

The second *Hague case*,<sup>54</sup> relied upon by this court, as the foundation of the *Kelly* decision, fails strikingly to furnish that support. Nor does the first *Hague case*,<sup>55</sup> furnish such support.

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PLEADINGS—AMENDMENTS UNDER PRACTICE ACT OF NEW JERSEY—EXTENT AND TIME.—The New Jersey Practice Act of 1903 as amended by the Practice Act of 1912 attempts to make the common law rules of pleading more liberal insofar as the power to amend a pleading is concerned.<sup>1</sup> To prevent the failure of justice because the pleader has made mistakes in form<sup>2</sup> or has mistaken the proper remedy or procedure,<sup>3</sup> the court may in its sound discretion allow an amendment to the pleadings so that the real question in controversy may be determined. In addition to its powers of amendment the court may, upon terms, before or at the trial, permit the statement of a new or different cause of action in the complaint or counterclaim.<sup>4</sup> The difficulty that the courts have found in applying the statutes arises out of the necessity of determining what the real question in a controversy is and whether or not a requested amendment states a new and different question. This problem is particularly acute when to allow the amendment would permit the pleader to circumvent the statute of limitations.

As in many other legal problems, here, too, is a situation where the rule of law has been well formulated and frequently repeated, but great difficulty is found in applying the rule to individual cases. The courts in this state have held that if the identity of the transaction forming the cause of action is preserved, if the gist of the action or the subject of controversy remains the same, the amendments are per-

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54. *Supra*, note 48.

55. *Supra*, note 3.

1. The pertinent statutory references are to be found in R.S. 1937, 2:27-130 to 2:27-133, 2:27-157, 2:27-158; P.L. 1903, Chap. 247, secs. 123-126; P.L. 1912, Chap. 231, secs. 23-24.

2. R.S. 1937, 2:27-157; P.L. 1903, Chap. 247, sec. 126.

3. R.S. 1937, 2:27-158; P.L. 1912, Chap. 231, sec. 23.

4. R.S. 1937, 2:27-132; P.L. 1912, Chap. 231, sec. 24.

missible.<sup>5</sup> The fact that the same matter is more fully or differently laid or the form of liability or alleged incidents of the transaction are different will not bar an amendment.

It is only by examining the cases in detail that the rule can be made useful in dealing with specific problems. The attempted amendments range from more clearly formal ones such as time, additional details, and amount of damages, to the border line cases where the parties and even the theory of the case would be altered. An amendment correcting an erroneous allegation in the complaint of the date when the cause of action arose is not one introducing a new cause of action.<sup>6</sup> The addition of two new elements of damage which grew out of the same cause as the original damage claimed was permitted.<sup>7</sup> So, too, an amendment waiving damages in excess of a jurisdictional amount was allowed.<sup>8</sup>

Pleadings may be adjusted to conform with the evidence produced at the trial by adding new matter to correct an omission. For example, a statute on which an action is founded may be averred by amending the pleadings.<sup>9</sup> More detail may be supplied in a pleading by the amendment thereof, such, for example, as the more extensive statement of the terms of a contract to meet a defendant's counterclaim,<sup>10</sup>

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5. For the fullest discussion of the rule see *O'Shaughnessy v. Bayonne News Co.*, 9 N.J.Misc. 345, 154 Atl. 13 (C.C., 1931), *aff'd*, 109 N.J.L. 271, 160 Atl. 696 (E. & A., 1932). Other cases dealing with the rule in detail are *Rygiel v. Kanengieser*, 114 N.J.L. 311, 176 Atl. 605 (E. & A., 1935); *Casavalo v. D'Auria*, 12 N.J.Misc. 81, 169 Atl. 520 (S. C. 1933), *aff'd*, 113 N.J.L. 328, 174 Atl. 506 (E. & A., 1934).

6. *Rygiel v. Kanengieser*, 114 N.J.L. 311, 176 Atl. 605 (E. & A., 1935).

7. *Johnson v. Gick & Bingemann, Inc.*, 9 N.J.Misc. 883, 155 Atl. 802 (S. C., 1931). See also *Excelsior Electric Co. v. Sweet*, 57 N.J.L. 224, 30 Atl. 553 (S. C., 1894).

8. *Harris v. Roth*, 6 N.J.Misc. 1006, 143 Atl. 557 (S. C. 1928).

9. *Norko v. Rau*, 107 N.J.L. 479, 154 Atl. 766 (E. & A., 1931). In *Ware v. Millville Fire Ins. Co.*, 45 N.J.L. 177 (E. & A., 1883) the defendant in its plea averred that an assessment was made pursuant to a section of its charter but failed to put the charter in evidence. The court did not reverse but amended the plea to aver that the assessment was made pursuant to the terms of a condition.

10. *Magliaro v. Modern Homes, Inc.*, 115 N.J.L. 151, 178 Atl. 733 (E. & A., 1935).

the amplification of acts of negligence,<sup>11</sup> the branding as false of an additional representation of defendant in an action for deceit,<sup>12</sup> and the inclusion of a new count stating another injury from the same wrongful act complained of in the original complaint.<sup>13</sup>

The courts have consistently held that the form of action itself may be changed, as the form is merely the shell containing the substantive right. A complaint based on an action under the common counts for personal services rendered was amended by a count alleging a special contract.<sup>14</sup> The real question in controversy was whether the defendant was legally bound to pay the plaintiff's claim because the plaintiff was not removed from office according to law. The court stated that what the real question is a question of fact for the trial judge, and depends on what the parties hoped and intended to try. An action in assumpsit on an insurance policy under seal, in another case, was changed to an action in covenant.<sup>15</sup> A suit in trespass after trial and verdict was altered to one in case, the court deciding that the real question was whether the accident was caused by the negligence of defendant's agents and whether defendant was liable for the value of the plaintiff's horses, killed by the train.<sup>16</sup>

The first real disagreement among the cases is found when the subject of allowing an amendment to change the parties to an action is met. Early cases were strict about allowing a party to change the capacity in which he sued.<sup>17</sup> Under the Pennsylvania Death Act, the widow of a deceased must sue as such and not as administratrix. The court refused to allow the plaintiff to correct her complaint holding that no real question existed between the administratrix and the defend-

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11. *Swank v. Penn. R.R.*, 94 N.J.L. 546, 111 Atl. 44 (E. & A., 1920).

12. *Duffy v. McKenna*, 82 N.J.L. 62, 81 Atl. 1101 (S. C., 1912).

13. *Ten Eyck v. Delaware & Raritan Canal Co.*, 19 N.J.L. 5 (S. C., 1842).

14. *Hoboken v. Gear*, 27 N.J.L. 265 (S. C. 1859). See also *Joslin v. N. J. Car Spring Co.*, 36 N.J.L. 141 (S. C., 1873).

15. *American Life Ins. Co. v. Day*, 39 N.J.L. 89 (E. & A., 1876).

16. *Price v. N. J. R.R. & Trans. Co.*, 31 N.J.L. 229 (S. C., 1865).

17. *Lower v. Segal*, 60 N.J.L. 99, 36 Atl. 777 (S. C., 1897); *Rankin v. Central R.R. of N. J.*, 77 N.J.L. 175, 71 Atl. 55 (S. C., 1908). See also *Laute v. Gearhart*, 11 N.J.Misc. 117, 165 Atl. 115 (S. C., 1933) for a recent case with a strict ruling.

ant. The New Jersey Death Act requires the personal representative to sue, and the court refused to allow a father to amend his complaint for the defendant's negligence in causing his son's death.<sup>18</sup> Recent cases decided since the Practice Act of 1912 have reversed the holdings of the previous cases and have permitted parties to change the capacity in which they sue, in spite of the running of the statute of limitations.<sup>19</sup>

Where an attempt is made to change the theory of a case the courts are reluctant to grant the amendment and do so only on rare occasions. The difficulty seems to be greatest in negligence cases. An original complaint was based on the negligence of the defendant's servants, and the amendment which was granted was based on the negligence of the defendant in failing to protect the plaintiff from the conduct of the employees of another railroad using the same station.<sup>20</sup> The court held that the gist of the action, the negligence in the care of a passenger, was the same. In another case, it was stated that 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>21</sup>

In the majority of cases, however, an amendment which seeks to alter the grounds of liability in tort is denied. An original complaint based on negligence of servant imputed to master could not be amended

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18. *Fitzhenry v. Consolidated Traction Co.*, 63 N.J.L. 142, 42 Atl. 416 (S. C., 1899).

19. *Giardini v. McAdoo*, 93 N.J.L. 138, 107 Atl. 437 (E. & A., 1919); *Wilson v. Dairymen's League Co-op. Assn.*, 105 N.J.L. 188, 143 Atl. 454 (E. & A., 1928); *Martin v. Lehigh Valley R.R. Co.*, 114 N.J.L. 243, 176 Atl. 665 (E. & A., 1935); *Boniewsky v. Polish Home of Lodi*, 103 N.J.L. 323, 136 Atl. 741 (E. & A., 1927); *Brice v. Atlantic Coast Elec. Ry. Co.*, 102 N.J.L. 288, 132 Atl. 253 (S. C., 1926); *Norko v. Rau*, 107 N.J.L. 479, 154 Atl. 766 (E. & A., 1931). Some early cases allowed an amendment to change parties in special cases. *Vunk v. Raritan River R. Co.*, 56 N.J.L. 395, 28 Atl. 593 (S. C. 1894); *Guild, Ex'r v. Parker, Rec'r*, 43 N.J.L. 430 (E. & A., 1881); *Farrier v. Schroeder*, 40 N.J.L. 601 (E. & A., 1878), agent substituted for principal.

20. *Miller v. West Jersey & S. R. Co.*, 76 N.J.L. 282, 70 Atl. 175 (S. C., 1908).

21. *O'Shaughnessy v. Bayonne News Co.*, 9 N.J.Misc. 345, 154 Atl. 13 (C. C., 1931), *aff'd*, 109 N.J.L. 271, 160 Atl. 696 (E. & A., 1932).

to base action on negligence of the master.<sup>22</sup> Where complaint was based on landlord's negligence in failing to maintain stairway in safe condition an amendment charging negligence in repairing porch was not allowed.<sup>23</sup> The latest case in this field shows the tendency of the recent decisions to be strict. A suit brought on grounds of negligence to one not a passenger could not be amended to allege that plaintiff was a passenger.<sup>24</sup>

The time for requesting the amendment is while the case is still before the trial court, as the granting or refusal of such a motion in a matter of substance rests in the sound discretion of the court of original jurisdiction and is not assignable for error.<sup>25</sup> Before an answering pleading is filed, however, an amendment may be obtained as of course without costs and without prejudice to the proceedings already had.<sup>26</sup> The liability in granting amendments is greatest at the time the law suit is commenced and decreases as the suit progresses. While the record remains in the custody of the superior court on appeal, that tribunal may permit an amendment,<sup>27</sup> although for convenience such matters are usually remitted to the trial court.<sup>28</sup> Where the decision of the appellate court would result in closing the record, if the decision were not quali-

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22. *Doran v. Thomsen*, 79 N.J.L. 99, 74 Atl. 267 (S. C., 1909).

23. *Casavalo v. D'Auria*, 12 N.J.Misc. 81, 169 Atl. 520 (S. C., 1933), *aff'd*, 113 N.J.L. 328, 174 Atl. 506 (E. & A., 1934). See also *Cuddihy v. Hoboken Mfrs. R. Co.*, 14 N.J.Misc. 693, 186 Atl. 682 (C. C 1936); *Di Lello v. Manufacturer's Land & Improvement Co.*, 165 Atl. 121 (S. C., 1933).

24. *Macknowski v. Hudson & Manhattan R.R.*, 1 Atl. (2d) 373 (E. & A., 1938).

25. *Crawford v. N. J. R.R. Co.*, 28 N.J.L. 479 (S. C., 1860); *Goodyear Tire & Rubber Co. v. Kruvant*, 96 N.J.L. 352, 113 Atl. 304 (S. C., 1931); *Bruch v. Carter*, 32 N.J.L. 554 (E. & A., 1867); *Lutlopp v. Heckmann*, 70 N.J.L. 272, 57 Atl. 1046 (E. & A., 1904); *Reed v. Director Gen. of Railroads*, 95 N.J.L. 525, 113 Atl. 146 (E. & A., 1921); *Yuska v. Yuska's Estate*, 114 N.J.L. 157, 176 Atl. 133 (E. & A., 1935); *Watson v. Detroit Fidelity & Surety Co.*, 109 N.J.L. 71, 160 Atl. 657 (E. & A. 1932).

26. R.S. 1937, 2:27-130.

27. *McCarthy v. Mullen*, 82 N.J.L. 379, 82 Atl. 933 (E. & A., 1912); *American Life Ins. Co. v. Day*, 39 N.J.L. 89 (E. & A., 1876).

28. *Boniewsky v. Polish Home of Lodi*, 103 N.J.L. 323, 136 Atl. 741 (E. & A., 1927).

fied, that court will remit the case with directions to allow the amendment on terms if it is justified.<sup>29</sup>

MORTGAGES—NECESSITY OF JOINING TENANTS IN FORECLOSURE PROCEEDINGS.—By judicial construction of the statutory enactment<sup>1</sup> governing proceedings in suits to foreclose mortgages on real property, a condition precedent to an action on the bond for a deficiency arising out of a sale of the mortgaged premises is the complete exhaustion of the property and all interests therein.<sup>2</sup>

From this construction has developed the rule that the failure to make a tenant of the mortgaged premises a party defendant to a foreclosure suit, and thus bar his interest, constitutes a valid defense to a suit by the mortgagee, against the mortgagor on the bond secured by the foreclosed mortgage, for a deficiency arising from the foreclosure and sale of the mortgaged premises.<sup>3</sup>

In *Guardian Life Ins. Co. v. Lowenthal*,<sup>4</sup> and *American-Italian B & L Ass'n v. Liotta*,<sup>5</sup> strict applications of the rule were approved, but *dicta* in the *Liotta* case and subsequent decisions<sup>6</sup> indicate a trend toward liberalization and modification of the general principle.

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29. *McCarthy v. Mullen*, 82 N.J.L. 379, 82 Atl. 933 (E. & A., 1912).

1. REV. ST. 1937, 2:65-1, 2 *et seq.* (P. L. 1880, ch. 170).

2. *Deal Park Co. v. Bannard*, 2 N.J.Misc. 194, (Sup. Ct. 1924); see EISENBERG & SPICER, *Mortgage Deficiencies In New Jersey* (1934), 3 MERCER BEASLEY LAW REVIEW 27; *Federal Title and Mortgage Guaranty Co. v. Lowenstein*, 113 N.J.Eq. 200, 166 Atl. 538 (Ch. 1933); *Mahaffey v. Evans*, 115 N.J.Eq. 434, 171 Atl. 315 (Ch. 1934); *American-Italian B & L Ass'n v. Liotta*, 117 N.J.L. 467, 189 Atl. 118 (E. & A. 1936), 108 A.L.R. 1346.

3. *Ellveay Newspaper & Co. Ass'n v. Wagner Market Co.*, 110 N.J.L. 577, 166 Atl. 332 (Sup. Ct. 1933), *aff'd* in 112 N.J.L. 88, 169 Atl. 692 (E. & A. 1933); see (1935) 1 UNIV. OF NEWARK LAW REVIEW 76 (note 16) and cases therein cited; *American-Italian B & L Ass'n v. Liotta*, *supra*, note 2. *Cf.* *Strong v. Smith*, 68 N.J.Eq. 686, 60 Atl. 66 (E. & A. 1905); *Walgreen Co. v. Moore*, 116 N.J.Eq. 348, 173 Atl. 687 (Ch. 1934); *Polish Home B & L v. Burinefsky*, 119 N.J.L. 1, 194 Atl. 140 (E. & A. 1937).

4. 13 N.J.Misc. 849, 189 Atl. 897 (Sup. Ct. 1935).

5. *Supra*, note 2.

6. *Harvester B & L v. Elbaum*, 119 N.J.L. 437, 196 Atl. 709 (E. & A. 1937), *rev'd* in 121 N.J.L. 515 (E. & A. 1939) for procedural reasons; *Stratford B & L*