Michigan Law Review

Volume 48 | Issue 4

1950

PLEADING AND PRACTICE-FAILURE TO ANSWER REQUEST FOR ADMISSION OF FACTS AS BASIS FOR JUDGMENT ON THE PLEADINGS-FORM OF REQUEST FOR ADMISSION OF FACTS

Robert H. Frick
University of Michigan Law School

PLEADING AND PRACTICE—FAILURE TO ANSWER REQUEST FOR ADMISSION OF FACTS AS BASIS FOR JUDGMENT ON THE PLEADINGS—FORM OF REQUEST FOR ADMISSION OF FACTS—Plaintiff filed a complaint for money owing for goods sold and delivered. Defendant filed a cross-complaint. Plaintiff filed an affirmative reply setting forth defenses to the cross-complaint, and three days later served defendant with a request that he "admit each and every allegation and averment contained in paragraphs I, II, III and IV of the plaintiff's affirmative reply to the cross-complaint of the defendants herein is true." Defendant failed to answer the request. Washington Rule of Practice 21 provides that such fail-

ure shall be deemed an admission of the facts submitted.[1] The trial court granted plaintiff's motion for judgment on the pleadings. On appeal, *held,* reversed. Matters outside the pleadings cannot be considered on a motion for judgment on the pleadings. A request for admissions must specifically set forth the matters of fact concerning which an admission of truth is sought. A request for admissions cannot incorporate by reference affirmative allegations of a reply since they are deemed denied. *Weyerhaeuser Sales Co. v. Holden,* (Wash. 1949) 203 P. (2d) 685.

By the orthodox view, a motion for judgment on the pleadings is based on the pleadings alone, without consideration of outside matters.[2] Since the motion is in effect a demurrer,[3] it came within the common law prohibition of the speaking demurrer, and this view continued under the codes[4] and to some extent under the original Federal Rules of Civil Procedure.[5] Judge Clark advocated that to be consistent with the abolition of the demurrer,[6] matter outside the pleadings should be admitted and the motion treated as one for summary judgment,[7] and this view has been incorporated into the 1946 amendments to the Federal Rules.[8] Washington, however, has neither abolished the demurrer, nor provided for summary judgment, and would appear to be correct in refusing to consider the defendant's failure to answer in the principal case. While, in view of the foregoing, the objections of the court in the principal case to the form of the request for admissions may be considered dictum, they merit consideration. In requiring an express statement of the facts in the request itself, and in forbidding incorporation by reference of statements of facts in other documents, the court has adopted an inflexible test of the validity of a request. Where the document referred to is illegible, unduly lengthy, or where it contains much irrelevant matter, it might impose a hardship to require an answer. This seems to be the basis of the decision in the only other case to consider the ques-

[1] Wash. Rev. Stat. (Rem. 1945 Supp.) §308-21. This rule is identical with original Federal Rule of Civil Procedure 36: 28 U.S.C.A. §723 (1941).

[2] CLARK, CODE PLEADING, 2d ed., 554 (1947); 2 MOORE, FEDERAL PRACTICE, 2d ed. 2269 (1948).

[3] CLARK, CODE PLEADING, 2d ed., 554 (1947); Blume, "Theory of Pleading: A Survey Including the Federal Rules," 47 MICH. L. REV. 297 at 305 (1949).

[4] Jefferies v. The Fraternal Bankers' Reserve Society, 135 Iowa 284 at 289, 112 N.W. 786 (1907).

[5] Most of the federal courts were willing to allow a speaking demurrer on a motion to dismiss: 2 MOORE, FEDERAL PRACTICE, 2d ed., 2268 (1948). It was not allowed, however, on a motion for judgment on the pleadings: Ream v. Callahan, (D.C. N.Y. 1942) 42 F. Supp. 951; Snowhite v. Tide Water Assoc. Oil Co., (D.C. N.J. 1941) 40 F. Supp. 739; Minor v. Minor, (D.C. Neb. 1947) 74 F. Supp. 815.

[6] Federal Rule 7 (c).

[7] U.S. Trust Co. of N.Y. v. Sears, (D.C. Conn. 1939) 29 F. Supp. 643; Palmer v. Palmer, (D.C. Conn. 1940) 31 F. Supp. 861; Clark, "Simplified Pleading," A.B.A. JUDICIAL ADMIN. MONOGRAPH, Series A., No. 18, abridged in 6 F.R. Serv., L.R. 57.

[8] The amendments are to Rules 12 (b) and 12 (c). For Judge Clark's comments on these amendments see Clark, "The Amended Federal Rules,". 15 BROOKLYN L. REV. 1 at 10 (1948).

tion.[9] Where the statements in the document are clear, however, there would seem to be no valid objection to the incorporation, provided the document is adequately described and available to the party served. The correct test would seem to depend on the clarity of the document, rather than the form of the request. The rule laid down by the Washington court would in many cases impose unnecessary work on the party serving without materially aiding the party served. The court raised another objection to the request in that it incorporated by reference affirmative allegations of the plaintiff's reply which by statute are deemed denied.[10] Provisions for the assumed denial of new matter are found where the pleadings are cut off with the reply, no rejoinder being permitted.[11] If the court in the principal case intended its statements as an additional reason for not considering the failure to answer the request in a motion for judgment, it would appear correct.[12] If, however, the objection was to the form of the request, it is not well founded. The arbitrary limitation on the number of pleadings is designed solely to save the time consumed under the common law system of pleading to issue.[13] It is not intended to prevent the introduction of evidence at the trial.[14] A failure to answer a request for admission of the truth of such new matter would clearly be admissible for the purpose of proving its truth if in proper form. Granting there is no valid objection to incorporation by reference in a request per se, there can be no valid objection to the incorporation by reference in the request of portions of the pleadings, whether or not deemed denied for the purpose of early termination of the pleadings.

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[9] Kraus v. General Motors Corp., (D.C. N.Y. 1939) 29 F. Supp. 430.

[10] Wash. Rev. Stat. (Rem. 1932) §297.

[11] CLARK, CODE PLEADING, 2d ed., 701 (1947).

[12] See Central Trust Co. v. Second National Bank, (D.C. Pa. 1939) 1 F.R. Serv. 12c. 23, Case 4, and Geist v. Prudential Ins. Co. of America, (D.C. Pa. 1940) 35 F. Supp. 790 for analogous situations.

[13] CLARK, CODE PLEADING, 2d ed., 702 (1947).

[14] Blume, "The Scope of Civil Action," 42 MICH. L. REV. 257 at 277 (1943).