

under the same act. Here the decision in *Young v. Hardware Co.* is the first and only decision by the supreme court under the act. In *Douglass v. Pike Co.* the supreme court said:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, the same, in its effect on contracts, as an amendment of the law by means of a legislative enactment."

But here the case arises under an amendment of the law, and not under a change of decision. Moreover, the amendment is a departure from all previous legislation by the state of Ohio upon the subject. Counsel admit that there was no adjudication in Ohio of the exact point decided in *Young v. Hardware Co.* prior to that case, but they insist that the principles involved had been settled in many cases which were in effect, if not in words, overruled by that decision. Without stopping to cite and comment upon the cases referred to in support of this contention, it is sufficient to say that their view, if adopted, would extend the rule laid down in *Douglass v. Pike Co.* beyond all precedent. The demurrer will be sustained, and the bill and the cross bill of the respondents Sesman and Landis, to which also a demurrer for insufficiency was filed upon the same ground as those urged in support of the demurrer to the bill, will be dismissed.

RHINO v. EMERY et al.

(Circuit Court, S. D. Ohio, W. D. March 29, 1897.)

No. 4,595.

1. EQUITY—NEGATIVE PLEAS.

Negative pleas are permitted.

2. SAME.

The averment of heirship in a bill presents a single issue, and a plea framed to meet it is not double, although it negatives two different facts upon which the averment of heirship is based.

3. SAME.

The averment in a plea that it is not true that the complainant and one of the defendants are the "sole" heirs at law of a certain person contains a negative pregnant, and is not good, there being no denial that they are heirs.

4. SAME.

The averment in a plea that it is not true that complainant and another are the heirs of a certain person is not good, unless supported by an answer denying the allegations of pedigree in the bill showing that they are heirs of the person in question, on his maternal side.

5. SAME—NECESSITY FOR ANSWER IN SUPPORT OF PLEA.

Where the case of the complainant stands solely on the bare averment of a particular fact, without the averment of evidence in the bill to support it, it is not necessary for the defendant to file an answer in support of the plea.

This was a suit in equity brought by Gustavus F. Rhino against Thomas J. Emery and others, seeking to hold the defendants, as trustees, to an accounting for certain real and personal property.

This case comes on to be heard upon a plea to the amended bill. The complainant, Gustavus F. Rhino, averring that he is the heir and next of kin of one James Berry, seeks to hold the defendants, as trustees, to an accounting for certain real and personal property which he alleges in his bill was obtained from James Berry by the fraud of William G. Roberts, one of the defendants, and which came into the hands of the other defendants with notice of the fraud. The first part of the bill, in which the heirship of the complainant is set forth, is as follows: "Gustavus F. Rhino, of Hannibal, Missouri, and a citizen of the state of Missouri, brings this, his bill, against Thomas J. Emery and John J. Emery, of Cincinnati, Ohio, and citizens of the state of Ohio; William G. Roberts, of Cincinnati, Ohio, and a citizen of the state of Ohio; and said William G. Roberts, trustee under the last will and testament of Eliza A. Berry; Sarah A. Weller, of Cincinnati, Ohio, and a citizen of the state of Ohio; and M. E. Sperry, of Minneapolis, Minnesota, and a citizen of the state of Minnesota. And thereupon your orator complains, and says that one James Berry intermarried with one Rachel Rolston; and that there was born of said marriage three children, to wit, James Berry, an only son, and two daughters, Nancy Berry and Betsy Berry; and that the said Nancy Berry and Betsy Berry both died without issue; and that the said James Berry, the son of the said James Berry and Rachel Berry (whose maiden name was Rolston), intermarried with one Eliza A. Rhino, a daughter of Abram Rhino and Catherine Rhino (whose maiden name was Catherine Boyd); and the said James Berry, who intermarried with Eliza A. Rhino, as aforesaid, departed this life, testate, in Hamilton county, Ohio, on the ——— day of ———, A. D. 1864, leaving, him surviving, his relict, Eliza A. Berry, and two children born of the marriage last aforesaid, to wit, a son, James Berry, and a daughter, Kate E. Berry, as his next of kin and sole heirs at law; and the said Kate E. Berry intermarried with one Robert Brady, whom she survived, and died testate, without issue, July, A. D. 1882; and the said Eliza A. Berry, relict of the said James Berry, died testate, on the ——— day of ———, A. D. 1886; and the said James Berry died intestate, without issue, and unmarried, May 13th, A. D. 1891; and at the time of the death of the said James Berry, last aforesaid, to wit, on the 13th day of May, A. D. 1891, the blood of the Berrys and Rolstons, his ancestors on the paternal line, became extinct. And your orator further says that, at the time of the death of the said James Berry, the son of James Berry and Eliza A. Berry, aforesaid, to wit, on the 13th day of May, A. D. 1891, your orator, Gustavus F. Rhino, and the defendant M. E. Sperry, were the nearest of kin and sole heirs at law of the said James Berry, last aforesaid, of the name or family of Rhino; that is to say, your orator was the only son, and the said M. E. Sperry was the only daughter, of John Rhino, a son of Abram Rhino and Catherine Rhino, whose maiden name was Catherine Boyd, as aforesaid, which said John Rhino, then deceased in his lifetime, was the brother of the said Eliza A. Berry, a daughter of the said Abram Rhino and Catherine Rhino, whose maiden name was Boyd, as aforesaid, and which said Eliza A. Berry was the mother of the said James Berry aforesaid, who died May 13th, A. D. 1891; so that your orator, Gustavus F. Rhino, and the said defendant, M. R. Sperry, stood in the relationship of first cousins to the said James Berry, deceased, as aforesaid, and so your orator, as heir at law and next of kin, became entitled upon the death of the said James Berry, on the 13th day of May, A. D. 1891, as aforesaid, to one moiety of the estate, real, personal, and mixed, of which the said James Berry was seised of or entitled to at his death, by virtue of the statute in such case made and provided; the other children of the said Abram Rhino and Catherine Rhino, whose maiden name was Boyd, as aforesaid, to wit, Jefferson Rhino, who in his lifetime was a brother of the said Eliza A. Berry and Prudence Rhino, who in her lifetime was a sister of the said Eliza A. Berry, having each departed this life without leaving any lawful issue." To the bill, Sarah A. Weller, one of the defendants, filed the following plea: "The said defendant, Sarah A. Weller, by protestation, not confessing or acknowledging all or any part of the matters or things in the said amended bill of complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, does plead thereto, and for plea says that, as she is informed and believes, it is not true that at the time of the death of the James Berry

who died on May 13th, 1891, the blood of the Berrys and Rolstons, his ancestors on the paternal line, became extinct, and that it is not true that, on the death of the said James Berry, the complainant and the said defendant M. E. Sperry were his next of kin and his sole heirs at law, all which matters and things this defendant avers to be true, and pleads the same to the said amended bill of complaint, and humbly craves the judgment of this honorable court whether she ought to be compelled to make any further or other answer to the said amended bill of complaint." This plea was set down for argument.

David S. Hounshell and Harlan Cleveland, for complainant.
Herbert Jenney and William Worthington, for defendants.

TAFT, Circuit Judge (after stating the facts). Three objections are made to the plea: First, that it is double, and presents two defenses to the bill; second, that it contains a negative pregnant, in that it only denies that the complainant, Rhino, and defendant Sperry, are sole heirs at law of the intestate, James Berry, but does not deny that they are heirs; and, third, that the plea is not supported by an answer, as it should be.

This is a negative plea. Such pleas are permitted. *Mif. Eq. Pl.* (Smith's Ed.) 270; 3 *Brown*, Ch. 489; 1 *Madd.* 194; 16 *Ves.* 264, 265; *Sanders v. King*, 2 *Sim. & S.* 277; *Thring v. Edgar*, 2 *Sim. & S.* 274. I do not think the plea is double. The plea is filed to traverse the averment of heirship. That presents a single issue, and the plea is framed to meet it. It does not introduce two different defenses.

The objection to the second averment of the plea, that it contains a negative pregnant, is well founded. It would be quite consistent with this averment if the complainant were an heir, and entitled to a share of the estate of James Berry. Therefore the second averment in the plea is bad. It is bad for another reason. The bill sets out a pedigree which shows that Rhino and Sperry are the sole heirs of James Berry on his maternal side. It is with reference to this part of the bill that this averment of the plea is made and its meaning is to be construed. The averments of pedigree in the bill as to the kinship of Rhino and James Berry on the maternal side, if undenied, would defeat the plea in so far as the second averment in it is concerned. It follows that, if the second averment is to be relied on as part of the plea, it was the duty of the defendant to support it by an answer denying the allegations of pedigree in the bill by which it appears that Rhino and Sperry were the heirs and next of kin of James Berry on his maternal side.

But it is well settled that a plea may be good in part and bad in part. *Mif. Eq. Pl.* (Smith's Ed.) 343; *Story*, *Eq. Pl.* 692; *Duncalf v. Blake*, 1 *Atk.* 52; *Huggins v. Buildings Co.*, 2 *Atk.* 44; *Beach*, *Mod. Eq. Prac.* § 294; *Kirkpatrick v. White*, 14 *Fed. Cas.* 685. I may therefore overrule so much of the plea as contains the second averment, and treat it as if the plea contained simply a traverse of the averment in the bill "that at the time of the death of the James Berry who died on May 13, 1891, the blood of the Berrys and Rolstons, his ancestors on the paternal line, became extinct." This is the indispensable averment in the bill, upon which depends the right of the complainant to assert any interest in the property made here the subject of the controversy. There are no facts averred

in the bill which, if admitted, would defeat this negative averment. Hence, under the modern rule, no answer is required to support such a plea. There is no averment of evidence in the bill tending to show that the blood of the Berrys and the Rolstons was extinct. The case of the complainant in the bill stands solely on the bare averment of this as a fact. In such a case, it is not necessary for the defendant to file an answer in support of the plea.

Judge Wallace, in the case of *Hilton v. Guyott*, 42 Fed. 249, states the principle as follows:

"The rule is that a defendant must answer as to facts which would be evidence to dispute the plea, but he is not required to answer to those things which may be well admitted consistently with the bar pleaded. If he does not answer interrogatories upon the argument of the plea, every fact which they would tend to prove is treated as proved in impeachment of the plea. But if a plea sets up a defense which appears to be a good bar, notwithstanding all these facts are admitted to be true, it is not necessary to support it by an answer."

In *Sims v. Lyle*, 4 Wash. C. C. 301, 22 Fed. Cas. 184, Mr. Justice Washington said:

"If the plea be only to a part of the bill, the rest of the bill ought to be answered, or else the court would consider the parts not embraced by the plea, or answered, as true. But there is no instance where the plea contains in itself a full defense to the bill, that an answer is necessary, unless it is rendered so, in order to negative some equitable ground, stated in the bill for avoiding the effect of the anticipated bar." Story, Eq. Pl. § 674; 2 Daniell, Ch. Prac. (Ed. 1840) pp. 115, 119-122.

In *Adams' Equity* (Ed. 1890, p. 61) the statement of the rule is as follows:

"It often happens, where a negative plea is used, that the bill contains allegations in evidence of the disputed statement. In this case the plea of its untruth will not protect from discovery of matters which would prove it true; and therefore these allegations must be excepted from the plea, and must be met by an answer in support."

And again, on page 337:

"In order, therefore, to avoid such discovery, he must resort to a negative plea denying the allegations of partnership or heirship; and, until the validity of his plea is determined, he will be protected from giving discovery consequent on the allegation. It is, however, very seldom that a pure negative plea can be made available; for, although it protects against discovery consequent on the alleged equity, it does not protect against discovery required to prove it. If, therefore, there be any statements in the bill tending to prove the disputed allegations, distinct from such allegations itself, the discovery asked on those points must be excepted from the plea, and must be given by an answer in support,"—citing *Thring v. Edgar*, 2 Sim. & S. 274; *Denys v. Locock*, 3 Mylne & C. 205.

I ought to add that the view expressed above with reference to the answer in support of the negative plea is not that which meets the approval of Prof. Langdell in his *Equity Pleading*. Langd. Eq. Pl. pp. 116, 117. He traces the erroneous view to the decision of Sir John Leach in *Thring v. Edgar*, 2 Sim. & S. 274, but he admits the case has had its effect upon modern authorities, and that they support the conclusion I have stated above. See

Hunt v. Penrice, 17 Beav. 525; Young v. White, Id. 532; Wilson v. Hammonds, L. R. 8 Eq. 323.

The order of the court will be that the plea is overruled so far as the second averment is concerned, and is held good so far as the first averment is concerned, and the defendant is given leave to file a replication.

GAMBLE et al. v. CITY OF SAN DIEGO et al.

(Circuit Court, S. D. California. March 22, 1897.)

1. ABATEMENT—PENDENCY OF ANOTHER SUIT—TAXPAYERS' SUITS.

A pending suit by a nonresident taxpayer, in behalf of herself and all other nonresident taxpayers, to annul a contract made by the city, may be pleaded in abatement of a suit for the same object subsequently brought in the same court by other nonresident taxpayers.

2. SAME—STATE AND FEDERAL COURTS.

A suit in a state court cannot be pleaded in abatement of a suit as to the same matter in a federal court.

3. COURTS—CONCURRENT JURISDICTION.

Where a state court has first taken cognizance of a cause of which that court and the federal court have concurrent jurisdiction, the federal court will dismiss a suit brought in that court as to the same matter, or suspend proceedings therein until the final action of the state court.

4. SAME.

Where separate suits seeking the same relief have been filed in a state court and in a federal court on the same day, upon a motion in the federal court to suspend proceedings in the suit brought therein proof will be heard as to which suit was instituted first.

Works & Works, Works & Lee, and Trippet & Neale, for complainants.

H. E. Doolittle, Gibson & Titus, and W. J. Hunsacker, for defendants.

ROSS, Circuit Judge. This is a suit in equity, the bill in which was filed in this court August 27, 1896, not only on behalf of the complainants, but, according to its averments, on behalf of all other property owners and taxpayers of the city of San Diego who are not citizens of the state of California. The bill alleges, among other things, that the complainant William A. Gamble is a resident and citizen of the state of Ohio, and the complainant Elvira Carver is a resident and citizen of the state of Massachusetts, and that all of the defendants are residents and citizens of the city of San Diego, state of California; that each of the complainants is the owner of real estate in the defendant city; that the amount of taxes that each of the complainants would be compelled to pay by reason of the levying of the taxes necessary to pay the principal and interest of the bonds mentioned in the bill will exceed the sum of \$2,000, and that the property owners and taxpayers of the defendant city who are not citizens of the state of California number about 700, and each of them has a direct interest with the complainants in the relief sought by them; that the population of the defendant city has never at any time mentioned in the bill exceeded 20,000 inhabitants; that the average daily consumption of water