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THE CONSOLIDATION OF PRELIMINARY MOTIONS AND DEMURRERS IN CONNECTICUT*

The abolishment of demurrers by the new equity rules of the Federal Court and by the recent Practice Act of the Law Courts of New Jersey makes pertinent the question whether Connecticut may not to her advantage amend her practice to conform to that of those two jurisdictions and that of the English Courts. The Connecticut State Bar Association has already gone on record as favoring the adoption of a rule which should compel a party to embody in one document a motion to expunge and a demurrer, where the motion and demurrer are addressed to the same pleading, whether the moving party claims both forms of relief or "whether he is experimenting to ascertain what is the proper form of relief to which he is entitled."

The undoubted purpose of the modern codes is as far as possible to make rules in accord with the principle of the maximum simplicity in methods of procedure and of the minimum delay in reaching issues which shall determine the case. The advantages to be gained by compelling all existing objections to a pleading to be combined in one paper are too obvious to require extended argument.

That it will tend to simplify preliminary pleadings is clear from the wording of the Bar Association's recommendation. If "the purpose of the Practice Act is to secure the utmost simplicity and freedom from mere technical forms consistent with the accuracy indispensable to judicial proceedings", we are far from that end, if after thirty-three years' experience under the act the Bar has still to experiment to ascertain whether an objection to a pleading should be labelled "motion to expunge" or "demurrer".

Plaintiffs are no longer thrown out of Court because they have mislabelled the statement of a good cause of action, and should we now say to a pleader, "You have stated a valid objection to your opponent's pleading, but you have waived that objection because you called your statement a 'demurrer' instead of a 'motion'," or "Go back and have your stenographer substitute the word 'demur-

* This article was referred to in the note on page 236 of the January issue of the YALE LAW JOURNAL as being entitled, "Should the Demurrer Be Abolished in Connecticut."

rer' for 'motion', then file your statement again, claim it for the short calendar again, and then we will hear you"?

The present method of permitting one objection to a pleading to be taken by motion, and another and entirely independent objection to be taken later by demurrer after the determination of the motion offers an opportunity for dilatory tactics, especially in counties where short calendar sessions are infrequent, increases the client's expenses by compelling him to pay his attorney for two appearances in Court instead of one, plus travel and extra time in cases where the attorney resides at a distance from the county seat, and results in a waste of the Court's time in familiarizing itself on each occasion with the pleadings.

Is it then possible to compel all existing objections to a pleading to be embodied in one paper, to be called "a motion" or "exception", or any other suitable name, and still preserve the accuracy indispensable to judicial proceedings; in short, to abolish all distinctions between motions and demurrers in so far as they attack defects of form or substance in a pleading? Motions are of five classes: to strike out or expunge, to make more certain or more specific, to separate causes of action, for misjoinder of parties, and to cite in or admit new parties. Demurrers, on the other hand, are used to test the sufficiency of a cause of action or defense, to object to duplicity or misjoinder of causes of action, to the relief demanded, and to the non-joinder or want of parties.

There is nothing inconsistent in stating and arguing together the objections now raised by a motion to expunge and a demurrer, for the ruling on the motion is entirely immaterial as far as the statement and argument of the demurrer is concerned.

The motion confined with its proper limits as defined by the Practice Act cannot be used to remove matter which would change the aspect of the complaint from the standpoint of demurrability, for if the matter sought to be expunged is material to the statement of the cause of action or defense, it cannot be reached by the motion. Otherwise a party could have an allegation stricken out, and then properly demur because the complaint failed to contain that allegation. Suppose a complaint is objected to because it contains scandalous matter and also because it fails to state a cause of action, the presence or absence of the scandalous matter cannot affect the sufficiency of the complaint, for it is only scandalous when it is unnecessary to be stated to set out the cause of action.

It has been urged that it would be impossible to argue at the same time the objections now raised by a demurrer and a motion to make more specific because you would not know until after a ruling on the motion in what particular the Court would order the pleading made more specific; and further, you would not know the details of the more specific statement until made by your opponent. This situation cannot cause difficulty for the purposes of the two objections are entirely different. The demurrer in such a case is used to test the sufficiency of the pleading as stating a cause of action or defense, a question which the motion cannot raise, for the motion assumes sufficiency in substance and only reaches defects in form, so the granting or denial of the motion does not in any way affect the grounds of the demurrer. Again if the more specific statement when made is objectionable, then ground for a second "exception" has arisen, as the first need present only causes of objection existing at the time it is filed.

Again assume that you wish to attack a pleading on the grounds of misjoinder of parties, failure to state a cause of action, and improper relief demanded. It is entirely reasonable and practical to state and argue all these objections at once.

A ruling that one party should not have been joined cannot supply the omission in the complaint of a fact essential to the statement of a cause of action. If on the other hand the objection to the complaint is that it contains improper matter and the determination of this question turns on the ruling as to the misjoinder of the parties, there can be no hardship in requiring the objector to state and argue his objection on the hypothesis that the ruling on the misjoinder will be in his favor. The same reasoning applies if the relief demanded is only improper, if there has been a misjoinder of parties. Cases are constantly submitted to juries by our judges with instructions to find one way or the other as they find this or that fact proven. Furthermore, in ten States misjoinder of parties is reached by a demurrer, and it is not uncommon in those States to find this objection combined with the other grounds of demurrer in a single demurrer. From the fact that these States have continued this practice, the inference is fair that no inconvenience has been found.

Again suppose a complaint to contain two counts. In the first count are combined two causes of action which are unitable, but one of them is not stated with sufficient certainty. The second count states a cause of action which cannot properly be united

with one or either of the other two stated in the first count. Under the present practice the defendant would first file a motion to separate to the first count, and, after the separation, move to correct, and then demur for the misjoinder.

Under the proposed rule requiring all existing objections to be taken at once, he would object to the complaint, first for the misjoinder, and second, for the jumbling of the two causes of action into one count. These two objections can be argued at once, for the very ground of the second presupposes that the objector has, before making the objection, singled out the two separate and distinct causes of action in the first count.

The impracticability of requiring the third objection to be taken before separation is apparent, for you compel the objector to recast the first count into two counts and then in argument assume that his opponent will separate in the same way. This difficulty may be obviated by making an express exception in cases where the objection is one which would be reached by the present motion to separate, or by not regarding the defective statement as an existing cause of objection until after the separation has taken place.

Lack of space forbids the discussion of other possible combinations but it is submitted that the suggested amendment will simplify our procedure, and materially decrease the present constant running to the courts on preliminary matters, and that unforeseen practical difficulties of the change, if any arise, can be taken care of by the Court under provisions in substance as follows:

1. All objections to pleadings shall be made by exception. The action of the Court thereon is appealable after final judgment.
2. Every exception addressed to a pleading must present every cause of objection then existing.
3. Where an exception presents more than one cause of objection the Court shall hear and determine all together, unless in the opinion of the Court they should be separated for the purposes of argument or decision.¹

John W. Edgerton.

¹ Since the above article was written it is reported that Governor Sulzer has decided to recommend to the New-York legislature that demurrers be abolished and all objections be taken by motion.