

## MITCHELL v. FEDERAL INTERMEDIATE CREDIT BANK

Supreme Court of South Carolina, 1932.  
165 S.C. 457, 164 S.E. 136.

STABLER, J.

This action was commenced by the plaintiff, a citizen and farmer of Beaufort county, in October, 1926, for an accounting between him and the defendants, Federal Intermediate Credit Bank of Columbia, hereinafter referred to as the bank, the South Carolina Agricultural Credit Company, hereinafter referred to as the credit company, and W. E. Richardson, for the proceeds of a crop of potatoes grown and shipped by him under an alleged agreement with the defendants, and for recovery of any balance due him, after the payment of an indebtedness evidenced by two outstanding notes. The plaintiff alleged that the defendant Richardson, acting for and in behalf of the bank, represented to him that, in order to obtain loans from the bank at low rates of interest, it was necessary to discount them through the credit company, and "that all produce of the borrower should be sold through the Beaufort Truck Growers Co-operative Association, and that the proceeds should be assigned for the security of the defendant bank"; that, pursuant to these representations, plaintiff borrowed, in November, 1925, \$6,000, and in January, 1926, \$3,000, executing in favor of the credit company two notes, aggregating \$9,000, and two agricultural crop mortgages to secure their payment; that in the fall of 1925, and extending up to the summer of 1926, the plaintiff raised crops of vegetables upon his land, and delivered these crops, when harvested, according to the agreement, to the Co-operative Association for sale, and that when sold they netted an amount of not less than \$18,000, and that one or more of the defendants received this sum of money belonging to him, for which they had refused to account. \* \* \*

After the pleadings were filed, notice of a motion to frame issues was given by the defendant bank; but, by agreement of the parties, the case was held in abeyance pending the outcome of an action which had been brought in the federal court, on August 1, 1926, by the bank against Mitchell to recover on the two notes, which had been transferred to it by the credit company. In that case Mitchell, who was a defendant, \* \* \* pleaded, among other things, as a separate and complete defense to the action, the facts that constitute the basis of his claim in the case at bar, the substance of which is hereinabove set out, but he did not, by way of counterclaim, ask for any affirmative relief. The jurisdictional question was finally decided in favor of the bank in May, 1928, and the trial of the case in January, 1930, resulted in a verdict for Mitchell, the judgment being affirmed later by the Circuit Court of Appeals.

After final disposition of the suit in the federal court, the bank gave notice to the plaintiff that on March 16, 1931, it would move the presiding judge of the court of common pleas for Beaufort county for an order requiring him to reply to the supplemental answer of the bank, which it proposed to file by leave of the court. In its supplemental answer the bank alleged that the action brought by it against the plaintiff in the United States District Court had resulted in a verdict and judgment for the plaintiff, who was the defendant in that action, and on appeal the judgment had been affirmed; and that "this defendant pleads the said action, the verdict and judgment therein, in bar and in abatement of the further maintenance of this action by the plaintiff herein against this defendant." The plaintiff also gave notice that he would move the court, at the same time and place, for an order permitting him to amend his complaint (1) by adding a paragraph thereto setting up the result of the action in the federal court and portions of the opinion of the Circuit Court of Appeals in that case, and (2) as to the amount asked for.

On hearing the matter, in open court, Judge Dennis granted the motion for the filing of the bank's supplemental answer, which set up the plea in bar. He then ordered an immediate and separate trial of that defense; and the plaintiff thereupon gave notice, in open court, of an appeal from this order to the Supreme Court. The trial judge, however, ruled that such notice of appeal would not operate as a stay and proceeded to try the plea in bar upon the

record. Through the deputy clerk of the United States District Court, the record of that court in the suit of the bank against Mitchell was identified and introduced in evidence, this being the only testimony offered. On April 18, 1931, Judge Dennis, having taken the matter under advisement, filed an order sustaining the plea in bar, holding that the cause or causes of action, pleaded in this case by plaintiff for an independent recovery against the bank, were set up by him in the federal court as a defense to the bank's suit on the notes; and that plaintiff could not "thus split up his cause or causes of action, whether in the shape of an answer, defense and counterclaim, or in the shape of a complaint, because the cause or causes of action had a common origin in the same facts"; and that "the final judgment in the cause in the United States District Court is *res adjudicata* as to the causes of action attempted to be raised in this case, and that the plaintiff is barred and estopped from prosecuting this action."

From this order the case comes here on appeal.

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We now come to the main question presented by the appeal, namely, Was the circuit judge in error in sustaining the plea in bar to plaintiff's action? Turning to appellant's answer in the federal court case, in which he appeared as a defendant, we find that the facts there pleaded by him as a defense to the bank's recovery on its notes are the same as those set out by him in his complaint as the basis of his action in the case at bar, it being alleged that the total amount paid to the bank was in excess of all sums advanced to him on the notes or otherwise, and as a result of the transaction the notes sued upon were fully paid and discharged. In addition, we find in the record of the case before us the following statement by appellant as an admission of fact on his part: "The transaction out of which the case at bar arises is the same transaction that was pleaded as a defense to the Federal action. The indebtedness of the bank to Mitchell arising from the embezzlement of the proceeds of the crop was used *pro tanto* as an offset to the claim of the bank in the Federal Court. The case at bar seeks recovery of the surplusage, over the offset, of the proceeds of the same crop lost by the same embezzlement. The appellant, however, is not seeking to recover in this action the same money that has already been used as an offset."

The appellant states the issue to be "whether a defendant in a Federal Court action will be debarred from asserting in an independent action in the State Court a cause of action that he might have asserted (but did not) as counterclaims in the Federal Court proceeding"; and his counsel urge with much earnestness that, under the facts and the applicable principles of the law of pleading, appellant was allowed to set up, if he so elected, in his answer in the case in the federal court, his claim against the bank to the extent necessary only to bar the bank's recovery on the notes sued upon, having the option either to counterclaim in that action to collect the balance owing him by the bank or to bring an independent suit against the bank for that purpose. But in whatever form stated, the real question is whether Mitchell could split his cause of action, using a portion of it for defense in the federal court case and the balance for offense in the case at bar.

The United States Supreme Court \* \* \* thus defines a cause of action:

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they

conclusively evince.’ ”

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In support of his position, however, appellant cites certain decisions of this court, which he claims to be conclusive of the issue, relying especially upon *Kirven v. Chemical Co.* \* \* \*

In *Kirven v. Chemical Company*, the record shows that Kirven had bought from the Chemical Company \$2,228 worth of fertilizers and had given his note for that amount. The company, upon maturity of the note, brought action against him on his obligation. He at first filed an answer setting up three defenses, the third of which was that the fertilizers furnished were deleterious and destructive to the crops, and that there was an entire failure of consideration for the note. Later, he was permitted to file a supplemental answer in which he withdrew the third defense. On trial in the federal court, the jury rendered a verdict for the Chemical Company. Thereafter, Kirven brought an action against the company in the court of common pleas for Darlington county, alleging that the defendant caused damage to his crop in the sum of \$1,995 by reason of the deleterious effect of the fertilizers furnished. The company set up the defense that the issues in this action were or could have been adjudicated in the suit in the Circuit Court of the United States. A verdict was given Kirven in the amount prayed for, and on appeal, as to whether the judgment rendered in the Circuit Court, on the note given for the fertilizers, was an adjudication of all the issues between the same parties in the cause in the state court, this court held, speaking through Mr. Justice Gary, that, while the actions were between the same parties, they were upon different claims, “one being upon a promissory note and the other for unliquidated damages.” In addition, it was pointed out that the question raised in the state court was not *actually* litigated and determined in the federal action, and it appears that the court, for that reason, took the view that a bar or estoppel did not exist. Mr. Justice Woods, in his concurring opinion, took the view that, as Kirven elected not to use, as a defense, the fact of *worthlessness*, which might have been available in the action of the company against him, “he was not precluded from using the very different facts of deleteriousness and positive injury caused by appellant’s alleged negligence in the manufacture of the fertilizer as the basis of an independent cause of action.”

We think the facts of the case at bar, however, present a different situation. The notes given by Mitchell, upon which the bank brought its action in the federal court, were for money advanced, under agreement among the parties, for agricultural purposes—the making of a potato crop—the crop, when harvested, to be sold and the proceeds applied to the payment of the debt, any balance to be paid to Mitchell. The proceeds, as alleged, amounted to about \$18,000. The respective claims or causes of action of the parties arose out of the same transaction or state of facts; unlike Kirven, Mitchell pleaded in the federal court his claim as a defense to the bank’s claim; and even if the *Kirven* Case, decided by a divided court, was correctly decided, it is not authority, we think, under the facts of this case and in the light of the later decisions of this court for sustaining appellant’s position.

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Turning to the decisions of other courts, we find that, while appellant’s position is sustained in some few jurisdictions, the great weight of authority supports the general principles already announced. An examination of some of these cases may prove helpful and enlightening.

*O’Connor v. Varney* was an action on contract to recover damages for Varney’s failure to build certain additions to a house according to the terms of a written agreement between the parties. The defendant set up as a defense

a judgment recovered by O’Connor in an action brought by Varney against him on that contract to recover the price therein agreed to be paid for the work, in defence of which O’Connor relied on the same nonperformance by Varney, and in which an auditor to

whom the case was referred, and upon whose report that judgment was rendered, found that Varney was not entitled to recover under the agreement,

as the work had been so imperfectly done that it would require a greater sum than the amount sued for to make it correspond with the contract. At the trial of the second action, the trial judge ruled that the judgment in the first suit was a bar, and directed a verdict for the defendant. The plaintiff O'Connor thereupon appealed.

Chief Justice Shaw, who rendered the opinion of the court, said:

The presiding judge rightly ruled that the former judgment was a bar to this action. A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon, and rely on them in defence. But if he intends to claim, by way of damages for nonperformance of the contract, more than the amount for which he is sued, he must not rely on the contract in defence, but must bring a cross action, and apply to the court to have the cases continued so that the executions may be set off. He cannot use the same defence, first as a shield, and then as a sword.

It will be noted that Varney was not entitled to recover in the first suit because his dereliction amounted to more than he sued for. This would seem to be exactly the situation in the case at bar. The bank in the first suit was not allowed to recover because the injuries which Mitchell, defendant in that suit, suffered by reason of the bank's dereliction were greater than the amount for which the bank was suing. It will be observed that Chief Justice Shaw says that, if the defendant intends to claim, by way of damages for nonperformance of the contract, *more than the amount for which he is sued*, he must not rely on the contract in defense, but must bring a cross-action, etc.

\* \* \*

The appellant Mitchell concedes that, if his position and theory in the present case were inconsistent with his position in the federal case, or if the matters pleaded here as a cause of action and there as a defense had been there decided against him, he would be out of court; but contends that, as he won in the first action, the facts there pleaded as a defense being identical with those set up by him as constituting his cause of action in the present suit \* \* \*. Nor do we think the position sound. It is true that in some decisions the courts hold that, where a defendant loses in an action, the judgment would operate as a bar to a subsequent suit brought by him as plaintiff on the same state of facts pleaded by him as a defense in the former action, for the reason that the facts he must establish to authorize his recovery in the second action are inconsistent with, or in direct opposition to, the facts on which the plaintiff in the first action recovered. In such case, it would not be necessary to look further in order to see that he could not recover in the second action. There is no conflict between this holding and the generally accepted rule against splitting a cause of action.

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In the matter before us, the legal wrong which Mitchell suffered was the violation by the bank of his right to receive the proceeds of his potato crop which had come into the bank's hands, amounting to about \$18,000, and for this wrong he had a single indivisible cause of action against the bank. When the bank sued him on his two notes, amounting to about \$9,000, he had the option to interpose his claim as a defense to that suit or to demand judgment against the bank, by way of counterclaim, for the amount owing him by it. He elected to set up his claim as a defense only, and the jury applied it to the payment of the notes held by the bank. The transaction out of which the case at bar arises is the same transaction that Mitchell pleaded as a defense in the federal suit. He might, therefore, "have recovered in that action, upon the same allegations and proofs which he there made, the judgment which he now seeks, if he had prayed for it." He did not do this, but attempted to split his cause of action, and to use one portion of it for defense in that suit and to reserve the remainder for

offense in a subsequent suit, which, under applicable principles, could not be done. As said in the *Miller Company* Case: “If in the application of such principles the want of full satisfaction accrues to the plaintiff, it is only because of its [his] own actions, deliberately taken in choosing the method of enforcing its [his] claims and demands.”

The judgment of the circuit court is affirmed.

