BEEBE *vs.* SUTTON.

A plea on partial payment is bad on demurrer.

Writ of Error to the Circuit Court of Pulaski County.

DEBT, on a writing obligatory for $458.33 determined before Clendenin judge in November 1845. Sutton sued Beebe. There was a plea of payment stating that on the day the bond fell due the defendant paid to the plaintiff three hundred dollars, parcel of the sum demanded. There was a demurrer assigning for cause, that a parcel payment was no defence at law—the court so held; and the defendant refusing to say more, final judgment went against him.

WATKINS & CURRAN, for the plaintiff. Where a plea begins only

as an answer to part, and is in truth but an answer to part, the plaintiff must not demur or reply without first taking judgment as by *nil dicit* for the part unanswered; for if he does the whole action is discontinued, unless there are other pleas in the case going to the whole action. 1 *Saund. R. p.* 28, *note* 3. 1 *Rolls. Abr.* 487, *pl.* 10. 1 *Salk.* 179. *id.* 180. 1 *Ld. Raym.* 231. *id.* 716. 2 *Ld. Raym.* 841. 1 *Stra.* 308. 1 *Ch. Pl.* 554. *Stephens Pl.* 216. 1 *Bos. & Pul.* 411. 1 *Gould's Pl.* 261-2-3-4, 4 *Reports* 62. 8 *Petersdorf's Abr.* 273. 7 *Modern* 124. 12 *Modern* 421. *Warren vs. Nexson et al.* 3 *Scammon* 38.

The rule has been denied to be the law in New York, but upon examination we find that the change originated in a mistake in one case, and that case followed for uniformity. The first case was *Sterling vs. Sherwood,* 20 *John. R.* 206, in which there was plea of not guilty to the whole, and a justification to part: but the court did not place the decision upon the ground that there was another plea to the whole but decided generally that it was not a discontinuance to demur to the plea of justification as to part. The decision was correct but the court placed it on the wrong ground. Inasmuch as the plea of not guilty went to the whole action, there could not possibly be a discontinuance. In the case of *Warren vs. Nexson et al. ub. sup.,* the court say "against the whole current of authority upon the subject stands the case of *Sterling vs. Sherwood,* 20 *J. R.* 204. In delivering the opinion of the court in that case chief justice Spencer expresses a very decided opinion that the doctrine as laid down by Chitty and Saunders, is not law. In support of his decision he cites the cases of *Higgs vs. Deniston,* 3 *John. Cas.* 205 and *Buttythorpe vs. Turner, Willes* 475. In the case of *Riggs vs. Deniston* it does not appear but that the plea professed to answer the whole action, and consequently no inference can be drawn from this case either for or against the doctrine of discontinuance. Chief Justice Spencer seems to place his main reliance on the case of *Buttythorpe vs. Turner,* in which chief justice Willes repudiates the doctrine of discontinuance and cites the case of *Hughes vs. Phillips, Yelverton* 38, and a case in *Croke James.* By reference to the two cases cited by chief justice Willes it will

be seen that neither of them sustain his decision. In the case in *Yelverton* the plea professes to answer the whole declaration, and the court say that the question of discontinuance was neither raised nor decided during the progress of that case. See *Yelverton's Rep.* 38. It also appears from Sergeant Williams, note to 1 Saunders 28 that the question of discontinuance was not involved in the case cited from *Croke James.* Sergeant Williams, after reviewing both of those cases arrives at the following conclusion. 'It seems therefore that the opinion of chief justice Willes is not well founded, especially as the other cases cited in the above note fully support *Herley Rendon's* case.' The decision of chief justice Willes being unsupported by the cases on which it was predicated and the opinion of chief justice Spencer being founded on the decision of chief justice Willes of course neither of them can be considered as authority when standing in direct opposition to the whole current of authorities upon this subject."

In *Ethelridge vs. Osbourn,* 12 *Wend. R.* 402, *Sutherland J.,* in delivering the opinion of the court on the demurrer to the plea, admits the rule in England to be as stated in Chitty and Saunders, but says the whole rule is different in New York—that the English rule is the soundest but that since the case of *Sterling vs. Sherwood,* 20 *J. R.* 206, a different rule of practice has grown up in New York which for the sake of uniformity ought not now to be disturbed.

RINGO & TRAPNALL, contra. Error assigned that demurrer to the plea without first taking judgment for the residue of the demand unanswered, discontinued the action. This is laid down by *Chitty* 1 *Vol.* 554 to be law, on the authority of *Salk.* 179. 1 *Saund.* 28, *note* 3. 1 *Hew. Blac.* 645. But this position is successfully controverted by judge Kent in *Riggs vs. Deniston,* 3 *John. Cases* 205, and by judge Spencer in *Sterling vs Sherwood,* 20 *John.* 205; and the contrary is well established. 2 *Vern.* 193. *Cro. Jomes* 434. *Willes R.* 475, 480. *Yelv.* 38.

A plea of partial payment is no defence at law. *McConnell ad'r vs. Ficklin,* 4 *Bibb.* 414. *Stark's ad'r vs. Thompson's Ev.,* 3 *Mon-*

roe 299. *Mechanic's Bank vs. Haggard,* 13 *John.* 353. *Dederick vs. Lemon,* 9 *John.* 333, and was no answer to any part of the demand.

JOHNSON, C. J. The defendant below pleaded partial payment to which the plaintiff demurred, which demurrer was sustained by the court. The plaintiff in error has brought the case into this court and assigns for error the decision of the circuit court in thus sustaining the demurrer to the plea. In England if a plea begins as an answer only to part of the declaration and is in truth only an answer to part, the plaintiff cannot demur, but must take judgment for the part unswered as by *nil dicit.* Here, however, it is otherwise: and to such plea a general demurrer will be sustained. *Etheridge vs. Osbourn,* 12 *Wend.* 399. If a plea professes to answer only a part of a count and is in truth but an answer to part, the plaintiff may demur, and is not bound to take judgment for the part unanswered; so held, where in covenant two breaches were assigned and the defendant put in a plea as to the breach first assigned, without any notice of the second breach. *Slocum vs. Despard,* 8 *Wen.* 615. The case of *Sterling vs. Sherwood,* 20 *J. R.* 204, is also strictly in point and conclusive upon the parties.

Judgment affirmed.