

[HIGH COURT OF AUSTRALIA.]

CALDWELL BROTHERS APPELLANTS;
PLAINTIFFS,

AND

COBBLEDICK RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

Practice—Local Court of South Australia—Special defence—Payment—Local
Courts Act 1886 (S.A.) (49 & 50 Vict. No. 386), sec. 108.

H. C. OF A.
1912.

Sec. 108 of the *Local Courts Act 1886* (S.A.) provides that “ A defendant desirous of appearing to plaintiff’s claim shall give notice in writing thereof to the clerk, and such appearance, in case of a debt, whether by simple contract or specialty, shall operate as a denial as well of the particular contract, dealing, or transaction between the defendant and the plaintiff out of which the alleged debt or liability arises, as of the breach thereof, . . . but if the defendant intends . . . to rely upon any special defence, such as . . . payment, . . . he shall, at the time of giving notice of appearance, file, in duplicate, a memorandum containing a clear and concise statement of the grounds of his defence.”

ADELAIDE,
June 4.
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Griffith C.J.,
Barton and
Isaacs JJ.

Held, that the section does not apply to a case in which the non-payment by the defendant of a particular sum is a condition precedent to the liability set up by the plaintiff in the action, and that such non-payment must, therefore, be proved by the plaintiff.

Special leave to appeal from the Supreme Court of South Australia refused.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Local Court of Adelaide by Caldwell Brothers, the plaintiffs, to recover from Cobbledick, the defendant, £252 4s. 6d. alleged to be money due, owing and

H. C. OF A. payable under a covenant for the principal and interest due
 1912. under a bill of sale. The bill of sale of which Cobbledick was
 { the grantor contained a covenant by him to repay the principal
 CALDWELL sum of £250 by weekly instalments and a provision that "in
 BROS. case the grantor shall be in arrear with the said weekly instal-
 v. COBBLEDICK. ————— ments for more than three weeks, or in case of breach of any of
 the covenants herein expressed or implied and on the part of the
 grantor to be done or performed, then the whole of the said
 principal shall forthwith become due and payable." The bill of
 sale showed on its face the proper dates for payment of the
 instalments and the action was brought more than three weeks
 after the date fixed for payment of the second instalment. There
 was no plea of payment by the defendant.

At the hearing the plaintiffs put in the bill of sale and closed their case. *Homburg J.* thereupon nonsuited the plaintiffs on the ground that no breach of the covenant had been proved, and an appeal to the Full Court from that decision was dismissed.

The plaintiffs now applied for special leave to appeal from the decision of the Full Court.

Cleland for the plaintiffs. The plaintiffs' right of action depended upon non-payment of an instalment and they discharged the onus which was upon them by showing a liability to pay it. If the defendant relied upon payment of that instalment he was bound under sec. 108 of the *Local Courts Act* 1886 to specially plead it.

GRIFFITH C.J. delivered the judgment of the Court:—The point sought to be raised turns upon the provisions of sec. 108 of the *Local Courts Act* 1886, which requires payment to be pleaded specially as a defence. In an action on a contract alleged to result in a debt, if the defendant admits the debt but says that he has discharged it, that is a plea of payment. If he does not admit that the debt ever existed that provision has no application. The plea of payment is a plea in confession and avoidance. It admits that the liability once existed but says that it has been discharged. The question in this case was whether the liability ever existed. The contract was one which did not create the