

Case No. 16,829.
[5 Biss. 193.]¹

VAN AVERY v. PHOENIX INS. CO.

Circuit Court, N. D. Illinois.

Nov., 1870.

PLEADING AT LAW—PLEAS.

Where the declaration is special, stating facts and circumstances, a plea setting up the same matter is bad; they can be given in evidence under the general issue.

[This was a suit by Thomas Van Avery against the Phoenix Insurance Company of Hartford, Conn., upon a policy of insurance. Heard on demurrer to the pleas.]

O. B. Sansum, for plaintiff.

Miller & Van Arman, for defendant.

BLODGETT, District Judge. In this case a demurrer is interposed to the special pleas of the defendant. The first plea is in substance, that the suit has not been brought within one year from the time the loss occurred, upon the policy of insurance. The second plea is in substance that the loss occurred while the steamer was engaged in saving a stranded vessel off a reef, whereby it is claimed that she vitiated her policy and that the insurers are not liable.

The pleader who drew the declaration has averred the specific manner in which the loss occurred, that she was relieving a stranded vessel, and that it was in pursuance of an immemorial custom among persons engaged in the navigation of these waters that such relief should be rendered.

I am inclined to think that both these pleas, in view of the averments of the declaration, are nothing more than what can be given in evidence under the general issue. I do not think that the second plea, the last plea in reference to showing the manner in which the loss occurred, is anything more than a reiteration of the matter in the declaration. The question as to whether it does present a defense is one to be decided when the evidence is taken as to whether such a custom exists. I think that the defense under the first plea can be given under the general issue. It is a mere question of fact to be determined on the trial.

Demurrer to special pleas sustained.

¹ [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]