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EQUITY - ADMISSIBILITY OF EVIDENCE ARISING PENDENTE LITE

EQUITY — ADMISSIBILITY OF EVIDENCE ARISING PENDENTE LITE — In equitable actions "the right to judgment is not limited to the facts as they existed at the commencement of the action, but the relief administered is such as the nature of the case, and the facts as they exist at the close of the litigation, demand." [1] While this quotation may express the general rule regarding the admissibility of evidence arising *pendente lite,* the difficulties in its application are numerous.

I.

At the outset, it is desirable to take note of a distinction, admittedly somewhat nebulous, which is made by the courts between those facts which existed at the time the bill was filed, but which have only later become provable, and those events which have occurred subsequently to the filing of the bill. As to the former, they serve only to establish the situation as it existed at the commencement of the action, and there would seem to be no good reason for excluding this proof, pertinent to the issues formed by the pleadings.[2] When, however, events occur after the action is begun which are important as evidence, it requires close scrutiny to ascertain whether the new evidence is in support of the issues being tried and is proper as serving to corroborate and strengthen the facts of which one of the parties has already offered

[1] Pond v. Harwood, 139 N. Y. 111, 34 N. E. 768 (1893). See also Sherman v. Foster et al., 158 N. Y. 587, 53 N. E. 504 (1899). In Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. 350 (1888), an injunction proceeding, where the plaintiff contended that the "right to judgment depends upon the facts as they existed at the commencement of the action," the court said: "such is the rule in actions at law, but not in actions at equity . . . where such relief only is administered, as the nature of the case and the facts as they exist at the close of the litigation demand."

[2] In 10 Ruling Case Law 501 (1915), the rule is laid down: "Nor need new facts of a purely evidentiary nature, corroborative of the allegations of the bill and material only as tending to prove those allegations, be brought in by supplemental bill." The same authority goes on to say that, since it is generally conceded that good pleading does not tolerate the setting forth of evidence only, it would be improper to allow

proof, or whether it is foreign to the issues and gives the other party a legitimate claim of surprise.[3]

The difficulties which arise when this distinction is sought to be applied are well brought out in the Minnesota case of *Paterson, et al. v. Shattuck Arizona Copper Co., et al.*[4] The plaintiff was a minority stockholder in the defendant corporation, and sought to restrain the defendant from consolidating with another corporation. The consolidation was on a share-for-share basis, and the plaintiff's objection, in which he was sustained by the trial court, was that the properties of the other corporation were much less valuable than the defendant's. The trial court refused evidence offered by the defendant of explorations made on the mining property of the other corporation since the filing of the bill which tended to show that it was very valuable. The defendant could argue that the present mineral wealth of the property existed at the time the bill was filed, and had merely become provable since the bill was filed. On the other hand, the practical miner's attitude is that exploration produces new values. Undiscovered mineral is, practically speaking, non-existent.

This case should make it quite apparent that admissibility cannot be determined by any simple test depending upon the time when the evidence arose, and while the distinction should be considered, it is not conclusive upon the larger question presented. In the *Paterson* case the appellate tribunal indicated that it might be error to exclude this

a supplemental bill except where the new facts could be the basis for judicial action. See Jenkins v. Eldridge, 3 Story (U. S. C. C.) 299 (1845).

[3] Cases of this type are numerous. In Bissey et al. v. City of Marion, 108 Kan. 553, 196 Pac. 235 (1921), which was a proceeding to compel the defendant city to build a bridge, the court allowed the plaintiff to show that the defendants had money to build the bridge at various times after the suit was begun, and also that officials of the city had made declarations that they would not build. This evidence was important to show that the defendants had "arbitrarily and capriciously" refused to build the bridge as the plaintiff charged. Haffey v. Lynch, 143 N. Y. 241, 38 N. E. 298 (1894) (specific performance of contract for sale of land. Plaintiff was allowed to show that an incumbrance had been lifted after the bill was filed, even though he knew of the incumbrance when he began the action). An interesting case is that of Lyster v. Stickney, (C. C. Colo. 1882) 12 Fed. 609, which was an action to cancel notes allegedly executed under duress. The plaintiff's intestate had executed notes payable to the defendant when the latter threatened to kill him. The deceased began an action to cancel the notes, whereupon the defendant did kill him. The court said that the plaintiff could show that the defendant carried out his threat after the beginning of the action, because that fact tended to show that duress actually existed at the time the notes were made. In Barricolo v. Trenton Mutual Life and Fire Ins. Co., 13 N. J. Eq. 154 (1860), a minority stockholder brought a bill to wind up the defendant corporation on the ground of insolvency. The court said that facts occuring after the filing of the bill which tended to show insolvency were merely "cumulative evidence in support of charges in the original bill."

[4] 186 Minn. 611, 244 N. W. 281 (1932).

sort of evidence in some cases, but that the exclusion was immaterial here because the plaintiff was not entitled to an injunction anyway.[5] It is submitted that the evidence should have been admitted by the lower court. The only substantial objection that the plaintiff could have would be that he was taken by surprise, but in this instance it would seem that this argument would not be valid since the element of surprise would not be material.

As for evidence which has clearly come into existence since the original bill was filed, Mr. Justice Story, in his treatise on Equity Pleadings,[6] says that the usual way to introduce such matter is by supplemental bill.[7] But he goes on to say that a supplemental bill is neither necessary nor proper when there is no "alteration in the interest of the parties," or when no circumstance has arisen which requires further discovery; "but where a fact only has occurred, which might be proved under the proceedings in the original bill, . . . and the relief is not varied by the supplemental matter, the supplemental bill is improper." This would seem to mean that if the circumstances happening subsequently could have been introduced as evidence under the original bill had they existed when the bill was filed, no supplemental pleading is necessary to get them in whenever they arose. If Mr. Justice Story correctly states the law, it is submitted that the lower court in the *Paterson* case should have admitted the evidence, not because of any distinction as to when the facts came into existence but because, if in existence and known, they could have been proved under the proceedings in the original bill.

2.

This rule is applied consistently by the courts in those cases where its equity is more obvious. In cases where the plaintiff seeks a money decree,[8] for example, courts of equity are very liberal. In bills for accounting it is quite uniformly held that the plaintiff is entitled to get what is due at the time the decree is entered and is not limited to the

[5] 31 MICH. L. REV. 1157 (1933).

[6] 10th ed. secs. 332, 352 (1892).

[7] For the comparatively simple rules regarding the liberality of equity courts in allowing amendment and supplemental pleadings see STORY, EQUITY PLEADINGS, 10th ed., secs. 332-351, 882-906 (1892). Also HOPKINS' FEDERAL EQUITY RULES ANNOTATED, 7th ed., pp. 192 and 222 (1930), and cases there cited.

[8] This is not surprising when it is remembered that even in cases at law for damages, the plaintiff is frequently allowed to show facts which came into existence since the suit began in order to show how much he has suffered. Thus in Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62 (1897), where the defendant contracted to raise lemons for the plaintiff and the former repudiated his contract when it had some years to run. The plaintiff sued immediately, and at the trial some years later, the plaintiff was allowed to show the yield of lemon groves during the interim in order to fix his

amount due at the filing of the bill.[9] And in cases where a money decree is granted as incidental to specific relief, the same tendency is noted.[10] The Illinois court in the case of *Kelly v. Galbraith*[11] said that the usual rule is that matter arising after the bill is filed must be brought in by supplemental bill if that matter is to be made the basis for distinct relief, but that this rule has been relaxed in actions for accounting and in mortgage foreclosure proceedings. In this connection the New York case of *Sherman v. Foster, et al.*[12] deserves special mention. In that case the plaintiff was mortgagee of three separate mortgages on the defendant's property. The plaintiff brought a foreclosure action on two of the mortgages after default by the defendant and asked for general relief. The third mortgage became due before a decree in the cause was rendered, and the court, though no supplemental bill was filed, allowed the plaintiff a decree foreclosing all three

damages. To the same effect is Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 Pac. 1020 (1895) (breach of contract); Morgan v. Reynolds, 1 Mont. 163 (1870) (replevin plus damages for detention). See SUTHERLAND ON DAMAGES, 4th ed., sec. 107 (1916). But evidently the courts do not carry this as far as personal injury cases, as seen in Brinberg v. Oliver Typewriter Co., 174 App. Div. 511, 161 N. Y. S. 226 (1916), where the court held that it was necessary for the plaintiff to file a supplemental complaint if he was to be allowed to show developments in his injuries occurring subsequent to the original complaint.

[9] Napier v. Westerhoff, (C. C. S. D. N. Y. 1907) 153 Fed. 985; Adams v. Dowding and Another, 2 Madd. 53, 56 Eng. Repr. 255 (1816); see also the statement in Kelly v. Galbraith, 87 Ill. App. 63 (1889).

[10] Brown, et al., v. Miner, Frost and Hubbard, 128 Ill. 148, 21 N. E. 223 (1889) (a mortgage foreclosure suit in which the plaintiff was allowed to show he had paid taxes after filing the bill); Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431 (1900) (action to reform a lease and the plaintiff was given judgment for rent accruing up to the time of the decree); Worrall v. Munn, 38 N. Y. 137 (1868) (specific performance of land contract — plaintiff was given damages for waste and being deprived of possession); Whiting v. Eichelberger, 16 Iowa 422 (1864) (where a mortgage note matured after filing of the bill it was included in the decree under a complaint for general relief). But see Null v. Jones, 5 Neb. 500 (1877), where the court held that supplemental pleadings were necessary in a foreclosure suit to show that interest had accrued after the original bill was filed. Also reaching a contrary result is the case of Duplesse et al. v. Haskell et al., 89 Vt. 166, 94 Atl. 503 (1915), in which the plaintiff and defendant were entitled to the use of a spring and the defendant prevented the plaintiff from using it. The court allowed damages only to the filing of the bill saying that the plaintiff would have to file a supplemental bill in order to recover damages subsequently accruing, so that the defendant might have a chance to answer and defend. But this seems superficial. The defendant could as well as not defend the issue of damages right up to the decree if he knew that the plaintiff was entitled to prove them. In other words, the surprise consists merely in learning that the rule is more liberal than the defendant supposed. In foreclosure proceedings upon default in an installment mortgage, courts have quite uniformly shaped the decree to give relief as to future installments which shall become due and not be promptly paid. See exhaustive note in 37 L. R. A. 737 (1896).

[11] 87 Ill. App. 63 (1899), affirmed 186 Ill. 593, 58 N. E. 431 (1900).

[12] 158 N. Y. 587, 53 N. E. 504 (1899).

mortgages. This case, it seems, goes too far and might work a real injustice unless the court allowed the defendant ample time to prepare a defense against foreclosure of the third mortgage.[13]

There is another group of cases in which the courts have generally allowed evidence arising *pendente lite* to be admitted under the original pleadings, viz., in proceedings where a continuing offense or injury is charged. Thus it has frequently been held in proceedings to abate a liquor nuisance that evidence of sales of liquor made after the filing of the original bill can be shown.[14] Likewise, in an action against a trustee for malversion of trust funds, the plaintiff can show under the original bill wrongs of which the trustee has been guilty since the commencement of the action.[15] In *Martin v. Sexton*[16] it is said that a supplemental bill is not necessary when no new facts have arisen since the filing of the bill except that the defendant has continued to do or has done that which the bill said he was doing or about to do. Perhaps this rule needs the qualification that the plaintiff must make a case out of events occurring previous to the bill,[17] but there is no good reason why subsequent facts should not be admitted to ascertain the amount of the damage or to strengthen the plaintiff's case.

There seem to be no rules of thumb to be worked out in regard to the admissibility of evidence arising *pendente lite*. The result in each case should depend upon the peculiar facts presented and the answer of the trial court to the question, "Will the evidence offered have the effect of giving the opposing party a legitimate claim of surprise, thereby operating to his prejudice?" The courts should draw the line when the evidence offered has a tendency to change the relief or to make new issues which the opponent is not prepared to meet. It would seem that a liberal application of the rules of evidence is wholesome in any case where the defendant has done a wrong for which the law will give the plaintiff relief, and to adhere to formalities of pleading and evidence which throw the plaintiff's case out and put him to

[13] See similar liberal tendency supra, n. 10.

[14] Hall v. Coffin et al., 108 Iowa 466, 79 N. W. 274 (1899); Murphy et al. v. United States, (C. C. A. 3d, 1926) 16 F. (2d) 595 (see a note on this case in 27 COL. L. REV. 606 (1927)); Mickewicz et al. v. United States, (C. C. A. 3d, 1925) 4 F. (2d) 48.

[15] Harrison v. Mock, 10 Ala. 185 (1846).

[16] 112 Ill. App. 199 (1904). To the same effect are: Pennsylvania Co. v. Bond, 99 Ill. App. 535 (1902), where the plaintiff sought to enjoin the building of railroad tracks, and was allowed to show that the defendant had completed them since the bill was filed. See Lyster v. Stickney, n. 3, supra.

[17] Murphy et al. v. United States, (C. C. A. 3d, 1926) 16 F. (2d) 595 (action to abate nuisance of defendant selling liquor; the plaintiff must show the nuisance existed before he can show sales made after the bill was filed).

additional expense merely because of the time when the defendant committed the acts complained of is unnecessarily formalistic. The important point is that the defendant has acted in a manner which entitles the plaintiff to some sort of relief. Certainly, if the defendant knew that what he did *pendente lite* was admissible against him, he could not be taken unawares unless there was carelessness in the preparation of his defense.

D. P. K.