

Case No. 2,576.  
[2 Biss. 124.]<sup>1</sup>

CHAMBERLAIN v. ECKERT.

Circuit Court, N. D. Illinois.

April, 1869.

PLEA IN ABATEMENT—SUIT PENDING IN STATE COURT.

To a suit on a promissory note, defendant pleaded in abatement the pendency of a suit in the state court; plaintiff replied that since the filing of the plea, the suit had been dismissed. *Held*—a good replication.

This was a suit upon a promissory note. Defendant pleaded in abatement that at the time of commencement of this suit an action was pending in the circuit court of La Salle county upon the same note, and between the same parties, which action was still pending. Plaintiff replied that on the 6th of March, after the filing of the plea in abatement, but before the replication, the suit in the state court had been dismissed. Defendant demurred to replication.

J. Milton Peters, for plaintiff.

Elliott Anthony, for defendant.

DRUMMOND, District Judge. I am inclined to think that this replication ought to be held good; and, in the absence of any express authority to the contrary, I shall so hold. There is an opinion given by Chief Justice Parsons, proceeding on the ground that a suit pending at the time of the commencement of the second suit is a good plea; but this, I think, is not the present doctrine. At any rate, it is not the doctrine in this state; and I think it ought not to be because, when a suit has once been commenced, and is dismissed, the fact that it was pending at the time the second suit was brought is no reason why the court in which the second suit was commenced should not go on and adjudicate on the rights of the parties, because, although there was a difficulty once, it is removed. When the suit was commenced there was an obstacle in the way. When the plea was pleaded there was the same obstacle. But now, when the replication is filed, that obstacle is removed.

Demurrer to replication overruled.

Plea of *lis pendens* in another state not good. *Smith v. Lathrop*, 44 Pa. St 326, and cases there referred to.

[NOTE. Subsequently, and without leave of the court, defendant filed a demurrer to the declarations, and on motion of plaintiff the demurrer was stricken from the files. See Case No. 2,577, next following.]

<sup>1</sup> [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]