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Notes and Comments

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NOTES AND COMMENTS

PAYMENT: AN AFFIRMATIVE DEFENSE?

No good common law pleader engaged in preparing a declaration in an action of assumpsit, whether special or general, would omit an allegation of breach of promise if he expected to sustain his pleading against attack.[1] The fact that the contract relied on merely called for the payment of money, as would be the case on a promissory note,[2] or a lease,[3] in no way changed this requirement. The defendant, in turn, by specific traverse or under the general issue, was able to show that no breach had occurred in such cases, say, because the sum promised had, in fact, been paid. By so doing, the defense of payment, though affirmative in nature, was negative in form, hence the burden of proof lay on the plaintiff to prove nonpayment rather than on defendant to establish the satisfaction of the claim.[4] Proof of nonpayment, however, might be rendered easier by the use of presumptions, such as the one arising from plaintiff's possession of the uncancelled note.[5]

The pleading reforms introduced in the English common law system through the Hilary Rules,[6] by restricting the use of the general issue,[7] placed on the defendant the duty of using special pleading to question many of the matters previously traversed by that compendious denial. Among the special pleas thus required, the one asserting payment as a defense became affirmative in form, hence, though plaintiff was still obliged to allege breach of contract even in money cases, the burden of proof of payment, whether on or after due date, thereafter rested on the defendant.[8] Liability in such cases, enforcible in litigation, must undoubtedly rest upon the maker's default by failure to pay upon the maturity of the instrument. Logic would dictate, therefore, a different rule of proof. But one which required the plaintiff to take the affirmative of the issue as of one day, and put the responsibility on the defendant as of the next day, if payment was delayed, though logical, would hardly be practical in its operation.

The codifiers of the procedural reforms developed in the United States were not ignorant of these facts when, in their desire to eliminate

1 Chitty, A Treatise on Pleading (8th Ed. Dunlap), I, 331.

2 Chitty, op. cit., II, 114. 3 Chitty, op. cit., II, 549.

4 Chitty, op. cit., II, 476. Paramore v. Johnson, 1 Ld. Raymond 566, 91 Eng. Rep. 1278 (1700); though defendant might plead specially if he wished, Vanhatton v. Morse, 2 Ld. Raymond 787, 92 Eng. Rep. 25 (1702).

5 Ritter v. Schenk, 101 Ill. 387 (1882).

6 3 William IV, c. 42, § 1; Chitty, op. cit., I, 733. Though the Hilary Rules, as such, were not binding on American courts, the early Illinois courts applied them [McNulta, Receiver v. Lockridge, Administrator, 137 Ill. 270, 27 N. E. 452 (1891)], and later, using *stare decisis* as a basis, refused to retract their error [The Chicago Union Traction Company v. Jerka, 227 Ill. 95, 81 N. E. 7 (1907)].

7 Rules, Hilary Term 4 William IV, Chitty, op. cit., I, 742: ". . . the plea of *non-assumpsit* shall operate only as a denial in fact of the express contract or promise alleged. . . ."

8 Fidgett v. Penny, 1 C. M. & R. 108, 149 Eng. Rep. 1014 (1834).

the general issue as a form of answer which concealed rather than revealed the defense,[9] they promulgated the requirement that certain enumerated defenses, including payment, had to be set forth in an affirmative answer whether affirmative or not according to substance.[10] What did they accomplish thereby with reference to the defense of payment?

There is some authority for the view that such a provision, when applied to an action based on a money contract, makes it unnecessary for the plaintiff to either allege or prove nonpayment.[11] In such jurisdictions the substantive cause of action must be taken as one in which breach of contract, in money cases, is not an essential, *i.e.* the justiciable cause is choate from the moment of execution and delivery of the instrument except as its enforcibility may be temporarily suspended in the interval between making and maturity. Other forms of contractual liability, however, are dealt with as heretofore,[12] so that, in such situation, no cause of action exists until breach, either partial or total, has occurred.

By far the majority of the American jurisdictions still require the plaintiff, in any contractual situation, whether requiring the payment of money or the performance of some act, to allege, as an essential element of his complaint, some breach by the defendant even if it requires only the use of the simple phrase "which said sum the defendant has failed (or refused) to pay."[13] These states, recognizing the fundamental nature of the cause of action, are, at least, preserving a logical symmetry in the requisites of a good complaint without attempting to draw discrimination between types of contractual obligations. The difficulty develops, in such jurisdictions, when the defendant prepares his answer. If he has performed the promised act, his answer should logically be a simple denial of the allegation of breach, fulfilling the intrinsic function of a denial by resting on the theory that plaintiff *never* acquired a cause of action against him.[14] If, however, his defense is payment, whether paid according to the promise or subsequent to maturity, he is forced to use an affirmative answer akin to the common law plea of confession and avoid-

[9] Ill. Rev. Stat. 1941, Ch. 110, § 164, and see note to Section 40 in Illinois Civil Practice Act Annotated 85.

[10] Ill. Rev. Stat. 1941, Ch. 110, § 167. The list contains some truly affirmative defenses such as release, discharge, and laches; others which under former systems of pleading were treated as affirmative by reason of the procedural rule forbidding plaintiff from anticipating a defense (e.g. license), or relieving plaintiff of the necessity of alleging that his claim rested on a written instrument (e.g. statute of frauds); while still others were intrinsically negative defenses tending to show that plaintiff never had a cause of action against the defendant, e.g. duress, illegality, nondelivery, fraud in the execution, and want of consideration.

[11] Rossiter v. Schultz, 62 Wis. 655, 22 N.W. 839 (1885). See dicta in Archambeault v. Jamelle, 100 Conn. 690, 124 A. 820 (1924), and First National Bank v. Strait, 71 Minn. 69, 73 N.W. 645 (1898).

[12] Supervisors of the Town of Franklin v. Kirby, 25 Wis. 498 (1870).

[13] Lent v. New York & Massachusetts Ry. Co., 130 N. Y. 504, 29 N.E. 988 (1892). For collection of cases, see Alison Reppy, "The Anomaly of Payment as an Affirmative Defense," 10 Corn. L. Q. 269 (1925).

[14] Such is the case in one jurisdiction, Yancey v. Northern Pacific Ry. Co., 42 Mont. 342, 112 P. 533 (1910).

ance,[15] and, in theory, is forced to admit that plaintiff *once* had a cause of action which has since, by the payment, become discharged. In strict logic, such an affirmative defense would impose the burden of proof on defendant as well as the duty of raising the issue.[16]

The problem has not been squarely decided by an Illinois court since the adoption of the Civil Practice Act, but an intimation is expressed in the specially concurring opinion of Justice O'Connor in *First National Bank & Trust Company of Evanston* v. *Simon*,[17] that, despite the anomalous nature of the pleadings, *the duty is still on the plaintiff to prove nonpayment* of the amount claimed due even though the issue be introduced into the case by an affirmative answer filed by defendant as required by Section 43(4) of the Illinois Civil Practice Act.[18] No recognition seems to have been given to the sound policy of the law that, regardless of the order of pleadings, the burden of proof may be easier discharged

[15] Clark v. Mullen, 16 Neb. 481, 20 N.W. 642 (1884), where payment was made contemporaneously with sale, but defendant was forced to use an affirmative answer. Contra, McDonald v. Faulkner, 2 Ark. 472 (1840). A distinction is drawn, however, in suits based on official bonds, where the payment relied on is made in compliance with the provisions thereof, rather than as satisfaction after a breach has occurred, Barker v. Wheeler, 62 Neb. 150, 87 N.W. 20 (1901). In such cases a denial form of answer is proper, equivalent to the common law plea of *non-damnificatus*, Chitty, op. cit., I, 485y; Kaye v. Waghorn, 1 Taunt. 428, 127 Eng. Rep. 900 (1809). Such matter may not be shown under the general issue of *non est factum*, Beggs, Administrator v. Chicago Bonding & Surety Company, 207 Ill. App. 621 (1917).

[16] McKyring v. Bull, 16 N. Y. 297 (1857). Such seems to have been the case in Illinois prior to the adoption of the Civil Practice Act. At an early date the proof could be offered under the general issue, Crews v. Bleakley, 16 Ill. 20 (1854), but later was given under a plea supported by notice, Ill. Rev. Stat. 1933, Ch. 110, § 46, or under a separate plea of payment, The Whitaker Paper Company v. Galesburg Mail Company, 238 Ill. App. 600 (1925). For the practice in equity proceedings see Ritter v. Schenk, 101 Ill. 387 (1882).

[17] 312 Ill. App. 214, 38 N.E. (2d) 360 (1941). A ten-year lease had been executed calling for a lump sum rental due in advance. Six months after executing the lease, the lessor transferred the premises to plaintiff as trustee under a trust agreement. Five years later lessor died, leaving a will appointing plaintiff as executor. After appointment as executor, plaintiff sued in its dual capacity, as trustee under the agreement and as executor under the will, to recover the rent allegedly due from the lessee-defendant. Upon plaintiff's motion, the suit was dismissed as to the trustee, and prosecuted by plaintiff as executor. Defendant filed an affirmative answer, as required, alleging payment of the rent to lessor during her lifetime. At the trial plaintiff introduced the lease in evidence and rested. Defendant sought to testify as to the payment, but was deemed incompetent by reason of Ill. Rev. Stat. 1941, Ch. 51, § 2. Defendant then introduced the trust agreement in evidence and contended that the cause of action, if any existed, was vested in the trustee. The trial court so held, and its judgment for defendant was affirmed. The majority opinion makes no reference to the procedural question here considered. It is interesting to note that the parties regarded the matter of payment as a true affirmative defense, to be pleaded and proved by the defendant. The concurring opinion states that plaintiff alleged non-payment of the rent but "*made no attempt to prove non-payment and therefore made no case by merely introducing the lease in evidence.*" 312 Ill. App. 214, 217, 38 N.E. (2d) 360, 361 (1941).

[18] Ill. Rev. Stat. 1941, Ch. 110, § 167(4).

by the one able to show the affirmative than by him who must prove the negative of any proposition. No help can be drawn from the manner of dealing with the related problem of pleading and proving performance of conditions precedent in contract cases, as the context of Rule 13(3) of the Illinois Supreme Court[19] shows no intention to change the original burden of proof though providing for an alteration in the former method of alleging such matter.[20]

Clarification of the question seems highly desirable and may take one of two forms:

(a) Regard payment as a true affirmative defense which must be both pleaded and proved by the defendant;[21] or

(b) Require defendant to introduce the question by an answer merely affirmative in form but actually negative in fact, since it will be a negation of plaintiff's necessary allegation of nonpayment, leaving the burden of proof on the plaintiff.

The first suggestion may be accomplished by legislative amendment of Section 43(4) of the Illinois Civil Practice Act.[22] The second, by the application through judicial decision of the thought perhaps already implicit in the statute, but clearly expressed in the opinion above mentioned.

W. F. ZACHARIAS

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—AMOUNT IN CONTROVERSY—WHETHER THE AMOUNT CLAIMED OR THE AMOUNT OF THE JUDGMENT CONTROLS IN DETERMINING JURISDICTION OF THE SUPREME COURT.—Section 75 of the Illinois Civil Practice Act[1] provides for appeals from the Appellate Courts to the Supreme Court in certain cases. It specifically denies the right to appeal in actions sounding in contract or damages where the amount involved is not large.[2] In *Martin* v. *Martin's Estate*[3] the plaintiff filed three distinct

19 Ill. Rev. Stat. 1941, Ch. 110, § 259.13(3).

20 Bigelow, Trustee v. Oglesby, Executrix, 302 Ill. App. 27, N.E. (2d) 378 (1939).

21 In such case plaintiff probably would be obliged to file a reply denying receipt of payment, Ill. Rev. Stat. 1941, Ch. 110, § 156, or else be regarded as admitting such defense, Ill. Rev. Stat. 1941, Ch. 110, § 164(2). Such is the view in Hubler v. Pullen, 9 Ind. 273 (1857) and Benicia Agricultural Works v. Creighton, 21 Ore. 495, 28 P. 775 (1892). Contra: Frish v. Caler, 21 Cal. 71 (1862), in which state a reply is never used, Van Giesen v. Van Giesen, 10 N. Y. 316 (1852), State ex rel. Spaulding v. Peterson, 142 Mo. 526, 39 S.W. 453 (1897).

22 The constitutionality of legislation changing the burden of proof in civil cases is not open to doubt, but must be exercised with care by reason of the provisions of the Illinois Constitution, 1870, Art. IV, § 13, regarding the subjects which may be included under one title, since the matter would primarily involve amendment of An Act in regard to evidence and depositions in civil cases, Laws 1871-2, 405, found in Ill. Rev. Stat. 1941, Ch. 51.

1 Ill. Rev. Stat. 1941, Ch. 110, § 199 (2).

2 Ill. Rev. Stat. 1941, Ch. 110, § 199 (2) provides for appeals to the Supreme Court: "Provided, however, that . . . in actions ex contractu . . . and in all cases sounding in damages, . . . the judgment, exclusive of costs, shall be for fifteen hundred dollars ($1,500.00) or more. . . ."

3 377 Ill. 392, 36 N.E. (2d) 742 (1941).

claims against his mother's estate which totalled $4334. The county court disallowed the claims; the circuit court held that two items were barred by the statute of limitations and submitted the third item to the jury which returned a verdict in favor of the plaintiff for $934. The Appellate Court affirmed this decision[4] and the plaintiff, without a certificate of importance from that court, moved the Supreme Court for leave to appeal from the decision on the ground that the amount in controversy was in excess of $1500. Plaintiff relied on one earlier Illinois case[5] which seemed to sustain his contention. The Supreme Court, however, in the instant opinion dismissed the petition to appeal being careful to point out that the earlier Illinois cases were decided prior to 1907 under statutes which used the phrase "the amount involved"; whereas the present act uses the word "judgment." In this connection the court said: "In cases where the judgment is in favor of the plaintiff, [jurisdiction to review] is based upon the amount of the 'judgment' and not upon the 'amount involved,' as, under prior acts."[6]

That portion of the Civil Practice Act now under consideration follows generally the language used in section 121 of the Practice Act of 1907[7] as amended in 1929.[8] The original language fixed the jurisdictional amount at $1000, and made the "sum or value in controversy" the test of the right to appeal. By the 1929 amendment a different standard was introduced, one of two-fold nature depending on who succeeded in the trial court. If the plaintiff won, the basis for appellate review depended on the amount of the judgment; if judgment ran against the plaintiff, he could secure review only if a certificate was issued to the effect that there was fairly involved a claim of $1500 or more. Whenever the plaintiff's judgment was for less than the jurisdictional amount, review thereof beyond the appellate court was not possible.[9] Following adoption of the present provision it was but natural for the court to give the same interpretation to the clear language of the statute. It has now done so.

A new but somewhat related problem was presented in the case of *Antosz* v. *Goss Motors, Inc.*,[10] in which four persons injured in one auto-

[4] 310 Ill. App. 259, 33 N.E. (2d) 713 (1941).

[5] Estate of Guyer v. Caldwell, 189 Ill. 581, 60 N.E. 50 (1901), in which the court said: "The claim of the appellee as filed in the circuit court was for more than $1,000, and the appeal by him was from a judgment of that court refusing to allow him the amount of his claim. There is nothing in the record to show that he in any way abandon any part of his claim. . . . The amount in controversy in the circuit court, and also in the Appellate Court, was more than $1,000, and by the terms of the statute either party was given the right to appeal to this court." 60 N.E. 50 at p. 51.

[6] 377 Ill. 393, 36 N.E. (2d) 742, 743 (1941).

[7] Laws 1907, p. 468. [8] Laws 1929, p. 578.

[9] Funk v. Kempton, 235 Ill. 280, 85 N.E. 218 (1908); Dale v. Modern Woodmen of America, 237 Ill. 499, 86 N.E. 1065 (1909); La Monte v. Kent, 253 Ill. 230, 97 N.E. 387 (1912). In the last cited case the court said: "Under the present statute a judgment in an action *ex contractu*, or in an action sounding in damages which does not exceed $1,000, may only be brought from the Appellate Court to this court for review where the Appellate Court shall grant a certificate of importance." 97 N.E. 387 at p. 388.

[10] 378 Ill. 608, 39 N.E. (2d) 322 (1942).

mobile accident joined as plaintiffs though each sought independent relief.[11] Their claims were tried together resulting in separate verdicts and separate judgments for the several plaintiffs in varying amounts but aggregating $1600. After these judgments had been affirmed in the Appellate Court[12] the defendant, without a certificate of importance, attempted to secure leave to appeal from the Supreme Court on the ground that the amount involved was in excess of $1500. That court, upon motion, refused to grant such request pointing out that earlier Illinois cases[13] which had construed the provision regarding the jurisdictional amount required that the judgment must in *each* case be in excess of the statutory requirement. These cases were regarded as still applicable and not affected by the fact that since 1933 it has been possible for several plaintiffs, having separate and distinct demands, to join in one proceeding where, theretofore, each one would have been obliged to sue separately. The consolidation of these several claims resulting in total judgment against defendant in excess of the jurisdictional amount does not change the fact that each claim is to be treated as a distinct one, and, hence, review thereof by the Supreme Court is not possible unless the judgment for the individual litigant exceeds the statutory requirement.

Necessarily left undetermined, because not involved, is the problem of the scope of review to be granted where one plaintiff has such a judgment but the amounts awarded the other joined plaintiffs fall short of the required figure. It would seem that any review granted on the larger claims should not affect the rights of the other parties whose claims would have been regarded as finally established in the Appellate Court had they seen fit to sue separately.[14] A rather freak result is, however, possible in the event the Supreme Court should decide the larger claim has no legal support while being left powerless to disturb the judgments rendered on the companion smaller claims.[15] D. A. ESLING

11 Joinder was permitted by reason of Ill. Rev. Stat. 1941, Ch. 110, § 147.

12 311 Ill. App. 254, 35 N.E. (2d) 688 (1941).

13 Martin v. Stubbings, 126 Ill. 387, 18 N.E. 657, 9 Am. St. Rep. 620 (1888); Farwell v. Becker, 129 Ill. 261, 21 N.E. 792, 6 L. R. A. 400, 16 Am. St. Rep. 267 (1889); Aultman & Taylor Co. v. Weir, 134 Ill. 137, 24 N.E. 771 (1890); Fehr Construction Co. v. Postl System, 288 Ill. 634, 124 N.E. 315 (1919).

14 Ill. Rev. Stat. 1941, Ch. 110, § 199.

15 By the time such decision was reached it would be too late for the Appellate Court to grant a certificate of importance on the smaller demands, since proceedings thereon must be taken within twenty days after final judgment has been pronounced in the Appellate Court. Ill. Rev. Stat. 1941, Ch. 110, § 259.32.