

Gilman v. Rives.

certified ; and also the fifth question, except that part of said fifth question which refers to a description of the premises, and which is not so stated as to enable this court to express an opinion ; all of which is hereby ordered and adjudged, by this court, to be certified to the said circuit court.

*BENJAMIN I. GILMAN, Plaintiff in error, v. PETER G. RIVES. [*298

Abatement.—Non-joinder of proper defendant.—Effect of judgment on plea in abatement.

Gilman obtained a judgment in an action of debt, instituted in the circuit court of Kentucky, against Rives and Lyne ; and he instituted a suit against Rives, on the judgment, in the circuit court of West Tennessee ; the declaration stated the judgment to have been joint, against Rives and Lyne ; and no reason was assigned in it, why Lyne was not a party to the suit ; the defendant, Rives, demurred, and the circuit court sustained the demurrer : the judgment of the circuit court was affirmed.

Generally speaking, all joint obligors, and other persons bound by covenants, contract or quasi contract, ought to be made parties to the suit ; and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of by a plea in abatement ; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence upon the trial. But the same doctrine does not appear to have been acted upon, to the full extent, in cases of recognisance and judgments, and other matters of record, such as bonds to the crown ; if, in cases of this sort, it appears by the declaration, or other pleadings, that there is another joint-debtor who is not sued, although it is not averred that he is living, the objection need not be pleaded in abatement, but it may be taken advantage of, upon demurrer, or in arrest of judgment.

A judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action ; the judgment is, in no just sense, a judgment upon the merits.¹

ERROR to the Circuit Court of West Tennessee. The case is stated at large in the opinion of the court.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of West Tennessee. The plaintiff in error, Gilman, brought an action of debt against the defendant in error, Rives, upon a joint judgment rendered in his favor against Rives and one Leonard H. Lyne, in the circuit court for the district of Kentucky. The declaration is in the following terms :

“For that, whereas, the said Benjamin Ives Gilman, jun., heretofore, to wit, at the November term, in the year of our Lord 1829, of the seventh circuit court of the United States, sitting in and for the district of Kentucky, at Frankford, in said state, before, &c., by the consideration and judgment of the said court, recovered against the *said Peter G. Rives and one Leonard H. Lyne, the sum of \$6860, then and there [*299 adjudged to the said B. I. Gilman, jun., for his damages, which he had sustained by reason of the non-performance of the defendant and the said Leonard H. Lyne, of certain promises and undertakings then lately made by them to the plaintiff, and also his costs and charges by him about his suit in that behalf expended, whereof the said Peter G. Rives, the present defendant, and the said Leonard H. Lyne, were convicted, as by the record,

¹ Gould v. Evansville and Crawfordsville Railroad Co., 91 U. S. 526 ; Fleming v. Insurance Co., 12 Penn. St. 391.

Gilman v. Rives.

&c., which said judgment still remains in full force and effect, &c.; whereby an action hath accrued to him, the said B. I. Gilman, jun., to demand and have of the defendant the said sum of \$6860 above demanded; yet the defendant, though often requested, &c."

To this declaration, there was a general demurrer filed; and upon the joinder in demurrer, the circuit court gave judgment in favor of the defendant, "that the declaration aforesaid and the matters in the same contained, are not good and sufficient in law, to enable the plaintiff to have and maintain his action aforesaid," &c. The present writ of error is brought to revise that judgment.

The sole question in the case is, whether the action was maintainable against the defendant Rives alone, the judgment appearing on the face of the declaration to be a joint one against him and Lyne, and no reason being assigned in the declaration, why Lyne was not made a party thereto. If it had appeared upon the face of the declaration, that Lyne was dead, or out of the jurisdiction of the court, or incapable of being made a party to the suit, there is no doubt, that the action might well be maintained against the other judgment-debtor. The question then is, whether the non-joinder of Lyne, as a co-defendant, and the omission to aver any reason for such non-joinder, are fatal defects, upon a general demurrer to a declaration thus framed. The matter might, without doubt, have been pleaded in abatement; and not having been so pleaded, it is contended, that it cannot be taken advantage of, upon general demurrer.

The doctrine, which is to govern in this case, is of a purely technical nature, and turns upon the rules of good pleading. We have certainly no desire to encourage exceptions of this sort, for they are generally of a nature wholly beside the merits of the case. But still, if they are founded in the general rules of pleading, and are supported by authority, it is our duty not to disregard them.

Generally speaking, all joint obligors, and other persons bound by covenants, contract, or *quasi* contract, ought to be made parties to the *300] suit; and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of, by a plea in abatement; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence, upon the trial. Thus, for instance, if one obligor be sued upon a joint bond, and upon *oyer*, the bond is spread upon the record, and thereby becomes a part of the declaration, by which it appears, that another person is named as a joint obligor, the party should not demur, but should plead in abatement, that the other sealed and delivered the bond, and was in full life; for *non constat*, upon the *oyer*, that the other did seal and deliver the bond. So, it was held, in *Whelpdale's Case*, 5 Co. 119, and in *Cabell v. Vaughan*, 1 Saund. 291, and that doctrine has been constantly referred to ever since, and was fully confirmed in *Rice v. Shute*, 5 Burr. 2611. But if it should appear upon the face of the declaration, or other pleading of the plaintiff, that another jointly sealed the bond with the defendant, and that both are still living, the court will arrest the judgment, and the objection may be taken by demurrer; because the plaintiff himself shows, that another ought to be joined; and it would be absurd to compel defendant to plead the facts, which are already

Gilman v. Rives.

admitted. It is unnecessary to do more to support this distinction than to refer to the learned note of Serjeant Williams, to the case of *Cabell v. Vaughan*, 1 Saund. 291, note 4, where all the leading authorities are collected and commented on.

But the same doctrine does not appear to have been acted upon, to the full extent, in cases of recognisance and judgments, and other matters of record, such as bonds to the crown. If, in cases of this sort, it appears by the declaration, or other pleadings, that there is another joint-debtor, who is not sued, although it is not averred that he is living; the objection need not be pleaded in abatement, but it may be taken advantage of, upon the demurrer, or in arrest of judgment. Thus, in *Blackwell v. Ashton*, Aleyn 21, a *scire facias* was brought against three parties, upon a recognisance acknowledged by them and the principal, jointly and severally; and upon a demurrer, the writ abated, by good advisement, as the report says, because this being found upon a record, the plaintiff ought to show forth the cause of the variance from the record. But if an action be brought upon a bond, in the like case, there the defendant ought to show, that it was made by them and others in full life, not named in the writ; *because the court shall not intend, that the bond was sealed and delivered by all that [*301 are named in it. There is another report of the same case, or of another case between the same parties, in the preceding term of the court, in Style 50, in which the points are somewhat differently stated; but it is a very loose note. The case in Aleyn 21, has been fully recognised and acted on in the recent cases in the court of exchequer. In *Rex v. Young*, 2 Anstr. 448, there was a *scire facias* against two joint sureties upon a recognisance to the king; and the declaration stated, that four persons became bound by the recognisance, without averring the other to be dead or outlawed. There was a plea put in by the defendant, to which the crown replied; and upon general demurrer, the plea and replication were held to be bad. An exception was taken to the declaration, that all the parties were not joined; and it was held a fatal objection, by the court. Lord Chief Baron MACDONALD, in declaring the opinion of the court, said: "The defendant, however, rests on an objection to the declaration, that two of those jointly bound in the recognisance are sued, without the rest, and without averring that the others are dead. And it is clear, that this is a valid objection to it. But it has been contended, that the objection should have been taken by a plea in abatement. That rule holds, where the fact does not appear upon the declaration; but where it already appears on the declaration, that others ought to have been joined, and are not, no plea is necessary. It is clear, from the cases cited in 5 Burr. 2611, and that in Aleyn, which corresponds very accurately with the present." The same point was adjudged, in the same way, by the same court, in the subsequent case of *Rex v. Chapman*, 3 Anstr. 811.(a)

As a question, therefore, of authority, the doctrine seems well settled; and we cannot say, that upon principle there is not good sense in requiring the plaintiff in his suit, to assign some reason, why, when he declares upon

(a) See also the note of Messrs. Pattison and Williams to the last edition of Saunders. 1 Saund. 291, note c.

Gilman v. Rives.

a joint judgment, he does not join a party, whom he states in his declaration to be jointly liable.

The objection may be urged, that the judgment upon a general demurrer, in this case, will be a good bar to any future suit brought against the present defendant, upon the same debt, or against him and the other judgment-debtor. We are of a different opinion as to both, if the declaration be properly framed; for a judgment, that a declaration is bad in substance *302] (which alone, and not matter of form, *is the ground of a general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is, in no just sense, a judgment upon the merits. If authority be wanting for this position, it will be found in the case of *Lepping v. Kedgewin*, 1 Mod. 207; where, to an action in the nature of a conspiracy, the defendant pleaded a bad plea, and judgment was in fact rendered against the plaintiff for the insufficiency of his declaration; but by mistake or design, the judgment was entered, that the plea was good, and *ideo consideratum*, instead of that the declaration was bad and insufficient, and *ideo consideratum*. Upon a second suit for the same cause of action, the former judgment was pleaded, and upon demurrer, held no bar. And the court held, that notwithstanding this mistake in the entry, if the plea was bad, it was no estoppel; and the court accordingly took notice of the plea, and said upon that matter, as it falls out to be good or otherwise, the second action is maintainable or not. And judgment was accordingly given, *nisi*, for the plaintiff. But if the judgment had been properly rendered, that the declaration was insufficient, &c., there was no doubt, that the former judgment was no bar.

But to avoid all possible difficulty on this point, in our own judgment, we shall state the cause for which the declaration is held bad; so that it cannot be a bar to any suit properly brought on the judgment. The judgment of the circuit court is, therefore, affirmed, with costs.

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 West Tennessee, and it was argued by counsel: On consideration whereof, inasmuch as it appears to the court that the declaration and the matters therein contained are not sufficient in law for the said Gilman to have or maintain his aforesaid action against the said Rives, because it appears upon the declaration that there is another joint judgment-debtor, the said Lyne, who is not sued, nor any reason assigned why he is not joined in the suit; therefore, and for this cause, it is considered by the court, that the judgment of the said circuit court be and hereby is affirmed, with costs.