Minnesota Thresher Mfg. Co. v. Schaack

(Starting on page 2 of this PDF)

Robin Yeamans (YRobin777@aol.com), an attorney living in California, provided the attached 1896 South Dakota Supreme Court brief (see page 2) to Korns.org in April 2007. In regards to the brief, Robin wrote:

"*EB Korns evidently was a stellar attorney, and I'm lucky enough to have one of his briefs which was filed with the Supreme Court of So. Dakota in 1896. A pencil notation on the front says, "Won - Decision - 68 N.W. 287, and this is a reference to an official book of court decisions which contains:*

Minnesota Thresher Mfg. Co. v. Schaack
9 S.D. 184, 68 N.W. 287
S.D. 1896.
August 05, 1896 (Approx. 1 page)

It indicates that EB Korns represented the "respondent" in that case.

The next page after the cover is a letter from someone who was a "student" taken in by EB. The letter refers to EB's "lawyer grandson" which would be my now-deceased father, Richard Korns Yeamans. Like EB, I am a lawyer (certified as an appellate law specialist in California by the Calif. St. Bar Board of Legal Specialization), and my daughter married a lawyer. I hope that we all have been lawyers in the tradition of Abraham Lincoln and Clarence Darrow rather than other lawyers who may come to people's minds."

Robin Yeamans also provided the following background information:

- "*I'm quite sure I'm descended from the Kornses who were in Holmes County, Ohio. Elizabeth Hoyman Korns was the wife of William and the mother of Joseph Korns who was the father of Emanuel B Korns who was the father of Mildred Korns Yeamans who is my grandmother.*"
- "*I talked to my Uncle Robert Yeamans today (son of Mildred Korns Yeamans, now in his late 90's), and he remembered that eventually Emanuel B. Korns and Josie Winters came to California, where they built Korns Court, a motel, at 1738 E. 4th St. in Long Beach CA. This was the first time I'd heard that EB came to California; I thought he died in So. Dakota. However, the motel did not do well financially, and I believe they lost it.*"

Pages 227-228 of the book "Genealogy of Michael Korns, Sr." states the following about E.B. Korns: "*E. B. Korns, born in 1858, graduated in Law at Ann Arbor, in 1881, and located in the Dakota Territory to practice Law for seventeen years, once elected as County Prosecutor. He took an active part in. shaping the destinies of the new State, then he moved to Tracy, Minnesota, where he practiced twenty-one years and then moved to Long Beach, California, there he devoted his practice to probate Law and to the civic affairs of that city, being known as the silver tongued orator:, he died in 1929.*"

In the Supreme Court

—OF THE—

State of South Dakota.

APRIL TERM, A. D. 1896.

MINNESOTA THRESHING MANUFACTURING CO., Respondent,
vs.
ANNA SCHAACK, Appellant.

Appeal From Circuit Court, Codington County.

RESPONDENT'S BRIEF.

E. B. KORNS, - Attorney for Respondent.

Non-Revision - 68 N.W. 287

JOURNAL OBSERVER PRINT,
REDFIELD, S. D.

Happening to find this old brief, I think it may be appreciated by E.B.'s lawyer grandson, as the only one of his brief's alone that I know to be in existence.

Any lawyer reading it will recognize at once the ability of its writer, the conciseness of the points made, analysis sustaining them, clarity of expression, and citation of authorities which examination proves supporting the point.

This brief was written shortly before I became E.B.'s student. The attorney opposing E.B. was John B. Hanten of Watertown, S.D. and I was familiar with the case after the Supreme Court sustained E.B. and it went back for trial. On the trial, E.B. had the case won, Hanten knew it, and promptly settled without waiting for the court's decision.

Hanten had a large practice, in frequent conflict with lawyers from Aberdeen, Sioux Falls, Huron, Minneapolis and St. Paul. He told me that E. B. was one of the very ablest lawyers he knew, and by far the best on pleading, admired him so much that he took me in as a cub for over a year on E.B.'s recommendation. That was just a little while ago, only 54 years ago last month.

The Supreme Court of South Dakota, with only three judges, had ample time to consider cases and examined authorities cited. In Minnesota, we found the Supreme Court was too busy to do much reading and adopted a different style of brief, not merely citing authorities, but quoting the language of the decision in sufficient detail to show the point sustained, a practice I have followed since, without losing a single case in Washington Supreme Court or U.S.Court of Appeals, due to E. B.'s careful training.

E. Rosenbaum

Nov 7-1952

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RESPONDENT'S BRIEF.

MOTION TO DISMISS APPEAL.

It is insisted by respondent that the order appealed from—striking out two certain portions of appellant's answer as irrelevant and redundant—folios 22 to 25 of abstract) is not an appealable order, and therefore the appeal should be dismissed.

McElwain vs. Huston, 25 *P.* 465, *or* 1*st Washington State*, 359, 3*rd Estee Section* 4478.

If appealable at all it is by virtue of sub-division

4 of section 5236 Compiled Laws. But that sub-division specifically covers the subject of appeals from orders striking out (off) an entire demurrer answer or reply, and therefore by necessary implication, ex-
1 cludes the right to an appeal from anything less, namely, an order striking out a *portion* of an answer as irrelevant or redundant.

This order, if error, can only be reviewed on exception in another way, and this appeal should be dismissed.

ON THE MERITS.

ARGUMENT.

Although we believe the motion to dismiss should prevail, we present the following points for consideration on the merits:

Dalbkermeyer vs. Dalbkermeyer, 3, *S. D.*, 83.

Each of the allegations of the complaint are admitted by appellant's defense.

It will be observed by reference to respondent's complaint (folios 1 to 13 of abstract) and appellant's
2 defense (folios 13 to 21), that the allegations in the complaint of indebtedness incurred by Johann Schaack, the husband of appellant, to plaintiff, the judgment rendered thereon, the docketing of the same, the issuing and return of execution on the judgment wholly unsatisfied, the amount due on the judgment, the transfer of a large amount of personal property and 560 acres of land by said Johann Schaak to respondent after said indebtedness was incurred with full

knowledge thereof on the part of appellant; that at the time said indebtedness was incurred, said Johann Schaack was solvent, but that he transferred all of 3
his property both personal and real, thereafter to appellant, without consideration, and to defraud respondent with her knowledge and consent; that after the transfer of the property said Johann Schaack became and is insolvent and has no property whatever liable to execution, are each and all admitted by failure to deny the same.

Calkins vs. Seabury-Calkins Consol, Min. Co.
58 *N. W.* 797 (*S. D.*)

ANALYSIS OF APPELLANT'S DEFENSE.

The appellant attemps to set up affirmative matter in her answer as a defense. Let us make a careful analysis of this alleged defense and see what it is:

It alleges (folio 14 of abstract) that the "plaintiff 4
did *sell* and *deliver* to Johann Schaack" certain machinery "at the price of $2395, and took in payment therefor notes signed by said Johann Schaack secured by mortgage on said property so sold for the payment of said sum of $2395; that said sale was so made before the 25th day of September, 1895," which is the date of the alleged fraudulent transfer to her. Then follows (folios 15 and 16 of abstract), the first paragraph stricken out by the Court. This paragraph pretends to set out certain terms of a contract under which Johann Schaack purchased the machinery, for 5
which he gave his notes and which he claims would give him the right to return the machinery and take

up his notes and consequently there would no indebtedness.

This paragraph is fatally deficient, for several reasons. So far as this paragraph is concerned, the only facts she could allege, if true, would be that she *had no knowledge* of any indebtedness at the time of tne alleged fraudulent transfer, or that no indebtedness existed. But it appears conclusively from this paragraph and the one preceding, that not only there
6 *was* an indebtedness, but that she *knew* of it; in fact she shows not only a *sale* of property but a *delivery* thereof (folio 14), and that notes properly executed for the price were in the possession of and held by the respondent.

If, however, it is claimed this paragrah is intended in substance to show that she had no knowledge of the indebtedness at the time of the transfer, then she should have alleged the simple fact of no *knowledge* of the indebtedness, if true, or denied that allegation in the complaint, as it
7 is only ultimate or issuable facts and not probative facts or evidence that can be alleged in a pleading. In other words, in alleging the facts it is not proper to state in a pleading such circumstances as merely tend to prove the truth of facts.

Vermilye vs. Vermilye, 21 *N. W.* 736, (*Minn*);
1*st Estee, section* 199, *page* 112;
Bliss on Code Pleading, 2*nd edition, section* 140.

But as a matter of law; the facts or terms of the alleged contract which she sets out in this paragraph,

would not authorize Johann Schaack to return the machinery and thus cancel his notes, because the alleged 8
contract does not even show a warranty or any right to return the property.

A breach of warranty does not authorize a buyer to rescind an executed sale.

Section 3645, *Compiled Laws;*

Hull, V.;

Caldwell, 54, *N. W.* 100, (*S. D.*)

Appellant cannot in this action *litigate* the question of whether the contract on which these notes were given is *valid or invalid.*

She cannot do this because,

First: It would be no more than a collateral issue, and,

Second: By her pleading she has shut herself off from ever raising that collateral issue. She shows not only knowledge of the indebtedness at the time of 9
the transfer, but facts that demonstrate clearly that it did then exist.

Third: She pleads the judgment (folio 17 of abstract) and claims its benefits as adjudging a return of a part of the property. She is therefore estopped from denying its full force as a judgment.

2 *Black on Judgments, sec.* 632.

And this fact, taken in connection with the true rule as to the conclusiveness of judgments on strangers or third parties as announced in

1*st Black on Judgments, Sec.* 260,

Is a sufficient reply to counsel's contention (page

10 2 of appellant's brief) that the judgment is not conclusive upon her. Appellant's contention that she must allege the contract and its force at the time of transfer and facts showing its invalidity then, has no application to this case. That would be true as between Johann Schaack and the respondent in a suit on the notes, which it appears in her pleadings was all gone over and litigated in such suit. But the only issue in the case at bar is the *indebtedness*, and her *knowledge* of the same and *evidence* of those facts can not be pleaded.

11 AS TO THE SECOND PARAGRAPH STICKEN OUT.

It is alleged in the answer (folio 17) "that the plaintiff's judgment is given on the balance due on said notes," and that plaintiff converted to its possession certain machinery. Then follows the paragraph stricken out, which says:

"And said machinery now is and always was of the same value as when sold, and the said plaintiff's claim against said Johann Schaack is not and never was of any greater amount than the cost of the action—$155.91."

This is no sufficient allegation of *value* in conver-
12 sion. The judgment was given "on the balance due on said notes." But the property may not have had any particular value. Especially would this seem so as appellent alleges in the defense that the property was "wholly unfit to do threshing," etc. The other allegation that the plaintiff's claim "is not and never was more than $155.91," etc., is a poor conlusion of

law

But the whole of a defense should beconstrued together and the concluding part of the defense (19 to 21) shows clearly that the only claim is that the "plaintiff did sell and pretend to sell" the machinery "at an amount wholly *inadequate* and 13
disproportionate to the amount of the value of said property, and did * * * retain and hold against said Johaan Schaack a deficiency judgment as stated in said complaint," thereby indicating clearly that the sale was made upon or by authority of the judgment, or execution, which of course would not be conversion.

But even if the plaintiff had converted property of Johann Schaack, she could not set that up as against this judgment—the existence of which she admits—notwithstanding Johann Schaack might have a right of action against respondent.

Each paragraph stricken out contains no issuable facts whatever—only irrelevant evidence, conclu- 14
sions of law and argument—and were properly stricken out by the Court.

Mere matters of evidence, inserted in a pleading, will render it objectionable and redundant.

2nd Waite's Pr., 481, *and citations.*

Where relevant and irrelevant matter is so commingled in a pleading that they cannot be separated, the whole may be struck out as redundant.

2nd Waite's Pr., 485.

By omitting to move to strike out irrelevant or

15 redundant matter it is assumed that the party admits there is nothing to be rejected on that ground, and his failure to move will be construed as an acceptance of the issue.

2nd Waite's Pr., 485.

In 1st Estee, Sec. 184, the author lays down the rule as follows:

"In pleading under the code it is the invariable "rule that facts should be stated. The reasons for "the existence of these facts are not to be given, but "only the naked facts, disrobed of any circumstance "connected with or pertaining to them, hypothetical "statements, or statements of the law, or of the pre- "tenses of the opposite party."

16 The pleading should contain a statement only of issuable facts, and not mere evidence, and it is proper to strike out mere evidence, and the order striking out portions of the answer was affirmed.

Vermilye vs. Vermilye, 21 N. W. 736, (Minn.)

In fact not only the paragraphs stricken out, but the whole alleged defense is an aggregation of promiscuously irrelevant evidence, poor conclusions of law and ingenious argument, and, as a literary curiosity, is interesting, but as a pleading of facts—simple, issuable facts, is had.

17 If, however, it should be contended by counsel, that the several defenses are so connected that the qualified denial in the first defense, is intended to apply to the third or last defense—then the order stricking out was proper.

Where a portion of an answer is ordered stricken out for redundancy and contains allegations that might be proven under the remaining portions of the answer, the order is not pre-judicial, does not involve the merits and is therefore not appealable.

Carpenter vs. Reynolds, 17 N. W. 300, (Wis.)

See also

Vermilye vs. Vermilye, 21 N. W. 736, (Minn.);

Sloteman et al. vs. Mack, 21 N. W. 527, (Wis.); 18

where like orders were affirmed as they did not involve the merits or affect any substantial rights.

The case of Merrill vs. Johnson, 96 Ill. 224-230, cited by counsel, has no application to this case.

As to the proposition stated by counsel, that the order should be reversed, as respondent's complaint fails to state entry of judgment, we have to say that question cannot *arise* on this motion to strike out or on this appeal—but on demurrer. Besides, appellant cannot raise it, as she admits the judgment in her defense. The complaint also states filing of judg- 19 ment roll and docketing, which necessarily involves entry, as the entry must precede each of those.

Sec. 5103-4, *Compiled Laws.*

The order should therefore be affirmed and appeal dismissed.

E. B. KORNS,

Attorney for Respondent.