

Practice and Procedure--Splitting Causes of Action-- -Mistake of Law--Mistake of Fact (White v. Adler, 255 App. Div. 580 (1st Dept. 1938))

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ship of an instrumentality merely tends to indicate that the driver furnished with the vehicle is in the owner's employ; and the borrower will be held liable if it can be shown that the driver in the general employment of the owner was really engaged in furthering the borrower's business and that the borrower had control of the manner of performance.¹⁸

It cannot be said that even the control test is an infallible one. The elements of each case must be taken into consideration. Where, however, it is clear that control by the defendant was coupled with performance for the defendant and in defendant's business (as in the instant case) the result is certain.¹⁹ The only difficulty lies in the application of the rule to a particular set of facts.

S. M. S.

PRACTICE AND PROCEDURE—SPLITTING CAUSES OF ACTION—MISTAKE OF LAW—MISTAKE OF FACT.—Plaintiff, Superintendent of Banks, seeks to recover assessments levied under Section 113a of the N. Y. Banking Law against defendants as stockholders of the Bank of United States. Defendants, prior to the closing of the bank, were the owners of 326 and 10 shares of stock respectively. Shortly prior to the closing they sold 325 and 2 shares respectively to X.¹ Final entries in the stock ledger were made after the closing of the bank. In the first action, plaintiff sued and recovered the assessments upon the shares remaining in defendants' names, to wit, one share and eight shares. Relying on the case of *Broderick v. Aaron*, plaintiff now seeks to recover for the shares sold by the defendants claiming that they were not relieved of their liabilities for assessments because the transfer on the stock ledger had been completed before the closing of the bank. *Held*, complaint dismissed. The liability of a stockholder for

¹⁸ If so he becomes the borrower's servant. See note 12, *supra*.

¹⁹ Thus, the instant case falls within the rule of *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252 (1909) ("If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished."); *cf.* the dissenting opinion of Loughlin and Miller, JJ., in *Schmedes v. Defaa*, 153 App. Div. 819, 138 N. Y. Supp. 931 (1st Dept. 1912); *Robbins Dry Dock and Repair Co. v. Navigazione Libera Triestina*, 154 Misc. 788, 279 N. Y. Supp. 257 (1931). It is submitted that in the case of the independent contractor who carries on his own work by his own means and methods, and therefore controls the manner of the performance of the work of his employees, it is sufficient to show that the employee was engaged in his business or in business contemplated or incidental to the contract. *Higgins v. West Union Tel. Co.*, 156 N. Y. 75, 50 N. E. 500 (1898); *Chapin-Owen Co. v. Yeoman*, 232 App. Div. 560, 250 N. Y. Supp. 95 (4th Dept. 1931).

¹ The statement of facts erroneously states the number of eight shares sold by this defendant.

assessments is a single cause of action which cannot be split; the prior judgments against the defendants being a bar to the instant action. *White v. Adler*, 255 App. Div. 580, — N. Y. S. (2d) — (1st Dept. 1938).

The nature of a stockholder's liability for assessments has been variously described.² In New York the rule is that the liability of a stockholder in a banking corporation is contractual in its nature. By acquiring stocks the stockholder enters into an implied contract on his part that he will be liable for the indebtedness of the bank in the manner and to the extent prescribed by the statute.³

Prior to the decision in *Broderick v. Aaron*⁴ it was held in New York that the owner of record of stock in a banking corporation is relieved from his liability for assessments when he has sold his stock and has done all that is necessary to cause the certificates to be transferred on the books of the bank.⁵ In *Broderick v. Aaron* the Court of Appeals laid down the rule that a stockholder is not relieved from his liability upon a transfer of his stock when, before a reasonable time has lapsed after his request for a transfer on the books, the bank has closed.⁶

The assessment on shares in a banking corporation creates a personal obligation of the stockholder which is one and entire, the amount of shares owned by the individual stockholder being the measure only to fix the extent of his liability.⁷ Upon a single cause of action one action only can be maintained. A single cause of action or entire claim or demand cannot be split up or divided so as to be made the subject of different actions. The recovery of one judgment bars the whole claim. The law abhors multiplicity of actions and aims to prevent vexatious and oppressive litigation.⁸

² *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680 (1914); 13 FLETCHER, C.Y. CORP. (Perm. ed. 1939) § 6270, nn. 10, 13.

³ *White v. Idsardi*, 253 App. Div. 96, 102, 300 N. Y. Supp. 1239 (4th Dept. 1937).

⁴ 268 N. Y. 411, 414, 198 N. E. 11 (1935).

⁵ *Broderick v. Adamson*, 148 Misc. 353, 265 N. Y. Supp. 804 (1933), *aff'd*, 243 App. Div. 692 (1st Dept. 1935), the court, at p. 358, citing *Richards v. Robin*, 178 App. Div. 535, 543, 165 N. Y. Supp. 780 (1st Dept. 1917), and *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61 (1885).

⁶ The court tries to distinguish this case from *Broderick v. Adamson*. The facts in both cases, however, are the same.

⁷ *Harrison v. Remington Paper Co.*, 140 Fed. 385, 397 (C. C. A. 8th, 1905), *cert. denied*, 199 U. S. 607, 26 Sup. Ct. 749 (1905). The nature of assessments upon stocks is unlike assessments for local improvements where a lien on the property only is created so that an action as to each lot is a separate cause of action even where the several lots are owned by the same person. *Real Construction and Mortgage Co. v. Superior Court*, 165 Cal. 543, 132 Pac. 1048 (1913).

⁸ *Perry v. Dickerson*, 85 N. Y. 345, 347 (1881); *Carvill v. Mirror Films, Inc.*, 178 App. Div. 644, 165 N. Y. Supp. 676 (1917); 1 C. J. S. 1308 (1936) § 102. In other countries, actions for a part of a claim are favored by the

An exception to this rule exists where, without his own fault or negligence, the plaintiff, at the time of bringing his first action, was ignorant of the facts constituting his cause of action, *e.g.*, of the true amount of the claim or the full extent of the wrongs received or injuries done.⁹ In the present case, when he brought his first action plaintiff knew all the facts constituting his claim but was mistaken as to the point of law. Relying upon *Broderick v. Adamson*,¹⁰ the doctrine of which is still the rule in the federal courts,¹¹ he sued only for the shares not sold by defendants. Citing *Harrison v. Remington Paper Co.*¹² that a mistake of law will not relieve a party from the application of the rule against splitting a cause of action, the court holds that plaintiff is prevented from bringing the present action because he failed to sue for these assessments in the first action.

Now, we are confronted with the following situation: Had plaintiff in his first action sued for assessments upon all the shares owned by defendants, sold as well as not sold, his action would presumably have been defeated under the doctrine of *Broderick v. Adamson*, and such judgment would have been a bar to any subsequent action

law in order to enable a plaintiff to test a claim for a considerable amount by bringing an action for a part only, so saving fees and cost which are computed upon the amount actually sued for. Such action for a part, however, does not bar the running of the Statute of Limitations as against the balance of the claim.

⁹ 1 C. J. S. 1313 (1936) § 102. In *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1 (1899), the court said: "Even if it were possible to apply the rule against the splitting up of accounts or demands, the facts show here that at the time he filed the claim plaintiff did not know that defendant had collected the rents now in question. Of necessity, the splitting up of accounts or demands implies on the part of the suitor a conscious act or knowledge."

¹⁰ See note 5, *supra*.

¹¹ *Young v. Floria*, 81 F. (2d) 275, 277 (App. D. C. 1935); *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61 (1886); *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254 (1903); *Apsey v. Kimball*, 221 U. S. 514, 31 Sup. Ct. 695 (1911).

¹² See note 7, *supra*. This case represents the federal rule; see *International Curtis Marine Turbine Co. v. United States*, 56 F. (2d) 708, 710 (1932), the Court of Claims saying: "The courts have in some instances granted relief to a plaintiff where the suit first brought was instituted under a mistaken belief as to facts; but the mistake in this case, if there was any, related to the law, and for such a mistake the courts can afford no relief."; *Guettel v. United States*, 95 F. (2d) 229, 232 (C. C. A. 8th, 1938), listing *New York upon Gedney v. Gedney*, *supra* note 9, among the jurisdictions where lack of knowledge of the parties as to their legal rights has been recognized as an exception to the rule that a prior judgment upon the merits is a bar to a second action upon the same claim. But already in *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901), where a plaintiff had two remedies, an action for ejectment and an action in equity, the court held that since there was only one cause of action the judgment in the ejectment suit barred a subsequent action in equity because the equitable relief prayed for, under proper pleadings, could have been granted in the first action.

against defendants, although in the meantime the law has changed, because an adjudication erroneous however it may be is *res judicata*.¹³

P. S.

REAL PROPERTY—SECTION 78 OF THE MULTIPLE DWELLING LAW — CONTRACTUAL OBLIGATIONS BETWEEN LANDLORD AND TENANT.—Defendant corporation leased premises from the plaintiff in order to sub-let the same, under a lease which contained the following covenants: (1) landlord reserved the right to re-enter to make such repairs as he might deem necessary; (2) the tenant was to make such repairs of the premises as were due to its neglect or misuse; (3) there should be no allowance to tenant for a diminution of rental value and no liability upon landlord for failure to make any repairs. The tenant repaired the premises which had deteriorated without his fault after the landlord had refused so to do. The tenant then tendered his bill of costs together with the balance of the rent after deducting said costs which the landlord refused to accept. In the landlord's action for summary proceedings the tenant counterclaimed for the value of the repairs to be set off as against the rent, claiming that Section 78 of the N. Y. Multiple Dwelling Law¹ had imposed a duty upon the landlord to repair. The trial court dismissed the counterclaim and gave judgment to the plaintiff. On appeal, *held*, affirmed. Although Section 78 has extended the landlord's tort liability, it does not alter the contract obligations of the parties. Their rights must be determined by the covenants in the lease and in the absence of the landlord's *express* covenant to repair the tenant cannot successfully set off the cost of repairs. *Emigrant Industrial Bank v. One Hundred Eight West Forty Ninth Street Corp.*, 255 App. Div. 570, 8 N. Y. S. (2d) 354 (1st Dept. 1938).

A covenant to repair will never be implied.² An oral contract

¹³2 FREEMAN, JUDGMENTS (5th ed. 1925) 1436, §709 ("But where the parties and the matter to be determined are identical, the former adjudication is *res judicata* and conclusive of the law as applied to that matter, even though it is afterwards determined that the law was erroneously adjudicated or applied."). "The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered." *Wilson's Executor v. Deen*, 121 U. S. 525, 534, 7 Sup. Ct. 1004 (1887).

¹"Every multiple dwelling and every part thereof shall be kept in good repair * * *. The owner of such multiple dwelling shall be responsible for compliance with the provisions of this section but the tenant also shall be liable for every violation of the provisions of this section if such violation is caused by his own wilful act or negligence or that of any member of his household or his guest."

²*Witty v. Matthews*, 52 N. Y. 512 (1873); *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837 (1892).