

ADAMS AND ANOTHER V. HOWARD AND  
ANOTHER.

*Circuit Court, S. D. New York.*      October 24, 1881.

1. PLEADING—ANSWER—DEMURRER.

By putting in an answer to the whole bill, a defendant overrules his demurrer which is also to the whole bill.

*F. H. Betts*, for plaintiffs.

*J. A. Whitney*, for defendants.

BLATCHFORD, C. J. The defendant Morse has demurred to the whole bill and has put in an answer to the whole bill. The suit is one for the infringement of a patent. The grounds of demurrer set forth in the demurrer are all of them also set forth in the answer. They relate solely to the title set forth in the bill to the patent, and to the allegations in the bill respecting infringement. A replication to the answer has been filed. The plaintiffs now move for an order, either that the defendant elect between his demurrer and his answer, or that the demurrer be set down for argument. By rule 32 in equity, a defendant may demur to the whole bill, and may demur to a part of the bill and answer as to the residue. But there is nothing that allows him to demur to the whole bill and at the same time to answer to the whole bill, especially where the answer sets up everything that is in the demurrer. Putting in such an answer is a waiver of such a demurrer. The defendant must elect between his demurrer and his answer; and, to guard against misunderstanding, if he should elect his demurrer, and it should be overruled on argument, he would be held, probably, to have waived what, ordinarily and otherwise, would be, under rule 34, his right to answer.

The defendant moves to dismiss the bill. The ground of the motion is not specified in the notice

of motion. From the affidavit made in support of the motion, one ground would seem to be that the plaintiffs did not, under rule 38, set down the demurrer for argument within the time required, and that they did not take any testimony within three months after the replication was filed. I think the plaintiffs sufficiently excuse the omissions. The demurrer ought to be disposed of before any testimony is taken.

The motion is denied.

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