[84] *PLEA SIDE.*

GRIFFITHS *v.* SPENCE. (1847. *June* 25. *Friday.*)

Pleading replication De injuria and New Assignment when double.

Trespass. The declaration alleged that defendant on a certain day assaulted the plaintiff, and then seized and struck him many blows, and dragged him along the ground and damaged his wearing apparel. *Second plea*—justifying the whole of the trespasses alleged, on the ground that defendant was possessed of a close wherein the plaintiff was unlawfully making a great noise and disturbance—*Third plea*—Justification in defence of servants of defendant, on whom plaintiff had made violent assault. *Replication*—De injuria and new assignment of excess.

Held bad for duplicity and that plaintiff was confined to trespasses on one occasion.

TRESPASS. The plaint stated that the defendant theretofore to wit on the 20th day of April 1847 with force and arms &c. assaulted and beat the plaintiff and with great force and violence seized and laid hold of him and then with his hands and fists gave and struck the plaintiff a great many violent blows on and about his head and divers parts of his body and also then with force and violence threw the plaintiff down upon the ground and thereon pulled and dragged and caused the plaintiff to be pulled and dragged by the hair of his head and also then tore and damaged his clothes and wearing apparel; by means whereof the plaintiff was very much hurt and became sick.

Second plea.—As to the said several trespasses in the plaint mentioned, the defendant says that before and at the time when &c. the said defendant was lawfully possessed of a certain building called the Town Hall with the appurtenances situate and being at and in Esplanade Row in Calcutta, and which said building has divers to wit ten rooms and which said building at the said time when &c. was used by the defendant (amongst other purposes) as and for and was the dwelling house of the defendant who occupied one room therein as a sleeping room and the defendant being so possessed of the said Town Hall and the said sleeping room therein the plaintiff just before the said time when &c. to wit on the day and year in the plaint mentioned was unlawfully in the said Town Hall and the said sleeping room of the defendant therein and with force and arms was making a great noise and disturbance therein and then using violent and abusive language and continued so making such noise and disturbance and using such violent and abusive language of and to the defendant without the leave or **[85]** license and against the will of the defendant and during all that time greatly disturbed and disquieted the defendant and his family in the peaceable and quiet possession and enjoyment of the said Town Hall and of the said sleeping room therein whereupon the defendant requested the plaintiff to cease making his said noise and disturbance and from using his said violent and abusive language, and to go and depart from and out of the sleeping room and Town Hall respectively which the plaintiff then wholly refused to do whereupon the defendant in defence of the possession of the said Town Hall and his said sleeping room therein at the same time when &c. gently laid his hands and caused hands to be gently laid upon the plaintiff in order to remove and did then cause to be removed the plaintiff from and out of the said sleeping

room and Town Hall respectively as he lawfully might for the cause aforesaid which are the said several alleged trespasses in the introductory part of this plea mentioned and whereof the plaintiff has complained against the said defendant. Verification.

Third plea—As to the said several trespasses in the plaint alleged, the defendant says that the plaintiff before the said time when &c. to wit on the said day and year in the plaint mentioned with force and arms &c. made a violent assault on one Hyder Ally one Juggroo and one Bundoo Sing then being the servants of the defendant and did then beat bruise and illtreat them the said Hyder Ally, Juggroo, and Bundoo Sing, and was continuing to beat and would then have further greatly beaten bruised and illtreated them if the defendant had not immediately defended them the said H. A. and J. and B. S., wherefore he the said defendant did then defend them the said H. A. and J. and B. S. so then being his servants as aforesaid against the plaintiff as he lawfully might for the cause aforesaid and in so doing did necessarily and unavoidably commit the said several trespasses in the **[86]** said plaint and in the introductory part of this plea mentioned doing no unnecessary damage to the plaintiff on the said occasion and so the defendant says that the hurt and damage that then happened to the plaintiff and his wearing apparel were occasioned by the said assault so made by the plaintiff on the said H. Ally, Juggroo, and B. Sing, and in the necessary defence of them against the plaintiff which are the same alleged trespasses in the introductory part of this plea mentioned and whereof the plaintiff hath above thereof complained against the defendant. Verification.

Replication (separate to each of the pleas) *de injuria* and also new assignment that the plaintiff sued out his said plaint and declared thereupon not only for the said several trespasses in the introductory part of the said second and third pleas mentioned and therein respectively attempted to be justified but for that the said defendant at the said time when &c. with force and arms &c. assaulted the plaintiff and beat seized and laid hold of him and struck and threw him down and upon the ground and damaged his clothes as in the said plaint mentioned with more force and violence and in a greater degree and to a greater extent than was necessary for the purpose in the said 2nd and 3rd pleas mentioned in modo et forma &c. which said trespasses above newly assigned are other and different trespasses than those in the introductory part of the said second and third pleas mentioned and therein attempted to be justified—concluding with a prayer of judgment.

Demurrer to both replications and new assignments:—For that by the mode of pleading adopted by the plaintiff he has unduly attempted after tendering a complete issue by traversing the pleas to raise a fresh issue on the record by new assignment. That the replications are double and complex. That the issue attempted to be raised by new assignment is immaterial inasmuch as **[87]** excess might be given in evidence under *de injuria*. That the new assignment is a departure, and in other respects informal and insufficient. Joinder therein

Mr. *Dickens*,—in support of the demurrer. These replications are bad for

the causes assigned. The plaint alleges a single act of trespass, *on one day*, the whole of which each of the pleas covers. The plaintiff therefore is not at liberty to put in issue the whole trespass by the replication de injuria, and *further* new assign the same or different causes of action. If de injuria puts in issue the whole, it is clear that by proceeding to new assign the same causes of action thereby already put in issue the replication would be double; and if the new assignment were for other and different assaults than those mentioned in the plaint, then it would be a departure. The plaintiff can only adopt one or other of those courses here, as the trespasses are not alleged to have been committed on different days and times, or with a continuando. A similar replication was considered bad by *Parke* B. in *Thomas* v. *Marsh* (a). And *Polkinhorn* v. *Wright* (b) is an express authority in point.

Mr. *Taylor* in support of the replications. First,—As to the cases cited by the other side, in that of *Thomas* v. *Marsh* the learned Judge who tried the cause merely threw out an observation, that such a replication might be demurrable, and the case of *Polkinhorn* v. *Wright* is distinguishable from the present. There the declaration alleged, that the defendant on *a certain* day assaulted the plaintiff; and to a plea justifying in defence of defendant's possession of a close, which plaintiff attempted forcibly to enter, de injuria was replied, and further, a new assignment of trespasses com-**[88]**mitted on *other and different occasions* than those in the *declaration* and plea mentioned, which was clearly double as well as a departure. Here nothing is introduced into the new assignment, which is not already included in the plaint, and the statements as to excess bear special reference to the causes of action originally declared on. These pleas, although professing to do so, do not in reality cover the whole cause of action. Although a justification involves a question of law and fact, yet the Court will notice whether the substance of the plea amounts to a justification in law or not. The plaintiff is entitled to treat the pleas (although purporting to be pleaded to the whole) as justification only of so much as the law allows to be justified under the circumstances. The plaint here specifies causes of action of such a nature, as neither are nor can be justified in this form of plea, which admits a *peaceable* entry in the first instance by the plaintiff. Both plaint and plea are general in their terms, and the replication makes that specific which before was general, de injuria merely covering so much of the trespass, in respect of which the defendant was entitled, in the language of the plea, molliter manus imponere, and the new assignment of excess recapitulating the original causes of action *not* justified. The plea being in fact divisible into what is justifiable and what is not. The authorities show, that whenever, in trespass or trover, a plea which professes to answer the whole of a count, in reality only answers a part, the plaintiff may show, by a new assignment, that defendant has not pleaded to the whole of the real cause of action. *Vivian* v. *Jenkin* (a)

[87] (a) 5 Carr. and Pay. 596.
(b) 15 L.J.Q.B. p. 70.
[88] (a) 3 Ad. & El. 714; 5 L.J. (*N.S.*) K.B. 27

Lambert v. *Hodgson* (b), *Monkton* v. *Shepherdson.* (c) Besides the new assignment points to the trespasses as being the same, "whereof the plaintiff hath **[89]** in manner and form in the plaint complained against the defendant," *Page* v. *Hatchett* (a), is an authority expressly in favour of this replication.

The true test is whether the plaintiff under either one or other of these replications (de injuria or new assignment) could give evidence of the whole cause of action. It is submitted he could not; for it is manifest the former only puts in issue the jurisdiction; and the cases of *Oakes* v. *Wood* (b) and *Penn* v. *Ward* (c) decide that excess must be specially replied; which disposes of this objection in the demurrer. But the plaintiff is not obliged to give up any portion of his claim, he is entitled to split the plea, and (inasmuch as it does not, though it professes to do so) answer the whole, to reply as to so much de injuria and to the residue *excess*. This is similar to a case, when a right of way is traversed, and also a new assignment extra viam replied; such a replication was held good in the case of *Loweth* v. *Smith* (d), where *Parke* B. said time was as divisible as space, and, by analogy of reasoning, quality and quantity are equally divisible as time and space. And in *Worth* v. *Terrington* (e), which was an action of trespass for assaulting and imprisoning without reasonable cause, to wit for 24 hours, the plea justified the imprisonment for a reasonable time, being a portion of the 24 hours, and the plaintiff replied de injuria and new assigned the excess, the replication was held good. So here the plea can only justify what is by law justifiable, and that is *a part* merely of the cause of action. The plaintiff in his replication merely says "you the defendant can only justify to a certain extent, that justification I (the plaintiff) deny to be true; moreover I go for much more already stated in the plaint which in **[90]** this form of plea, you (defendant) cannot justify, and which is therefore unanswered," and that forms the subject of excess. For that reason also the 2d plea is bad on general demurrer, for being pleaded to more than it really answers. *Crump* v. *Adny.*(a)

Points however of argument not having been furnished by plaintiff, this objection was not pressed.

SIR L. PEEL, C. J. We are of opinion that the demurrer must be allowed. The case quoted by Mr. *Dickens* of *Polkinhorn* v. *Wright* appears to us to govern this. The assault and battery alleged, is one single act of trespass, though consisting of several acts of violence; it is not laid as committed at different times, nor as enduring for any continued length of time; but the several acts are connected altogether. The 2d and 3d pleas apply, by their reference to the plaint, to the whole trespass complained of, and respectively

[88] (b) 1 Bing. 317. 1 L.J. C.P. 114.
(c) 11 Ad. & El. 411; 9 L.J. (*N.S.*) Q.B. 134.
[89] (a) 15 L. J. Q.B. 68.
(b) 2 Mees. and W. 797.
(c) 2 Cr. Mees. and Ros. 338.
(d) 12 Mees. and W. 582; 14 L.J. Exch. p. 5.
(e) 13 Mees. and W. 781; 14 L.J. Exch. p. 7.
[90] (a) 1 Cr. and M. 362.

justify it, and though the 2d plea appears to be demurrable as a plea of justification of all that it professes to justify, yet the introductory and concluding part alike show that it was not intended to be pleaded to part only of the whole trespass. The plaintiff must either admit the matter of the justifications and reply excess; or deny the matter of the justification; and if either of them were defective as a jurisdiction, he might have demurred to it, or to both, if defective; but he cannot reply to a justification to one and the same indivisible trespass by denying the existence of the matters of fact constituting the justification, and say, at the same time, that the matters of fact existed, but that the license given by the law was abused. The case is one of indivisible trespass. The cases quoted for the plaintiff are distinguishable. Trespasses which are stated as continuing on different days are distinct trespasses in law on each day; and the case of *Loweth* v. *Smith*, is a case of that **[91]** description. The replication *de injuria* and the new assignment in that case applied not to the *same trespasses*. The case of *Worth* v. *Terrington*, as to the point of divisibility, seems to me to be opposed to a prior decision, viz. the case of *Aitkenhead* v. *Blades* (a). I am not aware that in any preceding case a continuing imprisonment for the same cause *during the same day*, was ever held divisible into divers imprisonments, (*both the subject of action*,) and though time is divisible, an imprisonment is not (by reason merely of the divisibility of the time during which it endures,) divisible in fact into separate imprisonments. The case of *Aitkenhead* v. *Blades* seems to be opposed to such division. The plaintiff in the case of *Worth* v. *Terrington* sued, in fact, for the alleged wrong continuing during the whole time of imprisonment, treating the whole imprisonment as wrongful, and his declaration applied to the whole time. If he had, in fact, meant to sue for the imprisonment during the shorter time, viz. that to which his new assignment applied, treating the excess over a reasonable time of imprisonment only, as the wrong of which he complained, then he should have explained that by a new assignment, and have waived the imprisonment during the first part of the time, as a matter not the subject of his complaint; but I am at a loss to see how upon principle, unless he were permitted at his discretion to divide the actual single imprisonment into several, he could both deny the jurisdiction as to the first part, and new assign as to the 2d part, of the same imprisonment during the same day. If he meant originally, as he clearly did, to sue for the wrong during the whole time, then he could not state truly that he meant to sue only for that during the minor time, and if he meant to sue for the wrong during the whole time, either his denial of the jurisdiction, or his replication of **[92]** excess, if made out, would have served his purpose. If the jurisdiction had failed, the whole trespass would have been without any justification, and the excess would have made the whole imprisonment actionable as a trespass ab initio. But though this case does not satisfy my understanding, I bow to its authority, and if the present case were undistinguishable from it, my decision would be for the plaintiff. The Court however in that case pronounced on the ground

[91] (a) 5 Taunt. 198

that, as time was divisible as well as space, the continuous imprisonment was divisible into distinct acts of imprisonment, and therefore the general replication and the new assignment applied not to one and the same trespass. The case of *Page* v. *Hatchett* was in trover. As the plaintiff was not bound to prove the exact number of chattels which he alleged to have been wrongfully converted by the defendant to his own use, but might have recovered for a number differing from that alleged; the plea, though varying in the number of the chattels, apparently applied to all claimed, and justified the prima facie conversion by local matter of justification, and if there had been no new assignment in that case, and the evidence had established the justification as to all such as were so locally situate, the declaration, for want of the explanation of its true meaning, would have been understood as applying to that class of chattels alone. The replication in the nature of a new assignment applied itself to *different chattels* from those to which the replication de injuria applied, and it is an analogous case to trespasses in different parts of the same close; but the present case falls not within any of those cases, and the general principle must govern, that where one single indivisible trespass is complained of, and that not mistaken by the defendant, whether really or affectedly, the plaintiff cannot, in replying to pleas of jurisdiction, avail himself both of the common replication de injuria and of new assignment.

[93] The dictum Mr. *Baron* v. *Parke* in the case of *Thomas* v. *Marsh* is in accordance with our decision. That case was quoted on the argument of the case of *Loweth* v. *Smith*, and the learned Baron indicated no change of opinion, though he distinguished *Loweth* v. *Smith*, as one trespass continuing in point of time, and therefore in the opinion of the Court of Exchequer divisible.

Demurrer allowed; with liberty to plaintiff to amend.

PLEA SIDE.

MOONSHEE ABDOOL HULLEIM *v.* BOWANYCHURN SEIN.

(1847. *June* 28. *Monday.*)

Detinue. Pleading.

To detinue for cow hides, defendant pleaded in substance;—"That the goods were deposited with him on account of a loan to plaintiff repayable on demand under an agreement empowering defendant, in case of default in repayment, to sell at the Bazaar price, and to charge commission, and retain the same, as well as the principal, out of the proceeds of the sale." The plea then averred, that, after demand of the sum due and refusal to pay, defendant contracted to sell at the Bazaar price.—*Replication* "That after demand of payment and default, and before defendant entered into any binding agreement to sell, plaintiff tendered a large sum to wit Rs. 1,500 in full satisfaction of the sum due, and then requested defendant to re-deliver the cow hides, which defendant refused.—*Demurrer*, in substance.—That the replication did not show, that the authority to sell was revocable after demand of payment and default thereon; or after defendant had entered into contracts to sell; or that the authority was revocable at all, without the consent of defendant. *And also*; that the statement as to tender "of a sum to wit Rs. 1,500 in full satisfaction of the sum due" was informal.

Held—as to both objections, well pleaded.