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ALTERNATIVE PLEADING IN KENTUCKY

Pleading in the alternative occurs in two ways, either as to the subject matter of the cause or defense, or as to the parties.¹ At common law, pleading in the alternative was not permissible. For example an allegation that the defendant wrote and published, or caused to be written and published, a certain libel, was bad for uncertainty

However, alternative pleading is desirable because often the pleader cannot know nor reasonably be expected to know, which of two or more alternatives is the correct one. Especially is this true as to the details of an injury or breach, which often are known only to the defendant in advance of trial. Thus, it is unfair to enforce strictly the common law rule prohibiting pleading in the alternative unless the common law rule permitting inconsistency in pleading is also adopted.² Therefore the rule permitting allegations in the alternative is very desirable in any jurisdiction which, as does Kentucky, considers inconsistency a vice.³ Alternative pleading is permitted under the Federal Rules⁴ and in at least ten jurisdictions in the United States, including Kentucky.⁵ In several states it is permitted by judicial decision.⁶

Kentucky however, has placed a limitation on alternative pleading, that of allowing pleading in the alternative as to facts or subject-matter but not as to parties. Thus, the pleader cannot allege in the alternative that one or the other of two defendants is liable.

¹ CLARK, CODE PLEADING, 254 (2d ed. 1947).

At common law pleading in the alternative was considered a defect in form, objectionable on special demurrer. However, if a party had a cause of action, but was not certain as to the most expedient way of stating it, the common law permitted a single cause of action to be differently stated in separate counts, in the same declaration. However, under the Codes the use of inconsistent counts is either not permissible, as in Kentucky (*Post*, note 3) or is not desirable because such a practice is confusing and cumbersome.

² KY. CODE CIV. PRAC. ANN., sec. 113 (Carroll's 1948).

³ Fed. R. Civ. P. 8 (e) (2) (1948), as follows:

"A party may set forth two or more statements of a claim alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both."

ARIZ. CODE ANN., sec. 21-403 (2) (1939); COLO. STAT. ANN., Rule 8 (e) (2) (Michie 1935); CONN. PRAC. BK., P. 30, sec. 38 (1934); ILL. ANN. STAT., ch. 110, sec. 167 (2) (Smith-Hurd); KY. CODE CIV. PRAC. ANN., sec. 113 (Carroll's 1948); MASS. GEN. LAW., c. 231, sec. 37 (1932); MO. REV. STAT. ANN., sec. 847.42; N.J. SUP. CT. Rule 53, Pr. Act 1912 (1938); N.M. STAT. ANN., sec. 19-101 (822) (1941); TEX. RULES CIV. PROC., Rule 43 (Vernon 1942).

Supra, note 1, at 256, footnote 142.

In *Powell v Manufacturers Coal and Coke Company*,⁷ it was stated that:

"The appellant filed his motion in the Pike Circuit Court against the appellee and Lafe Stansbury and George Childers. The substance of his allegations was that the defendants, *the one or the other of them, but he did not know which*, had taken from him certain property exempt to him as a housekeeper of the aggregate value of \$324, and that he had demanded a return of the property, but they had refused to return it. A demurrer was interposed to the petition and sustained by the court. The demurrer was properly sustained, as the petition does not allege who took the property from appellant. The provisions of the Civil Code, sec. 113, allow alternative statements relating to the facts, but they do not allow alternative statements relating to the parties. The appellant, therefore, may have alleged that the defendants were jointly liable to him, or he may have alleged that one or more of them was liable; but when he alleged that *one or the other* of them was guilty of violating his property rights he made his petition bad." (Italics writer's).

In *Hartzell v Bank of Murray*,⁸ it was alleged in a cross-petition that the defendant had turned over notes to the plaintiff bank for collection to cover the note upon which it was sung. The balance was to be returned to the defendant. It was alleged that *either the bank or the cashier* collected the notes, but that the defendant *had no means of knowing which*. This was held insufficient to sustain a judgment against either the bank or the executors of the cashier, under the rule that a cause of action against one party or another is not good against either.

Having shown that pleading in the alternative in Kentucky is permitted only as to facts or subject-matter but not as to parties, we will focus our attention on the limited practice of alternative pleading as it exists in this state.

The pleader is not limited to the pleading of only two alternative facts, two or more being allowable. In *Louisville & Nashville R. R. Co. v Wyatt's Adm'r.*,¹⁰ the first error complained of by the appellant was that the court failed to sustain its motion to compel the appellee to elect which of the several grounds of recovery set up in her petition and amended petition she would rely upon, and that the other grounds be stricken from the pleading. The court, after citing subsection 4 of section 113 of the Code, stated:

"The appellant contends that the Code does not provide or allow the statement in a pleading of more than two inconsistent acts, and as appellee stated more than two, therefore the court should

⁷ 230 Ky. 784, 20 S.W. 2d 991 (1929).

⁸ *Id.* at 785, S.W. at 991.

⁹ 211 Ky. 263, 277 S.W. 270 (1925).

¹⁰ 29 Ky. L.R. 437 (1906).

have sustained its motion. We do not think this is a proper construction of this provision of the Codes. If a party loses his life, and it is alleged that his death was caused by one or more of three different acts of negligence, but did not know which in substance and effect this would be proper pleading under the Code. There can be no good reason shown why this provision should be limited to two inconsistent facts, and in our opinion it was not intended to be so limited."¹¹

Another requirement of alternative pleading is that regardless of the number of alternatives, each of them must state a good cause of action. It will not suffice that one alternative states a good cause of action even if the other does not. In *Hoffman v City of Maysville*¹² the plaintiff was suing the City of Maysville because he was injured by falling through a sidewalk into a pool of hot water. The original petition stated a good cause of action against the city because it alleged that the drain was defective at a point under the sidewalk, and that the plaintiff broke through and fell into the pool beneath while lawfully using the highway, and that the *municipality knew, or by the exercise of ordinary diligence could have known*, of the defective drain and the dangerous pool beneath the sidewalk. In either case, if the municipality knew or could have known of the defect, the plaintiff would have stated a good cause of action. However, the plaintiff alleged in an amendment to his original petition that the pool of hot water had accumulated *either under the sidewalk or at a point within the private property* of the company to whom the City of Maysville had given permission to construct and maintain a wooden box sewer under the sidewalk. The plaintiff stated that one of these alternative allegations of fact was true, but he did not know which. As stated by the court:

"The rule is, that where facts are stated in the alternative with the allegation that one or the other is true, but the pleader does not know which is true, both of the alternative statements must present a cause of action. If one, even if true, fails to present a cause of action, the pleading is bad."¹³

The court cited the section of the Code with which we are concerned, and held that the lower court correctly sustained the general demurrer of the city to the amended petition. The alternative allegation stating that the pool of hot water had accumulated at a point within the private property of the company failed to state a cause of action, since in such event, the city would not be liable for accumulation of water upon premises it was under no duty to inspect.

¹¹ *Id.* at 440, 441.

¹² 123 Ky. 707, 97 S.W. 360 (1906).

¹³ *Id.* at 710; S.W. at 361.

The entire cause of action failed because of the defective alternative pleading.¹⁴

Analogous to the requirement that each alternative complaint or claim must state a good cause of action, is the requirement that where there are alternative defenses each must make out a defense or both are bad. In *Rogers v McAlister*¹⁵ the defendant Frank Rogers purchased property at a delinquent tax sale. The auditor of the state executed and delivered to Rogers a deed for the property Plaintiff, who claimed as a remainderman brought suit against Rogers to cancel the deed executed to him by the auditor alleging that it was void for a number of reasons. Rogers filed an answer and an amended answer. The answer alleged that the tax delinquent held the property *either in her own right or as an agent for Joseph Price, that he did not know which of these allegations was true.* The court stated that an allegation that the tax delinquent held the property as an agent was a bad defense, for reasons not here pertinent. Thus, the Kentucky Court of Appeals affirmed the sustaining of a demurrer to the *entire* defense.

“Where an answer contains alternative allegations each alternative must present matter sufficient in law to constitute a defense to the action. If either of them fails to state facts sufficient to support the defense, the demurrer to it is properly sustained.”¹⁶

The Code's permission for a plea of facts in the alternative does not extend to the pleader the license to plead causes of action in the alternative by stating that he does not know which is true. In an old Kentucky case,¹⁷ the plaintiff originally instituted an action on a contract for logs. The plaintiff subsequently amended his petition as one in tort as well as contract, alleging that defendant converted the logs to his own use and further alleging that the statements as to the contract or tort were true, but that he did not know which was true. The Kentucky Court of Appeals stated:

“A party must be presumed to know whether he is entitled to recover on a contract or upon a tort, and he is required to set up his cause of action in definite form, and can not be allowed to prosecute an action based upon a declaration showing the party either indebted on contract or in tort, accompanied by the statement that he does not know which.”¹⁸

¹⁴ In accord: *Farmers Bank of West Louisville, Kentucky, and Holland National Bank of Holland, Indiana v. American Surety Co., of N.Y.*, 205 Ky. 177, 265 S.W. 505 (1924). *Scobee v. Brent, Same v. Same*, 185 Ky. 734, 216 S.W. 76 (1919).

¹⁵ 151 Ky. 488, 152 S.W. 571 (1913).

¹⁶ *Id.* at 490, S.W. at 572.

¹⁷ *Southern Lumber Co. v. Wireman*, 19 Ky. L.R. 585 (1897).

¹⁸ *Id.* at 587.

Alternative pleading under the Federal Rules is more liberal than under the Kentucky Code in several respects. Under the Federal Rules one may join parties in the alternative whether plaintiffs or defendants.¹⁹ However, the Kentucky cases have held, as we have seen, that parties may not be joined in the alternative. Also under the Federal Rules when claims or defenses are pleaded in the alternative, the entire pleading will not fail just because one of the claims does not present a good cause of action or one of the alternative defenses a good defense.²⁰ On the other hand, in Kentucky *all* the alternative statements of fact must be sufficient or all the defenses sufficient, and if one or more are insufficient, the rest though good shall fail.²¹

In conclusion, it is submitted that the Kentucky Code should be revised so as to allow alternative pleading as to parties as well as to facts. About twelve states and the Federal Rules already permit joinder of plaintiffs in the alternative, and several allow joinder of defendants in the alternative. This sort of joinder is a highly desirable reform as it permits the settlement of an entire dispute in a single action and avoids the difficulties and possible injustice resulting from the necessity of bringing separate suits.²²

It is true that cases have made a distinction between pleading in the alternative as to parties and pleading in the alternative as to subject matter or facts, but it is difficult to see a difference in principle between these examples of alternative pleading, the difference being entirely historical. Even in England today parties plaintiff may be joined in the alternative.²³

It is necessary however, to point out a limitation upon alternative pleading of parties for which the Federal Rules does not provide. This limitation is that the pleader, after stating in the alternative that one

¹⁹ FED. R. CIV. P., 20 (a), as follows:

"Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or *in the alternative* in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or *in the alternative* any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. (Italics writer's).

²⁰ *Supra*, note 4.

²¹ *Supra*, note 3.

²² CLARK, *op. cit.* *supra* note 1 at 393. Also see, *supra* note 19.

²³ Hankin, *Alternative and Hypothetical Pleading*. 33 YALE LAW JOURNAL 365, 370 (1923-4).

or the other party is liable should add; "but (the pleader) *does not know which*." At this point the Federal Rule is too lax and it would be well to require the pleader to make a statement that his pleading is not sham, but that he actually does not know which defendant is liable. The Federal Rules should adopt this limitation also in connection with alternative pleading of facts. Kentucky has such a limitation.

Another suggested reform is that an entire cause of action or defense alternatively pleaded should not be held bad merely because one of the alternatives is insufficient in itself to state a cause of action or defense. The suggested change, with the limitations stated, follows the practice under the Federal Rules,²⁴ and seems to be a good one. If neither alternative states a cause of action, the entire pleading will fall before a demurrer. If one of the alternatives is so deficient, it may be eliminated by a motion to strike, thus still leaving a good count on which issue may be joined.

Gregory Hankin very aptly stated in an article entitled *Alternative and Hypothetical Pleading*:²⁵

"The relaxation of the rule against alternative pleadings has in no way injured our legal system. On the contrary, it is benefiting our procedure in that it eliminates many useless battles which consume the time of the courts delaying suits and heaping expenses on litigants. The reform with reference to this problem is not yet complete, for if we once realize that a disjunction does not necessarily imply uncertainty, then there is no reason for sustaining a greater variety of objections to alternative pleading than to any other pleadings"²⁶

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²⁴ *Supra*, note 4.

²⁵ *Supra*, note 23.

²⁶ *Id.* at 376.