LISCHEN WADE SHANNON, Appellant, v. **JAMES G. BULL, SR.,** Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: January 12, 1984. Decided: February 9, 1984.

1. There is only one form of action. Accordingly, the distinction between actions at law and suits in equity, and the forms of those actions and suits heretofore existing are abolished.

2. The test of the sufficiency of a complaint or petition is whether the facts alleged therein are admitted or proved.

3. In determining whether a petition discloses a cause of action, the court must look to the body of the petition and the averments of facts, and not to the prayer for relief.

4. The sufficiency of the complaint is not determined from a single isolated allegation but must be tested in the light of all the averments pleaded.

5. The grounds for partition of realty and personal properties are separate, and to sustain a petition for the partition of properties does not depend upon promise and agreement reached by the parties; consequently, averments to that effect are mere surplusage which do not vitiate.

6. Surplusage is deemed not to vitiate a pleading and ordinarily will be disregarded notwithstanding the absence of a motion to strike, unless it has the effect of confusing the issue. Surplusage will also not affect the other allegations in the pleadings which are material and are properly pleaded.

7. A conveyance to husband and wife creates a tenancy by the entirety with a right of survivorship; however, when an absolute divorce is obtained, the tenancy by the entirety is automatically converted to a tenancy in common with no right of survivorship.

8. In a divorce case, the failure of a court to award the successful wife one-third of the real and personal properties of her husband does not divest the divorced wife of her right to a cause of action for a judicial partition.

9. Where a division of properties cannot voluntarily be made, the proper remedy is a petition for a judicial partition.

10. The existence or non-existence of a cause of action vested in the petition is mixed law and facts which require production of evidence.

11. A bill of exceptions is not required to be in any particular form.

Appellant Lischen Wade Shannon, formerly Lischen Shannon-Bull, and Appellee James G. Bull, Sr., were lawfully married, and during the period of their coverture, they acquired, in fee

simple, possessed and owned jointly real and personal properties as tenants by the entirety. The marriage was subsequently dissolved and a decree of court issued to that effect. Subsequently, the appellant filed a petition in the Civil Law Court praying for the partitioning of the real property which she and the appellee held jointly in fee.

The trial court ruled that by virtue of the dissolution of the marriage, the parties no longer held in common any real or personal properties as any such rights should have been asserted prior to the issuance of the final decree of divorce. The trial court therefore dismissed the action. It is from this ruling that the appellant appealed to the Supreme Court for a review of the matter. On review, the Supreme Court reversed the judgment of the trial court, reasoning that the basis for the dismissal was erroneous in that the fact that the appellant had received her statutory share of the appellee's property at the time of their divorce did not deprive her of her right to her portion of the property jointly acquired and owned by them during the marriage. The Court noted also that the fact that at the time of the divorce the trial court had failed to partitioned the property jointly owned by the appellant and appellee did not amount to a waiver and did not preclude appellant from seeking her share of such property in a separate suit. The Court observed that the joint property was owned by the appellant and appellee in fee simple was owned in their own right, and therefore the one-third or the appellee's property given to appellant, as prescribed by statute, did not affect the appellants vested right to her share of the joint property.

S. Raymond Horace appeared for the appellant. Joseph Williamson and James G. Bull, Sr., appeared for the appellee.

MR JUSTICE YANGBE delivered the opinion of the Court.

The gist of the petition constituting the cause of action are as follows:

1. That appellant and appellee were lawfully married and during the period of the coverture they both acquired, in fee simple, possessed and owned jointly real and personal properties, described in the petition. However, subsequently, the marriage was dissolved by decree of court.

2. Appellee agreed and promised to issue the quit claim deeds in favour of appellant, conveying the several pieces of real property described in the petition.

3. That as a divorce settlement, appellee had promised and agreed to pay appellant $11,000.00.

4.Appellant prayed for a decree ordering the appellee to issue in her favour quit claim deeds for the realty, partition the premises jointly owned, possessed and award appellant the $11,000.00 including her personal furniture listed in the petition.

Several dilatory defenses were asserted in the answer, to which a reply was filed and the pleadings rested thereat. Later, the lower court rendered a ruling during the disposition of the issues of law in which the court abated the entire action. It is from that ruling appellant appealed to this forum for review.

In the answer, the appellee contended that the averments in the petition are not suited for an application to partition real property, rather they are suited in an action for specific performance of a contract, since appellant stated an alleged agreement and promise made by appellee to convey to appellant certain real and personal properties and the payment of $11,000.00 as divorce settlement. It is also contended in the answer that since appellant alleged that there was a marriage and a divorce, the court should have awarded appellant in the final judgement one-third of the property of the husband now appellee and after the divorce the former wife of appellee, now appellant, had no longer any cause of action vested in her to recover any real or personal properties of her former husband, the appellee. These contentions in the answer were the sole reasons on which the lower court dismissed the entire case in these words, inter alia:

"Partitioning, under common law, is the sharing of the rights encroached in an article or property. In the instant case, the petitioner and the respondent by virtue of the dissolution of marriage no longer hold in common any property, real or personal, and an action of partitioning is not applicable, if the respondent had concluded a contract and/or agreement to settle certain acts upon the dissolution of their marriage, a redress for failure to comply therewith will not find a remedy in an application for partitioning, but rather a performance of an act concluded by the parties, and therefore specific performance."

Prior to the passage of the Civil Procedure Law, Rev. Code 1, where the averments in the complaint were not suitable to the form of action chosen, the complaint or petition was a fit subject for dismissal. Jantzen v. Coleman, 2 LLR208 (1915). However, at present, "there is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits heretofore existing are abolished." "The provision of this title shall be construed to promote the just, speedy and inexpensive determination of every action." Civil Procedtire Law, Rev. Code 1: 1.3 and 1.4.

Under the common law, we quote the following:

"It has been declared that the sufficiency of each complaint considered must be determined from the fact conditions therein set out. Where forms of action have been abolished, matters of substance have been said to be, in the main, the same as at common law.

With respect to substance, the test of the sufficiency of a declaration, complaint, or petition is whether, if the facts alleged therein are admitted or proved, plaintiff would be entitled to recovery against defendant, or, from any point of view, or on any theory, is entitled to relief.

If such a right is shown, the pleading will be held sufficient, even though the ground of recovery assigned in the complaint is insufficient . . . .This is true, even though the cause of action arising from the facts set forth is not the cause of action which plaintiff intended to state. . .even though the pleading contains a demand for relief to which plaintiff is not entitled, because the sufficiency of the pleading must be determined from the substance thereof rather than by the legal verbiage to be found therein.

Neither is it necessary, under code provision abolishing forms of action, that plaintiff's pleading state facts bringing the cause under any particular form of action at common law, but it is sufficient if it states facts which entitle him to some or any relief, either legal or equitable, although it has also been considered that a complaint does not comply with the statutory requirement that it shall contain a plain statement of the facts constituting the cause of action where it is impossible to tell from the facts pleaded whether plaintiff was attempting to state a cause of action in equity or at law.

It is necessary that the allegations should be sufficient to show to the court that a good cause of action actually exists, and, if such allegations go no further than to show that such a cause of action might exist, the pleading is insufficient. So also, if plaintiff alleges two states of the case, in one of which defendant is liable, and in the other of which defendant is not liable, the pleading is bad.

The question of sufficiency must be determined from the allegations of the pleading alone, and not from any theory of plaintiff, and regardless of any evidence which may be introduced in support of the pleading, or of the arguments made on the trial or on appeal, or of any extraneous matters. In determining whether a petition discloses a cause of action, the court must look at the body of the petition and the averments of fact, and not to the prayer for relief.

The sufficiency of the complaint is not to be determined from a single isolated allegation, but it must be tested in the light of all the averments which are well pleaded.

" We will now address ourselves to what are the requirements of the statute. Where a petition is filed to partition real property, the essential allegations in such a case are as follows:

"When several persons hold and are in possession of any land or premises as joint tenants, or as tenants in common, one or more of them having estates of inheritance, or for life or lives, or for years, any one or more of such persons may apply for partition of such lands or premises or for a sale of such premises if it appears that partition cannot be made without great injury to the interests of the owners." Property Law, 1956 Code 28: 80.

The petition for partition in this case contains the pertinent allegations in conformity with the requirements of the statute we have just quoted above. With respect to the averments of

the alleged agreement and the promise of appellee to convey the said property to appellant, and appellee's alleged refusal so to do, the same are mere surplusage. In 71 C.J.S., Pleadings, § 36, it is recorded thus:

"Surplusage, stickily speaking, consists in the allegation of matter so wholly foreign and irrelevant that no allegation whatever on the subject is necessary. In actual practice, the term has been applied to all immaterial matters and matter which is unnecessary to either the substance or the form of the pleading, that is, to allegations of fact beyond what are necessary to constitute a statement of a cause of action or defense, the test being whether such matter could be stricken and still leave a good pleading.

Allegations necessary for recovery may not be rejected as surplusage. Whether or not an allegation is surplusage depends on the pleading and not on the proof. If the allegation is one of an issuable fact necessary to the claim set forth in the pleading, it does not become surplusage because of the failure to prove it.

Surplusage is deemed not to vitiate a pleading, and, according to the judicial decisions on the question, ordinarily will be disregarded notwithstanding the absence of a motion to strike unless it has the effect of confusing the issue. Likewise, surplusage will not affect other allegations in the pleading which are material and are properly pleaded.

It has been held, however, that unnecessary or immaterial matter cannot be rejected as surplusage where it describes or limits matter which is material. So, where an allegation of a complaint, although superfluous, shows that plaintiff has no cause of action, it cannot be rejected, but will vitiate the complaint." The grounds for partitioning of realty and personal properties are separate and to sustain a petition for partition does not depend upon a promise and agreement reached between the parties; consequently, averments to that effect are mere surplusage which do not vitiate.

"Whenever persons interested in land as owners and cotenants cannot, by consent and agreement among themselves, make a division thereof, that is, have a voluntary partition, any one or more of them may apply for a partition by judicial proceedings - a compulsory partition - which takes place without regard to the wishes of one or more of the owners. If, however, land has already been divided under a voluntary partition, a judicial partition cannot be had without first establishing the invalidity of and setting aside the voluntary partition."

Reverting to the defense that appellant cannot maintain a separate action for partition after appellant had obtained a final divorce decree against appellee, in that under the Domestic Relations Law, a wife who is a successful party in an action of divorce is entitled to recover one-third of her divorced husband's personal property outright and one-third of his real property for life, and that since the court did not award the wife such property in the court's

final decree for divorce, appellant had waived such cause of action against the appellee, appellee cited for reliance Domestic Relations Law, Rev. Code 9: 8.7. That law reads thus:

"When a wife as plaintiff prevails in an action to obtain a divorce, the court in the final judgement shall award her not less than one-fifth nor more than one-third of the defendant husband's personal property outright and not less than one-fifth nor more than one-third of his real property for life. Upon the wife's death, so much of the real property so awarded her shall descend to her children begotten by the defendant husband. If the wife dies leaving no such children her surviving, such property shall revert to the defendant husband, or in the event of his prior death, it shall descend in accordance with the provision with regard thereto, if any, contained in his last will or in default thereof to his distributors in accordance with the statute of descent and distribution"

It is noteworthy that the property now the subject of this petition was allegedly acquired in fee simple by appellant and appellee jointly during their marriage and not the property exclusively owned by the former husband now appellee. Therefore, whether the court awarded the appellant one-third of the real and personal properties of her then husband in the final decree of divorce is not relevant and does not affect appellant's alleged vested rights in the real and personal properties thus jointly purchased by the parties during coverture. Hence, the Domestic Relations Law, Rev. Code 9:8.7, relied upon by appellee and quoted supra, is not applicable in this case.

With reference to the effect of the divorce on the property allegedly acquired and jointly owned by the then couple, a conveyance to husband and wife creates a tenancy by the entirety with a right of survivorship, however, when an absolute divorce is obtained, the tenancy of the entirety is automatically converted to a tenancy in common with no right of survivorship. In re the estate of Lloyd K Whisnant, 24 LLR 298 (1975). And where a division of the properties cannot voluntarily be made, the proper remedy is a petition for a judicial partition as in this case. In view of the categorical denial in the answer, certainly the existence or non-existence of a cause of action vested in the petition is mixed law and facts which requires production of evidence, which was not done in this case as the case was dismissed upon issues of law.

In the bill of exceptions, appellant has charged the trial judge with not having passed upon all the issues of law and for not doing so in a reversed order.

A careful study of the ruling of the judge shows that the court did pass upon all the issues of law by implication when he dismissed the entire action mainly predicated upon counts 1 and 9 of the answer. Whilst it is true that the opinions of this Court direct that the judge should commence disposition of issues of law in a reverse order, in our opinion, the failure so to commence does not constitute a reversible error as long as the mandate of the statute has been fully met by deciding all the issues of law before trial of facts.

With respect to the contention of the appellee concerning the bill of exceptions not being properly framed in law to warrant its entertainment by this Court, this Court held in Cole v. Williams, 10 LLR 191 (1949), that a bill of exceptions is not required to be in any particular form. The points we have considered and passed upon above are the only issues which we deem important for our decision in this case.

Therefore, considering the circumstances and the above citations of law, the ruling of the lower court which dismissed the action is reversed, and the Clerk of this Court is instructed to send a mandate to the lower court to resume jurisdiction over this matter immediately and proceed with the case, first with the disposition of the issues of law anew and then to the trial of the facts. Costs are disallowed. And it is so ordered.

Judgment reversed; case remanded