

the questions designed to be raised could be presented in a better form under a special answer. Since then an amended petition and an answer thereto have been filed.

It is of importance, not for this cause alone, but for the general practice of the court, that the modes of proceeding should be clearly understood, and I therefore take this occasion to restate some well settled rules which prevail in this court.

Mr. Justice Miller, at an early day, with the concurrence of Judges Dillon and Treat, held :

First. That in pleading, the parties respectively must aver the issuable facts and nothing more.

If irrelevant and redundant matter is inserted in the petition or answer the court will not entertain a motion to eliminate the same, but will receive a motion to make said pleading more certain and definite. The reason for this ruling is based not only on the essential requisites of good pleading, but on the duty of attorneys to so plead as not to drive the opposing attorney, with the aid of the court, to do the pleading for the party. The function of the court is to pass upon the papers filed, and not to become the pleader for the parties. Let the plaintiff and defendant respectively come to an issue, not on matters of evidence, relevant or irrelevant, but on the ultimate facts, determining their respective rights. There is nothing in the Missouri practice act which abrogates those essential rules of pleading. The very object of pleading is to bring the parties face to face with the issuable facts on which their rights depend.

Second. If a pleading has not issuable facts sufficient to constitute a cause of action or a defence, or is mixed with statements as to evidence to support the same, the opposite party may demur; so that the court, disregarding the irrelevant matter, may determine whether the alleged cause of action or special defence has any foundation in law.

Third. If the vicious pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements are contained therein, some issuable

and others non-issuable, the proper practice is a motion to make the pleading more definite and certain.

Fourth. Motions to strike out special clauses or sentences in a pleading this court will not entertain, for it cannot determine, in advance of the trial, to what issuable facts they may pertain; nor will the court, through such motions, be driven to the necessity, after repeated experiments, of doing practically the pleading for the party in default. This court recognizes, therefore, demurrers and motions to make pleadings more definite and specific. A motion to strike out, if admissible at all, must be directed to an entire pleading, or a whole count or division. Matter appearing to be scandalous would form an exception to the rule.

There is a very important consideration in this ruling, which every good pleader will recognize, viz.: that while a demurrer cuts back to the first bad pleading, it is by no means sure that a motion to strike out will effect the same end; nor is it sure that the decision on such a motion could be considered a final judgment, entitling the party to a writ of error or appeal.

These general propositions are now reduced to form, not because this case requires the statement of them, but that it may be understood that the rulings of Mr. Justice Miller, and Judges Dillon and Treat, heretofore made on the points stated, are to be adhered to.

As to the motion now before the court, it must suffice to say that the question intended to be prescribed would have been more properly raised on demurrer to the answer, instead of a motion to strike out. But, waiving that technical question, we find that the answer as to the special defence is somewhat vague; yet, if true, it makes it appear that the alleged agreement set up in the petition, if made, was fraudulent and void. The defendants ought to have put themselves distinctly on record, by positive averments; yet they have, by liberal construction, done so, and if a demurrer, instead of a motion, had been interposed, the objection made would have cut back to the petition.

The cause of action, as set out, discloses imperfectly a con-

tract on the part of plaintiffs to receive a sum of money beyond what other creditors were to receive for assenting to a *quasi* composition; and such a contract, if the assent of all was required, the law pronounces void.

We regard the answer, liberally construed, as charging in substance that the contract sued on, if made, was one under which the plaintiffs were to receive a secret preference over other creditors of the same debtor, and this, if true, is a perfect defence.

The motion to strike out is overruled. If plaintiff desires a more specific statement of the points of defence he may move therefor, or he may demur to the answer and thus secure a more concise and clear statement. But the present motion for reasons stated cannot prevail.

TURNER and another v. HART and another.

(*District Court, D. Kentucky.* March 4, 1880.)

MORTGAGE—REFORMATION FOR UNCERTAINTY—EVIDENCE.—A court of equity will not reform a mortgage for uncertainty or misdescription, when the evidence fails to identify the land intended to be mortgaged.

On pleadings and proofs in equity.

The bill sets forth that in 1878 defendant Hart was adjudicated a bankrupt, and defendant Ward elected his assignee; that on the twenty-second of February, 1876, Hart executed to Hall and Allen a mortgage of real property, described as follows: "One hundred acres of land on the Ohio river, opposite the Diamond Island, and being a part of the same land conveyed to me by Brooks' heirs, as shown by deed of record in the Henderson county clerk's office, in Book P, page 532"; that on the fourteenth of August, 1877, Allen assigned to Hall, his co-mortgagee, all his interest in the mortgage, and on the eighteenth of March, 1879, Hall assigned the same, as well as his own interest, to the complainants.

The bill further alleges that at the time the mortgage was executed the mortgagor, Hart, owned three parcels of land on

the Ohio river, known as the "Brooks land," the "Fuller tract," and the "Carson land," immediately adjoining each other, and that the Brooks land and the Carson land had been originally parts of one and the same tract, known as the Brooks tract; that these three parcels had been considered and treated by Hart as being a single tract, under the name of the "Brooks land," or the land bought of the Brooks heirs; that prior to the execution of the mortgage the parcel marked on the plat annexed to the bill as the "Brooks land," containing 263 acres, and the Fuller tract, 21 acres, had been levied upon by the creditors of Hart, under an execution, and that the levy was in full force at the time the mortgage was executed; that it was then well known, both to Hart and to Hall and Allen, the mortgagees, that almost, if not the whole, of said two parcels would be required to satisfy such levy, and that subsequently they were in fact sold in satisfaction thereof, and complainants became the owners of the same by assignment from the purchasers.

The bill then sets forth the proper description of the lands owned by Hart at the date of the execution of the mortgage, by metes and bounds; that, allowing for accretions on the river front and inaccuracies in former surveys, there remains after the sale upon execution, subject to this mortgage, about 100 acres. The bill further alleges that, at the time of the execution of the mortgage, the words "lands conveyed to me by Brooks' heirs," were understood and intended by the parties to include and embrace the original Brooks tract, and the mortgage was accepted by Hall and Allen under the belief and impression that the said words did so embrace and include all lands owned by said Hart within the boundary hereinbefore set out, and it was the intention and meaning of the parties thereto to give Hall and Allen a lien upon 100 acres of land within the said boundary, without reference to the subdivisions as shown by the map, and if such mortgage does not give such lien to Hall and Allen, and to the complainants, as their assignees, it is because of a mistake or inadvertence in reducing the same to writing, and it does not correctly embrace and express the intention and understand-