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THE SPECIAL DEMURRER AS A DISCOVERY DEVICE IN GEORGIA

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Under Georgia procedural rules, the special demurrer has two dissimilar functions, the first being to compel the striking or withdrawal of extraneous matter, and the second being to compel the demurree to plead, or to plead more fully, the facts relied upon to support his cause of action or defense, or the theory upon which it is based.

The diversity of these two functions, coupled with the further rules which prohibit direct appeals from nisi prius rulings on special demurrer,[1] but which permit reversal of an entire proceeding where such a ruling is erroneous,[2] have for many years contributed to the accretion of the great body of confusion and conflict which now makes Georgia practice and procedure an almost occult science.

There is little difficulty to be found in reducing the first function of the special demurrer to a simple and understandable rule; necessity requires that every pleading system provide a method for the elimination of matter which is extraneous to the issues, or is prejudicial or otherwise improper. In Georgia, the special demurrer has traditionally satisfied this requirement.[3] Thus, the special demurrer is properly used to complain of the pleading of impertinent and prejudicial matter,[4] improper organization of pleadings,[5] surplusage,[6] and irrelevant matter.[7] The objective of the demurrant who complains of these defects, which all constitute the pleading of too much matter, is to have the extraneous matter stricken. If the demurrant is successful and his demurrer is sustained, the court orders the matter stricken, and for practical purposes it disappears from the proceedings, cannot be proven, or within strict rules of legal propriety referred to by counsel.

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1. Mayor and Council of Alamo v. Smith, 66 Ga. App. 10, 16 S.E.2d 762 (1941).
2. Atlantic Coast Line R. Co. v. Cox, 42 Ga. App. 439, 156 S.E. 733 (1931).
3. DAVIS AND SCHULMAN, GEORGIA PRACTICE AND PROCEDURE, § 138, etc.
4. DAVIS AND SCHULMAN, *supra*, § 139 (12); Linder v. Wimberly, 158 Ga. 285, 123 S.E. 129 (1924).
5. DAVIS AND SCHULMAN, *supra*, § 139 (1): GA. CODE (1933) § 81-103; News Pub. Co. v Lowe, 8 Ga. App. 333, 69 S.E. 128 (1910).
6. Martin v. Mayer, 63 Ga. App. 387, 11 S.E.2d 218 (1940).
7. DAVIS AND SCHULMAN, *supra*, § 139 (14) and cases cited.

The office of this type of special demurrer then is to strike the offensive matter. But compare this description with the description of the same pleadings given in *Brinson v. Kramer*:[8] "The office of a special demurrer to a petition is to cause the plaintiff to fully inform the defendant of facts relied on to make out the cause of action, so as to enable him to prepare his defense." And again in the older case of *Smith v. Bugg*,[9] a similar definition is found: "The essential purpose and function of a special demurrer is to compel amendment."

Obviously, the courts which made the above quoted statements were referring to the second and more complex function of the special demurrer, which may be described as its discovery function. A casual examination of but a few of the decisions which have established this function of the special demurrer shows that it is a most efficient method for the procuring of essential information, and in fact, many of the decisions have required the pleading of facts which cannot accurately be described as essential. For example, some of the facts which the courts have required demurrees to plead in response to the "insatiable demand"[10] of the special demurrer are the name of a doctor who treated a personal injury plaintiff[11] the amount of the doctor who treated a personal injury plaintiff,[11] the amount of the of every occurrence pleaded,[14] the location of a hole in a street into which a plaintiff fell,[15] and the name of the agent of a corporation with whom a plaintiff claims to have dealt.[16]

In addition to these cases, which require the demurree to plead some bit of fact which in many cases might well be considered evidence, there is another group of cases which require of a demurree a disclosure, not only of the factual details as his cause of action, but a full, unambiguous and unevasive statement of the theory upon which the pleader casts his cause.[17] Thus

8. 72 Ga. App. 63, 33 S.E.2d 41 (1945).
9. 35 Ga. App. 317, 133 S.E. 49 (1926).
10. Griffin v. Russell, 144 Ga. 275, 288, 87 S.E. 10 (1915).
11. Louisville & Nashville R. Co. v. Barnwell, 131 Ga. 791, 63 S.E. 501 (1909).
12. Louisville & Nashville R. Co. v. Bradford, 135 Ga. 522, 69 S.E. 870 (1910); Griffin v. Russell, *supra*, Note 10.
13. Western Union Tel. Co. v. Griffith, 111 Ga. 551, 36 S.E. 859 (1900).
14. Anthony v. Dudley Sash, Door and Lbr. Co., 21 Ga. App. 412, 94 S.E. 634 (1917); Brinson v. Kramer, *supra*, Note 8.
15. Bryan v. Mayor and Council of Macon, 91 Ga. 530, 18 S.E. 351 (1893).
16. Cherokee Mills v. Gate City Cotton Mills, 122 Ga. 268, 50 S.E. 82 (1905); Chelsea Corp. v. Steward, 82 Ga. App. 679, 62 S.E.2d 627 (1950).
17. Jenkins v. Dunlop Tire and Rubber Corp., 71 Ga. App. 255, 30 S.E.2d 498 (1944); McMath Plantation Co. v. Allison and Co., 26 Ga. App. 744, 107 S.E. 420 (1921); Cedartown Cotton and Export Co. v. Miles, 2 Ga. App. 79, 58 S.E. 289 (1907).

in *Cedartown Cotton and Export Co. v. Miles*,[18] Judge Powell said, "(the Code) requires a higher degree of certainty in pleading than was necessary at common law; but the object to be obtained is the same under both systems, to wit, that the pleadings be understood by the party, the jury, and the court. They certainly ought to be so certain in full that the court may look to allegations of fact and know whether a cause of action is set forth or not. The plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the declaration, and a demurrer cannot properly be used to compel him to do so; but all the facts necessary to be stated should be set forth plainly, and special demurrer will compel this."

Thus, the traditional complaint of the special demurrer that the pleading to which it is directed is "vague and indefinite" is a serious one, and has received serious consideration by the appellate courts of Georgia.

It may even be said, that in a limited way, appropriate use of the special demurrer under Georgia practice can effect some of the results available by the discovery weapons provided by the Federal Rules of Civil Procedure. The comparison may be extreme, but certainly the two aims of any discovery procedure are met by the special demurrer. These are, first, the procurement of factual information, and this term rather than the term "evidence" is used advisedly; and second, compulsory pleading of the full theory of the cause of action by the demurree, thus in many cases opening the demurree's case to the ultimate general demurrer, or motion to dismiss.

There is, however, one flaw in the effectiveness of the special demurrer as a discovery device, and that is a lack of the very compulsion which is necessary to force the reluctant pleader to fully and distinctly set forth his cause of action or defense, and thereby procure compliance with the requirements of the Code.[19]

The difficulty arises when a party files a special demurrer which calls for additional information either as to the fact or the theory of his adversary's cause, and such a demurrer is sustained, and the demurree is given a fixed period of time in which to amend to meet the defect pointed out by the demurrer.

Normally, the demurree will comply with the order on demurrer by supplying the demanded information by amendment. But occasionally, the demurree refuses to comply, and attempts to go forward with his cause of action without supplying the information demanded. The question then arises as to what authority the court has to compel compliance. This question has

13. Western Union Tel. Co. v. Griffith, 111 Ga. 551, 36 S.E. 859 (1900).
19. GA. CODE (1933) § 81-101.

been answered by the appellate courts in such various and diverse ways as to make it impossible to outline any clear answer, or in fact, to delineate with any degree of clarity what the possibilities are.

Of course, in the absence of any efficient remedy to require compliance on the part of a demurree, the entire efficacy of the special demurrer as a discovery device is lost. It should be noted here that this hiatus between the function of the special demurrer and the authority of the court to compel obedience to its order on such demurrers, does not occur in those situations in which the first of the dual uses of the special demurrer outlined here is sought. That is, when the special demurrer is used to strike extraneous matter from the petition, it is clear that the court has ample authority to order such matter stricken and proceed with the cause of action, it being universally acknowledged that the court is the judge of what is proper and what is improper matter in the pleadings before it, subject of course to later appeal. But when the demurrant is demanding not that matter already pleaded by the demuree be stricken, but that matter not pleaded by the demurree be supplied, the question of the court's authority to force the demurree to supply it is subject to a number of conflicting answers, under the decisions of the appellate courts.

The decisions on the question of the court's authority may be roughly grouped into three broad classifications, provided it is noted at the outset that there is a good deal of overlapping among the groups. The first of these groups of cases consists of decisions which hold that if the demurree refuses to supply the information sought by the demurrer, his petition or answer, as the case may be, shall be summarily dismissed. The second group of cases consists of decisions which hold that if the demurree refuses to supply the information, the petition may be dismissed, but only if the delinquency complained of relates to the entire cause of action; if, however, the demurrer goes only to some particular part of the petition without which a valid cause of action would still be set forth, then these cases hold that the court should merely strike the defective portion, without dismissing the action. The third classification of cases consists of decisions which hold that if the demurree refuses to supply the information sought by the demurrer, the action should be dismissed on general demurrer, because without the information sought by the special demurrer, the petition is so vague and indefinite as to be vulnerable to general demurrer. The obvious logical defect in this last classification will be discussed hereinafter.

It should be noted that all of the decisions uniformly require that when a special demurrer which seeks additional information is sustained, leave to amend to supply such information should be allowed.[20]

I. Cases Which Require Summary Dismissal Upon Failure Of The Demurree To Supply The Demanded Information

Perhaps the leading case of that group which requires the summary dismissal of a party's pleading upon his refusal to supply information sought by sustained special demurrer is that of *Hudgins v. Coca-Cola Bottling Co.*[21] In that case, the plaintiff alleged that he had been injured by the explosion of a soft drink bottle, and that the bottle had exploded because of the negligence of the defendant. The defendant filed general and special demurrers, of which the special demurrer complained that the allegations of negligence were too general in their nature. The court reserved decision on the general demurrer but sustained the special demurrer allowing ten days leave to the plaintiff in which to amend the petition. An amendment was filed, but it was ineffective and did not meet the demurrer. The trial court dismissed the plaintiff's petition, and on appeal it was held:

> As the plaintiff did not except to the order sustaining the special demurrer to the original petition and requiring him to amend, it must be assumed that this judgment was correct. The amendment did not cure the defect in the original petition pointed out by the special demurrer, unless the allegations with reference to the plaintiff's inability to ascertain the real cause of the explosion had this effect . . . . . The plaintiff having been given an opportunity to amend, to meet the defects in the original petition pointed out by the special demurrer, and the amendment offered not being sufficiently definite to cure the defects, there was no error in dismissing the petition, without regard to whether the petition was good in substance. It is therefore unnecessary to determine whether the general demurrer should have been sustained.

It should be noted that although the pernicious doctrine of "law of the case" is prominent in the above quotation, it does not in any way affect the basis or result of the decision of the court.

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20. Abernathy v. News Pub. Co., 45 Ga. App. 693, 165 S.E. 924 (1932). The computation of the time so allowed, and the application of the court's order on demurrer to a proffered amendment has been the subject of much litigation, some of very recent date. See Hayes v. Simpson, 83 Ga. App. 22, 62 S.E.2d 441 (1950); Clements v. Hollingsworth, 206 Ga. 255, 56 S.E.2d 505 (1949); Parker v. Giles, 71 Ga. App. 763, 32 S.E.2d 408 (1944); Peoples Loan v. Allen, 198 Ga. 516, 32 S.E.2d 175 (1944); Holcomb v. Jones, 197 Ga. 825, 30 S.E.2d 903 (1944).

21. 122 Ga. 695, 50 S.E. 974 (1905).

Again, in the case of *Driskal v. Mutual Benefit Life Ins. Co.*[22] a similar situation was considered by the Supreme Court. This was an action to recover upon a life insurance policy, and the defendant had filed general and special demurrers, the special demurrer calling for certain material information and to require distinct allegations as to such provisions of the policy. The trial court sustained the special demurrer granting thirty days in which to amend, but the plaintiff did not file any amendment which met the requirements of the order on demurrer. The trial court then summarily dismissed the petition. On appeal, the Supreme Court said:

> In sustaining the special demurrer which called for certain information, the Court ruled that the defendant company was entitled to the information called for by the special demurrer, and that the petition was defective in the respects wherein it was claimed in the demurrer to be defective; and it is manifest that the amendment to the petition, which was made subsequently to the ruling sustaining the demurrer, did not meet the demurrer which had been sustained.

Thus, "the Court did not err in dismissing this case after the amendment filed by counsel for petitioner."

Another of the cases in which special demurrers complaining of the generalities of the allegations of negligence were sustained, is that of *Blackstone v. Central of Georgia Ry. Co.*[23] There the plaintiff alleged that while he was in the employ of the defendant railroad he was hanging on the side of a boxcar and was looking back towards the train as it was his duty to do and that he was hit by an electric light pole which had been allowed to be placed "too near the track." The defendant railway demurrer specially and generally, particularly complaining that the allegation "too near the track" was too general. This demurrer was sustained, and no amendment was filed which met the order on demurrer. The trial court dismissed and on appeal the Supreme Court held:

> While the petition sets out as a fact that the injury was sustained because the pole was erected and maintained too near the track, these allegations are too general and indefinite to withstand the effect of a special demurrer . . . We do not mean to say that, in the absence of a special demurrer directed to this general allegation, the petition would not, when considered as a whole, be held to be good; but in this case the defendant specially demurred to this allegation as being insufficient . . . The general allegation could of course have been cured by amendment, but that was not done, nor offered to be done; and on this ground we think the demurrer was properly sustained and

22. 144 Ga. 534, 87 S.E. 668 (1916).
23. 105 Ga. 380, 31 S.E. 90 (1898).

> find no error in the judgment of the trial court in dismissing the petition.

There are other cases of similar import.[24]

Were it not for the fact that there are other decisions of both appellate courts which flatly contradict these decisions, the problem would be simple, but as will be shown, the cases in this classification have not been consistently followed.

A question which arises in considering the results of a summary dismissal on special demurrer, is whether or not such a dismissal is a final adjudication, which would support a plea of res adjudicata in the event that the same plaintiff again brought the same suit. There is some authority to the effect that the plea would not be good. This question is discussed in *Wolfe v. Georgia Ry. and Electric Co.*,[25] although on the point herein mentioned that decision is probably mere obiter.

II. Cases Which Hold That The Defective Portion Of The Pleading Should Be Stricken, But That The Cause Should Continue

The leading case in the second classification of cases is that of *McSwain v. Edge*.[26] In that case, the Court of Appeals laid down the rule in language which has been exactly quoted time and again to this day, as follows:

> The proper judgment on a special demurrer, going only on to the meagerness of the allegations, is not a peremptory judgment of dismissal of the action, but a judgment requiring the plaintiff to amend and to make his petition more certain in the particulars wherein he has been delinquent; and then if he refuses to amend, the petition may be dismissed, if the delinquency relates to the entire cause of action. However, if the special demurrer goes only to some particular part of the petition, without which a valid cause of action would be still set forth, the result of finally sustaining the special demurrer would be, not to dismiss the action, but to strike the defective portion.

The cases which follow this decision are legion,[27] but none of them has ever enunciated a standard for determining when a

24. McEachin v. South Georgia Trust Co., 186 Ga. 320, 147 S.E. 390 (1929); Lastinger v. City of Adel, 69 Ga. App. 535, 26 S.E.2d 158 (1943); Willingham, Wright and Covington v. Glover, 28 Ga. App. 394, 111 S.E. 306 (1922); Howell v. Fulton Bag, 188 Ga. 488, 4 S.E.2d 181 (1939); Beerman v. Economy Laundry Co., 153 Ga. 21, 111 S.E. 399 (1922).
25. 6 Ga. App. 410, 65 S.E. 62 (1909).
26. 6 Ga. App. 9, 64 S.E. 116 (1909).
27. Cheatham v. Palmer, 191 Ga. 617, 13 S.E.2d 674 (1941); Griffeth v. Wilmore, 46 Ga. App. 96, 166 S.E. 673 (1932); Broyles v. Haas, 48 Ga. App. 321, 172 S.E. 742 (1934); Moseley v. Equitable Life Assurance Society, 49 Ga. App. 424, 176 S.E. 87 (1934).

"delinquency relates to the entire cause of action" nor when it goes "only to some particular part of the petition." Comparing this rule with the cases from classification one above, it is obvious that there is a head-on conflict. For example, in the *Blackstone* case, above quoted, the plaintiff's entire cause was dismissed upon his refusal to state the exact distance between the railroad track and an electric light pole. It could hardly be said that his delinquency in failing to establish the exact number of feet called for went "to the entire cause of action." Nor may the cases be reconciled by pointing to a rather obvious trend in the Georgia decisions which ascribes great importance to the particularity with which negligence is specified; the *Driskal* case, being a contract action, is alone sufficient to obviate the possibility of any accord between the two classifications. It may be said that the cases in this classification expound the true rule, because they are apparently in the numerical majority. Further, the *McSwain* rule seems to have been sanctioned by the appellate courts more recently than the *Hudgins* rule. For example, in the case of *Cheatham v. Palmer*,[28] which was decided in 1941, the *McSwain* rule was given almost in *ipsissimis verbis*.

The great and obvious defect in the *McSwain* rule is that the party who has interposed the special demurrer, which demurrer has been sustained by the court, is forced to trial without having the benefit of the information which he sought by his demurrer, and which the court adjudicated him entitled to by sustaining the demurrer. In effect, the demurree is permitted to offer the demurrant a nibble at the information, but when the demurrant demands more, the demurree is entitled to take all of it back. Of course, it may be said that the skeletonized type of pleading which is now in vogue, particularly in the Federal Courts, does not require a plaintiff to inform his adversary of all the facts of his case; but there is no valid analogy between the Federal procedure and Georgia procedure in this respect, because although the complaint in a Federal action may indeed be skeletonized and brief, the adversary has at his disposal all of the Federal discovery procedures which can be speedily, effectively and cheaply utilized. To the contrary, however, under Georgia procedure aside from the expensive and oftentimes cumbersome deposition procedure, the adversary has little chance to effectively discover the plaintiff's position.

III. Cases Holding That Failure To Amend To Meet The Order On Special Demurrer Make A General Demurrer Good

There is a third group of cases to which may be assigned

28. *Supra*, Note 26.

those decisions which do not seem to fit into either of the two above classifications. Some of the decisions in this latter group do not actually conflict with one or the other of the previous groups, but rather represent an outgrowth of the two, and in some instances, an effort to harmonize the two groups. For example, in the case of *Cook v. Kroger Baking and Grocery Co.*,[29] plaintiff sought damages for personal injury. Special and general demurrers were filed, complaining that the allegations of negligence were too generally pleaded. The special demurrer was upheld, and leave to amend was allowed, but the plaintiff refused to amend. The trial court then dismissed the petition, on the basis that the general demurrer was good, and the Court of Appeals, in affirming this decision said:

> Where special and general demurrers are filed to a petition claiming damages for negligence which alleges in general terms that the defendent was guilty of negligence, it is not sufficient to allege the negligence, in general terms when the defendant objects by proper demurrers to such allegation or allegations, calling the particulars of the negligence complained of; and when the judgment on special demurrers requires the pleader to amend in these particulars wherein he has been delinquent, and he refuses to amend, the pleading may be dismissed if the delinquency relates to the entire cause of action set up in the petition . . . There was no error in sustaining the special demurrer in this case, and thereafter in sustaining the general demurrer and dismissing the action.

It will be readily seen that while this position has greater logical appeal than that put forward by the *McSwain* rule, and at least to a limited extent is in harmony with it, it cannot be universally applied. For example, suppose that all that the special demurrer demands is the date or hour of a particular occurrence; if the plaintiff refused to amend his petition to supply such information, would the trial court be justified in dismissing his entire cause of action? None of the other cases which may be assigned to this group[30] provide a suitable solution to this contretemps.

CONCLUSION

The special demurrer affords an efficient discovery device under Georgia practice, so long as the adversary party is tractable; if the demurree refuses to supply the information sought by demurrer, and approved by the court, there is a substantial conflict of the Georgia authorities as to what action the trial court may take to enforce compliance with its order on demurrer. Obviously, reform either by judicial decision or by statutory enactment is desirable in this field.

29. 65 Ga. App. 141, 15 S.E.2d 531 (1941).
30. McEachin v. South Georgia Trust Co., 168 Ga. 320, 147 S.E. 390 (1929); Johnson v. Edwards, 147 Ga. 438, 94 S.E. 514 (1917).