

But it never was the law, even after the Common Law Procedure Act, nor was it the rule in Equity practice that a suitor might recover in respect of a cause of action not alleged in the pleadings either originally or by amendment, and we do not think that such a course is warranted even under the very lax system which at present prevails. What Hodgins, J.A., recently said regarding a libel action applies to some extent to all actions. The learned Judge said: "The pleadings in a libel action must define the issue which is being tried—justification means one thing, and one thing only—i.e., that the libel is true as printed. If the parties can shift their ground during the trial, and evidence can be given, not under the limitations imposed by that plea, upon the theory that the pleadings do not bind the parties, utter confusion may be caused and a general verdict one way or the other may mean a mis-trial."

And yet in a recent case in the Divisional Court a judgment of a District Court, based on a contract not alleged in the pleadings nor capable of being introduced into the pleadings, was affirmed by a Divisional Court. We refer to *Mazzareno v. Pastino*, 9 O.W.N. 414. The note, however, does not give a full statement of the case, but a reference to the record shows that the writ issued on Sept. 21st, 1914, and that the action was based on contracts made prior to that date for 1,200 cases of macaroni. According to the statement of the learned Chief Justice who delivered the judgment of the court, war broke out, the defendants thought they should be excused. The plaintiff accepted this view and the parties entered into negotiations for another contract—a substituted one. The plaintiff testified that the original contract was reduced to one for 600 cases." This the defendant's agent denied. "The judge gave the plaintiff reasonable *damages for the breach of that contract*." Now, if that contract had been made before action, not much exception could be taken to the judgment, because, even though not actually made the ground of action, yet by amendment it could have been so; but it appeared by the evidence that the new contract, if made at all, was not made until the 26th of September, 1914, and therefore was not susceptible of being set up in an action commenced five days before.