PATENTS—SOME ELEMENTS OF A COMBINATION BEING OLD DOES NOT NECESSARILY NEGATIVE INVENTION.

The U. S. District Court for Connecticut in the case of The Carnes Limb Co. v. Delworth Arm Co. (June 16, 1921) held that a patent for a device which is inoperative or fails to accomplish the desired end, is not an anticipation of one which successfully accomplishes it. The court also held that the fact that some of the elements of a combination are old does not negative invention, where the combination is new and produces a new and practical device. In rendering the decision in this case the court went on to say that in order to establish anticipation it is not sufficient to pick out one part of a patented device from one prior patent, another part from some other, and so on, and then say that it is not invention to bring these several parts together, especially when the patentee is the first to conceive of so doing, and by so doing has produced a practical operating device.

A rather interesting coincidence in this case is the fact that Carnes, prior to his invention had lost a foot, and Delworth an arm, and that both had perfected their respective inventions as a consequence of their inability to find a suitable article on the market to replace their lost limbs.

PLEADING — DEMURRER ORE TENUS—NOT VIEWED IN SAME LIGHT AS A FORMAL DEMURRER.

In the Case of Adams v. Pickerel Walnut Co., 232 S. W. 271, (Mo.) an agreement is set forth between plaintiff (Adams) and Craig for the purchase of certain walnut logs by Craig. Craig, in turn, was to ship the logs to defendant (Pickerel Walnut Co.). For certain of these logs which were of a superior quality, plaintiff refused to accept the price agreed upon and as a result of this Craig refused to accept certain of the logs which were of an inferior quality. Following this there was continued correspondence between plaintiff and defendant concerning the sale of the logs. Omitting certain details, a letter comprising part of the above-mentioned correspondence and marked "Exhibit G" was offered in evidence by plaintiff. In this letter defendants agreed to take the logs provided all of them were loaded under the "supervision" of Craig. As a matter of fact the loading of the logs was *supervised* by Mr. Moore, attorney for plaintiff. After the logs were loaded a number of them were lost, owing to a sudden rise of the Mississippi river. In the case at bar the plaintiff brought action against the defendant lumber company for the value of the logs lost and for the additional money he (plaintiff) had expended in trying to save them. In the court below plaintiff obtained judgement against defendant for $1819.26. In the St. Louis Court of Appeals the judgment was reversed, altho upon other grounds than the particular point to be commented upon here.

At the commencement of the trial defendant objected to the introduction of any evidence on the ground that the second amended petition upon which the case was tried did not state facts sufficient to constitute a cause of action. Appelant claimed that tho the petition alleged that defendent agreed to buy

certain walnut logs from plaintiff, provided plaintiff had the logs loaded under the "supervision" of Craig, the petition does not aver that plaintiffs did in fact have such logs loaded under the "supervision" of Craig. From this it will be seen that the defendant did not attack the petition by a formal demurrer and did not raise any objection until after the jury was impanelled. Plaintiff by objecting to the introduction of any evidence at the commencement of the trial in effect entered a demurrer ore tenus and the question arises as to the view taken by courts of such a demurrer.

In 11 Pomeroy on Code Pleading, pages 446 and 7, it is stated that "Where a complaint fails to state a cause of action, and the defendant at the trial objects, on that ground, to the introduction of any evidence, such objection is equivalent to a *general* demurrer, and a judgement for the plaintiff must be reversed." This view seems to be supported by Hays v. Lewis, 17 Wis. 210. Following this statement in Pomeroy, supra, it says, "Demurrer under this subdivision may be taken at any stage of the game" and cites cases substantiating the same. Gould v. Glass, 19 Barb. 186; Montgomery Co. Bank v. Albany City, 3 Seld. 464; People v. Booth, 32 N. Y. 397. The practice is recognized in nearly half the states "in civil cases." 15 H. L. R. 738. The proceeding, however, is so hedged about with technicalities that it is infrequently resorted to and when invoked has been the subject of continuing disapproval of the courts ever since it was said by Chief Justice Tilghman that "he who demurs to parol evidence engages in uphill business." Bouvier's Law Dictionary.

In Missouri, however, a demurrer ore tenus is not viewed in the same light as a formal demurrer. Young v. Schickle Iron Co. 103 Mo. 324. Reverting to the statement, supra, in Pomeroy that an objection to the introduction of evidence, is equivalent to a general demurrer the view is taken in Missouri that, "If a petition defectively states a cause of action it is good on general demurrer" State ex rel v. Carroll, 63 Mo. 156; Ferguson v. Davidson, 65 Mo. App. 193. It is only where it is so wholly wanting in necessary averments that it fails to state any cause of action whatever that a demurrer will lie. Verdin v. St. Louis, 131 Mo. 26. Objections to the introduction of any evidence come after the parties have prepared for trial and when the case is called for hearing, and are too late to deserve a very favorable consideration at the hands of the court. Even tho a petition is informal and the cause of action is defectively stated, still if it states sufficient facts to show a cause of action, the objection made at the trial to the introduction of any evidence should be overruled. Donaldson v. Co. of Butler, 98 Mo. 163. Also, if a matter material to the plaintiff's cause of action is not expressly averred in the petition, but is necessarily implied in what is stated therein, tho objection thereto must be taken by demurrer or motion; such objection cannot be made at the trial by the objection to the introduction of evidence, and is cured by verdict. Thompson v. Stearns, 197 Mo. App. 344, loc. cit. 352. The view taken in Missouri of a demurrer ore tenus, as shown by cases cited, supra, seems to be in keeping with the characterization of the same by Justice Emery in Dicky v. Schneider, 3 S. & R. (Pa.) 416, where he says that its use is "an unusual and antiquated practice."