

TRUE v. HUNTOON & A.

If, after a plea in bar, the defendant pleads a plea *puis darrein continuance*, this is a waiver of his plea in bar, and he shall take no advantage of anything in the bar in that case.

But such plea *puis darrein continuance* may be properly pleaded with the general issue, either specially or by brief statement, when no plea has been previously pleaded.

The fact that two or more pleas, when pleaded at the same time, are repugnant to each other, is no objection to either of them.

TRESPASS, by Sylvanus True against Ariel Huntoon, Lewis Bartlett, and Benjamin F. Gilman, for an assault. Writ dated May 16, 1872. The action was entered at the September term, 1872. An appearance was entered for the defendants, and the case was continued to the January term, 1873. During the January term the defendants, who had not previously filed any plea, filed the general issue, and at the same time filed several pleas *puis darrein continuance* in bar of the further maintenance of the action, alleging an accord and satisfaction. The plaintiff moved to dismiss the plea of the general issue. The motion to reject the plea was *pro forma* denied. The plaintiff excepted.

Case reserved, including all questions of discretion.

Barton and Wait, for the plaintiff.

Burke and Bowers, for the defendants.

SARGENT, C. J. In *Everendon v. Beaumont*, 7 Mass. 76, which was a writ of entry, the general issue was pleaded, and also by leave of the court a plea in bar, in which the defendants allege that pending the suit the demandants by deed released their rights to the defendants. So in *Austin v. Hall*, 13 Johns. 286, which was trespass *quare clausum*, the defendant pleaded not guilty, and also *liberum tenementum*. The plaintiff new assigned, and the defendant pleaded not guilty, and also a release after suit commenced. So, in 1 Chitty's Pl. 562, it is said that infancy, a release, or the statute of limitations may be pleaded with non-assumpsit. So in trespass, not guilty, a justification, and accord and satisfaction may be pleaded together.

And in *Wishart v. Legro*, 33 N. H. 177, 182, it is said that a general release, given after the commencement of an action, need not be pleaded *puis darrein continuance*, unless a plea has been before filed in the action, nor need it be pleaded in bar to the further maintenance of the suit, but in bar generally, and that such plea may be pleaded in bar after the last continuance with the general issue. And in that case it was expressly held that the general issue, and a brief statement of a release and settlement of the action since the last continuance, were properly pleaded.

While it seems to be thus settled that a release or a settlement of the action since suit commenced may be properly pleaded with the general issue, yet it is equally well settled by authority, that if after a plea in bar the defendant pleads a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall be taken of anything in the bar. *Kimball v. Huntington*, 10 Wend. 679; *Wallace v. McConnell*, 13 Pet. 143, 151.

The fact that the pleas are repugnant to each other is no objection when they are filed together as in this case. *Kimball v. Wilson*, 3 N. H. 96; 5 Bac. Abr. 479; *Rogers v. Odell*, 39 N. H. 452, 460, and cases.

Exceptions overruled.

BUCKLIN v. TRUELL & A.

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Twenty years' use of the water of a stream or a pond in a particular way is evidence of a right to use it in the same way, and the use of a dam for twenty years in a particular way is evidence of a right thus to use such dam.

CASE, by Moses Bucklin against Hiram Truell and Sumner Truell, for flowage.

This cause having been tried by the court under the provisions of ch. 189, secs. 4 and 5, Gen. Stats., the following facts and conclusions of law are reported:

At the northerly margin of Grafton pond, so called, in Grafton, is a tract of land, with a saw-mill, mill privilege, and a dam at the outlet of said pond, on said northerly shore. More than forty years ago this tract of land, saw-mill, privilege, and dam were owned by Phineas Gage, who also owned a tract of land containing about fifty acres, situated on the south-westerly shore of said Grafton pond. By his last will, approved October 16, 1849, Phineas Gage devised the said tract of land, situated on the south-westerly margin of said pond, to his grandson, Roswell Gage; and by the same will he devised to his two sons, Calvin and Converse, and to said Roswell, the saw-mill, land, privilege, and dam at the outlet of said pond. On March 30, 1850, the said Roswell, Calvin, and Converse joined in the conveyance, by warranty deed, of said saw-mill, privilege, dam, and the lands belonging thereto, "with all the privileges and appurtenances," to one John Williams. On March 15, 1851, Williams conveyed the same to Hiram Truell, one of the defendants, who occupied the same till 1863, when he conveyed one undivided half thereof to Sumner Truell, the other defendant.

The tract of land lying on the south-westerly shore of said pond, before mentioned, was conveyed by Roswell Gage to the plaintiff, by his deed of November 2, 1859, "excepting every legal right of flow-