Messrs. Traphagen, *Brady*, and *Carlisle*, *contra*.

Mr. Justice WAYNE delivered the opinion of the court:

I am instructed by the court to announce it to be its opinion that there can be no abatement of the case upon the counsel's suggestion, as it is declared in the charter of the bank, that though its charter should continue as such until the first day of January, 1859, and that all its banking powers should cease after the first day of January, 1857; that it should have all the "necessary and incidental powers to collect and close up its business," within which we deem the rights of the plaintiff in this court to be comprehended.

MOTION REFUSED.

CLEARWATER v. MEREDITH ET AL.

1. The statute of Indiana, passed February 23, 1853, which authorizes connecting railroad corporations to merge and consolidate their stock, and make one joint company of the roads thus connected, causes, when the consolidation is effected—as is declared by the Supreme Court of the State, in *McMahon* v. *Morrison* (16 Indiana, 172)—a dissolution of the previous companies, and creates a new corporation with new liabilities derived from those which have passed out of existence. Hence, where the declaration avers that the defendant had agreed that stock of a particular railroad in Indiana should be worth a certain price at a certain time and in a certain place, and the plea sets up that under the above mentioned statute of February 23, 1853, the stock of the railway named was merged and consolidated *by the consent of the party suing*, with a second railway named; so forming "one joint stock company of the said two corporations," under a corporate name stated, such plea is good, though it does not aver that the consolidation was done without the consent of the defendants. And a replication which tenders issue upon the destruction of the first company and upon the fact that its stock is destroyed, rendered worthless, and of no value, traverses a conclusion of law, and is bad.
2. Such a plea as that just mentioned contains two points, and two points only, which the plaintiff can traverse,—the fact of consolidation and the fact of consent; and these must be denied separately. If denied together, the replication is double, and bad.
3. When a plaintiff replies to a plea, and his replication being demurred to, is held to be insufficient, and he withdraws that replication and substitutes a new one—the substituted one being complete in itself, not referring to or making part of the one which preceded—he waives the right

to question in this court the decision of the court below on the sufficiency of what he had first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one.

4. On demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue in fact joined upon the same pleading, and found in favor of the same party; and judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action. This rule of pleading declared and applied.

UNDER the provisions of a statute of Indiana, passed May 11, 1852, for the *incorporation* of railroads, the Cincinnati, Cambridge & Chicago Short Line Railway Company—frequently entitled throughout the case, for brevity, "The Short Line Railway"—was created and made a "corporation" in that State.* This act contained no provision by which any railroad company incorporated under it could consolidate its stock with the stock of any other corporation. In February of the year following, however, the legislature did pass an act† allowing any railway that had been organized, to intersect with any other road, and to merge and consolidate their stock; an act whose privileges, on the 4th of the month following, were extended to railroad companies which should afterwards be organized. The language of the act was: "Such railroad companies are authorized to merge and consolidate the stock of the respective companies, *making* ONE JOINT STOCK COMPANY *of the two railroads thus connected.*"

With these statutes in force, Clearwater, on the 12th July, 1853, sold a tract of land to Meredith and others for $10,000, taking 200 shares of the already mentioned Short Line Railway Company's stock in payment; Meredith and they, however, by written contract, guaranteeing to Clearwater, that the stock should be worth par, that is to say, $50 a share, in Cincinnati, on the 1st October, 1855.

The 1st October, 1855, having arrived and passed, and Clearwater, considering that the stock was not worth par at Cincinnati, brought assumpsit in the Circuit Court for the

* Revised Statutes of Indiana, ed. 1860, p. 504.

† Act of 23d February, 1853; ib. 526.

Indiana District, against Meredith and his co-guarantors, on the contract. The declaration set forth the sale, acceptance of the stock, and guaranty; that Clearwater still held possession of the stock; and it assigned for breach, that the stock was not worth par at the time and place stipulated, but on the contrary, was of no value at all.

To this declaration there were six pleas. Issues, in fact, were joined on the first and fourth, and demurrers sustained to the second, third, and sixth.

The fifth plea set forth substantially, that after the execution of the guaranty, and before the 1st of October, 1855, to wit, &c., the stock of the said Short Line Railway was merged and consolidated with the stock of a second railway company named;* making one joint stock company of the two, under a new corporate name, which was given;† that the said corporations were organized and formed under the already mentioned act of May 11, 1852, to provide for the incorporation of railroad companies; that the roads were connecting and intersecting roads; that the *consolidation* was made with the consent of the stockholders and directors of both companies; that afterwards, in August, 1854, the said newly formed joint company was merged and consolidated with a *third* railway corporation of the State of Indiana, whose name was also given;‡ which company was constructing a road that intersected with the said already mentioned newly formed joint company; that by the said consolidation, the stock of the said two companies was merged and consolidated, "forming *one joint stock company out of said two companies;*" that the said consolidation was made with the consent of the directors and stockholders of said two companies, *and with the consent of said plaintiff;* that the said consolidated company assumed a third corporate name, which was stated;§ and that, *by reason of the said consolidation*, the stock of the Short Line Railway Company in said agreement specified, was destroyed,

* The Cincinnati, New Castle & Michigan Railroad Co.

† The Cincinnati & Chicago Railroad Co.

‡ The Cincinnati, Logansport & Chicago Railway Co.

§ The Cincinnati & Chicago Railroad Co.

and rendered wholly worthless and of no value. A demurrer was interposed to this plea, which was overruled.

Then the plaintiff filed a replication. To this a demurrer was put in by the other side, and the court having sustained it, an amended or rather a substituted replication was put in. To this a demurrer was also sustained. Whereupon, on motion and by leave of the court, the plaintiff withdrew his joinder in demurrer, and filed the following second amended replication:

"And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that he ought not, by reason of anything therein alleged, to be debarred or precluded from having and maintaining his aforesaid action against the defendants, because he says that the said stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company *was not destroyed, either in whole or in part*, nor *was the same rendered worthless and of no value*, in *manner and form as the defendants by their said plea have alleged.* And this he prays may be inquired of by the country."

This replication was also demurred to, and the demurrer sustained. The plaintiff now saying nothing further, and choosing to abide by his last-named amended replication, judgment was rendered for the defendant.

The question presented on error here was this: Did the court below commit error when it sustained a demurrer to the last replication, and gave judgment against the plaintiff, Clearwater, as it did?

Mr. Pugh for Clearwater, the plaintiff in error: The demurrer asserts, of course, that the replication is bad, and the reasons which will be assigned to show that it is so are, that it is double, and also that it traverses matter of law.

1. *Is the replication double?* It cannot be supposed that the fifth plea intended to allege the three facts stated, namely, the consolidation, the plaintiff's consent, and the destruction of the stock, as three *separate* matters of defence. It means that the defendants were excused from their agreement because the stock of the plaintiff had been destroyed, and that the destruction resulted from a consolidation to which the

plaintiff had consented. Now all three facts constitute (together) but a single point of defence; and that point, including all its elements, the plaintiff, by settled rule of pleading, had a right to put in issue. Sergeant Stephen thus illustrates the rule:*

"In an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff, in the replication, traversed 'that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle.' On demurrer for duplicity, it was objected that there were three distinct facts put in issue by this replication, any one of which would be sufficient by itself; but the court held that the point of the defence was that the cattle in question were entitled to common; that this point was single, though it involved the three several facts that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle; that the replication traversing these facts, in effect, therefore, only brought in issue the single point whether the cattle were entitled to common, and was, consequently, not open to the objection of duplicity."

The rule itself was neatly declared by Lord Mansfield, who says:† "It is true you must take issue upon a single point, but it is not necessary that this single point should consist of a single fact." It received application stronger than any we ask for in the late English case of *Selby* v. *Bardons*.‡ The action was replevin. The defendants avowed the taking; Bardons as collector of the rates, and the other defendant as his bailiff. The avowry alleged that the plaintiff was an inhabitant of the parish, and ratable in respect of his occupancy of a certain tenement: it then alleged the making of a rate, publication thereof, demand of payment

* Stephen on Pleading, 298 (5th Lond. ed. 1843).

† Robinson *v.* Rayley, 1 Burrow, 316.

‡ 3 Barnewall & Adolphus 2; affirmed in the Exchequer Chamber, 3 Tyrwhitt, 430.

and refusal, summons of the plaintiff before the petty sessions, judgment against him, warrant of distress, &c. The plaintiff pleaded in bar, *de injuria*, &c.; to which the defendant demurred, for that the plea tendered issue of several distinct matters. But Parke, J., says:

"It is true that these pleas in bar put in issue a great number of distinct facts, and it is also true that the general rule is that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed; and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue, and with respect to some actions of tort in the replication *de injuria sua propria absque tali causa*. This replication, where it is without doubt admissible, generally—indeed, it may be said, always—puts in issue more than one fact, and often a great number."

Other cases illustrate the distinction.*

2. *Does the replication traverse matter of law?* These parties did not bargain with each other upon a question of names, but upon a matter of values. Assuming the consolidated company to be a corporation—a matter which we speak of hereafter—it was the successor, in law, of the Short Line Railway, and bound by the contracts of that company as if no consolidation had occurred.† So complete would be the identity, in such a case, that an action of covenant might be maintained against the new company, by name, upon a deed sealed with the corporate seal of any one of its constituent bodies.‡ The mere fact of consolidation, therefore, with or without the plaintiff's consent, is not material to the performance of this agreement on the part of the defendants.

* O'Brien *v.* Saxon, 2 Barnewall & Creswell, 908; Isaac *v.* Farrar, 1 Meeson & Welsby, 69.

† Lancashire Railway Co. *v.* East Lancashire Railway Co., 5 Clark, 792.

‡ Philadelphia Railroad Co. *v.* Howard, 13 Howard, 333.

It may be that the Short Line Railway Company acquired, by means of it, additional property, or facilities of some other description for enhancing the value of its stock. So, on the other hand, the consolidation may have involved its affairs in ruin. This, however, *is a question of fact*, to be tried by a jury, and upon evidence. The plaintiff took issue in regard to it; but he was not allowed any trial of that issue. And so it stands upon record, as the judgment of the Circuit Court in this case, that (although the stock of the Short Line Railway was not destroyed, "either in whole or in part," by means of consolidation, as alleged in the plea) the defendants are excused, nevertheless, from performing their contract.

3. But a new point arises. The question is not only as to the sufficiency of our replication. A demurrer being put on the pleadings it searches the record. The first bad piece of pleading will be laid hold of, and judgment given on it. Now does the plea to which we have replied, itself put in a sufficient defence? The fifth plea does not allege that a new "corporation" was created by the consolidation of the Short Line Railway Company with either or both of the other companies named, but that "*one* JOINT STOCK *company*" was formed by union of the three. And the statute of Indiana, authorizing consolidation, uses that peculiar language.* Upon the other hand, the general act of May 11th, 1852, under which as well the Short Line Railway Company as both the other companies mentioned in the plea were formed, declares that the companies formed under it shall be "corporations" in the proper sense. These two statutes show, therefore, that the Legislature of Indiana *intended to express* the difference between a joint-stock company (as such) and a corporation. It is not only a difference well established, but peculiarly significant in this connection.† The old corporation, therefore, was not drowned, dissolved, nor otherwise destroyed. Decisions of the Supreme Court of Indiana

* See ante, Statement, p. 26.

† Warner *v.* Beers, 23 Wendell, 103; Simpson *v.* Denison, 16 Jurist, 828.

favor, perhaps, this view.* Perkins, J., in the case of *Booe* v. *The Junction Railroad Co.*,† says, speaking of the point before him:

"The question is, Whether two railroad companies, by consent of the legislature, granted subsequently to the subscriptions of stock, but without the consent of the stockholders, can consolidate their separate existences into one? It is admitted that they can do it with such consent. This court has held that they cannot without. A stockholder, not consenting, may withdraw from the corporation. *Such consolidation does not necessarily* DISSOLVE *the corporation*, it seems, *but releases non-consenting stockholders?*"

The act of February 23d, 1853, does not specify *the manner* in which two companies may consent to their consolidation,—whether by a *vote* of the directors only, or of the stockholders as well as of the directors. The plea does not allege that Clearwater *voted* for the consolidation: and construing it, according to the rule of pleading, against the party pleading it, we may assume that his alleged "consent" consisted in the fact that he did not withdraw and renounce the character of a stockholder.

4. But there is another answer. The act of February 23, 1853, was in force when Clearwater made his agreement with the defendants. He was not, therefore, a stockholder entitled to the privilege of withdrawing in the event of consolidation: he had subscribed in view of the possibility of such an event, and that possibility was one of the elements of his contract.‡ This view, supported by English authorities and authorities elsewhere than in Indiana, receives support in Indiana itself. Perkins, J., in the already cited case of *Booe* v. *Junction Railroad Co.*,§ raises the question which

* McCray *v.* Junction Railroad Co., 9 Indiana, 358; Carlisle *v.* Terre Haute Railroad Co., 6 Id. 316.

† 10 Indiana, 93.

‡ Midland Railway Co. *v.* Gordon, 16 Meeson & Welsby, 804; South Bay Meadow Dam Co. *v.* Gray, 30 Maine, 547; Burlington, &c., Railroad Co. *v.* White, 5 Iowa, 409.

§ 10 Indiana, 93.

we have already stated, to wit: "Whether two railroad companies, by consent of the legislature, granted *subsequently* to the subscriptions of stock, but without the consent of the stockholders, can consolidate their separate existences into one?" He makes the question in view of a previous Indiana case,* which decides that one who subscribes *after* the enactment of a law authorizing the company to consolidate, is bound by his subscription, although such consolidation be without his consent or even his knowledge. And are not the principles lately declared by *this* court, in *Sherman* v. *Smith*,† conclusive; especially when we consider that the Short Line Railway Company was formed under the *general* act of May 11th, 1852, relating to railroads,—an act subject to modification by the legislatures at any time?

Yet more: The plea does not allege that the consolidation of the Short Line Railway Company with the second or with the third company, was an act done without the consent, or even contrary to the wishes, of the defendants. The defendants do not allege that the plaintiff discharged them intentionally, or even directly, from their agreement; but only that *in consequence* of an act to which he assented,—not foreseeing or imagining the result,—performance of their stipulation was prevented. Now, if *they* assented to the same act, and, *à fortiori*, if they induced him to assent, with what justice or by what principle of law could they so excuse themselves?

[The counsel further brought before the court the two replications filed previously to that one which was the subject of the preceding discussion before this tribunal; which previous ones, demurred to below by the other side, had been there in fact supplied by the one now considered. He also contended, that even if his last replication was bad, he was still entitled to judgment because the *first* and *fourth* pleas were yet undisposed of.]

Mr. Hendricks, *contra*: There are in fact three causes of demurrer to the replication:

1st. The plea sets up the traversable facts of the consoli-

* Sparrow *v.* Evansville, &c., Railroad, 7 Indiana, 369. † 1 Black, 587.

dation of the stock of the Short Line Railroad Company with the stocks of other railway companies, which are the only traversable facts in the plea which are neither admitted nor denied by a replication.

2d. The plea sets up the consolidations of the stocks therein described, with the consent of the plaintiff, either of which, if correct, is an issuable fact, and the replication is a denial of both, and is therefore double.

3d. The replication is informal, inasmuch as it does not deny some one of the "issuable facts set up in the plea."

If the replication puts in issue only the question whether the stock was destroyed and rendered worthless, then it presents an issue that cannot decide the controversy; "an immaterial issue;" for if the stock was merged with the stock of other companies, and thereby made to represent another interest and a different property, which the defendants had not agreed to guaranty, and that by the consent of the plaintiff, then the defendants were discharged from their contract, although the stock may not have been impaired in its value. By the two consolidations and mergers, the $10,000 of stock in the Short Line Railroad Company came to be 200 shares in the company finally formed; and was evidence of an interest and property in that road of the nominal value of $10,000,—a different corporation or company. The stock of such a company the defendants had not agreed to guaranty; it was not within their contract; and they were as well discharged whether the stock was still of the same market value at Cincinnati, or became of no value at all. The defence rests upon the consolidation and plaintiff's consent, thereby changing and merging the thing guarantied.

The plaintiff claims that his replication is a more general traverse; and puts in issue, first, the consolidation of the companies and the stock; second, the consent of the plaintiff; and third, that the stock was thereby rendered of no value. Thus understanding the replication, it is double; and for that reason the demurrer was properly sustained.

It is not claimed that the traverse must be of a single fact,

but that the traverse must be confined to a single point. The difficulty in practice is to determine what is a single point, as contradistinguished from a single fact. Gould* says:

"The meaning of the rule is, that when the pleading, on one side, consists of several *distinct* and material points, all of which are necessary to its legal sufficiency, the adverse party is allowed to traverse only one of them. For in every such case, a denial of *one* of them is in law a sufficient answer to the whole; and he may traverse which of them he pleases;" and to illustrate, he says: "If therefore, in trespass for false imprisonment, the defendant justifies under a capias directed to the sheriff, and a warrant from the sheriff directed to himself, the plaintiff may traverse either the capias or the warrant, but should not traverse both. For the denial of either of them is a sufficient answer to the plea; since the capias, without the warrant, or the warrant, without the capias, would be no justification; and the traverse of both would, in effect, tender two issues instead of one, upon one and the same plea."

The case given by Stephen, and cited by Mr. Pugh, is considered by Gould.† He says:

"Of this case it may be observed, that the defence to which the traverse applied consisted of three distinct points.

"1. The existence of a prescriptive *right of common.*

"2. The defendant's title to share in that right, as tenant of a manor or lordship.

"3. That the particular beasts in question *were entitled to common.*

"The replication applied to the last point only, viz., that the beasts *were entitled to common.* But to entitle them to common, in the defendant's right, they must have been, as alleged in the plea, his own cattle—and also *levant and couchant* on his tenement—and commonable cattle.

"These last *three* facts, therefore, the plaintiff precisely traversed, and the court held that the traverse was not *double*, inasmuch as it embraced only the *simple point* that the cattle were *entitled to common.*"

* Gould's Pleading, chap. vii, §§ 49 and 50.

† Chap. vii, § 52.

But the facts stated in the plea here do not go to make but one point; they make two material points. 1st, the consolidation of the stock; and 2d, the plaintiff's consent thereto—but both points necessary to "the legal sufficiency of the plea"—both points constituting but one defence. Aptly illustrative is the analogous case, "if the defendant pleads title in a stranger, and justifies as servant to the latter, and by his command, the plaintiff may traverse the *title*, or the *command*, but should not traverse *both*."* The court, in the instance cited, allowed a traverse either of the title in the stranger, or his command to his servant, but not both; and so in this case, the traverse was allowed of the consolidation of the stock, or of the plaintiff's authority or consent, but not both.

In one New York case,† it was held "that a plea that the promise declared on was made by defendants and a third person jointly, and that plaintiff had released the third party, a reply denying the joint promise and the release was bad for duplicity." In another case in that State,‡ that "where to a plea of the statute of limitations the plaintiff replied the suing out of process, and a promise within six years previous to such process, a rejoinder denying both the suing out the process and the alleged promise, was bad for duplicity."

3. But it is said that the fifth plea is itself bad; offering no defence.

What, then, is the defence made by it? It is that after the contract was made and before the time limited for its execution, the *plaintiff consented* to a consolidation of the company with *other* companies, and the consolidation of the stock of the *different* companies. How is it material whether, under the laws of Indiana, a new "corporation," or a "joint-stock company," was the result of the consolidation? The stock was merged in either event: it became mingled; and the identity and separate existence of the plaintiff's 200

* Gould's Pleading, chap. 7, § 50; Crogate's case, 8 Co., 67 b.

† Tubbs *v.* Caswell & Pettit, 8 Wendell, 129.

‡ Tuttle *v.* Smith, 10 Id., 386.

shares became lost: the shares represented a new interest, and different property. Whether worth more or less in its new form and position is not material, nor whether the new organization increased or diminished the means for the enterprise. Nor is it material, although discussed by plaintiff, whether the new organization is reponsible for the debts of the old companies. But it is material that the plaintiff did consent to a change of the subject of the contract, so that it is no longer identified, nor the same property which was guaranteed.

McMahan v. *Morrison et al.** settles this question; for the decision is upon the effect of the consolidations now before *this* court; it is by the Supreme Court of Indiana, and upon the statutes of that State. The court then held that, by the consolidation of the Short Line Railroad Company with the different roads referred to in the fifth plea, pursuant to the act of the legislature, the three corporations were dissolved, and passed out of existence, and a new corporation came into existence, and that the new corporation came into existence "with property, liabilities, and stockholders, derived from" the corporations that then passed out of existence.

The plaintiff claims, moreover, that the plea is defective, because it lacks the averment that the consolidation of the railroads was an act done without the consent of the defendants. But how does that help him? Suppose the consolidation had been with the consent of both plaintiff and defendant, the effect would have been to rescind the contract, for the reason that the contract was no longer applicable to the new stock, and it would require a new contract to bind the defendants.

But were this not so, and were it held that if the defendants consented to the consolidation, they would still be liable on the contract; the fact of such consent is not a matter to be negatived by defendants, but the plaintiffs should reply that fact. It is a general rule of pleading that matter which should come more properly from the other side, need not be

* 16 Indiana, 172.

stated. Each party makes out his own case. Neither is bound to anticipate, and therefore neither is compelled to notice and remove, every possible exception, answer, or objection which may exist.

It is insisted, however, inasmuch as the statute law of Indiana authorized railroads to be consolidated, that therefore the defendants contracted with a view to a possible consolidation, and are bound by it. The authorities cited do not go so far; they establish only the position that where the legislature has reserved the right to amend the charter, the subscribing stockholders, by the act of subscription under such a charter, agree to such increased liabilities as the legislature may impose. It does not follow, however, that whoever contracts with a railroad company, or with a third party in relation to railroad property or stock, is subject to have his liabilities varied by any and all acts, which, according to law, the company may do. Nor does such a principle exist.

The remaining points are feeble. The 1st and 2d replications were withdrawn below and cannot be reinstated here. Neither is there any use of disposing of the 1st and 4th pleas: since judgment in favor of the 5th, which is in bar to the action, ends the case.

Mr. Justice DAVIS, after stating the case, delivered the opinion of the court:

In order to arrive at a correct solution of this question, it is important to consider whether the *plea* is a good one, for a demurrer, whenever interposed, reaches back through the whole record, and "seizes hold of the first defective pleading." The plea in controversy confesses the original cause of action, but sets up matter, which has arisen subsequent to it, to avoid the obligation to perform it. It acknowledges that the guaranty was given as claimed, but insists that the consolidation of the interests and stock of the three railroad companies necessarily destroyed and rendered worthless and of no value the guaranteed stock, and that Clearwater having consented to the transfer, is in no position to claim redress from Meredith and his co-defendants.

If Clearwater was a consenting party to a proceeding which, of itself, put it out of the power of the defendants to perform their contract, he cannot recover, for "promisors will be discharged from all liability when the non-performance of their obligation is caused by the act or the fault of the other contracting party." *

The Cincinnati, Cambridge and Chicago Short Line Railway Company, whose stock was guaranteed, was, as stated in the pleadings, organized under a general act of the State of Indiana, providing for the incorporation of railroad companies. This act was passed May 11, 1852, and contained no provision permitting railroad corporations to consolidate their stock. It can readily be seen that the interests of the public, as well as the perfection of the railway system, called for the exercise of a power by which different lines of road could be united. Accordingly, on the 23d February, 1853, the General Assembly of Indiana passed an act allowing any railway company that had been organized, to intersect and unite their road with any other road constructed or in progress of construction, and to merge and consolidate their stock, and on the 4th of March, 1853, the privileges of the act were extended to railroad companies that should afterwards be organized.

The power of the legislature to confer such authority cannot be questioned, and without the authority, railroad corporations organized separately, could not merge and consolidate their interests. But in conferring the authority, the legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. There was no reservation of power in the act under which the Cincinnati, Cambridge & Chicago Short Line Railway was organized, which gave authority to make material changes in the purposes for which the corporation was created, and without such a reservation, in no event could a dissenting stockholder be bound.

* 2 Parsons on Contracts, 188.

When any person takes stock in a railroad corporation, he has entered into a contract with the company, that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be, new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit.

But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking.* The act of the legislature of Indiana allowing railroad corporations to merge and consolidate their stock, was an enabling act—was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done, and which without that consent could not be done at all. By virtue of this act, the consolidations in the plea stated were made. Clearwater, *before* the consolidation, was a stockholder in one corporation, created for a given purpose; after it he was a stockholder in another and different corporation, with other privileges, powers, franchises, and stockholders. The effect of the consolidation "was a dissolution of the three corporations, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those passing out of existence;" *McMahan* v. *Morrison.*† And the act of consolidation was not void because the State assented to it, but a non-consenting stockholder was discharged.‡ Clearwater could have prevented

* The Hartford, &c., R. R. Co. *v.* Croswell, 5 Hill, 383; Banet *v.* The Alton, &c., R. R., 13 Illinois, 510.

† 16 Indiana, 172.

‡ McCray *v.* Junction Railroad Co., 9 Id. 358.

this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined.* There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. By his own act he has destroyed the stock to which the guaranty attached, and made it impossible for the defendants to perform their agreement. After the act of consolidation the stock could not have any separate, distinct market value. There was, in fact, no longer any stock of the Cincinnati, Cambridge & Chicago Short Line Railway.

Meredith and his co-defendants undertook that the stock should be at par in Cincinnati, if it maintained the same separate and independent existence that it had when they gave their guaranty. Their undertaking did not extend to another stock, created afterwards, with which they had no concern, and which might be better or worse than the one guaranteed. It is not material whether the new stock was worth more or less than the old. It is sufficient that it is another stock, and represented other interests.

But it is said that the plea is defective because it does not aver that the consolidation was an act done without the consent of the defendants. The pleadings do not aver that the defendants were stockholders in any of the roads whose interests were merged, and if they were not, it is not easy to see what right they had to interpose objections to consolidation, nor how their consent was necessary to carry out the object contemplated. If the plaintiff consented because they did, and it is meant to be argued on that account, they would still be liable on their contract; the answer is, that this is not a matter to be negatived by the defendants, but the plaintiff should reply the fact.†

* Lauman *v.* Lebanon Valley Railroad, 30 Pennsylvania State, 46.

† 1 Chitty's Pleading, 222.

It follows that the fifth plea presented a complete defence in bar of the action.

In this plea there were two points, and two only, which the plaintiff had the right to traverse. He could deny *either* the act of consolidation, or that he gave his consent to it. He could not deny both, for that would make his replication double. And if either fact was untrue, the defence was destroyed. The truth of both was essential to perfect the defence. But traverse can only be taken on matter of fact, and it is always inadmissible to tender an issue on mere matter of law.*

The last replication *does* traverse a conclusion of law. Whether the stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company was destroyed and rendered worthless and of no value, was not a question for a jury to try. If the roads were consolidated, with the consent of the plaintiff, then it followed, as a conclusion of law, that the stock was destroyed and of no value. The stock passed out of existence the very instant the new corporation was created. The issue, therefore, tendered by the plaintiff in his last replication, was an immaterial one, and the court did not err in sustaining a demurrer to it.

But the plaintiff claims the right to have the decision of the court below on the sufficiency of his previous replications reviewed here. This he cannot do. Each replication in this cause is complete in itself; does not refer to, and is not a part of what precedes it, and is new pleading. When the plaintiff replied *de novo*, after a demurrer was sustained to his original replication, he waived any right he might have had, to question the correctness of the decision of the court on the demurrer. In like manner he abandoned his second replication, when he availed himself of the leave of the court, and filed a third and last one.

But the plaintiff insists that even if his replication was bad, that still upon the whole record he was entitled to judgment, because the first and fourth pleas were undisposed of.

* 1 Chitty's Pleading, 645.

If an issue in fact had been joined on the fifth plea, and found for the defendants, judgment was inevitable for them, because the plea was *in bar* of the action, and the other pleas would then have presented immaterial issues. If the plea was true, being a complete defence, it would have been useless to have tried other issues, for no matter how they might terminate, judgment must still be for the defendants. The state of pleading leaves the fifth plea, precisely as if traverse had been taken on a matter of fact in it, and determined against the plaintiff. "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party." (*Gould's Pleading*, ch. ix, § 42.) "And when the defendants' plea goes to bar the action, if the plaintiff demur to it and the demurrer is determined in favor of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action." (*Tidd's Practice*, *4th American Edition*, 741–2.)

There is no error in the record.

JUDGMENT AFFIRMED WITH COSTS.

COMMANDER-IN-CHIEF.

1. Parties excepting to a report of a commissioner in admiralty proceedings, should state, with reasonable precision, the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is. *Ex. Gr.* If the exception be that the commissioner received "improper and immaterial evidence," the exception should show what the evidence was. If, that "he had no evidence to justify his report," it should set forth what evidence he did have. If, that "he admitted the evidence of witnesses who were not competent," it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected.
2. This same necessity for specification it is declared—though the case was not decided on that ground, the point not having been raised on argument—exists in a high degree in regard to an *answer* put in to an admi-