Kentucky Law Journal

Volume 29 | Issue 1 Article 15

1940

Trial Procedure--Does a Motion for Peremptory Instruction Test the Sufficiency of the Pleading?

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The language and references of the court in the instant case clearly indicate that there was no intention to depart from the accepted conception of felony murder. Reference was made to Judge Roberson's treatise on criminal law, and a clear felony murder concept was quoted therefrom:

> "It is murder . . . if a person commits arson by setting fire to a dwelling house and *accidentally* burns the occupant."[17] (Italics added).

The court also referred to *Reddick* v. *Commonwealth*, which, as pointed out above, is in conformity with the accepted theory of felony murder.

In conclusion, it is submitted that the instant case is not a departure from the generally recognized felony murder doctrine. The conspiracy factor, and that alone, rendered it necessary for the court to include the theory of natural and probable causation before the conviction of murder could be sustained. Also, a reiteration of the long-standing Kentucky precedent makes it evident that a departure from this precedent was not intended.

J. WIRT TURNER, JR.

TRIAL PROCEDURE—DOES A MOTION FOR PEREMPTORY INSTRUCTION TEST THE SUFFICIENCY OF THE PLEADING?

In an action for injuries resulting from the alleged negligence of the defendant, defendant pleaded contributory negligence, and filed a counterclaim for his injuries. These allegations were not controverted by the plaintiff's reply. The defendant's motions for peremptory instructions, made at the close of the plaintiff's evidence, and again at the close of all the proof, were denied. The defendant asks reversal of the judgment for the plaintiff on the ground that his affirmative defense went undenied. The Court of Appeals said:

> "We have ruled in actions ex contractu and in suits of equity that a party waives the failure to traverse an affirmative allegation where the case was tried as if the issue had been joined in the pleading, but in tort actions the rule is otherwise."

The Court reversed the judgment but allowed the plaintiff to file a reply controverting the allegations if he desired to have a new trial. *Short* v. *Robinson*, — Ky. —, 134 S.W. (2d) 595 (1939).

The statement of the Court that there is a distinction between these three classes of actions, contract equity, and tort, must be considered in the light of the facts of the case before it. Should the court follow this dictum, it would necessarily hold that a motion for peremptory instruction in contract and equity actions will not raise the sufficiency of the pleadings, but in tort actions the rule is otherwise. Such a rule is not supported by law.

In a search for authority upon which the Kentucky Court could base such a holding the only case found is *Glens Falls Insurance Co.* v.

[17] Whitfield v. Com., 278 Ky. 111, 116, 128 S.W. (2d) 208, 210-11 (1939).

Elliot.[1] There, plaintiff, in a suit on a contract, failed to reply to the affirmative allegations of the defendant. At the close of all the evidence the defendant moved for a peremptory instruction which was not granted. The defendant appealed on the ground that his pleading went undenied. In rather loose language the Court of Appeals affirmed the judgment, saying:

> ". . . a motion for a peremptory instruction does not raise the question of the sufficiency of the evidence, where the attention of the court is not called in some way to the condition of the pleading, and this question is not presented to the court . . . The rule is settled that, where parties on the trial treat the pleadings as conroverted, the judgment will not be reversed here; for it is a wise rule that all these objections should be made first in the circuit court. It is evident that this objection is first made here, and that either the defendant's attorneys did not know the facts when the trial was going on or concealed them from the court and treated the pleadings as controverted. The pleadings, having been treated as controverted during the long trial, can not be treated otherwise here."[2]

In making such a statement the court was evidently overlooking its prior decisions on this point.[3] It has been held almost uniformly in Kentucky that a motion for a directed verdict tests the sufficiency of both pleading and evidence.[4] But if the *Glens Falls Case* did correctly set forth the law in regard to what will be tested by motion for peremptory instruction it was certainly overruled by *Utterback's Adm'r.* v. *Quick*,[5] which held that a motion for peremptory instruction, in an action ex contractu, did raise the question of the sufficiency of the pleading. In that case the court said:[6]

> "If evidence can not be considered without pleading to support it, then it follows that a motion for a peremptory instruction tests both the pleading and the evidence . . . 'It is true, as urged, that a motion for a peremptory instruction tests the sufficiency of the pleading as well as the evidence.'"

The cases that are cited and which might be cited by the court as authority for such a decision as in the *Glens Falls Case* fall readily into two classes: first, cases in which the court found that because of the particular circumstances the pleadings had in fact been traversed;[7]

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[1] Glens Falls Insurance Co. v. Elliott, 223 Ky. 205, 3 S.W. (2nd.) 219 (1928).

[2] Glens Falls Insurance Co. v. Elliott, 223 Ky. 205, 209; 3 S.W. (2nd.) 219, 221 (1928).

[3] Schulte v. L. & N. R.R. Co., 128 Ky. 627, 108 S.W. 941 (1908); Louisville R. Co. v. Hibbitt, 139 Ky. 45, 129 S.W. 319 (1910); Bender v. South, 189 Ky. 623, 225 S.W. 504 (1920); Insurance Co. v. Gore, 215 Ky. 487, 284 S.W. 1107 (1926).

[4] Cases cited supra, n. 4.

[5] Utterback's Adm'r. v. Quick, 230 Ky. 333, 19 S.W. (2nd.) 980 (1929).

[6] Utterback's Adm'r. v. Quick, 230 Ky. 333, 336, 19 S.W. (2nd.) 980, 982 (1929).

[7] Carter Coal Co. v. Bays, 183 Ky. 29, 208 S.W. 1 (1919); (*see infra*

second, cases in which there had been no objections at all raised in the lower court.[8] Both classes being distinguishable the cases cited as authorities by the court in the *Glens Falls Case* do not support its holding.[9]

But looking at the problem from another viewpoint, if a motion for a peremptory instruction questions only the suffciency of the *evidence*, then why can not a party after requesting such instructions obtain a judgment on the *pleading* by a motion for judgment notwithstanding the verdict?[10] Such a motion is uniformly denied in Kentucky because, says the Court of Appeals, the circuit court has determined that matter in the prior motion and can not be required to consider it again in a motion of another form.[11] In so holding the court is, of necessity, saying that a motion for peremptory instruction raises the question of the sufficiency of the pleading.

The statement of the court in the principal case, ". . . In actions ex contractu and in suits of equity . . . a party waives the failure to traverse an affirmative allegation where the case was tried as if the issue had been joined in the pleading, . . ." if applied to the facts of that case would be incorrect. On the contrary it is the law in Kentucky that in all cases, contract and equity as well as tort, a motion for peremptory instruction raises the question of the sufficiency of the pleadings. There is no reasonable basis for any distinction in these classes of actions, and the Kentucky Court of Appeals, with the exception of the *Glens Falls Case*, has never made any such distinction. The decision in that case was not in accord with reasoning and authority. If it ever was the law in this jurisdiction, it was clearly overruled by the *Utterback Case*. Therefore, it can not be doubted that a motion for peremptory instruction tests the sufficiency of the pleadings as well as the evidence and that the rule is the same in actions of tort, contract, and equity.

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n. 10); Rowe v. Arnett, 241 Ky. 768, 45 S.W. (2nd.) 12 (1931) (The pleading in two actions were consolidated; thus the court held that the issues had been formed.)

[8] Fitzpatrick v. Vincent, 121 Ky. 185, 88 S.W. 1073 (1905); Hack v. Laskley, 197 Ky. 117, 245 S.W. 851 (1922); Horton's Committee v. Shelman, 245 Ky. 508, 55 S.W. (2nd.) 923 (1932); Edward Brackhans and Co. v. Gilson, 263 Ky. 509, 92 S.W. (2nd.) 830 (1937).

[9] In Carter Coal v. Bays, supra n. 8, the circuit court treated the answer of of the previous trial of the same facts to be the answer of the second trial. The pleadings were controverted as of record. In Fitzpatrick v. Vincent, supra n. 9, there had been no objection of any kind to the pleadings for the lower court to pass upon. These two cases are not authority for a holding that a motion for peremptory instruction does not test the sufficiency of the pleading in actions ex contractu.

[10] Kentucky Civil Code (Carroll, 1938) sec. 386.

[11] Connecticut Fire Insurance Co. v. Moore, 154 Ky. 18, 156 S.W. 867 (1913); Sheffield King Milling Co. v. Sorg, 180 Ky. 539, 203 S.W. 300 (1918); The Franklin Life Insurance Co. of Phila. v. Cook's Adm'r., 216 Ky. 15, 287 S.W. 553 (1926).