 62 N. J. 101; Wilson *v.* Mayor, 15 How. Pr. 500; Larimore *v.* Wells, 29 Oh. St. 13; Caspary *v.* Portland, 19 Oreg. 496; Warren *v.* Providence Co., (R. I. 1896) 33 Atl. R. 876; Rust Co. *v.* Fitch, 3 S. Dak. 213; Buckham *v.* Hoover, (S. Dak. 1904) 101 N. W. R. 28; Story *v.* Dobson, 2 Heisk. 29; Guadalupe Co. *v.* Johnston, 1 Tex. Civ. Ap. 713; Hortland *v.* Windsor, 29 Vt. 354; Harris *v.* Thomas, 1 Hen. & Munf. 18; Fowler *v.* Colton, 1 Pinn. (Wis.) 331; Roberts *v.* White, 3 Wis. 414; Zaegel *v.* Kuster, 51 Wis. 31; Smith *v.* Janesville, 52 Wis. 680; Magdeburg *v.* Uiblein, 53 Wis. 165; Pritzloff Co. *v.* Carlson, 76 Wis. 33; Benedix *v.* German Co., 78 Wis. 77; Northwestern Co. *v.* West Co., (Wis. 1895) 64 N. W. R. 323 *Accord*. — ED.

[4] Only a portion of the opinion of the court is given. — ED.

and that the complaint does not state facts sufficient to constitute a cause of action.

It does not appear upon the face of the complaint that there is a defect of parties, but the defendants, in order to make the defect apparent, allege as facts that the mortgaged premises are a portion of the estate of José de la Guerra y Noriega, and that the estate is unsettled, and that for that reason the creditors, claimants, and legatees of the estate are necessary parties to the action.

This mode of pleading is inadmissible under any system, for it is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to.[1]

The second ground is not well taken, for the complaint does state all the facts that are necessary in a complaint to foreclose a mortgage.

The judgment is affirmed.

TOMKINS *v.* ASHBY.

AT NISI PRIUS, CORAM ABBOTT, C. J., JANUARY 19, 1827.

[*Reported in Moody & Malkin*, 32.]

ASSUMPSIT for money deposited by the plaintiff with the defendant.

The defence suggested was that the money was deposited for a particular purpose (the answering the differences on some Mexican bonds), and applied to that purpose.

The defendant had filed a bill in chancery against the plaintiff, alleging, among other things, the circumstances now relied on with respect to the Mexican bonds. The plaintiff had originally demurred to this bill; but the demurrer being overruled, he put in an answer, pleading to that part of the bill which respected the Mexican bonds, and answering the remainder of the bill.

Scarlett, for the defendant, proposed to read the proceedings in

[1] Brownsword *v.* Edwards, 2 Ves. 243, 245; Edsell *v.* Buchanan, 2 Ves. Jr. 83, 4 Bro. C. C. 256, s. c.; Cawthorn *v.* Chalie, 2 S. & S. 127, 129 (*semble*); Davies *v.* Williams, 1 Sim. 5, 7 (*semble*); Pendlebury *v.* Walker, 4 Y. & C. 424 (*semble*); Wood *v.* Midgeley, 5 D. M. & G. 41, 44 (*semble*); Stewart *v.* Masterson, 131 U. S. 151; Chicago Co. *v.* Means, 2 Fed. 18; Nybladh *v.* Herterius, 41 Fed. 120; Darrow *v.* Home Co., 57 Fed. 463; Ghiradelli *v.* Greene, 56 Cal. 629; Ins. Co. *v.* Lanier, 5 Fla. 110; State *v.* Putnam Co., 23 Fla. 632; Beckner *v.* Beckner, 104 Ga. 219; Woods *v.* Colony Bank, 114 Ga. 683; Hust *v.* Conn, 12 Ind. 257; Douglass *v.* Blankenship, 50 Ind. 160; Balt. Co. *v.* Ritchie, 31 Md. 191, 198; Dennehey *v.* Woodsum, 100 Mass. 195, 198 (*semble*); Warner *v.* Cameron, 64 Mich. 185; Black *v.* Shreeve, 7 N. J. Eq. 440; Teeter *v.* Veitch, (N. J. Eq. 1904) 57 Atl. R. 160; Brooks *v.* Gibbons, 4 Paige, 374 (*semble*); Leland *v.* Tousey, 6 Hill, 328, 333; Coe *v.* Beckwith, 19 How. Pr. 398; Von Glahn *v.* De Rossett, 76 N. Ca. 292; Davison *v.* Gregory, 132 N. Ca. 389, 392; Wyoming Co. *v.* Bardwell, 84 Pa. 104; Saxon *v.* Barksdale, 4 Dess. 522, 525 (*semble*) *Accord*.

In an early case, in which the plaintiff replied new facts and demurred to the plea, it was decided that the defendant by his joinder in demurrer admitted the new facts. J. S. of Dale *v.* J. S. of Vale, Jenk. Cent. Cas. 138. This decision seems never to have been followed and must be deemed erroneous. — ED.

chancery, as amounting to an admission on the part of the plaintiff of the circumstances respecting the Mexican bonds as stated in the defendant's bill.

ABBOTT, Ld. C. J., refused the evidence; observing that, after a demurrer to a bill in equity, if the demurrer were overruled, the party might still go on and answer; and that, consequently, the demurrer was not to be taken as an absolute admission of the facts charged; and that on the same principle a plea in equity could not be so, for that it amounted merely to a statement of circumstances to prove that, supposing the facts charged to be true, the defendant is not bound to answer; it could, therefore, no more amount to an admission of those facts, than a witness who declines to answer a question can be held to admit the fact inquired into.

Verdict for the plaintiff.[1]

M. GILMORE AND OTHERS *v.* CHRIST HOSPITAL AND ANOTHER.

SUPREME COURT, NEW JERSEY, JUNE 9, 1902.

[68 *New Jersey Reports*, 47.]

ON demurrer to *narr.*

The opinion of the court was delivered by

VAN SYCKEL, J. The first count of the declaration sets out a cause

[1] Auld *v.* Hepburn, 1 Cranch, C. C. 122, 166; Gray *v.* Finch, 23 Conn. 495; Pearce *v.* Provost, 4 Houst. 467 *Accord.*

Similarly, statements in a pleading, to which a party has demurred, cannot be used as evidence against the demurrant on the trial of an issue of fact in the same litigation. Ingram *v.* Lawson, 9 C. & P. 326; Pease *v.* Phelps, 10 Conn. 62; Crogan *v.* Schiell, 53 Conn. 186, 208; State's Atty. *v.* Selectmen, 59 Conn. 402; Alexander *v.* Sutlive, 3 Ga. 27 (*semble*); Standish *v.* Dow, 21 Iowa, 363; Jacobs *v.* Vaill, 67 Kan. 107; Stimson *v.* Gardner, 33 Me. 94; Bartholow *v.* Campbell, 56 Mo. 117; McKinzie *v.* Mathews, 67 Mo. 187; Luna *v.* Mohr, 3 N. Mex. 56; Cook *v.* Wright, 22 N. Y. 472, 482; Hudson Co. *v.* United Co., (Ap. Div. Nov. 1904) 91 N. Y. S. 179; Rice *v.* Rice, 13 Oreg. 337 (*semble*); Chambers *v.* Miller, 9 Tex. 236 *Accord.*

In Pease *v.* Phelps, *supra*, Church, J., said, p. 68: "A demurrer presents only an issue in law to the court for consideration; the jury has no concern with it; and although it is a rule of pleading that a demurrer admits facts well pleaded, for the sole purpose of determining their legal sufficiency, yet, as a rule of evidence, it was never supposed that a demurrer admitted anything."

Upon the trial of the question of damages, after a demurrer to the declaration has been overruled, the defendant, while not at liberty to dispute the truth of the essential allegations in the declaration for the purpose of defeating a recovery altogether, may dispute those allegations for the purpose of reducing the damages to a merely nominal amount. Lamphear *v.* Rockingham, 33 Conn. 237.

The admission by a demurrer, being merely a constructive admission, is not an admission within the Oregon Code, § 494, which applies only to express admissions. Rice *v.* Rice, 13 Oreg. 337.

This remark of James, L. J., in Day *v.* Brownrigg, 10 Ch. Div. 305, may be added: "It is not in my opinion proper, where, for the purpose of meeting a litigation the defendant is advised to stop the action *in limine* by demurrer, that . . . he should be exposed to reprehension, as if the allegations which are admitted to be true, for the purpose of decision upon the demurrer, were true *de facto*. It is quite possible that they may be wholly or substantially fictitious." — ED.

of action against both defendants and also a cause of action against the defendant Dickinson alone.

This is a misjoinder of causes of action, and is the subject of general demurrer

A plaintiff cannot join in one action distinct claims against several defendants. Wills *v.* Shinn;[1] Hancock *v.* Haywood;[2] Drummond *v.* Dorant;[3] 1 Chit. Pl. 199, 206; Gould, Pl. ch. 4, §§ 97, 98.

The demurrer to this count is sustained.

The third count of the declaration does not allege any facts which will constitute a cause of action, but avers that "by reason of the aforesaid wrongs and injuries" the plaintiff has suffered damage.

Each count must contain a complete cause of action. The reference to the previous counts cannot in this case avail the plaintiff. He does not specify to which count he refers. If he relies upon the statement of alleged wrongs in the first count, the third count is tainted with the vice of the first count. Each count must show affirmatively a legal basis of recovery.

Unless the second count expressly refers to the first, no defect therein will be aided by the preceding count; for though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations or the latter count must expressly refer to the former.[4] 1 Chit. Pl. *397.

No legal ground of action being set forth in the third count, the demurrer to that count is also well taken.

[1] 13 Vroom, 138 · 2 Saund. 117 *a*.

[2] 3 T. R. 433.

[3] 4 T. R. 360.

[4] Nelson *v.* Swan, 13 Johns. 483; Loomis *v.* Swick, 3 Wend. 205, 207; Green *v.* Parsons, 14 N. Y. St. Rep. 97; Durkee *v.* City Bank, 13 Wis. 216; Curtis *v.* Moore, 15 Wis. 134 *Accord*.

Upon the same principle in case of a demurrer to one plea, the court cannot look at any averment in another plea. Pate *v.* Allison, 114 Ga. 651; Ayrault *v.* Chamberlin, 33 Barb. 229; Baldwin *v.* U. S. Co., 54 Barb. 505; Zenia Bank *v.* Lee, 7 Abb. Pr. 372; Hammond *v.* Earle, 58 How. Pr. 426.

Similarly upon a demurrer to the declaration, the court cannot consider any statement in a plea or subsequent pleading: Tommey *v.* Ellis, 41 Ga. 260; Griffin *v.* Stewart, 101 Ga. 720; Williams *v.* Lancaster, 113 Ga. 1020. Nor in any other part of the record: Dodge *v.* McKay, 4 Ala. 346 (the writ); Huss *v.* Central Co., 66 Ala. 472 (the writ); Rust *v.* Frothingham, 1 Ill. 258 (the writ); McComas *v.* Haas, 93 Ind. 276 (special verdict); American Co. *v.* Replogle, 114 Ind. 1 (special verdict); De Armond *v.* Ballou, 122 Ind. 398; Weems *v.* Millard, 9 Har. & G. 143; Brooks *v.* Metrop. Co., 70 N. J. 36 (the summons).

But a statement in another part of the record may be incorporated in a pleading by reference: Robinson *v.* Drummond, 24 Ala. 174; Loomis *v.* Swick, 3 Wend. 205; Cragin *v.* Lovell, 88 N. Y. 258. But see *contra*, Potter *v.* Earnest, 45 Ind. 416; Cobbey *v.* Rogers, 152 Ind. 169; and compare Pate *v.* Allison, 114 Ga. 651, 654.

DAVIES *v.* PENTON.

In the King's Bench, February 6, 1827.

[*Reported in 6 Barnewall & Cresswell*, 216.]

Declaration stated articles of agreement of the 23d December, 1823, whereby the defendant, a surgeon, apothecary, and accoucheur, demised to the plaintiff his house in Great Surrey Street for the term of 19 years at the yearly rent of 80*l.*, sold his stock in trade for a two months' bill of exchange for 170*l.*, accepted by the plaintiff in favor of the defendant, and sold the good-will of his business for 400*l.* in cash and a twelve months' bill for 400*l.*, payable to the defendant and accepted by the plaintiff. The defendant agreed further to use his best endeavors to induce his patients and friends to employ the plaintiff, and he undertook also not to carry on his business or profession within five miles of the house demised. The plaintiff promised to pay the two bills of exchange. *And for the true performance of their respective agreements each of them did bind himself unto the other in the penal sum of 500l. as and by way of liquidated damages.* The declaration then stated mutual promises. Breach, that the defendant did use, exercise, and carry on the business or profession of a surgeon, apothecary, and accoucheur, within the distance of five miles from the said messuage. Plea, that plaintiff did not well and truly pay and discharge the said two several bills of exchange, according to the form and effect of the articles of agreement in that behalf, but wholly neglected and refused so to do, and therein failed and made default; and thereupon and according to the tenor and effect, true intent, and meaning of the articles of agreement, the plaintiff forfeited and became liable to pay to defendant the said sum of £500 in the articles of agreement mentioned, as and by way of liquidated damages. The plea then alleged further, that the plaintiff at the commencement of the suit was indebted to the defendant in the further sum of £500 for work and labor, etc. Replication (except as to so much of the plea as related to the penal sum of £500 first mentioned), that plaintiff before and on the 23d December, 1823, was a trader, etc.; and that in October, 1824, he became bankrupt, and on the 27th May, 1825, obtained his certificate. Demurrer to plea as related to the sum of £500 first mentioned.[1]

The *Solicitor-General* in support of the demurrer.

Chitty, contra. But it appears that the plaintiff has no right to sue; for the replication shows that after the agreement he became bankrupt, and consequently the right of action vested in his assignees.

[1] The statement of the case is abridged. The plea to which the plaintiff demurred was adjudged bad as a plea of set-off, on the ground that the stipulation for forfeiture of 500*l.* was a penalty and not liquidated damages. So much of the case as relates to this point is omitted. — Ed.

[BAYLEY, J. The plea of set-off goes to the whole declaration, the replication of the plaintiff's bankruptcy only to part of the plea. The demurrer is to the residue; and upon this demurrer the defendant cannot avail himself of the replication.]

ABBOTT, C. J. Then as to the other point, it is said that the plaintiff upon certain parts of the record has set forth his bankruptcy, and that as it appears upon the whole record that his assignees are entitled to the benefit of the contract stated in the declaration, the plaintiff cannot have judgment upon this demurrer. But in considering what judgment we are to pronounce upon this demurrer, we are bound to look only to that part of the record upon which the demurrer arises, and not at the other collateral parts of the record not connected with it; and, looking to that part of the record upon which the demurrer arises, we are of opinion that the plaintiff is entitled to the judgment of the court.

BAYLEY, J. As to the other point, in arguing the question whether the defendant or the plaintiff is entitled to judgment upon this demurrer, neither of them has a right to have recourse to any parts of the record not connected with that upon which the demurrer arises. If the defendant had intended to rely on the bankruptcy as a bar to the plaintiff's right to recover, he should have pleaded it; and the plaintiff in that case might have replied that the assignees had repudiated the contract.

HOLROYD, J. I entirely agree with my brother Bayley that the defendant cannot claim in aid the other parts of the record, to show that the plaintiff is not entitled to judgment upon the demurrer.

LITTLEDALE, J. Then it is said that the plaintiff has no right of action, because it appears upon the record that he had become bankrupt. As to one sum, the plaintiff says, "that he has obtained his certificate." Then he demurs to the other parts of the plea. But supposing anything turned on the question of bankruptcy, we should be bound to decide on the plea and demurrer following one another. We must treat the count, plea, and replication, and the count, plea, and demurrer, as distinct records, and give judgment upon each without reference to the other.

Judgment for the plaintiff.[1]

[1] Galloway v. Jackson, 3 M. & G. 960, 976; Moore v. Leseur, 18 Ala. 606; Clarke v. Holt, 16 Ark. 257; Pate v. Allison, 114 Ga. 651; Hunter v. Bilyeu, 39 Ill. 367; Cole v. Gray, 139 Ind. 396; Elwood Co. v. Baker, 13 Ind. Ap. 576; Bell v. Lamprey, 52 N. H. 49 (*semble*); Douglass v. Phenix Co., 138 N. Y. 209; Ayres v. Coville, 18 Barb. 260; Baldwin v. U. S. Co., 54 Barb. 505; Valentine v. Lunt, 51 Hun, 544; Hammond v. Earle, 58 How. Pr. 426; Wiley v. Rouse's Pt., 86 Hun, 495; Boyd v. McDonald, 35 N. Y. St. Rep. 484; James v. Saunders, 19 N. Y. Ap. Div. 538; Eells v. Dumary, 84 N. Y. Ap. Div. 105; Ritchie v. Garrison, 10 Abb. Pr. 246; Craft v. Brandon, 24 N. Y. Misc. Rep. 306; Bernascheff v. Roeth, 34 N. Y. Misc. Rep. 588; Birdsall v. Birdsall, 52 Wis. 208 *Accord.*

Compare M'Dougal v. Robertson, 4 Bing. 441; Burroughs v. Hodson, 9 A. & E. 499, n.; Reg. Gen. Q. B., C. P. & Exch. H. T., 16 Vict. r. 17, 1 E. & B. App. v.; Bush v. Madeira, 14 B. Mon. 212. — ED.

TITTLE AND ANOTHER v. BONNER.

SUPREME COURT, MISSISSIPPI, OCTOBER, 1876.

[53 *Mississippi Reports*, 578.]

CAMPBELL, J.,[1] delivered the opinion of the court.

Bonner brought an action of *assumpsit* on a bill of exchange against Howell, as drawer, and Tittle, as acceptor. At the appearance term Howell pleaded *non assumpsit*, and a special plea, averring that said bill of exchange was, to a large extent, for usurious and compound interest. The plaintiff demurred to this special plea.

The demurrer was sustained, and leave given to the defendant to amend. He filed another plea, which was demurred to, and the demurrer was sustained. No leave was given to the defendant to plead over, and there was no further pleading by him, and no application for leave to plead further.

These several special pleas were bad, because, while professing to answer the whole cause of action, they contained only what purported to be a partial defence. That defence is, that the bill of exchange sued on is for too much, because it embraces usurious interest, and for that reason *all* of the amount claimed is not recoverable. A plea professing to answer the whole declaration, and answering only a part, is demurrable.[2] 1 Chitty, Plead. 524; Holcomb *v.* Mason.[3]

Only the excess over lawful interest can be avoided for usury, and the way to plead in such case is to limit the plea to such part as the defendant is entitled to avoid, so that the plaintiff may be able to take judgment *nil dicit* for all not denied.

Tittle, the other defendant, pleaded *non assumpsit*, and four special pleas. The special pleas were demurred to in one demurrer, and the demurrer was sustained as to all except the fourth, as to which it was overruled. The pleas to which the demurrer was sustained were bad.

The plaintiff replied to Tittle's fourth plea; and Tittle demurred to

[1] Only a part of the opinion of the court is given. — ED.

[2] Pendlebury *v.* Elmott, Cro. El. 268; Kent *v.* Sponder, Cro. El. 331; Ascue *v.* Sanderson, Cro. El. 434; Thornel *v.* Lassels, Cro. Jac. 27; Newhall *v.* Barnard, Yelv. 225, 1 Bulst. 116 s.c.; Manchester *v.* Vale, 1 Saund. 27; Truscott *v.* Carpenter, 1 Ld. Ray. 229; Woodward *v.* Robinson, 1 Stra. 302; Ridout *v.* Brough, Cowp. 133; Herries *v.* Jamieson, 5 T. R. 553; Barnard *v.* Duthy, 5 Taunt. 26; St. Germains *v.* Willan, 2 B. & C. 216; Thomas *v.* Heathorn, 2 B. & C. 477; Clarkson *v.* Lawson, 6 Bing. 266; Connop *v.* Holmes, 2 C. M. & R. 719; Wood *v.* Farr, 7 Dowl. 263 (plaintiff cannot sign judgment); Trott *v.* Smith, 12 M. & W. 688, 702; Dietrichsen *v.* Giubelei, 14 M. & W. 845; Gabriel *v.* Dresser, 15 C. B. 622; Ashe *v.* Pouppeville, 8 B. & S. 825; Lyne *v.* Siesfeld, 1 H. & N. 278; Ashe *v.* Pouppeville, L. R. 3 Q. B. 86; Hogan *v.* Ross, 13 How. 173, 182 (*semble*); Flint *v.* Delany, (Cal. 1887) 15 Pac. R. 208; Corsa *v.* Nichols, 1 Root, 217; Hatfield *v.* Jenkins, 76 Ill. 488; Puett *v.* State Bank, 4 Ind. 45; Feaster *v.* Woodfill, 23 Ind. 493; Eccles *v.* Shackleford, 1 Litt. (Ky.) 36; Farquhar *v.* Collins, 3 A. K. Marsh. 31; Miller *v.* Commw., 4 B. Mon. 304; Willing *v.* Bozman, 52 Md. 44; Lake *v.* Thomas, 84 Md. 606; Parker *v.* Parker, 17 Pick. 236, 241 (*semble*); Weimer *v.* Shelton, 7 Mo. 237; Tappan *v.* Prescott, 9 N. H. 531; Leslie *v.* Harlow, 18 N. H. 518; Grofflin *v.* Jackson, 40 N. J. 440; Sprague Bank *v.* Erie Co., 62 N. J. 474; Naglee *v.* Ingersoll, 7 Pa. 185; Reed *v.* Moore, Meigs, 80; Goodrich *v.* Indevine, 40 N. H 190; Ellis *v.* Cleveland, 54 Vt. 437; Fitzsimmons *v.* City Co., 18 Wis. 234 *Accord.* — ED.

[3] 35 Miss. 698.

the replication. His demurrer was properly overruled. The judgment on this demurrer did not give Tittle leave to rejoin, nor did he ask it; and there was no rejoinder, but judgment was taken *nil dicit* on the replication unanswered; and, as the defendant had pleaded the general issue, a trial was had on this before the court, and the finding and judgment were for the plaintiff.

It is assigned for error that, on sustaining the plaintiff's demurrer to Howell's second plea, amended after one demurrer sustained to it, the judgment should have been *respondeat ouster*. This is not correct Code, § 613. Another ground of error is, that, on overruling the defendant's demurrer to the replication to his fourth plea, the judgment should have been *respondeat ouster*. Not so. It should have been *nil dicit*, if the defendant did not obtain leave, and rejoin.

A demurrer to a declaration overruled is followed by judgment *quod recuperet*, unless the "defendant make oath that he hath a good and substantial defence," and obtain leave to plead. Code, § 612. A demurrer to a replication is followed, when overruled, by judgment final as to that issue, unless the defendant asks and obtains leave to plead, and pleads over.[1] Another complaint is, that, on overruling the plain-

[1] EFFECT OF DEMURRER SUSTAINED OR OVERRULED.

Demurrer sustained. — If a demurrer is sustained, it is in the discretion of the court to allow or refuse an amendment of the defective pleading. Wilbur *v.* Abbot, 6 Fed. 817; Payne *v.* Bruton, 6 Ark. 278 (demurrer to replication); Lord *v.* Hopkins, 30 Cal. 71; Buckley *v.* Howe, 86 Cal. 596; Andrews *v.* Loveland, 1 Colo. 8; S. W. Co. *v.* Hickory Co., 18 Colo. 489; McAlister *v.* Clark, 33 Conn. 253; W. E. Wood Co. *v.* Wilmington Acad., 5 Houst. 513; Garlington *v.* Priest, 13 Fla. (demurrer to plea); Gates *v.* Hayner, 22 Fla. 325; Augusta Co. *v.* Andrews, 92 Ga. 706; Savannah Co. *v.* Chaney, 102 Ga. 815 (but see Central Co. *v.* Paterson, 87 Ga. 646, — no amendment of declaration after judgment affirming judgment of the court below against its validity); Fleece *v.* Russell, 13 Ill. 31; Ricker *v.* Scofield, 28 Ill. Ap. 32 (demurrer to plea); Strother *v.* Hamburg, 11 Iowa, 59 (demurrer to plea); Frye *v.* Atlantic Co., 47 Me. 523; Wakefield *v.* Littlefield, 52 Me. 21; Bird *v.* Decker, 64 Me. 550; Maine Inst. *v.* Haskell, 71 Me. 487 (demurrer to replication); Terry *v.* Bright, 4 Md. 436; Riddell *v.* Douglas, 60 Md. 337; Webber *v.* Davis, 5 All. 393; Barlow *v.* Nelson, 157 Mass. 395; Cayce *v.* Ragsdall, 17 Mo. 32 (demurrer to plea); Spears *v.* Bond, 79 Mo. 467; Creek *v.* McManus, 13 Mont. 152; Lake Co. *v.* Bedford, 3 Nev. 399; Hale *v.* Lawrence, 22 N. J. 72 (demurrer to plea); Utica Co. *v.* Scott, 6 Cow. 606 (demurrer to plea); Thatcher *v.* Candee, 3 Keyes, 157; Lowry *v.* Inman, 37 How. Pr. 286 (except in case of demurrer for misjoinder of causes of action); Liegeois *v.* McCracken, 22 Hun, 69; Dick *v.* Livingston, 41 Hun, 455; Snow *v.* Fourth Bank, 7 Robt. (N. Y.) 479; Netherston *v.* Candler, 78 N. Ca. 88; Morris *v.* Gentry, 89 N. Ca. 248; Devoss *v.* Gray, 22 Oh. St. 159; Wood *v.* Anderson, 25 Pa. 407 (but see Stephens *v.* Myers, 12 Pa. 302 — demurrer to plea); Stallings *v.* Barrett, 26 S. Ca. 474; Tompkins *v.* Augusta Co., 37 S. Ca. 382 (the old rule was quite the contrary, Bayley *v.* Johnston, 4 Rich. 22; Chalk *v.* McAlily, 10 Rich. 92); Salt Co. *v.* Golding, 2 Utah, 319; Reid *v.* Field, 83 Va. 26 (demurrer to plea); Hart *v.* Balt. Co., 6 W. Va. 336; Baylor *v.* Balt. Co., 9 W. Va. 270; Teetshorn *v.* Hall, 30 Wis. 162.

In some jurisdictions, by statute or decision the privilege to amend a defective pleading after demurrer sustained is a matter of course. Stewart *v.* Hargrove, 23 Ala. 429; Ewing *v.* Patterson, 35 Ind. 326; Whitfield *v.* Wooldridge, 23 Miss. 183; Berrer *v.* Moorehead, 22 Neb. 687; Alexander *v.* Thacker, 30 Neb. 614.

In Louisiana the privilege of amending a defective declaration in such cases is denied as a matter of course. Hart *v.* Bowie, 34 La. An. 323.

If the privilege of amendment is refused, or not exercised seasonably, judgment follows for the demurrant. If the demurrer to the declaration or replication is sustained, the judgment is that the plaintiff take nothing and that the defendant recover his costs. If the demurrer is to the plea, the judgment is that the plaintiff recover the amount of his claim, if liquidated, and his damages to be assessed, if the claim is unliquidated.

For example, demurrer to declaration or replication. Clearwater *v.* Meredith, 1 Wall. 25; Brock *v.* South Co., 65 Ala. 79; Brown *v.* Comm. Co., 86 Ala. 139; Smith *v.* Yreka

tiff's demurrer to the defendant Tittle's fourth plea, the court did not give judgment *nil capiat* against the plaintiff, but gave him leave to

Co., 14 Cal. 201; Barker *v.* Freeman, 85 Cal. 533; Williamson *v.* Jones, 140 Cal. 669; Wade *v.* Doyle, 17 Fla. 522; Howard *v.* Lenton, 18 Fla. 328; State *v.* Peck, 60 Me. 498; Riddell *v.* Douglas, 60 Md. 337; Spears *v.* Bond, 79 Mo. 467; Snow *v.* Fourth Bank, 7 Robt.(N. Y.) 479; Devoss *v.* Gray, 22 Oh. St. 159; Morris *v.* Lyon, 84 Va. 331.

Demurrer to plea. Leach *v.* Smith, 25 Ark. 241; Pettys *v.* Marsh, 24 Fla. 44; Giles *v.* Gullion, 13 Ind. 487; Strothers *v.* Hamburg, 11 Iowa, 59; Bauer *v.* Roth, 4 Rawle, 83; Reid *v.* Field, 83 Va. 26.

Demurrer overruled. — After demurrer overruled it is in the discretion of the court to permit or refuse a withdrawal of the demurrer and the filing of a new pleading by the demurrant. Anon., 2 Wils. 173; Levy *v.* Herbert, 1 J. B. Moo. 56, 61; Alley *v.* Nott, 111 U. S. 472, 475; Deloach *v.* Neal, 5 Ark. 243; Campbell *v.* Strong, 33 Ark. 678; Barron *v.* Deleval, 58 Cal. 95, 97; Chivington *v.* Colo. Co., 9 Colo. 597; Conradi *v.* Evans, 3 Ill. 185; Erdbrook *v.* Cooper, 79 Ill. 582; Violett *v.* Dale, 1 Bibb, 144; Jones *v.* McDowell, 4 Bibb, 188; Pemberton *v.* Hoosier, 1 Kan. 108; Fox *v.* Bennett, 84 Me. 338; Wyckoff *v.* Bishop, 98 Mich. 352; Mills *v.* Miller, 3 Neb. 87; Winter *v.* Winter, 8 Nev. 129; Johnson *v.* Rowan, 16 N. J. 266; Hale *v.* Lawrence, 22 N. J. 72; Hopper *v.* Freeholders, 52 N. J. 313; Simson *v.* Satterlee, 64 N. Y. 657; Fisher *v.* Gould, 81 N. Y. 228; Ransom *v.* McClees, 64 N. Ca. 17; Love *v.* Commissioners, 64 N. Ca. 706; Beaumont *v.* Herrick, 24 Oh. St. 445; Bridgman *v.* Swinx, 205 Pa. 479; Andrew Co. *v.* White, 14 S. Ca. 51; Lowry *v.* Jackson, 27 S. Ca. 318; Guth *v.* Luvach, 73 Wis. 131.

Formerly the privilege was not readily obtained. Anon., 5 Mod. 18; Weeks *v.* Peach, 1 Ld. Ray. 179; Sutton *v.* Laycon, Pract. Reg. 153; Saxby *v.* Kirkus, Say. 116 ("It is not usual to give leave to amend after a demurrer has been argued and the opinion of the court is known"); Robinson *v.* Raby, 1 Burr. 316, 321; Hamilton *v.* Wilson, 1 East, 383, 391; Partridge *v.* Court, 5 Price, 412, 424; Bramah *v.* Roberts, 1 B. N. C. 481; Randel *v.* Ches. Co., 1 Harringt. 151, 178; Moore *v.* Burtage, 2 McMull. 268. See also Vernon *v.* Vernon, 3 Leon. 28.

To-day, however, the privilege of amendment after demurrer overruled is granted with great liberality. Indeed, in England, under the Judicature Acts, the demurrant, after demurrer overruled, is entitled to plead over. Bell *v.* Wilkinson, 26 W. R. 275. The rule is the same in several states in this country. See, for example, Denton *v.* Danbury, 48 Conn. 368, 371; Hourigan *v.* Norwich, (Conn. 1904) 59 Atl. R. 487; McKinney *v.* State, 10 Ind. 355; Rollins *v.* Coggshall, 29 Iowa, 510; State *v.* Peck, 60 Me. 498. See also Cooke *v.* Crawford, 1 Tex. 9.

If, after demurrer overruled, the demurrant is not permitted to plead over, or fails to exercise his privilege seasonably, judgment follows in favor of his adversary. If the demurrer was to the declaration or replication, the judgment is that the plaintiff recover the amount of his claim, if liquidated, or that he recover his damages to be assessed, if the claim is unliquidated. If the demurrer was to the defendant's plea or rejoinder, the judgment is that the plaintiff take nothing, and that the defendant recover his costs.

For example, demurrer to declaration or replication. Alley *v.* Nott, 111 U. S. 472; Deloach *v.* Neal, 5 Ark. 243; Bailey *v.* Sloan, 65 Cal. 387; Campbell *v.* West, 86 Cal. 197; McNasser *v.* Sherry, 1 Colo. 12; Hereford *v.* Benton, (Colo. Ap. 1905) 80 Pac. R. 499; Lamphear *v.* Buckingham, 33 Conn. 237; Binz *v.* Tyler, 79 Ill. 248; Klein *v.* Wells, 82 Ill. 201; Bruschke *v.* North Co., 145 Ill. 433; Consol. Co. *v.* Peers, 205 Ill. 531; Lossman *v.* Knights, 89 Ill. Ap. 437; Tipton *v.* Barron, 5 Blackf. 154; Brown *v.* Mallory, 26 Iowa, 469; Minear *v.* Hogg, 94 Iowa, 641; Washington *v.* Evans, 6 All. 417; Tefft *v.* McNoah, 9 Mich. 201; Whiting *v.* Mayor, 37 N. Y. 600; Fisher *v.* Gould, 81 N. Y. 228, 9 Daly, 144; Walton *v.* Walton, 32 Barb. 203; Ransom *v.* McClees, 64 N. Ca. 706; Goss *v.* Waller, 90 N. Ca. 149; Marx *v.* Croisan, 17 Oreg. 393; Ross *v.* Meek, 93 Tenn. 666; Conan *v.* Donaldson, 95 Tenn. 322; Donville *v.* Merrick, 25 Wis. 688.

Demurrer to plea. Bird *v.* Higginson, 5 A. & E. 83; Weatherford *v.* Wilson, 3 Ill. 253; Hunter *v.* Bilyeu, 39 Ill. 367; Fish *v.* McGann, 205 Ill. 179; Wenom *v.* Fossick, 213 Ill. 70; Boehm *v.* Mayor, 61 Md. 259; Henley *v.* Henley, 93 Mo. 95; Estabrook *v.* Hughes, 8 Neb. 496; Beaumont *v.* Herrick, 24 Oh. St. 445; Phila. *v.* Wistar, 92 Pa. 404.

In equity, the court, in cases of great importance, sometimes declines to decide the controversy on demurrer, but overrules the demurrer for the sole purpose of securing the fullest possible development of the facts involved. Kansas *v.* Colo., 185 U. S. 125; Rankin *v.* Miller, 130 Fed. 229. See also Leidersdorf *v.* Flint, 50 Wis. 401.

Even at common law in cases of demurrer to a count in libel, the court often overrules a

reply to the plea. In such case, the judgment is not required to be *respondeat ouster;* but it is not error to grant leave to the plaintiff to reply. Hardin *v.* Pelan.[1]

It is said that, because the demurrer was held not well taken as to one of several pleas, it should have been overruled, although some of the pleas were bad. Undoubtedly, one good plea to the whole action is as complete a bar as a dozen pleas; and if, on demurrer to several pleas, one is held good as to the whole cause of action, it will entitle the defendant to judgment against the plaintiff *nil capiat,* if the plaintiff shall not obtain leave, and reply to such plea; but no reason is perceived why a demurrer to several pleas, some good and some bad, should not be sustained as to the bad, and overruled as to the good. This practice has prevailed in our courts, and has been sanctioned elsewhere, and meets our approval. Gearhart *v.* Olmstead.[2]

We do not perceive any error in the record for which the judgment should be reversed, and it is *Affirmed.*[3]

demurrer simply on the ground that the question of libel may go to a jury. Fray *v.* Fray, 17 C. B. N. S. 603; Cornish *v.* Bennett, 38 N. Y. Misc. R. 688.

If the pleadings have developed an issue of fact as well as an issue of law, final judgment upon the demurrer is not given until the issue of fact is disposed of. Hobson *v.* Satterlee, 163 Mass. 402; Middleby *v.* Effler, 118 Fed. 261 (Mass. law). — ED.

[1] 41 Miss. 112.

[2] 7 Dana (Ky.) 441.

[3] Heid *v.* Ebner, 133 Fed. 156; Gearhart *v.* Olmstead, 7 Dana, 442 *Accord.*

French *v.* Tunstall, Hempst. 204; Brown *v.* Duchesne, 2 Curt. C. C. 97; Puckett *v.* Pope, 3 Ala. 552; Bruce *v.* Benedict, 31 Ark. 301; Munnerlyn *v.* Augusta Bank, 88 Ga. 333, 339; Florence *v.* Pattillo, 105 Ga. 577; Caldwell *v.* Ruddy, 2 Idaho, 5; Romine *v.* Romine, 59 Ind. 346; Bayless *v.* Glenn, 72 Ind. 5; Gregory *v.* Gregory, 89 Ind. 345; Nichols *v.* Nichols, 96 Ind. 433; Dorr *v.* Lilley, 11 Iowa, 4; Zapple *v.* Rush, 23 Iowa, 99; Holbert *v.* St. Louis Co., 38 Iowa, 315; Munn *v.* Taulman, 1 Kan. 254; Archer *v.* Nat. Co., 2 Bush, 226; Armstrong *v.* Hinds, 9 Minn. 356; First Bank *v.* How, 28 Minn. 150; Douglas *v.* Satterlee, 11 Johns. 16; Mercein *v.* Smith, 2 Hill, 210 (plea of set-off); Cuyler *v.* Trustees, 12 Wend. 165; Mansfield Co. *v.* Hall, 26 Oh. St. 310; Everett *v.* Waymire, 30 Oh. St. 308; Hurst *v.* Sawyer, 2 Okla. 470; Buist *v.* Salvo, 44 S. Ca. 143; State *v.* Williams, 8 Tex. 255; Roberts *v.* Johannes, 41 Wis. 616 *Contra.*

Demurrer to declaration containing good and bad counts. — It is generally held in this country that a demurrer to a declaration containing several counts should be overruled if any count is good. Gill *v.* Stebbins, 2 Paine C. C. 417; Chamberlain *v.* Darrington, 4 Port. (Ala.) 515; Ward *v.* Neal, 35 Ala. 602; Williamson *v.* Woolf, 37 Ala. 298; Montgomery Co. *v.* Barber, 45 Ala. 237; Palmer *v.* Breed, (Ariz. 1896) 43 Pac. R. 219; Lane *v.* Levillian, 4 Ark. 76; Warner *v.* Capps, 37 Ark. 323; Bagley *v.* Weaver, (Ark. 1903) 77 S. W. R. 903; Weaver *v.* Conger, 10 Cal. 233; Griffiths *v.* Henderson, 42 Cal. 566; Cassidy *v.* Cassidy, 63 Cal. 352; Fleming *v.* Albeck, 67 Cal. 226; Pfister *v.* Wade, 69 Cal. 133; Moyle *v.* Landers, (Cal. 1889) 21 Pac. R. 1133; Remy *v.* Olds, 88 Cal. 537; Asevado *v.* Orr, 100 Cal. 293; Rawlinson *v.* Christian Co., 139 Cal. 620; Barbee *v.* Jacksonville Co., 6 Fla. 262; McKay *v.* Friebele, 8 Fla. 21; Pryor *v.* Brady, 115 Ga. 848; Hay *v.* Collins, 118 Ga. 243; Hudson *v.* Hudson, 119 Ga. 637; Carter *v.* Wann, 6 Ida. 556; Reece *v.* Smith, 94 Ill. 362; Knapp Co. *v.* Ross, 181 Ill. 392; Wolf *v.* Alton, 103 Ill. Ap. 587; Brown *v.* Gooden, 16 Ind. 444; Urton *v.* Luckey, 17 Ind. 213; Heavenridge *v.* Mondy, 34 Ind. 28; Jeffersonville Co. *v.* Cox, 37 Ind. 324; Jewett *v.* Honey Co., 39 Ind. 245; Washington *v.* Bonney, 46 Ind. 172; Cooper *v.* Hayes, 96 Ind. 386; Raymond *v.* Wathen, 142 Ind. 367; Lake Co. *v.* Cherman, 161 Ind. 95, 98; Baker *v.* Groves, 1 Ind. Ap. 522; Jarvis *v.* Worick, 10 Iowa, 29; Coon *v.* Jones, 10 Iowa, 131; Edmonds *v.* Cochran, 12 Iowa, 488; Hendershott *v.* Ping, 24 Iowa, 134; Bonney *v.* Bonney, 29 Iowa, 448; Albin Co. *v.* Kuttner, 25 Ky. L. Rep. 1100; Brown *v.* Castles, 11 Cush. 348; Sears *v.* Trowbridge, 15 Gray, 184; Little Co. *v.* Woodward Assn., (Mich. 1903) 97 N. W. R. 682; First Bank *v.* How, 28 Minn. 150 (*semble*); Johnson Co. *v.* White, 78 Minn. 48; Collier *v.* Ervin, 2 Mont. 335; Alexander *v.* Thacker, 30 Neb. 614; Bank *v.* Moore, 15 N.

J. Eq. 97: Durling v. Hammer, 20 N. J. Eq. 220; Garrison v. Technic Works, 55 N. J. Eq. 708; Cole v. Cole, (N. J. Eq. 1905) 59 Atl. R. 895; Whitney v. Crosby, 3 Cai. 89; Adams v. Willoughby, 6 Johns. 65; Martin v. Williams, 12 Johns. 264; Cochran v. Scott, 3 Wend. 229; Mercein v. Smith, 2 Hill, 210; Hale v. Omaha Bank, 49 N. Y. 626; Wheeler v. Conn. Co., 82 N. Y. 543; Martin v. Mattison, 3 Abb. Pr. 8; Baker v. Wood, 10 How. Pr. 222; Seaver v. Hodgkin, 63 How. Pr. 128; Jaques v. Morris, 2 E. D. Sm. 639; Hanenkratt v. Hamil, 10 Okla. 219; Barbre v. Goodale, 28 Oreg. 465; Carson v. Cock, 50 Tex. 325; Weatherford Co. v. Granger, 85 Tex. 574; Potter v. Warren, 1 Utah, 249; Va. Co. v. Harris, (Va. 1905) 49 S. E. R. 991; Chevret v. Mech. Co., 4 Wash. 721; Hindle v. Holcomb, 34 Wash. 336; Hyde v. Supervisors, 43 Wis. 129; Pinkum v. Eau Claire, 81 Wis. 301; Kearney Works v. McPherson, 5 Wyo. 178.

For a short time the rule in the English courts was the same as the American rule. But by the ancient and by the modern English practice a demurrer to a claim containing several counts, one or more of which is good and the other or others are bad, is taken distributively, judgment being given for the plaintiff on the good counts and for the defendant on the bad counts. The history of the English practice is stated by BRETT, L. J., in S. E. Co. v. Railway Commissioners, 6 Q. B. D. 586, 605-606: "If the demurrer is to the whole declaration, and part of the declaration be good and part bad, should the judgment on demurrer be absolutely in favour of the plaintiff, or for the plaintiff as to the good and for the defendant as to the bad? There has been a difference of judicial opinion. The origin of the dispute is described with the usual learning of Mr. Serjeant Manning, in the note to Hinde v. Gray, 1 Man. & G. 201; and it is there suggested that the doctrine of overruling a demurrer as too large, and therefore giving judgment absolutely in favour of a pleading admitted to be good as to one separate part of it, but bad as to another separate part of it, was a novel doctrine, and was contrary to the older decisions. This note, written in 1840, changed the opinion of Parke, B., as expressed by him in 1838, in Boydell v. Jones, 4 M. & W. 451. For in 1842, in Briscoe v. Hill, 10 M. & W. 741, he said, 'With respect to the subject of a demurrer being too large, there is a very learned note of my Brother Manning, which, in my opinion, is entitled to considerable weight.' 'The question is,' he says, after describing the practice, 'Is that practice right or not, or ought not the court on such demurrer to give judgment on the whole record according to the truth? I think the observations in that note are entitled to considerable weight, and I am inclined to think the practice has been wrong, and that the judgment on demurrer should be given on the whole record, according to the truth.' In 1845, in Slade v. Hawley, 13 M. & W. 761, he said: 'There is an able note of my Brother Manning in the case of Hinde v. Gray, 1 Man. & G. 201, which tends strongly to show that the practice of overruling demurrers as being too large is incorrect, and that the court ought to give judgment on the whole record, according to the truth.' And in Dawson v. Wrench, 3 Ex. 365, he said, 'Formerly if a demurrer was too large, the court gave judgment generally against the party demurring. That rule was imported from courts of equity, but is incorrect with respect to courts of law, as pointed out by my Brother Manning in a note to the case of Hinde v. Gray,' 1 Man. & G. 201. The higher justice of this later view of Parke, B., seems obvious. The futility of the intermediate practice cannot be better exemplified than by the description of the result of it given by Parke, B., in Boydell v. Jones, 4 M. & W. 451. The later view of Parke, B., is shown in the note by Serjeant Manning to be in accordance with the ancient decisions of the common law courts. I am of opinion that the later view of Parke, B., is correct, and that upon a demurrer to the whole of a pleading which contains allegations capable of being separated, some of which allegations are correct and some incorrect, the judgment on the demurrer should be distributed, and should be in favour of the good and against the evil pleading." See, also, Donaldson v. San Miguel, 1 N. Mex. 263.

Although a demurrer is allowed for the improper joinder of two counts, a demurrer will be overruled if one of the counts is bad, and the bad count stricken out. Sullivan v. N. Y. Co., 11 Fed. 848; Crosby v. Lehigh Co., 128 Fed. 193.

If there is a separate demurrer to each of several counts, or to each of several pleas, the demurrer will be sustained or overruled accordingly as each count or plea is bad or good. Parker v. Thomas, 19 Ind. 213; Fankboner v. Fankboner, 20 Ind. 62; Hume v. Dessar, 29 Ind. 112; Ind. Co. v. Dailing, 110 Ind. 75.

No demurrer to part of a count or plea. — No demurrer is allowed to part of a single cause of action or defence. Hornby v. Cardwell, 8 Q. B. D. 329; Muller v. Ocala Co., (Fla. 1905) 38 So. R. 64; Daniels v. Bradley, 4 Minn. 158; Knoblauch v. Foglesong, 38 Minn. 459; Cobb v. Brazee, 4 How. Pr. 413; McCall Co. v. Stone, (Wis. 1905) 102 N. W. R. 1052.

Demurrer to a plea purporting to answer entire declaration. — A plea, purporting to answer a declaration containing two or more counts, is commonly held to be demurrable,

if it is not a good answer to every count. Webb v. Martin, 1 Lev. 48; Wilcox v. Newman, 1 Chit. 132; McCurday v. Driscoll, 1 Cr. & M. 618; Calvert v. Mogge, 10 A. & E. 632; Putney v. Swann, 2 M. & W. 72; Parratt v. Goddard, 1 Dowl. N. s. 874; Phillips v. Clagett, 10 M. & W. 102 (plea in abatement); Christopherson v. Bare, 11 Q. B. 473 (*semble*); Chappell v. Davidson, 18 C. B. 194; Goldsmid v. Hamilton, 5 C. B. N. s. 94, 103 (*semble*); Deshler v. Hodges, 3 Ala. 509; City Co. v. Henry, 139 Ala. 161; Jones v. Cecil, 10 Ark. 592; Goodrich v. Reynolds, 31 Ill. 490; Ill. Co. v. Read, 37 Ill. 484; People v. McCormack, 68 Ill. 226; Gebbie v. Mooney, 121 Ill. 255; People v. McClellan, 137 Ill. 352; Ice Co. v. Swift, (Ill. 1904) 72 N. E. R. 737; Reno v. Hallowell, 2 Blackf. 38; Barrett v. Ruitt, 3 Ind. 571; Alvord v. Esaner, 45 Ind. 156; Taylor v. Calvert, 138 Ind. 67, 81; Burch v. Young, 3 A. K. Marsh. 417; Brewster v. Hobart, 15 Pick. 302; Conover v. Tindall, 20 N. J. 513; Brehen v. O'Donnell, 34 N. J. 408; Nevins v. Keeler, Johns. 63; Hallett v. Holmes, 18 Johns. 28; Hathaway v. Rice, 19 Vt. 102. But see *contra*, Blagrave v. Bristol Co., 1 H. & N. 369; Gearhart v. Olmsted, 7 Dana, 441. — Ed.

Joint Demurrer to the Same Pleading. — If several parties join in a demurrer to the same pleading, and the pleading is good against any one of them, the demurrer will be overruled. Asevado v. Orr, 100 Cal. 293; Rogers v. Schulenburg, 111 Cal. 281; Hirschfeld v. Weill, 121 Cal. 13; Neumann v. Moreth, (Cal. 1905) 79 Pac. R. 510; May v. Jones, 88 Ga. 308; Bennett v. Preston, 17 Ind. 291; Estep v. Burke, 19 Ind. 87; Shore v. Taylor, 46 Ind. 345; Wilkerson v. Rust, 57 Ind. 172; Holzman v. Hibben, 100 Ind. 338; Miller v. Rapp, 135 Ind. 614; Armstrong v. Dunn, 143 Ind. 433; Clark v. Lovering, 37 Minn. 120; Petsch v. Dispatch Co., 40 Minn. 291; Palmer v. Bank, 65 Minn. 99; Dunn v. Gibson, 9 Mo. 578; Mo. Co. v. Pollock, 11 Neb. 192; Conant v. Barnard, 103 N. Ca. 315; People v. Mayor, 28 Barb. 240, 17 How. Pr. 56 s. c.; Oakley v. Tugwell, 33 Hun, 357; Woodbury v. Sackrider, 2 Abb. Pr. 402; Phillips v. Hagadon, 12 How. Pr. 17; Eldridge v. Bell, 12 How. Pr. 547; Fish v. Hose, 59 How. Pr. 228; Warner v. James, 88 N. Y. Ap. Div. 567; Moore v. Monell, 27 N. Y. Misc. Rep. 235; Conant v. Barnard, 103 N. Ca. 315; Dalrymple v. Security Co., 9 N. Dak. 306; Stiles v. Guthrie, 3 Okla. 26; Burr v. Brantley, 40 S. Ca. 538; Stahn v. Catawba Mills, 53 S. Ca. 519; Evans v. Falls Co., 9 S. Dak. 130; Rockford v. School Dist., (S. Dak. 1903) 97 N. W. R. 747; Walker v. Popper, 2 Utah 96; Webster v. Tibbits, 19 Wis. 438; Willard v. Reas, 26 Wis. 340; McGonigal v. Colter, 32 Wis. 614; Mark Co. v. Douglas Co., 94 Wis. 322; Boyd v. Mut. Assn., 116 Wis. 155, 175.

But see *contra*, Wood v. Olney, 7 Nev. 109.

In equity a joint demurrer may be overruled as to one of the demurrants and sustained as to another. Mayor v. Levy, 8 Ves. 398, 403; Barstow v. Smith, Walk. Ch. 394, 397: Wooden v. Morris, 3 N. J. Eq. 65.

Joint Plea and Demurrer thereto. — A demurrer to a joint affirmative plea will be sustained, if the plea is bad as to either co-defendant, the plea being treated as wholly bad. Philips v. Biron, 1 Stra. 509; Middleton v. Price, 2 Stra. 1184; Smith v. De Bouchier, 2 Stra. 994, Cas. C. Hard. 62 s. c.; Duffield v. Scott, 3 T. R. 374, 376, (*semble*); Hedges v. Chapman, 2 Bing. 523; Andrews v. Marris, 1 Q. B. 3, 17; Overdeer v. Riley, 30 Ala. 709; Doe v. Richardson, 76 Ala. 329; McCreary v. Jones, 96 Ala. 592; Hayden v. Nott, 9 Conn. 367 (*semble*); Gleason v. Edmunds, 3 Ill. 449; Beesley v. Hamilton, 50 Ill. 88; Sandusky v. Exch. Bank, 81 Ill. 353; Ward v. Bennett, 20 Ind. 440; Black v. Richards, 95 Ind. 184; Supreme Council v. Boyle, 15 Ind. Ap. 342; Norton v. Norton, 10 Iowa, 58; Moore v. Parker, 3 Mass. 310; Leslie v. Harlow, 18 N. H. 518 (*semble*); Bordentown v. Wallace, 50 N. J. 13; Schermerhorn v. Tripp, 2 Cal. 108; Bradley v. Powers, 7 Cow. 330; Love v. Howell, 3 Dev. & B. 69; Lowry v. Jackson, 27 S. Ca. 318 (*semble*); Clark v. Lathrop, 33 Vt. 140; Ellis v. Cleveland, 54 Vt. 437.

The rule is otherwise in the case of issue joined upon a joint negative plea. Such a plea is taken distributively. Govett v. Radnidge, 3 East, 62; Hayden v. Nott, 9 Conn. 367; Brown v. Wheeler, 18 Conn. 199, 207 (*semble*); Drake v. Barrymore, 14 Johns. 166; Weaver v. Cryer, 1 Dev. 337; Downer v. Flint, 28 Vt. 527. — Ed.

RULES OF THE SUPREME COURT, 1883.

ORDER XXV.

Proceedings in Lieu of Demurrer.

1. No demurrer shall be allowed.

2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.[1]

3. If, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court or judge may thereupon dismiss the action or make such other order therein as may be just.

4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.[2]

[1] As in Bryson *v.* Russell, 14 Q. B. Div. 720; London Co. *v.* S. E. Co., 53 L. T. Rep. 109; O'Brien *v.* Tyssen, 28 Ch. D. 372; Salaman *v.* Warner, [1891] 1 Q. B. 734.

[2] An "objection in point of law" taken under Rule 2 of Order XXV. is substantially a demurrer under another name. Percival *v.* Dunn, 29 Ch. D. 128, 131. The party raising such objection, like a demurrant, admits all the material allegations of fact in his adversary's pleading: Watson *v.* Hawkins, 24 W. R. 884; Johnstone *v.* Johnstone, 33 W. R. 239; O'Brien *v.* Tyssen, 28 Ch. D. 372; Burrows *v.* Rhodes, [1899] 1 Q. B. 816, 821; Anderson *v.* Midland Railway, [1902] 1 Ch. 369, 374; Hollander *v.* Ffoulkes, 26 Ont. R. 61, but, doubtless, no statements of law.

As in the case of a demurrer, judgment will be given on the whole record. Odgers, Pl. (5 ed.) 165. Costs will go to the successful party, O'Brien *v.* Tyssen, 28 Ch. D. 372; and the right to open and close belongs to the party taking the objection to point of law. Richards *v.* Butcher, 62 L. T. Rep. 867; Stevens *v.* Chown, [1901] 1 Ch. 894, 900. The form of objection under Rule 2 is given in Bullen & Leake, Prec. in Pl. (5 ed.) 602.

Under Rule 4 of Order XXV. "the pleading" objected to "will not be struck out unless it is demurrable and something worse than demurrable." Per Chitty, J., in Republic *v.* Peruvian Co., 36 Ch. D. 489, 496. The difference between Rule 2 and Rule 4 is put clearly by Lindley, M. R., in Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86, 90. "Order XXV. abolished demurrers and substituted a more summary process for getting rid of pleadings which show no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order XXV., r. 2; the other is to apply to strike out the statement of claim under Order XXV., r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks." A motion to strike out under Rule 4 was granted in Burstall *v.* Beyfus, 26 Ch. D. 35; Johnstone *v.* Johnstone, 33 W. R. 239, 32 W. R. 1016; Reichel *v.* Magrath, 14 App. Cas. 665; Republic *v.* Peruvian Co., 36 Ch. D. 489; Dreyfus *v.* Peruvian Co., 41 Ch. D. 151; Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86. A similar motion failed in Parsons *v.* Burton, W. N. [1883] 215; *In re* Batthyany, 32 W. R. 379; Boaler *v.* Holder, 54 L. T. Rep. 298; Dadswell *v.* Jacobs, 34 Ch. Div. 279; Shafto *v.* Bolckow, 34 Ch. D. 725; Atty.-Gen. *v.* London Co., [1892] 3 Ch. 274; Worthington *v.* Belton, 18 T. L. R. 438. — Ed.

SECTION II.

Special Demurrers.

(A) Under Early English Statutes.

[*27 Eliz. Cap. V.* § 1.]

Forasmuch as excessive charges and expenses, and great delay and hinderance of justice, hath grown in actions and suits between the subjects of this realm, by reason that upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else, after long time and great trouble and expenses, to renew again their suits: for remedy whereof, be it enacted by the Queen's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, That from henceforth, after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right and cause of the matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express together with his demurrer; and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted.[1]

[1] Per Holt, C. J. There were special demurrers at common law, but they were never necessary but in cases of duplicity, and therefore they were seldom practised; for as the law was then taken to be upon a special demurrer, the party could take advantage of no other defect in the pleading, but to that which was specially assigned for cause of his demurring.

But upon a general demurrer he might take advantage of all manner of defects, that of duplicity only excepted; and there was no inconvenience in such practice, for the pleadings being at bar *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer as upon a special one; therefore, after the Reformation, when the practice of pleading at bar altered, the use of general demurrers still continued, and thereby this public inconveniency followed, that the parties went on to argue a general demurrer, not knowing what they were to argue, and this was the occasion of making the statute 27 Eliz., by which it is enacted, that the causes of demurrer should be known in all cases, and this was restorative of the common law.

The statute of Elizabeth was interpreted so narrowly by the courts (see Heard v. Baskerville, Hob. 232, Ames Cas. on Pl. [1st ed.] 13 s. c.) that supplementary legislation was required to accomplish its object. Accordingly the statute 4 Ann. c. 16, § 1, was passed enacting that "from and after the said first day of Trinity term, no advantage or exception shall be taken of or for an immaterial traverse; or of or for the default of en-

WALDEN *v.* HOLMAN.

In the Queen's Bench, Hilary Term, 1704.

[*Reported in* 2 *Lord Raymond*, 1015.]

The plaintiff declared against the defendant by the name of John, who pleaded in abatement that he was baptized by the name of Benjamin, *absque hoc, quod idem* Johannes, was ever known by the name of John; and the plaintiff demurred generally.

Holt, C. J. Matters of form may be taken advantage of on a general demurrer, when the plea only goes in abatement, for the Statute of Elizabeth only means that matters of form in pleas which go to the action shall be helped on a general demurrer. So here, the plea is ill in form, for it is *absque hoc, quod idem* Johannes, etc., which is a confession of his name to be so, and makes the subsequent matter repugnant; and by this traverse the defendant has waived the matter that went before, of his being baptized by the name of Benjamin, and has made the traverse the substance of his plea. This plea is only dilatory, and not to the merits.[1]

Let the defendant answer over, per curiam.[2]

tering pledges upon any bill or declaration; or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration or other pleading; or of or for the default of alleging of the bringing into court letters testamentary, or letters of administration; or of or for the omission of *Vi et Armis et contra pacem*, or either of them; or of or for the want of averment of *Hoc paratus est verificare*, or *Hoc paratus est verificare per Recordum*; or of or for not alleging *prout patet per Recordum*, but the court shall give judgment according to the very right of the cause, as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer." — Ed.

[1] The report is slightly curtailed. — Ed.

[2] Nowlan *v.* Geddes, 1 East, 634; Lloyd *v.* Williams, 2 M. & Sel. 485, per Bayley, J.; Esdaile *v.* Lund, 12 M. & W. 613; Casey *v.* Cleveland, 7 Port. 444; Elmer *v.* McKenzie, 5 Ala. 617; Hart *v.* Turk, 15 Ala. 675; Getchell *v.* Boyd, 44 Me. 482; Clifford *v.* Cony, 1 Mass. 495; Clarke *v.* Brown, 6 N. H. 34; Shaw *v.* Dutcher, 19 Wend. 222; Hoppin *v.* Jenckes, 9 R. I. 102; Bullock *v.* Bolles, 9 R. I. 501; Capwell *v.* Sipe, 17 R. I. 475; Bent *v.* Bent, 43 Vt. 42; Mantz *v.* Hendley, 2 Hen. & Munf. 308 *Accord.*

If the demurrer to a plea in abatement is sustained, the judgment is not final, but that the defendant answer over. Eichhorn *v.* Le Maitre, 2 Wils. 367; Bowen *v.* Shapcott, 1 East, 542; Digby *v.* Alexander, 8 Bing. 416; Gibson *v.* Laughlin, Minor (Ala.) 182; Cravens *v.* Bryant, 3 Ala. 278; Renner *v.* Reed, 3 Ark. 339; Nichols *v.* Heacock, 1 Root, 286; Lambert *v.* Lagow, 1 Blackf. 388; Clark *v.* Hite, 5 Blackf. 167; Moore *v.* Morton, 1 Bibb, 234; Copeland *v.* Hewett, 93 Me. 554; Baker *v.* Fales, 16 Mass. 147, 157; Trow *v.* Messer, 32 N. H. 361; Garr *v.* Stokes, 16 N. J. 403; Harkness *v.* Harkness, 5 Hill, 213 (*semble* — *aliter*, if plea in abatement follows a plea in bar); McCabe *v.* U. S., 4 Watts, 325; Rainey *v.* Sanders, 4 Humph. 447; Turner *v.* Carter, 1 Head, 520; Kendrick *v.* Davis, 3 Cold. 524. And the defendant in answering over must plead in bar, another plea in abatement not being allowed. Lyde *v.* Heale, Pr. Reg. 21; Esdaile *v.* Lund, 12 M. & W. 606; Houck *v.* Scott, 8 Port. 169; Cook *v.* Yarwood, 41 Ill. 115; Getchell *v.* Boyd, 44 Me. 482; Brown *v.* Nourse, 55 Me. 230; Cassidy *v.* Holbrook, 81 Me. 589 (*semble*); Trinder *v.* Durant, 5 Wend. 72; Mitchum *v.* Droze, 11 Rich. 196. But by statute in some jurisdictions the court may permit such a plea to be amended. Hoppin *v.* Jenckes, 9 R. I. 102; Capwell *v.* Sipe, 17 R. I. 475.

If a plea in abatement is traversed and a verdict found for the plaintiff, the judgment is not that the defendant answer over but that the plaintiff recover. Y. B. 5 Ed. IV. 90, b;

[15 & 16 *Vict. Cap. LXXVI.* §§ 50–52.]

EITHER party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form.

No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.

If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit.

STATE OF MAINE *v.* PECK AND OTHERS.

SUPREME JUDICIAL COURT, MAINE, 1872.

[*Reported in* 60 *Maine Reports*, 498.]

ON exceptions. Debt on the official bond of Benjamin D. Peck, treasurer of the State of Maine, dated Jan. 28, 1858. Writ dated March 23, 1861.

At the April term, 1868, the defendants pleaded full performance of the covenants and condition of the bond. To which the plaintiff replied, that the principal defendant was treasurer of the State from Jan. 13, 1858, to Feb. 4, 1859, and that on Jan. 14, 1858, and divers other days and times between that day and Feb. 4, 1859, the said Peck, as said treasurer, received divers sums, amounting to $39,231.19, belonging to the State of Maine, and hath not accounted for any part of

Amcots *v.* Amcots, 1 Lev. 163; Eichhorn *v.* Le Maitre, 2 Wils. 367; Bowen *v.* Shapcott, 1 East, 542 (*semble*); Hollingsworth *v.* Duane, Wall. C. C. 51; Alling *v.* Shelton, 16 Conn. 436; Brown *v.* Ill Co., 42 Ill. 366; John *v.* Clayton, 1 Blackf. 54; Bond *v.* Wagner, 28 Ind. 462; Moore *v.* Morton, 1 Bibb, 234; Frye *v.* Hinkley, 18 Me. 320; Boston Manufactory *v.* Langdon, 24 Pick. 49 (but see now Young *v.* Gilles, 113 Mass. 34; Parks *v.* Smith, 15 Mass. 26, 30); Good *v.* Lehan, 8 Cush. 301; Texas Co. *v.* Saxton, 3 N. Mex. 282; Dodge *v.* Morse, 3 N. H. 232; Jewett *v.* Davis, 6 N. H. 518; Chase *v.* Deming, 42 N. H. 274, 280; McCartee *v.* Chambers, 6 Wend. 649; Mechanics' Bank *v.* Dakin, 24 Wend. 411; Myers *v.* Hunter, 20 Oh. 381; Mehaffy *v.* Share, 2 Pen. & W. 361; Straus *v.* Weil, 5 Cold. 120; Simpson *v.* Railway Co., 89 Tenn. 304 (overruling Battelle *v.* Youngstown Co., 84 Tenn. 355); Peach *v.* Mills, 13 Vt. 501; Vanderburg *v.* Clark, 22 Vt. 185.

But see State *v.* Superior Court, 9 Wash. 366. — ED.

it. To this replication the defendants filed a special demurrer, which was joined.

(The pleadings may be found 58 Maine, 123.)

May 30, 1871, the certificate of the decision of the law court was received by the clerk overruling the demurrer and adjudging the replication good. On the 13th day of the succeeding October term, 1871, the defendants moved for leave to withdraw the demurrer without the consent of the plaintiff and plead to the issue, tendering therewith a rejoinder alleging, substantially, that Peck did account for and pay to the plaintiff the said sums of money by the replication alleged not to have been paid, and tendered an issue to the country. But the presiding judge overruled the motion and declined to receive the rejoinder, and ordered judgment to be entered for the plaintiff for $150,000, the penalty of the bond.[1]

DANFORTH, J. This case has once been before the law court upon a special demurrer to the plaintiff's replication. 58 Maine, 123.

The demurrer was overruled, the replication held good, and the case sent back for final judgment, unless the defendants were permitted to withdraw their demurrer and plead anew under the provisions of the R. S. c. 82, § 19. At the term subsequent to the announcement of the decision, the defendants' counsel moved for leave to withdraw said demurrer, without the consent of the plaintiff and without complying with the provisions of the statute, and to plead to the issue. This motion was denied and judgment ordered for the plaintiff. To this the defendants except, and now claim the allowance of the motion as of right. If the judgment upon the issue, as made up, should have been *respondeat ouster*, the defendants are right in their claim, otherwise not.

Previous to the several acts embodied in the revision above cited, on a general demurrer, final judgment would have been ordered by the law court, and entered as of the preceding, instead of at the following term. The demurrer was not to a plea in abatement, but to a replication, which presented the full merits of the case. The party had his option to plead or demur. By electing the latter, "he shall be taken to admit that he has no ground for denial or traverse."[1]

The result of this principle is the well-established rule, "that a demurrer admits all such matters of fact as are sufficiently pleaded." It must be conceded that the replication contains all the facts necessary to maintain the plaintiff's case, and the court have decided that it is sufficient in form. Hence a final judgment must necessarily follow. The authorities are to the same effect. Stephen, in his work on Pleading, treating of judgments for the plaintiff, says, on pages 104, 105: "If it be an issue in law, arising on a dilatory plea, the judgment is only, that the defendant answer over. . . . Upon all other issues in law, and in general all issues of fact, the judgment is, that the plaintiff recover." Also in note on page 144: "On demurrer to any pleadings which go to the action, the judgment for either party

[1] Stephen on Pl. 143.

is the same as it would have been on an issue of fact, joined upon the same pleading and found in favor of the same party." Clearwater v. Meredith;[1] McKeen v. Parker;[2] McAllister v. Clark;[3] and in Parlin v. Macomber;[4] Washington v. Eames,[5] final judgment was ordered by the law court. But without denying the correctness of these principles when applied to a general demurrer, it is contended that they are not applicable to a special one, and it is said that none of the authorities so lay down the law. While this may be true, it is also true that in Parlin v. Macomber, above cited, the court applied the law to a special demurrer, and also in Washington v. Eames, though in Massachusetts, under their practice act, all demurrers must be special. No authority has been cited, or fallen under notice, in which any distinction between the two kinds of demurrer, in respect to the judgment, has been alluded to, which, to say the least, is a little singular, if any such difference exists.

Nor are we able to perceive any such distinction from the principles involved.

Every special demurrer includes a general one, for under the former "the party may, on the argument, not only take advantage of the faults which his demurrer specifies, but, also, of all such objections in substance, as regarding the very right of the cause, as the law does not require to be particularly set down."[6] In the one just as much as in the other the party has his option to plead or demur, and must be equally bound by his election. But one answer, unless by leave of court, can be made to the plea, and if that is overruled, it must stand as true. A special demurrer raises a question of law just as much as a general one, and there is no exception to the rule as laid down, that where there is an issue of law upon a plea "which goes to the action" the judgment will be final.

To these principles of law the statute adds its mandate. R. S. c. 82, § 19. The statute gives the parties some rights which did not previously exist, and, for the purpose of enabling them to secure those rights, the action is to stand upon the docket until the term following the certificate of decision. But these rights must be asserted within the time and in the manner specified, otherwise they are waived, and the case ended. No distinction is made between a special and general demurrer, but the word used comprehends both. In this case the new pleadings were not filed on the second day of the term, nor do the costs appear to have been paid. Hence, in accordance with the statute, judgment must be entered.[7]

APPLETON, C. J.; CUTTING, WALTON, and DICKERSON, JJ., concurred. TAPLEY did not concur.

[1] 1 Wallace, 25, 43. [2] 51 Maine, 389. [3] 33 Conn. 258.
[4] 5 Maine, 413. [5] 6 Allen, 417.
[6] Stephen on Pl. 141, 142; Bouvier's Law Dict., "Demurrer."
[7] Martin v. Iron Works, 35 Ga. 320; Brown v. Jones, 10 G. & J. 334 *Accord*. See to same effect, Boyce v. Whitaker, Doug. 94; Darling v. Gurney, 2 Dowl. 101; Andrus v Waring, 20 Johns. 153; Stoney v. McNeile, 1 McC. 85. — ED.

(B) Under Modern Codes.

[*New York Code of Civil Procedure. Sections* 488, 490, 493, 494.]

The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof: —

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties.
5. That there is a misjoinder of parties plaintiff.
6. That there is a defect of parties, plaintiff or defendant.
7. That causes of action have been improperly united.
8. That the complaint does not state facts sufficient to constitute a cause of action.

The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth, or eighth of section four hundred and eighty-eight of this act, may be stated in the language of the subdivision; an objection taken under either of the other subdivisions must point out specifically the particular defect relied upon.

The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defence or counterclaim contained in the reply, on the ground that it is insufficient in law, upon the face thereof.

The plaintiff may demur to a counterclaim or a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof.[1]

PORTER and Another v. WILSON and Another.

Supreme Court, Indiana, May Term, 1871.

[35 *Indiana Reports*, 348.]

Appeal from the Howard Circuit Court.

Worden, J. Action by the appellees against the appellants. Complaint in three paragraphs. Demurrer to the complaint in the following words: "Now come the defendants and demur to the first, second, and third paragraphs of the plaintiffs' complaint, for the following grounds of objection, to wit: first, said first, second, and third paragraphs, nor either of them, is good in law." The demurrer was overruled, and the defendants excepted.

[1] The legislation relating to demurrers varies in different states; but, in the main, resembles the provisions of the New York Code. — Ed.

The first[1] cause of demurrer, that the several paragraphs are not "good and sufficient in law," raises no question for our consideration. It is not equivalent to a statement that the pleading does not state facts sufficient to constitute a cause of action, nor is it any one of the statutory causes of demurrer. The statute enumerates and defines six causes of demurrer, and provides that for no other cause shall a demurrer be sustained. 2 G. & H. 77; Lane v. The State;[2] Tenbrook v. Brown;[3] Kemp v. Mitchell.[4]

The judgment below is affirmed, with costs, and five per cent. damages.[5]

[1] Only so much of the case as relates to this cause of demurrer is given. — ED.

[2] 7 Ind. 426. [3] 17 Ind. 410. [4] 29 Ind. 163.

[5] In the following cases a demurrer was overruled because not in the proper form to test the sufficiency in point of law of the pleading against which it was directed: Tranum v. Ezekiel, 112 Ala. 277 ("no reason in law why writ of prohibition should issue"); Lane v. State, 7 Ind. 426 (pleading "insufficient to constitute a legal defence"); Tenbrook v. Brown, 17 Ind. 410 ("not sufficient in law to enable defendant to sustain his defence or bar the complaint"); Aiken v. Bruen, 21 Ind. 137 (facts "not sufficient to constitute a defence"); C. & C. Co. v. Washburn, 25 Ind. 259 (facts alleged "do not entitle plaintiff to relief demanded"); Kemp v. Mitchell, 29 Ind. 163 (complaint "is not sufficient in law to entitle the plaintiff to the relief demanded"); Porter v. Wilson, 35 Ind. 548 (complaint "is not good in law"); Gordon v. Swift, 39 Ind. 212 (answer "as a defence is not sufficient in law"); Campbell v. Routt, 42 Ind. 410 (facts "not sufficient to bar the action"); Vaughan v. Fewell, 57 Ind. 182 ("neither of said paragraphs constitutes a good reply to said answer"); Martin v. Martin, 74 Ind. 267 ("paragraph insufficient to constitute a legal defence to the action"); Pine Township v. Huber Co., 85 Ind. 121 ("facts not sufficient to constitute a complaint"); Reed v. Higgins, 86 Ind. 143 ("said paragraph does not constitute a defence to the action"); Thomas v. Goodwine, 88 Ind. 458 (facts "not sufficient to constitute an answer to the complaint"); Young v. Warder, 94 Ind. 357 (facts "not sufficient to constitute a good answer to the complaint"); Grubbs v. King, 117 Ind. 243 (facts "not sufficient to constitute a good and sufficient petition"); Peden v. Mail, 118 Ind. 356 (facts "not sufficient to constitute a good reply to defendant's answer"); Hawley v. Sigerly, 120 Ind. 248 ("answer does not state facts sufficient to constitute a cause of action"); Krathwohl v. Dawson, 140 Ind. 1 ("not facts sufficient to constitute a good defence or reply to the answer"); Wintrode v. Renbarger, 150 Ind. 556 (facts "not sufficient to constitute a good answer to the complaint"); Firestone v. Werner, 1 Ind. Ap. 293 (facts "not sufficient to constitute a ground of complaint"); Sovereign Corp. v. Haller, 39 Ind. Ap. 450 (like Krathwohl v. Dawson, *supra*); White v. Sun Co., (Ind. 1905) 73 N. E. R. 891 ("for want of facts"); Harris Co. v. Pitcairn, 122 Iowa, 595 ("petition shows no personal liability against the defendants"); Hudson Co. v. Glens Falls Co., 90 N. Y. Ap. Div. 513 (counterclaim "is not sufficient in law upon the face thereof"); Hill v. Walsh, 6 S. Dak. 421 ("answer does not state facts sufficient to show that the plaintiff is estopped from maintaining the said action").

A demurrer on the ground that the complaint on the answer does not state facts sufficient to constitute a cause of action, or a defence respectively, was held good in point of form in the following cases: Ellissen v. Halleck, 6 Cal. 386; Kent v. Snyder, 30 Cal. 666; Henderson v. Johns, 13 Colo. 280; Bennett v. Stern, 11 Ind. 324; Pace v. Oppenheim, 12 Ind. 533; State v. Peeples, 13 Ind. 232; Silvers v. Junction Co., 43 Ind. 435; Petty v. Board, 70 Ind. 290; Stone v. State, 75 Ind. 235; Wright v. Whipple, 92 Ind. 310; McFadden v. Fritz, 110 Ind. 1; Lewellen v. Crane, 113 Ind. 289; Ross v. Menafee, 125 Ind. 432; Toledo Co. v. Beery, 31 Ind. Ap. 556 ("complaint does not state a cause of action"); Vincennes v. Spees, (Ind. Ap. 1904) 72 N. E. 531; Durbin v. N. W. Co., (Ind. Ap. 1905) 73 N. E. R. 297 ("insufficient facts to constitute ground of defence"); Monette v. Cratt, 7 Minn. 233; Mo. Bank v. Haden, 35 Mo. 358; Morgan v. Bouse, 53 Mo. 219; Darby v. Cabanné, 1 Mo. Ap. 196; German Bank v. Mulhall, 8 Mo. Ap. 558; Haire v. Baker, 5 N. Y. 357; Johnson v. Wetmore, 12 Barb. 433; Dewitt v. Swift, 3 How. Pr. 280; Durkee v. Saratoga Co., 4 How. Pr. 226; Hyde v. Conrad, 5 How. Pr. 112; Anibal v. Hunter, 6 How. Pr. 255; Getty v. Hudson Co., 8 How. Pr. 177; Hoogland v. Hudson, 8 How. Pr. 213; White v. Brown, 14 How. Pr. 282; Paine v. Smith, 2 Duer, 298 (Glenny v. Hitchins, 4 How. Pr. 98, and Purdy v. Car-

C. CHENERY v. INHABITANTS OF HOLDEN.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1860.

[16 *Gray*, 125.]

ACTION of contract or tort.[1]

The defendants demurred to the declaration, "and for cause thereof say that the matters therein contained, in manner and form as therein stated and set forth, are not sufficient in law for the said plaintiff to maintain his aforesaid action against the defendants." The Superior Court sustained the demurrer, and the plaintiff appealed.

BIGELOW, C. J. The declaration sets out no facts on which this action can be maintained, either in tort or contract.

An objection was taken to the form of the demurrer, because it does not set out the specific grounds on which the defendants rely to defeat the action. But we think it is sufficient in cases like the present, where the demurrer goes to the entire ground of action as stated in the declaration, and not to any specific defect or cause of demurrer, for the defendant to aver that the matters set out in the declaration are insufficient in law to enable the plaintiff to maintain his action.

Demurrer sustained; judgment for the defendants.[2]

McLAUGHLIN v. BASCOMB.

SUPREME COURT, IOWA, JUNE 16, 1873.

[36 *Iowa Reports*, 593.]

DAY, J. This is an action of slander. To the petition the defendant demurred, as follows: "And now comes the defendant, James Bascom, and demurs to the plaintiff's amended petition, for the reason that the matters therein stated and contained are not sufficient

penter, 6 How. Pr. 361 *contra* are overruled); Riggs v. Home Ass'n, 61 S. Ca. 448; O'Rourke v. Sioux Falls, 4 S. Dak. 47; Howland v. County Board, 40 Wis. 240.

If in jurisdictions, in which it is sufficient to state as the ground of the demurrer that the complaint does not state facts sufficient to constitute a cause of action, the defendant unnecessarily alleges a special reason for the legal insufficiency of the complaint, he is not allowed to attack its validity for other reasons, as he might have done if he had omitted his special reason. Lopez v. Central Co., 1 Ariz. 464; Sluss v. Shrewsbury, 18 Ind. 79; Nellis v. DeForest, 16 Barb. 61. But see, *contra*, Spear v. Downing, 22 How. Pr. 30.

[1] Only so much of the case is given as relates to the form of the demurrer. — ED.

[2] Van Dyke v. Doherty, 6 N. Dak. 283 ("answer is insufficient in law to constitute a defence to the complaint"); Proctor v. Stone, 1 All. 193 ("answer does not state a legal defence to plaintiff's declaration"); Johnson v. Reed, 136 Mass. 421 ("declaration sets forth no legal cause of action"); Whiton v. Batcheller Corp., 179 Mass. 169 ("declaration and the matters therein contained . . . are not sufficient in law for the plaintiff to have his action against the defendant"); Easton v. Driscoll, 18 R. I. 318 ("pleas are insufficient in law to exonerate defendants") *Accord*. — ED.

to constitute a cause of action against him." This demurrer was sustained, and plaintiff appeals.

We do not inquire whether the petition sets forth a cause of action. The demurrer does not specify any ground of objection to the petition intended to be urged. It does not comply with the provisions of section 2877 of the Revision. It should have been disregarded by the court. McKellar v. Stout.[1]

Reversed.[2]

G. E. DODGE v. J. L. COLBY.

COURT OF APPEALS, NEW YORK, FEBRUARY 28, 1888.

[108 *New York Reports*, 445].

THE complaint herein contained three counts. The first two alleged in substance that plaintiff was the owner in fee of certain lands situate in the state of Georgia; that defendant and his agents "caused various persons to cut timber and take turpentine, the property of the plaintiff," from said lands.

The defendant demurred separately to each count, upon the ground that the court had not jurisdiction of the subject of the action.[3]

RUGER, C. J. The General Term held that the first and second counts of the complaint each stated a cause of action arising out of trespass upon lands in the state of Georgia, and that in respect to such actions the courts of this state had no jurisdiction, and therefore sustained the demurrer to those counts.

[1] 13 Iowa, 487.

[2] Cotten v. Rutledge, 33 Ala. 110; Burns v. Mayor, 34 Ala. 485; Helvenstein v. Higgason, 35 Ala. 259; Robins v. Mendenhall, 35 Ala. 722; Harrison v. Nolin, 41 Ala. 256; Donegan v. Wood, 49 Ala. 242; Cook v. Rome Co., 98 Ala. 409; Browder v. Irby, 112 Ala. 379; Milligan v. Pollard, 112 Ala. 465; Miller v. Cross, 73 Conn. 538; McKellar v. Stout, 13 Iowa, 487; Davenport Co. v. Davenport, 6 Iowa, 6; Singer v. Cavers, 26 Iowa, 178; McGregor Co. v. Birdsall, 30 Iowa, 255; Childs v. Limback, 30 Iowa, 398; McLaughlin v. Bascomb, 38 Iowa, 606; Davidson v. Biggs, 61 Iowa, 609; Traders Bank v. Alsop, 64 Iowa, 97; District v. Independent District, 73 Iowa, 687 (but otherwise in case of a demurrer to a bill in equity, Stokes v. Sprague, 140 Iowa, 89); Re McMurray, 107 Iowa, 619; Love v. Commissioners, 84 N. Ca. 708 (but defendant may move at once in arrest of judgment); George v. High, 85 N. Ca. 99; Bank v. Boyle, 85 N. Ca. 203; Jones v. Commissioners, 85 N. Ca. 278; Goss v. Waller, 90 N. Ca. 149; Elam v. Barnes, 110 N. Ca. 73; Renton v. St. Louis, 4 Wash. T. 215, 222 *Accord*.

See also Bidder v. McLean, 20 Ch. Div. 512 (under Rules of Court, 1875, Ord. XXVIII, r. 2).

In Love v. Commissioners, *supra*, PEARSON, C. J., said, p. 708: "A demurrer under the C. C. P. differs from a demurrer in equity in this, the judgment overruling it is final, and decides the case, unless the pleading be amended, by leave to withdraw the demurrer and put in an answer; and it differs from a demurrer at law under the old mode in this, that every demurrer is special and must distinctly specify the ground of objection to the complaint. . . . Although the demurrer in our case is disregarded, it does not follow that the plaintiff can have judgment if the complaint does not contain facts sufficient to constitute a cause of action. The objection is still open to a motion in the nature of a motion in arrest of judgment." — ED.

[3] Only so much of the case is given as relates to this ground of demurrer. — ED.

We concur in the conclusions reached by that court in respect to this portion of the complaint. The counts referred to, we think, under the liberal system established by the Code, each clearly stated a good cause of action in trespass *quare clausum fregit* and entitled the plaintiff, if sustained, to recover for all damages accruing to him from the acts described therein.

The doctrine that the courts of this state have no jurisdiction of actions for trespass upon lands situated in other states is too well settled to admit of discussion or dispute. American Union Tel. Co. *v.* Middleton;[1] Cragin *v.* Lovell.[2] All concur.

Judgment accordingly.[3]

THE OGDENSBURGH & CHAMPLAIN RAILROAD COMPANY *v.* THE VERMONT & CANADA RAILROAD COMPANY.

SUPREME COURT, SPECIAL TERM, NEW YORK, JULY, 1874.

[16 *Abbott's Practice Reports, New Series*, 249.]

THE complaint prayed the court to adjudge whether a certain agreement between the plaintiff and the defendant was beyond the corporate powers of the plaintiff. Demurrer, because it appeared upon the face of the complaint that the court had not jurisdiction of the person of the defendant.[4]

JAMES, J. As to all the defendants, other than Schrier, the only question now in the case is as to the jurisdiction of this court over

[1] 30 N. Y. 408.

[2] 88 N. Y. 258.

[3] If the declaration discloses the absence of jurisdiction of the subject of the action, the defendant may demur. Bradlaugh *v.* Gossett, 12 Q. B. D. 271; Mayor *v.* Cox, L. R. 2 H. L. 239, 291 (*semble*); Doll *v.* Feller, 16 Cal. 432; Toledo Co. *v.* Milligan, 52 Ind. 505 (*semble*); Whitewater Co. *v.* Bridgett, 94 Ind. 216; Powers *v.* Ames, 9 Minn. 178 (*semble*); Dodson *v.* Scruggs, 47 Mo. 285; Cones *v.* Ward, 47 Mo. 289; Cragin *v.* Lovell, 80 N. Y. 258; King *v.* Poole, 36 Barb. 242; Johnson *v.* Adams, 14 Hun, 89; Crowley *v.* Royal Co., 2 N. Y. Civ. Pr. 174 (*semble*); Drake *v.* Drake, 41 Hun, 366 (*semble*); Bank of Charlotte *v.* Britton, 66 N. Ca. 365 (*semble*); Roy *v.* Clarke, 75 Tex. 28; Western Co. *v.* Arnold, (Tex. Civ. Ap. 1904) 77 S. W. R. 249; Gaddis *v.* Western Co., (Tex. Civ. Ap. 1904) 77 S. W. R. 37 *Accord.*

Inferior courts. — If an action is brought in an inferior court or a court of limited jurisdiction, all the facts necessary to give the court jurisdiction must be alleged in the declaration to make it good against a demurrer. Keighley *v.* Nodes, Sty. 313; Stanyon *v.* Davis, 6 Mod. 223, 1 Salk. 404, 2 Ld. Ray. 795 s. c.; Trevor *v.* Wall, 1 T. R. 157; Doll *v.* Feller, 16 Cal. 432, 433; Schell *v.* Leland, 45 Mo. 289.

Objection to be pointed out. — The demurrer must point out specifically the objection of want of jurisdiction of the subject of the action. The defendant cannot raise the question by a demurrer on the ground that the facts stated are not sufficient to make a cause of action. Toledo Co. *v.* Milligan, 52 Ind. 505; Whitewater Co. *v.* Bridgett, 94 Ind. 216; Drake *v.* Drake, 41 Hun, 366; Saxton *v.* Sieberling, 48 Oh. St. 554; McKibben *v.* Salinas, 36 S. Ca. 279.

Non-suit. — In Doulson *v.* Mathews, 4 T. R. 503, the objection to a count alleging an entry upon the plaintiff's close in Canada was taken by a motion for a non-suit. — ED.

[4] The statement of the case is abridged, and only a part of the opinion of the court is given. — ED.

the persons of said defendants, for without such jurisdiction it can render no personal judgment against them.

The Code permits a defendant to demur on the ground that the court has no jurisdiction of his person when this fact appears upon the face of the complaint; and when it does not so appear, to take the objection by answer (Code, §§ 144–147). But such objection is not to be deemed waived, even if not taken by demurrer or answer (Code, § 148); much less is it to be deemed waived by an appearance for the sole purpose of raising it in the exact method provided by the Code. 4 Robt. 616.

This objection to the jurisdiction of the court does not mean that the suit has been irregularly commenced, but that the person named as defendant is not subject to the jurisdiction or order of the court. Nones *v.* Hope Ins. Co.[1] Hence the inquiry is not as to the irregularity of the proceedings by which service of the summons has been made, but whether the defendant is such a person as can be subjected by process to the court's jurisdiction.

One over whose person the court has no jurisdiction is not bound to wait until final judgment and then seek relief by motion to set it aside. The Code gives him the right to present that contingency by pleading, and by appearing to exercise that right he does not waive it, nor in any way impair the force of the objection. To hold otherwise would make the means provided for presenting that issue destroy the issue itself. In my judgment the issue was properly taken by demurrer, and such demurrers present issues of law for the decisions of the court. Code, § 249; King *v.* Poole.[2]

An action against a foreign corporation is authorized by section 427 of the Code, but before the action can proceed or the court render judgment either *in rem* or *in personam*, it must have jurisdiction of the property or the person of the defendant.

This is not a proceeding *in rem*, but an action against the persons of the defendants.

As the complaint in this case shows the said defendants to be foreign corporations, and there not having been any voluntary general appearances therein, no jurisdiction of their persons has been obtained, and the demurrers of the said defendants are well taken.[3]

[1] 5 How. Pr. 96. [2] 36 Barb. 242, 247.

[3] Belden *v.* Wilkinson, 44 N. Y. Ap. Div. 420 (*semble*) *Accord.* — Ed.

C. F. A. DAMBMAN v. H. SCHULTING.

SUPREME COURT, SPECIAL TERM, NEW YORK, FEBRUARY, 1874.

[51 *Howard's Practice Reports*, 337.]

THE complaint in this action states that the plaintiff loaned to defendant $5000, which is unpaid. That the plaintiff, in June last, brought his action in this court, to recover the said $5000, and that the defendant, in his answer, set up a release under seal as a defence, and that this action is still pending.

The plaintiff further states that the said release was obtained from him by fraud, etc., and demands judgment that said release be delivered up and cancelled, and that the defendant be enjoined from setting the same up in above-mentioned action. The defendant demurs to this complaint, upon the ground that another action is pending between the same parties for the same cause.

VAN BRUNT, J. Since the adoption of the Code parties have had the right, in actions at law, to interpose any equitable defence they may have, and are not obliged to file a separate bill in the equity branch of the court, as they were obliged to do under the former practice. The object of this provision of the Code being to prevent multiplicity of actions, Dobson *v.* Pearce.[1] The plaintiff seems to fear, in case he goes to trial in the first action, that he, not being permitted to reply to the answer setting up the release, will be prevented from showing the facts alleged in the complaint in this action, but I think that he is clearly in error. Up to the year 1853 the Code required a reply to all new matter constituting a defence or set-off set up in the answer, and it was not until the amendment of that year that the necessity of a reply was limited to new matter constituting a counterclaim.

The result of this amendment was that the plaintiff, upon the trial without a reply, could prove any state of facts whatever which would, either in law or equity, show that the new matter set up in the answer of such new matter did not constitute a counterclaim, did not constitute a defence to the plaintiff's claim.

In 1860 the Code was amended by providing that the court could, in its discretion, upon the motion of the defendant, require a reply to any new matter constituting a defence by way of avoidance. This amendment was passed in the interest of the defendant, in order that he might be apprised of the grounds upon which the plaintiff proposed to meet his defence. The universal course of practice since the Code has been to compel the parties to litigate each and every question pertaining to the same subject-matter in one action.

The release set up in the defendant's answer can be attacked upon the trial of that cause for the fraud set up in the complaint in this

[1] 2 Kern. 165.

action, and it must be attacked there, that action being commenced first.

Demurrer sustained with costs.[1]

THE PHŒNIX BANK OF NEW YORK *v.* E. J. DONNELL.

COURT OF APPEALS, NEW YORK, JUNE 12, 1869.

[40 *New York Reports*, 410.]

APPEAL from a judgment of the General Term of the Supreme Court in the first district affirming a judgment in favor of the plaintiff on demurrer to the complaint.

The grounds of the demurrer were:

1. That it appears by the complaint that the plaintiff has not legal capacity to sue.

2. That it does not appear that the plaintiff is a corporation duly incorporated, and entitled to sue.

And for a further and separate ground of demurrer to said complaint, this defendant states:

That the complaint does not state facts sufficient to constitute a cause of action.[2]

GROVER, J. Section 114 of the Code provides that the defendant may demur to the complaint, when it shall appear upon the face thereof that there is one or more of six specified defects therein. It is settled that these are the only grounds upon which a demurrer to the complaint can be sustained. The counsel for the appellant relies in the present case upon the second and sixth, principally upon the second, for the reason that the complaint contains no allegation that the plaintiff is a corporation, insisting that unless it is such, it has no capacity to sue in that character. In this position the counsel is correct; but does the argument show that the demurrer is well taken? All that the argument proves, is that the complaint does not show upon its face, affirmatively, that the plaintiff has capacity to sue. But to sustain the demurrer, the Code requires that it should appear upon its face that it had not such capacity, which in no respect appears. For aught appearing upon the face of the complaint, the plaintiff may be a corporation entitled to sue as such. Section 147 provides, that when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This would seem to indicate the proper practice with sufficient clearness. If it appears upon the face of the complaint that a plaintiff suing as

[1] Affirmed 4 Hun, 50. See, to the same effect, Geary *v.* Webster, 11 Hun, 430 (*semble*).

If the pendency of another action appears upon the complaint, the objection can be taken only by a demurrer. Garvey *v.* N. Y. Co., 14 N. Y. Civ. Pro. 106, 14 N. Y. St. Rep. 909 s. c. — ED.

[2] The statement is abridged.

a corporation is not such in fact, a demurrer is the proper remedy of the defendant under section 144. If the complaint does not show that the plaintiff is not a corporation on its face, the objection that it is not such must be taken by answer, under section 147. This would seem to render further discussion of the question unnecessary. Upon looking into the authorities, some conflict will be found. The counsel for the appellant cites a number of cases, holding that allegations showing that plaintiff is a corporation are necessary in the complaint. Most of these are cases arising under the system of pleadings in use prior to the enactment of the Code. Under that system, although cases may be found intimating a contrary doctrine, yet the decided weight of authority is that such averments were necessary, and that the want thereof could be taken advantage of by demurrer. But these authorities have no application to the question under the Code. There are a few cases in which similar opinions have been expressed since the Code. Stoddard *v.* The Onondaga Annual Conference,[1] Elizabethport Manufacturing Company *v.* Campbell.[2] In some cases the contrary has been held. Union Insurance Company *v.* Osgood,[3] Kennedy *v.* Colton.[4] In Bank of Havana *v.* Magee, DENIO, J., in giving the opinion of the court, speaking of a complaint precisely like that in the present case in this respect, says: "But there was not here any defect on the face of the complaint. For aught that appeared, the plaintiff was a corporate body. This indicates clearly the view of the learned judge upon the point under consideration, although it was not directly involved in that case. The weight of authority under the Code is against sustaining the demurrer upon this ground.[5]

[1] 12 Barb. 573. [2] 13 Abb. 86. [3] 1 Duer, 107. [4] 26 Barb. 59.

[5] City Council *v.* Wright, 72 Ala. 411 (public law); Seymour *v.* Thomas Co., 81 Ala. 250 (default); Moore *v.* Martin, 124 Ala. 291 (*semble*); Miss. Co. *v.* Gaster, 20 Ark. 455; District No. 110 *v.* Feck, 60 Cal. 403; American Co. *v.* Moore, 2 Dak. 280 (foreign corporation); Wilson *v.* Sprague Co., 55 Ga. 672; St. Cecilia Co. *v.* Hardin, 78 Ga. 38; Mattox *v.* State, 115 Ga. 212, 219 (*semble*); O'Donald *v.* Evansville Co., 14 Ind. 259; Mackenzie *v.* Board, 72 Ind. 189; Sayers *v.* First Bank, 89 Ind. 230; Smythe *v.* Scott, 124 Ind. 183; Northrup *v.* Wills, 65 Kan. 769 (foreign corporation); Henderson Co. *v.* Leavell, 16 B. Mon. 358; State *v.* Torinus, 22 Minn. 272; Minneapolis *v.* Works, 24 Minn. 327; Howland *v.* Jewel, 55 Minn. 102, 104 (*semble*); Herbst Co. *v.* Hogan, 16 Mont. 384; Exchange Bank *v.* Copps, 32 Neb. 242; Trister *v.* Mo. Co., 33 Neb. 171, 184 (foreign corporation); Bennington Co. *v.* Rutherford, 18 N. J. 105; German Church *v.* Puechelstein, 27 N. J. Eq. 30; U. S. Bank *v.* Haskins, 1 Johns. Cas. 132 (foreign corporation — but see *contra*, Comm. Bank *v.* Smith, 9 Abb. Pr. 168, 17 How. Pr. 487 s. c. — foreign corporation); Kennedy *v.* Cotton, 23 Barb. 59 (discrediting Johnson *v.* Kemp, 11 How. Pr. 186; Bank of Havana *v.* Wickham, 16 How. Pr. 97); La Fayette Co. *v.* Rogers, 30 Barb. 491; Holyoke Bank *v.* Haskins, 4 Sandf. 675 (foreign corporation); Union Co. *v.* Osgood, 1 Duer, 707; Waterville Bank *v.* Beltser, 13 How. Pr. 270; Elizabethport Co. *v.* Campbell, 13 Abb. Pr. 86; Smith *v.* Sewing Co., 26 Oh. St. 562 (foreign corporation); Cheraw Co. *v.* White, 14 S. Ca. 51; Cone *v.* Poole, 41 S. Ca. 70 (foreign corporation); Crane Co. *v.* Reed, 3 Utah, 506; Central Bank *v.* Knowlton, 12 Wis. 624; Chickering Lodge *v.* McDonald, 16 Wis. 112 *Accord.*

Central Co. *v.* Hartshorn, 3 Conn. 199; Winnipiseogee Co. *v.* Young, 40 N. H. 420; Bank *v.* Simonton, 2 Tex. 531 (foreign corporation); Holloway *v.* Memphis Co., 23 Tex. 465 *Contra.*

By statute in some jurisdictions an express averment that the plaintiff is a corporation is required. In a few jurisdictions the complaint must state also whether the corporation is domestic or foreign, and if foreign where its domicile is. There is much conflict of decision as to whether a failure to comply with these statutory requirements is a ground of demurrer.

"The appellant's counsel insists that if the demurrer is not sustainable upon the second ground specified in section 144, it is upon the

A demurrer was sustained in the following cases: Sweet v. Irvin, 54 Iowa, 101; Colnan Co. v. Brown, 110 Iowa, 37 (*semble*); Aull Bank v. Lexington, 74 Mo. 104; Baker v. Star Co., 3 N. Y. M. L. Bull. 29; Gorton Co. v. Spofford, 5 N. Y. Civ. Proc. 116 (*semble*); Harvey v. Little Falls, 19 N. Y. W. Dig. 48 (*semble*); Clegg v. Cramer, 3 How. Pr. N. S. 128, 8 N. Y. Civ. Proc. 404 s. c. (defendant); First Bank v. Doying, 13 Daly, 509; Farmers Bank v. Rogers, 15 N. Y. Civ. Proc. 250, 1 N. Y. Sup. 757 s. c.; Nat. Soc'y v. Anderson, 3 N. Y. Sup. 49; Columbia Bank v. Jackson, 4 N. Y. Sup. 433 (*semble*); Amer. Soc'y v. Foote, 52 Hun, 307 (*semble*); Schillinger v. Arnott, 14 N. Y. Sup. 326.

But a demurrer was overruled in the following cases, the defect being assailable only by answer or by a motion. Irving Bank v. Corbett, 10 Abb. N. C. 85 (objection should be by answer); Haffner Co. v. Grumme, 10 N. Y. Civ. Proc. 176; Rothchild v. Grand Trunk Co., 30 N. Y. St. Rep. 642, 19 N. Y. Civ. Proc. 53 s. c.; Brady v. Nally, 8 N. Y. Misc. Rep. 9 (defendant); Ochs v. Frey, 47 N. Y. Ap. Div. 390.

Special plea of nul tiel corporation. — In most jurisdictions, in which the corporate capacity of the plaintiff cannot be questioned by a demurrer, this objection cannot be taken by plea of the general issue, or by a general denial. A special plea denying the incorporation is essential. Mayor v. Stafford, 1 B. & P. 40 (but see Norris v. Staps, Hob. 210, *b*; Henriques v. Dutch Co., 1 Stra. 612, 2 Ld. Ray. 1535; Nat. Bank v. De Bernales, 1 C. & P. 569); Conard v. Atlantic Co., 1 Pet. 386; Society v. Pawlet, 4 Pet. 480; U. S. v. Ins. Co., 22 Wall. 99; Pullman v. Upton, 96 U. S. 328; Union Co. v. Noble, 15 Fed. 502; Imperial Co. v. Wyman, 38 Fed. 574 (general denial); Prince v. Comm. Co., 1 Ala. 241; Phenix Bank v. Curtis, 14 Conn. 437; West Bank v. Ford, 27 Conn. 288; Litchfield Bank v. Church, 29 Conn. 137; McIntyre v. Preston, 10 Ill. 48; Bailey v. Valley Bank, 127 Ill. 332; Gage v. Consumers Co., 194 Ill. 30; Harris v. Muskinghum Co., 4 Blackf. 267; Guaga v. Dawson, 4 Blackf. 202; Richardson v. St. Joseph Co., 5 Blackf. 146; Dunning v. New Albany Co., 2 Ind. 437; Jones v. Cincinnati Co., 14 Ind. 89; Haaston v. Cincinnati Co., 16 Ind. 275, 278; Cicero Co. v. Craighead, 28 Ind. 274; Wiles v. Trustees, 63 Ind. 206 (general denial. But see Chance v. Indianapolis Co., 32 Ind. 472); Ryan v. Farmers Bank, 5 Kan. 658; Taylor v. Bank, 7 Mon. 576, 584; Woods v. Bank, 4 B. Mon. 203; Jones v. Bank, 8 B. Mon. 122, 123; Penobscot Corp. v. Lamson, 16 Me. 224; Roxbury v. Huston, 37 Me. 42; Oldtown Co. v. Veazie, 39 Me. 571; Orono v. Wedgewood, 44 Me. 49; Whittington v. Farmers Bank, 5 Har. & J. 489 (but see Agnew v. Bank, 2 Har. & G. 478); Monomoy Beach v. Rogers, 1 Mass. 159; Kennebec Purchase v. Call, 1 Mass. 483, 485; Sutton v. Cole, 3 Pick. 232, 245; Christian Soc'y v. Macomber, 3 Met. 235; Williams v. Cheney, 3 All. 215; Garton v. Union Bank, 34 Mich. 279; Canal Co. v. Paas, 95 Mich. 372; Ludington Co. v. Ludington, 119 Mich. 480 (but see Cahill v. Kalamazoo Co., 2 Doug. 134); Farmers Bank v. Williamson, 61 Mo. 259; Nat. Co. v. Robinson, 8 Neb. 452; Dietrichs v. Lincoln Co., 13 Neb. 43; Herron v. Cole, 28 Neb. 692 (foreign corporation); Kelly v. Neb. Co., 52 Neb. 355; Fletcher v. Coop. Co., 58 Neb. 511; School Dist. v. Blaisdell, 6 N. H. 197 (but see Society v. Young, 2 N. H. 310); Concord v. McIntire, 6 N. H. 527; Star Co. v. Ridsdale, 36 N. J. 229; Genesee Bank v. Patchin Bank, 13 N. Y. 309; Concordia Assn. v. Read, 93 N. Y. 474; Union Co. v. Osgood, 1 Duer, 707, 708; Waterville Bank v. Beltser, 13 How. Pr. 270; Canandaigua Acad. v. McKechnie, 19 Hun, 62, 90 N. Y. 618, 630 (Jackson v. Plumb, 8 Johns. 378; Dutchess Co. v. Davis, 14 Johns. 238, 245; Auburn Bank v. Weed, 19 Johns. 300; Williams v. Bank, 7 Wend. 539; U. S. Bank v. Stearns, 15 Wend. 314; Utica Bank v. Smalley, 2 Cow. 770; Trustees v. Hills, 6 Cow. 23, 25; Wood v. Jefferson Bank, 9 Cow. 194; Trustees v. Tryon, 1 Den. 451; Waterville Co. v. Bryan, 14 Barb. 182 *contra* are no longer law); M. E. Church v. Wood, 5 Oh. 283; Elkhorn Co. v. Jones Co., 8 Oh. C. C. 311 (but see Lewis v. Ky. Bank, 12 Oh. 132); Rheem v. Naugatuck Co., 33 Pa. 358 (but see Wolf v. Goddard, 9 Watts, 544); Comm. Co. v. Turner, 8 S. Ca. 107; Steamship Co. v. Rodgers, 21 S. Ca. 27; Palmetto Co. v. Risley, 25 S. Ca. 309; American Co. v. Hill, 27 S. Ca. 164; Boston Foundry v. Spooner, 5 Vt. 93; Manchester Bank v. Allen, 11 Vt. 302; Ætna Co. v. Wires, 29 Vt. 93; Gillett v. American Co., 29 Grat. 565 (but see Reed v. Conococheague Bank, 5 Rand. 326; Taylor v. Bank, 5 Leigh, 471; Jackson v. Marietta Bank, 9 Leigh, 240); Central Bank v. Knowlton, 12 Wis. 624, 625; Mower Co. v. Smith, 33 Wis. 580.

In some jurisdictions, however, the general issue puts the plaintiff to the proof of corporate capacity. Odd Fellows v. Hogan, 28 Ark. 261 (*semble*).

In other jurisdictions a general denial challenges the corporate capacity of the plaintiff. Hummel v. First Bank, 2 Colo. Ap. 571 (*semble*); Hungerford Bank v. Van Nostrand, 106 Mass. 559; Bateman v. Potter, 121 Mass. 89; Girls' Home v. Fritchey, 10 Mo. Ap. 344; Denver v. Spokane Falls, 7 Wash. 226. — ED.

sixth. In this, the counsel is in error. That relates only to the statement of facts constituting the cause of action. If this statement fails to show a right of action, then a demurrer on this ground may be interposed. But it has no application to the capacity of the plaintiff to sue or to the other grounds of demurrer specified. Each of these are to be determined by itself in like manner as were the grounds of a special demurrer under the former practice.[1] The judgment appealed from must be affirmed with costs."

HUNT, C. J., MASON, LOTT, and DANIELS, JJ., concurred with GROVER, J., for affirmance.

WOODRUFF, J., thought that legislation, either special or general, was necessary always to give an artificial body authority to sue. And therefore, where there is no allegation of incorporation in an action by such a body, in the complaint, there does appear on the face of the pleading substantially a want of capacity to sue. He was therefore for reversal.

JAMES, J., was for reversal upon the same ground.

Judgment affirmed.

WOOLF *v.* THE CITY STEAMBOAT COMPANY.

COMMON BENCH, JANUARY 29, 1849.

[7 *Common Bench Reports*, 103.]

ASSUMPSIT. The declaration commenced thus: "The plaintiff complains of the City Steamboat Company, who have been summoned to answer the plaintiff," etc.

Special demurrer, — assigning for causes, that the names of the defendants were not stated, that it did not appear whether they were sued as a corporation or a company completely registered, or by virtue of what act of parliament they were entitled to be sued by the name of a company.

Hugh Hill, in support of the demurrer. The question in this case is, whether the plaintiff may, in his declaration, describe the defendants as a company, without showing whether or not they are a corpor-

[1] Odd Fellows Ass'n *v.* Hogan, 28 Ark. 261 (*semble*); Gibson *v.* Ponder, 40 Ark. 195; Mora *v.* Le Roy, 58 Cal. 8 (corporation); District *v.* Feck, 60 Cal. 403; Nolte *v.* Libbert, 34 Ind. 163; Rogers *v.* Lafayette Works, 52 Ind. 296; State *v.* Stout, 61 Ind. 143 (corporation); Bond *v.* Armstrong, 88 Ind. 65 (*semble*); Radabaugh *v.* Silvers, 135 Ind. 605 (administrator); State *v.* Ohio Co., 150 Ind. 21; Ætna Co. *v.* Sellers, 154 Ind. 370 (lunatic); Savings Bank *v.* Horn, 41 Iowa, 55 (default); Soule *v.* Thelander, 31 Minn. 227 (freeholder); Sanborn *v.* Hale, 12 Neb. 318 (partnership); Fulton Co. *v.* Baldwin, 37 N. Y. 648 (corporation); People *v.* Crooks, 53 N. Y. 648; Perkins *v.* Stimmel, 114 N. Y. 359, 369; Hobart *v.* Frost, 5 Duer, 672, 3 Abb. Pr. 119 s. c. (receiver); Shoe Bank *v.* Brown, 9 Abb. Pr. 218; Robbins *v.* Wells, 18 Abb. Pr. 191 (foreign administrator); Bank *v.* Lowville, 11 How. Pr. 216; President *v.* Smith, 17 How. Pr. 487; Irving Bank *v.* Corbett, 10 Abb. N. C. 85; Mickle *v.* Construction Co., 41 S. Ca. 394; Dawkins *v.* Mathis, 47 S. Ca. 64 (receiver) *Accord.* — ED.

ation or a registered company. In the doubtful state of the allegation, the defendants could not safely plead *nul tiel* corporation. [Cresswell, J. Is not this the usual form of declaring against a corporation? It may be that the defendants are a chartered company: how does it appear that they are not?] In Thompson *v.* The Universal Salvage Company,[1] — which was an action against a registered company upon a promissory note, — the declaration stated that the company had been duly registered under the statute 7 and 8 Vict. c. 110. [Maule, J. If the defendants in fact are a corporation, the declaration is correct: if they are not, they may traverse it.] In The Queen *v.* West [2] a coroner's inquisition, stating that certain goods and chattels were the goods and chattels of the proprietors of the Hull and Selby Railway, was held bad, because it did not show that there was any corporation so intituled. [Cresswell, J. That case would have been more to the purpose if the defendants here had been described as "the proprietors of the City Steamboats."] Since the statutes creating these registered corporations, it is essential that they should in all proceedings be described according to the truth. [Cresswell, J. How can the mode of describing them in pleading be affected by the statutes?] It is important that the true character in which a party sues or is sued should appear upon the record.

Hawkins, contra, was not called upon.

MAULE, J. The mode of pleading is governed either by positive rules or by a known course of precedents. There is no positive rule that I am aware of which requires such a mode of description as the defendants' counsel insists upon in this case: nor is the description which is given at all out of the usual form: it impliedly amounts to an allegation that the defendants are a corporate body. I think the plaintiff is entitled to judgment.

The rest of the court concurring.

Judgment for the plaintiff.[3]

[1] 1 Exch. 694.

[2] 1 Q. B. 826.

[3] Selma *v.* Perkins, 68 Ala. 148; Lord *v.* Mobile, 113 Ala. 360; Indep. Order *v.* Paine, 122 Ill. 625; Indianapolis Co. *v.* Horrell, 53 Ind. 527; Salem Co. *v.* Pennington, 62 Ind. 175; Lighte *v.* Everett Co., 5 Bosw. 716; Stanley *v.* Richmond Co., 89 N. Ca. 331; Hart *v.* Balt. Co., 6 W. Va. 336; Smith *v.* Janesville, 52 Wis. 680 *Accord.*

State *v.* Chicago Co., 4 S. Dak. 261; Life Ins. Co. *v.* Davidge, 51 Tex. 244; Galveston Co. *v.* Smith, 81 Tex. 479; Mo. Co. *v.* Douglas, 2 Tex. Ct. of App. Civ. Cas. § 28 *Contra.*

By statute in some jurisdictions a count against a corporation must allege expressly the fact of incorporation, and by some statutes whether the defendant is a domestic or foreign corporation, and the domicile of a foreign corporation. The authorities are not agreed upon the point whether a failure to comply with these statutes is a ground for demurrer. A demurrer was thought to be proper in the following cases: Loup *v* Cal. Co., 63 Cal. 97; People *v.* Central Co., 83 Cal. 393; Miller *v.* Pine Co., 2 Idaho, 1206; Root *v.* Ill. Co., 39 Iowa, 102 (*semble*); Hard *v.* Decorah, 43 Iowa, 313; Dodge *v.* Minn. Co., 14 Minn. 49 (*semble*); Smith *v.* Janesville, 52 Wis. 680 (*semble*); Galveston Co. *v.* Smith, 81 Tex. 479.

According to the following cases this objection should not be taken by demurrer, but by answer or motion: Cribb *v.* Waycross Co., 82 Ga. 597 (only by special plea); Fox *v.* Erie Co., 93 N. Y. 54; Harmon *v.* Vanderbilt Co., 79 Hun, 392, affirmed 143 N. Y. 665; Brady *v.* Nally, 8 N. Y. Misc. Rep. 9 (but see Clegg *v.* Cramer, 3 How. Pr. N. S. 128, 8 N. Y. Civ. Proc. 404, s. c.; Stoddard *v.* Onondaga, 12 Barb. 573); Fraser *v.* Granite Co., 58 N. Y. St. Rep. 803; Sanders *v.* Sioux City, 6 Utah, 431 (only by special plea); Garneau *v.* Port Co, 8 Wash. 467 (only by special plea). — ED.

W. H. SECOR, as Administrator of C. A. SECOR, v. W. H. PENDLETON.

Supreme Court, New York, January Term, 1888.

[47 *Hun*, 281.]

Appeal from an interlocutory judgment sustaining a demurrer to the plaintiff's complaint.

Daniels, J. The demurrer was served to the plaintiff's complaint upon two grounds, the first being the objection that there was a defect of parties plaintiff in the action, and the other that the complaint did not state facts sufficient to constitute a cause of action. The second objection was directed in part to the insufficiency of the averment that the plaintiff had been appointed administrator of the estate of the intestate by any tribunal having authority to make the appointment in this state. What the complaint alleged upon this subject was that "letters of administration were duly issued and granted unto plaintiff, who is in fact alone entitled to the possession of and has sole power as administrator, etc., to collect the assets and liquidate the business affairs of said firms." It was not stated in the complaint that the intestate died leaving property in this state, or that the letters of administration had been issued upon his estate by any surrogate having that authority within this state. But the right of the plaintiff to maintain the action was left to rest wholly upon the allegation that letters had been duly issued and granted to him. It is entirely consistent with the allegation that the letters were issued in some other state than the state of New York, and they would supply the plaintiff with no legal authority to maintain this action. For that object it should have been shown by the complaint that the letters were issued by a tribunal in this state having that authority under its laws.

In Beach *v.* King[1] such an allegation as this was held to be entirely insufficient; and in Sheldon *v.* Hoy[2] it was held that the point could be taken by demurrer, although that was doubted by the same court in Cheney *v.* Fisk.[3] But the principle asserted in White *v.* Joy[4] is directly in harmony with the earlier of these decisions. And the same rule was followed in Hulbert *v.* Young[5] and Dayton *v.* Connah.[6] And it substantially has the sanction of this court in Kingsland *v.* Stokes.[7] It was an essential fact upon which the right of the plaintiff to maintain the action depended, and it should have been averred to disclose and maintain that right.[8]

[1] 17 Wend. 197. [2] 11 How. 11. [3] 22 How. 236. [4] 13 N. Y. 83.
[5] 13 How. 413. [6] 18 How. 327. [7] 25 Hun, 107.

[8] A demurrer was allowed in the following cases because from a statement that the plaintiff sued as executor (or other representative), or that the plaintiff is executor, the legal capacity of the plaintiff to sue did not sufficiently appear on the declaration.

Administrator or executor. — Cummings *v.* Edmonson, 5 Port. (Ala.) 145 (admr. *de bonis*

But it will not result from this defect in the statement of the plaintiff's authority to sue, as the representative of this estate, that the judgment can be sustained, for the demurrer was not framed in such a form as to take advantage of it. It was not a deficiency in the statement of the cause of action, but it was a failure on the part of the plaintiff to show that he had legal capacity to sue; and the demurrer, to be effectual, should have been in that form according to subdivision 2 of section 495 of the Code of Civil Procedure. As it was framed it did not disclose the existence of any legal capacity on the part of the plaintiff to maintain the action. In Sheldon *v.* Hoy [1] the objection was raised by the statement in the demurrer that it did not appear that the plaintiff was the administrator of the goods, chattels, and credits of the deceased intestate, which, though not in the language of the Code, was substantially an assertion of the objection that the plaintiff was without legal capacity to sue. And in Cheney *v.* Fisk [2] a demurrer in this form was also considered to be essential to the presentation of this objection. And that it cannot be considered under a demurrer in the form adopted by the defendants is maintained by Fulton Fire Insurance Company *v.* Baldwin [3] and People *ex rel.* Lord *v.* Crooks.[4] The cases of Clegg *v.* Chicago Newspaper Union [5] and First National Bank *v.* Doying [6] arose under a different provision of the Code of Civil Procedure, and are not strictly applicable to this controversy. But in Hafner, etc., Company *v.* Grumme,[7] it was considered and held by Mr. Justice Bradley that a demurrer to the complaint, as failing to state facts sufficient to constitute a cause of action, will not raise this objection under this other section of the Code.

By failing to present the objection, by the demurrer, that the plaintiff had not the legal capacity to recover the demand, the objection has been waived. Code of Civil Proc. § 499. And that waiver will

son); Vanblaricum *v.* Yeo, 2 Blackf. 322 (admr. *de bonis non*); Tapley *v.* Matson, 38 Mo. 489; Headlee *v.* Cloud, 51 Mo. 301; State *v.* Green, 65 Mo. 528 (admr. *de bonis non*); Cole *v.* Worden, 18 N. J. 20 (admr. *dur. absentia*); Beach *v.* King, 17 Wend. 197; Sheldon *v.* Hoy, 11 Howe, 11; Forrest *v.* Mayor, 13 Abb. Pr. 359; Cordier *v.* Thompson, 8 Daly, 172 (*semble*); Kingsland *v.* Stokes, 25 Hun, 107; Brenner *v.* McMahon, 20 N. Y. Ap. Div. 3 (*semble*); Lewis *v.* Ewing, 3 S. & R. 44 (admr. *pend. lite*); Moir *v.* Dodson, 14 Wis. 279 (*semble*).

Guardian. — Stanley *v.* Chappell, 8 Cow. 236; Hulbert *v.* Young, 13 How. Pr. 413; Grantman *v.* Thrall, 44 Barb. 173.

Receiver. — Gillett *v.* Fairchild, 4 Den. 83; Dayton *v.* Connah, 18 How. Pr. 326; White *v.* Law, 7 Barb. 206; White *v.* Joy, 13 N. Y. 83; Swing *v.* White Co., 91 Wis. 517.

In Minnesota a count failing to state the legal capacity of the plaintiff is demurrable as stating no cause of action. Chamberlain *v.* Tiner, 31 Minn. 371 (admr.); Rossman *v.* Mitchell, 73 Minn. 198 (receiver — distinguishing Walsh *v.* Byrnes, 39 Minn. 527).

Waiver by failure to demur. — If a count is demurrable because of the legal incapacity of the plaintiff to sue, but no demurrer is filed, the objection is waived. Fuggle *v.* Hobbs, 42 Mo. 537 (executor); Gregory *v.* McCormick, 120 Mo. 657 (foreign executor); Seaton *v.* Davis, 1 Th. & C. 91 (guardian); Bartholomew *v.* Lyon, 67 Barb. 86 (infancy); Robbins *v.* Wells, 26 How. Pr. 15, 18 Abb. Pr. 191 (*semble* — administratrix); Van Zandt *v.* Grant, 67 N. Y. Ap. Div. 70, 73 (guardian); Moir *v.* Dodson, 14 Wis. 279 (foreign executor); Manseau *v.* Miller, 45 Wis. 430 (receiver); Webber *v.* Ward, 94 Wis. 605 (guardian); Mayer *v.* Barth, 97 Wis. 352 (trustee). — Ed.

[1] 11 How. Pr. 11. [2] 22 How. Pr. 236. [3] 37 N. Y. 648. [4] 53 Id. 648.
[5] 3 Civ. Pro. Rep. 401. [6] 11 Id. 61. [7] 10 Id. 176.

permit the plaintiff, as administrator, to maintain this action, notwithstanding the defective averment of his appointment to act as such. The judgment should be reversed, with costs, and a judgment entered overruling the demurrer to the complaint with leave to the defendants to answer in twenty days, on payment of the costs of the demurrer and of this appeal.

VAN BRUNT, P. J., and BRADY, J., concurred.

KELLEY v. LOVE, EXECUTOR.

SUPREME COURT, INDIANA, MAY TERM, 1871.

[35 *Indiana Reports*, 106.]

APPEAL from the Greene Common Pleas.

DOWNEY, C. J. The appellee, as executor of the will of Oliver H. Smith, deceased, sued the appellant on a judgment rendered in the Greene Circuit Court in favor of the Evansville, Indianapolis, and Cleveland Straight Line Railroad Company, against the appellant, and which it is alleged had been assigned by the plaintiff therein to the deceased. A copy of the judgment and also of the assignment are made part of the complaint and filed therewith. In the title of the case, the plaintiff styles himself as "executor of Oliver H. Smith's estate," and in the body of the complaint as "executor of the last will of Oliver H. Smith." It is not anywhere alleged in the complaint that Oliver H. Smith is dead, or that the plaintiff had been appointed executor of his will.

A demurrer to the complaint was filed, on the ground that, first, it did not state facts sufficient to constitute a cause of action; second, that the plaintiff had not legal capacity to sue; third, that there was a defect of parties plaintiffs. This demurrer was overruled, and the point reserved by exception. The defendant failing to answer over, final judgment was rendered against him.

The only error assigned here is the overruling the demurrer. The first[1] point made is, that the complaint does not allege the death of Smith, and that Love had been appointed the executor of his will. We think these facts sufficiently appear.[2] It is true that they might

[1] Only so much of the case as relates to this point is given. — ED.

[2] See to the same effect the following cases: *Administrator or executor.* — Miller v. Luco, 30 Cal. 257; Locke v. Klunker, 123 Cal. 231; Champlain v. Tilley, 3 Day, 303, 305 (*semble*); Jordan v. Hamlink, 21 Dist. Col. 189; Langsdale v. Girton, 51 Ind. 99; Brigham v. Coburn, 10 Gray, 329 (*semble*); Ellis v. Appleby, 4 R. I. 462 (*semble*).

Assignee for creditors. — Wilhoit v. Cunningham, 87 Cal. 453; Brigham v. Coburn, 10 Gray, 329.

In several states, an averment that the plaintiff is executor (or other representative of A. B. is sufficient, even if it is not enough to state simply that he sues as executor of A. B. Mayer v. Turnley, 60 Iowa, 407; Sparks v. Ancient Association, 100 Iowa, 458; Clark v.

have been, and perhaps, generally are, alleged in a more direct manner than in this case. Profert of the letters testamentary need not be made, nor can the right of the executor to sue be questioned, unless by a sworn answer. 2 G. & H. 527, § 152.

The judgment is affirmed, with five per cent. damages and costs.

Pishon, 31 Me. 503; Brown v. Nourse, 55 Me. 230; Stewart v. Smith, 98 Me. 104; Ellis v. Appleby, 4 R. I. 462.

If the legal capacity of the plaintiff is sufficiently alleged to preclude a demurrer, the defendant must raise the question of incapacity by a special plea. If he pleads the general issue or a general denial he waives the objection. *e. g.*:

Administrator or executor. — Thynne v. Protheroe, 2 M. & Sel. 553; Yeaton v. Lynn, 5 Pet. 223; Wise v. Getty, 3 Cranch, C. C. 292; McAleer v. Clay Co., 38 Fed. 707, 710; Worsham v. Goar, 4 Port. 441 (admr. — general issue); Clarke v. Clarke, 51 Ala. 498; Louisville Co. v. Trammell, 93 Ala. 350; Kowanachi v. Askew, 17 Ark. 595; Denver Co. v. Woodward, 4 Colo. 1; Cooper v. People, 28 Colo. 87 (*semble*); Champlain v. Tilley, 3 Day, 303; Phœnix Bank v. Curtis, 14 Conn. 437, 440 (*semble*); Harris v. Harris, 2 Harringt. 354 (*semble*); Sullivan v. Honacker, 6 Fla. 372; Kenan v. Du Bignon, 46 Ga. 258; Merritt v. Cotton Co., 55 Ga. 103; Ballance v. Frisby, 3 Ill. 63; Collins v. Ayres, 13 Ill. 358; Breckenridge v. Ostrom, 79 Ill. 71; Chicago Co. v. Browne, 103 Ill. 317; Union Co. v. Shacklet, 119 Ill. 232; Fischer v. Stiefel, 179 Ill. 59; Dye v. Gritton, 29 Ill. Ap. 54; Harte v. Fraser, 104 Ill. Ap. 201; Lutcher Co. v. Eells, 108 Ill. Ap. 156; Pollard v. Buttery, 3 Blackf. 239; Lowe v. Bowman, 5 Blackf. 410; Mayes v. Turley, 60 Iowa, 407; Sparks v. Accident Ass'n, 100 Iowa, 458; Kesley v. West, 3 Litt. 362; Willis v. Willis, 6 Dana, 48; Clark v. Pishon, 31 Me. 503; Brown v. Nourse, 55 Me. 230; Langdon v. Potter, 11 Mass. 313; Vickery v. Beir, 16 Mich. 50 (*semble*); Fuggle v. Hobbs, 42 Mo. 537; Gregory v. McCormick, 120 Mo. 657 (but see Gilmore v. Morris, 13 Mo. Ap. 114); Varnum v. Taylor, 59 Hun, 554; Smith v. Ludlow, Anth. N. P. 174; Robbins v. Wells, 18 Abb. Pr. 191, 26 How. Pr. 15 s. c.; Nance v. Oakley, 122 N. Y. 631; Gibbs v. Cahoon, 3 Dev. 80; Hyman v. Gray, 4 Jones (N. Ca.) 155; McKimm v. Riddle, 2 Dall. 100; Ayers v. Musselman, 2 Browne, 115; Lewis v. Ewing, 3 S. & R. 44 (*semble*); Finney v. Huston, 7 W. N. (Pa.) 44; Ellis v. Appleby, 4 R. I. 462; Kelly v. Thomson, 2 Brev. 58; Reynolds v. Torrance, 2 Brev. 59; Brockington v. Vereen, 1 Bail. 447; Hutchinson v. Bobo, 1 Bail. 546; Hankinson v. Charlotte Co., 41 S. Ca. 1; Mickle v. Construction Co., 41 S. Ca. 394; Glass v. Stovall, 10 Humph. 453; Cheek v. Wheatley, 11 Humph. 556; Marble Co. v. Black, 89 Tenn. 118; Cheatham v. Riddle, 12 Tex. 112; Dignowitty v. Coleman, 77 Tex. 98; Callahan v. Hendrix, 79 Tex. 494; Clapp v. Beardsley, 1 Vt. 151; Perrin v. Granger, 33 Vt. 101, 106 (*semble*); Moir v. Dodson, 14 Wis. 279; Manseau v. Mueller, 45 Wis. 430; State v. Tuttle, 53 Wis. 45; Wood v. Union Ass'n, 63 Wis. 9; Webber v. Ward, 94 Wis. 605; Mayer v. Barth, 97 Wis. 352 (trustee).

Receiver. — Dawkins v. Mathis, 47 S. Ca. 64.

Lunatic. — Ætna Co. v. Sellers, 154 Ind. 370; Blackwell v. Mortgage Co., 65 S. Ca. 105.

Infant. — Hicks v. Beam, 112 N. Ca. 642.

Married woman. — Beville v. Cox, 109 N. Ca. 265.

Overseers of Poor. — Carpenter v. Whitman, 15 Johns. 208.

LEGAL CAPACITY OF DEFENDANT. — An averment that the defendant is executor (or other representative) of A. B. is sufficient. Holliday v. Fletcher, 2 Ld. Ray. 1510, 2 Stra. 781, 1 Barnard, 29 s. c. (discrediting Wade v. Atkinson, Cro. Jac. 9; Bracton v. Lister, 2 Vent. 84); Petto v. Ruddock, 1 Sid. 228; Curtis v. Bowrie, 2 McL. 374; Wilson v. Bothwell, 50 Ala. 378; Espalla v. Richard, 94 Ala. 159; Brown v. Hicks, 1 Ark. 232; Wise v. Williams, 72 Cal. 544; Kirsch v. Derby, 96 Cal. 602 (*semble*) (see Barfield v. Price, 40 Cal. 535, 543); Stewart v. Smith, 98 Me. 104; Giles v. Perryman, 1 Har. & G. 164; Stoner v. Devilbis, 70 Md. 144; Dodson v. Scroggs, 47 Mo. 285; Skelton v. Scott, 18 Hun, 375; Kingsland v. Stokes, 25 Hun, 107 (affirming s. c. 58 How. Pr. 1); Meara v. Hobrook, 20 Oh. St. 137 (receiver).

And in such cases the objection to the legal capacity of the defendant to be sued must be taken by a special plea. It is waived by pleading the general issue or a general denial. Espalla v. Richard, 94 Ala. 159; Harris v. Harris, 2 Harringt. 354; Stewart v. Smith, 98 Me. 104; Stewart v. Richardson, 32 Miss. 313; Lomax v. Spierin, Dudley (S. Ca.) 335; Greenville Co. v. Joyce, 3 Rich. 117; Tolbert v. McBride, 75 Tex. 95. — ED.

S. BERNEY AND OTHERS v. A. J. DREXEL AND OTHERS.

SUPREME COURT, NEW YORK, OCTOBER TERM, 1884.

[33 *Hun*, 419.]

MOTION for a reargument of an appeal from a judgment overruling a demurrer to the complaint.

DAVIS, P. J. The demurrer in this case assigned the following grounds: —

First. That the plaintiffs had no legal capacity to sue.

Second. That there was a defect of parties defendant.

Third. That the complaint did not state facts sufficient to constitute a cause of action.

The substantial question presented on this motion is, whether on these assignments of grounds of demurrer it can be urged that the demurrants are entitled to judgment on the ground that it appears by the allegations of the complaint that there is a misjoinder of parties plaintiff. This question was not presented on the former argument by counsel, nor was it considered by the court. The allegations of the complaint do show that the title of the cause of action, and the right to maintain the same, are vested in the several plaintiffs, other than the plaintiff Louise Berney, who otherwise appears by the complaint to have an interest in the estate of her deceased husband as a beneficiary in trust, if the other plaintiffs recover. The long and short of it is that she is improperly joined as a plaintiff.

Section 488 of the Code of Civil Procedure specifies when a defendant may demur to a complaint and on what grounds. The fifth ground so specified is "that there is a misjoinder of parties plaintiff." Section 490 declares that the demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. And it further provides that an objection taken under the fifth, sixth, and seventh subdivisions "must point out specifically the particular defect relied upon."

In order therefore to take advantage by demurrer of the misjoinder of Mrs. Berney as a plaintiff in this action it was necessary that the plaintiff should not only assign as a ground of demurrer "that there is a misjoinder of the parties plaintiff," but have proceeded to point out that the plaintiff Louise Berney is improperly joined with the other plaintiffs, because she is shown to have no cause of action jointly with them; but that the sole cause of action set forth in the complaint is averred to be in the other plaintiffs exclusive of her. A demurrer with such an assignment and specification would probably have been sustained both at the special term and on appeal.[1]

[1] Gassett v. Kent, 19 Ark. 602; Christian v. Crocker, 25 Ark. 327; Rowe v. Bacigalluppi, 21 Cal. 633 (*semble*); Tennant v. Pfister, 45 Cal. 270 (*semble*); Daniels v. Miller, (Ind. Terr. 1902) 69 S. W. R. 925; Enos v. Leach, 18 Hun, 139; Tew v. Wolfsohn, 77 N. Y. Ap. Div.

It is insisted, however, that the point can be taken under the general assignment made under the eighth subdivision of the section, to wit, "that the complaint does not state facts sufficient to constitute a cause of action," because the complaint shows affirmatively that the cause and right of action are not vested in all the parties plaintiff. There would be greater force in this contention if it were not for the fact that the present Code makes the misjoinder of plaintiffs a special ground of demurrer, and requires that when that objection is taken the demurrant must proceed to "point out specifically the particular defect relied upon." If that had been done in this case the plaintiffs could have amended the complaint by dropping out the name of Mrs. Berney altogether; or by transferring her name, if for any reason it was desirable to continue her as a party, to the rank of defendant. They are deprived of that opportunity if it be held at this stage of the case that the same point may be made under the eighth subdivision of section 488.

Besides, it may be answered that the eighth subdivision of the section does not reach any such defect. It is aimed only at a failure to state any cause of action in the complaint. Where several plaintiffs unite in bringing an action and state in their complaint facts which do constitute a cause of action in favor of one or more, but not of all the plaintiffs, a demurrer based upon an assignment of the eighth ground of the section must be overruled, because the defect is not that the complaint does not state facts sufficient to constitute a cause of action, but that it fails to show that the cause of action thus stated belongs to all the plaintiffs — which is quite another thing and belongs to another subdivision of the section.[1]

454, 456 (Palmer v. Davis, 28 N. Y. 242, 245; Case v. Carroll, 35 N. Y. 385; Allen v. Buffalo, 38 N. Y. 280; People v. Crooks, 53 N. Y. 648; Peabody v. Washington Co., 20 Barb. 339 are superseded) *Accord*.

Redelsheimer v. Miller, 107 Ind. 485 (*semble*); Armstrong v. Dunn, 143 Ind. 433; Frankel v. Garrard, 160 Ind. 209, 215 (but a demurrer to a count on the ground that it does not state facts sufficient to constitute a cause of action will be sustained in Indiana, if the count fails to state a cause of action as to any one of the parties plaintiff); Bershire v. Shultz, 25 Ind. 533; Harris v. Harris, 61 Ind. 117; Hyatt v. Cochran, 85 Ind. 231; Brown v. Critchell, 110 Ind. 31; Brunson v. Henry, 140 Ind. 455; McIntosh v. Zaring, 150 Ind. 301; Mornan v. Carroll, 35 Iowa, 22; Dubuque Co. v. Reynolds, 41 Iowa, 454 (in Iowa the objection of misjoinder of parties must be taken by motion); Winifield Co. v. Maris, 11 Kan. 128; McKee v. Eaton, 26 Kan. 226; Hurd v. Simpson, 47 Kan. 372; Dean v. English, 18 B. Mon. 132 (objection to be taken by motion to strike out superfluous parties); Hoard v. Clum, 31 Minn. 186; Boldt v. Budwig, 19 Neb. 739; Burns v. Ashworth, 72 N. Ca. 496 (*semble*); Stiles v. Guthrie, 3 Okla. 26; Weber v. Dillon, 7 Okla. 568; Mader v. Plano Co., (S. Dak. 1903) 97 N. W. R. 843; Willard v. Reas, 26 Wis. 540; Marsh v. Board, 38 Wis. 250; Kucera v. Kucera, 86 Wis. 416; Geilfuss v. Gates, 87 Wis. 395; Wunderlich v. Chicago Co., 93 Wis. 132 *Contra*. — Ed.

[1] Tennant v. Pfister, 51 Cal. 511; O'Callaghan v. Bode, 84 Cal. 489 *Accord*. The demurrer must point out the particular misjoinder, O'Callaghan v. Bode, 84 Cal. 489. And, of course, the objection is waived, if there is no demurrer, Gillam v. Sigman, 99 Cal. 637.

Misjoinder of defendants. — The joinder of too many parties defendant is not a ground of demurrer. Fry v. Street, 37 Ark. 39; Bennett v. Preston, 17 Ind. 291; Hill v. Marsh, 46 Ind. 218; Redelsheimer v. Miller, 107 Ind. 485; Clark v. Crawfordsville Co., 125 Ind. 277; Armstrong v. Dunn, 143 Ind. 433; Beckwith v. Dargets, 18 Iowa, 303; Turner v. First Bank, 36 Iowa, 562; King v. King, 40 Iowa, 120; Whiteoak v. Oskaloosa, 54 Iowa, 513; Dolan v. Hubinger, 109 Iowa, 408; Cedar Bank v. Lavery, 110 Iowa, 575; Railway Co. v. Smith, 59

Assuming as we do that the court did not err in holding that facts sufficient to constitute a cause of action are stated in the complaint, it necessarily follows that a reargument would be quite unavailing to the demurrants and should therefore be denied, with the usual costs of a motion.

BRADY and DANIELS, JJ., concurred.

Motion denied, with ten dollars costs.

B. PORTER *v.* L. FLETCHER AND ANOTHER.

SUPREME COURT, MINNESOTA, MARCH 5, 1879.

[25 *Minnesota Reports*, 493.]

GILFILLAN, C. J. The complaint alleges that in May, 1877, the defendants owned six certain lots in an addition to Minneapolis, and, to induce plaintiff and one Libby to purchase the same, and with intent to cheat and defraud them, falsely and fraudulently represented to them that the lots extended out to and fronted on Twenty-first Avenue south, and Minnehaha Avenue, and thence back to an alley through the centre of the block, and were about the ordinary size of lots in that vicinity — to wit, about fifty feet front by about one hundred and fifty-seven feet deep; and that, believing in said representations, the plaintiff and Libby purchased the lots from defendants, and paid them therefor $3000, and defendants conveyed the lots to them; that such representations were false, and known to defendants to be so; and that, except as to a part of one of them, the lots do not extend to the avenue, but that a strip of land about forty feet wide, owned by other persons, and not conveyed by defendants' deed, lies between the lots and the avenue; that afterwards, and before they discovered the fraud, plaintiff and Libby made partition of the lots, each taking in severalty three of them; alleges that, by reason of such matters, plaintiff has sustained damages to a specified amount, and

Kan. 80; Dean *v.* English, 18 B. Mon. 132; Livermore *v.* Norfolk Co., (Mass. 1904) 71 N. E. 305; Lewis *v.* Williams, 3 Minn. 151; Nichols *v.* Randall, 5 Minn. 304; Roose *v.* Perkins, 9 Neb. 304; Boldt *v.* Budwig, 19 Neb. 739; Brownson *v.* Gifford, 8 How. Pr. 389; Voorhies *v.* Baxter, 1 Abb. Pr. 43, 44; Pinckney *v.* Wallace, 1 Abb. Pr. 82; Gregory *v.* Oakesville, 12 How. Pr. 134; N. Y. Co. *v.* Schuyler, 17 N. Y. 592; Palmer *v.* Davis, 28 N. Y. 242; Davy *v.* Betts, 23 How. Pr. 396; Richtmeyer *v.* Richtmeyer, 50 Barb. 55; Fish *v.* Hose, 59 How. Pr. 238; Nichols *v.* Drew, 94 N. Y. 577; McCrea *v.* Cahoon, 54 Hun, 577; Paxton *v.* Patterson, 26 Abb. N. C. 389; Tew *v.* Wolfsohn, 174 N. Y. 372, 77 N. Y. Ap. Div. 454; Hall *v.* Gilman, 77 N. Y. Ap. Div. 458; Adams *v.* Slingerland, 87 N. Y. Ap. Div. 323; Burns *v.* Ashworth, 79 N. Ca. 496; Powers *v.* Bumcratz, 12 Oh. St. 273; Gutridge *v.* Vanatta, 27 Oh. St. 366; Neil *v.* Board, 31 Oh. St. 15; Clark *v.* Bayer, 32 Oh. St. 299; Stiles *v.* Guthrie, 3 Okla. 96; Cohen *v.* Ottenheimer, 23 Oreg. 220; Gr. West Co. *v.* Ætna Co., 40 Wis. 373; Murray *v.* McGarrigle, 69 Wis. 483. But see *contra*, Fults *v.* Waters, 2 Mont. 185 (*semble*); Cunningham *v.* Orange, 74 Vt. 115 (following the old common law rule).

By the codes of some states the misjoinder of parties plaintiff or defendant is made a ground of demurrer. Boone, Code Pleading, § 50, n. 2. — ED.

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demands judgment therefor. The defendants demurred: *first*, for defect of parties plaintiff, because Libby is not joined.[1]

The first ground of demurrer is well taken. An objection is made that a demurrer for defect of parties will not lie, except it appears from the complaint that the original proper party to the cause of action not joined is still alive, so that he can be made a party, or, if dead, who succeeded to his interest or liability, as seems to have been required in a plea in abatement for want of proper parties, at common law. If this were so, it would be difficult to conceive a well-drawn complaint upon which the question of want of proper parties could be raised by demurrer. The demurrer given by the statute is not a mere substitute for the plea in abatement. The former raises a question of law upon the facts stated in the complaint. The latter presented an issue of fact, and as it was regarded as a dilatory plea, strict rules were applied to it, and it was required to state the facts so fully as to exclude the possibility of its having been improperly interposed. The demurrer presents the issue of law that upon the facts stated in the complaint, no other facts appearing, another party named should be joined as plaintiff or defendant. If, on those facts standing alone, some other party should be joined, the complaint ought to have alleged other facts, showing that the interest or liability of such other party had ceased.[2]

Order reversed.

[1] Only so much of the case is given as relates to this ground of demurrer. — ED.

[2] In accordance with the principal case, if the declaration discloses the non-joinder of an essential party, it is demurrable, although it does not appear that such party is alive.

Non-joinder of a party as plaintiff. — Osborne v. Crosberne, 1 Sid. 238 (*semble*); Hayes v. Lasater, 3 Ark. 565; Sullivan v. N. Y. Co., 119 N. Y. 348.

Non-joinder of party as defendant. — Blackwell v. Ashton, Al. 21; Osborne v. Crosberne, 1 Sid. 238 (*semble*); King v. Young, 2 Anst. 448; King v. Chapman, 3 Anst. 811; South v. Tanner, 2 Taunt. 254; Cocks v. Brewer, 11 M. & W. 51, 53, 55 (*semble*); Gilman v. Rives, 10 Pet. 298; Percival v. McCoy, 4 McCrary, 418; Bragg v. Wetzel, 5 Blackf. 95; Harwood v. Roberts, 5 Me. 441; Merrick v. Trustees, 8 Gill, 59, 74; Prather v. Monro, 11 Gill & J. 261 (*scire facias*); Kent v. Holliday, 17 Md. 387; Hanley v. Donoghue, 59 Md. 239; Eaton v. Bailson, 33 How. Pr. 80; Green v. Lippincott, 53 How. Pr. 33; Hyde v. Van Valkenburgh, 1 Daly, 416; Sanders v. Yonkers, 63 N. Y. 489 (the decisions to the contrary in Brainard v. Provost, 11 How. Pr. 569; Scofield v. Van Syckel, 23 How. Pr. 97 are overruled); Sweigert v. Berk, 8 S. & R. 308; Leftwich v. Berkeley, 1 Hen. & M. 61; Newell v. Wood, 1 Munf. 555.

But see *contra*, Dillon v. State Bank, 6 Blackf. 5; Deegan v. Deegan, 22 Nev. 185; Smith v. Miller, 49 N. J. 521 (*semble*); Geddis v. Hawk, 10 S. & R. 33 (*semble*).

The non-joinder of an essential party is a good ground of demurrer.

Plaintiffs. — Vernon v. Jefferys, 2 Stra. 1146; Bell v. Layman, 1 Monr. 39 (*semble*); Mackall v. Roberts, 3 Monr. 130 (*semble*); Drury v. Corey, 60 Mo. 224.

Defendants. — Snyder v. Voorhees, 7 Colo. 296; Durham v. Bischof, 47 Ind. 211; Smith v. Miller, 49 N. J. 521; Mott v. Ruenbuhl, 1 Tex. Ap. Civ. Cas. § 599. (But see *contra*, Mackall v. Roberts, 3 Monr. 130.)

By statute, in many states, the demurrer must point out the precise defect and give the name of the party to be joined.

Plaintiffs. — Gaines v. Walker, 16 Ind. 361; Kelley v. Love, 35 Ind. 106; Van Sickle v. Erdelmeyer, 36 Ind. 262; Marks v. Indianapolis Co., 38 Ind. 440; Willett v. Porter, 42 Ind. 250; Durham v. Bischof, 47 Ind. 211, 213; Nicholson v. Louisville Co., 55 Ind. 504; Dewey v. State, 91 Ind. 173; Foley v. Mail Co., 8 N. Y. Misc. Rep. 91.

Defendants. — Stephens v. Parvin, (Colo. 1905) 78 Pac. R. 688; Gaines v. Walker, 16 Ind. 361; Van Sickle v. Erdelmeyer, 36 Ind. 262; Marks v. Indianapolis Co., 38 Ind. 440;

State v. McClelland, 138 Ind. 395; Boseker v. Chamberlain, 160 Ind. 114; Smith v. Miller, 49 N. J. 521 (statutory notice served purpose of special demurrer); Skinner v. Stewart, 13 Abb. Pr. 442; Hodge v. Drake, 37 N. Y. St. Rep. 933; Baker v. Hawkins, 29 Wis. 576; Emerson v. Schwindt, 108 Wis. 167.

Accordingly the objection of defect of parties plaintiff or defendant cannot be taken by a demurrer on the ground that the declaration does not state facts sufficient to make a cause of action. Grain v. Aldrich, 38 Cal. 514; Strong v. Downing, 34 Ind. 300; Clough v. Thomas, 53 Ind. 24; Bray v. Black, 57 Ind. 417; Cox v. Bird, 65 Ind. 277; Barnett v. Leonard, 66 Ind. 422; Whipperman v. Dunn, 124 Ind. 349; Foster v. Lyon Co., 63 Kan. 43; Walton v. Washburn, 23 Ky. L. Rep. 1008; Mahoney v. Minn. Co., 71 Minn. 331; Svanburg v. Fosseen, 75 Minn. 350; Ross v. Sage, 11 N. Dak. 458; Umsted v. Buskirk, 17 Oh. St. 113; Beyer v. Crandon, 98 Wis. 306.

A party can demur for the non-joinder of another only when he is himself interested in having that other joined. Anderton v. Wolf, 41 Hun, 571; Bauer v. Platt, 79 Hun, 336, 332; Thompson v. Richardson, 4 N. Y. Ap. Div. 62.

Waiver by Failure to Demur. — If the declaration is demurrable for defect of parties plaintiff or defendant, the objection is waived if not taken by demurrer.

Defect of parties plaintiff. — Ryan v. Mullinix, 45 Iowa, 631; Bouton v. Orr, 51 Iowa, 473; Prichard v. Peace, 98 Ky. 99; Rittenhouse v. Clark, 110 Ky. 147; Combs v. Kirsh, (Ky. 1905) 84 S. W. R. 562; McRoberts v. South Co., 18 Minn. 108, 110; Moore v. Bevier, 60 Minn. 240; Mason v. St. Paul Co., 82 Minn. 336; Reugger v. Lindenberger, 53 Mo. 364; McConnell v. Braynor, 63 Mo. 461; Dunn v. Hannibal Co., 68 Mo. 268; Mech. Bank v. Gilpin, 105 Mo. 17; Castile v. Ford, 58 Neb. 507; Smith v. Miller, 49 N. J. 521; Gen. Mut. Co. v. Benson, 5 Duer, 168; Wells v. Cone, 55 Barb. 585; Hees v. Nellis, 65 Barb. 440, 1 Th. & C. 118 s. c.; Cunningham v. White, 45 How. Pr. 486; Davidson v. Elms, 67 N. Ca. 228; Johnson v. Good, 114 N. Ca. 62; Wyman v. Heran, 9 Okla. 35; Spencer v. Van Cott, 2 Utah, 337; Hannegan v. Roth, 12 Wash. 695; Kimball v. Noyes, 17 Wis. 695; Dreutzer v. Lawrence, 58 Wis. 594.

Defect of parties defendant. — Medano Co. v. Adams, 29 Colo. 317; Groves v. Ruby, 24 Ind. 418; Shirts v. Irons, 54 Ind. 13; Thomas v. Wood, 67 Ind. 132; Talmage v. Bierhause, 103 Ind. 270; Carskaddon v. Pine, 154 Ind. 410; Boseker v. Chamberlain, 160 Ind. 114; Coe v. Anderson, 92 Iowa, 515; McCallister v. Savings Bank, 80 Ky. 684; Blakely v. Le Duc, 22 Minn. 476; Baldwin v. Canfield, 26 Minn. 43; Horstkotte v. Menier, 50 Mo. 158; Gimbel v. Pignero, 62 Mo. 240; Donnan v. Intelligencer Co., 70 Mo. 168; Parchen v. Peck, 2 Mont. 567; Beeler v. First Bank, 34 Neb. 348; Bates Co. v. Scott, 56 Neb. 475; Engel v. Dado, 66 Neb. 400; Potter v. Ellice, 48 N. Y. 321; Davis v. Bechstein, 69 N. Y. 440; Baggott v. Boulger, 2 Duer, 160; Rhodes v. Dymock, 33 N. Y. Super. Ct. 141; Leak v. Covington, 99 N. Ca. 559; Howe v. Harper, 127 N. Ca. 356; Osborn v. Logus, 28 Oreg. 302; Cooper v. Thomason, 30 Oreg. 161; Allan v. Cooley, 53 S. Ca. 77; Carney v. La Crosse Co., 15 Wis. 503; Hall v. Gilbert, 31 Wis. 691, 695; Hallam v. Stiles, 61 Wis. 270; Radant v. Werheim Co., 106 Wis. 600.

The objection of non-joinder of parties, if apparent on the face of the declaration, cannot be taken even by answer. Andrews v. Mokelumne Co., 7 Cal. 330; Alexander v. Gaar, 15 Ind. 89; Musselman v. Kent, 33 Ind. 452; McCormick v. Blossom, 40 Iowa, 256; Justice v. Phillips, 3 Bush, 200; Lowry v. Harris, 12 Minn. 255; State v. Sappington, 68 Mo. 454; Walker v. Deaver, 79 Mo. 664; Zabriskie v. Smith, 13 N. Y. 322; De Puy v. Strong, 37 N. Y. 372; Patchin v. Peck, 38 N. Y. 39; Fisher v. Hall, 41 N. Y. 416; Ingraham v. Ingraham, 12 Barb. 9, 18; Dennison v. Dennison, 9 How. Pr. 246; Gassett v. Crocker, 10 Abb. Pr. 133; Maxwell v. Pratt, 24 Hun, 448; Stelling v. Grabowsky, 46 N. Y. St. Rep. 700; Cunningham v. White, 45 How. Pr. 486.

Non-joinder of a joint contractor. — Apart from modern legislation the non-joinder of a joint contractor is not a ground of demurrer. The objection is to be taken by a plea in abatement. Gray v. Sharp, 62 N. J. 102. — Ed.

A. H. WILES AND OTHERS v. L. SUYDAM.

COURT OF APPEALS, NEW YORK, FEBRUARY 8, 1876.

[64 *New York Reports*, 173.]

CHURCH, Ch. J.[1] The ground of demurrer relied upon is that several causes of action are improperly united. The complaint contains but one count composed of a series of allegations, and was doubtless framed upon the theory that there is but one cause of action contained. If, however, the complaint does contain several causes of action, and they are improperly united, the omission to state the causes of action in separate counts properly numbered does not deprive the defendant of the right to demur.[2] Goldberg *v.* Utley.[3] The complaint alleges an indebtedness against the Imperishable Stone Block Pavement Company of New York City, which had been prosecuted to judgment and execution; that the defendant was a "stockholder to the amount of $50,000," but had not paid for the same, and that no certificate had been made and recorded that the capital was paid in. Section 10 of the act authorizing the formation of corporations for manufacturing and other purposes declares that until such certificate is recorded the stockholders shall be liable for the debts of the company to the amount of their stock respectively. The complaint also alleges that at the time the debt was contracted and ever since, the defendant was a trustee of the corporation, and that no report was filed on the 1st day of January, 1873, nor at any time since, and for this neglect the twelfth section of the act aforesaid declares that the trustees shall be liable for all the debts of the corporation then existing, or which may be thereafter created, until such report is filed.

It is insisted by the counsel for the plaintiff that this constitutes but one cause of action, and he argues that the cause of action is to recover the debt upon two grounds of personal liability created by statute. I am unable to concur in this view. The allegations in the complaint are sufficient to establish a perfect cause of action against the defendant as a stockholder primarily liable for the debts to the amount of his stock. The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, but of an entirely different character. Here the liability is created by statute and is in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the company.

The nature of the two actions is essentially different, although the

[1] Only a part of the opinion of the court is given. — ED.

[2] Haskell Bank *v.* Bank, 51 Kan. 39; Ederlin *v.* Judge, 86 Mo. 359; Mulholland *v.* Rapp, 50 Mo. 42; Goldberg *v.* Utley, 60 N. Y. 427, 429; Lamming *v.* Galusha, 135 N. Y. 239 (*semble*); Anderson *v.* Hill, 53 Barb. 238; Reed *v.* Livermore, (Ap. Div. Jany. 1905) 91 N. Y. S. 986; Market Bank *v.* Jones, 7 N. Y. Misc. Rep. 207; Plankinton *v.* Hildebrand, 89 Wis. 209 *Accord.* — ED.

[3] 60 N. Y. 427.

object to be attained is the same. The facts to establish the liability are entirely unlike. The measure of liability is different; the defences are different. The rights of the defendant may be seriously prejudiced.

It may be convenient for the plaintiff to combine the two causes of action, but, looking at the rights of both parties and the rules of law, we cannot think that the Code was designed to authorize their union in one complaint.[1]

[1] That a misjoinder of causes of action in a declaration is a ground of demurrer is well settled. King *v.* Inlander, 133 Fed. 416; Pharr *v.* Bachelor, 3 Ala. 237 (*semble*); Lyon *v.* Evans, 1 Ark. 349; Green *v.* Taney, 7 Colo. 278 (*semble*); Bissell *v.* Beckwith, 33 Conn. 357, 362; Willis *v.* Galbreath, 115 Ga. 793; Townsend *v.* Brinson, 117 Ga. 375; Bodley *v.* Roop, 6 Blackf. 158; Fritz *v.* Fritz, 23 Ind. 388 (compare Lane *v.* State, 27 Ind. 108; Baddeley *v.* Patterson, 78 Ind. 157; Cargar *v.* Fee, 140 Ind. 572); Jeffers *v.* Forbes, 28 Kan. 174; Hurd *v.* Simpson, 47 Kan. 372; Haskell Bank *v.* Bank, 51 Kan. 39; Fernald *v.* Garvin, 55 Me. 414 (*semble*); Fairfield *v.* Burt, 11 Pick. 244; Whiting *v.* Cook, 8 All. 63; Shattuck *v.* Marcus, 182 Mass. 572; Livermore *v.* Norfolk Co., (Mass. 1904) 71 N. E. R. 305; Anderson *v.* Scandia Bank, 53 Minn. 191; Ederlin *v.* Judge, 36 Mo. 350; Mulholland *v.* Rapp, 50 Mo. 42; Lane *v.* Dowd, 172 Mo. 167; Reed *v.* Reed, (Neb. 1904) 98 N. W. R. 73; Reed *v.* Reed, (Neb. 1904) 98 N. W. R. 76; Wills *v.* Shinn, 42 N. J. 138; Gilmore *v.* Christ Hospital, 68 N. J. 47; Cooper *v.* Bissell, 16 Johns. 146; Pell *v.* Lovett, 19 Wend. 546; Goldberg *v.* Utley, 60 N. Y. 427, 429; Nichols *v.* Drew, 94 N. Y. 22; Lamming *v.* Galusha, 135 N. Y. 239 (*semble*); Tew *v.* Wolfsohn, 174 N. Y. 272 (*semble*); Anderson *v.* Hill, 53 Barb. 238; Averill *v.* Barber, 20 N. Y. W. D. 11; Zorn *v.* Zorn, 38 Hun, 67; Groh *v.* Flammer, (Ap. Div. Jany. 1905) 91 N. Y. S. 423; Green *v.* Davies, (Ap. Div. Jany. 1905) 91 N. Y. S. 470; Stoddard *v.* Bell, (Ap. Div. Jany. 1905) 91 N. Y. S. 477; Sweet *v.* Ingerson, 12 How. Pr. 331; Harris *v.* Eldridge, 5 Abb. N. C. 278; Adams *v.* Stevens, 7 N. Y. Misc. Rep. 468; Morton *v.* Western Co., 130 N. Ca. 299; Weber *v.* Dillon, 7 Okla. 568; Hayden *v.* Pearce, 33 Oreg. 89; Joy *v.* Hill, 36 Vt. 333; Dean *v.* Cass, 73 Vt. 314; Richardson *v.* Carbon Co., 10 Wash. 648; Dudley *v.* Duval, 29 Wash. 528; Lavanway *v.* Cannon, (Wash. 1905) 79 Pac. R. 1117 (*semble*); Barnes *v.* Beloit, 19 Wis. 93; Hackett *v.* Carter, 38 Wis. 394; Leidersdorf *v.* Second Bank, 50 Wis. 406; Plankinton *v.* Hildebrand, 89 Wis. 209; Boyd *v.* Mut. Co., 116 Wis. 155.

Misjoinder only of good causes of action. — A demurrer for misjoinder of causes of action will be sustained only when the causes of action are valid. Sullivan *v.* N. Y. Co., 19 Blatchf. 388, 9 N. Y. Civ. Pro. 285 s. c.; Jenkins *v.* Thomason, 32 S. Ca. 566; Lee *v.* Simpson, 29 Wis. 333; Hiles *v.* Johnson, 67 Wis. 517; Koepke *v.* Winterfield, 116 Wis. 44; Boyd *v.* Mut. Co., 116 Wis. 155, 176.

But see *contra*, Higgins *v.* Chrichton, 63 How. Pr. 354, 11 Daly, 114 s. c.

A declaration uniting two causes of action, one within and one without the jurisdiction of the court, is not open to a demurrer for a misjoinder of causes of action. Dodge *v.* Colby, 108 N. Y. 445.

Waiver. — If the objection of misjoinder is not taken by demurrer, it is waived. Marius *v.* Bicknell, 10 Cal. 217; Fuhn *v.* Weber, 38 Cal. 636; Hibernia Bank *v.* Ordway, 38 Cal. 679; Learned *v.* Castle, (Cal. 1884) 3 West Coast R. 154; Everdon *v.* Mayhew, 85 Cal. 1; Sickman *v.* Wollett, 31 Colo. 58; Johnson *v.* Bolt, (Colo. Ap. 1903) 72 Pac. R. 612; Frayley *v.* Bentley, 1 Dak. 25; Burrows *v.* Holderman, 31 Ind. 412; Keller *v.* Boatman, 49 Ind. 104; Rankin *v.* Collins, 50 Ind. 158; Simpson *v.* Greeley, 8 Kan. 586; Berry *v.* Carter, 19 Kan. 135; Fernald *v.* Garvin, 55 Me. 414; Barlow *v.* Leavitt, 12 Cush. 483; James *v.* Wilder, 25 Minn. 305; Dailey *v.* Houston, 58 Mo. 361; Mead *v.* Brown, 65 Mo. 552; Bandmann *v.* Davis, 23 Mont. 382; Porter *v.* Sherman Co., 36 Neb. 271; Gardner *v.* Gardner, 23 Nev. 207; Meloon *v.* Read, (N. H. 1905) 59 Atl. R. 946; Blossom *v.* Barrett, 37 N. Y. 434; Dodge *v.* Colby, 108 N. Y. 445; Smith *v.* Orser, 43 Barb. 187, 193; McMillan *v.* Edwards, 75 N. Ca. 81, 83; Finley *v.* Hayes, 81 N. Ca. 368; McCarthy *v* Garaghty, 10 Oh. St. 438; Cloon *v.* City Co., 1 Handy, 32; Field *v.* Hurst, 9 S. Ca. 277; Jackins *v.* Dickinson, 39 S. Ca. 436; Ross *v.* Jones, 47 S. Ca. 211; Ross *v.* Wait, 4 S. Dak. 584; Lee *v.* Mellette, 15 S. Dak. 586; Cory *v.* Wheeler, 14 Wis. 281; Mead *v.* Bagnall, 15 Wis. 156; Jones *v.* Hughes, 16 Wis. 683; Smith *v.* Putnam, 107 Wis. 155.

Under modern codes the objection of misjoinder cannot be taken even upon demurrer, unless the demurrer points out the precise misjoinder. Cox *v.* Western Co., 47 Cal 87;

The judgment must be reversed, and the demurrer sustained, with leave to the plaintiff to amend within the usual time.

All concur. *Judgment accordingly.*

Haverstick v. Trudel, 51 Cal. 431; Anguisola v. Arnaz, 51 Cal. 435; Green v. Taney, 7 Colo. 278; Irwine v. Wood, 7 Colo. 477; Henderson v. Johns, 13 Colo. 280; Stephens v. Parvin, (Colo. 1905) 78 Pac. R. 688; Mandlove v. Lewis, 9 Ind. 194; Wabash Co. v. Rooker, 90 Ind. 581; Shroyer v. Pittenger, 31 Ind. Ap. 158; Hudson v. McNear, (Me. 1904) 59 Atl. R. 546; Inhabitants v. Eames, 6 All. 417; Cheely v. Wells, 33 Mo. 106; Jamison v. Copher, 35 Mo. 483; Collier v. Ervin, 2 Mont. 335; Anderton v. Wolf, 41 Hun, 571; Turner v. Althaus, 6 Neb. 55; Davis v. N. Y., 75 N. Y. Ap. Div. 518; Hodge v. Drake, 37 N. Y. St. Rep. 933; Ruhling v. Hackett, 1 Nev. 360; Marvin v. Yates, 26 Wash. 50.

Apart from modern legislation the objection of misjoinder of actions is open on a general demurrer. See next paragraph but one of this note, and Emmons v. Nat. Assn., 135 Fed. 689; Hazlehurst v. Cumberland Co., (Miss. 1904) 35 So. R. 951; Gilmore v. Christ Hospital, 68 N. J. 47.

Objection to misjoinder by motion. — In a few states the objection to misjoinder of causes of action is taken not by demurrer but by motion. Terry v. Rosell, 32 Ark. 478; Grant v. McCarthy, 38 Iowa, 468 (parties plaintiff and defendant not the same in the united causes of action); McDonald v. Second Bank, 106 Iowa, 517; Hancock v. Johnson, 1 Met. (Ky.) 242; Murray v. Booker, 22 Ky. L. Rep. 781; Beale v. Barnett, 23 Ky. L. Rep. 1118.

By the former English practice the misjoinder of causes of action was a ground for a general demurrer, whether the parties plaintiff and defendant were the same — Willett v. Tydy, Carth. 188, 189; Denison v. Ralphson, 1 Vent. 365, 366; Kettle v. Bromsall, Willes, 118; Corbett v. Packington, 6 B. & C. 268; or different, May v. House, 2 Chit. 697; Rose v. Bowler, 1 H. Bl. 108; Jennings v. Newman, 4 T. R. 347; Brigdon v. Parkes, 2 B. & P. 424; Ashby v. Ashby, 7 B. & C. 444; Corner v. Shew, 3 M. & W. 350.

But by the Common Law Procedure Act of 1852, § 41, that practice was completely changed: "Causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment; and where two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient; and in such case such court or judge may order separate records to be made up, and separate trials to be made up." This provision is reproduced in substance in Order XVIII, r. 1 of Rules of Supreme Court, 1883.

There has been similar legislation in Iowa, Code of 1897, § 3545. The modern English practice is so superior to the American practice that it is surprising that it has not been adopted by the Code of Procedure in the several states.

By Order XVIII, rr. 3, 4, 5, and 6 of Rules of Supreme Court, 1883, provision is made for joinder of causes of action in certain cases, even though the parties plaintiff and defendant in the several claims are not the same.

Failure to state causes of action in separate counts. — If two causes of action, properly to be joined as separate counts of a declaration, are improperly blended in a single count, this objection cannot be raised by demurrer. Dawson v. Lail, 1 Ariz. 490; Gates v. Kieff, 7 Cal. 124; City Works v. Jones, 102 Cal. 506; Astill v. South Co., (Cal. 1905) 79 Pac. R. 594 (but see Nev. Co. v. Kidd, 37 Cal. 282, 42 Cal. 180; White v. Cox, 56 Cal. 169); Brewer v. McCain, 21 Colo. 382; Fox v. Rogers, 6 Idaho, 710; Hendry v. Hendry, 32 Ind. 249; Adams v. Secor, 6 Kan. 542; Eisenhower v. Stein, 37 Kan. 281; Ellsworth v. Rossiter, 46 Kan. 237; Atchison v. Board, 51 Kan. 617; Shrigley v. Black, 59 Kan. 487; Otis v. Mech. Bank, 35 Mo. 128; State v. Davis, 35 Mo. 406; Childs v. Kan. Co., 117 Mo. 414; Kern v. Pfaff, 44 Mo. Ap. 29; Hardy v. Miller, 11 Neb. 395; Ponca Co. v. Mikesell, 55 Neb. 98; Chicago Co. v. O'Neill, 58 Neb. 239; Bass v. Comstock, 38 N. Y. 21 (overruling several earlier cases); Freer v. Denton, 61 N. Y. 492; Anderson v. Hill, 53 Barb. 238; Colton v. Jones, 7 Robt. (N. Y.) 164; Austin v. Heiser, 6 S. Dak. 429; Smith v. Jones, 16 S. Dak. 337; Baxter v. State, 9 Wis. 38; Nichol v. Alexander, 28 Wis. 118; Sentinel Co. v. Thomson, 38 Wis. 489; Beers v. Kuehn, 84 Wis. 33.

But see *contra*, Downs v. Hawley, 112 Mass. 237, 241; Shattuck v. Marcus, 182 Mass. 572 (*semble*).

In general the objection of bunching two or more causes of action in a single count must be taken by a motion that the causes of action be stated separately.

In a few jurisdictions, however, the motion is that the plaintiff elect between the causes of action. For example, Fox v. Roger, 6 Idaho, 710; Otis v. Mech. Bank, 35 Mo. 128; State v. Davis, 35 Mo. 406; O'Neill v. Blase, 94 Mo. Ap. 648 (*semble*). — ED.

SECTION III.

Effect of Demurrer in Opening the Record.

SCHWAB *v.* FURNISS.

SUPERIOR COURT, NEW YORK, FEBRUARY 20, 1852.

[4 *Sandford*, 704.]

DEMURRER to portions of an answer. On the argument at the special term before SANDFORD, J., the defendant took the ground that the complaint did not show facts sufficient to constitute a cause of action against him, and that therefore judgment should be given in his favor and the complaint dismissed. The argument proceeded on the questions presented by the demurrer. Before examining those, the judge took the advice of his associates on the point raised by the defendant, and with the concurrence of them all, decided that, on a demurrer to a pleading, or portions of it, the rule now is the same as it was before the code of procedure, that judgment shall be given against the party who committed the first substantial fault. That is, if the demurrer be to an answer, and it appear that the complaint does not show a cause of action, judgment shall be given against the plaintiff and the complaint dismissed.[1] (Code, § 148.) If the demurrer be

[1] Piggot's Case, 5 Rep. 29 a; Duppa *v.* Mayo, 1 Wm. Saund. 282, 285, n. 5; Foster *v.* Jackson, Hob. 56; Smith *v.* Wilson, 3 East, 437, 442; Gorman *v.* Lenox, 15 Pet. 115; McCabe *v.* Cruikshank, 106 Fed. R. 649; Metropolitan Co. *v.* Toledo Co., 107 Fed. R. 628; Donnell *v.* Jones, 13 Ala. 490; Sykes *v.* Lewis, 17 Ala. 261; Baldwin *v.* Cross, 5 Ark. 510; Carlock *v.* Spencer, 7 Ark. 12; Burke *v.* Stilwell, 23 Ark. 294; Pierson *v.* Springfield Co., 7 Houst. 307; Johnson *v.* Pensacola Co., 16 Fla. 623; Price *v.* Drew, 18 Fla. 670 (*semble*); Stokes *v.* Baars, 18 Fla. 656; Myrick *v.* Merritt, 22 Fla. 335; Stott *v.* Chicago, 20 Ind. 280; Sugar Creek *v.* Johnson, 205 Ill. 281; McEwen *v.* Hussey, 23 Ind. 395; Ice *v.* Ball, 102 Ind. 42; Reeves *v.* Howes, 104 Ind. 435; Low *v.* Studebaker, 110 Ind. 57; Alkire *v.* Alkire, 134 Ind. 350; Hiatt *v.* Darlington, 152 Ind. 570; State *v.* Wheatley, 160 Ind. 183; Board *v.* Stock, 11 Ind. Ap. 167; Whitesew *v.* Strickler, (Ind. Ap. 1905) 73 N. E. R. 153; Coulter *v.* Bradley, (Ind. Ap. 1904) 69 N. E. R. 710 (*semble*); Martin *v.* McDonald, 14 B. Mon. 544; Hoskins *v.* South. Bank, 24 Ky. L. Rep. 2250; Shelden *v.* Call, 55 Me. 159; Osceola Tribe *v.* Schmidt, 57 Md. 98; Smith *v.* State, 66 Md. 215, 219; Loomis *v.* Youle, 1 Minn. 175; Smith *v.* Mulliken, 2 Minn. 319; Stratton *v.* Allen, 7 Minn. 502; Bennet *v.* Hargus, 1 Neb. 419, 424; Hower *v.* Aultman, 27 Neb. 251; Oakley *v.* Valley Co., 40 Neb. 900; Hawthorne *v.* State, 45 Neb. 871; West Point Co. *v.* State, 49 Neb. 223; State *v.* Moores, 52 Neb. 770; Leslie *v.* Harlow, 18 N. H. 518; Mershon *v.* Williams, 63 N. J. 394, 402; Ward *v.* Sackrider, 3 Cai. 262 (*semble*); U. S. *v.* White, 2 Hill, 59; Lipe *v.* Becker, 1 Den. 568; McKeon *v.* Lane, 1 Hall, 319; People *v.* Booth, 32 N. Y. 397; Baxter *v.* McDonnell, 154 N. Y. 432, 436, 155 N. Y. 83, 91; Little Falls *v.* Cobb, 80 Hun, 20; Savage *v.* Buffalo, 50 N. Y. Ap. Div. 136; Harvey *v.* Brisbin, 16 N. Y. St. Rep. 42; Noxon *v.* Bentley, 7 How. Pr. 316; Allen *v.* Malcolm, 12 Abb. Pr. N. S. 335 (N. Y. C. P.); Fromme *v.* Union Co., 39 N. Y. Misc. Rep. 105; George *v.* N. Y., 42 N. Y. Misc. Rep. 270; Bigelow *v.* Drummond, 42 N. Y. Misc. Rep. 617; Trott *v.* Sarchett, 10 Oh. St. 241; Hillier *v.* Stewart, 26 Oh. St. 652; R. R. Co. *v.* Moffatt, 35 Oh. St. 284; Barnett *v.* Barnett, 16 S. & R. 51; Railton *v.* Taylor, 20 R. I. 279; Shelton *v.* Bruce, 9 Yerg. 24; Lawton *v.* Howe, 14 Wis. 241; Ferson *v.* Drew, 19 Wis. 225; Dietrich *v.* Koch, 35 Wis. 618; Lowe *v.* Hyde, 39 Wis. 345 (demurrer to counterclaim) *Accord.* — ED.

to the reply, the plaintiff may show that the answer is insufficient, and have judgment in his favor.[1]

There is no more reason now than formerly, that a plaintiff should have judgment on demurring to an answer, when it appears upon the face of the record that he has no cause of action; or that the defendant should succeed on a demurrer to the reply, when it is apparent upon his answer that he has no defence.

(The judge, thereupon, looked into the complaint, and directed a judgment that it should be dismissed.)

CUMMINS v. GRAY.

SUPREME COURT, ALABAMA, JUNE TERM, 1833.

[*4 Stewart & Porter*, 397.]

ERROR to the circuit court of Tuskaloosa.

This action was debt, on a bond.

The defendant demurred to the declaration, but the demurrer was overruled. He then pleaded several pleas, to which the plaintiff demurred. The circuit court pronounced these pleas to be bad, but

[1] Bonham's Case, 8 Rep. 120 b; Turnor's Case, 8 Rep. 133 b; Tresham's Case, 9 Rep. 110 b; Gewen v. Roll, Cro. Jac. 131, 133; Marshall v. Freake, Palm. 287; Alexander v. Porter, Litt. 337, 341; Nicholson v. Simpson, 1 Stra. 297; Woodward v. Robinson, 1 Stra. 302; Palmer v. Stone, 2 Wils. 96; Anon., 2 Wils. 150; Lockwood v. Nash, 18 C. B. 536; U. S. v. Arthur, 5 Cranch, 257, 261; Sprigg v. Bank, 10 Pet. 257; Williams v. Moore, 33 Ala. 506; Brown v. Tucker, 7 Colo. 30; Knight v. Lawrence, 19 Colo. 425; Wade v. Doyle, 17 Fla. 522; Peoria Co. v. Neill, 16 Ill. 269; Massey v. People, 201 Ill. 409; Puntenny v. Paddock, 1 Blackf. 415; Wiley v. Howard, 15 Ind. 169; Bank v. Lockwood, 16 Ind. 306; Menifee v. Clark, 35 Ind. 304; Ætna Co. v. Baker, 71 Ind. 102; Wile v. Matherson, 2 Greene, (Iowa) 184; Alexander v. Porter, Litt. (Ky.) 341; Chesapeake Co. v. Riddle, 24 Ky. L. Rep. 1687; Morgan v. Morgan, 4 Gill & J. 395; Murdock v. Winter, 1 Harr. & G. 471; Robey v. State, 94 Md. 61; Frost v. Hammett, 11 Pick. 75; People v. Byron, 3 Johns. Cas. 53, 55; Patcher v. Sprague, 2 Johns. 462; Bennett v. Irwin, 3 Johns. 363; Gelston v. Burr, 11 Johns. 482; Spencer v. Southwick, 11 Johns. 573; Griswold v. Nat. Co., 3 Cow. 96; Allen v. Crofoot, 7 Cow. 46 (*semble*); Mercein v. Smith, 2 Hill, 310; Halliday v. Noble, 1 Barb. 137; Day v. Pickett, 4 Munf. 104; Babb v. Mackey, 10 Wis. 371, 375 *Accord*.

The doctrine of the principal case is of the widest application. On a demurrer to any pleading, any prior pleading in the line back to the declaration may be attacked. Accordingly a demurrer to a reply hits not only the plea but the declaration also. Hayworth v. Junction Co., 13 Ind. 348; Lockwood v. Bigelow, 11 Minn. 113; Bausman v. Woodman, 33 Minn. 512; State v. Crites, 48 Oh. St. 142. A demurrer to a rejoinder hits the replication (Cutler v. Southern, 1 Wm. Saund. 119; Aurora City v. West, 7 Wall. 82); or the plea (McDonald v. Wilkie, 13 Ill. 22; Gordon v. Preston, Wright, Oh. 341); or the declaration (Cooke v. Graham, 3 Cranch, 229).

A demurrer to a surrejoinder hits the plea (Mercein v. Smith, 2 Hill, 210); or the declaration (Hull v. Sprague, 23 R. I. 188).

A demurrer to a rebutter hits the rejoinder. Palmer v. Stone, 2 Wils. 96.

In Cooke v. Graham, *supra*, MARSHALL, C. J., said, p. 234: "There were several pleadings, and among the rest a bad declaration, a bad rejoinder, and a special demurrer to this bad rejoinder. When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error. When the special demurrer is by the plaintiff, his own pleadings are to be scrutinized, and the court will notice what would have been bad upon a general demurrer." — ED.

thinking, contrary to their first opinion, that the declaration too was bad, gave judgment for the defendant.[1]

SAFFOLD, J. The counsel for the plaintiff does not deny the general principle, that a demurrer to a plea may reach the declaration; but it is contended, the circumstance of the defendant having demurred to the declaration; of his demurrer having been overruled; and of his having pleaded over, creates an exception to the rule: that, the circuit court having once passed on the sufficiency of the declaration, it was incompetent for the same tribunal, at a succeeding term, to reverse the decision; also, that the defendant having submitted to the first decision, he thereby waived the defect, if any, in the declaration, and could not, afterwards, claim any benefit from it; and that to adjudge it insufficient, on the demurrer to his several bad pleas, is to give him an advantage for his own wrong.

The principle is conceived to be well settled, that a demurrer to any part of the pleading may refer to the first error, and when filed by the plaintiff, to the plea, it may be visited on his own declaration, if defective and insufficient.

The position is equally correct, that a party who has acquiesced in a decision, by pleading over, amending the pleading, or otherwise varying the state of record in conformity to the decision, will be considered to have waived that question, and cannot afterwards claim a revision of it, *in the same form*, either in the same or in the appellate court. But the same question may subsequently arise, in a *different form*, and require an independent adjudication: it may so happen, where a special plea, containing matter which would be good, under the general issue, has been overruled on demurrer, and the defendant offers evidence of the same defence under the general issue; or, it may be so, where a motion in arrest of judgment is made, on the same objection to the declaration, for which a demurrer has been overruled; and on the same principle, the supposed insufficiency of this declaration was subject to an independent consideration on the demurrer to the pleas: the same principle of decision in either form would produce a similar effect.[2]

Let the judgment be affirmed.

[1] The statement of the case is condensed, and only so much of the opinion of the court is given as relates to the effect of the demurrer. — ED.

[2] Aurora City v. West, 7 Wall. 82; Sykes v. Lewis, 17 Ala. 261 (see Louisville Co. v. Johnson, 135 Ala. 232); Johnson v. Pensacola Co., 16 Fla. 623; Pittsburgh Co. v. Hixon, 79 Ind. 111; Perrin v. Thurman, 4 T. B. Mon. 176, 179 *Accord.*

Claycomb v. Munger, 51 Ill. 373; Stearns v. Cope, 109 Ill. 340; Fish v. Farwell, 160 Ill. 236 (McDonald v. Wilkie, 13 Ill. 22, and McFaddon v. Fortier, 20 Ill. 509 (*semble*) *contra*, must be regarded as overruled); Ricknor v. Clabber, (Ind. Terr. 1903) 76 S. W. R. 271 (*semble*) *Contra.*

The overruling of a demurrer to a declaration does not preclude the defendant from objecting at the trial that the declaration shows no cause of action. Perry v. Baker, 61 Neb. 841 (overruling Marvin v. Weider, 31 Neb. 774); Tiernan v. Miller, (Neb. 1903) 96 N. W. R. 661. — ED.

THE AUBURN AND OWASCO CANAL CO. *v.* LEITCH.

SUPREME COURT, NEW YORK, JANUARY, 1847.

[*Reported in* 4 *Denio*, 65.]

DEMURRER to a replication. The declaration was in assumpsit for the recovery of certain instalments due upon shares of the capital stock of the plaintiff corporation, subscribed for by the defendant. Pleas: 1. Non-assumpsit. 2. *Nul tiel corporation.* Replication to the second plea, setting out the act incorporating the plaintiff, together with certain acts amending and continuing that act. The defendant demurred to the replication, and the plaintiff joined in demurrer.

W. H. Seward, for the defendant.

B. D. Noxon, for the plaintiff.

By the Court, BRONSON, C. J. The defendant insists that the declaration is bad on general demurrer. [The Chief Justice then examined the pleadings, and came to the conclusion that the declaration was substantially defective; and then proceeded as follows:] But it is said, that as the defendant pleaded non-assumpsit as well as *nul tiel corporation*, he cannot upon this demurrer go back and attack the declaration; and several cases have been cited to sustain that position. But it will be found on examination that the point has never been directly and necessarily adjudged. The doctrine was first stated in Wheeler *v.* Curtis,[1] and was there supposed to result from the well-established rule that the defendant cannot both plead and demur to the same count. It was said that the defendant should not be allowed to do indirectly what he would have no right to do directly. But the question whether the declaration was good or bad was not decided. The cause went off upon other grounds; and the point in question was not necessarily settled. In Dearborn *v.* Kent,[2] the *dictum* in the first case was repeated; but it was expressly held that the declaration was sufficient; so that it was wholly unnecessary to inquire whether the defendant was at liberty to make the question or not. Russell *v.* Rogers[3] is the next case; and there it was not decided whether the declaration was good or bad. It was apparently good; so that the point in question did not necessarily arise. In Miller *v.* Maxwell,[4] this doctrine was mentioned for the last time; and the same learned judge who first stated it went a great way towards knocking it on the head. In that case the defendant pleaded the general issue, and two special pleas. The plaintiff demurred to the special pleas, and they were adjudged bad; but the defendant was allowed to go back and attack the declaration; and judgment was given against the plaintiff for the insufficiency of that pleading. Now, although the learned judge who delivered the opinion of the court took a distinction between a defect

[1] 11 Wend. 653.
[2] 14 Wend. 183.
[3] 15 Wend. 351.
[4] 16 Wend. 9.

in a declaration which would not be cured by a verdict, and one which could only be reached by a demurrer, the principle of that case is directly opposed to the *dicta* which had preceded it.

It is quite clear that the defendant cannot both plead and demur to the same count. And it is equally clear that, at the common law, he could not have two pleas to the same count. Indeed, the two things, though stated in different words, are only parts of one common-law rule; to wit, that the defendant cannot make two answers to the same pleading. The statute of 4 & 5 Anne, c. 16, was made to remedy this inconvenience; and it allowed the defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defence. With us, leave of the court is no longer necessary. 2 R. S. 352, § 9. The statute does not say that the defendant may both plead and demur; and consequently he cannot make two such answers. But he may plead two or more pleas; some of which may terminate in issues of fact, to be tried by a jury; while others may result in issues of law, to be determined by the court. And whenever we come to a demurrer, whether it be to the plea, replication, rejoinder, or still further onward, the rule is to give judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer. This rule has always prevailed. It was the rule prior to the statute of Anne; and to say that the defendant, because he pleads two pleas, one of which results in a demurrer, cannot go back and attack the declaration, would be to deprive him of a portion of the privilege which the legislature intended to confer. He cannot plead and demur at the same time, because the common law forbids it; and the statute does not allow it. But he may plead two pleas; and he takes the right with all its legitimate consequences, one of which is, that whenever there comes a demurrer upon either of the two lines of pleading, he may run back upon that line to see which party committed the first fault; and against that party judgment will be rendered. Aside from the *dicta* in question, there is not a shadow of authority, either here or in England, for a different doctrine.

Although it seems that no case upon this point has found its way into the books, I well remember that since the decision in Miller *v.* Maxwell,[1] it has been several times announced from the bench that in a case like this the defendant was at liberty to go back and attack the declaration; and I think the point has been more than once directly decided. I know that the late Mr. Justice Cowen entertained and expressed that opinion, as I did myself; and it is also the opinion of my present associates. I would not lightly overrule so much as a mere *dictum*, if it was of the nature of a rule of property, and had stood long enough to become one. But this is not a question of that kind.[2]

Judgment for the defendant.

[1] 16 Wend. 9.

[2] Bishop *v.* Quintard, 18 Conn. 407 (*semble*); Smith *v.* Mulliken, 2 Minn. 319; Miller *v.* Maxwell, 16 Wend. 9 (*semble*); Shaw *v.* Tobias, 3 Comst. 188 *Accord*.

Brawner *v.* Lomax, 23 Ill. 496; Wear *v.* Jacksonville Co., 24 Ill. 593; Wilson *v.* Myrick,

HASTROP v. HASTINGS.

In the King's Bench, Easter Term, 1692.

[*Reported in* 1 *Salkeld*, 212.]

In an action upon the case for beer and wages, the defendant pleaded in abatement, *et pet. judicium de billa, et quod billa prædict. cassetur;* for uncertainty in the declaration upon demurrer, the defendant's counsel insisted upon many faults in the declaration. *Et per Cur.* The defendant shall not take advantage of mistakes in the declaration upon a plea in abatement; but if he would do that, he must demur to the declaration, *per quod* a *respondeas ouster* was awarded.[1]

MARSH, Executor of QUINLAN, v. BULTEEL.

In the King's Bench, Hilary Term, 1822.

[*Reported in* 5 *Barnewall & Alderson*, 507.]

Covenant upon a deed, whereby the parties agreed to submit certain differences to the award of arbitrators. The first [2] count of the declaration stated the defendant's covenant to obey, abide by, and perform the award, and that he would not by affected delay, or otherwise, hinder or prevent the arbitrators from making their award. It then stated that the arbitrators duly made their award, and that they thereby directed that the defendant should pay to the plaintiff certain sums therein mentioned. The breaches assigned were, that the defendant did not pay those sums of money. The defendant pleaded to the first count, that before the arbitrators made their award, he, the defendant, by deed, revoked their authority, of which deed and revocation of their authority the arbitrators, before the making of the award in the first count mentioned, had notice. To this plea the plaintiff demurred.

26 Ill. 34; Schofield *v.* Lettley, 31 Ill. 515; Ward *v.* Stout, 32 Ill. 399; Culver *v.* Bank, 64 Ill. 529; Compton *v.* People, 86 Ill. 176; Mix *v.* People, 86 Ill. 329 (plea of *non est factum*; but see *contra*, Reeves *v.* Forman, 26 Ill. 312); Supreme Lodge *v.* McLennan, 171 Ill. 417; Wheeler *v.* Curtis, 11 Wend. 653 (*semble*); Dearborn *v.* Kent, 14 Wend. 183 (*semble*); Russell *v.* Rogers, 15 Wend. 351 (*semble*) *Contra.* — Ed.

[1] Peter *v.* Pilkington, Carth. 171; Chambers *v.* Garnt, 1 Show. 91; Bonham's Case, 8 Rep. 120; Belayse *v.* Hester, 3 Lutw. 506; Bullythorp *v.* Turner, Willes, 478; Dundalk Co. *v.* Tapster, 1 Q. B. 667 (*semble*); Rogers *v.* Smiley, 2 Port. 249; Crawford *v.* Slade, 9 Ala. 887; Knott *v.* Clements, 13 Ark. 335; Wade *v.* Bridges, 24 Ark. 569; State *v.* Hamlin, 47 Conn. 95, 118; Ryan *v.* May, 14 Ill. 491; Price *v.* R. R., 18 Ind. 137; Indiana Co. *v.* Foster, 107 Ind. 430; Dean *v.* Boyd, 9 Dana, 171; Clifford *v.* Coney, 1 Mass. 500; Shaw *v.* Dutcher, 19 Wend. 219; Ellis *v.* Ellis, 4 R. I. 110, 122; Bent *v.* Bent, 43 Vt. 42 *Accord*. Powys *v.* Williams, 3 Lutw. 514; Evans *v.* Stevens, 4 T. R. 224 *Contra.* — Ed.

[2] Only so much of the case is given as relates to this count. The argument for the defendant and the short concurring judgments of Bayley and Holroyd, JJ., are omitted. — Ed.

Chitty, for the plaintiff. The plaintiff is entitled to judgment on the demurrer to the plea to the first count. The ground of action stated in that count is the breach of the covenant to perform the award. The plea shows the award to be void, but admits that the defendant has committed a breach of another covenant set out in the declaration, by which the parties covenanted not to prevent the arbitrators from making their award. In Charnley *v.* Winstanley,[1] this court refused to arrest the judgment in an action brought upon an arbitration deed, where one of the parties to the submission had become a *feme covert* subsequently to the submission and before the award: the breach alleged in the declaration being non-payment of money pursuant to the award, on the ground that it appeared upon the whole record that one of the parties had been guilty of a breach of the covenant not to abide by the award. Le Bret *v.* Papillon.[2] Now, here it appears by the defendant's plea that he has broken that covenant by revoking the arbitrators' authority, and therefore that case is expressly in point.

ABBOTT, C. J. I am of opinion that the defendant is entitled to judgment upon the demurrer to the plea to the first count of the declaration. The ground of complaint in that count is the non-payment of money pursuant to the award, or, in other words, a breach of the covenant to perform the award when made. It appears by the plea that the defendant, by countermanding the authority of the arbitrators, has broken the covenant to abide by the award, or that whereby he stipulated not to hinder the arbitrators from making an award; and it is urged on the part of the plaintiff that although this plea is an answer to the cause of action suggested in this count, yet that, inasmuch as it appears upon the whole record that the defendant has been guilty of a breach of covenant, the plaintiff is entitled to judgment upon that count, and the case of Charnley *v.* Winstanley[1] has been relied upon. That case, however, is very distinguishable from the present. There it appeared upon the face of the plaintiff's count that the award was made after one of the parties to the submission had become a *feme covert*. Her marriage was in itself a revocation of the authority of the arbitrators, and therefore was a breach of the covenant to abide by the award. In this case, the breach of that covenant is disclosed only by the defendant's plea, and it never has been held that a plaintiff who seeks to recover damages for one ground of action stated in his count is entitled to recover in respect of another disclosed by the defendant's plea. I am of opinion that a plaintiff can recover only in respect of the ground of action stated in his declaration.[3]

Judgment for the defendant upon the demurrer to the plea to the first count.

[1] 5 East, 266. [2] 4 East, 502.

[3] Butt's Case, 7 Rep. 24 b, 25 a; Head *v.* Baldrey, 6 A. & E. 459, 468; Grant *v.* Burgwyn, 88 N. Ca. 95; Johnson *v.* Finch, 93 N. Ca. 205, 209 *Accord*. See Ins. Co. *v.* Stanton, 57 Ill. 359. — ED.

BROOKE *v.* BROOKE AND OTHERS.

IN THE KING'S BENCH, EASTER TERM, 1664.

[*Reported in* 1 *Sidersin*, 184.]

IN trespass for taking a hook, etc., the defendant pleaded that he had a way to such a wood across the land of the plaintiff, that he was passing there, and that the plaintiff endeavored to cut his harness and to wound him with the said hook, wherefore he took the said hook out of the hands of the plaintiff, and delivered it to the constable, etc. Issue upon the way, and verdict for the plaintiff. And it was moved, in arrest of judgment, that the plaintiff had not shown in his declaration that the hook was in his possession. And it was agreed by the court, that if the defendant had pleaded Not guilty, the judgment should be arrested, because the plaintiff does not say in his declaration *hamum suum*, nor show that it was in his possession. But in this case the court were of opinion that the defendant, by his special plea, made the declaration good, for the defendant pleads that he took the hook *extra possessionem* of the plaintiff, wherefore the plaintiff may well maintain this action on his possession without any property.[1]

[1] In the principal case the question arose upon a motion in arrest of judgment, and not upon a demurrer. But the rule that a defective pleading may be cured by the subsequent pleading of the adversary applies equally to cases of demurrer, demurrer *ore tenus*, motions in arrest of judgment and writs of error, as appears from the following cases: —

Demurrers. — Ridgeway's Case, 3 Rep. 52 a, Poph. 41 s. c.; Cutler *v.* Southern, 1 Lev. 194, 1 Saund. 116 s. c.; Bamfield *v.* Bamfield, 1 Sid. 336; Dunning *v.* Owen, 14 Mass. 157, 162 (*semble*); White *v.* Ivy, 13 N. Y. 83; Ayres *v.* Covill, 18 Barb. 260 (*semble*); Ellis *v.* Appleby, 4 R. I. 462, 468; Wood *v.* Scott, 13 Vt. 42 (replication cures plea).

Demurrers ore tenus. — Carhart *v.* Oddenkirk, (Colo. Ap. 1905) 79 Pac. R. 303; Jackson *v.* Powell, (Kan. Ap. 1905) 84 S. W. R. 1132; Vinal *v.* Richardson, 13 All. 521; Whittemore *v.* Ware, 101 Mass. 352; Shartle *v.* Minneapolis, 17 Minn. 308; Cohn *v.* Husson, 113 N. Y. 662; Garrett *v.* Trotter, 65 N. Ca. 430; Johnson *v.* Finch, 93 N. Ca. 205.

Motions in arrest of judgment. — Wilkinson *v.* Sharland, 10 Ex. 724; Louisville Co. *v.* Murphy, 9 Bush, 512; Slack *v.* Lyon, 9 Pick. 62.

But see *contra*, Badcock *v.* Atkins, Cro. El. 416; Pelton *v.* Ward, 3 Cai. 73.

Writs of error. — Anon., Dy. 15 a (*semble*); Drake *v.* Corderoy, Cro. Car. 288; Osborne *v.* Brooke, Aleyn, 7; Fitzgerald *v.* Cragg, Com. 140; Cocks *v.* Nash, 2 M. & Sc. 434; U. S. *v.* Morris, 10 Wheat. 246, 286, 287; Knight *v.* Sharp, 24 Ark. 602; Schenck *v.* Hartford Co., 71 Cal. 28; Moffat *v.* Greenwalt, 90 Cal. 368; Cohen *v.* Knox, 90 Cal. 266; Hegard *v.* Cal. Co., (California, 1886) 11 Pac. R. 594; Burns *v.* Cushing, 96 Cal. 669 (*semble*); Shively *v.* Semi Tropic Co., 99 Cal. 259; De la Mar *v.* Hurd, 4 Colo. 442; Limberg *v.* Higenbotham, 11 Colo. 156; Robinson Co. *v.* Johnson, 13 Colo. 258 (*semble*); Wall *v.* Toomey, 52 Conn. 35; Wiles *v.* Lambert, 66 Ind. 494 (*semble*); Howland Works *v.* Brown, 13 Bush, 681; Berea College *v.* Powell, (Ky. 1903) 77 S. W. R. 381; Monson *v.* St. Paul Co., 34 Minn. 269; Garth *v.* Caldwell, 72 Mo. 622; Donaldson *v.* Butler Co., 98 Mo. 163; Henry *v.* Sneed, 99 Mo. 407; Allen *v.* Chouteau, 102 Mo. 309; Mendenhall *v.* Leivy, 45 Mo. Ap. 20; Hershfield *v.* Aiken, 3 Mont. 442; Hamilton *v.* Great Falls Co., 17 Mont. 334; Hefferlin *v.* Carlman, 29 Mont. 139; Haggard *v.* Wallen, 6 Neb. 271; Hawthorne *v.* Smith, 3 Nev. 182; Vaughan *v.* Havens, 8 Johns. 109, 110 (*semble*); Bate *v.* Graham, 11 N. Y. 237; Haddon *v.* Lundy, 59 N. Y. 320; Pearce *v.* Mason, 78 N. Ca. 37; Erwin *v.* Shaffer, 9 Oh. St. 43; Drake *v.* Sworts, 24 Oreg. 198; Zerger *v.* Sailer, 6 Binn. 24; Sanderson *v.* Hubbard, 14 Vt. 463; Sengfelder *v.* Mut. Co., 5 Wash. 121; Goff *v.* Board, 43 Wis. 55; Kretzer *v.* Cary, 52 Wis. 374 (*semble*).

Defect cured by traverse and verdict. — Although a statement of claim is demurrable because of the omission of a material allegation, if the defendant instead of demurring pleads

TIPPET and Others v. MAY and Two Others.

In the Common Pleas, April 30, 1799.

[*Reported in* 1 *Bosanquet & Puller*, 411.]

Declaration in *assumpsit* against three. Two of the defendants pleaded a debt of record by way of set-off, without taking any notice of the third. The plaintiffs replied *nul tiel record*, and gave a day to produce the record to the two defendants who pleaded, but entered no suggestion on the roll respecting the third.

To this there was a general demurrer and joinder.

Marshall, Serjt., in support of the demurrer. The ground of this demurrer is, that as two of the three defendants have pleaded, and the plaintiffs have given them a day to produce the record, without suggesting anything with respect to the third, the action is discontinued as to him, and that a discontinuance as to one defendant is a discontinuance as to all. It is a settled rule of law that a suit must be continued from its commencement to its conclusion without any chasm; and that any chasm is a discontinuance. In Gilb. Hist. C. P. 155, 158, it is said that if a defendant pleads to part, and says nothing to the other part, and the plaintiff replies to such plea without taking judgment for the part not answered to, it is a discontinuance, because he does not follow his entire demand in the court. So if he demur generally, for he ought to have prayed judgment upon *nil dicit* for that part.[1] 1 Rol. Abr. fo. 487, 488. And this rule applies not only to the

a denial of the missing averment, and a verdict is found for the plaintiff, the defect in the plaintiff's statement is cured. Jewell v. Mills, 3 Bush, 62; Worthley v. Hammond, 13 Bush, 510; Quaid v. Cornwall, 13 Bush, 601; Main v. Ray, 22 Ky. L. Rep. 250; Ware v. Long, (Ky. 1902) 69 S. W. R. 797; Stivers v. Horne, 62 Mo. 473; Henry v. Sneed, 99 Mo. 407; Allen v. Chouteau, 102 Mo. 309; Murphy v. Phelps, 12 Mont. 531; Dayton Co. v. Kelly, 24 Oh. St. 348, 357; Bruce v. Beall, 100 Tenn. 573.

If, however, the defendant, after pleading such a denial, demurs *ore tenus* at the trial before the case goes to the jury, the defect in the plaintiff's statement of claim is fatal. Scofield v. Whitelegge, 49 N. Y. 259.

Declaration vitiated by a replication. — A party, by his subsequent pleading, may destroy the effect of his prior good pleading; *e. g.*, a good count in ejectment, followed by a bad plea, may be ruined by a replication disclosing an insufficient title in the plaintiff. Perkins v. Perkins, Hob. 128; Zouch's Case, Godb. 138; Johnson v. Norway, Winch, 37 (*semble*); Keay v. Goodwin, 16 Mass. 1, 3 (*semble*).

See also Norton v. Simmes, Moore, 856; Brickhead v. York, Hob., 118, 197; Bonham's Case, 8 Rep. 120 b; Gewen v. Roll, Cro. Jac. 131, 133; Armitt v. Breame, 2 Ld. Ray. 1076, 1080, to the effect that notwithstanding a good declaration upon a bond conditioned to perform an award, followed by a bad plea, the plaintiff will fail if he does allege a breach of the award in his replication. — Ed.

[1] Herlakenden's Case, 4 Rep. 443; Carrill v. Baker, 1 Brownl. 227; Weeks v. Peach, 1 Salk. 179, Holt, 561, 1 Ld. Ray. 679, 2 Lutw, 1218 s. c.; Vincent v. Beston, 1 Ld. Ray. 716; Market v. Johnson, 1 Salk. 180, 2 Ld. Ray. 1121, 11 Mod. 36 s. c.; Wilson v. Dodd, 1 Roll. R. 176, 2 Bulst. 335 s. c.; Dense v. Dense, 1 Roll. 477; Pierce v. Henriques, 7 Mod. 124, 2 Ld. Ray. 841, Far. 124; Woodward v. Robinson, 1 Stra. 302; Wood v. Farr, 5 Bing. N. Ca. 247, 248; Hogan v. Ross, 13 How. 173, 182 (*semble*); Postmaster-Gen. v. Reeder, 4 Wash.

subject-matter of the cause, but also to the parties. 1 Rol. Abr. fo. 488; Com. Dig. Pleader (W. 3).

Shepherd, Serjt., *contra*. Though the question immediately in issue on this demurrer be, whether the replication which the plaintiffs have put in be sufficient in law to answer the defendants' plea, still if we can show that the plea itself is bad, they cannot have judgment. Indeed, if we were to amend our replication, the defendants would be under the same difficulty. No authority has been adduced to show that discontinuance is the subject of demurrer.

EYRE, C. J. There is no rule in pleading more certain than that if a party can trace back the vices in the pleadings to the first fault, he has a right to take advantage of it on demurrer. But he cannot ask the judgment of the court unless he appear on the record to be capable of demanding judgment. Now in this case the plaintiffs, having replied to a plea by two of the defendants without taking notice of the third against whom they declared, have made a discontinuance; the cause, therefore, being discontinued, judgment must be given against the plaintiffs, for they are not in a situation to take advantage of the badness of the defendants' plea.[1]

ROOKE, J. The plaintiffs, not being in court, cannot call upon the court to give them judgment.

Per Curiam. Leave given to amend on payment of costs.

C. C. 678; Davis v. Burton, 4 Ill. 41; McCall v. Welsh, 3 Bibb, 289; Flemming v. Hoboken, 40 N. J. 270 *Accord*.

Mallory v. Matlock, 7 Ala. 757, 760 (*semble*); Thompson v. Kirkpatrick, 18 Ark. 580; Edwards v. White, 12 Conn. 28; Bayless v. Tousey, 20 Ind. 151 (*semble*); McWaters v. Draper, 5 T. B. Mon. 494; Frost v. Hammett, 11 Pick. 70 (*semble*) (Dwight v. Holbrook, 1 All. 560, two counts, demurrer to one, default as to other. Plaintiff may contest demurrer and have verdict for default on the other); Harrison v. Balfour, 13 Miss. 301 (*semble*); Sterling v. Sherwood, 20 Johns. 206; Hicock v. Coates, 2 Wend. 419; Slocum v. Despard, 8 Wend. 615; Elleridge v. Osborne, 12 Wend. 399; Bettle v. Wilson, 14 Oh. 257; Young v. Fentress, 10 Humph. 151 *Contra*.

In Vermont there is no discontinuance upon a failure to sign judgment when the adversary's pleading professedly is only a partial answer. Nor is the partial answer treated as a nullity upon a demurrer. The partial answer is effective as far as it goes and the demurrant is entitled to judgment as to the part unanswered. Carpenter v. Briggs, 15 Vt. 34.

So, if issue is taken on the partial plea and verdict goes for the plaintiff, the discontinuance is cured, and the plaintiff will have his judgment. Harvey v. Richards, 1 H. Bl. 644; Wats v. King, Cro. Jac. 353.

There is no discontinuance by a demurrer to a professedly partial plea, if some other plea is pleaded to the whole of the preceding pleading. Gray v. Pinder, 2 B. & P. 427; Clarkson v. Lawson, 6 Bing. 587, 595; Tubb v. Manning, Minor (Ala.) 129; Wells v. Mason, 5 Ill. 84; Richmond Co. v. Farquar, 8 Blackf. 89; Frost v. Hammett, 11 Pick. 70. — ED.

[1] Compare Lockwood v. Nash, 18 C. B. 543. — ED.

CHAPTER II.

DEFAULT.

EAST INDIA CO. *v.* GLOVER.

AT NISI PRIUS, BEFORE PRATT, C. J., MICHAELMAS TERM, 1725.

[1 *Strange*, 612.]

THE plaintiffs declared upon a sale of coffee at so much per hundred, which the defendant was to take away by such a time, or answer in damages. There was judgment by default, and on executing a writ of inquiry before Chief Justice Pratt at Guildhall, he refused to let the defendant in to give evidence of fraud on the side of the plaintiffs at the sale, because he said the defendant had admitted the contract to be as the plaintiff had declared, by suffering judgment by default, instead of pleading *non assumpsit;* and now they were only upon the *quantum* of damages.[1]

[1] The following cases illustrate the principle that a default, like a demurrer, is a constructive admission of the truth of the adversary's pleading: Bevis *v.* Lindsell, 2 Stra. 1149; Anon., 3 Wils. 155; Davis *v.* Holdship, 1 Chitt. 644 n. (a); Green *v.* Hearne, 3 T. R. 301; Lumsden *v.* Winter, 8 Q. B. D. 650; Ripley *v.* Sawyer, 34 W. R. 270; Ripley *v.* Sawyer, 31 Ch. D. 494; Bagley *v.* Searle, 56 L. T. Rep. 306, 35 W. R. 404 s. c.; Webster *v.* Vincent, 77 L. T. Rep. 167; Miller *v.* U. S., 11 Wall. 268; Oreg. Co. *v.* Oreg. Co., 28 Fed. 505; McGehee *v.* Childress, 2 Stew. 506; Cater *v.* Hunter, 3 Ala. 30; Wash. Co. *v.* Potter, 128 Ala. 278; Johnson *v.* Pierce, 12 Ark. 599; Bumpass *v.* Taggart, 26 Ark. 398; Harlan *v.* Smith, 6 Cal. 173; People *v.* County Court, 10 Cal. 19; Rowe *v.* Table Co., 10 Cal. 441; McGregor *v.* Shaw, 11 Cal. 47; Hunt *v.* City, 11 Cal. 250; Hutchings *v.* Ebeler, 46 Cal. 557; Alexander *v.* Dow, 108 Cal. 25; Weese *v.* Barker, 7 Colo. 178; Downing Co. *v.* Burns, 30 Colo. 283; Shepard *v.* N. H. Co., 45 Conn. 54; Dexter *v.* Whitbeck, 46 Conn. 224; Martin *v.* N. Y. Co., 62 Conn. 331; Bernhard *v.* Curtis, 75 Conn. 476; Randel *v.* Chesapeake Co., 1 Harringt. 233; Russ *v.* Gilbert, 19 Fla. 54; Hellen *v.* Steinwender, 28 Fla. 191; Greenup *v.* Woodworth, 1 Ill. 232; Cook *v.* Skelton, 20 Ill. 107; Peck *v.* Wilson, 22 Ill. 205; Simmons *v.* Jenkins, 76 Ill. 479 (no replication); Mass. Co. *v.* Kellogg, 82 Ill. 614; Tucker *v.* Hamilton, 108 Ill. 469; Foreman Co. *v.* Lewis, 191 Ill. 155; Chicago *v.* English, 198 Ill. 211; Marion Co. *v.* Lomax, 7 Ind. 406; Hoefgan *v.* Harrison, 7 Ind. 594; May *v.* State Bank, 9 Ind. 233; Fisk *v.* Baker, 47 Ind. 534; Briggs *v.* Sneghan, 45 Ind. 14; Cravens *v.* Duncan, 55 Ind. 347; Bash *v.* Osdol, 75 Ind. 186; McKinney *v.* State, 101 Ind. 355; Whittey *v.* Douge, 9 Iowa, 597; Pfantz *v.* Culver, 13 Iowa, 312; Alexander *v.* Doran, 13 Iowa, 283 (no replication); Greeley *v.* Sample, 22 Iowa, 338; Bloomer *v.* Glendy, 70 Iowa, 757; Brenner *v.* Bigelow, 8 Kan. 496; State *v.* Gilmore, 81 Me. 405; Kiersted *v.* Rogers, 6 Har. & J. 282; Perry *v.* Goodwin, 6 Mass. 498; Gardner *v.* Field, 1 Gray, 151; Claiborne *v.* Planters Bank, 3 Miss. 727; Winn *v.* Levy, 3 Miss. 902; Moore *v.* Sanborin, 42 Mo. 490 (no replication); Deroin *v.* Jennings, 4 Neb. 97; Hardy *v.* Miller, 11 Neb. 395, 398; Bunting *v.* Goodman, 1 Nev. 314; Martin *v.* Dist. Court, 13 Nev. 85; Ewing *v.* Jennings, 15 Nev. 379; Huntress *v.* Effingham, 17 N. H. 584; Toppan's Pet. 24 N. H. 43; Willson *v.* Willson, 25 N. H. 229; Manchester's Pet. 28 N. H. 296; Parker *v.* Roberts, 63 N. H. 431; Casnett *v.* Young, 67 N. H. 159; Creamer *v.* Dikeman, 39 N. J. 197; Gifford *v.* Thorn, 9 N. J. Eq. 702; Lenney *v.* Finley, 118 Ga. 427 (pointing out change of Georgia rule by statute in 1895; Southern Co. *v.* East, (Ga. 1903) 45 S. E. R. 319; Bates *v.* Loomis, 5 Wend. 134; Foster

COLLINS v. GIBBS.

In the King's Bench, November 27, 1759.

[2 *Burrow*, 899.]

Mr. Burland had moved, on Thursday last, in arrest of judgment, after a judgment by default, and a writ of inquiry executed, in an action upon the case on *assumpsit*.

His objection was the want of an averment of performance of what he insisted to be a condition precedent.[1]

Lord Mansfield now delivered the resolution of the court.

This is a motion made by the defendant in arrest of a judgment by default: so that it comes before the court exactly as if it had been upon demurrer; and is not like the cases of objections to judgments after verdict.

The plaintiff has not averred performance of what was to be done on his part; nor shown that he was ready to perform it.

Therefore we are all of opinion, that it cannot be made good, as laid in the declaration: and the true distinction, as to supplying such defects is, whether the objection be made after a verdict or not.[2]

Therefore the judgment must be arrested.

v. Smith, 10 Wend. 377; Sayres v. Miller, 10 N. Y. Civ. Pro. R. 69; Garrard v. Dollar, 4 Jones, 175; Parker v. Smith, 64 N. Ca. 291; Rogers v. Moore, 86 N. Ca. 85; Osborn v. Leach, 133 N. Ca. 427; McKinzie v. Perrill, 15 Oh. St. 162; Frean v. Cruikshanks, 3 McC. 84; Wilkie v. Walton, 2 Speers, 473; Hopson v. Fountain, 4 Humph. 243; Union Bank v. Hicks, 4 Humph. 327; Hall v. Mount, 3 Cold. 73; Warren v. Kennedy, 1 Heisk. 437; Miss. Co. v. Green, 9 Heisk. 588; Long v. Wortham, 4 Tex. 381; Guest v. Rhine, 16 Tex. 549; Ricks v. Pinson, 21 Tex. 507; Niblett v. Shelton, 28 Tex. 546; Boles v. Linthicum, 48 Tex. 220; Kimmarle v. Houston Co., 76 Tex. 686; Elliot v. Harris, L. R. 17 Ir. 351.

In Georgia, although a defendant, who has failed to plead, cannot introduce evidence, the plaintiff is not entitled to judgment until he has made out his case by proof. Durden v. Carhart, 41 Ga. 76; Hayden v. Johnson, 59 Ga. 106; Davis v. Wimberly, 86 Ga. 46, 48.

If, notwithstanding a default, the parties go to trial as if there were no default, it is too late thereafter to claim that the allegations in the pleading not answered must be taken to be true. Long v. Valleau, 87 Iowa, 675; Medland v. Walker, 96 Iowa, 175; Gregory v. Bowlsby, (Iowa, 1905) 102 N. W. R. 517.

If his claim is liquidated, the plaintiff upon defendant's default is entitled to judgment for the amount claimed. Gage v. Rogers, 20 Cal. 91; Lattimer v. Ryan, 20 Cal. 628; Lamping v. Hyatt, 27 Cal. 99; Gautier v. English, 29 Cal. 165; Parrott v. Den, 34 Cal. 79; Mass. Co. v. Kellogg, 82 Ill. 614.

If the claim is unliquidated, a jury must assess the damages. Disosway v. Edwards, 134 N. Ca. 254. — Ed.

[1] Only the judgment of the court is given. — Ed.

[2] In the following cases judgment on default was either arrested or reversed because of the insufficiency of the declaration: Bowdell v. Parsons, 10 East, 364; Randolph v. Cook, 2 Port. (Ala.) 286; Emanuel v. Ketchum, 21 Ala. 257; Chaffin v. McFadden, 41 Ark. 42; R. R. Co. v. State, 58 Ark. 39; Warner v. Hess, 66 Ark. 113; Heutsch v. Porter, 10 Cal. 555; Abbe v. Marr, 14 Cal. 210; Choynski v. Cohen, 39 Cal. 501; Harmon v. Ashmead, 60 Cal. 439; Hoyt v. Macon, 2 Colo. 113; O'Connor v. Brucker, 117 Ga. 451; Cronan v. Frizell, 42 Ill. 319; Bragg v. Chicago, 73 Ill. 152 (*semble*); Board v. Smith, 95 Ill. 328; Smith v. Carley, 8 Ind. 451; Bosch v. Kassing, 64 Iowa, 312; Johnson v. Mantz, 69 Iowa, 710; Gould v. Bonds, 1 Bush, 189; Wolfe v. Murray, 96 Ind. 727; Doud v. Duluth Co., 55 Minn. 53; Winston v. Miller, 20 Miss. 550; Argall v. Petts, 78 N. Y. 239; Hooker v. Kilgour, 2 Cincin. S. C. 350; Gillian v. Gillian, 65 S. Ca. 129; Hall v. Jackson, 8 Tex. 305; Moseley v. Smith, 21 Tex. 441.

J. O. HOLLIS AND ANOTHER v. GIDEON D. RICHARDSON.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1859.

[13 *Gray*, 392.]

WRIT of error on a judgment of the court of common pleas in an action of contract brought by Gideon D. Richardson upon two promissory notes made by the plaintiff in error, and payable to Eliphalet W. Richardson, but not purporting to be payable to order.

In that action each count was in this form: "And the plaintiff says, the defendants made a promissory note, a copy whereof is hereto annexed, payable to Eliphalet Wharff Richardson, and the plaintiff is the owner of said note, and the defendants owe him the amount of said note and interest thereon." Copies of the notes were annexed to the declaration. The defendants filed an affidavit of merits, but were afterwards defaulted, and judgment was rendered against them for the amount claimed.

The error assigned was that the notes were not negotiable and were not made to Gideon D. Richardson, and he could maintain no action at law thereon. Plea, *in nullo est erratum*.[1]

SHAW, C. J. The ground of this writ of error is, that the declaration shows no cause of action in the plaintiff. The judgment having been rendered upon the default of the defendant, the case is not within the provisions of the new practice act, which prohibit the taking of objections in arrest of judgment or by writ of error, for causes existing before verdict, in any case in which a verdict has been rendered. St. 1852, c. 312, §§ 22, 77.

The question is, whether there is enough in the declaration, of which the notes themselves are part, and of course, part of the record, to sustain the judgment. The declaration sets forth the making of a note payable to a person other than the plaintiff, and not negotiable. It then adds that "the plaintiff is the owner of said note." But how can he own it? Only as assignee in equity, which, by law, does not enable him to sue in his own name.

The plaintiff's final averment, "that the defendants owe him the amount of said note," is a mere statement of a conclusion of law from facts previously stated, and not an allegation of a distinct substantive fact. Millard *v.* Baldwin. If it could be treated as a distinct and sufficient averment, no other averment would be needed in any case.[2] *Judgment reversed.*

[1] The argument for defendant in error and a part of the opinion of the court are omitted. — ED.

[2] Cragin *v.* Lovell, 109 U. S. 194 *Accord*.

In this case, Gray, J., said, p. 199: "The final allegation, that by reason of the causes aforesaid, the defendant is indebted and liable to the plaintiff, is a mere conclusion of law, which is not admitted by demurrer or default. Hollis *v.* Richardson."

Immaterial allegations. — A default, like a demurrer, does not admit the truth of superfluous allegations. Johnson *v.* Stallcup, 41 Tex. 539.

CHAPTER III.

NEGATIVE ANSWERS OR PLEAS BY WAY OF TRAVERSE.

JOHN KELLOGG *v.* CHARLES CHURCH.

SUPREME COURT, SPECIAL TERM, NEW YORK, JUNE 10, 1850.

[4 *Howard, Practice Reports*, 339.]

PLAINTIFF complained for the wrongful taking and conversion of sundry articles of personal property, comprising a numerous list of small articles.

Defendant answered as follows: —

"*Above named defendant answers to the complaint of plaintiff in the above entitled action, and denies each and every allegation alleged in plaintiff's complaint.*"

B. F. Chapman, for plaintiff, insisted that this was not a sufficient denial of the complaint and demanded judgment, notwithstanding the answer, and cited section 149 of the Code, also section 168.

CADY, J. I think such an answer will do. It would be intolerable to require specific denials of an entire complaint in other terms. I will not aid in establishing the intricate and voluminous system of pleading under the Code, which seems to be growing up in practice. I cannot believe that it was the design of the code-makers; and, until my position is overruled by the Supreme Court, in bench, I shall hold such a denial as this good.[1]

[1] Adkins *v.* North Co., 63 L. J. Q. B. 361 (not a commendable pleading. See Odgers Pl. [5 ed.] 210, and also Benbow *v.* Low, 13 Ch. D. 553); Hastings *v.* Dollarhide, 18 Cal. 390; Brown *v.* Curtis, 128 Cal. 193 (but general denial not allowed if answer is verified. People *v.* Hagar, 52 Cal. 171); Greenthal *v.* Lincoln, 67 Conn. 372, 377; De Soto Co. *v.* Hammett, 111 Ga. 24 (defendant denies all the allegations of each paragraph of both counts); Ocean Co. *v.* Anderson, 112 Ga. 835 (like preceding case); Kahn *v.* Southern Co., 115 Ga. 459 (like preceding case); Westcott *v.* Brown, 13 Ind. 83; Ralya *v.* Atkins, 157 Ind. 331; Boston Co. *v.* Burnett, 1 All. 410; D'Arcy *v.* Steuer, 179 Mass. 40; Fitz *v.* Clark, 7 Minn. 217; Kingsley *v.* Gilman, 12 Minn. 515; Radde *v.* Ruckgaber, 3 Duer, 684 (*semble*); Gassett *v.* Crocker, 9 Abb. Pr. 39 (denial of all allegations within certain specified folios); Wayland *v.* Tysen, 45 N. Y. 281; Thompson *v.* Erie Co., 45 N. Y. 468; People *v.* Tunnicliff, 17 N. Y. Civ. Pro. R. 331; Mut. Co. *v.* Toplitz, 58 N. Y. Ap. Div. 188, 190; Perry *v.* Levenson, 82 N. Y. Ap. Div. 94; Lewis *v.* Coulter, 10 Oh. St. 451; Lewis *v.* Smith, 2 Disney, 434 ("not indebted to plaintiff in the sum of $600 as stated in petition upon the cause of action stated therein, or in any sum whatever"); Penter *v.* Straight, 1 Wash. 365; Hoffman *v.* Eppers, 41 Wis. 251 (answer to complaint for a battery that "defendant is not guilty of the grievances alleged in the complaint or any or either of them"); Gascard *v.* Darling, 2 West Aust. R. 67 *Accord.*

Guynn *v.* Macaulay, 32 Ark. 97; Shirk *v.* Williamson, 50 Ark. 562; Alden *v.* Carpenter, 7 Colo. 87 (*semble*); Watson *v.* Leman, 9 Colo. 200; Binyon *v.* U. S., (Ind. Terr. 1903) 76 S. W. R. 265; Nat. Co. *v.* McPherson, 19 Mont. 355; Rosenthal *v.* Brush, 1 Code Reporter, N. s. 238 (decided under N. Y. Code of 1851); Seward *v.* Miller, 6 How. Pr. 312 (like pre-

ceding case); Woods v. Jordan, 69 N. Ca. 189, 195; Flack v. Dawson, 69 N. Ca. 42; Schehan v. Malone, 71 N. Ca. 440 (but see Brown v. Cooper, 89 N. Ca. 227, sanctioning a denial of "the truth of the allegations in the first, second, third, fourth, fifth, and sixth paragraphs of the complaint") *Contra.* — Ed.

Denial of allegations except those admitted. — A denial of each and every allegation in the preceding pleading "except those herein admitted or denied" or "except those herein admitted qualified or denied" is good, provided the allegations excepted are so clearly indicated as not to make the answer indefinite or uncertain. A denial of this sort was upheld in Anderson v. War Eagle Co., (Idaho 1903) 72 Pac. R. 671; Childers v. First Bank, 147 Ind. 430; Ingle v. Jones, 43 Iowa, 286; Boston Co. v. Burnett, 1 All. 410; Kingsley v. Gilman, 12 Minn. 515; Becker v. Switzer, 15 Minn. 427; Leyde v. Martin, 16 Minn. 38; Jellison v. Halloran, 40 Minn. 485; Parshall v. Tillon, 13 How. Pr. 7 (*semble*); Allis v. Leonard, 46 N. Y. 688 (more fully reported in 22 Abb. L. J. 28); Fellows v. Muller, 38 N. Y. Super. Ct. 137; Walsh v. Mehrback, 5 Hun, 448; Smith v. Gratz, 52 How. Pr. 274; Calhoun v. Hallen, 25 Hun, 155; Haines v. Herrick, 6 Abb. N. C. 379; McGuiness v. Mayor, 13 N. Y. W. D. 522; Johnson v. Haberstro, 7 N. Y. St. Rep. 225; Burley v. German Bank, 111 U. S. 216, 5 N. Y. Civ. Pro. 172 s. c.; Tracy v. Baker, 38 Hun, 263; Mingst v. Bieck, 38 Hun, 358; Griffin v. Long Island Co., 101 N. Y. 348; Crane v. Crane, 43 Hun, 309; Lake Bank v. Judson, 122 N. Y. 279; Owens v. Hudnut, 20 N. Y. Civ. Pro. 145; Pittenger v. South. Ass'n, 15 N. Y. Ap. Div. 26; Learned v. Mayor, 21 N. Y. Misc. Rep. 601; Mattoon v. Fremont Co., 6 S. Dak. 301; Hardy v. Purington, 6 S. Dak. 382; State v. Pierre, 15 S. Dak. 559; Lamberton v. Shannon, 13 Wash. 404 (*semble*); Matteson v. Ellsworth, 28 Wis. 254.

If the excepted allegations are not indicated clearly, the only remedy is a motion to make the pleading more definite and certain. Youngs v. Kent, 46 N. Y. 672; Greenfield v. Mass. Co., 47 N. Y. 430; McGuiness v. Mayor, 13 N. Y. W. D. 522; Burley v. German Bank, 111 U. S. 216, 5 N. Y. Civ. Pro. 172 s. c.; Chamberlain v. American Co., 5 N. Y. W. D. 129 (*semble*); Farnsworth v. Wilson, 5 N. Y. Civ. Pro. 179 n. (cited); Zimmerman v. Meyrowitz, 34 N. Y. Misc. Rep. 307; Hardy v. Purington, 6 S. Dak. 382; State v. Pierre, 15 S. Dak. 559. See also Pecha v. Kastl, (Neb. 1902) 89 N. W. R. 1047.

In the following cases, however, such a denial was treated as no denial, with the result that the opposite party obtained judgment on the pleadings. Levinson v. Schwartz, 22 Cal. 229; Dezell v. Fidelity Co., 176 Mo. 253 (citing Long v. Long, 79 Mo. 644 and Snyder v. Free, 114 Mo. 360, which merely recognized the right of the adversary to have such a denial made more definite and certain.)

The following cases, in which a denial of each and every allegation "except those admitted or denied" or "except those admitted qualified or denied" was adjudged so bad as to warrant a judgment on the pleadings for the opposite party, or to justify the exclusion of all evidence in support of the denial, must be deemed erroneous. People v. Northern Co., 53 Barb. 122, 42 N. Y. 217 (*semble*); People v. Snyder, 41 N. Y. 397, 400 (*semble*); McEncroe v. Decker, 58 How. Pr. 250; Bixby v. Drexel, 9 Reporter, 630 (*semble*); Miller v. McCloskey, 1 N. Y. Civ. Pro. 252; Leary v. Boggs, 3 N. Y. Civ. Pro. 229; Luce v. Alexander, 49 N. Y. Super. Ct. 202, 4 N. Y. Civ. Pro. 428 s. c. (affirmed 100 N. Y. 613); Potter v. Frail, 67 How. Pr. 445; Thierry v. Crawford, 33 Hun, 366; Hoffman v. N. Y. Co., 50 N. Y. Super. Ct. 403; Callanan v. Gilman, 67 How. Pr. 464; Rosenwald v. Hammerstein, 12 Daly, 377; Barton v. Griffin, 36 N. Y. Ap. Div. 572 (Putnam, J., diss.)

A denial of everything except what the court may construe to be admitted was struck out as bad in Starbuck v. Dunklee, 10 Minn. 168.

In Hammond v. Earle, 5 Abb. N. C. 105, a motion was granted to make more definite and certain a "denial of every allegation contrary to any of the allegations in the foregoing answer not heretofore admitted ignored or denied."

Denial of all material allegations. — A denial of each and every material allegation is not a good denial in jurisdictions in which the denial must be verified. The remedy is a motion to make the answer more definite and certain. Hamilton v. Huson, 21 Mont. 9 (objection too late after trial at law); Missoula Co. v. O'Donnell, 24 Mont. 65 (same as preceding case); Burke v. Interstate Co., 25 Mont. 315 (same as preceding case); Mattison v. Smith, 1 Robt. (N.Y.) 706, 19 Abb. Pr. 288 s. c.; Hammond v. Earle, 5 Abb. N. C. 105; Lewis v. Coulter, 10 Oh. St. 451; Thomas v. Cline, 1 Clev. L. Rep. 123; Mead v. Pettigrew, 11 S. Dak. 529.

The objection to such a denial should not be taken by a demurrer. Goodrich v. Union Co., 37 Fed. 182 (Colorado statute declared to warrant such a denial); Lewis v. Coulter, 10 Oh. St. 451; Nix v. Gilmer, 5 Okla. 740. But see *contra*, Montour v. Purdy, 11 Minn. 384; Dodge v. Chandler, 13 Minn. 114; Abrahamson v. Lamberson, 68 Minn. 454, 456; Mead v. Pettigrew, 11 S. Dak. 529 (motion for judgment on the pleadings).

Nor by a motion to strike out. Ingle v. Jones, 43 Iowa, 286. But the contrary view

CHARLES J. BENNETT, RESPONDENT, v. THE LEEDS MANUFACTURING COMPANY, APPELLANT.

COURT OF APPEALS, NEW YORK, JUNE 19, 1888.

[110 *New York Reports*, 150.]

ANDREWS, J.[1] The defendant was sued upon a contract, which the plaintiff, in his verified complaint alleged, upon information and belief, was made by the corporation. The defendant, in its answer, also verified, denied in like manner, upon information and belief, certain material allegations in the complaint, and the sole question is, whether this form of denial is authorized by subdivision 1 of section 500 of the Code, which declares that the answer must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief." Upon reason, this form of denial would seem to be justified. Information is the source of much, indeed, of the most that we call knowledge. We affirm or deny the existence of an alleged fact, either from personal knowledge of its existence, or because we have information thereof which we credit. This latter is the source of most of our knowledge of the facts of history, and in the ordinary affairs of life we often accept and act upon facts known to us only by information, as fully and confidently as though they were personal incidents in our experience. But asser-

was expressed in Edmonson v. Phillips, 73 Mo. 57; Pry v. Hannibal Co., 73 Mo. 123; Collins v. Trotter, 81 Mo. 275; Smith v. Lindsey, 89 Mo. 76, in which cases the objection was waived by proceeding to trial as upon an ordinary general denial.

In Miller v. Brumbaugh, 7 Kan. 343, a denial of "each and every material allegation," etc., was declared to be a good denial, but the objection was raised after trial.

Defendant says that he denies. — The words "says that he denies" are treated as equivalent to "he denies." Espinosa v. Gregory, 40 Cal. 58; Munn v. Talman, 1 Kan. 254; Reiss v. Argubright, (Nebraska, 1892) 92 N. W. R. 958; Moen v. Eldred, 22 Minn. 538; Chapman v. Chapman, 34 How. Pr. 281; Jones v. Ludlum, 74 N. Y. 61 (overruling Arthur v. Brooks, 14 Barb. 533; Blake v. Eldred, 18 How. Pr. 240; Powers v. Rome Co., 3 Hun, 285, 286 (*semble*); People v. Christopher, 4 Hun, 805); Humble v. McDonough, 5 N. Y. Misc. Rep. 508; Denver v. Spokane Falls, 7 Wash. 226; Wadleigh v. Marathon Bank, 58 Wis. 546.

Miscellaneous inadequate denials. — Harris v. Gamble, 7 Ch. D. 877 ("defendant puts plaintiffs to the proof of the several allegations in their statement of claim"); Sheldon v. Middleton, 10 Iowa, 17 (whether his signature is genuine defendant "is unacquainted and requires plaintiff to prove the same"); Clark v. Finwell, 16 B. Mon. 329 (defendant "does not admit," etc. "but calls for proof"); Boles v. Bennington, 136 Mo. 522 (defendant "admits all allegations except one"); Young v. Schofield, 132 Mo. 650 (denial in a reply of all allegations in the answer inconsistent with allegations in the petition); Herdman v. Marshall, 17 Neb. 252 (like preceding case); Gross v. Scheel, (Nebraska, 1903) 93 N. W. R. 418 (like preceding case); Crete v. Hendricks, (Nebraska, 1902) 90 N. W. R. 215 (reply denies "each and every allegation of new matter in answer"); Lake v. Steinbach, 5 Wash. 659 (defendant "neither admits nor denies.")

Denial in manner and form. — A general denial "in manner and form as alleged" is an insufficient answer. Dole v. Burleigh, 1 Dak. 227; Phœnix Co. v. Mayor, 28 Neb. 124; Sherman v. N. Y. Mills, 1 Abb. Pr. 187; Rumbough v. Improvement Co., 106 N. Ca. 461; Board v. Prior, 11 S. Dak. 292; Seattle v. Buzby, 2 Wash. Ter. 25. — ED.

[1] Only the opinion of the court is given. — ED.

tions of facts are frequently made, of which facts we neither have absolute knowledge, nor are they accredited in such a way as to satisfy us of their existence. We may not be able either to affirm or deny their existence, or even to form a judgment or belief in respect to them. It is obvious that each of these several conditions may exist in the case of a defendant brought into court to answer a complaint. The facts alleged may be true or false to his personal knowledge. If he has no personal knowledge of their truth or falsity, nevertheless he may have information which satisfies him that they are either true or false, and a belief founded thereon. Still again, he may have no information upon which he can affirm or deny the facts alleged, or if he has some information, it may not be such as to create a belief one way or the other as to their existence, or whether the assertions made are true or untrue. In the first and third cases supposed, concededly the defendant can put the plaintiff to his proof. He may do this in the one case by a direct and positive denial, and in the other by denying any knowledge or information sufficient to form a belief as to the existence of the alleged facts.[1] If the defendant is in

[1] *Denial of knowledge or information a good denial.* — Trapnall v. Hill, 31 Ark. 345 (*semble*); Sayles v. Fitzgerald, 72 Conn. 391 (*semble*); Garland v. Gaines, 73 Conn. 662 (*semble*); Jacobs v. Hogan, 73 Conn. 740 (*semble*); Jackson v. Holland, 14 Fla. 384 (*semble*); Manny v. French, 23 Iowa, 250 (*semble*); Claflin v. Reese, 55 Iowa, 207; Hutchins v. Moore, 4 Met. (Ky.), 110; Ward v. Edge, 100 Ky. 757 (*semble*); Morton v. Jackson, 2 Minn. 219; Smalley v. Isaacson, 40 Minn. 450; Schroeder v. Capehart, 49 Minn. 525; Revely v. Skinner, 23 Mo. 98; Snyder v. White, 6 How. Pr. 321; Temple v. Murray, 6 How. Pr. 329; Edwards v. Lent, 8 How. Pr. 28 (*semble*); Ketcham v. Zerega, 1 E. D. Sm. 553; Elton v. Markham, 20 Barb. 343 (*semble*); Flood v. Reynolds, 13 How. Pr. 112; Leach v. Boynton, 3 Abb. Pr. 1; Sackett v. Havens, 7 Abb. Pr. 371, n.; Blake v. Eldred, 18 How. Pr. 240 (*semble*); Livingston v. Hammer, 7 Bosw. 670; Richter v. McMurray, 15 Abb. Pr. 346; Heye v. Bolles, 33 How. Pr. 266; Lloyd v. Burns, 38 N. Y. Super. Ct. 423, affi'd 62 N. Y. 651 (*semble*); Mechan v. Harlem Bank, 5 Hun, 439; Grocers' Bank v. O'Rorke, 6 Hun, 18; Hauteman v. Gray, 5 N. Y. Civ. Pro. R. 224 (*semble*); First Bank v. Clarke, 22 N. Y. W. D. 569 (*semble*); Johnson v. Haberstro, 7 N. Y. St. Rep. 225; Warner v. U. S. Co., 53 Hun, 312; Zivi v. Einstein, 2 N. Y. Misc. Rep. 177; Sheldon v. Heaton, 78 Hun, 50; Gruenstein v. Jablonsky, 1 N. Y. Ap. Div. 550; Bidwell v. Sullivan, 10 N. Y. Ap. Div. 135; Steinback v. Diefenbrock, 52 N. Y. Ap. Div. 437 (*semble*); Pray v. Todd, 71 N. Y. Ap. Div. 391; Hidden v. Godfrey, 88 N. Y. Ap. Div. 496; Hughes v. Wilcox, 17 N. Y. Misc. Rep. 32; Farmers Bank v. Charlotte, 75 N. C. 45; Durden v. Simmons, 84 N. C. 555 (*semble*); Fagg v. Southern Bank, 113 N. C. 364 (*semble*); Woodcock v. Bostic, 128 N. C. 243 (*semble*); Sigmund v. Minot Bank, 4 N. Dak. 164 (*semble*); Gilreath v. Furman, 57 S. C. 289; Cumins v. Lawrence Co., 1 S. Dak. 158 (*semble*); Bartow v. Northern Co., 10 S. Dak. 132 (*semble*); Wilson v. Commercial Co., 15 S. Dak. 322; Colby v. Spokane, 12 Wash. 690; Hastings v. Gwynn, 12 Wis. 671; Boorman v. American Co., 21 Wis. 152; Smith v. Janesville, 26 Wis. 291; Collart v. Fisk, 38 Wis. 239 *Accord.*

State v. Butte Co., 18 Mont. 199; Rossiter v. Loebar, 18 Mont. 379 *Contra.*

In Colorado, it is not enough to say that one has neither knowledge nor information; one must add that he cannot obtain knowledge or information. Haney v. People, 12 Colo. 345; Jones v. Perot, 19 Colo. 141; Grand Co. v. Lesher, 28 Colo. 273.

In California, following the direction of the statute, to the statement that he has no knowledge or information, the pleader adds an explicit denial on that ground. Read v. Buffum, 29 Cal. 77; Etchas v. Orena, 121 Cal. 270.

In Ohio and Nebraska the statute requires a "general or specific denial of each material allegation of the petition controverted by the defendant." Furthermore all pleadings must be verified, an affidavit of belief being a sufficient verification. There is no provision in the statute for the case in which a party has no belief as to the truth of the allegations of his adversary. The court, however, has decided that a denial in such case is proper with a statement that the party denying has not knowledge or information sufficient to

the condition of having information and a belief founded thereon, that the facts alleged are untrue, but no actual knowledge, unless he can deny absolutely the allegations of the complaint or deny them upon information and belief, he will be precluded in such a case, where the complaint is verified, from answering at all, and judgment may go against him by default, although the plaintiff might not be able on a trial to establish the facts alleged. It may be safely assumed that it was not in the mind of the legislature in framing the rules of pleading to permit such a result or to put a defendant so situated in a position where he could not, by his pleading, compel the plaintiff to

form a belief. State v. Commissioners, 11 Oh. St. 183; McKenzie v. Washington, 2 Disney, 223. But an actual denial is necessary, not only when the defendant says nothing as to his belief, as in Bomberger v. Turner, 13 Oh. St. 263 ("defendant does not admit," etc.), but also when he states his absence of belief, as in Bentley v. Dorcas, 11 Oh. St. 398, 409 ("defendant says that he cannot state whether," etc., "and calls for proof"); Building Assn. v. Clark, 43 Oh. St. 427 ("has no means of knowing anything in regard to the allegation," etc., "and therefore cannot admit or deny the same, but demands proof thereof"); Maxwell v. Higgins, 38 Neb. 671 (defendant "not knowing the facts, neither admits nor denies"); First Bank v. Stoll, 57 Neb. 758 (defendant "knows not whether," etc., "and therefore would ask that strict proof be given"); Nat. Co. v. Martin, 57 Neb. 350 (defendant "has not sufficient knowledge or information," etc., "and therefore demands strict legal proof thereof"); Wilson v. Neu, (Nebraska, 1901) 95 N. W. R. 502 (like preceding case); McIntosh v. Omaha, (Nebraska, 1902) 91 N. W. R. 527 (defendant "is not sufficiently informed and therefore denies").

In Connecticut under similar legislation it is not necessary to add a formal denial to the statement of absence of knowledge or information sufficient to form a belief. Sayles v. Fitzgerald, 72 Conn. 391; Garland v. Gaines, 73 Conn. 662; Jacobs v. Hogan, 73 Conn. 740.

The Ohio and Nebraska doctrine seems to be over nice; but one must go back to the Middle Ages to match the technicality of the following distinctions which obtain in Oregon: (a) Defendant "denies that he has any knowledge or information sufficient to form a belief." This is a good answer. Wilson v. Allen, 11 Oreg. 154; Colburn v. Barrett, 21 Oreg. 22. (b) Defendant "says that he has no knowledge or information sufficient to form a belief." This is a bad answer. Law Society v. Hogue, 37 Oreg. 544 (overruling Robbins v. Baker, 2 Oreg. 52). (c) Defendant "says that he has no knowledge or information sufficient to form a belief, and therefore he denies." This is a good answer. Sherman v. Osborn, 8 Oreg. 66.

A general denial "either of his own knowledge or as not having sufficient knowledge or information" may be required on motion to be made more definite and certain. Sheldon v. Sabin, 4 N. Y. Civ. Pro. R. 4. The same is true of a denial "upon information and belief in part and in part of his own knowledge." Fairbank Co. v. Blaut, 24 N. Y. Civ. Pro. R. 334.

A denial of sufficient knowledge or belief "as to the fifth paragraph of the complaint" instead of the allegations of the fifth paragraph is insufficient. Bidwell v. Overton, 26 Abb. N. C. 402.

A denial of knowledge alone is an insufficient denial. Trapnall v. Hill, 31 Ark. 345; Haney v. People, 12 Colo. 345; Lester v. McIntosh, 101 Ga. 675; English v. Grant, 102 Ga. 35; Watson v. Hawkins, 60 Mo. 550; Nichols v. Jones, 6 How. Pr. 355 (defendant "has no recollection"); Edwards v. Lent, 8 How. Pr. 28; Wood v. Staniels, 3 Code Rep. 152; Sayre v. Cushing, 7 Abb. Pr. 371 (defendant "does not know of his information or otherwise"); First Bank v. Clarke, 22 N. Y. W. D. 569; Galbraith v. Daily, 37 N. Y. Misc. Rep. 151 (defendant "on information and belief has no knowledge," etc.); Durden v. Simmons, 84 N. Ca. 555; Fogg v. Southern Bank, 113 N. Ca. 264.

But see *contra*, Wales v. Chamblin, 19 Mo. 500.

A denial of information alone is an insufficient denial. James v. McPhee, 9 Colo. 486; Manny v. French, 23 Iowa, 250; Claflin v. Reese, 54 Iowa, 544; Revely v. Skinner, 33 Mo. 96; Elton v. Blackham, 20 Barb. 343; Blake v. Eldred, 18 How. Pr. 240; Heye v. Bolles, 33 How. Pr. 266; Hauteman v. Gray, 5 N. Y. Civ. Pro. R. 224; Lloyd v. Burns, 38 N. Y. Super. Ct. 423, affi'd 62 N. Y. 651; Steinback v. Diefenbrock, 52 N. Y. Ap. Div. 437; Woodcock v. Bostic, 128 N. Ca. 243; Sigmund v. Minot Bank, 4 N. Dak. 164. — ED.

prove his complaint. Section 500 of the Code does not prescribe the form of a denial, except that it must be general or specific, or where the defendant has no knowledge or information as to any material fact alleged, sufficient to form a belief in regard to the same, his denial may be in that formula. Reading section 500 in connection with sections 524 and 526, it is, we think, very clear that a general or specific denial under the first subdivision of section 500 may be upon information and belief. By section 524 "the allegations or denials in a verified pleading must in form be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the persons verifying the same. An allegation that the party has not sufficient knowledge or information to form a belief with respect to the matter must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information." This section on its face applies to all pleadings, the answer as well as the complaint, and to denials in the answer as well as to affirmative defences or counter-claims. It assumes that when a party has no personal knowledge an averment or denial may be made upon information and belief, and treats every positive averment or denial as having been made on personal knowledge, and declares, in substance, that it is to be so regarded in criminal prosecutions. Section 526, which prescribes the form of verification, requires it to be stated therein that the pleading is "true to the knowledge of the person making it, except as to those matters therein stated to be alleged on information and belief," etc. This section also recognizes allegations (which manifestly include denials) made upon information and belief, as proper forms of pleading. We think, therefore, upon reason as well as upon the construction of the Code, a denial in a verified answer of a material allegation in the complaint, "upon information and belief," is good.[1] Any other conclusion would lead in

[1] Vassault v. Austin, 32 Cal. 597; Roussin v. Stenart, 33 Cal. 208; Jones v. Petaluma, 36 Cal. 230; People v. Alameda Co., 45 Cal. 395; Wickersham v. Comerford, 104 Cal. 494; People v. Curtis, 1 Idaho, 753; Leyner v. Fuller, 67 Iowa, 188; Maclay v. Sands, 94 U. S. 586 (Montana law); Hackett v. Richards, 3 E. D. Sm. 13 (*semble*); Stent v. Continental Bank, 5 Abb. N. C. 88; Metraz v. Pearsall, 5 Abb. N. C. 90; Brotherton v. Downey, 21 Hun, 436, 59 How. Pr. 206 s. c.; Henderson v. Manning, 5 N. Y. Civ. Pro. R. 221; Ledgerwood Co. v. Baird, 14 Abb. N. C. 318; Richards v. Frechsel, 14 Abb. N. C. 316, n.; Macauley v. Bromell Co., 67 How. Pr. 252; Musgrove v. Mayor, 51 N. Y. Super. Ct. 528; Wood v. Raydure, 39 Hun, 144; Taylor v. Smith, 8 N. Y. Sup. 519; Trumbull v. Ashley, 26 N. Y. Ap. Div. 356; Hemsbury v. Clark, 22 N. Y. Misc. Rep. 37; Hill v. Warner, 39 N. Y. Ap. Div. 424; Donovan v. Main, 74 N. Y. Ap. Div. 44; Farmers Bank v. Charlotte, 74 N. Ca. 45; Kitchen v. Wilson, 80 N. C. 191; Russell v. Amundson, 4 N. Dak. 112; Hall v. Woodward, 30 S. Ca. 565; Wadleigh v. Marathon Bank, 58 Wis. 546; Stacy v. Bennett, 59 Wis. 234 *Accord*.

The following cases *contra* may be ignored. Nelson v. Murray, 23 Cal. 338; Hackett v. Richards, 11 N. Y. Leg. Obs. 315; Therasson v. McSpedon, 2 Hilt, 1; Powers v. Rome Co., 3 Hun, 285; Swinburne v. Stockwell, 58 How. Pr. 312; Pratt Co. v. Jordan Co., 33 Hun, 143; 5 N. Y. Civ. Pro. R. 372 s. c.; Schroeder v. Wanzor, 2 How. Pr. N. s. 13.

An answer upon information must contain a denial. The statement: "Defendant is informed and believes that the goods were not shipped," etc., "all of which this defendant will prove on the trial" is not a denial. Bidwell v. Overton, 26 Abb. N. C. 402. — Ed.

some cases to great injustice. There are diverse authorities upon the question, but the great preponderance of authority supports the conclusion we have reached. Brotherton v. Downey,[1] Wood v. Raydure,[2] Musgrove v. Mayor, etc.,[3] Macauley v. Bromell,[4] Maclay v. Sands,[5] Jones v. City of Petaluma.[6]

It follows that the judgment of the General and Special Terms and the order striking out defendant's answer, should be reversed.

All concur.

Judgment and order reversed.

N. E. HOWE, RESPONDENT, v. J. E. ELWELL, APPELLANT.

SUPREME COURT, NEW YORK, JANUARY TERM, 1901.

[57 *New York Appellate Division*, 357.]

APPEAL by the defendant, Joseph E. Elwell, from an order of the Supreme Court, made at Broome Special Term and entered in the office of the clerk of the county of Otsego on the 10th day of May, 1900, striking out the answer of the defendant as sham, false, and frivolous.

This is an action for slander. The first count of the complaint contains the usual allegations charging that the defendant maliciously spoke concerning the plaintiff certain defamatory words, therein specifically set forth. The second count is vague and general, and in substance alleges that the defendant at various times and places charged the plaintiff with unchastity.

The answer, on information and belief, denied each and every allegation of the complaint and was verified by the defendant's attorney.

On motion, made by the plaintiff on the pleadings, an order was made by the court striking out the answer as "sham, false, and frivolous." From this order the appeal is taken.

EDWARDS, J. An answer cannot be stricken out as frivolous. If adjudged to be frivolous, judgment must be ordered thereon and the pleading must remain in the record and become a part of the judgment roll. Strong v. Sproul.[7] The inference, therefore, is that the answer was stricken out as sham. Briggs v. Bergen.[8]

The form of the general denial "upon information and belief" is good, Bennett v. Leeds Mfg. Co., and a general or specific denial, if pleaded in a form permitted by the Code, cannot be stricken out

[1] 21 Hun, 436.
[2] 39 Ind. 144.
[3] 51 N. Y. Super. Ct. Rep. [19 J. & S.], 523.
[4] 14 Abb. N. C. 316.
[5] 94 U. S. 586.
[6] 36 Cal. 230.
[7] 53 N. Y. 497.
[8] 23 N. Y. 162.

as sham, although shown by affidavits to be false.[1] Wayland v. Tysen;[2] Thompson v. Erie R. R. Co.;[3] Farmers' Nat. Bank v. Leland.[4]

The plaintiff's counsel contends that the denial is insufficient, for the reason that the defendant must be presumed to have knowledge of the allegations of the complaint and, therefore, must either admit or deny absolutely.

If this proposition were correct, the denial could not be stricken out as sham.[5] A sham answer is one that is false. The words "sham" and "false" are synonymous (Thompson v. Erie R. R. Co.[6]), and a motion to strike out a pleading as sham "calls for a determination whether the pleading be true or false. (Wayland v. Tysen.[6]) The court cannot say that a denial on information and belief is untrue because the party presumably had sufficient knowledge to deny absolutely the allegation if it were not true.

But I think that this form of denial is permissible in cases where a party would naturally be presumed to have knowledge of the truth or falsity of an allegation. Such a presumption might be erroneous. A defendant may conscientiously doubt whether he has sufficient knowledge to deny absolutely, yet may be in possession of such information as will enable him truthfully to deny on information and belief, and if he choose to adopt the latter form, it cannot be stricken out as sham. The following authorities support this view: Neuberger v. Webb;[7] Humble v. McDonough;[8] Martin v. Erie Preserving Co.[9]

The contention of the plaintiff is based on the authority of Pardi

[1] Wayland v. Tysen, 45 N. Y. 281; Thompson v. Erie Co., 45 N. Y. 468; Roby v. Hallock, 5 Abb. N. C. 86; Central Bank v. Thein, 76 Hun, 571; Barrie v. Yorston, 35 N. Y. Ap. Div. 404; Mut. Co. v. Toplitz, 58 N. Y. Ap. Div. 188; Alexander v. Aronson, 65 N. Y. Ap. Div. 174 *Accord*. — Ed.

[2] 45 N. Y. 281. [3] Id. 468. [4] 50 Id. 673.

[5] Caswell v. Bushnell, 14 Barb. 393; Grocers Bank v. O'Rorke, 6 Hun, 18; Neuberger v. Webb, 24 Hun, 347; Martin v. Erie Bank, 48 Hun, 81; Robert Gere Bank v. Inman, 51 Hun, 97, affirmed 115 N. Y. 650; Wilson v. Eastman Co., 9 N. Y. Sup. 189; Harvey v. Walker, 13 N. Y. Sup. 170; Humble v. McDonough, 5 N. Y. Misc. Rep. 508; Nichols v. Corcoran, 38 N. Y. Misc. Rep. 671; Ginnel v. Stayner, 71 N. Y. Ap. Div. 540; Hopkins v. Meyer, 76 N. Y. Ap. Div. 365 *Accord*.

Humphreys v. McCall, 9 Cal. 59; Brown v. Scott, 25 Cal. 189; Walker v. Buffandeau, 63 Cal. 312, 314 (*semble*); Loveland v. Garner, 74 Cal. 298; Gribble v. Columbus Co., 100 Cal. 67; Mulcahy v. Buckley, 100 Cal. 484; Wickersham v. Comerford, 104 Cal. 494; Mullaly v. Townsend, 119 Cal. 47; Weill v. Crittenden, 139 Cal. 488; Hanna v. Barker, 6 Colo. 303; Smith v. Champion, 102 Ga. 92 (answer bad on demurrer); Angier v. Eq. Assn., 109 Ga. 625 (like preceding case); First Bank v. Martin, 6 Idaho, 204; Simpson v. Remington, 6 Idaho, 681; Beyre v. Adams, 73 Iowa, 382; Wing v. Dugan, 8 Bush, 583; Huffaker v. Nat. Bank, 12 Bush, 287 (answer bad on demurrer); Nashville Co. v. Carico, 95 Ky. 489; Wheaton v. Briggs, 35 Minn. 470; Smalley v. Jackson, 40 Minn. 450; Schroeder v. Capehart, 49 Minn. 525 (but see Morton v. Jackson, 2 Minn. 180); Maclay v. Sands, 94 U. S. 586 (*semble* — Montana law); Oakes v. Ziemer, 62 Neb. 603, 61 Neb. 6; Gas Co. v. Neuse Co., 91 N. Ca. 74; Van Dyke v. Doherty, 6 N. Dak. 263 (answer bad on demurrer); Mills's Est., 40 Oreg. 424; Thompson v. Skeen, 14 Utah, 209; Raymond v. Johnson, 17 Wash. 232 (judgment for plaintiff); Chase v. Dearborn, 21 Wis. 51 (plaintiff entitled to verdict); Elmore v. Hill, 46 Wis. 618 (answer bad on demurrer); Union Co. v. Board, 47 Wis. 245; Sweet v. Davis, 90 Wis. 409 (plaintiff entitled to verdict); Winterfield v. Cream Co., 96 Wis. 239 (judgment for plaintiff) *Contra*. — Ed.

[6] *Supra*. [7] 24 Hun, 347. [8] 5 Misc. Rep. 512. [9] 48 Hun, 81.

v. Conde,[1] which cites as authority Edwards *v.* Lent,[2] the doctrine of which in respect to the power to strike out a denial as sham has been overruled by the later cases.[3]

The order appealed from should be reversed.

All concurred; SMITH, J., in result.

Order reversed, with ten dollars and disbursements.

FORTESCUE *v.* HOLT.

IN THE KING'S BENCH, TRINITY TERM, 1672.

[1 *Ventris*, 213.]

A *scire facias* was brought upon a judgment of £1000, as administrator of J. S.

The defendant pleaded that before the administration committed to the plaintiff, viz., such a day, etc., administration was granted to J. N., who is still alive at D., and demandeth judgment of the writ.

The plaintiff replies, J. N. died, etc., and *de hoc ponit se super patriam*. And to that the defendant demurs.

For that he ought to have traversed *absque hoc*, that he was alive; for though the matter contradicts, yet an apt issue is not formed without an affirmative and a negative; and so said the court.[4]

[1] 27 Misc. Rep. 496.

[2] 8 How. Pr. 28.

[3] Not only Pardi *v.* Conde and Edwards *v.* Lent, but also the following cases, in which an answer like that in the principal case was struck out as sham, or treated as no bar to a judgment on the pleadings, must be regarded as overruled. Ketcham *v.* Zerega, 1 E. D. Sm. 553 (*semble*); Hance *v.* Rumming, 2 E. D. Sm. 48, 1 Code Rep. N. S. 204 S. C.; Mott *v.* Burnett, 1 Code Rep. N. S. 225; Richardson *v.* Wilton, 4 Sandf. 708; Thorn *v.* N. Y. Mills, 10 How. Pr. 19; Lewis *v.* Acker, 11 How. Pr. 163; Chapman *v.* Palmer, 12 How. Pr. 37; Fales *v.* Hicks, 12 How. Pr. 153; Shearman *v.* N. Y. Mills, 1 Abb. Pr. 187; Wesson *v.* Judd, 1 Abb. Pr. 254; Leach *v.* Boynton, 3 Abb. Pr. 1; Livingston *v.* Hammer, 7 Bosw. 670; Lawrence *v.* Derby, 15 Abb. Pr. 346, n.; Beebe *v.* Marvin, 17 Abb. Pr. 194; Fallon *v.* Durant, 60 How. Pr. 178 (reply bad on demurrer); Robbins *v.* Long, 60 How. Pr. 200; Byrne *v.* Burton, 3 N. Y. Month. L. Bull. 100; Sherman *v.* Boehm, 13 Daly, 42; McLean *v.* Julien Co., 28 Abb. N. C. 249; Austen *v.* Westchester Co., 8 N. Y. Misc. Rep. 11.

[4] Argumentativeness was originally a fatal defect on general demurrer, but after the Statute of Elizabeth, 1585, objection to this defect of form could be taken only by a special demurrer. Y. B. 10 H. VI., fol. 7, pl. 21; Ewer *v.* Moile, Yelv. 140; Courtney *v.* Phelps, 1 Sid. 301; Ayer *v.* Joyner, Ow. 141; Kenchin *v.* Knight, 1 Wils. 253; Muntz *v.* Foster, 6 M. & G. 745, per Coltman, J.; Spear *v.* Bicknell, 5 Mass. 125; Eames *v.* Savage, 14 Mass. 425.

Since special demurrers for defects of form are abolished in most jurisdictions, argumentativeness, as such, is no longer open to attack. An argumentative denial, however, may be so prolix or obscure as to justify a motion to make the pleading more definite and certain. Woodworth *v.* Knowlton, 22 Cal. 164; Way *v.* Oglesby, 45 Cal. 655; Thompson *v.* Thompson, 52 Cal. 154; Scott *v.* Wood, 81 Cal. 398; Robinson *v.* Merrill, 87 Cal. 11; Burris *v.* People's Co., 104 Cal. 248; Phillips *v.* Hagart, 113 Cal. 552; French *v.* Howard, 14 Ind. 455; Judah *v.* Trustees, 23 Ind. 272; Loeb *v.* Weis, 64 Ind. 285; Burns *v.* Stanley, 72 Ind. 350, 352; Stoddard *v.* Johnson, 75 Ind. 20; State *v.* Wylie, 86 Ind. 396; Barkley *v.* Mahon, 95 Ind.

KINNEY v. OSBORNE.

SUPREME COURT, CALIFORNIA, OCTOBER TERM, 1859.

[14 *California Reports*, 112.]

BALDWIN, J., delivered the opinion of the court — COPE, J. concurring.[1]

This was assumpsit on a promissory note.

1. The note or a copy was annexed to the complaint. The defendant answered, not denying the execution of the note, but denying that he was indebted to the plaintiff.[2] This was no denial at all. The admission that he made the note being equivalent so far to a confession of the debt; and the denial of the indebtedness being only a denial of the legal consequence resulting from the execution of the note.

Judgment affirmed.[3]

101; Dickson v. Lambert, 98 Ind. 487; Clauser v. Jones, 100 Ind. 123; Leary v. Moran, 106 Ind. 566; State v. Osborne, 143 Ind. 671; Boos v. Morgan, 146 Ind. 111; Childers v. First Bank, 147 Ind. 430; Hiatt v. Darlington, 152 Ind. 570; Oren v. Board, 157 Ind. 158; State v. Perry, 159 Ind. 508; Becker v. Sweetzer, 15 Minn. 427; Polkinghome v. Hendricks, 61 Miss. 366; Merch. Bank v. Calmes, 82 Miss. 603; Mauldin v. Ball, 19 Mont. 355; Sorensen v. Sorensen, (Nebraska, 1902) 94 N. W. R. 540; De Wees v. Manhattan Co., 34 N. J. 244, 253; Noble v. Travellers' Co., (New Jersey, 1901) 51 Atl. R. 622; Dayton Co. v. Kelly, 24 Oh. St. 345; Corry v. Campbell, 25 Oh. St. 134.

There are numerous statements in the New York decisions that argumentativeness *per se* makes the answer bad. But it seems impossible to believe that an answer which meets an allegation that "A is dead" by the statement that "A is alive" will be adjudged an insufficient answer in New York, notwithstanding the *dicta* in the following cases: Wood v. Whiting, 21 Barb. 190 (*semble*); West v. Exchange Bank, 44 Barb. 175 (*semble*); Powers v. Rome Co., 3 Hun, 285, 286 (*semble*); Marston v. Swett, 66 N. Y. 206, 210 (*semble*); Swinburne v. Stockwell, 58 How. Pr. 312 (*semble*); Fleischmann v. Stern, 90 N. Y. 110 (*semble*); Hand v. Belcher Co., 9 N. Y. Sup. 738; Beard v. Tilghman, 20 N. Y. Sup. 736 (*semble*); Berry v. Rowley, 11 N. Y. Ap. Div. 396; Place v. Bleyl, 45 N. Y. Ap. Div. 17; Rodgers v. Clement, 162 N. Y. 422, 428 (*semble*); Hand v. Miller, 58 N. Y. Ap. Div. 126, 128; Smith v. Coe, 170 N. Y. 162 (*semble*) (but see s. c. 170 N. Y. 612, 613, and also Staten Co. v. Hinchliffe, 170 N. Y. 473, 481, in which case a demurrer to an argumentative denial was overruled); Ivy Co. v. Morton, 73 N. Y. Ap. Div. 335 (*semble*); Zwerling v. Annenberg, 38 N. Y. Misc. Rep. 169; Soper v. St. Regis Co., 38 N. Y. Misc. Rep. 294 (*semble*); Jaeger v. New York, 39 N. Y. Misc. Rep. 543 (*semble*); Kraus v. Agnew, 80 N. Y. Ap. Div. 1, 5 (*semble*).

In Maryland the court, without regard to the contrary view in Neale v. Clantice, 7 Har. & J. 379, treated argumentativeness as a defect of substance, which rendered the pleading bad on general demurrer. The same opinion was expressed *obiter* in Keedy v. Long, 71 Md. 385, 389, and Spencer v. Patten, 84 Md. 414. But, it should be observed, the error in sustaining the demurrer in Miller v. Miller was harmless, since the defendant had pleaded also the general issue. Furthermore, in Davis v. Wolfsheimer, (Super. Ct. Baltimore) 1 Poe, Pl. & Pract. (3d ed.), 895, the court, thinking that the decision in Miller v. Miller did not represent the final opinion of the Supreme Court, declined to follow it. — ED.

[1] Only a portion of the opinion of the court is given. — ED.

[2] The plaintiff demurred to the answer, and the demurrer was sustained by the district court. — ED.

[3] Trower v. Chadwick, 3 B. & C. 334 (denial of liability to support adjoining wall); Cane v. Chapman, 5 A. & E. 647 (denial of duty to pay); Lawrence v. Meyer, 35 Ark. 104; Fain v. Goodwin, 35 Ark. 109; Moore v. Nichols, 39 Ark. 145; Taylor v. Purcell, 60 Ark. 606; Curtis v. Richards, 9 Cal. 33; Wells v. McPike, 21 Cal. 215; People v. Supervisors, 27 Cal. 655; Lightner v. Menzel, 35 Cal. 452; Buffalo Co. v. Todd, 133 Cal. 292; Watson v. Lemen, 9 Colo. 200; Gale v. James, 11 Colo. 540; Swanholm v. Reeser, 3 Idaho, 476; Mann

E. A. GILBERT, Appellant, v. R. COVELL, Respondent.

Supreme Court, General Term, New York, December, 1857.

[16 *Howard, Practice Reports*, 34.]

By the Court — Welles, Justice. The complaint is upon a promissory note made by the defendant to Simeon Alvord or bearer, for $300, dated October 1, 1855, payable one day from date, with interest. The complaint, after setting out the note, states that Alvord, before the commencement of the action, "sold, transferred, and delivered the said promissory note to the above-named plaintiff, who is now the lawful owner and holder of said note," and then alleges non-payment, etc.

The first[1] answer denies, upon the information and belief of the defendant, that the plaintiff is the owner or holder of the note.

The plaintiff demurs specially to this answer for insufficiency.

The answer is clearly insufficient. It does not deny any material fact stated in the complaint. The facts stated in the complaint show a good cause of action, not one of which is denied by the answer, and therefore, on this demurrer, must be all taken as true. Neither does the answer set up new matter by way of defence or otherwise. It consists only of denials of conclusions of law. The answer is clearly frivolous.[2]

The judgment of the special term should be reversed, and the plaintiff should have judgment upon the demurrers.

v. Howe, 9 Iowa, 546; Cottle v. Cole, 20 Iowa, 481; Morton v. Coffin, 29 Iowa, 235; McIntosh v. Lee, 57 Iowa, 356; Hinbrager v. Richter, (Iowa, 1892) 52 N. W. R. 188 (denial of liability on a warrant); Callenan v. Williams, 71 Iowa, 363 (but see Godfrey v. Cruise, 1 Iowa, 92); Haggard v. Hay, 13 B. Mon. 175; Gilbert v. Covell, 16 B. Mon. 329; Francis v. Francis, 18 B. Mon. 57; Aultman v. Mead, 109 Ky. 583; Frasier v. Williams, 15 Minn. 288; Sapington v. Jeffries, 15 Mo. 628; Engler v. Bate, 19 Mo. 543; Springer v. Kleinsorge, 83 Mo. 152, 156; Hurt v. Ford, 142 Mo. 283, 302 (but see Westlake v. Moore, 19 Mo. 556); Higgins v. Germania, 1 Mont. 230; Power v. Gun, 6 Mont. 5; Marrigan v. English, 9 Mont. 113; Baldwin v. Burt, 43 Neb. 245; Bankers Union v. Favolora, (Nebraska, 1905) 102 N. W. R. 1013; Pierson v. Cooley, 1 Code Rep. 91; Beers v. Squire, 1 Code Rep. 84; Mullen v. Kearney, 2 Code Rep. 18; McMurray v. Gifford, 5 How. Pr. 14; Edson v. Dillaye, 8 How. Pr. 273; Gilbert v. Covell, 16 How. Pr. 34; Fosdick v. Groff, 22 How. Pr. 158; Excelsior Bank v. Campbell, 4 Th. & C. 549 (denial of default as mortgagor); Baldwin v. Rees, 8 Am. L. Rec. (Oh.) 556; Knox Bank v. Lloyd, 18 Oh. St. 353; Larimore v. Wells, 29 Oh. St. 13; Rolling Co. v. Railroad, 34 Oh. St. 450 (but see Lewis v. Smith, 2 Disn. 434); Spencer v. Turney, 5 Okla. 683; Jackson v. Green, 13 Okla. 314; Simpson v. Prather, 5 Oreg. 86; Dickert v. Weise, 22 Utah, 474 (but see Heath v. White, 3 Utah, 474); Robbins v. Lincoln, 12 Wis. 1 *Accord*.

If a count alleges an indebtedness for work and labor, goods sold and the like, the defendant may deny the indebtedness for work and labor, goods sold, or the like. Morrow v. Conger, 3 Abb. Pr. 328 (coal sold); Anon., 2 Code Rep. 67 (debt on account); McLaughlin v. Wheeler, 1 S. Dak. 497 (work and labor as attorney). — Ed.

[1] Only so much of the case is given as relates to this answer. — Ed.

[2] Poorman v. Mills, 35 Cal. 118; Frost v. Harford, 40 Cal. 165; Felch v. Beaudry, 40 Cal. 439; Monroe v. Fohl, 72 Cal. 568; Bank v. Boyd, 99 Cal. 604; Clemens v. Luce, 101 Cal. 432; Freeman v. Curran, 1 Minn. 169; Frazier v. Williams, 15 Minn. 288; Downer v. Reed,

RUSSELL'S CASE.

IN THE ——, HILARY TERM, 1537.

[*Reported in Dyer, 26 b, placitum* 171.]

ONE Christopher Russell brought an action upon the case against a man, who comes and defends the force, etc., and as to the speaking and publishing of the aforesaid words, viz., "I will abide by it, that Christopher Russell was and is a false thief, and was at my door in the sessions-day at night between one and two of the clock after midnight, and would have robbed me, and did break open my doors, and did put me in jeopardy of my life," the said plaintiff is not damnified in manner and form, etc. And upon that plea the plaintiff demurred in law. And by the opinion of the court the plea is clearly bad, for it admits the speaking of the aforesaid words, but that the plaintiff was not damnified by that; and what damage can be more grievous than such a report of him? And they were of opinion to give judgment for the plaintiff, if the defendant pleads nothing by the Monday next ensuing, at which day, by the opinion of the whole court, a writ of inquiry of damages was awarded without any argument.

SMITH *v.* THOMAS.

IN THE COMMON PLEAS, NOVEMBER 25, 1835.

[2 *Bingham, New Cases*, 372.]

THE Plaintiff a haberdasher and laceman counted against the Defendant upon a slander reflecting upon his credit and the count con-

17 Minn. 493; Fleury v. Reget, 5 Sandf. 646; Seeley v. Engell, 17 Barb. 530; Helden v. Kirby, 21 Wis. 149 *Accord*.

See to the same effect: Safford v. Miller, 59 Ill. 205; Cottle v. Cole, 20 Iowa, 481; Drake v. Cerkroft, 4 E. D. Sm. 34; Foshey v. Riche, 2 Hill, 247.

In the following cases also a negative answer was adjudged insufficient because it denied matter of law: Willion v. Berkley, Plow. 231, a; Grills v. Marnell, Willes, 378; Priddle v. Napper, 11 Rep. 10; Hume v. Liversidge, 1 Cr. & M. 332; Hobson v. Middleton, 6 B. & C. 295; Dangerfield v. Thomas, 9 A. & E. 292; Summers v. Ball, 8 M. & W. 596; Rindel v. Sabell, 4 C. B. *n. s.* 97 (denial that demand was for liquidated damages as distinguished from a penalty); Clearwater v. Meredith, 1 Wall. 25, 42 (denial of legal effect of a consolidation); Rutherford v. Foster, 125 Fed. 187 (denial that defendant wrongfully caused death of plaintiff's husband); Bank v. Armstrong, 12 Ark. 602; Tyner v. Hays, 37 Ark. 599 (denial of a wrongful detention of goods); Nelson v. Murray, 23 Cal. 338 (denial that a road became a highway in lawful manner); Scott v. Umbarger, 41 Cal. 410 (denial of liability as a constructive trustee); Bradbury v. Cronise, 46 Cal. 287 (denial of a lien); Heydenfeldt v. Jacobs, 107 Cal. 373; Rhoades v. Higbee, 21 Colo. 88 (denial of wrongfulness of defendant's possession); Cottle v. Cole, 20 Iowa, 481 (denial of assignment on the facts alleged); State v. Bryant, 55 Iowa, 451 (denial of matter of record); Rixford v. Wait, 11 Pick. 339; Chamberlain v. Noyes (Nebraska, 1902), 92 N. W. R. 175 (denial of competency of plaintiff to sue); Foshay v. Rich, 2 Hill, 247; Manice v. N. Y. Co., 3 Edw. 143 (denial of usury in facts alleged); Dresser v. Brooks, 3 Barb. 429, 433 (*semble*); Litchfield v. Pelton, 6 Barb. 187 (denial that alleged facts amounted to fraud); Robinson v. Stewart, 10 N. Y. 189 (like preceding case); Lawrence v. Cabot, 41 N. Y. Super. Ct. 122; Schaetzel v. Germantown Co., 22 Wis. 412 (denial that action had accrued to plaintiff). — ED.

cluded by alleging as special damage, by reason of the committing of the grievances by the Defendant, the refusal of several persons, *nominatim*, to deal with the plaintiff.

The Defendant, in his third plea, denied the existence of the special damage alleged in the second count of the declaration.

To this plea the Plaintiff demurred, and assigned as cause of demurrer, that the special damage was not the gist of the action, nor traversable; that the Defendant could not plead a plea to the damage alone, the damage not being by itself a cause of action or divisible from the rest of the grievances.[1] . . .

TINDAL, C. J. As to the third plea, which is pleaded, not to the action, but to the special damage only, we held it to be insufficient as the argument was proceeding before us. The allegation of special damage in a declaration of slander is intended only as notice to the Defendant, in order to prevent his being taken by surprise at the trial. Where the words are actionable in themselves, it is not the gist of the action, but a consequence only of the right of action. If the Plaintiff proves his special damage, he may recover it; if he fails in proving it, he may still resort to, and recover, his general damages. A traverse, therefore, of such an allegation is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict.

Judgment for Plaintiff.[2]

GERMAN-AMERICAN BANK *v.* WILLIAM C. WHITE.

SUPREME COURT, MINNESOTA, JUNE 5, 1888.

[38 *Minnesota Reports*, 471.]

MITCHELL, J.[3] Ejectment. The complaint alleges that the value of the rents and profits of the lands during the time they have been wrongfully withheld from plaintiff was $80, and, in addition to the possession, asks judgment for that sum. The answer contains a general denial of each and every allegation in the complaint. Upon the trial, no evidence was offered as to the value of the rents and profits, but the court gave judgment for plaintiff for $80 as damages for the wrongful detention. This seems to have been done upon the idea that the general denial in the answer did not put in issue the allegation as to the value of the rents and profits; being, as to such allegation, a negative pregnant, under the decisions of this court.

[1] The statement of the case is abridged, and the arguments are omitted. — ED.

[2] Robinson *v.* Marchant, 7 Q. B. 918 *Accord*.

In accordance with the doctrine of the principal case, the allegation of special damage, which is not the gist of the action, is not admitted to be true by a failure to deny it. Thompson *v.* Lumley, 7 Daly, 74. — ED.

[3] Only a portion of the opinion is given. — ED.

Even if followed and adhered to, we do not think the doctrine of these decisions is applicable. Rents and profits are allowed as damages for the unlawful withholding, the allegation of value only going to the *quantum* of damages. Such damages are unliquidated, and require to be assessed; and in an action for unliquidated damages the allegation of their amount is not traversable. Pullen *v.* Wright.[1] But the majority of the court are of opinion that the rule that a general denial will not put in issue an allegation of value, first suggested in McClung *v.* Bergfeld,[2] and expressly held in Dean *v.* Leonard,[3] and subsequently followed in other cases, should no longer be adhered to, and for the following reasons: It is unsound in principle. A negative pregnant is a negative that implies an affirmative; and from its very nature such a negative can never be found in a general denial, which is a denial in gross of all the allegations of the pleading to which it is interposed. A general denial has as wide a scope as the allegations of the pleading which it denies, and puts in issue every fact alleged in it Bliss, Code Pl. § 332; 2 Wait, Pr. 419, 420, and cases cited. If such a denial is to be held a negative pregnant as to an allegation of value, on principle it should be also so held as to allegations of time, quantity, and the like. Secondly, any such rule of pleading puts us out of harmony with that which obtains in every other jurisdiction. In every other state, so far as we can ascertain, in which the code system of pleading prevails, a general denial is held a good traverse of every allegation of the pleading to which it is interposed. And, lastly, our rule works badly in practice.

From what has been said it follows that the judgment appealed from is erroneous, in so far as it awards the plaintiff $80 damages for the unlawful detention of the premises. In other respects it is correct. The cause is remanded, with instructions to the court below to modify its judgment by striking out that part which adjudges that the plaintiff recover $80 damages.[4]

WALKER *v.* JONES.

In the Exchequer, Easter Term, 1834.

[2 *Compton & Messon*, 672.]

In this case, which was an action of detinue, the defendant pleaded a plea traversing the delivery; to which there was a demurrer. On the demurrer being called on for argument,

[1] 34 Minn. 314 (26 N. W. Rep. 894); 2 Wait, Pr. 418. [2] 4 Minn. 99 (148).
[3] 9 Minn. 176 (190).
[4] Bank *v.* Western Co., 14 Wash. 162 *Accord.*
The following cases *contra* are overruled: Dean *v.* Leonard, 9 Minn. 190; Pottgieser *v.* Dorn, 16 Minn. 204; Moulton *v.* Thompson, 26 Minn. 120; Coleman *v.* Pearce, 26 Minn. 123; Steele *v.* Thayer, 36 Minn. 174. — Ed.

Comyn stated that the plea had been drawn from a precedent in Chitty;[1] but that, after the case of Gledstane *v.* Hewitt,[2] from which it appeared that the bailment in detinue was immaterial, he could not support the plea.

The plea was ultimately struck out on payment of costs.[3]

GORAM *v.* SWEETING.

In the King's Bench, Michaelmas Term, 1670.

[2 *Saunders*, 205.]

Assumpsit on a policy of assurance by Goram, plaintiff, against Sweeting, defendant. The plaintiff declares that he had caused a policy of assurance to be written on the good ship called the "Margaret," of London, and on the tackle and apparel, etc., of the same ship. And the plaintiff further shows that the defendant became an assurer on the said policy for £50, and in consideration of the plaintiff's promise to pay him at the rate of £3 12*s.* per cent for six months, undertook and promised to perform the said policy as to £50 so insured by him. And the plaintiff avers in fact that the ship, etc., did not arrive in safety, but "that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the said voyage," of which the plaintiff gave the defendant notice, and abandoned all his interest therein, yet the said defendant has not borne the adventure, nor paid the said £50, wherefore the plaintiff brings this action.

The defendant pleads in bar that the ship and all the apparel and tackle aforesaid arrived in good safety, and traverses without this, that "the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the said voyage in manner and form as," etc., and this, etc., wherefore, etc., upon which plea the plaintiff demurs in law.

And *Jones*, for the plaintiff, argued that the traverse in the defendant's plea was bad, because the defendant has traversed in the conjunctive, namely, without this that the said ship and tackle, etc., were

[1] 3 Chit. (4th ed.) 1023. [2] 1 C. & J. 565.

[3] In the following cases the plea or answer was adjudged insufficient, because it denied a superfluous and therefore immaterial allegation. Palmer *v.* Ekins, 2 Stra. 817; Kempe *v.* Crews, 1 Ld. Ray. 167 (*semble*); Cooke *v.* Birt, 5 Taunt. 765; Hall *v.* Tapper, 3 B. & Ad. 855; Radford *v.* Smith, 3 M. & W. 254; Spaeth *v.* Hare, 9 M. & W. 336; Hodgins *v.* Hancock, 14 M. & W. 120; Whitehead *v.* Harrison, 6 Q. B. 423; Reg. *v.* Dendy, 22 L. J. Q. B. 247; Cassady *v.* Curtis, 7 Ark. 123; Chandler *v.* Chandler, 21 Ark. 95; Young *v.* Howell, 14 Cal. 468; Pink *v.* Catanich, 51 Cal. 420; Elder *v.* Spinks, 53 Cal. 293; Hunter *v.* Martin, 57 Cal. 365; Kidder *v.* Stevens, 60 Cal. 414; Parish *v.* Stanton, 2 Root, 155; Hale *v.* Dennie, 4 Pick. 501; Loring *v.* Gay, 9 Pick. 66; Rixford *v.* Wait, 11 Pick. 339; Freeman *v.* Curran, 1 Minn. 169; Gates *v.* Lounsbury, 20 Johns. 427; People *v.* Manhattan Co. 9 Wend. 351; King *v.* Utica Co. 6 How. Pr. 485; Marvin *v.* Wilkins, 1 Aik. 107 *Accord.* — Ed.

sunk and destroyed, whereas it ought to be in the disjunctive, namely, without this that the said ship or tackle, etc., were sunk and destroyed. For, as he said, if in this case any of the things enumerated arrive in safety, as, for instance, if the ship arrive in safety, although all the goods and merchandises, and all the apparel and tackle of the ship, for which by the policy a satisfaction ought to be made to the plaintiff, are lost, yet if issue had been taken on the defendant's traverse as it now is, it would be found against the plaintiff. . . . Wherefore he concluded that the traverse was bad, and prayed judgment for the plaintiff.

Coleman and *Saunders*, for the defendant, argued that the traverse was good. The plaintiff has averred in the copulative, "that the said ship, tackle, apparel, ordnance, munition, artillery, and other furniture" were totally lost, whereby he has given an advantage to the defendant to traverse it precisely as the plaintiff has alleged it; as in the case of Tatem *v.* Perient,[1] where the plaintiff had alleged more than he needed in his declaration, and thereby gave an advantage to the other side to traverse it. So in Sir Francis Leke's Case.

But notwithstanding this, it was adjudged for the plaintiff, because, as Twysden declared, it was only an action for damages, and the defendant might aid himself on the writ of inquiry; and if he had traversed in the disjunctive, and issue had been joined upon it, the defendant might give in evidence any such matter in mitigation of damages.[2] . . .

[1] Yel. 195.

[2] Moore *v.* Boulcott, 1 H. N. C. 323; Stubbs *v.* Lainson, 1 M. & W. 728; Dawson *v.* Wrench, 3 Ex. 359; Blankman *v.* Vallejo, 15 Cal. 638; Kuhland *v.* Sedgwick, 17 Cal. 123; Ghirardelli *v.* McDermott; 22 Cal. 539; More *v.* Del Valle, 28 Cal. 170; Richardson *v.* Smith, 29 Cal. 529; Fitch *v.* Bunch, 30 Cal. 208; Blood *v.* Light, 31 Cal. 115; Fish *v.* Redington, 31 Cal. 185; Burke *v.* Carruthers, 31 Cal. 467; Leroux *v.* Murdock, 51 Cal. 541; Mulcahy *v.* Buckley, 100 Cal. 484; Wise *v.* Rose, 110 Cal. 159; Morgan *v.* Booth, 13 Bush, 481; Hendrick *v.* Robert Mitchell Co. (Kentucky, 1895), 29 S. W. R. 750; Rogers *v.* Felton, 98 Ky. 148; Pullen *v.* Wright, 34 Minn. 314; Bach *v.* Montana Co., 15 Mont. 345; Hopkins *v.* Everett, 6 How. Pr. 159; Kay *v.* Whittaker, 44 N. Y. 565, 571; Stuber *v.* McEntee, 142 N. Y. 200; McClave *v.* Gibbs, 11 N. Y. Misc. Rep. 44; Laurie *v.* Duer, 30 N. Y. Misc. Rep. 154 (*semble*); Pascekwitz *v.* Richards, 37 N. Y. Misc. Rep. 259; Scoville *v.* Barney, 4 Oreg. 268; Moser *v.* Jenkins, 5 Oreg. 447; Curnow *v.* Phœnix Co., 46 S. Ca. 79; Gamman *v.* Dyke, 2 Wash. Ter. 266; State *v.* McGarry, 21 Wis. 496 *Accord.*

In accordance with the doctrine of the principal case a denial of knowledge or information sufficient to form a belief as to the truth of "all of the allegations" or as to "each and every allegation" in the complaint is bad as implying knowledge or information as to one or more of the allegations. Yeung *v.* Catlett, 6 Duer, 437; Waters *v.* Curtis, 13 Daly, 179; Collins *v.* North Side Co., 1 N. Y. Misc. Rep. 211. But a denial of knowledge or information sufficient to form a belief as to "the allegations" in the complaint is sufficient, although it would be better to deny as to "any of the allegations." Trustees *v.* Nesbitt, 65 Minn. 17.

In the following case a denial in the conjunctive was deemed sufficient, since the allegations were treated as amounting to a single averment. South *v.* Jones, 1 Strs. 245; Eden *v.* Turtle, 10 M. & W. 635; Alsager *v.* Currie, 11 W. & W. 14; Jones *v.* Eddy, 90 Cal. 147; Feldman *v.* Shea, 6 Idaho, 717.

See also Bradley *v.* Milnes, 1 Bing. N. C. 644; Palmer *v.* Gooden, 8 M. & W. 890. — Ed.

COLBORNE *v.* STOCKDALE.

In the King's Bench, Hilary Term, 1722.

[1 *Strange*, 493.]

Debt upon a bond conditioned for the payment of £1550. The defendant upon *oyer* pleads in bar that part of the sum mentioned in the condition, *scil.*, £1500, was won by gaming, contrary to the statute, *per quod* the bond became void. The plaintiff replies that the bond was given for a just debt, and traverses that the £1500 was won by gaming, *contra formam statuti modo et forma*, as the defendant has pleaded. The defendant demurs, and

Strange, pro def., argued that the replication was ill, because it makes the sum parcel of the issue, and obliges the defendant to prove that the whole sum of £1500 was won by gaming; whereas the statute avoids the bond, if any part of the consideration became due on that account; and he urged the common case of a plea of payment before the day, where if issue is joined, and a verdict *pro quer'*, there shall be a repleader, because it leaves it open to a possibility that there might be a payment at the day, and then the plaintiff could have no cause of action; so in this case the finding that the whole sum of £1500 was not won by gaming will not toll the presumption as to a less sum. Besides, the sum is put in only for form, and therefore within the reason of the case of Stallard *v.* Tims, the replication will be ill, for making it the substance of the issue.[1]

Wearg, contra, insisted that the replication following the words of the plea would be well enough; and cited Dy. 365, pl. 1, for that purpose.

Sed per Curiam, There is no color to maintain the replication; the material part of the plea is, that part of the money for which the bond was given was won by gaming, and *scilicet*, so much, is only matter of form, of which no notice should be taken in the replication.[2]

[1] Only so much of the case is given as relates to the sufficiency of the replication. — Ed.

[2] In the following cases, as in the principal case, the denial was too large by reason of putting in issue the amount alleged in the preceding pleading. Payne *v.* Brigham, 3 Lev. 228; Brown *v.* Johnson, 2 Mod. 145; Tildesley *v.* Harper, 7 Ch. D. 403, 10 Ch. Div. 393; Caulfield *v.* Sanders, 17 Cal. 569; Higgins *v.* Wortell, 18 Cal. 330; Towdy *v.* Ellis, 22 Cal. 660; Leffingwell *v.* Griffin, 31 Cal. 231; Doll *v.* Good, 38 Cal. 287; Huston *v.* Twin Co. 45 Cal. 550; Marsters *v.* Lash, 61 Cal. 622; James *v.* McPhee, 9 Colo. 486; Swanholm *v.* Reeser, 3 Ida. 476; Mann *v.* Howe, 9 Iowa, 546; Sheldon *v.* Middleton, 11 Iowa, 17; Stuckeger *v.* Smith, 27 Iowa, 236; Callenan *v.* Williams, 71 Iowa, 363; Pottgieser *v.* Dorn, 16 Minn. 204; Moulton *v.* Thompson, 26 Minn. 190; Coleman *v.* Pearce, 26 Minn. 123; Steele *v.* Thayer, 26 Minn. 174; Edgerton *v.* Power, 18 Mont. 350; Gray *v.* Elbling, 35 Neb. 278; Scovill *v.* Barney, 4 Oreg. 286; Conway *v.* Clinton, 1 Utah, 215; Coal Co. *v.* Sanitarium Co. 7 Utah, 158; Dillon *v.* Spokane Co. 3 Wash. Ter. 496; Robbins *v.* Lincoln, 12 Wis. 1.

But see *contra* Parker *v.* Tillinghast, 1 N. Y. St. Rep. 296 (motion to make the answer more definite and certain denied).

If a party improperly traverse the amount, and his adversary, instead of demurring, joins issue, the party traversing will not obtain a verdict, even though the amount alleged by his adversary be not proved, if the evidence discloses some amount due. Verdict will be entered for the adversary for the amount found, the defect in the issue being cured by the statute of jeofails. Cobb *v.* Bryan, 3 B. & P. 346. — Ed.

CASTRO v. WETMORE.

SUPREME COURT, CALIFORNIA, OCTOBER TERM. 1860.

[16 *California Reports*, 379.]

APPEAL from the Seventh District.

The averment in the complaint, as to the execution of the note is, "That on the fourteenth day of November, 1854, at, etc. . . . the said defendant made his promissory note in writing, whereby at the date thereof he promised to pay to the plaintiff the sum of $1500, for value received, and then and there delivered the same to plaintiff." The answer denies this *in haec verba*, with the addition, "as alleged and averred in said complaint."

Plaintiff had judgment. Defendant appeals.

COPE, J., delivered the opinion of the Court — FIELD, C. J., concurring.

1. The complaint alleges, that on a particular day the note in question was made by the defendant, and delivered to the plaintiff. The answer denies the making and delivery of the note on the day mentioned in the complaint. This is clearly no denial of the substantial matter of the averment, and its only effect is to raise an immaterial issue as to time. The allegation is of a matter of substance, and did not require to be literally proved. A denial in the words of the allegation is, therefore, insufficient. "A distinction," says Phillips, "is now fully established between allegations of matter of substance and allegations of matter of description. The former require to be substantially proved, the latter must be literally proved. Thus, if the declaration states that on such a day the defendant drew a bill of exchange, without alleging that it bore date on that day, the day in the declaration is immaterial. But, if it be alleged that the defendant made his bill of exchange bearing date on a particular day, and the date of the bill is different, it will be a substantial variance." (5 Phil. on Ev. 2.)

We think the judgment correct, and that it should be affirmed.

Ordered accordingly.[1]

[1] Lane v. Alexander, Yelv. 122, Cro. Jac. 202, 1 Brownl. 140, s. c.; Sherman v. Brampton, Latch, 92; Rex v. Kilderby, 1 Wms. Saund. 310, 312, (c) (*semble*); Brown v Johnson, 2 Mod. 145; Dring v. Respass, 1 Lev. 193; Thomas v. Nichols, 3 Lev. 40; Helliott v. Selby, 2 Ld. Ray. 902; Kuhland v. Sedgwick, 17 Cal. 123; Caulfield v. Sanders, 17 Cal. 569; Frazier v. Williams, 15 Minn. 288; McMurphy v. Walker, 20 Minn. 382; Knight v. Denman, 64 Neb. 814; Thompson v. Fellows, 21 N. H. 425; Rogers v. Burk, 10 Johns. 400; Baker v. Bailey, 16 Barb. 54; Elton v. Markham, 20 Barb. 343 (*semble* — defect of form, not of substance); Salinger v. Lusk, 7 How. Pr. 430; Davison v. Powell, 16 How. Pr. 467; Hincken v. Mut. Co., 6 Lans. 21 (*semble*); Armstrong v. Danahy, 75 Hun, 405 (*semble*); Kelly v. Sammis, 25 N. Y. Misc. Rep. 6; Pigot v. McKeever, 32 N. Y. Misc. Rep. 45; Donovan v. Main, 74 N. Y. Ap. Div. 44, 47 (*semble*); Levin v. Jackson, (February, 1905) 92 N. Y. S. 307; Blossom v. Knox, 3 Pinn. (Wis.) 295; State v. McGarry, 21 Wis. 496; Schaetzel v. Germantown Co., 22 Wis. 412; Argard v. Parker, 81 Wis. 581; Grimm v. Washburn, 100 Wis. 229 *Accord*.

Mahana v. Blunt, 20 Iowa, 142; Doolittle v. Greene, 32 Iowa, 122; Parker v. Tillinghast, 1 N. Y. St. Rep. 296 *Contra*.

Denial of place immaterial. — A plea or answer which puts in issue the place at which an

DE MEDINA v. NORMAN.

IN THE EXCHEQUER, MAY 4, 1842.

[9 *Meeson & Welsby*, 820.]

THE declaration stated, that whereas the plaintiff, before and at the time of the making of the agreement as thereinafter mentioned, was lawfully possessed, for the residue of a term of years, whereof twenty-one years and upwards from the 24th of June, 1841, were then to come and unexpired, of a certain dwelling-house and premises; and thereupon, to wit, on the 31st of March, 1841, by a certain agreement made between the plaintiff and the defendant, it was agreed that the plaintiff should, on or before the 24th of June, 1841, let to the defendant, and that the defendant should become tenant to the plaintiff, and the defendant then agreed to become tenant to the plaintiff, of the said house and premises, upon the following terms; viz. that the letting should be by a lease to be executed and granted by the plaintiff to the defendant for twenty-one years, the said term to commence from the 24th of June, 1841, when the plaintiff was to execute such lease. The declaration then stated, that although the plaintiff *had performed and fulfilled all things* in the agreement contained on his part to be performed, and although he was within a reasonable time after the making of the said agreement, and on the 24th June, 1841, *ready and willing to let* to the defendant the said house and premises, and to grant and execute to the defendant the said lease, yet the defendant did not nor would, at any time on or before the 24th June, 1841, become tenant to the said plaintiff of the said house and premises upon the terms aforesaid, or otherwise, and on the day and year last aforesaid wholly refused to become such tenant, or to accept such lease. To this declaration the defendant pleaded, secondly, that the plaintiff was not lawfully possessed for the residue of the said term of years of the said dwelling-house and premises in the declaration mentioned, *modo et forma*. Thirdly, that the plaintiff, at the time of the agreement, had not a good title to, and could not, nor could he on the 24th of June, 1841, legally let to the defendant, or grant and execute to her a lease of the dwelling-house for the said term of twenty-one years.

Special demurrer.[1]

act occurred, when the place is immaterial, is an insufficient pleading. Sherman v. Brampton, Latch, 92; Thomas v. Nichols, 3 Lev. 40; Rogers v. Burk, 10 Johns. 400; Salinger v. Lusk, 7 How. Pr. 430; Davison v. Powell, 16 How. Pr. 467; People v. Gunter, 37 N. Y. Ap. Div. 550; Spencer v. Turney, 5 Okla. 683. — ED.

[1] The second plea was objected to as being an immaterial traverse, and the third as putting in issue "more than was alleged in the averment, to wit, that at the time of the making of the agreement the plaintiff had not a good title to let the dwelling-house," etc. The arguments of counsel and the concurring judgments of Alderson and Rolfe, B.B., are omitted, together with portions of the other judgments sustaining the sufficiency of the declaration. — ED.

Lord ABINGER, C. B. I am of opinion that the second plea is bad, as containing an immaterial traverse of the plaintiff's title. It may be that the plaintiff was not possessed of the term on the day of the agreement being entered into, but that is unimportant, if he was possessed of it on the day when he was to execute the lease to the defendant.

PARKE, B. I think the second plea is bad, as containing an immaterial traverse. The averment in the declaration is, that the plaintiff was possessed of the term at the time of his agreement with the defendant, not that he contracted that he had the term on the 24th of June. The traverse of that averment is immaterial. The third plea is also bad, as being too large, since it includes the title of the plaintiff at the time of the contract, and also at the time of the demise.

Judgment for the plaintiff.[1]

BRIDGWATER v. BYTHWAY.

IN THE COMMON PLEAS, EASTER TERM, 1683.

[*Reported in* 3 *Levinz*, 113.]

BATTERY; defendant pleads a judgment obtained by his father against Elias Jones, and an execution thereupon, whereon the goods of Jones were taken in execution, and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon, in aid of the bailiffs, and by their command, the defendant *molliter manus imposuit* upon the plaintiff to prevent his rescue of the goods. The plaintiff replied, *de injuria sua propria absque hoc* that the defendant by command of the bailiffs, and in aid of them, to prevent a rescue of the goods, etc. Whereupon the defendant demurred generally; and upon argument it was resolved by the whole court: That the replication in traversing the command of the bailiffs was not good; for he might of himself do that, to prevent the rescue, which is a tort and a breach of the peace.[2]

QUEEN CITY BANK v. F. W. HUDSON AND S. E. SHORT.

SUPREME COURT, NEW YORK, JUNE TERM, 1896.

[3 *New York, Appellate Division*, 27.]

ORDER affirmed on the opinion of SPRING, J., delivered at Special Term, with ten dollars costs and disbursements.

[1] In the following cases, as in the principal case, the denial was too large in point of the time covered: Osborne v. Rogers, 1 Saund. 267; Basam v. Arnold, 6 M. & W. 559; Tempest v. Kilner, 2 C. B. 300; Aldis v. Mason, 11 C. B. 132; Camden v. Mullen, 29 Cal. 565. — ED.

[2] Thurman v. Wild, 11 A. & E. 453 *Accord*. — ED.

All concurred.

The following is the opinion of SPRING, J.:[1]

SPRING, J. The action is on a promissory note made by the defendant, Hudson, to the order of his co-defendant. The complaint alleges that the payee, "for value and before the maturity of said note, duly indorsed and transferred the same to the plaintiff, which thereupon became and still is the sole, true, and lawful owner thereof."

The averment of denial of the defendant Hudson, who alone answers, is as follows: "That he has no knowledge or information sufficient to form a belief as to whether or not said defendant, Sarah E. Short, for value, indorsed and transferred said note to said plaintiff, as alleged in said complaint, or otherwise, and, therefore, denies the same."

The contention of the defendant is, that this is a denial of the indorsement and transfer of the note to plaintiff, which is an issuable averment. Taylor v. Smith;[2] The Robert Geer Bank *v.* Inman.[3]

The vice in the denial is that it does not deny the indorsement and transfer, but that they were made for value, which is an immaterial averment. Whether the plaintiff's title came by gift, or was based upon a valuable consideration, is unimportant in this case; but the significant inquiry is as to whether it obtained title by indorsement and transfer from the payee, and that fact is not covered by the quoted allegation in the answer. If the defendant possessed knowledge of the indorsement and transfer of this note, no indictment for perjury could be based upon the denial, for he could say that he simply denied that the indorsement and transfer were for value, and an inspection of the answer would sustain this contention.

Nor does the phrase "or otherwise" shield defendant from the defective pleading, for that limits the consideration of the transfer; that is, defendant has no knowledge whether the transfer was made for value or otherwise, whether with or without consideration. The averment is skillfully drawn to place stress upon the *quid pro quo* and evade any denial of the facts which vest title and possession in the plaintiff as alleged in the complaint.[4] See Morrill *v.* Morrill;[5] Frasier *v.* Williams.[6]

[1] A portion of this opinion is omitted. — ED.

[2] 29 N. Y. St. Repr. 365. [3] 51 Hun, 97.

[4] Morrill *v.* Morrill, 26 Cal. 263; Landers *v.* Bolton, 26 Cal. 393; Randolph *v.* Harris, 28 Cal. 561; Tate *v.* People, 6 Colo. Ap. 202; Mahoney *v.* Butte Co., 19 Mont. 377 *Accord.*

For other instances of the mistake of covering by a denial not only the material allegation but also an immaterial qualification of the allegation, when the denial should deny simply the material allegation and ignore the immaterial qualification, see Anon., 2 Leon. 13 (denial that defendant converted a chattel to his own use by a sale to a buyer); De Godey *v.* Godey, 39 Cal. 157 (denial that defendant fraudulently transported plaintiff to Kerr Co. for the purpose of having her served with summons); Bradbury *v.* Cronise, 46 Cal. 267 (denial that plaintiff worked in mine at request of defendant); Knowles *v.* Murphy, 107 Cal. 107 (denial that defendant holds possession as tenant); Grand Co. *v.* Lester, 23 Colo. 273 (denial of execution of deed conveying perpetual water rights); Wright *v.* Fire Co., 12 Mont. 474 (denial of incorporation under the laws of a particular State); State *v.* Board, 53

[5] 26 Cal. 288–292. [6] 15 Minn. 288.

Judgment is ordered for plaintiff on the ground that the answer is frivolous, with ten dollars costs.

AUBERY *v.* JAMES.

IN THE KING'S BENCH, EASTER TERM, 1670.

[1 *Ventris*, 70.[1]]

ASSAULT, Battery and Wounding: The Defendant Justified; for that he, being Master of a Ship, commanded the Plaintiff to do some Service in the Ship, which he refusing to do, he *moderate castigavit* the Plaintiff, *prout ei bene licuit.*

The Plaintiff maintains his Declaration *absque hoc quod moderate castigavit*, and issue was taken thereupon.

After Verdict for the Plaintiff, it was moved in arrest of Judgment that the Issue was not well joined; for *non moderate castigavit* doth not necessarily imply that he did Beat him at all, and so no direct Traverse to the Defendant's Justification, which *immoderate castigavit* would have been: But, *De injuria sua propria absque aliqua tali causa* would have been the most formal *Replication.*

But the Justices held, that it would serve as it was, after a Verdict, though the Statute at Oxford, 16 Car. 2, the last and most aiding Act of Jeofails be expired, and that *de injuria sua propria*, not adding *absque aliqua tali causa*, hath been held good after a Verdict.[2]

WALL *v.* THE BUFFALO WATER WORKS COMPANY.

COURT OF APPEALS, NEW YORK, SEPTEMBER, 1858.

[18 *New York Reports*, 119.]

APPEAL from the Superior Court of the city of Buffalo. Action to recover damages for an injury sustained by the plaintiff, by falling

Neb. 767, 771 (like preceding case); First Bank *v.* Gibson, 60 Neb. 767 (similar to preceding case); Storey *v.* Kerr, (Nebraska, 1902) 89 N. W. R. 60 (denial that note was lost by burning); McCormick Co. *v.* Hovey, 36 Oreg. 259 (denial of incorporation under laws of Illinois); St. Paul Co. *v.* Dakota Co., 10 S. Dak. 191 (denial that execution was duly returned); Briggs *v.* Mason, 31 Vt. 433 (denial of attachment of goods by virtue of said writ); Seattle Bank *v.* Meerwaldt, 8 Wash. 630 (denial that warrant came to A. by indorsement); Crane *v.* Morse, 49 Wis. 368 (denial of promise in writing); Carpenter *v.* Bolling, 107 Wis. 559 (denial that road was legally laid out as a highway). — ED.

[1] 1 Sid. 444, 2 Keb. 623, s. c. — ED.

[2] In Myn *v.* Cole, Cro. Jac. 87, the defendant, in bar of action of trespass *quare clausum fregit*, pleaded that he entered by the license of the plaintiff's daughter. The plaintiff replied that he did not enter by the said license. It was agreed that this was a bad issue, but the judges were divided as to whether the defect was cured by a verdict for the plaintiff. — ED.

into an excavation made by the defendant, in a street in Buffalo, in putting down their water pipes. The complaint alleged that the ditch was very negligently left open by the defendant, and it stated the injury to the plaintiff as follows: "That on or about, &c., and about the hour of ten o'clock in the evening of that day, the plaintiff fell into said ditch or trench. That he so fell into said ditch or trench while walking in Pearl-street, a highway, as he lawfully might, and without any fault or want of care on his part."

The answer, after denying that the ditch was negligently left open, proceeded thus: "And the defendant further denies that the plaintiff, without any fault or want of care on his part, did fall therein," &c.

On the trial, it appeared from the evidence that the plaintiff was found, on the night in question, some rods from the open ditch which the defendant had left, with his leg badly broken, and the evidence had a tendency to show that he had fallen into the ditch and thus injured himself, and had been able to get to the place where he was found, and could go no further. After the plaintiff had rested, the defendant moved for a nonsuit mainly on the ground that it was not proved that the plaintiff had fallen into the ditch. The judge thereupon decided that the answer admitted the fact of the plaintiff having so fallen, and the defendant excepted to this decision. The motion for a nonsuit was then denied, and there was another exception by the defendant. The plaintiff ultimately had a verdict for $1000.

ROOSEVELT, J.[1] The answer denies that the ditch was left unguarded, and "that the plaintiff, without any fault or want of care on his part, did fall therein." And the question is, does this averment put in issue the plaintiff's want of negligence, or the plaintiff's falling into the ditch, or both.

We consider the answer, as open to criticism. It is a species of negative pregnant. But the plaintiff, if dissatisfied with the vagueness and uncertainty of the pleading, had his remedy by motion. Not having applied, at the proper time, for an order to compel the defendants to be "more definite and certain," he is presumed to have been satisfied with the pleading as it stood, especially as he knew that, under the present system, it was made "the duty of the court to construe pleadings liberally," and of course not to assume that parties, by implication, intended to admit when they could safely deny their adversary's case.

The point has been decided in this court, in a case which has not been reported here. At the March term, 1855, it had under review the action of Lawrence v. Williams, upon an appeal from a judgment of the Superior Court of the city of New York, which is reported in 1 Duer, 585. It was an action in the nature of ejectment, to recover the possession of certain premises which had been demised to the defendant, on the ground that he had broken the covenant not

[1] Portions of the opinion are omitted. — ED.

to underlet without the consent of the lessor. The defendant answered, denying that "in violation of the said covenant, *and without the consent of said plaintiff*, he had underlet the said premises." On the trial the plaintiff gave in evidence the lease containing the covenant not to underlet, and a general clause of reëntry, and rested. The plaintiff had a verdict on the ground that the answer did not deny the fact of underletting, and the judgment was affirmed at a general term. The court held that the answer admitted the underletting, and that it took issue merely upon the allegation that such underletting was without the consent of the plaintiff.[1] On the appeal here, this court reversed the judgment. The opinion which prevailed was prepared by Gardiner, then Chief Judge. It has not been furnished to the reporter; but, on inquiry of that officer, I find that he entered in his minutes the conclusion to which the court arrived, as follows: "The plaintiff should have proved the underletting. The answer, although it contains a negative pregnant, puts in issue the subletting." The case is in principle precisely like the present, and must determine the judgment we have now to render.

The judgment of the Supreme Court must be reversed and a new trial awarded.

DENIO, J. (dissenting.) The answer avers that the plaintiff did not fall in without fault or want of care on his part. This is not a denial that he did fall in. It is an implied admission that he did, but that it was not done under the circumstances alleged. But it is enough for the plaintiff's purpose that it is not a denial. To show it is not a denial of the precise fact which the defendant was called upon to answer, let us suppose that the action was against a natural person who happened to be present at the accident which befell the plaintiff; and suppose, further, that the case was such that he might well have entertained the belief that the plaintiff was wanting in circumspection. The plaintiff, desirous of availing himself of the defendant's admission of the principal fact, and being, we will suppose, unable to prove it in any other way, swears to a complaint containing the allegations in the one before us. The defendant might put in and swear to the answers contained in this record, without making the admission required, and without exposing himself to be questioned for perjury. If indicted for falsely swearing that the plaintiff did not fall into the excavation, when in truth he saw him so fall with his own eyes, he could say with perfect truth that he did not swear to the contrary; that he did not, on oath, deny the general fact of his falling in at all, but that by a strong implication he admitted it.

But it is said the plaintiff should have moved to compel the defendant to make his pleading more definite and certain, by amend-

[1] Duer, J., giving the opinion of the Superior Court of the city of New York, said: "If the answer is to be construed as averring that the plaintiff gave his consent to the underletting, this was a matter of defence, the burden of proving which rested upon the defendant. The plaintiff was not bound to prove a negative, and in proving the execution and contents of the lease, gave all the evidence that under the pleadings was requisite to maintain the action." 1 Duer, 587.

ment, according to § 160. This depends upon the consideration whether the answer as it stands is, in any respect, indefinite or uncertain. I think it is neither. The defendant had a clear right to waive any controversy respecting the simple fact of the plaintiff's fall, and to limit the issue to the question whether he was at the time in the exercise of proper care. This he has done in language quite appropriate to set forth that line of defence. It may very well be that those concerned in defending the action misunderstood the effect of the answer. If so, it was for the defendant to ask leave to amend it upon terms. The plaintiff is not to be charged with laches, because he understood it correctly and acted upon that understanding.

It is essential to apply to pleadings, under the Code, the common principles of literary interpretation. The disuse of established forms and technical language has led to much vagueness and uncertainty. But pleadings are still, in terms, required to be in ordinary and concise language. To secure a compliance with this direction, we must apply to their construction the usual principles of criticism. Conformably with these principles, it is impossible to say that a denial that a person did a thing under particular circumstances is a denial that he did it at all. I am, therefore, in favor of affirmance.

HARRIS, J., also dissented; COMSTOCK, J., did not hear the argument.

Judgment reversed and new trial ordered.[1]

SIR RALPH BOVY'S CASE.

IN THE KING'S BENCH, TRINITY TERM, 1672.

[1 *Ventris*, 217.]

IN debt upon an escape; the plaintiff sets forth in his declaration a voluntary escape.

The defendant, protesting that he did not let him voluntarily escape, pleads that he took him upon fresh pursuit. To which it was demurred, because he did not traverse the voluntary escape, and resolved for the defendant; for it is impertinent for the plaintiff to allege it, and no ways necessary to his action. It is out of time to set it forth in

[1] The following cases accord with the dissenting opinion of Denio, J.: Cincinnati Co. v. Barker, 94 Ky. 71 (denial that defendant negligently set fire to property admits the setting fire, and puts in issue only the question of negligence); Harden v. Atchison Co., 4 Neb. 521 (denial that defendant company negligently ran over the plaintiff's mare, admits the running over, and denies only its negligence).

The doctrine of negative pregnant is said not to exist in Missouri; Merchants Bank v. Richards, 74 Mo. 77, 6 Mo. Ap. 454. See also First Bank v. Hogan, 47 Mo. 472; Ells v. Pacific Co., 55 Mo. 278, 286.

the declaration; but it should have come in the replication. It is like leaping, as Hale, C. J., said, before one come to the stile. As if in debt upon a bond the plaintiff should declare that at the time of sealing and delivery of the bond the defendant was of full age, and the defendant should plead *deins age* without traversing the plaintiff's allegation. Whiting and Sir G. Reynell's Case [1] seems to be against it; but Harvey and Sir G. Reynell's [2] is resolved that no traverse is to be taken. [3]

DENNIS C. FEELY *v.* SILAS SHIRLEY.

SUPREME COURT, CALIFORNIA, APRIL, 1872.

[43 *California Reports*, 369.]

APPEAL from the District Court of the Third Judicial District, Santa Clara County.

The complaint averred that the plaintiff was the owner and in possession of a ditch and flume, constructed for conducting water, and that he had for a long time been conveying water in the same for irrigating his land, and that the defendant wrongfully and unlawfully pulled down and destroyed the flume and diverted the water. There was a prayer for an injunction and for judgment for damages.

The answer denied that the defendant wrongfully and unlawfully pulled down or destroyed the flume and ditch.

By the Court, NILES, J.:

The motion for a nonsuit was properly denied. The breaking of the flume was distinctly alleged in the complaint, and the answer took issue upon the wrongful character of the act merely, but did not deny its commission. The breaking was, therefore, an admitted fact; and,

[1] Cro. Jac. 652.

[2] Latch, 200.

[3] Hollis *v.* Palmer, 2 B. N. C. 713; Gittings *v.* Loper, 84 Fed. 102; Canfield *v.* Tobias, 21 Cal. 349; Sands *v.* St. John, 36 Barb. 628 *Accord.*

In the following cases an anticipatory reply in the declaration was struck out on motions: Brooks *v.* Bates, 7 Colo. 576; Clark *v.* Harwood, 8 How. Pr. 470; Butler *v.* Mason, 16 How. Pr. 546; Sands *v.* St. John, 36 Barb. 628, 633, 634 (*semble*, — discrediting Bracket *v.* Wilkinson, 13 How. Pr. 102); and in Atty. Gen. *v.* Mich. Bank, 2 Doug. Mich. 359 an anticipatory rejoinder was struck out of an answer.

In Benicia Works *v.* Creighton, 21 Oreg. 495 and Louisville Co. *v.* Copas, 95 Ky. 462 (but see Logan Bank *v.* Barclay, 104 Ky. 97) the anticipatory replication, it was said, would not dispense with the necessity of an actual reply. But in Louisville Co. *v.* Copas, *supra*, the court decided that no objection could be raised to the want of a reply after a trial of the case upon the assumption that an issue had been raised by the anticipatory replication.

For other instances of anticipatory affirmative replications see Weinberger *v.* Weidman, 134 Cal. 599, 601; Higgins *v.* Graham, 143 Cal. 131; Guggenheim *v.* Goldberger, 7 N. Y., Misc. Rep. 740.

For instances of anticipatory negative replications, see Ricketts *v.* Loftus, 14 Q. B. 492; Fitchburg Co. *v.* Nichols, 85 Fed. 945; Murray *v.* N. Y. Co., 85 N. Y. 236. — ED.

conceding the plaintiff's right of property in the flume, no proof of the breaking was requisite to establish his right to recover at least nominal damages.

Judgment and order affirmed.[1]

HUDSON v. THE WABASH WESTERN RAILWAY COMPANY.

SUPREME COURT, MISSOURI, APRIL TERM, 1890.

[101 *Missouri Reports*, 13.]

THE petition alleged the negligent management of its train of freight cars, setting forth three particular acts of negligence, and that by reason of such careless acts of the defendant, the plaintiff, without any fault on his part, was caught between two of said cars and had his foot smashed to his damage, etc.

The defendant's answer denied each and every allegation in the plaintiff's petition.

At the trial the judge gave this instruction: —

"The court instructs the jury that defendant has not pleaded, as a defence in this case, contributory negligence on the part of the plaintiff, and therefore the question, whether the plaintiff himself was negligent or not, is not before the jury and must not be considered by it."

The defendant excepted to this instruction.[2]

SHERWOOD, J. I. It is the unquestioned law of this state that contributory negligence is strictly an affirmative defence and, in order to avail a defendant as a matter of *pleading*, it must be affirmatively pleaded. O'Connor *v.* Railroad,[3] and cases cited; Donovan *v.* Railroad;[4] Schlereth *v.* Railroad.[5] The contention is, however, made by the defendant that as the petition amongst other things alleged concerning plaintiff, "that by said negligent acts and *without any fault on his part*, he was then and there caught between two of said cars," etc., and the answer denied this averment, that therefore the defence

[1] Rutherford *v.* Foster, 125 Fed. 187 (denial that defendant wrongfully caused death of plaintiff's husband); Tyner *v.* Hays, 37 Ark. 599 (*semble*, — denial of wrongful detention); Busenius *v.* Coffee, 14 Cal. 91 (denial of unlawful entry); Woodworth *v.* Knowlton, 22 Cal. 164 (denial of unlawful taking and carrying away); Lay *v.* Neville, 25 Cal. 545 (denial of wrongful taking); Richardson *v.* Smith, 29 Cal. 529 (denial of wrongful taking); Larney *v.* Mooney, 50 Cal. 610 (denial of unlawful entry); Leroux *v.* Murdock, 51 Cal. 541 (denial of unlawful entry); Marshall *v.* Hamilton, 41 Miss. 229 (denial by trustee of wilful neglect to collect a debt); Harris *v.* Shontz, 1 Mont. 212 (denial of wrongful and illegal diversion); Toombs *v.* Hornbuckle, 1 Mont. 286 (denial of illegal diversion); Proctor *v.* Irvine, 22 Mont. 547 (denial of wrongful taking) *Accord.* — ED.

[2] Only so much of the opinion is given as relates to this instruction. The statement of the case as given in the opinion is abridged. — ED.

[3] 94 Mo. 155. [4] 89 Mo. 147. [5] 96 Mo 509.

of contributory negligence was raised. This is a mistake.[1] True, the case of Karle *v.* Railroad [2] apparently supports this contention, but the utterance there was only *obiter* and should not be regarded as possessing any authoritative value.

II. Besides, under our rulings, there was no manner of necessity for the petition to contain the allegations that the injuries were done to plaintiff "without any fault on his part." This follows as a corollary from the necessity of the defendant setting forth such a defence in his answer; the rule of the code being that "the defendant, by merely answering the allegation in the plaintiff's petition, can try only such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon new matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be so relied on. It follows that whenever a defendant intends to rest his defence upon any fact which is not included *in the allegations necessary to the support of the plaintiff's case*, he must set it out according to the statute in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial." Northup *v.* Ins. Co.[3] That case was cited and approved in Kersey *v.* Garton.[4]

LUSH *v.* RUSSELL.

In the Exchequer, May 8, 1850.

[5 *Exchequer Reports*, 203.]

Assumpsit. The declaration, after stating the terms of a contract of employment for four years, alleged as a breach that the defendant wrongfully dismissed and discharged the plaintiff therefrom *without any reasonable or probable cause whatsoever.*

The defendant pleaded, "that the said plaintiff conducted himself in an improper, offensive, and disobedient and insolent manner, and was guilty of habitual negligence and carelessness in and about his said capacity and duty of a journeyman baker, insomuch that the defend-

[1] Orient Co. *v.* Northern Co., (Montana, 1905) 78 Pac. R. 1036 *Accord.*

Long *v.* R. R. Co., 50 S. Ca. 49. Hutchings *v.* Mills Co., (South Carolina, 1904) 47 S. E. R. 710 *Contra.*

Similarly, if the plaintiff in his complaint denies any other anticipated affirmative defence, the defendant under a general denial cannot offer evidence of such affirmative defence. Lush *v.* Russell, 5 Ex. 203, 207, per Parke, B. (reasonable cause for dismissing employee); Hubler *v.* Pullen, 9 Ind. 273 (payment); Pierce *v.* Hower, 142 Ind. 626 (payment); Barker *v.* Wheeler, 62 Neb. 150 (*semble*) (payment); Gallup *v.* Lederer, 1 Hun, 283 (payment); Columbia Bank *v.* Western Co., 14 Wash. 162 (payment).

If the pleadings in such a case have been treated by the parties as raising the issue of contributory negligence at the trial, no objection can be taken afterwards to the admission of evidence: Denver Co. *v.* Schmock, 23 Colo. 456. — Ed.

[2] 55 Mo. 482.

[3] 47 Mo. 444.

[4] 77 Mo. 645.

ant was forced and obliged to dismiss and discharge the plaintiff, and could not longer keep him in his the defendant's service, and the defendant was forced and obliged by such conduct of the plaintiff to put an end to such service and employ; *without this*, that the defendant then wrongfully dismissed and discharged the plaintiff therefrom without any reasonable or probable cause whatsoever," *modo et forma*; concluding to the country. Upon which plea issue was joined.

At the trial, before Cresswell, J., at the last Summer Assizes at Bristol, the defendant's counsel admitted the dismissal, but offered evidence to show that the plaintiff had so misconducted himself as to justify his dismissal by the defendant. The learned judge refused to receive this evidence, being of opinion that the only question raised by the plea was the mere fact of dismissal.

A rule for a new trial was obtained, on the ground of misdirection.[1]

Peacock, in support of the rule. The present plea distinctly raises the question, whether or not the plaintiff was discharged for reasonable cause. An objection might have been raised to the plea, on special demurrer, that it ought to have been in confession and avoidance, and that it ought to have set out affirmatively what the dismissal was. Even assuming that the allegation which the plaintiff contends to have been in issue at the trial, was altogether immaterial before plea, the defendant has made it material by this form of pleading. A traverse cannot be properly taken on an immaterial point, or one which is prematurely alleged;[2] but if the defendant please to take upon himself to traverse such an allegation, he puts it in issue. The declaration would no doubt be good without the allegation: Sir Ralph Bovy's case.

The judgment of the court was now delivered by

PARKE, B. We are to decide whether the direction of the judge was right, and we are of opinion that it was not. The question is not, whether the plea would have been bad on demurrer, for putting in issue an immaterial allegation, but how the issue raised was to be disposed of at the trial.

There is no doubt that the plaintiff might have omitted the allegation that the defendant dismissed him "without reasonable cause," and that the averment of his having done so was, in the declaration, immaterial and surplusage, and ought not to have been put in issue; and that the plea, in form at least, throws the burden of the proof of the want of reasonable cause on the plaintiff, which the defendant, on proper pleadings, ought to have borne; and on these grounds the plea is clearly demurrable; but, it not having been demurred to, the matters which it *does put in issue*, though immaterial in that stage, and improperly put in issue, must be disposed of by the jury, under the direction of the judge. For example, if the plea were to put in issue matter of aggravation unnecessarily stated, and only that — as the conversion of goods in an action of trespass for taking them, the death

[1] The report of the case has been considerably abridged. — ED.

[2] Stephen on Pleading, p. 275, 5th edit.

of cattle in the same form of action for driving them — though the plea would be unquestionably bad, the verdict must be taken one way or the other upon the issue on the trial. In like manner, it must, if the plea put in issue that *and another* and material fact, the only question being, *whether it is put in issue.* Now, it is certain that if the form of the traverse is such that the material may be separated from the immaterial averments, the material need only be proved on the trial. Such is the case where there is a plea which is a general denial only, as not guilty in trespass, or case where immaterial matter or matter in aggravation was stated; such would be the case in non assumpsit, under the old system, on such a declaration as the present; and such would have been the case if the defendant had traversed the allegation of dismissal in the general form, "that he did not dismiss the plaintiff, *modo ac forma;*" then the dismissal only, the material part, would have been in issue.

Now, there cannot be any doubt that this form of a traverse does in express terms deny the want of reasonable cause; and therefore, that question must be disposed of by the jury. Whether it throws the burden of proof on the wrong party is immaterial in the present inquiry; if it does, it is an additional reason for demurring to it; but it nevertheless puts in issue the want of reasonable cause, however informally. We think, however, that on the trial of the issue the *onus probandi* would be on the defendant, on the ground that he had the *affirmative* of the proposition to maintain, and that the defendant ought to justify the act of dismissal, which is *prima facie* a breach of covenant.[1]

Upon reference to the authorities and cases cited on the argument, there is none that is at variance with the rule, that if the traverse be general in its terms, it does not involve matter which need not have been pleaded, and that, if it is special, denying that matter *expressly*, it does, except the case of Powell *v.* Bradbury,[2] on the authority of which no doubt the learned judge proceeded.

In the present case there is an inducement which leaves no doubt as to the intention of the pleader in the traverse; which there was not in that; but we do not think we ought to rely upon that distinction.

We cannot ascertain, from the short report of the case of Powell *v.* Bradbury, in the Law Journal, whether the question of what was in issue on such a traverse, on which the opinion of the court appears to have been declared, was material to the decision of the case, or extra-judicial; in the report of the same case, in 7 Com. Bench Reports,[3] just published, it does. Be this as it may, it does distinctly appear that the opinion was founded on the authority of the case of Frankum *v.* The Earl of Falmouth,[4] which we think inapplicable, as the question there arose on the issue on a plea of not guilty, and it was rightly held,

[1] Ricketts v. Loftus, 14 Q. B. 482; Fitchburg Co. v. Nichols, 85 Fed. 236; Murray v. N. Y. Co., 85 N. Y. 236; Benicia Works v. Creighton, 21 Oreg. 495 *Accord.* — Ed.

[2] 18 L. J. C. P. 116. [3] P. 201. [4] 2 A. & E. 452.

that although there was an averment in the declaration, that the defendant *wrongfully* diverted a watercourse, the wrongful nature of the act was not in issue. It was not the case of an express traverse. Matter of aggravation would not have been in issue on not guilty, and yet, *if expressly put in issue*, it must have been proved. So, unnecessary matter, as an averment of the defendant being of full age when he executed a bond, if the plea had stated (admitting the execution of the bond) that he was not then of full age, that question would have been in issue, and equally so if the issue was such (whether informal or not, in that respect, is of no consequence) as to put both facts, the execution of the bond and the majority, in issue.

In this case the question whether there was reasonable cause of dismissal, was a material matter, though alleged out of its proper place, and though the issue was improper.

Rule absolute.[1]

GILBERT v. PARKER.

In the Queen's Bench, Easter Term, 1704.

[2 *Salkeld*, 629.]

In replevin for taking cattle, the defendant made conusance that A., his master, was seised of the *locus in quo*, and *per ejus praecept*, he took them damage-feasant. Plaintiff replied, that he was seised of one third part, and put in his cattle, *absque hoc*, that the said A. was sole seised. To this the defendant demurred, and judgment was given against him; for the defendant makes a conusance under his master as sole seised, when he was only tenant in common; in which case he should have pleaded according to the truth, that he was only tenant in common, &c. When the defendant pleads his master was seised in fee of the place where, &c., that must necessarily be understood that he is sole seised; and whatever is necessarily understood, intended, and implied, is traversable as much as if it were expressed; and, therefore, though a seisin in fee is only alleged generally, yet that being intended a sole seisin, the plaintiff may traverse, *absque hoc*, that he is sole seised; since the plaintiff makes himself tenant in common with the defendant, it had not been enough to say that he is tenant in common, without traversing the sole seisin.[2]

[1] Approved in Horton v. McMurtry, 5 H. & N. 667. Powell v. Bradbury, 7 C. B. 201, *contra*, may be regarded as overruled.

In Hummel v. Moore, 25 Fed. 380, and Edson v. Dillaye, 8 How. Pr. 273, a complaint upon a note alleged non-payment. The answer denied non-payment. This denial was struck out as irrelevant. In Manufacturers Bank v. Russell, 6 Hun, 375, a similar answer was declared to be frivolous. But see Randolph v. Simmons, 40 Oreg. 554. — Ed.

[2] Bonner v. Walker, Cro. El. 524; Meriton v. Briggs, 1 Ray. 39; Chambers v. Jones, 11 East, 406; E. & L. R. R. Co. v. Hebblewhite, 6 M. & W. 707; Bowdon v. Hall, 4 Q. B. 351 *Accord*. — Ed.

SIR FRANCIS LEKE'S CASE.

In the Common Pleas, Michaelmas Term, 1579.

[*Dyer*, 365, *placitum* 32.]

In replevin the defendants, as bailiffs of Sir Francis Leke, knight, made cognizance of the taking of the cattle in Whitbridge-close, containing two acres of pasture for damage-feasant, as in the soil and freehold of the said Francis Leke; to which the plaintiff pleaded, that before the said time when, &c., and at the said time when, &c., he was seised in his demesne as of fee of and in one close of pasture called But-close, contiguous and adjoining to the said two acres of pasture; and that Sir Francis Leke, and all those whose estate he hath, have used from time whereto memory runneth not to enclose the said two acres of pasture sufficiently from the aforesaid close, called But-close, and by default of sufficient enclosure the cattle entered into the two acres of pasture, and depastured therein until, &c. And the defendants by protestation, denying the prescription, for replication said, that the said But-close was the soil and freehold of George Earl of Salop, without this, that the aforesaid plaintiff at the said time when, &c., was seised of But-close aforesaid in his domain as of fee, as the said plaintiff had above alleged, and this, &c. Upon which it was demurred, &c. And the opinion of the court was, that the precise estate which the plaintiff had in But-close was not traversable by the defendants if the plaintiff had not shown any estate in it, [but] generally that he was seised of it, without showing of what estate, or that it was his freehold, &c. And then the other party should be driven to say that he had nothing therein; for if he had but common, or a term of years, or at will, or only a license from the owner to put in his cattle *pro hac vice*, it is sufficient; and then the best answer to it would have been with a flat negative, *scil.*, that he had nothing in the aforesaid close at the time, &c., which is more ready pleading; for an *absque hoc* ought to be taken to a thing expressly alleged before, and is induced with a former plea, *scil.*, as he said before, or by showing a cross matter contrary to the plaintiff's plea, as here above, *scil.*, "that the But-close was the freehold of the Earl of S., *absque hoc*," &c. And at length the opinion was, that the *absque hoc*, that he was seised in fee, was a good traverse, because the plaintiff had given this advantage to his adversary in this preciseness of estate, who best knew what interest he had to put his beasts into But-close; for if he was a mere stranger and had nothing in But-close, nor common there, nor license from the owner, nor command, he was a trespasser to the defendant, although the enclosure was not sufficient. Wherefore, &c., but Windham doubted.[1]

[1] Tatem *v.* Perient, Yelv. 195; Wood *v.* Budden, Hob. 119; Cockerill *v.* Armstrong, Willes, 103; Morewood *v.* Wood, 4 T. R. 157; Smith *v.* Dixon, 7 A. & E. 1; Sutton *v.* Page, 3 C. B. 204; Lush *v.* Russell, 5 Ex. 203, 211, 212 (*semble*); Webb *v.* Rose, 4 H. & N. 111 *Accord.*

Conf. Carrick *v.* Blagrave, 1 B. & B. 531; Reg. *v.* Dendy, 23 L. J. Q. B. 247. — Ed.

WHITE v. BODINAM.

In the Queen's Bench, Easter Term, 1704.

[2 *Salkeld*, 639.]

Lessee for years brings covenant against the lessor, declaring upon a demise and covenant for quiet enjoyment, and assigns for breach that the lessor did enter upon him and oust him of the premises. The defendant pleads, that he entered to distrain for rent-arrear, *absque hoc*, that he ousted him *de præmissis*. To which the plaintiff demurred, thinking the traverse ill; because if he ousted him of any part of the premises, he had a good cause of action, therefore he should have traversed, *absque hoc*, that he ousted him of the premises, or of any part thereof. *Vide* Colborne *v.* Stockdale. But, *per Cur.*, The plea is well enough in this case; for if the plaintiff will join issue upon the matter of the traverse, and prove the ouster of any part, the issue shall be for him. And the court took a diversity between pleading the general issue, as in debt, you must plead *non debet nec aliquam inde parcellam*, and a special issue, as this is. 3 Cro. 83, 84; Dyer, 115. *Judgment for the defendant.*[1]

ROBINS v. THE VISCOUNT MAIDSTONE.

Queen's Bench, June 1, 1843.

[4 *Queen's Bench Reports*, 811.]

Assumpsit. The count was on a promissory note, made by defendant on 1st October, 1842, payable to John Phillips Beavan, for 1160*l.* 15*s.*, at four months after date, indorsed by Beavan to plaintiff.

Plea, that the promissory note therein mentioned "was made by him the defendant, and delivered to the said J. P. Beavan, without any value or consideration whatever, as between the defendant and the said J. P. B., and in order that the said J. P. B. might raise money thereon for and on behalf of the defendant, and not otherwise; and that there never was any consideration or value whatever given by

[1] Teril *v.* Dune, Dy. 115 *b*; Robsert *v.* Andrews, Cro. El. 82; Waltham *v.* Sparks, 1 Ld. Ray. 42; Cobb *v.* Bryan, 3 B. & P. 348 (after verdict. Replevin. Avowry a distress for 120*l.* rent due. Plea, a denial that 120*l.* was due. Verdict that 24*l.* was due. Defendant prevailed); Jones *v.* Powell, 5 B. & C. 647 *Accord*.

Under a plea of *liberare tenementum* the defendant will succeed, if he proves his title to the part of the close described upon which the entry was made, without proving title to the whole close. Richards *v.* Peake, 2 B. & C. 918; Bassett *v.* Mitchell, 2 B. & Ad. 99; Tapley *v.* Wainwright, 5 B. & Ad. 395; Smith *v.* Royston, 3 M. & W. 381 (Hawke *v.* Bacon, 2 Taunt. 156, *contra*, is thought to be overruled). — Ed.

the said J. P. B., or received by the defendant, for the said delivery of the said note to the said J. P. B.; nor had he, the said J. P. B., at any time any claim or demand against the defendant upon or in respect of the said note." "That, after the making of the said note, and before any indorsement thereof by the said J. P. B., to wit," etc. (1st October aforesaid), "the said J. P. B., for the purpose aforesaid, applied to and requested the plaintiff to make an advance of money upon the security of the said note." "That the plaintiff then thereupon advanced, upon the security of the said note, a certain small sum of money only, to wit, the sum of 200*l.*, and no more; and the said note was then thereupon indorsed and delivered by the said J. P. B. to the plaintiff." "That, except as aforesaid, there never was at any time existing any consideration or value whatever for the said making or indorsing of the said note, or for the payment thereof." "That afterwards, and before the commencement of this suit, he the plaintiff was duly paid and satisfied by the defendant all the money by him so advanced as aforesaid upon the security of the said note, and all his the plaintiff's right, title, and cause of action upon or in respect of the said promissory note." Verification.

Replication. That plaintiff "was not paid or satisfied by the defendant the money by him the plaintiff so advanced upon the security of the said note in the first count mentioned, and his the plaintiff's right, title, and cause of action upon and in respect of the said promissory note, in manner and form," etc.; conclusion to the country. Issue thereon.

On the trial, before WIGHTMAN, J., at the Middlesex sittings in this term, neither party offered any evidence. The defendant, however, contended that the plaintiff could recover only so much damages as arose from the non-payment of the 200*l.* The learned judge directed a verdict for the whole amount of the note.

Thesiger now moved[1] that a new trial should be had, on the ground of misdirection, unless the damages were reduced by consent.

Lord DENMAN, C. J., in the ensuing Trinity vacation (June 23d), delivered the judgment of the court.

This was an action on a promissory note made by the defendant, brought by the plaintiff as indorsee. The defendant pleaded that the note was given to the payee to raise money for the defendant, by way of discounting; that this was not done, and afterwards the plaintiff advanced 200*l.*, and no more, on the security of the note, which was indorsed to him; and that the 200*l.* so advanced had been paid. The replication traversed that the 200*l.* so advanced had been paid. On this issue the defendant offered no evidence of payment: and the plaintiff had a verdict for the full amount of the note.

A motion is now made for a new trial unless the plaintiff will consent to reduce the verdict to 200*l.*; which is grounded upon the supposition that the plaintiff, by denying only the payment of the 200*l.* so advanced, has admitted that no more was advanced, and therefore

[1] Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

can recover no more. For this position the case of Bingham *v.* Stanley [1] was cited, in which this court held "that an admission made in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes of the cause, whether the facts relate to the parties or to third persons, provided that the allegation so made be material." In the Exchequer, in the subsequent case of Smith *v.* Martin,[2] expressions are used not agreeing with other expressions used by this court in Bingham *v.* Stanley.[3] Yet, looking to the facts of both the cases, it will be found that there was no real difference of opinion between the courts. The expression in Bingham *v.* Stanley,[3] "for all purposes of the *cause*," is not strictly correct; for, as it stands, it might be supposed that it extended to other issues joined in the cause, as well as that which arises out of the particular pleading, one allegation of which is traversed. It would have been more correct to have said, "for all purposes regarding the issue arising from that pleading." For instance, in this particular case, if the *defendant* had proved the payment which he alleged, it would not have been competent to the plaintiff to prove that more had been advanced: if he wished to have done so, he ought to have traversed the allegation that no more had been advanced, and perhaps shown how much more. But, where a plea consists of several material allegations, one of which is traversed and found for the *plaintiff*, there is an end of the plea altogether; and the defendant can take no advantage of that part which was not traversed. The defendant sustains no injury; for he has pleaded that which is false, viz., the payment. If, in truth, 200*l.* only was advanced, he should have so pleaded, adding a payment into court of the amount due; and then the plaintiff would have been obliged either to take the sum paid in, with costs, in discharge of the action, or to have replied that more was due, at the peril of having a verdict against him if he failed to prove it.

We think that the verdict is quite right, and that the rule must be refused. *Rule refused.*[4]

[1] 2 Q. B. 117, 127. [2] 9 M. & W. 304. [3] *Supra.*

[4] Boileau *v.* Rutlin, 2 Ex. 665, 681, per Parke B. *Accord.* — Ed.

CHAPTER IV.

AFFIRMATIVE ANSWERS OR PLEAS IN CONFESSION AND AVOIDANCE.

EARL OF MANCHESTER AND OTHERS v. VALE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1666.

[1 *Saunders*, 27.]

TRESPASS. The plaintiffs declare that the defendant, on the 29th of September, in the seventeenth year of the reign of the now king, broke the close of the plaintiffs, called Marking and Yonder Moore, in the parish of Westmarke, in the county of Somerset, and the grass there with feet in walking trod down, and other the grass there with cattle, to wit, horses, oxen, cows, swine, and sheep, eat up, with a *continuando*, &c. The defendant as to the force and arms, and the trespass with swine, pleads not guilty, and to the residue of the trespass, he pleads in bar, that Sir Thomas Bridges, knight, was seised of the manor of Wedmore with the appurtenances in the said county, in his demesne as of fee, and prescribes in the said Sir Thomas for common in the place where, &c., for all his commonable cattle levant and couchant upon the said manor at every time of the year, as appurtenant to the said manor. And further says, that the said Sir Thomas constituted and appointed the defendant to take care of his cattle put into the said close which, &c. And he further says, that the said Sir Thomas caused to be put divers commonable cattle of the said Sir Thomas Bridges which at the time when, &c., were in the said place where, &c. Whereupon the defendant, as servant to the said Sir Thomas Bridges at the time when, &c., entered into the said close in which, &c., to see the said cattle there, lest any damage should happen to them; and in entering he trod down the grass there, which is the same residue of the trespass, and this, &c. Wherefore, &c., upon which the plaintiffs demurred in law.

And it was objected on the part of the plaintiffs, that the defendant in his bar hath only said that the cattle were in the place where, &c., but not that he put them there. And it appears that the cattle were not the defendant's own cattle, and therefore, if he did not put them into the place where, &c., he is not guilty: for a man cannot be guilty of trespass with cattle, unless they are his own cattle, or he actually put them into the place where, &c. And here the defendant has justified the trespass with cattle, and yet has not confessed it, nor said anything to such purpose. Then the plea being bad in part, is bad for

the whole, although he has justified some part well; for an entire plea cannot be good in part, and bad in another part; because such an entire plea is not divisible. Pendlebury *v.* Elmott;[1] Kent *v.* Sponder;[2] Ascue *v.* Sanderson;[3] Sir John Thornel *v.* Lassels.[4] And of such opinion was all the court. And judgment was given for the plaintiff. *Saunders*, of counsel with plaintiff.[5]

WISE *v.* HODSOLL.

In the King's Bench, April 28, 1840.

[11 *Adolphus & Ellis*, 816.]

Trespass for assaulting and beating plaintiff.

Second plea. And for a further plea in this behalf the defendant says that, just before the said time when, etc., to wit, on the day and year in the declaration mentioned, the plaintiff with force and arms assaulted him the defendant, and would then have beat, bruised, and ill treated him, if he had not immediately defended himself against the plaintiff; wherefore he the defendant did then defend himself against the plaintiff as he the defendant lawfully might for the cause aforesaid; and the defendant further says that, if any hurt or damage then happened or was occasioned to the plaintiff, the same happened and was occasioned by the said assault of him the plaintiff upon him the defendant, and in the necessary defence of himself the defendant against the plaintiff. And this, etc. Verification.

Demurrer, assigning for causes that the plea does not sufficiently confess and admit the assaulting and beating of plaintiff by defendant in manner and form as alleged in the declaration. Joinder in demurrer.

Miller, for the plaintiff. This plea fails in the same manner as that which was held bad in the Earl of Manchester *v.* Vale; it attempts to justify, but does not confess, and therefore amounts to the general issue. "The time when," etc., there, was not considered as implying an admission. [Coleridge, J. The plea there was very different.] This plea does not show that the defendant used any active means of defence. The averment, that, if any damage happened to plaintiff, the same happened by plaintiff's assault on defendant, might mean that the plaintiff hurt himself in assaulting the defendant; and the hypothetical admission, "if any," etc., was held insufficient in Gould *v.*

[1] Cro. Eliz. 268. [2] Cro. Eliz. 331. [3] Cro. Eliz. 434. [4] Cro. Jac. 27.

[5] Willets Co. *v.* Freeholders, 60 N. J. 29 *Accord.*

In Wheeler *v.* Me-Shing-go-me-sia, 30 Ind. 402; Gallimore *v.* Ammerman, 39 Ind. 333; Scircle *v.* Neeves, 47 Ind. 289 (*semble*); Young *v.* Warder, 94 Ind. 357; Pyle *v.* Peyton, 146 Ind. 90, affirmative pleas, which seem to have been full answers to the complaints, were adjudged bad because they did not in express terms identify the act justified with the act complained of. It seems difficult to find a good reason for these decisions. — Ed.

Lasbury[1] and Margetts v. Bays.[2] [LORD DENMAN, C. J. Here the words are, "if any hurt or damage happened to the plaintiff," not, "if the defendant assaulted the plaintiff." LITTLEDALE, J. In Lowe v. King[3] and Greene v. Jones[4] this form was used, and no objection taken, though the declaration was demurred to in each case] In the first of those cases the commencement of the plea of *son assault demesne* stated it to be pleaded "as to the assaulting, beating," etc.; and in the latter case the commencement was to the same effect. [PATTESON, J. The commencement of this plea, "and for a further plea in this behalf,"[5] etc., refers to the whole declaration.]

Platt, contra, was stopped by the court.

LORD DENMAN, C. J. We think the assault and battery are sufficiently confessed.

LITTLEDALE, PATTESON, and COLERIDGE, JJ., concurred.

Judgment for defendant.

McPHERSON v. DANIELS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1829.

[10 *Barnewall & Cresswell*, 263.]

DECLARATION for slander stated that the plaintiff, before the time of the committing of the grievances thereinafter mentioned, and from thence had been and still was a coach proprietor, and sold and disposed of cattle for divers persons for commission; that defendant falsely and maliciously spoke and published in the hearing and presence of divers good and worthy subjects of this realm of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, the scandalous, defamatory words following, that is to say, "His horses have been seized from the coach on the road; he has been arrested, and the bailiffs are in his house;" thereby then and there meaning and intending that the said plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. Averment of special damage. Plea, that before the speaking and publishing of the several words in the declaration mentioned, and therein supposed to have been spoken and published by the said defendant, of and concerning the said plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, to wit, on, etc., at, etc., one T. W. Woor, of Swaffham, in the county of Norfolk, spoke and published the following words to the defendant of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, that is to say, "His horses have been seized from the coach on the road; he has been arrested, and the bailiffs are in his house;" thereby then

[1] 1 C. M. & R. 254. [2] 4 A. & E. 489. [3] 1 Saund. 76. [4] 1 Saund. 295 c.
[5] The first plea (not stated in the paper book) was not guilty.

and there meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. And the defendant further saith, that at the time of speaking and publishing the said several words in the declaration as therein mentioned, he the defendant also declared, in the presence and hearing of the same persons in whose presence and hearing the said words were so spoken by him the defendant, that he had heard and been told the same from and by the said T. W. Woor, of Swaffham, in the county of Norfolk; wherefore he the defendant, at the said time when, etc., in the said declaration mentioned, did speak and publish of and concerning the plaintiff the said several words in the said declaration mentioned, as he lawfully might for the cause aforesaid. General demurrer and joinder.[1]

PARKE, J. This plea is bad for two reasons. To be a good plea, it must confess and avoid the cause of action stated in the declaration. But this plea either does not confess, or if it confesses, does not avoid, that cause of action. It appears from the case of Bell *v.* Byrne,[2] that if a defendant has not made an assertion as his own, but has merely alleged that some other person had made it, it must be so averred; and that an averment in a declaration that the defendant used slanderous words, must be taken to mean, that he used them as his own words, and as a substantive allegation of his own, and will not be supported by proof that he used them as the words of another person. To apply the principle of that decision to the present case, if the plea be understood to confess that the words were spoken as those of another person, and not as a direct assertion of the defendant himself, it does not properly confess the matter stated in the declaration; if, on the other hand, the plea be considered as confessing the words to have been used as those of the defendant himself, making a substantive allegation of his own, it does not contain any proper avoidance of the matter so confessed: for if one make such assertion of a slander as his own, it can be no answer, even admitting the latter part of the fourth resolution in Lord Northampton's Case to be law, if in the same conversation he add that some one else has also said the same thing.

Judgment for plaintiff.[3]

DAVIS *v.* MATHEWS.

SUPREME COURT, OHIO, APRIL TERM, 1826.

[2 *Ohio Reports*, 397.]

THE declaration set out sundry words spoken by the defendant, charging the plaintiff with the crime of perjury. The plea contained

[1] The report of the case is abridged, and the concurring judgments of Bayley and Littledale, JJ., are omitted.

[2] 13 East. 554. [3] See Lucas *v.* Smith, 1 H. & N. 481.—ED.

a full and technical averment of the truth of the words charged in the declaration, but did not aver, or confess, that the defendant had spoken them. The plaintiff demurred to this plea, and the demurrer was overruled.[1]

By the COURT. The rules of pleading require, that special pleas in bar shall contain an answer to the whole declaration. The declaration in this case charges that the defendant spoke and published the words set out, and avers that they were false and malicious.

The plea avers that the words were true, but does not confess or deny the speaking of them. A material part of the declaration, therefore, remains unanswered, which could not be decided by any verdict that might be rendered in the case. It is immaterial whether the words be true or false, if the defendant did not speak them, consequently an issue on which that fact alone is to be decided, cannot settle the merits of the case, as it leaves the principal matter in controversy undetermined.

We believe that no form of a plea of justification of slanderous words, can be found in any approved collection of entries, or precedents, that does not aver the subject matter of the plea to have taken place before the speaking of the words, and that does not also expressly and distinctly confess the speaking. Such are the forms in Lilly, Morgan, Richardson, and Chitty.

Demurrer sustained.[2]

D. J. COLE *v.* W. D. WOODSON.[1]

SUPREME COURT, KANSAS, JULY TERM, 1884.

[22 *Kansas Reports*, 272.]

THE opinion of the court was delivered by

VALENTINE, J.[3] This was an action for slander, brought by W. D. Woodson against D. J. Cole. The petition contained two counts. The defendant answered, setting up three several defences: *First*, A general denial; *second*, a denial that he used the words charged in the petition, but alleging that if he did use the same, "he was justified in so doing, for the reason that the said words were true in substance and in fact," and that the plaintiff was guilty of the matters and things which such words imputed to him. The plaintiff demurred to the second defence, which demurrer was overruled, and the plaintiff then replied by filing a general denial.

On the trial in the court below, the defendant offered to show that the supposed slanderous language alleged to have been used by him

[1] The statement of the case is abridged, and a part of the opinion is omitted. — ED.

[2] Lewis *v.* Black, 27 Miss. 425, 431 (*semble*); Atterbury *v.* Powell, 29 Mo. 429 (*semble*); Anibal *v.* Hunter, 6 How. Pr. 255 *Accord.* — ED.

[3] Only a portion of the opinion is given. — ED.

was in fact true; whereupon the plaintiff objected to the introduction of any such evidence, or of any evidence in justification of the alleged defamatory language, for the reason that the defence did not admit the speaking of the alleged slanderous language. The court below sustained the objection, and the defendant duly excepted.

Section 94 of the civil code provides, among other things, as follows: —

"The defendant may set forth in his answer as many grounds of defence, counter-claim, set-off and for relief as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both."

It is understood that the decision of the court below was based entirely upon the theory that in actions for slander the defendant cannot set forth in his answer both a denial that he used the language charged against him, and also, in justification, that such language is true. Now we think that this theory is erroneous. The two defences are not inconsistent. It may certainly be true that the defendant never used the language charged against him, and it may also be true that the language itself with all that it implies is true. One of such defences does not in the least contradict the other. Both are defences under the statutes; and thereunder the defendant may set forth in his answer as many defences as he may have. And why should he not be entitled to do so? It would certainly be a great hardship to a defendant who has been sued for slander to be required to admit that he had used the alleged slanderous words, when in fact he may never have used them, in order that he may be allowed to show that such words are in fact true. And it would equally be a great hardship to him to be required in effect to admit that the words are false and slanderous, when in fact they may be true, in order to be allowed to make the defence that he never used such words. Our statutes do not tolerate any such unjust rules, but allow a defendant to set forth as many defences as he may have, which in slander cases may be that he did not use the words charged, and also that the words are true. And it makes no difference what the common law may have been, or what may have been decided by courts in other states, where their statutes are different from the statutes of Kansas. The statutes of Kansas must govern in actions originating and instituted within the borders of Kansas. And where they are clear and explicit, we need not look any further.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.[1]

[1] Nelson v. Brodhack, 44 Mo. 596, 599; Wood v. Hilbish, 23 Mo. Ap. 389; Nelson v. Wallace, 48 Mo. Ap. 193; Stiles v. Comstock, 9 How. Pr. 48; Ormsby v. Douglas, 5 Duer, 665; Butler v. Wentworth, 17 Barb. 649; Kingsley v. Kingsley, 79 Hun, 569, 571 *Accord*.

To the same effect may be cited the following decisions allowing a denial and an affirmative defence in the same answer in jurisdictions in which inconsistent defences are not permitted: De Lissa v. Fuller, 59 Kan. 319 (denial of contract — fraud); Leavenworth Co. v. Waller, 65 Kan. 514 (denial of negligence — contributory negligence); Welch v. Atchison

EAVESTAFF *v.* RUSSELL.

IN THE EXCHEQUER, JUNE 22, 1842.

[10 *Meeson & Welsby*, 365.]

DEBT for goods sold and delivered, and on an account stated. Plea, that the said several supposed causes of action in the declaration mentioned did not accrue to the plaintiff within six years next before the commencement of the suit. Special demurrer, on the ground that the plea, although it professed to be pleaded in confession and avoidance, did not contain any sufficient confession that the plaintiff ever had any cause of action. Joinder in demurrer.

Peacock, in support of the demurrer. The term "supposed causes of action" does not amount to a sufficient admission that there ever was a cause of action in the plaintiff. [PARKE, B. Gould *v.* Lasbury[1] is an authority against you. There this court, after conference with the Court of King's Bench, held that a plea in bar, which alleged that the defendant was discharged under the Insolvent Debtors' Act "from the said debts and causes of action, if any and each and every of them," was bad; but Lord Lyndhurst, in the course of the argument, observed that "the word 'supposed' may, perhaps, be considered as no more than 'alleged,'" and stated that he found that word in several of the forms adverted to at the bar, but not the words "if any such there be."] His Lordship afterwards says that "it is difficult to distinguish the expression 'supposed' from that of 'if any.'" [ALDERSON, B. Surely the supposed cause of action must mean the alleged cause. PARKE, B. In Margetts *v.* Bays[2] the words made it doubtful whether any debt existed at all.]

Udall, contra, referred to Gwillim *v.* Daniell,[3] and was stopped by the court.

Co., 66 Kan. 792 (like preceding case); Fowler *v.* Brooks, (Kansas, 1902) 70 Pac. R. 600 (like preceding case); Weingartner *v.* Louisville Co., (Kentucky, 1897) 42 S. W. R. 839 (denial of negligence — contributory negligence); Smith *v.* Doherty, 109 Ky. 616 (*non est factum* — want of consideration); First Bank *v.* Wisdom, 111 Ky. 135 (like preceding case); Spencer *v.* Society, (Kentucky, 1901) 64 S. W. R. 468 (like preceding case); Booth *v.* Sherwood, 12 Minn. 426 (*semble*, denial of title — license); Steenerson *v.* Waterbury, 52 Minn. 211 (denial of contract — payment); Bank *v.* Cain, 89 Minn. 473 (denial of contract — fraud); Ledbetter *v.* Ledbetter, 88 Mo. 60 (denial of title — equitable defence); Patrick *v.* Boonville Co., 17 Mo. Ap. 462 (denial of contract — payment); Cavitt *v.* Thorp, 30 Mo. Ap. 131 (denial of ownership of note — payment); Schuchman *v.* Heath, 38 Mo. Ap. 280 (denial of contract — statute of limitations); Blodgett *v.* McMurtry, 39 Neb. 210 (denial — estoppel); Home Co. *v.* Decker, 55 Neb. 346 (denial — destruction of property by insured); Citizens' Bank *v.* Closson, 29 Oh. St. 78 (denial of making of note — fraud); Pavey *v.* Pavey, 30 Oh. St. 600 (denial — fraud); Booco *v.* Mansfield, 66 Oh. St. 121 (denial of contract — want of consideration); McDonald *v.* Oregon Co., 17 Oreg. 626 (denial of contract — misconduct of plaintiff); Burnham *v.* Call, 2 Utah, 433 (*semble*); Pugh *v.* Oreg. Co., 14 Wash. 331 (denial of negligence — contributory negligence); Corbitt *v.* Harington, 14 Wash. 197 (denial of contract — fraud); Lord *v.* Horr, 30 Wash. 477 (denial of contract — mistake); Gates *v.* Avery, 112 Wis. 271 (denial of contract — payment). — ED.

[1] 1 C. M. & R. 254. [2] 4 A. & E. 489. [3] 2 C. M. & R. 68.

PARKE, B. There can be no doubt whatever that the word "supposed" is a sufficient admission of a cause of action. It is the usual and ordinary mode of pleading in cases of this nature; and I have seen instances without number, where, after a plea of the general issue, a special plea has followed, professing to answer the supposed causes of action in the declaration mentioned. The words "if any" stand on a different footing, and although sufficient in a plea in abatement, they are not so in a plea in bar, because they leave it doubtful whether any debt at all ever existed.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the defendant.[1]

SWETT AND OTHERS v. SOUTHWORTH AND ANOTHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 21, 1878.

[125 *Massachusetts Reports*, 417.]

CONTRACT upon an account annexed for goods sold and delivered, and upon a promissory note given by the defendants to the plaintiffs. Answer: 1. A general denial. 2. "And the defendants aver that if the plaintiffs shall prove the making of the note declared on, or any of the items in the plaintiffs' bill of particulars, the same have been fully paid."

At the trial in the Superior Court, before GARDNER, J., without a jury, the plaintiffs objected to the admission of any evidence of payment under this answer; but the judge overruled the objection.[2]

ENDICOTT, J. The defence of payment is positively averred in the answer. After a general denial, "the defendants aver, that if the plaintiffs shall prove the making of the note declared on, or any of the items in the plaintiffs' bill of particulars, the same have been fully paid." The case is clearly to be distinguished from Caverly *v.* McOwen,[3] and the other cases cited by the plaintiffs.

Exceptions overruled.[4]

[1] Gale *v.* Capern, 1 A. & E. 102; Gwillim *v.* Daniell, 2 C. M. & R. 68; Scadding *v.* Eyles, 9 Q. B. 858; Ketcham *v.* Zerega, 1 E. D. Sm. 553, 560 *Accord.* — ED.

[2] Only so much of the case is given as relates to this objection. — ED.

[3] 123 Mass. 574.

[4] Louisville Co. *v.* Hall, 87 Ala. 708 (by implication); McDonald *v.* Montgomery Railway, 110 Ala. 161 (by implication); Urquhart *v.* Powell, 54 Ga. 29 (motion to strike out plea denied); Jones *v.* Forehand, 89 Ga. 520 (demurrer to plea overruled); Goss *v.* Catkins, 164 Mass. 546; Bank *v.* Cain, 89 Minn. 473 (by implication); Citizens' Bank *v.* Closson, 29 Ohio St. 78 (by implication); Veasey *v.* Humphreys, 27 Oreg. 515 (*semble* — by implication) *Accord.*

Martin *v.* Swearengen, 17 Iowa, 346 (plea bad on demurrer); Williams *v.* McKee, 98 Tenn. 139 (plea struck out on motion) *Contra.*

At common law a hypothetical plea like that in the principal case was defective in form, and, therefore, a special demurrer to it would be sustained. Griffiths *v.* Eyles, 1 B. & P. 413; Gould *v.* Lasbury, 1 C. M. & R. 254; Margetts *v.* Bays, 4 A. & E. 489; Conger *v.*

S. T. SUIT and Another v. S. WOODHALL.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 9, 1875.

[116 *Massachusetts Reports*, 547.]

CONTRACT on an account annexed, the first item of which was for certain whiskey sold by the plaintiffs to the defendant on June 17, 1874; the second item being for casings sold the same day. The answer first set up the defendant's ignorance as to whether the plaintiffs sold him the goods described in the account annexed, and left the plaintiffs to their proof. It then proceeded as follows:

"If it shall be made to appear that the plaintiffs ever sold and delivered said items or either of them to the defendant, it will also appear that item numbered one was intoxicating liquors, and that item numbered two was the casings containing said liquors; all of which said liquors were sold by the plaintiffs to the defendant, in violation of the laws of this Commonwealth relating to spirituous and intoxicating liquors."

At the trial in the Superior Court, before LORD, J., the defendant offered to prove that the liquors sued for were sold by the plaintiffs to the defendant, in violation of the liquor laws of this Commonwealth. But the judge excluded the evidence, and ruled that this defence was not open to the defendant under his answer; that the answer did not set forth in clear and precise terms the substantial facts recited in the answer, but only inferentially that from some source and in

Johnston, 2 Den. 96; Comm. Bank v. Sparrow, 2 Den. 97; Hart v. Meeker, 1 Sandf. 623; McCormick v. Pickering, 4 N. Y. 276, 280 (*semble*).

The decisions in New York upon hypothetical pleas like that in the principal case are embarrassingly inconsistent.

In the following cases such a plea was adjudged bad on demurrer: Sayles v. Wooden, 6 How. Pr. 84; Buddington v. Davis, 6 How. Pr. 401, Arthur v. Brooks, 14 Barb. 533 (*semble*); Mann v. Milne, 21 Hun, 408 (*semble*); Goodman v. Robb, 41 Hun, 605 (*semble*); Saleeby v. Central Co., 40 N. Y. Misc. Rep. 269. See also McMurray v. Gifford, 5 How. 14 (judgment on pleadings notwithstanding such plea).

But the opposite view was taken in Ketcham v. Zerega, 1 E. D. Sm. 553; Brown v. Ryckman, 12 How. Pr. 313; Taylor v. Richards, 9 Bosw. 679; Boyce v. Brown, 7 Barb. 80, 85 (*semble*); Wiley v. Rouse's Point, 86 Hun, 495; Corn v. Levy, 97 N. Y., Ap. Div. 49.

In the following cases a motion to strike out such a plea was granted: Wies v. Fanning, 9 How. Pr. 543; Hamilton v. Hough, 13 How. Pr. 14.

But the opposite view was taken in Buhler v. Wentworth, 17 Barb. 649; Doran v. Dinsmore, 33 Barb. 86, 20 How. Pr. 503 s. c.; Mann v. Milne, 21 Hun, 408; Goodman v. Robb, 41 Hun, 605; furthermore, in Ketcham v. Zerega, *supra*; Brown v. Ryckman, *supra*; Taylor v. Richards, *supra*; Wiley v. Rouse's Point, *supra*, in which cases the objection was taken by demurrer, the court was inclined to consider the pleas good against any mode of attack. In the last of the cases just cited, the plaintiff claimed damages for a personal injury caused by the dangerous condition of the highway. The defendant's answer alleged that "if the plaintiff fell upon the streets or sidewalks of the village . . . and suffered any injury thereby, the same was caused solely by the contributory negligence of the plaintiff." The court overruled a demurrer to this answer, saying, through Putnam, P. J.: "The allegation that 'if the plaintiff,' etc., does not deny, and hence admits the averments in the complaint." — ED.

some manner such facts would appear, and that an amendment stating the facts was necessary; but the defendant's counsel declined to ask leave to amend the answer in that respect. Whereupon the defendant submitted to a verdict for the plaintiffs, and alleged exceptions.

GRAY, C. J. It is the object of every system of pleading to bring the controversy to a precise and definite issue for trial. The common law required that in every plea material facts should be alleged directly and positively. Gould Pl. c. 3, § 49. Even under the St. of 1836, c. 273, which abolished special pleading, and required the general issue to be pleaded in all cases, with a specification of the matters intended to be given in evidence, it was held that such a specification must contain as distinct an allegation of the grounds of defence, though not in the same technical form, as a special plea. Brickett v. Davis.[1]

The new practice act was intended, without going back to the technicalities of special pleading, to require the issues to be tried to be more precisely and distinctly stated than under the St. of 1836. It in terms abolishes the general issue, as well as special pleas in bar as formerly used; requires that both the denials and allegations in the answer shall be in clear and precise terms; permits the plaintiff to file a demurrer or a replication to the answer; and provides that "the allegations and denials of each party shall be so construed by the court as to secure as far as possible substantial precision and certainty, and discourage vagueness and loose generalities." Gen. Sts. c. 129, §§ 15, 17, 20, 23, 27.

The present action is upon an account annexed for goods sold and delivered. The defendant was not entitled to avail himself of the defence that the contract of sale was illegal, without clearly and precisely setting it up in his answer. Bradford v. Tinkham;[2] Libby v. Downey;[3] Cardoze v. Swift.[4]

He has not pleaded such a defence otherwise than by stating that "if it shall be made to appear," or "if it shall appear," that the plaintiffs sold and delivered the goods to the defendant, "it will also appear" that they were intoxicating liquors, and the vessels containing the same, "all of which said liquors" (necessarily limited by grammatical construction to the liquors which may so appear to have been the goods sold) were sold by the plaintiffs to the defendant in violation of law.

The answer contains no clear and precise allegation that the goods sued for were sold illegally, but only that if it shall appear that the goods were sold as alleged in the declaration, it will also appear that they were sold in violation of law. The issue thereby tendered is not whether there was an illegal sale, but whether in a certain contingency it will appear that there was an illegal sale. If the plaintiff had demurred to the answer, his demurrer would not have admitted

[1] 21 Pick. 404. [2] 6 Gray, 494. [3] 5 Allen, 229. [4] 113 Mass.

an illegal sale, but merely that it might appear that there was such an illegal sale. And if he had filed a replication, denying all the allegations in the answer, his denial would in like manner have been limited to what might be made to appear, and no issue would be joined upon what the fact was.

The case cannot be distinguished from Cassidy *v.* Farrell,[1] in which it was decided that, in an action like the present, the defence of an illegal sale was not open under an answer alleging that "if the plaintiff shall offer any evidence tending to prove the items in the account, the defendant will offer evidence tending to prove that said items were spirituous and intoxicating liquors," sold in violation of law. In this case, as in that, the allegation is of what the state of the evidence will or may be at the trial, not what was the fact at the time of the contract. In Hanson *v.* Herrick,[2] on which the defendant relies, no question of the form of the answer was raised or considered.

It was therefore rightly ruled at the trial that no question of the illegality of the contract sued on was open to the defendant under his answer, and the defendant having declined to accede to the suggestion of the court to amend, his

Exceptions must be overruled.[3]

MONTGOMERY *v.* RICHARDSON AND OTHERS.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., JUNE 22, 1832.

[5 *Carrington & Payne*, 247.]

FALSE imprisonment. Pleas: the general issue; and several special pleas, which were holden bad on demurrer.

Wyborn, for the plaintiff, proposed to read one of the special pleas which stated the fact of the suing out of the writ by one of the defendants. He contended that he was entitled to have the special pleas read, as the jury were to assess the damages upon them as well as give a verdict on the general issue.

LORD TENTERDEN, C. J. Taking this as a general question, it would be contrary to all the practice in my experience, and I believe in that of every gentleman at the bar, to hold that the statements in a special plea may be evidence under the general issue. Then, as to the particular reason given, Mr. Wyborn contends, that, because the jury are to assess the damages on the special plea, therefore he is entitled to read that plea. I am clearly of opinion that he is not, because there can be no damages on the special plea until the plaintiff has proved

[1] 109 Mass. 397. [2] 100 Mass. 323.

[3] Cassidy *v.* Farrell, 109 Mass. 397; Jackman *v.* Doland, 116 Mass. 550; Caverly *v.* McOwen, 123 Mass. 574 (*semble*); Lewis *v.* Kendall, 6 How. Pr. 59 *Accord.* — ED.

his case on the general issue. Now, this he has not done, as he has not proved that the defendant sued out the writ. *Nonsuit.*

In the ensuing term, Wyborn applied to the court to set aside the nonsuit; but the court refused a rule.[1]

HARTWELL *v.* PAGE AND OTHERS.

SUPREME COURT, WISCONSIN, JANUARY TERM, 1861.

[14 *Wisconsin Reports*, 49.]

APPEAL from the Circuit Court for Milwaukee County.

Action against a sheriff and his deputies for an unlawful taking of the plaintiff's goods. Answer, 1st. A general denial. 2d. A justification under a writ of attachment in favor of one Woodward against the property of one King, alleging that at the time of the taking, the goods were the property of King, and were claimed by Hartwell under a pretended sale from King, which was fraudulent as to creditors. The answer was verified. On the trial the plaintiff proved the taking of the goods by the defendants on the 5th of May, 1858, and their value, and gave evidence tending to show that the store from which the goods were taken was at the time in his possession.

The court, at the request of the plaintiff, charged the jury that they must find for the plaintiff if they found that the goods were taken

[1] Lapworth *v.* Wast, Cro. Jac. 86; Kirk *v.* Nowill, 1 T. R. 118; Harrington *v.* Macmorris, 5 Taunt. 228, 1 Marsh. 33, s. c.; Firmin *v.* Crucifix, 5 C. & P. 98; Glenn *v.* Sumner, 132 U. S. 152, 157; Smith *v.* Gale, 144 U. S. 509, 524 (*semble*); Pope *v.* Welsh, 18 Ala. 631; Wright *v.* Lindsay, 20 Ala. 428; Youngs *v.* Bell, 4 Cal. 201; Klink *v.* Cohen, 13 Cal. 623; Siter *v.* Jewett, 33 Cal. 92; Nudd *v.* Thompson, 34 Cal. 39; Buhne *v.* Corbett, 43 Cal. 264; Amador Co. *v.* Butterfield, 51 Cal. 526; Billings *v.* Drew, 52 Cal. 565; Miller *v.* Chandler, 59 Cal. 540; Botto *v.* Vandament, 67 Cal. 332; McDonald *v.* South Co., 101 Cal. 206 (overruling Bell *v.* Brown, 22 Cal. 678); Miles *v.* Woodward, 115 Cal. 308; Bank *v.* Silber, 121 Cal. 414; Ball *v.* Putnam, 123 Cal. 134; Hayes *v.* Williams, 17 Colo. 465, 471 (*semble*); Pike *v.* Sutton, 21 Colo. 84; Farnan *v.* Childs, 66 Ill. 544; Richolson *v.* Moloney, 195 Ill. 575; Wheeler *v.* Robb, 1 Blackf. 330; Arnold *v.* Sturges, 5 Blackf. 256; Ricket *v.* Stanley, 6 Blackf. 169; Weston *v.* Lumley, 33 Ind. 489; Smelser *v.* Wayne Co., 82 Ind. 417; Palmer *v.* Poor, 121 Ind. 135; People's Soc'y *v.* Templeton, 16 Ind. Ap. 126; Ray *v.* Moore, 24 Ind. Ap. 490; Grash *v.* Sater, 6 Iowa, 301; Shannon *v.* Pearson, 10 Iowa, 588; Quigby *v.* Merritt, 11 Iowa, 147; Treadway *v.* Sioux Co., 40 Iowa, 526; Barr *v.* Hack, 46 Iowa, 308; Heinricks *v.* Terrell, 65 Iowa, 25 (but see Curl *v.* Watson, 25 Iowa, 35; Moore *v.* Isbel, 40 Iowa, 383, and compare Burns *v.* Chicago Co., 110 Iowa, 385); Nye *v.* Spencer, 41 Me. 272; Hix *v.* Drury, 5 Pick. 296, 299 (under Mass. St. 1826, c. 107, which nullified Jackson *v.* Stetson, 15 Mass. 48, and Alderman *v.* French, 1 Pick. 1); Doss *v.* Jones, 6 Miss. 158; Cilley *v.* Jenness, 2 N. H. 87, 90 (*semble*); Hamer *v.* McFarlin, 4 Den. 509, 510; Troy Co. *v.* Kerr, 17 Barb. 581, 599; Swift *v.* Kingsley, 24 Barb. 541; Redmond *v.* Tone, 32 N. Y. St. Rep. 260; Duschnes *v.* Heyman, 2 N. Y. Ap. Div. 354 (affirmed 158 N. Y. 735); Young *v.* Katz, 22 N. Y. Ap. Div. 542; De Waltoff *v.* Third Co., 75 N. Y. Ap. Div. 351; Whitaker *v.* Freeman, 1 Dev. 271 (*semble* — but not clear whether admission was express or constructive); Sumner *v.* Shipman, 65 N. Ca. 623 (*semble* — like preceding case); Fowler *v.* Davenport, 21 Tex. 626; Duncan *v.* Magette, 25 Tex. 245; Express Co. *v.* Copeland, 64 Tex. 354; Young *v.* Kuehn, 71 Tex. 645; Silliman *v.* Gano, 90 Tex. 637; Bauman *v.* Chambers, 91 Tex. 106; Murphy *v.* Carter, 1 Utah, 17 *Accord.* — ED.

from his possession as charged in the complaint, unless they should find that the goods were, as regards the creditors of King, at the time of the taking, King's property; that the defence of fraud must be proved; and that if the evidence showed that King held the goods only as an agent of some other person, it was not incumbent upon the plaintiff to show who that person was. The court also charged the jury, at the request of the defendants, that before they could find for the plaintiff, they must find that he was the owner of the goods. The defendant excepted to the refusal of the circuit judge to give two other instructions. Verdict and judgment for the plaintiff.[1]

By the Court, PAINE, J. We think the rulings of the court below in respect to the possession of the plaintiff, whether right or wrong, may, upon these pleadings, be regarded as immaterial. The answer specifically admits that the goods in question had been sold by King to the plaintiff, and seeks to avoid the sale by alleging that it was fraudulent. It is true it first contains a general denial of the allegations in the complaint. But we have several times decided that although under the Code a defendant may set up as many different defences as he pleases, yet he cannot, by making repugnant allegations, compel the plaintiff, in order to avoid a denial in one part of the answer, to prove any fact specifically admitted in another part. The provision requiring a verification of the pleadings shows that it was not the design to allow repugnant allegations, but to introduce the element of truth in pleading, and compel the defendant to admit such parts of the plaintiff's case as he could not conscientiously deny. If a fact sustaining the plaintiff's right is expressly admitted in any part of the answer, that fact is to be taken as true against the defendant, and the plaintiff is relieved from the necessity of proving it, just as he would have been as to any fact admitted in an answer in chancery.[2] The answer here having admitted the sale from King to the plaintiff,

[1] Only a portion of the case is given. — ED.

[2] Dole v. Burleigh, 1 Dak. 227; Myrick v. Bill, 3 Dak. 284; Wiley v. Keokuk, 6 Kan. 94; Butler v. Kaulback, 8 Kan. 668; Wright v. Bacheller, 16 Kan. 259, 267; Barnum v. Kennedy, 21 Kan. 181; Derby v. Gallup, 5 Minn. 119; Ledbetter v. Ledbetter, 88 Mo. 60 (*semble*); State v. Firemen's Co., 152 Mo. 1, 39; McCord v. Branch, 21 Mo. Ap. 92; Bank v. Stone, 93 Mo. Ap. 292; Dwelling Co. v. Brewster, 43 Neb. 528; Western Co. v. Tomson, (Nebraska, 1904) 101 N. W. R. 341; Young v. Katz, 22 N. Y. Ap. Div. 542, per Cullen, J.; Veasey v. Humphreys, 27 Oreg. 515; Maxwell v. Bolles, 28 Oreg. 1; Baines v. Coos Co., 41 Oreg. 135; Seattle Bank v. Carter, 13 Wash. 281; Allen v. Olympia Co., 13 Wash. 307; Lamberton v. Shanuon, 13 Wash. 404; Corbitt v. Harington, 14 Wash. 197 (*semble*); Sexton v. Rhames, 13 Wis. 99; Miller v. Larson, 17 Wis. 624; Farrell v. Hennesy, 21 Wis. 632; Grever v. Culver, 84 Wis. 295, 297; South Co. v. Harte, 95 Wis. 592, 595 (*semble*) *Accord.*

In Young v. Katz, *supra*, CULLEN, J., said, p. 547: "It may be necessary for the purpose of pleading certain defences, 'to allege matter by way of confession, followed by those in avoidance upon which the alleged defence is founded.' But, in my opinion, in a verified pleading, however essential to the pleading it may be to make the confession, the confession can only be properly made when it is the truth. There is a marked distinction to be drawn between common law pleading and the present system, which has prevailed since 1847. . . . The object of the reform in legal pleading, effected by the old Code, and continued in existence by the present one, was to require of a party in a verified pleading the same degree of veracity which is expected in other transactions of life. There are some exceptions. In certain cases, where the result would be to criminate himself, a party is not required to verify a pleading. But the general rule is that in a verified pleading a party can plead

the plaintiff was entitled to judgment unless the defendants established fraud in the sale.

We see no error in the rulings of the court.

The judgment is affirmed, with costs.

GERTRUDE B. MURRAY, RESPONDENT, *v.* NEW YORK LIFE INSURANCE COMPANY, APPELLANT.

COURT OF APPEALS, NEW YORK, APRIL 26, 1881.

[85 *New York Reports*, 236.]

MILLER, J.[1] The right of a party holding the affirmative upon an issue of fact upon trial to open and close the evidence, and upon the final submission of the case to the jury to reply in summing up the case is too well settled to admit of any question. And when such right is denied by the judge upon the trial, such denial furnishes ground for exception, which is the subject of review upon appeal. Millerd *v.* Thorn.[2] The defendant in this case clearly held the affirmative of the issue upon trial, and the judge erred in refusing to allow the defendant to open and close the case in accordance with such right. The complaint was upon two policies of insurance, copies of which were attached, each of which contained a provision as follows, that: "If the person whose life is hereby insured shall . . . die in, or in consequence of a duel, or of the violation of the laws of any nation, State or province, . . . then, and in every such case, this policy shall be null and void."

It alleged among other things that the death of the insured was not caused by the breaking of any of the conditions and agreements in either of the policies. This allegation was not required, and all that was essential to make out a cause of action was a statement of the contract, the death of the assured, and the failure to pay as provided. The insertion of an unnecessary allegation in the complaint, which the plaintiff was not required to aver or to prove in order to establish his case, could not and did not deprive the defendant of his right to the affirmative, if such right actually existed. As the allegation referred to was not properly there for the purpose of making out a good cause of action, the complaint must be regarded as if it contained no such averment. The answer of the defendant denied this allegation

only that which is true in fact, regardless of what he may think or be advised the state of the law requires him to set up to constitute a valid claim or defence. Therefore, any allegation made in a verified pleading on a party's own knowledge is presumptorily true and may be taken against him as an admission. But I agree with Judge Bradley, that when such allegation is only part of a single defence and is taken therefrom, it operates only as an admission, and is not conclusive against the party making it, but may be rebutted and explained the same as other admissions." — ED.

[1] Only a portion of the opinion of the court is given. — ED.

[2] 56 N. Y. 402.

of the complaint, admits the death, and sets up that the insured died in consequence of a violation by him of the laws of the State of New York, and in consequence of an unlawful assault committed by him upon one Robert H. Berdell. The only facts which were really to be tried were those averred in the affirmative defense set up that Wisner Murray died in consequence of a violation of the laws of the State. If the defendant introduced no such evidence by the answer which admitted the plaintiff's cause of action she was entitled to recover the amount of the policies.

The defendant had alleged a breach, and unless it was proved no defense was made out, and the plaintiff was not called upon to disprove what had not been established by evidence. No presumption could arise in favor of the defendant without proof that the assured died from a violation of law, and unless this was established the plaintiff would have been entitled to a judgment upon the pleadings. The rule is well established that in an action upon a policy of insurance when the answer admits the issuing of the policy and the allegations in the complaint, and alleges a breach of its conditions, the burden of proof is upon the defendant, and the plaintiff is entitled to recover unless the defendant satisfies the court or jury, by a preponderance of evidence, that the conditions had been broken. Jones *v.* Brooklyn Life Ins. Co.;[1] Van Valkenburgh *v.* American Pop. Life Ins. Co.;[2] Elwell *v.* Chamberlin.[3] There is no ground for claiming that the answer did not admit all that was essential to entitle the plaintiff to a judgment, and there is no such denial of any material fact in the complaint as required any proof on the part of the plaintiff to maintain the action.

The judgment should be reversed and new trial granted, with costs to abide the event.

All concur.

Judgment reversed.[4]

BEHRLEY *v.* BEHRLEY.

SUPREME COURT, INDIANA, NOVEMBER TERM, 1883.

[93 *Indiana Reports*, 255.]

ELLIOTT, J.[5] We do not find it necessary to set forth all of the allegations of appellant's complaint, for there is one which conclu-

[1] 61 N. Y. 79. [2] 70 Id. 605. [3] 31 Id. 611.

[4] Ricketts *v.* Loftus, 14 Q. B. 482; Lush *v.* Russell, 5 Ex. 203, 210; Benicia Works *v.* Creighton, 21 Oreg. 495 *Accord.*

Similarly an anticipatory negative rejoinder will not affect the plaintiff's right to plead his affirmative replication, and with the same effect as if the anticipatory rejoinder were non-existent. Middleton *v.* Graveley, 12 Price, 513.

A plaintiff who is so ill-advised as to insert in his complaint an anticipated affirmative defence, will cure his mistake if he pleads in his complaint a good anticipatory reply to such defence. Trotter *v.* Mutual Co., 9 S. Dak. 596; Sir Ralph Bovy's Case, *supra*, 93. — ED.

[5] Only a portion of the opinion is given. — ED.

sively shows that she cannot maintain this action. The complaint seeks a recovery upon an antenuptial contract, and contains this allegation: "That on the 9th day of August, 1882, she filed her application for a divorce against Remegius Behrley, on the ground of cruel treatment, and afterwards, at the September term, 1882, of the Harrison Circuit Court, and after full appearance to said suit, she was granted a divorce from the defendant on the ground of cruel treatment." Questions concerning marital rights, as well as property rights growing out of the marriage relation, are deemed to be adjudicated by the decree in the suit for divorce.

In Muckenburg *v.* Holler,[1] it was said: "All questions of property between the parties, like that in controversy here, are thus in litigation in a suit for divorce, and must there be settled. The complaint here shows that the parties have been divorced. It shows, therefore, by legal inference, that the subject-matter of this suit was there settled and put at rest." This ruling is in harmony with a long line of decisions. Fischli *v.* Fischli;[2] Williams *v.* Williams;[3] Sullivan *v.* Learned;[4] Moon *v.* Baum;[5] Rose *v.* Rose.[6]

Where a complaint states facts constituting a cause of action, but also states facts which constitute a defence, it will be held bad on demurrer.[7] Calvo *v.* Davies.[8]

Judgment affirmed.

[1] 29 Ind. 139. [2] 1 Blackf. 360 (12 Am. Dec. 251). [3] 13 Ind. 523.
[4] 49 Ind. 252. [5] 58 Ind. 194. [6] 93 Ind. 179.

[7] Beckett *v.* Bradley, 2 Dowl. & L. 586 (defendant pleads a good affirmative replication of *res judicata*); Moss *v.* Anglo-Egyptian Co., 1 Ch. Ap. 106 (*semble* — *res judicata*); So. Co. *v.* Adams, (Alabama, 1902) 32 So. R. 503, 506 (justification of imprisonment); Goring *v.* Dinwiddie, 86 Cal. 633 (justification of imprisonment); Williamson *v.* Joyce, 140 Cal. 669 (statute of limitations); Hax *v.* Leis, 1 Colo. 187 (*res judicata*); Keen *v.* Brown, (Florida, 1903) 55 So. R. 400 (*semble* — *res judicata*); Williams *v.* Cheattam, 99 Ga. 301; Ream *v.* Pittsburgh Co., 49 Ind. 93 (contributory negligence); Greenup *v.* Crooks, 50 Ind. 410; Gold *v.* Pittsburgh Co., 153 Ind. 232, 247 (*res judicata*); Roberts *v.* Indianapolis Co., 158 Ind. 634 (*res judicata*); Henry *v.* Moberly, 6 Ind. Ap. 490 (privileged communication); Crown Point *v.* Thompson, (Indiana Appeals, 1902) 65 N. E. R. 13; Van Winkle *v.* N. Y. Co., (Indiana Appeals, 1905) 73 N. E. R. 157; Robinson *v.* Morgan, 100 Ky. 529 (justification of imprisonment); Durham *v.* Louisville Co., 16 Ky. L. Rep. 757 (contributory negligence); Holtheide *v.* Smith, (Kentucky, 1905) 84 S. W. R. 321 (*res judicata*); Hertung *v.* Shaw, 130 Mich. 177 (privileged communication); Lydecker *v.* St. Paul Co., 61 Minn. 414 (contributory negligence); Majors *v.* Majors, 58 Miss. 806 (*res judicata*); Stone *v.* Cook, 179 Mo. 534 (estoppel); Kennon *v.* Gilmer, 4 Mont. 433 (contributory negligence); Rapp *v.* Rapp, (New Jersey, Equity, 1904) 58 Atl. R. 167; (bill for divorce alleges plaintiff's desertion of defendant); Garr *v.* Selden, 4 N. Y. 91 (privileged communication); Suydam *v.* Moffat, 1 Sandf. 459 (privileged communication); Calvo *v.* Davies, 73 N. Y. 211 (discharge of surety by time given); Davis *v.* Hall, 4 Jones, Eq. 403 (*res judicata*); Texas Co. *v.* Murphy, 46 Tex. 356, 362 (contributory negligence); H. & T. Co. *v.* Pittsburg Co., 59 Tex. 373 (contributory negligence); Gulf Co. *v.* Shieder, 88 Tex. 152 (contributory negligence); Frick *v.* Wood, 31 Tex. Civ. Ap. 167 (*res judicata*); Kimble *v.* Kimble, 14 Wash. 369 (privileged communication); Dimmey *v.* Wheeling Co., 27 W. Va. 32 (*semble* — contributory negligence); Hoth *v.* Peters, 55 Wis. 405 (contributory negligence); Murphy *v.* Martin, 58 Wis. 276 (justification of imprisonment); King *v.* Johnson, 81 Wis. 578 (justification of imprisonment); Bonnifield *v.* Price, 1 Wyo. 172 (statute of limitations); Cowhick *v.* Shingle, 5 Wyo. 87 (statute of limitations); Marks *v.* Board, 11 Wyo. 483 (*semble* — statute of limitations); Columbia Ass'n *v.* Claus, (Wyo. 1904) 78 Pac. R. 708 (statute of limitations) *Accord.* — Ed.

[8] 73 N. Y. 211.

G. C. DANA *v.* T. BRYANT AND OTHERS.

SUPREME COURT, ILLINOIS, DECEMBER TERM, 1844.

[6 *Illinois Reports*, 104.]

TREAT, J. At the October term, 1839, of the Peoria Circuit Court, a judgment was recovered in the name of the People of the State of Illinois against Thomas Bryant, Charles Ballance, Augustus O. Garrett, John C. Caldwell, and Luther Sears, for the sum of ten thousand dollars, the amount of the penalty of the official bond of said Bryant, as sheriff of Peoria County.

At the April term, 1841, Giles C. Dana moved the court for a writ of inquiry of damages suggesting several breaches, the chief of which was that Bryant had collected the amount of a judgment in favor of Dana against one Phillips, but had refused to pay the money to Dana.

The defendant's fifth plea alleges, that the said sum of money was received by said Bryant without any legal authority, and was not received by him as sheriff. To this plea, the plaintiff replied by way of estoppel, that the defendants ought not to be permitted to plead said plea, because said Bryant, by his return indorsed on the *alias fieri facias*, acknowledged that he received said sum of money as sheriff as by the said return, remaining of record, will be seen. The defendant rejoined, *nul tiel record*.

This last issue was heard by the court, and found for the defendants. A writ of inquiry was awarded, and a jury sworn to assess the damages sustained by the plaintiff, by reason of the breaches suggested, who found that the breaches assigned were true, and assessed the plaintiff's damages at $509.66.

The defendants entered their motion for judgment on the issue found in their favor by the court, which motion the court sustained, and rendered final judgment for the defendants, although the jury had found for the plaintiff on the other issues.

To reverse that judgment, Dana prosecutes his writ of error.

It is insisted by the defendants, that the replication admitted the truth of all the material allegations of the plea, and that the plaintiff failing to sustain his replication by the production of the record, the defendants were entitled to final judgment. If the replication is to be regarded as an admission by the plaintiff of the facts set up by the plea, the conclusion contended for follows, and the defence was complete. The principle is undeniable, that a defendant succeeding on one plea, which is a complete answer to the declaration, shall have judgment in his favor, in bar of the action.

It is a general rule in pleading, that a party confesses all such traversable allegations on the opposite side, as he does not controvert. The omission by him, to traverse material facts alleged by his adversary, is considered as an admission of them. And what he thus concedes on the record, he is not permitted afterwards to contradict.

To this general rule, there are certain exceptions. One of them is in the case of dilatory pleas. Such pleas do not go to the merits of the action, but merely oppose some matters of form to the further progress of the case.

Another exception is in the case of a new assignment. The office of a new assignment is to obviate a difficulty occasioned by the generality of the declaration, and the defendant is required to plead to it anew, leaving out of question the original plea tendered to the declaration.

Again, the rule is not held to be applicable to pleadings in estoppel. A plea in estoppel, instead of confessing the allegations of the opposite party, neither admits them, as in the case of a plea in confession and avoidance, nor denies them, as in the case of a plea of traverse, but alleges some new matter, which being inconsistent with those allegations, precludes the party from availing himself of them. Stephen on Pl. 219, 220; Gould's Pl. 46, 343.

If this be the correct doctrine in relation to this kind of pleading, it would seem to follow necessarily that a party, who has been unsuccessful in pleading an estoppel, is not afterwards precluded from confessing and avoiding, or traversing the allegations of his adversary. The issue presented by the estoppel, is not to determine the truth or validity of the particular facts pleaded, but the right and power of the party to insist on them as a defence. This is the only question to be decided. If the estoppel is sustained, the other party is concluded from making the allegations he has interposed. If disallowed, the party who has admitted nothing by pleading it, may then present his answer to the allegations. The question seems, therefore, to be a preliminary one, which may not necessarily dispose of the whole case, and should be first decided, when there are other questions of fact to be tried.

In this view of the case, the finding of the court on the issue of *nul tiel record* only decided that the defendants were not estopped by the record from insisting on the allegations of their plea, and did not determine that those allegations were true. The proper judgment on such finding was interlocutory, and not final, concluding the plaintiff from the further assertion of his claim. The plaintiff, after this decision against him, should have tendered an issue to the plea, and that issue, with those formed on the other pleas, should have been submitted by the court to the jury for trial together.[1]

The judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings consistent with this opinion.[2]

Judgment reversed.

[1] Darlington v. Pritchard, 4 M. & G. 783 *Accord.*
Whittemore v. Stephens, 48 Mich. 573 (*semble*) *Contra.*
See Eikenberry v. Edwards, 71 Iowa, 82, 86.
In Darlington v. Pritchard, *supra*, Tindal, C. J., said, p. 795: "The very notion of an estoppel is, that it admits the facts against the allegation of which the estoppel is pleaded, *quo fensu* — but to a certain extent only. It amounts to saying — such is your plea, but you are estopped by law from setting it up. The estoppel, therefore, cannot be relied upon as an admission of facts, so as to be taken advantage of in the cause." — ED.

[2] A petition for a rehearing was filed in this case, which was denied.

JOHN M. G. PARKER v. CITY OF LOWELL.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1858.

[11 *Gray*, 353.]

ACTION of tort for damages occasioned by an obstruction in a culvert, running under River Street in Lowell, to the plaintiff's dwelling-houses on the southerly side, and his shop and stable on the northerly side of that street.

The defendants called a member of the city government in 1855, who examined the plaintiff's premises after the alleged injury; and offered to prove by him that, while he was at the building, the plaintiff told him that if the city would raise the building and repair the walls on the front, he would be satisfied, and that the defendants made such repairs accordingly; and for this reason they contended that the plaintiff could not maintain his action. Upon objection, the judge ruled that this evidence was incompetent and inadmissible as tending to show accord and satisfaction, because no such matter was set forth in the answer.[1]

BIGELOW, J. Evidence tending to show an adjustment of damages with the plaintiff, and a satisfaction thereof in whole or in part, was rightly excluded. No such ground of defence was set forth in the answer, and as it was clearly matter in discharge of the action, it was necessary to plead it in order to render proof of it admissible. St. 1852, c. 312, § 18.

Judgment on the verdict.[2]

[1] Only so much of the report is given as relates to this ruling of the judge. — ED.

[2] Tiblethorpe v. Hunt, Cro. El. 309; Phillips v. Kelly, 29 Ala. 628; Karter v. Fields, 140 Ala. 352 (facts of the accord and satisfaction to be stated); Owens v. Chandler, 16 Ark. 651; Coles v. Soulsby, 21 Cal. 47; Sweet v. Burdett, 40 Cal. 97; (Garvin v. Annam, 2 Cal. 494; McLarren v. Spalding, 2 Cal. 510, *contra*, are overruled); Berdell v. Bissell, 6 Colo. 162; Atchison v. Atchison, 67 Conn. 35; Fogil v. Boody, 76 Conn. 194; Kenyon v. Sutherland, 8 Ill. 99; Wall v. Galvin, 80 Ind. 447; Taylor v. Frink, 2 Iowa, 84; Burnsides v. Smith, 5 T. B. Mon. 464 (*semble*); Grinnell v. Spink, 128 Mass. 25; Cordner v. Roberts, 58 Mo. Ap. 440; Longstreet v. Ketchum, 1 N. J. 170; Niggli v. Foehry, 83 Hun, 269; Jacobs v. Day, 5 N. Y. Misc. Rep. 410; Covell v. Carpenter, 24 R. I. 1 (*semble* — but admissible under *non assumpsit*); Standard Co. v. Gunter, 102 Va. 568; Seaver v. Wilder, 68 Vt. 423 *Accord*.

But if the plaintiff's evidence discloses an accord and satisfaction, the defendant may take advantage of this defence although not pleaded. Looby v. West Troy, 24 Hun, 78.

In England before the Hilary Rules of 1833 the defence of accord and satisfaction might be introduced under *non assumpsit*. There are a few survivals of this anomalous practice in this country. Chicago v. Babcock, 143 Ill. 358, 365; Kapischki v. Koch, 180 Ill. 44, 47; Papke v. Hammond Co., 192 Ill. 631, 643; Cincinnati Co. v. Goodson, 101 Ill. Ap. 123, 127; Shafer v. Stonebraker, 4 Gill & J. 345, 355; Barr v. Perry, 3 Gill, 313, 322; Herrick v. Burnside, 56 Md. 439, 456; Dawson v. Pynsent, 4 Yeates, 349; Greenwalt v. Horner, 6 S. & R. 71, 77; Gilchrist v. Bale, 3 Watts, 355 (but see Johnson v. Phila. Co., 163 Pa. 127 — notice of defence of accord and satisfaction must be given); Covell v. Carpenter, 24 R. I. 1; First Bank v. Kimbulanda, 16 W. Va. 555. — ED.

D. A. HORTON *v.* S. D. HORTON.

SUPREME COURT, GENERAL TERM, NEW YORK, DECEMBER TERM, 1894.

[83 *Hun*, 214.]

CULLEN, J. This is an appeal from a judgment rendered at the Special Term dismissing the plaintiff's complaint.

We have little doubt that the decision of the trial court was right on the facts proved, and that it was justified in finding that the plaintiff did execute the release despite her final statement to the contrary. But the plaintiff objected to the proof of the release on the ground that no such defence was pleaded and excepted to this ruling of the court admitting it in evidence. The objection was well founded. A release of a cause of action is an affirmative defence, and must be pleaded.[1] McKyring *v.* Bull;[2] Kirchner *v.* New Home Sewing Machine Company.[3]

The judgment appealed from should be reversed and new trial ordered, costs to abide event.

BROWN, P. J., concurred; DYKMAN, J., not sitting.

In re WESSON.

DISTRICT COURT, UNITED STATES, EASTERN DISTRICT OF VIRGINIA, MAY, 1881.

[18 *Federal Reporter*, 855.]

IN Bankruptcy.

This was a petition filed by a discharged bankrupt to enjoin the sheriff from proceeding under an execution issued on a judgment

[1] Greenwald *v.* Freese (California, 1893), 34 Pac. R. 73; San Pedro Co. *v.* Reynolds, 121 Cal. 74; Golstein *v.* Reynolds, 190 Ill. 124; Bender *v.* Sampson, 11 Mass. 42, 45; Nelson *v.* Thompson, 7 Cush. 502; Rivers *v.* Blom, 163 Mo. 442 (*semble*); Collier *v.* Field, 2 Mont. 320; Franklin *v.* Cobban, 20 Mont. 168; Wiseheart *v.* Legro, 33 N. H. 177; Johnson *v.* Kerr, 1 S. & R. 25; Trotter *v.* Mutual Ass'n, 9 S. Dak. 596; Harvey *v.* Sweasy, 4 Humph. 449; Marley *v.* McAnilly, 17 Tex. 658.

In England prior to the Hilary Rules of 1833 a release might be given in evidence under the general issue to an action on the case. This loose practice still continues in some of the states in this country. Brown *v.* Baltimore Co., 6 Dist. Col. Ap. Cas. 237; Chicago Co. *v.* Peterson, 45 Ill. Ap. 507; Chicago *v.* Babcock, 143 Ill. 358, 365; Cincinnati Co. *v.* Goodson, 101 Ill. Ap. 123, 127; Papke *v.* Hammond Co., 192 Ill. 631; Shafer *v.* Stonebraker, 4 Gill & J. 345, 355; Lyon *v.* Marclay, 1 Watts, 271; Herrick *v.* Burnside, 56 Md. 439, 456; Dawson *v.* Pynsent, 4 Yeates, 349; Greenwalt *v.* Horner, 6 S. & R. 71, 77; Gilchrist *v.* Bale, 8 Watts, 355 (but see Johnson *v.* Phila. Co., 163 Pa. 127 — notice of defence of release must accompany plea of general issue). — ED.

[2] 16 N. Y. 297 [3] 135 Id. 182.

recovered in a state court just prior to the filing of the petition in bankruptcy, and which, after becoming dormant, was revived by *scire facias*. The writ of *scire facias* had been served on the defendant, but he entered no appearance or defence.

HUGHES, District Judge. A discharge in bankruptcy must be pleaded affirmatively,[1] just as infancy, coverture, or any other special defence to a debt must be pleaded. This is not only so, as to an original suit on a bond or other obligation, but it is so as to any subsequent proceeding to revive a judgment. The bankrupt in this case, having neglected and failed to enter the plea of bankruptcy in the proceeding for revival, or to suggest his bankruptcy in the original suit, has, as to King's judgment against him, lost by his own laches the benefit of his discharge in bankruptcy, and the judgment on *scire facias*, as well as the lien of the *fieri facias*, is good against him. Courts cannot be expected to help those who sleep on their rights. The injunction must be denied.

PIERCY *v.* SABIN AND OTHERS.

SUPREME COURT, CALIFORNIA, JULY TERM, 1858.

[10 *California Reports*, 22.]

BURNETT, J., delivered the opinion of the court — TERRY, C. J., and FIELD, J., concurring.[2]

The second error assigned is, that the court erred in excluding the record of a former suit.

Under the old system of pleading, a former recovery could be given in evidence under the general issue, in assumpsit, trover, case, and ejectment. In ejectment, the only plea allowed was, "not guilty." Miller *v.* Manice;[3] Young *v.* Rummell;[4] Reynolds *v.* Stansberry.[5] But the question arises whether our Code has not changed the former rule upon this subject. Under section 46 there are only two classes of defence allowed. The first consists of a simple denial; and the second, of the allegation of new affirmative matter. And as the Code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defence, these two classes of defence must be the same in *all* cases.

The plaintiff is required to state in his complaint the facts that constitute his cause of action; and it seems to have been the intention of the Code to adopt the true and just rule, that the defendant must either deny the facts as alleged, or confess and avoid them. It is cer-

[1] Anderson *v.* Goff, 72 Cal. 65; Lane *v.* Holcomb, 182 Mass. 360; Ackerman *v.* Van Houten, 5 Halst. 332; Spencer *v.* Beebe, 17 Wend. 557; Cornell *v.* Dakin, 38 N. Y. 253, 256. *Accord.* — ED.

[2] Only a part of the opinion is given. — ED.

[3] 6 Hill, 115.

[4] 2 Hill, 478.

[5] 20 Ohio R. 344; 1 Ch. Plea., 507.

tain that where new matter exists it must be stated in the answer. The answer "shall contain a statement of any new matter constituting a defence." The language of this section is very clear, that this new matter, whatever it may be, must be set up in the answer. The question then arises: what is "new matter" in the contemplation of the Code itself? New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the *onus* of proof is thrown upon the defendant, the matter to be proved by him is new matter. A defence that concedes that the plaintiff *once* had a good cause of action, but insists that it no *longer* exists, involves new matter.[1] Gilbert *v.* Cram;[2] Radde *v.* Birckgaher.[3]

If facts which occur subsequent to the date of the original transaction do not constitute *new* matter, what facts do constitute it? And if any subsequent matter can properly be called "new matter," must not *all* subsequent matters be equally entitled to the same designation? The language of the Code is explicit that the "answer shall contain a statement of *any* new matter constituting a defence." The Code makes no distinction between different classes of new matter. *All* new matter of defence must be stated in the answer.

This feature of the Code is one of the most beneficial and obvious improvements upon the former system. This classification of defences is simple, logical, and just. Each party is distinctly apprised of all the allegations to be proven by the other; and each is, therefore, prepared to meet the proofs of his adversary. The plaintiff is compelled to set out every fact necessary to constitute his cause of action, and the defendant every new matter of defence. This is required by the true principles of pleading.[4]

Two of the leading ends contemplated by the Code are simplicity and economy. Adams & Co. *v.* Hackett & Casserly.[5] As contributing to the attainment of these ends it was the intention of the Code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them, respectively, but to narrow the proofs upon the trial. This intention is clearly shown, not only by the spirit and general scope of the system, but by particular provisions. The different provisions of the act, when construed together and legitimately applied, lead to this conclusion.

Anciently, in England, the general issue was seldom pleaded, except when the defendant meant wholly to deny the allegations of the declaration. Matters in discharge of the action were specially pleaded. But by acts of Parliament special matter was allowed to be given in evidence, under the general issue, in certain cases, affecting public officers. The rule was gradually extended to other cases. It was the opinion of Sir William Blackstone that this relaxation of strictness anciently observed did not produce the confusion anticipated. This supposition prevailed for a long time, but subsequent experience led to a change of opinion. The result of this change was the adoption

[1] 1 Ch. Plea. 472. [2] 12 How. Pr. Rep. 445. [3] 3 Duer, 635; 2 Keenan, 17.
[4] 1 Ch. Plea. 526. [5] 7 Cal. Rep. 187.

of the Reg. Gen. Hil. T. 4 W. 4, "which puts an end to the misapplication and abuse of the *general issue*, and compels a defendant in terms to deny particular parts of the declaration, and to plead specially every matter of defence, not merely consisting of denial of the allegations of the declaration." [1]

These regulations restored the ancient rule, and placed the science of pleading upon its true principle. The framers of the New York Code, from which ours is mainly taken, would seem to have intended to accomplish the same result. It has been there held, and seems now to be the well-settled rule, that new matter must be set forth in the answer. Payment, an award, or a former recovery, must be pleaded. Calkins *v.* Parker; [2] Brazil *v.* Isham. [3] Such defences admit the contract as alleged, but avoid it by matter *ex post facto*.

There was no error in refusing the copy of the record of the former recovery, as the answer of defendants contained a simple denial of the allegations of the complaint.

Judgment affirmed. [4]

WOOD AND OTHERS *v.* OSTRAM AND OTHERS.

SUPREME COURT, INDIANA, NOVEMBER TERM, 1867.

[29 *Indiana Reports*, 177.]

THE plaintiffs filed a bill in chancery seeking to establish a constructive trust in certain lands by reason of the fraud of John W.

[1] 1 Ch. Plea. 473, 512. [2] 21 Barbour, 275. [3] 2 Keenan, 17.

[4] Edevain *v.* Cohen, 43 Ch. Div. 187; Feversham *v.* Emerson, 11 Ex. 385; Cave *v.* Crafts, 53 Cal. 135; Brown *v.* Campbell, 110 Cal. 644; McLean *v.* Baldwin, 136 Cal. 565; Norris *v.* Amos, 15 Ind. 365; Louisville Co. *v.* Cauley, 119 Ind. 142; Bowe *v.* Minn. Co., 44 Minn. 460; Swank *v.* St. Paul Co., 61 Minn. 423; Carnahan *v.* Brewster (Nebraska, 1903), 96 N. W. R. 590; Brazill *v.* Isham, 12 N. Y. 9, 17; Krekeler *v.* Ritter, 62 N. Y. 372; Calkins *v.* Parker, 21 Barb. 275; Hendricks *v.* Decker, 35 Barb. 298; Willis *v.* McKinnon, 37 N. Y. Misc. Rep. 386; Mandeville *v.* Avery, 44 N. Y. St. Rep. 1; Harrison *v.* Hoff, 102 N. Ca. 126; Blackwell *v.* Dibbrell, 103 N. Ca. 270; State *v.* Ellsworth, 131 N. Ca. 773; Fanning *v.* Ins. Co., 37 Oh. St. 344; Meiss *v.* Gill, 44 Oh. St. 253, 258; Bays *v.* Trulson, 25 Oreg. 109; Railroad *v.* Power Co., 23 Utah, 22; Brinsmaid *v.* Mayo, 9 Vt. 31; Gray *v.* Pingry, 17 Vt. 419 *Accord*.

Compare Larum *v.* Wilmer, 35 Iowa, 244.

Although *res judicata* is not pleaded affirmatively, it may be given in evidence, in some jurisdictions, under a denial, but since the jury determines the issue of fact raised by the pleadings the former judgment is not conclusive. Vooght *v.* Winch, 2 B. & Al. 662 (discrediting Bird *v.* Randall, 3 Burr. 1353); Bowman *v.* Rostron, 2 A. & E. 295 n.; Stafford *v.* Clark, 2 Bing. 377; Litchfield *v.* Ready, 5 Ex. 939, 945; Matthew *v.* Osborne, 13 C. B. 919; Feversham *v.* Emerson, 11 Ex. 385; Jones *v.* Reynolds, 7 C. & P. 335; Picquet *v.* McKay, 2 Blackf. 465; Howard *v.* Mitchell, 14 Mass. 241; Bartholomew *v.* Candee, 14 Pick. 167; Meiss *v.* Gill, 44 Oh. St. 253; Gray *v.* Pingry, 17 Vt. 419.

See also Wilson *v.* Butler, 4 Bing. N. C. 748.

If, however, because of the generality of the pleadings or for any other reason *res judicata* could not be pleaded effectively as an affirmative plea, the party relying upon it could use it as conclusive evidence under a denial. Phila. Co. *v.* Howard, 13 How. 307; Flandreau *v.* Downey, 23 Cal. 358; Clink *v.* Thurston, 47 Cal. 21; Shelton *v.* Alcox, 11 Conn. 240; Woodhouse *v.* Williams, 3 Dev. 506; Wilkins *v.* Suttles, 114 N. Ca. 550 (*semble*); Railroad *v.* Power Co., 23 Utah, 22; Fry *v.* Cook, 2 Aik. 342; Isaacs *v.* Clark, 12 Vt. 692.

AWARD. — An award must be pleaded affirmatively. Brazill *v.* Isham, 12 N. Y. 9. — ED.

Hitchcock, one of the defendants, and the *mala fides* of his grantees, the other defendants.[1]

FRAZER, C. J. Evidence was offered by the appellants, and rejected by the court, to the effect that in 1849, after the filing of the original bill and Marcus' answer, the latter specifying lots one and eight, in Deming's division, as amongst the real estate conveyed to him by John W., they applied to one of the attorneys of the plaintiffs, and informed him that they wished to sell those lots, and inquired of him if the plaintiffs had, or intended to set up, any claim to them; that a negative answer was given, and thereupon they sold the lots. This ruling is questioned by the appellants. No estoppel was pleaded, and we do not perceive that the evidence would have been pertinent to any issue made by the pleadings. As an admission, it is not contended that it was competent, but only as an estoppel, and it is argued that the estoppel need not be pleaded. It is true, that in the Welland Canal Co. *v.* Hathaway[2] it was said that "estoppels *in pais* cannot be pleaded, but are given in evidence." The question was in no manner involved in that case.

But whatever may have been the rule formerly, it seems to us that under our code of procedure the matter is made very clear. A denial admits proof of no affirmative defence, as the general issue did. It merely puts the plaintiff upon the proof of his averments, and authorizes the defendant, by his evidence, to controvert their truth. He can offer no evidence which proceeds upon the ground that the complaint is true, but that there are other facts which preclude the plaintiff's recovery, nothwithstanding. What is an estoppel *in pais?* It is some fact, because of which a man is precluded from saying even the truth. It does not controvert the truth of the matter at all, but is merely assigned as a reason why the adversary should not be permitted to avail himself of it. It is new matter constituting a defence, and must, therefore, be pleaded. 2 G. & H. 87.

The judgment is affirmed, with costs.[3]

[1] This short summary is substituted for the full statement of the facts in the opinion. Only so much of the rest of the opinion is given as relates to the admission of evidence covered by the estoppel. — ED.

[2] 8 Wend. 481.

[3] Mabury *v.* Louisville Co., 60 Fed. 645; Gaines *v.* Bank, 12 Ark. 769; Clarke *v.* Huber, 25 Cal. 593; Davis *v.* Davis, 26 Cal. 23 (*semble*); Etcheborne *v.* Auzerais, 45 Cal. 121 (election to claim under will instead of as widow); Carpy *v.* Dowdell, 115 Cal. 677 (*semble*); Newhall *v.* Hatch, 134 Cal. 269 (but see *contra* Hostler *v.* Hay, 3 Cal. 302); Debofic *v.* McGerr, 15 Colo. 467; Gaynor *v.* Clements, 16 Colo. 209; Prewitt *v.* Lambert, 19 Colo. 7; Hecter Co. *v.* Valley Co., 28 Colo. 315; Parliman *v.* Young, 2 Dak. 175, 184; Mann *v.* Oberne, 15 Ill. Ap. 35; Potter *v.* Fitchburg Co., 110 Ill. Ap. 430; Troyar *v.* Dyer, 102 Ind. 396, 399; Board *v.* O'Connor, 137 Ind. 622; Bowles *v.* Trapp, 139 Ind. 55, 59; Centre School *v.* State, 150 Ind. 168; Internat. Co. *v.* Watson, 158 Ind. 508; Adams *v.* Adams, 160 Ind. 61; Webb *v.* John Hancock Co., (Indiana, 1904) 69 N. E. R. 1006; Bartholomee *v.* Lowell, (Indiana, 1905) 72 N. E. R. 1030; Ransom *v.* Stanberry, 22 Iowa, 334; Phillips *v.* Van Schaick, 37 Iowa, 229; Folsom *v.* Starline, 54 Iowa, 490; Eikenberry *v.* Edwards, 67 Iowa, 14; Eggleston *v.* Mason, 84 Iowa, 630; Botna Bank *v.* Silver Bank, 87 Iowa, 479, 483; Warder Co. *v.* Cuthbert, 99 Iowa, 681 (estoppel by election); Spencer Co. *v.* Papach, 103 Iowa, 513; Kahler *v.* Ins. Co., 106 Iowa, 380; Haag *v.* Nat. Bank, (Iowa, 1904) 100 N. W. R. 490; Dwelling-House Co. *v.* Johnson, 47 Kan. 1; Palmer Co. *v.* Blodgett, 60

BUTLER, Jr., v. MASON and another.

SUPREME COURT, SPECIAL TERM, NEW YORK, JUNE 12, 1857.

[16 *Howard, Practice Reports*, 546.]

THE complaint in this action demands judgment for debts incurred in 1844 and 1845; and for the purpose of anticipating the defence, that the claims are barred by the statute of limitations, it alleges that the defendants have not resided at any time within six years before the commencement of this action in the state of New York. The defendants move to have this allegation struck out on the ground of irrelevancy. The plaintiff's counsel insists that it is material; as without it the complaint would show on its face that the claim was barred by the statute.

CLERKE, Justice. In maintaining his argument, the plaintiff's counsel overlooks the provision contained in section 74 of the Code, which declares that "the objection that the action was not commenced within the time limited, can only be taken by answer." So that evidently

Kan. 712; Faris v. Dunn, 7 Bush, 276, 287; Ray v. Longshaw, 4 Ky. L. Rep. 904; Seibert v. Blomfield, 23 Ky. L. Rep. 646 (election under a will); Wood v. Nichols, 33 La. An. 744; Dale v. Turner, 34 Mich. 405, 417; Bray v. Marshall, 75 Mo. 327; Noble v. Blount, 77 Mo. 235; Hammerslough v. Cheatham, 84 Mo. 13; Central Bank v. Doran, 109 Mo. 41; Thompson v. Cohen, 127 Mo. 215; Cockrill v. Hutchinson, 135 Mo. 67; Stone v. Cook, 179 Mo. 534, 548 (estoppel by election); Miller v. Anderson, 19 Mo. Ap. 71; Burlington R. R. v. Harris, 8 Neb. 140; Norwegian Co. v. Haines, 21 Neb. 689; Nebraska Co. v. Van Kloster, 42 Neb. 746; Union Bank v. Hutton, (Nebraska, 1901) 95 N. W. R. 1061 (but see Towne v. Sparks, 23 Neb. 142 — in replevin evidence of estoppel may be given under a general denial); Hanson v. Chiatovich, 13 Nev. 395; Gillson v. Price, 18 Nev. 109; Schurtz v. Colvin, 55 Oh. St. 274; Pugh v. Offenheimer, 6 Oreg. 231; Remillard v. Prescott, 8 Oreg. 37; Bruce v. Phœnix Co., 24 Oreg. 486; Texas Co. v. Stone, 49 Tex. 4; Texas Co. v. Hutchins, 53 Tex. 61, 67; Scarbrough v. Alcorn, 74 Tex. 358; Knudsen v. Omanson, 10 Utah, 124; Homberger v. Alexander, 11 Utah, 363; Reynolds v. Pascoe, 24 Utah, 219; Walker v. Baxter, 6 Wash. 244 (but see Parker v. Davis, 1 Wash. 190); Jacobs v. First Bank, 15 Wash. 358; Interstate Ass'n v. Knapp, 20 Wash. 225; Gill v. Rice, 13 Wis. 549, 554; Waddle v. Morrill, 26 Wis. 611 (*semble* — but plaintiff not being obliged to plead any reply, may give evidence of estoppel as of any other reply to the answer without pleading it. See to the same effect Gans v. St. Paul Co., 43 Wis. 109; Johnston v. N. W. Co., 94 Wis. 117); Warder v. Baldwin, 51 Wis. 450; Borkenhagen v. Paschen, 72 Wis. 272; Bank v. Ryan, 105 Wis. 37; Chippewa Falls v. Hopkins, 109 Wis. 610; Pratt v. Hawes, 118 Wis. 603 *Accord*.

Freeman v. Cook, 2 Ex. 654; Phillips v. Im Thurn, 18 C. B. N. S. 400 (but under the Judicature Acts estoppel *in pais* is believed to be an affirmative plea. Odgers Pl. (5th ed.) 222; Bullen v. Leake, Prec. in Pl. (5th ed.) 693); Hawley v. Middlebrook, 28 Conn. 527 (see Plumb v. Curtis, 66 Conn. 154, 173, 174); Bank v. Wollaston, 3 Harringt. 90; Kapischki v. Koch, 180 Ill. 44 (in actions on the case); Papke v. Hammond Co., 192 Ill. 631, 643 (in actions on the case); Alexander v. Walter, 8 Gill, 239; Dean v. Crall, 98 Mich. 591 (in common law cases); Coldwell v. Auger, 4 Minn. 217; Coleman v. Pearce, 26 Minn. 123; Turnipseed v. Hudson, 50 Miss. 429, 435; Chace v. Deming, 42 N. H. 274, 280; Welland Co. v. Hathaway, 8 Wend. 480; People v. Bristol Co., 23 Wend. 222, 230 (*semble*); Rogers v. King, 66 Barb. 495; Lites v. Addison, 27 S. Ca. 226; Gilchrist v. Bale, 3 Watts, 355 (in actions on the case); Greenwalt v. Horner, 6 S. & R. 71, 77 (in actions on the case) *Contra*.

It should be added that in those jurisdictions in which evidence of an equitable estoppel is admissible under a denial, it has the same conclusive effect as when pleaded affirmatively. — ED.

this allegation is unnecessary. Whatever may be the time stated in the complaint when the indebtedness was incurred, the plaintiff has a *prima facie* right to recover, and it is a mere optional privilege on the part of the defendants to interpose the defence allowed by the statute of limitations. If the defendants failed to answer a complaint showing on its face that the debt was incurred more than six years previous, judgment could be recovered by default, and no error would appear on the record. It is not necessary and, therefore, not relevant to insert the allegation complained of. In pleading, parties must be required to confine themselves to a statement of the mere facts essential to the maintenance of the action or the defence; and if a plaintiff were permitted to incumber his complaint with matters in anticipation of every possible defence which the apparent rights or ingenuity of a defendant may interpose, the record would be incumbered, and issues which may be otherwise avoided, would be introduced into the case. As it is probable that the plaintiff's counsel might have been misled by the decision in Genet *v.* Tallmadge,[1] I grant this motion without costs.[2]

[1] 1 C. Rep. S. C. 346.

[2] There are three distinct doctrines as to the effect of disclosing in the complaint that the statutory period of limitation to the action has fully run, each of the doctrines assuming that the statutory bar is an affirmative defence.

I. THE COMPLAINT IS GOOD BOTH AT LAW AND IN EQUITY. — See in accordance with the principal case, Potter *v.* Smith, 36 Ind. 231 (equity); Cravens *v.* Duncan, 55 Ind. 347 (equity); Kent *v.* Parks, 67 Ind. 53 (law); Kent *v.* Taggart, 68 Ind. 163 (law); Devor *v.* Rerick, 87 Ind. 337 (law); Falley *v.* Gribling, 128 Ind. 110 (equity); Dorsey Co. *v.* McCaffrey, 139 Ind. 545 (equity); Swatts *v.* Bowen, 141 Ind. 322 (equity); Roberts *v.* Smith, 165 Ind. 415 (law); Pence *v.* Young, 22 Ind. Ap. 427; Chiles *v.* Drake, 2 Met. (Ky.) 146 (law); Rankin *v.* Turney, 2 Bush, 555 (law); Board *v.* Jolly, 5 Bush, 86 (law); Brandenburg *v.* McGuire, 105 Ky. 10 (equity); Spalding *v.* St. Joseph's School, 107 Ky. 382, 394 (but if there is no exception to the bar of the statute, and the complaint discloses the bar, a demurrer to it will be sustained. Stillwell *v.* Leavy, 84 Ky. 379; Johnson *v.* Robertson, (Ky. 1898) 45 S. W. R. 523); Bihin *v.* Bihin, 17 Abb. Pr. 19 (equity); Sands *v.* St. John, 36 Barb. 628 (law); Baldwin *v.* Martin, 14 Abb. Pr. N. S. 9, 35 N. Y. Super. Ct. 35 S. C. (equity); Minzesheimer *v.* Bruns, 1 N. Y. Ap. Div. 324 (law); Ladew *v.* Hart, 8 N. Y. Ap. Div. 150 (law); Reilly *v.* Sabater, 26 N. Y. Civ. Pro. R. 34 (law); Bergman *v.* Leavitt, (Ap. Div. May, 1906) 99 N. Y. S. 748; Green *v.* N. Ca. Co., 73 N. Ca. 524 (*semble* — law); Guthrie *v.* Bacon, 107 N. Ca. 337 (equity); Randolph *v.* Randolph, 107 N. Ca. 506 (equity); McConnell *v.* Spicker, 15 S. Dak. 98 (law); State *v.* Patterson, 18 S. Dak. 251 (law).

II. THE COMPLAINT IS BAD BOTH AT LAW AND IN EQUITY. — Sublette *v.* Tinney, 9 Cal. 423 (equity); Berringer *v.* Warden, 12 Cal. 311 (equity); Ord *v.* De la Guerra, 18 Cal. 67 (*semble* — equity); Smith *v.* Richmond, 19 Cal. 476 (law); Bliss *v.* Sneath, 119 Cal. 526 (*semble* — law); Trubody *v.* Trubody, 137 Cal. 172 (*semble* — equity); Pipe *v.* Smith, 5 Colo. 146 (equity); Hexter *v.* Clifford, 5 Colo. 168, 173 (*semble* — equity); Meyer *v.* Binkelman, 5 Colo. 262 (*semble* — law); Hunt *v.* Hoyt, 10 Colo. 278 (*semble* — law); Jennings *v.* Rickard, 10 Colo. 395 (*semble* — law); McLane *v.* State, 4 Ga. 335 (law); Hansford *v.* State, 54 Ga. 55 (law); Colding *v.* Williamson, 71 Ga. 89 (law); Holston Co. *v.* Hargis, 73 Ga. 113 (law); Kraft *v.* Greathouse, 1 Ida. 254 (*semble*); Chemung Co. *v.* Hanley, 9 Ida. 786, 794 (*semble*); Sleeth *v.* Murphy, Morr. (Iowa), 321 (*semble* — law); Robinson *v.* Allen, 37 Iowa, 27 (equity); *Re* McMurray, 107 Iowa, 648 (equity); Miflin *v.* Stalker, 4 Kan. 283 (law); Barnes *v.* Ganey, 4 Kan. 555 (law); Zane *v.* Zane, 5 Kan. 134 (law — no waiver by not demurring); Young *v.* Whittenhall, 15 Kan. 134 (law); Myers *v.* Center, 47 Kan. 324 (law); McCalla *v.* Daugherty, 4 Kan. Ap. 410 (equity); School Dist. *v.* Herr, 6 Kan. Ap. 861 (law); Hunt *v.* Jetmore, 9 Kan. Ap. 333 (law); Kennedy *v.* Williams, 11 Minn. 314 (*semble* — law); McArdle *v.* McArdle, 12 Minn. 98 (*semble* — law); Hoyt *v.* McNeil, 13 Minn. 390 (*semble* — law); Wood *v.* Cullen, 13 Minn. 394 (law); Millette *v.* Mehmke, 26 Minn. 306 (law);

Trebby v. Simmons, 38 Minn. 508 (*semble* — law); Humphry v. Carpenter, 39 Minn. 115 (law); Burk v. Western Ass'n, 40 Minn. 506 (equity — but in Minnesota if the defendant answers and does not rely upon the bar of the statute, he waives the objection although apparent on the face of the complaint. Hardwick v. Jekler, 71 Minn. 25; Gilbert v. Heurtson, 79 Minn. 326, 336; Schmitt v. Hager, 88 Minn. 413); State v. Bird, 22 Mo. 470 (law); Boyce v. Christy, 47 Mo. 70 (law); Henoch v. Chaney, 61 Mo. 129 (law); Heffernan v. Howell, 61 Mo. 344 (equity); State v. Spencer, 79 Mo. 313 (law); Ratican v. Terminal Ass'n, 114 Fed. R. 666 (law — Mo. law); Knox v. Gerhauser, 3 Mont. 267 (law); Murphy v. Phelps, 12 Mont. 531 (law); Peters v. Dunnells, 5 Neb. 460 (equity); Hurley v. Cox, 9 Neb. 220 (equity); Hedges v. Roach, 16 Neb. 673 (law); Merriam v. Miller, 22 Neb. 218 (equity — but see Scroggin v. Nat. Co., 41 Neb. 195, deciding objection to be waived, if no demurrer to petition); Best v. Zutavern, 53 Neb. 604 (equity); Eayrs v. Nason, 54 Neb. 604 (equity); Sturges v. Burton, 8 Oh. St. 215 (law); Commissioners v. Andrews, 18 Oh. St. 49, 67 (law); Vore v. Woodford, 29 Oh. St. 245 (law); Combs v. Watson, 32 Oh. St. 228 (equity); Seymour v. R. R. Co., 44 Oh. St. 12 (law — general demurrer sufficient); Douglas v. Corry, 46 Oh. St. 349 (law); Scott v. Christenson (Oreg. 1905), 80 Pac. R. 731 (*semble*); Dunlap v. Gibbs, 4 Yerg. 94 (equity); McClurg v. Sneed, 3 Head, 218 (equity); Wyatt v. Luton, 10 Heisk. 458 (equity); Whaley v. Catlett, 103 Tenn. 347 (law); Memphis v. Postal Co., 145 Fed. 602 (equity); Thompson v. Cincinnati Co., 109 Tenn. 268 (law — but see Allen v. Word, 6 Humph. 284); Rivers v. Washington, 34 Tex. 267 (equity); Hudson v. Wheeler, 34 Tex. 356 (law); Gathwright v. Wheat, 70 Tex. 740; Thomas v. Glendinning, 13 Utah, 47 (law); Fullerton v. Bailey, 17 Utah, 85 (equity); Wilt v. Buchtel, 2 Wash. Terr. 417 (law); Ritchie v. Carpenter, 2 Wash. 512, 524 (*semble*); Howell v. Howell, 15 Wis. 55 (equity); Whereatt v. Worth, 108 Wis. 291 (law); Chemung Bank v. Lowery, 93 U. S. 72 (law — Wis. law); Bonnifield v. Price, 1 Wyo. 172 (law); Cowhick v. Shingle, 5 Wyo. 87 (law).

III. THE COMPLAINT IS BAD IN EQUITY BUT GOOD AT LAW. — *Bill demurrable in Equity.* Foster v. Hodgson, 19 Ves. 180; Hoare v. Peck, 6 Sim. 51; Fyson v. Pole, 3 Y. & C. 266; Dawkins v. Penrhyn, 4 App. Cas. 51, 6 Ch. Div. 318; Prance v. Sympson, 18 Jur. 929 (but see *Re* Burge 57 L. T. Rep. 364; Wakelee v. Davis, 25 W. R. 60); R. I. v. Mass. 15 Pet. 233; Maxwell v. Kennedy, 8 How. 210; Nat. Bank v. Carpenter, 101 U. S. 567; Wisner v. Ogden, 4 Wash. C. C. 631; Underhill v. Mobile Co., 67 Ala. 45; Thompson v. Parker, 68 Ala. 387; Scruggs v. Decatur Co., 86 Ala. 173; Dugger v. Tutwiler, 129 Ala. 258 (*semble*); Riley v. Norman, 39 Ark. 158; Apalachicola v. Curtis, 9 Fla. 340 (*semble*); Board v. Winnebago Co., 52 Ill. 454; Bell v. Johnson, 111 Ill. 374; Fulton v. No. Ill. College, 158 Ill. 333; Mooers v. Kennebec Co., 58 Me. 279; Baxter v. Moses, 77 Me. 465, 478; Belt v. Bowie, 65 Md. 350; Biays v. Roberts, 68 Md. 510; Meyer v. Saul, 82 Md. 459; Fogg v. Price, 145 Mass. 513, 516; Campbell v. Chene, 1 Mich. 400; Highstone v. Franks, 93 Mich. 52; Patterson v. Ingraham, 23 Miss. 87; Archer v. Jones, 26 Miss. 983; Wood v. Ford, 29 Miss. 57; Wilkinson v. Flowers, 37 Miss. 579; Partridge v. Wells, 30 N. J. Eq. 176; Montgomery's Est., 3 Brewst. 306; Warren v. Prov. Co., 19 R. I. 360 (*semble*); Jackson v. Hull, 21 W. Va. 601; Lambert v. Ensign Co., 42 W. Va. 813.

The rule was formerly the same in New York and North Carolina. Humbert v. Rector, 7 Paige, 195, 24 Wend. 587; Robinson v. Lewis, Busb. Eq. 58. But the modern rule is otherwise, as appears from cases cited in the second paragraph of this note.

Complaint good at Law. — Stile v. Finch, Cro. Car. 381; Hawkings v. Billhead, Cro. Car. 404; Thursby v. Warren, Cro. Car. 160; Puckle v. Moor, 1 Vent. 191; Gould v. Johnson, 2 Ld. Ray. 838; Lee v. Rogers, 1 Lev. 110; U. S. v. Cook, 17 Wall. 168; U. S. v. Brace, 143 Fed. 703; Huss v. Central Co., 66 Ala. 472 (*semble*); Norton v. Kempe, 121 Ala. 447, 449 (*semble*); Collins v. Mack, 31 Ark. 684; Hutchinson v. Hutchinson, 34 Ark. 164; State v. Reed, 45 Ark. 333; St. Louis Co. v. Brown, 49 Ark. 253; O'Connor v. Waterbury, 69 Conn. 206 (*semble* — but rule is otherwise if there can be no exception to the running of the statute. Hartford Co. v. Montague, 72 Conn. 692; Davis v. Mills, 121 Fed. 703, — Conn. law); Parker v. Whitaker, 4 Harring. 527; McDaniel v. Townsend, 4 Pennew. 359; Wall v. Chesapeake Co., 200 Ill. 66; Stephen v. Lake Co., 106 Ill. Ap. 13; Rich v. Scalio, 115 Ill. Ap. 166; Merryman v. State, 5 Har. & J. 423; Belt v. Bowie, 65 Md. 352, 353; Brickett v. Davis, 21 Pick. 404, 410 (*semble*); Sawyer v. Boston, 144 Mass. 470, 472; Renackowsky v. Board, 122 Mich. 613; Hines v. Potts, 56 Miss. 346; Barclay v. Barclay, 206 Pa. 307; Lambert v. Ensign Co., 42 W. Va. 813, 816 (*semble*).

Demurrer special or general? — In a majority of the jurisdictions, in which the complaint is demurrable, the demurrer must point out the statute of limitations as the ground of demurrer, or the objection will be waived. Thompson v. Parker, 68 Ala. 387; Espy v. Comer, 76 Ala. 501 (*semble*); Brown v. Martin, 25 Cal. 82; Bliss v. Sneath, 119 Cal. 526;

Trubody v. Trubody, 137 Cal. 172; Hexter v. Clifford, 5 Colo. 168; Hunt v. Hoyt, 10 Colo. 278; Jennings v. Rickard, 10 Colo. 395; Kraft v. Greathouse, 1 Ida. 254; Chemung Co. v. Hanley, 9 Ida. 786; Robinson v. Allen, 37 Iowa, 27; *Re* McMurray, 107 Iowa, 648; Patterson v. Ingraham, 23 Miss. 87; Archer v. Jones, 26 Miss. 983; Wood v. Ford, 29 Miss. 57; Wilkinson v. Flowers, 37 Miss. 579; State v. Spencer, 79 Mo. 313; Rivers v. Washington, 34 Tex. 267; Hudson v. Wheeler, 34 Tex. 356; Boyd v. Ghent, 70 Tex. 740; Thomas v. Glendinning, 13 Utah, 47; Fullerton v. Bailey, 17 Utah, 85; Howell v. Howell, 15 Wis. 55; Whereatt v. Worth, 106 Wis. 291.

But in some states the objection may be taken under a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause for action. McLane v. State, 4 Ga. 335; Hansford v. State, 54 Ga. 55; Zane v. Zane, 5 Kan. 555 (but see Crane v. Baden, (Kan. 1906) 85 Pac. R. 532); Seymour v. R. R. Co., 44 Oh. St. 12.

Statutory Bar not apparent on the Face of the Complaint. — If the complaint does not indicate that the bar of the statute has attached, the objection, it is everywhere agreed, must be taken by an answer, and, except in actions based upon title to property, by an affirmative answer. Sands v. Hammell, 108 Ala. 624; Garrison v. Hawkins Co., 111 Ala. 308; Harmon v. Page, 62 Cal. 448; Cameron v. San Francisco, 68 Cal. 390; Wise v. Williams, 72 Cal. 544; Wise v. Hogan, 77 Cal. 184; Doe v. Sanger, 78 Cal. 150; Kraner v. Halsey, 82 Cal. 209; Bixby v. Crafts, (Cal. 1898) 53 Pac. R. 404; Walter v. Merced Acad., 126 Cal. 582; Adams v. Tucker, 6 Colo. Ap. 393; Chivington v. Colo. Co., 9 Colo. 597; Perkins v. Morgan, (Colo. 1906) 85 Pac. R. 640; Robbins v. Harvey, 5 Conn. 335; Small v. Cohen, 102 Ga. 248 (but see Crawford v. Watkins, 118 Ga. 631, petition for review); Nichols v. Padfield, 77 Ill. 253; Chicago Co. v. Glenny, 28 Ill. Ap. 364; Funk v. Davis, 103 Ind. 281; Welch v. McGrath, 59 Iowa, 519; McDonald v. Bice, 113 Iowa, 44; Borghart v. Cedar Rapids, 126 Iowa, 313; Backus v. Clark, 1 Kan. 303; Chellis v. Cobb, 37 Kan. 558; Davis v. Millikan, (Kan. Ap. 1898) 54 Pac. R. 512; Chiles v. Drake, 2 Met. (Ky.) 146; Uniontown v. Berry, 25 Ky. L. Rep. 598; Mansfield v. Doherty, 21 La. An. 395; Brickett v. Davis, 21 Pick. 404; Ripley v. Davis, 15 Mich. 75; Whitworth v. Pelton, 81 Mich. 98; Shank v. Woodworth, 111 Mich. 642; Bellows v. Butler, 127 Mich. 100; Davenport v. Sharp, 17 Minn. 24; Matthews v. Southeimer, 39 Miss. 174; Benoist v. Darby, 12 Mo. 196; Atchison Co. v. Miller, 16 Neb. 661; Alexander v. Meyers, 33 Neb. 773; Hanna v. Emerson, 45 Neb. 708; Easton Bank v. American Co., (N. J. Eq. 1906) 64 Atl. R. 917; Jackson v. Varick, 2 Wend. 294; Lefferts v. Hollister, 10 How. Pr. 383; Cotton v. Maurer, 3 Hun, 552; Dezengremel v. Dezengremel, 24 Hun, 457; Woodward v. Holland Co., 39 N. Y. St. Rep. 411; Farrington v. Muchmore, 30 N. Y. Misc. Rep. 218; McKinney v. McKinney, 8 Oh. St. 423; Towsley v. Moore, 30 Oh. St. 184; Scott v. Christenson, (Oreg. 1905) 80 Pac. R. 731; Briggs v. Bard, 2 Rawle, 102; Heath v. Page, 48 Pa. 130; Carter v. Wolfe, 1 Heisk. 701; Caldwell v. McFarland, 11 Lea, 463; Lewis v. Alexander, 51 Tex. 578; Hayes v. Lavagnini, 17 Utah, 185; Seborn v. Beckwith, 30 W. Va. 774; Atkinson v. Winters, 47 W. Va. 226.

In actions founded upon the title to property a defendant who disputes the plaintiff's title by asserting title in himself or in some one under whom he claims, by adverse possession, may offer evidence of such adverse possession under a negative answer denying the plaintiff's title, either in actions relating to

Land, — Dawkins v. Penrhyn, 6 Ch. Div. 318, 4 App. Cas. 51; Hogan v. Kurtz, 94 U. S. 773, 775; Trowbridge v. Royce, 1 Root, 50; Wade v. Doyle, 17 Fla. 522; Weiskoph v. Dibble, 18 Fla. 72; Hutts v. Thornton, 44 Miss. 166; Wilson v. Williams, 52 Miss. 487; Nelson v. Brodhack, 44 Mo. 596; Hill v. Bailey, 8 Mo. Ap. 85; Freeman v. Sprague, 82 N. Ca. 366; Farrier v. Houston, 95 N. Ca. 578; Neuse Co. v. Brooks, 106 N. Ca. 107; Cheatham v. Young, 113 N. Ca. 161; Bomar v. Hagler, 7 Lea, 85; Cooper v. Lyons, 9 Lea, 596; Donahue v. Thompson, 60 Wis. 500 (but see Lawrence v. Doe, (Ala. 1906) 41 So. R. 612, — or,

Chattels, — Campbell v. Holt, 115 U. S. 620, 624 (*semble*); Lay v. Lawson, 23 Ala. 377; Traun v. Keiffer, 31 Ala. 136; Smart v. Baugh, 3 J. J. Marsh, 363; Smart v. Johnson, 3 J. J. Marsh, 373; Duckett v. Crider, 11 B. Mon. 188; Elam v. Bass, 4 Munf. 301.

Form of affirmative Answer. — A general statement that the claim of the plaintiff is barred by lapse of time is a bad answer. Scroggin v. Nat. Co., 41 Neb. 195; Pope v. Andrews, 90 N. Ca. 401; Walker v. Lancy, 27 S. Ca. 150.

In actions upon contract the approved plea is that the action did not accrue within —— years. If the cause of action was contemporaneous with the making of the promise it will be safe to plead that the defendant did not promise within —— years. But in all other cases the latter form will be had upon demurrer. Puckle v. Moor, 1 Vent. 191; Gould v. Johnson, 2 Ld. Ray. 838; McCollister v. Willey, 52 Ind. 382; Bank v. Coyle, 2 A. K. Marsh. 564; Gemmell v. Davis, 71 Md. 458; Richman v. Richman, 8 N. J. 55;

Cunningham v. Stanford, 68 N. J. 7; Bullard v. Lopez, 7 N. Mex. 561, 624 (*semble*); Soulden v. Van Rensselaer, 3 Wend. 472; Atkinson v. Winters, 47 W. Va. 226.

Burden of Proof. — The Statute of Limitations being an affirmative answer, it would seem too clear for argument that, as in the case of other affirmative answers (Shailby v. Fales, Neb. 1906, 106 N. W. R. 1035; Gregory v. Trainor, 4 E. D. Sm. 58; Brice v. Brice, 2 S. Aust. L. R. 108), upon a denial of the answer by the plaintiff, the defendant would have the burden of establishing by a preponderance of evidence that the period of limitation had elapsed. It was so decided in Borland v. Haven, 37 Fed. 394; Wright v. Ward, 65 Cal. 525; Chemung Co. v. Hanley, 9 Ida. 786; Harlin v. Stevenson, 30 Iowa, 371; Tredway v. McDonald, 51 Iowa, 663; Jenks v. Lansing Co., 97 Iowa, 342; White v. Campbell, 25 Mich. 463; Van Burg v. Van Enger, (Neb. 1906) 107 N. W. R. 1006; Duggan v. Cole, 2 Tex. 381; Thomas v. Glendinning, 13 Utah, 47; Green v. Dodge, (Vt. 1906) 64 Atl. R. 499; Wilkinson v. Holloway, 7 Leigh, 288 (*semble*); Lewis v. Mason, 84 Va. 731, 741; Goodell v. Gibbons, 91 Va. 60. See also a learned note by Professor Graves in 1 Va. L. Reg. 343.

But by a strange abandonment of a fundamental principle, several courts have reached the opposite result. Hurst v. Parker, 1 B. & Al. 92, 2 Chit. 249 s. c.; Wilby v. Henman, 2 Cr. & M. 658, 4 Tyrw. 957 s. c.; Bodenham v. Hill, 7 M. & W. 274, 279 (*semble*); Taylor v. Spears, 6 Ark. 412 (*semble*); Carnall v. Clark, 27 Ark. 500; McNeil v. Garland, 27 Ark. 343; Leigh v. Evans, 64 Ark. 26; Watkins v. Martin, 69 Ark. 311; Huston v. McPherson, 8 Black, 562 (*semble*); Pond v. Gibson, 5 All. 19 (discrediting Emmons v. Hayward, 11 Cush. 48); Moore v. Garner, 101 N. Ca. 374; Hobbs v. Barefoot, 104 N. Ca. 224; Koonce v. Pelletier, 115 N. Ca. 223; Graham v. O'Bryan, 120 N. Ca. 463; Parker v. Hardon, 121 N. Ca. 57; House v. Arnold, 122 N. Ca. 220 (but see Davenport v. Wynne, 6 Ired. 128); Prigmore v. E. T. Co., 1 Lea, 204.

Exceptions to the Statute, Affirmative Replication. — If the plaintiff relies upon some exception which prevents the bar of the statute from attaching, he has the burden of establishing the exception, and except in jurisdictions in which no pleading after the answer is required, of pleading the exception as an affirmative replication. Kempe v. Gibson, 9 Q. B. 609; Gibbs v. Guild, 9 Q. B. Div. 59; Somerville v. Hamilton, 4 Wheat. 230; Wood v. Carpenter, 101 U. S. 135; Barlow v. Arnold, 6 Fed. 35; Crossey v. Morrill, 125 Fed. 878; Knight v. Clements, 45 Ala. 89; Bercy v. Larretta, 63 Ala. 374; Morrison v. Stevenson, 69 Ala. 448; Condon v. Enger, 113 Ala. 233; Yell v. Lane, 41 Ark. 53; Simpson v. Brown Co., 70 Ark. 598; Levy v. Gillis, 1 Pennew. 119; Chandler v. Duncan, 1 Pennew. 170; Vinson v. Palmer, 45 Fla. 630; Beatty v. Nickerson, 73 Ill. 605; Bartelott v. Internat. Bank, 119 Ill. 260; Gunton v. Hughes, 181 Ill. 132; Kettenring v. N. W. Assn. 99 Fed. 532 (Illinois law); Vail v. Halton, 14 Ind. 344; Young v. Whittenhall, 15 Kan. 579; Lemon v. Dryden, 43 Kan. 477; Meeh v. Mo. Co., 61 Kan. 630; Cottom v. Nat. Co., 65 Kan. 511; Good v. Ehrlich, 67 Kan. 94; Newdigate v. Early, 20 Ky. L. Rep. 1452; Dessaunier v. Murphy, 33 Mo. 184; Campbell v. Laclede Co., 84 Mo. 352; Spuryer v. Hardy, 4 Mo. Ap. 573; Erickson v. Quinn, 3 Lans. 299; Hulbert v. Nichol, 20 Hun, 454; Baldwin v. Martin, 14 Abb. Pr. N. S. 9, 35 N. Y. Super. Ct. 98 s. c.; Reilly v. Sabater, 26 N. Y. Civ. Pro. 34; Burdicke v. Hicks, 29 N. Y. Ap. Div. 205; Metz v. Metz, 45 N. Y. Misc. R. 338; Edwards v. University, 1 Dev. & B. Eq. 325; Hussey v. Kirkman, 95 N. Ca. 63; Gupton v. Hawkins, 126 N. Ca. 81; Hooper v. Worthington, 134 N. Ca. 283; Burr v. Burr, 26 Pa. 284; Barclay's Ap., 64 Pa. 69; Barnes v. Pickett Co., 203 Pa. 570; Godbolt v. Lambert, 3 Rich. Eq. 155; Apperson v. Pattison, 11 Lea, 484; Gross v. Denney, (Tenn. 1895) 32 S. W. R. 632; Phillips v. Holman, 26 Tex. 276; Harvey v. Cummings, 68 Tex. 599; Byers v. Carll, 7 Tex. Civ. Ap. 423; Phillips v. Sherman, (Tex. Civ. Ap. 1897) 39 S. W. R. 187; Dodge v. Signor, (Tex. Civ. Ap. 1898) 44 S. W. R. 926; Capen v. Woodrow, 51 Vt. 106.

Affirmative Rejoinder. — Occasionally the defendant may defeat the affirmative replication only by an affirmative rejoinder. Newborg v. Freehling, 43 Ill. Ap. 463; McGregor v. McGregor, 15 Vt. 727; Rixford v. Miller, 49 Vt. 319; Burnham v. Courser, 69 Vt. 183.

Anomalous Plea. — Sands v. St. John, 36 Barb. 632; Scott v. Christenson, (Oreg. 1905) 80 Pac. R. 731. — ED.

CHAPTER V.

DILATORY PLEAS.

THE SOUTH FORK, ETC., CANAL CO. *v.* SNOW.

SUPREME COURT, CALIFORNIA, OCTOBER, 1874.

[49 *California Reports*, 155.]

APPEAL from the District Court of the Eleventh Judicial District, El Dorado County.

The action was brought to restrain the defendants from diverting the waters of Webber Creek at a point above the head of a certain ditch owned by the plaintiffs and used by them to obtain water for mining purposes. The South Fork and Placerville Canal Company was joined with Newton Booth and four others as plaintiffs. The defendant, in his answer, set up a misjoinder of the corporation with each of the other parties plaintiff, alleging that it had no interest in the property described in the complaint. At the trial the plaintiffs failed to prove that the Canal Company had any interest in the property, and after the plaintiffs had closed their evidence, the defendant, upon motion, obtained a judgment of nonsuit against all the plaintiffs, upon the ground that there was a misjoinder of parties plaintiff as set out in the answer. The plaintiffs appealed.

George G. Blanchard, for appellants.

The substantial rights of the defendant cannot be affected by permitting those plaintiffs who have a cause of action, to recover, and it was therefore the duty of the court to deny the motion for a nonsuit and render judgment according to the rights of the parties. (Code Civil Pro. Sec. 475.) [1]

The Court (Mr. Justice CROCKETT presiding, in the absence of Mr. Chief Justice WALLACE) affirmed the judgment.[2]

[1] The argument of appellants is abridged and that of respondent omitted. — ED.

[2] MISJOINDER OF PLAINTIFFS.

A. APPARENT IN DECLARATION — DEMURRER. — At common law if the declaration disclosed a misjoinder of plaintiffs, the defendant might demur, move in arrest of judgment after verdict, or proceed by writ of error after judgment, on the ground that the declaration was not sufficient in law, since it did not state a joint cause of action in favor of all the plaintiffs. Arundel *v.* Short, Cro. El. 183 (arrest of judgment); Abbot *v.* Blofield, Cro. Jac. 644, 2 Rolle, 250 s. c.; Helliar's Case, Sty. 9 (arrest of judgment); Coleman *v.* Harcourt, 1 Lev. 140 (arrest of judgment); Staunton *v.* Hobart, 1 Sid. 224 (arrest of judgment); Anon. 1 Sid. 346 (arrest of judgment); Buckley *v.* Collier, 1 Salk. 114 (demurrer);

King v. Basingham, 8 Mod. 199, 341 (arrest of judgment); Holmes v. Wood, 1 Barnard, 75, 249 (arrest of judgment); Bidgood v. Way, 2 W. Bl. 1236 (writ of error); Serres v. Dodd, 2 B. & P. N. R. 405 (demurrer); Gossett v. Kent, 19 Ark. 602 (*semble*); Christian v. Crocker, 25 Ark. 327 (*semble*); Lewis v. Moore, 25 Ark. 63; Leavet v. Sherman, 1 Root, 159; Gerry v. Gerry, 11 Gray, 331 (*semble*); Cofran v. Shepard, 148 Mass. 582 (*semble*); Bond v. Hilton, 6 Jones, (N. Ca.) 180 (arrest of judgment); Lockhart v. Power, 2 Watts, 371 (writ of error).

By statute in England and in several of the states in this country misjoinder of plaintiffs is no longer a ground for demurrer, but for a motion to strike out the superfluous party or parties. Bellingham v. Clark, 1 B. & S. 332; Rhoads v. Booth, 14 Iowa, 575; Mornan v. Carroll, 35 Iowa, 22; Dubuque Co. v. Reynolds, 41 Iowa, 454; Horwick v. Ringen Co., 116 Iowa, 1; Winfield Co. v. Maris, 11 Kan. 128; McKee v. Eaton, 26 Kan. 226; Hurd v. Simpson, 47 Kan. 372; Dean v. English, 18 B. Mon. 132; Hoard v. Clum, 31 Minn. 186; Wiesener v. Young, 50 Minn. 21; Boldt v. Budwig, 19 Neb. 739; Lancaster Co. v. Rush, 35 Neb. 119; Green v. Green, 69 N. Ca. 294; Burns v. Ashworth, 72 N. Ca. 496 (*semble*); McMillan v. Baxley, 112 N. Ca. 578; Stiles v. Guthrie, 3 Okla. 26; Weber v. Dillon, 7 Okla. 568; Martin v. Clay, 8 Okla. 46; Mader v. Plano Co., 17 S. Dak. 553; Willard v. Reas, 26 Wis. 540; Marsh v. Board, 38 Wis. 250; Schiffer v. Eau Claire, 51 Wis. 385; Boyd v. Beaudin, 54 Wis. 193; Nevil v. Clifford, 55 Wis. 161; Kucera v. Kucera, 86 Wis. 416; Wunderlich v. Chicago Co., 93 Wis. 132. (But see Read v. Sang, 21 Wis. 678.)

In many of the states, however, the statute provides that the objection to a misjoinder of plaintiffs may be taken by a special demurrer, pointing out the particular misjoinder. Rowe v. Bacigaluppi, 21 Cal. 633 (*semble*); Tennant v. Pfister, 45 Cal. 270 (*semble*); White v. Portland, 67 Conn. 272; Daniels v. Miller, (Ind. Terr. 1902) 69 S. W. R. 925; Gerry v. Gerry, 11 Gray, 331; Cofran v. Shepard, 148 Mass. 582; Michael v. St. Louis Co., 17 Mo. Ap. 23; Finney v. Randolph, 68 Mo. Ap. 557 (waiver); Dunderdale v. Grimes, 16 How. Pr. 195; Enos v. Leach, 18 Hun, 139; Tew v. Wolfsohn, 77 N. Y. Ap. Div. 454, 456 (Palmer v. Davis, 28 N. Y. 242, 245; Case v. Carroll, 35 N. Y. 385; Allen v. Buffalo, 38 N. Y. 280; People v. Crooks, 53 N. Y. 648, and Peabody v. Washington Co., 20 Barb. 339, are superseded); Birmingham v. Griffin, 42 Tex. 147.

In these jurisdictions a demurrer upon the ground that the declaration does not state facts sufficient to constitute a cause of action, *i. e.* a cause of action in favor of all the plaintiffs, is not allowed. Tennant v. Pfister, 51 Cal. 511; O'Callaghan v. Bode, 84 Cal. 489; Berney v. Drexel, *supra*, 48.

In some jurisdictions the legislation is the converse of that just described, a demurrer not being allowed, if based expressly upon the misjoinder of plaintiffs, but only upon the ground that the complaint does not state facts sufficient to constitute a cause of action, *i. e.* a joint cause of action by all the plaintiffs. Berkshire v. Shultz, 25 Ind. 523; Goodright v. Goar, 30 Ind. 418; Devolt v. Carter, 31 Ind. 355; Lippert v. Edwards, 39 Ind. 165; Parker v. Smith, 58 Ind. 349; Harris v. Harris, 61 Ind. 117; Hyatt v. Cochran, 85 Ind. 231; Brown v. Critchell, 110 Ind. 31; Brunson v. Henry, 140 Ind. 455; McIntosh v. Zaring, 150 Ind. 301; Swales v. Grubbs, 6 Ind. Ap. 477; Bartgas v. O'Neil, 13 Oh. St. 72; Masters v. Freeman, 17 Oh. St. 323 (no evasion by not demurring).

A special demurrer for misjoinder of parties must point out the particular misjoinder. O'Callaghan v. Bode, 84 Cal. 489. And the objection is waived if there is no demurrer. Gillam v. Sigman, 29 Cal. 637; Mueller v. Kaessman, 84 Mo. 318; Finney v. Randolph, 68 Mo. Ap. 557; Enos v. Leach, 18 Hun, 139 (*semble*); Kelly v. Jay, 79 Hun, 535; Miller v. Baxley, 112 N. Ca. 578; Hocutt v. Wilmington, 124 N. Ca. 214.

B. NOT APPARENT IN THE DECLARATION. (1) *Objection by a negative Plea.* — If there is a misjoinder of parties plaintiff, not apparent in the declaration, the defendant can usually raise the objection by a negative plea. For the plaintiffs at the trial will rarely be able to prove their allegation of a joint right in contract or tort of all the plaintiffs against the defendant. The plaintiffs, accordingly, were non-suited for a variance in the following cases.

Contract. — Bell v. Allen, 53 Ala. 125; Phillips v. Pennywhit, 1 Ark. 59; Medlock v. Merritt, 102 Ga. 212; Snell v. DeLand, 43 Ill. 323; Fairbanks v. Badger, 46 Ill. Ap. 644; Brent v. Tivebaugh, 12 B. Mon. 87; Ulmer v. Cunningham, 2 Me. 117; Grozier v. Atwood, 4 Pick. 234; Tuttle v. Cooper, 10 Pick. 281, 283; Oakley v. Emmons, (N. J. 1906) 62 Atl. R. 996 (*semble* — statutory notice of misjoinder essential); Doremus v. Selden, 19 Johns. 213; Waldsmith v. Waldsmith, 2 Oh. 156; Heron v. Hoffner, 3 Rawle, 393; Gay v. Rogers, 18 Vt. 342; Dennison v. Boylston, 48 Vt. 439; Goodale v. Frost, 59 Vt. 491; Estabrook v. Messersmith, 18 Wis. 545.

Tort. — Walker v. Fenner, 28 Ala. 367 (demurrer to evidence); Towns v. Mathews, 91 Ga.

546; McGlamory v. McCormick, 99 Ga. 148; Medlock v. Merritt, 102 Ga. 212; Rhoads v. Booth, 14 Iowa, 575; Glover v. Hunnewell, 6 Pick. 222; Gerry v. Gerry, 11 Gray, 381 (see Bullock v. Hayward, 10 Atl. 460, 462); Rogers v. Raynor, 102 Mich. 473.

If the objection is not taken at the trial it is waived. Dodge v. Wilkinson, 3 Met. 292.

In some states, by statute, the practice of non-suiting all the plaintiffs, because one or more of them are misjoined, is abolished. In Indiana, verdict and judgment will be given for those properly plaintiffs and against those improperly plaintiffs. Nicodemus v. Simons, 121 Ind. 564. So also in Iowa and California. (See however Weinreich v. Johnston, 78 Cal. 254). But, in Iowa, the defendant may move to strike out the superfluous plaintiff. Miller v. Keokuk Co., 63 Iowa, 680; Lull v. Anamosa Bank, 110 Iowa, 537; and in California, as appears from the principal case, the effect of a negative plea at common law in non-suiting all the plaintiffs may be accomplished by an answer setting up the misjoinder. See also Rowe v. Bacigaluppi, 21 Cal. 633; Gillam v. Sigman, 29 Cal. 637. In New York and Missouri, also, an answer specially setting up a misjoinder of parties plaintiff, not apparent on the face of the declaration, operates as a bar to all the plaintiffs, and a failure to make such answer is a waiver of the objection, with the consequence that all the plaintiffs may obtain judgment against the defendant. Mills v. Carthage, 31 Mo. Ap. 141; Walrod v. Bennett, 6 Barb. 141; Clark v. Aldrich, 4 N. Y. Ap. Div. 52 (answer insufficient because not specifying the particular misjoinder).

MISJOINDER OF DEFENDANTS.

A. Apparent in Declaration — Demurrer. — At common law, if the declaration disclosed a misjoinder of defendants, the defendants might demur, move in arrest of judgment after verdict, or proceed by a writ of error after judgment, on the ground that the declaration was not sufficient in law, since it did not state a joint cause of action against all the defendants. May v. House, 2 Chit. 697 (joint demurrer); Morris v. Norfolk, 2 Taunt. 212 (writ of error); Lester v. Harlow, 18 N. H. 518 (demurrer); Carleton v. Haywood, 49 N. H. 314 (joint demurrer), Robinson v. Scull, 3 N. J. 597 (writ of error); Edwards v. Davis, 16 Johns. 281 (writ of error — joint); Grasser v. Eckhart, 1 Binn. 575 (arrest of judgment); State Treasurer v. Priott, 24 Vt. 134 (demurrer); Cunningham v. Orange, 74 Vt. 115 (demurrer); Wooster v. Northrup, 5 Wis. 245 (demurrer.)

But by the code provisions of many of our states, changing the common law practice, a defendant may not demur because others are improperly made co-defendants with him upon the same cause of action. Garland v. Dunn, 11 Ark. 720; Christian v. Crocker, 25 Ark. 327; Oliphint v. Mansfield, 36 Ark. 191; Fry v. Street, 37 Ark. 39; Clark v. Gramling, 54 Ark. 525; Gardner v. Samuels, 116 Cal. 84; Hill v. Marsh, 46 Ind. 218; Redelsheimer v. Miller, 107 Ind. 485; Turner v. First Bank, 26 Iowa, 562; White Oak v. Oskaloosa, 44 Iowa, 512; Union Co. v. Smith, 59 Kan. 80; Livermore v. Norfolk Co., 186 Mass. 133; Sweet v. Converse, 88 Mich. 1; Bigelow v. Sanford, 98 Mich. 657; Lewis v. Williams, 3 Minn. 151; Nichols v. Randall, 5 Minn. 304; Mitchell v. Bank, 7 Minn. 252, 256; Ashby v. Winston, 26 Mo. 210; Lumber Co. v. Oliver, 65 Mo. Ap. 435; Territory v. Hildebrand, 2 Mont. 426; Roose v. Perkins, 9 Neb. 304; Pinckney v. Wallace, 1 Abb. Pr. 82; Richtmyer v. Richtmyer, 50 Barb. 55; New York Co. v. Schuyler, 17 N. Y. 592; Nichols v. Drew, 94 N. Y. 22, 26 (*semble*); McCrea v. Chahoon, 54 Hun, 577; Hall v. Gilman, 77 N. Y. Ap. Div. 458; Boston Ass'n v. Brooklyn Club, 37 N. Y. Misc. R. 521; Tew v. Wolfsohn, 77 N. Y. Ap. Div. 454, 174 N. Y. 272 (*semble*); Adams v. Slingerland, 87 N. Y. Ap. Div. 312 (*semble*); Wool v. Edenton, 113 N. Ca. 33; Sullivan v. Field, 118 N. Ca. 358; Powers v. Bumcratz, 12 Oh. St. 273; Gutridge v. Vanatta, 27 Oh. St. 366; Neil v. Board, 31 Oh. St. 15, 20 (*semble*); Ruffatti v. Lexington Co., 10 Utah, 386 (compare Whitehill v. Lowe, 10 Utah, 419).

Nor can the defendant, properly made a defendant, unite with the defendant, improperly made a defendant, in a joint demurrer for the misjoinder. Empire Co. v. Rio Grande Co., 21 Colo. 244; People v. Stoddard (Colo. 1906), 86 Pac. R. 251; Burnett v. Preston, 17 Ind. 291; Clark v. Crawfordsville Co., 125 Ind. 377; Armstrong v. Dunn, 143 Ind. 433; Beckwith v. Dargett, 18 Iowa, 303; King v. King, 40 Iowa, 120; Cedar Bank v. Lanoy, 110 Iowa, 575; Alnutt v. Leper, 48 Mo. 319; Brownson v. Gifford, 8 How. Pr. 389; Davy v. Betts, 23 How. Pr. 396; Fish v. Hose, 59 How. Pr. 238; Burns v. Ashworth, 72 N. Ca. 496 (*semble*); Clark v. Boyer, 32 Oh. St. 299; Stiles v. Guthrie, 3 Okla. 26; Cohen v. Ottenheimer, 13 Oreg. 220; Lowry v. Jackson, 28 S. Ca. 318; Great Western Co. v. Ætna Co., 40 Wis. 373; Bronson v. Markey, 53 Wis. 98; Murray v. McGarigle, 69 Wis. 483; North Ass'n v. Childs, 86 Wis. 292.

But the party improperly made a defendant may demur, not, however, on the ground of a misjoinder of defendants, but because the declaration does not state facts sufficient to con-

stitute a cause of action against him. Gardner v. Samuels, 116 Cal. 84; Bennett v. Preston, 17 Ind. 292, 293; Makepeace v. Davis, 27 Ind. 352; Livermore v. Norfolk Co., 186 Mass. 133, 135; Lewis v. Williams, 3 Minn. 151; Nichols v. Randall, 5 Minn. 304; Mitchell v. Bank, 7 Minn. 252, 256; Ancell v. Cape Girardeau, 48 Mo. 80; Brown v. Woods, 48 Mo. 330: Alnutt v. Leper, 48 Mo. 319; Territory v. Hildebrand, 2 Mont. 426, 429; Roose v. Perkins, 9 Neb. 304 (but see Boldt v. Budwig, 19 Neb. 739); Wood v. Olney, 7 Nev. 109; Brownson v. Gifford, 8 How. Pr. 389; Voorhies v. Baxter, 1 Abb. Pr. 43; Paxton v. Patterson, 26 Abb. N. C. 389 (but see Barnes v. Blake, 59 Hun, 371); Cohen v. Ottenheimer, 13 Oreg. 220, 224; Webster v. Tibbets, 19 Wis. 438, 448; Truesdell v. Rhodes, 26 Wis. 215, 219, 220; Gr. West. Co. v. Ætna Co., 40 Wis. 373, 375; Bronson v. Markey, 53 Wis. 98; North Ass'n v. Childs, 86 Wis. 292, 298.

In a few states, misjoinder of parties defendant is one of the statutory grounds for a demurrer. Idaho, Civ. Code (1901) § 3206; Nev. Gen. St. (1885) § 3062; Rev. St. Utah, § 2962.

WAIVER. — If one improperly joined as a defendant fails to demur when he might properly demur, he waives the objection. Bensieck v. Coop, 110 Mo. 173; Burkarth v. Stephens (Kan. St. 1906), 94 S. W. 720.

B. NOT APPARENT ON FACE OF DECLARATION — NEGATIVE PLEA. — At common law, if the declaration in an action *ex contractu* did not disclose the actual misjoinder of defendants, the defendant under a denial of the alleged contract might move for a nonsuit on the ground of variance, or obtain a verdict for himself. Sherriff v. Wilks, 1 East, 48; Weall v. King, 12 East, 425 (tort based upon a contract); Cooper v. Whitehouse, 6 C. & P. 545; Eliot v. Morgan, 7 C. & P. 334; Robson v. Doyle, 3 E. & B. 396; Wickens v. Steel, 2 C. B. N. S. 488; Walcott v. Canfield, 3 Conn. 194; Supreme Lodge v. Zuhlke, 129 Ill. 298 (but objection cannot be raised if not taken at the trial. Nelson v. Smith, 54 Ill. Ap. 345); Ogle v. Miller, 128 Iowa, 474; Erwin v. Devine, 2 T. B. Mon. 124; Brown v. Warner, 2 J. J. Marsh, 37 (even tho' one defendant is an infant); Kimborough v. Ragsdale, 69 Miss. 674; Spann v. Grant, 83 Miss. 19; Robinsons v. Scull, 3 N. J. 597; Fleming v. Freese, 26 N. J. 263; Patterson v. Longridge, 42 N. J. 21 (but plea must be followed up by notice of the objection of misjoinder); Elmendorph v. Tappen, 5 Johns. 176; Livingston v. Tremper, 11 Johns. 101; Robertson v. Smith, 18 Johns. 459, 478; Rowan v. Rowan, 29 Pa. 181.

By statute, in England, and in some of our states, the objection of misjoinder of parties defendant, not apparent on the face of the declaration, can no longer be taken by a negative plea, denying the contract alleged. Such a plea, under the legislation of some of the states, justifies a verdict against those properly made defendants and in favor of the others. Rutenberg v. Main, 47 Cal. 213; Shain v. Forbes, 82 Cal. 577; Gruhn v. Stanley, 92 Cal. 86 (compare Curry v. Roundtree, 51 Cal. 184); Hubbell v. Woolf, 15 Ind. 204; Stafford v. Nutt, 51 Ind. 535; Louisville Co. v. Treadway, 142 Ind. 475, 487, 143 Ind. 702 s. c.; Crews v. Lackland, 67 Mo. 619; Conklin v. Fox, 3 Mont. 208; Knatz v. Wise, 16 Mont. 555; Ryan v. State Bank, 10 Neb. 524; Brumskill v. James, 11 N. Y. 294; Marquat v. Marquat, 12 N. Y. 336; McIntosh v. Ensign, 28 N. Y. 169; Lampkin v. Chisom, 10 Oh. St. 450; Ancker v. Adams, 23 Oh. St. 543; Grinnell v. Marine Co., 13 R. I. 135; Harrington v. Hingham, 15 Barb. 524.

SPECIAL ANSWER. — In some states the defendants may raise the objection of a misjoinder of defendants by a special answer pointing out the misjoinder. Rutenberg v. Main, 47 Cal. 213; Gruhn v. Stanley, 92 Cal. 86, 88; Conklin v. Fox, 3 Mont. 208.

In New Jersey, a negative plea must be accompanied by a notice of the objection of misjoinder of defendants. Patterson v. Longridge, 42 N. J. 21.

MISJOINDER OF DEFENDANTS IN ACTION EX DELICTO. — By the common law the joinder of superfluous persons as defendants in actions upon a joint tort is no ground of objection in any mode by those properly made defendants. A verdict and judgment was given against those properly made defendants and in favor of the others. Hardyman v. Whitaker, 2 East, 573; Govett v. Radnidge, 3 East, 62; Chaffee v. U. S., 18 Wall. 516; Hayden v. Nott, 9 Conn. 367; Swigert v. Graham, 7 B. Mon. 661 (*semble*); Tuttle v. Cooper, 10 Pick. 281 (*semble*); Keer v. Oliver, 61 N. J. 154; Lansing v. Montgomery, 2 Johns. 382; Lockwood v. Bull, 9 Cow. 322; Montfort v. Hughes, 3 E. D. Sm. 591; Pearson v. Stroman, 1 N. & McC. 354.

But see Harlem v. Emment, 41 Ill. 319. — ED.

LEFEBRE *v.* UTTER.

SUPREME COURT, WISCONSIN, SEPTEMBER TERM, 1867.

[22 *Wisconsin Reports*, 189.]

APPEAL from the Circuit Court for Winnebago County.

Trespass. The complaint avers that on, etc., and at divers times between the day named and the commencement of the action, defendant, with force and arms, wrongfully broke and entered plaintiff's close (describing it), and with various domestic animals did tread down, spoil, consume and destroy plaintiff's hay, then and there being on said premises, to his damage, etc. The answer set up an accord and satisfaction as to part of the trespasses complained of, and also a license from plaintiff to defendant.

On the trial, plaintiff testified that part of the stacks of hay on the premises were owned by himself alone, and part by himself in common with other persons, plaintiff having a half interest; and he was then permitted, against objection, to testify as to the injuries done by defendant's cattle to the hay thus owned in common, as well as to that of which he was sole owner. The court charged the jury that they might allow the plaintiff for all the damage done to his separate property, and one-half of that done to the hay owned by him in common with other persons, and situate on the premises described in the complaint.

Verdict and judgment for plaintiff; and defendant appealed.[1]

DIXON, C. J. — It appears to be well settled, say the court, in Wheelwright *v.* Depeyster,[2] that in actions of trover or trespass, the plaintiff may sue separately for his aliquot share or proportion of interest in a chattel, and that the defendant may give the joint interest of the other part owners in evidence in mitigation of damages, but that he cannot avail himself of the omission of the plaintiff to unite the other tenants in common with him in the suit, otherwise than by pleading it in abatement. He cannot take advantage of it at the trial. Mr. Chitty[3] lays down the same rule in all actions in form *ex delicto*, and says that the defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder as a ground of nonsuit, on the plea of the general issue, or demur, or move in arrest of judgment, or support a writ of error, although it appear on the face of the declaration or other pleading of the plaintiff that there is another party who ought to have joined. And if one of several part-owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part owners may afterwards sue alone for the injury to their undivided shares, and the defendant cannot plead in abatement of such action. By the Code,[4] the objection must be taken by demurrer

[1] The statement is abridged, and the arguments as well as a part of the opinion are omitted. — ED.

[2] 1 Johns. 486. [3] 1 Pl. 66. [4] R. S. chap. 125, secs. 5, 8, 9.

or answer, and if not so taken, it is waived. It will be seen from these citations that the remedy by plea in abatement, or, as now, by demurrer or answer, is not very much favored, and that that given by way of apportionment of the damages is considered fully as efficacious, and quite sufficient to secure the defendant in all his legal rights.

The only difference between this case and those in which the question has ordinarily arisen is, that here the plaintiff was sole owner of part of the property (stacks of hay) which was destroyed. The acts of trespass were the same both to the stacks of which the plaintiff was sole owner and those which he owned in common with another. This fact appearing in evidence, the defendant objected to any testimony as to the destruction of the stacks of which the plaintiff was but part owner. The court overruled the objection, and received the testimony, to which the defendant excepted. We see no error in the ruling. Had the defendant answered that the plaintiff was but part owner of some of the stacks, the evidence as to those stacks would have been excluded. As it is, he has lost no substantial right, and the judgment ought not to be reversed.[1]

[1] NON-JOINDER OF PLAINTIFFS — CONTRACTS.

A. APPARENT ON FACE OF DECLARATION — DEMURRER. — At common law the non-joinder of a necessary party plaintiff, if apparent on the declaration, was ground for a demurrer, a motion in arrest of judgment, or a writ of error, because the declaration did not disclose a cause of action in favor of the actual plaintiff or plaintiffs, but only a cause of action in favor of a group or larger group of persons. Slingsby's Case, 5 Rep. 18 b (writ of error); Levit v. Stanforth, 1 Vent. 34 (cited); Eccleston v. Clipsham, 1 Saund. 153 (arrest of judgment); Pullen v. Palmer, 5 Mod. 73; Osborn v. Crosberne, 1 Sid. 238 (*semble*); Chapple v. Vaughan, 1 Sid. 420 (*semble*); Scott v. Godwin, 1 B. & P. 67; Petrie v. Bury, 3 B. & C. 353; Lane v. Drinkwater, 1 C. M. & R. 599, 3 Dowl. 223 s. c. (arrest of judgment); Foley v. Addenbrooke, 4 Q. B. 197; Berlin v. Sheffield Co., 124 Ala. 322, 324; Hays v. Lasater, 3 Ark. 565; Bell v. Layman, 1 T. B. Mon. 39, 40 (*semble*); Mackall v. Roberts, 3 T. B. Mon. 130 (*semble*); Halsey v. Norton, 45 Miss. 703 (*semble*); Smith v. Miller, 49 N. J. 521 (but statute requires notice); Ehle v. Purdy, 6 Wend. 629; Sweigart v. Berk, 8 S. & R. 306 (writ of error); May v. Slade, 24 Tex. 205; Galveston v. Le Gierse, 51 Tex. 189.

In England the non-joinder of parties plaintiff is no longer a ground for demurrer, but for a motion to add the omitted parties. By statute, in many of our states, the objection that the declaration discloses the non-joinder of a necessary party plaintiff is to be taken, not by the general demurrer of the common law, or its equivalent, a demurrer on the ground that the declaration does not state facts sufficient to constitute a cause of action, but by a special demurrer on the specific ground of a defect of parties plaintiff. Lawrence v. Montgomery, 37 Cal. 153; Grain v. Aldrich, 38 Cal. 514; Cox v. Bird, 65 Ind. 277; Barnett v. Leonard, 66 Ind. 422; King v. Kehoe, 91 Iowa, 91; Foster v. Lyon Co., 63 Kan. 43; Walton v. Washburn, 23 Ky. L. Rep. 1008; May v. Western Co., 112 Mass. 91; Porter v. Fletcher, 25 Minn. 50; Mahoney v. Minn. Co., 71 Minn. 331; Svanburg v. Fosseen, 75 Minn. 350; Clark v. Cable, 21 Mo. 223; Dewey v. Cany, 60 Mo. 224; Ryan v. Riddle, 78 Mo. 521; State v. True, 25 Mo. Ap. 451; Merritt v. Walsh, 32 N. Y. 685; De Puy v. Strong, 37 N. Y. 372; Sullivan v. N. Y. Co., 119 N. Y. 348; Dean v. Chamberlain, 3 Duer, 691; Proctor v. Ins. Co., 124 N. Ca. 265; Nevil v. Clifford, 55 Wis. 161; Beyer v. Crandon, 98 Wis. 306.

The special demurrer must point out the precise defect and give the name of the party to be joined. Gaines v. Walker, 16 Ind. 361; Kelley v. Love, 35 Ind. 106; Van Sickle v. Erdelmeyer, 36 Ind. 262; Marks v. Indianapolis Co., 38 Ind. 440; Willett v. Porter, 42 Ind. 250; Durham v. Bischof, 47 Ind. 211, 213; Nicholson v. Louisville Co., 55 Ind. 504; Dewey v. State, 91 Ind. 173; Foley v. Mail Co., 8 N. Y. Misc. Rep. 91.

A declaration disclosing the non-joinder of an essential party is demurrable at common law and is equally bad upon the modern special demurrer, although it does not appear that such party is alive. To save the declaration, the plaintiff must allege the death of the one not joined. Y. B. 36 Hen. VI. f. 16, pl. 11; Osborne v. Crosberne, 1 Sid. 238 (*semble*); Scott v. Godwin, 1 B. & P. 67; Hays v. Lasater, 3 Ark. 565; Gilbert v. Allen, 57 Ind. 524, 526; Porter v. Fletcher, 25 Minn. 493; Ehle v. Purdy, 6 Wend. 629; Sullivan v. N. Y. Co., 119 N. Y. 348; Sweigart v. Berk, 8 S. & R. 308, 311.

A party may demur for the non-joinder of another only when he is himself interested in having that other joined. Anderton v. Wolf, 41 Hun, 571; Bauer v. Platt, 72 Hun, 326, 332; Thompson v. Richardson, 74 N. Y. Ap. Div. 62.

WAIVER BY FAILURE TO DEMUR. — If the declaration is demurrable for defect of parties plaintiff, the objection is waived if not taken by demurrer. Clark v. Gramling, 54 Ark. 525; Dunn v. Toser, 10 Cal. 167; Ryan v. Mullinix, 45 Iowa, 631; Bouton v. Orr, 51 Iowa, 473; Parker v. Wiggins, 10 Kan. 420; Hardee v. Hall, 12 Bush, 327; Prichard v. Peace, 98 Ky. 99; Rittenhouse v. Clark, 110 Ky. 147; Combs v. Kirsh, (Ky. 1905) 84 S. W. R. 562; McRoberts v. South Co., 18 Minn. 108, 110; Moore v. Bevier, 60 Minn. 240; Bell v. Mendenhall, 71 Minn. 331; Mason v. St. Paul Co., 82 Minn. 336; Reugger v. Lindenberger, 53 Mo. 364; McConnell v. Braynor, 63 Mo. 461; Dunn v. Hannibal Co., 68 Mo. 268; Mech. Bank v. Gilpin, 105 Mo. 17; Castile v. Ford, 53 Neb. 507; Smith v. Miller, 49 N. J. 521; Merritt v. Walsh, 32 N. Y. 685; Donnell v. Walsh, 33 N. Y. 43; Potter v. Ellice, 48 N. Y. 321; Gen. Mut. Co. v. Benson, 5 Duer, 168; Wells v. Cone, 55 Barb. 585; Hees v. Nellis, 65 Barb. 440, 1 Th. & C. 118 s. c.; Cunningham v. White, 45 How. Pr. 486; Davidson v. Elms, 67 N. Ca. 228; Johnson v. Good, 114 N. Ca. 62; Ross v. Page, 11 N. Dak. 458; Wyman v. Heran, 9 Okla. 35; Spencer v. Van Cott, 2 Utah, 337; Hannegan v. Roth, 12 Wash. 695; Kimball v. Noyes, 17 Wis. 695; Drentzer v. Lawrence, 58 Wis. 594.

The objection of non-joinder of parties, if apparent on the face of the declaration, cannot be taken even by answer. Andrews v. Mokelumne Co., 7 Cal. 330; McCormick v. Blossom, 40 Iowa, 256; Justice v. Phillips, 3 Bush, 200; Lowry v. Harris, 12 Minn. 255; State v. Sappington, 68 Mo. 454; Zabriskie v. Smith, 13 N. Y. 322; De Puy v. Strong, 37 N. Y. 372; Patchin v. Peck, 38 N. Y. 39; Fisher v. Hall, 41 N. Y. 416; Sullivan v. N. Y. Co., 119 N. Y. 348; Ingraham v. Ingraham, 12 Barb. 9, 18; Dennison v. Dennison, 9 How. Pr. 246; Gassett v. Crocker, 10 Abb. Pr. 133; Maxwell v. Pratt, 24 Hun, 448; Stelling v. Grabowsky, 46 N. Y. St. Rep. 700; Cunningham v. White, 45 How. Pr. 486.

B. NOT APPARENT ON FACE OF DECLARATION — NEGATIVE PLEA. — By the Common Law, if the non-joinder of an essential plaintiff does not appear on the face of declaration upon a contract, the defendant, under a negative plea, may take the objection of non-joinder by motion for a nonsuit, or may obtain a verdict for himself. Leglise v. Champanti, 2 Stra. 820 (*semble*); Graham v. Robertson, 2 T. R. 282 (*semble*); Hill v. Tucker, 1 Taunt. 7; Snellgrove v. Hunt, 1 Chitty, 71; Hatsall v. Griffith, 2 Cr. & M. 679; Chanfer v. Leese, 4 M. & W. 295 (*semble*); Hopkinson v. Lee, 6 Q. B. 964; Newton v. Reardon, 2 Cranch, C. C. 49; Jordan v. Wilkins, 3 Wash. C. C. 110; Hicks v. Branton, 21 Ark. 186; Duval v. Mayson, 23 Ark. 30; Connolly v. Cottle, 1 Ill. 286; Snell v. Land, 43 Ill. 393; Tully v. Excelsior Works, 115 Ill. 544; Hansel v. Morris, 1 Blackf. 307; Smith v. Crichton, 33 Ind. 103; Marshall v. Jones, 11 Me. 54; White v. Curtis, 35 Me. 534; Holyoke v. Loud, 69 Me. 59; Eveleth v. Sawyer, 96 Me. 227; Halliday v. Doggett, 6 Pick. 359; Cushing v. Marston, 12 Cush. 431; Wiggin v. Cumings, 3 All. 353; Howe v. Hyde, 88 Mich. 93; Blackburn v. Blackburn, 132 Mich. 525; Rainey v. Smizer, 28 Mo. 310; State v. Hesselmyer, 34 Mo. 76 (*semble*); White v. Dyer, 81 Mo. Ap. 643; Culver v. Smith, 82 Mo. Ap. 390 (demurrer to evidence); Lemon v. Wheeler, 96 Mo. Ap. 651; Pitkin v. Roby, 43 N. H. 138; Murray v. Pfeiffer, 70 N. J. 768 (*semble* — statutory notice of non-joinder essential); Dob v. Halsey, 16 Johns. 34; Ehle v. Purdy, 6 Wend. 629; Scott v. Brown, 3 Jones, (N. Ca.) 541; Wilson v. Wallace, 8 S. & R. 53; Morse v. Chase, 4 Watts, 456; Hoard v. Wilcox, 47 Pa. 51; Clapp v. Pawtucket Inst. 15 R. I. 489; Sims v. Tyre, 3 Brev. 249; Gordon v. Goodwin, 2 N. & McC. 70 (*semble*); Coffee v. Eastland, Cooke (Tenn.), 159; Hall v. Adams, 1 Aik. (Vt.) 166; Hilliker v. Loop, 5 Vt. 116.

But the non-joinder of all the executors or administrators as plaintiffs in an action upon a contract cannot be shown under a denial of the promise, but is matter for a plea in abatement or an affirmative answer. Newton v. Cocke, 10 Ark. 169; Hicks v. Branton, 21 Ark. 186, 189; Macon v. Davis, 27 Ga. 113; Lillard v. Lillard, 5 B. Mon. 340; Hunt v. Kearney, 3 N. J. 529; Packer v. Willson, 15 Wend. 343; Scrantom v. Farmers' Bank, 33 Barb. 527; Gordon v. Goodwin, 2 N. & McC. 70.

In some jurisdictions, the objection of non-joinder of parties plaintiff, if not apparent on

the face of the complaint, can be taken only by an affirmative answer. Berlin v. Sheffield Co., 124 Ala. 322; Wendt v. Ross, 33 Cal. 650; Pavisick v. Bean, 48 Cal. 364; Trenor v. Central Co., 50 Cal. 222; Lyford v. North Co., 92 Cal. 93; Foley v. Bullard, 99 Cal. 516; Williams v. So. Co., 110 Cal. 457; Ah Tong v. East Co., 112 Cal. 679; Gilbert v. Allen, 57 Ind. 524; Moore v. Harmon, 142 Ind. 555; Lillie v. Case, 54 Iowa, 177; Parker v. Wiggin, 10 Kan. 420; Davis v. Chouteau, 32 Minn. 548; Moore v. Bevier, 60 Minn. 240; Rengger v. Lindenberger, 53 Mo. 364; Dunn v. Hannibal Co., 68 Mo. 268; Parchen v. Peck, 2 Mont. 567; Conklin v. Barton, 43 Barb. 435; Merritt v. Walsh, 32 N. Y. 685; Patchin v. Peck, 38 N. Y. 39; Risby v. Wightman, 13 Hun, 163; Wilbur v. Collin, 4 N. Y. Ap. Div. 417; Freinhardt v. Excelsior Co., 82 N. Y. Ap. Div. 627; Lunn v. Sherman, 93 N. Ca. 164; Johnson v. Gooch, 114 N. Ca. 62; Gilland v. Union Co., 6 Wyo. 185.

NON-JOINDER OF PLAINTIFFS — TORTS.

By the common law, the objection of non-joinder of plaintiffs in an action of tort can be taken only by a plea in abatement. Stowel's Case, Moo. 466, pl. 660; Deering v. Moor, Cro. El. 554; Winchworth v. Mayo, Cro. Jac. 183; Blackbrough v. Graves, 1 Mod. 102, 3 Keb. 263, 329, s. c.; Child v. Sanders, 1 Salk. 31, 3 Lev. 351, s. c.; Dockwray v. Dickenson, Skin. 640; Leglise v. Champente, 2 Stra. 820; Addison v. Overend, 6 T. R. 770; Sedgworth v. Overend, 7 T. R. 279; Bloxam v. Hubbard, 5 East, 407; Broadbent v. Ledward, 11 A. & E. 209; Wallis v. Harrison, 5 M. & W. 142 (*semble*).

In this country, the objection of non-joinder of parties plaintiff must be taken by a plea in abatement, or, in jurisdictions in which pleas in abatement, as distinguished from pleas in bar, are abolished, by an answer. Newton v. Reardon, 2 Cr. C. C. 49, 51; Whitney v. Stark, 8 Cal. 514; White v. Webb, 15 Conn. 302; Edwards v. Hill, 11 Ill. 22; Johnson v. Richardson, 17 Ill. 302; Balt. Co. v. Higgins, 69 Ill. Ap. 402; Carlisle v. McAllister, 3 Ind. Terr. 164; Kansas Co. v. Nichols, 9 Kan. 235, 248; Seip v. Tilghman, 23 Kan. 289; Atchison Co. v. Hucklebridge, 62 Kan. 506 (*semble* — rule not applied because plaintiff concealed the facts); Bell v. Laymam, 1 T. B. Mon. 39; Lothrop v. Arnold, 25 Me. 136; Holmes v. Sprowl, 31 Me. 73; Gent v. Lynch, 231 Md. 58; Thompson v. Hoskins, 11 Mass. 419; Call v. Buttrick, 4 Cush. 345; Putney v. Lapham, 10 Cush. 232; May v. Western Co., 112 Mass. 90; Chouteau v. Hewitt, 10 Mo. 131; Butler v. Boynton (Kan. Ap. 1906), 94 S. W. R. 723; Thompson v. Rush, 66 Neb. 758; Pickering v. Pickering, 11 N. H. 141; True v. Congdon, 44 N. H. 48; Wheelwright v. Depeyster, 1 Johns. 471; Brotherson v. Hodges, 6 Johns. 108; Bradish v. Schenck, 8 Johns. 151; Rich v. Penfield, 1 Wend. 380; Gilbert v. Dickerson, 7 Wend. 449; Abbe v. Clark, 31 Barb. 238; Scranton v. Farmers' Bank, 33 Barb. 527; Dickinson v. Vanderpoel, 2 Hun, 636; Weare v. Burge, 10 Ired. 169; Deal v. Bogue, 20 Pa. 228; Backenstoss v. Stahler, 33 Pa. 251; Fell v. Bennett, 110 Pa. 181; Clapp v. Pawtucket Co., 15 R. I. 489; Mather v. Dunn, 11 S. Dak. 196; Winters v. McGhee, 3 Sneed, 128; Rowland v. Murphy, 66 Tex. 534; Leonard v. Worsham, 18 Tex. Civ. Ap. 410; Briggs v. Taylor, 35 Vt. 57; Hannegan v. Roth, 12 Wash. 695; Bevier v. Dillingham, 18 Wis. 529; Pratt v. Radford, 52 Wis. 114; Gilland v. Union Co., 6 Wyo. 185.

Actions of Tort for Recovery of Property. — If the action is for recovery of property, evidence of non-joinder of parties plaintiff may be given under a general denial. Cox v. Morrow, 14 Ark. 603 (replevin); Pritchard v. Culver, 2 Harring. 129 (replevin); Hart v. Fitzgerald, 2 Mass. 509; Webster v. Vandeventer, 6 Gray, 428 (writ of entry); Reinheimer v. Hemingway, 35 Pa. 432 (replevin).

See also Fowler v. Hayden, 130 Mich. 47.

Waiver. — If the objection is not taken by answer it is waived. Summers v. Heard, 66 Ark. 550; Wells v. Cone, 55 Barb. 585.

NON-JOINDER OF DEFENDANTS — CONTRACTS.

A. Apparent on the Face of the Declaration — Demurrer. — By the common law, if the declaration discloses the non-joinder of a co-contractor as defendant, and also indicates that he is alive and in the jurisdiction, and, in case of actions upon a specialty, that he sealed the obligation, the declaration is bad on general demurrer, as not containing a cause of action against the actual defendant or defendants, but only against a distinct group of persons. Horner v. Moor, 5 Burr. 2614 (cited); Gilman v. Reeves, 10 Pet. 298, 300; Hamilton v. Buxton, 6 Ark. 24, 26; Belden v. Curtis, 48 Conn. 32 (*semble*, motion in arrest of judgment); Raney v. McRea, 14 Ga. 589, 591 (*semble*); Bragg v. Wetzell, 5 Blackf. 95 (writ of error); Waits v. McClure, 10 Bush, 753 (*semble*, but see Mackall v. Roberts, 3 T. B. Mon. 130); Smith v. Miller, 49 N. J. 521; Burgess v. Abbott, 6 Hill, 135 (*semble*);

McArthur v. Ladd, 5 Oh. 514 (*semble*); Davis v. Willis, 47 Tex. 134; Needham v. Smith, 17 Vt. 233 (*semble*).

But see *contra*, Gray v. Sharp, 62 N. J. 102.

If, however, the declaration discloses merely the non-joinder of the co-contractor without averring that he is still alive, or, in the case of a specialty, its non-execution by the co-obligor, a demurrer to it will not be sustained. Ascue v. Hollingworth, Cro. El. 494, 544; Cable v. Vaughan, 1 Saund. 291, 1 Sid. 420, 1 Vent. 34, 2 Ket. 518, 528 s. c.; Putt v. Vincent, 1 Vent. 76, 135 (*semble*); Anon., W. Jones, 303; Blackwell v. Ashton, Al. 21, Sty. 50 s. c.; Gilbert v. Bath, 1 Stra. 503; Morrison v. Trenchard, 4 M. & G. 709; Hamilton v. Buxton, 6 Ark. 24; Belden v. Curtis, 48 Conn. 32; Bragg v. Wetzel, 5 Blackf. 95; Dillon v. State Bank, 6 Blackf. 5; Gilbert v. Allen, 57 Ind. 524; Allen v. Lucket, 3 J. J. Marsh, 164; Commw. v. Davis, 9 B. Mon. 128; Lillard v. Planters Bank, 4 Miss. 78, 82 (*semble*); Deegan v. Deegan, 22 Nev. 185; Nealley v. Moulton, 12 N. H. 486, 488; Smith v. Miller, 49 N. J. 521, 527 (*semble*); Burgess v. Abbott, 6 Hill, 135 (but see Whitaker v. Young, 2 Cow. 569); Brainard v. Jones, 11 How. Pr. 569; Scofield v. Van Syckle, 23 How. Pr. 97; Strong v. Wheaton, 36 Barb. 616; Geddis v. Hawk, 10 S. & R. 33, 38; Anderson v. Chandler, 18 Tex. 436; Davis v. Willis, 47 Tex. 155; Needham v. Preston, 17 Vt. 223.

But, see, *contra*, Cummings v. People, 50 Ill. 132; Sandusky v. Sidwell, 173 Ill. 493; Powell v. People, 214 Ill. 475; Harwood v. Roberts, 5 Me. 441; Richmond v. Toothaker, 69 Me. 451 (*semble*); State v. Chandler, 79 Me. 172; Merrick v. Trustees, 8 Gill, 59, 74; Kent v. Holliday, 17 Md. 387; Eaton v. Balcom, 33 How. Pr. 80; Sanders v. Yonkers, 63 N. Y. 489, 493 (*semble* — the contrary decisions in Brainard v. Jones, 11 How. Pr. 569; Scofield v. Van Syckle, 23 How. Pr. 97, are overruled); Green v. Lippincott, 53 How. Pr. 33; McGregor v. Balch, 17 Vt. 562, 567 (*semble*); Leftwich v. Berkeley, 1 Hen. & M. 61; Newell v. Wood, 1 Munf. 555.

The rule in *scire facias* is that the life of a co-obligor need not be alleged. King v. Young, 2 Anst. 448; King v. Chapman, 3 Anst. 811; Blackwell v. Ashton, Al. 21, Sty. 50 s. c.; Cocks v. Brown, 11 M. & W. 51, 53, 55; Gilman v. Rives, 10 Pet. 298; Prather v. Manro, 11 Gill & J. 261; Bowie v. Neal, 41 Md. 124; Hanley v. Donoghue, 59 Md. 239.

In England, the non-joinder of parties defendant is no longer a ground for a demurrer, but for a motion to add the omitted parties.

By statute, in many of our states, the objection that the declaration disclosed the non-joinder of a necessary party defendant is to be taken, not by the general demurrer of the common law, or its equivalent, a demurrer on the ground that the declaration does not state facts sufficient to constitute a cause of action, but by a special demurrer on the specific ground of a defect of parties defendant. Little v. Johnson, 26 Ind. 170; Strong v. Downing, 34 Ind. 300; Shane v. Lowry, 48 Ind. 205; Clough v. Thomas, 53 Ind. 24; Bray v. Black, 57 Ind. 417; Cox v. Bird, 65 Ind. 277; Leedy v. Nash, 67 Ind. 311; Dunn v. Tousey, 80 Ind. 288; Whipperman v. Dunn, 124 Ind. 349; Carskaddon v. Pine, 154 Ind. 410; Boseker v. Chamberlain, 160 Ind. 114; Svanburg v. Fosseen, 75 Minn. 350; Ross v. Sage, 11 N. Dak. 458; Umsted v. Buskirk, 17 Oh. St. 113; Helm v. Briley, (Okla. 1906) 87 Pac. R. 595; Burlop v. Milwaukee, 18 Wis. 431.

The demurrer must point out the precise defect and give the name of the party to be joined. Kreling v. Kreling, 118 Cal. 413; Stephens v. Parvin, (Colo. 1905) 78 Pac. R. 688; Gaines v. Walker, 16 Ind. 361; Van Sickle v. Erdelmeyer, 36 Ind. 262; Marks v. Indianapolis Co., 38 Ind. 440; State v. McClelland, 138 Ind. 395; Boseker v. Chamberlain, 160 Ind. 114; Smith v. Miller, 49 N. J. 521 (statutory notice served purpose of special demurrer); Skinner v. Stewart, 13 Abb. Pr. 442; Hodge v. Drake, 37 N. Y. St. Rep. 933; Baker v. Hawkins, 29 Wis. 576; Emerson v. Schwindt, 108 Wis. 167.

WAIVER BY FAILURE TO DEMUR. — If the declaration is demurrable for defect of parties defendant, the objection is waived if not taken by demurrer. Medano Co. v. Adams, 29 Colo. 317; Groves v. Ruby, 24 Ind. 418; Shirts v. Irons, 54 Ind. 13; Thomas v. Wood, 67 Ind. 132; Talmage v. Bierhause, 103 Ind. 270; Carskaddon v. Pine, 154 Ind. 410; Boseker v. Chamberlain, 160 Ind. 114; Coe v. Anderson, 92 Iowa, 515; McCallister v. Savings Bank, 80 Ky. 684; Blakely v. Le Duc, 22 Minn. 476; Baldwin v. Canfield, 26 Minn. 43; Horstkotte v. Menier, 50 Mo. 158; Gimbel v. Pignero, 62 Mo. 240; Donnan v. Intelligencer Co., 70 Mo. 168; Parchen v. Peck, 2 Mont. 567; Beeler v. First Bank, 34 Neb. 348; Bates Co. v. Scott, 56 Neb. 475; Engel v. Dado, 66 Neb. 400; Potter v. Ellice, 48 N. Y. 321; Davis v. Bechstein, 69 N. Y. 440; Baggott v. Boulger, 2 Duer, 160; Rhodes v. Dymock, 33 N. Y. Super. Ct. 141; Leak v. Covington, 99 N. Ca. 559; Howe v. Harper, 127 N. Ca. 356; Osborn v. Logus, 28 Oreg. 302; Cooper v. Thomason, 30 Oreg. 161; Allan v. Cooley, 53 S.

Ca. 77; Carney v. La Crosse Co., 15 Wis. 503; Hall v. Gilbert, 31 Wis. 691, 695; Hallam v. Stiles, 61 Wis. 270; Radant v. Werheim Co., 106 Wis. 600.

The objection of non-joinder of parties defendant, if apparent on the face of the declaration, cannot be taken even by answer. Alexander v. Gear, 15 Ind. 89; Walker v. Deaver, 79 Mo. 664.

B. NOT APPARENT ON THE FACE OF THE DECLARATION — PLEA IN ABATEMENT. — In actions upon contracts under seal, the non-joinder of co-obligors was never a ground for nonsuit under a plea of *non est factum*. The objection was taken by a plea in abatement. Cokeworthy v. J., Y. B. 28 Hen. VI. f. 3, pl. 11; Whelpdale's case, 5 Rep. 119; Stead v. Moon, Cro. Jac. 152; Cabell v. Vaughan, 1 Saund. 291; Sayer v. Chayter, 1 Lutw. 695; South v. Tanner, 2 Taunt. 254.

In England, the non-joinder of parties defendant in actions upon a simple contract was originally ground for a nonsuit, if the defendant denied the alleged promise. Cole v. Wilkes, Hutt. 121; Boson v. Sandford, 1 Show. 101, Salk. 440, 3 Mod. 321, 3 Lev. 258, Carth. 58, Skin. 280, s. c.; Dockwray v. Dickenson, Skin. 640 (*semble*); Scott v. Godwin, 1 B. & P. 67, 75.

But, in Lord Mansfield's time, it was decided that this objection must be taken by a plea in abatement, unless the non-joinder appeared upon the face of the declaration. Abbot v. Smith, 2 W. Bl. 947; Rice v. Shute, 2 W. Bl. 695, 5 Burr. 2611, s. c. And this new doctrine was followed in England and in this country. Rees v. Abbott, Cowp. 832; Powell v. Layton, 2 B. & P. N. R. 365; Evans v. Lewis, 1 Wms. Saund. 291, d. (cited); Germain v. Frederick, 1 Wms. Saund. 291 d (cited); Buddle v. Wilson, 6 T. R. 369; Sheppard v. Baillie, 6 T R. 327, 329; Richards v. Heather, 1 B. & Ad. 29, 35; Cocks v. Brewer, 11 M. & W. 51. In Powell v. Layton, *supra*, Sir James Mansfield, C. J., said, p. 373: "I am old enough to remember that the decision in Rice v. Shute caused great surprise in Westminster Hall; for before that case there had been an infinite number of nonsuits on the ground that other joint contractors should have been sued."

By the Judicature Acts and orders made under them "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of parties actually before it;" and "no plea or defence shall be pleaded in abatement." Under these orders the Court on the application of the defendant will regularly order that co-contractors, if within the jurisdiction, be joined as defendants. Pillers v. Robinson, 20 Q. B. D. 155; Wilson v. Balcarres Co. [1893], 1 Q. B. 422. But no such order will be made if the plaintiff has done everything in his power to effect service upon the co-contractors. Robinson v. Geisel [1894], 2 Q. B. Div. 685.

In this country, the objection of non-joinder of parties defendant, not disclosed by the declaration, can be raised only by a plea in abatement, or in jurisdictions, in which pleas in abatement, as distinguished from pleas in bar, are abolished, by an affirmative answer. Barry v. Foyles, 1 Pet. 311; Metcalf v. Williams, 104 U. S. 93; First Bank v. Hamor, 49 Fed. 45; Jones v. Pitcher, 3 St. & P. 135; Henderson v. Hammond, 19 Ala. 340; Boswell v. Morton, 20 Ala. 235; Hamilton v. Buxton, 6 Ark. 24; Pavisich v. Bean, 48 Cal. 364; Medano Co. v. Adams, 29 Colo. 317; Johnson v. Ransom, 24 Conn. 531; Douglas v. Chapin, 26 Conn. 76; Belden v. Curtis, 48 Conn. 32; Andrews v. Allen, 4 Harringt. 452; Hurly v. Roche, 6 Fla. 746; Raney v. McRea, 14 Ga. 589; Beasley v. Allan, 23 Ga. 600; Fourth Bank v. Mayer, 100 Ga. 87; English v. Grant, 102 Ga. 35; Lurton v. Gilliam, 2 Ill. 377; Ross v. Allen, 67 Ill. 317; Swigart v. Weare, 37 Ill. Ap. 258; Wilson v. State, 6 Blackf. 212; Bledsoe v. Irvin, 35 Ind. 293, 294; Levi v. Haverstick, 51 Ind. 236; Boseker v. Chamberlain, 160 Ind. 114, 117; Hine v. Houston, 2 Greene (Iowa), 161; Bonnon v. Urton, 3 Greene (Iowa), 228; Chicago Co. v. Fowler, 55 Kan. 17; Allen v. Lucket, 3 J. J. Marsh, 164; Albro v. Lawson, 17 B. Mon. 642; Waits v. McClure, 10 Bush, 763; McGreary v. Chandler, 58 Me. 537; Furbish v. Robertson, 67 Me. 35 (*semble*); Sittig v. Birkestack, 38 Md. 158; Smith v. Cooke, 31 Md. 174; Bliss v. Bliss, 12 Met. 266; Kendall v. Weaver, 1 All. 277, 279; Leonard v. Speidel, 104 Mass. 356; Townsend v. Wheatland, 186 Mass. 343; Mitchell v. Chambers, 43 Mich. 150; Porter v. Leache, 56 Mich. 40; Dillenbeck v. Simons, 105 Mich. 373; Lewis v. State, 65 Miss. 468; Parchen v. Peck, 2 Mont. 567; Duignan v. Montana Club, 16 Mont. 189; Maurer v. Miday, 25 Neb. 575; Hanscomb v. Lantry, 48 Neb. 665; Stephens v. Harding, 48 Neb. 659; Ayres v. Duggan, 57 Neb. 750; Bower v. Cassels, 60 Neb. 620; Deegan v. Deegan, 22 Nev. 185; Powers v. Spear, 3 N. H. 35; Nealley v. Moulton, 12 N. H. 485; Gove v. Lawrence, 24 N. H. 128; Marston v. Hobonsack, 22 N. J. 372; Lieberman v. Brothers, 55 N. J. 379; Gray v. Sharp, 62 N. J. 102; Mayhew v. Robinson, 10 How. Pr. 162; Robertson v. Smith, 18 Johns. 459; Hosley v. Black, 28 N. Y. 438; Chapman v. Forbes, 123 N. Y.

532; Amsterdam Co. v. Rayher, 42 N. Y. Ap. Div. 602 (discrediting Rice v. Hollenbeck, 19 Barb. 660); Johnson v. Gooch, 114 N. Ca. 62; McArthur v. Ladd, 5 Oh. 514; Wilson v. Wallace, 8 S. & R. 53 (*semble*); Means v. Milliken, 33 Pa. 517; Chorpenning v. Royce, 58 Pa. 474; Collins v. Smith, 78 Pa. 423; Exum v. Davis, 10 Rich. 357; Ross v. Linder, 12 S. Ca. 592; Allen v. Cooley, 53 S. Ca. 77; Shull v. Caugham, 54 S. Ca. 203; Cone v. Cone, 61 S. Ca. 512; Nash v. Skinner, 12 Vt. 219; Hardy v. Cheney, 42 Vt. 417; Prunty v. Mitchell, 76 Va. 169; Wilson v. McCormick, 86 Va. 995; Bignold v. Cave, 24 Wash. 413; Dickerson v. Spokane, 261 Wash. 292; Markoe v. Seaver, 2 Wis. 148; Bevier v. Dillingham, 18 Wis. 529; Newhall Co. v. Flint Co., 47 Wis. 516; Radant v. Werkheim Co., 106 Wis. 600.

Similarly, the failure to set up by answer the non-joinder of persons as defendants in suits in equity, is a waiver of the objection. Grain v. Aldrich, 38 Cal. 514; Smith v. Dorn, 96 Cal. 73; Lowry v. Harris, 12 Minn. 255; Thurston v. Thurston, 58 Minn. 279; Fitzgerald v. Fitzgerald Co., 44 Neb. 463; Ft. Stanwix Bank v. Leggett, 51 N. Y. 552; Lawrence v. Congreg. Church, 164 N. Y. 115; Henderson v. Turngren, 9 Utah, 432; Greene v. Finnell, 22 Wash. 186; Carney v. LaCrosse Co., 15 Wis. 503; Cord v. Hirsch, 17 Wis. 403; Bevier v. Dillingham, 18 Wis. 529.

A plea in abatement or an affirmative answer for the non-joinder of parties defendant must allege that the persons not joined are living and resident within the jurisdiction of the court. Y. B. 28 Hen. VI f. 3, pl. 11; Ascue v. Hollingsworth, Cro. El. 544; Sayer v. Chaytor, 1 Lutw. 695; Belden v. Curtis, 48 Conn. 32; Wilson v. State, 6 Blackf. 212; Levi v. Haverstich, 51 Ind. 236; Boseker v. Chamberlain, 160 Ind. 114; Alexander v. Collins, 2 Ind. Ap. 176; Carico v. Moore, 4 Ind. Ap. 20; Harwood v. Roberts, 5 Me. 441; Furbish v. Robertson, 67 Me. 35; Goodhue v. Luce, 82 Me. 222; Deegan v. Deegan, 22 Nev. 135; Burgess v. Abbott, 6 Hill, 135, 136; Holt v. Streeter, 74 Hun, 538; Palmer v. Field, 76 Hun, 229; McArthur v. Ladd, 5 Oh. 514; Cone v. Cone, 61 S. Ca. 512; Davis v. Williams, 47 Tex. 154; Roberts v. McLean, 16 Vt. 608, 612; Door Co. v. Keogh, 77 Wis. 24.

But it is not necessary to allege that those not joined were of full age, unmarried, or sane at the time of the contract made. Roberts v. McLean, 16 Vt. 608.

Formerly all joint obligors were to be joined as defendants, although one was a discharged bankrupt. Plaintiff could not defeat a plea in abatement by replying that the one not joined was a discharged bankrupt. Noke v. Ingham, 3 Esp. 77, n., 1 Wils, 89 s. c.; Hawkins v. Ramsbottom, 6 Taunt. 179; Bovill v. Wood, 2 M. & Sel. 23; Moravia v. Hunter, 2 M. & Sel. 444. See also Exp. Read, 1 V. & B. 346, 1 Rose 460 s. c. But by St. 3 & 4 Wm. IV. c. 42, § 9 the rule was changed so that it was no longer necessary to join co-obligors who had been discharged in bankruptcy. If defendant pleaded the non-joinder in abatement, the plaintiff would destroy the plea by replying the discharge in bankruptcy. To the same effect see Belden v. Curtis, 48 Conn. 32 (*semble*). But in accord with the old English rule, requiring the joinder of a discharged bankrupt, are the following cases: Tuttle v. Cooper, 10 Pick. 281, 291; Tinkum v. O'Neall, 5 Nev. 93; Dorn v. O'Neal, 6 Nev. 155; Camp v. Gifford, 7 Hill, 169 (*semble*); Roberts v. McLean, 16 Vt. 608.

Similarly a demurrer for non-joinder of a party defendant will be sustained, although the person not joined is freed from liability by the Statute of Limitations. Hyde v. Van Valkenburgh, 1 Daly, 416.

In *ex parte* Henderson, 4 Ves. 163, it was said that an infant co-obligor must be joined as defendant. But it became the practice in England to join as defendants only the adult obligors. Chandler v. Parkes, 3 Esp. 76; Jaffray v. Freborn, 5 Esp. 47; Gibbs v. Merrill, 3 Taunt. 307; Burgess v. Merrill, 4 Taunt. 468; Boyle v. Webster, 17 Q. B. 950.

In this country it is customary to join the infant co-obligor as defendant. If he pleads his infancy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other defendants. Kirby v. Cannon, 9 Ind. 371; Barlow v. Wiley, 3 A. K. Marsh, 457; Cutts v. Gordon, 13 Me. 474; Woodward v. Newhall, 1 Pick. 500; Tuttle v. Cooper, 10 Pick. 281, 288; Bethel v. Chipman, 57 Mich. 379; Gay v. Johnson, 32 N. H. 167; Dacosta v. Davis, 24 N. J. 319; Hartness v. Thompson, 5 Johns. 160; Robertson v. Smith, 18 Johns. 459, 473; Mason v. Denison, 15 Wend. 64, 66; Ex parte Nelson, 1 Cow. 417; Root v. Herman, 2 N. Y. City Ct. R. 409; Hyde v. Van Valkenburg, 1 Daly 416; Allen v. Butler, 9 Vt. 122; Cole v. Pennell, 2 Rand. 174. Accordingly the non-joinder of the infant is ground for a plea in abatement, and a reply of infancy is no answer to such a plea. Slocum v. Hooker, 13 Barb. 537 (approving s. c. 12 Barb. 563.) If the plaintiff declares against the adult alone, alleging a joint obligation and that one of the obligors is an infant, his declaration is bad on demurrer. Walmsley v. Lindenburger, 2 Rand. 478. — Ed.

PYRON AND SON v. RUOHS.

SUPREME COURT, GEORGIA, AUGUST 12, 1904.

[120 *Georgia Reports*, 1060.]

COMPLAINT. Before Judge REID. City Court of Atlanta. November 14, 1903.

CANDLER, J. Ruohs brought suit against "J. B. Pyron and Ruohs Pyron, as partners doing business under the firm name of J. B. Pyron & Son," upon eight promissory notes signed by J. B. Pyron & Son, payable to the Armour Fertilizer Works, and transferred, without recourse, to Ruohs. The petition alleged that J. B. Pyron was a resident of Fulton County, and that Ruohs Pyron resided in Bartow County; and the suit was brought in the city court of Atlanta. The defendants filed a plea to the jurisdiction, averring that J. B. Pyron's residence was Bartow County, and not Fulton County, and that the superior court of Bartow County, and not the city court of Atlanta, had jurisdiction of the suit. The petition was filed to the May term, 1902; and on October 15, 1903, the issue raised by the plea to the jurisdiction was submitted to a jury, who found against the plea. The defendants moved for a new trial, which was denied. The defendants bring the case to this court, assigning error upon the refusal of the court below to grant a new trial on the plea to the jurisdiction.[1]

The motion for a new trial on the plea to the jurisdiction complains that the court erred, at the commencement of the trial, in ruling that the burden was upon the defendants to establish by proof the averments of the plea, and that the plaintiff was not required to first establish the truth of the jurisdictional facts set up in his declaration. We do not hesitate to hold that the court properly ruled that the burden of establishing their plea was upon the defendants. Ordinarily the *onus probandi* rests upon the party maintaining an affirmative position. Civil Code, § 5160. But there is one peculiarity in regard to pleas to the jurisdiction, viz., it is not sufficient that they deny the jurisdiction of the court in which the suit is filed, but this must be done by showing that jurisdiction of the suit is in some other court in this state.[2] Civil Code, § 5082. Thus, a plea to the jurisdiction is really in an important sense an affirmative plea, for it is only by asserting an affirmative position that the plea can prevail. The case of Oliver *v.* Wilson,[3] relied upon by counsel for the plaintiff in error,

[1] Only so much of the opinion as relates to this plea is given. — ED.

[2] Strode *v.* Little, 1 Vern. 59; Derby *v.* Athol, 1 Ves. Sr. 202; Sodor *v.* Derby, 2 Ves. Sr. 337, 357 (*semble*); Mostyn *v.* Fabrigas, Cowp. 161, 172; Doe *v.* Roe, 2 Burr. 1046, 1047; King *v.* Johnson, 6 East, 583; R. I. *v.* Mass., 12 Pet. 657, 718; Heilman *v.* Martin, 2 Ark. 158; Lister *v.* Stevens, 29 Ill. 155; Rea *v.* Hayden, 3 Mass. 24 (*semble*); McKie *v.* Reynolds, 1 Tex. Civ. Ap. § 1282 *Accord*. — ED.

[3] 29 Ga. 642.

is not in conflict with what is here held. The case cited was an attachment issued on the ground that the defendant was absconding. This allegation was traversed, the traverse setting out the place where it was alleged the defendant was publicly living at the time the attachment was issued. It was held that "on the trial of such a traverse, the burthen of proof is on the plaintiff in attachment." It must be apparent at a glance that this is an altogether different case from the one now under consideration. The attachment could only issue on the ground that the defendant was absconding, and in order to maintain the suit it was necessary that it should affirmatively appear that the grounds on which the attachment issued were true. That the court, however, did not intend that the principle announced should have the application which the plaintiffs in error now seek to give it is evidenced by the following language of Judge Stephens, who delivered the opinion (p. 646): "So, the plea of non-residence in the county where the suit is brought must not only deny the defendant's residence in that county, but also set forth his residence in another county. He must swear to the plea, and yet, after having sworn to it, he must take the burthen of proving it." See also Bailey on Onus Probandi, p. 586, where it is said, citing Stephen on Pleading, 342, that "all dilatory pleas impose the burden of proof on the party pleading them, where they involve a question of fact." [1]

Judgment affirmed. All the Justices concur.

[1] Padrosa v. High, 122 Ga. 264; Gambrill v. Schooless, 95 Md. 260 *Accord.*

Similarly, under the Judiciary Act of 1789 a defendant, who relied upon the absence of diverse citizenship of plaintiff and defendant to exclude Federal jurisdiction, had the burden of establishing his plea. Sheppard v. Graves, 14 How. 505, 510; De Sobry v. Nicholson, 3 Wall. 420, 423; Fremont v. Merced Co., McAll. 267, 268; Foster v. Cleveland Co., 56 Fed. R. 434; Nat. Ass'n v. Sparks, 83 Fed. R. 225, 227; Collins v. Ashland, 112 Fed. R. 175; Wiemer v. Louisville Co., 130 Fed. R. 244.

If, as in the principal case, the right to object to the jurisdiction is a personal privilege of the defendant, he may waive it, and will waive it by appearing, unless he claims it by an affirmative answer.

Waiver of Privilege of being sued in a particular County. — Trumball v. Trowell, Sty. 273; North v. Hoyle, 3 Lev. 182; Lane v. Saltmarsh, 2 Salk. 544; Mayor v. Bonner, 2 Stra. 864; Crosby v. Shaw, 2 W. Bl. 1085, 1088; Snee v. Humphreys, 1 Wils. 306; Interior Co. v. Gibney, 160 U. S. 217; Hughes v. Martin, 1 Ark. 455; Farmers' Co. v. Buckle, 49 Ill. 482; Eel Co. v. State, 143 Ind. 231; Rudisell v. Jennings, (Indiana Appeals, 1906) 77 N. E. R. 959; Brown v. Webber, 6 Cush. 560; Murphy v. Merrill, 12 Cush. 284; Templin v. Kinsey, (Neb. 1905) 105 N. W. R. 39 (*semble*); Bunker v. Langs, 76 Hun, 543; Wheelock v. Lee, 74 N. Y. 495 (*semble*); Green v. Mangum, 3 Murph. 39; Killian v. Fulbright, 3 Ired. 9; Moseley v. Hunter, 3 Ired. 543; Leach v. Western Co., 65 N. Ca. 486; McMinn v. Hamilton, 77 N. Ca. 300; Carlisle v. Cowan, 35 Tenn. 165; University v. Joslyn, 21 Vt. 52, 59.

Waiver of Lack of Jurisdiction over the Person of the Defendant. — Gracie v. Palmer, 8 Wheat. 699; Bishop v. Vose, 27 Conn. 1; Curtis v. Howard, 34 Fla. 251, 256; Hall v. Mobley, 13 Ga. 313; Muscogee Co. v. Neal, 26 Ga. 120; Bryan v. S. W. Co., 41 Ga. 71; McGahee v. Hilton Co., 112 Ga. 513; Kenney v. Greer, 13 Ill. 432; Waterman v. Tuttle, 18 Ill. 292; Wallace v. Cox, 71 Ill. 548; Callender v. Gates, 45 Ill. Ap. 374; Willard v. Zehr, 215 Ill. 148; Ludwick v. Beckamin, 15 Ind. 196; Day v. Henry, 104 Ind. 324; Perkins v. Hayward, 132 Ind. 95; Eel Co. v. State, 155 Ind. 433; Holliday v. Perry, (Indiana Appeals, 1906) 78 N. E. R. 877; Meixell v. Kirkpatrick, 29 Kan. 679; Kaw Ass'n v. Lemke, 40 Kan. 142; Wells v. Patton, 50 Kan. 732; Burnham v. Lewis, 65 Kan. 481; Hibbard v. Newman, (Maine, 1906) 64 Atl. R. 720; Gott v. Brigham, 41 Mich. 227; Bishop v. Mining Co., 62 N. H. 455; Davis v. Packard, 6 Wend. 327; Mahaney v. Penman, 4 Duer, 603; Olcott v. Mac-

WITTE, Respondent, v. FOOTE and Wife, Appellants.

Supreme Court, Wisconsin, April 23, 1895.

[90 *Wisconsin Reports*, 235.]

Winslow, J. The plaintiff brought action to enforce a mechanic's lien for lumber sold and delivered to the defendant Foote. The defendant counterclaimed for fraudulent representations as to the quality of the lumber, by which he claimed to have been damaged. The reply was practically a denial of the facts alleged in the counterclaim. Upon the trial the plaintiff moved to strike out the counterclaim because another action was pending by defendant against the plaintiff involving the same claim, and offered the record of such action in evidence. The record was objected to as incompetent and immaterial, and because no such matter was pleaded, but the objection was overruled, and the record received, and the counterclaim stricken out; and judgment was thereupon rendered for the plaintiff.

The action of the court in receiving the record of the other action, when no such defence was pleaded, was plainly error. The defence of prior action pending is an affirmative defence and must be pleaded if there be an opportunity to plead it.[1] For this error there must be a new trial.

By the Court. — Judgment reversed, and action remanded for a new trial.

lean, 73 N. Y. 223; Popfinger v. Yutte, 102 N. Y. 38; Reed v. Chilson, 142 N. Y. 152; Dake v. Miller, 15 Hun, 356; Coe v. Raymond, 22 Hun, 461; McLean v. St. Paul Co., 9 N. Y. Civ. Pro. 394; Pease v. Del. Co., 10 Daly, 459.

If the defendant puts in a plea or answer alleging the absence of jurisdiction over him, he has the burden of establishing the plea. Gardner v. Baker, 12 Mass. 36.

Federal Jurisdiction based on diverse Citizenship. If, on the face of the declaration, it does not appear that each of the parties plaintiff is a citizen of a state other than that of any of the parties defendant, the defendant may demur, move in arrest of judgment, sue out a writ of error, or move to dismiss or remand the action; furthermore the court may act of its own initiative. Sullivan v. Fulton Co., 6 Wheat. 450 (demurrer); So. Co. v. Denton, 142 U. S. 202 (demurrer); Maddox v. Thorn, 60 Fed. R. 217 (arrest of judgment); Stuart v. Easton, 156 U. S. 47 (error); Glass v. Concordia Co., 176 U. S. 207 (motion to dismiss); North Co. v. Morrison, 178 U. S. 262 (motion to remand); Gr. So. Co. v. Jones, 177 U. S. 449 (voluntary action of court).

Under the Judiciary Act of 1789, if the diverse citizenship appeared on the face of the declaration, the jurisdiction of the Circuit Court could not be questioned unless the defendant pleaded affirmatively that some one of the plaintiffs and some one of the defendants were citizens of the same state. Smith v. Kernochan, 7 How. 198; Sheppard v. Graves, 14 How. 505; De Sobry v. Nichols, 3 Wall. 420. But this practice was changed by the Act of March, 1875, and now, under U. S. Rev. St. § 914, the allegation of diverse citizenship may be met by a negative plea, and the burden of proof will be upon the plaintiff, and not, as under the Judiciary Act, upon the defendant. Roberts v. Lewis, 144 U. S. 653; or, the defendant may move to dismiss the action upon affidavits that the averment of diverse citizenship is not true. Morris v. Gilmer, 129 U. S. 315. — Ed.

[1] Smock v. Graham, 1 Blackf. 314; Sherwood v. Hammond, 4 Blackf. 504 (*semble*); Morton v. Sweetser, 12 All. 134; Somers v. Dawson, 86 Minn. 42; Harris v. Johnson, 65 N. Ca. 478; Blackwell v. Dibrell, 103 N. Ca. 270 *Accord*.

By the former English practice, the objection of a prior action pending must be taken by

HORNFAGER v. HORNFAGER.

SUPREME COURT, SPECIAL TERM, OCTOBER, 1850.

[6 *Howard, Practice Reports*, 279.]

THIS was a motion by plaintiff to set aside the proceedings in an action for partition, commenced by the defendant, on the ground that an action for the partition of the same premises had been previously commenced by the plaintiff.

PARKER, Justice. — Where it appears by the complaint that there is another action pending between the same parties for the same cause, the remedy is by demurrer (Code, § 144, *sub.* 3). When any of the matters enumerated in section 141 do not appear upon the face of the complaint, the objection may be taken by answer (Code, § 147). This is applicable to a suit brought by a defendant for partition. It is a suit between the same parties for the same cause.

The remedy is to set forth in the answer in the suit last commenced, the fact of the pendency of the first suit commenced.

Motion denied, but without costs.[1]

a plea in abatement and before pleading in bar of the action. Sperry's Case, S. Rep. 61 a; Harley v. Greenwood, 5 B. & Al. 95, 101; Bissill v. Williamson, 7 H. & N. 391, 393, 394. Pleas in abatement have been abolished in England, and, by the Judicature Act, 1873, § 24 (5), if an action is brought while another action is pending, the defendant may apply for a stay of proceedings in one or the other of the two actions. See Williams v. Hunt, [1905] 1 K. B. 512, 514. In many of the states in this country the former English practice still obtains. Stephens v. Monongahela Bank, 111 U. S. 197; Watts v. Sweeney, 127 Ind. 116; Carmian v. Cornell, 148 Ind. 83; Moore v. Spiegel, 143 Mass. 413; Near v. Mitchell, 23 Mich. 382; Engle v. Nelson, 1 Pen. & W. 442; Hartz v. Commw., 1 Grant (Pa.), 389; Commw. v. Cope, 45 Pa. 161 (*semble*); Maxwell v. First Bank, (Tex. Civ. Ap., 1894) 24 S. W. R. 848; Risher v. Wheeling Co., (West Virginia, 1905) 49 S. E. R. 1016.

In some states, pleas in abatement, as such, have been abolished, and the objection formerly taken by such pleas must be raised in the same mode as defences in bar, that is, by the defendant's answer. In consequence of this change a defendant may plead in the same answer the pendency of a prior action and defences in bar of the action. Page v. Mitchell, 37 Minn. 368; Gardner v. Clark, 21 N. Y. 399; Dewley v. Brown, 9 Hun, 461; Freeman v. Carpenter, 17 Wis. 126.

But see *contra*, Watts v. Sweeney, 127 Ind. 116; Hopwood v. Patterson, 2 Oreg. 49.

But in jurisdictions in which by statute dilatory matter may be pleaded, with defences, in the answer, the objection is waived, if not so pleaded. Hawkins v. Hughes, 87 N. Ca. 115; Blackwell v. Dibrell, 103 N. Ca. 270.

The plea or answer of a prior cause of action pending must make clear that the two causes of action are identical and between the same parties or their privies. Needham v. Wright, 140 Ind. 190. — ED.

[1] Lake Co. v. Cowles, 31 Cal. 215; Smoak v. Graham, 1 Blackf. 314; Morton v. Sweetser, 12 All. 134; Moore v. Spiegel, 143 Mass. 413; Near v. Mitchell, 23 Mich. 382; Sullings v. Goodyear Co., 36 Mich. 313; People v. Smith, 65 Mich. 1; Williams v. McGrade, 18 Minn. 82, 88; Gregory v. Kenyon, 34 Neb. 640; Percival v. Hickey, 18 Johns. 257; White v. Talmage, 35 N. Y. Super. Ct. 223; Walton v. Walton, 80 N. Ca. 26; Hawkins v. Hughes, 87 N. Ca. 115; Wright v. Maseras, 56 Barb. 521; Engle v. Nelson, 1 Pen. & W. 442; Hartz v. Commonw. 1 Grant (Pa.), 389; Commonw. v. Cope, 45 Pa. 161, 164; Findlay v. Keim, 62 Pa. 112; Drake v. Brander, 8 Tex. 351 (*semble*); Williamson v. Paxton, 13 Grat. 475, 504 *Accord.*

REQUISITES OF THE PLEA OR ANSWER. — The plea must allege

(1) that the prior action was pending at the time of the second action brought. Moore

CHARLOTTE B. DILLAYE *v.* SMITH A. PARKS.

SUPREME COURT, NEW YORK, FEBRUARY, 1860.

[31 *Barbour*, 132.]

BY the Court, BROWN, J.[1] The disability of the plaintiff, who is a married woman, did not appear upon the face of the complaint. If the defendant, therefore, intended to avail himself of the coverture as a defence to the action, he should have set it up in the answer. She might then have shown, if it was in her power, that the action concerned her separate estate, and the precise question upon which the referee decided in favor of the defendant would have been presented by the pleadings. The defendant, however, in his answer, denied each and every allegation in the complaint only, and thus waived whatever advantage he might have had by pleading the coverture.[2]

v. Spiegel, 143 Mass. 413, 416; Jenkins *v.* Peporn, 2 Johns. Cas. 312; Haight *v.* Holley, 3 Wend. 258; Porter *v.* Kingsbury, 77 N. Y. 164; Hadden *v.* St. Louis Co., 57 How. Pr. 390; Porter *v.* Fuld Co., (N. Y. Ap. Div., June, 1906) 99 N. Y. S. 815;

(2) that it was still pending at the time of plea pleaded. Nelson *v.* Foster, 5 Biss. 44; Moss *v.* Ashbrooks, 13 Ark. 369; Bancroft *v.* Eastman, 7 Ill. 259; Johnson *v.* Johnson, 114 Ill. 611; O'Donnell *v.* Raymond, 106 Ill. Ap. 146; Moore *v.* Kessler, 59 Ind. 152 (but see Lee *v.* Hafley, 21 Ind. 98; Hale *v.* Miller, 131 Ind. 80); Hawley *v.* Chicago Co., 71 Iowa, 717; Lewis *v.* Higgins, 52 Md. 614; Wales *v.* Jones, 1 Mich. 254; Pew *v.* Yoare, 12 Mich. 16; Phelps *v.* Winona Co., 37 Minn. 485; O'Beirne *v.* Lloyd, 1 Sweeny, 19; Hopwood *v.* Patterson, 2 Oreg. 49; Toland *v.* Tichenor, 3 Rawle, 320; Gardner *v.* Kiehl, 182 Pa. 194; Polsey *v.* White Co., 19 R. I. 482;

(3) the identity of the cause of action and of the parties. 1 Encyc. Pl. & Pr. 757–763;

(4) the designation of the court in which the prior action is pending. Miller *v.* Rigney, 16 Ind. 327; Fahey *v.* Brannagan, 56 Me. 42; Berger *v.* Moessinger, 5 Oh. C. C. 432;

(5) a reference to the record of the prior action. Clifford *v.* Cony, 1 Mass. 495; Bullock *v.* Bolles, 9 R. I. 501; Polsey *v.* White Co., 19 R. I. 492.

But see Ward *v.* Dewey, 12 How. Pr. 193, 196. — ED.

[1] Only so much of the case as relates to the coverture of the plaintiff is given. — ED.

[2] Morgan *v.* Painter, 6 T. R. 265; Walker *v.* Golling, 11 M. & W. 78; Powell *v.* Glenn, 21 Ala. 458; Morningstar *v.* Querens, 142 Ala. 186; Laster *v.* Toliver, 11 Ark. 450; Baldwin *v.* Second St. Co., 77 Cal. 390; Loomis *v.* Hollister, 75 Conn. 275; Albert *v.* Freas, (Md., 1906) 64 Atl. R. 282; Hayden *v.* Attleborough, 7 Gray, 338; Hubert *v.* Fera, 99 Mass. 198, 199; Jaha *v.* Belleg, 105 Mass. 208, 211; Simmons *v.* Thomas, 43 Miss. 31; Jordan *v.* Cummings, 43 N. H. 134; Dutton *v.* Rice, 53 N. H. 496; Stevens *v.* Bostwick, 2 Hun, 423; Beville *v.* Cox, 109 N. Ca. 265; Hoop *v.* Plummer, 14 Oh. St. 449; Woog *v.* Barnhart, 41 Oh. St. 177; Wilson *v.* Hamilton, 4 S. & R. 238; Sheidle *v.* Weishlee, 16 Pa. 134; Bates *v.* Stevens, 4 Vt. 545.

The rule is the same as to coverture of the defendant. Atwood *v.* Higgins, 76 Me. 423; Ross *v.* Linder, 12 S. Ca. 592.

It is for the plaintiff to reply, and not for the defendant in his plea of abatement to deny in advance, exceptional circumstances permitting a married woman to sue alone. Dutton *v.* Rice, 53 N. H. 496. But see Ferris *v.* Holmes, 8 Daly, 217, *contra*. — ED.

SMITH v. ALLEN.

SUPREME COURT, INDIANA, JUNE 7, 1861.

[16 *Indiana Reports*, 316.]

APPEAL from the Wells Common Pleas.

WORDEN, J. This was an action by the appellee against the appellant, to recover the value of certain personal property, brought before a justice, and appealed to the Common Pleas, in which Court there was a verdict and judgment.

The fifth[1] error is that the plaintiff was proved to be a minor, and therefore could not maintain an action in her own name, without a next friend. This objection was made for the first time on the motion for a new trial. It was then too late. Pleading to the merits and going to trial, was a waiver of any objection on that ground, and an admission of the plaintiff's capacity to sue.[2]

[1] Only so much of the case is given as relates to this point. — ED.

[2] Cowne v. Boules, 1 Salk. 93, 205; Howland v. Wallace, 81 Ala. 238; *In re* Cahill, 74 Cal. 52; Graham v. Cain, 2 Harringt. 97; Bartlett v. Batts, 14 Ga. 539; Edwards v. Beall, 75 Ind. 401; Albert v. State, 66 Ind. 325; Blood v. Harrington, 8 Pick. 552; Jaha v. Belleg, 105 Mass. 208, 211; Smith v. Carney, 127 Mass. 179; Sick v. Mich. Ass'n, 49 Mich. 50; Shuck v. Hagar, 24 Minn. 339 (objection by special motion, not by general denial); Gully v. Dunlap, 24 Miss. 410; Robinson v. Hood, 67 Mo. 660 (*semble*); Young v. Young, 3 N. H. 345; Smith v. Van Houten, 9 N. J. 381; Schemerhorn v. Jenkins, 7 Johns. 373; Fellows v. Niver, 18 Wend. 563; Treadwell v. Bruder, 3 E. D. Sm. 596; Parks v. Parks, 19 Abb. Pr. 161; Rutter v. Puckhofer, 9 Bosw. 638; Smart v. Haring, 14 Hun, 276; Sims v. N. Y. College, 35 Hun, 344; Rima v. Rossie Works, 47 Hun, 153 (discrediting Imhoff v. Wurts, 9 N. Y. Civ. Pro. R. 48); *Re* Watson, 2 Dem. 642, 647; Hicks v. Beam, 112 N. Ca. 642; Woog v. Barnhart, 41 Oh. St. 177; Heft v. McGill, 3 Pa. St. 256; Drago v. Moso, 1 Speers, 212; Moke v. Fellman, 17 Tex. 367; Hepp v. Hueffner, 61 Wis. 148; Webber v. Ward, 94 Wis. 605 (*semble*) *Accord*. — ED.

Other instances of personal incapacity must be pleaded specially or the objection is waived.

Plaintiff an alien Enemy. — Shivers v. Wilson, 5 Har. & J. 130, 132 (*semble*); Burnside v. Matthews, 54 N. Y. 78.

Plaintiff an Indian. — Jaha v. Belleg, 105 Mass. 208; Jemmerson v. Kennedy, 55 Hun, 47.

Plaintiff a Lunatic or Idiot. — Ætna Co. v. Sellers, 154 Ind. 370; Lung v. Whidden, 2 N. H. 435; Blackwell v. Mortgage Co., 65 S. Ca. 105; Hoyt v. Hoyt, 58 Vt. 538.

Non-Residence of Plaintiff. — Gurney v. Grand Trunk Co., 37 N. Y. St. Rep. 557; Dutcher v. Dutcher, 39 Wis. 651.

Non-Qualification of District Attorney. — Board v. Hackett, 21 Wis. 613.

Guardian. — Plath v. Braunsdorf, 40 Wis. 107.

Failure to file Articles of Incorporation. — Ontario Bank v. Tibbits, 80 Cal. 68.

Failure of Corporation to appoint resident Agent. — Weaver Co. v. R. I. Co., (R. I. 1905) 61 Atl. R. 426.

Action premature. — That an action is brought too soon because of some statute postponing legal proceedings for a certain time, as, for instance, in the case of claims against executors, is matter for an affirmative dilatory plea. Goodrich v. Atlanta Ass'n, 96 Ga. 803; Pitts Co. v. Commercial Bank, 121 Ill. 582; Bacon v. Schepflin, 53 Ill. Ap. 17; Clements v. Swain, 2 N. H. 475; Kittridge v. Folsom, 8 N. H. 98.

Misnomer. — *Misnomer* is an affirmative dilatory plea or answer. Mayor v. Bolton, 1 B. & P. 40; Jowell v. Charnock, 6 M. & Sel. 45; McCreery v. Everding, 54 Cal. 168; Hammond v. Starr, 79 Cal. 556; Augusta Co. v. Tennville, 119 Ga. 804; Rhodes v. Louisville Co., 121 Ga. 551, 553; McIntosh Co. v. Aiken, 123 Ga. 647; Chicago Co. v. Heinrich,

Per Curiam. The judgment is affirmed, with costs, and 5 per cent. damages.

157 Ill. 388, 57 Ill. Ap. 399; Board v. Huffman, 134 Ind. 1; Gilbert v. Nantucket, 5 Mass. 97.

It is to be remembered that in many jurisdictions pleas or answers in abatement have been abolished. — Ed.

CHAPTER VI.

SEVERAL PLEAS.

F. WENDLING, RESPONDENT, *v.* G. M. PIERCE, APPELLANT.

SUPREME COURT, NEW YORK, MARCH TERM, 1898.

[27 *New York Appellate Division Reports*, 517.]

ADAMS, J. The plaintiff, a real estate broker, brings this action to recover the amount claimed to be due him by reason of his employment by the defendant to negotiate the exchange of his farm of about 400 acres for certain real estate in the city of Buffalo.

The answer of the defendant denies any employment of or indebtedness to the plaintiff. It then admits the execution of the contract for the exchange of the property referred to in the complaint and alleges that the defendant was induced to enter into the same by reason of the false statements and representations made by the plaintiff as the agent or representative ot one Harmon Frost, the other party to the contract, and that when he, the defendant, discovered the fraud which had been practiced upon him he refused to complete the exchange and so notified both the plaintiff and Frost.

The allegations respecting the representations made by the plaintiff were regarded as irrelevant by the Special Term, and it is from the order striking them from the answer that this appeal is brought. The theory upon which this order was granted was that the allegations of the defendant's answer were inconsistent with each other, as possibly they were; but we do not understand that consistency is any longer required of a defendant in pleading several separate and distinct defences.

The former Code of Procedure (§ 150) permitted a defendant to set forth in his answer as many defences and counterclaims as he might have; and under this system of pleading it was repeatedly held that defences which were utterly inconsistent with each other might be properly united in the same pleading, as, by way of illustration, a denial of speaking the words, and an allegation that the words spoken were true, in an action of slander (Buhler *v.* Wentworth),[1] or a denial and a justification of the taking in an action of replevin. Hackley *v.* Ogmun.[2]

When the present Code of Civil Procedure was enacted, in 1876, an

[1] 17 Barb. 649.

[2] 10 How. Pr. 44.

attempt was made to impose a limit upon a defendant's right to plead separate and distinct defences by requiring that "they must not be inconsistent with each other." (Laws of 1876, chap. 448, § 507.) But, in 1879 (chap. 542), the words above quoted were stricken from the section, so that now, as formerly, a defendant, without any restriction, may set forth in his answer "as many defences or counterclaims, or both, as he has" (Code Civ. Proc. § 507); and it matters not whether they are consistent or inconsistent with each other. Bruce *v.* Burr;[1] Goodwin *v.* Wertheimer;[2] Societa Italiana *v.* Sulzer.[3]

A defendant is sometimes required to elect upon which of two inconsistent defences he will rely, but this is done only where, from the very nature of the case, it is impossible for him to avail himself of both. Breunich *v.* Weselman;[4] Hollenbeck *v.* Clow.[5]

In these modern times the tendency is unmistakably towards liberality in our system of pleading, and the courts are disposed to afford suitors ample opportunity to so frame their issues as to be able to litigate any and all matters in difference between them. We see no sufficient reason for making the present case an exception to this rule and are, therefore, of the opinion that the order appealed from should be reversed.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.[6]

[1] 67 N. Y. 237. [2] 99 id. 149. [3] 138 id. 468.
[4] 100 N. Y. 609. [5] 9 How. Pr. 289.

[6] Tribner *v.* Duerr, 1 B. N. C. 266; Berdan *v.* Greenwood, 3 Ex. Div. 251, 255 (unless embarrassing; but see Spurr *v.* Hall, 2 Q. B. D. 615); Hawkesley *v.* Bradshaw, 5 Q. B. Div. 302; *Re* Morgan, 35 Ch. Div. 492; Buhne *v.* Corbett, 43 Cal. 264 (the contrary opinions in Klink *v.* Cohen, 13 Cal. 623, and Uridias *v.* Morrell, 25 Cal. 31, must be regarded as superseded); Banta *v.* Siller, 121 Cal. 414; Butler *v.* Delafield, 1 Cal. Ap. 414; People *v.* Lothrop, 3 Colo. 428, 448; Hummel *v.* Moore, 25 Fed. 380 (Colorado law); Hill *v.* Groesbeck, 29 Colo. 161 (*semble*); Conrey *v.* Nichols, (Colo., 1906) 84 Pac. R. 470; Weston *v.* Lumley, 33 Ind. 486; Fudge *v.* Marquell, (Indiana, 1905); 73 N. E. R. 895; Warshaky *v.* Anchor Co., 98 Iowa, 221; Runkle *v.* Hartford Co., 99 Iowa, 414; Thorson *v.* Baker, 107 Iowa, 49; Ball *v.* Gussenhoven, 29 Mont. 321; Potter *v.* Lohse, (Montana, 1904) 77 Pac. R. 419; Mott *v.* Burnett, 2 E. D. Sm. 50; Stiles *v.* Comstock, 9 How. Pr. 48; Hollenbeck *v.* Clon, 9 How. Pr. 289 (discrediting Schneider *v.* Shultz, 4 Sandf. 664, and Arnold *v.* Dimon, 4 Sandf. 680); Kellogg *v.* Baker, 15 Abb. Pr. 286; Kelly *v.* Bernheimer, 3 Th. & C. 140; Bruce *v.* Burr, 67 N. Y. 237; Societa Italiana *v.* Sulzer, 138 N. Y. 468 (*semble*); U. S. Co. *v.* Schlegel, 143 N. Y. 537; Sheldon *v.* Heaton, 78 Hun, 50; Woods *v.* Reiss, 78 Hun, 78; Conklin *v.* Woodbury Inst., 87 N. Y. Ap. Div. 610; Kelly *v.* Supreme Council, 46 N. Y. Ap. Div. 79; Schlesinger *v.* Wise, (New York, Ap. Div., July, 1905) 94 N. Y. S. 718; Schlesinger *v.* McDonald, (New York, Ap. Div., July, 1905) 94 N. Y. S. 721; Sinian *v.* Deutsch, 12 N. Y. Misc. Rep. 213; Ten Broeck *v.* Orchard, 79 N. Ca. 518; Threadgill *v.* Commissioners, 116 N. Ca. 616, 627 (*semble*); McLamb *v.* McPhail, 126 N. Ca. 218 (*semble*); Peters *v.* Ulmer, 74 Pa. 402; Drown *v.* Allen, 91 Pa. 393; Ferber *v.* Gazette Ass'n, (Pennsylvania, 1905) 61 Atl. R. 939; Millan *v.* South. Co., 54 S. Ca. 485; Stebbins *v.* Lardner, 2 S. Dak. 127; Lawrence *v.* Peck, 3 S. Dak. 645 (*semble*); Green *v.* Hughitt, 5 S. Dak. 452 (*semble*); Hardman *v.* Kelley, (South Dakota, 1905) 104 N. W. R. 272; Fowler *v.* Davenport, 21 Tex. 626; King *v.* Davis, 137 Fed. 198 (Virginia law); Lake Co. *v.* Call, 3 Wyo. 135 *Accord*.

Hatch *v.* Thompson, 67 Conn. 74; Fernside *v.* Rood, 73 Conn. 83; Church *v.* Pearce, 75 Conn. 350; Jones *v.* Forehand, 89 Ga. 520; Caldwell *v.* Ruddy, 2 Idaho, 1 (*semble*); Murphy *v.* Russell, 8 Idaho, 133; Roomy *v.* Tierney, 82 Ky. 253; Lane *v.* Bryant, 100 Ky. 138; Hollingsworth *v.* Warnock, 112 Ky. 96 (Harper *v.* Harper, 10 Bush, 447 *contra* is overruled);

SWEET v. TUTTLE.

COURT OF APPEALS, NEW YORK, DECEMBER, 1856.

[14 *New York Reports*, 465.]

THE plaintiff, in his complaint, alleged that in November, 1847, he was employed by the defendant in and about saving the wreck of the steam propeller Phœnix, on Lake Michigan, and that he then, at the instance and request of the defendant, performed services and expended moneys in and about saving said wreck, to the value and amount of about $160; for which sum he demanded judgment. The

Bomar v. Railroad Co., 42 La. An. 985; Derby v. Gallup, 5 Minn. 119; Cook v. Finch, 19 Minn. 407; Atterberry v. Powell, 29 Mo. 429; Cobbe v. McDaniel, 33 Mo. 363; Adams v. Trigg, 37 Mo. 141; Darrett v. Donnelly, 38 Mo. 492; Smith v. Culligan, 74 Mo. 387; Vette v. Evans (Missouri, 1905), 86 S. W. R. 504; School Dist. v. Holmes, 16 Neb. 486; Omaha Co. v. Diercks, 43 Neb. 473; Dunn v. Bozarth, 59 Neb. 244 (*semble* — waiver); Oakes v. Ziemer, 61 Neb. 6; Green v. Tierney, 62 Neb. 561; McCormick Co. v. Hiatt (Nebraska, 1903), 95 N. W. R. 627 (*semble* — waiver); Davis v. Ford, 15 Wash. 107. *Contra.*

In the following cases also the practice of pleading inconsistent defences was condemned, but the defences combined in the particular case were adjuged to be consistent in fact. Bell v. Brown, 22 Cal. 671 (denial and statute of limitations); Willson v. Cleveland, 30 Cal. 192 (denial and statute of limitations); Barnes v. Scott, 29 Fla. 285 (denial of contract and want of consideration); Cole v. Wordson, 32 Kan. 272; Goodman v. Nichols, 44 Kan. 22; DeLissa v. Fuller, 59 Kan. 319 (denial of contract, and fraud); Chase v. House, 64 Kan. 320; Leavenworth v. Waller, 65 Kan. 514 (denial of negligence — contributory negligence); Welch v. Atchison Co., 66 Kan. 792; Fowler v. Brooks (Kansas, 1902), 70 Pac. R. 600; Cincinnati Co. v. Wright, 11 Ky. L. Rep. 233; Weingartner v. Louisville Co., (Kentucky, 1897) 42 S. W. R. 839 (denial of negligence — contributory negligence); Smith v. Doherty, 119 Ky. 616 (*non est factum* — no consideration); First Bank v. Wisdom, 111 Ky. 135 (like preceding case); Spencer v. Society, (Kentucky, 1901) 64 S. W. R. 468 (like preceding case); Robinson v. Hill, (Kentucky, 1902) 66 S. W. R. 623 (breach of warranty — accord and satisfaction); Booth v. Sherwood, 12 Minn. 426 (*semble* — denial of title — license); Conway v. Wharton, 13 Minn. 458 (accord and satisfaction — statute of limitations); Steenerson v. Waterbury, 52 Minn. 211 (denial of contract — payment); Hausman v. Mulkeran, 68 Minn. 48; Bank v. Cain, 89 Minn. 473 (denial of contract — fraud); Nelson v. Brodhack, 44 Mo. 596, 599 (denial of slander — truth); Rhine v. Montgomery, 50 Mo. 566; Ledbetter v. Ledbetter, 88 Mo. 60 (denial of title — equitable defence); Fisher v. Stevens, 143 Mo. 181 (denial — purchase under void sale); Patrick v. Boonville Co., 17 Mo. Ap. 462 (denial of contract — payment); Lee v. Dodd, 20 Mo. Ap. 271 (illegality — performance of contract); State v. Samuels, 28 Mo. Ap. 649; Cavitt v. Tharp, 30 Mo. Ap. 131 (denial of ownership of note — payment); State v. Moss, 35 Mo. Ap. 441; Schuchman v. Heath, 38 Mo. Ap. 280 (denial of contract — statute of limitations); Grier Co. v. Dockstader, 47 Mo. Ap. 42 (illegality — misconduct of plaintiff); Gaar v. Black, (Kan. Ap. 1906) 96 S. W. R. 683 (general denial — payment); Kline v. Kline, 14 Mont. 361 (lease from month to month — eviction); Blodgett v. McMurtry, 39 Neb. 210 (denial — estoppel); Home Co. v. Decker, 55 Neb. 346 (denial — destruction of property by insured); Cate v. Hutchinson, 58 Neb. 232 (denial — unfair price); Citizens' Bank v. Closson, 29 Oh. St. 78; Famura Co. v. Frick, 29 Oh. St. 466; Parry v. Parry, 30 Oh. St. 600 (denial — fraud); Ins. Co. v. Carnahan, 63 Oh. St. 258 (breach of condition — refusal to arbitrate); Booco v. Mansfield, 66 Oh. St. 121 (denial — no consideration); McDonald v. American Co., 17 Oreg. 626 (denial of contract — misconduct of plaintiff); Veazey v. Humphreys, 27 Oreg. 515 (*semble*); Randall v. Simmons, 40 Oreg. 554; Burnham v. Call, 2 Utah, 433 (*semble*); Pugh v. Oregon Co., 14 Wash. 331 (denial of negligence — contributory negligence); Corbitt v. Harrington, 14 Wash. 197 (denial — fraud); Lord v. Horr, 30 Wash. 477 (denial — mistake); Irwin v. Buffalo Co. (Washington, 1905), 81 Pac. R. 849); South Co. v. Harte, 95 Wis. 592; Gates v. Avery, 112 Wis. 271 (general denial — payment); Kerslake v. McInnis, 113 Wis. 659, 672. — ED.

defendant, by his answer, denied the complaint; for a second and further answer he alleged that the labor and services in the complaint referred to, and the moneys expended, therein mentioned, were done and performed, laid out and expended, for and at the request of the defendant jointly with seven other persons who were named, and it was alleged that they were living, and should have been joined as defendants in the action. The plaintiff replied, denying the facts stated in the second answer. The cause was referred to and tried before a referee in 1853.

As a conclusion of law the referee decided that the proper parties defendants not having been joined, the defendant was not indebted to the plaintiff on account of the matters in the complaint demanded. Upon this report judgment was entered in favor of the defendant for his costs in the action. This judgment was affirmed at a general term in the eighth district. The plaintiff appealed to this court.[1]

COMSTOCK, J. The first question is, whether a defendant, along with other defences, may set up in his answer the non-joinder of other parties who ought to have been sued with him. Under the former practice, the non-joinder of defendants could be pleaded only in abatement, and could not be joined with a plea in bar; but under the Code there is no classification of answers or defences corresponding with the distinction between pleas in abatement and in bar. That distinction is entirely gone with the system to which it belonged. The defendant now answers but once, and he may set forth as many defences as he thinks he has, but must state them separately. Code, § 150. Among these is that of non-joinder, where it does not appear on the face of the complaint. (§ 147.) This is to be tried like any other defence, and its effect upon the suit is the same. A record showing that such a defence has been pleaded and tried will not be a bar in another action between the proper parties, unless it be made to appear that the plaintiff was defeated on the merits of the controversy. But in the pending suit the meaning of the Code plainly is that it may be pleaded and tried as other defences are.[2]

The judgment must be affirmed.

[1] The statement is abridged and only a part of the opinion is given. — ED.

[2] Erb v. Perkins, 32 Ark. 428 (failure to give twenty days' notice before suing); Union Co. v. Craddock, 59 Ark. 593 (no jurisdiction of person of defendant); Trigg v. Ray, 64 Ark. 150 (*semble* — failure to file affidavit); Thompson v. Greenwood, 28 Ind. 327 (non-joinder of parties defendant); Bond v. Wagner, 28 Ind. 462 (non-joinder of parties defendant — but by statute matters in abatement and bar may not be joined in the same answer. See Indiana cases in the next paragraph); Garretson v. Ferrall, 92 Iowa, 728; Page v. Mitchell, 37 Minn. 368 (pendency of prior action); Little v. Harrington, 71 Mo. 390 (non-joinder of parties plaintiff); Byler v. Jones, 79 Mo. 261 (no jurisdiction of defendant); Y. M. C. A. v. Dubach, 82 Mo. 475 (legal incapacity of plaintiff); Cohn v. Lehman, 93 Mo. 574 (*semble* — criticising earlier cases to the contrary); Coombs Co. v. Block, 130 Mo. 668 (statutory plea in abatement of an attachment); Johnson v. Detrick, 125 Mo. 243 (no jurisdiction of the *res* in suit); Meyer v. Phœnix Co., 184 Mo. 481 (no jurisdiction of person); Little Rock Co. v. So. Co., (Mo. 1906) 93 S. W. R. 944 (no jurisdiction of the person); McIntire v. Calhoun, 27 Mo. Ap. 513 (no jurisdiction of defendant); Hurlburt v. Palmer, 39 Neb. 158 (no jurisdiction of defendant); Templin v. Kimsey, (Neb. 1905) 105 N. W. R. 89; Bridge v. Payson, 5 Sandf. 210

STATE OF SOUTH DAKOTA *v.* J. T. McCHESNEY.

SUPREME COURT, GENERAL TERM, NEW YORK, JUNE, 1895.

[87 *Hun*, 293.]

APPEAL by the plaintiff, the State of South Dakota, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of April, 1895, denying its motion to strike out certain parts of the answer of the defendant, John T. McChesney.

Per Curiam. This action was begun February 11, 1895, to recover on a bond executed by the defendant as surety for William W. Taylor, the treasurer of the plaintiff. It is alleged that the treasurer is a defaulter to the State in a sum exceeding the penalty of the bond. The answer does not contain a general denial — a denial of all the allegations in the complaint — but there are several specific denials set forth in the first defence. In all the other defences, second to eighth, inclusive, new matter is set up as defences, and in all of them the following words appear, which the plaintiff moves to strike out: "Reiterates the denials of the first defence and alleges." Then follows the new matter.

An affirmative defence, not including a counterclaim, necessarily admits and avoids the cause of action set out in the complaint, and a denial, general or specific, cannot be included and form a part of such defence. A denial, general or specific, may be pleaded in the same answer as a separate defence, but not as a part of a plea of new matter. "It is elementary that a defence of new matter should be pleaded; and as new matter must of necessity be a distinct defence

(non-joinder of parties defendant); Mayhew *v.* Robinson, 10 How. Pr. 162 (non-joinder of parties defendant); Roberts *v.* Lewis, 144 U. S. 653 (Nevada law — no jurisdiction); Gardner *v.* Clark, 21 N. Y. 399 (pendency of former suit); Dawley *v.* Brown, 9 Hun, 461 (pendency of former suit); Hamburger *v.* Baker, 35 Hun, 455 (no jurisdiction over defendant); Curtis *v.* Piedmont Co., 109 N. Ca. 401, 405 (*semble*); Freeman *v.* Carpenter, 17 Wis. 126 (pendency of prior suit); Dutcher *v.* Dutcher, 39 Wis. 651 (non-residence of plaintiff); Board *v.* Van Stralen, 45 Wis. 675 (*semble*); Hooker *v.* Greene, 50 Wis. 271 (*semble*) *Accord.*

Bailey *v.* Dozier, 6 How. 23 (plea to jurisdiction waived by plea of non assumpsit); Sheppard *v.* Graves, 14 How. 505; Marshall *v.* Otto, 59 Fed. R. 249 (pendency of prior action; New Decatur *v.* Smith, (Ala. 1906) 41 So. R. 1028; Field *v.* Malone, 102 Ind. 251 (misjoinder of plaintiffs); Glidden *v.* Henry, 104 Ind. 278 (*semble*); Brink *v.* Reid, 122 Ind. 257 (*semble*); Watts *v.* Sweeney, 127 Ind. 116 (prior action pending); Moore *v.* Harmon, 142 Ind. 555 (non-joinder of plaintiffs); Carmien *v.* Cornell, 148 Ind. 83; Eel Co. *v.* State, 155 Ind. 433 (no jurisdiction over person of defendant); Meixell *v.* Kirkpatrick, 29 Kan. 679 (but see Wells *v.* Patten, 50 Kan. 732); Curd *v.* Lewis, 1 Dana, 351, 353 (pendency of prior action); Clark *v.* Pishon, 31 Me. 503; Stewart *v.* Smith, 98 Me. 104; Morton *v.* Sweetser, 12 All. 134, 137 (*semble*); Near *v.* Mitchell, 23 Mich. 382; Hopwood *v.* Patterson, 2 Oreg. 49 (pendency of prior suit); Derkeny *v.* Belfils, 4 Oreg. 258 (action premature); Lassas *v.* McCarty, (Oreg. 1906) 84 Pac. R. 76; Compton *v.* Western Co., 25 Tex. Sup. 67 (no jurisdiction of person of defendant) *Contra.*

In jurisdictions in which the ancient common law practice still obtains, pleas in abatement and pleas in bar cannot be pleaded together. Putnam Co. *v.* Eliot Co., (Florida, 1905) 39 So. R. 193. But see Gardner *v.* James, 5 R. I. 235. — ED.

from a denial, it follows that it cannot properly be associated or mingled up with denials, general or specific, in one paragraph or plea." (Pom. Code Rem. § 690.) By permitting a general or specific denial to be joined with an affirmative defence, a plaintiff would be effectually deprived of the right to demur to the new matter pleaded as an affirmative defence. In case an action should be brought to recover on a contract for the payment of money, and the defendant should plead as a separate defence that the contracting parties being more than fifty years of age, the contract was void, and then conclude the new matter with a general or specific denial, the plaintiff could not safely demur to the defence. In the case supposed the plaintiff could move to strike out the new matter as frivolous; but in case the new matter should require argument to show that the defence was frivolous, the validity of the defence could not be tested on motion.

The order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

Present — VAN BRUNT, J. P., O'BRIEN, and FOLLETT, JJ.[1]

[1] Coble v. Eltzroth, 125 Ind. 429; Racer v. State, 131 Ind. 393; Board v. Woodring, 12 Ind. Ap. 173; Adams v. Trigg, 37 Mo. 141; Flechter v. Jones, 64 Hun, 274 (*semble*); White v. Koster, 89 Hun, 483 (*semble*); Winteringhaus v. Whitney, 1 N. Y. Ap. Div. 219 (*semble*); Stieffel v. Tolhurst, 55 N. Y. Ap. Div. 532; Waltham Co. v. Brady, 67 N. Y. Ap. Div. 102; Uggla v. Brokaw, 77 N. Y. Ap. Div. 310; Eells v. Dumary, 84 N. Y. Ap. Div. 105, 108; De Witt v. Brill, 6 N. Y. Misc. Rep. 44; Zacharias v. French, 10 N. Y. Misc. Rep. 202; Green v. Brown, 22 N. Y. Misc. Rep. 279; Fay v. Hauerwas, 26 N. Y. Misc. Rep. 421; Cruikshank v. Press Co., 32 N. Y. Misc. Rep. 152; Carter v. Eighth Bank, 33 N. Y. Misc. Rep. 128; Burkart v. Bennett, 35 N. Y. Misc. Rep. 318; Sanford v. Rhoads, 39 N. Y. Misc. Rep. 548; Blaut v. Blaut, 41 N. Y. Misc. Rep. 572, *Accord.*

Compare Rogers v. Morton, (N. Y. Misc. Rep. March, 1906) 95 N. Y. S. 49.

But the defendant may answer in one paragraph in denial to a part and in confession and avoidance to another part of a single cause of action. State v. St. Paul Co., 92 Ind. 42; Colglazier v. Colglazier, 117 Ind. 460; Childers v. First Bank, 147 Ind. 430; Weser v. Welty, 18 Ind. Ap. 664; Unger v. Mellinger, (Indiana Ap. 1906) 77 N. E. R. 814.

Defences in separate Paragraphs. If several defences are united in the same answer they should be in distinct paragraphs duly numbered. Lyman v. Corwin, 27 Ark. 560; Taylor v. Purcell, 60 Ark. 606; Church v. Pearce, 75 Conn. 350; Cronk v. Cole, 10 Ind. 485; Kimball v. Christie, 55 Ind. 140; Woolen v. Whiteacre, 73 Ind. 198; Ray v. Moore, 24 Ind. Ap. 480, 489; Donahue v. Prosser, 10 Iowa, 276; Morgan v. Ins. Co., 37 Iowa, 359; Truitt v. Baird, 12 Kan. 420, 423; Mundy v. Wright, 26 Kan. 173; Runkle v. Hartford Co., 99 Iowa, 414, 418; Cincinnati Co. v. Wright, 11 Ky. L. Rep. 234; Bass v. Upton, 1 Minn. 406 (*semble*); Benedict v. Seymour, 6 How. Pr. 298; Lippincott v. Goodwin, 8 How. Pr. 242; Bridge v. Payson, 5 Sandf. 210; Fay v. Hauerwas, 26 N. Y. Misc. Rep. 421; Carpenter v. Mergert, 39 N. Y. Misc. Rep. 634; Gardner v. McWilliams, 42 Oreg. 14.

But the objection is waived if the plaintiff demurs or replies to the answer, without making a motion that the defences be separately paragraphed. U. S. v. Ordway, 30 Fed. R. 30; Bass v. Upton, 1 Minn. 406; Fleishman v. Meyer, (Oreg. 1905) 80 Pac. R. 209; Forbes v. Petty, 37 Neb. 899.

DENNISON v. DENNISON.

SUPREME COURT, GENERAL TERM, NEW YORK, JANUARY, 1854.

[9 *Howard Practice Reports*, 246.]

THIS is an appeal from an order made at special term held by Justice CRIPPEN, at Cortland, in July, 1853. The plaintiff made a motion to strike out certain portions of the amended answer to the complaint, on the ground of redundancy, &c., which motion was granted, with $10 costs. Defendant appeals.

By the Court — SHANKLAND, J. The defendant commences his answer by a general denial of each and every allegation in the complaint; and then goes on to deny specifically nearly all of the allegations in detail. This he is not authorized to do by the Code. Section 149 allows a defendant to elect whether he will answer by a general or a specific denial, and having elected, he is bound by it. He cannot answer in both modes. The general denial puts in issue every allegation of the complaint as fully as the specific denial could. The specific denials were unnecessary, and therefore redundant. The learned justice did right in striking out those specific denials.

The order appealed from is affirmed, with $10 costs.[1]

[1] Woskett v. Brown, 13 Ind. 83; Board v. Hill, 122 Ind. 215; De Forest v. Butler, 62 Iowa, 78; School District v. Holmes, 16 Neb. 486; Lippincott v. Goodwin, 8 How. Pr. 242; Cruikshank v. Press Co., 32 N. Y. Misc. Rep. 152 *Accord*.

But see Homan v. Byrne, 14 N. Y. W. Dig. 175. — ED.

CHAPTER VII.

REPLIES OR REPLICATIONS.

S. G. BABCOCK *v.* THE FARMERS' AND DROVERS' BANK.

SUPREME COURT, KANSAS, JANUARY TERM, 1891.

[46 *Kansas Reports*, 548.]

OPINION by GREEN, C.: The Farmers' and Drovers' Bank sued the plaintiffs in error in the district court of Kingman county, upon a promissory note for $1776.50. S. G. Babcock answered, admitting the execution of the note, and set up the affirmative defence that the note was void for want of consideration; that he had, at different times and in different sums, borrowed money from the Farmers' and Drovers' Bank, and had agreed to pay usurious interest for the use of the money so borrowed; that the whole sum of such usurious interest agreed to be paid by him amounted to the sum stated in the note sued on; and that this note was executed for the usurious interest over and above the legal rate of interest on the various sums loaned to him. This answer was verified, and before the trial the district court made an order permitting the defendants below, Alexander and Culver, to adopt the pleading filed by Babcock as their answer. No reply was filed by the plaintiff below to this answer. The defendants asked for judgment upon the pleadings, which was overruled, and the court ordered the case to be tried, without a reply to the answer, over the objection of the defendants; a jury was impaneled and sworn, and the plaintiff introduced its note in evidence, which was objected to. The defendants then offered in evidence the verified answer filed by Babcock, which was objected to, and the trial court sustained the objection. No other evidence was offered. The court instructed the jury to return a verdict for the plaintiff for the amount due on the note sued on. A verdict was returned for the sum of $1952.37, and a judgment was rendered for that amount, in favor of the plaintiff below. The plaintiffs in error bring the case to this court.

It is claimed that the answer of the defendants below contained such material allegations of new matter or affirmative defence as required a reply from the plaintiff to put the same in issue, and, having failed to reply, it admitted the same to be true, and that the defendants' motion for judgment on the pleadings should have been sustained. The reply was not waived, and we think it was error for the trial court to proceed without requiring a reply to the new mat-

ter set up in the answer. Section 128 of the civil code provides that every material allegation of new matter in the answer not controverted by the reply shall, for the purposes of the action, be taken as true. The defence set up was that the entire consideration of the note was usurious, which, if true, was a complete defence to the note set out in the petition. We think a reply was necessary, and, none having been filed, we are of the opinion that the plaintiffs in error should have had judgment upon the pleadings. Scott *v.* Morning.[1] It is unnecessary for us to notice the other errors. We recommend a reversal of the judgment, and that a new trial be granted.

By the Court: It is so ordered.

All the Justices concurring.[2]

DAVIS *v.* PAYNE AND SHADDUCK.

SUPREME COURT, IOWA, DECEMBER 13, 1876.

[45 *Iowa Reports*, 194.]

ACTION upon a promissory note against the defendants as joint makers. Default was entered against the defendant, Payne, for want of a defence. Shadduck answered, setting up in substance that he was surety, and that there was an extension of time given by Davis to

[1] 18 Kan. 489.

[2] Briggs *v.* Bruce, 9 Colo. 283; 2 Denver Co. *v.* Nestor, 10 Colo. 403; McCarty *v.* Roberts, 8 Ind. 150; Kimberling *v.* Hall, 10 Ind. 407; Kimberlin *v.* Carter, 49 Ind. 111 (*semble*); Ballanger *v.* Lantier, 15 Kan. 608; Board *v.* Shaw, 15 Kan. 33; Hixon *v.* George, 18 Kan. 253; Chicago Co. *v.* Frazier, 66 Kan. 422 (*semble*); Evans *v.* Stone, 80 Ky. 78; White *v.* Louisville Co., 15 Ky. L. Rep. 49; Louisville Co. *v.* Mayfield, 18 Ky. L. Rep. 224; Ill. Co. *v.* Nall, 21 Ky. L. Rep. 281; Brooks *v.* Louisville Co., 24 Ky. L. Rep. 1318; Craig *v.* Cook, 28 Minn. 232 (*semble*); Webb *v.* O'Donnell, 28 Minn. 369 (*semble*); Olson *v.* Tvete, 46 Minn. 235 (*semble*); Robinson *v.* Suter, 15 Mo. Ap. 599, Nelson *v.* Wallace, 48 Mo. Ap. 193; Cordner *v.* Roberts, 58 Mo. Ap. 440; Holke *v.* Herman, 87 Mo. Ap. 125, 132; Childers *v.* Stone Co., 99 Mo. Ap. 269 (*semble*); Mauldin *v.* Ball, 5 Mont. 96 (*semble*); Williams *v.* Evans, 6 Neb. 216; Payne *v.* Briggs, 8 Neb. 75; Scofield *v.* State Bank, 9 Neb. 316; Culbertson Co. *v.* Cox, 52 Neb. 684; Stewart *v.* Am. Bank, 54 Neb. 461; Davis *v.* First Bank, 57 Neb. 373; Sexton *v.* Shriver, (Neb. 1903) 95 N. W. 594; Western Co. *v.* Potter, (Neb. 1903) 95 N. W. 841; Ridenour *v.* Mayo, 29 Oh. St. 138; Creighton *v.* Kellerman, 1 Disn. 548; Benicia Works *v.* Creighton, 21 Oreg. 495; Minard *v.* McBee, 29 Oreg. 225; Johnson *v.* Maxwell, 2 Wash. 482; Henry *v.* Oh. Co., 40 W. Va. 334 *Accord.*

But there is no need of a reply to the negative answer. Riddle *v.* Parke, 12 Ind. 89; Ferris *v.* Johnson, 27 Ind. 247; Ferguson *v.* Tutt, 8 Kan. 370; Hoisington *v.* Armstrong, 22 Kan. 110; West *v.* Cameron, 39 Kan. 736; Uhl *v.* Harvey, 78 Ind. 26; Walker *v.* Sioux Co., 66 Iowa, 751; Medland *v.* Walker, 96 Iowa, 175; Nebcott *v.* Porter, 19 Kan. 131; Scaggs *v.* Poteet, 22 Ky. L. Rep. 775; Cravens *v.* Despain, 25 Ky. L. Rep. 2018; Wheeler *v.* Davis, (Ky. 1906) 96 S. W. R. 451; Conway *v.* Elgin, 38 Minn. 469; Pinger *v.* Pinger, 40 Minn. 417; King *v.* Burnham, 93 Minn. 288; State *v.* Williams, 48 Mo. 210; State *v.* Raes, 93 Mo. 126; Jordan *v.* Buschmeyer, 97 Mo. 94; Mauldin *v.* Ball, 5 Mont. 96; Nat. Co. *v.* McPherson, 19 Mont. 355; Nat. Bank *v.* Rocky Co., 20 Mont. 379; Peak *v.* Lord, 42 Neb. 15; Hoffman *v.* Gordon, 15 Oh. St. 212; Dayton Co. *v.* Kelly, 24 Oh. St. 345; Corry *v.* Campbell, 25 Oh. St. 134; Simmons *v.* Green, 35 Oh. St. 104; Cave *v.* Anderson, 50 S. Ca. 293; Heath *v.* White, 3 Utah, 474; Iba *v.* Central Ass'n, 5 Wyo. 355. — ED.

Payne, upon some consideration, without the knowledge of the surety, and thereby Shadduck was discharged; and that at or before the maturity of the note, Shadduck, as surety, requested Davis to sue said Payne on said note and to collect the money due thereon, and that said Davis refused to enforce collection, whereupon Shadduck informed Davis that he would not be held as surety longer, unless Davis would proceed to enforce collection against Payne. A jury was waived, and there was trial to the court. Judgment for plaintiff and defendant, Shadduck, appeals.

ROTHROCK, J. — II.[1] It is insisted by counsel for appellant that as there was no reply to the answer, the allegations thereof should be held as admitted. A reply was neither necessary nor allowable. There was no counter-claim; and plaintiff did not claim to have a defence to any matter alleged in the answer by reason of the existence of some fact which avoided the matter alleged in the answer.[2] The allegations of the answer not relating to a counter-claim are to be deemed controverted without a reply.[3] Code, Secs. 2665, 2712.

Affirmed.

C. F. A. DAMBMAN, APPELLANT, *v.* H. SCHULTING, RESPONDENT.

SUPREME COURT, NEW YORK, MARCH TERM, 1875.

[4 *Hun*, 50.]

APPEAL from an order sustaining a demurrer to the plaintiff's complaint.

DANIELS, J. This action was brought to set aside and annul a release, on the ground of the defendant's alleged fraud in its procurement. It appeared by the complaint, that a preceding action had been brought for the recovery of the debt, and the release answered as a defence. For that reason the demurrer was sustained. The plaintiff

[1] Only so much of this case is given as relates to the necessity of a reply. — ED.

[2] If the plaintiff seeks to defeat the answer by new affirmative matter, he must, in Iowa and Texas, plead his affirmative reply. Hay *v.* Frazier, 49 Iowa, 454, 456 (*semble*); Clapp *v.* Cunningham, 50 Iowa, 307; Parno *v.* Iowa Co., 114 Iowa, 132, 134; Tex. Co. *v.* Davidge, 51 Tex. 244; Tex. Co. *v.* Hutchins, 53 Tex. 61; East Tex. Co. *v.* Brown, 82 Tex. 631; Ætna Co. *v.* Holcomb, 89 Tex. 404; Lawder *v.* Larkin, (Tex. Civ. Ap. 1906) 94 S. W. R. 171. See Rev. St. Ariz. (1901), § 1357. — ED.

[3] Cassidy *v.* Caton, 47 Iowa, 22; Kirk *v.* Woodbury Co., 55 Iowa, 190; Crittenden *v.* Ins. Co., 85 Iowa, 652; Parno *v.* Iowa Co., 114 Iowa, 132; Brooks *v.* Pegg, (Tex. 1888) 8 S. W. R. 595; McKinney *v.* Nunn, 82 Tex. 44; Bauman *v.* Chambers, 91 Tex. 108; Rev. St. Ariz. (1901), § 1357 *Accord.*

In England, by the modern practice, an affirmative answer is treated as denied without any negative reply. But, as in Iowa, an affirmative reply is essential if the plaintiff would defeat the answer by proof of new matter consistent with answer. This affirmative replication, however, cannot be pleaded, as in Iowa, as a matter of course. The plaintiff must first obtain an order of court sanctioning such replication. Rules of Superior Court, 1883, Order XXIII r. 1; Odgers Pl. (5th ed.), 245. — ED.

insisted that the decision made was erroneous, for the reason that he could not avoid the effect of the release by proving the fraud in that action. In that the learned counsel for the plaintiff is very clearly mistaken. Fraud invalidates all instruments, however solemn, both at law and in equity. And as no reply is either required or provided for, unless directed by special order of the court, to the defence of a release, the plaintiff may avoid and overcome its effects by evidence showing it to have been procured by fraud. The provision of the Code upon this subject, is, that "the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require." Code, § 168. And it is so broad, that it secures to the plaintiff the benefit of every possible answer to the defence made by way of new matter not constituting a counter-claim, as fully as though it were alleged in the most complete and artistic form. He may avoid it by any evidence properly attended with that result, under the principles of either law or equity.[1] This was held to be the right of the plaintiff under the present system of practice, when a reply was required to new matter in the answer. Phillips *v.* Gorham.[2] And the principle has been held to be equally as applicable since the reply to such a defence has been dispensed with. Sheehan *v.* Hamilton.[3] In deciding that case, it was stated by Judge Leonard, who delivered the opinion of the court, that no reply to an answer is necessary, unless it sets up a counter-claim; but the plaintiff is permitted to prove any matter in denial or avoidance of the answer, where it sets up new matter, as the case may require. § Id., 306.

The right of the plaintiff to avoid the release by proof of fraud in the action prosecuted for the recovery of the debt, is further confirmed by the conclusion stated by Judge Allen, in deciding the case of Dobson *v.* Pearce,[4] and which was concurred in by the court, that the

[1] Cannon *v.* Davis, 33 Ark. 56; Curtiss *v.* Sprague, 49 Cal. 301; Colton *v.* Raynor, 57 Cal. 588; Rankin *v.* Sisters, 82 Cal. 88; Grangers Assn. *v.* Clark, 84 Cal. 201; Williams *v.* Dennison, 94 Cal. 540; Sterling *v.* Smith, 97 Cal. 343; Moore *v.* Copp, 119 Cal. 429; Brooks *v.* Johnson, 122 Cal. 569; Harding *v.* Harding, (Cal. 1906) 83 Pac. R. 434; 3 Idaho, Codes, § 3452; Hickman *v.* Dawson, 33 La. An. 438; Cook *v.* Shearman, 103 Mass. 21; Lyon *v.* Manning, 133 Mass. 439; Moore *v.* N. W. Co., (Mass. 1906) 78 N. E. R. 488; Caruthers *v.* Pemberton, 1 Mont. 111; Babcock *v.* Maxwell, 21 Mont. 407; Gen. St. Nev. § 3087; Johnson *v.* White, 6 Hun, 587; Claflin *v.* Taussig, 7 Hun, 223; Jackson *v.* Brown, 76 Hun, 41; Sheehan *v.* Hamilton, 2 Keyes, 304; Vassear *v.* Livingston, 13 N. Y. 248; Arthur *v.* Homestead Co., 78 N. Y. 462; Metrop. Co. *v.* Meeker, 85 N. Y. 614; Argall *v.* Jacobs, 87 N. Y. 110; Keeler *v.* Keeler, 102 N. Y. 30; Keck *v.* Phœnix Co., 3 N. Y. Civ. Pro. 380; Marich *v.* Brooks, 21 N. Y. St. Rep. 534; Chambovet *v.* Cagney, 35 N. Y. Super. Ct. 474; Fox *v.* Powers, 65 N. Y. Ap. Div. 112; Sullivan *v.* Traders' Co., 169 N. Y. 213; Nesbit *v.* Jencks, 81 N. Y. Ap. Div. 140; Reno *v.* Thompson, (N. Y. Ap. Div. 1906) 97 N. Y. S. 744; Jones *v.* Cohen, 82 N. Ca. 75; Fitzgerald *v.* Shelton, 95 N. Ca. 519; Askew *v.* Byran, 118 N. Ca. 526; Fishblate *v.* Fidelity Co., (N. Ca. 1906) 53 S. E. R. 354; Heebner *v.* Shepard, 5 N. Dak. 56; Price *v.* R. R. Co., 38 S. Ca. 199; Egan *v.* Bissell, 54 S. Ca. 30; Bank *v.* Gadsden, 56 S. Ca. 313; Seiberling *v.* Mortinson, 10 S. Dak. 644; Wood *v.* Lake, 13 Wis. 84; Smith *v.* Coolbaugh, 21 Wis. 427; Payne *v.* Payne, (Wis. 1906) 109 N. W R. 105 *Accord.* — Ed.

[2] 17 N. Y. 270. [3] 2 Keyes, 304. [4] 2 Kern. 156.

intent of the legislature is very clear, that all controversies respecting the subject-matter of the litigation should be determined in one action, and the provisions of the Code are adapted to give effect to that intent.[1] To the same general effect, also, are the cases of Crary v. Goodman,[2] and Foot v. Sprague.[3]

The plaintiff's right to be relieved from the effect of the release on the ground of fraud, was, under these principles, included in the preceding action.[4] This action to secure that result was therefore improper, and the decision sustaining the demurrer to the complaint was right, and should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, with costs.

HUBBELL v. FOWLER.

SUPREME COURT, SPECIAL TERM, NEW YORK, NOVEMBER, 1865.

[1 *Abbott, Practice, New Series*, 1.]

MOTION that plaintiff be required to reply to the first defence contained in defendant's answer.

MULLEN, J. In this case the defendant has pleaded the statute of limitations, and now asks for an order requiring the plaintiff to reply to the plea, by specifying the grounds which he relies upon to defeat the operation of the statute.

The case is not one in which, by the Code of Procedure, the plaintiff is bound to reply, or the facts stated in the answer will be taken as admitted. But the application is made under section 153 of the Code, which provides that in cases other than where a counter-claim is set up in the answer, if the answer contains new matter constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter.

The case before me is one in which the court has power to require a reply.

To introduce the practice of requiring a reply in all cases which may come within the terms of the clause of the section cited, is to multiply motions not only unnecessarily but unreasonably. In many,

[1] 2 Kern. 165. [2] Id. 266. [3] 12 How. Pr. 355.

[4] It is well settled in accordance with the decision in the principal case that the failure to set up an available defence to the pleading of one's adversary, is in legal effect a forfeiture of the defence forever. Life Ins. Co. v. Bangs, 103 U. S. 70; Reeve v. Jackson, 46 Ark. 272; Gorman v. Bonner, (Ark. 1906) 97 S. W. R. 282; Carpenter v. Oakland, 30 Cal. 442; Ruegger v. R. R. Co., 103 Ill. 449; Ætna Co. v. Tremblay, (Maine, 1906) 65 Atl. R. 22; Tuttle v. Hamill, 35 N. Ca. 456; Bridge Co. v. Sargent, 27 Oh. St. 233; Roby v. Rainsberger, 27 Oh. St. 674; Peterson v. Thomas, 28 Oh. St. 596; Bell v. McColloch, 31 Oh. St. 397; Witte v. Lockwood, 39 Oh. St. 141 (*semble*); Kunneke v. Mapel, 60 Oh. St. 1, 7, 8; Mangest v. Brinkerhoff, 67 Oh. St. 472.— ED.

if not in most, cases, the defendant knows with reasonable certainty the answer which will be given to his defence; and there can be no reason for a motion to enable him to ascertain a fact of which he is already cognizant.

There are, however, very many cases in which the defendant may not know the answer which the plaintiff may make to the new matter in his defence because it may be matter affecting the plaintiff personally, or the business may have been transacted on the part of the defendant by an agent, or there may be, as in the case before me, a large number of answers which may be insisted on by way of reply to the new matter of the answer, all of which it would be unreasonable to require the defendant to prepare to meet on the trial, although the matter to be replied to may be presumed to be known to him personally.

The bar by reason of the running of the statute of limitations may be defeated in several different ways.

1. By the commencement of an action within the time limited.
2. By an attempt to commence such action as prescribed in § 99 of the Code.
3. By absence of defendant from the state when the right of action accrued.
4. If the plaintiff was under twenty-one years, or
5. Insane, or
6. Imprisoned on a criminal charge, or
7. A married woman.
8. Death of the person having the right of action before the time limited expired.
9. That the plaintiff was an alien, subject or citizen of a country at war with the United States.
10. Actions brought to judgment recovered, and reversed on appeal.
11. Stay by injunction.
12. A new promise.

To this last may be added others, unnecessary to enumerate; but the list is sufficiently formidable to show how difficult it may be in many cases to know on what ground the plaintiff intends to defeat the bar of the statute.

If there is any case in which it is proper to require a reply, it seems to me this is the one.

It was suggested by counsel that the defendant should be required to aver that he does not know the ground on which the plaintiff intends to rely to defeat the bar. While this may in some cases be very proper, yet in most instances the nature of the defence, and the manner in which the business was conducted out of which the action or defence accrued, will afford a much better guide in determining the propriety of requiring a reply. In this case I do not deem it essential.

Let an order be entered requiring the plaintiff to serve a reply to

the answer setting up the statute of limitations within twenty days from service of copy order; the costs of the order, $10, to abide event of the suit.[1]

[1] A reply was ordered in the following cases: Gull Co. v. Keep, 6 Dak. 160, 167 (*semble*); Moore v. N. W. Co., (Mass. 1906) 78 N. E. R. 488 (*semble*); Jarvis v. Pike, 11 Abb. Pr. N. S. 398; Peillon v. Lawrence, 77 N. Y. 207; Brinkerhoff v. Brinkerhoff, 8 Abb. N. C. 207; McGine v. Torrence, 4 N. Y. M. L. Bull. 29; Schwan v. Mut. Assn., 9 N. Y. Civ. Pro. 82; Watson v. Phyfe, 20 N. Y. W. D. 372; Rogers v. Mut. Assn., 1 How. Pr. N. S. 194; Williams v. Kilpatrick, 21 Abb. N. C. 61; Cavanagh v. Oceanic Co., 30 N. Y. St. Rep. 532; Winchester v. Browne, 25 Abb. N. C. 148; Steinway v. Steinway, 68 Hun, 430; Mercantile Bank v. Corn Bank, 73 Hun, 78; Cauchois v. Proctor, 79 Hun, 388; Hartford Bank v. Beinecke, 15 N. Y. Ap. Div. 470; Toplitz v. Garrigues, 71 N. Y. Ap. Div. 37; Seaton v. Garrison, (Ap. Div. Dec. 1906) 101 N. Y. S. 526; Wester v. Mut. Ass'n, 27 N. Y. Misc. Rep. 830; Timble v. Russell, 41 N. Y. Misc. Rep. 577; Jones v. Cohen, 28 N. Ca. 75, 80 (*semble*); Fitzgerald v. Shelton, 95 N. Ca. 519, 523 (*semble*); Code of Pro. S. Ca. 174.

The court declined to order a reply in the following cases: O'Gorman v. Arnoux, 63 How. Pr. 159; Schofield v. Demarest, 55 Hun, 254; N. Y. Co. v. Robinson, 25 Abb. N. C. 116; Avery v. N. Y. Co., 6 N. Y. Supp. 547; Columbus Co. v. Ellis, 25 Abb. N. C. 150; Perls v. Metrop. Co., 15 Daly, 517; Voisin v. Mitchell, (N. Y. Ap. Div., Dec. 1905) 96 N. Y. S. 386.

In some jurisdictions a voluntary reply has been deemed improper. Connor v. Davies, 33 Ark. 56; Abbott v. Rowan, 33 Ark. 593; St. Louis Co. v. Higgins, 44 Ark. 293; Lusk v. Perkins, 48 Ark. 238; Gull Co. v. Keefe, 6 Dak. 160, 166; Avery v. N. Y. Co., 6 N. Y. Sup. 547; Dillon v. Sixth Av. Co., 46 N. Y. Super. Ct. 21; Davis v. Schmidt, 22 S. Ca. 128, 132.

REPLICATION DE INJURIA. — Since the Statute of 4 & 5 Anne, c. 16, s. 4, permitting defendants to plead more than one plea to a single count, did not give plaintiffs the similar privilege of making more than one replication to one plea, it followed logically that a plaintiff could deny only one of several material allegations of his adversary's plea, if he would avoid the overruling of his replication upon a special demurrer for the formal defect of duplicity. But this hardship was largely removed by the device of the replication *de injuria*, which, while a comprehensive traverse, much like the general issue of the defendant, was still a single replication. The mass of learning connected with this replication, at one time of much practical importance, has become, by the general abolition of special demurrers for defects of form, well-nigh useless in most of our states. For this reason this topic is omitted from this edition. A full collection of the authorities upon this form of replication will be found in the writer's first edition of Cases on Pleading, Chapter iii, Section 4, pp. 143-184.

REJOINDERS AND SUBSEQUENT PLEADINGS. — By the common law, rejoinders and subsequent pleadings of the parties are governed by the same rules as pleas and replications. The common law rule is still in force in many of our states. For illustrations see Miller v. Hoe, 1 Fla. 189; Livingston v. Anderson, 30 Fla. 117, 125; Rutherford v. Tevis, 5 Ind. 530; Pegram v. McCormack, 14 Iowa, 141; Bullitt's Civ. Code, Ky. 1895, §§ 99, 100; Cumb. Co. v. Slack, 45 Md. 161; Att'y-Gen. v. McQuade, 94 Mich. 439; Lewisburg Co. v. Steer, 77 Pa. 332 (*semble*); Hinchy v. Foster, 3 McC. 428; Wilkinson v. Bennett, 3 Munf. 314; Totty v. Donald, 4 Munf. 430; South Co. v. Daniel, 20 Gratt. 344; Huffman v. Alderson, 9 W. Va. 616, 634.

In England the privilege of pleading a rejoinder or any subsequent pleading must be obtained, as in the case of a replication, by leave of the court. Bullen & Leake, Prec. Pl. (6th ed.); 547 n.; Monck v. Smythe, [1895] 1 Ir. 200. In some jurisdictions an affirmative reply is deemed to be denied without any rejoinder, as in Kansas. Board v. Shaw, 15 Kan. 33; Continental Co. v. Pearce, 39 Kan. 396; Hughes v. Durein, 3 Kan. App. 63. In general, it may be said, that the rules applicable to replications hold as to rejoinders and subsequent pleadings in the states which permit any pleadings after the reply. — ED.

CHAPTER VIII.

DEPARTURE.

ANONYMOUS.

In the Common Pleas, Trinity Term, 1566.

[*Reported in Dyer*, 253, *placitum* 101.]

A lease was made by indenture for years without impeachment of waste, and one covenant was, that the lessee at every felling of wood should make a fence to save the spring; and he was bound for the performance of the covenants. And in debt on bond he pleaded the indenture, and to the said covenant pleaded that he had not felled any wood, &c. And the plaintiff showed the felling of two acres of wood, and that the defendant did not make any fence to save the spring, and the defendant rejoins, that he made a fence, &c., and of that he puts himself upon the country; and the aforesaid plaintiff does the like, therefore let twelve, &c. And this was holden a jeofail and departure; and the jury at the bar discharged for this in the Bench.[1]

VERE *v.* SMITH.

In the King's Bench, Easter Term, 1671.

[*Reported in* 2 *Levinz*, 5.[2]]

Debt upon an obligation, by the plaintiff a brewer, against the defendant his clerk, conditioned to perform covenants, to account for all sums of money he should receive. Defendant pleads covenants performed. The plaintiff replies, That such a day £26 came to his

[1] Co. Lit. 304 a; Fulmerston *v.* Steward, Plowd. 106; Palmer *v.* Stone, 2 Wils. 96; Hickman *v.* Walker, Willes, 27; Ellis *v.* Rowles, Willes, 638; Meyer *v.* Haworth, 8 A. & E. 467; Nevile *v.* Boyle, 11 M. & W. 26; McAden *v.* Gibson, 5 Ala. 341; Harper *v.* Hampton, 1 H. & J. 453; State *v.* Dorsey, 3 G. & J. 75; Dawes *v.* Winship, 16 Mass. 291; Sibley *v.* Brown, 4 Pick. 137; Hapgood *v.* Houghton, 8 Pick. 451; Gildart *v.* Howell, 2 Miss. 198; Fiser *v.* M. & T. R. R., 32 Miss. 359; Vanzant *v.* Shelton, 40 Miss. 332; Tarleton *v.* Wells, 2 N. H. 306; Moore *v.* Stevens, 42 N. H. 404; Munro *v.* Alain, 2 Cai. 320; Andrus *v.* Waring, 20 Johns. 153; Griswold *v.* Ins. Co., 3 Cow. 96; Benjamin *v.* DeGroot, 1 Den. 151; Lindsay *v.* Jamison, 4 McC. 93; Houghton *v.* Jewett, 2 Tyl. 183 *Accord.* — Ed.

[2] 1 Vent. 121, 2 Keb. 761, 779, 830 s. c. — Ed.

hands, for which he has not accounted. The defendant rejoined, That he accounted *modo sequente*, viz., That certain malefactors broke into his counting-house and stole it, wherewith he acquainted the plaintiff *et hoc paratus est verificare;* upon which the plaintiff demurred. And now it was argued, That the rejoinder is a departure, for fulfilling a covenant to account cannot be intended but by actual accounting; whereas the rejoinder does not show an account, but an excuse for not accounting.

Cur' contra. This is an account, and no departure. *Adjournatur.* But after in Trinity term the demurrer was waived, and issue taken upon the robbery.

OWEN AND ANOTHER *v.* REYNOLDS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1732.

[*Reported in Fortescue*, 341.]

DEBT on bond conditioned to save harmless from tonnage of coals due to William Biddle. Defendant pleads *non damnificat.;* plaintiff replies that Biddle distrained for said coals, and defendant rejoins that nothing was due to Biddle for tonnage; this held to be a good rejoinder and no departure, for it fortifies the plea, and gives a good reason why he was not damnified.[1]

LEGG *v.* EVANS AND WHEELTON.

IN THE EXCHEQUER, HILARY TERM, 1840.

[*Reported in 6 Meeson & Welsby*, 36.]

TROVER against the defendants, as sheriff of Middlesex, to recover the value of certain pictures and picture-frames, of which the declaration stated that the plaintiff was "lawfully possessed as of his own property."

[1] But a rejoinder that the plaintiff was injured by his own wrong is a departure, Richards *v.* Hodges, 2 Saund. 83, as is a rejoinder that the defendant had no notice of the damage. Cutler *v.* Southern, 1 Saund. 116, 1 Lev. 194 s. c.

If to a count upon a bond conditioned to perform an award, the defendant pleads no award, and then to a replication setting out the alleged award, rejoins, showing that the alleged award was not pursuant to the submission, and so not a legally binding award, his rejoinder is not a departure according to the following cases: Fisher *v.* Pimbley, 11 East, 188; Young *v.* Beck, 1 C. M. & R. 448; Hickes *v.* Crackwell, 3 M. & W. 72; Gisborne *v.* Hart, 5 M. & W. 50; Allen *v.* Watson, 16 Johns. 205.

But see *contra*, — Anon. Keilw. 175 a; Skinner *v.* Adams, 1 Lev. 245; House *v.* Launder, 1 Lev. 85; Morgan *v.* Man, 1 Lev. 127; Garrett *v.* Weeden, 1 Lev. 133; Roberts *v.* Marriett, 2 Saund. 188; Harding *v.* Holmes, 1 Wils. 122; Praed *v.* Duchess, 4 T. R. 585; s. c. 2 H. Bl. 250 (*semble*); Joy *v.* Simpson, 2 N. H. 179; Barlow *v.* Todd, 3 Johns. 367. — ED.

Plea: that, before the defendants converted and disposed of the said goods and chattels, one William Thompson had sued out of the Court of her Majesty the Queen, before the Barons of her Exchequer at Westminster, a writ of *fieri facias*, directed to the sheriff of Middlesex, commanding him of the goods and chattels of the plaintiff, to levy, &c.; and that by virtue of that writ they (the defendants) being such sheriff as aforesaid, seized, and took in execution, the said goods and chattels, for the purpose of levying the moneys so directed to be levied, which was the conversion in the declaration mentioned.

Replication:[1] Right of possession to the said goods at the time when by virtue of a lien; that before the said time when, &c., in the declaration mentioned, to wit, on, &c., one David Williams, being then lawfully possessed as of his own property of the said goods and chattels in the declaration mentioned, delivered the same to the plaintiff, for the purpose of the plaintiff, in the way of his trade of a carver and gilder, which he then carried on, performing certain work and labor upon the said goods and chattels, and supplying certain materials for the same; and the plaintiff then had and received the said goods and chattels for the purposes aforesaid, and in the way of his said trade or business then performed upon the said goods and chattels certain work and labor, and supplied certain materials for the same; in respect of which said work, labor, and materials, the said D. Williams then became, and was, and from thence hitherto has been, and still is, indebted to the plaintiff in a large sum, to wit, £311 13*s.* 5*d.*; and the plaintiff further says, that after the said goods and chattels were so delivered to him as aforesaid, and whilst they remained in his possession, and before the said time when, &c., to wit, on, &c., it was agreed between the plaintiff and the said D. Williams, that, in consideration that the plaintiff, at the request of the said D. W., would draw, and indorse, for the use of the said D. W., certain bills of exchange, the plaintiff should have a right to hold the said goods and chattels for securing the payment by the said D. W. of such bills of exchange; and the plaintiff says, that afterwards, in pursuance of the said agreement, and before the said time when, &c., to wit, on the respective dates of the said bills in that plea after mentioned, he (the plaintiff), at the request of the said D. W., and for his use, drew and indorsed certain bills of exchange, to wit, &c. (setting out three bills drawn by the plaintiff upon and accepted by the said D. W., for the several sums of £55, £50, and £40, and payable to the order of the plaintiff, one at two, and the other at three months after date, respectively), which said several bills, from the time they were so drawn and indorsed as aforesaid, continually until the said time when, &c., remained, and still remain, wholly unpaid by the said D. W.; and the plaintiff further says, that from the time the said goods and chattels were delivered to the plaintiff as in that plea aforesaid, until the conversion thereof in the declaration mentioned, the said goods and

[1] The substance only of the replication is here given. — Ed.

chattels remained in the possession of the plaintiff, and that he (the plaintiff), before and at the said time when, &c., had, and but for the said conversion thereof would still have had, a lien upon the said goods and chattels for the aforesaid sum so due to the plaintiff for the said work, labor, and materials, and a right to hold the said goods and chattels for securing the payment by the said D. Williams of the said bill of exchange; and the plaintiff, in fact, further says, that by means of the premises in this plea mentioned, and of the said lien and right to hold the said goods and chattels, and in no other manner whatsoever, the plaintiff, at the time of the said conversion of the said goods and chattels as in the declaration mentioned, was possessed of the said goods and chattels as in the declaration also mentioned; of all which premises in this plea aforesaid the defendants, before and at the time they seized and took in execution the said goods and chattels as in the said plea alleged, had full notice. Verification.

Special demurrer, assigning for cause, that the replication was a departure from the declaration.

Kennedy, in support of the demurrer.

The replication is bad, as being a departure from the declaration. The declaration alleges that the plaintiff was possessed of the goods as of his own property; but the replication sets up a mere right to the possession on the ground of having a lien on them, which is a departure from the declaration.

Mellor, contra.

As to the replication being a departure, surely a person having this right might declare in trover, alleging a general property, and yet, on a subsequent pleading, set up a special property, sufficient to maintain trover; it is not inconsistent with, but explanatory of, his interest. [PARKE, B. It is not a departure. Any person having a right to the possession of goods may bring trover in respect of the conversion of them, and allege them to be his property.]

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the plaintiff.[1]

[1] Prince v. Brunatte, 1 Bing. N. Ca. 435; Rixon v. Emary, L. R. 3 C. P. 546; Merchants Bank v. Richards, 6 Mo. Ap. 454, affirmed 74 Mo. 77; Mayes v. Stephens, 38 Oreg. 512; Haley v. McPherson, 3 Humph. 104 *Accord*.

Johnson v. State Bank, 59 Kan. 250; Laws v. Carrier, 2 Cincin. Sup. Ct. 80 (Petition by plaintiff as indorsee of a note. Answer that note belonged to A. Reply that plaintiff held as trustee for A) *Contra*.

There was thought to be a departure, also, in Wiard v. Semken, 19 Dist. Col. 475 (Complaint upon a bailment at will. Answer, that defendant received the property as a pledge. Reply, that the pledge was got by defendant's fraud), and in Moore v. Stevens, 42 N. H. 404 (Replevin by A and B as partners. Plea, property wholly in A. Reply, property in A and B jointly). — ED.

KITSON *v.* HARDWICK.

COURT OF COMMON PLEAS, MAY 30, 1872.

[*Law Reports*, 7 *Common Pleas*, 473.]

ACTION for goods sold and delivered, goods bargained and sold, money received to the use of the plaintiff, and interest.

Third plea, that, since the alleged cause of action arose, and before action, to wit, on the 2d of December, 1870, the plaintiff, then being unable to pay his debts, summoned a first general meeting of his creditors, and such meeting did, by special resolutions as provided in and by the provisions of the Bankruptcy Act, 1869 [1] duly declare that the said first general meeting be adjourned to the 7th of December then next, and at such adjourned meeting, held at an interval of not more than a week, to wit, on the 7th of December, 1870, it was resolved that the affairs of the plaintiff should be liquidated by arrangement, and S. J. Beswick was duly appointed trustee under the said liquidation.

Replication, that, after the said 7th of December, 1870, and after the passing of the alleged resolution, to wit, that the affairs of the plaintiff should be liquidated by arrangement, and after Beswick was duly appointed trustee under the liquidation as alleged, and before the action, Beswick for good and valuable consideration in that behalf sold, assigned, and transferred to the plaintiff all the estate, right and title, contracts, causes of action, and interests of and theretofore belonging to the plaintiff and then vested in Beswick as aforesaid; and that, by reason of the premises, and before the commencement of the action, the causes of action in the declaration mentioned were duly vested in the plaintiff, and that he was entitled to maintain the action.

Demurrer, on the ground that the claim in this action, being a chose in action, and having by force of the Bankruptcy Act, 1869, vested in Beswick, could not at law be assigned by him, so as to entitle the plaintiff to sue. Joinder.

Cave, in support of the demurrer.

Then, the replication is a departure from the declaration.[2] In Stephen on Pleading, 7th ed. 362, after referring to some examples of departure, it is said: "These, it will be observed, are cases in which the party deserts the ground in point of *fact* that he had first taken. But it is also a departure, if he puts the same facts on a new ground in point of *law*; as, if he relies on the effect of the common law in his declaration, and on a custom in his replication; or on the effect of the common law in his plea and a statute in his rejoinder."[3] So, here, the plaintiff in his declaration relies on a common-law liability

[1] 32 & 33 Vict. c. 71.

[2] Only so much of the case is given as relates to departure. — ED.

[3] Citing Mole *v.* Wallis, 1 Lev. 81, and Fulmerston *v.* Steward, Plowd. 102.

arising out of the position of purchaser and vendor; whereas, the replication sets up a statutory title distinct from the title at common law.

[WILLES, J. Does not the purchase from the trustee, like the re-indorsement of the bill of lading in Short *v.* Simpson,[1] place the plaintiff where he was? In that case the point as to departure was given up.]

That case turned upon the effect of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. The plaintiff should have declared as assignee of the trustee; that would have given the defendant an opportunity of traversing the title of both.

WILLES, J. Then it is said that there is a departure. The plaintiff, it is said, relying on a common law right, declares for a debt which was originally due to him, and which remains due to him down to the present moment; whereas, in his replication, he relies upon a statutory right. And this is said to be a departure. I think that is a fallacy. All that the replication amounts to is that by means of a purchase from the trustee, the plaintiff has got rid of a claim which might have interfered with his right to sue for this debt. No one of the cases relied on by Mr. Cave amounts to an authority for saying that that is a departure.

KEATING, J. I am of the same opinion; and I entirely concur in the reasons given by my Brother Willes.

Judgment for the plaintiff.[2]

G. POTTS AND ANOTHER *v.* THE POINT PLEASANT LAND CO.

SUPREME COURT, NEW JERSEY, NOVEMBER TERM, 1885.

[47 *New Jersey Reports*, 476.]

ON demurrer to replication.

Argued at June Term, 1885, before Justices KNAPP and REED.

The opinion of the court was delivered by

REED, J. The declaration is for breach of covenant. It sets out a contract under seal, by the terms of which the plaintiff was to perform for the defendants certain work in filling and grading certain lots and claying certain sidewalks at Point Pleasant. It then declares that the defendants did covenant, in consideration of the faithful performance of the said work, to pay eighteen cents per cubic yard for the sand or clay removed, the payment to be made by a deed of real

[1] Law Rep. 1 C. P. 248.

[2] Hooper *v.* Marshall, L. R. 5 C. P. 4; McFadden *v.* Schroeder, 4 Ind. Ap. 305; Bishop *v.* Travis, 51 Minn. 183 *Accord.* — ED.

estate, by an assignment of certain mortgages, by orders for guano and by the payment of cash.

It then avers the due performance of the work on the part of the plaintiffs, and the failure of the defendants to perform their covenant to make payment according to the terms of their contract.

To this declaration the defendants pleaded, among others, the plea that the performance of the work was a condition precedent to the plaintiffs' right to payment, and that the plaintiffs had not performed the said work.

To this plea the plaintiffs replied that although they tendered themselves ready and willing to complete the said work, the defendants notified them to remove from the defendants' land all the plaintiffs' material, tools and working implements, by reason of which they were prevented from continuing said work according to the terms of the contract. To this replication a demurrer was filed.

The point of the demurrants upon the argument was that the ground upon which the plaintiffs based their right of action in their replication, was a clear departure from the position taken by them in their declaration.

The counsel for the plaintiffs contended that the replication fortified the case made by the declaration, and so was legitimate. The design of a replication is to put upon the record some new facts which show that, notwithstanding the existence of the matters pleaded by the defendants, the declaration is yet true.

Thus, if plaintiff declares upon a statute, and defendant pleads that it is repealed, a replication that it has been revived by a subsequent act, is good. For the reviving act gives renewed effect to the first, on which the action is founded. *Gould on Plead.* 455.

So, if in trespass the defendant justifies for a distress *damage feasant*, the plaintiff may reply that the defendant afterwards converted to his own use, for this shows the taking to be a trespass *ab initio*. *Comyn's Dig., tit.* "*Pleader*," ¶ 11.

These are obvious instances of a fortification of the position first taken by the pleader. But in the two pleadings of the plaintiffs in the present case it appears manifest that the grounds upon which the plaintiff rests his claim is in each distinct. He assumes on each that he has a condition to perform as a precedent to his right to recover compensation. He first says "I performed it." He next says "I did not perform it, but was ready to do so, and you hindered me."

The performance of such a condition, and an excuse for not performing it, are matters so distinct that good pleading requires the certain averment of that one upon which the party relies. They are so treated by Mr. Chitty, he giving the rules that regulate the pleading of a performance of conditions precedent, and also the averments necessary in setting out an excuse of performance by the plaintiff. In regard to the latter he remarks: "In stating an excuse for non-performance of a condition precedent, the plaintiff must in general show

that the defendant either prevented the performance or rendered it unnecessary to the prior act by his neglect or by his discharging the plaintiff from performance." *Chitty on Plead.* p. 326.

But the point involved here is not new. Thus, Mr. Gould, citing *Co. Litt.* 304 *a*, and 1 *Sid.* 10 says: "If in covenant broken the defendant pleads performance on general terms, and the plaintiff replies non-performance of a particular act, a rejoinder that the defendant was ready to perform, and tendered performance, and that the plaintiff prevented it, is a departure from the plea; performance, and tender and refusal being distinct and inconsistent grounds of defence. The matter rejoined should have been pleaded in the first instance."[1] *Gould on Plead.* 455.

In the present case the plaintiffs rest their case upon performance of a preceding covenant. In the case mentioned by Mr. Gould the defendant rested his defence upon the performance of his covenant.

In neither case could the parties in a subsequent pleading shift their ground of attack or defence from performance to an excuse for non-performance.

There should be judgment for the defendants, with costs.[2]

NIBLET *v.* SMITH.

In the King's Bench, January 27, 1792.

[*Reported in* 4 *Term Reports*, 504.]

This was a replevin for taking the goods and chattels, to wit, one lime-kiln, &c., of the plaintiff; to which there was an avowry for rent in arrear. The plaintiff, in his plea in bar, said that the lime-kiln before and at the said time when, &c., was affixed to the freehold of the piece or parcel of ground on which, &c., and as such was by law exempt from any distress for the arrears of rent in the avowry mentioned, and ought not to have been distrained for the same, &c. To this plea the defendant demurred generally.

Holroyd, in support of the demurrer. The plea in bar is bad. It is

[1] Rolf *v.* Neale, Dy. 371 a; Clinton *v.* Bridges, 4 Leon. 79; Winchelsea *v.* Higden, 2 Barnard. 193; Parker *v.* Middleton, 3 Lutw. 126; Chapman *v.* Chapman, Cro. Car. 76; Grager *v.* Hemborough, 1 Keb. 115; Countess *v.* Crispe, 1 Salk. 221; White *v.* Clever, Ray. 1449; Sams *v.* Dangerfield, 2 Mod. 31; Gambier *v.* Larkin, Com. 553; Lee *v.* Rayner, T. Ray. 86; Ross *v.* Hodges, Ray. 233; Warren *v.* Powers, 5 Conn. 373 (see Edwards *v.* White, 12 Conn. 28, 35); Lord *v.* Cockshut, 1 H. & McH. 40; Burroughs *v.* Clarke, 3 Gill, 196; Larned *v.* Bruce, 6 Mass. 57; Darling *v.* Chapman, 14 Mass. 101; McSherry *v.* Askew, 1 Yeates, 79 *Accord.* — Ed.

[2] Granger *v.* Hemborough, T. Ray. 22; Perry *v.* Smith, Car. & M. 554 (*semble*); Daley *v.* Russ, 86 Cal. 114; Tillis *v.* Liverpool Co., 46 Fla. 263 (*semble*); Murray *v.* Bright, 2 A. K. Marsh. 146; Trainor *v.* Worman, 34 Minn. 227; Mohney *v.* Reed, 40 Mo. Ap. 99; Burk *v.* Huber, 2 Watts, 306; Joslyn *v.* Taylor, 33 Vt. 470; Osten *v.* Winehill, 10 Wash. 333; Calhoun *v.* Union Co., 3 Pugs. & Bur. 13 *Accord.* — Ed.

inconsistent with, and is a departure from, the declaration, by stating the lime-kiln to be affixed to the freehold, when the declaration had alleged it to be a chattel.[1]

Smith, contra.

The COURT was of opinion that the plea in bar could not be supported, because it was a departure from the declaration; that the declaration, treating the lime-kiln as a chattel, might possibly have been true, because lime may be burnt in a portable oven, and the kiln need not therefore necessarily be affixed to the freehold: but that, as the plea in bar stated it to be affixed to the freehold, it was inconsistent with the declaration.

Judgment for the defendant.[2]

BARTLETT v. WELLS.

IN THE QUEEN'S BENCH, JANUARY 17, 1862.

[*Reported in* 1 *Best & Smith*, 836.]

DECLARATION for goods bargained and sold, and goods bargained, sold, and delivered; and for work and labor; and for money paid; and for money due on accounts stated.

Pleas. 1. Never indebted. Issue thereon.

2. That the defendant, at the time of the contracting of the said debt, was an infant within the age of twenty-one years.

Replication to the second plea upon equitable grounds: that the defendant, before and at the time of the accruing of the causes of action in the declaration mentioned, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he the defendant then was of full age, whereby the plaintiff, then having no knowledge or means of knowledge that the defendant then was not of full age, was induced to make and enter into the said contracts in the declaration mentioned, and to supply the said goods therein mentioned to the defendant; and that, but for such false and fraudulent representations as aforesaid, the plaintiff would not have entered into the said contracts or supplied the said goods, or any part thereof.

Demurrer and joinder therein.

Gibbons, for the defendant. First, the replication, if treated as a legal replication, is a departure from the declaration. "A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another;" Stephen on Pleading, p. 32, 6th ed. The declaration is upon a contract. The replication making the liability of the defendant to depend on a

[1] Only so much of the case is given as relates to departure. — ED.

[2] Green v. James, 6 M. & W. 656; Lacey v. Umbers, 2 C. M. & R. 112 *Accord*. — ED.

false representation, converts the action into an action in tort, which cannot be done; Manby *v.* Scott,[1] Johnson *v.* Pie,[2] Jennings *v.* Rundall,[3] Green *v.* Greenbank.[4] [COCKBURN, C. J. Those cases only decided that, if goods are delivered to an infant under a contract, the party who delivered them cannot bring trover or case against him, and are not applicable to a fraudulent representation made by an infant.] The plaintiff has elected to declare on a contract.[5]

Beasley, contra. The replication is good as an equitable replication. [CROMPTON, J. In Bullen and Leake's "Precedents of Pleadings," which contains a very convenient and well-arranged collection of rules as to when a defence on equitable grounds may be pleaded, it is laid down, page 332, note (*a*): "Equitable replications will not be allowed which are inconsistent with the legal right alleged in the declaration." And, after citing the instances in Hunter *v.* Gibbons,[6] and Gulliver *v.* Gulliver,[7] they add: "These replications are objectionable, both as being departures from the declaration and as setting up matter for a suit in equity instead of a cause of action at law." This replication is contrary to both of the rules laid down.]

Gibbons was not called upon to reply.

COCKBURN, C. J. The replication is a departure. The declaration is on a contract for money payable for goods supplied to the defendant; the plea answers that; the plaintiff seeks to put the plea aside by replying a tort. That is a departure, the nature of the cause of action being changed.

CROMPTON, J. Also the replication is bad as a departure, which is an objection open on general demurrer (though there has been some doubt as to that), because it sets up a tort, the original cause of action being a contract.

MELLOR, J. I am also of opinion that the replication is a departure; and therefore, on both grounds, the demurrer ought to be allowed.

Judgment for the defendant.[8]

[1] Sid. 109, 129.
[2] 1 Keb. 905, 913, 1 Lev. 169; s. c. *nom.* Johnson *v.* Pye, 1 Sid. 258.
[3] Per Lord Kenyon, 8 T. R. 335, 336.
[4] 2 Marsh. 485.
[5] Only so much of the case is given as relates to the question of departure. — ED.
[6] 1 H. & N. 459.
[7] 1 ib. 174.
[8] De Roo *v.* Foster, 12 C. B. N. S. 272; Thames Works *v.* R. M. S. P. Co., 13 C. B. N. S. 358; Hunter *v.* Gibbons, 1 H. & N. 459; Reis *v.* Scott Co., 2 H. & N. 21; Wheelton *v.* Hardisty, 26 L. J. Q. B. 265; Christian *v.* Niagara Co., 101 Ala. 634 *Accord.*

In the following cases the reply setting up a different cause of action from that alleged in the complaint was adjudged a departure: Earp *v.* Henderson, 3 Ch. D. 254; Burdell *v.* Denig, 15 Fed. 397; Ennis *v.* Cass Co., 30 Fed. 487; Winter *v.* Mobile Bank, 54 Ala. 172; Christian *v.* Niagara Co., 101 Ala. 634; George *v.* Mobile Co., 109 Ala. 245 (Count upon negligence. Plea, contributory negligence. Reply, a wilful injury by defendant); Gates *v.* O'Gara, (Ala. 1905) 39 So. R. 729; Woodward *v.* Woodward, 33 Colo. 457 (bill upon express trust. Reply, a constructive trust); Wiard *v.* Semken, 19 Dist. Col. 475; Collins *v.* Waggoner, 1 Ill. 51; Burtch *v.* State, 17 Ind. 506; McAroy *v.* Wright, 25 Ind. 22; Reinskopf *v.* Rogge, 37 Ind. 207; Hopkins *v.* Grunsburg, 46 Ind. 187; Bearss *v.* Montgomery, 46 Ind. 544; Teal *v.* Langsdale, 78 Ind. 339; Shaw *v.* Jones, 156 Ind. 60; Chaplin *v.* Baker, 124 Ind. 385; Jones *v.* Marshall, 56 Iowa, 739 (petition claims ordinary damages; reply demands exemplary damages); Mander *v.* Wright, 70 Iowa, 42; McKay *v.* Henderson, 24

G. N. BURDICK, Administrator, v. N. F. KENYON and Another.

Supreme Court, Rhode Island, April 30, 1898.

[20 *Rhode Island Reports*, 498.]

Assumpsit. Heard upon defendant's petition for a new trial.

Stiness, J. The plaintiff sued as administrator *c. t. a.* of Robert N. Langworthy, upon a promissory note given December 21, 1887, by the defendants Kenyon and Chapman, as principal and surety, averring promises to the testator, and the defendants pleaded the statute of limitations. The plaintiff replied by averring a promise within six years to *himself*. The defendants joined issue, and the case went to the jury, resulting in a verdict for the plaintiff. The defendants move for a new trial upon the ground that the replication was a departure from the declaration.[1]

A replication which avers a promise to one person, while the declaration avers a promise to another, is clearly a departure in pleading. And the rules of pleading have made no exception in the case of a representative plaintiff, who stands in the place of, and who for all legal purposes is a continuation of, the original promisee, although such an exception would seem to be both reasonable and just. The text-books agree that where an executor sues in *assumpsit* upon promises to the testator, to which the statute of limitations is pleaded and

Ky. L. Rep. 1484; Hanover Co. v. Brown, 77 Md. 64; Bernheimer v. Marshall, 2 Minn. 78; Tullis v. Orthwein, 5 Minn. 377; Webb v. Bidwell, 15 Minn. 479; Fiser v. Miss. Co., 32 Miss. 359; Porterfield v. Butler, 47 Miss. 165; Noel v. Aron, (Miss. 1891) 8 So. R. 647; State v. Grimsley, 19 Mo. 171; Wonderly v. Christian, 91 Mo. Ap. 158; Mogrude v. Admire, 4 Mo. Ap. 133; Philibert v. Burch, 4 Mo. Ap. 470; School Dist. v. Caldwell, 16 Neb. 69; Kliment v. Torpin Co., (Neb. 1903) 97 N. W. R. 587 (Count upon one kind of negligence. Reply a different kind of negligence); Kearney Co. v. Zimmerman, (Neb. 1904) 99 N. W. R. 524; Moore v. Stevens, 42 N. H. 404; Henries v. Kennedy, 3 Halst. 364; Salt Bank v. Hendrickson, 40 N. J. 52; Miller v. Hillsborough Assn., 47 N. J. 393; Holmes v. Seashore Co., 57 N. J. 502; Wilson v. Johnson, (N. J. 1894) 20 Atl. R. 418; Eidlitz v. Rothschild, 87 Hun, 243; Durbin v. Fisk, 16 Oh. St. 533; Lilienthal v. Hotaling, 15 Oreg. 371; Kiernan v. Kratz, 42 Oreg. 474; Union Co. v. First Bank, 42 Oreg. 606; Graham v. Graham, 4 Munf. 205; Clark v. Sherman, 5 Wash. 681; Kingston v. Corker, L. R. 29 Ir. 364.

In Houston v. Sledge, 101 N. Ca. 640, the complaint prayed for specific performance of a contract to convey. The answer alleged the insolvency of the plaintiff and a rescission of the contract. The reply asserted that the defendant as a part of the rescission agreed to pay the plaintiff for improvements made by him upon the land and demanded payment of the same. This reply was adjudged not to be a departure under the Code practice of North Carolina.

Similarly, the rejoinder setting up a different defence from that alleged in the plea or answer was adjudged a departure in the following cases: Cutler v. Southern, 1 Saund. 116; Richards v. Hodges, 2 Saund. 83; Hillier v. Plympton, 1 Stra. 422; Palmer v. Stone, 2 Wils. 96; Cossens v. Cossens, Willes, 25; Praed v. Cunberland, 4 T. R. 585; Elliott v. Von Glehn, 18 L. I. Q. B. 221; McAden v. Gibson, 5 Ala. 341; Kilgore v. Powers, 5 Blackf. 22; Burroughs v. Clarke, 3 Gill, 196; State v. Dorsey, 3 G. & J. 75; Harper v. Hampton, 1 Har. & J. 453; Van Zant v. Shelton, 40 Miss. 332; Bennington v. Rutherford, 18 N. J. 467; Roberts v. Kelly, 2 Hall, 307; Andrus v. Waring, 20 Johns. 153. — Ed.

[1] Only so much of the case is given as relates to departure. — Ed.

the reply is a subsequent promise *to himself*, the replication is a departure and bad.[1] 1 Chit. Pl. *675; Steph. Pl. *410; Gould Pl. Chap. VIII, § 67.

Another rule, also well settled, is that when a party takes issue upon a replication or rejoinder containing a departure, and it is found against him, the court will not arrest the judgment. The verdict cures the fault. 1 Chit. Pl. *679; Gould. Pl. Chap. VIII, § 79.

The case of Beard *v.* Hand,[2] was quite like the one before us, in which the court said: "If a defendant go to trial without objection to a reply, he waives objection thereto, on the ground of departure. The objection cannot be made after verdict."

In Kannaugh *v.* Quartette Mining Co.,[3] the court said: "If it be conceded that the replication is a departure from the cause of action as pleaded in the complaint, this could only have been taken advantage of by demurrer, motion, or otherwise, before trial. If this had been done, the complaint might have been amended and the omission supplied. It was not done. By voluntarily going to trial with the pleadings as they were, the defendant must be held to have waived such objections. This is true at common law as well as under the code."

We are of opinion that the petition for a new trial, upon the ground that there was a departure in pleading, must be denied.[4]

Petition dismissed, and case remitted to the Common Pleas Division for further proceedings.

[1] Green *v.* Crane, 2 Ray. 1101 (*semble*); Dean *v.* Crane, 1 Salk. 28 (*semble*); Sarell *v.* Wine, 3 East, 409 (*semble*); Jones *v.* Wister, 5 Binn. 473 (*semble*); Lindsay *v.* Jamison, 4 McC. 93 *Accord*. Similarly, in the few jurisdictions in which one who relies on a new promise to pay a debt barred by lapse of time or discharge in bankruptcy, is required to declare on this new promise, a replication setting up the new promise will be a departure from a complaint upon the original cause of action. Coles *v.* Kelsey, 2 Tex. 541.

But in most jurisdictions the plaintiff counts upon the original promises, and in these the reply of the new promise operates as a waiver of the defence of lapse of time or discharge in bankruptcy and is, therefore, not a departure. Trustees *v.* Hartford, 5 Ark. 554; Way *v.* Sperry, 6 Cush. 238, 241. See also Bolling *v.* McKenzie, 89 Ala. 470. — Ed.

[2] 88 Ind. 183.

[3] 16 Col. 341.

[4] Lee *v.* Rayner, T. Ray. 86; Ankeny *v.* Clark, 148 U. S. 345 (*semble*); Kannaugh *v.* Quartette Co., 16 Colo. 341; Denver Co. *v.* Cahill, 3 Colo. Ap. 158; Blyth *v.* People, 16 Colo. Ap. 526; McAroy *v.* Wright, 25 Ind. 22; New *v.* Wambach, 42 Ind. 456; Beard *v.* Hand, 88 Ind. 183; Consol. Co. *v.* Osborne, 66 Kan. 393; Barbaroux *v.* Barker, 4 Met. Ky. 47; Whitney *v.* Nat. Ass'n, 57 Minn. 472; Mortland *v.* Holton, 44 Mo. 58; Philibert *v.* Burch, 4 Mo. Ap. 470; Herf Co. *v.* Lackawanna Line, 100 Mo. Ap. 164; Gregory *v.* Kaar, 36 Neb. 533; Jordan *v.* James, 5 Oh. 88; Harwood *v.* Tappan, 2 Speers, 536 *Accord*. — Ed.

WILL AND OTHERS *v.* WHITNEY AND ANOTHER.

SUPREME COURT, INDIANA, NOVEMBER TERM, 1860.

[15 *Indiana Reports*, 194.]

APPEAL from the La Grange Common Pleas.

PERKINS, J. — Suit upon a note of the following tenor, to wit: —

"$469 $\frac{40}{100}$. "*Piqua, November* 30, 1857.

"Six months after date we promise to pay *Whipple* and *Gray*, or order, at the *Piqua* branch bank of *Ohio*, four hundred and sixty-nine dollars and $\frac{40}{100}$, for value received.

"*Will, Cable & Co.*"

Indorsed, "*Whipple* and *Gray*."

The suit is against Will, Cable, and Jones, upon a promissory note made in Ohio, but containing no special stipulation to bring the contract within a particular statute. The note, upon its face, made a good cause of action under the general law of Indiana. The defendants answered by way of set-off. The plaintiffs replied a statute of Ohio, putting promissory notes substantially under the operation of the law merchant, setting out the statute.

The defendants demurred, on the ground that the reply was a departure[1] from the complaint, and did not, therefore, contain facts that could be legally replied in avoidance of the answer. The Court overruled the demurrer.

If the reply was objectionable as a departure, it was because it did not support the cause of action. Such being the case, it would seem that a departure would be ground of demurrer; for the reason that the reply, founded on it, would not contain facts legally sufficient to avoid the defence. Perk. Prac. 236.

But was the reply a departure? Such was the decision of this Court under the former system of practice. Wells *v.* Teall.[2]

If there was any reason or law in the rule under the old system, we think there is equally as much under the new. The plaintiffs, instead of replying the law of Ohio, should have amended their complaint. See Zehnor *v.* Beard.[3]

Per Curiam. The judgment is reversed, with costs. Cause remanded, &c.[4]

[1] Only so much of the case is given as relates to departure. — ED.

[2] 6 Blackf. 306.

[3] 8 Ind. 96.

[4] Wells *v.* Teall, 5 Blackf. 306; Midland Co. *v.* Citizens' Bank, 26 Ind. Ap. 71 *Accord.* — ED.

MOLE v. WALLIS, OR BOLD v. WARREN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1662.

[*Reported in* 1 *Levinz*, 81.[1]]

COVENANT on an indenture of apprenticeship to serve him seven years, which he had not done, but departed. The defendant pleads infancy; the plaintiff replies the custom of London, for infants to bind themselves apprentices; the defendant demurs; And whether this was a departure? was the question. And Wyndham and Foster, Chief Justice at one time, seemed that it was not, it being laid in London, where the custom is known; and Foster cited a case, where infancy being pleaded to a feoffment, the plaintiff replied the custom of gavelkind in Kent; that an infant might make a feoffment at fifteen, and the action being laid in Kent, it was resolved to be good. Twysden and Mallet on the contrary said, that which is pleaded generally as the common law cannot be maintained by custom, but is a departure, and cited Yel. 14; Plowd. Com. 105; Mich. 6 H. VII. pl. 4; Hill. 21 H. VII. pl. 29; 2 Cro. 494; Hutt. 63, 64. But they agreed, that if one pleads a statute, and the other says that it is repealed, the other may say that it is revived by another statute; or, if a man pleads a statute, and the other says that it was to continue but till such a time, which is expired, the other may say, that the first statute was afterwards made perpetual, because it is only a fortifying of the first matter. And in Hilary term following, the party (plaintiff) prayed leave to discontinue.[2]

BRINE v. THE GREAT WESTERN RAILWAY COMPANY.

IN THE QUEEN'S BENCH, FEBRUARY 22, 1862.

[*Reported in* 2 *Best & Smith*, 402.]

THE declaration stated that the plaintiff was lawfully possessed of a messuage and premises situate at Adber, in the parish of Trent, in the County of Somerset, in which messuage and premises the plaintiff and his family resided and dwelt. Nevertheless the defendants "wrongfully raised and made and formed, and caused and procured to be raised, made, and formed, a certain embankment of earth near the

[1] T. Ray. 60, Bohun, Priv. Lond. 183, 184, 1 Sid. 142 s. c. — ED.

[2] Pleading like that in the principal case was thought to be no departure in Y. B. 21 Hen. VII, p. 17, pl. 29; Anon. Godb. 122, 4 Leon. 77 s. c.; Stanton's Case, Moo. 135 (no objection taken to replication of custom).

But see *contra* Wood v. Hawkshead, Yelv. 14, 15 (*semble*); Yeatman v. Cullen, 5 Blackf. 240, 247.

The question was left open in Walker v. Nickerson, Cro. El. 652. — ED.

plaintiff's said house as aforesaid, and wrongfully continued the same from thence hitherto; by reason whereof, from thence continually to the commencement of this suit, divers large quantities of water have run and flowed down to, upon, against, and into the said messuage and premises of the plaintiff, whereby the walls, roofs, ceilings, paperings, floors, stairs, doors, and other parts thereof and therein being, have been greatly weakened, injured, wetted, and damaged; and by reason of the premises the said messuage and premises of the plaintiff became, and were, and have been, and are damp, incommodious, and less fit for habitation; and also by reason of the premises the plaintiff and his family have been, during all the time aforesaid, rendered sick and ill, and the plaintiff has been obliged to call in and employ divers medical men in and about curing the sickness and illness so occasioned as aforesaid, and to expend and lay out large sums of money in paying the same, and in and about removing and causing to be removed the said water so flowing upon and into his said messuage as aforesaid."

Second plea. That the said embankment was raised, made, and formed, and continued by the defendants, under and by virtue of the powers of certain Acts of Parliament granted in that behalf, to wit, "The Wilts, Somerset and Weymouth Railway Act, 1845," "The Great Western Railway Act, 1851," and "The Great Western Railway (Berks, Hants and Wilts, Somerset and Weymouth) Act, 1854."

Replication to the second plea. That, although true it is that the said embankment was raised, made, and formed, and continued by the defendants, under and by virtue of certain Acts of Parliament referred to in the said second plea, yet the plaintiff says that this is no bar to his claim in this action, because he says that the running and flowing of the water upon, against, and into the plaintiff's messuage, as in the declaration mentioned, was and is occasioned by the wrongful construction and negligent and improper raising, making, and forming of the said embankment, and the want of proper and sufficient drains to the same, and the continuing the said embankment so wrongfully constructed and insufficiently drained from thence hitherto, whereby and by reason whereof, after the raising, making, and forming the said embankment, and after the making and completing the railway of which the said embankment formed a part, the said running and flowing of the water upon, against, and into the plaintiff's said messuage took place, and not otherwise.

Demurrer and joinder therein.

The demurrer was argued in this term, January 24th, by—

Montague Smith (with him *Gadsden*), for the defendants. The replication is a departure from the declaration, not a new assignment. The declaration complains of damage to the plaintiff's dwelling-house by the wrongful erection and continuance of an embankment; the replication, admitting that the erection and continuance of the embankment were authorized by the statutes referred to in the plea,

introduces a new cause of action, viz., negligence in the mode of erecting the embankment and in not providing proper and sufficient drains. The plea is an answer to the declaration, but would not be a good rejoinder to the replication; and that is a test whether the replication is a departure from the declaration. [He referred to 1 Chitt. on Plead. 674, 7th ed., by Greening, and the cases cited in note (1) to Richards *v.* Hodges.[1]] [COCKBURN, C. J. Suppose the statutes had not been pleaded, and the case had gone down to trial, on the plea of not guilty, it would not have been necessary for the plaintiff to prove negligence. This is like the case of an action against a person for doing something on his own land; a replication admitting that the defendant had a right to do the act, but that it was done negligently, would be a departure.] The replication puts forward as a distinct cause of action, not an excess of authority, but negligence in erecting the embankment; and therefore it does not support and fortify the declaration, but states a new cause of action.

J. B. Karslake (with him *Prideaux*) for the plaintiff. The replication is not a departure. It is consistent with the declaration, and states the same cause of action. The declaration states that the defendants "wrongfully" erected the embankment; and that word may be taken to include negligence. The plea founded on the statutes is *prima facie* an answer to the declaration; and the replication answers the plea by showing that, though the erection of the embankment was rightful under the statutes, it was wrongful by reason of negligence. [CROMPTON, J. The word "wrongful" in this declaration may be construed to mean without any authority under law or statute. The defendants set up certain things as a lawful excuse; then the plaintiff may show that the excuse is not sufficient. COCKBURN, C. J. The plaintiff, who knows what his cause of action is, should state it as early as possible. Why, by his omission to allege negligence in his declaration, should the defendants be put to plead their Acts of Parliament?] The plaintiff, in framing his declaration, does not know what defence will be set up, and he is not bound to look through the defendants' Acts of Parliament to see whether they have a justification under them. [CROMPTON, J. The declaration in Turner *v.* The Sheffield and Rotherham Railway Company,[2] did not allege that the houses injured by the works of the railway company were so injured without the consent of the owners, and were not specified in the schedule annexed to the Company's Act; those allegations were introduced in the replication to a plea justifying under the Company's Act. The advantage of this mode of pleading is, that the authority under which the defendants did the act complained of is shown.] The forms of pleadings given in schedule B to the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, exclude all common words of mere form, such as "*vi et armis*," "wrongfully," &c. In an action for diverting the flow of a stream from the defendant's mill,

[1] 2 Wms. Saund. 84 a, 6th ed.

[2] 10 M. & W. 425.

No. 30, the declaration simply states "that the defendant, by cutting the bank of the said stream, diverted the water thereof from the said mill." This declaration would have been good without the word "wrongfully."

Montague Smith, in reply. Although the forms given in the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, have left the declaration at large, still, where negligence is the gist of the action, the declaration should allege it. [CROMPTON, J. The plaintiff should state in his declaration, as shortly as he can, the legal result of the facts which constitute his cause of action.] The plaintiff must recover on the statement of the cause of action in his declaration. Only one tenth of the damage may have arisen from the negligence, and the plaintiff may have already received compensation for that occasioned by erecting the embankment. If the declaration had charged negligence, the defendants would have pleaded, as to erecting the embankment, the authority under their statutes, and as to the negligence, not guilty; or they would only have pleaded a plea to the negligence. This declaration would have been supported without proof of negligence; whereas the replication puts forward negligence as the real cause of action, and is therefore a departure; Palmer *v.* Stone,[1] cited in note (1) to Richards *v.* Hodges.[2] [*J. B. Karslake.* Palmer *v.* Stone is commented upon by *Manning*, Serjt., in note (*a*) to Evans *v.* Elliott.[3]] [CROMPTON, J. The replication in that case set up entirely new matter.] *Cur. adv. vult.*

February 22. CROMPTON, J. (sitting alone), read the following judgments.

MELLOR, J. The declaration in this case alleged that the defendants, whilst the plaintiff was possessed of and residing in a certain dwelling-house, wrongfully raised and continued a certain embankment of earth near the plaintiff's said house, by reason whereof large quantities of water have run and flowed down to and upon and against the said dwelling-house of the plaintiff, rendering it damp and incommodious, and less fit for habitation, &c. To this declaration the defendants, for a second plea, pleaded that they raised and continued the said embankment under the powers and provisions of three Acts of Parliament granted in that behalf. To this plea the plaintiff replied that, although true it was that the said embankment was raised, made, and continued by virtue of the powers and provisions of the said Acts of Parliament, yet he said that the plea was no bar to his claim because he said that the running and flowing of the water to and against his said dwelling-house, in the declaration mentioned, was occasioned by the wrongful construction, and negligent and improper raising and making of the said embankment, and the want of proper and sufficient drains to the same. To this replication the defendant demurred, alleging it to be a departure from the declaration.

Upon the argument it was contended, by the plaintiffs, that a de-

[1] 2 Wils. 96. [2] 2 Wms. Saund. 84 c, 6th ed. [3] 6 N. & M. 606, 608.

parture in pleading was not ground of general demurrer; but we thought this point not open for the plaintiff in this Court, after our recent decision in the case of Bartlett *v.* Wells.[1] See also note (1) to Richards *v.* Hodges.[2]

The real question on the argument was, whether the replication was a departure from the declaration. On considering what is the gravamen of the charge alleged in the declaration, I am of opinion that the replication is no departure. The substance of the complaint in the declaration is the wrongfully raising, making, and continuing an embankment near the plaintiff's dwelling-house, and by means thereof wrongfully causing water to run and flow to and against such dwelling-house, whereby it was rendered damp and incommodious, &c. The plea excuses the making and raising of the embankment under the provisions of three Acts of Parliament, to which the plaintiff in substance replies, that his complaint against the defendants is, not for the lawful exercise of the powers conferred upon them, but for causing the water to run and flow against his dwelling-house by the wrongful construction of the embankment, and by the negligent and improper raising and making it without proper drains. It appears to me that the substance of the complaint, both in the declaration and replication, is the wrongful causing of the water to run and flow against the dwelling-house of the plaintiff; and although it may be doubtful whether the replication is to be considered as an informal traverse of the plea, or in the nature of a new assignment, it appears to me not to be obnoxious to the very wholesome rule against departure in pleading.

In Co. Litt. 304 *a*, as cited in note (1) to Richards *v.* Hodges,[3] "a departure in pleading is said to be, when a man quits, or departs from the ground which he has first relied upon, and has recourse to another;"

[1] Western Co. *v.* Davis, 66 Ala. 578; Warren *v.* Powers, 5 Conn. 373; Wiard *v.* Semken, 19 Dist. Col. 475; Tillis *v.* Liverpool Co., 46 Fla. 268; Hite *v.* Wells, 17 Ill. 88; Kilgore *v.* Powers, 5 Blackf. 22; Etter *v.* Anderson, 84 Ind. 333; Haas *v.* Shaw, 91 Ind. 384; Pollard *v.* Taylor, 2 Bibb, 234; Peare *v.* McKusick, 25 Me. 75; Burroughs *v.* Clarke, 3 Gill, 196; Keay *v.* Goodwin, 16 Mass. 1; Vanzant *v.* Shelton, 40 Miss. 332; Anderson *v.* Imhoff, 34 Neb. 335 (*semble*); Joy *v.* Simpson, 2 N. H. 179; Tarleton *v.* Wells, 2 N. H. 306; Moore *v.* Stevens, 42 N. H. 404; Salt Bank *v.* Hendrickson, 40 N. J. 52; Miller *v.* Hillsborough Assn., 47 N. J. 393; Sterns *v.* Patterson, 14 Johns. 132; Andrus *v.* Waring, 20 Johns. 153; Durbin *v.* Fisk, 16 Oh. St. 533; Laws *v.* Carrier, 2 Cincin. Sup. Ct. 80; Lillienthal *v.* Hotaling Co., 15 Oreg. 371; Scott *v.* Ins. Co., 9 Phila. 266; Heath *v.* Doyle, 18 R. I. 252; Harwood *v.* Tappan, 2 Speer, 547; Haley *v.* McPherson, 3 Humph. 104; Joslyn *v.* Taylor, 33 Vt. 470; Graham *v.* Graham, 4 Munf. 205.

But see Serjeant Manning's note, 6 N. & M. 607; West *v.* Nibbs, 4 C. B. 181; Paine *v.* Fox, 16 Mass. 133.

Departure is no ground for a motion in arrest of judgment. Lee *v.* Rayner, T. Ray. 86.

In some jurisdictions the objection to a departure may be taken either by a demurrer or by a motion to strike out the objectionable pleading. Kavanaugh *v.* Quartette Co., 16 Colo. 341; Blyth *v.* People, 16 Colo. Ap. 526; Hunt *v.* Johnson, 105 Iowa, 311; Ins. Co. *v.* Hickman, 64 Kan. 388, 391 (but see Walters *v.* Chance, Kan. 1906, 85 Pac. R. 779); Barbaroux *v.* Barker, 4 Met. (Ky.) 47; Herf Co. *v.* Lackawanna Co., 100 Mo. Ap. 164. (In Missouri demurrer must be special.) In Kansas and Nebraska objection may be taken to the admission of evidence in support of a pleading which constitutes a departure. Johnston *v.* State Bank, 57 Kan. 250; Plummer *v.* Rohman, 61 Neb. 61, 67. — Ed.

[2] 2 Wms. Saund. 84 f, 6th ed.

[3] 2 Wms. Saund. 84 a, b, 6th ed.

and the rule is stated by Tindal, C. J., in Prince v. Brunatte,[1] in the following terms: "Undoubtedly, where a replication does not consist with or fortify the declaration, it is a departure in pleading; for a plaintiff is not entitled to declare in respect of one right, and then to set up another in his replication. The only question here is, whether this replication does not set up a title inconsistent with that disclosed in the declaration." Another test of a departure in pleading is stated by Tindal, C. J., in Smith v. Nicolls,[2] as follows: "That which is a departure in pleading is a variance in evidence; and if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure." Applying that test to the present case, it appears to me that the evidence necessary to prove the matter alleged in the replication is not inconsistent with, but would clearly support, the allegations in the declaration.

Tried therefore by the test of variance in evidence, as suggested in Smith v. Nicolls, I think that the objection fails, and that the plaintiff is entitled to recover on this demurrer. The case of Palmer v. Stone,[3] cited by Mr. Smith, is clearly distinguishable, inasmuch as the plea was that the defendant impounded the mare damage-feasant, which is a private trespass, whereas the rejoinder, that the mare was mangy, set up that which is a common nuisance.

I am therefore of opinion that the plaintiff is entitled to judgment.

CROMPTON, J. I concur with my Brother Mellor in thinking that the replication in this case is no departure from the declaration. The declaration is for wrongfully, that is, without lawful excuse, causing the water to flow on the plaintiff's land and against his house by means of an embankment, and so injuring his premises; and the plea is a justification for so causing the water to flow and injure the premises under the authority conferred on the defendant by three Acts of Parliament. The replication is very inartificially drawn, but it appears to me in substance to avoid the plea, either by way of informal denial that the acts complained of were justified by the authority of the statutes, or by way of showing how they were not justified.

The replication commences by a statement that it is true that the embankment was raised under the powers of the Acts, and then goes on to show that it was negligently and improperly constructed, so as to show that it was not justified by the powers of the Acts. This seems repugnant and inartificial, but, taken according to its real meaning, seems to me to amount to saying,—though you had the authority of the Acts of Parliament, and were raising your embankment under their authority, yet you did not so construct your embankment as to make it a work done under the authority of the statutes.

The distinction is now clearly established between damage from works authorized by statute, where the party generally is to have compensation, and the authority is a bar to an action, and damage by

[1] 1 Bing. N. C. 435, 438; 1 Scott, 342, 345.
[2] 5 Bing. N. C. 208, 218; 7 Scott, 147, 164.
[3] 2 Wils. 96.

reason of the works being negligently done, as to which the owner's remedy by way of action remains; and it seems to me that the effect of the plea and replication, fairly considered as on general demurrer, is, that the plea says, what you complain of arises from works justified under statutes, and for which your remedy, if any, is for compensation; and that the replication inartificially answers this by saying the works causing the injury were not authorized by the Acts of Parliament, but were negligent and improper works, for which you are answerable in damages.

Whether the replication is a mere informal denial, or whether it explains why the plea is not a bar, or is in the nature of a replication of excess, it is not necessary to inquire.

The plea, pleaded in a compendious and general form, that the works were done under the authority of the statutes must, I think, be construed as if it contained all the necessary averments of a special plea expanded on the record, and would, I think, be bad if not construed to contain expressly or impliedly an averment that the works were such as were authorized by the Act. And to this averment the replication seems to me to contain a direct answer. It might depend on the mode in which the special plea, if expanded on the record, were framed, whether the formal mode of answering the plea would be by a denial of the averment of the acts complained of being justified by the statutory authority, or whether a new assignment or replication of excess might be rendered necessary by reason of the plea containing an averment of *quae est eadem*, or of the acts being done under the statutory authority without any unnecessary damage. But these questions no longer arise in the general mode of pleading adopted in this case, which seems sufficient, as special demurrers are no longer allowed. It is sufficient if the replication contains, as I think it does, either a denial that the acts complained of were authorized by the statutes, or an explanation how they were not so authorized.

Suppose that this case had arisen before the new rules of pleading, when the whole matter of defence would have arisen under the general issue of Not guilty. The plaintiff would have proved the injury to his premises by the water being thrown upon them by means of the embankment. The defendants would have shown their authority under the Acts of Parliament, and the plaintiff's answer would have been that the construction of the works was such as was not authorized by the statutes. The evidence which would prove the replication would therefore support the declaration, according to the test proposed by Lord Chief Justice Tindal, cited by my Brother Mellor; and it should be observed that the facts in the replication do not the less prove the declaration because the replication contains something more in answer to the plea than would be necessary to prove the declaration, so long as the new matter is not inconsistent with that in the declaration. The case in principle does not differ from the ordinary case of a plaintiff replying, to a plea setting up a license or authority

in law, or in fact, or under a deed, that the acts were not such as were covered by the license, or were acts done in excess of it.[1] The plaintiff was not called upon to anticipate the defence by showing that the works were not justified by reason of an Act of Parliament which might never be set up. Such mode of pleading would probably be improper, and the matter alleged would probably have no effect on the subsequent pleadings, and be treated as merely idle; as in the case when a plaintiff alleges in his declaration that a defendant, from whom he expects a plea of infancy, was of full age when he executed the instrument declared on. Such pleading is what has been called "leaping before you come to the hedge."

I think that the plea in the present case must be taken to aver that the grievances complained of were such as were justified under the authority of the statutes, and that the replication is not in the nature of bringing forward a new cause of action, but avoids a plea either by an informal denial of the implied averments of the plea, or by stating matters which show how the plea does not answer the declaration, because the grievances in the declaration were not such as the statute authorized.

If indeed it could be made out, as argued by Mr. Smith, that the replication disclosed a new distinct cause of action, it would no doubt be a departure; but after consideration, and with great respect for the doubts thrown out in the course of the argument on this part of the case, I construe the replication as not complaining of the breach of some specific statutory duty, as for the building of a bridge or making a communication, but as averring and undertaking to prove that the construction of the works was so faulty as not to be under the protection of the statutes; in other words, as alleging that the grievances complained of in the declaration were not occasioned by the building of an embankment which the statutes authorized, because the statutes must be taken to authorize properly constructed embankments only. The replication seems to me to set up the improper construction of the embankment in question as an answer to the supposed protection under the statutes, and so to rely on the plaintiff's common-law right, claimed in his declaration, to have damages for the mischief occurring from the water being thrown on his land without any lawful excuse.

I therefore concur with my Brother Mellor in thinking that our judgment should be for the plaintiff; but the decision must be taken as the decision of him and myself only, as the Lord Chief Justice is not prepared to assent to the judgments we have delivered.

Judgment for the plaintiff.[2]

[1] See Bracegirdle v. Peacock, 8 Q. B. 174, 185, 186.

[2] See Minneapolis Co. v. Home Ins. Co., 64 Minn. 61. The plaintiff declared upon an insurance policy covering a quantity of wheat which he had undertaken to carry and deliver as a common carrier, alleging that the wheat was destroyed by fire, that he had paid the shippers the value of the wheat thus destroyed and claimed reimbursement from the Insurance Co. Answer: that the wheat was carried under a bill of lading exempting

CATHERINE BRADLEY *v.* EMELINE H. JOHNSON.

SUPREME COURT, NEW JERSEY, NOVEMBER TERM, 1883.

[45 *New Jersey Reports*, 487.]

THIS is a motion to strike out the second and third replications to a plea.

The opinion of the court was delivered by

REED, J. The declaration was upon a bond made by a woman. The plea was coverture. The replications set up such facts as it was supposed fixed a liability upon a married woman, by force of the act of 1862. Nix. Dig. p. 548. The bond was made previous to the enactment of the present act relative to the ability of married women to enter into contracts. Rev. P. 637.

The replications concluded to the country. They set up new matter, and should have concluded with a verification.

For this reason, the motion must prevail.

There is another view in which the replications must be regarded with disfavor. They are departures from the ground taken in the declaration. In the case of Eckert *v.* Reuter,[1] it was ruled that, in actions under this statute,[2] the declarations should be special, and not simply on the common counts. The rule is that, where the plaintiff should have founded his action upon a statute, his declaration asserting a right at common law is not supported by a replication grounded upon the statute. Gould Plead. ch. VIII, §§ 69, 70.

The replications must be struck out, with leave to the plaintiff to amend his declaration upon payment of costs.

E. J. McGAVOCK *v.* H. B. WHITFIELD AND WIFE.

SUPREME COURT, MISSISSIPPI, OCTOBER TERM, 1871.

[45 *Mississippi Reports*, 452.]

SIMRALL, J.[3] The object of pleading is to put upon the record the altercations of the parties, until they come to an issue of fact or law. All the pleadings of the plaintiff, subsequent to his declaration, must be in aid and support of the cause of action therein stated. He is not, in his replication, or other after-pleading, allowed to shift his ground, and bring forward a new and independent cause of action,

the plaintiff carrier from liability in the absence of negligence on his part and that the plaintiff was not negligent. Reply: that plaintiff was negligent. Demurrer on the ground that the reply was a departure. Demurrer overruled. — ED.

[1] 4 Vroom. 266.

[2] N. J. Statute.

[3] Only so much of the opinion is given as relates to departure. — ED.

that would be a departure; so the defendant must conform his rejoinder to a maintenance of the defence made by his plea.

The plaintiff counted upon a promissory note made by H. B. Whitfield, personally, H. B. Whitfield, guardian of John D. Young, and Laura Y. Whitfield. The defence set up by the pleas was the coverture of Laura Y. Whitfield, and that the guardian did not by this note impose a liability on the estate.

The declaration did not disclose the fact that Laura Y. was the wife of H. B. Whitfield, but the plaintiff, in order to obviate the effect of coverture upon the contract, replied the new matter, that the consideration of the note (detailing it) brought the contract within the 25th art. of the Code of 1857, in reference to married women and their separate estate, and therefore the wife was bound by it. In this there was no departure from the cause of action in the declaration; it was rather a novel assignment, disclosing fully and at large the same "right" of action. It was legitimate and logical pleading, precisely as in the case of Hardin *v.* Phelan.[1]

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.[2]

CROWN CYCLE CO. *v.* BROWN.

SUPREME COURT, OREGON, APRIL 8 1901.

[39 *Oregon Reports*, 285.]

MR. JUSTICE WOLVERTON delivered the opinion.

The amended complaint herein, omitting formal allegations, runs as follows: "That on or about the first day of March, 1896, the plaintiff, at the special instance and request of the defendant, sold and delivered to defendant certain goods, wares, and merchandise, of the reasonable value of $12,234." The answer denies that the plaintiff sold or delivered to the defendant any goods, wares, or merchandise whatever, except under a special contract of purchase and sale between them, which provided for the payment of a stipulated price at a time certain, which had not elapsed at the commencement of the action. The plaintiff replied that the goods were procured and said contract was induced through the fraudulent and deceitful representations of the defendant as to the condition of his credit. There was a demurrer interposed to the reply, and a motion to strike out the affirmative averment, which were both overruled. The verdict and judgment being in favor of the plaintiff, the defendant appeals.

2. The defendant next urges that the reply constitutes a departure

[1] 41 Miss.

[2] Collett *v.* Dickinson, 26 W. R. 403; Hardin *v.* Phelan, 41 Miss. 112, 114 *Accord.* — ED.

from the ground taken in plaintiff's first pleading.[1] The complaint is in assumpsit for goods sold and delivered on a *quantum valebat*. The answer pleads, in avoidance of that form of action, a specific contract, and that the time for which credit was accorded under it had not expired. The purpose of the reply is to show that the special contract was a nullity, because induced by fraud, and that the defendant, by reason thereof, was not entitled to the credit given him, and thus to overcome or avoid the defence relied upon. This does not state a new cause of action. True, the plaintiff might have anticipated the defence interposed, and stated the fraud attending the transaction in his complaint, but the more logical method was adopted, to simply state its cause of action on an implied contract, and await the movement of its adversary, and, when the specific contract was interposed, then to show that, by reason of the fraud practised in its procurement, it was ineffectual for the purpose designed by the pleader. The reply does not quit or depart from the complaint, and state a different cause, nor is anything it contains inconsistent with the cause there stated. The defendant seeks to destroy the plaintiff's right of action by setting up this specific contract, and the reply avoids it, and thus is put upon the record a perfectly logical procedure. The reply may be said to fortify the cause, but it goes no further, and cannot be termed a departure:[2] Mayes *v.* Stephens;[3] Cederson *v.* Oregon Nav. Co.;[4] Rosby *v.* St. Paul, M. & M. Ry. Co.;[5] Shillito Co. *v.* McClung (C. C.);[6] Ætna Life Ins. Co. *v.* Nexsen;[7] Ankeny *v.* Clark.[8]

[1] Only so much of the case is given as relates to departure. — ED.

[2] Ankeny *v.* Clark, 148 U. S. 345; Johnson *v.* Hillstrom, 37 Minn. 122; Rosby *v.* St. Paul Co., 37 Minn. 171; Niebels *v.* Howland, (Minn. 1906) 106 N. W. R. 337 *Accord*.

Distler *v.* Dabney, 3 Wash. 200; Ostene *v.* Winehill, 10 Wash. 333 *Contra*.

In the following cases the reply operating merely to destroy the plea or answer was adjudged not to be a departure: Thorp *v.* Wingfield, 3 Leon. 203; Butler *v.* Coll. of Phys., Cro. Car. 256; Gargrave *v.* Smith, 1 Salk. 221; Winstone *v.* Linn, 1 B. & C. 460; Arbouin *v.* Anderson, 1 G. & D. 403; Smith *v.* Marsack, 6 C. B. 486; Morris *v.* Walker, 15 Q. B. 589; Rixon *v.* Emery, L. R. 3 C. P. 546; Hall *v.* Eve, 4 Ch. Div. 341; Ankeny *v.* Clark, 148 U. S. 345; Shillito Co. *v.* McClung, 45 Fed. 778; Trustees *v.* Hatfield, 5 Ark. 551; Colo. Co. *v.* Chappell, 12 Colo. Ap. 385; Jamieson Co. *v.* Brainard, 16 Colo. Ap. 509; Conklin *v.* Botsford, 36 Conn. 105; Chicago *v.* People, 210 Ill. 84; Sparks *v.* Clapper, 30 Ind. 204; Shirts *v.* Irons, 47 Ind. 445; Kimberlin *v.* Carter, 49 Ind. 111; Brown *v.* First Bank, 115 Ind. 572; Franklin Co. *v.* Feist, 31 Ind. Ap. 390; Home Co. *v.* Bellew, (Ky. 1906) 96 S. W. R. 878; Rosby *v.* St. Paul Co., 37 Minn. 171; Townsend *v.* Minneapolis Co., 46 Minn. 121; Minneapolis Co. *v.* Home Co., 64 Minn. 61; Niebels *v.* Howland, (Minn. 1906) 106 N. W. R. 336; Hoover *v.* Mo. Co., (Mo. 1891) 16 S. W. R. 480; Auchincloss *v.* Frank, 17 Mo. Ap. 41; Baltzell *v.* Modern Woodmen, 98 Mo. Ap. 153; Mollyneaux *v.* Wittenberg, 39 Neb. 547; Breck *v.* Blanchard, 22 N. H. 303; Hackett *v.* Slidell, 11 Johns. 56; Bame *v.* Drew, 4 Den. 287; Houston *v.* Sledge, 101 N. Ca. 640; Knox Bank *v.* Lloyd, 18 Oh. St. 353; Crown Co. *v.* Brown, 39 Oreg. 235; Hammer *v.* Downing, 39 Oreg. 504; Normile *v.* Oreg. Co., 41 Oreg. 177; Carpenter *v.* McClure, 38 Vt. 375; Beach *v.* Trudgeain, 2 Grat. 219; Va. Co. *v.* Saunders, 86 Va. 969; Childs Co. *v.* Page, 28 Wash. 28; Rainsford *v.* Massengale, 5 Wyo. 1.

Similarly, the rejoinder, operating only as a full answer to the reply or replication was not a departure in the following cases: Vere *v.* Smith, 2 Lev. 5; Dudlow *v.* Watchorn, 16 East, 39; Mathews *v.* Hamblin, 28 Miss. 611; Cravens *v.* Gillilan, 73 Mo. 524; Dutton *v.* Holden, 4 Wend. 643; Racine *v.* Barnes, 6 Wis. 472. — ED.

[3] 38 Or. 512 (63 Pac. 760).

[4] 38 Or. 343 (63 Pac. 763).

[5] 37 Minn. 171 (33 N. W. 698).

[6] 45 Fed. 778.

[7] 84 Ind. 347 (43 Am. Rep. 91).

[8] 148 U. S. 345 (13 Sup. Ct. 617).

O. J. ROSBY *v.* ST. PAUL, MINNEAPOLIS & MANITOBA R. R. CO.

SUPREME COURT, MINNESOTA, JUNE 30, 1887.

[37 *Minnesota Reports*, 171.]

MITCHELL, J.[1] This action was brought to recover damages for breach of a contract alleged to have been made by defendant with plaintiff to transport a car-load of household goods and live-stock from Minnesota Transfer to Beltrami, in Polk County. The breach alleged was that defendant transported the car to Larimore, Dakota, instead of Beltrami, thereby delaying the plaintiff in reaching his destination, and causing him expense in transporting his property from Larimore to Beltrami, and causing injury to the stock from being so long confined upon the car. The answer denied the making of any such contract, but alleged the making of a written contract with defendant for the transportation of the car to Larimore. This contract, signed by both parties, was set out as an exhibit to the answer. The plaintiff in reply admitted that he signed this writing, but averred that he was induced to do so through the fraud and deceit of defendant's agent, who made it out, and falsely read and represented it as a contract for the transportation of the car to Beltrami; that, relying upon the false and fraudulent representations, and being unable to read it himself, he signed it, supposing it to be what it was represented to be, and what their actual agreement was, — a contract for the transportation of the car to Beltrami.

1. The first two assignments of error are based upon the idea that the reply is a departure from the complaint. A departure is a statement of matter in a subsequent pleading which is not pursuant to the previous pleading of the same party, and which does not support and fortify it. This reply, reduced to its lowest denomination, is to the effect that the contract was just as alleged in the complaint; that the writing set up in the answer is not the contract in fact made; that plaintiff was induced to sign it by the false and fraudulent representations of defendant as to its contents. This is not a departure. On the contrary, it fortifies and supports the allegations of the complaint by avoiding the new matter set up in the answer. Estes *v.* Farnham;[2] Trainor *v.* Worman;[3] Johnson *v.* Hillstrom.[4]

Order affirmed.[5]

[1] Only so much of the case is given as relates to departure. — ED.

[2] 11 Minn. 312 (423). [3] 34 Minn. 237 (25 N. W. Rep. 401). [4] 37 Minn. 122.

[5] Breslauer *v.* Barwick, 36 L. T. Rep. 52, 24 W. R. 901 s. c.; Wright *v.* Sun Co., 5 Ont. Ap. 218; Wright *v.* London Co., 5 Ont. Ap. 218 *Accord*.

But if the plaintiff declares upon a contract of a certain tenor, he cannot in his reply seek the reformation of the contract and a recovery upon it as reformed. Wood *v.* Deutschman, 75 Ind. 148; Hunt *v.* Johnston, 105 Iowa, 311.

Replication of an Estoppel. — A replication that the defendant is estopped from pleading

GARGRAVE *v.* SMITH.

COMMON PLEAS, HILARY TERM, 1689.

[1 *Salkeld*, 221.]

TRESPASS for breaking his house, and taking and carrying away his goods; the defendant justified the taking and carrying away *nomine districtionis* for damage-feasant; plaintiff replied *quod post districtionem praed. viz. eodem die, &c.*, he converted them to his own use. On demurrer it was urged, that the replication was a departure, for it does not make good the plaintiff's declaration in trespass, but shews rather that the plaintiff's should have brought trover and conversion: *Sed non allocatur;* he that abuses a distress, is a trespasser *ab initio*, and therefore if in trespass the defendant justifies *nomine districtionis*, the plaintiff may shew an abuse, and it is no departure, but makes good his declaration; and so it does in this case, for the converting is a trespass or trover at election, and the matter disclosed in the replication makes good his election; for it proves it a trespass as well as a trover.[1]

COLE *v.* HAWKINS.

IN THE KING'S BENCH, HILARY TERM, 1716.

[*Reported in* 1 *Strange*, 21.]

PARKER, C. J., delivered the resolution of the court.

This is an *indebitatus assumpsit*, laid 16th of January, 1706. The defendant has pleaded *actio non accrevit infra sex annos*. The plaintiff has replied a bill filed 23d of January, 12 Ann., and that the cause of action arose within six years before. The defendant has demurred generally, and it has been insisted on by his counsel that the replication is a departure, there being seven years' distance between the day in the declaration and the filing the bill as set forth in the replication.

But we are all of opinion, notwithstanding, that the plaintiff must have judgment. This being only a parol promise, the time alleged in the declaration is only matter of form, not of substance; and not being a departure in a material point, is only a defect in form of pleading, which not being shown for cause of demurrer pursuant to the act for

the matter alleged in his plea or answer is not a departure. Shillito Co. *v.* McClung, 45 Fed. 778; Va. Co. *v.* Saunders, 86 Va. 969; Rainsford *v.* Massengale, 5 Wyo. 1; Wright *v.* Sun Co., 5 Ont. Ap. 218; Wright *v.* London Co., 5 Ont. Ap. 218.

But see Plummer *v.* Rohman, 61 Neb. 61. — ED.

[1] Bagshawe *v.* Goward, Cro. Jac. 147, Yelv. 96 s. c.; Gates *v.* Bayley, 2 Wils. 313, 314; Dye *v.* Leatherdale, 3 Wils. 20; Oxley *v.* Watts, 1 T. R. 12; Taylor *v.* Cole, 3 T. R. 292 (*semble*); Oakes *v.* Wood, 2 M. & W. 791, 797; Price *v.* Woodhouse, 1 Ex. 559; Darling *v.* Chapman, 14 Mass. 101, 103; Breck *v.* Blanchard, 22 N. H. 303 *Accord.* — ED.

the amendment of the law, the defendant cannot take advantage of it. If a verdict had found the promise, or the filing the bill to be another day, that would not have vitiated the proceedings. 1 Lev. 110; 1 Keb. 566, 578; Hob. 164, 199.

If the day had been substance, it would have been a departure; and so it was adjudged in this court, Pas. 1 Geo. Stafford *v.* Forcer.[1] That was upon a promissory note dated in 1704. The defendant pleaded *actio non accrevit infra sex annos;* the plaintiff replied a bill filed 12 Ann. [and that the promise was made within six years before, to wit, at a day after the day in the *narr.*],[2] and after a verdict the judgment was arrested, because in that case the day was material. If the day in this case should be looked upon as such, it would be in the defendant's power, in almost all cases, to fix the time and place. As where the plaintiff brings an action of assault and battery in London, the defendant pleads he made the assault in Middlesex, and that afterwards the plaintiff released all batteries except in London. By this he would make the place material, and the doctrine of bringing transitory actions where the plaintiff pleaded would fall to the ground, if the defendant should be allowed by artificial pleading to make the time and place matter of substance. *Vide* Co. Litt. 282, *b.* Yel. 114.

Judic' pro quer'.[3]

[1] 10 Mod. 311.

[2] Quoted from Gilbert, 279. — Ed.

[3] Matthews *v.* Spicer, 2 Stra. 806; Serle *v.* Darford, 1 Ray. 120; 3 Lut. 464 s. c.; Anon. 2 Ld. Ray. 1015, 6 Mod. 115 s. c.; Lee *v.* Rogers, 1 Lev. 110; Primer *v.* Phelps, 1 Salk. 222; Webly *v.* Palmer, 1 Salk. 222; Howard *v.* Dennison, 1 Salk. 223; Gledstane *v.* Hewitt, 1 Cr. & J. 565; McMechan *v.* Hoyt, 16 Ark. 303, 307; Thompson *v.* Fellows, 21 N. H. 425; Wakeman *v.* Paulmier, 39 N. J. 340; Burr *v.* Baldwin, 2 Wend. 580 *Accord.*

See Arnold *v.* Arnold, 3 B. N. C. 81. — Ed.

CHAPTER IX.

NEW ASSIGNMENT.

R. ELLET AND ANOTHER *v.* J. PULLEN AND ANOTHER.

SUPREME COURT, NEW JERSEY, SEPTEMBER TERM, 1831.

[12 *New Jersey Reports*, 357.]

DRAKE, J.[1] In this case, the plaintiffs declared, that on the 12th day of January, 1824, the defendants broke their close, lying on the north side of Pole Brook, in the township of Upper Freehold, &c., and cut twelve trees, &c. The defendants pleaded that the said close was their soil and freehold. And issue was taken thereon.

Upon the trial of the cause, at the Monmouth Circuit, the defendants gave some evidence of an exclusive possession of a small lot of land lying on the north side of Pole Brook, in the township of Upper Freehold aforesaid. And the plaintiffs gave evidence of title and possession in a distinct lot, near by, and similarly situated with reference to Pole Brook, and the township; and that William Pullen, one of the defendants, had acknowledged that he and his brother had cut on the same. Upon this state of facts, the defendants insisted upon a verdict. And it appears not to have been denied that they were entitled to it upon the ordinary principles of pleading and evidence in the action of trespass *quare clausum fregit*. But the counsel for the plaintiffs contended that this cause having originated in the court for the trial of small causes, where a similar declaration and plea had been filed, it was not in their power, in this court, to depart from their original demand, even so far as to make a new assignment; and that therefore, in the prosecution of these actions of trespass, originating in the justice's courts, the settled principle, above alluded to, must yield; and that, under the general description in the declaration, the plaintiffs must have power to select the place to which the evidence shall be confined. The judge, at the circuit, reserved the point. And the plaintiffs having given evidence of title and possession, in a certain lot falling within the general description, and the defendants having given no evidence of title or possession in that identical lot, the plaintiffs recovered the verdict, which the defendants now move to set aside.

[1] Only a portion of the opinion of the court is given. Ewing, C. J., delivered a dissenting opinion. — ED.

In Chitty on Pleading, 605, it is laid down that "in trespass to real property, if the declaration does not state the name or abuttals of the close, &c., with such precision as to avoid the possibility of the defendants having a close, &c., in the same parish, of a similar description, and the defendant has pleaded *liberum tenementum*, without describing the close, the plaintiff should new assign, and not take issue on the plea, for if he were, he would fail upon the trial, if the defendant could show that any close in the parish or place stated in the declaration was his freehold." And see 10 East, 80. 11 do. 51. 3 Starkie, 1465.

The pleadings are so general, that they will apply to either tract. The issue is taken upon the defendants' plea, and they verify it by evidence. How can they be involved in damages, if they have pleaded a good plea, and verified it in fact? Upon general principles they cannot; and I see no necessity for changing the rule to accommodate this new class of cases; or rather, to accommodate plaintiffs in them, at the expense of defendants. It is the plaintiff's business, before he goes to trial, to give to the issue the proper degree of *certainty?* And if he cannot do it in this court, or cannot do it without endangering his security for costs, still he is not remediless. There can be no doubt that the legislature contemplated that the proceedings in the Supreme Court would be upon the *same issue* as in the court below. If a new assignment is to be made anywhere, the above reasoning would favor its being done in the court below, rather than in this court. But I am aware that there would be some inconvenience in this. And there is a more easy course for plaintiffs to pursue. It is, to specify the close particularly, in the first instance, in their declaration, whenever they have reason to apprehend that the defendant has a freehold in the same township. This was the English practice when our act, out of which these proceedings have grown, was passed. In the case of Martin *v.* Kesterton[1] it was doubted by the court, whether a general declaration was not bad, upon demurrer. And it is laid down in 1 Saunder's Rep. 299, c. that "it is now the usual way in all the courts at Westminster, and particularly in the Common Pleas, to ascertain the place in the declaration. In which case the defendant is bound to answer that place, and cannot plead the common bar."

Upon the whole case I am of opinion, that the rule to show cause should be made absolute.

FORD, J., concurred.

Rule to show cause made absolute.[2]

[1] 2 Wm. Bl. 1089.

[2] William *v.* Robert, Y. B. 5 Ed. III. f. 49, pl. 46; Anon. Y. B. 5 Hen. VII. f. 28, pl. 11; Elwis *v.* Lombe, 6 Mod. 117, 119, Salk. 453 s. c. (*semble*); Lambert *v.* Stroother, Willes, 218, 223; Goodright *v.* Rich, 7 T. R. 327, 335 (discrediting Anon. Dy. 23 b); McFarlane *v.* Ray, 14 Mich. 465; Tindall *v.* Tindall, 20 N. J. 146, 150; Palmer *v.* Tuttle, 39 N. H. 486, 488; Tabor *v.* Judd, 62 N. H. 288, 291; Austin *v.* Morse, 8 Wend. 476; Ellice *v.* Boyce, 8 Wend. 503, 504; Collum *v.* Andrews, 6 Watts, 516; Providence *v.* Adams, 10 R. I. 184, 189, 197, 198 *Accord.*

A learned judgment upon the history and nature of new assignment in actions of tres-

COCKER v. CROMPTON AND OTHERS.

IN THE KING'S BENCH, APRIL 22, 1823.

[*Reported in* 1 *Barnewall & Cresswell*, 439.]

TRESPASS for breaking and entering the plaintiff's close, called the Fold-yard, situate in the parish of Prestwick *cum* Oldham, in the county of Lancaster. Plea, that the said close in the said county mentioned, and in which, &c., now is, and at the said time when, &c., was the close, soil, and freehold of the said defendant Crompton; wherefore he, in his own right, and the other defendants, as his servants, broke and entered the same, &c. Replication, that the said close was not the close, soil, and freehold of the said defendant Crompton, as alleged. At the trial before Holroyd, J., at the last Lancaster assizes, it was proved that the plaintiff was in possession of a close, called the Fold-yard, and that a trespass had been there committed; but it appeared that Crompton also had a close called the Fold-yard, in the same parish; whereupon it was objected for the defendants, that they were at liberty to apply all the evidence to that close, and that the plaintiff must, therefore, be nonsuited. Holroyd, J., reserved the point, and the plaintiff having obtained a verdict,

Cross, Serjt., now moved for a rule *nisi* to enter a nonsuit. It must be admitted, that, according to an anonymous case in Dyer's Reports,[1] "If in trespass for breaking a close the defendant plead that the place is six acres of land in D., which are his freehold, and the plaintiff reply that they are his freehold, and not the freehold of the defendant; if the plaintiff have six acres in D., and the defendant other six, the defendant cannot give in evidence that he did the trespass in his own land." But in Goodright *v.* Rich,[2] Lawrence, J., says, "Notwithstanding the case in Dyer, according to the modern practice, if the defendant plead *liberum tenementum*, the plaintiff is driven to a new assignment, in which he must specify the close; otherwise, if the defendant prove his title to any land falling within the general description mentioned in the declaration, it is sufficient." And in Hawke *v.* Bacon,[3] the court use this expression: "This case does not differ from the common case of pleading *liberum tenementum*, where, if the defendant proves that he has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there." It cannot make any difference that the plaintiff in the present case gave his

pass *quare clausum fregit* was given by Blackstone, J., in Martin *v.* Kesterton, 2 Blackst. 1089.

Under the Codes of some states new assignments, as such, are abolished. But the benefit of a new assignment is secured by an amendment of the complaint. McFarlane *v.* Ray, 14 Mich. 465; Stewart *v.* Wallis, 30 Barb. 344; Shull *v.* Green, 49 Barb. 311; Locklin *v.* Casler, 50 How. Pr. 43; Baier *v.* Ziegelbaum, 66 Wis. 524.

[1] 23 b, pl. 147. [2] 7 T. R. 335. [3] 2 Taunt. 156.

close a name in the declaration, for the defendant's close was known by the same name.

ABBOTT, C. J. I am clearly of opinion that the plaintiff was not bound to new assign in this case. In order to compel him to do that, as a name was given to the close in the declaration, the defendant should have given some further description in his plea.

BAYLEY, J. According to the old form of pleading in trespass, the plaintiff did not name his close. Then the defendant gave some name to the close; and if the plaintiff did not new assign, the common bar applied. This is the rule laid down in Dyer;[1] afterwards it became usual for the plaintiff to name the close in the declaration, and then he may apply his evidence to any close of that name in his possession, and the defendant does not maintain a plea of *liberum tenementum* by showing that he is the owner of a close of that name. In order to avail himself of such a plea, he must set out the abuttals.

HOLROYD, J. The plaintiff in trespass declares upon his possession; and it appears to me that the question upon the issue was, whether the close, described in the declaration as the plaintiff's, was the defendant's freehold or not. Now there was evidence that a close of that name, in the plaintiff's possession, was not the freehold of the defendant, and he had no right to substitute another close as the subject-matter of the issue. In the old common bar, the defendant alone gave a name to the close, and then the issue was, whether that close was the defendant's freehold.[2] In the rules of this court, made in 1654, § 12, it is said, "For the avoiding of the common bar and new assignment, the declaration upon an original *quare clausum fregit* may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment;" and by § 16, "The common bar and new assignment is to be forborne where certainty is contained in the declaration equivalent to a new assignment." I mention these rules to show what was then considered sufficient certainty in a declaration to prevent the application of the common bar. In the present case, I think, the certainty was such as to prevent the defendant from availing himself of the common bar.

BEST, J., concurred.

Rule refused.[3]

[1] 23 b.

[2] In Martin v. Kesterton, 2 Blackst. 1089, BLACKSTONE, J., said that the defendant was permitted "to name any place, as Broomfield (true or false was immaterial) in A as the place where the supposed trespass happened, and then to allege that such place so named was the defendant's own freehold. And, as the plaintiff could prove no trespass in Broomfield, this drove him to a new assignment." But Blackstone seems to be in error here. If the defendant could prove that Broomfield was his freehold he was entitled to a verdict. If he could not prove this allegation, the plaintiff won the verdict for nominal damages, without any evidence of actual entry of defendant upon Broomfield, for the defendant, by not denying, admitted the entry alleged in the declaration. Providence v. Adams, 10 R. I. 184, 199; Caruth v. Allen, 2 McC. 226. — ED.

[3] In North v. Ingamells, 9 M. & W. 249, 251, PARKE, B., said: "It was settled in Cocker v. Crompton, that if there be a description of the close in the declaration, *liberum tenementum* is not a common bar, because the defendant must be taken to know what close

PRETTYMAN v. LAWRENCE.

In the Common Pleas, Hilary Term, 1591.

[*Reported in Croke's Elizabeth*, 312.[1]]

Trespass *quare domum et clausa sua fregit.* The defendant pleaded, that the house is called Crable-house, and one of the closes is Black-Acre, and the other is White-Acre, and pleads that they are his freehold; and so justifies. The plaintiff saith, that the trespass done was in the house called Crable-house, and in Black-Acre, which are his freehold, *absque hoc* that they are the freehold of the defendant; and that the trespass was done in another place, containing twenty acres, *alias quam* White-Acre, &c. It was thereupon demurred; for it was said, when the plaintiff makes a new assignment, so that the defendant hath not agreed to him, and hit every parcel intended in the declaration, this new assignment is as a new declaration, to which the defendant shall have a new answer in all, and is a waiver of the former pleading in all; wherefore he ought to have omitted his traverse. And of that opinion was Walmsley: but all the other justices *à contra;* for in regard that the defendant hath hit some of the places wherein the plaintiff intended the trespass, and pleaded thereto, the plaintiff may well answer to that part, and the defendant shall have no other answer; as if the defendant had hit one place, and had confessed the action therein, the plaintiff needed not make any answer thereto; and the defendant shall not waive his answer, and answer to all *de novo.* Wherefore it was adjudged for the plaintiff.

ODIHAM v. SMITH.

In the Queen's Bench, Michaelmas Term, 1593.

[*Reported in Croke's Elizabeth*, 589.[2]]

Error of a judgment in the Common Pleas, Trinity Term, 34 Eliz. Roll, 124, in trespass of his close breaking at Wytlsham, and taking an ox there. The defendant justifies for damage-feasant in Black Acre. The plaintiff made a new assignment of the trespass in White Acre. The defendant justifies there as servant to Belknap Rudstone,

is meant; and the question is whether the close so described is or is not the close of the defendant." To the same effect are Lempriere v. Humphrey, 3 A. & E. 181; Cooke v. Jackson, 9 D. & R. 495; Lethbridge v. Winter, 2 Bing. 49; Providence v. Adams, 10 R. I. 184. But see *Contra*, Troughton v. Googe, Yelv. 166, Brownl. 217, s. c.

Compare Smith v. Royston, 8 M. & W. 381; Ellison v. Isles, 11 A. & E. 665; Whitaker v. Jackson, 2 H. & C. 926.

[1] Lambert v. Strother, Willes, 218, 225 *Accord.* — Ed.

[2] Moore, 540, Golds. 191 s. c.

for that the plaintiff held of him the place, where, &c., by heriot service *inter alia servitia*, as of his manor of Paulter, and that he seized the said ox there for an heriot. Whereupon the plaintiff demurred, and had judgment. And error being now brought, Foster argued for the defendant in the writ of error, that one cause of the judgment was in the pleading.[1] For in the bar he justifies for damage-feasant, wherein he claims not any property; and in the rejoinder he justifies for an heriot, wherein he claims it as his; for it is contrary, and a departure. Wherefore, &c. But all the Justices severally delivered their opinions as to the objection against the pleading, holding it to be well enough; for by the novel assignment the bar is out of doors, and as if it never had been pleaded; as 27 Hen. VIII. pl. 7, is.[2]

PRATT *v.* GROOME.

In the King's Bench, February 11, 1812.

[*Reported in* 15 *East*, 235.]

Trespass *quare clausum fregit*, parcel of Fen Mead in the parish of Totternhoe, in the county of Bedford. There were other counts laying the close in the parish of Eaton Bray, and in Totternhoe and Eaton Bray. The defendant pleaded the general issue; and, secondly, after averring the closes in the different counts to be one and the same, that the *locus in quo* is parcel of a common field called Fen Mead, which is divided into allotments holden of the lord of the manor of Eaton Bray, and within the jurisdiction of the leet jury of the said manor. The plea then set forth a custom for the leet jury to meet at certain specified times, and to set out the bounds of the different allotments in the common fields within the manor: that the defendant was seised in fee of a certain allotment within Fen Mead holden of the lord, and within the jurisdiction of the leet jury, and adjoining to an allotment also within Fen Mead, &c., possessed by the plaintiff; that the jury set out and determined that the *locus in quo* was parcel of the said allotment of the defendant, and was his close, soil and freehold, &c. The plaintiff in his replication, after setting out the abuttals to the closes in each of the counts of the declaration, concluded thus: "Which said closes above newly assigned were and are other and different closes than the said allotment, or piece, or parcel of land of the defendant in his said last plea mentioned." To this the defendant pleaded not guilty. At the trial before Mansfield, C. J., at

[1] Only so much of the case is given as relates to pleading. — Ed.

[2] Gawdy, J. "After a new assignment the old barre is waved and out of the book, and the defendant shall plead to the new assignment, as if he had never pleaded before." Golds. 191. — Ed.

the last assizes for the county of Bedford, the plaintiff's counsel, in opening his case, did not pretend to be able to prove a trespass anywhere but on the spot allotted to the defendant by the leet jury; whereupon the learned judge directed the jury to find for the plaintiff on the general issue only, and for the defendant on the not guilty to the new assignment; which they accordingly did.

Sellon, Serjt., in Michaelmas term, obtained a rule *nisi* for a new trial, or to enter a verdict generally for the plaintiff, notwithstanding the verdict for the defendant on the other issue.

Blosset, Serjt., now showed cause, and contended that the plaintiff under this form of pleading had no right to show a trespass in the place which the defendant by his plea claimed as his allotment; for by his new assignment the plaintiff had waived the trespass to which the defendant had before pleaded in bar. In support of this he cited Bull. N. P. 92; Freeston *v.* Crouch;[1] Freeston *v.* Standford;[2] 1 (Williams's) Saund. 299, n. 6, and 2 Saund. 5.

Lord Ellenborough, C. J., said there could be no doubt that the not guilty to the new assignment put the whole of it in issue, a part of which was that the close was different from that mentioned in the plea. The court therefore thought the direction of the learned Chief Justice at the trial right, but they gave the plaintiff leave to amend on payment of costs.

Grose, J., had left the court, and Le Blanc, J., was absent at Horsemonger-lane.[3]

NORMAN *v.* WESTCOMBE and Another.

In the Exchequer, January 15, 1837.

[*Reported in* 6 *Law Journal Reports, Exchequer*, 164.[4]]

Trespass for breaking and entering the plaintiff's house.

Pleas. First, not guilty; second, that one W. F., before the said time when, &c., held and enjoyed a certain dwelling-house of the defendant T. W., under a demise, at a yearly rent of £8, payable from the said W. F. to the said defendant, and that just before the said time when, &c., a large sum, to wit, the sum of £8, for one year of the said demise, was owing from the said W. F. to the defendant; and while the same was in arrear, and within thirty days before the said time when, &c., the said W. F. fraudulently and clandestinely con-

[1] Cro. Eliz. 492. [2] Cro. Eliz. 355.

[3] Freeston *v.* Crouch, Cro. El. 492; Freeston *v.* Standford, Cro. El. 355; Oakeley *v.* Davis, 16 East, 82; Darby *v.* Smith, 2 M. & Rob. 184; McNutt *v.* Arnott, 5 Blackf. 95; Boynton *v.* Willard, 10 Pick. 166 *Accord*.

See Atkinson *v.* Matteson, 2 T. R. 176–7; Hall *v.* Middleton, 4 A. & E. 107.

Compare Bolton *v.* Sherman, 2 M. & W. 395; East. Co.'s R. R. *v.* Dorling, 5 C. B. N. S. 821. — Ed.

[4] 2 M. & W. 349 s. c. — Ed.

veyed away and carried off and from the premises, so held and enjoyed by the said W. F., certain goods and chattels, to wit, &c., of the said W. F., to prevent the defendant from distraining the same for the rent so due, and for that purpose conveyed them to the said dwelling-house in which, &c., without leaving any goods and chattels on the said premises, sufficient to satisfy the said arrears of rent; that the defendant requested the plaintiff to allow him to enter his dwelling-house to seize and take the said goods, which he refused to do; that a warrant to search the said plaintiff's house was then obtained from two justices; and the defendants justified the entry, under that warrant, to search for the goods so clandestinely removed.

Replication. That the plaintiff declared for that the defendants broke and entered the said dwelling-house upon a different occasion, and upon another and different part of the day from that in the plea supposed, and stayed and continued therein for a long space of time, to wit, for six hours *modo et forma*, which said trespasses newly assigned are other and different trespasses. Verification.

To this new assignment the defendants pleaded the same defence as to the declaration, merely alleging that it was before the trespasses newly assigned; and the plaintiff replied *de injuria*.

At the trial before Williams, J., at the last Summer Assizes for Somersetshire, the defendants proved that W. Fuke had removed his goods to the plaintiff's house to avoid the distress, and that the defendant, who was the landlord of Fuke, had gone to the plaintiff's house to demand the goods on the 19th of April. He then entered with the plaintiff's license. On the 20th he came again with the other defendant, Sayer, and left him there at eleven o'clock, in order to obtain a warrant. He returned at one o'clock, and, together with Sayer, who had been turned out of the house in the interval, entered under the warrant. No proof was given of the demise to Fuke, nor of the arrears, but it was contended that these facts were admitted on the pleadings; and the learned judge directed a verdict for the defendants. In Michaelmas Term last, a rule had been obtained for a new trial, on the ground of a misdirection, against which —

Erle now showed cause. The facts stated in the defendants' plea to the new assignment had been admitted by the plaintiff on the record, and therefore did not require to be proved at the trial. The plea to the new assignment is to be referred in its construction to the plea to the declaration; House *v.* The Thames Commissioners.[1] Although in the plea to the new assignment a demise and arrears are stated, yet they have been already stated in the plea to the declaration, and admitted by the plaintiff. It was enough for the defendant to apply those facts by parol evidence to the same premises and the same time, which was done. In all continuous pleadings, everything not traversed is admitted, and the whole of the pleadings in the present case are continuous. The new assignment, therefore, admits the

[1] 3 Brod. & Bing. 117.

truth of the justification. 1 Wms. Saund. 299, *a*; Oakley *v.* Davis.[1] The case of collateral pleadings is different.

[PARKE, B. Under the issue on the new assignment, it must be proved that Fuke was tenant at the precise part of the day on which the plaintiff proves that the defendants entered.]

It is submitted, that that is done by the aid of the parol evidence.

[LORD ABINGER, C. B. You seek to help out the admission on the pleadings by parol evidence.]

[PARKE, B. Can you use parol evidence to apply the admission on the pleadings to the facts? You cannot call in aid an admission in one plea to prove another.]

No, that cannot be done where there are collateral pleadings; but it is different where they are continuous. This case may be illustrated by other analogies. Suppose a trespass *quare clausum fregit*, or an assault, and a right of way be pleaded to the former, and a justification to the latter; if there be a new assignment of *extra viam*, or excess, the justification in each case is admitted.

[LORD ABINGER, C. B. If there had been two counts in trespass, and the defendant had pleaded a justification to each, which had been admitted by the plaintiff as to one count, and traversed as to the other, the former plea would have been as though it were struck out of the record, and the trial would have been on the other. The question on the new assignment is the same.]

The two counts are as two actions, and it may be treated as collateral pleadings; but even then probably the admission in the one might be used in the other, provided there were a proper application by parol evidence. Again, take the case of an action on a bill of exchange, and for goods sold, for which the bill was given; and the defendant pleads to the count on the bill, payment, to which the plaintiff enters a *nolle prosequi*, and to the count for the goods a satisfaction by the bill; the defendant might show that the plaintiff has admitted the payment of the bill.[2]

LORD ABINGER, C. B. The ingenious argument for the defendants raised a considerable doubt in my mind. If this had been parallel to the cases suggested, of two separate counts, with an admission of certain facts in the pleadings to one, or of two separate actions, to one of which there was a plea admitted by the plaintiff, or the defendants had recovered a verdict thereon, I should have thought it worthy of consideration, whether the admission or verdict would not have been evidence in support of the pleadings to the other count or action. But those are distinguishable from the present case. A new assignment does not admit the facts stated in the plea, but is merely an assertion that the plaintiff does not investigate the subject-matter set forth in the plea. It is not an admission, but is the same as if the plaintiff were to say, "I do not choose, and never intended to go for that trespass, which you have attempted to justify." Suppose a plaintiff

[1] 16 East, 32.

[2] The argument for the plaintiff is omitted. — ED.

embraces several matters in his declaration, to one of which the defendant pleads a justification, which the plaintiff cannot deny, and he agrees to have it struck out of the declaration, and obtains an order for that purpose, and goes to trial on the other matters, that would be taken from the consideration of the judge and jury, and would not be evidence in support of the other issues. Here the pleadings, previous to the new assignment, are to be taken as if they were in point of fact struck out of the record, and the defendants had no right to use them on the trial of the other issues.

PARKE, B. I entertained no doubt when this case was moved, but I have been led into a doubt by assuming that the new assignment admits the truth of the matter previously pleaded. But when we examine the nature of a new assignment, we find that it only admits the existence of another trespass, as to which the plaintiff wholly abandons all inquiry. Its effect, as Mr. Crowder says, is not an admission of the facts stated in the plea, but an assertion that that is not the cause of action of which the plaintiff complains. Then the other pleadings, previous to the new assignment, being out of the case, the defendants cannot make use of any admission of the facts stated in the plea to the declaration.

BOLLAND, B., concurred.

Rule absoluta.[1]

BATT *v.* BRADLEY.

IN THE KING'S BENCH, TRINITY TERM, 1606.

[*Reported in Croke's James*, 141.]

TRESPASS *quare averia sua cepit* at Kymbolton, and chased them, &c. The defendant justifies in such a close for damage-feasant. The plaintiff shows, that the place *where* was another close; whereupon the defendant demurred, pretending that the plaintiff never made any new assignment, but where the writ is *quare clausum fregit*. The court held the contrary. Wherefore it was adjudged for the plaintiff.[2]

[1] Dand *v.* Kingscote, 6 M. & W. 197, per Parke, B.; Robertson *v.* Gantlett, 16 M. & W. 289; Grove *v.* Withers, 4 Ex. 875; Brancker *v.* Molyneux, 1 M. & G. 710; Wilmshurst *v.* Bowker, 5 B. N. C. 550 *Accord.*

See Aldred *v.* Constable, 6 Q. B. 376, 377; per Patteson, J.; Bartlett *v.* Prescott, 41 N. H. 449. — ED.

[2] Abbot *v.* John, Parson, Y. B. 34 Hen. VI f. 10, pl. 21; Coke *v.* Evans, 2 Salk. 453; Cockley *v.* Pagrave, Freem. 238; Scott *v.* Dixon, 2 Wils 3; Heydon *v.* Thompson, 1 A. & E. 210 (*assumpsit*); Nelson *v.* Robe, 6 Blackf. 214 (*action for slander*); Campbell *v.* Bannister, 79 Ky. 205 (*action for slander*); Stickle *v.* Richmond, 1 Hill, 77 *Accord.* — ED.

FREEMAN *v.* CRAFTS.

In the Exchequer, Trinity Term, 1838.

[*Reported in 4 Meeson & Welsby, 4.*]

Debt in £10 for goods sold and delivered, in £10 for work and labor and materials, and in £10 on an account stated. Pleas, first, *nunquam indebitatus;* secondly, that the defendant paid to the plaintiff divers sums of money, amounting in the whole to a large sum of money, to wit, the amount of all the several alleged debts and moneys in the declaration mentioned, in full satisfaction and discharge of the said several debts and moneys, &c.; on which issue was taken. On the trial before the under-sheriff of Middlesex, the defendant proved payments to the plaintiff of sums exceeding the amount claimed in the declaration, and the jury found that £92 had been paid by the defendant to the plaintiff, but that the plaintiff had done work for the defendant to the amount of £107. A verdict was thereupon taken for the plaintiff for the balance of £15, leave being reserved to the defendant to move to enter a verdict for him, if the Court should be of opinion that the plaintiff was not entitled to recover without a new assignment.

Corrie now moved accordingly. The plea was supported by proof of any sum paid, to the amount claimed in the declaration, and if the action was brought for other sums than those so paid, the plaintiff ought to have new assigned: otherwise how is the defendant to get the costs of the plea of payment? It is to be assumed that the defendant has answered what the plaintiff charges against him. In Collins *v.* Aron,[1] it seems to be implied in the judgment of Tindal, C. J., that the proper course to have pursued in such a case as this, would have been to apply to increase the damages laid in the declaration, or else to new assign. The declaration here is quite general.

Lord Abinger, C. B. So is the plea; it means that the defendant has paid the sums the plaintiff goes for, or it means nothing. To make the plea a good defence, it must be interpreted to apply to a payment of the money the plaintiff seeks to recover; it is no answer unless it means that the plaintiff can prove no sum which the defendant has not paid.

Alderson, B. It is like the plea of license in trespass, where the defendant must prove a license for every trespass the plaintiff can prove.[2] So, in a plea of payment, you undertake to prove that whatever demand the plaintiff can establish, you have paid him. No new assignment was therefore necessary.

Per Curiam. *Rule refused.*[3]

[1] 4 Bing. N. C. 233.

[2] "I consider Barnes *v.* Hunt an authority merely for cases of leave and license." Per Littledale, J. in Brown *v.* Jenkin, 6 A. & E. 919.

[3] James *v.* Lingham, 5 B. N. C. 553; Alston *v.* Mills, 9 A. & E. 248; Hill *v.* White, 6 B. N. C. 26; Kennington *v.* Alison, 2 Dowl. N. S. 658; Moses *v.* Levy, 4 Q. B. 213 *Accord.*

MONKMAN v. SHEPHERDSON.

In the King's Bench, January 15, 1840.

[*Reported in* 11 *Adolphus & Ellis*, 411.]

Indebitatus debt for £10, for wages of plaintiff for his service as hired servant of defendant.

Plea: that when plaintiff was hired by defendant, it was agreed between them that, in case plaintiff should at any time during his service voluntarily become drunk, he should forfeit all wages then due, and defendant should cease to be liable for the same or any part thereof; that plaintiff served defendant on those terms: that afterwards, and after the money mentioned in the declaration became due, and whilst plaintiff was in the service of defendant, and before action brought, plaintiff became and was drunk, whereby he forfeited the wages in the declaration mentioned, and defendant ceased to be liable for the same, or any part thereof. Verification.

Replication: that, after plaintiff so became and was drunk, defendant, well knowing that plaintiff had been drunk, exonerated and discharged him from so being drunk, and from all forfeitures incurred by him, and which had accrued to defendant in respect thereof, and then agreed to pay to plaintiff the wages already due to him as such hired servant as aforesaid, and then continued to employ him as such servant as aforesaid. Verification.

New assignment, alleging that only a part, to wit, £3, parcel, &c., accrued to plaintiff as wages before he so became drunk, and that the residue, to wit, £7, accrued to plaintiff for wages as aforesaid after he so became drunk, and after defendant had notice thereof as aforesaid; and that plaintiff declared not only for wages due before, but also for wages due after, he so became drunk, and after notice thereof to defendant. Verification.

Demurrer, showing for causes, 1. As to the replication, that it stated no consideration for exonerating plaintiff from the forfeitures, &c., or for agreeing to pay the wages; and that it tended to raise an immaterial issue, viz., the continued employment of plaintiff as servant;[1] 2. That the replication and new assignment were double, for that the former, if true, was an answer to the plea, and the latter was also an answer to part of the plea. Joinder.

The case was argued at the sittings in banc after Hilary Term, 1839.[2]

But if the defendant identifies the debt as growing out of a particular contract and pleads payment of such debt, the plaintiff is driven to a new assignment if he wishes to recover on a debt arising from some other contract. Rogers v. Custance, 1 Q. B. 77. See also Jubb v. Ellis, 3 Dowl. & L. 364. — Ed.

[1] The court held the replication bad for the reason above alleged. The arguments and opinions in relation thereto are omitted. — Ed.

[2] February 5th, before Lord Denman, C. J., Littledale, Williams, and Coleridge, JJ.

Martin, for the defendant. Then the new assignment and replication together are double, for the plea covers the whole declaration, and the replication answers the whole plea, yet the plaintiff goes on to give a further answer as to part of the sum demanded; so that he gives a double answer to the plea.

Wightman, contra. As to the new assignment, the declaration is general, and the plea *prima facie* covers the whole; so that the defendant would, on proving his plea to any part of the wages, be entitled to a general verdict, unless the plaintiff took care to new assign so as to recover wages due for service since the cause of forfeiture. Vivian *v.* Jenkin [1] shows that the plaintiff may subdivide his demand in the replication in answer to a plea that in terms covers the whole declaration. The same form of pleading was adopted in Solly *v.* Neish.[2]

Martin, in reply. Vivian *v.* Jenkin is an authority only to show that the plaintiff might have replied as to £3, parcel, &c., a forfeiture; and as to the rest, that it became due after the forfeiture. The plaintiff, if he proves his replication, and it be good in law, will recover all that he demands, though the new assignment should be struck out of the record. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

Besides the replication, the plaintiff has also new assigned that only part of the moneys in the declaration mentioned accrued due for services done before the intoxication alleged in the pleas, and that he sued, and has declared, as well for the money due for services after, as before, the intoxication. To this the defendant has demurred specially for duplicity, but it appears to us without any sufficient grounds. The declaration is general in form; and under it the plaintiff would have been entitled to give in evidence any demand for wages accruing due before the commencement of the suit. The plea treats the demand as entire, but assumes the action to be brought only for wages which had accrued due before the intoxication; the replication answers the whole plea by the agreement which we have just been considering, and it was necessary that it should do so. The plea could not be divided, for that is confined to whatever was due before the intoxication, and the answer is co-extensive with the excuse, and no more. If, therefore, the plaintiff had intended to sue only for the wages accruing after the intoxication, the plea would not have hit at all, and no replication at all would have been necessary. A new assignment alone would have been the plaintiff's proper course. But, as the plaintiff intended to sue both for the wages accruing due before, and those accruing due after, and the plea answers the former only, treating that as the only demand, the plaintiff might give such reply as he could to sustain the former part of his demand, and was also at liberty to new assign and point his declaration as to the latter. In this there is no duplicity either in form or substance; and the supposition that there

[1] 3 A. & E. 741. [2] 2 C., M. & R. 355; s. c. 5 Tyr. 695.

is any arises from neglecting to observe that in truth the plea did not answer the whole extent of the declaration, that is, everything which might be given in evidence under it. This part of the demurrer, therefore, fails; but as it was divisible,[1] the judgment will be for the defendant as to the replication, and for the plaintiff as to the new assignment. *Judgment for defendant on the replication; for plaintiff on the new assignment.*[2]

TAYLOR *v.* SMITH.

In the Common Pleas, November 9, 1816.

[*Reported in 7 Taunton*, 156.]

Trespass for that the defendant, on 17th October, 1815, stopped the plaintiff's cattle and cart. Plea, not guilty; and justification that the plaintiff was loading his cart with turf, which he had wrongfully cut from the waste of the manor of Clapham, and the defendant, as bailiff of the lord, took it from him. The plaintiff replied to the justification, *de injuria sua*, and newly assigned, that the defendant on other days and times did the trespasses complained of; and upon the trial, before Lord Ellenborough, C. J., at the Guilford Summer Assizes, 1816, he proved a license from the lord to cut the turf. Verdict for the defendant, which *Onslow*, Serjt., now moved to set aside, on the ground that, upon the evidence of the license, the verdict ought to have been for the plaintiff.

The court held clearly, 1. That a single act only of trespass being laid, and not *diversis vicibus et diebus*, and that act being covered by the defendant's plea of justification, there could be no new assignment. 2. That the license, not being replied, could not be given in evidence to rebut the justification, and therefore the verdict was right, and they

Refused the rule.[3]

[1] See 11 A. & E. 412, note (*a*).

[2] Page *v.* Hatchett, 8 Q. B. 187 *Accord.* See Brown *v.* Jenkin, 6 A. & E. 911.

[3] "The court were clearly of opinion against the plaintiff on both grounds. They held that the replication was double. It was an attempt by a new assignment to amplify the cause of action stated in the first count. The plaintiff declared in that count for one breaking and entering; this was justified, and after issue taken on that justification, he attempted to make a new assignment of other matter; which was irregular. They said it was the same as if, to an action of trespass for breaking and entering the plaintiff's close, generally, in such a parish, the defendants were to plead that the trespass complained of was in a close there called Whiteacre, which was his own soil and freehold; and then the plaintiff were to reply, admitting that it was in Whiteacre, and taking issue upon the defendant's soil and freehold; and after that, should go on to state that he meant also to go for a trespass in Blackacre; which was not allowable. So with respect to the single act of trespass complained of in the third count; that also was justified; and after taking issue on the matter of that justification, the plaintiff, without alleging any different fact, made a new assignment of the same matter; so that there would be two issues to be taken on the same fact.

BARNES v. HUNT.

KING'S BENCH, JUNE 20, 1809.

[11 *East*, 451.]

THE declaration alleged that the defendant on the 1st of September, 1808, and on *divers other days* and times between that day and the day of exhibiting the plaintiff's bill, broke and entered the plaintiff's close at Combe, &c., and with dogs hunted and beat for game there, and committed other trespasses there, particularizing them. The defendant pleaded, that *at the said several days and times* when, &c., he committed the said several trespasses in the introductory part of his plea mentioned *by the leave and license* of the plaintiff. The plaintiff replied that the defendant of his own wrong, and *without the cause* by him in that behalf alleged, committed the said several trespasses, &c.; on which issue was joined. At the trial before Chambre, J., at Salisbury, it appeared that the defendant, who had been warned by a prior notice from the plaintiff not to trespass upon his grounds, was seen trespassing thereon on the 1st, 2d, 13th, and 19th of September. That on the 2d, as the defendant was returning from shooting upon the plaintiff's land, he met the plaintiff, and after mutual salutation offered him some game, which the latter accepted and thanked him for. And the defendant having been asked whether a Mr. H. was to have all the game (meaning on the plaintiff's land), the plaintiff replied, "I do not care who has the game; you may kill as much as you like, or all if you please, so as you do not ride over my corn." On this evidence the question arose whether there was any necessity for the plaintiff to have made a new assignment, to enable him to recover for the trespasses committed prior to the license. The plaintiff took a verdict for the first trespass, with nominal damages; and liberty was given to the defendant to move the Court to set aside that verdict, and enter a verdict for the defendant.[1]

Burrough (*Pell*, Serjt. was with him) in support of the rule, contended that though upon the plea of not guilty the plaintiff might prove as many trespasses as he pleased within the period laid in his declaration; yet upon the plea of license, the proof of which lay upon the defendant, the trespasses were agreed upon, and nothing was in issue except *the cause of the justification*, namely, the license; and if

They observed that the object of a new assignment was to give the go-by to all that the defendant had pleaded, by saying that the trespass stated and justified by the defendant was not that which the plaintiff had complained of in his declaration, but some other which is stated." Cheasley *v.* Barnes, 10 East, 79; Lucas *v.* Nockells, 10 Bing. 169, per Parke, B.; Thomas *v.* Marsh, 5 C. & P. 596; Polkinhorn *v.* Wright, 8 Q. B. 197; Gisborne *v.* Wyatt, 3 Dowl. P. C. 505; Meriton *v.* Coombes, 9 C. B. 787; Stults *v.* Buckalew, 28 N. J. 150; Spencer *v.* Bemis, 46 Vt. 29 *Accord.*

See Smith *v.* Powers, 13 N. H. 216. — ED.

[1] The statement is abridged, and only the argument of the defendant and the opinions of the court are given. — ED.

the defendant proved any trespass covered by his license, the issue must be decided for him. [Lord Ellenborough, C. J. The question is, what is *the cause* under the replication of *de injuria sua propria, absque tali causa;* is it *one*, or *several*, trespasses; and one, or several licenses?] Here the license is the only cause, and it has always been so considered.

Lord ELLENBOROUGH, C. J. *The cause* is one combined thing arising out of several facts; and I will venture to translate that word in this case into what it really means, and that is, *without the matter of excuse alleged.* Now what is the matter of excuse alleged? The defendant, in answer to a declaration complaining of several trespasses committed by him on the 1st of September, and on divers other days and times between that day and the day of exhibiting the bill, says that at the *said several days and times* when, &c., he had the license of the plaintiff; not a license to commit one or more trespasses, but a license, as large as the declaration, to commit as many trespasses as the plaintiff has assigned and is able to prove. What then does the replication import when it alleges that the defendant of his own wrong and without the cause alleged committed the several trespasses? It denies the defendant's justification to the extent pleaded by him: it denies that he had license to commit the several injuries of which the plaintiff complained and is able to prove within the terms of his declaration. Whatever practice may have prevailed, this sense of the pleadings appears to me to be clear.

GROSE, J., was of the same opinion.

LE BLANC, J. The defendant having by his plea applied a license to *all* the trespasses complained of, the plaintiff, intending to deny a license co-extensive with those trespasses, could only reply as he has done.

BAYLEY, J. The declaration is general, complaining of trespasses on divers days within a certain period. The defendant undertakes to meet that general and indefinite charge, and says, in effect, that whatever may be the number of trespasses that the plaintiff complains of within that period, he is prepared to show as many licenses. The replication states that the defendant at the said several days committed the said several trespasses of his own wrong, and without the cause alleged. What does that put in issue but that the defendant had a license to cover all those trespasses. Then, in common sense and understanding, we must take it that *the cause* put in issue by the replication is, that the defendant had not a license co-extensive with the trespasses complained of: and a new assignment could have done no more than repeat the same thing.

Rule discharged.[1]

[1] Hill *v.* White, 6 Bing. N. C. 26; Hayward *v.* Grant, 1 C. & P. 448 *Accord.* See Brown *v.* Jenkin, 6 A. & E. 919. — ED.

LOWETH *v.* SMITH AND ANOTHER.

IN THE EXCHEQUER, FEBRUARY 10, 1844.

[*Reported in* 12 *Meeson & Welsby*, 582.]

TRESPASS. The declaration stated, that the defendants, on the 20th of June, 1843, with force and arms, &c., broke and entered a certain dwelling-house and brick-yard of the plaintiff, situate, &c., and then made a great noise and disturbance therein, and stayed and continued therein making such noise and disturbance for a long time, to wit, for the space of four days then next following. It then went on to allege other trespasses, by seizing goods, &c.

Third plea, as to the breaking and entering the said dwelling-house and brick-yard, and staying and continuing therein, as in the declaration mentioned, a justification, by the leave and license of the plaintiff, to take possession of certain goods and effects.

Replication, traversing such alleged leave and license; and new assignment, that the plaintiff issued his writ, and declared thereon, not only for the breaking and entering the said dwelling-house and brick-yard, and staying and continuing therein, as in the introductory part of the said third plea mentioned, and in the said plea attempted to be justified; but also for that the defendants, with force and arms, and without the authority, and against the leave and license of the plaintiff, to wit, at the said times in the said declaration in this behalf mentioned, stayed and continued in and upon the said dwelling-house and brick-yard, making such noise and disturbance as in the said declaration mentioned, for a long time, to wit, for the space of three days next after the said day in the declaration mentioned, for other and different purposes than those in the said third plea mentioned, and also for a much longer time, to wit, the space of three days longer, than was necessary for the purpose of taking possession of the said goods, chattels, and effects in the said third plea mentioned, which trespasses, so newly assigned, are other and different trespasses, &c.

Special demurrer, for duplicity and multifariousness, and for departure from the declaration. Joinder in demurrer.

Cole, in support of the demurrer. The declaration complains of only one continued trespass to the dwelling-house and brick-yard, not of divers trespasses on divers days. The third plea justifies the trespass so alleged. The plaintiff might either have replied, traversing the plea, or new assigned; but he was not entitled to do both. Taylor *v.* Smith, Cheasley *v.* Barnes,[1] Thomas *v.* Marsh,[2] Gisborne *v.* Wyatt,[3] Franks *v.* Morris.[4] [PARKE, B. The plaintiff may traverse a right of way across the close mentioned in the declaration, and also new

[1] 10 East, 73.
[2] 5 C. & P. 596.
[3] 3 Dowl. P. C. 505.
[4] 10 East, 81 *n*.

assign *extra viam*.[1] That seems to be an authority against you. Though this is only one trespass, it is one occupying some time, and which is, therefore, divisible.] There can be no trespass which does not occupy some time. In trespass for false imprisonment, and a justification under a *ca. sa.*, could the plaintiff traverse the writ, and also new assign that the defendant kept him an unreasonable time in custody? So in an action for expelling the plaintiff, and keeping him so expelled for a long time, which is all one trespass; could the plaintiff deny the right to expel him, and also new assign that the defendant kept him out longer than he ought to have done? [PARKE, B. Most probably the justification of the expulsion would cover the whole time.] The trespass charged in Cheasley *v.* Barnes was one which occupied a considerable time, and was laid to have been committed *diversis diebus*, which makes the case a still stronger authority. There the defendants pleaded, to a count for breaking and entering the plaintiff's close and seizing manure, and detaining it until afterwards, on the same day, and on divers other days, they took it away from the close, a justification under a *fi. fa.* against a third person; to which the plaintiff replied, admitting the judgment and writ, *de injuria absque residuo causæ*, and also new assigned that the defendants broke and entered the close after the return of the writ; and this was held bad for duplicity. Suppose the defendants here had only pleaded not guilty, could the plaintiff have proved several distinct trespasses? [PARKE, B. No; but he could have proved that the defendant entered and stayed four days; that he threw the goods out at the end of the first day, and stayed three days longer. The question is, whether a trespass by continuation in point of time is not equally severable as the traversing over a continuous space of a close. The only limitation is, that the plaintiff cannot make that, which is one cause of action in the declaration, into two in the replication. ALDERSON, B. The declaration says, the defendants entered and stayed four days; the defendant sets up a justification, which entitled him to enter and stay for two days; to which the plaintiff replies, I deny you had any right to enter at all; but if you had, your only right was to stay two days, and you stayed two days longer without any color of authority.] If the continuing in possession amounts to a new trespass, Cheasley *v.* Barnes appears to be a direct authority.

Hayes, contra, was stopped by the court.

PARKE, B. The case of Cheasley *v.* Barnes proceeds upon this, that there the plaintiff in his replication alleged a fresh breaking and entering, one only being alleged in the declaration. But staying and continuing in a house appears to be a divisible trespass in point of time; there is a fresh trespass on each day: then the plea *prima facie* is an answer as to the whole. The plaintiff then says, as to part of the time, the defendants had no such authority as they allege; as to the rest,

[1] Creswell *v.* Chapman, 42 N. H. 53 *Accord*.
Spencer *v.* Bemis, 46 Vt. 29 *Contra*. — ED.

they had no justification even by the license they set up. It seems to be as divisible as a trespass is in point of space, on different parts of the surface of a close.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.[1]

MONPRIVATT *v.* SMITH AND ANOTHER, SHERIFF OF MIDDLESEX.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 7, 1809.

[*Reported in* 2 *Campbell*, 175.]

TRESPASS for breaking and entering the plaintiff's house, staying therein three weeks, and seizing and carrying away his goods.

Pleas, 1. Not guilty to the whole. 2. As to breaking and entering the house, and staying therein twenty-four hours, part of the said time in the said declaration mentioned, and also as to seizing and carrying away the goods, a justification under a writ of *fieri facias*. Replication to last plea, admitting the writ, *de injuria sua propria absque residuo causæ*.

The defendants proved their justification; but it appeared that their officers continued in the plaintiff's house beyond twenty-four hours.

Garrow and Wigley, for the plaintiff, contended, that the excess beyond twenty-four hours stood merely upon the plea of not guilty; and as the defendants had been proved to have been guilty of remaining in the house longer than they pretended to justify, the plaintiff was entitled to a verdict and damages for what he had thereby suffered.

LORD ELLENBOROUGH. I am of opinion that the last plea, in point of law, applies to the whole declaration, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. As the pleadings now stand, the residue of the cause mentioned in the plea is alone put in issue, and the length of the time during which the officers remained in the house is rendered immaterial.

The plaintiff was nonsuited.[2]

[1] Worth *v.* Terington, 13 M. & W. 781; Adams *v.* Andrews, 15 Q. B. 294-5 (*semble*); Ash *v.* Dawney, 8 Ex. 237; Cheswell *v.* Chapman, 42 N. H. 47 *Accord.* — ED.

[2] Scott *v.* Dixon, 2 Wils. 3; Pyewell *v.* Stow, 3 Taunt. 425; Ditcham *v.* Bond, 3 Camp. 524; Kavanagh *v.* Gudge, 7 M. & G. 316; Aldred *v.* Constable, 6 Q. B. 370; Gelston *v.* Hoyt, 3 Wheat. 246, 326; McGill *v.* Bishop, 27 Ill. Ap. 53; Lloyd *v.* District Court, 1 S. Aust. 121 *Accord*.

See also Lambert *v.* Hodgson, 1 Bing. 317; Gale *v.* Dalrymple, 1 Camp. 331; Bowen *v.* Parry, 1 Camp. 394. — ED.

BUSH v. PARKER AND OTHERS.

IN THE COMMON PLEAS, JUNE 3, 1834.

[*Reported in* 1 *Bingham's New Cases*, 72.]

TRESPASS for assaulting the plaintiff, seizing and laying hold of him, pulling and dragging him about, striking him many violent blows, forcing him out of a certain field into and through a pond, and there imprisoning him.

Second count for assault and imprisonment.

The defendants pleaded, first, not guilty; and then, as assistants of John Powell, justified the assaulting, seizing and laying hold of the plaintiff, and a little pulling and dragging him about, on the ground that the plaintiff was unlawfully in a close of John Powell's, and refused to go out when civilly requested.

The jury having found Parker and John Powell guilty on the general issue, with £5 damages, and having found a verdict for the defendants on the residue of the record, —

Ludlow, Serjt., obtained a rule *nisi* to enter up judgment for Parker and Powell, notwithstanding the verdict against them on the general issue, on the ground that the dragging through the pond, which was not adverted to in the pleas of jurisdiction, was only matter or aggravation; the gist of the action being the assault and battery, which were covered by the pleas of justification.[1]

Wilde, Serjt., showed cause.

The defendants having pleaded not guilty to the whole declaration, and having omitted to justify the dragging through the pond, it was unnecessary for the plaintiff to new assign; Cheasley *v.* Barnes, therefore, does not apply; and the dragging through the pond was parcel of the gist of the action. It was an act which the defendants could not avow without alleging and proving facts in justification, and no such facts appear on these pleadings. For though the defendants had a right to expel their plaintiff from the employer's field, and to use the force necessary for that purpose, they had no right, when he was out of the field, to proceed to corporal infliction. That infliction is a serious ground of action, independently of the expulsion.

Ludlow and *Talfourd*, Serjt., *contra*.

Here, if the dragging through the pond were a corporal infliction unnecessary for the defendant's purpose of extruding the plaintiff, he ought to have new assigned the extra violence. But for aught that appears to the contrary, the pond was parcel of the close, and the only direction by which it might be possible to expel the plaintiff. He might have refused to mount a stile. The gist of the action was the

[1] The arguments of counsel are curtailed and the concurring judgments of Park, Gaselee, and Bosanquet, JJ., omitted. — ED.

expulsion from the field. The track by which the plaintiff was driven was immaterial. In Monprivatt *v.* Smith, where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours, under a writ of *fi. fa.*, it was held that the plea covered the whole declaration.

And in Lambert *v.* Hodgson,[1] where the declaration was of two counts, for assault and imprisonment; plea, that defendant being bail for plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action; replication, *de injuria*. It appeared that defendant, in addition to detaining plaintiff till he satisfied the demand in the action, detained him an hour longer, till he paid the expenses of the defendant's becoming bail, &c. It was held, that there was one continuing trespass; and that, therefore, in order to recover from that part of it which was unjustifiable, namely, the additional detention for the bail expenses, the plaintiff ought to have newly assigned Dale *v.* Wood[2] is to the same effect.

TINDAL, C. J. I agree in the rule of law as laid down by the counsel for the defendants, that where in trespass a defendant pleads a justification, going to the gist of the action, it is not necessary to include that which is mere matter of aggravation. But that brings us to the application of the rule, and to the inquiry whether it will serve the defendants or not. And we have only to look to the pleadings here, and to apply our common sense to the allegation that the defendants dragged the plaintiff through a pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the plaintiff first complains. He alleges that the defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field, into and through a pond, and there imprisoned him. It does not appear where the pond was, whether in the field or not. However, waiving that, how much do the defendants justify? The assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about; altogether omitting to notice the allegation in the declaration, that the plaintiff was forced through a pond. The question is, whether this was a separate and distinct trespass, or a mere aggravation of the original assault; and it is plain that this was one link in a chain of trespasses following each other, and not a mere aggravation of the first assault. If that assault were alone the gist of the action, and justifying the gist were to be considered a justification of all that followed, we might suppose a case in which, after the assault, the assailant might throw his adversary over a precipice and break his arm. Would that, which stands on such distinct grounds, be justified by any answer to the assault? From one assault to another it might proceed to a contest in which the life of a plaintiff might be at stake. In like manner, as the outrage in question is no part of the trespass

[1] 1 Bing 317. [2] 7 B. M. 33.

included in the justification, and would have required a distinct statement of facts to justify it, it is not covered by the defendants' plea. The case relied on for them is Taylor *v.* Cole.[1] There, the plaintiff declared in trespass against the defendant, for breaking and entering the plaintiff's house and expelling him therefrom; the defendant, in one plea, justified the entry under a writ of *fi. fa.*, and in another plea, the expulsion, under a sale of the plaintiff's leasehold interest in the premises by virtue of the *fi. fa.;* and the court held, that the breaking and entering were the gist of the action, and that the expulsion was only matter of aggravation. But I beg to call attention to the way in which that point was treated in the court of error; that court distinguishing as to the case in which expulsion might or might not be a substantive trespass.

Lord Loughborough says, "It is not necessary to consider in what cases expulsion may be a substantive trespass.[2] Undoubtedly to enter into a house, and to expel the possessor, may be distinct acts, and they may be also connected. But when the plaintiff charges them as parts of one trespass, as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new assignment, state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation. The plaintiff complains that the defendant broke and entered his house and expelled him; the defendant shows a justification of the entry; if the expulsion makes him a trespasser *ab initio*, it takes away his justification, and therefore should be replied." [3]

Here, the dragging through the pond is not a trespass existing at the same time, but succeeding those trespasses in the declaration, which the defendant justifies. It is one of a chain of trespasses, which is not justified by merely justifying that which preceded it. Phillips *v.* Howgate [4] goes the full length of this proposition; and, although the converse of it, proves the principle. There, in trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about: justification, that defendant arrested plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c. The defendant failed in proving that the plaintiff, while in custody, conducted himself so violently as to render it necessary the defendant should strike him to prevent his escape, and then said, "Let me get out of my difficulty by saying it was a mere aggravation of the original trespass." But the court said, no. The circumstance of the defendant having put matter into his justification, of which no proof had been given, would not, of itself, vitiate the justifi-

[1] 3 T. R. 297.
[2] See Meriton *v.* Coombes, 9 C. B. 787. — Ed.
[3] 1 H. Bl. 561.
[4] 5 B. & Al. 220.

cation. But the proof given was not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he stated that the plaintiff resisted when in custody. That not being done, the court thought the justification was not proved, and that the plaintiff would be entitled to a verdict. That case is in point; and, therefore, the present rule must be discharged.

Rule discharged.[1]

HUDDART *v.* RIGBY.

In the Exchequer Chamber, November 30, 1869.

[*Reported in 5 Law Reports, Queen's Bench*, 139.]

Appeal from the decision of the Court of Queen's Bench refusing a rule for a new trial moved on the ground of misdirection.

Declaration, that the defendant broke and entered certain land of the plaintiff called the Moor Croft, otherwise the Maiden Croft, situate at Ribbleton, in the county of Lancaster, abutting, on the northerly side thereof, in part upon land of Richard Holden, and on the easterly side thereof in part upon land of Sir T. G. Hesketh, Bart., and in other part upon land used as a public cemetery by and belonging to the burial board of the borough of Preston, and broke open, damaged, broke to pieces, and destroyed the plaintiff's gates, hedges, and fences standing and being upon the land of the plaintiff, and destroyed the grass and other herbage there growing.

Plea, that at the time of the alleged trespass there was, and of right ought to have been, a common and public footpath over the land of the plaintiff for all persons to go and return on foot at all times of the year at their free will and pleasure; and the defendant, having occasion to use the way, then entered into and upon the land of the plaintiff, and along the footpath, then using the same, as he lawfully might, for the cause aforesaid, and because the gates, hedges, and fences had been erected, and then were wrongfully in and across the highway, and obstructing the same, and preventing the convenient use thereof, the defendant necessarily pulled down and destroyed the gates, hedges, and fences for the purpose of using the footpath, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Joinder of issue.

At the trial before Hannen, J., at the summer assizes, 1868, held at Lancaster, the defendant's counsel proposed to give evidence of a common public footpath running east and west over the land of the plaintiff in the declaration mentioned. The plaintiff's counsel admitted such

[1] Lane v. Dixon, 3 C. B. 776; Dale v. O'Brien, 26 N. Br. 118 *Accord.* — Ed.

common public footpath, but offered to prove that the trespasses complained of were committed elsewhere.

The plaintiff's counsel offered to prove that there were no gates, hedges, or fences erected upon or across the admitted footpath, or obstructing the same, or preventing the convenient use thereof, but that there were such gates, hedges, and fences on the plaintiff's land across the track by which the defendant so passed, and that some of such gates, hedges, or fences were pulled down by the defendant.

Upon the admission that a common public footway did exist over the land, the learned judge ruled that the defendant, without further evidence, was entitled to a verdict, and he accordingly directed the jury to find, and the jury did accordingly find, a verdict for the defendant.

The plaintiff applied to the Court of Queen's Bench for a rule for a new trial, on the ground that the learned judge misdirected the jury.

The court refused a rule, on the ground that, the plaintiff not having new assigned, the evidence was not admissible, holding that the case was governed by Glover *v.* Dixon;[1] but the court gave the plaintiff leave to appeal.

Gorst, for the plaintiff (*Holker*, Q. C., with him). A new assignment is not necessary. The declaration sets out the close by abuttals, and contains an averment that the defendant destroyed the gates on the close: this is not mere aggravation, but a substantive averment. The defendant has treated it as a substantial matter, for he has pleaded a justification to the right of way, and also to breaking the gates. The replication traverses the whole plea. The right of way on these pleadings is identified as one having gates on it, and the plea could not be proved by showing that there is another right of way without gates. A new assignment is only necessary when there are two trespasses, or when, from the generality of the declaration, the defendant has mistaken the cause of action, which is not the case here. In Bush *v.* Parker the declaration was for assaulting the plaintiff, and dragging him through a pond, and it was held that the dragging through the pond was a substantive trespass. In Lane *v.* Dixon,[2] trespass was brought for breaking into a room and removing a brass plate. The removal of the brass plate was held to be, not mere aggravation, but a substantive offence. So, again, in Phillips *v.* Howgate,[3] where the defendant pleaded a justification to breaking and entering the dwelling-house of the plaintiff and assaulting him, and only proved a justification to entering the dwelling-house, the court held that the plea was not proved. So, in Noden *v.* Johnson,[4] the same doctrine was laid down. These cases show that the breaking of the gates is substantial matter, and the defendant, having pleaded a right to do these acts, cannot show that they were done on another and different right of way elsewhere; a new assignment is therefore unnecessary. Before the Common Law Procedure Act of 1852, the plaintiff could not have

[1] 9 Ex. 158; 23 L. J. (Ex.) 12.
[2] 3 C. B. 776.
[3] 5 B. & A. 220.
[4] 16 Q. B. 218; 20 L. J. (Q. B.) 95.

replied *de injuria;* but since that Act, under § 79, he may put in issue everything stated in the plea. Glover *v.* Dixon[1] is distinguishable, for the declaration did not set out the close by abuttals. Bracegirdle *v.* Peacock[2] shows that even before the Common Law Procedure Act of 1852, the plaintiff might have replied that the gates were not standing in the way. In Ellison *v.* Isles[3] the plaintiff was compelled to new assign because the way had not been identified in the pleadings. In Bond *v.* Downton[4] the plaintiff sued in trespass for seizing his pigs. The plea stated that defendant was possessed of a close in which the pigs were eating, and were taken damage-feasant. The replication stated that the defendant was not possessed of the close in which the pigs were alleged to have been eating. It was ruled that the trespass to the close having been identified, the defendant was bound to show that he was possessed of a close in which the pigs were eating. The plaintiff could only have new assigned under § 87 of the Common Law Procedure Act of 1852, and would have had to state that he proceeded for causes of action different from all those which the pleas professed to justify. The plea having justified the whole declaration, and there being no other right of way with gates on it, the new assignment would be untrue, and would not be allowed under that section.[5]

KELLY, C. B. In this case we are of opinion that the judgment of the Court of Queen's Bench should be affirmed.

My Brother Willes[6] entertains some doubt on the case, and but for the high authority of Parke, B., and the decisions of Glover *v.* Dixon,[7] and Webber *v.* Sparkes,[8] would have thought that this case might have been otherwise decided. Were it not for the doubt entertained by my Brother Willes, I must say, speaking for myself, that this case would be entirely free from doubt.

The declaration is in the ordinary form, and alleges that the defendant broke and entered the plaintiff's land, and there broke down and destroyed certain gates and fences. If to that declaration the defendant had pleaded not guilty, to entitle the plaintiff to a verdict, it would have been sufficient for him to have proved that the defendant did break and enter his land; and if it had turned out during the trial that there were no gates and fences on the land, or if there were any the defendant had not destroyed them, the plaintiff would still have been entitled to a verdict with more or less damages. But if the plaintiff had proved that there were gates on his land, and the defendant had destroyed them, the plaintiff would have been entitled to damages, not only in respect of the trespass to the land, but also in respect of the value of the gates he had destroyed. Now on this record the defendant admits the trespass complained of, but sets up as a defence that there was a right of way over the land in question, and there were cer-

[1] 9 Ex. 158; 23 L. J. (Ex.) 12. [2] 8 Q. B. 174. [3] 11 Ad. & E. 665.
[4] 2 Ad. & E. 26. [5] The argument for the defendant is omitted. — ED.
[6] Willes, J., had left the court at the conclusion of the argument.
[7] 9 Ex. 158; 23 L. J. (Ex.) 12. [8] 10 M. & W. 485.

tain gates and fences obstructing that way, so that by reason of the obstruction the defendant could not exercise his right, and that he therefore destroyed the gates. To this plea there was a replication taking issue on the whole plea. At the trial the plaintiff admitted a right of way across the close in question; but he offered to prove that the trespasses complained of were committed at another spot on his land within that close, and not upon any part of that portion of his land upon which he had admitted a right of way. Is not this the common case in which there must be a new assignment, and in which the evidence tendered is only admissible under a new assignment? Section 87 of the Common Law Procedure Act of 1852, allows one new assignment, which shall be consistent with and confined by the particulars delivered in the action, and it shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify. In this case what the plea professed to justify, taken with the plaintiff's admission, was a right of way from A. to B., and what he proposed to establish his claim to was damages for a trespass, not upon that portion from A. to B., but upon another portion of his land. That clearly is a case for new assignment within this section. On this part of the case Glover *v.* Dixon [1] and Webber *v.* Sparkes [2] are absolutely conclusive. It may be said that the authority of the latter case as to this point is a mere dictum of Parke, B., but its soundness has been established by Glover *v.* Dixon. I think on the authority of these cases the plaintiff ought to have new assigned. Then it is said that the breaking of the gates is a substantive trespass. I do not think so; it is mere aggravation which might increase the amount of damages. On these grounds we are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

Judgment affirmed. [3]

PENN *v.* WARD.

In the Exchequer, Trinity Term, 1835.

[*Reported in* 2 *Crompton, Meeson & Roscoe*, 338.]

Trespass for assault and battery. Pleas, first, not guilty; secondly, that the plaintiff was the apprentice of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him, as he was justified in doing, &c. Replication to the latter plea, *de injuria;* on which issue was joined. At the trial, before Tindal, C. J., at the last Warwick Assizes, it was proved that the plaintiff was the defendant's apprentice, and having behaved in a saucy

[1] 9 Ex. 158; 23 L. J. (Ex.) 12. [2] 10 M. & W. 485.

[3] Bracegirdle *v.* Peacock, 8 Q. B. 174; Webber *v.* Sparkes, 10 M. & W. 485; Glover *v.* Dixon, 9 Ex. 158 *Accord.* — Ed.

manner, was beaten by the defendant; and the plaintiff's counsel proposed to show that the defendant, in beating him, had used excessive and unjustifiable violence. It was objected that such evidence could not be given on these pleadings, there being no replication of excess. The learned judge, however, admitted the evidence, and left it to the jury, who found a verdict for the plaintiff, damages one shilling.

In Easter term, *Adams*, Serjt., obtained a rule *nisi* for a new trial on the ground of misdirection, contending that the question of excess was not open on these pleadings; and cited Dale *v.* Wood,[1] Franks *v.* Morris,[2] Piggott *v.* Kemp, Selby *v.* Bardons, Bowen *v.* Perry,[3] Lamb *v.* Burnett.[4] Cause was now shown by

Humfrey and *Miller*. The jury have found that the defendant corrected the plaintiff as an apprentice, but not moderately. And it is submitted that, on these pleadings, not only the cause alleged in the plea, but also the moderateness of the chastisement, is put in issue. The replication *de injuria* is a good answer to any plea which justifies on matter of fact only; Com. Dig. Pleader, F. 19; Jones *v.* Kitchin. One of the facts stated by the defendant in his plea, and indeed the essential part of his excuse, was, that the chastisement was moderate; that fact he was bound to establish, and it was properly left to the jury to decide upon. [ALDERSON, B. The party states certain grounds on which he says he was authorized to inflict a moderate punishment; does the replication do more than deny the existence of those grounds?] A chastisement disproportionate to the offence is not excused by any cause. Lord Chief Baron Gilbert, in his "History of the Common Pleas,"[5] puts a case expressly in point: — "So, in an action of assault and battery, the defendant pleads that the plaintiff neglected his service, *per quod moderate castigavit;* the plaintiff replies *quod non moderate castigavit*, and the issue was found for the plaintiff; for, though this be an informal traverse, and bad on demurrer, being rather a traverse of the chastisement than of the moderate manner of doing it, and the right traverse should have been *de injuria sua propria absque tali causa;* yet after verdict it is good, because the jury have ascertained that he did beat him immoderately." [ALDERSON, B. No doubt *de injuria* puts in issue the whole cause; the question is, whether the *moderate* chastisement is part of the cause. Suppose the case of a plea of *son assault demesne;* do you mean to say that the replication *de injuria* would put in issue the allegation that the defendant *molliter manus imposuit*, and a little unavoidably, and so forth?] In a late case of Reece *v.* Taylor,[6] to a declaration for assault and false imprisonment, the defendant justified in defence of his possession, with an additional allegation that the plaintiff assaulted him in the presence of a police officer; and the Court held, on a replication *de injuria*, that

[1] 7 B. Moore, 33.
[2] 10 East. 81, n.
[3] 1 Carr. & P.
[4] 1 C. & J. 291.
[5] P. 154, referring to Awbry *v.* James, 1 Sid. 444; 1 Ventr. 70.
[6] 4 Nev. & Man. 469.

the defendant was bound to prove the latter allegation; and Littledale, J., is reported to have said, that, under the plea of *son assault demesne*, the defendant must show an assault by the plaintiff commensurate with the act complained of by him. So, in Phillips *v.* Howgate,[1] where the defendant justified an arrest under process of the Court, and alleged that the plaintiff, having conducted himself violently while in custody, he therefore struck him to prevent his escape, it was held, on the replication *de injuria*, that the defendant was bound to prove the violent conduct of the plaintiff. [ALDERSON, B. There the violent conduct alone could justify the striking of which the plaintiff complained, so that it went to form a material part of the excuse.] In Cockcroft *v.* Smith,[2] the Court appears to have been of opinion that immoderate violence could not be justified under a plea of *son assault demesne*. The cases cited on the other side are not conclusive against the plaintiff. In Dale *v.* Wood, and Piggott *v.* Kemp, the point under consideration was quite different. In Lamb *v.* Burnett, the only question was, whether the justification was made out in other respects, independently of the point now in dispute. [ALDERSON, B. Mr. Baron Bayley only left it to the jury in that case to consider the cause alleged by the defendant, and not the excessive violence; and Lord Lyndhurst appears to have thought the excess ought to have been replied. So far, therefore, that case is an authority.]

Adams, Serjt., and *G. Hayes*, in support of the rule, were stopped by the Court.

BOLLAND, B. The Court is of opinion that, on these pleadings, the plaintiff had no power to put in issue the moderateness of the chastisement inflicted by the defendant, but was bound to reply the excess. The case cited from Lord Chief Baron Gilbert would undoubtedly have been an authority for the plaintiff, if it had not been impeached by later decisions, which have laid it down that the excess must be replied. I may observe that, since the case of Reece *v.* Taylor was decided, my Brother Littledale has altered the opinion which he is reported to have expressed on that occasion, that the plea of *son assault demesne* required the defendant to prove the moderation of his conduct. The only question is, whether this replication does more than put in issue the cause alleged in the plea. What is that cause? The right which the defendant had, under the circumstances, to inflict a moderate chastisement on his apprentice. The plea says in effect, "I had a right to beat my apprentice because he misconducted himself." That is, on the face of it, a satisfactory answer to the plaintiff's complaint; and if he meant to admit that he had misconducted himself, but to charge the defendant with unwarrantable violence, he should have replied that he had not so misconducted himself as to warrant such a beating. I think, therefore, that the direction of the learned judge was wrong, and that the rule must be made absolute for a new trial.

[1] 5 B. & Ald. 220. [2] 11 Mod. 43.

ALDERSON, B. The plaintiff complains of a battery; the defendant says it was the fruit of a moderate and suitable chastisement, and goes on to assign the cause for which he had a right to inflict it. That cause is, that the plaintiff, being his apprentice, behaved himself improperly and disobediently; and, being proved, it amounted to a good justification. The plaintiff, by his replication, denies that cause, and says the defendant acted, not for the cause he has assigned, but of his own wrong. He puts in issue the cause, not the character, of the chastisement — that is to say, whether or no he misconducted himself as an apprentice. He had no right, therefore, to go beyond this issue, and raise a question before the jury as to the excess.

GURNEY, B., concurred.

Rule absolute.[1]

[1] Oakes v. Wood, 2 M. & W. 791, 797; Oakes v. Wood, 3 M. & W. 150; Lambert v. Hodgson, 1 Bing. 317; Lamb v. Burnett, 1 C. & J. 291; Bowen v. Parry, 1 C. & P. 394; Dale v. Work, 7 B. Moore, 33; Kavanagh v. Gudge, 7 M. & G. 316; Oystead v. Shed, 12 Mass. 506; Great Falls Co. v. Wooster, 15 N. H. 412; Tomlinson v. Darnall, 2 Head, 538; Lloyd v. Dist. Court, 1 S. Aust. 121 *Accord.*

Ayres v. Kelly, 11 Ill. 17; Fisher v. Bridge, 4 Blackf. 518; Gaither v. Blowers, 11 Md. 557 (but changed by statute, Poe, Pl. & Pr. § 668); Hannen v. Edes, 15 Mass. 347; Loring v. Aborn, 4 Cush. 608; Curtis v. Carson, 2 N. H. 539; Bennett v. Appleton, 25 Wend. 371; Elliot v. Kilburn, 2 Vt. 470; Mellen v. Thompson, 32 Vt. 407; Harrison v. Harrison, 43 Vt. 417 *Contra.* — ED.

In Dean v. Taylor, 11 Ex. 68, it was decided that the plaintiff under the form of plea of self defence given in the Com. Law Pr. Act of 1852, might give evidence of excess of force on the defendant's part without a new assignment. But in Rimmer v. Rimmer, 16 L. T. Rep. 238, Mellor, J., declined to follow this decision. — ED.

CHAPTER X.

AMENDMENT OF PLEADINGS.

Supreme Court Rules, 1883. — England.

Order 28, *Rule* 1.

The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

New York Code of Civil Procedure.

Section 723.

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved. And in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

Revised Laws of Massachusetts.

Chapter 173, *Section* 48.

The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading, or proceeding which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or which may enable the defendant to make a legal defence.

WELDON v. NEAL.

COURT OF APPEAL, AUGUST 4, 1887.

[19 *Queen's Bench Division*, 394.]

APPEAL of plaintiff from the order of the Queen's Bench Division (Field and Wills, JJ.) directing certain paragraphs of the statement of claim to be struck out.

The facts were as follows: —

The plaintiff commenced an action for slander on 1st September, 1883. At the trial the judge nonsuited the plaintiff on the ground that the alleged slander was not actionable without special damage, and that the plaintiff had not alleged any special damage, and refused to give leave to amend. The plaintiff subsequently obtained from the Court of Appeal an order for a new trial with leave to amend her statement of claim. On the 6th April, 1887, she amended her statement of claim.

The statement of claim as amended set up in addition to the claim for slander fresh claims in respect of assault, false imprisonment, and other causes of action, which at the time of such amendment were barred by the Statute of Limitations, although not barred at the date of the writ.

The Divisional Court ordered the paragraphs stating such fresh causes of action to be struck out, on the ground that amendments ought not to be allowed which would deprive the defendant of the benefit of the Statute of Limitations.[1]

LORD ESHER, M. R. We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule. For these reasons I think the order of the Divisional Court was right and should be affirmed.

LOPES, L. J. I am of the same opinion. I think the court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, viz., that, however neg-

[1] The arguments and the concurring judgment of Lindley, L. J., are omitted. — ED.

ligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side. But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant.

I think the appeal should be dismissed.

Appeal dismissed.[1]

[1] Lancaster v. Moss, (C. A.) 15 Times, L. R. 476 (count for money lent repayable on demand — amended count on agreement to repay after a certain event); Wheeler v. North Co., 10 Colo. 582 (mandamus for supply of water at one time — amended count for supply at a different time); Mullen v. McKim, 22 Colo. 468 (*semble* — objection waived by consenting to amendment); Rockwell v. Holcomb, 3 Colo. Ap. 1 (count on a contract — amended count on a different contract); Drake v. Watson, 4 Day, 37 (in transaction for usury on a loan — amended count describes a different loan); Gillmore v. Chicago, 224 Ill. 490 (count for not taking care of sidewalk on A Street — amended count placed sidewalk on B Street); Bartz v. Chicago Co., 116 Ill. Ap. 554 (count for negligent running of train — amended count for negligent equipment); Roush v. Vanceburg Co., 120 Ky. 165 (count to enforce a lien — amended count to avoid a fraudulent conveyance); Gorman v. Judge, 27 Mich. 138 (count on common count — amended count on special agreement); People v. Judge, 35 Mich. 221 (count against X as carrier — amended count against X as warehousemen); Fire Co. v. Circuit Judge, 77 Mich. 231 (count on insurance policy — amended count on oral contract to give a policy, and praying also for reformation of written policy); Nugent v. Adsit, 93 Mich. 462 (count for conversion of 900 bushels of wheat by fraudulent conveyance — amended count applies the tort to 30 acres of growing wheat); Wingert v. Carpenter, 101 Mich. 395 (count on Michigan Statute for death in Canada — amended count on Canada Statute); Flint Co. v. Wayne, 108 Mich. 80 (common count — amended count on special agreement varying from common count); Gibbons v. Steamboat, 40 Mo. 253 (count upon lien for one thing — amended count upon lien for another thing); Sims v. Field, 24 Mo. Ap. 557 (count upon removal of statutory fence — amended count on removal of non-statutory fence); Bullion Co. v. Crœsus Co., 2 Nev. 168 (count claims one piece of land — amended count another); Weston v. Worden, 19 Wend. 648 (count in slander for malpractice — amended count for calling plaintiff a quack); Williams v. Cooper, 1 Hill, 637 (count for slander of stealing apples — amended count for slander of stealing bonds); Quimby v. Claflin, 27 Hun, 611 (amended count adds a wholly new claim); Eggleston v. Beach, 33 N. Y. St. Rep. 835 (count on account stated — amended count on an account); Miller v. Johnson, 10 N. Y. Civ. Pro. R. 205 (amended count adds a new charge of slander); Sheldon v. Adams, 18 Abb. Pr. 405 (count on promissory notes — amended count on stock notes); Evangelical Church v. Finger, 11 N. Y. W. D. 460 (wholly new case of action); New York v. Knickerbocker Co., (Ap. Div. Nov. 1907) 106 N. Y. S. 506 (action for removal of an encroachment — amended count for removal of a different encroachment); Commissioners v. Andrews, 18 Oh. St. 49 (count on a bond — amended count on bond and other matters); Wright v. Hart, 44 Pa. 454 (count on one note — amended count on another note); Smith v. Smith, 45 Pa. 403 (count on a slander — amended count on a different slander); Fairchild v. Dunbar Co., 128 Pa. 485 (count in trespass q. c. f. — amended count for statutory penalty of double damages); Philadelphia v. Hestenville Co., 203 Pa. 38 (count against Company A, for cost of repairing streets occupied by A's tracks — amended count to recover for damages caused by Company B, but assumed by Company A); Mahoney v. Park Co., (Pa. 1907) 66 Atl. R. 90 (count for injury by certain machinery — amended count for injury by different machinery); Mayo v. Spartanburg Co., 43 S. Ca. 225 (count upon statutory liability for fire — amended count upon common law liability); Trousdale v. Thomas, 3 Lea, 715 (count in trover — amended count on negligence of bailee); Booth v. Houston Co., (Tex. Civ. Ap. 1907) 105 S. W. R. (count against a bailee — amended count on different express contract); Meinshausen v. Gettelman, (Wis. 1907) 113 N. W. R. 408 (count on contract for fixed price — amended count on a *quantum meruit*) *Accord.* — ED.

W. H. A. HAMILTON AND ANOTHER *v.* C. B. THIRSTON.

SUPREME COURT, MARYLAND, JANUARY 15, 1902.

[94 *Maryland Reports*, 253.]

BRISCOE, J., delivered the opinion of the Court.[1]

On the 30th of December, 1899, the appellee, Calvin B. Thirston, brought suit against the appellants, Wm. H. A. Hamilton and J. Rowland Smith, surviving administrators of John B. Thirston, in the Circuit Court for Washington County to recover damages for the breach, by the appellants intestate, of an alleged oral contract to devise to him a child's portion of the intestate's estate.

Subsequently, the plaintiff recovered a judgment for the sum of $3250, but upon an appeal to this Court this judgment was reversed "with liberty to the appellee to apply for the remanding of the case, to permit him to so amend his pleadings as to declare in *assumpsit* for the value of any services rendered by him at the request of the intestate, during his lifetime." (93 Md. 213.)

On the 29th of March, 1901, the plaintiff obtained leave to amend his declaration, and on the 22d of April of the same year the declaration was amended so as to declare in *assumpsit* for a *quantum meruit* for services rendered the intestate during his lifetime. To this declaration the defendants at the second trial filed six pleas; . . . fourth, the cause of action did not accrue within three years prior to the commencement of the suit, to wit, March 29th, 1901. . . . This plea was, on plaintiff's motion, stricken out by the Court below.

It is insisted on the part of the appellees that the fourth plea was properly stricken out by the Court below because the commencement of the suit was not on the 29th of March, 1901, but on the 30th day of December, 1899, and the amendment of the declaration did not change the form of action. We cannot agree to the appellee's contention. The original declaration was a suit upon an alleged oral agreement, and there was no count in the declaration on a *quantum meruit* for the value of the services rendered. The present suit, under the amendment, is an action in *assumpsit*, on a *quantum meruit*, and is a new case.

We think then that under the circumstances of this case the appellants had the right to interpose the plea of limitations as a defence to this suit, and it was error in the Court below to refuse to allow the plea and to have granted the motion to strike it out. Newcomer *v.* Keedy,[2] Bixler *v.* Sellman,[3] Schulze *v.* Fox,[4] Dempsey *v.* McNally,[5] 2 Poe's Pl. & Pr. sec. 189.

It follows from what we have said that there was error in granting the appellee's prayers and in rejecting those offered by the appellants.

[1] Only so much of the opinion is given as relates to the amendment. — ED.
[2] 9 Gill, 263. [3] 77 Md. 496. [4] 53 Md. 43. [5] 73 Md. 433.

The Statute of Limitations being a complete bar to a recovery in this case, we find no ground in the record upon which this action can be sustained. We shall therefore reverse the judgment without awarding a new trial.

Judgment reversed and new trial refused, with costs.

HESS *v.* BIRMINGHAM RAILWAY LIGHT AND POWER CO.

SUPREME COURT, ALABAMA, NOVEMBER 29, 1906.

[42 *Southern Reporter*, 595.]

THE second count was as follows:[1] "Plaintiff claims of the defendant $5000 as damages, for that heretofore, to wit, on the 24th day of January, 1903, the defendant was a common carrier of passengers over and along a railway running from Birmingham to Woodlawn, Jefferson County, Alabama, by means of a car operated by electricity; that on said day, while plaintiff was on said car, being carried by defendant as its passenger on said car, said car collided with another car at a point on said railway in or near said Birmingham, and as a proximate consequence thereof plaintiff was [here follows a detailed description of his injuries and special damages]." "Plaintiff avers that defendant wantonly or intentionally caused plaintiff to suffer said injuries and damages as aforesaid by wantonly or intentionally causing or allowing said collision." The original complaint was filed on the 24th of March, 1903. On the 18th of October, 1904, the plaintiff by leave of the court amended his complaint as follows: By striking from the second count the word "defendant," where it last occurs therein, and inserting in lieu thereof the words "defendant's servant or agent, acting within the line and scope of his authority as such." Defendant moved to strike the second count of the complaint as amended on the grounds of a departure, a change of cause of action, and because not within the *lis pendens* of the original suit. This motion being overruled, the defendant pleaded the general issue and the Statute of Limitations of one year to the amended complaint.

DOWDELL, J. The only question presented is whether by the amendment a new claim or new cause of action was introduced into the complaint, to which the Statute of Limitation might be pleaded as a defense.

The second count, as originally filed, under the decision in City Delivery Co. *v.* Henry,[2] and the cases following that one, was in trespass, and the amendment to this count converted it to one in case. This

[1] Only so much of the case as relates to this count is given. — ED.

[2] 139 Ala. 161, 34 South. 389.

introduced into the complaint a new and different cause of action from that stated in the second count as originally filed, which did not relate back to the commencement of the suit, and was consequently subject to the plea of the Statute of Limitations.[1]

[1] Sicard v. Davis, 6 Pet. 124 (ejectment on demise of A — amended count on demise of B); Union Co. v. Wyler, 158 U. S. 285; Buntin v. Chicago Co., 41 Fed. R. 744 (count for overflow by embankment — amended count for overflow by bridge); Whalen v. Gordon, 95 Fed. R. 305 (count on breach of warranty — amended count for recovery of price paid); The Harmony, 1 Gall. 123 (libel for forfeiture on one ground — amended libel on another ground); Kramer v. Gille, 140 Fed. 682 (count by company to recover money paid to its shareholders for their shares in fraud of creditors — amended count to recover the value of goods delivered to shareholders for their shares); Lansford v. Scott, 51 Ala. 557 (common count — amended count on a note); Mohr v. Lemle, 69 Ala. 180 (count for libel impeaching plaintiff's solvency — amended count for attacking his integrity); Ala. Co. v. Smith, 81 Ala. 229 (count for expulsion from train — amended count for leading plaintiff to alight by calling wrong station); Anniston Co. v. Ledbetter, 92 Ala. 326 (count against R. R. as carrier — amended count against R. R. as warehouseman); Nelson v. First Bank, 139 Ala. 578 (count for money had and received — amended count for goods sold); Anderson v. Myers, 50 Cal. 525 (count on judgment on a note — amended count on the note); Atkinson v. Amedor Co., 53 Cal. 102 (count for trespass on one close — amended count for entry on another close); Meeks v. So. Co., 61 Cal. 149 (count for money paid — amended count for exoneration from liability to pay); Johnston v. District, 1 Mack. (D. Col.) 427 (count fails to allege negligence of defendant — amended count alleges negligence); Roe v. Doe, 30 Ga. 873 (ejectment on demise of A — amended count on demise of B); Ayers v. Daly, 56 Ga. 119 (count for an account — amended count on breach of warranty); Jones v. Johnston, 81 Ga. 293 (ejectment on demise of A — amended count, ejectment on demise of B); Burbage v. Fitzgerald, 98 Ga. 582 (like preceding case); Bentley v. Crummey, 119 Ga. 911 (like preceding case); Ill. Co. v. Cobb, 64 Ill. 128 (count against carrier on one shipment — amended count on another shipment); Phelps v. Ill. Co., 94 Ill. 548 (count against carrier for not accepting goods — amended count for not carrying seasonably); Pa. Co. v. Sloan, 125 Ill. 72 (count for negligence of one kind — amended count for negligence in another way); Chicago Co. v. Jones, 149 Ill. 361 (count for statutory treble damages — amended count for common law liability for excessive rates); Simmons v. Hawley, 157 Ill. 218 (bills for reformation of deed — amended count adds claim for rents and profits); Fish v. Farwell, 160 Ill. 236 (count for goods sold — amended counts for refusal to buy); Illinois Co. v. Campbell, 170 Ill. 163 (count for negligence — amended count for a different act of negligence); Chicago Co. v. Leach, 182 Ill. 359 (count for negligence in running train at excessive speed — amended count on incompetency of defendant's servants); Wabash Co. v. Blymer, 214 Ill. 579 (count for injury by negligence in not giving notice that train ahead was to be stopped — amended count for negligence in not notifying that train ahead had been wrecked); Peoria Co. v. U. S. Co., 28 Ill. Ap. 79 (count for damage to one car — amended count for damage to another car); Blake v. Minkner, 136 Ind. 418 (bill for partition — amended count in ejectment); Van de Haar v. Van Domseler, 56 Iowa, 671 (count for seduction — amended count for rape); Box v. Chicago Co., 107 Iowa, 660 (count for using certain set of bumpers — amended count for negligence in handling the bumpers — but see Gordon v. Railway Co., 129 Iowa, 747, 751); Parsons Co. v. Hill, 46 Kan. 145 (count upon note — amended count for account stated); Atchison Co. v. Schroeder, 56 Kan. 731 (count by servant against master for negligence — amended count on statutory liability for acts of fellow-servants); Kansas City v. Hart, 60 Kan. 684 (count for loss of service of daughter — amended count on statute for causing death); Schulze v. Fox, 53 Md. 37 (count for words charging plaintiff with theft — amended count for words imputing embezzlement); Miller v. Northern Bank, 34 Miss. 412 (count upon one loan — amended count upon another loan); Dinkins v. Bowers, 49 Miss. 219 (count in assumpsit — amended count claims mechanic's lien); Holliday v. Jackson, 21 Mo. Ap. 660 (trespass q. c. f. — amended count for statutory treble damages); Baker v. Mo. Co., 34 Mo. Ap. 98 (count for ordinary damages — amended count for liquidated damages); Buerstetta v. Tecumseh Bank, 57 Neb. 504 (count upon contract — amended count upon fraud); Clifford v. Thun, (Neb. 1905) 104 N. W. R. 1052 (foreclosure bill — amended bill adds claim to redeem against some parties); Davis v. N. Y. Co., 110 N. Y. 646 (count for negligence in one way — amended count for negligence in another way); Christmas v. Mitchell, 3 Ired. Eq. 535 (count for re-

LASSITER v. RAILROAD CO.

SUPREME COURT, NORTH CAROLINA, SEPTEMBER 27, 1904.

[136 *North Carolina Reports*, 89.]

CLARK, C. J.[1] The complaint is a sufficient statement of the facts constituting a cause of action (if the death had occurred in this State) for negligently causing the death of plaintiff's intestate by ordering him to go between cars not equipped with improved couplers to uncouple said cars, in obeying which order he was run over and killed. The defendant demurred on the ground that the complaint disclosed that "the intestate came to his death in the State of Virginia by reason of the alleged wrongful acts of the defendant, but does not allege that an action for wrongful death may be maintained in that State." Thereupon the plaintiff asked leave to amend the complaint by pleading the "statute law of Virginia, which gives a right of action for negligently causing death," which motion was refused on the ground that "the court had no power or discretion to allow the same, and but for such want of power the amendment would be allowed." The court further gave as a reason why it did not have such power to grant the motion: "1. Such an amendment would introduce a new cause of action and not enlarge or amplify the cause of action pleaded. 2. Such an amendment would deprive the defendant of the benefit of the statute of limitations embraced in the statute law of Virginia."

If not pleaded and proved, the presumption under the authorities is that the unwritten or common law of another State is the same as the unwritten or common law in this State. Minor Confl. Laws, sec. 214, says that for as good reason the weight of authority is now that in the same absence of pleading and proof the presumption is that the written law of another State is the same as the written law here.

But we do not pass upon the point and need not do so. An entirely

covery of land — amended count for recovery of negroes also); Hester v. Mullen, 107 N. Ca. 724 (amended count alleges an additional slander); Hills v. Ludwig, 46 Oh. St. 373 (count for one piece of land — amended count for an additional tract); Miller v. Bealer, 100 Pa. 583 (count claims one lot of land — amended count claims another lot); Crofford v. Cothran, 2 Sneed, 492 (count in assumpsit — amended count in debt); Allen v. Link, 5 Lea, 454 (count for cotton sold — amended count for breach of fiduciary duty as to the cotton); Ayres v. Cayce, 10 Tex. 99 (bill for foreclosure — amended bill upon a prior decree); Hopkins v. Wright, 17 Tex. 30 (count claims certain slaves as owner — amended count claims one third of slaves as a widow's share); Governor v. Burnett, 27 Tex. 32 (count for money collected one year — amended count for money collected another year); Wooldridge v. Hathaway, 45 Tex. 380 (count on a note — amended count for conversion of chattel for which it was given); Bisham v. Talbot, 63 Tex. 271 (count upon contract between A and B — amended count by A as assignee of contract between C and B); Woods v. Huffman, 64 Tex. 98 (count for conversion — amended count for wrongfully suing out an attachment); Internat. Co. v. Pope, 73 Tex. 501 (count for obstruction of right of way — amended count on breach of contract to provide the way); East Co. v. Scott, 75 Tex. 84 (count on contract to employ A as long as A wished — amended count on contract to employ A for A's life); Turner v. Hamilton, 13 Wyo. 408 (election contest on one ground in count and on another ground in amended count) *Accord*. — ED.

[1] Only a part of the opinion is given. — ED.

different question is before us, *i. e.*, whether the trial court has power to permit an amendment to allege the nature of the law in the State where the transaction took place, and prove it when by inadvertence such allegation has been omitted in the complaint. Such allegation does not add to or change the "cause of action" which by the Code, sec. 233 (2), is a "statement of the facts." Those facts, the death and the wrongful negligence, are already fully stated. "In such cases the law of the place where the right was acquired or the liability was incurred, will govern as to the *right of action*." Railroad *v.* Babcock.[1] The failure to allege this foreign law is merely a defective statement of a good cause of action. But even if there were a failure to allege an essential fact to constitute the cause of action, the Code, sec. 273, expressly gives power to amend "by inserting other allegations material to the case." The rounding out of the complaint to cure a defective complaint, even in material matters, is not changing a cause of action nor adding a new cause, but merely making a good cause out of that which was a defective statement of a cause of action because of the omission of "material allegations" which the Code, sec. 273, authorizes to be inserted by amendment. If the cause of action were not defectively stated, there would be no need of amendment.

The difference between a "defective statement of a good cause of action" which can be amended by inserting "other material allegations," as here, and a "statement of a defective cause of action" is that the latter cannot be made a good cause by adding other allegations. Ladd *v.* Ladd.[2] We have a case exactly "on all fours" with this under the New York Code, sec. 723, which is the same as our Code, sec. 273. In that case, Lustig *v.* Railroad,[3] the administratrix brought suit in New York for the death of her intestate in New Jersey caused by the wrongful act of the defendant. After both sides had rested the defendant moved to dismiss "because there was no allegation in the complaint, nor proof on the trial, of any statute in New Jersey authorizing a recovery of damages for death from wrongful injury, and that as no right of recovery existed at common law no cause of action had been made out." The trial court reopened the case and allowed the plaintiff to amend her complaint and to supply this defect in her evidence. This was sustained on appeal, the court holding that it was authorized by the New York Code, sec. 723 (which, in the words of our Code, sec. 273, allows an amendment "inserting allegations material to the case"), and that this "did not add a new cause of action" nor change the cause of action, but merely perfected a defective statement of a good cause of action, defective because of the omission of this averment. For the same reason the plea of the statute of limitations would not run, because the facts of the transaction being stated in the complaint the defendant had notice of the demand from the beginning of this action. The same power of amendment to insert the allegation of the foreign statute (which had been

[1] 154 U. S. 197. [2] 121 N. C. 121. [3] 20 N. Y. Supp. 477.

omitted in the complaint) was sustained, and the same ruling that the amendment related back to the beginning and the statute of limitation did not bar was made in Railroad *v.* Nix,[1] in effect overruling a former Georgia decision, which is the only one found in any court to the contrary. In Tiffany on "Death by Wrongful Act," sec. 202, it is said that "if the plaintiff's right of action arises under a foreign statute he should allege and prove it," but if the complaint "fails to allege the foreign statute, an amendment alleging it is not open to the objection that it sets up a new cause of action, although the period of limitation prescribed by the foreign statute has elapsed." In The New York, 175 U. S. 187, where a Canadian statute was treated as if in evidence, on the trial below, though it was not pleaded and the record did not show that it was put in evidence, the court held on appeal that it should be treated as if pleaded and put in evidence. In Steamship Co. *v.* Ins. Co.[2] the United States Supreme Court held that even after verdict, "if justice should appear to require it," it would remand the case with directions to the lower court to allow pleadings to be amended and proof of the foreign law (of Great Britain) to be introduced.[3]

[1] 68 Ga. 572. [2] 129 U. S. 447.

[3] Jeffersonville Co. *v.* Hendricks, 41 Ind. 48; Indianapolis Co. *v.* Fearnaught, (Ind. 07) 82 N. E. R. 102; Carnegie *v.* Hulbert, 70 Fed. R. 209 (amended count supplies averment of diverse citizenship essential to give Federal Court jurisdiction); S. Ca. Co. *v.* Nix, 68 Ga. 572 (count for death by administrator but admitting essential allegation that suit was for benefit of wife and children of deceased — amended count supplies averment); Rowell *v.* Moeller, 91 Hun, 421 (action to charge one as shareholder, but not alleging that stock was not fully paid — amended count supplies this allegation); Huntingdon R. R. *v.* Decker, 84 Pa. 419 (count for death by widow, but not alleging existence of children of deceased — amended count supplies this allegation); Love *v.* So. Ca., 108 Tenn. 104 (declining to follow Atlanta Co. *v.* Hooper, 92 Fed. R. 820, in its contrary interpretation of the Tennessee statute — facts like those in 68 Ga. *supra*); Ft. Worth Co. *v.* Wilson, 85 Tex. 516 (like case in 84 Pa. *supra*) *Accord*.

To the same effect are the following cases in which the validity of an attachment was upheld, although the original count lacked an essential allegation which was supplied by the amended count: Bowden *v.* Burnham, 59 Fed. R. 752 (count in Federal Court not alleging diverse citizenship — amended count supplies this defect); Bamberger *v.* Moayon, 91 Ky. 517 (count by surety for exoneration by principal, but not making creditor a party — amended count supplies this omission); Lanahan *v.* Porter, 148 Mass. 596 (count against maker and anomalous indorser, but not alleging notice of dishonor to latter — amended count makes this allegation).

An amendment supplying a necessary allegation was allowed in the following cases in which, however, neither the applicability of the Statute of Limitations nor the validity of an attachment was involved. Anderson *v.* Pollard, 62 Ga. 46 (count joins surviving partners and representative of deceased partner as defendant, without alleging insolvency of firm and survivors — amended count makes this allegation); Rice *v.* Caudle, 71 Ga. 605 (count for commission on goods sold by others in plaintiff's territory — amended count alleges exclusive right of A in his territory); Ga. Co. *v.* Murden, 83 Ga. 753 (count against Co. for exacting excessive rate of fare — amended count supplies essential allegation as to why plaintiff had no ticket); Pratt *v.* Davis, 105 Mich. 499 (count for negligence — amended count alleges absence of contributory negligence); Johnston *v.* Farmers Co., 106 Mich. 96 (count on insurance policy — amended count alleges performance of condition precedent); Lustig *v.* N. Y. Co., 65 Hun, 547 (like principal case); Woodbury *v.* Evans, 122 N. Ca. 779 (amended count alleges tender of deed as condition precedent); Thompson *v.* Hibby, 45 Oreg. 141 (bill for contributors, but not alleging co-suretyship nor referring to any principal — amended bill supplies those defects); Tidball *v.* Shenandoah Bank, 100 Va. 741 (count against indorser — amended count alleges notice of dishonor). — Ed.

G. S. FOSTER, EXECUTOR, v. THE ST. LUKE'S HOSPITAL.

SUPREME COURT, ILLINOIS, JUNE 19, 1901.

[191 *Illinois Reports*, 94.]

MR. JUSTICE HAND delivered the opinion of the court.

This is an action on the case brought by George S. Foster, executor of the last will and testament of Candis Foster, deceased, against the St. Luke's Hospital, to recover damages for the death of said Candis Foster, which was caused by her falling from the fifth story window of said hospital on December 6, 1895. The suit was commenced February 27, 1896, and on the following 10th day of April a declaration was filed, in which the plaintiff failed to allege his relationship to Candis Foster, or that she left her surviving a husband or next of kin, or that any one had sustained any pecuniary loss because of her death. On November 2, 1898, the plaintiff filed an amendment to each count of the declaration, in which it was averred "that said George Foster is the husband and only surviving heir and beneficiary of the said Candis Foster, deceased," and "that said George S. Foster, plaintiff and surviving heir and beneficiary of the said Candis Foster, deceased, became and was deprived of the services and companionship of his said wife." A demurrer to the amended declaration having been overruled, the defendant filed the general issue and a plea of the Statute of Limitations thereto, to which latter plea the court sustained a demurrer, whereupon the case was tried before a jury, and a verdict and judgment were rendered in favor of the plaintiff for $2500, from which judgment the defendant prosecuted an appeal to the Appellate Court for the First District, which court reversed said judgment without remanding the cause, and the plaintiff has sued out a writ of error from this court to review such judgment of reversal.

At the time the amended declaration was filed, more than two years had elapsed since the accident took place. If the original declaration failed to state a cause of action and by the amendment thereto a new cause of action was sought to be introduced, the same was barred and the plea of the Statute of Limitations thereto should have been sustained. Phelps *v.* Illinois Central Railroad Co.,[1] Chicago, Burlington and Quincy Railroad Co. *v.* Jones,[2] Eylenfeldt *v.* Illinois Steel Co.,[3] Chicago City Railway Co. *v.* Leach.[4] The controlling question therefore is, did the original declaration state a cause of action?

This court has uniformly held that where an action is brought to recover damages for the death of a person, to entitle the plaintiff to recover it is necessary to allege and prove that such deceased person left him or her surviving a widow or husband or next of kin. Chicago and Rock Island Railroad Co. *v.* Morris,[5] Quincy Coal Co. *v.* Hood,[6]

[1] 94 Ill. 548. [2] 149 id. 361. [3] 165 id. 185.
[4] 182 id. 359. [5] 26 Ill. 400. [6] 77 id. 68.

Lake Shore and Michigan Southern Railway Co. *v.* Hessions.[1] In Chicago and Rock Island Railroad Co. *v.* Morris, *supra*, on page 402 the court say: "Before a party sueing for these damages can be allowed to recover, it must be alleged in the declaration, and proved, that the deceased left a widow or next of kin, to whom the damages could be distributed." In Quincy Coal Co. *v.* Hood, *supra*, on page 72 it is said: "The fact of the survivorship of a widow or next of kin, being an essential element of the cause of action, renders it indispensable that it should be alleged in the declaration." And in Lake Shore and Michigan Southern Railway Co. *v.* Hessions, *supra*, it is held (page 556): "It is the settled law that the fact of survivorship of a widow or next of kin is an essential element to the cause of action, and it is therefore indispensable that it should be alleged and proved."

At the common law no action could be maintained for negligently causing the death of a human being, or for any damages suffered by any person in consequence of such death. An action to recover such damages can be maintained, therefore, only by virtue of the statute (Hurd's Stat. chap. 70). It must be brought in the name of the personal representative of the deceased, and can only be maintained for the benefit of the persons designated in the statute. If the deceased left him surviving no widow or next of kin, there is no cause of action; hence the necessity of alleging and proving that the deceased left him surviving a widow or next of kin. A declaration defective in this regard would not be good even after verdict. In Bowman *v.* People,[2] it is said (page 477): "The rule is, if the declaration omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the findings of those which are alleged, a verdict for the plaintiff does not cure the defect." In Quincy Coal Co. *v.* Hood, *supra*, proof was made that there was next of kin other than those named in the declaration. This was held to be error and not cured by verdict.

We are of the opinion the declaration, as originally filed, stated no cause of action, and that the cause of action stated in the amended declaration was barred by the Statute of Limitations. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.[3]

[1] 150 id. 546.

[2] 114 Ill. 474.

[3] Atlanta Co. *v.* Hooper, 92 Fed. R. 890 (count for homicide by administrator for benefit of widow — amended count by administrator for benefit of father); Foley *v.* Suburban Co., 98 Ill. Ap. 108 (Haynie *v.* Chicago Co., 9 Ill. Ap. 105, and Calumet Co. *v.* Lewis, 68 Ill. Ap. 598 *contra* are overruled); Eylenfeldt *v.* Ill. Co., 165 Ill. 185 (count alleges a personal injury received by plaintiff as an employee of defendant, but not alleging any negligence on the part of defendant — amended count alleges such negligence); Doyle *v.* Sycamore, 193 Ill. 501 (count for damage to A's land by erection of water tower causing apprehension that it may fall upon A's land — amended count alleges probability of fall of tower); Mackey *v.* Northern Co., 210 Ill. 115 (count against Company by employee for injury by the pushing of a car upon him by another employee not a fellow servant, but not alleging any negligence by latter employee — amended count supplies this allegation); Klawiter *v.* Jones, 219 Ill. 626 (count for injury to employee of X Co. received while obeying commands of defendant X's foreman, but not alleging any facts showing breach of duty by defendant — amended

ANNIE McLAUGHLIN v. WEST END STREET RAILWAY CO.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 22, 1904.

[186 *Massachusetts Reports*, 150.]

KNOWLTON, C. J. The plaintiff was injured while a passenger on a car of the West End Street Railway Company, and brought a suit to recover for the injury. In the meantime a lease had been made to the Boston Elevated Railway Company, which latter corporation assumed all obligations and liabilities of the former corporation, and began to operate the road, and the suit was brought against this latter corporation. The plaintiff was allowed to amend her writ by substituting the West End Street Railway Company for the Boston Elevated Railway Company as defendant, and the question submitted on the report is whether the order allowing the amendment was within the authority of the court.

The cause of action for which the suit was brought was the injury, and the plaintiff intended to bring it against the party liable for the injury. Our statute is very liberal in allowing any amendment "in matter of form or substance . . . which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought." R. L. c. 173, § 48. "The allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action." R. L. c. 173, § 121. Batchelder *v.* Pierce,[1] and cases cited. Driscoll *v.* Holt.[2] An amendment may substitute one party for another. Winch *v.* Hosmer,[3] Hutchinson *v.* Tucker,[4] Lewis *v.* Austin.[5] The defendant contends that this rule should not go so far as to permit the substitution of one sole defendant for another sole defendant. But this objection is covered by the decision in Adams *v.* Weeks,[6] in which an amendment of this kind was held to have been rightly allowed. We see no good reason why the rule should not be the same in reference to a change of the party defendant as to a change of the party plaintiff.

The defendant contends that such an amendment cannot be allowed, if, at the time of proposing it, the action would have been barred by the Statute of Limitations if no suit had been brought. But the fact that a claim would be lost if an amendment was not allowed has often been considered an additional reason for allowing one, if in other re-

count alleges those circumstances); Mo. Co. *v.* Bagley, 65 Kan. 188 (count upon a contract, but not alleging a consideration — amended count alleges a consideration. Two judges dissented); Becker *v.* Atchison Co., 70 Kan. 193 (petition against R. R. Co. for piling material on unfenced track, but not alleging demand upon the Co. — amended count alleges demand); Power *v.* Badger Co., (Kan. 1907) 90 Pac. R. 254 (petition to foreclose mechanic's lien, but not alleging notice of its filing — amended petition alleges due notice); Dudley *v.* Price, 10 B. Mon. 84 (bill to reach assets in hands of shareholders, but not alleging the exhausting of remedy against Co. — amended bill supplies this allegation) *Accord*. — ED.

[1] 170 Mass. 260. [2] 170 Mass. 262. [3] 122 Mass. 438.
[4] 124 Mass. 240 [5] 144 Mass. 383. [6] 174 Mass. 45.

spects the case was within the rule permitting amendments. George *v.* Reed,[1] Sanger *v.* Newton,[2] Hutchinson *v.* Tucker,[3] Cogswell *v.* Hall.[4] The new party, brought in as a defendant, is precluded from contending that the Statute of Limitations is a bar, by the fact that a suit was seasonably brought upon the cause of action. By the bringing of the suit, the rights of the plaintiff were saved, and when the former proceeding is corrected by an amendment, it is as if the proceeding had been perfect in the beginning.[5]

This case is not like Smith *v.* Butler,[6] in which the cause of action against the new parties brought into the suit in equity was not included in the original suit at all, but only such cause of action as existed against the original parties.

Case to stand for trial.

[1] 101 Mass. 378. [2] 134 Mass. 308. [3] 124 Mass. 240. [4] 185 Mass. 455.

[5] U. S. *v.* Martinez, 195 U. S. 469; Anderson *v.* Atchison Co., 71 Kan. 453 (amendment allowed, but Statute of Limitations pleadable as a bar to amended declaration); Leatherman *v.* Times Co., 88 Ky. 291 (distinguishing Heckman *v.* Louisville Co., 85 Ky. 631); Nunn *v.* Louisville, (Ky. 1907) 105 S. W. R. 119 (like case in 71 Kan., *supra*); Schwartz *v.* Stock, 26 Nev. 155 (count on conversion by administrator of A — amended count on conversion by A); Shaw *v.* Cock, 78 N. Y. 194 (like preceding case); N. Y. Ass'n *v.* Remington Works, 89 N. Y. 22; Alker *v.* Rhoads, 73 N. Y. Ap. Div. 158 (*semble* — count against A — amended count against A, as administrator; but count against A, trustee, may be amended to count against A; Boyd *v.* U. S. Co., 187 N. Y. 262); Licausi *v.* Ashworth, 78 N. Y. Ap. Div. 486; Peterson *v.* Delaware Co., 190 Pa. 364 *Contra.*

Similarly an amendment adding a new party defendant, after the Statute of Limitations has run in his favor, is either disallowed as in Willink *v.* Redwick, 22 Wend. 608 (but see Challinor *v.* Roder, 1 Times L. R. 527 *contra* by an equally divided count) or, if allowed, will be ineffectual against a plea setting up the statute, as in Seibs *v.* Engelhardt, 78 Ala. 508; Wilson *v.* Holt, 91 Ala. 204; Jeffers *v.* Cook, 58 Cal. 147; U. S. *v.* Ludwig, 108 Ill. 514, 519 (*semble*); Jones *v.* Porter, 23 Ind. 67; Woodward *v.* Ware, 37 Me. 563.

In Shaw *v.* Cock, *supra*, the COURT, by ANDREWS, J. said, pp. 197, 199: "The commencement of an action against A upon a cause of action against B will not arrest the running of the statute against the latter. . . . It is said that the name of 'The Overland Dispatch Company' was inserted by mistake. Assuming this to be true, it does not avoid the difficulty. The suit was constructively commenced only against the parties who were named as defendants. It is not the case of mere misnomer. It is more like the case of a suit brought against one corporation upon a demand existing against another. The fact that this was by mistake, and that the real intention was to sue the corporation liable, would not, I apprehend, be a ground for holding that the delivery of a summons to the sheriff entitled against the wrong corporation, was the commencement of a suit, within section ninty-nine of the Code, against the real party to the obligation."

If there is no question of the Statute of Limitations, an additional or substituted party defendant may be brought in by an amendment in several jurisdictions. Louvall *v.* Gridley, 70 Cal. 507; Haviland *v.* Mayfield, (Col. 1906) 88 Pac. R. 143 (count against A & B as partners — amended count against A & B as individuals); Fuller *v.* Webster Co., 12 How. Pr. 293 (count against defunct corporation — amended count against receiver); Munzinger *v.* Courier, 82 Hun, 575 (count against corporation — amended count against unincorporated association); Burgie *v.* Sparks, 11 Lea, 84; Bird *v.* Stout, 40 W. Va. 43.

But see *contra*, Goward *v.* Guibelin, 11 C. B. N. S. 616.

Similarly, a count against two persons may be amended by dropping one of them. Paddon *v.* Clark, 124 Iowa, 94 (count on a sale to firm of A & B — amended count on sale to A); but see People *v.* Sill, 3 Conn. 157 *Contra.* — ED.

[6] 176 Mass. 33.

PATRICK H. HUTCHINSON *v.* JAMES C. TUCKER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 22, 1878.

[124 *Massachusetts Reports*, 240.]

CONTRACT on an account annexed. The writ, dated March 23, 1875, and returnable to the Superior Court, was against the defendant personally. On February 27, 1877, Gardner, J., allowed the plaintiff to amend the writ so as to charge the defendant as administrator of John C. Tucker, the defendant objecting to the amendment on the ground that he, as administrator, had rendered his final account and fully administered on the estate. The defendant alleged exceptions.

The case was afterwards tried before Bacon, J. The defendant put in evidence that his first and final account was allowed by the Probate Court on February 5, 1877, and that the amendment was allowed more than two years after he gave due notice of his appointment as administrator; and requested the judge to rule that the plaintiff could not recover, for these reasons.

The judge declined so to rule. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

BY THE COURT. The allowance of the amendment was within the discretion of the Superior Court, to the exercise of which no exception lies. Gen. Sts. c. 129, §§ 41, 82. Lester *v.* Lester.[1]

Exceptions overruled.[2]

HUDSON *v.* FERNEYHOUGH.

COURT OF APPEAL, FEBRUARY 3, 1890.

[34 *Solicitors' Journal*, 228.]

THIS was an appeal from the decision of a divisional court (Lord Coleridge, C. J., and Mathew, J.[3]). The defendant, on October 20, 1883, gave an I. O. U. to a man named Stanley for £42 money lent. On September 25, 1889, Stanley transferred the I. O. U. for value to the plaintiff, and on September 27 the plaintiff issued a writ against the defendant claiming the amount. No notice of assignment was given to the defendant, but on October 21, the day after the period limited

[1] 8 Gray, 437.

[2] A similar amendment was made in the following cases, in which, however, no question of the Statute of Limitations was involved: Lucas *v.* Pitman, 94 Ala. 616; Lester *v.* Lester, 8 Gray, 437; Alker *v.* Rhoades, 73 N. Y., Ap. Div. 158. See to the same effect the following cases in which a count against A, as administrator, was changed by amendment to a count against A in his individual capacity: McDonald *v.* Ward, 57 Conn. 304; Tighe *v.* Pope, 16 Hun. 180. — ED.

[3] Reported 61 L. T. Rep. 722.

by the Statute of Limitations expired, the plaintiff took out a summons to amend the writ by adding Stanley as a party. The master made an order giving leave to amend, on condition that the plaintiff should be in no better position with regard to the statute than if the writ had been issued on the date of the application to amend. Grantham, J., at chambers, reversed this order, and gave unconditional leave to amend; but the Divisional Court restored the order of the master, holding that the plaintiff ought not to be allowed to make such an amendment as to take away from the defendant a defence which had already accrued to him under the Statute of Limitations. The plaintiff appealed.

The court (Lord Esher, M. R., and Fry, L. J.) dismissed the appeal. Lord Esher, M. R., said that the effect of allowing an unconditional amendment would be to seriously affect the defendant's position. If Stanley had been the plaintiff in the action when the writ was issued, the Statute of Limitations would have been barred. But the sole plaintiff at that time was the assignee of the I. O. U. The assignment was, by section 25 (6) of the Judicature Act, 1873, not effectual without notice to the defendant. Before that act there could be at common law no transfer of a *chose in action*, and all that the assignee would get would be an equitable right. That right, if he had it, was in no way affected by the order of the master, but it would not be right in such a case to allow an amendment on any other terms than that the defendant's position should not be prejudiced by it. Fry, L. J., delivered judgment to the same effect.[1]

[1] Van Patten v. Waugh, 122 Iowa, 302 (action by A on note — amended count sets up claim of A as subrogated surety having paid the note); Lilly v. Tobbein, 103 Mo. 477 (count by unincorporated society as if it were a corporation — amended count by some members of society on behalf of all); Lower v. Segal, 60 N. J. 99 (count for homicide by administratrix for benefit of widow and children — amended count by widow); Fitzhenry v. Consol. Co., 63 N. J. 142 (like preceding case); La Bar v. N. Y. Co., (Pa. 1907) 67 Atl. R. 413 (count by widow for homicide — amended count by executrix for benefit of widow); Lilly v. R. R. Co., 32 S. Ca. 142 (like case in 60 N. J., *supra*; see comments on this case in Free v. So. Railway, (S. Ca. 1907) 58 S. E. R. 952, 953); Flatley v. Memphis Co., 9 Heisk. 230 (count for homicide by widow — amended count by administratrix for benefit of widow) *Accord.*

Van Doren v. Pa. Co., 93 Fed. R. 260 (declining to follow the similar case in 60 N. J., *supra*); McDonald v. State, 101 Fed. 171 (count by State Treasurer — amended count by State); Atlanta Co. v. Smith, (Ga. 1907) 58 S. E. R. 106 (count by A, administrator for benefit of widow — amended count by widow); Thomas v. Farm Co., 108 Ill. 91 (count by A to use of B against X. — amended count by B against X); U. S. Co. v. Ludwig, 108 Ill. 514 (count by assignee of chose in action — amended count by assignor to use of assignee); McCall v. Lee, 24 Ill. Ap. 585 (count by A to use of B — amended count by B); Service v. Farrington Bank, 62 Kan. 587 (indorsee substituted as plaintiff for payee whose name was used by mistake of indorsee's attorney); Hucklebridge v. Railway Co., 66 Kan. 443 (count in name of A — amended count by firm of A & B which did business in name of A); Tully v. Herrin, 44 Miss. 626 (sureties on attachment bond not discharged by amendment); Martin v. Young, 85 N. Ca. 156 (count by one partner — amended count by both partners); Bender v. Luckenbach, 162 Pa. 18 (count by B — amended count by A to use of B); Roberson v. McIlhenny, 59 Tex. 615 (count by one partner — amended count by both partners) *Contra.*

In the cases cited in the preceding paragraphs the amendment substituted the nominal plaintiff for the beneficial owner or *vice versa*. An amendment substituting for or adding to one claimant in his own behalf another claimant in his own behalf after the Statute of

JOHN B. WOLF v. DORA BAUEREIS.

SUPREME COURT, MARYLAND, APRIL TERM, 1890.

[72 *Maryland Reports*, 481.]

ALVEY, C. J., delivered the opinion of the court.[1]

The plaintiff in this case is a married woman, and the action is for an assault and battery of her person. The action was originally instituted in the joint name of husband and wife, but by an amendment of the declaration the name of the husband was omitted, and the suit was thence conducted in the name of the wife alone.

The defendant pleaded that the cause of action sued on did not accrue within one year next prior to the filling of the amended declaration. To this plea the plaintiff demurred, and the demurrer was sustained.

We are clearly of opinion that the court committed no error in

Limitations has run against the substituted or added claimant, will either be disallowed, or be ineffectual against a plea of the statute in bar of the new claimant: King *v.* Avery, 37 Ala. 169 (count by wife — amended count by husband). But see Agee *v.* Williams, 30 Ala. 636 (count by A — amended count by A as administratrix); Barker *v.* Anniston Co., 92 Ala. 314 (count by wife — amended count by husband and wife); Lucas *v.* Pittman, 94 Ala. 616 (*semble* — question of Statute of Limitations not involved); Miles *v.* Strong, 60 Conn. 393 (count by A as executor — amended count by A, trustee — no question of Statute of Limitations); Lagow *v.* Neilson, 10 Ind. 183 (count by A — amended count by A and B, tenants in common); Hawthorn *v.* State, 57 Ind. 286 (suit on official bond *ex rel.* A — amended count *ex rel.* B); Wood *v.* Ins. Co., 96 Mich. 437 (count by A — amended count by A and B, a partial assignee of claim); Cogdell *v.* Exum, 69 N. Ca. 464 (count by A — amended count by assignee in bankruptcy of A); Kaul *v.* Lawrence, 73 Pa. 410 (amendment adds a new plaintiff in ejectment); Commw. *v.* Dillon, 81½ Pa. 41 (new plaintiff — no question of Statute of Limitations); Gorman *v.* Glass, 197 Pa. 101 (like preceding case); Kille *v.* Ege, 82 Pa. 102 (count by A — amended count by B); Thayer *v.* Farrel, 11 R. I. 305 (substituted plaintiff — no question of Statute of Limitations); East Co. *v.* Culberson, 72 Tex. 375 (count for homicide by widow and some beneficiaries — amended count adds other beneficiaries).

But see *contra*, Dixon *v.* Dixon, 19 Iowa, 512 (count by A against X — amended count by firm of A & B against X); Hodges *v.* Kimball, 49 Iowa, 577 (like preceding case); Vunk *v.* Raritan Co., 56 N. J. 395 (amended count adds wife as co-plaintiff in action for injury to land owned by husband and wife); Martin *v.* Young, 85 N. Ca. 156 (count by A — amended count by A & B, co-partners).

Amendment independently of Statute of Limitations. An amendment similar to that in the principal case has been deemed inadmissible in a few cases, although no question of the Statute of Limitations was involved: Miles *v.* Strong, 60 Conn. 393; Barron *v.* Walker, 80 Ga. 121; Thayer *v.* Farrell, 11 R. I. 325.

But the opposite rule prevails generally: Whittaker *v.* Pope, 2 Woods C. C. 463; Wilson *v.* First Church, 56 Ga. 554; Lewis *v.* Furgerson, 59 Ga. 644 (Compare Willis *v.* Burd, 116 Ga. 374); Van Pelt *v.* Chattanooga Co., 89 Ga. 706 (count in name of guardian for ward — amended count in name of ward by his guardian); Teutonia Co. *v.* Mueller, 77 Ill. 22 (count for homicide by administrator for benefit of widow — amended count by widow); Congress Co. *v.* Farson Co., 199 Ill. 398; Burk *v.* Andis, 98 Ind. 59; Lake Co. *v.* Boswell, 137 Ind. 336; Winch *v.* Hosmer, 122 Mass. 438; Lewis *v.* Austin, 144 Mass. 383; Buckland *v.* Green, 133 Mass. 421; Morford *v.* Dieffenbacker, 54 Mich. 593 (like case in 39 Ga., *supra*); Wood *v.* Lane, 84 Mich. 521; Montague *v.* King, 37 Miss. 441; Tully *v.* Herrin, 44 Miss. 626; Farrier *v.* Schroeder, 40 N. J. 601; Patton *v.* Pittsburg Co., 96 Pa. 169; Miller *v.* Pollock, 99 Pa. 202; Nance *v.* Thompson, 1 Sneed, 321; Augusta Co. *v.* Vertress, 4 Lea, 75; Robertson *v.* McIlhenny, 59 Tex. 615; Pugmire *v.* Diamond Co., 26 Utah, 115. — ED.

[1] Only so much of the opinion is given as relates to the amendment. — ED.

holding the plea insufficient. The amended declaration was founded upon no new cause of action; and the statute only ran to the commencement of the suit. At the time of the commencement of the action the statute had not formed a bar, and the subsequent amendment of the declaration did not extend the running of the statute to the time of amendment.

It follows that the judgment must be affirmed.

Judgment affirmed.[1]

R. W. WOOD AND ANOTHER *v.* D. DENNY, EXECUTOR.

SAME *v.* SAME.

SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER TERM, 1856.

[7 *Gray*, 540.]

Two writs of *scire facias* against bail. The cases were tried together before the chief justice, and by him reported to the full court, and are sufficiently stated in their opinion.

METCALF, J. In the second of these actions the court are of opinion that the plaintiffs are entitled to judgment. The assumed ground of defence is, that the counts on the two promissory notes, in the suit in which the defendant's testator became bail, were not for the same cause of action which was set forth in the original money counts. It is not denied, however, by the defendant, that the notes might have been given in evidence on those counts, and would have supported them; and that the new counts were therefore unnecessary. But he contends that an amendment, by filing new counts, cannot legally be made, unless it "appears from the record" that the amended counts are for the same cause of action as that in the original ones. And *dicta* to that effect have been cited. But those *dicta* are only a deduction from a rule which was formerly supposed to be in force, namely, that a new count could not be filed, unless it would be supported by the same evidence which would support the original count. That rule, if it ever existed in this commonwealth, exists no longer. See Ball *v.* Claflin,[2] Swan *v.* Nesmith,[3] Smith *v.* Palmer.[4] But if it were now in force, it would permit the amendment that was allowed in this action. The notes declared on in the new counts, when given in evidence, would have supported the money counts. The amendment, therefore, did not affect the liability of the bail or of the principal. The judgment was for the same cause of action, and for the same amount that it

[1] Dickson *v.* Chicago Co., 81 Ill. 215 (count by wife and husband — amended count by wife alone); Haldeman *v.* Schuh, 109 Ill. Ap. 259 (count by husband and wife — amended count by husband alone) *Accord.* — ED.

[2] 5 Pick. 303. [3] 7 Pick. 220. [4] 6 Cush. 513.

would have been if no amendment had been made. Brooks v. Clark.[1]

Still it is denied by the defendant that parol evidence is admissible to show that the notes were the cause of action on the money counts. But we have no doubt on this point. As the record need not show that the new counts are for the same cause as the old, it follows that this may be shown *aliunde;* and in most cases, if not in all, it can be shown only by parol evidence. The attorney's testimony was therefore rightly admitted; and it showed that the money counts, at the time they were made, were intended for no cause of action besides the notes.

Judgment for the plaintiffs.[2]

In the first of these actions, the new count on a guaranty of a debt due from a third person to the plaintiffs was not for the same cause of action as the money counts, and could not have been given in evidence on those counts. Whether, as between the parties to the action, the filing of that count was properly allowed, is not now in question. As to the bail, we are of opinion that it discharged him from his undertaking. He became bail in an action for money had and received, money lent and money paid, as set forth in the writ and declaration against the principal, and not in an action on a guaranty, by the principal, of the plaintiffs' claim on another.

The rule by which the court is to decide whether an amendment discharges bail, or dissolves an attachment so as to let in subsequently attaching creditors, is correctly stated by Mr. Justice Wilde, as follows: "Amendments in form merely will not dissolve an attachment, or discharge bail. To have this effect, the amendment must be such as to let in some new demand or new cause of action." Haven v. Snow,[3] Wight v. Hale.[4] See also Haynes v. Morgan.[5] In the case before us, the amendment did let in a new cause of action, which was not known, even by the attorney, until after the writ, declaration, and arrest were made.

In England, bail are not liable for any cause of action different from that which is stated in the process or in the affidavit to hold to

[1] 2 D. & R. 148.

[2] The amendment, not creating a new cause of action, did not release the sureties in the following cases: Low v. Clark, 14 Pick. 223 (amended count omits superfluous matters); Brown v. How, 3 All. 528 (amended count restates declaration); Doran v. Cohen, 147 Mass. 342 (amended count amplifies original count); Townsend Bank v. Jones, 151 Mass. 454 (amended count explains original count); Norris v. Anderson, 181 Mass. 308 (amended count corrects misnomer); Morton v. Shaw, 190 Mass. 555 (amended count corrects formal error); Lanahan v. Porter, 148 Mass. 596 (count against maker and anomalous indorser, but not alleging notice of dishonor to latter — amended count makes this allegation); Merrick v. Greely, 10 Mo. 106 (amendment a merely formal change); Smith v. Brown, 14 N. H. 67 (count against two — amended count against one); Christal v. Kelly, 88 N. Y. 285 (count against A & B, partners, amended to a count against A, B & C, partners); Jayne v Platt, 41 Oh. St. 262 (amended count amplifies original count); Wright v. Brownell, 3 Vt. 435 (amended count restates original count).

[3] 14 Pick. 33, 34. [4] 2 Cush 493. [5] 3 Mass. 210.

bail.[1] Wilks *v.* Adcock,[2] Wheelwright *v.* Jutting,[3] Thompson *v.* Macirone.[4] *Judgment for the defendant.*[5]

JAMES F. FREEMAN *v.* SAMUEL W. CREECH, Jr.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1873.

[112 *Massachusetts Reports*, 180.]

WRIT of entry to recover land in Boston. It appeared from an agreed statement of facts that both parties claimed title from one Wentworth; that one McNiel sued Wentworth in an action of contract, and attached the land in question; that, after the attachment, Wentworth mortgaged the premises; that the mortgage title by assignment came to the demandant; that after the making of the mortgage McNiel filed an amended declaration containing additional counts; that it did not appear upon the record that the original and the amended declaration were for the same cause of action; that the case was heard before a referee upon the amended declaration; that afterwards McNiel obtained judgment upon the referee's award; that execution issued and was levied upon the demanded premises; and that the tenant claimed title through this levy.

It was admitted, "if equally provable by oral testimony, that neither of the claims set forth in the third and fourth counts of the amended declaration was included in the original declaration, and that the referee included in his award the amount claimed in the third count, and at least a part of the amount claimed in the fourth count."

Upon the statement of facts, judgment was ordered in the Superior Court for the tenant, and the demandant appealed.

BY THE COURT. The demandant, as subsequent purchaser, is not shown to have had any notice of the amendment of the declaration in the action in which the attachment was made under which the tenant claims title. It does not appear on the face of the original and amended declarations that they were for the same cause of action, and oral evidence is therefore admissible to show whether they were or were not. It being admitted, if legally provable by such evidence, that claims not included in the original declaration were included in the amended declaration, and in the award and judgment and levy of execution on which the tenant relies, the attachment was dissolved,

[1] 1 Tidd's Pract. (1st Amer. ed.) 242.
[2] 8 T. R. 27.
[3] 7 Taunt. 304.
[4] 4 D. & R. 619.
[5] The amendment creating a new cause of action, the sureties were discharged in the following cases: Furness *v.* Read, 61 Md. 1 (count by 3 co-owners — amended count by 16 co-owners); Richards *v.* Storer, 114 Mass. 101 (count against A & B — amended count against A & C); Quillen *v.* Arnold, 12 Nev. 238 (count by A & B, executors of A's deceased partner, for goods sold — amended count by A, surviving partner); Fullerton *v.* Cambell, 25 Pa. 345 (like the case in 61 Md. *supra*). — ED.

and the levy gave no title, as against this demandant. His title is therefore better than the tenant's. Gen. Sts. c. 129, § 82. Hill v. Hunnewell;[1] Willis v. Crooker;[2] Wood v. Denny.[3]

Judgment for the demandant.[4]

OLIVER v. RAYMOND AND ANOTHER.

CIRCUIT COURT, EASTERN DISTRICT OF WISCONSIN, MAY 15, 1901.

[108 *Federal Reporter*, 927.]

AT LAW. On application for leave to amend complaint before answer.

SEAMAN, District Judge. The proposed amendment states an additional cause of action of the same nature and arising out of the same course of transactions alleged in the original complaint; and it is tendered, as I understand the situation, within the time when an amendment is allowable as of course under the state practice. That the plaintiff could have united in the original complaints this cause of action with the one therein set up is unquestionable, and its introduction here may save instituting a second action, tending "to a multiplicity of suits, which the law abhors." Stein v. Benedict.[5] Its allowance would seem to be "in furtherance of justice" between the parties, and should be granted, unless it is barred by the rules of practice governing this court. Section 2830, Rev. St. Wis. 1898, authorizes the allowance of amendments at the discretion of the court when the new allegations are "material to the case," with a provision that an amendment "conforming the pleading or proceeding to the facts proved" shall "not change substantially the claim or defence."

[1] 1 Pick. 192. [2] Ib. 204, 206, note. [3] 7 Gray, 540, 542.

[4] Because the amendment created a new cause of action, the attachment based upon the original cause of action was inoperative in Peck v. Sill, 3 Conn. 157 (count against firm of A & B — amended count against A alone); Willis v. Crocker, 1 Pick. 204 (amendment adds a new count); Smead v. Chrisfield, 1 Handy, 574; Lutterloh v. McIlhenny Co., 74 Tex. 73 (count on note — amended count for goods sold); Boyd v. Beville, 91 Tex. 439 (*semble* — count on note — amended count on contract to indemnify).

But see Tilton v. Cofeld, 93 U. S. 163.

In the following cases the amendment not creating a new cause of action, the attachment based upon the original claim held good against subsequent conveyances or attachments of the same property: Bowden v. Burnham, 59 Fed. R. 752 (count in Federal Court not alleging diverse citizenship of plaintiffs and defendants — amended count supplies this defect); Bamberger v. Mosyon, 91 Ky. 517 (count for exoneration by surety against principal, but not making creditor a party — amended count supplies this omission); Townsend Bank v. Jones, 151 Mass. 454 (amended count explains original count); Mendes v. Freiters, 16 Nev. 388 (count upon an account stated — amended count upon the items of the account); Meyer v. Brooks, 29 Oreg. 203 (amended count amplifies original count); Sweetzer v. Claflin, 82 Tex. 513 (amended count varies chain of title to a note); Austin v. Burlington, 34 Vt. 506 (count on money counts — amended count on a note, but same claim the basis of each). — ED.

[5] 83 Wis. 603, 611, 53 N. W. 891.

Counsel for the defendant contends that the rule is well settled by decisions of the supreme court of Wisconsin that no amendment can be thus allowed which introduces a "new, separate, and distinct cause of action," and cites Newton *v.* Allis;[1] Stevens *v.* Brooks;[2] Wheeler *v.* Russel;[3] Geary *v.* Bennett.[4] But in each of these cases the amendment proposed a change of the original cause of action, which was refused by the trial court, and such ruling was approved; in other words, it was not error to deny the motion under the circumstances disclosed. The strongest expression against such amendment is found in Stevens *v.* Brooks, *supra*, — that "a new and different cause of action cannot be substituted for that on which the action was commenced," except "under very extraordinary circumstances." Yet in Packet Co. *v.* Shaw[5] and Vliet *v.* Sherwood,[6] such amendments were sanctioned as just allowances, without unusual circumstances; and in Morgan *v.* Bishop,[7] the general doctrine of liberality in that regard is clearly stated. On careful examination of the Wisconsin cases, I am satisfied that no ruling is intended to deprive the courts of discretion in the allowance or disallowance according to the circumstances, and that the early common-law doctrine against such amendments no longer prevails in this forum. In Tiernan *v.* Woodruff,[8] on review of the English and American authorities, the right to introduce a new independent cause of action is clearly upheld; and this decision is cited with approval in the opinion by Mr. Justice Swayne in Tilton *v.* Cofield,[9] as so holding. The same view is maintained in Bowen *v.* Bank,[10] and is well exemplified in Hatch *v.* Bank,[11] Mason *v.* Whitely,[12] and Freeman *v.* Webb.[13] In Bowden *v.* Burnham,[14] it is remarked that the right to allow amendments is conferred by section 954, Rev. St. U. S., and "exists quite independently of any state statute;" and in Erstein *v.* Rothschild,[15] the exhaustive opinion by Mr. Justice Matthews is of like effect. I am of opinion, therefore, that no rule of practice stands in the way of this amendment, and that it is just and equitable to have a single trial of the issues tendered by both of the alleged causes of action. The amendment will be allowed accordingly.[16]

[1] 12 Wis. 378. [2] 23 Wis. 196. [3] 93 Wis. 136.
[4] 65 Wis. 554. [5] 37 Wis. 655. [6] 38 Wis. 159.
[7] 61 Wis. 407. [8] 5 McLean, 135. [9] 93 U. S. 163, 166.
[10] (C. C.) 79 Fed. 49. [11] 78 N. Y. 487. [12] 4 Duer, 611.
[13] 21 Neb. 160. [14] 8 C. C. A. 248, 251, 59 Fed. 752. [15] (C. C.) 22 Fed. 61.

[16] In the following cases, in which no question of the Statute of Limitations or of the rights under an attachment was involved, an amendment was allowed although introducing new cause of action: Budding *v.* Murdock, 1 Ch. D. 42 (amendment a wholly new case); Tiernan *v.* Woodruff, 5 McL. 135 (amended count on a new note); U. S. *v.* 76,125 Cigars, 18 Fed. R. 147 (like the next case); Brown *v.* Needles Bank, 79 Fed. R. 49 (count on note — amended count adds a promise to indemnify); Nelson *v.* Webb, 54 Ala. 436 (special count for use and occupation — amendment a common count); Berry *v.* Tenn. Co., 134 Ala. 618 (count for partition by sale — amended count for partition without sale); Spencer *v.* Howe, 26 Conn. 200 (count on breach of covenant against incumbrances — amended count specifies a new incumbrance); Church *v.* Syracuse Co., 32 Conn. 372 (count on false warranty of title to land — amended count for fraud inducing purchase of land and coal); Western Co. *v.*

Burnham, 123 Ga. 28 (count for forcible expulsion from train — amended count for assisting plaintiff to alight in such a way as to cause injury); Central Co. v. Foshee, 125 Ill. 199 (count upon a negligent injury — amended count upon a wilful injury); Strong v. State, 75 Ind. 440 (count by a trustee to recover township funds — amended count to recover school funds also); Holmes v. Clark, 10 Iowa, 423 (*semble* — count for damages for deceit — amended count for rescission for false but not fraudulent misrepresentations); Louisville Co. v. Case, 9 Bush, 728 (count for negligence — amended count for wilful injury); Adams Co. v. Christmas, 101 Ky. 564 (count upon a note — amended count upon consideration of note); Home Co. v. Ballen, (Ky. 1906) 96 S. W. R. 878 (count alleges waiver of condition precedent — amended count alleges another waiver); Ledoux v. Buhler, 21 La. An. 130 (count on a note — amended count on promise to pay note after war was over); Ball v. Claflin, 5 Pick. 303 (count for goods sold — amended count for not accounting as factor for same goods); Swan v. Nesmith, 7 Pick. 220 (count for balance of account — amended count on *del credere* liability as agent); Smith v. Palmer, 6 Cush. 513 (count for goods sold and an order on G — amended count for breach of contract to discontinue suit if plaintiff would draw order on G); Strang v. Branch, 108 Mich. 229 (count on breach of warranty of title — amended count that patent did not cover article described); Rau v. Minn. Co., 13 Minn. 442 (count for injury to lots 7 and 8 in block 181 — amended count for injury to lots 8 and 9 in block 182); Dongan v. Turner, 51 Minn. 330 (count for commissions on sales — amended count for compensation for taking orders); Morison v. Herrington, 120 Mo. 665 (count in ejectment — amended count adds prayer for cancellation of deeds); Roberts v. Springfield Co., 21 Mo. Ap. 633 (count *ex contractu* — amended count *ex delicto* on same transaction); McKeighan v. Hopkins, 19 Neb. 33 (count in ejectment — amended complaint a bill to redeem); Freeman v. Webb, 21 Neb. 160 (amended count has an additional cause of action); Carmichael v. Dolan, 25 Neb. 335 (count for battery — amended count for negligent shooting); Stevens v. Sibbett, 31 Neb. 612 (bill for specific performance by A as partial assignee of promisee — amended bill by A as total assignee); Burnham v. Spooner, 10 N. H. 165 (count on a note — amended count upon consideration for the note); Mayor v. Gear, 27 N. J. 265 (count for work and labor — amended count for breach of express contract); Brown v. Leigh, 49 N. Y. 78 (amended count alleges wholly new and distinct cause of action); Deyo v. Morss, 144 N. Y. 216 (count for fraud — amended count upon a statute, but both counts claiming proceeds of same land); Robinson v. Willoughby, 67 N. Ca. 84 (count for recovery of land — amended count for foreclosure of mortgage); Ely v. Early, 94 N. Ca. 1 (count for recovery of land — amended count for reformation of mistake in deed); Spice v. Steinruck, 14 Oh. St. 213 (count for malicious prosecution — amended count for imprisonment); Fell v. Union Co., (Utah, 1907) 88 Pac. R. 1063 (count against carrier on contract to carry to end of line — amended count on contract to carry beyond defendant's line); Tillotson v. Prichard, 60 Vt. 94 (count on covenant of seisin — amended count on breach of warranty); Daley v. Gatis, 65 Vt. 591 (count for enticing plaintiff's husband's p. q. c. a. — amended count for criminal conversation p. q. c. a.); Lackner v. Turnbull, 7 Wis. 105 (count for work and labor — amended count asserts a lien for work and labor); Pellage v. Pellage, 32 Wis. 136 (count upon a *quantum meruit* — amended count for a fixed price); N. W. Co. v. Shaw, 37 Wis. 655 (count on breach of contract — amended count for restitution of consideration); Reindle v. Heath, 109 Wis. 570 (like case in 7 Wis. *supra*); Gates v. Paul, 117 Wis. 170 (count for dissolution of partnership and accounting for lands — amended count asserts a trust in the lands).

Amendments not introducing a new cause of action. — Obviously amendments should be allowed, which do not introduce a new cause of action, as in the following cases, in which the new count merely amplified or varied in non-essential matters the original count: Chamberlain v. Mensing, 51 Fed. R. 511; Northrop v. Mercantile Co., 119 Fed. R. 969 (enlargement of claim for damages); McLean v. Smitherman, 71 Ala. 563; Springfield Co. v. De Jarnett, 111 Ala. 248; Ala. Co. v. Hall, (Ala. 1907) 44 So. R. 592 (change of prayer for relief); Reynolds v. Lawrence, (Ala. 1907) 40 So. R. 576; Henry v. Frolichstein, (Ala. 1907) 43 So. R. 126; Montgomery Co. v. Fitzpatrick, (Ala. 1907) 43 So. R. 136; Nevada Co. v. Kid, 28 Cal. 673; Ware v. Walker, 70 Cal. 591 (dropping of certain co-plaintiffs); Haviland v. Mayfield, (Colo. 1906) 88 Pac. R. 148; Nash v. Adams, 24 Conn. 33; Pratt v. Rhodes, (Conn. 1905) 61 Atl. R. 1009; Rome Co. v. Barnett, 89 Ga. 718; Colley v. Gate Co., 92 Ga. 664; Glover v. Savannah Co., 107 Ga. 34; Raleigh Co. v. Bradshaw, 113 Ga. 862; City v. Anglin, 120 Ga. 785; Ins. Co. v. Leader, 121 Ga. 260; So. Co. v. Horne, 121 Ga. 386; Central Co. v. Henson, 121 Ga. 462; Challener v. Niles, 78 Ill. 78; Independent Order v. Paine, 122 Ill. 625; St. Louis Co. v. Schultz, (Ill. 1907) 80 N. E. R. 879; Harkins v. Edwards, 1 Iowa, 296; Mather v. Butler Co., 16 Iowa, 59; Emmet Co. v. Griffin, 73 Iowa, 163 (change

of prayer for relief); Cook v. Chicago Co., 75 Iowa, 169 (like preceding case); Barnes v. Hekla Co., 75 Iowa, 11 (like preceding case); Youngerman v. Long, 95 Iowa, 185 (like preceding case); Cox Co. v. Chicago Co., 105 Iowa, 462 (like preceding case); Thayer v. Smoky Co., 129 Iowa, 550; Kansas Co. v. Salmon, 14 Kan. 512; Joyce v. Hamilton, 10 Bush, 544 (husband dropped as co-defendant); Reynolds v. Price, 22 Ky. L. Rep. 5; Bishop v. Williamson, 11 Me. 495; Place v. Braun, 77 Me. 342; Babb v. Oxford Co., 99 Me. 298; Daley v. Boston Co., 147 Mass. 101; Doran v. Cohen, 147 Mass. 342 (increase of claim for damages); Townsend Bank v. Jones, 151 Mass. 454; Bachelder v. Pierce, 170 Mass. 260; Driscoll v. Holt, 170 Mass. 262; Crossman v. Griggs, 188 Mass. 156; Smalley v. N. W. Co., 113 Mich. 141; Belden v. Blackman, 124 Mich. 667; Detroit v. Wayne, 125 Mich. 634; Cleveland v. Rothschild, 138 Mich. 90; Holt Co. v. Cannon, 114 Mo. 514 (change of prayer for relief); Liese v. Meyer, 143 Mo. 547 (like preceding case); Grigsby v. Barton Co., 169 Mo. 221; Edge v. S. W. Co., (Mo. 1907) 104 S. W. R. 90; Schwab v. St. Louis Co., 71 Mo. Ap. 241; Bocker v. Crescent Co., 101 Mo. Ap. 429; Sain v. Rooney, (Mo. Ap. 1907) 101 S. W. R. 1127; Schreckengast v. Early, 16 Neb. 510; Shoemaker v. Commercial Co., 72 Neb. 650; Chicago Co. v. O'Donnell, 72 Neb. 900; Stevenson v. Mudgett, 10 N. H. 368; Price v. N. J. Co., 31 N. J. 229 (count in trespass — amended count in case); American Co. v. Day, 39 N. J. 89 (count in assumpsit — amended count in covenant); Ware v. Millville Co., 45 N. J. 177; Excelsior Co. v. Sweet, 57 N. J. 224 (increase of *ad damnum* clause); Baldock v. Atwood, 21 Oreg. 73; York v. Nash, 42 Oreg. 321 (dropping of a co-plaintiff); Good Co. v. Hartzell, 22 Pa. 277; Trego v. Lewis, 58 Pa. 463; Edwards v. Chicago Co., (S. Dak. 1907) 110 N. W. R. 832; Galveston Co. v. Perry, (Tex. Civ. Ap. 1904) 85 S. W. R. 62; Rhemke v. Clinton, 2 Utah, 230 (reduction of *ad damnum* clause); Casady v. Casady, (Utah, 1906) 88 Pac. R. 32; Jones v. Ogden, (Utah, 1907) 89 Pac. R. 1006 (change in *ad damnum* clause); Boyd v. Bartlett, 36 Vt. 9; New Co. v. Painter, 100 Va. 507; Clarke v. Ohio Co., 39 W. Va. 732 (change in *ad damnum* clause); Bentley v. Ins. Co., 40 W. Va. 729 (like preceding case); Brayton v. Jones, 5 Wis. 117; Bell v. McGeogh, 78 Wis. 355; Post v. Campbell, 110 Wis. 378.

Amendments correcting a misnomer or clerical error are allowed. Dunn v. Mayo Mills, 134 Fed. R. 804; Sidway v. Marshall, 83 Ill. 438; Morris v. Anderson, 181 Mass. 262; Morton v. Shaw, 190 Mass. 555; Wright v. Eureka Co., 206 Pa. 274; Cleavenger v. Franklin Co., 47 W. Va. 595; Staats v. Ins. Co., 57 W. Va. 571.

The amendment was allowed and the Statute of Limitations was no bar in the following cases, in which the amended count merely amplified or varied, in non-essential matters, the language of the original count: Christy v. Beckitt, 3 Lev. 348 cited; Howell v. James, 1 Wils. 163; Cross v. Kaye, 6 T. R. 543; Petre v. Craft, 4 East, 432; Texas Co. v. Cox, 145 U. S. 393; Atlantic Co. v. Laird, 164 U. S. 393 (amended count drops a co-defendant in action of tort); Smith v. Mo. Co., 56 Fed. R. 458 (reversing s. c. 50 Fed. R. 760); Cincinnati Co. v. Gray, 101 Fed. R. 623; So. Co. v. Simpson, 131 Fed. 705; Bradford v. Edwards, 32 Ala. 628 (slander — varies words but not changing import); Gordon v. Ross, 63 Ala. 361; Dowling v. Blackman, 70 Ala. 308 (count upon $200 note — amended count upon a conditional $200 note); Adams v. Phillips, 75 Ala. 461; Ala. Co. v. Arnold, 80 Ala. 600; Western Co. v. Way, 83 Ala. 542; Ala. Co. v. Thomas, 89 Ala. 294; Winston v. Mitchell, 93 Ala. 554; Taylor v. Smith, 104 Ala. 537; Louisville Co. v. Woods, 105 Ala. 561; City Council v. Harris, 112 Ala. 614; Manchester Co. v. Feibelman, 118 Ala. 308; Chambers v. Talladega Co., 126 Ala. 296 (count on a note — amended count on covenant to same effect); Louisville Co. v. Robinson, 141 Ala. 325; Hughes v. Howell, (Ala. 1907) 44 So. R. 410; So. Co. v. Cunningham, (Ala. 1907) 44 So. R. 658; St. Louis Co. v. Douglas, (Ala. 1907) 44 So. R. 676; Gannon v. Moore, (Ark. 1907) 104 S. W. R. 139 (amended count in ejectment alleges a new ground of title); Lorenzano v. Camarillo, 45 Cal. 125 (amended count drops a party defendant); Cox v. McLaughlin, 76 Cal. 60 (count on special contract — amended count on *quantum meruit*); Vanderslice v. Matthews, 79 Cal. 273; Redington v. Cornwell, 90 Cal. 49; Bogart v. Crosby, 91 Cal. 278; Smullen v. Phillips, 92 Cal. 408; Nellis v. Pacific Bank, 127 Cal. 167; Frost v. Witter, 132 Cal. 421 (count upon note — amended count asks foreclosure of mortgage securing it); Frey v. Vignier, 145 Cal. 251; Dist. v. Frazer, 21 D. Col. App. 154; Central Co. v. Hunter, (Ga. 1907) 58 S. E. R. 154; North Co. v. Monka, 107 Ill. 340; Swift v. Foster, 163 Ill. 50 (count for injury by employee — amended count for injury by defective machinery); Swift v. Madden, 165 Ill. 41; Chicago Co. v. Carroll, 189 Ill. 273; Wolf. v. Collins, 196 Ill. 281; Chicago Co. v. Wallace, 202 Ill. 129; Chicago Co. v. McMeen, 206 Ill. 108; Hinchcliff v. Rudnik, 212 Ill. 569; Cicero v. Bartelme, 212 Ill. 256; Evanston v. Richard, 224 Ill. 444; Grace Co. v. Strong, 224 Ill. 630; Deering Co. v. Barzak, 227 Ill. 71; Lake Co. v. Enright, 227 Ill. 403; Hertel v. Boismenue,

FRANKLIN LAWRY v. STILLMAN J. LAWRY.

SUPREME JUDICIAL COURT, MAINE, FEBRUARY 15, 1896.

[88 *Maine Reports*, 482.]

FOSTER, J.[1] Trespass *quare clausum* for cutting standing trees on a lot of land the plaintiff owned in remainder, the widow of his father having a life estate therein as her dower.

The question is, whether this action can be maintained in its present form by the plaintiff, whose interest is only that of remainderman. We think it cannot.

Trespass *quare clausum* is a possessory action. To maintain it, it is necessary to show possession in the plaintiff and the injury committed. Jones *v.* Leeman,[2] and cases cited; Bartlett *v.* Perkins,[3] 1 Ch. Pl. 175*.

Though *quare clausum* may be maintained by the owner of the land for an injury to the freehold, when it is in the occupation of a tenant at will (Bartlett *v.* Perkins,[4] Davis *v.* Nash,[5] Kimball *v.* Sumner,[6] Starr *v.* Jackson,)[7] yet we do not think this doctrine is to be extended so as to apply to the remainder-man who is not entitled to possession.

(Ill. 1907) 82 N. E. R. 298; Cicero Co. *v.* Brown, 89 Ill. Ap. 318; Salmon *v.* Libby, 114 Ill. Ap. 258; Jeffersonville Co. *v.* Hendricks, 41 Ind. 48; Floyd *v.* Floyd, 90 Ind. 132 (new parties brought into a will case); School Loan *v.* Grant, 104 Ind. 168; Chicago Co. *v.* Bills, 118 Ind. 221; Ohio Co. *v.* Stein, 140 Ind. 61; Cleveland Co. *v.* Bergschicker, 162 Ind. 108; Shirk *v.* Coyle, 2 Ind. Ap. 354; Cas *v.* Blood, 71 Iowa, 632 (change in prayer for relief); Barke *v.* Early, 72 Iowa, 273; Newman *v.* Covenant Ass'n, 76 Iowa, 56 (count at law — amended count in equity); Kuhn *v.* Railway Co., 76 Iowa, 67; Thayer *v.* Coal Co., 129 Iowa, 550; Gordon *v.* Railway Co., 129 Iowa, 747; Sarchfield *v.* Hayes, (count upon express contract — amended count on *quantum meruit*); Culp *v.* Steen, 47 Kan. 746 (count upon representation — amended count on a warranty); Davenport *v.* Holland, 2 Cush. 1; George *v.* Reed, 101 Mass. 378 (action at law changed to suit in equity); Sanger *v.* Newton, 134 Mass. 308 (count claims damages under one statute — amended count under another); Cogswell *v.* Hall, 185 Mass. 455; Pratt *v.* Davis, 105 Mich. 499; Bruns *v.* Schreiber, 48 Minn. 366; Buel *v.* St. Louis Co., 45 Mo. 562; Lottman *v.* Barrett, 62 Mo. 159 (amended count drops a co-defendant in tort); Cytron *v.* St. Louis Co., (Mo. 1907) 104 S. W. R. 109 (count for homicide by father — amended count by father and mother); Haines *v.* Pearson, 107 Mo. Ap. 481; McKeighan *v.* Hopkins, 19 Neb. 30 (count in ejectment — amended count for redemption); Hatch *v.* Central Bank, 78 N. Y. 487 (count for passing off four notes — amended count adds other notes); Deane *v.* O'Brien, 13 Abb. Pr. 11; Ward *v.* Kalbfleisch, 21 How. Pr. 283; Eighmie *v.* Taylor, 39 Hun, 366 (count on warranty — amended count upon fraudulent representation); Elting *v.* Dayton, 67 Hun, 425; Truman *v.* Lester, 71 N. Y. Ap. Div. 612 (action at law changed to suit in equity); Smith *v.* Bellows, 77 Pa. 441 (count for m. h. and r. — amended count for deceit in obtaining the money); Nashville Co. *v.* Foster, 10 Lea, 351; Dana *v.* McClure, 39 Vt. 197 (count in *indeb. assumpsit* — amended count on a note); Lamb *v.* Cecil, 28 W. Va. 653; Kuhn *v.* Bromfield, 34 W. Va. 252; Wise Co. *v.* McCormick, (Va. 1907) 58 S. E. R. 584.

Similarly the Statute of Limitations did not prevent the amendment or bar the action in the following cases, in which the amendment corrected a misnomer or other mistake: Maddock *v.* Hammet, 7 T. R. 55; Doe *v.* Richardson, 76 Ala. 329; Taylor *v.* Taylor, 110 Iowa, 207; Sachra *v.* Manilla, 120 Iowa, 562; American Co. *v.* Dickey, (Kan. 1906) 88 Pac. R. 66; Western Co. *v.* State, 82 Md. 293; Walker *v.* Wabash Co., 193 Mo. 453; Guild *v.* Parker, 43 N. J. 430; Borden *v.* La Tulle Co., (Tex. Civ. Ap. 1907) 99 S. W. R. 128. — ED.

[1] Only the opinion of the court is given. — ED.
[2] 69 Maine, 489.
[3] 13 Maine, 87.
[4] Ibid.
[5] 32 Maine, 411.
[6] 62 Maine, 305, 309.
[7] 11 Mass. 519.

It has been held that such an action will not lie by the reversioner for waste committed by a person acting under authority of the tenant for life. Shattuck *v.* Gragg.[1] But the reversioner or remainder-man is not without remedy when the injury is of a permanent character affecting the inheritance, for an action would lie, either on the case or for waste. Stetson *v.* Day,[2] Shattuck *v.* Gragg, *supra.*

The amendment changing the declaration to case ought not to be allowed.

True, the statute has abolished the distinction between actions of trespass and trespass on the case. But this relates to the distinction in form only. In cases where the distinction is really of substance, rather than of form, the statute is inapplicable. Place *v.* Brann,[3] Sawyer *v.* Goodwin,[4] Kelly *v.* Bragg.[5]

Such an amendment is more than a matter of form. It changes the nature of the action. Sawyer *v.* Goodwin, *supra.* This is not allowable. Milliken *v.* Whitehouse,[6] Farmer *v.* Portland.[7]

It will not be wise to depart too far from the established rules of pleading. Constant departures from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them. Shorey *v.* Chandler.[8]

Plaintiff nonsuit.[9]

[1] 23 Pick. 88. [2] 51 Maine, 434. [3] 77 Maine, 342.
[4] 34 Maine, 419. [5] 76 Maine, 207. [6] 49 Maine, 527.
[7] 63 Maine, 46, 48. [8] 80 Maine, 409, 411.

[9] It will be observed that in the principal case no question of the Statute of Limitations nor of the rights under an attachment was involved. Nor was the amendment refused because its allowance would have caused injustice in any other way. The refusal was based wholly upon the fact that it would introduce a new cause of action. This narrow view of the right of amendment obtained in the following cases also: Venable *v.* Louisville Co., 137 Fed. R. 981 (count for penalty — amended count on contract); So. Co. *v.* McIntyre, (Ala. 1907) 44 So. R. 624 (count in trespass q. c. f. — amended count for obstructing plaintiff's use of his land); Mahan *v.* Smitherman, 71 Ala. 503 (count on special agreement — amended count a common count on wholly different claim); Semple *v.* Glenn, 91 Ala. 245 (like preceding case); Patrick *v.* Whitely, 75 Ark. 465 (count against A, B, and C as partners for goods sold — amended count charges B and C for goods sold and A upon his assumption of liabilities of B and C); Wheeler *v.* West, 78 Cal. 95 (*semble* — but objection not to be taken by answer); Givens *v.* Wheeler, 5 Colo. 598, 6 Colo. 149 (count for breach of warranty — amended count for fraudulent representations); Union Co. *v.* Sternberg, 13 Colo. 141 (count against R. R. for stock-killing — amended count adds a claim for burning grass); Denver Co. *v.* Ives, 25 Colo. 19 (count for breach of contract — amended count for negligent tort); Connell *v.* El Paso Co., 33 Colo. 30 (count for fraud — amended count for mistake); Ross *v.* Bates, 2 Root, 198 (count for malicious prosecution — amended count on conspiracy to prosecute); Minor *v.* Woodbridge, 2 Root, 274 (count for fraud — amended count upon loss of deed of defeasance); People *v.* Sill, 3 Cõnn. 157 (count, ejectment against firm of A and B — amended count against A alone); Donahue's App. 62 Conn. 370 (count upon express contract — amended count upon quasi-contract growing out of breach of agreement); Latine *v.* Clements, 3 Ga. 426 (count upon judgment — amended count on cause of action on which judgment was given); Pearson *v.* Reid, 10 Ga. 580 (count for flooding mill — amended count for injury to stock); Williams *v.* Hollis, 19 Ga. 313 (count for use and occupation — amended count for ouster); Dauty *v.* Hansell, 20 Ga. 659 (count on statutory real action — amended count, ejectment in name of A); Matthews *v.* Woolfolk, 51 Ga. 618 (count against executor *de son tort* — amended count on covenant of seisin); Croghan *v.* N.Y. Agency, 53 Ga. 109 (count on fraud — amended count on breach of contract); Ayers *v.* Daly, 56 Ga. 119 (count upon an account — amended count on breach of warranty); Ransom *v.* Christian, 56 Ga. 351

(count for libel — amended count for trespass to person); Long v. Bullard, 59 Ga. 355 (count upon a note — amended count for foreclosure of mortgage); Anderson v. Pollard, 62 Ga. 46 (count upon an account — amended count for goods sold); Broach v. Kelly, 66 Ga. 148 (like case in 59 Ga., *supra*); Fokes v. De Vaughn, 66 Ga. 735 (count upon bill given as collateral for future advances — amended count on note for past advances); White v. Moss, 67 Ga. 89 (count in ejectment — amended count upon constructive trust); Mitchell v. Ga. Co., 68 Ga. 644 (count on contract — amended count on fraudulent tort); Roberts v. Germania Co., 71 Ga. 478 (count upon renewal of insurance policy — amended count on refusal to renew); Bell v. Central R. R., 73 Ga. 520 (count for injury caused by death — amended count p. q. s. a.); Parmalee v. Savannah Co., 78 Ga. 239 (count upon statute for excess of freight — amended count on common law right); Adkins v. Hutchings, 79 Ga. 260 (count for year's support — amended count for a devastavit); Barron v. Walker, 80 Ga. 121 (count on an account between A and B — amended count on account between M and B, assigned to A); Exposition Mills v. Western Co., 83 Ga. 441 (count against carrier on common law liability — amended count on statutory liability as to connecting lines); Bolton v. Railway Co., 83 Ga. 660 (count on common law duty — amended count on statutory duty); Smith v. East Co., 84 Ga. 183 (like case in 73 Ga. *supra*); Cox v. Richmond Co., 87 Ga. 747 (count against carrier in tort — amended count on contract); Chattanooga Co. v. East Co., 89 Ga. 732 (count for taking by eminent domain — amended count for carrying off part of the soil); Singer Co. v. Armstrong, 91 Ga. 745 (count for services as manager — amended count for services of instruction to his successor as manager); Lamar v. Lamar Co., 118 Ga. 850 (count for price of goods + 10 % for freight and handling — amended count for price of goods + cost of delivery + 10%); Irvine v. Paulett, 1 Kan. 418 (count on a note — plea payment — no denial of payment — amendment was a denial of payment); Beyer v. Reed, 18 Kan. 86 (count upon statute — amended count a different claim independent of statute); Jewett v. Malott, 60 Kan. 509 (count on note — amended count on constructive trust); Lyons v. Berlan, 67 Kan. 426 (amended count brings in new party in a will contest); Rutledge v. Van Meter, 8 Bush, 354 (count a creditor's bill on one debt — amended count similar bill on another debt); Martin v. Hanson, 114 La. 783 (amended count on a claim arising after action began); Eaton v. Ogier, 2 Me. 46 (count for false return that bail was taken — amended count against sheriff for not giving up bail bond); Bartlett v. Perkins, 13 Me. 87 (count in trespass q. c. f. — amended count for a disseisin); Lambard v. Fowler, 25 Me. 308 (count against sheriff for acts of deputy — amended count for other acts of sheriff himself); Sawyer v. Goodwin, 34 Me. 419 (count for breaking close and setting fire — amended count for negligently suffering fire to escape to plaintiff's land); Skowhegan Bank v. Cutler, 49 Me. 315 (count for aiding X to make fraudulent conveyance of property — amended count related to other property); Cooper v. Waldron, 50 Me. 80 (count for malicious prosecution of civil action — amended count for abuse of legal process); Farmer v. Portland, 63 Me. 46 (count against city for destruction of buildings to stop fire — amended count to charge city with ⅓ of property destroyed by mob); Bruce v. Soule, 69 Me. 562 (count for one slander — amended count for another); Van Cleef v. Therasson, 3 Pick. 12 (count for goods sold — plea, payment by note — amended count upon the note); Hayward v. Hapgood, 4 Gray, 437 (count at law — amended count in equity); People v. Judges, 1 Doug. Mich. 434 (count in debt for statutory penalty — amended count in assumpsit for money had and received); People v. Circuit Judge, 13 Mich. 206 (count in trover — amended count in assumpsit); Gorman v. Judge, 27 Mich. 138 (count a common count — amended count on special contract); People v. Judge, 35 Mich. 221 (count against X as carrier — amended count against X as warehouseman); Hurst v. Detroit Railway, 84 Mich. 539 (count for damages to A by death of X — amended count for damages to X); Loranger v. Davidson, 110 Mich. 605 (count for work and labor — amended count on special contract); Angell v. Pruyn, 126 Mich. 16 (count on breach of warranty — amended count on a later breach of warranty); Walker v. Lansing Co., 144 Mich. 685 (count by husband p. q. c. a. — amended count by him as administrator of his wife); Lumpkin v. Collier, 69 Mo. 170 (count on bond — amended count on fraud); Parker v. Rodes, 79 Mo. 83 (count for conversion — amended count for fraud); Scovill v. Glasner, 79 Mo. 449 (count for conversion — amended count for malicious attachment); Fields v. Maloney, 78 Mo. 172 (count for partition — amended count in ejectment); Heman v. Glann, 129 Mo. 325 (count on breach of trust — amended count on debt); Seymore v. Franklin (Mo. law), 92 Fed. R. 122 (count on one judgment — amended count on a different judgment); Sears v. Loan Co., 56 Mo. Ap. 122 (count against corporation for conversion — amended count against shareholders under a statute); Bullion Co. v. Crœsus Co., 2 Nev. 168 (count for once piece of land — amended count for another); Butterfield v. Harrell, 3 N. H. 201 (count on contract to carry carefully — amended count to

carry safely — questioned in Stephenson v. Mudgett, 10 N. H. 338, 340); Goddard v. Perkins, 9 N. H. 488 (count for conversion — amended count for negligence causing loss of goods); Merrill v. Russell, 12 N. H. 74 (count on one account — amended count on another); Lawrence v. Langley, 14 N. H. 70 (count against indorser — amended count on independent special contract); Pillsbury v. Springfield, 16 N. H. 565 (count on a judgment — amended count on different judgment); French v. Gerrish, 22 N. H. 97 (count for money had and received and rent of goods — amended count on note for specific articles); Thompson v. Phelan, 22 N. H. 339 (count for work and labor — amended declaration in two counts, one for use and occupation and one for goods sold); Little v. Morgan, 31 N. H. 499 (count in assumpsit — amended count in debt on covenant); Wood v. Folsom, 42 N. H. 70 (count for money had and received — amended count for work and labor); Burt v. Kinne, 47 N. H. 361 (count on common count — amended count for breach of covenant); Mt. Wash. Co. v. Redington, 55 N. H. 386 (count for goods sold — amended count for non-acceptance of shares); Ball v. Danforth, 63 N. H. 420 (count on common count — amended count for non-payment of note); Clement v. Beal, 53 N. Y. Ap. Div. 416; Wheeler v. Hall, 54 N. Y. Ap. Div. 49; McNair v. Board, 93 N. Ca. 364 (count for injunction — amended count for mandamus); Clendenin v. Turner, 96 N. Ca. 416 (amended count on a cause of action not existent when original count was pleaded); Powell v. Allen, 103 N. Ca. 46 (like preceding case); Winder v. Northampton Bank, 2 Pa. St. 446 (count for deceit — amended count for conversion); Tatham v. Ramey, 82 Pa. 130 (count for dower — amended count in debt); Wolf v. Wolf, 158 Pa. 621 (amended count for entry on a different close); Greer v. Assurance Co., 183 Pa. 334 (count on insurance policy — amended count on subsequent promise to pay amount of policy); Wilcox v. Sherman, 2 R. I. 540 (count in trespass — amended count, trover); Dowling v. Clark, 13 R. I. 650 (count in case in nature of account — amended count in account); Slater v. Fehlberg, 24 R. I. 574 (count in case — amended count in trespass); McKenna v. Houlihan, (R. I. 1906) 66 Atl. R. 834 (bill for specific performance — amended bill to redeem mortgage); Wilbanks v. Willis, 2 Rich. 108 (count on warranty — amended count for deceit); Bleckley v. Branyan, 28 S. Ca. 445 (amended count a wholly new cause of action); All v. Barnwell Co., 29 S. Ca. 161 (count on statutory liability for defect in highway — amended count on a different statutory liability for negligence); Halcomb v. Kelly, 57 Tex. 618 (count on judgment — amended count for foreclosure of lien); Carpenter v. Gookin, 2 Vt. 495 (count in assumpsit — amended count, trover); Sumner v. Brown, 34 Vt. 194 (count for one conversion — amended count for another); Denny v. Nicholas, 44 Vt. 24 (count for goods sold — amended count for work and labor); McDermid v. Tinkham, 53 Vt. 615 (count, debt on judgment — amended count, debt on note); Brodek v. Hirschfeld, 57 Vt. 12 (count for goods sold — amended count on guaranty); Snyder v. Harper, 24 W. Va. 206 (count for battery — amended count for another battery); Newton v. Allis, 12 Wis. 378 (count for flooding by mill-dam — amended count for compensation for taking for a mill-dam); Sweet v. Mitchell, 15 Wis. 641 (count on express trust — amended count on constructive trust *ex delicto*); Larkin v. Noonan, 19 Wis. 82 (count for libel — amended count for malicious prosecution); Stevens v. Brooks, 23 Wis. 196 (count for costs — amended count for redemption of mortgage); Board v. Decker, 34 Wis. 378 (count for conversion of money — amended count for money had and received; same transaction); Shinners v. Brill, 38 Wis. 648 (bill for injunction by mortgagee against removal of goods — amended count for conversion of goods); Johnson v. Filkington, 39 Wis. 62 (count for mechanics lien — amended count for damages for preventing performance of contract); Carmichael v. Argard, 52 Wis. 607 (count in ejectment — amended count seeks to remove cloud on title); Hollehan v. Roughan, 62 Wis. 64 (count for goods sold — amended count for money had and received); Geary v. Bennett, 65 Wis. 554 (count for one slander — amended count for another); Klipstein v. Raschein, 117 Wis. 248 (count in tort — amended count in contract; in Gates v. Paul, 117 Wis. 170, 182, the court deplores Wisconsin rule forbidding amendments which change action from contract to tort or from law to equity and *vice versa*). — Ed.

STEWARD v. NORTH METROPOLITAN TRAMWAYS CO.

COURT OF APPEAL, JANUARY 27, 1886.

[16 *Queen's Bench Division*, 556.]

APPEAL from the order of the Queen's Bench Division[1] affirming the order of a judge at chambers, whereby he rescinded the order of a master who had given leave to the defendants to amend their statement of defence.

The action was brought against the defendants, a tramway company, to recover damages in respect of personal injuries alleged to have been sustained by the plaintiff through their not having maintained a road upon which their tramway ran in a safe and proper condition. The pleadings in the action were closed in May, 1885, and the case set down for trial. In the following November the defendants applied for leave to amend their statement of defence by setting up that there was at the time of the accident to the plaintiff a contract, under the 29th section of the Tramways Act, 1870 (33 & 34 Vict. c. 78), between themselves and the vestry, the road authority of the district, whereby, according to the decision in Howitt *v.* Nottingham Tramways Co.,[2] the liability to maintain the road in proper condition was shifted from them to the vestry. It appeared that, when the defendants delivered their defence, the plaintiff would have been in time to sue the vestry, but that at the time of the application for leave to amend, the statutory period of limitation within which the plaintiff could have sued the vestry as road authority had elapsed.[3]

LORD ESHER, M. R. I am not certain that in refusing this application we shall be doing any substantial harm to the defendants. That will depend on whether it should turn out that the decision in Howitt *v.* Nottingham Tramways Co.[4] can be upheld, as to which, however, I express no opinion, beyond saying that I do not feel at present quite clear that it can. The state of the case is this: the pleadings having been for a long time closed, the defendants allege that they have made a mistake in their statement of defence, and seek to amend. Having thus committed a fault in pleading, they had given an advantage to the plaintiff through their own default. The question is whether, under the circumstances, the court ought to deprive the plaintiff of that advantage. With regard to questions of amendment of pleadings, a rule has been enunciated by the court, which is rather a rule of conduct than a rule of rigid law such as can never be departed from; because I take it that the court might depart from it if there were very exceptional circumstances in any particular case leading the court to think that it would not be right to apply it. It is neverthe-

[1] See 16 Q. B. D. 178. [2] 12 Q. B. D. 16.

[3] The arguments and the concurring judgments of Lindley and Lopes, L. JJ., are omitted. — ED.

[4] 12 Q. B. D. 16.

less a rule of conduct which must be generally followed. The rule was thus laid down in Tildesley *v.* Harper [1] by Lord Bramwell, who there says: "My practice has always been to give leave to amend, unless I have been satisfied that the party applying was acting *malâ fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." The subject was again discussed in Clarapede *v.* Commercial Union Association,[2] where I stated the rule in terms substantially equivalent to those used by Lord Bramwell. I there said, "The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made." And the same principle was expressed, I think perhaps somewhat more clearly, by Bowen, L. J., who says that an amendment is to be allowed "whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made."

To apply that rule to the present case: if the amendment is allowed now, will the plaintiff be in the same position as if the defendants had pleaded correctly in the first instance? If the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants, and then have given notice of action and brought an action against the vestry; but now, more than six months having elapsed, he can no longer sue the vestry. If, therefore, the amendment were allowed, the plaintiff could not be put in the same position, or compensated by costs or otherwise. It seems to me, therefore, that the court below were right, and that this application should be refused.

[1] 10 Ch. D. 393. [2] 32 W. R. 262.

[3] The doctrine of the principal case was recognized in the following cases in which, however, the defendant was allowed to amend: Tildesley v. Harper, 10 Ch. Div. 393; Clarapede v. Commercial Ass'n, 32 W. R. 262 (reversing s. c. 32 W. R. 151). Amendments asked by a defendant were refused in the following cases because it would not be for the furtherance of justice to allow them: Wells v. McCarthey, (Calif. Ap. 1907) 90 Pac. R. 203; Archdeacon v. Cincinnati Co., (Oh. 1907) 81 N. E. R. 152. — ED.

CHAPTER XI.

SET-OFF AND COUNTER-CLAIM.

Rules of the Supreme Court. — England.

1883.

Order XXI, Rules 10 *and* 17.

10. Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall, in his statement of defence, state specifically that he does so by way of counter-claim.[1]

17. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favor of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

HOLDING'S EXECUTOR *v.* SMITH.

Supreme Court, North Carolina, July, 1807.

[1 *Murphey*, 154.]

In this case among other pleas the defendant pleaded a set-off. To this plea the plaintiff replied — first, there was no such set-off — and secondly, the Statute of Limitations. To this replication the defendant demurred specially, and for cause of demurrer alleged that the replication was double.

Locke, Judge, delivered the opinion of the court. According to the strict rule of pleading upon common law principles, this replication is certainly bad; but it appears to be good under the provisions of our act of Assembly, Iredell, 305. This act does not warrant a double replication to every plea, and perhaps allows it to no plea but that of set-off. This plea was allowed in England by Stat. 2d, Geo. 2d, Ch. 22,

[1] Prior to the Hilary Rules of 1833 a defendant might give evidence of a set-off under the general issue, if accompanied by a notice of set-off. But by the Hilary Rules a defendant was required to plead a set-off specially. Graham *v.* Partridge, 1 M. & W. 395. Such is the law generally in the United States; but in some jurisdictions a defendant is allowed to file with the general issue a mere notice of his intention to claim a set-off or counter-claim. — Ed.

and adopted by our Act of 1756, the preamble of which states that the object of introducing the plea was to prevent multiplicity of lawsuits; and wherever there were mutual debts subsisting, instead of compelling each party to sue, one debt was allowed to be set off against the other, and this in lieu of an action, or rather cross-action. Every defendant therefore pleading a set-off is to be considered (so as respects this plea) in the light of a plaintiff, and bound to produce the same testimony to support it that would be required to enable him to recover in that character; and consequently the plaintiff against whom the set-off is pleaded, ought to be permitted by way of replication to make the same defence which the law would permit him to enter by way of plea had he been originally sued. If then the present defendant had sued the plaintiff on this account, would he not, in the character of defendant, have been permitted to plead the general issue and Statute of Limitation? He surely would, and if so, he may reply the same to the plea of set-off.

Let the demurrer be overruled.[1]

HEER DRY GOODS CO. v. SHAFFER.

SUPREME COURT, ARKANSAS, NOVEMBER TERM, 1888.

[51 *Arkansas Reports*, 368.]

BATTLE, J.[2] Appellant brought an action against appellee on a promissory note. Appellee denied that he was indebted to appellant and pleaded a set-off, which was an account showing a balance due appellee from appellant in the sum of $464.24, with an affidavit of appellee annexed to the effect that the account was just and correct. Appellant filed no reply, and failed to deny the correctness of the account, either in whole or in part. When the cause was called for trial he dismissed his action, and appellee demanded judgment for the amount of his set-off. The appellant having failed to ask further time in which to plead, the court rendered judgment against him in favor of appellee for the amount of the account, without any evidence to establish the same, except the affidavit.

Appellant contends that the court erred in rendering judgment against it before it was warned or summoned to answer the set-off, and without evidence of the account being correct, except the affidavit.

1. It is not necessary to summon or warn a plaintiff in an action to answer a set-off pleaded by the defendant. There is no reason why he should be. The set-off is pleaded in the answer to his complaint, and he is bound to take notice of it. A summons or warning order

[1] Worth v. Fentress, 1 Dev. 419; Watts v. Greenlee, 2 Dev. 87 *Accord*. — ED.

[2] Only the opinion of the court is given. — ED.

could answer no useful purpose. The statute, without requiring notice in any form to be given to him, says he must file his reply to the set-off on or before the calling of the cause for trial. Mansf. Dig., secs. 5033, 5046, 5047; Pillow *v.* Sentelle.[1]

2. Section 2915 of Mansfield's Digest provides: "In suits upon accounts, the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account, either in whole or in part, in which case the plaintiff shall be held to prove such part of his account as is thus denied by other evidence."

The pleading a set-off is, in effect, a cross-action brought by the defendant against the plaintiff. It is not a defence. "A defence goes to the plaintiff's right of action; it either goes to his cause of action, like the plea in bar, or to his right to recover in the present proceeding, like dilatory pleas; but in either case it is a negation, a denial of the facts, or some material facts, pleaded by the plaintiff, or a denial of his right to recover because of other facts not appearing in making out his case." But a set-off is a cross-claim for money by the defendant, "and must be a cause of action arising upon contract or ascertained by the decision of a court." The answer which sets it up must state facts which constitute a cause of action against the plaintiff, "and its sufficiency is governed by the same rules that would apply to the complaint if the defendant had sued the plaintiff." The plaintiff can reply to it, denying each allegation setting up the set-off, and alleging any new matter not inconsistent with the complaint, constituting a defence. If he fails to do so, every material allegation of the answer constituting the set-off, except as to value or amount of damages, is taken as true.[2] If he dismisses his action or fails to appear, the defendant can prosecute his set-off to judgment.[3] So in every

[1] 49 Ark. 430.

[2] Union Bank *v.* Carr, 49 Iowa, 359, 361; Clute *v.* Hazleton, 51 Iowa, 355; Babcock *v.* Maxwell, 21 Mont. 507 (*semble*); Brophy *v.* Downey, 26 Mont. 252; Clinton *v.* Eddy, 1 Lans. 61; Potter *v.* Smith, 9 How. Pr. 262; Lemon *v.* Trull, 13 How. Pr. 248; McKensie *v.* Farrell, 4 Bosw. 192; Cockle *v.* Underwood, 3 Duer, 676; Isham *v.* Davidson, 52 N. H. 237; Dempsey *v.* Rhodes, 93 N. Ca. 120; Davison *v.* Land Co., 121 N. Ca. 146 (*semble*); Power *v.* Bowdle, 3 N. Dak. 107; Heebner *v.* Shepard, 5 N. Dak. 56; Moyer *v.* Gunn, 12 Wis. 385; Jarvis *v.* Peck, 19 Wis. 74 (counter-claim); Resch *v.* Senn, 31 Wis. 138 (*semble*) *Accord.*

Similarly an affirmative matter in answer to a counter-claim or set-off cannot be used unless pleaded affirmatively even in jurisdictions in which an affirmative reply to a true affirmative defence need not be pleaded: Clinton *v.* Eddy, 1 Lans. 61; Von Sachs *v.* Kretz, 10 Hun, 95; Posten *v.* Rose, 87 N. Ca. 279.

In some jurisdictions in which a defendant relying upon a set-off or counter-claim is not required to plead it formally, but is allowed the benefit of it by merely filing notice of the intention to claim such benefit, a reply by the plaintiff would be inappropriate and the absence of a reply does not relieve the defendant of the necessity of proving his set-off or counter-claim, or preclude the plaintiff from introducing evidence of what would ordinarily be matter for an affirmative replication: Coulter *v.* Repplier, 15 Pa. 208; Trimyer *v.* Pollard, 5 Grat. 460; Sexton *v.* Aultman, 92 Va. 20. — Ed.

[3] McGowan *v.* Middleton, 11 Q. B. Div. 464; Cockle *v.* Underwood, 3 Duer, 676 *Accord.* — Ed.

respect it is essentially a cross-action, in which the relation of the parties in the original action is reversed and the defendant is plaintiff and *vice versa;* and the account which may constitute the set-off may be proven in the manner prescribed by section 2915 of Mansfield's Digest. *Judgment affirmed.*

CHAPTER XII.

MOTIONS BASED ON THE PLEADINGS.

SECTION I.

Motion in Arrest of Judgment.

BIGHTON *v.* SAWLES.

COMMON PLEAS, EASTER TERM, 1593.

[1 *Leonard*, 309, *placitum* 428.]

IN an action upon the case it was agreed by the whole court, that when judgment is given that the plaintiff shall recover, and, because it is not known what damages, therefore a writ issueth to inquire of the damages, that the same is not a perfect judgment before the damages returned and adjudged; and therefore they also agreed that after such award and before the damages adjudged, that any matter might be showed in court in arrest of the judgment.[1] And by PERIAM, Justice, the difference is where damages are the principal thing to be recovered and where not; for if damages be the principal, then the full judgment is not given until they be returned; but in debt where a certain sum is demanded it is otherwise.

THE VONDERHORST BREWING CO. AND OTHERS *v.* CHARLES H. AMRHINE.

SUPREME COURT, MARYLAND, JANUARY 15, 1904.

[98 *Maryland Reports*, 406.]

McSHERRY, C. J., delivered the opinion of the court.[2]

This is a negligence case. Suit was brought by Charles H. Amrhine against the Vonderhorst Brewing Company of Baltimore, a body corporate, and the Maryland Brewing Company of the same city, also a body corporate, to recover damages for injury to himself and to his

[1] Vandeput *v.* Lord, 1 Stra. 78; Collins *v.* Gibbs, *supra*, 67, and cases cited *supra*, 67, n. 2; Dunn *v.* Sullivan, 23 R. I. 605; McMinnville *v.* Stroud, 109 Tenn. 569 *Accord*. — ED.

[2] Only a part of the opinion is given. — ED.

personal property. After a verdict for the plaintiff, a motion in arrest of judgment was made and overruled and judgment entered on the verdict, from which judgment the defendants appeal.

We are now brought to the questions presented by the motion in arrest of judgment. It appears by that motion, but appears in no other way, that on the 25th of July, 1900, the Vonderhorst Brewing Company had, by a decree of the circuit court of Baltimore City, been placed in the hands of receivers and that the receivers were not made parties to this cause, nor was the consent of the circuit court obtained permitting them, or the company under the court's control, to be sued. We need not allude to any of the other reasons assigned in the motion in arrest of judgment, because they all pertain to matters which could not be reviewed in any event by this court, relating, as they do, to questions which only can be considered by the trial court on a motion for a new trial. It has long been the settled law of Maryland that a judgment cannot properly be arrested except for substantial error apparent upon the face of the record, and that extrinsic or foreign matters not so appearing will be wholly unavailable upon such a motion. State *v.* Phelps;[1] Grover *v.* Turner;[2] Poe's Plead. sec. 750 P. W. B. R. R. Co. *v.* State, use of Bitzer and others.[3] Had the Vonderhorst Company, instead of pleading to the merits, filed a separate plea, setting up a receivership, a different situation would have been presented; but as the record now stands, there is nothing before us to show that the Vonderhorst Company ever went into the hands of receivers at all, because the motion in arrest of judgment alleging that extrinsic fact does not bring it before us. If it be a fact (as doubtless it is), it is a foreign fact extrinsic to the record and cannot be imported into the record, after verdict, by an averment contained in a motion made in arrest of judgment. It was a matter of defence which ought to have been pleaded in the first instance and cannot now be incorporated in the record by a mere motion.

Judgment affirmed with costs above and below.[4]

[1] 9 Md. 21. [2] 28 Md. 600. [3] 58 Md. 372.

[4] Carter *v.* Bennett, 1 How. 354; Bond *v.* Dustin, 112 U. S. 604; U. S. *v.* Barnhart, 17 Fed. R. 579; Burrows *v.* Niblach, 84 Fed. R. 111; Clary *v.* Hardeeville Co., 100 Fed. R. 915; U. S. *v.* McKnight, 112 Fed. R. 982 (*semble*); Walker *v.* State, 91 Ala. 76; Taylor *v.* Corley, 113 Ala. 580; Crow *v.* Brown, 233 Ark. 684; State *v.* Bledsoe, 47 Ark. 233; Floyd *v.* Colo. Co., 10 Colo. Ap. 54; Jordan *v.* State, 22 Fla. 528; Smith *v.* State, 29 Fla. 408; Caldwell *v.* State, 43 Fla. 545, 547; Herron *v.* State, 93 Ga. 554; Mayor *v.* Calhoun, 103 Ga. 675; Lefler *v.* Union Co., 121 Ga. 40; Grand Co. *v.* Pinkerton, 217 Ill. 61; Cella *v.* Chicago Co., 217 Ill. 326; Howard *v.* State, 6 Ind. 444; Miller *v.* Wild Cat Co., 52 Ind. 51; Balliett *v.* Humphreys, 78 Ind. 388; State *v.* Malone, 37 La. An. 266; State *v.* Gerrish, 78 Me. 20; Commonwealth *v.* Edwards, 12 Cush. 187; Commonwealth *v.* Donahue, 126 Mass. 51; Commonwealth *v.* Brown, 150 Mass. 336; Commonwealth *v.* Fletcher, 157 Mass. 14; State *v.* Conway, 23 Minn. 291; Heward *v.* State, 21 Miss. 261; McBeth *v.* State, 50 Miss. 81; Bowling *v.* McFarland, 38 Mo. 465; McGammon *v.* Millers' Co., 171 Mo. 143; Powe *v.* State, 43 N. J. 34; People *v.* Thompson, 41 N. Y. 1; People *v.* Kelly, 94 N. Y. 526; Jacobowsky *v.* People, 6 Hun, 524; People *v.* Menker, 36 Hun, 90; State *v.* Lanier, 90 N. Ca. 714; State *v.* Sheppard, 97 N. Ca., 401; Challen *v.* Cincinnati, 40 Oh. St. 113; McCoy *v.* Jones, 61 Oh. St. 119; Skinner *v.* Robinson, 4 Yeates, 375; Weaver *v.* Commonwealth, 29 Pa. 445; Del. Co. *v.* Commonwealth, 61 Pa. 367; State *v.* Peabody, 25 R. I. 178; State *v.* Heyward, 2 N. & McC.

RUSHTON *v.* ASPINALL.

KING'S BENCH, JUNE 15, 1781.

[2 *Douglas*, 679.]

THIS case came on upon a writ of error from the court of the county palatine of Lancaster. It was an action of assumpsit. The first count in the declaration was upon a bill of exchange by the second indorsee against the second indorser, but did not allege presentment to the acceptor, nor notice of dishonor to the indorser. There was another count upon an *insimul computassent*.

There was a general verdict for the plaintiff, and, judgment being entered, the record was removed into this court.[1]

LORD MANSFIELD. The two objections insisted upon are: 1. That the declaration does not allege a demand on the acceptor. 2. That it does not state notice to the defendant of the acceptor's refusal to pay. The answer was, that, after verdict, it must be presumed that those facts were proved at the trial; and our wishes strongly inclined us to support the judgment if we could. But, on looking into the cases, we find the rule to be, that, where the plaintiff has stated his title or ground of action defectively or inaccurately, — because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial, — it is a fair presumption, after a verdict, that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and, therefore, there is no room for presumption. The case cited from Shower comes within this distinction; for the grant of the reversion was stated, which could not have taken effect without attornment, and therefore, that being a necessary ceremony, it was presumed to have been proved. But, in the present case, it was not requisite for the plaintiff to prove either the demand on the acceptor or the notice to the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged. If they were to be presumed to have been proved, no proof at the trial can make good a declaration which contains no ground of action on the face of it. The promise alleged to have been made by the defendant is an inference of law, and the declaration does not contain premises from which such an inference can be drawn. I see, in a note of a case in this court, in Easter Term, 18 Geo. 3, I am stated to have said: "A verdict will not mend the matter where the gist of the case is not laid in the declaration,

312; Burnett v. Ballund, 2 N. & McC. 435; Peter v. State, 11 Tex. 762; State v. Thornton, 56 Vt. 35; Montpelier Co. v. Macchi, 74 Vt. 403; Commonwealth v. Cohen, 2 Va. Cas. 158; Commonwealth v. Watts, 4 Leigh, 672; Gray v. Commonwealth, 92 Va. 772; State v. Martin, 38 W. Va. 568; Hughes v. Frum, 41 W. Va. 158; Grubb v. State, 14 Wis. 434; Terr. v. Pierce, 1 Wyo. 168 *Accord*. — ED.

[1] The statement is abridged and the arguments omitted. — ED.

but it will cure ambiguity;" and there is a strong case in print of an action for keeping a malicious bull,[1] where, the *scienter* having been omitted in the declaration, it was held bad after verdict. Therefore we are all of opinion that there should be judgment for the plaintiff in error. *The judgment reversed.*[2]

THE TOWN OF WALPOLE *v.* THE TOWN OF MARLOW.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, MAY TERM, 1821.

[2 *New Hampshire Reports*, 385.]

THIS was an action of assumpsit. It was alleged in the declaration, that the town of Walpole had relieved and maintained one F. M. a pauper, having her legal settlement in the town of Marlow, which

[1] Buxendin v. Sharp, 2 Salk. 662; 3 Salk. 12.

[2] In the following cases, as in the principal case, judgment was arrested because the plaintiff failed to allege the performance of a condition precedent: Wood v. Worsley, 6 T. R. 710; Morton v. Lamb, 7 T. R. 125; Lane v. Crockett, 7 Price. 566 (discrediting Palgrave v. Windham, 1 Stra. 212); Williams v. Germaine, 7 B. & C. 468; Butt v. Howard, 4 B. & Al. 655; Griffin v. Platt, 3 Conn. 513; Dale v. Dean, 16 Conn. 579 (Spencer v. Overton, 1 Day, 183, *contra*, two judges dissenting, would seem to be discredited); Lester v. Piedmont Co., 55 Ga. 475; Ancient Order v. Brown, 112 Ga. 545; Smith v. Curry, 16 Ill. 147; Pierse v. Thornton, 44 Ind. 235; Heddens v. Younglove, 46 Ind. 212; Newman v. Perrill, 73 Ind. 153; Williams v. Hingham, 4 Pick. 341 (but see Colt v. Root, 17 Mass. 229; Crocker v. Gilbert, 9 Cush. 131); Ball v. Doud, 26 Oreg. 14 (judgment reversed on appeal); Tumley v. Clarksville R. R., 2 Colo. 327 (writ of error).

See *Contra*, Bliss v. Arnold, 8 Vt. 252; Pasteur v. Parker, 3 Rand. 458 (*semble*); Bailey v. Clay, 4 Rand. 346 (*semble*).

The following cases are a few of the numerous illustrations of the rule that a verdict for the plaintiff will not cure his omission to state either expressly or by implication an allegation without which his declaration would be demurrable for not stating facts sufficient to constitute a cause of action: Anon. Keilw. 71, pl. 15; Buxendin v. Sharp, 2 Salk. 662, Say. 282 s. c.; Spieres v. Parker, 1 T. R. 141 (criticising Wicker v. Norris, C. t. Hardw. 116); Jackson v. Pesked, 1 M. & Sel. 234; Russell v. Slade, 12 Conn. 455; McCune v. Norwich Co., 30 Conn. 521; Wright v. Bennett, 4 Ill. 258; Commercial Co. v. Treasury Bank, 61 Ill. 482; Spann v. Eagle Works, 87 Ind. 474; Eberhart v. Reister, 96 Ind. 478; Alexander v. Grand Lodge, 119 Iowa, 519; Lacey v. Davis, 126 Iowa, 675; Heald v. Western Co., 129 Iowa, 326; State v. Delerno, 11 La. An. 648; Carlisle v. Western, 1 Met. 26; Kean v. Mitchell, 13 Mich. 207 (writ of error); Lusk v. State, 64 Miss. 845; Frazer v. Roberts, 32 Mo. 457; Gould v. Kelley, 16 N. H. 551; Bedell v. Stevens, 28 N. H. 118; State v. Gove, 34 N. H. 510; Bartlett v. Crozier, 17 Johns. 439; Addington v. Allen, 11 Wend. 374; State v. Doyle, 11 R. I. 574; So. Co. v. Maxwell, 113 Tenn. 464; Haselton v. Weare, 8 Vt. 480; Merritt v. Dearth, 48 Vt. 65.

The following cases, in which the verdict was held to cure a substantial defect in the declaration, seem to be inconsistent with the cases just cited: Skinner v. Gunton, 1 Saund. 228 and Wine v. Ware, 1 Sid. 15 (omission in a count for malicious prosecution of an allegation that the prosecution had terminated in favor of the party prosecuted. See criticism of these cases in 1 Chitty, Pl. (7th ed.) 712).

In Robinett v. Morris, Hardin, 93, the verdict cured the defect of not filling out the blank for the amount promised to be paid by the defendant.

In some jurisdictions the practice of arresting the judgment after a verdict is abolished by statute: Stetson v. Corinne, 44 Me. 29; Fernald v. Garvin, 55 Me. 414, 417; Dean v. Ross, 178 Mass. 397 (except for matter going to the jurisdiction of the court); Lane v. Holcomb, 182 Mass. 360. — ED.

was by law chargeable for her support, and had expended in her support $129.71, of which the said town of Marlow had had due notice, etc., and thereby became liable, and in consideration thereof promised, etc.

The cause was tried here at May term, 1820, upon the general issue, and a verdict returned in favor of the town of Walpole.

J. C. Chamberlain, of counsel for Marlow, moved in arrest of judgment.[1]

RICHARDSON, C. J. It is contended in this case that judgment must be arrested, because the declaration does not allege that the pauper had no relations by law bound to support her. If the title stated in the declaration be defective, the judgment must be arrested. But if this be only an instance of a title defectively stated, the defect is cured by the verdict. The true distinction between a defective title and a title defectively stated, is this: when any particular fact is essential to the validity of the plaintiff's title, if such fact is neither expressly stated in the declaration, nor necessarily implied from those facts which are stated, the title must be considered as defective, and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the title must be considered only as defectively stated, and the defect is cured by a verdict.[2]

The declaration in this case contains an allegation that the town of Marlow was by law chargeable with the support of the pauper. This allegation necessarily implies, and could not be proved without evidence, that the pauper had no relations by law bound to support her. For if she had such relations, the town of Marlow was not chargeable with her support. This then is an instance, not of a defective title, but of a title defectively stated. The defect is cured by the verdict, and judgment must be rendered on the verdict.

EDWARDS *v.* BLUNT.

KING'S BENCH, EASTER TERM, 1721.

[1 *Strange*, 425.]

Per curiam, After judgment on demurrer, the defendant shall not come to arrest the judgment on return of the inquiry, for an excep-

[1] The argument for the defendant is omitted.

[2] The following are a few of the multitude of cases in which a declaration assailable for generality or looseness of statement was held after a verdict for the plaintiff to warrant a judgment for him: Dobson *v.* Campbell, 1 Sumn. 319; Peden *v.* American Co., 120 Fed. R. 523; Jacobs *v.* Holgenson, 70 Conn. 68; Huger *v.* Cunningham, 126 Ga. 684; Hartrich *v.* Hawes, 202 Ill. 334; State *v.* Williams, 77 Mo. 463; Gould *v.* Kelley, 16 N. H. 551; Sewall's Bridge *v.* Fisk, 23 N. H. 171; Maxfield *v.* Johnston, 2 Oh. 204; Barlow *v.* Tierney, 26 R. I. 557; Memphis Co. *v.* Williamson, 9 Heisk. 314. — ED.

tion that might have been taken on arguing the demurrer.[1] The parties cannot be said to come as *amici curi*, nor shall anybody tell us that the judgment we gave on mature deliberation is wrong;[2] it is otherwise indeed in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for there the party could not allege it before.[3]

NEWMAN *v.* PERRILL.

SUPREME COURT, NOVEMBER TERM, 1880.

[73 *Indiana Reports*, 153.]

ELLIOTT, J.[4] The questions presented by this appeal arise upon the ruling of the court sustaining the appellee's motion in arrest of judgment.

Appellant argues that, as the court had overruled demurrers to the complaint, it could not afterwards rightfully sustain a motion in arrest. We do not think that the court, by ruling wrongly upon the demurrers, precluded itself from afterwards ruling rightly upon the motion in arrest. If, when the motion was presented, the court deemed the complaint so clearly bad as not to be sufficient to sustain a judgment, it was right to arrest the proceedings at that stage, notwithstanding the fact that at an earlier stage the court had entertained a different opinion.

A complaint fatally defective is vulnerable to attack, even upon appeal, and there can certainly be no error in declaring a fatally defective complaint bad on motion in arrest, although demurrers may have been previously overruled. It is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation. There can be no valid judgment without a sufficient complaint, and, where a party's

[1] Rouse *v.* Peoria Co., 7 Ill. 99; American Co. *v.* Pinckney, 29 Ill. 392; Quincy *v.* Hood, 77 Ill. 68; Chicago Co. *v.* Hines, 132 Ill. 161; Schreffler *v.* Nadelhofer, 133 Ill. 536; Chicago Co. *v.* Clausen, 173 Ill. 100; Davis *v.* Carroll, 71 Md. 568 (statutory); Freeman *v.* Camden, 7 Mo. 298; Ross *v.* Bank, 1 Aik. 43 *Accord*.

The Illinois cases cited in the preceding paragraph illustrate the same idiosyncrasy which led to the Illinois decisions cited *supra* 58, n. 2, par. 2. The Illinois rule is almost fantastically technical, for although a defendant whose demurrer has been erroneously overruled, may not move in arrest of judgment, he may move for judgment *non-obstante veredicto*. Chicago Co. *v.* Hines, 132 Ill. 161, 166; or, in accordance with the English practice, Cresswell *v.* Packham, 6 Taunt. 630, 2 Marsh. 326 s. c., may procure a reversal of a judgment on the verdict on the ground of error in the judgment. People *v.* Spring Valley, 129 Ill. 169; Chicago Co. *v.* Clausen, 173 Ill. 100; but not for the objection of misjoinder of causes of action. Mayer *v.* Lawrence, 58 Ill. Ap. 194. — ED.

[2] Cresswell *v.* Packham, 6 Taunt. 630, 2 Marsh. 326 s. c. *Accord*. — ED.

[3] How *v.* Godfrey, Mich. 4 Geo. 2.

[4] Only a part of the opinion of the court is given. — ED.

complaint is incurably bad, he cannot justly complain of any ruling which prevented him from obtaining a judgment based upon it.[1]

Judgment affirmed.

LEACH *v.* THOMAS.

In the Exchequer, Easter Term, 1837.

[*Reported in 2 Mees. & Welsby, 427.*]

Assumpsit.[2] The declaration set forth seven breaches. The defendant pleaded nine pleas.

At the trial before Patteson, J., at the Pembrokeshire Summer Assizes, 1835, the plaintiff had a general verdict on all the issues — damages, £20. In the following Michaelmas term, —

Evans obtained a rule *nisi* to arrest the judgment, on the ground that the third, fourth, and sixth breaches were bad. The case stood over for some time, in order that an application might be made to the learned judge to amend the record; but his lordship having declined to do so, —

E. V. Williams and *Leach* now showed cause.

Evans, contra. Holt *v.* Scholefield[3] is a distinct authority to show that where some counts are good and others bad, and general damages are given, the court will arrest the judgment and not award a *venire de novo*. Sicklemore *v.* Thistleton[4] is to the same effect. Eddowes *v.* Hopkins[5] does not apply; that was an application to amend the entry of the verdict on the *postea* by the judge's notes. In the other cases cited for the plaintiff, the *venire de novo* was awarded by the court of error.

Parke, B. This case must go down to a new inquiry. On this verdict we know that the defendant has been guilty of all the breaches assigned, but we do not know what amount of damages are to be ascribed to each. Our present decision is undoubtedly at variance with that of Holt *v.* Scholefield; that case, therefore, must be considered as overruled as to this point. If the court of error can grant a *venire de novo* in such a case as this, *a fortiori* the court having original jurisdiction in the cause may do so. Unless, therefore, the parties can agree on some terms of compromise, the rule must be absolute for a *venire de novo*, in order that the jury may assess the damages on the good breaches.

Alderson, B. It does not appear that this point was at all argued

[1] Griffin *v.* Baker Co., 17 Ga. 96; Stewart *v.* Terre Haute Co., 103 Ind. 44; Frum *v.* Keeney, 109 Iowa, 393; Decatur *v.* Simpson, 115 Iowa, 848; Field *v.* Slaughter, 1 Bibb, 180; Turnpike Co. *v.* Yates, 108 Tenn. 428 (*semble*); So. Co. *v.* Maxwell, 113 Tenn. 464 *Accord*. — Ed.

[2] Only a part of the case is given. — Ed.

[3] 6 T. R. 691. [4] 6 M. & Sel. 9. [5] 1 Doug. 377.

in Holt *v.* Scholefield, though Grant *v.* Astle[1] was referred to; the whole of the argument was addressed to the question as to the sufficiency of the declaration. *Venire de novo awarded.*[2]

CORNER *v.* SHEW, EXECUTOR OF LEWIS, DECEASED.

IN THE EXCHEQUER, TRINITY TERM, 1838.

[4 *Meeson & Welsby*, 163.]

THE rule having been made absolute, in Hilary Term last, to arrest the judgment in this case, on the ground that there was a misjoinder of counts in the declaration,[3] *Platt*, in the same term, obtained a rule

[1] 2 Doug. 722.

[2] Ayrey *v.* Fearnsides, 4 M. & W. 168; Gould *v.* Oliver, 2 M. & G. 231; Lewin *v.* Edwards, 9 M. & W. 720; Empson *v.* Griffin, 11 A. & E. 187; Emblin *v.* Darnell, 12 M. & W. 830 (Grant *v.* Astle, Doug. 730; Trevor *v.* Wall, 1 T. R. 151; Hancock *v.* Haywood, 3 T. R. 435; Holt *v.* Scholefield, 6 T. R. 691; Sicklemore *v.* Thistleton, 6 M. & S. 9, *contra* are overruled); Mandeville *v.* Corkenderfer, 3 Cranch, s. c. 257 (*venire facias de novo* granted after an arrest of judgment); State *v.* McCaulees, 9 Ired. 375; State *v.* Smiley, 101 N. Ca. 709; Posnett *v.* Marble, 62 Vt. 481 (overruling earlier Vermont cases); Dean *v.* Cass, 73 Vt. 314 (*semble*) *Accord.*

Bank *v.* Hopkins, 1 T. B. Mon. 245 (*semble*); Clough *v.* Tenney, 5 Me. 446; Hemming *v.* Elliott, 66 Md. 197; Blanchard *v.* Fisk, 2 N. H. 398; Peabody *v.* Kinsley, 40 N. H. 416; Vaughan *v.* Havens, 8 Johns. 109 (writ of error) *Contra.*

If it appears from the judge's notes that at the trial the evidence related only to the good counts, the general verdict will be amended so as to apply only to the good counts: Grant *v.* Astle, 2 Doug. 722, 730 (*semble*); Williams *v.* Breedon, 1 B. & P. 329; Canal Co. *v.* Rowan, 4 Dana, 606, 608; Stafford *v.* Green, 1 Johns. 505.

If two demands, one valid and the other invalid, are stated in the same count instead of in two separate counts, the court will assume, without any statement from the trial judge, that the damages were given exclusively for the valid claim: Doe *v.* Dyeball, 3 B. & C. 70; Ring *v.* Roxbrough, 2 Tyrwh. 468; Kitchenman *v.* Steel, 13 L. J. Ex. 23, 3 Ex. 49 s. c. Karnuff *v.* Kelch, 69 N. J. 499, 503.

By statute in some jurisdictions judgment may not be arrested, if any one of several counts is good: Lewis *v.* Niles, 1 Root, 433; Burrows *v.* Niblack, 84 Fed. R. 111 (Ill. law); Snyder *v.* Gaither, 4 Ill. 91; Bradshaw *v.* Hubbard, 6 Ill. 390; Gebbie *v.* Mooney, 121 Ill. 255, 22 Ill. Ap. 369; Chicago Co. *v.* Moran, 210 Ill. 9; Garibaldi *v.* O'Connor, 112 Ill. Ap. 58 affirmed 210 Ill. 284; Chicago Co. *v.* Gore, 105 Ill. Ap. 16 affirmed 202 Ill. 188; Findley *v.* Buchanan, 1 Blackf. 12; Clarkson *v.* McCarty, 5 Blackf. 574; Newell *v.* Downs, 8 Blackf. 523; Waugh *v.* Waugh, 47 Ind. 580; Kelsey *v.* Henry, 48 Ind. 37; Spahr *v.* Nicklaus, 51 Ind. 221; Toledo Co. *v.* Miligan, 52 Ind. 505; Louisville Co. *v.* Fox, 101 Ind. 416; Sims *v.* Dame, 113 Ind. 127; Durham *v.* Hiatt, 127 Ind. 514; Stockdon *v.* Bayless, 2 Bibb, 60; Parker *v.* Commonwealth, 8 B. Mon. 30, 31; Bishop *v.* Williamson, 11 Me. 495; Karnuff *v.* Kelch, 69 N. J. 499, 503; Johnson *v.* Mullen, 12 Oh. 10; Porter *v.* Porter, 14 Oh. 220; Chisom *v.* Directors, 19 Oh. 289; Roe *v.* Crutchfield, 1 Hen. & M. 361, 367.

If one of several counts in a declaration be bad, but all be for the same demand, and a general verdict be given, the judgment will not be arrested, nor will it be necessary to have a *venire facias de novo* for a new assessment of damages, for the plaintiff has recovered no more than the good count would warrant: Baker *v.* Sanderson, 3 Pick. 348; Cornwall *v.* Gould, 4 Pick. 444; Payson *v.* Whitcomb, 15 Pick. 212; Smith *v.* Cleveland, 6 Met. 332; West *v.* Platt, 127 Mass. 367; Pelton *v.* Nichols, 180 Mass. 245; Brownell *v.* Pacific Co., 47 Mo. 239; Silcox *v.* McKinney, 64 Mo. Ap. 330; Zellars *v.* Mo. Co., 92 Mo. Ap. 107; Lask *v.* Hastings, 19 Wend. 627, 628-9. — ED.

[3] See 3 M. & W. 350.

to show cause why that rule should not be varied, and instead of the judgment being arrested, a *venire de novo* should not issue on the authority of Leach *v.* Thomas.

PARKE, B.[1] In this case a rule was pronounced, in Hilary Term last, to arrest the judgment, on the ground of misjoinder of counts, two being against the defendant in his own right, and one against him as executor. During the same term, a rule nisi was obtained to vary the former rule, and for a *venire de novo* to issue, and cause was shown against the rule.

One objection was, that the applicant came too late after the former rule pronounced; but the court disposed of that objection on the argument.

The other was, that a *venire de novo* could not be awarded in such a case. It had been decided in Leach *v.* Thomas, that, where general damages are assessed on a declaration containing one breach ill assigned, a *venire de novo* ought to be awarded; a question which, before that time, has been considered doubtful, as there were apparently conflicting authorities upon it; yet it is remarkable that such a doubt should exist, as this case had been provided for by an ancient rule of the King's Bench, Michaelmas Term, 1654, which states that, "where a verdict finds entire damages, where damages are the principal, and part not actionable, the judgment may be arrested; yet, by a rule of court, a *venire facias de novo* may issue, as upon an ill verdict, and upon the new trial, the party may sever his damages;" and a similar rule exists, of the date of 1654, in the Common Pleas, which was acted upon in that court, in the cases of Smith *v.* Howard,[2] and Auger *v.* Wilkins:[3] and see Eddowes *v.* Hopkins.[4]

But it is admitted, that there is no precedent of such a proceeding, when there is misjoinder of counts, and the damages have not been severally assessed; and judgment has been arrested absolutely in some reported cases. It was done in Corbett *v.* Packington;[5] and judgment was reversed for a similar objection in Herrenden *v.* Palmer.[6] No question appears to have been raised in either case as to the right or duty of the court to award a *venire de novo* and therefore none of these cases are decisive authorities upon this question; but the absence of any intimation in the cases or books (and we have not been able to find any) as to the power to grant a *venire de novo* in such a case, makes us pause before we adopt this proceeding. The difference between this case and that provided for by the rule of court, and sanctioned by the decision in Leach *v.* Thomas, is slight; still there is a difference in the principle, and we do not feel ourselves, in the absence of all authority, warranted in disregarding it.

A *venire de novo* can only be granted on what appears to the court on record; and unless the record warrant it, it will be error to grant

[1] Only the judgment of the court is given. — ED.
[2] Barnes, 478.
[3] Id. 480.
[4] Dougl. 375.
[5] 6 B. & Cr. 268.
[6] Hob. 88.

it; and it proceeds (where the jury have been regularly summoned and impanelled) on a suggestion of their misbehavior: Lewis d. Earl of Derby v. Witham.[1] Where there is an imperfect or defective verdict, on which, if perfect, the court could give judgment, the jury have misconducted themselves; and the case of a general assessment of damages on a declaration, with a bad count or breach, may fall within this rule; for it may be presumed that the jury were instructed as to the law, and told to disregard the part of the declaration which was not actionable, or to assess the damages severally; and in such a case an award of *venire de novo* may be made, "as on an ill verdict," to use the language of the old rule. In that case, the verdict, if good, and confined to the good count or breach, or capable of being applied to it, would at once authorize and require a verdict for the plaintiff; and the court ex-officio would be bound to award it, overlooking the bad count or breach. But where the counts are both good, but misjoined, the jury ought to assess the damages on all the counts. Each is actionable; and, but for the misjoinder, judgment might be given on each; and if the damages had been assessed on each severally, that would have been of no avail, for the court could not have given any judgment at all ex-officio; and further acts of the plaintiff, in releasing the damages on one or the other counts, would be necessary. If indeed it were a matter of discretion in the court to grant or refuse such a writ, it would admit of a question, whether it would not be reasonable to do it, in order to enable the plaintiff to make an election which he had omitted to make at the proper period before; and in that case, it would be fitting also to consider whether he ought not to pay the costs of such a proceeding. But it is clearly a matter of duty on the court to grant the writ or to refuse it; an improper refusal is a ground of error, and it cannot well be error in the court to refuse a writ, the granting of which would not necessarily enable the court to give a judgment one way or the other.

For these reasons, we think that the rule must be discharged.

Rule discharged.[2]

[1] 2 Stra. 1135; affirmed in Dom. Proc. 1 Wills. 55.

[2] Hooker v. Quilter, 1 Wils. 171, 2 Stra. 1271 s. c. (writ of error); Kitchenman v. Skeel, 3 Ex. 49; Iowa Association v. Moore, 73 Fed. R. 750 (*semble*); Lyon v. Evans, 1 Ark. 349; Boerum v. Taylor, 19 Conn. 122; Phelps v. Hurd, 31 Conn. 444; Sellick v. Hall, 47 Conn. 261 (*semble*); Dalson v. Bradberry, 50 Ill. 82 (writ of error); Bodley v. Roop, 6 Blackf. 158, 159 (*semble*); Harris v. Harris, 61 Ind. 117; Canal Co. v. Rowan, 4 Dana, 606 (writ of error); Canton Co. v. Webber, 34 Md. 669; Swerve v. Sharretts, 48 Md. 408; Brown v. Webber, 6 Cush. 560; Whiting v. Cook, 8 All. 63 (writ of error); Clark v. Hannibal Co., 36 Mo. 202; Pitts v. Fugate, 41 Mo. 405; State v. Dulles, 45 Mo. 269; St. Louis v. Allen, 53 Mo. 44; State v. Peterson, 142 Mo. 526; Grimes v. Sprague, 86 Mo. Ap. 245; Johnson v. Bedford, 90 Mo. Ap. 43 (*semble*); Shuck v. Pfenninghausen, 101 Mo. Ap. 697; Morse v. Eaton, 23 N. H. 415; Peabody v. Kinsley, 40 N. H. 416; Potts v. Clarke, 20 N. J. 536 (*semble*); Lusk v. Hastings, 19 Wend. 627; Nimocks v. Inks, 17 Oh. 596; Henshaw v. Noble, 7 Oh. St. 226 (*semble*); McNulty v. O'Donnell, 27 Pa. Super. Ct. 93; Bull v. Mathews, 20 R. I. 100; Rodgers v. Ellison, Meigs, 88; Joy v. Hill, 36 Vt. 333; Dean v. Cass, 73 Vt. 314 *Accord.*

Chicago Co. v. Murphy, 198 Ill. 462 (statutory); Barlow v. Leavitt, 12 Cush. 483 (statutory) *Contra.*

By statute in some jurisdictions judgment may not be arrested if any one of several counts,

SECTION II.

Motion for Judgment before or notwithstanding the Verdict.

A. SMITH *v.* I. W. SMITH.

SUPREME COURT, NEW YORK, AUGUST, 1829.

[2 *Wendell*, 624.]

MOTION for judgment *non obstante veredicto*. This cause was tried at the Monroe circuit in March, 1829. The action was on a bond for the payment of money. Five several issues were joined, three of which were found for the plaintiff, and two for the defendant. A motion for judgment *non obstante veredicto* was made by the plaintiff, founded on an affidavit (setting forth the pleadings and the result of the trial), and on a certified copy of the minutes of trial, furnished by the clerk of the circuit.

By the Court, SUTHERLAND, J. On a motion of this kind, the *nisi prius* record and *postea* must be produced, so that the court may be enabled to judge whether the party is entitled to his judgment, notwithstanding the verdict. It is irregular to apply on affidavit.

The motion is denied, with costs.[1]

improperly joined, is good. Harris *v.* Rivers, 53 Ind. 216; Baddeley *v.* Patterson, 78 Ind. 157; Penniman *v.* Winner, 54 Md. 127.

If two good counts are improperly joined in a declaration and the verdict is for the plaintiff on one and for the defendant on the other, or if three or more good counts are improperly joined, and the verdict is for the plaintiff upon counts that might properly be joined and for the defendant on the other or others, there is no occasion for an arrest of judgment. Full justice is done by giving judgment for the plaintiff pursuant to the verdicts in his favor and judgment for the defendant on the verdicts found for him. The authorities support this view. Knightly *v.* Birch, 2 M. & Sel. 533 (overruling Bage *v.* Bromwel, 3 Lev. 99); Kitchenman *v.* Skeel, 3 Ex. 49 (*semble*); Sellick *v.* Hall, 47 Conn. 260; Dalson *v.* Bradberry, 50 Ill. 82, 83 (*semble*); Canal Co. *v.* Rowan, 4 Dana, 606 (*semble*); Lusk *v.* Hastings, 19 Wend. 627 (*semble*); Wenberg *v.* Homer, 6 Binn. 307.

If a general verdict be given on counts improperly joined, but the trial judge certifies that the evidence given was relevant only to one count or to the counts that might properly be joined, the verdict will be amended so as to be only upon the proper count or counts. Eddowes *v.* Hopkins, 1 Doug. 376; Williams *v.* Breedon, 1 B. & P. 329; Harris *v.* Davis, 1 Chitty, 625 n. (a); Canal Co. *v.* Rowan, 4 Dana, 606, 608.

If damages are assessed separately upon counts improperly joined, the plaintiff may have judgment upon the counts that might properly be joined, the judgment being arrested on the others. Hancock *v.* Haywood, 3 T. R. 433; Kitchenman *v.* Skeel, 13 L. J. Ex. 22, 25, 3 Ex. 49 s. c.; Attorney General *v.* Ruck, 11 Ex. 763; Haskell *v.* Bowen, 44 Vt. 579. — ED.

[1] McCoy *v.* Jones, 61 Oh. 119; Snow *v.* Conant, 8 Vt. 301 *Accord*.

In Minnesota, by statute, judgment *non obstante veredicto* may be given not only because the pleadings are bad in substance, but also because the jury had given a wholly indefensible verdict. Brennan *v.* Gr. North Co., 80 Minn. 263; Baxter *v.* Covenant Co., 81 Minn. 1; Swensen *v.* Erlandson, 86 Minn. 263. See also Cruikshank *v.* St. Paul Co., 75 Minn. 266; Marquardt *v.* Hubner, 77 Minn. 442; Kreats *v.* St. Cloud, 79 Minn. 14; Bragg *v.* Chicago Co., 81 Minn. 130; Marengo *v.* Gr. North Co., 84 Minn. 397, in which the doctrine was recognized although the verdict was not thought to be wholly indefensible. — ED.

CRAVEN v. HANLEY.

In the Common Pleas, Michaelmas Term, 1738.

[*Reported in Barnes's Notes*, 255.]

This was an action of trespass, whereto defendant pleaded a bad justification. Plaintiff took issue, and defendant obtained a verdict. Plaintiff moved an arrest of judgment, and the court heard counsel on both sides several times, and took time to consider; and in Easter term last made a rule to stay the entry of judgment on defendant's verdict, and that plaintiff should have leave to sign judgment, the trespass being confessed by the plea.[1]

[1] Bliss v. Stockton, 2 Roll. Abr. 98, pl. 2; Broadbent v. Wilks, Wills, 360, s. c. 1 Wils. 65; Kirk v. Nowill, 1 T. R. 266; Drayton v. Dale, 2 B. & C. 293; Earl of Lonsdale v. Nelson, 2 B. & C. 302; Lambert v. Taylor, 4 B. & C. 138; Lewis v. Clement, 3 B. & Al. 702; Filliul v. Armstrong, 7 A. & E. 557; Down v. Hatcher, 10 A. & E. 121; Goodman v. Bowman, 9 Bing. 532; Masterson v. Gibson, 56 Ala. 56; Hammer v. Pounds, 57 Ala. 483; Taylor v. Smith, 104 Ala. 537; Fitch v. Scot, 1 Root, 351; Pomeroy v. Burnett, 8 Blackf. 142, 143; Jones v. Fennimore, 1 Greene, Iowa, 134; Dewey v. Humphrey, 5 Pick. 187; Lough v. Bragg, 18 Minn. 121; Plano Co. v. Richards, 86 Minn. 94; Garnet v. Beaumont, 24 Miss. 377; Roberts v. Dame, 11 N. H. 226, 229; Moye v. Petway, 76 N. Ca. 327; Ward v. Phillips, 89 N. Ca. 215; Walker v. Scott, 106 N. Ca. 56; Sullenberger v. Gest, 14 Oh. 205, 206; Friendly v. Lee, 20 Oreg. 202 (*semble*) *Accord*.

In all the cases cited in the preceding paragraph, as in the principal case, the defendant had obtained a verdict on an insufficient affirmative plea, and the judgment was rendered on the express confession of the declaration by the plea. At common law judgment *non obstante veredicto* was allowed originally in no other case. The rule was afterwards so far relaxed that judgment would be given for the plaintiff notwithstanding a verdict for the defendant upon an affirmative plea, even though it contained no express confession of the truth of the declaration, provided that the defendant had also denied and the plaintiff had proved all the material allegations of the declaration: Goodburne v. Bowman, 9 Bing. 532. The rule was further relaxed so that the plaintiff might have judgment notwithstanding a verdict for the defendant, although there was no affirmative plea, if the verdict for the defendant was upon an immaterial issue, and the plaintiff had obtained a verdict upon a traverse of any material allegation: Couling v. Coxe, 6 D. & L. 399, 6 C. B. 903 s. c. But the courts did not take the final and logically necessary step of giving judgment for the plaintiff if the only pleading by the defendant was a traverse of an immaterial allegation, and the verdict was for him: Duke of Rutland v. Bagshawe, 19 L. J. Q. B. 234. In other words they adopted the principle of constructive admission in place of express confession in a half-hearted and incomplete manner.

At common law a plaintiff for whom a verdict had been found upon an immaterial issue, instead of entering judgment in the verdict, might move for judgment *non obstante veredicto* upon the confession in the defendant's affirmative plea: Lacy v. Reynolds, Cro. El. 214; Cook v. Pearce, 8 Q. B. 1044; Rochester v. Whitehouse, 15 N. H. 468. See Brown v. Searle, 104 Ind. 218. — Ed.

WHITWELL v. THOMAS AND ANOTHER.

SUPREME COURT, CALIFORNIA, APRIL TERM, 1858.

[9 *California Reports*, 499.]

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action on a promissory note. The complaint alleges the copartnership of the defendants, and the execution by them, of the two notes in suit. The answer of the defendant, Thomas, denies the copartnership at the date of the notes, and any authority in his co-defendant to bind him as partner; but does not deny the execution of the notes by the defendants, or by himself in their name.

FIELD, J., delivered the opinion of the court — TERRY, C. J., and BURNETT, J., concurring.

The only question for consideration is, whether any material averment of the complaint is denied by the answer. The test of materiality is this: Could the averment be stricken from the pleading without leaving it insufficient? (Practice Act, § 66.) Judged by this test, the averment of copartnership is immaterial. The complaint would be sufficient if this were stricken out. The execution of the notes — not the copartnership of the defendants at the time, constitutes the material averment, and this is not controverted.

Judgment affirmed.[1]

[1] In England and in many of our States the plaintiff may move for judgment on the pleadings either before verdict or after verdict for the defendant, and whether the bad plea of the defendant is affirmative or negative. Miles *v.* McCallan, 1 Ariz. 491 (*semble*); Hancock *v.* Herrick, 3 Ariz. 247, 250; Felch *v.* Beaudry, 40 Cal. 439; Hemmé *v.* Hays, 55 Cal. 337; Montgomery *v.* Merrill, 62 Cal. 385; Johnson *v.* Vane, 86 Cal. 110; Drew *v.* Pedlar, 87 Cal. 443; Crewe *v.* Hutcheson, 115 Ga. 511; Walling *v.* Bown, 9 Ida. 134; Barnard *v.* Haworth, 9 Ind. 103; Hutchinson *v.* Myers, 52 Kan. 290; Field *v.* Montmollin, 5 Bush. 457; Garrett *v.* Beaumont, 24 Miss. 377; Norton *v.* Beckman, 53 Minn. 456; Lloyd *v.* Secord, 61 Minn. 448; Sweeney *v.* Schlessinger, 18 Mont. 326; Schuyler *v.* Smith, 51 N. Y. 309; Mallory *v.* Lamphear, 8 How. Pr. 491 (see *contra*, Moss *v.* Witteman, 4 N. Y. Misc. Rep. 81); Oades *v.* Oades, 6 Neb. 304; Manning *v.* Orleans, 42 Neb. 712, 714; Connor *v.* Beeker, 62 Neb. 156; Toole *v.* Clifton, 22 Oh. St. 297; Simpson *v.* Prather, 5 Oreg. 86; Fargo *v.* Vincent, 6 S. Dak. 209; Port *v.* Parfit, 4 Wash. 369.

By the old equity practice, if issue was taken upon a bad plea, instead of setting it down for argument, and the plea was found to be true, the bill was dismissed; Harris *v.* Ingledew, 3 P. Wms. 95; Myers *v.* Dorr, 13 Blatchf. 22; Hughes *v.* Blake, 6 Wheat. 453 (*semble*); R. I. *v.* Mass., 14 Pet. 210, 257 (*semble*); Bean *v.* Clark, 30 Fed. 225; Bogardus *v.* Trinity Church, 4 Paige, 178; Little *v.* Stephens, 82 Mich. 596. But at the present day a good bill will not be dismissed in such a case; Pearce *v.* Rice, 142 U. S. 28; Green *v.* Bogue, 158 U. S. 478, 499; Soderberg *v.* Armstrong, 116 Fed. 709; Todd *v.* Munson, 53 Conn. 579; Bellows *v.* Stone, 8 N. H. 283 (plaintiff may withdraw reply and attack plea). — ED.

BROWN AND OTHERS v. HARTFORD FIRE INSURANCE CO.

UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS, 1858.

[*Brunner*, 663.]

THIS was an action of assumpsit by George O. Brown and others, trustees, upon an insurance policy by the terms of which the loss was payable to the *cestui que trust*, Thomas Brown. The defendant pleaded a binding award by arbitrators chosen by the trustees and the defendant. Replication that Thomas Brown, the *cestui que trust*, did not assent to the submission to arbitration. Rejoinder denying the replication. Verdict for the plaintiff. The defendant then moved for judgment notwithstanding the verdict. The court was of opinion that the declaration was bad, because Thomas Brown was the promisee and only proper party plaintiff upon the policy, and was also of opinion that if the declaration could be maintained, it was fully met by the plea, to which the replication was an insufficient answer.[1]

CURTIS, J. The defendant moves for a judgment *non obstante veredicto*. Such a judgment may be rendered in favor of the plaintiff when the cause of action shown by the declaration is confessed by the plea and no bar pleaded. But a defendant cannot have such a judgment.[2] He can only move in arrest of judgment if the bar shown by the plea be sufficient, and the matter found by the verdict does not answer it. Smith *v.* Smith,[3] Schermerhorn *v.* Schermerhorn,[4] Bellows *v.* Shannon.[5]

Upon the whole matter, my opinion is that the judgment must be arrested.

[1] The statement of the case has been greatly condensed, and only a small part of the opinion is given. — ED.

[2] Rand *v.* Vaughan, 1 B N. C. 767 (*semble* — but see Benson *v.* Duncan, 3 Ex. 652; Reg. *v.* Darlington School, 6 Q. B. 705–706); German Co. *v.* Frederick, 58 Fed. R. 144 (Kansas law); Quimby *v.* Boyd, 8 Colo. 194; Floyd *v.* Colo. Co., 10 Colo. Ap. 54; Bradshaw *v.* Hedge, 10 Iowa, 402; Smith *v.* Powers, 15 N. H. 546; Smith *v.* Smith, 4 Wend. 468 (*semble*); Schermerhorn *v.* Schermerhorn, 5 Wend. 513 (*semble*); Bellows *v.* Shannon, 2 Hill, 86; Va. Mills *v.* Abernathy, 115 N. Ca. 402; Christian *v.* Yarborough, 124 N. Ca. 72; Buckingham *v.* McCracken, 2 Oh. St. 287; Tillinghast *v.* McLeod, 17 R. I. 208; Burnham *v.* N. Y. Co., 17 R. I. 544 (explaining earlier R. I. decisions); Bowdre *v.* Hampton, 6 Rich. 208; Barnes *v.* Rodgers, 54 S. Ca. 115; Bradley Co. *v.* Caswell, 65 Vt. 231; Trow *v.* Thomas, 70 Vt. 580 (but motion for judgment *non obstante veredicto* will be treated as motion to arrest judgment); Sheehy *v.* Duffy, 89 Wis. 6 *Accord*. — ED.

[3] 5 Wend. 468. [4] 5 Wend. 513. [5] 2 Hill, 86.

MADDEN v. LANCASTER COUNTY.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER 3, 1894.

[65 *Federal Reporter*, 188.]

BEFORE CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff in error brought an action against the defendant in error, the county of Lancaster, for damages caused by a defective bridge, more than thirty days after his injury occurred. The defendant in error demurred to the plaintiff's petition, which disclosed this fact, on the ground that it did not state facts sufficient to constitute a cause of action, and its demurrer was overruled. The defendant then answered, among other things, that the action ought not to be maintained because it was not brought within thirty days of the time when the injury or damage occurred. The case was tried to a jury, and a verdict rendered for the plaintiff.

Section 440 of the Code of Nebraska provides that "where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Consol. St. Neb. 1891, § 4965.

After the verdict, and upon the motion of the defendant, the court rendered a judgment in its favor upon the statements in the pleadings, and this is the error complained of.

It is insisted that the defendant waived the defence that the action was not commenced in time, because it did not stand upon its demurrer, and that a judgment *non obstante veredicto* can never be lawfully rendered in favor of a defendant. It is a conclusive answer to both of these objections that, whatever the rule may be in the absence of a statute establishing it, section 440 of the Code of Civil Procedure of Nebraska (Consol. St. Neb. 1891, § 4965) expressly requires that where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party. This section is not, in our opinion, in any way limited or qualified by any other portion of the code to which our attention has been called. It appeared both from the statements in the petition and from those in the answer that this action was not brought within the thirty days after the injury occurred, prescribed by the statute which gave it, and the court below could not have refused judgment for the defendant without disregarding this statute. Moreover, the defendant did not waive this defence by its failure to stand upon its demurrer, or by filing its answer. Under the code and the settled practice in Nebraska, if the facts stated in the petition do not constitute a cause of action, not because of some defect in the form of pleading, but on account of a substantial defect that is fatal to a recovery, the defend-

ant does not waive such defect by filing his answer, but may take advantage of it at any time. Consol. St. Neb. § 4636; Farrar *v.* Triplett;[1] O'Donohue *v.* Hendrix;[2] Thompson *v.* Stetson;[3] Railroad Co. *v.* Crockett;[4] Renfrew *v.* Willis;[5] Plow Co. *v.* Webb;[6] Bennett *v.* Butterworth.[7] The defendant was guilty of no waiver here. It insisted upon this defence at every stage of the proceeding below. It raised it by demurrer, it raised it by answer, and it raised it by motion after verdict.

The judgment below must be affirmed. It is so ordered.[8]

W. T. TOOKER, RESPONDENT, *v.* W. H. ARNOUX, APPELLANT.

COURT OF APPEALS, NEW YORK, MARCH 18, 1879.

[76 *New York Reports*, 397.]

THE complaint was upon a contract, showing the existence, but failing to allege the performance of a condition precedent. The answer alleged the non-performance of the condition precedent.[9]

RAPALLO, J. At the opening of the trial the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied and exception taken. The reason assigned was that the defendant should have demurred.

This position is in conflict with section 148 of the Code and with many decisions of this court. If the complaint was bad in substance the objection was available on the trial, and the motion to dismiss should have been granted. Schofield *v.* Whitelegge,[10] Coffin *v.* Reynolds,[11] Emery *v.* Pease.[12]

We think the complaint was clearly bad. The sale of the houses mentioned in the order and the receipt of money from such sale were conditions precedent to the defendant's liability on his acceptance, and those facts should have been averred. In the absence of such

[1] 7 Neb. 237, 240. [2] 13 Neb. 255. [3] 15 Neb. 112.
[4] 17 Neb. 570, 572. [5] 33 Neb. 98, 106. [6] 141 U. S. 616, 623.
[7] 11 How. 669, 675.
[8] Stokes *v.* Grant, 4 C. P. D. 25, 28; McDougall *v.* Knight, Odgers, Pl. (6th ed.) 165; Casey *v.* Pa. Co., 109 Fed. R. 744, 114 Fed. R. 189 (Pa law); Ft. Scott *v.* Eads Co., 117 Fed. R. 51 (Kansas law); Watson *v.* Brazeal, 7 Ala. 451 (*semble* — after verdict for plaintiff on an affirmative replication); Martindale *v.* Price, 14 Ind. 115, 118; Bledsoe *v.* Parker, 30 Ind. 354; Moreland *v.* Thorn, 143 Ind. 211; Carl *v.* Granger, 69 Iowa, 519 (*semble*); Evans *v.* Stone, 80 Ky. 78; Hill *v.* Ragland, 114 Ky. 209 (*semble*); Louisville Co. *v.* Mayfield, (Ky. 1896) 35 S. W. R. 924; Plunkett *v.* Detroit Co., 140 Mich. 299 (*semble*); Cruikshank *v.* St. Paul Co., 75 Minn. 266, 267–268; Johnson *v.* Spencer, 51 Neb. 198; Barge *v.* Haslam, 63 Neb. 296; McCoy *v.* Jones, 61 Oh. 119; Benicia Works *v.* Creighton, 21 Oreg. 495; Fry *v.* Hubner, 35 Oreg. 134; Lyen *v.* Bond, 3 Wash. Terr. 407 *Accord.* — ED.
[9] Only a part of the case is given. — ED.
[10] 49 N. Y. 259. [11] 37 id. 640. [12] 20 id. 62.

averments no indebtedness on his part to the plaintiff appeared. Munger *v.* Shannon.[1]

The denial in the answer of the receipt of any such moneys did not supplement the complaint in this respect. In Bate *v.* Graham,[2] the answer contained an affirmative allegation of the fact which the complaint should have averred, but in Schofield *v.* Whitelegge, as in the present case the answer contained a denial of the essential fact, and it was held that such denial did not cure the defect in the complaint.

Judgment reversed.[3]

LUMBY *v.* ALLDAY.

EXCHEQUER, HILARY TERM, 1831.

[1 *Crompton & Jervis*, 301.]

ACTION for words.[4]

At the trial, before Alexander, L. C. B., at the last Assizes for the county of Warwick, the plaintiff proved the material part of the words

[1] 61 N. Y. 251, 260. [2] 11 N. Y. 237.

[3] To the same effect are the following cases, in some of which, because of the invalidity of the declaration, the defendant moved for a judgment dismissing the action, and in others the defendant's motion was for the exclusion of all evidence in support of the declaration, with the same practical result in each case. Adams *v.* South Bank, 123 Fed. R. 641 (*semble* — Nebraska law); King *v.* Montgomery, 50 Cal. 115; Kelley *v.* Kriess, 68 Cal. 210; De Toro *v.* Robinson, 91 Cal. 371; Evans *v.* Paige, 102 Cal. 132; Hibernian Soc'y *v.* Thornton, 117 Cal. 481; Stintsman Co. *v.* Mansfield, 5 Dak. 78 (*semble*); Weathers *v.* McFarland, 97 Ga. 265; McCook *v.* Crawford, 114 Ga. 337; Fleming *v.* Roberts, 114 Ga. 634; Crew *v.* Hutchison, 115 Ga. 511, 534, 535; Kelly *v.* Strouse, 116 Ga. 872, 884 (qualifying earlier Ga. cases); Henderson *v.* State, 123 Ga. 465, 466; Walden *v.* Walden, 124 Ga. 145; Gainesville Co. *v.* Austin, 127 Ga. 120 (*semble*); Halliday *v.* Bank, 128 Ga. 639; Laithe *v.* McDonald, 7 Kan. 154 (*semble*); State *v.* School Dist., 34 Kan. 237 (*semble*); Robbins *v.* Barton, 50 Kan. 120 (*semble*); Mo. Co. *v.* Murphy, (Kan. 1907) 90 Pac. R. 290 (*semble*); Kean *v.* Mitchell, 13 Mich. 207 (*semble*); Stofiet *v.* Marker, 34 Mich. 313; Rowland *v.* Superintendents, 49 Mich. 553; Sutton *v.* Van Aken, 51 Mich. 463 (*semble*); Smith *v.* Cowles, 123 Mich. 4 (*semble*); McDonald *v.* Smith, 139 Mich. 211 (*semble*); Haseltine *v.* Smith, 154 Mo. 404 (*semble*); State *v.* Delaney, (Mo. 1907) 99 S. W. R. 1 (*semble*); Burlington Co. *v.* Crockett, 17 Neb. 570 (*semble*); Roberts *v.* Taylor, 19 Neb. 184 (*semble*); Marvin *v.* Weider, 31 Neb. 774 (*semble*); Renfrew *v.* Willis, 33 Neb. 98; Coffin *v.* Reynolds, 37 N. Y. 640; Schofield *v.* Whitelegge, 49 N. Y. 259; Pope *v.* Terre Haute Co., 101 N. Y. 61; Budd *v.* Bingham, 18 Barb. 494; St. John *v.* Northrup, 23 Barb. 25 (*semble*); Burnham *v.* De Bevoise, 8 How. Pr. 159 (*semble*); Smith *v.* Leo, 92 Hun, 242 (*semble*); Rogers *v.* Fine, 49 N. Y. Misc. Rep. 633; Tucker *v.* Baker, 86 N. Ca. 1; Burbank *v.* Commissioners, 92 N. Ca. 257; Elam *v.* Barnes, 110 N. Ca. 73; Haffner *v.* Dobrinski, (Okla. 1907) 88 Pac. R. 1042; Whitbeck *v.* Sees, 10 S. Dak. 412; Thomas *v.* Issenhuth, 18 S. Dak. 303; O'Day *v.* Ambaum, (Wash. 1907) 92 Pac. R. 421; Grannis *v.* Hooker, 29 Wis. 65 (*semble*); Teetshorn *v.* Hull, 30 Wis. 162 (*semble*); Rothe *v.* Rothe, 31 Wis. 570; Lutheran Church *v.* Gristgau, 34 Wis. 328; Potter *v.* Taggert, 54 Wis. 395; Doud *v.* Wis. Co., 65 Wis. 108; Docter *v.* Hellberg, 65 Wis. 418, 420; Hagenal *v.* Geffert, 73 Wis. 636; Wis. Co. *v.* Pike Co., 115 Wis. 377 (*semble*) *Accord*. In Rothe *v.* Rothe, *supra*, the court, through Dixon, C. J., said, p. 572: "The objection to any evidence being received on the ground that the complaint does not state facts sufficient to constitute a cause of action, is in the nature of a demurrer *ore tenus* to the complaint, and upon such demurrer, as upon any other, the court must determine from the facts alleged what the cause of action stated, or intended to be, is, and whether such statement is sufficient." Mudge *v.* Treat, 57 Ala. 1; Farrow *v.* Andrews, 69 Ala. 96; Lewis *v.* Simon, 101 Ala. 546; Taylor *v.* Smith, 104 Ala. 537; Breitling *v.* Marx, 123 Ala. 222; Rasco *v.* Jefferson, (Ala. 1905) 38 So. R. 246 *Contra*. — ED.

[4] Only a part of the case is given. — ED.

charged in the first count. The counsel for the defendant submitted, that the words were not actionable, and that the plaintiff ought to be nonsuited. The learned judge refused to nonsuit the plaintiff, and told the jury, that if they thought the words might probably have occasioned the loss of the plaintiff's situation, to find a verdict for the plaintiff; and the jury having found a verdict for the plaintiff, he gave the defendant leave to move to enter a nonsuit.

Adams, Serjt., in Michaelmas Term last, obtained a rule to set aside the verdict, and to enter a nonsuit; against which —

Goulburn, Serjt., showed cause. —

Adams, Serjt., contra. — In an action for words, the plaintiff must be nonsuited, if the words are not actionable, for the jury cannot assess the damages when there is no cause of action.

[*Bayley, B.* — The rule is, that if the facts alleged in the declaration be proved, it is the duty of the jury to find for the plaintiff; and if those facts do not disclose a sufficient cause of action, the defendant must move in arrest of judgment. Where a defendant is satisfied that the allegations if proved do not establish a cause of action, he ought to demur. The judge is not at liberty to nonsuit on the ground that the facts alleged in the declaration do not amount to a cause of action.

Cur. adv. vult.

The judgment of the court is now delivered by —

BAYLEY, B. — This case came before the court upon a rule nisi to enter a nonsuit. The ground of motion was, that the words (in slander) proved upon the trial were not actionable.

The next question is, whether this is properly a ground of nonsuit; and I am of opinion that, under the circumstances of this case, it is not. The words proved are nearly all the words which the first count contains; and if the words proved are not actionable, none of the other words contained in that count are. When the general issue is pleaded to a count it puts in issue to be tried by the jury the question whether the facts stated in that count exist? The legal effect of those facts, whether they constitute a cause of action or not, is not properly in question. The proper mode to bring that legal effect into consideration, is, before trial, to demur; after trial, to move in arrest of judgment. The duty of the judge, under whose direction the jury try questions of fact, is not to consider whether the facts charged give a ground of action, but to assist the jury in matters of law, which may arise upon the trial of those facts.

As the defendant, therefore, in this case put in issue the allegations in the declaration, and those allegations were proved upon trial, we are of opinion that the rule for nonsuit ought to be discharged; and, notwithstanding the lapse of time, that there ought to be a rule nisi to arrest the judgment, if the defendant be advised to take such rule.

Rule discharged.[1]

[1] Wells v. Abrahams, L. R. 7 Q. B. 554, 555, 558, 563; Bas v. Steel, Pet. C. C. 406; Mes-

CHAPTER XIII.

ERROR AND APPEAL ON THE PLEADINGS.

SLACUM *v.* POMERY.

SUPREME COURT, UNITED STATES, FEBRUARY, 1810.

[6 *Cranch*, 221.]

ERROR to the circuit court for the district of Columbia, sitting in Alexandria, in an action of debt (under the law of Virginia), brought by Pomery against Slacum, as endorser of a bill of exchange.

The verdict and judgment being for the plaintiff, for the whole amount demanded in the declaration, the defendant brought his writ of error.

Swann, for the plaintiff in error, contended.

That it was not averred in the declaration that the defendant had notice of the protest for non-payment And although this might have been taken advantage of in the court below in arrest of judgment, yet it was also a fatal objection upon a writ of error.

senger *v.* Woge, 20 Colo. Ap. 275; Adams *v.* Way, 32 Conn. 160; Cook *v.* Morris, 66 Conn. 196; Anderson *v.* Pollard, 62 Ga. 46; Reeves *v.* Jackson, 113 Ga. 182; Strouse *v.* Kelly, 113 Ga. 575; Flewellen *v.* Flewellen, 114 Ga. 403; O'Connor *v.* Bruckor, 117 Ga. 451; Western Co. *v.* Bank, 125 Ga. 489; Nollen *v.* Wisnen, 11 Iowa, 190; Wetmore *v.* Mellinger, 64 Iowa, 741; Linden *v.* Green, 81 Iowa, 365; Haynes *v.* Brown, 36 N. H. 544, 566; Potter *v.* Clarke, 20 N. J. 536, 540; Reynolds *v.* Lounsbury, 6 Hill, 534 (*semble*); Kelly *v.* Kelly, 3 Barb. 419 (but see *contra* Wood *v.* Ball, 114 N. Y. Ap. Div. 743); Stanley *v.* Southwood, 4 Phila. 291 (*semble* — but changed by statute in 1836) *Accord*.

See, however, Swan *v.* Tappan, 5 Cush. 104.

In Anderson *v.* Pollard, *supra*, Bleckley, J. said, p. 51: "The want of necessary averments in a declaration is not cause for a nonsuit; for a nonsuit, under our practice, takes place for failure to support the declaration by evidence. We demur to the evidence as insufficient, and move to nonsuit the plaintiff. When a declaration is defective, we demur to *it*, or move, *ore tenus*, to dismiss it. And this distinction in practice is matter of substance; for there is a great economy of time and expense in not waiting for the evidence to come in in order to try the sufficiency of the declaration. The object of introducing evidence is not to aid the declaration, but to prove the truth of it. A motion for a nonsuit is aimed at the evidence as compared with what the declaration is, not at the declaration as compared with what it ought to be."

In Georgia and Massachusetts after the plaintiff's evidence is in, the defendant may ask for and the judge may give a direction to the jury to find a verdict for the defendant, on the ground that the plaintiff has not proved facts sufficient to constitute a cause of action: Crew *v.* Hutchinson, 115 Ga. 510, 119 Ga. 142 s. c.; Harrell *v.* Nicholson, 119 Ga. 458; Williams Co. *v.* Warner, 125 Ga. 408; Hervey *v.* Moseley, 7 Gray, 479; Montague *v.* Boston works, 97 Mass. 502, 503 (*semble*); Scollans *v.* Rollins, 173 Mass., 275; Dooling *v.* Budget Co., 144 Mass. 258; Oulighan *v.* Butler, 189 Mass. 287. This doctrine is believed to be exceptional. It is opposed to the following authorities: Hazard *v.* Purdon, 3 Port. (Ala.) 43; Pearl *v.* Rawdin, 5 Day, 244; Canterbury *v.* Bennett, 22 Conn. 623; Power *v.* Mallory, 51 Conn. 432; Nollen *v.* Wisner, 11 Iowa, 190.

Demurrer to Evidence. On a demurrer to evidence, no objection can be made to the pleadings: Cort *v.* Birkbeck, Doug. 218; U. S. Bank *v.* Smith, 11 Wheat. 171, 173; Kelly *v.* Strause, 116 Ga. 872, 882. — ED.

Youngs. There was no motion in arrest of judgment. This objection was not taken in the court below.

In our case if notice were necessary to entitle the plaintiff to a verdict, it will be presumed, after verdict, that notice was proved.

MARSHALL, Ch. J., delivered the opinion of the court as follows, viz.:

There is, however, an objection taken to this declaration. It omits to allege notice of the protest; an omission which is deemed fatal.

Had this error been moved in arrest of judgment, it is presumable the judgment would have been arrested; but it is not too late to allege, as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below.[1]

W. AND R. L. RUDDICK v. PATTERSON AND OTHERS.

SUPREME COURT, IOWA, JUNE 15, 1859.

[9 *Iowa Reports*, 103.]

WRIGHT, C. J. Judgment by default was rendered against the defendants as the makers and indorsers of a certain promissory note, The indorsers appeal and assign as error that the petitioner does not aver that they had due notice of the demand and non-payment of the note by the maker, and that taking the petition as true, therefore, it shows no cause of action against them. Held: That granting that the petition would be bad upon demurrer, the defect could not avail. when presented for the first time in this court. Davis *v.* Burt, et al.[2]

Judgment affirmed.[3]

[1] Western Co. *v.* Sklar, 126 Fed. R. 295; Louisville Co. *v.* Williams, 113 Ala. 402; Ala. Co. *v.* Addler, 144 Ala. 555; Chaffin *v.* McFadden, 41 Ark. 42; Am. Co. *v.* McManus, 68 Ark. 283; Buckman *v.* Hatch, 139 Cal. 53; Creswell *v.* Woodside, 8 Colo. Ap. 514; Nylan *v.* Reuhard, 10 Colo. Ap. 46; Eddins *v.* Tweddle, 35 Fla. 107; Gorman *v.* County, 1 Ida. 655; Kipp *v.* Lichtenstein, 79 Ill. 358; Bowman *v.* People, 114 Ill. 474; Chicago Co. *v.* Clausen, 173 Ill. 100; Chicago Co. *v.* Eselin, 86 Ill. Ap. 94; Mansur *v.* Streight, 103 Ind. 358; Taylor *v.* Johnson, 113 Ind. 164; Western Co. *v.* Koontz, 17 Ind. Ap. 54; Metropolitan Co. *v.* McCormick, 19 Ind. Ap. 49 (but objection to a substantial defect in an answer can be taken only by demurrer or by motion for judgment *non obstante veredicto;* Bledsoe *v.* Rader, 30 Ind. 354; Moreland *v.* Thorn, 143 Ind. 211); Fible *v.* Caplinger, 13 B. Mon. 464; Walters *v.* Chinn, 1 Met. (Ky.) 499; Chesapeake Co. *v.* Thieman, 96 Ky. 507; Crossen *v.* Hutchinson, 9 Mass. 206 (Massachusetts law changed by statute, Rev. L. ch. 193, § 4, so as to exclude a writ of error for substantial defects in pleadings, if a verdict has been rendered; Hollis *v.* Richardson, *supra*, 68); Smith *v.* Dennett, 15 Minn. 81; Northern Co. *v.* Markell, 61 Minn. 271; Slater *v.* Olson, 83 Minn. 35; Smith *v.* Burrus, 106 Mo. 94; State *v.* Thompson, 149 Mo. 441; Terr. *v.* Va. Co., 2 Mont. 96; Morse *v.* Swan, 2 Mont. 306; Hudelson *v.* First Bank, 51 Neb. 557; Kemper *v.* Renshaw, 58 Neb. 513; Manning *v.* Railroad, 122 N. Ca. 824; Toomey *v.* Avery Co., 20 Oh. C. C. 183; Bowen *v.* Emmerson, 3 Oreg. 452; Ball *v.* Doud, 26 Oreg. 14; Wyatt *v.* Henderson, 31 Oreg. 48; Byers *v.* Ferguson, 41 Oreg. 77, 81 (*semble*); Porter *v.* Booth, 1 S. Dak. 558; Johnson *v.* Burnside, 3 S. Dak. 230; Shelton *v.* Bruce, 9 Yerg. 24; Tumley *v.* Clarksville R. R., 2 Colo. 327; Holt *v.* Pearson, 12 Utah, 63; Bishop *v.* Averill, 17 Wash. 209 *Accord.* — ED.

[2] 7 Iowa, 58.

[3] Davis *v.* Burt, 7 Iowa, 56; Williams *v.* Sill, 12 Iowa, 511; McCoy *v.* Cornell, 40 Iowa, 457; Clews *v.* Traer, 57 Iowa, 459, 467; Weis *v.* Morris, 102 Iowa, 327; Midlothian Co. *v.* Dahlby, 108 Wis. 195.

In Massachusetts a writ of error is not allowed for causes existing before verdict, in any case in which a verdict has been rendered. Hollis *v.* Richardson, 13 Gray, 392, 393. — ED.

GEORGE B. STARBIRD v. JAMES EATON.

SUPREME JUDICIAL COURT, MAINE, 1856.

[42 *Maine Reports*, 569.]

APPLETON, J.[1] — The plaintiff in error, being duly summoned, was defaulted in the original action, the judgment in which he now seeks to reverse.

It is objected that the notes upon which judgment was rendered, do not correspond with those set forth in the declaration. The purpose of a writ of error is to enable the justices of this court to examine the record upon which a judgment has been rendered in this or in an inferior court, and, on such examination, to affirm or reverse the adjudication. The court will not take notice of a note described in the assignment of errors, as filed in the case, any more than a deposition or other proof offered to sustain the declaration. Storer *v.* White.[2] The papers presented to a common law court, and acted upon as evidence, are no part of the record. Kirby *v.* Wood.[3] When the error is one of law, there is nothing upon which the court can act except the transcript of the record.[4] Valentine *v.* Norton.[5]

Exceptions overruled.

COMMERCIAL INVESTMENT CO. v. THE NATIONAL BANK OF COMMERCE.

SUPREME COURT, WASHINGTON, DECEMBER, 1904.

[36 *Washington Reports*, 287.]

APPEAL from a judgment of the superior court for Pierce county, Snell, J., entered March 19, 1903, upon granting defendant's motion for judgment on the pleadings, in an action for damages for breach of a covenant to assume mortgages, and save the plaintiff from suits thereon.

FULLERTON, C. J.[6] It is said, however, that the complaint contains

[1] Only a part of the opinion of the court is given. — ED.

[2] 7 Mass. 448.

[3] 16 Maine, 81.

[4] Macheca *v.* U. S., 26 Fed. R. 845; Layton *v.* Poor, 6 Houst. 13; Ex parte *v.* Powell, 20 Fla. 806; McClay *v.* Norris, 9 Ill. 370; Lewiston Co. *v.* Merrill, 78 Me. 107; State *v.* Williams, 5 Md. 82; Green *v.* State, 59 Md. 123; Miller *v.* Rosier, 31 Mich. 475; Claggett *v.* Simes, 31 N. H. 22; Collins *v.* Wallace, 55 N. H. 437; Loper *v.* Somers, 71 N. J. 657; People *v.* Allen, 43 N. Y. 28; Bain *v.* Funk, 61 Pa. 185 *Accord*.

In New York a judgment will not be reversed for a substantial error in the pleadings, if evidence admitted without objection disclosed a cause of action or defence: Knapp *v.* Simon, 96 N. Y. 284; Hinds *v.* Kellogg, 37 N. Y. St. Rep. 856 (affirmed 133 N. Y. 536); Boesert *v.* Poerschke, 51 N. Y. Ap. Div. 381, 384 (*semble* — rule not applied because evidence was admitted against objection). — ED.

[5] 30 Maine, 194.

[6] Only a part of the opinion of the court is given. — ED.

averments sufficient to show a right to nominal damages, and that the judgment must be reversed because the trial court did not permit a recovery for nominal damages. But we have held that this court will not, where the sole object of the action is the recovery of damages, reverse a judgment because the court erroneously failed to direct judgment for nominal damages. Johnson *v.* Cook.[1] Whether the plaintiff does, or does not, recover, affects only the question of costs, and the appellate court will not entertain an appeal for the sole purpose of determining who is entitled to costs in the court below.

The judgment is affirmed.[2]

JESSE *v.* CATER.

SUPREME COURT, ALABAMA, JANUARY TERM, 1856.

[28 *Alabama Reports*, 475.]

To an action upon an injunction bond, the defendants filed two special pleas, to each of which a demurrer was interposed, but overruled.

The overruling of the demurrers to the pleas is now assigned for error.[3]

WALKER, J. The appellant, who was the plaintiff below, demurred separately to the defendants' two pleas. The demurrers were overruled; and, the plaintiff declining to further plead, a judgment was rendered for the defendant. If either of the pleas, the demurrers to which were overruled, averred facts constituting a defence to the action, the judgment of the court below must be affirmed. Both the pleas go to the entire action; and therefore the plaintiff has not been prejudiced by the erroneous overruling the demurrer to one of the pleas, if the other was good. See the cases of Firemen's Ins. Co. *v.* Cochran & Co.;[4] and The State *v.* Brantley.[5]

The judgment of the circuit court is affirmed.[6]

[1] 24 Wash. 474, 64 Pac. 729.

[2] Peck *v.* Tribune Co., 154 Fed. R. 330; Platter *v.* Seymour, 86 Ind. 323; Rhine *v.* Morris, 96 Ind. 81; Coffin *v.* State, 144 Ind. 578; McConihe *v.* N. Y. Co., 20 N. Y. 495; Johnson *v.* Cook, 24 Wash. 474 *Accord.* — ED.

[3] The statement of the case has been much condensed. — ED.

[4] 27 Ala. 228. [5] 27 Ala. 44.

[6] Clearwater *v.* Meredith, 1 Wall. 25; Packett *v.* Pope, 3 Ala. 552; State *v.* Brantley, 27 Ala. 44; Firemen's Co. *v.* Cochran, 27 Ala. 228; Brown *v.* Commercial Co., 86 Ala. 189, 195; Zinkle *v.* Jones, 129 Ala. 444; Andrews *v.* Hall, 132 Ala. 320 (overruling a dictum in Breitling *v.* Marx, 123 Ala. 222, 236); Jordan *v.* Newborn, 3 Ark. 502; Stevens *v.* McCall, Smith, Ind. 257; Swan *v.* Rary, 2 Blackf. 291; Huston *v.* McPherson, 3 Blackf. 562; Gorham *v.* Reeves, 1 Ind. 421; Burton *v.* Johnson, 2 Ind. 339; Board *v.* Walker, 71 Oh. 169 *Accord.*

Similarly judgment will not be reversed for error in sustaining a demurrer to a special plea, if the facts of that plea might be introduced under a general denial which was also pleaded. Evansville Co. *v.* Baum, 26 Ind. 70; Wolf *v.* Schofield, 38 Ind. 175; Trogdon *v.* Deckard, 45 Ind. 572. — ED.

CHAPTER XIV.

PLEADINGS IN PARTICULAR ACTIONS.

SECTION I.

Specialty and Simple Contracts.

NOTE.

1385.

[*Bellewe*, 111.[1]]

WADHAM.[2] In debt on a contract the plaintiff shall show in his count for what consideration (*cause*) the defendant became his debtor. Otherwise in debt upon an obligation, for the obligation is a contract in itself.[3]

[1] Also reported Bellewe, Annuitie, 32, Fitz. Ab. Annuitie, pl. 54. — Ed.

[2] Judge of the Common Pleas in 1388. — Ed.

[3] "The declaration is in the usual form in an action of covenant, and by setting out the bond upon which suit is brought, sufficient is shown to entitle the plaintiff to his action. No statement of consideration is necessary." Per Wilson, C. J., in Buckmaster v. Grundy, 2 Ill. 310, 312. See to the same effect, Y. B. 45 Ed. III f. 24, pl. 30; Fitz. Ab. Dett. 166 (19 Rich. II); Fellowes v. Taylor, 7 T. R. 475 (*semble*); McCarty v. Beach, 10 Cal. 461; Wills v. Kempt, 17 Cal. 98; Moore v. Waddle, 34 Cal. 145; Chicago Co. v. Haven, 195 Ill. 474; Towsley v. Olds, 6 Iowa, 526; State v. Wright, 37 Iowa, 522; Northern Co. v. Oswald, 18 Kan. 336 (bill for specific performance); Bowyer v. Sowles, 109 Mich. 481; Robson v. Dayton, 111 Mich. 440; Benza v. Briggs, 2 Miss. 195; Montgomery Co. v. Auchley, 92 Mo. 126; Harrison v. Vreeland, 38 N. J. 366; Parker v. Crane, 6 Wend. 647, 648; Bush v. Stevens, 24 Wend. 256; Howie v. Kashowitz, 83 N. Y. Ap. Div. 295; Grubb v. Willis, 11 S. & R. 107; Angier v. Howard, 94 N. Ca. 27; Cock v. Taylor, 2 Overt. (Tenn.) 49, 52; Jones v. Thomas, 21 Gratt. 96; Considine v. Gallagher, 31 Wash. 669. See further 9 Harv. L. Rev. 49. — Ed.

PENSON v. HODGES.

In the Queen's Bench, Hilary Term, 1600.

[*Croke, Elizabeth*, 787.]

Error of a judgment in the common pleas, in debt upon an obligation. The error assigned was because the plaintiff declares that the defendant *per scriptum suum obligatorium concessisset se teneri*, &c., without saying *sigillo suo sigillat*, as the course is in the Queen's Bench; as *Kemp* said, that all their precedents there were. But it was moved on the defendant's part, and so certified by the prothonotaries of the common pleas, that they were never used to mention the sealing of a bond. — And Gawdy said, that the declaration was well enough, although it were not good by precedents (but as it is, it is clear); for when he saith, *per scriptum suum obligatorium concessit se teneri*, &c., all necessary circumstances are intended to concur, *viz.* the sealing and delivering of the deed; for otherwise it is not a writing obligatory; and delivery is never alleged:[1] which proves that it is not necessary to allege the sealing; for that it is as necessary as the other. Wherefore it was adjudged accordingly that the judgment should be affirmed.[2]

MORE v. JONES.

In the King's Bench, Michaelmas Term, 1728.

[1 *Barnardiston*, 61, 85.[3]]

This was an action of covenant in the Common Pleas. The plaintiff declares that the defendant *per quoddam scriptum factum sub manu sua propria convenit*, etc. Upon demurrer to a plea, judgment was given for the plaintiff. The defendant took out a writ of error.[4]

[1] Maidwell v. Andrews, 1 Leon. 309, 310; Sir Francis Englefield's Case, 4 Leon. 169, 175; Ashmore v. Rypley, Cro. Jac. 420; Woodcock v. Morgan, 6 Mod. 306; Wineman v. Hughson, 44 Ill. Ap. 22, 26; Van Santwood v. Sandford, 12 Johns. 197 *Accord*.

Similarly in declaring upon a bill or note it is not necessary to allege its delivery. It is enough to state that the defendant made or endorsed the bill or note, the delivery being thereby implied. Churchill v. Gardner, 7 T. R. 591; Smith v. McClure, 5 East, 476; Keesling v. Watson, 91 Ind. 578; Russell v. Wipple, 2 Cow. 536, Prindle v. Caruthers, 15 N. Y. 425; Peets v. Bratt, 6 Barb. 662; Binney v. Plumbey, 5 Vt. 500; Wochoska v. Wochoska, 45 Wis. 423. — Ed.

[2] Ashmore v. Rypley, Cro. Jac. 420; Green v. Cubit, 1 Vent. 70; Bond v. Moyle, 2 Vent. 106; Woodcock v. Morgan, 6 Mod. 306; Lee v. Adkins, Minor (Ala.), 187 *Accord*.

Similarly, it is enough to allege an obligation *per factum suum*, *per scripturam indentatam*, or *per indenturam factam*. Maidwell v. Andrews, 1 Leon. 309, 310; Bond v. Moyle, 2 Vent. 106; Atkinson v. Coatsworth, 1 Stra. 512, 8 Mod. 33 s. c.; Wineman v. Hughson, 44 Ill. Ap. 22; Van Santwood v. Sandford, 12 Johns. 197. — Ed.

[3] 2 Ld. Ray, 1536, 2 Stra. 816 s. c. — Ed.

[4] The statement of the case is condensed, and only a portion of the report upon the reargument is given. — Ed.

This case was now more largely spoke to than it was upon the former argument. A good deal of stress was laid by the plaintiff's counsel upon the word *convenit*, in order to show, that that was a technical word as well as *factum*, and of consequence carried with it an implication of there being all circumstances complied with necessary to found an action of covenant upon. To this purpose he cited the case of Atkinson and Cotesworth, Pas. 8 of the late king, where the plaintiff had charged in the declaration that the defendant *per scriptum obligatorium convenit* to do such and such acts. In that case, it was argued whether the declaration was good or not. It was held that it was good; there some of the judges put it upon the words *scriptum obligatorium* being technical, and others of them upon the word *convenit* being so. The court said, they paid a great regard to the opinions of those judges; but yet they could not see how *convenit* could carry with it those circumstances; for if it could, then *convenit* would do alone of itself, which never was heard of. It was hinted at farther by the counsel, as if this form was usual to declare in, in the Common Pleas. The Chief Justice said, if that could be made out, it would be very hard, that this court's declaring in another way should overturn the precedents in that court; but that he did not think that that could be the way of declaring in that court. So for these reasons the judgment below was reversed.[1]

FINDLEY *v.* COOLEY.

SUPREME COURT, INDIANA, NOVEMBER 5, 1823.

[1 *Blackford*, 262.]

ERROR to the Dearborn Circuit Court.

BLACKFORD, J. — J. Cooley, assignee of Marshall, brought an action of debt against Findley on several promissory notes for the payment, in all, of 900 dollars. The defendant pleaded two pleas,[2] to which the plaintiff demurred. The declaration is said to be defective for not averring the consideration of the notes. The general rule to be sure is, that in simple contracts the consideration must be set out; but bills of exchange by the law merchant, and promissory notes by statute, are exceptions to the rule. The moment our act of assembly made a promissory note the foundation of an action, the only description of

[1] Southwell *v.* Brown, Cro. El. 571; Courtney *v.* Greenville, Cro. Car. 209 (*semble*); Blenerhasset *v.* Pierson, 3 Lev. 234; Pierson *v.* Pierson, 6 N. 168 *Accord.*

Vulgar *v.* Higgins, Palm. 173 *Contra.*

In the old books covenant was used in the general sense of agreement and was not restricted, as in modern times, to an agreement under seal. 2 Harv. L. Rev. 11 and n. 1; Sharington *v.* Strotton Plowden, 298. — ED.

[2] So much of the case as relates to the pleas is omitted. — ED.

the contract necessary was that of the note itself. The note then became the contract, and instead of being only evidence of a debt as formerly, was constituted by force of the statute a debt *per se*. So that the consideration of a note within the statute need not be averred, any more than that of a bond or bill of exchange.

PER CURIAM. — The judgment is affirmed.[1]

HENDERSON v. BOOTH.

SUPREME COURT, IOWA, OCTOBER 18, 1860.

[11 *Iowa Reports*, 212.]

LOWE, C. J.[2] The plaintiff brought this suit upon the following instrument: —

"$113.60. DUBUQUE, IOWA, November 27th, 1858.

"Upon settlement made this day, between William Yewey and Henderson, for boarding said Yewey, there appears a balance due Henderson, of one hundred and thirteen 60–100 dollars, the payment of which sum I hereby guaranty. C. H. BOOTH."

[1] Carter v. Palmer, 12 Mod. 380; Phillips v. Scroggins, 1 St. & P. 23; Click v. McAfee, 7 Port. 62; Thompson v. Hall, 16 Ala. 204; Winters v. Rush, 34 Cal. 136; Younglove v. Cunningham, (Cal. 1896) 43 Pac. R. 755; Travelers' Co. v. Denver, 2 Colo. 434; Johnson v. Wright, 2 Dist. Col. Ap. 216; Hulme v. Renwick, 16 Ill. 371; Bilderback v. Burlingame, 27 Ill. 338; Gaddy v. McClean, 59 Ill. 182; Arnold v. Brown, 3 Blackf. 273; Nichols v. Woodruff, 3 Blackf. 493; Hamilton v. Newcastle Co., 9 Ind. 359; Durland v. Pitcairn, 51 Ind. 426; Keesling v. Watson, 91 Ind. 578; Magic Co. v. Stone Co., 158 Ind. 538; Spurgeon v. Swain, 13 Ind. Ap. 188; Luke v. Koenen, 120 Iowa, 103; Brown v. Hall, 2 A. K. Marsh, 599; Mullikin v. Mullikin, 15 Ky. L. Rep. 608; Priedman v. Johnson, 21 Minn. 12; Pinney v. King, 21 Minn. 514; Adams v. Adams, 25 Minn. 72; Caples v. Branham, 20 Mo. 244; Taylor v. Newman, 77 Mo. 257; Eyermann v. Piron, 151 Mo. 107; Dutchess Co. v. Davis, 14 Johns. 238; Parker v. Crane, 6 Wend. 647, 648; Troy Bank v. Topping, 13 Wend. 557; Russell v. Whipple, 2 Cow. 536; Underhill v. Phillips, 10 Hun, 591; Campbell v. McCormac, 90 N. Ca. 491; Dugan v. Campbell, 1 Oh. 115; Dumont v. Williamson, 18 Oh. St. 515; Paddock v. Hume, 6 Oreg. 84; Withers v. Deapie, (Pa.) 21 Leg. Int. 300; Hubble v. Fogartie, 3 Rich. 413; Bank v. Chambers, 11 Rich. 657; Perry v. Rice, 10 Tex. 367; Binney v. Plumley, 5 Vt. 500; Dewey v. Washburn, 12 Vt. 580; Crawford v. Daigh, 2 Va. Cas. 521; Peasley v. Boatwright, 2 Leigh, 195; Hollingsworth v. Milton, 8 Leigh, 50; Jackson v. Jackson, 10 Leigh, 448; Snead v. Coleman, 7 Gratt. 300; State v. Harmon, 15 W. Va, 115; McClain v. Lowther, 35 W. Va. 297; Cheuvront v. Bee, 44 W. Va. 103; Strunk v. Smith, 36 Wis. 631.

The rule is the same as to notes having all the requisites of negotiable notes, except words of negotiability. Moor v. Paine, C. & Hard. 288; Reed v. Murphy, 1 Ga. 236 (*semble*); Louisville Co. v. Caldwell, 98 Ind. 245; Taylor v. Newman, 77 Mo. 257; Downing v. Backenstoes, 3 Cai. 137; Goshen Co. v. Hurtin, 9 Johns. 217; Dutchess Co. v. Davis, 14 Johns. 238; Carnwright v. Gray, 127 N. Y. 92; Paine v. Noelke, 53 How. Pr. 273 (but see *contra* Deyo v. Thompson, 53 N. Y. Ap. Div. 9, decided under a misconception as to the law prior to the Negotiable Instruments Law); Richmond v. Patterson, 3 Oh. 368; Leiden v. Tammany, 9 Watts, 353 (*semble*).

But see *contra* Edgerton v. Edgerton, 8 Conn. 6; Bristol v. Warner, 19 Conn. 7 (*semble*); Bourne v. Ward, 51 Me. 191 (*semble*); Feet v. Judd, 3 Utah, 414. — ED.

[2] Only a part of the opinion of the court is given. — ED.

The petition which makes this written guaranty the foundation of the action, was demurred to, the demurrer sustained and judgment rendered for the defendant. This ruling of the court is assigned for error.

1. It does not appear, from the face of the instrument, or by averment in the petition, that there was any consideration to support the guaranty.

The first ground of demurrer, we suppose, had its origin in the common law notion, that an undertaking to pay the past debt of another, without more, that is, forbearance or other consideration, to support the promise, was not binding or effectual in law. But it is submitted that this objection is fully answered by section 975 of the Code, which says, "that all contracts in writing, signed by the party to be bound, shall import a consideration in the same manner as sealed instruments now do." See also, Linder *v.* Lake,[1] Towsley *v.* Olds,[2] Blake *v.* Blake.[3]

Judgment reversed and cause remanded.[4]

FRYBARGER *v.* COCKEFAIR.

SUPREME COURT, INDIANA, DECEMBER 11, 1861.

[17 *Indiana Reports*, 404.]

APPEAL from the Fayette Circuit Court.

PERKINS, J. — A promissory note was made as follows: —

"$1060. CONNERSVILLE, February 9, 1858.

"Twelve months after date, we promise to pay to the order of W. W. Frybarger, one thousand and sixty dollars, for value received, without relief from valuation or appraisement laws, etc.

(Signed) "SHERMAN SCOFIELD,
"JESSE HATTON."

This indorsement was made thereon: —

"I assign the within to E. Cockefair, for value received.

"W. W. FRYBARGER."

The above note fell due February 9, 1859. Cockefair, the assignee,

[1] 6 Iowa, 164. [2] 6 Iowa, 526. [3] 7 Iowa, 46.

[4] Phillips *v.* Scroggins, 1 St. & P. 28; Click *v.* McAfee, 7 Port. (Ala.), 62; Nesbit *v.* Bradford, 6 Ala. 746; Holman *v.* Norfolk Bank, 12 Ala. 369, 413 (bill for specific performance); Williams *v.* Hall, 90 Cal. 606; Poirier *v.* Gravel, 88 Cal. 79; Henke *v.* Eureka Co., 100 Cal. 429; Younglove *v.* Cunningham, (Cal. 1896) 43 Pac. R. 755; Durland *v.* Pitcairn, 51 Ind. 426; Linder *v.* Lake, 6 Iowa, 164; Towsley *v.* Olds, 6 Iowa, 526; Roller *v.* Ott, 14 Kan. 609; Northern Co. *v.* Oswald, 18 Kan. 336 (bill for specific performance); Sprague *v.* Mo. Co., 34 Kan. 347, 353; McCurdy *v.* Dudley, 1 A. K. Marsh, 288; Caples *v.* Branham, 20 Mo. 244; Glasscock *v.* Glasscock, 66 Mo. 627; Montgomery Co. *v.* Auchley, 92 Mo. 126; Wulze *v.* Schaefer, 37 Mo. Ap. 551; Locher *v.* Kuechenmiester, (Mo. Ap. 1906) 93 S. W. R. 92 *Accord*.

The statutes similar to that of Iowa, are collected in 1 Williston, Cases on Contracts, 332, n. 1. — ED.

commenced suit upon it, August 22, 1859, and obtained judgment on January 21, 1860, in the Fayette Circuit Court. Frybarger answered that the assignment of the note by him to Cockefair was without any consideration, paid or to be paid. To this answer the Court sustained a demurrer. In this the Court erred.[1] Appellee's counsel contend that the error, if it be such, should not reverse the case, because evidence of want of consideration might have been given under the general denial. We think such evidence could not have been given under the general denial. The suit was upon the assignment, a *prima facie* cause of action. Under the new code, want of consideration for a written instrument, of the class which, *prima facie*, imports a consideration, must be specially answered.

PER CURIAM. — The judgment is reversed, with costs.[2]

[1] A general plea of no consideration, without a statement of the circumstances under which the instrument was executed, was adjudged sufficient in the following cases: Giles v. Williams, 3 Ala. 316 (contract by deed — but such a plea bad on special demurrer; Darby v. Berney Bank, 97 Ala. 643); Kolsky v. Enslin, 105 Ala. 97; Milligan v. Pollard, 112 Ala. 465; Ragsdale v. Gresham, 141 Ala. 308; Dickson v. Burk, 6 Ark. 412, 11 Ark. 307 (contract by deed); Cheney v. Higginbotham, 10 Ark. 273 (contract by deed); Taylor v. Purcell, 60 Ark. 606; Barner v. Morehead, 22 Ind. 354; Swope v. Fair, 18 Ind. 300; Conwell v. Clifford, 45 Ind. 392; Bush v. Brown, 49 Ind. 573; Moore v. Boyd, 95 Ind. 134; Fisher v. Fisher, 113 Ind. 474; Ralston v. Bullitt, 3 Bibb, 261 (contract by deed); Boone v. Shackleford, 4 Bibb, 67 (contract by deed); Simpson College v. Bryan, 50 Iowa, 293 (*semble*); Evans v. Stone, 80 Ky. 78; Brown v. Ready, 14 Ky. L. Rep. 583; Pavey v. Pavey, 30 Oh. St. 600; Booco v. Mansfield, 66 Oh. St. 121.

But a general plea of this kind was held bad in substance in Trinder v. Smedley, 3 A. & E. 522; Graham v. Pitman, 3 A. & E. 521; Lacey v. Forrester, 2 C. M. & R. 59 (*semble*); Tittle v. Bonner, 53 Miss. 578, 585. The court, however, would not sustain an objection to such a plea after issue joined upon a traverse of it. Easton v. Pratchett, 2 C. M. & R. 542, 3 Dowl. 472 s. c.; Mills v. Oddy, 2 C. M. & R. 111, 3 Dowl. 722 s. c. — ED.

[2] Easton v. Pratchett, 3 Dowl. 472, 475; Low v. Burrows, 4 Nev. & M. 366; McClintick v. Johnston, 1 McL. 414, 423 (*semble*); Allen v. Dickson, Minor (Ala.), 119 (*semble*); Chamberlain v. Darrington, 4 Port. (Ala.), 515; Young v. Foster, 7 Port. 420 (contract in writing); Holman v. Norfolk Bank, 12 Ala. 369, 413 (contract by deed); Kolsky v. Enslin, 103 Ala. 97 (contract in writing); Milligan v. Pollard, 112 Ala. 465; Rankin v. Badgett, 5 Ark. 348 (contract by deed); Dickson v. Burk, 6 Ark. 412, 11 Ark. 307 (contract by deed); Greer v. George, 8 Ark. 131; Cheney v. Higginbotham, 10 Ark. 273 (contract by deed); Catlin v. Horne, 34 Ark. 169; McCarthy v. Beach, 10 Cal. 461 (contract by deed); Pastene v. Pardini, 135 Cal. 431; Thompson v. Thompson, 140 Cal. 545; Gallagher v. Kiley, 115 Ga. 421; Stacker v. Hewitt, 2 Ill. 207; Rose v. Mortimer, 17 Ill. 475; Sheldon v. Lewis, 97 Ill. 640; McMicken v. Stafford, 197 Ill. 540; Chicago Bank v. Leadfield, 73 Ill. Ap. 73; Mitchell v. Sheldon, 2 Blackf. 185, 186; Bingham v. Kimball, 17 Ind. 396; Frybarger v. Cockefair, 17 Ind. 404; Linder v. Lake, 6 Iowa, 164 (contract in writing); Smith v. Flack, 95 Ind. 116 (contract in writing); Moore v. Boyd, 95 Ind. 134; University v. Livingston, 57 Iowa, 307 (contract in writing); Church v. Donnell, 95 Iowa, 494 (contract in writing); Northern Co. v. Oswald, 18 Kan. 331 (contract in writing); Ralston v. Bullitt, 3 Bibb, 261 (contract by deed); Boone v. Shackleford, 4 Bibb, 67 (contract by deed); Evans v. Stone, 80 Ky. 78; Brown v. Ready, 14 Ky. L. Rep. 583; Kiesewetter v. Kress, 24 Ky. L. Rep. 405; Cox v. Cox, 25 Ky. L. Rep. 1934; Boyer v. Sowles, 109 Mich. 481 (contract by deed); Hollenbeck v. Breakley, 127 Mich. 555 (contract by deed); Matlock v. Livingston, 17 Miss. 489; Taylor v. McNairy, 42 Miss. 276; Montgomery Co. v. Auchley, 92 Mo. 126, 103 Mo. 492; Houck v. Frisbee, 66 Mo. Ap. 16, 22; Sharpless v. Giffen, 47 Neb. 146 (but see Nebraska cases in last paragraph of this note); Kendall v. Brownson, 47 N. H. 186, 192 (*semble*); Rittenhouse v. Creveling, 38 N. Y. St. Rep. 280; Olsen v. Ensign, 7 N. Y. Misc. Rep. 682 (*semble*); Sprague v. Sprague, 80 Hun, 285 (but see *contra* Bringman v. Von Glahn, 71 N. Y. Ap. Div. 537); Howie v. Kasnowits, 83 N. Y. Ap. Div. 295 (*semble* — contract by deed); Pavey v.

PEARLY BALLOU v. ALFRED WELLS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1866.

[12 *Allen*, 485.]

FOSTER, J. The question of pleading presented in this case is the following: The plaintiff declared upon a promissory note; the defendant answered, first, want of consideration; secondly, the statute of limitations. The plaintiff, without any order of court, filed a replication which admitted the note to have been made more than six years prior to the commencement of the action, but alleged an acknowledgment of the debt and a partial payment within that time. The defendant thereupon requested the court to rule that the replication admitted want of consideration, by omitting to deny that averment of the answer. But this prayer was rightly refused. By Gen. Sts. c. 129, § 23, it is provided that "if the answer contains any new matter in avoidance of the action, such new matter shall be deemed to be denied by the plaintiff; or the court may, on motion of the defendant, require the plaintiff to reply thereto, and state whether he admits or denies any, and if any, what part thereof. The plaintiff may if he pleases without such order, at any time before trial, file a replication to the answer, clearly and specifically stating any facts in reply to the new matter therein." The only new matter in this answer was the statute of limitations; the facts in reply to which were a new promise and part payment. This defence is in confession and avoidance of the declaration, and by the old system might have been pleaded specially, and the new promise and part payment relied upon to remove the bar of the statute set forth in a replication. Want of consideration would have been a defence under the plea of *non assumpsit*, requiring only a joinder of issue. It was a denial of a part of the plaintiff's case as to which the burden of proof remained upon him. It was not new matter in avoidance of the action, nor was there any fact to be stated in reply thereto.

Exceptions overruled.[1]

Pavey, 30 Oh. St. 600; Booco v. Mansfield, 66 Oh. St. 121; Louderman v. Judy, 2 Oh. C. C. 351 (contract by deed); Paddock v. Hume, 6 Oreg. 82; Flint v. Phipps, 16 Oreg. 437, 448; Newton v. Newton, 77 Tex. 508; Nat. Bank v. Fook, 12 Utah, 157, 167; McKenzie v. Oreg. Co., 5 Wash. 409 *Accord.*

In jurisdictions in which the absence of consideration is an affirmative defence, the plaintiff may ruin his complaint by alleging facts disclosing the absence of consideration. Roller v. Ott, 14 Kan. 609, 615 (*semble*); Glasscock v. Glasscock, 66 Mo. 627. — ED.

[1] McCallum v. Driggs, 35 Fla. 277; Alden v. Carpenter, 7 Colo. 87; Best v. Rocky Co., 37 Colo. 149; Martin v. Donovan, 15 La. An. 41; Bourne v. Ward, 51 Me. 191; Small v. Clewley, 62 Me. 155; Jones v. Ins. Co., 90 Me. 40, 45; Clark v. Haney, 101 Me. 391, 395; Delano v. Bartlett, 6 Cush. 364; Black Bank v. Edwards, 10 Gray, 387; Morris v. Bowman, 12 Gray, 467; Davis v. Travis, 98 Mass. 222; Perley v. Perley, 144 Mass. 104; Estabrook v. Boyle, 1 All. 412 (*semble*); Huntington v. Shute, 180 Mass. 371; Lombard v. Byrne Co., 194 Mass. 236; Manistee Bank v. Seymour, 64 Mich. 74; Keystone Co. v. Forsyth, 128

HITCHCOCK AND ANOTHER v. PAGE.

SUPERIOR COURT, NEW HAVEN COUNTY, CONNECTICUT, AUGUST TERM, 1791.

[1 *Root*, 293.]

ERROR to reverse a judgment of a justice in an action by Page against Hitchcock and Merriman, declaring that the defendants promised to stop a certain suit which they had or were about to commence against him on a note given by him to said Merriman; or that they would pay all the cost he should be put to thereby. That the defendants, not regarding their promise, did prosecute said suit against him, whereby he was put to cost, which the defendants have never paid, damage £ . Plea — Non assumpsit. Judgment, that the defendants are guilty or did assume and promise and that the plaintiff recover, etc.

Error assigned — That the declaration is insufficient.

Judgment — Manifest error. The declaration is clearly bad, for want of consideration [1] and for want of certainty — and the want of a consideration in an action upon a parole promise, is not aided by the finding of the justice, or by verdict of a jury; for as it is not alleged, it need not be proved on the trial.

Mich. 626, 628; Farnsworth v. Fraser, 137 Mich. 296; Taylor v. Taylor, 138 Mich. 658; Bogie v. Nolan, 96 Mo. 85 (but see Montgomery Co. v. Auchley, 92 Mo. 126, 103 Mo. 492); Search v. Miller, 9 Neb. 26; Smith v. Kinney, 32 Neb. 162 (but see Sharpless v. Giffen, 47 Neb. 146); Bruyn v. Russell, 60 Hun, 280; Bringman v. Von Glahn, 71 N. Y. Ap. Div. 537 (but see New York cases cited *supra* 221 n. 2); Campbell v. McCormac, 90 N. Ca. 491, 492 (*semble* — but see McArthur v. McLeod, 6 Jones (N. Ca.) 475); Conmey v. Macfarlane, 97 Pa. 361; Atlas Bank v. Doyle, 9 R. I. 76; Stevenson v. Gunning, 64 Vt. 601 *Accord*. — ED.

[1] Smith v. Boheme, Gilb. 93; Josselyn v. Lacier, 10 Mod. 294, 316; Jenney v. Herle, 2 Ld. Ray. 1361; Dawkes v. DeLorane, 3 Wils. 213; Carlos v. Fancourt, 5 T. R. 482; Blanckenhagen v. Blundell, 2 B. & Al. 417; Newton v. Brook, 134 Ala. 269; Moore v. Waddle, 34 Cal. 145, 147 (*semble*); McFadden v. Crawford, 39 Cal. 662; Acheson v. Western Co., 96 Cal. 641; Cook v. Bradley, 7 Conn. 57; Connolly v. Cottle, 1 Ill. 364; Post v. Brown, 55 Ill. Ap. 355; Poundstone v. Lewark, 4 Blackf. 173; Wheeler v. Hawkins, 101 Ind. 486; Higham v. Harris, 108 Ind. 246; Decker v. Birhap, Morr. (Iowa), 62; Bruner v. Stout, Hardin, 225; Prior v. Lindsey, 3 Bibb, 76; Hemmenway v. Hickes, 4 Pick. 497; Murdock v. Caldwell, 8 All. 309; Jeffries v. Hager, 18 Mo. 272; Burnet v. Biscoe, 4 Johns. 235; Bailey v. Freeman, 4 Johns. 280; Ford v. Adams, 2 Barb. 349; Speer v. Downing, 34 Barb. 522; Dolcher v. Fry, 37 Barb. 152; Johannessen v. Munroe, 84 Hun, 577 (*semble*); Greene v. Dodge, 2 Oh. 430; Hayden v. Steadman, 3 Oreg. 550; Whitall v. Morse, 5 S. & R. 358; Garvis v. Kendrick, 2 Mills C. R. 339; Douglass v. Davie, 2 McC. 218; Shelton v. Bruce, 9 Yerg. 24; Life Ins. Co. v. Davidge, 51 Tex. 244; Beverly v. Holmes, 4 Munf. 95; Moseley v. Jones, 5 Munf. 23 *Accord*. — ED.

M. B. KEAN *v.* D. MITCHELL.

SUPREME COURT, MICHIGAN, APRIL 26, 1865.

[13 *Michigan Reports*, 207.]

COOLEY, J.[1] Mitchell brought suit against Kean in assumpsit, and declared specially that defendant, on a day and at a place named, "for a good and valuable consideration, then and there paid by said plaintiff to said defendant," bargained and sold to plaintiff certain goods and chattels, and then and there "for the consideration aforesaid," promised and agreed to deliver said goods and chattels to said plaintiff, when thereunto afterwards requested. Breach: a neglect and refusal to deliver. The declaration also contained the common counts. The defendant pleaded the general issue.

On the trial, the defendant objected to the introduction of any evidence under the special counts, for the reason that no consideration was set forth therein for the defendant's promise; but the court overruled the objection, and admitted the evidence offered, and plaintiff had a verdict. The sole question before us is, whether the court was correct in this ruling.

In declaring upon simple contracts, except in those cases where the contracts themselves import a consideration, the rules of pleading require the consideration to be set forth. When that which is stated is clearly insufficient or illegal, the defendant may either demur, or move in arrest of judgment, or support a writ of error. But when the mode in which the consideration is stated is defective, informal, or uncertain, the declaration will be bad upon special demurrer; but after verdict, a defective statement of the consideration will be aided, provided, by a reasonable construction of the whole declaration, it sufficiently appears that there was a consideration capable of supporting the promise.[2]

The consideration is required to be set forth "that the court may see that it is of that kind and nature to sustain the promise." — Lansing *v.* McKillip.[3] It "should be distinctly set out, that the court may judge of it." — Whitall *v.* Morse.[4] And the declaration should

[1] Only a part of the opinion of the court is given. — ED.

[2] 1 Chit. Pl. 300. [3] Caines, 287. [4] 5 S. & R. 361.

"state the whole consideration expressly and formally, correspondent with the facts in the case, and co-extensive with the contract." Hendrick v. Seeley;[1] Treadway v. Nicks[2]

It is obvious that, if the plaintiff may allege, in general terms, that there was a consideration, without specifying in what it consists, it will be impossible for the court to say, from the declaration, whether that which the plaintiff considers a valid consideration is, in fact, one which will support an assumpsit. And it has been held that to allege that the defendant, being indebted to the plaintiff in a sum specified, in consideration thereof, promised to pay, etc., was not sufficient to support a judgment by default, because the cause or consideration upon which the debt was founded was not set forth. — Beauchamp v. Bosworth.[3] See, also, Maury v. Olive,[4] where a similar declaration was held bad on general demurrer.[5] In Parker v. Crane,[6] a declaration for that the defendant, in consideration that the plaintiff had, before that time, sold and conveyed to the defendant a certain farm, undertook and promised, etc., was held bad on demurrer to a plea, because the consideration being past, it was not alleged to have been done at the request of the party promising. And in Goldsby v. Robertson,[7] a special verdict, which set forth the consideration in the same form, was held insufficient to authorize a judgment.

In the present case, the declaration simply avers that the promise was made for a good and valuable consideration. It does not undertake to state in what that consideration consists, and is, therefore, more clearly defective than those in the cases cited. If it is sufficient for the party to state generally that the defendant promised, for a valuable consideration, I see no reason why he should not be allowed to state, in terms but a little more general, and without mentioning a consideration, that the defendant made a valid contract, since a valid contract necessarily includes a sufficient consideration; and this form of declaration would give the court quite as much information on the subject as the other. Whether there was a consideration sufficient to support the promise, is a conclusion of law to be drawn from the facts; but the pleader has omitted the facts entirely, and averred only the conclusion of law.

It is true that, in declaring upon a contract in writing, which, upon its face, purports to be for value received, the instrument has been allowed to be set forth according to its terms, and the recital held a sufficient allegation of consideration.[8] Jerome v. Whitney;[9] Saxton v.

[1] 6 Conn. 179. [2] McCord, 122. [3] 3 Bibb, 115. [4] 2 Stew. 472.

[5] See Tyrwhite v. Kynastan, *supra*, 12, and cases cited in note 1. — Ed.

[6] 6 Wend. 648. [7] 1 Blackf. 247.

[8] Edgerton v. Edgerton, 8 Conn. 6 (*semble*); Bristol v. Warner, 19 Conn. 7 (*semble*); Frank v. Irgens, 27 Minn. 43; Elmquist v. Markoe, 39 Minn. 494; Steinbach v. Brant, 79 Minn. 382, 384; Jerome v. Whitney, 7 Johns. 321 (*semble*); Walrad v. Petrie, 4 Wend. 575; Prindle v. Caruthers, 15 N. Y. 425; Meyer v. Hibsher, 47 N. Y. 265; Leonard v. Sweetzer, 16 Oh. 1; Jones v. Holliday, 11 Tex. 412 (*semble*) (but see Henderson v. Glass, 16 Tex. 559) *Accord*.

Blanckenhagen v. Blundell, 2 B. & Al. 417; Shee v. McGargee, 4 Phila. 7 *Contra*. — Ed.

[9] 7 Johns. 323.

Johnson;[1] Walrad v. Petrie.[2] But the principle of those cases does not apply to the present, which must fall within and be governed by the general rule.

It is clear, therefore, that this declaration, if demurred to, could not have been sustained.[3] It remains to be seen whether the defect therein can be aided by the verdict which has been rendered.

In Hitchcock v. Page, it was held that, where no consideration was alleged in a declaration in assumpsit, the defect was not cured by verdict. I take this to be on the ground that, as the declaration only alleged a naked promise, and as the issue joined upon that would not necessarily require, upon the trial, proof of any consideration, the court would not be at liberty to presume that any such proof had been presented to the jury. To the same effect is Whitall v. Morse.[4]

But, although the allegation of consideration in this declaration would be insufficient on demurrer, or to sustain a judgment by default, I am of the opinion that it may be held sufficient after verdict. At that stage of the cause, the court looks at the issue actually made, to see if it can be fairly presumed that the evidence necessary to establish a case has been given under it, and if so, the court is to make that presumption, and sustain the verdict. The declaration in this case does aver a consideration. The defendant, who had a right to insist that that consideration should be specifically set out, contents himself with pleading the general issue. I think it doing him no injustice to hold that he thereby waived his right to a more specific allegation, and consented that the plaintiff might introduce his evidence of consideration under the declaration as it stood. Had the pleadings put in issue a mere *nudum pactum*, the court could not infer that a legal contract had been proved. But to infer proof of a sufficient contract here, is not going beyond the issue which has been framed, however defective that issue may be; and I, therefore, consider it our duty to sustain the judgment.

The judgment of the court below should be affirmed, with costs.

CHRISTIANCY, J., concurred.

CAMPBELL, J. — I concur with my brother, Cooley, in his views upon the case. I reserve my opinion upon the question whether an absence of any allegation of consideration would be fatal after verdict, without previous objection.

MARTIN, CH. J., was absent.

[1] 10 Johns. 418. [2] 4 Wend. 575.

[3] Wynne v. Colorado Co., 3 Colo. 155; Rossiter v. Marsh, 4 Conn. 196; Leach v. Rhodes, 49 Ind. 291; Jones v. Holliday, 11 Tex. 412; Marshall v. Aiken, 25 Vt. 327 *Accord*. Bank v. Ins. Co., 72 Wis. 535 *Contra*. — ED.

[4] 5 S. & R. 358.

SIMMS v. WESTCOTT.

QUEEN'S BENCH, MICHAELMAS TERM, 1589.

[1 *Croke, Elizabeth*, 147.]

ASSUMPSIT. The plaintiff declares, that in consideration that he at the request of the defendant should marry Elizabeth, the daughter of the defendant, he assumed to pay him 13*l.* 6*s.* 8*d.* after marriage when required, and should have all the hemp growing upon such land, and would give him a bed, and divers other things there expressed; and alleges *in facto* that he had married the said Elizabeth, and the defendant had not paid the 13*l.* 6*s.* 8*d.* nor any of the other things. The defendant pleads a special plea, and traverseth he did not assume *modo et forma.* The jury found he assumed to pay 13*l.* 6*s.* 8*d.* but did not assume any of the other things. — And I moved that the verdict was found for the defendant; for when the plaintiff declares of an assumpsit to do divers things, and the jury find he assumed to do only one of them, the plaintiff hath failed in the assumpsit; for he ought to show the truth of his case, and not to vary from it. — And so was the opinion of WRAY, SCHUTE, and CLENCH. GAWDY, *contra;* and cited 32 Hen. 8 Br. "Verdict" 90. But WRAY said that book was no law, and the contrary had been adjudged in this court. — Afterwards, GAWDY being absent, it was adjudged for the defendant; but the court allowed him no costs; for WRAY said that was in their discretion.[1]

STONE v. KNOWLTON.

SUPREME COURT, NEW YORK, OCTOBER, 1829.

[3 *Wendell*, 374.]

THE plaintiff declared that the defendant, in consideration of the payment of $35, and the plaintiff's promise to pay $3 per ton for the transporation, undertook and agreed with the plaintiff that he would convey and transport a certain quantity, to wit, twenty tons of marble of the said plaintiff from Fort Ann, in the county of Washington, to Weedsport, in the county of Cayuga, and deliver the same at Weedsport. Then followed an averment of the payment of $35, the breach of the contract, and common conclusion.

The contract proved on the trial was that the defendant agreed to transport fifteen or twenty tons of marble for the plaintiff from Fort Ann in Washington county, to Weedsport, in the county of Cayuga.

The defendant's counsel moved that the plaintiff be nonsuited for

[1] If the plaintiff states the consideration truly, but alleges a promise to do one thing, and a breach of that promise, the count is good, although in fact the defendant promised to do other things also. Miles v. Sheward, 8 East, 7; Favor v. Philbrick, 7 N. H. 326; Morrill v. Richey, 18 N. H. 295; Henry v. Cleland, 14 Johns. 400; Sandford v. Halsey, 2 Den. 235; Allen v. Goff, 13 Vt. 148; Ammel v. Noonan, 50 Vt. 402. — ED.

a variance between the contract as proved and as set forth in the declaration. The motion for a nonsuit was denied. The jury found a verdict for the plaintiff for $250; which was now moved to be set aside.[1]

By the Court, MARCY, J. . . . It seems to be well settled that where the contract is in the alternative, and not so set out in the declaration, the variance is material. In the case of Penny *v.* Porter,[2] where the contract for the delivery of one hundred bags of wheat, forty or fifty to be delivered at a particular time, at the option of the defendant, and the defendant afterwards elected to deliver forty, was declared on as a contract for the absolute delivery of forty bags, the variance was held to be fatal. The case of Tate *v.* Whellings[3] is also an authority to show that this variance is material.

Motion for a new trial granted.[4]

CHURCHILL *v.* WILKINS.

KING'S BENCH, NOVEMBER 17, 1786.

[1 *Term Reports*, 447.]

THIS was an action upon the case, tried before Eyre, Baron, at the last Summer Assizes at Oxford, in which the plaintiff declared upon a special agreement of the defendant to sell and deliver to the plaintiff all the fat or tallow that the defendant should have to dispose of for twelve months, in consideration of the plaintiff's agreement to buy the same and pay therefor 4*s.* per stone.

The agreement proved was, That the plaintiff was to give 4*s.* per stone, and if he gave any other person more, he was to give the same to the defendant. Upon which Eyre, Baron, being of opinion that this was a material variance, nonsuited the plaintiff.[5]

Plumer showed cause against a rule which had been obtained for setting this nonsuit aside. In order to maintain this action, the plaintiff ought to have stated in his declaration the entire contract: but he has omitted to set forth a most essential part, namely, the whole consideration of the promise, which is now only partially set forth. If the consideration proved is different from that which is laid, it is a fatal variance.

ASHHURST, J. This nonsuit is proper. It was incumbent on the plaintiff to state his case truly. But the contract, as stated, is different in sense from that which is proved. For a contract, that the defendant shall deliver all his tallow at a particular price, is not the same as a contract, that he shall deliver it at that price, or at a greater, on the happening of a particular event. The plaintiff should have

[1] The statement of the case is abridged and only a part of the opinion is given. — ED.
[2] 2 East, 2. [3] 3 T. R. 531.
[4] Shipman *v.* Saunders, 2 East, 3 n. (a); Penny *v.* Porter, 2 East, 2 *Accord.* — ED.
[5] The statement of facts and the argument for the defendant have been abridged. The argument for the plaintiff and the concurring judgment of BULLER, J. are omitted. — ED

stated the whole, and then have averred that he had not given more than 4*s.* per stone to any other person, and that he was ready to have paid that sum.

Rule discharged.[1]

D. STANWOOD *v.* J. SCOVEL AND TRUSTEE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1827.

[4 *Pickering*, 422.]

ASSUMPSIT against the maker of a promissory note, dated August 27, 1822, payable to Ezekiel Scovel or order on demand, and by him indorsed to the plaintiff. The declaration set forth an indorsement in common form, but at the trial the writing upon the note appeared to be as follows: "Sept. 19th, 1822. Pay the contents &c. to D. S. or order, provided he makes no demand for the payment thereof before one year from the date aforesaid." The action was commenced in 1824. The defendant objected to the admission of the note in evidence, because of the variance, but PARKER, C. J. overruled the objection, and a verdict was found for the plaintiff.

WILDE, J. delivered the opinion of the court.[2] It is a familiar and well-settled rule of pleading, that in declaring on a contract, the plaintiff is bound to describe it truly, and according to its legal effect; and that any material variance, however trivial, will be fatal; and that the defendant may take advantage of it on the general issue.

It is not, however, always necessary or proper to set out the entire contract, for this, when it consists of several distinct parts, might lead to unnecessary prolixity. It is sufficient to state such parts only as are material to the action. But if the parts omitted go to qualify the parts set out in the declaration, and are essential to the plaintiff's title, the omission will be fatal. Whatever forms a constituent part of the plaintiff's title must be truly described. A contract, therefore, in the alternative, must be so stated in the declaration. And so a conditional contract must not be set out as an absolute one, although it should appear by evidence, that the condition had been performed; unless the condition be merely a defeasance of the contract, in which case it is considered as matter of defence, and may be omitted in the declaration.[3]

According to these rules of pleadings, the declaration in this case is clearly defective, and is not supported by the evidence.

Verdict set aside and new trial granted.[4]

[1] Durston *v.* Tuthan, 3 T. R. 67, n.; Blythe *v.* Bampton, 11 Moo. 387; Cross *v.* Bartlett, 3 Moo. 537 *Accord.* — ED.

[2] Only a part of the opinion of the court is given. Parker, C. J. dissented. — ED.

[3] 6 East, 570; 8 East, 8; 2 East 2; Doug. 696.

[4] Mustard *v.* Hopper, Cro. El. 149; Horsefall *v.* Testar, 7 Taunt. 385; Sicklemore *v.* Thistleton, 6 M. & Sel. 9; Brind *v.* Dale, 2 M. & W. 775; Dawson *v.* Wrench, 3 Ex. 359; Griffin *v.* Bass Co., 135 Ala. 490; Powers *v.* Insurance Co., 68 Vt. 390 *Accord.* — ED.

SIEVEKING AND ANOTHER v. DUTTON.

COMMON PLEAS, JUNE 11, 1846.

[*Reported in 3 Common Bench Reports*, 331.]

ASSUMPSIT. The first count of the declaration stated that the plaintiffs, at the request of the defendant, agreed to supply the defendant, and the defendant ordered of the plaintiffs, divers large quantities of wool, to be purchased by him upon certain terms, that is to say, [one hundred and thirty-one bales at 2*s.* 7*d.*;][1] that, in consideration thereof, and that the plaintiffs, at the like request of the defendant, then promised the defendant to deliver the said quantities of goods to the defendant, according to the said contract, the defendant then promised the plaintiffs to accept the said goods, and to pay for the same according to the terms of the said contract. Averment, that the plaintiff had always been ready and willing, and afterwards, to wit, on, &c., tendered and offered to deliver the said goods to the defendant, according to the terms of the said contract, &c. Breach, that the defendant refused to accept them.

Plea, that, at the time of the defendant's ordering the said quantities of wool, and making the said promise, as in the first count of the declaration alleged, the plaintiffs produced and showed to the defendant a certain sample of the said wool, and then promised the defendant to deliver the said quantities of wool to the defendant, and that the whole of the said quantities of wool were equal in quality and description to the said sample; that the defendant then ordered the said quantities of wool, and made the said promise, as in the said first count mentioned, on the faith and terms, and in consideration of the said promise of the plaintiffs, and not otherwise; but that the said quantities of wool, at the time when they were so offered and tendered for delivery by the plaintiffs as in the said first count mentioned, were not equal in quality and description to the said sample, but, on the contrary thereof, the same were of a very inferior and bad and indifferent quality and description, and of much less value, and of no use or value to the defendant; whereupon and wherefore the defendant then refused to accept the said wool, or pay for the same; as he lawfully might, &c. Verification.

To this plea the plaintiffs demurred specially, on the ground, amongst others, that it amounted to non-assumpsit.

Dowling, Serjt., in support of the demurrer. The declaration alleges an absolute contract on the part of the defendant to receive the wool, without any condition as to quality, or any specific description. The plea alleges that the contract was for a sale of wool, with a warranty that the bulk was equal to sample: that introduces a qualification into the contract, and amounts to a mere denial of the contract

[1] The bracketed words are taken from the report in 15 L. J. C. P. 276. — ED.

declared on. Morgan v. Pebrer;[1] Nash v. Breeze;[2] Heath v. Durant.[3]

Channel, Serjt., *contra*. Had this been pleaded to a count in *indebitatus assumpsit* for goods sold and delivered, or goods bargained and sold, the plea would undoubtedly have been open to the objection suggested. But the difficulty here arises from the new rules, which provide that the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matter of fact from which the contract or promise alleged may be implied in law. This plea does not deny the express contract alleged in the declaration; on the contrary, it admits it; and it seeks to justify the refusal to accept the wool, by showing that it differed in quality from that which the plaintiffs contracted to deliver. [MAULE, J. The contract stated in the declaration is for the delivery of wool of a merchantable quality. TINDAL, C. J. Upon non-assumpsit the plaintiffs would be non-suited, if they proved a contract other than that alleged. CRESSWELL, J., referred to Parker v. Palmer.[4] MAULE, J. If issue were taken on the tender, the plaintiffs would fail unless they proved a tender of wool of the quality and description ordered.] The plea, at all events, complies with the spirit of the new rules. [MAULE, J. The defendant should certainly be allowed to plead this defence, if it is not open to him under non-assumpsit.]

Dowling, Serjt., in reply. The plea in question clearly amounts to no more than a denial of the contract alleged in the declaration. [TINDAL, C. J. The contract set up by the plea is not necessarily incompatible with that stated in the declaration.] It is difficult to see how the two could coexist. [MAULE, J., referred to Street v. Blay.[5]]

The court, after some deliberation, were about to pronounce judgment in favor of the plea, when *Dowling*, Serjt., prayed leave to withdraw the demurrer; which was granted, upon the usual terms.

Rule accordingly.[6]

VAVASOUR v. ORMROD.

KING'S BENCH, MAY 3, 1827.

[6 *Barnewall & Cresswell*, 430.]

DECLARATION stated, that by a certain indenture between the plaintiff and one J. S. (profert of which was made) plaintiff did demise, lease, and set unto J. S., his executors, administrators, and assigns, certain tenements, to hold, &c., "yielding and paying therefore the

[1] 3 N. C. 457; 4 Scott, 230. [2] 11 M. & W. 352. [3] 12 M. & W. 438.
[4] 4 B. & Ald. 387. [5] 2 B. & Ad. 456.
[6] See Parker v. Palmer, 4 B. & Ald. 387; Sharland v. Leifchild, 4 C. B. 529; Weeden v. Woodbridge, 13 Q. B. 462. — ED.

yearly rent of 160*l.*, by two even and equal portions in each and every year during the said term, that is to say, on, &c.," as by the said indenture, reference thereunto being had, would more fully and at large appear. The entry of J. S. was then stated; his assignment to the defendants, their entry, and that rent had accrued for certain periods since. Plea, *nil debet*. At the trial before Hullock, B., at the last Lancaster Spring assizes, the reservation of rent appeared, on the production of the indenture, to be in the following words: "Yielding and paying during the said term (except as hereinafter mentioned);" and then the reservation was as stated in the declaration. In a later part of the lease was a covenant, that the lessor should lay out 600*l.* in erecting a steam-engine. In a still later part was a proviso, that in case the lessee should, within three years, pay the lessor 300*l.*, in part discharge of the 600*l.* so to be laid out by the lessor, then the rent of 160*l.* should be reduced to 130*l.*; and that if the remaining 300*l.* were paid within six years, the rent should be reduced to 100*l.* No evidence of payment of any part of the 600*l.* was given. It was objected by Scarlett and Parke, on the part of the defendant, that there was a variance. It was, they contended, clearly established, that upon a plea of *non est factum* to a lease, an exception in a reservation or covenant, not noticed, creates a variance, although a distinct proviso, if not insisted upon, need not be noticed;[1] and that although the proviso itself in this case were a distinct one, the exception referring to it was in the body of the reservation, which reservation must, therefore, be read as if it had contained the proviso in the form of an exception; that this, therefore, would have been a variance on a plea of *non est factum*, and that *nil debet* put in issue the execution of the indenture stated in the declaration as much as a plea of *non est factum*. On the part of the plaintiffs it was admitted that the reservation should be read as if it contained the proviso in the form of an exception, but it was contended that the distinction between a proviso and an exception did not depend upon the mere form of expression; and that this was a proviso in its nature, for the event might or might not occur; and here it actually had not occurred. The supposed exception was to be a nullity, except on the occurrence of a particular event; and as that had not occurred, it was a nullity, and was properly omitted in the recital of the reservation set out. In instruments in general, no more need be noticed in the declaration than that upon which the plaintiff proposes to rely. The learned judge was of opinion that this was an exception; and that as by the terms of the reservation the whole rent was to be paid only under particular circumstances, such a limitation should have been noticed; although a proviso for a distinct purpose, as for reëntry on non-payment, would stand on a different ground. The plaintiff was therefore nonsuited.

F. Pollock now moved to set aside the nonsuit, and contended, that the clause in the subsequent part of the lease referred to in the red-

[1] 1 Saund. 234, note (2) c. 5th edit.

dendum was a proviso, and not an exception, and that it was unnecessary for the plaintiff to declare upon any more of the deed than the reservation; and it was for the defendant to show the proviso which was in defeasance of the covenants. He cited Elliott v. Blake,[1] Hotham v. The East India Company.[2]

Lord Tenterden, C. J. If an act of parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must in pleading state it with the exception; and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance. This is a middle case. Here the exception is not in express terms introduced into the reservation, but by reference only to some subsequent matter in the instrument. The words are "except as hereinafter mentioned." The rule here applies, "Verba relata inesse videntur." And the clause *thereinafter mentioned* must be considered as an exception in the general clause, by which the rent is reserved;[3] and then, according to the rule above laid down, the plaintiff ought in his declaration to have stated the reservation and the exception. Not having done so, I am of opinion that the variance is fatal, and that there is no ground for setting aside the nonsuit.

Rule refused.

TEEL v. YETTES and Another.

Supreme Court, New York, May, 1809.

[4 *Johnson*, 304.]

This was an action of debt, on the 8th section of the act (24th sess. c. 87)[4] to prevent and punish champerty and maintenance, in which there is the following *proviso:* "That it shall be lawful for any person, being in lawful possession, by taking the yearly rents or profits of any lands, tenements, or hereditaments, to buy or obtain, by any reasonable ways or means, the pretended right or title of any other person thereto." The declaration in this case did not negative the

[1] 1 Lev. 88. [2] 1 T. R. 638, 645.

[3] Coolidge v. Continental Co., 67 Vt. 14 *Accord.*

Southwell's Case, Poph. 93; Ward v. Bird, 2 Chit. 582; Hart v. Cleis, 8 Johns. 41; Fleming v. People, 27 N. Y. 329 *Contra.* — Ed.

[4] 2 Rev. Stat. 691.

proviso: and a verdict having been found for the plaintiff, a motion was made in arrest of judgment.[1]

VAN NESS, J., delivered the opinion of the court. The rule is this: If the *proviso* furnishes matter of excuse for the defendant, it need not be negatived in the declaration, but he must plead it. Such is the *proviso* in the present case. It forms no part of the plaintiff's title, and affords merely an excuse to the defendant, if he had come within its purview. It would be unnecessary to proceed further, were it not that these cases are apparently irreconcilable, and it is desirable that the law should be finally and correctly settled. Serjeant *Williams*, in his note to 1 Saund. 262, says, "But when the exemption is contained under the proviso to a subsequent section or act of parliament, it is matter of defence, and, therefore, it is not necessary to state in the declaration, that the defendant is not within such proviso." The only inaccuracy in this remark consists in restricting the rule to provisos contained in a subsequent section or statute, which was not warranted by the cases. In Jones *v.* Axten,[2] TREBY, CH. J., with the concurrence of the rest of the court says, "that where an exception is incorporated in the body of the clause, he who pleads the clause ought to plead the exception;[3] but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to show the proviso." The same distinction is adopted in the case of the King *v.* Bryan,[4] that when the offence is brought within the enacting clause, and the justification comes in by way of *proviso* or exception, in the first case, it is matter of defence to be shown by the defendant; in the other case, the exception must be negatived. In Spieres *v.* Parker,[5] all the judges agree that the rule is, that any one who will bring an action for a penalty on an act of parliament, must show himself entitled under the enacting clause; and if there be a subsequent exemption, that is a matter of defence, and the other party must show it to protect himself against the penalty.

The court are of opinion, therefore, that the motion must be denied.

Motion denied.[6]

[1] The arguments and a part of the opinion are omitted. — ED.

[2] 1 Ld. Ray. 119.

[3] Spieres *v.* Parker, 1 T. R. 141; King *v.* Pratten, 6 T. R. 559; Tennant *v.* Cumberland, 1 E. & B. 401; Smith *v.* U. S., 1 Gall. 261; Guptill *v.* Richardson, 62 Me. 257, 263; Commw. *v.* Maxwell, 2 Pick. 138; Myers *v.* Clark, 12 Mich. 63, 71; Clough *v.* Shepherd, 31 N. H. 490, 494; Bennett *v.* Hurd, 3 Johns. 438; Harris *v.* White, 81 N. Y. 532; Reynolds *v.* State, 2 N. & McC. 365 *Accord.* — ED.

[4] 2 Str. 1101.

[5] 1 Term Rep. 141.

[6] Jones *v.* Axten, 1 Ld. Ray. 110; Whitwell *v.* Osbaston, 1 Lev. 26; King *v.* Bryan, 2 Stra. 1101; Steele *v.* Smith, 1 B. & Al. 94; Grand Co. *v.* White, 8 M. & W. 221; Thibault *v.* Gibson, 12 M. & W. 88; U. S. *v.* Cook, 27 Wall. 168; Schlemmer *v.* Buffalo Co., 205 U. S. 1; U. S. *v.* Atlantic Co., 153 Fed. R. 918; Muller's Case, 4 Ct. Cl. 61; Brinkly *v.* Jackson, 2 Houst. 71; Commw. *v.* Hart, 11 Cush. 130; Gould *v.* Kelley, 16 N. H. 562; Sheldon *v.* Clark, 1 Johns. 513; Hart *v.* Cleis, 8 Johns. 41; People *v.* Kibler, 106 N. Y. 321; People *v.* Briggs, 114 N. Y. 56; Rowell *v.* Janvrin, 151 N. Y. 60; People *v.* Scannell, 172 N. Y. 316; State *v.* Norman, 2 Dev. 222 *Accord.* — ED.

BROWNE *v.* KNILL.

COMMON PLEAS, JANUARY 26, 1821.

[2 *Broderip & Bingham*, 395.]

COVENANT on a lease for not repairing the premises. The covenant was stated in the declaration to be, that the defendant "should and would well and sufficiently repair and keep the said premises in all needful repair when, where, and so often as occasion should require." Plea, *non est factum*. The lease produced in evidence contained the words above set forth, with the addition of the following qualification, "casualties by fire excepted." At the trial before Dallas, C. J., it was objected for the defendant, that this variance was fatal, and Dallas, C. J., non-suited the plaintiff.[1]

Vaughan, Serjt., now moved to set aside this nonsuit, and have a new trial, urging that the qualification of the covenant need not be stated in pleading, unless it constituted a condition precedent; it was sufficient if the plaintiff disclosed enough to entitle him to recover. If the qualification constituted a condition subsequent, as it did here, it might be pleaded as matter of defence, but could not be taken advantage of on *non est factum*.

Sed per Curiam. You are bound to set out the covenant truly: the distinction is, whether the qualification forms part of the covenant or not: if it forms part of the covenant, it must be set out, if not, it may be omitted; here it is part of the covenant which you state to be an absolute covenant, whereas it turns out to be qualified.

Rule refused.[2]

SMART *v.* HYDE.

IN THE EXCHEQUER, TRINITY TERM, 1841.

[8 *Messon & Welsby*, 723.]

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff would buy of the defendant a mare at a certain price, the de-

[1] The statement and argument are slightly curtailed. — ED.

[2] Tempany *v.* Burnand, 4 Camp. 20 (covenant to repair, "fire and all other casualties excepted"); Latham *v.* Rutley, 2 B. & C. 20 (carrier's promise to deliver safely, "fire and robbery excepted," approved in White *v.* Gr. West. Co., 2 C. B. N. S. 7); Jones *v.* Conley, 4 B. & C. 445 (warranty that horse was sound everywhere "except the kick on the leg"); Hemming *v.* Parry, 6 C. & P. 580 (warranty that horse was sound everywhere "except in one foot"); Camp *v.* Hartford Co., 43 Conn. 333 (similar to Latham *v.* Rutley, *supra*); Scott *v.* Whipple, 6 Me. 425 (covenant to build a dam within three months, "unavoidable accidents excepted"); Ferguson *v.* Cappeau, 6 Har. & J. 394 (carrier's promise to deliver in good order, "the dangers of the sea only excepted"); Sohier *v.* Norwich Co., 11 Cush. 336 (insurance policy interpreted as equivalent to a promise to insure against damage by fire "not originating in the theatre proper"); Sandford *v.* Halsey, 2 Den. 235, 255 (*semble*); Davidson *v.* Graham, 2 Oh. St. 131 (carrier's contract to deliver, "damage from the river, fire, and unavoidable accident excepted"); Stump *v.* Hutchinson, 11 Pa. 533 (carrier's promise to deliver, "the dangers of the river and fire excepted") *Accord*.

Compare Fraser *v.* Grand Trunk Co., 26 Ap. Cas. Q. B. 488. — ED.

fendant promised the plaintiff that the mare was sound, and averred as a breach that the mare was not sound.

The defendant pleaded, amongst other pleas, thirdly, that, before the promise, he the defendant sent the mare to a certain place for the sale of horses, called Lucas's Repository, there to be sold according to certain rules, which were in the words following: "Terms of private sale. A warranty of soundness, when given at this repository, will remain in force until twelve o'clock at noon of the day next after the day of sale, when it will be complete, and the responsibility of the seller will terminate, unless in the mean time a notice to the contrary, accompanied by the certificate of a veterinary surgeon, be delivered at the office of R. Lucas; such certificate to set forth the cause, nature, or description of any alleged unsoundness;" of all which the plaintiff, before and at the time of making the said promise, had notice. The plea then averred that the sale was a private sale, and that the promise, and the buying from the defendant, took place subject to the said rules and regulations touching the private sale of horses, and that the same were agreed to by the parties; and although the time limited by the said rules for the delivery of the notice and certificate had elapsed before the commencement of this suit, yet no such notice or certificate had been delivered by or for the plaintiff, at the office of the said R. Lucas. Verification.

Special demurrer, assigning for causes, that the plea amounted to the general issue; that whereas the plaintiff had declared on an absolute and unqualified undertaking that the mare was sound, the defendant had not confessed and avoided the same, nor had directly denied such promise, but had stated matters for the purpose of qualifying such promise, and of showing that the warranty remained in force only until twelve at noon of the day after the sale, and was a warranty against such unsoundness only as the plaintiff might discover within such period.

Crompton, in support of the demurrer. The plea attempts to show that there was a qualification of the warranty, and that the contract was different from that declared upon, and it therefore amounts to the general issue. [PARKE, B. The warranty, as set out in the declaration, is an absolute one. The plea admits the statement in the declaration, but sets out new facts, for the purpose of showing that there was no breach of contract; it does not deny a sale of the horse, or the warranty that the horse was sound.] On the warranty stated in the plea, there is to be no responsibility at all in certain cases, and that is a qualification which might have been given in evidence under the general issue. In Bywater *v.* Richardson,[1] where there was a similar condition, Littledale, J., treats it as a qualified warranty. [PARKE, B. You say that the contract which would have to be proved would vary from that stated in the declaration, and therefore might be given in evidence under the general issue.] Yes. In Latham *v.*

[1] 1 Ad. & Ell. 508; 3 Nev. & M. 743.

Rutley,[1] the declaration stated a contract to carry goods from London, and deliver them safely at Dover; the contract proved was to carry and deliver safely, fire and robbery excepted; and it was held to be a variance. Here the contract stated in the declaration is, that the defendant will be generally answerable for the unsoundness of the mare; but the contract stated in the plea is, that he will not be answerable at all, if the act be not done within a given time. In Latham *v.* Rutley, Abbott, C. J., says, "The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made that, under certain circumstances, he shall not be liable at all, that must be stated." [PARKE, B. The contract there stated was a contract to carry the goods safely, not a limited contract, if the goods were not affected by fire or robbery. Here the contract alleged is, that the defendant undertook that the mare was sound: that he is to be responsible if unsound is merely an inference from that.] Where a condition merely limits the amount of damages, it is true that it need not be stated in the declaration: Clarke *v.* Gray;[2] but where the contract, as in this case, is qualified by conditions, it is a variance to state it as absolute in its terms. In Howell *v.* Richards,[3] it was held that, if a covenant for quiet enjoyment be restrained by any qualifying context, it must be stated, and if not, that the defendant might take advantage of it under the plea of the general issue, as being an untrue statement of the deed in substance and effect. Tempany *v.* Burnaud[4] and Browne *v.* Knill[5] are authorities to the same effect. In Whittaker *v.* Mason,[6] the plaintiff declared upon a contract of sale of certain books; the defendant pleaded that the books were sold subject and according to the usage and course of dealing observed among booksellers in London; to which the plaintiffs replied *de injuria;* and on demurrer to the replication, it was held that the plea in effect amounted to the general issue. [PARKE, B. There the plea set up a different contract; here the plea does not alter the consideration or the promise.] The omission to state the qualification entirely alters the legal effect of the contract. The case is distinguishable from Syms *v.* Chaplin,[7] which was an action against a coach proprietor for the loss of a parcel above the value of £10; for the omission to declare the value of the parcel did not qualify the nature of the contract, but was a matter which avoided it, and therefore required to be specially pleaded. The general rule is, that contracts are entire, and it is only an exception to that rule, that where a part of the contract does not affect the rest which is declared upon, such part need not be stated.

J. Henderson, Contra.

PARKE, B. I am of opinion that the plea is a good plea, and that the defendant is entitled to judgment. The declaration states that, in consideration that the plaintiff would buy a mare of the defend-

[1] B. & Cr. 20; 3 D. & R. 211.
[2] 6 East, 564.
[3] 4 Campb. 20.
[4] 2 Bing. N. C. 359; 2 Scott, 567.
[5] 11 East, 633.
[6] 2 Brod. & B. 395.
[7] 5 Ad. & Ell. 634; 1 Nev. & P. 129.

ant, the defendant promised that she was sound. Then there is a special plea, which states, that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which provided that the warranty of soundness was to remain in force up to a certain time only, unless notice of the unsoundness was in the mean time given; and it goes on to aver that the sale took place subject to those rules, and that no notice was delivered within the time specified. It appears to me that such plea is not bad as amounting to the general issue. It admits the contract and the promise, but shows it to have been made subject to certain rules which have not been complied with. What is the meaning of those terms? It seems to me to be this, that the warranty shall be deemed to have been complied with, unless a notice and certificate shall be delivered to the vendor before twelve o'clock at noon of the day next after the day of the sale. That is not a denial of the warranty, but a mere condition annexed to it. No notice and certificate were delivered, and therefore the contract is to be considered as complied with. If the matter relating to the notice had been by way of proviso upon the warranty it might perhaps have been necessary to state it in the declaration; but upon that point I give no opinion. It is enough to say that every word of this plea is consistent with the contract stated in the declaration.

ALDERSON, B. The meaning of the plea is, that there was a sort of conventional warranty of soundness, and that the warranty was to be considered as complied with, unless a notice and certificate of unsoundness were given within a certain time, which was not done. That is not a denial of the contract, as alleged in the declaration.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant.[1]

[1] Elliott v. Blake, 1 Lev. 88 (covenant to deliver goods by such a day. Proviso that if any mischance happened by fire or water, covenantor should be excused; Hotham v. E. I. Co., 1 T. R. 638 (promise to allow for short tonnage — not to be allowed if a certain survey was not taken); Gordon v. Gordon, 1 Stark. 294 (covenant to pay annuity — not to be payable if covenantor should be evicted from certain premises); Jewett v. Lyon, 3 Greene, Iowa, 577 (note to be reduced if land for which it was given measures short); Supreme Lodge v. Knight, 117 Ind. 489 (insurance policy — amount payable to be reduced if the number of persons insured dropped below a certain limit); People's Society v. McKay, 141 Ind. 415 (like preceding case); People's Society v. Werner, 6 Ind. Ap. 614 (like preceding case); McGrath v. Crouse, 6 Kan. Ap. 507 (stipulation that all disputes as to prices of stock shall be settled by an umpire); Highland Co. v. Long, 7 Kan. Ap. 173 (note to be void if after five years a second professorship is not endowed at Highland University); Gray v. Gardner, 17 Mass. 188 (promise to pay money "to be void if a certain quantity of sperm oil arrived at New Bedford within a certain time"); Kingsley v. N. E. Co., 8 Cush. 393 (fire policy "on condition that the applicants take all risk from cotton waste"); Root v. Childs, 68 Minn. 142 (written contract to be void if A's title to certain property fails; Baxter v. Brooklyn Co., 119 N. Y. 450 (statutory notice of non-payment of insurance premium and lapse of thirty days thereafter); Wilmington Co. v. Robeson, 5 Ired. 391 (subscription for stock — subscriber to be allowed to withdraw if a sufficient subscription is not raised by a certain date); Speer v. Cowles, 72 N. Ca. 265 (contract to be void in case of accident or want of integrity on the part of A); Mullen v. Mut. Co., 89 Tex. 259 (like Baxter v. Brooklyn Co., *supra*); Medlan v. Abeel (Tex. Civ. Ap. 1898), 47 S. E. R. 1041 (note to be void if title to property fails) *Accord.*

See Clarke v. Gray, 6 East, 564; Sharland v. Leifchild, 4 C. B. 533; Weedon v. Woodbridge, 13 Q. B. 462.

METZNER v. BOLTON.

EXCHEQUER, HILARY TERM, 1854.

[9 *Exchequer Reports*, 518.]

THE declaration stated that, in consideration that the plaintiff would enter the service of the defendant as a commercial traveller for one year, the defendant agreed to employ the plaintiff in the capacity aforesaid, at and for the yearly salary of £150, and to continue him in such service for one whole year. Averments, that the plaintiff entered into the service of the defendant in the capacity and on the terms aforesaid, and continued in such service until a certain day before the expiration of the year. Breach, that although the plaintiff was ready and willing to continue in the service of the defendant, yet the defendant wrongfully dismissed him therefrom.

Plea, non-assumpsit.

At the trial before MARTIN, B., at the London sittings after last Trinity term, the plaintiff was examined, and proved that he and the defendant met at a hotel in London, when an agreement was come to between them precisely as stated in the declaration; that he entered into the employment, and went a journey into the west of England, after which the defendant dismissed him within the year, upon a ground which turned out to be unfounded. On cross-examination, the plaintiff admitted that there was a usage in the trade in which the plaintiff was so employed, that in any yearly hiring of a traveller either party might put an end to the employment on giving three months' notice.

It was objected on behalf of the defendant that, under these circumstances, if such usage was proved to exist so generally as that it was to be considered as imported into the contract of hiring, there would be a misdescription of the contract, and a variance upon non-assumpsit. The learned judge thought that the contract being for a year was proved according to the allegation, and that the power to determine it, coming by way of defeasance of the contract, need not be noticed by the plaintiff, but must be pleaded and proved by the defendant. The plaintiff's counsel then agreed that it should be taken as a fact that the engagement was so determinable; and the question of damages having been left to the jury, they found a verdict for the plaintiff for £56.

A rule *nisi* having been obtained to set aside the verdict, and for a new trial, on the ground of misdirection,

In a few cases the courts seem to have gone to extreme lengths in finding in the language used a condition subsequent in form rather than a condition precedent. Grisold v. Scott, 13 Ga. 210 (sale of cotton gin for $80 to be paid if it works well — interpreted as a sale with a contingent right of rescission); Freeman v. Travelers Co., 144 Mass. 572 (insurance policy against accident. Insured is required to use all due diligence for his personal safety ". . . provisions and conditions and a strict compliance therewith . . . are conditions precedent to the making of this contract"); Fuller v. N. Y. Co., 184 Mass. 12 (like preceding case). — ED.

Prentice showed cause in Hilary term (January 17). There is no misdescription of the contract. With respect to a covenant or a statute, the rule of law is clear. In declaring on a covenant it is not necessary to notice a proviso or condition subsequent; though it is otherwise where the exception is contained in the covenant itself. Vavasour *v.* Ormrod. So where a statute imposes a penalty, and in a subsequent clause there is an exemption, that must come by way of plea. Chitty on Pleading, vol. i, p. 245 (7th ed.). This is a middle case. The contract is to employ for a year; but it is sought to import into it the usage of trade to determine the employment by three months' notice. That custom is in the nature of a proviso or condition subsequent in a deed, and should therefore be pleaded. In the case of a tenancy from year to year, the law implies that it may be determined by proper notice; but in declaring on such a contract, it is not necessary to show how it may be determined. [PARKE, B. It is stated as a tenancy from year to year for so long as both parties shall agree.] This resembles the case of a lease for seven years, with a proviso for determining it at the end of the first year; and in declaring on such a lease the proviso need not be noticed. [ALDERSON, B. When a person hires a domestic servant, though nothing is said about notice, it is plain that, according to the custom of England, it is a hiring for a year, with liberty to put an end to the contract by giving a month's notice. So in making this contract the parties must be supposed to be speaking according to the custom of the trade; and the plaintiff would say to the defendant, "I agree to hire you for a year, provided that if I give you three months' notice the contract shall be put an end to." That is not an absolute hiring for a year certain.] Smart *v.* Hyde is an authority that if the custom relied on in this case had been pleaded, the plea would not have been bad as an argumentative denial of the contract. In Weedon *v.* Woodbridge,[1] the plea set up a consideration for the promise materially different from that stated in the declaration, and yet it was held not to amount to the general issue. It is said that the defendant is prejudiced by this mode of declaring, because he cannot pay money into court without admitting the contract; but that objection would equally apply to a declaration against a carrier for the loss of goods, which may be in the common form, notwithstanding he has by notice limited his responsibility to a particular amount. Clarke *v.* Gray.[2]

T. Jones, in support of the rule. The doctrine as to provisos and exceptions, which is not disputed, has never been applied to declarations on parol contracts. The observations of Lord Tenterden in Vavasour *v.* Ormrod are confined to instruments under seal. The true test in this case is, whether a plea that the employment was determinable by three months' notice would, before the Common Law Procedure Act, have been bad as amounting to the general issue. It is submitted that it would, inasmuch as it would have set up a con-

[1] 13 Q. B. 462. [2] 6 East, 534.

tract inconsistent with that alleged. The declaration states an absolute contract, whereas the plea would show that it was conditional. Nash *v.* Breeze [1] and Sharland *v.* Leifchild [2] are express authorities that a plea which introduces matter qualifying the contract stated in the declaration is bad as amounting to the general issue. In Smart *v.* Hyde, the matter pleaded did not contradict the contract, but was something collateral to it. Baxter *v.* Nourse [3] affords a strong instance of the admissibility of evidence for the purpose of explaining a contract by usage. Here the contract was, that the service should only last so long as either party refrained from giving the other three months' notice, and that is totally inconsistent with the statement in the declaration that the plaintiff agreed to continue the defendant in his service for one whole year. *Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE, B. This case was argued during last term, upon showing cause against a rule for a new trial of a cause tried before my brother Martin. My Lord Chief Baron, my brothers Alderson, Martin, and myself were present. It was an action of assumpsit. His Lordship then stated the pleadings, facts, and ruling of the learned judge, as above set forth. We think that this ruling of the learned judge cannot be supported.

It is quite certain that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly or impliedly exclude them. This, therefore, must be considered as a contract for the defendant to hire, and the plaintiff to serve for a year, determinable on three months' notice. Whittaker *v.* Mason.[4] And the question is, whether in this form of action this power of determining the contract need be noticed by the plaintiff in describing it. In an action of covenant on an instrument under seal, consisting of several causes, there is no doubt the plaintiff may declare upon so much of the deed as contains the covenant on which he proceeds, which is obligatory because it is under seal; and it is for the defendant to show the proviso, if any, which defeats it. See 1 Saunders, 233 *a*, note. So, where an interest or estate passes presently, and is to be divested by matter subsequent, it is enough to state the estate which vested; and the matter defeating it must be pleaded by the party who would take advantage of it. Ughtred's Case.[5] But this is not either the description of a covenant under seal, or of a vested estate or interest, but of the substance and effect of a parol contract between the parties, and a defeasible contract cannot correctly be described as an absolute one.

It is not true that the defendant undertook to employ the plaintiff for a year in consideration of the plaintiff's services for a year, for the true contract was, that the defendant would employ him for a year,

[1] 11 M. & W. 354. [2] 4 C. B. 529. [3] 6 Man. & G. 935.
[4] 2 Bing. N. C. 350. [5] 7 Rep. 9 b.

determinable at any time by three months' notice, in consideration of the plaintiff serving him for that time. And if, instead of stating the contract in this short form, it had been expanded into a statement of a contract with mutual promises, the whole to be done on each side must have been stated, and it would have been clearly a variance to allege that the contract on the plaintiff's side was to serve for a year; because it was only to serve for a year unless he or the defendant chose to determine it by three months' notice; and so the corresponding promise to employ by the defendant. The shorter statement in the declaration in this case cannot exonerate the plaintiff from stating the substance of the contract correctly. Had this defeasance been stated by way of plea to this declaration, it would have been demurrable specially, before special demurrers were abolished, on the ground that it amounted to the general issue, because it was a qualification of the contract itself, and therefore an argumentative denial of the contract alleged. The abolition of special demurrers cannot make a difference in the meaning of the words of the allegation, and a contract with a defeasance is not the same as a contract without one, consequently the variance is fatal. We think, therefore, that the ruling cannot be supported.

My brother Martin is not quite satisfied with this view of the case, and would, we believe, decide it otherwise if the decision depended on himself. *Rule absolute.*[1]

C. P. WHIPPLE AND ANOTHER v. THE UNITED FIRE INS. CO.

SUPREME COURT, RHODE ISLAND, OCTOBER 16, 1897.

[20 *Rhode Island Reports*, 260.]

ASSUMPSIT on an insurance policy. Heard on demurrer to the declaration.

MATTESON, C. J.[2] The defendant criticises the declaration because the plaintiffs have not averred and negatived the several provisions contained in the policy which are in the nature of conditions subsequent, the existence of the facts creating which would avoid the policy. All that is necessary, however, for a plaintiff to do in declaring on a contract of insurance is to set forth so much of it as will show a right to recover;[3] hence it follows that the various limitations, conditions, and stipulations of a policy which are in the nature of conditions subsequent, and go to defeat the liability of the insurer,

[1] Conf. North v. Wakefield, 13 Q. B. 536; Fazakerly v. M'Knight, 26 L. J. Q. B. 30. — ED.

[2] Only a part of the opinion of the court is given. — ED.

[3] May, Ins. § 589; 2 Greenl. Ev. 13th ed, § 376.

are matters of defence, and have no place in the declaration.[1] Lounsbury v. Protection Ins. Co.[2]

Demurrer overruled, and case remitted to the Common Pleas Division for further proceedings.

MICHAEL MULRY v. MOHAWK VALLEY INSURANCE CO.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1856.

[5 *Gray*, 541.]

BIGELOW, J. The defendants in this case relied at the trial upon two grounds of defence to the claim of the plaintiff under his policy.[3]

The other ground of defence was that spirituous liquors were kept and sold on the premises by the defendant, at the time the policy was made and issued, and that this use of the premises was not stated by the defendant in his application for insurance, as required by the conditions annexed to the policy, and that for this reason, the plaintiff could not recover. This ground of defence was not set out by the defendants in their answer. It appeared, however, in the course of the trial, on the cross-examination of the plaintiff's witnesses, that the premises were so used by the defendant at the time of making his application and at the date of his policy. Upon this state of facts, which was not controverted by the plaintiff at the trial, the defendants contended, and asked the court to rule, that the plaintiff, upon a just construction of the policy, and of the terms and conditions annexed to it, could not recover. The judge who presided at the trial refused so to rule, and it is upon this refusal, that the case now comes before the whole court.

We have not found it necessary to determine whether the facts disclosed by the plaintiff's witnesses, as to the use of the premises at the time the policy was issued, would render it void; because we are of

[1] Gordon v. Gordon, 1 Stark. 294; Wyld v. Pickford, 8 M. & W. 443; Bittinger v. Prov. Co., 24 Fed. 549 (*semble*); Manhattan Co. v. Willis, 60 Fed. 236; Conn. Co. v. McWhirter, 73 Fed. 444; McRae v. Raser, 9 Port. (Ala.) 122; Plowman v. Riddle, 7 Ala. 775; Love v. Simmons, 10 Ala. 113; Cowan v. Phenix Co., 78 Cal. 181; Berliner v. Travelers Co., 121 Cal. 451 (explaining Gilmore v. Lycoming Co., 55 Cal. 123, and Bobbitt v. Liverpool Co., 66 N. C. 70), Supreme Lodge v. Wollschlager, 22 Colo. 213; Jacobs v. Nat. Co., 1 McArth. 632; Travelers' Co. v. Shepperd, 85 Ga. 751; Herron v. Peoria Co., 28 Ill. 235; Rockford Co. v. Nelson, 65 Ill. 415 (*semble*); Guardian Co. v. Hogan, 80 Ill. 35; Continental Co. v. Rogers, 119 Ill. 474; Continental Co. v. Kessler, 84 Ind. 310; Penn. Co. v. Wiler, 100 Ind. 92; Phœnix Co. v. Stark, 120 Ind. 444; Stanwood v. Scovel, 4 Pick. 422, 423; Forbes v. Amer. Co., 15 Gray, 249, 257; Throop v. N. A. Co., 19 Mich. 423; Owen v. Geiger, 2 Mo. 39; Sandford v. Halsey, 2 Den. 235, 255 (*semble*); Union Co. v. McGorkey, 33 Oh. St. 555; East Tex. Co. v. Dyches, 56 Tex. 565; Allemania Co. v. Fred, (Tex. Civ. Ap. 1895) 32 S. W. R. 243; Tripp v. Vt. Co., 55 Vt. 100; Coolidge v. Continental Co., 67 Vt. 14; Simmons v. Ins. Co., 8 W. Va. 474; Troy Co. v. Carpenter, 4 Wis. 20; Redman v. Ætna Co., 49 Wis. 431 *Accord*.

But see Rogers v. Ins. Co., 72 Iowa, 448; Lycoming Co. v. Sailer, 67 Pa. 108; Am. Ass'n v. George, 97 Pa. 238; Lycoming Co. v. Stowe, 97 Pa. 354. — ED.

[2] 8 Conn. 459.

[3] Only a part of the opinion is given. — ED.

opinion that this defence is not open to the defendants, inasmuch as it was not set forth in their answer. Formerly, by pleading the general issue, everything was open to proof, which went to show that the plaintiff's claim was invalid through fraud or illegality, or was in its inception void in law.[1] But the practice act, St. 1852, c. 312, by abolishing the general issue, and substituting therefor an answer which is required to contain precise, certain, and substantial averments and denials, and providing that every matter averred in the declaration, and not denied by the answer, shall be deemed to be admitted, effected a material change, not only in the forms of pleading, but also in the mode of making up issues of fact between the parties. There being now no general form of denying the plaintiff's right to recover, the defendant is compelled by §§ 14, 26, to deny every substantive fact alleged by the plaintiff in his declaration, or declare his ignorance thereof and leave the plaintiff to his proof. These provisions enable the defendant, by an answer denying the plaintiff's allegations, to put in issue only such matters as are properly averred in the plaintiff's declaration. The plaintiff, by § 2, is required to make no allegations except those which he is bound by law to prove. Therefore the defendant, by merely answering the allegations in the plaintiff's declaration, can try only such questions of fact as are necessary to sustain the plaintiff's case. He cannot thus put in issue matters which go to defeat or avoid it; and it is accordingly provided by § 18, that the answer shall set forth in clear and precise terms each substantive fact intended to be relied on in avoidance of the action; by which are intended to be embraced all matters which cannot be proved under the denial of the allegations in the plaintiff's declaration.

Applying this construction of the statute to the answer of the defendants in the case at bar, it is manifest that the defence relied upon was not open to the defendants. Proof that the policy was void in its inception, by reason of misrepresentation or concealment on the part of the plaintiff of material facts, was clearly in avoidance of the action. It did not come within any of the allegations contained in the plaintiff's declaration. He was not bound to aver or prove any such fact. It was for the defendants to allege and prove it as a distinct substantive ground of defence.[2]

[1] Hulet v. Stratton, 5 Cush. 539; Dixie v. Abbott, 7 Cush. 610.

[2] It is well settled that in actions upon insurance policies containing a stipulation that the policy shall be void if any of the representations of the insured are untrue, the defendant must allege and prove the untruth of the particular representation claimed to be untrue.

Anderson v. Fitzgerald, 4 H. L. C. 484; Jeffries v. Life Ins. Co., 22 Wall. 47; Piedmont Co. v. Ewing, 92 U. S. 377; Ins. Co. v. Grindley, 100 U. S. 614; Tidmarsh v. Washington Co., 4 Mas. 439; Geib v. Ins. Co., 1 Dill. 443; Swick v. Home Co., 2 Dill. 160; Holabird v. Atlantic Co., 2 Dill. 166, n.; American Co. v. Wood, 73 Fed. 81; Conn. Co. v. McWhirter, 73 Fed. 444; Boulden v. Phœnix Co., 112 Ala. 422; Supreme Lodge v. Wollschlager, 2 Colo. 213; Lampkin v. Ins. Co., 11 Colo. Ap. 249; O'Connell v. Supreme Conclave, 102 Ga. 143; Continental Co. v. Rogers, 119 Ill. 474; Phœnix Co. v. Stocks, 149 Ill. 319; Supreme Lodge v. Matejowsky, 190 Ill. 142; Globe Ass'n v. Ahern, 191 Ill. 167; Provident Society v. Cannon, 103 Ill. Ap. 534; Supreme Lodge v. Albers, 108 Ill. Ap. 85; John Hancock Co. v. Daly,

It was urged at the argument, that it was always competent for the defendant to take advantage of any matter in defence to an action, which was disclosed by the plaintiff's own testimony. This was true to a certain extent, when the general issue was pleaded, because under it all matters which tended to prove the original invalidity of the plaintiff's claim were open and competent to be proved. But, for the

Mass. 381; Home Co. v. Curtis, 32 Mich. 402; Maas v. Anchor Co., 148 Mich. 432; Price v. Phœnix Co., 17 Minn. 497; Perine v. Grand Lodge, 51 Minn. 224; Chambers v. N. W. Co., 64 Minn. 495; Statham v. N. W. Co., 45 Miss. 581; Grangers Co. v. Brown, 57 Miss. 308; Kettenbach v. Omaha Assn., 49 Neb. 842; Hardinger v. Modern Brotherhood, (Neb. 1905) 103 N. W. R. 74; Jones v. Brooklyn Co., 61 N. Y. 79; Dwight v. Germania Co., 103 N. Y. 341; Spencer v. Citizens Co., 142 N. Y. 505; Weed v. Schenectady Co., 7 Lans. 452; Boos v. World Co., 4 Hun, 133; Dougherty v. Metrop. Co., 3 N. Y. Ap. Div. 313; Jacobs v. N. W. Co., 30 N. Y. Ap. Div. 285, affirmed 164 N. Y. 582; Fitzgerald v. Supreme Council, 39 N. Y. Ap. Div. 251, affirmed 167 N. Y. 568; Alden v. Supreme Tent, 78 N. Y. Ap. Div. 18; Union Co. v. Reif, 1 Cincin. L. Bull. 290; Buford v. N. Y. Co., 5 Oreg. 334; Roach v. Ky. Co., 28 S. Ca. 431; Guiltinan v. Ins. Co., 69 Vt. 469; Schofield v. Metrop. Co., 79 Vt. 161; Logan v. Provident Co., 57 W. Va. 382; Redman v. Ætna Co., 49 Wis. 431. But see *contra* Wilson v. Hampden Co., 4 R. I. 159 (promissory warranty); Sweeny v. Metrop. Co., 19 R. I. 171 (promissory warranty); Leonard v. State Co., 24 R. I. 7 (promissory warranty).

The rule is the same as to policies conditioned to be void if the insured commits suicide. Assn. v. Sargent, 142 U. S. 691; Grand Lodge v. Bannister, 80 Ark. 190; Dennis v. Union Co., 84 Cal. 570; Rose-Lewin v. Germania Co., 20 Colo. Ap. 262; Modern Woodmen v. Noyes, 158 Ind. 503; Sutherland v. Ins. Co., 87 Iowa, 505; Ingraham v. Nat. Union, 103 Iowa, 395; Mut. Co. v. Wiswell, 56 Kan. 765; Phillips v. La. Co., 26 La. An. 404; Leman v. Life Co., 46 La. An. 1189; Boynton v. Life Co., 105 La. 202; Knickerbocker Co. v. Peters, 42 Md. 414 (but plaintiff has burden of proving insanity of insured); Hale v. Life Co., 61 Minn. 516; Sartell v. Royal Neighbors, 85 Minn. 369, 373; Lindahl v. Sup. Ct. I. O. F., 100 Minn. 87; Kornig v. Western Co. (Minn. 1907), 112 N. W. R. 1039; Laessing v. Travelers Assn., 169 Mo. 272; Modern Woodmen v. Kosak, 63 Neb. 146; Germain v. Brooklyn Co., 30 Hun, 535; Smith v. Home Co., 47 Hun, 30; Seybold v. Supreme Tent, 86 N. Y. Ap. Div. 195, 199; Schultz v. Ins. Co., 40 Ohio St. 217. But evidence of suicide by one insured by an accident policy is admissible under a general denial, since it negatives any accident. Ætna Co. v. Vandecar, 86 Fed. R. 282; Fidelity Co. v. Weise, 182 Ill. 496.

Or if the policy is to be avoided by other acts subsequent to its issue. Western Co. v. Mohlman Co., 83 Fed. 811; Travelers Assn. v. Gilbert, 111 Fed. 269; Phenix Co. v. Luce, 123 Fed. 257; Standard Co. v. Jones, 94 Ala. 434; Cassimus v. Scottish Co., 135 Ala. 256; Blasingham v. Home Co., 75 Cal. 633; U. S. Co. v. Casualty Co., 20 Colo. Ap. 393; Lownsburg v. Protection Co., 8 Conn. 459; Young v. Newark Co., 59 Conn. 41; Clay Co. v. Wusterhausen, 75 Ill. 285; Home Co. v. Boyd, 19 Ind. 173; Louisville Underwriters v. Durland, 123 Ind. 544; Newman v. Covenant Assn., 76 Iowa, 56; Russell v. Fidelity Co., 84 Iowa, 93; Krell v. Ins. Co., 127 Iowa, 748; Ætna Co. v. McLeod, 57 Kan. 95; Royal Co. v. Schwing, 87 Ky. 470; Transatlantic Co. v. Bamberger, 11 Ky. L. Rep. 101; Cluff v. Mut. Co., 13 All. 308; Hodsdon v. Guardian Co., 97 Mass. 144; Coburn v. Travelers Co., 145 Mass. 226; Anthony v. Mercantile Assn., 162 Mass. 354; Noyes v. Eastern Assn., 190 Mass. 171; Kidder v. Supreme Commandery, 192 Mass. 327; Hess v. Preferred Assn., 112 Mich. 196; Malicki v. Guaranty Soc'y, 119 Mich. 151; Friedman Co. v. Atlas Co., 133 Mich. 212; Barker v. Citizens Co., 136 Mich. 626; Ins. Co. v. Farnsworth, 72 Miss. 555; Western Co. v. Ferrell, (Miss. 1906) 40 So. R. 8; Ritter v. Sun Co., 40 Mo. 40; Meadows v. Pacific Co., 129 Mo. 76; Farmers Co. v. Peterson, 47 Neb. 747; Van Valkenburgh v. Am. Co., 9 Hun, 583, 70 N. Y. 605; Murray v. N. Y. Co., 85 N. Y. 236 (but see Whitelatch v. Fidelity Co., 149 N. Y. 45); Hunt v. Hudson Co., 2 Duer, 481; Moody v. Ins. Co., 52 Oh. St. 12; Ins. Co. v. Crunk, 91 Tenn. 376; Hicks v. N. W. Co., (Tenn. 1906) 96 S. W. R. 962; Allemania Co. v. Fred, (Tex. Civ. Ap. 1895) 32 S. W. R. 243; Merchants Co. v. Arnold, (Tex. Civ. Ap. 1895) 32 S. W. R. 579; Employers Corp. v. Rochelle, (Tex. Civ. Ap. 1896) 35 S. W. R. 869; Burlington Co. v. Rivers, (Tex. Civ. Ap. 1884) 23 S. W. R. 453 (declining to follow Pelican Co. v. Troy Assn., 77 Tex. 225, and Phœnix Co. v. Boren, 83 Tex. 97); Bryan v. Peabody Co., 8 W. Va. 605; Cronkhite v. Travelers Co., 75 Wis. 116; Butternut Co. v. Manuf. Co., 78 Wis. 202; Johnston v. N. W. Co., 94 Wis. 117. — ED.

reasons already given, it is otherwise under the system of pleading established by the practice act. Nothing is open and competent to be proved, except what is comprehended in the distinct averments and denials of the parties. All other matters are irrelevant to the issue. Strictly speaking, therefore, all the evidence drawn out of the plaintiff's witnesses on cross-examination, which tended to show that spirituous liquors were kept and sold on the premises at the time of making the policy, was incompetent and irrelevant, because no such issue was before the jury on the pleadings. It might therefore have been properly excluded; but, being in, it cannot be used to defeat the plaintiff's claim on a ground not set out in the answer.[1]

Exceptions overruled.

ANONYMOUS.

COMMON PLEAS, HILARY TERM, 1501.

[*Year Book*, 15 *Henry VII*, *folio* 1, *placitum* 1.]

IN a writ of annuity the deed ran that W., Prior of E, granted to the plaintiff 10*l.* of annual rent until he was advanced to the benefice of his church by the said W., and was sealed with the convent seal. This action was against his successor. The plaintiff counted generally upon the deed without alleging that he had not been advanced. Objection was taken to this, but the count nevertheless was adjudged good; because this condition goes in defeasance of the annuity, which must be shown by the defendant. Also this annuity begins before the condition is to be performed, and its performance is to be alleged by the defendant. The case differs from one in which the condition is that if the grantee does a certain act, then he shall have such an annuity. In such case, if he will demand the annuity, he must allege that the act has been done, and by this performance the annuity takes effect. So a diversity, as admitted by all the judges.[2]

NEWTON RUBBER WORKS *v.* JOHN R. GRAHAM.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 23, 1898.

[171 *Massachusetts Reports*, 352.]

CONTRACT, upon a written agreement alleged to have been made by the defendant with the plaintiff. The defendant demurred to both counts of the declaration, alleging as ground therefor "that the per-

[1] Haskins *v.* Hamilton Co., 5 Gray, 432; Home Co. *v.* Curtis, 2 Mich. 402 *Accord.* — ED.

[2] Anon. Y. B. 36 Hen. VI. f. 2, pl. 2; Anon. Y. B. 22, Ed. IV. f. 42, pl. 3; Ughtred's Case, 7 Rep. 9, b, 10a, 10b; Hamond *v.* Jethro, 2 Brownl. 97 (grant of a debt — memorandum that grantor was "not to be liable until he recovers £30 from X. Y.") *Accord.* — ED.

formance of the alleged promise and agreement of the defendant was contingent upon the prior performance of a certain condition, and that it nowhere appears in either of said counts that such condition had been performed or complied with." In the Superior Court the demurrer was sustained; and the plaintiff appealed to this court.

MORTON, J. The body of the agreement is an engagement on the part of such creditors of the Quincy Cycle Company as shall sign it to transfer their claims to the defendant upon receiving from him notes or cash therefor as specified in the agreement. There is in it no contract on the part of the defendant that he will purchase such claims, and pay therefor in notes or cash as set forth in the agreement. The question is then whether the defendant's signature to the supplemental line, which reads, "I authorize the above offer, and agree to carry the same out if secured within the time named," imports an absolute or conditional liability on his part, and if the latter, whether the cause of action, if any, has been well pleaded.

It is clear, we think, that the liability is a conditional one. The defendant authorizes and agrees to carry out the stipulations contained in the body of the agreement, "if secured within the time named" in it. That is plainly a conditional undertaking, and, according to well settled rules of pleading, the condition should have been set out as a part of the contract, and performance of it averred, or the want of performance excused.[1] Newcomb *v.* Brackett;[2] Whitaker *v.* Smith;[3] Stanwood *v.* Scovel;[4] Codding *v.* Mansfield;[5] Murdock *v.* Caldwell;[6] Riley *v.* Farnsworth;[7] Palmer *v.* Sawyer;[8] Pub. Sts. c. 167, § 2, cl.

[1] Clark *v.* Gurnell, 1 Bulst. 167; Worsley *v.* Wood, 6 T. R. 710; Grafton *v.* Eastern Co., 8 Ex. 699; McDonald *v.* Hobson, 7 How. 745; U. S. *v.* Beard, 5 McL. 441; Griffin *v.* Bass Co., 135 Ala. 490; McLaughlin *v.* Hutchins, 3 Ark. 207; Loup *v.* Cal. Co., 63 Cal. 97 (happening of event); Fisher *v.* Fearson, 48 Cal. 472; Dennis *v.* Strasburger, 89 Cal. 583; McPhee *v.* Young, 13 Colo. 80; Patrick *v.* Colo. Co., 20 Colo. 268; Pierson *v.* Springfield Co., 7 Houst. 307 (lapse of time); Sanford *v.* Cloud, 17 Fla. 532; Myrick *v.* Merritt, 22 Fla. 335; Milligan *v.* Keyser, 52 Fla. 331; Griswold *v.* Scott, 13 Ga. 210 (*semble*); Henderson *v.* Wheaton, 139 Ill. 581; Myers *v.* Cicott, 5 Blackf. 225; Magic Co. *v.* Stone Co., 158 Ind. 538; Kenney *v.* Bevelheimer, 158 Ind. 653; Mondamin Co. *v.* Brudi, 163 Ind. 642; Chicago Co. *v.* Burlington Co., 73 Iowa, 629; Pierson *v.* Indep. Dist., 106 Iowa, 695; Milwaukee Co. *v.* Winfield, 6 Kan. Ap. 527; Jobson *v.* Stokes, 9 Bush. 279: Louisville *v.* Muldoon, 94 Ky. 462; Chesley *v.* Welch, 21 Me. 50; Stevens *v.* Haskell, 72 Me. 244: Murdock *v.* Caldwell, 8 All. 309; Nat. Co. *v.* Commw., 183 Mass. 89; Wilson *v.* Clark, 20 Minn. 367 (happening of event); Root *v.* Childs, 68 Minn. 142 (happening of event); Fultz *v.* House, 14 Miss. 404; Basye *v.* Ambrose, 32 Mo. 484; Taylor *v.* Newman, 77 Mo. 257; Beckman *v.* Phœnix Co., 49 Mo. Ap. 604; Connelly *v.* Priest, 72 Mo. Ap. 673; Estabrook *v.* Omaha Hotel, 5 Neb. 76; Husenetter *v.* Gullikson, 55 Neb. 32 (happening of an event); Fisher *v.* Buchanan, (Neb. 1901) 96 N. W. R. 339; Bachelder *v.* Wendell, 36 N. H. 204; Whitton *v.* Whitton, 38 N. H. 127, 136 (*semble*); Hugg *v.* Collins, 18 N. J. 294; Hecht *v.* Taubel, 55 N. J. 419; Goodwin *v.* Holbrook, 4 Wend. 377; Relyea *v.* Drew, 1 Den. 561 (happening of event); Lester *v.* Jewett, 11 N. Y. 483; Reining *v.* Buffalo, 102 N. Y. 308; Pope *v.* Terre Haute Co., 107 N. Y. 61; Welsbach Co. *v.* Brostam, 96 N. Y. Ap. Div. 52; Mulford *v.* Young, 6 Oh. 294; Philomath *v.* Ingle, 41 Oreg. 289; Peck *v.* Addicks, 174 Pa. 543; Hyde *v.* Darden, 3 Heisk. 515; Johnston *v.* McDonnell, 37 Tex. 595; Baltimore Co. *v.* McCullough, 12 Grat. 595; Metrop. Co. *v.* Rutherford, 95 Va. 773; Harris *v.* Lewis, 5 W. Va. 575 (happening of an event); Boorman *v.* Juneau Co., 76 Wis. 550 *Accord.*— ED.

[2] 16 Mass. 161. [3] 4 Pick. 83. [4] 4 Pick. 422. [5] 7 Gray 272. [6] 8 Allen, 309.

[7] 111 Mass. 152. [8] 114 Mass. 1, 13; Pub. Sts. c. 167, § 2, cl. 10.

10. The allegation that "the plaintiff has done and performed all things on its part in said agreement contained to be done and performed, and that it has kept all of the conditions of said agreement," is not sufficient.[1] The condition should also be set out.

Judgment for the defendant.

[1] Nat. Co. v. Commw. 183 Mass. 89 *Accord.*

At common law the general averment of performance of conditions precedent was bad in form, for not alleging with particularity the performance of each condition, the objection being taken only by a special demurrer. Proctor v. Sargent, 2 M. & Gr. 20; Manby v. Cremonini, 6 Ex. 808.

By the English Common Law Procedure Act of 1852, § 57: "It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest." The averment was usually in this form: That all conditions had been performed, that all things had happened and all times had elapsed to entitle the plaintiff to the performance of the defendant's promise. Bentley v. Dawes, 9 Ex. 666.

By the Supreme Court Rules, 1883, Order XIX, v. 14: "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." Under the modern English practice, therefore, it is unnecessary to aver in any form the performance of conditions precedent. For similar legislation as to counts upon insurance policies, see Harvey v. Northern Co., 75 Vt. 441.

In nearly all the states of the country, by statutes similar to the provision in the English Common Law Procedure Act of 1852, one may aver the performance of conditions precedent generally. Moritz v. Lavelle, 77 Cal. 10; Smith v. Nedan, 87 Cal. 489; Dennis v. Strasburger, 89 Cal. 583; Wilcox v. Stephenson, 30 Fla. 377; Bertelson v. Bowen, 81 Ind. 512; Hart v. Nat. Co., 105 Ind. 717; Magic Co. v. Stone Co., 158 Ind. 538; Home Co. v. Gagen, 38 Ind. Ap. 680; Phœnix Co. v. Lathrop, (Ind. Ap. 1907) 81 N. E. R. 227; Hagan v. Merchant Co., 81 Iowa, 521; Halferty v. Wilmering, 112 U. S. 713 (Iowa law); Gridler v. Farmers Bank, 12 Bush, 333; Preston v. Roberts, 12 Bush, 570; Andreas v. Holcombe, 22 Minn. 339; Richardson v. North Co., 57 Mo. 413; Forse v. Supreme Lodge, 41 Mo. Ap. 106; Bryant v. Barton, 32 Neb. 613; Vail v. Pa. Co., 67 N. J. 66; Dimick v. Metrop. Co., 67 N. J. 367; Vail v. Pa. Co., 67 N. J. 422; Bogardus v. N. Y. Co., 101 N. Y. 328; Vandegrift v. Bartoon, 83 N. Y. Ap. Div. 548; Gansevoort Bank v. Emoire Co., 117 N. Y. Ap. Div. 455 (but *semble* not enough to allege performance of all conditions, plaintiff must allege *due* performance of all conditions); Crawford v. Satterfield, 27 Oh. St. 421; Union Co. v. McGookey, 33 Oh. St. 555; Nathan v. Lewis, 1 Handy, 239; Griffin v. Pitman, 8 Oreg. 342; Fisk v. Henarie, 13 Oreg. 157; Long v. McCauley, (Tex. 1887) 3 S. W. R. 689; Smith v. Chicago Co., 19 Wis. 326; Schobacher v. Germantown Co., 59 Wis. 86; Miles v. Mut. Assn., 108 Wis. 421, 427. A collection of the statutes on this point may be found in 4 Encyc. Pl. & Pr. 633, n. 3.

And the defendant who wishes to put the plaintiff to the proof of the performance of any condition must specifically deny the performance of the particular condition, a general denial to such general averment of performance being improper. Hart v. Nat. Co., 105 Ind. 717; Hagan v. Merchant Co., 81 Iowa, 521; Halferty v. Wilmering, 112 U. S. 713 (Iowa law); Gridler v. Farmers Bank, 12 Bush, 333; Preston v. Roberts, 12 Bush, 570; Dimick v. Metrop. Co., 67 N. J. 367; Vail v. Pa. Co., 67 N. J. 422; McGlade v. Home Co., 71 N. J. 40; Taylor v. Modern Woodmen, 42 Wash. 304.

If the plaintiff sees fit not to aver general performance of conditions, but alleges the performance of the several conditions separately, the defendant may deny the performance by a general denial. Brock v. Des Moines Co., 96 Iowa, 39. — Ed.

SAMUEL COLT v. WILLIAM H. MILLER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1852.

[10 *Cushing*, 49.]

METCALF, J.[1] The plaintiff's declaration sets forth an executory agreement of the defendant to do certain work for a certain sum, and within a certain time, on materials to be furnished by the plaintiff, and alleges that the plaintiff did furnish the materials to the defendant in season for him to complete the stipulated work within the stipulated time. And the question is, whether this declaration was legally proved by evidence that the plaintiff furnished the materials to the defendant, but not in season for him to complete the work thereon according to the agreement, and that the defendant nevertheless received and worked on them. We are of opinion that it was not; but that there was a fatal variance between the allegation and the proof.

It is a cardinal rule of evidence, that allegations essential to the plaintiff's claim must be proved. In the declaration in this case, it was essential, in order to show the plaintiff's claim, that he should allege that he furnished or was ready to furnish the defendant with the materials on which he was to work, and in season for him to complete the work on them within the stipulated time; or else that he should allege a sufficient excuse for not so furnishing them. 1 Chit. Pl. (6th Am. ed.) 351, 358; 6 Greenl. 111, 112; 2 Met. 502, 503. The plaintiff has adopted the former course, and has alleged his performance of what the agreement required of him; and to prove this allegation, he relies on evidence of matter which excused him from such performance, to wit, a waiver thereof by the defendant. But a waiver, by one party to an agreement, of the performance of a stipulation in his favor, is not a performance of that stipulation by the other party. It is an excuse for non-performance, and, as above stated, should be so pleaded.[2]

[1] Only the opinion of the court is given. The defendant excepted to the instruction of the judge that the jury should find for the plaintiff if they were satisfied that the defendant's conduct amounted to a waiver of strict performance. — ED.

[2] Littler v. Holland, 3 T. R. 590; Daley v. Russ, 86 Cal. 114; Purdue v. Noffsinger, 15 Ind. 386; Home Co. v. Duke, 43 Ind. 418, 421; Bird v. St. John's Church, 154 Ind. 138, 151, 152; White v. Mitchell, 30 Ind. Ap. 342; Bernhard v. Washington Co., 40 Iowa, 442; Fauble v. Davis, 48 Iowa, 462; Eiseman v. Hawkeye Co., 74 Iowa, 11; Brock v. Des Moines Co., 96 Iowa, 89; Western Co. v. Thorp, 48 Kan. 239; Duckham v. Smith, 5 T. B. Mon. 372; Lamson Co. v. Russell, 112 Mass. 387, 394; Palmer v. Sawyer, 114 Mass. 1; Boon v. State Co., 37 Minn. 426; Hand v. Nat. Co., 57 Minn. 519 (*semble* — objection waived); Nichols v. Larkin, 79 Mo. 264; Lanitz v. King, 93 Mo. 513 (but see Okey v. State Co., 29 Mo. Ap. 105); Shinn v. Roberts, 20 N. J. 435; Shinn v. Haines, 20 N. J. 340; Franklin v. Empire Co., 72 N. J. 58; Hosley v. Black, 28 N. Y. 438; Beecher v. Schuback, 1 N. Y. Ap. Div. 359 (affirmed 158 N. Y. 687); Ryer v. Prudential Co., 85 N. Y. Ap. Div. 7; Williams v. Fire Assn., (N. Y. Ap. Div., May, 1907) 104 N. Y. S. 100; Mehurin v. Stone, 37 Oh. St. 49; Long Assn. v. State Co., 29 Oreg. 569; Griffith v. Newell, 69 S. Ca. 300; St. Paul Co. v. Hodge, 30 Tex. Civ. Ap. 257; Warren v. Bean, 6 Wis. 120 *Accord*. — ED.

The ground taken by the plaintiff is, that the defendant, by his conduct, waived his right to be furnished with the materials according to the agreement, and that proof of such waiver supports the averment that the plaintiff did furnish them according to the agreement. And two cases were cited, in which it was held that, in an action by the indorsee of a note against the indorser, the allegation that notice was given to the defendant of non-payment by the promisor, was supported by proof that the defendant waived such notice. Those decisions have often been questioned, and are certainly contrary to the law as held in England. Burgh *v.* Legge,[1] Chit. on Bills (10th Am. ed.), 577. But supposing them to have been rightly decided, they only show an exception to an established and most salutary rule of evidence.

New trial granted.

W. H. HARRISON AND ANOTHER *v.* W. S. BAILEY AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1868.

[99 *Massachusetts Reports*, 620.]

CONTRACT on a promissory note dated September 1, 1866, made by Hannah Post and Levi Post, payable on January 1, 1867, to the order of the defendant Bailey, and by him indorsed to the plaintiffs. The declaration alleged the failure of the makers to pay the note at maturity; and that due notice of its nonpayment was given to Bailey.

At the trial in the Superior Court, before Devens, J., the jury found for the plaintiffs; and Bailey alleged exceptions, of which the following is the material part: "The only question in the case arose concerning Bailey's liability. No evidence was offered to show actual demand and notice. The plaintiff relied wholly upon a waiver of demand and notice by Bailey; and offered evidence tending to show a waiver by Bailey upon the day the note matured. The defendant objected that evidence of a waiver by Bailey could not be given under this declaration; but the court admitted the same."[2]

HOAR, J. It has been settled by a series of decisions, in this Commonwealth, that, in an action by the indorsee against the indorser of a promissory note, evidence of a waiver of demand and notice is sufficient to support an averment in the declaration of demand and notice. The case most expressly to the point is Taunton Bank *v.* Richardson;[3] but the doctrine is supported by Jones *v.* Fales;[4] City Bank *v.* Cutter;[5] North Bank *v.* Abbot;[6] Kent *v.* Warner.[7] Professor Greenleaf refers

[1] 5 Mees. & Welsb. 418.

[2] The statement is abridged and a part of the opinion omitted. — ED.

[3] 5 Pick. 436, 444.

[4] 4 Mass. 245.

[5] 3 Pick 414.

[6] 13 Pick. 465.

[7] 12 Allen, 561.

to the practice in these terms: "When matter in excuse of the want of demand and notice is relied upon, it is usual to declare as if there had been due presentment and notice, some latitude in the mode of proof being allowed, and the evidence being regarded not strictly as matter in excuse, but as proof of a qualified presentment and demand, or of acts which, in their legal effect, and by the custom of merchants, are equivalent thereto."[1] 2 Greenl. Ev. § 197. See also 2 Stark. Ev. (4th Am. ed.) 274, note 1; Norton v. Lewis;[2] Williams v. Matthews.[3]

DE PINNA v. POLHILL.

At Nisi Prius, coram Tindal, C. J., June 29, 1837.

[Reported in 8 Carrington & Payne, 78.]

The first count of the declaration stated that before the commencement of the suit, and before the making of the promise, &c., the plaintiff had composed and written the music and poetry of a certain opera, called "The Rose of the Alhambra, or the Enchanted Lute," and, as such composer and author, had a right to the music and poetry of the said opera, and in consideration of the premises, and that the plaintiff would sell him such right for three hundred guineas, the defendant undertook and faithfully promised to buy of him his right in the said music, etc. It then averred default on the part of the defendant. The defendant pleaded only that he did not undertake and promise in manner and form, &c.

The agreement consisted of two letters, which were mutually signed by the parties and exchanged. One of the plaintiff's witnesses admitted on his cross-examination that one of the songs was written by Mr. Fitzball.

Crowder, for the defendant. The question is, whether this is to be taken as a sale of the copyright of the music and poetry. There is an averment that the plaintiff did sell.

[1] Pugh v. McCormick, 14 Wall. 374; Taylor v. Branch, 1 St. & P. 249; Kennon v. McRea, 7 Port. 175; Manning v. Maroney, 87 Ala. 563; Ala. Bank v. Rivers, 116 Ala. 1; Norton v. Lewis, 2 Conn. 478; Camp v. Bates, 11 Conn. 487; Windham Bank v. Norton, 22 Conn. 213; Spann v. Baltzell, 1 Fla. 301; Tobey v. Berly, 26 Ill. 426; Taunton Bank v. Richardson, 5 Pick 436; Armstrong v. Chadwick, 127 Mass. 156; Goodloe v. Godley, 21 Miss. 233; Hibbard v. Russell, 16 N. H. 410; Lyman v. Littleton, 50 N. H. 42, 47; Williams v. Matthews, 3 Cow. 252 (rule different under the Code); Myers v. Standart, 11 Oh. St. 29; Farmers Bank v. Day, 13 Vt. 36 *Accord.*

Burgh v. Legge, 5 M. & W. 418; Lambert v. Palmer, 29 Iowa, 104; Woolsey v. Williams, 34 Iowa, 413; Peck v. Schick, 50 Iowa, 281; Closz v. Miracle, 103 Iowa, 198; Pier v. Heinrichhoffen, 52 Mo. 333 (rule changed by statute); First Bk. v. Hatch, 78 Mo. 13; Garvey v. Fowler, 4 Sandf. 665; Schultz v. Depuy, 3 Abb. Pr. 252; Clift v. Rodger, 25 Hun, 39; Keteltas v. Myers, 19 N. Y. 231; Congress Co. v. Habenich, 83 N. Y. Ap. Div. 141 (but see Clark v. Tryon, 53 N. Y. St. Rep. 123); Baumgardner v. Reeves, 35 Pa. 250; Cole v. Wintercost, 12 Tex. 118; Dolph v. Rice, 18 Wis. 398 *Contra.* — Ed.

[2] 2 Conn. 478.

[3] 3 Cow. 252.

TINDAL, C. J. You have not taken issue upon that. If you had, the question would arise whether anything short of a deed would do.

Crowder. There is no evidence that the plaintiff was the author of the poetry. On the contrary, it appears that Mr. Fitzball wrote one of the songs. Is the defendant to pay the three hundred guineas, and then find that he has no right at all?

TINDAL, C. J. All your difficulty arises from the state of the record. You do not say that the plaintiff did not write and compose.

Crowder. Does not your Lordship think that the denial of the promise is a denial of that on which it is founded?

TINDAL, C. J. No; they are separate averments antecedent to the promise, and you should have pleaded that the plaintiff did not sell, or that he had not the right, or that he was not the author; and as you have not, you must be taken to have admitted these facts as far as the jury are concerned, who have to decide on this issue.

Verdict for the plaintiff; damages, £315.[1]

GARDNER *v.* ALEXANDER.

COMMON PLEAS, MICHAELMAS TERM, 1834.

[3 *Dowling*, 146.]

KELLY moved for a rule for leave to plead several matters. The action was for goods bargained and sold. The declaration was in the common form, and the alleged defence was, that the goods were bargained and sold; but that it was under a special written contract, two of the conditions of which were, that the goods should be shipped within the current month, and landed in London within a given time. Neither condition having been complied with, the defendant refused to accept the goods. The difficulty which had arisen in the mind of the special pleader was, whether proof of these facts could be given under the general issue, or whether it was not requisite to plead them specially.

Per Curiam. It is unnecessary: you may give in evidence the special contract under the general issue.

Kelly took nothing by his motion.[2]

[1] "Note, when a man assumes to pay money or do anything upon condition, the defendant may take issue upon the condition, and needs not plead *non assumpsit;* but if he pleads *non assumpsit*, then he confesses the performance of the condition, which mark." Richard *v.* Carvamel, 1 Brownl. 10.

Compare Bell *v.* Welch, 9 C. B. 154. — ED.

[2] Cousins *v.* Paddon, 2 C. M. & R. 547; Hayselden *v.* Staff, 5 A. & E. 153; Grounsell *v.* Lamb, 1 M. & W. 352; Dawson *v.* Collis, 10 C. B. 523; Milner *v.* Field, 5 Ex. 329; Kerstetter *v.* Raymond, 10 Ind. 199; Gwinnup *v.* Shies, 161 Ind. 500; Denmead *v.* Coburn, 15 Md. 29; Gill *v.* Vogeler, 52 Md. 663; Stout *v.* St. Louis Co., 52 Mo. 342; Goelth *v.* White, 35 Barb. 76 (money had and received); Wilson *v.* Flickinger Co., 76 N. Y. Ap. Div. 399 *Accord.* — ED.

N. E. SOLOMON v. JOHN VINSON AND ANOTHER.

SUPREME COURT, MINNESOTA, NOVEMBER 12, 1883.

[31 *Minnesota Reports*, 205.]

MITCHELL, J. Appeal from a judgment entered upon defendants' default. The objection is here interposed for the first time that the complaint does not state facts constituting a cause of action. The allegations of the complaint are "that on the 1st day of March, 1883, the defendants were indebted to the plaintiff on an account then past due, for goods sold and delivered to the defendants (at a time and place specified), in the sum of $241.13, and that the same is now due and owing plaintiff, and no part thereof has been paid." The objections to this complaint are that it does not allege that the goods were sold and delivered by plaintiff, and does not allege either that the defendants promised to pay the sum named, or that the goods were of that value. Conceding that within the cases of Foerster *v.* Kirkpatrick,[1] and Holgate *v.* Broome,[2] this complaint would have been held bad on demurrer, we think the objection is not available on this appeal. From the facts that are alleged it is fairly inferable, by reasonable inference, that the goods were sold to defendants by the plaintiff, and that they amounted in value to the sum stated, and that defendants were to pay plaintiff that sum for them. Therefore, under the circumstances, the judgment ought to be sustained. Smith *v.* Dennett;[3] Drake *v.* Barton;[4] Cochrane *v.* Quackenbush;[5] Hurd *v.* Simonton.[6]

While this disposes of the present case, we deem it proper to add that we are not inclined to adhere to the doctrine of Foerster *v.* Kirkpatrick and Holgate *v.* Broome, *supra*, in which it was held that pleadings substantially like those in the present case (except that they contained an express allegation that the goods were sold and delivered "by plaintiff") did not state a cause of action, because they contained no allegation of value, or of a promise to pay the sum stated, and that, without one or the other of these, the allegation of indebtedness was a mere statement of a conclusion of law. Such a pleading contains all the allegations necessary to constitute a good *indebitatus* count in an action of debt at common law, and under that system of pleading it was just as necessary to allege the facts as it is under the code. By fair and reasonable construction such a pleading implies, as language is usually understood, that the plaintiff had sold and delivered to defendant goods to the amount stated, and for which the latter was to pay the former that sum. It plainly advises the defendant that this is the claim made against him, and therefore sufficiently performs the office of a pleading. Laying aside all nice verbal criticisms, and considering it from a practical standpoint, there is no chance for a defendant to misunderstand what such allegations mean.

[1] 2 Minn. 171 (210). [2] 8 Minn. 209 (243). [3] 15 Minn. 59 (81).
[4] 18 Minn. 414 (462). [5] 28 Minn. 376. [6] 10 Min. 340 (423).

In almost every state which has adopted the code such a pleading is held good, and hence such forms are commonly given in works on code practice and pleading. Pomeroy on Remedies, § 542, and cases cited in note; Allen *v.* Patterson;[1] Abadie *v.* Carrillo;[2] Pavisich *v.* Bean.[3] This fact is entitled to some weight as a reason why we should bring ourselves in harmony on this question with the general current of authority in other states which have adopted the code.

Judgment affirmed.[4]

[1] 7 N. Y. 476. [2] 32 Cal. 172. [3] 48 Cal. 364.

[4] It is still permissible under the Codes or Practice Acts of most of our states to declare after the manner of the common law *indebitatus* counts.

GOODS SOLD. — Goodwin *v.* Glazier, 10 Cal. 337; Abadie *v.* Carrillo, 32 Cal. 172; Magee *v.* Moore, 49 Cal. 141; Wilcox *v.* Jamison, 20 Colo. 158; Henry Co. *v.* Semonian, (Colo. 1907) 90 Pac. R. 682; Meagher *v.* Morgan, 3 Kan. 372; Griffin *v.* Murdock, 88 Me. 254; Appleman *v.* Michael, 43 Md. 269; City *v.* Basshor, 82 Md. 397; Pioneer Co. *v.* Hager, 57 Minn. 76 (*semble*); Higgins *v.* Germaine, 1 Mont. 230; Allen *v.* Patterson, 7 N. Y. 476; Goodman *v.* Alexander, 165 N. Y. 289; Hatch *v.* Leonard, 165 N. Y. 435; Doherty *v.* Shields, 86 Hun, 303; Kilpatrick *v.* Box, 13 Utah, 494 (count must be for goods sold and delivered or must contain a promise to pay).

LANDS SOLD AND CONVEYED. — Curran *v.* Curran, 40 Ind. 32.

WORK AND LABOR. — Willard *v.* Carrigan, 8 Ariz. 70; Wilkins *v.* Stidger, 22 Cal. 231; Castagnino *v.* Balletta, 32 Cal. 250; Brown *v.* Board, 103 Cal. 531; Farwell *v.* Murray, 104 Cal. 464; Rauer's Co. *v.* Bradbury, (Cal. Ap. 1906) 84 Pac. R. 1007; Union Co. *v.* Nixon, 199 Ill. 235; McArthur Co. *v.* Whitney, 202 Ill. 527; Brown *v.* Perry, 14 Ind. 32; Stulling *v.* Templeton, 66 Ind. 585; Scott *v.* Congdon, 106 Ind. 268; Kenney Co. *v.* Branham, 145 Ind. 364; Board *v.* Gibson, 158 Ind. 471; Gwinnap *v.* Spies, 161 Ind. 500; Clark *v.* Fensky, 3 Kan. 389; Water Co. *v.* McMurray, 24 Kan. 62; School Dist. *v.* Lund, 51 Kan. 731; Jenson *v.* Lee, 67 Kan. 539; Brashear *v.* Rabenstein, 71 Kan. 455; Miller *v.* Hahn, 116 Mich. 607; Carroll *v.* Paul, 16 Mo. 226; Stout *v.* St. Louis Co., 52 Mo. 342; Mansur *v.* Botts, 80 Mo. 651; Conrad Bank *v.* Gr. N. Co., 24 Mont. 178; Farron *v.* Sherwood, 17 N. Y. 227; Hosley *v.* Black, 28 N. Y. 438; Hurst *v.* Litchfield, 39 N. Y. 377; Fells *v.* Vestvali, 2 Keyes, 152; Raymond *v.* Hanford, 6 Th. & C. 312; Worthington *v.* Worthington, 100 N. Y. Ap. Div. 332; Burton *v.* Rosemary Co., 132 N. Ca. 17; Livingstone *v.* School Dist., 11 S. Dak. 150; Davis *v.* Streeter, 75 Vt. 214; Messmer *v.* Block, 100 Wis. 664.

MONEY PAID. — Luke *v.* Hancock, 76 Cal. 127; Pleasant *v.* Samuels, 114 Cal. 34; Mansfield *v.* Edwards, 136 Mass. 15; Mass. Co. *v.* Green, 185 Mass. 306; Cudlipp *v.* Whipple, 4 Duer, 610; Fox *v.* Easter, 10 Okla. 527.

MONEY HAD AND RECEIVED. — Ball *v.* Fulton Co., 31 Ark. 379; Snapp *v.* Stanwood, 65 Ark. 222; Dashaway Assn. *v.* Rogers, 79 Cal. 211; Minor *v.* Baldridge, 123 Cal. 187; Harbaugh *v.* Tanner, 163 Ind. 574; Slater *v.* Olson, 83 Minn. 35; Johnson Co. *v.* Central Bank, 116 Mo. 558; Sloman *v.* Schmidt, 8 Abb. Pr. 5; Betts *v.* Bache, 14 Abb. Pr. 279; Middleport *v.* Titus, 35 Oh. St. 253; Grannis *v.* Hooker, 29 Wis. 65; Burke *v.* Milwaukee Co., 83 Wis. 410; Thomson *v.* Elton, 109 Wis. 589; School Dist. *v.* School Dist. 118 Wis. 233.

ACCOUNT STATED. — Bonslog *v.* Garrett, 39 Ind. 338.

OMNIBUS COUNT. — Campbell *v.* Shiland, 14 Colo. 491; Griffin *v.* Murdock, 88 Me. 254; Acome *v.* Am. Co., 11 How. Pr. 24; Adams *v.* Holley, 12 How. Pr. 326.

ALLEGATION OF REQUEST. — In the count for work and labor and money paid it must be alleged that the plaintiff did the work or paid the money at the request of the defendant. Berdoe *v.* Spittle, 1 Ex. 175; Gwaltney *v.* Cannon, 31 Ind. 227; Mansfield *v.* Edwards, 136 Mass. 15; Mass. Co. *v.* Green, 185 Mass. 306; Conrad Bank *v.* Gr. N. Co., 24 Mont. 178; Fox *v.* Easter, 10 Okla. 527. But in the counts for goods sold, money lent, money had and received and an account stated, the transaction itself necessarily imports a request, so that no express request need be alleged. Victors *v.* Davies, 12 M. & W. 758.

In a few states the use of the common counts is either prohibited or allowed only when accompanied by a bill of particulars. N. Y. Co. *v.* Baker, 68 Conn. 337; McNamara *v.* McDonald, 69 Conn. 484; Cummings *v.* Gleason, 72 Conn. 587; Dunnett *v.* Thornton, 73 Conn. 1; Hoggson *v.* Sears, 77 Conn. 587; Penn Co. *v.* Conoughy, 54 Neb. 123; Bowen *v.* Emmerson, 3 Oreg. 452; Hammer *v.* Downing, 39 Oreg. 504 (but see Waite *v.* Willis, 42 Oreg. 288; Keene *v.* Eldridge, 47 Oreg. 179). — ED.

T. H. PHIPPS v. R. HOPE, Administrator, and Others.

SUPREME COURT, OHIO, DECEMBER TERM, 1866.

[16 *Ohio State Reports*, 586.]

BRINKERHOFF, J.[1] To the petition of the plaintiff in the common pleas, the defendant Hope, administrator, etc., demurred, on the ground that the petition did not state facts sufficient to constitute a cause of action.

Do the facts stated in the petition, taking them as true, make a case of any sort in favor of the plaintiff against the personal representative of the intestate, on the ground of contract between the plaintiff and the intestate? What was that contract as alleged in the petition? It was this, that the intestate "promised the plaintiff that if he would work for him, and take an interest in his affairs, as if they were plaintiff's own, he would finally make or leave the plaintiff well off, and would do more for him than he would do for anybody else." And the plaintiff alleges that he accepted this offer and performed the contract on his part. This, we have no doubt, would make a cause of action against the administrator of the intestate, if the contract were broken on the part of the intestate. But *was* it broken on the part of the intestate? To this inquiry the petition gives no response. No breach of contract is alleged. And, for aught that appears in the petition, the intestate may have made and left the plaintiff well off, and may have done better by him than he did by anybody else. The plaintiff admits having received gifts to some extent, but he carefully abstains from stating the amount of them. Indeed, there is nothing in the petition inconsistent with the supposition that the intestate, during his lifetime, gave to the plaintiff every cent's worth of his property, except the note here in controversy.

Judgment affirmed.

SCOTT, C. J., and DAY, WHITE, and WELCH, JJ., concurred.[2]

[1] Only a part of the opinion of the court is given. — ED.

[2] Dabovich v. Emerich, 7 Cal. 208; Moore v. Besse, 30 Cal. 570; Morgan v. Menzies, 60 Cal. 341; Thornton v. Burr, 90 Ind. 488; Rich v. Calhoun, (Miss. 1892) 12 So. R. 707; Langford v. Sanger, 40 Mo. 160; Kendall v. Brownson, 47 N. H. 186, 198; Gibbs v. Dempsey, 3 N. J. 617; Schenck v. Naylor, 2 Duer, 675; Knower v. Reynolds, 99 N. Y. 245; Holman v. Criswell, 13 Tex. 38 *Accord*.

If the contract is to do one or the other of two things, the plaintiff must allege non-performance of each. Fisher v. Pearson, 48 Cal. 472; Dorsey v. Lawrence, Hardin, 508.

An averment in general terms that the defendant did not keep his promise was held an insufficient statement of the matter in Hart v. Bludworth, 49 Ala. 218; Wilson v. Clark, 20 Minn. 367; Picker v. Wiese, 39 N. Y. Misc. Rep. 22. A count is obviously bad which alleges a breach, not of the promise declared upon, but of another promise. Du Bruts v. Jessup, 70 Cal. 75. — ED.

NEWTON MORGAN *v.* STEWART MENZIES.

SUPREME COURT, CALIFORNIA, MARCH, 1882.

[60 *California Reports*, 341.]

MORRISON, C. J.[1] The City and County of San Francisco commenced an action against Morgan to recover a certain amount of money which, it was claimed, he owed the plaintiff in that action, and procured a writ of attachment to be issued, which was levied on shares of mining stock, the property of Morgan. Before the writ was issued, defendant Menzies and one Ashbury (since deceased), executed an undertaking in the form prescribed by the statute, concerning attachments. The case of the City and County of San Francisco against Morgan terminated adversely to the City and County, and the case we are now considering was the result.

The undertaking is in the sum of fifteen thousand dollars, and the judgment in the court below was for that amount against the sureties on the undertaking. From that judgment, as well as from an order denying a motion for a new trial, this appeal is prosecuted.

The condition of the undertaking is, that "we, the undersigned residents of the City and County of San Francisco, in consideration of the premises and of the issuing of this attachment do jointly and severally undertake in the sum of fifteen thousand dollars, and promise to the effect that if the said defendant recovers judgment in said action, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of said attachment, not exceeding the sum of fifteen thousand dollars, together with a reasonable attorney's fee."

It will be observed that the undertaking on the part of the defendants is that the *plaintiff* in the action will pay, and there is no averment in the complaint that it has not paid, or that even a demand has been made. There is not, therefore, any averment in the complaint of a breach which would give the plaintiff in this case a right of action against the defendants on the undertaking. "The breach of the contract, being obviously an essential part of the cause of action, must in all cases be stated in the declaration" (Chitty on Pleading, 332; 1 Saunders on Pleading and Evidence, 216); and the omission of a breach cannot be aided or cured even by verdict (1 Chitty on Pleading, 327).

Judgment and order reversed.

SHARPSTEIN, MYRICK, MCKEE, ROSS, and THORNTON, JJ., concurred.[2]

[1] Only a part of the opinion of the court is given. — ED.

[2] Williams *v.* Staton, 13 Miss. 347; Pinney *v.* Hershfield, 1 Mont. 367 *Accord.*

Similarly, the failure to allege a breach in an action upon a bond conditioned for the performance of certain acts is fatal wherever, by statute, the plaintiff is required to state a breach of the condition of the bond. Lunn *v.* Payne, 6 Taunt. 140; Hill *v.* Rushing, 4 Ala.

ROSSITER v. SCHULTZ.

SUPREME COURT, WISCONSIN.

[62 *Wisconsin Reports*, 655.]

TAYLOR, J. This is an appeal from an order of the County Court of Milwaukee County, overruling the demurrer to the cause of action stated in the complaint. The complaint reads as follows: "And for a cause of action this plaintiff alleges and shows to the court that he was heretofore the owner of the scow or steam-vesssel named the Commerce, which was used for obtaining sand and gravel from Lake Michigan as aforesaid. That on or about April 30, 1882, the said defendants, as copartners, aforesaid, duly purchased from and this plaintiff duly sold and delivered to them said scow or steam-vessel, together with a derrick used in connection therewith, at and for the sum of $1500, which sum said defendants promised and agreed to pay this plaintiff therefor. Wherefore, the plaintiff, on account of the premises aforesaid, demands judgment against said defendants for the sum of $1500, together with interest thereon from April 30, 1882, and the costs and disbursements of this action."

It is alleged by the learned counsel for the appellants that no cause of action is stated, because the complaint does not expressly allege that any part of the purchase price for the property sold and delivered to the defendants by the plaintiff, and purchased of the plaintiff by the defendants, was unpaid when the action was commenced. It must be admitted that under the old common-law rule of pleading the complaint is clearly defective in several respects: (1) in not alleging that the sale was made at the request of the defendant;[1] and (2) in not alleging that the purchase money or some part of it had not been paid to the plaintiff by the defendants, although they had been requested to pay the same;[2] and probably for other defects. But these rules of the common law as to pleadings have been, to some extent at least, abrogated by the statutes of this state regulating pleadings in actions, and abolishing the old forms of action. Sec. 2645, R. S., reads as follows: "The forms of pleadings in civil actions in courts of record, and the rules by which the sufficiency of the pleadings are determined, are those prescribed by this chapter." The chapter referred to in this section is ch. 121, R. S. The next section (2646) prescribes what the complaint shall contain. It must contain the name of the court in which the action is brought, the county where the case is to be tried,

212 (*semble*); Love v. Kidwell, 4 Blackf. 553; Michael v. Thomas, 27 Ind. 501; Uhrig v. Sinex, 32 Ind. 493; Ryder v. Thomas, 32 Iowa, 56; Horner v. Harrison, 37 Iowa, 378; Hencke v. Johnson, 62 Iowa, 555; Knapp v. Barnard, 78 Iowa, 347 (*semble*); Nelson v. Bostwick, 5 Hill, 37; Austin v. Pickler, 98 N. Ca. 408; Carrington v. Bayley, 43 Wis. 507.

[1] This is a mistake. No request need be alleged in a count upon a sale or loan. Victor v. Davies, 12 M. & W. 758. — ED.

[2] This is also a mistake. The statement of the breach in an action upon a debt was mere form. Goodchild v. Pledge, 1 M. & W. 363. — ED.

and the parties, plaintiff and defendant. "2. A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition. 3. A demand of the judgment to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof shall be stated." Section 2668: "In the construction of a pleading for the purposes of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

There is under these statutory provisions no objection to the complaint demurred to, unless it be that it does not contain a plain and concise statement of the facts constituting a cause of action. It does contain a concise statement of all the facts necessary to be proven by the plaintiff in order to entitle him to recover of the defendant the purchase price of the property alleged to have been sold by him to them. It alleges a sale by him to the defendants of the property described, for a specified price, and a delivery of such property to the defendants, and that the defendants purchased of him the same property for the agreed price of $1500; and in his demand for judgment he claims the $1500, with interest from the date of the sale and delivery thereof.

The facts stated do not mislead the defendants. They clearly apprise them that the plaintiff claims from them the alleged agreed purchase price for the property sold and delivered. But it is urged that the plaintiff fails to show that the purchase price was not paid, and so does not show a breach of contract on the part of the defendants; but this appears to us to be a mere technical objection and not a substantial one. If he had alleged it in his complaint, he would not have been required to prove it, even though the defendant had answered by alleging a payment of the price, nor upon a general denial. Why, then, under the statutory pleading, should the plaintiff be required to make an allegation in his complaint which it is unnecessary to prove upon the trial? We see no reason for such allegation. This court has repeatedly held that under the present rules of pleading payment is an affirmative answer, and it must be alleged in the answer in order to be shown as a defence.[1] Gregory v. Hart,[2] Martin

[1] Lane v. Mullins, 2 Q. B. 254; McLendon v. Hamblin, 34 Ala. 86; Wolf v. Hall, 62 Ala. 24; Snodgrass v. Caldwell, 90 Ala. 319; Mann v. Scott, 32 Ark. 593; Blass v. Lawhorn, 64 Ark. 466; Mohr v. Barnes, 4 Colo. 350; Watson v. Leman, 9 Colo. 200, 203 (*semble*); Perst v. Cooper, 17 Colo. 80; Esbensen v. Cooper, 3 Colo. Ap. 467; Lakeside Co. v. Campbell, 39 Fla. 523; O'Neal v. Phillips, 83 Ga. 556; Archibald v. Banks, 203 Ill. 380 (foreclosure bill); O'Brien v. Stambach, 101 Iowa, 40; University v. Emmert, 108 Iowa, 500; Stevens v. Thompson, 5 Kan. 305; Gutteman v. Schroeder, 40 Kan. 507 (foreclosure bill); First Bank v. Hellger, 53 Kan. 695 (mortgagee *vs.* mortgagor for possession); Johnson v. Anderson, 60 Kan. 578 (like preceding case); Anthony v. Mott, 10 Kan. Ap. 105; Sun Co. v. Seigler, 19 Ky. L. Rep. 1227; Hilton v. Smith, 5 Gray, 400; Clarke v. Murphy, 164 Mass. 490; Selleck v. Garland, 184 Mass. 596 (but *aliter* in case of foreclosure bill. Temple v. Phelps, — Mass. 1906 — 79 N. E. R. 482); Farnham v. Murch, 36 Minn. 328; Marshall Bank v. Child, 76 Minn. 173; Dean v. Boyd, 86 Miss. 204; Ferguson v. Dalton, 158 Mo. 323; Buzzell v. Snell, 25 N. H. 474; Kendall v. Brownson, 47 N. H. 186; Smith v. Lewiston Mill, 66 N. H. 613;

[2] 7 Wis. 532, 540.

v. Pugh,[1] Hawes v. Woolcock,[2] Shipman v. State.[3] Under the rule that payment must be set up as an affirmative defence, it is clear that the complaint states every fact necessary to be proven by the plaintiff on the trial to entitle him to a judgment in his favor, and when he has done that it seems to us that under the statute he has stated all the facts necessary to constitute a cause of action, and he need not go further and allege either what the law will presume, or matter which should come properly from the other side. Moak's Van Santv. Pl. 254–256, 329; Maynard v. Talcott.[4]

The case of Keteltas v. Myers,[5] cited by the learned counsel for the appellants, was not only reversed by the court of appeals (19 N. Y. 231), but, on page 233, the court say "that the objections to the complaint were strictly technical, and under the present system of pleading such technicality should not be encouraged further than is necessary for the due and orderly administration of justice. In our opinion they should have decided in conformity to these views. They should have gone further; they should have declared the demurrer frivolous, as we now do." In the case of Allen v. Patterson,[6] JEWETT, J., says: "The Code requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action. Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated." And we think the rule stated is the correct one. Under the rules of pleading, as held by this court, suppose the plaintiff in the case at bar had alleged, in addition to what he has stated in his complaint, that there was due and owing to him from the defendants the sum of $1500, for the purchase price of the property described in the complaint, could the defendants have made a good answer to such complaint by simply denying that there was any sum whatever due from them to the plaintiff on account of the sale of such property? We think it is clear that such an answer would have been no defence to the plaintiff's action, and would either have been stricken out as frivolous, or been properly subject to a demurrer on the part of the plaintiff. In the case of Glenny v. Hitchins,[7] Justice Sill says: "If the complaint contains all the facts which upon a general denial the plaintiff would be bound to prove to entitle him to judgment, it then clearly contains a statement of the facts con-

McKeen v. Cook, 73 N. H. 410; McKinney v. Slack, 19 N. J. Eq. 164 (foreclosure bill); Banking Co. v. Walker, 121 N. Ca. 115; Burton v. Rosemary Co., 132 N. Ca. 17; Royster v. Marks, (N. Ca. 1904) 47 S. E. R. 127; Lokken v. Miller, 9 N. Dak. 512; Fewster v. Goddard, 25 Oh. St. 276; Benicia Works v. Creighton, 21 Oreg. 495; Clark v. Wick, 25 Oreg. 446; Minard v. McBee, 29 Oreg. 446; Farmers' Bank v. Hunter, 35 Oreg. 188; Sturgis v. Baker, 39 Oreg. 541; Bell v. Young, 1 Grant (Pa.), 175; Brassell v. Silva, 50 S. Ca. 181; Hopper v. Hopper, 61 S. Ca. 124; Ford v. Lawrence, (Tenn. Ch. 1898) 51 S. W. R. 1023; Terryberry v. Woods, 69 Vt. 94; Columbia Bank v. Western Co., 14 Wash. 162; Richards v. Jefferson, 20 Wash. 166; Knapp v. Runels, 37 Wis. 135; Meyer v. Hafemeister, 119 Wis. 539 *Accord.* — ED.

[1] 23 Wis. 184.
[2] 30 Wis. 213, 215
[3] 43 Wis. 381, 385.
[4] 11 Barb. 570.
[5] 1 Abb. Pr. 403.
[6] 7 N. Y. 478.
[7] 4 How. Pr. 98.

stituting a cause of action, and is sufficient under the Code. The sale and delivery are the issuable facts in the present case, and these, sustained by the testimony, determine the case for the plaintiff."

In the case at bar the issuable facts are the sale and delivery of the property to the defendants at the price stated, and are all the facts necessary to be proved by the plaintiff in order to make out a case against the defendants, and is therefore a sufficient statement of his cause of action.[1]

[1] Ensall v. Smith, 1 C. M. & R. 522; Goodchild v. Pledge, 1 M. & W. 363; Ashbee v. Pidduck, 1 M. & W. 564; Esbensen v. Hover, 3 Colo. Ap. 467, 469; State v. Peterson, 142 Mo. 526, 532; Welsh v. Argyle, 85 Wis. 307, 313 *Accord.*

Frisch v. Caler, 21 Cal. 71; Davanay v. Eggenhoff, 43 Cal. 395; Roberts v. Treadwell, 50 Cal. 520; Scroufe v. Clay, 71 Cal. 123; Barney v. Vigoreaux, 92 Cal. 631; Richardson v. Lake Co., 115 Cal. 71; Hurley v. Ryan, 119 Cal. 71; Dodge v. Kimple, 121 Cal. 580 (*semble*); Penrose v. Winter, 135 Cal. 289 (qualifying Ryan v. Holliday, 110 Cal. 337); Knox v. Buckman Co., 139 Cal. 598; Lawson v. Sherra, 21 Ind. 363; Pace v. Grove, 26 Ind. 27; Howorth v. Scarce, 29 Ind. 278; Stafford v. Davidson, 47 Ind. 319; Green v. Louthain, 49 Ind. 139; Higert v. Trustees, 53 Ind. 326; Goodman v. Gordon, 87 Ind. 126; Stanton v. Kenrick, 135 Ind. 382; Jaqua v. Shewather, 10 Ind. Ap. 234; Hershfield v. Aiken, 3 Mont. 442 (*semble*); Hudelson v. First Bank, 51 Neb. 557 (replevin by mortgagee vs. mortgagor; Van Giesen v. Van Giesen, 10 N. Y. 316; Keteltas v. Myers, 19 N. Y. 231 (*semble*); Krower v. Reynolds, 99 N. Y. 245; Lent v. N. Y. Co., 130 N. Y. 504; Tracy v. Tracy, 59 Hun, 1 (overruling Salisbury v. Hinson, 10 Hun, 242); Coulter v. Bower, 11 Daly, 203 (foreclosure bill); Newton v. Brown, 6 N. Y. Misc. Rep. 603; Holman v. Criswell, 13 Tex. 38, 44; Douglass v. Central Co., 12 W. Va. 502; Kinsley v. County Court, 31 W. Va. 464; Smoot v. McGraw, 48 W. Va. 144; Railway Co. v. Wilson, 52 W. Va. 647; Risher v. Wheeling Co., 57 W. Va. 149; Hendersen v. Southall, 4 Call, 371 (but see Nadenbousch v. McRea, Gilm. 228); Tunnell v. Watson, 2 Munf. 282; Buckner v. Blair, 2 Munf. 336; Nicholson v. Dixon, 5 Munf. 198; Strange v. Floyd, 9 Gratt. 474 *Contra.*

In California, although the plaintiff must allege non-payment of the debt, he need not prove it. Melone v. Ruffino, 129 Cal. 514; Huxley v. Ryan, 137 Cal. 461; Stuart v. Lore, 138 Cal. 672; Latour's Est. 140 Cal. 414, 430; Peterson v. Mineral King, 140 Cal. 624, 634; Roche v. Baldwin, 143 Cal. 186, 191; and the defendant, although he must prove payment, need not plead it affirmatively, but may offer evidence of payment under a general denial. Davanay v. Eggenhoff, 43 Cal. 395; Wetmore v. San Francisco, 44 Cal. 294. Furthermore a special plea of payment is a traverse. Frisch v. Caler, 21 Cal. 71.

In Indiana, Nebraska, New York, and Texas, although the plaintiff must allege non-payment of the debt, he need not prove it. Lawson v. Sherra, 21 Ind. 363; Howorth v. Scarce, 29 Ind. 278; Magenau v. Bell, 14 Neb. 7; Curtis v. Perry, 33 Neb. 519; Lerch v. Brasher, 104 N. Y. 157; Heilbronn v. Herzog, 165 N. Y. 98 (*semble*); Conkling v. Weatherwax, 181 N. Y. 258 (*semble*); Hicks-Alixanian v. Walton, 14 N. Y. Ap. Div. 199; *Re* Rowell, 45 N. Y. Ap. Div. 333; Ralley v. O'Connor, 71 N. Y. Ap. Div. 338 (affirmed 173 N. Y. 621); Hussey v. Culver, 6 N. Y. Sup. 466; Claflin v. N. Y. Co., 7 N. Y. Misc. Rep. 668 (Cochran v. Reich, 91 Hun, 440 *contra* is discredited); Grant v. Roberts, (Tex. Civ. Ap. 1897) 38 S. W. R. 650. But, otherwise than in California, the defendant, in these states, must not only prove, but allege payment, evidence of payment not being admissible under a general denial. Hubler v. Pullen, 9 Ind. 273; Howorth v. Scarce, 29 Ind. 278; Pierce v. Hower, 142 Ind. 626, 632; Johnson v. Tyler, 1 Ind. Ap. 387; Clark v. Mullen, 16 Neb. 481; Lamb v. Thompson, 31 Neb. 448; Cady v. South Bank, 46 Neb. 756; Ashland Co. v. May, 51 Neb. 474; Barker v. Wheeler, 62 Neb. 150; Union Bank v. Haskell, (Neb. 1902) 90 N. W. R. 233; McKyring v. Bull, 16 N. Y. 297; First Bank v. Jennings, 44 N. Y. Misc. Rep. 374; Hander v. Baade, 16 Tex. Civ. Ap. 119.

In California, New York, and West Virginia, a plea of payment to an action for a debt has been held to be a traverse, notwithstanding the fact that the defendant has the burden of establishing its truth. Frisch v. Caler, 21 Cal. 71; Van Giesen v. Van Giesen, 10 N. Y. 316; Douglass v. Central Co., 12 W. Va. 502; Krisley v. County Court, 31 W. Va. 464; Risher v. Wheeling Co., 57 W. Va. 149.

In Indiana, on the contrary, a special plea of payment is not a traverse but an affirmative plea. Hubler v. Pullen, 9 Ind. 273. — Ed.

BY THE COURT. — The order of the county court is affirmed.

CASSODAY, J. It must be confessed that the rules of pleading under the Code are exceedingly liberal. Being so, there would seem to be no good reason for enlarging the statutory liberality by construction. I am not aware of any reported case in any state having a Code like ours, holding a complaint for breach of contract good on demurrer which contained no allegation of the breach. Unwilling to join in initiating this new departure from a well-established rule of pleading, I am necessarily forced to dissent.

ANONYMOUS.

EXCHEQUER, HILARY TERM, 1663.

[*Hardres*, 320.]

IN an action upon the case, upon a promise to redeliver some rings to the plaintiff, in as good plight as they were delivered to him, or else to pay him 18*l.* in money: The plaintiff averred, that the defendant had not redelivered to him the rings, but omitted to say, nor paid him the 18*l.* in money: And this was held to be naught, though after a verdict, upon not guilty found for the plaintiff. Because it may well be that the 18*l.* was paid, and then the plaintiff had no cause of action.[1]

G. E. BARKER AND OTHERS *v.* B. G. WHEELER.

SUPREME COURT, NEBRASKA, JUNE 19, 1901.

[62 *Nebraska Reports*, 150.]

SULLIVAN, J. Bert Glendore Wheeler sued the plaintiffs in error as sureties upon an official bond and obtained judgment against them. The petition alleges that one James W. Eller was county judge of Douglas county during the term ending January 3, 1894; that the defendants, George E. Barker and William S. Rector, were the sureties upon his official bond; that Eller, in his official capacity, received certain money belonging to the plaintiff and converted the same to his own use. The answer admits that Eller was county judge and that defendants were his sureties, but denies in general terms the other averments of the petition. The only assignment of error with

[1] Gibbons *v.* Northcott, 1 Sid. 447; Lowe *v.* Peers, 4 Burr. 2225; Legh *v.* Lillie, 6 H. & N. 165; Fisher *v.* Pearson, 48 Cal. 472 *Accord*.

A promise to pay or cause to be paid is not a promise to do one of two things, but one thing. Aleberry *v.* Walby, 1 Stra. 229, 231. — ED.

which we have to deal calls in question a ruling of the trial court excluding evidence tending to show that Eller, while he was yet judge of the county court, paid the plaintiff's money to her duly constituted guardian. The correctness of this ruling depends upon whether, in actions of this kind, evidence of payment is admissible under a general denial. It is settled doctrine in this state that, in actions to recover money claimed to be due upon ordinary contracts, the general denial is the Code equivalent of the common law plea of non-assumpsit, and hence does not put the allegation of non-payment in issue. Magenau *v.* Bell,[1] Clarke *v.* Mullen,[2] Lamb *v.* Thompson,[3] Lewis *v.* Lewis,[4] Ashland Land & Live-Stock Co. *v.* May,[5] Hudelson *v.* First Nat. Bank.[6] These cases recognize no distinction between payment according to the terms of the contract and payment after breach of the contract; and one of them at least, Clarke *v.* Mullen, is a direct adjudication to the effect that payment at the time goods were sold and delivered, and before a cause of action arose, could not be shown unless specially pleaded. But neither this court, nor any other so far as we know, has ever held in an action on an official bond or other bond of indemnity, that the plaintiff was, by a general denial, relieved of the necessity of proving the loss or injury out of which arose his right of action. The defendants did not by their bond become indebted to the plaintiff; they assumed no specific obligation to her which they were bound at all events to discharge by payment or otherwise; their promise, given to the county of Douglas, was to make good any loss that the public or individuals might sustain by reason of the official misconduct of Eller. This being so, it would be illogical — it would be inconsistent with reason and common sense — to hold that a general denial, like the plea of non-assumpsit, put in issue nothing but the execution of the bond. An offer to prove payment is not in every case an implied admission that the plaintiff once had an actionable demand against the defendant; its purpose may be, as in this case, to prove that a right of action never existed. Eller received the money in question rightfully; his possession of it as county judge was lawful, and there is no presumption that he was guilty of official misconduct. The allegation of conversion was, therefore, a material one, and it was not admitted by the general denial. Payment was not new matter, within the meaning of section 99 of the Code of Civil Procedure, for it was offered, not to show the discharge of an obligation that once existed, but to show that the bond had not been forfeited as alleged; that Eller had not been guilty of official misconduct; that the plaintiff had not been injured, — in short, that one of the essential averments of the petition was not true. In State *v.* Peterson,[7] which was an action upon an official bond, the court, speaking by Macfarlane, J., said: "In cases in which non-payment is a material fact necessary to constitute plaintiff's cause of action, it must be alleged in the petition

[1] 14 Neb. 7. [2] 16 Neb. 48. [3] 131 Neb. 448. [4] 31 Neb. 528.
[5] 51 Neb. 474 [6] 51 Neb. 557. [7] 142 Mo. 526.

and proved as a part of plaintiff's case, and defendant can controvert it, under a general denial, by proof that payment was made."

Other cases to the same effect are Wheeler & Wilson Mfg. Co. *v.* Tinsley,[1] and Knapp *v.* Roche.[2] The case of Hudelson *v.* First Nat. Bank does not at all support the position for which the plaintiff contends. It merely decides that, in an action by a mortgagee for possession of mortgaged chattels, an allegation of non-payment of the mortgage debt is indispensable. The legal effect of a general denial was not determined, nor was there any occasion to consider the question, as the statute declares the effect of such a denial in actions of replevin.

The judgment heretofore rendered in this court is set aside, the judgment of the district court is reversed and the cause remanded for further proceedings.[3] REVERSED AND REMANDED.

BROOMFIELD *v.* SMITH.

EXCHEQUER, TRINITY TERM, 1836.

[*Reported in* 1 *Meeson & Welsby*, 542.]

DEBT for goods sold and delivered. Plea, *nunquam indebitatus.* At the trial before Arabin, Serjt., at the Sheriff's Court in London, the sale and delivery having been proved, the defendant proposed to show that the goods were sold on a credit which had not expired when the action was brought. It was objected for the plaintiff, on the authority of Edmunds *v.* Harris,[4] that such defence was not admissible unless specially pleaded; the learned serjeant so ruled, and rejected the evidence, and the plaintiff had a verdict.

Barstow obtained a rule for a new trial, citing Taylor *v.* Hilary,[5] Cousins *v.* Paddon,[6] and Alexander *v.* Gardner,[7] to show that Edmunds *v.* Harris could not be supported.

Ryland showed cause, and again relied on Edmunds *v.* Harris. [ALDERSON, B. How does this evidence confess or avoid the debt? It denies that there ever was a debt before action brought.] It admits a *debitum in præsenti solvendum in futuro.* [ALDERSON, B.

[1] 75 Mo. 458. [2] 94 N. Y. 329.

[3] Hill *v.* Cushing, 4 Ala. 212 (*semble*); Wheeler *v.* Tinsley, 75 Mo. 458; State *v.* Peterson, 142 Mo. 526 *Accord.*

In any case in which a promise to pay money does not create a debt, the breach of such a promise, like the breach of any other promise, which creates a claim for unliquidated damages, must be alleged to make out a cause of action, and a plea of payment must therefore be a negative plea. Wilkes *v.* Hopkins, 6 M. & G. 36 (promise by accommodated acceptor to accommodating drawer to pay the bill to the holder at maturity). See also Knapp *v.* Roche, 94 N. Y. 329; Wellington *v.* Continental Co., 52 Hun, 408. — ED.

[4] 2 A. & E. 414. [5] 1 C. M. & R. 741.

[6] 2 C. M. & R. 547. [7] 2 Bing. N. C. 671.

There is no debt till the credit has expired. How is the defendant indebted for goods sold and delivered till then?] The principle of the New Rules is, that any matter which goes to avoid the cause of action must be specially pleaded. [ALDERSON, B. Avoiding is admitting the cause of action, and afterwards avoiding it; here the defendant denies a cause of action.] The evidence appears to admit a debt, though not yet payable.

LORD ABINGER, C. B. It would show that the plaintiff had no cause of action at the time of action brought. This court has already decided[1] that where there is a special contract for goods sold, which has not been performed, and the plaintiff brings his action on the implied assumpsit, he may be met by that defence under the general issue. The rule must be absolute for a new trial.

Rule absolute.[2]

BUSSEY *v.* BARNETT.

EXCHEQUER, JANUARY 14, 1842.

[*Reported in* 9 *Meeson & Welsby*, 312.]

DEBT for goods sold and delivered, and on an account stated. The particulars of demand claimed the sum of £3 5*s.* 6*d.*, being the balance of an account for goods sold and delivered by the plaintiff to the defendant. Pleas, except as to the sum of 4*s.* 6*d.*, parcel, &c., *nunquam indebitatus*; as to that sum, a tender, which was denied by the replication. At the trial before the under-sheriff of Middlesex, it appeared that the action was brought to recover an alleged balance of a disputed account for goods bought by the defendant, for ready money, at the plaintiff's shop. The defendant produced evidence to prove that, within ten minutes after the delivery of the goods at his house, he paid for them in full, with the exception of the 4*s.* 6*d.*, as to which the tender was pleaded. It was objected for the plaintiff that it was not competent for the defendant to give evidence of this payment, there being no plea of payment on the record; but the under-sheriff thought that, under the circumstances, no debt ever arose between the parties, and therefore the evidence was admissible under the plea of *nunquam indebitatus*, and he accordingly received it; and the tender being also proved to the satisfaction of the jury, the defendant had a verdict on both issues.

[1] Cousins *v.* Paddon, Grounsell *v.* Lamb, 1 M. & W. 352.

[2] Landes *v.* Morrissey, 69 Cal. 83 *Accord.*

Edmands *v.* Harris, 2 A. & E. 414; Reed *v.* Scituate, 7 All. 141 (see, however, Wilder *v.* Colby, 134 Mass. 377, in which case plaintiff's evidence disclosed that action was premature, and Waterhouse *v.* Levine, 182 Mass. 407); Heilbronn *v.* Herzog, 165 N. Y. 98, 653; Crown Co. *v.* Brown, *supra*, 187 *Contra*. "Defendant's plea of an unexpired term of credit, which is relied on to defeat plaintiff's recovery, is in the nature of an affirmative defence which must be supported by evidence before the defendant can succeed. Like the defence

C. Jones now moved for a new trial, on the ground of misdirection, and contended that the defence was inadmissible without a plea of payment. [ALDERSON, B. The plea of *nunquam indebitatus* means that there never was a sale of goods to the defendant on credit. This was a mere exchange of goods for money, and no debt ever arose. LORD ABINGER, C. B. There was no contract whereby the defendant became indebted to the plaintiff.] In Goodchild *v.* Pledge,[1] where to a count in debt for £20 for goods sold and delivered the defendant pleaded, that before the commencement of the suit, and when the said sum of £20 became due and payable, to wit, on, &c., the defendant paid the plaintiff the said sum of £20, according to the defendant's said contract and liability; this plea was held bad on demurrer for concluding to the country, and not with a verification; and Parke, B., there says, "The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant?" And he adds, "The new general issue, that the defendant never was indebted, that is, at no instant of time, was framed for the express purpose of making all these defences pleadable by way of discharge." [ALDERSON, B. What the learned judge there means is, that the moment goods are delivered on credit a contract arises whereby the defendant becomes indebted. No doubt that was a proper case for a plea of payment.] This was a defence in the nature of confession and avoidance.

LORD ABINGER, C. B. In this case the goods were not delivered upon a contract out of which a debt arose; there was no promise to pay, but immediate payment.

ALDERSON, B. Where there is a contract for the sale and delivery of goods for ready money, and ready money is paid, there is no debt.

GURNEY, B., concurred. *Rule refused.*[2]

SMITH *v.* PARSONS.

AT NISI PRIUS, CORAM LORD ABINGER, C. B., JUNE 27, 1837.

[8 *Carrington & Payne*, 189.]

THE declaration stated in substance that, in consideration that the plaintiff would give the defendant a horse, and the sum of £2, the

of payment, it must not only be pleaded, but proved. The allegation of the complaint, that the sum claimed is due and payable, and the denial thereof in the answer, adds nothing to the issue. These are merely statements of conclusions of law." Per WERNER, J., giving the opinion of the court.

A present debt payable in the future may be reached by garnishee or trustee process. Johnson *v.* West, 1 Barnard. 21; Dunnegan *v.* Byers, 17 Ark. 492; Seymour *v.* Over River Dist., 53 Conn. 502; Sand Co. *v.* Parsons, 54 Conn. 310; Stone *v.* Hodges, 14 Pick. 81. — ED.

[1] 1 M. & W. 363.

[2] Wood *v.* Bletcher, 4 W. R. 566 *Accord.*

Compare Littlechild *v.* Banks, 7 Q. B. 739; Timmins *v.* Gibbins, 18 Q. B. 726; Smith *v.* Winer, 12 C. B. 489; Baker *v.* Heard, 5 Ex. 959; Flowers *v.* Slater, 2 West. L. Month. (Oh.) 445. — ED.

defendant agreed to sell him a horse, and undertook and promised that the horse was sound, and quiet in harness, whereas in fact it was not, &c.

The defendant pleaded only that he did not undertake and promise in manner and form as the plaintiff had alleged.

Payne then proposed to call witnesses to show that the plaintiff himself had injured the horse, and that it was not unsound at the time of the sale.

Lord Abinger, C. B., was of opinion that the plea did not put in issue the question of soundness, and therefore that the evidence was not admissible. *Verdict for the plaintiff; damages,* £8.

YOUNG & CO. *v.* BELL and Another.

United States Circuit Court, District of Columbia, July Term, 1806.

[1 *Cranch, Circuit Court Reports,* 342.]

Debt on a promissory note. The defendant pleaded *nil debet*, and offered evidence of infancy in support of the plea.[1]

The Court, having taken time to consider, decided (*nem. con.*) that infancy cannot be given in evidence, on the plea of *nil debet* to an action of debt on a promissory note, being of opinion that it is not void, but voidable. See Hyer *v.* Hyatt, at Washington, December, 1827.[2]

[1] The arguments of counsel are omitted. — Ed.

[2] Generally to-day infancy is an affirmative defence. Miller *v.* Fisher, 1 Ariz. 232; Jarman *v.* Windsor, 2 Harring. 162 (*semble*); Curry *v.* St. John Co., 55 Ill. Ap. 82; Pitcher *v.* Laycock, 7 Ind. 398; Blake *v.* Douglass, 27 Ind. 416; Boyd *v.* Fitch, 71 Ind. 306; Cohee *v.* Baer, 134 Ind. 375; Stern *v.* Freeman, 4 Met. (Ky.) 309; Bryant *v.* Pottinger, 6 Bush, 473 (*semble*); Lynch *v.* Johnson, 109 Mich. 640; Reynolds *v.* Alderman, (N. Y. Misc. Rep., March, 1907) 103 N. Y. Sup. 863; Roe *v.* Augevine, 7 Hun, 679; Rush *v.* Wick, 31 Oh. St. 521; Campbell *v.* Wilson, 23 Tex. 252.

Formerly, evidence of infancy was allowed under the plea of *non assumpsit*, and this practice still obtains in a few states. Darby *v.* Boucher, 1 Salk. 279; Forrestell *v.* Wood, (Md. 1891), 23 Atl. R. 133; Herrick *v.* Swomley, 56 Md. 439, 456; Thorne *v.* Fox, 67 Md. 67, 73; Dacosta *v.* Davis, 24 N. J. 319; Wailing *v.* Toll, 9 Johns. 141; Thrall *v.* Wright, 38 Vt. 494.

But this anomaly was not extended to the plea of *non est factum*. Y. B. 1 Hen. VII, f. 15, pl. 2; Y. B. 14 Hen. VIII, f. 28, pl. 7; Whelpdale's Case, 5 Rep. 119, a; Thompson *v.* Leach, 3 Mod. 301, 310; Zouch *v.* Parsons, 3 Burr. 1794, 1805; Baylis *v.* Dineley, 3 M. & Sel. 477, 478; Edwards *v.* Brown, 1 Tyrwh. 182, 207; Union Bank *v.* Ridgely, 1 Har. & G. 324, 416. — Ed.

NANCY M. TRACY *v.* JULIA KEITH.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1865.

[11 *Allen*, 214.]

CONTRACT brought by the executrix of the will of Asaph Tracy upon two promissory notes in the usual form, signed by the defendant, and payable to the plaintiff's testator or order. The answer admitted the making of the notes, but averred that the defendant was then a married woman living with her husband, and that the notes were given without consideration to her, and not for the benefit of her separate estate or for her own benefit or in respect to any separate trade, business, labor, or services of her own.

At the trial in the Superior Court, before WILKINSON, J., the plaintiff put in the two notes, and rested; and the defendant put in proof that she was a married woman living with her husband, and rested; and the judge thereupon ordered a verdict for the defendant, which was returned accordingly; and the plaintiff alleged exceptions.[1]

HOAR, J. The question which these exceptions present is, whether an action can be maintained against a married woman upon a promissory note made by her, which recites that it is for value received, without any further proof to support it. And we can have no doubt that it cannot.

The principle is simply this: By the common law, a married woman is generally incapable of making a valid contract. The recent statutes of the Commonwealth have given her a special, limited power of binding herself by her contracts, under certain circumstances. Unless these circumstances are shown to exist she has no contracting power. The plea of coverture, generally, is therefore a sufficient defence to an action of contract against her, and it is not necessary for her to negative in pleading or proof all possible exceptions.[2]

[1] The argument for the plaintiff is omitted. — ED.

[2] Garland *v.* Peeney, 1 Ill. Ap. 108; Downing *v.* O'Brien, 67 Barb. 582; Scudder *v.* Gori, 3 Robt. (N. Y.) 661 (but see *contra* Ferris *v.* Holmes, 8 Daly, 277; Brant *v.* Hammond, 65 How. Pr. 264); City Bank *v.* Holden, 9 Oh. Dec. 546, 14 W. L. Bull. (Oh.) 399 s. c. *Accord.*

This doctrine that a plea of coverture without more is a good affirmative answer to a claim upon a contract finds support in the following cases, which decide that a complaint, disclosing the coverture of the defendant, is bad upon demurrer, unless it states also special circumstances under which a married woman is liable. Punch *v.* Walker, 34 Ala. 494; Stillwell *v.* Adams, 29 Ark. 346; Warner *v.* Hess, 66 Ark. 113; Aiken *v.* Davis, 17 Cal. 119; Crawford *v.* Feder, 34 Fla. 397; Crawford *v.* Tiedeman, 35 Fla. 27; Lindley *v.* Cross, 31 Ind. 106; Johnson *v.* Tutewiler, 35 Ind. 353; Crickman *v.* Breckenridge, 51 Ind. 294; Emmett *v.* Yandes, 60 Ind. 548; Gall *v.* Fryberger, 75 Ind. 98; Brown *v.* Will, 103 Ind. 71; Rubell *v.* Bushnell, 91 Ky. 251, 254 (compare Wren *v.* Ficklin, 22 Ky. L. Rep. 1035; Herring *v.* Johnson, 24 Ky. L. Rep. 1940); Higgins *v.* Pelzer, 49 Mo. 152; Bragg *v.* Israel, 86 Mo. Ap. 338; Leslie *v.* Harlow, 18 N. H. 578; Broome *v.* Taylor, 76 N. Y. 564; Greene *v.* Ballard, 116 N. Ca. 144; Moore *v.* Wolf, 122 N. Ca. 711; Jenz *v.* Gugel, 26 Oh. St. 527; Becroft *v.* Dossman, 2 W. L. Bull. (Oh.) 110; Parke *v.* Kleeber, 37 Pa. 251; Swayne *v.* Lyon, 67 Pa. 436; Berger *v.* Clark, 79 Pa. 340; Fenn *v.* Early, 113 Pa. 264; Fell *v.* Brown, 115 Pa. 218; Sheppard *v.* Kindle, 3 Humph. 80; Brown *v.* Ector, 19 Tex. 346; Laird *v.*

As a rule of pleading, this appears to be supported by the precedents, and conforms to the rule in analogous cases. To an action on the contract the defendant pleads coverture, and the replication states the facts which bring the defendant within the exception. Or if the coverture is pleaded in abatement to a suit by a married woman, the replication should state the facts which enable her to sue alone. Chit. Pl. (6th Amer. ed.) 484–488, 551. So in a suit against an infant, if infancy is pleaded, the replication may aver that the promise was for necessaries suitable to his estate and degree.

The point seems to have been directly decided in this commonwealth. In Gregory *v.* Pierce,[1] the question was whether a husband who had left the commonwealth had so utterly deserted his wife and renounced his marital rights as to enable her to contract as a *feme sole;* and the Court say, "The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception." And in Commonwealth *v.* Williams,[2] it was held that the presumption of fact that personal property in the possession of a married woman is the property of her husband, is not changed by the statute enabling mar-

Thomas, 22 Tex. 276; Trimble *v.* Miller, 24 Tex. 214; Brown *v.* Farmers Bank, 88 Tex. 265; Wooster *v.* Northup, 5 Wis. 245. In Broome *v.* Taylor *supra*, EARL, J. said: "If the complaint had not shown that the defendant, Helen, was a married woman, it would have been good against her; and, in that case, in order to avail herself of the defence of coverture, it would have been necessary for her to set it up in her answer (Smith *v.* Downing, 61 N. Y. 249; Frecking *v.* Rolland, 53 N. Y. 422). But the complaint shows that the bond is the obligation of a married woman; and there is no allegation showing that it was given for any purpose that would make it binding upon her. As to her, the bond is *prima facie* a nullity; and hence, the complaint does not show a cause of action against her."

In some jurisdictions, however, because, by statute, a married woman's capacity to contract is now the rule and her incapacity the exception, a plea of coverture alone is no longer a good plea. The defendant must also allege the facts bringing her within the exception of incapacity. Marion *v.* Regenstein, 98 Ala. 475; Strauss *v.* Glase, 108 Ala. 546; Rose *v.* Otis, 18 Colo. 59 (all disability removed); Elliott *v.* Gregory, 115 Ind. 98; Miller *v.* Shields, 124 Ind. 166; Field *v.* Noblett, 154 Ind. 357; Cook *v.* Buhrlage, 159 Ind. 162; Harbaugh *v.* Tanner, 163 Ind. 574, 580; Gillespie *v.* Smith, 20 Neb. 455; First Bank *v.* Stoll, 57 Neb. 756; Hinkson *v.* Williams, 41 N. J. 35; Van Syckel *v.* Woolverton, 56 N. J. 8; Patrick *v.* Smith, 165 Pa. 526, 528 (*semble*). And in these jurisdictions a complaint upon a contract which discloses the coverture of the defendant is not on that account open to a demurrer. Bennett *v.* Matting, 110 Ind. 197; Miller *v.* Shields, 124 Ind. 166, 170.

Coverture as Affirmative Defence. Coverture is an affirmative plea at common law and under the statutes. White *v.* Adams, 52 Cal. 435; Monson *v.* Beecher, 45 Conn. 299; Work *v.* Cowhick, 81 Ill. 317, Johnson *v.* Miller, 47 Ind. 376; Long *v.* Dixon, 55 Ind. 352; Ætna Co. *v.* Baker, 71 Ind. 102; Cupp *v.* Campbell, 103 Ind. 213; Bethell *v.* Durall, 22 Ky. L. Rep. 1801; Smoot *v.* Judd, 184 Mo. 508; Morris *v.* Lindsley, 45 N. J. 435; Hier *v.* Staples, 51 N. Y. 136; Frecking *v.* Bolland, 53 N. Y. 422; Smith *v.* Dunning, 61 N. Y. 249; Stevens *v.* Bostwick, 2 Hun. 423; Hansee *v.* Fiero, 56 Hun, 463; Minners *v.* Smith, 40 N. Y. Misc. Rep. 117; Kennard *v.* Sax, 3 Oreg. 263; Sheppard *v.* Kindle, 3 Humph. 80 (*semble*).

In England, prior to the Hilary Rules of 1833, coverture, like many other affirmative defenses, was admissible under the general issue. James *v.* Fowks, 12 Mod. 101; Linch *v.* Hooke, 1 Salk. 7; Cole *v.* Delawn, 3 Keb. 228 (*semble*); Edwards *v.* Brown, 1 Tyrwh. 182, 207. And this objectionable practice has not altogether disappeared in this country. Streeter *v.* Streeter, 43 Ill. 155; Culver *v.* Johnson, 90 Ill. 91; Garland *v.* Peeney, 1 Ill. Ap. 108; Painter *v.* Wallenford, 1 Greene, Iowa, 97; Barr *v.* Perry, 3 Gill, 313, 322; Union Bank *v.* Ridgely, 1 Har. & G. 324, 416; Edelin *v.* Sanders, 3 Md. 118, 130; Lyman *v.* Hibbard, 18 N. H. 233. — ED.

[1] 4 Met. 478.

[2] 7 Gray, 337.

ried women to hold such property in their own right, and to trade on their own account; and that the party, whose case requires him to prove property in the wife, must rebut such presumption, and show the facts which bring it within the statute, as a case in which the statute declares it to be the separate property of the wife.

Exceptions overruled.

HARRISON v. RICHARDSON.

AT NISI PRIUS, BEFORE LORD ABINGER, C. B., AUGUST 20, 1835.

[1 *Moody & Robinson*, 504.]

ASSUMPSIT against drawer of a promissory note.

Pleas: 1st, that the defendant did not make the note, and issue thereon. 2d, that the defendant, when he made the note, was of imbecile mind. Replication, that the plaintiff had not notice of the defendant's imbecility of mind, and issue thereon.

The defendant being unable to prove that the plaintiff had such notice, *Cresswell* proposed to show defendant's imbecility of mind, as alone constituting a defence; and he contended that he was at liberty to do this upon the first plea, inasmuch as it was a matter operating not by way of confession and avoidance, but by way of denial.

LORD ABINGER, C. B. (after referring to the 1st rule of Hilary Term, 4 W. 4. s. 3.) was of opinion that such a defence could not be gone into on the general plea that the defendant did not make the note: and the evidence was rejected.

Verdict for the plaintiff.[1]

HIRSCHMAN v. BUDD.

EXCHEQUER, APRIL 16, 1873.

[*Law Reports*, 8 *Exchequer*, 171.]

DECLARATION that the United Wine Growers of Hungary (Limited), on the 11th day of October, 1872, by their bill of exchange now overdue, directed to the defendant, required him to pay to them, or order,

[1] Alcock v. Alcock, 3 M. & G. 268; Ireland v. White, 102 Me. 233, Rea v. Bishop, 41 Neb. 202; Whitman v. Lake, 32 Wis. 189 *Accord*.

In England, before the Hilary Rules of 1833, the defence of insanity was admissible under the general issue. Yates v. Boen, 2 Stra. 1104; Cole v. Robbins, Bull. N. P. 172 (drunkenness); and there are several American decisions to the same effect; Winston v. Moffatt, 9 Port. 518; Walker v. Clay, 21 Ala. 797; Milligan v. Pollard, 112 Ala. 465; Walker v. Winn, 142 Ala. 560; Allen v. Babcock, 1 Harring. 348; Collins v. Trotter, 81 Me. 275; Mitchell v. Kingman, 5 Pick. 431 (*non assumpsit*); Young v. Stevens, 48 N. H. 133, 136. — ED.

71*l.* 10*s.* 6*d.* four months after date; that the defendant accepted the said bill, and the United Wine Growers of Hungary indorsed it to the plaintiff, but the defendant did not pay the same.

Plea traversing the acceptance of the bill. Issue.

The cause was tried before Martin, B., at the Middlesex Sittings in Easter Term last. The bill having been produced, and appearing to be dated on the 11th of October, the defendant proved that, when originally accepted by him, it bore date the 1st of October, and that after it had been so accepted and placed in circulation the date had been altered without his knowledge or assent from the 1st to the 11th of October. It was objected that this circumstance should have been specially pleaded, but the learned judge ruled that it was open to the defendant under the traverse of the acceptance, and (the jury having found that the alteration had been made after the bill had been accepted and issued, and had never been assented to by the defendant) a verdict was entered for the defendant.[1]

KELLY, C. B. There should be no rule in this case. The declaration is upon a bill stated to have been accepted by the defendant on the 11th of October, 1872. The defendant, amongst other pleas, traversed the acceptance. The bill, when produced, appeared to be dated on the 11th of October; but evidence was given by the defendant that, when he accepted the bill, the date was the 1st of October, and he therefore denied that he ever entered into the contract declared on. I think it was open to him to do so under the traverse of the acceptance,[2] and that he is entitled to retain the verdict entered for him on that issue. If the declaration had been on the bill in its original form, the alteration should, no doubt, have been specially pleaded;[3] but the declaration being on the altered bill, no special plea was required.

[1] The arguments, together with the concurring judgment of Martin, B., and a part of the judgment of Kelly, C. B., are omitted. — ED.

[2] Cock *v.* Coxwell, 2 C. M. & R. 291; Knight *v.* Clements, 8 A. & E. 215; Calvert *v.* Baker, 4 M. & W. 417; Wood *v.* Steele, 6 Wall. 80; Dennie *v.* Clark, (Cal. Ap. 1906) 87 Pac. R. 59; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Conkling *v.* Olmstead, 63 Ill. Ap. 649 (but see Dewey *v.* Merritt, 100 Ill. Ap. 156, 159); Moorman *v.* Barton, 16 Ind. 206; Conner *v.* Sharpe, 27 Ind. 41; McKinney *v.* Cabell, 24 Ind. Ap. 676; Threshing Co. *v.* Peterson, 51 Kan. 713; Belfast Bank *v.* Harriman, 68 Me. 522, 524; Dodge *v.* Haskell, 66 Me. 429, 433; Wilde *v.* Armsby, 6 Cush. 314; Lincoln *v.* Lincoln, 12 Gray, 45; Simpson Co. *v.* Davis, 119 Mass. 269; Cape Bank *v.* Burns, 129 Mass. 596; Graham *v.* Middleby, 185 Mass. 349; Willett *v.* Shepard, 34 Mich. 106; Eberenkrook *v.* Webber, 106 Mich. 314; Howlett *v.* Bell, 52 Minn. 257; Roberts *v.* Nelson, 65 Minn. 240, 242; Henderson *v.* Wilson, 7 Miss. 65; Whitney *v.* Frye, 10 Mo. 349; Nat. Bank *v.* Nickell, 34 Mo. Ap. 295; Walton Co. *v.* Campbell, 72 Neb. 356 (but see McClintock *v.* State Bank, 52 Neb. 130); Schwarz *v.* Oppold, 74 N. Y. 307; Farmers Co. *v.* Siefke, 144 N. Y. 354 (distinguishing sharply between burden of establishing and duty of giving evidence); Boomer *v.* Koon, 6 Hun, 645; Davis *v.* Crawford, (Tex. Civ. Ap. 1899) 53 S. W. R. 384; Consumers Co. *v.* Jennings, 100 Va. 719; Schwalm *v.* McIntyre, 17 Wis. 232 *Accord.* — ED.

[3] Hemming *v.* Trenery, 9 A. & E. 926; Bradley *v.* Mann, 11 M. & W. 590; Davidson *v.* Cooper, 11 M. & W. 778; Parry *v.* Nicholson, 13 M. & W. 778; Sneed *v.* Sabinal Co., 73 Fed. R. 925; Barclift *v.* Treece, 77 Ala. 528; Brown *v.* Johnston, 135 Ala. 608; Fudge *v.* Marquell, 167 Ind. 447, 453 (*semble*); O'Dell *v.* Gallup, 62 Iowa, 253; Roberts *v.* Nelson, 65 Minn. 240; Farmers Co. *v.* Siefke, 144 N. Y. 354, 360 (*semble*) *Accord.*

Smith *v.* Weld, 2 Barr, 54 *Contra.* — ED.

POLLOCK, B. I also think this rule should be refused. The distinction between declarations on bills in their original and altered forms is well established. In the former case an alteration must be specially pleaded. In the latter the traverse of the acceptance is sufficient, and this distinction is recognized in the text-books — for instance, in Bullen and Leake, Precedents, 3d ed. p. 532 — and is supported by the case of Cock *v.* Coxwell,[1] which was not referred to in Parry *v.* Nicholson.[2] In some cases the date of a bill may be immaterial, and may therefore be omitted in pleading in accordance with the Common Law Procedure Act, 1852, s. 49; but where it is material, and is stated, it must be proved as pleaded.

Rule refused.

LEAF AND OTHERS *v.* TUTON.

EXCHEQUER, JULY 7, 1842.

[10 *Meeson & Welsby*, 393.]

ASSUMPSIT for goods sold and delivered, and on an account stated. Pleas as to 35*l.* 8*s.* 6*d.*, parcel, etc.; that at the said time when he the defendant became indebted to the plaintiffs in the manner as in the said first count is mentioned, he became indebted to them, so far as relates to the said sum of 35*l.* 8*s.* 6*d.*, upon one entire contract then made between the plaintiffs and the defendant for the sale of parcel of the said goods in the first count mentioned, for a price and value exceeding 10*l.*, to wit, for the price and value of the said sum of 35*l.* 8*s.* 6*d.*; and that the defendant, being the buyer thereof, did not accept and actually receive the said goods in this plea mentioned, parcel as aforesaid, or any part thereof, nor did he give or pay anything in earnest or to bind the bargain so constituted by the said contract, or in part of payment of or for the same goods or any part thereof, nor was any note or memorandum in writing of the said bargain made and signed by the defendant, being the party to be charged by such contract, or by his agent thereunto lawfully authorized. — Verification.

Special demurrer assigning for cause of demurrer, that the plea operates as a denial of the contract in the first count of the declaration mentioned, so far as the same relates to the sum of 35*l.* 8*s.* 6*d.*, parcel, etc., in that count mentioned, and therefore amounts to the plea of non assumpsit, and should be so pleaded, and is bad as being an indirect and argumentative denial of the contract, etc. Joinder in demurrer.

The judgment of the court was now delivered by

PARKE, B. The case of Buttemere *v.* Hayes,[3] in this court, decided that the general issue, which, under the new rules, is "a denial in

[1] 2 C. M. & R. 291. [2] 13 M. & W. 778. [3] 5 M. & W. 456.

fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged is implied by law," is a denial that the requisites of the Statute of Frauds have been complied with, in cases where the statute applies; and on an issue on that plea, the plaintiff must prove the affirmative. The plea of the non-compliance with the Statute of Frauds is, therefore, nothing but an argumentative denial of the contract, or of the facts from which it is implied by law; and is demurrable on that account. This case differs materially from those in which the contract is avoided by the statute or common law, for some matter which (as the plaintiff is admitted to have a color of action) is the subject of proof on the part of the defendant, such as usury, fraud, gaming, infancy, or coverture: an allegation of any of these does not amount to a denial of the contract, but to a confession and avoidance; and these, according to the new rules, must all be specially pleaded. Under the old system of pleading, they were admissible under the general issue, non assumpsit, because the general issue, as then understood, had not the limited operation of denying allegations in the declaration, but amounted to a plea that there was no cause of action, or that, if there were, it had ceased before the commencement of the suit; but they did not amount to the general issue, that is, to an unqualified denial of the facts alleged. The case of Maggs *v.* Ames [1] was decided without sufficiently adverting to that distinction: at all events, since the decision in Buttemere *v.* Hayes (which has been confirmed by the Court of Queen's Bench, in Eastwood *v.* Kenyon), that case cannot be supported.

Judgment for the plaintiff.[2]

[1] 4 Bing. 470.

[2] In a few jurisdictions a complaint upon a claim within the purview of the Statute of Frauds must allege a compliance with the provisions, and, for want of such allegation, is bad upon demurrer. Duncan *v.* Clements, 17 Ark. 279; Krohn *v.* Bantz, 68 Ind. 277 (overruling Harper *v.* Miller, 27 Ind. 277); Lowe *v.* Turpie, 147 Ind. 652; Goodwine *v.* Cadwallader, 158 Ind. 202; Bonham *v.* Doyle, (Ind. Ap. 1906) 77 N. E. R. 859; Babcock *v.* Meek, 45 Iowa, 137; Burden *v.* Knight, 82 Iowa, 584; Wiseman *v.* Thompson, 94 Iowa, 607 (*semble* — objection irrevocably waived if not taken by demurrer); Marr *v.* Burlington Co., 121 Iowa, 117; Smith *v.* Fah, 15 B. Mon. 443; Linn Co. *v.* Terrell, 13 Bush, 463; Smith *v.* Theobald, 86 Ky. 141; Morgan *v.* Wickliffe, 110 Ky. 215; Hunt *v.* Taylor, 27 Ky. L. Rep. 978; Powder Co. *v.* Lamb, 38 Neb. 339; Barney *v.* Lasbury, (Neb. 1906) 107 N. W. R. 989; Smith *v.* Aultz, (Neb. 1907) 110 N. W. R. 1015.

It follows, that, in such jurisdictions, a good declaration should be met by a negative plea if the defendant wishes to raise the defence of non-compliance with the statute. Wynne *v.* Garland, 19 Ark. 23; Trapnall *v.* Brown, 19 Ark. 39; McMillen *v.* Terrell, 23 Ind. 163; Suman *v.* Springate, 67 Ind. 115; Indiana Co. *v.* Finitzer, 160 Ind. 647; Hocker *v.* Gentry, 3 Met. (Ky.) 463; Thompson *v.* Frakes, 112 Iowa, 585; Powder Co. *v.* Lamb, 38 Neb. 339; Riiff *v.* Riibe, 68 Neb. 543.

Generally, however, in this country, as in England, a plaintiff is not required to make it appear in his complaint upon a claim covered by the Statute of Frauds that its provisions have been complied with. Wakefield *v.* Greenhood, 29 Cal. 597; Broder *v.* Conklin, 77 Cal. 330; Morrow *v.* Morton, (Cal. 1894) 38 Pac. R. 953; Bradford *v.* Joost, 117 Cal. 204; Draper *v.* Mason Co., 103 Ga. 661; Bluthenthal *v.* Moon, 106 Ga. 424; Taliaferro *v.* Smiley, 112 Ga. 62; Eaton *v.* Barnes, 121 Ga. 548; Delaware Co. *v.* Pa. Co., 126 Ga. 380; Belt *v.* Lazenby, 126 Ga. 767; Ecker *v.* McAllister, 45 Md. 290; Dayton *v.* Williams, 2 Dong. (Mich.) 31; Photographic Co. *v.* Fisher, 81 Mich. 136; Kroll *v.* Diamond Co., 106 Mich. 127; Laybourn *v.* Zinns, 92 Minn. 208; Wildbahn *v.* Robidoux, 11 Mo. 659; Gardner *v.* Armstrong, 31 Mo. 535; Sherwood *v.* Saxton, 63 Mo. 78; Boyd *v.* Paul, 125 Mo. 9; Mo. Syn-

dicate v. Sims, 179 Mo. 679; Phillips v. Hardenberg, 181 Mo. 463; Sweetland v. Barrett, 4 Mont. 217; Mayger v. Cruse, 5 Mont. 485; Hefferlin v. Karlman, 29 Mont. 139; Walker v. Richards, 39 N. H. 259; Wilkinson v. Van Riper, 63 N. J. 394 (but see Titus v. Taylor, (N. J. Eq. 1907) 65 Atl. R. 1003); Alexander v. Cleland, (N. Mex. 1906) 86 Pac. R. 425; Hemmings v. Doss, 125 N. Ca. 400; Shields v. Titus, 46 Oh. St. 528, 541; Hepworth v. Pendleton, 1 W. L. Bull. (Oh.) 300; Albee v. Albee, 3 Oreg. 321; Taylor v. Patterson, 5 Oreg. 121; Russell v. Swift, 5 Oreg. 233; Cranston v. Smith, 6 R. I. 231 (*semble*); Whiting v. Dyer, 21 R. I. 85 (*semble*); Groce v. Jenkins, 28 S. Ca. 172; Gonzales v. Chartier, 63 Tex. 36; Robb v. San Antonio Co., 82 Tex. 392; Robbins v. Deverill, 20 Wis. 142.

Nevertheless, in many of our states, as in England prior to the Judicature Acts, although the plaintiff need not allege a compliance with the Statute of Frauds, the defendant is allowed to show a non-compliance with the statute under a denial of the contract. Eastwood v. Kenyon, 11 A. & E. 438; Buttemere v. Hayes, 5 M. & W. 456; Fricker v. Tomlinson, 1 M. & G. 772; Reade v. Lamb, 6 Ex. 130; Ridgway v. Wharton, 3 D. M. & G. 677, 689 (these English cases are superseded by the Judicature Acts); May v. Sloan, 101 U. S. 231; Dunphy v. Ryan, 116 U. S. 491; Buhl v. Stephens, 84 Fed. R. 922; Trapnall v. Brown, 19 Ark. 739; Wakefield v. Greenhood, 29 Cal. 597 (*semble*); Feeney v. Howard, 79 Cal. 525 (overruling Osborne v. Endicott, 6 Cal. 149); Bradley Co. v. Robbins, (Ind. Terr. 1907) 103 S. W. R. 777; Wiswell v. Tefft, 5 Kan. 263; Semmes v. Worthington, 38 Md. 298; Hewes v. Jordan, 39 Md. 472; Ecker v. McAllister, 45 Md. 290 (*semble*); Hamilton v. Thirston, 97 Md. 213; Morgart v. Smouse, 103 Md. 463; Palmer v. Marquette Co., 32 Mich. 274; Tatge v. Tatge, 34 Minn. 272; Fontaine v. Bush, 40 Minn. 141; Iverson v. Cirkel, 56 Minn. 299; Bean v. Lamprey, 82 Minn. 320; Metcalf v. Brandon, 58 Miss. 841; Wildbahn v. Robidoux, 11 Mo. 659; Allen v. Richard, 83 Mo. 55; Springer v. Kleinsorge, 83 Mo. 152; Hackett v. Watts, 138 Mo. 502; Hurt v. Ford, 142 Mo. 283; Hillman v. Allen, 145 Mo. 638; Glasgow Co. v. Burgher, 122 Mo. Ap. 14; Sweetland v. Barrett, 4 Mont. 217; Ryan v. Dunphy, 4 Mont. 342; Christiansen v. Aldrich, 30 Mont. 446 (*semble*); Brophy v. Idaho Co., 31 Mont. 279 (but see Duane v. Molinak, 31 Mont. 343); Walker v. Richards, 39 N. H. 259 (*semble*); Van Duyne v. Vreeland, 12 N. J. Eq. 142, 150; Walker v. Hill, 22 N. J. Eq. 513; Busick v. Van Ness, 44 N. J. 82; Wakeman v. Dodd, 27 N. J. Eq. 564; McKee v. Griggs, 51 N. J. Eq. 178; Tynan v. Warren, 53 N. J. Eq. 313; Lozier v. Hill, 68 N. J. Eq. 300; Cleland v. Alexander, (N. Mex. 1906) 86 Pac. R. 425, 427 (*semble*); Allen v. Chambers, 4 Ired. Eq. 125; Bonham v. Craig, 80 N. Ca. 224; Morrison v. Baker, 81 N. Ca. 76; Holler v. Richards, 102 N. Ca. 545; Browning v. Berry, 107 N. Ca. 231; Williams v. Lumber Co., 118 N. Ca. 928; Birchell v. Neaster, 36 Oh. St. 331; Shields v. Titus, 46 Oh. St. 528, 541; Heaton v. Eldridge, 56 Oh. St. 87; Hepworth v. Pendleton, 1 W. L. Bull. (Oh.) 300; Albee v. Albee, 3 Oreg. 321 (*semble*); Taylor v. Patterson, 5 Oreg. 121 (*semble*); Russell v. Swift, 5 Oreg. 233 (*semble*); Cosand v. Bunker, 2 S. Dak. 294; Moody v. Jones, (Tex. Civ. Ap. 1896) 37 S. W. R. 379; Texas Co. v. Walters, (Tex. Civ. Ap. 1897) 43 S. W. R. 548; Internat. Co. v. Campbell, (Tex. Civ. Ap. 1906) 96 S. W. R. 93; Montgomery v. Edwards, 46 Vt. 151; Strong v. Dodds, 47 Vt. 348; Scofield v. Stoddard, 58 Vt. 290; Pike v. Pike, 69 Vt. 535; Holt v. Howard, 77 Vt. 49; Barrett v. McAllister, 33 W. Va. 738; Popp v. Swanke, 68 Wis. 364 (*semble*); Kaufer v. Stumph, 129 Wis. 476 (*semble*).

In jurisdictions in which the defence of the Statute of Frauds may be taken under a negative answer denying the alleged contract, a defendant who does not plead such a denial is allowed, nevertheless, to plead the statute specially, and this special answer, oddly enough, is treated as an affirmative plea. If there is neither a denial of the contract nor a special plea of the statute, the defence of the statute is waived. Guynn v. McCauley, 32 Ark. 97, 116; Iverson v. Cirkel, 56 Minn. 299 (but defence waived); Bean v. Lamprey, 82 Minn. 320 (*semble*); Maybee v. Moore, 90 Mo. 340; Boyd v. Paul, 125 Mo. 9; Phillips v. Hardenburg, 181 Mo. 463, 473; Lafayette Assn. v. Kleinhoffer, 40 Mo. Ap. 388; Van Idour v. Nelson, 60 Mo. Ap. 523; Christiansen v. Aldrich, 30 Mont. 446; Connor v. Hingten, 19 Neb. 472; Davis v. Greenwood, (Neb. 1902) 96 N. W. R. 526; Van Duyne v. Vreeland, 12 N. J. Eq. 142; Wakeman v. Dodd, 27 N. J. Eq. 564, 565; Tynan v. Warren, 53 N. J. Eq. 313, 315; Fee v. Sharkey, 59 N. J. Eq. 284; Loughran v. Giles, 110 N. Ca. 423; Cozart v. West Co., 113 N. Ca. 294; League v. Davis, 53 Tex. 9; Battell v. Matot, 58 Vt. 271; Lauer v. Richmond Inst., 8 Utah, 305; Barrett v. McAllister, 33 W. Va. 738.

In Missouri, a defendant who denies the alleged contract waives the defence of the statute unless he objects to the admission of oral evidence or asks for an instruction, when the plaintiff rests, that the plaintiff is not entitled to recover because of non-compliance with the statute. Beckman v. Mepham, 97 Mo. Ap. 161; Walker v. Cooper, 97 Mo. Ap. 441; Schmidt v. Rozier, 121 Mo. Ap. 306.

In South Dakota, Texas and Vermont, a defendant who denies the contract waives the

RULES OF THE SUPREME COURT. — ENGLAND, 1883.

Order 19, *Rule* 20.

When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise.

H. MATTHEWS *v.* F. H. MATTHEWS, ADMINISTRATRIX.

COURT OF APPEALS, NEW YORK, NOVEMBER 23, 1897.

[154 *New York Reports*, 288.]

ANDREWS, C. J.[1] Subsequently to the decision of the former appeal in this case,[2] the case of Crane *v.* Powell[3] came before the court, in which the controverted question was whether, in an action on an oral contract, within the Statute of Frauds, where the complaint did not disclose the nature of the contract, whether oral or written, it was necessary for the defendant to plead the statute in order to avail himself of the objection. The question was distinctly decided in that case, and it was held that the statute was a defense, and unless pleaded was not available to the defendant to defeat the action. The case must be regarded as settling the law of this state upon a question upon which courts of different jurisdictions have differed in

defence of the statute, unless he objects to the admission of oral evidence. Cosand *v.* Bunker, 2 S. Dak. 294; Texas Co. *v.* Walters, (Tex. Civ. Ap. 1897) 43 S. W. R. 548; Holt *v.* Howard, 77 Vt. 49.

In Vermont, a defendant who denies the making of the alleged contract waives the defence of the statute if he does not raise it until all the evidence is in and the arguments have begun. (Montgomery *v.* Edwards, 46 Vt. 151); and also, even though he has objected to the oral evidence, if he fails to except to the master's report admitting such evidence (Schofield *v.* Stoddard, 58 Vt. 290). So far is the doctrine of waiver carried in this state that a defendant who has pleaded the statute as an affirmative plea renounces the benefit of the statute if he does not object to the admission of oral evidence. Pike *v.* Pike, 69 Vt. 535.

Statute of Frauds as an objection to a claim set up by a defendant — In Ohio, while a plaintiff suing upon a contract need not allege compliance with the Statute of Frauds, a defendant relying upon an agreement as a defence must aver that the provisions of the statute have been satisfied. Reinheimer *v.* Carter, 31 Oh. St. 579; Harley *v.* Weber, 2 Oh. C. C. 57 (but see Brock *v.* Becher, 2 W. L. Bull. (Oh.) 262). But generally no more is required in an answer than in a complaint. Young *v.* Austen, L. R. 4 C. P. 553; Nunez *v.* Morgan, 77 Cal. 427; Lehou *v.* Simonton, 3 Colo. 346 (*semble*); Tucker *v.* Edwards, 7 Colo. 209; Dayton *v.* Williams, 2 Dong. (Mich.) 31, 32; Galway *v.* Shields, 1 Mo. Ap. 546; Dewey *v.* Hoag, 15 Barb. 365, 368; Mendelsohn *v.* Banov, 57 S. Ca. 147. — ED.

[1] Only a part of the opinion of the Court is given. — ED.

[2] 133 N. Y. 681. [3] 139 N. Y. 379.

opinion. This court regarded the rule adopted in Crane v. Powell as sound in principle and as supported by the rule applied in analogous cases.

It is plain, upon the view that the Statute of Frauds does not make an oral contract within its terms illegal, but only voidable at the election of the party sought to be charged, that such election must be manifested in some affirmative way. The mere denial in the answer of the contract alleged in the complaint, when the character of the contract is not disclosed, is quite consistent with an intention to put in issue simply the fact whether any agreement was entered into, either oral or written. One of the rules established by the English Judicature Act, as amended in 1873,[1] ordained that, "where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise," and in Towle v. Topham,[2] Jessel, M. R., applied the rule to the pleadings in an equity case. The statutory rule enacted by the English Judicature Act was regarded by this court, in Crane v. Powell, as declaring the true rule independently of statute.

The mere denial in the answer in the present case of the contract alleged in the complaint did not, therefore, raise any question under the Statute of Frauds, and it could not be raised by objection on the trial, to the proof of the oral contract, for the very conclusive reason that the statute must be pleaded before the validity of the contract on that ground can be assailed.[3] Regarding the agreement alleged and

[1] 38 & 39 Vict., ch. 77, rule 19.

[2] 37 L. T. [N. S.] 309.

[3] Catling v. King, 5 Ch. Div. 660; Towle v. Topham, 37 L. T. Rep. 306; Clark v. Callow, 46 L. J. Q. B. D. 53; Dawkins v. Penryhn, 4 App. Cas. 51, 58; Pullen v. Snelus, 48 L. J. Q. B. D. 394; Manchester Bank v. Cook, 49 L. T. Rep. 674; James v. Smith, [1891] 1 Ch. 384; Brunning v. Odhams, 75 L. T. Rep. 602; Fraser v. Pape, 91 L. T. Rep. 340, 20 T. L. R. 798 s. c.; Patterson v. Ware, 10 Ala. 444 (Equity); Bolling v. Munchus, 65 Ala. 558; Clark v. Taylor, 68 Ala. 453; Cooper v. Hornsby, 71 Ala. 62; Shakespeare v. Alba, 76 Ala. 351; Manning v. Pippen, 86 Ala. 357 (Equity); Espalla v. Haynie, 86 Ala. 487; Smith v. Pritchett, 98 Ala. 649; Harper v. Campbell, 102 Ala. 342; Beadle v. Seat, 102 Ala. 532 (Equity); Lagerfelt v. McKie (Ala. 1893), 14 So. R. 281; Tyron v. Desparin, 22 Colo. 240; McLure v. Coen, 25 Colo. 284; Hamill v. Hall, 4 Colo. Ap. 290; Baldwin v. Central Bank, 17 Colo. Ap. 7; Cerrusite Co. v. Steele, 18 Colo. Ap. 216; Barnesdall v. Waltemeyer, 142 Fed. R. 415 (Colo. law — but see *contra* Salomon v. McRea, 9 Colo. Ap. 23); McDougald v. Banks, 13 Ga. 451; Turner v. Stewart Co., 94 Ga. 468; Tift v. Wight, 113 Ga. 681 (compare Johnson v. Latimer, 71 Ga. 470); Switzer v. Skiles, 8 Ill. 529; Esmay v. Gorton, 18 Ill. 483; Chicago Co. v. Liddell, 69 Ill. 639; Carpenter v. Davis, 72 Ill. 14; McClure v. Otrich, 118 Ill. 320; Neagle v. Kelly, 146 Ill. 460; Koenig v. Dohm, 209 Ill. 468 (but see Ruggles v. Gatton, 50 Ill. 412); Williams v. Davis, 46 Ill. Ap. 228; Lawrence v. Chase, 54 Me. 196; Bird v. Munroe, 66 Me. 337, 346; Farwell v. Tillson, 76 Me. 227; Middlesex Co. v. Osgood, 4 Gray, 447; Elliott v. Jenness, 111 Mass. 29 (law); De Montague v. Bacherach, 187 Mass. 128, 132 (*semble*); Livingstone v. Murphy, 187 Mass. 315 (*semble*); Wentworth v. Wentworth, 2 Minn. 288 (*semble*); Gardner v. Armstrong, 31 Mo. 535; Sherwood v. Saxton, 63 Mo. 78; Crane v. Powell, 139 N. Y. 379; Roberge v. Winne, 144 N. Y. 709; Sanger v. French, 157 N. Y. 213; Parmele Co. v. Haas, 171 N. Y. 579, 583; Brauer v. Oceanic Co., 178 N. Y. 339 (*semble*); Seamens v. Barentsen, 180 N. Y. 333; Hardt v. Recknagel, 62 N. Y. Ap. Div. 106; Banta v. Banta, 84 N. Y. Ap. Div. 138; Kramer v. Kramer, 90 N. Y. Ap. Div. 176; Pattat v. Pattat, 93 N. Y. Ap. Div. 102 (*semble* — but plaintiff may rely upon Statute of Frauds, as upon other affirm-

found in this case as one for the sale or conveyance to the plaintiff of the house and lot, and applying the rule established in Crane *v.* Powell, it is plain that it must be treated as a valid contract, and its breach by the original defendant (who has died since the last trial) as giving a right of action for damages, as if the contract had been written and not oral. The complaint alleged a contract founded on a good consideration, but did not allege whether it was oral or written. The defendant in his answer denied the making of the contract alleged, but did not plead the Statute of Frauds as a defense. On the trial the plaintiff proved an oral contract, to the effect stated in the complaint.

The judgment of the Appellate Division should, therefore, be reversed, and the judgment of the Special Term affirmed.

All concur.

Judgment reversed.

ative matter, without a reply to an answer); Worth *v.* Kastriner, 114 N. Y. Ap. Div. 766 (it is not necessary to cite the conflicting New York decisions prior to Crane *v.* Powell, *supra*); Callaway *v.* Prettyman (Pa. 1907), 67 Atl. R. 418 (*semble*); Suber *v.* Richards, 61 S. Ca. 393 (explaining Poag *v.* Sandifer, 5 Rich. Eq. 170, Groce *v.* Jenkins, 28 S. Ca. 172, and Hillhouse *v.* Jennings, 60 S. Ca. 373); Citty *v.* Manufacturing Co., 93 Tenn. 276 (discussing earlier Tennessee cases); Barnes *v.* Coal Co., 101 Tenn. 354; Gregory *v.* Farris, (Tenn. Ch. Ap. 1900) 56 S. W. R. 1058; Abba *v.* Smyth, 21 Utah, 109 (*semble*) *Accord.*

If the plaintiff states in his complaint facts shewing that the Statute of Frauds was not complied with, his complaint is demurrable, for, by pleading the substance of a good affirmative answer, he has nullified his claim. Wood *v.* Midgeley, 5 D. M. & G. 41; Randall *v.* Howard, 2 Black, 585; Trammell *v.* Craddock, 93 Ala. 450 (*semble*); Nelson *v.* Shelby Co., 96 Ala. 515, 530 (*semble*); Gary *v.* Newton, 201 Ill. 170; Slack *v.* Black, 109 Mass. 496; Putnam *v.* Grace, 161 Mass. 237, 245 (*semble*); Wentworth *v.* Wentworth, 2 Minn. 277 (*semble*); Roth *v.* Goerger, 118 Mo. 556; Galway *v.* Shields, 1 Mo. Ap. 546; Seamans *v.* Barentsen, 180 N. Y. 333; Howard *v.* Brown, 37 Oh. St. 402; Mendelsohn *v.* Banov, 57 S. Ca. 147; Hillhouse *v.* Jennings, 60 S. Ca. 373; Suber *v.* Richards, 61 S. Ca. 393, 399 (*semble*); Stovall *v.* Gardner, (Tex. 1906) 94 S. W. R. 217, 218; Kilpatrick *v.* Box, 13 Utah, 494, 500 (*semble*). The dicta to the contrary in Catling *v.* King, 5 Ch. D. 660, and Morgan *v.* Worthington, 38 L. T. Rep. 443, seem indefensible.

In quite a number of cases in this country the courts have sustained a demurrer to a complaint stating simply a parol agreement. Phillips *v.* Adams, 70 Ala. 373; Lewis *v.* Teal, 82 Ala. 288 (*semble*); Strouse *v.* Elting, 110 Ala. 132; Thompson *v.* New South Co., 135 Ala. 630; Barr *v.* Connell, 76 Cal. 469; Cloud *v.* Greasley, 125 Ill. 313; Dicken *v.* McKinley, 163 Ill. 318; Farnham *v.* Clemens, 51 Me. 426; Walker *v.* Locke, 5 Cush. 90; Ahrend *v.* Odiorne, 118 Mass. 261; Macey *v.* Childress, 2 Tenn. Ch. 438. These cases, it is submitted, are erroneous. The mere statement that the alleged contract of the defendant was oral would not make a good affirmative plea of the Statute of Frauds. The plea should contain also a denial of the making of any subsequent memorandum, and of all other possible compliances with the statute. Accordingly a complaint should not be obnoxious to demurrer unless it also negative all possible compliances with the statute. This view finds support in Clark *v.* Callow, 46 L. J. K. B. 53; Brunning *v.* Odhams, 75 T. Rep. 602.

In Booker *v.* Hoeffner, 95 N. Y. Ap. Div. 84, the plaintiff failed because his own evidence disclosed a non-compliance with the statute, although the statute was not pleaded by the defendant. — Ed.

JENKINS AND ANOTHER v. LONG AND ANOTHER.

SUPREME COURT, INDIANA, NOVEMBER TERM, 1862.

[19 *Indiana Reports*, 28.]

PERKINS, J.[1] — Suits upon notes and a mortgage.

Answer. That the notes were given for the purchase money of a livery stable, horses, carriages, etc., and the good-will of the stable; that the owners represented that the profits of the stable were from fifteen hundred to two thousand dollars a year; whereas, they aver, that the business, instead of being from fifteen hundred to two thousand dollars a year, never cleared exceeding two hundred dollars.

To this answer, a demurrer was sustained.

The answer, in the case at bar, was bad, for failing to aver that the purchase was made in reliance upon the representation.

At common law, fraud could be given in evidence under the general issue, or under a general plea of fraud. Cohee *v.* Cooper.[2] But, under the code, fraud must be specially pleaded;[3] and the answer of fraud must contain the averments of all the elements necessary to be proved to make a fraud; and they are that the representation must go to a material fact; must be made under such circumstances that the party has a right to rely on it; the party must rely on it, and it must be

[1] Only a part of the opinion is given. — ED.

[2] 8 Blackf. 115.

[3] Generally in this country, as in England, fraud is to-day an affirmative defence and to be pleaded as such. Edwards *v.* Brown, 1 Tyrwh. 192; Byrne *v.* Muzio, 8 L. R. Ir. 396; Gifford *v.* Carvill, 29 Cal. 589; Wetherly *v.* Straus, 93 Cal. 283; Blood *v.* La Serena Co., 113 Cal. 221, 237; Brereton *v.* Bennett, 15 Colo. 254; Arthur *v.* Gard, 3 Colo. Ap. 133; Guild *v.* Atchison Co., 57 Kan. 70; Bank *v.* Schlegel, 66 Kan. 509; Miller *v.* Finley, 26 Mich. 249; Ward *v.* Reed, 134 Mich. 392; Daly *v.* Proetz, 20 Minn. 411; Bauer *v.* Taylor, (Neb. 1903) 96 N. W. R. 268; Dubois *v.* Hermance, 56 N. Y. 673; Metrop. Bank *v.* Loyd, 90 N. Y. 530; Dalrymple *v.* Hillenbrand, 62 N. Y. 5; Sutherland *v.* Mead, 80 N. Y. Ap. Div. 103; Prahar *v.* Tonsey, 93 N. Y. Ap. Div. 507, 513; Finck *v.* Schmitt, 48 N. Y. Misc. Rep. 503; Hoyt *v.* Clarkson, 23 Oreg. 51; Houx *v.* Blum, (Tex. Civ. Ap. 1895) 29 S. W. R. 1135; Leavitt *v.* Cutler, 37 Wis. 46 (*semble*).

In the federal courts fraud is no defence to a common law action upon a contract under seal. The defendant must proceed in equity for an injunction and cancellation of the contract. Levi *v.* Mathews, 145 Fed. R. 152; 9 Harv. L. Rev. 51.

In some jurisdictions the defense of fraud may be pleaded in general terms. Robson *v.* Luscombe, 2 D. & L. 859; Dawes *v.* Hartnett, 23 W. R. 398 (old English cases superseded, *e. g.* Connop *v.* Holmes, 2 C. M. & R. 779); Irlam *v.* Midland Co., 23 W. R. 660; Ross *v.* Brayton, 2 Dana, 161; Whitehead *v.* Rott, 2 Met. (Ky.) 584; Ryan *v.* Middleborough Co., 106 Ky. 181; Craft *v.* Barron, 28 Ky. L. Rep. 98; Fivey *v.* Pa. Co., 66 N. J. 23; Culver *v.* Hollister, 17 Abb. Pr n. s. 405; Read *v.* Corry, (Tex. Civ. Ap. 1901) 61 S. W. R. 157 (but see Miller *v.* Lovell, (Tex. Civ. Ap. 1897) 40 S. W. R. 835).

In others the specific facts of the fraud must be set forth. Byrne *v.* Muzio, 8 L. R. Ir. 396; Giles *v.* Williams, 3 Ala. 318; Thompson *v.* Armstrong, 5 Ala. 383, 387; Phœnix Co. *v.* Moog, 78 Ala. 284; Catling *v.* Horne, 34 Ark. 169; Gushee *v.* Leavitt, 5 Cal. 160; Jain *v.* Giffin, 3 Colo. Ap. 90; Hopkins *v.* Woodward, 75 Ill. 62; Swope *v.* Fain, 18 Ind. 300; Ham *v.* Greve, 34 Ind. 18; Iles *v.* Martin, 69 Ind. 114; Reid *v.* Brown, 1 Wils. (Ind.) 312; Parker *v.* Jewett, 52 Minn. 514; Tittle *v.* Bonner, 53 Miss. 578; Barber Co. *v.* Field, 183 Mo. 182; Dresser *v.* Brooks, 3 Barb. 429, 439; Eccard *v.* Eisenhauer, 74 N. Y. Ap. Div. 35; Beaman *v.* Ward, 132 N. Ca. 68; Voorhees *v.* Fisher, 9 Utah, 303. — ED.

false to a material extent. See the common law forms of a special plea of fraud. 3 Chit. Pl. 962. 2 Swan Pr. 742. See Mattock v. Todd, at this term.

Per Curiam. — The judgment is affirmed with one per. cent damages and costs.

John F. Kibbey, for the appellants.

M. Wilson, for the appellees.

RICHARDSON v. HITTLE.

SUPREME COURT, INDIANA, MAY TERM, 1869.

[31 *Indiana Reports*, 119.]

GREGORY, J.[1] — Suit by Hittle against the appellant, Mary Ann Richardson, and her husband, on a note and mortgage executed by the husband and wife to one Carpenter, and by the latter assigned to the appellee.

The appellant answered, "that at the time of the making of the note and mortgage sued on, she was, and still is, the wife of William H. Richardson, her co-defendant; that said note and mortgage were made to said payee thereof by said William H. Richardson on a contract for the purchase of an interest in a certain patented invention purchased by said William H. Richardson from said payee of said note, and for no other cause or consideration whatever; that the lot of land mentioned and described in said mortgage then was, and still is, the separate property of her, said Mary Ann Richardson, the fee simple title thereof being in her and acquired by her prior to her marriage with said William H. Richardson; and that she was induced by the persuasions of said payee and by the coercion of her said husband to execute said note and mortgage."

The court sustained a demurrer to this paragraph.

It is urged that the paragraph is bad, for not averring the facts which constituted the coercion.

Fraud, duress, and coercion are alike made up of distinct facts, and all may vary greatly in their circumstances. It has been repeatedly ruled by this court, that an answer setting up fraud must aver the facts, and that an answer averring fraud without stating the facts constituting it is bad on demurrer. There is no difference in principle, as to pleading, between fraud and coercion. Mr. Chitty, in his forms, states the facts which constitute duress. 3 Chit. Pl. 964, *et seq.* So are all the precedents.

Judgment affirmed, with costs.[2]

[1] Only a part of the opinion is given. — ED.

[2] Generally in this country, as in England, the defence of duress is to be pleaded affirmatively. Y. B. 1 Hen. VII. f. 15, pl. 2; Y. B. 14 Hen. VIII. f. 28, pl. 7; Whelpdale's

W. O. DODGE AND OTHERS v. T. B. McMAHAN.

SUPREME COURT, MINNESOTA, MAY 24, 1895.

[61 *Minnesota Reports*, 175.]

MITCHELL, J.[1] This was an action to recover money "loaned to the defendant, and paid for his use and benefit." The answer was a general denial. The plaintiffs offered evidence tending to prove that the defendant employed them, as commission men, to buy for him 5000 bushels of wheat for future delivery, on a margin of five cents per bushel. The court excluded certain evidence offered by defendant for the alleged purpose of proving that the transaction was not an actual purchase of wheat, but a mere wager by him on the future price of the commodity. The evidence was properly excluded. It was inadmissible, under the pleadings. Authorities may be found, even in some of the code states, to the effect that, under a mere denial, evidence of any fact may be given in evidence that would go to the original validity of the contract sued on, — that is, which, although admitting the making of the contract, would show that, when made, it was for some reason invalid; as, for example, that it was made on Sunday, or that it was a gambling or wagering contract. But this rule is not in accordance with either the spirit of the reformed procedure or the decisions of this court. The correct rule is that, under a denial, the defendant is at liberty to give only such evidence as tends to disprove the existence of the facts, as facts, alleged by the plaintiff, but not of any matter aliunde, which, although admitting such facts, would tend to avoid their legal effect and operation. Finley *v.* Quirk;[2] Brown *v.* Eaton;[3] Lautenschlager *v.* Hunter;[4] Bliss, Code Pl. § 352. The cases holding that where a plaintiff alleges generally his ownership of property, without setting out the source of his title, the defendant may give evidence of any facts tending to disprove such ownership, so far from being in conflict with this rule, are in exact accord with it.

Order affirmed.[5]

Case, 5 Rep. 119; Edwards *v.* Brown, 1 Tyrwh. 182, 206, 1 Cr. & J. 307 s. c.; Conn. Co. *v.* McCormick, 45 Cal. 580; Line *v.* Blizzard, 70 Ind. 23 (*semble*); First Bank *v.* Bryan, 62 Iowa, 42; Birch *v.* King, 71 N. J. 392 (*semble*); Sternback *v.* Friedman, 23 N. Y. Misc. Rep. 173.

And as a rule the facts constituting the duress must be set forth. Carswell *v.* Hartridge, 55 Ga. 412; Bond *v.* Kidd, 122 Ga. 812, 813; Lord *v.* Lindsay, 18 Hun. 484. — ED.]

[1] Only a part of the opinion of the court is given. — ED.

[2] 9 Minn. 179 (194). [3] 21 Minn. 409. [4] 22 Minn. 267.

[5] Martin *v.* Smith, 4 Bing. N. C. 436; Rucker *v.* Bolles, 133 Fed. 858 (Colo.); Dickson *v.* Burk, 6 Ark. 412; Hallock *v.* Jandin, 34 Cal. 167 (lack of a stamp); Sharon *v.* Sharon, 68 Cal. 29; Board *v.* Linn, 29 Colo. 446; Mining Co. *v.* Bentley, 10 Colo. Ap. 271; Wiggin *v.* Federal Co., 77 Conn. 507; Brumback *v.* Oldham, 1 Idaho, 709; Miller *v.* Donovan, 11 Idaho, 545; Pixley *v.* Boynton, 79 Ill. 351; Stanton *v.* Strong, 94 Ill. Ap. 486; Casad *v.* Holdridge, 50 Ind. 529; Fisher *v.* Fisher, 113 Ind. 474; Bowser *v.* Spiesshofer, (Ind. Ap. 1892) 30 N. E. R. 942; Pritchett *v.* Sheridan, 29 Ind. Ap. 81; Glidden *v.* Higbee, 31 Iowa,

O. J. ROSE v. W. E. MORTIMER.

Supreme Court, Illinois, June Term, 1856.

[17 *Illinois Reports*, 475.]

Caton, J.[1] This was an action on a promissory note, by an assignee, to which the defendant filed a plea of the general issue. Under this plea the defendant, on the trial, offered to prove a failure of consideration, which the court ruled out, and which is the decision complained of.

The court decided correctly. The right to defend a promissory note for a want, or failure, or partial failure, of consideration, is conferred by the 10th section of chapter 73, R. S., and that statute requires the defence to be pleaded. There is hardly a volume of our reports in which cases are not found where this court has passed upon the sufficiency of such special pleas; but I do not find that it

879; Riech *v.* Block, 68 Iowa, 526; Shawyer *v.* Chamberlain, 113 Iowa, 742; Disbrow *v.* Supervisors, 119 Iowa, 538, 541; Iowa Assn. *v.* Berlau, 125 Iowa, 22 (*ultra vires*); Gibson *v.* Jenkins, (Kan. Ap. 1902) 70 S. W. R. 1076; Denton *v.* Logan, 3 Met. (Ky.) 434; Powell *v.* Flanary, 109 Ky. 342; Yowell *v.* Walker, 118 La. 29; Granger *v.* Ilsley, 2 Gray, 521 (common count for goods sold); Bradford *v.* Tinkham, 6 Gray, 494; Goss *v.* Austin, 11 All. 525; Rice *v.* Enwright, 119 Mass. 187; N. Y. Co. *v.* Kidder Co., 192 Mass. 391, 404; Barger *v.* Farnham, 130 Mich. 487; Finley *v.* Quirk, 9 Minn. 194; Brown *v.* Eaton, 21 Minn. 409; Babcock *v.* Murray, 58 Minn. 385; Woodbridge *v.* Sellwood, 65 Minn. 135; Herndon *v.* Henderson, 41 Miss. 584; St. Louis Assn. *v.* Delano, 108 Mo. 220; McDearmott *v.* Sedgwick, 140 Mo. 172 (overruling Sprague *v.* Rooney, 104 Mo. 360); Gibson *v.* Jenkins, 97 Mo. Ap. 27; McClure *v.* Ullman, 102 Mo. Ap. 697; Dillon *v.* Darst, 48 Neb. 803; Horton *v.* Rohlff, 69 Neb. 95; Goodwin *v.* Mass. Co., 73 N. Y. 480; Milbank *v.* Jones, 127 N. Y. 370; McNulty *v.* N. Y., 168 N. Y. 117; Laux *v.* Gildersleeve, 23 N. Y. Ap. Div. 352; Keating *v.* American Co., 62 N. Y. Ap. Div. 501 (*ultra vires*); Ocorr Co. *v.* Little Falls, 77 N. Y. Ap. Div. 592; Ferguson *v.* Bien, 47 N. Y. Misc. Rep. 618; Lewis *v.* Clyde Co., 132 N. Ca. 904 (*ultra vires*); Mathews *v.* Leaman, 24 Oh. St. 615 (*semble*); Buchtel *v.* Evans, 21 Oreg. 309; Thayer *v.* Buchanan, 46 Oreg. 106; First Bank *v.* Penman, (Tex. Civ. Ap. 1898) 47 S. W. R. 68; Rogers *v.* O'Barr, (Tex. Civ. Ap. 1904) 81 S. W. R. 750; Croco *v.* Oreg. Co., 18 Utah, 311; Potter *v.* Ajax Co., 22 Utah, 273; Lyts *v.* Keevey, 5 Wash. 606; Brundage *v.* Burke, 11 Wash. 679; Maitland *v.* Zanga, 14 Wash. 92; Hoshor *v.* Kautz, 19 Wash. 256; Cox *v.* Cameron Co., 39 Wash. 562; Grubb *v.* Stewart, (Wash. 1907) 91 Pac. R. 562 *Accord*.

A plaintiff may nullify his complaint upon a contract by alleging facts which show it to be illegal. Tool Co. *v.* Norris, 2 Wall. 45; McDearmott *v.* Sedgwick, 140 Mo. 172, 182; Thatcher *v.* Morris, 11 N. Y. 437. He may also fail, by disclosing the illegality of the contract by his own evidence, although the illegality is not pleaded by the defendant. Cheney *v.* Unroe, 166 Ind. 550; Cardoze *v.* Swift, 113 Mass. 250; Milbank *v.* Jones, 127 N. Y. 370, 376 (*semble*); Cary *v.* Western Co., 47 Hun, 610, 20 Abb. N. C. 333 a. c.; Wilkins *v.* Richter, 25 N. Y. Misc. Rep. 735; Haynes *v.* Abramson, (N. Y. Misc. Rep. 1906) 97 N. Y. Sup. 371; Buchtel *v.* Evans, 21 Oreg. 309; Ah Doon *v.* Smith, 25 Oreg. 89; Roller *v.* Murray (Va. 1907), 59 S. E R. 421; Maitland *v.* Zanga, 14 Wash. 92 (*semble*). The same result follows if the plaintiff's counsel admits the illegality of the contract. Oscanyan *v.* Arms Co., 103 U. S. 261, 266; Rucker *v.* Bolles, 133 Fed. R. 858.

Before the Hilary Rules of 1833 the defence of illegality was admissible under *non assumpsit*. Hussey *v.* Jacob, 12 Mod. 97; Harrison *v.* Cage, 12 Mod. 214. And this doctrine is followed to some extent in this country. Craig *v.* Mo., 4 Pet. 410; Pollak *v.* Electric Assn., 128 U. S. 446 (Alabama law); McCrea *v.* Persons, 112 Fed. R. 917 (Illinois law).

In several jurisdictions the facts constituting illegality must be set forth. Dickson *v.* Burk, 6 Ark. 412; Fisher *v.* Fisher, 113 Ind. 474; Powell *v.* Flanary, 109 Ky. 342. — Ed.

[1] Only the opinion of the court is given. — Ed.

has before been attempted to set up the defence under the general issue. The statute does not authorize it, and the court properly ruled out the defence offered.

The judgment must be affirmed.

Judgment affirmed.[1]

HARVEY v. TOWERS.

EXCHEQUER, JUNE 13, 1851.

[6 *Exchequer Reports*, 656.]

ASSUMPSIT on a bill of exchange drawn by J. Pellew upon and accepted by the defendant, and indorsed by J. Pellew to the plaintiff.

Plea (*inter alia*) — That the acceptance of the bill was obtained from the defendant by J. Pellew and others in collusion with him, by fraud, covin, and misrepresentation, and there never was any value or consideration for the indorsement of the bill by J. Pellew to the plaintiff, and that the plaintiff held the bill without any value or consideration. — Verification.

There were two similar pleas, except that, instead of alleging want of consideration for the indorsement, they alleged respectively that the plaintiff took the bill with notice of the fraud, and that it was indorsed to the plaintiff after it became due.

Replications — *de injuria.*

At the trial, before Martin, B., at the London Sittings after Hilary Term, 1851, the defendant, in support of the above pleas, proved that the consideration for the acceptance of the bill was some shares in a mining concern in Cornwall, which he had been induced to purchase through the representations of the drawer of the bill; and evidence was adduced to show that the shares were worthless, and the transac-

[1] Generally in this country, as in England, the defence of failure of consideration must be pleaded affirmatively. Topper v. Snow, 20 Ill. 434 (note); Keith v. Moffitt, 38 Ill. 303 (note); Mitchell v. Deeds, 49 Ill. 416 (note); Leggat v. Sands, 60 Ill. 158 (note); Sheldon v. Lewis, 97 Ill. 640 (note); Dickinson v. Citizenship, 70 Ill. Ap. 405 (note); Chicago Co. v. Landfield, 73 Ill. Ap. 173 (note); Mitchell v. Sheldon, 2 Blackf. 185 (note); Cook v. Noble, 4 Ind. 221 (note); Smith v. Griswold, 95 Iowa, 684 (note); Sawyer v. Vaughan, 25 Me. 337 (*semble* — note — but see Small v. Clewley, 62 Me. 155, 156); Jennison v. Stafford, 1 Cush. 168 (note); Perley v. Perley, 144 Mass. 104, 108 (*semble*); Smith Co. v. Rembaugh, 21 Mo. Ap. 390 (note); King v. Edwards, 1 Mont. 230 (common count); Eldridge v. Mather, 2 N. Y. 157 (note); Dubois v. Hermance, 56 N. Y. 673 (simple contract).

In a few states in accordance with the former English practice, evidence of a failure of consideration is admissible under non-assumpsit. Wilson v. King, 83 Ill. 232 (common count); Clarke v. Holway, 101 Me. 391 (*semble* — note); Perkins v. Brown, 115 Mich. 41 (note); Keystone Co. v. Forsyth, 126 Mich. 98 (note); Hubbard v. Freiberger, 133 Mich. 139 (note); Columbia Assn. v. Rockey, 93 Va. 673 (common count).

The facts showing the failure of consideration must be set forth in the plea. Carmelich v. Mims, 88 Ala. 335; McAfee v. Glen Co., 97 Ala. 709; Swope v. Fair, 18 Ind. 300; Billan v. Hercklebrath, 23 Ind. 71; Osborne v. Hanlin, 158 Ind. 525; Coyle v. Fowler, 3 J. J. Marsh. 472; Staley v. Ivory, 65 Mo. 74. — ED.

tion fraudulent. Upon this evidence, the defendant's counsel submitted that, fraud having been established, the onus was cast on the plaintiff to prove that he gave value for the bill. The learned Judge expressed an opinion that the facts proved did not amount to fraud, and that, even if fraud were established, the plaintiff was not bound to prove consideration, inasmuch as the affirmative of the issue was on the defendant. The plaintiff's counsel, in consequence, declined to give evidence of consideration, and addressed the jury upon the evidence of fraud; and the learned judge having left that question to the jury, they found that the bill was obtained from the defendant by fraud on the part of the drawer. His lordship, thereupon, directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him on the pleas of fraud, or to enter a nonsuit.

Wilkins, Serjt., in the following Easter Term, having obtained a rule nisi to enter a nonsuit.[1]

POLLOCK, C. B. — The rule must be absolute to enter a nonsuit. This is an action on a bill of exchange, with a plea of fraud, which, according to the ordinary course of pleading, contains an allegation, not merely that the bill was obtained by fraud, but also that the plaintiff gave no value for it. In point of law, the latter allegation is necessary to make the plea good;[2] for, notwithstanding the bill may

[1] The argument for the plaintiff, a part of the judgment of POLLOCK, C. B., and the concurring judgment of PLATT, B., are omitted. — ED.

[2] The rule that a defendant in an action upon a bill or note who relies upon the defence of fraud, duress, illegality, or, in the case of paper negotiable by delivery, upon the defence of theft, must allege as against any holder subsequent to the party with whom the defendant dealt, that each successive transfer of the bill or note down to and including the plaintiff was made either with knowledge of the fraud, duress, illegality, or theft on the part of each transferee or without value paid by him, or after maturity, is supported by following cases: Bramah v. Roberts, 1 B. N. C. 469 (fraud); Uther v. Rich, 10 A. & E. 784 (fraud); Morley v. Culverwell, 7 M. & W. 174 (payment); Bailey v. Bidwell, 13 M. & W. 73, 77 (illegality); Berry v. Alderman, 14 C. B. 95, 99 (fraud); McClintick v. Johnston, 1 McL. 414; Atlas Bank v. Holm, 71 Fed. R. 489, 493 (illegality); King v. Mecklenburg, 17 Colo. Ap. 312 (fraud by partner on his firm); Pate v. Allison, 114 Ga. 651 (duress); Clapp v. Cedar Co., 5 Iowa, 15, 58, 59; Lane v. Krekle, 22 Iowa, 399 (fraud); Sillyman v. King, 36 Iowa, 207, 215; Savings Bank v. Boddicker, 105 Iowa, 548, 552; La. Bank v. U. S. Bank, 9 Mart. (La.) 398 (theft of banknote); Pelletier v. State Bank, 114 La. 172 (theft of bank note); Banks v. McCasker, 82 Md. 518 (fraud); Black v. First Bank, 96 Md. 399 (fraud); Tower v. Whip, 53 W. Va. 158.

Even though the answer alleges not only fraud, duress, or illegality, but also that each successive transfer was without value or with notice by the transferee, or after maturity, the defendant establishes a *prima facie* defence by giving satisfactory evidence of the fraud, duress, or illegality alone. It is then for the plaintiff to go forward with evidence of value, or of no notice, or of a transfer before maturity, according to the allegations of the answer. Wyat v. Campbell, M. & M. 80 (illegality); Bailey v. Bidwell, 13 M. & M. 73 (illegality); Smith v. Braine, 16 Q. B. 244 (fraud, overruling Brown v. Philpot, 2 M. & Rob. 285); Fitch v. Jones, 5 E. & B. 238, 245, 246 (fraud); Hall v. Featherstone, 3 H. & N. 284 (fraud); Oakley v. Boulton, 5 T. L. R. 60 (fraud by partner on his firm); Tatam v. Haslam, 23 Q. B. D. 345 (fraud); Smith v. Sac County, 11 Wall. 139 (fraud); Stewart v. Lansing, 104 U. S. 505 (illegality); Sperry v. Spaulding, 45 Cal. 544 (fraud); Graham v. Lavinier, 83 Cal. 173 (illegality); Jordan v. Grover, 99 Cal. 194 (fraud); Mitchell v. Tomlinson, 91 Ind. 167 (fraud); Woodward v. Rogers, 31 Iowa, 342 (fraud); Rock Bank v. Nelson, 41 Iowa, 563 (illegality); Totten v. Buey, 57 Md. 446 (fraud); Williams v. Huntington, 68 Md. 590

have been concocted by fraud, or stolen, or the party may have been swindled out of it, that is no defence, unless the holder obtained it

(fraud); Griffith v. Shipley, 74 Md. 591 (fraud); Cover v. Myers, 75 Md. 406 (fraud); French v. Talbot Co., 100 Mich. 443 (illegality); Stevens v. McLachlan, 120 Mich. 285 (fraud by partner on his firm); Thompson v. Mecosta, 127 Mich. 522 (illegality); Cummings v. Thompson, 18 Minn. 246; Hamilton v. Marks, 63 Mo. 167 (fraud); Harrington v. Butte Co., 27 Mont. 1 (fraud); Wortendyke v. Meehan, 9 Neb. 221 (illegality); Colby v. Parker, 34 Neb. 510 (illegality); Smith v. Weston, 159 N. Y. 194 (fraud by partner upon his firm); McKesson v. Stanberry, 3 Oh. St. 156 (fraud); Kenney v. Walker, 29 Oreg. 41 (fraud); Owens v. Snell, 29 Oreg. 433 (fraud); McGill v. Young, 16 S. Dak. 360 (fraud); Limerick v. Adams, 70 Vt. 132 (fraud).

The principle of these cases is well put by Lord Campbell in Fitch v. Jones, *supra*: "It is not properly that the burden of proof as to there being consideration is shifted, but that the defendant, on whom the burden of proof that there was no consideration lies, has by proving fraud or illegality in the former holder raised a *prima facie* presumption that the plaintiff is agent for that holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration. But no such presumption arises where there was in the former holder a mere want of consideration, without any illegality or fraud."

If the defendant alleges in his answer both notice to a transferee and absence of value paid by him, and makes out a *prima facie* case in support of his additional allegation of fraud, illegality, or theft, the plaintiff must then go forward with evidence both as to the absence of notice and the payment of value. Tatam v. Haslam, 23 Q. B. D. 345; Oakley v. Boulton, 5 T. L. R. 60.

In the following cases, in which either the report does not indicate the form of the pleadings or the question arose under the reprehensible and now rapidly disappearing general issue, it was decided that the disclosure by the defendant's evidence of fraud, duress, illegality, or theft, on the part of the payee, put upon a subsequent holder the burden of proving himself or some one of his predecessors to be a purchaser for value without notice. Whether by burden of proof the courts meant the burden of establishing or the burden of going forward with evidence to rebut a *prima facie* case is not clear in the jurisdictions which have not decided whether it is for the defendant to allege in his answer, as to the transferees, notice or absence of value paid, or for the plaintiff to allege in his reply that he or some one of his predecessors was a holder for value without notice.

Fraud. — Commissioners v. Clark, 94 U. S. 278, 285, 286; Simons v. Fisher, 55 Fed. R. 905; Salmon v. Rural Dist., 125 Fed. R. 275; Gamble v. Rural Dist., 132 Fed. R. 514; McVicar Co. v. Union Co., 136 Fed. R. 678; Ross v. Drinkard, 35 Ala. 434; Harrington v. Johnson, 7 Colo. Ap. 483; Wright v. Brosseau, 73 Ill. 381 (fraud by partner upon his firm); Charles v. Remick, 156 Ill. 327 (like preceding case); Hodson v. Eugene Glass Co., 156 Ill. 397; Hide Bank v. Alexander, 184 Ill. 416; Bank v. Cook, 125 Iowa, 111; Savings Bank v. Boddicker, 105 Iowa, 548; Keegan v. Rock, 128 Iowa, 39; Harbison v. Bank, 28 Ind. 133; Giberson v. Jolley, 120 Ind. 301; Commercial Bank v. Paddick, 95 Iowa, 63 (fraud by partner on his firm); Aldrich v. Warren, 16 Me. 465; Perrin v. Noyes, 39 Me. 384; Roberts v. Lane, 64 Me. 108; Crampton v. Perkins, 65 Md. 22; McCosker v. Banks, 84 Md. 292; Munroe v. Cooper, 5 Pick. 412 (fraud by partner on his firm); Bissell v. Morgan, 11 Cush. 198; Tucker v. Morrill, 1 All. 528; Smith v. Livingston, 111 Mass. 342; Merchants Bank v. Haverhill Works, 159 Mass. 158; Nat. Bank v. Morse, 163 Mass. 383 (fraudulent diversion); Conant v. Johnston, 165 Mass. 450; Savage v. Goldsmith, 181 Mass. 420; Regester Co. v. Reed, 185 Mass. 226; Carrier v. Cameron, 31 Mich. 373 (fraud by partner on his firm); Conley v. Winsor, 41 Mich. 253; Mace v. Kennedy, 68 Mich. 389; Horrigan v. Wyman, 90 Mich. 121; Glines v. State Bank, 132 Mich. 638; Stouffer v. Fletcher, 146 Mich. 341; Merchants Bank v. Luckow, 37 Minn. 542; MacLaren v. Cochran, 44 Minn. 255; Montreal Bank v. Richter, 55 Minn. 362; First Bank v. Holan, 63 Minn. 525; Merchants Bank v. Cross, 65 Minn. 154; Dekalb Bank v. Thompson, 79 Minn. 151; Robbins v. Swinburne, (Minn. 1904) 98 N. W. R. 331; Hamilton v. Marks, 63 Mo. 167; Campbell v. Hoff, 129 Mo. 317; Meyer v. Withmar, 41 Mo. Ap. 397 (fraud by partner on his firm); Hahn v. Bradley, 92 Mo. Ap. 399; First Bank v. Hammond, 104 Mo. Ap. 403; Stewart v. Andes, 110 Mo. Ap. 243; Harrington v. Butte Co., 19 Mont. 411; Haggland v. Stuart, 29 Neb. 69; Violet v. Rose, 39 Neb. 660; Lahrman v. Bauman, (Neb. 1906) 107 N. W. R. 1008; Hallock v. Young, 72 N. H. 416; Holcomb v. Wyckoff, 35 N. J. 35, 36; Haines v. Merrill Co., 56 N. J. 312; Vallett v. Parker, 6 Wend. 615, 621; Morton v. Rogers, 14 Wend. 575; Farmers Bank v. Noxon, 45 N. Y. 762; Ocean Bank v. Carll, 55 N. Y. 440; Vosburgh v. Diefendorf, 119 N. Y. 357;

without value. At the trial, my brother Martin ruled that proof of fraud did not cast upon the plaintiff the burden of proving consideration; but he took the opinion of the jury as to the existence of fraud, and reserved leave to the defendant to move to enter a verdict on those pleas, if the Court should be of opinion that the onus of proving consideration was thrown on the plaintiff; or, if the plaintiff preferred it, a nonsuit was to be entered. A motion was made on behalf of the defendant to enter a nonsuit. Several matters were urged in argument, to which it is unnecessary to advert. The material question is, whether, when a plea of fraud is proved, does that call upon the holder of the bill to prove that he gave value for it? As a general question of law, that was established long ago, when a defendant was

Canajoharie Bank v. Diefendorf, 123 N. Y. 191; Joy v. Diefendorf, 130 N. Y. 6; Grant v. Walsh, 145 N. Y. 502; American Bank v. N. Y. Co., 148 N. Y. 698 (fraudulent diversion); Smith v. Weston, 159 N. Y. 194 (fraud by partner on his firm); Second Bank v. Weston, 161 N. Y. 520 (fraud by partner on his firm); Citizens Bank v. Weston, 162 N. Y. 113 (like preceding case); Pelly v. Onderdonk, 61 Hun, 314; McCameron v. Shantz, 49 N. Y. Ap. Div. 460 (fraudulent diversion); Lucker v. Iba, 54 N. Y. Ap. Div. 566 (fraud by partner on his firm); Mitchell v. Baldwin, 88 N. Y. Ap. Div. 265; German Bank v. Cunningham, 97 N. Y. Ap. Div. 244 (fraudulent diversion); Nat. Bank v. Foley, 54 N. Y. Misc. Rep. 126 (but see Catlin v. Hansen, 1 Duer, 309; Hill v. Northrup, 4 Th. & C. 120); Pugh v. Grant, 86 N. Ca. 39 (*semble*); Commercial Bank v. Burgwyn, 108 N. Ca. 62; Manufg. Co. v. Summers, 143 N. Ca. 102 (preponderance of evidence); Vickery v. Burton, 6 N. Dak. 245; Knowlton v. Schultz, 6 N. Dak. 417; Mooney v. Williams, 9 N. Dak. 329; Ravicz v. Nickells, 9 N. Dak. 536; Holme v. Karsper, 5 Binn. 469; Hutchinson v. Boggs, 28 Pa. 294; Erie Co. v. Eicherlaub, 127 Pa. 164; Landauer v. Sioux Co., 10 S. Dak. 205; Dunn v. Nat. Bank, 11 S. Dak. 305; McGill v. Young, 16 S. Dak. 360; Risch v. Planters Bank, 84 Tex. 413; Hart v. West, 91 Tex. 184; Capital Bank v. Bank Co., 77 Vt. 189; Union Co. v. McClellan, 40 W. Va. 405; Kinney v. Kruse, 28 Wis. 183 (*semble*); Gutwillig v. Stumes, 47 Wis. 428, 433 (*semble*); Harris v. Aldous, 18 N. Zeal. L. R. 240.

But see *contra*, Arnold v. Lane, 71 Conn. 61; Standard Co. v. Windham Bank, 71 Conn. 668, 684.

Illegality. Stewart v. Lansing, 104 U. S. 505; Pane v. Bowler, 107 U. S. 529; Lytle v. Lansing, 147 U. S. 59; Shain v. Goodwin, 46 Fed. 564; Edwards v. Bates Co., 117 Fed. 526; Fuller v. Hutchings, 10 Cal. 523; Le Tourneux v. Gilliss, 1 Calif. Ap. 411; Harrington v. Johnson, 7 Colo. Ap. 483; Tescher v. Merea, 118 Ind. 586, 589; Schmueckle v. Waters, 125 Ind. 265; Sisterman v. Field, 9 Gray, 331; Holden v. Cosgrove, 12 Gray, 216; Estabrook v. Boyle, 1 All. 412; Smith v. Edgeworth, 3 All. 233; Emerson v. Burns, 114 Mass. 348; Paton v. Coit, 5 Mich. 505; French v. Talbot Co., 100 Mich. 443; Thompson v. Mecosta, 127 Mich. 522; Askegaard v. Dalen, 93 Minn. 354; Darst v. Backus, 18 Neb. 231; Lincoln Bank v. Davis, 25 Neb. 376; Blackwell v. Wright, 27 Neb. 269; McDonald v. Aufdengarten, 41 Neb. 40; Male v. Wink, 61 Neb. 748; Simpson v. Heffter, 42 N. Y. Misc. Rep. 482; Orr v. South Co., 45 N. Y. Misc. Rep. 350.

But see *contra*, First Bank v. Emmitt (Kansas, 1894), 35 Pac. R. 213.

Duress. Rossiter v. Loeber, 18 Mont. 372; Clark v. Pease, 41 N. H. 414; First Bank v. Green, 43 N. Y. 298.

Theft of paper negotiable by delivery. Hooper v. Browning, 19 Neb. 420; Fifth Bank v. First Bank, 48 N. J. 513; Kuhns v. Gettysburg Bank, 88 Pa. 445.

In some jurisdictions, however, the plaintiff having made out a case of paying value, it is then incumbent upon the defendant to show notice on the part of the plaintiff of the fraud, duress, illegality, or theft. Johnson v. Hanover Bank, 88 Ala. 271 First Bank v. Slaughter, 98 Ala. 602, 604; Slaughter v. First Bank, 109 Ala. 157, 162; Hart v. Church, 126 Cal. 471; Roberts v. Burr, 135 Cal. 156; Hapgood v. Needham, 59 Me. 442; Swett v. Hooper, 62 Me. 54; Kellogg v. Curtis, 69 Me. 212, 214; Market Bank v. Sargent, 85 Me. 349; Wing v. Ford, 89 Me. 140; First Bank v. Flath, 10 N. Dak. 281; Davis v. Bartlett, 12 Oh. St. 534; Tod v. Wick, 36 Oh. St. 370; First Bank v. Fook, 12 Utah, 157; Reeve v. Liverpool Co., 89 Wis. 520; Hodge v. Smith, 130 Wis. 326. — ED.

not embarrassed by the rules of pleading. At one time, some judges thought that if a bill was shown to be an accommodation bill, especially if the plaintiff had notice of it, that cast on him the burden of proving consideration. I agree with what my Lord Campbell said in Smith v. Braine, that no principle can be extracted from the cases on this subject before the New Rules. But it is now settled, that if a bill be founded in illegality or fraud, or has been the subject of felony or fraud, upon that being proved the holder is compelled to show that he gave value for it. That was established in Bailey v. Bidwell, and subsequently, by the Court of Queen's Bench, in Smith v. Braine, in a considered judgment. It has been contended that, as a matter of pleading, that view cannot be supported. I think, however, that as a plea must contain everything necessary to constitute a good defence, and as the mere act of fraud would not afford any defence unless the holder took the bill without value, it was incumbent upon the defendant to allege that fact in his plea, and the question is, on whom is cast the onus of proving it. The cases of Bailey v. Bidwell and Smith v. Braine show that my brother Martin was wrong in ruling that proof of fraud alone, in the absence of proof of want of consideration, was not a good defence. The rule will therefore be absolute to enter a nonsuit.

ALDERSON, B. — I am of the same opinion. I consider the form of pleading to be quite right, and the ruling in Bailey v. Bidwell and Smith v. Braine to be right also. At first it would seem unnecessary in a plea like this to aver that the plaintiff gave no consideration, if that fact is to be inferred from proof that the bill was obtained by fraud. But when the whole record is considered, that is not the correct view. The declaration contains an averment that there was an indorsement of the bill to the plaintiff. That is an ambiguous expression, and may mean either an indorsement simpliciter to part with the possession, or an indorsement for a valuable consideration. If therefore fraud alone is pleaded, that does not negative the averment in the declaration taken in the latter sense, and the plea would be bad, because consistent with the fact of the indorsement having been made for a valuable consideration. It consequently becomes necessary to add, that the bill was not passed to the plaintiff for valuable consideration, and so fix the sense in which the indorsement mentioned in the declaration is to be understood; then, if the plaintiff intends to say, that the averment means that there was an indorsement to him for value, he must say so in his replication; and he must prove it, because he has in fact made the averment in his declaration.

MARTIN, B. — Substantially this case is decided by Bailey v. Bidwell and Smith v. Braine. But, although I consider myself bound by those authorities, I own I do not understand them. Here is a plea in which several facts are alleged, all of which are necessary to make it good; the plaintiff by his replication puts the whole in issue; and how the proof of one of those facts shifts the burden of proof as to

the others, I must confess I do not understand. Still such is the law, and I am not sorry for it; because such a rule, no doubt, throws difficulties in the way of recovering on fraudulent bills.

Rule absolute to enter a nonsuit.

THE FIRST NATIONAL BANK OF HUNTINGTON *v.* RUHL AND OTHERS.

SUPREME COURT, INDIANA, NOVEMBER TERM, 1889.

[122 *Indiana Reports*, 279.]

ELLIOTT, J.[1] The appellant's complaint is founded on a promissory note, negotiable by the law merchant, of which the appellant is the holder by endorsement.

The appellant's counsel contend that the several answers of the appellee are insufficient, and thus state their position: "The point we make on these answers is, that they do not aver notice of the defence to the appellant at the time it purchased the note sued on, or any facts equivalent to such notice." Counsel also say: "We understand the rule of evidence to be that when the maker of a negotiable note, in a suit upon it, shows that it was procured by fraud, a presumption arises that the holder purchased with notice of the defence, and the burden of showing that he was an innocent holder for value is put upon the holder, but we do not think this is the rule of pleading." We shall consider the question as it is presented by counsel.

The common law giving protection to a *bona fide* holder is a reasonable one when confined within just limits, but it becomes unjust and oppressive when too widely extended. Our cases have, however, uniformly held that while the common law rule protecting a *bona fide* holder prevails, yet they also hold that in order to receive its protection it devolves upon the plaintiff to show that he became a holder before maturity, without notice, and for a valuable consideration, whenever the defendant makes it appear that the note was obtained by fraud. It seems to follow, necessarily and directly, that if the answer shows that the note was obtained by fraud it states a *prima facie* defence, sufficient to require a reply from the plaintiff. It is quite difficult to conceive how it can be otherwise when, as the cases generally declare, the fact that the note was obtained by fraud casts the burden upon the holder.

We hold that the paragraphs of the answer which allege facts showing that the note was obtained by fraud are sufficient.[2]

[1] Only a part of the opinion of the court is given. — ED.

[2] Louisville Co. *v.* Ohio Co., 57 Fed. R. 42 (fraud); Ala. Bank *v.* Halsey, 109 Ala. 196 (fraud); Citizens' Bank *v.* Leonhart, 126 Ind. 206 (fraud); Shirk *v.* Neible, 156 Ind. 64, 72

There is, however, at least one paragraph of the answer which is clearly bad, and that is the paragraph which pleads want of consideration. This paragraph is bad because it does not aver that the plaintiff was not a purchaser for value and in good faith.[1]

The authorities discriminate between cases in which a note is obtained by fraud and those in which there is a want or total failure of consideration. There is reason for this distinction. It often happens that one man executes a note without consideration for the accommodation of another, and no one would think of declaring that it would

(fraud); Ray v. Baker, 165 Ind. 74, 90 (fraud); Zink v. Dick, 1 Ind. Ap. 269 (fraud); Hapgood v. Needham, 59 Me. 442 (*semble* — illegality); Montreal Bank v. Richter, 55 Minn. 362, 365; Thawling v. Duffey, 14 Mont. 567 (fraud); Bovier v. McCarthy, (Nebraska, 1903) 94 N. W. R. 965 (illegality); Hutchinson v. Boggs, 28 Pa. 299 (*semble* — fraud); Smith v. Popular Co., 93 Pa. 19 (fraud); Lerch Co. v. First Bank, 109 Pa. 240 (fraud by partner on his firm); Real Est. Co. v. Russell, 148 Pa. 496 (fraud); Rische v. Planters Bank, 84 Tex. 413 (fraud); Vathir v. Zane, 6 Grat. 247 (fraud); Piedmont Bank v. Hatcher, 94 Va. 229 (*semble* — fraud) *Accord*.

Consistently with the decisions cited in the preceding paragraph, a bill in equity for the cancellation of a bill or note in the hands of a subsequent holder need allege only that it was obtained from the plaintiff by fraud, duress, or illegality without any allegation of notice or absence of value. There are decisions to this effect. Louisville Co. v. Ohio Co., 57 Fed. R. 42 (fraud); Baldwin v. Fagan, 83 Ind. 447 (fraud); Vathir v. Zane, 6 Grat. 247 (fraud). — Ed.

[1] Sturdivant v. Memphis Bank, 60 Fed. R. 730; Caler v. Dolley, 105 Fed. R. 836; Hunter v. McLaughlin, 43 Ind. 38, 46; Coffing v. Hardy, 86 Ind. 369; Citizens' Bank v. Leonhart, 126 Ind. 206; Shirk v. Neible, 156 Ind. 66; Potter v. Streets, 5 Ind. Ap. 506; Yenney v. Central Bank, 44 Neb. 402 (payment); Bank v. Morgan, 165 Pa. 199; Gee v. Saunders, 66 Tex. 333 *Accord*.

The defendant must not only allege in his answer that each successive transfer was either with notice of such defences as failure of consideration, absence of consideration, payment, breach of warranty, and the like, or without value paid by the transferee, or after maturity; he must also at the trial, in order to make out a *prima facie* case, offer evidence of notice, or of no value paid, or of a transfer after maturity as to each successive transfer.

Failure of consideration. — Mitchell v. Deeds, 49 Ill. 416; Bemis v. Horner, 165 Ill. 347; Topeka Bank v. Wilson, (Kansas, June, 1897) 49 Pac. R. 155; Noxon v. DeWolf, 10 Gray, 343; Emerson v. Burns, 114 Mass. 348; Horton v. Bayne, 52 Mo. 531; Bennett v. Torlina, 56 Mo. 309; Hahn v. Bradley, 92 Mo. Ap. 399; Western Co. v. Boyle, 10 Neb. 409; Violet v. Rose, 39 Neb. 66; Kelman v. Calhoun, 43 Neb. 157; Crosby v. Ritchey, 47 Neb. 924, 56 Neb. 336; Nat. Bank v. Miller, 51 Neb. 156; Knight v. Finney, 59 Neb. 274; Chapman v. Snyder, (Nebraska, 1901) 95 N. W. R. 346; Mechanics' Bank v. Crow, 60 N. Y. 85; Albrecht v. Strimpfler, 7 Barr, 476; Sloan v. Union Co., 67 Pa. 470; Dingman v. Amsink, 77 Pa. 114, 116; Herman v. Gunter, 83 Tex. 66; Malsch v. Heller, (Tex. Civ. Ap. 1896) 37 S. W. R. 384; Graham v. Lawrence, (Tex. Civ. Ap. 1898) 44 S. W. R. 558; Wilson v. Lazier, 11 Grat. 477.

Absence of Consideration. — Collins v. Gilbert, 94 U. S. 753, 761; Galvin v. Meridian Bank, 129 Ind. 439; Kellogg v. Curtis, 69 Me. 212, 213; Produce Co. v. Bieberbach, 176 Mass. 577; Little v. Mills, 98 Mich. 423, 426; Cummings v. Thompson, 18 Minn. 246, 254; Royer v. Fleming, 58 Mo. 436; Harger v. Worrall, 69 N. Y. 370; Bank v. Bridgers, 98 N. Ca. 67; Knight v. Pugh, 4 W. & S. 445.

But see *contra*, Ross v. Drinkard, 35 Ala. 434; Battle v. Weems, 44 Ala. 105.

Breach of warranty. — Shirk v. Mitchell, 137 Ind. 185; Graff v. Adams, 100 Iowa, 481; Holden v. Rattan Co., 168 Mass. 570; Cookley v. Christie, 20 Neb. 509.

Suretyship of a married woman. — Farmers' Bank v. Eubanks, (Ga. 1907) 59 S. E. R. 193.

Payment. — Webster v. Lee, 5 Mass. 334; Stevens v. Bruce, 21 Pick. 193; Noxon v. DeWolf, 10 Gray, 343 (*semble*); Little v. Mills, 98 Mich. 423; Knight v. Finney, 59 Neb. 274, 278; Atlas Bank v. Doyle, 9 R. I. 76.

Set-off. — In the case of set-off the defendant must prove both the set-off and a transfer after maturity. Ranger v. Cary, 1 Met. 369; Hendricks v. Judah, 1 Johns. 319. — Ed.

not be valid in the hands of one who paid value for it before maturity, although he may have known that it was executed without consideration. Hinkley *v.* Fourth Nat'l Bank, etc.[1]

Judgment reversed.

HUNTER *v.* WILSON.

EXCHEQUER, NOVEMBER 20, 1849.

[19 *Law Journal Reports, Exchequer*, 8.]

THIS was a rule calling on the plaintiff to show cause why the interlocutory judgment signed in this case should not be set aside. The judgment was signed on the ground that the defendant being under terms of pleading issuably, had pleaded a non-issuable plea. The action was brought by the plaintiff as the indorsee of a bill of exchange against the defendant as the acceptor. The plea stated that the bill of exchange was drawn by one M. M'Lean, at the request and for the accommodation of the defendant, and without any consideration or value whatever, and that the bill was indorsed by the said M. M'Lean without any consideration or value given by the plaintiff for such indorsement to the defendant, or to the said M'Lean, or any other person whomsoever. There was no affidavit of merits.

Willes showed cause. The plea is not issuable. It is not stated that there was no consideration for the acceptance. It is quite consistent with the plea that there may have been a good consideration for the bill. It is not necessary that the plaintiff should have given consideration for it.

[ROLFE, B. A. B. may have given value for the bill, and may have made a present of it to the plaintiff.]

[PARKE, B. Some party to the bill may have given value for it, so as to vest a valid title in the plaintiff. We cannot tell through how many hands it may have passed.]

[ROLFE, B. The plaintiff may be the executor of some person who may have given value for the bill.]

The statement of the bill having been drawn for the accommodation of the defendant is ridiculous. There is no affidavit of merits, and therefore the rule will be discharged, with costs.

Barnard, in support of the rule, contended that the plea was at least good on general demurrer, and was therefore issuable.

PARKE, B. The plea is not issuable. There ought to have been a statement equivalent to an allegation that none of the previous parties to the bill had given value for the indorsement. There is no

[1] 77 Ind. 475.

affidavit of merits, and therefore the rule must be discharged with costs.

POLLOCK, C. B., ALDERSON, B., and ROLFE, B., concurred.

Rule discharged, with costs.[1]

[1] Low v. Chiffney, 1 B. N. C. 267, 3 Dowl. 130 s. c. *sub. nom.* French v. Archer; Reynolds v. Iverney, 3 Dowl. 453 *Accord.*

To make out a *prima facie* case against a subsequent holder, an accommodating party must give notice not only of the fact of accommodation, but also to the effect that no transferee has paid value. Percival v. Frampton, 2 C. M. & R. 180; Mills v. Barber, 1 M. & W. 425 (overruling Heath v. Sansom, 2 B. & Ad. 291); Fitch v. Jones, 5 E. & B. 238; Jacob v. Hungate, 1 M. & Rob. 445; Hinkley v. Fourth Bank, 77 Ind. 475; Monarch Co. v. Hardinsburg, 20 Ky. L. Rep. 94; Ellicott v. Martin, 6 Md. 509; Duncan v. Gilbert, 29 N. J. 521; Grant v. Ellicott, 7 Wend. 277; Ross v. Bedell, 5 Duer, 462; Gray v. Ky. Bank, 29 Pa. 365; Atlas Bank v. Doyle, 9 R. I. 76. — ED.