Indiana Law Journal

Volume 6 | Issue 9 Article 12

6-1931

Pleading-Appeal and Error-Theory of the Case

PLEADING—APPEAL AND ERROR—THEORY OF THE CASE—The complaint alleged that the appellant was negligent in maintaining its rails so that they were higher than the street at a place where vehicles were supposed to cross them at an angle; that while the appellee was attempting to cross at that point with his auto the auto was held on the tracks; that while it was so held the appellant, by its servants, with knowledge of the appellee's dangerous position negligently ran its street car against appellee's auto and injured the appellee without making any effort to stop or to check the speed of the car and avoid the collision. The instructions given charged the jury that there could be a recovery if it was found that the track was negligently maintained as alleged and that such negligence was the proximate cause of the appellee's injury. The jury was also instructed that, if it found that the appellant operated its street car in the manner alleged in the complaint and that the conduct of the appellant in this reward was the proximate cause of the appellee's injuries, then the jury would be justified in finding for the appellee. There was a verdict and judgment for the appellee and the appellant appealed. *Held,* reversed, and a new trial ordered. The complaint was drawn upon the theory that the alleged injuries were caused by two dependent, concurring acts of negligence committed by the appellant, viz., the negligent maintenance of the crossing and the negligent operation of the street car, the proof of both of which is necessary to entitle the appellee to a recovery. The instructions were erroneous in that they departed from the theory of the complaint and should not have been given. *Southern Indiana Gas & Electric Co. v. Winstead,* Appellate Court of Indiana, March 25, 1931, 175 N. E. 281.

In the course of the opinion it was said, "That a complaint must proceed on some definite theory, which must be adhered to throughout the trial and upon appeal, is so thoroughly settled that the citation of authorities is unnecessary." In a recent case note appearing in 6 Indiana Law Journal 402 (March, 1931) it was sought to be shown that, in view of sections 725 and 426 of Burns' Annotated Indiana Statutes 1926 which provide that cases shall not be reversed for defects in the pleadings or where it appears that the case was fairly tried and determined upon the merits, and in view of the recent decisions giving effect to these statutes, it is doubtful whether or not the theory of the complaint is still law in Indiana. Apparently these statutes and decisions were overlooked in the principal case as no mention is therein made of them. These statutes were

overlooked in most of the older cases but many of the more recent decisions have considered and given effect to them. It would be interesting to note the outcome of a case in which both these statutes and the doctrine of the theory of the case were properly urged. The situation at present seems to be that whichever of these positions is brought to the attention of the court is the one that controls its decision while the other is apparently not considered. This probably accounts for the result reached in the principal case.

It is again suggested that were the court forced to choose between the aforementioned statutes and the doctrine of the theory of the case the former might easily be held to prevail and the latter which has been the butt of much criticism in recent years might definitely be repudiated. Here is a situation in which certainty as to what the law is is of vast importance. Whatever the final choice between the two competing rules, it seems highly desirable that the law in Indiana be made clear to the profession once and for all.

S. J. S.