

ance. These are statements of the rule at law. That notice, if necessary in this case, was clearly manifested by the bank bringing its action against the defendant and others on the original notes in West Virginia, in 1890. It is, however, urged that the bank, by receiving and crediting the payments, elected to rely upon the composition notes, and waived any right to sue upon the original notes. The case of *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, is cited in support of this claim. But that case is not in point. There the trustees, having made their election by bringing a suit, were held to be estopped from subsequently attempting to enforce another and inconsistent remedy. Here the only suits brought against these defendants have been upon the original notes. It is so well established as not to require verification by citations that, when a party has once made an election between two or more inconsistent courses of proceeding, he will be estopped to depart from that which he first adopts. But in *Coleman v. Oil Co.*, 51 Pa. St. 74, the supreme court of Pennsylvania intimates that the estoppel is limited to other actions between the same parties. This is, indeed, only recognizing the doctrine of privity as it is always applied in determining the extent of an estoppel. See, also, *Vulcanite Co. v. Caduc*, 144 Mass. 85, 10 N. E. 483. It is also contended that in a suit brought by the bank in the court of common pleas of Brown county, Ohio, against the maker and prior indorsers of the original notes, the defendants pleaded that *Humphreys & Son* had made a payment of \$6,000,—that is to say, had set up the composition notes as a credit upon the original notes,—and that the bank, by failing to reply, admitted the truth of that allegation, and allowed the credit to be taken accordingly, judgment being had for the residue. But the rule of the Ohio Code of Civil Procedure that the failure of the plaintiff to make denial by replying to new matter set up in the answer is a rule of pleading, which does not estop from setting up the truth in any other case not between the same parties. Collaterally, pleas are not to be regarded as admitting what they do not contest. *Whart. Ev.* § 1116a, and cases cited. There is no privity between the maker, indorser, and acceptor of a promissory note. *Freem. Judgm.* § 162, and cases cited. The judgment in the Brown county case, therefore, is not conclusive upon the bank in this case. It follows, upon all these considerations, that the plaintiff is entitled to judgment against the defendant for the amount due upon the original notes; and it is so ordered.

JACKSONVILLE, T. & K. W. RY. CO. v. CHATHAM NAT. BANK.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1895.)

No. 330.

ASSUMPSIT.

In Error to the Circuit Court of the United States for the Northern District of Florida.

This was an action in assumpsit by the Chatham National Bank against the Jacksonville, Tampa & Key West Railway Company, a corporation under the

laws of Florida. The declaration contained 10 counts, some of which were upon notes made by the defendant to Charles C. Deeming, treasurer, and indorsed by him to plaintiff. Other counts alleged that the plaintiff, at the defendant's request, released the Florida Construction Company from indebtedness in amounts specified, and that defendant thereupon promised to pay such indebtedness. The last three counts were the common counts for money paid out and expended, money lent, and on account stated. Various motions and demurrers were passed upon by the circuit court, and numerous amendments were made to the declaration. The defendant ultimately filed pleas to all the counts. To these pleas replications were filed, and, the issues being finally joined, the case was tried before a jury, resulting in a verdict for the plaintiff for \$86,291.41. Defendant made a motion for a new trial, and plaintiff entered a remittitur for \$17,588.37. A new trial was denied, and judgment entered against the defendant for \$68,693.04. Defendant then sued out this writ of error. There were 26 specifications of error. No opinion appears to have been filed by the circuit court upon any of the questions ruled upon.

T. M. Day, Jr., for plaintiff in error.
John Wurts, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. A careful examination of the record in this case shows no error warranting the reversal of the judgment of the circuit court, which judgment appears to be in accordance with, and fully supported by, the evidence. Judgment affirmed.

LADD v. MISSOURI COAL & MINING CO.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1895.)

No. 420.

TRIAL—RECEPTION OF EVIDENCE—OFFER TO PROVE.

On an issue as to the acceptance of a proposed contract for the sale of lands, plaintiff offered to prove a conversation between witness and one M. The offer was not accompanied by any statement as to what the conversation was, or that it was material to the issue, and it did not appear from the record that M. was defendant's agent in the matter of the proposed sale. *Held* insufficient to sustain an exception to the exclusion of the testimony.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action by William M. Ladd against the Missouri Coal & Mining Company to recover damages for breach of contract. The court directed a verdict for defendant, and plaintiff brings error.

Upton M. Young, for plaintiff in error.
James A. Seddon and Chester B. McLoughlin (James L. Blair and T. J. Rowe, with them on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was commenced in the United States circuit court for the Eastern district of Missouri by William M. Ladd, the plaintiff in error, against the Missouri Coal & Mining Company, the defendant in error, to recover \$34,637 damages for the breach of an alleged contract of