

was occasioned to him thereby. It may be argued that the words he was "induced to remain" imply that otherwise he would not have remained a depositor. But we think that, as the action of deceit is founded on fraud, every element of the cause of action must affirmatively appear. While the common-law rule that the pleadings must be construed most strictly against the pleader has been abrogated under most code systems, it is not required, even under the code system, that every equivocal word or phrase shall be construed most strongly in favor of the pleader. On the contrary, the meaning of the pleader must be fairly ascertained, without regard to technical rules, from the whole instrument. *Robinson v. Greenville*, 42 Ohio St. 625; *Crooks v. Finney*, 39 Ohio St. 57. The words of the petition really charge no more than that the plaintiff, being a depositor in the defendants' bank, acquired confidence in its safety from the statements made; whereas, if he had known the truth, he would not have remained a depositor. It is not enough in deceit to show that, if the plaintiff had known the truth, he would have done otherwise than he did. It must appear that he did otherwise than he would have done if the false statement had not been made to him. We concur with counsel for the defendants in error in the view that:

"When one alleges that, relying upon a certain statement, he altered his condition, that is sufficient to show that the statement was the moving cause; but where the allegation is that, relying upon a certain statement, he failed to alter his condition, that is not sufficient to show that the statement was the cause of his failure to alter his condition, but he must go further, and allege that he would have altered his condition but for the statement. In the one case there is a presumption that there was some cause for the alteration of his condition, and it is sufficient to allege what that cause was. In the other case the failure to alter his condition does not require the assignment of any cause, the presumption being that he would continue in the position in which he had placed himself until something happened to induce him to change it; and therefore he must affirmatively allege that he would have changed his position but for the act of defendants of which he complains."

For this reason we think the action of the court below in sustaining the demurrer was correct. Judgment affirmed.

RICAUD v. TYSEN.

(Circuit Court, S. D. New York. January 22, 1897.)

1. RES JUDICATA—DIFFERENT CAUSES OF ACTION.

In an action by a receiver to recover an assessment on certain shares of a national bank, defendant pleaded a prior judgment dismissing a bill brought to charge her father's estate with the same assessment, to which suit she was also a party. *Held*, that the causes of action were different,—that in the earlier suit being the alleged ownership of the shares by the father at the date of the bank's failure, and that in the latter, the alleged ownership by the daughter of the same shares at the same date,—and that, therefore, the former suit operated as an estoppel only as to the matters actually litigated and determined.

2. SAME—EVIDENCE ALIUNDE.

Where the causes of action are different, and the decree in a former suit does not show on its face that the question involved in the present one was directly and necessarily determined, evidence aliunde, consistent with the record, may be received to show that it was actually determined.

This was an action at law by Addison G. Ricaud, receiver of the First National Bank of Wilmington, against Fannie D. Tysen, to recover an assessment made by the comptroller of the currency on certain shares of the bank's stock. The case was heard on plaintiff's demurrer to the answer, which set up a prior adjudication as an estoppel.

L. Karge, for plaintiff.

A. Prentice, for defendant.

SHIPMAN, Circuit Judge. The plaintiff, as receiver of the First National Bank of Wilmington, N. C., has brought an action at law in this court to recover the assessment made by the comptroller of the currency upon the stockholders of the said insolvent bank, and alleges in his complaint that the defendant, Fannie D. Tysen, was on November 21, 1891, the date when the bank failed, the owner of 214 shares of its stock. The plaintiff's predecessor as receiver had previously brought, and prosecuted to final decree, in the United States circuit court for the Eastern district of North Carolina, a bill in equity, the object of which was to charge the estate of James Dawson, the father of the present defendant, with the same assessment upon the same 214 shares, which the bill alleged belonged to the estate of James Dawson when the bank failed. In that suit the present defendant was made a party. The bill was dismissed. The defendant in this cause has pleaded in bar that the questions sought to be litigated in this action were determined in the North Carolina suit adversely to the receiver, and are res adjudicata. To this answer the plaintiff has demurred. It will be perceived that the causes of action in the two suits are not the same, the cause of action in the North Carolina suit being the alleged ownership by the estate of James Dawson of the stock at the date of the bank's failure, while the cause of action in this suit is the alleged ownership by Mrs. Tysen of the same stock at the same date. The effect of a judgment in a prior action upon a second action between the same parties upon a different claim or demand has been frequently considered of late by the supreme court. *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, Id. 423; *Russell v. Place*, Id. 606. In the *Cromwell Case* the court said:

"The judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The course to be pursued when the decree in the former suit does not show upon its face that the question in the second suit was directly and necessarily determined was considered in *Packet Co. v. Sickles*, 5 Wall. 580, in which case the court said:

"In cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may

be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involves its consideration and determination it will not be concluded."

The decree in the North Carolina case does not show that the court necessarily and directly found that, at the date of the failure of the bank, William Hildreth Field, either as executor of Mrs. M. S. Dawson, or as trustee of Mrs. Tysen, owned the stock. The opinions of Judge Seymour in the circuit court, and of Judge Simon-ton in the circuit court of appeals (*Ricaud v. Trust Co.*, 17 C. C. A. 170, 70 Fed. 424), are not necessarily parts of the record. They purport to be opinions, and not to be findings of fact. But extrinsic evidence may show that in fact the court necessarily found who was the owner at the date of the failure, and such evidence can be presented under the answer in this case. The answer avers "that each and all the matters set forth in the complaint herein were settled and determined by the said adjudication, and are, as between this plaintiff and this defendant, *res adjudicata*."

The demurrer to the part of the answer contained in paragraph 6, with regard to the pendency of another suit between the same parties in the superior court for New Hanover county, in the state of North Carolina, is sustained. The demurrer to the answer contained in paragraph 7, which relates to the matter pleaded as *res adjudicata*, is overruled, with liberty to the plaintiff to answer anew, and without costs.

RYAN v. STAPLES.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1897.)

No. 701.

1. VENDOR AND VENDEE—BONA FIDE PURCHASER.

One who buys property from an innocent bona fide purchaser is protected by the latter's good faith and innocence, though he may himself have notice of antecedent defects or equities that would have defeated his title if he had been the first purchaser.

2. EXECUTION SALE—ERRONEOUS JUDGMENT.

One not a party to the suit, who purchases at a sale under a judgment merely erroneous and not void, before a writ of error is allowed, acquires a valid title, which is not divested by a subsequent reversal.

3. REVIEW ON ERROR—TRIAL TO COURT.

Where the court below, trying a case without a jury, makes a mere general finding that one party is the owner of the premises and entitled to possession, the only questions open to review on error are rulings on the admission and rejection of evidence.

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

Motion for a Rehearing.

For former report, see 76 Fed. 721.

C. S. Thomas, W. H. Bryant, and H. H. Lee, for plaintiff in error.
Hugh Butler, for defendant in error.