Garland Vs. Davis

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Appellant : Garland

Respondent : Davis

Judgement :

Garland v. Davis - 45 U.S. 131 (1846)
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Garland v. Davis

45 U.S. (4 How.) 131

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF COLUMBIA

SYLLABUS

This was an action on the case, brought by Davis against Garland, the former Clerk of the House of Representatives. The declaration set out, by way of inducement, a contract between Davis and Franklin, the predecessor in office of

Garland, and then charged upon Garland a wrongful and injurious neglect and refusal to furnish a copy of certain laws to Davis, as had been agreed by Franklin.

The plea was "non assumpsit," and the issue and verdict followed the plea.

This court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.

When a declaration sounds in tort and the plea is "non assumpsit," such a plea would be bad on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict under the statute of jeofails.

Bad pleas, which are cured by verdict, are those which, although they would be bad on demurrer because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration.

The provision by Congress in relation to amendments, which is found in the 32d section of the Judiciary Act of 1789, is similar to that of 32 Hen. 8, but certainly not broader.

The issue was an immaterial issue.

The opinion of this court in *Patterson v. United States,* 2 Wheat. 221, reviewed and reaffirmed, namely

"Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court, or to the appellate court, that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict."

This principle applies equally to a plea varying from the substance of the declaration.

In this case, the verdict does not find any of the misfeasance charged upon the defendant.

If the merits of the case were passed upon in the court below, it was illegally done, because no evidence was competent except such as related to the promise described in the declaration.

This court abstains from awarding a repleader, for the reasons stated in the opinion, but remands the case so that the pleadings may be amended.

Page 45 U. S. 132

This was an action on the case, brought by Davis, the defendant in error, against Garland, the Clerk of the House of Representatives.

The circumstances under which the suit was brought are thus set forth in the plaintiff's declaration, which was filed on 16 September, 1839.

"DISTRICT OF COLUMBIA,"

" *Washington county, to-wit:* "

"Hugh A. Garland, late of said county, was attached to answer to George M. Davis in a plea of trespass on the case and so forth. And whereupon the said Davis, by H. M. Morfit, his attorney, complains, that whereas the House of Representatives of the United States had, at the first session of the 25th Congress, which was before the committing of the grievances herein complained of, passed a resolution that the clerk of said House be, among other things, directed to cause to be printed a ninth volume of the laws of the United States, after the manner of the eighth volume thereof, and being so directed, in pursuance of such resolution the then clerk of said House, to-wit, Walter S. Franklin, in the month of July of the year 1838, at the county aforesaid, had employed the said plaintiff, and, in his capacity

of clerk of said House, had agreed and contracted with said plaintiff to print a ninth volume of said laws in the manner as resolved, and to deliver from his office, as Clerk of the House aforesaid, a copy of said laws to said plaintiff, to enable him to print the same, and had directed the Chief Clerk in the office of said Clerk of the House of Representatives to prepare the said copy and deliver the same to said plaintiff; he, the said plaintiff, in consideration thereof, had made ample arrangements, and employed the means to print the said ninth volume of said laws, and was in all respects ready and willing to print the same after the manner as directed in said resolution when the said Walter S. Franklin departed this life, and the said Hugh A. Garland was elected his successor as Clerk of the House of Representatives aforesaid, and had charge of the laws aforesaid, from which the said ninth volume was to be printed. And the said plaintiff having the contract aforesaid, and in consideration thereof having prepared for the faithful execution of the terms thereof according to said resolution, and having also, soon after the election of said defendant as clerk aforesaid, to-wit, on or about the month of December, in the year 1838, at the county aforesaid, and before the committing of the grievances herein complained of, the said defendant was notified of said subsisting contract, and of plaintiff's readiness and willingness and preparation to comply with the same according to the said resolution, all of which notification of contract and preparation, as given aforesaid, the said plaintiff avers, and the said defendant was in duty bound, as clerk aforesaid, to deliver a copy of said

Page 45 U. S. 133

laws to said plaintiff, in consequence and by reason of the said resolution of Congress and the said contract of said plaintiff. And he the said plaintiff afterwards, to-wit, on or about 1 February, 1839, at the county aforesaid, asked and demanded of said defendant, who had charge of said laws from which the said ninth volume was to be printed, as Clerk of the House of Representatives aforesaid, a copy of said laws under his charge, for the purpose of printing the same according to said contract, and in the manner as directed in said resolution, and without which copy from the office of said clerk the said plaintiff could not print the said laws as directed in said resolution; that the said defendant, contriving and

wrongfully and injuriously intending to injure the said plaintiff, and to deprive him of the profits, and emoluments, and advantages which he might and otherwise would have derived and acquired from the printing of said ninth volume of the laws of the United States, and of the profits, emoluments, and advantages of the said subsisting contract, well knowing that, without a copy of said laws from his said office, the plaintiff could not print the same as directed in said resolution; and the said defendant being in duty bound to deliver a copy of said laws, as clerk aforesaid, to said plaintiff, to comply with said resolution of Congress and with plaintiff's contract aforesaid, afterwards, to-wit, on or about 1 February, 1839, at the county aforesaid, and on divers other days and times between that day and the day of the issuing the writ in this behalf, did wrongfully and injuriously refuse to deliver or furnish or permit to be delivered from said office or furnished therefrom to said plaintiff a copy of the laws of the United States for printing the said ninth volume of said laws, as resolved in said resolution, and did also wrongfully and injuriously refuse to allow the said plaintiff to print the said ninth volume of said laws in the manner directed in said resolution, and did prevent and hinder him from printing the same. By means whereof the said George M. Davis lost the printing of said ninth volume of said laws, and the benefit of said contract, and hath been hindered and prevented from making, deriving, and having the profits, emoluments, and advantages of such printing, and of the compliance, upon his part, with the said contract, and hath also lost his time, trouble, and money, in preparations for complying with said contract, which profits, emoluments, and advantages [he] hath been so hindered from making, and time, trouble, and money he hath so lost in said preparations, were of great value, to-wit, of the value of two thousand five hundred dollars, current money, and which profits and money he, the said plaintiff, might and would have had and received but for the wrongful conduct of said defendant."

There was another count in the declaration, setting forth the same circumstances in a different manner.

The plea was "nonassumpsit," upon which issue was joined and the cause went on to trial. The record, after mentioning the names of the jury, proceeded thus:

"Who, being empanelled and sworn to say the truth in the premises, upon their oath do say that the said defendant did assume upon himself in manner and form as the aforesaid plaintiff above against him hath complained, and they assess the damages of the said plaintiff, sustained by reason of the nonperformance of the promise and assumption aforesaid, to the sum of nineteen hundred dollars current money."

A motion was then made in arrest of judgment for the following reasons, *viz.:*

"1. Because there is no cause of action stated in the first count of the "

"2. Ditto, as to the second count."

"3. Because there is a general verdict, and one count is bad."

"F. S. KEY, *for defendant* "

This motion was overruled, and judgment entered upon the verdict.

In the course of the trial, two bills of exceptions were taken on the part of the defendant, which were as follows:

"1st Exception. In the trial of this cause, the plaintiff, having offered the resolution of Congress of 14 October, 1837, proved that in July, 1838, a verbal contract was made between the plaintiff and Walter Franklin, then Clerk of the House of Representatives of the United States, for the printing of the ninth volume of the laws of Congress, in which it was agreed that the plaintiff should do the printing thereof on the same terms as had been previously agreed with plaintiff's father, who had died some short time before, and had been paid to said plaintiff's father for the eighth volume of the laws of the United States, and was to be paid for the same at the usual Congress prices -- the printing to be executed under the superintendence and direction of Samuel Burche, Chief Clerk of said House of Representatives; that no minute or entry of said agreement was made in writing,

among the books and papers of said Franklin's office; that it is usual and customary for the contracts made on the authority of the House to be made verbally, and the same have always been received by the House and paid for; and that the said plaintiff frequently, after the making of the said agreement, called on said Burche for the work, stating his readiness to proceed with the work, and did not receive the same, because the said Burche had not prepared the laws for publication."

"And then further proved that the said Walter Franklin died in September, 1838, and the defendant was elected Clerk of the House on the first Monday of December, 1838; that some time afterwards, in December, 1839, the said Burche, not having yet

prepared the said laws for said publication, and the said plaintiff waiting as before for the same, the said Garland was informed, about 1 January, 1839, of the contract so as aforesaid verbally made between the said Franklin and the plaintiff, and observed that he had understood such a resolution was passed, and that such a work was to be given out for printing, and that he considered that as the agreement was a verbal one it was not binding, and that he had the right to give the contract to whom he pleased; that afterwards, in about two months from the beginning of December, 1838, he was again called upon and informed of the said contract, verbally made with the plaintiff by the said Franklin, when he said he had made an agreement or a contract with one Langtree, and that the said Garland did make such agreement with said Langtree, and ordered the work not to be given to the said plaintiff, but to be given to said Langtree to be printed, which was done accordingly, and the plaintiff thereby prevented from doing the work."

"And further proved that said plaintiff had made considerable preparations for the work and had engaged Mr. Gideon to do the printing of the work, and had transferred to said Gideon his office and press, valued at $1,000, to be paid for by the profits of the work -- of all which the defendant was informed before he made the contract with Langtree; and that plaintiff suffered considerable loss by the

taking away said contract; and that said Gideon, in the prosecution of his preparations for said work, had expended $600 or $700 for paper for that very work."

"And further that at the time of making said verbal contract with said Franklin, the plaintiff asked him if it was necessary it should be reduced to writing, and was answered that it was not necessary and was not usual; and also proved that there was no written contract in the office of the clerk for the printing of the eighth volume of the laws of the United States. And that said Franklin knew and assented to the plaintiff's engaging said Gideon to do the said printing at the time of said contract; and that the defendant was advised by the clerks, before he made the contract with said Langtree, to be cautions and not get into difficulties by giving the work to another. And that no written contract with said Langtree, nor any memorandum thereof, appears in the office of said clerk."

"And upon the evidence aforesaid of the said plaintiff, the defendant, by his counsel, prayed the court to instruct the jury that if the same was believed by the jury to be true, the plaintiff was not entitled to recover, which the court refused -- to which refusal defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done this 14 April, 1842."

"W. CRANCH [SEAL]"

"B. THRUSTON [SEAL]"

"JAS. S. MORSELL [SEAL]"

Page 45 U. S. 136

"2d Exception. And thereupon the defendant, on the said evidence, prayed the court to instruct the jury as follows:"

"If the jury believe from the evidence that the defendant, in making the subsequent contract with Langtree, and causing the compilation to be delivered to him to be

printed, acted officially and *bona fide,* and not with corrupt motives, and verily believed that the prior contract made verbally with the plaintiff was not obligatory, then he is not liable to damages in this action upon the evidence aforesaid; which also the court refused to give -- to which refusal defendant excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 14th day of April, 1842."

"W. CRANCH [SEAL]"

"B. THRUSTON [SEAL]"

"JAS. S. MORSELL [SEAL]"

Page 45 U. S. 143

MR. JUSTICE WOODBURY delivered the opinion of the Court.

In the examination of this case, a defect has been discovered in the pleadings and verdict which was not noticed in the court below nor suggested by the counsel here.

And the first question is whether, under these circumstances, it can be considered by us, and if it can be and is a material defect not cured or otherwise capable of being overcome, whether it ought to be made a ground for reversing the judgment and sending the case back for amendment and further proceedings.

There can be no doubt that exceptions to the opinions given by courts below must all be taken at the time the opinions are pronounced.

But it is equally clear that when the whole record is before the court above, as in this case, any exception appearing on it can be taken by counsel which could have been taken below. *Roach v. Hulings,* 16 Pet. 319.

So it is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel. *Slacum v. Pomeroy,* 6 Cranch 221; *Baird & Co.*

v. Mattox, 1 Call, 257; 41 U. S. 16 Pet. 319.

In *United States v. Burnham,* 1 Mason 62, the court alone took notice of the defect, which was the sole ground of its opinion.

In *Patterson v. United States,* 2 Wheat. 222, it is stated that "the points made mere not considered by the court, and judgment was pronounced on other grounds," and Justice Washington says (p. 24):

"The court considers it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it,"

and on that account the proceedings below were reversed. *See also* *Harrison v. Nixon,* 9 Pet. 483, 34 U. S. 535 .

I proceed, then, to consider the nature and character of the difficulty in this case appearing on the record.

Since discovering it, an opportunity has been given to the counsel for the original plaintiff, which has been improved, to attempt to remove it by argument and authorities. But it still remains, and consists in this.

The declaration is an action on the case sounding in tort. It

sets out no contract except one by way of inducement, made by Mr. Franklin, the predecessor in office of the defendant, and it then proceeds to make the gist of its complaint a wrongful and injurious neglect and refusal by the defendant to furnish a copy of certain laws to the plaintiff, as had been agreed by Franklin. We are required to take this view of the declaration not only by the averments, in it, but by both the present and past positions of the counsel for the plaintiff that it was intended to be founded on a misfeasance. The plea, however, instead of being "not guilty," as was proper in such case (Com.Dig. *Pleader*), is *nonassumpsit,* and the plaintiff below, not demurring thereto nor moving for judgment

notwithstanding such a plea, joined issue upon it, and the verdict of the jury conforms to the plea and issue, and merely finds "that the defendant did assume upon himself in manner and form," &c.;, and assesses damages, "sustained by reason of the nonperformance of the promise and assumption aforesaid."

Beside the general reasoning in the books that pleas amounting to the general issue should traverse the material averments in the declaration, and, where the action is one on the case for a tort, should deny the tort by pleading "not guilty," it is laid down in most elementary treatises that "not guilty" is the proper general issue in such cases. *See* Com.Dig. *Pleader.*

Beyond this, it has been actually adjudged in an action on the case, after full hearing, that *nonassumpsit* was a bad plea. *Noble v. Lancaster,* Barnes 125.

That action was trover, but being still an action on the case, the same principle applied.

Nor is the difference merely formal or technical between actions founded in tort and in contract. 1 Chit.Plead 418, 229.

Because, when in tort or *ex delictu,* a setoff is not admissible, nor can infancy be pleaded as to one *ex contractu,* nor can a plea in abatement be sustained that all concerned in the wrong are not joined, as it may be in counts on contracts, and a writ of inquiry must issue to ascertain the damages, which is often unnecessary in suits on contracts. A declaration is bad which unites a count in tort with one in contract. 2 Chit. 229, 230; 1 Chitty's 625, note; 4 D. & E. 794; 8 D. & E. 33.

Various other cases analogous to this might be cited which tend to show that the present plea is improper, but it is not deemed necessary in this stage of the inquiry to enlarge on that point, and I proceed to the next and more difficult question -- whether such a plea, though bad on demurrer, should not be considered as good after verdict and cured by the statute of jeofails.

As a general rule, all informality in a good plea is held to be cured by a verdict, and ought to be, in order not to delay, through a defect of mere form, what may seem

to be just. 1 Levinz 32; 6 Mod. 1; Com.Dig. *Pleader,* R. 18; 6 Johns. 1.

Here, however, there appears to be no informality in a good plea; on the contrary, it looks more like formality in a bad one. And if it be asked whether there are no cases of bad pleas which are cured by a verdict, we answer that several exist, but that they are cases where the pleas, though bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue the material parts of the declaration. That is the test.

In the opinion of a majority of the Court, the plea under consideration does not contain enough for that purpose, and my apology for examining this point somewhat more in detail must be found in the circumstance that the court are divided upon it.

The provision by Congress in relation to amendments is to be found in the 32d section of the Judiciary Act of September 24, 1789, and is similar to that in the 32 Henry 8, but certainly not broader. *See* the former, in 1 Lit. & Brown's ed. 91, and the latter in 1 Bac.Abr. *Amendment and Jeofail,* B.

Under both of these statutes, it has frequently been adjudged that defects in substance are not cured by a verdict, "for this," says Bacon (Abr., before quoted, E), "would have ruined all proceedings in the courts of justice," and a defect in substance, in a plea or verdict, is conceded in all the books to exist when they do not cover "whatever is essential to the gist of the action."

The present plea, if tried by this test, seems not to be remedied by the verdict, because, so far from traversing all that is essential, nothing is denied, unless it be the inducement. Thus it traverses a promise simply; but the only promise set out in the declaration is one introductory to those material averments, which, as before stated, are the wrongful and injurious acts of the defendant. So far from denying those acts, the plea entirely passes them by, and they are neither put in issue nor a verdict returned upon them one way or the other. It is true that in some actions

for a tort, a promise may be referred to in the declaration which sometimes will constitute one material fact among several others. But it is only one, and not the whole, nor is it the most material fact, that being, in such cases, the misfeasance of the defendant. Nor does the verdict here find this one fact or promise such as averred in the inducement. There it is stated to be made by Mr. Franklin, but on the contrary, the verdict finds a promise made by the defendant.

On recurring to precedents, several are found which confirm these conclusions. In respect to pleas, they show that when so imperfect and immaterial as this, they are not cured by verdict. And the reason generally assigned, and which pervades the whole, is that before mentioned -- namely that they do not cover or traverse all the gravamen of the declaration. *Staple v. Heyden,* 6 Mod. 10; Willes 532; Tidd's Prac. 827; Gilb. C.P. 146.

Hence it has been decided that a plea of *nonassumpsit* to an

action of debt is not thus cured, *Brennan v. Egan,* 4 Taunt. 164; *Penfold v. Hawkins,* 2 Maule & Selw. 606, because it covers too little or is irrelevant. While, in pursuance of the same rule, it has been held that *nil debet* to assumpsit, 1 Hen.Bl. 664, and "not guilty "either to assumpsit, Cro.El. 470 and 8 Serg. & R. 441, or to covenant, 1 Hen. & Munf. 153, or to debt for a penalty. *Coppin v. Carter,* 1 D. & E. 462, note, are cured by a verdict because they contain enough to put in issue all which is important in the declaration.

In the present case the issue manifestly reaches only a part of the case, and is therefore incurable, Hardres 331, and it comes expressly within the definition of an immaterial issue, which is also incurable. Carth. 371; Bac.Abr. *Verdict,* K; 2 Levinz 12; 2 Saund. 319; 2 Mod. 137; Gould's Pl. 506, 509.

This is undoubted, from Williams' definition in *Bennet v. Holbech,* 2 Saunders 319 *a* . He says

"An immaterial issue is where a material allegation in the pleadings is not answered, but an issue is taken on some point which will not determine the merits of the case, and the court is often at a loss for which of the parties to give judgment."

So in *Benden v. Manning,* 2 N.H. 291, it is laid down, on circumstances like the present, that

"if, instead of assumpsit, a special action on the case had been brought for misfeasance, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the misfeasance, and it would have been wholly immaterial whether the contract was a valid one or not."

5 D. & E. 143; 2 Wils. 359; 1 Saund. 312, note 2.

If we should next compare this plea and issue in their substance with a few others less general that have been solemnly adjudged to be bad and not cured by verdict, though found for the plaintiff, the result will be the same.

It may be seen in *Tryon v. Carter,* 2 Strange 994, that in debt on bond, payable on or before 5 December, the defendant pleaded payment on 5 December, and issue being joined and found against him, the court still awarded a repleader, as it could not be inferred from these pleadings that payment may not have been made before the 5th.

See another in *Enys v. Mohun,* 2 Strange 847, where to covenant on a lease to C., averred to come by assignment to the defendant, the plea was that C. did not assign to him, and verdict was for plaintiff. But the court awarded a repleader, as the issue found does not cover all the important parts of the declaration -- namely that the lease may have come to the defendant not from C. direct, but by mesne assignments. *Same case* in 1 Barnardiston 182, 220. *See also other cases. Yelv. 154; Peck v. Hill 2 Mod. 137; Read v. Dawson, ibid. 139; Stafford v. Mayor of Albany,* 6 Johns. 1; Com.Dig.

Pleader, R. 1 and 2, V. 5; 1 Chit.Pl. 625, 695; 6 D. & E. 462; 1 Saund. 319, n.

In *Patterson v. United States,* 2 Wheat. 224, Judge Washington lays down the whole law precisely as we view it, in respect to a verdict varying materially from the issue, and which principle applies equally well to a plea varying from the substance of the declaration. He says

"Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which it is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court or to the appellate court that the finding is different from the issue or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict."

And on error, the proceedings below were reversed.

After all this, it is hardly necessary to state further, by way of precedent, that in *Noble v. Lancaster,* Barnes' Notes, 125, before cited, this very point was decided. *Non assumpsit* was pleaded to an action on the case (*e.g.,* trover), and was held not to be cured by a verdict, but was bad in arrest of judgment.

Looking, then, to many precedents as well as correct principles in pleading, the issue presented and tried here is not only an improper one for the case, but, not containing enough to cover all that is material in the declaration and being thus imperfect in substance, it "does not determine the right between the parties," and is not cured by the verdict or the statute of jeofails.

A moment as to the defects in the verdict. It is difficult to see how an immaterial and bad plea can be cured by a verdict, which, as in this case, is quite as immaterial as the plea. Indeed, in some respects the verdict here, compared with the declaration, is more defective and irremediable than the plea.

It is laid down in Comyns' Dig. *Pleader,* S. 24, that a verdict is even void if it be "variant from the declaration," and he gives as one illustration from 2 Roll. 703, 1. 35, "in assumpsit, if it finds a different promise."

In the present case, the promise is found not only different from that laid in the declaration as inducement, but the verdict varies in other essential respects from the declaration, finding nothing of any of the misfeasance charged in it on the defendant.

The defect here, then, is in the verdict as well as plea, and though a mere informality in the former is cured by the act of Congress as to amendments, 41 U. S. 16 Pet. 319, yet the defect here is similar in both, and as just shown, being on principle in both a defect in substance no less than form, is uncured. *Stearns v. Barrett,* 1 Mason 170, and 2 Mason 31.

But several arguments have been offered against a reversal of the judgment and further proceedings and in favor of rendering judgment for the plaintiff, on this record, though the plea, issue, and

Page 45 U. S. 148

verdict are all defective in substance, and do not show which party is entitled to recover on the real merits in dispute or that they have been legally tried.

These arguments it is our duty to examine. One is that the whole merits, according to the evidence reported, may have actually been considered and passed upon in the court below under this plea and issue. But it is a sufficient answer to this that if so done, it was illegally done, no evidence being competent under that issue except the promise described in it and no opinion of the jury or the court being regular or proper under it except as to that promise alone. *Harrison v. Nixon,* 9 Pet. 484.

There are many cases showing that the evidence must be limited to the plea. *Mar. Ins. Company v. Hodgson,* 6 Cranch 206; 17 U. S. 4 Wheat. 64, in case of the *Divina Pastora.* The Court said you must "not admit the introduction of evidence varying from the facts alleged." 34 U. S. 9 Pet. 484. The probata should conform to the allegata. *Boone v. Chiles,* 10 Pet. 177.

In *Barnes v. Williams,* 11 Wheat. 415, it is said

"Upon inspecting the record, it had been discovered that the special verdict found in the case was too imperfect to enable the court to render judgment upon it."

A certain fact was important to the recovery.

"Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not upon a special verdict intend it."

These illustrations and cases then to show the difficulties in forming an opinion on anything not found or apparent on the record, and the impropriety of conjecturing and pronouncing on the real merits, when both the issue and verdict are defective in substance in relation to them. But in this case, if the promise averred to have been made by Franklin was treated at the trial as one made by Garland, so far as regarded its operation and his duty -- which has been the argument of the original plaintiff's counsel before us and which may, for aught we now decide, be correct -- then we should be called upon to render judgment against Garland merely on such promise and a breach of it.

That is everything which the verdict finds or the issue presents, in the most favorable view.

But that being a promise confessedly on the whole evidence made by the original defendant, or his predecessor, as a public agent, if now rendering final judgment, we should probably, in that view of the record (no tort having been put in issue or found by the verdict), be obliged to decide against the original plaintiff on the merits, because public agents are not usually liable on mere contracts or promises made in behalf of their principals. *See* on this *Hodgson v. Dexter,* 1 Cranch 345; *Macbeath v. Haldimand,* 1 D. & E. 172; *Fox v. Drake,* 8 Cowen

Page 45 U. S. 149

191; 2 U. S. 2 Dall. 444; *Osborne v. Kerr,* 12 Wend. 179; Story on Agency 302-308; *Lord Palmerston's Case,* 3 Brod. & Bing. 275; *Freeman v. Otis,* 9 Mass. 272, *quaere* in part.

On the contrary, however, if the action is to be considered as brought not on any promise except as inducement, but on a wrongful act or misfeasance, as the plaintiff sets out his case in his declaration and still contends to be the truth, then it seems manifest that -- nothing on that misfeasance, the essential point of the action, having been either traversed in the plea or found by the verdict -- there is nothing upon which judgment can legally be rendered for either party on the merits. It will be seen that we come to this conclusion, not because cases are wanting which hold that officers not judicial, nor having any discretion to exercise on a subject, *Wheeler v. Patterson,* 1 N.H. 88; *Kendall v. Stokes,* 3 How. 98; 11 Johns. 114; 2 Ld.Raym. 938, are liable in tort for misfeasances, whenever they are violations of public laws or official duties, *Shepherd v. Lincoln,* 17 Wendell 250; 5 Burr. 2709; 6 D. & E. 445; Gidley, *Ex. of Holland v. Lord Palmerston,* 7 J.B.Moore 91; 15 East 384; 9 Clark & Fin. 251; 1 Bos. & Pul. 229; *Little v. Barreme,* 2 Cranch 170; 13 Johns. 141; *Tracy v. Swartwout,* 10 Pet. 95, though others consist of unsuccessful attempts to charge persons in tort for matters which originated and existed in fact only as contracts, *Bristow v. Eastman,* 1 Esp.N.P. 172; *Jennings v. Rundall,* 8 D. & E. 335, or which were mere nonfeasances, 20 Johns. 379; 12 Mod. 488; 1 Ld.Raym. 466; 4 Maule & Selw. 27; Story on Agency 308; but because the issue and verdict present nothing in relation to any such misfeasance, and our opinion is intended to be confined to the questions on the pleadings, without any decision upon the merits. Indeed, it would be difficult to express one on them where we have been unable to agree on one, and where a majority of the court think the pleadings are not in a proper state to enable us to give one satisfactorily.

In this state of things, the most obvious course to assist us to "reach the law and justice of the case" would be to reverse the judgment below and award a repleader. This would not deprive either party of any merits they may have and may be able hereafter to show on proper pleadings, and costs would indemnify the party who has been delayed by any bad pleading, so far as he ought to be indemnified considering his own fault in this case, in joining and trying an issue immaterial or radically insufficient to settle the cause of action, rather than demurring to the plea seasonably. But such a course is objected to on certain

grounds not yet considered and which it is our duty to notice. One of them is that when a plea or verdict is radically defective, judgment ought to be rendered, notwithstanding the verdict, for the party

Page 45 U. S. 150

whose pleadings are right; and another, a branch of this, is that a court ought in no case to permit the party who commits the first error to have the judgment reversed and be allowed a repleader unless perhaps when the verdict is in his favor.

Though several of the textbooks lay down rules like these in broad terms, it is first to be noticed that some state them with a *quaere* or doubt. 1 Chit.Pl. note, 522, 633, and Com.Dig. *Pleader.* In others, the cited authorities do not support them, as Gilbert, quoted in Tidd, 828. In others, the counsel, rather than the court, recognize them. *Kempe v. Crews,* 1 Ld.Raym. 170; *Taylor v. Whitehead,* Doug. 749. In others, the court refer to them but do not appear to have founded their decision on them, as *Webster v. Bannister,* Doug. 396, where the issue covered the merits, 3 Hen. & Munf. 388, and in others, matters still different existed, which justified the judgment given, independent of these rules.

Thus, if a plea be bad but still confesses the cause of action without setting out a sufficient avoidance, judgment can with propriety be rendered for the plaintiff on such confession if the declaration be good. *Rex v. Philips,* 1 Str. 397; *Jones v. Bodingham,* 1 Salk. 173; Gould on Pl. 509; *Simonton v. Winter,* 5 Pet. 141; *Kirtley v. Deck,* 3 Hen. & Munf. 388; 6 Mod. 10; Tidd 827.

So if the plea be a mere nullity -- putting nothing material in issue -- judgment is at times allowed to be signed as for want of a plea, as if *nil dicit,* provided the declaration be good. 4 Taunt. 164; 2 Maule & Selw. 606.

So if the plea be evidently a sham plea, or fictitious, a like course is warranted. 10 East 237; Tidd 831.

Or if the plea, though neither of these, still be defective, but sets out such facts as demonstrate that the party has no merits, and that no amendment could be made

which would avail him anything, or, in other words, nothing is left in the case that can be mended. Gould on Pl. 514, 39; Tidd, 831; *Henderson v. Foote,* 3 Call 248.

It is incidental circumstances like these, affecting the merits and not adverted to always in decisions or elementary treatises, which have governed most of the opposing cases, rather than a mere technical, and in some degree arbitrary rule, without reference to the merits, and which would bar a party claiming to possess them from having them tried on a repleader or amendment, on complying with equitable terms.

In the case now under consideration, the plea comes under neither of these categories, neither confessing a cause of action nor appearing to be a sham or fictitious plea nor disclosing enough to show the defendant to be without any good defense. On the contrary, a defense appears which the original defendant seems always

Page 45 U. S. 151

to have urged with great confidence as being good. Under these circumstances, then, repleading or something equivalent would seem proper to do justice between the parties and to carry out the principle of the statutes of jeofails, so as not to prevent a judgment on the merits, because some "slip," as Lord Mansfield calls it, has happened on the part of the defendant in his plea. *Rex v. Philips,* 1 Burr. 295; Tidd 828; Gould on Pl. p. 508, 31, 40. If the right be not put in issue and may be, a ruling to permit it seems reasonable. *Staple v. Heyden,* 6 Mod. 2.

The true meaning of these technical rules can be made rational and consistent if they are held to apply to eases where good grounds are apparent for rendering final judgment. Then it may well be rendered against him who committed the first material fault in the pleadings, and which fault has not afterwards in any way been cured.

But if no such grounds appear, in consequence of the imperfections of the pleas and verdict, final judgment cannot properly be rendered, and the rules are inapplicable, and the judgment below should be reversed so as to furnish an

opportunity to remove those imperfections and reach the justice of the case by amendments or repleaders. And so far from the party not being permitted to enjoy this indulgence who committed the first fault, he is the only one who needs it and in whose behalf, under the liberal spirit of modern times, all statutes of jeofails are passed. Nor can the opposite party suffer by this course in respect to the merits, as they are left open. Or in respect to cost and delay, as he should be indemnified for them, in the manner before mentioned, by equitable terms, for allowing any amendments.

In this view of the subject, it is of no consequence for which party the defective verdict was found, except at times the fact in it may be an indication of merits in that party who has the *postea,* so far as that fact can affect the merits. But in this case, the fact found was immaterial in relation to the merits, as already shown, and the object now is to prevent such immaterialities from making a final disposal of the case -- to prevent substance from being sacrificed to form -- and where merits may exist, to adopt such a course as will present them to the court intelligibly for a final adjudication of the real justice of the case.

To all this, in an advanced era of jurisprudence, it will hardly do to repeat from some of the old books that a party is forever to be barred either for the badness or the falsity of his plea if it happens to be imperfect and is found against him, though he has not confessed the declaration nor stated any facts in his plea inconsistent with merits.

Much more, too, is it proper, if not indispensable, in a case like this, so defective on the record as not to justify any decision about the merits, to adopt a course which shall not bar the due consideration

Page 45 U. S. 152

of them in the end, and which shall be for the benefit and guide of the court even more than a party, so as to prevent a leap in the dark, and which for these and other reasons shall let the cause be reopened, and prepared and tried in a manner to bring the whole of the merits legally before both the court and the jury. Cro.Eliz.

245; 5 Hen. & Munf. 393; *Baird & Co. v. Mattox,* 1 Call 257.

Considering the character and position of this tribunal, as one of the last resort in administering justice, and considering the increased disposition of the age in which we live to eviscerate the truth and decide ultimately only on the real merits in controversy between parties, or in the words of Justice Story, 1 Story 152, in *Bottomly and the United States,* as to "technical niceties," considering "the days for such subtleties in a great measure passed away," it seems a duty of our own motion to give all reasonable facility to get the record in an intelligible and proper shape before we render final judgment.

As proof that such a course is sometimes deemed proper to aid a court as well as a party notwithstanding the technical rules before mentioned, it is stated in Gould on Pl. 507, 28, that judgment may be arrested after verdict, "if the issue is immaterial, so that the court cannot discover, from the finding upon it, for which party judgment ought to be given." 23 and 22.

So, though Gould lays down these rules before named, he says, page 514, 40, if a special plea show there may be a good justification, though it has been badly pleaded, judgment must be arrested and a repleader awarded, as it appears a good issue might be formed, and when this is the case, "the ends of justice require that an opportunity for forming such an issue should be afforded." And in respect to objections in such cases to indulgence to a party whose plea is bad, Gould, p. 508, says in a note:

"The true answer to this inquiry appears to be, that the awarding a repleader in such case was originally rather an act of indulgence to a party, who tendered an improper issue, than a matter of strict right. An indulgence grounded on the presumption that the issue was misjoined through the inadvertence and oversight of he pleaders, and that a farther opportunity to plead would probably result in a material issue decisive of the merits of the cause,"

&c.;

There are also some very high precedents against the application of these technical rules in cases and circumstances like those now under consideration. Such was the case of *Rex. v. Philips,* 1 Burr. 302. The reasoning of Lord Mansfield on this whole subject is directly in point, as well as the case itself, and contains that beautiful correction by him of a much abused maxim, in which he says it is the duty of a good judge to amplify justice rather than his jurisdiction, *"boni judicis est ampliare justitiam, non jurisdictionem."* There, after verdict for the plaintiff, he allowed an amendment of

Page 45 U. S. 153

the plea on payment of costs, being satisfied that "the ends of justice require that an opportunity for forming a proper issue be allowed."

There are many other cases, some ancient and some modern, which fully support the same conclusion. *See Enys v. Mohun,* 2 Strange 847, and *S.C.* Barnardiston 182, 220; *Tryon v. Carter,* 2 Strange 994; *Love v. Wotton,* Cro.Eliz. 245.

In *Serjeant v. Fairfax,* 1 Levinz 32, the plea was defective as not taking issue on enough, though it denied part of what was material in the declaration. Verdict was found for the plaintiff. This is in substance the very case now under consideration. Counsel contended

"When the issue is found against the pleader, judgment shall be for the plaintiff, but if for him (the pleader) not. But Justice Twysden said that if an improper issue is taken and verdict given thereon, judgment shall be given thereupon, be it for the plaintiff or defendant. 2 Cro. 575. But an immaterial issue is where, upon the verdict, the court cannot know for whom to give judgment, whether for the plaintiff or for the defendant, as in Hob. 175, and with him the Chief Justice and Wyndham wholly agreed, and awarded a repleader."

In *Simonton v. Winter,* 5 Pet. 141, the verdict was for the plaintiff, and yet, the plea being bad, the court reversed the judgment, as the cause of action was not confessed in the plea, and remanded the case with an order for a *venire de novo.*

See also in point *Green v. Baily,* 5 Munford 246, and *Baird & Co. v. Mattox,* 1 Call, 257.

And in 22 U. S. 9 Wheat. 729, the pleadings are not given, but Justice Story said there was great irregularity and laxity in them, and

"it is impossible, without breaking down the best settled principles of law, not to perceive that the very errors in the pleadings are of themselves sufficient to justify a reversal of the judgment and an award of a repleader,"

and without "appropriate pleas," "it would be difficult to ascertain what was to be tried or not tried."

See also *Harrison v. Nixon,* 9 Pet. 483.

All that remains is to consider the best form of carrying these conclusions into effect.

In some of the cases before cited, the court has not only reversed the judgment but ordered a repleader. But in others it is said that this cannot be done after a writ of error. 6 Mod. 102; 2 Keb. 769; Com.Dig. *Pleader* and *Verdict.*

Such probably has always been the practice in relation to not ordering it by the court below, after a writ of error is sued out, till the case is again reopened; but it was once not the practice in the higher courts of error in England. *See* 2 Saund. 319; *Holbech v. Bennett,* 2 Levinz 12.

Nor is it the practice now in some of the higher courts in this country. In *Green v. Baily,* 5 Munford 251, judgment was reversed

on the writ of error, the pleadings set aside after the plea and a repleader awarded.

The 32d section of the Judiciary Act, before referred to, expressly empowers "any court of the United States" "at any time to permit either of the parties to amend any

defect in the process or pleadings." Lit. & Brown's ed. 91.

All know that a repleader is little more in substance than permitting an amendment.

But most of the precedents in this Court allowing amendments after a writ of error are in maritime or admiralty proceedings, and I have found none of those in the form of repleaders. In 17 U. S. 4 Wheat. 64 (though one in admiralty, where less strictness prevails in pleading than at common law), Chief Justice Marshall said, "The pleadings in this case are too informal and defective to pronounce a final decree on the merits," and the judgment was therefore reversed and the cause remanded with directions to permit the pleadings to be amended.

See also a like order in the *Divina Pastora,* 4 Wheat. 63, and in *Case of the Edward,* 1 Wheat. 264, and *Case of the Samuel,* 1 Wheat. 13; *Harrison v. Nixon,* 9 Pet. 483.

In cases at common law, the form is usually somewhat different. In 30 U. S. 5 Pet. 141, the form was suited to the case, and judgment not only reversed but a *venire de novo* ordered, and in *United States v. Hawkins,* 10 Pet. 125, JUSTICE WAYNE says -- "A *venire de novo* is frequently awarded in a court of error upon a bill of exceptions to enable parties to amend" -- and "amendments may, in the sound discretion of the court, upon a new trial, be permitted."

See further 15 U. S. 2 Wheat. 226; *Barnes v. Williams,* 11 Wheat. 415; *Bellows v. Hallowell & Augusta Bank,* 2 Mason 31; *Peterson v. United States,* 2 Wash.C.C. 36.

See the form in England. *Parker v. Wells,* 1 D. & E. 783, and *Grant v. Astle,* Doug. 922.

In *Pollard v. Dwight,* 4 Cranch 432, the Court said let judgment "be reversed and the cause remanded for a new trial."

Mr. Lee prayed "with leave for the defendants below to amend their pleadings."

The Court said "that the court below had the power to grant leave to amend, and this Court could not doubt but it would do what was right in that respect." Similar to this was the course in *Day v. Chism,* 10 Wheat. 404.

And in *United States v. Kirkpatrick,* 9 Wheat. 738, the Court not only reversed the judgment and awarded a *venire de novo,* but gave "directions also to allow the parties liberty to amend their pleadings." So 22 U. S. 9 Wheat. 540.

See on this further 10 U. S. *Ins. Co. v. Hodgson,* 6 Cranch 218; 11 U. S. 7 Cranch 47, 497; 13 U. S. 9 Cranch 244; 14 U. S. 10 Cranch 449; 41 U. S. 16 Pet. 319; *Moody v. Keener,* 9 Porter 252.

Page 45 U. S. 155

In conclusion, then, as by several cases in England the allowance of a repleader in courts of error seems to have gone into disuse in modern times, and as the practice in common law cases in this tribunal, though otherwise in some of the states, has usually been not to direct either amendments or repleaders in cases like these, but to reverse the judgment and remand the cause to the court below for further proceedings there, we shall conform to that practice in the present instance.

Let the judgment below be reversed and the case remanded for further proceedings.