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May the Question Whether an Amended Declaration Introduces a New Cause of Action Be Certified to the Supreme Court for Decision?

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whether it would lead to correct results in practice. Its difficulties and uncertainties are obvious and they raise a question as to whether it should displace the more certain, if less logical, doctrine which arbitrarily fixes an age below which no responsibility is recognized. Each jurisdiction fixes this age for itself and can put it low enough to meet any situation which may be presented.

It is not unlikely that in fixing the minimum age as to capacity for contributory negligence, the courts have been influenced by a similar rule in criminal law, where children under seven are deemed incapable of committing crimes,[30] or that the courts are following the Roman theory of conclusive presumption of incapacity below seven years.[31] But the real reason would seem to be the conviction that a child under the age of seven, is a "creature of instinct and impulse,"[32] lacking that judgment and discretion and that appreciation of the probability and extent of the danger which are essential elements in determining whether a child has exercised due care. As one court puts it:[33] "The rule which denies relief to one who is guilty of negligence contributing to the injury is based more upon considerations of public policy, which require that everyone should guard his person against injury, than upon what is just to the defendant. It is quite clear that a rule which has its foundation in such considerations cannot with any propriety, apply in the case of an infant of such tender years as not to have reached the age of discretion." When we give due regard to the fact that before there can be a recovery for an injury defendant's negligence must be established, there seems no injustice in protecting every child of six years from the application of the harsh doctrine of contributory negligence. —E. C. D.

MAY THE QUESTION WHETHER AN AMENDED DECLARATION INTRODUCES A NEW CAUSE OF ACTION BE CERTIFIED TO THE SUPREME COURT FOR DECISION?—In a recently decided West Virginia case,[1] an amended declaration was demurred to on the ground that it introduced a new cause of action, and hence constituted a departure from the cause declared upon in the original declaration. In accord with previous West Virginia cases cited, the Supreme Court

[30] In Sexton *v.* Noll Construction Co., *supra*, note 20, the South Carolina court says: "The rule of the common law that a child under seven years of age is conclusively presumed incapable of committing crime prevails as the test for determining his capacity to be guilty of contributory negligence."
[31] MOYLE'S INSTITUTES, book III, title 19, sec. 10.
[32] Government Street R. Co. *v.* Hanlon, 53 Ala. 70 (1875).
[33] Walters *v.* Chicago, Rock Island etc. R. Co., 41 Iowa 71 (1875).

[1] McMechen *v.* Baltimore & Ohio R. Co., 110 S. E. 474 (W. Va. 1922).

decided that such objection could not be raised on demurrer and affirmed the judgment of the lower court overruling the demurrer. The Supreme Court explains that the proper method of urging such an objection is to object to the filing of the amended declaration, or, if it has been filed, to move to strike it out, and then raises the question whether, if such an objection or motion had been made in the present case, the action of the lower court thereon could have been reviewed on a certification of the question under Acts of 1915, chapter 69.[2] Since no such objection or motion had been made, the question thus raised was a moot question. However, a *dictum* embodying the opinion of the court reads as follows:

> "We are inclined to the view that a motion to strike out, or an objection to the filing because of the introduction of new matter, does not challenge the sufficiency of the pleading, and this court has no jurisdiction to review, under the statute quoted."

Since the appellate jurisdiction of the Supreme Court is statutory, and Acts of 1915 are merely amendatory of the previous statute, the whole question is one of statutory construction. The statute, so far as pertinent to the present inquiry, reads as follows:

> "Any question arising upon the sufficiency of a summons or return of service, or challenge of the sufficiency of a pleading, ... may in the discretion of the court in which it arises, and shall, on the joint application of the parties to the suit in beneficial interest, be certified by it to the Supreme Court of Appeals for its decision."[3]

As is recognized by all, this statute, enacted for the first time in 1915, is for the purpose of enabling the Supreme Court to review certain matters determined in the lower court by judgments and decrees interlocutory in nature and hence not reviewable by writ of error or appeal until the entry of a final judgment or decree. Its object, which no doubt it is fulfilling, is to remedy what had long been recognized, even by laymen, as a crying evil in our system of procedure; and hence it is highly remedial in character. In brief, its purpose is to make it possible for the litigant to be sure that he has a good foundation before he starts to build his

[2] W. Va. CODE, c. 135, §1.
[3] Other states have statutes providing for certification of questions to the appellate tribunal, but in most instances the provisions are so different from those of the West Virginia statutes that decisions construing them throw very little light upon the question under discussion. See 3 C. J. 989, *et seq.*

house, so that he will not have the entire structure toppled down upon him by the Supreme Court after he has finished it. Notwithstanding previous decisions, it is not too much to say that the spirit of the statute would justify certification of the entire record antecedent to trial, in order that the Supreme Court might determine whether a trial would be futile. The fact that the right to such a certification is to a great extent arbitrary, requiring no petition to the Supreme Court as a prerequisite, is a plain indication of legislative intent that litigants should have the broad benefit of the Supreme Court's advice on essential matters leading up to an issue, and that sufficiency of the whole record, rather than the sufficiency of a pleading tested by any particular method of objection, is the end sought.

The construction of this statute with reference to pleadings must depend upon the meaning of the phrase, "challenge of the sufficiency of a pleading," and the important words in this phrase are *challenge* and *sufficiency*. What can or can not be done under the statute may be considered with reference to (1) the method of objecting to the pleading in the lower court, and (2) the subject matter of the objection. The use of the comprehensive word "challenge," unqualified, would seem to indicate a conscious effort on the part of the legislature not to restrict the operation of the statute to those instances where the sufficiency of the pleading is questioned by a demurrer. Hence, since it is the nature of a demurrer to test only the *intrinsic* sufficiency of a pleading, it may very readily be surmised that the statute, in defining the method of objection by a more general term, intended that the subject matter of the objection should include extrinsic elements of sufficiency which have to do with the general and all-important question of whether the pleading will be sufficient to support a final judgment. At least, notwithstanding the tendency of statements in *Tyler* v. *Wetzel,* hereinafter cited, it must be conceded that the statute does not prescribe a demurrer as a condition prerequisite to certification.

Next, as to the subject matter of the objection, what does the word "sufficiency" mean? Does it mean sufficiency of the declaration disconnected and in the abstract, or sufficiency with reference to a particular function in a particular cause of action? Does it mean, narrow, intrinsic sufficiency, or entire sufficiency, which includes intrinsic and extrinsic sufficiency? Does it mean suffic-

iency of the pleading within itself, or this and in addition thereto sufficiency in co-operation with other essential elements of the action? Does it mean sufficiency merely upon demurrer, or sufficiency to support a judgment *quod recuperet* or *nil capiat?* A literal interpretation of the word would seem to give it the more general meaning, rather than the restricted one tentatively approved in the *dictum.* It is a futile process to inquire into the sufficiency of a declaration except with reference to its capacity to fulfil its purpose as a pleading in the action in which it is filed. A declaration standing in isolation is a mere form, not a pleading. Moreover, the defect under consideration is not entirely an extrinsic defect. True, it can not be determined that the amended declaration introduces a new cause of action without looking to the original declaration; but nevertheless *the matter which makes the amended declaration bad is in the amended declaration itself,* is intrinsic. In *Tyler* v. *Wetzel,*[4] the court says:

> "The jurisdiction of the appellate court is limited to questions arising solely upon the face of a pleading, . . . or . . . . . of the pleading attacked and other pleadings to which it responds."

Why consider pleadings to which the attacked pleading responds? To test their sufficiency? No; simply and solely because the sufficiency of the pleading attacked can not be determined without considering the pleading to which it responds. So the sufficiency of an amended declaration with reference to a departure can not be determined without reference to the original declaration. The latter process might very aptly be termed considering the sufficiency of the pleading with reference to the pleading to which it corresponds, and is fairly exemplified when a demurrer is interposed to a replication or subsequent pleading on the ground of a departure from a previous pleading filed by the same party. On such a demurrer (which, it will be remembered, reaches only intrinsic defects) to a replication, nobody ever thought of arguing

[4] 85 W. Va. 378, 101 S. E. 726 (1920). This case is cited as supporting the *dictum* under discussion. It is believed, however, that the case cited, conceding that it was correctly decided, is not entirely in point. The motion there made was to quash process, and it required a consideration and comparison of the process, the return thereon and the bill. It will be conceded that there is a wider gap between the process and a pleading than there is between an original declaration and an amended declaration. The language to the effect that the question certified must always arise on demurrer and can not be certified if it arises on a motion, it is believed is too broad.

that the court could not look to the declaration in order to determine whether there be a departure.[5] Why can the court look outside of the pleading attacked in the one instance and not in the other?

However, conceding, for purposes of argument, that there may be ambiguity in the statute, it would seem that the remedial purpose and spirit of the statute ought to control. That a liberal construction and broad application of the statute will, under the circumstances of the principal case, reach the evils which the statute intended to destroy, would seem to be obvious. Likewise, it is equally obvious that the restricted interpretation approved in the *dictum* will subject litigants to the very evils which the statute intended to avoid. What does it matter to the plaintiff if his declaration does stand the test of a demurrer if it will not in the end support a recovery? The defect is fatal[6] and it is in the foundation itself. If the question can not be certified, nobody can know whether the house is going to stand or fall until the last shingle has been nailed down—until the ultimate costs of abortive construction have accumulated. How a more liberal interpretation of the statute, contended for in this note, could lead, as suggested in the Tyler Case, to anomalous or confused appellate procedure, it is difficult to understand.

—L. C.

[5] It will be noted that this process of looking back is not the familiar one by which a demurrer searches the record for previous error. In the latter process, prior pleadings are considered for defects which they themselves may contain; while in the former process, prior pleadings are looked to only to determine whether the substance of the pleading demurred to is sufficient.

[6] Snyder *v.* Harper, 24 W. Va. 206 (1883); Findley *v.* Coal & Coke R. Co., 76 W. Va. 747, 87 S. E. 198 (1915).