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The Theory of the Case

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COMMENTS

THE THEORY OF THE CASE

The doctrine of the theory of the case seems to have been one of peculiar vitality, for although it has been often repudiated, it has been often resurrected. Its latest appearance is in the case of Nesbitt v. Miller,[1] where the court says this: "That one must recover upon the theory of his complaint, or, not at all, is too well settled to require the citation of authorities."

The doctrine of the theory of the case includes three rather distinct situations. (1) The one most frequently arising is the one in the principal case, where it is a statement to the effect that a verdict, finding or judgment must be supported by, or conform to the formal pleadings in the case, without regard to the merits of the case as disclosed by the evidence. In this form it is a continuation of the common law rule on the subject. The Legislature has attempted in no uncertain terms to repudiate it. Sec. 426 Burns Ann. Ind. Stat. 1926[2] requires the courts to disregard "in every stage of the action, any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Sec. 725 Burns Ann. Ind. Stat. 1926[3] prohibits the reversal by the courts of appeal of any case for a defect in the pleadings which might be amended by the court below, and to decide every appeal on the merits.

The statutes have been accepted and applied in many cases, even where the pleading was properly attacked in the first instance.[4] The most recent acceptance is in the case of Kostanzer v. State.[5] The problem is adequately discussed; the doctrine

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1 —— Ind. App. ——, 188 N. E. 702 (1934).

2 Sec. 2-1071 Burns Ann. Ind. Stat. 1933.

3 Sec. 2-3231 Burns Ann. Ind. Stat. 1933.

4 Sec. 368 Burns Ann. Ind. Stat. 1926 (Sec. 2-1013 Burns Ann. Ind. Stat. 1933) provides that if a demurrer is overruled erroneously the case shall still be decided on the merits.

5 —— Ind. App. ——, 187 N. E. 337 (1933).

repudiated and the authorities collected in the case of Cleveland, C. C. & St. L. Ry. v. Gillespie.[6]

In two very recent cases the Appellate Court itself has in effect repudiated it. For in the case of School City of Crawfordsville v. Montgomery[7] it determined that a demurrer to the complaint should have been sustained and reversed the case because this decision made "it unnecessary to consider other questions presented by this appeal." On rehearing,[8] however, the court struck out that statement in its opinion and passed upon the sufficiency of the evidence to support the trial court's decision. And in the case of Hosanna v. Odishoo[9] it sustained a judgment for a party who had filed no pleading asking for it. The court laid some emphasis upon the fact that the action was equitable. This is immaterial. The code applies equally to actions at law and in equity.

There is thus ample authority contrary to the court's statement in the principal case. In the interest of consistency it would seem desirable, however, for the courts to either finally repudiate the statutes on the subject or the cases which go back to the common law rule.

(2) The doctrine of the theory of the case has also been used to compel a plaintiff to elect between two inconsistent allegations in one paragraph of complaint when the case is submitted to the jury.[10] In view of the fact that had the plaintiff made his inconsistent allegations in separate paragraphs of his complaint he could not be required to so elect this result seems itself inconsistent. Certainly it is at variance with the statutes referred to above, for the plaintiff has done nothing more than to violate a rule of pleading requiring inconsistent allegations to be made in separate paragraphs of complaint. The defect is thus procedural and clearly should be held to be cured by the statutes.[11] (The

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[6] —— Ind. App. ——, 173 N. E. 708 (1930). See note on this case in 6 Ind. L. J. 402; cf. Southern Ind. G. & E. Co. v. Winstead, 92 Ind. App. 329, 175 N. E. 281 (1931) where within a year the same court returned to the doctrine. See note on this case in 6 Ind. L. J. 575.

[7] —— Ind. App. ——, 187 N. E. 57 (1933).

[8] —— Ind. App. ——, 188 N. E. 695 (1934).

[9] —— Ind. App. ——, 187 N. E. 897 (1933).

[10] See, *e. g.*, Union City v. Murphy, 176 Ind. 597, 96 N. E. 584 (1911).

[11] See Nordyke & Marmon Co. v. Hilborg, 62 Ind. App. 196, 110 N. E. 684 (1916) where the complaint was in one paragraph and the court prop-

case of Union City v. Murphy[12] was decided in 1911, prior to many significant changes in our Code on the subject, so that it, along with practically all of our cases prior to 1911 are of no authority in the proper decision of a case under our present statutes.)

(3) The doctrine of the theory of the case is applied where a case calls for a choice between a legal action or an equitable suit and the constitutional right to a jury trial is involved.[13] If a plaintiff starts what is construed to be an equitable suit to allow him to recover on a legal action would deprive the adverse party of a jury trial. There seems to be no escape from the doctrine in such a case. Although, of course, the failure to establish the equitable claim must be such as to indicate bad faith, for equity has jurisdiction to render a common law judgment in cases where the failure to establish the equitable claim indicates good faith and reasonable grounds for equitable relief in the first instance.[14]

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erly took the position that the defect was waived by the failure to properly attack it during the pleading stage of the trial.

[12] *Supra* Note 10.

[13] See, *e. g.*, Elliott v. Pontius, 136 Ind. 641, 36 N. E. 421 (1894); Boonville Natl. Bank v. Blakely, 166 Ind. 427, 76 N. E. 529 (1906).

[14] See, *e. g.*, Doherty v. Holliday, 137 Ind. 282, 32 N. E. 315 (1893). See also Pomeroy, Equity Jurisprudence (4th ed.), Secs. 236-242.