VEATCH VS. GREENWOOD.

In case of misjoinder of counts, the entire declaration is bad, and it is error to sustain a demurrer to some of the counts and overrule it as to others—in such case the court should, in general, on motion, grant leave to amend by striking out.

Appeal from Chicot Circuit Court.

Hon. JOHN C. MURRAY, Circuit Judge.

HUTCHINSON, for appellant.

GARLAND & RANDOLPH, for appellee.

Mr. Justice COMPTON delivered the opinion of the Court.

Assumpsit by Greenwood against Veatch and Wardlow. Veatch demurred to the declaration for misjoinder of counts, upon the ground that some of the counts were against Veatch and Wardlow, and others against Veatch alone. Pending the demurrer, the plaintiff discontinued as to Wardlow, and the court sustained the demurrer as to the third and fourth, and overruled it as to the first and second counts. Veatch rested, final judgment was rendered against him, and he appealed.

The demurrer was to the whole declaration, and in refusing to sustain it to that extent, the court erred. In case of misjoinder of counts, the entire declaration is bad, and the rule is, that the plaintiff cannot if the declaration be demurred to, aid the mistake by entering a *nolle prosequi,* so as to prevent the operation of the demurrer for misjoinder; though the court may, and, in general, should grant him leave to amend by striking out of some of the counts on payment of costs. *Chit. on Plead.. marg. p.* 206; *Drummond vs. Dorant,* 4 *T. Rep.* 360; *Jennings vs. Newman, Ib.* 347. Here, there was no motion for leave to strike out.

Let the judgment be reversed and the cause remanded, to be proceeded in according to law.