

HAYS vs. ROBERTS.

If either of several replications be a good answer to a plea, it is sufficient on demurrer.

Although the record does not state that the party rested upon his demurrer being overruled, the court will so infer where he does not take issue to the pleading demurred to, but goes to trial on another issue.

Error to Saline Circuit Court.

HON. JOHN. J. CLENDENIN, Circuit Judge.

WILLIAMS & MARTIN, for the appellant.

SMITH, for the appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court. Roberts brought trespass against Hays for entering his close, taking his goods, etc.

Hays pleaded not guilty, and a special plea of justification. Roberts took issue to the first plea, and filed four replications to the the second. Hays demurred to the replications, the demurrer was overruled, and judgment against him for cost of the demurrer.

The parties then submitted the issue to the plea of not guilty to a jury, and the verdict and judgment were for plaintiff, and the defendant, without reserving any question upon the trial, brought error.

Three of the replications to the plea of justification traversed material allegations of the plea, concluding to the contrary, and the other replication alleged an abuse of the process under which Hays justified, and concluded with a verification.

It is conceded by the counsel for the plaintiff in error that two of the replications were good answers to the plea; and upon this concession the judgment upon the demurrer was properly rendered for the plaintiff below, even if the other two replications were bad, because the good replications were a bar to the defense set up by the plea. *Cuyler vs. Trustees of Rochester*, 12 *Wend.* 169; *Harrison vs. McIntosh*, 1 *John.* 384.

The record does not expressly state that the plaintiff in error rested upon his demurrer to the replications, but it is to be inferred from the the record entries that he did. Upon the overruling of the demurrer he not only did not take issue to the replications, but, in the language of the record, "thereupon said cause came on to be heard upon the general issue of not guilty, and both parties announcing themselves ready for trial," etc., etc.

The judgment must be affirmed.