

out the first, it was received. This Statute was never construed to aid duplicity in one and the same plea, though allowing of different grounds of defence being stated in different pleas. The proviso of the section of the Code above cited affirms the same rule, a violation of which must therefore be taken advantage of by general demurrer, *McCauley v. State*, 21 Md. 571; though pleading double in this sense is scarcely lack of substance, one of the matters being, on the contrary, a *superfluity*; and if an immaterial fact be put in issue, it is only surplusage and does not make the plea double, *Stewardson adm'r v. White*, 3 H. & McH. 455.¹¹ If the plaintiff do not demur, however, he must answer both material allegations of the plea. But it is a well settled rule, that if a double plea that is wrong be pleaded, and the plaintiff reply thereto and take issue on one matter, if it be found against him, he cannot afterwards move in arrest of judgment, for the replication admits it to be good.

It was assumed in the *State v. Green*, 4 H. & J. 542, that the Statute did not permit a defendant to rejoin a double defence to a breach assigned in the replication in an action of debt on bond with collateral condition. The Statute 8 & 9 W. 3 c. 11, sec. 8, permitted plaintiffs in actions on such bonds to assign as many breaches as they think proper, and the Act of 1829, ch. 220, allowed defendants to plead several rejoinders to every breach assigned by the plaintiffs in such actions.¹²

The omission to state that the second and following pleas are pleaded with leave of the Court is treated in England as only an informality, and not cause for demurrer, except, it is said, in the Court of Common Pleas, where the application is made by a rule to show cause. With us, the practice was always to state the leave as of course. The point is now of no importance, except to suggest that the aim of the Statute may have been to give the Court authority to put the defendant under terms as to his pleadings. The rule of practice is that inconsistent pleas are not to be pleaded together. But in *Shafer v. Stonebraker supra*, the Court of Appeals held that a plea * of estoppel might be joined with the general issue, and **667** said that it is every day's practice to try one plea by the Court and another by the jury. In *Union Bank v. Ridgely*, 1 H. & G. 407, they held that *non est factum* and performance might be pleaded together in spite of a rule of the County Court to the contrary, and laid down the rule, that the general issue and a tender are the only pleas now disallowed on the mere ground of incompatibility.¹³ However, *non assumpsit* and an alien enemy have been refused, *Deheaulme v. Boisneuf*, 4 H. & McH. 413; *Augustin v. Vaughan*, cited in note to *Shaw v. Everett*, 1 B. & P. 222, see also *Thyatt v. Young*, 2 B. & P. 72, the one being an absolute bar, the other amount-

¹¹ The statement of a multiplicity of facts constituting the defense and material to its conclusiveness, even if there is surplusage, does not make the pleading double. *Deford v. Hewlett*, 49 Md. 62. But see *Wilson v. Merryman*, 48 Md. 339, where an immaterial averment in a plea was held to make it bad.

¹² See *Poe's Pleading*, sec. 570; note 11 to 8 & 9 Wm. 3, c. 11.

¹³ See *Stephen on Pleading* (Tyler's Ed.) 265. Cf. *Carroll v. Bowen*, 113 Md. 153.