

LIZARRAGA HERMANOS, PLAINTIFFS AND APPELLEES, VS. F.M. YAP TICO ET AL., DEFENDANTS AND APPELLANTS.

G.R. No. 6791. March 27, 1913

Ponente: MORELAND, J.

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MORELAND, J.:

The action is one to determine the ownership of certain real property and to secure a permanent injunction restraining the defendants from levying upon and selling or other wise invading the same.

There is only one appellant, F.M. Yap Tico. Three questions are raised: one, the sufficiency of the complaint on demurrer; another, the sufficiency of the complaint to sustain the injunction; the third, upon the merits.

The ownership and right to possession of the plaintiffs to the property in question is conceded.

We regard this case as turning upon the question whether the defendant sheriff had levied upon or announced for sale the corpus of the property in litigation herein or whether he had seized upon and was selling merely the right to repurchase which at the time belonged to the judgment debtor, Secundino Mendezona, one of the defendants herein. If he had levied upon and was selling the latter only, an injunction would not lie. If the former, an injunction was proper.

The argument of counsel for the appellants is based upon the theory that the sheriff had levied upon and was about to sell only that interest in the premises belonging to Mendezona known as the right of repurchase. In such case the action would not lie and the injunction was, of course, improper.

In resolving this question it must be borne in mind that, although there was a trial with the introduction of evidence by both parties, such evidence has not been brought to this court. In deciding this appeal upon the merits we look only to the pleadings and proceedings in the action and to the facts stated in the opinion of the trial court.

It is true that the complaint seems to allege in a general way that the sheriff proposed selling the "right, interest, and share" which the judgment debtors had in the premises in litigation; but it does not state that that was all that the sheriff had actually seized and levied upon. On the contrary, it affirmatively alleges that the defendants, were actually invading the property, rights and interests of the plaintiffs. Moreover, the prayer of the complaint indicates that the corpus of the property had actually been seized by the sheriff under the execution, and was being advertised for sale. The prayer is to the effect that the court "issue a preliminary injunction against all of the defendants and each of them, their agents, servants, lawyers, and other persons, requiring them to abstain from selling, taking possession of, or seizing any of the property described in the complaint until after final judgment in this case." While the prayer is not strictly an allegation of the complaint, it may, nevertheless, be used to make clear an allegation which might, rigidly speaking, be susceptible of different interpretations.

As we have said, the defendants failed to bring here the levy and return of the sheriff, which are primarily the best evidence of the nature and extent of the levy, and failed also to present on appeal the notice of sale published by the sheriff. We have, however, in addition to the finding of the court below, the answer of the sheriff in this case.

In the absence of the evidence referred to, and, in fact, any other evidence in the case, we must take this answer, together with the finding of the court on the subject, as conclusive of the question as to what property was the subject of the levy and the proposed sale.

That answer, so far as material to this question, reads as follows:

"The undersigned appears and respectfully represents:

"1. That he is sheriff of the Province of Nueva Ecija and one of the defendants in the above-entitled action.

"2. That in attempting to sell, as sheriff, the property described in the second paragraph of the complaint, he was doing so by virtue of the executions issued on the 24th of November, 1906, by the Honorable Court of First Instance of the city of Manila, or, in other words, he was engaged in the performance of his duties as sheriff."

Paragraph 2 of the complaint describes the property as follows:

"A warehouse of strong materials located on land situated in the pueblo of Cabanatuan of the Province of Nueva Ecija and leased to Dona Ruperta Garcia, which warehouse measures 26 feet in length and 65 feet in width, with a wing 52 feet in length and 39 feet in width; a steam engine of 35 nominal English horsepower; 6 mills; 4 sifters; 7 elevators; 3 ventilating cones and complete accessories for threshing paddy and bleaching and polishing rice with a capacity of 1,500 sacks daily, installed in the said warehouse, as well as a locomotive of 15 American horsepower; a threshing machine with a capacity of 1,000 cavanese of paddy daily; and 75 carts with iron axles and wheels."

This property, as is readily seen, is not the interest known as the right of repurchase, but is the property, and the whole thereof, which was purchased by the plaintiffs in this action from Mendezona and his partners and as to which said Mendezona reserved only the right of repurchase.

This admission of the sheriff that he had levied upon the corpus of the property and was attempting to sell it is of importance in this action for the reason that he is the person who knew best the nature of the levy and the property that he had actually seized. We regard this answer as substantially taking the place of the sheriff's levy and return and the published notice of sale, as it shows the property levied upon and exposed for sale as fully as the levy and return would do.

It is conceded in this case that the plaintiffs had a right to the possession and control of this property and that the sheriff had no right to interfere therewith. It is also conceded that the sheriff had no right to levy upon anything concerning said property except Mendezona's right to repurchase the same, leaving the plaintiffs in the possession and control of the corpus and permitting them to continue the business in which they were then engaged thereon. Such being the case, a seizure of and levy upon said property itself was an unwarranted invasion of the rights and interests of the plaintiffs; and an attempt to sell the property under said levy could be enjoined in the proper action.

It may be true that the terms of the injunction were somewhat broader than the prayer of the complaint. If so, a motion should have been made to vacate the injunction, or such part of it as was in excess of the remedy demanded. In such case the execution creditor would have been at liberty to levy upon the right of repurchase and proceed with its sale. The only objection made, however, was directed against the sufficiency of the complaint as a basis for any injunction whatever. Such objection, in the form of a demurrer, was not made, however, until the 29th of April, 1907, when the demurrer was filed; while the answer of the sheriff above referred to, showing the nature of the levy, was filed on the 12th of March, 1907.

While the complaint, from the viewpoint of the draftsman is not well drawn, and while criticism of it in incidental

particulars is easy, still the broad question is, Does it fairly apprise the defendants of the plaintiff's real contentions and claims against them? Would they be misled to their surprise and injury if they placed faith in its allegations? (Code of Civ. Proc, sec. 06.)

Paragraph 7 of the complaint, so much relied upon by those attacking the validity of the judgment below, does not allege what property was actually seized, or in what manner the execution had been levied, or what methods were being used to carry the levy and sale to completion. It simply states that the sheriff was offering for sale certain interests of the defendants. This would, of course, indicate that those interests were the only property levied upon. But it does not indicate what property had actually been seized, or taken possession of, or invaded, in order to make such levy and sale. It may well be, and it seems to be, the intention and purpose of paragraph 8 of the complaint to allege that, in order to sell the right to repurchase plaintiff's property, the sheriff had gone upon and taken possession of the property itself, or, at least, was attempting to do so. It would not be at all surprising if the sheriff, attempting to levy upon such an indefinite thing as a right to repurchase, should deem it necessary for a valid levy, to take possession of or otherwise invade the property to which that right pertained. Construing paragraphs 7 and 8 together, and considering them in conjunction with the prayer for relief, one is forced to the conclusion that objection is made not only to the notice of sale, but also to what had been done to carry the proposed sale to completion. It is reasonably clear that the plaintiffs were complaining to defendants that they were actually invading the plaintiff's property. It matters not whether that invasion was for the purpose of selling the corpus of the property, or whether it had as its object merely the sale of the right to repurchase. It was an invasion in either event. Seizing one man's property for the purpose of selling that of another is, in principle, as illegal and indefensible as it is to seize and sell one man's property to pay the debt of another. Selling property is not the only way of committing trespass upon it.

For these reasons we believe that the demurrer was properly overruled.

But, granting all that may be said about the deficiency of the complaint, still it is not more deficient than the demurrer urged against it. Strictly speaking, the demurrer to the complaint in this case is valueless as a pleading, in that it fails in one of the essential requirements of a demurrer. Section 91 of the Code of Civil Procedure provides:

"The demurrer must distinctly specify the grounds upon which any of the objections to the complaint, or to any the causes of action therein stated, are taken."

When a demurrer is made to a complaint, whether upon one ground or another, it should set out distinctly the grounds upon which the objection is based. It cannot be couched simply in the language of the code. It must set forth distinctly the grounds upon which that language is founded. The reason for this is plain. It is not fair to the plaintiff to interpose to a complaint the simple objection that it does not state facts sufficient to constitute a cause of action. Neither is it fair to the court. Neither the plaintiff nor the court should be left to make, possibly, a long and tiresome examination and investigation and then, perhaps, finally be compelled to guess. The grounds of the objection should be pointed out so that all may see. A demurrer was not invented to make useless work for a court, or to deceive or delude a plaintiff. Its purpose was to clarify all ambiguities; to make certain all indefinite assertions; to bring the plaintiff to a clear and clean expression of the precise grievance which he has against the defendant; to aid in arriving at a real issue between the parties; to promote understanding and prevent surprise. To that end, a demurrer should specify, for the benefit of the plaintiff and the court as well, the very weakness which the demurrant believes he sees in the complaint. It should be so presented and handled as to bring to a quick determination the question whether the plaintiff has, at bottom, a legal claim against the defendant. To attain this object, the demurrer should be clear, specific, definite, and certain as to the precise weakness of the complaint. Being an instrument to cure imperfections, it should not itself be imperfect.

To the, complaint before us a demurrer was interposed, stating merely that the complaint did not allege facts sufficient to constitute a cause of action. No particular ground was specified. No specific failure was asserted or named. No precise weakness was pointed out. The order overruling the demurrer does not indicate that the court was informed as to the specific grounds upon which it was based. Certainly, so far as the record goes, the plaintiffs never knew until after the demurrer was decided precisely what the defendant was driving at when he presented it.

Under such conditions, we do not feel that we should use our discretion to indulge presumptions in favor of the demurrant in determining whether or not the allegations of the complaint are sufficient. We do not feel like going out of the beaten path, even if we could, to search for defects in the complaint when neither the plaintiff nor the court was precisely informed of the alleged defects until it was too late to be of use to either. We do not feel like favoring a demurrer which is as full of defects as the pleading against which it is launched. The order of the court overruling the demurrer should be sustained if there is any legal ground upon which it can be, although such ground was not presented by the court below as one of the reasons for its decision. The fact that the demurrer was worthless as a pleading is one of the strongest reasons for overruling it.

It has been urged that our decision, requiring that in all demurrers the specific grounds of the particular objection should be set out distinctly, is against the weight of authority. We do not think so. But if it were, we should still be forced, in conscience, to stand upon the proposition as we have stated it, as it seems to us to be fundamentally right and to be fully supported by reason and logic.

In an examination of the authorities which have been urged against the proposition here taken, we have found only one State which has been shown, to our satisfaction, to have taken a position opposed to ours. The courts of the State of New York have been cited against us and one of the latest decisions presented in support thereof. An actual reading of the New York Code of Civil Procedure demonstrates that the case is not well cited. The New York Code of Civil Procedure provides expressly that a demurrer, based upon the ground that the complaint does not state facts sufficient to constitute a cause of action, may be presented in those words, which are the words of the statute; and no specific grounds of such objection need be given. Instead, then, of requiring the specific grounds upon which the objection is based to be distinctly stated, as does our statute, the New York statute provides expressly that they need not be given. Therefore, the contention that the decisions of New York are opposed to our decision seems to be unfounded. As a necessary result, the claim that New York is not in accord with this decision is also unfounded. Most of the decisions presented from other States, such as those of Indiana, North Dakota, and Missouri, are based, so far as can be ascertained with the material at hand, upon statutes materially different from our own, and for that reason are not in point.

As highly as we respect the learning and ability of the supreme courts of the States holding contrary views, if there is more than one, we cannot accept their judgment as to the construction which should be given to section 91 of our Code of Civil Procedure. To our mind, that section clearly requires two things to be done by the demurrant: (1) He shall make an objection, putting such objection in the words of the statute, or substantially in those words; and (2) he shall specify the grounds of that objection. The construction given by that section by those who oppose that here set forth requires only one of those things to be done, namely, the making of the objection in the words of the statute. This construction leaves the other part of the statute, namely, that requiring that the grounds of the objection shall also be specified, without force and effect. Thus, by what appears to be construction, a very important, in fact the most important, part of the law has been abrogated. As for us, we do not construe or interpret this law. It does not need it. We apply it. By applying the law, we conserve both provisions for the benefit of litigants. The first and fundamental duty of courts, in our judgment, is to apply the law. Construction and interpretation come only after it has been demonstrated that application is impossible or inadequate without

them. They are the very last functions which a court should exercise. The majority of the laws need no interpretation or construction. They require only application, and if there were more application and less construction, there would be more stability in the law, and more people would know what the law is.

Some authorities still adhere to the technicalities of the old pleading and procedure in spite of the liberal tendency of procedural laws. They still cling to the old difference between general and special demurrers, holding with the old authorities that in special demurrers the precise defect must be pointed out, while in a general demurrer no defect whatever need be specified. This is distinctly against the tendency of modern thought and modern legislation. The more general a demurrer is, the worse it is. The assertion that a special demurrer, which under the old practice was used only against form, should specify the particular defect, while the general demurrer, which under the old practice was used only as to substance, should specify none, does not appeal to us. The claim that, in an objection to the form, one must aim exactly at the defect; whereas, in an objection to the substance, he may aim at the sky, is not convincing. As we view it, it is not logical to maintain that, as to form, which, as a rule, is of slight importance, the party must be fully advised and informed of the alleged defect, and to that end the demurrant must point it out specially; while as to the substance, which, at all times, is the important thing of all, the party need not be advised or informed as to the precise defect alleged, and that, therefore, the demurrant need not point it out but is fully justified in keeping, so far as he can, both the court and the party in complete ignorance thereof.

It is claimed, following the old theory, that the general demurrer searches the whole record; but if it searches, it does not discover or disclose. It may search, but if it finds anything, it puts it carefully away in a dark place, cautiously concealing it from the eyes of the court and the knowledge of the adversary. The reason for this is that, if the court or the party knew the precise defect that had been "searched" there would be an immediate amendment. If the party against whom a demurrer is interposed can be kept from discovering the real defect in his pleading until he is deeply in the meshes of demurrant's net, then the case many times is substantially won. He cannot escape except by loss of so much time and at so great expense that, many times, it is not worth while to recommence or continue his action.

It has been the policy of modern legislation to do away with these objectionable features, as well as others, and to that end the general demurrer has been, in effect, abolished in a number of States. Our own statute requires that "the demurrer must distinctly specify the grounds upon which any of the objections to the complaint, or to any of the causes of action therein stated, are taken.

A pleading is not an instrument of deception. It is not something to get parties into trouble. It is not to be used to dig pitfalls or to lay traps or snares. It is not to be used to deceive but to inform; not to begot but to clarify; not to cause trouble but to obviate it; not to make expense but to save it. A demurrer, for example, should not leave the court and the party against whose pleading it is aimed as ignorant of the defect in the offending pleading as before the demurrer is filed. Many times the objection that the complaint does not state facts sufficient to constitute a cause of action means very little. There are occasions, of course, when it is sufficient. But it is certain that no injury can ever result from naming the precise reason why the complaint does not state facts sufficient to constitute a cause of action; and, in the great majority of cases, great good will come of it. Take this very case. Much of the real difficulty and uncertainty would have been avoided if the demurrer had pointed out the precise defect which it was claimed was found in the complaint. If the demurrer had specified and stated that the complaint was defective, if it were really so defective, in that it alleged that the defendant had levied simply upon the interest of Mendezona in the premises known as the right to repurchase, something which he had a right to do and upon which no cause of action could be predicated, then the plaintiff would have been given a fair opportunity to meet the objection, either by amending his complaint and alleging a levy by the defendant upon the

corpus of the property, or by standing upon the complaint and submitting to the court the question of law whether the defendant had a right to levy upon the right of repurchase. If the plaintiff had amended by alleging a levy upon the corpus, then the demurrer and all the questions relating thereto, now vexing the parties, would have been out of the case. If the plaintiff really intended to allege just what the demurrant now claims that he did allege, then the question of law above referred to would have been clearly presented and the case entirely resolved by the decision of that question. Indeed, it is more than probable that the plaintiff, if his complaint was really defective, would have withdrawn it after full consideration of the objection urged against it.

It is not to be taken, from what we have said, that we will, of our own motion, raise the question of the sufficiency of a demurrer. We treat it as we do every other pleading. If the parties do not make timely objection to the defect, it will be deemed to have been waived. We take cognizance of the defect only when it has been duly and, properly raised below or when, as in this case, it is necessary to sustain a judgment of the inferior court.

It must be remembered that, although, according to the record, there was a formal trial, with the introduction of testimony by both parties, the evidence has not been brought up on this appeal and we are, therefore, limited to the facts stated in the opinion of the trial court, together with the pleadings and proceedings in the action, in determining whether the judgment should be affirmed or reversed. The trial court, in its decision, finds as a fact that, "by virtue of two executions issued out of the Court of First Instance of Manila against the property of Secundino Mendezona, the sheriff of Nueva Ecija announced for public sale the property described in paragraph 2 of the complaint." The property there described is concededly the property of the plaintiff. This finding is, of course, fatal to appellant's contention that only the right to repurchase was levied upon. We must assume this finding to be based upon the evidence, as none of it is here from which we may determine otherwise.

Having these things in mind, we consider the place which a demurrer, as a pleading, occupies in our practice.

In this jurisdiction, the results flowing from the interposition of a demurrer, as a pleading, lack some of the features which pertain to such interposition in other jurisdictions. It has been uniformly held by this court that an order overruling a demurrer is not separately appealable, for the reason that it is interlocutory in its nature and falls within the prohibition of section 123 of the Code of Civil Procedure. (*Segovia vs. Prov. Board of Albay*, 13 Phil. Rep., 331; *Averia vs. Reboldera*, 10 Phil. Rep., 316; *Serrano vs. Serrano*, 9 Phil. Rep., 142.) There are two cases only in which proceedings based upon demurrers are appealable, and then only after final judgments have been entered, terminating definitely the action in that court. One case is where a demurrer to a complaint is sustained, the plaintiff refuses to amend and final judgment dismissing the complaint is entered. This is, however, in one sense, an appeal from a final judgment and not from an order. The other is where a demurrer is overruled, the defendant declines to answer and a judgment in favor of the plaintiff is entered upon the evidence thereupon offered to establish the allegations of the complaint. Even this case may partake much of the nature of an appeal from a judgment on the merits. In every other case, except, of course, where a demurrer is made to an answer, to a cross complaint, or to a counterclaim, in which substantially the same proceedings are had as are described above relative to a demurrer to the original complaint, the order overruling the demurrer and the exception taken thereto are brought to this court, not separately, but along with and as a part of the appeal from the final judgment after trial. In such appeal, if no objection has been made to the introduction of plaintiff's evidence, the case is here considered upon the merits, and, even though it clearly appears that the complaint was and is still fatally defective, the demurrer thereto is of no consequence in the decision of the appeal, provided the evidence presented by the plaintiff, received without objection, has cured the defect and established a cause of action. This court, under such circumstances, has never reversed a case based upon the fact that the demurrer was, in the first instance, well founded. On the contrary, the appeal has always been, and is now, decided upon the merits as presented by the evidence, and, if the evidence establishes a cause of action, the judgment is affirmed, no matter

how defective the complaint may have been.

The reason for this practice is not far away: To prevent the multiplication of appeals, to secure the speedy termination of litigation, and to save expense to litigants.

It may be urged that, where the complaint fails to state a cause of action against a defendant, an appeal from an order overruling the demurrer should be permitted in order that he may not be forced to undergo the expense, trouble, and worry of a trial when nothing has been alleged against him. This contention, however, overlooks two very important considerations, aside from the insurmountable one that the Code of Civil Procedure prohibits it. One of them is, "Who is to determine whether or not the complaint does state a cause of action?" The answer to that question presents the other consideration, namely, that the decision of the court upon the demurrer holds that the complaint does state a cause of action. Now, the strong probabilities are that the decision is right. The chances are strongly against the defendant in his appeal from that decision. Why, then, should the plaintiff be put to the expense of an extra appeal when he has the judgment of a court in his favor, and when, for that reason, the probabilities are in favor of the proposition that the defendant is wrong in his pleading? To the contention that the defendant ought not to be pressed to trial if he is right is interposed the reply that the plaintiff ought not to be pressed to an appeal if he is right. The question is, "Who is right?" The only answer to that question is, "The plaintiff." It is always the one against whom the judgment of the court runs who is the appellant, and it is always he against whom all the presumptions are indulged. He cannot be permitted, therefore, to play his one chance of reversal against plaintiff's nine chances of affirmance, and thereby cause the plaintiff the expense, trouble, and worry of an appeal. It proves nothing to say that the defendant may be right in interposing his demurrer. The plaintiff may be right also. Having already a judgment in his favor, he has more chances of being right than the defendant.

Moreover, if the demurrer alone cannot be made the basis of an appeal, why should it be made the sole reason for a reversal in an appeal taken from a judgment on the merits?

It may be asked what, then, is the protection which a demurrer affords a pleader? There are several. In the first place, if a demurrer is well founded, an amendment, generally speaking, immediately results or the action is withdrawn or is dismissed, and the demurrer has accomplished a real purpose. In the second place, if the demurrer is overruled, the pleader, if he has sufficient faith, may still stand upon it, with or without answering, and, upon the proof of plaintiff's cause of action if there is no answer, or upon the trial if there is an answer, object to the introduction of any testimony which tends to surprise him in that it is not within the scope of the allegations of the complaint. Whatever testimony offered is, in reality, subject to objection must be rejected. This will prevent surprise and protect the demurrant from the establishment of a cause of action of which he was not apprised by the allegations of the complaint. Moreover, when the case has reached this point the trial court is given an opportunity to use its sound discretion relative to the allowance of amendments of the defective pleading, of giving time to the other party to procure witnesses to meet the purpose of the amendments, and of doing all those things necessary to dispose of the case according to the right and prevent an error or mistake from causing a miscarriage of justice.

It is apparent in this case that the complaint, if defective, was cured by the evidence introduced on the trial, as shown by the finding of the court, presumably based on the evidence, that the sheriff had levied upon the corpus of the property which concededly belonged to the plaintiff. The appeal must, therefore, be decided upon the merits. We are of the opinion that a sufficient case has not been made for reversal.

Much objection has been made to that branch of our decision which provides that, under the Code of Civil Procedure, the introduction of evidence upon the trial, without objection on the part of the defendant, which establishes a cause of action against the defendant, will prevent him from thereafter raising the question that the

complaint does not state facts sufficient to constitute a cause of action, as well as from taking advantage of an equivalent objection made before the trial. Cases are cited to the effect that "such a defect is not cured by verdict and judgment, even in the absence of any objection by demurrer or answer in the lower court, and objection made on account thereof may be made at any time;" and that "pleadings which wholly and completely fail to state any cause of action or defense, so that the admitted allegations cannot be assumed to have been proved, is not cured by verdict.

It must be observed, however, that we are not asserting that a cure of the complaint is brought about by a verdict or a judgment. Our contention is that the cure is brought about by defendant's own act. An issue may be joined as well at the trial as before. The reason why issues are required by law to be joined before trial is to give all the parties due notice of the claims made against them, thereby offering full and fair opportunity to produce their witnesses and meet the charges against them. But, where the issue, by some defect in the complaint or answer, has not really been joined before the trial, the parties may, by mutual consent, join issue at the trial. Issues may be raised between the parties in other ways than by pleadings. They may be raised on the trial by the evidence of the parties. However defective the complaint may be, if the parties go to trial, and, without objection from the defendant, the plaintiff proves facts sufficient to constitute the particular cause of action which it was intended his complaint should allege and the defendant voluntarily produces his witnesses to meet the cause of action thus proved, there is then and there joined an issue as fully and effectively as if it had been joined long before by the most perfect pleadings. As we have already said, the purpose of pleadings is to notify the parties of the claims which each has against the other and what each expects to prove. This is in order that each may have a fair opportunity to rebut the evidence of the other by the production of witnesses of his own. If each can be informed of the claims and demands of the other and can have a fair opportunity to produce his evidence in relation thereto, then the object of pleadings has been subserved. When, therefore, upon the trial the plaintiff, by his own proof, tenders the issue which the complaint was intended to tender, and the defendant accepts it and presents his evidence in relation thereto, is it not unreasonable to say that, thereafter, the defendant may, nevertheless, successfully move to dismiss the whole matter for the reason that the complaint did not state facts sufficient to constitute a cause of action? If necessary, may not the complaint be amended to meet the situation? (Code Civ. Proc, §§ 107, 109, 110.)

It has also been urged that the sufficiency of the demurrer under the law was not raised at any time by anyone. It is asserted that the plaintiffs always accepted the demurrer as sufficient, and that this court, upon its own motion, has taken up the question of its sufficiency without either of the parties having been heard upon it.

While this objection has been fully answered before, we may here add that we do not regard this objection as sound either in fact or in law. The judgment of the court below is entitled to be upheld upon any legal ground, and it is of no consequence whether the court assigned that ground as a basis for its judgment or not. It could very well have dismissed the demurrer upon the sole ground that it was insufficient in law and that the court would not be moved to exercise its power by a pleading which itself did not comply with the law. All this court has done in this connection, therefore, if anything, is to add one more ground to the support of the decision of the lower court.

We are of the opinion that the judgment of the court below overruling the demurrer was, under all the conditions, proper, even though the complaint were as defective as is now contended. (See 31 Cyc, pp. 317,813, and cases cited.)

The judgment is accordingly affirmed, without special finding as to costs.

Arellano, C. J., Torres, Mapa, and Johnson, JJ., concur.

DISSENTING

TRENT, J.,

I dissent.

The important question in this case is whether the complaint constitutes a cause of action. It sets out in great detail that plaintiffs, by a number of transactions, became the owners of the property, subject only to the right of repurchase within a given period. A single paragraph (No. 7), however, is devoted to the nature of the levy made by the sheriff. It reads as follows:

"By virtue of two executions issued by the Court of First Instance of Manila in cases Nos. 4596 and 4597, in which two cases J. M. Yap-Tico is the plaintiff and Secundino Mendezona and Exequiel Pardo are defendants in the first, and in the second Secundino Mendezona is defendant, the sale at public auction has been announced by the sheriff of Nueva Ecija for the 11th day of March, 1907, of all the rights, interest and participation which said Secundino Mendezona and Exequiel Pardo have or may have in the property which I have mentioned in the second paragraph of this complaint, which property belongs to Lizarraga Hermanos. The two executions represent approximately eleven thousand pesos, Philippine currency."

If paragraph 7 is to be believed, it was the intention of the sheriff to dispose of the right, title, and participation of the judgment debtors in the property mentioned "in the second paragraph of the complaint, which property belongs to Lizarraga Hermanos." The statement that the property in question belongs to Lizarraga Hermanos was true in the qualified sense that it was subject to the right of redemption, and such could have been the only meaning intended to be conveyed by this statement in paragraph 7, in view of the express admission in paragraph 2 of the same complaint, that the property was subject to pacto de retro which expires December 31, 1907." The majority opinion disposes of the allegations contained in paragraph 7 by saying that the complaint "seems to allege in a general way that the sheriff proposed selling the 'right, interest, and share' which the judgment debtors had in the premises in litigation." There can hardly be any argument as to the signification of paragraph 7 read in connection with the preceding paragraphs of the complaint. All of the first seven paragraphs taken together simply set out that the judgment debtors sold certain specified property upon a pacto de retro agreement, and that the sheriff had advertised the sale of the "rights, interest, and participation" of the said judgment debtors. But the majority opinion further states as an argument in favor of its theory that the corpus was included in the sheriff's levy that the complaint "does not state that that was all that the sheriff actually seized and levied upon." This holding in effect permits a plaintiff to take advantage of all matters which he does not specifically exclude from his complaint. E converso, it could be said under this ruling, that the plaintiff must specifically exclude all matters which he does not wish to include in his complaint. If any principle of construction would apply to the language used in paragraph 7, wherein it is alleged that the sheriff proposed to sell all of the "right, interest, and participation" of the judgment debtors in the property in question, it is that of *expressio unius est exclusio alterius*, and that, therefore, the corpus of the property was not included in the description. As to the prayer of the complaint:

"The court is asked

* * * * *

"2. That a preliminary injunction be issued against all of the defendants and each of them, their agents, servants, lawyers, and other persons, requiring them to, abstain from selling, taking possession of, or seizing any of the property described in the complaint until after final judgment in this case."

I am not at all inclined to agree with the majority of the court that this language indicates any unlawful seizure of

the corpus. What is the property described in the complaint? Let us say that the corpus is described and set forth in the complaint; in the same paragraph (No. 2) is set forth the right to repurchase. Here, then, are two kinds, of property described in the complaint—paragraph 7 states that only the right, interest, and participation of the judgment debtors "in the property which I have mentioned in the second paragraph of the complaint" is to be sold. According to the second paragraph, the only interest which they have in the property is the right to repurchase. Notwithstanding this fact, the language of paragraph 7 must be construed to mean the corpus of the said property in order to sustain the position of the court. This, in my opinion, furnishes to a plaintiff, who had neither, both a right of action and a cause of action. The only logical construction to be placed upon paragraph 7 is that there is therein alleged only the sale of the "rights, interest, and participation" of the judgment debtors in the property. Furthermore, the prayer for relief is no part of the cause of action. It is the legal consequence of the cause of action from the plaintiff's viewpoint, and derives all its force and effect from the cause of action. It is the operation of the cause of action and not the action itself, or any part of it.

But the principal reliance of the court is on the answer of the sheriff. It is quite true that admissions in the answer cure defects in the complaint. But the answer of the sheriff was unnecessary. It could serve no useful purpose in the pleadings, and the relief asked for by him (that he be relieved from all responsibility in the matter) could not have been granted without impairing the strength of the injunction. The relief asked for well illustrates the vagueness and ambiguity of the answer. He had incurred no responsibility except that of obeying the injunction, yet he asks to be relieved from all responsibility, which obviously could not have been granted. In fact, the answer of the sheriff was never taken into consideration at all by the lower court. Again, as to the property described in the second paragraph of the complaint, which the sheriff in his answer states he was attempting to sell. There are, as stated above, two kinds of property rights referred to in that paragraph, That part of the paragraph not quoted in the majority opinion reads as follows:

"By said writing Don Secundino Mendezona sold the property described to the plaintiff for the sum of P25,000 Philippine currency with the right to repurchase, which expires December 31, 1907.

Here, other property than the corpus is described. To which did the sheriff refer? Here are two constructions equally applicable to the language used. The adoption of the one (adopted by the court) not only protects the plaintiffs in their rights but effectually prevents the defendants from exercising their rights; the other infringes no right belonging to the plaintiffs and allows the full exercise by the defendants of their right to levy upon the "right to repurchase." The ambiguity is due to the inapt language used by the plaintiffs in their complaint. Under these circumstances, it seems to me that, as a matter of construction as well as of equity, the latter meaning should have been adopted. It further occurs to me that in thus seizing upon the loose language of the sheriff, who had no real interest in the case, to establish a cause of action in favor of the plaintiffs, is a very unusual application of the rule that defects in the complaint are cured by admissions in the answer. But it is certainly unjust, in my opinion, to thus determine the cause of action stated in the complaint. By so doing, paragraph 7 is left entirely without force and effect. This is the only section of the complaint which alleges the invasion of any right belonging to any person. At the time this paragraph was framed, the notice of the sale was public property, and the interests to be sold were stated therein. What was stated in that notice was used by the plaintiffs in the preparation of paragraph 7. In the absence of the notice of sale itself, from what source at our command may we expect to find a more accurate description of its contents than in this paragraph, prepared by the plaintiffs themselves? It must be conceded that the import of the language there used does not amount to the invasion of any right belonging to the plaintiffs. The demurrer to this complaint should have been sustained on the first ground urged; i. e., "that the facts set forth in the complaint do not constitute a cause of action in favor of the plaintiff nor against the defendants."

In the meantime, however, a preliminary injunction was issued on the facts set out in the complaint. Of this injunction the court says:

"It may be true that the terms of the injunction were somewhat broader than the prayer of the complaint."

For the better consideration of this injunction and its terms, the following facts set forth in the complaint are stated:

"1. The property in question was owned by the plaintiffs.

"2. This property was subject to a right to repurchase in favor of the judgment debtors which had not yet expired."

With the right of repurchase clearly set forth in the complaint, an injunction was issued enjoining further action in regard to this property, or "any right, interest, or participation in the same." The most liberal construction placed upon the complaint by this court is to the effect that it asks for nothing except as to the corpus of the property. But the injunction is sweeping. Not only were the plaintiffs protected in their rights, but the defendants were prevented from exercising their undoubted right to levy upon the "right to repurchase," a right which this court admits was theirs.

By relying on his demurrer to the complaint, the defendant has apparently lost his right to object to the scope of the injunction. The lower court has held that the right to repurchase expired on December 31, 1907, notwithstanding these proceedings. That judgment has been affirmed by this court, and the defendant is thus finally deprived of the value of the right to repurchase, which, according to his estimate, was P5,000. The injunction bond was for P7,500.

Since writing the above, the opinion of the court has been modified. The argument as to the sufficiency of the complaint has been somewhat amplified, but I am still of the opinion that the complaint is fatally deficient and rest this assertion upon the above dissenting opinion.

Two additional points have, however, been touched upon by the court. Both relate to matters of pleading, and I am unable to agree with the majority of the court on either point. Whereas this case at first turned merely upon the sufficiency of the complaint on demurrer, it has now become the foundation for a doctrine of pleading which, with the profoundest respect for the judgment of my associates, I consider new in principle and unsupported by authority.

The first of these points is as to the sufficiency of the demurrer. The court says that granting that the complaint does not state a cause of action, the demurrer is also insufficient. The demurrer reads:

"Comes now the defendant in the above-entitled cause and interposes a demurrer against the complaint in this cause based upon the following grounds:

"1. That the facts set forth in the complaint do not constitute a cause of action in favor of the plaintiff or against the defendants.

"2. That the complaint is ambiguous, unintelligible, and vague."

The second ground of demurrer is not urged on this appeal and could not have been considered in any case in view of the fact that the defendant answered after the overruling of his demurrer.

Section 91 was borrowed from the California Code of Civil Procedure, sections 430 and 431. The decisions of the supreme court of that State, therefore, as to the import of the language there used are entitled to great weight in

construing section 91 of our Code. In the late case (1908) of *Burke vs. Maguire* (154 Cal., 456, 462) the very point at issue was decided by that court without a single dissenting vote. The court said:

"It is urged that this point cannot be considered in this court on appeal because it is in the nature of matter in abatement and the general demurrer merely states that this count 'does not state facts sufficient to constitute a cause of action against said defendant,' without specifying this omission as the particular point in which it was claimed to be lacking. It was decided in this State very soon after the adoption of the Practice Act, which in this respect is the same as the present Code of Civil Procedure, that a general demurrer need not specify the particulars wherein the complaint failed to state facts constituting a cause of action, but that, if couched in the language above quoted, it would search the entire complaint, or the count thereof to which it was directed, for any and every failure to state a material fact. (*Ellisen vs. Halleck*, 6 Cal., 393; *Williamson vs. Blattan*, 9 Cal., 501.) Afterwards, in *Brown vs. Martin* (25 Cal., 91), an exception to this rule was made in cases where the bar of the statute of limitations appeared on the face of the complaint. Apparently, though not expressly applying the familiar common law rule that the benefit of this statute is a personal privilege which is waived unless specially pleaded, the court, in that case, held that a general demurrer which did not specify the bar of the statute as the defect relied on was insufficient to present that objection. This precedent has been uniformly followed ever since, so far as the statute of limitations is concerned. The opinion in the case also attempted to establish and recommended the future observance of a rule to the effect that a general demurrer must always specify the particular facts which it is claimed are not alleged, else it will be disregarded. This attempt proved futile, and in *Kent vs. Snyder* (30 Cal., 666) the rule suggested was repudiated and it was declared that no specifications were necessary in a general demurrer, except where the benefit of a personal privilege, such as the statute of limitations, was claimed. Thenceforward, this has been the accepted rule of pleading, and, so far as we are aware, the statute of limitations is the only personal privilege which has been declared to fall within the exception."

In *Kent vs. Snyder* (30 Cal., 666, 672) the court said:

"The statute provides that unless the demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken, it shall be disregarded, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action. (Practice Act, sees. 41 and 45.) Sections 41 and 45 of the Act are to be read in conjunction. To give unqualified force and effect to the former without regard to the excepted objections specified in the latter would be to abrogate an important provision of the statute. This we have no right to do, and hence we hold the objection taken by demurrer to the complaint that it does not state facts sufficient to constitute a cause of action to be well and sufficiently assigned in the language of the statute."

And in *Ellisen vs. Halleck* (6 Cal., 386, 393), where the demurrer was on the grounds, first, that the court had no jurisdiction either of the persons of the said defendants or of the subject of the action, and second, that the complaint did not state facts sufficient to constitute a cause of action, the court said:

"The objection that the demurrer does not 'distinctly specify the grounds on which the objections to the complaint are taken would perhaps be maintained were it not for the fact that the courts of this State, following the analogies of the New York Code, have adopted the construction of her courts upon this subject, and maintained the sufficiency of such a demurrer."

An examination of the law and decisions of New York to which reference is made in this latter quotation will show, first, that the language of the New York statute on the subject of demurrer (sees. 488 and 490, 1 Bliss, Code, 622, 642) is practically identical with that of the California statute, with the exception that the former specifically provides by section 490 that a demurrer on the ground in question "may be stated in the language of" the statute, which is, "That the complaint does not state facts sufficient to constitute a cause of action;" and secondly, that the decisions of the New York courts on this point are practically one in sustaining a demurrer in

such form. (Durkee vs. Saratoga & W. R. Co., 4 How. Prac, 226; Johnson vs. Wetmore, 12 Barb., 145; Haire vs. Baker, 5 N. Y., 357; Paine vs. Smith, 9 N. Y. Super. Ct. (2 Duer), 298.) It is the form now in use in that jurisdiction. (See Long Island JR. R. Co. vs. City of New York, 199 N. Y., 288; Hirsch vs. New England Nav. Co., 200 N. Y., 263; Witherbee vs. Bowles, 201 N. Y., 427.)

In Indiana, where the grounds for demurrer are practically the same as in California and New York, but no provision is made as to what language shall be used in stating the demurrer, the supreme court of that State has consistently held since the adoption of the code system of pleading that a demurrer in the language of the statute which is "That the complaint does not state facts sufficient to constitute a cause of action" (sec. 344, subdivision 5, 1 Burns' Stat, 189) is good. (Pace vs. Oppenheim, 12 Ind., 533; Petty vs. Board, 70 Ind., 290; Ross vs. Menefee, 125 Ind., 432; 25 N. E., 545; Hay vs. Bash, 37 App. Div., 167; 76 N. EM 644.)

The provisions of the code in North Dakota are very similar to those of California and our own jurisdiction. Section 6855, R. S. 1905, provides:

"The demurrer shall distinctly specify the grounds of objection to the complaint Unless it does so, it may be disregarded. * * *"

Section 6854 (idem) provides as one of the grounds of demurrer as follows:

"6. That the complaint does not state facts sufficient to constitute a cause of action."

Nevertheless no objection is made to demurrers couched in the language of the statute under the above provision of the code. (Tisdale vs. Ward County, 20 N. D., 401; Weber vs. Lewis, 19 N. D., 473.) It may be well to here note that a distinction is made in this jurisdiction between a demurrer submitted as a part of the pleadings had prior to the opening of the trial, and a demurrer, ore tenus, offered after the trial has begun. In the latter case it has been held that a demurrer is not sufficient unless it points out defects in the complaint relied upon. (James River National Bank vs. Purchase, 9 N. D., 280.)

The Code of Missouri, section 599 (1 Ann. Stat., 1906, 627), provides:

"The demurrer shall distinctly specify the grounds of objection to the pleadings. Unless it does so, it may be disregarded."

The supreme court of that State has held that a demurrer on the ground that the complaint does not state facts sufficient, etc., is good if it follows the language of the statute, which is the same as that used in our own code. (Wilson vs. Polk County, 112 Mo., 126; 20 S. W., 469; Darby vs. Cabanne, 1 Mo. App., 126; Hanson vs. Neal, 215 Mo., 256, 114 S. W., 1073.)

In O'Rourke vs. City of Sioux Falls (46 Am. St. Rep., 760; 4 S. D., 47; 54 N. W., 1044; 19 L. R. A., 789) the supreme court of South Dakota disposes of this point as follows:

"A preliminary question is presented by the contention of appellant that, under section 4910 of the Compiled Laws, providing that the demurrer shall be disregarded unless it distinctly specify the grounds of objection, the court should have refused to entertain the demurrer, and, in the language of the statute, should have disregarded it. Appellant contends that even if, generally, that form of demurrer is allowable, as 'where the question is a lack of sufficient allegations in the complaint, yet it is not sufficient where it is attempted to take advantage of affirmative facts alleged in the complaint.' While we recognize some force and reason in the suggestion, we think the distinction has not generally been observed, and that the contrary rule prevails. (Maxwell's Code Pleading, 381; Bayliss on Code Pleading, 216, 217; Bliss on Code Pleading, sec. 416; Getty vs. Hudson River R. R. Co., 8 How. Pr., 177; Henderson vs. Johns, 13 Col., 280; Greensburgh, etc., Co. vs. Sidener, 40 Ind., 424.)"

Pleadings are designed to create only the skeleton or framework of a lawsuit. Their whole purpose is to form an issue by statements and denials, upon which a hearing may be had. Only ultimate facts are to be stated in the pleadings. Probative facts, conclusions of law, argumentation, etc., have no place in these preliminary proceedings. (See *Green vs. Palmer*, 15 Cal., 411.) After the issue has been formed, a hearing upon that issue is the place for all these matters. If a demurrer (which is one of the irregular parts of pleading) is interposed at the proper time, before a hearing is had, upon the ground that the pleading of the adverse party does not state facts sufficient to constitute a cause of action, an issue is immediately formed. A demurrer of this kind searches the whole record. To require the pleader to show in his demurrer why a complaint does not state facts sufficient to constitute a cause of action is to compel him to inject into his demurrer argument or conclusions of law, a procedure utterly at variance with the philosophy of the reformed procedure. If the pleader is there required to show the why and wherefore of his demurrer, at what point shall pleading cease and argument begin? It would be manifestly unfair to limit him to a certain number of words, as in some cases a very few words might suffice; while in others, where questions of negligence, liability in tort, in contract, etc., are involved, it often requires a lengthy brief to set forth the law on the subject. The issue would thus become beclouded and it would be often impossible to say whether the defendant had demurred to or answered the complaint.

Referring again to the stand taken by the majority of the court on this point, it is said that even admitting all that is said about the complaint (which is that it does not state facts sufficient to constitute a cause of action), the demurrer is also imperfect. It is not error to sustain a demurrer so defective in form as to present no question for decision, where the complaint to which it is addressed is insufficient for want of facts. (*Garrett vs. Bissell, etc., Works*, 154 Ind., 319; *Spaulding vs. Mott*, 167 Ind., 58.) As is sometimes said, "a bad plea is sufficient for a bad declaration."

The second ruling contained in the majority opinion is that, given a complaint which fails to allege facts sufficient to constitute a cause of action, and a demurrer to the same for that reason improperly overruled, no reversible error exists where it appears that evidence was presented at the trial without objection from the defendant which supplies the defects in the complaint. It must be remembered that the defects in such a case do not consist of matters of form, but of substance; that is, matters of substance wholly lacking in the complaint and riot to be legitimately inferred from other facts which may be stated in the complaint.

My dissent in the case at bar is based upon the ground that the complaint only goes so far as to allege that the sheriff was seeking to attach the interest (that is, the right to repurchase) of Mendezona et al. in the property in question; that it does not allege, by fair construction and interpretation, that the sheriff had attempted to attach the corpus of the said property, nor is such defect supplied by any subsequent pleading. Neither can it be legally inferred from the assertion that the sheriff had attached the interest which Mendezona had in the property that he had also attached the interest which the plaintiffs had in the property. Certainly, with the pleadings in such a state, it cannot be said that any cause of action was presented to the lower court for decision. And that no amount of evidence would supply this defect in the pleadings is abundantly supported by authority.

In *Arnold vs. American Insurance Co.* (148 Cal., 660, 661) the court said:

"It is claimed that the amended complaint failed to state facts sufficient to constitute a cause of action. A general demurrer for want of facts was interposed in the lower court and overruled.

* * * * *

"The complaint nowhere alleged that at the time of any of these fires either house was occupied as a dwelling house, or that the furniture insured was contained in the house No. 735 Stewart Street, nor did it allege any facts from which such a conclusion might be inferred or even surmise

* * * * *

"The insurer was not liable upon the policies at all, except upon proof that the Joss occurred within the terms of the policy. It was therefore essential to the statement of any cause of action that a loss within the terms of the policy should be alleged. That the houses were occupied as dwelling houses at the time of the fires, and that the furniture was at such times contained in the specified house, were essential to [any liability on the part of the defendant, and therefore essential to] the statement of a cause of action. Not being alleged, they must be taken as having no existence. (Hildreth vs. Montecito Water Co., 139 Cal., 22-27; 72 Pac, 395.) The complaint lacked essential and necessary allegations in a case of this character, and was fatally defective. (Burbridge vs. Rauer, 146 Cal., 21, 25; 79 Pac., 526.)

"Such a defect is not cured by verdict and judgment, even in the absence of any objection by demurrer or answer in the lower court, and objection made on account thereof may be made at any time, (Code Civ. Proc, sec. 434.)"

The judgment of the lower court was accordingly reversed and the cause remanded. Attention is called to the fact that section 434 of the California Code of Civil Procedure, cited in the above excerpt, corresponds to section 93 of our own code.

In *McAndrews vs. C. L. S. & E. Ry. Co.* (222 Ill., 232, 241) the court says:

"It is also urged that even though it be conceded the original declaration failed to state a cause of action, the defect was cured by verdict. The rule is, if the declaration omits to allege any substantial fact which is essential to a right of action and which is not implied in or inferable from the findings of those which are alleged, a verdict for the plaintiff does not cure the defect. (Foster vs. St. Luke's Hospital, 191 Ill., 94.) Here, one element of the plaintiff's cause of action, viz, the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains, was wholly omitted from the declaration, and the averment thus omitted cannot be implied or inferred from the facts which are alleged in the declaration. Such omission was, therefore, not cured by the verdict."

In *Sheffer et al. vs. Hines* (149 Ind., 413, 414) the court said:

"The lower court overruled appellant's demurrer to said complaint, and that ruling presents one of the alleged errors for review.

"In our opinion, the description was fatally deficient in not pointing out the lands in question with such certainty as, when carried into the decree, the judgment of the court would become effective without extraneous evidence. Without pointing out the location by country or state, or some fixed monument of which judicial knowledge would be taken, it could not be known that the lands were within the jurisdiction of the court. As a question of pleading, the complaint, in this respect, was bad, and the demurrer should have been sustained. (Swatts vs. Bowen, 141 Ind., 322, and authorities there cited. See also, Weed vs. Edmonds, 4 Ind., 468; Boxley vs. Collins, 4 Blackf., 320; Eel River, etc., Ass'n. vs. Topp, 16 Ind., 242; Leary vs. Langsdale, 35 Ind., 74; Lenninger vs. Wenrick, 98 Ind., 596; 1 Works Prac, 134; Liggett vs. Lozier, 183 Ind., 451.)

"Counsel for appellee insists that after verdict the complaint will be regarded as amended as to the description. A like insistence was made in *Lenninger vs. Wenrick*, supra, but its application was denied. The statute, section 670, Burns' R. S., 1894, under which amendments for any defect in form are deemed to have been made, does not apply to matters of substance which have been omitted. (May vs. State Bank, 9 Ind., 233; Johnson vs. Breedlove, 72 Ind., 368; Friddle vs. Crane, 68 Ind., 583; Old vs. Mohler, 122 Ind., 594; Elliott's App, Proa, sec. 640.)

"An error in overruling a demurrer is never cured by this statute. (Johnson vs. Breedlove, supra; Abell vs. Riddell, 75 Ind., 345; Pennsylvania Co. vs. Poor, 103 Ind. 553.)

* * * * *

"For the error named, the judgment is reversed, with instructions to sustain the demurrer of the appellants to the complaint."

And again, in *Goodwine vs. Cadwallader* (158 Ind., 202, 205), the court said:

"If an averment essential to the sufficiency of a pleading is omitted therefrom, and the special finding finds said omitted averment, which, if it had been contained in the pleading, would have rendered the same sufficient, this will not supply the allegation omitted, or otherwise cure the defect in the complaint, for the reason that such a finding is outside the issues, and must be disregarded. (Citing many cases.)

"A special finding, special verdict, or answer to interrogatories cannot supply essential averments omitted from a pleading, but many show that errors in rulings on pleadings were harmless." (Citing many additional cases.)

And the general rule is stated as follows:

"A pleading which wholly and completely fails to state any cause of action or defense, so that the omitted allegations cannot properly be presumed to have been proved, is not cured by verdict. As the rule is sometimes stated, a verdict cures a defectively alleged cause of action, but not the allegation of a defective cause of action." (31 Cyc, 770, citing a long array of authorities.)

Finally, had there been no demurrer to the complaint on the ground in question, the objection in this court for the first time would have been properly presented for consideration.

This objection that the complaint fails to state facts sufficient to constitute a cause of action is not waived by failure to demur, and may be taken at any stage of the case. (Code Civ. Proc, sec. 434.) Nor is the omission cured by verdict or judgment. (*Buckman vs. Hatch*, 139 Cal., 53; 72 Pac, 445; *Bell vs. Thompson*, 147 Cal., 689, 694.)

There is here another interpretation by the supreme court of California of the section of their Code which corresponds to our section 93. Under any state of the pleadings, the objection in question was properly presented to this court for decision.

All the cases cited in the majority opinion in support of this second proposition deal with attempts to appeal from the ruling on a demurrer before judgment was rendered in the lower court. It is submitted that these cases are not controlling where, as in this case, judgment had been rendered and the ruling on the demurrer regularly brought to this court as an assigned error.

The lower court evidently took the same view of the complaint as the majority of this court has taken. If it were insufficient, due to the failure to allege that the sheriff was invading the rights of the plaintiffs, the lower court would nevertheless have deemed evidence admissible on the point, when clearly it was not admissible. It is also clear, therefore, that whether, as a matter of fact, the sheriff was actually attempting to attach the corpus of the property, or whether he was only attempting to attach the right to repurchase, the complaint, as it appears to me, failing to show the former state of facts, and no amount of evidence could cure this substantial defect. The complaint states no cause of action. Plaintiff failed to allege that the sheriff was attempting to sell the corpus of the property. This omitted averment cannot be implied or inferred from the facts which are alleged, especially if the allegations in paragraph 7 be kept in mind. As to whether or not the sheriff was attempting to sell the corpus of the property was not put in issue by the complaint. If the court did as a matter of fact find that this was what the sheriff was attempting to do, such a finding was outside of the issues and should be disregarded.

Again, neither the sufficiency of the demurrer nor the effect produced by overruling it was ever raised by anyone at any time. The plaintiffs always accepted it as sufficient; but this court upon its own motion has entered into an

extended discussion upon these two points and announced a new and untried practice without the questions ever having been discussed by the parties. It is a cardinal principle that appellate courts will rarely, if ever, discuss and decide question of this importance without the same having been raised by the parties.

Again, the court says:

"The demurrer was not argued in the court below and the order overruling it does not indicate that the court was informed as to the specific grounds upon which it was based."

Here this court says that the appellant and his counsel failed in their duty in not arguing their demurrer, when, as a matter of fact, neither the appellant nor his counsel ever received notice of the day set for the hearing upon the demurrer. The overruling of the demurrer took place in their absence and without their knowledge. Immediately after they were notified that the demurrer had been overruled they appeared and moved the court to set aside that order and give them an opportunity to be heard. Counsel were anxious to argue the question, but the court refused to hear them and denied their motion. The appellant duly excepted and now assigns as an error this action of the court. To now hold in the face of these facts that counsel failed in the performance of their duty is, in my opinion, wholly unwarranted.

And again, this court says that the trial court found that the sheriff was attempting to sell the corpus of the property and that as the appellant has failed to bring the testimony to this court that finding of fact cannot be disturbed. The appellant made a motion for a new trial upon the ground that the findings of fact were contrary to the weight of the evidence. This motion was overruled and exception noted. The stenographic notes are in the record in this court, but it is true that they have not been transcribed and we therefore cannot read them; but in view of all the facts and circumstances in this case I think that in the interests of justice the appellant should be given an opportunity to have these notes transcribed so this court could determine with absolute certainty whether or not the sheriff was attempting to sell the corpus of the property of merely the right to repurchase of Mendezona.

As a legal proposition, I am of the opinion that the judgment should be reversed with instructions to the lower court to sustain the demurrer and give the plaintiffs an opportunity to amend if they so desire.

Since writing the second edition of this dissent, the court has again revised its opinion. The questions involved in this case are:

"1. Does the complaint state a cause of action?

"2. Is a demurrer to a complaint, on the ground that it does not state sufficient facts to constitute a cause of action, bad, if stated in the language of the statute?

"3. Is a complaint which fails to state a cause of action cured by verdict or judgment, or, as this court prefers to state it, by the introduction of evidence without objection at the trial?"

The court answers all these questions in the affirmative, while I am of the opinion that each should be answered in the negative.

1. I am still content to rest my opinion as to the first proposition upon the first edition of this dissenting opinion.

2. As to the form of a demurrer addressed to the complaint on the ground of insufficient facts, the court has examined the authorities presented in the above dissenting opinion (which do, not by any means exhaust the list) and has declined to accept them as correctly expounding the law in this jurisdiction. As I conceive the position taken by the court, a new principle of pleading is established by its decision; a principle which deals with a

much-used branch of pleading, and this decision is, therefore, of vital interest to every practitioner and court in this jurisdiction. It is a doctrine that has heretofore never been announced by the court and flatly disapproves of a form of demurrer which has heretofore been in constant use in this jurisdiction and accepted in this court without question as submitting the complaint to the test of law. *Pascual vs. Del Saz Orozco* (19 Phil. Rep., 82), *Duran vs. Arboleda* (20 Phil. Rep., 253), and *Grattage vs. Standard Fuel Company* (20 Phil. Rep., 460) are some late cases in which this form of demurrer was used without question. The point was not raised by counsel on either side, and the court's standing is admittedly at variance with the interpretation of an identical statute of long standing in another jurisdiction. By its decision upon the third question, the ruling of the court upon this point is rendered unnecessary to the disposition of the case. In the face of these conditions, it is difficult to understand the necessity of announcing such a ruling at this time. The original opinion of the court, as already stated, contained no suggestion that the court based any part of its decision sustaining the judgment of the lower court on the fact that the demurrer was too defective in form to raise a question as to the sufficiency of the complaint. In the first revision of that opinion the court first intimated that the form of the demurrer itself effectually barred the defendants from attacking the complaint. In the second revision, after an examination of the authorities, it has unequivocally sustained its position that a demurrer in the language of the statute will not raise the question of the sufficiency of the complaint.

The argument in chief in this last revision of the majority opinion, inferentially at least, considers a demurrer in the language of the statute a relic of the common law, which tends to cause the plaintiff delay and expense and conceals instead of discloses the real objection to the complaint. The court says:

"A demurrer, for example, should not leave the court and the party against whom it is aimed as ignorant of the defect in the offending pleading as before the demurrer is filed. Many times the objection that the complaint does not state facts sufficient to constitute a cause of action means very little. There are occasions, of course, when it is sufficient. But it is certain that no injury can ever result from naming the precise reason why the complaint does not state facts sufficient to constitute a cause of action; and, in the great majority of cases, great good will come of it."

If all that is alleged against this form of demurrer be true, it is difficult to understand just why there are so many modern authorities sustaining it. It is said that the law in the State of New York is dissimilar to our own in that it permits the demurrer for this cause to be stated in the language of the statute. It is true that this provision of law places it beyond the power of any court to disapprove of a demurrer in that particular form, but the question arises, Why does the law permit it? The State of New York (some sixty years ago) was the first to break the shackles of the common law pleading and enact a code of procedure. This code has been copied in its substantial parts in the great majority of the jurisdictions of the United States, and our own is no exception. During all this time, in the State which initiated the crusade against the common law with its costly and tedious procedure, we not only find this form of demurrer sanctioned by usage but safeguarded by law. If it be argued that this seeming backwardness in the State of New York is due to the obtuseness of the legislature or to powerful influences whose selfish interests are subserved by maintaining this particular feature of the common law pleading despite its incongruity in the code, let us turn to the sovereign State of Indiana, where no provision is made as to what form the demurrer shall take. We find the courts there, by an unbroken line of decisions, upholding this particular form, while the legislature has made no attempt to correct the practice. It is practically admitted by the court that the interpretation of a law exactly similar to our own in California is contrary to this doctrine which is to take its place in our practice. This court does not, however, accept as controlling the decisions from North Dakota and Missouri as to the form of the demurrer. No reason is given for this stand. The statutes of those States, as pointed out above, have the same provision as is found in our section 91, Code of Civil Procedure, that:

"The demurrer must distinctly specify the grounds upon which any of the objections to the complaint * * * are

taken."

It is this provision in our own law which the court construes to require a detailed statement of the allegations of fact which are lacking in the complaint. But whether the court admits any of these authorities to be contrary to its holding or not, certainly the chief argument against the demurrer in the language of the statute, that it is not in harmony "with the liberal tendency of procedural laws," loses much of its force when we find it in vogue in so many jurisdictions where this tendency is at work. Nor, so far as I am aware, have any objections ever been made by bench or bar in this jurisdiction of the vagueness or inconvenience resulting from a demurrer in this form.

By the new rule the demurrer itself is open to the charge that it is "ambiguous, unintelligible, or uncertain." The sufficiency of the demurrer to present the insufficiency of the complaint must first be passed upon. No other formula that human ingenuity has ever devised so completely and unequivocally raises an issue as to the sufficiency of the complaint as the one now disapproved by this court. It is clear and it is direct. It is brevity personified. And it has a certainty of meaning rarely equaled. Again, it searches the whole record. On the other hand, the inquiry on a demurrer enumerating the allegations of fact upon which the defendant bases it will, of course, be restricted to the matters therein set forth. By thus limiting the scope of the demurrer, its efficiency is impaired and its object, in part at least, defeated. After a careful examination of section 91, I can find no provision which restricts the inquiry on the demurrer to any particular portion of the complaint.

3. The third and last question upon which I differ with the court is the most important. The court, without either agreeing to or dissenting from the authorities which hold that a complaint which fails to state a cause of action is not cured by verdict or judgment, disposes of this proposition and the authorities in its support in the following language:

"It must be observed, however, that we are not asserting that a cure of the complaint is brought about by a verdict or a judgment. Our contention is that the cure is brought about by defendant's own act. An issue may be joined as well at the trial as before. The reason why issues are required by law to be joined before trial is to give all the parties due notice of the claims against them, thereby offering full and fair opportunity to produce their witnesses and meet the charges against them. But, where the issue, by some defect in the complaint or answer, has not really been joined before the trial, the parties may, by mutual consent, join issue at the trial. Issues may be raised between the parties in other ways than by pleadings. They may be raised on the trial by the evidence of the parties. However defective the complaint may be, if the parties go to trial, and, without objection from the defendant, the plaintiff proves facts sufficient to constitute a particular cause of action, and the defendant voluntarily produces his witnesses to meet the cause of action thus proved, there is then and there joined an issue as fully and effectively as if it had been joined long before by the most perfect pleadings."

I am very much of the opinion, however, that the principle of law and the authorities which the court declines to consider as being in point are very much so. When we consider that both verdicts and judgments are based, so far as the facts are concerned, upon the evidence admitted at the trial, it is mere quibbling to say that there is a distinction in meaning between the phrase "a complaint cured by verdict or judgment" and "a complaint cured by evidence admitted at the trial." Evidence admitted at the trial is always followed by verdict or judgment, by which form and effect are given to it. By using the term "verdict or judgment," we include in the name of the whole one of the heterogeneous parts; the genus includes the species.

In *Goodwine vs. Cadwallader* (158 Ind., 202), one of the authorities cited, *supra*, it is expressly said that a special finding, special verdict, or answer to interrogatories cannot supply essential averments omitted from a pleading. All of these are based upon the evidence admitted at the trial. In *Daly, Admr., vs. New Haven* (69 Conn., 644), the court quoted the following from *Ives vs. Goshen* (63 Conn., 79, 82):

"It is not enough that a party prove facts constituting a cause of action; he must also have alleged them before

he can recover."

If the pains be taken to examine the authorities cited in support of the general rule in 31 Cyc, 770, quoted supra, it will be found that the rule applies, regardless of whether evidence was admitted at the trial.

Pomeroy on Code Remedies, § 550, says:

"It has even been held that where a cause of action is so defectively set out that a demurrer for want of sufficient facts would have been sustained, but the adverse party answers instead, and goes to trial, the objection to the pleading is hereby waived, and evidence in its support must be admitted. Other cases are directly opposed to this position, and expressly declare that if the complaint or petition fails to state any cause of action the objection is not waived, and all evidence should be excluded at the trial, even though the defendant has answered; and this ruling is in exact conformity with the provisions of all the codes regulating the use of demurrers. The doctrine first stated is clearly erroneous, and the dicta or decisions which sustain it ought to be wholly disregarded; it violates the section of the codes which enacts that the absence of sufficient facts as a ground of demurrer is not abandoned by an omission to demur; and it utterly ignores the established distinction between a failure to state any cause of action and the statement of a cause of action in an imperfect and defective manner. It is only when the answer itself by some of its averments supplies the omission in a complaint or petition otherwise demurrable, that the fault is cured and the objection waived by answering; mere answering instead of demurring cannot produce that effect. If the averments are so defective, if the omission of material facts is so great that, even under the rule of a liberal construction, no cause of action is stated, it is not a mere case of insufficiency but one of complete failure; and the complaint or petition should be dismissed at the trial, or a judgment rendered upon it should be reversed."

It appears to me that the court's ruling is a radical departure from the authorities on the subject.

Section 90 of the Code of Civil Procedure provides:

"The complaint must contain:

* * * * *

"2. A brief statement of the facts constituting the cause of action * * *."

A casual reading of this section would indicate that this was mandatory and not merely directory or permissive. Under the new rule, this must be read as merely directory or permissive; or, in other words, "The complaint may contain," since by mutual consent the parties may agree upon an issue which it does not contain.

By mutual consent, the pleadings may be wholly abandoned and an action in its inception ex contractu may conclude ex delicto. The court will be powerless to rule upon the admission of evidence so long as the parties mutually agree that it shall be received. By the same method, parties may confer jurisdiction upon the court of the subject matter of the action (a heretofore unheard-of privilege).

But the court evidently means to apply this rule to other cases than those where there is a mutual agreement as to what the issues shall be. In the present case there is no authority for assuming that there was a mutual agreement between the parties that evidence should be admitted showing that an attempt was made to levy upon the corpus of the property; nor, indeed, is there anything to indicate that such evidence was admitted without objection from the defendant. The rule therefore applies to those cases where there is no agreement between the parties as to what the evidence shall be. In other words, it applies to evidence admitted at the trial, whether with or without objection.

On appeal to this court, the pleadings will serve no useful purpose. If a transcript of the record is not elevated to this court, the inquiry on appeal will be limited to a consideration of the facts found in the decision of the lower

court. If the facts of the case are not sufficiently set out in the decision of the trial court, an embarrassing situation will result. The pleadings cannot be relied upon to state the issues upon which the case was tried, and it will be necessary to either hazard a guess as to what occurred in the lower court or remand the case with a request for additional facts.

Section 93 of the Code of Civil Procedure reads:

"If no objection be taken to the complaint, either by demurrer or answer, the defendant shall be deemed to have waived all objections, excepting only the objection to the jurisdiction of the court over the subject matter, and that the complaint does not state facts sufficient to constitute a cause of action."

This section expressly reserves to the defendant the right to object to the complaint at any time on the ground that it does not state sufficient facts. Yet the court holds that such defects will be supplied by the admission of evidence without objection. It appears, then, that the defendant's statutory right to object to the sufficiency of the complaint is abridged in certain cases. Nevertheless, the language used in section 93 indicates no exceptions to the rule.

Section 109 of the same code provides that if there be an immaterial variance between the allegations in the pleadings and the proof, the pleading shall be forthwith amended; but if it appears that a variance is material and that a party has been misled, the court shall, upon such terms as may be just, order the pleadings to be amended in accordance with the facts. In other words, if there be a variance between the pleadings and the proof, an amendment is required in any case. The pleadings are always considered the very foundation upon which the judgment must rest. If they are not in accordance with the facts they must be so amended as to cover such facts. Defective pleadings cannot be cured by evidence alone. This is the law according to the expressed will of the legislature. But, strange as it may seem, this court has stepped in and said:

"But where the issue, by some defect in the complaint or answer, has not really been joined before the trial, the parties may, by mutual consent, join issue at the trial. Issues may be raised between the parties in other ways than by pleadings. They may be raised on the trial by the evidence of the parties."

It is unnecessary to enumerate the formidable opportunities for mischief made possible by this very liberal rule for raising an issue. They will undoubtedly suggest themselves as occasion arises to take advantage of the rule. Pleadings, under the new rule, will become a mere formality; an open sesame to a field of maneuvering, where counsel will bargain and bicker in the presence of the court as to what the issues of the case shall be.

Finally, in any methodical system of raising issues for trial, there must occur isolated instances where a departure from established rules would work a saving of time. But this loss is supposed to be more than compensated by time saved in a great number of other cases by adhering to the system. System, method, adherence to a fixed procedure, in any undertaking is usually recognized as a saving of energy and expense; a guaranty of stability and a surety of dispatch. But if the system be not observed, its beneficial results cannot be obtained. It is only when the cases where the system is inconvenient assume the dignity of a class that its procedure should be amended or disregarded. Admitting for the moment that the doctrine laid down by the court will, in the present case, permit a judgment upon the very merits of the case, as well as a saving of time, it must be remembered that the court has laid its rules in general language, and we must look beyond the present case to note their possible effect. I have always believed and still believe that there are certain well established rules of pleading which are conducive to fairness and justice, and without which the administration of justice must necessarily suffer. I am very much of the opinion that the actual operation of these two rules of pleading will require endless emendations and qualifications to prevent a failure of justice in cases as they come up and that in the end we shall have a system of pleading more cumbersome than the common law itself.

Reverting to the merits of this case, if these new rules will have the effect of expediting cases through the courts and facilitate their examination on the merits (a proposition with which I am unable to agree), they will, nevertheless, in my opinion, fail of their purpose in the present case. It appears to me that the equities of this case are altogether with the defendants. The uncertainty of the plaintiff's complaint, the fact that a preliminary injunction was issued manifestly more extensive than was called for, even on the assumption that the complaint correctly set forth the; cause of action stated in the majority opinion, and that the court overruled the demurrer of the defendants without giving them a hearing, could all be corrected by simply permitting the enunciation of these rules to bide a more opportune time (when the questions have been raised and counsel have had an opportunity to be heard) and remanding the cause on the ground that the complaint does not set forth facts sufficient to constitute a cause of action.

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