the inference that it was the understanding of the vendees that they were buying under a warranty that the quality of the madder in the casks was equal to that of the sample in the bottle, and that the agent of the vendors intended to be understood as giving such a warranty. It is hardly credible in the presence of such facts that the understanding and intention of the parties could have been otherwise.

But it is not necessary that the state of the evidence should have been such as necessarily to lead to this conclusion. It is enough that there was evidence upon the subject proper to be left to the consideration of the jury. If the jury erred, the remedy was by a motion for a new trial, and not by a writ of error. This part of the case was argued as if such a motion were before us. The rules of law which would be applicable in that event are very different from those which apply as the case is presented. A motion for a new trial in the courts of the United States is addressed to the sound discretion of the tribunal which tried the case, and to grant or refuse it cannot be made the subject of exception.* Here the question is, whether the court erred in refusing to take the case from the jury. Upon that subject we concur in the opinion of the learned judge who tried the cause. If a motion for a new trial were before us we should overrule it. In our opinion right and justice have been done. The judgment below is

AFFIRMED WITH COSTS.

HARDY v. JOHNSON.

1. By the law of California, one tenant in common of real property can sue in ejectment, and recover the demanded premises entire as against all parties, except his co-tenants, and persons holding under them. But the judgment for the plaintiff in such case will be in subordination to the rights of his co-tenants.
2. According to the system of pleading and practice in common law cases which prevails in the courts of California, and which has been adopted by the Circuit Court of the United States in that State, a title acquired

* Brown v. Clarke, 4 Howard, 15.

Argument for the plaintiff in error.

by the defendant in ejectment after issue joined in the action can only be set up by a supplemental answer in the nature of a plea *puis darrein continuance*.

WRIT of error to the Circuit Court of the United States for the Northern District of California; the action having been ejectment, by Johnson against Hardy and wife, to recover a parcel of land in the city of Oakland, California. Johnson, in his complaint, as a declaration is there called, alleged a seizin in fee and a right to the possession of the entire demanded premises. The jury, however, by special verdict, found that the plaintiff was seized of a fractional part only; to wit, of an undivided twentieth interest. The defendants showed no title in any part; and the court gave judgment in Johnson's favor for the *entire* premises, "*in subordination to the rights of his co-tenants.*"

On the trial the defendants offered in evidence a deed, conveying the interest of some of the co-tenants, executed after issue joined; an issue amounting in fact to the general issue. The deed was admitted (the question of its admissibility under the pleadings being reserved), and the jury based one of its findings upon it. The court, however, finally held the evidence not competent, and, in entering judgment on the verdict, excluded the finding made upon its basis.

The questions in this court were:

1. Whether judgment could properly be given, as it was in favor of the plaintiff for the entire premises, in subordination to the rights of his co-tenants?

2. Whether the deed was rightly excluded?

Mr. Train, for the plaintiffs in error, relied, as respected the first point, on the familiar principles that the plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of the defendant's; and that a recovery must be had *secundum allegata*, or not at all: arguing, from the last position, that even though the special verdict found the plaintiff entitled to an undivided twentieth, he could not have judgment therefor, except by amending the declaration or complaint. On the second point, he contended that the

title of the defendants acquired after issue was admissible; citing *Stockdale* v. *Young*, a decision in South Carolina,* in which it was held that, "in trespass to try title, the acquisition of title by defendant, since the last continuance, could not operate to prevent the recovery of damages to which the plaintiff might be entitled, and therefore that it was unnecessary to plead it *puis darrein continuance;* but that it might be given in evidence under the general issue."

Messrs. Hepburn and Hill, contra, relied, for the first point, on *Stark* v. *Barrett*;† and, for the second, on *Yount* v. *Howell*,‡ California decisions, both.

Mr. Justice FIELD delivered the opinion of the court:

This is an action of ejectment for the possession of certain real property, situated in the city of Oakland, in the State of California. The plaintiff below, the defendant in error in this court, alleges in his complaint a seizin in fee and a right to the possession of the entire premises. The proof established and the jury found that he was only seized of an undivided twentieth interest; but the court held that, as the defendants had shown no title, he was entitled to the possession of the entire premises, "in subordination," however, "to the rights of his co-tenants," and directed judgment to be entered in his favor as against the defendants for the same. The ruling of the court in this particular constitutes the principal error urged for a reversal of the judgment.

The ruling was in conformity with the settled law of the State. Under the allegation of seizin in the complaint, it was sufficient, as determined by repeated adjudications of the Supreme Court of the State, for the plaintiff to establish any interest in the premises which gave him a right of possession. The action of ejectment determines no rights but those of present possession; and that one tenant in common has such rights as against all parties but his co-tenants, or persons holding under them, is not questioned.§

* 3 Strobhart, 501. † 15 California, 371. ‡ 14 Id., 468.

§ See Stark *v.* Barrett, 15 California, 371; Touchard *v.* Crow, 20 Id., 162; Mahoney *v.* Van Winkle, 21 Id., 583.

On the trial the defendants produced a conveyance of the interest in the premises of some of the co-tenants of the plaintiff, executed after issue joined. The evidence was admitted, subject to the opinion of the court upon its admissibility under the pleadings, and the jury based one of their findings thereon. But the court, in directing the judgment to be entered upon the special verdict, held the evidence inadmissible, and excluded the finding. Its ruling in this particular constitutes the second error assigned for a reversal of the judgment.

This ruling was correct under the system of pleading and practice which prevails in the State courts of California, and which, with some slight modifications, has been adopted by the Circuit Court of the United States for common law cases. By a statute of the State the different forms of action known to the common law are abolished. The plaintiff is required to state in his complaint the facts constituting his cause of action in ordinary and concise language, with a prayer for the relief to which he may deem himself entitled. To the complaint the defendant must answer either by a denial of its allegations or by a statement of any new matter constituting a defence. The fictions of the action of ejectment at common law have no existence. The names of the real claimants and defendants must appear in the pleadings. The complaint must allege the possession or seizin of the premises, or of some estate therein by the plaintiff, on some day to be stated, the subsequent entry of the defendant thereon, and his withholding the same from the plaintiff. A denial of its allegations puts in issue the title of the plaintiff at the date alleged, or at least his title at the commencement of the action.* Any title acquired subsequent to the issue thus joined must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*. No permission to file such supplemental answer was applied for, and there was no error in excluding the title subsequently acquired under the pleadings as they stood.

JUDGMENT AFFIRMED.

* Yount *v.* Howell, 14 California, 468.