

*Leary v. Long.*LEARY *v.* LONG.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 50. October Term, 1880.—Decided November 8, 1880.

When it appears in the pleadings that a former bill for the same cause of action was dismissed for the reason that a plea that had been filed and not denied presented a good defence, an averment that there has been no adjudication upon the merits is not enough; but it must be averred in the pleadings and shown that the nature of the defence did not present a bar to the action.

MOTION TO DISMISS. The case is stated in the opinion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. Upon the case made by the bill, the appellant is not entitled to recover. Paragraphs 9 and 10 of the bill are as follows:

“9. Complainant further states that he filed his bill of complaint in said court against said defendant and said Kappell, on or about the 19th day of July, 1870, praying that said sale should be set aside, and for other matters, which will more fully appear by reference to said bill, which bill was afterwards dismissed for want of prosecution upon the part of the attorney for complainant.

“10. Complainant further states that on or about the 16th day of October, 1871, he filed his second bill in said court, praying for the same relief, and that the defendant plead thereto, which bill was also dismissed for the reason of the default of a replication to said plea, the attorney of the complainant having died during the pendency of said last-mentioned bill.”

Here is an express admission of record that a bill for the same identical cause of action now sued on was dismissed for the reason that a plea which had been filed and not denied presented a good defence. What the plea was, does not appear, but as the bill was dismissed absolutely, the presumption is it went to the merits. A mere averment that there has been no adjudication upon the merits, is not enough. To overcome the effect of the other allegations, the nature of the defence set up in the plea should have been stated, so that it could be seen that it did not present a bar to the action.

*Affirmed.*

*Mr. L. G. Hine and Mr. S. T. Thomas* for the motion. *Mr. A. L. Merriman* opposing.