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 Little v. Paddleford.
 

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And we are all of the opinion, that the covenant of the plaintiff in this case required him to convey to the defendants a perfect and indefeasible title, and to assure the same by a deed in common form, and with the usual full covenants. The undertaking was for a conveyance, good in form and substantially operative in fact upon the title, and vesting it in the defendants free from incumbrance.

In *Judson vs. Wass*, 11 *Johns.* 584, it was decided, that a contract to execute a deed with covenant of warranty, was not merely a contract that the grantor should execute a deed containing such a covenant, but was a contract that he had the power, and would give a deed conveying an indefeasible title.

So, also, in *Everson vs. Kirtland*, 4 *Paige's R.* 628, it was holden that "a covenant to cause to be conveyed, by a good and sufficient warrantee deed, is not complied with by the mere giving of a warrantee deed, where the grantor has no title to the land, or where his title is imperfect. It must be a deed good and sufficient, both in form and substance, to convey a title to the land."

These authorities we think go very far to support the view which we have taken of the question under consideration.

The opinion of the court, therefore, is, that the verdict must be set aside, and that there must be

*Judgment for the defendants.*

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 COLBY vs. KNAPP.

A general entry of appearance on the docket is not an imparlance, so as to alter or affect any rules of the court as to special pleas or pleas in abatement.

The rule requiring pleas in abatement to be filed during the first four days of the term, extends through the entire day, except when the session of court shall terminate within such time.

**ASSUMPSIT.** A plea in abatement was filed with the clerk,

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after the close of the sitting of court on the fourth day of the term, and after a general entry of the defendant's name had been made on the docket, without notice of such plea.

The plaintiff objected that the defendant was precluded from filing a plea in abatement after the entry of a general appearance; and also that the plea was not filed seasonably, agreeably to the rules of court.

The case was transferred for decision on these exceptions.

*W. C. Thompson*, for the plaintiff. 1. The entry of the defendant's name to the action is an imparlance; and it is well settled that a plea in abatement is too late after an imparlance. 1 *Mass. R.* 347, *Martin vs. Commonwealth*; 5 *Pick.* 61, *Coffin vs. Jones*; 3 *Greenl.* 186, *Wyman vs. Dorr*. A plea in abatement may be filed at any time before imparlance, but not after. 9 *Mass.* 217, *Campbell vs. Stiles*. 2. Where pleas are required to be filed by the court, or other acts done within any given day of a term, the time will be holden to have expired by the adjournment of court on such day.

*Bellows*, for the defendant.

UPHAM, J. An appearance in a suit originally signified in the English practice the filing of common or special bail. Now it is usually effected on the part of the defendant by making certain formal entries in the proper office of the court, expressing such appearance. 1 *Tidd's Prac.* 68; 1 *Arch. Prac.* 22. There are only three ways for the defendant to appear in a cause, viz. : by putting in special bail, filing common bail, or causing his appearance to be entered. 4 *Cow.* 168, *Mann vs. Carley*; 1 *Cow.* 209, *Vanderpoel vs. Wright*.

The rules of this court as to appearance, require the names of the attorneys, or parties who conduct the cause, to be entered upon the docket; and unless such entry is made within the first four days of the term, the party omitting such entry

will be considered as nonsuited, or defaulted, as the case may be. This requirement is wholly independent of the rules as to pleading, and is not an imparlance, which is an entry confined to the pleadings in the case, or time given to plead. 2 *Saund.* 1, n. 2. A general imparlance is a prayer for time to plead, without reserving special exceptions; and special imparlance is a prayer for time to plead, reserving such exceptions. *Com. Dig., Abatement; Ditto, Pleader, D.; Bac. Ab., Pleas, G.; 1 Chit. Pl.* 420.

The rules of this court as to pleading require all special pleas to be filed with the clerk of the court, or delivered to the plaintiff's attorney, within ninety days of the commencement of the term at which the action was entered; otherwise the action is to be tried on the general issue. Either party may, however, obtain a rule on the other to plead, reply, or rejoin, within a given time, to be prescribed by the court. Pleas in abatement are to be delivered to the counsel of the adverse party, or filed with the clerk, and notice thereof put upon the docket within the first four days of the term. *Regulæ Generales, 6 N. H. Rep.* 579.

The rules as to the entry of an appearance and as to pleading are disconnected. The entry of an appearance upon the docket does not restrict or limit the time or mode of pleading, or affect it in any manner. It is a mere notice of a defence. It is no waiver of a special plea of any kind, and the exception taken on this ground cannot prevail. 5 *Dane's Ab., ch.* 175, art. 18.

It is further contended, that the plea in this case was not seasonably filed; that it should have been delivered to the plaintiff's counsel, or filed with the clerk of the court, and notice given upon the docket, prior to the adjournment of the court on the fourth day of the term; and a delivery of the same, or filing of the notice after the adjournment, was insufficient.

The rule as to the entry of actions requires that no civil action shall be entered after the second day of the term, and

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all pleas in abatement are required to be filed within the first four days of the term. The practice has been to consider the court open, for such entry of actions and filing of pleas, during the entire days named, without reference to the adjournment of court, except when the session shall terminate within such time. We see no objection to such construction ; and as it appears that the plea was actually filed within the first four days of the term, we hold it seasonable. The plea is, therefore, received, and the plaintiff must file his replication.

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WHEAT vs. NORRIS.

Where a certain number of pounds of live sheep were delivered, and the same number of pounds were to be returned at the end of the year, with one quarter of that number of pounds in addition, and assumpsit on account annexed, and for money had and received, was brought for non-delivery of the same—*Held*, that such evidence would not support either count in the declaration.

**ASSUMPSIT.** The declaration contained two counts. The first was on an account annexed for three hundred and eighty-eight pounds of sheep. The second was for money had and received.

It appeared in evidence, that in 1831 the plaintiff delivered to one Flanders three hundred and fifteen pounds of live sheep, on a contract that Flanders should return to the plaintiff the same number of pounds, and an addition of one fourth that number of pounds yearly for the use and increase of the sheep, until the whole was paid.

In 1835 Flanders agreed with Norris, the defendant, to fulfil the contract made by him, and drew an order on the defendant in the plaintiff's favor for six hundred and thirty pounds of sheep, which was the quantity then due upon the contract, which order the defendant agreed with the plaintiff