Washington Law Review

Volume 5 | Number 1

1-1-1930

# Supreme Court Rule III of Pleading, Procedure and Practice—Amendments and Irregularities

E. B. Herald

driver, with whom the deceased was riding as a guest, is not admissible as to what the deceased said or as to what was said to him concerning taking the deceased on the trip in defendant's truck.[18]

CONCLUSION

It will thus be seen that the decisions of our Supreme Court during the last four and one-half years have adhered closely to the former decisions in this state upon the subject and to what we believe may be considered a fair, sound and correct interpretation and application of this important statute.

ELWOOD HUTCHESON.*

---

SUPREME COURT RULE III OF PLEADING, PROCEDURE AND PRACTICE —AMENDMENTS AND IRREGULARITIES. Can Rule III.[1] governing amendments and irregularities, be invoked by the Supreme Court voluntarily after the trial and after judgment of dismissal for failure of proof? In the case of *Porter v. Baretich*[2] in which the complaint was predicated upon an express contract, the action proceeded regularly to trial and resulted in judgment for the full amount claimed in favor of the plaintiff-respondent. Defendant's answer prayed for judgment of dismissal. In the opinion, the Supreme court said.

> "We are also convinced from the record before us that appellants never intended to deal with Perry E. Joy or to purchase any machine from him. This being true, respondent cannot recover upon the contract sued upon."

Further in the opinion, the Court said.

> "In view of the liberal rules of practice now in force concernings amendments (Rule III, *etc.*), we will not order the action dismissed, but the judgment appealed from is reversed with directions to the trial court to hear testimony as to the reasonable value of the cash register, and such other testimony as may be offered by either party and deemed admissible under the rules of evidence."

The defendant had not made any motion for a new trial but appealed from the final judgment upon the merits. No motion was made by the plaintiff at any time to amend the complaint. He stood consistently upon the contract, upon which the Supreme Court says he cannot recover. He sought neither in the trial court

---

[18] *Klopfenstein v. Eads*, 143 Wash. 104, 105, 254 Pac. 854, 256 Pac. 333

[1] 140 Wash. XXXVI.

[2] 53 Wash. Dec. 476, 280 Pac. 78 (1929).

nor the Supreme Court to amend his complaint to conform to the evidence. In fact the Supreme Court says that "further testimony must be taken before a proper judgment can be entered." This is not a case where the court may deem amendments of pleadings made to conform to the evidence in support of the judgment. The Supreme Court disagrees with the judgment of the trial court.

Laws of 1929, Ch. 89, Sub-division 8, relating to judgments of non-suit, *etc.*, provides for non-suit "upon the motion of the defendant, when, upon the trial, the plaintiff fails to prove some material fact or facts necessary to sustain his action as alleged in his complaint."

All of the sub-divisions of Rule III[3] appear to relate to amendment of pleadings at any stage of the action "upon the motion" of a party to the action, except sub-division 9, which provides as follows

> "At any time after trial, whether before or after judgment, the trial court or appellate court may allow or make any amendment necessary to make a pleading conform to the proof, so far as may be just."

This sub-division permits a pleading to be amended *ex post facto* to conform to the proof already in the record, but it does not seem broad enough to justify the appellate court to send the case back for the taking of additional proof to support a pleading not amended or ordered amended. The appellate court expressly found that there was not proof enough to support a judgment upon *quantum meruit,* but it sent the case to the trial court to allow the respondent to supply that proof. It would seem that such proof, when offered, would be irrelevant and immaterial unless the complaint is amended, and yet the respondent has not sought to amend it nor has the appellate court ordered it amended. It is doubtful that there exists any rule of court which justifies the appellate court in sending down for retrial an action, where the court expressly finds that the appellant should prevail upon both the pleadings and the proofs as the record stands, and where the respondent has made no motion to amend his complaint in any stage of the action and has offered no additional proof, and where the appellant had made no motion for a new trial but has appealed only from the final judgment upon the merits. It would seem that the province of the appellate court, as a court of appeal was to determine the correctness of the judgment of the trial court or of some order or ruling of that court, which is submitted to it for review.

It may be interesting to see how the respondent will amend the complaint, if permitted to do so in the trial court, in view of the finding of the appellate court that the appellants had no dealings

---

[3] 140 Wash. XXXVIII.

with the respondent's assignor, Perry E. Joy The question arises whether the respondent would have any standing as party plaintiff and whether the Remington Cash Register Co., Inc., the apparent owner of the cash register according to the written contract, should be the party plaintiff in an action for *quantum meruit.*

The principle involved in this decision would seem to enhance the "uncertainties of litigation," if the prevailing party may expect the appellate court to send back the case for retrial piece-meal upon any possible form of action, which an incomplete record may suggest.

The Bar may be interested in the court's interpretation of the Rules regulating procedure and practice as placing the appellate court perhaps somewhat beyond the old-fashioned notion of a court of review, as exercising a voluntary regulatory function in the procedure of a particular case. E. B. HERALD.

---

# RECENT CASES

ELECTION OF REMEDIES—ACTS CONSTITUTING ELECTION—INEFFECTIVENESS OF REMEDY—MISTAKE. Plaintiff was mortgagee of a valid chattel mortgage on A's lumber. A later became financially involved and delivered the lumber to defendant along with other assets. Plaintiff sued defendant in the first action on contract, on the theory that defendant had promised to pay the chattel mortgage. Judgment was entered dismissing that action on the ground that defendant did not assume and agree to pay the mortgage. Now plaintiff brings this action alleging conversion and defendant pleaded the former action as a defense. *Held* for the plaintiff. The first choice of remedy was merely a mistake and did not constitute such an election of remedies as to prevent the maintenance of this second action. *Spokane Security Finance Co. v. Crowley Lumber Co.*, 150 Wash. 559, 274 Pac. 102 (1929).

Election of remedies has been defined as the adoption of one of two or more coexisting remedies, inconsistent with each other, with the effect of precluding a resort to the others. 20 C. J. 3; *Phillips v. Rooker* 134 Tenn. 457, 184 S. W 12 (1916). It is also well settled that two or more inconsistent remedies must coexist for the doctrine of election of remedies to apply. Consequently, where the suitor has, in the first action, mistaken his remedy and adopted a mode of redress incompatible with the facts of his case, he is still free to elect and proceed anew. *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (n. s.) 144 and note (1906) *Zimmerman v. Robinson*, 128 Iowa 72, 102 N. W 814 (1905) 20 C. J. 21, 22 L. R. A. (n. s.) 1153, note. Washington has followed this rule of mistake of remedy in several cases, making the statement that there is no election of remedy when there is a good defense to the remedy chosen. *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713 (1909) *Roy v. Vaughn*, 100 Wash. 345, 170 Pac. 1019 (1918) *Harris v. Northwest Motor Co.*, 116 Wash. 412, 199 Pac. 992 (1922) *Warren v. Sheane Auto Co.*, 118 Wash. 213, 203 Pac. 372 (1922); *Godefroy v. Reilly*, 146 Wash. 257, 262 Pac. 639 (1928) *In re Pulver*, 146 Wash. 597, 264 Pac. 406 (1928)

The doctrine of election of remedies is often confused with that of choice of substantive rights. The former is not a rule of substantive law, but is merely a rule of procedure of judicial administration for the purpose