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Minnesota Pleading as Fact Pleading

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MINNESOTA PLEADING AS "FACT PLEADING"

By G. W C. Ross*

DENIALS AND AFFIRMATIVE DEFENSES

MINNESOTA pleading is called "fact pleading."[1] This is expressed by the maxim that "the facts" and not "conclusions of law" are to be pleaded.[2] A "fact" in this connection seems generally to mean an event—something that took place. Not always, for instance, the allegation that certain goods were "of the actual and reasonable value of" so many dollars is undoubtedly a good allegation of "fact," yet it is hardly the statement of an event that happened. Rather, it states simply an existing condition of things. But more commonly the distinction between "fact" and "conclusion of law" seems to have in mind the "facts" as events, as distinguished from the legal rights and obligations to which the stated events gave rise. An "operative" or "issuable fact" means substantially an event which created a legal right or obligation, or changed somebody's rights or obligations. So to "plead the facts" means virtually, to state simply that certain specified events occurred. The law's "method of creating rights is to provide that upon the happening of a certain event a right shall accrue. The law annexes to the event a certain consequence, namely, the creation of a legal right. The creation of a right is therefore conditioned upon the happening of an event."[3]

This is considered a primary, basic principle of code pleading[4] Yet we find it urged, that pragmatically applied, the theory develops no consistent, defined meaning. One of the practical problems of pleading involving and testing the general conception is the drawing of the distinction between denials and affirmative defenses. What is the scope of proof admissible under an answer (or reply) by way of denial, and what is "new matter"[5] to be specially and affirmatively pleaded? From that point of view this examination of our Minnesota cases is undertaken.

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[1]Clark, Code Pleading 19, 150 et seq. Cf. Minn. G. S. 1923, sec. 9250 (2), Dunnell, Minn. Pleading, 2nd ed., sec. 249.

[2]And of course, the "ultimate facts" and not "evidentiary facts" are to be pleaded. But that side of the general problem is outside the purview of this paper.

[3]J. H. Beale. Summary of the Conflict of Laws, sec. 2, at the end of Vol. III of his Cases on the Conflict of Laws (1902 Ed.).

[4]Cf. Pomeroy· Code Remedies, 4th ed., 560, 561.

[5]Minn. G. S. 1923, sec 9253 (2).

Our earliest leading case seems to be *Finley v. Quirk*,[6] an action for breach of warranty in the sale of a horse. The answer admitted the sale but denied the warranty. The testimony at the trial incidentally disclosed the fact that the sale had been consummated on Sunday; whereupon defendant moved for judgment, for the illegality of a Sunday sale. The motion was denied, and on appeal a verdict for the plaintiff was sustained. The court said the sale was illegal; but this was an affirmative defense, not available under the denial. Since the complaint alleged only that the warranty was given, the denial denied only that that event took place. If the warranty was actually given, but by reason of the further fact that it was given on Sunday it did not create the seller's legally enforceable obligation to make it good, such further fact is matter of affirmative defense.[7]

But a counter-argument suggests itself here. A "warranty," like the "sale" of which it is part, is a "contract", and a "contract," it is urged, (and a "warranty" or a "sale")means a legally binding and valid agreement.[8] Hence, a complaint alleging that the parties "made and entered into" a stated "contract" alleges that they made a legally binding, enforceable agreement. If for any reason, as, e.g., that it was made on Sunday, it was not such a valid, legally obligatory agreement, then the parties did not make a contract at all. Therefore a denial that the parties made the contract should admit proof of anything to show that they did not make such a binding, enforceable agreement. This position gets color of cogency from the common law maxim, which the code is said to have inherited, that facts may be pleaded "according to their legal effect."[9] As applied to such allegations as these here considered, it is submitted that this maxim might be more happily stated by saying, that acts may be alleged according to the meaning and intention of the actors in performing them. To allege that plaintiff "sold" certain goods to defendant un-

[6](1864) 9 Minn. 194.

[7]At the end of the opinion the court remarks that the answer admitted the sale, and intimate that that admission may have narrowed the scope of the denial of the warranty. But that is not the main basis or course of reasoning of the opinion.

[8]Is this necesarily true? Must the word "contract" be taken to mean more than the word "bargain," i.e., an agreement by which each party gives a quid pro quo? Should the fundamental question of pleading hereinafter discussed be made to turn upon whether the allegation is, that the parties "made a contract," or, aliter, that they "made a bargain" (or, agreement," on a consideration stated)?

[9]Dunnell, Minn. Pleading 2nd ed., secs. 211, 217, Clark, Code Pleading 161.

doubtedly alleges more than bare physical facts. Every human act initiated by human will comprises mental as well as physical ingredients and aspects. The allegation is, that the parties physically did and said the things that they did do and say *with the meaning and intention* of transferring the (ownership of the) goods to defendant in exchange for a payment or a promise by him. Whether they accomplished their intention in its full legal result is another matter. That is the conclusion of law, which by the very fundamental philosophy of "fact pleading" is to be kept out of the pleadings. To import the full conclusion of law into such allegations breaks down the possibility of "fact pleading" at all. It is not a practical possibility to state the voluntary acts of human beings without using such words as "sold," "purchased," "made a contract" and the like. Such expressions are mere necessary conciseness of diction. If the allegation that parties "made a contract" means more than that they did actually make a bargain, intentionally pledging their faith to each other—if, beyond that, it means that they made such a bargain as did create a full, legally valid obligation, then "fact pleading" is abandoned at its threshold.[10]

Our first case of *Finley v. Quirk* at any rate sanctions no such doctrine. It applies logically the fundamental theory of "fact pleading" as first outlined. From a little different angle the case of *Register Printing Co. v Willis*[11] illustrates the same general principle. That was an action for the reasonable value of printing work done. The answer was a general denial. At the trial defendant proved an expressly agreed price, less than the sum plaintiff had proved to be the reasonable value of the work, and thereupon moved for dismissal. But the motion was denied, and

[10]The point here made is carefully worked out in the case of Christianson v. Chicago, etc., Ry., (1895) 61 Minn. 249, 63 N. W 639. In that, a personal injury action, defendant pleaded settlement and release; reply, general denial. Plaintiff was held entitled to prove, that while he did sign a paper on its face a release, he did so only under deception as to its nature and terms. He had not knowingly, intentionally released his claim. But Chief Justice Start takes pains to point out that this ordinance is admissible under the denial because it does actually deny the act alleged, and that if plaintiff had actually and intentionally released his claim, but had been induced to do so by some collateral fraud—e.g., as to the diagnosis or prognosis of his injury—that would have been affirmative matter requiring special pleading in the reply. The allegation that plaintiff had released his claim did not involve the conclusion of law, that the release was valid and binding; it merely summed up the (alleged) mental as well as physical action of the party. Cf. ac: Hanson v. Diamond Iron Mining Co., (1902) 87 Minn. 505, 507; 92 N. W 447

[11](1894) 57 Minn. 93, 58 N. W 825.

on appeal findings for the plaintiff were sustained, the court holding the evidence of the agreed price not admissible under the general denial. The complaint had alleged only (a) that the work was done, (b) at defendant's request; and (c) its reasonable value. Defendant's proof did not contradict any one of these three facts, but sought to show that by reason of a further fact, to-wit. the agreed price, plaintiff was not legally entitled to recover the reasonable value of the work; and that, the court held, is clearly "new matter" of affirmative defense.[12]

It is not surprising to find perhaps our clearest statement of this doctrine by Mr. Justice Mitchell. In the case of *Dodge v. McMahon*[13] a grain broker sued for money advanced to protect defendant's margins on a trade in futures. Under a general denial defendant at the trial offered to prove that the trade was a gambling transaction, but the evidence was excluded and on appeal decision for the plaintiff was affirmed, defendant's proof being held inadmissible under his answer. After mentioning some contrary intimations Mr. Justice Mitchell says

"The correct rule is that under a denial the defendant is at liberty to give only such evidence as tends to disprove *the existence* of the facts, *as facts,* alleged by the plaintiff, but not of any matter aliunde, which, although admitting such facts, would tend to avoid their legal effect and operation."[14]

This case has been cited and followed repeatedly Thus, in *Andrus v. Dyckman Hotel Co.,*[15] a defendant, sued for rent under a lease, was not allowed under a general denial to show that the lease was invalid because made in contemplation of unlawful selling.[16]

[12]*Accord:* Reishus-Remer Land Co. v. Benner, (1920) 91 Minn. 401, 98 N. W. 186.—In the principal case defendant's motion to dismiss was based on the technical ground that in an action *quantum meruit* the plaintiff is not entitled to recover at all if a definite price was expressly agreed on. That precise proposition is not law in Minnesota since the case of Meyer v. Saterbak, (1915) 128 Minn. 304, 150 N. W 901, but it was believed to be the orthodox Minnesota doctrine at the time of the principal case. Defendant's appeal failed, not because he was wrong on that proposition, but, as stated in the text, because under his answer he was held not entitled to raise the point.

[13](1895) 61 Minn. 175, 63 N. W 487.

[14](1895) 61 Minn. 175, 177 63 N. W 487. Italics the author's.

[15](1914) 126 Minn. 417, 421, 148 N. W 566.

[16]Cf. Start, C. J., in Christianson v. Chicago, etc. Ry., (1895) 61 Minn. 249, 252, 63 N.W 639, (see note 10, supra), that it is "the general rule of pleading that under a general denial no fact can be given in evidence which does not go directly to disprove *the act* alleged by the opposite party; that matters which *admit the act, but avoid its effect,* or discharge the obligation, cannot be given in evidence under the general denial." (Italics, the author's). Cf. ac: Woodbridge v. Sellwood, (1896)

These cases make a consistent body of authority applying with reasonable strictness and accuracy the primary philosophy of "fact pleading." Meantime, however, our court had decided the case of *Handy v St. Paul Globe Co.*[17] Handy sued for having been wrongfully discharged in violation of a five-year contract employing him as advertising manager of the newspaper. The answer denied the contract. At the trial plaintiff offered in evidence his written contract of employment, which on inspection included the daily and Sunday paper, and thereupon, on objection, it was excluded. This contract being the foundation of plaintiff's case, defendant of course got a verdict, and on appeal it was sustained. The court held the contract illegal, and though no such defense had been pleaded, yet since plaintiff's own evidence showed the illegality, defendant could exclude that evidence and so shut the plaintiff out of court. Mr. Justice Gilfillan, for the court, explained that while it is "sometimes necessary to plead the facts on which illegality depends, it is never necessary to plead the law

"When the facts appear, either upon the pleadings or proofs, either party may insist upon the law applicable to such facts. In this case plaintiff had, under the pleadings, to prove the contract upon which he sued. If it be void on its face he, not defendant, showed its illegality"[18]

This appears to mean, that if plaintiff could have got his contract in evidence without disclosing its relation to a Sunday newspaper, defendant under his answer could not by evidence from his side have shown that relation. That would have been matter of affirmative defense. But since plaintiff's own evidence established the defense, defendant could avail himself of it, though not pleaded. That is not easy to reconcile with our first case of *Finley v. Quirk*,[19] which also involved a Sunday transaction, and where that fact had come to light in the course of plaintiff's proof of his main case.[20] Nor at first blush is it easy to reconcile with the familiar rule that an item of evidence properly admitted for one purpose does not thereby become available to the other side

65 Minn. 135, 67 N. W 799; Van Dusen-Harrington Co. v. Jungeblut, (1899) 75 Minn. 298, 301, 77 N. W 970; Banner Grain Co. v. Burr Farmers Elevator Co., (1925) 162 Minn. 334, 202 N. W 740.

[17](1899) 41 Minn. 188, 42 N. W 872.

[18](1889) 41 Minn. 188, 190, 42 N. W 872.

[19](1864) 9 Minn. 194.

[20]The opinion (page 199) says it appeared "in the examination of plaintiff's witness;"—whether on direct or on cross examination, is not stated.

for other purposes not in issue.[21] However, it is of course true, that not only must evidence be competent to prove the fact it is offered to prove, but that fact, which it is sought to prove by the evidence, must be an "operative" fact. And the trouble with Handy's written document was that it did not prove an "operative" fact, for an illegal contract is not an operative fact, i.e., it gives rise to no rights or obligations.

But in recent cases our court has gone further and explained that "illegality" is more than a mere defense. If it amounts to positive immorality, or, perhaps, to violation of a statutory prohibition, then such illegality will defeat the action regardless of the pleadings and whenever and however it may appear. The first case distinctly to enounce this rule seems to be *Goodrich v. Northwestern Telephone Co.*[22] That was an action to recover money the defendant had agreed to pay the plaintiffs. In the course of the litigation it transpired that the consideration moving from the plaintiffs had been their illegal undertaking to use their influence and position as citizens and as public officials to help the company stifle competition. Although no such defense had been pleaded, the plaintiffs were denied recovery. Apparently the written contract did not disclose the illegality on its face, as Handy's contract did, but that was not deemed important. It is not even needful, in the court's view, that the defendant shall urge or seek to take advantage of the defense at all, the court of its own motion will refuse recovery. Says Chief Justice Wilson, for the court:[23]

"The defense is not allowed for the sake of the defendant, but of the law itself. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be void for the same reasons."[24]

[21]Cf. Lautenschlager v. Hunter, (1875) 22 Minn. 267

[22](1924) 161 Minn. 106, 201 N. W 290.

[23]Quoting with approval from the case of Oscanyan v. Arms Co., (1880) 103 U. S. 261, 268, 26 L. Ed. 539.

[24]Goodrich v. Northwestern Tel. Co., (1924) 161 Minn. 106, 112, 201 N.W 290. Cf. Stone, J., in Bosshard v. County of Steele, (dissentiente), (1927) 173 Minn. 283, 286, 217 N.W 354 "The proposition is not, in the final analysis, that illegality is a defense. It is rather the simple refusal of the law to rescue its violators from the consequences of their own wrong. Whenever and however illegality appears to the court its duty is to stop the inquiry, leave the parties where they are and decline to assist either. 1. *The rule applies, of course, only when the parties are in part delicto,*" (Italics, the author's.) But this case did not raise

This removes "illegality" from any relationship to the law of pleading and manifestly raises a considerable exception to our general principle. It is only an exception, it may be noted, this new doctrine does not purport to abandon the whole theory of "fact pleading" as already set out, except where an "illegality" comes into view But how large an exception is involved! What sorts of facts will constitute such "illegality," and what will be mere defenses, morally colorless and waived unless specially pleaded? According to Justice Stone's dictum,[25] the rule of "illegality" applies only where the parties are in pari delicto. This, perhaps, was intended to explain the fact that such defenses as usury[26] and fraud are not treated on this basis. Our court has repeatedly said that fraud—not in esse contractus, but affecting only the inducement or consideration—is generally an affirmative defense, waived unless specially pleaded.[27] But in the late case of *Kampfer v Peterman*[28] the fact that a realtor had been secretly employed and paid by the seller defeated his action for a commission promised him by the buyer, although the buyer had pleaded no such defense but had merely denied his own agreement to pay the commission. It goes without saying that these parties were not in pari delicto. The defendent, however, was the innocent party to the situation, but on that basis fraud, it would seem, should be similarly treated in favor of a defrauded defendent, but as already noted, it has not been. If *Kampfer v. Peterman* is to be taken as our considered and settled law, the attempt to apply the doctrine of "illegality" on the basis of the maxim about parties in pari delicto seems to break down.

Professor Clark suggests the applicability of some scale of moral values;[29] but any attempt so to line up all our actual Minnesota

the question of pleading, for the illegality was specially pleaded as an affirmative defense.

[25]Supra, note 24.

[26]Adamson v. Wiggins, (1891) 45 Minn. 448, 449, 48 N. W 185, (semble).

[27]Christianson v. Chicago, etc., Ry., (1895) 61 Minn. 249, 251, 252, 63 N. W 639· Trainer v. Schutz, (1906) 98 Minn. 213, 218, 107 N. W 812 Marshall-Wells Hdw. Co. v. Emde, (1913) 121 Minn. 514, 140 N. W 1027

[28](1926) 166 Minn. 306, 207 N. W 633.

[29]Clark, Code Pleading 423 "Illegality, where not so great as to *shock the conscience* of the court, ordinarily must be affirmatively pleaded. In the case of 'inherent illegality' *so great as to vitiate the entire transaction,* the matter may be raised by a denial, or the court may, whenever it is brought to its attention, dismiss the case summarily" (Italics, the author's.)

decisions is plainly hopeless.[30] It must probably be assumed that the *Goodrich Case* and the later cases following it have overruled the earlier cases to this extent; but this leaves the boundaries of the "illegality" rule still undefined.[31]

Can a key to the solution be obtained by considering from another point of view the nature of such defenses as fraud, or infancy? It is learning that needs no citation, that a contract between an adult and an infant is not "void" but is only "voidable," which means, that it binds the adult and is enforceable against him, but is not binding or enforceable against the infant. To be sure, the infant's defense, looking at the situation solely from his side, does not at first seem sui generis. While his promise is executory his defense, at least in Minnesota, is virtually absolute and is available "at law," unconditionally.[32] But the fact remains that the transaction was an "operative fact;" it did affect rights and obligations. The same is true of a transaction induced by fraud. Against the defrauder it is valid and binding; only at the option of the defrauded party is it "voidable." Now can we say, that the distinction between "illegality" that is available independently of the pleadings, and waivable affirmative defenses, follows the line of this distinction between transactions "void" and "voidable?" Does this suggestion, or does it not, come back substantially to Mr. Justice Stone's dictum about the maxim in pari delicto? Will it explain and justify the case of *Kampfer v. Peter-*

[30]Thus, the sale of one's civic influence and position to help a public utility stifle competition, Goodrich v. Northwestern Tel. Co., (1924) 161 Minn. 106, 201 N. W 290; secret receipt of a commission from both sides, by a broker, Kampfer v. Peterman, (1926) 166 Minn. 306, 207 N. W 633; and perhaps, Sunday desecration, Handy v. St. Paul Globe Co., (1889) 41 Minn. 188, 42 N. W 872; would be "shocking" illegality; while gambling, Dodge v. McMahon, (1895) 61 Minn. 175, 63 N. W 487 and note 16; fraud, Christianson v. Chicago, etc., Ry., (1895) 61 Minn. 249, 251, 252, 63 N. W 639; Trainer v. Schutz, (1906) 98 Minn. 213, 218, 107 N. W 812; Marshall-Wells Hdw. Co. v. Emde, (1913) 121 Minn. 524, 140 N. W 1027, usury, Adamson v. Wiggins, (1891) 45 Minn. 448, 48 N. W 185; bootlegging, Andrus v. Dyckman Hotel Co., (1914) 126 Minn. 41, 148 N. W 566, and perhaps, Sunday desecration, Finley v. Quirk, (1864) 9 Minn. 194, would not be!

[31]N. B., that the case of Banner Grain Co. v. Burr Farmers Elevator Co., (1925) 162 Minn. 334, 202 N. W 740, (see note 16, supra) where gambling was held a (waivable) affirmative defense, is later than the Goodrich case, (1924) 161 Minn. 106, 201 N. W 290, and is cited with approval in the still later case of Trovatten v. Hanson, (1927) 171 Minn. 130, 132, 213 N. W 536. In gambling cases too, the parties of course are in pari delicto.

[32]Johnson v. Northwestern Mut. Life Ins. Co., (1894) 56 Minn. 365, 374, 59 N. W 992.

man?[33] It would seem that here is something our court might well take the first occasion to put in clearer light.

Another exception to the logic of "fact pleading," well established in our decisions, is the permission to an ejectment or replevin plaintiff to "plead his title generally," i.e., to allege simply that "plaintiff owns" the property in question.[34] That allegation does not state any fact (event) whatever. It is a mere conclusion of law, since title to property is nothing but a legal right—more accurately, a "bundle of legal rights."[35] The cases that settled this rule for Minnesota[36] do not seem to have recognized its anamalous character, though elsewhere our court impliedly has done so. Thus, in Minnesota if a pleader says simply that "plaintiff owns" described property, that is held a good allegation of "fact." But if he first says that on a given past date "John Doe owned" the property, and then proceeds at once to say that "plaintiff is now the owner" thereof, that second statement is held bad as conclusion of law[37] It is so, indeed, and the court perceives the reason, to-wit. that the pleading fails to state any conveyance by John Doe, that is, it states no event whose occurrence has changed the initial legal situation. But of course the statement that "plaintiff is now the owner of" the property is no more a

[33]Kampfer v. Peterman, (1926) 166 Minn. 306, 207 N. W 633.

[34]Atwater v. Spalding, (1902) 86 Minn. 101, 90 N. W 370; and cases there cited.

[35]Professor Cook's penetrating article on "Statements of Fact in Code Pleading" (21 Col. L. Rev. 416) seems criticizable at this point. He says (p. 419) "Consider the statement in a pleading, that 'defendant owes plaintiff $500.' It is the conclusion of a logical argument" (to-wit) "Whenever certain facts, a, b, c, etc., exist, B (defendant) owes A (plaintiff) $500 · facts a, b, c, etc., exist, therefore B owes A $500. This being so, whenever the bare statement is made that 'B owes A $500,' we may if we wish regard it as a statement in generic form that all the facts necessary to create the legal duty described by the word 'owe' are true as between A and B." This might do if "facts a, b, c, etc.," were always similar facts—if only one sort or sequence of facts (events) could create the legal duty which we call a debt. But that is far from true. A debt may arise, e. g., from a sale of goods, from performance of service, from a wide variety of events and circumstances. Hence the bare statement that "B owes A" does not in any sense state what events have occurred. It tells us only that the legal duty exists, by virtue of what sort of events, the reader is left to guess in the dark. The same considerations apply to the general allegation of title. The distinction may be "one of degree only" (Clark, Code Pleading 155) but so is the distinction between 30 Fahrenheit and 35 Fahrenheit merely a matter of 5 degrees but it crosses the critical freezing point. Mr. Justice Holmes truly opined, in Haddock v. Haddock (diss. 201 U. S. 562, Sup. Ct. 525, 50 L. Ed. 867) that "most distinctions" are matters of degree, "and are none the worse for it."

[36]Atwater v. Spalding, (1902) 86 Minn. 101, 90 N. W 370.

[37]Topping v. Clay, (1895) 62 Minn. 3, 63 N. W 1038.

conclusion of law than the opening statement that on the past date "John Doe owned" it. Neither does that allegation state any event which made Doe the owner. The rule allowing one to plead title generally may be justified on grounds of necessary convenience. It would often be impossible to trace the title to a chattel back to its original producer; and if every real estate title had to be specifically deraigned step by step, from the government patent down, the pleadings would be intolerably long. But it should not be overlooked that the rule is an exception to every logical principle of "fact pleading." Hence, for instance, the effect of this general pleading of title in widening inordinately the scope of the general denial is likewise to be recognized as a peculiar result of the anomalous character of the allegation denied.[38]

It is thus seen, that while Minnesota has not repudiated the essential philosophy of "fact pleading"—indeed, one of the very latest cases in terms re-affirms it[39]—yet its practical application has been considerably whittled down in at least two directions. Our reports contain scattered dicta looking still further and intimating that almost the whole distinction here contended for, between denials and affirmative defenses, should be deemed outmoded. In *Hodgson v. Mather*[40] Mr. Justice Lovely, for the court, criticizes our first case of *Finley v. Quirk*.[41] "The court below," he says "may have been misled by the limitations upon the scope of the general denial in" that case. "But we have in cases of a more recent date given a wider and broader scope to the general denial than formerly, in consonance with modern enlarged views of pleading."[42] This does not refer to the fact that the defense in *Finley v. Quirk* was perhaps a matter of "illegality" as since defined, it is intended as a criticism of the whole theory of pleading relied on by the court in that case. But it is dictum, no such criticism of *Finley v. Quirk* has any application or point in *Hodgson v. Mather*.[43] The allegation there was that a note had been "duly assigned and transferred to" the plaintiff. Under general denial, defendant was held entitled to show that the transfer was after maturity In other words, the allegation that

[38]Cf. Commonwealth Co. v. Dokko, (1898) 72 Minn. 229, 75 N. W 106; Adamson v. Wiggins, (1891) 45 Minn. 448, 449, 48 N. W 185; Johnson v. Oswald, (1888) 38 Minn. 550, 552, 38 N. W 630.

[39]Gjesdahl v. Hanson, (Minn. 1928) 221 N. W 639.

[40](1904) 92 Minn. 299, 100 N. W 87

[41]Finley v. Quirk, (1864) 9 Minn. 194.

[42]Hodgson v. Mather, (1904) 92 Minn. 299, 300, 100 N. W 87

[43]Hodgson v. Mather, (1904) 92 Minn. 299, 100 N. W 87.

the note was "duly assigned" is held to mean that it was assigned before maturity ("in the due course of business"), hence, denial that it was "duly assigned" admits proof that it was assigned after maturity Mr. Justice Lovely expresses this by saying that "the specific averments set forth in the complaint *and all inferences of fact implied by law therefrom* are as fully put in issue by" [the general denial] "as if what is inferred by law from the general statements therein had been specifically set forth and specifically denied."[44] As applied to the facts in *Hodgson v. Mather,* this seems hardly a matter of "inference." It seems rather a case of synonymous terms. Justice Lovely's doctrine of "inferences," indeed, seems hardly borne out by our authorities. An allegation that on a consideration stated defendant promised to pay a certain sum of money, means, without more, that the promise was to pay "on demand;" which in our law means immediately and without any demand. So a complaint alleging such a promise, with no maturity stated, is not demurrable, because the promise is presumptively ("inferentially") a promise to pay at once.[45] From this, Justice Lovely might well urge that a defendant denying a promise so alleged ought to be allowed to prove that the promise really made was to pay at a future date, not yet arrived. But that does not seem to be so. If defendant wishes to show that a term of credit was given, not yet expired, that appears to be held matter of affirmative defense.[46]

Again, in the case of *Hanson v. Marion*[47] the court says that a general denial "squarely presented the issue whether a *valid* contract was entered into."[48] But that statement goes far beyond any requirements of the case, and is not accurate even as applied to the case itself. It was a question of the statute of frauds, and the court applies and extends the rule that where the complaint alleges the contract generally (i.e., without disclosing whether it was written or oral) defendant under denial may shut out plaintiff's evidence of an oral contract. They hold further in this case, that defendant may admit the proof without objection and still move for a directed verdict, apparently on the ground that plaintiff's evidence has proved nothing—no "operative

[44]Hodgson v. Mather, (1904) 92 Minn. 299, 300, 100 N. W 87 Italics the authors.
[45]Chamberlain v. Tiner, (1884) 31 Minn, 371, 18 N. W 143.
[46]Iselin v. Simon, (1895) 62 Minn. 128, 64 N. W 143.
[47](1915) 128 Minn. 468, 151 N. W 195.
[48]Hanson v. Marion, (1915) 128 Minn. 468, 473, 151 N. W 195.

fact."[49] But they recognize in the same opinion, that if the complaint disclosed the "character of the contract" (as written or oral) "defendant must either demur thereto or plead the Statute in his answer" (i.e., affirmatively), "otherwise there is a waiver."[50] This of course could hardly be true if a denial presented the broad issue of validity.

The reader is by this time highly impatient at all this "logic-chopping." "What difference does it make," he can be heard exclaiming· "Let all the facts be shown!" But it needs to be remembered that every extension of the scope of the denial by just so much impairs the value of the pleadings, either as defining the issues or as giving notice to the adversary and the court, of the lines of proof that are to be anticipated and prepared for. From this point of view the wisdom of the modern rule of "illegality" may well be doubted. Certainly it goes far enough in breaking down the utility of the pleadings and enabling defendant to play a blind hand. But the dicta last considered, on their face, would all but abolish affirmative defenses. Not quite, facts which occurred since the original transaction took place would still be "new matter·" for instance, payment, accord and satisfaction, release. But any and all facts entering into the original transaction and which for any reason rendered it defensible ab initio would be admissible under a denial that the transaction took place. It is submitted it were hardly worth while to retain the answer at all merely for the purpose of pleading defenses that have arisen since the original transaction, such as payment and release. Let the pleadings stop with the complaint and let defendant prove anything that will defeat recovery under it—just as we do now stop with the reply, and let defendant prove anything and everything to defeat its effect, whether by contradiction or by confession and avoidance, and without any pleading by way of rejoinder This of course would simply abandon any attempt to make the

[49]Sed quaere. The court relies on the fact that our statute of frauds says the contract "shall be void," not simply, that defendant "shall not be charged." But a complaint that alleges only a truly non-operative fact will not support a judgment. No judgment could rightfully be entered, for instance, on a complaint that alleged simply that defendant "is six feet tall Wherefore, plaintiff demands judgment for $500." Even a default judgment, if entered on such complaint, would be erroneous and reversible on appeal. But if a complaint alleges an oral contract to convey land, and defendant defaults, judgment is properly entered for the plaintiff and is not reversible on appeal, as the opinion in the principal case immediately recognizes.

[50]Hanson v. Marion, (1915) 128 Minn. 468, 473, 151 N. W 195.

parties sift their case and define what is in dispute, for each other or for the court. Undoubtedly the liberal allowance of amendments before and during and even after the trial tends powerfully to break down the whole system of pleading. Small use spending time and labor to define the issues unless the parties are going to be held to the issues defined! It is suggested that the need of giving "fair notice," at least to the adversary, can easily be overemphasized,[51] and it is entirely permissible to contend that the whole process of having the parties themselves state the issues in controversy by written pleadings framed on their own responsibility in advance of trial, has become archaic. Perhaps it would be better if every case before trial had to be submitted to an official in the nature of a referee or master, to settle and define the issues authoritatively for the parties and for the trial court.[52] It is pertinent to remark that such a system will not have much value either, unless the right of amendment thereafter be strictly curtailed. But perhaps much might be hoped for from a system of settling the issues in advance by an impartial officer under judicial supervision and control, instead of leaving them as we do, to be framed by counsel for the parties out of court, at their own peril, and then trying to patch up the results of their laziness or incompetence by free amendments in the midst of the hurly-burly of trial. But be that as it may, the traditional system is the one we have had and are supposed still to be working under in Minnesota, and it is urged once more that every unnecessary widening of the scope of the denial is simply destructive of any value that may be thought still left in that system. It is submitted that the parties had better not be relieved of their responsibility for defining the issues until some better procedure is substituted for it.[53]

[51]Clark, Code Pleading 30.

[52]Clark, Code Pleading 5, 6, 36.

[53]It may be observed, that in certain actions the common law gradually "debauched" the general issue till it covered virtually the whole ground of validity and perhaps some defences by way of subsequent discharge. But this evidently did not give satisfaction in practice, and one of the chief accomplishments of the first reform of English pleading, by the famous Hilary Rules, was to narrow again the scope of the general issue and reinstate the affirmative defences. Cf. Finley v. Quirk, (1864) 9 Minn. 194, and Clark, Code Pleading 15.