UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 29 | Number 4 Article 14

6-1-1951

Pleading -- Unnecessary Allegations in Answer -- Motion to Strike

Earl W. Vaughn

of the relation back rule may be based. With such a repudiation of the relation back rule, priority, as between liens and contract liens or any combination thereof, would simply depend on the times of the filing of notices of lien or recording of the contract liens.

Furthermore, in *Penland v. Red Hill Methodist Church*,[52] the court held, in deciding a venue question, that as far as an interest in real property is concerned there is no essential difference between a statutory lien and a contract lien.[53] Hence, there is little reason why the recordation of statutory liens and the recordation of contract liens should not be given the same effect. This would make the rules easy of application and produce uniformity in lien law generally.

WILLIAM H. BOBBITT, JR.

Pleading—Unnecessary Allegations in Answer—Motion to Strike

Plaintiff instituted an action against defendant administrator to compel defendant to pay plaintiff, as sole distributee, assets of the estate of one Arsemus Chandler. Plaintiff alleged that he was born of the marriage between Arsemus Chandler and Della Fender Hensley and is the son and only heir of Arsemus Chandler. The defendant specifically denied this allegation and for further answer and defense set out matter to the effect that plaintiff was born to Della Fender more than two years after she and Arsemus Chandler separated and that plaintiff was not the son of Arsemus Chandler. In apt time plaintiff moved to strike this further answer and defense. The motion was overruled. In an opinion by Justice Winborne the North Carolina Supreme Court reversed saying;

"The plea of denial controverts and raises an issue of fact between the parties as to each material allegation denied, and forces the plaintiff to prove them. . . . averments of evidence which defendant contends sustain his denial of the controverted facts are irrelevant as pleading and have no place in the answer. . . .[1]

This decision seems inconsistent with an earlier case where the allegation sought to be stricken was but an elaboration of the denial previously made. The trial judge refused to strike the unnecessary allegation. The Supreme Court affirmed, saying that since under the denial the evidence would be competent with or without the explanatory

[52] 226 N. C. 171, 37 S. E. 2d 177 (1946).

[53] "And we see no essential difference in so far as an interest in real property is involved, in an action to foreclose a mortgage, a lien created by contract, and in one to foreclose a specific statutory lien on real property." Penland v. Red Hill Methodist Church, 226 N. C. 171, 173, 37 S. E. 2d 177 (1946).

[1] Chandler v. Mashburn, 233 N. C. 277, 63 S. E. 2d 553 (1951).

allegation, it was doubtful whether the ruling affected such a substantial right as to be appealable.[2]

In the present case counsel for plaintiff urged that the matter was irrelevant; that his client would be prejudiced[3] by its retention in the pleadings; and that therefore the case fell within the "irrelevant and prejudicial" rule of *Hinson v. Britt*.[4] *Quaere,* however, as to whether the court considered the Hinson case controlling in this case.[5]

The court's reference to the facts alleged therein as irrelevant does not mean that they are irrelevant to the issue at hand, for the opposite is clearly true. The allegations are irrelevant only in the sense that they are unnecessary. Nor did the court indicate that the plaintiff would be injured by the retention of the matter in the pleadings (unless it be assumed that the reversal of an interlocutory ruling necessarily implies prejudice).[6]

Thus it appears that for the first time the court has squarely held that it is improper pleading to allege affirmatively matter which could be presented in evidence under a general denial.

The rule appears to be a sound one and if followed it will force a

[2] Teasly v. Teasly, 205 N. C. 604, 172 S. E. 197 (1937). See also, Virginia Trust Company v. Dunlop, 214 N. C. 196, 198 S. E. 645 (1938).

[3] The possibility of prejudice cannot successfully be advanced as a *ground* for the motion to strike. Parker v. Duke University, 230 N. C. 656, 657, 55 S. E. 2d 189, 190 (1949). Tar Heel Hosiery Mill v. Durham Hosiery Mills, 189 N. C. 596, 152 S. E. 794 (1930). See Brandis and Bumgarner, *The Motion to Strike Pleadings in North Carolina,* 29 N. C. L. REV. 3 (1950). After the motion has been denied on some proper ground, the trial court will be reversed only on a showing of prejudice. Hinson v. Britt, 232 N. C. 379, 61 S. E. 2d 185 (1950). In passing it is interesting to note that most of the few cases where the trial judge has been reversed for failure to strike involved allegations of matter that clearly would have been incompetent as evidence. Parlier v. Drum 231 N. C. 155, 56 S. E. 2d 383 (1949); Parish v. Atlantic Coast Line R. R. 221 N. C. 292, 20 S. E. 2d 299 (1942); Sayles v. Loftis, 217 N. C. 674, 9 S. E. 2d 393 (1940); Duke v. Crippled Children's Commission, 214 N. C. 570, 199 S. E. 918 (1938).

[4] 232 N. C. 379, 61 S. E. 2d 185 (1950). "The court does not correct errors of the Superior Court unless such errors prejudicially affect the substantial rights of the party appealing. Hence the denying or overruling of a motion to strike matter from a pleading under the provisions of G. S. 1-153 is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party." Followed in Buchanan v. Dickerson, Inc., 232 N. C. 421, 61 S. E. 2d 187 (1950).

[5] The court makes no reference to the Hinson case or to the earlier cases where it has attempted to resolve what matter is irrelevant as pleading and when it will be stricken. For an exhaustive discussion of these cases see, Brandis and Bumgarner, *The Motion to Strike Pleadings in North Carolina,* 29 N. C. L. REV. 3 (1950).

[6] "In an appeal from an interlocutory order which does not destroy, impair, or seriously imperil some substantial right of appellant, unless corrected before the trial, this court, ordinarily, will not interfere with the order entered." Light Co. v. Bowman, 231 N. C. 332, 56 S. E. 2d 602 (1949).

decided change in the widely prevalent practice among attorneys of denying an allegation and then setting out at great length a differing version of the facts. As a practical matter, it is unlikely that many attorneys will bother to object to this type of pleading so long as the matter contained in the allegation is not really harmful to their clients. The old forms will probably continue to be used and tolerated to a great extent.

EARL W. VAUGHN.