course, that two suits, involving the same questions and between the same parties, may be pending at the same time, the one in a state and the other in a federal court, and that in such event a plea of lis pendens may not be available as a defense to the suit which was last brought. This is always the case where the two suits are strictly in personam. Stanton v. Embrey, 93 U. S. 548. And in Orton v. Smith, 18 How. 263, 265, it was said, in substance, although the question was not strictly involved in that case, that the pendency of a suit in ejectment in one jurisdiction will not serve to stay prosecution of a later suit in ejectment for the same land brought in another court of co-ordinate jurisdiction. But when, as in the case at bar, two suits in chancery are pending between the same parties, the one in a state and the other in a federal court, the object of both suits being to quiet the title to the same tract of land, that court which first acquires jurisdiction by the issue and service of process must be allowed to proceed with the hearing and determination of the case; and, so long as the first suit remains pending and undetermined, the action of the court in which it is pending should not be embarrassed by proceedings taken or orders made in the case which was last brought. Orton v. Smith, supra. It would be manifestly improper, however, to order a dismissal of a second suit because of the pendency of a prior suit between the same parties in those cases where the bringing of the second action was a necessary or proper step, either to create or preserve a lien, or to avoid the bar of the statute of limitations, or to give due notice by lis pendens of the plaintiff's rights, or to guard against the results of a possible dismissal of the first suit before its determination upon the merits. Heidritter v. Oil-Cloth Co., 112 U. S. 294, 304, 5 Sup. Ct. 135; Gates v. Bucki, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961. In all such cases the proper practice is to suspend further action in the second suit until the first suit is tried and determined, instead of dismissing it. Indeed, considering the numerous reasons which may render it advisable and not improper to commence a second suit, although a prior suit is pending in which the plaintiff's rights may be fully adjudicated, we think it is the better practice in all cases to pursue the course last indicated, when a plea of lis pendens is interposed and sustained. The mere pendency of a second suit, if no action is taken therein, does not affect the orderly prosecution of the first suit; and the court is much better able to determine, after the first suit has ended, whether it is necessary or proper to grant further relief in the action which was last brought. In our opinion, therefore, the trial court, when it overruled the demurrer to the plea, should have entered an order staying all further proceedings until the case in the state court was determined, instead of entering a final order of dismissal. It may be that the judgment of the state court will leave some matters at issue between the parties undetermined, which may properly be adjudicated by the federal court. If not, an order dismissing the action should then be entered.

Complaint is further made that the trial court did not allow the plaintiff below to file a reply to the plea, after the demurrer thereto had been overruled. With respect to this contention, it should be ob-

served that the filing of a demurrer to the plea, instead of setting the plea down for argument, was irregular, and contrary to the established course of procedure in equity. If a party desires to test the sufficiency of a plea, either in form or substance, the proper practice is to set the plea down for hearing. No such proceeding as a demurrer to a plea in equity is recognized. When a plea is thus set down for hearing, the sole question for determination is whether it is sufficient in form and substance. If the decision on this question is in the affirmative, and the plea goes to the whole bill, the usual order is that the plea "be allowed." When the plea is thus allowed, the complainant is entitled to take issue with the facts alleged in the plea, and the issue thus raised is the sole question to be tried. Bassett v. Manufacturing Co., 43 N. H. 249, 253, and cases there cited; Davison's Ex'rs v. Johnson, 16 N. J. Eq. 112; Daniell, Ch. Pl. & Prac. (5th Ed.) pp. 697, 692. Although the practice pursued in the present case was irregular, yet it was not objected to; and, as the irregularity in question does not affect the substantial rights of the parties, it may well be ignored. The filing of a demurrer to the plea was tantamount to setting the plea down for argument, and subserved the same purpose. Klepper v. Powell, 6 Heisk. 503, 506. The filing of the demurrer, therefore, may be treated as the equivalent of setting the plea down for argument, and the order overruling the demurrer may be regarded as, in effect, an order that the plea be allowed. After the plea was thus allowed, the complainant was entitled to take issue with the facts stated in the plea, and the denial of that right was an error on account of which the plaintiff may justly complain. Daniell, Ch. Pl. & Prac. (5th Ed.) p. 697. We have not overlooked the fact that, according to the former practice in equity, it was not usual to set a plea down for argument when, as in this instance, it alleged the pendency of another suit between the same parties, for the same cause of action, the practice in such cases being to move a reference to a master to ascertain the truth of the facts stated in the plea, without setting it down for argument. This practice, however, went upon the theory that a plea that another suit between the parties, for the same cause of action, was pending in the same court, was obviously good in substance, and that, by setting such a plea down for argument, the only question that could be raised was whether the plea was defective in form. Daniell, Ch. Pl. & Prac. (5th Ed.) pp. 637, 692. This rule however, has no bearing on the case at bar. In the case in hand the plea alleged the pendency of a suit in another jurisdiction, to wit, in the state court, and the complainant below was entitled to set the plea down for argument, for the purpose of having it determined whether the pendency of a suit in that forum operated to prevent the federal court from entertaining jurisdiction of the cause during the pendency of the other suit in the foreign jurisdiction. The demurrer raised the question of the sufficiency of the plea in substance, as well as in form; and, by setting the plea down for argument under such circumstances, the complainant cannot be regarded as having waived his right to take issue with the facts alleged in the plea, provided the same was allowed. The decree of the circuit court is accordingly reversed, and the cause is remanded for further proceedings, not inconsistent with this opinion.

GODDARD et al. v. MAILLER et al.

(Circuit Court, S. D. New York. May 7, 1897.)

FEDERAL COURTS—JURISDICTION—NONRESIDENTS OF DISTRICT.

Rev. St. § 740, providing that, if there are two or more defendants residing in different districts of the state, the suit may be brought in either district, was not repealed, either expressly or by implication, by the provision in the judiciary acts of 1875 and 1887–88, that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant.

This was a suit in equity by William Goddard and others, stockholders of the Bowery Insurance Company, against Isaac P. Mailler and others, as the receiver and directors of that company, for an accounting because of alleged malfeasance resulting in the impairment of the company's capital stock.

Henry M. Ward and Masten & Nichols, for complainant.
Alexander Tison and Seth S. Terry, for defendant.

COXE, District Judge. This is an action by 10 of the stockholders of the Bowery Insurance Company against its receiver and directors praying for an accounting by reason of the alleged malfeasance of the defendants and the consequent impairment of the capital stock of the company. The complainants are citizens of Rhode Island and Maryland and the defendants are citizens of New York, New Jersey, Illinois and Kentucky. The sole ground of jurisdiction is the diverse citizenship of the parties. The defendant Mailler has filed a plea disputing the jurisdiction of the court upon the ground that he is not an inhabitant of the Southern district of New York but resides in the Eastern district. The act of August 13, 1888 (25 Stat. 433), is clear and explicit. It provides that no civil suit shall be brought in this court against any person "in any other district than that whereof he is an inhabitant." There is but one exception to this rule to be found in the statute. Where jurisdiction is founded solely upon diverse citizenship the suit may also be brought in the district of the plaintiff, if a citizen, provided he can there obtain service upon the defendant. This proviso is not now involved. The act of 1888, correcting the act of 1887, has been repeatedly construed by the courts. It has been held that the words "plaintiff" and "defendant" as used in the first section are not intended to restrict the act to causes where there is but one plaintiff and one defendant, but that the words are used in a collective sense and apply to cases where there are several parties on one side or both sides of the controversy. Accordingly, in a cause like the present, if no other law applies, all of the defendants must be inhabitants of the district where the venue is laid. Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303; Bensinger Self-Adding Cash-Register Co. v. National Cash-Register Co., 42 Fed. 81. The general object of the act of 1888 was to restrict and not to enlarge the jurisdiction of the circuit courts and where the jurisdiction is based on citizenship it requires that the suit shall be brought "in the state of which one of the parties is a citizen, and in the district therein of which he is an inhabitant and resident." Shaw v. Mining Co., 145 U. S. 444, 12 Sup.

Ct. 935. It is manifest that if Mailler were the only defendant the court would be without jurisdiction, as in that event none of the parties to the action would be a resident of this district. It is equally clear that under the act, as interpreted by the courts, the fact that some of the defendants are residents of this district does not give the court jurisdiction of the defendant Mailler who is not a resident. The plaintiffs do not dispute this proposition, but they maintain that jurisdiction can be sustained under the provisions of section 740 of the Revised Statutes which provides that "if there are two or more defendants residing in different districts of the state, it [the suit] may be brought in either district and a duplicate writ may be issued." If this section be still in force it is conceded that the plea must be overruled, and, on the other hand, it is conceded that if it has been repealed the plea must be allowed. The question then is narrowed to the simple inquiry, has section 740 been repealed by subsequent legislation? The section has not been expressly repealed; it is not mentioned eo nomine either in the act of 1875, or in the act of 1888. The act of 1875 (18 Stat. 470), after enacting that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he may be found at the time of serving such process," etc., repeals all acts and parts of acts in conflict therewith. The act of 1888 expressly provides that it shall in no way affect any jurisdiction or right mentioned in sections 641–643, 722, and title 24 of the Revised Statutes or section 8 of the act of March 3, 1875, or the civil rights act of March 1, 1875. The act of 1888 expressly repeals the last paragraph of section 5 of the act of March 3, 1875, section 642 of the Revised Statutes and "all laws and parts of laws in conflict with the provisions of this act." The question here involved has never been directly decided by the supreme court. In several cases, as in Shaw v. Mining Co., supra, section 740, is referred to, and is treated, apparently, as part of the existing law, but the question here discussed seems not to have been the subject of judicial investigation in that court. The nearest approach to an expression of opinion is found in Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, where the court, at page 72, 155 U. S., and page 27, 15 Sup. Ct., says:

"As no exception was made in that act [1875] of the cases provided for by sections 740, 741, and 742, Rev. St., it is at least open to some doubt as to whether suits will lie against nonresident defendants under those sections."

The question has, however, been squarely decided in East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co., 49 Fed. 608, where the court in a well-reasoned opinion reaches the conclusion (page 616):

"That the special cases for which provision was made by the act of May 4, 1858, embodied in sections 740, 741, and 742 of the Revised Statutes, relating to the locality of suits in the states containing more than one district, were not within the contemplation of congress when that act [1875] was enacted, and are not repealed by it. * * * The provisions of the act of August 13, 1888, amendatory of the act of 1875, in respect to the questions under discussion, are in no particulars different from the latter act. These recent statutes, therefore, are likewise within the range of the authority of U. S. v. Mooney, 116 U. S. 104, 6 Sup. Ct. 304, and, in the opinion of the court, clearly did not repeal sections 740, 741 and 742 of the Revised Statutes."