

claration for it avers, that the Appellant, Defendant in the Court below, kept the sugars in a warehouse or store contrary to the Respondent's (Plaintiff's) instructions and charges, in violation of those instructions. It likewise uses language like that of a demurrer, nevertheless, it concludes to the country upon the whole matter, and therefore we cannot doubt, especially after verdict, that no objection can be taken as to a *departure*, which the Appellant (Defendant) might have demurred to, even if there were no new matter pleaded by the replication, but upon the whole and as the strict rules of pleading cannot in this case be enforced, we must consider this additional statement respecting violation of instructions as only a further specification of the charge of negligence in the declaration. That charge in truth forms the whole ground of the action, and the not following instructions may justly be considered as one circumstance, and a material circumstance, tending to shew negligence in the care of Plaintiff's goods. Nothing therefore arises upon the pleadings, except this remark, which is very material to be kept in view. *That there is no breach of contract charged.* The action is not upon the contract, if it had been, then some damages, must have been recoverable, at all events had the breach of contract been proved, after proving what is not even alleged and *certainly not found in the Special Verdict*, that the sugars had been accepted on the foot of the instructions, or in some other way that the Defendant (Appellant) had made himself a party to those instructions as to a contract.

Our attention is next required to the judgment which proceeds upon a special verdict. Now upon this verdict some observations arise. There is no reason to hold that the niceties of our pleadings are applicable to a proceeding in those North American Colonies which are under the French and not the English Law. Those rules may neither govern the pleadings or the verdict, nor the judgment. In short we may assume that no part of the record is subject to them. Nevertheless without adverting to the particulars of our system *three* things must of *necessity* belong to what-