

AMENDMENTS TO PLEADINGS AFTER STATUTE OF LIMITATIONS HAS RUN.—Recent cases regarding amendments to pleadings after the running of the Statute of Limitations have been at variance with the earlier cases. In order to review this subject it is well to consider the general rules regarding amendments.

The statutes have made the rules very liberal. The Practice Acts of 1903<sup>1</sup> and 1912<sup>2</sup> provide substantially:

1. All amendments are made by leave of court except when made before the answering pleading has been filed, in which case amendment may be made as a matter of course.

2. Pleadings may be amended at trial if there be a variance between the proof and the pleadings, if variance did not mislead the opposite party to his prejudice, in which case it may be made upon terms.

3. All defects and errors in pleadings may be amended for the purpose of determining the real question in controversy between the parties.

4. If the plaintiff mistakes the remedy, he may amend if the court can properly grant the right remedy.

5. At or before the trial, the court may permit, on terms, an amendment to introduce a new or different cause of action in complaint or counterclaim.

Amendments are addressed to the discretion of the court and the decision thereon is not reviewable on appeal<sup>3</sup> except where the amendment opens a new ground of liability or defense not before suggested, to the surprise of the other party, in which case there should be a reasonable time given to meet the new matter.<sup>4</sup> Clear proof of an improper exercise of discretion will be required before the court will review.<sup>5</sup>

Variance between a pleading and the evidence at trial is of no great consequence today. Nevertheless it is sound law and reason that there must be no variance to the prejudice of the adverse party between the pleadings and the proof.<sup>6</sup> Where the facts of the case are fully understood by both sides and no surprise is possible, an amendment may be allowed.<sup>7</sup>

<sup>1</sup> C.S. 4053, 4064, Sec. 123, 124, 125, 126.

<sup>2</sup> Cum. Supp., Sec. 163-299, 163-300.

<sup>3</sup> Reed v. Director-General, 95 N.J.L. 525 (E. & A. 1921).

<sup>4</sup> Goodyear Tire & Rubber Co. v. Krivant, 96 N.J.L. 352 (Sup. Ct. 1921).

<sup>5</sup> Allen v. Spring St. Realty Co., 111 N.J.L. 88 (E. & A. 1933); King v. Steglitz, 111 N.J.L. 11 (E. & A. 1933); Waton v. Detroit Fidelity & Surety Co., 109 N.J.L. 71 (E. & A. 1932).

<sup>6</sup> Jordan v. Reed, 77 N.J.L. 584 (E. & A. 1908). The court may properly deny such amendments. Charlton v. Jersey Mutual Casualty Ins. Co., 107 N.J.L. 126 (E. & A. 1930).

<sup>7</sup> Gaudiosi v. Micone, 141 Atl. 575 (Sup. Ct. 1928). In the case of Valiant v. Plaza Realty Co., 145 Atl. 475 (Sup. Ct. 1929), the evidence made out a *prima facie* case of negligence for improper construction of a coalhole. The

All amendments which may be necessary for the purpose of determining the real question in controversy between the parties are permissible. What the real question in controversy is becomes a question of fact. It is that question which the parties hoped and intended to try, and it is not limited to the issue on the record.<sup>8</sup> Where a technical defense is forgotten, the court will not allow an amendment to permit such a technical defense to be interposed.<sup>9</sup> But the desire of the court to prevent forfeiture in insurance cases cannot prevent amendments of defenses involving forfeiture in order to determine the real question in controversy.<sup>10</sup>

After the defendant has been named in a summons and has been regularly brought into court, the writ cannot be amended to substitute the name of another party as defendant.<sup>11</sup> But where the defendant was incorrectly named an amendment will be allowed to correct his name.<sup>12</sup> But if the defendant is not brought in by regular process, there is no other known method, without consent, by which the courts can acquire jurisdiction over him. And if he comes in under a special appearance, an amendment will not be permitted to make him a party defendant.<sup>13</sup> In *Elsberg v. Honeck*<sup>14</sup> an amendment by an assignee of a cause of action to have the suit changed from the plaintiff's to his name was denied. The court refused to consider the question on appeal because it was a matter in the discretion of the court. There was, however, another ground on which this case was reversed. If that other ground had not been present, it is probable that the court would have reviewed the action of the trial judge on the ground of abuse of discretion.

The pleadings may be amended after the verdict is rendered in order to conform with the proof.<sup>15</sup> And on appeal the court has power

pleadings charged negligent maintenance. Here it was permissible to amend since there was no injurious surprise.

<sup>8</sup> *Miller v. West Jersey & Seashore R.R. Co.*, 76 N.J.L. 282 (Sup. Ct. 1908).

<sup>9</sup> *West Hoboken v. Syms*, 49 N.J.L. 546 (Sup. Ct. 1887) (defense of Statute of Limitations); *Board of Education v. Richmond, etc., Co.*, 92 N.J.L. 496 (E. & A. 1918) (defense failed to specify condition as required by statute).

<sup>10</sup> *Hanrahan v. Met. Life Ins. Co.*, 72 N.J.L. 504 (E. & A. 1906). This was an action on an insurance policy. The defendant pleaded warranty that the plaintiff had not been under the care of a physician within 15 years. The proof was of warranty of last attendance by physician 15 years before. The court allowed an amendment.

<sup>11</sup> *Maitland v. Worthington*, 59 N.J.L. 114 (Sup. Ct. 1896).

<sup>12</sup> *Allbright v. Standard Roofing Co.*, 10 N.J.Misc. 646 (Sup. Ct. 1932). The plaintiff amended his pleadings to show the correct name of the defendant who was doing business under a trade name. It was held proper because such facts appeared in the sworn papers used in the case by the defendant.

<sup>13</sup> In *Hubbard v. Montross Metal Shingle Co.*, 79 N.J.L. 208 (Sup. Ct. 1909), an action was brought against a corporation and the members came in under special appearance. The plaintiff attempted to amend in order to make them parties defendant. It was held that such an amendment will not be allowed.

<sup>14</sup> 76 N.J.L. 181 (Sup. Ct. 1908).

<sup>15</sup> *Kapherr v. Schmidt*, 98 N.J.L. 803 (E. & A. 1923).

to amend the pleadings in order to support the judgment.<sup>16</sup> But to amend the pleadings to embody an issue that was not proved will not be permitted since it would support a verdict on matter that the parties had not fairly litigated.<sup>17</sup>

The *ad damnum* clause cannot be amended after the verdict is rendered to make it correspond to the verdict where the suit is for unliquidated damages.<sup>18</sup> The *ad damnum* clause fixes the maximum amount. But if a cause of action is alleged on proof of which a larger sum must be stated than that shown in the *ad damnum* clause, then it becomes a mere matter of form and as such may be amended to conform to the real claim.<sup>19</sup>

A consideration of amendments after the Statute of Limitations has run shows a variance in the cases. Where the statute has become a bar to the action, the court will not allow a subsequent amendment that will set up a new or different cause of action. In *Lower v. Segal*<sup>20</sup> an administratrix sued under the Pennsylvania death act, which requires the suit to be brought by the widow. She, being also the widow, sought to amend the pleadings. It was there held that such an amendment would create a new suit and would be unreasonably vexatious to the defendant since the Statute of Limitations had run. This case was followed in *Fitzhenry v. Consolidated Traction Co.*<sup>21</sup> where the father of the deceased sued in the wrong capacity. It was held that since the Statute of Limitations had run such an amendment would prejudice the defendant in his defense.<sup>22</sup> Recently, however, the court has been very liberal in the death action cases. If the facts alleged show substantially the same wrong with respect to the same transaction, or if the gist of the action remains the same, it is not a new cause of action. The courts are more ready to grant an amendment. In *Rygiel v. Kanengieser*<sup>23</sup> an amendment to change the date of the accident after the Statute of Limitations had run was allowed on the ground that it did not state a new cause of action, the time being considered no material part of the issue. In *Martin v. Lehigh Valley R. Co.*<sup>24</sup> the case was captioned in the name of deceased. The plaintiff was misled by correspondence with the defendant into discontinuing the suit and when the plaintiff started a new suit the defendant set up the Statute of Limitations. The court set aside the discontinuance and then allowed an amendment to the name of the

<sup>16</sup> *Levenson Wrecking Co. v. Gatti-McQuade Co.*, 93 N.J.L. 184 (E. & A. 1919).

<sup>17</sup> *Excelsior Electric Co. v. Sweet*, 59 N.J.L. 441 (E. & A. 1896).

<sup>18</sup> *Standard Lumber Co. v. Penna R. Co.*, 6 N.J.Misc. 21 (Sup. Ct. 1928).

<sup>19</sup> *Excelsior Electric Co. v. Sweet*, 59 N.J.L. 441 (E. & A. 1896).

<sup>20</sup> 60 N.J.L. 99 (Sup. Ct. 1897).

<sup>21</sup> 63 N.J.L. 142 (Sup. Ct. 1899).

<sup>22</sup> *Rankin v. Central R.R. Co.*, 77 N.J.L. 175 (Sup. Ct. 1908), also followed these decisions.

<sup>23</sup> 114 N.J.L. 311 (E. & A. 1935).

<sup>24</sup> 114 N.J.L. 243 (E. & A. 1935).

administratrix *ad prosequendum*. In line with these two recent cases is that of *Wilson v. Dairymen's, Etc., Inc.*,<sup>25</sup> somewhat prior in time. In that case the widow sued under the death act as administratrix. She was not appointed administratrix *ad pros.* until after the Statute of Limitations had run. It was held she could amend so as to appear in the proper capacity because no substantial right of the defendant would be affected. Such an amendment would be merely a correction of a technical mistake and therefore good, the court said.<sup>26</sup> These later cases, therefore, in effect, overrule the *Lower v. Segal* case and the other earlier cases following it.

What constitutes a new cause of action seems to be more strictly construed in other cases than the death cases. In the case of *Casavalo v. D'Auria*<sup>27</sup> the original complaint charged a breach of the defendant's duty to maintain a stoop. An amendment was asked in order to charge the defendant with negligence in making repairs. It was held not to be substantially the same wrong with respect to the same transaction. It was considered a different cause of liability and therefore there could be no amendment after the Statute of Limitations had run.<sup>28</sup> However, in *Johnson v. Gick & Bingemann, Inc.*,<sup>29</sup> two new elements of damage were permitted to be added after the Statute of Limitations had run, since they arose out of the same cause of action, and therefore relate back to the commencement of the action and are not affected by intervening lapse of time. They did not relate to a new cause of action. In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured, or as to the manner of the defendant's breach of duty.<sup>30</sup>

<sup>25</sup> 105 N.J.L. 188 (E. & A. 1928).

<sup>26</sup> Another case following this more liberal view was *Swank v. Pennsylvania R.R. Co.*, 94 N.J.L. 546 (E. & A. 1920), where the plaintiff sought to make two amendments. The first amendment was to add an additional dependent of the decedent and the second concerned negligence. These amendments were allowed after the Statute of Limitations had run because they did not constitute a new or different cause of action. It was held they merely expanded the cause of action already asserted, the first in no way changing the plaintiff, since the general administrator still remained the sole plaintiff, and the second simply amplifying the acts of negligence already charged.

Other cases in line: *Norko v. Rau*, 107 N.J.L. 479 (E. & A. 1931); *Duffy v. McKenna*, 82 N.J.L. 62 (Sup. Ct. 1921); *Giardini v. McAdoo*, 93 N.J.L. 138 (Sup. Ct. 1919).

<sup>27</sup> 12 N.J.Misc. 81 (Sup. Ct. 1933), *aff'd* 113 N.J.L. 328 (1934).

<sup>28</sup> Likewise in *Doran v. Thomsen*, 79 N.J.L. 99 (Sup. Ct. 1909), where an amendment charging defendant with negligence in supplying auto to his inexperienced daughter was held to be a new and different cause of action from the negligence of the servant imputed to the master.

<sup>29</sup> 9 N.J.Misc. 883 (Sup. Ct. 1931).

<sup>30</sup> In *O'Shaughnessy v. Bayonne News Co.*, 9 N.J.Misc. 345 (Cir. Ct. 1931), *aff'd* 109 N.J.L. 271 (E. & A. 1932), it was held that when the amendment sought to change the place where the plaintiff was injured it was a mere incident and the subject of the controversy remained the same—the negligent operation:

Under these cases, therefore, the addition or substitution of a party plaintiff will be allowed unless to do so would have the effect of creating a new cause of action.<sup>81</sup> This would also prevent the adding of a new defendant. In *Laute v. Gearhart*<sup>82</sup> a suit was instituted against the guardian of an infant. After the Statute of Limitations had run, it was held that the infant could not be made a party to the suit instituted against his guardian, since he was not sued or served with process.

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NEWLY DISCOVERED EVIDENCE AS A GROUND FOR NEW TRIAL.—It is undeniable that it is highly desirable and convenient that judgments and decrees of courts of competent jurisdiction be dispositive of the matter controverted.<sup>1</sup> It follows that applications for new trials or for rehearings on the ground of newly discovered evidence are not favored by the courts and will not be entertained unless special circumstances are shown.<sup>2</sup> The grounds for giving relief in both law courts and chancery are based on equitable considerations.<sup>3</sup>

Prior to 1885, the New Jersey law court had no power to set aside its judgment, after the term in which it was rendered, on the ground of newly discovered evidence. When the unsuccessful party discovered new evidence subsequent to the end of the term, it was necessary for him to go into equity for relief.<sup>4</sup> Although the court of equity had no power to set aside a judgment of the law court, it could, if the judgment had not been paid, perpetually restrain the successful party from enforcing his judgment unless he would consent to a new trial, or, if the judgment had been enforced, it could require restoration.<sup>5</sup> In *Cairo & Fulton R.R. Co. v. Titus*,<sup>6</sup> Chancellor Runyon pointed out that there might be some special circumstances where there would be no propriety in referring a matter again to the law court, as, for example, where a release or receipt is discovered, and intimated that in such a case the Court of Chancery would enter a decree which in effect would grant a new trial in the Court of Chancery instead of in the court of law in which the matter was originally tried.

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of the auto. See also *Di Lello v. Manufacturers' Land & Imp. Co.*, 11 N.J. Misc. 164 (Sup. Ct. 1933).

<sup>81</sup> *Farrier v. Schroeder*, 40 N.J.L. 601 (E. & A. 1878).

<sup>82</sup> 11 N.J. Misc. 117 (Sup. Ct. 1933).

<sup>1</sup> *Grant Inventions Co. v. Grant Oil Burner Corp.*, 104 N.J. Eq. 341 (Ch. 1929); *Miller v. McCutcheon*, 117 N.J. Eq. 123 (E. & A. 1934).

<sup>2</sup> *Christie v. Petrullo*, 101 N.J.L. 492 (Sup. Ct. 1925).

<sup>3</sup> *Jessup v. Cook*, 6 N.J.L. 434 (Sup. Ct. 1798).

<sup>4</sup> *Cairo & Fulton R.R. Co. v. Titus*, 32 N.J. Eq. 397 (E. & A. 1880); *Hayes v. U. S. Phonograph Co.*, 65 N.J. Eq. 5 (Ch. 1903).

<sup>5</sup> *Cairo & Fulton R.R. Co. v. Titus*, 35 N.J. Eq. 384 (Ch. 1882); *Hayes v. U. S. Phonograph Co.*, *supra* note 4.

<sup>6</sup> *Supra* note 5.