

Case No. 5,108a.

FRERICKS v. COSTER.

{17 Reporter, 168.}²

Circuit Court, S. D. New York.

Jan. 19, 1884.

DEMURRER—TO SUPPLEMENTAL COMPLAINT—NEW YORK
CODE—ADDITIONAL DAMAGES CLAIMED.

1. The Code of Civil Procedure of New York does not authorize a demurrer unless it is to the whole complaint or to a separate cause of action alleged in the complaint.
2. Where a supplemental complaint has been served alleging matters arising since the complaint which increase the plaintiffs damages but do not change the cause of action, a demurrer to such supplemental complaint will be stricken out.

On motion to strike out a demurrer. Defendant [Charles R. Coster] was collector of internal revenue and seized a still and other property of the plaintiff [Frederick Frericks] for alleged violations of the internal revenue law. The information was dismissed by the district court and a certificate of probable ["reasonable"] cause was refused, and this action was brought to recover damages for the wrongful seizure. Plaintiff by permission of the court filed a supplemental complaint alleging that the judgment and order of the district court were taken up by defendant for review [Case No. 15,166], and affirmed by the supreme court [106 U. S. 160, 1 Sup. Ct 169], and that defendant had been put to additional expense thereby. The defendant demurred to the supplemental complaint on the ground that it did not state facts sufficient to constitute a cause of action.

Edward Salomon, for the motion.

Elihu Root Dist Atty., and H. E. Davies, contra.

WALLACE, Circuit Judge. The demurrer interposed by the defendant is not to the whole complaint or to any separate cause of action alleged in the complaint, and is, therefore, an unauthorized pleading. Code, § 492. The supplemental pleading of the plaintiff which is thus demurred to does not take the place of the original complaint; it avers facts arising since the original complaint which increase the plaintiff's damages but do not change his cause of action. It is a pleading in addition to the original complaint but not one in place of it, and is authorized by section 544 of the Code of Procedure. Motion granted.

[NOTE. Subsequently, the defendant moved this court for a certificate of probable cause of seizure, which was refused. *Frericks v. Coster*, 22 Fed. 637. A petition was filed in the court of claims by Frericks against the United States. Judgment was given for the plaintiff (21 Ct Cl. 16), which was affirmed by the supreme court (*U. S. v. Frericks*, 124 U. S. 315, 8 Sup. Ct. 514).]

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