

taining that one painting is not a collection. But in this case it is not necessary to determine that proposition, for it is admitted that Mr. Garrett had and has a collection of portraits by the old masters, to which this Rubens was to be added. When it arrived in Baltimore it was a part of that collection; the only thing to be said about it being that some of the portraits Mr. Garrett had collected were at his dwelling, while a part of the collection was at the custom-house. It is to be noted, moreover, that the genuineness of the portrait is not disputed in this appeal. The decision of the general board of appraisers will be sustained, and the appeal dismissed.

FIRST NAT. BANK OF CLARION *v.* HAMOR.

(Circuit Court, D. Washington, W. D. July 31, 1891.)

1. ACTION ON JUDGMENT—VARIANCE.

Where a complaint upon a judgment alleges that it was rendered in an action wherein the parties to this suit were plaintiff and defendant, proof of a judgment rendered against defendant and another person is a fatal variance, and there can be no recovery thereunder.

2. SAME—PLEADING—GENERAL DENIAL.

In an action on a judgment a general denial under the Code of Washington is equivalent to pleading the general issue of *nul tuel record*, and the burden is upon the plaintiff to prove the record sued upon.

At Law. Action on judgment.

Govnor Teats and *W. C. Sharpstein*, for plaintiff.

Crowley & Sullivan, for defendant.

HANFORD, J. The nature of this case and the material facts are concisely shown by the following statement of the cause of action set forth in the plaintiff's complaint:

"For its first cause of action against the said defendant plaintiff says that on the 13th day of August, 1888, this plaintiff obtained judgment against the said defendant in the county court of common pleas of Clarion county, Pennsylvania, in consideration of said court, in which court this plaintiff and defendant was the plaintiff and defendant therein, at the regular November term of said court, held at Clarion, Clarion county, in the commonwealth of Pennsylvania, and with full jurisdiction of the subject-matter and persons and parties recovered a judgment against the said defendant, George D. Hamor, in the sum of \$2,110.50, and costs taxed at \$4.90; that there has accrued costs by virtue of executions having been issued thereon in the further sum of \$16.35; that said judgment still remains in that court in full force and effect, in no wise reversed or annulled or satisfied or set aside; that there is due this plaintiff from said defendant thereon, over and above all credits or offsets whatsoever, the sum of \$2,131.75, together with all interest thereon at 6 per cent. per annum from the 10th day of August, 1888, and an exemplified copy of said judgment and proceedings is hereto attached, marked 'Exhibit A,' and made part hereof."

Two other similar causes of action are set forth in the complaint by similar statements. The defendant, in his answer, denies any indebtedness to the plaintiff, and denies that he has any knowledge or information sufficient to form a belief as to the other allegations of the complaint, which form of denial under the Code of this state is sufficient to make an issue, and to impose on the plaintiff the burden of proving the averments of the complaint. By stipulation a jury was waived, and the case has been tried before the court, and submitted upon the pleadings, evidence, and arguments.

In behalf of the plaintiff it is claimed that the pleadings admit the judgments upon which the action is founded. I hold, however, that under the code system of pleading and practice a plaintiff, by alleging the existence of a judgment in his favor, tenders an issue, and assumes the burden of proof, if the defendant joins issue by a denial, as in this case. In other words, a general denial is equivalent to pleading the general issue, and amounts to the same thing as a plea of *nul tiel record*. *Westcott v. Brown*, 13 Ind. 83; *Kinsey v. Ford*, 38 Barb. 195; *McCracken v. Swartz*, 5 Cr. 63. The plaintiff has introduced transcripts showing judgments of the court of common pleas in and for the county of Clarion, in the state of Pennsylvania, for the sums alleged in the complaint and rendered on the days mentioned in the complaint, but not in actions wherein the parties were the same as pleaded. The complaint alleges judgments recovered against the defendant alone in actions wherein the plaintiff and the defendant, George D. Hamor, were the plaintiff and defendant. The transcripts show judgments in favor of the plaintiff and against both defendants in three actions in which the plaintiff was plaintiff and George D. Hamor and one E. Kuntz were defendants. The judgments appear to have been entered by the prothonotary upon promissory notes made by one H. Loeb to Hamor and Kuntz, and which notes were, by indorsements thereon, assigned by George D. Hamor and E. Kuntz to the plaintiff, and by the same indorsements the assignors jointly guarantied the payment at maturity, and empowered any attorney of any court of record to confess judgment against them for the sums named in the notes, with 5 per cent. attorney's fees. The contracts of assignment, guaranties of payment, and warrants to confess judgment created as to each of the notes a joint liability; and the judgments entered thereon are against the defendant and E. Kuntz, and do not in any way change the position of the parties, or create any several or new liability. The record in this case and the evidence fail to disclose that Kuntz has died, if such be the fact, or that there is any reason for not joining him as a party defendant. If he has paid the debt, or been released, or has any valid defense, the same should be as available to the defendant as it would be to him. For this reason the variance between the allegations of the complaint descriptive of the judgments sued upon and the proofs introduced cannot be deemed immaterial or unimportant. *City of Detroit v. Houghton*, 42 Mich. 459, 4 N. W. Rep. 171, 287; *Mace v. Page*, 33 Mich. 38; *Cunningham v. Hobart*, 7 Gray, 423; *Dibrell v. Miller*, 29 Amer. Dec. 126. There is a total failure to prove the existence of the judgments described, and it would

be unjust for the plaintiff to recover upon proof of other and different judgments, not mentioned in the complaint, especially as there could be no recovery against this defendant alone in an action with proper pleadings conforming to the proofs.

ANDERSON v. NEW YORK & T. S. S. Co.

(Circuit Court, S. D. New York. July 30, 1891.)

1. MASTER AND SERVANT—INCOMPETENT FELLOW-SERVANT—EVIDENCE.

In an action for personal injuries caused by the negligent handling of a winch it appeared that while the vessel was discharging its cargo a man from the shore was put at the winch. Signals were given by a whistle, and plaintiff testified that the winchman told him he was deaf, and that he must blow loud; that the winchman did not follow signals correctly; and that the draft which struck plaintiff was carried on after the signal to stop, and lowered too fast while he was reaching for it. *Held* sufficient to sustain a verdict that the winchman was incompetent, notwithstanding that he testified that he was not deaf, and others testified that he was skillful and attentive.

2. EVIDENCE—RES GESTÆ.

The declaration of the winchman that he was deaf, made in connection with a request to the plaintiff in the course of their employment, was a part of the *res gestæ*, and evidence of deafness.

At Law. Action for damages for personal injuries. On motion for new trial.

George L. Carlisle, for plaintiff.

Butler, Stillman & Hubbard, for defendant.

WHEELER, J. The plaintiff shipped at New York as an able seaman on the defendant's steam-ship San Marcus. At Key West a man from the shore was put at the winch on the lower deck, and the plaintiff, with a whistle for signaling to the winchman on the upper deck, discharging cargo. A draft was lowered suddenly by the winchman when signaled to stop, which struck the plaintiff, and sent him down the hatch, severely injuring him. The principal question on the trial of this action for this injury was whether the winchman was fit for that place, and on this motion of the defendant for a new trial is whether the evidence of unfitness was sufficient for the verdict. The plaintiff testified in substance that the winchman said he was deaf, and that the plaintiff must blow loud; that the winchman did not hear the signals, and follow them correctly, and some barrels being unloaded were broken; and that the draft which struck him was carried too high, past a signal to stop, and lowered too fast, while he was reaching for it. The winchman controlled powerful machinery, moving heavy loads handled by the plaintiff and others out of his sight, on signals given to him by the sound of the whistle only; and good hearing and attention, as well as understanding of the machinery and of his duties, were essential qualifications which those employing him ought to see that he possessed,