Assumpsit–Common Counts–Action by Assignee

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severance deed did not make the adverse possession of the surface extend to the minerals.

Cases directly on this question of subsequent severance are rare. However, in Finnegan v. Stineman, 5 Pa. Super. 124, 140 Am. St. Rep. 951 (1897), the question was put directly before the court. There was a severance deed executed by the true owner after the adverse possession commenced. The severance deed was recorded. The court held that the severance deed did not interrupt the adverse possession of the minerals unless the grantee of the minerals actually made an entry, and the recording of the deed was not equivalent to an entry. The court further stated that as between the grantee of the minerals and the adverse possessor of the surface there was no severance and that at the end of the statutory period the adverse possessor gained title to the minerals as well as the surface.

Whether or not the West Virginia court would follow the dictum set out in the instant case or the rule set out in the Finnegan case is an open question.

R. L. H., Jr.

Assumpsit—Common Counts—Action by Assignee.—P and X contracted to strip and deliver coal to D to be paid for by tonnage ascertained on D's scales. After partially performing the contract, X assigned all of his interest in the contract to P. D's scales registered the coal lower than the actual weight. P filed a declaration in assumpsit based solely on the common counts for balance due. Item 1 of P's bill of particulars set forth the assignment. Verdict was given for P and, thereafter, over the objection of D, P was permitted to amend a common count to conform to the proof and verdict by showing the assignment. Judgment for P. Held, on appeal, that although it is permissible to allow an amendment after verdict [W. Va. Code c. 56, art. 4, § 24 (Michie, 1949)], a common count can not be amended to show an assignment since a special count is required. Judgment reversed. Sammons Bros. Const. Co. v. Elk Creek Coal Co., 65 S.E.2d 94 (W. Va. 1951).

In a vigorous dissenting opinion, Given, J., stated that there is no need for any amendment at all for "... the clear intent of the statute [W. Va. Code c. 55, art. 8, § 9 (Michie, 1949)] is to permit an assignee to proceed on such a claim, both as to pleading and proof, without regard to the fact that the claim was assigned.
... Of course if a defendant is not informed as to the nature of the plaintiff's claim, he may be entitled to a bill of particulars, as in other cases.” However, Judge Given contends that even if an amendment is necessary, the statute which allows amendments to conform to the proof, when the court believes that substantial justice will be promoted thereby [W. Va. Code c. 56, art. 4, § 27 (Michie, 1949)], is not limited to counts other than the common counts.

The majority opinion contended that, although it is “... the uniform holding in this jurisdiction that, independent of statute, courts of law and equity will show great liberality in permitting amendments to pleadings, and such authority may be exercised whenever justice will be promoted,” the issue is, not as to the right to make the amendment, but the character of the amendment to be made. Such amendment as here attempted “... is not consonant with good practice and procedure.”

However, it was asserted in the dissenting opinion that the general amendment statute [W. Va. Code c. 56, art. 4, § 24 (Michie, 1949)] not only allows, but requires, great liberality in permitting amendments to pleadings, and that the rule should be applied here instead of “... exploring the law of common law pleading for some superficial technical theory upon which to deny the amendment.”

The principal case cited no authority on the proposition, but the only other cases in point which have been found seem to be contra holdings. In Pierce v. Closterhouse, 96 Mich. 124, 55 N.W. 663 (1894) it was held that an assignee of an open account cannot recover thereon under a common count declaration in which the assignment is not averred. This may imply that if the assignment were averred in the common count declaration, the declaration would be sufficient.

In a later case the plaintiff was the assignee of an account against the defendant for goods sold and delivered. The plaintiff's declaration was based on the common counts. The court, allowing an amendment to show the assignment, held that it was unnecessary for the plaintiff to declare on the special contract as there was nothing left for the defendant to do but pay for the goods which it had received. Nierman v. White's Motor Parts, 269 Mich. 608, 257 N.W. 751 (1934). The Nierman case did not
cite the Pierce case, and the authorities it did cite for its holding were not actions by assignees.

Even if the principal case was correctly decided on the rules of common law pleading as modified in West Virginia, the principal case illustrates the superfluous technicality in the present system and the need for further reform. Under the Federal Rules the amendment here considered would be unnecessary as the issue would be treated as if it had been raised by the pleadings. Fed. R. Civ. P. 15 (b); cf. Pearl Assur. Co. v. First Liberty Nat'l Bank, 140 F.2d 200 (5th Cir. 1944); see Lugar, Common Law Pleading Modified Versus the Federal Rules, 53 W. VA. L. REV. 27 (1950).

C. M. H.

Deeds—Recital of Consideration—Applicable Statute.—P brought suit against D to set aside a deed by which an elderly widow shortly before her death had conveyed her home and other realty to D. The consideration stated in the deed was, "... the sum of One ($1.00) Dollar, cash in hand paid by the party of the second part . . . , and in further consideration of the said party of the second part agreeing to make the necessary repairs upon the real estate of the said party of the first part hereinafter described, and other considerations hereinafter mentioned, . . . ." The issues pertained to the mental competency of the widow when the deed was executed, undue influence by the grantee, and sufficiency of consideration for the deed. The circuit court set the deed aside because of a lack of consideration and undue influence. Held, on appeal, that the lack of consideration, together with other evidence, shows the presence of undue influence such as to invalidate the deed. Judgment affirmed. Kadogan v. Booker, 66 S.E.2d 297 (W. Va. 1951).

An historical approach is necessary to understand the reason for the recital of consideration in deeds. Prior to the statute of uses no consideration was necessary in any conveyance of land. The ceremony of enfeoffment gave validity to the transfer. After the statute of uses a conveyance operating under the statute had to be supported by consideration to prevent the creation of a resulting use in the grantor. It became customary to state a consideration, usually a nominal sum, and acknowledge its receipt,