Kentucky Law Journal

Volume 3 | Issue 5 Article 3

1915

The Demurrer Under the Civil Code of Practice in Kentucky

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a beneficial change, those who profit, or believe they profit, by the old abuses are quick to resist and persevering in opposition, while those to be benefitted are apathetic, if not befooled into active resistance.

A few years ago I discovered that if $10 were paid at the beginning of every suit filed in Louisville, the revenue would be enough to pay the expenses of all the courts there. A lawsuit should be tried in court with simple procedure, without cost and with no serious delay. A free court for deciding what is right between man and man is as essential as free schools, free libraries, free hospitals and a free ballot. The indefinite and heavy costs now imposed upon litigants do not deter the litigious and unjust, but do deter the good and the careful, who will often endure oppression rather than risk further loss. The courts should not be the refuge mainly of rich men or mere paupers, but should be the refuge always of the honest, industrious citizen of little means and blameless life.

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THE DEMURRER UNDER THE CIVIL CODE OF PRACTICE IN KENTUCKY

Section 89 of the Civil Code of Practice, declares, "The pleadings allowed are, 1—Petitions, answers, and replies, and such additional pleadings, by way of rejoinder and rebuttal, as may be necessary to form a material issue of fact. 2—Demurrer. It will be the purpose of this article to take up the demurrer as established under our so-called code procedure and to note the material changes that have been made in the demurrer as it existed at common law.

Section 91 of the Civil Code declares, "Demurrers are

Special or general." Mr. Perry in his Common Law Pleading, p. 233, states: "A demurrer, as in its nature, so also in its form, if of two kinds: It is either general or special." Again the Code in defining the demurrer as used in this State says in section 92: "A special demurrer is an objection to a pleading which shows:

1. That the court has no jurisdiction of the defendant or of the subject of the action; or

2. That the plaintiff has not legal capacity to sue; or

3. That another action is pending, in this State, between the same parties, for the same cause; or,

4. That there is a defect of the parties, plaintiff or defendant. Either of said grounds of objection shown to exist by a pleading is waived unless distinctly specified by a demurrer thereto, except the objection to

the jurisdiction of the court of the subject matter of the action; which objection is not waived by failing so to make it; but a party failing so to make it when or before he files a pleading other than a demurrer, is liable for all costs resulting from such failure."

Section 93 of the Code further describes a general demurrer: "A general demurrer is an objection to a pleading because it does not state facts sufficient to constitute a cause of action or a defense or because it does not state facts suffiicient to support a cause of action or defense." Stephen on Pleading p. 158, defines the demurrers at common law: "A general demurrer excepts to the sufficiency in general terms, without showing specifically the nature of the objection. A special demurrer adds to this specification of the particular ground."

It will be noticed that there is no material difference between the general demurrer at common law and the general demurrer as defined by the Code of this State. There is, however, a material and marked difference between the special demurrer at common law and the special demurrer of the Code of Practice. There is, however, a material and marked difference between the special demurrer at common law and the special demurrer under the Code. The main difference in the special demurrer of the Code and at common law, is, "A special demurrer is necessarily where it turns upon a matter of form only; that it, where, notwithstanding such objection, enough appears to entitle the opposite party to judgment, as far as relates to the merit of the cause. For by two statutes, 27 Elizabeth, c. 5, and 4 Anne, c. 16, passed in a view to the discouragement of merely formal objections, it is provided, in nearly the same terms, that the judges 'shall give judgment according as the very right of the cause and matter in law shall appear unto them without regarding any imperfection, omission, or defect or want of form, except those only which the party demurring shall specifically and particularly set down and express, together with his demurrer, as causes of the same;" the latter statute adding this proviso: 'So as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause, since these statutes therefore, no mere matter of form can be objected on a general demurrer; but the dmurrer must be in the special form and the objection specially stated." Stephen on Pleading, p. 158.

But in Kentucky, defect in the form of pleading can only be reached by motion to make more specific, and not by a special demurrer. In the case of Posey vs. Green, 78 Ky. 162, Judge Hines delivering the opinion of the court said: "The general demurrer under the Code is the same as that under the common law proceduce and reaches only matter of substance. The reply in this case is in substance good, and, if defective, is only so in form, and as the special demurrer as provided for in section

92 of the Code does not reach the formal defect complained of, resort can only be had to the 134th section of the Code of Practice which declares, "If the allegation of a pleading is so indefinite or uncertain that the precise nature of the claim or defense is not apparent, the court may require the pleading to be made definite and certain by an amendment. The court must strike out any error in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Mr. Pomeroy, in his work on Remedies and Remedial Rights, sec. 596, states the rule as follows: "If the defect is one merely of form; if the denial for example, although sufficiently addressed to the plaintiff's allegations to indicate the intended issues, are so formally defective that it is a question whether the denials or denials attempted to be made, do in fact accomplish the purpose for which they were intended; or if the averments of new matter in some sort embrace or refer to facts which, if properly pleaded, would amount to a defense, or a counter-claim, but are stated in such an uncertain, ambiguous, inferrential manner that it is a question whether they can avail to the defendant in such cases, it is settled that the demurrer is not the proper mode of reaching the defect. Instead of the special demurrer, the Codes have substituted the motion to make the pleadings more specific and certain."

Lastly the difference between the special demurrer under the Code of Practice, and at common law. The special demurrer at common law is more comprehensive than the special demurrer under the Code. The special demurrer at common law is broader than the general demurrer; for it might reach substance as well as form. (Stephen p. 189.) The special demurrer under the Code of Kentucky, is confined to the causes enumerated in section 92. All said grounds for demurrer are waived, unless specified by demurrer thereto, except jurisdiction of the court.

Having noticed the scope of the demurrer as exists at common law and as defined by the Code of Practice, we shall consider the effect of the demurrer at common law, and as modified by the Code.

Stephen on Pleading, says: "With respect to the effect of a demurrer it is, first a rule *that a demurrer admits all such matters of fact as are sufficiently pleaded.*

The meaning of this rule is that the party having had his option whether to plead or demur, shall be taken in adopting the latter alternative, to admit that he has no ground for denial or traverse (which as formerly shown) is one of the kinds of pleading. A demurrer is consequently an admission that the facts alleged are true; and therefore the only question for the court is, whether assuming the facts to be true, they sustain the case of the party by whom they are alleged. It will be

observed, however, that the rule is laid down with this qualification, that the matters of fact be *sufficiently pleaded.*"

In the case of Norman, Auditor, vs. The Kentucky Board of Managers, the facts were these: The commissioners representing the State, brought an action against the State Auditor to compel him by mandamus, to issue his warrant for money claimed to have been appropriated by an Act of the Legislature. The answer of the Auditor set out these facts connected with the passage of the Act: The Journals of the two Houses, which showed that the bill was not passed as required by the constitution. The appellee desiring to raise the question—Can the Auditor go behind the enrolled bill to the records of the Houses to see if a bill is passed properly—demurred to the answer. Chief Justice Holt, delivering the opinion of the court said: "Although the pleading may purport to state its terms or effect, but do so incorrectly, a demurrer does not admit the averment (Pennie vs. Reis, 132 U. S. 464; Interstate Land Co. vs. Maxwell Land Grant Co. 139 U. S. 569.) The court tries the question as one of law and a *demurrer admits as true only averments of the fact well pleaded,* and not legal conclusions. The answer of the Auditor, however, sets out the steps connected with the passage of the Act. It states what was done and what was not done. It avers the facts connected with the passage of the Act, and files as part of it a copy made by the Public Printer of the Journals of the Senate relating to it. These facts, as to the manner of the passage, were admitted by a general demurrer. They show the Act when it came back to the Senate, after amendment, was not voted for by a majority of all the Senators and that a yea and nay vote was not taken; it was not therefore constitutionally passed and yet the court is asked by the appellees to use its power to enforce it by mandamus when, by their demurrer to the answer and failure to plead, they are regarded as agreeing that this is true." See further Morgan vs. Ballard, 1 Mar. 558; Bank vs. New Port, 1 B. M. 13.

Stephen on Pleading, p. 160, says: "Again it is a rule, that on a demurrer the court will consider the whole record and will give judgment, for the party who, on the whole, appears to be entitled to it. Thus, on demurrer to the replication, if the court thinks the replication bad, but perceive a substantial fault in the plea, they will give judgment not for the defendant, but for the plaintiff, provided the declaration be good, but if the declaration be bad also, in substance, then upon the same principle, judgment would be given for the defendant. This belongs to the general principle stated in the first chapter, that when judgment is to be given, whether the issue be in law, or fact, and whether its cause have proceeded to issue, or not, the court is always bound to examine the whole record, and adjudge for the plaintiff or defendant according to the legal right, as it may on the whole appear"

This principle of law as stated by Mr. Stephen, is upheld by the courts of this State. In the case of Wile vs. Sweeny, 2 Duvall 161, the appellant filed an answer to which the appellee demurred, and the demurrer having been sustained, a judgment was rendered for the appellees from which this appeal is taken. Chief Justice Sampson, speaking for the court said: "The demurrer to the answer *brought the whole record before the court,* and it was the duty of the court to render judgment upon the demurrer against the party who had committed the first material error in his pleadings. As the sufficiency of the petition, is therefore involved, the first question for consideration is, whether it sets forth a good cause of action." Again in the case of Young vs. Duhme, 4 Met. 239, Justice Peters delivering the opinion of the court said: "The demurrer of the appellees to the answer brought the whole record before the court in deciding upon the demurrer, it was the duty of the court to decide against the party who committed the *first* fault. (Mitchell vs. Vance, 5 Mon. 528.; Birney vs. Haun, 3 A. K. Mar. 322.)"

Next let us notice, the effect of failure to demur, at common law and such material changes as have been made by the Code Procedure. Stephen on Pleading, p. 162, says: "It thus appears then, that in many cases, that a party though he has pleaded over without demurring, may nevertheless, afterwards avail himself of an insufficiency in the pleading of his adversary. But this is not universally true. For, in many instances it is to be observed, that faults in the pleading are, in some cases, aided by pleading over. Again it is to be observed that faults in the pleadings are in some cases aided by a verdict. Lastly it is to be observed that in certain stages of the cause all objections to form are cured by the different statutes of jeofails and amendment."

Section 93 of the Cod estates—Effect of failure to demur—"Failure so to make such objection is not a waiver thereof, but a party failing to make it when or before he files a pleading, other than a demurrer shall be liable for all costs resulting from such failure." In the case of Fible vs. Caplinger, 52 Ky. 374, Chief Justice Hise, speaking for the court said: "The failure of the plaintiff's petition to present a good cause of action not cured by the verdict of the jury, because such failure of the petition was not supplied by the answer of the defendant, which relied upon as a matter of defense, the alleged facts that the plaintiff was an infant. There was nothing, therefore, in the answer to cure the defect in the petition, nor in fact was there any evidence whatever in the cause showing the offer by the plaintiff or the refusal by the defendant, to perform the agreement. If a petition be so defective that is does not, in fact, show a cause of action, or state facts enough to warrant a recovery, such defect is not cured after the verdict by any of the provisions of our statute of jeofails, when the other pleadings do not, in fact, cure the defect, and

where the verdict does not settle upon the proof or the fact omitted or defectively stated, and such defect under the Code of Practice, may be taken advantage of by demurrer or answer; and although such defect is not taken advantage of by demurrer or by answer, yet it is not waived and may be taken advantage of by motion for an arrest of judgment, or by writ of error. (Code of Prac. p. 31, sec. 146-9.)"

It will be noticed that the Kentucky has adopted by construction of the court, and by section 93 of the Code, almost the exact statement as set forth by Mr. Stephen above. Many other comparisons can be made of the common law procedure and the pleading set forth in the Civil Code, which will show that the Code is only declaratory of the common law procedure. The main and material change of the demurrer under the Code of Kentucky, being in the definition and application of the special demurrer,

—BASIL DUKE SARTIN.

EXAMINATIONS IN EVIDENCE

List of examination questions given by Judge Lyman Chalkley, of the University of Kentucky, to his class at the conclusion of the course in Evidence.

I. In the pleadings and in the introduction of evidence before the jury, what things may counsel take it for granted the court knows without proof?

II. State the rules by which the production of evidence to the jury is governed, and explain the circumstances under which facts collateral to the issue may be proved.

III. The action is debt against a sheriff for illegal fees taken on a writ of execution: plaintiff alleges, in effect, that a judgment was recovered by A. B. vs. C. D., on a certain day and upon that judgment, execution was issued, and that under cover of that execution the sheriff exacted the illegal fees. Will the plaintiff have to prove the recovery of the judgment? State the rule of law and give your reasoning.

IV. State both the Common Law and the Kentucky Statute rules as to Burden of Proof, and explain the different meanings which are given to the term "Burden of Proof."

V. (1) State the rule under which evidence is classified as "Primary" and "Secondary."

(2) Upon his examination before the magistrate upon a criminal warrant, the prisoner made a confession, which is taken down in writ-