CHAPTER XI.

CONSTRUCTION OF PLEADINGS.

SAGE v. CULVER.

Court of Appeals of New York. 1895.

147 New York, 241.

O'BRIEN, J.: While the complaint in this action is open to criticism as lacking in that clearness and fullness of statement essential to good pleading, yet we think that the decision of the general term overruling the defendants' demurrer was correct. When a complaint is met by a demurrer on the ground of insufficiency, the question always is whether, assuming every fact alleged to be true, enough has been well stated to constitute any cause of action whatever. The complaint will be deemed to be sufficient whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative, and the pleading deficient in logical order and in technical language. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. *Vabriskie v. Smith*, 13 N. Y. 330; *Marie v. Garrison*, 83 N. Y. 14, 23; *Sanders v. Soutter*, 126 N. Y. 193.

The complaint in this case was not, we think, so deficient in the statement of facts as to warrant the defendants in assailing it by demurrer.

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WITHAM v BLOOD

Supreme Court of Iowa. 1904.

124 Iowa, 695.

WEAVER, J.: The plaintiff's petition in equity states her claim substantially as follows: * * * To this petition

the trial court sustained a demurrer, and the plaintiff, electing to stand upon her pleading, has appealed.

* * * It was a maxim of the common law that everything in pleading is to be taken most strongly against the pleader. Gould's Pleadings (5th Ed.) § 169. This rule was based upon the very natural theory that every person states his case as favorably to himself as possible, and, moreover, that in stating his case for judicial consideration he is in duty bound to state it fully and unequivocally. The strictness of this rule has been much relaxed in courts where code systems have been enacted. But even under a code, while pleadings are to be liberally construed, and the pleader given the benefit of every allegation made or reasonably implied from the language employed, the principal at the base of the ancient rule, that the party is presumed to have stated his case as strongly as the facts will justify, still prevails. *Beadle v. R. R. Co.*, 48 Kan. 379, 29 Pac. 696; *Collins v. Townsend*, 58 Cal. 608; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Rapier v. Paper Co.*, 64 Ala. 330; *Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210. In other words, nothing will be assumed in favor of the pleader which has not been averred, or may not, upon a liberal and fair interpretation, be implied from his averments. Abbott's Trial Brief, Pleadings, vol. 1, p. 100; *Cogswell v. Bull*, 39 Cal. 320; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Stone v. Young*, 4 Kan. 17; *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869; *Hoag v. Warden*, 37 Cal. 522; *Chamblin v. Blair*, 58 Ill. 385. The plaintiff in this case is attacking and asking to have canceled an apparently regular and legal title to land, and her petition, to entitle her to relief, must state facts, which, if admitted, will demonstrate the validity and superiority of her own title. As we have just seen, the law will assume nothing in her favor in addition to the matters which she has expressly or by fair and reasonable implication alleged; and if, when liberally and fairly construed, all the express and implied allegations of the petition may be admitted, and her title still be invalid, or the defendant's title may still be held unimpeached, then the pleading is insufficient, and a demurrer thereto will be

sustained. Tried by this test, we think the ruling of the trial court was correct.[1] * * *

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[1] There is much conflict in the language of the decisions in the code states on this subject of construction of pleadings on demurrer, and even the same court seldom adheres to an entirely consistent policy. In each case as it comes up the court attempts to do justice to the parties, and there seems to be little difference in the general results whether the rule announced calls for a liberal construction or, as is true in many code states, for a construction against the pleader. It is indeed, doubtful whether pleadings are construed very differently under the code than they are in states which still retain the common law form of pleading. The construction of pleadings is determined by the general liberal or technical attitude of the judiciary more than by statute, and that attitude is not very closely subject to legislative control.

PATTERSON v. PATTERSON.

Supreme Court of Oregon. 1902.

40 Oregon, 560.

Mr. Justice MOORE delivered the opinion:

This is an action to recover on a promissory note executed by the defendants, John Patterson and M. L. Chamberlin, to the Capital National Bank of Salem, Oregon, June 30, 1892, for the sum of $239.20, payable on demand, with interest at the rate of 10 per cent. per annum, and alleged to have been assigned by said bank to plaintiff, who claims to be the owner and holder thereof, and that no part of the same has been paid, except certain specified sums. The answer denies the material allegations of the complaint, and, for a separate defense, avers that the remainder due on said note was paid to the bank March 4, 1893. For a further defense, it is alleged that Chamberlin signed said note as surety only; that the defendant Patterson induced the plaintiff, who is his wife, to take up and pay off the note in question; that she well knew said note was given for her husband's debt; and that Chamberlin was only an accommodation maker. The answer contains other defenses, a statement of which is not necessary to the decision. The reply denies the allegations of new matter in the answer, and contains the following concession: "But plaintiff admits and avers that she did on said 4th day of

March, 1893, purchase said note, and pay the balance due thereon to the said Capital National Bank with her own funds, and took an assignment of the same." At the trial of the issues thus joined the jury found for plaintiff in the sum of $257.15, whereupon defendants' counsel moved the court for judgment on the pleadings, on the ground that plaintiff had admitted therein that said note had been fully paid by her to said bank, which motion having been sustained, the action was dismissed, and plaintiff appeals.

The question to be considered is whether the admission in the reply that plaintiff purchased the note and paid the remainder due thereon overcomes the allegation of the assignment of the instrument as stated in the complaint and reply, thereby defeating the right of action. It is argued by plaintiff's counsel that, the allegations of the reply not having been assailed by motion or challenged by demurrer, the verdict aided any defective statement in their pleadings, and, this being so, the court erred in setting aside the verdict and dismissing the action. Defendants' counsel insist, however, that the pleadings should be construed most strongly against the pleader, and, the plaintiff having admitted in the reply that she paid the note, the averment shows that the instrument was thereby discharged, and hence no error was committed as alleged.

The statute provides that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.[1] Hill's Ann. Laws Or. § 84. In *Stewart v. Balderston*, 10 Kan. 131, under a similar statute (Comp. Laws Kan. 1879, p. 617, § 115), Mr. Justice VALENTINE, speaking for the court, in construing the allegations of a pleading, says: "But when the proper motions have been made to require the adverse party to so amend his defective pleading as to make it definite, certain, correct, and formal, thereby giving the adverse party notice wherein his pleading is defective, informal, or insufficient and where the adverse party then refuses to amend his defective pleading, resists the motions to have it amended, and has the motions overruled by the court, the most rigid rule of the common law should prevail. No statement of fact in the pleading which the motions reached should then be taken as true, un-

[1] This provision is found in practically all of the codes.

less well pleaded; and, if any such statement would bear different constructions, the party demurring should be allowed to adopt any one of such constructions which he should choose. The old rule of the common law that 'everything should be taken the more strongly against the party pleading,' although it can seldom have application under our code practice, should then prevail. After a party has received full notice that his pleading is defective in some particular, and has been asked to correct it, it is his fault if it still remains defective in such particular; and he is the one who should suffer on account of such defective pleading and not the other party." It has been held in this state that when the sufficiency of a pleading is challenged by motion or demurrer, and the action of the court in passing upon the objection thus interposed is not waived by answering over, the allegations of the complaint, answer, or reply thus assailed are to be construed most strictly against the pleader. *Pursel v. Deal*, 16 Or. 295, 18 Pac. 461; *Kohn v. Hinshaw*, 17 Or. 308, 20 Pac. 629. A different conclusion, however, seems to have been reached in *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847. Whatever the rule may be in respect to the interpretation of a pleading when assailed by motion or demurrer, and the action of the court in deciding the issue of law thus involved has not been waived by the defeated party, it is settled in this state, by repeated adjudications upon the subject, that if the sufficiency of a pleading has not been challenged in the manner indicated, but is drawn in question upon the admission of evidence, a liberal construction of the allegations of fact will be adopted. * * * No objection having been taken to the reply, its allegations will be liberally construed, for the purpose of determining its effect, with a view of substantial justice between the parties; and the allegations of the complaint and of the reply, not being repugnant, will be construed in *pari materia*, for the purpose of ascertaining the intent of the pleader. * * *

Observing these rules of interpretation, we think it reasonably inferable from plaintiff's pleadings that she intended to state that, in consideration of the payment of the remainder due on the note, it was assigned to her by the bank, and that she was the owner and holder thereof.

If it be assumed, however, that the averment of payment of the note by the plaintiff, as alleged in the reply, is a defective statement of the facts constituting the cause of

action, the rule is well settled in this state that, where no objection by motion or demurrer is made to the sufficiency of a pleading, every reasonable inference will be invoked and every legitimate intendment indulged in its aid when supported by a verdict. Thus, in *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506, Mr. Chief Justice BEAN, speaking upon this subject, says: "No objection was made to the sufficiency of the reply by demurrer or otherwise, and we think it comes too late when made for the first time by motion for judgment notwithstanding the findings of the referee. It avers that the settlement alleged in the answer did not include the claim upon which this action is founded, or any part thereof, or have any reference thereto; and while it may have been defective in not setting forth fully the fraud, error, or mistake relied upon to surcharge or falsify the settlement, we are not trying the question on demurrer, but considering the sufficiency of the pleading after verdict. In such case it is entitled to the benefit of every reasonable inference and intendment in support of the judgment, and will not be held insufficient for a mere defective statement." In *Houghton v. Beck*, 9 Or. 325, it was held that a defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict. The rule is settled in this state that, while a verdict will never supply the omission of a material averment, it will aid informal defects in the pleading that do not go to the gist of the action.
* * *

If it be assumed that there was a defect in the statement of facts in the reply, no objection thereto having been taken, the verdict necessarily cured it, and hence the act of the court in setting aside the verdict and dismissing the action must be held erroneous.

It follows from these considerations that the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

NATIONAL FIRE INSURANCE COMPANY v. EASTERN BUILDING AND LOAN ASSOCIATION.

Supreme Court of Nebraska. 1902.

63 Nebraska, 698.

ALBERT, C.: * * *

It is first urged that the court erred in overruling defendant's demurrer *ore tenus*. This demurrer was interposed after both parties had rested. The petition is long, and, as the case must be reversed, we think, on other grounds, it would serve no useful purpose to set out the petition at length in this opinion. It will suffice, perhaps, to say that had the demurrer been interposed before the introduction of any testimony, or before the parties had developed their respective theories of the case, it should have been sustained. But coming, as it did, at the close of the testimony, we cannot ignore the construction placed upon the petition by the parties to the suit, as evidenced by the answer and the nature of the evidence introduced. Interposed at so late a day, the pleading assailed should be scanned in the light of the entire record, and the court should give it such construction as the parties themselves have seen fit to place upon it, although, standing alone, it might not admit of such construction. Viewed in that light, the demurrer, in our opinion, was properly overruled.

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TREANOR v. HOUGHTON.

Supreme Court of California. 1894.

103 California, 53.

SEARLS, C.: This is an action by a street contractor to recover $132.80 assessed upon the lot of defendants for its pro rata of the cost of improving Julian street, in the city of San Jose, under proceedings had by virtue of the act of March 18, 1885 (St. 1885, p. 147).

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The whole question on this appeal, relates to the sufficiency of the complaint, in stating facts sufficient to constitute a cause of action.

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There was no demurrer or other objection interposed to the complaint, and the objections to its sufficiency are urged here for the first time. The cause was tried by the court, and the findings are full and explicit upon all the material issues, and no objections are made thereto. Hence, it follows that all errors and omissions which are cured by verdict are waived.

* * * It is objected that the complaint fails to allege that the contract fixed the time for the commencement and completion of the work, which it is claimed, is fatal to the validity of the complaint.

* * * The contracts were awarded August 13, 1888, and entered into August 25, 1888,—less than 15 days after the award. The complaint does not, in express terms, aver the time specified in the contract for the commencement and completion of the work under the contract. It avers that all the work ordered to be done under the resolution "was and has been completed pursuant to said contracts and said plans and specifications, *within the time given by said commissioner of streets in said contracts*, with materials complying with the specifications, * * * under the direction and to the satisfaction of said commissioner of streets, and was and has been duly accepted by him." Beyond this quotation, I find no averment in the complaint referring to the matter under consideration.

* * * That the omission in the complaint would have been fatal, in the face of a special demurrer, is settled by the cases quoted *supra*, and by many others to which we might refer. The question, however, is, can appellant, after verdict, raise the question here for the first time?

Chitty, in his work on Pleading (at page 705 of volume 1) lays down the rule as follows: "The second mode by which defects in pleading may be, in some cases, aided, *is by intendment after verdict.* The doctrine upon this subject is founded upon the *common law*, and is independent of any statutory enactments. The general principle upon which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in *substance* or *form*, which would have been a fatal objection

upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is *cured by verdict.*

"The expression, '*cured by verdict,*' signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proven at the trial."

The difficulty experienced, in many cases of this character, is to determine whether or not the omitted fact or facts were proven at the trial. In the present instance, we are met with no difficulty of this character. The cause having been tried by the court, and facts found, it appears affirmatively by the record that what was omitted in the complaint was supplied without objection at the trial.

The defective statement of the complaint, wherein it was averred that the work and improvements were completed pursuant to the contracts, "within the time given by said commissioner of streets in said contracts," was but an inferential statement that the contracts specified the time within which the work was to be done, but was, in the language of the common law, an allegation that is "*holpen by verdict.*"

The defendant having gone to trial upon such imperfect statement without objection, and it having been cured by the findings, which we must suppose were supported by testimony, he cannot now successfully raise the question of the sufficiency of the complaint in that respect.

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