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Pleading-The Theory of the Case

RECENT CASE NOTES

PLEADING—THE THEORY OF THE CASE.—Plaintiff, a public utility, operating under and in accordance with a franchise granted by the defendant city in 1899 and accepted by plaintiff, seeks recovery for water furnished the city for the period between April 1, 1930 and June 30, 1931 at a rate provided in a contract entered into between said city and plaintiff in 1919, the rates therein fixed being approved by the Public Service Commission of Indiana. The original franchise was to run for a period of thirty years and was to

be renewed for another such period if the city did not elect to purchase the utility prior to the expiration of the thirty year period. The second contract, made while the franchise was still in effect, was to last for ten years, during which time the utility was to furnish the defendant with water "under the franchise heretofore granted." The plaintiff has never elected to purchase said utility. Held, the rates as provided in the original contract will control.[1]

The fact that recovery in this case was allowed on the basis of a rate upon which the plaintiff did not, in his complaint seek to recover, raises anew the question of whether or not one must have a theory of recovery in his complaint and recover on that theory or not at all. At common law this doctrine of the theory of the case was strictly followed. The doctrine, however seems inconsistent with the code method of pleading the facts alone, and, because of the advent of this system of pleading, the doctrine of the theory of the case has been abandoned in most jurisdictions.[2] The courts of Indiana have followed the doctrine more consistently than those of any other state.[3] Yet the doctrine has been repudiated in many Indiana cases, and writers have taken the position that the rule is not supported by modern authority and is no longer operative.[4]

However, it is true that occasionally the old doctrine is reiterated in a decision, and lawyers are consequently at a loss to determine the present status of the rule. Typical is the principal case in the decision of which the court says, "that a party must recover upon the theory of his complaint in any action brought, or not at all, is a general rule so often stated that the citation of authorities in its support is not needed." Yet here the court found the rule to be inapplicable to the immediate facts of the case.

The problem in Indiana would seem to be simplified because of our statute which provides that where the issues have been fairly tried in the court below, the judgment will not be disturbed because of any defect in the pleading.[5] It is evident that this statute should take from the doctrine of the theory of the case much of its application. However, the old cases invariably followed the doctrine of the theory of the case without regard to the statute, and an occasional modern case will reiterate the doctrine without the qualification of the statute. As a matter of fact the tendency of the courts in many decisions that expressly follow the statute is to condition its application on whether or not that application would be unfair to the opposing party,

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[1] Seymour Water Co. v. City of Seymour (1935), — Ind. App. —, 197 N. E. 701.

[2] Clark, Code Pleading, page 174.

[3] 50 L. R. A. 9; Clark, Code Pleading, page 174.

[4] Hosanna v. Odishoo (1933), 2 Ind. Adv. Rep. 532, 187 N. E. 897, Hawkins v. Thompson (1919), 69 Ind. App. 605, 122 N. E. 431, Pittsburg C. C. & St. Louis Ry. v. Rushton (1925), 90 Ind. 227, 148 N. E. 337; 6 Ind. Law Journal 402; Cleveland C. C. & St. Louis Ry. v. Gillespie (1930), 96 Ind. App. 335, 173 N. E. 708.

[5] No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance or imperfection contained in the record, pleadings, process, entries, or other proceedings therein, which, by law, might be amended in the court below but such defects shall be deemed to be amended in the Supreme; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below. Sec. 2-3231 Burns Ann. Ind. Stat. (1933).

or whether or not the case was tried upon its merits.[6] This is true in spite of the fact that the statute states that the pleadings shall be "deemed to be amended in the Supreme Court."[7] Since the courts in the face of the express language of the statute have the tendency to look for other factors, it is obvious that any prediction of what the court will do based upon a literal construction of the statute will be unavailing and will afford lawyers very little satisfaction.

In order to make a prediction as to what the courts will do with greater assurance, it would, perhaps, be well to consider the office of a pleading. Pleadings must be considered as merely tools in reaching a fair decision and they must not be looked upon as the ultimate end of the law in themselves, as they are sometimes stated to have been regarded by the common law.[8] The modern view is that the pleading should give fair notice of the pleader's case to the opposing party and to the court. The strict doctrine of the theory of the case arose to aid the pleadings in fulfilling their purpose. The application of the theory to a specific case results in the defendant's knowledge of the plaintiff's theory of recovery and his subsequent protection against a change of that theory. If this fact will be kept in mind it will be easier to determine when the courts will follow the doctrine of the theory of the case. In the principal case the cause was submitted upon an agreed statement of facts. It is evident that in such a case there would be no reason for the application of the doctrine, for both the opposing party and the court have notice of the facts upon which the plaintiff is going to rely. The court for this reason was correct in refusing to apply the doctrine. In other words where the correct and fair conclusion is reached, the ultimate purpose of the pleadings has been gained, and the application of any theory which would disturb the decision would operate to defeat the purpose of the pleadings.

As has been seen above, it may not be assumed, however, that the doctrine is of no consequence today. Its existence must be appreciated by the legal profession in spite of the statute that would seem to supercede it. The fact that the courts judiciously apply the doctrine to carry out the purpose of the pleadings, does not justify their disregarding the statute. The application of the theory being inconsistent with the obvious meaning of the statute, that theory should not be applied without a concurrent holding that the statute is invalid. O. E. G.

ADOPTION—RIGHT OF PARENT TO NOTICE.—An action to quiet title to land was brought by appellants, brothers and sisters of the deceased. In 1924 the deceased and her husband brought proceedings to adopt the appellee. Their petition was granted and the appellee was adjudged their heir at law. Now that the adoptive parents have died seised of real property, the appellants seek to have their title to the land quieted as against the appellee. They

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[6] Hosanna et al. v. Odishoo (1933), 2 Ind. Adv. Rep. 532, 187 N. E. 897, Hawkins et al. v. Thompson (1919), 69 Ind. App. 605, 122 N. E. 431. Both of these cases being directly in point go to some length to show that the parties were not misled.

[7] Sec. 2-3231 Burns Ann. Ind. Stat. (1933).

[8] Clark, Code Pleading, page 28.