

HAMILTON vs. BUXTON.

ERROR to the circuit court of Conway.

By the rules of the common law, if parties who ought to be sued, are omitted, the nonjoinder is matter of abatement, and cannot be taken advantage of by demurrer, unless it appear from the face of the declaration that the parties not sued, not only entered into the contract sued upon, but are living. Under section 64, chapter 116 of Revised Statutes of Arkansas, page 628, a person having a cause of action against a firm of individuals, on a partnership contract, may sue one or more of the partners at his election. There is a repugnancy between section 3, chapter 1, page 58, and section 64, chapter 116, page 628 of the Revised Statutes of Arkansas, and the latter, having been passed subsequently to the former, repeals it, under a rule of construction prescribed by the Legislature.

THIS was an action of assumpsit, by attachment, brought by Henry Hamilton against Earl Buxton, and determined in the Conway circuit court, at the August term, 1843, before Judge BROWN.

The declaration charged that the defendant was indebted to the plaintiff for goods, wares, and merchandise, sold to *him*, *Berger* and *Ball* (who were not sued) as partners, under the style of *Berger, Buxton & Co.*

The defendant demurred to the declaration, because the other members of the firm were not joined in the action. The court

sustained the demurrer, and gave judgment for the defendant, which the plaintiff assigns as error, in this court.

The questions which arose under the assignment are: 1st, whether the plaintiff had a right, under the provisions of the Revised Code, to sue one of the partners alone on a partnership contract? 2d, if he did not, could the non-joinder be taken advantage of by demurrer? There was no averment in the declaration that the partners not sued were *dead or living*

CUMMINS, for the plaintiff. *Sec. 64, ch. 116, Rev. St.* authorizes any party having cause of action against several persons, and entitled to but one satisfaction, to sue one or any number of them. No distinction is perceived between the nature of the liability of partners on a partnership contract and that of other joint contractors, which would exempt the former from the operation of this section.

If there be any repugnancy between the above section and the *3d sec. of ch. 1, Rev. St. tit. ab.*, the later is repealed by the former, as it was passed subsequently. See *sec. 24, ch. 129, Rev. St.*

LINTON & BATSON, contra. That there was not the proper parties defendants, see 1 *Saund.* 153, *n. 1, 291, b. n. 4.* 1 *Ch. Pl. tit. "Joinder of Parties."* That the non-joinder could be reached by demurrer, 1 *Saund.* 291, *b. 154.* *South vs. Tanner et al.*, 2 *Taunton*, 254. 5 *Burr.* 2614. 2 *East.* 313. 2 *D. & R.* 439.

JOHNSON, C. J., delivered the opinion of the court.

This was an action of assumpsit, by attachment, brought by the plaintiff in error against the defendant in error, in the Conway circuit court. The plaintiff declared against the defendant upon a contract, which he avers he made together with Bennet B. Ball and Benedict Berger; that they made the contract with him as partners, and that Ball and Berger are not sued. To this declaration the defendant interposed his demurrer, and had judgment. To reverse which the case is brought into this court.

The question raised by the record and assignment of errors, is

whether the demurrer was rightly sustained. In order to decide this question correctly, it will be necessary in the first place to see what the common law is upon the subject, and then to inquire whether or not the common law has been repealed or in any manner impaired by the statutes of our State. If it had appeared, upon the face of the declaration, that the parties not sued had not only entered into the contract but were also in full life at the time of the institution of the suit, the demurrer, by the rules of the common law, would have been properly sustained. But the objection that parties, who ought to be joined, were omitted, was not available even at the common law, on demurrer, unless it appears in the declaration, or other pleading of the plaintiff that the parties not sued, not only made the contract but also that they are still living; and if this does not appear, the objection can only be taken advantage of by plea in abatement. *Taylor et al. vs. The Auditor*, 2 *Ark. R.* 174, and cases there cited. Generally speaking, all joint obligors and persons bound by covenants, contracts, or quasi contracts, ought to be made parties to the suit, and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of by plea in abatement; for, if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment upon the finding of the jury, or of variance in evidence in the trial. But the same doctrine does not appear to have been acted upon, in the full extent, in cases of recognizance and judgments, and other matters of record, such as bonds to the crown. If in cases of this sort it appears by the declaration or other pleadings, that there is another joint debtor, who is not sued, although it is not averred that he is living, the objection need not be pleaded in abatement, but it may be taken advantage of upon demurrer or arrest of judgment. *Gilman vs. Rives*, 10 *Peters*, 298. This is the doctrine of the common law; and it is clear that the judgment in this case is not warranted by it.

We now come to consider the second proposition; which is, to inquire whether there is any thing in the statutes of the State that will uphold and support the decision of the court below. The act

of March 5th, 1838, chapter 129 in the Revised Code, declares that "For the purpose of construction, the revised statutes passed at the present session of the General Assembly, shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times; but if any provisions of different statutes are repugnant to each other, that which shall have been last passed, shall prevail; and so much of any prior provisions as may be inconsistent with such last provisions, shall be deemed repealed thereby." Under this provision of the law it becomes necessary, in the investigation of this case, to compare two several acts of the legislature which were passed at different times, and to determine how they operate upon each other. The act of December 9th, 1837, chapter 1, provides that "when one or more of the partners of any company, or association of individuals shall be sued, and the person or persons so sued shall plead in abatement that the parties are not joined in the suit, such suit, for that cause, shall not abate; if the plaintiff sue out a summons against the other partners named in such plea, and on the return of such summons, the names of the other partners named in such plea may be inserted in the declaration, and the suit shall proceed in all other respects thereafter, as if the partner named in such plea had been included in the original suit. And the act of December 18, 1837, chapter 116, also provides that "every person who may have cause of action against several persons, and entitled by law to but one satisfaction therefor, may bring suit jointly against all or as many of them as he may think proper. The question here arises, whether the two last mentioned acts are repugnant to each other. For if so, the former is repealed by the latter. That there is a palpable and manifest repugnancy between the two acts cannot admit of doubt. The former contemplates cases which would admit of a plea alleging the non-joinder of parties who ought to be joined as co-defendants; whilst the latter confers no such privilege. Such being the construction which we feel bound to place upon these statutes, the plaintiff had his election to sue one or all of the parties, and such right being secured to him by the law the defendant had no right to demur for the non-joinder.

The judgment is therefore reversed, the case remanded to the Conway circuit court with instructions to overrule the defendant's demurrer; and to proceed with the case in conformity with this opinion.
