

Appeal - The Appealability of an Order Overruling a Demurrer Ore Tenus

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Appeal — The Appealability of an Order Overruling a Demurrer *Ore Tenus* — The plaintiff's complaint alleged substantially the following facts: The plaintiff was duly elected, qualified, and sworn as judge of the Mayor's Court of Pilot Mountain Township. He continued to hold office and faithfully perform his duties until the Mayor of the Township and its Board of Commissioners attempted to remove him from office after an administrative hearing. Plaintiff prayed for an order restraining the defendant Mayor and Board from interfering with the plaintiff's performance of his duties on the grounds that the Mayor and Board had no such authority, and that the plaintiff could be replaced only after an election under the statute creating the Mayor's Court. The plaintiff further contended that, under the North Carolina Constitution, he could be removed from judicial office only by a two-thirds vote of the state's General Assembly. At the trial, the defendant demurred to the complaint *ore tenus* on the ground that the plaintiff was merely an officer of the township and, under the township charter, could be removed by the Mayor and Board, and that therefore the plaintiff's complaint failed to state facts sufficient to constitute a cause of action. The trial court entered an order overruling the demurrer, the defendant excepted, and an appeal was taken. *Held*, in affirming the order, that, although an appeal will not ordinarily lie from an order overruling a demurrer *ore tenus*, the case involved a matter of public interest, and the court deemed it expedient to entertain the appeal. *Reid v. Mayor and Board of Commissioners of the Town of Pilot Mountain*, 241 N.C. 551, 85 S.E.(2d) 872 (1955).

For the purpose of a temporary working definition, a demurrer *ore tenus* may be simply described as an oral demurrer. This type of pleading was originally recognized in both the common law courts and courts of equity. At common law, all pleadings were orally made. The parties to an action would meet before the court and orally argue their pleadings until a final issue of law or fact had been reached. Under this procedure it was possible to orally demur to the sufficiency of the complaint as stating a cause of action.¹

A similar practice arose in courts of equity. In Chancery, if a formal demurrer to the complaint had been filed upon stated causes and such causes were overruled, it was possible to present an oral demurrer on other causes.² Thus it was possible in equity to orally challenge the sufficiency of the complaint although it was necessary to first file a formal demurrer.

A practice similar to the demurrer *ore tenus* of the English courts arose early in Wisconsin law. The first case in which the Wisconsin court recognized such a demurrer was the case of *Hays v. Lewis*.³ In

¹ HOLDSWORTH, HISTORY OF THE ENGLISH LAW (4th Ed. 1926) 635.

² STORY, EQUITY PLEADING, (7th Ed. 1865) 413, §464.

³ *Hays v. Lewis*, 17 Wis 217 (*210) (1866).

that case, the plaintiff asked foreclosure of a mortgage given to secure a bond, but made no allegations as to the plaintiff's ownership of the bond. The defendant objected at the trial to the introduction of any evidence under the complaint on the grounds that the complaint did not contain facts sufficient to constitute a cause of action. The objection was overruled and judgment was reversed, the court stating that the defendant's oral objection was equivalent to a general demurrer and should have been sustained since the complaint was fatally defective.

This decision was presumably based upon what is now Section 263.12 of the WISCONSIN STATUTES, but which first appeared in Wisconsin law in 1856.⁴ The section now appears as follows:

"If not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction of the court and the objection that the complaint does not state a cause of action."⁵

The Wisconsin court continued to recognize the objection to evidence as a demurrer *ore tenus* with the one qualification that the complaint was to be more liberally construed in favor of the plaintiff if a demurrer *ore tenus* had been interposed.⁶

The Wisconsin court decided that other grounds than jurisdiction and want of a cause of action could not be used to support a demurrer *ore tenus* in the case of *Murray v. McGarigle*.⁷ In that case the defendant was not allowed to attack the plaintiff's capacity to sue by means of a demurrer *ore tenus*.

In 1954, the Wisconsin Supreme Court changed the statute in formulating its rules to read as follows:

"If not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction of the court but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action."⁸

Therefore, the present status of the demurrer *ore tenus* in Wisconsin seems to be that an objection to the introduction of any evidence under a complaint is allowed on the grounds that the court lacks jurisdiction. This objection must be made immediately after the first witness is sworn.⁹ It is possible, however, to make such an objection equivalent to a general demurrer by stipulation of the parties to the action.¹⁰ The want of formal pleading may always be waived by stipulation.¹¹

⁴ WISCONSIN ANNOTATIONS, (1950) p. 1067.

⁵ Wis. STATS. (1953), §263.12.

⁶ Hagenah v. Geffert, 73 Wis. 636, 41 N.W. 967 (1889).

⁷ Murray v. McGarigle, 69 Wis. 483, 34 N.W. 522 (1887).

⁸ Wis. S. CT. RULES, 265 Wis. vii (1954).

⁹ Smith v. Kibling, 97 Wis. 205, 72 N.W. 869 (1897).

¹⁰ *Ibid.*

¹¹ State ex rel Briesen v. Borden, 77 Wis. 601, 46 N.W. 899 (1890).

The appealability of an order sustaining a demurrer *ore tenus* has been well settled by four Wisconsin cases. There seems to have been some confusion on this issue perhaps created by the fact that, although a demurrer *ore tenus* is actually merely an objection to the introduction of evidence, the historical naming of the practice as a demurrer has led some to believe an order sustaining or overruling the objection is directly appealable in the same manner as an order in relation to a general or special demurrer which is made an appealable order by statute.¹² The question first arose in the case of *Smith v. Kibbling*.¹³ In that case, the defendant answered the complaint and included a demurrer in his answer. The plaintiff moved to make the answer more definite and certain. During the hearing of that motion, the defendant orally challenged the sufficiency of the complaint to state a cause of action. The trial court issued an order sustaining a demurrer, and the plaintiff appealed. The court dismissed the appeal, stating that the demurrer *ore tenus* was merely an objection to the evidence, being called a demurrer only for convenience. Such being the case, the court stated that the ruling on such an objection must be preserved in a bill of exceptions and considered only on an appeal from the judgment of a trial court.

The next case to arise was *Mandelert v. Superior Consolidated Land Company*.¹⁴ In that case the plaintiff orally objected to the defendant's offer to prove the facts alleged in its answer. The trial court issued a written order sustaining a demurrer to the answer, and the defendant appealed. The appeal was dismissed on the grounds that, although the trial court order was in written form, it was merely a ruling on an objection and had to be preserved by a bill of exceptions and considered on an appeal from the judgment.

In the case of *Town of Iron River v. Bayfield County*,¹⁵ the Wisconsin court again declared that a written order sustaining a demurrer *ore tenus* was merely a ruling on an objection and could be considered only on an appeal from the judgment.

The latest Wisconsin case on the matter is that of *Plankinton Building Properties v. Hurley-Reilly Company*.¹⁶ In that case, the plaintiff brought an unlawful detainer action in the Civil Court of Milwaukee County. The defendant answered, and when the cause came to hearing, the defendant demurred *ore tenus* on the grounds that the court had no jurisdiction and the complaint failed to state a cause of action. The demurrer was sustained, and the plaintiff's case was dis-

¹² WIS. STATS. (1953), §274.33(3).

¹³ *Supra*, Note 9.

¹⁴ *Mandelert v. Superior Consolidated Land Company*, 104 Wis. 423, 80 N.W. 726 (1899).

¹⁵ *Town of Iron River v. Bayfield County*, 106 Wis. 587, 82 N.W. 559 (1900).

¹⁶ *Plankinton Building Properties v. Hurley-Reilly Co.*, 198 Wis. 296, 223 N.W. 835 (1929).

missed. The plaintiff appealed to the Circuit Court which reversed the order of the Civil Court and overruled the demurrer. The defendant then appealed to the Supreme Court. In dismissing the appeal, the court held that the order was not an order relating to a formal demurrer and therefore not directly appealable. The court also held that the Civil Court's order was not a judgment and could not be appealed to the Circuit Court. The entire case was thus remanded to the Civil Court.

The decision of the North Carolina court in the principal case was undoubtedly based upon the public interest involved in the fact situation. This is strikingly illustrated by a case coming down from the same court on the same day in which an appeal from a demurrer *ore tenus* was summarily dismissed.¹⁷

It would seem highly unlikely that the Wisconsin court would take the position of the North Carolina court even in a case of great public interest based upon a consideration of the four Wisconsin cases cited *supra*.¹⁸ In each case the court definitely states that, in order to be appealable, an order must fall within the express provisions of the statutes. The definite and continued stand of the Wisconsin court as to the inviolability of the statute in determining what orders are appealable is illustrated by the case of *Pick Industries v. Gebhard-Berghammer Co.*,¹⁹ where the court denied an appeal from an order denying a motion to vacate an award stating:

"We see no occasion for additional appeal rights, and since the statute has not provided for them, we do not consider it within our province to make additions to the statute."

The proper practice for the Wisconsin attorney confronted by an adverse ruling on a demurrer *ore tenus* would seem to be to accept the suggestion of the Wisconsin cases on the subject,²⁰ by standing on the complaint after the ruling, allowing a judgment to be entered, and appealing directly from the judgment.

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¹⁷ *Langley v. Taylor*, 241 N.C. 573, 85 S.E.2d 927 (1955).

¹⁸ *Supra*, Notes 13-16.

¹⁹ *Pick Industries v. Gebhard-Berghammer*, 262 Wis. 498, 56 N.W.2d 97 (1952).

²⁰ *Supra*, Notes 13-16.