

Case No. 5,194.

GALLAGHER v. ROBERTS.

{1 Wash. C. C. 320.}¹

Circuit Court, D. Pennsylvania.

Oct. Term, 1806.

PLEADING IN EQUITY—EFFECT OF VERDICT AND JUDGMENT AT LAW—FAILURE TO REPLY TO PLEA—DEMURRER—SET-OFF—EQUITABLE RELIEF.

1. If the plea be set down for argument by the complainant, without replying to it, the matter contained in it must be considered as true.

{Cited in *Myers v. Dorr*, Case No. 9,988.}

2. A verdict and judgment at law, is no bar to relief in equity, if an equitable ground of relief be laid, and that is not denied by the plea. If it be denied, the plaintiff may reply generally, and go into proofs to support the bill; and if he fail to make his proof, the plea will be a good bar, as if no replication had been put in.

{Cited in *Wistar v. McManes*, 54 Pa. St. 321.}

3. If a bill in equity contain no ground for relief, the defendant ought to demur.
4. When a bill of exchange is remitted to A, and the responsibility of the parties to it is released, by the neglect of A to give notice of its dishonour; although, as the bill was not remitted in payment to A, the claim against A being for damages, cannot be set off, yet it is a good ground for relief in equity against A.

To the bill of injunction filed in this cause [by Gallagher's executors], the defendant pleaded in bar, the verdict and judgment at law, and that the matters in issue before the jury, were the same as are now stated as the ground of relief, except as to the charge of management on the part of the defendant's counsel, and a slip on that of the plaintiffs', which is denied. The cause was set down to be argued on the plea.

Mr. Levy, for plaintiffs in equity, contended, that a verdict and judgment at law is no bar to relief in equity, unless the ground of relief is traversed in the plea. 1 Har. Ch. Pr. 361. Slip of the attorney at law good ground of relief. Prec. Ch. 233; 2 P. Wms. 425.

Mr. Hallowell, for defendant. The only ground of relief is, the management and slip which are denied in the plea. The ground of relief is not sufficient. 3 Abbt. 232.

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WASHINGTON, Circuit Justice. The plea not being denied by a replication, but set down for argument, must be considered as true; and therefore we must now take it as a fact that the management and slip, if material, did not take place, because the plea denies them. A verdict and judgment is no bar to relief in equity, provided the bill lays an equitable ground for relief, and the plea does not deny the ground laid. If it does, then the plaintiff may reply generally, and go on to support the facts stated in the bill, to entitle him to relief. If he do so, and fail in his proof, the plea will be a good bar, as well as if he had set down the cause upon the plea; which would have admitted the truth of the plea. If the bill contain no ground for relief, the defendant ought to demur. But in this case, the bill lays a ground for relief, which is not denied—namely, that the amount of the bill remitted to the defendant, was lost to the plaintiff, by his neglect in not giving notice of the protest. This defence was deemed inadmissible at law; because as it did not appear that it was remitted as a payment, the claim of the plaintiff, for the improper conduct of the defendant, was for damages only, which could not be offset at law. But it is a good ground of relief in equity. We shall therefore overrule the plea, and let it stand for an answer, if the defendant wishes it.

[NOTE. See *Gallagher v. Roberts*, Case No. 5,195, and *Roberts v. Gallagher*, Id. 11,902.]

¹ [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]