

CHAPTER IX.

BILLS OF PARTICULARS.

TILTON v. BEECHER.

Court of Appeals of New York. 1874.

79 New York, 176.

This was an action for *crim. con.*

The complaint alleged that defendant had criminal intercourse with plaintiff's wife, "on or about the 10th day of October, 1868, and on divers other days and times after that day, and before the commencement of this action," at the house of the plaintiff, and at the house of the defendant, in Brooklyn. The motion was that plaintiff be required to deliver to defendant's attorney "a statement in writing of the particular times and places at which he (plaintiff) expects or intends to prove that any acts of adultery or criminal intercourse took place between the defendant and the wife of the plaintiff." The motion was denied, as is stated in the order, "on the ground that the court had no power to grant the same, and on the other grounds stated." * * *

RAPALLO, J.: The only question arising upon the present appeal, which is reviewable in this court, is whether or not the court below had no power to grant the application of the defendant.

* * * * *

It may not be absolutely essential to consider the question, whether the particulars sought could have been obtained under section 160, by an application to make the complaint more definite and certain. If the power to order particulars existed before the enactment of that section, it is not thereby abrogated; the most that could be said upon the subject is that, if section 160 affords an appropriate remedy the court might require the party to resort to that remedy. Both remedies might consistently

exist together. But so much stress has been laid on the assertion that a remedy could have been obtained under section 160 that it is proper to ascertain whether or not that position is sound.

The language of the section is: "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain."

It will be observed that it is only where the precise *nature* of the charge is not apparent that an application can be made under this section. It enables a party to obtain a definite statement in the pleading of the *nature* of the charge intended to be made against him, but not of the particulars or circumstances of time and place. For this purpose a different proceeding is pointed out, viz., an application under section 158, which provides among other things that "*the court may in all cases order a bill of particulars of the claim of either party to be furnished.*"

It is evident that in the present case there was no occasion for an application under section 160 to make the complaint more definite and certain. There is no uncertainty or indefiniteness in respect to the *nature* of the charge made against the defendant. The difficulty under which he claims to be laboring is that the complaint does not point out the times or occasions when the alleged offenses are claimed to have been committed, but avers simply that they were committed "on the 10th of October, 1868, and on divers other days and times after that day and before the commencement of this action," thus covering a period of very nearly six years, the action having been commenced in August, 1874. He denies that the acts charged were ever committed, but claims that for the purpose of preparing his defense it is necessary that he should be furnished with the particulars of time and place, in order that he may summon witnesses to rebut such evidence as may be brought against him, to explain the circumstances which may be proved and upon which the plaintiff may rely to establish the charge.

In actions upon money demands consisting of various items, a bill of particulars of the dates and description of the transactions out of which the indebtedness is claimed to have arisen, is granted almost as a matter of course, and this proceeding is so common and familiar, that when

a bill of particulars is spoken of, it is ordinarily understood as referring to particulars of that character. But it is an error to suppose that bills of particulars are confined to actions involving an account, or to actions for the recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading. They have been ordered in actions of libel; escape (*Davies v. Chapman*, 6 Ad. & El. 767; 7 D. & R. 774); trespass (*Johnson v. Birley*, 5 B. & A. 540); trover (*Humphrey v. Cottleyou*, 4 Cow. 54), and in ejectment (*Vischer v. Conant*, 4 Cow., 396). Even in criminal cases the instances in which the courts have, by analogy to the practice in civil actions, ordered bills of particulars, are frequent, viz.: On an indictment for being a common barrator, where a general form of pleading is allowed. (Hawkins' P. C., B. 1, chap. 83, sec. 13; *Goddard v. Smith*, 6 Mod. 261; *Commonwealth v. Davis*, 11 Pick. 432.) On an indictment for nuisance the prosecutor has been required to specify particulars of the separate acts of nuisance which he intended to prove (*Rex v. Carwood*, 3 Ad. & El. 815; *Regina v. Flower*, 3 Jur. 558), and in a prosecution for embezzlement (*Rex v. Hodgson*, 3 Carr & P. 422; *Rex v. Bootyman*, 5 id. 300); and in England there is nothing more common at the present day than to order particulars to be filed in an action for divorce, either on the ground of cruelty or adultery; and this is done on the application either of the defendant, or, in cases where the wife is defendant, of the person with whom she is alleged to have committed adultery, and who under the statute of 20 and 21 Victoria, chapter 85, is joined with her as co-respondent for the purpose of being mulcted in damages. * * *

* * * * *

A reference to a few of the authorities upon which these decisions were founded, will show that in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet, the court has authority to compel

the adverse party to specify those particulars so far as in his power. * * *

* * * * *

Most of the authorities which I have mentioned consist of adjudications prior to the amendment of 1849 to section 158 of the Code of Procedure, which is in these words: "And the court may, *in all cases*, order a bill of particulars of the claim of either party to be furnished.

It must be borne in mind that we are now discussing simply a question of power, whether, in the case before us, the court below had power to order particulars to be furnished; not whether, upon the facts disclosed by the affidavits, the court below ought or ought not to have ordered particulars, but whether it had the *power* so to do. If it made a mistake in that respect we must correct it.

If the code had been silent upon the subject of bills of particulars, the four hundred and sixty-ninth section¹ would probably have sufficed to preserve the authority of the court to order particulars in all cases before accustomed. But the express authority conferred by section 158 to order particulars in *all cases*, especially when read in view of the cases which have been cited, and in which particulars had been ordered, would seem to place the question beyond doubt.

* * * * *

Our conclusion is, that the orders of the special and general terms of the city court of Brooklyn be reversed, without costs, and the case remitted, to be heard at special term, that its discretion may be exercised upon the merits.²

* * * * *

All concur with RAPELLO, J., except ALLEN, J., who was for dismissal of the appeal; and GROVER, J., who doubted the existence of the power, but concurred with ALLEN, J.

¹ This statute seems to be the following: "The present rules and practice of the courts in civil actions, inconsistent with this act, are abrogated, but where consistent with this act, they shall continue in force, subject to the power of the respective courts to relax, modify, or alter the same." Voorhies Code, 1867, § 469.

² In *Conover v. Knight* (1893), 84 Wis. 639, the court said: "We are not disposed to draw any nice distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be made more definite and certain, for we think such distinction has no tangible existence in reason or law." This statement was cited with approval in *Stocklen v. Barrett* (1911), 58 Ore. 281.

BOARD OF COUNTY COMMISSIONERS v. AMERICAN LOAN AND TRUST COMPANY.

Supreme Court of Minnesota. 1899.

75 Minnesota, 489.

START, C. J.: This is an action on a bond given by a depositary of public funds, the American Loan & Trust Company, and its sureties. * * * The complaint alleges the execution of bond, its acceptance, the designation of the trust company as a depositary, the deposit of county funds with it, and that on July 14, 1894, there was on deposit with the trust company, and upon open and current account, of the money deposited with it by the county treasurer, the sum of \$98,368.20, and the further sum of \$7,772.87; and that the county treasurer duly demanded of the trust company, on the day named, the payment of the amount so on deposit with it, which was refused. * * *

* * * * *

The counsel for respondent, insisting that the appellants were not entitled to a bill of particulars as a matter of right, served one, as a matter of grace, after the time limited for such service, if he was bound to furnish it, which was returned by the appellants. It is only where an account is set forth in a pleading that is alleged as a cause of action, counter-claim, or set-off that the adverse party is entitled to a bill of particulars as a matter of right or demand. Gen. St. 1894, § 5246; ¹ *Board v. Smith*, 22 Minn. 97; *Jones v. Trust Co.*, 67 Minn. 410, 69 N. W. 1108; *Dowdney v. Volkening*, 37 N. Y. Super. Ct. 313; *Cunard v. Francklyn*, 49 Hun. 233, 1 N. Y. Supp. 877. This action is not upon an alleged account, but upon the bond, for a breach of its conditions. It is true that, to establish the breach, it was necessary to allege and prove the amount

¹ This statute provides in part as follows: "It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account verified," etc.

"The court, or judge thereof, may order a further or more particular bill."

Bills of particulars are seldom expressly authorized in very general terms under the codes, and the above is a very common form of provision. For this reason they are used much less frequently than motions to make more definite and certain.

of the county funds on deposit with the trust company at the time of the alleged breach, but the accounts between the parties were the mere data or evidence tending to establish the amount of the deposit. If the complaint did not set forth sufficient particulars as to the amount of the deposit to enable the defendants to answer understandingly, and adequately defend themselves, their remedy was by motion to make the complaint more definite and certain. Such was the remedy sought and granted in the case of *City of Rochester v. McDowell* (Sup.) 12 N. Y. Supp. 414, cited and relied on by the appellants. The appellants were not entitled to a bill of particulars as a matter of right, and the trial court committed no errors in the premises of which they can complain.

Judgment affirmed.

DUDLEY v. DUVAL.

Supreme Court of Washington. 1902.

29 Washington, 528.

ANDERS, J.: This was an action to recover the amount alleged to be due plaintiff from the defendants for services rendered by the former for the latter. The cause of action, as stated in the complaint, is as follows: "(4) That the defendants are indebted to the plaintiff in the sum of seven hundred and eighty-four and 15/100 dollars (\$784.15) for services rendered by the plaintiff for the defendants at the special instance and request of the defendants, for which the defendants each agreed to pay the plaintiff. (5) That the said sum of seven hundred and eighty-four and 15/100 dollars is now due from the defendants to the plaintiff, and is wholly unpaid." The defendants interposed no motion to require the plaintiff to make his complaint more definite and certain, but it seems to be conceded that the defendants Duval and Fitch did demand a bill of particulars of the plaintiff's claim. In response to this demand the plaintiff made a statement in writing, which was filed in the cause. * * *

The defendants Duval and Fitch then demurred to the complaint as amplified by the bill of particulars, on the ground that it stated several causes of action not properly joined. This demurrer was overruled, and the demurring defendants excepted. * * *

And it is contended by the appellants that the complaint, as amplified by the bill of particulars, states two distinct causes of action improperly united, and that the court, therefore, erred in overruling the demurrer to the complaint on that ground. It is said in the brief of the learned counsel for the appellants that this so-called bill of particulars is, in effect, a complaint in itself because of its stating certain transactions therein set forth. But, if that be true, it can hardly be regarded as a bill of particulars at all, and should have been objected to in the court below for insufficiency, and a further and more perfect account demanded.

“A bill of particulars does not set forth the *cause* of action or the *ground* of defense; these constitute the function of the original pleading. * * * Another object of a bill of particulars is to prevent surprise on the trial, by furnishing that information which a reasonable man would require respecting the matters against which he is called upon to defend himself, and by thus limiting the generality of the pleading its effect is to confine the proof to the particulars specified therein.” 3 Enc. Pl. & Prac., pp. 519, 520.

See, also, *Ferry v. King Co.*, 2 Wash. St. 337-343, 26 Pac. 537.

Under our statute a bill of particulars cannot be considered a pleading. Ballinger's Ann. Codes & St. §§ 4904, 4905. The plaintiff's cause of action must be stated in his complaint, and “the defendant may demur to the complaint when it shall appear upon the face thereof * * * (5) that several causes of action have been improperly united.” Id. § 4907. It does not seem to be claimed by appellants that the complaint itself states more than one cause of action, but it is argued that as amplified by the bill of particulars it states two causes of action,—one upon a parol guaranty to pay the salary due plaintiff from the respondent corporation to June 7, 1899, and the other upon the joint obligation of the company and the appellants to pay the plaintiff the salary to become

due after said date, less the payments alleged to have been made. We think the demurrer was properly overruled. While a bill of particulars may be said to be a part of the plaintiff's complaint in the sense that it must relate to the complaint and be construed with reference to it, yet it cannot be considered as a part of the complaint for the purposes of the subsequent pleadings, but only to the extent of restricting the plaintiff's proof to the matters therein specified. In other words, the complaint cannot be enlarged or amended by a bill of particulars.

* * * * *