CASSADY & DUNN *vs.* CLARKE.

Plaintiff agreed to do the carpenter-work of a brick house for defendants, for which they were to pay him a stipulated sum on the completion of the work. In covenant on the agreement, plaintiff, in the declaration, alleges full performance on his part, except the furnishing of six window shutters, and alleges as an excuse for not furnishing them, that defendants refused to receive such as he contracted to furnish—Held, on demurrer, that the excuse for the non-performance of that portion of plaintiff's covenant was sufficient.

Where a duty is created by law, a party will be excused from performing it, if disabled without his own fault, but it is otherwise where the duty arises from his own agreement. Hence where plaintiff agreed to do the carpenter-work of a house by a particular day, it is no excuse for a non-performance within the time, that he was prevented by sickness; but if defendant permitted him to go on after the day and complete the work, and then accepted it, it is a sufficient performance on the part of the plaintiff to entitle him to recover of the defendant the stipulated price of the work.

A plea which does not traverse any material allegation in the declaration, nor confess and avoid, but merely sets up matters which are admitted by the declaration, is bad on demurrer.

So with a plea controverting an unnecessary and superfluous allegation.

Writ of Error to the Circuit Court of Crawford County.

COVENANT, determined in the Crawford circuit court, at the August term 1845, before the Hon. R. C. S. BROWN, judge.

The declaration, in substance, follows:

"Henry Clark complains of Thomas Cassady and Matthew Dunn of a plea of breach of covenant: for that whereas heretofore on the

5th day of August, 1844, at, &c., by a certain covenant then and there made by and between the said plaintiff and Robert S. Gibson now deceased, as his security, and who is not a party to this action, and the said defendants, which said covenant was sealed with the respective seals of said plaintiff, said Gibson, the said defendants, and also of Thomas McCameon, who is not sued, and which plaintiff now brings here into court, the date whereof is the day and year aforesaid; by which said covenant, the said plaintiff for and in consideration of the several sums of money to be paid as hereinafter specified, agreed to do and perform all the carpenter-work in and about a brick house, to be erected in Fort Smith in the county of Crawford aforesaid, on lot No. 102 and block No. 7 according to the plat and survey of said town, on or before the 15th day of December 1844 said building to be of the following dimensions, to wit: two stories high, 40 feet long by 22 feet broad; said building to have six windows, 12 lights, each 12 by 14 glass, and ten windows above of 12 lights, 10 by 12 glass, six panel doors, two floors dressed, tongued and grooved, one room ceiled, two mantle-pieces, 20 feet of counter and shelves, four rooms with wash-boards around, and shutters for six windows; and said Clarke also agreed to find lumber, nails, glass, and four locks; all of which was to be done in a good plain and workman-like manner at the time above specified, unless longer detained by the brick work of said building: and the said defendants for and in consideration thereof agreed to pay said plaintiff $100 in hand, $100 when said building was roofed in, and $300 when the building was finished, making in all the sum of $500; to which said several agreements said defendants and plaintiff, and said Gibson as his security, jointly and severally bound themselves, their heirs, &c. in the penal sum of $1000. And although the said plaintiff did well and truly execute and perform all the carpenter-work in and about said brick house, in a good, plain, and workman-like manner, according to the specifications and plan thereof contained in said covenant, and did well and truly perform and fulfill all things mentioned and contained in said covenant, on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof, *except in this, that said*

plaintiff did not make and finish shutters for six windows; and plaintiff avers that the *reason* why he did not make and finish the said shutters was that the said defendants *refused to accept and receive such shutters as were required by said covenant:* and *except* also that the said *plaintiff did not* do and perform *all the carpenter-work* in and about said brick house *on or before the* 15*th day of December* 1844; and plaintiff avers that he did not do and perform all the carpenter-work in and about said building on or before the said 15th day of December 1844, because of said *plaintiff's indisposition, and of his inability to procure lumber,* but the plaintiff avers that he did afterwards, to-wit: on the first day of April 1845, at, &c., do and perform all the carpenter-work in and about said building, in a good, plain and workman-like manner, according to the specification and plan thereof, contained in said covenant, *except as aforesaid,* and did then and there *tender said building* so completed and finished as aforesaid to said defendants, and the said plaintiff avers that said defendants did then and there *receive and take possession of said building* so completed and finished as aforesaid, and expressed themselves well satisfied therewith. Nevertheless the said plaintiff in fact saith that the said defendants did not, nor would faithfully perform and fulfill all things contained in said covenant, on their part to be performed and fulfilled, according to the tenor and effect thereof, but on the contrary thereof they the said defendants broke their said covenant, in this, that they did not pay to plaintiff $100 in hand, nor did they pay to plaintiff $100 when said building was roofed in, nor did they pay plaintiff $300 when said building was finished, although often requested so to do." Then followed a general breach in the usual form, concluding to plaintiff's damage $1000. Dunn filed a separate demurrer to the second and third breaches of the declaration, that is, the breaches alleging a failure of defendants to make the second and third payments, and assigned for causes of demurrer: "1st, the declaration contains no averment of the performance of the several conditions precedent to the payment of the said several sums of money in said 2nd and 3rd breaches mentioned, nor any sufficient excuse for the non-performance thereof: 2d, the declaration neither alleges the time when

said building was roofed in, nor the manner in which it was done: 3d, it is not alleged that defendants had notice of the times when said building was roofed in, and when it was completed: 4th, it is not alleged that plaintiff made a special request of defendants to pay said several sums of money in said breaches mentioned: 5th, the declaration does not show a legal excuse for not making and furnishing shutters for six windows: 6th, no legal excuse is shown for not completing said building at the time required by the stipulations of the said deed: and 7th, the declaration alleges a general performance of the conditions precedent, without alleging and showing specifically how, and in what manner, plaintiff performed the covenants on his part."

The defendant Cassady filed six separate pleas: 1st, payment of $100 at the time of entering into the covenant according to agreement: 2d, payment of $100 when the building was roofed in: 3d, accord and satisfaction as to the $300 installment: 5th, "and for a further plea &c., as to the said supposed breach of convenant lastly above assigned, said Cassady says *actio non,* because he says, that the brick work of said building was completed in full time for plaintiff to have done and performed all the carpenter-work in and about said brick house according to the stipulations of said covenant, and to find and procure lumber, nails, glass, and four locks, before the said 15th day of December 1844, and of this said plaintiff had notice, to-wit: on the first day of September 1845, at &c. And said Cassady further avers that although the said plaintiff was not prevented or delayed from doing and performing all the carpenter-work in and about said house in a good and plain and workman-like manner, according to the true intent and meaning of said deed, by reason of the brick work of said house not having been completed in due time; and the said Cassady further says, that the said plaintiff did not do and perform all the carpenter-work in and about said brick house, in manner and form as aforesaid, on or before the 15th day of Dec'r 1844, contrary to the tenor of the aforesaid deed: and the covenant of said plaintiff being a condition precedent to the performance of the covenant aforesaid, he ought not to be bound to the performance of his covenant until said plaintiff hath in all things

performed and fulfilled his aforesaid covenant, and this he is ready to verify," &c: 5th, "and for a further plea, &c. as to said supposed breach of covenant thirdly above assigned, said Cassady says *actio non,* because he says that said plaintiff did not do and perform all the carpenter-work in and about said brick house, in a good, plain and workman-like manner, according to the tenor and effect, true intent and meaning of said deed; and the covenant of said plaintiff being a condition precedent to the performance of the convenant aforesaid, he ought not to be bound to the performance of his covenant until said plaintiff hath in all things performed and fulfilled his aforesaid covenant, and of this he puts himself on the country:" and the 6th, "and for a further plea &c., as to said supposed breach of covenant thirdly above assigned, the said Cassady says *actio non,* because he says that neither the said Cassady nor the said Dunn did express themselves well satisfied with said building at the time of the receiving and taking possession thereof, in manner and form as alleged in said plaintiff's declaration, and of this he puts himself upon the country."

Plaintiff took issue to the first three, and demurred to the 4th, 5th, and 6th pleas. The court overruled Dunn's demurrer to the declaration, and sustained plaintiff's demurrer to the last three pleas. Dunn declined to answer over, and the cause was tried on the issues to the first three pleas: the jury found for plaintiff on the third plea, against him on the other two, and final judgment was rendered accordingly. Defendants brought error.

W. WALKER, for the plaintiffs. The demurrer to the declaration ought to have been sustained. The performance of the work and the furnishing of the materials, on the part of Clarke, are clearly conditions precedent to the payment of the money. See *Chitty's Pleading,* 1 *Vol. m. p.* 354: and the omission of the averment of performance of a condition precedent or of an excuse for the non-performance is fatal on demurrer, or in case of judgment by default. See *Chitty's Pleading, Vol.* 1 *m. p.* 360. If there be a condition precedent, however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed

does not vest. Same book, *m. p.* 354. The declaration does not allege that the work was completed at the time required, nor that the plaintiff "made and provided shutters for six windows." The excuses stated in the declaration for the non-performance of the conditions precedent are insufficient. In stating an excuse for non-performance of a condition precedent, it must be shown that the defendant either prevented the performance or rendered it unnecessary to do the prior act, by his neglect, or by his discharging the plaintiff from performance. See same book, *m. p.* 358. The plaintiff does not even allege that the shutters were made, the allegation that defendant refused to receive and accept such shutters as were required by the contract, without showing that such shutters had been made and tendered, amounts to nothing. The time stipulated for the completion of the building was important, and unless the plaintiff could show that the building was completed at that time, or a legal excuse therefor, he was not entitled to recover. In the 1st Vol. of Johnson's Reports, page 282, it is decided that if there be a special agreement under seal to do work, the workman cannot maintain covenant unless he perform the work strictly within the time. If the plaintiff cannot prove performance pursuant to agreement, either in point of time and other respects, he must abandon his contract and sue on the general counts. 1 *Vol. American Common Law.*

The declaration is clearly defective in alleging generally that the plaintiff had kept and performed all the covenants in the deed on his part to be performed, without showing specially the mode and manner of their performance, that the court might judge whether the intent of the covenant had been duly fulfilled—the *quo modo* ought to have been pointed out. See *Chitty's Pleading,* 1 *Vol. m. page* 356.

The demurrer to the 4th and 5th pleas ought to have been overruled.

The contract was to pay $100 when the building should be roofed in, and $300 when it should be completed; and averments of notice of the building being roofed in, and of the completion of the building, and a special request to pay over were necessary. It is laid

down in *Comyn's Digest, Vol.* 6, *title, Pleader, page* 86, (*c.* 75) that "if a man be bound, covenants, or assumes to pay money, to convey lands &c., on the performance of an act by a stranger, notice need not be alleged, for it lies in the defendant's cognizance as well as in the plaintiff's and he is to take notice," but it is otherwise when money is to be paid on the performance of an act by the plaintiff.

PIKE & BALDWIN, contra.

OLDHAM, J. This action is brought upon a covenant entered into between the parties to this suit and others as their respective securities, whereby Clarke obligated himself to perform all the carpenter's work of a certain brick house to be built in the town of Fort Smith, for Cassady & Dunn in a plain workman-like manner, and to furnish lumber and other materials, and to complete the work by the 15th day of December 1844. In consideration of which Cassady & Dunn agreed to pay him one hundred dollars in hand, one hundred dollars when the building should be roofed, and three hundred dollars when it should be completed. The declaration avers that "Clarke did well and truly execute and perform all the carpenter's work in and about said brick house, in a good, plain and workman-like manner according to the specifications and plan thereof contained in said covenant, and did well and truly perform all things mentioned and contained in said covenant on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning of the said covenant except in this, that he did not make and finish shutters for six windows, but the reason why he did not make them, said Dunn and Cassady refused to accept and receive such shutters as were required by said covenant, and also that he did not do and perform said work on or before the 15th day of December 1844, because of his indisposition and of his inability to procure lumber; but that he did afterwards, to-wit, on the first day of April 1845 complete said work with the exception aforesaid, and tendered said building so completed to said Cassady and Dunn, who received and took possession of the

same and expressed themselves well satisfied therewith. The declaration then charges for a breach on the part of Cassady & Dunn, the non-payment of the one hundred dollars in hand, one hundred dollars when the building was roofed, and three hundred dollars when it was completed. The defendant Dunn demurred to the declaration, and Cassady filed six pleas. To the first three the plaintiff took issue and demurred to the others. The demurrer to the declaration was overruled and that to the pleas sustained. The issues upon the remaining pleas were tried, when the first two, averring payment of one hundred dollars in hand and one hundred dollars when the building was roofed, were found for the defendants; the other plea for the plaintiffs, and his damages were assessed to sixty-eight dollars and twenty-five cents, for which and costs judgment was rendered in his favor.

It is contended for the plaintiffs in error, who were the defendants below, that the declaration is defective in not showing a sufficient performance of the condition precedent on the part of the defendant in error. It is no objection that the six window shutters were not made, as a lawful excuse is shown for that failure—the refusal of the opposite party to receive such shutters as were required by the agreement. In *Wilhelm vs. Caul,* 2 *Watts & Serg.* 27, it was held that "if a contract require the performance of the entire work by one party, yet if the other party dispense with portions of it, the plaintiff may recover under the contract the price he is entitled to for the work actually done, and that where the plaintiff contracted to do the carpenter's work of a house for the defendant, for a certain price to be paid as the work progressed, and completed the work with the exception of two doors and a window, which the defendant dispensed with, he might recover for the work actually done." That case we think sufficient to settle this point in the question under consideration.

The indisposition of Clarke, and his inability to procure lumber, which, by the agreement he was to furnish, afford no excuse for the non-completion of the work by the 15th day of December, 1844, when by the contract it should have been finished. Where a duty is created by law, a party will be excused from performing

it, if he is disabled without his own fault, but it is otherwise where the duty arises from his own agreement. *Mill Dam Foundry vs. Hovey,* 21 *Pick. Rep.* 417, 430, 431, 441. And therefore where a person contracts to build a house, he will not be discharged by its being destroyed by fire before its completion. *Adams vs. Nichols,* 19 *Pick.* 275.

Although he did not complete the house by the time in which he agreed to do it, and was in law guilty of a breach of his covenant, yet as he was permitted to go on with the work and complete it, which was then tendered to and accepted by the other party, it amounted to such a performance of the contract on his part as will entitle him to his action against them for a breach of their part of the contract. In *Flagg vs. Dryden,* 7 *Pick.* 52, the plaintiff, having agreed to deliver certain machinery at a certain time and place, delivered it after the time: it was held to amount to a performance if the defendant agreed to the postponement, or knowing of the delivery did not dissent.

The demurrer was properly sustained to Cassady's pleas. They are palpably and manifestly bad. The fourth and fifth, so far from traversing any material allegation contained in the declaration, or of confessing and avoiding it, set up matters which are admitted. The fourth plea alleges that the brick work of the house was completed in time for Clarke to have done the carpenter's work by the 15th Dec., 1844, when it should have been completed, and that he did not complete the work within the time specified by the contract. The declaration by not alleging by way of excuse that the brick work was not completed in sufficient time, admits that such excuse did not exist, and it specially admits that the carpenter's work was not completed within the time agreed upon, but sets up as we have already seen, a legal avoidance of that failure. The fifth denies that Clarke performed all the carpenter's work in a good and plain, workmanlike manner &c., which fact is expressly admitted, six window shutters not having been made, but for which a valid excuse is also shown. The sixth plea traverses a wholly unnecessary and superfluous allegation contained in the declaration. The completion of the work, after the time when it should

have been completed, together with the tender of the house so completed by Clarke, and the acceptance and possession thereof by Cassady and Dunn are the substantial facts which go to show performance. What was said by them of their being satisfied may be matter of evidence, but is wholly useless and immaterial as an allegation in the declaration.

We see no error in the judgment and the same is therefore affirmed.