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Civil Procedure -- Use of Motion to Strike

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res judicata practices out of intimate acquaintance with their individual problems.[43]

GILBERT C. HINE.

Civil Procedure—Use of Motion to Strike.

If appealed cases afford an accurate criterion, the statutory motion to strike from pleadings is becoming much more prevalent in the North Carolina courts. In the last completed volume of the North Carolina Reports, there are five cases raising the point as compared to only twenty-five in the previous sixteen volumes. The part of the statute with which this note is concerned provides in effect that irrelevant or redundant matter may be stricken out on the motion of the aggrieved party, if made before answer or demurrer, or before extension of time is granted in which to plead.[1]

In a recent suit against a railroad and its employee for negligent injuries from the use of firearms in the hands of the employee, the trial court, on defendant's motion, struck from the amended complaint allegations that the individual defendant was possessed of a nervous and irritable disposition, and of a violent and ungovernable temper. On appeal the Supreme Court reversed the trial court only as to the nervous disposition, saying "Irritability and violent and ungovernable temper could hardly be a contributing factor to negligence, while nervousness may readily be a concomitant part thereof, and the retaining of a person equipped with firearms with which to guard the railway station of which he was in charge, when such person was known to possess a nervous disposition, might constitute negligence on the part of the railway company."[2] In passing it may be said that such a distinction is rather difficult to comprehend. The reverse appears nearer the truth.

The principal case lays down a general rule that seems quite popular with the court: "On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial."[3] The difficulty of this rule is in its application. There is no apparent reconcilable or pre-

[43] Note, *Res Judicata in Administrative Law* (1940) 49 YALE L. J. 1250. Also see Culp, *Administrative Remedies In the Assessment and Enforcement of State Taxes* (1938) 17 N. C. L. REV. 118, in which a hands-off policy is suggested to the courts insofar as upsetting expert administrative determinations as to tax liability, thereby relying more heavily on the bodies' expertness.

[1] N. C. CODE ANN. (Michie, 1939) §537.

[2] Whitlow v. Southern Ry., 217 N. C. 558, 8 S. E. (2d) 809 (1940).

[3] Pemberton v. Greensboro, 203 N. C. 514, 166 S. E. 396 (1932); Patterson v. Southern Ry., 214 N. C. 38, 198 S. E. 364 (1938); Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645 (1938); Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938); Wadesboro v. Coxe, 215 N. C. 708, 2 S. E. (2d) 876 (1939); Sayles, Adm'x v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

dictable consistency in the decisions. On occasion the court will go into a lengthy discussion of the merits of the particular pleading being attacked by the motion. If the conclusion is that it constitutes part of the pleader's cause of action or defense, it will remain because evidence to support it may be presented at the trial;[4] otherwise it will be stricken.[5] In other cases the court has announced itself in opposition to a policy of "charting the course of the trial in advance", and therefore has refused to sustain a motion to strike without considering the question of the relevancy of the attacked pleading. The protection afforded the moving party where this procedure is followed lies in an objection to the evidence when presented at the trial.[6]

Why this diametrically opposite treatment? The reason is probably founded on very practical considerations. Where the court allows or disallows the motion after a discussion of the merits of the case, it does so because it is sure of the ground on which it treads; that is, there is no doubt in the court's mind that the particular pleading is relevant or irrelevant to the suit at hand.[7] Or else, in rare cases, the court might feel that the pleading is so worded as to make a profound impression when read to an easily prejudiced jury, which would be definitely harmful to the moving party.[8] On the other hand, where the court refuses to "chart the course of the trial in advance", it would seem that it is uncertain, at least at the early stage in which such motion arises, whether or not the pleading will be proper.[9] Consequently the moving party is left to the adequate remedy of objecting to the evidence, if and when it is offered.

"When made in apt time, it (motion to strike) is not addressed to the court's discretion, but is made as a matter of right." This rule is found in numerous decisions.[10] As contrasted with "discretion", it would seem that "matter of right" should mean that the moving party has a right to have his motion decided on the merits, from which decision either party can appeal. This is true where the motion is allowed,

[4] Scott v. Bryan, 210 N. C. 478, 187 S. E. 756 (1936); Barron v. Cain, 216 N. C. 282, 4 S. E. (2d) 618 (1939).

[5] Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938); Whitlow v. Southern Ry., 217 N. C. 558, 8 S. E. (2d) 809 (1940); Herndon v. Massey, 217 N. C. 610, 8 S. E. (2d) 914 (1940); *cf.* Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129 (1931).

[6] Hardy v. Dahl, 209 N. C. 746, 184 S. E. 480 (1936); Hildebrand v. Southern Bell Tel. & Tel. Co., 216 N. C. 235, 4 S. E. (2d) 439 (1939).

[7] *Cf.* Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938).

[8] *Cf.* Patterson v. Southern Ry., 214 N. C. 38, 198 S. E. 364 (1938).

[9] Hardy v. Dahl, 209 N. C. 746, 184 S. E. 480 (1936); *cf.* Hildebrand v. Southern Bell Tel. & Tel. Co., 216 N. C. 235, 4 S. E. (2d) 439 (1939).

[10] Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129 (1931); Poovey v. Hickory, 210 N. C. 630, 188 S. E. 78 (1936); Herndon v. Massey, 217 N. C. 610, 8 S. E. (2d) 914 (1940); *cf.* Fayetteville v. Spur Distilling Co., 216 N. C. 596, 5 S. E. (2d) 838 (1939).

for the Superior Court judge has necessarily made a "merit" decision in order to have determined that the contested pleading is irrelevant. The injured party may then except and immediately appeal. There is no justifiable escape from this, for he may be entitled to have his lost pleading remain and it would be most unfair to force him, against his will, to go to the expense of continuing the trial to its end before he is allowed to raise the point. For if he lost and then established his right to material pleadings, the trial would have been in vain. When deciding such an appeal, the Supreme Court may determine the merits of the case,[11] or refuse to chart the course of the trial in advance.[12] Either method, under these circumstances, will adequately protect the injured party.

The problem, as it relates to appeals, is more difficult of solution where the motion to strike is denied and the contested pleading remains. In this situation, what is the meaning of the court's statement that the motion is made as a "matter of right"? It seems to mean that the court will either determine whether or not the pleading is relevant,[13] or will refuse to chart the course of the trial in advance.[14] When this "chart" rule is used, the only effect is to decide the motion itself by merely postponing a decision as to the relevancy of the particular pleading. The use of this rule appears to rest entirely in the Supreme Court, in view of its policy of hearing immediate appeals. There is nothing to indicate that any leeway has been given the Superior Court judge in his invocation of this rule. He apparently is as liable to be reversed when he invokes it as when he decides the motion on the merits.

Assuming that the North Carolina Court is going to continue its use of the "chart" rule, it should grant the Superior Court judge wide discretion in applying it, and allow no appeal from his ruling. Awareness of the possibilities of such a procedure may have caused the recently expressed doubt of the Supreme Court concerning the right of immediate appeal where the motion is denied.[15] Overwhelming factors argue against such an appeal. Although C. S. 638 allows an appeal from every judicial order affecting a substantial right, such right is

[11] Patterson v. Southern Ry., 214 N. C. 38, 198 S. E. 364 (1938); Whitlow v. Southern Ry., 217 N. C. 558, 8 S. E. (2d) 809 (1940); *cf.* Federal Reserve Bank v. Atmore, 200 N. C. 437, 157 S. E. 129 (1931).

[12] Hildebrand v. Southern Bell Tel. & Tel. Co., 216 N. C. 235, 4 S. E. (2d) 439 (1939).

[13] Duke v. Crippled Childrens' Hospital, 214 N. C. 570, 199 S. E. 918 (1938); Barron v. Cain, 216 N. C. 282, 4 S. E. (2d) 618 (1939); Sayles, Adm'x v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

[14] Pemberton v. Greensboro, 205 N. C. 599, 172 S. E. 196 (1934); Hardy v. Dahl, 209 N. C. 746, 184 S. E. 480 (1936); *cf.* Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. (2d) 645 (1938).

[15] Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645 (1938); *cf.* Scott v. Bryan, 210 N. C. 478, 187 S. E. 756 (1936).

sufficiently protected by allowing the moving party to object to the evidence. The infrequent argument that the reading of the pleadings to the jury will prejudice them seems, in actuality, rather negligible, for juries apparently pay little attention to the pleadings when presented.[16] Also it is possible that evidence may not be presented to support such allegations. In view of the safeguards to the moving party, it seems rather unfair to leave the other party without any choice but to submit to the expense of defending such an unnecessary appeal. Since it is apparent that the use of the motion to strike is becoming more frequent, and since, as it stands now, the discretion as to charting or not charting the course of the trial is in the Supreme Court, thus necessitating their consideration of such appeals, their work will be burdened with deciding an increasing number of questions which are of no material benefit. To refuse appeal in this situation would obviously remedy these problems, and would put the discretion in the Superior Court judge where it rightfully belongs.

The "law of the case" is that a court, having ruled on a certain question, will not again hear the case upon the same point.[17] To what extent does this pertain to motions to strike? On appeals, if the motion is allowed, evidence to support the stricken allegations cannot be admitted, as the court has ruled on the merits that the particular pleading is improper. However, this should not bar such evidence for a secondary purpose, such as impeachment of an adverse witness, for here there would be no attempt to introduce it in support of the wrongful allegations. On the other hand, where the court denies the motion on its merits, it seems that the trial judge would be bound to allow the evidence to come in. Where the "chart" rule is invoked, nothing has been decided. Consequently the moving party must prepare to defend, in view of a possible adverse ruling by the trial judge on his objection to the evidence.

Often a party who has suffered an adverse ruling on a motion to strike may feel that an immediate appeal is unnecessary or undesirable. How should he protect himself so that he may have the privilege of contesting the ruling in case he should lose his case and appeal? If the Superior Court judge allows the motion the injured party must except. Logically, an offer of the evidence at the trial should be unnecessary, for in allowing the motion, the judge has, in effect, ruled that he will not admit the evidence, and consequently any offer of it would be useless. However, a careful attorney, to show that he is still relying on his exception and to prevent any question of his having

[16] *Cf.* Poovey v. Hickory, 210 N. C. 630, 188 S. E. 78 (1936); Warren v. Virginia Carolina Joint Stock Land Bank, 214 N. C. 206, 198 S. E. 624 (1938).
[17] McIntosh, North Carolina Practice and Procedure (1929) §28.

waived his right to do so, should make some offer of the evidence that he would like to prove under the stricken pleadings. Where the motion is denied, the moving party's only remedy is to object to the evidence when presented. If it is denied on the merits, the Superior Court judge has made his decision to allow the evidence to come in. In this situation the moving party should except to the denial and then object to the evidence. If he does not except to the denial he may be considered to have waived his right to object to the evidence by acquiescing in it; while if he fails to object to the evidence, he may, on appeal, be considered to have waived his right to his exception to the denial. If the judge denies the motion by invoking the "chart" rule, he is simply deferring a decision on the question until the evidence is offered. Thus it seems that the moving party would not have to except in order to object to the evidence. However, in many instances the judge may give no reason for his denial, and exception should be taken in all such cases to prevent any subsequent contention that the judge's ruling was on the merits.

In the interest of simplicity, and in order to clarify the difficult, and in many cases unnecessary problems that develop from the use of the motion to strike, it seems that it would be advantageous from both the point of view of the court and of the parties litigant, for the court to lay down the following set rule on motions to strike made in apt time: (1) Where allowed, the aggrieved party may (a) except and appeal immediately, and obtain a decision as to whether or not he may support the contested allegations by evidence at the trial, or (b) except to the ruling and be allowed to raise the question if the case is subsequently appealed, provided, at least, that he has preserved his exception by offering the evidence at the trial. (2) Where denied, he may not appeal, but must seek his relief by excepting to the ruling and objecting to the evidence when and if it is offered.

J. B. CHESHIRE, IV.

Contracts—Effect of Second Contract With Defaulter Upon Rights for Breach of First.

An elementary rule of contract law is that a party injured by a breach of contract has a "duty"[1] to mitigate any damages suffered

[1] Strictly speaking the "duty" to mitigate damages is not a duty at all, not an affirmative obligation. The rule merely sets up a standard for ascertainment of damages, recognizing a disability in the injured party to collect avoidable damages. RESTATEMENT, CONTRACTS (1932) §336, comment (d); 5 WILLISTON, CONTRACTS (Rev. Ed. 1937) 3795, 3813. In the interests of brevity the word "duty" is used throughout this note as qualified by this footnote.