prior time, by relation back, was applicable to contracts of insurance; that the agreement to insure was the principal act, and that the formal execution of the policy might be concurrent therewith, or subsequent thereto, and when subsequent, and made as of the date of the principal act, took effect by relation as of that date.

Numerous other authorities to the same purport were cited on the argument, but we do not deem it necessary to pursue the subject further. We see no error in the ruling of the court below, and its judgment must, therefore, be affirmed; and it is so ordered.

JUDGMENT AFFIRMED.

GILLETTE *v.* BULLARD.

In an action on the bond given on appeal from the District Court to the Supreme Court of the Territory of Montana, the plea was that the defendant had prosecuted a writ of error from the judgment of the Territorial court to the Supreme Court of the United States, and had had executed his bond which operated as a supersedeas of that judgment, and that no remittitur or mandate had issued from the latter court, and that the judgment of the Supreme Court of the Territory still remained in the court so stayed by the supersedeas bond and the order thereon.

This plea is insufficient in that it does not aver that at the commencement of this action the appeal was then pending in this court or had ever been perfected. Nor is the case altered by the Practice Act of Montana, which enacts, in its seventy-eighth section, that "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice."

ERROR to the Supreme Court of the Territory of Montana.

Bullard, assignee of Marden, sued Gillette upon an appeal bond. The action was commenced on the 30th of January, 1872. The complaint alleged that on the 15th June, 1868, Marden recovered a judgment in the District Court of the Territory against Plaisted & Wheelock, which yet remained in full force, unreversed and unsatisfied except as thereinafter

stated; that on the 16th day of July, 1868, Plaisted & Wheelock appealed from that judgment to the Supreme Court of the Territory, and that on such appeal Gillette executed a bond, whereby he became bound for the payment of the judgment and all damages and costs that might be awarded against the appellants if it should be affirmed; that on the 31st December, 1868, said judgment was affirmed by the Supreme Court of the Territory, and costs adjudged against the appellants; that on the 2d of July, 1870, Marden assigned the judgment and his interest therein to the plaintiff; that by virtue of executions issued, certain sums were made on the 22d of August, and the 26th of September, 1870, but that a large balance still remained unpaid, for the recovery of which the action was brought.

The answer, filed on the 21st of February, A.D. 1872, did not deny any of the averments in the complaint, but alleged by way of defence, that on the —— day of January, 1869, Plaisted & Wheelock appealed from the judgment of the Supreme Court of the Territory to this court; that they thereupon executed and filed with the clerk of the Supreme Court of the Territory a good and sufficient bond on appeal, and that court stayed all proceedings upon the judgment and granted a supersedeas in the action; that no remittitur or mandate had ever been issued from this court to the Supreme Court of the Territory, or from the Supreme Court of the Territory to the District Court, and that the judgment of the Supreme Court of the Territory still remained in that court "so stayed by the order thereof by the giving of the bond on appeal and by the supersedeas."

After the filing of the answer, judgment was given against Gillette upon the pleadings, and he brought the case here.

The question was whether the answer stated facts sufficient to constitute a defence to the action.

By the seventy-eighth section of the Practice Act of Montana it is provided, that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

Opinion of the court.

Mr. Robert Leech (*a brief of Mr. W. F. Sanders being filed*), *for the plaintiff in error:*

The undertaking sued on was simply security for the judgment, and the plaintiff had no right to maintain an action thereon until the final affirmance of the judgment in the court of last resort. To enable him to maintain this action against the surety, it was necessary that he have a right to enter and collect a *judgment of affirmance* in the case.* This right, as the pleadings show, the plaintiff has never acquired.

It is true that the defendant, in his answer or plea, does not allege in express terms that the cause is still pending in this court. But he avers that which, by reasonable intendment and independent of any enactment, is equivalent thereto, namely, that "no remittitur or mandate has ever been issued from this court to the Supreme Court of the Territory, or from the Supreme Court of the Territory to the District Court; and that the judgment so rendered in the Supreme Court of the said Territory still remains in that court so stayed by the order thereof, by the giving of the said bond on appeal, and by the said supersedeas."

But the answer is made more effective by statute. The seventy-eighth section of the Practice Act of Montana enacts that in the construction of a pleading *for the purpose of determining its effect* its allegations shall be *liberally* construed. Construing this answer or plea *liberally*, it must be taken to intend not only that the appeal had been taken, but that it had been perfected and was pending when the action was begun.

No opposing counsel.

The CHIEF JUSTICE delivered the opinion of the court.

The seventy-eighth section of the Practice Act of Montana—which provides that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice

* Poppenhusen *v.* Seeley, 41 Barbour, 450; Robinson *v.* Plimpton, 25 New York, 484.

between the parties"—is a modification of the common-law rule which construes all pleadings most strongly against the pleader, but even with the statute as our guide, we think the judgment below was correct. An answer to be good must overcome the case made by the complaint. If the facts well pleaded in the complaint are admitted, as in this case, it must state other facts, sufficient, if true, to defeat the action in whole or in part, or it will not avail as a defence.

That is not the case here. It is nowhere averred that at the time of the commencement of this action the appeal to this court was pending or that it had ever been perfected. In fact, such averments seem to have been studiously avoided. The appeal was allowed in January, 1869. Unless a transcript was filed in this court before the end of the following term that appeal would be vacated. In the language of very many decisions it would become *functus officio.** The supersedeas is but an appurtenance of the appeal. The stay insisted upon in the answer, although there seems to have been an attempt to make it more, is only that which resulted from the supersedeas. That was at an end when the appeal became inoperative. The failure, therefore, to aver that the appeal was in force was a failure to aver that the stay as granted continued to have effect.

The complaint alleges that money was made upon executions in 1870. The date of the issue of the executions is not given, but if the collection was regular the judgment could not have been stayed when the money was made, and that was after the time within which the appeal, if it was to remain in force, must be perfected. Clearly, therefore, to make the defence perfect, it was incumbent upon the defendant to aver distinctly in his answer not only that the appeal had been taken, but that it had been perfected and was still pending when the action was commenced.

It is, however, stated that no mandate or remittitur had been issued from this court to the Supreme Court of the

* Edmonson *v.* Bloomshire, 7 Wallace, 310.

Territory, or from the Supreme Court of the Territory to the District Court when the action was commenced. None could issue from this court, for there was nothing here, so far as the pleadings show, to remand. None was necessary from the Supreme Court of the Territory to the District Court, because the condition of the bond is to pay if the judgment should be affirmed. The affirmance, therefore, is the material fact which is to fix the liability. That is averred in the complaint and not denied in the answer.

JUDGMENT AFFIRMED.

LONGSTRETH *v.* PENNOCK.

The Pennsylvania statute of June 16th, 1836, which provides that where property upon demised premises, and liable to distraint, is seized on execution and sold, the officer making the sale shall pay the rent (provided it does not exceed one year's rent) in preference to the judgment on which the execution issued, extends, by an equitable intendment, to a seizure of goods similarly situated, by an assignee in bankruptcy. A landlord's claim is accordingly, in Pennsylvania, first paid out of the bankrupt's goods liable to distress on demised premises, and before making a dividend of their proceeds among the creditors generally.

ERROR to the Circuit Court of Pennsylvania; the case being thus:

A Pennsylvania statute of June 16th, 1836,* enacts as follows:

"The goods and chattels being in or upon any messuage, lands, or tenements, which are or shall be demised for life or years or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: *Provided*, That such rent shall not exceed one year's rent.

"After the sale by the officer, of any goods or chattels as

* Purdon's Digest, edition of 1873, p. 879.