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Photographic Evidence

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NOTES AND COMMENTS

PHOTOGRAPHIC EVIDENCE

DAVID F. MATCHETT, JR.

The plaintiff brought suit for personal injuries sustained when he was struck by an automobile driven by the defendant. To rebut testimony as to the extent of the plaintiff's injuries the defendant offered in evidence motion pictures of the plaintiff showing him engaged in physical activities. The pictures were admitted in evidence. Plaintiff appealed from an adverse judgment, asserting that admission of these pictures was error. The judgment was affirmed. Proper foundation having been laid, the pictures were admissible, notwithstanding that an eye witness was present in court and could testify to seeing the activity and that an employee of defendant may have persuaded plaintiff to do the acts shown by the pictures.

This decision, in *McGoorty v. Benhart*,¹ is the first of its kind in a court of review in Illinois, although the question has arisen in nisi prius courts.²

In a comparatively recent case before an Illinois court of review the court indicated motion pictures were proper evidence in certain cases but held that the evidence was immaterial to the issues involved.³

Motion pictures have for a long time been in regular use before commissions, and other like tribunals, and have been displayed to juries in a number of states.⁴

It is now almost universally conceded that, at least in cases where the principal purpose is impeachment, motion pictures are admissible if proper foundation is laid.⁵ Cases of exclusion are generally cases in which no adequate foundation has been laid.⁶ Since the foundation laid is most important, the bar generally must bear in mind the proper approach. Testimony must be introduced concerning the competency of the operator, the mechanism and operation of the camera used, the type of film, the conditions of exposure, the circumstances of developing, including the competency of the person performing the service. The film should be identified. Testimony should be offered concerning the construction and operation of the projector showing it to be in perfect

¹ 305 Ill. App. 458, 27 N.E. (2d) 289 (1940).

² 3 Wigmore, Evidence (3rd Ed.) § 798a, p. 206; Herbert H. Kennedy, "Motion Pictures in Evidence," 27 Ill. L. Rev. 424 (1932).

³ Ottenstroer v. Belt Ry. Co. of Chicago, 272 Ill. App. 615 (1933).

⁴ Herbert H. Kennedy, "Motion Pictures in Evidence," 27 Ill. L. Rev. 424 (1932).

⁵ 9 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 6383, p. 873; 3 Wigmore, Evidence (3rd Ed.), § 798a; *Boyarsky v. G. A. Zimmerman Corp.*, 270 N.Y.S. 134 (1934), noted in 19 Minn. L. Rev. 124; *Snyder v. American Car & Foundry Co.*, 322 Mo. 147, 14 S.W.(2d) 603 (1929); Charles Calvin Scott, "Legal Photography, Part VI" 3 Kan. City L. Rev. 83 (1935); *Massachusetts Bonding & Ins. Co. v. Worthy*, 9 S.W.(2d) 388 (Tex. Civ. App., 1928).

⁶ *Pacific Mutual Life Ins. Co. v. Marks*, 230 Ala. 417, 161 So. 543 (1935); *Gibson v. Gunn*, 202 N.Y.S. 19 (1923); Cf. *DeCamp v. United States*, 10 F.(2d) 984 (1926).

working condition, and the size and type of screen, together with the distance of the projector therefrom should be revealed.⁷

In preparing motion pictures for use in evidence, it has been suggested that the photographer use a rented camera instead of his own, thus enabling the dealer to give independent testimony as to the time when the camera was rented and tending to establish the time when the picture was taken and eliminating charges of tricks; that the film should be purchased from the same dealer for like reasons; that after taking, it be returned to the same dealer for processing and be run through the projector for his benefit for purposes of identification; that enough of the surroundings should appear in the picture to enable one to testify where it was taken; and that the film should be kept in its original state, without cuts or splices.⁸

While the chief use of the motion picture has been in the field of exposing fraud in personal injury cases⁹ it has also been otherwise employed. A sound motion picture has been displayed to rebut a contention that a confession in a criminal case was obtained by coercion.¹⁰

Its use to portray a reconstructed scene was not permitted.¹¹ The court there determined that there was no accurate reproduction of the scene and there was risk of manipulation. The court held, however, that the decision as to admissibility, depending as it does on circumstances, should be left to the trial court. Hence the question of admissibility generally is still open.

There is a strong possibility that in the future records on appeal will consist of sound pictures of the trial.¹² Such procedure, while now too costly, would simplify the work of appellate courts while at the same time extending the scope of review.

Whatever may be the future attitude of the court to motion pictures it would seem that in the decision in the instant case the court has taken a forward step in the law of evidence. Whatever operates to expose malingerers promotes honesty in the legal profession and aids in securing the prompt payment of legitimate damage claims.

CIVIL PRACTICE ACT CASES

ACTIONS—ABOLITION OF DISTINCTIONS AS TO FORM—AVAILABILITY OF MOTION IN NATURE OF CORAM NOBIS IN CHANCERY PROCEEDINGS.—The remedy in the nature of a writ of error coram nobis under the Illinois Civil Practice Act enabling correction by motion of "all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ" has been held inapplicable to

⁷ Kennedy, "Motion Pictures in Evidence," 27 Ill. L. Rev. 424 (1932).

⁸ Charles Calvin Scott, "Legal Photography, Part VI," 3 Kan. City L. Rev. 83 (1935).

⁹ Sweet, "The Motion Picture as a Fraud Detector," 21 Am. Bar Jour. 653.

¹⁰ Commonwealth v. Roller, 100 Pa. Super. Ct. 125 (1930).

¹¹ State v. United Railways & Electric Co., 162 Md. 404, 159 A. 916 (1932).

¹² Charles Calvin Scott, "Legal Photography, Part VI," 3 Kan. City L. Rev. 83 (1935).

proceedings in chancery in a decision by the Illinois Supreme Court¹ reversing a decision by the Appellate Court heretofore noted.²

The case is of considerable significance with regard to the extent of the merger between law and equity effected by the Civil Practice Act.³ In this connection, the court stated that "it was the obvious intention [of the legislators] to do away with forms of pleading but to preserve separate procedure in law and equity."⁴ If this doctrine is carried to a logical conclusion, it may be expected that the attempted merger between law and equity, except for purposes of pleading, will produce little of significance in Illinois.

W. L. SCHLEGEL, JR.

COMPLAINT—MOTION TO DISMISS—EFFECT OF RENEWING MOTION TO DISMISS AFTER EARLIER DENIAL THEREOF.—In the case of *McGraw v. Oelig*¹ one of the defendants, acting in a representative capacity, filed a counterclaim against certain of his co-defendants to recover for the wrongful death of his intestate. A motion to dismiss the counterclaim² was presented on the ground that the same could not be maintained since the person whose negligence caused the death was one of the next of kin and would be entitled to a distributive share in any recovery.³ This motion having been denied, the counter-defendants answered and a trial was had resulting in a verdict in favor of the counterclaimant. Upon motion, a new trial was granted. Thereafter the counter-defendant, upon leave of court,⁴ withdrew his answer and filed another motion to dismiss the counterclaim predicated on the same ground above-mentioned.⁵ This motion, over counterclaimants' objection that the point having been once determined adversely could not be reconsidered, was granted, and, counterclaimant electing to stand by his pleading, judgment was entered dismissing the same. On appeal therefrom, held: judgment affirmed, the trial court being allowed to retain discretionary control over the pleadings until final judgment.

Although there is no express precedent for such decision since the adoption of the Illinois Civil Practice Act, at least where the case had proceeded as far as the instant one, an earlier decision under the for-

¹ *Frank v. Salomon*, 376 Ill. 439, 34 N.E.(2d) 424 (1941).

² See 17 CHICAGO-KENT LAW REVIEW 276 where the facts of the case are stated.

³ See Roger L. Severns, "Equity and 'Fusion' in Illinois," 18 CHICAGO-KENT LAW REVIEW 333 (1940).

⁴ *Frank v. Salomon*, 376 Ill. 439, 444, 34 N.E.(2d) 424 (1941).

¹ 309 Ill. App. 628, 33 N.E.(2d) 758 (1941).

² Ill. Rev. Stat. 1939, Ch. 110, § 169. Motions under this section, equivalent to general demurrers under the former procedure, may be presented where a pleading "is substantially insufficient in law."

³ *Hazel v. Hoopston-Danville Motor Bus Co.*, 310 Ill. 38, 141 N.E. 392, 30. A.L.R. 491. (1923); *Ohnesorge v. Chicago City Railway Co.*, 259 Ill. 424, 102 N.E. 819 (1913). See also, as to other comparable situations, Gregory, "Imputed Contributory Negligence," 2 U. of Chi. L. Rev. 173 (1935).

⁴ Ill. Rev. Stat. 1939 Ch. 110, § 170.

⁵ The counterclaimant filed a motion to strike the motion to dismiss. For the propriety of "demurring to a demurrer" see *Bohnert v. Ben Hur Life Ass'n*, 362 Ill. 403, 200 N.E. 326 (1936), and note thereon in 14 CHICAGO-KENT REVIEW 185 (1936).

mer system of procedure dealt with the identical problem in the same fashion.⁶ The instant result was also foreshadowed by the holding in *Municipal Employees Insurance Association of Chicago v. Taylor*⁷ decided since the adoption of the present Practice Act, although in that case the two motions to dismiss were presented before the trial stage had been reached, and the second one had been filed without leave being granted. There is, however, no logical difference between the two cases, since the granting of a motion for a new trial puts the case back to the pleading stage, during which the trial court should have full discretion to permit amendments, strike pleadings, and in general control the steps affecting the ultimate disposition of the case. To deny the trial court power to reverse its own earlier erroneous rulings occurring during the pleading stage would produce the ridiculous result of forcing an appellate tribunal to do the work of the trial court. C. WHITMAN

SUMMARY JUDGMENT—FAILURE TO FILE REPLY TO ANSWER—WHETHER MOTION FOR SUMMARY JUDGMENT OPERATES AS WAIVER OF FAILURE TO FILE REPLY.—An interesting sidelight has been thrown on the procedure for securing a summary judgment in certain types of actions by the decision in *Eagle Indemnity Co. v. Haaker*.¹ In that case a judgment creditor of a closed state bank filed suit against certain of the stockholders to secure satisfaction. One defendant filed a verified answer, to which no reply² was filed. Subsequent thereto, plaintiff moved for a summary judgment in accordance with the provisions of Section 57 of the Illinois Civil Practice Act,³ supporting its motion with affidavits as provided by Rule 15 of the Illinois Supreme Court.⁴ In opposition, the defendant filed counter-affidavits, but did not deny the facts alleged in the plaintiff's complaint or in the affidavits made in support of the motion. Plaintiff's motion was accordingly granted and judgment was entered. Defendant appealed, relying on two grounds, to wit: (1) the case was not one falling within the purview of the summary judgment procedure; and (2) the failure of the plaintiff to file a reply to defendant's answer, which amounted to an admission of the matter contained therein,⁵ hence judgment should have been rendered for the defendant. Judgment was affirmed.

The provisions for summary judgment apply only to actions "upon a contract, express or implied, or upon a judgment or decree for the payment of money, or in any action to recover the possession of land or . . . specific chattels."⁶ The defendant contended that since the plaintiff's

⁶ *Shaw v. Dorris*, 290 Ill. 196, 124 N.E. 796 (1919).

⁷ 300 Ill. App. 231, 20 N.E.(2d) 835 (1939).

¹ 309 Ill. App. 406, 33 N.E.(2d) 154 (1941).

² Despite the language of § 32 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1939, Ch. 110, § 156), the courts still persist in denominating the third stage of pleading as a "replication," following the terminology of common law pleading.

³ Ill. Rev. Stat. 1939, Ch. 110, § 181.

⁴ Ill. Rev. Stat. 1939, Ch. 110, § 259.15(1).

⁵ On this see § 40(2) of the Illinois Civil Practice Act; Ill. Rev. Stat., 1939, Ch. 110, § 164(2).

⁶ Ill. Rev. Stat. 1939, Ch. 110, § 181.

claim originally arose out of an ultra vires contract of bailment followed by a conversion of the bailed chattels, the summary judgment procedure was not available. The court, nevertheless, held that the plaintiff, by reducing its claim against the closed bank to judgment, had changed the same into a contractual demand against the stockholders,⁷ clearly justifying the use of the more expeditious device of the motion for summary judgment.

The second point relied on was that by failure to file a reply the plaintiff had admitted the facts alleged in the defendant's answer. This the court also found to be groundless. In an earlier case,⁸ the Illinois Supreme Court held that the failure to file a reply may be regarded as a waiver of the right to do so if the parties proceed to trial without questioning the omission. While the motion for summary judgment is not a "trial" of the cause in the sense indicated by that decision, it is, nevertheless, an inquisition to determine if any factual question exists which needs to be tried, and the defendant, by joining therein, through the use of counter-affidavits, must now be regarded as waiving the defect as effectively as if he had gone to trial and offered proof. The applicability of the analogy thus drawn can hardly be challenged.

C. WHITMAN

⁷ *Golden v. Cervenka*, 278 Ill. 409, 116 N.E. 273 (1917). See also *Civil Practice Act Annotated*, (Foundation Press, 1933) p. 137, where the annotator suggests that the term "implied contract" as used in the summary judgment section includes contracts "implied in law."

⁸ *Watt v. Cecil*, 368 Ill. 510, 15 N.E.(2d) 292 (1938). See also *Ford Motor Co. v. National Bond and Investment Co.*, 294 Ill. App. 585, 14 N.E.(2d) 306 (1938).