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Pleading and Practice--Defective Common Count

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ABSTRACTS

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PLEADING AND PRACTICE—DEFECTIVE COMMON COUNT.—In an action of assumpsit, *P* seeks recovery from *D* for breach of contract. *P* is a former employee of *D*. *D* demurred to both counts of *P*'s amended declaration. "The first count of the amended declaration, which purports to be a common count, alleges that the defendant on March 18, 1954, in Cabell County, was indebted to the plaintiff in the sum of \$38,000.00 for work and services performed by the plaintiff over a long period of years for the benefit of the defendant at its request; that \$30,000.00 of the amount sued for is due the plaintiff 'under a paid up Group Annuity Contract'; that \$8,000.00 of the amount sued for is due the plaintiff for 'salary and fringe benefits,'; that being so indebted the defendant, 'in consideration thereof,' promised the plaintiff to pay him, on request, the amount so due him, but that the defendant, though often requested, has not paid, and refuses to pay, the amount due the plaintiff, or any part of it, to the damage of the plaintiff in the amount sued for of \$38,000.00."

"The necessary allegations of the common count in general assumpsit for . . . labor and services performed . . . are that the defendant was indebted to the plaintiff in a designated sum of money, that, being so indebted, in consideration of such indebtedness, the defendant promised to pay the sum so designated, and that the defendant has failed and refused to do so."

"The essential allegations of a special count are the statement of the contract, the consideration except when based upon an instrument in writing which imports a consideration, the promise, the breach of contract, the damages, and, in certain instances, the inducement for the contract."

Although portions of the first count are set forth in the established form of a common count in general assumpsit, other allegations therein show that \$30,000.00 of the alleged indebtedness arises from and is based upon an express or special contract and that the residue of \$8,000.00 likewise arises from and is based upon an express or special contract. Here, the portions of the count which relate to the special contracts are defective in that they do not sufficiently allege the nature of the contract, the consideration, the promise of the defendant, and the breach by the defendant. Had the allegations as to the amounts of \$30,000.00 and \$8,000.00 been omitted, the other allegations, being in the recognized form, would have been sufficient to constitute a good common count in general assumpsit for labor and services performed and would have been

sufficient on demurrer. The addition of these allegations converted the first count into a special count based upon two separate express or special contracts. *Held*, that "As the count fails to set forth the substance of these contracts, the consideration upon which each is based, the promise of the defendant, and the breach of each such contract, it is fatally defective and as it does not sufficiently state a cause of action in either general or special assumpsit, the demurrer to it should have been sustained". *Wright v. Standard Ultramarine and Color Co.*, 90 S.E.2d 459 (W. Va. 1955).

This decision should serve as a strong caveat to those who draft common counts. It shows that more than a mere surplusage may result when the draftsman does not stay within the bounds of common count requirements.

G. H. W.

TORTS—ATTRACTIVE NUISANCE DOCTRINE.—*D* refinery company installed a ramp from a river bank to its docking facility where barges with gasoline cargoes were moored for unloading. *D* knew that boys sometimes played on their riverside premises. *P*, 9 years old, and a group of companions noticed that a disconnected hose on a barge was dripping gasoline into the river. They boarded the barge and obtained some of the gasoline. Proceeding to their normal play area, they put some of the gasoline in a bottle and set fire to a fuse which they had made with wrapped paper. When the fuse burned down to the gasoline, the bottle burst open and burning gasoline spilled on the ground. *X*, 14 years old, deliberately threw gasoline on the fire while *P* was attempting to stamp it out, and the resultant explosion burned *P*'s leg. *P* sued *D* alleging that *D* maintained an "attractive nuisance" which was the proximate cause of his injury. The district court gave judgment for *P*.

On appeal, *held*, that West Virginia has repudiated the "attractive nuisance" doctrine. A less rigid doctrine has been employed which emphasizes ". . . that, in order for liability to exist, (1) the presence of the child at the dangerous instrumentality must have been either known or could have been reasonably anticipated; and (2) the danger of the instrumentality must be hidden, concealed or latent to one who is not familiar with its uses". Here, "there was nothing *latent* about the danger resulting from the gasoline flowing from the hose". Extraneous application of heat or flame