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Appeal and Error-Effect of Overruling of Demurrer to Bad Paragraphs of Complaint

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RECENT CASE NOTES

APPEAL AND ERROR—EFFECT OF OVERRULING DEMURRER TO BAD PARAGRAPHS OF COMPLAINT—In an action to quiet title to real estate the plaintiff filed a complaint in seven paragraphs. After demurrers to each paragraph had been overruled, the cause proceeded to trial before the court without a jury. The findings of fact and conclusions of law were in the plaintiff's favor, and judgment was accordingly entered for him. The defendant upon appeal, contends that the court erred in overruling the demurrers to six of the paragraphs, claiming that they did not state facts sufficient to constitute a cause of action. *Held*, judgment affirmed.¹

In affirming the judgment the court proceeded upon the theory that since the findings disclosed a right to the relief granted, and since all the evidence necessary to support these findings would have been admissible under the unattached paragraph, no harm was done by any error in overruling the demurrers. The effect of error in overruling demurrers to a complaint which has both sufficient and insufficient paragraphs, where the cause proceeds to trial and judgment, is a question which has been raised frequently in Indiana. The decisions have not been harmonious. Probably the first Indiana case in which the problem arose was *Findley v. Bullock*.² There the court held that such error was not reversible. That decision was, however, based upon a special statute, which provided that "when there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good."³ This provision was not incorporated into the Code of 1851, nor has it since been re-enacted.

At present there are three statutes which would seem to touch upon the problem. They are sections 368, 426, 725 of Burns.⁴ Sec. 368 provides that "no objections taken by demurrer and overruled shall be sufficient to reverse the judgment, if it appears from the whole record that the merits of the cause have been fairly determined." Sec. 426 states that "the court must, in every state of the action, disregard any error in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Sec. 725 provides, in effect, that a judgment must not be reversed for any defect in the pleading which might have been cured by the lower court by amendment. It further declares "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."

For many years the Indiana courts held that where there was a complaint containing both good and insufficient paragraphs, and demurrers had been erroneously overruled, the rule was that the judgment was presumed to be affected by the bad paragraphs⁵ and would be reversed unless

¹ *Bollenbacher v. Miller*, Appellate Court of Indiana, Jan. 15, 1932, 179 N. E. 556.

² 1 Blackf. (Ind.) 467 (1818).

³ Rev. Code, p. 323.

⁴ Revision of 1926.

⁵ *Lake Erie & Western Ry. v. McFall* (1905), 165 Ind. 574, 76 N. E. 400; *Baltimore, etc., R. R. v. Jones* (1901), 158 Ind. 87, 62 N. E. 994.

the record affirmatively disclosed that it was based upon a good paragraph or paragraphs.⁶ It is difficult to see how this result was reached under the statutes pointed out above. Most of the cases in which it was stated ignored them altogether.

The result reached in the principal case may well be considered to be in conflict with that rule. The mere fact that all the evidence necessary to support the findings were admissible under the good paragraph would not necessarily show that the court based the judgment upon it. However, there is another doctrine upon which the decision can be supported. The courts have frequently held that where there are special findings⁷ or a special verdict⁸ any error in overruling a demurrer to a pleading is immaterial. The theory is that if the facts found show a right to relief in the plaintiff no harm is done, and it would be useless to remand the cause for further proceedings. Since the facts found in the principal case showed a right in the plaintiff to the relief granted, the case falls squarely within this rule. Since all the necessary evidence was properly admitted, the defendant has no grounds at all upon which to complain. The court surely committed no error in refusing to reverse the judgment.

It is likely that the result would have been the same had the judgment been entered upon a general verdict rather than upon special findings, if the verdict were rendered upon proper instructions and sufficient evidence. A number of recent cases have held that where a demurrer to an insufficient complaint is overruled there is no reversible error if evidence which supplied the deficiency was admitted without objection and the cause was fairly tried upon its merits, even though the judgment was entered upon a general verdict.⁹ One of these cases, all of which have been decided in the Appellate Court, has been reversed in the Supreme Court, but it was upon another point.¹⁰ While this rule has not gone entirely uncontradicted,¹¹ it is to be hoped that it will be accepted as a correct statement of the law, as it seems to be the only logical result under the Code.¹² Most of the cases in which this doctrine was advanced involved situations where there was only one paragraph of complaint. But it seems impossible to point out any material distinctions between a case involving a bad complaint in one paragraph and a case where there are several paragraphs involved, some good and some bad. If one case is to be decided upon the evidence without regard to the pleadings, the other must likewise be so decided.

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⁶ *Lake Erie & W. Ry. Co. v. McFall* (1905), 165 Ind. 574, 76 N. E. 400; *Baltimore, etc., R. R. v. Jones* (1901), 158 Ind. 87, 62 N. E. 994; *Rowe v. Peabody* (1885), 102 Ind. 198, 1 N. E. 353; *Bailey v. Trowell* (1873), 43 Ind. 432; *Wolf v. Schofield* (1871), 38 Ind. 175.

⁷ *Pleasant School Township v. Fultz* (1922), 79 Ind. App. 27, 137 N. E. 60; *Eisman v. Whalen* (1906), 39 Ind. App. 350, 79 N. E. 514; *Woodward v. Mitchell* (1895), 140 Ind. 406, 49 N. E. 437.

⁸ *Pape v. Randall* (1897), 18 Ind. App. 53, 47 N. E. 530.

⁹ *Cleveland, C., C. & St. L. R. R. v. Gillespie* (1930), — Ind. App. —, 173 N. E. 708; *Pittsburgh, C., C. & St. L. R. R. v. Rushton* (1925), 90 Ind. App. 227, 148 N. E. 337; *Terre Haute, I. & E. Traction Co. v. Scott* (1925), 91 Ind. App. 690, 149 N. E. 454.

¹⁰ *Terre Haute, I. & E. Traction Co. v. Scott* (1926), 197 Ind. 587, 150 N. E. 777.

¹¹ *So. Ind. Gas & Electric Co. v. Winstead* (1931), 92 Ind. App. 329, 175 N. E. 281, 6 Ind. Law J. 575 (1931).

¹² 6 Ind. Law J. 402 (1931).

The conclusion seems inevitable, then, that the improper overruling of demurrers to a complaint containing both good and insufficient paragraphs does not amount to reversible error where there is a special finding or a special verdict, and a defendant can have no grounds for complaint if such findings are supported by evidence properly admissible under a good paragraph. In fact, under the cases last cited even if the judgment were based upon a general verdict and some or all of the paragraphs of the complaint were faulty, the judgment would stand if the evidence showed a right to the relief given and was either properly admissible under a good paragraph (since such evidence should have the same effect as that admitted without objection) or was admitted improperly but without objection.

W. H. H.