LINCOLN *vs.* WILAMOWICZ.

The right of a defendant under our statute to plead as many several matters whether of law or fact, as he may think necessary for his defence, cannot be limited or restricted by the court.

The regular order of pleading matters of law and fact must be observed. *Pope vs. Latham*, 1 *Ark.* 66, cited.

Appeal from the Circuit Court of Pulaski County.

ASSUMPSIT, determined before Clendenin judge, in June 1846. The declaration counted upon a promissory note made by Jennings, Tucker and Lincoln to Baker, who endorsed to Brown & Fenno, who endorsed to the plaintiff Wilamowicz. Lincoln only was sued, he pleaded five pleas all of which except the first, which was non-assumpsit, were sworn to. The plaintiff moved to strike out the 2d, 3d, 4th and 5th pleas because the 2d and 3d were inconsistent with and contradicted the 4th and 5th, in that the 2d and 3d admit a consideration and the 4th and 5th deny any consideration whatever. The motion was sustained, and Lincoln excepted. Final judgment was then taken for the plaintiff, the defendant refusing to amend, or say more. The note sued on was for $300. The defense relied upon was usury. The second plea stated in sub-

stance that Jennings corruptly agreed contrary &c. with Brown and Fenno for the loan of $200 at usurious interest, to secure which the above note was made and endorsed as stated above. The third plea was in substance the same except that the corrupt agreement was with Brown. The fourth and fifth pleas simply deny any consideration whatever for the note. The pleas are drawn up with care and the second and third at great length and fulness. Lincoln appealed.

HEMPSTEAD and LINCOLN, for the appellant. 1. The court, on mere motion, struck four pleas from the files on the ground that they were inconsistent with each other. If the reason assigned had any existence, which it has not, the decision would still be in violation of law. The defence offered could not be received, according to a late decision of this court, under the plea of non-assumpsit, so that the effect of the ruling was to deprive the defendant of his whole defence to the action. A defendant in all actions, may plead as many several matters whether of law or fact, as he may think necessary for his defence. *Rev. Stat. sec.* 68, *p.* 628. One plea cannot be taken to help or destroy another, but every plea must stand or fall by itself on a demurrer to it (*Grills vs. Mannell, Willes' R.* 380) and the rule must be the same on a motion to strike out; the proceeding on which, has been regarded by this court in the same light as if the pleading had come up on demurrer. *Pope vs. Tunstall,* 2 *Ark.* 222.

2. But what if the pleas are inconsistent; the law allows it, and the books of precedent are full of such pleas. In assumpsit, the general issue, payment, infancy, release, usury, and the statute of limitations may be pleaded together. In covenant or debt on bond, *non est factum,* usury, payment, discharge by bankruptcy, and accord and satisfaction may be pleaded together in the same action. In trespass, not guilty and justification, and accord and satisfaction may be pleaded in the same action; and many other examples might be put if it were necessary. *Com. Dig. Pleader, E.* 2 *Tidd's Practice* 655. *Atkinson vs. Atkinson, Stra.* 871. *Lechmere vs. Rice,* 2 *Bos. & Pul.* 12. *Union Bank vs. Ridgley,* 1 *Har. & G.*

324. Chitty asserts the general doctrine to be that the defendant may in different pleas, state as many substantial grounds of defence as may be thought necessary though they may appear to be contradictory or inconsistent. 1 *Chitty's Pl.* 593.

3. Where a disposition is manifested to unnecessarily encumber the record with pleas clearly and indisputably repugnant to each other, or with several pleas of the same kind and admitting the same proof, the only motion which a court can properly entertain is to compel the party to elect on which he will stand and proceed to trial. 1 *Chitty's Pl.* 595. *Pelham vs. Page,* 1 *English* 538. The case of *Chitty vs. Hume,* 13 *East,* 255, fully and pointedly sustains the practice—which is just in itself, because it affords the party an opportunity to defend, while the other entirely cuts it off.

4. The third and fourth pleas setting up the usury with certainty and particularity, as to both form and substance, are absolutely necessary, and without which no defence could be made, and neither of them can be dispensed with because great precision is required in pleas of this character, and the proof must correspond with the allegation. *Ferrall vs. Shaen.* 2 *Saund.* 295, *note* 1. 2 *Stark. Ev.* 860. *Tate vs. Wellings,* 3 *T. R.* 531.

WATKINS & CURRAN, contra. 1. We do not contend that a party cannot plead inconsistent pleas. There are too many adjudications upon similar statutes, determining that a party has such right for that question to be mooted at this day; but the position assumed by us is that a party will not be permitted to file inconsistent pleas, sworn to. For a defendant to file two pleas directly contradictory, both supported by affidavit, would be mere mockery—a contempt of court, and it would be the duty of the court, of its own motion, to order them to be taken from the files.

2. Usury cannot be given in evidence under the pleadings. It is the grade of evidence that determines the character of the pleadings. It results from the various statutory provisions in this State, that it requires the same grade of evidence to impeach the consideration of a note, as a bond—the two kinds of instruments are placed on the same footing. *The R. E. Bank,* 4 *Ark. Rep.* 124.

In actions upon bonds, usury must be pleaded specially. *Comyn Dig. title Pleader,* 2 *W.* 23. 2 *Saund. Pl. & Ev.* 895. 2 *Saund. Rep.* 295, *a.* All pleas impeaching the consideration of any instrument, whether sealed or not, must be supported by affidavit. *Rev. Stat. p.* 129, *sec.* 75. Usury impeaches the consideration and consequently comes within the statute requiring pleas to be supported by affidavit. *Vincent vs. Howell, ante.*

OLDHAM, J. The appellant contends that the circuit court improperly struck out his 2d, 3d, 4th and 5th pleas to the declaration of the appellee who was plaintiff below. It is contended for the appellee that the pleas were inconsistent and were therefore properly stricken out.

By *Rev. St. ch.* 116, *sec.* 68, it is enacted that "the plaintiff in replevin and the defendant in all other actions may plead as many several matters, whether of law or fact, as he may think necessary for his defence." This section of the statute is *verbatim,* the same as the statute of Virginia upon the same subject. See *Rev. Code of Virginia of* 1819, *Vol.* 1, *p.* 510, *sec.* 88. The right of the defendant to file inconsistent pleas under the statute of Virginia was discussed and decided in the case of *Furniss et al. vs. Ellis & Allan,* 2 *Brock.* 14. In delivering the opinion of the court in that case, Chief Justice Marshall said: "From the comprehensive letter of the law there would be some difficulty in excluding any plea which the defendant might offer at a time when he had a right to offer it. * * * But the plaintiffs contend that there is in the nature and fitness of things an objection to the allowance of inconsistent matter to be pleaded in the same cause which must enter into the act of assembly and control or at least influence the meaning of its words. There is, they say, this inconsistency in a demurrer to a whole declaration and a plea to the whole; the demurrer confesses all the facts and the plea denies them all. * * * I cannot however admit that it is beyond the power of the legislature to pass an act allowing inconsistent pleas, or that a court can disregard such an act.

The plaintiff's counsel supports his argument by reference to

several English authorities, to all which I think it may be observed that the law which governs the practice in England is different from that which governs the practice in Virginia. The statute of 4 and 5 *Anne, ch.* 16, allows the defendant to plead several matters only with the leave of the court. English statute gives the court a controlling power over the admission of the plea; the statute of Virginia gives the court no such power. In the exercise of this controlling power, the courts of England have presented rules by which they will be governed in granting or refusing an application to plead different matters. But the courts of Virginia can prescribe no such rules. The law declares that the defendant may plead as many several matters of law and fact as he pleases, without making any application to the court necessary. The defendant in England is, when he first pleads, in the same situation as to a double plea that the defendant in Virginia is after his right to plead depends on the favor of the court."

We have thus far adopted the language employed by C. J. Marshall in construing a statute precisely the same as our own, and under which he decided that the defendant might file both a plea and demurrer to the same declaration. To this extent however we are not prepared to go. The statute is in the alternative and gives to the defendant the right to plead as many pleas whether of law or fact &c. and in doing this he should be held to the order of pleading matters of law and fact. A plea in bar of fact is subsequent to a demurrer in the order of pleading, and the first is considered as an abandonment or waiver of the last. In *Pope, Gov. use &c. vs. Latham,* 1 *Ark. R.* 60, it was held that "a plea of *non est factum* denying the execution of the deed, and a plea of conditions performed admitting its execution" &c. could not be pleaded together. Although the territorial statute then in force was the same as that now in force upon the subject, yet the court does not refer to the statute or acknowledge the rights of the defendant under it. Even under the English statute the courts have allowed many inconsistent matters to be pleaded at the same time, as the authorities cited by the appellant clearly show. We believe the construction which we have given to the act is the proper one, and the

rights of the defendant under the statute cannot be limited or restricted by the court. The court therefore erred in striking the pleas from the record. Had the defendant below pleaded the same matter in several pleas, all amounting to the same thing, the court might have compelled him to elect upon which plea he would rely.

The remaining question presented by the record, that the court refused to permit evidence of usury to be given to the jury under the general issue without affidavit, has already been decided at the present term in *Jennings vs. Wilamowicz,* in accordance with the decision of the circuit court in this case. Reversed.