



1934

Pleading--Probative Facts May Not Be Pleaded

James T. Hatcher
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Civil Procedure Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Hatcher, James T. (1934) "Pleading--Probative Facts May Not Be Pleaded," *Kentucky Law Journal*: Vol. 22 : Iss. 2 , Article 13.
Available at: <https://uknowledge.uky.edu/klj/vol22/iss2/13>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

1803. (Sergeant East in *Picas of the Crown*). This misinterpretation limited dying declarations to criminal prosecution for homicide. A note by Chief Justice Redfield in his edition of Professor Greenleaf's treatise, gave it its widest credit and led to its general acceptance. § Wigmore, Evidence (2d ed. 1923) §1432.

In 10 B. U. L. Rev. 470-87, the fundamental difference in the reception of evidence in criminal and civil actions is given as the reason for the distinction. It is unnecessary in civil actions because in a pending action testimony of witnesses can be taken by deposition, and in anticipated actions, the testimony may be perpetuated. This is not true in criminal cases. If the exception were not made, slayers might often go free because of the provision in the Federal Constitution securing to the accused the right to be confronted with witnesses against him.

While it is submitted that the admissibility of dying declarations in civil as well as criminal actions is the only logical and consistent rule, the fact remains that by the overwhelming weight of authority, dying declarations are admitted as evidence only in public prosecutions for homicide involving legally the resulting death as a necessary element.

ELEANOR DAWSON.

PLEADING—PROBATIVE FACTS MAY NOT BE PLEADED.—In an action to recover on an insurance policy a demurrer to the plaintiff's petition was sustained in the trial court. Plaintiff refused to plead further and appealed the case, assigning the ruling on the demurrer as error. The injury for which the plaintiff sought damages consisted of the loss of sight of one eye. The policy read, "loss of eye or eyes shall mean the irrecoverable loss of the entire sight thereof." In his petition the plaintiff stated that he entirely and irrecoverably lost the practical use and sight of his left eye. It was contended by the appellee that this was a mere conclusion of the pleader, since no facts are alleged showing to what extent the sight of his eye was impaired or diminished. The court stated that it was sufficient to plead ultimate as distinguished from probative facts, and that if plaintiff had stated to what extent he was able to discern objects or distinguish light from darkness he would merely have pleaded evidentiary facts tending to establish the resultant or ultimate fact. *Johnson v. Inter-Southern Life Ins. Co.*, 244 Ky. 83, 50 S. W. (2d) 16 (1932).

Briefly, the subject under discussion in this paper is the statement of facts in the pleading of either party, which sets forth his petition, answer, counterclaim, or any other pleading that might appear. There are imaginary limits within which the pleader must place his statement of facts. He must not, on the one hand, make his pleadings so elementary as to embrace evidentiary matter, nor, on the other, make them so general as to be only conclusions of law. The line of demarcation between ultimate facts and evidentiary matter will be the only one dealt with here.

Ky. Civil Code of Practice, Section 119, states, "Neither the evidence relied on by a party nor presumptions of law . . . shall be stated in a pleading." This is the abstract rule used in practically all of the code states. Clark on Code Pleading, section 38, p. 150. The rule is stated simply, but its application has probably been the most difficult of all of the codifier's reforms. Under this rule the parties can never be certain as to the sufficiency of their pleadings. If sufficient facts are not stated by the pleading a demurrer will lie thereto, Ky. Code, section 93 (1), and if the facts stated are too elementary a motion to strike may be entertained, Ky. Code, section 121. Of course amendments are freely allowed, Ky. Code, section 134, but are always at the cost of the party whose pleading requires them. Ky. Code, sections 94 and 121. A better knowledge of this subject would enable the counsel to save his client money, the court time and himself work.

The problem does not at first appear so difficult, but when we consider it in the light of the conditions existing in a particular case we understand better the difficulty with which we are confronted. The pleader generally does not know his entire case until it comes to trial, and even though he does, he does not want to disclose any more of it than is absolutely necessary. On the other hand the opposing litigant will want to tie him down to a particular issue and be prepared to attack everything in his opponent's case. If a test or standard could be set to which the pleadings must conform the difficulty might be largely obliterated, but the impracticability of such a test is readily discernible. A brief review of some of the textbooks on code pleading might afford some help, but will by no means settle the problem. As to what facts must be pleaded the text-writers have various names. Bliss, in his book on Code Pleading, third edition, section 206, p. 324, calls them "issuable or ultimate facts," and says, "A pleader may determine by inquiring whether a denial of such a fact would make a material issue—whether, if the denial be sustained, the defendant may not still be liable." Phillips, Code Pleadings, section 347, p. 344, discusses the matter in this way: "That only the operative facts constituting the right of action or the defense shall be pleaded, and that evidential facts shall not be alleged, is an elementary principle of pleading; and its careful observation is indispensable to that brevity, simplicity, and clearness aimed at by the new procedure. To take the raw material of a transaction and separate the operative facts from the probative matter is a process that requires much care and discrimination." Pomeroy, Code Remedies, fifth edition, section 411, p. 620 to 624, states that, "The material facts which constitute the ground of relief, or the defense of new matter (confession and avoidance), should be averred as they actually exist or took place, and not the legal effect or aspect of those facts, and not the mere evidence or probative matter by which their existence is established." Then Clark, Code Pleading, section 38, p. 157, who probably has the most rational as well as the most practical attitude toward the problem, and undoubtedly the most liberal, makes these statements; "Rarely should a

pleading be condemned for being over-specific and the objection should then be considered one of form merely—undue verbosity, repetition, etc., rather than one of substance.” “The matter should be one within the fair discretion of the trial court in most cases. No rule of thumb is possible . . .”

Although these eminent writers have proven most valuable on the subject of pleading and in the interpretation of the code reforms, they have not been able to assist a great deal in determining just what amounts to ultimate facts and probative matter. An examination of some of the cases shows that they are also of very little assistance.

Fuller v. Keesee et al., 31 Ky. L. R. 1099, 104 S. W. 700 (1907), was a case in which an action was brought for the recovery of land granted to the plaintiff's grantor by a patent containing some exceptions that were not granted. The court held that plaintiff was not required to allege that the land sued for was not within the exceptions, and stated, “He need not so aver because he is not required to plead his evidence.” In *Turner v. Hamlin*, 152 Ky. 469, 153 S. W. 778 (1913), the court said, “Although a judgment is prima facie evidence of a fact it is not a sufficient allegation of that fact in a pleading.” Then in *War Fork Land Co. et al. v. Carr*, 236 Ky. 453, 33 S. W. (2d) 308 (1930), the court said, “Matters of evidence need not be pleaded, and, if pleaded, failure to deny such matter constitutes no admission of the evidentiary facts.” In this last case, granting that a failure to deny evidentiary matters constituted no admission thereof, it would be difficult for the defendant and the court to always tell exactly what allegations were material and what evidentiary.

The cases from other jurisdictions are in accord with the principal case and, although declarative of the rule in its concrete form, they do not attempt to give a criterion by which other cases may be judged. *Texas Indemnity Ins. Co. v. Bridges*, (Texas) 52 S. W. (2d) 1075 (1932), held that “Testimony need not be pleaded.” In *Weis v. West et al.*, 256 N. Y. Supp. 571 (1932), the court held that a motion to strike defenses that alleged only evidentiary matter should be allowed. In *Mitchell Woodbury Corporation v. Albert Pick Barth Co. Inc. et al.*, 41 (2d) 148 (1930), a case arising in Massachusetts, the court stated, “The plaintiff is not required in its declaration to set forth in detail all the evidence on which it relies. It is sufficient unless objected to for lack of particularity to allege his cause of action with substantial certainty.”

There are two views that may be taken on this subject. On the one hand, there is the view of Pomeroy, that a strict line of demarcation should be drawn and that only a certain type of facts should be pleaded. On the other hand, there is the less conservative view of Clark, that it is practically impossible for any criterion to be set to which the pleadings must conform, that no substantial harm can be done by liberality in the pleadings and that it should be largely discretionary with the trial court to decide these matters. The cases are divided as to these views. In *Johnson v. Johnson*, (Mont.) 15 (2d) 842

(1932), the court stated, "Good pleading neither requires nor permits the pleading of evidence upon which the pleader relies to maintain his action. Ultimate facts only should be set out. Ultimate facts are nothing more than issuable, constitutive, or traversable facts essential to the statement of the cause of action." A more liberal view is taken by the Iowa court in *Dorman v. Credit Reference & Reporting Co. et al.*, (Iowa) 241 N. W. 436 (1932). Although holding that a party cannot be required to set out evidence in his pleading, the court stated that an appeal will not lie from a motion to strike.

The principal case illustrates the usual conflict as to this matter. The defendant there thought that the plaintiff should allege more specifically to what extent the sight of his eye had been impaired. Had the plaintiff averred more specifically the defendant could have been better prepared to meet the allegations with his evidence. It is clear that the petition was sufficient to bring the case under the policy and to give the defendant fair notice of the plaintiff's case against it. The eminent judge was, therefore, correct in overruling the demurrer.

It is not often that the pleader makes his statements too elementary. The tendency is to the converse. But, in cases where evidentiary matter appears the remedy in this state is easily consummated. The redundant matter may be stricken by a motion or by the court on its own motion. Ky. Civil Code, section 121; *City of Princeton v. Baker et al.*, 237 Ky. 325, 35 S. W. (2d) 524 (1931). On the other hand when a pleading is demurred to for not containing sufficient facts and the demurrer is sustained, the pleader must either elect to stand on his pleading or plead over. At least some of the courts hold that if the pleader merely enters his exceptions and pleads over he cannot then assign the ruling on the demurrer as error on appeal. He must elect to stand on his pleading. *Dorman v. Credit Reference & Reporting Co. et al.*, *supra*.

This matter should be left fairly up to the discretion of the trial court. When we attempt to define "ultimate," "issuable," "traversable," or "constitutive" facts we encounter a task that is beyond our human ability. Every case has different facts and conditions. The best we can do is to lay down general rules. First, we should aim at brevity, simplicity and clearness, guarding against undue verbosity and repetition. Second, we should, with substantial certainty, give the opponent fair notice of the case or defense thereto.

JAS. T. HATCHER.

MINES AND MINERALS—DAMAGES FOR TRESPASS.—In the recent case of *Kentucky Harlan Coal Co. v. Harlan Gas Coal Co.*, 245 Ky. 256, 53 S. W. (2d) 538 (1932), it was said of one who takes coal from land on which he has no right to mine, that if he were a trespasser through innocent mistake and not guilty of an intentional taking, the measure of damages he would be liable to pay would be the value of the coal as it lay in the ground or the reasonable and customary royalty, rather than