STATE BANK *vs.* MINIKIN.

The right of a defendant to file several pleas, under the *69th sec., chap.* 126, *Dig.*, is unconditional, and, if within the time prescribed by the statute for pleading, may be done without leave of the court; but under the 77th sec. of the same chap., the right to file more than one replication or rejoinder depends upon leave granted for that purpose, upon motion, and consideration as to whether such additional pleading is necessary to the attainment of justice.

In order to enable the court to exercise its discretion, the facts should be presented by motion on petition, and perhaps the more regular practice would be to present with it the pleadings intended to be filed, that the court might, upon examination of the issues formed, and the nature of the action, as well as the additional pleadings presented, determine whether such leave should, or not, be granted; and such application, and the decision of the court upon it, should appear upon the record.

As to the proper mode of putting in issue the identity of names and causes of action, where a former judgment is pleaded, &c., and herein, as to the effect of *nul tiel record.*

Where a defendant files four rejoinders, without special leave of the court, a motion to strike all of them out but one, might be sustained, but where the motion is to strike them all out, it should be overruled, because the defendant has the right to file one, and the motion to strike them all out should be determined without division.

Writ of Error to Independence Circuit Court.

On the 22d March, 1849, the Bank of the State of Arkansas brought an action of debt, by petition, against Peter Engles and John Minikin, in the Independence Circuit Court, on a note due 25th October, 1844, executed by them, and one William D. Engles to the Bank. At the return term, September, 1849, oyer of the note sued on was prayed and granted. At the March term, 1850, the death of Peter Engles was suggested, and the suit abated as to him. Defendant Minikin filed three pleas in abatement, alleging, in different forms, that the writ issued without the seal of the court; to which the plaintiff replied that the writ was sealed when it issued, but the impression had become dim, indistinct, &c. The Court determined the issue for plaintiff.

On the 7th August, 1850, at an adjourned term of the court, the defendant filed three pleas: 1*st, nil debet;* 2d, payment: and 3d, the statute of limitations—three years.

At the September term, 1850, on the 2d September, plaintiff took issue to the 1st and 2d pleas of defendant, and filed a special replication to the third, alleging that within the bar, she brought suit on the same cause of action, against defendant and the other makers of the note, suffered a non-suit therein, and commenced the present action within one year thereafter.

On the 3d day of September, the defendant filed five rejoinders to said replication:

1. That the plaintiff did not, within three years, next after the cause of action accrued, on, &c., commence her action against this defendant, nor did she suffer a non-suit, on, &c., nor did she re-commence her action against defendant on the identical cause of action, on, &c., in manner and form as alleged, &c.

2. That the cause of action in the first suit, mentioned in said replication, did not accrue to the said plaintiff within three years next before the commencement of said first suit.

3. That the cause of action in the first suit in said replication mentioned, is not the identical same cause of action as that in the plaintiff's petition in this suit mentioned.

4. That defendant is not the same identical John Minikin named in the first suit in said replication mentioned.

5. That there are no such records in the Circuit Court of Independence county, as the said plaintiff, by her said replication hath alleged.

On the 4th September, the plaintiff filed a motion to strike out the 1st, 2d, 3d, and 4th of said rejoinders, stating several objections to the form and substance of them, and that they were filed without leave of the court, &c.

On the 9th day of September, the defendant withdrew the 5th rejoinder, and thereupon the motion of the plaintiff to strike out the other four was submitted, and overruled by the court, and plaintiff excepted.

The plaintiff declined to answer said rejoinders, and judgment was rendered for defendant.

The case was determined in the court below before the Hon. WM. C. SCOTT, Judge. Plaintiff brought error.

BEVENS and HEMPSTEAD, for the plaintiff.

BYERS & PATTERSON contra. Nothing can properly be stricken from the files, if filed in apt time, except where the pleading filed

is a mere nullity, (4 *Ark.* 454, 5 *id.* 141, 1 *Eng.* 196); but in this case, each rejoinder was a full answer to the replication.

Mr. Justice WALKER delivered the opinion of the Court.

Whether the court below erred or not in overruling the plaintiff's motion to strike from the files the four rejoinders of the defendant to the plaintiff's replication, must depend upon the right which the defendant had to file them under the statute, or in point of order, or time; or because by no form of pleading could the subject matter be made a legal response to the replication.

In regard to the first class of objections, it may be remarked that whilst our statute, like that of Ann, gives to the defendant a right to file as many pleas as he may deem necessary for his defense, these statutes have uniformly been held to extend to pleas only, and left the parties to be governed by the common law rule in regard to other pleading, under which but one plea, replication or rejoinder, was allowable to a count, plea or replication. 2 *Strange* 908. *Gray's ad. v. White,* 5 *Ala. Rep.* 492. Our statute has, however, conferred upon the courts, when in their opinion it shall become necessary to attain the ends of justice, upon application for that purpose, to allow more than one replication or rejoinder. *Sec.* 77, *Dig., ch.* 126.

If such application was made and leave granted in this case, the record should show it, and as no such application or order appears of record, it is only by inference, from the fact that the court refused to strike them out, that we may infer they were filed with its consent. The state of the pleadings in this, as well as in several other cases before us, induces the belief that the circuit courts overlooked the 77th section of the statute, and, acting under the provisions of the 69th, considered the right to file several replications or rejoinders, as co-extensive with pleas. Such is clearly not the case. The defendant's right to file several pleas under the 69th section, is unconditional, and, if within the time prescribed by the statute for pleading, may be done without leave of the court; whilst the right to file more than one replication or rejoinder depends upon leave granted for that purpose, upon

motion and consideration, as to whether such additional pleading is necessary to the attainment of justice.

In order to enable the court to exercise its discretion, the facts should be presented by motion or petition, and perhaps the more regular practice would be to present with it the pleading intended to be filed, that the court might, upon examination of the issues formed and the nature of the action, as well as the additional pleading presented, determine whether such leave should or not be granted. And such application and the decision of the court upon it, as in all other matters determined by the court, should appear of record. A glance at the rejoinder on file in the case under consideration, will suffice to show that the circuit court either overlooked or disregarded the 77th sec., or it never would have suffered these rejoinders to have been filed. Taken all together, they do, at most, but amount to *nul tiel record,* and traverse the material facts of the replication.

We are aware that something more than this seems to have been contemplated by the defendants. He no doubt intended to put in issue the identity of the defendant and of the cause of action in the two suits. This he wholly failed to do. The records (the only competent evidence under the issue), in which like names and causes of action were disclosed, was amply sufficient to sustain the issue on the part of the plaintiff. He who would question these matters, must do so by affirmative pleading; when the existence of the record is denied, or when any material fact therein is denied, the record is the only evidence permissible. *May v. Jamison,* 6 *Eng. Rep.* 368. The case of *Barkman v. Hopkins, & Co.,* 6 *Eng. Rep.* 157, may to some extent show the proper mode of interposing a defense of this kind. In that case the record showed a judgment *prima facie* valid and binding upon the defendant: *nul tiel record* would not have availed him as a defense, yet a special plea was allowed, setting up new matter consistent with facts set forth in the record, and yet a valid defence.

There are two other decisions of this court which may be thought to bear upon this question. The first is the *State v. Murphy,* indicted for an escape. That was a criminal proceeding where the

general issue put the State to strict proof of the material facts in the indictment, and even in that case it is not altogether clear that the rule was not extended too far. The other was the case of *White v. Yell,* decided at the July term, 1851. A plea in abatement averring a former action pending between the same parties on the same cause of action, was interposed without affidavit. The question was whether the averments should be verified by affidavit. It was held that they should, but expressly upon the ground that in abatement greater certainty of pleading was required, and that although the rule might be different in ordinary pleading, yet the facts, although *prima facie* of record, should be verified by affidavit.

We are not however called upon to decide, nor do we intend to be understood as deciding, what the practice in such cases should be. The question is not before us on demurrer.

Turning to the more immediate subject before us, there can be no doubt of the right of the defendant to file one rejoinder. This he could have done without leave of the court; and if the plaintiff's motion had been to strike out all but one of them, it should have been sustained. His motion was, however, general and embraced all of the rejoinders, and as the motion came as an entire proposition to strike them all out, unless no one of them presented matter which, if well pleaded, would have been a legal response to the replication, it was correctly overruled. The court was not bound to separate an entire proposition, and sustain the motion as to part and overrule it as to the balance. *State v. Jennings, use, &c.,* 5 *Eng. Rep.* 428.

The judgment of the circuit court must be affirmed.