COX *vs.* GRACE.

In replevin, counts in *the cepit* and *detinet* may be joined, but in such case plaintiff must file two affidavits corresponding with the counts, or one affidavit embracing both counts.

But objections to the affidavit must be raised by plea in abatement, and not by demurrer to the declaration.

Writ of Error to Johnson Circuit Court.

REPLEVIN brought by Leah Grace against Batson W. Cox, determined in the Johnson Circuit Court, at the September term, 1848, before the HON. W. W. FLOYD, Judge.

Two counts in the declaration; *first,* in substance, that on the 29th June, 1848, at &c., the said defendant took the cattle of the said plaintiff, *to wit:* one cow of great value, *to wit:* of the value of ten dollars, and one calf of great value, *to wit:* of the value of four dollars, both of black color without ear-marks, and unjustly detains the same, wherefore, &c.

Second. And whereas afterwards, *to wit:* on the first day of July, 1848, at &c., the said defendant received from the plaintiff other cattle, *to wit:* one cow of great value, *to wit:* of the value of ten dollars, and one calf of great value, *to wit:* of the value of four dollars, both of black color, and without ear marks, to be delivered to the said plaintiff when thereunto afterwards requested, yet the said defendant although he was afterwards, *to wit:* on the 10th day of July, 1848, at &c., requested by the said

plaintiff so to do hath not as yet delivered the said cow [and calf] to the plaintiff but refuses to deliver the same, and unlawfully detains said property, wherefore, &c.

Appended to the declaration is the following affidavit:

"State of Arkansas,
County of Johnson.

This day comes before me, Clark B. Sartin, an acting and duly commissioned justice of the peace in and for the county aforesaid, Leah Grace, and makes oath, in due form of law, that the property mentioned in the foregoing declaration is hers, and that she is lawfully entitled to the possession of the same, and that it was wrongfully taken and detained from her, and that her right of action has accrued within two years. LEAH GRACE.

Sworn to and subscribed before me,
this 27th June, 1848.
C. B. SARTIN, J. P."

Demurrer to declaration for misjoinder of counts; demurrer overruled, defendant rested, and final judgment for plaintiff.

Defendant brought error.

W. WALKER, for the plaintiff, contended that the causes of action in the two counts were different in their nature and could not be joined. (Chitt. Pl. 200 *id.* 201. *Pirani vs. Barden,* 5 *Ark.* 81. *Trapnall vs. Hattier,* 1 *Eng.* 18. *Town vs. Evans, id.* 260. *Dig. Title Replevin, secs.* 4 *and* 6,) and that the filing of two affidavits would not enable the plaintiff to declare, in the same suit, for a wrongful taking, and for a wrongful detention.

No Counsel, *contra.*

MR. JUSTICE WALKER, delivered the opinion of the Court.

This is an action of Replevin. The declaration contains two counts, one for the taking and detention, the other for the detention only. The defendant demurred for misjoinder of counts: the demurrer was overruled and judgment rendered for the plaintiff.

The question is, can these two counts be joined in the same

action. The general rule is that where the same pleas may be pleaded, and the same judgment given on all of the counts in the declaration, or where the counts are of the same nature, and the same judgment is to be given on them all, though the plea be different, as in the case of debt on bond and simple contract, they may be joined. 1 *Chit. Pl.* 200. In this case the same form of action is presented in each count; upon each the judgment is the same; the statute however provides different pleas, and evidently contemplated different affidavits, adapted to the facts in each count. No objection therefore could be taken to the joinder of these counts, unless by doing so that provision of the statute which requires an affidavit to be filed by the plaintiff before the commencement of the action be rendered inoperative. The affidavit should state that the property was wrongfully taken, if for the taking; and if for the detention only, that it was wrongfully detained. Now if it was consistent with truth that one could be guilty of a tortious act, and still have acquired the property peaceably and lawfully and be only liable for a wrongful detention, then one affidavit would suffice; otherwise, one or the other of these counts must, if allowed to be joined, remain without an affidavit of the truth of the material allegations contained in it. Suppose however that, in truth, the plaintiff was the owner of two horses (for example) and the defendant acquires peaceable possession of one of them, and tortiously takes the other, and detains both; the plaintiff is clearly entitled to this action to recover both of them, and the question is, shall he be driven to two actions to recover them, or should he be permitted to sue for both in one declaration, varying the counts to suit the facts? If he can make the necessary affidavits we think he should be permitted to do so; for the courts invariably discourage multiplicity of actions. In cases of this kind we are of opinion that the plaintiff may truly file two affidavits, or one embracing both counts, distinctly verifying the truth of each count. By this means the whole object of the statute in requiring an affidavit would be fully subserved and the parties saved the expense of two suits.

It is true in this case that the affidavit is not sufficiently comprehensive to embrace both counts. Had that defect been plead in abatement, the count unsupported by affidavit should have been abated, for the plaintiff was endeavoring to prosecute his action upon two counts, when in fact his affidavit only related to one. The demurrer however does not reach this objection. We have the facts contained in the declaration alone before us, from which it affirmatively appears that the property in the second count is other and different property from that in the first count. The demurrer admits this to be true and we are simply called upon to say whether these counts may be joined in the same action without reference to the fact, whether the affidavit is sufficient or not. We are of opinion that they may, and that the demurrer was properly overruled.

The judgment of the Circuit Court is therefore in all things affirmed with costs.