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Pleading--Interpretation of Rule 8.01, Kentucky Rules of Civil Procedure--Cause of Action Revived?

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> [F]rom and after the first day of July, eighteen hundred and thirty seven, it shall be as necessary to record deeds of mortgage or trust on *equitable titles** on real or personal property, as though the grantor had the legal estate; and all bona fide deeds of mortgage and trust, shall secure the parties according to the terms thereof, in the order of their execution.
> * (Emphasis added)

This statute gives priority to mortgagees according to time of *execution.* The reason for inserting this last clause into the 1837 act is not known; nor can it be explained with certainty why this statute uses execution as the criterion for priority rather than actual recordation. One possible explanation for the statute's peculiar wording is that the word "execution" was inadvertently used instead of recordation. Another explanation would be that the statute's purpose was to give priority to the conveyance which was recorded immediately after execution. Whatever the explanation and purpose of this clause, the 1852 legislature attempted to remove its ambiguities. The 1852 Kentucky Revised Statutes contained these changes: (1) The first clause of the 1837 statute was dropped and the "notice" statute was changed to apply to both legal *and equitable* interests;[18] (2) The second clause of the 1837 statute was enacted as a separate section of the Revised Statutes (now KRS 382.280) and the word "execution" was replaced, in effect, by the word "recordation".[19] It seems ironic that, as KRS 382.280 came into its present form, it at the same time lost its original purpose of requiring equitable interests to be recorded—since now this requirement was embodied in the "notice" statute.

The preceding discussion makes it apparent that the Kentucky recording statutes are repetitive and contradictory in relation to deeds and mortgages. Kentucky, unlike Arkansas, has ignored the statutes which do not fit the general scheme of the Kentucky recording system. KRS 382.280 was enacted approximately 120 years ago for a specific purpose; this purpose ceased to exist after 15 years. The only possible purpose that it can now serve is to cast doubt upon the present recording law and at the same time cause fear that it may someday be resurrected. It ought to be repealed. *Luther House*

PLEADING—INTERPRETATION OF RULE 8.01, KENTUCKY RULES OF CIVIL PROCEDURE—CAUSE OF ACTION REVIVED?—In a contract with the lessee of certain coal mines, plaintiff acquired the right of hauling all coal mined under the lease. Defendants subleased the mines, but they

[18] Rev. Stat. of Ky., Ch. 24, sec. 11, p. 197 (Turner and Nicholas 1852).
[19] Id., sec. 12, p. 198 (Turner and Nicholas 1852).

refused to allow plaintiff to haul any coal from the mines. Plaintiff brought an action for breach of contract alleging that defendants had knowledge of the lessee's obligations to plaintiff at the time they subleased the property. However, the complaint did not allege that defendants had assumed the lessee's contractual obligations, and assumption by defendants was essential to plaintiff's right of action against defendants who were not parties to the original contract. The lower court held that this defect was fatal and entered judgment dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted. *Held:* judgment affirmed. *Johnson* v. *Coleman,* 288 S.W. 2d 348 (Ky. 1956).

Johnson v. *Coleman* constitutes the first interpretation by the Court of Appeals of Kentucky of the pleading requirements of Rule 8.01 of the new Kentucky Rules of Civil Procedure for the purpose of testing the sufficiency of a complaint.[1] The Court, Stanley, C., said:

> We may agree with the appellants' argument as to the liberality of the new Rules of Procedure with respect to stating a cause of action, particularly that rule which requires that a pleading need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8.01. But the simplification and liberality extend to the manner of stating a case and are not so great as to obviate the necessity of stating the elements of a cause of action or defense, as the case may be.[2]

Thus it appears that in testing the sufficiency of a complaint, Kentucky will require the statement of all the elements of a cause of action as under the old code pleading, although greater generality will be allowed in the manner of stating those elements.

In interpreting the equivalent federal rule, Rule 8(a), a majority of federal courts have been extremely reluctant to dismiss a complaint for failure to state a claim upon which relief can be granted. In *Bowles* v. *Sauer,* the Court stated:

> It is a well settled principle of law that a complaint should not be dismissed unless it appeared to a certainty that the plaintiff would not be entitled to relief under any set of facts which could be proved in support of the allegations set forth therein.[3]

This view reflects a philosophy as to the functions and aims of the pleadings that arose with the adoption of the Federal Rules of Civil

[1] A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

[2] 288 SW 2d at 349 (Ky. 1956).

[3] 6 FRD 571 at 578 (WD Pa. 1947); see also cases cited 2 Moore, Federal Practice sec. 8.13 at 1653 (2d ed. 1948) and 1 Barron and Holtzoff, Federal Practice and Procedure sec. 255 at 437-38 (1950).

Procedure. As it was succinctly stated in an early case under the rules:

> The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required.[4]

According to this view, it is no longer the function of the pleadings to formulate issues or even to advise the adverse party of all the facts involved. The various pre-trial and discovery devices are supposed to provide a much more efficient means of satisfying those needs.[5] There is no requirement that the pleader state facts sufficient to constitute a cause of action,[6] but rather it has been said that the rule "envisages the statement of circumstances, occurrences, and events in support of the claim."[7] Under this view that the pleadings need give only fair notice, it is certainly arguable that the plaintiff's complaint in *Johnson v. Coleman* should not have been dismissed as there was the possibility that, at trial, plaintiff might have proved that defendants had in fact assumed the lessee's obligations.

However, a respectable minority of Federal courts have placed an interpretation upon the rules which is more nearly that reflected by the Court of Appeals of Kentucky. It has been held that a complaint must do more than merely "create a suspicion"[8] or "hint"[9] that plaintiff is entitled to relief. The statement of facts as opposed to conclusions couched in broad generalities has been required in a significant number of cases,[10] and it has been pointed out that the statement of facts is necessary in order that the adverse party may prepare a proper answer.[11] Moreover, many courts have recognized that pleadings must serve an important function in formulating and defining the issues.[12]

[4] Securities and Exchange Commission v. Timehurst, 28 F Supp. 34 at 41 (ND Calif. 1939).

[5] 2 Moore, note 3, supra, sec. 8.13 at 1652.

[6] Dioguardi v. Durning, 139 F 2d 774 at 775 (CCA2 1944).

[7] Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, at 19 (1955).

[8] Hays v. Hercules Powder Co., 7 FRD 599 at 600 (WD Mo. 1947).

[9] Caribe Candy Co. v. Mackenzie Candy Co., 78 F Supp. 1021 at 1022 (ND Ohio 1948).

[10] Foley-Carter Ins. Co. v. Commonwealth Life Ins. Co., 128 F 2d 718 (CCA5 1942); Schaefer v. Macri, 196 F 2d (CA 9 1952), *cert. denied* 344 US 832 (1952); Cohen v. Beneficial Industrial Loan Corp., 69 F Supp. 297 (DC N.J. 1946); Porter v. Shoemaker, 6 FRD 438 (MD Pa. 1947); Cole v. Riss & Co., 16 FRD 116, (WD Mo. 1954).

[11] Baird v. Dassau, 1 FRD 275 (SD N.Y. 1940); Johnson v. Occidental Life Ins. Co. of California, 1 FRD (DC Minn. 1941).

[12] Sharp v. Barnhart, 117 F 2d 604 (CCA 7 1941); Price Vacuum Stores, Inc. v. Admiral Corp., 223 F 2d 269 (CCPA 1955); Baird v. Dassau, note 11, supra; Johnson v. Occidental Life Ins. Co. of California, note 11, supra; Brickhart v. Union Barge Line Corp., 6 FRD 579 (WD Pa. 1947); Trantham v. Canal Ins. Co., 117 F Supp. 241 (ED Tenn. 1953), *aff.* 220 F 2d 752 (CA 6 1955).

Numerous leaders in the legal profession have also taken exception to the premise that the pre-trial conference and other discovery devices are so efficient in the formulation of the issues and in informing the adverse party of the factual basis of plaintiff's claim that they preempt the role of the pleadings in those fields. These devices have been cited as causing unnecessarily delayed and expensive litigation.[13] As stated by one exasperated Federal Judge:

> Why put the Court and the parties to the trouble of searching through various papers to determine what the issues are when the complaint and answer might serve the purpose—a purpose they have served from time immemorial.
>
> Nor do we consider it good practice leading to "the just, speedy and inexpensive determination of every action" to say that the party seeking full information on the issues may obtain it by pre-trial conference. Such a proceeding requires time of the Court and the litigants. . . .[14]

Perhaps the most serious charge against pleading as it exists in a majority of Federal courts is that unfounded and exaggerated claims are encouraged since it is unlikely that they will be dismissed where no issues are reached in the pleadings.[15] Believing that it is no longer necessary to state a cause of action in the pleadings, some feel that the foundation of any judgment may be left uncertain and res adjudicata imperiled.[16] Others have emphasized that an unwarranted burden is placed upon the defendant to determine the facts and issues of plaintiff's case. "It is true that the discovery procedures help, but," as Judge J. A. Fee pointed out, "unless the adversary's case is known from the outset, there is difficulty in discovering about what to inquire."[17] Defenders of the liberality allowed under the notice theory of pleading maintain that a defendant seldom has no knowledge of the facts involved. However, critics of notice pleading reply that, "It is not

[13] Judicial Conference of the Ninth Circuit, "Claim or Cause of Action," 13 FRD 253 at 255, 261, 279 (1952); Fleming v. Dierks Lumber & Coal Co., 39 F Supp. 237 at 240 (WD Ark. 1941).

[14] Bush v. Skidis, 8 FRD 561 at 564-65 (ED Mo. 1948). Defendant's motion to make the complaint more definite and certain was sustained where plaintiff alleged negligence generally. Even under the old code pleading, a general allegation of negligence was sufficient in Kentucky, Louisville and N. R. Co. v. Shearer, 119 Ky. 648, 59 SW 330, 22 Ky. L. Rep. 929 (1900). Bush v. Skidis has been questioned as to soundness in Petrikin v. Chicago, R.I. & P.R. Co., 14 FRD 31 (WD Mo. 1953) and in McKenzie v. Springfield City Water Co., 14 FRD 503 (WD Mo. 1953).

[15] O. L. McCaskill, "The Modern Philosophy of Pleading: A Dialogue Outside the Shades," 38 A.B.A.J. 123 (1952); Judicial Conference of the Ninth Circuit, note 13, supra, at 255-56.

[16] Judicial Conference of the Ninth Circuit, note 15, supra at 255; J. H. Tucker, Jr., "Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs," 13 La. L. Rev. 395 at 420 (1953).

[17] J. A. Fee, "The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure," 48 Col. L. Rev. 491 at 494 (1948).

enough to say . . . that the defendant knows or should know the facts. What any litigant wants to know is what his opponent says are the facts."[18] At least one Federal Judge believes that the function of the various pre-trial devices has been misinterpreted:

> Discovery, Summary Judgment Procedure, and Pre-trial Procedures . . . are not issue-forming devices, as supposed, but devices relating to ascertaining *evidence* to support issues, and . . . they are dependent upon the pleadings to disclose the issues; . . . they are strictly supplementary, not substitutional.[19]

These criticisms have been reflected in the retention of the requirement of stating facts sufficient to constitute a cause of action by Louisiana in adopting the Federal Rules of Civil Procedure,[20] in the interpretation placed upon a rule similar to Rule 8(a) of the Federal Rules by New Jersey,[21] and in a call for amending Rule 8(a) so as to require the statement of facts constituting a cause of action.[22]

In *Daves* v. *Hawaiian Dredging Co.*,[23] the court reflected the view most nearly approximating that of the Kentucky Court of Appeals in *Johnson* v. *Coleman.* McLaughlin, C. J., stated:

> This court thinks that the requirements of Rule 8 are not met by a mere "notice of disaffection" to the opposite party. . . . This is the implication we find necessarily flowing from sub-section (2) of sub-paragraph (2) of Rule 8: "a short and plain statement of the claim showing that the pleader is entitled to relief." Apparently the only practical way of making such a showing is to state the prima facie elements of the claim. . . . These elements should be indicated by operative facts, in order that entitlement to relief can be *shown* by the complaint. . . .
>
> Thus it seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted *i* and the crossed *t* and the uncertainties of distinguishing in advance between evidentiary and ultimate facts, while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery. . . . Therefore, if a pleader cannot allege definitely and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court.[24]

This view requires more than the nebulous statement that the pleader need only disclose the "circumstances, occurrences, and events"[25] in

[18] J. H. Tucker, Jr., note 16, supra, at 425.

[19] P. M. Hall, Jr. (SD Calif.), Judicial Conference of the Ninth Circuit, note 13, supra, at 263.

[20] J. H. Tucker, Jr., note 16, supra, at 395.

[21] Grobart v. Society for Establishing Useful Manufactures, 2 N.J. 136, 65 A 2d 833 (1949); Anderson v. Modica, 4 N.J. 383, 73 A 2d 49 (1950).

[22] Judicial Conference for the Ninth Circuit, note 13, supra, at 253.

[23] 114 F Supp. 643 (DC Hawaii 1953).

[24] Id. at 645.

[25] See note 7, supra.

support of the claim, but it avoids the semantic labyrinth of 'ultimate fact', 'evidentiary fact', and 'conclusion of law.' While critics of notice pleading desiring a return to strict fact pleading may not be entirely satisfied by this interpretation, it is felt that application of the rule set forth in the *Johnson* and *Daves* cases will mean an earlier formulation of the issues involved. A defendant should be able to prepare his answer more readily since the complaint should clearly state the basis of the claim. A liberal application of the right to amend the complaint should prevent this rule from working any hardship upon plaintiffs. More important perhaps, courts should be able to recognize the unmeritorious claim at the earliest possible time, thereby fulfilling the avowed purpose of the rules—"the just, speedy, and inexpensive determination of every action."[26]

Prior to the *Johnson* case, there were indications that Kentucky would not adopt the extreme view of notice pleading. As stated by the Civil Code Committee:

> The proposed rules make no fundamental change in the content of pleadings, although they do adopt a change in terminology. . . . In one sense the present and proposed requirements are identical, since a stated claim which gives rise to legal or equitable relief is the essence of what we term a "cause of action." The real difference is one of emphasis, which is characterized in the proposed rule by the absence of the word "facts" and the positive requirement that the statement be "short and plain."[27]

It has been emphasized at many times that what constituted good pleading under the old code is good pleading under the new rules.[28] In view of the great freedom of amendment permitted, the rule of the Johnson case will not result in throwing out a meritorious case, but it is obvious that the Court of Appeals of Kentucky will not accept the view that:

> No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it.[29]

Therefore care should be taken to insure that the complaint clearly states every element of the plaintiff's cause of action.

James Park, Jr.

[26] Rule 1, Kentucky Rules of Civil Procedure.

[27] B. B. Fowler and G. M. Catlett, "Report of the Civil Code Committee," 16 Ky. St. Bar J. 23 at 27 (1951); see also notes to Rule 8.01, Tentative Draft of the Rules of Civil Procedure of Kentucky, at 29 (1952).

[28] Fowler and Catlett, note 27, supra, at 29; Clay, Kentucky Civil Rules 90 (1954).

[29] Continental Collieries, Inc. v. Shober, 130 F 2d 631 at 635 (CCA3 1942).