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Pleading: Limitation on Right to Amend Defective Pleading

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States v. *Russell*, 13 Wall. 623, 20 L.ed. 474 (1871); *United States* v. *Great Falls Manufacturing Co.*, 112 U.S. 645, 5 Sup. Ct. 624, 28 L.ed. 846 (1884); *United States* v. *Palmer*, 128 U.S. 262, 9 Sup. Ct. 104, 32 L.ed. 442 (1888); *Bigby* v. *United States, supra.*

HENRY G. PETERSEN, JR.

Pleading— Limitation on Right to Amend Defective Pleading.—In an action against four defendants, three of them demurred to a third amended complaint on ground that as to them the complaint stated no cause of action. In sustaining the demurrers part of the trial court's order was as follows: "It appearing from said third amended complaint and the three complaints previously served and filed herein, the decision of the Supreme Court of Wisconsin with respect to the last of said previous complaints and the entire record herein that the facts reiterated in all said complaints without change and obviously undisputed negative the existence in plaintiff of any actual and just cause of action against said demurring defendants and that the following order should be made herein in the interests of justice.

"It Is Further Ordered that leave to further amend be withheld unless and until the plaintiff makes due application for such leave accompanied by the tender of pleading sufficient to withstand demurrer and a showing sufficient in law to satisfy the court that plaintiff is justly entitled to such leave to amend." From a judgment on the merits, upon motion of defendants, and a dismissal of the complaint, plaintiff appealed.

Held; judgment of trial court affirmed. Since pleading over is a matter within the sound discretion of the trial court, plaintiff is not entitled to amend his complaint indefinitely. The plaintiff having failed to apply to the trial court for leave to amend in accordance with the order, he elected thereby to stand or fall upon the third amended complaint. Since an earlier complaint had been passed on by this court he knew in what respects it had been held defective, he knew whether there were facts which if alleged and set out in the complaint would cure the defect. Because of this and the three unsuccessful attempts to state a cause of action it was not an abuse of discretion to withhold leave to amend the complaint a fourth time except on proper showing. *Angers* v. *Sabatinelli et al.*, 1 N.W. (2d) 765 (Wis. 1942).

The number of times a party to a civil action may amend his pleading or plead over is, at common law and under the majority of state codes, a matter largely within the discretion of the trial court, and an order granting or denying leave to amend will not be overruled unless there is a manifest abuse of discretion. Typically, in agreement with the principal case, where a plaintiff had three opportunities in a California court to make a good complaint and failed, the appellate court said, "Three failures to make a good complaint fairly indicate that a fourth attempt would also be unavailing. The proposed amendment, or proposed amended pleading, was not tendered to the court for inspection, and we see nothing erroneous in the action of the trial court in refusing to allow further amendments. The failure to make good pleading probably arises in lack of facts, rather than in the fault of the pleader." *Dukes* v. *Kellog*, 127 Cal. 563, 60 Pac. 44 (1900).

Similarly, it was held not an abuse of discretion to deny a third amendment to a complaint held insufficient on a general demurrer, because "we must assume that the questions presented were fully discussed and argued before the court below and the plaintiff thus made thoroughly familiar with the particular

respect wherein his pleading was deficient. It is therefore probable that the plaintiff is without facts necessary to bring himself within the views herein expressed or the allegations requisite to state a cause of action against defendant. *Bouri* v. *Spring Valley Water Co.,* 8 Cal. App. 588, 97 Pac. 530 (1908); see also, *Loeffler* v. *Wright,* 13 Cal. App. 224, 109 Pac. 269 (1910); a refusal to allow a sixth amendment was held not an abuse of discretion, *Consolidated Concessions Co.* v. *McConnel,* 40 Cal. App. 443, 180 Pac. 842 (1919); a fourth amendment properly refused because "there should be a reasonable limitation on the number of amendments allowed to any particular pleading." *Sheldon* v. *Board of Education of City of Lawrence,* 134 Kan. 135, 4 P.(2d) 430 (1931).

While the trial court should be liberal in allowing amendments where the defect in the complaint is one of form only, the plaintiff's leave to amend is always of grace and not of right after a demurrer has been sustained. *Billesbach* v. *Larkey,* 181 Cal. 649, 120 Pac. 31 (1911); *Hamilton Trust Co.* v. *Shevlin,* 141 N.Y.S. 232, 156 App. Div. 307 (1913); judgment affirmed, 215 N.Y. 735, 109 N.E. 1077 (1915).

It has been held error not to allow a third amendment to a complaint after demurrer was sustained because it must first be clear that the complaint could not be amended to obviate the objections. *Hamer* v. *Ellis,* 40 Cal. App. 57, 180 Pac. 30 (1919). Where the third amended complaint was plaintiff's first attempt to set up a cause of action against the particular defendants exclusively, it must first be clear on the record that it is legally impossible to amend before leave to amend can be denied. *Black* v. *Browne,* 103 P.(2d) 1012 (Cal. App. 1940). In a case where two federal courts had held contradictorily as to the validity of a certain judgment, and that fact was at issue in the pending action, it was held that while two special demurrers to plaintiff's declaration for matters of form had been sustained, the court would permit a plaintiff to amend upon proper terms "not only once, but twice or thrice more" where to deny that opportunity would cut off part of plaintiff's remedy by exercise of the discretion from which there is no appeal and where the case is important and difficult. *Wilbur* v. *Abbot,* 6 Fed. 817 (C.C.D. N.H. 1880).

Most statutes which grant this discretionary power to the trial court apply to pleadings generally and not to the complaint alone. A Missouri statute, however, specifies that the court shall allow a complaint to be amended no more than three times. *Mo. Rev. Stat.* (1939) § 948. This limitation has been held to be mandatory, leaving no discretion in the trial coure. *Beardslee* v. *Morgner,* 73 Mo. 22 (1880). In Wisconsin the code provides that pleadings shall be liberally construed. WIS. STAT. (1941) § 263.27. By judicial interpretation it appears that the same rules affecting amendments apply to answers as well as complaints, for the court has said that "the statute providing that in construing a pleading to determine its effect the allegations shall be liberally construed, every reasonable intendment and presumption is to be made in favor of the pleader, and if essential facts can be discovered, as alleged in the pleading, to exist either by express statement or reasonable inference, it must be held good, though its allegations be in form uncertain, defective, and incomplete." An order denying leave to amend an answer was in that case reversed. *Palmersheim* v. *Hertel,* 179 W. 291, 191 N.W. 567 (1923).

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