HARRIS ET AL. *vs.* PRESTON ET AL.

The rule as to pleading in abatement is that if the facts which tend to give a better writ are particularly within the knowledge of the defendant, he must set them forth in his plea with precision.

What is necessary to show *misjoinder* or *nonjoinder* of parties.

An order of the county court appointing commissioners to divide land without petition and without notice to the parties interested is void, nor does the mere confirmation of their report by the court without decree of title or deed by them vest a legal title.

Persons having a separate and distinct right of action to distinct tracts of land, cannot join in a suit to recover such lands.

The legal effect of a *retraxit* is a present and perpetual release and abatement of all right of action in the subject matter in dispute so that at no subsequent period can the retractor in any form of action contest with the defendant his right or title to the possession of the property in suit.

Retraxit is a voluntary acknowledgment that the plaintiff has no cause of action, and therefore will not further proceed, which operates as a bar forever; and the retractor cannot assert title against the defendant in whose favor he has retracted, nor against any one who may take under such defendant.

After a retraxit the retractor cannot join in the prosecution of a writ of error, as it would be utterly at variance with the legal effect of the retraxit; but this objection must be interposed by plea before joinder, and comes too late after the pleadings are made up in the court.

In actions *ex delicto* judgment may be rendered against one defendant even though the other be acquitted.

Writ of Error to Phillips Circuit Court.

This was an action of ejectment brought in the Phillips Circuit Court by John K. Hart and Harriet his wife, late Harriet Burriss; Love M. Harris and Frankey his wife, late Frankey Burriss; Stephen Harris and Mary Jane his wife, late Mary Jane Burriss; Joshua Skinner and Martha Ann his wife, late Martha Ann Burriss; Benjamin Marcellus Mooney by his guardian Henry F. Mooney, son and heir at law of Elizabeth Mooney, late Elizabeth Burriss; John M. Burriss, Allen D. Burriss, William B. Bur-

riss, George W. Burriss and Margaret Burriss, heirs at law of Benjamin Burriss, deceased, and of Henry D. Burriss and Appleton E. Burriss, deceased, who were also heirs at law of the said Benjamin, plaintiffs, against John Preston, Junior, lessor, and John L. Gervais his tenant in possession, defendants, and was determined in said court on the 31st October, 1845. before the Hon. JOHN T. JONES, the judge thereof.

The declaration was in the usual form, and charged the defendants with unlawfully entering upon, and withholding from the possession of the plaintiffs the *north* half of section numbered *twenty-eight,* in township numbered *one* south of range numbered *four* east, containing three hundred and twenty acres of land, and the houses, tenements, appurtenances and buildings thereon situate, being in the county of Phillips, and that the plaintiffs were entitled to the possession thereof.

The defendants filed four pleas in abatement of the writ and declaration, and which were verified by affidavit. The first plea after averring that the plaintiffs had no right, title, or interest whatsoever in and to the tract of land and premises, mentioned in the declaration, and that the right, title, and interest of said Benjamin Burriss, Henry D. Burriss and Appleton E. Burriss, deceased, to the said tract of land and premises belonged to and vested absolutely in George W. Burriss, one of the plaintiffs, and Betsey Burriss, proceeded to state that after the death of the said Benjamin Burriss and before the institution of the suit, Nicholas Rightor, James Martin, and Thomas Harten, appointed commissioners on the 16th day of October, 1832, by order of the county court of Phillips county, then Territory of Arkansas, to make division and alotment among the heirs of Benjamin Burriss, deceased, of the lands belonging to his estate according to the provisions of his last will and testament allotted and awarded a part of the said tract of land, to wit: the N. E. quarter of section 28, township 1 south range 4 east, to the said plaintiff, William B. Burriss, and allotted and awarded to the plaintiff, George W. Burriss, the other part of the said tract of land, to wit: the N. W. quarter of sec. 28, township 1 south, range 4 east, and that

said commissioners reported such division and allotment to said county court, the report was filed, made a part of the record of said court, and was approved by the said court on the 23d day of January, 1833; and that on the 7th day of August, 1834, said William B. Burriss by deed of that date conveyed, transferred and assigned, to said Betsey Burriss all his right, title and interest in and to the said N. E. qr. sec. 28, township 1 south, range 4 east, which the defendants were ready to verify; and prayed judgment of the writ and declaration and that the same might be quashed.

To the second and third pleas, replications were filed and issue taken thereon, but these issues were not tried, nor is it necessary to notice them further.

The fourth plea averred, in substance, that Benjamin Burriss, the ancestor of the plaintiffs, died leaving Betsey Burriss his widow and, that by the law of the land then existing, she became entitled during her natural life to a joint interest with her children, the plaintiffs, in the tract of land sued for; and that she had not parted with her interest. To this plea a general demurrer was filed and sustained.

The plaintiff demurred to the first plea assigning as special causes, (1) that the matter therein set forth could not be pleaded in abatement, (2) that it was uncertain; (3) that it contained matter of record without asking that there should be an enquiry by the record; (4) and that the plea was double, bad, informal and insufficient. This demurrer was overruled April 12th, 1844, and the case continued until the next term with leave to the parties to make up their pleadings.

At the next term, in October, 1844, the said John L. Jervais filed his plea of not guilty, and to which the plaintiffs filed a simileter. On the 23d October, 1845, Love M. Harris, one of the plaintiffs, filed the following retraxit, viz: "And the said plaintiff Love M. Harris comes into open court here in his own proper person and enters his retraxit in the above suit, and voluntarily renounces all right, title and interest whatsoever he has or may

have against said defendants John Preston, Jr., and John L. Gervais in the above suit. LOVE M. HARRIS."

John K. Hart, another of the plaintiffs, at the same time entered a similar retraxit in the suit.

On the 25th October, 1845, the court on the motion of the defendants entered judgment on these retraxits, that the said Love M. Harris and John K. Hart, take nothing by their suit and the defendants go hence thereof without day, and recover from the retractors their costs.

On the 31st October, 1845, the court on the motion of the defendants, dismissed the suit, because of the failure and refusal of the plaintiffs to reply to the first plea in abatement or in anywise answer the same, discharging the defendants without day and adjudging costs against the plaintiffs; and to reverse this judgment the plaintiffs sued out a writ of error, in which the names of the two retractors were included with the other plaintiffs.

S. H. HEMPSTEAD, for the plaintiffs. (1.) The matter in the first plea supposing it could be pleaded at all, could not be available in abatement, and hence the demurrer to it should have been sustained. *Jackson vs. Decker,* 11 *J. R.* 423. 2 *Sellon's Practice* 110.

(2) The plea of not guilty interposed by Gervais amounted to a waiver of the pleas in abatement in which he had previously joined. *Fitzgerald vs. Beebe,* 2 *Eng.* 316. *Watson vs. Higgins, id.* 475. It was absurd therefore to dismiss the suit as far as Gervais was concerned, because his first plea in abatement was not replied to. If it was a good plea it might have afforded a reason for dismissing the suit as to Preston, but still it should have progressed as to the other regularly to judgment, for this is an action in form *ex delicto* in which one defendant may be found guilty and another acquitted, or a *nolle prosequi* may be entered as to one without affecting other defendants, thus differing materially from an action *ex contractu. Noke vs. Ingram,* 1 *Wilson* 89 1 *Chitty's Pl.* 546. *Hartness vs. Thompson,* 5 *J. R.* 160. *Frazier vs. The Bank of the State,* 4 *Ark.* 510.

(3.) Where there are several plaintiffs in ejectment and title be shown in one only, the verdict shall be in his favor and for the defendant as against the other plaintiffs. And if the suit be against several defendants the verdict may be against one only; if the plaintiff recovers the whole premises claimed the verdict shall be general; but if only a part is recovered the verdict shall specify such part, and so for an undivided share. *Harrison vs. Stevens,* 12 *Wen.* 170. *Bear vs. Snyder,* 11 *Wen.* 592. *Rogers vs. Arthur,* 21 *Wen.* 593. *Baker vs. Jewell,* 6 *Mass.* 460. Preston and Gervais severed in their pleadings, and according to principle and authority the court was bound to try the case on the issue between the plaintiffs and Gervais who was the tenant in possession and the real defendant in the action.

4. It was erroneous to enter judgment on the retraxits. They might be conclusive on the retractors in another suit, but could have no effect in this, because they were offered after issue joined. *Adams' Ejectment,* 246. *Jackson vs. Rich,* 7 *J. R.* 195. *Doe ex dem. Byne vs. Brewer,* 4 *M. & S.* 300. And the other plaintiffs had the right to use the names of the retractors to carry on proceedings. *Bodle vs. Hulse,* 5 *Wen.* 313. *Byrd use of Taylor vs. Crutchfield,* 2 *Eng.* 50.

PIKE & BALDWIN, contra. A non-suit is but a default on non-appearance. A *retraxit* is a voluntary acknowledgment that he hath no right of action, and therefore will no further proceed, and is a bar forever. (*Beecher's Case,* 8 *Co.* 117. *S. C. as Beecher vs. Shirley, Cro. Jac.* 211. *Walwyn vs. Smith,* 4 *Mod.* 87.) The distinction between a *non pros.* and a *retraxit* has been firmly established by a long series of cases. The former is not a bar to a future action. The latter is, as it was at common law. The cases are cited in the note to 1 *Saund.* 207. *Bridge vs. Sumner,* 1 *Pick.* 370. *Minor vs. Mech. Bk. of Alexandria,* 1 *Pet.* 74.

The plaintiffs claimed and could only recover by showing a *joint* interest; and upon the entry of the *retraxit,* which operated to transfer the possessory right, if not the fee, of two of the

plaintiffs to the defendants, the suit could not progress in the names of the plaintiffs.

As two of the plaintiffs had entered *retraxits,* they cannot prosecute the writ of error in this court, and the cause must be dismissed or the judgment affirmed.

The plea in abatement after striking out the surplusage is good. It denies the title of the plaintiffs, and avers a title in one of them and a third person, wholly inconsistent with the title laid in the declaration. It shows both a *mis-joinder* and *non-joinder* of parties, which may be pleaded in abatement. (1 *Saund.* 291. 6 *T. R.* 766. 7 *id.* 249. *Cro. Eliz.* 143, 473. 3 *B. & P.* 235. 3 *East.* 62.) Duplicity in pleading can be taken advantage of only by special demurrer.

Mr. Justice WALKER delivered the opinion of the Court.

This is an action of ejectment, brought by the plaintiffs as heirs at law of Benjamin Burriss, Henry D. Burriss, and Appleton E. Burriss, deceased, against the defendants, for the recovery of two quarter sections of land.

The first question which is presented by the record for our consideration is the sufficiency of the first plea in abatement filed by the defendant Preston. The plea is, in substance, that none of the plaintiffs except George W. Burriss have any interest or title in the lands in suit, for the reason that after the death of Benjamin Burriss, by the report of commissioners appointed by order of the county court of Phillips county, to make division and allotment amongst the heirs of Benjamin Burriss, deceased, according to the provisions of the last will and testament of said Benjamin, said commissioners allotted the north-east quarter of said tract to the plaintiff William B. Burriss, and the north-west quarter section of said land to the plaintiff George W. Burriss, which allotment was reported to said court, and approved and ordered to be made part of the records thereof: that said William B. Burriss by deed conveyed his quarter section to one Betsy Burriss.

Upon first view of this plea a doubt might arise whether it

was not defective for duplicity; but, upon a more careful examination of it, we are of opinion that it contains but one cause in abatement, misjoinder of parties. The fact disclosed that there is a party in interest not named in the writ, is indispensably necessary in order to give the plaintiff a better writ. This could only be done by stating truly in whom the right of action existed, and, for this purpose, it was an indispensably necessary disclosure in order to the validity of his plea of misjoinder. True the facts disclosed would have entitled the party, had he desired to do so, to have interposed a plea of *non-joinder;* but it does not follow because these facts appear without an attempt by the defendant to set them up as a distinct ground of defence, that they must be so considered.

The next objection to the sufficiency of the plea is, that it does aver facts sufficient to show that the legal right of action is in the two, who, it is averred, have the sole right of action in this cause. The rule of pleading in abatement is: "That in all matters particularly within the knowledge of the defendant pleading, and which must tend to give a better writ, ought to be set forth in the plea. But as applying to matters within the knowledge of the plaintiff, the rule ought not to be extended." 1 *Chit. Pl.* 457. The facts in this case, as to the proper parties in interest and their chain of title, so far as regards the true plaintiffs in interest upon the record, are presumed to be most properly within the knowledge of the plaintiffs: and the defendants are relieved under this rule from the responsibility of setting forth such facts as would show title in such plaintiff. The plaintiffs, by uniting with him and presenting him of record as a party in interest, ought not to object if the defendants simply acquiesce in it and so represent him also. But not so with regard to Betsy Burriss, who was not joined in the suit. She is a new party in regard to whose title the plaintiffs are to be presumed ignorant, and they should have set forth such facts in their plea as would have apprised the plaintiffs of the title under which she claimed. This, we think, is not sufficiently done. In the first place the plea represents the plaintiffs as claiming as heirs at law of three

persons deceased; without notice to the parties interested, or any preliminary steps, it avers an order appointing commissioners to divide the land according to the provisions of the will of Benjamin Burriss. These commissioners reported that they had divided the land and set apart a distinct tract to William B. Burriss and the other tract to George W. Burriss, of one of whom Betsy Burriss claims to have purchased. Now there is an utter repugnancy and inconsistency between the allegation that the title is in George W. Burriss and Betsy Burriss, as heirs at law of Benjamin Burriss, deceased, Henry D. Burriss, deceased, and Appleton E. Burriss, deceased, and the title disclosed in the plea. If these two have the exclusive right of action in this case, (and to have it they must have the whole legal title,) they acquire it, according to their own showing, not as heirs of the three persons deceased, but as devisees of Benjamin Burriss. The plea does not disclose the fact, but if as matter of conjecture we suppose that Benjamin Burriss devised these lands to them jointly, no legal division of it appears to have been made. An order appointing commissioners without petition or notice is void. Nor does the mere affirmance of the report without decree of title or deed by commissioners vest in the two a title to the respective tracts set apart to them. If this be true, it is evident that Betsy Burriss, who purchased of one of them, could not acquire such legal title as would enable her to maintain a joint action with George W. Burriss for the land. Her deed only covered one quarter section of the land, and, as we have said, the division without decree or deed conveyed no separate legal title; it follows that William B. Burriss had no exclusive title to the land, and could convey none to Betsy Burriss. As regards the other tract in suit, she has by her deed no shadow of title. But conceding every thing contended for in the plea, and that George W. Burriss has the legal title to one quarter section, and Betsy Burriss has title to the other quarter section, this title will not sustain the allegation in the plea that the right of action is in these two as heirs at law of three persons deceased. It is a well established principle of law that persons having a separate

and distinct right of action to distinct tracts of land cannot join in a suit to recover them. (*Green vs. Siter,* 8 *Cranch* 229. 3 *Cond. R.* 97.) So that in every point of view in which this plea may be considered, we deem it insufficient.

Issue having been taken on the other pleas of defendant Preston, and defendant Gervais having filed his plea of not guilty, to which issue was joined; two of the plaintiffs, in their own proper persons, came into court and filed and entered their formal *retraxit,* which *retraxit* separately filed each for himself, is as follows: "And the said plaintiff, Love M. Harris, comes into open court here, in his own proper person, and enters his *retraxit* in the above suit, and voluntarily renounces all right, title and interest whatsoever he has, or may have, against the said defendants, John Preston, Jr. and John L. Gervais, in the above suit. (Signed) Love M. Harris." A similar *retraxit* having been filed by the other plaintiff, judgment was rendered against them in favor of the defendants. The legal effect of this very unusual proceeding we will next proceed to consider. But few modern authorities have been found on the subject, and they do but little more than recognize and re-affirm the doctrine as it has been settled by the English authorities, amongst the earliest of which and a leading case is *Beecher's Case,* reported in 8 *Co. Rep., p* 117. It is there said that "*Retraxit* is a voluntary acknowledgment that the plaintiff hath no cause of action, and therefore will no further proceed, which operates as a bar forever." The doctrine thus laid down is recognized in the English courts, and is re-affirmed by the United States courts. The court, in delivering the opinion in *Minor vs. The Mech. Bk. of Alexandria,* 1 *Peters Rep.* 74, says that "a *retraxit* operates as a full release and discharge of the action, and is a bar to any further action or suit." The authorities on this subject, although not numerous, are perfectly harmonious, and clearly and distinctly declare the legal effect of the *retraxit* to be a present and perpetual release, surrender, and abandonment, of all right of action in the subject matter in dispute; so that at no subsequent period can he, in any form of action, contest with the defendant his right or title

to the possession or property in suit. It is a question of much doubt, under such circumstances, what becomes of the legal title in such cases. Can it be said to exist in one who has not the power to assert it? and if not the power to assert it himself, most clearly he cannot convey it to one who can. His grantee can derive by the grant no greater power than his grantor possessed, and it is equally clear that, if he cannot assert his title against the defendant in whose favor he has retracted, he cannot against any one who may take under him. In the absence of any adjudicated case in point, (as it is not indispensably necessary to the determination of this case to do so,) we will not undertake to decide that the retractor has by his act divested himself of every vestige of title which he possessed; but whatever title may remain in him is evidently so restricted by the *retraxit* as to place it beyond the power of the retractor or his assigns to set up or assert his claim against the defendant or any one who may hold under him.

The plaintiffs had a right to be heard on the plea interposed by defendant Gervais. In actions *ex delicto* judgment may be rendered against one defendant even though the other be acquitted. Gervais had withdrawn from the plea in abatement with Preston by pleading over to the action; and, whether the plaintiffs were bound to reply to Preston's plea in abatement or not, the court could not force the plaintiffs to a peremptory non-suit, or take judgment against them for refusing to take issue on that plea. This was in effect anticipating the difficulties into which the plaintiffs were plunged by the acts of those who had surrendered all further right of action to the defendants. The plaintiffs had a right to elect their course, and should have been permitted to do so.

The counsel for the defendants have presented, for our consideration, the question whether, after two of the plaintiffs have renounced all right of action in this case, present and future, against the defendants, they can after their *retraxit* join in a writ of error and prosecute the same. Upon this question we have found but one authority in point, which fully goes to sustain the

doctrine that they cannot; and even in the absence of all authority, it is utterly at variance with the legal effect of the *retraxit* to permit them to do so. But this question comes too late to avail the defendants any thing in the present state of the issue. Had a plea been interposed to the writ for that cause before joinder in errors the question would have been properly before us.

The judgment of the Circuit Court is reversed with costs, and the cause remanded.