*John W. Simonton, Plaintiff in error, *v.* Samuel Winter and Samuel G. Bowman, survivors of Joshua Bowman, Defendants in error.

Pleading.—Issue.—Covenant.

Action of covenant on a charter-party, by which the owners of the brig James Monroe let and hired her to the plaintiff in error for a certain time; the money payable for the hire of the vessel, to be paid at certain periods, and under circumstances, stated in the charter-party; after some time, and after the vessel had earned a sum of money, while in the employment of the charterer, she was lost by the perils of the sea. The declaration set out the covenants, and averred performance on the part of the plaintiffs, and that the sum of $2734.17 was due and unpaid upon the charter-party; the defendant pleaded, that he had paid to the plaintiffs all and every such sums of money as were become due and payable from him, according to the true intent and meaning of the articles of agreement; on the trial of the issue, upon this plea, the court, at the request of the plaintiffs, instructed the jury, that the plea did not impose any obligation on the plaintiff to prove any averment in the declaration; but that the whole *onus probandi*, under the plea, was upon the defendant, to prove the payment stated in the same, as the plea admitted the demand as stated in the declaration: *Held*, that there was no issue properly joined; the breach assigned in the declaration is special, the non-payment of a certain sum of money, for particular and specified services alleged to have been rendered; the plea alleges, generally, that the defendant had paid all that was ever due and payable, according to the tenor of the agreement, and not all of the specified sum; this does not meet the allegations in the declaration, nor amount to an admission that the vessel had earned the sum demanded; and there was error in the court in instructing the jury, that the plaintiffs were not bound to prove the allegations in the declaration.

The general rule of pleading is, that when an issue is properly joined, he who asserts the affirmative must prove it; and if the defendant, by his plea, confesses and avoids the count, he admits the fact stated in the count.

An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties; and generally, should be made up by an affirmative and negative.

If matter is not well pleaded, and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration.

It is laid down in the books, that although the object of the action of covenant is the recovery of a money demand, the distinction between the terms damages and money *in numero* must be attended to.[1]

Winter *v.* Simonton, 3 Cr. C. C. 104, reversed.

Error to the Circuit Court of the district of Columbia, and county of Washington.

In the circuit court, the defendants in error, the plaintiffs below, instituted an action of covenant on a charter-party, *dated July 15th, 1820, [*142
at Bath, Maine, by which they, the plaintiffs, let and hired to the defendant, the brig James Monroe, to proceed from Bath to Havana, thence to Mobile and elsewhere, as Simonton should direct, the dangers of the seas excepted, for the term of twelve months from the 7th of July. The plaintiffs covenanted to keep the brig in good order, and well victualled, during the said term, the dangers of the seas excepted. The defendant, on his part, covenanted, *inter alia*, to pay to the plaintiff for the hire of the brig, $425 each and every month, during the said term, in manner following, to wit, $600 on the arrival of the brig at Havana; and then $600, from time to time, as often as the charter of the brig should amount to that sum; that is to say, when the brig should have earned $600 at the rate of the charter-party, it

[1] The burden of proof is upon a party who alleges a breach of covenant. Chambers *v.* Jaynes, 6 Penn. St. 39; Hubbard *v.* Wheeler, 17 Id. 425; Sartwell *v* Wilcox, 20 Id. 117.

was to be paid in Spanish dollars, in the United States, or in good and approved bills, &c.

The declaration, after setting out the covenants, and averring performance on the part of the plaintiffs, &c., in the usual form, averred, that the brig was taken into service by defendant, on the said 7th July 1820, sailed on the 16th, from Bath to Havana, where she arrived, and continued under the control and in the employment of defendant, under said charter-party, till the 20th of January then next ensuing, when, in the prosecution of a voyage under the direction of defendant, she was totally lost by the perils of the sea; that the brig, at the time of her loss, had earned the sum of $2334.17, for her hire and affreightment from the 7th of July 1820, to the 20th of January 1821, at the monthly rate stipulated by the charter-party. The refusal of the defendant to pay this sum, or any part, in any of the modes of payment stipulated in the charter-party, was the breach of covenant complained of.

The defendant pleaded four several pleas; upon the first of which issue was joined, and there was, on this plea, a trial and verdict, and judgment for the plaintiffs on the same. The plaintiffs demurred to the remaining pleas, and judgment was given for them.

The first plea, after claiming *oyer* of the charter-party, which was granted, set forth, that the plaintiffs ought not to have or maintain their action afore-
*143] said against *him, because he said, that the said defendant had paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent and meaning, of the said articles of agreement; and of this he put himself on the country, &c.

The question presented to the court, on the record of the proceedings of the court below, on the trial of this issue, was contained in a bill of exceptions taken by the counsel for the defendant. The bill of exceptions, after stating certain matters of fact, which were admitted to prove, and did prove, the payment of $210, by John W. Simonton, to the agent of the plaintiffs, and for their use, proceeded to say, that the plaintiffs, without giving evidence to the jury, prayed the court to instruct the jury as follows: "The plaintiffs insist before the jury, under the issue of fact joined in this cause, that the plea is no traverse of any averment in the declaration, necessary to establish the primary obligation to pay what is therein demanded, nor imposes on the plaintiffs any necessity in supporting the issue on their part above joined, to prove any averment in their declaration; but that the whole *onus probandi*, under the affirmative plea of payment, is on the defendant, to prove such payment as he has alleged; and the plaintiffs pray the court to instruct the jury accordingly." Which instruction the court gave, being of opinion, and so expressing it to the jury, that upon the issue joined in this case, and which the jury had been sworn to try, the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel, for the time stated in the declaration, at the rate of $425 per month: to which instruction, the defendant, by his counsel, excepted, &c.

The second plea of the defendant alleged, that the plaintiffs did not on their part keep and perform their covenants in the charter-party; that the brig did not pursue the voyage and voyages ordered and appointed for her by the defendant, and did not carry on the legal trade on which the defend-

ant employed her; but without sufficient cause, deviated therefrom, on the 27th November 1820, while under the control of the *defendant under the charter-party; omitted to proceed from Port au Prince to Crooked [*144 Island as ordered; and in violation of the agreement, proceeded to the Havana, against the orders of the defendant, by which great expense was sustained, and the voyage in which the brig was engaged was greatly delayed and defeated; and afterwards, during the charter-party, the brig, against the will of the defendant, sailed from Crooked Island to Rag Island, instead of to Mobile, where she was destined, according to orders, whereby the voyage to Mobile was defeated; and that on the 20th of January 1821, the brig was wholly lost by shipwreck, and a cargo on board, of the value of $10,000, was wholly lost and destroyed; wherefore, &c.

The third plea alleged, that while the brig was lawfully subject to the orders of the defendant, she was dispatched, in a lawful trade, from Port au Prince to Crooked Island, and under such orders, sailed, on the 27th day of November 1820, on that voyage; and according to the tenor and effect of the agreement, it was the duty of the master and crew of the brig, acting on behalf of the plaintiffs, to have carried the brig to Crooked Island: yet the master and crew, in violation of the orders of the defendant, carried the vessel to the Havana, to the great injury of the defendant, whereby the covenants in the charter-party were wholly broken by the plaintiffs; wherefore, &c.

The fourth plea stated, that on the 30th of December 1830, the brig James Monroe was at Crooked Island, for the purpose of taking on board a cargo of salt for the defendant, to carry the same from thence direct to Mobile; and the defendant, relying on the faithful performance of their duty by the master and crew, caused insurance to be effected on the cargo of salt from Crooked Island to Mobile; yet the master and crew, well knowing the same, did deviate from the voyage to Mobile, without lawful authority or excuse, and proceeded from Crooked Island to Rag Island: in consequence of which, and after the said deviation, the brig and cargo were wholly lost by shipwreck, on the 20th of January 1821, and the policy of insurance became wholly void and of no effect; and the defendant thereby sustained damages to the amount of $10,000, whereby he became discharged from all *further payments under the charter-party, and from the [*145 performance of any of the agreements contained in the charter-party; wherefore, &c.

The defendant in the circuit court prosecuted this writ of error.

The case was argued by *Coxe*, for the plaintiff in error, and by *Jones*, for the defendants.

Coxe, for the plaintiff in error, contended, as to the instructions given upon the trial of the issue under the first plea, that by the terms of the charter-party, no part of the monthly freight was due, until the end of the month. Covenants were to be performed on both sides. The plaintiff averred performance, and the defendant pleaded payment of all moneys due and payable. If this had been an action upon a bond, with a condition, the plaintiffs would have been obliged to assign specific breaches, and to prove them.

The plea does not say, that the defendant had paid the whole amount

claimed by the plaintiffs, but that payment had been made so far as freight had been earned; and if the plaintiffs claimed and were entitled to more than the sum of $210, which was paid, they should have proved that more was earned and due under the charter-party. By going to trial on this plea, the defendant need not go beyond it.

If the plea was not issuable, and if the plaintiffs had taken judgment upon it, they would have been obliged to prove their damages before a jury of inquiry. As issue was joined upon the plea, the plaintiffs should have proved that the vessel performed the charter-party, and earned the freight; and also that the amount of $600 was payable when the vessel arrived at Havana, and the same amount when it was afterwards earned. If any freight was due under the charter-party, it must have been because the vessel had delivered the goods of the charterer, and had, under his direction, performed the voyage or voyages designated or ordered by him. It was, therefore, essential, that evidence to establish these facts should have been exhibited on the trial of this issue.

*146] The substance of the second, third and fourth pleas, to which *the plaintiff demurred, is, that the owners retained the management of the brig, and the charterer was to direct the voyages to be performed by her; they engage to carry the vessel to every port required by the charterer. The pleas aver, that the master of the brig deviated from the orders of the charterer, and thereby caused her loss and that of the cargo. By demurring, the plaintiffs admit these facts. Pothier on Charter-Parties 16, &c.

Jones, for the defendants in error.—The charter-party was itself sufficient to show the amount due to the owners of this vessel. The sum payable was $425 per month, and at the same rate for a fraction of a month. The time the vessel was in the employ of the charterer being shown, or admitted by the pleadings, no evidence could be necessary to maintain the issue under the first plea.

As to the remaining pleas, he argued, that the covenants of the owners of the brig did not create conditions precedent; so that the breach of one on the part of the owners, created an excuse for the non-performance of the obligations of the charterer. If the conduct of the master of the brig had been such as to entitle the charterer to claim damages for his misconduct, they should be recovered in a distinct suit, and could not be set off in this suit. 4 Maule & Selw. 208; 5 Petersd. 301; 7 Ibid. 96–106, 404–7; 5 Ibid, 311, 314, 326, 328, 332.

Thompson, Justice, delivered the opinion of the court.—This case comes before the court upon a writ of error to the circuit court of the district of Columbia. The action is covenant, on a charter-party, dated the 15th of July 1820, by which the plaintiffs in the court below let and hired to the defendant, the brig James Monroe, to proceed from Bath, in the state of Maine, to Havana, thence to Mobile, or elsewhere, as the defendant might direct, for the term of twelve months, from the 7th day of the said month of July; at and after the rate of $425 per month. And the plaintiffs cove-

*147] nanted on their part, that the brig should be *tight, stiff, staunch and strong, well-victualled and manned, at their expense, during that period (the dangers of the seas excepted). And the defendant, on his part,

covenanted, among other things, to pay to the plaintiffs for the hire of the brig, $425 each and every month during the said term, in manner following, to wit, $600 on the arrival of the brig at Havana ; and then $600, from time to time, as often as the charter of the brig should amount to that sum ; that is to say, when the said brig earns $600 at the rate of the charter-party ; to be paid in Spanish dollars, in the United States, or in good and approved bills.

The declaration, after setting out the covenants, averring performance on the part of the plaintiffs, &c., in the usual form, avers, that the brig was taken into service by the defendant, on the said 7th of July 1820, and sailed, on the 16th of the same month, from Bath to Havana, where she arrived, and continued under the control and in the employment of the defendant, under said charter-party, till the 20th of January then next ; when, in the prosecution of a voyage, under the direction of the defendant, she was totally lost by the perils of the sea. That the brig, at the time of her loss, had earned the sum of $2734.17, for her hire and affreightment, from the 7th of July 1820, to the 20th of January 1821 ; which sum, or any part thereof, the defendant had refused to pay, in any of the modes stipulated in the charter-party.

The defendant pleaded four several pleas. The first of which, and the only one upon which issue is taken, is as follows : "And the said John W. Simonton, by his attorneys, comes and defends the wrong and injury when, &c., and craves *oyer* of the said articles of agreement of charter-party in the said declaration mentioned, and they are read to him in these words, &c. ; which being read and heard, the defendant says, as to the said breach of covenant in the said declaration assigned, that the said plaintiffs ought not to have or maintain their action aforesaid against him, because he says, that the said defendant hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent and *meaning, of the said articles of agreement ; and of this he puts himself upon the country, &c." The plaintiffs demurred to the three other pleas ; upon which the court gave judgment for them. [*148

The question now to be decided arises upon a bill of exceptions taken at the trial. It was admitted on the part of the plaintiffs, that the defendant had paid $210 on account of the charter-party ; and thereupon, without giving any evidence, the plaintiffs prayed the court to instruct the jury as follows : The plaintiffs insist before the jury, under the issue of fact joined in this cause, that the plea is no traverse of any averment in the declaration, necessary to establish the primary obligation to pay what it therein demanded, nor imposes on the plaintiffs any necessity ; in supporting the issue on their part above joined, to prove any averment in their declaration ; but that the whole *onus probandi*, under the affirmative plea of payment, is on the defendant, to prove such payment as he has alleged ; and the plaintiffs pray the court to instruct the jury accordingly : which instruction the court gave, being of opinion, and so expressing it to the jury, that upon the issue joined in this case, the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel, for the time stated in the declaration, at the rate of $425 per month. To which instruction, the defendant excepted.

The only question arising upon this bill of exceptions is, whether the

defendant, by his plea, has admitted the cause of action as alleged in the declaration, so as to dispense with any proof on the part of the plaintiffs to establish such cause of action. The instruction given by the court to the jury was, that the defendant had, by his plea of payment, admitted the demand of the plaintiffs, as stated in the declaration. The general rule, undoubtedly, is, that when an issue is properly joined, he who asserts the affirmative must prove it; and if the defendant, by his plea, confesses and avoids the count, he admits the facts stated in the count.[1] But these rules do not apply to this case. The answer of the defendant is not to the allegation in the declaration; there is no issue properly joined. The plea must not only be adapted to the nature and *form of the action, but must also be conformable to the count. An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties, and generally, should be made up by an affirmative and negative. The breach assigned in this declaration is special; the non-payment of a certain sum of money, for particular and specified services, alleged to have been rendered. If the plea had been payment of the sums of money demanded in the declaration, it would confess and avoid the count, and the affirmative would rest upon the defendant to prove payment. But the plea, instead of alleging payment of the sum demanded in the declaration, alleges generally, that the defendant had paid all such sums of money as were become due and payable from the defendant, according to the tenor and effect, true intent and meaning, of the said articles of agreement. This does not meet the allegation or breach in the declaration, or amount to an admission that the brig had earned the sum demanded, so as to dispense with the necessity of the plaintiff's proving it. The plea is certainly bad; it amounts to a general plea of performance, when the declaration contains an assignment of a particular breach. This cannot be done; the defendant was bound to meet the allegation of the particular breach. Issue cannot be taken on a general plea of performance; and the plaintiff, if driven to reply, would be obliged to repeat his declaration. When a particular breach is assigned, the defendant has an affirmative offered upon which he may take issue. 2 Johns. 413; Arch. Plead. 233, and cases there cited.

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If this matter is not well pleaded, and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration. Suppose, the plaintiff had demurred to this plea, and the court had given judgment for him upon the demurrer, a jury would have been necessary to assess the damages. The court could not have given judgment for the damages claimed in the declaration. Nor would the plea be evidence upon which the jury could assess the damages. This would be treating that as an admission of the demand, which the court had said was no answer to the allegation in the declaration. The plea being considered a nullity, the case would stand as if no plea had been put in, and the plaintiffs would be bound to prove their *cause of action. Or, if the plaintiff, instead of going to trial, had treated the plea as no answer to the declaration, and taken judgment as by *nil dicit*, the damages must have been assessed by a jury, and the plaintiffs would have been bound to prove their cause of action. This general plea of payment of all that was

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[1] The Bella, 6 Ben. 287.

due, amounts to no more than averring that nothing was due. Had the action been upon a bond, or other instrument for the payment of money, the instrument itself would show what was due. But this is an action of covenant, sounding in damages, and such damages depend upon matter *dehors* the instrument declared on, and must be ascertained by proof *aliunde*. It is laid down in the books, that although the object of the action of covenant is the recovery of a money demand, the distinction between the terms damages, and money *in numero*, is material to be attended to. Chit. Plead. 113. The court, therefore, erred in the instruction given to the jury, that it was not necessary for the plaintiffs to prove any of the averments in their declaration.

It is not deemed necessary to express any definitive opinion upon the validity of the pleas to which the plaintiffs have demurred. It may not be amiss, however, to intimate that, had it become material to decide those points, it is probable, the judgment of the court below, upon the demurrers, would be sustained.

The judgment of the circuit court must be reversed, and the cause remanded, with directions to issue a *venire facias de novo*.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

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*Francis Henderson and wife, Plaintiffs in error, *v.* Ira Griffin, [*151
Defendant in error.

State decisions.—Statute of uses.—Ejectment.—Costs of former suit.

The supreme court of the state of South Carolina having decided, that the act of the legislature of that state, of 1744, relative to the commencement, within two years, of actions of ejectment, after nonsuit, discontinuance, &c., is a part of the limitation act of 1812, and that a suit, commenced within the time prescribed, arrests the limitation; and this being the decision of the highest judicial tribunal on the construction of a state law relating to titles and real property must be regarded by this court as the rule to bind its judgment.

That court having decided on the construction of a will, according to their view of the rules of the common law in that state, as a rule of property, this decision comes within the principle adopted by this court in Jackson *v.* Chew, 12 Wheat. 153, 167, that such decisions are entitled to the same respect as those which are given on the construction of local statutes.

Where an estate was devised to A. and B., in trust for C. and her heirs, the estate, by the settled rules of the courts of law and equity in South Carolina, as applied to the statute of uses of 27 Hen. VIII., c. 10, in force in that state, passed at once to the object of the trust, as soon as the will took effect, by the death of the testator; the interposition of the names of A. and B. had no other legal operation than to make them the conduits through whom the estate was to pass, and they could not sustain an ejectment for the land. C., the grandchild of the testator, is a purchaser under the will, deriving all her rights from the will of the testator, and obtaining no title from A. and B.; and A. and B. were as much strangers to the estate, as if their names were not to be found in the will.

The case contemplated in the law of 1744, by which a plaintiff or any other person claiming under one who had brought an ejectment for land, which suit had failed by verdict and judgment